ANDHRA PRADESH HIGH COURT

Kasibhatla Satyanarayana Sastrulu

Vs.

Kasibhatla Mallikarjuna Sastrulu

Appeals Nos. 426, 427 and 428 of 1954 and Civil Misc. Petn. No. 523 of 1959

(Manohar Pershad and Seshachalapati, JJ.)

05.12.1953. 20.03.1959

JUDGMENT

Seshachalapati, J.

1. These three appeals arise out of the final decree proceedings passed in O. Section 32 of 1946, on the file of the District Court, Anantapur. The above suit was instituted by the present appellants for the partition and separate possession of their share in the joint family properties described in plaint schedules A to D, and allotting to them one share and to the defendants 1 and 2 the other share. The case of the plaintiffs is that the father of the 1st plaintiff and the 1st defendant were the sons of one Madhavayya.
Madhavayya and his two sons, Ramayya, the 1st plaintiff's father, and the 1st defendant, Venkata Subbaiah, constituted an undivided Hindu family owning the joint family properties referred to in the plaint schedules. It is alleged that Madhavayya died in or about 1935, and that even during his life time the 1st plaintiff's father, Ramayya, was living separately and that out of 590 acres of land Ramayya was put in possession of 170 acres. It is further alleged that defendants 1 and 2 had been in possession of the rest of the lands, the family outstandings and moveables and that certain lands referred to in the schedule 'C' to the plaint. It is also alleged that defendants 4 to 19 were in possession of such items as noted against each one of them.

2. The 1st defendant filed a written statement pleading inter alia that in the year 1917 there was a partition between Ramayya and the 1st defendant in the presence of their father, Madhavayya, that the family lands were divided into two lots, one lot comprising of 310 acres burdened with the obligation to discharge the family debts, and the second lot consisting of 240 acres without the liability to discharge the debts, that the plaintiff's father was asked to choose between the two lots and that he chose lot No. 2 for his share and in pursuance of that arrangement the two branches of the family have been in separate and exclusive possession of their respective lands and that they were also paying cist separately. He also pleaded that there were certain acquisitions made by the 1st defendant in which the plaintiffs' branch could obviously have no share. It was further contended that in O. S. No. 226 of 1939 the plaintiffs themselves set up the case of partition that the present case was at variance with the case as put forward by the plaintiffs in that suit. As regards the alienations noted in schedule "C", it is contended that the 1st

defendant was entitled to sell those properties, most of which were for the discharge of the family debts. It is not necessary to refer in detail to the various other denials and allegations in the written statement. The second defendant while adopting in the main the written statement of the 1st defendant had stated that the suit was barred by the principles of *res judicata* and estoppel by reason of the case put forward by the plaintiffs in O. Section 226 of 1939, on the file of the District Munsiff Court, Gooty, that he got himself divided from his father, the 1st defendant, as a result of which he was in separate and exclusive possession of items 1, 2, 4, 6, 11, 16, 17 and 18 in the plaint 'B' schedule, and item 16 of the "C" schedule and that he sold item 16 of the "C" schedule to the 18th defendant. The 3rd defendant while denying many of the allegations in the plaint had set up exclusive title in his own right to items 12 to 15 of the plaint "B" schedule properties.

3. The 20th defendant claimed item No. 8 of the plaint schedule as belonging to him by reason of his having held it adversely to the plaintiffs as well as defendants 1 and 2. The other defendants 4, 5, 6, 9, 10, 11, 12, 13, 15, 16, 18 and 19 pleaded that they were *bona fide* purchasers for value from the defendants or their alienees, and that they had made improvements and that their shares should be upheld.

4. The learned Subordinate Judge held that except the alienation of item 5 of the "C" schedule to the 8th defendant and the subsequent sales in respect of the property, the alienations in favor of the other defendants 4 to 19 have not been proved to be binding on the plaintiffs. The alienations so held to be not binding are with respect to items 3, 6, 10, 11, 12, 13 and 14 of the 'C' schedule and the plaintiffs were directed to be given lands in substitution. As a matter of equity, the learned Subordinate Judge directed that the lands covered by the alienations held to be not binding on the plaintiffs be allotted to the share of the 1st defendant. The learned Judge nagatived the claim of the defendant No. 3 and also that of the 20th defendant. He further directed the 1st defendant to account for a sum of Rs. 5,000/- to the plaintiff.

