

(1982) 11 KL CK 0011

High Court Of Kerala

Case No: A.S. No. 162 of 1977

P. Balakrishnan and Others

APPELLANT

Vs

Chakkalakandadiyil Mathew and
Others

RESPONDENT

Date of Decision: Nov. 11, 1982

Hon'ble Judges: Subramonian Poti, Acting C.J.; Chandrasekhara Menon, J

Bench: Division Bench

Advocate: Govind Bharathan and Lekha, for the Appellant; R. Bhaskaran, for Respondent
No. 1, T.P. Kelu Nambiar and P.G. Rajagopalan, for the Respondent

Final Decision: Dismissed

Judgement

Subramonian Poti, A.C.J.

1. Having been made liable for mesne profits under the terms of a preliminary decree the Appellants who have been found to be liable to pay to the Plaintiff Rs. 4,000 per annum from 28th July 1967 have filed this appeal challenging the award passed for the mesne profits at the rate of Rs. 4,000 per annum towards the share of the Plaintiff. According to them it should be less. In fact the Commissioner determined the mesne profits at the rate of Rs. 5,000 per annum. This was challenged on the ground that the Commissioner estimated mesne profits on the basis of the income of the trees as he saw them in the year 1974 and that some of the trees might not have been bearing during certain years and particularly during 1967 and 1968 and therefore it is said that the actual mesne profits must be lesser. The Commissioner met this in his report itself. He had indicated that there was no special means to determine the income for each one of the years accurately. The estimate for the year 1974 would more or less represent the income for the earlier years also i.e. though some of the trees might not have been bearing during earlier years trees which would have been bearing during 1964 and 1967 would have been bearing more during subsequent years. We are told that the income for the year 1974 should be taken to be the income of the previous years also. On the facts and

circumstances of the case we see considerable force in this approach. The Plaintiff, evidently to have a settlement of the controversy as far as possible, agreed to limit the claim of mesne profits at Rs. 4,000 per annum. Whether this object has been achieved is doubtful, for, this appeal has been pending in this Court for five years now.

2. The attack is only to the determination of the income at the rate of Rs. 4,000 per annum. The court gave a decree on ascertaining the facts, but on law such a decree cannot be given because the Plaintiff in the plaint asked for a decree for mesne profits prior to the date of suit at the rate of Rs. 2,500 per annum. That naturally raises a question as to whether the Plaintiff should be allowed to limit her claim in the plaint in regard to mesne profits.

3. In a suit for recovery and partition where a person seeks recovery of his share he must necessarily estimate the mesne profits. If he is out of possession his estimate can only be a rough estimate and approximation, and therefore nothing estops him from claiming the actual mesne profits when that is determined by a Court. It is more so when under a preliminary decree the Court directs determination of mesne profits. If in a case the Plaintiff claims a specific sum as mesne profits for the future and the Court does not accept his claim but directs that mesne profits will be determined in the final decree or in execution the decree must govern the parties and in determination of mesne profits there will be no restriction on the basis that the Plaintiff's claim is limited. In a case where a Plaintiff makes only a rough estimate there cannot be a limitation on his claim if on actual assessment the Court finds the mesne profits higher than what is claimed in the plaint. It may be that a person may estimate the past mesne profits and may leave to the Court to determine future mesne profits, in that case evidently there is no estimation of the future mesne profits and that is left to be decided by the Court. Even when a person claims mesne profits on the basis of the profits he obtained from the property on the date of the suit due to changes of circumstances the mesne profits may be lower than what is claimed for the subsequent years. The price of the produce from the land may rise considerably, later in which case there is no reason to limit mesne profits to what is claimed in the plaint, or, the Plaintiff could make an estimation of only what the income then is and he could not anticipate what is going to happen in future years. Hence during the period the suit is pending or execution is pending, estimation of mesne profits may change. Therefore we see no reason to limit the claim of the Plaintiff to what is either roughly estimated in the plaint or what is claimed as mesne profits as worked out for the previous years or what is claimed at the time when he could not anticipate what the mesne profits for the subsequent years would be. It is only in a case where a Plaintiff categorically limits his claim to a particular sum for the future years as canvassed before Madhavan Nair, J., in *Kunhiraman v. Kunhi* 1968 KLT 264. If in the preliminary decree the court directs determination of mesne profits in passing the final decree that decree shall govern the parties so much so there would be no restriction in regard to mesne profits

found due. What we have said here is in consonance with the view expressed by Justice Janaki Amma in Koshy v. Luckose 1975 KLT 443 and by a Division Bench in [Rev. Father K.C. Alexander of Kuttikandathilaya Kollakulhiyil, Thadiyoor Muri Vs. Nair Service Society Ltd.](#), In this view there is no merit in this appeal.

The appeal is accordingly dismissed with costs.