(1977) 03 AP CK 0009

In the Andhra Pradesh High Court

Case No : A. No. 633 of 1974

Kakuturu Raghava Reddy and others APPELLANT

Vs

Patnam Sreedevamma and others RESPONDENT

Date of Decision : 11-03-1977

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 20 Rule 12, Order 20 Rule 18, Order 20 Rule 2, Order 7 Rule 2, 2(12)
Trusts Act, 1882 — Section 59, 94, 95

Citation : (1977) 03 AP CK 0009

Hon'ble Judges : Punnayya, J;Alladi Kuppuswami, J

Bench : Division Bench

Advocate : M.V. Ramana Reddy and K. Rajagopala Reddy, for the Appellant; M. Jagannadha Rao, for the Respondent

Judgement

Punnayya, J.—This appeal is directed against the final decree passed by the Subordinate Judge, Nellore in I.A. No. 37 of 1958 in O.S. No. 266 of 1953. In O.S. No. 265/1953 a preliminary decree for partition of the plaintiff''s 1/3rd share of immoveable properties in Schedules A and C excepting items 57 and 58 of A Schedule and 1/3rd share in moveables was passed by the learned Subordinate Judge. The preliminary decree also directed defendants 1 and 2 to render accounts, for the profits of the joint family estate which consists of bus, salt pans, casuarina plantation, mango thope, outstandings, oil engine and pump sets and the lauds due to the family, for a period of six years prior to the date of the suit. Against the said preliminary decree an appeal was preferred to the High Court. The High Court modified the preliminary decree only with regard to the date from which the mesne profits should be rendered and the High Court directed the determination of the mesne profits from the date of the suit only.

2. After she receipt of the orders passed by the High Court, the learned Subordinate Judge, appointed a commissioner for the determination of the mense profits. The Commissioner inspected the properties and also held enquiry recording the evidence of the witnesses produced before him by both sides and

then he submitted his report.

3. On the basis of the evidence placed before him, the Commissioner filed the plaintiff''s 1/3rd share towards mesne profits as follows:-

Table Missing in file No. AP770248

Table-I

4. Thus be calculated the total mense profits of the plaintiff''s 1/3rd share as Rs. 1,30,009-80. The Commissioner also fixed interest at 5 1/2 percent on the mense profits payable in the respective years till the date of realization as the parties are agriculturists.

5. The learned Subordinate Judge agreed with the Commissioner''s report with regard to mense profits on salt pans, outstandings, manures and hay and he differed from the Commissioner with regard to other items, as could be seen from his findings, as follows:-

Table Missing in file No. AP770248

Table-II

6. Thus he arrived at a sum of Rs. 1,26,325-51 towards the plaintiff''s 1/3rd share.

7. The plaintiff also filed a memo before the learned Subordinate Judge showing the total advances which would came to Rs. 36,925/- made by defendants 1 and 2, The defendants did not dispute the amounts mentioned in this memo. Hence the learned Subordinate Judge gave credit to that amount out of the net amount payable to the plaintiff. After deducting that, he held that the amount payable to the plaintiff by defendants I and 2 will be Rs. 89,400-51. He also accepted the rate of interest awarded by the Commissioner at 5 1/2 per cent per annum on the mesne profits in the respective years till the date of realisation and also the interest on the outstandings and other items from the date of the suit till the date of realisation. Though the defendants contended before the learned Suborinate Judge that the interest cannot be awarded since the possession of the defendants cannot be said to be wrongful and hence Order 20 Rule 12 C.P.C. does not apply to the defendants'' possession and management of the joint family properties in which the plaintiff has interest, the learned Subordinate Judge did not accept this contention. He felt that in view of the overall conduct of the defendants who have been in possession and enjoyment of the entire estate for 12 years even after the suit, deriving benefits therefrom to the exclusion of the plaintiff, the Commissioner rightly proposed to award interest and therefore the plaintiff is entitled to interest at the rate of 5 per cent on the mesne profits of paddy derived by the defendants by the end of March every year in the respective years till the date of realisation and also on the outstanding at 5 1/2 per cent from the date of suit and on other items from the respective dales till the date of realisation. He also held that counter-interest can be calculated and

given credit for the advances of the defendants to the plaintiff from the due dates as mentioned in the calculation memo of the plaintiff dated 5-4-1971. He further held that the plaintiff will get costs of the proceedings from defendants 1 and 2.

