

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

Date of decision: 5th August, 2013.

+ **RFA 217/2013**

SONJOY CHATTERJEE **Appellant**

Through: Ms. Anisha Banerji, Adv.

Versus

SOLIL CHATTERJEE **Respondent**

Through: None.

CORAM:

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

RAJIV SAHAI ENDLAW, J.

1. The appeal impugns the judgment and decree dated 8th November, 2012 of the Additional District Judge (ADJ)-04, Central, Delhi of dismissal of Suit No.433/2008 filed by the appellant.

2. The appeal came up for consideration on 15th July, 2013 when the delay of 23 days in re-filing the appeal was condoned and certain queries as to the very maintainability of the suit from which this appeal arises were made from the counsel for the appellant.

3. The counsel for the appellant sought time to address thereon. While adjourning the appeal to today, the Trial Court record was also requisitioned and has been received. The counsel for the appellant has since also placed

copies of certain orders in other proceedings between the parties on record and has been heard further.

4. The appellant/plaintiff had instituted the suit from which this appeal arises, in or about May, 1994, for an enquiry into mesne profits due with effect from 18th November, 1991 to the appellant/plaintiff from the respondent/defendant with respect to the property No.D-8/5, Vasant Vihar, New Delhi and for recovery of the mesne profits so found due together with interest on arrears thereof @ 21% per annum, pleading:

(i) that the father, of the appellant/plaintiff and the respondent/defendant, was the owner of the suit property; he died leaving the appellant/plaintiff and the respondent/defendant as his only legal heirs;

(ii) that the respondent/defendant in January, 1993 filed CS(OS) No.334/1993 in this Court for partition of the said property and obtained an *ex-parte* ad-interim order therein restraining the appellant/plaintiff from dispossessing the respondent/defendant from the said property;

(iii) that as a consequence of the said order, the respondent/defendant had been enjoying the entire property to the

exclusion of the appellant/plaintiff;

(iv) that on 4th March, 1994 a preliminary decree for partition of the said property was passed in CS(OS) No.334/1993, declaring the appellant/plaintiff and the respondent/defendant to be having 50% share each in the suit property;

(v) that the said property if let out would fetch a monthly rent of Rs.1 lakh;

(vi) that since the appellant/plaintiff had been denied the use of the property, he was entitled to 50% of the rent as mesne profits.

5. The respondent/defendant contested the suit by filing a written statement pleading:

(a) that no court fees on the mesne profits claimed for the period prior to the institution of the suit had been paid;

(b) that the respondent/defendant being a co-owner of the property was entitled to use the whole property and the suit for mesne profits was not maintainable;

(c) that the respondent/defendant had a right to occupy the entire property till the time the same was partitioned and for which a suit as aforesaid had already been filed by the respondent/defendant.

6. The appellant/plaintiff filed a replication pleading that since the respondent/defendant was admittedly the owner of only half share in the property, he did not have a right to occupy the entire property and undertaking to pay the court fees on the arrears claimed of mesne profits.

7. On the pleadings of the parties, the following issues were framed in the suit on 18th October, 2000:

- “1. Whether the suit has been properly valued for the purposes of court fee and jurisdiction?*
- 2. Whether the suit of the plaintiff for mesne profits is maintainable? If so, to what effect?*
- 3. If Issue No.2 is decided against the defendant, at what rate the plaintiff is entitled by way of mesne profits and if so for what period?*
- 4. Whether the plaintiff is entitled to interest on mesne profits @21% p.a.?*
- 5. Relief.”*

The said order also records the statement of the counsels that Probate Petition No.35/1996 relating to the same property was also pending before this Court (and before which the suit was then pending) and was listed for recording of evidence and the outcome of the probate petition shall have a bearing on the proceedings in the present suit.

8. The trial in the suit from which this appeal arises did not commence for the reason of the pendency of the probate petition aforesaid and ultimately in the year 2004 the suit, on change in pecuniary jurisdiction, was

transferred to the District Court.

9. The appellant/plaintiff himself did not appear as a witness and Mr. Atul Puri, Chartered Accountant appeared as a witness on behalf of the appellant/plaintiff. The respondent/defendant examined himself as a witness. No other witnesses were examined.

