
(1977) 11 BOM CK 0047
In the Bombay High Court
Case No : First Appeal No. 444 of 1977

Pandurang Ramji Doiphode	Vs	APPELLANT
Dhondiram Ramji Doiphode		RESPONDENT

Date of Decision : 09-11-1977

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 122, 2, 54

Citation : (1979) 81 BOMLR 279

Hon'ble Judges : Kanade, J;Apte, J

Bench : Division Bench

Judgement

Apte, J.—This appeal by original defendants Nos. 1 and 5 to 8 is directed against the final decree passed by the Civil Judge, Senior Division, Pune, in Special Civil Suit No. 117 of 1958 on January 31, 1977 determining the future mesne profits from the date of suit till 1967 to be paid by the defendants Nos. 1 and 5 to 8 to the plaintiff and defendants 2 and 3 who are other sharers.

2. Plaintiff and defendants Nos. 2 and 3, who respectively are respondents Nos. 1, 2 and 3 in this appeal, are real brothers while appellant No. 1, who is original defendant No. 1, is their step brother. Appellants Nos, 2 to 5, who were defendants Nos. 5 to 8 in the trial Court, are the sons of defendant No. 1. Defendant No. 4, since deceased, was the natural mother of plaintiff and defendants Nos. 2 and 3 and step-mother of defendant No. 1.

3. Plaintiff and defendants Nos. 1 to 3 along with the sons of defendant No. 1 formed a joint Hindu family.

4. The family owned agricultural lands at four villages of Pimpre, Shिवtakra, (Nira), Korhale and Wathar of Nimbalkar. Besides, the family owned some house structures at Nira. One more house structure was constructed by defendant No. 1 on one of the plots at Nira, which belonged to the family, sometime in 1964 to 1966. According to defendant No. 1, he spent about Rs. 13,000 for construction of this building which is referred to in the record as Building No. 2.

5. In addition, the family conducted since 1939 at adat shop, that is, shop of commission agency in agricultural products, at Nira. Similarly, business in country blankets was also carried on by plaintiff and defendants Nos. 2 and 3 as a joint family concern in Konkan region of this State since 1928. This business is referred to in record as "Konkan business".

6. It is not in dispute, at least at this stage, that defendant No. 1 and his sons were in exclusive charge of the commission agency shop at Nira while plaintiff and defendants Nos. 2 and 3 were looking after the blanket business in Konkan. Similarly, defendant No. 1 and his sons-defendants Nos. 5 to 8-were also looking after the management of other immovable properties both agricultural lands and houses.

7. It appears that present defendant No. 2, Raghunath Ramji, had filed Special Civil Suit No. 193 of 1950 against his brothers for partition and separate possession of his share in the joint family property. In that suit the present defendant No. 1 was impleaded as defendant No. 1 while present plaintiff was defendant No. 2 and present defendant No. 3 was defendant No. 3. It seems that after the hearing of that suit commenced, the parties came to some understanding and, therefore, that suit was withdrawn by the plaintiff in that suit on September 5, 1955 and defendants Nos. 2 and 3 in that suit also passed a purshis that they did not wish to proceed further as defendant No. 1 had agreed to privately partition the property and give possession of their share therein.

8. It, however, so happened that this understanding never materialised with the result that the suit in which this appeal arises was instituted by present respondent No. 1 Dhondiram Ramji again claiming partition and possession of his share in the aforesaid joint family property.

9. Defendants Nos. 2 and 3 also supported the plaintiff and claimed similar partition and possession of their share in the joint family property.

10. Defendant No. 4, the genitive mother of plaintiff and defendants Nos. 2 and 3 and the step-mother of defendant No. 1, who was impleaded as defendant No. 4 in this suit claimed partition and possession of her 1/5th share.

11. It is unnecessary to set out at great length the defences raised by present appellants. Suffice it to state that defendant No. 1 and his sons claimed that the commission agency shop at Nira and the other property consisting of agricultural lands and houses was their exclusive property, while plaintiff and defendants Nos. 2 and 3, who were in charge of the blanket business in Konkan, claimed that that business was exclusively owned by them.

12. The trial Court, however, rejected these contentions advanced on both sides and held that the entire property was the joint family property and that plaintiff and defendants Nos. 2 to 4 were each entitled to 1/5th share in these properties while defendant No. 1 along with his sons, defendants Nos. 5 to 8, were together entitled to 1/5th share in these properties and defendant No. 4 was entitled to

1/5th share.

