IN THE HIGH COURT OF HIMACHAL PRADESH, SHIMLA.

RFA No. 153 of 2020 a/w C.O. No. 3 of 2021

Reserved on: 21.08.2024

Date of decision : 30.09.2024

Kiran Kochhar & Ors. .....Appellants/non-cross-objectors

Versus

Mohit Gupta and another .... Respondents-cross-objectors

Coram:

Hon'ble Mr. Justice Bipin Chander Negi, *Judge*

Whether approved for reporting? [1]

For the appellants	**:**	Mr. R.K. Bawa, Sr. Advocate with Mr. Ajay Kumar Sharma and Mr. Abhinav Thakur, Advocates.
For the respondents	**:**	Mr. R.L. Sood, Sr. Advocate, with Ms. Sanjivani Sood, Advocate.

Bipin Chander Negi, Judge

The suit property is the entire ground floor of property known as "Bhupender Bhawan". In the plaint filed by the present respondents it is averred that Respondent No.1 and the other legal heirs of late Sh. Virender Prakash, Yogender Prakash are the legal and lawful owners of the suit property. Other than the aforesaid in the plaint it is averred that the suit property stands duly recorded in their names in the revenue record as owners thereof.

[1] *Whether the reporters of the local papers may be allowed to see the judgment? Yes*

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2. Besides the aforesaid in the plaint it is averred that Respondent No.2 is a trust created for the purpose of collecting rent from the tenants in the suit property with a view to undertaking charitable, religious activities. Respondent No.1 is averred to be the Secretary-cum-Trustee of respondent No.2 trust, who vide resolution dated 08.05.2017 (Exhibit PW-1/5), of the respondent No.2-trust has been authorized to file the suit in the case at hand.

3. In a nutshell, the case filed by the present respondents before the trial Court was that the father-in-law of appellant No.1 and grandfather of appellants No.2 and 3, one late Sh. Baldev Raj Kochhar had been inducted as a tenant by respondent No.2-Trust in the suit property specifically in the entire ground floor of the said 'Bhupender Bhawan'. Sh. Baldev Raj Kochhar had died in the year 1993. The tenancy thereof was inherited by his son Sh. Rajesh Kochhar and Smt. Prakash Kochhar, his widow. Sh. Rajesh Kochhar had died in the year 1997 and Smt. Prakash Kochhar had died in the month of June, 2005.

4. Since the suit property falls within the purview of the Himachal Pradesh, Urban Rent Control Act, therefore, in terms of the expression 'tenant' defined therein in Section 2 (j) tenancy after the death of the initial tenant i.e. Sh. Baldev Raj Kochhar in the year 1993 devolved on his son Rajesh Kochhar and widow

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Prakash Kochhar. Subsequent to the death of the aforesaid son and wife in terms of Section 2(j) of the H.P. Urban Rent Control Act, the tenancy did not devolve on the legal heirs of Rajesh Kochhar i.e. the present appellants. In the aforesaid facts and attending circumstances, a suit for possession along with a claim for use and occupation charges was made by the respondents.

5. In the response filed to the plaint in the preliminary objections, a bald assertion with respect to the maintainability of the suit was taken. Besides the aforesaid, an objection on account of pecuniary jurisdiction was raised. Other than the aforesaid, it was stated that the suit was not sustainable in view of the provisions of the H.P. Urban Rent Control Act, as according to the appellants, they had inherited the tenancy from Rajesh Kochhar. On merits, it was averred that Rajesh Kochhar was the original tenant. It was admitted that respondent No.2 i.e. the trust was the landlord. It was further stated in the written statement filed to the plaint that appellant No.1 had been paying rent along with 10% enhancement every five years. The same according to the appellants was being accepted by the landlord i.e. respondent No.2-Trust.

