



IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH, NAGPUR

SECOND APPEAL NO.79 OF 2023

APPELLANTS
(Original Applicants)
On R. A.

- : 1) Smt. Sudhadevi W/o. Ramakant Loiya
Aged about 80 Years, Occ. Housewife
- 2) Shri. Rajesh S/o. Ramakanth Loiya
Aged about 65 years, Occ. Business
- 3) Shri Anil S/o Ramakant Loiya (Dead)
- 3(A) Smt. Madhu Wd/o. Anil Loiya
Aged about 63, Years, Occ. Housewife
- 3(B) Shri. Pranav S/o. Anil Loiya
Aged about 28 years, Occ. Business
- 3(C) Shrinidhi W/o. Piyush Agrawal
Aged about 37 years, Occ. Housewife,
- 3(D) Richa D/o. Anil Loiya
Aged about 36 years, Occ. Housewife
All the above Appellants 1 to 6 are R/o. Raj Bhavan,
Sarafa Bazar, Kamptee, Tah. And Dist. Nagpur.
4. Smt. Ushadevi Wd/o. Banwari Loiya
Aged about 81 years, Occ. Housewife
5. Shri. Sunil S/o. Banwari Loiya
Aged about 64 years, Occ. Housewife
6. Smt. Pushpadevi Wd/o. Umashankar Loiya,
Aged about 79 years, Occ. Housewife
7. Smt. Sudharani Wd/o. Rameshchandra Loiya,
(Being dead through LR's)

Shri Ravindra S/o. Rameshchandra Loiya,
Aged about 55 years. Occ. Business

All above Appellants 4 to 7 are R/o. Raj Bhavan,
S.R. Loiya Marg, Kamptee, Tah. And Dist. Nagpur

– Versus –

RESPONDENT : Maharashtra State Ware Housing Corporation, 583,
(Original Non-applicant)
On R. A. Market Yard, Gultekdi, Pune Through its Managing
Director.

Mr. C. S. Kaptan, Sr. Advocate a/b. Mr. H. N. Verma, Advocate for
the appellants.

Mr. N. R. Saboo, Advocate for the Respondent.

CORAM : **ROHIT W JOSHI, J.**
DATE OF RESERVE : **08.10.2025**
DATE OF PRONOUNCEMENT : **17.10.2025**

J U D G M E N T :

The present Second Appeal arises out of the judgment and decree dated 03.10.2022 passed by the learned District Judge-1, Bhandara in Regular Civil Appeal No.61/2018. By the said judgment and decree, the learned District Judge has allowed the aforesaid appeal, thereby quashing and setting aside the judgment and decree dated 11.11.2011 passed by the learned Civil Judge, Junior Division, Bhandara, in Special Mesne Profit Case No.1/2004, thereby dismissing the said mesne profit case.

02. The appellants had filed a suit for eviction and possession against the respondent being S.C.S. No.29/1997. The said suit was decreed vide

judgment and decree dated 30.04.2002. It will be pertinent to mention that a prayer for enquiry into future mesne profit from the date of institution of the suit till the date of delivery of possession was also made in the plaint. Although the suit was decreed and mesne profit for the period preceding to the date of filing of the suit was also awarded, the decree is silent with respect to future mesne profits. The learned Civil Court did not pass decree directing enquiry into future mesne profits. The judgment is also silent on this aspect.

03. The plaintiffs thereafter filed an application purporting under Section 152 of the Code of Civil Procedure (C.P.C. for short) *inter alia*, seeking direction for enquiry into future mesne profit. The said application was registered as M.J.C. No.1/2002. The said application was rejected by the learned trial Court vide order dated 07.04.2003. The learned trial Court observed that the prayer made in the application was beyond the scope of Section 152 of the Code of Civil Procedure and that a relief which was not granted in the original judgment and decree would not be granted by taking recourse to Section 152 of C.P.C. The learned Court also observed that a relief which is not granted, is deemed to be rejected.

04. The plaintiffs challenged the said order dated 07.04.2003 before this Court vide Civil Revision Application No.156/2003. The said civil revision application came to be disposed of vide order dated 17.09.2003, which is at Page No. 104 and reads as under :-

“Heard.

By consent, the revision-petitioner shall be entitled to make an application for future mesne profits under Order XX Rule 12 of Code of Civil Procedure.

CRA is disposed of accordingly.”

05. Perusal of the order will demonstrates that the matter was not adjudicated on merits. This Court recorded consent of the parties to the effect that the plaintiffs shall be entitled to file application for future mesne profits under Order 20 Rule 12 of C.P.C.