5. In pursuance of the preliminary decree a Commissioner was appointed, and it would appear he divided the lands in the light of the directions contained in the decree and also filed a report into court. Four appeals were preferred against the preliminary decree in the High Court by the plaintiffs and defendants 1 and 2 and defendants 3 and 20. Those four appeals were heard together by a Bench of the High Court of Madras. It was held by the High Court that the decision of the learned Subordinate Judge that there was no prior partition and that the plaintiffs are entitled to their lawful share in the family property was correct, that in addition to the alienations found to be not binding upon the plaintiff by the learned Subordinate Judge, it was held that the alienations of items 1, 8 and 9 of the 'C' schedule were also not binding upon the plaintiffs. The High Court rejected the appeals filed by the 3rd and the 20th defendants. It was, however, held by the High Court that the 1st defendant was not accountable in respect of the amount of Rs. 5,000/- received by him and to that extent directed the deletion of the clause in the preliminary decree.

6. In pursuance of the findings of the High Court, a direction was given to the Commissioner to allot the items covered by alienations held to be not binding by the High Court to the share of the 1st defendant. The Commissioner would appear to have gone into the question in great detail and to have examined several witnesses and suggested the division of the properties in the manner set out in his report. The report of the Commissioner has been strongly objected to by both the

parties.

7. Before the passing of the final decree three applications (I. A. Nos. 135 of 1952, I. A. No. 490 of 1952 and I.A. No. 11 of 1953) were filed. The above I. As. were dismissed and final decree passed.

8. We will first take I. A. No. 135 of 1952. A. S. No. 426 of 1954.

9. I. A. No. 135 of 1952, is an application out of which Appeal No. 426 of 1954 arises. It may be remembered that under the High Court decree items 1, 8 and 9 have to be allotted to the share of the 1st defendant in addition to what the trial court had directed. This application was filed by the plaintiffs for allotting additional items of properties to them in place of items 1, 8, 9 and 10 of the 'C' schedule. The Commissioner has suggested the allotment of items 4, 5, 15 and 20 to be allotted to the plaintiffs' share in lieu of items 1, 8, 9, and 10. The plaintiffs want in this application that in the place of item 20 of an extent of 8 acres and 60 cents items 7 and 9 may be allotted to them. The reason of that desire is that items 7 and 9 are continuous, while item 20 is in the village of Haviligi, and that the distance prevents a convenient and useful enjoyment of the land. The learned Subordinate Judge has rightly rejected this plea on the ground that the plaintiff had some other lands at Haviligi, and there was no case whatever made out why they should be allotted items 7 and 9, in the place of item 20. The learned Subordinate Judge has also, in our opinion, very correctly overruled the plaintiffs' objection with respect to the allotment of item 15. As stated already, it would appear from the Commissioner's report that the Commissioner examined a number of witnesses and took considerable pains in arriving at an equitable distribution.

10. We therefore, think that the learned Subordinate Judge was perfectly justified in rejecting the application for the substitution of the items in the manner prayed for by the plaintiffs. This appeal has absolutely no substance. It fails and is accordingly dismissed. We make no order as to costs. A. S. No. 427 of 1954:

11. I. A. No. 490 of 1952, out of which A. Section 427 of 1954, arises is an application made under Order 20 Rule 18 C.P.C. praying for the ascertainment of mesne profits for which the plaintiffs are entitled and for the passing of a decree against the second defendant. The defendants resisted this application on the ground that the plaintiffs were in possession of a substantial portion of the property, that the finding of the High Court that there is no accountability on the part of the 1st defendant means that the plaintiff cannot lay any claim to mesne profits. It was further contended that the mesne profits were not claimed in the suit and as such in law the present claim cannot be made, and that the defendants 1 and 2 were not in the receipt of such profits as the items in question were in the possession of the alienees.

