

IN THE HIGH COURT OF MADHYA PRADESH

AT GWALIOR

BEFORE

HON'BLE SMT. JUSTICE SUNITA YADAV

SECOND APPEAL No. 26 of 2005

BETWEEN:-

1. **KUTUBUDDIN KHAN (DIED)
THROUGH LRS (1(a)) KHURSHEED
BEGUM (DEAD) W/O LATE SHRI
KUTUBUDDIN CHANA KOTHAR
KAMPOO LASHKAR DISTRICT
GWALIOR (MADHYA PRADESH)**
- (1(b)). SABU S/O LATE KUTUBUDDIN,
AGED ABOUT 48 YEARS, R/O CHANA
KOTHAR, KAMPOO, LASHKAR,
GWALIOR (MADHYA PRADESH)**
- (1(c)).SAMSUDDIN S/O LATE
KUTUBUDDIN, AGED ABOUT 42 YEARS,
R/O CHANA KOTHAR, KAMPOO,
LASHKAR, GWALIOR (MADHYA
PRADESH)**
- (1(d)).JAMSHED S/O LATE
KUTUBUDDIN, AGED ABOUT 38 YEARS,
R/O CHANA KOTHAR, KAMPOO,
LASHKAR, GWALIOR (MADHYA
PRADESH)**
- (1(e)). SHAKIR S/O LATE KUTUBUDDIN,
AGED ABOUT 28 YEARS, R/O CHANA
KOTHAR, KAMPOO, LASHKAR,
GWALIOR (MADHYA PRADESH)**
- (1(f)). FIROJ KHAN S/O LATE
KUTUBUDDIN, AGED ABOUT 25 YEARS,
R/O CHANA KOTHAR, KAMPOO,**

**LASHKAR, GWALIOR (MADHYA
PRADESH)**

**(1(g)). SMT SAYRA D/O LATE
KUTUBUDDIN W/O MOHIN KHAN,
AGED ABOUT 44 YEARS, R/O
AWADPURA LASHKAR, GWALIOR
(MADHYA PRADESH)**

**(1(h)).SMT SABBO D/O LATE
KUTUBUDDIN W/O AMZAD, AGED
ABOUT 30 YEARS, R/O VILLAGE MAU,
PARGANA AND DISTRICT BHIND
(MADHYA PRADESH)**

.....APPELLANTS

***(SHRI HARISH DIXIT - LEARNED COUNSEL FOR THE
APPELLANTS).***

AND

**TAHIR KHAN [DEAD] THROUGH LRS
(1(a))ISHRAT BEGUM W/O LATE TAHIR
KHAN, AGED ABOUT 36 YEARS, APAGANJ
1. NEAR KALLA KACHHIS FARM MAMA KA
BAZAR LASHKAR DISTRICT GWALIOR
(MADHYA PRADESH)**

**(1(b)). USMAN S/O LATE TAHIR KHAN,
AGED ABOUT 22 YEARS, R/O APAGANJ,
NEAR KALLA KACHHI'S FARM, MAMA
KA BAZAR, LASHKAR, GWALIOR
(MADHYA PRADESH)**

**(1(c)). AFTAB S/O LATE TAHIR KHAN,
AGED ABOUT 21 YEARS, R/O APAGANJ,
NEAR KALLA KACHHI'S FARM, MAMA
KA BAZAR, LASHKAR, GWALIOR
(MADHYA PRADESH)**

**(1(d)). ARIF (MINOR) THROUGH
GUARDIAN MOTHER ISHRAT BEGUM S/O
LATE TAHIR KHAN, AGED ABOUT 15**

**YEARS, R/O APAGANJ, NEAR KALLA
KACHHI'S FARM, MAMA KA BAZAR,
LASHKAR, GWALIOR (MADHYA
PRADESH)**

**(1(e)). IRFAN (MINOR) THROUGH
GUARDIAN MOTHER ISHRAT BEGUM S/O
LATE TAHIR KHAN, AGED ABOUT 13
YEARS, R/O APAGANJ, NEAR KALLA
KACHHI'S FARM, MAMA KA BAZAR,
LASHKAR, GWALIOR (MADHYA
PRADESH)**

**YAKUB KHAN (DEAD) THROUGH LRS
(2(a)) RABIA BEGAM W/O LATE YAKUB
2 KHAN, AGED ABOUT 60 YEARS, R/O
SHEKH KI BAGIA NAI SADAK, LASHKAR,
GWALIOR (MADHYA PRADESH)**

