

(1979) 01 KL CK 0030

In the High Court Of Kerala

Case No : S.A. No. 1299 of 1974 and Memorandum of Cross Objections

Aduvathu Poyil Thamasikkum Thazha Narukkoth Raghavan
Nair and Another

APPELLANT

Vs

Kalliani Pallikkaramma's Children Kallangadi Edathil Appu
Kidavu and Others

RESPONDENT

Date of Decision : 18-01-1979

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 41 Rule 1(2)

Citation : AIR 1980 Ker 4

Hon'ble Judges : T. Chandrasekhara Menon, J;G. Balagangadharan Nair, J

Bench : Division Bench

Advocate : Panicker and Potti, for the Appellant; A. Achuthan Nambiar, T.P.K. Nambiar and P.G. Rajagopalan, for the Respondent

Final Decision : Allowed

Judgement

Chandrasekhara Menon, J.—The plaintiffs are the appellants here. The suit was filed to set aside a summary order passed in I. A. No. 2588

of 1967 in O. S. No. 70 of 1947 on the file of the Sub-Court, Kozhikode, and also to declare the plaintiffs' tenancy rights on the suit properties

and for an injunction restraining the defendants from entering on the properties. The suit was decreed by the trial court declaring the plaintiffs'

tenancy rights and restraining the defendants from entering on the properties. In appeal by defendants 2, 4, 5 and 6 the appellate court confirmed

the finding of tenancy, but dismissed the suit as not maintainable. The appellate court found that the order Ext. A 10 in I. A. No. 2588 of 1967 was

an order passed under Order 40 Rule 1 Sub-rule (2) and therefore the remedy of the aggrieved party is only by way of an appeal and a fresh suit

to set aside the order is not maintainable. It is from this decision that the Second

Appeal has been filed.

2. The matter came up before one of us and by order dated 4-4-1975 the case was referred to a Division Bench. The reference order reads :--

The principal question involved in the appeal is whether the appellants' suit is incompetent or barred because they approached the Court with an

interlocutory petition when the receiver in a suit to which they are not parties dispossessed them and invited an adverse order from which they did

not appeal. I think that the question is important enough to be considered by a Bench. I am therefore referring the appeal for decision by a Division

Bench.

3. It might be noted that the question is now covered by an authority of a single Bench's decision as far as this court is concerned. The decision is

Venkappa Bhatta v. Inthra Crasts (1973 KLT 1037). The appellants question the correctness of the decision and request that the decision may be

reconsidered. According to the counsel for the appellants, this decision does not lay down the correct law. The scope of the enquiry under Order

40 Rule 1 Sub-rule (2) has not been correctly understood or appreciated, so goes the contention. The counsel would contend that no question of

title could be properly adjudicated in proceedings under Order 40 Rule 1 Sub-rule (2). The enquiry is purely of a summary nature. The remedies

available to the 3rd party are not mutually exclusive. It is also contended that the applicability of Section 43 of the Specific Relief Act has not been

correctly appreciated. There is also a prayer that in case this court finds that the suit is not maintainable to set aside Ext. A 10 order, the Second

Appeal may be treated as an appeal against Ext. A 10 order excluding the time of the pendency of the suit in the trial court as well as in the

Appellate Court.

4. To appreciate the contentions of the parties and for understanding the scope and ambit of the questions that are posed before us we think it

would be necessary to deal with the facts of the cases in some more detail and also to find out how the courts below have dealt with them. There

was a suit for partition as O. S. No. 70 of 1947 on the file of the Sub Court Kozhikode, in respect of the Kallangadi Edam. Defendants 2 to 6 in

the present suit were defendants 152 to 156 in the said suit. The present plaintiff items" were items 180 and 181 in that suit. A preliminary decree for

