

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% Judgment Reserved on: July 09, 2012
Judgment Pronounced on: July 17, 2012

+ **RFA(OS) 40/2010 and CM No.15968/2010**

RANBIR YADAV Appellant
Represented by: Mr. H.L. Narula, Advocate

Versus

BALKISHAN & ANR. Respondents
Represented by: Mr. B.S. Sharma, Advocate for R-1.
Mr. Ravi Shankar, Advocate for
Mr. S.L. Gupta, Advocate for R-2.

CORAM:
HON'BLE MR. JUSTICE PRADEEP NANDRAJOG
HON'BLE MR. JUSTICE MANMOHAN SINGH

MANMOHAN SINGH, J.

1. The present appeal arises out of the judgment and decree dated 9th March, 2010 passed by the learned Single Judge of this Court in CS(OS) No.836/2006 whereby the suit filed by the respondent No.1 herein was decreed in the sum of ₹7,92,419.34 with interest @12% per annum from the date of the suit till realization.

2. In fact, the suit was filed for recovery of ₹20,18,681/- towards share of rent for the period June, 2001 to 31st March, 2006 and mandatory injunction against his brother Ranbir Yadav and State Bank of India.

3. Some facts as per pleadings are that appellant and respondent No.1 are born of their deceased father Umrao Singh, who had also two more sons, namely, Dharam Pal and Randhir Singh. Both were neither parties to the suit nor in the present appeal.

4. Property bearing No.55, Jwalaheri, Paschim Vihar, New Delhi (hereinafter referred to as the 'suit property') was owned by their deceased father Umrao Singh. The same was let out to the respondent No.2 by the deceased Umrao Singh in his life time in the year 1980, who is still in occupation of the said property as a tenant.

5. The case of respondent No.1 is that as per decree passed on 19th May, 1971 in suit No.184/1971, only the built-up portion of the suit property had fallen to the share of the appellant. The open verandah and ground on which construction was raised by their deceased father subsequently in the year 1980 and said portion had been given on lease to respondent No.2 which was the joint property of all the brothers after the death of father on the basis of which 1/4th share of rent was claimed by respondent No.1 who authorized his brother/appellant vide special power of attorney to collect rent on his behalf from respondent No.2. The said arrangement continued for several years. Umrao Singh died intestate on 8th April, 1996. As the appellant failed to discharge his obligation faithfully, the respondent No.1 revoked his power of attorney by cancellation deed dated 6th September, 1996.

5.1 In order to resolve their dispute, a family settlement agreement dated 3rd January, 1997 was arrived at between them with regard to suit property which was duly signed by all brothers and it was agreed that each of the four brothers would be entitled to 1/4th share of the rent payable by the respondent No.2. The appellant in view of settlement also written a letter to respondent No.2 in this regard.

5.2 Thereafter, respondent No.2 started crediting the 1/4th share of the rent in his bank account no.28893 which had

fallen due. The said arrangement continued from February 1997 up to June, 1998. After that the respondent No.2 discontinued paying rent to the respondent No.1, who filed the suit, being CS(OS) No.933/2001, against the appellant and respondent No.2 for recovery of due rent.

5.3 In the suit, by order dated 17th January, 2002, the respondent No.2 was restrained from releasing 1/4th share of the total rent, i.e., share of the respondent No.1 to the appellant, however, an application for release of the rent filed by the respondent No.1 was dismissed by order dated 28th February, 2002.

5.4 An appeal against the said order, being FAO (OS) No.132/2003, was filed by respondent No.1. The Division Bench by disposing of the appeal by order dated 4th August, 2004, directed respondent No.2 to deposit the 1/4th share of respondent No.1 in his bank account maintained by him in the same bank.

5.5 After passing of the said order in appeal, the parties had arrived at settlement and on 1st February, 2005, the respondent No.1 withdrew his suit having been compromised.

5.6 After the said settlement, the appellant wrote a letter on 14th April, 2005 to the respondent No.2 asking to pay 1/4th share of the respondent No.1 in his account but respondent No.2 refused to credit the amount in the account of the respondent No.1.

5.7 Despite of legal notice dated 30th December, 2005, the request was not acceded to by the respondent No.2, thus, respondent No.1 filed the suit for recovery of ₹20,18,481/- towards his share of rent from June, 2001 to 1st February, 2005 (rent being paid @ ₹80,000/- per month) and from February, 2005 to 31st March, 2006 (rent being paid @ ₹1 lac per month).

