



2023/KER/71558

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR.JUSTICE K. BABU

FRIDAY, THE 17TH DAY OF NOVEMBER 2023 / 26TH KARTHIKA, 1945

RSA NO. 1118 OF 2010

(AGAINST THE JUDGMENT AND DECREE DTD. 29.11.1997 IN OS.NO.

707/1994 OF PRINCIPAL SUB COURT,NORTH PARAVUR

JUDGMENT AND DECREE DATED 29.5.2010 IN AS 166/2002 OF

ADDITIONAL DISTRICT COURT, NORTH PARAVUR)

APPELLANT/RESPONDENT/DEFENDANT:

JOY, S/O.KUNJUVAREETH



BY ADVS.SRI.T.RAMPRASAD UNNI
SRI.RAHUL VENUGOPAL

RESPONDENT/APPELLANT/PLAINTIFF:

MARY, D/O.LATE KUNJUVAREETH



BY ADVS.SRI.DINESH R.SHENOY
SRI.MAHESH MENON

THIS REGULAR SECOND APPEAL HAVING COME UP FOR ADMISSION
ON 17.11.2023, THE COURT ON THE SAME DAY DELIVERED THE
FOLLOWING:



"C.R."

JUDGMENT

This appeal arises from the judgment dated 29.5.2020 passed by the Additional District Court, North Paravur, in A.S.No.166 of 2002. The defendant is the appellant.

2. The plaintiff and defendant are the children of Kunjuvareeth. Kunjuvareeth has another daughter named Annies. The plaintiff schedule property belonged to Kunjuvareed, who died intestate in 1984.

3. The plaintiff instituted a suit for partition as O.S.No.707/1994 before the Principal Subordinate Judge's Court, North Paravur, seeking partition of the plaintiff schedule property.

4. The plaintiff pleaded the following:-

The plaintiff is residing in Madras along with her family. Annies, her sister, had been given a share in the family property when she was married. The plaintiff and defendant are the only persons entitled to share in the plaintiff schedule property in their joint possession and enjoyment.



5. The defendant pleaded as follows:-

The plaintiff has no right over the property. She had already received her share in the family property even during the lifetime of their father. The plaintiff has received Rs.20,000/- in cash and 25 sovereigns of gold ornaments in addition to the usufructuary mortgage regarding a property in favour of herself and her husband. The period fixed for the mortgage was five years. The redemption period was over, and therefore, the plaintiff obtained that property without encumbrance. Hence, the plaintiff cannot claim any share in the property of Kunjuvareeth.

6. The parties went to trial. During the trial, Exts.A1 & A2 were marked on the plaintiff's side, and Ext.B1 was marked on the defendant's side.

7. The trial Court framed the following issues:-

1. Is the suit maintainable?
2. Whether the plaint schedule property is partible?
3. What is the share if any of plaintiff?
4. Whether the plaintiff is entitled to get mesne profits. If so the quantum?
5. Costs and Reliefs.



8. The trial Court dismissed the suit, holding that the plaintiff was not entitled to a share in her father's property as she had already obtained her share in the family property.

9. The Plaintiff challenged the decree and judgment passed by the trial Court in A.S.No.166/2002 before the First Appellate Court. The First Appellate Court decreed the suit, holding that the plaintiff, defendant and Smt.Annies are entitled to 1/3rd share each in the plaint schedule property.

10. The defendant challenges the decree and judgment passed by the First Appellate Court under Section 100 of the CPC in this Regular Second Appeal.

11. After hearing both sides, this Court re-formulated the substantial question of law as follows:-

"Did the non-impleadment of Smt.Annies, one of the daughters of Kunjuvareeth, prevent the Courts below in passing an effective decree as provided in Order 20 Rule 18 of the Code of Civil Procedure?"

12. Heard the learned Senior Counsel appearing for the appellant/defendant Sri.K.Ramakumar and Sri.Dinesh R.Shenoy, the learned counsel appearing for the respondent/plaintiff.



