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**IN THE HIGH COURT OF DELHI AT NEW DELHI**Date of decision: 08th JULY, 2025IN THE MATTER OF:+ **CS(OS) 2453/2015 & I.A. 16871/2015****SARVINDER SINGH & ANR**

.....Plaintiffs

Through: Mr. Abhishek Aggarwal, Advocate

versus

VIPUL TANDON

.....Defendant

Through: Mr. Aniruddh Sharma and Ms.
Pratibha Bhadoria, Advocates.**CORAM:****HON'BLE MR. JUSTICE SUBRAMONIUM PRASAD****JUDGMENT**

1. The Plaintiff had initially filed a suit to seek the relief of possession and mesne profits/damages from the Defendant in respect of the flat having three floors with lawn and terrace and four servant quarters in property no.27, Rajpur, Delhi, shown in red colour in the site plan attached with the plaint (*hereinafter referred to as "suit property"*). The Plaintiffs have also claimed damages of Rs. 2,00,000/- per month along with interest @ 15% p.a against the Defendant towards use and occupation charges in respect of the suit property from the date of the filing of the suit till possession.
2. The Plaintiff filed an application under Order XII Rule 6 of the CPC on 06.01.2016.
3. This Court *vide* Judgment dated 03.05.2016 in I.A No. 1190/2016 under Order XII Rule 6 of the CPC allowed the application and passed a partial decree for possession in favour of the Plaintiffs in respect of the suit



property whereby the Defendant was asked to vacate the suit property as prayed for by the Plaintiffs.

4. Consequently, the suit was decreed with regard to the claim of possession; the only claim that remained to be adjudicated was the claim for mesne profits.

5. Shorn of unnecessary details, facts as narrated in the plaint are as follows: -

- a) The suit property was owned by the mother of the Plaintiffs, Late Smt. Nirmal Satyendra Singh. Plaintiff No.1 is settled in U.K. and Plaintiff No. 2 has been settled in Canada for the last 44 years. The father of the Plaintiffs had also settled in Canada since the year 1968.
- b) It is stated that the mother of the Plaintiffs refused to shift abroad and stayed back in India having spent most of her time on the suit property. The Defendant was appointed as the caretaker of the mother of the Plaintiffs.
- c) It is stated that upon the death of their mother, the Plaintiffs being Class-I legal heirs, inherited the suit property.
- d) It is stated that on 13.05.1996, the Defendant filed a probate petition being PC NO. 182/1996 in the Court of Additional District Judge, (Central) Delhi. This probate was filed in respect of an alleged will dated 15.08.1992 attributed to late Smt. Nirmal Satyendra Singh, whereunder, purportedly the suit property had been bequeathed to the Defendant, to the exclusion of the Plaintiffs who are her sons.



- e) It is further stated that the probate petition was filed by playing fraud as the fact that the Plaintiffs are residing abroad since 1970 was not disclosed and the service report *qua* the Plaintiffs was obtained by manipulation as the signature of the Plaintiffs on the summons was forged. It is stated that the Plaintiffs were not in India on 31.05.1996 when the service of summons was allegedly affected on them. On the basis of the service report, since no objections were filed, on 13.08.1997, the Additional District Judge granted probate to the Defendant in respect of the alleged Will dated 15.08.1992.
- f) It is stated that the suit property was earlier in the tenancy of one R.S Chitnis and was illegally sold by the Defendant to one Smt. Renu Agarwal by forging the signatures of the Plaintiff's mother and got the documents executed for sale of the said flat. Plaintiff No.1 visited India and learnt of the said development. Since the Defendant was intending to sell the other portions of the suit property, Suit No.39/2002 was filed before the Court of the Civil Judge, Delhi, along with an application under Order XXXIX Rule 1&2 of the CPC to seek a permanent injunction against the Defendant from dealing with the property. This injunction was granted on 04.05.2002.
- g) It is stated in response to the aforesaid suit for injunction filed by them, the Defendant filed his written statement claiming ownership in the suit property on 22.02.2002. The Defendant claimed ownership based on the probate granted *vide* Order dated 15.08.1992. Consequently, the Plaintiff no.1 filed an application



under Section 263 of the Indian Succession Act, 1925 praying for the revocation of probate granted in favour of the Defendant. The said application was contested by the Defendant and was dismissed by the learned ADJ *vide* Order dated 24.04.2007.

