

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on : 23.01.2020

Date of Verdict : 04.03.2020

CORAM

THE HONOURABLE MR. JUSTICE G.K.ILANTHIRAIYAN

S.A.No. 1698 of 2003

Rathinaswamy

..Appellant/1st Defendant

Vs.

1.Achi Kannu

2.Uthiradam (Died)

3.Amutha

4.Valarmathi

5.Munuswamy

6.Suguna

7.Ilayaraja

8.Dharmaraj

9.Minor Sulochana

10.Minor Sugasini

11.Minor Sudhi

Respondents 9 to 11 are rep. By their father & guardian,
5th respondent, Munuswamy.

(R5 to R11 brought on record as LRs of the deceased R2
vide order of Court dated 12.11.2019 made in C.M.P.No.
2559/2007 in S.A.No. 1698 of 2003) ...Respondents/Plaintiffs &
2nd Defendant

Prayer: Second Appeal filed under Section. 100 of C.P.C. against
the judgment and decree made in A.S.No. 37 of 2001 on the file
of the Court of Additional Sub-Ordinate Judge, Nagapattinam
dated 18.06.2003 in confirming the judgment and decree made in
O.S.No. 99 of 1995 on the file of the District Munsif, Nannilam
dated 09.09.1998.

For Appellant : Mr.A.Muthukumar

For Respondents : Mr.S.Sounthar for R1 & R3

R2 - Died

R4 - Notice Served-NA

R5 to R8 - Not ready in notice

R9 to R11 - No Appearance

J U D G M E N T

This appeal has been preferred as against the judgment and decree passed in A.S.No.37 of 2001 on the file of the court of Additional Sub-Ordinate Judge, Nagapattinam dated 18.06.2003 in confirming the judgment and decree passed in O.S.No.99 of 1995 on the file of the District Munsif, Nannilam dated 09.09.1998.

2. For the sake of convenience, the parties are referred to as per their ranking in the Trial Court.

3. The case of the plaintiffs in brief is as follows:-

3.1. The suit is for partition. The first defendant is the son of the first plaintiff's husband's first wife. The first plaintiff got married with her husband one Muthaiyan under Hindu rights and customs and gave birth to the plaintiffs 2 and 3. The first defendant, after death of his first wife got second marriage and thereafter, he left her father Muthaiyan after obtaining his house. Thereafter, the said Muthaiyan and the first plaintiff were lived in a hut put up at Poromboke land and after death of the said Muthaiyan, the first plaintiff is living there. The said house is the second item of the A schedule suit property. The suit properties belonged to the said Muthaiyan and all are joint family properties and the first item of the suit property shown as gift. In the second item of the suit property, the first plaintiff and the said Muthaiyan constructed a house. The 3rd item of the suit property belonged to the first plaintiff, which is derived from her ancestral property. Therefore, the plaintiffs caused notice to the first defendants. Since after death of Muthaiyan, the first defendant is in possession and enjoyment of the Item 1 and 3 of the suit schedule property. Further, the first defendant rented out the first item of the suit A schedule property and also has separate income and never shared the income with the plaintiffs. Therefore, filed a suit for partition of 3/5th share in the first item of the suit A schedule property and 3/10th share in the Item 2 and 3 of the suit A schedule property.

4. Resisting the same, the first defendant filed a written statement stating that he is the son of Muthaiyan, who died in the year 1975. He denied that the first plaintiff is not the legally wedded to the said Muthaiyan. The first plaintiff had lived for sometime with the said Muthaiyan as his mistress and they never lived jointly in the first item of the suit schedule property. Admittedly, the suit property belonged to the said Muthaiyan. The Government had issued Kudiyiruppu Patta in favour of the first defendant in respect of the first item of the property. The second item of the A schedule property is still classified as a Government poromboke. The government issued B Memo notice in the name of the wife of the

first defendant by name, Achikannu. In fact, the said property was purchased by the wife of the first defendant. In so far as the third item of the suit A schedule property was usufructually mortgaged in favour of one Kamaraju by the deceased Muthaiyan. The first defendant redeemed the same at the cost of Rs.4,000/-. Therefore, the plaintiffs are not at all entitled for any share over the properties. The first plaintiff, immediately after death of Muthaiyan has left for Thirumananchery Village which is her native thereafter, she did not claim anything for her. The suit itself is barred by limitation. Further, the first defendant has got another their sister born through said Muthaiyan. Therefore, his sister has not been shown as a party in the partition suit and as such the suit is bad for non-joinder of necessary parties, since she has also entitled to her respective share. Therefore, prayed for dismissal of the suit.

