

(1980) 07 MAD CK 0032
In the Madras High Court

Manickam alias Manickavasagam and Others

APPELLANT

Vs

Ramaswamy Gounder and Another

RESPONDENT

Date of Decision : 04-07-1980

Acts Referred:

Citation : (1981) ILR (Mad) 172 : (1980) 93 LW 780 : (1981) 1 MLJ 163

Hon'ble Judges : S. Natarajan, J

Bench : Division Bench

Judgement

S. Natarajan, J.—Defendants 1 to 9, 11 to 15, 17 to 25, 27 to 35 and 38 to 40, in the trial Court, respondents 41 to 43 (legal representatives of the deceased 10th respondent) and respondents 44 and 45 (legal representatives of the 16th respondent) in the lower appellate Court are the appellants. The plaintiff (first respondent herein) filed this suit, O.S. No. 978 of 1971 on the file of the Court of the District Munsif, Dindigul, for declaration of title and injunction in respect of the plaintiff A Schedule properties, failing which, for partition of his one-eighth share in the total extent of properties comprised in plaintiff Schedules A and B and for equitable allotment of the A Schedule portion to him. The District Munsiff declined to grant the first of the prayers and held that the plaintiff was entitled only to a decree for partition, but even there, he was not entitled to equities in his favour in the matter of the allotment of the A Schedule portion to him. Not satisfied with the decree passed in his favour the plaintiff preferred A.S. No. 134 of 1973 to the Subordinate Judge, Dindigul to reiterate his claim for declaration and injunction in respect of the A Schedule property. The appellants herein preferred a memorandum of cross-objections to canvass the correctness of the decree for partition granted by the trial Court to the plaintiff. The learned Subordinate judge dismissed the cross-objections and allowed the plaintiff's appeal and granted him the reliefs of declaration and injunction with reference to the A Schedule property. It is as against the reversing judgment of the Subordinate Judge the appellants have preferred the second appeal.

2. The brief facts which require to be noticed are as follows : The A and B

Schedule properties are situate on the west of the catchment area of Kasigoundankulam in Kalvarpatti village and originally belonged in common to the ancestors of the plaintiff as well as the defendants. The lands were originally being enjoyed as pasture lands. The parties were entitled to graze eighty heads of cattle and the respective sharers were grazing cattle in proportion to their shares. The plaintiff is entitled to an one-eighth share, i.e., to graze ten heads of cattle; defendants 16 to 19 are jointly entitled to graze $7\frac{1}{2}$ heads of cattle; defendants 14, 26 and 27 are together entitled to graze $2\frac{1}{4}$ heads of cattle; defendants 30 to 35 are each entitled to graze one head of cattle; the remaining shares belonged to the other branches who were also making use of the pasture lands in accordance with their shares. Subsequently, the sharers found that the lands can, with advantage, be brought under cultivation and therefore, decided to effect a partition between the various sharers so that they could conveniently raise crops on the portions allotted to them. Accordingly, a partition was effected and the plaintiff who is the major sharer was allotted the A Schedule properties towards his one-eighth share in the lands. An extent of about 2 acres in Survey Nos. 56211 and 56212 was also included in the portion allotted to the plaintiff on account of the fact that the land comprised in these two sub-divisions would always be water-logged and hence unfit for cultivation. The defendants were allotted various portions in the land set out in the B Schedule. For effective and convenient enjoyment of the A Schedule property, the plaintiff at first put up a thorny fence to enclose the property. But after some years, the plaintiff found it difficult to keep the thorny fence in good repair and hence he replaced the thorny fence with a live fence. The plaintiff dug a new well in the same place where the old well which had become silted up, was situate. The plaintiff had been raising crops in the A Schedule land and enjoying the same exclusively all these years. Likewise, defendants 2, 3, 24 and 25 had also enclosed the portions of land allotted to them by means of fences and were enjoying their properties separately. The other defendants, however, chose to keep the portions allotted to them as one plot and they were using the land only as grazing ground. By the intensive efforts taken by him, the plaintiff had developed the A Schedule land into an admirable garden land and such development made the defendants envious of the plaintiff. Defendants 1 to 14 called upon the plaintiff in the year 1970 to reopen the partition, but since the plaintiff did not yield to their demand, those defendants along with their henchmen, attempted to trespass into the A Schedule property on 28th October, 1970 and they actually demolished the fences on the northern and eastern sides of the land. The plaintiff preferred a complaint to the police at Vendasandur against defendants 1 to 14 and they were duly charged and convicted in the criminal Court. In spite of the conviction, defendants 1 to 14 as well as the other defendants were casting covetous eyes on the A Schedule land and were making preparations to trespass upon the land once again. It was in such circumstances the plaintiff came forward with his suit. He prayed that the Court should pass a decree in his favour declaring his title to the A Schedule property and also grant him a permanent injunction to restrain the defendants from interfering with his possession and enjoyment of the same.

