

THE HON'BLE SRI JUSTICE M.SATYANARAYANA MURTHY

CIVIL REVISION PETITION NOS.7005, 7017, 7022, 7106, 7107 & 7108 OF 2017

COMMON ORDER:

All these civil revision petitions are filed under Article 227 of the Constitution of India, challenging the common order in I.A.Nos.304,305 & 306 of 2015 in O.S.No.933 of 1981 dated 04.10.2017 passed by the II Senior Civil Judge, City Civil Court, Hyderabad.

Petitioner in C.R.P.Nos.7005, 7017 & 7022 of 2017 is the first respondent before the Court below, whereas, the petitioner in C.R.P.Nos. 7106, 7107 & 7108 OF 2017 is the third respondent before the Trial Court.

For the sake of convenience, they will hereinafter be referred as referred before the Trial Court.

I.A.No.304 2015 was filed by the petitioners/plaintiffs under Order XXVI Rule 13 r/w 151 C.P.C for appointment of an Advocate Commissioner to divide the Plaint 'A', 'B' & 'C' Schedule properties in O.S.No.933 of 1981 by metes and bounds. I.A.No.305 of 2015 was filed for passing a final decree in respect of the above properties and I.A.No.306 of 2015 was filed for determination of mesne profits in respect of 3/98th share of the petitioners/plaintiffs for the above properties and to enable them to withdraw their share out of the said amount.

As far as the relationship among the parties is concerned, Sri S. Ramchandra Reddy had two wives, namely Shankamma/Sole Plaintiff/Plaintiff No.1 (first wife) and Mannemma/Defendant No.2 (second wife). Through the first wife Shankamma, the said Ramchandra Reddy had a daughter,

namely Padmamma/Defendant No.4/Plaintiff No.2. Through the second wife Manemma, the said Ramchandra Reddy had one son, namely S. Ramakrishana Reddy/Defendant No.1 and also a daughter, namely Subhashini/defendant No.3. The available record also shows that the second wife of Sri S. Ramchandra Reddy died on 17-05-2009, but no separate LR petition was filed. However, it is also mentioned that her son and daughter who are defendant Nos.1 and 3 are already on record and that even the said defendants did not prefer to intimate the death of Manemma even to the Supreme Court in the Civil Appeal was pending. At any rate, the defendant Nos. 1 and 3 are also not contending that there are other LRs to be impleaded in the present proceedings and therefore the question of abatement does not arise. Similarly, it can also be seen that the daughter and son of Padmamma/Plaintiff No.2 were also brought on record during the pendency of the LPA Proceedings before High Court and infact in the LPA Proceedings No.3/1993, CCCA No.25 & 30 of 1998, W.P.No.16843/1992 and W.P. No.5404/1995 they were arrayed as petitioner Nos.3 and 4, namely Smt G Manjula and Sri N. Sree Kanth Reddy, consequent upon the death Smt. Shankaramma/Plaintiff No.1. Hence, there is no dispute regarding the relationship among the parties.

Relationship among the parties to the suit and subsequent proceedings till date are not disputed. However, one Sri Subbagari Ramchandra Reddy and Subbagari Anantharam Reddy were brothers and they have partitioned their properties. To the limited extent required for this case, the Plaint 'A' Schedule properties consisting of item Nos.1 to 14 were also partitioned and both the brothers have half share each. The half share which fell to Sri Late

S. Ramchandra Reddy is the subject matter in the present proceedings apart from the total property in plaint B and C schedule properties. The total extent of the Plaint 'A' Schedule item Nos.1 to 14 is Ac 26.37 Guntas and as per the Plaint 'A' Schedule in the case on hand, the property sought for partition is Ac 13.18 Guntas. The Plaint 'B' Schedule is a house bearing Municipal No.2-2-977 and the Plaint 'C' Schedule Mulgi is bearing Municipal No.2-2-1010. All the Plaint 'A', 'B' and 'C' schedule properties are situated at Bagh Amberpet Tq, Musheerabad, Hyderabad.

O.S.No. 933/1981 was filed on behalf of the sole plaintiff/ Smt Shankamma against the defendant Nos.1 to 4. Subsequently, the 4th defendant/Smt. Padmamma was transposed as Plaintiff No.2 in the suit proceedings. The court below had decreed the suit partly by disallowing partition of item Nos.1 to 6 in Plaint 'A' Schedule on the ground that occupancy rights certificate was issued to the defendant No.1 and passed a preliminary decree on 24-04-1989 after contest and 1/5th share to each of the parties is to be allotted in all the other suit schedule properties.

Aggrieved by the said Judgment, the defendant No.1 preferred an appeal in CCCA No.94/1989 and the plaintiffs preferred cross-objections. On contest, this Court has confirmed the judgment passed by this court so far as item Nos.1 to 6 are concerned, thereby dismissed the cross objections in the appeal and also modified the decree passed by this court so far as the allotment of shares are concerned. As per the said decree plaintiff No.1 and Defendant No.2 were allotted 1/8th share each and

Plaintiff No.2, Defendant Nos.2 & 3 were allotted 1/4th share each respectively in item Nos.7 and 8 of 'A' Schedule and 'B' and 'C' Schedule properties, thereby modifying the shares allotted by this Court. It was also observed that the question regarding the partition of the house in 'B' Schedule may be decided by the lower court in the final decree proceedings while working out equities between the parties. In so far as partition of plaintiff 'A' schedule Item Nos.9 to 14 are concerned, this Court observed in Para 2 of the Preliminary Decree, dated: 24-09-1992 as follows :

“that, the plaintiffs shall be entitled to their share of the amount deposited in the court towards the value of the item Nos.9 to 14 of plaintiff schedule as the authority of the urban land (Ceiling & Regularization) Act have determined the excess land vested in the Government and granted permission to sell some extent of the land, which is already sold, and as the value of the land is deposited in the court.”

Aggrieved by the order passed by this Court, the Plaintiffs preferred LPA No.3/1993, CCCA No.25 & 30 of 1998, W.P.No.16843/1992 and W.P. No.5404/1995 and the same was also dismissed vide judgment dated.11-08-2006. Subsequently, as against the said judgment, the plaintiffs preferred an Appeal before the Supreme Court, in Civil Appeal No.3632/2008 and the same was disposed off on merits on 30-10-2014. The Supreme Court passed the Decree in the said Civil Appeal and as seen from the decree copy received by this court, it runs as follows :

“We allow this appeal and set aside the judgment and order passed by the Courts below to the extent the same hold that inam lands granted in favour of respondent no.1 upon abolition of the inam under the Andhra Pradesh (Telangana Area) Abolition of Inams Act, 1955 are not partible among the heirs left behind by Shri Ramachandra Reddy. The suit filed by the appellants shall resultantly stand decreed even qua the inam land in the same

ratio as has been determined by the High Court by the impugned judgment in regard to other items of properties. No costs.”

In view of the factual matrix narrated above, the resile of the suit from Trial Court to Apex Court has changed from time to time and the judgments of the Trial Court and First Appellate Court are merged in the judgment of the Supreme Court. Therefore, the judgment of the Apex Court is the final decision with regard to rights of the parties and accordingly, a preliminary decree was passed for partition of ‘A’, ‘B’ & ‘C’ schedule properties.

In view of the decrees passed by the different Courts in the suit, the plaintiffs and defendants are entitled to the following shares:

Plaintiff No.1 Shankaramma (first wife) : 1/8th share.
Plaintiff No.2 Padmamma (daughter) : 1/4th share.
Defendant No.2 Manemma (second wife) : 1/8th share.
Defendant No.1 Ramakrishna Reddy (Son) : 1/4th share.
Defendant No.3 Subhashini (daughter) : 1/4th share.

