

IN THE COURT OF Ms. TANIA SINGH,  
CIVIL JUDGE-01, CENTRAL: TIS HAZARI COURTS: DELHI

Suit No. 593861/2016

1. Mr. Sheikh Mohd Arif  
Son of late Shri Haji Mohd. Muslim  
Resident of House No.495/3,  
Churiwalan,  
Delhi.
2. Sheikh Mohd Farooque  
Son of late Haji Mohd. Muslim  
Through his Attorneys Sheikh Mohd . Arif  
And Sheikh Mohd Adil  
495/3, Churiwalan,  
Delhi
3. Sheikh Mohd Adil  
Son of late Haji Mohd. Muslim  
495/3, Churiwalan,  
Delhi.

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4. Mst. Makhdooma Sultan  
Wife of Abdul Quddus Khan  
Resident of 495/3, Churiwalan,  
Delhi.

..... Plaintiffs

Versus

1. Mst. Akbar Sultan, Deceased

Represented by her Legal Representaives:-

(A) Zahir-Ul-Islam

(B) Mohd. Majid Samim

(C) Farazana Begam

(D) Rukhsana

(E) Salma Khatoon

All Residents of 1174,  
Churiwalan, Near Jama Masjid,  
Delhi.

2. Shri Shekh Mohd. Azam

Son of late Shri Haji Mohd. Muslim

Residents of 1181,

Churiwalan,

Delhi.

3. Shri Jhangi Ram

Son of Shri Thana Ram

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Shop No. 5329, Ground Floor,  
Sarai Hafiz Banna, Sadar Bazar,  
Delhi.

4. Shri Naresh Kumar

Son of Shri Kishan Lal

Shop No. 5329, First Floor/1,  
Sarai Hafiz Banna, Sadar Bazar,  
Delhi.

5. Shri Subhash Chander Rakiwala

Son of Shri Shiv Ram Chander

Shop No. 5329, First Floor/2,  
And 2F-1, And 3F-1,  
Sarai Hafiz Banna, Sadar Bazar,  
Delhi.

6. Shri Praveen Arora

Son of Shri Mandan Lal

Shop No. 5329, (First Floor)/3,  
Sarai Hafiz Banna, Sadar Bazar,  
Delhi.

7. Shri Aminuddin

Son of Shri Hakim Shahalluddin

Shop No. 5329, (First Floor/4),  
Sarai Hafiz Banna, Sadar Bazar,

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Delhi.

8. Shri Mansoor Ahmad

Son of Shri Mumtazzuddin

Shop No. 5329, (First Floor/5),

Sarai Hafiz Banna, Sadar Bazar,

Delhi.

9. Shri Mohd Nadim

Son of Shri Mohd Ayub

Shop No. 5329, (First Floor/6),

Sarai Hafiz Banna, Sadar Bazar,

Delhi.

10. Shri Brij Mohan

Son of Shri Dhani Ram,

Shop No. 5329, (First Floor/7),

Sarai Hafiz Banna, Sadar Bazar,

Delhi.

11. Shri Ram Chander

Son of Shri Narain Dass,

Shop No. 5329, (First Floor/8),

Sarai Hafiz Banna, Sadar Bazar,

Delhi.

12. Shri Dinesh Kumar

Son of Shri Kishan Lal,

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Shop No. 5329, (First Floor/9),  
Sarai Hafiz Banna, Sadar Bazar,  
Delhi.

13. Shri Dharam Pal

Son of Shri Kishan Lal,  
Shop No. 5329, (First Floor/10),  
Sarai Hafiz Banna, Sadar Bazar,  
Delhi.

14. Shri Prem Prakash,

Son of Shri Sohan Lal Duggal,  
Shop No. 5329, Second Floor 2 & 3,  
Sarai Hafiz Banna, Sadar Bazar,  
Delhi.

15. Shri R.K. Saxena,

Shop No. 5329, (Third Floor/2 & 3),  
Sarai Hafiz Banna, Sadar Bazar,  
Delhi.

