



CMP NO.14717 OF 2020 IN S.A.NO.460 OF 2018

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**R.SAKTHIVEL, J.**

The petitioners filed this Civil Miscellaneous Petition under Order 1 Rule 10(2) read with Section 151 of The Code of Civil Procedure, 1908 praying to implead the petitioners herein as respondent Nos.6 and 7 in S.A.No.460 of 2018.

2.The case of the petitioners is that the respondent Nos.5 and 6 filed a Suit for partition against the respondent Nos.1 to 4 in O.S.No.17 of 2003 on the file of District Munsif Court, Harur. According to the petitioners, the second respondent married one Krishnaveni and respondent Nos.1, 5, 6 and one Jayanthi were born to them. Jayanthi passed away leaving behind her, the petitioners and the petitioners' father Raja. The petitioners' father Raja passed away ten years ago. According to the petitioners, the Suit properties are ancestral properties in the hands of the second respondent Duraisamy. The petitioners are having share and interest in the Suit properties and therefore, they are necessary parties to the Suit. However, the respondent



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Nos.5 and 6 have omitted to add them as necessary parties in the Suit. The Trial Court and the First Appellate Court concurrently held that the Suit properties are ancestral properties. In these circumstances, the petitioners are necessary parties in the Second Appeal. Accordingly, the petitioners prayed to allow the Civil Miscellaneous Petition.

3.Respondent Nos.2 to 4 filed counter affidavit, wherein, it is stated that this Civil Miscellaneous Petition is not maintainable at this stage. The respondent Nos.1 and 2 in their written statement have categorically stated that the second respondent's pre-deceased daughter Jayanthi passed away leaving behind her husband Raja and children Kapil and Surya. Despite the pleadings, respondent Nos.5 and 6 deliberately failed to take necessary steps to implead the petitioners in the main Suit. Accordingly, they prayed to dismiss the Civil Miscellaneous Petition.

4.The points that arise for consideration in this Civil Miscellaneous Petition are:



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(i)Whether the petitioners are necessary parties to the Suit in O.S.No.17 of 2003?

(ii)Whether this Civil Miscellaneous Petition is maintainable or not?

5.Reiterating the averments made in the affidavit filed in support of this Civil Miscellaneous Petition, learned counsel for the petitioners has submitted that the Suit properties are ancestral properties. The petitioners have distinct interest and share in the Suit properties. The Trial Court as well as the First Appellate Court concurrently held that the Suit properties are ancestral properties and the petitioners are entitled to share in it. He further submitted that no prejudice would be caused, if this Civil Miscellaneous Petition is allowed. Accordingly, he prayed to allow this Civil Miscellaneous Petition.

6.Per contra, learned counsel for the respondent Nos.2 to 4 has submitted that despite respondents pleaded in the written statement that the Suit is bad for non-joinder of necessary parties, the respondent Nos.5 and 6,



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deliberately, wantonly omitted to add the petitioners as necessary parties.

Now, in the Second Appeal, if the petition is allowed, it would cause prejudice to the case of the respondent Nos.2 to 4. Accordingly, he prayed to dismiss the Civil Miscellaneous Petition.

7.This Court has considered the submissions made on either side.

8.According to the respondent Nos.5 and 6, the Suit properties are ancestral properties in the hands of the second respondent. The Trial Court as well as the First Appellate Court concurrently held that the Suit properties are ancestral properties in the hands of the second respondent. The Trial Court decreed the Suit. The First Appellate Court dismissed the Suit by stating that the petitioners are necessary parties, were not added as parties in the Suit.

9.It is well settled principle of law that in a Suit for partition or declaration, all the sharers are necessary parties to the Suit. In general, a Suit



may not be dismissed for non-joinder of necessary parties. But, as far as the Suit for partition or declaration is concerned, if the necessary parties are not impleaded, the Suit must fail.

10.It is apposite to cite the case law in ***T.Panchapakesan (died) and Others Vs. Peria Thambi Naicker (Died) and Others*** reported in ***1973 Mad Page 133 = 1972 (2) MLJ 590***. In the said decision, this Court held as follows:

*“No doubt, Order 1, Rule 9, Civil Procedure Code provides that no suit shall be defeated by reason of the 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 the parties actually before it. The question arose before a Bench of the Calcutta High Court in Haran Sheik v. Rameshchandra, AIR 1921 Cal 622, as to whether notwithstanding this provision, the Court had power to dismiss a suit in which no effective decree can be made in the absence of an interested party. That was a suit in which the plaintiffs sued in a representative capacity for a declaration of a right of way as a village road over the land mentioned in the plaint and for removal of an obstruction thereon. In the trial court, an objection was taken that one of the persons interested in the land over which the relief was asked for was not made a party to the suit.*



The trial Court did not give weight to this objection and granted the relief. In appeal, a Bench of the Calcutta High Court, observed, after referring to Order 1, Rule 9, Civil Procedure Code as follows:--

*"But notwithstanding this provisions, it is plain that the court will not entertain a suit in which no effective decree can be made in the absence of an interested party. For instance, in a suit for partition of joint property, if it is established that one of the owners has not been joined as a party, the court will not proceed to make a decree; the decree will not be operative, as it must deal with the share of the absent person interested, who cannot be bound thereby. Similarly, in a case like the present, where the decree is to made for declaration of a right of way as a village road over the disputed land and for removal of an obstruction thereon, if it is discovered that a person interested in the servient tenement has not been made a party to the suit, the court will not proceed to make a decree. The decree, if made, must be infructuous, if a suit is instituted by the absent person for an injunction to restrain the successful plaintiff from executing the decree, there will be no possible answer to the prayer".*

*In Subbaraya Sastri v. Seetharamaswamy, 65 Mad LJ 290 = (AIR 1933 Mad 664), a learned Singe Judge of this court had to deal with a case of the non-joinder of a Municipality in a suit in which the Municipality was interested. On an elaborate review of the*



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case law and after referring to certain passages in Bullen and Leake's 'Precedents of Pleadings' the learned Judge found that notwithstanding Order 1, Rule 9, Civil Procedure Code, the court will be justified in dismissing a suit if the necessary party is not impleaded."

11.The above case law has been referred and followed by this Court in ***A.Ramachandra Pillai Vs. Valliammal (Died) reported in 1987 (100) LW 486.***

12.This Second Appeal was admitted on November 9, 2018 and the following substantial questions of law were framed:

*“(a)Whether the lower appellate court erred in law in holding that the marriage between the first defendant and the mother of the defendants 3 to 5 was conducted in the year 1997 and the defendants 3 to 5 were born after the said marriage out of the said wedlock without the date of marriage and the date of births of the defendants being proved by sufficient oral and documentary evidence, such as marriage certificate, voter list, family card, birth certificates, school certificates etc.?”*

*(b)Whether the judgment and decree passed by the lower appellate court are sustainable in law when it has rendered*



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*perverse findings without considering the oral and documentary evidence in their proper perspective?”*

13.In view of the substantial questions of law framed and the findings recorded by the Courts below, this Court is of the considered view that the petitioners are necessary parties to decide the Suit and no prejudice would be caused, if the petition is allowed. Hence, in the interest of justice, this Court is inclined to allow this petition.

14.Accordingly, this Civil Miscellaneous Petition is allowed.

15.Registry is directed to carry out necessary amendment and list the matter on 13.09.2024.

**23.08.2024**

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