

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on	Delivered on
25.09.2020	16.10.2020

CORAM:

THE HONOURABLE MR.JUSTICE R.SUBRAMANIAN

C.R.P.No. 1279 of 2018
and
C.M.P.Nos. 6556 & 6557 of 2018

Ramasamy ... Petitioner/Appellant
-vs-

1.Vetrivelan
2.Kasinathan
3.Kuzhandaivel
4.Meenatchi Ammal
5.Senthil
6.Vijayalakshmi ... Respondents/Respondents

Prayer: Civil Revision Petition filed under Article 227 of the Constitution of India, against the order and decreetal order in I.A.No.260 of 2016 in A.S.No. 30 of 2016 dated 07.03.2018 on the file of the Principal District Judge, Cuddalore.

For Petitioner : Mr.V.Raghavachari

For Respondents: Mr.N.Suresh for R1 to R6
Mr.Y.T.Aravind Gosh, AGP

O R D E R

This revision raises an interesting question as to the Court fee payable in an appeal against an order determining the share of the income from the properties to be divided between the parties in a suit for partition.

2. The suit in O.S.No.493 of 1993 was filed by one Palaniandi and the respondents 1 and 2 herein. Since Palaniandi died after the suit, his legal representatives were brought on record and arrayed as respondents 3 to 6 herein. A preliminary decree came to be passed by the Trial Court on 26.10.1998. An appeal was taken there from to this Court in A.S.No.861 of 1998, which came to be disposed of on 22.09.2008. Thereafter, the

plaintiffs in the suit filed an application in I.A.No.172 of 2010 seeking determination of the income from the suit properties. The application came to be filed under Order 20 Rule 12 of C.P.C.

3. The learned Principal Sub-Ordinate Judge, Cuddalore by an order dated 12.01.2016 fixed the income from the suit properties, which resulted in a direction to the petitioner herein to pay a sum of Rs.1,00,19,890/- with subsequent interest at 6% per annum from the date of the suit till date of realization. Aggrieved by this fixation, the petitioner, who is the sole defendant in the suit preferred an appeal in A.S.No.30 of 2016 on the file of the Principal District Judge, Cuddalore. The appeal was valued under Section 37(2) of the Tamilnadu Court Fees and Suits Valuation Act and a fixed court fee of Rs.750/- was paid. The respondents herein filed I.A.No.260 of 2016 under Section 44 r/w 52 of the Tamilnadu Court Fees and Suits Valuation Act, directing the appellant to pay ad valorem court fee at the rate of 7.5% contending that an appeal against an order determining mesne profits ought to be valued under Section 44 of the Tamilnadu Court Fees and Suits Valuation Act and the Court fee payable is on the income ascertained by the Court. They would also rely upon the direction made in the order of the Trial Court requiring them to pay Court fee at 7.5% per annum.

4. This application was opposed by the petitioner herein contending that the order passed by the Trial court though on an application under Order 20 Rule 12 of C.P.C, is not an order ascertaining mesne profits. It is actually an order passed under Order 20 Rule 18 of C.P.C., where the court is empowered to determine the share of the income of the parties as per the preliminary decree. Therefore, according to the petitioner herein, the appeal is not against an order passed under Order 20 Rule 12 of C.P.C as Order 20 Rule 12 could be invoked only in cases where there is a decree for possession against a person, who is found to be in illegal occupation of the property.

5. It is the further contention of the petitioner herein that Section 44 of the Tamilnadu Court Fees and Suit Valuation Act will apply only in cases where a decree for mesne profits granted by the Court as against person who is in illegal possession and not against the sharer in suit for partition. On the above contentions, the petitioner herein claim that the court fee that has been paid is just and proper. The learned Principal District Judge, who heard the application concluded that since the appeal is against an order determining mesne profits under Order 20 Rule 12, it is Section 44 of the Court fee Act that would apply and therefore, the appellant ought to have valued the appeal and paid ad valorem court fee at 7.5% of the share of the income that was determined by the Trial Court.

