
(1966) 09 GUJ CK 0003
In the Gujarat High Court

Rana Amersing Govindsing

APPELLANT

Vs

Rana Samatsingh Hathubha and Others

RESPONDENT

Date of Decision : 03-09-1966

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 20 Rule 8, 54, 54

Citation : (1968) 9 GLR 220

Hon'ble Judges : N.M. Miabhoy, C.J.; Akbar S. Sarela, J

Bench : Division Bench

Judgement

N.M. Miabhoy, C.J.—These two first appeals are directed against the decree, dated 23rd March 1959, passed by the learned Civil Judge (Senior Division), Surendranagar, in Civil Suit No. 2 of 1951 by which the learned Judge ordered partition of suit properties in terms of a Commissioner's report and rejected the claim made by defendant for future mesne profits in regard to common properties. First Appeal No. 667 of 1960 is by defendant and First Appeal No. 716 of 1960 is by plaintiffs. It is common ground that plaintiffs and defendant were co-owners of suit properties, that defendant had 1/2 share therein and that the other 1/2 share belonged to plaintiffs jointly. One Govindsingh was the original owner of the suit properties. He died leaving behind him surviving two sons Chhatrasingh and Amarsingh; the latter is defendant. Chhatrasingh died leaving behind him three sons, Hathubha, Dalpatsingh and Ganpatsingh; the latter two are plaintiffs Nos. 5 and 6. Plaintiffs Nos. 1, 2, 3 and 4 are the sons of Hathubha who died before the institution of the above suit. Plaintiffs were in actual and physical possession of the suit properties. They filed the aforesaid suit for partition on the allegation that defendant, though called upon on many occasions to agree to divide the suit properties, had either refused or neglected to do so. On 24th July 1951, the learned Judge passed a preliminary decree. Some of the terms thereof, material for the purposes of the present appeals, were as follows:

The Giras land shown in the lists Exs. 6 to 10 with constructions, being joint of both the parties, plaintiffs' 1/2 share is to be separated from the 1/2 share of

defendant. After partition in equal shares, the possession of 1/2 share to plaintiffs and possession of 1/2 share to defendants will be handed over. The costs of this suit of plaintiffs upto this stage is on defendant. The expenses of the partition is to be borne by the parties according to their shares. A Commissioner or a Surveyor will be appointed if an application is presented to gether with partition expenses.

Defendant then made an application which was numbered 133 of 1954, purporting to be an application for execution of the preliminary decree for partition and possession of the suit properties. On 22nd June 1955, defendant made an application for appointment of a Commissioner as directed in the preliminary decree. The Court passed an order below that application appointing a Commissioner. On 21st January 1958, the Commissioner submitted a report making his recommendations for partition of the suit properties. Some of the plaintiffs filed their objections against the recommendations made by the Commissioner. On 16th January 1959, defendant made an application praying that he should be awarded future mesne profits from the date of the suit till the date of delivery of possession of his share in the suit properties. On the contentions of the parties, the learned Judge drew up four issues for decision. The learned Judge rejected the contentions of plaintiffs against the recommendations made by the Commissioner for allotment of properties. He also rejected the prayer of defendant for future mesne profits. Both the sides felt aggrieved by the decisions recorded by the learned Civil Judge. Defendant preferred an appeal to the High Court of Judicature of Bombay at Rajkot which was numbered as Appeal No. 62 of 1959. On the reorganization taking place, that appeal was transferred to this Court and numbered as First Appeal No. 667 of 1960. Plaintiffs preferred an appeal to this Court and, as already stated, it bears First Appeal No. 716 of 1960. The appeal of defendant is directed against the order of the learned Judge rejecting defendant's claim for future mesne profits. Plaintiffs contest that claim, mainly on two grounds: (1) that there is no prayer for award of future mesne profits in the written statement; and (2) that no direction is given in the preliminary decree for ascertainment of future mesne profits and for awarding the same to defendant. The learned Civil Judge rejected defendant's claim for mesne profits on the ground that no relief was claimed therefore in the written statement, that there was no issue framed on the subject and that no direction for the purpose was given in the order appointing the Commissioner on 22nd June 1955. Therefore, though the learned Judge was convinced that defendant had a good case for being awarded the relief of mesne profits, he decided that defendant should be left to his ordinary remedy of seeking a relief by filing a separate suit. Plaintiffs challenge the recommendations of the Commissioner on the ground that the properties being Gharkhed lands and they being in actual and physical possession of the same, after the passing of the Land Reforms Act, all the Gharkhed lands should be allotted to them exclusively as they had made improvements in the same. The learned Judge rejected this contention. The total area of the lands was 91 acres and 5 gunthas. As the