12. The learned Subordinate Judge dismissed this application. One of the main reasons for his decision is that in the plaint there was no prayer for the ascertainment of profits either past or future, that at the time of the passing of the preliminary decree no direction was given for the ascertainment of future profits, and, therefore, the present claim could not be entertained. In arriving at that conclusion, the learned Subordinate Judge relied on the decision of the Supreme Court in *Mohammed Amin v. Vakil Ahmad*[1], In that case the High Court of Allahabad awarded to the plaintiffs mesne profits even though there was no such prayer in the plaint. It was contended

on behalf of the plaintiffs that the relief claimed in the plaint "awarding possession and occupation of the property aforesaid together with all the rights appertaining thereto", was wide enough to include the claim for mesne profits. Their Lordships of the Supreme Court rejected this contention advanced on behalf of the plaintiffs and held that mesne profits could not be awarded where there was no such claim in the plaint.

13. The learned Counsel for the appellants has contended before us that a Full Bench of the Madras High Court in *Basavayya v. Guravayya*[2], has held that in a partition action even though there is no specific prayer for the ascertainment of profits subsequent to the institution of the suit and the preliminary decree did not contain any such direction, it is still competent for the court to give the direction for the ascertainment of future mesne profits, provided a final decree has not been passed. It is contended that the authority of the Full Bench of the Madras High Court has by no means been shaken or impaired by the decision of the Supreme Court in AIR 1952 Supreme Court 358. In support of that contention, the learned counsel referred us to two bench decisions of this Court: *Atchamma v. Rami Reddy*[3], and *Krishnamma v. Latchumanaidu*[4], Subba Rao C. J., has observed that there is nothing in the decision of the Supreme Court in 'Mohammed Amin's case, AIR 1952 Supreme Court 358, to indicate whether their Lordships were referring to the future profits, i.e., profits since the institution of the suit. The following passage from the decision may usefully be extracted :

> "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 the 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 the 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 expressly or impliedly overruled by the judgment of the Supreme Court".

To the same effect is the decision in AIR 1958 Andh Pra. 520, which was decided by a Bench consisting of Subba Rao C. J., and Ranganadham Chetty J.

14. It would, therefore, be necessary to see what exactly is the decision of the Full

[1] AIR 1952 SC 358
[2] 1951-2 Mad. L.J. 176 (F.B)
[3] 1957-2 Andh. W. R. 474 : AIR 1958 And Pra 517
[4] AIR 1958 Andh Pra. 520 In 1957-2 Andh W.R. 474 : AIR 1958 And Pra 517

Bench in 1951-2 Mad LT 176 . In that case the plaintiff obtained a preliminary decree for partition and subsequently filed an application for an enquiry into the profits realised by the defendant subsequent to the institution of the suit, and for the passing of final decree for his share of such profits. The defendant objected on the ground that after the passing of the preliminary decree, no such application should be entertained. The court overruled that objection and posted the case for hearing on the merits. Against that order a Civil Revision Petition was filed under Section 115 C. P. C. The main ground in support of the petition in that case was based upon the

decision of the Madras High Court in *Gulusam Bivi v. Ahmadsa Rowther*[5], where Ayling and Krishnan JJ. held that where in a preliminary decree in a partition suit either intentionally or by inadvertence there was an omission to give direction for the enquiry into mesne profits, a subsequent application for directing such an enquiry was incompetent and that the Court had no power or jurisdiction to pass a final decree awarding profits. After considering the relevant provisions of the Civil Procedure Code and on a review of authorities bearing on the question, the Full Bench held that there was no prohibition in the Civil Procedure Code against the passing of more than one preliminary decree prior to one final and executable decree. It was further held that so long as a final decree had not been passed, a partition suit must be deemed to be pending and in proper cases it is competent for the court to give directions as to the enquiry into the future mesne profits. The following passage makes their meaning clear :-