It is the correctness of this order, which is questioned in this revision.

6. I have heard Mr.V.Raghavachari, learned counsel for the petitioner, Mr.N.Suresh, learned counsel for the contesting respondents. Since the matter involved in payment of Court fee, I had directed issuance of notice to the Additional Government Pleader (CS) and I have heard Mr.Y.T.Aravind Gosh, learned Additional Government Pleader (CS) also.

7. The application before the Trial Court namely, the application in I.A.No.172 of 2010 was filed under Order 20 Rule 12 of C.P.C. Order 20 Rule 12 of C.P.C reads as follows:-

"12. Decree for possession and mesne profits.- (1) Where a suit is for the recovery of possession of immovable property and for rent or mesne profits, the court may pass a decree-

(a) 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 direction an inquiry as to such rent;

(ba) for the mesne profits or directing an inquiry 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,

(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.

(3) Where an Appellate Court directs such an inquiry, it may direct the Court of first instance to make the inquiry, and in every case the Court of first instance may of its own accord, and shall whenever moved to do so by the decree holder inquire and pass the final

decree."

A very reading of the above provision would show that it will not apply to a suit for partition.

7. Subsection 12 of Section 2 of C.P.C defines the term mesne profits and it reads as follows:-

"(12) "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."

8. From the definition, it could be gathered that mesne profits is referable to those profits, which a person in "wrongful possession" received. As regards the partition action is concerned, the sharers are deemed to be in joint possession and possession of one of the sharers is on behalf of the others also. Therefore, it cannot be said that a sharer in possession of a joint property is in wrongful possession of the property. Therefore, a determination of the share of the income from the properties subject matter of a partition suit cannot be termed as determining mesne profits within the meaning of Order 20 Rule 12 of C.P.C. The nature of such determination is no longer res-integra. The nature and character of the proceeds from the estate subject matter of a suit for partition was subject matter of a several decisions of this Court as well as the other High Courts.

9. In Ramaswami Iyer Vs. Subramania Iyer reported in AIR 1923 Mad 147, a Hon'ble Division Bench of this Court had an occasion to consider the nature of the liability of a manager to account for profits subsequent to the suit. After referring to the judgment of the Privy council in Prithi Pal Vs. Jowahir singh reported in ILR 14 Cal 493, this Court had observed as follows:-

"8. As pointed out by their Lordships a member of a Hindu family suing for partition and for the profits on his share is really suing for an account of the profits received by the manager or the persons in possession so that the proceeds so received by the latter which are also divisible property, may be divided and his share therein also given to him. As stated by their Lordships at page 512, a sharer has a "clear right" to an account of the profits received by the person in possession of the whole, and to be awarded his share thereof, not as mesne profits received by a person in wrongful possession but as appurtenant to the plaintiff's right in his share of the lands." (Emphasis Supplied)

"10. I might also refer to the judgment of Abdul Rahim, J. and Oldfield, J. in A.S. No. 322 of 1919 explaining Ghulsam Bivi v. Ahamadsa Rowther (1919) I.L.R. 42 Mad. 296 and to the decision in Ramnath Choturam v. Goturam Radhakishan (1920) I.L.R. Bom. 179, and the other decisions referred to in the latter case in support of the following conclusions: (1) That Order 20 Rule 12, Code of Civil Procedure, relating to technical "mesne profits" does not apply to the claim of a plaintiff suing for partition of lands and the profits which are accruing on the lands which ultimately might fall to his share under the decree, (2) That unless a preliminary decree for partition refused or should be deemed to have refused to grant profits, the Court is not precluded from granting profits in its final decree."

10. The question relating to proper Court fee payable in a suit for partition and accounts was considered by this Court in Chandra Bhogi Vs. Guddappa Bhandary reported in 66 LW Page 348. After referring to various judgments cited at the bar, the Hon'ble Justice. Subba Rao as he then was had held as follows:

"6. From the aforesaid discussion of the case law the following principles emerge:

(1) The court fee payable for a relief of partition in a suit as well as in the appeal is only the fixed court fee payable under Article 17-B of Schedule II of the Court-fees Act.