parties were joint and Girasdars of "B" class, they were entitled to have 100 acres of land for home cultivation. But, as the parties were in possession of 91 acres and 6 gunthas only, they were given in joint possession the field belonging to the farmer Bhavji, admeasuring 5 acres and 38 gunthas and the field of the successor of one Dhana Bhagwan, admeasuring 3 acres. The Commissioner divided the lands into two parts: the first part "A" consisting of 50 acres and 4 gunthas and the other part "B" consisting of 49 acres and 39 gunthas. He recommended that lot "A" should be allotted to plaintiffs and lot "B" should be allotted to defendant. Plaintiffs also challenged the above partition on the ground that the division was unjust and inequitable. The learned Judge rejected both the aforesaid contentions. In Appeal No. 667 of 1960, defendant contends that, having regard to the circumstances of this case and the admitted position that he was a co-sharer of the suit properties, he must be awarded his share of the future profits realized by plaintiffs in order to do complete justice between him and plaintiffs. On the other hand, plaintiffs resist the aforesaid claim on the above two grounds upheld by the learned Civil Judge. Plaintiffs do not challenge the partition decree on the first ground. Mr. Vyas, Learned Counsel for plaintiffs, fairly concedes that the mere fact that the lands were Gharkhed lands was no ground for allotting these lands exclusively to plaintiffs, awarding defendant only the owelty of partition. Mr. Vyas, however, challenges the decree on the second ground that the partition was unjust and inequitable. However, Mr. Vyas is unable to show any good or substantial ground for holding that the aforesaid two divisions were unequal, unjust or inequitable. However, the main ground on which Mr. Vyas challenges in his appeal the final partition decree is a totally new ground. Such a ground was not urged by plaintiffs in the lower Court at any stage; nor is that ground to be found in the memo of appeal in First Appeal No. 716 of 1960. The suit properties consist of agricultural lands and non-agricultural properties. Mr. Vyas contends that the Court has no jurisdiction to partition agricultural lands or to order them to be so partitioned. He contends that the jurisdiction for the purpose is vested, u/s 54, Civil Procedure Code, in the Collector or any Gazetted Officer deputed by him only and that, therefore, the final decree dividing the agricultural properties is of no avail and requires to be ignored and that defendant must be directed to approach the revenue authorities for getting his share in the common properties allotted to him. We permitted Mr. Vyas to raise this point in his appeal because the point was purely one of law as it, prima facie, related to the power of the civil Court to pass a partition decree.

2. In view of the aforesaid contentions, it will be convenient to take up First Appeal No. 716 of 1960 first for discussion, for, it is quite clear that if the point raised in that appeal is upheld, then, the claim for future mesne profits would not be of any importance because of the view, which is binding on this High Court, taken by the Bombay High Court that a partition decree u/s 54 is final. According to that view, when a decree is passed u/s 54, CPC the civil Court is functus officio thereafter. In that view of the matter, the lis in regard to agricultural lands would become concluded by the decree dated 24th July 1951 and no further decree for

future mesne profits can be passed in regard to the agricultural lands. It appears from the record that the claim for mesne profits in regard to non-agricultural properties is insignificant. If Mr. Vyas's point regarding jurisdiction is upheld, then, the claim for mesne profits in regard to non-agricultural properties is not likely to be seriously pressed.

3. Now, there is no doubt whatsoever that Mr. Vyas is right in contending that Section 54 of the CPC directs that the Civil Court, when passing a decree for partition of lands assessed to revenue, should order that the partition of such properties shall be made by the Collector or any of his Gazetted subordinates, deputed by him, in accordance with law for the time being in force relating to the partition or separate possession of shares of such properties. Order 20, Rule 18, Sub-rule (1), Civil Procedure Code, makes a further provision in this regard. It states that where a decree in a partition suit in regard to an estate assessed to payment of revenue is to be passed, the decree shall declare the rights of the several parties interested in the properties, but shall direct partition or separation to be made by the Collector or any of his Gazetted subordinates in accordance with such declaration and the provisions contained in Section 54, Civil Procedure Code. Therefore, there is no doubt that, when a civil Court deals with the claim for partition in regard to an undivided share in estate assessed to the payment of land revenue to the Government or separate possession of a share of such an estate, the only power which the Civil Court has got in that regard is to make a declaration regarding the share of the parties to the suit in such estate. It itself has no power of dividing such an estate by metes and bounds or of appointing a Commissioner for the purpose. Order 20, Rule 18, in terms lays down that the Court shall direct that that function shall be discharged by the Collector or his deputy. But all these contentions can only mean that, at the time when the preliminary decree was passed, that is, at the time when the shares of the parties were found to be admitted, the civil Court should have, in regard to such lands, given a direction that the land; should be partitioned by the Collector or his deputy. Thus the objection raised by Mr. Vyas is an objection against the decree dated 24th July 1951. It is quite clear that the provisions contained in that decree cannot be the subject-matter of an appeal now. It is an admitted fact that no appeal was filed against that decree by plaintiffs. It is true that, if that decree is silent as to who has to partition the agricultural land, then, having regard to the provisions contained in Section 54 and Order 20, Rule 18, Sub-rule (1), Civil Procedure Code, a Court will construe such a decree to mean that the partition is to be effected by the collector or his deputy or, in the case of an omission as to who was to partition the property, as held in some of the cases, the Court may still have the power of making an order directing that the partition may be effected by the above revenue authorities. The contention of Mr. D.U. Shah, the Learned Counsel for the defendant, is that, rightly or wrongly, in the present case, the learned Judge, passing the decree on 24th July 1951, has directed that partition, even in regard to agricultural properties, is to be made by a Commissioner or a Surveyor to be appointed by the civil Court. Mr. Shah

