

(1995) 07 KAR CK 0066

In the Karnataka High Court

Case No : Regular Second Appeal No. 652 of 1981

Sandur Noorsab (Since deceased) by LR.s. and Others	APPELLANT
Vs	
H. Abdul Basith Sab (Since deceased) by LR.s. and Others	RESPONDENT

Date of Decision : 14-07-1995

Acts Referred:

Citation : (1995) 07 KAR CK 0066

Hon'ble Judges : A.B. Murgod, J

Bench : Single Bench

Advocate : K.S. Savanur and Mr. K.B. Adhyapak, for the Appellant; H. Rangavittalachar for Respondent-1 (v to xi), for the Respondent

Final Decision : Dismissed

Judgement

A.B. Murgod, J.—This second appeal is directed against the judgment and decree dated 15-12-1980 passed in Regular Appeal No.70 of 1978 on the file of the learned Civil Judge, Hospet confirming the judgment and decree dated 3-2-1976 passed in Original Suit No. 189 of 1971 on the file of the learned Principal Munsiff, Hospet.

2. Original Suit No. 189 of 1971 was filed by the appellants-plaintiffs for the following relief's:-

1. declaring the title of the plaintiffs in the plaint "B" schedule property described by letters EB and FD in the plan attached to the plaint;
2. for ordering vacant possession after removal of all the structures put up by the respondent in the "B" schedule portion of the plot described by letters EB and FD in the plan attached to the plaint.
3. The averments in the plaint were that appellants 1 and 2 and their brother Sandur Hussain Sab had jointly purchased the plaint schedule property from its owner Digambara Rao on 1-3-1958 for a sum of Rs.200/-. Appellants averred that said plaint schedule plot was lying vacant and on the request of the

defendant-respondent Dr. H. Abdul Basith Sab, Sandur Hussain Sab had permitted him to put-up a shed in the eastern half portion on the undertaking that he would vacate whenever demanded and accordingly the defendant was let in the premises. Appellants averred that about three years prior to the filing of the suit, Sandur Hussain Sab died and his son Sandur Pakeer Ahamed Sab third plaintiff became the joint owner of the plot along with appellants 1 and 2. They further averred that their request to vacate and hand over possession of the premises was not conceded to by the defendant and hence the suit.

4. The suit was resisted on the grounds among others that defendant Abdul Basith Sab was in possession of the property in his own right and that the suit was bad for non-joinder of necessary parties. According to him, Sandur Dodda Hussain Sab, the eldest brother of the appellants 1 and 2 had died leaving behind him his only son Sandur Jatka Kasim Sab and he was a necessary party. It was also contended that Sandur Sanna Hussain Sab the father of third appellant had died leaving behind him his widow and one more son by name Sandur Ismail Sab and two daughters Jamclabi and Banubi in addition to third plaintiff and they were also necessary parties. It is so contended in para 11 of the written statement.

5. Among other issues, the Trial Court framed issues relating to title and suit being bad for non-joinder of necessary parties as contended in paragraph 11 of the written statement.

6. The Trial Court after considering the evidence placed on record and the arguments advanced by the contesting parties held against the appellants on the point of title but had however held in favour of the appellants on the point of maintainability of the suit for not impleading necessary parties as contended in para 11 of the written statement. In the result the Trial Court dismissed the suit. On appeal, the learned Civil Judge took up for consideration the question of suit being bad for non-joinder of necessary parties and after hearing the parties on that issue only reversed the finding of the Trial Court and held that in the absence of the son, daughters and widow of Sandur Hussain Sab, the brother of appellants 1 and 2 as co-plaintiffs, the suit was not maintainable and on that count alone he proceeded to dismiss the appeal.

7. This Court while admitting the appeal framed the following substantial question of law for consideration:-

Whether the Court-below has erred in affirming the decree of the Trial Court dismissing the plaintiffs suit mainly on the ground of non-joinder of necessary parties ?

