

HON'BLE SRI JUSTICE D.V.S.S. SOMAYAJULU

CCCA No. 326 of 2007

J U D G M E N T :

This appeal is filed against the judgment and decree in OS.No.6 of 2002 dated 10.08.2007 passed by the Additional Chief Judge-cum-Judge, Family Court, Secunderabad.

The suit OS.No.6 of 2002 is filed for partition of the plaint schedule property and for costs and other reliefs. The claim of the first plaintiff is that she is the wife of one Omprakash. The said Omprakash and another person Mukundlal jointly purchased the property. Mukundlal died in October, 1967. The property was then enjoyed by Mukundlal's wife Shantha Kumari and the plaintiff. The said Shantha Kumari executed a registered Will bequeathing her half share in the suit schedule property in favour of plaintiffs 1 to 3. Therefore, after the death of Shantha Kumari, the plaintiffs acquired rights as per the Will. Hence, the suit is filed for partition.

The defendants filed a written statement strongly contesting the suit and contended that Shantha Kumari did not have a right to execute the Will for the entire property, that the other children of Shantha Kumari and Mukundlal were not jointed as parties. In addition, it is also mentioned that the defendant had eight (8) children who were also not jointed as parties to the suit. They also raised a dispute

about the Court fee paid and argued that inadequate court fee was paid. The Will executed by Shantha Kumari was also questioned.

Based on these pleadings, issues were framed on 23.06.2003 and later on 08.06.2006. The parties went to trial. For the plaintiffs, PW.1 was examined and Exs.A.1 to A.6 were marked. For the defendants one witness DW.1 was examined and EXs.B.1 to B.5 were marked. After hearing the parties, the lower Court granted a decree, which is now impugned in the present appeal.

This Court has heard Sri VLNGK Murthy, learned senior counsel for the appellants and Sri M.N.Narasimha Reddy for the respondents.

The essential questions that were urged in the appeal were about the non-joinder of the necessary parties. Issues 3 and 4 are on the non-joinder of the parties. The next two points that are strongly urged are about the manner in which the Will, marked as Ex.A.1, was executed.

Since the essential dispute centers round a decision on these issues and the argument was also on the same lines, this Court also proceeding to consider the first point raised namely, the non-joinder of necessary parties. As can be seen from the averments of the written statement and evidence, Mukundlal and Shantha Kumri had two children by name Omprakash and Ramesh Kumari. It is also clear that Shiv Narayan, the original owner of the property had eight (8)

children in all, namely four daughters and four sons. The cross-examination of PW.1 on 20.12.2006 is crucial and the witness admits that his father's sister Shantha Kumari was not added as a party and that the Shiv Narayan's four daughters were not added as parties to the suit.

It is the submission of the learned senior counsel appearing for the unsuccessful defendants/appellants that the suit is bad for non-joinder of necessary parties. The learned counsel points out that in page 6 para 10 of the judgment, the lower Court noticed and reproduced the plea of non-joinder of parties and yet the Judge did not answer the same. The lower Court, according to the learned counsel, adopted a simple method of stating that the plaintiffs and defendants are representing the two branches and therefore, the suit is not bad for non-joinder of necessary parties. The learned counsel argued that in a suit for partition, all the sharers are necessary parties and that an effective decree cannot be passed without the presence of all the sharers. Therefore, it is his contention that the non-joinder of the four daughters of Shiv Narayan and the Shantha Kumari is fatal to the suit.

This Court also notices the judgments reported in ***Shanmugham and others V. Saraswathi and others***¹, wherein it is held that a failure to add the necessary parties goes to the root of a matter in a partition suit. Similarly, in

¹ AIR 1997 Madras 226

the case of **S.D.Ayyakannu(died) and others v. Somasundaram and others**² another single Judge of the Madras High court held that in a suit for partition, all the heirs should be included as parties. In **Kusampudi Subba Raju vs. Master Penumatsa Sayi Raju and Others**³, a learned single Judge of this Court held that a suit for partition without adding all the legal heirs is bad in law. The Hon'ble Supreme Court of India also in a judgment reported in **Kanakarathanammal vs. V.S. Loganatha Mudaliar and Another**⁴ held that in a suit for partition, all the sharers are proper and necessary parties.

