

**\*IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ CS(OS) No. 2820/1998

Judgment delivered on : 28.10.2010

Shri Bhagwan Kishan Gupta

..... Plaintiff  
Through: Mr.Ajay Talesara, Adv.

Versus

SMT. RANI GUPTA & ORS.

..... Defendants  
Through: None

**CORAM:**  
**HON'BLE MR. JUSTICE RAJIV SHAKDHER**

- |                                                                               |    |
|-------------------------------------------------------------------------------|----|
| 1. Whether the Reporters of local papers may be allowed to see the judgment ? | No |
| 2. To be referred to Reporters or not ?                                       | No |
| 3. Whether the judgment should be reported in the Digest ?                    | No |

**Rajiv Shakdher, J. (Oral)**

1. This is a suit filed for partition, permanent injunction and recovery of damages / mesne profits. I am informed by Mr. Talesara, the learned counsel for the plaintiff, that as regards the reliefs sought in the suit with regard to the partition and permanent injunction, the same need not detain the court, as the contesting defendants herein, had instituted a parallel suit being CS(OS) 1367/1998 entitled Sh. Ram Kishan Gupta Vs. Smt. Rani Gupta & Ors., wherein this court proceeded to pass a preliminary decree vide judgment and decree dated 23.03.2006. I am also informed that the said matter was carried in an appeal by the plaintiff, which was, in the first instance, dismissed in limine by a Division Bench of this Court vide order dated 23.05.2006. Being aggrieved, the plaintiff preferred a Special Leave Petition whereby, the Supreme Court remanded the matter to the Division Bench vide order dated 27.04.2007 passed in SLP No.12350/2006. Pursuant to the order of the Supreme Court, the

Division Bench passed a detailed order and dismissed the appeal of the plaintiff vide order, dated 20.12.2007. Once again, the plaintiff carried the matter in appeal to the Supreme Court. The Supreme Court by a reasoned order dated 25.02.2009 passed in Civil Appeal no.1186/2009 dismissed the appeal of the plaintiff herein. Not being satisfied, the plaintiff preferred a review petition in the Supreme Court against the aforesaid dismissal of his civil appeal. The review petition also suffered the same fate, and was thus dismissed by the Supreme Court on 20.10.2009.

2. Consequent thereto, a Single Judge of this court vide order dated 15.12.2009 passed a final decree in the aforementioned suit. I am informed by Mr. Talesara that three review petitions have been preferred against the final judgment and decree dated 15.12.2009. The review petitions filed by the plaintiff and defendant no.3 (i.e., Sh. Bal Kishan Gupta) are numbered as RA-6 & 7/2010, respectively; while the review petition filed by defendant no.6 (i.e., Sh. Gopal Krishan Gupta) is numbered as RA-69/2010.

3. In the background of the aforesaid circumstances, the only prayer which survives in the captioned suit is with regard to the damages/mesne profits, which have been sought for by the plaintiff apart from relief of partition.

3.1 It is pertinent to note, at this stage, that vide order dated 23.03.2006 after noticing the fact that a preliminary decree has passed amongst the parties herein, the court framed the following issues with respect to the only outstanding issue, that is, mesne profits :-

(i) *Whether the plaintiff is entitled to any mesne profits as claimed by him?*

*OPP*

(ii) *Reliefs*

4. The parties have filed their affidavits of evidence with respect to the issues obtaining between them.

4.1 In so far as the plaintiff is concerned, he examined himself as a witness. In respect of the issue at hand, the plaintiff alluded to the following:-

(i) The plaintiff testified that defendant nos.1 to 3 had deprived him of the right to use atleast one of the two kitchens existing on the ground floor, and thereby he had to incur, on

account of mesne profits, an expenditure of Rs.300/- per day. In respect of the excess area occupied by defendant nos.1 & 2 on the ground floor, a compensation in the sum of Rs.2,000/- per day was sought. This was the amount that had been claimed at the stage of institution of the suit. At the stage of evidence, according to the plaintiff, the damage had escalated to approximately Rs.3,000/- per day. In so far as the barsati floor is concerned, he asserted that he was entitled to compensation at the rate of Rs.15,000/- per month in so far as his share was concerned which, at the point in time he testified before the court had shot up to Rs.18,750/- per month.

4.2 It is to be noticed that in the cross-examination, a suggestion made to the plaintiff that he was not entitled to mesne profits or that the claim for mesne profits was not maintainable in view of the fact that there had been no partition of the suit property amongst the parties herein by metes and bounds; was refuted by him. Furthermore, as regards another suggestion made to the plaintiff that his claim was not maintainable as the suit property was in occupation of the parties in their capacity as joint owners and co-sharers; was also refuted. It is also relevant to note that the plaintiff in his cross-examination accepted the fact that out of the three rooms, one room was added after the death of his father, late Sh. Murari Lal.

5. At this stage, it may also be relevant to note that the averments with regard to the damages/mesne profits are mentioned in paragraphs 9 & 10 of the plaint.

