

NAFR

HIGH COURT OF CHHATTISGARH, BILASPUR

SA No. 5 of 2005

1. Tikaram S/o Late Ram Krishna Aghariya Aged About 45 Years R/o Village Chhote Saja Pali, Tahsil Saraipali, District Mahasamund, Chhattisgarh., District : Mahasamund, Chhattisgarh
2. Jagdish S/o Ram Krishna Aghariya Aged About 43 Years R/o Village Chhote Saja Pali, Tahsil Saraipali, District Mahasamund, Chhattisgarh., District : Mahasamund, Chhattisgarh
3. Bhanu S/o Ram Krishna Aghariya Aged About 41 Years R/o Village Chhote Saja Pali, Tahsil Saraipali, District Mahasamund, Chhattisgarh., District : Mahasamund, Chhattisgarh
4. Susheel Kumar S/o Ram Krishna Aghariya Aged About 36 Years R/o Village Chhote Saja Pali, Tahsil Saraipali, District Mahasamund, Chhattisgarh., District : Mahasamund, Chhattisgarh
5. Mohan Lal S/o Ram Krishna Aghariya Aged About 34 Years R/o Village Chhote Saja Pali, Tahsil Saraipali, District Mahasamund, Chhattisgarh., District : Mahasamund, Chhattisgarh
6. Smt. Sunita D/o Ram Krishna Aghariya Aged About 38 Years R/o Village Chhote Saja Pali, Tahsil Saraipali, District Mahasamund, Chhattisgarh., District : Mahasamund, Chhattisgarh
7. (Deleted) Smt. Satyawati (Died) As Per Honble Court Order Dated 18-11-2019 And 07-01-2020.

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Versus

1. Khageshwar S/o Paduman Singh Aghariya Aged About 61 Years Occupation- Agriculturist And Teacher, R/o Village Sajapali, Tahsil Saraipali, District Mahasamund, Chhattisgarh., District : Mahasamund, Chhattisgarh
2. Late Smt. Chandan Moti (Since Dead) Through :
 - 2 (A) Nilambar S/o Khageshwar Aghariya R/o Village Sajapali, Tahsil Saraipali, District Mahasamund, Chhattisgarh.
3. Smt. Budhi Goutnean (Dead) Through Lrs-
 - 3.1(i)Devkunwar D/o Late Pyarelal, Aged About 70 Years
 - 3.2(ii)Devmoti D/o Late Pyarelal Aged About 68 Years
 - 3.3(iii)Bhurendra Prasad S/o Late Pyarelal Aged About 65 Years
 - 3.4(iv)Neera D/o Late Pyarelal Aged About 62 Years
 - 3.5(v)Madna D/o Late Pyarelal Aged About 60 Years
 - 3.6 (vi) Ratna D/o Late Pyarelal Aged About 50 YearsAll R/o Rupo Pali, Block Basna, Post Basna, District Mahasamund (CG)
4. Jayantlal S/o Parmanand Aghariya Aged About 33 Years R/o Village Daldali, Tahsil Saraipali, District Mahasamund, Chhattisgarh., District : Mahasamund, Chhattisgarh

5. Subhash S/o Parmanand Aghariya Aged About 33 Years R/o Village Daldali, Tahsil Saraipali, District Mahasamund, Chhattisgarh., District : Mahasamund, Chhattisgarh
6. Himadri S/o Parmanand Aghariya Aged About 37 Years R/o Village Daldali, Tahsil Saraipali, District Mahasamund, Chhattisgarh., District : Mahasamund, Chhattisgarh
7. Parmanand S/o Bhagatram Aghariya Aged About 61 Years R/o Village Daldali, Tahsil Saraipali, District Mahasamund, Chhattisgarh., District : Mahasamund, Chhattisgarh
8. Purushottam (Died) S/o Damodar Aghariya Aged About 75 Years R/o Village Sajapali, Tahsil Saraipali, District Mahasamund, Chhattisgarh.
9. Gajendra (Died) S/o Damodar Aghariya Aged About 70 Years R/o Village Sajapali, Tahsil Saraipali, District Mahasamund, Chhattisgarh., District : Mahasamund, Chhattisgarh
10. State Of Chhattisgarh Through Collector Mahasamund, Chhattisgarh., District : Mahasamund, Chhattisgarh

