

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

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Date of decision: 13th May, 2014

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FAO(OS) 579/2013 & CM No.20049/2013 (for stay)

SMT. SANTOSH ARORA & ORS

..... Appellants

Through: Mr. Ankit Jain, Advocate.

Versus

SH. M.L. ARORA

..... Respondent

Through: Mr. Yakesh Anand, Mr. Murari
Kumar and Mr. Prateek Kumar, Advs.

CORAM :-

HON'BLE THE CHIEF JUSTICE

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

RAJIV SAHAI ENDLAW, J.

1. This intra-court appeal impugns the order dated 27th September, 2013 of the learned Single Judge of this Court (exercising ordinary original civil jurisdiction) of dismissal of application being IA No.742/2013 filed by the appellants under Order 7 Rule 11 of the CPC for rejection of the plaint in CS(OS) No.1982/2012 filed by the respondent.
2. Notice of the appeal was issued and vide *ad interim* order dated 17th December, 2013, the operation of the said order dated 27th September, 2013 was stayed and further proceedings in the suit also stayed.

3. We have heard the counsel for the appellants / defendants and the counsel for the respondent / plaintiff.

4. The respondent / plaintiff filed the suit wherefrom this appeal has arisen for recovery of Rs.1,37,97,000/- from the appellants / defendants jointly and severally, towards arrears of rent, damages for use and occupation of the premises / *mesne* profits, pleading:-

- (i) that the respondent / plaintiff is the owner of shop and flat no.128, Sarojini Nagar, New Delhi;
- (ii) that the appellants / defendants are the legal heirs of the brother of the respondent / plaintiff;
- (iii) that the shop aforesaid was earlier in the tenancy of Punjab National Bank and the respondent / plaintiff had executed a Power of Attorney in favour of his brother i.e. the predecessor in interest of the appellants/defendants, for the purposes of legal proceedings for eviction of Punjab National Bank from the said shop;
- (iv) that after the shop was vacated by the Punjab National Bank in May, 2001 the appellants / defendants wrongfully entered into possession of front portion of the ground floor of the shop;

- (v) that upon the appellants / defendants refusing to vacate the said portion of the shop, the respondent / plaintiff filed a suit for recovery of possession of the said portion of the shop from the appellants / defendants and for recovery of Rs.1,20,000/- towards *mesne* profits and damages at Rs.60,000/- per month on the basis of the then prevailing rent of the premises and for recovery of future use and occupation charges / *mesne* profits at Rs.60,000/- per month;
- (vi) that the said suit, (hereinafter called the first suit) at the time of institution of the suit from which this appeal arises (hereinafter called the second suit), was still pending adjudication before the Court of the learned Addl. District Judge;
- (vii) that however the market rent of the portion in unauthorized occupation of the appellants / defendants for few years prior to the institution of the second suit was Rs.3 lacs per month; and,
- (viii) that the respondent / plaintiff without prejudice to his rights and contentions in the pending suit claims *mesne* profits and damages

from the appellants / defendants @ Rs.3 lac per month for the period from 1st January, 2009 to 30th April, 2012.

5. The appellants / defendants filed the application under Order 7 Rule 11 of the CPC for rejection of the plaint aforesaid contending:-

- (a) that the respondent / plaintiff in the first suit pending adjudication before the learned Addl. District Judge had *inter alia* claimed the following reliefs:-

“(c) Grant pendente lite and future use and occupation charges / mesne profits @ Rs.60,000/- P.M. in favour of the Plaintiff and jointly and severally against the defendants, after determining the same in accordance with law.”

- (b) that since the respondent / plaintiff in the first suit had also sought determination of *pendente lite* and future use and occupation charges / *mesne* profits, the following issue had *inter alia* been framed for adjudication in the first suit:-

“Whether the Plaintiff is entitled to damages / mesne profits on account of use and occupation of the suit property @ 60,000/- per month w.e.f. 11.05.2001 as prayed for?”

