

are that the suit in the Court of first instance shall be regarded as if filed by the plaintiff and the twenty-eighth defendant for the *whole* of Kannu Padayachi's estate and that costs are payable by both of them on that valuation. In regard to mesne profits the twenty-eighth defendant's claim shall be limited to mesne profits from 1927 onwards, that is to say, from three years before he made the application which is now under discussion in this petition. The twenty-eighth defendant must also pay before this decree can be granted to him the same court-fee as the plaintiff has paid.

Each side will bear its own costs in this revision petition.

A.S.V.

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### APPELLATE CIVIL.

*Before Mr. Justice Varadachariar and Mr. Justice  
Abdur Rahman.*

KOKKONDA VENKATA RAMA SURYA GOPALA  
KRISHNAMURTY AND SIX OTHERS (DEFENDANTS 2, 9,  
11, 13, 14, 21 AND 23), APPELLANTS,

1939,  
February 3.

*v.*

SURABHI SATYANARAYANA (PLAINTIFF), RESPONDENT.\*

*Mesne profits—Hindu widow—Debts contracted by—Mortgage  
—Foreclosure decree—Suit by reversioner for possession  
of property in the hands of third parties with mesne  
profits—Decree for possession conditional on his paying  
debts binding on the estate—Mesne profits for three years  
prior to suit, if can be allowed.*

In a suit by a reversioner for the recovery of possession of the properties of L from certain persons who derived

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title from one who took possession of the same in execution of a foreclosure decree on a mortgage executed by L's widow. The plaintiff was held entitled to mesne profits for the three years prior to the suit. It was found that only a portion of the consideration for the mortgage was binding on the estate. It was contended in appeal that, as the reversioner was entitled to possession only after payment of the portion of the consideration binding on the estate, he should not be allowed any mesne profits till such payment was made. Alternatively, it was contended that, the alienation by a Hindu widow being only voidable, the reversioner could claim to treat the persons in possession as not being entitled to the same only from the time that he instituted a suit or gave notice repudiating the binding character of the widow's alienation and that therefore the plaintiff was not entitled to any mesne profits prior to the institution of the suit.

*Held* that, according to the rule laid down in *Bhagwat Dayal Singh v. Debi Dayal Sahu*(1), the plaintiff was entitled to mesne profits for the three years prior to the suit.

*Banwari Lal v. Mahesh*(2) explained.

APPEAL against the decree of the Court of the Subordinate Judge of Rajahmundry in Original Suit No. 6 of 1932.

*B. Somayya* for *K. Kameswara Rao* and *D. Narasaraaju* for appellants 1 to 3, 5 to 7.

*B. Sitarama Rao* for *K. Rajah Ayyar* and *M. S. Ramachandra Rao* for respondent.

The JUDGMENT of the Court was delivered by VARADACHARIAR J.—This appeal arises out of a suit instituted by a reversioner for recovery of possession of the properties of one Lakshmayya who died in January 1889 leaving a widow Subbamma who died in February 1926. The first defendant is the widow of Subbamma's brother. She obtained the suit properties by a conveyance from her husband, that is Subbamma's brother, who in turn had taken possession in execution of a foreclosure decree obtained by him against his sister Subbamma in Original Suit No. 51

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(1) (1908) I.L.R. 35 Cal. 420 (P.C.). (2) (1918) I.L.R. 41 All. 63 (P.C.).

of 1903 on the file of the District Court, Godavari. The other defendants claim under the first defendant and their case need not be separately considered. The plaintiff contended that the document, Exhibit V, which was sought to be enforced in Original Suit No. 51 of 1903, was not binding on the reversioner, that the decree obtained in Original Suit No. 51 of 1903 was likewise not binding on him and that he was accordingly entitled to possession from the date of the widow's death. Against this claim, it was alleged that the widow Subbamma was obliged to incur debts from time to time for various purposes and that Exhibit V was executed to secure repayment of a consolidated amount representing these debts and that the same was binding on the plaintiff as also the decree obtained in Original Suit No. 51 of 1903.

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The learned Subordinate Judge held that the decree in Original Suit No. 51 of 1903 was not binding on the plaintiff, that out of the consideration for Exhibit V only a sum of Rs. 656-5-0 was binding on the estate and that the same with interest due thereon from the date of the widow's death could be set off against the mesne profits to which the plaintiff was held entitled for three years before the date of the institution of the suit. He also held that, for the period during which the first defendant's husband and the first defendant had been in possession in pursuance of the foreclosure decree, they were not entitled to interest even on the amount found to be binding on the estate. On these findings, he gave the plaintiff a decree for possession and for mesne profits subsequent to the date of the institution of the suit. Against this decree some of the contesting defendants have filed this appeal. The plaintiff has

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purported to file something which is described as a memorandum of objections, but it is not really in the nature of a memorandum of objections. It only suggests arguments on which the decree of the lower Court can be supported even apart from the grounds taken in the lower Court's judgment. It is therefore unnecessary to deal further with the so-called memorandum of objections.

