

IN THE HIGH COURT OF SINDH AT KARACHI

Suit No.318 of 2016

[Gul Banov.....Shahnaz Bano & others]

Date of Hearing : 03.09.2021
Plaintiff : Ms. Uzma Rafiq, Advocate for the plaintiff a/w Ms. Falak Mutahir, Advocate.
Defendants : Nemo.

JUDGMENT

Zulfiqar Ahmad Khan, J:-Through this lawsuit, the plaintiff Gul Bano grieves that she is one of the daughters of late Abdul Shakoor Khan who died in the year 1991 leaving five sons and three daughters (including her), as well as an immovable property bearing house No.A-323, Block-I, North Nazimabad, Karachi (“said property”). It is alleged in the plaint that soon after the death of her father, the defendant No. 1 to 3 occupied the said property, while the original documents of the said property remained in the possession of the defendant No.1. It is asserted by the plaintiff that the defendants were not paying her share and they were bent upon selling the said property depriving the plaintiff from her valuable inheritance rights, hence the plaintiff reached this Court with the prayers that the defendants be directed to give away her share, she also has prayed that mesne profit also be paid to her for the period the said house was enjoyed by the defendants after the death of her father.

2. Having received summons/notices, the defendants filed their respective written statements/counters but neither disputed the relationship with plaintiff nor the fact that the said property,

belonged to the deceased, they undertook to amicably resolve the dispute and showed willingness to handout share of the plaintiff as per law to her. It unfurls from the written statements of the defendants that they denied the claim of mesne profit as well as valuation of the said property as described in the pleadings.

3. From a scrutiny of the record and proceedings it surfaces that on 20.12.2017 the defendant No.1-5 showed their willingness to purchase the said property, whereafter, the said property was evaluated by independent estate agents of the locality to which it was reported that the market value of the said property was around Rs.2,30,00,000/- and vide order dated 30.01.2018 the defendant No. 1 to 5 agreed to purchase the said property in the given price, whereby, they were directed to deposit the share of the plaintiff and defendant No.6. It appears that the defendant No.1 to 5 deposited the share of plaintiff and defendant No.6 to the tune of Rs.57,75,000/- with the Nazir of this Court and as the time went by, the share of the defendant No.6 was handed out upon filing of his application vide order dated 09.05.2018.

4. The plaintiff also approached the Court for payment of her share which was already lying with the Nazir and for this purpose she filed CMA No.9940/2016 which was allowed vide order dated 27.09.2018 and Nazir was directed to handover the plaintiff her share. Record shows that the only issue ever framed in this case after the above development was of the payment of the mesne profit vide order dated 03.04.2018 and judgment was only sought in respect of the following issue:-

Whether the plaintiff entitled to claim past mesne profit? If so, its period and quantum?

5. Record also reflects that the learned commissioner reported the matter to the Court on 17.03.2020 that the defendants never appeared to record their evidence as well as defendants' counsel by filing statement before the learned commissioner stated that he will not lead any evidence.

6. Crux of submissions of learned counsel is that the plaintiff is daughter of late Abdul Shakoor Khan who was owner of the said property, therefore, she is entitled to the legal share bestowed upon her under Muslim law which share cannot be denied. She argued that even a co-owner may be in the wrongful possession of a property when he occupies the same to the exclusion of the other right-holders. In such cases, per learned counsel, the co-owner be held liable to the extent of his unauthorized or hostile possession or enjoyment of the property, therefore the plaintiff is entitled to the claim of mesne profit as she was kept out of possession notwithstanding she being a co-owner of the said property herself.

7. In contra, learned counsel for the defendants submitted that the share of the plaintiff was lying with the Nazir of this Court which could be obtained by her, however, so far as the claim of mesne profit is concerned, he submitted that a co-owner is not entitled to mesne profit, neither the defendants dispossessed the plaintiff nor enjoyed illegal possession of father's property rather they are owner of the said property being legal heirs of the deceased, therefore, the question of mesne profit does not arise. While concluding his

submissions, he introduced on record that the said property has been purchased by the defendants and the financial claim of the plaintiff had been handed out to the Nazir.

