
THE STUDY OF MESNE PROFITS - APPLICATION, ASSESSMENT AND CALCULATION IN PARTITION SUITS

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ABSTRACT

"Mesne profits" is the term used to describe the legal compensation for people who have been denied access to jointly owned property due to the illegal actions of joint co-owners. This is a remedy created by the courts through many years of jurisprudence under the Civil Procedure Code, 1908. It has been established that the Courts will determine a party's rights and interests in accordance with the statutory guidelines of Sections 2(12) and Order XX Rules 12 and 18 of the Civil Procedure Code. This paper will highlight how Section 2(12) and Order XX Rules 12 and 18 work together to provide the process for determining a party's interest in a property before commencing with the physically dividing of the property into separate lots and avoiding the need to file multiple Partition Suit actions when it comes to calculating Mesne Profits. The analysis of the law as determined by the Courts is as follows: Lucy Kochuvareed (1979), The Honourable Supreme Court held that post-preliminary-enquiry mesne profits determination was allowed; Phoolchand (1967), The Honourable Supreme Court allowed multiple decrees to be issued in relation to the same Partition Suit; Shiv Kumar Sharma (2007) held that the plaintiff must pay fees for any past profits recovered; alternatively, the Honourable Supreme Court Shub Karan Bubna (2009) held that mesne profits are a legal and equitable remedy for both parties and there are no standalone claims for mesne profits recovery. The Courts use their discretion to order mesne profits without the need for pleading or an amendment to the original suit when the party seeking mesne profits has complied with the fee requirements and the claim for mesne profits is not deemed to be frivolous. This paper urges the establishment of uniform guidelines for determining the value of mesne profits, as well as a common method for executing the enforcement process, and penalties for delayed enforcement of mesne profits, to enable rapid family partition resolutions and to reduce Court backlogs.

Keywords: Mesne profits, Partition suits, Order XX Rule 12, preliminary decree, court fees.

I. INTRODUCTION

In established plethora judicial pronouncements¹, *it is established and understood that when the ownership of a movable or immovable property vests with an individual but such person is barred by another person who has wrongfully prevented such person to peaceful enjoyment of his legal right and has profited in some qualitative or quantitative way purely by the consumption of such property, it is termed as unjust enrichment*. Perhaps, the theory as to why the concept of mesne profits was introduced largely vests on this concept and the governing procedure is provided under **section 2(12)² read along with Order XX Rule 12³ and 18⁴ of the Civil Procedure Code 1908**. The author, through this research article attempts to shed light on the procedural intricacies involved in assessment, ascertainment and calculation of mesne profits in case of partition suits. The concept of mesne profits is ideally never interpreted in isolation, that is to imply, in the foregoing parts of the research article, the author shall attempt to interpret the concept of mesne profits in light of partition suits (suits pertaining to family matters) and illegal possession combined with the manner in which a plaint consisting of prayer for enquiry into mesne profits may be made to the court of competent jurisdiction.

I.A. RESEARCH PROBLEM

- i. Whether in partition suits, the enquiry into mesne profits⁵ can be done in a stage subsequent to the preliminary decree as prescribed under Order XX Rule 12 of Civil Procedure Code 1908⁶?
- ii. Whether in partition suits, Mesne profits can be awarded in case where the prayer to the plea does not specify the plaintiff's seeking award under mesne profits?

I.B. RESEARCH OBJECTIVES

- i. *To identify and decode the legislative and procedural jurisprudence in line of assessment of mesne profits as under section 2(12) read along with Order XX Rule*

¹ Code of Civil Procedure, No. 5 of 1908, § 2(12).

² Supra note 1.

³ Code of Civil Procedure, No. 5 of 1908, Order XX r. 12

⁴ Code of Civil Procedure, No. 5 of 1908, Order XX r. 18.

⁵ supra note 2

⁶ supra note 3

12 and 18 of Civil Procedure Code, 1908.

