



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED : 30.07.2018

C O R A M

WEB COPY

THE HONOURABLE MR.JUSTICE M.SUNDAR

S.A(MD)No.201 of 2017
and
C.M.P(MD)No.8658 of 2017

1.Kayambu (died)

2.Velammal (died)

[Memo filed in USR No.4240/2017, dated 11.09.2017 to the effect that third appellant and second respondent are legal heirs of the deceased second appellant and they are already on record, is recorded vide order, dated 12.09.2017].

3.Vallimayil

[Cause title is accepted vide order dated 23.11.2016 made in C.M.P(MD)No.7619 of 2016 in S.A(MD)SR.28019 of 2016]

.. Appellants

Vs.

1.Athi Narayanan Servai

2.Kamala

.. Respondents

PRAYER: Second Appeal is filed under Section 100 of the Code of Civil Procedure, 1908, against the Judgment and decree dated 24.08.2010 passed in Appeal Suit No.39 of 2009 by the Sub Court, Paramakudi confirming the Judgment and decree dated 30.10.2008 passed in Original Suit No.48 of 1996 by the District Munsif Court, Mudukulathoor.

For Appellants : Mr.M.V.Venkataseshan

For Respondents : Mr.M.Shema Daniel
for Mr.H.Thanyumanaswamy

JUDGMENT

This litigation commenced two decades and two years ago, when one Kayambu filed a suit in O.S.No.48 of 1996 on the file of 'District Munsif cum Judicial Magistrate's Court, Mudukulathoor', which shall hereinafter be referred to as 'Trial Court' for the sake of convenience and clarity. This is a partition suit. There is no

dispute that the suit was filed with a prayer for partition of suit properties and for half share in the same. To be noted, suit properties are eight items of properties as set out in the plaint. Further to be noted, there is only one defendant and that defendant is plaintiff's blood brother one Athi Narayanan Servai. Considering the very narrow scope on which this entire second appeal turns, it is not necessary to extract the eight items of suit properties.

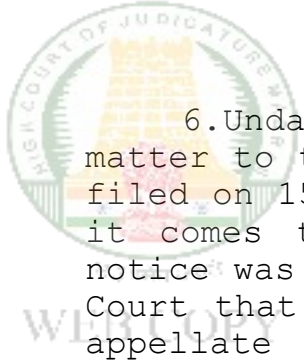
2. Defendant Athi Narayanan Servai entered appearance, filed written statement and completed pleadings. After completion of pleadings, as many as six issues were framed in the Trial Court. Amongst these six issues, in the light of trajectory of the hearing in this second appeal before this Court, only one issue is pivotal, that issue is issue No.4 and the same reads as follows:

“அவசியமான கட்சிக் காரர்களை சேர்க்காத தோஷத்திற்கு இந்த வழக்கு ஆட்பட்டுள்ளதா?”

3. The aforesaid issue was answered against the plaintiff. To be noted, eight items of suit properties, of which partition was sought, undisputedly belong to one Chellamuthu Servai, father of plaintiff and defendant. It is also not in dispute that besides the plaintiff and defendant, Chellamuthu Servai has three other children, i.e., son by name Ponnuchamy and two daughters by name Kamatchi and Karuppayee. It is also not in dispute that these three children have not been made parties to the suit in the Trial Court. In the light of this undisputed position, Trial Court answered aforesaid issue No.4 against the plaintiff. Besides this, Trial Court also noticed the fact that there is an admitted oral partition of the suit properties and that the parties to the oral partition are in possession and enjoyment of their respective shares.

4. Be that as it may, suffice to say that the Trial Court vide Judgment and decree dated 30.10.2008, after full contest, dismissed the aforesaid suit without costs.

