

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on : 18.12.2019

Date of Verdict : 22.01.2020

CORAM

THE HONOURABLE MR. JUSTICE G.K.ILANTHIRAIYAN

S.A.No.388 of 2006
and C.M.P.Nos.5120 of 2006 & 24040 of 2019

Devaraj Bharath Bhushan ...Appellant/1st Respondent /1st Defendant

Vs.

1.K.Moorthy ...1st Respondent/Appellant/Plaintiff

2.K.Raju

3.Janaki

4.Ganga (Deceased)

5.Sarasu

6.Ruckmani

7.Indira

8.Sarojini

...Respondents 2 to 8/Respondents 2 to 8
Defendants 2 to 8

9.N.Suresh(deceased)

10.N.Kishore

11.N.Meena

12.Usha

13.S.Krithish

...Respondents 9 to 13

(RR9 to 11 brought on record as LR's of the deceased R4 vide order of court dated 14.10.2014 made in CMP.Nos.340 to 342 of 2014 in SA.No.388 of 2006)

(RR12 and 13 brought on record as LR's of the deceased R9 vide order of court dated 01.11.2018 made in CMP.No.18280, 18287 and 18292 of 2018 in SA.No.388 of 2006(MGRJ))

Prayer :- This Second Appeal is filed under Section 100 of Civil Procedure Code against the judgment and decree dated 25.10.2005, in A.S.No.10 of 2005 on the file of the District Judge of the Nilgiris at Udthagamandalam reversing the judgment and decree dated 04.05.2005 in O.S.No.106 of 2001 on the file of the Subordinate Court, Udthagamandalam

For Appellants : Mr.Parthasarathy,
Senior Counsel,
for Mr.V.G.Suresh Kumar

For Respondents
For R1,2,3,5 to 8 : Mr.T.T.Ravichandran
: R4 - died
: R9 - died
R10 to R13 - notice served

JUDGMENT

This second appeal is directed as against the judgment and decree dated 25.10.2005, in A.S.No.10 of 2005 on the file of the District Judge of the Nilgiris at Udhagamandalam reversing the judgment and decree dated 04.05.2005 in O.S.No.106 of 2001 on the file of the Subordinate Court, Udhagamandalam.

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

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

3.1. The suit is filed for partition by metes and bounds and allot the extent of 0.03-1/16 acre to the plaintiff with separate possession. The immovable property admeasuring 0.65 acre of agricultural land in SF.No.233/B situated at Yedapalli Village, Nilgiris District was purchased jointly by M/s.Kullan and J.Nanjan, brothers both sons of Joghee Gowder of Yedappalli Village under registered sale deed dated 09.01.1919. The said J.Nanjan is the head of the branch of the first defendant's vendors and the Kullan is the head of the plaintiff's branch. They are entitled for undivided half equal share in the above said property. Therefore, the Survey Field No. was altered into R.S.No.233/2 (old) and at present as RS.No.153/57 of Yedappalli Village.

3.2 The first defendant is the purchaser from the descendants of the branch of J.Nanjan. The defendants 2 to 7 are the brothers and sisters of the plaintiff and the eighth defendant is the widow of the plaintiff's brother, Bhojan. The plaintiff and the defendants 2 to 8 are form the direct legal heirs of the branch of late J.Kullan referred to above. The said Kullan, out of his share to an extent of 8 cents conveyed to one Bellie Gowder by the document No.335 of 1919 dated 24.03.1919. His sons, Mathan and Kari executed another sale deed in respect of their vendor's share admeasuring 0.02 acres in favour one, Krishnamachari by document No.1162 of 1928 dated 15.09.1928. The said property was again purchased by the said Mathan and Kari on 13.11.1934 by the registered sale deed as

