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

+ **FAO(OS) 3/2022, CM APPLs. 706/2022, 3437-38/2023**

MRS RAGINI UDHRAIN

..... Appellant

Through: Mr. Vaibhav Kalra, Advocate

versus

USHA KAPILA & ORS.

..... Respondents

Through: Mr. Naresh Bakshi and Mr. Rahat Bansal, Advocates for R-1 to R-4.
Mr. Abdes Chaudhary, Ms. Meena Yadav, Ms. Geetanjali Setia, Mr. Vinayak Mishra, Ms. Manisha Suri and Mr. Nishikant Singh, Advocates for R-6.

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Date of Decision: 1st February, 2024

CORAM:

HON'BLE THE ACTING CHIEF JUSTICE

HON'BLE MS. JUSTICE MANMEET PRITAM SINGH ARORA

J U D G M E N T

MANMOHAN, ACJ: (ORAL)

1. Present appeal has been filed challenging the impugned order dated 16th May, 2019, passed in CS (OS) No. 37/2018, whereby the learned Single Judge, inter alia, ordered that if the defendant nos. 1 and 2 fail in the suit, they shall be liable for mesne profits/ damages for use and occupation charges at ₹ 2 lacs per month for the share of the plaintiffs and defendant no. 3 and that the said mesne profits shall be deducted out of the share of



defendant nos. 1 and 2 in the property bearing no. A-3, Hauz Khas, New Delhi – 110016, ad-measuring 1105 sq. yds., comprising of three block ('suit property').

2. The Appellant (i.e., the defendant no. 1 in the suit) filed a review petition i.e., R.P. No. 204/2021 along with an application for condonation of delay of 902 days, seeking a review of the impugned order dated 16th May, 2019. The said review petition has been dismissed vide a separate order dated 9th December, 2021 and the learned Single Judge declined to condone the delay. The said order has also been challenged in the present appeal.

3. The Appellant and Respondent No.5 herein are defendant nos. 1 and 2 respectively, the Respondent Nos. 1 to 4 are plaintiff nos. 1 to 4, respectively and the now deceased Respondent No.6 is the defendant no.3. CM APPL. 3437/2023 has been filed for bringing on record the legal representatives of Respondent No. 6 and the same is accompanied with CM APPL. 3438/2023 seeking condonation of delay.

4. The suit has been filed for seeking partition, rendition of accounts and mesne profits qua suit property.

5. Learned counsel for the Appellant states that the directions recorded in paragraphs 4 to 6 of the impugned order dated 16th May, 2019 as regards payment of mesne profits cannot be sustained as no evidence was led by either party with respect to the prevalent rate of rent. He states that without a formal proof of the rate of prevalent rent; mesne profits at ₹ 2 lacs per month could not have been determined by the learned Single Judge.

5.1. He states that as per the assertion made in the pleadings, Respondent Nos. 1 to 4 and Respondent No. 6 have alleged that they are in joint



possession of the suit property; so as to avoid making payment of ad valorem court fees. He states that therefore, on demurrer, no claim of mesne profits can be maintained against the Appellant herein. He however, fairly admits that as per the stand of Appellant and Respondent No. 5 in their joint written statement, the said parties were in exclusive possession of the entire suit property as on 16th May, 2019.

5.2. He states that after the passing of the impugned order dated 16th May, 2019, the Court has directed that the possession of 1st floor of suit property be handed over to (now deceased) Respondent No. 6. He states that presently the legal representatives of Respondent No. 6 are in possession of the 1st floor of the suit property and this subsequent event would mitigate the direction qua payment of mesne profit as recorded in impugned order dated 16th May, 2019. He states that Appellant and Respondent No. 5 are now in possession of ground floor of the suit property.

5.3. He states that Respondent No. 5, who is the son of the Appellant, was entrusted with the responsibility of defending the suit on behalf of the Appellant, however, he has failed to do the same and consequently, the Appellant herein has been unable to lead evidence in accordance with liberty granted in the impugned order dated 16th May, 2019.

6. In reply, learned counsel for the legal representatives of Respondent No. 6 states that the present appeal has been filed after an unexplained delay of 915 days, which has not been sufficiently explained. He states that therefore, the present appeal is not maintainable. He states that this appeal is an abuse of the process of law and has been filed to overcome the defaults in leading evidence in accordance with the directions issued in the impugned



order dated 16th May, 2019. He states subsequent orders have been passed in the suit proceedings and evidence has also been led by the contesting parties. He states that the present appeal is in endeavour to undo the progress in the trial.