- ii. To assess and explore the judicial pronouncements dealing with the evolution of court's interpretation of mesne profits.*
- iii. To understand the nuances of preliminary decree⁷ and the different stages in preliminary decree.*

II. LEGAL FRAMEWORK AND JUDICIAL PRONOUNCEMENTS.

II.A. LEGAL FRAMEWORK

1. "The legal framework is crafted largely under the Civil procedure Code, 1908 and stems from under section 2(12). The ingredients as under the section can be described in three-fold manner.
 - i. The dispute can accrue to movable or immovable property.
 - ii. The person in wrongful possession of the property must benefit from such property or might with ordinary diligence have received therefrom.
 - iii. Such benefit must not result out of improvements made by such person in wrongful possession on the disputed property.

The jurisprudence stems from the civil remedy of compensation and expands to the spectrum of civil liability."⁸

2. The procedural intricacies are provided under Order XX Rule 12 which reads specifically for 'decree for possession and mesne profits.' The relevant string attached to enquiry into mesne profits is dealt as under, Order XX Rule 12 (b), (be) and (c), answering which sub-clause (d) deals with the procedural outcome of such enquiry when made under the said sub-clauses.⁹

⁷ Code of Civil Procedure, No. 5 of 1908, § 2(12).

⁸ Supra note 7

⁹ supra note 3.

3. The question of awarding of mesne profits under suits for partition is dealt under Order XX Rule 18 of the code. The relevancy of this provision to assessment of mesne profits is fruitful when cross-sectional analysis decodes the above explained provision with Order XX Rule 18(2) which directs enquiry into mesne profits of immovable or movable property by directing an executive action of determination by metes and bounds as to physical enquiry of the disputed property through Preliminary Decree.¹⁰

II.B. JUDICIAL PRONOUNCEMENTS

1. **Lucy Kochuvareea v. P. Mariappa Gounder, (1979) 3 SCC 150**¹¹

This decision clarifies whether mesne profits may be recovered and assessed in a partition suit brought by a co-owner who has excluded other co-owners from enjoying their interests in the property and when that assessment may be made with respect to preliminary vs. final decrees. The court held that under Order 20 Rule 12, the court is permitted to order an early assessment of mesne profits in a partition action even if the shares of the co-owners have been adjudicated because mesne profits represent the benefit derived from the wrongful exclusion of the co-owners from use and enjoyment of the property. Enabling the assessment of mesne profits at an early stage of a partition action will reduce the number of separate actions being filed and is consistent with Section 2(12) of the Limitation Act.

2. **Chittori Shubanna v. Kudappa Shubanna, (1964) SCC OnLine SC 322.**¹²

Legal Issue: The extent of liability for mesne profits owed by a co-owner who is the sole possessor of the co-ownership property while partition proceedings are ongoing.

Ratio Decidendi: Any co-share holder who has exclusive possession over a piece of property must pay mesne profits (reasonable rental rate) to all other co-share holders from the date of their exclusion; i.e. there is no limit placed on this liability until all co-share holders have agreed to divide the property during the partition process.

¹⁰ supra note 4.

¹¹ Lucy Kochuvareed v. P. Mariappa Gounder, (1979) 3 SCC 150.

¹² Supra note 11

3. Shiv Kumar Sharma v. Santoshi Kumari, (2007) 8 SCC 600.¹³

Issue : The requirement of paying court fees as well as the issue of whether the procedural validity of seeking past mesne profits has been established in respect to the lack of any initial pleadings.

Ratio decidendi: The plaintiff(s) must pay an ad valorem court fee as estimated at the time when the suit commenced in respect to past mesne profits (if any existed), otherwise the plaintiff(s) will be barred from subsequently claiming any past mesne profits in accordance with the provisions of Order XX Rule 12. In relation to future mesne profits after the issuing of a preliminary decree, the future mesne profits may be examined under Order XX Rule 12 without the need to establish an initial estimate.

