

THE HON'BLE SRI JUSTICE M.SATYANARAYANA MURTHY

APPEAL SUIT No.1089 of 1997

JUDGMENT:

The un-successful plaintiff in O.S. No.146 of 1988 on the file of the Subordinate Judge, Karimnagar (for short, 'the trial Court'), preferred this appeal challenging the judgment and decree dated 14.09.1995 in the said original suit, whereunder, the suit filed by the plaintiff for partition of the plaint schedule property and for separate possession of half share in the plaint 'A', 'C' and 'D' and 1/6th share in the plaint 'B' schedule property, was dismissed.

2. For convenience of reference, the ranks given to the parties in the original suit before the trial Court will be adopted throughout the judgment.

3. (a) The plaintiff filed the suit for partition of the plaint 'A', 'B', 'C' and 'D' schedule property and for separate possession of half share in the plaint 'A', 'C' and 'D' and 1/6th share in plaint 'B' schedule property. The plaintiff is one of the daughters of Kapila Lingaiah and sister of defendant Nos.2 to 4 and defendant No.1 is the pre-deceased son of late Kapila Lingaiah and defendant Nos.5 and 6 are the strangers and supporters of defendant No.1.

(b) Plaint 'B' and 'C' schedule property is the ancestral joint family property of mother of the plaintiff, defendant Nos.2 to 4 and father of defendant No.1 and they are in joint possession and enjoyment of the plaint schedule property. The father of defendant No.1 was adopted by one Gampa Nagaiah, the pattadar of plaint 'B' schedule property. Late Kapila Lingaiah was the pattadar of plaint 'A' schedule property.

(c) Father of the plaintiff and defendant No.1 executed a registered Will during his lifetime bequeathing item No.1 of plaint 'A' schedule property on 07.01.1978 in favour of the plaintiff and defendant No.1, thereby, they are entitled to equal share in item No.1 of plaint 'A' schedule property. Defendant Nos.2 to 4 are not entitled to claim any share in the plaint 'A' schedule property in view of the registered Will

dated 07.01.1978.

(d) Plaint 'B' schedule property is the joint family property and defendant Nos.5 and 6 are no way concerned with the property, but the plaintiff and defendant Nos.1 to 4 are entitled to 1/6th share each.

(e) Since defendant Nos.5 and 6, in collusion with defendant No.1, are making attempt to occupy the plaint schedule land in Sy.Nos.695 and 701/A of plaint 'A' and 'B' schedule without any manner of right, they are impleaded as parties to the suit.

(f) Mother of defendant No.1 representing her minor son filed O.S. No.57 of 1978 on the file of the District Munciff, Karimnagar District, claiming exclusive right on the strength of agreement of relinquishment over the plaint 'B' schedule property, but the said suit was dismissed. The plaintiff and defendant Nos.2 to 4 were the parties to the said suit.

(g) Though the plaintiff and defendant Nos.1 to 4 are entitled to share as claimed above, defendant Nos.1 to 4 did not cooperate with the plaintiff for partition of the schedule property based on the Will executed by father of the plaintiff and defendant No.1 and refused for partition virtually. Hence, the suit.

4. Defendant Nos.2 to 4 remained *ex parte*.

5. Defendant No.1 filed written statement admitting the relationship between the plaintiff and defendant Nos.1 to 4 and contended that one Kapila Lingaiah went into illatom adoption to the family of Gampa Nagaiah and married the daughter of Gampa Nagaiah. Since then, Kapila Lingaiah was residing in the house of Gampa Nagaiah at Choppadandi village and blessed with a son by name Shankaraiah and daughters by name Annamma, Nagalaxmi, Bharatamma, Bhagyamma and Jayamma. Shankaraiah, who is father of defendant No.1, performed the marriages of all his sisters during his lifetime and died during minority of defendant No.1. By the date of death of Shankaraiah, his father Kapila Lingaiah was alive and defendant No.1 was a minor boy, but the plaintiff created a false Will, as if it was executed by Kapila Lingaiah. Therefore, denied the execution of Will by father of plaintiff and defendant No.1.

6. Defendant No.1 also contended that he is in exclusive possession and enjoyment of the schedule property, cultivating the same with the help of his mother since the date of death of his father and his name was mutated in the revenue records. The plaintiff and other daughters of Shankaraiah have nothing to do with the property and not entitled to claim any share in the property. Finally, prayed to dismiss the suit against him.

7. Defendant Nos.5 and 6 filed separate written statement contending that item No.5 of the plaint 'A' schedule property was purchased by Loke Malla Reddy under a registered sale deed bearing No.2241/71 dated 06.08.1971 and that Kapila Lingaiah sold his land in Sy.No.701/A about seven years prior to the date of the alleged Will. In fact, the said Lingaiah has not been in possession and enjoyment of item No.5 of the plaint 'A' schedule property and that the registered sale deeds and pahanis for the years 1971-72 to 1977-78 clearly show that he was in continuous possession. Similarly, the property measuring about Acs.5-14 gts, i.e., item No.1 of plaint 'A' and 'B' schedule property, was purchased by defendant No.6 from defendant No.1 and his mother, who are the real owners and possessors. Thus, defendant Nos.5 and 6 claimed to be in possession of item Nos.5 and 6 of plaint 'A' schedule by virtue of purchase. It is further contended that one Loke Surender Reddy also purchased item No.5 of plaint 'B' schedule, but he was not impleaded as a party to the suit and the suit is liable to be dismissed for non-joinder of necessary parties and finally prayed for dismissal of the suit.