Further, Item Nos.1 to 6 of Plaintiff A Schedule property have been confirmed for partition by the Supreme Court. Item Nos.7 and 8 of Plaintiff A Schedule property have been confirmed for partition as decreed by this Court. With regard to Item Nos.9 to 14 of Plaintiff ‘A’ Schedule property, a modified decree was passed by this Court and this Court confirmed that, Plaintiff ‘B’ and ‘C’ Schedule properties are also available for partition.

Thus plaintiff No.1 and Defendant No.2 did not dispute their entitlement regarding failure to bring other LR's of the said parties to be brought on record. Thus, the shares through the first wife can be summed-up as 3/8th and the shares through the second wife can be summed-up as 5/8th share. It is also an undisputed

fact that the share value of the property of Item Nos.9-14 of Plaintiff 'A' schedule property is deposited to the credit of the suit and it is lying with the Court. Hence, I.A.No.304 2015 was filed by the petitioners/plaintiffs for appointment of an Advocate Commissioner to divide the Plaintiff 'A', 'B' & 'C' Schedule properties in O.S.No.933 of 1981 by metes and bounds. I.A.No.305 of 2015 was filed for passing a final decree in respect of the above properties and I.A.No.306 of 2015 was filed for determination of mesne profits in respect of 3/8th share of the petitioners/plaintiffs for the above properties and to enable them to withdraw their share out of the said amount, based on good and bad quality with easementary rights and appoint Advocate Commissioner for division of the property in terms of the decree passed by the Supreme Court and to determine the mesne profits, alleging that the defendants were in unlawful possession from the date of suit.

The respondents disputed the right of the plaintiffs to claim final decree in terms of the decree passed by the Trial Court, modified by this Court and Supreme Court. As the petitioners were not entitled to claim right in various items of the property, they filed common counter in all the three petitions, extracting certain portions of judgment of Supreme Court, this Court, Court below, shares of each of the defendants and plaintiffs, along with observations of the Courts i.e from Trial Court to Apex Court, while admitting that the respondents deposited amount as per the order passed in C.M.A.No.363 of 1982 in I.A.No.1051 of 1981 and intentionally not disclosed the same for the reasons best known to the petitioners, thereby, Item Nos.9-14 of 'A' schedule property are not available for partition. It is also contended that Item Nos.7 & 8

of Plaint 'A' schedule property are not available for partition. It is also contended that Item Nos. 7 to 9 cannot be partitioned, as claiming share in these three items is nothing but playing fraud and alienating the properties, and thereby, violation of the order of the respondent is not only incorrect, but also far from truth. The order in C.M.A.No.363 of 1982 and I.A.No.1051 of 1981 are suffice to conclude that the petitioners played fraud on the record and sought for reliefs referred supra.

It is also contended that the petitioners are no way concerned with the commercial complex, as the amount equivalent the value of the property was already deposited into the Court and called upon the petitioners to put the same to strict proof regarding their entitlement in 'B' & 'C' schedule properties. Item Nos.9 to 14 of Plaint 'A' schedule property cannot be partitioned, as such, property is available for partition, in view of depositing amount, as directed by this Court and the petitioners can withdraw the amount equivalent to their share. Therefore, the petitioners are not entitled to claim partition of properties described in Item Nos.9 to 14 of Plaint 'A' schedule property and that the petitioners are also not entitled to claim mesne profits, as no such claim was made in the plaint itself.

The respondents specifically contended that the property covered by Items Nos.1 to 8 of Plaint 'A' schedule property is agricultural land assessed and where the decree is for partition of an undivided estate assessed to the payment of revenue by the Government or for the separate possession of a share of such an estate, the partition of the estate or the separation of the share shall be made by the Collector or any gazetted subordinate of the

Collector deputed by him, in accordance with law, as contemplated under Section 54 C.P.C, but not by appointing an Advocate Commissioner.

It is contended that these petitioners are not entitled to 3/8th share, as claimed in the petition by appointing an Advocate Commissioner or question of granting mesne profits does not arise. With regard to prejudice to the rights of the respondents, they asserted that, no such claim was made either before the Court or any other Courts, throughout till termination of the proceedings in the Apex Court. It is also contended that 'B' schedule property is not divisible and even if the Commissioner is appointed, no purpose would be served, as the property is indivisible. Therefore, the petitioners are not entitled to claim any relief and prayed for dismissal of the petitions.

The Court below upon hearing arguments of both the counsel, ordered I.A.Nos.304,305 & 306 of 2015. Aggrieved by the common order passed in all the three I.As, the first respondent preferred C.R.P.Nos.7005, 7017 & 7022 of 2017 and the third respondent filed C.R.P.Nos. 7106, 7107 & 7108 of 2017 challenging the common order in I.A.Nos.304,305 & 306 of 2015 on various grounds.

The main grounds urged in the petition in the present revisions are identical in all the petitions. Item Nos. 9 to 14 are the part of one M/s. Poornodaya Cooperative Housing Society Limited layout and they are not available for partition. Apart from that, question of determining future profits without claim, no preliminary decree was passed for mesne profits on 24.04.1989, appointing an Advocate Commissioner to conduct enquiry to

determine mesne profits payable towards the share of the respondents 1 to 4 is an illegality.

It is specifically contended that the application is vexatious and not maintainable insofar as Item Nos.9 to 14 of Plaint 'A' schedule is concerned and that this Court in CCCA No.94/1989 passed a judgment which is challenged in LPA Proceedings No.3/1993, CCCA No.25 & 30 of 1998, W.P.No.16843/1992 and W.P. No.5404/1995, but, passing an order for division of Item Nos.9 to 14 of Plaint 'A' schedule property was closed completely by the Division Bench, having declared in an appeal against the preliminary decree that the amount that can be partitioned is what was the consideration received from M/s. Poornodaya Cooperative Housing Society Limited. Therefore, this question cannot be re-agitated when it has attained finality in the present petitions. But, the Trial Court committed an error in ordering petitions for appointment of Advocate Commissioner for division of the property and for allotment of due share of the property to respondents 1 to 4.

The Court below ignored the deposit of amount towards the share of the respondents 1 to 4 and again ordered for division of the property. The commercial complex constructed by D-1 is exclusive property and the same cannot be partitioned, as the schedule property was ordered to be partitioned by the Trial Court, Appellate Court and Apex Court.

When the Special Officer and Competent Authority under Urban Land (Ceiling & Regularization) Act, had determined the holding of the petitioner as 6443.5 sq.mts in Sy.Nos.283/1,283/2,283/3,284 and 285 and the said order has

become final and unchallenged, therefore, the petitioner is entitled to the sale consideration equivalent to the value of the land which was determined by the Special Officer for Item Nos.9 to 14 of 'A' Schedule Property and the commercial complex has been constructed in the said land, exclusively belonging to the petitioners cannot be partitioned. But, the Trial Court on erroneous appreciation of facts, committed an error in ordering petitions appointing Advocate Commissioner directing him to divide the property shown in the schedule.

