



**IN THE HIGH COURT OF MADHYA PRADESH
AT GWALIOR
BEFORE
HON'BLE SHRI JUSTICE G. S. AHLUWALIA**

FIRST APPEAL No. 16 of 2011

***AHMED HUSAIN (DECEASED) THR. LRS. A) ZAMEEL AHMAD AND
OTHERS***

Versus

***GHASI LAL (DECEASED) S/O KANHAIYA LAL, TH:LRS.SMT.SARJU
(DELETED) AND OTHERS***

Appearance:

Shri Rajeev Shrivastava, Advocate for appellants.

Shri Santosh Agrawal and Shri Saket Sharma, Advocates for
respondent Nos. 1(b), 1(c) and 2.

Reserved on : 31.07.2025

Pronounced on : 08.08.2025

JUDGMENT

This first appeal under Order 21 Rule 103 of CPC has been filed against the order dated 15th of December 2010 passed by IV Additional District Judge (Fast Track) Guna in MJC No.09/09 by which an application filed by appellant under Order 21 Rules 97, 98, 99 and 101 of CPC has been rejected.

2. Appellant No. 1 Ahmed Husain has died during the pendency of this appeal and he is being represented by his legal representatives.

3. The facts necessary for disposal of present appeal, in short, are that Ghasilal, who is being represented by his representatives, filed a suit for



specific performance of contract against Maula Baksh and Ghanshyamdas which was registered as Civil Suit No.4A/1979. By judgment and decree dated 24/4/1981, the suit was decreed and Ghanshyam Das and Maula Baksh were directed to execute a sale deed in favour of Ghasilal. Ghanshyamdas preferred an appeal before this Court which was registered as F.A. No.33/1981. The aforementioned appeal was dismissed by judgment and decree dated 4/9/1996 and judgment and decree passed by the Trial Court was maintained.

4. In execution proceedings the appellants Ahmed Husain and Akhtar Husain filed an application under Order 21 Rule 97 CPC pleading inter-alia that Kale Khan alias Kallu had three sons namely Maula Baksh, Chand Khan and Nanne Khan. The appellants are legal representatives of Chand Khan. Kale Khan was the owner and in possession of two houses in Koteswar Mandir Street, one plot admeasuring 40 x 60 square feet in Nadi Mohalla, one house and two plots in Jatpura and one Kuchha house in Pujari Ki Gali and one Pucca House in Nadi Mohalla and one two storey building in Sadar Bazar (disputed property) in Guna. In the year 1947, all the three sons had mutually partitioned the property, according to which, house situated in Bhagwan Pujari Ki Gali and the disputed house went to the share of Chand Khan, the house situated in Nadi Mohalla went to the share of Nanne Khan and two houses situated in Koteswar Mandir Ki Gali, plot situated in Nadi Mohalla, house and two plots situated in Jatpura went to the share of Maula Baksh and from the date of partition, all the three brothers were residing separately along with their families in the property which came to their share. It was the case of the appellants that appellants are residing in the disputed property. First floor was let out to Bhagwandas on a monthly tenancy of Rs.300/-. Agreements dated 1/9/1977 and 24/8/1982 were also executed between the



appellants and Bhagwandas. It was the case of appellants that Maula Baksh had no right to enter into an agreement to sell the house situated in Sadar Bazar to Ghasilal. However, Maula Baksh in connivance with Ghasilal, prepared a forged agreement to sell in order to destroy the rights of appellants. Accordingly, Ghasilal filed a civil suit and obtained a decree on 24/4/1981. Since the appellants were not aware of the aforesaid decree & were not party, therefore, the same is not binding and on the basis of the decree the sale deed cannot be executed. Thus, it was prayed that the objection raised by the appellants may be accepted.

5. Ghasilal contended that the disputed property was of the ownership of Kale Khan and after his death, his sons Chand Khan, Maula Baksh and Nanne Khan inherited the property. After the mutual partition the disputed property went to the share of Maula Baksh and because of that he entered into an agreement to sell the disputed property to Ghasilal. Accordingly, Ghasilal had filed a suit for specific performance of contract which was registered as Civil Suit No.4A/1979 and by judgment and decree dated 24/4/1981, a decree was passed which is also binding on all the legal representatives of Kale Khan. It was further pleaded by Ghasilal that appellants are not in possession of the property in dispute. Since Maula Baksh had no issue, therefore, he was residing along with his brother Chand Khan. After the death of Chand Khan, his wife and sons were residing in the suit property with the permission of Maula Baksh and Maula Baksh was treating them as his children. Even if the appellants have let out the property, still it would not adversely effect the right of Maula Baksh as well as Ghasilal. It was further pleaded by Ghasilal that the judgment and decree passed by the Trial Court has also been affirmed by the High Court in F.A. No.33/1981. A document of partition was also executed amongst the legal representatives of Kale Khan, namely, Maula



