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A.S.No.555 of 2016

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 27.09.2022

CORAM

THE HONOURABLE MR.JUSTICE S.S.SUNDAR
and
THE HONOURABLE MRS. JUSTICE N.MALA

A.S.No.555 of 2016
and C.M.P.No.13992 of 2016

1.K.Vishnu
2.S.Vijayamala

... Appellants

Vs.

A.Kittusamy

... Respondent

PRAYER: Appeal Suit is filed Under Section 96 of the Code of Civil Procedure, against the Judgment and Decree of the I Additional District and Sessions Judge at Tiruppur, dated 04.06.2016 in O.S.No.639 of 2011.

For Appellants : Mr.P.Valliappan

For Respondent : No appearance

* * * * *

J U D G M E N T

(The Order of the Court was made by S.S.SUNDAR, J)

The appeal suit is filed against the Judgment and Decree of the I Additional District and Sessions Judge at Tiruppur, dated 04.06.2016 in



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O.S.No.639 of 2011.

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2.The plaintiffs in the suit in O.S.No.639 of 2011 on the file of the I Additional District and Sessions Court are appellants in the above appeal. The respondent is none other than the father of the first appellant and the husband of the second appellant.

3.Despite notice being served through Court on 10.02.2017, as per the postal endorsement the respondent neither appeared nor engaged a learned counsel of his choice. The name of the respondent is also printed in the cause list.

4.The brief facts that are necessary for disposal of the appeal are as follows: The first appellant is the son and the second appellant is the wife of the respondent. The suit in O.S.No.639 of 2011 was filed for partition of one of half share of first appellant in all the suit properties viz., item Nos.1 and 2 in the plaint schedule property. The suit is also for past and future maintenance of second appellant. The appellants prayed for other consequential reliefs and also to create a charge over the defendants $\frac{1}{2}$ share in Item Nos.1 and 2 for payment of maintenance to the second appellant. From the description of the plaint schedule properties. It is seen that the



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suit first item consists of larger extent of valuable lands in Tiruppur District.

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5.The case of the appellants in the plaint is that the suit properties are ancestral properties of the first plaintiff and the first appellant as the same having been allotted to the respondent in a Partition Deed dated 29.05.1998, which was entered into between the defendant and his mother and brother.

6.The specific case of appellants is that the suit first schedule properties were allotted to the respondent as “C” schedule to the partition deed dated 29.05.1998 and that the second schedule properties are the properties acquired by the respondent out of the income from the suit first item.

7.The suit was contested by the respondent on the ground that the partition deed dated 29.05.1998 is not valid as the female heirs of his father were not made as parties. The respondent though admitted the execution of the partition deed and the allotment of “C” schedule in the partition deed dated 29.05.1998, contended that the suit properties are his separate properties. However he filed the written statement questioning the validity of the said partition on the ground of non-joinder of female heirs of his



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father. It is also the specific contention of the respondent that the suit properties are his self acquired and separate properties.

8.The main defence raised by the respondent in the additional written statement was that the partition deed dated 29.05.1998 is not valid as the sisters of the defendant were not made as parties in the partition deed. The trial Court after finding that the suit properties are ancestral properties of respondent held that the daughters of Ayya Gounder viz., the sisters of the defendant are necessary and proper parties to the suit and dismissed the suit for non-joinder of necessary parties. It is seen that the trial Court has also found that the respondent himself filled a suit in O.S.No.103 of 1986 on the file of the Sub Court, Tiruppur against his father, brother and mother for partition. The preliminary decree was passed on 15.02.1999 in the said suit in O.S.No.103 of 1986, which was marked as Ex.B1. After perusal of Ex.B1, the trial Court found that the first item of suit property is one of the items shown in “B” Schedule in O.S.No.103 of 1986. After recording the fact that the sisters of the respondent are also necessary and proper parties to the suit, the suit was ultimately dismissed only on the ground that three daughters of the Ayya Gounder are also entitled to 1/18 share each in the share of Ayya Gounder. After finding that the previous decree in O.S.No.103 of 1986 has not attained finality by allotment of shares by



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metes and bounds, held that the partition under Ex.A1 in respect of suit first schedule properties will not be valid without the sisters of the respondent being made as parties. Therefore the trial Court though found that the plaintiff is entitled to 1/6 share in Item No.1 of suit properties. The suit was dismissed only on the ground of non joinder of necessary parties.

9. Aggrieved by the Judgment and Decree of the trial Court dismissing the suit for partition on a technical issue the above appeal is filed by the plaintiffs.

10. It is well settled that the suit for partition should be filed after impleading all the properties which are common to the members of the family. The position is also not different if a suit for partition is filed in respect of the ancestral properties. In a suit for partition of common or joint family properties every one in the family who is entitled to a share in the properties, should be made as parties as the properties could not be divided among the co-owners or the co-parceners by metes and bounds in the absence of any one of the sharer. Therefore the trial Court may be right in dismissing the suit for partition. However when the trial Court formed the opinion that the sisters of respondent are also necessary and proper parties



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and the suit cannot be divided without impleading all the shares and opportunity should be given to the plaintiffs to implead the necessary and proper parties who may also have a claim or share in the suit properties to avoid multiplicity of proceedings. However the trial Court has framed the issue only at the time of pronouncing the Judgment. In the said circumstances, this Court is of the view that the Judgment of the trial Court dismissing the suit of partition on the ground of non joinder of necessary parties without giving opportunity to the plaintiff/appellant is not appropriate.

11.The question of non-joinder of necessary parties ought to have been decided after framing the issue and giving an opportunity to the plaintiff. In the present case the issue itself was framed just before the pronouncement of Judgment. It is well settled that the Court has powers to implead a necessary party at any stage of the suit or proceedings. This Court is of the view that the Judgment of the trial Court dismissing the suit on the ground of non-joinder without giving opportunity to the plaintiff/appellant is liable to be set aside. The trial court however held that the respondent is liable to maintain the second plaintiff and granted a decree for past and future maintenance qualifying the amount and created a charge



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over item II of the suit property after holding that item II of the suit property is the separate property of defendant. In view of the fact that the suit second item is stated to be a property purchased out of the income from the suit 1st item and the quantum of maintenance depend upon the overall income of defendant/respondent, this Court is unable to sustain the finding and decree of trial Court granting a decree for maintenance in the absence of other sharers. Hence the judgment and decree as a whole is liable to be set aside.

12. Accordingly this appeal is allowed. The Judgment and Decree of the trial Court in O.S.No.639 of 2011 is set aside. Since the appeal is allowed on the ground that fair opportunity should be given to the appellant/plaintiff, the matter is remitted to the trial Court to give an opportunity to the plaintiff/appellant to file an application to implead the sisters of respondent as parties to the suit and the Lower Court may then dispose of the suit after issuing notice to the newly impleaded parties, uninfluenced by the observations of this Court made in this Judgment.

13. The trial Court may dispose of the suit one way or other after ensuring the participation of newly impleaded parties within a period of six



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months from the date of receipt of a copy of this order. Consequently, the connected miscellaneous petition is closed. Both side shall appear before the trial Court on 07.11.2022. However there shall be no order as to costs.

(S.S.S.R.J.) (N.M.J.)
27.09.2022

Index : Yes / No
Internet : Yes/ No
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To

The I Additional District and Sessions Judge,
at Tiruppur.



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S.S.SUNDAR, J.
and
N.MALA, J.

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