THE HONOURABLE SRI JUSTICE M.SATYANARAYANA MURTHY

APPEAL SUIT No.2009 OF 1996

JUDGMENT:

This appeal is filed by the appellant, who is respondent No.3 (defendant No.3) in I.A. No.1313 of 1982 in O.S. No.200 of 1953 on the file of Additional Subordinate Judge, Tenali, (hereinafter referred as 'the trial court'), challenging the final decree passed by the trial court, dated 12.12.1994, in I.A. No.1313 of 1982 in O.S. No.200 of 1953.

02. The appellant is defendant No.3 and respondent is the plaintiff in O.S. No.200 of 1953 as well as in I.A. No.1313 of 1982. During pendency of the appeal, the appellant died leaving behind the second appellant, who was brought on record as legal heir of the appellant, as per orders of this Court, dated 11.09.2013, in A.S. M.P. No.1317 of 2013.

03. For convenience of reference, the ranks given to the parties in I.A. No.1313 of 1982 in O.S. No.200 of 1955 by the trial Court will be adopted throughout this Judgment.

04. The plaintiff filed the Suit for Partition of schedule property into three equal shares and for allotment of one such share to the plaintiff and for rendering the account of income from plaintiffs share in properties, from the year 1949. The trial court decreed the Suit on 31.03.1955. Aggrieved by the Judgment, the defendants preferred the appeal in A.S. No.740 and 741 of 2010 and they were dismissed by this Court.

05. As the first defendant did not render true and correct account and did not cooperate for division of the property, the plaintiff filed I.A. No.1313 of 1982 to appoint an Advocate-Commissioner for division of property into three equal shares by metes and bounds and to determine the profits payable by the first defendant. The Commissioner was appointed by the trial court and the Commissioner filed his report suggesting the division of property and settled the account. The trial

court, after considering the report of the Commissioner, passed final decree directing respondents 2 to 5 in the petition i.e. defendants 2 to 5 in the Suit, to pay Rs.1,23,560/- together with interest from the year 1953-54 to 1985-86 @ 6% per annum, Rs.69,599.90 ps. from the year 1986-87 for

A-schedule and on Rs.1,200/- for B-schedule from the year 1988-89 till the date of realization.

06. Aggrieved by the final decree, the present appeal is preferred by defendant No.3 on various grounds. One of the major grounds raised by the appellant is payment of interest @ 6% on the profits payable to the plaintiff. It is further contended that the plaintiff being the coparcener is not entitled to claim mesne profits from the other coparcener, but the trial court did not consider the said facts while passing final decree and prayed to allow the appeal setting aside the part of decree regarding ordering payment of profits and interest thereon.

07. During the course of argument, learned counsel for the appellant/ defendant No.3 raised three contentions.

a. The plaintiff is not entitled to claim mesne profits.
b. The plaintiff is not entitled to claim interest on the profits
c. The expenditure incurred by the first defendant for maintenance and education of the plaintiff was not taken into consideration while fixing the profits.

08. In support of his contention, he placed reliance on two Judgments of this Court rendered in **P. Satyanarayana v. P. Venkata rao and others**[1] and **Kakturu Raghava Reddy and others v. Patnam Sreedevamma and others**[2].

09. Learned counsel for the plaintiff would submit that the facts of the present appeal are on different footing than the facts of the Judgment reported in Law Summary for the simple reason that the first defendant himself was appointed as a Receiver to manage the property

while passing a preliminary decree i.e. on 31.03.1955, since then the first defendant himself was managing the property in the capacity of the Receiver and is liable to render true and correct account of the profits on the property towards his share and pay due share to the plaintiff with interest. Therefore, the Judgments relied on by the counsel for the appellant/ defendant No.3 have no application; it is further contended that the trial court only awarded profits, not mesne profits and the same was awarded by the trial court in the final decree also. So far as the interest is concerned, the plaintiff is entitled to claim interest on the profits realized by the Receiver. It is the not the case of the appellant/ defendant No.3 that the first defendant was managing the property as a Coparcener or as a Manager of the family, managing the property as a Receiver, who is under obligation to render true and correct account profits realized on the property under Order XL of the Code of Civil Procedure, 1908 (for short, 'C.P.C.') and prayed to dismiss the appeal.

10. Considering the rival contentions and on perusal of the material available on record, the only points that arise for consideration before this Court are,

i) Whether the trial court awarded mesne profits against the defendant? If so, whether the plaintiff is entitled to recover the profits or mesne profits?

ii) Whether the plaintiff is entitled to claim interest on the share of the profits payable by the defendant to the plaintiff?

iii) Whether the first defendant incurred any amount for maintenance and education of the plaintiff? If so, to what amount? and whether it is deductible from the profits payable to the plaintiff?