13. The trial Court therefore passed a decree for partition and delivery of possession of the share of different sharers under Order XX, Rule 18(1) of the CPC with regard to agricultural lands through the Collector or any of his gazetted subordinate as provided in Section 54 of the Civil Procedure Code.

14. Similarly a preliminary decree with respect to the remaining property, viz. the two businesses and the other immovable property was passed under Order XX, Rule 18(2) of the Civil Procedure Code. This decree directed that on the application of the plaintiff or any of the parties, a Commissioner should be appointed to effect partition of the house and other movable property. Accounts of the commission agency shop at Nira with all its assets and liabilities were also directed to be taken through the Commissioner and defendant No. 1 was directed to render accounts of that business. Similarly plaintiff and defendants Nos. 2 and 3 were directed to render accounts of the blanket business in Konkan to the Commissioner. The decree also contained a direction that the Commissioner should "take account of the profits of the landed property, such as the fields and houses and give finding regarding them from the date of the suit till the date of the delivery of possession of the property or till the date of the findings of the Commissioner".

15. We are told that defendant No. 1 and his sons had filed an appeal against the preliminary decree, to the High Court, During the pendency of that appeal, defendant No. 4, Vithabai, who was a party to that appeal died and her heirs were not brought on record. Consequently the appeal is stated to have been disposed of as having abated.

16. Thus, it is common ground that the preliminary decree now stands.

17. Thereafter the present plaintiff made an application for appointing Commissioner as provided in the preliminary decree to take accounts of the shops and also to effect partition of the immovable property other than the agricultural lands and also to take accounts of profits of the landed property.

18. Plaintiff was held entitled to 7/30th share on the death of his mother, defendant No. 4, as he, as one of her heirs was entitled to 1/6th share in his mother's 1/5th share.

19. On this application the trial Court at first appointed Mr. Lavate, a practising lawyer of Pune as Commissioner; but as he was unable to carry out the work for a considerable time, his appointment was cancelled and another practising advocate by name Mr. M. N. Vaidya was appointed as Commissioner.

20. The Commissioner called upon the respective parties to produce accounts and to submit their statements before him.

21. None of the parties, however, filed any accounts before the Commissioner. It, however, appears that the plaintiff had taken copies of the account books of the

commission agency shop at Nira, which were maintained by defendant No. 1 and were produced in the previous suit and he produced those copies before the Commissioner and they are at exh. 175. These are accounts from 1950 onwards upto 1955.

22. As regards the landed property, plaintiff appears to have produced extracts of combined Form 7-12. The plaintiff examined himself and on behalf of the defendants, defendant No. 6 was examined before the Commissioner.

23. The Commissioner then on the material placed before him submitted his reports. The report submitted by him with respect to the accounts of the shops is at exh. 324 and the report regarding the income of the agricultural lands and other immovable property, such as buildings, is at exh. 331.

24. The Commissioner found that the total net income of the shop right from the year 1939 in which year the commission agency shop at Nira was started upto 1958 was Rs. 1,33,649.19; whereas the total net income of the blanket business carried on by the plaintiff and defendants Nos. 2 and 3 during the same period was Rs. 50,000.

25. The Commissioner, therefore, found that after giving credit to defendant No. 1 for the amount of Rs. 50,000 of the blanket business, which were in the hands of plaintiff and defendants Nos, 2 and 3, the balance of Rs. 1,33,649.19 was distributable between the four claimants and, therefore, the plaintiff was entitled to get Rs. 31,185 for his 7/30th share in the business.

26. The Commissioner found that the net income for nine years from 1958-59 to 1966-67 from the agricultural lands at Pimpri was Rs. 1, 37,105, from those at Korhale was Rs. 86,700, from those at Wathar-Nimbalkar Rs. 38,625, from those at Shivtakrar (Nira) was Rs. 2,325 and from four buildings at Nira was Rs. 32,396. Thus the total net income arrived at by the Commissioner was Rs. 2,97,151.00 and out of this for the 7/30th share of the plaintiff, the Commissioner found that the plaintiff was entitled to get Rs. 71,316 from defendant No. 1 and defendants Nos. 5 to 8.

