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IN THE HIGH COURT OF JUDICATURE AT MADRAS

THE HONOURABLE JUSTICE MR.N.ANAND VENKATESH

29.03.2022

Second Appeal No.125 of 2014 and MP.1 of 2014 and CMP No.3572 of 2022

G. Nagaiyan & Anr. Vs. K. Palanivel

Doctrine of Approbate and Reprobate – A party claiming right over the schedule property cannot take two contradictory stands before two different authorities/ courts.

Doctrine of Approbate and Reprobate - A party cannot claim a right over a property when he had obtained another Decree from the competent Civil Court on the ground that no right or title was conveyed to him under the sale deed. *(Para 31)*

For Appellant : Mr. V. Raghavachari for M/s. A. Tamilvanan

For Respondents : M/s. P. Valliappan for M/s. B. Vijay

J U D G M E N T

The plaintiffs are the appellants in this Second Appeal.

2. The plaintiffs filed the suit seeking for the relief of permanent injunction restraining the defendants from in any manner trespassing or interfering into the plaintiff's peaceful possession and enjoyment of the suit 'A' and 'B' schedule properties. The plaintiffs sought for a further relief of delivery of vacant possession of the 'C' schedule property after directing the defendants to remove the super structures.

3. The case of the plaintiffs is that they are the absolute owners of the suit properties. The plaintiffs claimed that the suit properties originally belonged to one Mrs. Rukmini Ammal and she in turn sold the property measuring an extent of 4 1/6 cents in Survey.No.11/3B (Part) to one Mrs. Seethalakshmi Ammal under a registered sale deed dated 13.10.1965. The said Seethalakshmi Ammal sold the property to one Nandakumar under a registered sale deed dated 15.10.1975. The said Nandakumar sold the portion of the property to the 1st plaintiff. Insofar as the other portion of the property is concerned, Rukmini Ammal sold 8 cents in Survey.No.11/2A and the remaining portion in Survey.No.11/3B to one Sreedhar under a registered sale deed dated 29.4.1964. The said Sreedhar sold the property to the plaintiffs. This property has been described as Item No.2 in the suit schedule.

4. The further case of the plaintiffs is that the vendor of the plaintiffs had properties which were adjacent to each other and they jointly sold half of the properties on the southern side in favour of the 1st plaintiff through a sale deed dated 29.4.1981. The whole of this property is described as the 'A' schedule property. Similarly,a separate sale deed was executed by the vendors on 29.4.1981 for the remaining half of their properties and this

property is described as the 'B' schedule property. After the purchase of the respective share, the 1st and 2nd plaintiffs claimed that they have been issued separate patta for the 'A' and 'B' schedule properties respectively.

5. The grievance of the plaintiffs at the time of filing this suit was that the defendant with the help of his men, attempted to trespass over the 'A' and 'B' schedule properties by removing the fencing that was put up by the plaintiff. A police complaint was also lodged in this regard. It is with this cause of action, the suit came to be filed in the year 1994 before the District Munsif Court, Poonamallee. At the time of filing the suit, the suit properties comprised of only 'A' and 'B' schedule properties.

6. The present suit kept moving from one Court to another due to change in territorial jurisdiction. Hence, the suit that was filed in the year 1994 before the District Munsif Court, Poonamallee was transferred to District Munsif Court, Ambathur and it was re-numbered as O.S. No. 230 of 1996. Once again, the suit was transferred to Sub-Court Poonamalle and re-numbered as O.S. No. 228 of 2008. It is quite unfortunate that it took nearly 14 years for the suit to ultimately settle down and it is only thereafter that effective proceedings commenced.

7. In the meantime, an Advocate Commissioner came to be appointed on 10.6.1994 by the District Munsif at Poonamalle and he filed the report which was marked as Ex.A14. The Advocate Commissioner was also examined as PW2. Based on his report, an amendment came to be made by the plaintiffs in the year 2009 wherein the 'C' schedule property was also added to the suit schedule and the necessary averments were made in the plaint at para 9 (a) and the plaintiffs also sought for the relief of delivery of vacant possession of the 'C' schedule property after removing the super structures.