16. Mst. Asma Sultan

Wife of Sheikh Chiraguddin  
87-A, New Muslim Town,  
Wahdat Road, Lahore,  
Pakistan.

.....Defendants.

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Date of Filing

: 10.01.1991

Date of pronouncement of judgment

: 13.06.2020

**SUIT FOR APPORTIONMENT OF RENT AND INJUNCTION**

**JUDGMENT**

1. Vide this judgment, I shall dispose off the present suit filed by the plaintiffs against the defendants, seeking relief of Apportionment of rent and injunction.

This case was originally filed before the Hon'ble High Court of Delhi on 10.01.1991 and vide order dated 07.09.1993 it was transferred to the District Court in view of Section 5(2) of Delhi High Court Act 1966 as amended by Hon'ble Delhi High Court Amendment Act 1991.

**Case of the plaintiff as per the plaint**

2. Brief facts of the case as culled out from the plaint are that predecessor in interest of the plaintiffs Sh Haji Mohd Muslim and that of defendant no 1 and 2 Sh Haji Mohammad Hashim were real brothers and as per memorandum of partition dated 07.11.1961 properties inherited by them was partitioned. Further as per the plaint vide the aforesaid memorandum, among other properties, area measuring 112 sq yards out of property no. 5328-29 ward no 13 inside Sarai Hafiz Banna, Sadar Bazar, Delhi had come to the share of Sh. Haji Mohd. Muslim after excluding the area for road towards east and an area measuring approximately 21 ½ sq yards towards south in the property no. 5328-29 had fallen to the share Sh. Haji Mohd Hashim.

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3. It is further averred in the plaint that Sh. Haji Mohd Muslim and his sister had filed suit no. 521/1966 against Sh. Haji Mohd Hashim and other brothers in the year 1965 for declaration that the properties mentioned in the aforesaid Memorandum of Partition belonged to Sh. Haji Mohd Muslim exclusively and in the alternative for partition of all the properties left by their father. Vide the decree pronounced in this suit on 17<sup>th</sup> September 1986 Sh Haji Mohd Muslim was held the owner of 112 sq. yards in property 5328-5329 and a strip measuring 5 ½ feet X 31 feet with area measuring 18.89 sq yards had come to the share of Sh. Haji Mohd Hashim who was the father of the defendant no. 1 and 2 in the present suit.
4. Defendants no. 3-15 are stated to be the tenants in different portions of part of the property no. 5329 on an area measuring 13 feet X 31 feet. The construction at the site occupied by these tenants is stated to exist partly over land fallen to the share of plaintiffs in property no 5329 measuring 7 ½ feet X 31 feet and partly over the land fallen to the share of defendant no 1 and 2 measuring 5 ½ feet x 31 feet.
5. As per a decree of partition passed in another suit no. 630/1990 on 11.05.1990 among the plaintiffs and defendant no. 16 the aforesaid portion of the land measuring 7 ½ X 31 feet has fallen to the share of plaintiff no. 1 who is seeking the reliefs claimed in the present suit exclusively and the other plaintiffs have been arrayed for supporting his claim.
6. It is the case of plaintiff no. 1 that his father and the father of defendant no. 1 and 2 were co-owners in the portion of property bearing no. 5329 and as per mutual agreement between them, father of defendant no 1 and 2 Sh. Haji Mohd Hashim was managing the property and realizing rent from the tenants. In light of these facts, plaintiff no. 1 seeks decree of rendition of accounts from defendant no 1 and 2 of the rent realized for the three years preceding the institution of this suit. He further prays for direction to be issued to the tenants to deposit rent with the plaintiff no 1 in proportion of his share in the property no 5329 in future and plaintiff has also sought a decree of permanent injunction to restrain defendant no.

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1 and 2 from letting out, taking possession or dealing with respect to the suit property in any manner without the written consent of plaintiff no. 1.