- (c) that since the matter and issue, of determination of *pendente lite* and future use and occupation charges / *mesne* profits in respect of the same property and between the same parties was sub-judice before the learned Addl. District Judge in the first suit, the second suit for recovery of *mesne* profits / damages for use and occupation of Rs.108,00,000/- towards damages / use and occupation charges for the period from 1st June, 2009 to 31st May, 2012 is not maintainable and is barred by Order 2 Rule 2 of the CPC;
- (d) that while the respondent / plaintiff in the first suit was claiming use and occupation charges / *mesne* profits @ Rs.60,000/- per month, in the second suit, the use and occupation charges/*mesne* profits are claimed @ Rs.3 lac per month;
- (e) that the cause of action in both the suits is identical;
- (f) that the second suit was thus without any cause of action; and,

6. The respondent / plaintiff contested the application by filing a reply thereto, contending that the second suit had been filed owing to increase in letting values over a period of time from that of Rs.60,000/- per month at the time of institution of the first suit to Rs.3 lacs per month for a few years prior to

the institution of the second suit; that the cause of action for recovering *mesne* profits of Rs.3 lacs per month had accrued to the respondent / plaintiff after the institution of the first suit; that it is the settled position in law that after filing a suit for recovery of possession of immovable property, a suit for recovery of *mesne* profits is not barred by Order 2 Rule 2 of the CPC. However surprisingly, though it was not denied that issue aforesaid had been struck in the first suit, it was denied that the learned Addl. District Judge would be deciding the same. It was further contended that the second suit had been filed without prejudice to the rights and contentions in the first suit.

7. The learned Single Judge has vide impugned order dismissed the application aforesaid of the appellants / defendants under Order 7 Rule 11 of the CPC with costs of Rs.50,000/-, finding / observing / holding:-

- (I) that it was the argument of the appellants / defendants that though it was open to the respondent / plaintiff to claim damages for use and occupation @ Rs.3 lacs per month in the first suit but the respondent / plaintiff had restricted his claim for damages at Rs.60,000/- per month only and the respondent / plaintiff did not reserve any right to claim damages at any higher rate for any future period;

- (II) that it was the argument of the counsel for the respondent / plaintiff that the appellants / defendants had unduly delayed the first suit and if the respondent / plaintiff had sought any amendment in the first suit enhancing the claim for damages for use and occupation / *mesne* profits, the same would have resulted in the Court of the learned Addl. District Judge losing the pecuniary jurisdiction to try the suit and would have caused further delays;
- (III) that it was further the argument of the respondent / plaintiff that owing to the filing of the second suit, no damages for the period 1st June, 2009 onwards could be awarded in the first suit and the respondent / plaintiff gave up his claim for damages for the period after 1st June, 2009 in the first suit;
- (IV) that the cause of action to claim damages for unauthorized use and occupation / *mesne* profits accrued to the respondent / plaintiff on each day of such unauthorized use and occupation and merely because the respondent / plaintiff may have sought damages at Rs.60,000/- per month in the year 2003, it did not mean that the respondent / plaintiff was bound by the said figure and could not

seek enhancement for later years even though there may have been upward revision in market rates;

(V) that the cause of action to claim damages at a higher rate therefore arose from the date when the market rent for the suit premises rises;

(VI) that though the respondent / plaintiff in the first suit had also made a claim for future *mesne* profits but in view of the statement of the respondent / plaintiff that he would not press the claim for future *mesne* profits in the first suit w.e.f. 1st June, 2009, the second suit for future *mesne* profits for the period from 1st June, 2009 to 31st May, 2012 was maintainable;

(VII) that the respondent / plaintiff could not have claimed *mesne* profits / damages for use and occupation @ Rs.3 lacs per month in the year 2003 when according to the respondent / plaintiff the prevalent letting value was only Rs.60,000/- per month and the respondent / plaintiff could not have had foresight that the first suit would remain undecided for years together;

(VIII) that though in both the suits the issue, whether or not the appellants / defendants are in unauthorized occupation would arise for consideration but the said commonality would have no bearing on the maintainability of the second suit as the question whether the respondent / plaintiff is entitled to *mesne* profits / damages for use and occupation for the first from 1st June, 2009 to 31st May, 2012 @ Rs.3 lacs per month or not was an issue in the second suit only and not in the first suit;

(IX) that the argument of the appellants / defendants that it was open to the respondent / plaintiff to amend the plaint in the first suit to enhance the rate at which *mesne* profits / damages for use and occupation were claimed itself amounted to an admission that the respondent / plaintiff could make a claim for a higher rate of damages for the period *pendente lite*; if the plaintiff could amend the plaint in the first suit, he could also file a second suit;

(X) reliance was placed on (i) ***A. Subramanian Vs. Muthukrishna Reddiar*** AIR 2005 Madras 43; (ii) ***Shrikant Panachand Shah Vs. Walubai Panachand Shah*** AIR 1997 Bombay 216; and (iii) ***Raj Mal Vs. Prem Narain*** AIR 2005 Rajasthan 129 laying down that

two successive suits for *mesne* profits for different period and at different rates were maintainable; and,

(XI) costs of Rs.50,000/- were imposed since the appellants / defendants inspite of the Court having after some hearing expressed an opinion that there was no merit in the application, having consumed further time of the Court.

