

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated : 15.04.2021

Coram

THE HONOURABLE MR. JUSTICE M.SUNDAR

S.A.No.367 of 2021
and
C.M.P.No.6890 of 2021
in
S.A.No.367 of 2021

Gaffor Sahib ... Appellant/Defendant
Vs.
Mumtaj ... Respondent/Plaintiff

Second Appeal under Section 100 of CPC to set aside the judgement and decree dated 06.01.2021 made in A.S.No.15 of 2017 on the file of the Court of II Additional District Judge, Vellore @ Ranipet confirming the judgment and decree dated 07.03.2017 made in O.S.No.95 of 2013 on the file of the Subordinate Judge, Ranipet, Vellore District.

For Appellants : Mr.R.Agilesh

J U D G M E N T

Captioned main second appeal i.e., S.A.No.367 of 2021 has been presented in this Court on 29.03.2021 under Section 100 of 'The Code of Civil Procedure, 1908' ('CPC' for the sake of brevity).

2. The parties are closely related. Respondent in captioned second appeal is wife of appellant's deceased elder brother Kasim. In other words, respondent is appellant's sister-in-law. Appellant was the lone defendant in the Court of first instance and the respondent was the lone plaintiff in the Court of first instance i.e., Subordinate Judge's Court, Ranipet, Vellore District (hereinafter 'trial Court' for the sake of brevity) vide O.S.No.95 of 2013.

3. This litigation commenced more than 13 years ago, to be precise on 29.11.2007 when the respondent in captioned Second Appeal presented the aforementioned suit in the trial Court.

4. Suit property, as can be culled out from the plaint, is land ad-measuring 2305 ½ square feet or thereabouts with one tiled house standing as superstructure thereon. Land is situate in Old S.No.153-Part, T.S.No.46, Block No.9, Ward B in Mosque Street, Ranipet Municipal Town, Walajah Taluk,

Vellore District and Door Number is 4. This land and superstructure in the form of a tiled house thereon shall hereinafter be referred to as 'suit property' for the sake of convenience and clarity. Respondent, as plaintiff in the trial Court, laid the suit O.S.No.98 of 2007 with prayers for declaration of title, recovery of possession, damages and permanent injunction restraining dismantling of superstructure. Other usual reliefs including the residuary limb of prayer was also made. Appellant in captioned Second Appeal, as lone defendant, entered appearance, filed written statement on 04.04.2008 and completed pleadings. Thereafter, after full contest, trial Court decreed the suit vide judgment and decree dated 07.03.2017. By saying full contest, it is to be noted that there were as many as 15 exhibits on the side of the plaintiff being Exs.A1 to A15 and two witnesses were examined on the side of plaintiff as PW1 and PW2. There were six exhibits on the side of the defendant being Exs.B1 to B6 and three witnesses were examined on the side of the defendant as DW1 to DW3. It is also to be noted that plaintiff and defendant examined themselves as PW1 and DW1.

5. Post suit being decreed, defendant in the suit in the trial Court carried the matter in appeal by way of a regular first appeal under Section 96 of CPC vide A.S.No.15 of 2017 on the file of 'II Additional District Judge's Court, Vellore @ Ranipet' (hereinafter 'first Appellate Court' for the sake of brevity). The first Appellate Court, after full contest, in and by judgment and decree dated 06.01.2021, dismissed the first appeal confirming the judgment and decree made by the trial Court.

6. Plaintiff predicated her claim primarily on a registered settlement deed executed by her late husband Kasim being registered Settlement Deed dated 28.07.1988 marked as Ex.A3 in the trial Court. The title deed of plaintiff's husband Kasim being a registered sale deed dated 21.11.1971 was marked as Ex.A1 and a mortgage deed executed in favour of one Noorjahan was marked as Ex.A2 to demonstrate that her husband Kasim had dealt with the suit property. Tax receipts were also marked.

