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S.A.No.714 of 2018

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 16.02.2024

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THE HONOURABLE MR. JUSTICE P.B.BALAJI

S.A.No.714 of 2018
and
CMP. No.20969 of 2018

M.C.Durai Raj

...Appellant

Vs.

1.Jayalakshmi
2.Venkatesan

...Respondents

PRAYER: Second Appeal filed under Section 100 of the Code of Civil Procedure to set aside the judgment and decree dated 31.01.2018 made in A.S. No.9 of 2017 on the file of the Sub Court, Palacode confirming the Judgment and Decree dated 27.11.2014 made in O.S. No.214 of 2011 on the file of the District Munsif Court, Palacode and allow the Second Appeal.

For Appellant : Mr.S.Subramanian

For Respondents : Mr.R.Selvakumar



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JUDGMENT

The plaintiff who suffered dismissal of suit in O.S. No.214 of 2011 before the learned District Munsif cum Judicial Magistrate, Palacode is the appellant. The suit was initially filed seeking only for the relief of permanent injunction. However, in view of the express denial of the title of the plaintiff by way of written statement, the plaint was sought to be amended to include the relief of declaration. The trial Court, allowed the said Application for amendment and the relief of declaration was therefore included in the plaint.

2. The trial Court as well as the First Appellate Court non-suited the plaintiff on the ground that the pleadings in the plaint were bereft of material particulars in support of his claim for title over the four items of the suit properties, excepting for claiming the title under suit documents viz., Pattas. The appellant was not able to substantiate his title by production of satisfactory documentary evidence. However, the learned counsel for the appellant would state that before the First Appellate Court, Interlocutory Application was taken out in I.A. No.41 of 2017 under Order XLI Rule 27 of CPC.



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3. According to the learned counsel for the appellant, the First Appellate Court, without following the mandate under Order XLI Rule 27 read with Rule 28 of CPC, did not decide the said Application on merits along with the Appeal and in fact, this Court, while admitting the above Second Appeal has also framed three substantial questions of law.

“ (1) Whether the First Appellate Court is wrong in not hearing and disposing of I.A. No.41 of 2017 in A.S. No.9 of 2017 filed under Order 41 Rule 27 of C.P.C on merits along with the hearing and disposal of A.S. No.9 of 2017?

(2) Whether the failure of the First Appellate Court to mention about I.A. No.41 of 2017 in A.S. No.9 of 2017 anywhere in the impugned judgment in A.S. No.9 of 2017 has resulted in miscarriage of justice and gross violation of the mandatory procedure prescribed under Order 41 Rule 27 of C.P.C in this regard?

(3) Whether the Courts below have acted perversely in not appreciating that the respondents are estopped from denying that the appellant is the son of Chinnathayapa Chetty especially, in view of the recitals contained in Ex.A7, Ex.A11 and Ex.A12 and Ex.B3 and Ex.B4? ”

4. The first two substantial questions of law are touching the hearing and disposal of I.A. No.41 of 2017 filed by the appellant for production of additional evidence invoking Order XLI Rule 27 CPC.



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5. However, Mr.R.Selvakumar, learned counsel for the respondents would submit that on the same date on which, the judgment was delivered in the First Appeal, I.A. No.41 of 2017 for production of additional evidence was also considered on merits and came to be dismissed. He has also produced a true copy of the said order and decretal order in I.A. No.41 of 2017. On perusal of the same, I find that the First Appellate Court has decided the Application for production of additional evidence on merits, after dealing with all the contentions put-forward by the learned counsel for the appellant. Thus there is no scope for entertaining the first two substantial questions of law.

6. Insofar as the third substantial question of law, with regard to the respondents being estopped from denying the title of the appellant, in view of recitals contained in Ex.A7, Ex.A11, Ex.A12, Ex.B3 and Ex.B4, the First Appellate Court has dealt with the Will under which the appellant seeks to establish his title, though not pleaded in the plaint. The First Appellate Court has held that there is absolutely no pleading with regard to the bequest made and only in the proof affidavit, averments have been made with regard to the Will and the Will came to be marked as Ex.A7. The First



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Appellate Court has also found that the evidence of the attesting witness was also not satisfactory and did not meet the requirement under Section 63 of the Indian Succession Act r/w Section 68 of the Indian Evidence Act. Moreover, the First Appellate Court has also found that the original Will had not been exhibited before the Court.

7. I do not find any illegality and perversity in the findings of the First Appellate Court and trial Court, warranting interference under Section 100 of the Code of Civil Procedure. Accordingly, this Second Appeal is dismissed. Consequently, connected Miscellaneous Petition is also dismissed. There shall be no order as to costs.

16.02.2024

Index : Yes/No
Internet : Yes/No
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To

- 1.The Subordinate Judge, Palacode .
- 2.The District Munsif , Palacode.



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P.B.BALAJI, J.

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