(2009) 08 DEL CK 0332

Delhi High Court

Case No: CS (OS) No. 1184 of 2005

Mr. Anil Madan		APPELLANT
	Vs	
Mr. R.K. Madan and Others		RESPONDENT

Date of Decision: Aug. 21, 2009

Acts Referred:

- Civil Procedure Code, 1908 (CPC) - Order 13 Rule 4, Order 20 Rule 12, Order 20 Rule 18, Order 23 Rule 1, Order 23 Rule 3

Hon'ble Judges: Anil Kumar, J

Bench: Single Bench

Advocate: Prem Kumar, Nilesh Sawhney and Girish Kumar, for the Appellant; Tarkeshwar Nath, P.K. Mishra and J.P.N. Shahi for Defendant No. 1, for the Respondent

Judgement

Anil Kumar, J.

This judgment shall dispose of plaintiff''s suit for partition of the suit property bearing Municipal No. 92-A (new Number 122), Sant Nagar, East of Kailash, New Delhi and for seeking a decree for a sum of Rs. 4,20,000/- in favour of plaintiff against defendant No. 1 and interest at 12% per annum from the date of payment till its realization.

2. The plaintiff, defendant No. 1 and Late Sh. Gulbir Madan were brothers. Sh. Gulbir Madan, the husband of defendant No. 2 and father of defendant Nos. 3 & 4 had died and therefore, his rights had devolved upon them.

3. In respect of the suit property bearing No. 92-A (new Number 122), Sant Nagar, East of Kailash, New Delhi measuring 207 sq. yards three separate sale deeds were executed by the vendor in favour of the three brothers. The sale deeds were in respect of 1/3rd share each. The property was purchased jointly and then a house was constructed out of the joint funds of the three brothers.

4. Disputes had arisen between the parties. On account of an arbitration agreement between the three brothers, an application for reference of disputes to arbitration

was filed. During the pendency of the arbitration application, a family settlement dated 31st October, 1996 was arrived at. The family settlement accepted that the property was jointly built and all the three brothers had 1/3rd share each. Pursuant to the family settlement between the plaintiff, defendant No. 1 and the widow and the children of Late Sh.Gulbir Madan, an application under Order XXIII Rule 1 and 3 of the CPC was filed in the Arbitration Proceedings, which was disposed of in terms of family settlement.

5. Under the family settlement, it was agreed that rent/damages for use and occupation of 1/3rd share of the suit property at the rate of Rs. 30,000/- per month for the period 1st November, 1996 to 30th April, 1998 was to be paid to the legal heirs of late Sh. Gulbir Madan, defendants No. 2 to 4, which was to be shared equally by the plaintiff and defendant No. 1. However, the amount of Rs. 5,40,000/- on account of rent/charges for use and occupation of 1/3rd share of Late Sh. Gulbir Madan was paid by plaintiff alone and the defendant No. 1 did not pay his share. Since the plaintiff had also paid the amount of Rs. 2,70,000/, which as per the family settlement had to be paid by defendant No. 1, the said amount is claimed by the plaintiff from defendant No. 1.

6. Since the plaintiff, defendant No. 1 and defendant Nos. 2 to 4 have 1/3rd share each in the property and as the property has not been physically partitioned, the present suit was filed. A preliminary decree dated 3rd January, 2006 was passed declaring the share of plaintiff, defendant No. 1 and defendant Nos. 2 to 4 as 1/3rd each and a local commissioner was appointed to suggest the mode of partition. The local commissioner filed his report opining that the suit property cannot be divided by metes and bounds. Objections to the report of the local commissioner were not filed. The Court had directed the parties to bid amongst themselves. On 8th March, 2007 on bidding between the parties for the property, the plaintiff gave a bid of Rs. 78 lakhs which was not objected to by defendant No. 1 as well as defendant Nos. 2 to 4 and, therefore, the bid of Rs. 78 lakhs of the plaintiff was accepted.

7. By order dated 8th March, 2007, while accepting the highest bid of the plaintiff of Rs. 78 lakhs, it was held that the house tax payable on the property shall be shared by the parties in proportion they had occupied the property. By the said order it was also held that the dispute raised by the plaintiff that defendant No. 1 was exclusively enjoying the property and, therefore, plaintiff would be entitled to mesne profits would also be adjudicated.

