



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED : 09.08.2021

CORAM

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THE HONOURABLE MR.JUSTICE G.R.SWAMINATHAN

S.A. (MD)No.192 of 2013

1.Maheen

2.Ahmedkhan

... Appellants/ Respondent 7 & 8/
Defendants 7 & 8

Vs.

1.Asma Beevi

... Respondent / Appellant /
Plaintiff

2.Mohammed Sali

3.Noohukannu

4.Asrat

5.Syed Mohammed

6.Kabeer

7.Beevi

... Respondents / Respondents /
Defendants 1 to 6

Prayer : Second Appeal filed under Section 100 of Civil Procedure Code, against the judgment and decree dated 26.04.2012 passed in A.S.No.16 of 2010 on the file of the Subordinate Judge, Kuzhithurai reversing the judgment and decree dated 06.11.2009 passed in O.S.No.349 of 2006 on the file of the Principal District Munsif Court, Kuzhithurai.

For Appellants : Mr.K.Sreekumaran Nair

For Respondents : Ms.J.Anandhavalli for R1

R2 to R7 Exparte

JUDGEMENT

The contesting defendants in O.S.No.349 of 2006, on the file of the Principal District Munsif, Kuzhithurai are the appellants in this second appeal.

2.The first respondent herein namely, Asma Beevi is the plaintiff. The suit schedule property measures 33 cents. According to the plaintiff, 8.250 cents out of 33 cents belonged to Syed Mohammed Pillai. After his demise, his rights devolved on his two



sons namely, Mohammed Bahrudin and Mohammed Noohoo. A daughter by name Fathumal Beevi was born to Mohammed Bahrudin through his first wife. One Katheeja Beevi was Mohammed Bahrudin's second wife. Katheeja Beevi begot Asma Beevi and Mohideen Beevi. Following the demise of the Mohammed Bahrudin, the legal heirs had entered into a partition, on 18.04.1964. It was also registered as Document No.1539 of 1964, on the file of the Munchirai Sub Registrar's Office. Mohammed Bahrudin's brother Mohammed Noohoo executed a gift on 08.02.1972 in favour of the Katheeja Beevi under document No.266 of 1972. As the result of the said gift, Katheeja Beevi's share had an accretion and she became entitled to 5.805 cents. Fathumal Beevi was entitled to 1.070 cents. The plaintiff Asma Beevi was entitled to 1.375 cents. All the three namely, Katheeja Beevi, Fathumal Beevi and Asma Beevi filed O.S.No.226 of 1976 before the District Munsif Court, Kuzhithurai, seeking the relief of partition in respect of 8.250 cents in the suit property. The suit came to be dismissed for default subsequently. While so, Katheeja Beevi executed a gift deed in favour of Asma Beevi, on 08.05.1995. It was registered as document No.756 of 1995, before the Munchirai Sub Registrar Office. Fathumal Beevi is also said to have relinquished her rights in respect of 1.070 cents in favour of the plaintiff. According to the plaintiff, in view of the execution of the gift deed executed by Katheeja Beevi and surrender by Fathumal Beevi, she became entitled to 8.250 cents in the said property. She therefore, filed the present suit O.S.No.346 of 2006 seeking the relief of partition in respect of 8.250 cents in the suit property.

3.As many as 8 persons were shown as defendants. Defendants 1 to 6 remained exparte. Defendants 7 & 8 alone resisted the suit. They filed written statement raising two defences. The first plea was that the suit was bad for non-joinder of necessary parties. The second plea was that in view of the dismissal of the O.S.No.226 of 1976 for default on 04.03.1980 under Order 9 Rule 9 of C.P.C, the present suit was barred.

4.The trial Court framed the necessary issues. The plaintiff examined herself as P.W.1 and her uncle Mohammed Noohoo was examined as P.W.2. Exhibits A1 and A2 were marked. The 7th defendant examined himself as D.W.1, while, the 8th defendant was examined as D.W.2. Exhibits B1 to B17 were marked. After considering the evidence on record, the trial Court dismissed the suit vide Judgment and Decree, dated 06.11.2009.

5.Aggrieved by the same, the plaintiff filed A.S.No.16 of 2010, before the Sub Court, Kuzhithurai. The first appellate Court by impugned Judgment and Decree, dated 26.04.2012 reversed the decision of the trial Court and granted preliminary decree as prayed for. Challenging the same, this second appeal came to be filed.

6.The second appeal was admitted on the following substantial



1. Whether the suit for partition without impleading all the necessary parties is maintainable in law especially when the plaintiff admitted in the previous suit O.S.No.226/1976 on the file of the Additional District Munsif, Kuzhithurai that 24 persons had interest in the suit property and had share in the suit property as proved by Exhibit B9 and B10?
2. Whether the second suit is maintainable under Order 9 Rule 9 of C.P.C. When the first suit O.S.No.226/1976 by the same plaintiff for the same relief on the same cause of action was dismissed for default as proved by Ex.B10?
3. Whether the plaintiff had established her title to the suit property?

