



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

RESERVED ON : 08.03.2022
DELIVERED ON : 11.03.2022

CORAM:

THE HONOURABLE MR.JUSTICE R.VIJAYAKUMAR

S.A(MD)No.423 of 2020

1.Kumarayee Ammal
2.Irulayee
3.Mahalingam
4.Selvi
5.Boominathan
6.Panchavarnam
7.Alagammal

... Appellants/Appellants/Plaintiffs

Vs

1.Sakkaiah
2.Lingammal
3.Valli
4.Velu
5.Kumaresan

... Respondents/Respondents/Defendants

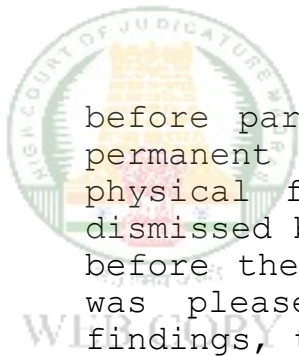
PRAYER: Second Appeal is filed under Section 100 of the Civil Procedure Code, against the judgment and decree passed in A.S.No.50 of 2018, dated 28.02.2019 on the file of the Subordinate Judge, Thirumangalam, confirming the judgment and decree passed in O.S.No.501 of 2007, dated 20.02.2018 on the file of the District Munsif, Thirumangalam.

For Appellants : Mr.N.Vallinayagam
For Respondents : Mr.M.Ponniah

JUDGMENT

The plaintiffs are the appellants herein.

2. The plaintiffs filed O.S.No.501 of 2007 before the District Munsif, Thirumangalam for partition claiming 3/4th share over the suit schedule properties and for permanent injunction restraining the defendants not to alienate the suit properties to third parties



before partition is effected. The plaintiffs further prayed for a permanent injunction restraining the defendants from erasing the physical features of the suit schedule properties. The suit was dismissed by the trial Court. The plaintiffs filed A.S.No.50 of 2018 before the Sub Court, Thirumangalam. The learned Subordinate Judge was pleased to dismiss the appeal. As against the concurrent findings, the plaintiffs filed the present Second Appeal.

3. The plaintiffs had contended that suit schedule properties originally belonged to one Kantha Thevar ancestrally and he died leaving behind his wife Kumarayee Ammal and four daughters by name, Kumarayee Ammal, Ramayee Ammal, Alagammal and Meenakshi Ammal. The legal heirs of Meenakshi Ammal were impleaded as D1 to D3. One of the daughters of Kantha Thevar, Kumarayee Ammal is the plaintiff. The legal heirs of the other daughter, Ramayee Ammal are plaintiffs 2 to 6. The seventh plaintiff is one of the daughters of the Kantha Thevar. Meenakshi Ammal had a son by name, Bose whose legal heirs are D4 and D5. According to the plaintiffs, they are entitled to 3/4th share in the suit schedule properties.

4. The first defendant filed a written statement disputing the entitlement of the plaintiff to claim partition. In paragraph No.6 of the said written statement, the first defendant has pointed out that one of the legal heirs of Meenakshi Ammal namely, Sakkarai has not been impleaded. That apart, all the legal heirs of the deceased son of Meenakshi Ammal have not been impleaded in the present suit. The non impleaded parties are also entitled to a share in the suit schedule properties. Hence, the suit is bad for non-joinder of necessary parties.

5. The first defendant also filed an additional written statement contending that his mother Meenakshi Ammal had executed several settlement deeds in his favour, in which S.No.79/2C1 has been dealt with by the said Meenakshi Ammal as her absolute property. In paragraph No.15 of additional written statement, the first defendant has contended that the plaintiff has wantonly omitted S.No.79/2C1 in the suit schedule properties and hence, the suit is bad for partial partition.

6. The plaintiffs filed a reply statement. In paragraph No.5 of the reply statement, the plaintiff had contended that all the necessary parties have been impleaded and the suit is not bad for non-joinder of necessary parties. The plaintiffs also disputed the fact that the suit is bad for partial partition.

7. The trial Court after analysis of the oral and documentary evidence came to a conclusion that the plaintiffs have not impleaded the sons of Kantha Thevar who were begotten through the second wife. That apart, all the legal heirs of Meenakshi Ammal have not been impleaded. The trial Court further found that suit is bad for



partial partition for not including some of the items of the joint family property.

8. The First Appellate Court held that the sons of Kantha Thevar through second wife namely, Rajendiran and Sakthivel have not been impleaded in the suit, alleging that they do not have a share in the suit schedule properties. The First Appellate Court also found that Exhibits B1 to B5 disclose that Meenakshi Ammal had created several settlement deeds covering S.No.79/2C1 and S.No.44/9 which have not been included as suit schedule properties. Based upon the said findings, the First Appellate Court concurred with the findings of the trial Court that the suit is bad for non-joinder of necessary parties and liable to be dismissed for partial partition. As against the concurrent findings, the plaintiffs have filed the above Second Appeal.