5.1 To be noted in the written statement on this aspect of the matter defendant nos.5 to 13, they have averred as follows :-

*“It is absolutely false that barsati unit can fetch Rs.60,000/- per month. The said portion has always remained in possession of Sh. Girdhari Lal Gupta during his life time and after his sad demise with his legal heirs i.e., defendant nos. 5 to 13. It is denied that the plaintiff is entitled to claim Rs.15,000/- per month as his alleged share from defendants 5 to 13 towards damages, mesne profits. As the plaintiff was never entitled to claim any mesne profits in respect of the portions in occupation of defendants 5 to 13, the question of plaintiff asking for the same does not arise.”*

5.2 Similarly, in the written statement of defendant no.2, the following averments have been made :-

“The allegations of the plaintiff that defendant nos.1 and 2 are misusing his share by carrying out various business activities, renting out portions to outsiders and other undesirable means to his disadvantage, are absolutely wrong and the plaintiff has spoken blatant lie before this Hon’ble Court.”

6. In the background of the aforesaid state of the pleadings and the evidence on record, Mr. Talesara has argued that the plaintiff is entitled to a decree of mesne profits/damages.

7. In my opinion apart from a perfunctory examination-in-chief carried out by way of an affidavit; on the quantification of damages, there is no other material evidence on record to establish the rate at which the damages have been claimed by the plaintiff, in respect of the portions of the suit property, which are in the possession of the defendants, contrary to the share lawfully accorded to them.

7.1 It is not disputed that by the preliminary decree dated 23.03.2006 passed by this court, the shares of the parties were crystallized in the following manner:-

- “i). the plaintiffs together are to get 1/4<sup>th</sup> of the half share of the branch of Late Murari Lal Gupta;*
- ii). the defendant Nos.1(a) and 1(b) together shall get 1/4<sup>th</sup> out of the half share of Late Murari Lal Gupta;*
- iii). the defendant nos. 2 & 3 shall get 1/4<sup>th</sup> share each of the half share of Late Murari Lal Gupta;*
- iv). the defendant Nos.5 & 6 will get 1/3<sup>rd</sup> share each of the half share of Late Girdhari Lal Gupta; and*
- v). lastly, the defendant Nos.7( a to f) are together entitled to 1/3<sup>rd</sup> of the half share of Late Girdhari Lal Gupta.”*

7.2 This decree has attained finality upon being challenged before the Supreme Court. As a matter of fact, the final judgment and decree, as noticed above, has also been passed on 15.12.2009. The review petitions filed against the final judgment and decree (of which reference has been made hereinabove) do not seek to challenge shares allocated to parties by

the court. Therefore, in view of the above, what requires to be determined is: whether the plaintiff has discharged his onus as to the quantification of the rate of damages/mesne profits claimed by him. As noticed above, the only evidence that has been adduced by the plaintiff is his own oral testimony. There is no evidence in the form of any lease of an adjoining or similarly circumstanced property, which could have facilitated the determination of the rate of damages.

7.3 Mr. Talesara has vigorously argued before me that the court should take judicial notice of the fact that the rent of the properties in general, in Delhi has increased, since the institution of the suit and, therefore, the damages could only have escalated to the advantage of the plaintiff.

7.4 A Division Bench of this court in the case of *National Radio & Electronic Co. Ltd. Vs. Motion Pictures Association 122 (2005) DLT 629* has squarely answered aforesaid issue. In that case, the trial court in the context of a leasehold property had granted mesne profits/damages, on taking judicial notice of the fact that rents have generally been on the increase; despite the fact that the plaintiff had failed to produce any evidence before the trial court as regards the rate of damage claimed. The Division Bench disagreeing with the trial court came to the conclusion that a court cannot on its own ipse dixit quantify and crystallize the rate at which the damages have to be granted. It is only on relevant and cogent evidence being produced by the plaintiff in that regard that the court can crystallize a particular rate of damage. The observations of the Division Bench being apposite are extracted hereinafter:

*“.....Judicial notice is taken of only such facts of which there can be only one view. In the light of the aforesaid position in law, there can be no manner of doubt that so far as the increase of rent is concerned, judicial notice can be taken of a fact that over a certain period rents generally have arisen. **However, so far as quantification of the rate at which the increase has actually taken place, a finding can be arrived at only on the basis of legal evidence and material establishing the actual rates at which properties have been let over the period and comparison of such properties with the property which is the subject matter of the lis.** Rents may vary based on location of properties, nature of construction, period of construction, purpose/user for which the*

*premises are let, variation between demand for tenanted premises and availability of premises and even factors relating to the position of the economy. Therefore, while a learned trial Judge may be justified in taking judicial notice of the fact that rents have risen over a certain period of time in the area in question, it would be incumbent upon a person laying a claim of entitlement to mesne profits to prove the same by cogent and reliable evidence in accordance with law.....”*

8. Mr. Talesara however insists that the oral testimony of the plaintiff in that regard would be sufficient to discharge the onus which lay on the plaintiff with regard to the quantification of damages since the matter had not been put in issue in cross-examination. I tend to disagree with the submissions of Mr. Talesara. As noticed above, the defendants in the cross-examination directly confronted the plaintiff with regard to his claim of damages at a particular rate. As a matter of fact, he was also confronted with regard to his claim of damages for a period prior to the suit property being partitioned by metes and bounds. In these circumstances, to say that the plaintiff had discharged his onus would in my view, not be quite correct. As observed by the Division Bench, it was for the plaintiff to place on record the relevant material to enable the court to crystallize the rate of damages.