5. The second defendant separately filed written statement and stating that the third defendant is not concerned in respect of the Item 1 and 3 of the suit A schedule property. The second item of the suit A schedule property is classified as poromboke land. Originally, the first defendant's wife one Achikannu was in possession and enjoyment of the second item of the property and she put up a hut in the said property. The government is also recognized her possession and issued B memo in her favour. Her house was assessed to house tax and paying house tax for the said house. Thereafter, she sold out the super structure in favour of the third defendant on 18.05.1990 for valuable sale consideration. Reversing from the date of purchase of the suit 2 item of the property, the 3rd defendant has been put in possession and enjoyment of the same. In fact, the B memo subsequently issued in the name of the 3rd defendant by the government. Therefore, the third defendant is absolute owner of the second item of the suit A schedule property and the plaintiffs have no right or interest over the said property and prayed for dismissal of the suit.

6. On the side of the plaintiffs, they examined P.W.1, P.W.2 and P.W.3 marked Exs. A1 to A5. On the side of the defendants, they examined D.W.1 to D.W.3 and were marked Exs.B1 to B25. On perusal of the materials available on record and submissions made by the counsels on either side, the Trial Court decreed the suit and in so far as the first item of the suit A schedule property is concerned, the plaintiffs are entitled to 3/10th share and in so far as the Item 1 and 2 are concerned, dismissed the suit. In respect of mense profits, the plaintiffs are given liberty to take appropriate action under Order 20 Rule 12 of the Code of Civil Procedure. Aggrieved by the same, the first defendant filed appeal suit in A.S.No.37 of 2001. Pending the said appeal, the plaintiffs also filed cross-objection. The first Appellate Court dismissed the appeal and

confirmed the judgment and decree passed by the Trial Court. Aggrieved by the same, the first defendant preferred this second appeal.

7. At the time of admission, the following substantial questions of law were framed for consideration:-

"1. When admittedly the other sharer viz Kaliyammal, the sister of the 1st defendant was not impleaded as a party to the suit, whether the suit is bad for non-joinder of necessary party ?

2. When the 3rd item of the suit property is a dwelling house and the 1st defendant is residing therein, whether the Courts below erred in law in holding that the said item is available for partition and division despite the specific bar in Section 23 of Hindu Succession Act ?

3. Whether the suit is bad for partial partition when the other properties are not included in the suit?

4. When the 3rd item of the suit property was never belonged to the father of the 1st defendant, whether the lower Appellate Court not erred in law in holding that the said item of the property is an ancestral of the 1st defendant ?"

8. The learned counsel appearing for the appellant raised his objection only on one ground that the suit itself is bad for non-joinder of necessary parties. When the first defendant specifically pleaded in his written statement that his sister has not been impleaded as party to the suit that too for partition. Even then, the Trial Court did not frame any issues in this regard. He also submitted that though the first Appellate Court discussed about the ground raised by the first defendant, no points have been framed for determination by the first Appellate Court. Therefore, the suit itself is bad for non-joinder of necessary parties and to support all his contention, he relied upon the judgment of this Court reported in 2010 6 MLJ 351 in Venkataramana and Others Vs. N.Munuswamy Naidu and Others.

9. Per contra, the learned counsel appearing for the plaintiffs submitted that though both the Courts below did not frame any issue with regards to non-joinder of necessary parties, the sister of the first defendant was also taken care and she was allotted 1/3rd share in the 3rd Item of the suit schedule property. Therefore, the suit is very much maintainable and it cannot be dismissed on the technical ground and prayed dismissal of the second appeal.

10. Heard Mr.A.Muthukumar, learned counsel appearing for the appellant and Mr.S.Sounthar, learned counsel appearing for the respondents 1 and 3.

