

(1985) 03 KL CK 0021

High Court Of Kerala

Case No: C.R.P. No. 1806 of 1993

Ayyappan Chellappan

APPELLANT

Vs

Ayyappan Thankappan

RESPONDENT

Date of Decision: March 1, 1985

Acts Referred:

- Civil Procedure Code, 1908 (CPC) - Order 1 Rule 1 , Order 1 Rule 3, Order 1 Rule 4, Order 1 Rule 5, Order 2 Rule 3

Hon'ble Judges: P.A. Mohammed, J

Bench: Single Bench

Advocate: K.K. John, for the Appellant; P.S. Krishna Pillai, for the Respondent

Final Decision: Allowed

Judgement

@JUDGMENTTAG-ORDER

P.A. Mohammed, J.

The suit involved in this revision petition is one for partition and also for setting aside a partition deed relating to plaint-schedule items 1 and 2. The first Defendant is the revision Petitioner and the Plaintiff is the Respondent. The revision is against an order of the Court below on a preliminary issue namely, "whether the suit is bad for misjoinder of parties and misjoinder of causes of action."

2. The facts are concisely stated thus: The plaint items 1 and 2 were purchased in the name of the Plaintiff and Defendants 1 and 2 in the year 1960. Later the Defendants 1 and 2 without the consent of the Plaintiff entered into a partition deed No. 161/89 and the said deed is sought to be set aside. One-third share of the Plaintiff in item 1 and 2 is liable to be allotted to him. The plaint item No. 3 belongs to the first Defendant and his deceased brother Gopalan who died issueless and on his death, his half share devolved on Plaintiff and Defendants 1 to 4 and thus the Plaintiff is entitled to one-tenth share over plaint item No. 3.

3. The contention of Defendants 1 and 2 is that the suit is not maintainable and the Plaintiff, though participated in preparing the partition deed, withdrew from executing the partition at the last moment. There is misjoinder of cause of action as well as misjoinder of parties. It is in view of this contention raised by the Defendants the above preliminary issue was framed by the Court below.

4. It is an admitted case that plaint items 1 and 2 were purchased in the name of Plaintiff and Defendants 1 and 2 and therefore Defendants 3 and 4 are not necessary parties in respect of those items. It is true that plaint item No. 3 was jointly purchased in the name of first Defendant and deceased Gopalan. Since Gopalan died issueless Plaintiff and Defendants 1 to 3 are entitled to claim one-tenth share over plaint item No. 3. Thus it is explicit that Defendants 3 and 4 have absolutely no interest over items 1 and 2 and they are unnecessary parties in so far as those items are concerned. However, the Court below observed that Defendants 3 and 4 had claimed share over plaint item No. 3. In that view of the matter the Court below found that the suit is not bad for misjoinder of parties. The view taken by the Court below is challenged in this revision petition.

5. The joinder of causes of action is dealt with under Order II Rule 3 of the Code of Civil Procedure. Sub-rule (1) of Rule 3 allows joinder of causes of action in the same suit against the same Defendant or the same Defendants jointly. The first part of this Sub-rule allows a Plaintiff to unite in the same suit several causes of action against the same Defendant or the same Defendants jointly. The second part allows any Plaintiffs having causes of action in which they are jointly interested to unite in the same suit such causes of action against the same Defendant or the same Defendants jointly. Thus it is a rule which deals with joinder of causes of action by Plaintiff in the same suit against the same Defendants. These causes of action cannot be said to arise against the various Defendants jointly but arise against the same Defendant or the same Defendants jointly. However, this Sub-rule starts with the words "save as otherwise provided". It necessarily means that this rule is subject to any other provisions of law to the contrary contained in the Code.

6. Learned Counsel for the Petitioner argued that there is no common question applicable to all the Defendants to be decided in the present suit and Defendants 3 and 4 have absolutely no interest in plaint items 1 and 2 sought to be partitioned. Admittedly there are two causes of action as framed in the suit. In the first place the Plaintiff seeks to set aside the partition deed No. 161/89 relating to items 1 and 2 and partition then among him and Defendants 1 and 2. In the second place the Plaintiff seeks partition of item 3 which belongs to first Defendant and his deceased brother Gopalan who died issueless, among him and Defendants 1 to 4. Thus there are two separate and distinct causes of action which the Plaintiff intended to try in the same suit. The question is whether the suit as framed is bad for misjoinder of causes of action. Strictly speaking, this question is directly governed by the provisions contained in order II Rule 3 which deals with the joinder of causes of