7. A perusal of the pleadings in the trial Court brings to light that the pleadings of the defendant was that the plaintiff was the first wife of his elder brother Kasim, she was divorced by said Kasim as per Mohammedan Law, she left for her native place Tiruvannamalai and there were issues between the brothers Kasim and defendant (appellant before me in the captioned second appeal). It is also pleaded that the defendant is entitled to claim adverse possession as the defendant is staying in suit property and is therefore in possession. It was also pleaded that it is false to state that the plaintiff is in continuous possession of the suit property. There were some Rent Control proceedings and the defendant pleaded that Rent Control proceedings ended in

favour of the plaintiff.

8. The burden of song continued in the first Appellate Court also and as did the trial Court first Appellate Court also believed the registered settlement deed executed by plaintiff's late husband Kasim qua suit property and confirmed the decree made by the trial Court.

9. Notwithstanding very many grounds raised in the memorandum of grounds of appeal and notwithstanding as many as five questions in the memorandum of grounds which according to appellant are substantial questions of law, learned counsel made pointed submissions to one aspect of the matter. That one aspect of the matter is, plaintiff in the trial Court pleaded Hiba and the ingredients of Hiba have not been established in the trial Court. Saying so, notwithstanding five questions being set out in the memorandum of grounds of appeal, learned counsel adverted to two questions (b) and (c) and projected his arguments and those two questions read as follows:

'(b) Whether the Lower Courts are correct in decreeing the suit when the defendant is residing in the suit schedule property since 1971 onwards?

c) Whether the Lower Courts are correct in decreeing the suit after dismissal of Exhibits A-11 and Exhibit A-13?'

10. Learned counsel submitted that the above questions qualify as substantial questions of law.

11. In support of his contention, learned counsel pressed into service a judgment of Hon'ble Supreme Court in Rasheeda Khatoon (D) Through LRs. Vs. Ashiq Ali reported in 2015-2-L.W. 230 and drew the attention of this Court to Paragraph 11 of the said judgment, which reads as follows:

'11. In Mahboob Sahab v. Syed Ismail and Others [6] a two-Judge Bench referred to Section 147 of the Principles of Mahomedan Law by Mulla wherein the essentials of valid gift under the Muhammadan Law have been elucidated and proceeded to explicate the principle. We think the reproduction of the relevant passage would be seemly:-

"Under Section 147 of the Principles of Mahomedan Law, by Mulla, 19th Edn., edited by Chief Justice M. Hidayatullah, envisages that writing is not essential to the [pic]validity of a gift either of moveable or of immovable property. Section 148 requires that it is essential to the validity of a gift that the donor should divest himself completely of all ownership and dominion over the subject of the gift. Under Section 149, three essentials to the validity of the gift should be, (i) a

declaration of gift by the donor, (ii) acceptance of the gift, express or implied, by or on behalf of the donee, and (iii) delivery of possession of the subject of the gift by the donor to the donee as mentioned in Section 150. If these conditions are complied with, the gift is complete. Section 150 specifically mentions that for a valid gift there should be delivery of possession of the subject of the gift and taking of possession of the gift by the donee, actually or constructively. Then only the gift is complete. Section 152 envisages that where the donor is in possession, a gift of immovable property of which the donor is in actual possession is not complete unless the donor physically departs from the premises with all his goods and chattels, and the donee formally enters into possession. It would, thus, be clear that though gift by a Mohammedan is not required to be in writing and consequently need not be registered under the Registration Act; for a gift to be complete, there should be a declaration of the gift by the donor; acceptance of the gift, expressed or implied, by or on behalf of the donee, and delivery of possession of the property, the subject-matter of the gift by the donor to the donee. The donee should take delivery of the possession of that property either actually or constructively. On proof of these essential conditions, the gift becomes complete and valid. In case of immovable property in the possession of the donor, he should completely divest himself physically of the subject of the gift." [Emphasis supplied]