7. This Court has considered the submissions of learned counsel for the parties and perused the record.

8. The Appellant in her common written statement dated 21st August, 2018, has categorically and unequivocally asserted that she is in exclusive possession of the suit property alongwith Respondent No. 5; and is therefore, estopped from now contending to the contrary that Respondent Nos. 1 to 4 are in possession. Even during arguments, Appellant admits that the actual physical possession of the suit property is with the Appellant and Respondent No. 5 to the exclusion of the Respondent Nos. 1 to 4. The plea of possession raised by the contesting Respondents in the plaint and the rejoinder is premised on the legal fiction created by co-ownership. However, the directions issued in the impugned order dated 16th May, 2019 are to compensate the winning party with mesne profits for the exclusion from the enjoyment of actual and physical possession. In view of the admitted stand of the Appellant as regards her actual and physical possession, the directions in the impugned order dated 16th May, 2019 are legal and justified. The relevant pleadings in the written statement read as under:

“PRELIMINARY OBJECTIONS/ SUBMISSIONS

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*4. That the present suit of the plaintiff is liable to be rejected as the plaintiff has not affixed proper court fees. It is specifically denied that plaintiff along with his family used to live in the said suit premises as averred by the plaintiff in the plaint. **That further it is submitted that Late Sh. Ravi Udhraia along with his family ie Defendant no. 1 & 2***



were and are at present in exclusive possession of the said suit property.
That just to negate the affixing the said court fee the plaintiff has vehemently lied about being in possession of the suit property.

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REPLY ON MERITS

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3. That the contents of para 3 of the plaint are admitted to the fact that the plaintiff and the defendants are relatives wherein defendant no .1 is the sister-in-law (wife of deceased real brother-Ravi Udhrain) of the plaintiff and defendant no.2 is the Nephew of the plaintiff i.e. son of the deceased real brother (Ravi Udhrain) That it is also admitted that the defendant no.3 & 4 are the sons (Nephew) of the deceased real sister (Pushpa Bhardwaj) of the plaintiff and the defendant no.5 & 6 are the real sisters of the plaintiff. That it is specifically denied that all the defendants are residing at the given address as per the cause title. That it is submitted that only Defendant no. 1 and 2 are residing at the given address as per the cause title and are in exclusive possession of the suit property.”

(Emphasis Supplied)

9. It is the matter of record that the suit property admeasures 1105 sq. yds. and is located in *Hauz Khas*, an upscale and posh residential colony in New Delhi. The description of the property as noted above shows the extent of facilities available in the said property. The Court in the impugned order dated 16th May, 2019 has determined the rent which the property of this magnitude is capable of fetching at ₹2 lacs per month. As is apparent from the impugned order, the determination of the said amount was not controverted by the Appellant or Respondent No. 5. It is settled law that the Court under Section 57 of Indian Evidence Act, 1872 can take judicial notice of the prevalent rent (Re. *M/s. M.C. Agrawal Huf vs. M/s. Sahara India & Ors.*¹ and *Hindustan Petroleum Corporation Ltd. Vs. Mohanjit Singh (Deceased) Through Legal Heirs*²). We are of the considered opinion

¹ 2011 SCC OnLine Del 3715

² 2019 SCC OnLine Del 9419



that the mesne profits at ₹2 lacs determined by the learned Single Judge is a conservative determination considering the expanse and scale of the suit property. Further, the reasonableness of the said rate of mesne profits is evident from the fact that the Respondent Nos. 1 to 4 and Respondent No. 6 were willing to pay same amount to Appellant and Respondent No. 5 for occupying the suit property during the pendency of the list. This Court therefore, finds no merit in the contention of the Appellant that the fixation of the amount of ₹2 lacs per month was invalid.

10. With respect to the contention of the Appellant that the legal representatives of Respondent No. 6 have since occupied the 1st floor of the suit property in pursuance to the subsequent order dated 25th October, 2021, the same can have no effect on the legality and correctness of the impugned order dated 16th May, 2019. The effect of the subsequent event will be adjudicated and considered by the learned Single Judge at the time of determining the final reliefs in favour of legal representatives of Respondent No. 6. The said subsequent event, in any event, does not affect the right of Respondent Nos. 1 to 4 to receive mesne profits.

11. The reasonableness of the said amount of ₹ 2 lacs per month was never in dispute and this is also evident from the fact that the present appeal has been filed belatedly after 915 days. No sufficient cause has been shown for the delay in filing the appeal. In fact, it is evident from the record that the appeal has been filed to overcome the defaults serious lapses by Appellant in conducting evidence as recorded by the learned Single Judge in the subsequent order dated 09th December, 2021.

12. This Court also finds no infirmity in the order dated 9th December,



2024:DHC:815-DB



2021 dismissing the application seeking review of the order dated 16th May, 2021.

13. This appeal is therefore bereft of any merits and is dismissed both on account of delay and merits. Accordingly, CM APPL. 706/2022 is dismissed.

14. For completeness of record, CM APPLs. 3437-3738/2023 are allowed and legal representatives of Respondent No. 6 are taken on record.

15. Pending applications, if any, stand dismissed.

ACTING CHIEF JUSTICE

MANMEET PRITAM SINGH ARORA, J

FEBRUARY 1, 2024/hp/aa

Click here to check corrigendum, if any