8. The defendant filed the written statement and he took a stand that he purchased the 'C' schedule property measuring an extent of 6 7/8 cents by virtue of a registered sale deed dated 27.8.1974 and that he is in possession and enjoyment of the said property. According to the defendant, this property is situated on the eastern side of the property owned by the plaintiffs. The defendant took a further stand that he had put up structures in the 'C' schedule property even prior to the filing of the suit and that the plaintiffs do not have any right or title over the 'C' schedule property. Accordingly, the defendant sought for the dismissal of the suit.

9. An additional written statement was also filed by the defendant to the effect that the plaintiffs have not properly valued the suit and paid the proper Court fees. A further stand was taken to the effect that the plaintiffs have not properly described the suit property and 'C' schedule property was not acquired by any authority and only the remaining portions were acquired.

10. Both the Courts below on considering the facts and circumstances of the case and on appreciation of the oral and documentary evidence, concurrently granted the relief sought for, in favour of the plaintiffs with respect to the 'A' and 'B' schedule properties after finding that the plaintiffs have made out a case establishing their right, title and

possession of the 'A' and 'B' schedule properties. However, insofar as the 'C' schedule property is concerned, the suit was dismissed and confirmed by the Lower Appellate Court. Aggrieved by the same, the plaintiffs have filed the present Second Appeal and the Second Appeal confines itself only insofar as the 'C' schedule property is concerned and this Court has to consider if the findings of both the Courts below, in not granting the relief in favour of the plaintiffs with respect to the 'C' schedule property, is sustainable.

11. When the Second Appeal was admitted, the following substantial questions of law were framed by this court:

(a) Are the courts below right in denying the relief of recovery of possession of plaint schedule ‘C’ property, when the plaintiffs (appellants herein) have established that plaint schedule 'C' property is part of plaint schedule 'A' property and schedule 'B' property and that the plaintiffs are owners of schedule 'A' and 'B' properties ?

(b) Are the courts below right in brushing aside Advocate in Commissioner's Report (Ex.A14) and Taluk Surveyor's Sketch (Ex.A15), which clearly identify the encroachment made by the defendant (respondent herein) stating a reason that the Surveyor has not shown boundary stones in the sketch?

(c) Are the courts below right in not rendering a finding that the respondent/defendant does not own land in that place, when the appellants/plaintiffs have clearly established through Ex.A16 (letter issued Tamil Nadu Housing Board) and Ex.A17 (Sketch Issued by Tamil Nadu Housing Board) that the entire extent of 18 cents in Survey No.11/3B3 including 6 7/8 cents purchased by the respondent/ defendant vide sale deed dated 27.8.1974, was acquired by Tamil Nadu Housing Board".

12. Heard Mr.V.Raghavachari, learned counsel for the appellants and Mr.P.Valliappan, learned counsel for the respondent. This Court also carefully went through the materials available on record and the findings of both the Courts below.

13. During the pendency of the Second Appeal, C.M.P. No. 3572 of 2022 has been filed by third parties to the proceedings on the ground that the respondent had already forfeited their right in the 'C' schedule property and the impleading parties as subsequent purchasers, want to get themselves impleaded and according to the petitioners, they are also proper and necessary parties to the proceedings. This Court did not pass any orders in this petition and it was decided to take up this petition along with the Second Appeal. Ultimately, the decision arrived at in the Second Appeal will have a bearing while considering the impleading petition.

14. This Court already made it clear that the present Second Appeal confines itself to the 'C' schedule property and the relief sought for by the plaintiffs with respect to this property. Therefore, it is not necessary for this Court to deal with any of the facts concerning the 'A' and 'B' schedule properties for which the reliefs have already been granted to the plaintiffs and it has also become final.

