

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

Date of Decision: 04.10.2012

+ FAO 341/2012

SARASWATI DEVI DECD THR LRS & ORS

..... Appellants

Through : Mr. Ram Prakash, appellant no.2 in person

versus

SOBHAGYA ADVERTISING SERVICE & ANR

..... Respondents

Through : None

CORAM:

HON'BLE MS. JUSTICE VEENA BIRBAL

VEENA BIRBAL, J.(ORAL)

1. The appellant has challenged the impugned order dated 26.07.2012 by which application filed by the appellant/plaintiff under Order 39 Rule 10 CPC has been dismissed with costs of ₹ 10,000/-.
2. The appellant herein (being represented through her LRs) i.e. plaintiff before the learned trial court had filed a suit for possession and recovery of damages/mesne profits in respect of suit property i.e. barsati floor of property No. 7, Community Centre, East of Kailash, New Delhi against the respondents herein i.e. defendants before the learned trial court. The suit was decreed vide judgment dated 29.05.2006 passed by the learned trial court. The possession of the suit property had already been delivered on 21.05.2001 by respondents/defendants during the pendency of suit to the appellant/plaintiff. The trial court vide judgment/decreed dated 29.05.2006

had awarded the mesne profits @ ₹ 7,200/- p.m. w.e.f. April, 1989 to 21.05.2001 along with interest @ 15% p.a. from the date of decree till realization. Some other reliefs towards costs of repairs, property tax were also granted. The aforesaid judgment/decreed was challenged by the respondents/defendants by filing RFA No. 505/2006 before this court. The appellant/plaintiff had also filed cross-objections under the relevant provisions of CPC praying for the enhancement of the mesne profits. The appeal and cross-objections were partly allowed by this court in aforesaid RFA wherein a decree in favour of appellant/plaintiff and against respondent in respect of mesne profits @ ₹ 7,200/- p.m. was passed from 07.04.1989 to 14.11.1991 and @ ₹ 9500/- p.m. from 15.11.1991 upto 06.04.1992 along with interest as awarded by the trial court. As regards the mesne profits in respect of the period from the date of filing of the suit onwards, this court directed for holding of an enquiry for ascertainment of amount of mesne profits and after conclusion of the enquiry, the final decree be passed. The relevant portion of the court is reproduced as under:-

“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.”

3. On remand before the learned trial court, the appellant/plaintiff had filed an application under Order 39 Rule 10 wherein prayer was made for grant of mesne profits for the period for which this court had directed for an enquiry under Order 20 Rule 12 of CPC. It was contended by the appellant before the learned trial court that it will take some time before it to complete the enquiry under Order 20 Rule 12 CPC for determining mesne profits from 07.04.1992 to 21.05.2001 as per directions contained in the order dated 15.03.2010 in RFA No. 505/2006, as such, it was prayed that the respondents/defendants be asked to pay the amount. It is contended that in the High Court also during the pendency of RFA, the respondents/defendants were ordered to deposit 50% of the decretal amount and to give an undertaking to pay the balance of decretal amount as might be decided on disposal of appeal without any execution application by the decree holder and accordingly in all appellant/plaintiff had paid a sum of ₹3,77,271/-. It is contended that learned trial court has rejected the said application by holding that the enquiry in respect of ascertaining of mesne profits is going on and it is not the proper stage to pass any further orders and the case has to be proceeded as per directions contained in Para 28 of judgment of aforesaid RFA.

4. The learned counsel for the appellant has contended that the matter is a very old one and there is no dispute about the period of use and occupation charges. It is contended that respondent has to pay mesne profits for a long period. In these circumstances, the learned trial court ought to have allowed the application of the appellant.

5. As noted above, this court in RFA No. 505/2006 has not considered it fit to grant mesne profits for the period for which the matter has been remanded back without holding enquiry. The relevant portion of the order is reproduced as under:-

“24. As far as the plaintiff’s 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 has 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 the trial court on issue no. 5 stand modified accordingly.”

6. The matter has been remanded back on 15.03.2010 with the specific directions for conducting enquiry under Order 20 Rule 12 of CPC. The mesne profits are yet to be ascertained in the enquiry. In these circumstances, the trial court has rightly rejected the application. Perusal of impugned order shows that appellant/plaintiff has also tried to mislead the trial court for the award of higher rates of mesne profits from 15.11.1991 upto the date of surrender in the application as if the same were the observation of the High Court while disposing RFA No. 505/2006 whereas the same were only the submissions of appellant/plaintiff. The trial court has observed the same as under:-

“12. Therefore, it is crystal clear that what has been recorded in the said para is only the contention/submission made on behalf of the plaintiff in the cross-objections and not the finding

recorded by the High Court. Therefore, it is further crystal clear that the plaintiff has made an unsuccessful attempt to modify the order dated 15-03-2010 in his own language and manner and also perhaps with a *malafide* intention and in doing so the plaintiff is not justified.”

In view of above discussion, no illegality is seen in the impugned order.

The appeal stands dismissed.

CM No. 13845/2012 (stay)

In view of the order on the main appeal, no orders are required on this application.

The same stands disposed of accordingly.

VEENA BIRBAL, J

OCTOBER 04, 2012
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