
(1937) 04 MAD CK 0022
In the Madras High Court

Gangamma

APPELLANT

Vs

Mahabala Bhatta and Another

RESPONDENT

Date of Decision : 29-04-1937

Acts Referred:

Citation : AIR 1937 Mad 879 : (1937) 46 LW 676

Hon'ble Judges : Varadachariar, J

Bench : Division Bench

Judgement

Varadachariar, J.—This second appeal arises out of a suit in which the plaintiff comprised 3 heads of claim and the Courts below have

dismissed the suit in respect of all those claims on grounds of law. It is much to be regretted that the questions of fact arising in the case remain to

be investigated hereafter, after the lapse of several years.

2. The following are the circumstances that led up to this suit. The plaintiff instituted O.S. No. 90 of 1924 on the file of the Mangalore Sub-Court,

for recovery of possession of certain properties with mesne profits and certain alienees were impleaded as parties thereto. The defendants to the

present suit were defendants 8 and 9 in the former suit. That suit was referred to arbitrators and an award was passed on 13th September 1926 to

the effect that the plaintiff would be entitled to take possession of the properties in the possession of the present defendants on depositing into

Court on the next Vishu Shankramana day (middle of April 1927) a sum of Rs. 2,600 for payment to the defendants as compensation for

improvements effected by them. The award went on to add that the plaintiff was not entitled to any mesne profits until the deposit was made and it

was next observed that:

Defendants 8 and 9 being in possession under the term lease are liable to pay rent for the two years ending Vishu Shankramana next, viz. Rs. 100

in all to the plaintiff. . . . from the date of deposit into Court the plaintiff is entitled to recover mesne profits from defendants 8 and 9 till recovery

of possession at the rate to be ascertained if necessary after the deposit.

3. On the filing of this award into Court, a decree was passed on 28th September 1926 merely to the effect that the award be made a decree of

Court. No formal decree with various clauses corresponding to the provisions of the CPC was drawn up. The money directed to be deposited

was deposited only on 31st August 1927, and the plaintiff obtained possession through Court on 17th October 1927.

4. Nearly 3 years later, the plaintiff filed this suit for recovery of (1) Rs. 270 odd representing the value of arecanuts, cocoanuts, cashewnuts etc,

alleged to have been collected by the defendants between 31st August 1927 and 17th October 1927; (2) Rs. 300 being the value of the crops on

the land at the time of delivery which the defendants harvested away without handing over the crops with the land to the plaintiff, and (3) Rs.

122.8-0 being damages for waste committed in respect of a building on the land between the date of the decree and the date of delivery of

possession. Several objections were raised to the plaintiff's claim on the merits, but two preliminary objections were also raised, one a plea of res

judicata (issue 1) and the other an objection of bar u/s 47, Civil P.C. (issue 2). Issue 4 raised the question whether the plaintiff was entitled to the

value of the crops.

5. The District Munsif as well as the learned Subordinate Judge found against the plaintiff on these 3 issues and dismissed the suit. Hence the

second appeal. It is conceded before me that issue 1 cannot possibly cover the claim for damages said to have been caused subsequent to the date

of the decree. The objection to that part of the claim can only be u/s 47, Civil P.C. The applicability of Section 47 to a claim for damages of this

kind is supported by the decision of the Bombay High Court in Hari Shridhar Prabhu Desai Vs. Sakharam Padmanna Magdum, , followed by a

Division Bench decision of this Court in Dhanarajagerji v. Parthasarathy AIR 1933 Mad 825 . There is an expression of opinion to the contrary in

Ramu Shettithi v. Manniappu Shettithi AIR 1917 Mad 79 and I am free to confess

that my own inclination is against the view taken in the Bombay case and in the recent Madras case. But as the amount involved under this head is very small, it does not seem to me worthwhile to dissent from the later judgments or refer this question for consideration by a Bench. I accordingly confirm the decree of the Courts below so far as the claim for Rs. 122 8-0 for damages as per Schedule B to the plaint is concerned; but in respect of the other two heads of the plaint claimed, I am unable to agree with the view taken by the Courts below.