(2) If the relief of accounting or any other relief is an inherent part of the main relief of partition and implied therein, it is not necessary to value that relief separately. The court fee paid on the relief for partition would cover the other relief also. In such a case if the relief claimed in an appeal is only that implied in the main relief for partition, the fixed court fee under Article 17-B of Schedule II will suffice.

(3) But if the relief for rendition of accounts relates to a different subject matter such as a relief for accounting against a manager of a Joint Hindu family on the ground of fraud or improper conduct, a separate court fee has to be paid both in the suit as well as in the appeal. In such cases the principle of the Full Bench decision in -- 'AIR 1938 Mad 435 (E)', will apply and 'ad valorem' court fee is payable in appeal on the amount decreed.

7. In the instant case, the appeals relate only to the sum of Rs. 21600 representing the share of the other members in the sale proceeds of the clay realised by the

appellants. That amount, therefore, only represents the value of the respondents' share in one of the assets of the family. Looking into the accounts by the Commissioner or the court for ascertaining the value of that asset is incidental to the relief of partition and is implied therein. I therefore hold that the appellants have correctly valued their relief in the appeals by paying the fixed fee of Rs. 100 under Article 17-B of Schedule II of the Court-fees Act."

11. A similar question as to the nature of the claim for accounting in the suit for partition was considered by a Hon'ble Full Bench of this Court in Basavayya Vs. Guruvayya reported in 1951 (2) MLJ 176. The essential question that was raised was as to whether the Court directed any enquiry into future profits in a partition suit where, the preliminary decree is silent. The main objection that was raised before the Hon'ble Full Bench was that since the preliminary decree passed in the suit did not direct an enquiry into the accounts and recovery of profits, the Court cannot direct enquiry and pass a final decree for such income. The correctness of the judgment of the Hon'ble Division Bench in Ghulusam Bibi Vs. Ahamadsa Rowther was considered by the Hon'ble full bench. While considering the question, the Hon'ble full bench had observed as follows:-

"3. It is necessary at the outset to distinguish between three different types of cases in which a question of profits or mesne profits might arise : (1) Suits for ejectment or recovery of possession of immoveable property from a person in possession without title, together with a claim for past or past & 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 & 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 defts. not being lawful, the plff. is entitled to recover "mesne profits" as defined in Section 2, Clause (12), Civ. P. C., such profits being really in the nature of damages. In the second case, the possession & receipt of profits by the deft, not being wrongful the plff's. remedy is to have an account of such profits making all just allowances in favour of the collecting tenant in common. In the third case, the plff. 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 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 plff. would, however, be in the position of a tenant-

in-common from the date of severance in status & his rights would have to be worked out on that basis."

12. The Hon'ble full bench also considered the scope of Order 20 Rule 12 and Order 20 Rule 18. It was observed that while Order 20 Rule 12 would apply to the first category of suits mentioned above, Order 20 Rule 18 would apply to the second and third categories of the suits. The Hon'ble full bench concluded that since the profits arising from the estate forming part of a partition suit, also form part of such estate are liable to be partitioned under the final decree. Even without a specific prayer in the plaint for an account of such profits and division there of the court can determine such profits and direct the sharer in possession to pay such share to the suing sharer, the Hon'ble Full Bench summarised its conclusion as follows:-