6. In the aforesaid backdrop, following issues were framed:-

> **1. Whether the father-in-law of defendant No.1 was original tenant and he died in the year 1993 and after his death, tenancy was inherited by his wife Smt. Parkash Kochhar and his son Sh. Rajesh kochhar and after the death of**

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Smt. Parkash Kochhar and Sh. Rajesh Kochhar, the tenancy came to an end and plaintiffs are entitled for possession, as prayed for?
…OPP

2. Whether the plaintiffs are entitled for recovery of Rs.5,49,000/- alongwith interest @ 12% per annum on account of occupation charges for the last three years?
…OPP

3. Whether the plaintiffs are entitled for Rs.500/- per day as use and occupation charges from the date of filing of suit till delivery of possession of suit property, as prayed for? **… OPP**

4. Whether the suit is not maintainable in the present form? **…OPD**

5. Whether the value of suit property is Rs.5,00,000/- and this Court has no pecuniary jurisdiction to try the same?
…OPD

6. Whether this Court has no jurisdiction in view of the provisions of HP Urban Rent Control Act to decide the present suit as alleged? **…OPD**

7. Whether late Sh. Rajesh Kochhar was original tenant and present defendants have inherited the tenancy right from him, as alleged?
…OPD

8. Relief.

7. Heard counsel for the parties and perused the entire record.

8. Qua the issue of maintainability, the following was stated as a preliminary objection in the written statement:

> **"That the suit, as framed, is not at all maintainable in its present form".**

9. In this respect, it would be appropriate to refer to provisions of Order VIII, which pertains to Written Statement, Set –Off and Counter-claim, and specifically Sub Rule 2 thereof:-

Order VIII

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2. New facts must be specially pleaded.- The defendant must raise by his pleading all matters which show the suit not to be maintainable, or that the transaction is either void or voidable in point of law, and all such grounds of defence as, if not raised, would be likely to take the opposite party by surprise, or would raise issues of fact not arising out of the plaint, as, for instance, fraud, limitation, release, payment, performance, or facts showing illegality.

10. From the bare perusal of the provisions of Order 8 Rule 2 thereof, it is clearly evident that in a written statement filed, once an issue of maintainability is raised then the defendant therein must raise by pleading all matters, which show the suit to be not maintainable. These facts specifically stated in a set of paragraphs will always give an opportunity to the plaintiff to respond to the same in the replication/rejoinder, if need be. For if the same are not raised specifically, then the same would take the opposite party by surprise (Rule itself provides). This in turn will enable the Court to properly comprehend the pleadings of the parties instead of searching for the material particulars of a bald plea of maintainability from the various paragraphs of the written statement. In this regard one can once again gainfully refer to ***Thangam's case*** referred below ***para 27 thereof***.

11. On scanning the written statement one finds that in the reply on merits (a) the present appellants therein admit the respondent trust to be their landlord. Under the H P Urban Rent Control Act the expression landlord includes not only the actual owner of the property but even someone who is authorized to collect rent on behalf of the owner (b) However as per the present

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appellants, Mohit Gupta is not its secretary cum trustee (c) resolution of the trust dated 08-05-17 authorizing Mohit Gupta to file the plaint on behalf of the trust is also denied, last but not the least (d) most importantly contents of the plaint pertaining to the description of the respondent trust (trust created for the purpose of collecting rent from the tenants in the suit property with a view to undertaking charitable, religious activities) have neither been denied specifically or by a necessary implication nor is there a statement that the fact in this respect is not admitted.

12. A general or evasive denial is not treated as sufficient. In this regard a reference to Order 8 Rule 5 CPC is essential. The same is being reproduced here-in-below:-

> Order 8 Rule 5:-
>
> **5. Specific Denial-** (1) Every allegation of fact in the plaint, if not denied specifically or by necessary implication, or stated to be not admitted in the pleading of the defendant, shall be taken to be admitted except as against a person under disability:
>
> Provided that the Court may in its discretion require any fact so admitted to be proved otherwise than by such admission.

13. In this respect reference can gainfully be made to case reported as ***(2024) 4 SCC 247 titled Thangam and another vs. Navamani Ammal***, relevant paras whereof are being reproduced-

> 25. Order 8 Rules 3 and 5 CPC clearly provides for specific admission and denial of the pleadings in the plaint. A general or evasive denial is not treated as sufficient. Proviso to Order VIII Rule 5 CPC provides that even the admitted facts may not be treated to be admitted, still in its discretion the Court may require those facts to be proved. This is an exception to the

general rule. General rule is that the facts admitted, are not required to be proved.