11. The suit is filed for partition in respect of the suit properties without going into the other substantial questions of law formulated by this Court. The first substantial question of law has to be dealt with as primary substantial question of law. The first plaintiff is the second wife of one Muthaiyan. Admittedly, he has got married with the first wife namely, the mother of the first defendant and gave birth to the first defendant and one daughter namely, Kaliammal, the second and third plaintiffs are born to the said Muthaiyan through the first plaintiff namely, the second wife. The first defendant filed his written statement and specifically stated that his sister has not been impleaded as party to the suit that too for partition. Even then, the plaintiffs did not take any steps to implead the sister namely, Kaliammal as a party to the suit. Further, the Trial Court also failed to frame any issue in this regard. Though the first Appellate Court discussed in question of law No.6 about the sister of first defendant has raised by the first defendant held that the plaintiffs are entitled to their 3/10th share in the 3 Item of the suit A schedule property. The remaining share were allotted to the first defendant and his sister. Therefore, the share of the sister of the first defendant has been duly taken care of by the Trial Court and as such the suit cannot be dismissed on the ground of the non-joinder of necessary party.

12. In this regard, the learned counsel appearing for the first defendant relied upon the judgment reported in 2010 6 MLJ 351 in Venkataramana and Others Vs. N.Munuswamy Naidu and others, this Court held as follows:-

"20. The learned Senior Counsel for the Respondents would strenuously contend that two co-sharers by name Rajendran and Ravindran have not been included in the Suit, who are sons of Govindasamy Naidu, 6th Defendant in the Suit, who remained ex parte and died pending the trial of the Suit. He invited attention of the Court to the provision in Order 1, Rule 9 of C.P.C. which reads as follows:

?9. Misjoinder and non-joinder:

No Suit shall be defeated by reason of the misjoinder or non-joinder of parties and the Court may in every Suit deal with the matter in controversy so far as regards the right and interests of the parties actually before it.?

21. When proper parties were not included in the Suit, the Suit is not bad for non-joinder, but if the parties who are not on the array of the parties in the Suit who are necessary parties in whose absence no final adjudication could be made, then the Suit has to be held bad for non-joinder of necessary parties. If proper parties are not added, the Court may allow further time affording opportunity to the Plaintiff to include them. But if the necessary parties were omitted to be included in the Suit, then the Plaintiff has to face the legal consequence of dismissal of the Suit. In the absence of necessary party, no effective decree could be passed. In short, non-joinder of proper party is not fatal while non-joinder of necessary party is fatal to the case. When the Court sees that a particular party, who has been ignored by the Plaintiff in the suit, there is no option for the Court except to dismiss the same.

23. The learned Senior Counsel for the Respondent has also admitted that specific defence as to the non-joinder of necessary party has not been raised in the Written Statement. However, it is open to the Defendant to raise the same at any stage of the case as it goes to the root of the matter. To establish his contention, he garnered support from a decision of this Court in Shanmugham and others v. Saraswathi and others, AIR 1997 Mad. 226 where it is held as follows:

9. ? ? The contention of non-joinder of necessary parties in a Suit for partition can be raised at any time as it goes to the root of the matter. It is well settled that a Suit for partition is not maintainable in the absence of some of the co-owners. See A. Ramachandra Pillai v. Valliammal, 1987 (100) Mad LW 486.?

In view of the above said principles, this Court is of the considered view that non-joinder of necessary party in this partition Suit is fatal and the Suit has to face dismissal on this point. The point is answered accordingly."