4. Baburru Basavayya v. Baburru Guravayya, (1951) SCC OnLine Mad 49.¹⁴

Primary issue: : The role of the preliminary decree in partition cases under Order XX Rule 18 and how it relates to the inquiry into interim profits.

Ratio decidendi: The preliminary decree in a partition suit establishes the shares or interests of the parties involved, allowing for a physical separation of the property by way of boundaries. The inquiry into interim profits takes into account the way in which the relationship between the parties has been affected to determine how much each party has lost as a result of the partition.

5. Shub Karan Bubna v. Sita Saran Bubna, (2009) 9 SCC 689.¹⁵

Issue: The Need for a Different Execution Suit for a Mesne Profits Decree in Partition Cases and to Avoid Multiple Suits.

Ratio Decidendi: Mesne Profits in Partition Suits are to be Determined in the Same Proceedings by Making a Preliminary Inquiry as Previously Mentioned in Order XX of the CPC. Therefore, It Is Not Necessary to File Multiple Execution Suits and Thus Create a Hindrance to the Purpose of the CPC of Preventing Multiple Litigation.

¹³ Chittori Subbanna v. Kudapa Subbanna, AIR 1965 SC 1325 : (1965) 2 SCR 661.

¹⁴ Shiv Kumar Sharma v. Santosh Kumari, (2007) 8 SCC 600

¹⁵ Shub Karan Bubna v. Sita Saran Bubna, (2009) 9 SCC 689

6. Phoolchand v. Gopal Lal, (1967) SCC Online SC 266.¹⁶

Issue: whether a partition suit can have several preliminary decrees (i.e., more than one), and whether the mesne profit inquiries can be appealed after they have been ordered.

Ratio decidendi: of the case states that partition suits permit more than one preliminary decree (such as a supplemental decree for mesne profits), and that it is only possible to appeal those orders when they are contrary to the terms of an original preliminary decree.

III. CRITICAL ANALYSIS

III.A. GENERAL UNDERSTANDING OF PARTITION AND MESNE PROFITS

*Mr. A, B and C are brothers and they jointly own a property in Nashik, Maharashtra. As a result of partition of the hindu joint family property thereto under Hindu succession act, Out of the three brothers, Mr. B wants to sell off the property and move to Mumbai for better opportunities while Mr. A and C do not want that. In this case, Mr. B will move a petition before the lowest court of appropriate competency for 'partition of the immovable property'. In light of the same, Mr. B will be eligible to sell off the judicially determined his share of this joint property and move to Mumbai. While the suit for partition lies, something which underlyingly lies is award for mesne profits. While awarding of mesne profits is not a rule of thumb, **this power is discretionarily exercised by the concerned court.** Usually, the prayer to the plaint by the plaintiff explicitly demands for enquiry, assessment and award of mesne profits, in cases where the prayer does not do so, the scope to effectively award mesne profits is not relinquished. The concept of mesne profits is also exercised under section 151 of the code so as to frame rules for its own functioning as it may deem fit.*

In continuation to this illustration, it shall be appropriate to understand that if Mr. B is the joint-owner to the property but *does not necessarily reside in the disputed property and has returned to such property only to realize that his share of property was being used by Mr. A and Mr. C to run a small-scale business by using Mr. A's land and available amenities, then during the suit for partition, a scope for enquiry and assessment of mesne profits will lie in*

¹⁶ Phoolchand v. Gopal Lal, AIR 1967 SC 1470 : (1967) 3 SCR 153.

*accordance to “Order XX Rule 12(b), (be) and 12(2)”.*¹⁷ There is nothing in the concerned code which limits mesne profits to partition suits. It can also be exercised in case of wrongful possession of the de facto owner’s property. Such institutions are common in case of rented properties, where even after the leave and license has expired, the defendant has carried on business on the plaintiff’s premise leading to unjust enrichment.

III.B. RESEARCH QUESTION 1: Whether in partition suits, the enquiry into mesne profits can be done in a stage subsequent to the preliminary decree as prescribed under Order XX Rule 12 of Civil Procedure Code 1908?