26. The requirement of Order VIII Rules 3 and 5 CPC are specific admission and denial of the pleadings in the plaint. The same would necessarily mean dealing with the allegations in the plaint para-wise. In the absence thereof, the respondent can always try to read one line from one paragraph and another from different paragraph in the written statement to make out his case of denial of the allegations in the plaint resulting in utter confusion.

27. In case, the defendant/respondent wishes to take any preliminary objections, the same can be taken in a separate set of paragraphs specifically so as to enable the plaintiff/petitioner to respond to the same in the replication/rejoinder, if need be. The additional pleadings can also be raised in the written statement, if required. These facts specifically stated in a set of paragraphs will always give an opportunity to the plaintiff/petitioner to respond to the same. This in turn will enable the Court to properly comprehend the pleadings of the parties instead of digging the facts from the various paragraphs of the plaint and the written statement.

28. The issue regarding specific admission and denial of the pleadings was considered by this Court in Badat and Co. Bombay Vs. East India Trading Co. While referring to Order VIII Rules 3 to 5 of the CPC it was opined that the aforesaid Rules formed an integrated Code dealing with the manner in which the pleadings are to be dealt with. Relevant parts of para '11' thereof are extracted below:

"11. Order 7 of the Code of Civil Procedure prescribes, among others, that the plaintiff shall give in the plaint the facts constituting the cause of action and when it arose, and the facts showing the court has jurisdiction. The object is to enable the defendant to ascertain from the plaint the necessary facts so that he may admit or deny them. Order VIII provides for the filing of a written-statement, the particulars to be contained therein and the manner of doing so; These three rules form an integrated code dealing with the manner in which allegations of fact in the plaint should be traversed and the legal consequences flowing from its non- compliance. The written statement must deal specifically with each allegation of fact in the plaint and when a defendant denies any such fact, he must not do so evasively, but answer the point of substance. If his denial of a fact is not specific but evasive, the said fact shall be taken to be admitted. In such an event, the admission itself being proof, no other proof is necessary."

29. The matter was further considered by this Court in Lohia Properties (P) Ltd., Tinsukia, Dibrugarh, Assam Vs. Atmaram Kumar8 after the 1976 Amendment Act in CPC whereby the existing Rule 5 of Order VIII of the CPC was numbered as sub-rule (1) and three more sub-rules were added dealing with different situations where no written

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> statement is filed. In paras 14 and 15 of the aforesaid judgment, the position of law as stated earlier was reiterated. The same are extracted below: (SCC pp. 8-9, paras 14-15).
>
> "14. What is stated in the above is, what amount to admit a fact on pleading while Rule 3 of Order 8 requires that the defendant must deal specifically with each allegation of fact of which he does not admit the truth.
> 15. Rule 5 provides that every allegation of fact in the plaint, if not denied in the written statement shall be taken to be admitted by the defendant. What this rule says is, that any allegation of fact must either be denied specifically or by a necessary implication or there should be at least a statement that the fact is not admitted. If the plea is not taken in that manner, then the allegation shall be taken to be admitted.

14. Hence, in terms of Order 8 Rule 5, contents of the plaint insofar as they pertain to the description of the respondent trust namely (a) respondent no. 2- trust has been created for purpose of collecting rent from the tenants in the suit property (b) rent is collected by the respondent no. 2-trust with a view to undertaking charitable, religious activities, are held to be admitted in terms of provisions of Order 8 Rule 5(1) CPC.

15. In view of the aforesaid the bald plea of maintainability taken by the present appellants in their written statement has to be taken to be one pertaining to the competence of the authorized signatory of the respondent trust to file the suit on behalf of the respondent no. 2-trust.

16. In the facts and attending circumstances of the case at hand the afore stated preliminary objection qua maintainability raised by the contesting appellantss is in fact a plea of demurrer. As respondent no 2 is admitted to be a trust, however, the competence of the authorized signatory of the respondent trust is

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doubted as being defective. Demurrer has been explained in ***Ramesh B. Desai v. Bipin Vadilal Mehta, (2006) 5 SCC 638*, at page 650** relevant extract is being reproduced hereinbelow;

> Demurrer is an act of objecting or taking exception or a protest. It is a pleading by a party to a legal action that assumes the truth of the matter alleged by the opposite party and sets up that it is insufficient in law to sustain his claim or that there is some other defect on the face of the pleadings constituting a legal reason why the opposite party should not be allowed to proceed further.