8. Not being satisfied with the findings given by the learned Subordinate Judge with regard to the income on various items and consequently the final decree passed on the basis of such findings and also with the awarding of interest on plaintiff''s share of profits, the defendants preferred this appeal.

9. Sri V. Ramachandra Reddy, the learned Advocate General, questioned the correctness of the findings given by the learned Subordinate Judge only with regard to the income derived from the items of salt pans, outstandings and lands. He also questioned the validity of awarding interest.

10. With regard to the income from the salt pans, the learned Advocate General contends that both the Commissioner as well as the lower Court committed error id relying upon the evidence of D.W. 5 ignoring the other evidence. From the facts mentioned above it is clear that the learned Subordinate Judge accepted the. Commissioner''s finding with regard to the income derived from the salt pans. The Commissioner took into consideration Exs. A-30 to A-32 which are the extracts from the Salt Office records also the evidence of D.W. 5 D.W. 5 was examined by the defendants themselves. He is one of the persons permitted by the defendants to cultivate the pans and obtain permission from the authorities and he and his brother engaged themselves in cultivating the pans and selling the salt. The plaintiff is, therefore, entitled to take advantage of the admissions made by these witnesses. He deposed that in good pans if conditions are favourable, one acre can yield from 15 to 20 garisas of salt, in good pans the expenses for production of one garisa of salt is about 40/- rupees and that if the production is good and the yield is fair, the income per acre would depend upon the price of salt. In the cross-examination he stated that the yied of the pans belonging to the defendants is ten garisas of salt per acre. It is on the basis of this material that the Commissioner as well as the learned Subordinate Judge came to the conclusion that the average yield is ten garisas of salt per acre. This conclusion also gains support from Exs. A-30 to A-32. The learned Advocate General did not make any comment on the genuineness of Exs. A-30 to A-32. Hence we accept the finding given by the learned Subordinate Judge, with regard to the yield of salt per garisa. D.W.s. 1 and 2 merely stated that they did not cultivate the salt pans, but leased out them during the accounting period. But they could not give the names of lessees in the cross-examination. The Commissioner as well as the learned Subordinate Judge, therefore did not accept the evidence of D.Ws. 1 and 2 that the salt pans were leased out and rightly relied upon the evidence of D.W. 5 who deposed that he and his brother were engaged to cultivate the salt pans of the defendants. Under these circumstances we are inclined to accept the contention of the learned Advocate General on this aspect and confirm the finding of the learned Subordinate Judge with regard to

the income derived from the salt pans and consequently the plaintiff''s 1/3rd share.

11. Regarding the outstandings, the learned Advocate General contends that neither the Commissioner nor the learned Subordinate Judge is correct to assume that all the outstandings were available for partition. According to him. The plaintiff did not adduce any evidence With regard to the existence of these outstandings on the date of the suit and the finding given by the learned Subordinate Judge on the basis of the Schedule F attached to the plaint in the suit O.S. No. 46/1953 is not correct.