Learned counsel for the respondents, on the other hand, argued that by virtue of the doctrine of substantial representation, it is not necessary to add all the legal heirs. He relied upon a case of **Mohd.Hussain (dead) by Lrs and others v. Occhavlal and others**⁵, wherein the Hon'ble Supreme Court of India considered this doctrine of substantial representation. However, this Court holds that the judgment is not applicable to the present facts, because the suit before the Hon'ble Supreme Court of India was a suit for mortgage and not a suit for partition. The plaintiff in the suit had two sons and two daughters. The two daughters were not added as parties to the suit. Therefore, in those circumstances, as the brothers were already on record, the

² 2002 AIHC 1138

³ 2005 (6) ALD 88

⁴ AIR 1965 SC 271

⁵ 2008(4) ALT 26B (SC)

Hon'ble Supreme Court held that there is a substantial representation for the branches and that a suit for mortgage can proceed. The two sons were also the original mortgagees along with their father. Therefore, the Hon'ble Supreme Court held that the son's had a right to continue the case and there was sufficient representation for both the wings to realise the mortgage deed.

The case on hand is, however, a case of partition. All the parties/heirs have a right to claim a share and to get a share. They are necessary and proper parties. In their absence, an effective decree cannot be passed. This non-joinder of necessary parties is fatal to the plaintiffs' case.

Learned counsel for the respondents also relied upon ***Yerrapareddy Polaiah v. Yerrapareddy Ramanaiah***⁶ and argued that the suit need not be remanded and that the necessary parties can be added even in a final decree. In ***Polaiah's*** case (6 surpa), the learned single Judge remanded the matter back to the trial Court. The case on hand is on a slightly different footing for the reason that despite the defendants pointing out that necessary and proper parties were not added, the plaintiffs proceeded with the suit. Therefore, ***Polaiah's*** case cannot be applied to the facts on hand. Despite pleas taken in the written statement and despite the cross-examination, no steps were taken to bring on record the legal representatives. It is the contention of the

⁶ 2017 (1) ALD 730

learned counsel for the appellants that the plaintiffs tried to take a decree showing themselves as the sole legal heirs to the detriment of others who are not added. Therefore, he argues that as the plaintiffs deliberately suppressed facts and did not add necessary parties, they are not entitled to make any prayer for remand. This Court holds that despite the clear pleadings, clear cross-examination etc., the plaintiffs did not take steps to add all the legal representatives, who are necessary to decide the issues. Hence, this Court is of the firm opinion that the suit is bad for non-joinder of necessary parties and that remand cannot be considered.

Issue No.3, which is framed on 23.06.2003 is therefore, answered in favour of the defendants/appellants and against the plaintiffs. The suit has to be dismissed on the ground that the necessary and proper parties are not added.

Issues 1 and 2 are about the testamentary capacity of Smt. Shantha Kumari to execute Will-Ex.A.1 claiming to be the owner of a half share. It is clear now that Shantha Kumari and Mukundlal had two children, viz., Omprakash and Ramesh Kumari. Therefore, on the death of Mukundlal, Omprakash, Ramesh Kumari and Shantha Kumari had a share in the suit schedule property. She cannot, therefore, execute a Will by herself claiming to be owner of half of the property. In addition to that, although the Will was marked as Ex.A.1, no further steps were taken to prove the same as required under law. Therefore, both the grounds were urged

namely that Shantha Kumari did not have adequate capacity to execute the Will as she did and as the same is not proved as required under law. This Court also concurs and holds that Shantha Kumari did not have the testamentary capacity to execute the Will as she did and that the said Will cannot be looked into for the purpose of apportionment of the suit schedule property. Therefore, issues 1 and 2 are decided against the plaintiffs and in favour of the defendants.

Issues 4 and 5 are for the partition. It is the contention of the defendants/appellants that the first plaintiff is the second wife of late Omprakash. Omprakash had a subsisting marriage which is not dissolved by a decree and therefore, the relationship with the first plaintiff is not legitimate. Consequently, the two children alone are entitled to file a suit for partition. Therefore, it is the specific objection of the defendants that plaintiff No.1 cannot ask for a partition of the property. The lower Court rightly held that plaintiffs 2 and 3 are entitled to a share in the property. However, while passing the decree, in the concluding portion of the para 21, the Court held that all the plaintiffs representing Mukundlal branch are entitled to a share in the property. This is a clear error.

Even though the issues 4 and 5 are decided in favour of the plaintiffs holding that they are entitled to seek a partition, in view of the fact that the suit is bad for non-joinder of parties, no relief can be granted to the plaintiffs.

This Court, therefore, holds that the judgment and decree of the lower Court are clearly wrong. The judgment and decree dated 10.08.2007, are, therefore set aside. The appeal is bound to succeed and the same is allowed. No order as to costs.

As a sequel, miscellaneous petitions, if any, pending in this appeal shall stand closed.

D.V.S.S. SOMAYAJULU, J

Date: 8.03.2018
KLP

