

ANDHRA PRADESH HIGH COURT

Simma Krishnamma

Vs.

Nakka Latchumanaidu

A.A.A.O. No. 82 Of 1954

(K. Subba Rao, C.J. and Ranganadham Chetty, J.)

09.12.1953. 22.11.1957

JUDGMENT

K. Subba Rao C.J.

1. This second appeal is directed against the decree and judgment of the Court of the Subordinate Judge, Srikakulam confirming that of the District Munsif, Srikakulam, dismissing the petition filed by the appellant for ascertainment of mesne profits.

2. One Nakka Appala Naidu filed O. S. No. 555 of 1942 in the Court of the District Munsif, Srikakulam, for partition of the plaint schedule property against defendants 1 to 3 and obtained a preliminary decree for partition on 9-9-1944. In the plaint, there was no prayer for the ascertainment of future profits. That decree was modified in Second appeal on 13-10-1949. The preliminary decree did not in terms give any direction for the ascertainment of future profits. The decree-holder transferred all his rights under the preliminary decree and also his claim for profits to the appellant, and the transfer was recognized by the Court. On a petition filed by the transferee decree-holder i.e., the appellant, a final decree was passed on 10-12-1951. The judgment-debtors preferred an appeal against the final decree to the Subordinate Judge's Court, Srikakulam, being A. S. No. 51 of 1952. The Subordinate Judge's Court modified the final decree on 5-2-1952. Pending the said appeal, the appellant filed I. A. No. 736 of 1952 in the Court of the District Munsif for ascertainment of future profits. The filing of this application was not brought to the notice of the Subordinate Judge at the time of the disposal of the appeal against the final decree and no directions were obtained from him in this behalf. The final decree as modified did not contain any directions in regard to future profits. The District Munsif and, on appeal, the learned Subordinate Judge held that, as the final decree was passed, the present petition was not maintainable and, on the ground dismissed it. Hence, the second appeal.

3. The only question in the second appeal is whether, in the aforesaid circumstances, a petition for the ascertainment of future profits would lie.

4. Learned counsel for the appellant contends that, in a partition suit, there can be more than one final decree, that the claim for mesne profits is part of the subject-matter of the suit, that so long

as the claim is not disposed of by the Court, a subsidiary decree for ascertaining future profits could be made and that, in the present case, an application for future profits was filed before the appeal against the final decree was disposed of and, therefore, the Court had to ascertain mesne profits and to incorporate the same in a subsidiary decree. Learned counsel for the respondents counters this argument thus : In view of the recent decision of the Supreme Court, a Court has no power to give a direction for future profits and that, in any view, as the appellant did not ask for any direction in regard to that relief when the appeal against the final decree was disposed of, the application filed after the final decree made by the first Court was not maintainable.

5. A Full Bench of the Madras High Court held in *Basavayya v. Guravayya*¹, that an enquiry into profits received or realised by one or the other of the parties during the pendency of the suit for partition can be ordered by the Court either as part of the preliminary decree itself, or, subsequently as a step towards the passing of the final decree and, in either case, the result of the enquiry has to be incorporated in the final decree. After considering the relevant provisions and the decided cases on the subject, Viswanatha Sastri J., who delivered the judgment on behalf of the Full Bench, summarized the law at p. 185 (of ILR) :

"A partition suit in which a preliminary decree has been passed is still a pending suit and the rights of the parties have to be adjusted as on the date of the final decree. In such a suit the Court has not only to divide the common properties but has also to adjust the equities arising between the parties out of their relation to the common property, the property to be divided. The preliminary decree determines the moieties of the respective parties and thereby furnishes the basis upon which the division of the property has to be made. There are other matters in addition to the moieties of the parties that have to be considered and decided before an equitable final partition can be effected.

Among them are the 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. Even after the passing of the preliminary decree it is open to the Court to give appropriate directions regarding all or any of these matters either suo motu or on the application of the parties. Order 20, Rule 18, Civil Procedure Code does not prohibit the Court from issuing such directions after the stage of a preliminary decree. It is open to the Court in order to prevent multiplicity of litigation and to do complete justice and effect an equal division of all the common assets and properties among the parties, to direct an enquiry into the profits received or realised by one or some of them during the pendency of the suit and to award the others their proper share of such profits under its final decree. This enquiry can be ordered either as part of the preliminary decree itself or, subsequently as a step towards the passing of the final decree, and in either case the result of the enquiry has to be incorporated in the final decree." We

¹ ILR (1952.) Mad 173

have extracted the summary in extenso as it clearly and succinctly enunciates the principles governing the ascertainment of profits received or realised by one or other of the parties during the pendency of the suit for partition. The judgment, being that of a Full Bench of the Madras High Court delivered before 5-7-1954 is binding on us. But it is said that the correctness of this

decision is open to doubt in view of the subsequent decision of the Supreme Court in *Md. Amin v. Vakil Ahmed*², This argument was considered by another Division Bench of this Court of which one of us was a member in *Atchamma v. Rami Reddi*³, After considering the facts of that case and the relevant passage in that judgment the Division Bench observed at p. 56 (of ILR) :

"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 a Court had no jurisdiction to award future mesne profits if there was no demand for the same in the plaint. As the Full Bench of the Madras High Court pointed out, the relief of future mesne profits is a discretionary one and it is open to the Court to refuse to exercise the discretion in suitable cases. We cannot, therefore, hold that the Supreme Court in the aforesaid decision held that a Court has no jurisdiction to award future mesne profits unless there was a prayer for that relief in the plaint. In our view, the Full Bench decision still holds the field and no part of the judgment has been either expressly or impliedly overruled by the judgment of the Supreme Court."

