IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 11.01.2021

CORAM:

THE HONOURABLE MR.JUSTICE G.K.ILANTHIRAIYAN

C.R.P.(N.P.D).No.3283 of 2015

R.Dhanraj ...Petitioner

Vs

1.Rajamani Ammal
2.Painthamizh Pavai
3.Rajendrachozhan
4.Pandian ...Respondents

Prayer: Civil Revision Petition filed under Article 227 of the Constitution of India to set aside the order dated 05.03.2015 passed in I.A.No.533 of 2012 in O.S.No.90 of 1984 on the file of the District Munsif of Jayankondam.

For Petitioner : Mr.S.Subbiah, Senior Counsel for Mr.P.Raja

For Respondents : Mr.A.Murugan

ORDER

The Civil Revision Petition is directed as against the fair and decretal order dated 05.03.2015 passed in I.A.No.533 of 2012 in O.S.No.90 of 1984 on the file of the District Munsif of Jayankondam, thereby dismissing the petition for determination of mesne profits.

2.Mr.S.Subbiah, learned Senior Counsel would submit that the petitioner filed the petition for determination of mesne profit as provided under Order 20 Rule 12 of CPC in terms of preliminary decree passed in O.S.No.116 of 1984 dated 18.01.1980. The same was dismissed for the reason that it should be filed within a period of three years from the date of passing of final decree as per the provisions under Order 20 Rule 12 (1) (iii) of CPC. He further submitted that the property had been taken possession by the petitioner on 16.07.2003 vide execution proceedings in E.P.No.174 of 2000. Therefore, the cause of action for filing the petition for determining the mesne profit arising on 16.07.2003. Therefore the petition for mesne profit is very well within the time as provided under Article 113 of the Limitation Act. In fact, if no application for mesne profit is filed and no decree for mesne profit, it can be granted and as such no question of limitation for determining the mesne profit. In support of his contention he relied upon the following Judgments

(1)In the case of ***Shub Karan Bubna Alias Shub Karan Vs. Sita Saran Bubna and others*** reported in ***(2009) 9 SCC 689***, (2) In the case of

Jayantilal Chimanlal Patel reported in ***(2017) 4 LW 55*** and (3) In the case of ***Ramasamy Vs. Vetrivelan and others*** reported in ***(2020) 6 CTC 529***.

3.He further submitted that in a petition for mesne profit, in a partition suit, can be determined only under Order 20 Rule 18 of CPC. Therefore the limitation could not be applicable for seeking mesne profit and the application for mesne profit is only in a pending suit. He further submitted that in a partition suit the preliminary decree is only to decide the path of the suit and any other application filed is only an application in a pending suit seeking further reliefs. Therefore, there is no limitation for filing any petition in a suit for partition.

4.Per contra, the learned counsel for the respondents submitted that the petition for determining the mesne profit is belated one and it was not filed in time as provided under Order 20 Rule 12. The suit is for recovery of immovable property and for the rent of mesne profit. Accordingly in the present suit, the final decree was passed on 29.03.1998 and the possession was handed over on 16.03.2003. Therefore from the date of passing of final decree, within a period of three years, the petitioner ought to have filed the petition for mesne profit. Admittedly the petitioner filed a petition for determining the mesne profit after a period of three years. In support of his contention he also relied on the case in ***A.Noorjahan and others Vs. Kabir and others*** reported in ***2013 (1) MWN (Civil) 161***. In the above cited Judgment, this Court has held that (1) when there is no prayer in the plaint, it is not open for the Court to provide direction for mesne profit. (2) mesne profit can be claimed even after the passing of preliminary decree but after the passing of final decree, there can be no claim for mesne profit. (3) mesne profits can be claimed only for three years from the date of passing of final decree and beyond that there can be no provision for ascertainment of mesne profits. Therefore, the trial Court has rightly dismissed the petition and the learned counsel for the respondent prayed for dismissal of the Civil Revision Petition.

5.Heard, Mr.S.Subbiah, learned Senior Counsel appearing for the petitioner and Mr.A.Murugan, learned counsel appearing for the respondents and also perused the materials available on record.

6.The petitioner is the plaintiff, he filed suit for partition and possession with mesne profit in O.S.No.116 of 1978. It was decreed on 18.01.1980 and the same was also confirmed by the Appellate Court. The final decree was passed on 29.03.1998. Accordingly, the petitioner filed execution petition in E.P.No.174 of 2000 and effected delivery of possession on 16.07.2003. Thereafter the petitioner filed a petition seeking mesne profit in respect of his share. A point for consideration is that whether the petitioner is entitled for mesne profit beyond the period of three years from taking delivery of possession.

7.It is reiterated that in the case of ***Shub Karan Bubna Alias Shub Karan Vs. Sita Saran Bubna and others*** reported in ***(2009) 9 SCC 689*** the Hon'ble Supreme Court of India has held as follows:-

> *"20.On the other hand, in a partition suit the preliminary decrees only decide a part of the suit and therefore an application for passing a final decree is only an application in a pending suit, seeking further progress. In partition suits, there can be a preliminary decree followed by a final decree, or there can be a decree which is a combination of preliminary decree and final decree or there can be merely a single decree with certain further steps to be taken by the court. In fact, several applications for final decree are permissible in a partition suit. A decree in a partition suit enures to the benefit of all the co-owners and therefore, it is sometimes said that there is*

really no judgment-debtor in a partition decree."