contends that, it may be that this direction contravenes the provisions of Section 54 and Order 20, Rule 18, Sub-rule (1), CPC but he says that a Court, which has initially the jurisdiction to entertain a suit, has the power to decide the matters involved therein, both rightly and wrongly, and that, if a matter is decided even wrongly, the matter is concluded, unless it is rectified by the appellate Court. Mr. Vyas does not dispute the correctness of these propositions. However, he contends that if the decree dated 24th July 1951 is properly construed, it does not mean that the partition was directed to be effected by any person other than a Collector or his deputy. He contends that, at the best, the proper construction of the decree is that it is silent on the subject, or that it does not contain a clear direction in it; but he says that, in either case, a presumption must be raised that the Court intends to direct a partition in accordance with law. Therefore, in the ultimate analysis, in order to decide First Appeal No. 716 of 1960, the question boils down to the construction of the relevant part of the decree. We have already reproduced that relevant part in a previous portion of this judgment. The part which is material for the purpose and which requires to be construed is the part which says that a Commissioner or a Surveyor will be appointed, on an application presented, together with the expenses of partition. Now, Mr. Vyas's contention is that this portion must be read to mean that a Commissioner was to be appointed in regard to the non-agricultural properties and that a Surveyor was to be appointed for the agricultural properties and that, by the use of the term "surveyor," the Court means really the Collector as provided in Section 54. We are unable to construe the decree in the aforesaid manner. In the first instance, there is no doubt whatsoever that the only proper construction of the aforesaid part of the decree is that the Court will appoint either a Commissioner or a Surveyor to effect partition of all the properties involved in the suit. The choice will be between a person who will have the qualification of a Surveyor. There is nothing in the aforesaid part or any other part of the decree, to which our attention has been drawn, to indicate that the Commissioner is to be appointed only in regard to non-agricultural properties and that Surveyor is to be appointed only in regard to the agricultural properties. In fact, the conjunction "or" suggests that the person appointed, whether a Commissioner or a Surveyor, will effect partition of all the properties in suit. The second and most serious objection to the construction contended for by Mr. Vyas arises from the fact that there is no doubt whatsoever that a Surveyor is to be appointed on a fresh application to be presented by the parties. If Section 54 and Order 20, Rule 18(1), Civil Procedure Code, are read properly, there is no doubt whatsoever that the Legislature does not contemplate the appointment of a Collector or his deputy by the Court. The Legislature has mentioned the Collector as the person who has to partition the properties covered by these provisions and that fact has only to be mentioned in the decree. The Collector is not an appointee of the civil Court but he is a functionary who has been designated for effecting partition of such properties. Therefore, probably, the Court mentions a "surveyor," thereby indicating that, if the name of a person having the qualifications of a surveyor is to be appointed, the Court will do so. Such a

provision appears to have been made probably because a majority of the suit properties is agricultural lands in nature. There is no doubt whatsoever that at no stage, did plaintiffs suggest that a Collector was intended to be appointed by the use of the term "surveyor". The person who was actually appointed as the Commissioner to divide the properties was not the Collector. The appointment of such a person was not objected to on the ground that he was not the Collector, but his deputy. It may be noticed that even a surveyor working under the Collector cannot directly be appointed by the civil Court. The right of selecting any other revenue officer vests u/s 54 with the Collector. If the Collector himself does not want to partition the agricultural properties, then, it is he alone who can select his deputy, the only limitation to his power being that he definitely must be a Gazetted Officer subordinate to him. From this point of view also, the absence of any reference to the Collector and the positive mention of the "surveyor" as the appointee of the Court indicates that what the decree dated 24th July 1951 has intended and directed to do is that either a Commissioner or a surveyor will be appointed to partition the agricultural properties if and when an application for the purpose happens to be made. Under the circumstances, in our judgment, the question as to who was to partition the properties was concluded by the aforesaid decree and no appeal having been preferred by plaintiffs against the aforesaid part of the decree, which, prima facie, was opposed to the provisions contained in Section 54, Civil Procedure Code, cannot now be challenged after the period of limitation for preferring an appeal against the decree dated 24th July 1951 had expired. Therefore, the contention raised by Mr. Vyas against the decree finally passed by the learned Judge must be rejected and First Appeal No. 716 of 1950 must be dismissed with costs.