8. On 19th March, 2007 the defendant No. 1 had disclosed before the Court that though as per the plaintiff there was a demand for a sum of Rs. 8,51,727/- as arrears of house tax, only a sum of Rs. 7,51,727/- was due and payable upto 31st March, 2004 as arrears of house tax. By order dated 19th March, 2007, therefore, the Court had directed the Registrar General to issue a cheque in favour of Municipal Corporation of Delhi with respect to house tax payable on the suit property in the sum of Rs. 7,51,727/- from the amount which was deposited on the acceptance of

highest bid of the plaintiff.

9. Since the highest bid of the plaintiff for Rs. 78 lakhs was accepted and the plaintiff had deposited the amount deducting his share, he became entitled for possession of the entire property. On 29th May, 2007 the counsel for the defendant No. 1 had addressed the court and had stated that defendant No. 1 has not been able to locate an alternate place to carry out his business and requested for time to vacate the premises. The defendant No. 1 who was present also stated that he will deposit the keys of basement, ground floor and first floor within three days. Consequent thereto, the defendant No. 1 filed an application dated 30th May, 2007 with request to deposit keys of basement, ground and first floor and deposited three keys of basement, ground and first floor before the Registrar. The keys of the basement, ground floor and first floor were deposited by the defendant No. 1 on 1st June, 2007. On 6th July, 2007 the counsel for the defendant No. 1 had sought time to file an affidavit giving reasons as to why the second floor and the third floor of the property had not been vacated. Defendant No. 1 on 18th September, 2007 stated on oath that he had deposited two keys of second and third floors, however, those two keys enabled access to the entire property. The defendant No. 1 also deposed that he had no other set of keys similar to the keys deposited by him which were in his possession. He also stated that the property was vacant and no one else was in possession of the same.

10. Pursuant to defendant No. 1 depositing keys of the property, an amount of Rs. 10 lakhs out of the defendant No. 1.s share of Rs. 26 lakhs was released to him. The defendant No. 1 thereafter, filed an application being IA No. 13136/2007 seeking release of balance amount of Rs. 16 lakhs which was contested by the plaintiff. By order dated 26th February, 2008 it was held that the balance amount of Rs. 16 lakhs be not released to defendant No. 1 till preferential claim of the plaintiff with regard to mesne profits and claims towards house tax liability are determined in accordance with law.

11. In the circumstances, the disputes which are to be adjudicated are as to how much house tax is to be shared by the parties on account of their occupation of the premises and how much amount, if at all, the plaintiff is entitled to from the defendant No. 1 on account of mesne profits.

12. The plaintiff has categorically pleaded in para 12 and 15 of the plaint that since May, 2001 defendant No. 1 is in exclusive possession of the suit property and whenever plaintiff visited Delhi to use the suit property the defendant No. 1 did not allow him to do so. It was categorically asserted by the plaintiff that during April, 2005 he had come to India and visited the suit property on 8th April, 2005 when he was stopped by defendant No. 1 from entering into the suit property. The plaintiff approached the local police and also made a complaint against defendant No. 1, however, no action was taken by the police. A copy of the DD No. 26 dated 9th April, 2005 has also been filed by the plaintiff. The plaintiff, therefore, claimed damages

for illegal use and occupation of his share of the property at the rate of Rs. 30,000/- per month for three years from August, 2002 to July, 2005 amounting to Rs. 10,80,000/-. The plaintiff has also claimed damages after filing of the suit till the time the possession was given by the defendant No. 1 to the plaintiff.

13. In his written statement, in reply to para 12 and 15 of the plaint, the defendant No. 1 averred that the entire business material and record of the business were taken away by the plaintiff and nothing has remained in the suit property. The defendant No. 1 also denied the averment that he did not allow the plaintiff to visit the suit property whenever he visited Delhi. The defendant No. 1 also denied his liability to pay damages/mesne profits at the rate of Rs. 30,000/- per month for three years from August, 2002 to July, 2005 and thereafter.