15. A careful reading of the amended plaint shows that there are absolutely no averments as to how the plaintiffs are claiming any right or title over the 'C' schedule property. This amendment itself came about in the year 2009, after nearly 15 years after the filing of the suit. This amendment was sought for by the plaintiffs based on the report filed by the Advocate Commissioner. The averments in the amended plaint is to the effect that the defendant had trespassed into the suit properties (which originally contained 'A' and 'B' schedule properties) and the portion that was trespassed was shown in red colour in the report of the Advocate Commissioner, and that was separately carved out as the 'C' schedule property. Therefore, the plaintiffs were proceeding further on the assumption that the 'C' schedule property also formed part of 'A' and 'B' schedule properties and the same is abundantly clear from their description of the 'C' schedule property in the plaint.

16. In view of the above, this Court has to first ascertain as to whether the plaintiffs have any independent right or title over the 'C' schedule property. It will therefore be relevant to take note of the findings of both the Courts below in this regard.

17. The report of the Advocate Commissioner was the spark for the amendment of plaint and for adding the 'C' schedule property. While dealing with the report of the advocate commissioner and his evidence when he was examined as PW2, both the Courts concurrently held that the survey that was conducted by the Advocate Commissioner with the help of the surveyor, does not anywhere indicate that the entire 'A' and 'B' schedule properties were properly measured. Both the Courts below also found that neither the respondent nor his counsel were present at the time of inspection made by the Advocate Commissioner. The Courts below also found that the eastern boundary line of the 'A' and 'B' schedule properties has not been correctly fixed by the surveyor. On carefully perusing Exhibits A14 and A15, both the Courts below categorically found that the surveyor did not properly measure the suit property and did not ascertain the survey stone and boundary line and a survey plan has been drawn as if a portion of the building has been constructed by the respondent by encroaching a portion of the suit property. This Court also carefully went through the report of the Advocate Commissioner and the sketch filed along with the report and this Court does not find any perversity in the findings of both the Courts below. Therefore, with respect to the 'C' schedule property, there is no material or proof to come to a conclusion that it forms part of the 'A' and 'B' schedule properties. The first and second substantial questions of law are answered accordingly.

18. During the course of arguments, the learned counsel for the appellants questioned the very right of the respondent over the 'C' schedule property. The learned counsel submitted that even if the 'C' schedule property is held not to form part of the 'A' and B schedule properties, the 'C' schedule property was already acquired by the Government and therefore, the respondent cannot put up any structures in the 'C' schedule property and cause hindrance to the appellants while enjoying the 'A' and 'B' schedule properties.

19. The learned counsel for the appellants further developed his argument and questioned the conduct of the respondent. It was submitted that the respondent did not

approach the Court with clean hands. To substantiate this submission, the learned counsel for the appellants particularly pointed out two facts which, according to the learned counsel for the appellants, reveals the conduct of the respondent. The first fact is that the respondent after purchasing the 'C' schedule property through registered sale deed dated 27.8.1974 from one Dayalan, measuring an extent of 6 7/8 cents, found that this property had already been acquired by the Government and hence he filed a suit in O.S.No.9228 of 1975 against Dayalan and sought for the relief of refund of the sale consideration along with cost. This suit ultimately ended with a joint endorsement made by both the parties wherein the respondent agreed to receive a sum of Rs.7000/- from the said Dayalan and a decree was also passed recording the same on 16.2.1979. To substantiate the same, the learned counsel pointed out to Exhibits A10 to A13. Therefore, it was submitted that the respondent cannot be allowed to wriggle out of this decree and claim a right over the 'C' schedule property. The next fact that was pointed out by the learned counsel for the appellants is that the respondent intentionally concealed this material fact in the written statement filed in the present suit. The learned counsel therefore submitted that both the Courts below ought to have taken into account this conduct of the respondent and drawn an adverse inference against the respondent.