"13. We may now summarise our conclusions. A partition suit in which a preliminary decree has been passed is still a pending suit & the rights of the parties have to be adjusted as on the date of the final decree: *Jadunath v. Parameswar*, I.L.R. (1940) 1 Cal. 255. In such a suit the Court has not only to divide the common properties but has also to adjust the equities arising between the parties out of their relation to the common property the property to be divided. The preliminary decree determines the moieties of the respective parties & thereby furnishes the basis upon which the division of the property has to be made. There are other matters in addition to the moieties of the parties that have to be considered & decided before an equitable final partition can be effected. Among them are the realisation of common outstandings, the discharge of common liabilities, the distribution of the profits of the properties realised pending the suit, either in cash or by allotment of property of the requisite value, the grant of owelty, the provision of maintenance to parties entitled thereto, the allotment of lands on which improvements have been effected to the sharer who has improved them, the allotment of alienated lands to the share of the alienor & other similar matters. Even after the passing of the preliminary decree it is open to the Court to give appropriate directions regarding all or any of these matters either suo motu or on the application of the parties. Order 20, Rule 18, Civ. P. C. does not prohibit the Court from issuing such directions after the stage of a preliminary decree. It is open to the Court in order to prevent multiplicity of litigation & to do complete justice & effect an equal division of all the common assets & properties among the parties, to direct an enquiry into the profits received or realised by one

or some of them daring the pendency of the suit & to award the others their proper share of, such profits under 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, & in either case the result of the enquiry has to be incorporated in the final decree."

The above judgment of the Hon'ble full bench lays to rest the controversy regarding the nature of the determination of the share in the income of a suing sharer in a suit for partition. Hon'ble Justice. V. Ratnam as he then was in D.Nataraja Achari Vs. Balambal Ammal reported in 1979 (2) MLJ 234 considered the difference between the determination under Order 20 Rule 12 and Order 20 Rule 18 C.P.C. After referring to the judgment of the full bench in Basavayya Vs. Guruvayya, it was held that the determination of profits in a partition suit would fall under Order 20 Rule 18 of C.P.C and not under Order 20 Rule 12 of C.P.C. Having held so, the claim of the appellants that the Court cannot grant mesne profits beyond a period of three years from the date of the decree was rejected. While doing so, this Court observed as follows:-

6. The Full Bench also held that Order 20, 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 up to the date of the final decree what actually happens is the division of an integral portion of the hotch pot comprising of not only the property but also the income and accretions thereto up to 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. (Emphasis Supplied)

14. The same question was considered by Hon'ble Justice.M.Srinivasan as he then was in P.Ponnammal and others Vs. Kanakavalli Srinivasan and another reported in 1988 (2) LW 447. Here again, the Hon'ble judge referred to judgment of the

full bench in Basavayya's case to conclude as follows:-

"8. There is no substance in the contention of learned Counsel for the appellants that the application for the ascertainment of mesne profits is barred by limitation, or that it is not maintainable as there is no provision therefor in the preliminary decree. It is merely a misnomer to call it mesne profits. The decree holders seek to have an account of the income from the property under Order 20, Rule 18, C.P.C., and it is not an application under Order 20, Rule 12, C.P.C. The law is well settled that it is too late in the day to question the right of a co-sharer in a partition suit to apply for ascertainment of the income pertaining to his share after the passing of a preliminary decree for partition. It is not necessary to refer to any authority other than that of a Full Bench of this Court in Babburu Basavayya v. Babburu Guruvayya. The following propositions laid down by the Full Bench are apposite to a partition suit in which a preliminary decree has been passed: it is still a pending suit and the rights of the parties have to be adjusted as on the date of the final decree; *Judunath Ray v. Parameswar Mallik* (1960) I.L.R. 1 Cal. 255 (P.C.) In such a suit the court has not only to divide the common properties but has also to adjust the equities arising between the parties out of their relation to the common property, the property to be divided. The preliminary decree determines the moieties of the respective parties and thereby furnishes the basis upon which the division of the property has to be made. There are other matters in addition to the moieties of the parties that have to be considered and decided before an equitable final partition can be effected. Among them are the realisation of common outstandings, then discharge of common liabilities, the distribution of the profits of the properties realised pending the suit, either in cash or by allotment of property of the requisite value, the grant of owelty, the provisions of maintenance to parties entitled therein, the allotment of lands on which improvements have been effected, to the sharer who has improved them the allotment of alienated lands to the share of the alienor and other similar matters. Even after the passing of the preliminary decree it is open to the court to give appropriate directions regarding all or any of these matters either suo motu or on the application of the parties. Order 20, Rule 10, C.P.C. does not prohibit the court from issuing such directions after the stage of a preliminary decree. It is open to the court in order to prevent multiplicity of litigation and to do complete justice and effect an equal division

of all the common assets and properties among the parties, to direct an enquiry into the profits received or realised by one or some of them during the pendency of the suit and to award the others their proper share or such profits under 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 in either case the result of the enquiry has to be incorporated in the final decree.

