(1964) 10 MAD CK 0006

In the Madras High Court

Case No : Appeal No. 200 of 1960

N. Venkataswami Naidu and Others APPELLANT

Vs

Narasimhalu Naidu RESPONDENT

Date of Decision : 09-10-1964

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 20 Rule 12, Order 20 Rule 18, 2

Citation : (1966) ILR (Mad) 151

Hon'ble Judges : Natesan, J;Anantanarayanan, J

Bench : Division Bench

Advocate : T.R. Ramachandran and K. Narayanaswami, for the Appellant; P.S. Srisailam, for the Respondent

Final Decision : Dismissed

Judgement

Natesan, J.—This appeal arises out of final decree proceedings in a suit for partition of joint family properties. The first Defendant in the suit,

who was the manager of the joint family in possession of the family properties, was the Appellant and is now represented by his legal

representatives. The Plaintiffs are entitled to a one-third share in the suit properties, the first Defendant to another one-third, t second Defendant

being entitled to the remaining one-third. A preliminary decree was passed in the suit on 19th August 1952 and was brought up to this Court by the

first Defendant in appeal, Appeal Suit No. 857 of 1952. The fir Defendant had been the manager of the joint family since 1938, and the Plaintiffs

had, in their plaint, claimed accounts against the first Defendant during the period of his possession. The preliminary decree passed by the trial

Court provided for a Commissioner to ascertain the income derived by the fir, Defendant from the date of his possession. This Court on 19th

December 1956, confirmed the decree of the trial Court excepting in respect of the direction as to accounting. The manager of a joint family

cannot be called upto account for the income from the properties, and this Court, therefore directed the deletion of the clause regarding

accounting. In the proceeding for the passing of the final decree, the Plaintiffs took out Interlocutory Application No. 344 of 1957, for taking of

accounts of profits from the joint family properties pending the suit and for a decree for their one-third share in the profits. The present appeal is

directed against the decree for the profits mad on that application.

2. Learned Counsel appearing for the Appellants has raised three contentions firstly, that, there being no provision in the preliminary decree for any

accounting for profits pendente lite there could be no relief for an account of the profit as now claimed secondly, that, the profits as ascertained and

decreed are high and unrelated to the normal and average income from the properties and, thirdly, that, the Court below erred in awarding interest

on the profits.

3. To take up the first point regarding the maintainability of the application, no doubt, there is no direction whatsoever in the preliminary decree for

ascertaining the income from the properties pendente lite. But the preliminary decree has not denied the relief and the only modification by this

Court related to the direction for accounting against the first Defendant as manager from the date of his possession in 1938, for the income from

the joint family properties. There was, at no time, any discussion about the Plaintiff''s share of the profits from the suit properties pendente lite. The

Court below has, following the Full Bench decision of this Court in Basavayya v. Guravayya ILR (1952) Mad. 173 (F.B.) overruled the contention

of the first Defendant. The contention on behalf of the first Defendant is that, in view of the decision of the Supreme Court in Mohd. Amin and

Others Vs. Vakil Ahmed and Others, the Plaintiffs are not entitled to rely on the decision of the Full Bench. Support for this argument is sought in

the observation of Rajagopala Ayyangar J., in Arunachala Mudali and Another Vs. Maragathammal and Another, where at page 530, the learned

Judge has observed:

It only remains for me to add that the Supreme Court has recently held in Mohd. Amin and Others Vs. Vakil Ahmed and Others, that a Court would not be justified in awarding mesne profits when there was no prayer for the same in the plaint a view which would throw doubt on the

observations in the Full Bench decision extracted above. No doubt the cases on the point are not considered. But the decision of the Court is clear

and emphatic.