27. Both sides were given opportunity to file their objections to these reports. The objections filed by defendant No. 1 are respectively at exhs. 338 and 344 and those filed by the plaintiff are at exh. 339 and 348 respectively.

28. In his objections the plaintiff claimed that he was entitled to get Rs. 1,15,555 for his share in the profits of the shop.

29. The contesting defendant No. 1, on the other hand, contended that the amount found by the Commissioner was excessive and he also contended that the amount of net profits of Rs. 50,000 of the blanket business found by the Commissioner was arbitrary and very low.

30. The contesting defendant also contended that the preliminary decree did not give any directions as to the point of time from which the accounts were to be

taken and the order of the Court appointing the Commissioner also did not give any such direction to the Commissioner and, therefore, it was necessary for the Commissioner to seek directions from the Court on this point. He also contended that in any event, the Commissioner was wrong in taking accounts of the commission agency business at Nira from the inception of the shop in 1939.

31. The contesting defendant No. 1 also contended that plaintiff was entitled to get mesne profits only for three years from the preliminary decree in view of the provisions of Order XX, Rule 12 of the CPC and not in the profits calculated upto the end of 1967 as was done by the Commissioner. He also contended that the income from agricultural lands and buildings found by the Commissioner was too much exaggerated.

32. The plaintiff in his objections to the Commissioner's report claimed that he was entitled to get Rs. 3,12,813 for his share, his contention being that the assessment of the profits made by the Commissioner was too low. He gave his own estimate of these profits and, according to him, the total net profits of the agricultural land were Rs. 6,40,953.50 and from buildings were Rs. 34,909,53 i.e. the total net income from these properties was Rs. 6,75,863.03.

33. After hearing both sides and considering the objections raised by them, the Civil Judge held that the plaintiff was entitled to 1/5th share in his own right and 1/6th share in the 15/16th share of his mother, that is to say, he was entitled to 7/30th share in the total profits.

34. The learned Judge held that the accounts of the shop at Nira should be taken from 1950 to 1958, in which year the suit was filed, and not from 1939 as was done by the Commissioner. The Commissioner had found that on an average from 1950 onwards this shop had earned profits of Rs. 6,735 annually.

35. The learned Judge found that after deducting the loss of Rs. 897 sustained in S.Y. 2008, the total profit earned by the shop during this period was Rs. 62,756 and, therefore, for his 7/30th share the plaintiff was entitled to Rs. 14,643, plus Rs. 5,000 on account of his share in the valuation of the shop which was at Rs. 25,000 as stated in the plaint. Thus, the plaintiff was entitled to get on account of his 7/30th share in the shop Rs. 20,475 and after deducting defendant No. 1's share in the profits of the blanket business, the plaintiff was held entitled to get Rs. 12,976.

36. The contention of defendant No. 1 that the plaintiff was entitled to get mesne profits only for three years from the passing of the preliminary decree was negatived and it was held that he was entitled to mesne profits till the delivery of possession in view of the amendment made by this High Court in Order XX, Rule 12(1) (c) of the Civil Procedure Code.

37. The learned Judge rejected the estimate of the income of agricultural lands given by the Commissioner but accepted the estimate given by the plaintiff and deducted 1/10th therefrom for costs of cultivation. Thus, he found that the total

income from agricultural lands from 1958-59 to 1966-67 in which year the

38. Receiver was appointed to manage these lands came to Rs. 6,40,953.00 and that, therefore, for plaintiff's 7/30th share, plaintiff was entitled to get Rs. 1,49,555.81 plus Rs. 26, 944.29 on account of interest at 6 per cent.

39. Then the learned Judge found that the total income from the house properties, which was earned during the aforesaid period, was Rs. 34,909.53 and, therefore, plaintiff was entitled to get Rs. 8,145 for his 7/30th share.

40. In the result, the learned Judge awarded a decree to the plaintiff against defendants Nos. 1 and 5 to 8 for Rs. 12,976.54 with 6 per cent, interest from January 1961, that is from the date of the preliminary decree, on account of profits of the shop at Nira. Similarly on account of profits from the house properties, plaintiff was awarded a decree for Rs. 8,145.55 with interest at 6 per cent, per annum from July 1, 1967 till realisation. Similarly, he was awarded a decree for Rs. 1,49,555.81 with interest at 6 per cent, per annum from July 1, 1957 till realization. He was also awarded a decree for Rs. 26,944.29 on account of interest till June 30, 1967. Defendants Nos. 1 and 5 to 8 were also directed to pay plaintiff's costs of the final decree proceedings.

