

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO. 12509 OF 2015**

*Avinash Karnik,
residing at 78, Catherina
Apartments, Chapel Road,
Bandra (West), Mumbai-400 050.*

....Petitioner

V/s.

- 1. Ajit Karnik*
- 2. Sanad Ajit Karnik
1 & 2, both residing at,
501, Payal Apartments
Off. Yari Road, Versova,
Mumbai.*
- 3. Anjali V. Nevrekar
residing at 1st Floor,
Selot Mansion, Tilak Nagar
Road No.1, Goregaon (W)
Mumbai-400 062.*
- 4. Ramgumpha Co-op Hsg.
Soc. Ltd., 99, Hindu
Colony, Dadar, Mumbai-
400 014.*
- 5. Subhash Awasthi,
residing at Prathamesh
Co-op Hsg. Society,
Prabhadevi, Mumbai-400 025.*

....Respondents

Mr. Shailesh Dalal i/by. Dalal & Co.,

Advocate for the petitioner.

Mr. Tejas M. Bhatt a/w. Ms. Saloni C. Sathe,

Advocate for respondent no.2.

Mr. Madhusudan R. Phal, Advocate for respondent no.5.

CORAM : SANDEEP K. SHINDE, J.

DATE : 3RD JUNE, 2019.

ORAL JUDGMENT :

1. The petitioner's Chamber Summons to amend the plaint was rejected by the Judge, City Civil Court on 5th September, 2015; against which this Writ Petition is preferred under Article 227 of the Constitution of India.

2. Petitioner's father was owner of the Flat, being Flat No.2 ("suit flat" for short) in the respondent no.4-Society. After the demise of the plaintiff's father and pursuant to the Will made by him, the suit flat was

transferred in favour of his mother in the records of the Society. During her lifetime, mother recorded the name of defendant no.2 as a nominee in the books of defendant no.4, Society. Mother died in the year 2005. Respondents no.1 and 3 are brother and sister of petitioner and defendant no.2 is son of the defendant no.1.

3. *It is the petitioner's case that, since his mother's death, the suit flat was lying vacant and respondent no.1 was in it's possession. Somewhere in September, 2007, defendant discovered a fact that, respondents no.1, 2 and 3 in collusion, with one another, agreed to sell the suit flat to the respondent no.5. Soon, thereafter, respondent no.5 applied to the Society for transfer of shares/membership, however, Society rejected the said application.*

4. *The petitioner in the circumstances filed suit in October, 2007 seeking declaration that, he has undivided one-third share in the suit flat and also sought vacant possession of the suit flat from the respondent no.5 herein. Pending suit, the petitioner applied for appointment of the Court Receiver and for injunction against creating third party rights. Vide order dated 12th July, 2010 the said application was allowed (Notice of Motion No. 1165 of 2010) wherein it is observed :*

“3. *In my view, on the facts as disclosed, defendant no.5 appears to be a person in whose favour the document has been executed only by a nominee who is not an heir since defendant no.1 who is the father of defendant no.2 is still alive. In the circumstances, since defendant no.5 is residing in the suit premises on the basis of what prima-facie appears to be a defective title, I am inclined to allow the prayer for*

Receiver subject to conditions. Notice of Motion is therefore, made absolute in terms of prayer clause-(a) subject to the condition that the Court Receiver to take only formal possession and will appoint defendant no.5 who is admittedly in actual physical possession, as an agent of the Court Receiver subject to royalty but without security. Notice of Motion stands disposed off."

5. *In Appeal, Hon'ble Supreme Court modified this order as under :*

"It is pointed out, with reference to the prayers in the suit, that there is no prayer made by the respondents for damages or mesne profits for use or occupation of the property in dispute. Under the circumstances, the requirement that the appellant should pay royalty is beyond the relief prayed for by the respondents.

We are of the view that what appellant says is correct. Under the circumstances, we

modify the order passed by the Division Bench and direct that the Court Receiver may continue to have formal possession of the property in dispute, the factual possession of which is with the appellant. The appellant will continue as the agent of the Court Receiver. However, he will not be obliged to pay any royalty for use or occupation of the property in dispute.”

6. On 24th March, 2015 plaintiff filed the Chamber Summons and sought amendment of the plaint, under Order 6 Rule 17 Civil Procedure Code. In the schedule of amendment, the plaintiff would assert that, the defendant no.5 having purchased the suit flat from the defendant no.2 vide transfer deed dated 16th May, 2006, has acquired no right, title or interest in the suit flat and thus, he is a trespasser and he is liable to pay mesne profits for unlawfully taking possession and remaining in possession of the suit flat at the rate of Rs.67,000/- per month or at such higher rate as may be

determined by the Court from the date he entered in the suit flat i.e. from 16th May, 2007. In view of this, he sought to add the following prayer : (emphasis supplied)

“b) pending the hearing and final disposal of the suit, Defendant no.5 be ordered to deposit in this Hon'ble Court a sum calculated at the rate of Rs.67,000/- per month from 16.05.2007 till date aggregating to Rs.61,64,000/-.”

