

(1923) 04 MAD CK 0034
In the Madras High Court

Pakkiri Kanni

APPELLANT

Vs

Haji Mohammad Manjoor Saheb by Agent Habibulla Saheb

RESPONDENT

Date of Decision : 11-04-1923

Acts Referred:

Citation : AIR 1924 Mad 124 : (1923) ILR (Mad) 844 : 75 Ind. Cas. 334 :
(1923) 18 LW 345 : (1923) 45 MLJ 321

Judgement

1. Objection has first been taken to the lower appellate Court's findings that two items of common property are available for partition but are not

referred to in the plaint. Those findings are findings of fact; and we have not been shown any ground on which we can interfere with them in second appeal.

2. The second appeal is then argued against the lower appellate Court's order remanding the suit with a direction to the District Munsif to give the

plaintiff an opportunity to amend his plaint by including a prayer for relief in respect of the properties just referred to and other properties if any left

by the deceased, and in case he does not so amend to dismiss the suit. We have not been shown any direct authority that a suit for partition of

common property, not joint property, is liable to dismissal on the ground that all the joint property, in respect of which it might have been brought,

has not been included. Shortly we have not been shown that the objection founded on what is usually described as the plea of partial partition is

available when a suit for division of common property not joint property is in question.

3. It is true that in Mahomed Fuzlur Rahman v. Mahomed Fazzur Rahman Chowdhury (1911) 15 C.W.N. 677, Moideensa Rowther v. Mahomed

Kasim Rowthen (1915) 289 C. 895 and Korumbakkat Parkum Vengalasheri Moidin Kutti Vs. Thuniyilandiyl Mariamumma and Others, , an

opinion was expressed against the expediency of suits for partition of common property, in which the whole of the property available for partition

was not included. But we have not been shown any decision that such suits are actually unsustainable and we are not prepared to hold that they are

so. It is, we may point out, always open to the defendant in such a case as the present, if he thinks himself prejudiced by the exclusion of any

property, himself to bring a suit in respect of it and have it tried with the suit already pending. Taking this view we must allow the appeal to the

extent that we set aside the lower appellate Court's order and direct it to dispose of the appeal in the light of the foregoing and with reference to

the District Munsif's findings on the issues. Costs in this Court will be costs in the cause and will be provided for by the lower appellate Court in

the decree to be passed.

This case coming on for hearing again on the nth April 1923, on being posted to be spoken to, the Court delivered the following

ORDER

1. It is pointed out to us that the additional Sub-Court of Tanjore, from which this appeal came has been abolished in consequence of the

bifurcation of the district into Tanjore East and Tanjore West for judicial purposes and that therefore our order of remand to the lower appellate

Court requires explanation. So far as we can ascertain, the District Court of Tanjore East now exercises appellate jurisdiction over Tiruthuraipundi

District Munsif's Court to which this case belongs. The remand must therefore be to the District Court of Tanjore East, and our orders must be

read accordingly.