partition had been passed in that suit on 9-11-1951. Ext. B2 in this case is a copy of the judgment therein. At that stage, the reservations claimed by various parties in the said partition suit were relegated to the final decree stage. Consequently, in the final decree proceedings, the special rights or reservations claimed by the parties were gone into and the court passed an order evidenced in this case by Ext. B3. The two items of properties mentioned earlier were treated as properties in the direct possession of the tarwad and the commissioner appointed in the final decree proceedings reckoned those items as in the direct possession of the tarwad and valued the same accordingly for the purpose of effecting partition by metes and bounds. These two items along with the other items of properties were set apart to the group of defendants 2 to 6 herein. In the final decree proceedings a receiver had been appointed who was directed to take possession of the properties which were in the actual possession of the tarwad. These included the present plaint properties also. When the receiver took possession accordingly, the present plaintiffs filed a petition I. A. No. 2588 of 1967 for recovery of possession of the properties from the receiver alleging that item 1 was outstanding on kanom lease granted by the tarwad in the year 1908. The alleged kanom tenancy right over the said item was said to have been purchased by one Achuthan Kidavu from the original lessees as early as 1912. Item 2 was similarly alleged to be outstanding in the possession of tenant and Achuthan Kidavu was alleged to have taken assignment of the tenancy right in the year 1909 evidenced by Ext. A 1 in this case. Achuthan Kidavu gifted his right in these two items and other properties to his niece one Nani Pallikkaramma in 1938, who in her turn gifted the aforesaid items to her husband, Gopalan Nair in the year 1943- That deed is evidenced by Ext. A 2 in the case. Gopalan Nair assigned his right in favour of one Krishnan Kidavu as per Ext. A3. Krishnan Kidavu was the 153rd defendant in the partition suit. He had not put forward any tenancy right by virtue of Ext. A3 the assignment in his favour. During the pendency of the partition suit, Krishnan Kidavu assigned the tenancy right over these items to his children who are the present plaintiffs in the suit evidenced by Ext. A4. It is on the strength of the assignment deed that the plaintiffs filed the interlocutory application in the partition suit at the final decree proceedings seeking recovery of possession from the receiver. The Sub Court after enquiry held that the tenancy

set up by the plaintiffs was not valid and binding and no such tenancy existed and accordingly dismissed the petition. Ext. A10 is the certified copy of that order. It is challenging this order the present suit had been filed for the reliefs mentioned earlier. The learned Munsiff after examination of the oral and documentary evidence in the case concluded that there did exist tenancy in respect of these two items which was not a matter in dispute in the partition suit. Therefore in that suit, Krishnan Kidavu had not been called upon to put forward the plea of tenancy and as such the partition final decree had not extinguished the tenancy right which now vested in the present plaintiffs. According to the learned Munsiff, the receiver who had been directed to take possession and manage the properties appointed in the partition suit did not come into actual possession of the plaintiff schedule properties and the possession continued with the present plaintiffs. In that view, the lower court declared tenancy right claimed by the plaintiffs and set aside the order of the Sub Court in the I. A. in the partition suit and granted the relief of permanent injunction against defendants from trespassing into the plaintiff schedule properties.

5. In appeal, the learned Additional District Judge of Kozhikode took a different view allowing the appeal there and dismissing the suit. According to the learned District Judge, as regards the question whether there was a tenancy in respect of the plaintiff properties which the plaintiffs now claimed to have vested in them and asserted possession thereunder, the argument advanced on behalf of the contesting defendants that tenancy created at a time when there was a maintenance arrangement in the tarwad would not survive the partition suit and the decree passed thereunder, is not sustainable. The items were not leased out by the maintenance allottee but by the tarwad as such. There was clinching evidence, according to that court, of the existence of tenancy. The court also said that there was no necessity for the present 3rd defendant to have raised the question of tenancy in the earlier suit. He became vested with the tenancy right only after filing the partition suit on 10-1-1948 as per Ext. A3 document. Even assuming that he had become vested with the tenancy right before the date of filing the written statement, it is not a matter which ought to have been raised in the suit. Any cause of action in regard to a suit arises before the date of the suit. Any subsequent action is not a matter which the

party is bound to raise. The Additional District Judge referred in this connection to the decision of this High Court reported in 1958 Ker LT 808

(Abdulla v. Ayisumma). Therefore, the learned Judge held that the principles of res judicata will not be attracted to detract the plaintiffs from

putting forward the plea now which the present 3rd defendant who was the 153rd defendant in the partition suit did not put forward in that suit.