13. The learned counsel for the appellant/defendant contends that the rights of the parties cannot be judicially determined in the absence of the persons interested in contesting them. It is further submitted that allotment of share to Smt. Annies, who is otherwise not entitled to it, without her in the party array, has affected the share the defendant is entitled to. The learned Senior Counsel relied on **Kanakarathanammal v. V.S.Loganatha Mudaliar and Another (AIR 1965 SC 271)** in support of his contention.

14. The learned counsel appearing for the plaintiff contends that non-impleadment of Annies would not affect the decree passed by the First Appellate Court as in a suit for partition, a party interested has the right to be impleaded until the final decree is passed. The learned counsel relied on **Ammini Ammal v. Krishnan and Others (1978 KHC 21)**, **Ollur Bank Ltd. v. Little Flower Bank Ltd. (1954 KHC 104)**, **Pitchai S. v. Ponnammal and Others (2017 KHC 5703)**, and **Ramader Appala Narasinga Rao v. Chunduru Sarada (AIR 1976 Andhra Pradesh 226)** in support of his contention.

15. The parties are Christians. Admittedly, Kunjuvareed, the father of the parties, died intestate in 1984.



16. The foundation of the defendant's pleading is that as the plaintiff and Annies, two daughters of Kujuvareeth, had received "Sthreedhanam" they are not entitled to any share in the property of the intestate. It appears that the defendant's plea is based on the proviso to Section 28 of the Travancore Christian Succession Act, 1092.

17. On the coming into force of Part-B States (Laws) Act, 1951, the Travancore-Christian Succession Act, 1092 stood repealed and Chapter II of Part V of the Indian Succession Act, 1925 became applicable and intestate succession to the property of members of the Indian Christian community in the territories of the erstwhile State of Travancore was thereafter governed by Chapter II of Part V of the Indian Succession Act, 1925 (vide: **Mary Roy & Others v. State of Kerala & Others [1986 KLT 508 (SC)]**).

18. The First Appellate Court found that the plaintiff, defendant and Annies are entitled to 1/3rd share each over the plaint schedule property, holding that the Indian Succession Act, 1925 is applicable to the parties.

19. The fact that Smt.Annies, one of the heirs of Kunjuvareeth, was not a party in the suit came to the notice of the First Appellate Court. The Court held that as Annies has the right to be



impleaded till the final decree is passed, the non-impleadment of Annies is not fatal. Therefore, the First Appellate Court directed partition of the plaint schedule property into three equal shares, 1/3rd each to the plaintiff, defendant and Annies. The learned Senior Counsel submits that non-joinder of Annies is fatal as the entitlement of Annies in the property ought to have been decided based on the pleading that she is not entitled to any share in the property of the intestate. It is pertinent to note that the plaintiff also contends that Annies is not entitled to any share in the property. Her contention is that Annies had been given a share in the family property. In the Second Appeal, the plaintiff sought to admit the decree in O.S.No.282/2003 wherein Annies had prayed for partition of the plaint property, impleading the plaintiff and defendant, and her claim was rejected on the ground that she had obtained property by way of a gift deed as part of a family arrangement. In O.S.No.282 of 2003, the Court held that Annies is estopped from claiming share in the remaining family property, and therefore, her claim for partition was declined. It is submitted that this decree has become final. The defendant's contention becomes more relevant in view of the additional document sought to be admitted by the plaintiff; if Annies was found to be not entitled to any share in the property, the



share allotted to the defendant would have been different.

