IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 13.07.2021

PRONOUNCED ON : 30.07.2021

CORAM

THE HON'BLE MR. JUSTICE G.K.ILANTHIRAIYAN

AS.No.258 of 2017 and Tr.AS.No.102 of 2021
& CMP.Nos.10060 of 2017 and 8018 of 2019

AS.No.258 of 2017

1.Samathuvam Ammal
2.T.Anand
..Petitioners/Defendants 1 & 4

Vs.

1.M.Vasugi
2.Madan Kumar
3.Shobana ... Respondents 1 & 3/Plaintiffs
4.The Indian Oil Corporation,
Rep. by its Senior Divisional Manager,
The Indian Oil Corporation Limited,
Indian oil Bhavan,
D.No.8/1079 Avinashi Road,
Coimbatore - 641 018
5.The Indian Oil Corporation,
Rep. by its Assistant Manager(Salem),
The Indian Oil Corporation Limited,
Salem - 636 002
..Respondents 4 & 5/Defendants 2 & 3

PRAYER:
The First Appeal is filed under Section 96 of the CPC against the judgment and decree dated 04.03.2017 made in OS.No.67 of 2011 on the file of the III Additional District Court, Salem

For Appellants : Mr.T.Murugamanickam,
Senior Counsel
for M/s.Zeenath Begum

For Respondents
For R1 to 3 : Mr.S.Parthasarathy,
Senior Counsel
for Mr.N.Damodaran

For R4 & 5 : Mr.R.Ravi

Tr.AS.No.102 of 2021

1.Samathuvam Ammal
2.Thilakavathi
3.Anand ..Appellants/Plaintiffs

Vs.

1.Vasuki
2.Madankumar
3.Shobana
4.A.Ganesan ..Respondents/Defendants

PRAYER:

The First Appeal is filed under Order 41 Rule 1 r/w Section 96 of CPC to set aside the observation made by the learned District Munsif of Omalur dated 15.02.2018 in OS.No.1100 of 1996 as such the permanent injunction granted against the defendants would not bind the defendants 1 to 3 from functioning (or) managing into the suit property upto the level of their shares already decided in OS.No.67 of 2011 on the file of the III Additional District Judge, Salem and allow this appeal by decreeing the suit of the appellants/ plaintiffs.

For Appellants : Mr.T.Murugamanickam, Senior Counsel for M/s.Zeenath Begum
For Respondents
For R1 to 3 : Mr.S.Parthasarathy, Senior Counsel for Mr.N.Damodaran

COMMON JUDGMENT

The appeal suit in AS.No.258 of 2017 is filed against the judgment and decree dated 04.03.2017 made in OS.No.67 of 2011 on the file of the III Additional District Court, Salem. The appellants in AS.No.258 of 2017 along with the wife of the deceased son, Selvakumar filed suit for permanent injunction in OS.No.1100 of 1996 restraining the respondents 1 to 3 from interfering with the functioning and management of the suit retail outlet, wherein the court below held that in view of the preliminary decree passed in OS.No.67 of 2011, they were entitled to decree of injunction. However, it would not bind upon the respondents 1 to 3 from functioning or managing into the suit property upto the level of their shares as decided in OS.No.67 of 2011. Against which Tr.AS.No.102 of 2021 has been filed on the file of the III Additional District Court, Salem.

2. In respect of AS.No.258 of 2017, the case of the plaintiffs is that the first plaintiff is the wife and the second and third plaintiffs are children of one, Mohan who died in an accident on 16.10.1989. During the said Mohan's lifetime, under self employment scheme for graduates obtained dealership of diesel bunk outlet from Indian Oil Corporation. The land for that purpose was purchased by him and opened diesel outlet in the name and style of Vangalamman High Ways Service. Thus, the land and the dealership exclusively belong to him. He borrowed loan from third parties and discharged the same out of his own income from his business. After his demise, the first plaintiff permitted her father in law to look after the business for herself and on behalf of her minor children for time being pending transfer of dealership by the Indian Oil Corporation. While being so, the father in law and mother in law raised novel claim that the business left behind her husband is the joint family business and created for unlawful purposes. Therefore, the plaintiffs filed suit in OS.No.291 of 1994 on the file of the District Munsif Court, Mettur directing the second defendant to transfer the dealership in the name of the plaintiffs and not to supply diesel till the disposal of the suit. However, the said suit was dismissed by the judgment and decree dated 30.10.1995 and aggrieved by the same, they filed appeal suit in AS.No.18 of 1996 and thereafter it was transferred to the Sub Court, Mettur and renumbered as AS.No.51 of 2001.