06. In view of the aforesaid order, the plaintiffs filed Special Mesne Profit Case No.1/2004 praying for grant of future mesne profit. The defendant appeared in the said matter to contest the same. Apart from merits of the claim, the respondent also raised an objection that the proceeding was not maintainable since the decree passed in the suit for eviction did not include any direction for enquiry into future mesne profit and further, that the application for modification of the decree was also rejected. As regards order dated 17/09/2003 passed in the revision application, defendant contended that the consent was given for filing of mesne profit case, which does not mean that objection to maintainability of the said case was given up by the defendant.

07. The learned trial Court decreed the mesne profit case filed by the plaintiffs. The application was allowed, granting mesne profit at the rate of

Rs.1.00 per sq.ft. from the date of institution of the suit i.e. 05/02/1997 till 31/12/2004 and at the rate of Rs.1.50 per st.ft. from 01/01/2005 till the date of delivery of possession.

08. Mr. C.S. Kaptan, learned Senior Advocate for the appellants, contends that parties had agreed that the appellants will be entitled to file an application seeking future mesne profits before this Court during the course of hearing of Civil Revision Application No.156 of 2003 and therefore, it was not open for the respondent to raise objection to the tenability of the mesne profit proceeding. The learned Senior Advocate further contends that the learned First Appellate Court has committed a jurisdictional error in allowing the appeal and dismissing the mesne profit case (for short, the M.P. Case) disregarding order passed in Civil Revision Application.

09. Perusal of the order passed by this Court in the Civil Revision Application will demonstrate that the respondent had accorded consent of filing of the M. P. Case by the appellants. That does not mean that the respondent had surrendered right to contest the issue of maintainability of the M.P. case. The order does not indicate that the respondent had forfeited its right to raise objection to maintainability of the application. In view of the above, the first contention raised on behalf of the appellants is liable to be rejected and is rejected as such.

10. The learned Senior Advocate for the appellants, however, contends that even on merits, the appellants were entitled to file an application for future mesne profits. He contends that the cause of action in the main suit and the cause of action in the mesne profits case are different. The cause of action for seeking future mesne profits, arises according to Mr. Kaptan, upon the decree for possession being passed by the Court and failure on the part of the defendant to deliver possession in accordance with the decree.

11. The learned Senior Advocate has referred to Order II, Rule 4 of the Code of Civil Procedure to contend that the normal rule is that no cause of action can be joined in a suit for possession without leave of the Court, except claims for mesne profits or arrears of rent or damages for breach of contract relating to property. Referring to the aforesaid provision, the learned Senior Advocate contends that a claim for mesne profits is independent of the cause of action for seeking decree for possession is apparent from reading of the said provision. He argues that cause of action for filing suit for possession and cause of action for claiming mesne profits are different and, therefore, provision is made under Order II, Rule 4 enabling plaintiff in a suit for possession to claim mesne profits in the same suit, although the claim arises on a different cause of action.

12. Mr. Kaptan, has placed reliance on the following judgments: *AIR 1997, Bom 216* in the matter of *Shrikant Panachand Shah...vs...Walubai Panachand Shah* and *AIR 1938, Bom 231 (FB)* in the matter of *Gangadhar Gopalrao Deshpande and anr. Vs. Shripad Annarao Deshpande*, and *AIR 1967, Supreme Court 155* in the matter of *Gopalakrishna Pillai And Others vs Meenakshi Ayal And Others*

13. Per contra, Mr. Saboo, the learned Advocate for the respondent, argues that the plaintiffs had specifically prayed for enquiry into future mesne profits in the suit. He draws attention to Prayer clause (D) in the plaint to point out that a specific prayer seeking enquiry into future mesne profits was made by the plaintiffs. Mr. Saboo contends that admittedly, although such prayer was made, the same was not granted by the learned Trial Court. Mr. Saboo, contends that a relief which is sought in a suit, if it is not granted, is assumed to be denied. He draws attention to Explanation 5 to Section 11 of the Code of Civil Procedure. He further contends that the plaintiffs had also filed a Misc. Judicial Application (MJC) to seek correction in the decree so as to incorporate relief of future mesne profits, which was specifically rejected. Mr. Saboo, further contends that a proceeding seeking mesne profits is a continuation of the original suit and not an independent proceeding.