6. In the written statement, the appellant raised an objection that the suit was barred under Order XXIII, Rule 1 of the Code of Civil Procedure, 1908 as well as under the provisions of Order II, Rule 2 CPC in view of withdrawal of the earlier suit on 1st February, 2005 being CS(OS) No.933/2001 unconditionally which was between the same parties. Fresh suit filed by respondent No.1 is on the basis of the same subject matter and on the same cause of action. It was also stated in the written statement that the respondent No.1 in the earlier suit had admitted that in terms of a decree dated 19th May, 1971 where it was agreed by the members of the family that the appellant is the exclusive owner of the suit property, therefore, respondent No.1 has no right, title or interest in the property and is not entitled to receive any share of rent.

7. It was alleged that respondent No.2 was earlier a tenant of late Umrao Singh and after his death as the appellant, being one of his legal heirs, started dealing with bank, thus the rent was being paid to him. Respondent No.2 in its written statement did not recognize the respondent No.1 as owner of the 1/4th share in the property and therefore, was not agreeable to pay the share of rent to the respondent No.1.

8. From the pleadings, 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 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.

9. The respondent No.1 tendered his evidence by way of affidavit Ex.PW-1/A and was cross-examined. He relied upon the following documents:

“Exbt.PW-1/1, the agreement dated 3-1-1997
Exbt. PW-1/2, the copy of the interim order dated 17-1-2002 restraining the respondent No.2 from releasing the 1/4th share of rent.

Exbt.PW-1/3 copy of the interim order dated 4-8-2004 in appeal filed against the interim order dated 17-1-2002 in the earlier suit,

Exbt.PW-1/4 also marked Exbt P-1 original copy of letter dated 14-4-2005 purported to have been sent by the appellant to the Bank.

Exbt. PW-1/5 the copy of statement of the plaintiff and of the appellant’s counsel in the earlier suit at the time of withdrawal of the same by the plaintiff on 1-2-2005.

Exbt.P-6 also marked Pw-1/14, the copy of the order dated 1-2-2005 of the Ld. ADJ in the earlier suit.

Exbt.PW-1/6 also marked as P-2, is the copy of the letter dated 4-11-2005 stated to have been sent by the plaintiff to the branch of the bank

with copies endorsed to other officers of the Bank.

Exbt.PW-1/7 also marked as P-3 is the reply dated 30-11-2005 by the chief manger to Balkishan Plaintiff thereby clarifying the non-receipt of any such letter dated 14.-4-2005 by the Bank from the appellant nor from the plaintiff.

Exbt. PW-1/8 receipt. Exbt. PW-1/11 –UPC

Exbt. PW-1/12 reminder notice dated 20-3-2006, Exbt. PW-1/13 copy of the application with affidavit dated 1-2-2005 by the plaintiff for the withdrawal of the suit by the plaintiff.

Exbt. PW-1/14 also marked as Exbt.P-6 is copy of written statement filed by the respondent No.2 as defendant No.2 in the earlier suit.

Exbt. PW-1/DX-1, is the decree of declaration granted in suit No.184/1971.

Exbt. PW-1/DX-2 copy of site plan with the decree.”

10. The appellant, who was defendant No.1 in the suit, also tendered his affidavit as DW1/A, who proved Ex.D-1, i.e., certified copy of the plaint dated 6th May, 2001 of earlier suit between the parties, and Ex.DW-1/PX, which is the written statement filed by the appellant in the earlier suit.

11. A witness of the respondent No.2/bank was also examined, who tendered his affidavit as Ex.DW-2/A and relied upon Ex.PW-2/X, which is a copy of letter dated 23rd June, 1985 written by Branch Manager to the appellant.

12. After recording the evidence of the parties, the suit of the respondent No.1 was decreed for part amount claimed, i.e., a sum of ₹7,92,419.34 with interest @12% per annum from the date of filing of the suit till realization. The following are the main findings of the learned Single Judge:

- a. That the suit filed by the respondent No.1 was maintainable as the subject matter of impugned suit was distinct.

- b. Causes of action in the suit were not the same, hence subsequent suit is not barred under Order II, Rule 2 CPC.
- c. Under Article 52 of Indian Limitation Act, 1963, right to sue on a claim of arrears of rent would be three years to be computed from the date when last amount became due. The entire claim is not barred in the matter.
- d. The respondent No.1 would be entitled to receive his share for the preceding three years prior to the filing of the suit, i.e., ₹7,92,419.34.
- e. That the inter-se arrangement and the inter-se disputes between the appellant and respondent No.1 are of no concern with the respondent No.2, who has no liability qua the respondent No.1 as the privity of contract of respondent No.2 was with the appellant after the death of Umrao Singh. Thus, the claim of the respondent No.1 lies against the appellant.

