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S.A.No.1323 of 2011

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on : 21.12.2023

Delivered on : 22.12.2023

CORAM

THE HON'BLE MR. JUSTICE C.KUMARAPPAN

S.A.No.1323 of 2011

&

M.P.No.1 of 2011

- 1.Siluvamma
2. Yesudoss
3. Sagayaraj

... Appellants

Vs.

1. Agnes @ Arokiamary
2. Irudayaraj
3. John Brittu
4. Elisapath
5. James
6. Chinnappa Naidu
7. Santhammal
8. Chinnammal
9. Royappa Naidu
- 10.P.S.Domnic
11. Jayaseeli

... Respondents



S.A.No.1323 of 2011

Second Appeal filed under Section 100 of the Code of Civil Procedure against the judgment and decree dated 22.03.2011 made in A.S.No.32 of 2009 on the file Sub-Judge, Kanchipuram reversing the judgment and decree dated 18.06.2009 made in O.S.No.121 of 2004 on the file of the District Munsif-cum-Judicial Magistrate at Uthiramerur.

For Appellants : Mr.Y.Jyothish Chander

For Respondents : Mr.A.Ganesan for R1 to R5
R7, 8 and 11 (No appearance)

R6, R9 and R10 served
(No appearance)

JUDGMENT

The instant second appeal has been filed at the instance of Defendants 5 to 7. Respondents 1 to 5 are the plaintiffs before the trial Court, and Respondents 6 to 10 are the Defendants 1 to 4, 8 and 9 before the trial Court.

The brief facts which give rise to this second appeal are as follows:

2. According to the plaintiffs, first plaintiff is the wife of one Arokiasamy and other plaintiffs are sons and daughters of said Arokiasamy. The suit property originally belongs to one Lourdammal, who is the mother of first plaintiff's husband. He had two brothers and two sisters. They are Royappa Naidu, Balusamy Naidu, Santhammal and Chinnammal.



S.A.No.1323 of 2011

3. According to the plaintiffs, Lourdammal died intestate during 1996 leaving behind the first plaintiff's husband and his brother and sister as her legal heirs. It is the further submission of the plaintiffs that the suit property is a self-acquired property of said Lourdammal. It is stated by the plaintiffs that both plaintiffs and defendants are Indian Christian and governed by the provisions of the Indian Succession Act, 1925. Hence, the plaintiffs submit that they are entitled to 1/6th share in the suit property and in spite of issuance of legal notice, the defendants did not come forward to divide the suit property. Hence, a suit was filed for partition.

4. The suit was resisted by the defendants by filing a written statement. The defendants admit the relationship between the parties. At the same time, they strongly object the intestate succession. According to the plaintiffs, said Lourdammal executed a Will in favour of his two sons Royappa Naidu and Balusamy Naidu. It is averred in the plaint that 76 cents of land was bequeathed in favour of Royappa Naidu, and 90 cents of land was bequeathed in favour of Balusamy Naidu. It is the further contention of the defendants that an extent of 40 cents was bequeathed to



S.A.No.1323 of 2011

one Dominic Savio, who is the grandson of Lourdammal. It was the further contention of the defendants that said Lourdammal executed three separate Wills on 26.12.1995 and such execution of Will and allotment and division among three persons were also confirmed by other sharers signing as witnesses to the said Wills. Hence, the defendants submit that the suit property measuring an extent of 2.06 acres belongs to Rayappa Naidu, Balusamy Naidu and Dominic Savio. Therefore, these defendants pray to dismiss the suit.

Evidence and documents:

5. Before the trial Court, the plaintiffs have examined three witnesses as PW1 to PW3 and on the side of the defendants, three witnesses were examined as DW1 to DW3. On behalf of the plaintiffs, six documents have been marked as Exs.A1 to A6 and on the side of the defendants, five documents were marked as Exs.B1 to B5.

