



**HIGH COURT OF JUDICATURE FOR RAJASTHAN AT
JODHPUR**

S.B. Civil First Appeal No. 593/2018

Hariram S/o Prabhujji, Aged About 60 Years, B/c Mali, R/o Dhora Bera, Bishangarh, Road, Near Jawai River, Jalore A Tehsil And District Jalore

----Appellant

Versus

Harish Kumar S/o Rikabchandji, Aged About 60 Years, B/c Brahmin, R/o Bishangarh, Tehsil And District Jalore

----Respondent

For Appellant(s) : Ms. Pratyushi Mehta

For Respondent(s) : Mr. Narendra Thanvi

HON'BLE MS. JUSTICE REKHA BORANA

Order

06/11/2023

Reportable

1. Matter comes up for final orders on stay petition.

Learned counsel for the appellant prays for confirmation of the interim order dated 13.12.2018 till the final disposal of the appeal and learned counsel for the respondent prays for vacation of the same & rejection of the stay petition. In the alternate, prayer for grant of 'mesne profit' in the eventuality of the interim order being confirmed, has been made.

2. Learned counsel for the appellant submitted that the interim order dated 13.12.2018 deserves to be confirmed till final disposal of the present appeal as **firstly**, it is an admitted fact that a revenue suit for partition is pending between the appellant and his family members and till the share of the defendant-appellant is determined, possession cannot be transferred to the plaintiff. She



submitted that until the partition is made by metes and bounds, the appellant-defendant cannot be directed to handover the possession and in support of her submission, relied upon the judgment passed by the Hon'ble Apex Court in the case of **Ramdas vs. Sitabhai, (2009) 7 SCC 444.**

3. Regarding the prayer for mesne profit as made by the respondents, learned counsel for the appellant, while relying upon the judgment of Andhra Pradesh High Court in the case of **Thamanna Nukia Shetti vs. Velapa Appalaraju & Ors., AIR 1975 AP 208** submitted that no mesne profit can be awarded in an appeal challenging the decree of specific performance wherein decision of a partition suit in respect of the disputed property is pending.

She further submitted that the basic concept of 'mesne profit' presupposes a wrongful possession of the party who is directed to pay the same. So far as the present matter is concerned, the appellant cannot be deemed to be in wrongful possession as no title is transferred merely by virtue of a decree for specific performance until there is an execution of a conveyance pursuant to the decree. Hence, as of date, the appellant continues to be owner of the property in question and cannot be said to be in wrongful possession of the same. In support of her submission, learned counsel relied upon the following judgments:

- i. **Purushothaman vs. Thulasi, 1994 SCC Online KER 274**
- ii. **H.M. Kumaraswamy vs. T.P.R. Rudradhya, AIR 1966 Mys 215**

**iii. Govinda Chandra Ghose vs. Provabati Ghose, AIR 1956****Cal 147**

4. Learned counsel further submitted that as is the settled position of law, the nature of the user of the premise in question is also a relevant consideration to determine whether the mesne profit is to be granted or not. Admittedly, the premise in question is used for agricultural purposes only which does not even suffice the needs of the entire family of the appellant. No profit is being generated from such user of the land in question hence, mesne profit ought not to be granted. To substantiate the said ground, learned counsel relied upon the order dated 23.03.2021 passed by the Coordinate Bench of this Court in **LRs of Gopal Bihari & Ors vs Shyam Baheti & Ors.** (Civil First Appeal No.170/2002).

5. Per contra, learned counsel for the respondent-plaintiff submitted that in the present matter, execution of the agreement to sell (Exh.1) was specifically admitted by the defendant. Further, the defence regarding the pendency of the revenue suit was never taken before the Court below and hence, the same cannot be permitted to be averred before this Court. Learned counsel submitted that mere filing of the appeal would not amount to stay and as the interim order dated 13.12.2018 was passed *ex-parte*, the same does not deserve to be confirmed.

In support of his contentions, learned counsel relied upon the judgment of Hon'ble Apex Court in the case of **M/s. Atma Ram Properties (P) Ltd. vs. M/s. Federal Motors Pvt. Ltd., (2005) 1 SCC 705.**



6. Learned counsel further submitted that no counter to the reply to stay petition as filed by the respondent has been filed by the appellant and hence, the facts as stated by the respondent remain uncontroverted.