13. The said judgment and decree has been challenged by the appellant in the present appeal which was admitted on 7th October, 2010. The interim order to the extent that the amount already lying with the Bank shall not be disbursed to respondent No.1 was passed. The respondent No.1 also filed cross-objection by means of C.M. No.15968/2010 and the judgment and decree with regard to Issue Nos.6, 8, 9 and 11, findings of which are given against the respondent No.1.

14. At the trial, Balkishan PW-1 has examined himself. He deposed that in suit No.184/71 vide decree dated 19th May, 1971 (Ex.PW1/DX1) only the built up portion of the suit property had fallen to the share of the appellant. Open ground

and unbuilt portion of the said property was constructed later on in 1980 by their deceased father and let out to respondent No.2. After the death of father, respondent No.1 had authorized the appellant in terms of the special power of attorney to collect the rent of the share of respondent No.1. This arrangement was continued up to 1996. As the appellant failed to discharge his obligation faithfully, he revoked his power of attorney by cancellation deed dated 6th September, 2006 (Ex.PW1/DY). PW-1 also proved family settlement/ agreement (Ex.PW1/1) dated 3rd January, 1997 duly signed by all the brothers which shows that four brothers had inter-se agreed that they being the joint owners of the properties bearing Nos.55 & 56 situated at Jwalaheri inherited by them from their father and mother and which properties are under the tenancy of State Bank of India and State Bank of Bikaner and Jaipur and the LIC, the rent/profits will be shared by all the parties equally. On the same date, i.e. 3rd January, 1997 a communication which was signed by the appellant had been sent to respondent No.2 requesting to apportion of total rent payable in four different shares, i.e. in the name of four brothers. The site plan appended to Ex.PW1/DX1 has also been proved as Ex.PW1/DX2. Respondent No.1 has also proved the document Ex.P1, the letter dated 14th April, 2005 sent to the appellant with a copy to the bank and also cancellation of the power of attorney in the year 1996 vide cancellation deed Ex.PW1/DY.

15. Ranbir Yadav DW-1 in his examination-in-chief on oath has deposed that the agreement dated 3rd January, 1997 (Ex.PW1/1) is a forged and fabricated document and no such settlement was arrived at between the brothers, nor was it acted upon. He also deposed that Ex.P1, i.e. the letter dated

14th April, 2005 is a forged and fabricated document. In his cross-examination, firstly he stated that as regards Ex.PW1/1, i.e. the family settlement/ agreement dated 3rd January, 1997, he cannot remember if any such document was executed by him. When he was confronted with Ex.PW1/1, he admitted that the signatures at points 'X' and 'Y' appear to be his signatures. But he never intended to execute any such agreement. He denied in his cross-examination about writing of the letter dated 3rd January, 1997. But in the written statement Ex.DW1/PX1 filed by him in CS(OS) No.933/2001 where the admission was made about sending the said letter when confronted he admitted the written statement filed by him. However, he deposed that due to the bonafide mistake, he started paying to respondent No.1 his share of rent from February, 1997 from his own account. He also admitted that he had given the suit property on rent in 1983 to respondent No.2 at the time when his father was alive and his father let out the suit property in 1980 and also stated that during the period 1980-83, the proceeds of the rent were credited in the accounts of the father.

16. DW-2 Ravi Prakash Mahor, Branch Manager of the State Bank of India had admitted in his cross-examination that the remaining portion of the property which was let out by the appellant on the basis of the letter dated 23rd June, 1985 which had been filed in suit No.244/1982 (Ex.PW6) & (Ex.PW1/14) filed by the bank in the earlier suit, i.e. CS(OS) No.933/2001. It was admitted by DW-2 that as per the document, the 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 the letter dated 3rd January, 1997

the appellant had advised them to equally divide the rent among all the four brothers.

17. Ex.PW1/DX1 is a decree dated 19th May, 1971 passed in suit No.184/1971. The said document is the admitted document by the parties. In the said suit, the other two brothers were also the parties. The details of the properties owned by the parties were mentioned in para-2 which include the suit property, i.e. bearing No.55, Jwalaheri, Paschim Vihar, New Delhi shown in red colour in the site plan. Apart from the suit property, there are four other properties which had been divided between the parties. Ex.PW1/DX2, the site plan annexed along with the partition decree formed a part of the decree.