8. No one came forward to testify on behalf of Defendants, but in their Written Statement it has been categorically mentioned that present Plaintiff is one of the legal heirs of late Abdul Shakoor Khan. While a Written Statement by itself does not have any evidentiary value, unless, deponent of pleadings (plaint or Written Statement), enters the witness box to lead the evidence as pleadings of parties are not substantive piece of evidence unless and until averments made in pleadings are proved from evidence in the Court. Reliance is placed on the precedents of Apex Court rendered in **Muhammad Akram & another v. Mst. Farida Bibi (2007 SCMR 1719) & Faqir Mohammad v. Abdul Momin (PLD 2003 S.C. 594)**.

9. I have appreciated the arguments of the respective learned counsel and have also considered the record. The factual controversy, relevant to the present lis has already been adjudicated partially, as discussed in the preceding paragraphs, therefore, I do not consider it appropriate to pen down any observations in that regard. The crux of the present determination is the question as to whether plaintiff is entitled to her claim of past mesne profit or not. As the issue relates to the entitlement of the plaintiff for mesne profit, it would suffice to say that question of entitlement shall come into play only when the claimant first establishes that she was entitled to retain possession and she was wrongly kept out of the possession.

10. It is an established position that mesne profit is damage or compensation recoverable from a person, who has been in wrongful possession of an immovable property. It is a settled principle of law that wrongful possession is the very essence of claim for mesne profit and for seeking mesne profit, a person must be owner of the captioned property or having right to its possession. Clause (12) of Section 2, C.P.C. gives meaning to the term “mesne profit” to include those profits, which the person in wrongful possession of such property actually received (or might with the ordinary diligence) have received therefrom. According to the said clause, a person becomes entitled to mesne profit only when he has right to obtain possession from another person whose possession is unauthorized and who keeps the former deprived of such a possession. The first and foremost condition for awarding mesne profit is the unlawful possession of the occupant of the property. The said clause defines “mesne profit” to mean:-

“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. A bare reading of the above definition makes it is clear that any person in possession of a property and enjoying benefit therefrom to the exclusion of rightful owner(s) is liable to pay rent or mesne profit. Now let’s see what sort of evidence has been introduced on record by the plaintiff during the course of evidence to substantiate her claim. Mr. Munawar Taqfiq Ahmed appeared into witness box as attorney of plaintiff and enumerated the factum of filing of the

present *lis* against the defendants. He introduced on record documents in the following sequence:-

Special Power of Attorney as Exh. PW/1

Lease of the said property as Exh. PW/2

Yearwise rent of said property issued by Khadia Ja Estate as Exh. PW/3.

Unreported verdict of Apex Court passed in CPLA No.83-K of 2014 as Exh.PW/4

Letters along with TCS receipts as Exh. PW/5 to PW/7

Legal notices addressed to the defendants along with TCS receipts as Exh. PW/8 to PW/13.

Tenancy Agreement of house No B384 Block 13, F.B. Area, Karachi along with receipts as Exh. PW/14 to PW/28.

Tenancy Agreement of house No. R-1016, Block 3 Khaliabad, Karachi along with receipts as Exh. PW/29 to PW/43.

Utilities bill as Exh. PW/44 to PW/57.

12. The witness underwent to the test of cross-examination of his testimony. The material constituent of the cross-examination of the attorney of plaintiff which impairs the intrinsic value of the *lis* at hand is delineated hereunder:-

“It is correct to suggest that the Rent Agreements I have produced as Exhibit PW/14 and PW/36 are not related to the property in question i.e. House No. A-323, Block-1, North Nazimabad, Karachi.”

“It is correct to suggest that the said rent agreements are not signed by the plaintiff (mother).”

13. It gleans from appraisal of the foregoing that the tenancy agreements introduced on record by the plaintiff’s attorney does not