Findings of the Courts below:

6. The trial Court, after having considered the oral and documentary



S.A.No.1323 of 2011

evidence, dismissed the suit by believing the case put forth by the defendants under testamentary succession. Aggrieved by the same, the plaintiffs preferred an appeal before the lower Appellate Court. The lower Appellate Court by invoking Sections 213 and 67 of the Indian Succession Act has held that since the defendants have not probated the Will and that the beneficiaries are signed in the Will, the Will is unenforceable and void. Based on such finding, the first Appellate Court reversed the finding of the trial Court and decreed the suit. Aggrieved over the same, the defendants 5 to 7 are before this Court by way of this second appeal.

Substantial questions of law:

7. This Court on 11.11.2011 has formulated the following substantial questions of law for consideration:

“1)Whether the Court below was right in entertaining the pleas of the plaintiffs for the first time in the first appeal, regarding the plea under Section 67 of the Indian Succession Act, without pleading and adducing any evidence, since the plea under Section 67 of the Indian Succession Act is one



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being mixed question of fact and law?

2) Whether the Court below was right in not ascertaining the fact the Will signed by the beneficiary is with Animo Attestandi of attesting witnesses or mere token of acceptance of the division, when D.W.2 has specifically deposed that the beneficiaries were asked to sign the will by the testator so that they know about the execution of will and division of properties in their favour?

3) Whether the Court below was right in coming to conclusion that all Christian wills have to be probated, when the Section 213 of the Indian Succession Act is amended by Amendment 26/2002, exempting the Christian will from the purview of Section 213 of the Indian Succession Act?

4) Whether the Court below was right in totally ignoring the pleadings and evidence, especially the evidence of the P.W.1, wherein, it is admitted that in the year 1989 itself, settlement was made in her favour by her father-in-law and there is no joint family?

8. This Court, even at the time of disposing of the same is competent to formulate an additional substantial question of law if the same arises for consideration. In the instant case, both the parties agreed that the substantial



S.A.No.1323 of 2011

question of law with regard to Order XLI Rule 31 CPC can be framed for consideration. They have also made their submissions referring Order XLI Rule 31 C.P.C.

9. Therefore, apart from the above substantial questions of law, this Court would also deem it appropriate to formulate an additional substantial question of law as follows:

“Whether the judgment of first Appellate Court is in contravention to Order XLI Rule 31 of CPC?”

Submissions on both sides:

10. The learned counsel for the appellants would vehemently submits that Section 213 of the Indian Succession Act has undergone an amendment by way of an amending Act in the year 2002, which came into force with effect from 27.05.2002, and such amendments are procedural in nature. Therefore, as long as no probate proceedings have been initiated, the amendment made under Section 213 of the Indian Succession Act would be attracted to the Wills which are filed before this Court subsequent to the



S.A.No.1323 of 2011

amendment. Therefore, learned counsel would contend that the probate proceedings are not at all mandatory.

11. In this regard, the learned counsel for the appellants relied upon a judgment of this Court in *Mary and Others Vs. Adaikkalasamy and Others* reported in (2008) 7 MLJ 238. It was also contended by learned counsel for appellants that even according to their pleadings, the signatures made by the beneficiaries in the Wills, is only to record confirmation of the shares allotted to each legatees. Therefore, such signatures found in the Will cannot be termed as an attestation of the beneficiary within the meaning of Section 67 of the Indian Succession Act. Therefore, contended that the finding given by the first Appellate Court based on Sections 213 and 67 of the Indian Succession Act is contrary to the provision.

12. It was further contended by the learned counsel for the appellant that the first Appellate Court did not frame any point for determination and has not re-appreciated the evidence, however, has gone on a different footing which was not at all pleaded by the parties. Therefore, learned



S.A.No.1323 of 2011

counsel would contend that the judgment passed by the first Appellate Court is in contravention to Order XLI Rule 31 of CPC and hence, prayed to interfere with the same.

