

* IN THE HIGH COURT OF DELHI AT NEW DELHI

% *Judgment Reserved on: 04.3.2010*

Judgment Delivered on: 09.3.2010

+ **CS(OS) No.836/2006, I.A.Nos.5693/2006 & 1241/2009**

BALKISHAN YADAV Plaintiff
Through: Mr.S.P.Kalra, Sr. Advocate with Mr.B.S.
Sharma, Advocate.

Versus

1-SHRI RANBIR YADAV
2-STATE BANK OF INDIA Defendants
Through: Mr.H.L.Narula, Advocate for defendant
no.1.
Mr. S.L. Gupta, Advocate for defendant
no.2.

CORAM:
HON'BLE MS. JUSTICE INDERMEET KAUR

1. Whether the Reporters of local papers may be allowed to see the judgment?
2. To be referred to the Reporter or not? Yes
3. Whether the judgment should be reported in the Digest? Yes

INDERMEET KAUR, J.

1. Plaintiff Balkishan Yadav and defendant no.1 Ranbir Yadav are real brothers; they are born of their deceased father Umrao Singh. They have two other brothers namely Dharam Pal and Randhir Singh, they are not parties to the present suit.

2. Property bearing no.55, Jwalaheri, PaschimVihar, New Delhi was owned by their deceased father Umrao Singh. He died intestate on 08.4.1996. The aforestated property, thus, devolved in equal shares upon all the four brothers including the plaintiff and the defendant no.1.

3. The said property had been let out to defendant no.2 by the deceased Umrao Singh in his life time in the year 1980. Defendant no.2 continues to be in occupation of the said property as a tenant. After the death of Umrao Singh, plaintiff authorized his brother defendant no.1 vide special power of attorney to collect rent of the plaintiff's share from defendant no.2 and this arrangement continued for several years.

4. In the year 1996, defendant no.1 was not faithful in discharging his obligations, plaintiff revoked the power of attorney. A family settlement was arrived at between the brothers. It was agreed that each of the four brothers would be entitled to 1/4th share of the rent payable by the defendant no.2 and intimation to the said effect dated 3.01.1997 was sent to defendant no.2. Defendant no.2 was requested by defendant no.1 to apportion the total rent in four shares and credit it in the account of the plaintiff to the extent of his 1/4th share. Similarly 1/4th share of the total rent payable was apportioned

as share of defendant no.1 and the balance fell to the share of the other two brothers.

5. Defendant no.2 started crediting the plaintiff's saving bank account no.28893 with 1/4th of the rent which had fallen due as his share. This arrangement continued from February 1997 up to June 1998. Thereafter defendant no.2 discontinued paying rent to the plaintiff. In spite of requests, defendant no.2 did not pay heed to the same.

6. CS(OS)No.933/2001 was filed by plaintiff against defendant nos.1 and 2 for the recovery of his unpaid rent. On 17.1.2002 defendant no.2 was restrained from releasing 1/4th of the total rent i.e. the share of the plaintiff to the defendant no.1. An application for release of the rent was filed by the plaintiff which was rejected vide order dated 28.2.2002. In appeal i.e. FAO(OS) No.132/2003 vide order dated 4.8.2004, defendant no.2 was directed to deposit the 1/4th share of the rent of the plaintiff in his account. Appeal was disposed of.

7. Parties had arrived at settlement and on 1.2.2005 the aforestated suit CS(OS)No.933/2001 was dismissed as withdrawn having been compromised. On 14.4.2005 in terms of the aforestated compromise defendant no.1 wrote a letter to defendant no.2 asking him to pay 1/4th share of the plaintiff to

him. However, defendant no.2 did not credit account of the plaintiff with his share of 1/4th of the rent. A request letter was sent to defendant no.2. In its reply, dated 30.11.2005 defendant no.2 stated that he had paid the share of the plaintiff's 1/4th rent to defendant no.1. Legal notice dated 30.12.2005 was sent by the plaintiff to both the defendants demanding the share of his rent. However, neither of the defendants paid any heed to this legal notice.

8. That the rent of the aforestated property had been enhanced from time to time by defendant no.2. From June 2001 to 1.2.2005 rent was being paid @ Rs.80,000/- per month; from February,2005 to 31.3.2006 rent was being paid @ Rs.1,00,000/- per month. Defendants are thus liable to pay Rs.20,18,481/- towards his 1/4th share of the rent which comprises as follows:-

- | | |
|--|----------------------|
| i. Difference of rent for the period February 1997 to June 1998 Rs.19,583.75-13, | |
| 522=6,061.75 & 17 months | Rs.1,03,049.75 |
| ii. Rent in arrears from July, 98 May 2001 @ Rs.19583.75 x 35 | |
| | Rs.6.85,431.25 |
| Total | <hr/> Rs.7,88,481.00 |
| iii. Rent from June 2001 to 1.2.05 @ Rs.20,000/- per month i.e. 44 months | |
| | Rs.8,80,000.00 |
| iv. Rent from Feb. 2005 to 31.3.06 | |

i.e. 14 months @ Rs.25,000/-	Rs.3,50,000.00
Grand total	Rs.20,18,481.00

Decree for the aforestated amount has been claimed.

