

THE HON'BLE SRI JUSTICE M.SEETHARAMA MURTI

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Civil Revision Petition No.5509 of 2012

ORDER:

This revision under Article 227 of the Constitution of India by the unsuccessful respondent/defendant is directed against the order dated 23.08.2012 of the learned Junior Civil Judge, Alamuru of East Godavari District passed in I.A.No.455 of 2010 in O.S.no.46 of 1995 filed under Order XX Rule 12 read with Section 151 of the Code of Civil Procedure, 1908 ('the Code', for brevity).

2. I have heard the submissions of the learned counsel for the revision petitioner/defendant ('the defendant', for brevity) and the learned counsel for the respondents/plaintiffs ('the plaintiff', for brevity). I have perused the material record.

3. The facts necessary for consideration, in brief, are as follows:

The plaintiffs had obtained a preliminary decree in O.S.no.46 of 1995 filed for partition of the plaint schedule properties. An appeal in A.S.no.14 of 2001 preferred by the defendant was dismissed confirming the preliminary decree and judgment in O.S.no.46 of 1995. The plaintiffs/ preliminary decree holders had filed an application for passing a final decree and sought for appointment of an Advocate Commissioner to conduct an inquiry and determine the mesne profits as per the terms of the preliminary decree. The trial Court, by the order impugned had appointed an Advocate Commissioner to conduct an inquiry and determine the mesne profits as per the terms of the preliminary decree. Aggrieved of the said orders, the defendant had preferred this revision petition.

4. The case of the defendant and his contentions are as follows: "The petition is filed in the year 2010 for ascertainment of mesne profits, pursuant to the preliminary decree dated 23.01.2001. Admittedly, the petition is filed

after a period of more than eleven years. Therefore, the application is not maintainable. The Court below ought to have seen that Order XX Rule 12 of the Code clearly debars filing of any application for determination of mesne profits beyond three years from the date of the decree. The period of limitation is three years as per Article 137 of the Indian Limitation Act. Though the application seeking appointment of a Commissioner for determination of mesne profits was filed beyond the time allowed under law, the trial Court had erroneously allowed the petition and appointed an advocate commissioner and directed him to determine the mesne profits as per the terms of the preliminary decree. The trial Court relied upon a decision, which is inapplicable to the facts of the case. The Court below had passed the order without referring to the relevant provisions of law. Therefore, the order impugned is liable to be set aside. At any rate, future mesne profits cannot be granted for a period beyond three years from the date of the decree of the trial Court or that of the decree of the appellate Court, as the case may be. The judgment in the first appeal suit was rendered on 27.09.2005 is not in dispute. And, hence the preliminary decree holders would be entitled to mesne profits at any rate until the expiration of three years from the date of the decree of the appellate Court, which has become final.

5. On the other hand, the learned counsel for the plaintiffs, while supporting the orders of the Court below, would contend that the preliminary decree has become final and that the parties are bound by the preliminary decree and that any contentions contrary to the terms of the preliminary decree cannot be permitted to be canvassed and that the Court below is not empowered to go behind the preliminary decree. He would also submit that the well-reasoned order of the Court below is sustainable and that the provisions of law being relied upon by the defendant have no application to the facts of the case and that the revision is devoid of merit and is liable to be dismissed.

6. I have carefully perused the material record and I have given earnest

consideration to the facts and the submissions.

7. Since the issue is relating to appointment of an Advocate commissioner for determination of mesne profits as per the terms of the preliminary decree, it is necessary to refer to the relevant clauses in the decree dated 23.01.2001, which read as follows:

“1) that the plaint schedule property be divided into three equal shares according to good and bad qualities and the plaintiffs be put in possession of two such shares;

2) that the plaintiffs be and are hereby at liberty to file a separate petition for determination of the past and future mesne profits on the schedule property of their shares;

3) that the defendant do pay the plaintiffs a sum of Rs.660-00 towards the costs of the plaintiffs and do bear his own costs of Rs.1020-00 in the suit.”

(Reproduced verbatim)

The suit which is admittedly filed for partition of the plaint schedule property into three equal shares by metes and bounds and according to good and bad qualities and for allotment of two such shares to the plaintiffs and for grant of past profits and future mesne profits from the date of the suit, is decreed. The judgment in the first appeal suit confirming the decree of the trial Court was rendered on 27.09.2005 is not in dispute.

