

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

% **RFA 505 OF 2006**

+ **Date of Decision: 15th March, 2010**

**M/S SOBHAGYA ADVERTISING
SERVICE & ORS** **...Appellants**

! **Through: Mr. J.S. Bakshi, Advocate**

Versus

\$ **MRS. SARASWATI DEVI
(THROUGH LRS.) & ORS.** **...Respondents**

^ **Through: Respondent No.2 for self
and as LR of R-1 & 3 and attorney
of R-3(ii-vi)**

CORAM:

* **HON'BLE MR. JUSTICE P.K.BHASIN**

1. **Whether Reporters of local papers may be allowed to see the judgment?(No)**
2. **To be referred to the Reporter or not? (Yes)**
3. **Whether the judgment should be reported in the digest?(Yes)**

JUDGMENT

P.K.BHASIN, J:

This is an appeal by unsuccessful defendants in a suit for possession and *mesne profits* filed by the respondents 1-3 herein. The appellants are aggrieved by the judgment and decree dated 29th May, 2006 passed by the learned Additional District Judge whereby a decree for *mesne profits* @ Rs.7200/- p.m. in respect of the suit property has been passed (the possession of the suit property having already been delivered by the appellants to the respondents 1 to 3 during the pendency of the suit) besides for some other reliefs.

2. Brief facts of the case may be noticed at the outset. Third floor of property no. 7 Community Centre, East of Kailash, New Delhi was let out to the appellants herein, (who shall hereinafter be referred to as 'the defendants 1 & 2') w.e.f. 1.3.1978 vide lease deed Ex.P-12 executed in their favour by one Smt. Saraswati Devi (who shall hereinafter be referred to as the 'original plaintiff'). Sometime during the year 1984 the defendants 1 & 2 illegally occupied the barsati floor and raised illegal structures consisting of five rooms of different sizes (hereinafter to be referred as 'the suit property'). They also took control of the stairs leading to the barsati floor thereby depriving the original plaintiff completely of the use of the barsati floor. On coming to know about the illegal construction on the barsati floor the original plaintiff served the defendants 1 and 2 with a notice dated 11/09/1984 raising objections about raising of unauthorized structures by them and requiring them to demolish the same and to vacate the barsati floor. The defendants 1 & 2 having failed to comply with that notice a reminder notice dated 30th October, 1986 was also served on defendants 1 & 2 by the original plaintiff Smt. Saraswati Devi reiterating her demand of vacation of the suit property by defendants 1 & 2. Damages for unauthorized occupation of the suit property @ Rs.240/- per day for some period and @ Rs. 10000/- p.m. for some period were also claimed. In the meanwhile because of the constructions on the barsati floor

Municipal Corporation of Delhi(hereinafter referred to as 'defendant no.3) had proposed to assess that additional construction for property tax and ultimately assessed the alleged unauthorised construction on the barsati floor at the ratable value of Rs.77,760/- vide assessment order dated 30/03/1991(Ext. P-1/9). The original plaintiff Smt. Saraswati Devi then got served another notice dated 10.11.1991 on defendants 1 & 2 requiring them once again to remove un-authorized structures on the barsati floor and to pay *mesne profits* @ Rs.7,200/- per month w.e.f. 01.04.1984 to 14.11.1991 and @ Rs.10,000/- per month from 15.11.1991 onwards, besides interest @ 18% p.a. However, the defendants no. 1 & 2 did not even respond to that notice and so Smt. Saraswati Devi filed a suit in April, 1992 for possession of the suit property, *mesne profits* of Rs.2,71,800/- for three years prior to the filing of the suit calculated @ Rs.7200/- p.m. from 01/04/89 upto 14/11/91 and @ Rs.10,000/- p.m. from 15/11/91 upto the date of filing of the suit. Future *mesne profits* were also claimed upto the date of delivery of suit property @ Rs.10,000/- p.m. or at such higher rate which the Court may determine, besides interest thereon @ 18%p.a. Directions to defendants 1 & 2 to bear the property tax liability in respect of suit property and to MCD to recover the same directly from them and also for demolishing the unauthorisedly constructed rooms on the barsati floor were also sought. It was claimed in the plaint by Smt.

Saraswati Devi that the land underneath property no.7 was acquired by her jointly with her son and daughter-in-law and then they had raised the super structure thereon. Thereafter they had effected a partition amongst themselves in respect of the super structure and as per the memorandum of partition the first and third floors along with roof above the third floor (where the defendants 1 and 2 had allegedly raised unauthorized constructions) had come to her share.