During hearing, learned Senior Counsel Sri S. Ravi, appearing on behalf of Sri Ch. Pushyam Kiran contended that, when a preliminary decree was passed by the Trial Court and affirmed by the Apex Court with slight modification, the same cannot be reopened in the final decree petition, since the scope is limited and appointing an Advocate Commissioner to determine the mesne profits is nothing but reopening a preliminary decree, since no such relief was claimed and granted by the Court below or by any of the Courts upto Supreme Court, as such, appointing an Advocate Commissioner to determine the mesne profits is contrary to the law and placed reliance on the judgments of the Supreme Court, Madhya Pradesh and this Court in **Venkata Reddi and ors. v. Pothi Reddi¹, Muthangi Ayyanna v. Muthangi Jaggarao and ors², Devisahai and ors. v. Sardar Govindrao Mahadik and ors³ and Neelam Chittemma and others v. Tirlangi Appa and others⁴**. It is **also** contended that, by applying the principles laid down by various Courts in the above judgments, the Trial Court

¹ 1963 (2) AnWR 126

² (1977) 1 SCC 241

³ AIR 1992 MP 13

⁴ 2014 (4) ALD 269

ought to have dismissed the interlocutory applications filed for appointment of Advocate Commissioner to determine mesne profits.

It is specifically contended that, Item Nos.9 to 14 were excluded from partition by this Court in CCCA No.94/1989, which is affirmed in LPA Proceedings No.3/1993 and confirmed by this Apex Court. In such case, in view of the finding regarding Item Nos.9 to 14 of Plaintiff 'A' Schedule Property, the Trial Court in an application filed for passing final decree cannot be disturbed. Learned Senior Counsel further contended that, Item Nos.9 to 14 were excluded from partition while admitting the petitioner to deposit the share of the sale consideration of respondents 1 to 4 into the Court, the property cannot be partitioned at this stage and appointing an Advocate Commissioner for dividing the plaintiff schedule property i.e. Item Nos.9 to 14 is a serious illegality and prayed to set-aside the order passed by the Court below.

Learned counsel for the respondents 1 to 4 Sri K. Srinivasa Murthy refuted the contentions of the learned counsel for the petitioners and supported the order in all respects while drawing attention of this Court to paragraph 31 of the judgment of this Court in CCCA No.94/1989, where the Court did not disturb the findings of the Trial Court even for Item Nos.9 to 14 of 'A' Schedule Property. It is also contended that this Court cannot normally exercise the power under Article 227 of the Constitution of India. Article 227 of Constitution of India deals with power of superintendence by the High Court over all Subordinate Court and Tribunals. The power of superintendence conferred upon the High Court by Article 227 is not confined to administrative

superintendence only, but includes the power of judicial revision also even where no appeal or revision lies to the High Court under the ordinary law, rather power under this Article is wider than that of Article 226 in the sense that it is not subject to those technicalities of procedure or traditional fetters which are to be found in certiorari jurisdiction and such power can also be exercised suo motu. It is a well settled principle that the High Court can exercise supervisory power under Article 227 of Constitution of India, as held by the Apex Court in **State (N.C.T. Of Delhi) v. Navjot Sandhu@ Afsan Guru**⁵ that under Article 227 of Constitution of India the High Court can interfere with the directions of the Subordinate Courts. In view of the law laid down by the Apex Court, this Court cannot exercise its power under Article 227 of the Constitution of India though the order is wrong, since the power can be exercised only to keep the subordinate Courts and Tribunals within its bounds. Therefore, in view of the limited jurisdiction, this Court cannot re-appreciate the entire material again by giving a different interpretation to the judgment of the Court below and this Court in CCCA No.94/19, LPA Proceedings No.3/1993 and judgment of Apex Court in Civil Appeal SC 3632/2008 dated 30.10.2014. Keeping in view the law declared by various Courts with regard to limited jurisdiction, the power of this Court under Article 227 of the Constitution of India, requested to dispose of the revisions in accordance with law, while supporting the common order impugned in these revision petitions.

⁵ (34)2005 (3) ALT (CrI.) 125 (SC)

Considering rival contentions, perusing the material available on record, the points that arise for consideration are as follows:

- 1) Whether an Advocate Commissioner can be appointed to ascertain the mesne profits when there was no claim for grant of mesne profits throughout the proceedings from Trial Court to Supreme Court?***
- 2) Whether an Advocate Commissioner can be appointed to divide the property in terms of preliminary decree and for allotment of one such share to the respondents 1 to 4?***

P O I N T N O . 1 :

The first and foremost contention raised by the learned Senior Counsel for the petitioner herein is that, the Court below, Appellate Court and Apex Court did not pass any decree for grant of mesne profits. Thereby, appointment of Advocate Commissioner to ascertain the mesne profits by exercising power under Order XX Rule 12 C.P.C is erroneous.

Whereas, learned counsel for the respondents contended that, even if no preliminary decree is passed, permitting this petitioner to file appropriate application to determine mesne profits, the Court can appoint an Advocate Commissioner for the said purpose.

It is an undisputed fact that the Trial Court passed a preliminary decree for partition of Item Nos.1 to 6 of Plaint 'A' Schedule Property and Item Nos. 7 & 8 of Plaint 'A' Schedule Property, which are available for partition. Thus, the Trial Court

passed a preliminary decree for division of Item Nos. 7 & 8 of 'A' Schedule properties and other properties mentioned in the preliminary decree. The Trial Court also held that Plaint 'B' & 'C' schedule properties are available for partition and determined the share of each party to the suit. Aggrieved by the preliminary decree and judgment of the Trial Court, preferred an appeal in CCCA No.94/1989 and this Court modified the preliminary decree by decree and judgment dated 24.09.1992. In paragraph 4 of the said judgment, it is clear that Plaint 'B' schedule house may be divided by the Court in the final decree proceedings, while working out the equities between the parties. Further, the plaint without schedule mulgi was ordered to be partitioned between the plaintiff and defendants, as per the preliminary decree dated 24.04.1989. The High Court held that Item Nos.1 to 8 are Inam lands and they cannot be partitioned, as it would on Government on the advent of Telangana Inams Abolition Act. Aggrieved by the decree and judgment in CCCA No.94/1989, LPA was preferred and in the LPA Proceedings No.3/1993, this Court held that those Item Nos.1 to 6 which are Inam lands cannot be partitioned, but in the Civil Appeal No.3632/2008, the Supreme Court took a different view and held that Item Nos. 1 to 6 of Plaint 'A' Schedule Property are liable to be partitioned, though they are Inam Lands. Thus, Item Nos. 1 to 8 of 'A' Schedule Property and Plaint 'B' & 'C' Schedule properties are liable for partition, while the plaintiffs/respondents 1 to 4 are entitled to claim share proportionate to the share of the sale consideration deposited proportionate to their share determined by the Court. The shares of each individual finally decided by the Courts are mentioned in the earlier paragraphs.

When the suit is filed and paid fixed court fee under Section 34(2) of A.P. Court Fee & Suits Valuation Act (for short 'APCF & SV Act'), while claiming that they are in joint possession and enjoyment of the property along with the defendants, the defendants possession cannot be termed as wrongful or unauthorized, to enable the respondents 1 to 4 to claim mesne profits.

The expression 'mesne profit' is defined under Section 2(12) C.P.C, which reads as follows:

"Mesne profits' of property 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 but shall not include profits due to improvements made by the person, in wrongful possession".