4. The suit in the case before the Supreme Court related to the estate of a deceased Mohamedan. The Plaintiffs therein sought a declaration that a

deed of settlement which had since his death been brought about was invalid and claimed their legitimate shares in the estate. One of the Plaintiffs in

that suit was a minor at the time of the settlement and represented by his brother as guardian. The Supreme Court upheld the decree of the High

Court invalidating the settlement as void and giving the Plaintiffs their shares in the properties. The relevant portion of the judgment of the Supreme

Court, which is relied upon as shaking the authority of the Full Bench of this Court, is as follows at page 1144:

It was however pointed out by Shri S.P. Sinha that the High Court erred in awarding to the Plaintiffs mesne profits even though there was no

demand for the same in the plaint. The learned Solicitor-General appearing for the Plaintiffs conceded that there was no demand for mesne profits

as such but urged that the claim for mesne profits would be included within the expression ""awarding possession and occupation of the property

aforesaid together with all the rights appertaining thereto"". We are afraid that the claim for mesne profits cannot be included within this expression

and the High Court was in error in awarding to the Plaintiffs mesne profits though they had not been claimed in the plaint. The provision in regard to

the mesne profits will therefore have to be deleted from the decree.

5. It is not clear from the judgment of the Supreme Court whether the Supreme Court was dealing with the question of future mesne profits or

income pendente lite. It was a case where a partition of the shares that the Plaintiffs were entitled to was sought after declaring an alienation void.

The decision of the Full Bench of this Court which relates to partition suits in joint Hindu families was not the subject of consideration by the

Supreme Court.

6. In Atchamma v. Rami Reddy ILR (1957) A.P. 52, Subba Rao C.J. as he then was, delivering the judgment of a division Bench, observed, after

referring to the Full Bench decision in Basavayya v. Guravayya ILR (1952) mad. 173 (F.B.) and the decision of the Supreme Court in Mohd.

Amin and Others Vs. Vakil Ahmed and Others, says as follows at page 56:

It is not clear from the aforesaid observations that the Supreme Court was dealing with the question of future mesne profits. That apart, their

Lordships did not purport to lay down as* proposition of law that a Court had no jurisdiction to award future mesne profits if there was no

demand for the same in the plaint. As the Full Bench of the Madras High Court pointed out, the relief of future mesne profits is a discretionary one

and it is open to the Court to refuse to exercise the discretion in suitable cases. We cannot, therefore, hold that the Supreme Court in the aforesaid

decision held that a Court has no jurisdiction to award future mesne profits unless there was a prayer for that relief in the plaint. In our view, the

Full Bench decision still holds the field and no part of the judgment has been either expressly or impliedly overruled by the judgment of the

Supreme Court.

7. The question came up for consideration again in Krishnamma v. Latchumanaidu AIR 1958 A.P. 520. That was a suit for partition and there was

no prayer in the plaint for the ascertainment of future profits and the preliminary decree in terms did not give any direction for the ascertainment of

future profits. Pending an appeal from a final decree, an application was made for ascertainment of future profits, and the maintainability of the

application was put in issue-After referring in extenso to the decision of the Full Bench in Basavayya v. Guravayya ILR (1952) mad. 173 (F.B.)

and the decision of the Andhra Pradesh High Court in Atchamma v. Rami Reddy (2) Subba Rao C.J., as he then was, once again affirmed that the

Full Bench decision of this Court will hold the field in the following words at page 521:

That apart, the observation made by the Supreme Court may have relevance to the question of the power of a Court to give a direction under

Order 20 Rule 12 when there was no prayer in the plaint for the said relief. But they have none in the context of the power of the Court to give

directions for the ascertainment of profits after the preliminary decree in the partition suit was made the Full Bench decision of the Madras High

Court, therefore, still holds the field.

8. The effect of the decision of the Supreme Court on that of the Full Bench was also raised in K. Venkata Subbaiya Vs. K. Veeraiyya and

Another, . That was a suit for partition like the present one, and the provisions of Order XX, Rule 18 applied, Umamaheswaram J., observed in

that case as follows:

It is not necessary for me to decide in this case as to whether the Full Bench decision, in so far as it deals with a claim for future mesne profits

under Order 20, Rule 12, Code of Civil Procedure, does not require reconsideration in the light of the Supreme Court decision.

