

IN THE HIGH COURT OF SINDH, CIRCUIT COURT HYDERABAD

IInd Appeal No.76 of 2018

Appellant: Shahabuddin, through Mr. Ravi Kumar Advocate
Respondents: Shahnawaz and others.
Date of hearing: 18.12.2025
Date of decision: 18.12.2025

JUDGMENT

MUHAMMAD HASAN (AKBER), J.- A short controversy appears to be involved in the instant appeal, only to the extent of mesne profits, which though was decreed by the learned trial Court, the same was however, disallowed by the learned appellate Court, vide the impugned Judgment and Decree dated 12.03.2018.

2. Brief background of the dispute is that the Appellant filed F.C. Suit No.450 of 2015 'Shahbuddin v. Shah Nawaz and others' before the learned Senior Civil Judge Hyderabad for declaration, possession, mesne profits and other reliefs, which was decreed vide consolidated Judgment and Decree dated 27.04.2017. A counter F.C.Suit No.362 of 2015 was filed by the Respondent, claiming therein ownership of the same property. Consolidated Issues were framed; a full-fledged trial was conducted; and vide consolidated Judgment and Decree dated 27.04.2017, the Respondent's suit was dismissed, whereas Appellant's suit was decreed. Mesne profits @ Rs.40,000/- was also allowed to the appellant from the date of institution of suit till restoration of possession of the suit property, which is the bone of contention in the instant appeal.

3. The Respondents assailed the consolidated Decree in Civil Appeals 132 of 2017 and 133 of 2017 before the learned IV Additional District Judge Hyderabad. Both the appeals were dismissed vide the impugned Judgment and Decree, but only to the extent of Mesne profits, the relief was disallowed to the appellant in the following words:

"POINT NO.03 & 04.

In view of my discussions and consequential findings on above points, I am clear in my mind that impugned judgment is well discussed and well reasoned, which does not require interference of this court and is maintained. However, the findings with regards to mense profits at the rate of Rs.40,000 per month from institution of suit till the restoration of suit bungalow granted to the Respondent/plaintiff (in suit No.450 of 2015) are not proper and are unjustified, therefore, such part of impugned judgment is hereby set aside. The appeal in hand is accordingly disposed of. There is no order as to costs."

4. The appellant's counsel argued that the impugned Judgment is non-peaking; is without any reasoning; and the same is in contrast to the evidence produced before the trial Court. Further submitted that in Civil Appeal No.132 of 2017, the learned Appellate Court while upholding the other portion of the Decree, set-aside the Decree to the extent of mesne profit.

Relying upon 1999 SCMR 985 & 2002 MLD 1397, learned counsel pleads that although the Respondent was not in unauthorized possession of the Suit property earlier, however, subsequently-when the counter Suit for an illegal claim of ownership was- raised by the Respondent (which was dismissed) and the suit for possession was filed by the Appellant (which was decreed), then as per the dictum laid down by the superior Courts in the above referred Judgments, he remained in unauthorized occupation of the suit property, and for which period, he was liable to pay mesne profit, which relief was rightly decreed by the learned Trial Court.

5. As on part of the Respondent, since filing of this Appeal seven years ago in 2018, the Respondents have consistently remained absent, despite service of repeated notices through all first three modes, which reflects their lack of interest in this matter. As a last chance and out of indulgence, the matter was again adjourned to 04.12.2025 and 18.12.2025 with note of caution, yet they chose to remain absent. The appeal was therefore heard, based upon the available record.

6. Heard and perused the record and proceedings. In Suit No.450 of 2015, the prayer (c) sought by the Appellant/ Plaintiff was:

"c] Defendants to pay mesne profit at the rate of Rs.40,000/- per month from the date of institution of suit till the restoration of suit bungalow."

7. The relevant Issue No.8 framed by the Court, was:

"8. Whether the Plaintiff shahabuddin is entitled for possession and mesne profit?"