Order XX Rule 12 C.P.C permits the Court to appoint Advocate Commissioner to determine the mesne profits payable by the person who is in wrongful or illegal occupation of the property. But, in the suit for partition, the plaintiffs are not entitled to claim mesne profits when they specifically asserted that they are in joint possession and enjoyment of the property and paid fixed court fee under Section 34(2) of the APCF & SV Act. More curiously, the court below did not pass any decree permitting the respondents 1 to 4 to file an application for determination of mesne profits. This Court and the Apex Court did not touch the aspect of mesne profits. When the plaintiffs/respondents 1 to 4 are claiming to be in joint possession and enjoyment of the property and paid Court fee under Section 34(2) of APCF & SV Act, the plaintiffs and defendants are deemed to be in joint possession and enjoyment of

the property. When their possession is lawful, directing the petitioners herein to pay mesne profits on determination, by appointing an Advocate Commissioner is an illegality. In a suit for partition, at best, the plaintiffs are entitled to claim rendition of accounts of the amount received by the defendants from the subject matter of the property, but not entitled to claim mesne profits. But, the Court below, basing on the law declared by various Courts in **Babburu Basavaya and others v. Babburu Guravayya and another**⁶, **Simma Krishnamma v. Nakka Latchumanaidu and others**⁷ and **Gopalakrishna Pillai and others v. Meenakshi Ayal and others**⁸, held that, in a suit for partition, though relief of mesne profits was not granted in a preliminary decree, the Court while passing a final decree can appoint an Advocate Commissioner for determination of mesne profits.

In **Babburu Basavaya and others v. Babburu Guravayya and another** (referred supra), the Court held that future mesne profits can be ordered even though not claimed in the partition suit. It is also observed that Order 20 Rule 18 of CPC does not prohibit the Court from issuing such directions after the stage of a preliminary decree. The mere fact that the preliminary decree does not direct an enquiry into the profits subsequent to the date of suit does not preclude the parties from applying for, or the court from awarding such profits by 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

⁶ AIR 1951 MADRAS 938

⁷ AIR 1958 AP 520

⁸ AIR 1967 SC 155

in either case the result of the enquiry has to be incorporated in the final decree.

Similarly, in **Simma Krishnamma Vs. Nakka Latchumanaidu and others** (referred supra), it is observed by this Court that in a proper case, even where a supplementary final decree can be made, the court is not precluded from ascertaining the profits and including the same in the supplementary decree. It is further observed that if the ascertainment of future profits is not ordered, the legal position is that the entire subject matter of the suit has not been finally disposed off and on that basis, it may be open to the court to make another supplementary final decree in regard to profits.

But, in **Gopalakrishna Pillai and others Vs. Meenakshi Ayal and others** (referred supra), the Supreme Court observed that the Court has a discretionary power to pass a decree directing an enquiry into future mesne profits. It is also observed by the Apex Court that regarding future mesne profits, the plaintiff has no cause of action on the date of institution of the suit and it is not possible for him to plead this cause of action or to value it, or to pay court fees thereon at the time of institution of the suit.

Therefore, in all the three judgments of this Court and the Supreme Court, it was consistently held that, as there was no cause of action for the plaintiff, to claim future mesne profits, the Court by exercising discretionary power, direct an enquiry for determination of future mesne profits from the date of suit in the present case. Taking advantage of these principles, the Court below concluded that, ordering of an enquiry for determination of future mesne profits is not illegal and on the basis of the principles

laid down in all the three judgments and concluded that, it is a fit case to appoint an Advocate Commissioner to determine the mesne profits.

Whereas, the contention of the learned counsel for the petitioner is that, when a preliminary decree is passed which has attained finality, due to decision of the Supreme Court, ordering determination of mesne profits by appointing an Advocate Commissioner is nothing but re-opening of a preliminary decree and the same cannot be ordered.

Learned counsel for the petitioner placed reliance on the judgment reported in **Venkat Reddy and others v. Petti Reddy**⁹, wherein, the Larger Bench of the Supreme Court while deciding a question relating to preliminary decree in paragraph 7 held that, a preliminary decree passed, whether it is in a mortgage suit or a partition suit, is not a tentative decree but must, in so far as the matters dealt with by it are concerned, be regarded as conclusive. No doubt, in suits which contemplate the making of two decrees – a preliminary decree and a final decree – the decree which would be executable would be the final decree. But the finality of a decree or a decision does not necessarily depend upon its being executable would be the final decree. The legislature in its wisdom has thought that suits of certain types should be decided in stages and though the suit in such cases can be regarded as fully and completely decided only after a final decree is made the decision of the court arrived at the earlier stage also has a finality attached to it. It would be relevant to refer to Section 97 of the C.P.C which provides that where a party aggrieved by a preliminary decree does

⁹ AIR 1963 SC 992

not appeal from it, he is precluded from disputing its correctness in any appeal which may be preferred from the final decree. This provision thus clearly indicates that as to the matters covered by it, a preliminary decree is regarded as embodying the final decision of the court passing that decree.

In **Muthangi Ayyanna v. Muthangi Jaggarao and others**¹⁰, the Full Bench of Apex Court in paragraph 5 of the judgment held that, a final decree cannot be amended or go behind the preliminary decree on a matter determined by the preliminary decree. Further, as per Clause 5 of the preliminary decree passed by the High Court, on appeal from the preliminary decree, had modified the decree passed by the Trial Court, which has become final, it cannot be disturbed.

A similar view was taken by the Division Bench of Madhya Pradesh in **Devisahai and others v. Sardar Govinrao Mahadik and others**¹¹, by placing reliance on the judgment of the Supreme Court in **Venkat Reddy and others v. Petti Reddy** (referred supra) held that, a preliminary decree passed in a mortgage suit or partition suit is not a tentative decree, but should be regarded as conclusive in respect of the matters dealt with in the preliminary decree.

In **Neelam Chittemma and others v. Tirlangi Appa and others**¹², this Court while placing reliance on the judgments of the Supreme Court in **Chittoori Subbanna v. Kudappa Subbanna**¹³, **Venkat Reddy and others v. Petti Reddy** (referred supra) and

¹⁰ AIR 1977 SC 292

¹¹ AIR 1992 MP 13

¹² 2014 (3) ALT 452

¹³ AIR 1965 SC 1325

Muthangi Ayyanna v. Muthangi Jaggarao and others (referred supra) held as follows:

“The learned counsel for the appellants submitted that the trial court committed grave error in passing final decree. To substantiate the contention, he has drawn my attention to the decision of the Supreme Court in **Chittoori Subbanna v. Kudappa Subbanna** (AIR 1965 SC 1325). In para - 26, the apex Court observed as follows.

It is urged for the decree-holder respondent that the trial Court, when passing the final decree, could not have ignored what had been decreed under the preliminary decree as no appeal against the preliminary decree had been preferred and section 97, C.P.C., provided that where any party aggrieved by a preliminary decree passed after the commencement of the Code did not appeal from such decree, it would be precluded from disputing its correctness in any appeal which might be preferred from the final decree. The object of section 97 is that questions which had been urged by the parties and decided by the Court at the stage of the preliminary decree will not be open for re-agitation at the stage of the preparation of the final decree and would be taken as finally decided if no appeal had been preferred against the preliminary decree.”

In view of the long line of perspective pronouncements referred supra, when a preliminary decree is passed, the Trial Court or any other Court, cannot go beyond the decree and pass orders.

Whereas, in the case of mesne profits, the Court below passed the impugned order by relying on the long line of judgments in **Babburu Basavaya and others v. Babburu Guravayya and another** (referred supra), **Simma Krishnamma v. Nakka Latchumanaidu and others** (referred supra) and **Gopalakrishna Pillai and others v. Meenakshi Ayal and others** (referred supra). This Court and Apex Court made it clear, this Court can grant future profits even if no preliminary decree is passed.

Though there is a little conflict between the legal position referred above, but in normal course, the law laid down by the

Apex Court is that, unless the Court cannot travel beyond the pleadings for grant of relief.

In view of the little controversy, with regard to grant of relief of appointing an Advocate Commissioner to determine mesne profits, the pleadings in the plaint are of vital importance to decide the entitlement. To grant relief of mesne profits, the concept of mesne profits is to be adverted.

