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SA No. 1059 of 2007

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IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 18-02-2025

CORAM

THE HONOURABLE MRS JUSTICE T.V.THAMILSELVI

SA NO. 1059 of 2007

Kandasamy Asari,
S/o.Venkatachala Asari, V.Pudhupallaiyam
Village, Kandachipuram Post, Thirukoilur.

Appellant(s)

Vs

1. Panjachara Mudaliar, S/o.Arumuga Mudaliar
2. Viruthambal Ammal W/o Amirthalingam
3. Perumal Chettiyar w/o Kesava Chettiyar
4. Vasuki w/o Ganesa Mudhaliar

Respondent(s)

PRAYER : This Second appeal has been filed under Section 100 of CPC, against the judgment and decree in A.S No. 138 of 2003, dated 31.01.2006 on the file of II Additional Subordinate Judge, Villupuram in partly allowing the judgment and decree in I.A No. 98 of 2000 in O.S No. 490 of 1979 dated 23.07.2002 on the file of the Ist Additional District Munsif Court, Thirukoilur.

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For Appellant(s):

M/s V.Srimathi

For Respondent(s):

M/s.V.Balaji For R 2

R3 - Died

No Appearance - R1, R4



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JUDGMENT

The appellant herein/plaintiff filed the suit in O.S No. 490 of 1979 on the file of the I Additional District Munsif Court, Thirukoilur, against the respondents herein/defendants for redemption of mortgage and for mesne profit and the defendants also contested the said suit. On hearing both sides, the Trial Court passed the preliminary decree on 31.08.1981 in respect of redemption of mortgage. Challenging the said findings the defendants preferred an appeal in A.S No. 221 of 1981 which was dismissed on 20.02.1982, against which, the second appeal was preferred in S.A No. 1531 of 1982 before this court on 24.11.1994. Thereafter, final decree petition was filed in I.A No. 1351 of 1995, in which, delivery was ordered on 02.02.1996 and thereafter through EP No. 268 of 1996 the plaintiff took delivery of the suit property on 09.11.1998. Thereafter, the appellant herein/plaintiff preferred an application under Order 20 Rule 12 of CPC, to determine the mesne profit after taking delivery of the suit property but the said application was dismissed stating that the application was not maintainable and as barred by limitation. The reason assigned by the Trial

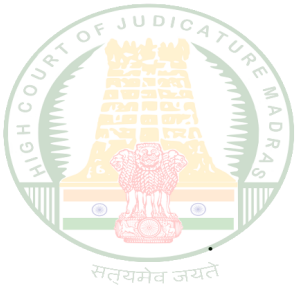


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Court is that while passing the preliminary decree there is order in respect of mesne profit. Even after passing the final decree the plaintiff has not taken any steps to file the application for mesne profit but only after delivery of the property the plaintiff filed the application as such is not maintainable and dismissed. By relying the ratio laid down in 1999 (2) CTC, wherein it is held that immediately passing the preliminary decree the application for mesne profit should have been filed but in the present case the plaintiff preferred the appeal only after taking delivery of the suit property as such is clearly barred by the limitation. Accordingly, said application was dismissed. Against which, A.S No. 138 of 2003 was preferred before the II Additional Subordinate court, Villupuram, the first appellate Court framed the following points for consideration:

i. Whether this application is I.A No. 98 of 2000 under Order 20 Rule 12 CPC is barred by limitation ?

ii. Whether the application for determination of the mesne profit is not maintainable after the passing of the final decree for delivery of suit property and when there was no grant of relief about the mense profits in the final decree especially when there is a relief granted in the preliminary decree for determination of the mesne profits under Order 20 Rule 12 CPC



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4. *To what relief the appellant/petitioner is entitled to ?*

2. By relying ratio laid down in the judgement reported in 1988(2) L.W. 217 at page 219. The first appellate Court held that application as such is maintainable and it is not barred by limitation. Subsequently, while deciding the point number 2 the first appellate court held that as per provisions under Order 20 Rule 12(c) (iii) CPC the valuation of mesne profits can be awarded only for three years from the date of decree for possession till the date of delivery and the advocate commissioner fixed Rs.70,700/- as mesne profit from the period on 27.04.1979 tile date of delivery dated 09.11.1998 based on the Advocate Commissioner report the first appellate court awarded Rs.11,169/- as mesne profits for a period of three years with 6% interest. Challenging the said findings the plaintiff preferred this second appeal.

