

PanikkaThe Kutti Pennu Maruvalamma's son Raghava Mannadiar Vs. PanikkaThe Kutti Pennu Maruvalamma's son theyyunni Mannadiar

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Court : Chennai

Decided On : Mar-27-1946

Reported in : AIR1947Mad106; (1946)2MLJ117

Appellant : PanikkaThe Kutti Pennu Maruvalamma's son Raghava Mannadiar

Respondent : PanikkaThe Kutti Pennu Maruvalamma's son theyyunni Mannadiar

Judgement :

Somayya, J.

1. The plaintiff-appellant filed a suit for partition and recovery of a half share in the property. The prayer in the plaint runs thus:

(a) Directing that the properties mentioned in the sub-joined schedule be divided into two equal shares and the properties allotted to one of such sharers be given to the possession of the plaintiff and that the properties belonging to the first defendant's share be made a charge for the Court costs and other amounts due to the plaintiff by the first defendant;

(b) Directing the first defendant to pay the plaintiff's costs of this suit with interest; and

(c) Granting other reliefs which the plaintiff may pray for in the course of this suit and which the Court might deem fit to allow.

2. The preliminary decree declared (1) that the properties available for partition are items 1 to 16 and the jenm right only over item 17 of the plaint schedule; (2) that they are to be divided into two equal shares, the plaintiff getting one share and the first defendant getting the other share. Paragraph (3) dealt with the liabilities. The other paragraphs dealt with outstandings. After the Commissioner prepared a scheme of division, the plaintiff-appellant asked for an account of the profits subsequent to the date of the plaint. In paragraph 9 of the affidavit filed in support of the petition it was stated thus:

As defendants 1 and a are thus holding possession of the properties in the schedule to the decree and enjoying the profit, the plaintiff is entitled to get towards his share 350 paras of paddy per annum with interest 2 per cent from the date of plaint to the date of his getting actual possession of his half share, and accordingly having ascertained the amount, the same may be directed to be paid by the first defendant or if necessary by the second defendant.

One of the objections was that there was no specific prayer in the plaint for profits from the date of suit and the other was that the preliminary decree did not deal with the question of profits and did not contain a direction that the defendants should be liable for profits. The trial Court refused relief on two grounds : firstly that the plaint did not ask for mesne profits subsequent to the date of suit and secondly that as the

preliminary decree did not contain any direction about the profits subsequent to the date of suit, the plaintiff was not entitled to ask for it at the stage of the final decree. In support of this proposition, the decision of this Court in *Ghulusam Bivi v. Ahamadsa Rowther* I.L.R.(1918)Mad. 296, was relied upon. On appeal the Subordinate Judge followed the decision in *Ghulusam Bivi v. Ahamadsa Rowther* I.L.R.(1918)Mad. 296, and confirmed the decision of the trial Court. The Subordinate Judge says that the decision in *Ghulusam Bivi v. Ahamadsa Rowther* I.L.R.(1918)Mad. 296 was confirmed in a later decision in *Bapa Laksh-mamma v. Koteswara Rao* 1931 M.W.N. 846 and that it was again referred to with approval in *Subbiah v. Kotamma* : AIR1945Mad222 . When his attention was drawn to a decision of this Court in *Rama-swami Aiyar v. Subramania Aiyar* : (1922)43MLJ406 the Subordinate Judge says this:

The decision in *Ramaswami Aiyar v. Subramania Aiyar* : (1922)43MLJ406 , does not really seem to be an authority for the opposite position in any direct way. That case if at all can apply to the present one only by an extension of the principles actually laid down therein. I do not think that in the light of the direct authorities on the question it would be proper to apply the case in *Ramaswami v. Stibramania Iyer* : (1922)43MLJ406 as laying down a contrary proposition.

In *Ghulusam Bivi v. Ahamadsa Rowther* I.L.R. (1918) Mad. 296 the suit was one for partition and the preliminary decree did not contain any direction as to the profits subsequent to the date of suit. At the stage of the final decree a request was made for enquiry on that matter. The learned Judges referred to two provisions of the Code, Order 20, Rule 12 and 18. They first referred to Order 20, Rule 12 which applies to a bare suit for possession. It was pointed out that if the decree for possession did not contain a direction for an enquiry into mesne profits an application under Order 20, Rule 12 cannot be filed after the decree. Then the learned Judges refer to Order 20, Rule 18 which deals with preliminary decrees in partition suits and they applied the principle of Order 20, Rule 12 to a case of partition decree under Order 20, Rule 18. That no doubt is an authority for the position that if the preliminary decree does not contain a direction for enquiry into subsequent profits, it should not be gone into at the stage of the final decree.