14. In support of his contentions plaintiff filed his evidence on affidavit dated 5th May, 2006 which was exhibited as P1. The defendant No. 1 also filed his deposition on affidavit dated 6th September, 2006 which was exhibited as exhibit DW1/A. The plaintiff and the defendant No. 1 were cross examined and during the cross examination the plaintiff was confronted by the defendant No. 1 with documents which were balance sheet, profit and loss account which were exhibited as PW1/DI and PW1/DII and a photocopy of an unattested affidavit dated 31st March, 2005 which was also exhibited as PW1/DIII. The plaintiff also filed a copy of the complaint dated 8th April, 2005 filed by Sh.Ravi Madan, defendant No. 1 to Station House Officer, Police Chowki Garhi, Lajpat Nagar, New Delhi.

15. I have heard the learned Counsel for the parties in detail and have also perused the pleadings, deposition of plaintiff and defendant No. 1 on affidavit and the cross examination of the plaintiff and the defendant No. 1 recorded before the Local Commissioner. From the deposition on affidavit of plaintiff and his cross examination it can be inferred that plaintiff is settled in United Kingdom and he has visited India on many occasions. The plaintiff categorically deposed that defendant No. 1 is in exclusive possession of the entire suit property since May 2001. It is also deposed that M/s Sat Guru Fashion Pvt. Ltd was over taken by him in terms of family settlement as also M/s. Satguru Enterprises, a partnership concern. However, according to plaintiff, the company Satguru Fashion Pvt Ltd is dead and it has not done any business. He has also deposed that the company was not wound up as amounts of the said company are to be recovered from AEPC. The plaintiff categorically deposed that he had been filing returns mainly to collect earnest money deposited with AEPC. The plaintiff admitted his signatures on the affidavit dated 31st March, 2005 in the cross examination though initially he had not admitted and recognized his signatures on the said affidavit. In the said affidavit, exhibit PW.1/DIII, which is also signed by defendant No. 2 and defendant No. 1 and the plaintiff, it has been deposed that the premises has been lying vacant since July, 1996 when the deceased Mr. Gulbir Madan had filed a suit in the High Court for settlement of money disputes which had come up between the brothers/partners.

This is an affidavit which was allegedly filed with the Municipal Authorities for the purpose of House Tax. 16. Exhibit PW.1/D1 is the photocopy of the computation of the income of the accounting year ending on 31st March, 2003 and the balance sheet as on 31st March, 2003 and PW.1/D2 is the balance sheet and the profit and loss account as on 31st March, 2004 and PW.1/DW1 is a certificate by the officer/manager incharge of the computer system under the Banker''s Books Evidence Act in respect of the statement of current account of M/s. Satguru Enterprises.

17. From the balance sheets of M/s. Satguru Fashion Pvt. Ltd. which were produced by the defendant No. 1 and confronted with the plaintiff , it is revealed that there has not been any licensed capacity, installed capacity, actual production detail, no raw material consumed, no turnover, no earnings in foreign currency, no expenditure in foreign currency and purchase of goods for resale for the year ending on 31st March, 2004 and for the previous year. From PW.1/D1 it also transpires that no income tax was payable and there had been a loss of Rs. 9,600,03/- as no business was carried on by the company. From the copy of the current account of M/s.Satguru Enterprises which is exhibited as exhibit PW.1/DW1 for the period from 1st March, 1997 to 31st March, 1998 it cannot be inferred that the plaintiff was in possession of any portion of the suit property. The plea of the plaintiff is that defendant No. 1 is in exclusive possession since May, 2001.

18. The defendant No. 1 in his cross examination recorded on 11th September, 2006 deposed that basement is lying vacant and 1/2 of the ground floor which is owned by Ms. Poonam/defendant No. 2 is also lying vacant whereas the first floor, allegedly owned by the plaintiff, contains old goods belonging to plaintiff which are stored there. The deposition of the defendant No. 1 is contrary to his averment in the pleadings that the entire business material and record of the business were taken away by the plaintiff and nothing remains in the suit property. The relevant portion of the para 12 is extracted as under:- "para 12...with reference to para No. 12 of the plaint, the same is absolutely false, frivolous and hence denied. In this regard it is submitted that the entire business material including the record of the business, the record of the suit property like house tax records and books of accounts are lying in the suit property. In this regard it is submitted that the entire business material and record of the business the same are taken by the plaintiff. Nothing remains in the suit property so far as the plaintiff is concerned."