41. Defendant No. 1 and his sons, defendants Nos. 5 to 8, have now preferred this appeal.

42. Although plaintiff filed cross-objections, Mr. Nargolkar, at the commencement of the hearing, stated that he did not wish to press them and he withdrew them with our permission. There was therefore no effective hearing of the cross-objections.

43. On behalf of the appellants it was first contended that the view taken by the trial Court that the plaintiff was entitled to recover mesne profits from the date of suit till the delivery of possession of his share to him is erroneous. It was submitted that under Order XX, Rule 12(1) (c) of the Code of Civil Procedure, in the case of a suit for recovery of possession of immovable property with mesne profits, Court can pass a decree directing an inquiry as to mesne profits from the institution of the suit until-

(i) the delivery of possession to the decree-holder,

(ii) the relinquishment of possession by the judgment-debtor with notice to the decree-holder through the Court, or

(iii) the expiration of three years from the date of the decree, whichever event first occurs.

It is submitted that since the event of expiration of three years has first occurred in this case, the plaintiff would be entitled to mesne profits only for three years from the date of the preliminary decree and, therefore, the lower Court was not right in awarding mesne profits upto 1967, that is, till the appointment of Receiver.

44. This High Court in its rule making power u/s 122 of the CPC has amended Clause (c) of Order XX, Rule 12(1) and has dropped Clause (iii) therefrom. Therefore, under the rules as amended by this Court, as regards future mesne profits, an inquiry can be directed to determine mesne profits from the institution of the suit until delivery of possession to the decree-holder or the relinquishment of possession by the judgment-debtor with notice to the decree-holder through Court.

45. The trial Court in view of the amendment and the dropping of Clause (Hi) held that the defendant No. 1's contention that plaintiff was entitled to mesne profits only upto three years from the date of decree was not tenable but that he was entitled to mesne profits until the date of delivery of possession. The mesne profits, however, were calculated upto 1967, presumably because in that year the Receiver took possession of the suit properties except one land S. No. 159/2 (Gat No. 110) of Wathar-Nimbalkar.

46. Mr. Nerlekar for the appellants submitted that the above amendment in Rule 12(c) having been made by this Court in 1966, it would not be applicable to the preliminary decree which was already passed long before in December 1960.

47. The learned Judge in this respect appears to have taken the view that this amendment being procedure had retrospective effect and so the contention was rejected.

48. Mr. Nerlekar further wanted to challenge the vires of the aforesaid amendment. According to him, such an amendment which virtually repeals the provisions of the Code cannot be made by the High Court in its rule making power. Besides, he also wanted to contend that the amendment made is in excess of the rule making powers of the High Court u/s 122 of the Code.

49. But we do not think that in the present case it is necessary to consider the provisions of O, XX, Rule 12 at all. It must be remembered that the suit was filed by one member of a joint Hindu family against the other members for partition and separate possession of his share in the joint family property. To such a suit, Rule 18 of Order XX is applicable. That rule deals with a decree in suit for partition of property or separate possession of a share therein. It says:

18. Where the Court passes a decree for tile partition of property or for the separate possession of a share therein, then,-

(1) if and in so far as the decree relates to an estate assessed to the payment of revenue to the Government, the decree shall declare the rights of the several parties interested in the property, but shall direct such partition or separation to be made by the Collector, or any gazetted subordinate of the Collector deputed by him in this behalf, in accordance with such declaration and with the provisions of section 54;

(2) if and in so far as such decree relates to any other immovable property or to movable property, the Court may, if the partition or separation cannot be

conveniently made without further inquiry, pass a preliminary decree declaring the rights of the several parties interested in the property mid giving such further directions as may be required.

50. In such a suit, a decree that is ultimately passed by a Court cannot be said to have been passed under Order XX, Rule 12 but it must be held to have been passed under Rule 18 thereof, even in respect of the award of profits to the plaintiff of his share in the joint family property subsequent to the institution of the suit. Indeed, in this case the decree was expressly passed under Order XX, Rule 18 and while passing the decree, the Court gave directions to effect partition of agricultural lands paying assessment to Government through the Collector or any of his gazetted subordinate and that of the other movable and immovable property through a Commissioner appointed by the Court. It further gave a direction that the Commissioner shall take account of the profits of the landed property such as fields and houses and give a finding regarding them from the date of the suit till the date of delivery of possession of the property or till the date of the findings of the Commissioner. Therefore, it is difficult, in the first place, to accept the contention of Mr. Nerlekar that that part of the decree awarding future menses profits must be treated to have been passed under Order XX, Rule 12(1) (c).

