

**Vasu Vs. Viswanathan**

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**Court :** Chennai

**Decided On :** Mar-25-1943

**Reported in :** AIR1943Mad721; (1943)2MLJ303

**Appellant :** Vasu

**Respondent :** Viswanathan

**Judgement :**

**Krishnaswami Ayyangar, J.**

1. This is an appeal from the final decree passed by the Subordinate Judge of South Malabar, Palghat, in O.S. No. 21 of 1938 on the file of his Court. That was a suit for partition of the family properties instituted by the respondent against his brother, the appellant. On 26th December, 1939, the Subordinate Judge passed a preliminary decree declaring the respondent to be entitled to one half of the properties referred to in paragraph I of the decree. He also declared that the respondent ' is entitled to mesne profits from the date of the registered notice, namely, 19th December, 1937.' The decree also contains the usual direction for the appointment of a Commissioner for effecting a partition by metes and bounds and for the ascertainment of the mesne profits as from the date mentioned. Against that decree the defendant appealed to this Court in A.S. No. 35 of 1940 but it ended in its being dismissed by this Court.

2. A Commissioner was appointed in pursuance of the preliminary decree and he submitted two reports to the Court. The first report was submitted on 5th August, 1940. In this report the Commissioner submitted a scheme for the division of the immovable properties which formed the subject-matter of the litigation. It is to be mentioned that the family owned immovable properties situate not only within the territorial jurisdiction of the Court below but also other properties in Cochin territory over which the Court had no jurisdiction. As regards the movables the Commissioner stated as follows:

The movables shown by the defendant in his written statement are said to be in his possession except the seed grains and stock of paddy shown as in hand, which he says, have been utilized for his cultivation this year. Except these latter, he is prepared to hand over to the plaintiff his share of the remainder when the plaintiff takes delivery of properties. The plaintiff agrees to the arrangement as he has at present no place whereto he can take the cattle.

3. The second report of the Commissioner was submitted on 11th October, 1940. The Commissioner suggested the mode of division of the movable properties between the parties and he also fixed the share of the mesne profits to which the respondent was in his opinion entitled from the appellant. In arriving at the amount of mesne profits divisible between the parties, the Commissioner took an account of the profits derived not only from the properties in British India but also from the properties situate in the Cochin state. He found that the plaintiff was entitled to a sum of Rs. 989-14-4 for the mesne profits of the properties in British India and a sum of Rs. 935-14-1 for the profits for the properties in Cochin. The profits so ascertained related to the income derived by the appellant for a period of three years from 19th December, 1937. After the report was submitted, the suit was adjourned to 17th October, 1940, and on that day the Judge being absent on casual leave, it was posted to 1st November, 1940. On 28th October, 1940, the appellant filed his objections to the report of the Commissioner. On the 1st November, the suit was heard and judgment was reserved. The final decree was passed on 5th November. By that decree the Court accepted the Commissioner's report that the plaintiff was entitled for his share of the mesne profits to a sum of Rs. 1,925-12-5. The Court also accepted the Commissioner's report regarding the

division of the movable properties. It is from this decree that the present appeal has been filed.

4. On behalf of the appellant, Dr. John raised two contentions : (1) that the learned Judge acted irregularly in not having dealt with the objections which the appellant had preferred against the report of the Commissioner, more especially with reference to the scheme of division recommended by him as regards the movables and (ii) that the learned Judge had no jurisdiction whatever to grant a decree to the respondent in respect of the mesne profits of the properties situate in Cochin. As regards the movables Dr. John contended that the Commissioner had arrived at his decision without taking evidence and without realising that the seed grains and stock of paddy admitted by the appellant in his written statement had been utilised by him long before the Commissioner held his inquiry and without realizing that some of the cattle mentioned in the written statement had since died. The Commissioner has, however, stated in his report to which we have already referred that the appellant was prepared to hand over to the respondent his share of the movables except the seed grains and the stock of paddy which he admitted to be in his possession at the time when he filed the written statement. It seems to me that it is no defence to say that the seed grains and the stock of paddy in which the plaintiff was entitled to a share had since been utilised by the defendant. If that be so he is undoubtedly accountable for the share of the plaintiff in these properties. As regards the cattle which are said to have died, it is for the appellant to place evidence before the Commissioner to show that the cattle died in circumstances in which he should not be held accountable for their value. No such evidence was placed before the Commissioner but it is contended that the appellant was not given sufficient opportunity to place the material he had before the Commissioner.

