

(1992) 10 MAD CK 0009
In the Madras High Court

Pe. Ramasamy Thevar		APPELLANT
	Vs	
Perumal Thevar and Others		RESPONDENT

Date of Decision : 16-10-1992

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 99

Citation : (1993) 1 MLJ 423

Hon'ble Judges : Thangamani, J

Bench : Division Bench

Judgement

Thangamani, J.—The respondents are the plaintiffs in the trial court. They instituted O.S. No. 464 of 1977 of the file of the District Munsif of

Periyakulam for a declaration that the respondents 1 to 7 are entitled to suit items 1 to 7 respectively and that the 8th respondent has right in suit

item No. 8 on the basis of an Othi and for consequential permanent injunction. Respondents 1 to 5 claimed title relying on the settlement deeds

Exs.A-10, A-13, A-1, A-6 and A-3 respectively dated 25.5.1967 executed by the appellant/defendant. The 6th and 7th respondents based their

claims on Ex.A-15, dated 5.7.1971 and Ex.A-19, dated 25.11.1967 the sale agreements respectively executed by the appellant. The 8th

respondent as P.W. 8 deposed that he was in possession of the 8th item as per an oral Othi entered into between himself and the appellant. The

trial court though found title in favour of respondents 1 to 5 took the view that possession did not remain with them in respect of the respective suit

items on the date of suit. It also found that respondents 6,7 and 8 had no right in respect of items 6 to 8 and these respondents failed to prove that

they were in possession on the date of suit. While the judgment was delivered on 7.11.1979, on the previous day 6.11.1979 two additional issues

were framed suo moto on mis-joinder of parties and maintainability of the suit. The parties were not put on notice regarding framing of the

Additional issues and argument was also not heard on this aspect. After discussion the trial court took the view that there was mis-joinder of

parties and the suit as framed was not maintainable in law. Accordingly it dismissed the suit with costs.

2. The present respondents/plaintiffs took up the matter in appeal before the Principal Sub-Judge, Dindigul, in A.S. No. 160 of 1979 on his file.

The lower appellate court held that it had no reason to differ from the findings of the learned District Munsif, the plaintiffs 6 to 8 have not

established their possession of items 6 to 8 of the suit properties. The findings of the learned District Munsif, regarding title to suit items 1 to 5 in

favour of present respondents 1 to 5 were not challenged before the lower appellate court and they were upheld. The lower appellate court

however, took the view that respondents 1 to 5 were in enjoyment of suit items 1 to 5 on the date of plaint. Accordingly it reversed the judgment

and decree of the trial court on this aspect and decreed the suit in favour of present respondents 1 to 5 granting declaration and injunction in

respect of the said items. It dismissed the appeal by present respondents 6 to 8 in respect of suit items 6 to 8. The learned Principal Sub Judge

also held that the respondents/plaintiffs are entitled to file a single suit against the appellant and that even assuming that there were misjoinder of

parties, the decree could not be reversed or substantially varied in appeal u/s 99 of the Code of Civil Procedure. While this second appeal has

been preferred by the defendant in the suit against the said findings, the plaintiffs have come forward with cross objection against the non-suiting of

plaintiffs 6 to 8.

3. Both the courts below have found as a matter of fact that title to the suit items 1 to 5 vested with present respondents 1 to 5 respectively and

this has become final. The first respondent herein relied on Exs.A-11 and A-12 kist receipts for faslis 1385 and 1386 to prove his possession on

the date of suit. While the second respondent pressed into service Ex. A-14 kist receipt for fasli 1385, the third respondent relied on Exs.A-33

and A-34 kist receipts for faslis 1386 and 1387 to prove their enjoyment. The fourth respondent has paid kist under Exs.A-7 to A-9 for faslis

1387, 1386 and 1385. The fifth respondent has paid kist under Exs.A-4, A-5 and A-35 for faslis 1387, 1386 and 1385. And the evidence of

P.W. 9 Village Munsif discloses that these kist receipts relate to the suit items. The appellant also as D. W.3 conceded that the kist receipt

produced by the respondents/plaintiffs are in respect of suit properties. Further the settlement deeds executed by the appellant herein in favour of

the respondents recite that the donees were put in possession of the respective properties on that date. Instead there is no document on the side of

the appellant to prove his actual enjoyment of the properties subsequent to the settlement deeds. So the lower appellate court has rightly held that

respondents 1 to 5 were in possession of their respective items on the date of plaint.

4. Admittedly plaintiffs 6 and 7 did not get any sale deeds executed in their favour pursuant to the alleged sale agreements Ex.A-15 dated

5.7.1971 and Ex.A-19 dated 25.11.1967 respectively. The claim of the 8th plaintiff was based only on an oral Othi and so both the Courts below

have rightly negated their title to the suit items 6 to 8. The conclusion of the trial court on this aspect was not challenged even before the lower

appellate court. Evidently there is no merit in their cross-objections.

5. The substantial questions of law framed in this second appeal are as under:

1. Whether the suit as framed for declaration of title and a consequential injunction in respect of different items of properties by different persons

on different causes of action who have no common interest in the suit property is maintainable?