14. Mr. Saboo has placed reliance on the following decisions in support of his contentions. The judgments of the Hon'ble Supreme Court

dated 03.09.2024 in Special Leave Petition (Civil) No.3056 of 2023 in the matter of *Choudappa & Anr....Vs...Choudappa Since Deceased by LRs. & Ors.* and *judgment dated 05.09.2017 in Civil Appeal No.1464 of 2008* in the matter of *M/s. Raptakos, Brett & Co. Ltd....Vs...M/s Ganesh Property* and judgment *dated 30.01.2002 in Civil Appeal No.5514 of 1994 in the matter of K. Hafiza Begum and Ors...Vs...K.M. Usman Pasha and ors*, and in the matter of *Tausif Ahmad and ors...Vs...Munshi Baharuddin*, reported in *AIR 1965 PATNA 436*, and in the matter of *Ramsewak Kaji and ors...Vs...Ramgir Choudhary and other*, reported in *AIR 1958 PATNA 448*.

15. In the matter of *Shrikant Panachand Shah...vs...Walubai Panachand Shah*, the question which fell for consideration in the said matter was as to whether fresh suit for mesne profit is maintainable after a decree for partition is passed in earlier suit and as to whether a subsequent suit for mesne profits is barred under Order II, Rule 2 of the Code of Civil Procedure. In that context, this Court has held that the right to claim mesne profits is a distinct and separate cause of action, different from the cause of action for filing suit for partition and separate possession. It is held that since cause of action is different bar under Order II, Rule 2 is not attracted and consequently, even if mesne profits are not claimed in the suit for partition and separate possession, the same can be claimed by filing a separate proceeding. It is held that there is no bar, either express or implied, in filing such a suit. The said

judgment is relevant only to the extent that cause of action in a suit for partition and separate possession is different from cause of action in a suit for mesne profits. In the present case, the plaintiffs had specifically sought mesne profits in the suit for possession filed by them and therefore, the question of Order II, Rule 2 does not arise. However, relevance of this judgment is only with respect to the causes of action being separate.

16. The facts of the case in the decision of Full Bench of this Court reported in AIR 1938, Bombay, 231 in the matter of ***Gangadhar Gopalrao Deshpande and anr. Vs. Shripad Annarao Deshpande*** has a close resemblance with the facts of the present case. Rather, the facts are almost identical. In the said case, a suit for possession was filed in which a prayer for future mesne profit was also made, however, the judgment and decree were silent with respect to future mesne profits. The matter was initially heard by a Division Bench. However, the Division Bench made a reference to the Full Bench since it could not agree with earlier Division Bench judgment of this Court in the matter of ***Atmaram Bhaskar...Vs....Parashram Ballal***, reported in ***AIR 1920/1912 (44), Bom. 954***.

17. In the matter of Atmaram Bhaskar (supra), a suit was filed for partition and separate possession along with a prayer for past and future mesne profits. A decree for partition and past mesne profits was passed in favour of the plaintiff. However, the decree was silent with respect to future

mesne profits. The plaintiff filed a fresh case for future mesne profits. The defendant raised an objection that the subsequent case filed for future mesne profits was barred by *res judicata* in view of explanation V to Section 11 of the Code of Civil Procedure, which provides that a relief which is not granted is deemed to be denied. This contention was upheld by the Division Bench and it was held that subsequent case filed for future mesne profits was not maintainable.

18. The Division Bench in the reported judgment was unable to agree with the view taken in the matter of *Atmaram Bhaskar* (supra) and therefore, made the following reference to the Full Bench.

“Whether after a suit for partition and possession of lands and mesne profits past and future has been brought and decided and the decree fails to award the claim to future mesne profits, a second suit to recover mesne profits from the institution of the first suit or the date of the decree till delivery of possession is barred under s.11, Expl. V of the Civil Procedure Code?”

19. The Full Bench has overruled the decision in the matter of *Atmaram Bhaskar* (supra), holding that even if a prayer for enquiry into future mesne profits is made in the suit and the decree is silent on this aspect, a fresh proceeding for future mesne profits will be maintainable. It is held that such a case will not be hit by *res judicata* under Section 11, Explanation V of

the Code of Civil Procedure. While answering the issue, the Full Bench has held that the relief referred in explanation V of Section 11 means a relief which can be granted on the basis of a cause of action that accrues to the plaintiff on the date of institution of the suit. It is held that the cause of action to claim future mesne profits does not arise at the time of filing of the suit and, therefore, relief of future mesne profits is not covered under explanation V of Section 11 of the Code of Civil Procedure. It will be pertinent to mention here that Section 11, explanation V is *pari materia* with Section 13 of the Code of Civil Procedure, 1882. Likewise, Order XX, Rule 12 of Code of Civil Procedure is *pari materia* with Section 244 of the Code of Civil Procedure, 1882. The relevant observations in the judgment are as under:-

“Now s. 244 of the old Act has been substantially re-enacted in s. 47 of the new Act and in O. XX, Rule 12. Under s. 244 questions regarding mesne profits had to be determined in execution. Then there was a proviso that-

“Nothing in this section shall be deemed to bar a separate suit for mesne profits accruing between the institution of the first suit and the execution of the decree therein, where such profits are not dealt with by such decree.”