51. Order XX, Rule 12 applies to a suit for recovery of possession of immovable property and for menses profits, The expression "menses profits" has been defined in Section 2(12) of the Code as follows:

"mense profits" of property means those profits which the person in wrongful possession of such property actually received or might with ordinary diligence have received therefrom, together with interest on such profits, but shall not include profits due to improvements made by the person in wrongful possession.

It cannot be said that in a case like the present one where one coparcener or co-owner is in possession of the entire property, he is in wrongful possession of the property in, the strict sense of the term. It cannot be said that he has taken possession of the property by committing any wrong. In fact, in such a case what happens is that the managing coparcener or co-owner while he is managing the property on behalf of himself and other members or other co-owner only excludes them either from joint possession or from the profits of the property. He does not obtain possession in such cases by committing any wrongful act. It is, therefore, difficult to see how in the present case provisions of O, XX, Rule 12 can be attracted.

53. Chitturi Subbanna Vs. Kudapa Subbanna and Others, , in which it was held that Order XX, Rule 12 does not empower a Court to direct an inquiry and pass a final decree with respect to mense profits for a period exceeding three years from the date of the decree. But that case has no application to the facts of the present case.

54. It appears that the decree in that case was passed on March 7, 1938 under

which plaintiff No. 2 was awarded possession of entire properties contained in schs. "A" and "C" and possession of 1/24th share in the properties described in Schedule "B" attached to the plaint. The possession of properties in schs, "A" and "C" was accordingly delivered to the decree-holder on February 17, 18 and 20, 1943. The decree also directed that enquiry be held into mense profits from the date of the institution of the suit till the delivery of possession and a final decree be passed for the amount so found due.

55. Pursuant to this decree, the decree-holder made an application for ascertainment of future mesne profits subsequent to the date of decree till the date of delivery of possession and the trial Court passed a final decree accordingly.

56. The defendant No. 1 appealed to the High Court and at the time of hearing he applied for permission to raise an additional ground to the effect that grant of mesne profits for more than three years from the date of the decree was not correct. The High Court, however, did not allow him to raise this point.

57. But before the Supreme Court the appellant was allowed to raise it.

58. Their Lordships held that the High Court should have allowed him to raise this point. The decision of the Supreme Court is contained in para. 32 of the report in which the Supreme Court held that a decree under Order XX, Rule 12, CPC directing enquiry into the mesne profits, however, expressed must be construed to be a decree directing the inquiry into the mesne profits in conformity with the requirements of Order XX, Rule 12(1) (c) and, that therefore, the decree-holder could not get mesne profits for the period subsequent to March 7, 1941 when the three years period from the date of the High Court decree expired, although the preliminary decree so provided. It is clear that the decree in that case was passed under Order XX, Rule 12(c).

59. As we have pointed out above, however, the decree in the present case not being one under Order XX, Rule 12, but it being under Order XX, Rule 18, this ruling has no application to the facts of the present case.

60. Mr. Nerlekar also invited our attention to a decision of a single Judge of this Court in Dhondi Vithoba Koli Vs. Mahadeo Dagdu Koli and Others, in support of his argument that a decree for mesne profits passed even in partition suit falls under Order XX, Rule 12, Civil Procedure Code.

61. That was a suit for partition filed by one of the co-owners after the Inam tenure of the property was abolished. Initially the property was held as Watan property and it was governed by special rules. It was subject to the rule of primogeniture and impartiality till it was converted into rayatawa property by abolition of Inam. In the partition which was effected between the brothers, this Watan property was kept joint and the other property which was partible was partitioned.

62. As already stated, after the abolition of the Watan by an enactment, one of

the brothers filed a suit for partition and separate possession of his share in the property. The main question that arose was whether the property which, on abolition of its watan character, was regranted to the person in whose name it stood was held by him for the benefit of the entire family including the other two brothers who were the members of the erstwhile joint family.