20. There is a well-founded distinction between necessary parties and proper parties to a suit. The Code of Civil Procedure does not contain any express provision as to who should be considered necessary parties, but it is clear from an examination of the rules of Or.1 of the Code that two conditions must be satisfied so that a party may be considered a necessary party namely; first, there must be a right to some relief against him in respect of the matter involved in the suit and, secondly, his presence is necessary to enable the court, effectually and completely, to adjudicate upon and settle all the questions involved in the suit. A person who is only indirectly or remotely interested is not a necessary party. A person who may be interested in the result of the suit and who may have a right to seek the assistance of the Court in deciding on the point in issue is a proper party in that suit. The absence of a necessary party is a fatal defect, but the absence of a proper party is not.

21. In a partition suit, the Court has, under Or.20, R.18, CPC, first to ascertain judicially who are the persons interested in the land to be partitioned and then in the decree, it has to declare who they are and also what their rights are. It goes to the whole root of the



matter that the entire interest in the property should be ascertained and fixed at the outset. The rights of the parties cannot be judicially determined in the absence of the persons interested in contesting them. The Court is also required to ascertain the property to be partitioned. All persons interested in determining these and other questions that may be raised in a suit for partition are necessary parties. A person who is not interested in the results of the suit or entitled to any share is not a necessary party. Conversely it means that where a person in a suit for partition is interested in its result and is entitled to a share, he must be regarded as a necessary party.

22. In **Kanakarathanammal** (supra), the Constitution Bench of the Supreme Court held that the failure to implead one of the heirs of the deceased who would inherit the property in question makes the suit incompetent. The Constitution Bench further held that if the party who is not joined is not only a proper party but also a necessary party to the suit, the infirmity in the suit is bound to be fatal. I am of the view that this patent defect in the suit cannot be overcome based on the principle declared by this Court in **Ammini Ammal v. Krishnan and Others (1978 KHC 21)** and **Ollur Bank Ltd. v. Little Flower Bank Ltd. (1954 KHC 104)** that even subsequent to the passing of



the final decree a necessary party is entitled to be impleaded. Annies is a necessary party in the suit, being one of the heirs of Kunjuvareed. The fact that Annies was a necessary party was brought to the notice of the Court, which after taking cognizance of that fact, passed a preliminary decree, allotting a share to her, which, according to the defendant, she is not entitled to.

23. I am satisfied that there has been no complete or effectual adjudication of the proceedings, and the irregularity committed by the First Appellate Court has caused material prejudice on that account to the appellant/defendant. An order remanding a proceeding may ordinarily be made when the trial Court has decided the case on a preliminary point, and the appellate court reversed that decision. An order of retrial after remand may also be made in exercise of the inherent jurisdiction of the Court where the Court of Appeal is satisfied that there has been no proper trial or non-adjudication and the irregularity has suffered material prejudice on that account.

24. In the present case, there has not been an effectual adjudication of the proceedings due to the non-impleadment of one of the heirs of the intestate. I hold that the course adopted by the First Appellant Court is illegal. The substantial question of law is answered in



favour of the appellant. The upshot of the discussion is that the matter is liable to be remanded to the First Appellate Court. The decree and judgment passed by the First Appellate Court in A.S.No.166 of 2002 are liable to be set aside.

In the result,

- (i) The appeal is allowed by way of remand.
- (ii) The judgment and decree dated 29.5.2020 in A.S.No.166 of 2002 on the file of the Additional District Court, North Paravur are set aside.
- (iii) The matter is remanded to the First Appellate Court for consideration afresh.
- (iv) The parties are at liberty to make application to implead necessary parties in the proceedings or to adduce additional evidence.
- (5) The First Appellate Court shall complete the proceedings and dispose of the matter as expeditiously as possible, at any rate, within a period of three months from the date scheduled for the appearance of the parties.
- (6) The parties are directed to appear before the First Appellate Court on 4.12.2023.



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- (7) Registry shall transmit the entire lower court records forthwith.
- (8) The parties are directed to bear their costs.
- (9) All Interlocutory Applications pending, if any, stand closed.
- (10) Registry shall return the certified copy of the judgment produced by the respondent as per I.A.No.1 of 2022.

Sd/-
K.BABU
Judge

TKS