
(1928) 03 MAD CK 0048
In the Madras High Court

(Kanchumarthi) Latchayya and Another	APPELLANT
Vs	
(Kuntamukkala) Suryaprakasa Rao	RESPONDENT

Date of Decision : 19-03-1928

Acts Referred:

Citation : AIR 1928 Mad 1165

Hon'ble Judges : Wallace, J;Thiruvenkatachariar, J

Bench : Full Bench

Judgement

Wallace, J.—The facts necessary for the disposal of this Second Appeal are: The plaintiff in O.S. No. 121 of 1917 on the tile of the District Munsif's Court, Peddapur, obtained, on 1st September 1919, a decree for possession of eight items of land and for past mesne profits for two years on all the items jointly at Rs. 280 a year. The decree left future mesne profits to be determined in execution. Against this decree the defendants appealed. The appellate Court on 30th April 1920 struck out item 8 from the decree and as in consequence of that the matter of mesne profits required re-adjustment, it directed that the plaintiff could by a petition apply for ascertainment of the mesne profits over seven items. An appeal to the High Court was dismissed on 25th April 1923. Meantime in 1922 the plaintiff had applied to the trial Court by way of execution petition -E. P. No. 275 of 1921, for ascertainment of future mesne profits, having, already for the past mesne profits withdrawn a sum of Rs. 560 deposited by defendants 1 and 2. This execution petition was withdrawn by him on 6th March 1922. Fourteen days later he put in a second execution petition asking for the ascertainment not only of future mesne profits but also for a re-ascertainment of past mesne profits on the ground that the lower appellate Court's decree had re-opened the whole matter of mesne profits. The trial Court awarded mesne profits past and future at a uniform rate of Rs. 700 a year. The lower appellate Court reduced the figure to Rs. 475 for past mesne pro-fits and Rs. 500 for future mesne profits. Defendants 1 and 2 have appealed against this to us.

2. As the lower appellate Court had omitted to deal with certain legal objections

taken before it by the appellants, this Court remanded the second appeal for a finding on these points. On the submission of the finding we have heard the appeal.

3. The first point taken by the appellants is that the plaintiff's withdrawal of his execution petition on 6th March 1922 is tantamount to an abandonment of his claim for mesne profits. The argument is this. Since the ascertainment of the mesne profits was still a proceeding in the suit the original decree of the District Munsif was of the nature of a preliminary decree, the execution petition was, therefore, not really an execution petition, as of course it was not, but was of the nature of an application for final decree, and to such application Order 23, Rule 1 (3) would apply. Since the plaintiff did not get leave of the Court to withdraw his application he is barred "from putting in a fresh one. As at present advised I think that it is sufficient to say that Order 23, Rule 1 (3), does not in terms apply. It is intended no doubt to apply to a case where a suit or part of a suit claim is withdrawn, but it does not in terms apply to an application for final decree. What is thereby barred is a fresh suit, not a fresh application. Here, in any case, a fresh suit is barred by the existence of the preliminary decree. I am not prepared to extend the application of that rule to a mere application for final decree. No authority for that proposition has been cited, while the ruling in *Ramachandra Raju v. Bhujanga Rao* AIR 1924 Mad. 473 is authority to the contrary.

4. The next point has more substance. It is that the lower appellate Court had no power to increase the award for past mesne profits beyond the figure given in the decree of 1st September 1919, namely, Rs. 280 a year. This seems to me obvious. The plaintiff had not appealed against that figure and it was therefore final against him. It was not open to the lower appellate Court in its appeal against that decree to increase that figure, and therefore it was not open to it to direct the trial Court to re-open that matter in the direction of an increase. Nor when the judgment of the " lower appellate Court dated 30th April 1920 is perused, does it afford any ground for supposing that it did so allow the trial Court scope to increase the figure. It re-opened the matter of the past mesne profits merely in order to adjust the decreed figure because that figure had been calculated on eight items jointly from which the lower appellate Court had struck out one. What the trial Court therefore had power to determine was only how much of the Rs. 280 was to be disallowed as arising from the item struck out. Both the lower Courts in their decision now under appeal erred in increasing that figure. It had on the contrary to be reduced by the amount of mesne profits attributable to the item struck out. That error now falls to be corrected.

