
(1891) 10 MAD CK 0021
In the Madras High Court

Narayana

APPELLANT

Vs

Shankunni and Others

RESPONDENT

Date of Decision : 05-10-1891

Acts Referred:

Specific Relief Act, 1877 — Section 42

Citation : (1892) ILR (Mad) 255

Hon'ble Judges : Parker, J; Muttusami Ayyar, J

Bench : Division Bench

Judgement

1. The only question which it is necessary for us to determine is whether the suit can in its present form be maintained u/s 42 of the Specific Relief

Act. The plaint contains no prayer for possession of the properties mentioned in schedule A, though the right which it is sought to establish is the

right to set aside the karar and the amalgamation effected thereby of the plaintiffs' branch and that of the defendants Nos. 3--17 into a single

tarwad, and so to establish the exclusive title of the plaintiffs' branch to those properties.

2. The effect of the declaration must practically be to restore the plaintiffs' branch to the position which it occupied prior to the date of the karar,

and to restore its exclusive possession and title. The separate allotment and possession to which they claim to be entitled is clearly a consequential

relief within the meaning of Section 42. There is also a distinct averment in the plaint that plaintiff No. 1 is the lawful karnavan of his branch, and a

decree awarding possession of a house and title-deeds to him in that capacity has also been claimed and obtained. It is no doubt true that most of

the properties mentioned in schedule A are stated to be in the possession of tenants, but we observe that they are held under demises granted by

defendants Nos. 1 and 3 in accordance with the stipulations contained in the karar, and the possession of the tenants can only be regarded as the legal possession of the demisors, which is clearly adverse to the title" which the plaintiffs desire to establish. The fact therefore that the tenants are in actual possession is no ground for the plaintiffs omitting to claim possession as against the defendants. Our attention is drawn to the fact that defendant No. 1, who is a member of the plaintiffs' branch, is in joint possession with defendant No. 3, who is the karnavan of the other branch, but such possession is distinct from the possession which the plaintiffs are entitled to claim. If the present suit were instituted by him, defendant No. 3, he would be bound to claim separate possession of the properties mentioned in schedule A in supersession of the arrangement embodied in Exhibit I. We are therefore of opinion that plaintiffs are not entitled to maintain the present suit without praying for possession of the properties as consequential relief.

3. It is suggested for the respondents that we should allow them to amend the plaint by adding a prayer for possession. We observe that the objection that the suit was not maintainable under section 42 was taken in the Court below on 15th August 1887, and that the plaintiffs instead of asking for permission to amend the plaint contended that the suit was maintainable and took a fresh issue in regard to it. This is no a case in which the objection is taken for the first time in appeal, and we do not consider that the decisions in *Limba Bin Krishna v. Rama Bin Pimplu* ILR 13 Bom. 548 *Chomu v. Umma* ILR 14 Mad. 46 and in *A.bulkddar v. Mahomed* see ante, p. 15 are in point.

4. Nor is this a case in which the amendment was asked for and refused in the Court of First Instance. It is not therefore on all fours with *Tildesley v. Harper* 10 Ch. D. 393 or *Kurtz v. Spence* 36 Ch. D. 770. On the other hand, the objection was taken in the Court below, and the plaintiffs elected to take an issue and to allow the suit to proceed subject to the risk of an adverse decision. It is true that, as a general rule, the plaintiff may be permitted even on appeal to amend the plaint when he had framed it bond fide under a mistake or erroneous advice, and the other party could be adequately compensated by an award of costs, but it must be observed that when such amendment might possibly create a necessity for fresh

written statements and for fresh issues and practically amount to a trial de novo from the commencement, it is much more convenient to leave the plaintiffs to the liberty of maintaining a suit for ejectment, so that the opposite party might in no way be prejudiced in his defence or harassed with a second trial of the same suit. Under the circumstances we do not consider that this is a case in which we should allow the suit to be changed into one for ejectment at this stage. We reverse the decree of the Subordinate Judge on the ground that a declaratory suit will not lie and dismiss the suit with costs.