3. Defendants 1 and 2 filed their written statement and contested the suit inter-alia on the grounds that Smt. Saraswati Devi was not the owner of the suit property since as per the memorandum of partition placed on record by the plaintiff she had become the owner of only the first and third floors and further that they were in occupation of the suit property 'since they were inducted as tenants of the 3rd floor by the plaintiff' and so she was not entitled to maintain the suit or to have a grievance against them regarding the trespass and illegal occupation of the barsati floor.

4. Smt. Saraswati Devi filed replication and reiterated that she was the owner of the first and third floors with roof rights by virtue of partition having been effected between herself, her son Shri Ram Prakash and her daughter-in-law. However, it appears that as an abundant caution Smt. Saraswati Devi had moved an application to implead her son Shri Ram Prakash and his wife Smt. Kamla Ahluwalia also as co-plaintiffs but before that application could be

disposed of Mrs. Kamla Ahluwalia died and finally Shri Ram Prakash and his five children were allowed to be impleaded by the trial Court.

5. Defendants 1 and 2 had filed amended written statement and in that written statement while maintaining their stand that they were in occupation of the suit property from the time of creation of the tenancy in their favour in respect of the third floor they also took the stand that they were inducted as tenants on the barsati floor and Mrs. Saraswati Devi's grand-daughters Neerja and Poonam, who had been impleaded as plaintiff no.3(iv) and (v) respectively after the death of their mother Smt. Kamla Ahluwalia, were receiving rent @ Rs. 1250/- p.m. each.

6. During the pendency of the suit Smt. Saraswati Devi had also expired and thereafter she was being represented by her son Shri Ram Prakash as her legal heir.

7. In the replication to the amended written statement of defendants 1 and 2 it was pleaded by the plaintiffs that Ms. Poonam and Ms. Neerja, to whom the defendants 1 and 2 were claiming to have paid rent of the suit property, were in fact working as part time consultants with defendant no.1 and the money which according to the defendants they were getting as rent was in fact their salary.

8. During the pendency of the suit the defendants 1 and 2 had offered to vacate the suit property in the year 1999 but the plaintiffs did not accept that offer as they wanted the unauthorised

constructions also to be removed first. Subsequently the defendants 1 and 2 vacated the suit property on 21/05/01 after demolishing the constructions existing there. After vacation of the suit property by defendants on 21/05/01 the plaintiffs found that lot of damage had been caused to the barsati floor and the plaintiffs got an estimate of cost of repairs from an expert who gave the cost of repairs to be of Rs. 45,000/-. Thereafter the plaintiffs added the prayer for a decree for that amount of Rs.45,000/- also by amending the plaint.

9. On the basis of pleadings of the parties the following issues were framed by the trial Court on 25/07/03:-

- (1) Whether defendants 1 and 2 trespassed the terrace/mumti, they are living to the roof terrace of level of third floor a total area of 1520 sq. ft.? OPP
- (2) Whether the defendants 1 and 2 occupied roof terrace level of third floor as a tenant? OPD- 1 and 2
- (3) Whether defendants 1 and 2 raised construction on the terrace of the third floor illegally and as a consequence thereof the property tax was enhanced. If so, its effect? OPP.
- (4) Whether the plaintiff is entitled to the damages to the tune of Rs.45,000/-, as claimed in para 14(a) in the plaint? OPP.
- (5) Whether the plaintiff is entitled to mesne profits, as claimed? OPP
- (6) Whether defendants 1 and 2 are liable to pay the property tax as a consequence of enhanced ratable value? OPP
- (7) Whether plaintiff is entitled to interest. If so, at what rate and for what period? OPP
- (8) Relief.

10. On behalf of the plaintiffs three witnesses were examined while on behalf of contesting defendants 1 and 2 only defendant no.2 entered into the witness box as the sole defence witness. The

learned trial Court vide judgment under challenge passed a decree in favour of the plaintiffs and against defendants 1 and 2 for *mesne profits* @ Rs. 7200/- p.m. w.e.f. April, 1989 to 21st May, 2001 along with interest @ 15% p.a. from the date of the decree till realization. A decree for a sum of Rs. 45,000/- on account of cost of repairs on the barsati floor was also passed. Another direction given to the defendants 1 and 2 was to pay to the plaintiffs half of the property tax on the basis of ratable value of Rs.77,760/- fixed by the MCD in respect of the barsati floor w.e.f. 01-01-86 to 21-05-01.