- h) Aggrieved by the said Order, the Plaintiff No. 1 preferred FAO No. 242/2007 before this Court. *Vide* Order dated 14.01.2011, this Court restored the probate petition to its original number and directed the same to be decided afresh after giving opportunity to the Plaintiff to file their objections, hence, the order granting probate in favour of the Defendant herein was set aside.
- i) Accordingly, the probate petition was restored for re-adjudication and *vide* Order dated 20.03.2014, the Probate Petition was dismissed and the appeal preferred by the Defendant, being FAO No. 179/2014, was also dismissed by this Court on 11.03.2015.
- j) It is stated that the right claimed by the Defendant premised on the alleged will could not be proved, and by force of the law of succession, the Plaintiffs-being the Class-I heirs, succeeded to the suit property, thereby excluding the Defendant.
- k) Hence, the present suit for possession and mesne profits.

6. The Defendant, upon the issuance of summons, filed the written statement wherein *inter alia* it is stated that:-

- a) The suit is barred by limitation as the Defendant is in possession and ownership of suit property since the death of the mother of the Plaintiffs in 1994.



- b) The Defendant becomes the owner of the suit property by adverse possession as he is in possession of the property for more than 12 years.
- c) The Plaintiffs never executed any Power of Attorney authorizing Sh. Mohd. Saleen to sign and verify the present suit therefore the suit is liable to be rejected.
7. The Plaintiff filed his reply denying the above averments.
8. Pleadings in the suit were completed on 08.04.2016.
9. The Court on 03.05.2016 framed the following issues on the said claim:
- i. Whether the Plaintiff is entitled to claim damages during the period that the Defendant remained in possession from the date of filing of the suit till possession is delivered to the Plaintiff and, if so, at what rate and for what period? OPP
 - ii. If the above issue is decided in favour of the Plaintiff, whether the Plaintiff is entitled to interest on the aforesaid amount? OPP
10. On the said date, a decree for possession was also passed in favour of the Plaintiff, and therefore, only the question of damages remained for adjudication in the suit.
11. The Defendant's evidence was closed as the Defendant decided not to lead any evidence or file any documents. The Plaintiffs filed their evidence by way of affidavit, and the power of attorney of the Plaintiff was examined as PW-1.
12. The matter was referred to mediation on 04.12.2019, however, no settlement took place as none of the parties turned up to participate in the



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mediation proceedings and the matter was sent back to the Court as “non-starter”

13. On 10.07.2024, PW1 was dropped from the list of witnesses and was discharged unexamined; thereafter Plaintiff’s evidence was closed.

14. On 03.03.2025, arguments were advanced and judgment was reserved on the issue of mesne profit.

15. A perusal of the facts reveals that the Defendant had sought for probate of the Will, which is not in existence. The Defendant has also managed to obtain an Order of Probate by playing fraud on the Plaintiffs. The probate granted had to be revoked by the Court granting the probate, leading to the filing of the present Suit. Based on the averments in the Petition, an application under Order XII Rule 6 of the CPC was allowed and the decree of possession was granted to the Plaintiff.

16. The learned counsel for the Plaintiff submits that the status of the Defendant in the suit property is merely that of an illegal/unauthorised trespasser/occupant. Hence, the Defendant is liable to pay a sum of Rs..2,00,000/- per month to the Plaintiffs towards use and occupation charges. The said amount of mesne profits has been claimed as per the prevailing market rate of rent in the same locality in respect of similar portions, and the Plaintiffs claim to have easily fetched the said amount by letting out the premises on rent. The Plaintiffs are also entitled to interest on damages @ 15% p.a.

17. The learned Counsel for the Plaintiff has relied on S. Kumar v. G.R. Kathpalia, 1998 SCC OnLine Del 553, wherein the Court held that though the landlord had not led any documentary evidence of the prevalent market rent of other premises in the vicinity, however, keeping in mind the prime



location of the suit premises, its proximity to the Community Centre and commercial activity, a sum of Rs. 25,000/- per month is a fair and just amount of damages/*mesne profits* from the premises.