12. The Commissioner relied upon Schedule ''F'' attached to the plaint in O.S. No. 46/1952 which was filed by the 2nd defendant himself against the 1st defendant for partition, rejecting the evidence of D.W. I, who stated that F schedule attached to the plaint was neither true nor correct and the correct position was indicated in his written statement in the present suit. It is not in dispute that the 2nd defendant filed O.S. No. 46/1952 against the 1st defendant for partition and Ex. A-18 is the certified copy of the plaint in that suit. It shows that the outstandings due to the family if worked out would come to Rs. 53,708/-. At the time when O.S. No. 46/1952 was filed there were no disputes between the plaintiff and the defendants and they were living as members of the joint family. Further, when the matter was taken in appeal to the High Court, against the decree granted by the learned Subordinate Judge to the effect that defendants 1 and 2 should render account for a period of six years prior to the institution of the suit, the High Court modified the decree holding that defendants 1 and 2 should render account from the date of the suit and hence the decree modified by the High Court in O.S. No. 46/1952 became final. It is, therefore, clear that so far as the properties of the family relating to O.S. No. 46/1952 are concerned there was no dispute either in the trial Court or in the High Court. Hence the 2nd defendant is estopped from contending that the outstandings mentioned in the Schedule attached to the plaint in O.S. No. 46/1952 are not correct or true. The learned Subordinate Judge is therefore justified in placing reliance upon Ex. A-18 to determine the outstandings. We are not prepared to accept the contention of the learned Advocate General on this aspect.

13. With regard to the income derived from the lands, the learned Advocate General contends that the learned Subordinate Judge committed error in not deducting an area of eight acres out of the total extent of 132 acres as it was not cultivable due to the existence of dibbas and vagus in the said land. He also contends that though the Commissioner inspected the lands and found that in an extent of 8 acres in Muthukur there are dibbas and vagus, he committed error in not deducting an extent of 8 acres of land from the total extent of the land that was cultivated.

14. A perusal of the Commissioner''s report clearly shows that he mentioned that an extent of 8 acres of land is uncultivate due to the existence of dibbas and

vagus and he did not exclude 8 acres of land from the total extent of 132 acres. The learned Subordinate Judge deducted only four acres of land on the basis of the admission made by P.W. 1 instead of 8 acres of land. In view of the report of the Commissioner with regard to the uncultivability of 8 acres of land due to the existence of dibbas and vagus, the learned Subordinate Judge ought to have excluded 8 acres of land from out of 132 acres. Even se, we do not see any reason to differ from the Court below regarding the yield from lands. The Commissioner relied upon the consent memo filed in I.A. No. 6/1954 in O.S. No. 266/1953 which was filed for appointment of a receiver where it was endorsed by the defendants that the average gross yield was one putty per acre from the lands and an undertaking was given to account at that rate. In view of that endorsement the plaintiff did not press the application for appointment of a receiver and it was dismissed. Since that endorsement was not in dispute, Commissioner instead of placing reliance upon the present interested version of the plaintiff as well as the defendants relied upon the endorsement and his finding was accepted by the learned Subordinate Judge also. When the endorsement was made by the plaintiffs that the average yield was one putty per acre they knew fully well that 8 acres were uncultivable. The average of one putty would have been arrived at by them taking into account the eight acres were uncultivable. Anyhow the Subordinate Judge excluded four acres and that is not questioned before us. We, therefore, see no reason to differ from the Court below regarding the yield. There is no dispute about the cultivating expenses. Hence the nett yield at also cannot be questioned.

15. Regarding the cost of paddy from 1953 onwards till the end of 1958 which is the accounting period, the Commissioner was of the opinion that after the abolition of rationing in 1952 the paddy was sold in open market and the prices were fluctuating from the time of the harvest and they were at the bottom at the time of harvest and at the top at the time of lean months. The defendants contended that the paddy was disposed of at the time of harvest to the local millers in Muthnkuru. But no documentary evidence was produced either before the Commissioner or before the learned Subordinate Judge in support of this contention. Instead of relying upon the interested testimony of P.W. 1 or D.Ws. 1 and 2, the Commissioner relied upon the Exs. B-34 to B-57 which are the account books of the District Marketing Co-operative Society which show the prices of paddy with reference to the transactions recorded in the said account book and these account books were produced by the plaintiff himself. The defendants also produced Exs. B-2 to B-20 of the Marketing Co-Operative Society to show the transactions and the prices of the paddy. The Commissioner tood into consideration the documents produced by both sides and worked out the reasonable prices from 1953 to 1964. He deducted Rs. 500/-, being the 1/3rd share of the cist payable each year on the basis of the statement give by D.W.2, The learned Subordinate Judge also took into consideration the documents Exs. B-34 to B-55 and also Exs. B-2 to B-20 filed by both sides and agreed with the findings of the Commissioner with regard to the cost of the

