GOPALAKRISHNA PILLAI AND OTHERS A

v.

MEENAKSHI AYAL AND OTHERS

March 31, 1966 B

[A. K. SARKAR C.J., J. R. MUDHOLKAR AND R. S. BACHAWAT, JJ.]

Civil Procedure Code, 1908, Order 20, r. 12 future mesne profits—When can be grated by Court.

S. died in 1927 and by a will bequeathed some items of property to his wife N and certain other property to his mother C. He also appointed C as a trustee of some property for the benefit of a temple. Upon the death of N in 1931, C inherited her properties as a limited heir. C

Some of this property was sold by C under a sale deed in June 1957; by a deed executed in August 1940 she gifted some of the other inherited property to M and thereafter purported to execute a will in September 1940, bequeathing to M the remaining properties belonging to her and inherited by her as a limited heir from N, as also her trusteeship rights in the property left by S. D

After C's death on September 15, 1940, M conveyed all the properties acquired by him under the gift deed and the will to V. V died in 1943 leaving some of the defendants as his heirs.

In about August 1952 the respondents instituted a suit and claimed the properties left by C and N as their heirs. They denied the factum and validity of the sale deed, the gift deed as well as the will of September 1940. E

The Courts below held that C had no power to dispose of the properties which she had inherited from N as a limited heir; that there was no sale by the deed executed in June 1957; and that the gift deed executed by her was valid. These findings were not challenged in the appeal to this Court.

The Trial Court, however, held that the respondents had failed to prove that they were entitled to inherit the properties on the death of C, and that the will of September 4, 1940 was forged. On appeal to the High Court, the single bench upheld the will and also directed that the question whether the respondents were the next reversioners of N should be tried afresh by the Trial Court. But in a Letters Patent Appeal the Division Bench held the will was not genuine and its execution and attestation were not proved; it also held that on the materials on the record the respondents must be held to be the next reversioners of N. The Court therefore passed a decree in favour of the respondents for recovery of the various items of property and declared that they were entitled to mesne profits for three years prior to the suit and also to future mesne profits in respect of the various properties; accordingly it directed an inquiry by the Trial Court to determine future mesne profits. F G

In the appeal to this Court by some of the defendants, it was also contended that the High Court had no power to pass a decree for mesne profits accrued after the institution of the suit as there was no specific prayer for such a decree. H

A HELD: On the facts, the High Court had rightly held that the appellants had failed to prove the execution and attestation of the will. [131 F-G]

The trial proceeded on the footing that the plaintiffs were the next reversioners of N and the High Court was therefore right in holding that it was not open to the appellants to contend that the B respondents were not the reversionery heirs of N. [132 B].

On a reading of the plaint it was clear that the suit was for recovery of possession of immovable property and for mesne profits. The provisions of Order 20, r. 12 were therefore attracted to the suit and the court had power to pass a decree in the suit for both past and future mesne profits. [132 F]

Order 20, r. 12 enables the court to pass a decree for both past and future mesne profits but there are important distinctions in the C procedure for the enforcement of the two claims. With regard to past mesne profits, a plaintiff has an existing cause of action on the date of the institution of the suit. In view of O. 7, rr. 1 and 2 and O. 7, r. 7 of the Code of Civil Procedure and s. 7(1) of the Court Fees Act, the plaintiff must plead this cause of action, specifically claim a decree for the past mesne profits, value the claim approximately and pay court-fees thereon. With regard to future mesne profits, the plaintiff has no cause of action on the date of the institution of the D suit, and it is not possible for him to plead this cause of action or to value it or to pay court-fees thereon at the time of the institution of the suit. Moreover, he can obtain relief in respect of this future cause of action only in a suit to which the provisions of O. 20, r. 12 apply. But in a suit to which the provisions of O.20, r. 12 apply, the court has a discretionary power to pass a decree directing an enquiry into the future mesne profits, and the court may grant this general relief, though it is not specifically asked for in the plaint. [132 G-133 B]

E Case law referred to.

Appeal by special leave from the judgment and decree dated February 24, 1961 of the Madras High Court in L.P.A. No. 126 of 1957.