18. The suit property No.55 was fallen to the share of the appellant which is shown in red colour. In front of this red portion, there is an open ground and described it as open. Another portion of the constructed area in the plot is green colour construction which has fallen to the share of brother Dharampal. The property shown in blue colour has fallen to the share of Randhir and the property shown in chocolate colour has fallen to the share of respondent No.1. There is another yellow portion which is described as courtyard in which two rooms and one verandah is shown as constructed. The said portion has fallen to the share of Umrao Singh deceased father of the parties.

19. We concur the finding of the learned trial Court who has rightly held that the Ex.PW1/DX2 shows that the shares falling in each of the parties are constructed portions. The open area in front of the red colour portion was left open. The trial Court has clearly held that it was in this portion that Umrao Singh had constructed a building in the year 1980 and

leased out the same to the bank. Initially, it was an area with a space of 2336 Sq. ft. as it is evident from the lease deed dated 21st July, 1980. The said document is not disputed by the parties. The trial Court has held that the defence of the appellant that the father had executed this lease in favour of the bank on behalf of the appellant is false, as the house tax on the said portion was admittedly paid by Umrao Singh and the rent was also being collected by him. The said factum is also admitted by respondent No.2 in his statement on oath. Thus, there is a finding by the trial Court that Ex.DW1/PX the front portion no longer remained an open land and stood constructed in 1980-85 and thus, as per the term of Ex.PW1/DX1 (decree dated 19th May, 1971) held that the appellant had become owner of portion only shown in red colour in Ex.PW1/DX2 (site plan).

20. The cancellation of power of attorney Ex.PW1/DY dated 6th September, 1996 is also proved by respondent No.1. No suggestion was given by the appellant at the time of cross-examination, nor it was alleged that the said document was false and incorrect in his statement as DW-1. The trial Court has also rejected the objection of the appellant about the controversies raised by the appellant about the relevant date of purchase of stamp paper (Ex.PW1/1).

21. Mr.Narula, while arguing the appeal, has heavily relied upon one more settlement dated 29th September, 1996 which is other than the agreement dated 3rd January, 1997 (Ex. P. No. PW-1/1, and argued that copy of the family settlement dated 29th September, 1996 was filed by the respondent No.1 himself as it is evident from the plaint Ex.D-1 and written statement Ex.DW-1/PX. According to him, as per one of the clauses of family settlement dated 29th September, 1996, the

receiving of 1/4th share of rent of the suit property by all the brothers was subject to other obligations to be complied with regard to other immovable properties. Therefore, the suit filed by the respondent No.1 was not maintainable as he was not entitled to receive any share of rent unless the said obligations are complied with. We have examined Ex.D-1, i.e., copy of the plaint, being Suit No.933/2001, filed by the respondent No.1 against the appellant and the respondent No.2. In para 13 of the said plaint, it was stated that all the brothers agreed and arrived at a settlement and after settling 'family decision' was executed between all the four brothers on 29th September, 1996. The said agreement was subscribed in the handwriting of appellant and all the four brothers signed the same. As per clause 11 thereof, it was agreed that Shops No.55, 56, 58, 94 and 95, i.e., Royal builders, S.B.I. shop, N.P. Traders, Jindal Traders and M/s. M.K. Lampshade and first floor on them would belong to four brothers. As per clause 19, it was agreed that all rentals of SBI, LIC, SBBJ and Union Bank shall be divided equally among the four brothers. Counsel for the appellant argued that the learned Single Judge has overlooked the said document.

22. It is pertinent to mention that there is no averment in the suit filed by respondent No.1 nor the appellant has pleaded or raised the said plea in the written statement. No issue was framed in this regard. Though photocopy of family decision was filed by respondent No.1 which is available on record, but the said document is not an exhibited document which has now been relied upon by Mr.Narula. The suit in question was simply a suit for recovery of share of rent filed by the respondent No.1 against the appellant with regard to House No.55, Jawalaheri, Paschim Vihar, New Delhi on the

basis of family settlement/agreement dated 3rd January, 1997 Ex.PW1/1. The impugned judgment has been passed about the family settlement dated 3rd January, 2007. Thus, the argument of the appellant cannot be accepted.

23. In his next argument, Mr.Narula challenged the finding of the learned Single Judge, who came to the conclusion that the accrual of rent for each month of the tenancy has given rise to a fresh cause of action as provided under Order XXIII, Rule 1(4)(b) CPC. His argument is that the said finding of the learned Single Judge is erroneous as the suit was withdrawn by the respondent No.1 on 1st February, 2005 unconditionally and a fresh suit would not be maintainable for the same cause of action.