4. As regards the other appeal, the contention of Mr. Vyas is firstly based on the provisions contained in Order 20, Rule 12, Civil Procedure Code. That rule deals with a decree for possession and mesne profits. The mesne profits dealt with are both past and future. The rule states that where a suit is for the recovery of possession of immovable property and for rent or mesne profits, the Court may pass a decree (i) for possession of the property; (ii) for past mesne profits or direct an enquiry into such profits; and (iii) direct an enquiry into future mesne profits, until the occurrence of one of the three events mentioned therein. Mr. Vyas's contention is that a decree for future mesne profits can be passed under the above rule only if there is a prayer for past mesne profits. Alternatively, he contends that, in any case, a decree for future mesne profits cannot be passed unless there is a prayer in the pleadings for the purpose. In support of his first contention, Mr. Vyas relies upon the express language used in the rule itself. He prefaces that contention by urging that every claim made in any suit must be preceded by a cause of action and the reliefs claimed must arise from such a cause of action. He contends that a Court of law can only deal with a cause of action which has already arisen before the institution of the suit and the reliefs claimed in the suit must necessarily arise from or be made on the basis of such a cause of action. He contends that the only exception where a Court can grant

reliefs in regard to matters arising after the institution of the suit would be those specifically provided for by the Legislature and that a Court has no jurisdiction to grant any relief in regard to future causes of action unless so specifically and expressly provided for by the Legislature. Mr. Vyas contends that the relevant part of Order 20, Rule 12, Civil Procedure Code, contains express provision in regard to future mesne profits and, therefore, in order to sustain a claim for future mesne profits, the party concerned must comply with the conditions laid down in the relevant part. Mr. Vyas's contention is that in order that a decree for future mesne profits may be passed under that rule, it is necessary that there would be a claim for past mesne profits. Secondly, Mr. Vyas contends that even if he is not right in his first contention, there is high authority for the proposition that a claim for future mesne profits cannot be awarded unless there is a prayer for the purpose in the pleadings. In the present case, plaintiffs have not asked for the claim for future mesne profits. In fact, they could not have as they themselves were in possession. Mr. Vyas contends that even if it be assumed that a defendant can ask for future mesne profits on the principle laid down in Mohd. Amin and Others Vs. Vakil Ahmed and Others, , there must be a prayer for the purpose in the written statement and admittedly there is no such prayer in defendant's written statement. That case arose out of a suit filed by some minor heirs of a Mohmedan for possession of the properties after setting aside a so-called deed of family settlement executed between the parties in regard to the distribution of the properties belonging to the estate of the deceased Mohmedan. In the plaint, no relief was asked for mesne profits. The High Court decreed the suit and also awarded plaintiffs the mesne profits. The decree for mesne profits was objected to in the Supreme Court on the ground that there was no prayer for the purpose in the plaint. The learned Solicitor General, who appeared for plaintiffs, after conceding that there was no such specific prayer for mesne profits, 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" used in the plaint. Their Lordships of the Supreme Court rejected this contention in the following words:

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.

The exact implication of this authority has been the subject-matter of a controversy in a number of cases decided in Madras, Andhra Pradesh and Mysore. In some cases, the decision of Their Lordships of the Supreme Court has been distinguished on the ground that the claim rejected was for past mesne profits. There is no doubt that this distinction must now be rejected. In R.S. Maddanappa (deceased) after him by his legal R.S. Madanappa and Others Vs. Chandramma and Another, , their Lordships of the Supreme Court have said that they had satisfied themselves from the record of the case that the decree appealed from in Mohd. Amin 's case was both for past and future mesne profits.

Mr. D.U. Shah contends, on the basis of the latter authority, that Mohd. Amin's case is no longer good law. In that case, their Lordships have observed that they feel that, when a suitable occasion arises, it may become necessary to reconsider the decision in Mohd. Amin's case as to future mesne profits. However, we do not think that this observation means that Mohd. Amin's case has been overruled. Mohd Amin's case, however, has been explained by Subba Rao C.J., as he then was, in *Rachepalli Atchamma v. Yerragunta Rami Reddi* AIR 1958 Andhra Pradesh, 517. In regard to the self-same question, Subba Rao C.J., has relied upon the Full Bench decision of the Madras High Court reported in *Babburu Basavayya v. Babburu Guravayya* ILR 1952 Mad. 173. Though the Full Bench case directly refers to Order 20, Rule 18, and not Order 20, Rule 12, their Lordships considered the provisions contained in the latter rule with a view to decide whether the case of *Ghulsum Bivi v. Ahmadsa Rowther* ILR 42 Mad. 296, was correctly decided. Their Lordships held that a claim for further mesne profits could not be rejected on the simple ground that there was no prayer for the purpose in the plaint. Subba Rao C.J. rejected the contention that the Full Bench case was overruled by Mohd. Amin's case, in the following words reported at page 519:

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 a proposition of law that 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.

