

Thomas and anr. Vs. Dr. Mathai and anr.

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Court : Kerala

Decided On : Oct-14-2008

Reported in : 2009(1)KLJ16

Judge : Pius C. Kuriakose, J.

Acts : [Contract Act, 1872](#) - Sections 62; Evidence Act - Sections 45; Code of Civil Procedure (CPC) - Sections 151 - Order 8, Rule 9

Appeal No. : A.S. No. 282 of 2000

Appellant : Thomas and anr.

Respondent : Dr. Mathai and anr.

Advocate for Def. : S. Santhosh Kumar, Adv. and; K.P. Dandapani, Sr. Adv.

Advocate for Pet/Ap. : C.T. Joseph, Adv.

Judgement :

Pius C. Kuriakose, J.

1. Defendants 1 and 2 in a suit for partition which was decreed by the court below are the appellants. The first respondent is the plaintiff and the second respondent is the third defendant who remained ex parte. The suit was filed by the first respondent claiming 1/3 share in the suit property - 7 cents and 286 square links

of land with a two stoned building thereon. The plea of the plaintiff was that the suit property is the property of the plaintiff and defendants 1 and 2 as per partition deed No. 1264/1973 of the Sub Registry, Kothamagalam. It was averred in the plaint that in the month of September 1985, the plaintiff agreed to transfer his rights in the plaint schedule property to defendants 1 and 2 for a price of Rs. 4 lakhs and that he had accepted two lakhs towards price and an agreement for sale (Ext.B1) was executed on 16-09-1985. It was further pleaded that within a week from the date of the agreement defendants 1 and 2 informed him that they did not require the building and demanded back the advance amount and accordingly the advance amount was returned by the plaintiff to defendants 1 and 2. It was also averred that since the sale agreement could not be implemented, the second defendant executed a rent deed in favour of the first defendant and the plaintiff agreeing to pay them Rs. 3,000/- per month and that the rental arrangement continued upto November 1988. It was averred that after November 1988, the plaintiff and defendants 1 and 2 have jointly run lodging business in the plaint building. But in November 1989, the plaintiff came to know that defendants 1 and 2 were not maintaining proper account or paying the plaintiff due share and as such the plaintiff caused to issue the lawyer notice on 27-05-1989 demanding partition. But a reply was given showing false contentions. Thereafter without the plaintiff's consent, the defendants 1 and 2 let out the ground floor of the building to defendant No. 3. It was also averred that as per Ext.A5 mortgage deed 1813/90(Ext.A5) defendants 1 and 2 have mortgaged the property in favour of the third defendant. It was contended that the creation of the document cannot affect the right of the plaintiff. The suit was accordingly filed seeking partition of the property into three equal shares and for allotment of 1/3 share with mense profits from the date of the suit. A declaration that the mortgage deed executed in favour of the third defendant (who remained ex parte in the suit) is not binding on the plaintiff was also sought.

2. Defendants 1 and 2 filed a joint written statement in which they admitted that the plaint schedule property belonged to plaintiff and defendants 1 and 2 as per the partition deed. But they denied the plaintiff's case that the agreement for sale Ext. B1 was given a go by. They also denied the allegation that the advance amount of rupees two lakhs was returned by the plaintiff to defendants 1 and 2. It was also

contended that the rent deed Ext.A1 was executed only as a security for the payment of share of income until payment of the balance sale price. It is further contended that after the execution of Ext.A1 the plaintiff was paid Rs. 1500/- per mensem till 13-09-1986. The balance sale consideration of rupees two lakhs was paid to the plaintiff in the presence of late brother Varghese and another brother Markose. The plaintiff thus received the entire sale consideration and thereafter the plaintiff has no right over the plaint schedule property. The defendants admitted execution of the mortgage deed in the year 1990. The plaintiff having accepted sale consideration in full is not entitled to seek a partition of the plaint schedule property. Defendants 1 and 2 are owners of the entire property ever since 13/09/1986 and they had every right to mortgage the ground floor to the third defendant. The plaintiff is not entitled for partition. It is alternatively contended that in case the plaintiff is found entitled for partition, the amount paid by the defendants should be ordered to be refunded with interest.