17. A resolution dated 08.05.2017, Exhibit PW-1/5 has been placed on record, whereby respondent No.2/Trust has authorized the filing of the present suit on their behalf by respondent No.1, who also as per the resolution happens to be the Secretary-cum-Trustee of respondent No.2-Trust. The aforesaid resolution needs to be understood in the context of the following admissions, (a) respondent no 2 trust is created for purpose of collecting rent from the tenants in the suit property (b) rent is collected by the respondent no 2 trust with a view to undertaking charitable, religious activities. Other than the aforesaid the fact that the suit property still continues to be a private property owned by respondent no 1 and other co-owners cannot be lost sight of as is evident from the record of rights i.e Jamabandi Exhibit PW/1.

18. In this respect it would be appropriate to refer to *Menakuru Dasaratharami Reddi* v. *Duddukuru Subba Rao*,AIR 1957 SC 797 wherein a Constitution Bench of the apex Court

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dealt with the question of whether the suit properties were the subject-matter of a public charitable trust or were merely charged with the obligation to undertake specific charities. P.B. Gajendragadkar, J. (as the learned Chief Justice then was), speaking for the Court, held : (AIR p. 800, para 5)

"*5.* … Now it is clear that dedication of a property to religious or charitable purposes may be either complete or partial. *If the dedication is complete, a trust in favour of public religious charity is created. If the dedication is partial, a trust in favour of the charity is not created but a charge in favour of the charity is attached to, and follows, the property which retains its original private and secular character. Whether or not dedication is complete would naturally be a question of fact to be determined in each case in the light of the material terms used in the document*.

In such cases it is always a matter of ascertaining the true intention of the parties; it is obvious that such intention must be gathered on a fair and reasonable construction of the document considered as a whole. The use of the word "trust" or "trustee" is no doubt of some help in determining such intention; but the mere use of such words cannot be treated as decisive of the matter.

Is the private title over the property intended to be completely extinguished? Is the title in regard to the property intended to be completely transferred to the charity? The answer to these questions can be found not by concentrating on the significance of the use of the word "trustee" or "trust" alone but by gathering the true intent of the document considered as a whole."

19. In the case at hand a charge in favour of the charity is attached to, and follows, the suit property which retains its original private and secular character as is evident from the

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record of rights i.e Jamabandi. Retention of the original private and secular character of the suit property is writ large from the revenue record. The use of the word “trust” or “trustee” in the case at hand is immaterial. Once the suit property retains its original private and secular character than in the said eventuality the suit in the case at hand would be maintainable at the behest of respondent no 1 i.e one of the co-owners.

20. Order 41 Rule 27(1)(*b*) of the Code of Civil Procedure could have invoked to see that injustice is not done by rejection of a genuine claim. Since I have come to the aforesaid conclusion, therefore there is no need to exercise jurisdiction under Order 41 Rule 27(1)(*b*) of the Code of Civil Procedure to direct any other competent person to be examined as a witness in order to prove ratification or the authority of Shri Mohit Gupta to sign the plaint on behalf of respondent no 2.

21. Exhibit PW/1 is the Jamabandi i.e the record of rights which carries with it a presumption of truth. The suit property has been recorded therein as bearing Khasra No. 454. In the remarks column thereof, it has been stated that by virtue of mutation bearing No.440, post the death of Virender Prakash, out of his share in the property half share has devolved upon respondent No.1. Mutation dated 10.06.2016 bearing No. 440 has been appended alongwith the plaint as Exhibit PW-1/2. Exhibit PW-1/3 is the voter identity card of respondent No.1

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issued by the Election Commission of India, wherein respondent No.1 has been shown as the son of Virender Prakash. In this respect, legal heir certificate of late Virender Prakash has been placed on record as Exhibit PW-1/4, wherein respondent No.1 has been shown as a legal heir.

22. In order to prove that late Baldev Raj Kochhar had been inducted as a tenant, the respondents in the case at hand had placed on record a personal declaration made on 30.05.1991 before the Municipal Corporation by late Sh. Baldev Raj Kochhar stating therein that he was the sole tenant in the suit property and was paying rent @ Rs.1500/- per year. The said declaration has been proved on record as Exhibit PW-1/20.

