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AS.No.331 of 2015

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED 31.03.2023

CORAM

THE HONOURABLE MR.JUSTICE S.S.SUNDAR

and

THE HONOURABLE MR.JUSTICE P.B.BALAJI

AS. No.331 of 2015

and

C.M.P.Nos.20531, 20552 & 20547 of 2022

1.Vijaya

2.Nandhini

(Appellant No.2 declared as mojar and
Vijaya discharged from guardianship
vide order dated 29.11.2022)

3.C.Murugan (died)

.. Appellant

Versus

1.Arunkumar

2.C.Jayavelu

3.C.Sekar (died)

4.Usha

5.Pavithra

6.Divya

(R4 to R6 are brought on record
as Lrs of the deceased 3rd respondent
vide order dated 29.11.2022)

7.Selvi

8.Karthikeyan

9.Nandhini

.. Respondents

(R7 to R9 are brought on record
as Lrs of the deceased 3rd appellant
vide order dated 12.01.2023)



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PRAYER: First Appeal is filed under Section 96 of C.P.C. r/w. Section 54 of L.A. Act, 1894, against the judgment and decree of the learned Principal District Judge, Krishnagiri dated 01.11.2014 in O.S.No.20 of 2012.

For appellants	:	Mr.J.Hariharan for Mr.V.Nicholas
For respondents		
for R1	:	Mr.R.Subramanian for M/s.Gupta & Ravi
for R2, R4 to R9	:	No Appearance
for R3	:	Died (steps taken)

JUDGMENT

(Judgment of the Court was delivered by S.S.SUNDAR, J)

This Appeal Suit is filed against the judgment and decree of learned Principal District Court, Krishnagiri dated 01.11.2014 in O.S.No.20 of 2012.

The appellants are defendants 2 to 4 in the suit in O.S.No.20 of 2012.

2. The brief facts are necessary for the disposal of this appeal are as follows:

The first respondent as plaintiff filed a suit in O.S.No.20 of 2012 for partition and separate possession of his 1/10 share in all the suit properties and also for consequential reliefs. The suit properties consist of items 1 and 2. The first item of the suit properties consist of 12 properties and the 2nd item of the



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property in a land measuring an extent of 0.76 hectares in S.No.46/1 in Bargoor Village, Krishnagiri District.

3. The case of the first respondent in the plaint is that the suit properties are the ancestral properties of one Chinnasamy. The genealogy tree filed before this Court is not in dispute. Chinnasamy, who is the father of first defendant died intestate leaving behind his wife, the 6th defendant and 4 sons by name Chinnasamy, C.Jeyavel (1st defendant), C.Murugan (4th defendant and C.Sekar (5th defendant). Out of 4 sons, Chinnasamy(Jr) died and his legal heirs namely wife and minor daughter of Chinnasamy(Jr) are impleaded as defendants 2 and 3. Plaintiff is the son of 5th defendant by name C.Sekar. The first respondent stated that the 1st item of the suit properties are the ancestral properties of Chinnasamy. According to the first respondent, the 2nd item of suit property was purchased by the first defendant by virtue of a sale deed dated 10.04.1997 and that the said property was also acquired out of the income from the joint family properties.

4. The appellants contested the suit on various grounds. One of the contention raised by the appellants is that the plaintiff has not impleaded his sisters. The plaint averments in entirety are denied in the written statement.



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The written statement was filed by the 4th defendant / 3rd appellant and adopted by defendants 2, 3 and 6. It was pleaded that there was a partition in the family after the death of Chinnasamy between the brother of Chinnasamy and 6th defendant in the presence of Panchayatdars and that the property allotted to sixth defendant was enjoyed by all the legal heirs of Chinnasamy. One of the defence taken by the 3rd appellant / 4th defendant in the written statement is that the 6th defendant who is the mother of defendants 1, 4 & 5, executed a Will at the request of all the members of the family. Though the document was written as a Will, it is contended that it was in fact, a family arrangement by which, every members of the family was given specific share in the properties. Stating that the plaintiff has not included some of the properties sold by mother during her life time, it is contended that the plaintiff has not come forward with a bonafide cause. It is also contended that all the parties are in enjoyment of the properties as per Will and some of them have also alienated the properties allotted as per Will.