5. Unsuccessful plaintiff carried the matter in appeal by way of a regular first appeal under Section 96 of 'The Code of Civil Procedure, 1908', which shall hereinafter be referred to as 'CPC' for brevity. This regular first appeal under Section 96 CPC is A.S.No.39 of 2009 on the file of 'Sub Court, Paramakudi', which shall hereinafter be referred to as 'first appellate Court' for the sake of convenience and clarity. The sole defendant in the Trial Court, i.e., Athi Narayanan Servai was arrayed as the lone respondent in the regular first appeal in the first appellate Court. Lone respondent entered appearance and contested the regular first appeal. After full contest and hearing, first appellate Court vide Judgment and decree, dated 24.08.2010, dismissed the first appeal again without costs. In other words, the first appellate Court confirmed the aforesaid Judgment and decree of the Trial Court, dismissing the suit inter-alia on the ground of non-joinder of necessary parties, i.e., non-joinder of other heirs of Chellamuthu Servai, whose estate was sought to be partitioned.



6.Undaunted, plaintiff in the Trial Court has carried the matter to this Court by way of the instant second appeal, which was filed on 15.07.2016. From the Court file placed before this Court, it comes to light that the second appeal was not admitted, but notice was ordered. It appears from the records placed before this Court that post dismissal of the regular first appeal by the first appellate Court, plaintiff Kayambu died. Court is informed that Kayambu died on 11.01.2016. Therefore, his wife and one daughter preferred the instant second appeal arraying lone defendant as first respondent and another daughter of Kayambu, who did not join her mother and daughter, as second respondent. Respondents have entered appearance through counsel and the second appeal is now before this Court for disposal.

7.By consent of both sides, the main second appeal itself was taken up along with the instant civil miscellaneous petition, being 'C.M.P(MD)No.8658 of 2017' [hereinafter referred to as 'CMP' for brevity], as the same goes to the root of the matter.

8.Aforesaid CMP has been taken out by the appellants under the provisions of Order XXIII Rule 1(3)(a) CPC. In other words, it is under sub-clause 'a' of sub-rule 3 of Rule 1 of Order XXIII CPC. The prayer is to permit the petitioners to withdraw the suit in the Trial Court with liberty to institute a fresh suit in respect of the same subject matter. The sole ground on which this CMP is predicated is articulated in paragraph No.5 of the affidavit filed in support of the CMP and the same reads as follows:

"I respectfully submit that perusal of Judgment of both courts below would show that the relationship of the parties, nature of subject properties are not denied. For instance in paragraph 17 of Trial Court the suit came to be dismissed only because of non-joinder of necessary parties. The same was confirmed in para 19 also, and then only the suit was dismissed. The same point has been confirmed by the appellate court in paragraph 10 of Judgment and further in para 11 it has held certain properties were also not included in the suit for partition. I further submit that both courts below dismissed the suit filed by father on technical grounds. In other words there has been formal defect in institution of suit. It is only under such circumstances the appellants are constrained to file this application before this Hon'ble Court".

A perusal of paragraph No.5 supra would reveal that the sole ground on which the instant CMP is predicated is on admitted factual position that there is non-joinder of necessary parties. Today, Mr.M.V.Venkataseshan, learned counsel is before this Court on behalf of the petitioners in the CMP, who are appellants in main second appeal. Mr.M.Shema Daniel, learned counsel representing counsel on record for the respondents in the CMP, who are also respondents in the main second appeal, is before this Court.



9. In the hearing also, it is not in dispute that late Chellamuthu Servai, whose estate was sought to be partitioned, had five children, i.e., three sons and two daughters, but the suit in the Trial Court [out of which the instant second appeal arises] was filed by one son against the other, without including the other three children.

10. As already mentioned supra, this second appeal has not been admitted.

11. This takes us to the question as to whether the suit filed for partition admittedly without including the other legal heirs, is only a formal defect?