12. In the light of the aforesaid narrative, this Court now embarks upon the exercise of examining whether any substantial question of law arises in the case on hand and for this purpose, this Court reminds itself of two recent judgments of Hon'ble Supreme Court being Kanailal case [Kanailal and Others Vs. Ram Chandra Singh and Others reported in (2018) 13 SCC 715] and Kirpa Ram case [Kirpa Ram Vs. Surendra Deo Gaur and others reported in 2020 SCC Online SC 935]. Kanailal principle is one by which Hon'ble Supreme Court held that Order XLI Rule 31 CPC ingredients stand telescoped into second appeal legal drill under Section 100 CPC also. Kirpa Ram principle is one by which Hon'ble Supreme Court has reiterated the position that a second appeal can be dismissed straightaway at the admission stage itself if no substantial question of law arises. On a combined and conjoined reading of Kannialal and Kirpa Ram principles, this Court in the light of the narrative thus far, deems it

appropriate to set out that the lone point for determination in the instant second appeal is, whether any substantial question of law arises in the light of facts finding, trajectory the matter has taken and the arguments advanced before this Court.

13. This Court now proceeds to give its decision on aforementioned point for determination and the reasons for the decision. Before proceeding further, this Court also deems it appropriate to remind itself about the expression 'substantial question of law' occurring in Section 100 CPC as explained elucidatively by various courts over a period of time, which is also the obtaining position of law. First of the judgment in this line of case laws was rendered by a Hon'ble Full Bench of this Court in the celebrated Rimmalapudi Subba Rao's case [Rimmalapudi Subba Rao Vs. Noony Veeraju And Others reported in AIR 1951 Madras 969 (FB)]. This Rimmalapudi Subba Rao principle rendered by Hon'ble Full Bench was affirmed by Hon'ble Supreme Court (a Constitution Bench of Hon'ble Supreme Court) in another celebrated case, namely Chunilal Mehta's case [Sir Chunilal V.Mehta and Sons Ltd., Vs. Century Spinning and Manufacturing Co. Ltd., reported in AIR 1962 SC 1314] which is also known as Century Spinning Mill's case. Paragraph 6 of Century Spinning Mill case is relevant and the same reads as follows:

'6. We are in general agreement with the view taken by the Madras High Court and we think that while the view taken by the Bombay High Court is rather narrow the one taken by the former High Court of Nagpur is too wide. The proper test for determining whether a question of law raised in the case is substantial would, in our opinion, be whether it is of general public importance or whether it directly and substantially affects the rights of the parties and if so whether it is either an open question in the sense that it is not finally settled by this Court or by the Privy Council or by the Federal Court or is not free from difficulty or calls for discussion of alternative views. If the question is settled by the highest court or the general principles to be applied in determining the question are well settled and there is a mere question of applying those principles or that the plea raised is palpably absurd the question would not be a substantial question of law. '

14. Rimmalapudi Subba Rao case rendered by Hon'ble Full bench of this Court, as affirmed by Hon'ble Supreme Court (Constitution Bench), was neatly captured and articulated by Hon'ble Supreme Court in Santosh Hazari case [Santosh Hazari Vs. Purushottam Tiwari (Deceased) by Lrs reported in (2001) 3 SCC 179]. Relevant paragraph in Santosh Hazari case is Paragraph 12, which is instructive and the same reads as follows:

'12. The phrase "substantial question of law", as occurring in the amended Section 100 is not defined in the Code. The word substantial, as qualifying "question of law", means - of having substance, essential, real, of sound worth, important or considerable. It is to be understood as something in contradistinction with - technical, of no substance or consequence, or academic merely. However, it is clear that the legislature has chosen not to qualify the scope of "substantial question of law" by suffixing the words "of general importance" as has been done in many other provisions such as Section 109 of the Code or Article 133(1)(a) of the Constitution. The substantial question of law on which a second appeal shall be heard need not necessarily be a substantial question of law of general importance. In *Guran Ditta v. T. Ram Ditta* [AIR 1928 PC 172 : 55 IA 235], the phrase "substantial question of law" as it was employed in the last clause of the then existing Section 110 CPC (since omitted by the Amendment Act, 1973) came up for consideration and their Lordships held that it did not mean a substantial question of general importance but a substantial question of law which was involved in the case as between the parties. In *Sir Chunilal V. Mehta & Sons Ltd. v. Century Spg. and Mfg. Co. Ltd.* [AIR 1962 SC 1314 : 1962 Supp (3) SCR 549] the Constitution Bench expressed agreement with the following view taken by a Full Bench of the Madras High Court in *Rimmalapudi Subba Rao v. Noony Veeraju* [ILR 1952 Mad 264 : AIR 1951 Mad 969] :