8. The term "Mesne Profits" has been defined under sub-section (12) of section 2 of the Civil Procedure Code 1908 (CPC) as, those profits which the person in wrongful profession of such property actually received, or might with ordinary diligence have received there from, together with interest on such profits but shall not include profits due to improvements made by the person in wrongful possession. Order XX Rule 12 CPC. provides for a preliminary decree, whereas sub-rule (2) of Order XX Rule 12 CPC. provides for a final decree for mesne profits and use of the word 'shall' therein, makes it mandatory upon the Court to pass a final decree. In **'Mst. Akhtar Begum and others v. Nawabzada Asad Mumtaz Ali Khan and others'** (1999 SCMR 985), the Honourable Supreme Court held that:

"Lastly, it was argued by the learned counsel that even if the respondents' suit for possession was decreed by the learned trial Court, no claim for mesne profits could be accepted when the finding was that the petitioners were licensees of the respondents. Even this last contention of the learned counsel appears to be devoid of force because when the petitioners declined to vacate the disputed property and started asserting their own right and title, they became liable for payment of mesne profit on account of wrongful possession,"

(emphasis added)

9. In **'Muhammad Ali v. Mst. Aisha and 8 others'** (2002 MLD 1397) wherein the Appellate Court declined mesne profits on the ground that possession of the property was handed over free of rent due to close relationship between parties, therefore, the appellant was not entitled to mesne profit, it was held that.

".....Since it has been established that respondent Muhammad Ali is in wrongful possession of the subject property is consequence mesne profit naturally will follow. The only question as to the quantum of the amount of such profit remains to be resolved. Learned trial Court allowed the same as claimed by the plaintiff which was disallowed by the First Appellate Court merely on the premises that since appellant did not charge any rent from Mst. Aisha. But it does not mean that the appellant is not entitled to recover from Muhammad Ali who admittedly is in unauthorised possession, since after the demise of Mst. Aisha. Examining the evidence of the parties, Respondent Muhammad Ali in his evidence admitted that a portion measuring 15' x 90' of the said property is under the Tenancy of Aslam at the rate of Rs.500 per month and the area in his possession measures 30 ft into 90 ft. that is double the area of the tenant. Reasonably and on the basis of the evidence of the defendant it can be safely determined that rent for the premises in his occupation reasonably would be Rs.1,000 p.m. In my humble opinion from the own showing of the respondent since for a premises half in size is fetching Rs.500 a fair compensation that could be awarded is Rs. 1,000 p.m. from the date of institution of the suit.

Accordingly, appeal is allowed, suit stands decreed for mesne profit at the rate of Rs.1,000 p.m. w.e.f. November 1987 till handing over of the possession. Finding of learned Appellate Court on the issue of mesne profit is set aside and that of learned trial Court is maintained with above modification."

10. In the instant case, with respect to his claim for mesne profits, Shahbuddin produced Exhibit 75-E being Rent agreement dated 13.09.2003 and another Rent agreement dated 14.03.2008 as Exhibit 75-F. The Exhibit 75-E contained tenancy arrangement between Shahbuddin and one Muhammad Ismaeel Shaikh with respect to the suit property from 18.09.2003 @ monthly rent of Rs.8,000/-. The next Exhibit 75-F contained tenancy arrangement between Shahbuddin and Saeed Ahmad son of Gulam Rasool with respect to the same property from 14.03.2008 @ monthly rent of Rs. 15,500/-

11. During Shahabuddin's evidence, not a single objection was raised from the Respondent side to challenge the production of the said Exhibits. The Honourable Supreme Court in the cases of **'Abdullah and 3 others v. Abdul Kareem and others'** (PLD 1968 SC 2025) and **'Malik Din v. Muhammad Aslam'** (PLD 1969 SC 136) held, that an Objection as to formal proof of a document must be taken in the **'earliest point of time'**, and a that document marked as an exhibit becomes admissible in evidence. In the case of **'Muhammad Iqbal v. Mehboob Alam'** (2015 SCMR 21), it was further held that if an objection is not raised at the relevant time, the same shall be considered to have been waived. In **'Shahin Shah v. Government of Khyder Pakhtunkhwa'** (2022 SCMR 1810) it was declared that if an objection at the time of production of a document is not raised at the relevant time, the same loses its significance. In the present

case, no objection was raised at all against production of the said Exhibits, hence there remains no justification to deny the production of the said exhibits.