In the above cited Judgment, the Hon'ble Supreme Court of India has held that in a case of partition, preliminary decree is only the part of the suit and subsequent applications are filed in pending suit, seeking further reliefs. Thus the application for final decree as and when made, is considered to be made in a pending suit.

8.In the case of ***Jayantilal Chimanlal Patel*** reported in ***(2017) 4 LW 55,*** relevant portion is extracted hereunder:

> *"4.In our opinion a preliminary decree for partition crystallizes the rights of parties for seeking partition to the extent declared, the equities remain to be worked out in final decree proceedings. Till partition is carried out and final decree is passed, there is no question of any limitation running against right to claim partition as per preliminary decree. Even when application is filed seeking appointment of Commissioner, no limitation is prescribed for this purpose, as such, it would not be barred by limitation, lis continues till preliminary decree culminates in to final decree.*
>
> ....
>
> ....
>
> *7.Similar is the view adopted by a Single judge of*

the High Court of Kerala in Laxmi & Ors. Vs. A.Sankappa Alwa & Ors. [AIR 1989 Kerala 289] the logic given by the High Court of Kerala that the preliminary decree does not completely dispose of the suit. The suit continues till the final decree is passed. Suit is pending till the passing of the final decree. There is no necessity of filing an application to apply for the final decree proceedings by litigants, then there is an obligation on the court for drawing up a final decree. The court had held thus:

"15.I turn to consider the question of obligation of the Court and the parties after a preliminary decree is gi en in a partition suit. I do not propose to discuss that matter elaborately. In my view a preliminary decree conclusively determines the rights and liabilities of the parties with regard to all or some of the matters in controversy in the suit although it does not completely dispose of the suit. Further proceedings await the suit to work out and adjust the rights of the parties. The Court cannot dismiss a suit for default when once a preliminary decree is passed in a partition suit. The parties to the suit have acquired rights or incurred liabilities under the decree. They are final, unless or until the decree is varied or set aside. The law being so, if the plaintiff does not take any steps after a preliminary decree is passed, the Court should adjourn the

proceedings sine die with liberty to the parties concerned to end the torpor and suspended animation of the suit by activising it by taking appropriate proceedings. In Thomas v. Bhavani Amma, 1969 Ker LT 729, Krishna Iyer, J. observed:

> *"It is correct law that in a suit for partition, after the passing of a preliminary decree it is the duty of the Court to pass a final decree and what is called an application for final decree is but a reminder to the Court of its duty. If so, it is the Court's duty to give notice to the parties."*
>
> *19.No rule provides for the filing of an application by the party for passing a final decree. The preliminary decree will not dispose of the suit. The suit continues. The position being so, it is more appropriate for the Court to adjourn the case sine die. It is difficult for me to say that there is an obligation on the part of the Court to "pass the final decree after necessary enquiries" as observed by Paripoornam, J. in 1985 Ker LT 940 (Sreedevi Amma v. Nani Amma).*
>
> *20.I am of the opinion that an application for drawing up a final decree in a partition suit is in*

no way an application contemplated under the Limitation Act. It is a reminder to the Court that something which the Court is obliged to do has not been done and so, such an application, is not governed by any provision of the Limitation Act. When once the rights of the parties have been finally determined in a preliminary decree, an application by a party thereto or the legal representatives, for effecting the actual partition in accordance with the directions contained in the preliminary decree can never be construed to be an application within the meaning of the Limitation Act. It shall be taken to be an application in a pending suit and therefore the question of limitation does not arise."

In the above matter, the Hon'ble Supreme Court has held that an application for final decree in a partition suit is anyway an application contemplated under the Limitation Act. It is a reminder to the Court that something which the Court is obliged to do has not been done and so, such an application, is not governed by any provision of the Limitation Act.

9.The learned Senior Counsel also cited the Judgment in the case of ***Ramasamy Vs. Vetrivelan and others*** reported in ***(2020) 6 CTC 529***. Relevant paragraphs are extracted here:-

> *"12. 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 C.R.P.No. 1279 of 2018 C.M.P.Nos. 6556 & 6557 of 2018 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.”*

13. 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 oat 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 Order20 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)"*

10.This Court after referring several Judgments held that the determination of mesne profit in a partition suit will fall under Order 20 Rule 18 of CPC. A claim for mesne profit under Order 20 Rule 12 of CPC has no application to the suit for partition. That being the position, the question of applicability of provision under Order 20 Rule 12 does not arise. Claiming of mesne profit would fall under Order 20 Rule 18 of CPC. Therefore period of limitation would not applicable for seeking mesne profit and it would be given for more than three years from the date of decree. It is not hold good. Therefore, the fair and decretal order passed by the Court below is perverse, illegal and liable to be set aside. Accordingly, the I.A.No.533 of 2012 in O.S.No.90 of 1984 on the file of the District Munsif of Jayankondam, dated 05.03.2015 is set aside and the Civil Revision Petition is allowed. No costs.

11.01.2021

Index:Yes/No
Internet: Yes/No
Speaking Order: Yes/No
Jer

To
The District Munsif, Jayankondam.

G.K.ILANTHIRAIYAN.J,

Jer

C.R.P.(N.P.D).No.3283 of 2015

11.01.2021