7. *The petitioner-plaintiff, therefore sought past and future mesne profits and leave to amend the plaint to that effect.*

8. *The learned Judge dismissed the Chamber Summons on the ground that, plaintiff had not assigned any reason as to why he could not incorporate the pleadings in the plaint which he wants to incorporate by way of proposed amendment and there is inordinate*

delay in taking out the Chamber Summons. The learned Judge refused the amendment as sought, having found the same was time barred.

9. *That by proposed amendment, the petitioner plaintiff is seeking the past and future mesne profits in terms of Order 20 Rule 12 of the Civil Procedure Code.*

10. *Order 20 Rule 12 of the Civil Procedure Code enables the Court to pass a decree for past and future mesne profits. The Apex Court in the case of **Gopal Krishna Pillai V/s. Meenaxi Ayal and Ors**, reported in AIR 1967 Supreme Court 155, has held as under :*

“O. 20, R. 12 enables the court to pass a decree for both past and future mesne profits but there are important distinctions in the procedure for the enforcement of the two claims. With regard to past mesne profits, a plaintiff has an existing cause of action on

the date of the institution of the suit. In view of o. 7, rr. 1, 2 and 7, of the Code of Civil Procedure and s. 7(1) of the Court Fees Act, a plaintiff must plead his cause of action, specifically claim a decree for the past mesne profits, value the claim approximately and pay court-fees thereon. 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. Moreover, he can obtain relief in respect of this future cause of action only in a suit to which the provisions of O. 20, R. 12 apply. But in a suit to which the provisions of O.20, R. 12 apply, the court has a discretionary power to pass a decree directing an enquiry, into the future mesne profits, and the court may grant this general relief, though it is not specifically asked for in the plaint.”

11. *In the case in hand, the petitioner is claiming*

the past mesne profits which he ought to have claimed on the date of the institution of the suit and valued it and pay court-fees thereon. So far as the future mesne profits is concerned, the plaintiff has no cause of action on the date of institution of the suit. However, neither past nor future mesne profits was claimed on the date of institution of the suit by him. It is settled principle of law that, wrongful possession is the very essence of a claim for mesne profits and the very foundation of the unlawful possessor's liability therefore. The first and foremost condition for claiming and awarding mesne profits is unlawful possession of the suit property. Therefore, unless it is proved by the plaintiff that, the defendant is in unlawful possession of the suit property, he is not entitled for the mesne profits. However, so far as the past mesne profits is concerned, when the plaintiff claims such profits prior to institution of suit, he has to claim the same and value the same

approximately and pay fees thereon on the date of institution of the suit. However, subject cause of action is not available and/or accrues to the plaintiff on the date of institution of the suit for claiming future mesne profits.

12. *In this case, the cause of action for claiming the past mesne profits arose in October 2007, however, the petitioner plaintiff sought this relief in the year 2015 which is nearly after seven years and more. In view of this fact, the claim for mesne profits was barred by limitation.*

13. *Admittedly, with regard to the future mesne profits the petitioner plaintiff had no cause of action on the date of institution of the suit and therefore even if such future mesne profits is not claimed, he cannot be precluded from making such claims as such claim is not*

time barred unlike the past mesne profits.

14. *The learned Counsel for the respondent while opposing the petition has relied on the judgment of the Supreme Court in the case of **Mohd. Amin v. Vakil Ahmad AIR 1952 Supreme Court 358** wherein it is held that, the Court has no jurisdiction to pass a decree of future mesne profits in absence of a specific prayer for the same. However, in the subsequent judgment of the Hon'ble Supreme Court in the case of Gopalakrishna Pillai (supra), it is held that in the case of Mohd. Amin (supra), the plaintiff had claimed only a declaration of title and recovery of possession of immovable property and made no demand or claimed either past or future mesne profits or rent. However, in the case in hand, the plaintiff has claimed the possession of the suit property which is in wrongful possession of respondent as trespasser and thus the claim for the future mesne*

profits cannot be said to be time barred and therefore to that extent, the impugned order is quashed and set aside. In the result, the petition is partly allowed in the following terms :

- (i) Petition is partly allowed.*
- (ii) Amendment of the plaint, corresponding to claim for past mesne profit is rejected.*
- (iii) Amendment of the plaint, corresponding to claim for future mesne profit is allowed.*
- (iv) The petition is disposed of in the aforesaid terms.*

(SANDEEP K. SHINDE, J)