8. In the light of the undisputed facts and the contentions of the defendant, the first question to be answered is – ‘whether there is any period of limitation for filing an application for ascertainment of mesne profits pursuant to a decree granted in a suit for partition?’ The answer to this question is no longer *res integra* in view of the following legal position.

In a decision in **Shub Karan Bubna v. Sita Saran Bubna**^[1] the Supreme Court while pointing out the fundamental difference between a mortgage suit and a partition suit and the preliminary decrees in a mortgage suit and a partition suit had, at paragraphs 17, 18 & 21 of the cited decision, held as follows: -

17. Once a Court passes a preliminary decree, it is the duty of the Court to ensure that the matter is referred to the Collector or a Commissioner for division unless the parties themselves

agree as to the manner of division. This duty in the normal course has to be performed by the Court itself as a continuation of the preliminary decree. Sometimes either on account of the pendency of an appeal or other circumstances, the Court passes the decree under Rule 18(1) or a preliminary decree under Rule 18(2) and the matter goes into storage to be revived only when an application is made by any of the parties, drawing its attention to the pending issue and the need for referring the matter either to the Collector or a Commissioner for actual division of the property. Be that as it may.

18. The following principles emerge from the above discussion regarding partition suits:

18.1. In regard to estates assessed to payment of revenue to the government (agricultural land), the Court is required to pass only one decree declaring the rights of several parties interested in the suit property with a direction to the Collector (or his subordinate) to effect actual partition or separation in accordance with the declaration made by the Court in regard to the shares of various parties and deliver the respective portions to them, in accordance with section 54 of Code. Such entrustment to the Collector under law was for two reasons. First is that Revenue Authorities are more conversant with matters relating to agricultural lands. Second is to safeguard the interests of government in regard to revenue. (The second reason, which was very important in the 19th century and early 20th century when the Code was made, has now virtually lost its relevance, as revenue from agricultural lands is negligible). Where the Collector acts in terms of the decree, the matter does not come back to the Court at all. The Court will not interfere with the partitions by the Collector, except to the extent of any complaint of a third party affected thereby.

18.2. In regard to immovable properties (other than agricultural lands paying land revenue), that is buildings, plots etc. or movable properties:

(i) where the Court can conveniently and without further enquiry make the division without the assistance of any Commissioner, or where parties agree upon the manner of division, the Court will pass a single decree comprising the preliminary decree declaring the rights of several parties and also a final decree dividing the suit properties by metes and bounds.

(ii) where the division by metes and bounds cannot be made without further inquiry, the Court will pass a preliminary decree declaring the rights of the parties interested in the property and give further directions as may be required to effect the division. In such cases, normally a Commissioner is appointed (usually

an Engineer, Draughtsman, Architect, or Lawyer) to physically examine the property to be divided and suggest the manner of division. The Court then hears the parties on the report, and passes a final decree for division by metes and bounds.

The function of making a partition or separation according to the rights declared by the preliminary decree, (in regard to non-agricultural immovable properties and movables) is entrusted to a Commissioner, as it involves inspection of the property and examination of various alternatives with reference to practical utility and site conditions. When the Commissioner gives his report as to the manner of division, the proposals contained in the report are considered by the Court; and after hearing objections to the report, if any, the Court passes a final decree whereby the relief sought in the suit is granted by separating the property by metes and bounds. It is also possible that if the property is incapable of proper division, the Court may direct sale thereof and distribution of the proceeds as per the shares declared.

18.3. As the declaration of rights or shares is only the first stage in a suit for partition, a preliminary decree does not have the effect of disposing of the suit. The suit continues to be pending until partition, that is division by metes and bounds, takes place by passing a final decree. An application requesting the Court to take necessary steps to draw up a final decree effecting a division in terms of the preliminary decree, is neither an application for execution (falling under [Article 136 of the Limitation Act](#)) nor an application seeking a fresh relief (falling under [Article 137 of Limitation Act](#)). It is only a reminder to the Court to do its duty to appoint a Commissioner, get a report, and draw a final decree in the pending suit so that the suit is taken to its logical conclusion.