6. In regard to the contention of lis pendens raised by the defendants which was on the basis of Ext. A4 dated 17-5-1952 subsequent to the filing

of the suit for partition, the court was of the opinion that the tenancy in respect of the two items was not the subject matter of any issue in that

suit. There was no adjudication of any reservation in respect of the items concerned. In the absence of any adjudication and negating of any right

which the 153rd defendant in that suit had in these items such right will not be affected by reason of the decree passed in that suit. So the decree

passed in the suit will not affect the rights which the 153rd defendant in that suit had and which right was transferred pendente lite. The plea of

estoppel raised by the 3rd defendant was also not accepted. The plea was based on the fact that the 153rd defendant in that partition suit who is

the 3rd defendant in this suit was one among the group to which these two items and other items were allotted. The said defendant did not put

forward the special right which he alleged to have had. By not putting forward such a plea, the division of various items was effected and these

items were reckoned as in the direct possession of the tarwad. The argument proceeded on the basis that as the said items were being allotted to

this group as properties in the direct possession, it is not now open to one member in that group to put forward and say that he had a special right.

The courts below said that the plea of estoppel by conduct could be raised only in cases where by the conduct of a particular party, the other party

is led to do or not to do something which action or non-action will be to that party's detriment if the first party resiles from his earlier stand as

revealed by his conduct. There had been no representation by the 153rd defendant in the matter. The failure to represent will not give for that

member any inhibition from raising the plea at the opportune moment.

7. However, the learned Additional District Judge accepted the plea of the contesting defendants regarding the maintainability of the suit. It had

been contended on their behalf that this being a suit to set aside an order passed in an application filed by the plaintiffs seeking restoration of possession from the receiver who is alleged to have dispossessed the plaintiffs by virtue of taking delivery, the only remedy for the plaintiffs, the aggrieved party was by way of an appeal and not a regular suit as the one that has been filed. If a third party is aggrieved by the actions of a receiver appointed by a court in a proceeding, the aggrieved party has got two remedies; either to file an application in the suit in which the court had appointed a receiver and get his right adjudicated upon as contemplated under Order 40 Rule 1, Sub-rule (2) or obtain sanction from the court which appointed a receiver and file a regular suit. When once a party takes the forum of filing an application envisaged by Order 40 Rule 1 Sub-rule (2), it is contended, that on failure of the said application, the party cannot fall back and take recourse to a suit. Therefore, according to the defendants, the present plaintiffs who were not parties to the partition suit in which a receiver was appointed, having filed an interlocutory application against the receiver for restoration of possession alleging dispossession and the same application having been dismissed, they should have taken out the matter in appeal and not to take recourse to a regular suit. In accepting the plea, the learned District Judge relied on the decision in 1973 Ker LT 1037. In view of the finding that the suit is not maintainable the District Judge allowed the appeal and dismissed the suit as pointed out earlier.

8. It might be also noted that a memorandum of cross objections had been filed by defendants 2 and 4 to 6 canvassing the finding of the courts below confirming the tenancy of the plaintiffs. It is contended that the suit is bad for nonjoinder of necessary parties. The final decree in O. S. No. 70 of 1947 has directed that the present plaint items (items 180 and 181 in O. S. No. 70 of 1947) be divided as in the actual possession of the tarwad and they are valued at a high price. If the tenancy claimed by the plaintiffs is reserved, the value of these items will be very low and the share value of defendants 2 and 4 to 6 will have to be calculated by adjusting the share value of the other members of the tarwad, whose presence is necessary. The receiver is not a substitute for the members of the tarwad. The cross objectors plead that the lower appellate court erred in