N. C. Chatterjee and *R. Ganapathy Iyer*, for the appellants.

T. V. R. Tatachari, for respondents Nos. 1 and 3 to 7.

F The Judgment of the Court was delivered by

Bachawat, J. The following pedigree shows the relationship of Sivasami Odayar and the members of his family:

Chinnayal

G Sivasami Odayar married Neelayadakshi	Meenakshi Ayal (Plff. No. 1)	Kamakshi Ayal (Plff. No. 2)

Sivasami died issueless in 1927. By his will dated September 14, 1927 he bequeathed items 1 to 4 and one half of items 12 and 13 of the suit properties to his wife, Neelayadakshi absolutely and H items 5 to 11 and one half of items 12 and 13 to his mother, Chinnayal absolutely. He also appointed Chinnayal as the trustee of items 14 to 18 for the benefit of the Pillayar temple. Neelayadakshi

died in 1931. It is common case that on her death Chinnayal inherited her properties as a limited heir. Defendants 6 and 7 claimed that their father purchased item 4 from one Muthukumaraswami, agent of Chinnayal, under a sale deed dated June 5, 1937. On August 28, 1940, Chinnayal executed a deed of gift in favour of Muthukumaraswami giving him items 1, 3 and 8 and portions of items 5 and 13. On September 4, 1940, Chinnayal is said to have executed a will bequeathing to Muthukumaraswami the remaining properties belonging to her absolutely and inherited by her as a limited heir from Neelayadakshi and also items 14 to 18 and her trusteeship right in respect of those items. Chinnayal died on September 15, 1940. It is common case that the plaintiffs are her heirs. Soon after her death, Muthukumaraswami conveyed to one Venugopala all the properties acquired by him under the aforesaid gift deed and will. Venugopala died in 1943 leaving defendants 1 to 5 as his heirs. In or about August 1952, Meenakshi and Kamakshi instituted a suit in the Court of the Subordinate Judge, Cuddalore for possession of the suit properties alleging that they were entitled to the properties left by Chinnayal and Neelayadakshi and denying the factum and validity of the gift deed dated August 28, 1940, the will dated September 4, 1940 and the alleged sale in favour of the father of defendants 6 and 7. The defendants contested the suit.

The Courts below held that (1) Chinnayal had no power to dispose of any of the properties which she had inherited from Neelayadakshi as a limited heir, (2) Chinnayal duly executed the gift deed and by that deed she lawfully disposed of items 8 and portions of items 5 and 13, and (3) there was no sale of item 4 to the father of defendants 6 and 7. These findings are no longer challenged. The Subordinate Judge held that the plaintiffs failed to prove that they were the reversioners of Neelayadakshi, or were entitled to inherit her properties on the death of Chinnayal, and that the will dated September 4, 1940 was forged and its execution and attestation were not proved. The plaintiffs and the defendants preferred separate appeals from this decree to the Madras High Court. Ramaswami, J held that the will was genuine and was duly executed and attested but it was inoperative with regard to items 14 to 18 and the trusteeship rights in those items. He also held that the question whether the plaintiffs were the next reversioners of Neelayadakshi should be tried afresh by the trial Court. Thereafter, Kamakshi died and her legal representatives were substituted on the record. Meenakshi and the legal representatives of Kamakshi filed an appeal under cl. 15 of the Letters Patent of the High Court, and the appellant filed cross-objections. A Division Bench of the Madras High Court held that the will was not genuine and its execution and attestation were not proved. It also held that on the materials on the record the plaintiffs must be held to be the next reversioners of Neelayadakshi. On this finding, the Division

A Bench passed a decree in favour of the appellants before them for the recovery of possession of items 1 to 4, 3 cents in item 5, items 6, 7 and 9 to 13 and items 14 to 18, declared that they were entitled to mesne profits for it three years prior to the suit and to future mesne profits in respect of the aforesaid properties, directed the trial Court to make an enquiry into the mesne profits under B O.20, r. 12 of the Code of Civil Procedure and ordered that in respect of the rest of the suit properties the suit be dismissed. Some of the defendants now appeal to this Court by Special leave.