11. Feeling aggrieved by the judgment and decree passed by the learned trial Court defendants 1 and 2 filed the present appeal. The plaintiffs also felt aggrieved with the grant of damages/*mesne profits* @ Rs. 7200/- p.m. only and the order for sharing the liability of property tax in respect of the illegal constructions on the barsati floor in equal shares by the plaintiffs and the defendants 1 and 2. So they also filed cross-objections under order XLI Rule 21 CPC praying for enhancement in the amount of *mesne profits* from Rs. 7200/- p.m. to Rs. 10,000/- p.m. from 15-11-91 to 31-03-92 and @ Rs. 17490/- from 01-04-92 to 21-05-2001 as also for interest @ 18% p.a. on the difference in the amount of *mesne profits* awarded by the trial Court and that being claimed by the cross-objectors. A direction to MCD was also sought for recovering the entire enhanced property tax from the appellants.

12. The appeal of defendants 1 and 2 and the cross-objections of the plaintiffs are now being disposed of by this common judgment.

13. Before proceeding further it may be stated here that as far as the third floor portion under the tenancy of the defendants 1 and 2 is concerned the plaintiffs had filed a separate suit for recovery of that portion also and during the pendency of the present suit that suit came to be decreed and the plaintiffs had got the possession of that property also.

14. The learned trial Judge after considering the evidence adduced by the parties came to the conclusion that the defendants no. 1 and 2 had made illegal constructions on the barsati floor and further that the defendants had failed to establish that they were tenants of the suit property. While dealing with the stands of the respective parties the trial Court made the following observations in para nos. 6-A and 6-B of the impugned judgment:

“6.A. On scrutiny of documentary record, we do not find any written agreement in respect of barsati floor, between the parties. Hence, it requires further scrutiny of oral testimonies of the parties. Defendants 1 and 2 in their joint written statement (paragraph 3 and 14A) suggest that they have been in occupation of barsati floor since the time defendants were inducted as tenants, by Lease Deed Ex. P-12. It has also been elucidated that barsati floor was let out by plaintiff; the plaintiffs 3(iv) and 3(v) were receiving rent @ Rs.1250/- per month through account payee cheques and they were minors in 1978-79. Thus, as per written statement the defendants 1 and 2 have been in occupation of barsati floor since the date of Lease Deed Ex. P-12 of top floor. Now, let us see and analyse the depositions of defendant's witness DW-1:-

“..... The terrace above the third floor is in our occupation since 01.01.1982. I do not have any document in proof of the same. Vol. I have been paying rent @ Rs. 1100/- per month in two parts i.e. Rs. 550/- each to Ms. Neerja and Ms. Poonam/plaintiffs since 01.01.1982.....” “.....Apart from mumti and toilet a kacha structure of wood was built by the

plaintiff at the time the terrace was let out on 01.01.1982.....” The terrace above the third floor was let out by Professor Ram Prakash from 01.01.1982 and rent was being paid in the names of his daughter, as per his instructions.....” “.....We were in occupation of the roof on the third floor since beginning of the tenancy on the third floor as our tenancy premises was the top floor and Professor Ram Prakash used to charge a few thousands Rupees every year for use of the terrace on the one pretext or the other.....”

“.....I was in occupation of 600 sq. ft. of the terrace.....”

“.....the area beyond 600 sq. ft. i.e. hall was, not in our tenancy but rest of the terrace was passage area and every occupant could have access to the same.....” DW-1 in his examination-in-chief deposed” as per the request and desire of Professor Ram Prakash the rent was split in two equal parts of Rs. 550/- each being the share of plaintiffs Ms. Neerja and Ms. Poonam and the said monthly rent was shown as monthly salary as per the desire of Professor Ram Prakash.