9. The learned Counsel for the appellant had contended that by mistake some of the sharers have not been impleaded in the suit and he may be given an opportunity to implead the said sharers. He further contended that in the interest of justice, the second appeal may be remitted back to the file of the trial Court for impleading the said sharers and conduct a fresh trial. The learned Counsel for the appellant further contended that the defendants have raised the plea of partial partition with regard to two survey numbers namely, S.No.79/2C1 and S.No.44/9, which have been dealt with by Meenakshi Ammal under Exhibits B1 to B5. The learned Counsel for the appellant contended that these properties are not available for partition and the defendants have not established how these properties are joint family properties, so as to include them in the suit schedule. The learned Counsel for the appellant further contended that the defendants have not specifically mentioned the left out items in the suit schedule which are joint family properties warranting inclusion in the suit schedule.

10. The learned Counsel for the appellant further contended that the two sons of Kantha Thevar through his second wife are not entitled to any share in the suit schedule properties and hence, the non impleadment of them cannot be found fault. He further contended that there is no second wife for Kantha Thevar and the alleged second wife is only a concubine and hence, the sons of the said concubine are not entitled to claim a share in the ancestral properties of Kantha Thevar. When the entitlement of the said two sons, namely Rajendiran and Sakthivel through the concubine are in dispute, the plaintiff cannot be non-suited on the ground of not impleading them.

11. The learned Counsel for the appellant further contended that however all the legal heirs of Meenakshi Ammal through her son Bose and another son Sakkarai have not been impleaded by mistake. The plaintiffs may be given an opportunity to rectify the said mistake and proceed with the trial. Hence, he prayed for remanding



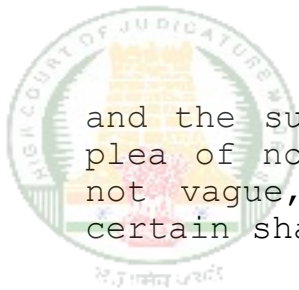
the matter back to the trial Court for impleading the appropriate parties.

12. Per contra, the learned Counsel for the respondent contended that in the original written statement as well as in the additional written statement, the first defendant has taken a specific plea with regard to the non-joinder of necessary parties. The names of all the sharers who have been left out have been mentioned along with the relationship in the original written statement itself. He further contended that in the additional written statement, the defendants have pointed out that gift deeds executed by Meenakshi Ammal in favour of various parties under Exhibits B1 to B5 covering S.No.79/2C1 and S.No.44/9. These two survey numbers have not been included in the suit schedule properties. In paragraph No.15 of the additional written statement, a specific plea has been raised by the defendant with regard to the non inclusion of S.No.79/2C1 and contended that the suit is bad for partial partition. Despite the objection regarding non-joinder of necessary parties and partial partition has been raised at the earliest point of time in the written statement, the plaintiff chose to defend his plaint by filing a reply statement. In the reply statement, the plaintiff defended the non inclusion of the properties and the non impleadment of the parties and contended that the suit is not bad for non-joinder of necessary parties or partial partition.

13. The learned Counsel for the respondent further contended that the trial Court framed issue Nos.4 and 5 with regard to the defence of non-joinder of necessary parties and partial partition. Thereafter, the trial Court arrived at a finding that the suit is bad for non-joinder of necessary parties and for partial partition. Even, before the First Appellate Court, the plaintiffs have not chosen to pray for an order to include the sharers and other properties. The plaintiffs proceeded to prosecute the appeal with the existing sharers and the properties. Hence, it cannot be contended that, by mistake, some properties were left out and some of the sharers have not been impleaded. When the non inclusion of properties and non impleadment of some of the sharers is conscious, the plaintiff cannot be given a second chance to fill up the lacunae by granting an order of remand. Hence, he prayed for dismissal of the Second Appeal.

14. I have carefully considered the submissions made on either side.

15. The defendants in paragraph No.6 of their original written statement, have specifically raised an objection with regard to non-joinder of necessary parties with full particulars of the sharers, who have been left out. The first defendant in his additional written statement, in paragraph No.15 has specifically mentioned



and the suit is bad for partial partition. It is evident that the plea of non-joinder of necessary parties and partial partition are not vague, but they are very specific with regard to naming of certain sharers and providing survey numbers.

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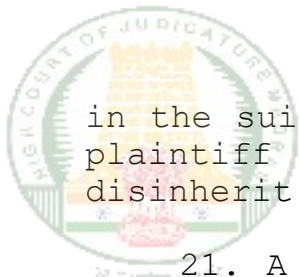
16. After perusal of the original written statement and additional written statement of the first defendant, the plaintiffs have chosen to defend their plaint contending that all necessary parties have already been impleaded and all the joint family properties have already been included.