Baksh, legal representatives of Chand Khan and the legal representatives of Nanne Khan on 26.08.1967. It was also contended by Ghasilal that the appellants had also filed a civil suit raising the same dispute which was dismissed for want of prosecution on 06.05.1999. Therefore, a similar objection in the form of Order 21 Rule 97 CPC is not maintainable. It was also the case of Ghasilal that Maula Baksh had also executed a sale deed in favour of Ghanshyam in respect of some part of the disputed property which was in the knowledge of appellants as well as Nanne Khan and the legal representatives of Chand Khan but no objection was taken by them and no steps were taken for setting aside the aforesaid sale deed. Therefore, it was claimed that the objection raised by the appellants may be rejected.

6. Ghanshyamdas filed his written objection. He also submitted that the objection raised by appellants is not maintainable.

7. The respondents No.3 to 7 therein also filed their written statement and contended that after the death of Kallu Khan, the property was inherited by his three sons Maula Baksh, Chand Khan and Nanne Khan, therefore, Maula Baksh had no right to enter into an agreement to sale. As per the family partition which took place in the year 1947, the property went to the share of their father Chand Khan and thus it was claimed that the objection raised by the appellants may be accepted.

8. On the basis of the objections raised by the appellants, the Trial Court framed the following two issues:

1. Whether the disputed property situated in Sadar bazar went to the father of the appellants as well as respondents No.3 to 7 in family partition or not ?
2. If yes, then whether the judgment and decree passed in favour of respondent No.1 in civil suit No.4-A/1979 is liable to be executed or



not ?

9. The Trial Court after recording the evidence of the parties, came to a conclusion that the objection filed by the appellants is misconceived and by impugned order dated 15.12.2010 has dismissed the application filed under Order 21 Rule 97 of CPC.

10. Challenging the order dated 15.12.2010, it is submitted by counsel for appellants that in a family partition which took place in the year 1947, the disputed house situated in sadar bazar went to the share of Chand Khan, whereas it is the case of the respondent that a family partition which took place prior to the year 1967 but an acknowledgment of partition was written on 26.08.1967, the property went to the share of Maula Baksh and accordingly in the said capacity Maula Baksh had executed an agreement to sale. Therefore, the Trial Court did not commit any mistake by rejecting the objection raised by appellants.

11. Heard learned counsel for the parties.

12. It is clear from the case of the respective parties that the property was originally belonged to Kale Khan who was survived by his three sons, namely, Chand Khan, Maula Baksh and Nanne Khan. Thus, the only question for consideration is as to whether the property went to the share of Chand Khan or to the share of Maula Baksh.

13. Shri Santosh Agrawal counsel for respondent No.1 submitted that the application filed under Order 21 Rule 97 CPC was not maintainable. It is submitted that the judgment and decree passed by the Trial Court for specific performance of contract was challenged by Ghanshyam by filing Civil First Appeal No.33/1981, whereas the mesne profits awarded by the Trial Court was challenged by Fatima Bee by filing Civil First Appeal No.45/1981. During the pendency of the appeal, Fatima Bee had expired and accordingly



appellants were substituted as legal representatives of Fatima Bee. Thus, it is clear that the appellants never challenged the decree for specific performance of contract. It was further stated that Ahmed Husain (PW-2) had admitted in paragraph 10 that after partition the respective parties remained in possession of the property in dispute. It is further submitted that respondent No.1 has relied upon the receipt Ex.D-18 to show that Maula Baksh was collecting the rent. It was further submitted that although the appellants were claiming that Maula Baksh was the Councillor therefore he got his name mutated in the records of Municipal Council but there is nothing on record to show that Maula Baksh was the Councillor. It is further submitted that Maula Baksh had mortgaged the property in favour of Smt. Bismillah Bai Ex.D-1 which clearly shows that the property went to share of Maula Baksh. It is further submitted that some part of the same house was alienated by Maula Baksh which was never challenged by appellants which clearly shows that the property in dispute had gone to the share of Maula Baksh. It is further submitted that Mohammad Husain who was one of the sons of Chand Khan had also specifically given his no objection by executing a no objection dated 26.08.1978 (Ex. D-4). It is submitted that in fact a document of acknowledgment of partition was executed on 26.08.1967 and according to the same, the property in dispute went to the share of Maula Baksh. The acknowledgment of partition is Ex. D-5. It is further submitted that Radheshyam Rawat (DW-3) has proved the execution of no objection given by Mohammad Husain Ex. D-4.