19. The plaintiff filed the photocopy of the complaint dated 8th April, 2005 addressed by defendant No. 1 to Station House Officer where he stated and admitted that till the year 2001 he used to work with the plaintiff. However, since 2001 he has severed his accounts with the plaintiff. He also categorically stated that he is exclusively running the business in the building for past 15 years and he admitted his exclusive possession of the suit property. The said document has not been exhibited, however, the defendant No. 1 in his cross examination recorded on

11th September, 1996 before the local commissioner admitted that he had filed the complaint dated 8th April, 2005. He also admitted that he filed other complaints dated 17th July, 2005 and 4th December, 2005 though the copies of the other complaints dated 17th July, 2005 and 4th December, 2005 were not produced by the defendant No. 1. He also admitted in his complaint dated 4th December, 2005 that he had stated that the plaintiff is a trespasser in the suit property.

20. The learned Counsel for the plaintiff has contended that even though the exhibit marks was not put on said documents, however, in view of evidence led by the parties, the document can be considered. Reliance for this can be placed on Shiv Ram Vs. Thakar Dutt, ; Ram Rattan (Dead) by Lrs. Vs. Bajrang Lal and Others, ; Santosh Kumar Gupta and Others Vs. Jay Prakash Agarwal, . From these judgments it is apparent that if a party fails to make an endorsement on a document of an exhibit mark under Order XIII Rule 4 of the Code of Civil Procedure, it does not preclude the consideration of the document, if the evidence has already been led about that document and it has been proved. The defendant No. 1 has admitted that he had filed the complaint to the police. He has also admitted the contents of the document and have not refuted them nor has he given any explanation about the said document and its contents. Thus there is ample evidence on record for the said document and it should be considered though an exhibit mark has not been put on the copy of the said complaint. In Shiv Ram (supra) it was held that omission to make the endorsement required under Order XIII Rule 4 of the CPC does not preclude the consideration of the document. The said provision contemplates that a document which has been admitted in evidence should bear an endorsement by the judge as to the number and title of the suit, the name of the person producing the document, the date on which it was produced and a statement of its having been so admitted. Admission of the document is not on account of endorsement made by the judge but on account of evidence already led in respect of the document. In Ram Rattan (supra) the Supreme Court had held that when a document is tendered in evidence and an objection is raised by the opposite party that the document is not admissible, it is obligatory upon the judge to decide the objection. However, endorsing an exhibit mark with a stipulation that the objections shall be decided later on is not proof of the document unless the objection is decided. Therefore, merely putting an exhibit mark is not the proof of the document. Conversely the absence of an exhibit mark on a document will not preclude the Court from considering the said document, if evidence in respect of the proof of the document has been led. Therefore, the document, copy of the complaint filed by the defendant No. 1 to the police can be considered despite no exhibit mark having been put on the said document.

21. The plaintiff was confronted with a photocopy of an affidavit dated 31st March, 2005 jointly executed by the plaintiff, defendant No. 1 and defendant No. 2 which is exhibited as PW.1/DIII. The plaintiff was therefore, re-examined on 21st August, 2006 and on his re-examination he deposed that defendant No. 1 was filing