13. Per contra, the learned counsel for the respondents would submit that the Will alleged to have been executed by Lourdammal, has got inherent legitimate suspicious circumstances, whereas the defendants have miserably failed to dispel such suspicious circumstances. It was also contended that the judgment passed by the first Appellate Court by invoking Sections 213 and 67 of Indian Succession Act is perfectly in order, and does not require any interference by this Court. The learned counsel would also rely upon several judgments so as to explain as to the proof and attestation of the Will.

14. I have given my anxious consideration to the submissions made on either side and perused the materials placed before this Court.



S.A.No.1323 of 2011

Analysis of the submissions:

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15. Though both counsel have argued elaborately in respect of Section 213 and Section 67 of Indian Succession Act, before delve into the above issues, this Court deems it appropriate to take up the additional substantial question of law framed today for consideration.

16. According to Order XLI Rule 31 CPC, there is a duty cast upon the first Appellate Court to formulate the points for consideration. It is pertinent to mention here that the first Appellate Court is last Court of fact, therefore, it is mandatory duty on the part of the first Appellate Court to determine the points for consideration and while deciding the points for consideration, the first Appellate Court must have given reasons upon each point. The reasons are endogenous vestige of any order. It is also the duty of the first Appellate Court to re-appreciate the evidence. While harmoniously reading the judgment of the first Appellate Court, this Court finds that the first Appellate Court has only framed an omnibus point for determination, as to whether the first appeal is to be allowed or not.



S.A.No.1323 of 2011

WEB COPY

17. Admittedly, the main issue between the plaintiffs and defendants is in respect of whether the succession is intestate succession or testamentary succession. The trial Court has found that the Will propounded by the defendants has been proved and thereby dismissed the suit. Whereas the first Appellate Court has not formulated any point on this aspect and without even having any discussion in respect of the finding made by the trial Court, the first Appellate Court misdirected itself by referring Sections 213 and 67 of the Indian Succession Act. This Court is of the firm view that prior to adjudicating the Will in question, on the basis of Section 213 and Section 67 of the Indian Succession Act, it is the duty on the part of the First Appellate Court to answer the defence put forth by the plaintiffs as to whether the Will propounded by the defendants is fabricated and whether it has been proved in the manner known to law.

18. On a harmonious reading of the first Appellate Court's judgment, this Court do not find any vestige or semblance as to the re-appreciation of evidence. At this juncture, this Court deems it appropriate to refer to judgment of the Division Bench of this Court. Wherein in the case of



S.A.No.1323 of 2011

K.M.M. Kadra Hussain Vs. O.M.R.Selvaraj and two others reported in

1997 1 CTC 559 this Court has held as follows:

11. We have gone through the judgment of the learned Single Judge. We are of the view that the judgment is defective, in that the learned Judge has not followed the provisions under Order 41 Rule 31, C.P.C. As rightly pointed out by the learned Senior Counsel for the appellant, it is also incumbent on the part of the Appellate Court to raise points for determination just to clear up the pleadings and focus the attention of the court and of the parties on the specific and rival contentions, which arise for decision. One of us (AR. Lakshmanan, J.) sitting single, in Kannammal v. KuppannaGounder, 1996 (II) MLJ 550, following a Division Bench of this Court in VisalakshiAmmal v. DhanalakshmiAmmal 1989 (2) L.W. 414 and for the reasons stated in the order, has set aside the judgment of the First Additional District Judge. Coimbatore and remitted back the matter to the said Court, to dispose of the appeal afresh on merits and in accordance with law and after affording opportunity to both the parties, within three months from the date of receipt of copy of the judgment.

