**KERALA HIGH COURT**

Mammathu

Vs.

Kathijumma Umma

Second Appeal No. 570 of 1960

(S. Velu Pillai, J.)

10.06.1964

**JUDGMENT**

**S. Velu Pillai, J.**

1. This second appeal relates to the reservations to be ordered in a partition suit between Mohammedan co-owners concerning a room, a cocoanut bin, a cattle shed and the compound wall alleged to have been constructed and a well alleged to have been dug, by two of them, defendants 3 and 4. Under a partition deed Ex. B. 1 dated the 20th September, 1930, the house and land sought to be partitioned, which were described in it as a house, two cattle sheds and a courtyard, were left in common. In the partition deed Ex. A-1 dated the 13th January, 1954, the description was in greater detail. The plea was that in the event of partition being allowed, the reservations may be made in favour of defendants 3 and 4. The Munsiff accepted the plea as regards the room and the bin, but not the others. The plaintiff appealed to the District Judge and defendants 2 to 7 who are the appellants here preferred a memorandum of objections. The District Judge while affirming the findings of Munsiff, held that there could be no reservation of even the room and the building, unless "the construction was a necessity or it was made with the concurrence express or implied of the other co-owners" and directed the Munsiff to pass a final decree after enquiry.

2. The findings that the room and the bin were constructed by defendants 3 and 4 are concurrent. The plea that the cattle shed, the compound wall. and the well, belonged to them was negatived by the Judge on the sole ground, that there is no evidence whatever to support the plea. The Munsiff accepted the evidence of the 4th defendant Dw. 1 and of his witnesses, to find that the room and the bin were constructed by them; the same evidence, if accepted, would prove that the well was dug and the compound wall built by defendants 3 and 4, The District Judge failed to advert to this evidence. The Munsiff has practically discarded the evidence of PW. 1. DWs. 1 and 2 admitted, that the cow-shed claimed, is what was rebuilt in the place of the old one which went into ruins. The renovation of the cattle shed, such as it was, was in the year 1958, after the suit was instituted and the commissioner had made a local inspection. In his report the commissioner observed, that a cattle shed was in a state of ruin. So all that defendants 3 and 4 could be held to have done was to repair the cattle shed; more than this, is not made out by the evidence. So,

differing from the lower Courts, I hold, that a compound wall was also constructed to the extent noticed by the commissioner in his report in Ex. C. 1, and a well dug by defendants 3 and 4.

3. Learned counsel for defendants 2 to 7 has taken exception to the statement of the law laid down by the Judge and has contended, that the items of improvement found, may be allotted to the share of defendants 3 and 4 in the event of partition. The law is stated thus by Freeman in his work on Co-tenancy ,and Partition, 2nd Edition, Section 509 :

> "The law declines to compel one co-tenant to pay for improvements made without his authorization; but it will not, if it can avoid so inequitable a result, enable a co-tenant to take advantage of the improvements for which he has contributed nothing. When the common lands come to be divided, an opportunity is offered to give the co-tenant who has enhanced the value of a parcel of the premises the fruits of his expenditures and industry, by allotting to him the parcel so enhanced in value, or as much thereof as represents his share of the whole tract. It is the duty of equity to cause these improvements to be assigned to their respective owners ..... so far as can be done consistently with an equitable partition."

This lays down a general rule of equity, but is subject to the condition, that no injustice is caused to the other co-tenants.

> "The equity of a co-tenant to have the part of the common property which he has improved allotted to him on a partition is not founded on the idea that he made the improvements with the consent, express or implied, of his co-tenants". Corpus Juris Secundum, page 228, Section 139.

4. Where such an allotment is not possible or practicable the question may arise, whether the other co-tenants may be required to pay their proportionate share of the value of improvements. The rule is stated thus, in 68 Corpus Juris Secundum, page 226, Section 130(c)(3) :

> "Where it is impossible or impracticable to allot that portion of the property on which the improvement is situated to the co-tenant who erected the improvement, the other co-tenants may be required to pay their proportionate share of the enhancement of value resulting from such improvement."