9. In the written statement filed by defendant no.1 the preliminary objection is that the suit is barred under Order 23 Rule 1 CPC as also under the provisions of Order 2 Rule 2 of the Code of Civil Procedure (hereinafter referred to as the CPC). It is contended that the earlier suit i.e. CS(OS) No.933/2001 between the same parties was withdrawn on 01.2.2005 on an application under Order 23 Rule 1 CPC. Present suit in respect of the same subject matter and on the same cause of action is thus not maintainable. It is stated that the plaintiff in the earlier suit had admitted that in terms of a decree dated 19.5.1971 the defendant no.1 is the exclusive owner of the suit property i.e. property bearing no.55, Jwalaheri, Paschim Vihar, New Delhi. This is an admission by the plaintiff himself which he is not permitted to withdraw.

10. Plaintiff has no right, title or interest in the property. The letter dated 14.4.2005 purported to have been signed by defendant no.1 is a forged and fabricated document; no such letter had been written by him. Plaintiff's claim is even

otherwise barred by estoppel in view of the fact that he had withdrawn the earlier suit CS(OS) No.933/2001 on 01.2.2005. On 10.5.2005 a gift deed was executed by defendant no.2 in favour of the plaintiff relating to 1/4th share in the land measuring 29 kannal 9 marla situated at Siwana Muaza Jautolla, Tehsil Farookh Nagar, Distt Guargaon, on a payment of stamp duty of Rs.36,000/- which fact has been concealed by the plaintiff. Suit is even otherwise barred by limitation as the claim for rent is from July 1998 whereas the present suit had been filed on 01.5.2006 i.e. after almost eight years. No original document has also been filed by the plaintiff. The forged documents relied upon by the plaintiff prima facie makes out a case of perjury for which he is liable to be prosecuted under Section 340 Cr.P.C.

11. On merits, it has been reiterated that on 19.5.1971 in Suit No. 184/1971 a compromise decree was passed and the property in dispute i.e. the property bearing no. 55, Jwalaheri, Paschim Vihar, New Delhi had fallen to the share of defendant no.1 who has thereafter raised additional constructions over the said property at the cost and expenses of defendant no.1. Plaintiff has no right or claim over the said property. It is denied that

the plaintiff has any claim in the rent accruing from the said property.

12. Defendant no.2 has filed a separate written statement. Preliminary objection on the bar of the present suit in view of the provisions of Order 2 Rule 2 CPC has been taken. It is stated that the earlier suit i.e. CS(OS) No.933/2001 had been withdrawn on 01.2.2004 unconditionally without seeking leave to file a fresh suit and as such the present suit is not maintainable. Proper court fee has not been paid. Defendant no.2 is a tenant of the premises and up to date rent has been paid. Defendant no.2 was earlier a tenant with late Umrao Singh and thereafter after his death defendant no.1 being one of his legal heirs started dealing with the defendant no.2 and rent was being paid to him to which the plaintiff had never objected. No action is maintainable against the answering defendant. It is stated that defendant no.2 had not recognized the plaintiff as the owner of the 1/4th share in the property; the amount of Rs.15,520/- was transferred by the answering defendant from the account of defendant no.1 to the account of the plaintiff on the express instructions of defendant no.1 being his banker and not as a tenant. In June 1998, defendant no.1 had withdrawn these instructions. As such defendant no.2 did not transfer any

amount to the plaintiff from the account of defendant no.1. It is denied that the answering defendant is under any obligation to pay any amount to the plaintiff. It is stated that the defendant no.1 had filed two suits i.e CS(OS) No.1404/2001 and 1405/2001 against defendant no.2 for possession and mesne profit; plaintiff had moved an application for impleading himself as a party which had been dismissed by trial court as also by the appellate court.

13. On 01.2.2005, the plaintiff had unconditionally withdrawn his suit CS(OS) No.933/2001. It is submitted that the defendant no.2 does not have any knowledge of any compromise arrived at between the plaintiff and the defendant no.1. At the relevant time when the rent payable was Rs.78,335/-, defendant no.2 was crediting a sum of Rs.13,522/- every month in the account of the plaintiff as per the instructions of defendant no.1 which is 1/4th of the total rent. It was from the account of defendant no.1 that the amount was being transferred to the account of the plaintiff. Thereafter on instructions from defendant no.1 to the contrary defendant no.2 stopped depositing this amount in the account of the plaintiff. Suit of the plaintiff is liable to be dismissed.

14. Replication has been filed by the plaintiff to the written statements of both the contesting defendants reiterating the

averments made in the plaint and denying the submissions and defence set up by the defendants.

15. On 10.9.2007 on the pleadings of the parties, the following issues were framed:-

1. Whether suit is barred under Order 23 Rule 1(4)(b) and Order 7 Rule 11 CPC as per preliminary objection in WS of D-1? OPD-1
2. Whether present suit is barred under Order 2 Rule 2 CPC as per preliminary objection of D-1? OPD-1
3. Whether suit is not maintainable in its present form as raised in preliminary objection in the WS? OPD
4. Whether plaintiff is entitled to 1/4th share in the rent payable by D-2? OPP
5. Whether letter dated 14.4.05 is a forged and fabricated document? If so, its effect? OPD-1
6. Whether the suit is within the period of limitation? OPP
7. Whether defendant no.1 was the owner of suit property and entitled to receive full rent by virtue of being the owner as alleged in the written statement? OPD-1
8. Whether defendant no.2 is not liable to pay any share in the rent of the suit premises to the plaintiff? OPD-2

9. To what amount is the plaintiff entitled and for what period? OPP

10. Whether plaintiff is entitled to any interest as claimed in the suit? OPP

11. Whether plaintiff is entitled to mandatory injunction against the defendants as prayed? OPP

12. Relief.

16. The plaintiff in support of his case has examined one witness Mr.Balkishan Yadav i.e the plaintiff himself. In defence two witnesses have been examined. Defendant no.1 has come into witness box as DW-1. Defendant no.2 has also produced one witness Ravi Prakash Mahor, Branch Manager, of defendant no.2, as DW-2.