action, and if it is so applied the present suit as framed would be bad for misjoinder of causes of action. But it was pointed out on behalf of the Respondents that this rule shall be read with Order I Rules 1 and 3. On a plain reading, order I related only to "parties to suits" and not to "causes of action". Under Order I Rule 3, all persons may be joined in one suit as Defendants where (a) 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 against such persons, whether jointly or severally or in the alternative; and (b) if separate suits were brought against such persons any common question of law or fact would arise. In other words, in cases where any right to relief in respect of the same act or transaction is alleged to exist against two or more persons and if separate suits were brought against such persons any common question of law or fact would arise, all such persons may be joined in one suit as Defendants. The right to relief may be in respect of or arising out of same act or transaction or series of acts or transactions against such persons whether jointly, severally or in the alternative.

7. Woodroffe, J. in *Ramendra Nath Roy v. Brajendra Nath Dass* AIR 1918 Cal. 858 adopted the view that Order I Rule 3 is not limited to joinder of parties but also applies to joinder of causes of action. The learned Judge expressed in page 859 of the report: "Order I is headed "parties" and Order II "frame of suit". The question of parties involves that of causes of action and vice versa. A person is made a party because there is a cause of action against him, and where causes of action are joined, parties are joined." However, a contrary view has been expressed in *Thompson and Anr. v. The London County Council* (1899) 1. Q.B. 840 See also: *Umabai v. Bhavu Balvant* 1909 (3) Ind Cas 165 and *Mt. Jankibai v. Shrinivas Ganesh Valsankar and Ors.* AIR 1914 Bom 193 . However, it is a settled position that Order II Rule 3 must be read with Order I Rules 1 and 3.

8. While examining the question whether the suit is bad for misjoinder of causes of action, the provision contained in Order I Rule 3 is decisive. Clauses (a) and (b) of Rule 3 deal with two conditions to be fulfilled before joining several persons as co-Defendants in the same suit. In reading Clause (a), it appears to me quite apparent that the word "same" which precedes "act or transaction" governs also the words "series of acts or transactions" and must be read before those words also. Therefore it is perspicuous that the first condition to be satisfied before joining several persons as co-Defendants in the same suit is that the right to relief sought in the suit must arise against all Defendants from the same act or transaction or from the same series of acts or transactions. The second condition to be satisfied under the rule is that some common question either of fact or law should arise against the Defendants if the separate suits were brought against such persons.

9. While interpreting Order I Rule 3 and Order II Rule 3, Punjab and Haryana High Court in *Sudershan Goel Vs. The New Bank of India and Others,* observed: "In other words it is not necessary that all the Defendants should be interested in all the

reliefs sought or that the liability of all the Defendants should be the same. It is enough if there is one question common to all Defendants which is of sufficient importance in proportion to the rest of the action." I respectfully dissent from this view because after the amendment of Order I Rule 3, two conditions must exist for enabling the Plaintiff to join two or more persons in one suit as co-Defendants as prescribed in Clauses (a) and (b). Clauses (a) and (b) are not alternative but conjunctive. The substance of the provisions contained in Clauses (a) and (b) could be seen as provided in the unamended rule specifying as "in the alternative", so that any one of the clauses need be fulfilled for enabling the Plaintiff for joining two or more persons as co-Defendants. But the Order I Rule 3 as amended by Act 104 of 1976 postulates co-existence of two conditions specified in Clauses (a) and (b) thereof. I derive respectful sustenance for this view point from the decision of this Court in *Vasavan v. Balakrishnan* 1986 KLT 988 where it was observed: "Order I Rule 3 CPC postulates that two conditions must be satisfied where two or more Defendants can be joined in the same suit. The first condition is that Plaintiff must allege a right to relief against them in respect of the same act or transaction or series of acts or transactions. The second condition is that if separate suits were brought against the Defendants any common questions of law or fact would arise. The above two conditions must exist together. Existence of one of the conditions alone is not sufficient." In *Gangadhar Sahu and Others Vs. Akhapati Ram Murty Patro and Others*, a Division Bench of the Orissa High Court took the view that Order I Rule 3 is applicable in a case where "if separate suits were brought against such persons and common questions of law or fact arose, they could also be sued jointly". Obviously the Division Bench was interpreting the provisions contained in Order I Rule 3 as unamended.