document No.161 of 1934. Hence, the plaintiff and the defendants 2 to 8 as the legal heirs of Kullan's branch are entitled to 0.24-1/2 acre in the said field. Another brother J.Nanjan's branch was originally entitled to an extent of 32 ½ cents. It was mortgaged by Ranganathan, son of the said Nanjan to one, Lalchand Abhaychand and Co. by the mortgage deed registered as document No.199 of 1968 dated 02.12.1968 with the file of the Sub Registrar, Coonoor. It is still in force and the same has not been redeemed. Therefore, the branch of the said Nanjan was entitled only to the extent of 32 ½ cents in the suit property. While being so, the property admeasuring 0.50 acre in RS.No.153/57, was conveyed to the first defendant from the legal heirs of the Nanja Gowder by the sale deed dated 25.08.1998. The purchase by the first defendant is illegal and cannot convey title for 50 cents as vendors can claim only 32 ½ cents. As such the plaintiff and the defendants 2 to 8 are entitled for 24 ½ cents in the suit property. As such the first defendant cannot abrogate the rights of the plaintiff and the defendants 2 to 8, who are legally entitled to 24 ½ cents in the suit property.

3.3 In fact, the plaintiff and the defendants 2 to 8 are in possession of their share in the suit schedule property. Now the first defendant is attempting to put up construction in the suit property to the derogation of the rights of the plaintiff. Therefore, the plaintiff and the defendants 2 to 8 caused notice on 12.02.2001. In fact, the first defendant attempted to demolish the super structure put up in the suit property and as such the plaintiff and the defendants 2 to 8 lodged a complaint as against the first defendant. Though the first defendant issued reply notice, the first defendant refused to accede to amicable partition of the suit property and replied with the untenable and false averments. Therefore, the plaintiff is entitled to 1/8 share in the suit property amounting to 3 1/16 cents in the suit property and filed suit for partition and possession.

4. The first defendant resisted the plaintiff's case by filing written statement stating that he purchased the property admeasuring 0.50 acres of land in survey No.233/2 corresponding to old S.No.233/B, which after resurvey has been assigned RS.No.153/57 of Yedappalli Village from M/s.Y.D.Morchan, Y.D.Bheeman, Gowriammal, Janaki, S.Devaraj and Jothimani by the registered sale deed dated 28.08.1998 as document No.1372 of 1998 with the Office of the Sub Registrar, Coonoor. The vendors of the first defendant are lawful and original owner of the said property. There is no dispute that the father of J.Kullan and J.Nanjan purchased property admeasuring 0.65 acres by the registered sale deed. Thereafter, even prior to the sale,

J.Nanjan Gowder was in open, continuous and uninterrupted possession and enjoyment of the said property without any concealment whatsoever ousting the plaintiff's grandfather Kullan branch from possession. After sale in favour of the Andi Gowder, the said Nanja Gowder took possession of the property and conveyed to him including the land comprised in survey No.233B, Yedappalli Village. Thereafter on 13.11.1934, the Andy Gowder reconveyed the suit property by the document No.332/1932 including 65 cents of the land comprised in survey No.233B of the Yedappalli Village to the J.Nanja Gowder and the same was registered as document No.1231 of 1934 in the Office of the Sub Registrar, Coonoor. After purchase of the suit property, the said J.Nanja Gowder alone is the absolute owner and he was in uninterrupted possession and enjoyment of the suit property excluding the others. After his death, his legal heirs stepped into his shoes. In fact, the sale in favour of the J.Nanja Gowder was registered as document No.332 of 1932 was never challenged by the plaintiff or his ancestor. Therefore, the branch of the J.Kullan is not at all entitled for half share in the suit property measuring 32 ½ cents, in which already 8 cents was sold out and remaining 24 ½ cents in the suit schedule property. In fact, in the sale deed executed in favour of J.Nanjan Gowder in the year 1932, categorically mentioned about the earlier purchase in the year 1919. When the plaintiff being in joint possession of the said property with the defendants 2 to 8, now the Kullan branch alone sold out to an extent of 8 cents and two cents without including J.Nanjan or his legal heirs as party under the sale deeds to other persons. The mortgage deed was executed by one of the sons of the Nanja Gowder and he is entitled for 32 ½ cents in the suit property and another son Dhona Gowder entitled for other share admeasuring 32 ½ cents in the suit property.