---- Respondents

For Appellants/Defendants	:	Shri H.B. Agrawal, Senior Advocate with Shri Amit Tirkey, Advocate
For Respondents- Plaintiff	:	Shri H.S. Patel, Advocate

SB: Hon'ble Shri Justice Manindra Mohan Shrivastava

Judgment On Board

05/03/2020

1. This appeal is directed against the impugned judgment and decree dated 25.9.2004 passed by learned First Additional District Judge, Mahasamund (CG) in Civil Appeal No.29-A of 2003 whereby, the learned lower appellate, reversing the judgment and decree of the learned trial Court, has granted decree in favour of respondent-plaintiffs both, declaring plaintiffs' title as shareholder as also for partition, separate possession and mesne profit.
2. Respondent -plaintiff filed a suit for declaration, partition and separate possession on the pleading inter alia that the property in dispute, as described in Schedule A, B & C was joint family property which had

devolved upon Paduman, father of plaintiff No.1, defendant No.1 and husband of plaintiff No.2. According to the plaintiffs, the disputed property earlier belonged to their common ancestor Sadashiv who had as many as seven sons including Paduman. The pleading contained in the plaint were to the effect that under family partition, which were effected amongst the sons of Sadashiv, Paduman had succeeded to disputed property which remained undivided and Paduman having died, the plaintiffs and defendant No.1 being successor are entitled. According to them, the other two defendants namely Purshottam and Gajendra were cousins of the plaintiff and sons of Damodar. Damodar was cousin of Paduman. But they also did not have any title over disputed property and partition was required to be made amongst plaintiffs and defendant No.1. While defendant No. 2 & 3 did not seriously dispute the claim of the plaintiff, defendant No.1 resisted plaintiff's case by pleading that the property in dispute was given to this defendant- Ramkrishna for the purpose of maintenance of invalid son Radheshym and the plaintiff had no claim over the property in dispute. The disputed property did not belong to the plaintiffs nor they had any undivided share or interest in the said property and the plaintiffs' suit was liable to be dismissed.

3. Learned trial Court, based on the pleadings of the parties, framed as many as nine issues and held that, though, the property was ancestral and was received by Late Paduman Singh in partition, it also held that plaintiffs are not entitled to share, as claimed by them and suit was dismissed. Aggrieved by the judgment and decree, plaintiffs preferred appeal. Learned lower appellate Court, reversing judgment and decree passed by the trial Court, held that the property is not only ancestral, it was received by Paduman upon partition, the plaintiffs were also having share in the property and accordingly they are entitled to their claimed share and thus, a decree was granted. Even though, no specific prayer for grant of mesne profit was made by the plaintiffs in the suit, in the appeal, prayer for grant of mesne profit were also made which

was accepted by learned lower appellate Court and mesne profit were also granted.

4. Against the aforesaid judgment and decree, the defendant filed appeal before this Court. This appeal was admitted on following two substantial questions of law:

- “1. Whether the lower appellate Court was justified in affirming the finding recorded by the lower Court that the suit is within limitation ?

2. Whether the lower appellate Court erred in granting mesne profits with effect from 1991 ?”

5. On the first substantial question of law, learned counsel for the appellants would submit that the Court below have committed patent illegality in deciding the issue of limitation. His argument is that even according to the plaintiffs' allegation, the plaintiffs and defendant had longstanding dispute with regard to title and possession over the disputed property which, according to plaintiff's own pleading, started in the year 1975 and culminated in passing of an order by the SDM in proceeding under Section 145 Cr.P.C. on 16.12.1978, directing attachment of the property. The plaintiffs, therefore, ought to have filed suit within one year to set aside order of the SDM, but the plaintiffs did not make any such prayer but only of declaration, partition and possession which also ought to be filed within outer limit of three years. The Courts below illegally held that as the suit was for declaration that the property is joint family property and the plaintiff is entitled to partition and separate possession, he was required to file suit within specified period. Further submission is that according to plaintiffs, the cause of action had arisen in 1975, therefore, as pleaded by the plaintiffs, suit ought to be filed within a period of 3 years from the date cause of action had arisen.

On the second substantial question of law, it has been argued that in the present case, the plaintiffs neither pleaded nor sought any specific

relief for grant of mesne profit nor did pay any Court fee, as required under the Law. Therefore, the Court below was wholly unjustified in granting mesne profit to the plaintiff from 1991 on the finding that the defendant had obtained possession of the property in dispute in the year 1991.