3. The learned Subordinate Judge formulated the following issues for trial:

- 1) Are the plaint schedule property partible?
- 2) Is the court fee paid proper?
- 3) Is the plaintiff entitled to get the share of Income. If so the quantum?
- 4) Is the mortgage deed dated 28-11-1990 is illegal?
- 5) Is D3 liable to be evicted?
- 6) Reliefs and costs

4. The evidence at trial consisted of the oral testimony of PW1, the plaintiff and documents Exts.A1 to A9 on the plaintiffs side. On the defendants' side evidence consisted of oral testimony of the first defendant Thomas as DW1 and that of Markose, brother of parties as DW2 and also Exts.B 1 and B2. Ext.A2 was copy of the suit notice and Ext. A3 was copy of the reply notice. Ext.A4 is copy of the suit notice at the Instance of the plaintiff to the defendants in occupation of the building. Ext.A6 is the gift deed executed by Mathai in favour of Thomas. Ext.A7

certified copy of the settlement deed executed by Mathai, father of the parties in favour of the plaintiff. Ext.A8 is sale deed executed in favour of Markose DW2. Ext.A9 is sale deed executed by DW2 in favour of second defendant. Ext B2 dated 13-09-1986 is unstamped receipt for rupees two lakhs issued by the plaintiff in favour of defendants 1 and 2 purportedly towards the balance sale consideration due under the agreement for sale.

5. Issue Nos. 2 and 3 pertaining to court fee and to the plaintiff entitlement for share of income were deleted on consent. Under issue No. 1 regarding partibility of the property, the learned Subordinate Judge would hold on evaluation of the evidence and circumstances that as on the date of Ext. A1 rent deed the parties were in Joint possession of the plaint schedule property. Ext.B2 receipt was not relied on by the court below on the basis of what is described in the judgment as a crucial admission made by DW2 who was examined for proving Ext.B2. The inaction on the part of the defendants for specific enforcement of the agreement for sale despite payment of the entire consideration was also noticed by the court below as a circumstances against defendants and it-was accordingly held that the parties continued as co-owners and that balance consideration has not been paid against Ext.B2. The argument raised by the plaintiff that Ext.B1 agreement for sale can no longer be relied on since fresh document Ext.A1 rent-deed has been executed by the same parties in view of the statutory provisions enshrining principles of novation i.e. Section 62 of the Indian Contract Act was also accepted by the court below. Accordingly, issue No. 1 was answered in favour of the plaintiff.

6. Issue Nos. 4 and 5 were also considered together by the learned Sub Judge. It was noticed that the mortgagee, the third defendant had not chosen to contest the suit. The admission of defendant 1 and 2 that the suit property belonged in common to them and the plaintiff and the absence of the specific contention that the defendants had obtained absolute title to the property were also noticed. The finding entered on issue No. 1 that Ext.B1 agreement has been substituted by Ext.A1 rent deed was also relied on and accordingly it was held that the mortgage deed is not binding on the plaintiff. Eviction of the third defendant was however not allowed in view of the statement in the plaint that in the event of partition being

granted, the portion under occupation of the third defendant can be allowed towards their share. Considering the issue regarding mens profits, the learned Subordinate Judge relied on Ext.A1 rent deed providing for monthly rent at the rate of Rs. 3000/- and found that the plaintiffs share of mens profits will come to Rs. 1500/- per mensem. On the basis of the findings, preliminary decree for partition was passed allowing partition by means and bounds and allotting 1/3 share to the plaintiff. It was provided however that as far as possible property covered by the mortgage deed shall be included in the share of defendants 1 and 2.