6. The present claim is only in respect of what must be described as future mesne profits from the point of view of the former suit. Future mesne profits were no doubt claimed in the plaint in the former suit. But, it has been held in more than one case in this Court that the mere omission to award the claim for future mesne profits will not bar the maintainability of a second suit for the same. I rather think what is referred to as a plea of res judicata even in this connection is substantially a plea of the bar u/s 47, Civil P.C. The award, far from negating or even ignoring the plaintiff's claim to mesne profits, recognized it. Hence it is, I think, the objection to the present suit, if at all, can only be that the plaintiff should have recovered future mesne profits by further proceedings in that suit and not by instituting a separate suit therefor. But further proceedings could have been for the purpose in that suit only if the decree had been drawn up in the terms contemplated by Order 20, Rule 12, that is, if the decree had directed an enquiry as to mesne profits. As I said before, the Court did not take the trouble of drafting a decree in conformity with the provisions of the Code and the arbitrators did not do either. If the plaintiff had applied for an enquiry into mesne profits in that suit, I am almost certain that in view of the terms I have already set out from the award, the defendants would have raised the objection that there was no direction in the decree for such enquiry; and there are authorities in this Court holding that in the absence of such a direction in the decree, no further proceedings either in the suit or in execution can be taken. The decision in *Kemgam Swamy and Others Vs. Vaddadi Subbamma and Others*, affords no true analogy to the present case, because the decree then under consideration contained an express direction that mesne profits shall be ascertained in execution. On a careful consideration of the terms of the award, I

very much doubt whether the arbitrators contemplated an enquiry into mesne profits in execution. They apparently hoped that the deposit will be made on the Vishu Shankramana day and possession will be given upon that date. The use of the words "if necessary" in the passage that I have already quoted indicates that they left the contingency of an enquiry into mesne profits unprovided for. In these circumstances, the more reasonable construction of the award seems to me to be that it merely declared the right of the plaintiff to mesne profits as from the date on which she made the deposit as directed in the award. There is therefore no force in the objection that the present suit is not maintainable either on the ground of res judicata or on the ground of any supposed bar u/s 47. The finding of the Courts below on issues 1, 2 and 4 in so far as they relate to the claim under the first two heads in the plaint must be set aside.

7. As regards the claim to arecanuts, cocoanuts, cashewnuts etc., the written statement raised the contention that the defendants did not cut or receive any income under that head between 31st August 1927 and 17th October 1927. This is a question of fact which must be enquired into and determined by the trial Court. As regards the claim for Rs. 300 being the value of the crops standing on the land at the time of the delivery, I cannot agree with the grounds on which that claim had been negatived by the Courts below. The claim for mesne profits under the first head does not relate to the same subject matter as the claim under the second head. I therefore fail to see the appropriateness of the observation of the first Court that the plaintiff cannot get both, mesne profits and the value of the standing crops, and it is difficult to say what exactly the lower Appellate Court has held on this point. I must however observe that the plaintiff's claim for Rs. 300 is not tenable in the particular form in which it has been made. The effect of the award is that if the deposit of money payable to defendants 8 and 9 is not made on the Vishu Shankramana day, the defendants are entitled to remain in possession, presumably as tenants, and if while so remaining in possession they raise crops on the land, I do not see why they should not be held entitled to the benefit of Section 108(1), Transfer of Property Act: cf. K.K. Narayanan Nambudripad Vs. M.K. Krishna Patter and Others, . The plaintiff will not therefore be entitled to insist that the crops should be handed over to her or their value

paid. But, as the defendants are treated as tenants for this purpose, they must also be liable for rent in respect of that period, i.e. the period

between Vishu Shankramana day, i.e. April 1927 and 17th October 1927. The rent for that period will have to be apportioned in accordance with

the principle underlying Section 36, Transfer of Property Act.

8. The decree of the Courts below will be modified in accordance with the above directions and the case sent back to the trial Court for disposal

in due course. Only three-fourths of the court-fee paid on the appeal memo both in this Court and in the lower Appellate Court will be refunded to

appellant, as the second appeal has failed in respect of one of the items. Likewise, the appellant will be entitled to three-fourths of her costs in this

Court and in the lower Appellate Court. In the Court of first instance the parties will bear their respective costs.