17. Arguments have been heard. Record has been perused. Issue-wise findings are as follows:-

18. ISSUE NO.1:-

A preliminary objection has been raised that the suit is barred under Order XXIII Rule 1 (4)(b) of the CPC as the earlier suit i.e. CS(OS) No.933/2001 titled as Bal Kishan Yadav Vs. Ranbir Yadav & Ors. which had been filed between the same parties had been withdrawn on 01.2.2005 unconditionally.

Plaintiff is precluded from filing the present suit in respect of the same subject matter.

19. Admittedly CS(OS) No.933/2001 had been filed which was a suit for recovery and mandatory injunction in which the plaintiff had made his claim for recovery of rent from February 1997 to May 2001 for Rs.7,88,481/-. The present suit has been filed claiming recovery of rent which for a period beginning from June 2001 to 31.3.2006; the accrual of rent for each month of the tenancy has given rise to a fresh cause of action. The period beginning June 2001 was admittedly not covered by the relief prayed in CS(OS) No.933/2001. As such the withdrawal of the said suit unconditionally on 1.2.2005 would not bar the plaintiff from making such a claim in the present suit which claim is based on a distinct and a separate cause of action. The bar of Order XXIII Rule 1 (4)(b) CPC is not attracted. "Subject matter" in the present suit is distinct from the subject matter of the earlier suit.

20. Issue no.1 is decided in favour of the plaintiff and against the defendant.

21. ISSUE NO.2.

The onus to discharge this issue is on the defendant.

Order II Rule 2 CPC prescribes that the suit shall include the
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whole of the claim which the plaintiff is entitled to make in respect of a cause of action; but the plaintiff may relinquish any portion of his claim in order to bring his claim within the pecuniary jurisdiction of this Court. The cause of action of the plaintiff in the earlier suit was the accrual of the rent for the period up to May 2001. The cause of action in the present suit is the accrual of rent up to 31.3.2006. The causes of action are distinct and different; plaintiff could not have prayed for a relief in respect of his share for the rent for the month of June 2001 onwards when he had filed the earlier suit. As such a plain reading of Order II Rule 2 shows that the entire claim in the present suit cannot be barred under this provision of law.

22. The object of this rule is based on the principle that the defendant should not be vexed twice for one or the same cause of action. Causes of action not being the same in the first suit and the subsequent suit, it is clear that this bar is not attracted.

23. Issue no.2 is decided in favour of the plaintiff and against the defendant.

24. ISSUE NO.6

The plaintiff has filed this suit for recovery of Rs.20,18,681/- which are arrears of rent which include different amounts and these amounts are claimed from February 1997 to

31.3.2006. Present suit has been filed on 11.5.2006. Under Article 52 of the Indian Limitation Act 1963 right to sue on a claim of arrears of rent would be 3 years to be computed from the date when the last amount became due which in this case would be three years preceding 11.5.2006. The entire suit of the plaintiff is not barred; he is entitled to make a claim from 11.5.2003 onwards.

25. Issue no.6 is decided accordingly.

26. ISSUE NOS.4,5,7 & 9

All the aforestated issues will be decided by a common discussion. The case of the plaintiff is that he is entitled to 1/4th share of the rent which is payable by defendant no.2 of the property which is under his lease. The total rent payable as on June 2001 to February 2005 is Rs.80,000/-; 25% share of the plaintiff is Rs.20,000/- which amount is payable from June 2001 to 1.2.2005. Thereafter the rent had been enhanced to Rs.1 lac per month; share of the plaintiff would be Rs.25,000/- per month. Further case of the plaintiff is that in terms of the partition between the brothers only the constructed portion of the suit property had fallen to the share of defendant no.1. The open verandah/ground on which construction had been raised by their father subsequently and which portion had been given on

lease to defendant no.2 was the joint property of all the brothers on the basis of which this 1/4th share in the rent has been claimed by the plaintiff. Defendant no. 1 is not the owner of this suit property. Apart from other documents the plaintiff has relied upon a family settlement/agreement dated 03.01.1997 signed by all the members whereby they had agreed to share the rental accruing from defendant no.2 in four equal shares. Further as per letter dated 14.4.2005 addressed by defendant no.1 to defendant no.2; defendant no.1 in terms of the compromise between the brothers had informed defendant no.2 that 1/4th share of the rent from the property leased out to defendant no.2 would fall to the share of the plaintiff Balkishan and the said rent be released to him on a regular basis.

