APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Parker.

NARAYANA (DEFENDANT No. 4), APPELLANT,

v.

SHANKUNNI AND OTHERS (PLAINTIFFS AND DEFENDANTS Nos. 1 TO 3), RESPONDENTS.*

1891. Sept. 22. Oct. 5.

Specific Relief Act—Act I of 1877, *s.* 42—*Declaration—Consequential relief—Civil Procedure Code, s.* 53—*Amendment of plaint.*

A karar was executed by members of two Malabar tarwads, by which the tarwad of the plaintiffs and defendants Nos. 1 and 2 was amalgamated with that of which defendant No. 3 was a karnavan; part of the property of the plaintiffs' branch was in the possession of defendants Nos. 1 and 3, and part of it was held under demises from defendant No. 3.

The plaintiffs sued for a declaration of their title to this property and for a declaration that the karar was not binding on them. An issue was framed on the question whether the suit was maintainable for want of a prayer for all relief consequential on these declarations:

Held, (1) that the suit was not maintainable for want of a prayer for possession of the lands under demise;

(2) that the plaintiffs should not be permitted on appeal to amend the plaint on appeal by the addition of such a prayer.

APPEAL against the degree of E. K. Krishnan, Subordinate Judge of South Malabar, in original suit No. 9 of 1887.

The plaintiffs alleged that they together with defendants Nos. 1 and 2 constituted the Vadakampat tarwad, plaintiff No. 1 being the present karnavan; that by a karar, now claimed to be invalid, executed by defendants Nos. 1 and 2 and representatives of the other defendants' tarwad, the two tarwads were amalgamated; that of the property of the plaintiffs' tarwad, the tarwad house was in the possession of defendant No. 3 as karnavan of the defendants' tarwad as per schedule B, and certain land in that of tenants to whom it had been demised by defendant No. 3 as per schedule A to the plaint. The prayer was for a decree declaring (1) that the karar was invalid as against the plaintiffs, and that the defendants, other than defendants Nos. 1 and 2, had no right to the property above referred to or to the rents thereof, but that the same was

* Appeal No. 149 of 1888.

NARAYANA v. SHANKUNNI.

vested in the plaintiffs' tarward; (2) showing the defendants' claim upon, and possession of the tarwad house specified in schedule B and directing the defendants Nos. 3 to 17 to restore it to the plaintiffs; (3) ordering that the defendants Nos. 3 to 17 do deliver to the first plaintiff all the subsidiary deeds and kychits in respect of the lands mentioned in schedule A; (4) ordering that the defendants Nos. 3 to 17 do pay costs with interest; (5) and by granting such other reliefs as to the Court seems fit.

Issues were framed raising the questions among others, "whether the plaintiffs are entitled to a decree as prayed for?" and "are the plaintiffs bound to ask for consequential relief under the "circumstances mentioned?"

The Subordinate Judge made the declarations prayed for and decreed that defendant No. 3 surrender to the plaintiffs the house mentioned in schedule B and the title-deeds of the properties mentioned in schedule A.

The defendants preferred this appeal on the following among other grounds:—

"The plaintiffs are not entitled to a declaratory degree so far as the properties in A are concerned. They ought to have prayed for consequential relief or possession."

Sankaran Nayar and *Ryru Nambiar* for appellants.

Rama Rau for respondents.

JUDGMENT.—The only question which it is necessary for us to determine is whether the suit can in its present form be maintained under section 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.

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.

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 not 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*(1), *Chomu* v. *Umma*(2), and in *Abdulkadar* v. *Mahomed*(3) are in point.

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*(4), or *Kurtz* v. *Spence*(5). 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

(1) I.L.R., 13 Bom., 548. (2) I.L.R., 14 Mad., 46. (3) See *ante*, p. 15.
(4) 10 Ch. D., 393. (5) 36 Ch. D., 770.

NARAYANA v. SHANKUNNI.

general rule, the plaintiff may be permitted even on appeal to amend the plaint when he had framed it *bonâ 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.

APPELLATE CIVIL.

Before Mr. Justice Parker.

1891. November 12.

THANIKACHELLA AND ANOTHER (DEFENDANTS), APPELLANTS,

v.

SHUDACHELLA (PLAINTIFF), RESPONDENT. *

Limitation Act—Act XV of 1877, *sched. II, arts.* 99, 132—*Payment of entire rent by a co-tenant—Suit for contribution.*

One of two persons, having a joint holding from a mittadar, paid the whole of the mittadar's dues for one year, and more than three years after the date of payment he sued the other for contribution:

Held, the payment did not create a charge on the land, and the suit was consequently barred by limitation.

APPEAL against the order of P. Narayanasami Ayyar, Subordinate Judge of Salem, in appeal suit No. 271 of 1889, reversing the decree of T. S. Krishna Ayyar, District Munsif of Krishnagiri, in original suit No. 133 of 1889, and remanding the suit for retrial.

The plaintiff and defendants were described in the plaint as owners each of one moiety of two permanent ijara villages held on

* Appeal against Appellate Order No. 134 of 1890.