3. Heard the learned counsel for the appellant and the learned counsel for the second respondent.



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4. This Court admitted the appeal with the following substantial

questions of law :

i. Whether the Courts below are right in restricting the award of mesne profit for three years alone, when the right of the plaintiff for claiming damages had been left to be adjudicated by the Court in a separate proceeding in and by its decree dated 31.08.1981 in O.S No. 470 of 1979 ?

ii. Whether the courts below are right in applying the rule of limitation of three years to a decree which had recognized the rights of the plaintiff to claim mesne profits after taking delivery of possession ?

5. The learned counsel for the appellant argued that at the time of filing the suit itself the appellant/plaintiff claiming the relief in respect of mesne profit by submitting calculation of loss sustained but both the Court below failed to grant said relief while passing decree and thereafter in the second appeal redemption of mortgage was confirmed by this court based on that the plaintiff/appellant took delivery of possession of the property in the year 1998. Thereafter, the plaintiff/appellant herein preferred an application under Order 20 Rule 12 of CPC claiming mesne profit in I.A No. 98 of 2000 but the same was dismissed by the Trial Court by stating

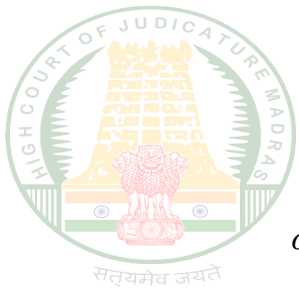


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that it is barred by limitation. Against which, the plaintiff/appellant herein filed an appeal, wherein, the first appellate Court held that application filed by the appellant for mesne profit as such is maintainable in law not barred by limitation but granted relief only for three years as such is erroneous one ,since the plaintiff has already claimed the mesne profit from the date of suit till passing of the decree in the suit. Further the learned counsel relied the judgment of the Hon'ble Supreme Court reported in 2022 SCC Online SC 1161 in the case Indian Oil Corporation Ltd. Vs. Sudera Reality Private Limited, the relevant portion of the judgment is extracted below:

72. [Article 51](#) contemplates a period of three years from the date on which the profits from the immovable property is received by the defendant. If it is to be understood as profits actually received by the defendant, then, it is obvious that [Article 51](#) may not apply. If a Suit for mesne profits of the kind involved in this case would fall more appropriately under [Article 113](#) of the [Limitation Act](#), which is the residuary Article, the Suit must be instituted within a period of three years from the date on which the right to sue accrue. This Article is in stark contrast with [Article 58](#) of the [Limitation Act](#), under which, the period of limitation is three years but from the date on which the cause



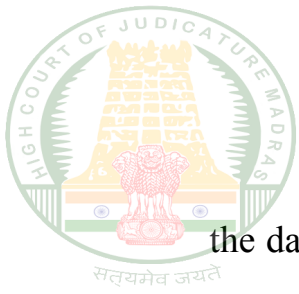
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of action first arises. If a claim for mesne profits is one, which accrues from day-to-day and it is a continuing one and if the suit for mesne profits would fall to be decided under [Article 113](#) of the [Limitation Act](#), then, since the cause of action is a continuing one, the suit may not be barred as regards any part of the claim as contended by the appellant.

6. The learned counsel for the respondent raised objection stating that the Court below rightly dismissed the claim of the appellant which needs no interference.

7. On perusal of the records, it reveals that at the time of filing the suit in O.S No. 90 of 1979, plaintiff claimed the relief of mesne profit under Order 20 Rule 12 CPC as third prayer in the plaint. However, while passing the decree the Trial Court not granted any relief in respect of mesne profit in the plaint and also in the second appeal the only main relief claimed in the suit was granted in favour of the plaintiff. As discussed above, in the execution proceedings in the year 1998 the plaintiff took delivery of the possession of the suit property it is an undisputed fact. Now, the point for consideration is that whether the plaintiff is entitle for mesne profit from