III.B.1 INTRODUCTION

In light of the legal frame-work it is appropriate to *understand that the definition of ‘decree’*¹⁸ as under the code extends well to *include preliminary and final decree both*. To elaborate the same in relation to mesne profits, it is appropriate to decipher that a final or preliminary decree shall formally decide the rights of the parties with regards to *‘all matters in controversy’*.¹⁹ Plain reading of this provision allows to decipher that the dichotomy of this section will apply to determination of mesne profits as well *because while dealing with the rights of one party it is also appropriate to decide whether the rightful owner of that property has lost something so material to have caused damage to the rightful share of such person*.²⁰ It is appropriate to state that ‘claim for property’ and ‘claim for mesne profits’ are based on difference cause of actions and in light of the same to interpret both of them under one suit, *Order 2 Rule 4*²¹ *has to be invoked, purely for the reason that the entire essence of having provision for mesne profits crafted under Order XX Rule 12 is to avoid multiplicity of litigation*.²²

III.B.2 MULTIPLE PRELIMINARY DECREE AND MESNE PROFITS

“The court not only has to consider the quantitative aspects but also the qualitative aspects like the relationship between the parties to be able to effectively deal with partition suits. What is the Use of preliminary decree? Firstly, to decide the moieties or interests of the parties and

¹⁷ supra note 3

¹⁸ Code of Civil Procedure, No. 5 of 1908, § 2(12).

¹⁹ Dattaraaya v. Radhabai, ILR (1921) 45 Bom 627..

²⁰ Jethanand & Sons v. State of U.P., AIR 1961 SC 794.

²¹ Code of Civil Procedure, No. 5 of 1908, Order II r. 4.

²² Ghulusam Bivi v. Ahmedsa Rowther, (1918) 41 Mad 386.

secondly to form the basis of division of property."²³

While dealing with partition suits the ***primary duty of the court is to determine the title of the parties to the suit and to do so, it becomes necessary to include in assessment the qualitative relationship between parties.*** "The partition of disputed property shall be deemed to include 3 different types of partition suits:

- a. Ejectment suits
- b. Suit for partition by one or more than one tenant.
- c. Claim by member of Joint Hindu family."²⁴

The rule applicable in the current case is that of (c) in the above written pointer and hence will ***attract order XX Rule 18.***²⁵ In cases where the petitioner claims for partition and is not purely aware of any kind of profits yielded by the defendant, *the petitioner can always amend the prayer and request for enquiry into mesne profits and claim relief for the previously acquired profits. There is nothing in the code to prevent the plaintiff from amending their prayer and applying for an assessment and enquiry into the mesne profits.*

Out of this derived presumption, the question is whether there can be more than one preliminary decree. It is well settled that one preliminary decree and one final decree does not mean that there cannot be more ***than one preliminary decree because nothing in the civil procedure code prohibits so.***²⁶ There was also point of examination in this case into the availability of examination into mesne profits and future mesne profits. *When the parties so concerned intentionally omit the enquiry, then the court may decide which it deems fit whether to direct the examination into the same* but if the parties while intentionally omitting the examination clause into their plaint, they cannot later seek appeal.²⁷

III.B.3. FUTURE AND PAST MESNE PROFITS.

It is settled principle that the yields from the past activities of the wrongful occupant of the

²³ Ghulusam Bivi v. Ahmedsa Rowther, (1918) 41 Mad 386.

²⁴ Supra Note 14.

²⁵ Id

²⁶ Madhuvihar Co-op Hsg. Soc. Versus. Jayantilal Investments and others, (2014) 3 SCC 187.