"[W]hen a question of law is fairly arguable, where there is room for difference of opinion on it or where the Court thought it necessary to deal with that question at some length and discuss alternative views, then the question would be a substantial question of law. On the other hand if the question was practically covered by the decision of the highest court or if the general principles to be applied in determining the question are well settled and the only question was of applying those principles to the particular facts of the case it would not be a substantial question of law."

and laid down the following test as proper test, for determining whether a question of law raised in the case is substantial:

"The proper test for determining whether a question of law raised in the case is substantial would, in our opinion, be whether it is of general public importance or whether it directly and substantially affects the rights of the parties and if so whether it is

either an open question in the sense that it is not finally settled by this Court or by the Privy Council or by the Federal Court or is not free from difficulty or calls for discussion of alternative views. If the question is settled by the highest court or the general principles to be applied in determining the question are well settled and there is a mere question of applying those principles or that the plea raised is palpably absurd the question would not be a substantial question of law.'

15. As alluded to supra, Paragraph 12 of Santosh Hazari case clearly captures the ingredients of expression 'substantial question of law' occurring in Section 100 CPC. This is the obtaining position of law and this has been followed repeatedly and as recently as in Malan Bi case [Syeda Rahimunnisa Vs Malan Bi (dead) by legal representatives and another reported in (2016) 10 SCC 315]. A careful perusal of the case file placed before this Court brings to light that the plaintiff in the trial Court has not pleaded Hiba. On the contrary, the plaintiff has predicated the claim based on a registered Settlement Deed executed by her late husband i.e, Ex.A3. To be noted, original title deed dated 21.11.1971 and a mortgage deed dated 22.09.1983 have also been marked as Exs.A1 and A2. Tax receipts have also been marked. The judgment of Hon'ble Supreme Court in Rasheeda Khatoon case wherein earlier judgment of Hon'ble Supreme Court in Mahboob Sahab case [Mahboob Sahab v. Syed Ismail and others reported in (1995) 3 SCC 693] was reiterated, does not come to the aid of the appellant in the case on hand though the principles and three ingredients that there should be declaration of gift, acceptance of the gift and delivery of possession are available. This Court is of the view that Hiba if pleaded has to be proved by independent witnesses to the transaction. It may not be necessary to dilate further on this aspect as the pleadings in trial Court are predicated on Ex.A3 and not on Hiba.

16. This takes us to the two questions projected by learned counsel, which have been extracted and reproduced supra. With regard to defendant residing in the property, that can hardly be a ground to resist a prayer for declaration of title and recovery of possession. There is a faint reference to adverse possession, but the trajectory of the trial before the trial Court reveals that there is no effort in this direction demonstrating that title has been perfected by adverse possession. Therefore, this puts an end to question (b), which has been suggested as substantial question of law. It is the end of the road and this draws the curtain on question (b).

turns on Exs.A11 and A13. Both these pertain to proceedings in Rent Control court between plaintiff and the defendant. While Ex.A11 is a photocopy of an order dated 20.02.1998 made in R.C.O.P.No.1 of 1995, Ex.A13 is the certified copy of decreetal order dated 26.07.2006 made in R.C.A.No.2 of 1998. Law is well settled that Rent Control proceedings are summary proceedings and can have no impact on title. To be noted, this is under the erstwhile Rent Control Act, namely 'The Tamil Nadu Buildings (Lease and Rent Control) Act, 1960 (Tamil nadu Act XVIII of 1960)' ['Rent Control Act' for brevity]. Even in this erstwhile Rent Control Act, with regard to denial of title, namely, Section 10(2)(vii), Rent Controller can only send the parties to a Civil Court for declaration of title after recording a prima facie view. This is mentioned for the limited purpose of emphasizing that Rent Controller cannot decide title and Rent Control proceedings going against the plaintiff does not in any manner cause any cloud over title and therefore do not impact or impede the prayer for declaration and recovery of possession. This Court is also informed that Rent Control proceedings were essentially for willful default under Section 10(2)(i) of Rent Control Act. Any order made for eviction under Section 10(2)(i) can hardly have any impact qua title. This draws the curtains on question No.(c), which has been proposed as a substantial question of law. If Rimmalapudi Subba Rao principle is applied, it follows as an inevitable sequitur that no substantial question/s of law much less substantial question/s of law within the meaning of Section 100 CPC as elucidatively explained by Hon'ble Supreme Court qua the expression occurring in Section 100 CPC arises in the case on hand. There is no question which is debatable and nothing that is res integra has arisen in the case on hand. It is also not a case of well settled principle being disregarded. Absent substantial question of law qua facts and trajectory of the matter, a second appeal can be dismissed at the admission stage on the ground that no substantial question of law arises and this is the Kirpa Ram principle alluded to supra.