5. Before the trial Court, defendants 1 and 5 remained exparte and defendants 2 and 3 adopted the written statement filed by the 4th defendant. The trial Court framed the following issues, which reads as under:-



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1. வழக்குரை சொத்துக்களும் மற்ற சொத்துக்களும் 20.08.1990ம் தேதியிட்ட உயில் சாசனத்தின் வாயிலாக பாகம் பிரித்துப் பெற உரியவரா?

2. வாதி வழக்குரையில் கோரியுள்ளபடி 1/10 பாகம் பிரித்துப் பெற உரியவரா?

3. வாதி வழக்குரையில் கோரியுள்ளபடி நிரந்தர உறுத்துக்கட்டளைப் பரிகாரம் பெற உரியவரா?

4. வாதி பெறக்கூடிய வேறு பரிகாரம் என்ன?

6. Before the trial Court, Plaintiff examined himself as P.W.1 and marked Exs.A1 to A5. On behalf of defendants, D.W.1 (4th defendant) and D.W.2 were examined and Exs.B1 to B3 were marked.

7. Finding that the 6th defendant is only the wife of Chinnasamy and she has no exclusive right over the properties of the family, the trial Court held that the Will alleged to have been executed by 6th defendant is not valid and that the alleged partition as a family arrangement on the basis of Will cannot be accepted. Since the recitals of the Will are to the effect that the Will should come into effect after the life time of 6th defendant, the lower Court held that the contention of the defendant that there was a partition by way of Will cannot be accepted. It also held that the alleged Will was not proved in the manner known to law. Since the relationship is not in dispute and the plaintiff is none other than the son of 5th defendant, the trial Court granted a decree in



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favour of plaintiff for his 1/10 share in all the suit properties. The consequential relief was also granted by the trial Court, granting injunction restraining the defendant from alienating the suit properties effected by metes and bounds. Aggrieved by the judgment and decree of the trial Court, the above appeal is preferred by defendants 2 to 4.

8. Learned counsel appearing for the appellants have raised the following points while challenging the judgment and decree of the trial Court in O.S.No.20 of 2012. The suit for partition is not maintainable and it is liable to be dismissed for non-joinder of necessary parties. The learned counsel pointed out that the plaintiff has not even impleaded two of his sisters who are also the daughters of the 5th defendant. The counsel further stated that Chinnasamy died not only leaving the 4 sons but also daughters. Since none of the daughters of Chinnasamy are impleaded, it is contended by the learned counsel that the suit is liable to be dismissed for non-joinder of necessary parties.

9. Learned counsel also submitted that the plaintiff has admitted the Will by acknowledging the sale of some of the properties allotted to fifth defendant (father of plaintiff) under the Will. Referring to the fact that the



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properties alienated by the fifth defendant have not been included in the suit schedule, the counsel submitted that the suit is also liable to be dismissed for partial partition. Finally, the learned counsel submitted that the 5th defendant has filed another suit in O.S.No.274 of 2008 on the file of District Munsif Court, Krishnagiri and admitted the partition or family arrangement on the basis of execution of Will by 6th defendant on 20.08.1990. Since the 5th defendant claimed right under the Will, accepting the Will as a partition effected among the family members, the counsel submitted that the suit for partition is unsustainable. Though several other grounds were raised by the appellant's counsel in the memorandum of grounds, the counsel appearing for the plaintiff / first respondent has admitted that the daughters of Chinnaasamy and the sisters of plaintiff are not made as parties in the suit.

10. Learned counsel appearing for the first respondent submits that the 6th defendant died during the pendency of suit after reserving orders by the trial Court. When the appeal was filed, the appellants have indicated the death of 6th defendant. However, it was recorded that all the legal heirs of 6th defendant are already on record. It is also admitted that the 3rd respondent in this appeal is the 5th defendant namely the father of the plaintiff. He died during the pendency of this appeal and respondents 4 to 6 were impleaded as



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the legal heirs of 3rd respondent. Since the plaintiff's sisters are now impleaded and they are parties in this appeal, the daughters of Chinnasamy are not made as parties before the trial Court.

11. Learned counsel appearing for the first respondent further submitted that all the daughters of Chinnasamy got married before the Hindu Succession Amendment Act and therefore, they are not entitled to any share in the suit properties. Recently, a larger Bench of Hon'ble Supreme Court in *Uttam's* Case has held that the Hindu Succession Amendment Act, 2005 is retrospective and that the daughters are entitled to equal share in the joint family properties, irrespective of their birth and irrespective of date of birth before or after the amendment, the death of the father before or after amendment.

