
(1921) 12 MAD CK 0018
In the Madras High Court

Thina Shanmuga Moopanar

APPELLANT

Vs

Mona Chuna Nana Subbayya Moopanar and Another

RESPONDENT

Date of Decision : 07-12-1921

Acts Referred:

Transfer of Property Act, 1882 — Section 91

Citation : AIR 1922 Mad 317 : (1922) 15 LW 283 : (1922) 42 MLJ 133

Hon'ble Judges : Spencer, J;Ramesam, J

Bench : Full Bench

Judgement

Spencer, J.—The two plaintiffs brought this suit (O. S. No. 6 of 1919) to recover properties forming the endowments attached to a temple.

2. They based their claim for possession upon their right as trustees in sole management of the trust. The lower Court found that the 1st plaintiff had

no right to call himself a trustee, and although it found that the trust was vested in one other person besides the 2nd plaintiff, namely in Papayya

alias Subbayya who was not made a party to the suit, it gave the 2nd plaintiff a decree for ejecting the defendant. It is argued in appeal that the suit

was bad for non-joinder of Papayya and should have been dismissed.

3. Under the original trust deed (Ex.-A) five trustees were appointed and their names were, 1. Ramalinga Moopanar, 2. Nallamuthu Moopanar, 3.

Veerabhagu Moopanar, 4. Chokkalinga Moopanar, 5. Subbayya alia Papayya Moopanar and it was provided that on the death of any trustee his

eldest male son was to carry on the trust provided that he was willing and competent, or failing him, a competent and willing member of the same

family might be appointed by the surviving trustees, or failing such a person, then any unobjectionable person from the same community.

4. Of the above 5 trustees No. 5 dropped out, Nos. 1, 2 and 4 died and the plaintiff alleged in his plaint that No. 3 never accepted office and that

his place was vacant. The 2nd plaintiff is the son of No. 2. and the 1st plaintiff claimed to be a trustee as nephew of No. 4, who died issueless, but

there was not found to be any record of 1st plaintiff's appointment and the Subordinate Judge consequently refused to make a decree in his

favour. No. 1 left a son Arumugha Moopanar who, by his will appointed the defendant Shanmugha Moopanar, Manager of the trust properties.

Arumugha Moopanar left a minor son Subbayya alias Papayya Moopanar whose guardian defendant was and who has since attained majority. It

is owing to the non-joinder of this guardian of Ramalinga Moopanar that the suit is argued to be incompetent. The Subordinate Judge conceded

that the failure to add this person at least as a defendant was a point to be considered, but he got over the difficulty by saying that Papayya had not

cared to come forward to press his claims and that as the defendant was a mere trespasser in the eye of the law, it was for the interest of the

institution that the suit should not be dismissed. Accordingly he pronounced judgment in favour of the 2nd plaintiff alone, observing that he would

hold the decree for the benefit of all the trustees.

5. There is no question to my mind that Papayya alias Subbayya ought to have been made a party to this suit. The only question is whether the 2nd

plaintiff should be allowed at this stage to amend his plaint and to bring papayya on the record as a defendant if he will not join him as a plaintiff or

whether the suit should be dismissed. It is not now contended that Papayya is not a trustee, the lower court's finding that he was never really

removed from office being allowed to go unchallenged in appeal.

6. The general rule is that if several persons have a joint right of action all must join in suing. If any of them will not come in as plaintiffs, they must

be added as defendants.

7. Order 1, Rule 8, C.P.C. which provides for representative suits, and Section 14 of Act XX of 1863 which provides for worshippers, who have

got the sanction of the District Court, singly instituting suits against trustees or managers of religious institutions for misfeasance or neglect of duty

form exceptions to this general rule.

8. Other exceptions are that under-Section 91 of the Transfer of Property Act any

person interested in or having a charge over property may bring a suit for redemption of a mortgage and that a tenant-in-common may sue a wrong-doer upon a tort without joining other injured persons (See *Mahabala Bhatta v. Kunhanna Bhatta* 8 M.L.J. 139) But co-trustees stand upon a higher footing even than joint owners and joint contractors as regards indivisibility of interest. All form as it were one collective trustee and they must exercise the powers of their office in their joint capacity and they cannot act separately (vide *Kokilasari Dasi v. Mohuni Rudranand Goswami* (1906) 5 Cal. L.J. 527) As their interests are joint and indivisible, it was pointed out in *Kunhan v. Moorthi* 20 M.L.J. 951 that it is not competent to some of the trustees, or even the majority to institute a suit without mutual consultation and after the majority have signified their will. As that was a suit for redemption it was finally held that the court was not bound to dismiss it on account of the plaintiff's failure to consult his co-trustees or to make them co-plaintiffs. In *Rajendranath Dutt v. Sheikh Muhammad Lal* I.L.R.(1881) Cal. 42 where three out of 4 joint shebaitis omitted to join the 4th shebait in their suit to recover alienated property, the Privy Council thought that the proper course was to dismiss the suit the reason for so doing being that in the opinion of their Lordships those plaintiffs were acting from motives personal to themselves and sought to recover the property for their own benefit alone. In *Kokilasari Dasi v. Mohunt Rudranand Goswami* (1906) 5 Cal. L.J. 527 it would have been necessary to amend the plaint so as to convert a suit for ejectment and mesne profits inconsistent with redemption into a suit for redemption and the learned judges refused to give leave to the plaintiff to do that and dismissed the suit. In *K.P. Kanna Pisharody v. V.M. Narayanan Somayajipad* I.L.R. (1881) M. 234 the other members were added and the suit was returned to the Court of first instance for the amendment of the plaint, as such an indulgence appeared to be warranted by the previous conduct of the parties. In *Narayanan v. Lakshmanan* 28 M.L.J. 571 the co-trustees were joined as defendants as their title was admitted by the plaintiffs at the trial before a decree was passed in favour of all the trustees. In the case before us no petition to add Papayya was brought to the notice of the Subordinate judge till after he had pronounced judgment.