5. However, it is not necessary to consider in the present appeal the correctness or otherwise of the various submissions made by Mr. Vyas, because, in our judgment, having regard to the true nature of the claim made by defendant, the case is not governed by Order 20, Rule 12, Civil Procedure Code, at all. Though defendant has designated his claim as a claim for mesne profits, that is not the correct description of the claim that he makes, "Mesne-profits" has been defined in Section 2, Clause (12), Civil Procedure Code, as "those profits which the person in wrongful possession of such property actually received or might with ordinary diligence have received there from,...". Now, on the facts of the present case, there cannot be any doubt that the plaintiffs from whom the future mesne profits are claimed were never and are not in wrongful possession of the suit properties. On the admitted facts in the present case, plaintiffs and defendant are and were at all material times co-sharers. It is well-known that, when one co-sharer is in possession of the whole of the common property or any part thereof, that possession is not only for himself but also on behalf of all his other co-sharers and therefore his possession is rightful. We may assume that, in a given case, the possession of a co-sharer may become unlawful if he denies the right

of his co-sharer and thereby renders himself liable to payment of mesne-profits. But, in the present case, there is nothing on the record to show that plaintiffs' possession was unlawful in the aforesaid sense at any time. Plaintiff is based on the footing that defendant is a co-sharer of the properties and that plaintiffs are willing to give him his share therein on a division of those properties by metes and bounds. There is nothing in the written statement to show that, according to defendant, plaintiffs' possession had ever become unlawful. That being so, the claim which defendant is entitled to make on account of the receipt of profits of the properties by plaintiffs is not a claim for mesne profits and that the share of those profits cannot be ascertained on the basis of the principles embodied in the definition of the expression "mesne profits" given in Section 2, Clause (12), Civil Procedure Code. When a co-sharer is in possession of the whole or any part of the common properties and receives the profits thereof, then, in law, that co-sharer is bound to give to his other co-sharers their share in the profits so received. This right to receive profits is an appurtenant right—a right which directly arises from the fact that the co-sharer has a right to receive his share in the common property. That such is the true nature of the above right is decided by their Lordships of the Judicial Committee in *Pirthi Pal and Uman Parshad v. Jowahir Singh and Ors.* 14 Indian Appeals, 37. *Sadasiva Aiyar J. in Ramaswami Aiyar v. Subramania Aiyar* 1953 Mad. 447, explains the aforesaid right on the basis of Privy Council case in the following words:

As stated by Their Lordships...a sharer has a "clear right" to an account of the profits received by the person in possession of the whole, and to be awarded his share thereof, not as mesne profits received by a person in wrongful possession but as appurtenant to the plaintiff's right in his share of the lands.

In order to enforce this right—a share in the profits of the common property—the law has given every other co-sharer another right—a right to ask for accounts of profits of the common property from the receiving co-sharer. Now a receiving co-sharer is not bound to render accounts in regard to the receipt of profits on the same basis as a trespasser does. When taking accounts of the receiving co-sharer, as explained in *Basavayya's* case, all just and proper allowances have got to be made in favour of the receiving co-sharer.

6. Therefore, the real question for consideration in the above appeal is not whether defendant is entitled to receive mesne profits from plaintiffs, but it is whether he is entitled to receive his share of the profits received by plaintiffs during the pendency of the suit, and whether the two objections advanced by Mr. Vyas in regard to that claim are valid. This question came up for consideration on a number of occasions in Madras, Andhra Pradesh and Mysore High Courts and, in a majority of cases, those High Courts have taken the view that the objections are not valid, vide, *Panikkathe Kutti Permit Maruvalamma's son Panikkathe Kutti Pennu Maruvalamma's son Raghava Mannadiar Vs. Panikkathe Kutti Pennu Maruvalamma's son Theyyunni Mannadiar*, *Abdul Rahim Saheb v. Abdul Salam Sahib* AIR 1949 Mad. 743, *Abdul Rahiman v. M.L. Narasinhiah* AIR 1950 Mys 60,

Basavayya v. Guravayya ILR (1952) Mad. 173 , K. Venkata Subbaiya Vs. K. Veeraiyya and Another, , Simma Krishnamma v. Nakka Latchumanaidu and Ors. AIR 1958 A.P. 520 , Kasibhatla Satyanarayana Sastrulu and Others Vs. Kasibhatla Mallikarjuna Sastrulu, and Ponnuswami Udayar and Another Vs. Santhappa Udayar and Others, . The objection on the ground that the preliminary decree did not give any direction as regards an account for profits and did not direct a share therein to be given to the non-receiving co-sharer: has been rejected by the same High Courts in a majority of cases. In fact, the matter is concluded in the Madras High Court by the Full Bench decision in Basavayya's case, already referred to, and this case has been consistently followed by the Andhra Pradesh High Court. In the above cases, the course of the authority of the Court to award a share in the profits of the common property has been found to be in Order 20, Rule 18, Sub-rule (2) which directly deals with the question of passing a preliminary decree in partition suits. Order 20, Rule 18 runs as follows:

Where the Court passes a decree for the 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 and giving such further directions as may be required.