inferring a tenancy in respect of plaint items from the recitals in Exts. A1 and A2 and the evidence of P. Ws. 1 and 3. The recitals cannot by themselves be accepted as evidence sufficient to establish the facts recited. The recitals are not binding on and are not evidence as against the third parties to the document. Another contention taken up is that the recitals in Ext. A1 relate only to plaint item 2 and no document had been produced in respect of the alleged tenancy of item 1. It is also contended that there is no evidence of any payment of rent to the tarwad. It is further urged that the will set up by Achu-than Kidavu has not been produced and has not been proved. There is no evidence that Nani Pallikkaramma is dead and no reason is given as to why she was not examined. According to the cross objectors Exts. A1 and A2 are only collusive documents and no tenancy had been created by the tarwad. Another contention taken up by the cross objectors is regarding the acceptance of evidence of P. Ws. 1 and 3. It is also put forward that the lower appellate court failed to note that the suit properties were outstanding in the possession of 153rd defendant in O. S. No. 70 of 1947 who is the present 3rd defendant for his maintenance under a razi decree and Achuthan Kidavu who got Ext. A1 assignment was the karanavan of the said tavazhi and the lease created by the said tavazhi is not binding on the tarwad and there is no valid tenancy in so far as the tarwad is concerned. The lease granted by the maintenance allottee, if any, is determined by the filing of the suit for partition. When the property was given on maintenance allotment any lease by the tarwad in 1908 cannot be true and valid. The admission of a fresh evidence -- a document -- by the lower appellate court is also questioned in the cross objections. The document was filed in O. S. No. 70 of 1947 in which the 3rd defendant was a party and no reason had been shown as to why it was not produced in the trial court. It is also urged that no reason had been given by the lower appellate court to admit it. Another point that is taken up is that the lower appellate court erred in holding that the schedule in the razi decree on comparison with the plaint schedule property which is the subject matter of the suit would show that they are different. What is pleaded is that the identity of the properties cannot be fixed or found by a comparison of the schedules. The identity will have to be determined by better evidence for which opportunity ought to have been given to defendants 2 and 4 to 6. A connected plea which is taken up

is that the lower appellate court erred in considering the question of identity in appeal when there was no pleading or issue and when the parties went to trial on the case that the suit items are items 180 and 181 of the plaint schedule in O. S. No. 70 of 1947 and when the 3rd defendant did not dispute the identity of items 180 and 181 with that of Ext. A4 in O. S. No. 70 of 1947. The cross objections also highlighted the plea of res judicata.

9. Mr. Sivasankara Panicker, learned counsel for the appellants in attacking the finding of the District Judge regarding the maintainability of the suit questions the basis of that finding, namely, when once a party takes the forum of filing an application envisaged by Order 40 Rule 1 Sub-rule (2), on the failure of the said application, the party cannot fall back and take recourse to the suit. He would contend that Order 40 Rule 1 (2) does not provide the procedure in case a third party is ousted by the receiver or more correctly by the court through the receiver. The rule does not state all the remedies open to the parties. He would point out that the summary proceedings is not an exhaustive remedy. When "that is not exhaustive, ordinary jurisdiction of the civil court is not ousted. No doubt, if there are two mutually exclusive procedures and if one is taken recourse to, the principle of election might debar the party from taking recourse to the other remedy. It might amount to an estoppel by representation. But there is difference between summary jurisdiction and exclusive jurisdiction. Summary jurisdiction is always subject to general law. In such cases the fact that there is a provision for appeal, as in this case under Order 43 Rule 1 (s) will not be relevant,

10. Justice Krishnamoorthy Iyer in Venkappa Bhatta v. Inthra Crasta (1973 KLT 1037) had said that Order 40 Rule 1 Sub-rule (2) implies that a receiver has got a right to remove even persons who are not parties to the suit from possession of the property. The only restriction is that a receiver has no right to remove from the possession or custody of the property any person whom any party to the suit has not a present right to remove. The section is based on the principle that a stranger to a suit should not be removed from possession of the property by the appointment of a receiver. As against a stranger who is in actual possession the appointment of a receiver is of no effect, but it is necessary that a person whose