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21. A preliminary decree for partition only identifies the properties to be subjected to partition, defines and declares the shares/rights of the parties. That part of the prayer relating to actual division by metes and bounds and allotment is left for being completed under the final decree proceedings. Thus the application for final decree as and when made is considered to be an application in a pending suit for granting the relief of division by metes and bounds.

[Emphasis supplied]

In view of this settled proposition of law, the contention of the defendant/revision petitioner that the application of the plaintiffs is barred by

law of limitation has no merit. Therefore, it follows that the trial Court is justified in overruling the objection of the defendant in that regard.

9. The next contention of the learned counsel for the petitioner/defendant is that the outer limit or the maximum period for which future mesne profits can be awarded is three years from the date of the decree of possession and mesne profits finally passed. Based on this contention, the learned counsel for the defendant would further contend that the order directing the Commissioner to determine the mesne profits as per the terms of the preliminary decree is contrary to law. In support of the said contention, he had placed reliance on Order XX rule 12(1)(c). He would also contend that in the instant case the period of three years mentioned in the provision is therefore, to be reckoned from the date of the preliminary decree or the date of the decree of the first appellate Court, whereby the preliminary decree was confirmed. The judgment in the first appeal suit was rendered on 27.09.2005 is not in dispute. Having regard to the submissions, it is necessary to refer to Order XX rule 12(1)(c), which reads thus:

Order XX Rule 12. Decree for possession and mesne profits:-

(1) Where a suit is for the recovery of possession of immovable property and for rent or mesne profits, the Court may pass a decree –

(a) xxx xxxxxxxx

(b) xxx xxxxxxxx

(ba) xx xxxxxxxx

(c) directing an inquiry as to rent or mesne profits from the institution of the suit until, --

(i) the delivery of possession to the decree-holder,

(ii) the relinquishment of possession by the judgment-debtor with notice to the decree-holder through the Court, or

(iii) the expiration of three years from the date of the decree, whichever event first occurs.”

Further, in the decision in **Lucy Kochuvareed v. P.Mariappa Gounder**^[2] relied upon by the learned counsel for the defendant, the facts and the ratio are as follows: ‘The District Court, Trichur decreed the suit for specific performance and mesne profits at a reduced rate of Rs.15,000/- per annum, instead of Rs.30,000/- per annum claimed by the plaintiff. The two appeals

preferred by the defendants 3 and 2 were allowed by the High Court. However, Civil Appeal 129/56 was allowed by the Supreme Court by a decree and judgment dated 22.04.1958. Later, an application was filed in the trial Court for determination of mesne profits. It was canvassed that the word 'decree' in sub-clause (iii) of clause (c) of the aforesaid rule 12(1), means the decree for possession and mesne profits, which the trial Court ought to have passed, and that in this view of the matter, the period of three years mentioned in sub-clause (iii) will be counted from 28.08.1952, the date of the trial Court's decree, whereby mesne profits at the reduced rate of Rs.15,000/-, instead of Rs.30,000/- per annum claimed by the plaintiff, were awarded.'

Considering the said contention, the Supreme Court had held as follows:

“The argument is certainly ingenious, but untenable, being founded on fallacious premises. The period of three years mentioned in sub-clause (iii) of clause (c) of rule 12(1) is to be computed from the date of the decree of this Court, i.e., from April, 22, 1958 and it will expire on the date on which possession was delivered or relinquished by the defendant in favour of the decree-holder pursuant to that decree.”

While placing reliance on the provision of law and the ratio in the above decision, it is sought to be contended that a trial Court can direct an inquiry as to mesne profits until the expiration of three years from the date of the decree and that the plaintiffs are not entitled to mesne profits for a period exceeding three years from the date of the decree of the 1st appellate Court.

10. However, this contention of the defendant is devoid of merit as a Division Bench of this Court in the decision in **Velicheti Audinarayana and another vs. Union of India and others** ^[3] held that Order XX Rule 12 (1)(c) (iii) of the Code is unconstitutional and *ultra vires* to Article 14 of the Constitution of India.