63. The trial Court answered this question in the affirmative and awarded plaintiff his 1/3rd share in the property together with mesne profits of his share. The District Court, however, took a different view and held that the suit was not maintainable, as on regrant the property became the exclusive property of the grantee. In appeal by the plaintiff to the High Court, this Court agreed with the view taken by the trial Court.

64. Since even after the abolition of Watan, the property was held by the person in whose favour the grant was made on impartible tenure, it could not be partitioned by metes and bounds without previous sanction of the Collector. It was, therefore, argued in the High Court that at any rate plaintiff in that case would not be entitled to mesne profits from the date of the institution of the suit but only from the date of the sanction of the Collector for partition of the property by metes and bounds. In other words, the argument was that the possession of defendant No. 1 would become wrongful only from the date on which the Collector gave the necessary sanction. This argument was rejected and it was held that when the Collector gives his sanction to partition, such a sanction relates back to the date of the institution of the suit and, therefore, the plaintiff would be entitled in such a case to mesne profits, under Order XX, Rule 12 of the CPC from the date of the institution of the suit. He was, therefore, awarded mesne profits from the date of institution of suit under Order XX, Rule (1)(c) of the Code.

65. Relying on this decision, Mr. Nerlekar wanted to urge that even to a suit for partition the provisions of Order XX, Rule 12 (1)(c) of the Code would apply so far as the award of future menses profits is concerned. But it appears that the learned Judge in passing the decree of menses profits under Order XX, Rule 12(1) (c) proceeded on the assumption that to such a suit the provisions of that rule are applicable. It does not appear to have been brought to his notice that to such a suit, in fact the provisions of Rule 18 of Order XX, are applicable. The decision in that case, therefore, has to be confined to the facts of that case, because it does not purport to lay down positively that a decree in a partition suit for future menses profits falls under O- XX, Rule 12(1) (c) of the CPC especially purports to have been passed under Order XX, Rule 18.

66. The Full Bench decision in *Ramabai Govind v. Anant Daji* AIR[1945] Bom. 338 : 47 Bom. L.R. 447, which was also referred to by Mr. Nerlekar, is not in any way helpful to appellants inasmuch as the point that was decided in that case was quite different. The point that arose in that case was whether an application made to the Court u/s 54 of the CPC to send the papers to the Collector for effecting partition of lands paying revenue to Government, in accordance with

the decree passed under Order XX, Rule 18(1) is governed by Article 181 or art 182 of the Limitation Act. The Full Bench held that such an application was in the nature of a mere proceeding in the suit rather than an application to execute the decree and, therefore, there was no period of limitation for making such an application. The question as to whether the decree passed for ascertaining future menses profits in such a case MI under Order XX, Rule 12(1) (c) did not arise for consideration in that case.

67. Mr. Nerlekar also invited our attention to Keshao Raghunath Deosant and Others Vs. Waman Keshao Deosani and Another, decided by Nain J. Again in that case also the question which arises for consideration in the present case did not arise. No doubt, in that case the decree for partition was passed in terms of the consent terms filed by the parties. But instead of sending the papers to the Collector to effect partition of revenue paying lands u/s 54 of the Code, the Court appointed Commissioner for effecting partition. The defendants' objection to this course was overruled by both the Courts below and, therefore, the defendants appealed to the High Court. The point raised in the second appeal before the High Court was that civil Court had no jurisdiction to effect partition of revenue paying estate. This contention was accepted and the decree passed by the trial Court with regard to the revenue paying estate was set aside and it was directed that the decree be sent to the Collector for effecting actual partition.

68. In *Lakshmibai v. Ravji* (1928) 31 Bom. L.R. 400 also the question that was considered was quite different. That was also a case of partition of property and the Court while passing the decree for partition and for delivery of separate possession of the share of the parties directed that menses profits to be recovered by the plaintiff for his 1/3rd share from defendant No. 1 should be ascertained in the execution proceedings when the plaintiff gets possession of the property after the actual division thereof. The executing Court upheld the objection raised by the defendants judgment-debtors that executing Court cannot determine future menses profits and declined to execute the decree which it thought was in contravention of the provisions of Order XX, Rule 12 of the Civil Procedure Code. The question that arose for consideration of the High Court was whether the executing Court could go behind the decree and refuse to execute the decree on the ground that the order of the Court was without jurisdiction in so far as it contravened the provisions of Order XX, Rule 12. It was held that the executing Court had no jurisdiction to go into the question whether the Court which passed the decree committed any error in the exercise of its jurisdiction and since the Court which passed the decree had ordered that the menses profits should be ascertained in execution, it was incumbent on the executing Court to ascertain the menses profits and it was not open to the executing Court to go behind the decree and go into the question whether there was an irregular or erroneous exercise of jurisdiction by the Court which passed the decree.