The learned Counsel for the appellants has not seriously challenged the conclusion of the lower Court that the decree in Original Suit No. 51 of 1903 was not binding upon the plaintiff. The lower Court's decree for possession must therefore stand. The arguments before us have been directed mainly to the question of the terms on which the plaintiff was entitled to recover possession. On behalf of the appellants, it has been contended that the decree for possession should be made conditional on payment with interest of the amounts due as per Exhibits II and III, two of the earlier documents executed by the widow, in addition to a sum of Rs. 360 borrowed by the widow at the time of Exhibit IV and another sum of Rs. 195-12-0 borrowed by her at the time of Exhibit V. It has also been contended that the lower Court was not justified in directing the amount that might be found payable by the plaintiff to be set off against mesne profits accrued due prior to the date of the suit, because, it was maintained, in a suit of this description, the plaintiff was not entitled to claim mesne profits prior to the date of suit.

There can be no doubt in this case that the widow Subbamma had been obliged to incur certain debts between 1890 and 1893. It is, however, by no means easy to determine how much was actually lent to her and how much of the monies so lent could be held to

be for purposes binding on the estate. The difficulty in dealing with the case is enhanced by the fact that during these years, Subbamma, who became a widow when she was barely twenty years old, was living with her father, who is said to have lent these monies and taken the various documents evidencing her loan transactions. The evidence also suggests that the father must have been looking after his daughter's affairs not merely in the matter of attending to her litigation and disbursing monies required therefor, but also in the matter of collecting the income due to her from time to time. It may not be possible at this distance of time to direct anything like an account to be taken of all the monies received by the father on her behalf or monies spent by him on her behalf. But in estimating the amount which may reasonably be regarded as having been borrowed by the daughter from the father for purposes binding on the estate, the situation in which the father stands could not be wholly ignored.

Besides the loan documents, Exhibits II, III, IV and V, there is one other document in the case which requires notice, namely, Exhibit XXIII. This purports to be a memorandum of account in the handwriting of the widow's father representing disbursements made by him between July 1890 and July 1893. This does not refer to any receipts on her account or even to expenses incurred for her maintenance; it relates mostly to expenses incurred in connection with one of her litigations. The learned Subordinate Judge has accepted this document as one written by the father though its genuineness was challenged and we see no reason to think otherwise.

[His Lordship discussed the evidence and proceeded :]

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The learned Subordinate Judge has found that in 1905 Subbamma's brother took possession of the estate in pursuance of the foreclosure decree except of a portion thereof which was outstanding with the mother-in-law under Exhibit E. This last item seems to have come into his possession only in 1916. We are of opinion that after 1905 there is no justification for calculating any interest as against the estate up to the date of the widow's death. The result will be that, on the date of the widow's death, the reversioner would have been entitled to demand possession subject to payment of Rs. 2,200 for principal and interest calculated as above.

It remains to deal with the plaintiff's right to mesne profits. The learned Counsel for the appellants contends that as the plaintiff is entitled to possession only after payment of a certain sum of money to the defendants, the plaintiff should not be allowed any mesne profits at all till such payment is made. Alternatively, he contends that, in any event, the plaintiff is not entitled to mesne profits prior to the date of the institution of the suit, because an alienation by the widow being "voidable", the plaintiff can claim to treat the defendant in possession as not being entitled to possession, only from the time that the reversioner institutes a suit or gives notice repudiating the binding character of the widow's alienation. The learned Counsel for the respondent has, however, contended that in the case of a reversioner suing for possession on the ground that an alienee from the widow has not derived a title binding on the estate, the alienee must be treated as being in possession without title from the date of the widow's death

and the reversioner is entitled to mesne profits as from that date, though on account of the law of limitation, the Court can award mesne profits only for three years prior to the date of the institution of the suit. Even in cases in which the reversioner is directed to pay a certain sum of money as representing the portion of the consideration found binding on the estate, it has been contended that the persons in possession are only entitled to claim interest on the amount found payable and are not on that account any the less liable for mesne profits.

