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

+ **FAO(OS) No. 81/2017 & CM Nos. 10773/2017 & 43979/2017**

Date of decision: 29th October, 2018

NEETY GUPTA

..... Appellant

Through: Ms. Shashi Kiran, Advocate with Appellant-in-person.

Versus

USHA GUPTA & ORS

..... Respondents

Through: Mr. Harsh Peechara, Advocate with Respondent No. 4 in person.

CORAM:

HON'BLE MR. JUSTICE SANJIV KHANNA

HON'BLE MR. JUSTICE ANUP JAIRAM BHAMBHANI

ANUP JAIRAM BHAMBHANI, J. :

CM No. 10772/2017

As the appeal is barred by limitation, the appellant has filed an application praying for condonation of delay of 382 days. In the application it is stated that the appellant had filed Review Application RA No. 146/2016 seeking review of order dated 28th January, 2016. This review application was disposed of by the single Judge vide order dated 17th February, 2017 as having been withdrawn with liberty to file an appeal against the impugned order. Referring to the decision of a single Judge of this Court in *Sita*

Kashyap & Anr vs. Harbans Kashyap & Others, 183 (2011) DLT 47, the review order observes as under:-

“6. Admittedly, this judgment which is relied upon in the case of ***Sita Kashyap (supra)*** was not cited before this Court when the order was passed on 28.1.2016 dismissing I.A. No. 22524/2004. That a judgment is ‘erroneous’ has two connotations. One aspect is that the judgment is ‘erroneous’ for being challenged in appeal and thus for being set aside, and the second connotation is that the judgment is ‘erroneous’ for the purpose of allowing of a review petition. In my opinion, since the judgment in ***Sita Kashyap (supra)*** was not cited before this Court when this Court passed the order dated 28.1.2016 dismissing I.A. No. 22524/2014, this review petition effectively is for re-arguing the case and with respect to which relief was declined by a speaking order dated 28.1.2016 giving reasons that no evidence was led to prove *mesne* profits and plaintiff had not sought framing of issues on *mesne* profits. The reasons given in the order dated 28.1.2016 are one possible and plausible view, and it is not as if this view taken is *ex-facie* illegal, more so because the judgment in ***Sita Kashyap (supra)*** case was not cited before this Court.

“7. Plaintiff, therefore, may possibly have a good case for challenging in appeal the order dated 28.1.2016 dismissing I.A. No. 22524/2014 declining the award of *mesne* profits, however, there is no error which is apparent on the face of record for allowing of a review petition because reasons are given in terms of the order dated 28.1.2016 to decline grant of *mesne* profits and which reasons given cannot be said to be erroneous on the face of record.

“8. In view of the above position, since this review petition in the opinion of this Court is not maintain-

able, counsel for the plaintiff/applicant is allowed to withdraw this review petition with liberty to file an appeal against the impugned order dated 28.1.2016 dismissing I.A. No. 22524/2014 and in which appeal plaintiff can raise all grounds against the order dated 28.1.2016 as asserted in the present review petition and also other grounds if may be available to the plaintiff. I may also note that the pendency of the present review petition would be a possible ground not only for plaintiff to seek condonation of delay in filing the appeal against the order dated 28.1.2016, but also, the case of the plaintiff so far as limitation period of filing of the appeal is concerned would also be within parameters of Section 14 of the Limitation Act, 1963.

“9. The review petition is accordingly disposed of in terms of the aforesaid observations.”

2. By Order dated 28.01.2016, being the order under challenge in this appeal, the single Judge has taken the view that the application for mesne profit cannot be entertained after preliminary decree is passed if no such prayer was made in the plaint. The said view, as also alluded to in the review order, is contrary to the view expressed by another single Judge in an earlier judgment reported in *Sita Kashyap & Anr (supra)*. In fact, before us reference is also made to the judgment in the case of *Seth Girdhari Lal & Ors vs. Seth Gaja Nand & Ors* ILR (1974) 1 Delhi 864 and order dated 12th August, 2013 of a Division Bench of this Court in FAO(OS) No. 238/2011 titled *Harbans Kashyap vs. Sita Kashyap & Ors* affirming the judgment of the single Judge in the case of *Sita Kashyap & Anr (supra)*.

3. In view of the aforesaid position, we condone the delay in filing of the appeal, noticing the fact that the appellant had filed the review application on 26.02.2016 which had remained pending till 17.02.2017.
4. The application for condonation of delay is therefore allowed, without any order as to costs.