.....RESPONDENTS

***(SHRI N.K. GUPTA - SENIOR ADVOCATE WITH SHRI S.D.S.
BHADORIYA – ADVOCATE FOR THE RESPONDENTS).***

Reserved on : 31.08.2023

Whether approved for reporting : YES

*This appeal coming on for pronouncement of judgment on this
day, the court passed the following:*

J U D G M E N T

(Passed on 15/09/2023)

1. This Second appeal under Section 100 of Civil Procedure Code (for brevity, CPC) has been filed by the appellants (Lrs. Of original plaintiff Kutubuddin) against

the judgment & decree dated 27.10.2004 passed by 3rd Additional District Judge, Gwalior in Civil Appeal No.32A/2003 reversing the judgment & decree dated 30.08.2003 and allowing the cross-objection of respondents/defendants passed by VI Civil Judge Class-1, Gwalior in Civil Suit No.102A/98, by which, the learned Civil Judge had partly allowed the suit to the extent that the sale deed dated 08.01.1985 is null & void, however, the relief for recovery of possession was denied.

2. The undisputed facts of the case are that the house No. 18/581, 49/1053 and new house No. 53/59 shown in the plaint map are situated at Mohalla Channa Kothar, Kampoo, District Gwalior (hereinafter referred to as “property in dispute”). It is also not in dispute that the aforesaid property was in the ownership and possession of one Gulam Moidden Khan, who was the father of original plaintiff Kutubuddin, original defendant No.2 Yakub and their sister Musammat Kallo who was arrayed as plaintiff No.-2 at the time of filing of suit; however, later on she did not support

the plaintiff and arrayed as the defendant. The fact that plaintiff and defendants belong to Sunni Muslim Community is not in dispute. It is also not disputed that Gulam Moidden Khan died in the year 1978.

3. The further pleading is that the property in dispute is ancestral property of plaintiff Kutubuddin and defendant No.-2/Yakub Khan and Must. Kallo. One portion of the ancestral house shown in blue lines in the plaint map was sold to Smt. Krishna Kumari by Gulam Moideen Khan father of plaintiff and defendant No. 2 and rest of the portion was mortgaged with Kuwar Pratap Singh Chauhan on an amount of Rs. 3,500/-. The plaintiff after making entire payment had freed the mortgaged property. The plaintiff and defendant No. 2 lived together for a period of one and half year after the death of their father and thereafter started living separately. The plaintiff is living in the southern part of the disputed property at ground floor and defendant No. 2/Yakub was living at First Floor of the southern part of disputed property. The defendant No. 2

was not living in the disputed property prior to two years of filing of the civil suit by the plaintiff and is started living in his in-laws house (his wife's parental home). The defendant No. 1 Tahir Khan was living in the southern part of the disputed house at ground floor as a tenant and had not paid the rent of the tenanted house. The defendant No. 2 had constructed his own home at Appa Ganj.

4. The further pleading is that on 31/07/1985, defendant No. 1/Tahir Khan had told to the plaintiff that the disputed house, in which, he is living as a tenant was sold to him by the defendant No.-2/Yakub for a consideration of an amount of Rs. 13,000/- vide registered sale deed though the fact remains that the defendant No. 2 has no right to sale the said disputed property to the defendant No. 1 because the partition of the disputed property has not been done, therefore, the registered sale deed of the said disputed property executed by the defendant No. 2 in favour of defendant No.-1 is null and void and the same deserves to be set aside.

5. The civil suit was filed by the appellant/plaintiff for handing over the vacant possession of the disputed property to the plaintiff, which is in possession of the defendant No. -1 in the capacity of tenant.

6. The defendant No.-1/Tahir Khan by submitting his written statement has denied the averments made in the plaint. It is submitted that after partition of the disputed property between the plaintiff and defendant No. 2, the property shown in red lines in the plaint map had come in share of defendant No.-2/Yakub and on 08/01/1985, he sold the property to this defendant No.-1/Tahir Khan which came in his share and accordingly that part of the disputed property which he purchased from Yakub is in his possession. The defendant No.-1/Tahir Khan had further denied that the disputed property was mortgaged with Kuwar Pratap and the plaintiff had freed the mortgaged property. It was also denied that he was living in the disputed house in the capacity of a tenant.