**Case of the defendants as per the Written Statement**

7. Defendant no. 1 has contested the suit by filing a Written Statement stating that the plaintiffs have no legal right, title or locus standi to file the present suit. The factum of execution of memorandum of partition dated 07.11.1961 has not been denied and father of defendant no. 1 is stated to have acquired 21'.6" square yards in the suit property vide the aforesaid partition, however it is the defence that father of defendant s no. 1 and 2 had acquired adjoining properties by way of adverse possession which has culminated into ownership and has never been objected to by any of the parties and naturally after his death defendant no 1 and 2 have succeeded to the property acquired by adverse possession. It is further stated that father of plaintiffs and father of defendant no. 1 and 2 used to collect rent separately and hence plaintiffs are not entitled to the reliefs prayed for.
8. It is further stated that plaintiff no 1 cannot claim more that 112 square yards of area out of the total 130 square yards of the suit property and as such he has no right or interest in the remaining area. As per the mutual partition between defendant no. 1 and 2, defendant no. 1 claims to be the exclusive owner of area measuring 54 square yards including the share awarded to her father vide the memorandum of partition dated 07.11.1961 and thus claims to be entitled to receive rent or deal with the property in any manner whatsoever.

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### Replication

9. The plaintiffs have also filed replication wherein contents of the written statement of defendant no.1 are denied that the predecessor of the defendant no.1 and 2 was owner of area measuring 54 sq yds as alleged and it was reiterated that an area measuring only 18.89 sq yds came to the share of predecessor of defendant no.1 and 2. Contents of the plaint were reiterated and reaffirmed.
10. It is pertinent to state that defendant no 2 was proceeded ex parte vide order dated 17.05.1996. He was subsequently reported to have died during the pendency of this suit, however order dated 09.02.2000 records that since he was proceeded ex parte before his death his Lrs need not be impleaded. His name was ordered to remain in the array of parties in order to bind his Lrs with the orders of this court.
11. Defendant no. 1 had also died during the pendency of this suit and his Lrs were impleaded vide order dated 20.04.2001.
12. It is also important to note that defendants no. 3-15 were deleted vide order dated 17.05.1996 upon statement of plaintiff. However, they were ordered to be impleaded again being necessary parties vide order dated 20.12.1996. Defendant no.3-15 have not contested the case.

### Issues

13. On the basis of pleadings of the parties, following issues were framed by the Ld. Predecessor on 22/08/2001.
- (i) *Whether the defendants no.1 and 2 are liable to render the amount of rent realized from defendant no.3 to 15? OPD*
  - (ii) *Whether the plaintiffs are entitled to claim amount of rent claimed in apportionment of rent? OPP*
  - (iii) *Whether plaintiff is entitled to relief of injunction as prayed for? OPP*
  - (iv) *Relief*

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### Plaintiff evidence

14. Shri Mohd Arif was examined as PW-1.

PW-1 tendered his evidence by way of affidavit Ex.P-1 and relied upon the following documents:-

- (i) Ex.PW1/1 : Site Plan
- (ii) Ex.PW1/2 : Certified Copy of the plaint along with schedule B filed in suit No.521 of 1966.
- (iii) Ex.PW1/3 : Certified copy of amended written statement filed in suit No. 521 of 1966.
- (iv) Ex.PW1/4 : Decree passed by Hon'ble High Court of Delhi in suit No.51 of 1966.
- (v) Ex.PW1/5 : Site plan which forms part of the decree in suit no 521/1966.
- (vi) Ex.PW1/6 : Judgment passed in Suit No. 521 of 1966.
- (vii) Ex.PW1/7 : Decree dated 11.05.1990 in suit No.630 of 1990.
- (viii) Mark A : Certified copy of Memorandum dated 07.11.1961.

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Thereafter plaintiff's evidence was closed on 11.01.2005 vide separate statement of Ld. Counsel for the plaintiff recorded in this regard and the matter was listed for recording of defendant evidence.

### Defendant's evidence

15. Shri Zahirul Islam was examined as DW-1 and Shri Abdul Mutalib was examined as DW-2.

DW-1 tendered his evidence by way of affidavit Ex.DW1.