27. PW-1 has on oath reiterated the aforementioned averments. He has deposed that the plaintiff and the defendant no.1 are real brothers; apart from them they have two other brothers Dharam Pal and Randhir Singh. Property bearing no. no.55, Jwalaheri, PaschimVihar, New Delhi i.e the suit property was owned and belonged to Umrao Singh their deceased father. Umrao Singh died on 08.4.1996. He had died intestate. This property amongst other properties devolved upon all the four brothers in equal shares. In suit no.184/1971 vide decree dated 19.5.1971

Ex. PW1/DX1 only the built up portion of this property bearing no. no.55, Jwalaheri, Paschim Vihar, New Delhi had fallen to the share of defendant no.1. Open ground and the unbuilt portion of the said property was constructed later on in 1980 by their deceased father and let out to defendant no.2 who till date is the lessee in the said property. After the death of their father plaintiff had authorized defendant no.1 in terms of a Special Power of Attorney to collect rent of the share of the plaintiff as well and this arrangement continued for several years up to 1996. Thereafter defendant no.1 did not discharge his obligation faithfully and the rental share of the plaintiff was not paid to him. On 3.1.1997 a communication duly signed by defendant no. 1 had been sent to defendant no.2 requesting him to apportion the total rent payable in four different shares i.e. in the names of the four brothers. This document is admitted by the defendant no. 1. He has admitted that this letter was sent by him to defendant no. 2. Another document of even date i.e. a family settlement/agreement Ex. PW1/1 dated 03.01.1997 duly signed by all the four brothers has also been proved; as per this settlement parties i.e. the four brothers had inter-se agreed that they being the joint owners of property no. 55 and 56 situated at Jwala Heri, inherited by them from their father and mother and

which properties are under the tenancy of the State Bank of India and State Bank of Bikaner & Jaipur and the LIC; the rents/profits will be shared by all the parties equally. PW-1 has further deposed that thereafter defendant no.2 continued to credit the account of the plaintiff with his 1/4th share; this was in his bank account no.28893. This arrangement continued from February, 1997 up to June, 1998. Thereafter defendant no.2 stopped paying any rent to the plaintiff. Defendant no.2 was legally obliged to pay this rent to the plaintiff. PW-1 has further deposed that due to this non-payment of rent CS(OS) no.933/2001 was filed by the plaintiff impleading the present defendants as parties in the said suit. On 17.1.2002 defendant no.2 was restrained from releasing 1/4th of the total rent to defendant no.1; the said order is Ex.PW-1/2. An application for release of this rent by the plaintiff was filed which was dismissed on 28.2.2002; in appeal being FAO No.132/2003 this request of the plaintiff was accepted by the Division Bench in terms of the order dated 4.8.2004 which is Ex.PW-1/3. Rights of the plaintiff to receive 1/4th share out of the total rent was recognized. Eventually a compromise settlement was arrived at between the parties whereby the defendant no.1 agreed that 1/4th share of the rental payable by defendant no.2 would fall to

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the share of the plaintiff. In terms of this compromise CS(O)S No.933/2001 was withdrawn by the plaintiff on 1.2.2005 vide Ex.PW-1/5. Letter dated 14.4.2005 Ex.P-1 was a communication sent by defendant no.1 to defendant no.2 informing defendant no.2 to release the 1/4th share of the rent to the plaintiff in terms of the settlement and continue to do regularly.

28. In his cross-examination PW-1 had denied that the earlier suit withdrawn by him is based on the same cause of action as the present suit; it is stated that the rent in the present suit has been claimed for different periods of time. He has reiterated that in terms of the decree Ex.PW-1/DX-1 only the built up portion of the property bearing no.55, Jwalaheri, PaschimVihar, New Delhi had fallen to the share of defendant no.1. It is further reiterated that the open ground in front of this property had been built up by their father subsequently which was the subject matter of the lease which had been executed with defendant no.2. The site plan appended to Ex.PW-1/DX-1 has been proved as Ex.PW-1/DX-2. PW-1 had admitted that the stamp paper on which the agreement/family settlement between the parties was recorded on 3.1.1997 was in his possession and copies of the same were in possession of the other brothers. He has denied the suggestion Ex. PW-1/1 is a fabricated document.

He has admitted that he has two copies of Ex. P-1 (letter dated 14.04.2005) and one copy was given to the bank. He has admitted that after the death of his father there was no direct agreement between him and the bank and the agreement was made through defendant no.1 who acted as his attorney. This power of attorney was cancelled in 1996 vide cancellation deed Ex.PW-1/DY. He has further stated that till 1986 i.e during the life time of their father, house tax for the said property was being paid by their father and there was no dispute till that time between the brothers. He denied the suggestion that the letter dated 14.4.2005 is a forged or a fabricated document.

29. Defendant no.1 has entered the witness box as DW-1. He has controverted the stand as set up by the plaintiff. On oath he has stated that the agreement dated 3.1.1997 (Ex.PW-1/1) is a forged and fabricated document and no such settlement was arrived at between the brothers and nor was it acted upon. The orders dated 17.1.2002 Ex.PW-1/2 and order dated 4.8.2004 Ex.PW-1/3 were passed on interim applications which have come to an end after the suit and the appeal had been withdrawn. Ex.P-1 which is the letter dated 14.4.2005 is forged and fabricated. DW-1 has deposed that he did not write any such letter. He has denied that he had been given any power of

attorney by the plaintiff for letting out the premises to the bank; the plaintiff had played a fraud upon the Court by manipulating and fabricating Ex.PW-1/1 and Ex.P-1.

30. In his cross-examination, he had deposed that he had given the suit property on rent in 1983 at the time when his father was alive. He has stated that his father let out the property in 1980 to defendant no.2 on his behalf. He has further stated that from 1980-83 the proceeds of the rent were credited in the account of his father. He denied the suggestion that till 1986 i.e. till the lifetime of their father the rent proceeds used to be credited to the account of his father. He denied the suggestion that his father was the owner of the suit property. He further denied the suggestion that the suit property had been let out by his father to the bank during his lifetime. On Ex.PW-1/1 dated 3.1.1997, the stand of the defendant is that he cannot remember if any such letter was written to defendant no.2. When confronted with Ex. PW-1/1 the witness has admitted that the signatures at point X and Y appear to be his own signatures but this is qualified by his statement that he has not signed nor intended to execute any such agreement; it is a fabricated document. He appears to be confused with the letter and the agreement both of which are of the same date i.e.