12. Secondly, after production of these exhibits, not a single question or suggestion was put to Shahabuddin during his cross examination to challenge the contents of the said Exhibits. Law of fairly settled on the point that when there is failure to cross examine a witness on a specific plea or document, then such a statement/ document would be deemed to have been accepted by the other side. Reliance is placed upon '**Qamaruddin through legal heirs v. Hakim Mahmood Khan**' (1988 SCMR 819), '**Walayat Khan v. Muhammad Yousaf**' (PLD 1995 SC (AJ&K) 41), '**Fida Hussain v. Anwari Khatoon**' (1985 MLD 110), '**Muhammad Yasin V. Shabbir Ahmad**' (1985 CLC 2111), '**HBL v. Thal Jute Mills Ltd.** (1988 CLC 2310). Perusal of the depositions in the instant case clearly reflects that the said documents were duly exhibited and not a single question was put to challenge the contents of the said documents on the aspect of mesne profits. In view of the above, I have no hesitation to hold that the statement of Shahabuddin, to the extent of his claim for mesne profits, based upon Exhibits 75-E and 75-F, stood fully established.

13. Thirdly, in the Judgment passed by the appellate Court, it has also been duly recorded that after passing of the Judgment and Decree by the learned trial Court, the Respondent handed over the possession of the suit property to the Applicant on 30.04.2017. The Applicant's claim for mesne profits was therefore, from the date of filing of the Suit till the date of handing over of possession by the Respondent to the Applicant. Such aspect was also duly considered by the learned trial court in its Judgment.

14. Fourthly, the '**onus probandi**' under Article 117 of the Qanun-e-Shahadat Order, 1984 is on the person who asserts a fact and desires the Court to pass Judgment thereon, as held in '**Boman Abadan Irani and Others Vs Jehangir J. Mobed and Others**' (PLD, 1967 Karachi 449). In the present case, such burden was on the Applicant and the evidence produced by him fulfils the requirements of the ratio settled in the case of '**Abdul Gani Matbar Vs. Apser Ali Matbar and another**' (PLD 1964 Dacca 633). As regards the starting date and the ending date for the grant of final decree for mesne profits, the same has also been fully ascertained, hence the requirements of the dictum expounded in '**Noorali Pirmohammad Parsala Vs. Mrs. Patricia Dinshaw**' (PLD 1974 Karachi 235) also appear to have been fulfilled.

15. By applying the principles settled in the above referred decisions to the facts of the instant case, the primary burden to establish his claim for mesne profits was on the applicant, which was duly fulfilled by production of documents/ exhibits, which were neither objected to, nor challenged, nor controverted by the Respondent side. The exercise of ascertaining the quantum of mesne profit was also fulfilled by the learned trial Court, so also the question of ascertainment, of the starting date and the ending date for which the final decree for mesne

profits, was also exactly considered by the learned trial Court in its Judgment which started from the date of unauthorized/illegal possession on 04.05.2015 till the possession was reverted back to the owner in compliance to the Court's directions on 30.04.2017. This further reflects application of judicial mind by the learned trial Court. The evidence led by the Applicant before the learned trial Court therefore makes it copiously and profusely translucent and cloudless, that he has fully discharged his burden to prove this aspect of the case. On the contrary, attention to these aspects of the case was not paid by the learned appellate Court while partly setting aside the decree, and that too, without giving any reasoning, which was inconsistent with the dicta laid down by the superior Courts. In these conditions, the impugned Judgment by the learned appellate Court being a result of non-reading of evidence, could neither be considered sacrosanct nor immune to interference and such decision was therefore, in violation of the parameters prescribed in '**Asmatullah v. Amantullah through legal representatives**' (PLD 2008 SC 155), '**Abdul Sattar v. Mst. Anar Bibi and others**' (PLD 2007 SC 609) and '**Mst. Naziran Begum through legal heirs v. Mst. Khursheed Beguni through legal heirs**' (1999 SCMR 1171).

16. Upshot of the above discussion is that the instant Appeal is allowed; the impugned Judgment and Decree dated 12.03.2018 and, 17.03.2018 respectively passed by the learned 4th Additional District Judge Hyderabad in Civil Appeal No. 132/2017, to the extent of mesne profits, are set-aside; and the Judgment and Decree dated 27.04.2017 passed by the learned Senior Civil Judge Hyderabad in F.C. Suit No.450 of 2015 '**Shahbuddin v. Shah Nawaz and others**' on the point of 'mesne profits' is upheld. The Office is directed to draw a Decree accordingly. The Appeal stands allowed along with pending application(s) in the above terms, with no order as to costs. These are the reasons for my short Order dated 18.12.2025.

JUDGE