FAO(OS) No. 81/2017

5. This intra-court appeal under Section 10 of the Delhi High Court Act 1966 impugns order dated 28th January, 2016 whereby IA No. 22524/2014 praying for a decree of mesne profits against the fourth respondent from the date of institution of the suit, has been dismissed.
6. The appellant and the four respondents are sisters. The fourth respondent has, to the exclusion of the appellant and other respondents, been in use and occupation of the property in respect of which mesne profits have been claimed, as detailed below.
7. The appellant and the respondents have inherited immovable properties from their parents, being property No. B-7, 80/2, Safdarjung Enclave, New Delhi and residential plot No. B-9, Rohit Kunj, Pitampura (Rohtas Cooperative House Building Society), Delhi. Mesne profits have been claimed by the appellant only in respect of the Safdarjung Enclave property, with the claim being restricted to her share in such mesne profits. As noted above, it is the conceded position that the fourth respondent has been in occupation of the Safdarjung Enclave property, to the exclusion of the other sisters including the appellant.

8. The appellant had filed CS (OS) No. 2209/2008 for partition of the said properties. Respondents Nos. 1, 3 and 4 herein did not appear in spite of service and were accordingly proceeded ex-parte in the suit. The second respondent had entered appearance and accepted the appellant's claim. Consequently by order dated 27th September, 2011 a preliminary decree of partition was passed, holding that the appellant and the fourth respondent have a 1/5th share each in the suit properties. The appellant had given-up the relief for rendition of accounts.
9. The fourth respondent thereafter filed an application under Order IX Rule 13 of the Code of Civil Procedure, 1908 ('Code', for short) for setting aside the ex-parte preliminary decree against her, which application was dismissed vide order dated 28th January, 2016 made by the single Judge. The appeal FAO(OS) No. 108/2016 preferred by the fourth respondent was dismissed by the Division Bench of this Court vide judgement dated 25th October, 2016. The Special Leave Petition filed by the fourth respondent was also dismissed. Accordingly, the preliminary decree dated 27th September 2011 has attained finality.
10. The application, being IA No. 22524/2014 dated 5th November, 2014, for decree of mesne profits in favour of the appellant and against the fourth respondent was rejected vide order dated 28th January, 2016 on the ground that no prayer for mesne profits had been made in the plaint. The appellant had not led any evidence to prove mesne profits before passing of the preliminary decree. As previously noticed, the appellant had thereupon filed a review application relying upon the judgment of the single Judge of this Court in *Sita Kashyap & Anr.*

(supra), which review application was disposed of vide order dated 17th February, 2017.

11. The provisions of the Code that are relevant for the issue of mesne profits are extracted hereinafter. Order XX Rule 12 of the Code reads as under :

“12. Decree for possession and mesne profits.—(1) Where a suit is for the recovery of possession of immovable property and for rent or mesne profits, the Court may pass a decree—

(a) for the possession of the property;

(b) for the rents which have accrued on the property during the period prior to the institution of the suit or directing an inquiry as to such rent;

(ba) for the mesne profits or directing an inquiry as to such mesne profits;

(c) directing an inquiry as to rent or mesne profits from the institution of the suit until, -

(i) the delivery of possession to the decree-holder,

(ii) the relinquishment of possession by the judgment-debtor with notice to the decree-holder through the Court, or

(iii) the expiration of three years from the date of the decree, whichever event first occurs.

(2) Where an inquiry is directed under clause (b) or clause (c), a final decree in respect of the rent or mesne profits shall be passed in accordance with the result of such inquiry.”

Order XX Rule 18 of the Code reads as under :

“18. Decree in suit for partition of property or separate possession of a share therein.—Where the Court passes a de-

decree for the partition of property or for the separate possession of a share therein, then,—

(1) if and in so far as the decree relates to an estate assessed to the payment of revenue to the Government, the decree shall declare the rights of the several parties interested in the property, but shall direct such partition or separation to be made by the Collector, or any gazetted subordinate of the Collector deputed by him in this behalf, in accordance with such declaration and with the provisions of section 54;

(2) if and in so far as such decree relates to any other immovable property or to movable property, the Court may, if the partition or separation cannot be conveniently made without further inquiry, pass a preliminary decree declaring the rights of the several parties, interested in the property and giving such further directions as may be required.”

