

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 05.08.2015

CORAM

THE HONOURABLE MR. JUSTICE **D.HARIPARANTHAMAN**

C.R.P.(PD)No.3085 of 2015 &
M.P.No.1 of 2015

1.Bakkialakshmi
2.Gurujeevanandini
3.Naveenkumar

... Petitioners

vs.

1.Ayyamauthu
2.Saraswathi

...Respondents

Civil Revision Petition filed under Article 227 of the Constitution of India, against the order in I.A.No.151/2010 in O.S.No.75 of 2003 on the file of the Subordinate Court, Pollachi dated 05.08.2014.

For Petitioners : Mr.V.Lakshminarayanan

ORDER

The revisions petitioners are defendants 1 to 3 in O.S.No.75 of 2002 on the file of Subordinate Court, Pollachi.

2. It is a partition suit. There are 5 plaintiffs and 26 defendants. The learned counsel for the petitioners would state that defendants 5 to 26 are tenants. The contesting defendants are defendants 1 to 4, who are family members.

3. The plaintiffs filed the suit in O.S.No.75 of 2002 for the following reliefs:-

- a) directing the defendants to divide the suit properties into 10 equal shares and allot 3 such shares to the plaintiffs.
- b) directing the defendants 5 to 10 to deposit the rents of suit 'A' schedule properties to court till the disposal of this suit.
- c) award cost
- d) pass such other reliefs as this Hon'ble Court may deem fit and proper under the circumstances of the case and render justice.

4. A preliminary decree, dated 24.03.2007 was passed by the learned Subordinate Judge granting only the relief claimed in 'a' referred to above.

5. Thereafter, the first plaintiff alone filed I.A.No.151 of 2010 in O.S.No.75 of 2003 to appoint a Court Commissioner and to direct him to divide the petition mentioned 'A' schedule properties into 10 equal shares with the help of the Taluk Surveyor, as per terms of the preliminary decree passed on 23.03.2007 and allot one such share to the first plaintiff by passing a final decree.

6. A counter affidavit was filed by the revision petitioners in I.A.No.151 of 2010 in O.S.No.75 of 2003.

7. The learned Subordinate Judge, Pollachi heard the matter on various dates. On 05.08.2014, the learned Judge passed an order appointing Tmt.M.Brindha as Advocate Commissioner and she was directed to submit a report by 05.09.2014. Thereafter, on 19.11.2014, the learned Judge, suo motu reopened the case for fresh arguments. However, the records does not disclose as to whether arguments were heard or not. But on 09.12.2014, the learned Judge recorded that the Commissioner report shall be filed by 18.12.2014. Thereafter, on 18.12.2014, the matter was adjourned to 06.02.2015 for Commissioner's report. On 06.02.2015, it was recorded that the Judge was on leave and the matter was posted to 12.03.2015. On 12.03.2015, the learned Judge posted the matter to 04.06.2015 for filing report of the Commissioner.

8. In these circumstances, the revision petitioners has filed this petition against the order dated 05.08.2014 of the learned Subordinate Judge, Pollachi in I.A.No.151 of 2010 in O.S.No.75 of 2003.

9. Heard the learned counsel for the petitioners.

10. The learned counsel for the petitioners has submitted that there is an incurable defect in in I.A.No.151 of 2010 filed by the first plaintiff, since the first plaintiff failed to make other plaintiffs as respondents, if they were unwilling to join as petitioners. The affidavit does not disclose that the

petition was filed on behalf of others showing other plaintiffs as petitioners. Since the other plaintiffs are neither shown as petitioners nor as respondents, the application is not maintainable for non-joinder of necessary parties.

11. The learned counsel for the petitioners has placed reliance on the judgment of this Court reported in **2010 (2) MWN (civil) 801 [Venkataramana and others v. N.Munuswamy Naidu]** and would submit that the learned Judge failed to adopt a fair procedure in dealing with I.A.No.151 of 2008.

12. The learned counsel would further submit that the learned Judge passed an order on 05.08.2014 for appointment of Commissioner. Thereafter, the learned Judge suo motu reopened the matter on 19.11.2014 and again, posted the matter on 12.03.2015 for report of the Commissioner. According to the learned counsel, such a procedure is not fair.

