

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 11-02-2020

CORAM

THE HONOURABLE MR. JUSTICE S.M.SUBRAMANIAM

A.S.No.477 of 2013

And

M.P.No.1 of 2013

Pangajam

..Appellant/Plaintiff

vs.

1.Mr.O.M.Saminathan

2.Mr.S.Gowthaman

3.Gomathi

4.Palaniammal (died on 23.04.2013)

..Respondents/Defendants

(Cause Title accepted vide
order of Court dated 20.09.2013

made in M.P.No.1 of 2013 in

A.S.SR.No.70844 of 2013)

Appeal Suit is preferred under Section 96 of the
Code of Civil Procedure, against the judgment and decree dated
15.04.2013 passed in O.S.No.38 of 2012 on the file of the
learned I Additional District Judge, Erode.

For Appellant : Mr.A.K.Kumarasamy,
Senior Counsel for
Mr.S.Kaithamalai Kumaran

For Respondents-1to3 : Mr.N.Manokaran

For Respondent-4 : Died

J U D G M E N T

The appeal suit on hand is directed against
the judgment and decree dated 15.04.2013 passed by the learned I
Additional District Judge, Erode in O.S.No.38 of 2012.

2. The appellant in the appeal suit is the
plaintiff in the suit and the respondents in the appeal suit are
the defendants in the suit.

3. For the sake of convenience, the ranking
of the parties in the appeal suit would be referred to as per
their ranks before the Trial Court.

4. The suit was instituted by the plaintiff for partition. Certain basic errors are brought to the notice of this Court regarding the manner in which the suit was dismissed and more specifically, the learned Senior Counsel appearing on behalf of the appellant reiterated that the suit was dismissed merely on the ground that one of the family properties is not included in the plaint and on that ground, it was dismissed. Further, it is contended that the appellant is ready and willing to forgo her rights in respect of the left out property.

5. Per contra, the learned counsel appearing on behalf of the respondents contended that it is not the only defect noticed and all necessary parties are not impleaded in the suit, more specifically, the other sons of Rakiya Gounder, namely, Mr.O.R.Arunachalam and Mr.O.R.Chenniappan have not been impleaded as parties in the partition suit and therefore, the Trial Court has to re-adjudicate these issues in the interest of all the parties.

6. In this regard, the learned counsel for the respondents cited the judgment of this Court in the case of Balamani and Another vs. S.Balasundaram [2009 (3) CTC 760], wherein in paragraphs 18 to 28, this Court observed as under:-

"18. A bare perusal of it would evince and project that necessary parties could be added at any stage of the proceedings. The Hon'ble Apex Court contemplated in the cited judgment that even at the appellate stage before the High Court, impleadment of necessary parties is possible. It is axiomatic that now the Second Appeal is before this High Court.

19. The learned counsel for the plaintiffs appropriately and appositely cited the decision of this Court Sabasthi Nadar v. Savurimuthu Nadar and another, 1998 (2) CTC 403. An excerpt from it would run thus:

"11. The learned counsel for the respondent would further contend that at any rate, in a Suit petition, impleading of parties can be done at any stage before passing of the final decree. The following are the decisions which were relied upon by the learned counsel in support of his point:

(1) SwayamprakasamChidambaranathan vs. R. vijayarangam, 1970 (1) MLJ 243,

(2) R.A. Narasinga Rao vs. Chunduru Sarada, A.I.R. 1976 A.P. 996,
(3) N.P.R. Nair vs. A. Pillai Kumar Pillai, AIR 1978 Ker.152.

