

(1922) 11 MAD CK 0022
In the Madras High Court

Mohanavelu Mudaliar

APPELLANT

Vs

Annamalai Mudaliar and Another

RESPONDENT

Date of Decision : 16-11-1922

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 99

Citation : AIR 1923 Mad 337 : (1923) 17 LW 241 : (1923) 44 MLJ 249

Hon'ble Judges : Walter Schwabe, J;Wallace, J

Bench : Full Bench

Judgement

Walter Schwabe, K.C., C.J.—The Chief Justice This is an action by two executors under a will which appointed twelve executors. The will

has been admitted to probate. Three executors have been removed and there are at present nine. Seven have given a power of attorney to the

other two, which in effect authorises the two to execute all the duties of the executors in collecting and managing the estate: but, in my view, that

does not authorise those two executors to sue on behalf of the estate in their own names. It might have been sufficient authority to these two to

take proceedings in the name of the nine. But that is a point which must turn on the construction of the power of attorney and it is unnecessary to

decide it here, because it is not what has been done. Therefore, in my view, this action is wrongfully conceived and must fail for non-joinder of

necessary parties.

2. u/s 99 of the CPC no decree is to be reversed on account of any misjoinder of parties not affecting the merits of the case or of the jurisdiction of

the Court, and it has been held, how far correctly I am not prepared at present to say, that ""misjoinder""in that section includes non-joinder. See

Yakkanath Eacharanunni Valia Kaimal v. Manekkat Vasunni Elaya Kaimal I.L.R. (1909) Mad. 436. But if a defendant is sued by one only of two

persons with whom he has contracted or by one only of two persons who have a joint cause of action against him, he has a right to have the action

dismissed unless the other is joined. This is not merely technical. It may be of great importance, because, as was pointed out in Ramsebuk v.

Ramlal Koondoo I.L.R.(1881) Cal. 815, he ought to be in a position to recover his costs if he succeeds as against all the parties. If there are many

executors some of whom are solvent and some insolvent it might be to the prejudice of the person against whom the estate has some claim that

particular executors should be able to sue him with the result that, if he succeeded and got the suit dismissed with costs, he might find no one

against whom he can execute his decree for costs, and so it is correctly stated in Woodroffe and Amir Ali's Code of Civil Procedure, Second

Edition, at page 543, that if the defendant takes the objection at a proper time it is his right to have all the proper persons joined as plaintiffs, and if,

after the objection has been raised, the plaintiff proceeds with the suit without taking steps to add the person or persons whose non-joinder has

been objected to, and the Court finds that the objection is well founded, the suit must be dismissed. In this case the objection was taken at the

earliest stage in the written statement. It was argued before the District Munsif and before the District Judge, and both those tribunals held, and in

my view wrongly, that these two executors by reason of the power of attorney could sue in their own names without joining the other. No

application was made to either of those Courts to amend the plaint by joining the other executors but, probably if an application had been made to

the District Munsif he would have permitted such amendment on terms as to costs. The position of the District Judge might have been more

difficult, although there too the position is not so difficult as it is in the High Court on second appeal, where one is conscious of the working of the

rule against appeals on questions of fact, because if we allow the amendment now, it might put the defendants in a worse position than they would

have been if the amendment had been allowed in the first instance: and that may be the defendant's objection to further plaintiffs being added at this

stage even if the consent of these proposed plaintiffs were obtained. I think there is no course open to us but to dismiss the suit with costs of both

defendants here and in the Courts below two sets. The appeal will be allowed with two sets of costs one to the appellant and the other to the

second respondent, payable by the first respondent. The first respondent's memorandum of objections must be dismissed and the second

respondent's memo of objections must be allowed both without costs.

Wallace, J.

3. I agree and have nothing to add.