It is clear that Sub-rule (1) deals with a decree which relates to a revenue paying estate and Sub-rule (2) deals with other properties. As already indicated, Sub-rule (1) requires the Court only to declare the rights of the parties interested in the property and to direct that partition or separation shall be made by the Collector or his deputy. As already indicated, a decree passed under Sub-rule (1) has been held by the High Court of Bombay to be a final decree. Sub-rule (2) deals with properties other than those described in Sub-rule (1) It confers a discretion upon the Court to pass a preliminary decree if, in its opinion, the partition or separation cannot be conveniently made without further inquiry. It says that, in case a preliminary decree is to be passed, the decree shall declare the rights of the parties interested in the property, "giving such further directions as may be required." The above authorities have held that the latter expression provides the basis for embodying a direction in a preliminary decree under Sub-rule (2) for taking accounts in regard to future profits received by a co-sharer in possession of the common property. In Basavayya's case, Viswanatha Sastri J., speaking for the Court, points out various directions which can be made by the

Court under the latter expression. He points out that these directions will include the directions regarding realisation of common outstandings, the discharge of common liabilities, the distribution of the profits of the properties realised pending the suit, either in cash or by allotment of property of the requisite value, the grant of owelty, the provision of maintenance to parties entitled thereto, the allotment of lands on which improvements have been effected, to the sharer who has improved them, the allotment of alienated lands to the share of the alienor and other similar matters. Whilst we agree with the learned Judge that all proper and just directions regarding the allotment of property of requisite value, grant of owelty, the allotment of lands on which improvements have been effected, to the sharer who has improved them, the allotment of alienated lands to the share of the alienor and other similar matters relating to the actual division of the properties by metes and bounds can be made under the aforesaid provision, we are not in agreement with the view that directions can be made under the aforesaid expression for taking accounts from the receiving co-sharer of profits realised and for distributing the profits amongst the co-sharer. In our judgment, the expression "giving such further directions" in Sub-rule (2) must necessarily be confined to the directions which relate to the actual division by metes and bounds and cannot support the direction for passing the decree for share in future profits. In the first instance, the expression is not "and give such directions as may be required" but the expression is "giving such further directions as may be required." That necessarily has connection with the directions relating to actual partition by metes and bounds, for it is quite clear that the rule as a whole deals, as shown by the opening words of the rule, with a decree for partition of property or separate possession of the share therein. Secondly, it is quite clear that the directions are with reference to the preliminary decree declaring the rights of parties interested in the property to be partitioned and, therefore, if any further direction is at all to be given, the direction can be given only in that preliminary decree and not afterwards. The direction which defendant seeks in the present appeal is not such a direction but a direction dehors that a decree -a direction to be given after the preliminary decree has been passed. Therefore, the source for giving such a direction must necessarily be found not in Sub-rule (2), but outside the same. However, the most serious objection, in our judgment, for construing Sub-rule (2) in the manner contended for by Mr. vyas is that, in such a case, the conclusion which necessarily will have to be reached is that, whereas a Court has got power whilst passing a preliminary decree to give a direction for a share in future profits in regard to properties other than an estate assessed to payment of revenue to Government, it has no such power in regard to such an estate, for, it is quite clear that Sub-rule (2) deals with properties other than properties covered by Sub-rule (1). With respect to the properties covered by Sub-rule (1), the Legislature has expressly left the question of division by metes and bounds and all ancillary orders, which are required to be passed for effecting a proper and just partition to the Collector or his deputy. It is for this reason that the aforesaid expression "giving such further directions" has not been used by the Legislature in Sub-rule (1). The

expression has been used in Sub-rule (2) to make it clear that the Court has the power of giving such directions in regard to the actual division by metes and bounds as may be necessary to effect a proper and just partition.

7. If that is so, then, Mr. Vyas is right in asking the question as to what is the basis on which the Court can make an order in a partition suit for an account of future profits and for a share therein to the non-receiving co-sharer. Mr. Vyas's contention is that, on principle, a Court cannot make such an order at all. His contention, as already indicated, is that a Court deals with a cause of action antecedent to the filing of the suit and has no power to deal with a cause of action which may arise after the institution of the suit unless such a power is expressly conferred by the Legislature. Whilst there is justification for the contention that a Court of law ordinarily deals with a cause of action antecedent to the filing of the suit, in our judgment, it is not correct to say that the powers of the Court are necessarily limited to giving reliefs or directions in regard to the cause of action anterior to the institution of the suit and that it cannot take into account matters which have arisen directly out of the rights which have been made the subject matter of litigation and in regard to which the parties fail to receive proper justice on account of the delay which naturally arises because of the fact that a Court cannot decide upon the rights of the parties on the date on which the suit is instituted. Ideally speaking, a suit must be decided on the very day on which it is instituted, but the laws of procedure are such and experience shows that it is impossible to decide upon the rights of the parties on the date when the suit is instituted. There is bound to be a time-lag between the date of the institution of the suit and the decision of the rights involved therein. It is not as if the time-lag occurs on account of the default of any one of the parties in all cases. Some time-lag occurs on account of the fact that a certain procedure has got to be followed before the Court pronounces upon the rights of the parties. Time-lag very often occurs on account of the fact that the Court is busy with a number of other suits. Under the circumstances, to say that a Court cannot mould its decree so as to give reliefs in regard to matters arising subsequent to the date of a cause of action-reliefs arising on account of the fact that the suit remained pending on the file of the Court-would be to deny justice to parties. It has been well-settled that the procedure of the Court must be designed to achieve the ends of justice and that procedure which denies or delays justice is to be discouraged. Procedure must advance and not subvert the cause of justice. One of the principles on which the Courts act in regard to such matters is to see that multiplicity of proceedings is avoided. If the Courts were not to take into account the fact, when the decree comes to be passed, there is a time-lag between the institution of the suit and the passing of the decree, the parties will have, in a large number of actions to go on filing suits so as to avoid the bar of limitation in matters which have already been made the subject of a dispute and before the Court has been able to pronounce upon those matters. Under the circumstances, the broad proposition of Mr. Vyas that no relief can be granted in regard to a matter which arises during the pendency of the suit cannot be