10. Learned Counsel for the Respondent has brought to my notice a decision of this Court in *Krishnan Achari v. Parthasarathi* 1959 KLT 849. In the facts of that case this Court found that the suit was not bad either for misjoinder of parties or for causes of action. That was a suit for partition of the assets of the deceased father of the Plaintiff. The first Defendant was the brother of the deceased and he was impleaded as he was in possession of the assets of the partnership firm where the deceased was also a partner. In that factual background this Court held: "In a partition action like this, the Plaintiff was bound to include all the assets of his father including the persons in whose hands those assets are; and the reliefs claimed as against the first Defendant in this litigation, in my opinion, are quite proper and necessary to give a decision regarding the rights claimed by the Plaintiff. In my view, the suit is not bad either for misjoinder of parties or of causes of action." While so holding this Court said that Order I, Rule 5 itself makes it very clear that it shall not be necessary that every Defendant shall be interested as to all the reliefs claimed in any suit against him. Therefore, this Court had not further examined the decisions cited in support of the contention that the suit was bad for misjoinder of parties and causes of action. The main cause of action for the suit was the Plaintiff's right to obtain share

in the assets of his father and hence he was bound to include in that litigation one of the important assets, namely, the share held by his father in the partnership business carried on by the first Defendant. This factual position, no doubt, strikes a difference from the facts of the present case. Therefore it cannot be said that the decision in Krishnan Achari's case 1959 KLT 849 supra supports the case of the Respondent. It is all the more clear from the following decisions which were cited but not considered by the Court.

11. In Purna Chandra Khanra v. Nanda Sundari Dassi ILR 1953 Cal 15 the Division Bench of the Calcutta High Court held: "There are, therefore, in fact two different estates in which the Plaintiff is claiming a partition. The cause of action for a partition of sch. ka is, therefore, distinct from the cause of action for partition of sch. ga. If we are to decide the question of misjoinder of parties and causes of action on the terms of Order I, Rules 3, 4 and 5 and Order II Rule 3 of the Code of Civil Procedure, it must be held that there is no common question of fact or of law as regards the lands of schs. ka andga. A joinder of the said two causes of action in respect of schs. ka and ga would not be permissible." In Khundrakpam Singh v. Maorungbam Amujao Singh AIR 1954 HP 5 it is observed: "The suit suffers from multifariousness inasmuch as there are some causes of action alleged against Defendants Nos. 1 and 2 and some against Defendants Nos. 3 and 4 and thus resulting in misjoinder of Defendants and causes of action." In Krishna Chandra Kabiraj and Others Vs. Sankarsan Kabiraj and Others, the Calcutta High Court held that the suit was bad for misjoinder of causes of action and Defendants in the following circumstances. "The Plaintiffs who were co-sharer landlords brought a suit for accounts against their other co-sharers impleading certain officers and employees connected with the estate and other proprietors of different estates. The causes of action were different not only for the different groups but even for different persons within the same group in some cases. It was not the case of the Plaintiffs that all the Defendants were by any one transaction made jointly and severally liable for rendering accounts".

12. When Defendants 3 and 4 have no manner of interest over items 1 and 2, the result would be that there is no community of interest among the parties in the present suit. No same act or transaction is alleged against all the Defendants. It is also explicit that if separate suits were brought against the Defendants on the basis of the respective causes of action, no common question of fact or law would arise. Only because Defendants 3 and 4 had claimed share over plaint item 3 it will not become a common question. The commonness must be evident when two causes of action are juxtaposed and tried together. There is no scope for emergence of a common question either of fact or law in the facts of the present case. Had the two causes of action in this case been channelized together, the inevitable result would be the misjoinder of causes of action and of parties. The order under challenge is therefore liable to be set aside and I do so.

13. What would be the consequence of the conclusion which I have herein before arrived at? Can it be said that the entire suit has been collapsed or fallen flat? No, it cannot be said so; it partially survives. It is more or less settled that in a case where a suit is bad for misjoinder of causes of action the Court should not dismiss the suit but should give the Plaintiff an opportunity to amend his plaint and to proceed with the claim in respect of one of the causes of action. This of course is the function of the Court below and it is for that Court to act in this regard in accordance with law. The petition is allowed. No costs.