2.1 The further case of the plaintiffs is that in the meanwhile, a portion of the property was acquired by National Highways Department. Since there is dispute over the property, the compensation was deposited in the account of LAOP.No.6 of 2007 on the file of the Sub Court, Mettur. Though the court below concluded that the suit property is a joint family property in OS.No.261 of 1992, it is passed in injunction suit and as such it cannot be considered in the present suit for partition. Thereafter, her father in law died and the first defendant along with her son and daughter in law i.e. wife of another deceased son, Selvakumar filed suit against the plaintiffs and the brother of the first plaintiff for permanent injunction in OS.No.1100 of 1996 on the file of the District Munsif Court, Omalur and prayed not to interfere with the running of the betrol bunk. Therefore, the plaintiffs are being the legal heirs of the said Mohan, are entitled to have ¾ share in the suit property. The first defendant is being mother entitled to have ¼ share. Except the plaintiffs and the first defendant, others have no share in the suit property. Hence, the suit for partition.

3. Resisting the same, the first defendant filed written statement and stated that the husband of the first defendant got considerable immovable property by virtue of family partition.

He had three sons. The land of the suit bunk is situated besides capital for installing the bunk and all necessary accessories were provided only through joint family fund. The husband of the first defendant continued as the 'karta' of the joint family and all these events happened prior to the marriage of the first plaintiff with the deceased son, Mohan. He was unemployed engineering graduate and he had no independent source of income to purchase the land and also to raise construction of buildings, godown for the bunk and also for the installation of machineries, etc. The land for the bunk was purchased in the name of Mohan on 23.10.1982 when he was aged about only 22 years. There was joint family nucleus and income was devolved therefrom and there was surplus income to purchase the property in the name of joint family members including the said Mohan. In fact, the husband of the first defendant also purchased one acre of land at Karuppur on 06.12.1976 in the name of the deceased Mohan and similarly another land was also purchased admeasuring 1.50 acres in the name of another son Selvakumar on 25.11.1976. Whereas the entire sale consideration was paid only from the joint family income since they are members of the joint family. Therefore, all the properties are identified as joint family properties. The deceased was duly allotted by the second and third defendants under unemployed graduate scheme in the name of the deceased Mohan since he was unemployed engineering graduate. All the family members actively participated in the business of the joint family. Unfortunately, he died on 16.10.1989 in a road accident.

3.1 The first defendant further stated that in fact, the claimants filed petition for compensation in MCOP.No.1334 of 1989 on the file of the I Additional District Court, Salem, wherein the first defendant was also made as party. The first plaintiff also deposed that her father in law was the karta of the joint family and till death of her husband, all are living together with other members of the joint family having common mess. In fact, the loan borrowed by the said Mohan, in which the husband of the first defendant stood as guarantor. The loan was settled from the income derived from the joint family business. In fact, the plaintiffs filed suit for general partition in OS.No.22 of 2004 and concluded that the suit properties as joint family properties. Therefore, this question need not be gone into once again in the present suit. After death of the said Mohan, father / karta of the joint family settled the entire dues. They filed suit for bare injunction in respect of bunk and the same was dismissed. Aggrieved by the same, the plaintiffs filed appeal suit, in which the first defendant accounted the income and expenditure and filed into the court. The net profit is also duly deposited into the court to the credit of the suit.

3.2 Further stated that the present suit is hit by legal concept of Order 2 Rule 2 of CPC. When the plaintiffs filed suit for bare injunction in OS.No.261 of 1992 itself, there was cause of action to file suit for partition. The first defendant along with the family members filed suit in OS.No.1100 of 1996 on the file of the District Munsif Court, Omalur for permanent injunction restraining the plaintiffs from interfering with the smooth running of the bunk. Therefore, the suit property is undivided joint family property. That apart, dealership granted by the second and third defendants is absolutely a non hereditable and undivisionable. The suit itself is bad for non joinder of necessary parties because when the character of the suit property is being joint family property, the legal heirs of another deceased son Selvakumar and another son are proper and necessary parties to the suit for proper, effective and complete adjudication and therefore prayed for dismissal of the suit.

4. The second and third defendants filed written statement stating that the dealership was awarded under self employment scheme in favour of the deceased Mohan. The agreement entered between the second defendant and the said Mohan will bind the subject suit property. Therefore, the plaintiffs and the other defendants have no right over the suit property. The said Mohan was died on 16.10.1989 and after his death, there are disputes among his family members. Both plaintiffs and defendants 1 and 4 filed suits which were pending. After death of the said Mohan, there is no reconstitution of the retail outlet. The petroleum products in the bunk is undivisible. Therefore, the plaintiffs have no manner of rights over the suit property and prayed for dismissal of the suit.

5. The fourth defendant filed separate written statement and sailing with the first defendant. Further stated that the suit property is ancestral joint property on which the fourth defendant is entitled for ¼ share besides share of 1/16 as a legal heir of his father. Therefore, he is entitled to have 5/16 share as well as the first defendant is entitled to have 1/16 share.