11. As already noted, in the case on hand, the preliminary decree was granted in a suit for partition. Therefore, in the well considered view of this Court, Order XX Rule 18 of the Code is applicable to the case on hand and not Rule 12. The view of this Court gets reinforced from the ratio in the

decision in **Kolluri Suseelamma v. Yerramilli Nageswara Rao**^[4]. In the cited decision, the substantial question of law that fell for consideration in the second appeal is – ‘whether Rule 12 or Rule 18 of Order XX of the Code is applicable for ascertainment of profits, both past and future, in a suit for partition and separate possession of properties devolved by gift jointly made to the donees?’. This Court, while answering the said question, dealt with the legal position, in detail, and made a copious reference to the precedents. In the earliest case, viz., **Basavayya v. Guravayya** [AIR 1951 Madras 938] decided by a Full Bench of Madras High Court, the legal position was succinctly laid down. The said legal position as summed up in the decision in **Kolluri Suseelamma’s** case (supra) is as follows:

“The legal proposition laid down was that in a suit for partition, the right to account of profits is implicit in the right to a share in the common properties and need not be separately asked for and both the rights have to be worked-out and provided for in the final decree for partition. It was further held that a direction for enquiry into profits of the common property received or realized 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 CPC interdicting such procedure. It was also held that the right to account of such profits is implicit in the right to a share in the common properties and need not be separately asked for and even after the passing of the preliminary decree; it is open to the Court to give appropriate directions either suo motu or on the application of the parties.

The ratio in the above case was accepted by this Court in subsequent decisions. It is apt to note that the Supreme Court in **Gopalakrishna Pillai v. Meenaksiri** [AIR1967SC155], had approved the view taken by the Madras High Court in **Basavayya v. Guravayya** (supra). After making a reference to the subsequent decisions of this Court, the decisions of the other High Courts and the Supreme Court, this Court, in **Kolluri Suseelamma** (supra) case, had finally summed up the legal position as follows:

“In view of the above discussion, what emerges is that there is no distinction between a coparcener and a co-sharer insofar as the application of Order XX Rule 18 CPC is concerned, as the criteria is that person having pre-existing right as a sharer

in the common properties is liable to be proceeded against for claim of both past and future profits and the legal provision applicable is only Order XX Rule 18 CPC regardless of the fact as to whether the said common properties are co-parcenary properties or joint family properties or the properties devolved by will or gift. Jointness of the properties is the criterion for application of Order XX Rule 18 CPC in which one person is in possession and enjoyment not only on his behalf, but on behalf of others, but did not distribute the profits to other sharers and is made liable to distribute after ascertainment of the said profits by applying Order XX Rule 18 CPC. The said profits are not the mesne profits within the meaning of Section 2(12) of CPC but in contradistinction, the profits, which are to be ascertained under Order XX Rule 12 CPC are the mesne profits coming within the definition of Section 2(12) of CPC, as the said profits are derived by a person in wrongful possession of a property belonging to another. Thus, the distinction is clearly made out that while a person who is in wrongful possession is accountable for profits under Order XX Rule 12 CPC as compared to a person, who is in possession lawfully as a co-sharer, but did not account for the profits and is made accountable under Order XX Rule 18 CPC.”

Therefore, in view of the ratio in the above decision, which squarely applies to the facts of the case, this Court finds that Order XX Rule 18 of the Code is only applicable to the facts of the case.

12. Having regard to the aforesaid reasons this Court holds that the contention of the defendant based on the provision of Order XX Rule 12 (1) (c) (iii) of the Code that the decree holders are entitled to claim mesne profits until expiration of three years from the date of the appellate Court’s decree is untenable and is devoid of merit. Further, in view of the finding of this Court that the provision of law applicable to the facts of the instant case is Order XX Rule 18 of the Code, this Court holds that the order impugned does not brook interference.

13. Accordingly, the Civil Revision Petition is dismissed. There shall be no order as to costs.

Miscellaneous petitions, if any, pending in this revision shall stand

closed.

M. SEETHARAMA MURTI, J

03rd June 2016

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[\[1\]](#) (2009) 9 SCC 689

[\[2\]](#) AIR 1979 SUPREME COURT 1214

[\[3\]](#) 2001 (5) ALD 604

[\[4\]](#) 1983 (2) An.W.R 127