12. I am unable to agree that these decisions could be pressed into service to contend that the findings as well as the decree granted by the Courts below have to be sustained and that the unimpleaded parties can be ordered to be impleaded, so that they can take part in the final decree proceedings. It has to be borne in mind that in the very decision of the Kerala High Court relied upon by the learned counsel reported in, N.R. Nair v. A. Pillai, A.I.R. 1978 Ker.152 it is specifically emphasised that the impleadment of parties after the passing of the preliminary decree is possible only on the basis that none of the questions already settled by the preliminary decree would have to be reopened by the Court as a consequence of such impleadment and that the impleadment could be only on the condition that further proceedings will be only on the basis of the preliminary decree already passed. This decision would only make it obvious that it will be an injustice to the unimpleaded parties, if the Court does not dismiss the Suit for non-joinder of parties. This is what was emphasized in the A. Ramachandra Pillai vs. Valliamal, 1987 (100) LW 486, cited earlier. If co-sharer who is entitled to raise his pleas on the merits of the Suit is to be deprived of his defence for no fault of himself and if the plaintiff could be put on premium for not having impleaded a necessary party, it would spell clear injustice, and it would only lead to multiplicity of proceedings.

13. On the other hand the decision of the learned Single Judge of this Court reported in Swayamprakasam Chidambaranathan vs.

R. Vijayarangam, 1970 (1) MLJ 243 is more practical as it holds that Order 1, Rule 10(2) of the Civil Procedure Code gives power to the Court to implead parties at any stage of the proceedings in a partition Suit. The proceedings do not come to an end till the passing of the final decree and therefore at the stage of final decree proceedings also, parties can be impleaded. Similarly the judgment of the Division Bench of the High Court of Andhra Pradesh reported in Ramader Appala Narasingha Rao v. Chundrur Sarada, AIR 1976 A.P. 226, it is also to the effect that a party who was impleaded only after passing of the final decree, can seek for setting aside the preliminary decree to do substantial justice between the parties having regard to the circumstances of the case.

14. The position which emerge as a result of the above analysis, in the context of the present case is that the plaintiff having deliberately suppressed the existence of certain other sharers and not having impleaded them as party and the Genealogy having been proved to be in correct, the suit deserves to be dismissed. Even at present no steps were taken by the plaintiff to implead all the necessary parties who have been left out and the Court cannot take any initiative on its own under Order 1, Rule 10 (2) of the Code of Civil Procedure in the absence of proper particulars relating to all parties who are left out. But instead of dismissing the Suit in its entirety, in the interest of justice, indulgence may be shown to the plaintiff by remanding the Suit to the Trial Court, giving opportunity to the plaintiffs to implead all the members of the family who are necessary parties to proceed further in accordance with law by giving opportunity to all parties to adduce

further evidence if any to the Court and to decide their claims on the merits afresh."

The said decision emerged in a partition Suit and this Court felt that the matter should be remitted back to the Trial Court for impleadment. As such, the above excerpts from the cited decision as well as the entire perusal of the decision would highlight and spotlight the fact that a partition suit should not be dismissed by the High Court, simply because of non-joinder of necessary parties and that opportunity should be given to the parties concerned to implead the necessary parties.

20. However, the learned counsel for the defendant placing reliance on a Division Bench decision of this Court A.Ramachandra Pillai vs. Valliammal (died), 1987 (100) LW 486, would develop his argument that consequent upon non-impleadment of necessary parties, this Court dismissed the claim of the plaintiff. An excerpt from the said decision would run thus:

"The Supreme Court further observed:

"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."

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, also, a Division Bench of this Court has taken a similar view by judgment dated 18.07.1972. 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.

8. Since we have not gone into the merits of the other issues but dismissed the Suit as not maintainable, it is but proper that we set aside all the findings on merits and leave all the issues and contentions at large for any future decision. Accordingly the Appeal is allowed and the judgment and decree of the Court below are set aside. The appellants will be entitled to their costs in the Appeal." (emphasis supplied)

21. A bare perusal of the said judgment of the Division Bench of this Court would not indicate that a case of this nature should not be remitted back to the Trial Court. The underlined portion of the above excerpt would clearly demonstrate and evince that the Division Bench of this Court had foreseen the possibility of instituting fresh proceedings and they never held that matter of this nature should not be remitted back to the Trial Court. They also contemplated that once the Suit is found to be bad for non-joinder of necessary parties, the findings rendered therein should not be allowed to subsist. Hence, I am of the considered opinion that instead of dismissing the claim

of the plaintiffs in this Appeal on the ground of non-joinder of necessary parties, the matter could be remitted back to the Trial Court and that would obviate fresh filing of a Suit for partition.