complaints against him as he had been applying for collection of earnest money deposited from AEPC. He also deposed that PW.1/DIII was signed by him on 31st March, 2005 as on that date there was an outstanding of approximately Rs. 12 lakhs for which defendant No. 1 wanted the plaintiff to pay 50% which was refused by the plaintiff. The plaintiff also deposed categorically that defendant No. 1 was in possession of the suit premises and he had suggested the execution of the said affidavit to obtain the rebate from the MCD. In the cross examination it has not been suggested to the plaintiff that defendant No. 1 was not in possession of the entire suit property. The explanation given by the plaintiff for execution of the joint affidavit dated 31st March, 2005 has also not been refuted categorically except for a general suggestion that the deposition of the plaintiff is false. From the photocopy of the affidavit, exhibit PW1/DIII, also it cannot be inferred that defendant No. 1 was not in exclusive possession after May, 2001 because the affidavit only deposes that the premises was lying vacant. The premises can be in possession of defendant No. 1 and may still be lying vacant and, therefore, exhibit PW1/DIII does not help the defendant No. 1 in support of his contention that he was not in exclusive possession of the property since May, 2001. There is another aspect which if taken along with the deposition of the parties will reveal that defendant No. 1 has been in exclusive possession of the property since May, 2001 and he had been using it for his business as has been contended by the plaintiff. On 29th May, 2007 it was stated by the counsel for the defendant No. 1 that the defendant No. 1 has not been able to locate the alternate place to carry out the business and therefore, he requested for time to vacate the premises. If the premises was lying vacant as has been contended by the parties in their affidavit to the MCD dated 31st March, 2005, then there was no need for the counsel for the defendant No. 1 to take time on behalf of defendant No. 1 on 29th May, 2007 on the ground that the defendant No. 1 cannot shift from the premises in dispute unless alternate place of business is located by the defendant No. 1. The defendant No. 1 handed over the keys of basement, ground floor and first floor on 1st June, 2007 and of second and third floor on 18th September, 2007. If the plaintiff was also in occupation of the part of the premises then when and how the defendant No. 1 came in to exclusive possession of the entire property as the keys of basement, ground and first floor were deposited on 1st June, 2007 and second and third floor on 18th September, 2007, has not been explained by the defendant No. 1. While handing over and depositing the keys for the second and third floor of the premises the defendant No. 1, on 18th September, 2007, he had deposed that with those two keys the entire property could be accessed. Therefore, despite handing over the keys of basement, ground and first floor, the defendant No. 1 had access to the entire property and he had handed over the possession of the entire property by handing over the keys to the second and third floors. This is not the case of the defendant No. 1 that the plaintiff also had the duplicate keys and he could access the entire property. The deposition of the plaintiff that in 2005 he wanted to access the property but was not allowed by the defendant No. 1 entailing filing of complaint by him to the police on which no action

was taken by the police, has not been categorically refuted on behalf of defendant No. 1 in the cross examination of plaintiff.

22. The logical inference from the statement of the defendant No. 1 and the reasons detailed hereinabove is that the defendant No. 1 was in possession of entire property till 18th September, 2007. The defendant No. 1 had averred in the written statement that the plaintiff had removed all his material and articles from the property. Considering the preponderance of probability in the facts and circumstances, the inevitable inference is that defendant No. 1 had been in exclusive possession of the entire property since May, 2001 up to September, 2007.

23. If the defendant No. 1 had been in exclusive possession of the entire property, whether the plaintiff shall be entitled for mesne profits from defendant No. 1 and if so at what rate? In support of his contention the plaintiff has relied on Punjab National Bank Ltd. Lahore through Branch Manager, Qila Sheikhupura v. Seth Pars Ram and Ors. AIR 1940 Lah 350 and Govind Ram Vs. Ganesh Ram and Others, . The learned Counsel for the defendant has refuted the entitlement of the plaintiff to recover the mesne profits from the defendant No. 1 on the ground that the plaintiff and defendant No. 1 are co-owners and, therefore, mesne profits cannot be recovered from the defendant No. 1 and has relied on Muhammed Haneefa Rowther Vs. Sara Umma and Others, . The learned Counsel for the defendant No. 1 has also relied on Mohd. Amin and Others Vs. Vakil Ahmed and Others, and Ganapati Madhav Sawant (dead) through his Lrs. Vs. Dattur Madhav Sawant, .

24. In Govindram (Supra) a preliminary decree was passed in favour of plaintiff in a suit for partition. The plaintiff had alleged that he had been ousted from possession of the properties from which the defendant had been realizing the profits and, therefore, he had sought rendition of account in respect of them. An objection was raised by the defendant against whom a preliminary decree was passed that the claim of mesne profits could not be raised at the stage of preparation of the final decree. Relying on Babburu Basavayya and Others Vs. Babburu Guravayya and Another, and K. Venkata Subbaiya Vs. K. Veeraiyya and Another, it was held that the question of mesne profits is not a separate item for partition and it is included in the properties forming subject matter of partition and, therefore, the Court can accordingly conduct an enquiry into it at the stage of preparation of the final decree. It was also held that Order XX Rule 18 of the CPC does not prohibit the Court from issuing such directions at the stage of preparation of final decree and that it is open to the Court, in order to prevent multiplicity of litigation and to do complete justice and effect an equal division of all the common assets and properties among the parties, to direct an enquiry into the profits received or realized by one or some of them during the pendency of the suit and to award the others their proper share of such profits under its final decree. It was also held that the enquiry can be ordered either as a part of the preliminary decree itself or subsequently as the step towards the passing of the final decree and in either case the result of the enquiry has to be

incorporated in the final decree.