23. Other than the aforesaid, the respondents have placed on record Exhibit PW-1/6 to Exhibit PW-1/19, relevant tax inspection list prepared by the Municipal Corporation, Shimla, wherein the name of Baldev Raj Kochhar exists as an occupant/tenant in the suit property. Besides the aforesaid, as Exhibit PW-1/21, the respondents have placed on record tax assessment, wherein the name of Baldev Raj Kochhar exists as a tenant. The electricity bills placed on record as Exhibit PW-1/22 reflects the name of Baldev Raj Kochhar. Water bills placed on record as Exhibit PW-1/23 to PW-1/25 again record the name of Baldev Raj Kochhar.

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24. One Sham Lal an employee of the water supply department of Municipal Corporation, Shimla had appeared as PW-2. In his testimony he had deposed that consumer account No. 14795 has been in the name of Baldev Raj Kochhar. Other than the aforesaid, one Sh. Ashwani Kumar an employee of the tax department of the Municipal Corporation, Shimla had appeared as PW-3 and had categorically stated that Baldev Raj Kochhar was the recorded tenant on the ground floor of 'Bhupender Bhawan' as per the tax assessment report i.e. Exhibit PW-1/21 and declaration made by Baldev Raj Kochhar i.e. Exhibit PW-1/20. Besides the aforesaid, one Mohender Chauhan had appeared as PW-5 and had produced the record of the electricity meter from the office of SDO Electricity. As per his deposition vide Exhibit PW-5/A i.e. certificate issued by the Assistant Engineer, Chotta Shimla -Sub-Division, HPSEBL, Shimla-II, the record pertaining to the installation of the electricity meter in the name of Baldev Raj Kochhar in the suit property is not traceable since the connection was installed before 1985. The consumption and payment record qua electricity meter installed i.e. Exhibit PW-5/B reflects that the same is in the name of Baldev Raj Kochhar.

25. Appellant No.1 had appeared as PW-3. She admits that the date of birth of her husband is 31.12.1959. Other than the aforesaid, she has admitted that since childhood, her

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husband had been in the suit premises and that he had done his schooling in Shimla. She had married Rajesh Kochhar in 1988. No documentary record has been placed on record by the said appellant to show that Rajesh Kochhar had been inducted as the initial tenant. In her testimony, she has deposed and admitted that the suit property in the case at hand had been in their possession since the last 60 to 70 years. In her testimony, she has also admitted that when the possession of the suit property was taken at that time, her husband i.e. Rajesh Kochhar might have been a small child or may not have been born.

26. Admittedly in the case at hand , Baldev Raj Kochhar had died in the year 1993. Rajesh Kochhar had died in the year 1997. Prakash Kochhar had died in the year 2005. On the basis of the declaration made by Baldev Raj Kochhar as Exhibit PW-1/20, recording of the name of Baldev Raj Kochhar in the electricity/water bills, tax record of the Municipal Corporation, in the absence of any record/document proving that Rajesh Kochhar had been inducted as the initial tenant and on the basis of admissions made in the deposition of appellant No. 1 i.e. PW-3, it is proven on record that Baldev Raj Kochhar had been inducted as the initial tenant.

As a last ditch effort a plea of tenancy in favour of the appellants was sought to be made on the basis of rent being

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deposited by them in the bank account of the respondent no. 2-trust. In this respect a reference to an apex Court judgement titled ***S.R. Radhakrishnan v. Neelamegam, (2003) 10 SCC 705***, at page 709 would suffice. Relevant extract whereof is being reproduced hereinbelow :

> 8…… Further, it is settled law that one does not become a tenant by mere payment of rent even if that be so.

27. According to the appellants, the Civil Court had no jurisdiction to decide the present suit in the case at hand as the same was triable under the provisions of H.P. Urban Rent Control Act. Qua this issue no evidence was led by the appellants on whom lay the onus to prove the same.