7. Sri. C.T. Joseph, learned Counsel for the appellant and Smt. Sumathy Dandapani learned senior counsel for the contesting first respondent addressed me extensively. Sri. Joseph referred to the pleadings and drew my attention to Exts.B1, B2 and A1 during the course of his submissions. I was taken by the learned Counsel through the testimony of PW1 and DW2. Sri. Joseph referred to Section 62 of the Contract Act and would assail the finding of the learned Subordinate Judge that Section 62 of the Contract Act applied in this case and that the agreement for sale Ext.B1 has been substituted by rent chit. Learned Counsel placed strong reliance on the judgment of the Supreme Court in *Latha Construction and Ors. v. Dr. Rameshchandra Ramniklal Shah and Anr.* : AIR 2000 SC380 to fortify his argument that in order that novation as envisaged by Section 62 of the Contract Act applies, there should be complete substitution of a new contract in place of the old contract and that the substituted contract has to rescind or alter or extinguish the previous contract. To fortify his argument that the reliance placed by the learned Subordinate Judge on the so called admission was not justified, Sri. Joseph relied on the judgment of the Supreme Court in *Chikkam Koteswara Rao v. Chikkam Subbarao and Ors.* : AIR 1971 SC1542 wherein the Supreme Court had laid down that before the right of a party can be considered to have been defeated on the basis of an alleged admission by him, the implication of the statement made by him must be clear and conclusive and that there should be no doubt or ambiguity about the alleged admission. The judgment of the Bombay High Court in *Andheri Bridge View Co.op.Hsg. Society Ltd. v. Krishnakant Anandrao Deo and Ors.* : AIR1991 Bom129 was also read by Sri. C.T. Joseph to show that the facts of that case are not similar to the fact of the case on hand.

8. The submissions of the Sri. C.T. Joseph against the findings of the court below regarding Ext.B2 were exceptionally forceful. I would therefore immediately asked Smt. Sumathy Dandapani, senior counsel as to whether Ext.B2 had not been executed by her client. I felt asking so since the purported signature of the plaintiff on Ext.B2 compared strikingly with the plaintiff's admitted signature. The senior counsel would answer that Ext.B2 was a concocted or fabricated document and that her client does not admit execution of the same. I would then remind the learned senior counsel that such a stand was not taken by the plaintiff before the court below and that even in re-examination PW1 had not chosen to clarify the position. The learned senior counsel would submit that the party's explanation is that he is not to blame for not clarifying the aspect through re-examination.

9. At that juncture, Sri. C.T. Joseph would submit that LA. No. 131/05 had been filed by the appellant along with the appeal itself under Section 45 of the Indian Evidence Act and Section 151 of the Code for sending Ext.B1 admitted document and Ext.B2 document now in dispute for comparison and expert opinion of the Director, Forensic Science Laboratory, Thiruvananthapuram as to whether signature in Ext. B1 and B2 have been put by one and the same person. Sri. Joseph submitted that no counter affidavit had been filed to the above I.A. all these years. Mrs. Dandapani would submit that though it is true that the I.A. was filed along with the appeal the petitioner had never chosen to move the I.A. for orders which explains why counter affidavit has not been field so far. It was then noticed by me that though the suit is one of the nature envisaged by Order XXX11A CPC, the learned Subordinate Judge has not explored the possibility of a settlement between the contesting parties who are direct brothers. Both Sri. Joseph and Smt. Sumathy Dandapani submitted that they have no objection in they taking up the endeavour and accordingly on 28/05/2008, I passed the following order:

Heard counsel for the appellants and the learned Sri. Counsel for the first respondent in part. It is noticed that though the suit is one of the nature envisaged by Order XXXIIA CPC, the learned Subordinate Judge has not explored the possibilities of a settlement between the parties. Therefore, I direct the appellants between the parties. Therefore, I direct the appellants and the first respondent to

be present in my chambers at 1.20 p.m. on 6-6-2008 so that possibilities of a settlement of the issues can be explored.