6. On hearing the rival pleadings, the learned trial Judge framed the following issues for determination of the suit :-

(i) Whether the plaintiff is entitled to ¾ share over the suit property?

(ii) Whether the plaintiff is entitled to preliminary decree as prayed for?

(iii) To what other relief?

Additional issues:

(i) Whether the suit properties are self acquired properties of late Mohan or joint family properties of Thangavel Gounder?

(ii) Whether the suit is bad for jon-joinder of necessary parties?

6.1 In support of the plaintiffs' case, P.W.1 was examined and one document was marked as Ex.P.1. On the side of the defendants, D.W.1 and D.W.2 were examined and Ex.D1 to Ex.D23 were marked. On considering the oral and documentary evidences adduced by the respective parties and the submission made by the learned counsel, the trial Court partly decreed the suit and allotted 4/16 share in favour of the plaintiffs. Aggrieved by the same, the first and fourth defendants have preferred this appeal suit.

7. Mr.T.Murugamanickam, Senior Counsel appearing for the appellants submitted that the case of the plaintiffs is that the entire suit property is self acquired property of late Mohan and marked Ex.P1 registered sale deed dated 23.10.1982 in respect of the suit property purchased in the name of the deceased late Mohan. Though the plaintiffs come forward with the case that the suit property is self acquired property of late Mohan, they failed to prove the same. Therefore, the trial court ought not to have partly decreed the suit. When the suit property is concluded as joint family property, all the parties are necessary parties to the suit and the present suit itself is bad for non joinder of necesary parties since without including the legal heirs of one deceased son, Selvakumar. The suit itself is for partition, then all sharers must be party and the suit cannot be proceeded with in the absence of legal heirs of one deceased son, Selvakumar. The preliminary decree granted in favour of the legal heirs of the deceased son, Selvakumar determined without the presence of them and as such it is untenable. Admittedly, the loan borrowed by the late Mohan was settled by the Manager/Karta i.e. their father Thangavel Gounder obtained loans from various places and cleared the debts. Therefore, the suit property is joint family property. In support of his contention, he relied upon the following judgments:

(i) Rathinaswamy Vs. Achi Kannu and 10 others reported in 2021 (2) CTC 639

(ii) A.Ramachandra Pillai Vs. Valliammal(died) rendered in Appeal No.776 of 1977 by this Court

8. Per contra, Mr.S.Parthasarathy, Senior Counsel appearing for the respondents 1 to 3 submitted that though the respondents 1 to 3 failed to implead the legal heirs of one of the deceased

son, the court below rightly allotted 4/16 share to the legal heirs of the Selvakumar. The suit property was declared as joint family property and as such the respondents 1 to 3 are entitled to have 4/16 share and the court below rightly allotted the share and prayed for dismissal of the appeal suit.

9. Mr.R.Ravi, the learned counsel for the Respondents 4 & 5 submitted that the original dealership of the petrol bunk was awarded under the self employment scheme in favour of the late Mohan. The petroleum products is undivisible. The respondents 1 to 3 have no manner of rights over the petroleum products, tanks and pumps in the retail outlet. As ordered by the court below, they are supplying its product to the first appellant herein. Therefore, he prayed for dismissal of the appeal suit.

10. Heard, Mr.T.Murugamanickam, Senior Counsel appearing for the appellants, Mr.S.Parthasarathy, Senior Counsel appearing for the respondents 1 to 3, and Mr.R.Ravi, the learned counsel for the respondents 4 & 5.

11. The respondents 1 to 3 filed suit for partition in respect of the suit property. According to them, the suit property was purchased by late Mohan, who is the husband of the first respondent and father of the respondents 2 and 3 by the registered sale deed dated 23.10.1982. Thereafter, the dealership was obtained by him under self employment scheme for graduates. Therefore, the land and the dealership are exclusively belong to him and it was self acquired property. Admittedly, his father one, Thangavel derived immovable property from his father by virtue of family partition. He had three sons. Mohan, Selvakumar and Anand i.e. the second appellant. Another son, Selvakumar already died and his legal heirs are not party to the present suit. Since the respondents 1 to 3 claimed the suit property as self acquired property, they have not chosen to implead the legal heirs of the deceased another son, Selvakumar.

12. At the time of purchasing the suit property, the said Mohan was aged about 22 years. He was engineering graduate. After completion of his graduation, immediately the property was purchased in the name of the said Mohan. The plaintiffs did not mark any document to show that the said Mohan was employed at the time of purchase of the suit property or he had other source of income to meet out the sale consideration. That apart, the first respondent got married the said Mohan on 08.06.1984. Therefore, the first respondent had no knowledge about his income at the time of purchasing the suit property. Admittedly, after demise of the said Mohan, the loans obtained by him were settled by his father i.e. Thangavel who managed the entire properties as manager / karta. Since the deceased was graduate and the dealership was obtained in his name under self

employment scheme for graduates. Therefore, the court below rightly concluded that the suit property is joint family property. When the suit property concluded as joint family property, all the sons and mother i.e. first appellant herein are entitled to have equal share in the suit property.

