

THE HON'BLE SRI JUSTICE M.SEETHARAMA MURTI

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Second Appeal No.367 of 2003

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JUDGMENT:

The unsuccessful plaintiff and the 7th defendant had together preferred this second appeal under Section 100 of the Code of Civil Procedure, 1908 assailing the decree and judgment dated 28.03.2002 of the learned Principal Senior Civil Judge, Srikakulam passed in A.S.No.26 of 2001 (A.S.no.3 of 1998). The learned Senior Civil Judge while allowing the said appeal had set aside the decree and judgment dated 30.09.1997 of the learned Principal District Munsif, Srikakulam passed in O.S.no.148 of 1993 filed by the sole plaintiff/1st appellant herein for partition of the plaint schedule properties into three equal and equitable shares and allotment of 2/9th share to the plaintiff, a 2/9th share to the 7th defendant, a 4/9th share to defendants 1 to 6 and a 1/9th share to the 8th defendant and for costs.

2. I have heard the submissions of the learned counsel for the appellants and the learned counsel for the contesting respondents/defendants 2 to 5 and 7, and the learned counsel for the 6th defendant/respondent. I have perused the material record.

3. During the pendency of this appeal, the 2nd appellant/7th defendant, who is the father of the 1st appellant/plaintiff had died. A memo was filed into Court stating that the 1st appellant's mother and the wife of late Bunga Appalanarasayya had also died on 03.03.2014 and that the 1st appellant, who is the plaintiff is the only legal heir and that he may be recognized as the only legal heir of Bunga Appalanarasayya, the deceased 2nd appellant/7th defendant.

4. At the time of admission of this appeal, the questions mentioned at ground nos. 10(a), (b) and (c) of the memorandum of grounds of appeal were taken note of as the substantial questions involved in this second appeal; and, the said substantial questions read as under:

a) Whether the judgment and the decree of the learned Principal Senior Civil Judge are legally sustainable in view of his categorical finding that, in view of the absence of prior partition the 7th defendant will not lose his right?

b) Whether the finding of the learned Principal Senior Civil Judge, that, the suit is bad and liable to be dismissed for non joinder of necessary parties legally sustainable?

c) Having regard to the fact that, the suit property being ancestral property, whether the heirs of the deceased coparcener are necessary parties in a suit for partition?

(Reproduced verbatim)

5. To adjudicate the *lis* and answer the substantial questions of law, it is necessary to first refer to the pleadings of both the parties and state the facts that led to filing of this appeal by the plaintiff and the 7th defendant (since died).

6. The averments in the plaint, in brief, are as follows:

The plaintiff is the Son of the 7th defendant-Bunga Appalanarsaiah. The 1st defendant is the wife of late Bunga Appa Rao. The defendants 2 to 5 are the sons and the 6th defendant is the daughter of the said late Bunga Appa Rao. The 8th defendant is the son of the sister of the said Appa Rao. The father of the 7th defendant by name Narasimhulu and one Surayya are brothers. In a partition between the said two brothers, late Surayya got the Southern portion and his brother Narasimhulu had got the Northern portion of a house, That Northern portion is the present subject matter of the suit. In the earlier partition, the title to the said suit house was asserted by late Appa Rao and the 7th defendant who are brothers. The suit schedule house consists of three rooms from East to West. The 7th defendant used to reside in the Eastern portion with his family. Later, the 7th defendant had developed intimacy with a lady and had started residing with her in Kattera Street.

His wife had continued to live in the suit schedule house along with her children, i.e., in the same Eastern portion. On account of the fact that the 7th defendant did not properly maintain his wife and children, they had left for the parental house of the wife of the 7th defendant at Rella Veedhi, Srikakulam. The said late Appa Rao and Appala Narsaiah-the 7th defendant and their sister's son Putta Appa Rao are entitled to shares in the entire house as per law and the suit schedule house is to be partitioned amongst them. As per law, the plaintiff is entitled to a 2/9th share in the suit schedule house. Therefore, the plaintiff had requested the defendants and late B.Appa Rao for partition of the plaint schedule house and to give him a share in the share of his father. But, the issue of partition was postponed on one pretext or the other. A dispute was raised in the presence of Rella Gopi, Rella Gunneswara Rao and others. Finally, a dispute was also raised on 17.08.1993 for partition in the presence of Baddiri Ramana, Rella Gunneswara Rao and others. The request of the plaintiff was refused. Hence, the plaintiff got issued a registered notice to the 2nd defendant who is managing the family. There was no reply. Hence the suit is filed.