Counsel for the appellants challenged before us the correctness of the findings of the Division Bench of the High Court with regard to (1) the factum and execution of the will and (2) the C plaintiffs' claim to be the next reversioners of Neelayadakshi. He also contended that the High Court had no power to pass a decree of mesne profits accrued after the institution of the suit.

The appellants' case is that the will of Chinnayal dated September 4, 1940 was attested by Balasubramania and Samiyappa. The appellants rely solely on the testimony of Samiyappa for D proof of the execution and attestation of the will. Samiyappa was not present when Chinnayal is said to have put her thumb-impression on the will. Samiyappa said that when he was passing along the street, Balasubramania and Muthukumaraswami called him. He went inside Chinnayal's house, Muthukumaraswami gave the will to him and after he read it aloud, Chinnayal acknowledged that she had affixed her thumb-impression on the will. He E then put his signature on the will and Balasubramania completed it after he left. In his examination-in-chief, he said nothing about the attestation of the will by Balasubramannia. In cross-examination, he said that after he signed, Balasubramania wrote certain words on the will and put his signature. On further cross-examination, he added that Balasubramania was saying and writing something on the will, but he did not actually see Balasubramania F writing or signing We are satisfied that Samiyappa did not see Balasubramania putting his signature on the will. The High Court rightly held that the appellants failed to prove the signature of Balasubramania or the attestation of the will by him. On this ground alone we must hold that the will was not proved. We do not think it necessary to consider the further question whether the will was genuine.

G

The plaintiffs claimed that on Chinnayal's death the properties acquired by Neelayadakshi under the will of Sivasami devolved upon them as the next reversioners of Neelayadakshi. Relying on a statement of P.W. 2, Sethurama Nainar, that Meenakshi had two daughters and a son, the appellants contend that the son of H Meenakshi was the reversionary heir of Neelayadakshi. Assuming that Meenakshi had a son, it is not possible to say that he was born before the death of Chinnayal, and, if so, he was alive at the time

of her death. In the absence of any son of Meenakshi at the time of Chinnayal's death, admittedly the plaintiffs would be the next reversioners of Nalayadakshi. No issue was raised on this question, and the trial proceeded on the footing that the plaintiffs were the next reversioners of Neelayadakshi. The trial Court refused leave to the appellants to file an additional statement raising an issue on this point. In the circumstances, the Division Bench of the Madras High Court rightly held that it was not open to the appellants to contend that the plaintiffs were not the reversionary heirs of Neelayadakshi, and were not entitled to succeed to her estate on the death of Chinnayal.

In the plaint, there was no specific prayer for a decree for mesne profits subsequent to the institution of the suit. Counsel for the appellants argued that in the absence of such a specific prayer, the High Court had no jurisdiction to pass a decree for such mesne profits. We are unable to accept this contention. Order 20, r. 12 of the Code of Civil Procedure provides that "where a suit is for the recovery of possession of immovable property and for rent or mesne profits" the Court may pass a decree for the possession of the property and directing an inquiry as to the rent or mesne profits for a period prior to the institution of the suit and as to the subsequent mesne profits. The question is whether the provisions of O.20, r. 12 apply to the present suit. We find that the plaintiffs distinctly pleaded in paragraph 9 of the plaint that they were entitled to call upon the defendants to account for mesne profits since the death of Chinnayal in respect of the suit properties. For the purposes of jurisdiction and court-fees, they valued their claim for possession and mesne profits for three years prior to the date of the suit and paid court-fee thereon. In the prayer portion of the plaint, they claimed recovery of possession, an account of mesne profits for three years prior to the date of the suit, costs and such other relief as may seem fit and proper to the Court in the circumstances of the case. On a reading of the plaint, we are satisfied that the suit was for recovery of possession of immovable property and for mesne profits. The provisions of O.20, r. 12 were, therefore, attracted to the suit and the Court had power to pass a decree in the suit for both past and future mesne profits.