22. It is a common or garden principle of law that multiplicity of proceedings should be avoided. Hence in these circumstances, the other two substantial question of law Nos.3 and 4 relating to ancestral nature of the suit property and the validity of Ex.B4, including the plea of ouster, cannot be decided at this stage, as it would amount to approbating and reprobating. The Division Bench of this Court as observed supra held that once a Suit is bad for non-joinder of necessary parties, the question of deciding on merits the other issues would not arise.

23. Further more, without any issue relating to ouster, the Trial Court rendered its judgment ordering partition providing share for those who were not parties. As such, adding fuel to the fire, the First Appellate Court without remitting the matter back to the Trial Court as contemplated under law or alternis visbis framing issue by itself relating to ouster as contemplated under C.P.C., simply formulated a point for determination and from the available evidence, it decided that there was ouster. Such a finding is fundamentally wrong. Without any issue relating to ouster, the parties might not have had the opportunity of focussing their attention in adducing evidence. The purpose of framing issues under Order 14 of C.P.C. is only to enable the parties to focus their attention in adducing evidence on a particular point.

24. It is a trite proposition of law that ouster is a serious plea, much more serious than a plea of prescription, and I am at a loss to understand as to how the Appellate Court was justified in simply ignoring this fact and deciding for itself that there was ouster of the plaintiffs from the suit property at the instance of the defendant.

25. Incidentally, without finally deciding the relevant material points which, as observed by me supra, cannot be done in the Second Appeal, I would like to point out that the First Appellate Court miserably failed to appreciate the genealogy involved in this case. The Courts below were expected to concentrate on the recitals in Ex.B11, dated 10.11.1924 and accordingly, arrive at a decision in conjunction with other evidence available in form of Ex.B12 dated 24.09.1952 the partition deed which emerged between Subramania Chettiar and others. In fact, the First Appellate Court did not take into consideration the fact that the purchasers under Ex.B11 were close relatives and as per Ex.B12 those close relatives got partitioned the property and in such a case, the core question arises as to whether the property was the ancestral property or not and there were also some references to moveable properties. As such, on deep analysis of those recitals coupled with oral evidence to be recorded and after hearing the parties interested in the Suit, a decision should be taken by the Trial Court.

26. In view of my observation supra, this Court, at this stage cannot render its verdict on the substantial question of law Nos. 3 and 4.

27. In the result, the judgment and decrees of both the Courts below are set aside and the matter is remitted back to the Trial Court for fresh disposal as per law within a period of six months from the date of receipt of a copy of this order. The parties shall appear before the Trial Court on 15.06.2009. On or before the end of June itself, the plaintiffs shall file Application for impleading the necessary parties and if there is any default on the part of the plaintiffs in filing such Application, the Trial Court is at liberty to dismiss the Suit once and for all.

28. I would like to make it clear that the Trial Court is expected to decide the lis afresh, after giving due opportunity of adducing evidence to all the persons

concerned, untrammelled and uninfluenced by any of the observations made by this Court in disposing of this Second Appeal.

Accordingly, this Second Appeal is disposed of. No costs. Consequently, connected Miscellaneous Petition is closed."

7. The learned counsel for the respondents cited the judgment of the Hon'ble Supreme Court of India in the case of S.Satnam Singh and Others vs. Surender Kaur and Another [2009 (2) SCC 562], wherein in paragraphs 16 and 17, it has been held as under:-

"16. For determining the question as to whether an order passed by a court is a decree or not, it must satisfy the following tests:

- "(i) There must be an adjudication;
- (ii) Such adjudication must have been given in a suit;
- (iii) It must have determined the rights of the parties with regard to all or any of the matters in controversy in the suit;
- (iv) Such determination must be of a conclusive nature; and
- (v) There must be a formal expression of such adjudication."