8. The Counsel on both sides have been heard at length on the above substantial question of law. The learned Counsel Sri K.S. Savdnur for the appellants contended that the suit of the appellants was one for ejectment and one co-owner even in the absence of other co-owners can maintain a suit for eviction against a trespasser. The learned Counsel further contended that there is nothing

wrong in the averments in the plaint that appellants 1 and 2 with the son of Sandur Hussain Sab have become joint owners of the plot after the death of Sandur Hussain Sab. It was also urged that out of the three original owners appellants 1 and 2 are there as plaintiffs and in the place of Sandur Hussain Sab his son the third plaintiff represents his branch and therefore there is full and proper representation of all the owners of the plot and therefore the lower Appellate Court is not right in finding against the appellants on their failure to implead the other son and daughters and the widow Of Sandur Hussain Sab. It was pointed out further that in the pleadings as found in the plaint, there is no title set up to the exclusion of the other son, daughters and widow of Sandur Hussain Sab and that according to the learned Counsel is the distinguishing feature of this case and the suit so filed is for the benefit of all the heirs of Sandur Hussain Sab and therefore the learned Counsel urged that the decision of the lower Appellate Court needs to be reversed. In this behalf he relied on certain decisions which will be considered a little later.

9. In reply the learned Counsel Sri H. Rangavittalachar for the contesting respondents contended that the decisions relied on by the appellants" are not applicable to the facts of the present case and according to him there is nothing in the plaint to indicate that the suit is for and on behalf of all the heirs of Sandur Hussain Sab and since the appellants have sought for the relief of declaration of title for themselves, granting of such relief by the Court would, according to him, imply denial of title of other heirs of Sandur Hussain Sab and therefore the suit suffers from the defect of non-joinder of necessary parties and he therefore urged for confirming the decision of the lower Appellate Court on that point.

10. The decisions relied on by the learned Counsel for the appellants are:- (1) Kenchappa v. Sayed Dawood and Others, 1963(2) Mys.L.J. 31 (2) Shivangouda v. Gangawwa, 1966(2) Mys.L.J. 148 and (3) Rajabibi and Others v. S. Ameerali and Another, 1974(1) Kar.L.J. 320: AIR 1974 Kar. 115.

11. In the first decision of Kenchappa's case, supra this Court has ruled that one of several co-owners can recover possession from a trespasser without impleading the other coparceners. However the Court proceeded to observe that different considerations may arise in cases relating to eviction of tenants by one of several landlords

12. In Shivanagouda's case, supra, it was a suit by one of the co-owners against a trespasser. On page 149 of the report the Court has observed as under -

There is a catena of decisions which have taken the view that one of the co-owners can bring a suit for ejecting a trespasser from the property owned by him and others either jointly or as co-owners, the basis being that he has a right to hold every inch of the joint property until a division takes place. The judicial opinion on this point is uniform.

In this decision this Court considered the decision of the Supreme Court in Kanakarathanammal Vs. V.S. Loganatha Mudaliar and Another, and distinguished

it on facts. The decision in Kanakarathanammal's case, *supra*, is heavily relied on by Sri H. Rangavittalachar, the learned Counsel for the respondent in this case. The decision no doubt supports his contention.

13. In Shivanagouda's case, *supra*, this Court distinguished Kanakarathanammal's case, *supra*, on facts by stating that the plaintiff therein had claimed that she was exclusively entitled to the suit property and she had repudiated the right of the other co-sharers and the Court understood her claim as being that so far as the properties in that suit were concerned, she was alone entitled to the same and that her brothers had no right in them. The Supreme Court observed that such a contention could not be upheld in the absence of the other co-sharers.