He submitted that after a decree having been passed in favour of the respondent, the appellant, who is a judgment-debtor, is under a mandatory obligation to pay the mesne profits qua the user of the land and therefore prayed that the stay petition of the appellant be dismissed and in the alternate, if the interim order is confirmed in favour of the appellant, he be directed to pay appropriate mesne profit to the respondent.

7. Heard the counsels.

8. In the present matter, factum of execution of 'agreement to sell' is admitted though there is a dispute regarding the quantum of the consideration amount. So far as the possession is concerned, it is also admitted on record that the possession was never handed over to the plaintiff and the same still lies with the defendant.

9. A perusal of the record shows that the plaintiff was well aware of the land being a joint family property which fact is evident from a bare reading of the legal notice (Exh.2) and the plaint. It is rather an admitted case of the plaintiff that he was assured by the defendant that after the partition having been finalized between the family members of the defendant, the sale deed would be executed in his favour and the possession of the property would be handed over to him.



10. The Apex Court in the case of **Ramdas** (supra) held as under:

*"17. In view of the aforesaid position there could be no dispute with regard to the fact that an undivided share of co-sharer may be a subject matter of sale, but **possession cannot be handed over to the vendee unless the property is partitioned by metes and bounds amicably and through mutual settlement or by a decree of the Court.**"*

In **Gajara Vishnu Gosavi vs. Prakash Nanasahed Kamble & Ors., (2009) 10 SCC 654** the Hon'ble Apex Court held as under:

*"11. Thus, in view of the above, the law emerges to the effect that in a given case an undivided share of a coparcener can be a subject matter of sale/transfer, but **possession cannot be handed over to the vendee unless the property is partitioned by metes and bounds, either by the decree of a Court in a partition suit, or by settlement among the co-sharers.**"*

In **Deva Ram & Ors. vs. State of Rajasthan & Ors., AIR 2023 Raj. 94** the Division Bench of this Court held as under:

"10...Therefore, this Court is of the specific opinion that the direction to get the registration of sale deed in favour of the applicant-Shiv Prakash Soni is perfectly valid and does not require any interference. So far as the permission to raise construction is concerned, this Court is of the opinion that the same could not have been granted in absence of the identified shares of all the coparceners and cannot be granted until partition is directed by metes and bounds.

11. So far as the judgment in the case of M.V.S. Manikayala Rao's (supra) is concerned there is no dispute on the ratio as laid down in the said judgment that only right available to a purchaser of a coparcener's undivided interest is to sue for partition of the property and ask for allotment to him of that which on partition might be found to fall to the share of the coparcener whose share he had purchased."

In **Thammana Nukiah Shetti** (supra), Andhra Pradesh High Court held as under:

"17. The above discussion leads us to the conclusion that the plaintiff in this case is not entitled to mesne profits from the





date of the sale. He will be entitled to such profits only from the date when a specified portion of the house is allotted to him representing the 2/7 portion he has purchased.

18. It is true that it can be seen from the written statement of defendants 3 to 6 that they were residing in separate portions, equal to their respective shares. But that is, obviously, by way of convenient enjoyment, because they clearly admitted that there was no division of the property by metes and bounds. So, no one is entitled to any specified portion.

19. In the result, we hold that, while the respondent (plaintiff) is entitled to a decree for partition for 2/7 share, he is not entitled to mesne profits until the allotment of specified portion to his share.....”

11. In view of the settled proposition of law as laid down vide the above judgments, in the present matter, it being an admitted position that the property in question has not been partitioned by metes and bounds, this Court cannot direct for transfer of possession to the plaintiff at this stage. Hence, the interim order dated 13.12.2018 cannot be vacated and deserves to be affirmed.