9. The matter came up for consideration once again before another division Bench of the Andhra Pradesh High Court in Kasibhatla Satyanarayana

Sastrulu and Others Vs. Kasibhatla Mallikarjuna Sastrulu, and after an exhaustive consideration of the matter and after quoting passages from the

Full Bench of this Court, which we shall be presently adverting to it was observed thus:

From the above observations contained in the decision of the Full Bench in Basavayya v Guravayya ILR (1952) Mad. 173 (F.B.) which two

Bench decisions of this Court have affirmed to be good law and unaffected by anything contained in. the decision of the Supreme Court in Mohd.

Amin and Others Vs. Vakil Ahmed and Others, , we are of opinion that the application filed by the Plaintiffs is entitled to be considered on merits

and not to be rejected on the ground that ascertainment of profits since suit has not been asked for in the plaint. It is for the Court entertaining that

application to determine whether the discretion should be exercised in giving a direction in the partition suit itself or refer the parties to a separate

suit.

10. The question came up for consideration before the Full Bench in Basavayya v. Guravayya ILR (1952) mad. 173 (F.B.) in the following

manner. In a suit for partition of joint family properties, the Plaintiff had not claimed profits pendente lite and the preliminary decree did not direct

an enquiry into the future profits. During the pendency of the suit, subsequent to the preliminary decree, he took out an application for an enquiry

into the profits of the properties realized by the Defendant subsequent to the institution of the suit and for a final decree for his share of such profits.

The Defendant opposed the application as not maintainable, and, on the objection being overruled, the matter was brought up in revision to this

Court. As the decision in Ghulusam Bivi v. Ahamadsa Rowther ILR (1918) Mad. 296 supported the contention of the Defendant, the matter was

placed before the Full Bench. Viswanatha Sastri J., delivering the judgment on behalf of the Full Bench, went into the entire matter, referring to the

several provisions in the Code of Civil Procedure. As the decision in Ghulusam Bivi v. Ahamadsa Rowther ILR (1918) Mad. 296 had placed

reliance on the provisions of Order XX, Rule 12, Code of Civil Procedure, the Full Bench dwelt at some length on the scope and effect of Order

XX, rule 12 also, though the provision applicable to partition suits is Order XX, Rule 18, Code of Civil Procedure. The types of cases in which

questions of profits or mesne profits arise were differentiated thus at page 175:

(i) Suits for ejectment or recovery of possession of immovable property from a person in possession without title, together with a claim for past or

past and. future mesne profits, (ii) Suits for partition by one or more tonants-in-common against others with a claim for account of past or past and

future profits, (iii) Suits for partition by a member of a-joint Hindu family with a claim for an account from the manager. In the first case, the

possession of the Defendant not being lawful, the Plaintiff is entitled to, recover ""mesne profits"" as defined in Section 2, Clause 12, Code of Civil

Procedure, 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 the demand for partition and is not entitled to open up past

accounts or claim relief on the grounds of past inequality of enjoyment of the profits, except where the manager has been guilty of fraudulent

conduct or misappropriation. The Plaintiff would, however, be in the position of a tenant-in-common from the date of severance in status arid Ms

rights would have to be worked out on that basis.

Order XX, Rule 12, Code of Civil Procedure, deals with the first class of suit above referred to, while Order XX, Rule 18, deals with the second

and the third categories. In view, however, of the considerable reliance placed on Order XX, Rule 12, code of Civil Procedure, in Ghulusam Bivi

v. Ahamadsa Rowther ILR (1918) Mad. 296 in dealing with the right of a Plaintiff to profits accruing during the pendency of a partition suit, it is

desirable to consider the scope of this provision. A claim for possession and a claim for past mesne profits have been hold to be based on different

Causes of action, at any rate, in the decisions of this Court.