germane to the said property. But this is not the claim of the plaintiff. The moot plea of the defendants is that they are not enjoying any benefits from the said property rather they are residing in it being legal heirs of late Abdul Shakoor Khan. Contention of learned counsel for the defendant that the plaintiff being co-owner cannot claim mesne profit is not substantiated by any law. As stated earlier, a person who claims mesne profit, he has to show that he is owner of the property and that the defendants are in wrongful possession, thereof, therefore in my humble view for all intent and purposes, even a co-owner (who may be related to the claimant) may be in wrongful possession of a property if he occupies the subject property to the exclusion of the other rightful co-owner(s). In such a case the co-owner in possession to the exclusion of other co-owner will however be held liable to the extent of his unauthorized or hostile occupation possession or enjoyment thereof to the extent of the share of the claimant. Once a person establishes and court comes to the conclusion that the person was entitled to any right or share in the property and he is being deprived of such right or share in the property by the other person, then even the partial owner who is out of possession or enjoyment becomes entitled to claim those profits actually received by the person in unlawful possession or enjoyment of such part thereof as the case may be. This Court in the case of **M. Anwar v. Dr. Gohar Ali (2007 CLC 621)** (authored by my Lord Mr. Justice Mushir Alam as his Lordship then was) held the similar principle and it is considered pertinent to reproduce the relevant constituent which is delineated as under:-

“Contention of Mr. Durrani, learned counsel for the appellant that the defendant/respondent

being co-owner cannot claim mesne profit is not substantiated by any law. Plaintiff who claims mesne profit has to show that he is owner of the property and that the defendant is in wrongful possession, thereof, Even a co-owner may be in wrongful possession, when he occupies the property to the exclusion of the other rightful co-owner. In such case the co-owner in possession to the exclusion of other co-owner may be held liable to the extent of his unauthorized or hostile occupation possession or enjoyment thereof.

Once a person establishes and Court comes to a conclusion that person is entitled to any right or share in the property and is being deprived of use of such right or share in property by the other person, then the owner who is out of possession or enjoyment becomes entitled to claim those profits actually received by person in unlawful possession or enjoyment of such part thereof as the case may be. Therefore, the conclusion of the learned Court that suit for mesne profit is not maintainable while deciding Issue No.1 cannot be sustained and is accordingly set aside.

Where there is clear and convincing evidence to show the actual profit or income derived out of such property by the person who is enjoying and reaping benefit out of its use, the Court may award such claim of profit that is derived or is capable of deriving out of such use and enjoyment by the person who is held to be in unauthorized use. The person claiming and establishing any right or share in the property may be entitled to claim profit or mesne profit to the extent of his share or right and interest in the property. In the instant case plaintiff has not led any convincing evidence as to determine with certainty the actual income or benefit derived by the defendant in authorized possession or enjoyment or that the property was capable of fetching. Such situation is redressed by awarding decree of mesne profit by directing preparation of decree for mesne profit in terms of Order XX, rule 12, C.P.C. and after holding such enquiry as may be necessary the final decree may be prepared. Cross-objection stands allowed let the decree for mesne profit be also prepared along with preliminary decree for possession and partition as ordered by the learned trial Court.”

14. The Hon'ble Supreme Court in an unreported case titled as Mahmood Ali Khan v. Hamid Ali & others (CPLA No.83-K of 2014) went on to hold as under:-

“We are also of the view that the respondents who had occupied by the subject property at the time of death of deceased Khawaja Azmat Ali are liable to pay mesne profits to the other legal heirs. We will therefore direct the trial Court that before distribution of the sale proceeds received from the petitioner to the respondents as per their sharia share he should deduct Rs.3000/- per month as subject property for first five years, from the death of late Khawaja Azmat Ali, Rs.4000/- per month for the next five years and Rs.5000/- per month for further period upto date from the share of the respondents No.2, 4 and 5 and distribute this amount of respondents according to their share as per Shariah in the inheritance of their late father.”

15. Admittedly, the said property remained in the possession of defendant No. 1 to 3 and after the death of deceased Abdul Shakoor Khan in the year 1991 year wise rental value of the said property was provided through the statement of Messrs. Khadia Estate (Ex. PW/3 available at page 45 of the evidence file) that remained unchallenged which provided the following rents from 1991 (the year of death of the father) and 2016 (when the present case was initiated)