paddy. As documentary evidence should be given preference to the oral testimony, we accept the finding given by the learned Subordinate Judge as correct on this aspect. Thus if the total advances made by defendants I and 2 which was admittedly to be Rs. 36,925/- were given credit from out of the net amounts payable to the plaintiff, the amount payable to the plaintiff by defendants would come to Rs. 89,400-51 as held by the learned Subordinate Judge.

16. As pointed above, the learned Subordinate Judge, awarded interest at the rate of 5 1/2 per cent on the profits in the respective years till the date of realisation and also on the outstandings at 5 1/2 per cent from the date of the suit and on other itemes from the respective dates till the date of realisation.

17. The learned Advocate General vehemently to objected to the interest being awarded by the learned Subordinate Judge, as the possession by the defendants of the properties in which the plaintiff''s interest was included cannot be said to be wrongful. He contends that in a suit for partition the question of awarding interest does not arise. In support of these contentions the learned Advocate General relied upon the decisions of the Madras High Court in Yesobadra vs. Samanthbadran AIR 1936 Mad. 12 and Babburu Basavayya and Others Vs. Babburu Guravayya and Another,

18. As against these contentions, Sri M. Jagannadha Rao, the learned Counsel for the respondent-plaintiff, contends that where the joint family derives income from the properties owned by it and if the manager or any member is in possession of the properties including the plaintiff''s share and enjoys the entire income derived from the properties including the plaintiff''s share, he is liable to pay interest on the income representing the plaintiffs share. In support of his contention he relied on a decision of the Division Bench of the Madras High Court in K.N. Ramakrishna Aiyar and Another Vs. Parameswara Aiyar and Others, . He further contends that a suit for profits should be regarded as a suit for damages which in its turn would be treated as a suit for money and hence the plaintiff is entitled to recover the profits with interest even in a suit for partition. In support of these contentions he relied upon two decisions of the Madras High Court in Sigappiachi and Others Vs. M.A.P.A. Palaniappa Chettiar, and Ramalingam Chettiyar Vs. Gokuldas Madavji and Co.,

19. It is not in dispute that if the profits derived by the defendants in possession are "mesne profits" the plaintiff would be entitled to claim interest thereon as u/s 2 (12) C.P.C. mesne profits include interest on profits.

20. In Yasobadra V. Samanthabadran AIR 1936 Mad. 12 the plaintiff contended that the 1st defendant who was the elder brother of the plaintiff and who was in possession of the properties including the share of the plaintiff collected the outstandings and thereby obtained sums of money and he should, therefore, be made liable on equitable grounds for Interest equitable rates upon such sums as from the date of collection. The question that arose for consideration by their

Lordships was whether there was only legal or equitable foundation for giving interest to one member of a joint Hindu family who has brought a partition suit, upon sums collected, but not invested by another member of the family. Their Lordships answered the question in the negative. Their Lordships held that there is no legal or equitable foundation for giving interest to one member of a joint Hindu family who has brought a partition suit, upon sums collected, but not invested, by another member of the family. The member in possession of the property cannot be deemed to have been liable to pay over any sum of money to the other member so as to entitle the latter to interest on it, it during the paration proceeding there is no particular item of property and no sum of money which can be claimed by any party as belonging to him, for whether it belongs to him or not would depend upon what is given to him under the final decree. The member in possession of the property cannot also be held liable for interest even on the basis of implied agency far his position is in no way different from that of a working partner who collects money for the partnership and does not invest those moneys, but keeps them as money in the partnership safe.