7. The defence of the 2nd defendant, in brief, is this:

The father of the plaintiff having figured as a witness for the plaintiffs in the suit O.S.No.24 of 1970 had disclaimed all his interest in the suit property. The 2nd defendant's father and his sister Putta Bhadramma had contested the suit and their title to the suit property was upheld. An appeal in A.S.No.18 of 1975 preferred by the plaintiff in the said suit was dismissed by the learned Additional District Judge, Srikakulam on 16.02.1976. Even before that suit, the father and the mother of the plaintiff and the plaintiff were driven out of that house. By that time, the plaintiff was aged about 6 years. Therefore, the plaintiff has no right, title and interest, much less possession over the plaint schedule house. The right, title and interest of Bunga Appa Rao and his family and Putta Bhadramma were upheld by the Court. They had perfected title by adverse possession by being in possession for over a long period. The property was also partitioned. The father of the plaintiff gave a legal notice claiming a share in the property in the year 1990. The defendants and Putta Bhadramma gave a reply dated 04.08.1990 setting out the true facts. Thereafter, the 7th defendant had set up the present plaintiff to file the present suit. There were

never any demands or requests for partition. A request was made at the time of the marriage of the plaintiff to permit him to have his marriage performed in the suit house. The said request was also refused. The suit is baseless and is bad for non-joinder of necessary parties. The suit may be dismissed.

7.1 The 7th defendant had filed a written statement *inter alia* contending as follows:

The plaintiff is his son. The 7th defendant and his brother-late Bunga Appa Rao are having a half share in the suit house. After the death of said Appa Rao, the defendants 1 to 6, who are his wife and children, are enjoying the suit schedule property by residing in the same, since this defendant is residing at Kattera Street, Srikakulam. The properties are not divided between him and his brother late Appa Rao. Appa Rao died while the status was joint with this defendant. The plaintiff is not entitled to a share. The suit may be dismissed.

7.2 In the additional written statement of the 2nd defendant, it is urged as under:

The 7th defendant is conducting the present litigation through his son. In his written statement, he had not denied the allegations in the plaint. Though a reply notice was issued denying the rights of the 7th defendant, he did not initiate any legal proceeding. The suit is a result of collusion between the plaintiff and the 7th defendant.

8. Having regard to the above pleadings, the trial Court had framed the following issues for trial:

1. Whether the plaintiff is entitled for partition and separate possession as claimed?
2. Whether the suit is bad for non-joinder of necessary parties?
3. To what relief?

At trial, PWs 1 to 4 were examined and exhibits A1 to A3 were marked on the side of the plaintiff. DWs 1 to 3 were examined and exhibits B1 to B7 were marked on the

side of the defendants. On merits, the trial Court had preliminarily decreed the suit and had granted a decree for partition of the plaint schedule property into three equal shares; and, as per the said decree the plaintiff was allotted a 2/9th share and was directed to be put in possession of such a share. The aggrieved defendants 1 to 6 and 8 had preferred the first appeal. As already noted, the said first appeal was allowed and the suit of the plaintiff was dismissed after setting aside the decree and judgment of the trial Court. Hence, this second appeal.