9. There is no question of limitation as the proceedings have been pending and the income has to be ascertained with reference to a period commencing from the date of suit."

It could be seen that the Hon'ble Judge had in fact held that it will a misnomer to call profits ascertained in a suit for partition as mesne profits.

15. A Division Bench of the Karnataka High Court had also considered the similar question in Parvathi and another Vs. Venkatramana Prasad and Others reported in ILR 2003 KAR 2304. In fact, the Hon'ble Division Bench had considered the question of correct court fee that is to be paid in an appeal, challenging the determination of profits in a suit for partition. The Hon'ble Division Bench had referred to the judgment of the full bench of this Court in Basavayya Vs. Guruvayya reported in 1951 (2) MLJ 176 and the judgment of the Hon'ble Division Bench of this Court in Ramaswami Iyer Vs. Subramania Iyer reported in AIR 1923 Mad 147 to conclude as follows:

"18. The concept of 'mesne profits' is applicable to cases of wrongful possession and not partition. The right of a tenant-in-common or a co-owner to a share in the profits from a property in the enjoyment of another tenant-in-common, is not a right to mesne profits for wrongful possession, but a right appurtenant in his right to a share in the property. A suit for partition and accounts is governed by Order 20 Rule 18 CPC. Neither Section 42 (relating to suits for mesne profits) nor Order 20 Rule 12 (relating to suits for possession and mesne profits) relied on by the first respondent, is relevant to a suit for partition and accounts and share in profits. Section 35 of the Act governs suits for partition with or without the ancillary relief of accounts. In a final decree for partition, what is determined is the share of the plaintiff in the profits from the property as a result of rendering of account by the tenant-in-common in physical possession or management, and not mesne profits.

19. The learned Counsel for first respondent lastly contended that if there is a complete ouster of the plaintiff from possession and enjoyment, then it is possible to claim mesne profits. This contention is academic and need not retain us long. If really there was such ouster, then the main suit for partition will itself fall under Section 35(1) in which event the Court Fee had to be computed on the market value of plaintiff's share. But where the suit is valued under Section 35(2) as in this case, by contending that the plaintiff is in joint possession, there is no question of ouster and consequently no question of mesne profits.

20. Therefore, we hold that Section 42 of the Act is not applicable. We further hold that the relief relating to rendering account and payment of plaintiff's share in profits, is an ancillary relief for which no Separate Court Fee is payable. The Court fee payable under Section 49, on an appeal against a final decree determining profits from the date of suit till the date of delivery of possession, would be the same as the Court fee that was paid in the Court of first instance and it is not necessary to pay ad valorem Court fee on the amount determined as profits. In this case, the Court fee payable and paid in the Court of first instance was Rs. 200/-. Therefore, Court fee payable on the appeal will be Rs. 200.00."

16. The Kerala High Court has considered the similar question in Mariyumma Vs. Kunhambu Nair reported in 1967 KLT 1017 and Abu and Others Vs. Thithikutty Umma and others reported in 1968 KLJ 549. The Division Bench in Mariyumma Vs. Kunhambu Nair had after referring to the judgment of the full bench of this Court held as follows:-