7. The learned counsel appearing for the appellants pointed out that the plaintiff along with her mother and sister had filed O.S.No.226 of 1976, seeking the very same relief now sought for. In the said suit, as many as 24 persons were shown as defendants. In the present case, only 8 persons have been shown as defendants. Thus, on the own showing of the plaintiff, 16 other co-sharers have been left out. That is why the learned trial Judge rightly non-suited the plaintiff by invoking the principle of non-joinder of necessary parties.

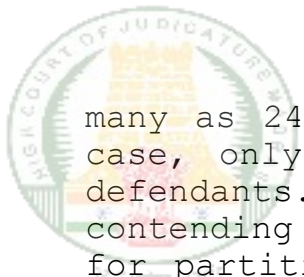
8. The learned counsel for the appellant relied on the decision reported in **AIR 1997 Mad 226 (Shanmugham and others Vs. Saraswathi and others)** in which it was held that a suit for partition is not maintainable in the absence of all the co-sharers. The learned counsel also pointed out that when the earlier suit was dismissed for non prosecution, the present suit would obviously be barred under Order 9 Rule 9 of the C.P.C. He called upon the Court to answer the substantial questions of law in favour of the appellants and set aside the impugned judgment and decree and restore the decision of the trial Court.

9. Per contra, the learned counsel appearing for the respondents submits that the impugned judgment and decree do not call for any interference..

10. I carefully considered the rival contentions and went through the evidence on record.

11. Let me take up the second substantial question of law first. The suit is one for partition. It is well settled that the bar that is otherwise applicable under Order 9 Rule 9 will not apply to partition suits. The cause of partition is in the nature of continuing cause of action. The second substantial question of law is answered against the appellant.

12. The other contention is regarding non-joinder of necessary parties. It is true that in the earlier suit for partition, which was filed by the plaintiff along with her mother and her sister as



many as 24 persons, were shown as defendants. But in the present case, only 8 persons including the appellants have been shown as defendants. The learned counsel for the appellant is right in contending that if all the co-sharers are not impleaded in a suit for partition, it must be dismissed. But the question is whether such co-sharers have been left out. I went through the contents of the present plaint as well as the earlier plaint. In the present plaint, it has been stated that the plaintiff is entitled to 8.250 cents out of the total 33 cents of the suit property. The plaintiff made a categorical averment that the balance extent of land apart from 8.250 cents in suit property belongs to the defendants. Since that is the specific case of the plaintiff, it is for the defendants to show who have been left out. As rightly pointed out by the learned counsel for the first respondent even in the cross-examination, except relying on the earlier plaint, the appellants herein have not shown who are the other co-sharers. In the earlier plaint filed in O.S.No.226 of 1976, these plaintiffs have made similar averments. The suit property measures 33 cents. The appellants claim only 10 cents therein. The appellants appear to have put up construction also. The plaintiff is claiming only 8.250 cents. Therefore, if the plaintiff encounters any resistance in the future at the hands of third parties, the plaintiff cannot take shelter behind this decree. The appellants had merely named some persons as co-sharers. There is nothing to show how they are entitled. A plea of non-joinder cannot be urged in vacuum. It must be backed by particulars. It is not necessary that the written statement must contain the details. It can also emerge during evidence. If even thereafter, the plaintiff failed to implead the left out persons who are necessary parties, then, the suit has to be dismissed. On the other hand, mere plea that the suit is bad for non-joinder will not advance the case of the defendant. At the end of the day, the defence must be anchored on a pucca factual foundation. Since the appellants have not given the particulars as to who are the other co-sharers in the suit property, I have to answer the other substantial question of law also against the appellants.

13.Accordingly, this Second Appeal is dismissed. No costs.

Sd/-

Assistant Registrar(CS II)

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/ /2022

Sub Assistant Registrar(CS)

skm

Note :In view of the present lock down owing to COVID-19 pandemic, a web copy of the order may be utilized for official purposes, but, ensuring that the copy of the order that is presented is the correct copy, shall be the responsibility of the

<https://hccservicescentre.gov.in/tcsignpost> concerned.



To

1.The Sub Judge, Kuzhithurai.

2.The Principal District Munsif, Kuzhithurai.

3.The Record Keeper, V.R. Section,
Madurai Bench of Madras High Court,
Madurai.

+1 CC to M/s.J.ANANDHAVALLI, Advocate (SR-25800[F] dated 10/08/2021)

+1 CC to M/s.K.SREEKUMARAN NAIR, Advocate (SR-25853[F] dated
11/08/2021)

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MK/21.03.2022/5P/7C