12. As is evident from a bare perusal of the provisions of Rules 12 and 18 of Order XX of the Code, in the case of a partition suit it is Rule 18 that specifically applies. It is also clear that the right to receive a share in mesne profits is a consequence of partition of the property. Sub-rule 2 of Rule 18 of Order XX of the Code states that if a decree for partition or separation cannot be conveniently made without enquiry, the court will pass a preliminary decree declaring the rights of the parties interested in the property. At this stage, the court can give further directions as may be required. These directions would include directions for payment of mesne profits. Interpreting the aforesaid Rule, a Division Bench of this Court in *Seth Girdhari Lal & Ors vs. Seth Gaja Nand & Ors* ILR (1974) 1 Delhi 864 observed as under:-

“The preliminary decree determines the shares of the respective parties and thereby furnishes the basis upon

which the division of the property has to be made. There are other matters, in addition to the shares of the parties, that have to be considered and decided before an equitable and final partition can be effected. They would include all questions of accountability between the parties, the distribution of the profits in the properties realised pending the suit etc. Even *after* the passing of the preliminary decree it is open to the Court to give appropriate directions regarding all or any of these matters *either suo motu or on the application* of the parties. Order 20, Rule 18 C.P.C. does not prohibit the Court from issuing such directions after the stage of a preliminary decree *even in a case where the plaint itself does not expressly ask for such relief*. It is open to the Court, to prevent multiplicity of litigation and to do complete justice and affect an equal division of all the common assets and properties among the parties, to direct an enquiry into the profits received or realised by one or some of them during the pendency of the suit and to award the others their proper share of such profits under its final decree. This enquiry can be ordered either as part of the preliminary decree itself *or subsequently as a step towards the passing of the final decree* and in either case the result of the enquiry has to be incorporated in the final decree.

(Emphasis Supplied)

“In *Babburu Basavayya vs. Babburu Guravayya* (1951 A.I.R. Madras 938 (7)) a Full Bench of the Madras High Court explained the above features of a partition suit as well as the scope of Order 20, Rules 12 and 18 C.P.C. The distinction between three types of cases, in which a question of profits or mesne profits might arise, was explained: (1) suits for ejection or recovery of possession of immovable property from a person without title with a claim for past or past and future mesne profits; (2) suits for partition by one or

more tenants-in-common against others with a claim for account of past or past and future profits, and (3) suits for partition by a member of a joint Hindu family with a claim for an account from the manager. In the first case, the possession of the defendant, not being lawful, the plaintiff is entitled to recover mesne profits; in the second case, the possession and receipt of profits by the defendants not being wrongful, the plaintiffs' remedy is to have an account of such profits; in the third case, the state of the family on the date of the partition is material and the parties are not entitled to open up past accounts or claim relief on the ground of past inequality of enjoyment of the profit, except where the manager has been guilty of fraudulent conduct or misappropriation. Order 20, Rule 12 C.P.C. deals with the first type of suits while Order 20, Rule 18 deals with the second and third categories. The preliminary decree in this case had directed the taking of accounts under Order 20, Rule 18 C.P.C. *Basavayya* held that even in the absence of a claim for future mesne profits and the preliminary decree being silent about it, it is open to the Court to give appropriate directions either *suo motu* or on the application of the parties *even after the date of the preliminary decree.*”

(Emphasis Supplied)

13. The Full Bench of the Madras High Court in ***B. Basavayya V.B. Guravayya vs. B. Guravayya***, AIR 1951 Madras 938, on interpretation of Rules 12 and 18 of Order XX, has held that the provisions of Rule 18 of Order XX apply to a suit for partition by a member of a joint family as also a suit for partition by one or more tenants-in-common against each other, with a claim for accounts of mesne profits ; whereas the provisions of Rule 12 apply to a suit for ejectment or recovery

of possession of immoveable property from a person without title, with a claim for past or future mesne profits.

14. Similar view has been expressed by a single Judge of this Court in ***Sita Kashyap & Anr. vs. Harbans Kashyap & Ors, (supra)***, which decision also refers to several other judgments including a judgment of the Madras High Court in ***Gnanaprakasa Mudalier & Ors vs. B. Anandathanadavan & Ors***, 1999 (2) CTC 6, a judgement of the Andhra Pradesh High Court in ***Azizabi vs. Fatima Biand & Ors***, 1977 (1) Andhra WR 136 and a Full Bench decision of the Patna High Court in ***Indradeo Prasad Singh & Anr vs. Sheonath Prasad Singh & Ors*** AIR 1980 Patna 201. Thereafter in ***Sita Kashyap (supra)*** it was held as under:

“21. In a suit for partition though there is no specific prayer for awarding profits, the Court has power to direct an inquiry into profits and grant a decree for plaintiff's share therein. This proposition was expressly approved by the Madras High Court in the case of *Basavayya (supra)*. *In fact, it becomes the duty of the Court in a suit for partition, to make an enquiry into profits even if there is no claim for profits, so as to balance the equities between the parties.* If one of the co-owners has been deriving some profit by way of rent, etc. or is in possession of a portion disproportionate to his share in the property subject matter of the partition, it becomes the duty of the Court to adjust the equities by directing appropriate division of profits, if any, earned from the property, which is subject matter of the partition or by directing appropriate payment by a person, who has been occupying a portion larger than he ought to be occupying considering his share in the property, to the sharer(s), who is either totally divested of possession or has been in posses-

sion of lesser portion as compared to his share in the property. Of course, such payment/adjustment can be directed by the Court only with respect to the *mesne* profits subsequent to the filing of the suit. Any claim for *mesne* profits which were earned or could on exercise of due diligence have been earned, before filing of the suit, needs necessarily to be specifically claimed and appropriate court fee needs to be paid on the amount claimed towards share in the *mesne* profits. *But, it would be hyper technical to take a view that merely because the Court did not direct payment of mesne profits either in the preliminary decree or in the final decree, the plaintiff should be deprived of his share in the mesne profits.* Of course, no order for such payment/adjustment/apportionment can be passed by the Court once it has become functus officio, in the sense that no proceedings in the main suit are pending before it, but, *when the suit proceedings continue to be pending before the Court for one reason or the other, there is no legal impediment in passing such an order even after passing of the final decree. In such cases, the Court is competent to pass a supplementary/additional decree limited to the grant of mesne profits.*”

(Emphasis Supplied)

15. The aforesaid view in ***Sita Kashyap*** was affirmed by a Division Bench of this court vide judgment dated 12th August, 2013 in FAO (OS) No. 238/2011 ***Harbans Kashyap vs. Sita Kashyap & Ors.***
16. In light of the aforesaid discussion, it must be held that the application for grant of *mesne* profits filed by appellant before passing of the final decree was maintainable. The impugned order erroneously holds that the application was not maintainable as the appellant had not prayed for *mesne* profits in the plaint and had not adduced evidence to prove

the prayer. A prayer for mesne profits can be made even if no such relief was claimed when the court passed a preliminary decree of partition or separation. A prayer in this regard can be granted even after passing of the preliminary decree in terms of Order XX Rule 18(2) of the Code. This is important and relevant since, in a suit for partition even a defendant is a plaintiff. Once the shares are declared by the court on passing a preliminary decree, a party can, by filing an application, seek a decree of mesne profits, from the party in occupation.

17. In the present case the fourth respondent is in exclusive possession of the Safdarjung Enclave property although she only has a 1/5th share therein. Accordingly, the appellant who also holds a 1/5th share, is entitled to claim mesne profits for her 1/5th share. However, the amount can only be quantified on a proper enquiry. We would also record that other shareholders, namely the other three sisters, have not made a claim and do not seek mesne profits from the fourth respondent.
18. Our attention was also drawn to the fact that the suit was finally adjudicated vide order-cum-final judgment dated 19.09.2016 and a final decree has been passed.
19. In light of the aforesaid position, we accept the appeal and set aside order dated 28.01.2016. We further direct that an enquiry for mesne profits in terms of Rule 18 of Order XX CPC be undertaken in execution proceedings.
20. During the course of hearing it was brought to our notice that the plot at Pitam Pura has since become subject matter of a sale deed, which allegedly has not been executed by the appellant nor by any of the re-

spondents. The fourth respondent present in Court states that she has filed a First Information Report and is, on her own, also pursuing a matter relating to the Pitam Pura property before the Debt Recovery Tribunal. Her grievance is that the appellant and the other sisters are not cooperating in these proceedings. The appellant who is present in person states that there are personal differences between her and the fourth respondent. However, she conceded that it would be in her interest as well to ensure that the plot at Pitam Pura is not lost to an allegedly fraudulent sale transaction ; and that it is sold by the parties at the earliest so that the sale proceeds thereof are divided between the parties. The fourth respondent also states that she is suffering from cancer. We only record these submissions with the hope that these would also be taken into consideration by the appellant.

21. In view of the aforesaid discussion, we allow the present appeal to the extent indicated above. However, there would be no order as to costs.

ANUP JAIRAM BHAMBHANI, J.

सात्यमेव जयते

SANJIV KHANNA, J.

October 29, 2018
MR