20. Per contra, the learned counsel for the respondent submitted that the appellant had sought for the relief of recovery of possession with respect to the 'C' schedule property even without properly explaining the facts and without any details with regard to the immoveable property as mandated under Order 7 Rule 3 of CPC. The learned counsel further submitted that the non-mentioning of the earlier suit filed by the respondent in O.S.No. 9228 of 1975, was not intentional and this issue that is now urged on the side of the appellants did not form part of the pleadings in the suit and also the grounds of appeal in A.S. No. 28 of 2011 filed by the appellants. Even otherwise, a specific stand was taken by the respondent in the additional written statement to the effect that the property in possession of the respondent to an extent of 6 7/8 cents,was never acquired by the Government. To substantiate this submission, the learned counsel relied upon Ex.A16 wherein it has been specifically stated that only 18 cents was acquired for the Tamil Nadu Housing Board. The learned counsel pointed out to Ex.B3 which is the sale deed dated 27.8.1974 and submitted that the total extent of the property in Survey No.11/3B3 was 24 cents and what was acquired was only 18 cents and the property that was purchased by the respondent under this sale deed measuring an extent of 6 7/8 cents roughly measuring an extent of 2610 Sq., feet was never acquired. The learned counsel concluded his arguments by submitting that the findings of both the Courts below does not warrant any interference of this Court and the appellants are not entitled for the relief sought for insofar as the 'C' schedule property is concerned.

21. Before rendering a finding and answering the third substantial question of law, the conduct of the respondent/defendant requires some consideration by this Court.

22. It is clear from Exhibits A10 to A13 that the respondent went before a competent civil court by filing O.S.No.9228 of 1975 and took a specific stand that the property purchased

by him under Ex.B3 did not convey any title to him since the property involved in this sale deed has been acquired by the Government for the Tamil Nadu Housing Board. For proper appreciation, the relevant portion in the plaint filed by the respondent is extracted hereunder:

"5. The Plaintiff submits that on further enquiries had found out that the Defendant has sold the said land for Rs.6,500/- without disclosing the fact that the particular land at the time of sale had already been acquired by the Govern m ent and also approved for laying down the Road. H ence the Defendant had no title or right over the property at the time of sale i.e., 27.8.1974. Theseinfor m at ions have been supressed by the Defendant wilfully with a view to defraud the Plaintiff. The Defendant has not conveyed any title or right by the sale deed dated 27.8.1974. Though he has received a sum of Rs.6,500/- as sale consideration. H ence there is a total failure of consideration paid by the plaintiff."

23. It is clear from the above that the respondent took a very specific stand that the vendor Dayalan did not convey any right or title under the sale deed. Therefore, the respondent sought for refund of the entire sale consideration along with the cost incurred by him. During the pendency of this suit, the parties came to an agreement and through a joint endorsement made on 16.2.1979, the respondent agreed to receive a sum of Rs. 7000/- from the vendor Dayalan in full quits. This was recorded by the competent Civil Court and a Decree was passed in O.S. No. 9228 of 1975. By virtue of this Decree, the respondent has given up his rights and title over the property that was purchased by him under Ex.B3. Under such circumstances, it will not be open to the respondent to take a completely contrary stand as if the property was not acquired by the Government and he continues to be the owner of the property. This is where the principle of approbate and reprobate comes into play.

24. It is a well-established rule in equity that a man cannot approbate and reprobate. The general rule, which originated from Scotland and is the foundation of the principle of election, was set out by Lord Redesdale in the early case of **Birmingham v Kirwan (1805 2 Sch. & Lef. 449)** in the following way:

"*The general rule is that a person cannot accept and reject the same instrument, and this is the foundation of the law of election."*

25. Years later in **Smith v Baker [1873 LR 8 CP 350]**, Honeyman, J., explained the doctrine thus:

"*As to the general rule of law there is no dispute. A man cannot at the same time blow hot and cold. He cannot say at one time that the transaction is valid, and thereby obtain some advantage, to which he could only be entitled on the footing that it is valid, and at another time say it is void for the purpose of securing some further advantage."*

26. In ***Verschures Creameries Limited v Hull and Netherlands Steamship Company [1921 2 KB 608]***, the Court of Appeal noted that the doctrine of election was not confined to instruments alone. These principles were finally approved by the House of Lords in ***Lissenden v C.A Bosch Limited [1940 A.C 412]***, where Viscount Maugham pointed out as under:

"*My Lords, I think our first inquiry should be as to the meaning and proper application of the maxim that you may not both approbate and reprobate. The phrase comes to us from the northern side of the Tweed, and there it is of comparatively modern use. It is, however, to be found in Bell's Commentaries, 7th ed., vol. i., pp. 141–2; and he treats "the Scottish doctrine of approbate and reprobate" as "approaching nearly to that of election in English jurisprudence." It is, I think, now settled by decisions in this House that there is no difference at all between the two doctrines."*