subscribed to. It is true that, as pointed out by Mr. Vyas, in the case of future mesne profits, express provision has been made by the Legislature. But the fact that the Legislature has done so does not mean that, in other suitable cases, the Court has no power whatsoever to deal with matters arising during the pendency of the suit and connected with the cause of action involved in the case. Such a provision appears to have been made in the case of future mesne profits probably out of caution. The principle on which the Courts should act is to see whether any bar is created by the Legislature against the grant of a relief which may have to be given on account of the fact that the suit was pending on the file of the Court. In the absence of any such bar, presumption would be that the Court has got the power of making all just and proper orders in regard to the litigation which would give complete and full justice to the parties and not drive them to the torture of instituting a series of suits connected with the matter. Of course, it may be stated that the Court is not bound in every case to grant a relief in regard to a future matter, but the matter is discretionary with the Court. In each case, the question is whether justice demands that any directions in regard to future matters are required to be given at the time when the final decree is passed. Acting on the aforesaid principle, the question which arises for consideration is, whether, in a partition suit, the Court should exercise its discretion in favour of non-receiving co-sharer for his share in the future profits of the suit properties which arise during the pendency of the suit.

8. A partition suit is brought by a co-sharer against another or others for separating his interest in the common property and for allotting him a specific part of the common property. The right to demand partition arises out of the fact that the co-sharer has a definite and defined share in the common property. As regards his right (described above as a right appurtenant to a right to a share in the common property) to share in profits of property, anterior to the date of the suit, It is quite clear that a cause of action for the purpose arises before the institution of the partition suit. Therefore, In regard to this right to share and the enforcement thereof, it is quite clear that no relief can be granted by the Court unless a specific prayer therefore Is asked for. This is so because a cause of action had already arisen and the law of procedure requires that the party concerned must ask for such reliefs as he seeks in regard to that cause of action. If he fails to do so, then, it is quite clear that the Court has no power of granting any relief in regard thereto. The law relating to payment of Court-fees requires the suit to be valued in regard to such a prayer and to pay the proper Court-fees. Therefore, there cannot be any doubt that no relief can be granted by the Court for enforcement of the right to a share in the past profits of the common property. Whilst this is so, in our judgment, when a partition suit is brought and relief for division by metes and bounds and allotment of specific properties is asked for, the Court can take into account the fact that, from the date of the institution of the suit, the non-receiving co-sharer has also, until his share is separated or a specific property is allotted to him, a right to share in the profits of the common property and that as some delay must necessarily occur before

the final decree is passed, the Court will not be able to do full and complete justice between the parties unless it passes also a suitable order for the purpose of enforcing the right to a share in the future profits of the common property. This is so because the right to a share is not an independent right, giving rise to a totally separate cause of action. It is, as already stated, an appurtenant right—a right which is so bound up with the main right that the Court would not be travelling beyond its jurisdiction in enforcing that right when dealing with the principal right of the separation of interest and allotment of specific property. This right to share in the profits of the common property has been variously put. In the case of *Ponnuswami Udayar and Another Vs. Santhappa Udayar and Others*, *Jagadisan J.* justifies the passing of a decree for future profits on the ground that such profits are part and parcel of the corpus of the property itself and are as such in the hotchpotch as the lands themselves. It is true that "land" has been defined in some statutes as including benefits to arise out of land. But we do not think that the matter can be put in this particular manner. If that view were to be accepted, past profits from common property may also be claimed without asking for a specific relief therefore on the ground that the past profits are also part and parcel of the common property, and the decree provides for division thereof automatically. Moreover, it is not correct to say that the moment a receiving co-sharer receives the profits of a common property, the same becomes part and parcel of the latter. Unless an account is taken of the profits and all just and proper allowances are made, it is not possible to postulate as to which part of the profits received and how much, would properly belong to the share of the non-receiving co-sharer. In another case, a receiving co-sharer has been described as a trustee in regard to the profits and passing of a decree in regard to future profits has been justified on that particular ground. Vide *Dr. G.V. Deshmukh v. Trimbak* ILR 1953 Nag. 130. In our judgment, it is not necessary to determine whether this view is correct because, even if this is so, still, the question will have to be answered as to what is the true basis on which a decree for future mesne profits can be justified. It is quite clear that it will be futile to ask for a relief in regard to the future profits because the profits, *ex hypothesi*, were not received at the date of the institution of the suit and the non-receiving co-sharer would not have anticipated as to whether the receiving co-sharer would go on receiving the profits during the pendency of the suit. The true basis for the grant of a decree for future profits is to be found in the very nature of the right of the non-receiving co-sharer and, in the fact that, unless the non-receiving co-sharer is given his share in the profits, the right to partition which he seeks to enforce in the litigation will not be finally and completely decided and the principle of avoiding multiplicity of suits will be violated. In that view of the matter, the Court has jurisdiction, although there is no specific provision in the Civil Procedure Code, to grant a relief in regard to future profits in a partition suit. But, if the profits are ascertained, a decree can straight off be passed. If they are not so ascertained, a decree can be passed by the Court instituting an enquiry on the subject and a final decree can be passed after the profits are ascertained.