8. We have heard the counsels for the parties and have at the outset enquired from the counsel for the respondent / plaintiff whether not the claim of the respondent / plaintiff for *mesne* profits / damages for use and occupation for the period from 1st June, 2009 to 31st May, 2012 (which is claimed in the second suit) covered by the prayer in the first suit for future *mesne* profits.

9. The counsel for the respondent / plaintiff agrees.

10. We have next enquired from the counsel for the respondent / plaintiff that if that is so; how the respondent / plaintiff could file the second suit;

11. The counsel for the respondent / plaintiff states that the second suit is necessitated owing to the first suit pending for a very long time and the rate at which the respondent / plaintiff is entitled to claim *mesne* profits having gone

up in the interregnum. He further states that the respondent / plaintiff gives up the claim for future *mesne* profits in the first suit.

12. We have next enquired from the counsel for the appellants / defendants whether the appellants / defendants are agreeable to the aforesaid i.e. of the respondent / plaintiff not claiming any *mesne* profits whatsoever for the period from the date of institution of the first suit in or about May, 2003 till 31st May, 2009 and claiming *mesne* profits for the period from 1st June, 2009 to 31st May, 2012 in the second suit.

13. The counsel for the appellants / defendants states he is not so agreeable.

14. We, to say the least, are surprised at the conduct of both the parties who seem to be interested only in denying and controverting what the other states, without regard to whether it is in their own beneficial interest or not. On the one hand we have the respondent / plaintiff who, merely to justify the maintainability of the second suit (for *mesne* profits from 1st June, 2009 to 31st May, 2012) is willing to give up the claim for *mesne* profits for nearly six years from June, 2003 to May, 2009; obviously to the grave detriment of the interest of the respondent / plaintiff on the other hand, the appellants/defendants, even

though offered being relieved of liability for mesne profits from June 2003 to May 2009; obviously to their advantage, are also not agreeable.

15. We may highlight that though the respondent / plaintiff before the learned Single Judge argued that the second suit was not only for recovery of *mesne* profits for the period from 1st June, 2009 to 31st May, 2012 but also for recovery of future *mesne* profits thereafter i.e. w.e.f. 1st June, 2012 till the date of delivery of possession, at Rs.3 lacs per month and on that basis made a statement that the respondent / plaintiff was giving up the relief for future *mesne* profits w.e.f. 1st June, 2009 onwards as made in the first suit, but the plaint in the second suit, does not claim the relief for recovery of future *mesne* profits from 1st June, 2012 onwards as indeed it could not.

16. The law permits a claim for future *mesne* profits i.e. for a relief, the cause of action wherefor has not accrued to the plaintiff on the date of the institution of the suit, only when such a relief is coupled with the relief of recovery of possession of immovable property. No relief of recovery of possession has been sought in the second suit as indeed it could not owing to the said relief having been sought in the first suit. The second suit is only for recovery of *mesne* profits for three years prior to the institution thereof. Once the respondent / plaintiff gives up the claim for future *mesne* profits, even if only till 1st June,

2009 from the first suit, the respondent / plaintiff, to be entitled to *mesne* profits for the period from 1st June,2012 till the date of recovery of possession, would have to file successive suits every three years if not earlier and we fail to see as to how expenditure in Court Fees and towards litigation costs in each of the said suits would be in the interest of the respondent / plaintiff.

17. In the same vein, the appellants / defendants though gainer from the respondent / plaintiff giving up totally the relief of future *mesne* profits from the first suit, are unnecessarily resisting the same.

18. This Court is however to act in the interest of the litigating parties and to avoid multiplicity of litigation and for which reason we reject the offer / statement of the counsel for the respondent / plaintiff of giving up the claim for future *mesne* profits from the first suit.