8. Basing on the above pleadings, the trial court framed the following issues:

- "i. Whether the will, dated 7-1-1978 is true and valid binds the defendants ?
- ii. Whether suit schedule properties are the joint family properties ? If so what is the share of the plaintiff ?
- iii. Whether the defendants 5 and 6 are the owners of item No.5 and item No.1 of the suit 'A' schedule and also all 'A' schedule lands and perfected their title by way of adverse possession as well ?
- iv. Whether the suit is bad for non-joinder of parties ?
- v. To what relief ?"

9. During trial, on behalf of the plaintiff, P.Ws.1 to 3 were examined and Exs.A.1 to A.4 were marked; and on behalf of the defendants, D.Ws.1 to 6 were examined and Exs.B.1 to B.62 were marked.

10. Upon hearing argument of both the learned counsel and considering oral and documentary evidence on record, the trial Court dismissed the suit on the sole ground that the said Surender Reddy, who is purchaser of item No.5 of plaint 'B' schedule property under Exs.B.61 and B.62, was not impleaded as a necessary party to the suit, while holding the other issues in favour of the plaintiff.

11. Aggrieved by the said judgment and decree, the un-successful plaintiff preferred the present appeal raising several contentions and mainly contended that non-joinder of Loke Surender Reddy, who purchased item No.5 of plaint 'B' schedule under Exs.B.61 and B.62, is not sufficient ground to dismiss the suit, when the Court concluded that the plaintiff is entitled to share in the property. Hence, the judgment and decree of the trial Court are erroneous and prayed to set aside the same and pass a preliminary decree declaring that the plaintiff is entitled to half share in the plaint 'A' schedule property and 1/6th share in plaint 'B' and 'C' schedule property.

12. Though this appeal is filed against defendant Nos.1 to 6 (respondent Nos.1 to 6), the appeal against defendant Nos.3 and 4 (respondent Nos.3 and 4), who are co-sharers along with plaintiff and defendant Nos.1 and 2, was dismissed for default vide order of this Court dated 18.10.2011.

13. Sri Devender Reddy, learned counsel representing Sri K.Raghuveer Reddy, learned counsel appearing for the appellant-plaintiff, would contend that in the absence of Loke Surender Reddy, this suit cannot be dismissed, and at best, the relief of partition in respect of item No.5 of plaint 'B' schedule can be denied, but dismissal of the suit in toto is erroneous and prayed to set aside the decree and judgment and pass preliminary decree in favour of the plaintiff.

14. Considering the contentions of learned counsel for the plaintiff-appellant and perusing oral and documentary evidence on record, the sole point that arises for consideration is as follows:

"Whether Loke Surender Reddy is necessary party to the suit for partition, who purchased item No.5 of plaint 'B' schedule under Exs.B.61 and B.62, and in his absence, whether a preliminary decree be passed for partition of plaint schedule property?"

15. **POINT:**

The trial Court dismissed the suit, on the sole ground that Loke Surender Reddy, who is purchaser of item No.5 of plaint 'B' schedule property, was not impleaded, since the purchaser of one of the items of the plaint schedule property is a necessary party in a suit for partition. The finding of the trial Court is supported by law declared by this Court and other Courts. However, the learned counsel for the plaintiff contended that in case, the purchaser of one of the items of plaint 'B' schedule property was not impleaded, the Court may, at best, deny the partition of particular item, which was purchased by Loke Surender Reddy and the dismissal of the suit in toto is an illegality.

16. The suit for partition is slightly on different footing than the other suits. When a question of non-joinder of necessary parties in a suit for partition is raised either in the written statement or at any subsequent stage and it goes to the root of the matter. Consequently, in the absence of necessary parties, a suit for partition cannot be decreed. Time and again, the Apex Court and this Court in catena of decisions reiterated the principle that failure to implead necessary parties in a suit for partition more particularly co-sharers or co-owners is fatal.

17. When a suit is filed both for the reliefs of partition and declaration, all the persons interested in the property be impleaded as parties to the suit, more particularly, in a suit for partition, in the absence of persons entitled to claim share in

the property, the suit cannot be decided effectively. When a similar situation came up before this Court in ***Balireddy Appalanarasaiah (died) Vs. Balireddy Saddhu and others***, this Court held that in a suit for partition, all the person who are entitled to claim right are to be impleaded, otherwise the suit is liable to be dismissed.