Sr.	Year	Amount	Amount
1	1991	Rs.3000 x 12	Rs.36,000/-
2	1992	Rs.3000 x 12	Rs.36,000/-
3	1993	Rs.3000 x 12	Rs.36,000/-
4	1994	Rs.3500 x 12	Rs.42,000/-
5	1995	Rs.3500 x 12	Rs.42,000/-
6	1996	Rs.3500 x 12	Rs.42,000/-
7	1997	Rs.4000 x 12	Rs.48,000/-
8	1998	Rs.4000 x 12	Rs.48,000/-
9	1999	Rs.4000 x 12	Rs.48,000/-
10	2000	Rs.6000 x 12	Rs.72,000/-
11	2001	Rs.7000 x 12	Rs.84,000/-
12	2002	Rs.7500 x 12	Rs.90,000/-
13	2003	Rs.8000 x 12	Rs.96,000/-
14	2004	Rs.8500 x 12	Rs.102,000/-
15	2005	Rs.9000 x 12	Rs.108,000/-
16	2006	Rs.9500 x 12	Rs.114,000/-
17	2007	Rs.9500 x 12	Rs.114,000/-
18	2008	Rs.10,000 x 12	Rs.120,000/-

19	2009	Rs.10500 x 12	Rs.126,000/-
20	2010	Rs.11,000 x12	Rs.132,000/-
21	2011	Rs.12,000 x 12	Rs.144,000/-
22	2012	Rs.15,500 x 12	Rs.150,000/-
23	2013	Rs.13,000 x 12	Rs.156,000/-
24	2014	Rs.15,000 x 12	Rs.180,000/-
25	2015	Rs.18,000 x 12	Rs.216,000/-
26	2016	Rs.22,000 x 2	Rs.44,000/-
	Total		Rs.32,90,000/-

16. It is also an admitted position that plaintiff alone cannot be entitled to entire share of the above sums as she was only one of the total nine children (3 daughters and 6 sons) thus her share is only 1/15, but equitable interest on the above sums on pro-rata basis for each year's earnings have to be applied. Also property was sold out in the year 2018, therefore, benefit of these two years also has to be added in the above list. If interest is kept @ 6 percent per annum as permitted under law, the following table details share of the plaintiff is mesne profit for the period 1991-2018:-

Year	Annual Rent	Plaintiff's Share (1/15)	Years	Interest %	Compounded Value
1991	36,000.00	2,400.00	28	6	12,268.05
1992	36,000.00	2,400.00	27	6	11,573.63
1993	36,000.00	2,400.00	25	6	10,300.49
1994	42,000.00	2,800.00	25	6	12,017.24
1995	42,000.00	2,800.00	24	6	11,337.02
1996	42,000.00	2,800.00	23	6	10,695.30
1997	48,000.00	3,200.00	22	6	11,531.32
1998	48,000.00	3,200.00	21	6	10,878.60
1999	48,000.00	3,200.00	20	6	10,262.83
2000	72,000.00	4,800.00	19	6	14,522.88
2001	84,000.00	5,600.00	18	6	15,984.30
2002	90,000.00	6,000.00	17	6	16,156.64
2003	96,000.00	6,400.00	16	6	16,258.25
2004	102,000.00	6,800.00	15	6	16,296.60
2005	108,000.00	7,200.00	14	6	16,278.51
2006	114,000.00	7,600.00	13	6	16,210.25
2007	114,000.00	7,600.00	12	6	15,292.69
2008	120,000.00	8,000.00	11	6	15,186.39
2009	126,000.00	8,400.00	10	6	15,043.12
2010	132,000.00	8,800.00	9	6	14,867.41
2011	144,000.00	9,600.00	8	6	15,300.94
2012	150,000.00	10,000.00	7	6	15,036.30
2013	156,000.00	10,400.00	6	6	14,752.60

2014	180,000.00	12,000.00	5	6	16,058.71
2015	216,000.00	14,400.00	4	6	18,179.67
2016	264,000.00	17,600.00	3	6	20,961.88
2017*	264,000.00	17,600.00	2	6	19,775.36
2018*	264,000.00	17,600.00	1	6	18,656.00
Total: >>					411,682.98

* Rent is kept the same for these years.

17. In view of the rationale and deliberation contained hereinabove, the forgoing discussion justifies that the decree should be apportioned under order XX Rule 12 CPC in the manner that the Defendants are liable to pay a sum of Rs. 411,682.98/- (rupees four hundred, eleven thousand, six hundred eighty two and ninety eight paise) to the Plaintiff as mesne profit as of the date of the judgment, however, parties are left to bear their own costs.

JUDGE

Karachi:
Dated:19.09.2022

Aadil Arab