12. The same view was taken by this Bench in the judgment dated 27.02.1997 rendered by us in Palanisami Pillai v. The Commissioner, Hindu Religious and Charitable Endowments (Admn.) Department, Madras-34 and another, (L.P.A. No. 16 of 1993). In that case. similar contention was raised before us. While considering the said submission, this Bench has observed in



WEB COPY



S.A.No.1323 of 2011

paragraph 12 of the judgment as follows:-

"The object of Order XLI Rule 31 CPC, in making it incumbent upon the appellate court to raise the points for determination and to state reasons for the decision is to clear up the pleadings and focus the attention of the court and of the parties on the specific and rival contentions which arise for determination as also to offer the litigant parties an opportunity of knowing and understanding the grounds upon which the decision proceeds with a view to enable them to exercise, if they see fit, and are so advised, the right of second appeal conferred by Section 100 CPC. On a perusal of the judgment of the learned single Judge, it appears to us that the reasons for his findings would not satisfy Order XLI CPC. This Court being the first appellate Court, and being the final court of facts, it is incumbent on it to consider all the evidence adduced by the parties in the case. Leamed single Judge has not even turned to the side of the plaintiffs who filed voluminous documents marked as Exs. A.1 to A. 33. The parties to the suit or appeal, in our opinion, have a right to know the reasons that have led the Judge to his conclusions. The learned single Judge (Bellic, J.) has not considered any facts and circumstances and the evidence adduced both oral and documentary by both sides, but merely recorded a finding by accepting the evidence of DWS. 1 & 2 without himself bestowing any consideration thereon, it can surely be said that this is not a judgment in the eye of law. In the instant case, the judgment of the learned Subordinate Judge is exhaustive and well reasoned. The learned single Judge when he reversed the judgment, there should be enough material to show that the Court of appeal has considered it fully and formed its own opinion. In the present judgment, there is no discussion at all about the documentary evidence filed and marked as Exs. A1 to A33. The law imposes upon the court of appeal the imperative duty and obligation of giving an adequate and satisfactory judgment such as is required by law and it is the duty to explain its reasons for so doing more



WEB COPY



S.A.No.1323 of 2011

especially when the court of first instance has gone so fully into the facts and the reasons for the conclusions arrived at."

Learned Senior Counsel appearing for the respondents has no objection for setting aside the judgment and decree of the learned single judge and remit the matter to another learned single Judge of this Court for consideration of the entire facts and circumstances and the evidence adduced by both the parties, both oral and documentary. As observed by us, the law imposes upon the court of appeal the imperative duty and obligation of giving an adequate and satisfactory judgment as is required by law and it is the duty of the Court to explain its reasons for so doing, more especially when the court of first instance has gone so fully into the facts and the reasons for the conclusions arrived at."

19. On a reading of the first Appellate Court's judgment, this Court is of the view that the first Appellate Court has not followed the above ratio. Therefore, the additional substantial question of law is liable to be answered in favour of the appellant.

20. In view of the same, the judgment passed by the lower Appellate Court is liable to be set aside. However, for due compliance of Order XLI Rule 31 CPC, this appeal is liable to be remitted back to the first Appellate



S.A.No.1323 of 2011

Court for fresh disposal according to law.

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21. In view of the above finding, the other substantial questions of law framed at the time of admission of the second appeal do not arise for consideration.

22. In the result, the second appeal is allowed and judgment and decree passed in A.S.No.32 of 2009 on the file Sub-Judge, Kanchipuram, dated 22.03.2011 is set aside and the matter is remitted back to the Sub-Judge, Kanchipuram with a direction to dispose of the appeal as expeditiously as possible according to law, as the suit is of the year 2004. Further, the First Appellate Court is directed to proceed with the first appeal, without being influenced by the order of this Court. The parties are directed to appear before the first Appellate Court on 29.01.2024. No costs. Consequently, the connected miscellaneous petition is closed.

22.12.2023

Index: Yes

Neutral Citation: Yes

Speaking order/Non-speaking order

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S.A.No.1323 of 2011

To

WEB COPY

1. The Sub-Judge, Kanchipuram
2. The District Munsif-cum-Judicial Magistrate at Uthiramerur
3. The Section Officer, V.R.Section, High Court, Madras.



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S.A.No.1323 of 2011

C.KUMARAPPAN.J.,

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Pre-delivery judgment in
S.A.No.1323 of 2011

22.12.2023