"7. We are in respectful agreement with the dictum laid down by the Full Bench in Basavayya Vs. Guruvayya (AIR 1951 Mad. 938 FB) and also the aforesaid decisions of the Andhra Pradesh High Court. In a suit for partition, the court has not only to divide the common properties but also to adjust equities arising between the parties out of their relation to the common property sought to be divided. A sharer claiming partition has a clear right to an account of the profits received by the person in possession of the common property and to be awarded his share thereof not as mesne profits but as appurtenant to his right in his share of the lands. The profits accruing from the common properties forming the subject matter of the division during the pendency of the suit form part and parcel of the corpus itself and are as much

in the hotchpot as the lands themselves. It is not correct to regard the claim for profits put forward in a suit for partition by a sharer of joint family property or of co-ownership property as a claim for mesne profits falling under Order 20 Rule 12 of C.P.C. In our view, it is part of the legitimate function of a court passing a final decree in a suit for partition and effectuating a division of properties pursuant to a preliminary decree to make a division of the profits that have accrued from such properties pending the suit as such profits really form part of the corpus available for division."

17. In Abu and Others Vs. Thithikutty Umma and Others, a Single Judge of the Kerala High Court has reiterated the position that determination of shares in a suit for partition will not fall under Order 20 Rule 12 and therefore, separate Court fee need not be paid under Section 37 of the Court Fees and Suits Valuation Act, 1959 (Act of 1960, Kerala). Making a distinction between decree for profits in a suit for partition as determined under Order 20 Rule 18 and determination of mesne profits under Order 20 Rule 12, the learned Judge held that the profits ascertained under Order 20 Rule 18 being one of the incidents of the suit for partition, it becomes a component part of the decree and therefore, separate Court fee need not be paid while a challenge is made to such determination. This reasoning is essentially based on the law laid down by the full bench of this Court in Basavayya's case to the effect in a partition action, the profits determining under Order 20 Rule 18 also forms part of the shares and it cannot be called as mesne profits stricto sensu. Recently, in Dr. Rachel Zachariah Vs. Dr. M. P. Korah, the another Single Bench of the Kerala High Court reiterated the very same position of law after referring to the above two decisions of the Kerala High Court.

18. Mr. N. Suresh, learned counsel for the respondents would vehemently contend that de-hors the law laid down by the full bench when there is a determination of profits at the particular amount and the defendant seeks to avoid liability of that particular amount, he has to pay ad valorem court fee under Section 44 of the Tamilnadu Court Fees and Suits Valuation Act. Section 44 of the Tamilnadu Court Fees and Suits Valuation Act reads as follows:-

"44. Suits for mesne profits. - (1) In a suit for mesne profits or for immovable property and mesne profits, fee shall in respect of mesne profits be computed, where the amount is stated approximately and sued for, on such amount. If the profits ascertained to be due to the plaintiff are in excess of the profits as approximately estimated and sued for, no decree shall be passed until the difference between

the fee actually paid and the fee that would have been payable had the suit comprised the whole of the profits so ascertained is paid.

(2) Where a decree directs an enquiry as to the mesne profits which have accrued on the property, whether prior or subsequent to the institution of the suit, no final decree shall be passed till the difference between the fee actually paid and the fee which would have been payable had the suit comprised the whole of the profits accrued due till the date of such decree is paid.

(3) Where, for a period subsequent to the date of the decree or final decree, such decree or final decree directs payment of mesne profits at a specified rate, such decree or final decree shall not be executed until the fee computed on the amount claimed in execution has been paid."

Section 44 provides for payment of Court fee in a suit for possession and mesne profits. The definition of the term 'mesne profits' as found in the C.P.C., has been extracted above. It is referable only to wrongful possession. The Full bench of this Court in Basavayya's case clearly laid down that Order 20 Rule 12 will not apply to a partition suit and the determination of profits if any made in a partition suit is essentially under Order 20 Rule 18 and not Order 20 Rule 12.

19. Mr.N.Suresh would however draw my attention to the judgment of the five bench of this Court in Inre Dhanukodi Nayakkar and others reported in AIR 1938 Mad 435 wherein, the Hon'ble full bench considered the court fee payable in a suit for accounts falling under Section 7(iv)(f) of the Court Fees Act, 1870. The Hon'ble Full Bench held as follows:--

"The section gives great freedom to plaintiff-appellants, but we do not consider that it gives the same freedom to defendant-appellants. When a defendant-appellant appeals against a final decree he knows exactly the value of his relief. It follows that we consider that 56 Mad 705 was wrongly decided and therefore should not be followed."