9. The learned counsel for the plaintiff/1st appellant would contend as follows:

The findings in the judgments of the Court below are contrary to the facts. The trial Court having considered the facts accurately and the evidence in proper perspective had passed a well-considered judgment. The Court below without properly appreciating the facts and the evidence had erroneously interfered with the decree and judgment of the trial Court though there is no material to do so. The Court below had rightly held that the schedule property is an ancestral property and there is no prior partition between the plaintiff and the 1st defendant's side at any time and hence, the Court cannot accept that the claim pertaining to the plaint schedule property was lost. Having held in favour of the plaintiff that the plaintiff is entitled to seek partition, the Court below was in error in holding that the suit is not maintainable for non-joinder of the necessary parties. The court below having held that there is no prior partition between the 7th defendant and his brother Appa Rao, who is the deceased husband of the 1st defendant had grossly erred in allowing the appeal on the sole ground of non-joinder of necessary parties. The finding of the court below that the suit is bad for non-joinder of necessary parties is erroneous and unsustainable, the said finding being inconsistent with the other facts and the findings in the judgment of the Court below. The finding of the Court below that since the mother of the plaintiff/1st appellant, who had acquired a share, is not brought on record to represent the estate of her deceased son, the suit is bad for non-joinder of necessary parties is an erroneous finding.

10. The contentions of the learned counsel for the respondents/contesting

defendants who are supporting the decree and judgment of the trial Court, in brief, are as follows:

The Court below had rightly dismissed the suit of the plaintiff for non-joinder of a necessary party. A suit for partition must be decided in the presence of all the parties entitled to a share. The estate can be represented only when all the sharers and legal heirs of a deceased party/sharer are before the Court. If the suit is filed without impleading a necessary party, the suit becoming bad and such suit is liable to be dismissed for non-joinder of the necessary party as the said infirmity is fatal. A specific issue has been framed by the trial court on this aspect. However, the trial Court had recorded an erroneous finding on the said issue. While reversing the finding of the trial Court and answering the said issue against the plaintiff, the Court below had recorded a well reasoned finding. The plaintiff had not moved the appellate Court and prayed that he should be allowed to implead the necessary party. There is no substance in the substantial questions and the second appeal is liable to be dismissed, being devoid of merit.

11. The points are now taken up.

11.1 I have gone through the pleadings and the evidence brought on record. I have noted the submissions. The suit for partition was decreed by the trial Court. The court below having agreed with the finding of the trial court that the plaintiff is entitled to seek partition, had yet set aside the decree and judgment of the trial Court only on the ground that a necessary party was not impleaded. The trial Court on issue no.1, after considering the facts accurately and the evidence in proper perspective, had recorded a well reasoned finding in favour of the plaintiff that the plaintiff is entitled to seek partition of the plaint schedule property and allotment of a share as claimed in the suit. The second issue as to whether the suit is bad for non-joinder of necessary parties is the relevant issue in the present context. While dealing with this issue, the trial Court had noted that though the defendants had contended in the written statement that the plaintiff had not added necessary parties to the suit and that the suit is bad for that reason, they had failed to state as to who are the necessary parties that are not impleaded and that they had further failed to adduce any evidence on their side on that issue and that they had also failed to put any

questions to PWs 1 to 4 during their cross-examinations on this particular aspect. Therefore, the trial Court had held that the defendants could not establish as to who are the necessary parties that are not impleaded and that therefore, the contention that the suit is bad for non-joinder of necessary parties cannot be countenanced; and, the trial Court had accordingly answered the said issue also in favour of the plaintiff while decreeing the suit of the plaintiff. The Court of first appeal had also recorded a concurrent finding of fact that there is no partition between the 7th defendant and his brother Appa Rao previously as per the record and that the defence in regard to the alleged partition between the 7th defendant and his brother Appa Rao is highly suspicious for want of cogent evidence and that there is no proof of prior partition concerning the suit schedule property and that since the suit schedule property is an ancestral property and since there is no prior partition at any stage between the plaintiff's side and the side of the 1st defendant, it cannot be accepted that the right to seek partition was lost. Thus, even the Court below had recorded a concurrent finding of fact supported by positive reasons and had *inter alia* held that the plaintiff is entitled to seek partition of the plaint schedule property. However, on the issue that the suit is bad for non-joinder of necessary parties, the Court below had held that the plaintiff's mother is a necessary party and that the plaintiff ought to have impleaded her as a party to the suit and that as she was not impleaded as a party, the suit is bad for non joinder of the necessary party and is liable to be dismissed. Having so held, the court below had dismissed the suit of the plaintiff by allowing the first appeal. Therefore, the non-joinder of the mother of the plaintiff as a necessary party is the only ground on which the suit for partition was dismissed. It is to be reiterated that in the defence taken in the written statement though it is stated that the suit is bad for non-joinder of necessary party, the said defence is vague and lacks in material particulars as to who is the necessary party to be impleaded and not impleaded. PW1 in his evidence had stated that he had a younger brother by name Narasingarao and that his said brother had died about 19 years back when he was four years old. Since the share of the said deceased Narasingarao had devolved upon the mother of the plaintiff, the Court below took the view that the suit is bad for non-joinder of the mother, who is entitled to a share on the death of her unmarried minor son. Except eliciting in the cross-examination of PW1 that he had a brother by name Narasingarao and that the said brother had died during his minority leaving behind him his mother as his legal heir, no other material was brought on record in support of the defence that the suit is bad for non-joinder of