At page 181, the position is set out thus:

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 those 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 realized during that period. He

need not, therefore, specifically ask for any relief in respect of future profits, the prayer for general relief being sufficient to enable the Court to

award him such profits. If during the pendency of the suit one or some of the co-sharers receive or realize the entire profits or more than their share

of the profits of the common properties, they have to account to the other shares for the excess. If the collecting co-sharer or tenant-in-common is

not in a position to bring into the hotchpot his realizations subject to all just allowances in his favour, the Court will, when passing a final decree

deprive him of a sufficient portion of the properties allot table to his share and allot the portion so taken away to the other sharers so as to give

thorn the equivalent of their share of the profits in, the share of property. Or the Court may impose a charge on the share of the defaulting tenant-

in-common, for the amount for which he is accountable to the other sharers and thus equalize the shares. The theoretical allotments and the general

declaration of rights in the preliminary decree have to be worked out with due regard to the realizations of profits and drawings by the parties

subsequent to the institution of the suit till the passing of the final decree. The profits accruing from the common properties pending a suit for

partition, like the properties themselves are liable to be partitioned under the final decree oven without a specific payer in the plaint for an account

of such profits and a division thereof 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. A suit for partition, by a member of a joint Hindu family is

substantially a suit for an account of the joint family properties on the date the suit as well as all the profits received by the manager since that date,

so that the pi should also be divided and his proper share given to him. If, as we think, this is the true nature of the proceedings in a suit for

partition, a direction for an enquiry into the profits of the com property resolved or realized by one of the parties during the pendency of the suit

may be u even after the passing of the preliminary decree and there is nothing in Order XX, Rule 18, CPC interdicting such procedure.

11. The case before Rajagopala Ayyangar J., in Arunachala Mudali and Another Vs. Maragathammal and Another, , was a simple suit for

possession of properties. The plaint contained o a prayer for possession of the properties and there was no prayer for past future mesne profits. It

is a case to which Order XX, Rule 12, CPC applied. The question came up for consideration again in Ponnuswami Udayar v. Santhappa Udayar

(1963) 75 L.W. 683 before Jagadisan J. That was a suit partition, and in the plaint there was no claim for recovery of future profit accruing due

after institution of the suit. A claim was made for the first time in the application which essentially was an application for the passing of a final decree

in the partition suit. After referring to the Full Bench decision Basavayya v. Guravayya ILR (1952) Mad. 173 (F.B.) and the decision of the

Supreme Court Jagadisan J., has observed thus:

It is not clear from this passage whether the claim for mesne profits in that case was I past profits prior to the institution of the suit or one for future

profits accruing after the suit. The Fall Banch decision of this Court has not been referred to by the Supreme Court, and I cannot say that the

necessary implication of the view of the Supreme Court is to lay down a rule of law Contrary to that decided by the Full Bench.

12. Referring to the decision of Rajagoapala Ayyangar J. in Arunachala Mudali and Another Vs. Maragathammal and Another, , as relating to an

action which was pure and simple one for recovery of possession and not for partition and separate possession, it is observed by Jagadisan J.:

I do not think that this decision applies to the present ease which is concerned with the maintainability of an application preferred after the

proceedings for the preliminary decree but before the final decree, in a partition action.

13. It is needless to consider in this case the scope of Order XX, Rule 12, CPC as this case comes in directly under Order XX, Rule 18 CPC and

is governed by the decision of the Full Bench and we respectfully agree with the view of Subba Rao C.J., as he then was in the decisions above

referred that the authority of the decision of the Full Bench in Basavayya v. Guravayya ILR (1952) Mad. 173 (F.B.), has not m the least been

shaken in its application to suits for partition. The objection as to the tenability of the claim or a share in the profits pendente lite has, therefore,

been rightly overruled by the trial Court.

14. Nor do we see any substance on the question of interest on the profits decreed as interest has been allowed only from the date of the decree.

15. In the result, subject to the above modification as regards the paddy income per year per kalam the decree and judgment of the Court below is

confirmed. In other respects the appeal is dismissed. In the circumstances we award the Plaintiffs-Respondents half their taxed costs.