5. As the lower Courts have not calculated the figure on that footing and it is not worth while spending further time in again remanding the case, since what we really want is the proportion of the mesne profits on item 8 in what is now a purely arbitrary figure of Rs. 280, I think it best to decide that proportion upon the figures put forward by the plaintiff himself in his execution petition. There he

estimates the mesne profits from items 1 to 8 at Rs. 1,000 per year and from item 8 alone at Rs. 150 per year, i. e., the proportion of item 8 to the rest is 150 to 850. Dividing the figure of Rs. 280 in that proportion we get Rs. 42 as the proportion attributable to item 8, and that figure we adopt. Thus, the plaintiff having withdrawn the whole Rs. 560 has withdrawn twice Rs. 42-Rs. 84-in excess on past mesne profits. That amount may now be credited towards the future mesne profits, but the defendants 1 and 2 will be entitled to interest on this sum of Rs. 84 at 6 per cent. from the date of the withdrawal of the Rs. 560 by the plaintiff till 16th July 1923, the date of the plaintiff's application for ascertainment of future mesne profits. They are entitled also to interest at 6 per cent on a sum of Rs. 158, that is, Rs. 266-4-0 -Rs. 108-4-0 (see para. 9 of the learned Judge's finding) from the date of the withdrawal of the sum of Rs. 266-4-0 until 16th July 1923. The amount payable by appellants will be calculated on the above footing and a revised decree passed in accordance therewith. In this second appeal proceedings each party will bear his own costs in all Courts.

Thiruvengkatachariar, J.

6. I have had the advantage of perusing the judgment of my learned brother. I agree with his conclusions on the points urged "before us, but I wish to add a few words on the main contention of the appellants, viz., that the plaintiff's present application for the ascertainment of the mesne profits decreed to him should be dismissed on the ground of his having withdrawn his previous application {Execution Petition No. 275 of 1921) in which he had prayed for the same relief. The present application was also put in as an application for the execution of the decree, but it was treated by both the lower Courts" and in my opinion rightly, as an application for an enquiry as to mesne profits under Clauses (b) and (c) of Order 20, Rule 12 and for a final decree being passed for such mesne profits in accordance with the result of such an enquiry. It is argued that the withdrawal of the previous application by the plaintiff which was also put in for the ascertainment of the said mesne profits amounts to an abandonment of the claim to mesne profits within the meaning of Order 23, Rule 1 (1) and as such abandonment of the claim was made without obtaining the permission of the Court granting him liberty to file a fresh suit or an application in respect of the same subject-matter, he is precluded from seeking for the same relief in a subsequent application. The order of the Court merely records the withdrawal of the petition and directs the petitioner to pay the respondents' costs. What was withdrawn was an application which purported to be for the ascertainment of mesne profits awarded by the decree and for attachment and sale of the defendants' moveables for realizing the amount so ascertained. The application, in so far as it purported to be for the execution of the decree, was misconceived as the proper relief which the plaintiff should have asked for was to ascertain the amount of mesne profits and pass a final decree under Order 20, Rule 12. It is only after the final decree is passed that it becomes executable, but the mistaken procedure adopted by the plaintiff is clearly traceable to the express direction

given in the decree of the first Court that the amount of mesne profits be determined in execution. In giving such a direction the District Munsif overlooked that, under the present Code, the amount of mesne profits as to which a preliminary decree has been passed must be determined by the decree itself and cannot be relegated to be determined in execution of the decree as it could be under the old Code. The decree of the appellate Court also gave a similar direction though not so explicitly as that of the first Court, that the plaintiff should apply by petition for ascertainment of the mesne profits on the items decreed to him. It was only after the appellate decree that the plaintiff put in Execution Petition No. 275 of 1921 the withdrawal of which is relied on by the appellants as a bar to his subsequent application (Execution Petition No. 157 of 1922). In that application the prayer was for the ascertainment of future mesne profits for three years 1918-19- 20. There was no prayer for the ascertainment of past mesne profits and the plaintiff alleged that he had appropriated towards such profits and costs two sums of Rs. 500 and Rs. 266-4-5, which had been already realized from the defendants in execution of the decree.