24. In para-19 of the judgment, the learned Single Judge has rightly given her finding against the appellant that the earlier suit which was withdrawn unconditionally was for recovery of rent from February 1997 to May, 2001 for sum of ₹7,88,481/- and the suit in question was filed claiming recovery of rent for a period beginning from June 2001 to 31st March, 2006, we are also of the same view that accrual of rent for each month of tenancy gives rise to a fresh cause of action. The bar of fresh suit as provided under Order XXIII, Rule 1 (4)(b) CPC is not attracted as the subject matter in the suit in question is distinct from the subject matter of the earlier suit. We find no infirmity in the judgment and decree. The appeal is therefore dismissed.

C.M. No.15968/2010 (Cross-Objections filed by respondent No.1)

25. These are filed by respondent No.1 against the judgment/decreed dated 9th March, 2010 challenging the finding on issues No.6, 8, 9 & 11.

26. The case of respondent No.1 in the cross-objections is that respondent No.1 is entitled for the entire claim. The findings of the learned Single Judge is that the arrears of rent in the previous suit filed in the year 2001 bearing Suit No.933/2001 are not correct despite of withdrawal of the suit by the respondent No.1 unconditionally. The amount claimed by the respondent No.1 from respondent No.2 is within the limitation period. It is sated that the earlier suit was filed in the year 2001. The application for release of the rent filed by the respondent No.1 was dismissed on 28th February, 2002. It was only on 4th August, 2004 when the appeal filed by him was allowed directing the respondent No.2 to deposit the amount in his account. The fresh suit of the said amount for the said period from respondent No.2 was filed by the respondent No.1 in the year 2006 which was within limitation. Therefore, the finding on issues No.6 & 9 be set-aside.

27. With regard to issue No.8, it is stated that the respondent No.1 is entitled to recover his share of rent, payable by respondent No.2, directly as per prayer made in the plaint and not through the appellant. It is erroneously held by the learned Single Judge that after the death of the father of respondent No.1, the appellant started dealing with respondent No.2 on the strength of power of attorney given by all the brothers including respondent No.1 to the appellant. The learned Single Judge was not correct in holding that respondent No.1 was not entitled to be directly paid his share of rent by respondent No.2 but, instead the right of respondent No.1 would only be to recover his share of rent from the appellant despite of cancellation of power of attorney issued by the respondent No.1 as well as by passing of the order of Division Bench on 4th August, 2004. Thus, respondent No.1 is

entitled to recover his share of rent from respondent No.2 directly, therefore, the direction be issued against respondent No.2 that respondent No.2 shall always pay the share of respondent No.1 directly to him. Thus, the findings on issues No.8 & 11 are also liable to be set-aside by allowing the cross-objections filed by the respondent No.1.

28. In order to appreciate the relevance of the cross-objections filed by respondent No.1, it is necessary to refer to para-8 of the judgment which reads as under:-

“8. That the rent of the aforesated 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 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”

29. Issues No.6, 8, 9 & 11 which are decided against respondent No.1 were framed as under:-

6. Whether the suit is within the period of limitation? OPP

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

30. The effect of findings on issues No.6, 8, 9 and 11 of the judgment/decreed dated 9th March, 2010 is that the respondent No.1 is entitled to claim rent only for a period of preceding three years, i.e., three years prior to the date of filing of the suit, i.e., from 11th May, 2003 till the date of filing of suit in May 2006 and rest of the claim is barred by limitation. Thus, the suit was decreed for a sum of Rs.7,92,419.34/- only. As regard Issue No.8 is concerned, the finding of learned Single Judge are that the inter-se disputes between appellant and respondent No.1 are of no concern with respondent No.2, who had no liability qua respondent No.1 as the privity of contract was between the respondent No.2 and the appellant.

31. We have gone through the paras 24, 39 to 48 of the impugned judgment and decree passed by the learned Single Judge on these four issues. As far as the rest of the claim from the period February, 1997 till 10th May, 2003 is concerned, admittedly respondent No.1 on 1st February, 2005 withdrew his suit, i.e., CS(OS) No. 933/2001 unconditionally. The statements of parties were recorded on the application under Order XXIII, Rule 1 CPC (Ex.PW-1/3). The said suit was filed claiming recovery of rent for a period beginning from June, 2001 to 31st March, 2006. From application for withdrawal of suit and the statements recorded by the parties, no clue is available as to what happened to the claim of recovery of the amount of rent

by respondent No.1. The suit was simply withdrawn, rather, it is evident from the facts and circumstances that no claim for 1/4th share of rental was pressed for the said period. Therefore, we agree with the finding of the learned Single Judge and concur with the view taken in the matter.