4.1 In fact in the year 1932 itself, the grand father of the plaintiff was ousted from the possession and thereafter the first defendant's vendors and their predecessors were in possession and enjoyment of the said land. In recognition of the said rights of the first defendant's vendors and their predecessors in title, the revenue and other relevant records have also been mutated accordingly. The settlement record pertaining to survey No.153/57 has been finalised as early as in the year 1984, based on the ownership and actual physical possession of the land. The entire records stand in the name of the first defendant and as against which, there is no appeal of any sort has been preferred by either the plaintiff or his ancestors till the filing of suit. Further submitted that the suit is bad for non joinder of necessary parties. According to the plaintiff, the vendors of the first defendant are the other

sharers of the suit property along with the plaintiff and the defendants 2 to 8, in which necessary parties have not been impleaded as parties. The grandfather of the plaintiff J.Kullan had another son, Mathan apart from the plaintiff's father Kari and the reference to him has been made in the plaint. The said Mathan is survived by his daughter Gowri and son, Kullan. Therefore, without including the branch of Mathan, the suit for partition cannot be sustained.

4.2 Further the plaintiff in his anxiety to grab the land not legitimately his own and with his greed for money, fabricated the document purporting to be an agreement of sale for the property admeasuring $32 \frac{1}{2}$ cents comprised in survey no.233/B of Yedappalli village to one Palanisamy who is having political connection and attempted to trespass into the first defendant's property and put up construction thereon. As such the first defendant preferred police complaint and the plaintiff gave undertaking that he would not indulge in such acts in future. Therefore no action was taken as against the plaintiff. Further stated that assuming without admitting that the plaintiff's grandfather was entitled to $24 \frac{1}{2}$ cents, the plaintiff's father would have been entitled only to $12 \frac{1}{4}$ of land in the suit property as the other $12 \frac{1}{4}$ cents ought to have been belong to said Madtan, in which case, $1/8$ share of plaintiff in the $12 \frac{1}{4}$ cents is only $1 \frac{1}{2}$ cents. Therefore, the plaintiff is claiming $3 \frac{1}{2}$ cents in the suit property each is not at all correct and maintainable. Therefore, the plaintiff is not entitled to seek any relief as prayed for and sought for dismissal of the suit.

5. In support of the plaintiff's case, P.W.1 was examined and eleven documents were marked as Ex.A.1 to Ex.A.11. On the side of the defendants D.W.1 was examined and Ex.B.1 to Ex.B.18 were marked. Ex.C.1 and Ex.C.2 were marked as Court documents. On considering the oral and documentary evidences adduced by the respective parties and the submission made by the learned counsel, the trial Court dismissed the suit for partition and possession for the reason that the suit without adding the complete legal heirs of the said Kullan Gowder is not maintainable and is hit by non joinder of necessary parties, and further held that the plaintiff failed to produce any corroborate evidence to show that he is jointly enjoying the suit property along with other defendants. There was partition of the joint family status between Kullan Gowder and Nanja Gowder in the year 1932 itself and as such the plaintiff also did not prove that there was joint status after 1932. Aggrieved over the judgment and decree of the trial Court, the plaintiff preferred an appeal suit in A.S.No.10 of 2005 on the file of the

District Judge of the Nilgiris at Udthagamandalam. The first appellate Court on appreciating the materials placed on records, allowed the appeal by reversing the judgement and decree passed by the trial Court. Challenging the same, the first defendant has come forward with the present second appeal.

6. At the time of admission of the second appeal, the following substantial questions of law were framed :-

a) Whether the suit is bad on account of non-joinder of necessary parties?

b) Whether the predecessors in interest of the appellant and the appellant have perfected title to the suit property by ouster as against the predecessors in interest of the respondents and the respondents?

7. While pending the second appeal, the plaintiff filed an application in CMP.No.24040 of 2019 to implead the proposed respondents as respondents 14 and 15 in the second appeal, who are none other than the plaintiff's father's brother's son and daughter.