25. In Punjab National Bank (supra) a suit was instituted by the Bank for partition of its share in the suit property and for mense profits after rendition of accounts. The trial court held that the suit for rendition of accounts was not maintainable as in its view one co-owner cannot be sued to render accounts to another of the rents and profits of the joint property. Holding the view taken by the trial court to be erroneous the High Court had observed -

It is true that one co-owner is not accountable to another merely because he has had "excess of enjoyment" of the joint property. But if there has been an "ouster" by one of the other - his "exclusion" or "dispossession" - there is no doubt as to the liability of the person in possession to render account of the rents and profits of the share of the other. Both these propositions are well founded on principle. Every owner of jointly owned property is seized of it per my et per tout, he is interested in each and every part of the property, and it is an incidence of their co-ownership that they have a right to occupy and enjoy it. The mere circumstances, therefore that at any given time one of them is in actual possession of more than his pro rata share, would not render him accountable to the other for "excessive use and occupation." If however his possession or user of joint property is inconsistent with the title of the others, or it amounts to their exclusion or dispossession, such possession or user clearly becomes unlawful and he cannot be allowed to retain the rents and profits of the property in excess of his just share. Numerous instances will be found in the reported cases of the application of these principles.

26. The cases relied on by the defendant are apparently distinguishable. In Muhammed Haneefa Rowther (Supra) a preliminary decree was passed along with a direction to pay mesne profits by defendant No. 1 to the plaintiff and other defendants. A commissioner was deputed and no objections were filed against his report and a final decree was passed and in an appeal filed by the defendant the correctness of mesne profits was challenged on the ground that possession of a co-sharer is not a wrongful possession and, therefore, mesne profits as defined in Section 2(12) does not arise in such cases. The Court had held that the right to profits against a co-sharer in possession is not a right in law to mesne profits, but is a right to obtain and call for an account of profits, and that the expression "mense profits. used in the preliminary decree has to be understood only as profits and not in the sense of mesne profits as defined in Section 2(12) of CPC or Order XX Rule 12 CPC. In this case the plaintiff had not alleged ouster of his possession from the property by the defendant so as to make the possession of the defendant unlawful. However these are not the facts in the present case. In the present case the plaintiff has categorically alleged that he was prevented by the Defendant No. 1 from entering the suit premises and use it in any manner whereas the defendant No. 1 had been using it for his business till the possession was handed over on 18th September, 2007. A complaint to that effect was also lodged with the police by the

plaintiff. Therefore the present case is not one of "excess of enjoyment. of the joint property by the defendant No. 1 but is one of ouster of the plaintiff.s possession by defendant No. 1. In the circumstances complete ouster of the plaintiff and the possession of entire property by the Defendant No. 1 was clearly unlawful and plaintiff would be entitled to mesne profits.

27. In Ganpati Madhav Sawant (Supra) and Amin (Supra) it was held that in the absence of a specific prayer for enquiry into the mesne profits, mesne profits cannot be granted by the Courts. In contradistinction, in the present case the plaintiff has prayed that defendant No. 1 is liable to pay damages to the plaintiff for illegal use and occupation of his share and, therefore, defendant No. 1 is liable to pay charges/damages/mesne profits for illegal use and occupation of his share of property at Rs. 30,000/- per month for three years prior to filing of the suit from August, 2002 to July, 2005. Therefore, it cannot be inferred that there is no prayer for claiming mesne profits/damages for illegal use and occupation of the share of the property of the plaintiff. Not only that the plea has been taken by the plaintiff, but the parties have led evidence on the said plea of the plaintiff. In the circumstances, the plaintiff is entitled for damages/mesne profits for use of the share of the property of the plaintiff by defendant No. 1 since May, 2001 when defendant No. 1 came in possession of the entire property as has been held earlier. However, since the suit claiming damages/mesne profits was filed in August, 2005, therefore, the plaintiff shall be entitled for damages/mesne profits from August, 2002 till the possession was given by the defendant No. 1 to the plaintiff which was in September, 2007 when the keys of the property were handed over by defendant No. 1 in the Court which were later on given to the plaintiff.