The concept of 'mesne profits' has its origin in the medieval period. Under the feudal system, the King owned all land. The King would let out a part of these lands to his barons on the condition that they will provide him with soldiers whenever he wanted to raise an army. Soon this turned into a nice way of raising money by charging rent for the land. In turn, the barons would let out part of the land to tenant farmers and they would pay rent – usually in kind, by providing livestock or crops – for the privilege of being able to keep some of the produce for themselves. Thus the concept of chains of tenancies was born. The person to whom they paid rent became known as the 'mesne landlord'. The word meant 'intermediate' in old French. The phrase was originally 'mesne rents and profits' meaning all the rent or profit from the land that could be extracted by the intermediate landlord. In the modern time the term 'mesne profits' means the claim that a lawful owner of the property has against the unlawful possessor of the property.

As regards nature of mesne profits, All the legal system, which governs the civilized nations of the world agree upon the basic principal of natural justice to obtain reparation for wrongs or infringement of legal rights. In other words, the law of nature gives primary right to a compensation for injuries. Mesne profit is one

such right to compensation granted against injuria i.e. breach of legal right. Mesne profit is a positive right available against infringement of private legal right.

Legal position relating to Mesne profits may be defined as the profits or other pecuniary benefits, which one who disposes the true owner receives between dis-seizin and the restoration of possession. Therefore mesne profits corresponds to the profits which the person in wrongful possession is receiving or might receive with due diligence for the wrongful occupation of property. Mesne profits are defined under Section 2(12) of Code of Civil Procedure. Section 2 (12) of the Code of Civil Procedure provides that: "Mesne profits" of property means those profits which the person in wrongful possession of such property actually received or might with the ordinary diligence have received therefrom, together with interest on such profits but shall not include profits due to improvement made by the person in wrongful possession. From the analysis of the above stated definition one can conclude that "Mesne profits" are the profits, which the person in wrongful possession actually earned or might have earned with ordinary diligence. According to Section 2(12) a person becomes entitled to mesne profits only when he has right to obtain possession but another person whose occupation is unauthorized or wrongful keeps him deprived of that possession. The first and foremost condition for awarding mesne profits is wrongful possession of the occupant of the property. The section further provides that Mesne profits also include interest on such profits. However it explicitly excludes any profit earned due to improvement in the property made by the person in wrongful possession of such property.

The main object of awarding mesne profit is to compensate the actual owner of the property for all the loss he has suffered. In other words the object of awarding a decree of mesne profits is to compensate the person who has been kept out of possession and deprived of enjoyment of his property even though he was entitled to possession of property, and the word compensation would embrace in its purview any actual loss suffered by a lawful owner. The idea of granting mesne profits as compensation normally connotes reparation for some past wrongful act i.e. wrongful possession.

It is necessary at the outset to distinguish between three types of cases in which a question of profits or mesne profits might arise. (1) Suits for ejectment or recovery of possession of immovable property from a person in possession without title, together with a claim for past or past and future mesne profits. (2) Suits for partition by one or more tenants-in-common against others with a claim for account of past or past and future profits. (3) Suits for partition by a member of a joint Hindu family with a claim for an account from the manager. In the first case, the possession of the defendants not being lawful, the plaintiff is entitled to recover "mesne profits" as defined in Section 2, Clause (12) of the Civil Procedure Code, such profits being really in the nature of damages. In the second case, the possession and receipt of profits by the defendant not being wrongful the plaintiff's remedy is to have an account of such profits making all just allowance in favour of the collecting tenant-in-common. In the third case, the plaintiff must take the joint family property as it exists at date of the demand for partition and is not entitled to open up past

accounts or claim relief on the ground of past inequality of enjoyment of the profit, except where the manager has been guilty of fraudulent conduct or misappropriation.

The Madras High Court in **D. Nataraja Achari v. Balambal Ammal**¹⁴, by relying on the judgments of the Supreme Court referred above, observed as follows:

“5. The provisions of Order 20, Rules 12 and 18, Code of Civil Procedure. Order 20, Rule 12 runs, thus:

Deeres 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) for the possession of the property;

(b) for the rents which have accrued on the property during the period prior to the institution of the suit or directing an inquiry as to such rent;

(ba) for the mesne profits or directing an enquiry as to such mesne profits;

(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; or

(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.

2. where an inquiry is directed under Clause (b) or Clause (c) a final decree in respect of the rent or mesne profits shall be passed in accordance with the result of such inquiry.

5. Order 20, Rule 18, Civil Procedure Code which specifically deals with the case of a suit for partition and separate possession of a share in the property runs, thus; Decree in suit for partition of property or separate possession of a share therein--Where the Court passes a decree for the partition of property or for the separate possession of a share therein, then--

(i) If and in so far as the decree relates to an estate assessed to the payment of revenue to the Government, the decree shall declare the rights of the several parties interested in the property, but shall direct such partition or separation to be made by the Collector, or any Gazetted Subordinate of the Collector deputed by him in his behalf in accordance with such declaration and with the Provisions of Section 54:

2. If and in so far as such decree relates to any other immovable property or to movable property, the Court may, if the partition or separation cannot be conveniently made without further inquiry, pass a preliminary decree declaring the rights of the several parties interested in the property giving much further directions as may be required.

The relative scope of Order 20, Rule 12 and Order 20, Rule 18, Civil Procedure Code, has been the subject-matter of an illuminating and exhaustive discussion by a Full Bench of

¹⁴ (1979) 2 MLJ 234

this Court in the decision reported in *Basavayya v. Guruvayya*, the Full Bench observed, thus:

It is necessary at the outset to distinguish between three types of cases in which a question of profits or mesne profits might arise. (1) Suits for ejectment or recovery of possession of immovable property from a person in possession without title, together with a claim for past or past and future mesne profits. (2) Suits for partition by one or more tenants-in-common against others with a claim for account of past or past and future profits. (3) Suits for partition by a member of a joint Hindu family with a claim for an account from the manager. In the first case, the possession of the defendants not being lawful, the plaintiff is entitled to recover "mesne profits" as defined in Section 2, Clause (12) of the Civil Procedure Code, such profits being really in the nature of damages. In the second case, the possession and receipt of profits by the defendant not being wrongful the plaintiff's remedy is to have an account of such profits making all just allowance in favour of the collecting tenant-in-common. In the third case, the plaintiff must take the joint family property as it exists at date of the demand for partition and is not entitled to open up past accounts or claim relief on the ground of past inequality of enjoyment of the profit, except where the manager has been guilty of fraudulent conduct or misappropriation.