Freeman states thus in Section 510 :

> "Where one tenant in common lays out money in improvements on the estate, although the money so paid does not, in strictness, constitute a lien on the estate, yet a Court of equity will not grant a partition without first directing an account and a suitable compensation. To entitle the tenant in common to an allowance on a partition in equity, for the improvements made on the premises, it does not appear to be necessary for him to show the assent of his co-tenants "to such improvements, or a promise, on their part, to

> contribute their share of the expense; nor is it necessary for them to show a previous request to join in the improvements and their refusal. 'The only good faith required in such improvements is that they should be made honestly for the purpose of improving the property, and not for embarrassing his co-tenants or encumbering their estate, or hindering partition. But if one joint-tenant, or tenant in common, covers the whole of the estate with valuable improvements, so that it is impossible for his co-tenant to obtain his share of the estate without including a part of the improvements so made, the tenant making the improvements would not be entitled to compensation therefor, notwithstanding they may have added greatly to the value of the land; because it would be the improver's own folly to extend his down improvements over the whole estate, and because it would be unjust to permit a co-tenant, at his pleasure, to charge another co-tenant with improvements he may not have desired. In such a case, the improver stands as a mere volunteer, and cannot without the consent of his co-tenant, lay the foundation for charging him with improvement'."

The passage just cited consists of two parts and envisages two classes of cases, the latter of the two parts dealing specially with improvements which covers the whole or the greater portion of the estate. The learned author proceeds :-

> "As the allowance of compensation for improvements is, in all cases, made, not as a matter of legal right, but purely from the desire of the Court to do justice, the compensation will be estimated so as to inflict no injury on the co-tenant against whom the improvements are charged. He will therefore be charged, not with the price of the improvements, but only with his proportion of the amount which at the time of the partition they add to the value of the premises. From this amount he will also be entitled to deduct any sum to which he may have a just claim for use and occupation of his moiety enjoyed by the co-tenant making the improvements."

5. The Indian law is not different. The latter part referred to, of the passage, which was pertinent, was quoted with approval by Ran kin C.J. in the bench decision in *Solaiman Moosali v. Jatindra Nath*[1], This case has been followed in *Abdul Sattar v. Mohammed Zahoor*[2], The same view was held in *Mahadei Bewa v. Keluni Dei*[3], The case relied on by the lower Court in *Najju Khan v. Imtiaz-ud-din*[4], did not arise in a partition suit, but was by one co-owner for an injunction to compel the other to demolish a building which he had erected. The erection of the building was considered as equivalent to one co-owner making a partition in his own favour and selecting the portion of the land, by building upon it he could not be allowed to create an equity and embarrass the other co-owners, or hinder a partition. The other case relied on *Subbiah v. Gundlapudi*[5], does contain observations to support the judgment of the lower court, but I do not think, that these observations can be regarded as a full statement of the law.

6. From the above, the questions to be decided are, whether defendants 3 and 4 can be allotted the improvements or any portion thereof and whether if this cannot be, they can be compensated for the improvements they have made, to any extent. If the

[1] AIR 1929 Cal553 [3] AIR 1962 Ori 71 [5] ILR 46 Mad 104: AIR 1923 Mad 358

[2] AIR 1962 Pat 300 [4] ILR 18 All 115

improvements are well within the share that may fall to them, the consent of the others is irrelevant; if otherwise, under the latter part of the rule summarised by Freeman in the passage extracted above, such consent express or implied would he essential so far as such excess is concerned. If the house and land are incapable of physical partition, then too the question of compensation out of the sale proceeds in the case of eventual sale would be governed by the same considerations. It has however to be observed, that defendants 3 and 4 will have the right, if they prefer to do so, to demolish the room and the bin, and remove the materials, though not the compound wall, without materially affecting the property. The well cannot of course be interfered with.

7. The court may proceed to pass the final decree after such further enquiry as it thinks necessary in the light of the findings and observations made above. The parties shall bear their costs here and in the lower appellate court. This second appeal is allowed to the extent indicated.

Appeal partly allowed.