14. The first question for consideration is that who remained in possession after the partition took place and whether the family partition had taken place in the year 1947 or a partition took place as per acknowledgment written in 1967 (Ex.D-5).

**Acknowledgment of Written Partition Ex.D-5.**

15. It appears that during the cross examination of Ahmed Husain (PW-2), acknowledgment of written partition Ex. D-5 was shown to him which was denied by Ahmed Husain (PW-2). However, in spite of the fact that Ahmed Husain (PW-2) had not admitted the execution of acknowledgment of written partition, still it was marked as Ex.D-5. An objection was also raised by counsel for the appellants that since the aforesaid document does not contain any signature, therefore, it cannot be exhibited but the Trial Court by reserving the objection of the appellants had permitted the parties to exhibit the written acknowledgment of partition as Ex.D-5.

16. The acknowledgment of partition Ex.D-5 does not contain the signatures of anybody and therefore the objection which was raised by counsel for the appellants at the time of marking of document Ex.D-5 should have been allowed by the Trial Court and should not have permitted the respondent No.1 to mark the written partition as Ex. D-5. A document should be exhibited only if the execution of the same is proved by the parties in accordance with law. Merely because a document was referred to a witness which was denied by him would not be sufficient to mark the said document as Ex. D-5. Thus, it is held that the marking of the written partition as Ex.D-5 by the Trial Court was not proper and it is held that the respondent No.1 has failed to prove that the written partition Ex.D-5 was executed on 26.08.1967.

No objection by Mohammad Husain.

17. Similar is the situation with regard to no objection given by Mohommad Husain Ex.D-4. A suggestion was given to Ahmed Husain (PW-2) in paragraph 20 of his cross examination that Mohammad Husain had executed a no objection (Ex. D-4) to the sale deed which was being executed by Maula Baksh. In paragraph 20, Ahmed Husain (PW-2) has specifically



denied the signatures of Mohommad Husain but in spite of that the aforesaid document was marked as Ex. D-4. An objection was also raised by counsel for appellants to the effect that since Ahmed Husain (PW-2) has denied the execution of this aforesaid document and has also denied the signatures of Ahmed Husain on the no objection (Ex. D-4), therefore, it cannot be exhibited but by reserving the objection raised by the counsel for appellants, the Trial Court had permitted the parties to mark the no objection as Ex. D-4. It is once again held that if a party has denied the execution of a document which was shown to him during his cross examination, then the said document cannot be marked as exhibit. A document can be exhibited only if the execution of same is admitted by the witness but in spite of the objection raised by counsel for the appellants, the Trial Court had permitted the parties to mark the aforesaid document as Ex. D-4. It appears that in spite of reserving the objection raised by the appellant with regard to admissibility and marking of no objection by Mohommad Husain Ex.D-4 as well as written partition (Ex.D-5), the aforesaid aspect was not considered by the Trial Court while passing the impugned order. Thus, it is held that the no objection purportedly executed by Mohommad Husain. Ex.D-4 should not have been marked as Ex. D-4 merely on the ground that the said document was shown to Ahmed Husian (PW-2), as he had denied the signatures of Mohommad Husain on the said document.

18. The respondent No.1 has examined Radheshyam Rawat who was one of the attesting witness of no objection executed by Mohommad Husain Ex.D-4. Radheshyam Rawat has stated that no objection was executed by Mohommad Husain in his presence and Mohommad Husain had put his signatures in front of him and he had also signed the aforesaid document. Now, the only question for consideration is as to whether the respondent No.1 has successfully proved the execution of no objection executed by