6. Learned counsel for the respondent/plaintiff would argue that the plaintiffs' suit was not for setting aside the order passed by the SDM or that of the revisional Court which was passed later on 3.9.1980, but suit of the plaintiff was based on their claim of title in the disputed property being the joint owner along with the defendant No.1- Ramkrishna. He would submit that proceedings drawn under Section 145 CR.P.C. or the order passed therein were not required to be set aside because those proceedings only related to issue of possession and did not involve any issue of title. He would next submit that the plaintiff was required to file suit when ultimately the revisional Court vide order dated 3.9.1980 passed order setting aside the order passed by the SDM and directing the SDM to pass fresh order and ordering handing over the possession of the property to Supurddar. It was submitted that order passed by the authority on 3.9.1980 gave the plaintiffs fresh cause of action and therefore, the suit was filed seeking decree of declaration, partition and separate possession. He next submits that in the present case, the suit for declaration for partition and separate possession would be maintainable because the possession of the defendant is not adverse to the title of the plaintiff and the possession of the defendant, in the absence of any plea of ouster, cannot be said to be an adverse possession so as to require the plaintiff to file suit. Possession of the co-sharer or co-owner is constructive possession of the plaintiff as well. Therefore, the plaintiff, a co-sharer, could ask for appropriate declaration, partition and possession. As the proceedings initiated under Section 145 Cr.P.C. was culminated in passing of order by the revisional Court on 3.9.1980, the plaintiff filed suit on 17.12.1982.

On the second substantial question of law, learned counsel for the respondents-plaintiff would submit that relief of mesne profit is general relief which could always be granted by this Court while passing of decree in view of provision contained under Order 7 Rule 7 CPC and does not require to be specifically pleaded or even ask for as relief. His next submission is that in any case, the finding of learned lower appellate Court, granting mesne profit is not based on pleadings or the evidence of the plaintiff but on the basis of evidence of defendant themselves, wherein witnesses have stated regarding yearly production of agricultural produce and its value and on that basis, a reasonable amount has been fixed by the trial Court and mesne profit has been directed to be granted since 1991.

7. I have heard learned counsel for the parties and perused the records of the Courts below.
8. As far as the first substantial question of law is concerned, appellants contention cannot be accepted. The suit is for declaration, partition and separate possession. According to plaintiffs' pleading and as has come on the record, in view of evidence led by both the parties, a dispute had arisen between the parties in 1975 which culminated in passing of order of attachment of the property and handing over the same to third party in view of dispute between the parties. This order was passed by SDM on 16.12.1978. That order was taken in appeal in revision and finally in revision, Session Judge vide its order dated 3.9.1980 set aside that order and remitted the matter back to the authority for passing fresh order and direction that till inquiry is made, the disputed property shall remain in hands of *suprddar*. It was at this stage that the plaintiff filed suit on 17.12.1982. The plaintiff's possession, if any, over the property in dispute was not an adverse possession. There is neither specific pleading nor any evidence led to prove ouster of the plaintiffs who were shareholder of the property being successor in interest of Late Paduman. The defendant No.1 has not disputed that property earlier belonged to Paduman. According to

him, Paduman had given the disputed property to him under an arrangement. Defendants have failed to establish that the possession, if any, would be only that of co-owner and therefore, the plaintiffs cannot be non-suited on the ground that defendants have remained in adverse possession and perfected their title against co-sharer.

9. The dispute amongst brothers continued since 1975 which culminated in passing of an order by the revisional Court only on 3.9.1980 and within three years thereof, the suit was filed. Therefore, the first question of law is answered against the appellants and in favour of respondent- plaintiff that the finding of the Court below that suit was within limitation does not suffer from any illegality.
10. This takes me to the second substantial question of law. This Court find that plaintiffs had not sought any relief of mesne profit prior to filing of the suit on 9.12.1982. Not even that, the plaintiff did not quantify the mesne profit, if any, which according to him, was liable to be paid by defendant to plaintiffs, nor paid any Court fee for the same. It appears however, that learned lower appellate Court, while reversing judgment and decree of learned trial Court, proceeded to grant mesne profit to the plaintiff from the date prior to date of filing of suit i.e. 1991.
11. As far as the mesne profit of the past period prior to institution of suit is concerned, the plaintiffs is required to make specific prayer with regard to it and pay Court fee. This is so because that was continuous cause of action on the date the suit was filed. That having not been done, no mesne profit for the period prior to date of institution of suit could be granted. However, it is within the discretion of the Court to grant mesne profit from the date of passing of the judgment. For that purpose, appropriate order could be passed by the Court for making necessary inquiry and then passing of final decree with regard to mesne profit that would be payable by the defendant to the plaintiffs till the date of delivery of possession to the plaintiffs. Legal position in this regard was explained by the Supreme Court in the case of