14. In the case on hand a perusal of the plaint averments shows that the appellants 1 and 2 with the only son of Sandur Hussain Sab impleaded as third appellant wanted a declaration by the Court that they were the owners of the plaint schedule property. There is nothing in the entire plaint to indicate that they had instituted the suit for and on behalf of other co-owners or heirs of Sandur Hussain Sab. In the absence of such an averment in the plaint when the appellants wanted a declaration of their title to the suit property to the exclusion of others, the contention of the learned Counsel for the respondent that they are seeking a declaration of title in themselves and grant of which would by implication exclude the right in other co-sharers is obvious and needs to be upheld. The learned Counsel for the appellants at this stage referred to Rajabibi's case, *supra*, in which the contention that the suit was bad for non-joinder of necessary parties had been raised for the first time in the second appeal and the Court had upheld that contention and it was ordered that it would be in the interest of justice to send back the matter to the Trial Court for giving an opportunity to the plaintiff to amend the plaint within the given time.

15. In the present case the learned Counsel for the respondent submitted that the ratio in Rajabibi's case is not applicable for the reason that unlike in Rajabibi's case the failure of the appellants to implead the co-sharers of third appellant has been specifically contended as an omission in the written statement and in spite of that the appellants had failed to implead them by making an application not only before the Trial Court but also before the lower Appellate Court but such an application has been made by the appellants before this Court on 4-4-1981.

16. In Kanakarathanammal's case, *supra*, when such an application was made before the Supreme Court, the Supreme Court observed as under-

It is unfortunate that the appellant's claim has to be rejected on the ground that she failed to implead her two brothers to her suit, though on the merits we have found that the property claimed by her in her present suit belonged to her mother and she is one of three heirs on whom the said property devolves by succession u/s 12 of the Act. That, in fact, is the conclusion which the Trial Court

had reached and yet no action was taken by the appellant to bring the necessary parties on the record. It is true that under Order 1, Rule of the CPC no suit shall be defeated by reason of the misjoinder or non-joinder of the parties, but there can be no doubt that if the parties who are not joined are not only proper but also necessary parties to it, the infirmity in the suit is bound to be fatal. Even in such cases, the Court can under Order 1, Rule 10, sub-rule (2) direct the necessary parties to be joined, but all this can and should be done at the stage of trial and that too without prejudice to the said parties' plea of limitation. Once it is held that the appellant's two brothers are co-heirs with her in respect of the properties left intestate by their mother, the present suit filed by the appellant partakes of the character of a suit for partition and in such a suit clearly the appellant alone would not be entitled to claim any relief against the respondents. The estate can be represented only when all the three heirs are before the Court. If the appellant persisted in proceedings with the suit on the basis that she was exclusively entitled to the suit property, she took the risk and it is now too late to allow her to rectify the mistake". In AIR 1931 229 (Privy Council) the Privy Council had to deal with a similar situation. In the suit from which that appeal arose, the plaintiff had failed to implead co-mortgagors and persisted in not joining them despite the pleas taken by the defendants that the co-mortgagors were necessary parties and in the end, it was urged on his behalf that the said co-mortgagors should be allowed to be impleaded before the Privy Council. In support of this plea, reliance was placed on the provisions of Order 1, Rule 9 of the Code. In rejecting the said prayer, Sir George Lowndes who spoke for the Board observed that "they are unable to hold that the said rule has any application to an appeal before the Board in a case where the defect has been brought to the notice of the party concerned from the very outset of the proceedings and he has had ample opportunity of remedying it in India.

17. In the result, the appeal fails and is dismissed. The appellant has been granted special leave to file this appeal as a pauper. In the circumstances of this case, however, we direct that she need not pay the Court fee which she would have had to pay if she had not been allowed to appeal as a pauper. There would be no order as to costs throughout". It is therefore obvious that as held by the Supreme Court such an application should have been made in the Trial Court and when such an application is made it is always subject to the law of limitation. Filing of such an application in this Court long after the limitation period will not advance the cause of justice and in that view that application cannot be allowed at this late stage. Therefore for the reasons stated above, the question of law is answered holding that the suit filed without impleading the co-sharers of the third appellant namely the brother, the sisters and the mother of the third appellant, is bad and not maintainable and the decree made by the lower Appellate Court is confirmed and the appeal is dismissed. Parties to bear their own costs.