6. The Full Bench also held that Order 30, Rule 12, Civil Procedure Code, deals with the first class of suits above referred, while Order 20, Rule 18 would take in suits in the second and third categories. It was also further held that Order 20, Rule 12 relates to "mesne profits" in the sense in which that expression is defined in Section 2(12) of the Civil Procedure Code and that the claim of the plaintiff suing for partition and his share of profits accruing from the lands pending the suit is not, properly speaking, a claim for mesne profits and Order 20, Rule 12 Civil Procedure Code, has no application to such a case. The learned Counsel for the appellant, however, would strongly rely upon a decision of the Supreme Court in *Chittoori Subbamma v. Kadappa Subbanna and Ors.* and urge that the first respondent cannot be granted a decree in respect of mesne profits in excess of three years from the date of the decree. The question, therefore, is whether the first respondent decree-holder could be denied her share of the income for a period in excess of three years. The scope and applicability of the judgment of the Supreme Court relied upon by the learned Counsel for the appellant was the subject-matter of the judgment of a Division Bench reported in *Subba Reddiar v Hara Bibi*. In that case also, the same objection that is being raised in the present second appeal by the learned Counsel for the appellant was raised, relying upon the aforesaid judgment of the Supreme Court reported in *Subbamma's case*. The Division Bench examined the provisions of Order 20, Rule 12 and Order 20, Rule 18. Civil Procedure Code, and followed the ratio of the Full Bench of this Court reported in *Basavayya v. Guruvayya*, and ultimately held that Order 20, Rule 12 of the Code of Civil Procedure will not be applicable to a case like the present case, because when an account of the income from the property pertaining to the share of the plaintiff is ordered upto the date of the final decree what actually happens is the division of an integral portion of the

hotchpot comprising of not only the property but also the income and accretions thereto upto the date of the final decree and to such a case, Order 20, Rule 12 will be inapplicable. In addition, the Division Bench also examined in detail the judgment of the Supreme Court and held that a careful perusal of the minority and the majority views shows that the entire discussion related only to the scope of Order 20, Rule 12, Civil Procedure Code, and in particular whether the preliminary decree would be binding upon the defendant at the stage of the final decree proceedings and whether the objection that the period for the award of mesne profits should not exceed three years could be allowed to be raised for the first time before the High Court. It was also pointed out by the Division Bench that in the judgment of the Supreme Court there is no reference whatever to Order 20, Rule 18, Civil Procedure Code, which deals with a case of suit for partition and mesne profits. It was also further pointed out that the Full Bench decision of this Court reported in Basavayya's case was not even referred to and, therefore, it is rather difficult to countenance an argument that the Supreme Court by implication intended to over-rule the view taken by the Full Bench which has been followed in all other decisions of other High Courts. That being the position, the question of the applicability of the provisions of Order 20, Rule 12 to the instant case does not arise because in this case, though the application purports to be one under Order 20, Rule 12, Civil Procedure Code, it would fall within the second and third categories enumerated by the Full Bench and to which the provisions of Order 20, Rule 12, will not be applicable Order 20, Rule 18, Civil Procedure Code, would govern the present case and, therefore, the objection of the learned Counsel for the appellant that the mesne profits cannot be given for more than three years from the date of the decree does not hold good."

Thus, from the view taken by the Madras High Court, in the said judgment, in a suit for partition, Order XX Rule 18 C.P.C is applicable to claim both past and future profits, but not mesne profits. The same view was expressed by the Madras High Court in **B.N. Thiayagarajan v. B.N. Sundaavelu¹⁵ and A.R. Veerappa Goundar v. Sengoda Goundar¹⁶**, the Court after referring to certain earlier decisions stated as follows:

(1) Where a preliminary decree awarding possession contains a direction for enquiry into the future profits, that part of the suit relating to the mesne profits continues to be pending

¹⁵ AIR 1972 Mad 216

¹⁶ (1975) 1 MLJ 53

and the decree-holder might move the Court to hold an enquiry and pass a final decree awarding such profits without the necessity of filing an application within the prescribed period under Article 181 of the Limitation Act.

(2) Where a decree awarding possession is silent with regard to enquiry into the future mesne profits and the decree has not completely disposed of the suit which for one reason or another, continues to be pending, there is nothing in the Code prohibiting the decree-holder from applying to the Court during the pendency of such suit for an enquiry into the future mesne profits of the Court from ordering such an enquiry; and

(3) Where no relief for mesne profits is claimed in the plaint and the preliminary decree does not provide for such relief, the relief for mesne profits can be claimed even for the first time in application for passing a final decree. But in every case above enumerated the enquiry must be concluded before the final decree is passed, so that the result of the enquiry may be incorporated in the final decree. If, however, the final decree is passed before the enquiry into the mesne profits is completed without the result of the enquiry being incorporated in the final decree itself, there can be no second final decree incorporating the result.

In **Bhagwati Prasad v. Shri Chandramauli**¹⁷ the Supreme Court while dealing with regard to the plaintiff's claim for past rent and future mesne profits observed as follows:

¹⁷ AIR 1966 SC 735

“We see no reason to interfere with the decree passed by the High Court. But we do not see how the High Court's decree in relation to future mesne profits can be sustained. Because, once it is held that the plaintiff is entitled to eject the defendant, it follows that the from the date of the decree granting the relief of ejectment to the plaintiff, the defendant who remains in possession of the property despite the decree, must pay mesne profits or damages for use and occupation of the said property until it is delivered to the plaintiff. A decree for ejectment in such a case must be accompanied by a direction for payment of the future mesne profits or damages. And therefore the plaintiff is entitled to future mesne profits at the rate of Rs. 300 per month.

Generally, Court can award Mesne Profits against the following persons as per Section 2 Sub-Section 12 of the Code of Civil Procedure, 1908.

1. Tenants in a suit for recovery of possession. (Anderson Wright Vs. Amar Nath Roy, AIR 2005 SC 2457)
2. Persons against whom a decree for possession of immovable property was passed. (Gopal Krishna Pillai Vs. Meenakshi Ayal, AIR 1967 SC 155)
3. Trespass (Sita Ram Lakshmanji Vs. Dipnarain Mandal, AIR 1977 SC 1870)
4. Mortgagors in possession of mortgaged property against whom a decree for foreclosure was passed. (Shiv Kumar Sharma Vs. Santhosh Kumari, AIR 2008 SC 171)
5. Mortgagors in possession of property after a decree for redemption was passed. (Prabhakaran Vs M. Azhagiri Pillai, AIR 2006 SC 1567).

The Madras High Court in **Nataraja Achari v. Balambal Ammal**¹⁸ pointed out that there are three different types of cases in which question of rights of profits arise, which are as follows:

¹⁸ AIR 1980 Mad 222

1. Suit for ejectment or recovery of possession of immovable property from a person in possession without title, together with a claim for past or past and future mesne profits.]
2. A suit for partition by one or more tenants in common against others with a claim for account of past or past and future profits.
3. Suits for partition by a member of joint Hindu family with a claim for an account from the manager.

The Madras High Court further delineated that , “In the first case, the possession of the defendant not being lawful, the plaintiff is entitled to recover mesne profits such profits being really in the nature of damages. In second case the possession and receipt of profits by the defendant not being wrongful the plaintiffs remedy is to have an account of such profits making all just allowance in the favour of the collecting tenant in common. In the third case the plaintiff must take the joint family property as it exists at the date of the demand for partition and is not entitled to open up past account or claim relief on the ground of past inequality of enjoyment of the profit, except where the manager has been guilty of fraudulent conduct or misappropriation. The plaintiff would however, be in the position of the tenant in common from the date of severance in status and his right would have to be worked out on that basis.

If, these principles are applied to the present facts of the case, in the present suit, which is a suit by a member of the Hindu Joint Family, Clause (3) will apply. Hence, a member of the Hindu

Joint family in a suit for partition is entitled to claim both past and future profits against the Manager for rendition of account and recovery. But, the question of claiming mesne profits i.e. profits payable by person who is in wrongful possession, as defined under Section 2 of Clause (12), in a suit does not arise, more particularly, when the plaintiffs pleaded that they are in joint possession and enjoyment of the property either actual or constructive and also paid Court Fee under Section 34(2) of APCF & SV Act, since the joint possession of the other member of the joint family or a coparcenery can only become illegal. As such, in a suit for partition, at the stage of preliminary decree, the items of property which are liable for partition or pending for ascertainment initially by an order under Order XX Rule 18(2) C.P.C, a preliminary decree is passed together with direction for account to be taken.