POINT No.i

11. The first and foremost contention of the appellant/ defendant No.3 is that the plaintiff is not entitled to recover mesne profits, when he is member of Coparcenery, from his father who was in the management of the property since the date of preliminary decree and drawn attention of this Court to a judgment of this Court reported in

P.Satyanarayana referred supra, wherein it is held that when a coparcener laid a suit, though there is severance in status from the date of the suit, the possession of the Manager is not wrongful and that he continues to remain in possession till the actual partition by metes and bounds. He is liable only to render an account for the profits he has received from the estate till handing over the possession to a coparcener pursuant to the final decree and ultimately held that the plaintiff is not entitled to claim mesne profits as defendant under Section 2(12) C.P.C.

12. Learned counsel for the appellant/ defendant No.3 drawn attention of this Court to another Judgment of the Division Bench of this Court reported in **Kakuturu Raghava Reddy and others** referred supra, almost the similar principle was laid down by the Division Bench of this Court held in page 334 as follows:

> "From the decision referred to above the following principles emerge, (1) In a suit for partition by a member of Joint Hindu family with a claim for account from the manager or from a person in possession of the joint family properties, the provisions of Order XX Rule 2 C.P.C. are not applicable. (2) He is not entitled to claim past profits. Regarding the subsequent profits he is entitled to have an account taken of the profits of the properties. (3) As claim for mesne profits under Order XX Rule 12 has no application to a suit for partition, there is no legal or equitable foundation for giving interest to the plaintiff who has brought a partition suit upon sums collected by the members from out of the joint family properties in his possession. (4) The member in possession of the properties of the joint family cannot also be held for interest even on any foundation of implied agency for his possession is in no way different from that of a working partner who collects moneys for the partnership and odes not invest those moneys, but keeps them as money in the partnership safe. (5) Even if the possession of the joint family properties by such a member is deemed to be that of a co-owner and consequently if he is treated as a constructive trustee with reference to Section 94 of the Trusts Act and is subject to the same liabilities as a trustee with reference to Section 95, it does not follow that he is liable for interest on the profits derived from the

properties in his possession."

13. No doubt, in view of the principles laid down in the above two Judgments, the Coparcener is not entitled to claim mesne profits from another Coparcener, who is managing the property. In fact, in the present Suit, the plaintiff claimed partition of Suit Schedule Property into three equal shares and to allot one such share to him and for rendering true and correct accounts of the profits on the property from the year 1949. On 31.03.1955, the trial court passed the Judgment and preliminary decree and its operative portion is as follows:

> "In the result, there will be a preliminary decree for partition and separate possession of the plaintiff's 1/3rd share in the plaint
> A schedule properties except item 4 and the 1st defendant is appointed Receiver for the management of the plaintiff's share of the properties till the plaintiff attained majority. The plaintiff is not entitled to past profits but he is certainly entitled to profits from the date of the suit in respect of his share in the properties."

14. Thus, it is evident from the operative portion of the Judgment in O.S. No.200 of 1953, the trial court granted preliminary decree for partition of schedule property into three equal shares and for allotment of one such share excluding item 4 of the schedule property, while appointing the first defendant as a Receiver for management of share of the plaintiff's property. However, in the final decree, the trial court appointed Advocate-Commissioner under Order XXVI Rule 18 C.P.C. for division of the property into three equal shares and for determination of the profits payable to the plaintiff and accordingly the Commissioner filed his report determining the profits payable towards share of the plaintiff. The plaintiff never claimed mesne profits, but claimed rendition of accounts or profits payable towards the share of the plaintiff.

15. According to Section 2(12) C.P.C., the "mesne profits" means those profits which the person in wrongful possession of such

property actually received or might with ordinary diligence have received therefrom, together with interest on such profits.

16. It is not the case of the plaintiff at any stage that the first defendant is in wrongful possession and never claimed mesne profits. Therefore, the contention that the plaintiff is not entitled to claim mesne profits though sustainable. As the plaintiff did not claim mesne profits, the contention of learned counsel for the appellant is not required to be gone into while deciding this appeal. The principle laid down by this Court in **P. Satyanarayana** referred supra is applicable only when the plaintiff claimed mesne profits against the first defendant alleging that he is in wrongful possession of the property. Therefore, this contention does not stand to legal scrutiny and the same is hereby rejected. Accordingly, point No.i is answered.