7. The defendant No.-2/Yakub by submitting his written

statement has denied the averments made in the plaint. It is submitted that the partition of the disputed property between him and the plaintiff was done and as per the partition deed the disputed property shown in the red lines in the plaint map has come in his share and he is in possession of the same. He has sold the property which came in his share to defendant No.-1/Tahir Khan. The defendant No.-2 denied that the disputed property was mortgaged with Kuwar Pratap and the plaintiff had freed the mortgaged property. It was also denied that defendant No.1/Tahir Khan was living in the disputed house in the capacity of a tenant.

8. On the basis of pleadings, learned trial court has framed as many as three (3) issues and parties were directed to lead their evidence.

9. The learned VI Civil Judge, Class-1, District Gwalior after hearing learned counsel for the rival parties has allowed the civil suit filed by the plaintiff vide judgment and decree dated 30/08/2003 passed in Civil Suit No.

102A/1998 and declared the sale deed dated 08/01/1985 as null and void, however, denied the relief for recovery of possession.

10. Being aggrieved by the judgment and decree dated 30/08/2003 passed in Civil Suit No. 102A/1998 by learned VI Civil Judge, Class-1, District Gwalior, plaintiff has filed a Civil Appeal bearing No. 32/2003 before the learned 3rd Additional District Judge, Gwalior. The defendant No. 1 has also filed cross objections aggrieved by the judgement and decree declaring the sale-deed dated 08.01.85 as null and void.

11. The learned 3rd Additional District Judge, Gwalior after hearing learned counsel for the rival parties has dismissed the appeal filed by the plaintiff vide judgment and decree dated 27/10/2004 reversing the judgment and decree dated 30/08/2003 passed in Civil Suit No. 102A/1998 by the VI Civil Judge, Class-1, Dist. Gwalior (M.P.) and allowed the cross-objection. Hence, this second appeal.

12. Learned counsel for the appellants submits that the learned Additional District Judge has acted illegally in dismissing the suit. It is further argued that Tahir Khan had instituted a suit for declaration & permanent injunction on the basis of the sale deed dated 08.01.1985. In that suit he had pleaded that the partition between the brothers (i.e. Kutubuddin & Yakub Khan) had taken place and Tahir Khan had purchased the portion which was allotted to Yakub Khan in the earlier oral partition. The stand of Kutubuddin in the earlier suit was similar to the present one meaning thereby that no partition had taken place and Yakub Khan had no right to sell any specific portion without actual partition. The plea of the appellant/Kutubuddin (since dead and represented by LRs) found favour and the court of VIII ADJ, Gwalior held in its judgment dated 09.08.1996 vide Ex P-8 that the partition was not proved and Yakub Khan had no right to sell any specific portion of the property. This judgment & decree attained finality and is binding on the parties on account of the principles of res-judicata. The

learned ADJ has committed an illegality in passing the impugned judgment without considering the effect of res-judicata in the light of Ex P/8.

13. The further argument is that the plaintiff has produced the municipal record up to the year 1986 vide Ex. P-4, P-5 & P-6 which goes to show that the suit property continued to be recorded in the name of Gulam Moiddeen without mention of the alleged oral partition.

14. The further submission is that the learned ADJ has erred in overlooking the law laid down by the Apex Court in the case of **Vidhyadhar vs Manikrao & Anr.** reported in **AIR 1999 SC 1441** that if the defendant does not choose to appear in the witness box it will be deemed that the case of the plaintiff is admitted to him. It is further argued that the learned ADJ has erred in law in ignoring the settled legal proposition that even in case of Muslim Joint Owners, a specific portion of the property cannot be transferred by one of them without partition. The purchaser has the only remedy to restore the possession and institute a suit for

partition.

15. The learned ADJ has further erred in ignoring that the registered sale deed dated 08.01.1985 is executed for more than the share of defendant No. 2/Yakub.

16. It is further argued that the impugned judgment & decree are outcome of non reading and/or misreading of the material, oral & documentary evidence on record. Thus, the findings of the learned ADJ have therefore become incorrect, arbitrary, illegal and perverse.

17. On the other hand, learned counsel for the respondents/defendants supported the impugned judgment and decree passed by the court below and prayed for dismissal of the instant appeal being bereft of merit and substance.

18. Heard the parties on I.A.No. 335/2011, an application under Order VI Rule 17 of CPC, I.A.No. 334/2011, an application under Order XLI Rule 27 of CPC and I.A.No. 3878/2023 under section 100(5) of CPC.