28. The plaintiff has claimed damages/mesne profits at the rate of Rs. 30,000/- per month from August, 2002 to July, 2005 when the suit was filed and from August, 2005 to September, 2007 for 26 months at Rs. 40,000/- per month. Perusal of the deposition of the plaintiff, however, reveals that no evidence has been led to prove that the property could fetch a rental of Rs. 1,20,000/- per month so that the share of the plaintiff would be Rs. 40,000/- per month. Rather in the cross examination on 11th September, 2006 the plaintiff admitted that he cannot say whether the suit property can fetch a minimum rental of Rs. 1,20,000/- per month so as to entitle plaintiff to recover damages/mesne profits at the rate of Rs. 40,000/- per month. However, this has not been disputed that plaintiff and defendant No. 1 paid the share of defendant Nos. 2 to 4, 1/3rd share, at the rate of Rs. 30,000/- per month. Therefore, the claim of the plaintiff to claim damages/mesne profits at the rate of Rs. 30,000/- per month cannot be rejected in the present facts and circumstances. Therefore, it is held that the plaintiff shall be entitled for damages/mesne profits from the defendant No. 1 at the rate of Rs. 30,000/- per month from August, 2002 up to September, 2007 (sixty two months) when the possession of the premises was given to the plaintiff. Therefore, plaintiff shall be entitled for a sum of Rs. 18,60,000/- (Eighteen lakhs sixty thousand) from the defendant No. 1 and decree for the

recovery of the said amount is passed in favor of plaintiff and against the defendant No. 1.

29. By order dated 8th March, 2007 it was held that the house tax liability shall be shared by the parties in the proportion they had occupied the premises. Since it is held that defendant No. 1 had been in possession of the property from May, 2001 till September, 2007 so the liability of the entire house tax for the said period will be of the defendant No. 1. An amount of Rs. 7,51,727/- as house tax was paid pursuant to the order dated 19th March, 2007. The defendant No. 1 had alleged that only said amount was payable as House Tax. The plaintiff has deposed in his cross examination to the question put on behalf of the defendant No. 1 that an amount of Rs. 1 lakh was paid as the arrears of property tax for the period 1996-2000 and thereafter Rs. 9,000/- to- 10,000/- approximately was paid by him, however, no receipts have been produced by the plaintiff to show that the amount was paid by him. In the deposition on affidavit dated 5th May, 2006 it was deposed by plaintiff that the receipt No. 216073 had been annexed with the affidavit as Annexure A. However, the copy of the receipt was not annexed with the affidavit nor the receipt has been filed by the plaintiff. Similarly no receipt has been filed for the amount of Rs. 9,000/- or 10,000/- allegedly paid by the plaintiff as house tax from 1996. In the cross examination the plaintiff stated it is not possible for him to recollect as to when the last payment was made by him and he also admitted that he was not carrying the original receipt with him. In the cross examination the plaintiff though stated that the house tax which was allegedly deposited by him was for 1996 till 2000, however, it has not been established that the plaintiff deposited any amount as house tax. In the circumstances, it can be safely inferred that Rs. 7,51,727/- is the house tax from 1996 till March, 2007 when the said amount was deposited. It has not been established by either of the parties as to what was the house tax till 2001. In order to ascertain as to what is the liability of plaintiff and defendant No. 1, the amount of Rs. 7,51,727/- can be taken as house tax from 1996 up to 2007, i.e for eleven years. The yearly house tax therefore, will be Rs. 68,339/- per annum. Though the defendant No. 1 has alleged that he also paid the house tax, however, he has also not established as to how much house tax was paid by him and when. In the circumstances, it is held that no amount was paid by the defendant No. 1 as house tax for the said period. This Court has held that the liability of the house tax will be computed on the basis of the respective portions in the possession of the parties. It has been held that the defendant No. 1 was in exclusive possession of the property from May, 2001 up to September, 2007. Therefore for seven years the entire liability of the house tax will be of the defendant No. 1. The liability of six years will be Rs. 4,10,034/- which will be the liability of defendant No. 1 in the facts and circumstances. The liability of the house tax during the period 1996-2000 amounting to Rs. 3,41,693/- is to be shared equally by the parties, plaintiff, defendant No. 1 and defendants No. 2 to 4. The house tax for the period 2001 to 2007 will be Rs. 4,10,034/- which amount has been paid from the money which was lying in the