21. An earlier decision of a Division Bench of she Madras High Court in Ramaswamy Ayyar V. Subramanya Ayyar AIR 1923 Mad. 147 also ruled that a co-owner in possession of the co-ownership property is not liable for interest on the profits though he is clearly entitled to have an account taken of the profits of the properties. Their Lordships held: "As in a partition suit the plaintiff is not entitled ordinarily to claim profits, his proclaim far profits before date of suit must be disallowed. As regards the subsequent profits he is clearly entitled to have an account of the profits of the properties A co-owner in possession of the co-ownership property is a constructive trustee with reference to Section 94 of the Trusts Act and is subject to the same liabilities as a trustee with reference to Section 59. But it does not follow that he is liable for interest on profits.

22. In Babburu Basavayya and Others Vs. Babburu Guravayya and Another, though the main question which the Full Bench had to consider was whether in the absence of a direction for profits in the preliminary decree, a final decree for profits would be passed, in that connection they had to consider in detail the nature and scope of a suit for partition, the position of a member of the joint family in possession of family properties after the suit is filed and his liability for profits thereafter. Their Lordships observed that the question of profits or mesne profits would arise in three different types of cases: (1) Suits for ejectment or recovery of possession of immoveable property from a person in possession without title, together with a claim for past or past and future mesne profits; (2) suits for partition by one or more tenants-in-common against others with a claim for account of past or past and future profits: and (3) suits for partition by a member of joint Hindu family with a claim for an account from the manager. In the first case the possession of the defendants not being lawful, the plaintiff is entitled to recover mesne profits as defined in section 2 (12) C.P.C., such profits being really in the nature of damages. In the second case, the possession and receipt of profits by the defendant not being wrongful, the plaintiff''s remedy is

to have an account of such profits making all just allowances in favour of the collecting tenant-in-common. In the third case, the plaintiff must take the joint family property as it exists at the date of demand for partition and is not entitled to open up past accounts, or claim relief on the ground of past inequality of enjoyment of the property except where the manager has been guilty of fraudulent conduct or misappropriation. The plaintiff would, however, be in position of a tenant-in-common from the date of severance in status and his rights would have to be worked on that basis. Order 20 Rule 12 deals with the first class of suits above referred to, while Order 20 Rule 18 deals with the second and third categories. Their Lordships further observed that the claim of the plaintiff suing for partition and his share of the profits accruing from the lands pending the suit is not properly speaking, a claim for mesne profits. A tenant-in-common who files a suit for partition seeks a partition not only of his share of the properties forming the subject matter of the suit, but also of his share of the profits accruing from these properties during the pendency of the suit or till he is put in possession of his share. He cannot anticipate how long the suit would be pending or estimate even approximately what amount of profits would be realised during that period. If during the pendency of the suit one or some of the co-sharers receive or realise the entire profits or more than their share of the profits of the common properties, they have to account to the other sharers for the excess. The right to an account of such profits, is implicit in the right to a share in the common properties and both rights have to be worked out and provided for in the final decree for partition. The suit for partition by a member of joint Hindu family is substantially a suit for an account of the joint family properties on the date of the suit as well as the profits received by the manager since that date, so that the profits should also be divided and his proper share given to him If this is the true nature of the proceedings in a suit for partition a direction for an enquiry into the profits of the common property received or realised by one of the parties during the pendency of the suit may be made even after the passing of the final decree and there is nothing in Order 20 Rule 18 C.P.C. interpreting such procedure. It is open to Court in order to prevent multiplicity of litigation and to do complete justice and effect an equal division of all the common assets and properties among the parties to direct an enquiry into the profits received or realised by one or some of them during the pendency of the suit to award their proper share of such profits under its final decree. This enquiry can be ordered either as a part of the preliminary decree itself or subsequently as a step towards the passing of he final decree and in either case the result of the enquiry has to be incorporated in the final decree.