In support of his first contention, the learned Counsel for the appellants has relied on the decision of the Judicial Committee in *Banwari Lal v. Mahesh*(1). In support of the alternative contention that the reversioner is not in any event entitled to mesne profits prior to the date of the institution of the suit, he has relied on the decision of the Bombay High Court in *Mohanlal v. Jagjivan*(2). On behalf of the plaintiff (respondent) reliance has been placed upon *Bhagwat Dayal Singh v. Debi Dayal Sahu*(3) and it has also been pointed out that the decree of the lower Court which was confirmed by the Judicial Committee in *Deputy Commissioner of Kheri representing the Court of Wards v. Khanjan Singh*(4) recognised the reversioner's right to mesne profits. It seems to us that *Deputy Commissioner of Kheri representing the Court of Wards v. Khanjan Singh*(4) does not give us much help, because there is no reference to this question in the judgment of the Judicial Committee and it is not possible to gather from the report whether what was set off against the sum directed to be paid by the plaintiff represented mesne profits prior

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(3) (1908) I.L.R. 35 Cal. 420 (P.C.). (4) (1907) I.L.R. 29 All. 331 (P.C.).

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to the institution of the suit. There can, however, be no doubt that *Bhagwat Dayal Singh v. Debi Dayal Sahu*(1) supports the plaintiff's contention. Mr. Somayya tried to distinguish it on the ground that in that case the alienee claimed to be in possession not under a title derived from the limited owner (Jilab Koer) but from another lady (Etraj Koer) who, it was stated, was in possession adversely to the widow. We do not think the case can be distinguished on this ground. It is true the alienees did plead in the lower Court a title derived from Etraj Koer; but the sale deed in their favour had been executed not merely by Etraj Koer but also by Jilab Koer and the judgment of their Lordships proceeded on the footing that the defendants were alienees from a limited owner. Dealing with the claim to mesne profits, their Lordships observed at page 430 that "as the deeds of sale are not good as such, the claim for mesne profits is well-founded". In respect of the sums found payable by the plaintiff to the defendants, their Lordships held that the defendants were, on their side, entitled to interest at six per cent per annum. In *Banwari Lal v. Mahesh*(2) the litigation related to an alienation by a Hindu father. When it was found that the sale was not wholly for justifiable or necessary purposes, the Court held that the plaintiff was entitled to possession on payment of a certain portion of the consideration which was found binding. Dealing with that situation, their Lordships observed that, as the sales were to be set aside only upon payment of certain sums,

"the defendants must be deemed to be lawfully in possession until they are set aside and are therefore not accountable for mesne profits".

(1) (1908) I.L.R. 35 Cal. 420 (P.C.).

(2) (1918) I.L.R. 41 All. 63 (P.C.).



At the first blush, the observations in these two cases seem not easily reconcilable and indeed in one case a learned Judge of the Nagpur Court thought that they were irreconcilable; see *Maroti v. Abhiman*(1). In this Court, a Division Bench sought to get over *Banwari Lal v. Mahesh*(2) by suggesting that the case had been heard *ex parte*; see *Ponnuwami Pillai v. Subramania Pillai*(3). We do not think that either of these ways of distinguishing *Banwari Lal v. Mahesh*(2) can be regarded as satisfactory. In the course of the arguments in the present appeal our attention has been drawn to several other decisions by way of analogy. Compare *Deivachilai Aiyangar v. Venkatachariar*(4), *Mallappa v. Anant*(5), *Subba Goundan v. Krishnamachari*(6), *Vadivelam v. Natesam*(7), *Bhirgu Nath Chaube v. Narsingh Tiwari*(8), *Ramasami Aiyar v. Venkatarama Ayyar*(9), *Visweswara Rao v. Surya Rao*(10), *Subraya Bhatta v. Sripathi Bhatta*(11), *Satgur Prasad v. Har Narain Das*(12) and *Nagappa Chettiar v. Brahadambal Ammani*(13). Some of these decisions proceed on the footing that, being in the nature of damages, mesne profits may be awarded according to the justice of the case without reference to any hard and fast rule. An examination of the other cases seems to us to suggest that it may not be right to place all cases of what are described as "voidable" alienations on one and the same footing for the purpose of determining the right of a successful plaintiff to mesne profits. As pointed out by the

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(1) (1920) 61 I.C. 543.

(3) (1919) 53 I.C. 412.

(5) A.I.R. 1936 Bom. 386.

(7) (1912) I.L.R. 37 Mad. 435.

(9) (1923) I.L.R. 46 Mad. 815.

(11) 1928 M.W.N. 51.

(2) (1918) I.L.R. 41 All. 63 (P.C.).

(4) (1925) 49 M.L.J. 317.

(6) (1921) I.L.R. 45 Mad. 449.

(8) (1916) I.L.R. 39 All. 61.

(10) (1935) I.L.R. 59 Mad. 667.

(12) (1932) I.L.R. 7 Luck. 64 (P.C.).

(13) (1935) I.L.R. 58 Mad. 350 (P.C.).