12. The leading case in this regard is the Constitution Bench Judgment of the Hon'ble Supreme Court in Kanakarathanammal v. V.S. Loganatha Mudaliar and another reported in AIR 1965 Supreme Court 271. In this Judgment, by a 4:1 majority, it has been held that an estate can be represented only when all the heirs are before the Court. Thereafter, a Division Bench of our High Court in A. Ramachandra Pillai v. Valliammal reported in (1987) 100 L.W. 486 (Mad) (DB) referred to Kanakarathanammal's case and laid down the law with regard to partition suits. Division Bench of this Court held that in a suit for partition, all the sharers are necessary parties and that the suit is liable to be dismissed for non-joinder of anyone of the parties. This is articulated in paragraph No. 6 of the Judgment of the Division Bench of our High Court in A. Ramachandra Pillai's case and that portion of paragraph No. 6 reads as follows:

"It is in that context, the decision of the Supreme Court in Kanakarathanammal v. Loganatha Mudaliar and another, is relevant. In that case, also, the plaintiff filed a suit for declaration and possession on the ground that the properties belonged to her mother and on her death she, as the sole heir, was entitled to the entirety of the properties. The suit was filed against two defendants who claimed that the father of the plaintiff had executed a will under which the first defendant had been appointed as executor and that as such executor he obtained probate of the said will, got possession of the properties and handed over possession to the second defendant therein as directed in the will. Thus the defendants set up a title in respect of the suit properties in the appellant's father. Alternatively they also added that if the properties belonged to the plaintiff's mother, she would not be entitled to claim exclusive title to the same, because by succession, the suit properties would devolve upon the appellant and her two brothers and the appellant's failure to join her brothers made the suit incompetent for non joinder of



necessary parties. The trial Court held that the mother was the owner of the properties. However, it held that the suit is bad for non-joinder of necessary parties and on that ground the suit was dismissed. On appeal however, the High Court held that the properties belonged to the father. The appeal was dismissed on this ground and therefore there was no necessity to go into the question whether the suit was maintainable or not. On a further appeal, the Supreme Court accepted the contention of the plaintiff that the properties belonged to the mother. However, the Supreme Court held that since she was one of the three heirs of her mother and since she had not impleaded her two brothers to her suit, the suit was liable to be dismissed. The Supreme Court further observed:

"It is true that under Order I, 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."

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 nonjoinder of any one of the parties. In (T.Panchapakesan and others v. Peria Thambi Naicker and others) 85 L.W. 841 (D.B.) 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".

13. Subsequently, another Single Judge of this Court, i.e., Hon'ble Mr. Justice M. Srinivasan, as his Lordship then was, in Shanmugam and others v. Saraswathi and others reported in AIR 1997 Madras 226, held that the question of non-joinder of parties in a suit for partition, can be raised at any time, as it goes to the



root of the matter. It was also held that suit for partition is not maintainable in the absence of co-sharers.

14. In the light of the aforesaid authoritative pronouncements, particularly in the light of the Judgment of the Division Bench of this Court [drawing inspiration from a Constitution Bench Judgment in Kanakarathanammal's case] in A. Ramachandra Pillai's case, it emerges clearly that the aforesaid decision is an authority for the position that in a suit for partition, all sharers are necessary parties and that the suit is liable to be dismissed for non-joinder of anyone of the parties. The relevant portion has been extracted supra. Therefore, this has to be read not just as a ratio, but as a determination of law in this regard.

15. In the light of the aforesaid position, the CMP has to necessarily be dismissed, as it is not a mere formal defect and the suit in the Trial Court is clearly not maintainable, in the light of the admitted position that all the sharers/children of Chellamuthu Servai [whose estate was sought to be partitioned], have not been made parties to the partition suit in the Trial Court.