19. The true legal position may be summed up as under:-

- A. The cause of action for a relief of recovery of *mesne* profits is separate and distinct from a cause of action for the relief of possession (See ***Gurudwara Baba Zorawar Singh and Baba Fateh Singh Ji Regd. Society Vs. Shri Piara Singh and Sons*** 141 (2001) DLT 228 (DB), ***Shri Prem Singh Verma Vs. Girdhari Lal***

Dhara MANU/DE/2207/2008 (DB), ***S. Santokh Singh Vs Gurbux Singh*** MANU/DE/0704/2001 (DB) & ***Syndicate Bank Vs. Raj Kumar Tanwar*** 154(2008) DLT 230(DB)).

- B. Thus even if in a suit for recovery of possession of immovable property, the relief of *mesne* profits has not been claimed, a second suit lies for recovering *mesne* profits for the period subsequent to the filing of the suit for recovery of possession; of course for the recovery of *mesne* profits as far as within limitation. Reference in this regard can be made to ***Shiv Kumar Sharma Vs. Santosh Kumari*** (2007) 8 SCC 600.
- C. However a claim for *mesne* profits for the period prior to the institution of the suit for recovery of possession according to ***Channappa Girimalappa Jolad Vs. Bagalkot Bank*** AIR 1942 Bom 338 (DB) has to be made along with the suit for recovery of possession and cannot be made subsequent to the filing of the suit for recovery of possession but according to the majority judgment of the Full Bench of the Punjab & Haryana High Court in ***Sadhu Singh Vs. Pritam Singh*** AIR 1976 P&H 38 the same can be made by a separate suit as well.

- D. Order 20 Rule 12 of the CPC requires the Court, in a suit for recovery of possession of immovable property and for rent or *mesne* profits, to, besides passing decree for possession, also pass a decree for *mesne* profits or direct an enquiry as to such *mesne* profits, for the period prior to the institution of the suit if claimed and if within limitation on the date of institution of the suit, and for the period, from the date of institution of the suit until delivery of possession.
- E. The Supreme Court in ***R.S. Madanappa Vs. Chandramma*** AIR 1965 SC 1812 & ***Bhagwati Prasad Vs. Shri Chandramaul*** AIR 1966 SC 735 has held that where in a suit for recovery of possession a claim for recovery of *mesne* profits for the period till the date of institution of the suit is made, even if no claim / prayer for recovery of future *mesne* profits from the date of institution of the suit till the date of delivery of possession is made, Order 20 Rule 12 mandates the Court to direct such an enquiry into future *mesne* profits.
- F. The reason for the aforesaid is not hard to fathom; the intent is to avoid multiplicity of suits for *mesne* profits for successive period

after the date of the institution of the suit; each of such suits would have to be filed for recovery of *mesne* profits for a maximum period of three years, to avoid the defence of the claim for *mesne* profits having become barred by time.

- G. No claim for *mesne* profits can be allowed without first finding the defendant being in unauthorized occupation of the premises, as is evident from definition thereof in Section 2(12) of CPC.

20. The question, whether the appellants / defendants in the present case are in unauthorized occupation or not is for adjudication in the first suit. No such adjudication can be undertaken in the second suit as well. Thus the recording of the evidence in the second suit can at best be confined to the rate of *mesne* profits for the period from 1st June, 2009 to 31st May, 2012 and even if such adjudication is done expeditiously i.e. prior to the decision of the first suit or appeals arising therefrom, no decree for recovery of *mesne* profits in the second suit can be passed unless the finding, of the appellants / defendants being in unauthorized occupation is returned in the first suit and attains finality.

21. Thus, pursuing the second suit in any case will not serve any useful purpose and even if it were to be held that enquiry into rate can go on, the

same will unnecessarily take up the time of this Court at the cost of other matters as, in the event of the appellants/defendants in the first suit being held to be not in unauthorized occupation, such inquiry will be futile. Ordinarily this Court does not order contingent trials

22. That leaves the question of the rate of future *mesne* profits and perhaps troubled by which the second suit was filed. The appellants / defendants as well as the respondent / plaintiff are labouring under the impression that the respondent / plaintiff in the first suit having claimed future *mesne* profits @ Rs.60,000/- per month would be entitled to *mesne* profits i.e. from the date of institution of first suit, till delivery of possession @ maximum Rs.60,000/- per month only, even if the *mesne* profits of the premises were to be higher.

23. In our opinion, both suffer from a misconception of law.

24. Section 2(12) of the CPC defines the *mesne* profits of property as meaning 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 profit. Thus, what is to be the rate of *mesne* profits, is to be determined by evidence and is not a matter of contract.