Turning to its application to Wills and other instruments, Viscount Maugham opined thus:

"*The doctrine is founded on the intention, explicit or presumed, of the testator in the case of a will and of the author or donor in the case of instruments, namely, the intention that a man shall not claim under the will or instrument and also claim adversely to it."*

27. These principles have been consistently followed in this country. In ***R.N. Gosain v. Yashpal Dhir*, (1992) 4 SCC 683,** the Supreme Court has observed as under:

"*Law does not permit a person to both approbate and reprobate. This principle is based on the doctrine of election which postulates that no party can accept and reject the same instrument and that "a person cannot say at one time that a transaction is valid and thereby obtain some advantage, to which he could only be entitled on the footing that it is valid, and then turn round and say it is void for the purpose of securing some other advantage". [See : Verschures Creameries Ltd. v. Hull and Netherlands Steamship Co. Ltd. [(1921) 2 KB 608, 612 (CA)] , Scrutton, L.J.]"*

28. In ***Joint Action Committee of Air Line Pilots' Assn. of India vs. DG of Civil Aviation*, *(2011) 5 SCC 435***, the Supreme Court has held thus:

"12. The doctrine of election is based on the rule of estoppel--the principle that one cannot approbate and reprobate inheres in it. The doctrine of estoppel by election is one of the species of estoppels in pais (or equitable estoppel), which is a rule in equity..... Taking inconsistent pleas by a party makes its conduct far from satisfactory. Further, the parties should not blow hot and cold by taking inconsistent stands and prolong proceedings unnecessarily."

29. In ***Union of India v N. Murugesan (2022 2 SCC 25)***, the English decisions on the point were cited with approval by the Supreme Court. It is important to notice that the Supreme Court has recognised it as a principle emanating out of the common law and not from the statutory text of Section 115 of the Evidence Act. This is clear from the following observations:

"*A person cannot be allowed to have the benefit of an instrument while questioning the same. Such a party either has to affirm or disaffirm the transaction. This principle has to be applied with more vigour as a common law principle, if such a party actually enjoys the one part fully and on near completion of the said enjoyment, thereafter questions the other part. An element of fair play is inbuilt in this principle. It is also a species of estoppel dealing with the conduct of a party."*

30. In its latest decision in ***Premalata @ Sunita vs Naseeb Bee*** (Civil Appeal Nos 2055-2056 of 2022), decided on 23.03.2022, the Hon'ble Supreme Court applied the doctrine of approbate and reprobate holding that a litigant cannot be permitted to take two different/contradictory stands before two different forums. The Hon'ble Supreme Court has observed as under:

"*At the outset, it is required to be noted and it is not in dispute that the plaintiff instituted the proceedings before the Revenue Authority under Section 250 of the MPLRC. These very defendants raised an objection before the Revenue Authority that the Revenue Authority has no jurisdiction to deal with the matter. The Tehsildar accepted the said objection and dismissed the application under Section 250 of the MPLRC by holding that as the dispute is with respect to title the Revenue Authority would not have any jurisdiction under MPLRC. The said order passed by the Tehsildar has been affirmed by the Appellate Authority (of course during the pendency of the revision application before the High Court). That after the Tehsildar passed an order rejecting the application under Section 250 of the MPLRC on the ground that the Revenue Authority would have no jurisdiction, which was on the objection raised by the respondents herein - original defendants, the plaintiff instituted a suit before the Civil Court. Before the Civil Court the respondents - original defendants just took a contrary stand than which was taken by them before the Revenue Authority and before the Civil Court the respondents took the objection that the Civil Court would have no jurisdiction to entertain the suit.* ***The respondents - original defendants cannot be permitted to take two contradictory stands before two different authorities/courts. They cannot be permitted to approbate and reprobate once the objection raised on behalf of the original defendants that the Revenue Authority would have no jurisdiction came to be accepted by the Revenue Authority/Tehsildar and the proceedings under Section 250 of t he MPLRC came to be dismissed*** *and thereafter when the plaintiff instituted a suit before the Civil Court it was not open for the respondents - original defendants thereafter to take an objection that the suit before the Civil Court would also be barred in view of Section 257 of the MPLRC."*