19. The appellant has filed I.A.No. 335/2011 under Order VI Rule

17 of CPC for amendment in the plaint on the ground that this Court has framed substantial question of law in respect to res-judicata based on Ex. P/8. Though, the pleadings regarding earlier judgment passed in Civil Suit No. 172/1992 which was decided on 23/12/1992 and its effect on the present suit are not necessary to be incorporated and the learned court ought to have taken into consideration the effect of the judgment contained in Ex. P/8 as the same has legal effect. However, learned court below has not taken into consideration Ex. P/8. This aspect has come into the notice of the counsel for the appellant on 23/08/2010, when he was placing final arguments before the Court, hence, application for amendment in the plaint is filed because the amendment is necessary for final adjudication between the parties. Therefore, the amendment mentioned in para 12 of the application be allowed to be incorporated in the plaint. Since, it is necessary for resolving the real controversy and the nature of the suit could not be changed by the proposed amendment. No evidence is needed, in case, the amendment is allowed as it is a pure question of law.

20. I.A.No. 334/2011 is the application filed by appellants under Order XLI Rule 27 of CPC for taking few documents as additional

evidence on record relating to the civil suit No. 172-A/1992 on the ground that these documents i.e. certified copy of the plaint dated 19/08/1985 filed in civil suit No. 172-A/1992, certified copy of the judgment and decree dated 23/12/1992 passed in same case as well as written statement dated 06/01/1986 submitted by the defendant Kutubuddin and Smt. Kallo in the aforesaid suit to prove the issue of res-judicata.

21. Learned counsel for respondents opposed the applications and prayed for their rejection.

22. Both the above applications are filed to prove the issue of res-judicata. The only reason for inordinate delay of 25 years in filing these application is given that when the counsel of appellants was preparing the arguments then it comes into notice to him that these amendments are necessary and the documents are required to be filed. However, the said ground can not be accepted for delay of 25 years. The Apex court in the case of **The State of Punjab Vs Bua Das Kaushal AIR 1971 SC 1676** held that Plea of res-judicata is not waived if necessary facts were present in the mind of parties and gone in to by court absence of specific plea in

written statement and framing of specific issue of waiver is immaterial. The case in hand can also be examined in the light of above principle of law. Thus, the pleadings regarding earlier judgment passed in Civil Suit No. 172/1992 which was decided on 23/12/1992 and its effect on the present suit are not necessary to be incorporated and therefore, the documents proposed to be filed as additional evidence are also not required to decide the appeal. Therefore, I.A.No.335/2011 and I.A. No. 334/2011 are hereby dismissed.

23. I.A.No. 3878/2023 under section 100(5) of CPC is filed for framing following substantial question of law:-

“Whether amendment allowed in 2002 relates back to the date of institution of suit and as such on holding the sale deed null and void, appellant is entitled for relief of possession?”

24. In view of the pleadings and evidence on record and in the light of findings of learned courts below the said question is required to be framed and therefore application I.A.No. 3878/2023 is allowed.

25. Now the substantial questions of law before this court are as

below:-

1. “Whether the court below has erred in holding that the suit property is not partitioned and whether Ex. P/8, the judgment between the same parties is operating as res-judicata?”

2. “Whether amendment allowed in 2002 relates back to the date of institution of suit and as such on holding the sale deed null and void, appellant is entitled for relief of possession?”

26. Heard learned counsel for the rival parties on merits and perused the record.

27. It is not disputed between the parties that the property in dispute was owned by Gulam Moiddeen Khan who was the father of the original plaintiff/ Kutubuddin and defendant No. 2. Undisputedly Gulam Moiddeen Khan died in the year 1978. Original Plaintiff No.-1/Kutubuddin Khan, Plaintiff No.-2 Musammat Kallo & original defendant No.-2/Yakub Khan (all three are since dead and represented by Lrs.) were the children of Gulam Moiddeen Khan.

28. Undisputedly the parties are Sunni Sect of Islam and are governed by the Mohammedan Law. Section 41 of the Principles of Mohammedan Law deals with the devolution of inheritance. Section 44 deals with the distribution of a estate. Section 56 deals with the

vested inheritance.

"41. Devolution of inheritance :--Subject to the provisions of Sections 39 and 40, the whole estate of a deceased Mohammedan if he has died intestate, or so much of it as has not been disposed of by will, if he has left a will (Section 118), devolves on his heirs at the moment of his death, and the devolution is not suspended by reason merely of debts being due from the deceased (k). The heirs succeed to the estate as tenants-in-common in specific shares (1).

