IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

RSA No.3901 of 2019 (O&M)
Reserved On 30.11.2023
Pronounced on :04.12.2023

Veena Goel and others

.Appellants

Versus

Bhim Aggarwal and another

..Respondents

CORAM: HON'BLE MR. JUSTICE ANIL KSHETARPAL

Present: Mr. Akash Singla, Advocate
Ms. Vaishali Singla, Advocate
Mr. Ankush Singla, Advocate
for the appellants.

Mr. Ashwani Chopra, Sr. Advocate, with
Mr. Brahmjot Singh Nahar, Advocate
for the respondents.

ANIL KSHETARPAL, J

1. In this regular second appeal, the limited dispute that revolves around the liability of the respondents (co-owners) to pay mesne profit for the use and occupation of the ground floor and basement of SCO 202, Sector 14, Panchkula, to the appellants, who are themselves in possession of the first and second floor of the building has come up for adjudication.

2. It may be noted here that the suit property was jointly purchased by five persons, three plaintiffs (50% share) and two defendants (remaining 50%), resulting in five co-sharers in the property.

3. In order to comprehend the issue involved in the present case, the relevant facts, in brief, are required to be noticed.

4. Following the construction of the basement and three floors of the showroom-cum-office, M/s Amar Electronics Plaza took occupation.

The plaintiffs are three sisters. 'M/s Amar Electronics Plaza' is a partnership firm comprising of the husbands of three sisters, namely, the appellants and son of appellant no.1. In the year 2008, M/s Amar Electronics Plaza filed a suit for injunction in which the defendants were proceeded against ex-parte as their postal address was mentioned incorrectly. Ultimately the ex-parte order was set aside. On 25.08.2010, the respondents filed a suit for possession against M/s Amar Electronics Plaza and its partners which was decreed with costs. The defendants were directed to hand over the vacant possession to the plaintiffs and pay mesne profit @ Rs.66,200/- per month. The first appeal filed by M/s Amar Electronics Plaza was dismissed. In order to defeat the rights of the respondents, the partners of M/s Amar Electronics Plaza handed over the possession to the plaintiffs (appellants herein) collusively. Ultimately, the Executing Court held that the tenants (M/s Amar Electronics Plaza) and the appellants herein are the members of the same family and therefore, ordered delivery of possession to the respondents. Even the review application was dismissed. On 25.04.2012, Civil Revision No.6763 of 2011, filed by the appellants was dismissed by the High Court while expressly making the observations regarding the malafide intention of the appellants. Special Leave Petition No.18312 of 2012, in the Supreme Court filed by the appellants was dismissed on 11.09.2012, while granting them time till 31.03.2013 to vacate the suit premises. On an application for extension of time, the period was extended for 45 days from 01.04.2013. Thereafter, the respondents were handed over the possession of the basement and the ground floor on 16.05.2013. During this period, the appellants, on 15.06.2012, filed the suit for possession by way of partition along with the consequential relief of permanent injunction, mandatory injunction and mesne profit (basement and ground floor). The trial court not only passed a preliminary decree for partition, but also passed a decree for mesne profit in favour of the plaintiffs and against the defendants directing the defendants to pay Rs.1,80,000/- per month along with interest @ 6% per annum with effect from 14.05.2013. The respondents filed the first appeal. The first appellate court modified the decree and held that the plaintiffs (appellants) shall be the owner to the extent of ½ share, whereas the remaining half belongs to the defendants but the decree for mesne profit was wrongly passed by the trial court as the parties are co-sharers and the plaintiffs are in possession of the first floor and second floor whereas the defendants are in possession of basement and ground floor.

5. In this regular second appeal, the plaintiffs claim that the decree for mesne profit is liable to be restored and the first appellate court has erred in reversing the judgment of the trial court to this extent.

6. This Bench has heard the learned counsel representing the parties at length and with their able assistance perused the paper book along with the relevant record produced by the learned counsel representing the parties, correctness whereof is not disputed.

7. The learned counsel representing the appellants admits that decree for mesne profit against the co-sharers could not be passed. However, he submits that the appellants can be granted a share in the income or profits. While elaborating, he submits that the decree for mesne profit is granted under Order XX Rule 12, whereas under Order 20 Rule 18, the Court while partitioning the property can grant relief by issuing necessary directions. He relies upon the judgment passed by a Full Bench judgment

of Madras and Patna High Courts in ***Babburu Basavayya and others. vs Babburu Guravayya and another, AIR 1951, Madras 938*** and ***Indradeo Prasad Singh and another. vs Sheonath Prasad Singh and others, AIR 1980 Patna 201 (FB)***.