possession is sought to be interfered with by the receiver should approach the court in view of Order 40, Rule 1 (2) C.P.C. to stop the receiver

from interfering with his possession and for that purpose pray for an adjudication of his rights. Justice Krishnamoorthy Iyer would further point out

that the particular method to be followed by such a person is not indicated in Order 40, Rule 1 (2), C.P.C. It can be done either by an application

before the court which appointed the receiver or by instituting a separate suit with the receiver on the party array after obtaining the sanction of the

court that appointed the receiver to establish his present right to possession. The learned Judge would then take the next step that when once the

stranger has chosen the summary remedy by filing an application under Order 40, Rule 1 (2), C.P.C. and when he has been unsuccessful in such

application it is no longer open to him to file a fresh suit to establish his right in the property. The enquiry that is contemplated whether it be in an

application or in a suit filed for the purpose is whether any of the parties to the suit has a present right to remove the third party in possession of the

property. If the right is found then the third party can be dispossessed by the receiver otherwise he cannot. According to the learned Judge, the

nature of the enquiry is the same whether the third party files an application or institutes a suit for the purpose. When once the third party has

chosen the remedy of filing an application and has obtained an adverse order it cannot be said that such an order will be subject to any suit to be

instituted by the third party. The proceedings, according to the learned Judge, have become final irrespective of the question whether the order is

appealable or not. The learned Judge further points out that the prevailing view now is that such an order is appealable under Order 40, Rule 1,

Sub-rule (1), clause (b) read with Order 43, Rule 1, Clause (s). In discussing the question, the learned Judge has referred to the decision in

Ramaswami Pillai v. Janaki Ammal (AIR 1923 Mad 129) where Justice Krishnan has said:--

When property of a third party is interfered with by an officer of the Court like the Receiver the party has ordinarily two remedies. He may apply

to the Court for a summary order restraining the Receiver from interfering or he may ask leave of the Court to permit him to sue the Receiver and

restrain him from interfering or any other appropriate relief.

11. In questioning the correctness of Justice Krishnamoorthy Iyer's view, Mr. Panicker learned counsel for the appellants made reference to the decision of the Supreme Court in *Raja Jagdish Pratap Sahi Vs. State of Uttar Pradesh*, . In that case in considering the provision which empowers the authorities to collect the tax assessed or a penalty imposed under a taxing statute by summary process, the Supreme Court stated that"" such summary provision will not preclude either specifically or by necessary implication their right to recover arrears of tax and other amount due to the Government by a suit. The method prescribed in the statute is only one of the modes of recovery which is a summary remedy. It will be open to the State to adopt any method available to it for the recovery of tax in the same way as it would be open to it to recover ordinary debt due to it. It can institute a suit and obtain a decree with costs against the assessee or other persons liable to pay. It could also probably, without obtaining a decree or attachment apply to a Court for the payment of dues if there are funds lying to the credit of the assessee in the court or it may perhaps demand payment in the hands of the receiver appointed in respect of any property of the assessee if due notice is given to all the parties interested in the funds. Once a debt is created, the State has a right to recover it by any of the modes open fo it under the general law, unless as a matter of policy only a specific mode to the exclusion of any other is prescribed by law. The Supreme Court in this connection referred to Justice Leach's observation in a Full Bench decision of Madras High Court *MANICKAM CHETTIAR Vs. Income Tax OFFICER, MADURA.*, where the right of the Crown to obtain payment of arrears of Income Tax due from the assessee's properties sold in execution of the decree was dealt with. It was said:

This section, however, does not profess to be exhaustive and it cannot without express words to that effect take away from the Crown the right of enforcing payment by any other method open to it. Therefore, I do not regard Section 46 as imposing a bar to an application of the nature of the one we are now concerned with.