Therefore, there is a lot of distinction between profits and mesne profits, in view of the law discussed above. For grant of mesne profits, the pleadings in the plaint plays vital role and to find out whether the respondents are in wrongful possession or the plaintiffs and the defendants are in joint possession or not. But, the plaint is not placed before this Court to verify and to conclude that the plaintiffs claim in the original suit was that the plaintiffs and defendants were in joint possession and enjoyment of the property and paid requisite Court Fee under Section 34(2) of the APCF & SV Act or not.

In the judgment in O.S.No.933 of 1981 dated 24.04.1989, few facts of the case are referred and in paragraph 3 of the judgment, it is averred that, after the death of Ramachandra Reddy, both the parties continued to be living together and

enjoying the usufruct of the entire property together. It is joint family property and parties are in joint possession. Thus, it means that the possession of the respondents is not wrongful or unauthorized to enable these petitioners to claim mesne profits. But, at best, the plaintiff can claim rendition of account of the profits received from the property by the Manager of the joint family, but cannot claim mesne profits. Therefore, it is relevant to advert to the pleadings and decide whether the plaintiff pleaded the joint possession of the property belonging to the Hindu Joint Family or pleadings that the defendants are in wrongful or unauthorized possession and decide whether the plaintiffs are entitled for rendition of account of profits against the Manager or mesne profits from the defendants basing on the plea and the Court fee paid on the plaint, since they are not available, it is difficult to decide this issue. Therefore, this Court has no option except to set-aside the finding recorded by the Trial Court, while remanding the same to the Trial Court by exercising power under Order XLI Rule 23(a) C.P.C, with a direction to verify the allegations made in the complaint the admission, if any, with regard to joint possession of both the plaintiffs and defendants and determine whether the petitioners herein and the other respondents are in wrongful possession or in joint legal possession and decide the application afresh, in view of the discussion in the paragraphs referred supra.

Accordingly, the point is answered.

P O I N T NO.2:

The contention of the learned counsel for the petitioner is that, Item Nos. 1 to 6 of 'A' schedule property is not liable for

partition and similarly Item Nos.7 to 14 of 'A' schedule property is also not available for partition. But, the Trial Court held that Item Nos. 1 to 6 of 'A' Schedule Property and Item Nos. 7 to 14 of Plaintiff 'A' Schedule are liable for partition and the plaintiffs are also entitled to claim share in 'B' and 'C' schedule properties.

But, in C.C.A.No.94 of 1989, this Court made certain observations and ultimately concluded as follows:

"From the fact that this property was purchased by Ramachandra Reddy and Anantharam Reddy in the name of their sons shortly after their partition and the evidence adduced by the 1st defendant that he purchased with the money given by his grand mother is not reliable and the other circumstances referred to by me i.e. recitals in the Will Ex.A.11 of Anantharam Reddy, the fact that the 1st plaintiff was made as a party to the agreement of sale, and the entries in the Ex.A.6 pahani, I agree with the contention of the learned counsel for the plaintiff that half in this property was purchased by Ramachandra Reddy in the name of his minor son, the 1st defendant and therefore, it becomes the joint family property.

At the same time, it was agreed by the learned counsel for the appellant therein that the property covered by Item Nos. 9 to 14 of plaintiff 'A' schedule is no longer available for partition, as an extent of 44,000 sq.mts out of the said property is vested in the government as excess land and the remaining extent of 11,000 sq.mts was sold by the defendants by virtue of the exemption granted by the government under the Urban Land (Ceiling and Regulation) Act, 1976 and the plaintiffs 1/8th share was deposited in the Court. Consequently, the plaintiff is entitled to claim the amount deposited towards the share of the plaintiff.

This Court also discussed in C.C.A.No.94 of 1989 about Item Nos.1 to 6 of 'A' Schedule Property and cross objections filed in the

appeal. It is averred that Item Nos. 1 to 6 of Plaintiff ‘A’ schedule are Inam lands vested in the government and the Inams were abolished after the advent of Andhra Pradesh (Telangana Area) Abolition of Inams Act, 1955, in view of Section 37 of the Andhra Pradesh (Telangana Area) Tenancy and Agricultural Lands Act, 1950, and concluded that the said items were not liable for partition, as they are not available and vested on the government in terms of Section 37 of the Andhra Pradesh (Telangana Area) Tenancy and Agricultural Lands Act. This Court further held that the civil court has no jurisdiction in respect of Inam lands to pass a decree under partition and dismissed cross objections filed by the plaintiffs. As regards the division of shares, this Court held that the parties are entitled to have their respective shares in the share of Ramachandra Reddy, which is liable for partition as stated above in the following proportions.

Plaintiff No.1	Plaintiff No.2	Defendant No.1	Defendant No.2	Defendant No.3
1/8 th	1/4 th	1/4 th	1/8 th	1/4 th

Accordingly, this Court modified the preliminary decree passed by the Court below and dismissed the appeal, subject to the modifications of the shares and observations made regarding Item Nos. 9 to 14 of ‘A’ & ‘B’ schedule properties of the plaintiff.

The judgment of this Court in C.C.A.No.94 of 1989 dated 04.09.1992 is assailed in LPA No.3/1993, CCCA No.25 & 30 of 1998, W.P.No.16843/1992 and W.P. No.5404/1995 before this Court and the Division Bench of this Court upheld the judgment passed by the learned Single Judge of this Court in C.C.A.No.94 of 1989 dated 04.09.1992.

But, in Civil Appeal No.3632 of 2008, the Supreme Court reversed the finding, and held in paragraph 17 as follows:

“17. In the result, we allow this appeal and set aside the judgment and order passed by the Courts below to the extent the same hold that inam lands granted in favour of the respondent no.1 upon abolition of the inam under the Andhra Pradesh (Telangana Area) Abolition of Inams Act, 1955, are not partible among the heirs left behind by Shri Ramachandra Reddy. The suit filed by the appellants shall resultantly stand decreed even *qua* the inam land in the same ratio as has been determined by the High Court by the impugned judgment in regard to other items of properties. No costs.”

Thus, the judgment of the Trial Court in O.S.No.933 of 1981 dated 24.04.1989 and this Court are merged with the judgement of Supreme Court in Civil Appeal No.3632 of 2008 dated 23.09.2014, by applying the Doctrine of Merger and the preliminary decree passed by the Supreme Court is the basis for claiming right.

The Doctrine of Merger is neither a doctrine of constitutional law nor a doctrine statutorily recognised. It is a common law doctrine founded on principles of propriety in the hierarchy of justice delivery system. On more occasions than one this Court had an opportunity of dealing with the doctrine of merger. It would be advisable to trace and set out the judicial opinion of this Court as it has progressed through the times.

In **Commissioner of Income-tax, Bombay v. M/s Amritlal Bhogilal and Co**¹⁹ Apex Court held that, there can be no doubt that, if an appeal is provided against an order passed by a tribunal, the decision of the appellate authority is the operative decision in law. If the appellate authority modifies or reverses the decision of the tribunal, it is obvious that it is the appellate decision that is effective and can be enforced. In law the position

¹⁹ AIR 1958 SC 868

would be just the same even if the appellate decision merely confirms the decision of the tribunal. As a result of the confirmation or affirmance of the decision of the tribunal by the appellate authority the original decision merges in the appellate decision and it is the appellate decision alone which subsists and is operative and capable of enforcement.