8. The learned counsel for the plaintiff submitted that he filed the suit for partition and separate possession of 3 1/6 cents of land out of 65 cents comprised in RS.No.153/57, O.S.No.232/2, Yedappalli Village, Coonoor District. The first defendant took a specific stand that the other two legal heirs of one, Madhan who is none other than the own brother of the plaintiff's father were not impleaded as party. The trial court even without framing any issue in respect of non joinder of necessary parties, dismissed the suit filed by the plaintiff only on the ground that the suit is hit by non joinder of necessary parties. Aggrieved by the same, the plaintiff filed the appeal suit and before the appellate court, the specific issue was framed that whether the suit was bad for non joinder of necessary parties, in which the first appellate court answered in favour of the plaintiff, as against which the present appeal has been filed by the first defendant and this Court framed one of the substantial questions of law as to whether the suit is bad for non joinder of necessary parties. Therefore, the suit cannot be dismissed on the technical point, since the legal heirs of one, Mathan who is none other than the plaintiff's father's brother have to be impleaded as parties in the second appeal. Therefore, he prayed for impleading the 14th and 15 respondents as party to the proceedings.

9. Per contra, the first defendant filed counter and submitted that the suit is filed for partition and possession. Even without filing the written statement, the first defendant had taken specific stand that necessary parties had not been impleaded in the suit and as such the suit itself is liable to be dismissed on account of non joinder of necessary parties. In spite of the same, the plaintiff did not chose to implead the necessary parties to the suit. It is also one of the grounds on which the suit was dismissed by the trial court. For the past 17 years, the plaintiff did not take any step to implead the legal heirs who were left out at the time of filing the suit. He further submitted that even now, the plaintiff did not chose to implead all the parties to suit and selectively chose only 14th and 15th respondents alone. Before the trial court, the plaintiff was examined as P.W.1 and in his evidence he categorically stated that his father's brother, Madhan only survived with two daughters namely, Gowri and Masi, whereas now, the plaintiff filed application to implead only one daughter, namely Gowri and one son. But during his evidence, he stated that the said Mathan did not have son by name, Kullan. However, now in this petition he has chosen to seek for impleading the said Kullan as son of the said Mathan and daughter Gowri. Further, the plaintiff's brother one Bhojan died leaving behind his legal heirs, wife, daughters and a son. Even then, the plaintiff did not chose to implead them as parties to the present proceedings. Therefore, the suit for partition itself is not maintainable. His vendors were in full and absolute right over the property and prayed for dismissal of the petition.

10. Heard Mr.Parthasarathy, Senior Counsel appearing for the defendants and Mr.T.T.Ravichandran, learned counsel appearing for the plaintiff.

11. This Court considered the rival submission made by the learned counsel on either side.

12. The plaintiff filed the suit for partition claiming equal share to the plaintiff as well as the defendants 2 to 8. According to the plaintiff, the suit property originally was purchased jointly by one, J.Kullan and Nanjan who are brothers and born to one Jogee Gowder by the registered sale deed dated 09.01.1919. Therefore, they were entitled for their respective undivided equal share to an extent of 32 ½ cents each in the suit property. The first defendant is the purchaser of the suit property from the descendants of the branch of J.Nanjan Gowder. The defendants 2 to 7 are the brothers and sisters of the plaintiff and the eighth defendant is the widow of the

plaintiff's brother Bhojan. While being so, the grandfather of the plaintiff, namely the said Kullan sold out an extent of 8 cents by the registered sale deed dated 24.03.1919 as document No.335 of 1919 in favour of one, Bellie Gowder. Thereafter his sons, namely the plaintiff's father and his brother sold out another extent of 2 cents to one, Krishnamachari on 15.09.1928 by the document registered as No.1162 of 1928. Thereafter it was purchased by them on 13.11.1934 and registered as document No.161 of 1934. The plaintiff and the defendants 2 to 8 as their share are entitled to an extent of 24 ½ cents out of 65 cents of the suit schedule property. As such the vendors of the first defendant, namely J.Nanjan Gowder branch is only entitled to an extent of 32.5 cents, whereas 50 cents of the suit schedule property was conveyed by them to the first defendant by the sale deed dated 25.08.1998 and registered as document No.1372 of 1998 with the Office of the Sub Registrar, Coonoor.