5. When the matter came before the learned Judge the appellant appears to have appeared in person without the assistance of a pleader. It is true that he filed a petition asking the Court to consider the objections filed by him on 28th October, 1940, but I find that the learned Judge has 'recorded' that petition by which I understand that the learned Judge expressed his willingness to consider it. At the hearing the appellant examined no witnesses and produced no other material

before the learned Judge for the purpose of persuading him to reject the Commissioner's report. In those circumstances the learned Judge had no other alternative but to confirm the report which he did and followed it up by passing the final decree. It seems to me in these circumstances that there is no reason for finding fault with the judgment of the learned Subordinate Judge in so far as it dealt with the movables.

6. As regards the mesne profits of the Cochin properties, Dr. John has vehemently argued that in the circumstances of this case the learned Subordinate Judge had no jurisdiction whatever to pass the decree which he has passed. With many of the facts on which he relies I am inclined to agree. The plaint does not ask for a division of the immovable properties in question nor can we see anything in it to suggest that the plaintiff was claiming a share in the mesne profits which the appellant had derived from the properties in Cochin. We have been referred by the respondent's learned advocate to paragraphs 6, 7 and 11 of the plaint as containing such a claim but so far as I have been able to understand these paragraphs, I find nothing in them to support the contention. The preliminary decree is no doubt quite general in its terms in that it merely states that the plaintiff is entitled to mesne profits from the date of the registered notice, namely, 19th December, 1937. It does not mention to what properties the mesne profits relate but we must read the preliminary decree in the light afforded by the allegations in the plaint. When these are considered there can be no doubt that what was intended by the preliminary decree was that the plaintiff is entitled to the mesne profits of the British Indian properties and not of the Cochin properties. Such being the nature of the preliminary decree, the Commissioner had no jurisdiction to hold an inquiry or to determine the mesne profits of the Cochin properties. Indeed it appears from his report that he was fully alive to the limitations under which he laboured. He states in paragraph 7 of his report that the Cochin lands were not covered by the decree and then goes on to state ' but their income is received and attempted to be accounted for.' The statement rather suggests that the appellant took upon himself the responsibility of rendering an account of the mesne profits not only of the British Indian properties but also of the Cochin properties as well. In fact there is some ground for thinking that so far as the movables and the mesne profits are concerned, both the parties were under the impression however wrong

it was, that the Court below could make a division of the same between the parties. For instance, in the 11st of movable properties given by the appellant in his written statement he includes buffaloes used for levelling the fields situate in Cochin state as one of the items belonging to the joint family but in his possession. It is not necessary to pursue this point because we agree with the contention that the preliminary decree declares and determines the rights of the parties and the final decree can only work those rights out and give effect to them according to the determinations contained in the preliminary decree.

7. The question then is whether the appellant is right in saying either that he has not waived the objection to the Court including in the final decree a direction regarding the mesne profits or that even if he had waived it and consented to the Court exercising jurisdiction, it does not enable the Court to make the decree which it has made. In the first place, it is perfectly clear on a reading of the objections filed by the appellant to the report of the Commissioner that he did not dispute the authority of the Commissioner to determine the mesne profits as not warranted by the terms of the preliminary decree. He concerned himself only with the question of the quantum of those profits. When the matter came before the Court it is not suggested that he raised the contention that the Commissioner exceeded his authority in inquiring into the mesne profits of the properties situate in Cochin. These facts are sufficient in my opinion to warrant the conclusion that the appellant acquiesced in the Commissioner determining the mesne profits and indeed he must be taken to have waived an objection which he could have taken but which he did not choose to take.