6.B. Now the picture emerged is that there is no written agreement in respect of barasti floor between the defendants and the plaintiffs 3(iv) and 3(v) or between the defendants and plaintiff no.1 or Professor Ram Prakash. The plea of defendants, as per pleadings, is that terrace/barsati was occupied from the inception of tenancy of top/third floor, whereas as per statement of DW-1 the tenancy of terrace/barsati floor began from 01.01.1982 and monthly rent was Rs. 1,100/- which was split into two parts and paid to plaintiffs 3(iv) and 3(v) under the heads of “salary”. In case, eventuality of relationship of the landlord and the tenant exists and in case the facts satisfy the requirement of Section 3(d) of Delhi Rent Control Act, certainly the jurisdiction of Civil Court would be barred. However, the plaintiff had proved letters Ex. P-3 to P-10, which have not been disputed by the defendants. Letters Ex. P-3 and P-4 are the appointment letters to Ms. Neerja and Ms. Poonam and letters Ex. P-5 to P-10 are correspondence with defendants’ bankers Bank of Baroda, East of Kailash, New Delhi directing them the amount payable to Ms. Neerja and Ms. Poonam be credited to their accounts. The letter Ex. P-3 and P-4 written by the defendant no. 2, suggests the salary payable from time to time to Ms. Neerja and Ms. Poonam besides terms of appointment. Letters Ex. P-3 and P-4 were issued on 01.01.1982. Witness PW-1 was cross-examined about date of birth of Ms. Neerja and Poonam, PW-1 suggested their respective date/year of birth as 1960 and 1962. Simultaneously, during the deposition of DW-1, he was inquired about the vouchers qua amount paid to Ms. Neerja and Ms. Poonam, however, DW-1 could not produce the record or the vouchers despite opportunities. Thus, on analytical assessment we find that depositions of DW-1 are contrary to the pleadings and in fact DW-1 has deposed, even beyond the versions given in the written statement, alike they came into occupation on 01.01.1982, the monthly rent of barasti floor was effective w.e.f. 01.01.1982, letters Ex. P-3 and P-4 were issued, which states that plaintiff 3(iv) and 3(v) have been receiving the rent @ Rs. 1,250/- when they were minors in 1978-79. In fact, DW-1 has improved to the extent, that prior to that yearly amount used to be paid to Professor Ram Prakash in respect of use and occupation of the barsati floor, however, there is no whisper about this fact in the written statement. On consolidated reading of record, the statement of DW-1 is not only inconsistent and paradoxical to his own version but the same contradict the stand taken in the written statement. Therefore, defendant no. 1 and 2 failed to establish that they were inducted as tenants in the

barsati floor on 01.01.1982. The defendant no. 1 and 2 would not derive any benefit merely by oral version that rent was paid to Ms. Poonam and Ms. Neerja as salary. Defendants' own letters Ex. P-3 to P-10 prove the facts in favour of plaintiff, the defendants failed to prove that they were inducted as tenants in barsati floor; thus, the suit is not barred by Section 50 of Delhi Rent Control Act. The defendant no. 1 and 2 failed to prove issue no. 2 in their favour.

Simultaneously it is an admitted fact that possession of the barsati was handed over by the defendant no. 1 and 2 to the plaintiff on 21.05.2001. Therefore, defendants were in occupation and use of barsati floor. Since defendants 1 and 2 could not prove their induction in the barsati floor as tenants, therefore, the plaintiffs have succeeded to prove issue no.1 that defendants had trespassed into the barsati floor. The plaintiffs have succeeded to prove issue no.1 in their favour to the extent trespassed in the property/barsati floor by defendant no. 1 and 2.

Still there is controversy as to what was the total area of barsati floor. According to the plaintiffs it was 1520 sq. ft. but according to the defendants it was 600 sq. ft. On analysis, I find that area of 600 sq. ft. has been assessed by defendant no. 3 in its assessment order Ex. P-9, however, the same is assessed on the basis of covered area. The plaintiffs in their pleadings and witness PW-1 has deposed that the barsati floor was occupied by the defendants by making locking arrangement at the mamti and this fact remained disproved on the part of the defendants 1 and 2, therefore, plaintiffs have also succeeded to prove issue no.1 to the extent that defendants 1 and 2 trespassed into the barsati floor in an area of 1520 sq. ft.