17. Before adverting to the rival contentions of the parties, it must be kept in mind the principle that ordinarily a party should not be prejudiced by an act of court. It must also furthermore be borne in mind that in a partition suit where both the parties want partition, a defendant may also be held to be a plaintiff. Ordinarily, a suit for partial partition may not be entertained. When the parties have brought on record by way of pleadings and/or other material that apart from the property mentioned by the plaintiff in his plaint, there are other properties which could be a subject-matter of a partition, the court would be entitled to pass a decree even in relation thereto."

8. The learned counsel for the respondent cited the judgment of the Hon'ble Supreme Court of India in the case of R.Mahalakshmi vs. A.V.Anantharaman and Others [2009 (9) SCC 52], wherein in paragraphs 22 to 26, it has been held as under:-

"22. In the light of the partition deed available on record, no further proof thereof was required, more so, when the plaintiff himself relied on the same. According to us, this aspect of the matter has not been considered by the courts below. Thus, after having considered the submissions of the learned counsel for the parties and after perusal of the records, we are of the considered opinion that the matter deserves to be remanded to the trial court on the following grounds:

(1) That all the properties that were inherited by the father of the parties by virtue of registered deed of partition dated 27-4-1954 have not been included in the partition suit.

(2) The appellant herein had taken a consistent stand right from the very beginning that unless all the properties are included in the plaint, the suit would be bad and partial partition cannot be effected.

23. The courts below committed an error in giving much weight to the legal notice sent by the appellant and still ignoring the documents filed and admitted by the parties wherein it was clearly mentioned that apart from the property for which partition was claimed by Respondent 1-plaintiff, there were other properties as well.

24. In the light of the foregoing observations, the judgment and decree passed by the courts below are hereby set aside and quashed. The matter is remitted to the trial court for giving opportunity to the parties to amend their respective pleadings, to file additional documents and to lead further evidence in support of the amended pleadings. The trial court thereafter would pass a judgment after appreciating the additional pleadings and the evidence adduced thereon.

25. Since the matter is old, the parties are directed to appear before the trial court on 1-9-2009 and would participate in the proceedings without asking for undue adjournments. The trial court would also endeavour to deliver the judgment within six months from the date of completion of pleadings of the parties. We also record our appreciation for Mr Sanjay Parikh, Advocate, who appeared as

amicus curiae for rendering his valuable time in bringing the correct legal position and facts to our notice.

26. The appeal thus stands allowed to the extent mentioned hereinabove, looking to the facts of the case, the parties to bear their respective costs."

9. The learned counsel for the respondents cited the judgment of this Court in the case of T.Ashok Surana and Another vs. T.Suresh Surana and Another [2018 (3) CTC 839], wherein in paragraph 15, it has been observed as under:-

"15. A partial partition may be as regards persons who are members of the family or as regards properties which belong to it. It is a settled principle of law that a suit for partition is liable to be dismissed on the sole ground that the plaintiff has not added all the properties available, in the suit. In other words omission to include all the family property is fatal in a suit for partition. In order to apply this principle, the property said to have been omitted to be added must be actually available. Any party who takes partial partition as a defence must be able to establish about the availability of the property by placing some material before the Court. Since in a suit for partition, the traditional understanding of the parties as plaintiffs and defendants will not apply, even a party arrayed as a defendant can file a petition to amend the plaint by adding the parties who have been omitted or adding properties which have been left out. The concept of dominus litus will not apply in a suit for partition."

10. The learned Senior Counsel appearing on behalf of the appellant opposed the said contention by stating that such mistakes can be rectified in the appeal suit itself. This Court is of the considered opinion that when certain basic errors crept in the judgment of Trial Court, though rectifiable, in the interest of parties, fresh adjudication is necessary. The Trial Court would be in a better position to record evidences and re-adjudicate the matter in respect of the lapses identified and crystallize the rights of the parties with reference to the documents and the evidences to be produced by the respective parties.

11. This apart, the parties to the original suit are entitled to file amended plaint, implead necessary parties, take all steps to ensure that the suit is adjudicated and to include left out properties etc., for the purpose of effective adjudication and crystallisation of the rights of the respective parties in the suit for partition.