²⁷ Supra note 25

disputed premise can be reasonably calculated, measured and defined, *but it is sheerly impossible to deduct in the present the possible future mesne profits that can be accrued from the wrongful occupation of such property.*²⁸ Hence, such a situation may occur when the parties are joint owners of the property and are claiming partition, thereby, a stepwise litigating process must be followed. *Firstly, the court will delve into determining the shares of each party, and once such is done, there has to be an executive action which in light of the judicial order of partition will, by the means of metes and boundaries make physical determination of partition.*²⁹

The two-step partition will give the court an empirical understanding of the practical partitioning possible and hence then the possible mesne profits which may accrue in the future *by deducting the rightful party to peacefully enjoy and dispose of his share vests.* In cases where the defendants fancy to appeal against such executive action, by the virtue of the already established principles in Phoolchand versus. Gopal Lal³⁰, it can only be done so when the executive actions de facto go against the decretal nature of the action.³¹ Hence, an empirical formula can be laid down as follows;

PARTITION OF COMMON PROPERTIES (+) ACCOUNTS REALIZED FROM THE PROFIT OF THE CO-TENANTS

Conclusively, it can be inferred that in a partition suit, where the court is satisfied by deducting reasonable rationales that an enquiry into mesne profits is required, be it, as a step in furtherance to preliminary decree or as preliminary decree itself or as one of the many preliminary decrees determining the rights and duties of the parties to the suit, the code has no prohibitions in furtherance of the same and a decree for enquiry into mesne profits lie

III.C. RESEARCH QUESTION: Whether in partition suits, Mesne profits can be awarded in case where the prayer to the plea does not specify the plaintiff's seeking award under mesne profits?

III.C.1 COURT FEES AND PLEA FOR ENQUIRY INTO MESNE PROFITS

²⁸Supra note 10

²⁹ Kusum Dashrath Kharmare v. Popat Madhav Gangarde, 2008 (1) ALL MR 576 (Bom).

³⁰ supra note 16.

³¹ Khemchand Shankar Choudhari v. Vishnu Hari Patil, (1988) 4 SCC 754

In light of the above analysed question, it becomes obligatory to understand whether the code permits the plaintiff to plead for enquiry into the mesne profits when the prayer does not mention the same.

While the code deducts that a plea for *enquiry into mesne profits can be done at any stage of the suit, it necessary to be read along with Order VII Rule 1³² and 2³³ of the code and section 7(1) of the court fees act.*³⁴It can then be effectively said that, while the prayer initially does not have a plea for such enquiry provided that the plaintiff already had the cause of action for such enquiry arose during the institution of the suit, *then the plaintiff must claim a decree for past mesne profits and pay the required court fees, notwithstanding which such a plea cannot be claimed.*³⁵If the plaintiff does not have cause of action already during the institution of the original suit then, reasonably *the party cannot estimate the possible future mesne profits and hence no valuation of court-fees is possible.* Similarly, in line of the research question (1) explored, infers *that a preliminary decree or an order as a step towards preliminary decree is necessary to evoke an award for mesne profits,* Hence, where the parties have not claimed the damages amount as a matter of right, the court has to calculate it. Here, the court fees pertaining to awarding of damages and preparation of decree has to be valued and paid.³⁶ In light of the same, *the courts have expressed their concern on requirement of a separate suit for execution of preliminary decree in cases of determination of mesne profits because the entire rationale underneath awarding of mesne profits in a civil suit of partition, is to avoid multiplicity of litigation.*³⁷

III.C.2. INTENTION OF THE PARTIES

It is now well established and understood that mesne profits cannot be claimed as a matter of right but the court by discretion can award mesne profits when it reasonably appears to it applicable.³⁸There have been judicial situations where, *the prayer does not intentionally omit such claim for mesne profits but is merely silent on the same, the reason usually is that, the petitioner is unaware of the technical partitioning by executive order of division by metes*

³² Code of Civil Procedure, No. 5 of 1908, Order VII r. 1.

³³ Code of Civil Procedure, No. 5 of 1908, Order VII r. 2

³⁴ Court Fees Act, No. 7 of 1870, § 7

³⁵ Gopalakrishna Pillai v. Meenakshi Ayal, AIR 1967 SC 155.