15. These findings of the learned trial Judge could not be challenged with force by the learned counsel for the appellants during the course of arguments. Rightly so, since in the original written statement filed by the appellants they had not even taken the plea that they were tenants in respect of the suit property and were paying rent in the form of salaries to the two grand-daughters of the original plaintiff. They had sought permission to include this plea in the written statement by seeking amendment of written statement but their amendment application was rejected by the trial Court but still the trial Court went into that plea. Since the parties had been permitted to adduce evidence during the trial by the trial Court itself on the controversy as to whether the defendants 1 and 2 had

unlawfully occupied the barsati floor or had been recognized as tenants I have also gone into that aspect. After considering the written statements of the defendants 1 and 2 and going through the evidence led by the parties I find myself in general agreement with the already noticed conclusions of the learned trial Court that the defendants had failed to establish their case that they were tenants in respect of the suit property and were paying rent to the two grand-daughters of late Smt. Saraswati Devi. Since I am in general agreement of the findings of the trial Court I need not re-appraise or restate the effect of the evidence adduced by the parties in view of the decision of the Supreme Court in "Girja Nandini Devi vs Bijendra Narain Chaudhary", AIR 1967 SC 1124 wherein also the High Court had expressed general agreement with the findings of the trial Court without detailed re-appraisal of the evidence and that course was approved by the Supreme Court in para no. 14 which is re-produced below:

"14. The Trial Court, as we have already observed, on a consideration of the entire evidence and the subsequent conduct of the parties came to the conclusion that there was no severance of Bijendra Narain from his uncle Bidya Narain and with that view the High Court agreed. It is true that the High Court did not enter upon a reappraisal of the evidence, but it generally approved of the reasons adduced by the Trial Court in support of its conclusion. We are unable to hold that the learned Judges of the High Court did not, as is contended before us, consider the evidence. It is not the duty of the appellate court when it agrees with the view of the Trial Court on the evidence either to restate the effect of the evidence or to reiterate the reasons given by the Trial Court. Expression of general agreement with reasons given by the Court decision of which is under appeal would ordinarily suffice."(emphasis laid)

16. The main grounds of challenge pressed into service by the learned counsel for the appellants were that the their plea of their being the tenants in respect of the suit property should have been accepted by the trial Court since plaintiffs no. 3(iv) & (v), who were actually receiving the rent did not enter into the witness box to rebut the defendants' claim that what they were admittedly receiving from Defendants 1 & 2 was on account of rent of the suit property and that the trial Court was not justified in awarding *mesne profits* to the plaintiffs for the period after the filing of the suit without holding an enquiry as contemplated under Rule 12 of Order XX CPC. Challenging the decree for payment of property tax in respect of the suit property to the extent of half of the total tax and the decree for Rs. 45,000/- on account of cost of repairs it was argued that the plaintiffs could not file suit for recovery of property tax without showing first that they had paid the tax to MCD and for cost of repairs without claiming and proving that they had actually spent Rs. 45,000/- which they had not done.

17. As far as non-examination of the two grand-daughters of the original plaintiff late Smt. Saraswati Devi is concerned the same has no adverse impact on the plaintiffs' case since their father and Prof. Ram Prakash, who was their attorney also, had examined himself and had categorically claimed that his daughters were part-time employees of defendant no.1 and were not receiving any money as

rent but were receiving salary only. He had also placed on record his daughters' appointment letters issued by defendant no.1 and the defendants 1 and 2 admitted those appointment letters. Learned trial Court has rightly observed that this in fact was not even the plea of the defendants 1 and 2 either in their original written statement or even in amended written statement. All that they had pleaded was that plaintiffs no.3(iv) and (v) were receiving rent @ Rs.1250/- each and not that the appointment letters relied upon by the plaintiffs issued by defendant no.1 were not appointment letters but were prepared as such at the request of Prof. Ram Prakash to avoid tax liability, as was the stand taken by them during evidence. Thus, findings of trial Court on issues 1 and 2 are confirmed.

18. Now I come to the challenge from both the sides against the decree for *mesne profits*. Section 2(12) of the Code of Civil Procedure defines '*mesne profits*' as under:

"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."

Rule 12 of Order 20 CPC deals with the grant of *mesne profits* by the Court in a suit for possession of immovable property and the same reads as under:

"Decree for possession and mesne profits:—

(1) Where a suit is for the recovery of possession of immovable property and for rent or mesne profits, the Court may pass a decree—

a) for the possession of the property;

(b) for the rents which have accrued on the property during the period prior to the institution of the suit or directing an inquiry as to such rent;

ba) for the mesne profits or directing an inquiry as to such mesne profits;

c) directing an inquiry as to rent or mesne profits from the institution of the suit until,-

(i) the delivery of possession to the decree-holder,

(ii) the relinquishment of possession by the judgment-debtor with notice to the decree-holder through the Court, or

(iii) the expiration of three years from the date of the decree, whichever event first occurs.