12. To decide whether the respondent is entitled to mesne profit, an understanding of the basic concept of ‘mesne profit’ is essential. Section 2(12), CPC defines mesne profit as under:-

“(12) **“mesne profits”** of property means those profits which the person in wrongful possession of such property actually received or might with ordinary diligence have received therefrom, together with interest on such profits, but shall not include profits due to improvements made by the person in wrongful possession”

The Apex Court in the case of **Lucy Kochuvareed v. P. Mariappa Gounder & Ors.**,: AIR 1979 SC 1214 observed as follows:--

“25. Mesne profits being in the nature of damages, no invariable rule governing their award and assessment in every case, can be laid down and “the Court may mould it according to the justice of the case”. Even so, one broad basic principle governing the liability for mesne profits is discernible from



Section 2(12) of the CPC which defines 'mesne profits' to mean "those profits which the person in wrongful possession of property actually received or might with ordinary diligence have received therefrom together with interest on such profits, but shall not include profits due to improvements made by the person in wrongful possession". **From a plain reading of this definition, it is clear that wrongful possession of the defendant is the very essence of a claim for mesne profits and the very foundation of the defendant's liability therefore. As a rule, therefore, liability to pay mesne profits goes with actual possession of the land. That is to say, generally, the person in wrongful possession and enjoyment of the immovable property is liable for mesne profits....."**

Meaning thereby, to hold a person liable to pay mesne profit, the basic and the foremost finding that he is in wrongful possession of the property, is a must.

13. Therefore, the question would now be – when can a person be said to be in wrongful possession and whether only by virtue of a decree for specific performance in his favour, the person would be entitled for mesne profit as a compulsion?

In the case of **Amol & Ors. vs. Deorao & Ors., Writ Petition No. 113 of 2010** decided on 06.01.2011, the Bombay High Court held as under:

28. Thus, a decree for specific performance passed on the basis of an agreement to sale or a contract for sale, merely recognizes a claim for specific performance of contract, which is capable of being specifically enforced at the instance of a decree-holder. It does not elevate the status of a decree-holder, subsisting prior to passing of such a decree, to that of the owner of the property in question. It does not create any right, title, interest in or charge on the immovable property in favour of a decree-holder. Even in respect of such a decree, the sale would be complete only upon the execution of the sale-deed in favour of the decree-holder either by the vendor/judgment-debtor or through the process of the Court..... Hence, mere passing a decree for specific performance of contract does not result in the transfer of property.





In **Purushothaman (supra)**, it was held as under :

"6. *Mesne profits by its very definition postulates that the possession of the person concerned is wrongful. The possession of the Defendant in this case would become wrongful only on the title to the property being conveyed to the Plaintiff. It is clear from Section 54 of the Transfer of Property Act that **an agreement for sale does not create any interest in or charge on the property agreed to be sold. Title passes only on execution of the registered instrument transferring the title. It is therefore clear that unless and until the deed of sale is executed in favour of the Plaintiff pursuant to the decree for specific performance, the title to property would not pass to the Plaintiff. That no liability for mesne profits would arise merely on the grant of a decree for specific performance is clear from the decisions reported in Govinda v. Provabati: A.I.R. 1956 Cal. 147, Kumaraswami Rudraradhya A.I.R. 1966 Mys. 215 and similar other decisions.***

14. The ratio that emerges from the above judgments is that until a conveyance is actually executed pursuant to an agreement for sale, the promisee under the agreement is not entitled to any proprietary interest in the property at all. Even on the passing of a decree for specific performance, no title passes until a conveyance is actually executed by the Defendant in obedience to the decree or orders of the court in execution of the decree. Until the title actually passes to the Plaintiff, the Defendant continues to be the owner of the property and he cannot be said to be in unlawful possession there of so as to hold him liable for mesne profits.

Further, in view of the ratios of the above judgments, it cannot be concluded that in every appeal, wherein a decree for specific performance of contract is under challenge, mesne profit has to be granted to the decree holder if the decree in question is stayed.



15. Once concluded that grant of mesne profit is not a mandate in every matter wherein the decree for specific performance has been stayed, the very next question would be if any mesne profit is to be granted, what would be the parameters to determine the quantum of the same?

The Apex Court in the case of **Fateh Chand v. Balkishan**

Dass (1964) 1 SCR 515, observed as under:

"The normal measure of mesne profits is therefore the value of the user of land to the person in wrongful possession. The assessment made by the High Court of compensation at the rate of five per cent of what they regarded as the fair value of the property based not on the value of the user, but on an estimated return on the value of the property, cannot be sustained....."