Order 20, r. 12 enables the Court to pass a decree for both past and future mesne profits but there are important distinctions in the procedure for the enforcement of the two claims. With regard to past mesne profits, a plaintiff has an existing cause of action on the date of the institution of the suit. In view of O.7, rr. 1 and 2 and O.7, r. 7 of the Code of Civil Procedure and s. 7(1) of the Court Fees Act, the plaintiff must plead this cause of action, specifically claim a decree for the past mesne profits, value the claim approximately and pay court fees thereon. With regard to future mesne profits, the plaintiff has no cause of action on the

A date of the institution of the suit, and it is not possible for him to plead this cause of action or to value it or to pay court-fees thereon at the time of the institution of the suit. Moreover, he can obtain relief in respect of this future cause of action only in a suit to which the provisions of O.20, r. 12 apply. But in a suit to which the provisions of O.20, r. 12 apply, the Court has a discretionary power B to pass a decree directing an enquiry into the future mesne profits, and the Court may grant this general relief, though it is not specifically asked for in the plaint, see *Basavayya* v. *Guruvayya*(1). In *Fakharuddin Mahomed Ahsan*, v. *Official Trustee of Bengal*(2), Sir R. P. Collier observed :

> "The plaint has been already read in the first case and C their Lordships are of opinion that it is at all events open to the construction that the plaintiff intended to claim wasilat up to the time of delivery of possession, although, for the purpose of valuation only, so much was valued as was then due; but be that as it may, they are of opinion that, under s. 196 of Act VIII of 1859, it was in the power of the Court, if it thought fit, to D make a decree which should give the plaintiff wasilat up to the date of obtaining possession."

Section 196 of Act VIII of 1859 empowered the Court in a suit for land or other property paying rent to pass a decree for mesne profits from the date of the suit until the date of delivery of possession to the decree-holder. The observations of the Privy Council E suggest that in a suit to which s. 196 of Act VIII of 1859 applied, the Court had jurisdiction to pass a decree for mesne profits though there was no specific claim in the plaint for future mesne profits. The Court has the like power to pass a decree directing an enquiry into future mesne profits in a suit to which the provisions of O.20, r. 12 of the Code of Civil Procedure, 1908 apply.

In support of his contention that the Court has no jurisdiction F to pass a decree for future mesne profits in the absence of a specific prayer for the same, counsel for the appellants relied upon the following passage in *Mohd. Yamin and others* v. *Vakil Ahmed and others*(3).

> "It was however pointed out by Shri S. P. Sinha that the High Court erred in awarding to the plaintiffs mesne G profits even though there was no demand for the same in the plaint. The learned Solicitor-General appearing for the plaintiffs conceded that there was no demand for mesne profits as such but urged that the claim for mesne profits would be included within the expression 'awarding possession and occupation of the property aforesaid together with all the rights appertaining

(1) I.L.R. 1952 Mad. 173 (F.B) at 177. (2) (8181) I.L.R. 8 Cal. 178 (P.C), 189
(3) [1952] S.C.R. 1133, 1144.

thereto'. We are afraid that the claim for mesne profits cannot be included within this expression and the High Court was in error in awarding to the plaintiffs mesne profits though they had not been claimed in the plaint. The provision in regard to the mesne profits will therefore have to be deleted from the decree."

In our opinion, this passage does not support counsel's contention. This Court made those observations in a case where the plaint claimed only declaration of title and recovery of possession of immovable properties and made no demand or claim for either past or future mesne profits or rent. It may be that in these circumstances, the suit was not one "for the recovery of possession of immovable property and for rent or mesne profits", and the Court could not pass a decree for future mesne profits under O.20, r. 12 of the Code of Civil Procedure. But where, as in this case, the suit is for the recovery of possession of immovable property and for past mesne profits, the Court has ample power to pass a decree directing an enquiry as to future mesne profits, though there is no specific prayer for the same in the plaint. In the aforesaid case, this Court did not lay down a contrary proposition, and this was pointed out by Subba Rao, C.J. in *Atchamma* v. *Rami Reddy*(1).

We are, therefore, satisfied that in this case the High Court had discretionary power to pass the decree for future mesne profits. It is not contended that the High Court exercised its discretion improperly or erroneously. We see no reason to interfere with the decree passed by the High Court.

In the result, the appeal is dismissed with costs.

Appeal dismissed.

(1) I.L.R. [1957] Andhra Pradesh, 52,56.