25. The Supreme Court in ***Gopalakrishna Pillai Vs. Meenakshi Ayal*** AIR 1967 SC 155 has held:-

“ With regard to future mesne profits, the plaintiff has no cause of action on the date of the institution of the suit, and it is not possible for him to plead this cause of action or to value it or to pay court-fees thereon at the time of the institution of the suit.. ”

It is for this reason only that payment of Court Fees of future *mesne* profits decreed is a condition to the execution thereof and is not to be paid at the time of institution of the suit. At the time of institution of the suit and which often remain pending for long, it is not possible for the plaintiff to state as to what benefits the defendant in wrongful possession of the property would receive from time to time.

26. The question which arises is that if the plaintiff, without even making a specific claim for future *mesne* profits is in law entitled thereto, as held in ***R.S. Madanappa & Bhagwati Prasad*** (supra) if makes a claim for future *mesne* profits at a particular rate, whether he is entitled to future *mesne* profits at the maximum of that rate only or if the same are determined / found to be due at a higher rate, would be entitled to such higher rate.

27. In our opinion the plaintiff in such a situation would be entitled to such higher rate since he was not obliged to make a claim for future *mesne* profits, not obliged to pay Court Fees thereon and could not have in any case known to future *mesne* profits at what rate he would be entitled to as observed by the Supreme Court in ***Gopalakrishna Pillai*** supra. Once it is held to be the duty of the Court under Order 20 Rule 12 to award future *mesne* profits even without a specific prayer in this regard, the specific prayer even if made by the plaintiff cannot limit the entitlement of the plaintiff to future *mesne* profits.

28. We find the High Court of Bombay in ***Nathumal Chandanmal and Co. Vs. Damodar Prabhat Sharma*** MANU/MH/0310/1978 to have succinctly dealt with the question as under:-

“The first question that has to be considered in this appeal is simply because the landlords in the plaint have claimed mesne-profits at the rate of Rs. 34 per month, are they precluded, when direction is given for determination of mesne-profits, from claiming a larger amount. So far as the claim for mesne-profits is concerned, it is for a period subsequent from the date of institution of the suit in the present case. Any party, however much foresight it may use, may not be able to foresee the duration of the litigation and the compensation that may be received from the premises in future after the institution of the suit in case a prudent owner is to give his property for occupation on leave and licence. Thus, merely because in the plaint the amount is restricted to the sum of Rs. 34 per month/a decree holder

cannot be prevented from claiming appropriate compensation by way of mesne-profits. For claims in future it is a mere surmise on the part of the landlords, who mentioned the amount that, according to him, would be reasonable. But such mentioning of a specific amount does not deter him from claiming an appropriate amount by way of compensation towards mesne-profits, if he is in law able to establish the same.”

We respectfully agree in toto with the same.

29. The Division Bench of the Calcutta High Court in ***Gauri Prosad Koondoo Vs. Reily*** ILR 9 Cal 112, High Court of Andhra Pradesh in ***Magunta Kota Reddy Vs. Pothula Chendrasekhara Reddy*** AIR 1963 AP 42 and the High Court of the Rajasthan in ***Prithvi Singh Vs. Pahap Singh*** MANU/RH/0369/2006 have also held that a plaintiff is not estopped from claiming a larger sum as *mesne* profits than what was claimed in the plaint.

30. The aforesaid reasoning is supported by the observations of the Supreme Court in ***M/s. Marshall Sons & Co. (I) Ltd. vs. M/s. Sahi Oretans (P) Ltd.*** (1999) 2 SCC 325 to the effect that because of the delay unscrupulous parties to the proceedings take undue advantage and person who is in wrongful possession draws delight in delay in disposal of the cases by taking undue advantage of procedural complications; even after obtaining a decree for possession of immovable property, its execution takes long time; in such a

situation, for protecting the interest of the judgment creditor, it is necessary to pass appropriate order so that reasonable *mesne* profits which may be equivalent to the market rent is paid by a person who is holding over the property.