17. Based upon the rival contentions, the trial Court framed two specific issues with regard to non-joinder of necessary parties and partial partition and thereafter, arrived at a finding that the suit is bad for non-joinder of necessary parties and partial partition. The findings were confirmed by the First Appellate Court. Now, the issue to be decided is whether the plaintiff is entitled to seek an order of remand, so as to rectify the defects like non-joinder of necessary parties and partial partition.

18. Though the plaintiff was put on notice and cautioned by the defendant in his written statement, that the suit is bad for non-joinder of necessary parties and bad for partial partition. The plaintiff has chosen to stick on to his plaint and that has resulted in the dismissal of the suit by the Courts below. Hence, the contention of the learned Counsel for the appellant that, by mistake, some of the sharers have been left out is not an acceptable argument.

19. According to the defendants, some of the properties dealt with by Meenakshi Ammal under Exhibits B1 to B5, covering S.No.79/2C1 and S.No.44/9 have been specifically omitted and hence, the suit is bad for partial partition. In the grounds of appeal, the appellants have contended that the defendant has not specifically pointed out the properties that have been left out. In view of paragraph No.15 of the additional written statement filed by the first defendant, this contention of the learned Counsel for the appellant is not acceptable.

20. The learned Counsel for the appellant had contended that one Rajendiran and Sakthivel are the sons of Kantha Thevar through a concubine and hence, they are not entitled to a share in the ancestral properties of Kantha Thevar. However, the Courts below have non-suited the plaintiff on the ground of not impleading the unnecessary parties. Whether the said Rajendiran and Sakthivel are the second wife's sons of Kantha Thevar or whether they are children through concubine, without having a right to claim a share in the ancestral properties or not is to be decided in their presence. Behind the back of the said Rajendiran and Sakthivel, the Court



in the suit schedule properties. Hence, the burden will be upon the plaintiff to implead them and prove his contentions in order to disinherit the said Rajendiran and Sakthivel.

21. A perusal of the written statement will indicate that many sharers have been left out and allegedly some of the properties had also been left out. If the suit is remitted back to the file of the trial Court, the plaintiff will have to amend not only the cause-title and schedule of properties, but also the entire body of the plaint. Unless the body of the plaint is amended, the entitlement or otherwise of some of the impleaded sharers cannot be explained. If some properties are newly included, the plaintiffs may have to explain the source of title and character of properties. That alone will decide whether the plaintiffs and the defendants will be entitled to a share in the newly included properties. To summarize the entire pleadings in the plaints will have to be amended.

22. When the plaintiffs have consciously avoided impleading the sharers and including some of the properties, despite warning from the defendants, this Court of the considered opinion that the plaintiffs shall not have the benefit of an order of remand start to a fresh with the same plaint. That apart, as discussed earlier, almost all the paragraphs in the plaint will require an amendment, apart from the amendment in the cause-title and the schedule of properties. Hence, this Court of the view that instead of remanding matter back to the trial Court, interest of justice would demand that the Second Appeal is dismissed with liberty to the plaintiff to file a fresh suit after impleading the necessary parties and all the joint family properties.

23. When a suit is being dismissed for non-joinder of necessary parties or for partial partition, the findings of the Courts below rendered on various issues cannot be left to be on the record. These findings have been arrived at by the Courts below behind the back of the parties who are yet to be impleaded. In case, if the plaintiffs chooses to file a fresh suit, these findings will be against the parties who were not parties to O.S.No.501 of 2007. That apart, the Courts below have made certain incidental remarks and findings in the present suit. Once a Court arrives at a finding that a suit is bad for non-joinder of necessary parties, the Court should not venture into answering all the issues and render findings.

24. Principles of fair play and natural justice demand that findings rendered in a suit in which some of the co-sharers are not parties shall not be permitted to subsist. These findings would have been rendered behind the back of the co-sharers who are not impleaded. Hence, this Court sets aside all the findings of the trial Court as well as the First Appellate Court except those relating to non-joinder of necessary parties and partial partition.



25. The plaintiffs are at liberty to file a fresh suit after impleading the necessary parties and including all the joint family properties. With the above said observations, this Second Appeal stands dismissed. No costs.

Sd/-

Assistant Registrar (CS-II)

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Sub Assistant Registrar(CS)

btr

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 advocate / litigant concerned.

To

- 1.The Subordinate Judge,
Thirumangalam.
- 2.The District Munsif,
Thirumangalam.
- 3.The Section Officer,
V.R.Section,
Madurai Bench of Madras High Court,
Madurai. (2C)

+1 CC to M/s.N.VALLINAYAGAM, Advocate (SR-11418[F] dated 11/03/2022)

+1 CC to M/s.M.PONNIAH, Advocate (SR-11381[F] dated 11/03/2022)

Judgment made in

S.A(MD)No.423 of 2020

11.03.2022

SVS(CO)

GC(29.03.2022) 7P 7C