It seems to me clear that that proviso presupposes that there was no other section in the Act which would bar such a suit. If the legislature imagined that s. 13 was a bar to the suit, it would have been unnecessary to provide that s. 244 should not be a bar. So that the proviso seems to me to presuppose that the legislature recognised that there was no other bar

to a suit for future mesne profits contained in the Act. Under the new Act the provisions as to mesne profits have been varied. It is not now necessary to claim mesne profits in execution. Under O. XX, r. 12, the Court has to direct an inquiry as to mesne profits and subsequently grant a decree for the amount found due, and in view of that alteration it may have been considered unnecessary to re-enact the proviso to s. 244. But in my judgment the omission of that proviso from the new Act has no bearing whatever upon the question whether Expl. V to Section 11 in the new Act should have placed upon it the same construction as had been adopted in relation to the corresponding Explanation in the old Act.”

There appears to be no doubt that under the old Code there was a consensus of opinion of practically all the High Courts to the effect that a separate suit for mesne profits subsequent to the suit would lie whether or not the plaintiff had asked for this relief, if the decree was silent on the subject. The principal grounds on which the Courts took this view were that the grant of this particular relief was discretionary under s. 211 of the old Code and that the words “relief claimed” in Expl. III to s. 13; which corresponded to the present Expl. V to s. 11, must be taken to apply only to what the plaintiff might claim as of right, that is to something which was included in his cause of action. Whether the reasoning in these cases is or is not convincing is not now material. The Explanation was re-enacted in the Code of 1908 without any alteration. This is one of the main considerations on which the other High Courts have

now held that the legislature must have intended the law to be the same under the new Code.”

20. In view of the aforesaid observations, the earlier view that if mesne profits were claimed and were not granted in the suit for possession, a fresh proceeding for mesne profits was barred being *res judicata*, is expressly overruled set aside by the aforesaid Full Bench decision. The Full Bench judgment is almost identical on facts of the present case. In the present case also, the plaintiffs had prayed for enquiry into future mesne profits and the judgment and decree passed by the learned Trial Court is silent with respect to the same. In view of the Full Bench decision, it cannot be said that application for future mesne profit filed by the plaintiffs is barred by Section 11, Explanation V.

21. The judgment in the matter of ***Gopalkrishna Pillai and ors***, reiterates the same legal principle that cause of action for claiming future mesne profits is different from the cause of action for filing suit for possession.

22. As regards decisions cited by Mr. Saboo, in the case of ***M/s. Raptakos, Brett & Co. Ltd...Vs...M/s. Ganesh Property***, a decree for eviction was passed against the appellant before the Hon'ble Supreme Court. Appeal was preferred against the said decree. The Appellate Court had passed an order granting stay to execution of the decree on the condition that the appellant shall pay rent to the respondent at the rate of Rs.2,500/- per month

till the final disposal of appeal. After the appeal was dismissed, the matter went before the Hon'ble Supreme Court. The Hon'ble Supreme Court also dismissed the appeal filed by the appellant against the decree for possession. However, subsequently, an application was filed before the Supreme Court stating that the appellants were ready to deliver possession to the respondents before a particular date and that they shall pay occupation charges to the respondents at the rate of Rs.2500/- per month and in the event of failure to deliver the possession on or before the stipulated date, occupation charges for subsequent period would be paid at the rate of Rs.50,000/- per month. The appellant had handed over possession to the respondent on the stipulated date. Thereafter, the respondent instituted a case for mesne profits. The mesne profits case also reached to the Hon'ble Supreme Court. A question arose before the Hon'ble Supreme Court with respect to maintainability of mesne profits case. The Hon'ble Supreme Court has observed that the respondent in the said case, who was the plaintiff, had specifically not pressed the claim for mesne profits. It is held that waiver to claim mesne profits disentitled the respondents from filing suit for future mesne profit.