18. The Apex Court in ***Kanakarathanammal Vs. V.S. Loganatha Mudaliar***, held as follows:

"It is unfortunate that the appellant's claim has to be rejected on the ground that she failed to implead her two brothers to her suit, though on the merits we have found that the property claimed by her in her present suit belonged to her mother and she is one of the three heirs on whom the said property devolves by succession under Section 12 of the Act. That, in fact, is the conclusion which the Trial Court had reached and yet no action was taken by the appellant to bring the necessary parties on the record. 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 entitled to claim any relief against the respondents. The estate can be represented only when all the three heirs are before the Court. If the appellant persisted in proceedings with the suit on the basis that she was exclusively entitled to the suit property, she took the risk and it is now too late to allow her to rectify the mistake. In *Naba Umar Hazra v. Radhashyam Mahish* MANU/PR/0053/1931, the Privy Council had to deal with a similar situation. In the suit from which that appeal arose, the plaintiff had failed to implead co-mortgagors and persisted in not joining them despite the pleas taken by the defendants that the co-mortgagors were necessary parties and in the end, it was urged on his behalf that the said co-mortgagors should be allowed to be impleaded before the Privy Council. In support of this plea, reliance was placed on the provisions of Order 1, Rule 9 of the Code. In rejecting the said prayer, Sir George Lowndes who spoke for the Board observed that 'they are unable to hold that the said rule has any application to an appeal before the Board in a case where the defect has been brought to the notice of the party concerned from the very outset of the proceedings and he has had ample opportunity of remedying it in India."

19. Even in the earlier judgment of this Court in ***Uppu Jhansi Lakshmi Bai Vs. Venkateswara Rao***, it was held as follows:

"When necessary party to the appeal was not impleaded in the appeal, the appeal is liable to be dismissed on that ground alone."

20. In the present case, Loke Surender Reddy, who is the purchaser of item No.5 of plaint 'B' schedule property under Exs.B.61 and B.62, was not impleaded and even after dismissal of the suit, no steps were taken to implead him. Peculiarly, the appeal is allowed to be dismissed against defendant Nos.3 and 4, who are co-sharers along with plaintiff and defendant Nos.1 and 2. Therefore, in the absence of Loke Surender Reddy, the purchaser of item No.5 of plaint 'B' schedule property under the original of Exs.B.61 and B.62 and dismissal of appeal against defendant Nos.3 and 4 is fatal to the case, since in their absence, the appeal cannot be decided. Therefore, if necessary party is not impleaded in the suit, it has to be dismissed on that ground alone.

21. In another judgment in ***Jahangirji and others Vs. K. Kumar***, this Court laid down similar principle that defect of non-joinder of necessary parties could not be cured by impleading them in appeal and it is fatal to suit for partition.

22. In ***K.Bhaskar Rao Vs. K.A. Rama Rao***, a learned Single Judge of this Court, while dealing with a suit for partition, where the defendants in the written statements raised the plea of non-joinder of two sisters of the parties for which the plaintiff stated in his rejoinder that as they were already married and were given sufficient share in the form of cash and articles, they were not necessary parties, the plaintiff came up with an application to implead the sisters as parties in the first appeal, this Court rejected the request holding that the defect of non-joinder of necessary parties being fatal, the same cannot be cured by impleading them in the appeal and upheld the dismissal of the suit on the ground of non-joinder of necessary parties by the trial Court. The decisions rendered in ***Naba Kumar Hazra***

and another Vs. Radhashyam Mahish and others, Chenthiperumal Pillai Chanthanamuthu Pillai Vs. D.M. Devasahayam and Loganatha Mudaliar's case (2 supra) were on the similar proposition that non-joinder of necessary party is a fatal defect and the suit for partition is liable to be dismissed even on that ground alone.

23. In another Division Bench judgment of this Court in **Addepalli Venkata Laxmi Vs. Ayinampudi Narasimha Rao**, this Court considered about the plea of non-joinder of necessary parties for the first time in the Appeal during argument but the same was not entertained. However, the principle laid down in the above judgment will have no application to the present facts of the case.

24. According to Section 99 of CPC, when no decree shall be reversed or substantially varied, nor shall any case be remanded, in appeal on account of any mis-joinder or non-joinder of parties or causes of action or any error, defect or irregularity in any proceedings in the suit, not affecting the merits of the case or the jurisdiction of the Court but the proviso added to Section 99 is clear that the bar under Section 99 is not applicable to non-joinder of parties. Therefore, even according to Section 99 of CPC, the decree cannot be varied or set aside merely on the ground of irregularity, but it can be interfered for non-joinder of necessary parties. In the present case, not only Loke Surender Reddy was not impleaded as a party, but also got this appeal dismissed against defendant Nos.3 and 4 (respondent Nos.3 and 4), who are the co-sharers along with the plaintiff, and in whose absence, the appeal cannot be decided effectively. Therefore, by applying the law declared by the Apex Court and this Court in catena of decisions referred to supra, I find no merit in this appeal and the same is liable to be dismissed. Hence, this point is answered against the plaintiff-appellant and in favour of the defendants-respondents.

25. Accordingly, this appeal is dismissed, but without costs. As a sequel thereto, miscellaneous petitions, if any pending in this appeal, shall stand closed.

M.SATYANARAYANA MURTHY, J.

Date: 16-09-2015

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