10. Accordingly, the first appellant Thomas, appellant's counsel Sri. C.T. Joseph, the first respondent, his wife and their son and also Mrs. Sumathy Dandapani, respondent's counsel came to my chambers at 1.20 p.m. on 6-6-2008. I persuaded both sides to have an amicable settlement of the issue considering the parties' relationship and also their social status, family prestige and reputation. I told both sides that a finding one way or the other regarding payment of the balance sale consideration of rupees two lakhs against Ext.B2 will be of consequence in the appeal. Despite my endeavours which were sincerely supported by both Sri. C.T. Joseph and Smt. Sumathy Dandapani, a settlement could not be brought forth between the parties and accordingly the case was posted for hearing of Smt. Sumathy Dandapani in full to 17-06-2008. Mrs. Dandapani was also orally directed to see that counter affidavit, if any; to the I. A. is filed by the next posting date of the case.

11. On 17/06/2008, Sri. C.T. Joseph prayed for orders in I.A. No. 131/05. It was noticed that no counter affidavit has been filed to the I.A. Smt. Sumathy Dandapani, senior counsel submitted that the first respondent admits the signature on Ext.B2 to be his own, but he does not admit B2 to be a genuine document executed by him. I recorded the above submission and closed the LA. on the basis that reference to Forensic Science Laboratory is not necessary for the purpose of determining whether signatures on Exts. B1 and B2 are put by one and the same person. Thereafter, Smt. Sumathy Dandapani was heard in full. Mrs. Dandapani would support all the findings of the court below. She submitted that the appellants had admitted co-ownership over the properties between them and the plaintiff and there was no document to conclude that co-ownership had come to an end. That being the position, there was no reason for declining partition. She further submitted that the case of the appellants that they had paid the entire balance consideration and had thus acquired equitable title over the property was highly improbable. If that were so, the appellants would have insisted on execution of a transfer deed or release deed by the plaintiff in their favour so that their title over the property becomes perfect as per records. As regards Ext.B2 receipt, she

submitted that the same had not been proved. Testimony of DW-2 Markose was rightly not relied on by the court below. DW-2 had his own axe to grind against the plaintiff, they having been pitted against each other in another legal battle, which is pending in second appeal before this Court even now. Copy of the judgment of the lower appellate court in that case (As. 50/07 of District Court, Ernakulam) was placed before me by Mrs. Dandapani in this context. Mr. C.T. Joseph would in his reply submit that the dispute involved in the litigation which is pending in second appeal is essentially a dispute between the plaintiff and the second defendant therein (appellant No. 2 herein) and that D W-2 Markose did not claim any subsisting interest over the property involved in that case. That suit was dismissed with cost by the trial court. It is reversing that decree that the appellate court allowed the appeal, but the issue has not attained finality.

12. I have considered the rival submissions. I have gone through the pleadings and I have scanned the evidence. The question which first arises seriously is whether the findings of the trial court that Ext. A1 rental agreement dated 16-11-1985 amounts to novation of Ext.B 1 agreement dated 16-9-1985 as contemplated by Section 62 of the Indian Contract Act is sustainable in law. According to the learned Sub Judge the binding force of Ext.B1 has come to an end and the said document has been substituted by Ext.A1 both in fact and also by operation of Section 62. To enter these findings the learned Sub Judge has relied on the judgment of the Bombay High Court in Andheri Bridge View Co.op. Hsg, Society Ltd. v. Krishnakant Anandrao Deo and Ors. : AIR1991 Bom129 . It is true that a proposition has been laid down by a learned single Judge of the Bombay High Court in that decision that where there are material or substantial changes which go to the root of an earlier agreement, the subsequent agreement entered into between the parties can be regarded as novation of the earlier agreement for the purposes of Section 62 of the Contract Act. But unlike the case on hand, in the case decided by the Bombay High Court, both the earlier agreement and the subsequent agreement were agreements for sale in respect of the very same property. The dispute before the Bombay High Court was whether the subsequent agreement can be treated as the first agreement itself with slight modification or whether it should be treated as a new agreement in substitution of the first agreement. The Supreme Court had occasion to pronounce on the principle of

