
Decree in suits involving Mesne Profit





RESEARCH CENTER, HIGH COURT OF BALOCHISTAN

COURT: HON'BLE MR. JUSTICE SHOUKAT ALI RAKHSHANI

SUBJECT: CIVIL LAW

DATE: 26TH OCTOBER 2024.

BY:

QUERIES: (1) ***Whether a co-sharer (plaintiff) can seek mesne profit against another co-sharer/defendant in civil suit of inheritance?***
 (2) ***What formal procedure should be followed by the trial Court in such suits?***
 (2) ***Whether a decree, which does not specify the amount of mesne profit, is tenable?***

RESPONSE TO QUERIES:

1. *Whether a co-sharer (plaintiff) can seek mesne profit against another co-sharer/defendant in civil suit of inheritance?*

It is submitted that in Civil law mesne profit refers to the profit derived by a person in wrongful possession of a property and the very object of awarding a decree for mesne profits is to compensate the person who has been kept out of possession, even though he was entitled to possession thereof, and deprived of the enjoyment and potential profits from the property. Section 2 (12) of the Code of Civil Procedure 1908 provide the legal definition of the mesne profit as under:-

"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".

Mesne profits are typically granted to a person who has been dispossessed of property by someone in wrongful possession, as defined under Section 2(12) of the Civil Procedure Code (C.P.C.) and **as a general rule one co-sharer cannot claim mesne profit against other co-sharer in possession of a joint property, on the principle that every co-sharer is deemed to have lawful right on every bit of such property unless severance takes place but an exception arises when a co-sharer in possession excludes or ousts the others, thereby depriving them of their rightful share of the property's benefits.** This view can be reinforced from the judgment of Hon'ble High Court

of Balochistan, reported as **Muhammad Rafiq and others vs Bibi Asifa and others (2013 CLC 1446)** in which the Court held that the Court held that a **co-sharer in possession of jointly owned property cannot be held liable for mesne profits to other co-sharers unless there is proof of ouster or exclusion.**

In the unreported judgement of the August Supreme Court in case **Mahmood Ali Khan v. Hamid Ali and others (CPLA No.83-K of 2014)** has addressed the issue of mesne profits among co-sharers. It states that:

*"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."*

Similar view was taken from by the Sindh High Court in in the case of **M. Anwar v. Dr. Gohar Ali (2007 CLC 621)**; therefore, it is considered pertinent to reproduce the relevant part of the judgment 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 ease 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.”

Off late, in the case of **GUL BANU versus SHAHBAZ BANU and others (2023 C L C 861)** the Sindh High Court reiterated the above view and held that:

“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."

In light of the judgments discussed, it is clear that the legal the claim for mesne profits among co-sharers emphasizes the necessity of establishing principle of exclusion or ouster.

Q. No. 2: What procedure should be followed by the trial Court in such suits?

According to the Civil Procedure Code (C.P.C.), particularly Order XX, Rule 12, a decree for mesne profits typically requires a preliminary decree to ascertain the amount due. The court must first determine the rights of the parties and then proceed to assess the quantum of mesne profits through an inquiry, if necessary, as per the mode provided under Order XXVI Rule 9 of the Code by issuing Commission. For ready reference the above quoted provisions are reproduced as under:

ORDER XX

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 rent or mesne profits, which have accrued on the property during a period prior to the institution of the suit or directing an inquiry as to such rent or mesne profits;

(c) directing an inquiry as to rent or mesne profits from the institution of the suit until-- (ii) the relinquishment of possession by the judgment-debtor with notice to the decree-

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

"9. Commissions to make local investigations. In any suit in which the Court deems a local investigation to be requisite. or proper for the purpose of elucidating any matter in dispute, or of ascertaining the

market-value of any property, or **the amount or any mesne profits** or damages or annual net profits, the Court may issue a **commission to such person** as it thinks fit directing him to make such investigation and to report thereon to the Court:

Provided that, where the [Provincial Government] has made rules as to the persons to whom such commission shall be issued, the Court shall be bound by such rules."

It follows from the above provisions of the Code, particularly Order XX, Rule 12, that before passing a final decree, specifying the amount of mesne profit, the Court should pass a preliminary decree directing an inquiry to determine the sum often by appointing a Commission under Order XXVI, Rule 9 of the Code.

(Main Query)

Whether a decree, which does not specify the amount of mesne profit, is tenable?

In general, as per section 2 (12) of the Code, there are **three types** of decrees; namely, (i) **preliminary**, (ii) **final**, and (iii) **partly preliminary** and **partly final**. A decree is preliminary *when further proceedings have to be taken before the suit can be completely disposed of*. It is final when such adjudication completely disposes of the suit. The Code specifically provides for passing preliminary decree in certain types of cases *including a suit for recovery of mesne profit and rents in terms of Rule 12 of Order XX of the Code*. If the trial court's decree adjudicates upon and determines the right of the plaintiff as to mesne profit but lacks specificity regarding the amount of mesne profits due to him or does not order inquiry into the quantum of mesne profit, such decree does not completely dispose of the suit to that extent, and, *in pith and substance*, it is a preliminary decree. As it stands established position of law that **when the preliminary decree is passed the suit remains pending and the Court would not become functus officio, rather retain control over the suit till such time a proper final decree is passed.** In this regard, reliance may be placed on the case **Syed TARIQ MUSTAFA vs. TAUQIR JAHAN MUSTAFA and others (P L D 2022 Sindh 423)** the Court observed that"