The Madras High Court's view had been accepted by the Patna High Court in *INDERCHAND Vs. SECRETARY OF STATE FOR INDIA IN COUNCIL.*, and *Chaganti Raghava Reddy Vs. State of Andhra (now Andhra*

Pradesh) and Others, . After referring to these decisions, the Supreme Court stated that it is beyond doubt that where a taxing statute provides for a summary mode of recovery and is not exhaustive, it will be open to State to have recourse to any other mode open to it under the general law. According to Mr. Siva-sankara Fanicker, as long as it is not provided in the statute that the remedies are mutually exclusive, (the provision may be by express or by necessary implication) the fact that the summary remedy is resorted to (which was unsuccessful) will not rule out recourse to the other remedy, here by way of a suit.

12. Mr. Rajagopalan, learned counsel for the respondents however would maintain that the decision of Justice Krishnamoorthy Iyer in 1973 KLT

1037 should govern the case as it lays down the correct law. There can be no question of that decision being re-considered. He would also submit

that the parties had invited the decision on merits in the proceedings under Order 40, Rule 1. He would strongly contend that the present suit is not

maintainable in view of the earlier decision on merits in the I.A. in the partition suit. He would also submit that the principle of estoppel would be

applicable here which would bar the institution of a subsequent civil suit. It is trite law that when a litigant has the right to choose between two

remedies, which are not co-existent but alternative, he may elect and adopt one as better adapted than the other, to work out his purpose, but

once he has made his choice and adopted one of the alternative remedies, his act at once operates as a bar as regards the other and the bar is final

and absolute. In this connection he referred to the decision of Baikuntha v. Salimulla (1907) 6 CLJ 547; Beni Madhub v. Jotendra (1907) 5 CLJ

580 corresponding to (1905) 11 Cal WN 765 and Samudra v. Srinivasa, (AIR 1956 Mad 301). Reference is also made to the decision of the

Supreme Court in Amin Lal Vs. Hunna Mal, where it was said that under the Representation of the People Act the petitioner is given option by the

Tribunal either to amend petition or to supply particulars or to strike off the particular para as vague and if he chooses to amend he loses his right

to adopt the alternative remedies. Mr. Rajagopalan's contention is that a person being free to seek alternative remedies and electing to bring an

action will be estopped from objecting later to the jurisdiction of that court to decide his case.

13. We feel that no question of election of remedies will arise unless the remedies are inconsistent and alternative. For example, where a plaintiff had been returned to the plaintiff to be presented to the proper court, it is not open to him to appeal from the order of return after he has taken back the plaint and refiled it in the Court directed. (See Beni Madhub v. Jotendra (1907) 5 CLJ 580 following Pearce v. Chaplin (1846) 9 QB 802 and Neale v. Electric etc. Co. Ltd. (1906) 2 QB 558). Similarly, a party affected by an order of remand should make his election either to prefer an appeal against the order of remand and obtain a stay of the proceedings during the pendency of the appeal or carry out the order of remand, take the chance of successful termination of the suit in his favour and in the event of defeat prefer an appeal against the final decree in which the validity of the order of remand is questioned; he cannot, however, if he has carried out the order of remand and taken the full benefit of it, turn round and prefer an objection to the order of remand. The two remedies, viz., application for review of a decree and a suit to set aside the same are not consistent but co-existent, and if an aggrieved party has recourse to the less appropriate remedy of review and has failed, the doctrine of election does not apply in bar of a regular suit for the same relief, but if he succeeds in one proceeding the judgment absorbs all his other remedies. (See Mst. Gulab Koer v. Badshah Bahadur (1909) 13 CWN 1197).

14. Order 40, Rule 1 states as follows:--

1. (1) Where it appears to the Court to be just and convenient, the Court may by order-

- (a) appoint a receiver of any property, whether before or after decree;
- (b) remove any person from the possession or custody of the property;
- (c) commit the same to the possession, custody or management of the receiver; and
- (d) confer upon the receiver all such powers, as to bringing and defending suits and for the realization, management, protection, preservation and improvement of the property, the collection of the rents and profits thereof, the application and disposal of such rents and profits, and the execution of documents as the owner himself has, or such of those powers as the court thinks fit.

(2) Nothing in this rule shall authorize the Court to remove from the possession

or custody of property any person whom any party to the suit has not a present right to remove.