novation statutorily recognised by Section 62 of the Indian Contract Act in *Lata Construction v. Rameshchandra Ramnikial Shah* : AIR 2000 SC380 of the judgment. The court held that one of the essential requirements of 'novation' as contemplated by Section 62 is that there should be complete substitution of a new contract in place of the old. It is in that situation that the original contract does not require not be performed. Substitution of a new contract in place of the old contract which would have the effect of rescinding or completely altering the terms of the original contract, has to be by agreement between the parties. The substituted contract should rescind or alter or extinguish the previous contract. The facts of the case were that there was an original contract between the parties that possession of a constructed flat will be given to the respondents by the appellants subject to certain terms and conditions within a stipulated time. Subsequently it was agreed between the parties that if a sum of Rs. 9,51,000/- is paid by the appellants to the respondents within a stipulated time the first agreement would come to an end. The contention of the appellants before the Supreme Court was that the second agreement amounted to novation of the first agreement and hence the first agreement was no longer enforceable. The Supreme Court noticed that the first agreement was for delivery of a flat and the second agreement was for payment of cash and the terms of these two agreements were so inconsistent and could not stand together. Therefore the second agreement cannot be said to be in substitution of the earlier agreement. Accordingly the plea of novation was turned down and it was held that the first agreement continues to operate. Here in the present case Ext.B1 dated 16-9-85 is an agreement for sale of the plaintiffs' one-third undivided interest in the plaint schedule property to defendants 1 and 2 for total consideration of Rs. 4 lakhs subject to the other terms and conditions incorporated in that agreement. The period stipulated for complete performance of this agreement is one year, i.e., by 15-9-1986. Ext.A1 is dated 16.11.1985, obviously before the expiry of the period stipulated for performance of Ext.B1. Ext.A1 is a rent chit executed by Johnny, appellant No. 2, the second defendant in favour of his brothers the respondent plaintiff and appellant No. 1, the first defendant. On the terms of Ext.A1, the two storied building which stands on the plaint schedule property is let out to appellant No. 2 by his brothers on a monthly rental of Rs. 3000/- for conduct of lodge business. The lease is not only of the

building but also of the equipments, fittings and implements which were already available in the building already under user for conduct of lodge by appellant No. 2. There is no reference in Ext.A1 to Ext.B1 and much less any reference to revocation of Ext. A1. Ext.A 1 certainly amounts to admission by parties regarding their co-ownership over the properties covered by Ext. A1. But then, so long as deed of transfer or release is not executed by the plaintiff pursuant to B1, the property will continue to be under co-ownership. I am however, unable to accept the conclusion of the learned Subordinate Judge that Ext.A 1 has been executed in substitution of Ext.B 1. Obviously these two agreements are different in character and are for different purposes. The partial identity of the subject matter of these agreements alone will not justify a conclusion that B1 agreement for sale has been substituted by Ext.A 1 agreement for lease of the building etc. situated upon the property agreed to be sold. The first question is therefore answered in favour of the appellants.

13. The next serious question which arises for consideration is whether the contention of the appellants that the balance sale consideration of Rs. 2 lakhs was paid to the plaintiff against Ext.B2 is acceptable. It is true that there is no express reference to Ext.B2 in Ext. A3 reply notice dated 15-6-1989 which was sent on behalf of the defendants. But it is certainly claimed in Ext.A3 that the balance sale consideration of Rs. 2 lakhs was also paid through mediators. Ext.A3 is referred to in the plaint and apart from a general statement that the statements in Ext.A3 are untrue I do not find any specific denial of the claim of the defendants in Ext.A3 that they have paid the balance sale consideration also through mediators. In paragraph 5 of the written statement it is contended that Ext.A 1 rent chit was executed by appellant No. 2 in favour of the plaintiff and appellant No. 1 so as to assure the plaintiff that he will get his due share of income from the property and to strengthen the possessory rights of the appellants over the lodge business being conducted in the building. It is contended in this paragraph that on 13-9-1986 the balance sale consideration of Rs. 2 lakhs was paid to the plaintiff at the house of appellant No. 2 in the presence of late Varghese and Sri. Markose, brothers of the parties and mother of the parties. It is also contended that till 13-9-1986 rent pursuant to Ext.A 1 was being paid and that after that date rent was not paid since the plaintiff ceased to have any interest over the property with effect