13. In the above case, this Court held that the appropriate parties were not included in the suit, the suit is not bad for non-joinder but, if the parties who are not on the array of the parties in the suit, who are necessary parties, in the absence, no final adjudication could be made, then the suit has to be held bad for non-joinder of necessary parties. Therefore, the plaintiff has to face the legal consequences on

dismissal of the suit. In the case on hand, admittedly, one Kamalammal was born to Muthaiyan through his first wife. He is none other than the own sister of the first defendant. When the first defendant specifically pleaded in his written statement that his sister has not been added as a party and as such prayed for dismissal of the suit for non-joinder of necessary parties. If the Trial Court failed to frame any issues in this regard and the plaintiff also failed to take any steps to implead the sister of the first defendant as a party to the suit. Especially, the suit for partition, all the parties have to be shown as a parties so that the partition can be completely effected. In the absence of necessary party no effective decree can be passed. Therefore, non-joinder of necessary party is fatal to the case. In view of the above said principles, this Court is of the considered opinion that non-joinder of necessary party in this partition suit is fatal and the suit is liable to be dismissed on this ground alone. Accordingly, the first substantial question of law is answered against the plaintiffs and in favour of the defendants. Therefore, this Court is of the considered opinion that the Courts below completely erroneous in holding that the suit is maintainable without adding the necessary party to the suit for partition and against the evidence on ground. Therefore, this Court is necessarily to interfere with the findings of the Courts below.

14. In fine, this second appeal is allowed, the judgment and decree passed by the Courts below are set aside and consequently, the suit filed by the plaintiff is dismissed. No costs.

Sd/-
Assistant Registrar (ADI MDU)

//True copy//

सत्यमेव जयते
Sub Assistant Registrar

kkn

To:-

1. The Additional Sub-Ordinate Judge, Nagapattinam.
2. The District Munsif, Nannilam.

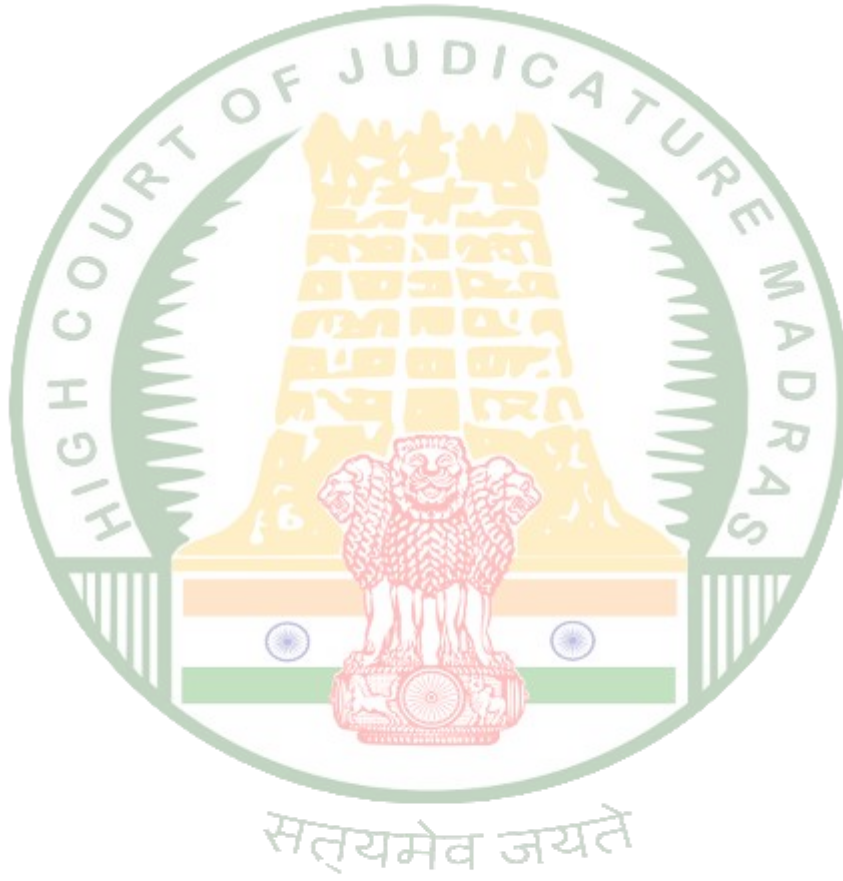
Copy To
The Section Officer,
VR Section, High Court, Madras

+1cc to Mr.A.Muthukumar, Advocate SR.No.19066

+1cc to Mr.S.Sounthar, Advocate SR.No.19506

S.A.No. 1698 of 2003

EV(CO)
GMY(14/09/2020)



WEB COPY