13. The trial court dismissed the suit and the first appellate court reversed the judgment and decree passed by the trial court and allowed the suit filed by the plaintiff. The preliminary issue framed by the first appellate court is that whether the suit is hit by non joinder of necessary parties. Admittedly, the branch of Kullan, two sons born to him by name Mathan and Kari. Kari's one of the sons is the plaintiff herein. In respect of Mathan, he had one daughter and one son. The plaintiff impleaded the defendants 2 to 8, in which the defendants 2 to 7 are brothers and sisters. The eighth defendant is his brother's wife. Therefore, the plaintiff did not implead his father's brother's legal heirs, namely, the daughter and son of the Mathan. Further, the plaintiff's brother one, Bhojan died leaving behind his wife, two daughters and a son. But the plaintiff added his wife as eighth defendant and did not chose to implead his son and daughters. Therefore, the trial court, on this ground dismissed the suit that the suit is directly hit for non joinder of necessary parties. However, the first appellate court reversed the same. Aggrieved by the same, the plaintiff filed this second appeal and also filed application to implead the legal heirs of the said Mathan, who is none other the plaintiff's father's brother.

14. Accordingly to the first defendant, even now the plaintiff did not chose to implead his brother's legal heirs, namely son and daughter of one Bhojan. Further the plaintiff deposed that his father's brother died leaving behind his two daughters. But now the plaintiff filed application to implead the daughter and the son of the said Mathan. Therefore, one daughter of the said Mathan is not impleaded in this petition

and also the plaintiff did not chose to implead his brother's legal heirs, namely the two daughters and one son.

15. In this regard, the learned counsel for the plaintiff relied upon the following judgments in support of his contention.

(i) Kanakarathanammal Vs. V.S.Loganatha Mudaliar and another reported in AIR 1965 SC 271, wherein it is held as follows:

"14.We do not think there is any justification for allowing the appellant to amend her plaint by adding her brothers at this late stage. We have already noticed that the plea of non-joinder had been expressly taken by respondents 1 and 2 in the trial Court and a clear and specific issue had been framed in respect of this contention. While the suit was being tried, the appellant might have applied to the trial Court to add her brothers, but no such application was made. Even after the suit was dismissed by the trial Court on this ground, it does not appear that the appellant moved the High Court and prayed that she should be allowed to join her brothers even at the appellate stage, and so, the High Court had no occasion to consider the said point. The fact that the High Court came to the contrary conclusion, on the question of title does not matter, because if the appellant wanted to cure the infirmity in her plaint, she should have presented an application in that behalf at the hearing of the appeal itself. In fact, no such application was made even to this Court until the appeal was allowed to stand over after it was heard. Under the circumstances, we do not think it would be possible for us to entertain the said application. In the result, the application for amendment is rejected.

15.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 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. 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.(1) the Privy Council 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 and 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 (1) A.I.R 19 31 P.C. 229. 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."

(ii) A.Ramachandra Pillai Vs. Valliammal (died) reported in 1987 - Vol.100 - LW - 486, wherein it is held as follows:

"Though O.1, R.9 of the Code of Civil Procedure provides that no suit shall be defeated by reason of mis-joinder or non-joinder of parties and the court

may in every suit deal with the matter in controversy so far as regards the rights and interests of parties actually before it, there is a proviso which says that nothing in that rule will apply to non-joinder of necessary parties. In a suit for general partition, there could be no doubt that all the sharers are necessary parties as mentioned above. Apart from this, the main part of R.9 is only an enabling provision and the Court shall deal with each case with reference to the particular facts in that case. It is in that context, the decision of the Supreme Court in Kanakarathnammal Vs. Loganatha, 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. 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 Vs. 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."

(iii) Balamani and another Vs. S.Balasundaram reported in 2009 (3) CTC 760, wherein it is held as follows:

"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 CPC., 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 CPC 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."

16. In the above judgment, the Hon'ble Supreme Court of India held no steps have been taken to implead the other legal heirs of the parties concerned till the High Court, though the defendants took a specific plea to dismiss the suit for non joinder of necessary parties. The trial court also framed specific issue in this regard and even then, the plaintiff failed to implead the legal heirs. Therefore, dismissed the application for impleading the other legal heirs.

17. In the case on hand, the trial court failed to frame any issue in respect of non joinder of necessary parties and on other ground dismissed the suit filed by the plaintiffs. Aggrieved by the same, the plaintiff filed appeal suit. Though the first appellate court framed substantial issue in respect of non joinder of necessary parties, allowed the appeal and decreed the suit in favour of the plaintiff. Aggrieved by the same, the first defendant preferred this second appeal and while admitting this second appeal, this Court framed substantial question of law that as to whether the suit is bad on account of non joinder of necessary parties. Therefore, the plaintiff has come forward with this petition to implead the necessary parties.