10. The learned ADJ, vide the impugned judgment, has dismissed the suit of the appellant/plaintiff finding/observing/holding:

(i) that the appellant/plaintiff had not adduced any evidence to show that the property could have fetched rent of Rs.1 lakh per month from November, 1991 and though the Attorney of the appellant/plaintiff had deposed that at the time of his deposition in December, 2005-2006, the property could have fetched rent of Rs.2 lakhs per month but no documentary evidence in support thereof also was produced;

(ii) that it was the admitted case of the appellant/plaintiff that the appellant/plaintiff had been residing out of India, in London, since the year 1971 and that since the construction of the property, the father of the parties along with the respondent/defendant had been residing in the property, though the appellant/plaintiff used to visit the same from

time to time;

(iii) that though the Attorney of the appellant/plaintiff in his cross-examination admitted that the appellant/plaintiff since three years prior to 2006 was in Delhi but the appellant/plaintiff did not step into the witness box;

(iv) that the suit has been correctly valued for the purposes of court fees and jurisdiction;

(v) that the appellant/plaintiff had neither pleaded nor proved having sought partition from the respondent/defendant at any time or the respondent/defendant having refused the same; it was rather the respondent/defendant who had prior to the institution of the suit from which this appeal arises, instituted the suit for partition of the property;

(vi) that it was the admitted case of the respondent/defendant that he had been residing in the suit property since the lifetime of the father;

(vii) that the appellant/plaintiff in the written statement filed in the said suit for partition had admitted having allowed the respondent/defendant use of the entire property out of respect and

love and that the property cannot be partitioned by metes and bounds due to the manner in which it has been constructed;

(viii) that a Division Bench of this Court in *Ranbir Singh Vs. Attar Singh* 65 (1997) DLT 617 has held that if any co-sharer is in exclusive possession of the joint property, he can preserve his possession by seeking protection of the Court till partition of the joint property;

(ix) that the mere fact that the respondent/defendant apprehending forcible dispossession had obtained interim injunction in the suit for partition restraining the appellant/plaintiff from forcibly dispossessing the respondent/defendant from the suit property did not make the possession of the respondent/defendant unlawful, so as to give a right to the appellant/plaintiff to claim mesne profits from another joint owner;

(x) that admittedly there was no separation of share of the parties, the respondent/defendant had a right to protect his possession and enjoyment of the property;

(xi) that wrongful possession is the foundation for a claim for mesne profits; possession of a co-sharer is not wrongful and therefore

the question of the respondent/defendant being liable for any mesne profits to the appellant/plaintiff did not arise;

(xii) reliance was placed on *Babburu Basavayya Vs. Babburu Guravayya* AIR 1951 Madras 938 (Full Bench), *Mst. Kamta Meherani Vs. Damru Meher* AIR 1964 Orissa 94, *Udekar Vs. Chandra Sekhar* AIR 1961 Orissa 111, *Nandkishore Vs. Parameshwar Prasad* AIR 1935 Patna 80 and *Shambhu Dayal Khetan Vs. Motilal Murarka* AIR 1980 Patna 106 in this regard;

(xiii) that it was not a case of the appellant/plaintiff that the respondent/defendant had earned any profits out of the suit property; the only case of the appellant/plaintiff was that had the property been let out, it would have fetched rent of Rs.1 lakh or Rs.2 lakhs in which the appellant/plaintiff would have a 50% share;

(xiv) that the suit was also barred by Order 2 Rule 2 of CPC.

11. During the hearing of this appeal on 15th July, 2013, the fate of the partition suit supra filed by the respondent/defendant was enquired. The counsel for the appellant/plaintiff informed that pursuant to the preliminary decree dated 4th March, 1994 for partition, *inter se* bids were invited and the respondent/defendant bought the share of the appellant/plaintiff in the

property.

12. It was next enquired from the counsel for the appellant/plaintiff as to how the appellant/plaintiff could be entitled to mesne profits when the possession of the respondent/defendant of the property was protected under an interim order of the Court. The counsel for the appellant/plaintiff informs that the appellant/plaintiff had preferred an appeal against the order of interim injunction obtained by the respondent/defendant and it was in that appeal that the parties agreed to *inter se* bids and in pursuance whereof the respondent/defendant bought the share of the appellant/plaintiff; it is thus contended that there was no finality of the order of interim injunction. The counsel for the appellant/plaintiff was asked to produce and has produced copies of the orders dated 14th February, 2005 and 24th May, 2005 in FAO(OS) No.164/2002 arising from the interim order in the partition suit.