from that date. Apart from contending so, the originals of Ext.B 1 agreement as well as Ext.B2 receipt were produced along with the written statement itself. It is true that no counter claim has been raised by the appellants for recovery of the sum of Rs. 4 lakhs which they claim to have paid to the plaintiff towards balance sale consideration. In paragraph 14 a claim is made to the effect that in the event of the court finding the suit to be maintainable the defendants 1 and 2 are entitled for refund of the amount with interest and right to sue for the amount is expressly reserved as per that paragraph. Thus technically it was not necessary for the plaintiff to have raised any additional pleadings by way of replication. At the same time I feel that in the light of the specific production of Ext.B2 and the contentions raised in the written statement the plaintiff could have raised additional pleadings under Order 8 Rule 9 with leave of the court since the contention that the entire sale consideration had been paid had been raised with all seriousness and document relied on had been produced. The non-raising of additional pleadings to answer the contention based on Ext.B2 I feel is of some consequence. B2 is sought to be proved by examining DW-2. DW-2's name is mentioned in the written statement as one of the brothers in whose presence the balance sale consideration of Rs. 2 lakhs was paid. He is a professor in the Engineering College at Kothamangalam, the native place of the parties and he has clearly deposed in chief examination that in his presence and in the presence of other family members including mother, the balance amount was paid to the plaintiff at the Tarwad house which is occupied by appellant No. 2. It was suggested to him in cross examination that his version that he witnessed the payment of the balance sale consideration is false. The above suggestion was denied by him. He stated that the amount was paid at noon time. He stated also that the amount was not counted by him. Having appreciated the testimony of PW-11 do not think that anything has been brought out for discrediting DW-1's testimony at least in so far as it relates to his witnesses the payment of consideration of Rs. 2 lakhs. On reading through the judgment of the learned Sub Judge it is seen that he also has not concluded that DW-2 is not a credible witness. Instead, he becomes inclined not to rely on Ext.B2 in view of four circumstances. (1) PW-1 in cross examination denied his signature on Ex.B2. (2) DW-2 has made a crucial 'admission' during cross examination that he had not seen the plaintiff issuing Ext.B2

acknowledgment at the time when the balance sale consideration was said to be paid. (3) Had the balance consideration was said to be paid. (3) Had the balance consideration been paid on 13-9-86, Ext. A1 rent chit would have been cancelled or necessary endorsement about the payment would have been obtained on Ext.B 1. (4) After 13-9-86 despite payment of the full consideration the appellants defendants have not taken any steps for enforcement of Ext.B1 agreement. They set up Ext.B2 only in Ext. A3 reply to Ext.A2 lawyer notice. I shall deal with the so-called crucial admission in the evidence of DW-2 relied on by the learned Subordinate Judge to hold that Ext.B2 has not been issued and that payment has not been made as stated in Ext.B2. What was slated by DW-2 was as follows: 'It was during noon time that money was paid for the second time. At that time no exchange of documents was seen'. The evidence of DW-1 as noted was only that he did not notice any exchange of documents at the time when the balance consideration was paid. The learned Subordinate Judge was not correct in reading that evidence as admission to the effect that Ext.B2 acknowledgment was not issued by the plaintiff. Obviously the evidence that DW-2 did not notice any exchange of documents was given as answer to a question in cross examination, whether he had witnessed any exchange of documents. Though for the purpose of evidence Ext.B2 receipt will also come within the ambit of 'documents' in common parlance laymen concerned with disputes over agreement for sale of immovable property will contemplate only documents in relation to the property when they are asked about exchange of documents. Significantly, despite being aware of the existence of Ext.B2 and the reliance placed by the defendants on B2, plaintiff's chief examination is silent regarding Ext.B2. During cross examination PW-1 is confronted with Ext.B2 and what he states is that his purported signature on Ext.B2 and what he states is that his purported signature on Ext.B2 and what he states is that his purported signature on Ext.B2 has not been subscribed by him. His definite case regarding Ext.B2 is that his signature on Ext.B2 is not a genuine one but is a forged one. In cross examination of DW-1 also it is suggested to him that the plaintiff's apparent signature on B2 was not put by the plaintiff and that B2 was created fraudulently for defeating the plaintiff's interest over the property. Thus the contention raised specifically regarding Ext.B2 is that the signature is not genuine and therefore the document is not genuine. Ext.B2 as already stated was