3.1.1997. In his cross-examination he has denied that he executed the letter dated 03.01.1997. This is a blatant lie as in the written statement filed by him. He has while admitting the execution of this letter stated that this letter did not create any right, title or interest of the plaintiff in the suit property. He denied the suggestion that the bank was giving 1/4th rent to the plaintiff from his account; he has reiterated that the entire rent was being received by him and he cannot remember whether he had parted at any time with 1/4th share of the rent to the plaintiff during the period from either February 1997 or June 1998 or otherwise. He denied the suggestion that after the letter of 3.1.1997 the bank started crediting the account of the plaintiff with 1/4th share of the total rent and this was in term of the settlement between the brother. He denied the suggestion that in the written statement Ex. DW-1/PX which had been filed by him in the previous suit he has admitted the execution of Ex.PW-1/1. He admitted that Ex.DW-1/PX is the certified copy of the written statement filed by him in CS(OS) No.933/2001. On the perusal of the written statement which was confronted to DW-1 he has admitted that Ex.DW-1/PX has stated that defendant bonafidely started paying to the plaintiff his share of rent from February 1997 from his own account. He has further stated that

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he cannot remember if he had made any complaint with the bank with regard to the non-receipt of the complete rent from February 1997 up to June 1998. DW-1 has reiterated that his father in the year 1971 had partitioned the entire property and DW-1 had become owner of the entire suit property. On the specific query as to who was receiving the rent from 1980-83 DW-1 has stated that he could not remember; he further could not remember if his father was receiving the rent at that time. To the specific query whether in 1971 when the partition decree had been passed the land underneath the suit property was an open piece of land, the defendant has given an evasive and non-committal answer that he does not know; it is qualified by his subsequent statement that he is not aware if the decree of 1971 related only to the built up portion of property bearing no. 55 or it belonged to the open area as well.

31. The second witness produced by the defendants is DW-2. He is Ravi Prakash Mahor, Branch Manager of State Bank of India. He has on oath deposed that in the year 1980 late Umrao Singh had let out the ground floor and a portion on the first floor of the property to defendant no.1 @ Rs.4670/- per month; subsequently another portion of the first floor was constructed by Ranbir Yadav after taking a loan from the bank. Lease deed

dated 21.7.1980 had been signed by Umrao Singh. This document pertains to an area 2336 sq. ft. and remaining area was let out by Ranbir Yadav. Umrao Singh died in 1986 and thereafter defendant no.1 started dealing with the bank to which the other legal heirs of Umrao Singh did not object. Bank has paid up to date rent to defendant no.1. In February 1997 defendant no.1 instructed the bank to transfer a sum of Rs.13,522/- every month from his account with the Branch to the account of the plaintiff and the same was regularly transferred till June 1998 when these instructions were withdrawn by defendant no.1. Bank was acting as per the instructions of defendant no.1. Rent was not being paid to the plaintiff in terms of his share. No amount is due from the bank.

32. In his cross-examination, he has admitted that he was not posted in the Branch from the period 1980 till 2007. He has no personal knowledge about the lease which was created in the year 1980. He has further admitted that in his affidavit by way of affidavit he has stated that remaining portion of the property was let out by Ranbir Singh on the basis of a letter dated 23.6.1985 which had been filed in Suit No.244/1982; he has not seen the file of that suit. The witness was specifically confronted with the written statement Ex.P-6(PW-1/14) filed by

defendant no.2 in the earlier suit i.e. CS(OS) No.933/2001. Defendant no.2 has admitted that as per this document, the first portion of the property was initially let out by Umrao Singh to the bank; there is no lease deed signed by Ranbir Singh prior to 1986; further in terms of letter dated 03.01.1997 defendant no. 1 had advised them to equally divide the rent between all the four brothers.

33. Ex.PW-1/DX-1 is the decree dated 19.5.1971 passed in Suit No.184/1971; this is an admitted document. The parties in the suit were the plaintiff, defendant no.1 and the other two brothers namely Randhir Singh and Dharampal. The details of the properties owned by the parties has been detailed in para no.2 which include the present property i.e. the property bearing no.55, Jwalaheri, Paschim Vihar, New Delhi shown in red colour in the site plan. Apart from this property there are four other properties which had been divided between the parties. Ex.PW-1/DX-2 the site plan annexed along with the partition decree forms a part of the decree. House no.55 has fallen to the share of Ranbir Singh i.e. defendant no.1 which is shown in red colour. In front of this red portion there is an open ground and it specifically describes it as open. Another portion of constructed area in this plot is a green coloured construction

which has fallen to the share of another brother namely Daharam Pal. The property shown in blue colour has fallen to the share of Randhir; the property shown in chocolate colour has fallen to the share of plaintiff Balkishan. All these portions are constructed portions as is evident from the description in the site plan; they are described as shops/rooms. There is another yellow portion which is described as the courtyard in which two rooms and one verandah is shown as constructed; this yellow portion has fallen to the share of Umrao Singh deceased father of the parties.