8. But argues Dr. John, there is here an inherent want of jurisdiction in the learned Subordinate Judge which precluded him from giving a decree for the plaintiff's share of the mesne profits of the Cochin properties. He says that the preliminary decree fixes the limits of the inquiry to be held by the Commissioner and also determines the scope of the final decree which can be passed by the Court. He argues that so long as the preliminary decree stands as it is, the Court is not entitled to add to it by giving to the plaintiff a decree for mesne profits not covered by it. He does not argue that the Subordinate Judge had no right to pass a decree against the appellant for the mesne profits of the Cochin properties already

realised by him because the properties are situate in Cochin. His contention is that jurisdiction is absent because and only because the preliminary decree does not contain a direction in regard to these mesne profits. In my opinion such a defect does not render the Court incompetent to try the question. It cannot be said that the Subordinate Judge had no inherent jurisdiction, for it is conceded that if the plaint had been properly framed and the preliminary decree had been passed with a direction to ascertain the mesne profits of the Cochin properties there is no objection whatever to the Court granting a decree for those profits. In this connection it is sufficient to refer to the principles laid down by the Privy Council in *Ledgard v. Bull* which explains the legal position. Lord Watson in delivering the judgment of the Board stated:

The District Judge was perfectly competent to entertain and try the suit if it were competently brought, and their Lordships do not doubt that, in such a case, a defendant may be barred, by his own conduct, from objecting to irregularities in the institution of the suit. When the Judge has no inherent jurisdiction over the subject-matter of a suit, the parties cannot, by their mutual consent, convert it into a proper judicial process, although they may constitute the Judge their arbiter, and be bound by his decision on the merits when these are submitted to him. But there are numerous authorities which establish that when, in a cause which the Judge is competent to try, the parties without objection join issue and go to trial upon the merits, the defendant cannot subsequently dispute his jurisdiction upon the grounds that there were irregularities in the initial procedure which, if objected to at the time, would have led to the dismissal of the suit.

9. I am clearly of opinion that the objection taken by the appellant cannot be upheld, for the Court undoubtedly possessed inherent jurisdiction over the subject-matter of the suit. All that can be said is that the learned Judge who had the necessary jurisdiction exercised it irregularly and in spite of the absence of a prayer in the plaint and of a direction in the preliminary decree. These in my opinion are mere irregularities which do not affect the inherent jurisdiction of the Court. That being so, I must hold that the objection is one which can be waived and in the present case it has been waived.

10. The result is that I must overrule both the contentions raised on behalf of the appellant. The appeal must accordingly be dismissed with costs.

11. There is also before us to day a Civil Miscellaneous Petition filed by the respondent for leave to amend the plaint by altering prayer (b) so as to include therein a relief in respect of the mesne profits of the Cochin properties as well. It is very doubtful whether such a prayer can be entertained at this stage in view of the fact that the preliminary decree does not refer to the Cochin properties at all, much less to the mesne profits derived by the appellant from them. I may add that a mere alteration of the prayer without the introduction of necessary allegations in the body of the plaint, is insufficient and infructuous as well. For these reasons, the petition is liable to dismissal and is accordingly dismissed. The appellant is entitled to his costs of this petition.

**Mockett, J.**

12. I entirely agree with what my learned brother has said. This is an interesting example of the difference between the pretended exercise of jurisdiction which the Court does not possess and the exercise of a jurisdiction which it does possess irregularly. My view of these proceedings is as follows. I think that in fact both the parties thought erroneously that there was before them a claim for the mesne profits in the possession of the defendant. The defendant is in British India and no doubt the mesne profits, which are movable properties, are with him. There are many indications in the record and in the conduct of the defendant himself to this effect. That being so, I am very ready to agree with my learned brother that having accepted the jurisdiction of the Court and having joined in it a matter which was irregularly before it, it does not lie with the appellant (defendant) now to turn round because he has lost and object to the jurisdiction. In fact his objection is as based on the suggestion that the Court had no jurisdiction at all but it cannot be doubted for a moment that had this claim for the Cochin mesne profits been properly before the Court, the Court could have tried the matter. For these reasons, I agree with the order proposed by my learned brother.