As a secondary relief, the plaintiff prayed that if, for any reason, the Court found that there had been no partition and that the A Schedule property had not been allotted to him, then the Court should pass a decree for partition of his one-eighth share in the A and B Schedule lands and for allotment of the A Schedule land to him by way of equity since he had effected significant improvements on the land at considerable cost.

3. The 37th defendant remained *ex parte*, but the other defendants contested the suit and filed different sets of written statements. The common defence taken by the defendants in their respective written statements was that there had been no partition between the various sharers of the land and the plaintiff had at no time been allotted the A Schedule land towards his one-eighth share. They refuted the plaintiff's statement that the lands which were originally grazing lands had been converted into cultivable lands and that the plaintiff had been raising crops on the A Schedule land. They denied the plaintiff's averment that the plaintiff had fenced his portion of the land, i.e., the A Schedule land with thorny fence originally and with live fence subsequently. They also refuted the plaintiff's claim that he had effected improvements to the A Schedule land at considerable cost. They denied the plaintiff's charge that they had trespassed upon his property and demolished the fence. Their further case was that the plaintiff was not in exclusive possession of the A Schedule land and on the other hand, he was in joint possession with the rest of the co-owners over the A and B Schedule properties and therefore, the plaintiff was not entitled to a decree for injunction.

4. After evaluating the evidence adduced by the parties in support of their respective cases, the District Munsif rejected the cases of partition set up by the plaintiff and therefore, declined to grant the first of the prayers asked for by the plaintiff. He, however, found that the plaintiff was entitled to one-eighth share and therefore, granted a decree for partition, but even there, he held that the plaintiff was not entitled to work out any equities in his favour.

5. The learned Subordinate Judge, while dealing with the appeal and the cross-objections filed by the plaintiff and the defendants respectively, assessed the parties with reference to the evidence and found that the plaintiff's case was true and acceptable. Consequently, he allowed the plaintiff's appeal and granted a decree for declaration and injunction and dismissed the memorandum of cross-objections. Against the judgment of the appellate Judge, the appellants have come forward with this second appeal.

6. From what has been stated above, it may be seen that the principal controversy in the case is whether there had been a prior partition between the parties and if such a partition had taken place, whether the A Schedule property had been allotted to the plaintiff towards his one-eighth share. Though the lower appellate Court has reversed the finding of the trial Court and held that an oral partition as pleaded by the plaintiff should have taken place about twenty years before the filing of the suit and in that partition the plaintiff had been allotted the

A Schedule property, it cannot be disputed that the finding has been rendered purely on appreciation of the evidence. Such being the case, it is not open to the defendants to canvass, in the second appeal, the correctness of the findings rendered by the Subordinate Judge. However, even if some indulgence were to be shown to defendants in this behalf, I do not think the findings of the appellate Judge lend themselves open to criticism. The Subordinate Judge has pointed out that the plaintiff has been paying kist continuously for a fraction of the property from the year 1927 till 1971 as evidenced by the kist receipts, Exhibits A-2 to A-12. If the entire property had remained undivided, the plaintiff could not have paid kist separately for a portion of the property. An Advocate Commissioner who had inspected the property at the instance of the plaintiff noticed the existence of live fence (kiluvai fence) along the lines HABCDF and HFE and referred to this feature in this report and plan, Exhibits C-1 and C-2. Besides the Commissioner also noticed the existence of wells with piccottas, not only in the A Schedule land, but in portions of the B Schedule land also. The wells and the piccottas, though some of the piccottas had become dilapidated, afford indisputable proof to the plaintiff's case that the grazing land had been subsequently converted into cultivable land by some of the sharers including himself and he had made the A Schedule land into a pucca garden land. In such circumstances, the defendants cannot be heard to say that the Subordinate Judge had rendered findings in favour of the plaintiff without adequate material therefore in the plaintiff's evidence.