13. I have considered the submissions made by the learned counsel for the petitioners.

14. As rightly contended by the learned counsel for the petitioners, first plaintiff alone has filed I.A.No.151 of 2010 in O.S.No.75 of 2003 praying for passing of a final decree. The first plaintiff should have made other plaintiffs either as petitioners or as respondents. The prayer in the application is only

in respect of the first plaintiff alone. The other plaintiffs are not made as parties. As rightly contended by the learned counsel for the petitioners, non-joinder of parties in a suit would be fatal. In support of his contention, he has relied on the following passages in paragraph 22 of the above said judgment in **Venkataramana's case (cited supra):-**

"22. The learned Senior Counsel for the Respondents cited two authorities to stress this position. In a Division Bench decision of this Court reported in A.Ramachandra Pillai v. Valliammal (died), 1987 (100) LW 486 the learned Judges have extracted and followed the earlier decision of Supreme Court in Kanakarathammal v. Loganatha, AIR 1965 SC 271 and held that the non-joinder of the necessary party would lead to the dismissal of the Suit. Such extraction of the Apex Court decision as well as the observation of the Division Bench are as under:

"It is true that under Order 1, Rule 9 of the Code of Civil Procedure no Suit shall be defeated by reason of the mis-joinder or non-joinder of the parties, but there can be no doubt that if the parties who are not joined are not only proper but also necessary parties to it, the infirmity in the Suit is bound to be fatal. Even in such cases, the Court can under Order 1, Rule 10, sub-rule (2) direct the necessary parties to be joined, but all this can and should be done at the stage of trial and that too without prejudice to the said parties' plea of limitation. Once it is held that the Appellant's two brothers are co heirs with her in respect of the properties left intestate by their mother, the present Suit filed by the Appellant partakes of the character of a Suit for partition and in such a Suit clearly the Appellant alone would not be entitle to claim any relief

against the Respondents. "

This decision is thus an authority for the position that in a Suit for partition, all the sharers are necessary parties and also for the position that the Suit is liable to be dismissed for non-joinder of any one of the parties. In *T.Panchapakesan and others v. Peria Thambi Naicker and others*, 1972 (85) LW 841 (DB) also, a Division Bench of this Court has taken a similar view by judgment dated 18.7.1972. We are accordingly of the view that the finding of the learned Subordinate Judge on issue No.10 holding that the suit is not bad for non-joinder of Nagarathinam's heirs is unsound and liable to be set aside. Accordingly, we hold that the Suit is liable to be dismissed for non-joinder of the heirs of Nagarathinam."

15. The aforesaid judgment makes it clear that non-joinder of necessary parties would be fatal for the suit. The judgment also makes it clear that suit could be saved, if parties are impleaded under Rule 10(2) at the stage of trial, without prejudice to the plea of limitation.

16. In this case, admittedly all the parties were included in the suit. Therefore, the suit is in order. However, for the reasons best known to the first plaintiff, he alone filed I.A.No.151 of 2010 in O.S.No.75 of 2003. Hence, on the face of it, the application, as such is not maintainable. But I am not going to set at naught the proceedings in I.A.No.151 of 2010 in O.S.No.75 of 2003 since it is at the final decree stage. Had it been at the suit stage, I could have no hesitation to dismiss the suit by relying on the judgment cited by the learned counsel for the petitioner.

17. Since it is at the final decree stage and the suit is pending from 2003, in the interest of justice, by invoking power under Order 1 Rule 10 of the Code of Civil Procedure, if plaintiffs 2 to 5 are impleaded as respondents 5 to 9 in I.A.No.151 of 2010, the defect will be cured.

18. In these circumstances, this Civil Revision Petition is disposed of by suo motu impleading plaintiffs 2 to 5 as respondents 5 to 9 in I.A.No.151 of 2010 in O.S.No.75 of 2003. The learned trial Judge shall dispose of the said application thereafter in accordance with law. No costs. Consequently, connected miscellaneous petition is closed.

05.08.2015

Index : Yes/No

Internet : Yes

svki

To

The Sub-Court, Pollachi

D.HARIPARANTHAMAN,J.,

svki

C.R.P.(PD)No.3085 of 2015 &
M.P.No.1 of 2015

05.08.2015