3. But this case has never been followed by this Court on the question of profits subsequent to the date of suit in partition actions. The Subordinate Judge has not correctly read the later decisions which he says follow the decision in *Ghulusam Bivi v. Ahamadsa Rowther* I.L.R.(1918)Mad. 296. The first of the decisions referred to by the Subordinate Judge as confirming the principle contained in *Ghulusam Bivi v. Ahamadsa Rowther* I.L.R. (1918)Mad. 296 is *Bapa Lakshmamma v. Koteswara Rao* 1931 M.W.N. 846. In that case there was a preliminary decree for partition which did not contain any direction for subsequent profits. At the stage of the final decree, the question was mooted and the final decree directed an enquiry into mesne profits under Order 20, Rule 12. Then an application under Order 20, Rule 12 was filed. At that stage objection was taken that no enquiry into subsequent profits could be directed. Reliance was placed on the decision in *Ghulusam Bivi v. Ahamadsa Rowther* I.L.R. (1918)Mad. 296 and *Cornish, J.*, while referring to it held that whether the final decree in the case before him was right or wrong, it was binding on both parties as it had been allowed to become final and that therefore the direction as to an enquiry under Order 20, Rule 12 was not open to question. Referring to the decision in *Ghulusam Bivi v. Ahamadsa Rowther* I.L.R.(1918)Mad. 296 the learned Judge said this:

That principle is not disputed by Mr. Raghava Rao, who appears for the petitioner, but he contends that though the inclusion of mesne profits in a final decree is erroneous as a matter of procedure still the decree having become final and the judgment-debtor having taken no steps to vacate it or revise it, it is not open to any one to go behind that decree in execution. I think that this contention is right. It is not open to an executing Court, if on the face of the decree there is no want of jurisdiction, to question the decree.

Rightly or wrongly the position was conceded by the advocate and it cannot possibly be stated that the principle of *Ghulusam Bivi v. Ahamadsa Rowther* I.L.R.(1918)Mad. 296, was affirmed by *Cornish, J.* When it is not necessary to deal with the correctness of an earlier decision and the case could be disposed of on another point, judges are not anxious to deal with the correctness of the earlier decision particularly as the learned

advocate who appeared for the decree-holder conceded the correctness of the decision in Ghulusam Bivi v. Ahamadsa Rowther I.L.R.(1918)Mad. 296 and proceeded to distinguish the case before him on the ground that' the final decree had become final. Nor are advocates anxious to question the correctness of earlier decisions when it is not necessary to do so.

4. The next case relied on by the Subordinate Judge is Subbiah v. Kotamma : AIR1945Mad222 . That was a suit for possession pure and simple. The decree for possession did not contain a direction for an enquiry under Order 20, Rule 12. Subsequently an application was filed asking for the determination of future mesne profits. The trial Court dismissed the application but on appeal the Subordinate Judge held that the application under Order 20, Rule 12 was maintainable. The matter was brought before King, J., and the learned Judge held that as the decree for possession did not contain a direction for an enquiry under Order 20, Rule 12, it was not open to order such an enquiry at a later stage. The suit comes to an end with the decree and there can be no further application for such an enquiry. Reference was made before the learned Judge to the decision in Ghulusam Bivi v. Ahamadsa Rowther I.L.R. (1918)Mad. 296 and referring to it the learned Judge says this:

That ruling deals primarily with a preliminary decree and a final decree in a partition suit but in order to analyse the significance of an order under Rule 18 of Order 20, Rule 12 is also referred to by the learned Judges; and it is held that unless the decree in a suit for possession directs an enquiry, there can be no such enquiry ordered in any final decree.

A decision of Varadachariar, J., which seemed to lay down a contrary proposition was then discussed and King, J., held that he would prefer to follow the decision in Ghulusam Bivi v. Ahamadsa Rowther I.L.R. (1918)Mad. 296 on this point. If the decision in Subbiah v. Kotamma : AIR1945Mad222 had only been scrutinised, the appellate Court would have seen that King, J., followed the decision in Ghulusam Bivi v. Ahamadsa Rowther I.L.R.(1918)Mad. 296 only so far as it laid down that in a bare suit for possession where the decree did not contain a direction for an enquiry under Order 20, Rule 12, no later application under that rule can be made.