34. Perusal of Ex.PW-1/DX-2 clearly shows that the shares falling to each party are constructed portions. The open area in front of the red colour portion has been left open; there is no colouring on it; it is an open, unclaimed and unpartitioned area. It was in this portion that Umrao Singh had constructed a building in the year 1980 and leased it to the Bank; initially it was an area a space of 2336 sq. ft.. This is evident from the lease deed dated 21.7.1980 executed between Umrao Singh and the State Bank of India. This document is mark X. It is not a disputed document. It is also not disputed by the parties that initially this lease deed had been executed between Umrao Singh and the bank. Defense of the defendant that Umrao Singh

had executed this lease in favour of the bank on behalf of the defendant no.1 is palpably false. House tax on this property was admittedly paid by Umro Singh during his lifetime. Rent was also being collected by him; this is admitted by defendant no. 2 in his statement on oath, he has categorically stated that only after death of Umro Singh defendant no. 1 started dealing with the Bank.

35. In Ex.DW-1/PX defendant no.1 has admitted that the partition decree between the parties was passed in 1971 and only thereafter the front portion no longer remained an open land and stood constructed in 1980-85. It is thus established that defendant no. 1 in terms of Ex. PW-1/DX1 (decree dated 19.05.1971) had become owner only of the portion shown in red in Ex.PW-1/DX2 (site plan). In 1980-85 the open ground in front of this red portion was constructed by Umro Singh which was leased out to the Bank; rent was being received by him in his lifetime; house tax was also being paid by him. Only after his demise in 1986 defendant no.1 on behalf of himself and his other brothers started dealing with the Bank which arrangement was in terms of a power of attorney executed by all the brothers in favour of defendant no.1. This power of attorney has not come on record. Yet the cancellation of this power of attorney is CS(OS) 836/2006

Ex.PW-1/DY dated 06.09.1996 which document proves that such a power of attorney had in fact been executed by all the brothers. No suggestion has been give to PW-1 that this document is a false or an incorrect document. DW-1 has also not denied this document in his written statement.

36. Ex.PW-1/1 has been endorsed on a stamp paper dated 3.7.1997. Much emphasis has been laid by defendant on this stamp paper; it is pointed out that a document executed on 3.1.1997 could not had been purchased on 3.7.1997 which itself throws out the veracity of this document. On the other hand counsel for the plaintiff has placed before the Court four other stamp papers purchased on 3.1.1997 having serial nos. 6680, 6687, 6688 and 6691 all purchased on 3.1.1997. Ex.PW-1/1 has a serial no.6681. There appears to be an overwriting on the date of 3.7.1997; all these stamp papers had been purchased from the same stamp vendor Narender Singh at Patiala House; it is clear that this stamp paper on which Ex.PW-1/1 has been endorsed is also dated 3.1.1997 and not 3.7.1997 on which there is a clear and visible overwriting. Defendant has even otherwise not denied this agreement in both his written statements i.e. the present written statement as also in Ex.DW-1/PX. His denial of the same at the time of arguments is thus of no value; defendant

no. 1 has taken shifting stands; he is not speaking the truth. Plaintiff along with his other brothers thus became entitled to receive $1/4^{\text{th}}$ share of the rental being paid by the Bank.

37. DW-1 has admitted both the documents of 3.1.1997. Letter dated 03.01.1997 was admittedly written by defendant no.1 to defendant no. 2 requesting the Bank to equally distribute the total rent into the names of the four brothers i.e. the plaintiff, defendant no. 1 and the other two brothers namely Randhir and Dharampal. This letter further recites that the share be credited to the parties after deducting TDS and 30% of the rent as house tax. The second document of 03.01.1997 (Ex.PW-1/1) i.e. the family settlement/agreement was initially disputed by defendant no.1 stating that this was a forged document. Yet in Ex.DW-1/PX (written statement of defendant no. 1 in the first suit i.e. CS(OS) 933/01) he has admitted this document; his only defense being that it was not acted upon. In his present written statement also he has admitted the execution of this document.

38. Perusal of these two documents further show that one is the follow up of the other. Ex.PW-1/1 recites that the rent/profit from the properties bearing nos. 55-56, Jwalaheri will be shared by all the four brothers; house tax and income tax will be

deducted from the share of each. This is reiterated in the letter dated 03.01.1997 (admitted document) written by defendant no.1 to defendant no.2, the same details of the deduction of house tax and income tax from the share of each brother has been given. Further in Ex.PW-1/DX defendant no. 1 has admitted that he had bonafidely started paying rent to the plaintiff from February 1997. In Ex.P-6(1st written statement of DW-2) defendant no.2 has admitted the receipt of letter dated 03.01.1997. He has further admitted that from February, 1997 defendant no. 1 had advised defendant no.2 to equally distribute the rent amongst the plaintiff, defendant no.1 and the other two sons of Umrao Singh which he had been doing regularly upto June 1998 when the aforestated instructions were withdrawn by defendant no. 1. Defendant no.2 was transferring this share of the plaintiff from the account of defendant no.1 to his account. Further the other brothers including the plaintiff as per the records of the Bank were all recorded as "co-owners" and defendant no.1 was acting as representative of the said co-owners. On 11.4.1996, defendant no.1 had instructed defendant no.2 to pay a sum of Rs.16,308/- to Randhir Singh (another brother) as his share of the rent. Further in Ex.PW-1/1 the agreement/settlement dated 3.1.1997 is an

agreement/settlement of property no.55, 56, Jwalaheri alone. If this property stood exclusively owned by defendant no.1 in terms of a decree dated 19.5.1971 there would have been no question of the execution of this document. Admitted letter dated 03.01.1997 written by defendant no.1 to defendant no.2 also relates to the sharing of the rent of this property which question could not have arisen if defendant no.1 was its exclusive owner.