So, based on the principle of Doctrine of Merger, the decision of Appellate Authority is alone effective and executable. Further, the Supreme Court after reviewing the entire law based on the principle of Doctrine of Merger and also referring the earlier judgments of the Supreme Court from **U.J.S. Chopra v. State of Bombay**²⁰ to **Gopalbandhu Biswal Vs. Krishna Chandra Mohanty & Ors**²¹, arrived at the following conclusions:

(i) Where an appeal or revision is provided against an order passed by a court, tribunal or any other authority before superior forum and such superior forum modifies, reverses or affirms the decision put in issue before it, the decision by the subordinate forum merges in the decision by the superior forum and it is the latter which subsists, remains operative and is capable of enforcement in the eye of law.

ii) The jurisdiction conferred by Article 136 of the Constitution is divisible into two stages. First stage is upto the disposal of prayer for special leave to file an appeal. The second stage commences if and when the leave to appeal is granted and special leave petition is converted into an appeal.

²⁰ AIR 1955 SC 633

²¹ 1998 (4) SCC 447

(iii) Doctrine of merger is not a doctrine of universal or unlimite application. It will depend on the nature of jurisdiction exercised by the superior forum and the content or subject-matter of challenge laid or capable of being laid shall be determinative of the applicability of merger. The superior jurisdiction should be capable of reversing, modifying or affirming the order put in issue before it. Under Article 136 of the Constitution the Supreme Court may reverse, modify or affirm the judgment-decree or order appealed against while exercising its appellate jurisdiction and not while exercising the discretionary jurisdiction disposing of petition for special leave to appeal. The doctrine of merger can therefore be applied to the former and not to the latter.

iv) An order refusing special leave to appeal may be a non-speaking order or a speaking one. In either case it does not attract the doctrine of merger. An order refusing special leave to appeal does not stand substituted in place of the order under challenge. All that it means is that the Court was not inclined to exercise its discretion so as to allow the appeal being filed.

v) If the order refusing leave to appeal is a speaking order, i.e. gives reasons for refusing the grant of leave, then the order has two implications. Firstly, the statement of law contained in the order is a declaration of law by the Supreme Court within the meaning of Article 141 of the Constitution. Secondly, other than the declaration of law, whatever is

stated in the order are the findings recorded by the Supreme Court which would bind the parties thereto and also the court, tribunal or authority in any proceedings subsequent thereto by way of judicial discipline, the Supreme Court being the apex court of the country. But, this does not amount to saying that the order of the court, tribunal or authority below has stood merged in the order of the Supreme Court rejecting special leave petition or that the order of the Supreme Court is the only order binding as res judicata in subsequent proceedings between the parties.

(vi) Once leave to appeal has been granted and appellate jurisdiction of Supreme Court has been invoked the order passed in appeal would attract the doctrine of merger; the order may be of reversal, modification or merely affirmation.

(vii) On an appeal having been preferred or a petition seeking leave to appeal having been converted into an appeal before Supreme Court the jurisdiction of High Court to entertain a review petition is lost thereafter as provided by sub-rule (1) of Rule (1) of Order 47 of the C.P.C.

In view of the conclusions arrived by the Apex Court and by applying the principles to the present facts of the case, the judgment of the Supreme Court in Civil Appeal No.3632 of 2008 dated 23.09.2014 is the only effective decision of the Court to claim reliefs claimed in the petition and the judgment of the Trial Court in O.S.No.933 of 1981 and judgment of the High Court passed by the learned Single Judge in C.C.A.No.94 of 1989 dated 04.09.1992 and judgment of the Division Bench of this Court in

LPA No.3/1993, CCCA No.25 & 30 of 1998, W.P.No.16843/1992 and W.P. No.5404/1995, would merge in the judgment of the Supreme Court in Civil Appeal No.3632 of 2008 dated 23.09.2014. Therefore, the basis for the claims is decision or judgment of the Supreme Court. In view of the judgment of the Supreme Court in Civil Appeal No.3632 of 2008 dated 23.09.2014, the properties available for partition are Item Nos.1 to 8 of 'A' schedule and the amount deposited towards share of the plaintiff and other items properties shown in 'A' & 'B' schedule properties. Taking into consideration of the decrees passed by the Trial Court and High Court, the Supreme Court concluded that the property available for partition.

Even otherwise, the petition was filed for appointment of Advocate Commissioner to divide the property by metes & bounds as per good and bad qualities. Whether the property is readily available on ground or not is a question which needs no consideration at this stage. If, the Commissioner visits and found no such property available, then the Court can pass appropriate order. But, when part of the property is agricultural land, assessable to tax, the Advocate Commissioner cannot be appointed for division of the property in view of Section 54 of C.P.C.

Therefore, an Advocate Commissioner cannot be appointed for division of an agricultural land assessed to tax, but a direction is to be issued to the District Collector for division of agricultural land to partition the property by nominating any of his subordinate. But, appointment of Advocate Commissioner for division of the agricultural land which is assessed to tax is an illegality, in view of law declared by Apex Court in **Khemchand**

Shankar Choudhary v. Vishnu Hari Patil And Others²².

Therefore, the Trial Court is directed to follow the procedure contemplated under Section 54 C.P.C and appoint an Advocate Commissioner for division of the property other than agricultural land to divide by metes and bounds, as per good and bad quality, while following the procedure for decision of agricultural land prescribed by Section 54 of C.P.C. The order of the Trial Court is modified to the extent stated above.

Accordingly, the point is answered.

P O I N T N O . 3

I.A.No.305 of 2015 was filed for passing a final decree after deciding plaint schedule Plaint 'A', 'B' & 'C' Schedule properties in O.S.No.933 of 1981. At this stage, no order can be passed on I.A.No.305 of 2015, as passing of a final decree would arise only after dividing the property by metes and bounds, either by appointing an Advocate Commissioner for properties other than agricultural land which is assessed to revenue and by following the procedure under Section 54 C.P.C, addressing letter to the Collector to nominate any of his subordinate to divide the agricultural land assessed to tax. Therefore, passing an order at this stage in I.A.No.305 of 2015 is an illegality committed by the Court below. At best, the Court below, if, concludes that the petitioner is entitled for mesne profits or relief of accounting of the income from the properties by the Manager of a Hindu Coparcenary or a Joint Family or rendition of the income received by the Manager of the Hindu Family or a coparcenary and after receiving a report from the Commissioner appointed for division of

²² 1983 AIR 124

the property. But, at this stage, deciding an application and passing the impugned order is an error committed by the Court below and the same is liable to be set-aside. Accordingly, the order passed by the Court below in I.A.No.306 of 2015 is hereby set-aside while remanding the same to the Trial Court to pass appropriate order, after deciding I.A.No.304 of 2015. In case the Commissioner is appointed for ascertainment of mesne profits or income for rendition of the account of income received by the Manager of the Hindu Joint Family or coparcenary after receipt of report from the Commissioner, appointed by this Court in I.A.No.305 of 2015 and pass appropriate order in accordance with law.

Accordingly, the point is answered.

In view of my foregoing discussion, the order in I.A.No.305 of 2015 is modified, as indicated in Point No.2. The order passed by the Trial Court in I.A.No.304 of 2015 is set-aside while directing the Court below to restore the same to the original number in interlocutory application's register and decide afresh after affording reasonable opportunity, as per the directions of this Court in Point No.1. Further, the order in I.A.No.306 of 2015 is set-aside while directing the Trial Court to pass appropriate order after receipt of reports from the Commissioner appointed in I.A.No.305 of 2015 and receipt of report from the Commissioner appointed in I.A.No.304 of 2015, subject to decision on its remand.

With the above directions, all the civil revision petitions are disposed of.

Consequently, miscellaneous applications pending if any, shall also stand closed. No costs.

JUSTICE M. SATYANARAYANA MURTHY

Date: 02.05.2018

SP