13. The learned Senior Counsel appearing for the appellants vehemently contended that when the suit property concluded as joint family property, all the family members are necessary parties to decide the suit for partition. Admittedly, whereas the respondents failed to implead the the legal heirs of the deceased son, Selvakumar. Therefore, the suit is bad for non joinder of necessary parties. In support of his contention, he relied upon the judgment in the case of Rathinaswamy Vs. Achi Kannu and 10 others reported in 2021 (2) CTC 639, wherein it is held as follows:

> 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. He also relied upon the judgment in the case of A.Ramachandra Pillai Vs. Valliammal(died) rendered in Appeal No.776 of 1977 by this Court, wherein it is held as follows:

> 6. It may be seen from the judgment of the Court below that it was not the case of anybody that Nagarathinam was not entitled to a share in the properties of Arumugham Pillai. Though the first plaintiff denied that Nagarathinam had any children, later she admitted that she had two daughteres that they were married and settled in life and they are alive. Therefore, Nagarathinam's daughters would undoubtedly be entitled to a share in the separate properties or the share of Arumugham Pillai in the joint family properties. Without impleading them as parties to the suit no decree for general partition could be granted by the Court below. What would have been their defence in the suit if they had been impleaded is problematical. They may not care to implead themselves as parties in the final decree proceedings as they would not be bound by any decree for partition granted in their absence. If a partition is effected without impleading them, even leaving that 1/9th share, it would be possible for them to question the entire partition. No partition also could be effected even with the consent of the other sharers as the presence of the heirs of Nagarathnam or consent is necessary for the allotment of a particular property to a particular sharer. In the circumstances, there could be no doubt that Nagarathinam's daughters are necessary parties to the suit.

It is well settled law that the non joinder of necessary party in a suit for partition can be raised at any time as it goes to the root of the matter. The suit for partition is not maintainable in the absence of some of the co-owners. Non joinder of necessary party in the partition suit is fatal and the suit has to face dismissal on the said point.

15. Whereas in the case on hand, the claim of the respondents 1 to 3 herein is that the suit property was purchased by the deceased late Mohan and the Indian Oil

Corporation granted dealership under self employment scheme for graduates. Therefore, the respondents 1 to 3 did not implead the other deceased son's legal heirs as parties. Therefore, the above judgments are not helpful to the case on hand, and the trial court rightly concluded that the suit was filed claiming that the entire suit property belonged to late Mohan and it was self acquired property. Non joinder of other legal heirs of the deceased son is not fatal to the present case. That apart, the legal heirs of the deceased son, Selvakumar are also allotted equal share as per their entitlement. Admittedly, dealership was granted in the name of the late Mohan and after his demise, the appellants are running the bunk outlet. The entire bunk with the land belong to joint family. The licence fee was also paid from the joint family fund. Therefore, all are entitled to have equal share. In respect of share of the father Thangavel Gounder devolved into plaintiffs, defendants 1, 4 and the legal heirs of the deceased son, Selvakumar equally. The share of the deceased Mohan devolved into his legal heirs i.e. the plaintiffs 1 to 3 and the fourth defendant are entitled to have ¼ share each.

16. Accordingly, the suit property is divided into 16 shares, in which the plaintiffs are entitled to have 4/16 share, the legal heirs of the deceased son, Selvakumar entitled to have 4/16 share. The first defendant is entitled to have 3/16 share and the fourth defendant is entitled to have 5/16 share. Therefore, the court below rightly, partly decreed the suit and this Court finds no infirmity or illegality in the judgment and decree passed by the court below. In fine, the appeal suit in AS.No.258 of 2017 is dismissed.

17. In view of the judgment and decree passed in the above appeal suit in AS.No.258 of 2017, Tr.AS.No.102 of 2021 is also dismissed and the judgment and decree passed by the court below in OS.No.1100 of 1996 is confirmed. Consequently, connected miscellaneous petitions are closed. No order as to costs.

Sd/-
Assistant Registrar(CCC)

//True Copy//

Sub Assistant Registrar

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To

1. The III Additional District Judge,
   Salem

2.The District Munsif of Omalur

+2CCs to Mr.N.Damodaran, Advocate, Sr.No.36792
+2CCs to M/s.Zeenath Begum, Advocate,Sr.Nos.36885, 36886

AS.No.258 of 2017
and
Tr.AS.No.102 of 2021

RSI (CO)
K.RK. (29.10.2021)