9. There is in my opinion another aspect of the matter, in respect of which I would like to make a few observations. In so far as mesne profits is concerned, it is noticed by the Privy Council in the case of *Pirithi Pal and Uman Parshad Vs. Jowahir Singh and Ors. reported in (1887) ILR 14P.C.493 (P.C.)* that a claim for mesne profits could not arise in a suit *for partition till the specific interest of the plaintiff is determined; which is after a decree is passed*. The relevant observations of the Privy Council are as follows :-

“...he pronounced his own opinion that under the Act I of 1869, or the sanad, the estate was not partible. The District Judge then proceeded, *erroneously in their Lordships’ opinion, to treat the claim for an account of the proceeds of the family estate as a claim for mesne profits, and quoted the provisions of the Code of Procedure as to mesne profits*. These provisions are intended for and are applicable to suits for land or other property in which the plaintiff *has a specific interest, and not to the suit which was instituted in 1865, or to a suit for a partition where he has no specific interest until decree.*”

9.1 This judgment of the Privy Council was followed in another judgment titled *Hardeo Baksh and Ors. Vs. Shankar Baksh (1889) ILR 16 Cal. 397*. The court went on to say that in real sense the claim of the mesne profits is an account for profits. This view in later years found resonance in the judgment of the Madras High Court in the case of *T. Ramaswami Aiyar Vs. T. Subramania Aiyar and Ors. (1922) 43 MLJ 406*. The court after noticing the Privy Council's judgment in *Pirithi Pal (supra)* and *Uman Parshad (supra)* observed as follows :-

“As pointed out by their Lordships a member of a Hindu family suing for partition and for the profits on his share is really suing for an account of the profits received by the manager or the persons in possession so that the proceeds so received by the latter which are also divisible property may be divided and his share therein also given to him. As stated by their Lordships at page 512, a sharer has a “clear right” to an account of the profits received by the person in possession of the whole, and to *be awarded his share thereof, not as mesne profits received by a person in wrongful possession but as appurtenant to the plaintiff's right in his share of the lands.*”

9.2 The ratio of the judgments, noticed above, demonstrates that in partition of a property belonging to Joint Hindu Family, the accounting of share in the profits arises after a decree is passed, that is, upon crystallization of a specific interest in the property. There is much weight in the principle propounded by the aforementioned judgments since grant of mesne profits is essentially pivoted on wrongful user [see section 2(12) of the CPC]. In case of joint family, this aspect comes to fore only on specific interest of the co-sharer being crystallized.

10. There is another aspect of the matter, which is also noticed in at least the following two judgments, which is, that a claim for mesne profit (i.e., a share of the profits) does not arise where it is a case of defendants being in possession of a share beyond what is lawfully due to them, in other words, a case of excess possession as against complete ouster of the plaintiff. In this regard, reference may be had to first, the following observations of the Calcutta High Court in *Gora Chand Chatterjee and Ors. Vs. Keshab Ohunder Khawas &*

***Ors. (1914) XXIII IC 122 (Cal.):***-

“In my opinion, the appellant is entitled to succeed. It is true *that mesne profits may be awarded against a co-sharer, if there has been an ouster. The mere excess of enjoyment does not in itself amount to ouster, and there is nothing in any of the judgments* which affirm the ouster of the plaintiffs by their co-sharers.”

10.1 This view is also reflected in the judgment of the Bombay High Court in the case of ***Bhivray Vs. Sita Ram: (1894) ILR XIX Bom. 532*** wherein the court approved the following dicta:-

“Melvill, J., remarked (p.595) in the course of the judgment delivered by him, that “the ordinary rule, no doubt, is that the members of an undivided Hindu Family are not entitled to an account of past transactions,” yet “where one member of the family has been entirely excluded, there might be good grounds for ordering an account.”

11. In my view, in the present case; there is no denial of the fact that the plaintiff continued to be in possession of the suit property; albeit less than the share which was finally accorded to him. It is not a case of complete ouster or exclusion. Ouster or exclusion may occur in varied circumstances, I do not propose to elaborate on it. However, one aspect is clear in this case, which is, that plaintiff continued to enjoy a portion of the suit property at every given point in time. The plaintiff has claimed mesne profits on the ground that he was entitled to a larger share than what was in his possession at the stage of institution of the suit. If the dicta of the judgments referred to hereinabove, is applied to the plaintiff, even on this ground, apart from the reason set out hereinabove, which was that, there is no evidence on record with regard to the rate at which damages have to be granted; the plaintiff, in my view, is not entitled to the mesne profit as prayed for.

12. For the reason given hereinabove, issue no.1 as set out above, is decided against the plaintiff. Accordingly, the plaintiff is not entitled to relief of mesne profit as prayed.

13. The captioned suit is dismissed, however, there shall be no orders as to costs. The suit be consigned to record.

**RAJIV SHAKDHER, J**

**OCTOBER 28, 2010**

yg