No doubt, this rule will enable a court to hold an enquiry when a third person in possession of a property in respect of which a receiver was

appointed objected to deliver possession to the receiver, with a view to ascertain if he was under a present liability to be removed from the present

possession of the property. A person whose possession is sought to be interfered with by the receiver can seek his remedy by an application to the

court which appointed the receiver or institute a separate suit with the receiver on the party array after obtaining sanction of the court that

appointed the receiver to establish his present right to possession. But then it cannot be said that the remedies are alternative and inconsistent. It

will not be right to say that when once the stranger has chosen the summary remedy by filing an application under Order 40, Rule 1 (2), C.P.C.

and when he has been unsuccessful in that application it is no longer open to him to file a fresh suit to establish his rights in the property. The

enquiry that is contemplated in the earlier proceedings is only a summary remedy and the court's jurisdiction to consider the matter in a separate

suit is not in any way ousted.

15. Estoppel by election is rather very far-reaching and important and is among the most prolific in illustrations of the working of the principles of

estoppel by representation, as Spencer Bower states in his well known work on Law Relating to Estoppel. The basic principle underlying all these

cases is that where A dealing with B is confronted with two alternative and mutually exclusive courses of action in relation to such dealing, between

which he may make his election and A therefore so conducts himself as reasonably to induce B to believe that he is intending definitely to adopt the

one course, and definitely to reject or relinquish the other and in such belief alters his position to his detriment A is precluded as against B from

afterwards resorting to the course which he has thus deliberately declared his intention of rejecting. In regard to this doctrine of election Spencer

Bower states that the most important and interesting of these, because yielding the greatest variety of illustrative examples, is the conduct of

litigation in the course of which it very frequently happens that a party litigant is confronted with the necessity of making a definite choice between

two possible courses of action which are mutually exclusive Whenever this occurs, the general rule of estoppel by election comes into play, that is

to say, if by words or as is almost invariably the case by conduct or inaction he represents to the other party litigant his intention to adopt one of

the two alternative and inconsistent proceedings or positions, with the result that the latter is thereby encouraged to persevere in a line of conduct

which he otherwise would have abandoned or modified, or as the case may be to change tactics from which he otherwise would never have

deviated, and in either case is put to trouble and expense, the first party is estopped, as against his antagonist, from resorting afterwards to the

course or attitude which, of his free choice, he has waived or discarded. Thus where either of two alternative tribunals are open to a litigant, each

having jurisdiction over the matters in dispute, and he resorts for his remedy to one of such tribunals in preference to the other, he is precluded, as

against his opponent, from any subsequent recourse to the latter and, so also, in the case of two alternative modes of trial, if a litigant, by conduct

of inaction, acquiesces in the adoption of one of these modes as by taking part in the proceedings down to their conclusion without objection or

protest, he is estopped from afterwards complaining that the mode of trial with which he was content at the time was irregular or without

jurisdiction. It must not be forgotten that in every case of election between two alternative courses no less than in every case of election between

two alternatively liable persons, the onus is on the party setting up the estoppel, if the question is put in controversy to establish that two alternative

courses were in fact open to the alleged elector which were inconsistent with and exclusive of one another, for obviously there can be no exhibition

of a preference by a man for one course for him to take, or where the two courses are such that the adoption of one of them does not necessarily

Indicate a final determination to abandon the other. It is too much to say that by putting forward their case in the summary proceedings, the other

side was misled by the plaintiffs to take the view that he has abandoned the course of filing a suit, nor are the two proceedings inconsistent and

exclusive of one another. It has been held that a workman who has failed to obtain statutory compensation under the Workmen's Compensation

Act is not thereby estopped from subsequently claiming damages from his employer at common law, because there is nothing in the statute to

prohibit these claims being made successively in the above order or to render the one exclusive of the other section of the Act being directed

against double recoveries and not against double claims. We have taken pains to quote these observations occurring at various places in Spencer

Bower's Law Relating to Estoppel in view of the decision in 1973 KLT 1037, which with due respect we may state, gives no valid reason for

coming to the conclusion that once a party approaches for summary relief under Order 40, Rule 1, he is debarred from filing a suit for

establishment of his right. We might also state that no question of bar by res judicata would also arise because of the very nature of the limited

width of a summary proceeding and of the broad based enquiry in an ordinary suit.