23. The facts of the said case are clearly distinguishable from the present case. In the present case, the appellant has not specifically given up the claim for mesne profits, as was done in the case before the Hon'ble Supreme Court. The ratio of the said judgment, therefore, cannot be made

applicable to the present case. It will, however, be pertinent to mention here that the Hon'ble Supreme Court has quoted with approval the legal principle that cause of action for recovery of possession is not necessarily identical with the cause of action for recovery of mesne profits.

24. In **K. Hafiza Begum (supra)** the plaintiff had not incorporated any prayer for future mesne profit and therefore, the Trial Court did not pass any decree with respect to future mesne profits. However, the learned Executing Court passed orders directing inquiry into mesne profits. It is in this context that the Hon'ble Supreme Court has held that the passed decree directing enquiry into future mesne profits is a discretionary power vested with the Civil Court. It is held that, since the Civil Court did not exercise its discretion to grant future mesne profits by incorporating direction in the decree with respect to the same, it was not open for the Executing Court to pass such order for inquiry into mesne profits.

25. The said judgment will also not be applicable to the present case, since in the present case, the appellant did not file execution proceedings for future mesne profits. The appellants have instituted a fresh suit or application for future mesne profits, which is different from an execution proceeding.

26. In **Choudappa & Anr (supra)** a decree for possession was passed with further directions to hold inquiry into mesne profits. The decree for possession was passed on 24.09.1963 and possession of the property was

taken in execution proceeding in the year 2005. Thereafter, an application under Order XX, Rule 12 of Code of Civil Procedure seeking future mesne profits was filed in the year 2014. The defendant filed an application under Order VII, Rule 11 of the Code of Civil Procedure, 1908, stating that the application/suit for mesne profits was barred by limitation. The learned Trial Court rejected the plaint. The appeal filed by the appellant/plaintiff was also dismissed by the High Court. In such circumstances, the matter reached the Hon'ble Supreme Court. The Hon'ble Supreme Court has held that the suit/application for mesne profits was filed within limitation. It is held that, while dealing with the matter of future mesne profits, the Court proceeds with final decree proceedings of the preliminary decree for possession which is passed in the suit. It is held that there is even no need to file separate application for preparing a final decree and that enquiry into future mesne profits is nothing but a continuation of the suit. It is held that a proceeding for enquiry into future mesne profits is not a fresh proceeding.

27. Referring to the aforesaid judgment, Mr. Saboo contends that since the proceeding is a continuation of the suit for possession and a decree for future mesne profits is not passed in the suit for possession, despite a specific prayer, the learned Trial Court could not have entertained mesne profits case. I am afraid the said contention cannot be accepted. The Hon'ble Supreme Court has clearly held that an enquiry into future mesne profits is

only a step in preparation of a final decree and further that there is no need to file a separate application for preparation of final decree. The judgment deals with a case where mesne profits case was filed purportedly beyond the prescribed period of limitation. The Supreme Court decision does not deal with the issue as to whether enquiry into future mesne profits is permissible even if the decree in suit for possession does not contain any direction for such inquiry despite a prayer being made in the plaint in that regard.

28. In the opinion of this Court, the issue is no longer *res integra* and is squarely covered by Full Bench decision in the matter of ***Gangadhar Deshpande (supra)***. The facts of the said case and the present case are almost identical. In both matters, although prayer for future mesne profits was made in the plaint, the decree was silent with respect to enquiry into future mesne profits and the plaintiffs had filed fresh proceeding for mesne profits which was allowed. The Full Bench clearly holds the fact that prayer for future mesne profits is made and the decree is silent with respect to the same would not mean that mesne profits case is foreclosed by constructive *res judicata* under Section 11, Explanation V of the Code of Civil Procedure.

29. In the present case, however, the appellants had filed an application under Section 152 for correction of the decree in order to get direction for enquiry into future mesne profits recorded in the decree. The said application was rejected. The said application was also rejected on the

ground of constructive *res judicata*. Civil Revision Application was filed challenging the said order which was allowed by recording consent of the respondent for filing of mesne profits case. In view of law laid down by the Full Bench, the proceeding for inquiry into mesne profits would be maintainable even if the respondent had not accorded consent for filing of the same.

30. In view of the above, the Second Appeal deserves to partly allowed in the following terms:-

- I. The judgment and decree dated 03.10.2022 passed by the learned District Judge-1, Bhandara in Regular Civil Appeal No.61 of 2018 is quashed and set aside.
- II. The appeal is remanded to the learned First Appellate Court for adjudicating the same on merits in the light of the present decision.
- III. Parties are directed to appear before the learned First Appellate Court on 10.11.2025.
- IV. Parties to note that separate notice for appearance will not be issued.

(ROHIT W. JOSHI, J.)