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Judicial Committee in *Satgur Prasad v. Har Narain Das*(1), a voidable transaction does not necessarily and always imply a good title until avoided. Speaking of a widow's alienation, their Lordships explained in *Bijoy Gopal Mukerji v. Krishna Mahishi Debi*(2) the sense in which it is to be regarded as voidable. They point out that it was not absolutely void in the sense that it could not even be ratified by the reversioner; they went on to add that the reversioner might at his pleasure treat it as a *nullity* without the intervention of any Court and he showed his election to do the latter by commencing an action to recover possession of the property. They emphasised a principle which they thought had been lost sight of by the High Court when applying article 91 of the Limitation Act to such a transaction and they stated that in such a case there was nothing for the Court either to set aside or cancel as a condition precedent to the right of action of the reversionary heir. The observations in *Bhagwat Dayal Singh v. Debi Dayal Sahu*(3) have to be understood in the light of these observations. Alienations by a father in a Mitakshara joint family and by the guardian of a minor might well be placed on a different footing; and it is significant in this connection to note that while articles 44 and 126 of the Limitation Act describe the suits there dealt with as suits to set aside an alienation, the language of article 141, which applies to suits by reversioners, is very different. The article merely refers to a suit for possession and does not suggest that the reversioner has got to set aside any transaction before he becomes entitled to possession. We are accordingly of opinion that there is no necessary

(1) (1932) I.L.R. 7 Luck. 64 (P.C.). (2) (1907) I.L.R. 34 Cal. 329 (P.C.).

(3) (1908) I.L.R. 35 Cal. 420 (P.C.).

inconsistency between *Bhagwat Dayal Singh v. Debi Dayal Sahu*(1) and *Banwari Lal v. Mahesh*(2) and that in the present case the rule applicable is that laid down in *Bhagwat Dayal Singh v. Debi Dayal Sahu*(1).

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In the above view, the plaintiff will be entitled to mesne profits for three years prior to the date of the institution of the suit. The learned Subordinate Judge has assessed these profits at Rs. 359 per annum and found that for the three years prior to suit, the plaintiff was entitled to Rs. 1,077. As we are not allowing any mesne profits in the plaintiff's favour for the period of two years between the widow's death and the commencement of the three years prior to the date of the institution of the suit, no interest need be allowed in the defendants' favour either during that period. Against the sum of Rs. 1,077 interest at six per cent per annum on Rs. 2,200 will be set off and the balance deducted from the principal amount of Rs. 2,200. The balance thus ascertained will carry interest from the date of suit at six per cent per annum, but as against it, the defendants will be liable for mesne profits at the rate allowed by the lower Court for future mesne profits. The right to the amount thus found payable by the plaintiff as well as the liability for the mesne profits will be worked out as between the various sets of defendants in the proportion indicated in paragraph 30 of the lower Court's judgment.

We direct the appellants to pay one half of the costs of this appeal to be divided between the contesting defendants. In the lower Court also, the plaintiff will be entitled to one half of his costs to be apportioned in the manner indicated in its decree. So

(1) (1908) I.L.R. 35 Cal. 420 (P.C.). (2) (1918) I.L.R. 41 All. 63 (P.C.).

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far as parties who have died during the pendency of the appeal are concerned, the decree of the lower Court will stand confirmed except in cases where legal representatives have been duly brought on record.

G.R.

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### APPELLATE CIVIL.

*Before Mr. Justice Pandrang Row and Mr. Justice  
Abdur Rahman.*

1939,  
March 13.

THE MADURA MUNICIPALITY, THROUGH ITS  
COMMISSIONER (PLAINTIFF), APPELLANT,

*v.*

K. ALAGIRISAMI NAIDU (DEFENDANT), RESPONDENT.\*

*Indian Contract Act (IX of 1872), ss. 65 and 70—Madras District Municipalities Act (V of 1920), ss. 68 (2) and 69 (2)—Contract with municipality entered into in contravention of sec. 68 (2)—Invalidity of—Person obtaining benefit under the contract—Liability to pay compensation under ss. 65 and 70 of the Indian Contract Act (IX of 1872)—Ratification of such contract by municipality—Unavailability of, under sec. 196 of the Indian Contract Act (IX of 1872)—Party receiving benefit incapable of returning same—Liability to pay compensation as a result of.*

A municipality sued to recover the balance of a certain amount of money due to it in respect of the right of taking rubbish, etc., within the municipality, basing its claim on a contract which was entered into by its chairman without conforming to the provisions of section 68 (2) of the Madras District Municipalities Act and also on an alleged ratification of the contract by the municipal council made more than a year after the entering into the said contract by the chairman

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\* Appeal No. 312 of 1935.