8. On the other hand, the learned counsel representing the respondents contends that the appellants are also in possession of the first and second floor of the premises and the property is in the occupation of the co-sharers. In the beginning the entire suit property was in possession of the plaintiffs through their respective spouses and family members, and therefore, the court should not mould the relief.

9. This court has considered the submissions of the learned counsel representing the parties.

10. The expression 'mesne profit' has been defined in Section 2(12) of CPC which reads as under:-

> "***2(12) "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."

11. The mesne profit is payable only when it is found that the person occupying the property is in its wrongful possession. A co-sharer is deemed to be in possession of every part of the joint property. Therefore, the learned counsel representing the appellants has fairly admitted that relief of mesne profit claimed by the plaintiffs was not maintainable. However, as already noticed he prays for moulding the relief according to the facts of the present case.

12. This court has carefully read the judgment passed by the Full Bench in ***Babburu Guravayya's case (supra)*** In this case the Full Bench after distinguishing between the three types of cases in which a question of profit or mesne profit might arise, held that while passing a decree for partition, the court can award share in the income or profits during the pendency of the suit or till possession of the share is handed over. This court respectfully agrees with the aforesaid view. However, it has not been laid down that the court is obligated to pass a decree for share in the profit in every case while deciding a partition suit.

13. In **Indradeo Prasad Singh's case(supra)**, the following question came up for adjudication before the Court.

> " *Whether an application by the plaintiff in the course of the preparation of the final decree for an enquiry into the profits of the properties realised by the defendants during the pendency of the suit and before the preparation of the final decree is maintainable or not?*

14. Ultimately, the court answered the aforesaid question in affirmative.

15. However, both these judgments does not help the appellants in the facts of the present case. As already noticed, the appellants are also in possession of the first floor and second floor of the joint property, whereas the defendants (respondents herein) are in possession of basement and ground floor. The respondents are themselves using some part of the joint property. It is claimed that the basement of the premises is lying vacant. In both judgments, the court in order to balance the equities between the parties has laid down that the relief can be granted. In this case, there is no

evidence about the rental value of the first and second floor of the premises, which is in the possession of the appellants.

16. When the judgment had been dictated, the learned counsel representing the appellants has filed a short note of his submissions. While relying upon the judgments passed by the Supreme Court in **AIR 1965 SC 1812, 2018 SCC Online Del 12574** and **1978 SCC Online P&H 295,** he contends that the future mesne profits can be granted under Order XX Rule 18 CPC.

17. This court has carefully read the aforesaid judgments. The Supreme Court held that in order to avoid the multiplicity of the litigation and in the interest of justice the court can proceed to award future mesne profit. On the similar lines are the judgments passed by the Division Bench of the Delhi High Court as well as the Single Bench of this Court. This court also holds the similar opinion as the legal precedent established by courts, stating that the future gains can be granted under the terms of 'share in the profit' or 'income', however, it depends upon the specific facts and circumstances of each case.

18. In the short note, the next submission of the learned counsel representing the appellants that the observations of the first appellate court regarding the fact that the appellants admitted their exclusive possession of the first floor and second floor is perverse. It may be noted here that the first appellate court has drawn conclusion which is not without any basis. Originally the appellants were in possession of the entire premises as they are residing in Chandigarh and the property is in Panchkula, a satellite town of Chandigarh. Pursuant to the orders passed by the courts in the previous round of litigation, the respondents were handed over possession of the

basement and ground floor. At the end of the short note, the appellants have stated that even if they are in possession, the respondents have not sought any mesne profit for that portion. The court while granting the equitable relief is expected to pass an equitable order. The plaintiffs or the respondents can file separate proceedings for the rendition of accounts or share in profits or income with regard to the entire joint property.

19. At this stage, it would not be equitable to remand the case back to the trial court to permit the respondents to lead evidence to prove charges for use and occupation of the first floor and second floor of the premises.

20. Keeping in view the aforesaid facts and discussion, this court does not find it appropriate to interfere with the judgment passed by the first appellate court.

21. Hence, the appeal is dismissed.

22. All the pending miscellaneous applications, if any, are also disposed of.

04th December, 2023 **(ANIL KSHETARPAL)**
nt **JUDGE**

Whether speaking/reasoned :YES/NO
Whether reportable :YES/NO