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IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated : 02.07.2021

Coram

THE HONOURABLE MR. JUSTICE M.SUNDAR

S.A.No.492 of 2021

&

C.M.P.No.9570 of 2021

V.Ashok

...Appellant/Plaintiff/Plaintiff

Vs.

1. V.Padma
2. Mr.Anandan
3. Mrs.Asha

...Respondents/Defendants/Defendants

Second Appeal filed under Section 100 of the Code of Civil Procedure, 1908 to set aside the judgment and decree dated 09.12.2019 in A.S.No.5 of 2019 passed by the V Additional Judge, City Civil Court, Chennai confirming the judgment and decree dated 30.11.2016 in O.S.No.1984 of 2012 passed by XVI Assistant Judge, City Civil Court, Chennai.

For Appellant : Mr.A.D.Janarthanan

JUDGMENT

Mr.A.D.Janarthanan, learned counsel on record for sole appellant in the captioned second appeal is before this Virtual Court. Sole appellant before this Second Appeal Court presented a plaint on 02.09.2012 on the file of 'XVI Assistant Judge's Court, Chennai' (hereinafter 'trial Court' for the sake of brevity), which was taken on file as O.S.No.1984 of 2012. Prayer in the suit was for partition and separate possession of what according to plaintiff is his 1/4th share in the suit properties. Plaintiff is the son of one Late Veeraswami and he had launched the suit against his mother Padma, brother Anandan and sister Asha i.e., spouse, son and daughter respectively of Late Veeraswami.

2. The suit for partition was resisted by pleadings that are primarily predicated on a testament i.e., a Will dated 20.12.1995. The prayer for partition in the suit essentially turns on the validity of the Will as the plaintiff disputes the validity of the Will said to have been executed by Late Veeraswami as according to the defendants the suit properties were bequeathed by Late Veeraswami vide this testament.



3. Matter of immense significance is, in the trial Court an issue was framed with regard to the Will. This is Issue No.3 and the same reads as follows:

' 3. Whether the deceased Veeraswami has executed a Will dated 20.12.1995 in favour of the 1st defendant and whether the WILL is true and genuine?'

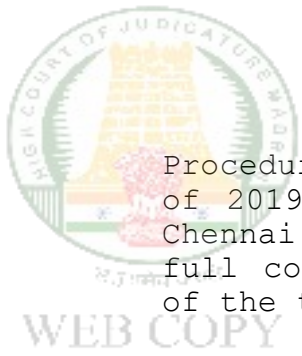
4. The aforementioned testament (Will) became subject matter of dispute.

5. Be that as it may, the protagonist of the testament (Will) filed O.P.No.659 of 2013 on the Original Side of this Court i.e., Madras High Court, seeking probate of this testament. On contest, this OP was converted into a Testamentary Original Suit, namely T.O.S.No.8 of 2014. This Court is informed that the same is pending. Under such circumstances, trial Court, after full contest in and by judgment and decree dated 30.11.2016 dismissed the suit for partition, but preserved the rights of the plaintiff to launch an appropriate suit/partition suit subject to probate proceedings which has now become Testamentary Original proceedings in this Court. This is captured in a portion of the judgment of the trial Court, which reads as follows:

' On hearing both sides and on perusal of evidence given by both sides, this Court decides that, when the Original Will is not available before this court, when the evidence of attestor namely, V.E.Padmanabhan, S/o.V.G.Ethirajulu/DW2 in the absence of production of Original Will can not be a full fledged evidence and when the probate proceedings is pending before the Honourable High Court, Madras in O.P.No.659 of 2013-T.O.S.No.8/2014 where both parties have participated, at present going into detail about the issue, whether the suit property is the self-acquired property of the Plaintiff's father Veeraswami or it was purchased by joint family income, is not required.

So, after disposal of the probate proceedings before the Honourable Court regarding the WILL dated 20.12.1995, if it is necessary, the plaintiff is entitled to file appropriate suit/partition suit. Hence in view of the above findings, this court has determined to dismiss the suit. Accordingly, Issue No.1 is answered.'

6. Plaintiff carried the matter in appeal by way of a regular first appeal under Section 96 of 'The Code of Civil



Procedure, 1908' ('CPC' for the sake of brevity) vide A.S.No.5 of 2019 on the file of V Additional City Civil Judge's Court, Chennai and first appeal Court dismissed the first appeal (after full contest) confirming the aforementioned judgment and decree of the trial Court.

