(1991) 12 MAD CK 0020

In the Madras High Court

Zainab Bibi (died) and Others — APPELLANT

Vs

Syed Bhaudeen Sahib and Another — RESPONDENT

Date of Decision : 11-12-1991

Acts Referred:

Citation : (1992) 1 MLJ 446

Hon'ble Judges : Srinivasan, J

Bench : Division Bench

Judgement

Srinivasan, J.—The petitioner obtained a decree for partition. In the final decree a sum of Rs. 16,202.97 was found to be due to the

petitioner towards her share in the income from the properties. A decree was passed accordingly, but the court used the expression ''mesne

profits'' which is really incorrect. A share of income from the properties which is due to a co-sharer cannot be treated as mesne profits. It is reallya

part of the divisible properties. In Babburu Basavayya and Others Vs. Babburu Guravayya and Another, , a Full Bench of this Court had

discussed the matter and held that in a suit for partition there is no question of mesne profits within the meaning of Order 20, Rule 12, C.P.C. but it

is only a question of accounting under Order 20, Rule 18, C.P.C, and it observed as follows:

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 even without a specific prayer 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.

2. Thus the decree passed in favour of the petitioner for a sum of Rs. 16,202.97 is a decree for a share in one of the items of properties viz., the

income from the other properties. When the petitioner seeks to execute a decree and realise the amount there is no necessity to attach the

properties allotted to the share of the accounting party. It is automatically a charge over the properties which are allotted to the accounting party.

Hence the decree can be executed straight away for realising the amount by bringing to sale the properties which are allotted to the accounting

party under the decree.

3. The court below is in error in dismissing the petition for execution on the ground that no attachment had been prayed for by the petitioner. As

there is a charge created by operation of law, there is no necessity for attaching the property.

4. The first respondent has not yet been served in the revision petition. He is the first defendant in the suit who is the accounting party as per the

decree, but he has sold the property allotted to him to the second respondent herein. He remained ex pane in the lower court. The executing court

was found that the second respondent will be liable as he has purchased the property from the first respondent subject to the liability of the first

respondent. Hence there is no necessity for service of notice in the revision petition on the first respondent. In so far as the second respondent is

concerned he is found to be liable by the executing court itself.

5. In the result, the order of the executing court in E.P.No.210 of 1988 is set aside. The revision petition is allowed. E.P. No. 210 of 1988 is

remitted to the executing court. The executing court is directed to proceed further with the proceedings therein. There will be no order as to costs.