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the date of filing of the suit till delivery of possession of the property. After taking delivery of the possession of the property, the plaintiff/appellant herein filed I.A No. 98 of 2000 claiming mesne profit from the date of the suit till taking delivery of possession of the property. The Trial Court dismissed the said application holding that it is barred by limitation. However, the first appellate Court in A.S No. 138 of 2003 partly allowed the appeal holding that petition as such is maintainable in law however restricted the profit only for three years. Hence, the plaintiff/appellant filed this second. As per the ratio laid down in the judgment of the Hon'ble Supreme Court reported in 2022 SCC Online SC 1161 in the case Indian Oil Corporation Ltd. Vs. Sudera Reality Private Limited, the plaintiff/appellant herein is entitled for filing the application for the mesne profit even after filing passing the final decree. The relevant portion of the judgement is extracted below:

72. [Article 51](#) contemplates a period of three years from the date on which the profits from the immovable property is received by the defendant. If it is to be understood as profits actually received by the defendant, then, it is obvious that [Article 51](#) may not apply. If a Suit for mesne profits of the kind involved in this case would fall more appropriately under [Article 113](#) of the [Limitation Act](#), which is



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the residuary Article, the Suit must be instituted within a period of three years from the date on which the right to sue accrue. This Article is in stark contrast with [Article 58](#) of the [Limitation Act](#), under which, the period of limitation is three years but from the date on which the cause of action first arises. If a claim for mesne profits is one, which accrues from day-to-day and it is a continuing one and if the suit for mesne profits would fall to be decided under [Article 113](#) of the [Limitation Act](#), then, since the cause of action is a continuing one, the suit may not be barred as regards any part of the claim as contended by the appellant.

74. It is true that a pure question of law which does not involve any investigation of facts, and if the plea of limitation in a given case is such, there can be no taboo in this court dealing with it even if raised for the first time. This is however not a case where the plea was not raised. It was raised and an issue was framed. But it was expressly given up before the Single Judge and not pursued before the Division Bench.

92. Therefore, it may not be appropriate to allow the appellant to raise the contention of limitation or to allow him to succeed on the same, based on the case falling under [Article 51](#). This is, no doubt, despite noticing the averment in the plaint which appears to have been made with reference to [Section 2\(12\)](#) of the CPC. We would have to, however, bear in mind the principle [laid down in](#) *Atmaram* (supra) and the principles we have already considered. We are of the view that landlord by the suit seeks to realise, what in law is described as damages for unauthorised occupation by the tenant after



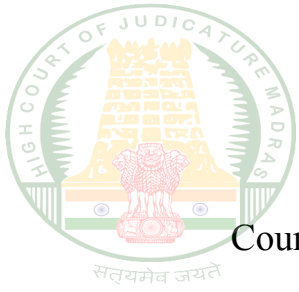
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the expiry of the lease. It is not to be conflated to the profits received within the meaning of [Article 51](#) of the [Limitation Act](#), as it involves finding out the rate at which the landlord could have let out the premises. It would be the residuary Article, namely, [Article 113](#), which should apply.

8. In the present case, at the time of filing the suit the plaintiff/appellant sought mesne profit as one of the prayer in the plaint from the date of the suit till delivery of possession. But the Trial court not granted the said relief as he is entitle for mesne profit after taking delivery of property, since it is continued cause of action. But the first appellate Court erroneously restricted the mesne profit only for three years, which is unsustainable and liable to be set aside. As per the ratio laid down by the Apex Court in the above referred case, the plaintiff is entitle for mesne profit from the year of 1979 till delivery of possession of the property. Already advocate commissioner submitted the report, in which, he stated a sum of Rs.70,700/-as mesne profit liable to be paid by the respondent/defendant. Therefore, the findings rendered by the first appellate



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Court is set aside. Accordingly, questions of law are answered. The appellant/plaintiff is entitle for mesne profit of Rs.70,700/- from the year of 1978 to 1998 with 6% interest. The defendant is directed to pay the said amount with the above said interest within a period of three months from the date of receipt of a copy of this judgment, if he fails, the appellant/plaintiff is entitle to recover the amount as per the manner to law. Accordingly, this second appeal is disposed of. Consequently, pending petition(s), if any, is/are closed. No Costs.

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To

- 1.The Additional District Munsif Court, Thirukoilur.
2. The II Additional Subordinate Judge, Villupuram.
3. The Section Officer, V.R. Section, High Court, Madras.



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