THE HON'BLE SRI JUSTICE M.SEETHARAMA MURTI

Civil Revision Petition No.1613 of 2012

ORDER:

This revision under Article 227 of the Constitution of India by the unsuccessful petitioner/15th defendant is directed against the order dated 01.11.2011 of the learned Senior Civil Judge, Bhimavaram of West Godavari District passed in I.A.No.4230 of 2008 in I.A.No.810 of 2005 in O.S.no.52 of 1982 filed by the 15th defendant under Section 151 of the Code of Civil Procedure, 1908 (for short, 'the Code').

2. I have heard the submissions of the learned counsel for the revision petitioner/15th defendant ('the 15th defendant', for brevity) and the learned counsel for the 1st respondent/plaintiff ('the plaintiff', for brevity). I have perused the material record.

3. The facts to be stated as a prelude to this order, in brief, are as follows:

The plaintiff had obtained a preliminary decree in the above suit filed for partition of the plaint schedule properties. The preliminary decree has become final. The plaintiff/ preliminary decree holder 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. In the preliminary decree it was also held that the plaintiff is also entitled for past mesne profits to an extent of half share which can be determined by a separate application under Order XX Rule 18 of the Code. There is no mention in the preliminary decree about the future mesne profits. Thus, no relief in regard to future mesne profits was specifically granted to the plaintiff and there is no term in the preliminary decree granting future mesne profits.

The plaintiff having had knowledge of the said fact had also filed I.A.No.810 of 2005 for appointment of an advocate Commissioner for determination of past mesne profits; and, the Court below by its orders dated 06.11.2006 consciously appointed an advocate as a Commissioner for determination of mesne profits for the periods 1977-78, 1978-79 and 1979-80. However, in the Warrant entrusted to the Commissioner it was stated that the Commissioner was appointed determination of mesne profits for the periods 1977-78, 1978-79 and 1979-80 and also future mesne profits till the delivery of 'A' schedule property. Having been aggrieved, the defendant filed the application I.A.No.4230 of 2008 for recalling the Warrant entrusted to the Commissioner. That application was resisted by the plaintiff. The trial Court, by the orders, which are impugned in this revision, dismissed the application of the 15th defendant giving liberty to him to raise the contention regarding future mesne profits while addressing arguments in the IA No.810 of 2005. Aggrieved of the said orders, the 15th defendant had preferred this revision petition.

4. The case of the 15th defendant and his contentions are as follows:

In the preliminary decree it was also admittedly held that the plaintiff is also entitled for past mesne profits to an extent of half share which can be determined by a separate application under Order XX Rule 18 of the Code. There is no mention in the preliminary decree about the future mesne profits. The plaintiff had also filed I.A.No.810 of 2005 for appointment of an advocate Commissioner for determination of past mesne profits; and, the Court below by orders dated 06.11.2006 had appointed an advocate as Commissioner for determination of mesne profits for the periods 1977-78, 1978-79 and 1979-80. However, in the Warrant entrusted to the Commissioner it was erroneously stated that he was appointed for determination of mesne profits for the periods 1977-78, 1978-79 and 1979-80 and also future mesne profits till the delivery of 'A' schedule property. Therefore, the direction in the warrant entrusted to the Commissioner directing to determine the future mesne profits till the delivery of 'A' schedule property is to be recalled as prayed for in the application of the defendant. The Court below, having agreed with the contentions of the defendant, ought to have recalled the Warrant and ought to have entrusted a fresh warrant as per its orders and the terms of the preliminary decree. However, without doing so, the Court below had wrongly held that no prejudice would be caused to this defendant if an enquiry is conducted by the Commissioner as directed in the Commission Warrant and had unnecessarily postponed the decision on the issue even though admittedly future mesne profits are not granted to the plaintiff in the preliminary decree. When the plaintiff is not entitled to claim mesne profits as per the preliminary decree, the Court below ought not to have postponed consideration of the fair and just request of this defendant and ought to have directed the Commissioner not to enquire into future mesne profits and not to determine future mesne profits as there is no necessity to do so and as there is no liability to pay future mesne profits as per the preliminary decree granted by the Court. Hence, the order impugned is erroneous, unjust and unsustainable. The same may be set aside in the interests of justice and the application of this defendant may be allowed.

5. On the other hand, the learned counsel for the plaintiffs, while supporting the orders of the court below, would contend that since the issue raised by the 15th defendant is left open by the Court below no prejudice is caused to the said defendant and that as rightly held by the Court below the defendant can raise this issue at the time of arguments in the IA no.810 of 2005 i.e., after filing his objections, if any, to the Commissioner's report. 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 15th defendant have no application to the facts of the case and that the revision is devoid of merit and is liable to be dismissed. He would also submit that even if the preliminary decree is silent in regard to future mesne profits, the plaintiff/preliminary decree holder in the suit for partition is still entitled to claim future mesne profits as per settled law.

6. I have carefully perused the material record and I have given earnest consideration to the facts and the submissions.

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

> **"1. That the suit in respect of plaint 'A' schedule property be and is hereby decreed.**
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> **2. It is hereby declared that the plaintiff and D-6 are entitled for half share each in plaint 'A' schedule property**
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> **3. That D-15 be and hereby is directed to deliver possession of plaint 'A' schedule property to the plaintiff and D-6 within two months from the date of this decree failing which plaintiff and defendant No.6 are at liberty to get the same through process of law.**
>
> **4. That the plaintiff is also entitled for past mesne profits to an extent of half share which can be determined by a separate application under Order 20 Rule 18 C.P.C.**
>
> **5. That plaintiff and D-6 be and are hereby directed to pay Court fee of Rs.561/- on plaint 'A' schedule property to the State of Andhra Pradesh equally.**
>
> **6. That each party do bear their own costs."**

The suit which is admittedly filed for partition of the plaint schedule property is decreed. The preliminary decree is silent about the plaintiff's entitlement to future mesne profits. However, in the Warrant entrusted to the advocate-Commissioner there is a direction to determine future mesne profits till the delivery of 'A' schedule property.

8. In the light of the undisputed facts and the contentions of the 15th defendant, the questions to be answered are – 'whether or not future mesne profits can be permitted to be claimed? And, whether or not such profits can be granted to the plaintiff-preliminary decree holder inspite of the fact that the preliminary decree granted in a suit for partition is silent on the said aspect?'

9. The answer to these questions is no longer *res integra* in view of the following legal position. In the decision in **Kolluri Suseelamma v. Yerramilli Nageswara Rao**[1] 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 including the earliest case in **Basavayya v. Guravayya** [AIR 1951 Madras 938] decided by a Full Bench of Madras High Court wherein 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 decision in **Basavayya** (supra) was accepted by this Court in subsequent decisions is not in dispute. It is apt to note that that the Supreme Court in **Gopalakrishna Pillai v. Meenakshi Ayal** [AIR 1967 SC 155], had approved the view taken by the Madras High Court in **Basavayya's case** (supra). After making a reference to the subsequent decisions of this Court, the other High Courts and the Supreme Court, this Court, in **Kolluri Suseelamma's** case (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 the 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."

10. Therefore, in view of the above ratio in the above decision, which squarely applies to the facts of the instant case, this Court finds 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. Therefore, 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. As a sequel it must be held that the right to account for 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.

11. Having regard to the aforesaid reasons this Court holds that the contention of the 15th defendant is untenable.

12. Viewed thus, this Court finds that the order impugned does not brook interference as the warrant issued is in accordance with the law applicable to the facts of the case on hand.

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

13th June 2016
Vjl

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[1] 1983 (2) An.W.R 127