69. In *Bhagwant Vinayak v. Radhakisan* (1958) 61 Bom. L.R. 348, a preliminary decree for partition and separate possession was passed in a suit instituted by

some of the sons against their father and his alienees. The preliminary decree directed that the plaintiffs shall obtain future menses profits from the date of suit till delivery of possession. It was held that although the decree directed that menses profits should be determined upto the date of delivery of possession, menses profits could not be awarded for a period of more than three years from the date of decree in view of the provisions of Order XX, Rule 12(1)(c) of the Code. But it must be remembered that that was a decree passed against the alienees who were strangers and, therefore, their possession was obviously wrongful in its inception inasmuch as the alienation by the father in their favour was in excess of the powers of the father. Besides, it appears that the decree was expressly passed under Order XX, Rule 12 and not under Order XX, Rule 18 of the Code.

70. In *Babburu Basavayya and Others Vs. Babburu Guravayya and Another*, , it was pointed out that the claim of a member of a joint Hindu family for partition and for his share of the profits accruing from the lands pending the suit is not, properly speaking, a claim for "menses profits" and Order XX, Rule 12, CPC has no application to such a case.

71. In *Subba Reddiar Vs. Hazra Bibi*, , it was held that in a suit for partition the plaintiff -co-sharer is entitled to and the Court has ample jurisdiction to award menses profits or rendition of accounts of the income of the plaintiff's share of the properties right upto the delivery of possession and not upto three years only; because in such a case O- XX, Rule 12 of the CPC has no application.

72. In *Mst. Kainta Meherani Vs. Damru Meher and Others*, , it has been held that the expression "menses profits", as defined in Section 2(12), CPC is restricted only to those profits which are derived by a person in wrongful possession of property belonging to another. It has no application to profits accountable by a person not in wrongful possession of the property such as by a co-sharer, before partition. Such a claim for accounts is not strictly speaking a claim for menses profits and the provisions of Order XX, Rule 12, CPC have no application to such claim for accounts.

73. In *D. Satyanarayana Murthi v. D. Bhavanna* AIR[1957] A.P. 766 it was held that a partition suit is not covered by the provisions of Order XX, Rule 12, CPC but by the provisions of Order XX, Rule 18 of that Code alone because the terms of Order XX, Rule 12 cannot at all apply to a partition action. The profits which the manager has to account for are not menses profits within the meaning of Section 2(12), Civil Procedure Code.

74. Having, therefore, considered the question carefully, we are of the opinion that a decree awarding share in future profits subsequent to the date of the institution of the suit to the successful plaintiff in partition suit does not fall under Order XX, Rule 12 of the Code particularly when the decree is passed under Rule 18 of that Order, and therefore the limitation of three years prescribed in Clause (c) of Rule 12(1) of Order XX is not applicable to such a decree.

75. In support of his contention that such a share in profits amounts to menses profits, Mr. Nerlekar invited our attention to para. 305(5) from Mulla's Hindu Law, fourteenth edn. There it has been stated that a coparcener who is entirely excluded from the enjoyment of the family property is entitled to an account of the income derived from the family property, and to have his share of the income ascertained and paid to him; in other words he is entitled to what are called menses profits. It is further observed there that menses profits may also be allowed on partition where the family property or any part thereof has been held by a coparcener who claims it as his exclusive property. Relying on these observations, it was contended that even in such a case the claim of the plaintiff for share in the profits subsequent to the date of suit amounts to menses profits.

76. But in our view, the expression "menses profits" here has been used not in the strict sense of that expression as defined in Section 2(12) of the CPC but it has been loosely used to denote profits accruing after the institution of the suit.

77. Since we are of the view that such a decree falls under Order XX, Rule 18, CPC and in fact in this case it has been expressly so passed under that rule, we are unable to accept the argument of Mr. Nerlekar that future menses profits could not be awarded to the plaintiff for more than three years after the institution of the suit.

78. [The rest of the judgment is not material to this report].