Moreover, in the case of **M/s. Martin & Harris Private Limited & Anr. Vs Rajendra Mehta & Ors.**; (2022) 8 SCC 527, it was observed that:

"12. The basis of determination of the amount of mesne profit, in our view, depends on the facts and circumstances of each case considering place where the property is situated i.e. village or city or metropolitan city, location, nature of premises i.e. commercial or residential are and the rate of rent precedent on which premises can be let out are the guiding factor in the facts of individual case....."

The ratio therefore, is that the mesne profits are to be calculated on the basis of advantage derived by the person in wrongful possession by the user of the property and not the fair value of the property.

16. Yet another aspect that emerges before this Court is - Whether the Court can grant the relief of mesne profit even when it is not prayed for in the suit?





Dealing with the said issue, the Apex Court in the case of **Shiv Kumar Sharma vs. Santosh Kumari**; (2007) 8 SCC 600

held as under :

"14. A suit is ordinarily tried on the issues raised by the parties. The plaintiff - respondent did not ask for payment of any damages. **No prayer for payment of damages by way of mesne profit or otherwise was also made by the plaintiff.** If the plaintiff was to ask for a decree, he was required to pay requisite court fees on the amount claimed. In such a situation, having regard to Order XX, Rule 12 of the Code, a preliminary decree was required to be passed. A proceeding for determination of the actual damages was required to be gone into.....

17. If the respondent intended to claim damages and/ or mesne profit, in view of Order II, Rule 2 of the Code itself, he could have done so, but he chose not to do so. For one reason or the other, he, therefore, had full knowledge about his right. **Having omitted to make any claim for damages, in our opinion, the plaintiff cannot be permitted to get the same indirectly.**

Law in this behalf is absolutely clear. What cannot be done directly cannot be done indirectly."

Also in the case **Mohd. Amin and Ors. vs. Vakil Ahmed**

and Ors.;AIR 1952 SC 358 held as under:

"23. It was however pointed out by Shri S. P. Sinha that the High Court erred in awarding to the plaintiffs mesne 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 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"

The conclusion hence, is that no mesne profit can be awarded if relief for the same has not been prayed for in the plaint.





17. Coming on to the present matter, the question is whether the respondent is entitled for grant of mesne profit. In view of the ratio as discussed in the preceding paras, no prayer for mesne profit having been made by the plaintiff in the suit, no order for grant of mesne profit can be passed in his favour. Further, there is no material available on record to show that the appellant is earning any profit out of the user of the land in question.

18. Furthermore, the present is a suit for specific performance which has been decreed in favour of the plaintiff and if ultimately the present appeal as preferred by the appellant is dismissed, the respondent-plaintiff would be entitled for execution of the sale deed in his favour on the same consideration amount as agreed for in the agreement to sell which was executed way back in the year 2010. Meaning thereby, he would not be required to pay any additional consideration amount for the increased market price qua the land in question. The said fact, in the opinion of this Court, is a sufficient consideration qua the user of the land by the defendant. Equally, the appellant-defendant, who is, and would be enjoying user of the property till disposal of the appeal, would also be under an obligation to execute the sale deed in favour of the respondent without any additional consideration amount qua the increased market price which definitely is increasing with time. On the other hand, if the appeal as preferred by the appellant is allowed, the plaintiff-respondent would definitely be entitled for refund of the paid consideration amount alongwith interest at the rate prevailing at that point of time. Meaning thereby, the equities would be appropriately balanced between the parties.



19. In view of the overall analysis, this Court does not find the respondent to be entitled for any mesne profit and the prayer for grant of mesne profit is hence, rejected.

20. Consequently, the interim order dated 13.12.2018 is hereby confirmed. Pending the hearing and final disposal of the appeal, the appellant shall also be restrained from alienating the property in question or creating any third party right in the same.

Meanwhile, the respondent, if he so wishes, would be at liberty to move an appropriate application/apply for impleadment before the Revenue Court in the proceedings pending between defendant Hariram and his family members.

21. Stay petition stands disposed of accordingly.

22. List the appeal for hearing on 04.04.2024.

(REKHA BORANA),J

128-/S.Phophaliya/T.Singh/