(2) Where an inquiry is directed under Clause (b) or Clause (c), a final decree in respect of the rent or mesne profits shall be passed in accordance with the result of such inquiry.

19. From a perusal of this, the following things become clear:

(1) A decree can straightaway be passed for the *mesne profits* which have accrued upto the date of filing of the suit or an enquiry into such profits can be ordered.

(2) A decree as regards *mesne profits* for the period subsequent to the institution of the suit would entail only after an inquiry, as is evident from Sub-rule (2) of Rule 12.

20. Thus, a plaintiff is entitled to receive from the person in wrongful possession of his immovable property either the profits received by such a person or the profits which such a person might have derived by the exercise of ordinary diligence. The burden of proof would depend on the nature of the claim made by the plaintiff. Where the plaintiff makes a claim in respect of profits that might have been realised by the defendant by the exercise of reasonable

care, as is the case of the plaintiffs in the present case, the burden of proof would lie on the plaintiff to show the probable profits which the defendant might have received.

21. In the present case the plaintiffs claimed past, *pendente lite* as well future *mesne profits* from defendants 1 and 2 upto the date of delivery of possession of the suit property. The trial Court did not consider it proper to order any enquiry into the amount of *mesne profits* either for the period prior to the filing of the suit or for the future and after considering the evidence on record awarded the same @ Rs.7200/- p.m. for the period of three years prior to the date of institution of the suit till delivery of possession of the suit property even though the plaintiffs had claimed the same @ Rs.10,000/- p.m. w.e.f. 15th November,1991 onwards. *Mesne profits* @ Rs.7200/- p.m. were awarded by the trial Court because the original plaintiff had demanded at that rate and MCD had also assessed the construction on the barsati floor at that rental value but *mesne profits* at the higher rate, as claimed by the plaintiffs, were not awarded for the reason that the plaintiffs had not been able to adduce sufficient evidence to justify that claim. The plaintiffs have challenged that view of the trial Court, as noticed already, by filing cross-objections.

22. As far as the decree for *mesne profits* @ Rs.7200/- p.m. for the period prior to the date of filing of the suit is concerned, learned

counsel for the defendants 1 and 2 did not seriously challenge that figure. I am also of the view that considering the fact that the defendants 1 and 2 were using an area of 1520 sq.ft. on the terrace floor unauthorisedly, thereby saving for themselves the rent which they would have paid to some other landlord if they had taken on rent that much area in any other building in East of Kailash which is a posh area of Delhi, the *mesne profits* @ Rs.7200/- p.m. appear to be quite reasonable. However, plaintiff no.2 Ram Prakash, who had argued the matter in person for self and as attorney of other plaintiffs, had submitted that he had examined PW-3 Nirependra Nath Jha, an employee of M/s World Pack Air Courier Services, which Company had taken on rent only 500 sq.ft. area(wooden structure) on the terrace floor of the property no. 6, which was adjoining the property in question, in the year 1987 at a monthly rent of Rs.9500/- but his evidence had been unjustifiably rejected by the trial Court on the ground that his evidence was hearsay while in fact that was not so and, therefore, *mesne profits* @ Rs.10,000/- p.m. should have been awarded for the period from 15.11.91 to 31.03.92 and after taking into consideration the increase in rentals of commercial properties during April, 1992 to 21.5.2001, *mesne profits* should have been awarded @ Rs.11,500/- from 01/04/92 to 31/03/95, @ Rs.13,225/- p.m. from 01/04/95, @ Rs.15200/- w.e.f. 01/04/98 and @ Rs.17,490/- from 01/04/01 till 21st May,2001 when the

defendants 1 and 2 had surrendered the possession of the suit property.

23. I find substance in the submission of Mr. Ram Prakash that the evidence of PW 3 was wrongly rejected as being hearsay. He had categorically deposed that his Company had taken on rent 500 sq. ft. area comprising of wooden structure in the building adjoining to the building in question at a monthly rent of Rs. 9500/-. That was not a hearsay evidence and his evidence could not be demolished in cross-examination on behalf of defendants 1 and 2. They did not lead any evidence to rebut his statement. Therefore, the plaintiff could have been awarded *mesne profits* @ Rs. 9500/- p.m. w.e.f. 15.11.91 till the date of the filing of the suit. The plaintiffs/cross-objectors are accordingly awarded *mesne profits* @ Rs. 9500/- p.m. for the said period.