POINT No.ii:

17. The next contention of learned counsel for the appellant/ defendant No.3 is that the plaintiff is not entitled to claim interest on the profits payable by the first defendant. Here the case of the respondent/ plaintiff is totally on different footing than the facts in the Judgment of this Court in **Kakuturu Raghava Reddy and others** referred supra. The distinction between the facts of the above case and the present case is that the first defendant is appointed as a Receiver to manage share of the property of the plaintiff till he attains majority in the Judgment, dated 31.03.1955. Therefore, during minority of the plaintiff, the plaintiff is bound to manage share of the property and accordingly he managed. The management of the share of the property by the defendant is not in dispute till the plaintiff attains majority. According to Order XL Rule 3 C.P.C., every Receiver appointed under this Order, shall furnish such security (if any) as the Court thinks fit, duly to account for what he shall receive in respect of the property; shall submit his accounts at such periods and in such form as the Court directs; pay the amount due from him as the Court directs; and be

responsible for any loss occasioned to the property by his wilful default or gross negligence. So, one of the duties of the Receiver appointed by the Court by virtue of the preliminary decree, dated 31.03.1955, is to render true and correct accounts and pay the amount as directed by the Court. The first defendant being the Receiver, who is managing the property, under an obligation to render true and correct account of the profit realized by him from the share of the plaintiff.

18. No doubt, the duty of the Receiver is to render true and correct accounts, but when failed to render true and correct accounts, the remedy of the plaintiff may be different, however, basing on hyper technicalities, the final decree passed by the trial court cannot be set aside, since the first defendant is under obligation to pay the amount as determined by the Receiver.

19. So far as the interest is concerned, the plaintiff is entitled to interest on the profits of his share, when the first defendant withholds the amount without rendering the true and correct accounts. Hence, the plaintiff is entitled to interest on the profits of his share, from the date of his appointment as a Receiver i.e. 31.03.1955. The principle laid down in the above Judgments has no direct application to the present facts of the case, particularly, when the first defendant was appointed as a Receiver.

20. Learned counsel for the appellant/ defendant No.3 also drawn attention of this Court to the Judgment of the Division Bench of this Court reported in **Kakuturu Raghava Reddy and others** referred supra, wherein it is held that while relying the Judgment in **Ramachandrappa v. Narayanappa**[3]**,** in a suit for partition, the parties are not entitled to interest on the share of the profits, but the facts and circumstances in **Ramachandrappa's case** is different from the facts of the case. In the facts of the above Judgment, the last defendant is found to have retained in his own hands some items notwithstanding the appointment of a Receiver and also in defiance of

orders passed from time to time. Therefore, the plaintiff claimed interest in the said Suit, but the High Court did not agree with the contention that the plaintiff therein was entitled to claim interest.

21. In the instant case, the first defendant was appointed as a Receiver by virtue of the preliminary decree, dated 31.03.1955, under an obligation to pay profits every year or atleast deposit the profits realized from the share of the property of the plaintiff into the Court and produce accounts before the Court, if the Receiver/ first defendant did not file the accounts and render any account for the profits received by him on the plaintiff's share, the first defendant being Receiver is not entitled to retain the amount payable to the plaintiff till he attains majority. In such case, the first defendant is liable to pay interest under Section 34 C.P.C. for the reason that in case amount deposited into the Court to the credit of the Suit, it would have fetch not less than 5% interest from the date of deposit. On account of first defendant failure, the plaintiff was deprived of interest on the share of the profits, payable to the plaintiff. As the 3rd defendant failed to deposit in income from the share of plaintiff every year or as directed by trial court, I find that the plaintiff is entitled interest as awarded by the trial court, as I find no substance in the contention raised by the appellant/ defendant No.3. Accordingly, point No.ii is answered in favour of the plaintiff/ respondent and against the 3rd defendant/ appellant.

<u>Point No.iii:</u>

22. One of the contentions of the defendant is that the amount incurred by him for maintenance and education expenses for the plaintiff was not deducted. No doubt, the first defendant being the father is under legal obligation to maintain his children under the provisions of the Hindu Adoption and Maintenance Act, 1956 and to pay maintenance in terms of the Act. Therefore, incurring any amount for maintenance and education expenses cannot be deducted from the profits payable to the plaintiff. However, the appellant/ defendant No.3

did not produce any piece of paper evidencing incurring of any amount towards maintenance or incurring any expenditure for education of the respondent/ plaintiff. In the absence of any documentary proof, the Commissioner is not supposed to deduct any amount incurred by the first defendant towards maintenance and education expenses. Therefore, the Commissioner rightly declined to deduct any amount towards maintenance and education expenditure of the plaintiff allegedly incurred by the first defendant.

23. Hence, I find no error in the report of the Commissioner in determining the share of the profits payable to the plaintiff. Accordingly, Point No.iii is answered in favour of the respondent/ plaintiff and against the appellant/ defendant No.3.

24. In view of the foregoing discussion, I find no merits in the appeal and the appeal deserves to be dismissed.

25. In the result, the appeal is dismissed. The final decree, dated 12.12.1994, passed by the Additional Subordinate Judge, Tenali, in I.A. No.1313 of 1982, is confirmed, but in the circumstances without costs.

M. SATYANARAYANA MURTHY, J

06th February, 2015
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[1] 1988(2) A.P. Law Summary page 202

[2] 1977 ALT page 325

[3] AIR 1940 Madras 339