> "Ordinarily there would be one preliminary and one final decree but, as pointed out in *Kasi v. Ramanathan Chettiar*[6], there is nothing in the Civil Procedure Code which can be construed as a prohibition against the Court, in 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. A judicial determination of the amount of future profits has to be made with reference to any one of the three events specified in Order 20 Rule 12 sub-rule (1)(e) whichever event first occurs. If a preliminary decree awarding possession contains a direction for enquiry into future mesne profits, the suit or that part of the suit relating to future mesne profits continues to be pending and the decree-holder might have the court to hold an enquiry and pass a final decree awarding such profits without the necessity of filing an application within the period prescribed by Article 181 of the Limitation Act. This is the effect of the decision in *Ramasubramania Pattar v. Karimbil Pati*[7], and the Madras amendment of Order 20 Rule 12(3). If to use the language of ILR 42 Mad. 296 , the preliminary decree "intentionally omits", that is to say, refuses to direct an enquiry into future mesne profits, that decision will, subject to the result of any appeal, be binding on the parties in all the subsequent stages of the suit and no application can thereafter be made in the course of the suit for an enquiry into such profits. Where a decree awarding possession is silent with regard to an enquiry into future mesne profits and the decree has not completely disposed of the suit which, for one reason or another, continues to

[5] ILR 42 Mad 296 [7]1940-1 Mad L. J. 54

[6]1947-2 Mad. L. J. 523

be pending, there is nothing in the Civil Procedure Code prohibiting the decree-holder from applying to the Court during the pendency of such suit for an enquiry. The Court may, in the exercise of its discretion refuse enquiry into future mesne profits or the Court from ordering such an enquiry leaving the decree-holder to a fresh suit for such profits. If it does order an enquiry it is bound to incorporate the result in a final decree. Unlike O. 20 Rules 13 and 16 and O. 34 Rules 2, 4 and 7, C. P. C. Order 20 Rule 12 is not mandatory and does not insist on a preliminary decree containing all the directions referred to in Rule 12. There is no express or implied prohibition in the Civil Procedure Code against awarding possession and directing an

enquiry into future mesne profits by successive adjudications in a pending suit though the normal ordinary procedure would be to pass a preliminary decree awarding possession and also direct an enquiry into future mesne profits. *Swaminatha Odayar v. Gopalaswami Odayar*[8], In any case an order directing an enquiry into future mesne profits passed subsequent to the preliminary decree but during the pendency of the suit, cannot be said to be without jurisdiction."

15. The above passage refers to Order 20 Rule 12. But the precise point that arose in the Full Bench reference was one under Order 20 Rule 18(2). With regard to that rule the Full Bench observed as follows :-

> "In our opinion, this rule does not mean that all directions which may be necessary or proper to be given in a partition suit before a final decree is passed should be given at the stage of the preliminary decree itself. It may be necessary in a partition suit not merely to divide the properties but also to realize outstanding, discharge common liabilities, sell properties not capable of easy division, direct different sharers to account for different periods of time in respect of profits of different properties, adjust equities between the parties and give directions from time to time to the Commissioners appointed to divide the properties or take accounts. It is not reasonable to suppose that the power of the Court to give directions in respect of all or any of these matters must be exercised only at the time of passing the preliminary decree and is exhausted with the passing of that decree. If Order 20, Rule 12 or the analogy of that rule is to be applied to suits for partition, as was done in ILR 42 Mad 296 , a direction for an enquiry into profits past or future, can be given only at the time when a decree for possession of the property is passed, that is to say, at the time of the passing of a final decree for partition of the properties when alone the sharers would be entitled to get possession of their respective allotments. On the completion of such enquiry a further final decree in respect of profits will have to be passed. This was the view taken by Oldfield J. in *Mahalakshmamma v. Rajamma*[9], We might mention that the conclusion of the learned Judge was affirmed in L.P.A. 116 and 58 of 1917.

Where a plaintiff claims not only a partition of common properties but an account of profits realized by the defendant before suit and recovery of his share of such profits he must value approximately the amount of such past profits and pay court-fee thereon. See Order 7 Rule 2, C. P. C. and Section 7(1) and (iv) (f) of the Court-fees

[8]1938-2 M.L.J. 704

[9]43 Ind Cas 458 : (AIR 1919 Mad 868)