DW-2 tendered his evidence by way of affidavit Ex.DW2/A.

DW-1 & DW-2 were duly cross examined at length.

Thereafter defendant's evidence was closed vide separate statement of Ld. Counsel for the defendant on 03.05.2013 and the matter was listed for final arguments.

16. I have heard final arguments on behalf of both the parties at length and the record has been carefully perused.

17. The Issue-wise findings are as follows:-

#### ISSUE NO.1

Issue no. 1 and 2 are taken up together for discussion.

- (i) *Whether the defendants no.1 and 2 are liable to render the amount of rent realized from defendant no.3 to 15? OPD*
- (ii) *Whether the plaintiffs are entitled to claim amount of rent claimed in apportionment of rent? OPP*

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18. As per the plaint, there have been various properties which have been divided among the ancestors of the parties but the present suit relates to property no. 5328-5329, inside Sarai Hafiz Banna, Sadar Bazar, Delhi (hereinafter referred to as 'suit property'). This property as per the plaintiffs was not physically partitioned in the Memorandum of Partition dated 07.11.1961 as it was tenant occupied and the parties were held entitled to claim rent to the extent of their respective shares. The plaintiffs have claimed that their late father Sh. Haji Mohd. Muslim was given area measuring 7 ½ X 31 feet whereas sh. Haji Mohhammad Hashim, predecessor in interest of Defendant No. 1 and 2 was given area measuring 5 ½ X 31 feet and the remaining area of the suit property was left for road etc. The suit property is stated to be in possession of defendant no. 3 -15 who are the tenants.
19. As per the plaintiffs, Sh. Haji Mohammad Hashim was collecting rent from the tenants and used to give share of Sh. Haji Mohd. Muslim therefrom. In para 17 of the plaint, the details of tenants and their rentals have been mentioned. As per the plaintiffs, there has been partition among them pursuant to which plaintiff no. 1 is entitled to entire rent of the share of his predecessor in interest Sh. Haji Mohd. Muslim. The other plaintiffs are impleaded to acknowledge the aforesaid fact.
20. During the pendency of suit plaintiffs had sought transposition of plaintiff no. 4 as defendant on the ground of differences having arisen with plaintiff no. 4. It has also come on record that the differences with plaintiff no. 4 do not entitle him to any share in the rent and the sole entitlement of plaintiff no. 1 has been upheld in the judgment passed by Hon'ble Delhi High Court on 23/11/1995, copy of which is Ex. PW 1/7. Plaintiff no. 4 in any case has not contested this claim of plaintiff no. 1. Thus, from amongst the plaintiffs, relief in the present suit is to be granted only in favour of plaintiff no. 1.

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21. So far as defendant no. 1 and 2 are concerned, defendant no 1 has contested the suit and filed WS. Defendant no. 2 has not contested the suit and was proceeded ex-parte vide order dated 17.05.1996. Defendant no 1 has claimed that there has been partition between him and defendant no. 2 pursuant to which the property in question has fallen to the share of defendant no. 1 only. Thus, the contest with respect to the present suit is between plaintiff no 1 and defendant no. 1.
22. To claim apportionment of rent, plaintiff no 1 was required to prove that plaintiff no. 1 is entitled to share of rent in proportion to his ownership qua the suit property which as per him is 7 ½ X 31 feet and defendant no. 1 is entitled to share of rent in proportion to the area measuring 5 ½ X 31 feet. The plaintiff is also required to prove the rate of rent and that rent has been paid to defendant no. 1 and 2 atleast of the period of 03 years prior to the institution of the present suit.
23. Unfortunately, except stating so in the pleadings, no positive evidence on the aforesaid aspect has been led. The tenants who are defendant no 3-15 have not filed WS and they were proceeded exparte. The tenants have not been examined by the plaintiffs or other defendants.
24. In para 17 of the plaint, the plaintiffs have given details of the tenants and the rent paid by them. Defendant no 1 in his WS has not denied the same and has answered the corresponding para in WS as matter of record. This reply by defendant no 1 can safely be concluded as an admission by him with respect to para 17 of the plaint. Thus, it is held that defendant no 3-15 are the tenants at the rates mentioned in the plaint. It would be a safe approach in the given conduct as even the tenants have not disputed the rate of rent mentioned in the plaint.