31. In the considered view of this Court, the respondent is not entitled to claim for any right or title over the 'C' schedule property. There is no requirement for this Court to undertake the exercise of finding out how much of property was acquired and how much was left out by the Government. This is in view of the fact that the respondent went before the competent Civil Court and obtained a Decree on the ground that no right or title was conveyed to him under the sale deed dated 27.8.1974 marked as Ex.B3. This crucial fact was lost sight of by both the Courts below and both the Courts unnecessarily undertook the exercise of finding out the ownership of the respondent over the 'C' schedule property. The third substantial question of law is answered accordingly.

32. Having given the finding for the third substantial question of law, this Court has to now see if the appellants are entitled for the relief sought for with respect to the 'C' schedule property. This Court has already held that the 'C' schedule property does not form part of the 'A' and 'B' schedule property and to that extent, the findings of both the Courts below have been upheld. The plaintiffs/appellants have tried to improve their case during the course of proceedings by taking advantage of the report of the Advocate Commissioner. The description of the 'C' schedule property was totally unclear and bereft of details. The relief was not supported by necessary pleadings as is required under Order VII Rule 3 of C.P.C. The plaintiffs/appellants will be entitled for the relief of recovery of possession with respect to the 'C' schedule property only if they are able to substantiate their right over the property and they identify the property to form part of the A and B schedule properties. The appellants during the course of proceedings improved their case as if a portion of the building has been constructed by the respondent on the

road margin and the remaining building has been erected within the 'A' and 'B' schedule properties. Consequently, it was argued that unless the entire building constructed by the respondent is removed, the appellant cannot have access towards the eastern side park road. Both the Courts below on analysing the oral and documentary evidence, have given a categorical finding that there is no evidence to hold that a portion of the property has been constructed in the 'A' and 'B' schedule properties and that the respondent has caused obstruction to the access of the appellant for the convenient enjoyment of 'A' and 'B' schedule properties. At every stage, the appellants have attempted to improve their case and only at the appellate stage, the appellants came up with the plea that the building constructed by the respondent is obstructing their pathway right. The amendment that was sought for by the appellants to the pleadings at the appellate stage was rightly rejected by the Lower Appellate Court. As stated supra, the only finding that deserves to be interfered in the Second Appeal is regarding the finding to the effect that the respondent has established that he is owning the land on the eastern side of 'A' and 'B' schedule properties and that the construction has been put up in his property. However, this adverse finding rendered against the respondent does not automatically result in granting the relief of recovery of possession with respect to the 'C' schedule property.

33. Insofar as the right claimed by the respondent in the property acquired through Ex.B3 sale deed and the construction put up by him in the said property is concerned, it is for the Government and the Housing Board to initiate appropriate action. They are not parties to the present proceedings and nobody from the department has been examined in this regard. Therefore, this Court is not inclined to get any deeper into the inter-se rights between the respondent and the Tamil Nadu Housing Board. In any case, it will not be relevant to go into this issue in the present Second Appeal. The findings rendered by both the Courts below disentitling the appellants from claiming the relief of recovery of possession with respect to the 'C' schedule property, does not suffer from any perversity and the appellants have not made out a case to interfere with the ultimate decision taken by both the Courts below rejecting/dismissing the suit with respect to the relief sought for the 'C' schedule property. Accordingly, the Judgment and Decree of both the Courts below are sustained.

34. Insofar as C.M.P. No 3572 of 2022 is concerned, the issue involved therein need not be gone into in this Second Appeal. Accordingly, this civil miscellaneous petition is closed. It is left open to the petitioners to independently agitate their rights in the pending suit in O.S. No. 267 of 2013.

35. In the result, the Second Appeal is dismissed. Considering the facts and circumstances of the case, there shall be no order as to cost. Consequently, connected miscellaneous petitions is closed.