39. On 17.1.2002 in CS(OS) 933/2001 defendant no.2 was restrained from releasing 1/4th of the total rent to defendant no.1. The Division Bench vide order dated 04.08.2004 had directed defendant no.2 to deposit this rent in the account of the plaintiff as was being done in the past. Entitlement of the plaintiff to receive this amount was prima facie recognized by the Appellate Court.

40. On 01.02.2005 this suit i.e. CS(OS) No. 933/2001 was withdrawn by the plaintiff as the parties had entered into a compromise settlement. Statement of the parties recorded on the application under Order 23 Rule 1 CPC(Ex.PW-1/13) inter alia reads under :-

"On S.A.

Statement of Shri Balkishan S/o Shri Chadhary Umrao Singh
aged 65 years, Agriculturist, R/o WZ-58, Jwala Heri, Paschim
Vihar, New Delhi

I have compromised the matter with the defts. The suit be
dismissed as withdrawn. Parties be left to bear their own costs.
I am matriculate. Ex. C-1 bears my signatures at point A. The
affidavit Ex. C-2 bears my signatures at points A & B.

R.O.& A.C.

(H.S. SHARMA)
ADJ, DELHI. 1/2/2005

Statement of Shri H.L.Narula, Adv. for deft. no.1 without oath

I have heard the statement of the plff. The same is correct.
The matter has been compromised. The suit be dismissed as
withdrawn and the parties be left to bear their own costs.

R.O.& A.C.

(H.S. SHARMA)
ADJ, DELHI. 1/2/2005"

41. It is evident from these versions of the plaintiff and the
defendant that the matter stood compromised in terms of which
this suit had been withdrawn.

42. Letter dated 14.4.2005 written by defendant no. 1 to
defendant no. 2 has been assailed. Vide this document
defendant no.1 had written to defendant no.2 informing him

that the parties had settled their disputes. This letter was a sequence to and in consequence of this compromise.

43. It categorically recites that the plaintiff and defendant no.1 have settled their disputes and the plaintiff had withdrawn his court case; defendant no.1 had requested the defendant no.2 to pay 1/4th share of the rent to the plaintiff and continue to do so regularly in future as well. The onus to establish this averment that this letter dated 14.4.2005 is a forged and fabricated document has been placed upon defendant no.1. At the time of the admission/denial of the documents the signature of defendant no.1 on the letter dated 14.4.2005 (Ex.P-1) stood admitted. Making a mere bald denial without detailing the circumstances as to when and how this letter had been forged or fabricated; at whose behest; by whom; the defendant has failed to discharge this onus. On the other hand, the plaintiff has categorically reiterated that this letter had been written by defendant no.1 to defendant no2 and this was in pursuance of the compromise between the parties pursuant to which the plaintiff had withdrawn his earlier suit. Version of the plaintiff appears to be more probably and more plausible.

44. Learned defence counsel has further argued that this cancellation document Ex. PW1/DY shows that the power of

attorney was executed by the plaintiff on 31.5.1982 i.e. during the lifetime of Umrao Singh but the case of the plaintiff is otherwise. The case of the plaintiff is that this power of attorney had been executed after the death of their father; this document is contrary to this version. This submission of the learned defence counsel is not borne out from the record. Defendant no.2 has in fact admitted that after the death of Umrao Singh defendant no.2 was dealing with defendant no.1 to which the other brothers although recorded as "co-owners" in the Bank record did not object; defendant no.2 under instructions from defendant no.1 was adhering to the arrangement of apportioning 1/4th share of the total rental in favour of the plaintiff. As per defendant no.1 after June 1996 he was not getting his 1/4th rental share. Thereafter a settlement dated 29.9.1996 had been entered into between the parties. This is an admitted document. This settlement was, however, not acted upon. On 3.1.1997 even as per the admission of defendant no.1 he had written to the bank to pay 1/4th share of the rental to the plaintiff. This was supported by the agreement of even date which was signed by all the brothers Ex. PW-1/1. Arrangement for payment of rent thereafter continued up to June 1998 when again this arrangement got suspended as defendant no.1

instructed the bank otherwise. Defendant no.2 the bank was admittedly all along dealing with defendant no.1 to which arrangement the other brothers did not object. Bank has further admitted that in terms of the letter dated 3.1.1997 from February 1997 up to June 1998 1/4th share of the rent of the plaintiff was paid by defendant no.2 to him. He continued doing so till June 1998 when defendant no.1 told him not to do so. Since defendant no.2 was dealing with defendant no.1, defendant no.2 adhered to the instructions of defendant no.1. Suit i.e. CS(OS) No.933/2001 was filed. Division Bench vide its order dated 4.8.2004 prima facie recognized the right of the plaintiff and directed defendant no.2 i.e. bank to deposit 1/4th share of the rental in favour of the plaintiff. Thereafter the parties settled their disputes; matter was compromised and the suit was withdrawn as compromised on 1.2.2005. On 14.4.2005 in terms of this compromise defendant no.1 wrote to defendant no.2 requesting defendant no.2 to pay 1/4th share of the rent to the plaintiff on regular basis. This version and the stand of the plaintiff is fully fortified by his documentary evidence.