44. Distribution of estate :--Since the estate devolves on the heirs at the moment of the death of the deceased, they are at liberty to divide it at any time after the death of the deceased. The distribution is not liable to be suspended until payment of the debts.

56, Vested inheritance :--A " vested inheritance" is the share which vests in an heir at the moment of the ancestor's death. If the heir dies before distribution, the share of the inheritance which has vested in him will pass to such persons as are his heirs at the time of his death. The shares therefore are to be determined at each death (y). See Section 41 above."

29. Thus the whole estate of a deceased Mohammedan if he has died intestate, or so much of it as has not been disposed of by Will, if he has left a Will, devolves on his heirs at the moment of his death,

and the devolution is not suspended by reason merely of debts being due from the deceased. The heirs succeed to the estate as tenants-in-common in specific shares. Unlike Hindu Law, estate of a deceased Mohammedan, if he has died intestate, devolves on his heirs at the moment of his death. Under the Mohammedan Law, birth right is not recognized.

30. As per the law relating to succession in Muslims, the right of an heir apparent or presumptive comes into existence for the first time on the death of the ancestor, and he is not entitled until then to any interest in the property to which he would succeed as an heir if he survived the ancestor. There is no joint tenancy in Mohammedan law and the heirs are only tenants-in-common. Therefore, an heir can claim partition in respect of one of the properties held in common without seeking partition of all the properties.

31. The joint system family or joint property is unknown to Muslim law and therefore the right, title and interest in the land held by the person stands extinguished and stands vested in other persons. As per interpretation by Mulla on Sec.51 about inheritance, there is no distinction in the Mohammedan Law of inheritance between movable

or immovable properties or between ancestral and self-acquired property. There is no such thing as a Joint Mohammedan family nor does the law recognize a tenancy in common in a Mohammedan family. In a Mohammedan family there is a presumption that the cash and household furniture belong to the husband.

32. Mohammedan law does not recognize a joint family as a legal entity. In fact according to the rules of Mohammedan law of Succession, heir ship does not necessarily go with membership of the family. There are several males and females who have no interest in the heritage but may be members of the family. On the other hand there are several heirs like, for example, married daughters of a deceased male owner who take an interest in the estate but are no part of the family.

33. In Mohammedan Law the doctrine of partial partition is not applicable because the heirs are tenants-in-common and the heirs of the deceased Muslim succeed to the definite fraction of every part of his estate. The share of heirs under Mohammedan Law are definite and known before actual partition. Therefore on partition of properties belonging to a deceased Muslim there is division by metes and

bounds in accordance with the specific share of each heir being already determined by the law.

34. In view of the law relating to succession in Muslims as discussed above, now it has to be seen whether in the case in hand the properties of Moiddeen Khan were partitioned ?

35. The plaintiff has examined himself as PW/1 and stated that disputed property belonged to his father Gulam Moiddeen Khan who died in the year 1978. After his death, he (Kutubuddin Khan) his sister Musammat Kallo and brother Yakub Khan became the owner of the property. There was no partition of any property in their family and, therefore, the defendant No. 2 had no right to sale the suit property to defendant No. 1.

36. Plaintiff has also examined Nasir Khan (PW-3) in support of his case who has supported the statement of plaintiff.

37. The statements of plaintiff (PW-1) and Nassir Khan (PW-3) remained unchallenged in their detailed cross-examination. In the present case, the defendants did not appear in the witness box and did not adduce any evidence at all. So, in the absence of rebuttal evidence, there is no reason to

disbelieve the evidence of plaintiff. The defendants have also not adduced any documentary evidence to prove that the properties of late Gulam Moideen Khan were ever partitioned. The plaintiff has produced the municipal record upto the year 1986 vide Ex. P-4, P-5 & P-6 which goes to show that the suit property continued to be recorded in the name of Gulam Moideen without mention of the alleged oral partition. Under these circumstances when there is no evidence to prove that the properties of Gulam Moideen were partitioned, the learned First Appellate has committed serious error to hold that the properties of Gulam Moideen Khan were partitioned between his children and the suit property was given to Yakub Khan.