produced along with the written statement and it is not even suggested in evidence that B2 has been fabricated by making use of any blank paper containing the plaintiffs signature which came to the hands of the appellants. I have already found that the court below was not right in thinking that DW-2's testimony contained an admission which was fatal to the appellants' case regarding Ext.B2. Moreover, it is fundamental that the admissions to be acted upon even when they are made by parties to the litigation should be clear and conclusive and there should not be any doubt or ambiguity - (See C. Koteswara Rao v. C. Subbarao : AIR 1971 SC1542). In the enquiry which I conducted under Order 32A I drew the attention of the plaintiff to the striking similarity between the plaintiff's admitted signatures and the disputed signature on Ext.B2. Later when I.A. 131/05 was taken up for consideration it was conceded by the learned senior counsel in the presence of the plaintiff himself that the signature on Ext.B2 is plaintiff's own signature. In the absence of any pleading or evidence to suggest that a blank paper signed by the plaintiff had reached the defendants' hand in some other connection and B2 had been fabricated by misusing such blank paper the only conclusion possible is that B2 was issued by the plaintiff against receipt of the balance consideration of Rs. 2 lakhs.

14. The other circumstances pointed out by the learned Subordinate Judge to hold that the defendants' claim of having paid the entire consideration is wrong is that the defendants did not take any action for specific enforcement of the agreement. The defendants have an answer that they did not insist on getting the agreement specifically enforced in view of the close relationship between the parties and more in view of the circumstance that the defendants were in absolute physical control and enjoyment of the plaint schedule property and the double storied building thereon and were able to collect the income from the lodge business conducted by them without being called upon to pay any share in the income to their brother the plaintiff. The above answer in my opinion is somewhat convincing. Yet another reason pointed out by the learned Sub Judge to repel the defendants' case regarding Ext.B is that even in Ext.A3 the existence of B2 is not referred to. True, existence is not specifically referred to in Ext.A3, but is certainly claimed in Ext.A3 that the balance sale consideration was paid on the date of Ext.B2 by cash. Thus reversing the finding of the learned Subordinate Judge regarding Ext.B2 I

hold that B2 was issued against payment of entire balance consideration of Rs. 2 lakhs by the appellants.

15. But just because the entire sale consideration which was payable as per Ext.B 1 has been paid off by the appellants as per Ext.B2 the plaintiff's co-ownership over the plaint schedule property does not come to an end. Similarly even if the claim of the appellants that with effect from the date of Ext.B2 they alone are being physical possession over the plaint schedule property and have been enjoying the plaint schedule property exclusively without paying any share in the income from the plaint schedule property to the plaintiff is assumed to be correct, then also the plaintiff's one-third share in the plaint schedule property as a co-sharer will not come to an end nor will that share become vested upon the appellants. When a co-sharer is found to be in possession of a property owned by him in common with his co-sharers the presumption which is raised that he holds possession in trust for the other co-sharers also. A presumption can never be drawn that a co-owner's possession is adverse to the interest of the other co-owners and is in denial of the title of the other co-owners. In order that the other co-owners lose their title to the possessing co-owners possession must be hostile to the interest of the other co-owners and should be in open of the title of the other co-owners during the whole length of the statutory period. Coming to this case it is seen from the written statement that apart from the contention that upon payment of the full consideration as per Ext.B2 the plaintiff's interest on the plaint schedule properties came to an end, there is no plea raised that plaintiff's rights have been lost to him by adverse possession and much less by ouster. This must be why the appellants did not even attempt to adduce any cogent evidence in support of plea of adverse possession or ouster. Under the above circumstances I do not find any reason for interfering with the preliminary decree for partition passed by the trial court.