Act. We are not here concerned with a claim for an account of past profits. A tenant-in-common who files a suit for partition seeks a partition not only of his share of the properties forming the subject matter of the suit, but also of his share of the profits accruing from these properties during the pendency of the suit till he is put in possession of his share. He cannot anticipate how long the suit would be pending or estimate even approximately what amount of profits would be realized during that period. He need not, therefore, specifically ask for any relief in respect of future profits, the prayer for general relief being sufficient to enable the Court to award him such profits. If during the pendency of the suit one or some of the co-sharers receive or realize the

entire profits or more than their share of the profits of the common properties they have to account to the other sharers for the excess. If the collecting co-sharer or tenant-in-common is not in a position to bring into the hotchpot his realizations subject reject to all just allowance in his favor, the court will, when passing a final decree deprive him of a sufficient portion of the properties allottable to his share and allot the portion so taken away to the other sharers so as to give them the equivalent of their snare of the profits in the shape of property. Or the court may impose a charge on the share of the defaulting tenant-in-common or the amount for which he is accountable to the other sharers and thus equalize the sharers. The theoretical allotments and the general declaration of rights in the preliminary decree have to be worked out with due regard to the realizations of profits and drawings by the parties subsequent to the institution of the suit till the passing of the final decree. The profits accruing from the common properties pending a suit for partition like the properties themselves, are liable to be partitioned under the final decree 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. A suit for partition by a member of a joint Hindu family is substantially a suit for an account of the joint family properties on the date of the suit as well as the profits received by the manager since that date, so that the profits should also be divided and his proper share given to him. If, as we think this is the true nature of the proceedings in a suit for partition, a direction for an enquiry into the profits of the common property received or realised by one of the parties during the pendency of the suit may be made even after the passing of the preliminary decree and there is nothing in Order 20, Rule 18 C.P.C. interdicting such procedure".

16. From the above observations contained in the decision of the Full Bench in *Bassavayya v. Guravayya*[10], which two bench decisions of this Court have affirmed to be good law and unaffected by anything containted in the decision of the Supreme Court in Mohammed Amin's case, AIR 1952 Supreme Court 358, we are of opinion that the application filed by the plaintiffs is entitled to be considered on merits and not to be rejected on the ground that ascertainmenl of profits since suit has not been asked for in the plaint. It is for the court entertaining that application to determine whether the discretion should be exercised in giving a direction in the partition suit itself or refer the parties to a separate suit. We think, therefore, that the matter should be sent down to the learned Subordinate Judge for disposing of the application on the merits. We, therefore, allow this appeal, set aside the decree of the learned Subordinate Judge, and direct the learned Judge to consider the application according to law. We

[10]1957-2 Andh. W. R. 474: (AIR 1958 And Pra 517)

make no order as to costs. A. S. No. 428 of 1954:

17. This appeal arises out of an application in I. A. No. 11 of 1953, filed by the plaintiffs for profits under Order 20, Rule 18 C. P. C. This application relates to defendants 3 and 20. In the view we have taken with respect to Appeal No. 427 of 1954, that the lower court should entertain this application for determination of future profits and in its discretion either give such a direction or refer the parties to a separate suit, we are of opinion that this appeal should be allowed. The appeal is accordingly allowed, the decree of the learned Subordinate Judge is set aside and he is directed to dispose of this application on the merits and in accordance with law. There shall be no order as to costs. C. M. P. No. 523 of 1959 :

18. The respondents filed an application for admitting the memorandum of cross objections. The

memo of cross objections has been filed on 7-1-1959. There is thus a delay of more than four years in the filing of the memorandum of cross objections. The reasons alleged for the long delay are that the parties did not apprehend that there was an earlier order passed by the learned Subordinate Judge, where-under the respondents' contentions were negatived. We are unable to see any force in this contention. Further is seems to us that the objection now raised as to the valuation of the property and for readjustment of the values and allotment of property on that basis would virtually be to reopen the entire arrangement made on the foot of the Commissioner's report. We are satisfied that the Commissioner has made due and necessary enquiries and there is no justification for practically reopening the entire case. Further the plaintiff as well as the defendants have been in possession of the plots allotted to them and have also made certain alienations. It is stated in the counter affidavit filed by the plaintiffs that the defendants have sold about 53 acres comprised in A and B schedules and the house which was allotted to their share as per the final decree and that the plaintiffs themselves have sold about 80 acres of land. Any disturbance of the final decree as to the allotment of lands would cause a good deal of confusion and injustice to all concerned. Apart from the question of this extraordinary delay, which we are unable to condone, we see no merits in this application. It is, therefore, rejected, but without costs. Order accordingly.