32. As far as cross-objections with regard to issue No.8 are concerned, the said issue was decided in favour of respondent No.2 and against the respondent No.1. The findings on issue No.8 are that inter-se disputes between the appellant and respondent No.1 have no concern with respondent No.2 and the respondent No.2 has no liability qua respondent No.1 as privity of contract of respondent No.2 was with the appellant after the death of Umrao Singh. By deed of cancellation dated 6th September, 1996 (Ex.PW-1/DY), special power of attorney given by respondent No.1 and other brothers was cancelled. Thereafter, the said understanding continued till June, 1998 when he had again withdrawn his instructions.

33. It appears to us that many times, the appellant had issued instructions to the bank to transfer the share of rent in his account and also withdrawn instructions on various occasions, however, the appellant has admitted the agreement dated 3rd January, 1997 (Ex.PW-1/1) which is signed by all brothers. Relevant clauses are reproduced hereunder:

- “1. That the aforesaid Properties are under the tenancy of State Bank of India, State Bank of Bikaner & Jaipur and Life Insurance Corporation.
2. That all benefits, rents, profits, from aforesaid properties shall be equally distributed among aforesaid parties.
3. That the equal ownership rights in the aforesaid properties shall go and devolve

upon in favour of all the parties by way of this Agreement.

4. That the charges of Income Tax, House Tax etc. shall be equally deducted from the share of profit of all the parties.

5. That the House Tax, Income Tax from the share of each party shall not be deducted from the share of other party or other property.

6. That the individual party shall be liable and responsible for his own responsibility and liability, the said liability shall not be faced by other person/party.

7. That if any of the party raises loan from any Bank the same shall be paid by him at his own individual capacity and other parties shall have no liability for the same.”

34. The appellant in view of agreement had also written a letter dated 3rd January, 1997 to the bank to pay 1/4th share of rental to the respondent No.1. The said arrangement continued upto June, 1998 as it was again suspended by appellant. The respondent No.1 thereafter filed suit, i.e., CS(OS) No. 933/2001, which was withdrawn/compromised between the parties on 1st February, 2005. On 14th April, 2005 (Ex.P-2), appellant wrote a letter to respondent No.2 to pay 1/4th share of the rent to respondent No.1 on a regular basis. The learned Single Judge after discussion has come to the conclusion that the appellant has failed to discharge the onus that the letter dated 14th April, 2005 (Ex.P-2) is forged or fabricated and the respondent No.1 was able to establish that he was entitled to 1/4th share of the rent and appellant is not the owner of the property. It is pertinent to mention that in earlier suit, the Division Bench in FAO(OS) No.132/2003 by order dated 4th August, 2004 directed the respondent No.2 to deposit the 1/4th share of respondent No.1 in his account. In the abovementioned circumstances, learned Single Judge

decided issued No.8 against the respondent No.1 by holding that the claim of respondent No.1 pertaining to 1/4th share of rent lies only against the appellant.

35. Thus, we are not agreeable to the finding of learned Single judge on issue No.8 in view of abovementioned facts and circumstances to the effect that respondent No.1 cannot claim his 1/4th share of rental from respondent No.2. No doubt, there is no dispute that his claim lies only against the appellant but the fact of the matter is that despite agreement (Ex.PW-1/1) and letter dated 14th April, 2005 (Ex.P-2) and cancellation of power of attorney (Ex.PW-1/DY) by the respondent No.1 and his brothers, still the respondent No.2 is following the instructions of the appellant although all the four brothers are the co-owners of the suit property.

36. Under these circumstances, equity demands that at least till the time respondent No.2 remains as tenant, the respondent No.1 is entitled to receive his 1/4th share of rent from the respondent No.2 directly. His share shall be deposited by the respondent No.2 in his account. The findings of learned Single Judge to this extent are modified and issue No.8 is decided accordingly.

37. The net result is that the appeal filed by the appellant is dismissed. The cross-objections filed by the respondent No.1 are partly allowed. No costs.

(PRADEEP NANDRAJOG)
JUDGE

(MANMOHAN SINGH)
JUDGE

JULY 17, 2012
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