2. Whether the suit is bad for misjoinder of parties?

3. Whether the first appellate court can invoke Section 99, C.P.C., in a suit in which the trial court has considered and found that the suit is bad for

non-joinder of parties?

6. The learned Counsel for the appellant assailed the granting of decree by the learned Sub-Judge in favour of respondents 1 to 5 in respect of suit

items 1 to 5 respectively mainly on the ground that a single suit for all the reliefs claimed does not lie. He submitted that the subject matters and

parties in this action are completely different from one another and all the remedies asked for could not be combined in one suit. The lower

appellate court ought to have held that the suit as framed is not maintainable

and it is bad for misjoinder of parties. Respondents 1 to 5 have claimed their title over the first five items of the suit properties by virtue of the five settlement deeds Exs.A-1, A-3, A-6, A-10 and A-13, dated 25.5.1967 respectively. The 6th and 7th respondents based their reliefs on the strength of sale agreements Ex.A-15, dated 5.7.1971 and Ex.A-19, dated 25.11.1967. The 8th respondent claimed right pursuant to an oral Othi. So different reliefs in respect of different properties by virtue of different transactions which took place on different dates are claimed by the respondents. The respondents have not instituted the suit for bare injunction. They have asked for declaration of title. So the origin of cause of action is execution of the settlement deeds. There is nothing in common as far as the respondents are concerned. In the absence of any common factor among them, they could not have joined in instituting one suit. The learned Counsel for the appellant also raised an additional plea during his arguments in this second appeal that the suit is bad for misjoinder of cause of action.

7. However, as it has been rightly contended by the learned Counsel for the respondents, there are no averments in the written statement regarding the misjoinder of parties and cause of action. When the issues were settled on 6.7.1978, no issue was framed on misjoinder of parties. But on 6.11.1979 the trial court framed an additional issue on misjoinder of parties and the judgment was pronounced on 7.11.1979. After arguments were over, the additional issues were framed suo moto by the trial court. The respondents/plaintiffs were not put on notice of the framing of these issues. The judgment of the trial court does not indicate that any arguments were advanced by the parties on this aspect. O.I, Rule 1, C.P.C. reads that "all persons may be joined in one suit as plaintiffs in whom any right to relief in respect of or arising out of the same act or transaction or series of acts or transactions is alleged to exist, whether jointly, severally or in the alternative, where if such persons brought separate suits, any common question of law or fact would arise". But under O.I, Rule 9, C.P.C., "no suit shall be defeated by reason of the misjoinder 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 :

Provided that nothing in this rule shall apply to non-joinder, of a necessary

party". Under Order 1, Rule 13, C.P.C., "all objections on the ground of non-joinder or misjoinder of parties shall be taken at the earliest possible opportunity and, in all cases where issue are settled, at or before such settlement, unless the ground of objection has subsequently arisen, and any such objection not so taken shall be deemed to have been waived".

Under Order 2, Rule 7, C.P.C. "all objections on the ground of misjoinder of causes of action shall be taken at the earliest possible opportunity,

and, in all cases where issues are settled, at or before such settlement, unless the ground of objection has subsequently arisen, and any such

objection not so taken shall be deemed to have been waived". A reading of the above said provisions would make it clear that in the absence of

any plea in the written statement on the misjoinder of parties and misjoinder of cause of action, the trial court was not within its limits in framing

issues on this aspect of its own accord and non-suiting the plaintiffs on the ground of misjoinder of parties. On the failure of the appellant to raise

any objection regarding misjoinder of parties and cause of action before settlement of issues, the objection must be deemed to have been waived.

In *Srinivasan v. Subramaniam* (1965)2 M.L.J. 502, a single Judge of this Court refused to permit the revision petitioner to succeed on a plea of

misjoinder of cause of action, which he had not chosen to put forward at any earliest stage of that proceeding. In *Setu Madhavrao Vs. Food*

Corporation of India, . Held that the provisions of O.I, Rule 13 of the CPC are mandatory. They provide that if such objection was not taken, it

shall be deemed to have been waived. They must be taken at the earliest possible opportunity and they must be taken in all cases where issues

were settled at or before such settlement, unless the ground of objection has arisen subsequently thereto. The lower appellate court has also held

that even assuming that there is misjoinder of plaintiffs, the decree cannot be reversed or substantially varied in appeal if it does not affect the merit

of the case u/s 99 of the Code of Civil Procedure. This section lays down that no decree shall be reversed or substantially varied, nor shall any

case be remanded in appeal on account of any misjoinder or non-joinder of parties or causes of action or any error, defect or irregularity in any

proceedings in the suit, not affecting the merits of the case or the jurisdiction of the court. It is the argument of the learned Counsel for the appellant

that the first appellate court could not have invoked this Section 99, C.P.C., in a suit in which the trial court had found that it was bad for misjoinder of parties. But, it does not appear that there is any substance in this claim. In any event in view of the provisions of Order 1, Rule 13 which I have already extracted, there is no necessity to invoke Section 99 of the C.P.C. 8. In the result, the second appeal and cross objections are dismissed and in the circumstances without costs.