

**HIGH COURT OF JUDICATURE FOR RAJASTHAN
BENCH AT JAIPUR**

SB CIVIL MISC. APPLICATION No.1/2022
in (S.B. Civil First Appeal No.345/2021)

Jitendra Kumar Sharma S/o Shri Govind Narain Sharma, Aged About 43 Years, R/o Plot No. 11, Govind Nagar (East), Amer Road, Jaipur (Raj.)

----Appellant

Versus

1. Govind Narain Sharma S/o Shri Ramkishor Sharma, At Present Residing At Plot No. 1, Ashok Vihar, Jagatpura, In Front Of R.b.i. Colony, Police Station Pratap Nagar, Jaipur (Raj.)
2. Prem Devi Sharma W/o Shri Govind Narain Sharma, R/o Plot No. 11, Govind Nagar (East) Amer Road, Jaipur (Raj.) Ex Party Date 24-10-2019
3. Giriraj Kishor Sharma S/o Shri Govind Narain Sharma, R/o Plot No. Ashok Vihar, Jagatpura, In Front Of R.b.i. Colony, Police Station Pratap Nagar, Jaipur (Raj.)

----Respondents

For Appellant(s)	:	Mr. J.P. Goyal, Sr. Advocate with Ms. Jyoti Swami
For Respondent(s)	:	Mr. Peush Nag

HON'BLE MR. JUSTICE SUDESH BANSAL
Order

21/11/2022

The matter comes up on an application (1/30-4-2022) for grant of mesne profits to respondent defendant Govind Narain, who had succeeded before the trial court vide judgment dated 2-9-2021, passed by Additional District Judge No.7, Jaipur Metropolitan, which judgment has been stayed by this court in the first appeal vide order dated 4-3-2022.

2. The facts of the case are that vide judgment dated 2-9-2021 the trial court while dismissed the appellant-plaintiff's suit for partition and permanent injunction decreed the counter claim of respondent defendant Govind Narain for possession of the property in issues. The plaintiff was also directed to remove the pillar and other possession from ground floor and first floor and to hand over possession to defendant. Till handing over

possession of the portion to defendant the plaintiff was directed to pay mesne profits to defendant Rs.100/- per month from April, 2019. Since, execution of the judgment has stayed, the defendant has filed the present application.

3. It has been submitted that there is finding against the plaintiff that he is a trespasser and continues in use and occupation of the suit property, therefore the trial court has fixed the mesne profits Rs.100/- per month from April, 2019. It has been submitted that the suit property, which is in use and occupation of the plaintiff can carry much rent and a prayer for mesne profits was made for Rs.10,000/-, but due to escalation in prices and increase in the market value of suit property the mesne profits should be Rs.25,000/- per month, but now due to interim order dated 4-3-2022 the plaintiff is allowed to be in use and occupation of the property further, therefore mesne profits should be fixed now as Rs.37,000/-. The defendant has placed on record the valuation report and submitted that property of such valuation can fetch rent of about Rs.25,000/-. Counsel for defendant submitted that rent in vicinity ranges about Rs.25,000/- per month. The defendant has also placed on record his expenses for maintaining his parents of spending Rs.10,000/- per month, while the plaintiff is not spending any money for meeting expenses of parents. Similarly has stated about criminal activities by plaintiff, for which criminal cases has also been registered against plaintiff. Counsel has submitted that while staying the operation of the impugned judgment and allowing plaintiff to be in use and occupation of the suit property, a reasonable condition may be imposed by fixing suitable and reasonable amount of mesne profits and prayed to fix it as Rs.37,000/- per month.

4. The plaintiff filed reply to application and opposed the same. It has been submitted that the valuation report contains value of whole property and the value of the portion in possession of plaintiff is only Rs.11,138/- as such the mesne profits as prayed for cannot be fixed. The plaintiff submitted that he is in possession of one room and kitchen out of six rooms, two big hall on ground floor, as such the said portion can fetch rent only of Rs.1000/- per month. It has been further submitted that portion on first story was constructed by plaintiff and no expense was incurred by defendant for which no mesne profit can be fixed. As such a prayer has been made to dismiss the application.

5. Heard learned counsel for parties on the application for mesne profits filed defendant, who had succeeded before the trial court and perused the material available on record.

6. Having heard learned counsel for parties this court is of the opinion that admittedly the defendant succeeded before the trial court and vide judgment dated 2-9-2021 while the plaintiff has been directed to hand over vacant possession of the suit property, mesne profits has been fixed from April, 2019. This court in first appeal vide order dated 4-3-2022 has stayed the execution of the judgment. In such circumstances, to maintain balance of equity and interest of justice between parties while granting stay in favour of one party interest of other party can be safeguarded under Order 41 Rule 5 CPC. The amount of mesne profits should be fixed in view of the valuation of the property and prevalent rent in the concerned area/ locality.

7. Keeping in mind the ratio of judgment of the Apex Court in Atma Ram Properties (P) Ltd. Vs. Federal Motors (P) Ltd. [(2005)1 SCC 705] and taking into consideration the valuation of room and kitchen in possession of plaintiff, its use for residential purpose, location and nature of construction,

according to document of valuation, photographs etc., placed on record as also the relationship of father and son, between the parties, mesne profit is determined @ Rs.5000/- payable during the course of first appeal to retain possession by plaintiff as per stay order. It is made clear that mesne profits, will increase 5% every year, on the basic amount of Rs.5000/-, during the course of appeal.

8. As a result the amount of mesne profits payable by plaintiff, the judgment-debtor, to defendant, the decree holder, is fixed at Rs.5,000/- per month from 30-4-2022, the date of filing the application for enjoyment, use and occupation of the suit property during pendency of the first appeal. The amount of mesne profits Rs.5000/- commencing 1st December, 2022 shall be paid be 10th of each month. The amount of mesne profit Rs.5000/- shall increase by 5% every year commencing from 1-12-2022 during the course of appeal. The appellant plaintiff is also directed to pay the arrears of mesne profits @ Rs.100/-, as directed by the trial court from April, 2019 to March, 2022 and Rs.5000/- from April, 2022 to November, 2022, within a period of two months from today. In the event of two consecutive default in paying mesne profits or the payment of arrears as directed, the interim order dated 3-4-2022 shall be liable to be vacated on an appropriate application being filed. Respondent- defendant may provide his bank account details to plaintiff-appellant within a period of two weeks, so as to deposit/ pay the mesne profits in the bank account.

8. Accordingly, the application stands disposed of.

9. Stay application, if pending, also stands disposed of.

(SUDESH BANSAL),J