24. As far as the plaintiffs' claim for *mesne profits* for the period after the filing of the suit is concerned, the same could be awarded by the trial Court only after passing a preliminary decree ordering an enquiry into the amount of *mesne profits* as provided under Order XX Rule 12 CPC and only after enquiry had been conducted a final decree for *pendente lite* and future *mesne profits* could be passed. Mr. Ram Parkash, however, submitted relying upon two judgments of the Supreme Court in "Atma Ram Vs Shakuntala Rani", AIR 2005 SC 3753 & "Marshall Sons & Co. (I) Ltd. Vs Sahi Oretrans (P) Ltd. and Another", (1999) 2

SCC 325 that the trial Court had the power to award *mesne profits* even for the period after the filing of the suit without any enquiry as contemplated under Order XX Rule 12 CPC. I have gone through the two judgments cited by Mr. Ram Parkash and find that in none of those two decisions the question of award of *mesne profits* after the filing of the suit till the delivery of possession of the property in question without holding an enquiry as contemplated under Order XX Rule 12 CPC came to be considered. The plaintiffs thus cannot get any benefit from those two judgments. Therefore, the decree of the trial Court awarding *mesne profits* from the date of the filing of the suit till the delivery of the possession of the suit property to the plaintiffs by defendants 1 and 2 without any enquiry cannot be sustained and is liable to be set aside. However, after lapse of many years it would not be appropriate to ask the plaintiffs to file a separate suit for *pendente lite mesne profits* and it would be proper and in the interest of justice to remand the matter to the trial Court with a direction to hold an enquiry for ascertaining *mesne profits* to be awarded to the plaintiffs as also the period upto which the same are to be awarded after the filing of the suit in accordance with Rule 12 of Order XX CPC. Findings of trial Court on issue no. 5 stand modified accordingly.

25. The plaintiffs have also been awarded decree for a sum of Rs. 45,000/- on account of cost of repairs in respect of the damage

caused to the barsati floor by defendants 1 and 2 while raising unauthorized constructions there. Perusal of examination-in-chief of plaintiff Sh. Ram Parkash, which was by way of his affidavit, shows that he had not claimed that after obtaining the estimate of cost of repairs from the expert valuer he had actually got the damage caused to the barsati floor repaired by spending Rs. 45,000/-. This was not pleaded also in the plaint. Therefore, the learned trial Court was not justified in passing a decree for Rs. 45,000/- in favour of the plaintiffs on that count. Consequently, the decision of the learned trial Court on issue no. 4 is set aside.

26. Now I come to the direction sought by the plaintiffs against MCD for recovery of the property tax in respect of the constructions on the barsati floor from defendants no. 1 and 2. I do not find any justification in the findings of the trial Court that the plaintiffs and defendants no. 1 and 2 should share equally the liability of property tax in respect of the constructions on the barsati floor since it had been found by the trial Court that the constructions had been raised illegally by defendants no. 1 and 2. Therefore, it shall be the liability of defendants no. 1 and 2 to pay the entire amount of property tax in respect of the construction on the barsati floor as and when the same is recovered from the plaintiffs. Findings of the trial Court on issues no. 3 and 6 stand modified accordingly.

27. No other point was urged from either side.

28. This appeal and the cross-objections accordingly stand allowed partly. There shall now be a decree in favour of the plaintiffs and against defendants 1 and 2 in respect of *mesne profits* @ Rs.7200/- p.m. from 07/04/89 to 14/11/91 and @ Rs. 9500/-p.m. from 15/11/91 upto 06/04/92 as also interest thereon as awarded by the trial Court. It is further decreed that the defendants shall be liable to pay the entire amount of property tax which would finally stand assessed by MCD and recovered also from the plaintiffs in respect of the construction on the barsati floor of property no.7, Community Centre, East of Kailash, New Delhi upto 21/05/01. Regarding *mesne profits* in respect of the period from the date of filing of the suit onwards there shall now be a preliminary decree directing holding of an enquiry for ascertainment of the amount of *mesne profits* and after the conclusion of the enquiry final decree shall be passed. In the circumstances, parties are left to bear their respective costs in respect of the appeal and cross-objections.

29. The trial Court shall take up the matter for the purpose of holding the enquiry on 9th April, 2010.

March 15, 2010

P.K. BHASIN,