9. But, Mr. Vyas contends that, even if it is so, the relief ought not to be granted unless there is a specific prayer for that particular purpose. There are a number of authorities which negative such a contention, the chief amongst them being the Full Bench case of Basavayya, already referred to. We are entirely in agreement with the view which the learned Judges of the Madras High Court have taken in the latter case on this particular subject. In our judgment, a specific prayer on the particular subject is not necessary. The prayer is included in the prayer for general relief asked for by the parties. It is true that, in the present case, it is the defendant who asks for a share in the future profits. He could not have asked for a general relief. But, that does not make any difference. It is well-known that, in a partition suit, defendant co-sharer is in the position of a plaintiff for some purposes. A general relief is always implied in any suit. Defendant is entitled to have the future profits ascertained and a relief granted to him in that manner. Mr. Vyas has not been able to point out to us any circumstance in the present case which would disen title the defendant to that relief or which would induce us to exercise our discretion against the grant of such a relief.

10. The second objection of Mr. Vyas is that, in any case, such a relief can only be granted in the preliminary decree and that, once the preliminary decree is passed, the Court is precluded from dealing with the matter. This contention of Mr. Vyas is based on the further contention that a preliminary decree determines the rights of the parties and that a final decree can only be passed on the basis of that which is contained in the preliminary decree. In support of this proposition, Mr. Vyas relies upon the Madras case of Gedela Atchayya and Others Vs. Koppiseti Appalaraju and Another, . The proposition, however, was negated in the Full Bench case of Basavayya. With respect, we are in agreement with the latter view. It was held by the Privy Council as far back as 1940 that a partition suit is still a pending suit after the preliminary decree is passed, vide AIR 1940 11 (Privy Council) . If this is so, then, it must follow that the trial Court has jurisdiction to do all that is necessary for the purpose of doing complete justice to the parties. It is true that if a preliminary decree expressly or constructively decides a particular point, the matter is concluded and the decision on the point can be set aside only by the appellate or the revision Court. But, subject to this condition, we do not see any reason as to why, if the suit is open and pending, the Court should be precluded from dealing with a matter which has not been expressly or constructively decided by the Court. Mr. Vyas relies upon Ghulsum Bivi's case, already referred to. That case, however, was overruled by the Full Bench case of Basavayya. In the former case, it was decided that, even if a preliminary decree inadvertently does not contain a direction for payment of future mesne profits, the Court is precluded from dealing with a matter at the stage of final decree. For the aforesaid reasons, we cannot agree with the decision in Ghulsum Bivi's case.

11. Another objection which Mr. Vyas raises is that, if the above view were to be accepted, then, the Court will be required to pass a second preliminary decree

and that such a procedure is not justified by the Civil Procedure Code. The same matter has been also discussed in the Full Bench case of Basavayya and, with respect, we agree with the decision arrived at by their Lordships in that case. In our judgment, there is nothing in the CPC or in the definition of the expression "preliminary decree" which justifies the view that a Court is precluded from passing more than one preliminary decree. On the contrary, several contingencies can be contemplated in which a Court may be required to pass a second preliminary decree. For example, in *R. Subramania Iyer and Ors. v. Thangammla* AIR 1965 Mad. 306, a second preliminary decree was passed as a result of a compromise which was arrived at between the parties after a preliminary decree was passed. With respect, in our judgment, the true principle on this particular subject is that enunciated by Sadasiva Aiyar J. in *Ramaswami Aiyar v. Subramania Aiyer and Ors.* 43 M.L.J. 406. This is what the learned Judge states:

In all adjudications which are not intended to be final but only to be determinations of some of the questions involved in a suit, there is and ought always to be implied the reservation of leave to all parties to apply for further directions and adjudications necessary for the complete trial and complete disposal of the litigation.

In our judgment, the fact that a second preliminary decree may have to be passed, is no bar to the grant of the relief for future profits.

12. In view of our aforesaid conclusions, First Appeal No. 667 of 1960 will have to be allowed with costs. First Appeal No. 667 of 1960 is allowed. We direct that the lower Court shall ascertain future profits derived by plaintiff, from the suit properties from the date of the suit until the date of the delivery of possession of the specific properties allotted to defendant under the decree dated 23rd March 1959. The lower Court may appoint, if it so chooses, a Commissioner for the purpose, and, after the profits are ascertained, pass a suitable decree in accordance with law. The costs of this appeal shall be paid by plaintiffs to defendant.