IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 18.04.2024

CORAM

THE HON'BLE Mr.JUSTICE **C.KUMARAPPAN**

S.A.No.85 of 2012
and
MP.No.1 of 2012

1. M.S.Sivasankar
2. S.Gunasekaran (Deceased)
3. M/s.Mani Transports,
   11, Muniappan Koil Street,
   Tiruchengode.
4. Saraswathi
5. Menaka
6. Keerthishri (minor)
   D/O.Gunasekaran rep. by mother
   and guardian Menaka 5th Appellant
   (Appellants 4 to 6 brought on record as LRs of the deceased
   2nd appellant vide order dated 04.01.2019 made in
   CMP.Nos.7508 & 7509/2018)

... Appellants

- Vs -

1. Dr.N.Kavitha
2. M.Selvamani
3. J.Leelavathi

... Respondents

Second Appeal is filed under Section 100 of the Civil Procedure Code against the judgment and decree dated 28.10.2011 made in A.S.No.18 of 2011 on the file of the Principal District Judge, Namakkal reversing the judgment and decree dated 30.09.2010 made in O.S.No.527 of 2008 on the file of the Subordinate Judge of Tiruchengode.

For Appellant : Mr.T.R.Rajagopalan
Senior Counsel
for Mr.S.T.Bharath Gowtham

For Respondents : Mr.P.Valliappan
Senior Counsel
for Mr.S.M.S.Shriram for R1
Ms.Mirula Roshini for R2
Mr.I.Abrar Md. Abdullah for R3

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JUDGMENT

The defendants 1, 2 and 5 are the appellants herein. The first respondent herein is the plaintiff before the Trial Court and the defendants 3 and 4 are the respondents 2 and 3 herein.

2. For the sake of convenience, the parties will be referred to according to their litigative status before the Trial Court.

3. The brief facts, which give rise to the instant Second Appeal is that the plaintiff is the daughter of one Savithri. The 1st and 2nd defendants' father

Selvamani, who is the 3rd defendant herein and deceased Savithri and the 4th defendant are the brother and sister and children of one Muthusami Gounder. The said Muthusami Gounder and the defendants 1 and 2 together constituted a firm in the name and style of M/s.Mani Transport. The firm was constituted for the purpose of plying buses. The partnership firm was serendipitously and curiously constituted on 01.04.2005 (April 1st) and registered under the Partnership Act. The said partnership firm is arrayed as 5th defendant in the suit. In the said partnership firm, Muthusami Gounder had 40% share, and the defendants 1 and 2 had share of 30% each.

4. While so, the said Muthusami Gounder died on 23.09.2006. The plaintiff being the grand daughter of Muthusami Gounder, claimed 1/3 share in Muthusami Gounder's property. After the death of Muthusami Gounder, the defendants are running the bus services and appropriated the entire income. Therefore, the plaintiff caused a legal notice on 10.07.2008 demanding for rendition of accounts. For which the defendants had replied that Muthusami Gounder bequeathed all his assets including the share in the 5th defendant-firm to them and repudiated the claim of the plaintiff. It is the submission of the plaintiff that said Muthusami Gounder did not bequeath any property to the defendants 1 and 2. If there be any such document

purporting to be the Will of Muthusami Gounder such document or documents can only be rank one forgeries. Hence, the plaintiff has come forward with a suit for rendition of accounts for the income derived on 5th defendant's Firm and payment of her 1/3 share of 13.3% therein to the plaintiff by the defendants 1 and 2.

5. The said suit was resisted by the 3rd defendant, who is the maternal uncle of the plaintiff by filing the separate statement. Wherein he disputes the claim of the plaintiff.

6. However, the partnership firm filed a separate detailed counter statement through its Managing Partner namely the 2nd defendant. According to this defendant, before constituting the partnership firm, the Bus Transport has been operated by Muthusami Gounder and that on 10.12.2004 late Muthusami Gounder executed a registered Will bequeathing his buses as well as the permits to the defendants 1 and 2. Subsequently, the said proprietorship concern was converted to a Partnership firm, which factum was also known to the father of the plaintiff and the 4th defendant. It is also the contention of this defendant that, when the defendants dispute the right of the plaintiff, mere filing of the suit for rendition of accounts without seeking the relief of declaration is not maintainable. Hence, prayed to dismiss the

suit.

7. Before the Trial Court, the plaintiff examined one witness as PW1, who is the Power of attorney holder and father of the plaintiff and marked 7 documents as Exs.A1 to A7. On behalf of the defendants, 3 witnesses were examined as DW1 to DW3 and marked 4 documents as Exs.B1 to B4.

8. The Trial Court, after having considered the oral and documentary evidence found that, in view of the execution of the Will-Ex.B1, the entire share of the deceased Muthusami Gounder fell upon the defendants 1 and 2, therefore, the plaintiff cannot have any relief to seek for a rendition of accounts, and ultimately dismissed the suit.

9. Aggrieved with the above order, the plaintiff preferred an appeal before the First Appellate Court, where the First Appellate Court found that in view of the execution of the partnership deed dated 01.04.2005, the Will dated 10.12.2004 become superseded and that there is no Will executed by the testator in respect of the partnership firm, therefore, the plaintiff is entitled for a decree of rendition of accounts and thereby, allowed the appeal, by reversing the finding of the Trial Court, and decreed the suit as prayed for.