28. Even otherwise once it has been held that the original tenant was late Baldev Raj Kochhar. Hence, in terms of provisions 2(j) of the Urban Rent Control Act, 1987, the tenancy could have only devolved on Rajesh Kochhar, the son of late Baldev Raj Kochhar and his wife Prakash Kochhar. Subsequent to the death of the aforesaid two individuals, tenancy could not have devolved any further on the other legal heirs of Rajesh Kochhar namely the present appellants. In the absence of a landlord tenant relationship inter-se the parties obviously no proceedings could have been initiated by the present respondents against the present appellants under the H P Urban Rent Control Act. Hence, the Trial Court correctly decided the

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same in favour of the present respondents and against the appellants.

29. From a perusal of the Jamabandi i.e. Exhibit PW-1/1, it is evident that the suit property is situated on Khasra No. 454. In the Jamabandi, the same has been recorded as 161-15 sq.mtrs. In the valuation report filed by the present respondents Exhibit PW-4/A, the schedule of area (ground floor area) has been shown to be 136.63 sq.mtrs. Valuation of the building and cost of land has been assessed in the aforesaid valuation report on the basis of the aforesaid area. Per contra, in the valuation got done by the appellants i.e. Exhibit DW-2/B, the schedule of area (ground floor area) has been wrongly shown to measure 134.36 square feet (12.48 sq.mtrs). No assessment on account of value of land has been taken into account.

30. Other than the aforesaid, it has come in evidence that the suit property is located near Chotta Shimla and only a few meters from the road leading to Chotta Shimla from the Mall Road. Taking into account the aforesaid, the trial Court has correctly come to conclusion that the suit property in the case at hand has been properly valued and on this count, the trial Court did not suffer from lack of pecuniary jurisdiction.

31. Once it has been established by cogent evidence that the original tenant was late Baldev Raj Kochhar therefore, in terms of provisions 2(j) of the Urban Rent Control Act, 1987, the

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tenancy could have only devolved on Rajesh Kochhar, the son of late Baldev Raj Kochhar and his wife Prakash Kochhar. Subsequent to the death of the aforesaid two individuals, tenancy could not have devolved any further on the other legal heirs of Rajesh Kochhar namely the present appellants.

32. In the suit, a specific claim qua use and occupation charges @ Rs. 500/- per day have been made by the present respondents prior to three years of the filing of the suit till possession of the suit property is delivered to the respondents by the present appellants. Since the appellants are illegal occupants, post determination of the tenancy by the trial court the present respondents are entitled to use and occupation charges, till date of delivery of possession by the appellants. The rationale behind the same being that once a decree for possession has been passed and execution is delayed for depriving the judgment-creditor of the fruits of decree it is necessary for the Court to pass appropriate orders so that 'reasonable' mesne profits which may be equivalent to the market rent is paid by a person who is holding over the property. The same puts a check on the diabolical plans of the person who is holding over the property and helps ensure that he does not squat on the premises by paying a meager rent. The idea is to reasonably compensate the landlord for loss caused by delay in execution of the decree by grant of stay order.

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33. Reference in this regard can gainfully be made to Judgment in ***(2017) Online H.P. 1928 : (2017) 2 RCR (Rent) 293 : (2017) 1 Latest HLJ 589, titled Champeshwar Lall and Anr. vs. Gurpartap Singh and Ors.***, relevant paras whereof is being reproduced:-

> 17. Likewise, in Marshals Sons and Co.(I) Ltd. vs. Sahi Oretrans (P) Ltd. (supra), it was categorically held that once a decree for possession has been passed and execution is delayed depriving the judgment-creditor of the fruits of decree,. it is necessary for the Court to pass appropriate orders so that 'reasonable' mesne profits which may be equivalent to the market rent is paid by a person who is holding over the property.
> 18. At the same time, it was also held that while fixing the amount, subject to payment of which the execution of the order/decree is stayed, the Court would exercise restraint and would not fix any excessive, fanciful or punitive amount.
>
> 19. What is 'reasonable' is difficult to define and this expression being a relative term is required to be considered vis-à-vis, the fact situation obtaining in a particular case……..
>
> 22. Therefore, the term 'reasonable', as has been used by the Hon'ble Supreme Court and this Court is required to be interpreted in a manner so as to ensure that the landlord is reasonably compensated for the loss occurred by the delay in execution of the decree by grant of stay order. The rent has to be determined on case to case basis depending upon the cogent material placed on record by the parties and would therefore, normally be dependent upon the occupation, trade or business etc. of the tenant and would further not be dependent solely on the capacity to pay or actual earning of the tenant, who has suffered an order of eviction.
>
> 23. **The fixation of mesne profits** and use and occupation charges are to be **assessed on the basis of the evidence led** by the parties **as to the prima facie market value existing at the time of admission of the appeal** after the eviction order, which has been exclusively bestowed on the landlord so that he would be able to reasonably compensate for loss caused by delay in execution of the decree by grant of stay order. The **Court while doing so is not to be guided by the factors that the parties at one point of time while creating the tenancy had agreed at a meager amount of rent**, it would depend upon the material produced before the Court which under no circumstances can be ignored even though thereafter the rent so fixed may work out to be multiple

