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

+ RFA 351/2019 & CM. Nos. 18396/2019, 18397/2019, 18398/2019
and 18399/2019

SHAMA KHATOON & ORS Appellants
Through: Ms. K.B. Hina, Adv.

versus

SHAMIM BANO & ORS Respondents
Through:

CORAM:
HON'BLE MR. JUSTICE V. KAMESWAR RAO

ORDER
% **22.04.2019**

CM. No. 18398/2019 (for exemption)

Exemption allowed subject to all just exceptions.

Application stands disposed of.

CM. No. 18399/2019 (for delay)

This is an application filed by the applicants / appellants seeking
condonation of 19 days delay in re-filing the appeal.

For the reasons stated in the application delay of 19 days in re-filing
the appeal is condoned.

Application stands disposed of.

RFA 351/2019

1. The present appeal has been filed by the appellants challenging the

order dated November 12, 2018 passed by Dr. Hardeep Kaur, ADJ-02, (Shahdara) KKD Courts/ Delhi in CS No. 883/2016, whereby the Suit for partition has been dismissed.

2. The case of the appellants before the Trial Court was, deceased Mohd. Sani was the husband of appellant no.1; father of appellant nos. 2 to 6 and respondent nos. 1 to 5; respondent no.6 is the husband of Naseem Bano, pre-deceased daughter of Mohd. Sani and respondent nos. 7 to 11 are grand children of deceased Mohd. Sani.

3. It was the case of the appellants before the Trial Court that Mohd. Sani was the owner of property bearing No. A-276, Old Seema Puri, Delhi-95, which consisted of two shops on the ground floor and one room on the first floor and open space. It was their case in the suit that the property was purchased in the shape of Malba from the previous occupant by Mohd. Sani during his lifetime and later on developed the same with his own efforts. Mohd. Sani expired on December 7, 2000. During his lifetime, he filed a suit for recovery of possession against respondent no.3. After the expiry of Mohd. Sani, the appellant nos. 1 and 4 filed an application under Order XXII Rule 3 CPC for their substitution in place of deceased Mohd. Sani on the basis of registered Will dated October 16, 1996. Respondent no.3 had

chosen to plead no objection to the said application. The names of appellant nos. 1 and 4 were substituted in place of deceased Mohd. Sani in the said Suit. The said suit bearing no. 656 of 2006 was tried and the same was decided by the Court of Administrative Civil Judge-cum-Additional Rent Controller (North-East), Karkardooma Courts, Delhi on February 25, 2011. While deciding the aforesaid Suit, the Court held that the aforesaid Mohd. Sani was not entitled to execute the Will for his entire property in view of the provisions of Clause 117 and 118 of Mulla's Principles of Mohammedan Laws. It was further held as per Muslim Law, a bequest to an heir is not valid unless other heirs consent to the bequest after the death of the testator and a single heir may consent so as to bind his own share and bequest to an heir, either in whole or in part is invalid, unless consented to by other heir or heirs and whosoever consents, the bequest is valid to that extent only and bind his or her shares. As such the Will in favour of Shama Khatoon and Sikander Baksh with respect to the Suit property is not binding on the heirs of the deceased Mohd. Sani.

4. Be that as it may, in the present Suit, the appellants case was, they are entitled to 53% of the share in the suit property and the respondents are entitled to 47% in the Suit property. The written statement was filed. The

following issues were framed by the Trial Court:

- 1. Whether the present suit has been valued properly for the purpose of court fees and jurisdiction? (OPD 1 to 5)*
- 2. Whether the present suit is barred u/s 11 CPC? (OPD1 to 5)*
- 3. Whether plaintiff is entitled to the relief of partition as claimed? (OPP)*
- 4. Whether the plaintiff is entitled to the relief of permanent injunction as claimed? (OPP).*
- 5. Whether the plaintiff is entitled to the relief of mandatory injunction as claimed? (OPP)*
- 6. Relief.*

5. An issue arose, whether Mohd. Sani owned the Suit Property. The trial court was of the view that the appellants have failed to establish that Mohd. Sani was the owner of the suit property. In fact, it has come on record that the suit property is a Government land which belongs to Govt. of NCT of Delhi and the appellants had no right to claim partition in the Suit property. A reference is also made to the statement of PW3, Pradeep Kumar Sharma, LDC from DUSIB, Govt. of NCT of Delhi in this regard. In other words, Mohd. Sani was in unauthorized possession of the suit property. On a specific query to the learned counsel for the appellants to show the title through which Mohd. Sani has acquired the documents, she has orally referred to a sale deed. On a specific query, whether there was any allotment of land by any of the Govt. authorities, the answer was in the

negative. If that be so, the finding of the learned Trial Court, regarding the ownership of the property by Mohd. Sani, is justified. Coming to the fact that Mohd. Sani had unauthorizedly occupied the property, surely his legal heirs could not have claimed partition of the property in question. Suffice it to state the Trial Court had rightly dismissed the Suit with which conclusion this court is in agreement.

I do not see any reason to entertain the appeal, the same is dismissed.

CM. Nos. 18396/2019 and 18397/2019

Dismissed as infructuous.

V. KAMESWAR RAO, J

APRIL 22, 2019/jg