10. Not satisfying with the order of the First Appellate Court, the

defendants 1, 2 and preferred the present Second Appeal.

11. At the time of admission on 21.04.2022, this Court has formulated the following substantial question of law:-

> *"a) Whether the lower Appellate Court while differing with the findings of the trial Court has assigned proper reasons as mandated under Order 41 Rule 31 of C.P.C.?*
>
> *b) Whether the lower Appellate Court was right in straight away passing a final decree in a suit for rendition of accounts?*
>
> *c) Whether the lower Appellate Court was right in disregarding Ex.B1 Will executed by Muthusamy Gounder in favour of D1 and D2, whereby, the right of the legal heirs of the said Muthusamy Gounder was excluded?*
>
> *d) Whether the findings of the lower Appellate Court suffers from perversity due to improper appreciation of the oral and documentary evidence?"*

12. The learned Senior Counsel appearing on behalf of the appellants would submit that by virtue of Ex.B1-Will, the entire property was bequeathed to the defendants 1 and 2, and that there is a concurrent findings by both the Courts below about the due execution of said Will. Therefore, when the 3 buses, which is the share of Muthusami Gounder bequeathed to the defendants 1 and 2, the question of asking rendition of accounts by the

plaintiff does not arise. It was also contended by the learned Senior Counsel that, apart from Ex.B1-Will, Ex.B2-Agreement would also vindicate the stand taken by the defendants. It is the submission of the learned Senior Counsel that by virtue of Ex.B2-Agreement, the share of the deceased Muthusami Gounder has been bequeathed to the defendants 1 and 2 equally. Therefore, it is the contention of the learned Senior Counsel that the findings recorded by the Trial Court that the Will-Ex.B1 was superseded by the partnership deed-Ex.A6 is contrary to law. The learned Senior Counsel would also contend that the real tenor of the partnership deed was not gone into by the First Appellate Court. Therefore, the learned Senior Counsel would contend that the findings recorded by the First Appellate Court is perverse and the same is not supported by the evidence. Hence, prayed to interfere with the same.

13. Per contra, the learned counsel for the respondent would invite the attention of this Court to Section 152 of The Indian Succession Act, and by executing the Partnership Deed-Ex.A6, Muthusami Gounder has adjusted the books of accounts maintained in his proprietorship concern M/s.Mani Transport to the partnership firm. Therefore, the legacies dealt under Ex.B1-

Will were adeemed and that there are no documents subsequent to Ex.A6-Partnership Deed to deal about the share of the deceased Muthusami Gounder. It was also the contention of the learned Senior Counsel that Ex.B2-Agreement is fabricated one. Thus, it is the contention of the learned Senior Counsel appearing on behalf of the plaintiff that the findings recorded by the First Appellate court is well merited and does not require any interference.

14. I have given my anxious consideration to either side submissions.

15. From the submissions of either side counsels, the main issue surfaces for adjudicating upon the substantial question of law is the validity of Ex.B1-Will. It is pertinent to mention here that, though in the plaint, it was seriously objected in respect of the execution of Ex.B1-Will, while cross examining PW1, he has categorically admitted in respect of the permit of 3 buses, and that the deceased Muthusami Gounder has permitted the defendants 1 and 2 to transfer the permit in their name. If we closely peruse Ex.B1-Will, which was marked through the attestor DW2, it refers about only 3 buses and its permits. Therefore, though at the time of filing of the suit, the

plaintiff disputes the execution of the Will-Ex.B1 by their subsequent conduct, they have categorically admitted the execution of Ex.B1-Will. Apart from that, both the Courts below have found that there are no suspicious circumstances in Ex.B1-Will. Even the plaintiff did not challenge the said finding before this Court. Therefore, this Court can safely arrive at a conclusion that the deceased Muthusami Gounder has executed Ex.B1-Will.

16. Now the next point to be considered is to see the effect and impact of the partnership deed-Ex.A6 dated 01.04.2005, by and in which the books of accounts of the proprietorship concern viz., M/s.Mani Transport, which ply 3 buses referred to in Ex.B1-Will, was adjusted to the partnership firm. It is also pertinent to mention here that in view of such adjustment of the books of accounts of proprietorship concern into the partnership firm, a 40% share was earmarked for the deceased Muthusami Gounder and the remaining 60% share was equally allotted between the defendants 1 and 2 having each 30% share. Therefore, it is the contention of the learned Senior Counsel appearing for the plaintiff that by virtue of Ex.A6-Partnership Deed, the legacy referred to in Ex.B1-Will has been adeemed and meta morphed, therefore, as a natural concomitant Ex.B1-Will would lapse. However, this Court is not in a

position to agree with the submissions made by the learned Senior Counsel for the respondents/plaintiff.