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25. The plaintiffs have claimed that they are entitled to sum of Rs. 652/- per month from the total rent of Rs. 1130/- per month. This amount of rent has been claimed by the plaintiffs on the basis of ownership of their respective area. In reply to this claim of the plaintiffs made in para 19 of the plaint, the denial by defendant no. 1 is per se evasive. Defendant no. 1 has not specifically stated as to what amount the plaintiffs are entitled to from the total amount of rent. The focus of the entire defence of defendant no. 1 has been that the plaintiffs are not entitled to any share. While stating so, defendant no. 1 has also raised the plea of adverse possession stating that the adjoining areas had been in adverse possession of their predecessor in interest, Sh. Haji Mohammad Hashim. To counter this plea, the plaintiffs in their replication have stated that the area other than mentioned in the memorandum of partition which is Mark 'A' were the adjoining areas left for carving out road etc in the lay out plan and these areas with the lapse of time have been encroached upon and this act of encroachment does not make defendant no. 1 or 2 or their predecessors as owners by adverse possession.

26. To counter the plea of adverse possession ld counsel for plaintiff has relied upon judgment of Hon'ble Supreme Court of India in case titled as **Hemaji Waghaji Jat vs Bhikhabhai Khengarbai Harijan & Ors in Civil Appeal No. 196 of 2007 decided on 23.09.2008 VII (2008) SLT451**. The relevant portion of the said judgment is as follows:-

*"34. Before parting with this case, we deem it appropriate to observe that the law of adverse possession which ousts an owner on the basis of inaction within limitation is irrational, illogical and wholly disproportionate. The law as it exists is extremely harsh for the true owner and a windfall for a dishonest person who had illegally taken possession of the property of the true owner. The law ought not to benefit a person who in a clandestine manner takes possession of the property of the owner in contravention of law. This in substance would mean that the law gives*

*seal of approval to the illegal action or activities of a rank trespasser or who had wrongfully taken possession of the property of the true owner.*

*35. We fail to comprehend why the law should place premium on dishonesty by legitimizing possession of a rank trespasser and compelling the owner to loose its possession only because of his inaction in taking back the possession within limitation.*

*36. In our considered view, there is an urgent need of fresh look regarding the law on adverse possession. We recommend the Union of India to seriously consider and make suitable changes in the law of adverse possession.”*

27. In so far as the claim of defendant no 1 based upon adverse possession is concerned, there is just a bald statement in the WS as well as in affidavit in evidence. To claim ownership by way of adverse possession, the claimant is first required to admit that he was never the rightful owner and that someone else was the lawful owner and to the knowledge of lawful owner the claimant had made hostile and unlawful entry in the said property and the rightful owner has not initiated any action against the claimant for a period of 12 years, in order to perfect title by way of adverse possession. There are no averments in the pleadings about these ingredients. There is no reference to any land of which adverse possession is claimed in memorandum of partition that its possession was with Sh. Haji Mohd Hashim. Thus, the plea of adverse possession has not been proved.

28. DW 1 in his cross examination has admitted that he does not claim ownership by adverse possession. Although DW 2 was thereafter examined but even his testimony is of no help to the defendants. The plea of adverse possession is therefore rejected.