45. Defendant no.1 has also laid much emphasis on the letter dated 4.11.2005 admittedly sent by the plaintiff to the bank wherein the plaintiff has requested the bank to credit his CS(OS) 836/2006

account with 1/4th share of the rental. It is pointed out by counsel for defendant no.1 that in this communication dated 4.11.2005 Ex.P-2 there is no mention of letter dated 14.4.2005 which again shows that this is a forged document and has been cooked upon later on. There is no force in this submission. This letter Ex.P-2 categorically recites that suit i.e. CS(OS) No.933/2001 had been withdrawn in terms of a compromise arrived at between the parties; defendant no.1 wrote to the bank to apportion 1/4th share of the rental to the account of the plaintiff; all these details are given; merely because the date of 14.4.2005 does not find mention in this letter Ex.P-2 does not substantiate this argument of the defendant which is of no merit; it is worthless. Further submission of defendant no.1 that the plaintiff has alleged in his plaint that he has already filed a contempt application which application is dated 24.5.2006 when the suit was filed on 11.5.2006 is also of merit; either way it would have no consequence to the case in hand. Defendant no.1 has failed to discharge the onus that the letter dated 14.4.2005 is either forged or fabricated. Defendant no.1 is playing a fraud upon the Court.

46. Plaintiff has been able to establish that he is entitled to 1/4th share of the rent. Defendant no.1 is not the exclusive

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owner of the property. Share of the plaintiff would thus be his share for the preceding three years i.e. three years prior to the filing of the suit i.e. from 11.05.2003. Rent for period June, 2001 to February, 2005 was Rs. 80,000/- per month; thereafter from March 2005 up to the filing of the suit it was Rs.1 lac per month. Share of the plaintiff is accordingly calculated at Rs.7,92,419.34 i.e. for the period of three years immediately preceding the filing of the suit.

47. Issue nos.4,5,7, & 9 are decided accordingly.

48. ISSUE NO.8

Onus to discharge this issue was on the defendant no.2. DW-2 on oath has stated that in the year 1980 vide lease deed dated 21.7.1980 Umrao Singh deceased father of defendant no.1 had leased out the property to the bank at monthly rental of Rs.4670/-. This was the ground floor and a portion of the first floor of the suit property; it was an area 2336 sq. ft. After the death of Umrao Singh in the year 1986 defendant no.1 started dealing with the bank and granted lease from time to time to which the other legal heirs of Umrao Singh never objected. The bank has paid up to date rent to defendant no.1. In February 1997 defendant no.1 had instructed the defendant bank to transfer Rs.13,522/- every month from his account to the

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account of the plaintiff and which was regularly done so till June 1998 when these instructions were withdrawn by the defendant no.1; the bank was acting as per the instructions of defendant no.1. No claim can be founded against defendant no.2.

49. The plaintiff has also not disputed that after the death of their father Umrao Singh defendant no.1 had been authorized to deal with the bank on behalf of all the brothers and this arrangement had continued satisfactorily till 1996. Thereafter since defendant no.2 stopped paying the 1/4th rental share to the plaintiff which was at the behest of defendant no.1, the plaintiff had vide Ex.PW-1/DY cancelled the power of attorney which he had executed in favour of defendant no.1. Plaintiff has thus admitted that he had authorized defendant no.1 to act on his behalf in his dealings with the bank. It is also not in dispute that defendant no2 has paid up to date rent. Defendant no.2 was earlier, for a partial period under instructions of defendant no.1, paying 1/4th share of the rental to the plaintiff but thereafter after the instructions had been withdrawn in June 1998 defendant no.2 continued to pay the rent to defendant no.1. The interse arrangement and the interse disputes between the plaintiff and the defendant no.1 are of no concern with defendant no2 who has no liability qua the plaintiff as the privity

of contract of defendant no.2 was with defendant no.1 after the death of Umrao Singh and this position has been amply admitted by the plaintiff himself. As such the claim of the plaintiff lies against the defendant no.1 only.

50. This issue is accordingly decided in favour of defendant no.2 and against the plaintiff.

51. ISSUE NO.3

Onus to discharge this issue is on the defendant. Both the defendants had taken a preliminary objection that the suit is not maintainable in the present form. Defendant no.1 has stated that the plaintiff has no right, title or interest in the suit property and nor in the suit premises. Defendant no.2 has stated that he has no privity of contract with the plaintiff. Plaintiff has successfully established his right and interest in the suit property. No arguments have been addressed on behalf of defendant no.2 and no submission has been advanced on this count.

52. Issue no.3 is accordingly, decided in favour of the plaintiff and against defendant no.1.

53. ISSUE NO.10:

Plaintiff has claimed interest @ 12% per annum on the principal sum.

54. While deciding the preceding issues this Court has held that the plaintiff is entitled to a claim of Rs. Rs.7,92,419.34. Interest @ 12% per annum is fair and equitable.

55. Issue no.10 is decided in favour of the plaintiff and against the defendant.

56. ISSUE NO.11

Issue no.11 no longer survives in view of the finding on the preceding issue i.e. while deciding issue no.8.

57. ISSUE NO.12: RELIEF:

Suit of the plaintiff is decreed in the sum of Rs.7,92,419.34 with interest @ 12% per annum to be paid from the date of filing of the suit till realization. Cost be also awarded in favour of the plaintiff. Decree sheet be drawn. File be consigned to record room.

(INDERMEET KAUR)
JUDGE

MARCH 09, 2010
nandan