17. To understand the concept of ademption of legacies, it is relevant to extract Section 152 of the Indian Succession Act. For ready reference, Section 152 of Indian Succession Act is as under:-

> *"152. If anything which has been specifically bequeathed does not belong to the testator at the time of his death, or has been converted into property of a different kind, the legacy is adeemed: that is, it cannot take effect, by reason of the subject-matter having been withdrawn from the operation of the will."*

It is pertinent to mention here that in order to invoke Section 152 of Indian Succession Act, the legacy must have met with an ademption. Here, if we look at Ex.B1-Will, the same specifically dealt 3 buses TN34 B-6680, TN34-A 9181, TN34-B 4496 namely the "Stock In Trade" with separate permit numbers. The registration number and permit number have not met with any ademption and the same is intact as such, and through Ex.B1-Will, the defendants 1 and 2 have been given absolute right over the "Stock In Trade" qua buses and permits. By executing Ex.A6-Partnership Deed, these buses and permits have not been specifically dealt, but only the books of accounts of the proprietorship concern was adjusted towards the partnership firm.

Therefore, Ex.B1-Will will bind upon the parties as the last wish of the testator which attained immortality in view of the findings recorded by the Trial Court.

18. Now we must analyse now, in spite of Ex.B1-Will, whether the plaintiff has got any remedy to seek a rendition of accounts upon the partnership firm. It is pertinent to mention here that the defendants 1 and 2 relies upon Ex.B2-letter, by and in which, they are claiming that the deceased Muthusami Gounder has permitted the defendants 1 and 2 to take over his share. But, more strangely such document has not been referred to in the reply notice given by them, and it was also categorically admitted by the defendants during cross examination that only by virtue of Ex.B1-Will, they are entitled to take over the share of the deceased Muthusami Gounder. Therefore, this Court feels unsafe to rely upon Ex.B2. Further, if we consider Ex.B1-Will, as rightly contended by the learned Senior Counsel for the respondents/plaintiff, there is no reference about the partnership firm.

19. At this juncture, this Court would like to rely upon to Section 37 of The Indian Partnership Act, and Section 88 of The Indian Trust Act.

20. For ready reference, both the provisions are extracted hereunder:-

"***Section 37 of The Indian Partnership Act***

37. Right of outgoing partner in certain cases to share subsequent profits.

Where any member of a firm has died or otherwise ceased to be a partner, and the surviving or continuing partners carry on the business of the firm with the property of the firm without any final settlement of accounts as between them and the outgoing partner or his estate, then, in the absence of a contract to the contrary, the outgoing partner or his estate is entitled at the option of himself or his representatives to such share of the profits made since he ceased to be a partner as may be attributable to the use of his share of the property of the firm or to interest at the rate of six per cent. per annum on the amount of his share in the property of the firm:"

"***Section 88 of The Trust Act***

88. Advantage gained by fiduciary.

Where a trustee, executor, partner, agent, director of a company, legal adviser, or other person bound in a fiduciary character to protect the interests of another person, by availing himself of his character, gains for himself any pecuniary advantage, or where any person so bound enters into any dealings under circumstances in which his own interests are, or may be, adverse to those of such other person and thereby gains for himself a pecuniary advantage, he must hold for the benefit of such other person the advantage so gained."

21. According to Section 37 of Indian Partnership Act, in respect of the deceased partner the representatives of the deceased partner is entitled to seek for a rendition of accounts. In view of Section 37 of the Partnership Act, the existing partners namely defendants 1 and 2 are holding the profit of the deceased partner as a trustee of the representatives of the deceased partner.

22. At this juncture, this Court would like to rely upon Section 88 of Indian Trust Act, wherein the illustration (f) has clearly stipulates the instances, which has been dealt in the present case. For ready reference, illustration (f) of Section 88 of Indian Trust Act is extracted hereunder:-

> "*(f) A and B are partners. A dies. B , instead of winding up the affairs of the partnership, retains all the assets in the business. B must account to A's legal representative for the profits arising from A's share of the capital.*"

23. Here, though the learned Senior Counsel for the respondents/plaintiff pleads an ademption in respect of the buses, this Court could only say that those buses may only be the Stock In Trade and in respect of such Stock In Trade, there was Ex.B1-Will. Therefore, the defendants can have absolute right over the buses qua the Stock In Trade as per Ex.B1-Will. However, apart from the stock in trade, there were investments made by the

testator, and the partnership firm might have generated either income or loss.

24. Therefore, while dealing a claim under Section 37 of the Partnership Act, this Court deals about the equitable jurisdiction. The defendants though plead that they have reconstituted the partnership firm, admittedly, they have not made any attempt to settle the final accounts of the deceased. Therefore, in such an event, it is not open to surviving partners to withhold the assets of the deceased partners, to their advantage. Therefore, this Court is of the firm view that the plaintiff is entitled to seek for a rendition of accounts.

25. In view of the above detailed discussion, the substantial questions of law are answered in favour of the respondents.

26. In the result, the Second Appeal is dismissed. There shall be no order as to costs. Consequently, connected Miscellaneous petition is also closed.

18.04.2024

kmi
Index : yes

Speaking Order

Neutral Citation Case: Yes

To
1. The Subordinate Judge,
   Tiruchengode.

2. The Principal District Judge,
   Namakkal.

C.KUMARAPPAN, J

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