12. It is in the circumstances, we cannot just ignore the right of daughters of Chinnasamy by virtue of Hindu Succession Amendment Act, 2005. In view of the fact that the respondents 4 to 6 have been impleaded now and notice is not yet served on them and the daughters of Chinnasamy are not made as parties, this Court is of the view that the judgment and decree of the trial Court granting 1/10 share in favour of plaintiff cannot be sustained, as the



suit itself is liable to be dismissed for non-joinder of necessary parties.

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13. This Court, recently in the case of ***K.Vishnu Vs. A.Kittusamy*** reported in **2023 (1) CTC 25** has held as follows:-

“10. It is well settled that the Suit for Partition should be filed after impleading all the properties which are common to the members of the family. The position is also not different if a Suit for Partition is filed in respect of the Ancestral properties. In a Suit for Partition of common or Joint Family properties every one in the family, who is entitled to a share in the properties, should be made as parties as the properties could not be divided amount the Co-Owners or the Co-parceners by metes and bounds in the absence of any one of the sharer. Therefore, the Trial Court may be right in dismissing the Suit for Partition. However, when the Trial Court formed the opinion that the Sisters of Respondent are also necessary and proper parties and the Suit cannot be divided without impleading all the shares an opportunity should be given to the Plaintiffs to implead the necessary and proper parties, who may also have a claim or share in the Suit properties to avoid multiplicity of proceedings. However, the Trial Court has framed the issue only at the time of pronouncing the Judgment. In the said circumstances, this Court is of the view that the Judgment of the Trial Court dismissing the Suit of Partition on the ground of non-joinder of



necessary parties without giving opportunity to the Plaintiff/Appellant is not appropriate.

11. The question of non-joinder of necessary parties ought to have been decided after framing the issue and giving an opportunity to the Plaintiff. In the present case the issue itself was framed just before the pronouncement of Judgment. It is well settled that the Court has powers to implead a necessary party at any stage of the Suit or proceedings. This Court is of the view that the Judgment of the Trial Court dismissing the Suit on the ground of non-joinder without giving opportunity to the Plaintiff/Appellant is liable to be set aside. The Trial Court, however, held that the Respondent is liable to maintain the Second Plaintiff and granted a Decree for past and future maintenance qualifying the amount and created a charge over Item II of the Suit property after holding that Item II of the Suit property is the separate property of Defendant. In view of the fact that the Suit Second Item is stated to be a property purchased out of the income from the Suit 1st Item and the quantum of Maintenance depend upon the overall income of Defendant/Respondent, this Court is unable to sustain the finding and Decree of Trial Court granting a Decree for Maintenance in the absence of other sharers. Hence, the Judgment and Decree as a whole is liable to be set aside.”



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14. As pointed out by this Court in the judgment, when a suit is liable to be dismissed for non-joinder of necessary parties, an opportunity should be given to the plaintiff. Since this Court has set aside the judgment only on the technical ground of non-joinder of necessary parties, the matter has to be remitted back to the trial Court for impleading the daughters of Chinnasamy. One of the objection raised by the appellants is that the alienation of properties allotted or bequeathed under the Will in favour of fifth defendant is not included in the suit. Further to avoid dismissal of suit for partial partition, the said property may also be included in the plaint by way of amendment. Accordingly, the judgment and decree of the trial Court in O.S.No.20 of 2012 (Principal District Court, Krishnagiri) is set aside and the matter is remitted back to the trial Court for fresh disposal. The first respondent / plaintiff is permitted to implead his sisters and the daughters of Chinnasamy as well as the alienees of the property alleged to have been sold by 5th defendant or anyone. The property that is conveyed by 5th defendant or anyone of the member may also be included so as to avoid further objection that the suit is bad for partial partition. It is open to the parties to raise further objections including the newly impleaded defendants and proper opportunity shall be given to the parties concern if new issues have to be framed and answered.

The parties shall appear before the trial Court on 07.06.2023. The trial Court



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is directed to dispose of the suit as expeditiously as possible preferably, within a period of six months from the date of first appearance of parties.

15. In the result, the Appeal Suit is accordingly disposed of. Consequently, connected miscellaneous petitions are closed. There shall be no order as to costs.

(S.S.S.R.J.) (P.B.B.J.)
31.03.2023

Index : Yes / No
Neutral Citation : Yes / No
AT

To
1. The Principal District Judge, Krishnagiri
2. The Section Officer,
V.R.Section, High Court, Madras.



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S.S.SUNDAR, J.
and
P.B.BALAJI, J.

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