Gopalakrishna Pillai and Ors. Vs. Meenakshi Ayal and Ors. (AIR 1967 SC 155) wherein, it was held :-

“7. Order 20, R. 12 enables the Court to pass a decree for both past and future mesne profits but there are important distinctions in the procedure for the enforcement of the two claims. With regard to past mesne profits, a plaintiff has an existing cause of action on the date of the institution of the suit. In view of O.7, R. 1 and 2 and O.7, R. 7 of the Code of Civil Procedure and S. 7(1) of the Court Fees Act, the plaintiff must plead this cause of action, specifically claim a decree for the past mesne profits, value the claim approximately and pay court fees thereon. With regard to future mesne profits, the plaintiff has no cause of action on the date of the institution of the suit, and it is not possible for him to plead this case of action or to value it or to pay court-fees thereon at the time of the institution of the suit. Moreover, he can obtain relief in respect of this future cause of action only in a suit to which the provisions of O.20, R. 12 apply. But in a suit to which the provisions of O.20, R. 12 apply, the Court has a discretionary power to pass a decree directing an enquiry into the future mesne profits, and the Court may grant this general relief, though it is not specifically asked for in the plaint, see *Basavayya v. Guruvayya*, ILR (1952) Mad 173 at p.177 :(AIR 1951 Mad 938 at p. 940) (FB). In *Fakharuddin Mahomed Ahsan, v. Official Trustee of Bengal* (1882) ILR 8 Cal 178 at p. 189 (PC), Sir R.P. Collier observed :

"The plaint has been already read in the

first case and their Lordships are of opinion that it is at all events open to the construction that the plaintiff intended to claim wasilat up to the time of delivery of possession, although, for the purpose of valuation only, so much was valued as was then due; but be that as it may, they are of opinion that, under S. 196 of Act VIII of 1859, it was in the power of the Court, if it thought fit, to make a decree which should give the plaintiff wasilat up to the date of obtaining possession."

Section 196 of Act VIII of 1859 empowered the Court in a suit for land or other property paying rent to pass a decree for mesne profits from the date of the suit until the date of delivery of possession to the decree-holder. The observations of the Privy Council suggest that in a suit to which S. 196 of Act VIII of 1859 applied, the Court had jurisdiction to pass a decree for mesne profits though there was no specific claim in the plaint for future mesne profits. The Court has the like power to pass a decree directing an enquiry into future mesne profits in a suit to which the provisions of O.20, R. 12 of the Code of Civil Procedure, 1908 apply. "

12. Therefore, as far as judgment and decree of learned lower appellate Court, to the extent it grants mesne profit for the period prior to institution of suit, is not proper and is therefore, set aside to that extent. However, considering that the Court below has held that the plaintiffs were entitled to partition in appropriate share in the property, it being a joint family property, definitely, the plaintiffs would be entitled to future mesne profit payable to them from the date of judgment till the date of delivery of possession. But for that purpose,

an enquiry is required to be made as provided under Order 20 Rule 12 CPC. The trial Court shall hold an enquiry with regard to future mesne profit payable to the plaintiffs from the date of judgment and decree till the date of delivery of possession. Thereafter, a final decree will be required to be passed by the learned trial Court which would include specific relief with regard to future mesne profit.

13. In the result, the appeal is partly allowed and judgment and decree passed by learned lower appellate Court is modified in the manner and to the extent stated here-in-above.
14. Let appellate decree be accordingly drawn in accordance with findings made here-in-above.
15. Case be sent back to learned trial Court for passing final decree after making due enquiry with regard to future mesne profit as directed by this Court.

Sd/-
(Manindra Mohan Shrivastava)
Judge