18. *Per contra*, the learned Counsel for the Defendant submits that till 11.03.2015, the Defendant continued to claim his title to the property on the basis of the will. It is further submitted that there is no admission made in the written statement that the Defendant has no right, title or interest in the suit property. The Defendant had set up his claim of title to the suit property by filing his written statement in the earlier suit of injunction. The said written statement was filed on 22.02.2002. The Plaintiff ought to have instituted the suit for possession of the suit property within 12 years from the Defendant's knowledge on the title claim of the suit property. That not having been done, the present suit, which has been filed only on 10.08.2015, is barred by limitation.

19. It is further submitted by the learned counsel for Defendant that the award of damages cannot be granted without material evidence and in a suit for damages, the Plaintiff must prove damages by leading proper evidence. The learned counsel for the Defendant further submits that the burden of proof lies with the Plaintiff to claim *mesne profits*.

20. Heard the learned counsels for the parties and perused the material on record.

21. Section 2(12) of Code of Civil Procedure, 1908 defines *mesne profits* which reads as under:-

“Section 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.”

22. The Madras High Court in Ramakka v. V. Negasam, 1923 SCC OnLine Mad 303, has held that:

*“On the second point, I am of opinion that the Commissioner and the District Judge were in error in requiring the plaintiff to open her case. Order XVIII, rule 1, Civil Procedure Code, which is applicable to miscellaneous proceedings through section 141, lays down that the plaintiff has the right to begin unless the defendant admits the facts alleged by the plaintiff. In a case like the present, where the fourth defendant is the person claiming mesne profits, he is in the position of a plaintiff, as it is his petition, that is the foundation of the proceedings and, if he adduces no evidence at all, no mesne profits can be awarded to him. Section 2, clause (12) defines mesne profits as those profits which a person in wrongful possession of such property actually _ received or might, with ordinary diligence, have received. The profit which a person actually received is a matter within the peculiar knowledge of that person and, under section 106 of the Evidence Act, the burden of proving the amounts actually received will lie on the person who received them; **but the burden of proving the profits that the person in occupation might have received will lie on the person who claims them...**”* (emphasis supplied)

23. The landlord is entitled to the mesne profits against a tenant who continues to stay in the tenanted premises after the termination of the tenancy. It is now well accepted that the amount which a landlord is entitled to receive on the termination of tenancy is the amount which the premises



can fetch if let out on rent during the period of its illegal occupation by the tenant.

24. The rent which the premises can fetch during the period of the illegal occupation by the erstwhile tenant is a fact which can be easily demonstrated in a suit for possession and mesne profits against the tenants by leading evidence. In the present case, the Plaintiffs have not led any evidence with respect to rent of similar premises within the locality.

25. The Plaintiffs in this case are claiming mesne profit from the date of filing of suit, i.e., 06.08.2015 till possession, i.e., 17.07.2018, at the rate of Rs.2,00,000/- per month along with interest @ 15% p.a. It is an admitted position that the probate of Will was not granted in favour of the Defendant, and therefore, the Defendant is not the owner of the said premises. It is also admitted that Plaintiffs are Class-I heirs of the owner of the property. However, the Plaintiffs in the present case have not presented any evidence to show that the said amount of *mesne profits* claimed is as per the prevailing market rate of rent in the same locality in respect of similar portions.

26. Mere guess work cannot be used for ascertaining the rent. This Court cannot make a guess work in thin air. Guess work cannot take the form of evidence. Coming to a figure which might be the rent of the area on its own without any material is not permissible in law. Thus, in the absence of any evidence, either oral or documentary, this Court is not in a position to calculate any *mesne profits*.

27. This Court is of the opinion that, in the absence of any evidence to ascertain the mesne profit, it cannot calculate the amount to be awarded as



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mesne profit on its own. Therefore, the claim of mesne profits cannot be granted.

28. The relief for possession already stands decreed *vide* Judgment dated 03.05.2016. The relief for *mesne profits* is rejected. The present suit is disposed of along with pending application(s), if any.

SUBRAMONIUM PRASAD, J

JULY 08, 2025
MP