share of the defendant No. 1. Therefore the defendant No. 1 shall not be entitled to claim any amount from this amount of Rs. 4,10,034/-. However the amount of house tax of Rs. 3,41,695/- was paid by the defendant No. 1 on behalf of the plaintiff and defendants No. 2 to 4, therefore, the defendant No. 1 shall be entitled to claim Rs. 1,13,898/- each from the plaintiff and the defendant No. 2 to 4.

30. The plaintiff has also claimed an amount of Rs. 2,70,000/- which was paid by the plaintiff to the defendants No. 2 to 4 under the family settlement dated 31st October, 1996. The plaintiff has categorically stated on oath that Rs. 30,000/- per month was payable to defendants No. 2 to 4 by the plaintiff and the defendant No. 1 for 18 months. Half of the said amount was payable by the defendant No. 1 which was not paid by him and which was paid by the plaintiff to the defendants No. 2 to 4. The plaintiff has categorically deposed about it and the said fact has not been refuted by the defendant no1 or on his behalf. Neither in the cross examination has it been put to him that the said amount was not paid by the plaintiff nor has the defendant No. 1 deposed in his statement that the said amount was not paid by the plaintiff. Therefore, the plaintiff is also entitled for the said amount from the defendant No. 1 and therefore a decree for recovery of Rs. 2,70,000/- is also passed in favor of the plaintiff and against the defendant no1.

31. Therefore, the plaintiff is entitled for a sum of Rs. 18,60,000/- as arrears of charges for occupation of share of the plaintiff in the property by the defendant No. 1 and Rs. 2,70,000/- as the amount which was paid by the plaintiff to the defendants No. 2 to 4 on behalf of the defendant No. 1 for the share of those defendants in the property. The arrears of house tax amounting to Rs. 7,51,727/- has been paid out of the share of the defendant No. 1 lying deposited with the court. The defendant No. 1 is entitled to recover Rs. 1,13,898/- each from the plaintiff and the defendant No. 2 to 4 on account of house tax which was paid out of the money of the share of the defendant No. 1 on the sale of his share of property. Therefore, the plaintiff is entitled to recover an amount of Rs. 20,16,102/- (18,60,000+2,70,000-113898) from the defendant No. 1. Therefore, a decree for the recovery of the said amount is passed in favor of the plaintiff and against the defendant No. 1. A decree for recover of Rs. 1,13,898/- is passed in favor of defendant No. 1 and against the defendants No. 2 to 4. The amounts became due from the defendant No. 1 from different dates during the present suit for partition. However, the possession was given by the defendant No. 1 in September, 2007, therefore the defendant No. 1 also became liable to pay pendent lite interest on the said amount. In the circumstances pendent lite and future simple interest at @ 6% is also awarded to the plaintiff against the defendant No. 1 from 1st October, 2007 till realization of the said amount.

32. An amount of Rs. 26,00,000/- as the share of the defendant No. 1 on purchase of entire property by the plaintiff was deposited. An amount of Rs. 10,00,000/- was paid to the defendant No. 1 and an amount of Rs. 7,51,727/- was paid as arrears of house tax. The balance amounting to Rs. 8,48,273/- with interest is lying deposited in the

Court. The plaintiff has been awarded an amount of Rs. 20,16,102/- with simple interest @ 6% per annum from 1st October, 2007 till the realization of the decreetal amount. The amount which is lying in share of the defendant No. 1 is less than the amount which the plaintiff in entitled to recover from the defendant No. 1. Therefore, the amount lying in the share of the defendant No. 1, i.e. Rs. 8,48,273/- with interest accrued thereon be paid to the plaintiff. The plaintiff shall be entitled to recover the balance amount from the defendant No. 1. The defendant No. 1 is also entitled to recover an amount of Rs. 1,13,898/- from the defendants No. 2 to 4. A final decree for partition in terms hereof is passed. Considering the facts and circumstances, the parties are however, left to bear their own costs. Final decree in terms hereof be prepared.