7. In the admission Board i.e., admission hearing of the captioned second appeal today, learned counsel for plaintiff submits that the probate proceedings were launched post partition suit. This can hardly alter the position much less lead to a substantial question of law as the captioned matter is a second appeal under Section 100 CPC. To be noted, as already alluded to supra, there is no disputation or disagreement that the aforementioned Testamentary Original Suit being T.O.S.No.8 of 2014 is now pending on the Original Side of this Court. Therefore, plaintiff has to necessarily await the outcome of this T.O.S and in any event, as already mentioned supra, trial Court and first Appellate Court have concurrently preserved the rights of the plaintiff to file an appropriate suit or a partition suit subject to / depending on the outcome of the Testamentary Original Suit proceedings. This aspect of the matter will obviously stand confirmed on dismissal of this second appeal.

8. This takes us to the issue whether any substantial question of law arises in the captioned second appeal. As many as 8 questions have been proposed as substantial questions of law by the appellant and the same (as culled out from the memorandum of Grounds of Appeal) read as follows:

'Substantial Questions of Law:

a) Whether the Courts below properly construed the oral and documentary evidence adduced by the parties?

b) Whether the Courts below has consider the property in question was constructed by the appellant / plaintiff?

c) Whether the Courts below have properly decided the case of the plaintiffs in granting the relief by share of the property?

d) Whether the Courts below have properly considered the appellant having share in the property?

e) Whether the courts below have consider the genuinity of the WILL decided by the Honourable High Court and the Partition of suit property will be decided only for Civil Suit?



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f) Whether the courts below have properly considered the suit filed by the appellant/plaintiff is genuine or not, since after filing of the partition suit the probate proceedings has been filed by the 1st defendant with help of other defendants?

g) Whether the Courts below have properly considered the deceased Mr.Veerasingam executed a Will within 3 months after purchase the property as vacant site?

h) Whether the Courts below have properly consider the appellant/plaintiff is also hard earning along with his father for more than 10 years was admitted by DW1.'

9. The expression 'substantial question of law' ('SQL'for brevity)occurring in Section 100 CPC has been elucidatively explained in a long line of authorities starting from Sir Chunilal Mehta's case [Sir Chunilal V.Mehta and Sons Ltd., Vs. Century Spinning and Manufacturing Co. Ltd., reported in AIR 1962 SC 1314] wherein a Constitution Bench of Hon'ble Supreme Court affirmed the view taken by a Hon'ble Full Bench of this Court in Rimmalapudi Subba Rao's case [Rimmalapudi Subba Rao Vs. Noony Veeraju And Others reported in AIR 1951 Madras 969 (FB)]. Suffice to say that this is the obtaining position of law as this has been reiterated by Hon'ble Supreme Court as recently as on 27.08.2020 in Nazir Ahmed case [Nazir Mohamed Vs. J.Kamala reported in 2020 SCC OnLine SC 676]. This Court deems it appropriate to not to extract and reproduce relevant portion from these celebrated judgments as it is not necessary to burden this judgment with those aspect of the matter. Suffice to say that nothing debatable or no issue of any settled position of law being disregarded arises in the case on hand. To put it differently, no substantial question/s law arise/s. From the narrative, discussion and dispositive reasoning thus far it will be clear that 8 questions suggested as substantial questions of law by the appellant neither qualify as SQL nor arise in the captioned second appeal.

10. This takes us to Kirpa Ram principle being principle laid down by Hon'ble Supreme Court in Kirpa Ram Vs. Surendra Deo Gaur and others reported in 2020 SCC Online SC 935 wherein the age old principle that a second appeal can be dismissed at the admission stage without formulating a substantial question of law if none arises has been reiterated. Drawing inspiration



from Kirpa Ram principle, captioned second appeal is dismissed holding that no substantial question of law arises. There shall be no order as to costs.

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Sd/-
Assistant Registrar

True Copy//

Sub Assistant Registrar

gpa

To

1. The V Additional Judge,
City Civil Court, Chennai
2. The XVI Assistant Judge
City Civil Court, Chennai.

Copy to

The Section Officer,
VR Section,
High Court, Madras - 104.

+1cc to Mr.A.D.Janarthanan, Advocate, S.R.No.31478

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PL[co]
NSK 16/11/2021