"9. From the perusal of the above provision, it reflects that in general there are three types of decrees; (i) Preliminary decree, (ii) Final decree

and (iii) Partly preliminary and partly final decree. A decree is the final decision given by the court after determining the rights of the parties in a dispute. The explanation attached to the Section 2(2) of the Code says that **"A decree is preliminary when further proceedings have to be taken before the suit can be completely disposed of. It is final when such adjudication completely disposes of the suit, it may be partly preliminary and partly final."** In certain situations, the court cannot give its final decision without conclusively determining the rights of the parties on a particular issue. **The Code provides for passing of preliminary decree in the following suits:**

1. Suits for possession and mesne profits (Order XX, Rule 12)
2. Administration suits (Order XX, Rule 13)
3. Suits for pre-emption (Order XX, Rule 14)
4. Suits for dissolution of partnership (Order XX, Rule 15)
5. Suits for accounts between principal and agent (Order XX, Rule 16)
6. Suits for partition and separate possession (Order XX, Rule 18)
7. Suits for foreclosure of a mortgage (Order XXXIV, Rules 2-3)
8. Suits for sale of mortgaged property (Order XXXIV, Rules 4-5)
9. Suits for redemption of a mortgage (Order XXXIV, Rules 7-8)
10. The above list; however, is not exhaustive and a Court may pass a preliminary decree in cases not expressly provided for in the Code. **Normally, preliminary decree is passed when adjudication decides the rights of the parties with regard to all or any of the matters in controversy in the suit leaving room for further inquiry to be carried on. It does not completely dispose of the suit and it is passed in those cases in which the Court has to first adjudicate upon the rights of parties and it is succeeded by a final decree.** It may be observed that the rights so determined from the preliminary decree are conclusive in nature and in that limited sense a preliminary decree is final; however, the Court then makes a further inquiry to settle all the issues and gives its final decision, which is a final decree. **When the preliminary decree is passed, the Court would not become functus officio and would retain control over the action even after the decree; as such, the suit remains pending till such time a proper final decree is passed and right of parties are determined.** In the case of *Shankar Balwant Lokhande (Dead) v. Chandrakant Shankar Lokhande* (AIR 1995 SC 1212), the Court has observed that "a preliminary decree is one which declares the rights and liabilities of the parties leaving the actual result to be worked out in further proceedings. Then, as a result of the further inquiries conducted pursuant to the preliminary decree, the rights of the parties are fully determined and a decree is passed in accordance with such determination which is final." It may also be observed that a preliminary decree and a final decree are both distinct and independent entities. If a question arises as to whether a decree is preliminary or final, it has to be decided by a reference to the decree itself. A decree is preliminary when further proceedings have to be taken before the suit can be completely disposed of. It is final where such adjudication completely disposes of the suit. Reliance in this regard may be placed on the case of *Ali Muhammad Brohi v. Haji Muhammad Hashim* (PLD 1983 Karachi 527) and *Syed Abdul Majid v. Choudry Manzoor* (1987 CLC 617).

11. There can be more than one preliminary decree in a suit wherein it is required to be passed. In the case of *Phoolchand v. Gopal Lal* (AIR 1967 SC 1470), a suit for partition of joint family property, a preliminary decree

was passed by the trial Court specifying the shares of all the parties. However, before the final decree could be passed, father and mother of the plaintiff died. A dispute arose with respect to the shares as the plaintiff's brother claimed the share of his father on the basis of a will. The trial Court decided the dispute by redistributing the shares indicated in the initial preliminary decree. Matter went up to the Supreme Court. The Court observed that "there is nothing in a Code of Civil Procedure which prohibits passing of more than one preliminary decree, if the circumstances justify the same and it may be necessary to do so". In the case of Ganduri Koteshwaramma v. Chakiri Yanadi (2011 9 SCC 788) the Court has observed that "the final decree is always required to be in conformity with the preliminary decree but that does not mean that a preliminary decree cannot be altered by the Court, before final decree is passed. Such an alteration is justified in the event of changed circumstances."

That apart, Principle of "**Actus Curiae Neminem Gravabit**": states that **no person should suffer due to the act of the court**. It applies when a court is required by law to take a specific action but fails to do so, resulting in prejudice to a party. In this case, the trial court was obligated to conduct an inquiry into the mesne profits after passing preliminary decree and in the light of such inquiry pass a final decree but it failed to do so, therefore, this principle come into play and save the plaintiff from the adverse effect of the act of the Court.

In this case, the trial Court has adjudicated upon the claim/right of plaintiff regarding mesne profit in the decree but has failed to categorize the decree, to said extent, as a preliminary decree and make an order for further inquiry as envisaged under Order XX Rule 12 and Order XXVI Rule 9 of the Code, for determining the quantum of mesne profit due to the plaintiff so as to pass a final decree accordingly. Inasmuch as the Court has failed to exercise such jurisdiction vested in it; therefore, in order to ensure that the necessary procedural steps are followed, and to save the parties being suffered from the act of the Court, corrective measures can be taken, by remanding the case, directing the trial Court to adopt the modes and procedure provided under Order XX Rule 12 and Order XXVI Rule 26 of the Code for determining the quantum of mesne profit due and proceed to pass a final decree specifying quantum of manse profit.

Annexures: Judgements referred.