³⁶ Supra Note 13

³⁷ Supra note 15

³⁸ Supra note 10

*and bounds, after which the petitioner can rightly claim mesne profits.*³⁹ In such cases, the parties are at ease to amend their plaint and pray for such amount as damages and in cases of future mesne profits, the plaintiff can pay court fees in accordance for computation of mesne profits. The intention of the parties are rendered necessary where *dilatory tactics by the defendants try to get benefit of frivolous litigation, particularly for courts to impose penal costs on such parties in addition to damages as mesne profits and also be prosecuted for perjury.*⁴⁰ Underlining this principle, the supreme court has shed light on the path that, in such frivolous cases, the litigating party in advantage of such long and subsisting litigation as result of frivolous suits must bear costs as good as Rs. 2,00,000/- and be expidiously dismissed.⁴¹

*Conclusively, it can be inferred that, procedurally it is immaterial whether the prayer to the plaint includes a plea to enquire into mesne profits, except for in cases where it appears to the court that the parties are litigating a frivolous suit. What is exuberantly material is that, whether the parties to the suit have paid the court-fees according to the scope of the suit extending to determination of past and future mesne profits, they key determining point shall be whether such damages are ascertained by the parties or are kept at mercy of court to be assessed.*⁴²

IV. CONCLUSION.

Over the period of time, the jurisprudential plethora of dealing with the partition suits dealing with subject matter of dealing with mesne profits has evolved to a large extent. The majority of power being vested in the court and the jurisprudence being in parametria *with tortious and contractual obligation and general principle of awarding damages in case of damage incurred by the plaintiff.* The Courts play a pivotal role in interpreting whether the subject matter is of calculation of mesne profits or awarding of mesne profits.⁴³ *The court shall submit the plaintiff's plea of awarding mesne profits or calculating mesne profits depending upon the legal framework stipulated as under Civil Courts Act and the admissibility of such a plea will also largely depend on it.*⁴⁴ The legislative intention of awarding mesne profits in the same suit as partition suit but preferably under a separate prayer to the plea is to reduce the pendency of

³⁹ Supra Note 26

⁴⁰ Ramshree Devi v. Nirmala Devi, (2011) 8 SCC 249.

⁴¹ id

⁴² Supra note 23, 27.

⁴³ Supra note 23

⁴⁴ C. Mitchell & L. Rostill, *Making Sense of Mesne Profits Causes of Action*, 80 Cambridge L.J. 130 (2021).

cases and multiplicity of unnecessary litigation and hence forming a precedential development as to how a plaint consisting of prayer for mesne profits must be presented before the court.

In light of the same, the courts have strictly despised frivolous suits before the courts because ideally, in cases involving procedural determination of mesne profits, the litigation is tedious and often it so happens that the defendants attempt to manipulate evidences and stretch the suit, ultimately wasting the court's precious time.⁴⁵ *Through several instances, the courts have also expressed their concern of requirement of a separate submission for execution of a preliminary decree because firstly, it is unnecessary furtherance to the already present procedure of law and secondly it often leads to multiplicity of litigation.* The judicial faculties also Pointed out the shortcoming in the civil judicial system of need of initiating separate suit for execution of a preliminary decree because it does not seem to appear convenient, hence a procedural change is proposed.⁴⁶

In light of the above-mentioned, problems and critical analysis presented through a wide plethora of legal framework and judicial pronouncements and development in the legislative intention, it can be clearly inferred that towards the end of this proposed article, the author has dealt in spectrum of *decode the legislative and procedural jurisprudence in line of assessment of mesne profits as under section 2(12) read along with Order XX Rule 12 and 18 of Civil Procedure Code, 1908, the judicial pronouncements dealing with the evolution of court's interpretation of mesne profits and the nuances of preliminary decree and the different stages in preliminary decree.*

⁴⁵ Supra note 26

⁴⁶ Supra note 29.