a necessary party. Be that as it may. The evidence brought on record on this aspect would show that the mother of the plaintiff, who was said to be a necessary party and who was not impleaded as a party to the suit for partition was examined as PW3. She had not claimed any interest or share in the schedule property during her evidence. In fact, an application in I.A.No.560 of 1997 under Order I Rule X of the Code was filed by the plaintiff requesting to accord permission to implead the mother, the necessary party; but, the said application was dismissed by the trial Court observing that PW3 having appeared as a witness had not claimed any interest or share in the property. Therefore, having regard to these reasons, this Court finds that the Court of first appeal is not justified in allowing the appeal and dismissing the suit for partition solely on the ground of non-joinder of necessary party when such a defence with necessary details was not raised in the written statement and when the facts of the case show that the plaintiff cannot be faulted for not impleading the mother as a party as an attempt promptly made in the trial court to bring on record the necessary party was discouraged by the trial Court holding that such an application is not necessary for impleadment of the party in the facts and circumstances peculiar to the case.

11.2 It is apt to refer to Order I Rule 13 of the Code, which reads as under:

“13.Objections as to non-joinder or mis-joinder:-- All objections on the ground of non-joinder or misjoinder of parties shall be taken at the earliest possible opportunity and, in all case where issues are settled, at or before such settlement, unless the ground of objection has subsequently arisen, and any such objection not so taken shall be deemed to have been waived.”

In the decision in **Ongole Byragi Mutt v. Kannayya**, the facts and the ratio are as follows: ‘A Mutt owned extensive landed properties. Pursuant to a decree, the trustees, who were in management of the affairs of the institution, were removed from their office; and three trustees were appointed and one of them was designated as the Managing Trustee. After obtaining possession of the land belonging to the Mutt, the Managing Trustee had filed suit nos. 7 to 9 of 1953 on the file of the Small Causes Court, Ongole on 20.06.1952 for recovery of damages for use and occupation on the ground that the defendants were in unauthorized occupation of

the lands. The defendants had resisted the suits on the ground that the suits brought by only one of the trustees were not maintainable. Thereupon, the other two trustees were impleaded as supplemental defendants in all the three suits. It was held by the learned Subordinate Judge that the suit must be deemed to have been properly instituted not on the date when the plaints were filed but on the date when the two other trustees were brought on record and that therefore, the claims for damages for use and occupation for the year 1949-50 are barred by time. Against the said decision, revision petitions were preferred by the managing trustee of the Mutt. The question that fell for consideration was whether or not the claims for the suits years 1949-50 are barred by law of limitation. A Full Bench of this Court had answered the questions formulated as follows:

(20) We would, therefore, answer the questions above formulated as follows:

“(1) The right to sue vests in the Mutt.

(2) The suits instituted by the Managing Trustees as representing the institution were even at the inception, properly constituted.

(21) On these conclusions, it must follow that the claim for recovery of damages for use and occupation for the year 1949-50 are not bared by limitation. They are therefore decreed with costs here and in the court below.