7. Mr. Doraiswami, learned Counsel for the defendants, then contended that, in any event, the plaintiff was not entitled to file an appeal against the judgment and decree of the trial Court since he had been granted the alternative relief prayed for by him in the suit, and, by reason of the decree passed in his favour the plaintiff cannot be considered an aggrieved person. In support of this contention, he cited Sakku Bai Amman Vs. R. Babu Reddiar and Others, . It is, no doubt, true that in the said decision it has been laid down that where a plaintiff asks for relief in the alternative and puts the alternative reliefs on a par with each other, he should be deemed to have made an election even at the threshold and after the grant of one of such alternative reliefs, he is not an aggrieved person who could carry the matter to the higher Court for the grant of that relief which was not given by the trial Court. The ratio contained in the decision cannot apply to the facts of the instant case, because the two prayers made by the plaintiff in the suit cannot be treated as alternative reliefs in the strict sense of the term. Moreover, it can never be said that the plaintiff had placed the second of the prayers on a par with the first prayer. The principal prayer of the plaintiff was that he should be declared entitled to the A Schedule property and that a decree for injunction should also be passed in his favour. The second prayer, which is loosely termed as an alternative prayer, is patently secondary in nature. As the plaintiff himself has stated, the second prayer has been sought for only if the Court, for any reason, found that the plea of partition was not acceptable and the plaintiff will not be entitled to the reliefs of

declaration and injunction. Even with reference to the second prayer, the plaintiff had wanted that his right to equities must be recognised and the relief moulded accordingly. In one sense, the plaintiff can well be deemed an aggrieved person, because, the trial Court did not grant the second relief asked for by the plaintiff in the manner in which he wanted it, but only gave him a qualified relief, i.e., a decree for partition without, however, any right to equities. Even if this technical aspect is overlooked there still remains the fact that the plaintiff had not placed the first and second reliefs on par with each other. In this context, it is apposite to refer to the judgment of the Supreme Court in R.C. Chandiok and Another Vs. Chuni Lal Sabharwal and Others, . That was a case where the plaintiffs sued for specific performance of an agreement of sale or, in the alternative, for return of the advance together with award of damages and the trial Court awarded them the alternative relief. In spite of it the plaintiffs preferred an appeal for re-iterating their claim for specific performance and the Supreme Court held that by reason of the grant of the alternative relief, the plaintiffs were not precluded from agitating for the relief of specific performance, well-known rule that a party cannot approbate and reprobate because, in that case, "the appellants (plaintiffs) had, by consistent and unequivocal conduct, made it clear that they were not willing to accept the judgment of the trial Court as correct". Therefore, it follows that unless a party is shown to have fully approbated to an alternative relief granted to him, he will not stand legally precluded from reprobating the decree and re-agitating his claim for the other relief, which was not given to him. I have already stated that in the present case, the alternative relief of partition asked for by the plaintiff had not been placed by him on par with the main relief of declaration of title and injunction and therefore, the defendants cannot base the contention that the plaintiff was not an aggrieved person and, consequently, his appeal to the lower appellate Court was itself not maintainable and, on that technical ground, the reversing judgment of the lower appellate Court should be set aside by this Court.

8. There being no other point for consideration, it follows that the second appeal has to fail and it will accordingly stand dismissed. But, having regard to the circumstances of the case, i.e., the parties being adjoining land-owners and as such, there should be cordial relationship between them, there will be no order as to costs.