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29. The entitlement of plaintiff no. 1 in proportion to the area owned by him in the property in question has not been seriously challenged either in the pleadings or in evidence. There is no denial that this property could not be physically partitioned in 1961 because of being fully tenant occupied. There is no denial of shared holdings of the parties in the suit property nor anything to the contrary has been proved in evidence.
30. Defendant no. 1 has not denied that rent has been received by them from the tenants. It is not the case of defendant that tenants are paying apportioned rent to plaintiff no. 1 and defendant no. 1. Rather it has been stated in the WS that defendants are receiving rent from the tenants of the property owned by them.
31. Considering the pleadings and the quality of evidence adduced by the parties and applying the scale of preponderance of probabilities, it can safely be held that the rent from tenants have been received by defendant no. 1 and before him by his predecessor in interest.
32. As a necessary corollary to the above, plaintiff no. 1 is held entitled to a sum of Rs. 652/- per month as rent. Plaintiff has sought decree of rendition of account but in my considered opinion when rental is known to plaintiff no. 1 and is so mentioned in the plaint also which is not controverted by defendant no. 1 and not contested by defendant no. 2, thus instead of. decree of rendition of accounts, a money decree straightaway for the amount equal to 36 months @ Rs. 652/- per month can be passed.
33. Accordingly, the plaintiff is held entitled to rent of Rs. 23,472/- which is equal to rent for 36 months for the period preceding the date of institution of the present suit.
34. It is reflected from the record that vide order dated 09.10.1991, defendants no. 3 - 15 were directed to deposit rent in the court, from the rent so deposited, plaintiff

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shall be entitled to rent @ Rs. 652/- per month. In the event of default by tenants in payment, plaintiff no. 1 may have recourse to remedy as per law. This is so because during the pendency of the suit none of the parties have brought to the notice of the Court that any default in deposit of rent has been committed by defendants no. 3-15.

35. The issues no. 1 and 2 are decided accordingly.

### **Issue no. 3**

#### ***(iii) Whether plaintiff is entitled to relief of injunction as prayed for? OPP***

29. The plaintiff has sought decree of permanent injunction to restrain defendant no. 1 and 2 from letting out, taking possession or dealing with respect to the suit property in any manner without the written consent of plaintiff no. 1.

30. It is undisputed that defendant no 1 is also the owner of certain portion of the property and so is plaintiff no. 1. Since tenancy is one and it cannot be split, therefore relief of injunction in the manner it has been claimed cannot be granted. However, to balance the equity, it is proper to put plaintiff no 1 and defendant no 1 to certain terms. In case any tenant is willing to surrender his tenanted portion, plaintiff no. 1 and defendant no. 1 shall jointly accept the said surrender and take joint possession. Re-letting of such portion will be only jointly by plaintiff no 1 and defendant no. 1. In the event of initiating any litigation against the tenant, plaintiff no. 1 shall make defendant no 1 a party to the said litigation and in case defendant no 1 institutes any legal proceeding against any of the tenants, plaintiff no. 1 shall be made a party, so that both can vouch for their respective interest in such litigation.

### **Issue no. 4**

#### **Relief:**

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31. In view of the findings on the aforesaid issues, the present suit stands partly decreed and plaintiff no. 1 is held entitled to the following reliefs:-

a) A money decree in the sum of Rs 23,472/- is hereby passed in favour of plaintiff no 1 and he is held entitled to recover the same from defendant no. 1 being rent for the period of 36 months prior to the institution of the suit. Interest is also awarded on this amount @ 6p.c per annum.

33. The rent deposited by defendant no 3-15 during the pendency of the suit before this court shall be released to the plaintiff no. 1 to the extent of Rs. 652/- per month and the balance amount be released to defendant no. 1.

34. The rent for future period is also apportioned and the tenants who are defendant No. 3-15 are directed to pay future rent to plaintiff No. 1 and defendant No. 1 separately in proportion to their respective area of ownership i.e in ratio of 7 ½ X 31 feet to plaintiff No. 1 and 5 ½ X 31 feet to defendant No.1.

35. No order as to cost.

36. All pending applications are disposed off accordingly.

37. Decree sheet be prepared accordingly.

38. File be consigned to record room after due compliance.

**Announced through CISCO Webex**

**Today on 13.06.2020**



**(TANIA SINGH)**

**Civil Judge-01, Central,**

**Tis Hazari Courts/Delhi**