7. The defendants (appellants) objected to that petition on the ground, that the plaintiff should also apply for the determination of the amount of past mesne profits as one of the items decreed by the first Court was disallowed by the appellate Court. They also contested the plaintiff's right to appropriate the amount already deposited into Court which they said was deposited merely for obtaining stay of execution of the decree, before the amount of mesne profits, past and future, payable according to the decree of the appellate Court is ascertained. But they raised no objection to the maintainability of the application as one made for the execution of the decree. The application was withdrawn as already stated and within a fortnight the present application which related to the ascertainment of both past and future mesne profits was filed.

8. Upon the facts of the case, it can hardly be disputed that there was no intention on the part of the plaintiff's next friend to abandon the claim for mesne profits. The contention which is urged on behalf of the appellants amounts to this, that the withdrawal of the application amounts in law to an abandonment of the claim to mesne profits which was comprised in that application. If the application can be viewed as one for the execution of the decree as it purported to be, then it is settled law that the withdrawal of the application will be no bar to a fresh application for execution being presented, praying for the same relief. Order 23, Rule 1 has no application to such a case. See the decision of the Privy Council in *Thakur Prasad v. Fakir Ullah* [1895] 17 All. 106. In this case, the plaintiff, if he erred in filing an application for execution of the decree instead of applying for the passing of a final decree, erred in consequence of an express direction given by the Court in the decree. I think, therefore, that it would be only just and equitable that he should not be penalized for adopting a procedure directed by the Court itself, though erroneous and that in this case the withdrawal of the execution petition should be given the same effect as it would have if that application had been rightly made. In this view, the withdrawal of

Execution Petition No. 275 of 1921 cannot be held to operate as a bar to the subsequent application in which relief is claimed, both for past and future mesne profits.

9. I may here add that when a decree which is passed is either entirely preliminary or partly preliminary and further questions remain to be decided not in execution of the decree but in the suit itself for passing a final decree it would be well if when the preliminary decree is passed the further hearing of the suit is adjourned to a definite date for the trial of the remaining questions. I do not overlook that the present Code allows appeals against preliminary decrees also and if an appeal is preferred against such a decree the further hearing may have to be stayed till the disposal of the appeal.

10. Apart from the above ground, I am also of opinion that Order 23, Rule 1 has no application to cases like the present in which a decree has been passed. The effect of the decree is to merge in it the; cause of action on which the suit is brought and it makes no difference whether the decree is entirely final or partly final and partly preliminary, or entirely preliminary. Whatever may be the nature of the decree, no fresh suit can be instituted on the same cause of action or claim. It follows, therefore, that the withdrawal of the suit or abandonment of the claim which has the effect of barring a fresh suit can relate only to withdrawal or abandonment before the decree is passed and that the rule has no application to suits in which decrees have already been passed. On this question, the decision of Phillips and Venkata subba Rao, JJ., in Ramachandra Raju v. Bhujanga Rao AIR 1924 Mad. 473, is entirely in point. In that case also, as in the present, a preliminary decree for mesne profits was passed and the plaintiff had previously filed execution petitions for ascertainment of these profits under the erroneous impression that they were to be ascertained in execution and those petitions were dismissed either because of his laches, or because he had not pressed those applications. He subsequently filed an application under Order 20, Rule 12 for the ascertainment of those profits and it was held that the same was not barred by the orders on the previous applications for the execution of the decree.

11. On behalf of the respondent, it was urged that, even if the withdrawal of the first execution petition should be held to amount to an abandonment of the minor plaintiff's claim for mesne profits, the Court should not uphold it as a valid withdrawal so far as the minor plaintiff is concerned, whose interests the Court is bound to look after and if need be, protect him against the fraudulent or negligent conduct of the guardian appointed for him by the Court. If it were necessary for the purpose of this case to entertain that contention, I would, following the observation of Bhashyam Ayyangar, J., in Doraswami Pillai v. Thungasami Pillai [1904] Mad. 377 be prepared to hold that the minor should not be prejudicially affected by the ill-advised act of his guardian, if it amounted to an abandonment of his claim in the suit for mesne profits. I am of opinion that the Court would be all the more bound in this case to save the minor from the consequences of his guardian's ill-advised act as the procedure adopted by him,

though unwarranted in law, is traceable to the direction given by the Court itself in its decree.

12. On the other points argued before us, I agree with my learned brother and have nothing to add to his observations thereon. I also agree to the order proposed by him in this case.