16. Similarly I do not find any infirmity about the decision of the court below fixing a sum of Rs. 1,500/- as the plaintiff's due share from the income of the plaint schedule property every month. It is on the basis of the contract rent provided in Ext. A1 rental agreement that the court below came to such a decision. Ext.A1 is a registered rental agreement; The appellants themselves concede that Ext.A1 was in operation till the date of Ext.B2. I therefore confirm the decision of the court

below that the, appellants are liable to pay a sum of Rs. 1,500/- to the plaintiff as the plaintiff's share in the income from the properties.

17. It was submitted before me that the mortgager of the plaint schedule property in favour of the third defendants was terminated and that the third defendants has already vacated that part of the building situated on the plaint schedule property which was covered by the mortgage. At the same time in the absence of any document supporting the above submission I do not propose to interfere with the direction issued by the court below that as far as possible the building portion covered by the mortgage should be allotted under the final decree towards the share of the appellants/defendants 1 and 2.

18. The only question which survives for consideration is as to what if any is the modification necessary to the decree of the trial court in the light of the findings entered herein before that the entire sale consideration of Rs. 4 lakhs was paid by the appellants to the plaintiff. The argument of Mr. C.T. Joseph was that the above amount with interest at the rate of 18% per annum should be made payable as charge over the plaintiff's share over the property to the appellants. Mr. Joseph submitted that it was most inequitable on the part of the plaintiff have sued for partition after having received the entire sale consideration for his due share in the plaint schedule property. He submitted that though not in law at least in equity the appellants have absolute title and possession over the plaint schedule property in view of payment of the full consideration to the plaintiff. According to him if the sum of Rs. 4 lakhs paid by the appellants to the plaintiff had been invested at that time in another item of immovable property which was available at that time in Kothamangalam Town itself the present value of that property will be far more than the amount with interest at the rate of 18% per annum. Unless interest is allowed at that rate the amount to be received back by the appellant will be nominal since the appellants have been made liable to pay income share to the plaintiff at the rate of Rs. 1500/- p.m. Even though the submissions of Mr. C.T. Joseph in the above context were stiffly resisted by the senior counsel Mrs. Dandapani I am of the view that there is justification for allowing a reasonable rate of interest. The judgment of the Supreme Court, in *Gaziabad Development Authority v. Union of India* and *Anr.* : (2000)6SCC113 and in *Secretary, Irrigation Department,*

Government of Orissa and Anr. v. GC. Roy, : [1991]3SCR417 to a certain extent give support to the above view. Therefore even as I confirm the decrees passed by the court below that I am inclined to find that the appellants are entitled to recover the sum of Rs. 4 lakhs paid by them to the plaintiff with interest at the rate of 9% per annum from the date of suit charged on the share to be allotted to plaintiff in final decree proceedings. The amounts due from the appellants to the plaintiff towards share of income can be adjusted towards the above amount.

19. The result of the appeal therefore is as follows:

- (1) The preliminary decree for partition passed by the trial court is confirmed.
- (2) The decision of the trial court fixing the plaintiff's share of the income from the plaint schedule building at Rs. 1,500/- p.m. from the date of suit is also confirmed.
- (3) The direction of the court below that as far as possible the portion of the property mortgaged to defendant No. 3 shall be included in the share of defendants 1 and 2 and the further direction that if a physical division of the property is not practicable plaintiff shall be awarded ovaity the quantum to be fixed in final decree proceedings is also confirmed.
- (4) Reversing the finding of the court below regarding Ext.B2 it is found that the entire consideration of Rs. 4 lakhs as per Ext.B 1. was paid by the appellants to the first respondent plaintiff by 13/9/1996 and the appellants are entitled to recover the above mentioned amount with interest at the rate of 9% per annum from date of suit charged on the plaintiff's share in the plaint schedule property. The appellants are allowed to set off the amount payable by them to the plaintiff towards share of income to the plaintiff against the above amount of Rs. 4 lakhs and interest.

Appeal is allowed to the above limited extent. In the circumstances of the case the costs of appeal will be borne by the parties.