12. Under these circumstances, this Court is of the considered opinion that the original suit is fit to be remanded for re-trial and consequently, the judgment and decree dated 15.04.2013 passed by the learned I Additional District Judge, Erode in O.S.No.38 of 2012 is set aside and the matter is remanded back to the Trial Court for re-adjudication. The parties to the original suit are at liberty to amend the plaint, implead necessary parties, include the left out properties, additional pleadings, if any for the purpose of effective adjudication. However, it is made clear that all these exercises are to be done within a reasonable period of time, since the suit is pending for more than eight years.

13. Accordingly, the Trial Court is directed to complete the trial and dispose of the original suit, within a period of six months from the date of receipt of a copy of this judgment. It is made clear that the parties to the suit are bound to cooperate for the early disposal of the suit. Unnecessary adjournments should not be granted by the Trial Court. Even in case of any request for adjournments, the reasons must be recorded and the routine grant of adjournments are to be averted and in the event of any such unnecessary adjournments on flimsy grounds, the Trial Court has to record the same in the Court proceedings itself.

14. With the above directions, the present appeal suit, namely, A.S.No.477 of 2013 stands allowed. However, there shall be no order as to costs. Consequently, connected miscellaneous petition stands closed.

s/d-

Assistant Registrar

True Copy

Sub-Assistant Registrar

Svn

To

1. The I Additional District Judge,
Erode.

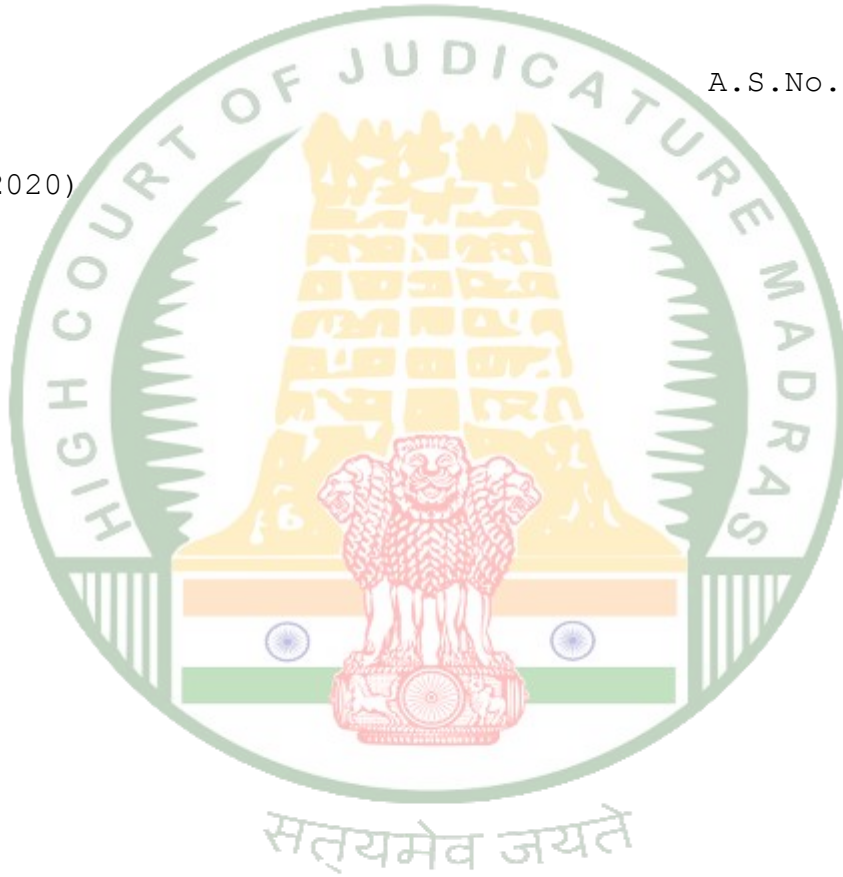
2.The Section Officer
VR Section
High Court, Madras 104.

+1 CC to Mr.S.Kaithamalai Kumaran, Advocate sr 11178

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A.S.No.477 of 2013

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