We entirely agree with the aforesaid observations. That apart, the observations made by the Supreme Court may have relevance to the question of the power of a Court to give a direction under Order 20, Rule 12 when there was no prayer in the plaint for the said relief. But, they have none in the context of the power of the Court to give directions for the ascertainment of profits after the preliminary decree in the partition suit was made. The Full Bench decision of the Madras High Court, therefore, still holds the field.

6. Even so, it is contended by the respondents that an order for ascertaining profits should be made before the final decree is passed and incorporated therein, and if no such relief is given in the final decree, it is not open to the Court to ascertain the profits thereafter. For this proposition, the last sentence of the same passage from the Full Bench judgment on which the appellant has relied upon is invoked, namely :

"This enquiry can be ordered either as part of the preliminary decree itself or subsequently as a step towards the passing of the final decree, and in either case the result of the enquiry has to be incorporated in the final decree."

The said observations must be read along with the other observations made by the Full Bench. The following observations are found at P. 178 (of ILR) :

"Ordinarily, there will be one preliminary and one final decree but, as pointed

²1952 SCR 1133

³ILR 1957 Andh. Pra. 52

out in *Kasi v. Ramanatham Chettiar*⁴, there is nothing in the Civil Procedure Code which can be construed as a prohibition against the Court, in a proper case, passing more than one preliminary decree and one final executable decree in a suit. The relevant provisions of the Code and the earlier rulings of this and the other High Courts are reviewed in the

judgment of Patanjali Sastri J. with which we are in respectful agreement."

The Full Bench recognised that there was nothing in the Civil Procedure Code which can be construed as a prohibition against the Court in a proper case passing more than one preliminary decree and one final executable decree in a suit. In a proper case, therefore, where a supplemental final decree can be made, the Full Bench does not preclude the Court from ascertaining the profits and including the same in the supplemental decree. If a party to a partition suit files an application for the ascertainment of future profits and the Court, without disposing of that application, makes a final decree in respect of the other matters and without incorporating any relief for profits, the legal position is that the entire subject-matter of the suit has not been finally disposed of and, on that basis, it may be open to the Court to make another supplemental final decree in regard to profits. That would have been the position if the appellant filed his application for ascertainment of profits before the Subordinate Judge's Court made the final decree.

7. But, in the present case, the application for ascertainment of profits was not made pending the final disposal of the suit but was made only after the final decree was made in the suit before the disposal of the appeal. The learned counsel for the appellant contends that an appeal is only a continuation of a suit and, therefore, as he filed the application before the appeal was disposed of, to that extent the dispute as regards the subject-matter of the suit, namely, profits was still outstanding and, therefore, the Court should have made a decree subsequently in respect of profits, it is true that an appeal is a continuation of the suit and in a sense the appellate Court's decree is a decree in the suit. See *Gurraju v. Venkateswara Rao*⁵, It may also be that, in extraordinary cases, an appellate Court can make an order to meet the ends of justice in favor of all or any of the respondents or parties, although such respondents or parties may not have filed an appeal and even though the appeal is as to a part only of the decree. See Order XLI, Rule 33 and Order XLI, Rule 4 C.P.C. But, notwithstanding the general power given to an appellate Court, there is a finality attached to the first Court's decree subject to the result of the appeal. So long as the general power is not exercised by the appellate Court, the appeal is confined only to that part of the subject-matter of the appeal and in respect of the parties to the appeal. In other respect i.e., in respect of that part of the decree not appealed against, the rights of the parties are finally decided by the decree of the first Court. A party aggrieved by any part of the decree has to file an appeal paying the requisite Court-fee questioning the correctness of the decree that went against him or he may invoke the Court's extraordinary power at the time of the passing of the appellate decree to give him relief in his favour in respect of the matter not appealed against. In the present case, the decree was not questioned on the ground that it did not incorporate any relief in regard to future profits. Though the appellant filed an application

⁴1947-2 Mad LJ 523

⁵30 Mad LJ 379

pending the appeal, he did not seek or obtain from the appellate Court, a direction for enquiry into future profits. In the circumstances, the decree of the lower Court had become final and, in view of the Full Bench decision, it is no longer open to the appellant to claim profits in the suit.

8. The same view was expressed by a Division Bench of this Court in ILR 1957 Andh. Pra. 52 : (AIR 1958 Andhra Pradesh 517 (C) though, in that case, the question related to an enquiry under

Order 20, Rule 12, C. P. C. There, pending an appeal to the Supreme Court, the petitioner filed in the trial Court a petition under Order 30, Rule 12, C. P. C, for assessment and for recovery of future mesne profits due to her from date of the plaint till the date on which she took possession. Before the dismissal of the appeal to the Supreme Court, the question of mesne profits was not raised before that Court and no directions in respect of that relief were given in the judgment of the Supreme Court. The petition was dismissed by the trial Court on the ground that it was not maintainable. Adverting to the argument similar to that advanced before us, the Division Bench observed at p. 58 (of ILR) :

"But in our view the fact that the Supreme Court appeal was pending would not help the petitioner as she did not bring the fact of the existence of this application to the notice of the Supreme Court and did not seek to get incorporated in the decree any directions in regard to the said relief by the Supreme Court. The judgment of the Supreme Court had become final and the petitioner cannot now seek to reopen it."

The same observations apply mutatis mutandis to the present case. The suit had been filed and disposed of and it ended in a final decree. The appeal against that final decree was confined to a relief unconnected with profits. No directions were given in the appellate decree in regard to profits. In the circumstances, following the Pull Bench decision we must hold that the application is not maintainable.

9. In the result, the appeal fails and is dismissed with costs.
Appeal dismissed.