16. If the prayer in this CMP is not acceded to and if the CMP is dismissed, it follows as an inevitable sequitur that the main second appeal also deserves to be dismissed in the light of the admitted position. However, I did peruse the two questions proposed by the appellants in their capacity as protagonists of the second appeal. The two questions proposed by the appellants and styled as 'substantial questions of law', are as follows:

"a) Whether the courts below are right in dismissing the suit of the appellant/plaintiff on the ground of mis-joinder of necessary parties when female heirs were not entitled for right in co-parcenary of properties in 1943?

b) Whether the courts below are right in dismissing the suit on the ground of partial partition when no proof was let in to prove that additional properties were available for partition?"

17. The aforesaid questions were tested by this Court by applying the principle laid down by the Hon'ble Supreme Court with regard to substantial question of law as distinguishable from question of law, in Hero Vinoth (Minor) v. Seshammal reported in (2006) 5 SCC 545, particularly paragraph 24(ii), which reads as follows:

"24. The principles relating to Section 100 CPC relevant for this case may be summarised thus:

... ..

(ii) The High Court should be satisfied that the case involves a substantial question of law, and not a mere question of law. A question of law having a material bearing on the decision of the case (that is, a question, answer to which affects the rights of parties to the suit) will be a substantial question of law, if it is not covered



by any specific provisions of law or settled legal principle emerging from binding precedents, and, involves a debatable legal issue. A substantial question of law will also arise in a contrary situation, where the legal position is clear, either on account of express provisions of law or binding precedents, but the court below has decided the matter, either ignoring or acting contrary to such legal principle. In the second type of cases, the substantial question of law arises not because the law is still debatable, but because the decision rendered on a material question, violates the settled position of law".

When the aforesaid substantial questions of law are tested using the aforesaid principle as touchstone, it follows as an inevitable sequitur that the aforesaid substantial questions of law do not qualify as substantial questions of law as they are neither debatable nor non application of settled law. Moreover for a substantial question of law to be entertained, the second appeal should turn on that substantial question of law. This has been lucidly articulated by the Hon'ble Supreme Court in the Judgment in Syeda Rahimunnisa v. Malan Bi reported in (2016) 10 SCC 315. Obviously, question (a), in the light of the admitted position and the settled legal principle, does not arise for consideration. Consequently, second question, i.e., (b) also does not arise.

18. In the light of the narrative and discussion supra and in the light of the settled legal principles with regard to partition suit being not maintainable when all the sharers are not made parties, the instant second appeal fails and the same is dismissed, as no substantial question of law arises in the same.

19. S.A(MD)No.201 of 2017 is dismissed confirming the concurrent judgments and decrees passed by the first appellate Court, i.e., Sub Court, Paramakudi, dated 24.08.2010 in A.S.No.39 of 2009 and the trial Court, i.e., District Munsif cum Judicial Magistrate's Court, Mudukulathoor, dated 30.10.2008, in O.S.No.48 of 1996.

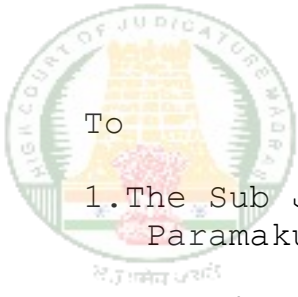
20. In the light of the discussion supra, C.M.P(MD)No.8658 of 2017 is dismissed.

21. Considering that the adversaries are siblings and that the present legal heirs are closely related, the parties are left to bear their respective costs.

Sd/-
Assistant Registrar(CO)

/True Copy/

Sub Assistant Registrar(CS-I)



To

1.The Sub Judge,
Paramakudi.

2.The District Munsif,
Mudukulathoor.

3.The Record Keeper,
V.R.Section,
Madurai Bench of Madras High Court,
Madurai.(2 copies)

+1CC TO M.V.VENKATASESHAN ADVOCATE IN S.R.NO.75728.

+1CC TO MR.H.THYUMANASWAMY, ADVOCATE IN S.R.NO.75845.

SMN

DS RSK SAR-1:28.09.2018: 8P/7C

JUDGMENT MADE IN
S.A(MD) No.201 of 2017
and
C.M.P (MD) No.8658 of 2017

30.07.2018