Madras High Court
Ramaswami Iyer vs A. Subbiar And Anr. on 2 April, 1956
Equivalent citations: AIR 1957 Mad 184
Author: B A Sayeed
Bench: B A Sayeed
JUDGMENT Basheer Ahmed Sayeed, J.

1. This revision petition is against the order of the learned District Munsiff of Tiru-nelveli in I. A. No. 445 of 1953 in O. S. No. 458 of 1941.

2. The suit itself was one for partition filed In 1941, but the issues were framed on the 6th April 1942. The suit being for partition among two brothers, the relevant order of the Civil Procedure Code and the rule applicable to the case would be Order XX Rule 18 and not Rule 12. Much time need not be spent on this question as to which exactly is the rule that applies to suits for partition.

Some four years after the issues were framed, there was a compromise entered into between the parties and, in pursuance of the compromise, a preliminary decree was passed on the 19th March 1946. Though in the suit there were issues raised relating to the taking of accounts & the liability of the defendants to the plaintiff in respect of such accounts, still, in the preliminary decree that was passed on the 19th March 1946, there was absolutely no mention, not even whisper, about accounting between the parties, or about any claim for mesne profits arising out of such accounts being taken between the parties.

3. On the other hand, as per the preliminary decree passed in pursuance of the compromise, paragraphs 3, 4 and 5 reserve several rights of the parties to be settled at a later stage, viz, at the stage of the final decree. But no such reservation has taken place in respect of the accountability between the parties as to mesne profits or otherwise. Therefore, construing the terms of the compromise decree, it would not be unreasonable to hold that the parties while deliberately reserving their rights in other respects to be settled and adjusted at the time of the final decree, deliberately left out of consideration the rights of parties to regard to the mesne profits or accounts.

4. The position did not stand there. The final decree in this case was passed on the 20th September 1949, and even at the stage of the final decree, no question was raised with regard to the mesne profits in respect of the properties which were being divided between the plaintiff and the defendants. The final decree only sets forth that the plaintiff was allotted item 1 in Schedule 1 and Items 2, 3, 8, 16 and 17 in Schedule II, in addition to the item allotted to him by the Commissioner, that the defendants 1 to 3 are allotted Items 1, 4, 5 and 6, 7 and 9 to 15 in Schedule II.

5. After this final decree was passed, possession was taken by the plaintiff of his share allotted to him, under the final decree in the properties comprised in the suit. Neither at the time of the final decree, nor even at the time of the taking of possession did the plaintiff think of approaching the Court for an enquiry into the Question of mesne profits and allotment of his share of the mesne profits of the properties in the suit. It is common ground that possession was taken on the 17th April 1950,

6. It is only on the 16th April 1953 that the plaintiff thought of filing an application under Order XX R. 12 O. P. C., for an enquiry into the mesne profits payable by the respondents to the petitioner in respect of the properties set out in plaint Schs. I and II, and to pass a decree in favour of the plaintiff against defendants 3 and 9, for the plaintiff's share in the mesne profits ascertained In the said enquiry. It must be observed that this application for mesne profits related only to the properties that were allotted to the plaintiff in the final decree.

7. Though the application was taken out under Order XX Rule 12, still it does not necessarily mean that the application should be dealt with by the Court only under that Order and rule. If a mistake has been committed in mentioning a provision of law under which an application is made, it does not preclude the Court from deciding the matter under the correct provision of law, viz, Order 20 Rule 18. The learned District Munsif must be presumed to have decided this case under the correct provision of law. Therefore there is not much point in saying that the application has been made under the Wrong provision of law.

8. However that be, the question that is now raised is whether the plaintiff is entitled to have such enquiry into the mesne profits payable to him in fespect of the properties which were delivered over to him on the 17th April 1950, when the final decree got executed. In the first place. It must be observed that there is no decree now pending in respect of which an application could be moved for enquiry into the mesne profits. Argument has been advanced that there could be a further final decree passed does not, in any way, preclude the Court from passing another final decree in the matter.

This is not the real issue involved in this case. The question is, after having given up right to mesne profits deliberately when the com-promise "decree was passed, and not, having raised the question of mesne profits at any stage there after, and until nearly three years after possession of the properties had been taken, whether such a petition for 'enquiry into mesne profits is competent. I do not think that I can agree, with the learned counsel for the respondent that such a petition is competent.

Taking the compromise decree and the terms thereof, and the failure of the plaintiff at every stage and neglecting the opportunity that was available to him to move the Court for an enquiry into mesne profits, it cannot be said that that right still enured in favour of the plaintiff to proceed with an application for enquiry into mesne profits. The plaintiff must have raised this Issue at the earliest possible date, or at any rate, when the final decree was being passed.

Not having done so, and the proceedings in court having become concluded, and there being no pending proceeding so far as the final decree in respect of Schedules I and II was concerned, I do not think there is any force in the contention that there is still scope for passing final decree in the self-same matter, awarding mesne profits to the parties.

9. Learned counsel for the respondent has relied upon the Full Bench decision in Basavayya v. Guravayya, (FB) (A), in support of the contention that an application for mesne profits could still be filed by him. I do not think that, on the facts of this case, the ruling in the Full Bench decision would

come into play. The circumstances are not similar, much less on all fours with those obtaining in the said decision.

On the other hand, the learned counsel for the petitioner has invited my attention to the ruling of the Supreme Court in the State of Tra-vancore-Cochin v. Bombay Co, Ltd. Aleppey, 1953-1 Mad LJ l: (Am 1952 SO 366) (B), and also to a decision of my learned brother, Rajagopala Ayyan-gar J. in Arunachala Mudall v. Maragathammal, (C). In the latter decision there was no prayer at all for any mesne profits, and even that decision cannot be said to be applicable to the facts in the present case. But the decision in 1953-1 Mad LJ 1: (AIR 1952 SC 366) (B) may have application to the facts of this case.

10. Therefore on a consideration of the entire circumstances that prevail in this case, I do not think that the learned District Munsif was right in making the order appointing a Commissioner to make an enquiry into the mesne profits. Before I conclude. I must observe that on the facts' of it, the order of the learned District Munsif Is very unsatisfactory. It does not appear to be a case where the learned Munsif has applied his mind to the points that were raised by both parties. His order is contained in one sentence without being supported by any reasons for the same.

The said order cannot be really called a judgment or an Order in terms. Therefore the civil revision petition is allowed and the order is set aside. In the circumstances of the case, there will be no order as to costs.