Answered accordingly.”

In the decision in **Kanakarathanammal v. S.Loganatha Mudaliar** relied upon by the learned counsel for the contesting respondents, the facts and the ratio are as follows: ‘A property was purchased by the wife with the money gifted to her by her husband. A suit was filed by the daughter to recover the property from the beneficiary under the Will of the father. In that suit, her brothers were not impleaded. Though on merits the court had found that the property claimed by her in that suit belonged to her mother and that she is one of the three heirs on whom the property had devolved by succession under Section 12 of the Act, the suit was held to be incompetent for non-joinder of necessary parties as she had failed to implead her two brothers to her suit. In this decision, the Supreme Court had referred to Rule 9 of Order I of the Code, which lays down that no suit shall be defeated by reason of mis-joinder or non-joinder of parties and had further held that 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. It is further 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 s. 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 O. 1 r. 9 of the Code of Civil Procedure no suit shall be defeated by reason of the misjoinder or non-joinder of 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 O. 1 r. 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 appellant 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 proceeding 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 Kumar Hazra & Anr. v. Radheshyam Mahish & Ors.* the Privy Council (AIR 1931 PC 229) 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 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 O. 1 r. 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."

11.3 I have given earnest consideration to the facts of the instant case and the ratios in the decisions cited. In the case on hand, an attempt was made to implead the mother as a party even when the suit was pending before the trial court, but the trial court had dismissed the application filed for impleadment of the mother as a party to

the suit holding *inter alia* that the mother who had appeared as witness had claimed no interest or share in the property. Therefore, when a *bona fide* attempt was made at the appropriate time by the plaintiff in the right direction to rectify the mistake and the said endeavour did not fructify due to the dismissal of the application for impleadment by the trial court, the plaintiff cannot be found fault and non-suited for no fault on his part. Moreover, during the hearing of this second appeal, it was brought to the notice of this Court that the mother, who was not impleaded had died and that all the legal heirs are on record and therefore, the defect, if any, stood rectified by a subsequent event, which can be taken note of by this Court in a suit for partition. It is further submitted by the learned counsel for the 1st appellant/plaintiff that by the death of the mother and subsequent events like change in the law there is a change in the shares of the sharers and that therefore, the appellants are entitled to succeed in this appeal, in any view of the matter. In view of the facts peculiar to this case, this Court is of the well considered view that there is substance in the substantial questions of law raised and that there is also merit in the second appeal and hence, the second appeal deserves to be allowed and the first appeal deserves to be remitted to the Court below for fresh disposal on merits and in accordance with the procedure established by law after giving an opportunity to the plaintiff to implead the necessary parties, if any, not impleaded and also after taking into consideration the subsequent events like the change in the shares of the sharers due to the death of the mother of the plaintiff and the change in the law of succession, if applicable, to the facts of the case.

12. In the result, the second appeal is allowed and the decree and the judgment of the court below are set aside and the appeal in A.S.no.26 of 2001 (A.S.3 of 1998-District Court, Srikakulam) presently on the file of the Principal Senior Civil Judge's Court, Srikakulam is remitted to the said court for a fresh decision on merits in accordance with the procedure established by law, however, after giving an opportunity to the plaintiff to implead the necessary parties, if any, already not impleaded and after taking into consideration the change in the shares of the sharers due to the subsequent events and the change in the law, if any, as may be applicable. It is needless to mention that the concurrent finding of fact that the plaintiff is entitled to seek partition of the plaint schedule properties is not disturbed by this Court and therefore, the said issue, which has become final, need not once again be gone into by the court below. Since the suit is a sufficiently old suit, the

court below shall complete the pre-hearing exercise as expeditiously as possible and dispose of the first appeal as directed in this judgment preferably within two months from the date of the receipt of a copy of this judgment. There shall be no order as to costs.

Miscellaneous petitions, if any, pending in this appeal shall stand closed.

M. SEETHARAMA MURTI, J

30th September 2015

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