5. It is rather unfortunate that the Subordinate Judge did not deal with the other decisions of this Court which have taken a view contrary to the decision in Ghulusam Bivi v. Ahamadsa Rowther I.L.R.(1918)Mad. 296. The first of these decisions is Ramaswami Aiyar v. Subramania Aiyar : (1922)43MLJ406 . to which reference has been made by the Subordinate Judge. In that case there was a suit for partition and a preliminary decree was passed. It did not contain any direction as to the enquiry into subsequent profits. At the stage of the final decree, the question was brought up. It was first dealt with by Sadasiva Aiyar and Napier, JJ. and that judgment is reported in Ramaswami Aiyar v. Subramania Aiyar : (1922)43MLJ406 . There the learned Judges dealt with the argument that as the preliminary decree did not contain a direction for an enquiry regarding profits, the Court was not competent to entertain that claim at the stage of the final decree. The question was considered at length from various aspects and it was held that it was competent for a Court to entertain the claim at the stage of the final decree even though the preliminary decree did not contain such a direction. A finding was then called for as regards the quantum and on other questions. When the matter came up after the findings were returned by the lower Court, it was dealt with by Oldfield and Venkatasubba Rao, JJ., and this is reported in Ramaswami Aiyar v. Subramania Aiyar : (1922)43MLJ406 . What is relevant to this purpose is not what is reported in Ramaswami Aiyar v. Subramania Aiyar : (1922)43MLJ406 . but the earlier judgment which is reported in Ramaswami Aiyar v. Subramania Aiyar⁴. In Ramaswami Aiyar v. Subramania Aiyar : (1922)43MLJ406 . the question was whether interest could be claimed in respect of the profits and the learned Judges held that the plaintiff was not entitled to interest. The Subordinate Judge says that a view contrary to Ghulusam Bivi v. Ahamadsa Rowther I.L.R. (1918)Mad. 296 could be deduced from the decision in Ramaswami Aiyar v. Subramania Aiyar : (1922)43MLJ406 only by way of extension of the principle laid down in that case. It is very unfortunate that the subordinate Judge's attention was not drawn to the earlier decision in Ramaswami Aiyar v. Subramania Aiyar : (1922)43MLJ406 .

6. In Swaminatha Odayar v. Gopaldaswami Odayar : (1938)2MLJ704 this question was dealt with at length by Venkatasubba Rao and Venkataramana Rao, Jf. At page 726, the learned Judges say this:

It is then contended that the final decree for mesne profits, not having been preceded by any preliminary decree relating to them, is incompetent. This contention is in our opinion untenable.

Then they discussed the question at great length and referred to the decision in Ramaswami Aiyar v. Subramania Aiyar : (1922)43MLJ406 and the other decisions. At page 728 they proceeded to say this:

It is then contended, the preliminary decree of 1924 being silent on the question of mesne profits, the Court was precluded at a later stage from going into it. That such a contention cannot prevail, has been held in several decisions, with which we agree.

Reference was made to Ramaswami Aiyar v. Subramania Aiyar : (1922)43MLJ406 , Ramanathan Chetti v. Alagappa Chetti 1929) 59 M.L.J. 102: I.L.R. 53 Mad. 378. It was pointed out that as observed by Sadasiva Aiyar, J., in Ramaswami Aiyar v. Subramania Aiyar : (1922)43MLJ406 , in all adjudications which are not intended to be final, there is, and ought always to be, an implied reservation of leave to all parties, to apply for further directions, necessary for a complete disposal of the litigation. Then they referred to the decision of the Judicial Committee in Maulvi Abdul Majid v. Muhammad Abdul Aziz I.L.R. (1896)All. 155 : L.R. 24 IndAp 22 ., where it was held that the decision on the question of title was the primary question and the question of accounting was incidental to it and that it was for the obvious advantage of all the parties that the question of title must first be decided and embodied in a preliminary decree and the second in a later stage of the proceedings.

7. As pointed out by Sadasiva Aiyar, J., in Ramaswami Aiyar v. Subramania Aiyar : (1922)43MLJ406

Every 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.

When the plaintiff asked for establishment of his right to a share in the lands, what is appurtenant to it, namely, a right to account need not be separately asked and hence there is no substance in the complaint that the plaintiff did not ask for it. As regards Ghulusam Bivi v. Ahamadsa Rowther I.L.R.(1918)Mad. 296 it is unfortunate that the attention of the Subordinate Judge was apparently not drawn to the decisions in Ramaswami Aiyar v. Subramania Aiyar : (1922)43MLJ406 and Swaminatha Odayar v. Gopaldaswami Odayar³. There is also a duty on the part of the judiciary to keep themselves informed of the current decisions of at least this High Court.

8. The result is that the parties are put to heavy expense and trouble to obtain, a proper decision on a point which as stated by Venkatasubba Rao, J., and Venkataramana Rao, J., in Swaminatha Odayar v. Gopaldaswami Odayar : (1938)2MLJ704 is well-settled.

9. I reverse the decree of the two lower Courts and direct an enquiry by the trial Court into the amount of profits payable to the plaintiff for his half share from the date of suit. The Court-fee paid on the memorandum of second appeal in this Court and on the memorandum of appeal in the lower appellate Court will be refunded. The appellant will have his costs in all the Courts up to date. Further costs will be provided for in the decree of the trial Court.

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