23. Umamaheswaram J. in Damisetti Satyanarayana Murthi and Another Vs. Damisetti Bhavanna and Others held that a suit for partition is not covered by the provisions of Order 20 Rule 12 C.P.C but only by the provisions of Order 20 Rule 18 of that Code because the terms of Order 20 Rule 12 cannot at all apply to a partition action. The learned Judge followed the ruling of the Full Bench of the Madras High Court in Basavayya Vs. Guravayya AIR Mad. 938 (F.B.)

Narasimham J., (as he then was) also held in S. Sri Ramulu V. Sitamahalakshm 1970 II An. W.R. 210 that the possession of the manager of a joint family pending the suit i.e., from the date of the suit for partition by a member to the date of decree could not be considered as wrongful. There can be no doubt that the mesne profits defined in Section 2(12) shows that wrongul possession of defendant is the very essence of a claim for mesne profits and the very foundation of a decree therefore, in other words it may be said that they can be no claim for mesne profits within the meaning of Section 2 (12) C.P.C. if the possession of the defendant has not been wrongul.

24. From the decision referred to above the following principles emerge, (1) In a suit for partition by a member of Joint Hindu family with a claim for account from the manager or from a person in possession of the joint family properties, the provisions of Order 20 Rule 2 C.P.C. are not applicable. (2) He is not entitled to claim past profits. Regarding the subsequent profits he is entitled to have an account taken of the profits of the properties. (3) As claim for mesne profits under Order 20 Rule 12 has no application to a suit for partition, there is no legal or equitable foundation for giving interest to the plaintiff who has brought a partition suit upon sums collected by the members from out of the joint family properties in his possession. (4) The member in possession of the properties of the joint family cannot also be held for interest even on any foundation of implied agency for his possession is in no way different from that of a working partner who collects moneys for the partnership and does not invest those moneys, but keeps them as money in the partnership safe. (5) Even if the possession of the joint family properties by such a member is deemed to be that of a co-owner and consequently if he is treated as a constructive trustee with reference to Section 94 of the Trusts Act and is subject to the same liabilities as a trustee with refence to Section 95, it does not follow that he is liable for interest on the profits derived from the properties in his possession.

25. In this case there is no allegation or proof that the defendants inversed the profits and derived interest therefrom or were negligent in not deriving interest on profits.

26. Therefore, in the light of these rulings, the plaintiff is not entitled to interest on his share in the profits, which the defendants derived from the properties of the joint family.

27. But another Division Bench consisting of C.J., and Madhavan Nair, J., in K.N. Ramakrishna Aiyar and Another Vs. Parameswara Aiyar and Others, held that though in an ordinary case interest should not be allowed on the profits claimed in a suit for partition of joint family properties, in certain cases the plaintiff is entitled to interest. In that case the plaintiff got decree for partition, after the appellants had unsuccessfully contested the claim in each of the courts upto the privy Council. During all the period of thirteen years he was kept out of enjoyment of his share of the family properties and the appellants had enjoyed the income. The appellants had from the first to last placed every obstacle in the

way of the plaintiff in obtaining his rights. The learned Judges therefore held that in these circumstances it was only right and proper that the appellants should make full restitution and such full restitution could not be made unless they paid interest on the moneys and that therefore the interest on the mesne profits were correctly awarded. The learned Judges also held that the circumstances mentioned in K.N. Ramakrishna Aiyar and Another Vs. Parameswara Aiyar and Others, are not exhaustive. Relying upon this decision Sri Jagannadha Rao contends that the defendants in the case on hand have placed every obstacle in the way of the plaintiff obtaining his rights, though the Suit was filed in 1953 and hence what was observed in K.N. Ramakrishna Aiyar and Another Vs. Parameswara Aiyar and Others, is equally applicable to the case on hand and the plaintiff is, therefore, entitled to be awarded with interest in respect of his share of profits from out of the profits derived by the defendants by virtue of their possession.