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> times to the one which was fixed at the time of creation of the tenancy."

34. In so far as the rate at which use and occupation charges have been claimed(Rs 500/- per day), in the written statement filed by the appellants the same has not been denied specifically or by necessary implication, or stated to be not admitted. A general or evasive denial is not sufficient. Hence, in terms of Order 8 Rule 5 CPC, the rate at which the use and occupation charges are claimed by the respondents/cross-objectors have been admitted. In this respect reference can once again be made to case reported as ***(2024) 4 SCC 247 titled Thangam and another vs. Navamani Ammal***, relevant paras whereof have already been reproduced supra.

35. Besides there is also no cross-examination in respect to the plea of use and occupation charges as have been claimed by the respondents-cross objectors. The effect of non-cross-examination is that the statement of witness has not been disputed. The rule of putting one's version in cross-examination is one of essential justice and not merely technical one. No challenge either in pleadings or cross-examination means that the rate at which the use and occupation charges have been claimed by the respondents/cross-objectors stands fully established. The rule of evidence is common both to the civil and the criminal trials. Reference in this regard can be made to Judgment in ***(2021) 11***

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SCC 1 titled Arvind Singh vs. State of Maharashtra, relevant extract whereof is being reproduced:-

> 62. ……The rule of putting one's version in cross-examination is one of essential justice and not merely technical one.
>
> "15. ……The effect of non-cross-examination is that the statement of witness has not been disputed.
>
> 16. In Maroti Bansi Teli v. Radhabai, it has been laid down that the matters sworn to by one party in the pleadings not challenged either in pleadings or cross-examination by other party must be accepted as fully established.

Hence the respondents would be entitled to use and occupation charges @ Rs. 500/- per day from the date of determination of the tenancy by the trial court till the suit property is delivered to the respondents.

36. The appellants in the case at hand tried to lay a claim of adverse possession in so far as the tenancy is concerned. In this respect, it would be appropriate to refer to case reported as ***(2004) 1 SCC 551, V. Rajeshwari v. T.C. Saravanabava,*** relevant extract whereof is being reproduced:-

> ***"… A plea not properly raised in the pleadings or in issues at the stage of the trial, would not be permitted to be raised for the first time at the stage of appeal***…"

37. The right to recover possession based on title is absolute irrespective of limitation in the absence of adverse possession pleaded by the present appellants/defendants for 12 years as has been held by the apex court in ***(2019) 8 SCC 729 titled Ravinder Kaur Grewal and others vs. Manjit Kaur and others***, relevant para whereof is being reproduced:-

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> 56. There is the acquisition of title in favour of plaintiff though it is negative conferral of right on extinguishment of the right of an owner of the property. The right ripened by prescription by his adverse possession is absolute and on dispossession, he can sue based on 'title' as envisaged in the opening part under Article 65 of Act. Under Article 65, the suit can be filed based on the title for recovery of possession within 12 years of the start of adverse possession, if any, set up by the defendant. Otherwise right to recover possession based on the title is absolute irrespective of limitation in the absence of adverse possession by the defendant for 12 years. The possession as trespasser is not adverse nor long possession is synonym with adverse possession.

In view of the aforesaid the appeal filed is dismissed being devoid of any merit and the cross-objections filed are allowed in the aforesaid terms. The costs to be borne by the parties. Pending miscellaneous applications(s), if any, shall also stand disposed of.

(Bipin Chander Negi)
Judge

30th September, 2024
(vs/tarun)