13. A perusal of the records shows, (a) that the application of the respondent/defendant for interim relief in the partition suit, on which the *ex-parte* injunction restraining the appellant/plaintiff from forcibly dispossessing the respondent/defendant from the premises was made on 2nd February, 1993, was finally disposed of vide order dated 11th January, 2002; (b) the said order records that the appellant/plaintiff (who was the defendant

in the partition suit) had filed applications in the years 1993 and 1997 for vacation of the *ex-parte* order dated 2nd February, 1993; (c) that as per the dicta in ***P. Periasami Vs. P. Periathambi*** (1995) 6 SCC 523, the appellant / plaintiff and the respondent / defendant inherited the property of their father as tenants-in-common; (d) that though tenants-in-common have unity of possession but in the present case, it was the admitted position that it was the respondent/defendant alone who had been exclusively residing in the property for long and the appellant/plaintiff had been residing abroad; (e) that each tenant-in-common has a right/title/interest in every inch of the property and it is for this reason only that a tenant-in-common cannot claim damages for use and occupation of the joint property even though the other co-sharer is in exclusive use and occupation of the property; (f) that though restraining a co-sharer's access and use of the property may seem unjust but so long as the shares are not divided and separated in a suit for partition, it would be incongruous to ask the joint sharer not to use a particular portion of the property or give up his right to use and enjoy that portion of the property as has already been held by the Division Bench of this Court in ***Ranbir Singh*** (supra); (g) that the respondent/defendant being admittedly in exclusive use and occupation of the property for long, his possession could

not be disturbed.

Accordingly, the *ex-parte* ad interim injunction dated 2nd February, 1993 was confirmed.

14. The appellant/plaintiff as aforesaid preferred FAO(OS) No.164/2002 against the aforesaid order dated 11th January, 2002.

15. The record further shows that during the pendency of FAO(OS) No.164/2002 (*supra*), the parties agreed to *inter se* bids and the appellant/plaintiff sold his 50% share in the property to the respondent/defendant for a consideration of Rs.2.35 crores, which has admittedly been received by the appellant/plaintiff.

16. I have wondered, why, when the preliminary decree for partition as aforesaid was passed on 4th March, 1994 itself and when it was the case of the parties that the property as constructed was indivisible by metes and bounds, the suit for partition remained pending as aforesaid till 2002 when the injunction was confirmed. The reason therefor appears to be that one Ms. Saraswati Chatterjee, who had filed Probate Petition No.35/1994 *supra* qua a Will of the father of the parties bequeathing 1/3rd share in the property to her and the remaining 1/3rd to each of the parties hereto, had applied for impleadment in the said suit.

17. In the aforesaid scenario, I am unable to find any merit in the claim of the appellant/plaintiff for mesne profits in this appeal, and axiomatically for the following reasons:

(A) As far as the claim of the appellant/plaintiff for mesne profits for the period from 18th November, 1991 till the institution of the suit in or about May, 1994 is concerned, neither in the plaint nor in the evidence it has been disclosed as to why the mesne profits have been claimed from 18th November, 1991—perhaps the intent was to claim mesne profits for three years prior to the institution of the suit on 3rd May, 1994;

(B) The appellant/plaintiff has not pleaded that he, on 18th November, 1991 or on any other date had asked the respondent/defendant to partition the property or to allow him use and occupation thereof or that the same was denied by the respondent/defendant; on the contrary, the cause of action for the suit for mesne profits is stated to be the filing (in or about January, 1994) of the suit by the respondent/defendant for partition of the property and for restraining the appellant/plaintiff from dispossessing the respondent/defendant therefrom;

(C) A co-owner, even if in law entitled to mesne profits, would be entitled to mesne profits only from the day when the exclusive possession of the other co-owner can be said to be wrongful; the respondent/defendant in the present case has admittedly been in exclusive use and occupation of the property since the construction thereof in 1972-73, with the consent of the appellant/plaintiff; for the said permissive possession to turn wrongful, there has to be pleading of the permission having been revoked or cancelled and which pleading does not exist;

(D) Not only does the appellant/plaintiff not claim to have at any time revoked or cancelled the permission admittedly granted to the respondent/defendant to exclusively use and occupy the property but did not even seek partition of the property; it was the respondent/defendant who sued for partition, again demonstrating that the respondent/defendant had no intent to usurp the share of the appellant/plaintiff in the property and when felt threatened from the appellant/plaintiff, sought separation of their respective shares by partition;

(E) It is also not the case of the appellant/plaintiff that he had

demanded partition or use and occupation of any portion of the property around January, 1993 when the respondent/defendant obtained the interim injunction; rather it is the case of the appellant/plaintiff that the respondent/defendant obtained the *ex-parte* injunction on false grounds and without any cause of action;

(F) Thus, the claim of the appellant/plaintiff for mesne profits till the institution of the suit from which this appeal arises is not made out;

(G) As far as the claim for mesne profits for the period after the institution of the suit i.e. from May, 1994 till the sale by the appellant/plaintiff of his share in the property to the respondent/defendant in or about the year 2005 is concerned, admittedly the exclusive possession of the respondent/defendant of the property was protected by an interim order of this Court; the question which arises is whether possession under protection of the order of the Court can be said to be unlawful, for a liability for mesne profits to arise;