28. But the learned Advocate General contends that the decision in K.N. Ramakrishna Aiyar and Another Vs. Parameswara Aiyar and Others, does not lay down a different principle from what was laid down in Ramaswamy Ayyar V. Subrahmanya Ayyar AIR 1923 Mad. 147 or in Yasobadra V. Samantha Badran AIR 1936 Mad. 12.

29. It is true that the Full Bench of the Madras High Court in Babburu Basavayya and Others Vs. Babburu Guravayya and Another,) did not deal with the question whether the plaintiff is entitled to interest on his share of profits from out of the profits which the defendants derived from the joint family properties in their possession. But the Full Bench clearly laid down that Order 20 Rule 12 C.P.C. does not apply to a suit for partition and hence the question of mesne profits does not arise. When once it is held that the possession of the properties by the defendants cannot be treated as unlawful and as such Order 20 Rule 12 C.P.C. does not apply to a suit for partition, there is no foundation for the claim of interest and hence the Division Bench of the Madras High Court in Ramaswamy Ayyar V. Subramanya Ayyar AIR 1923 Mad. 147 and also in Yasobadra V. Samanthabadran AIR 1936 Mad. 12 make it quite clear that the member in possession of the property cannot be deemed to have been liable to pay over any sum of money to the other member so as to entitle the latter to interest on it and he also not entitled to pay any interest even if he is deemed to be a constructive trustee in respect of the joint family properties. This legal position is not disputed by the Division Bench of the Madras High Court in K.N. Ramakrishna Aiyar and Another Vs. Parameswara Aiyar and Others, but it felt it necessary to take into consideration the unreasonable conduct of the defendants therein dragging on the litigation and opined that can be compensated only by granting interest to the plaintiff in respect of his share of profits.

30. The learned Subordinate Judge narrated the circumstances justifying the awarding of interest According to him, the Court directed defendants 1 and 2 to render account for the profits from the joint family estate including salt pans and

outstandings due to the family and for the income derived from the bus for a period of six years prior to the filing of the suit and also directed the plaintiff to recover future profits under Order 20 Rule 12 C.P.C. But the defendants took the matter to the High Court in appeal and the High Court modified the decree to the extent that defendants 1 and 2 are liable to render account from the date of the suit, but not from six years prior to the suit. The deceased plaintiff is the brother of defendants 1 and 2, The plaintiff being of unsound mind to file this suit through his guardian for partition and possession of his 1/3rd share in the plaint schedule properties which are very extensive, on the allegation that he has been excluded from his share in the properties. Defendants 3 and 4 are the wives of defendants 1 and 2. The suit was hotly contested by all the defendants on several grounds. A preliminary decree for partition of the plaintiff''s 1/3rd share was passed by the Subordinate Judge on 26-12-1955. Aggrieved with that, appeals were preferred by both in the High Court which dismissed them on 17-1-1961. In view of the overall conduct of the defendants who have been in possession and enjoyment of the entire estate for twelve years after the suit, enjoying benefits therefrom to the exclusion of the plaintiff, the plaintiff is entitled to be awarded interest.

31. The decision in K.N. Ramakrishna Aiyar and Another Vs. Parameswara Aiyar and Others, should not be taken to have general application to every suit for partition if contested hotly by the defendants and if taken on appeal, after the preliminary decree was passed. That decision does not and cannot lay down any principle contrary to that laid down not only in prior beach decisions of the Madras High Court but also in the Full Bench decision of Basavayya Vs. Guravayya AIR 1951 Mad. 931 (K.B.). In our view it should be restricted to apply to the peculiar facts of that case.