20. I am afraid that the said decision may not be helpful in considering the question that crops up in this revision in as much as the full bench was concerned with a suit for accounts filed under Section 7(iv)(f) of the Court fees Act, 1817, which is equivalent to Section 35 of the present Act. Section 35 essentially deals with suits for accounts. The determination of profits in a partition suit has been held to be incidental to the relief of partition. Therefore, the said judgment cannot be taken as a precedent to determine the question arising in this

revision.

21. Mr.N.Suresh would also rely upon the judgment of the Hon'ble Justice. V. Ratnam as he then was in Thulasibai Ammal -Vs-Kanna Pandithar reported in 1981(2) MLJ 250, wherein, a challenge was made to direction to the petitioner to pay owelty in a suit for partition in order to equalize deficit in the value of the share allotted to the respondent. When the said direction was challenged by way of an appeal, it was held that since the petitioner is seeking to avoid his liability to pay owelty, ad valorem Court fee will have to be paid and the petitioner cannot take advantage of Article 17(b) to justify payment of fixed fee on the basis of the valuation in the plaint. In doing so, the judgment in Inre Dhanukodi Nayakkar referred to above was relied upon. I do not think, the said judgment can also be taken as a precedent in deciding the question of Court fee payable in a suit for partition where, the challenge is to the determination of profits. The very same learned Judge has in Nataraja Achari Vs. Balambal Ammal reported in 1979 2 MLJ 234 referred to Supra had noted the distinction between Order 20 Rule 12 and Order 20 Rule 18.

22. My attention is also drawn to the judgment of the Hon'ble Justice Ramprasad Rao as he then was in Karuppanna Gounder Vs. Sennimalai Gounder reported in 1977 1 MLJ 491. That was also a case where a decree for possession and mesne profits was challenged. Therefore, the learned judge concluded that the Court fee should be payable on the difference in mesne profits. That was a case to which Section 44 would automatically apply. From the above discussion, the following principles emerge:-

1) A suit for partition takes in itself a prayer for determination of the share of the income of the plaintiff in the properties and there need not be a separate prayer.

2) The income determined in a suit for partition forms part of the estate in which the plaintiff would be entitled to his or her share even in cases where the preliminary decree does not grant such share and directs determination of such income.

3) The determination of income in a suit for partition cannot be called as determination of mesne profits in the strict sense of the term as mesne profits contemplates wrongful possession.

4) Once it is held that the determination of income is not mesne profits Section 44 of the Tamilnadu Court Fees and Suits Valuation Act will not apply.

5) Once it is held that the income determined forms part of the estate while challenging the quantum, the appellant need not value it separately and pay Court fee on such valuation, since he is not seeking to avoid the liability but he is only questioning the quantum of liability.

23. I therefore, find that the learned Principal District

Judge was not right in concluding that the court fee should be paid under Section 44 of the Tamilnadu Court Fees and Suits Valuation Act. This civil revision petition is allowed, the order of the learned District Judge is set aside and I.A.No.260 of 2016 will stand dismissed. Consequently, connected miscellaneous petitions are closed. No costs.

Kkn

The learned Principal District Judge, Cuddalore is directed to dispose of the Appeal in AS.No.30 of 2016 within a period of four months from the date of resumption of physical hearing in the Courts at Cuddalore.

Jv

Sd/-

Assistant Registrar(CS III)

//True Copy//

Sub Assistant Registrar

To:-

The Principal District Judge,
Cuddalore.

+1cc to Mr.V.Raghavachari, Advocate, Sr.No.34461

C.R.P.No.1279 of 2018
and

C.M.P.Nos. 6556 & 6557 of 2018

rr ii (02/12/2020)

सत्यमेव जयते

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