16. We are of the view that the decision in 1973 KLT 1037 on this aspect is not good law. Naturally this takes us to the question of the various

points raised by the contesting respondents in their cross-objections. The first question is whether the decision on the partition suit would constitute

constructive res judicata which would prevent consideration of the question in the present suit.

17. In holding that there is no bar of res judicata, the lower appellate court relied on the decision in *Abdulla v. Ayisumma* (1958 KLT 808). There,

speaking for a Division Bench of this Court, Justice M. S. Menon, as he then was, had said that a defendant in a suit is not bound to put forward a

plea on the basis of a cause of action which arises during the pendency of the suit. In order that a plea might be barred by Explanation IV to S. 11,

it must be one which not only might have been raised but also one which ought to have been raised. One of the decisions referred to by the learned

Judge in this connection is a Full Bench decision of the Madras High Court in *Seetamma v. Kotareddy* (AIR 1949 Mad 586). That Court had

said:

From *Arichandrana Deo Garu v. Ba-manna Chandiri* (1868) 3 Mad HCR 207, onwards it has been a well-recognised principle of law that a

plaintiff who acquires a fresh claim during the pendency of his suit or afterwards can bring another suit on the fresh cause of action. In that case, the

plaintiff claimed a right to resume a certain jeroiti land which had been temporarily alienated. He eventually failed on that cause of action; but during

the pendency of the suit the Government had transferred to him the rights in that village. He thereupon filed a fresh suit in which he claimed that the

mokhas which was the subject of the litigation in the earlier suit had lapsed to the Government and had been transferred to him by the Government.

It was held that he was entitled to put forward that plea and that the decision in the earlier suit did not operate as res judicata.

The Travancore-Cochin High Court had followed the Madras decision in *Gopalan Nair v. Bharathi Amma* (1951 K LT 660 : AIR 1952 TC 96).

In the instant case, the suit for partition had been filed in 1947. The present 3rd defendant acquired the tenancy right as per Ext. A3 on 10-1-

1948. He filed the written statement which is marked as Ext. B1 on 25-1-1948. Though the written statement was filed subsequent to the

acquisition of the tenancy right in view of the decisions referred to, we do not think that the 3rd defendant was bound to raise the question of his

tenancy right in the suit.

18. As regards the question whether the lease was by the tarwad or by the maintenance allottees this is a question of fact on which both the courts

below have held that the lease was by the tar-wad. We see no reason to differ from that view.

19. Another question that Mr. Raja-gopalan put forth vehemently was that the suit is bad for non-joinder of all the members of the tarwad. It is

said that the non-impleading will prevent the contesting respondents from working out their equities. It is difficult to say that all the members of the

tarward are necessary parties to the suit. The court is not working out here the equities in the partition suit. We are concerned with the rights of the

plaintiffs as lessees to certain properties belonging to the tarwad which had been set apart to some members of the tarwad in the partition suit.

Those members have been joined as parties. As regards setting aside the summary order which order was in favour of the receiver in proceedings

under Order 40, Rule 1, the receiver had been made a party to the suit. It is no doubt true that the receiver as such does not acquire a title to the

property in respect of which he has been appointed a receiver and the 3rd party is not entitled to bring a suit against the receiver alone ignoring the

real owners who are necessary parties to the suit. But it might be noted that the properties are set apart to the contesting respondents and the other

members of the tarwad as such have no right in the properties.

In the view we have taken, we set aside the judgment and decree of the lower appellate court by which the suit had been dismissed. The judgment

and decree of the trial court is restored. Consequently, the suit will stand decreed as prayed for. In the particular circumstances of the case, we feel

it is only just and equitable to direct the parties to bear their costs throughout.