(H) Though an interim order is on a *prima facie* view of the matter and cannot influence the final adjudication but the peculiarity in the

present case is that it is not as if the respondent/defendant dragged his feet in the partition suit either; as aforesaid, preliminary decree for partition was passed on 4th March, 1994 itself i.e. prior to the institution of the suit for mesne profits from which this appeal arises; a further peculiar fact is that it was the case of the appellant/plaintiff also that the construction of the property was such that it did not permit joint use thereof by the parties especially in view of the litigations which had erupted between them; there is no explanation as to why *inter se* bidding was not done immediately after the preliminary decree on 4th March, 1994 as it was ultimately done in the year 2005; till the final decree, there was no possibility of the appellant/plaintiff who was in any case resident of London, jointly enjoying the property with the respondent/defendant or the respondent/defendant receiving any profits from exclusive use thereof; for this reason also, the question of mesne profits for the period after the institution of the suit, does not arise;

(I) Yet another peculiar fact is that the appellant/plaintiff by agreeing to *inter se* bids and sale of his share in the property to the respondent/defendant, did not allow any final adjudication of rights

qua use and occupation of the property in the suit for partition;

(J) Order 20 Rule 18 of the Civil Procedure Code (CPC), 1908 empowers the Court passing a decree for partition of the property to give such further directions as may be required;

(K) The Division Bench of the Orissa High Court in *Udekar* (supra) held that though a separate suit for mesne profits may lie after the disposal of the main suit for recovery of possession from the trespasser as the claim for mesne profits is based on a distinct cause of action and has nothing to do with the original suit for recovery of possession from the trespasser but different considerations arise in a suit for partition amongst co-sharers; in a suit for partition, it is necessary not merely to divide the properties but also to adjust equities between the parties; the profits accruing from the common properties pending a suit for partition, like the properties themselves, are liable to be partitioned under the final decree even without a separate prayer in the plaint for an account of such profits and division thereof; hence a claim for accounts in a partition suit, ought to be settled at the time of preparation of final decree and if one of the sharers is found to be in possession of more than his legitimate share

of the joint property then the claim for adjustment of accounts should be made and the equities between the parties adjusted in the final decree itself—it will not be a separate cause of action so as to confer on a party the right to bring a separate suit subsequently; if a right to a separate suit is conceded to a co-sharer, there not only will be a multiplicity of litigation but it may be difficult to do complete justice between the parties; accordingly, a separate suit for mesne profits was held to be not maintainable;

(L) A Division Bench of the Madras High Court in ***Gnanaprakasa Mudaliar Vs. B. Anandathandavan*** AIR 1999 Mad. 312 following the Full Bench judgment in ***Babburu Basavayya*** (supra) held that in a partition action, the lis gets terminated for all purposes at the time of passing of the final decree even with regard to the future mesne profits and it is as such not open to the parties to claim the relief of mesne profits beyond the date of passing of the final decree, unless the final decree provides for such relief;

(M) Another Single Judge of the Madras High Court in ***A. Noorjehan Vs. Kabir*** MANU/TN/2043/2012 has reiterated that the right of a co-sharer in a partition suit to apply for ascertainment of

income pertaining to his share after the passing of the preliminary decree for partition, does not exist and that a partition suit in which a preliminary decree has been passed is still a pending suit and the right of the parties have to be adjusted as on the date of final decree;

(N) A Full Bench of the Allahabad High Court in ***Sardar Balbir Singh Vs. Atma Ram Srivastava*** AIR 1977 Allahabad 211 has held that the answer to the question whether a subsequent suit for mesne profits lies or not depends upon the facts and circumstances of each case and if the cause of action for the relief of mesne profits is found to be intertwined with the cause of action for the relief of possession, then a subsequent suit for mesne profits would be barred;

(O) The claim for mesne profits in the present case as aforesaid is for the period during the pendency of the suit for partition only and the said claim, in my view ought to have been raised in the suit for partition itself and cannot be raised subsequently, more so when the suit for partition was ultimately disposed of on consensual terms;

(P) The appellant/plaintiff as aforesaid has not proved the rate of mesne profits; a Division Bench of this Court in ***National Radio & Electronic Co. Ltd. Vs. Motion Pictures Association*** 122 (2005)

DLT 629 has held that no judicial notice of the rate of mesne profits can be taken; the appellant/plaintiff is not entitled to any mesne profits for this reason also;

(Q) No case of the respondent/defendant, in the aforesaid facts and circumstances, even if were to be held to be in wrongful exclusive possession of the property, actually receiving or which he could with ordinary diligence have received, any profits from such exclusive use and occupation is made out.

18. There is thus no merit in the appeal, which is dismissed. No costs.

Decree sheet be drawn up.

RAJIV SAHAI ENDLAW, J.

AUGUST 05, 2013

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