18. In the light of the narrative thus far, this Court has no hesitation in coming to the conclusion that no substantial question of law arises in the captioned second appeal and therefore, the same deserves to be dismissed. Considering the nature of the matter, considering the close relationship of the parties and the nature of the submissions made in this Court, there shall be no order as to costs. Consequently, C.M.P.No.6890 of 2021 is also dismissed.

Sd/-

Assistant Registrar (CO)

//True Copy//

Sub Assistant Registrar

To

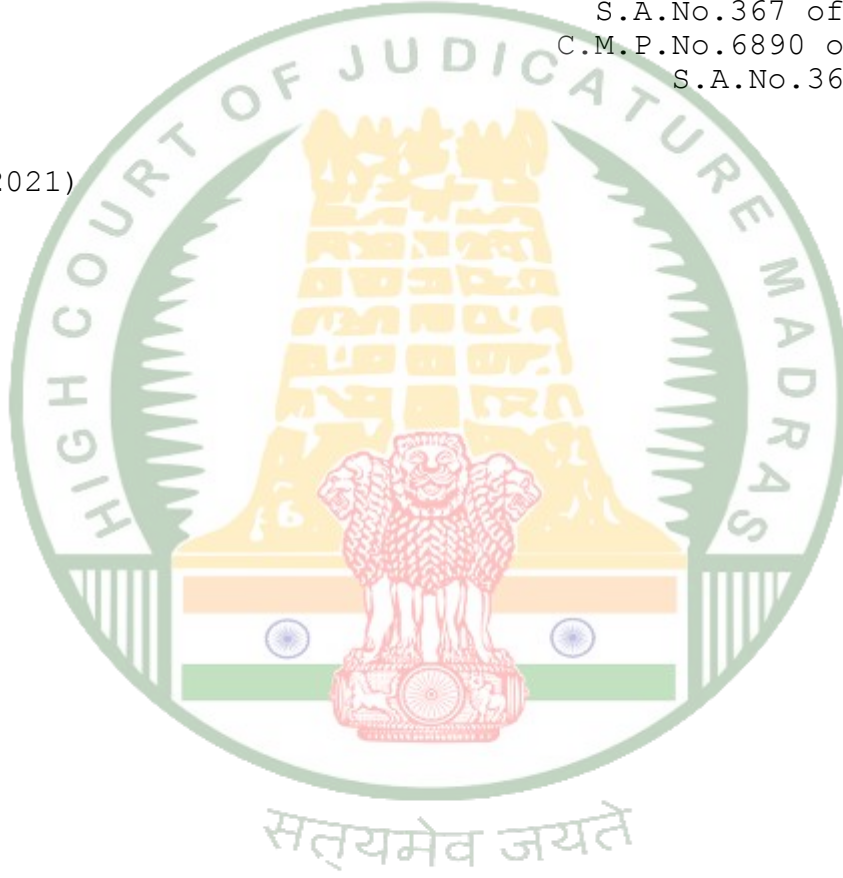
1. II Additional District Judge
Vellore @ Ranipet

2. The Subordinate Judge
Ranipet, Vellore District

+1cc to Mr.T.Dhanasekaran, Advocate, S.R.No. 23260

S.A.No.367 of 2021 and
C.M.P.No.6890 of 2021 in
S.A.No.367 of 2021

BS (CO)
GN (28/06/2021)



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