32. Sri Jagannadha Rao, the learned counsel for the respondents contends that a suit for profits can be regarded as a suit for damages and a suit for damages is a Suit for money and as such Section 34 C.P.C. is attracted and the plaintiff is therefore, entitled to be awarded with interest on his share of profits from out of profits derived from the joint family properties. He also contends that a suit for partition is essentially a suit for account and hence provisions of Section 34 C.P.C. would be applicable in awarding interest in a account suit. Viewed from any angle the plaintiff is entitled to be given interest in respect of his share of profits. In support of his contention he relied upon the decisions is Ramalingam Chettiyar Vs. Gokuldas Madavji and Co., Sigappiachi and Others Vs. M.A.P.A. Palaniappa Chettiar, and Kodali Kristnayya and Others Vs. Kodali Guravayya and Others,

33. In Ramalingam Chettiyar Vs. Gokuldas Madavji and Co., , it was held that a decree for payment of damages is undoubtedly a decree for the payment of money. In Sigappiachi and Others Vs. M.A.P.A. Palaniappa Chettiar, , it was held that from the provisions of Order 7 Rule 2 it is clear that an account suit is also treated as a money suit and hence the provisions relating to money suit will

apply to a suit for taking of accounts also and prima facie the provisions of Section 34 would be applicable in awarding interest in an account suit, in Secy. of State and Another Vs. M. Murugesa Mudaliar and Others, it was held that when a partition is demanded, a Hindu manager cannot evade his liability to give an account of the assets of the family as it existed at the time of partition and the Court can order an account to be taken.

34. In the last decision i.e., Secy. of State and Another Vs. M. Murugesa Mudaliar and Others, , the Court did not grant interest. In the first and second decisions referred to above i.e., Ramalingam Chettiyar Vs. Gokuldas Madavji and Co., and Sigappiachi and Others Vs. M.A.P.A. Palaniappa Chettiar, the Court granted interest u/s 34 C.P.C. There is no dispute that a suit for taking accounts and a suit for damages may be taken as a suit for money and hence the liability may be accompanied with interest u/s 34 C.P.C. But on that account it cannot be said that in a suit for partition interest can be charged u/s 34 C.P.C., in respect of the plaintiff''s share of profits which can be determined after accounts were taken. In Muthyala Ramachandrappa Vs. Muthyala Narayanappa and Others, it was contended before the learned Judges that as the last defendant is found to have retained in his own hands some items notwithstanding the appointment of a receiver and also in defiance of orders passed from time to time that he has to pay the whole or portions thereof, into Court the 1st defendant should be directed to pay interest from the date of collection or at least from the date of Court''s order appointing receiver. The learned Judges did not accept this contention. They held that as a co-owner he was entitled to collect the outstandings due to the family and till the accounts are taken and the respective rights and liabilities of the parties are ascertained, it cannot be said that he is in the position of a debtor to the plaintiff or in the position of one who is liable to pay over any particular sum then and there to the plaintiff and as such liable to be called upon to pay interest in the event of non-payment.

35. This decision thus clearly points out as to how a suit for partition and for the allotment of the plaintiffs share is different from that of a money suit and hence the plaintiff cannot be awarded interest in respect of his share of profits in a suit for partition.

36. For all the above reasons we find ourselves unable to accept the contentions raised by the learned counsel for the respondents with regard to liabilities for interest from the date of realisation for profits. The interest on profits etc., will be payable only from the date of the final decree. We therefore set aside the judgment and decree of the lower Court with regard to interest and the decree passed by the lower Court will be modified accordingly, by providing for interest from the date of the final decree.

37. In the result, the appeal is partly allowed, but without costs.

38. This appeal having been set down for being mentioned to on Monday the 21st day of March, 1977 in the presence of the Advocate General for M/s M.V.

Ramana Reddy Advocates for the Appellant and of Mr. M. Jagannadha Rao, Advocate for the Respondent Nos. 1 and 2 the court made the following order. The interest on profits etc., will be payable only from the date of the final decree.