9. It seems to me that, apart from the provision in Order 1, Rule 9 that no suit

shall be defeated by reason of the misjoinder or non-joinder of parties, which is a rule of procedure, it is a matter for the Court's discretion whether it will allow parties to be added at a late stage, as in appeal, when to do so will necessitate an amendment of the plaint and owing to the character of the suit being changed, a recasting of the issues for the determination of the new questions of fact that must arise out of the amendment. Now this appeal having been adjourned to enable the despondent to ascertain if Papayya is willing to join in the prosecution of respondent's claim, Papayya has appeared by vakil before us and expressed his unwillingness to be made a plaintiff. We have also a petition from one Arunachala Moopanar who says he is the son of Veerabhagu Moopanar the 3rd trustee and denies the assertion in the plaint that his father did not accept office.

10. Although it is open to us to dismiss the suit, we have the interests of the institution to consider, and therefore I think that the proper course and the course we should take in the proper exercise of our discretion in these circumstances is to set aside the lower Court's decree, to direct that Papayya and Arunachalla Moopanar be added as defendants and to send the case back to the Court of first instance to be retried after receiving the written statements of the newly added defendants and after recasting the issues in such a manner as may be necessary. The appellant's costs in this appeal (Appeal No. 128 of 1920) will be paid by the 1st respondent and the first respondent will bear his own costs in the appeal. The appellant's costs in the lower court up to date will be paid by the 1st respondent and will be provided for in the revised decree. The memorandum of objections is dismissed without costs.

11. This disposes also of Appeal 168 of 1920. The costs of the appellant and 1st and 2nd respondents in this appeal will abide, follow the result and be provided for in the revised decree.

12. Appellants in the two appeals are entitled to the refund of stamp duty on their appeals.

Ramesam, J.

I concur; but I wish to add a few words with reference to a contention of Mr. Ramachandra Aiyar the learned vakil for the respondent. He argued that, whatever may be the law as to the joinder of trustees the appeal can now

proceed without Papayya and he relied on (1) Order 1, Rule 9 and (2) Section 99 of the Civil Procedure Code.

1. So far as Order 1, Rule 9 is concerned I think it enacts a rule of procedure and it cannot affect rules of substantive law. (Such as, for example, the rule of Hindu Law that all the members of a joint family must be parties to a suit for partition and the rule of the Law of Trusts that all the trustees must act together). It means that, however much it may be convenient or desirable to add parties, the suit need not be dismissed, if it is possible to deal with the matter in controversy so far as regards the rights and interests of the parties actually before it. It cannot affect any rule of substantive law that the suit cannot proceed without other parties. The observations in *Mahabala Bhatta v. Kunhanna Bhatta* 8 M.L.J. 139 are also relied on. They only show that the absent party can be added and the suit can proceed after such addition. In this sense, it is true that the suit need not be dismissed, but it does not follow from them that the suit can proceed without the necessary parties.

2. As to Section 99, C.P. Code the case in *Yakkanath Eachara Unni Valia Kaimal v. Manakkat Vasunni Elaya Kaimal* ILR (1909) Mad. 136 is relied on. With all deference to the learned judges, I am unable to agree with the observations on this section in that case. White, C. J. says. "It is contended that Section 99 speaks only of misjoinder of parties or causes of action. But it has been held by this Court in *Mahabala Bhatta v. Kunhanna Bhatta* 8 M.L.J. 139 for the purposes of construing the section to which the present Section 99 corresponds that the word "misjoinder" includes non-joinder." Now the section of the old code corresponding to Section 99 of the present code is Section 578 which was never referred to or considered in *Mahabala Bhatta v. Kunhanna Bhatta* 8 M.L.J. 139. In that case it was said that the word "misjoinder" in Section 31 of the old code included non-joinder, and to arrive at this conclusion, resort was had to Order XVI, Rule 13 of the Supreme Court Rules (in its earlier form) and the decisions thereon a method of reasoning which is now unnecessary, seeing that the word "mis-joinder" is now added in Order 1, Rule 9 (corresponding to Section 31 of the old Code.) Not only does it not follow that the word "misjoinder" in Section 99 should include "non-joinder" but it is clear to me that it should not, seeing that the legislature added

the word " non-joinder" to" misjoinder" in Order I, Rule 9 but omitted to do so in Section 99. The language of Krishnaswami Aiyar J. ""Therefore Section 99 of the present CPC would seem to be sufficient to dispose of the objection"" is very indefinite.

It seems to me that objections as to nonjoinder, if taken at the earliest opportunity under Order I, Rule 13 fall under to classes.

1. If it is absolutely necessary to have the absent party, he ought to be added unless the plaintiff refuses to add him when the suit should be

dismissed. If the trial court erroneously proceeds with the suit, without following either of these courses, the objection can be repeated in appeal

when again, it may be disposed of only in the above said two ways. The present appeal fails under this heading.

2. If it is not a case of imperative necessity but only a matter of convenience or expediency either the absent party may be added or the suit may be

tried without him (O. 1, Rule 9). In such a case the objection if repeated in appeal may be dealt with similarly.

I agree with the order proposed by my learned brother.