

(1949) 03 MAD CK 0043
In the Madras High Court

Abdul Rahim Saheb

APPELLANT

Vs

Abdul Salam Sahib

RESPONDENT

Date of Decision : 01-03-1949

Acts Referred:

Citation : (1949) 62 LW 386 : (1949) 1 MLJ 522

Hon'ble Judges : Mack, J

Bench : Division Bench

Judgement

Mack, J.—Petitioner is the first defendant in a Mohamedan family partition suit. In the plaint filed by two members of the family there were

specific prayers for past and future mesne profits on the items of property to be decreed to them and in respect of past mesne profits specific

court-fee was admittedly paid. At the preliminary decree no provision was made for either past or future mesne profits. Subsequently on the

application of the second plaintiff the learned Judge directed an ascertainment of mesne profits both past and future to be determined by the

Commissioner working out the final decree.

2. It is contended that this order is without jurisdiction and is not in accordance with Ghulusum Bivi v. Ahamadsa Rowther ILR (1918) Mad. 296,

a Bench decision of Ayling and Krishnan, JJ. The facts as set out there do not however show that future mesne profits were asked for in the

written statement of the tenth defendant who it was that asked, subsequent to the preliminary decree, for ascertainment of future mesne profits only

on some property allotted to her in the preliminary decree. The decision in that case was to the effect that she could not ask for future mesne profit

which was not specifically provided for in the preliminary decree. The facts there

were rather different to those in the present case. The learned Judge rightly followed a later Bench decision of this Court in T.S. Swaminatha Odayar, lately a minor by guardian Meenakshi Achi but now declared a major and guardian on record discharged Vs. T.S. Gopalaswami Odayar and Others, , where it was specifically held that where a preliminary decree for partition is silent as to the claim for mesne profits, the parties are not precluded from applying, or the Court from awarding, mesne profits by its final decree. There is an observation there that though the CPC does not specially lay down any procedure in regard to a composite action for partition and possession, the Court may pass a final decree for mesne profits even if it was not preceded by a preliminary decree. In the present case the plaint specifically asked for past mesne profits and paid court-fee on this relief. I am not prepared to accept the technical contention that because the preliminary decree was silent about this relief it must be deemed that this relief was negated by the. Court. I can see no grounds for any interference in revision. The petition is dismissed with costs-one advocate's fee to be shared by the two learned advocates who have appeared for the respondents.