31. Reference with advantage can also be made to the judgment of the Division Bench of the Kerala High Court in ***Saraswathi Pillay Vs.***

Parameswara Kurup MANU/KE/0180/1977 reiterating as under:-

“It is pointed out on behalf of the 1st Defendant that the claim made in the plaint in respect of mesne profits is only at the rate of Rs. 5,000 per annum and it is contended that the decree cannot award anything more. This is to misunderstand the nature of the claim for mesne profits made in this particular case and the nature of such a claim in general. Having regard to the definition of mesne profits' in Section 2(12) of the Code, it is apparent that mesne profits are something which a Plaintiff cannot evaluate and which it is solely for the court to determine on the evidence before it. As in a suit for an account the Plaintiff can only mention rough figure as the amount which will be found due to him, and that is why the second paragraph of Order VII Rule 2 of the Code makes an exception to the general principle laid down in the first paragraph that in a suit for money the plaint shall state the precise amount claimed and says that when the claim is for mesne profits, or for an amount which will be found due on taking unsettled accounts, the plaint need only state approximately the amount sued for. Section 11 of the Court Fees Act, 1870 makes the position even clearer. It shows that the claim in a suit for mesne profits is only a rough estimate even if a precise amount is stated and that it is for the court to

ascertain is the true amount. And this can be in excess of the amount claimed. For, it says that in suits for mesne profits or for an account, if the profits or amount decreed are in excess of that claimed, the decree shall not be executed until the difference in court fee is paid. In this particular case, the relief sought in respect of the mesne profits (by prayer No. 2 in the plaint is that the court should award all profits received by the Defendants from the property, both before and after the institution of the suit, at the rate estimated by the Plaintiff at 35,625 fanams (Rs. 5,000) per annum. This, it seems to us, is just what is required by Order VII Rule 2 of the Code”.

32. This Court in ***Holiday Home Vs. R.P. Kapur HUF*** MANU/DE/3498/2010 has held that enquiry under Order 20 Rule 12 of the CPC is warranted only where the landlord has not been able to adduce sufficient evidence during trial; else, if sufficient evidence during trial has been led, there is no need for a separate enquiry under Order 20 Rule 12. Similarly in ***Kavita Gambhir v. Hari Chand Gambhir*** 162 (2009) DLT 459 it was held that it is in the discretion of the Court whether *mesne* profits are determined along with the adjudication for the relief of recovery of possession or an enquiry thereto has to be ordered after the adjudication as to the recovery of possession. Thus it is not as if the higher rate than claimed can be given only in an enquiry and not if the issue of *mesne* profits is decided along with the issue of recovery of possession of the premises.

33. The contention of the counsel for the respondent / plaintiff before the learned Single Judge that if the respondent / plaintiff were to amend the plaint in the first suit to enhance the rate at which mesne profits are claimed, the same would result in the Court of the learned Additional District Judge losing pecuniary jurisdiction to try the suit, causing further delays was also misconceived. The Supreme Court in ***Mahadeo Savlaram Shelke Vs. Puna Municipal Corporation*** (1995) 3 SCC 33 held that the limits of the pecuniary jurisdiction of the Court of first instance does not impede and is not a bar to award damages beyond its pecuniary jurisdiction.

34. In the light of the aforesaid though owing to the respondent/plaintiff in the first suit having claimed future mesne profits and being thus disentitled to maintain a second suit, also for recovery of mesne profits, for a period so covered by the claim for future mesne profits in the first suit, we are inclined to allow this appeal but by placing following conditions on the appellants / defendants and by giving the following clarification:-

- (i) that the respondent / plaintiff in the first suit, if found entitled to mesne profits and at a rate in excess of the rate at which mesne profits have been claimed in that suit, would be entitled thereto

without carrying out any amendment to the plaint and the appellants / defendants would not oppose the grant of *mesne* profits at a rate higher than claimed on the ground of the respondent / plaintiff in the plaint having sought future *mesne* profits @ Rs.60,000/- only;

- (ii) that the respondent / plaintiff if desires to lead any evidence in the first suit (which is stated to be at the stage of defendants evidence) to prove a higher rate of *mesne* profits, would be entitled thereto; needless to state that the appellants / defendants would be entitled to rebut the said evidence;
- (iii) the respondent / plaintiff would be entitled to adjust the Court Fees paid on the second suit from which this appeal arises in the Court Fee if found payable by him on the *mesne* profits if any decreed in his favour in the first suit.

35. The impugned judgment is accordingly set aside; the application of the appellants / defendants under Order 7 rule 11 of the CPC is allowed and the plaint in the second suit from which this appeal arises is rejected but on the aforesaid conditions; axiomatically this appeal is allowed leaving the parties to

bear their own costs. We also request the learned Additional District Judge before whom the first suit is pending to expeditiously dispose of the same and give liberty to respondent/plaintiff to apply in the event of non compliance.

RAJIV SAHAI ENDLAW, J

CHIEF JUSTICE

MAY 13, 2014

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