18. On the strength of the above judgment, this Court held that instead of dismissing the claim of the plaintiff in this second appeal, on the ground of non joinder of necessary parties, the matter could be remitted back to trial court and obviate fresh filing of the suit for partition. As such those judgments squarely apply to the case on hand.

19. On perusal of the written statement, the first defendant specifically pleaded as follows:

"Without prejudice to what is stated above, the First Defendant submits that the suit is bad for non-joinder of necessary parties. Accordingly to the plaintiff, the Vendors of the First Defendant, are the other sharers of the suit property, along with the plaintiff and Defendants No.2 to 8. in which case they are necessary parties to the suit, but have not been made parties. Further the enquiries of the First Defendant reveal that the plaintiff's grand-father J.Kullan had another son Mathan, apart from the plaintiff's father, Kari, a reference to whom has been made in the plaint. The said K.Mathan is survived by his daughter Goweri and son Kullan. Assuming without admitting that the plaintiff's case is true, without including the branch of Mathan, who would be entitled to a share in the suit property, a suit for partition,

cannot be sustained. It could be reasonably presumed that these individuals are unwilling to be parties along with the plaintiff, to prosecute such a false case. One other suspicious circumstance in the case of the plaintiff would be that, while the notice for partition prior to the suit has been issued by Defendants No.2 to 8 as well as the plaintiff, the suit has been filed showing only him, as the plaintiff, while arraying the other parties to the suit as Defendants. It could either be that Defendants No.2 to 8 are also not willing parties to join the plaintiff in trying to grab property not legitimately their own, or that the plaintiff is trying to be wily in doing so, to achieve his end, as for him it is not the means that would matter."

20. Even then, the trial court did not frame any issue whether the suit is hit by non joinder of necessary parties or not. However, the suit was dismissed on other ground for partition and separate possession. Before the first appellate court, though the substantial issue was framed for non joinder of necessary parties, the first appellate court allowed the appeal and decreed the suit in favour of the plaintiff. Therefore, both the courts below failed to appreciate the issue of non joinder of necessary parties. Once, the suit is found to be bad for non joinder of necessary parties, the findings rendered therein should not be allowed to subsist. Therefore, this Court is of the considered opinion that instead of dismissing the claim of the plaintiff in this second appeal on the ground of non joinder of necessary parties, the matter may be remitted back to the trial court for fresh consideration by adding necessary parties. It would also avoid multiplicity of proceedings by other legal heirs. Under these circumstances, the substantial questions of law of non joinder of necessary parties as well as the plea of ouster cannot be decided at this stage, as it would amount to approbate and reprobate. Once the suit is bad for non joinder of necessary parties, the question of deciding on the other issues would not arise. As such this Court cannot give any findings on the substantial questions of law.

21. In fine, the judgment and decree of both the courts below are set aside and the matter is remitted back to trial court for fresh disposal in accordance with law. Accordingly, the parties shall appear before the trial court on 03.02.2020 and within a period of two weeks, the plaintiff shall file application for impleading the necessary parties. Thereafter the trial court is directed, after giving due opportunity of

adducing evidence to all the parties concerned and dispose of the suit within a period of six months. The trial court is also directed to decide the suit afresh uninfluenced by any of the observations made by this Court while disposing of this second appeal. Accordingly, the second appeal is disposed of. Consequently, connected miscellaneous petitions are closed. No costs.

Sd/-
Assistant Registrar(CCC)

/True Copy/

Sub Assistant Registrar

To

1. The District Judge of the Nilgiris
at Udhagamandalam

2. The Subordinate Judge,
Udhagamandalam.

3. The Section Officer,
V.R. Section,
Madras High Court,
Chennai.

+1 cc to M/s.V.G.Suresh Kumar, Advocate Sr.No. 4187

AKM/24.01.2020/16P-5C /

Judgment in
S.A.No.388 of 2006
and C.M.P.Nos.5120 of 2006
& 24040 of 2019

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