38. Learned First Appellate Court has hold that the properties were partitioned due to separate living of plaintiff. However, the above finding is purely based on the presumption because the separate living does not prove the factum of partition in the family. The finding of Learned First Appellate Court is also contrary to the provisions of Mohammedan Law according to which the share of heirs are definite and known before actual partition and on partition of properties

belonging to a deceased Muslim there has to be division by metes and bounds in accordance with the specific share of each heir being already determined by the law. However, in this case the defendants have utterly failed to prove the fact of partition in the family of Gulam Moideen Khan as prescribed in the Mohammedan Law.

39. The learned First Appellate Court also ignored to consider Exhibit P-8, the earlier judgment passed in Civil Suit No. 172/1992 which was decided on 23/12/1992 in which the absence of partition was already held between the parties by competent civil court and which operates as res-judicata. In the case of **The State of Punjab Vs Bua Das Kaushal AIR 1971 SC 1676** held that Plea of res-judicata is not waived if necessary facts were present in the mind of parties and gone in to by court absence of specific plea in written statement and framing of specific issue of waiver is immaterial. In this case also the original plaintiff had been cross-examined at para 17 of his court statement by the counsel of respondent/defendant in respect to earlier Civil Suit No. 172/1992 which shows that the necessary facts in respect to earlier

suit were in the mind of parties. The learned trial court also in the judgment at para 11 specifically considered Ex. P-8 and hold that Ex. P-8 also proved that there was no partition. Thus Exhibit P-8 has been in the mind of the learned trial court as well. Therefore, Exhibit P-8 is operating as res-judicata in this case and in the light of this document i.e. Ex. P-8 also it is proved that the properties were not partitioned. Consequently, the learned ADJ has erred in law in ignoring the settled legal proposition that in case of Muslim Joint Owners, a specific portion of the property cannot be transferred by one of them without partition.

40. As discussed above specific portion of the property was sold by the original defendant No.-2/Yakub to Tahir Khan whereas Yakub Khan had no right to sell any specific portion without the partition by metes and bound. Therefore sale-deed dated 08.01.1985 has rightly been declared as null and void by the learned trial court.

41. Now comes the issue of relief of recovery of possession. In this regard learned counsel for the appellants

has argued that the amendment application in respect to relief for possession was allowed in the year 2002, however in the light of 'doctrine of relation back' which is defined in the case of **(2001)8 SCC 451 Siddalingamma and another Vs Mamtha Shenoy** by holding that “A plaint or petition would be deemed to have been filed as it appears after amendment and evidence must therefore, appreciated in the light of averments contained in the amended pleadings” the learned Civil Judge/trial Court erred in rejecting the prayer for recovery of possession as time barred on the ground that the amendment had been carried out after a delay of 17 years. But the reading of judgment of learned trial Court indicates that the Court has rejected the prayer for recovery of possession on various other grounds as well.

42. The plaintiff in his Court statement at para 12 specifically mentioned that Tahir Khan(the original defendant No.-1) had already left the suit premises and at that time the sister of Tahir Khan was living in that portion where Tahir had been residing. However, this suit is not

filed against the sister of Tahir Khan and, therefore, relief of recovery of possession from the sister of Tahir Khan can not be granted.

43. As per pleadings of plaintiff Tahir Khan was a tenant in the suit premises, therefore, he can be evicted as per the provisions of M.P. Accommodation Control Act. The suit property is undivided; however, the rest of the co-owner had not filed suit for eviction against Tahir Khan. The original plaintiff/Kutubuddin, Kallo and defendant No.-2/Yakub were the owners of the property after the death of their father and partition had not been taken place between them and therefore, decree for possession for any specific portion can not be given. Therefore, even if the prayer for recovery of possession was not time barred in the light of 'doctrine of relation back', learned Civil Judge has not erred in declining the relief of recovery of possession.

44. In view of above discussion, the substantial questions of law are answered as below:-

1. The learned trial Court has not erred in holding that the suit property was not partitioned, however, the learned First Appellate Court has erred in holding that the suit property was partitioned. Ex. P/8, the judgment between the same parties is operating as *res-judicata*.

2. The amendment allowed in 2002 relates back to the date of institution of suit; however, learned trial court has not erred in holding that the plaintiff is not entitled for relief of possession on other grounds as discussed above.

45. Consequently, this appeal is partly allowed in respect to relief of declaration of sale deed dated 08/01/1985 as null and void, but is dismissed for relief for recovery of possession. The judgment & decree dated 27.10.2004 passed by 3rd Additional District Judge, Gwalior in Civil Appeal No.32A/2003 is hereby set aside.

There shall be no order as to costs.

Certified copy as per rules.

**(SUNITA YADAV)
JUDGE**