Mohammad Husain Ex.D-4 or not? Radheshyam Rawat in paragraph 5 of his cross examination has admitted that he generally appears as a witness for Ghasilal. He further admitted that he always deposed whatever is told to him by Ghasilal. He further admitted that earlier in two cases he has already appeared as a witness for Ghasilal. He further stated that the document was got typed by Mohammad Husain and he does not know that who had typed the said document Ex. D-4. It was claimed by this witness that Mohammad Husain had stated that he has also enquired from both his brothers and since there is no dispute amongst them therefore he himself is competent to execute the no objection Ex.D-4. It is not out of place to mention here that both the appellants and Mohammad Husain were the sons of Chand Khan. Therefore, even if any solitary declaration was given by Mohammad Husain in the form of no objection Ex. D-4, the same would not bind the appellants. Furthermore the question for consideration is as to whether the no objection Ex. D-4 was executed by Mohammad Husain in presence of Radheshyam Rawat or not. From Ex. D-4, it is clear that the signatures of Radheshyam Rawat are completely different from what has been signed by Radheshyam Rawat in his affidavit filed under Order 18 Rule 4 CPC. Since Radheshyam Rawat is a pocket witness of Ghasilal and Radheshyam appeared as witness on behalf of Ghasilal in number of cases and Radheshyam has admitted categorically that he always says that whatever is told to him by Ghasilal, therefore, the evidence of Radheshyam that Mohammad Husain had executed the no objection certificate Ex.D-4 in his presence becomes doubtful specifically when the signatures on said certificate are completely different from the signatures which have been put by Radheshyam Rawat in his affidavit filed under Order 18 Rule 4 CPC. Furthermore, when Chand Khan had three sons, why a no objection certificate was obtained by respondent from Mohammad



Husain only and why it was not obtained from all the three brothers. Thus, the very execution of no objection by Mohommad Husain Ex. D-4 is a suspicious document and in absence of a conclusive proof that it was executed by Mohommad Husain, this Court is of the considered opinion that the respondents would not get any benefit from the no objection certificate executed by Mohommad Husain Ex. D-4.

19. Furthermore, Iqbal Husain son of Mohommad Husain had also entered in the witness box. A specific question was put to Iqbal Husain with regard to the signatures of his father Mohommad Husain on the no objection certificate Ex. D-4 and in paragraph 15 of his cross examination, this witness has specifically denied the signatures of his father, namely, Mohommad Husain on no objection certificate Ex. D-4. Thus, it is held that the respondents have failed to prove that no objection certificate (Ex.D-4) was ever executed by Mohommad Husain.

Whether the name of Maula Baksh @ Maatu was rightly recorded in the records of the Municipal Council or not?

20. Rambabu (DW-1) is the son of Ghasilal. Rambabu has proved the record of the Municipal Council Guna as Ex.D-11 to D-15 as well as Ex. D-23 and D-24. In paragraph 22 of his cross examination, he fairly conceded that in none of the documents it was mentioned that name of Maula Baksh is being recorded on the basis of partition. On whose order, the name of Maula Baksh was recorded in place of Kallu Pahalwan is also not mentioned in the revenue records. Even the respondents have not filed any document to show that how the name of Maula Baksh was recorded in the records of the Municipal Council Guna. Therefore, merely because the name of Maula Baksh was recorded in the record of Municipal Council Guna would not *prima facie* establish that his name was recorded on the basis of partition.



Furthermore, in absence of any order by a competent authority, any entry made in the revenue record or in the record of Municipal Council Guna has no legal sanctity in the eye of law. Furthermore, the entries of the record of Municipal Council Guna becomes more suspicious because if partition had already taken place and the property had gone to the share of Maula Baksh then why the respondent got a no objection certificate executed from Mohommad Husain Ex.D-4. A specific question was put to Rambabu (DW-1) in this regard and in paragraph 23 of his cross examination he tried to give an evasive reply that since Maula Baksh was an issueless person and he was being looked after by Mohommad Husain, Akhtar Husain and Ahmed Husain, therefore, Mohommad Husain had executed a no objection certificate. Thus, it is clear that not only the name of Maula Baksh was recorded in the revenue records without there being any order by the competent authority but even the respondent No.1 has failed to prove that any partition had taken place prior to the year 1967 and the respondents have failed to prove the acknowledgment of partition Ex.D-5 coupled with the fact that even the respondent was suspicious as to whether Maula Baksh has any right in property in dispute or not and therefore, in order to avoid any complexity had also relied upon a no objection certificate which according to this Court has not been proved by the respondents in accordance with law. Thus, merely because the name of Maula Baksh was recorded in the record of Municipal Council Guna would not give rise to any presumption that the property in dispute had gone to the share of Maula Baksh. Furthermore, the revenue entries or the mutation of name of Maula Baksh in the record of the municipal council that too without any order by the competent authority cannot be treated as a document of title or a *prima facie* case for partition.

Mortgage deed executed in favour of Smt. Bismillah Bai, Ex. D-1.



21. The respondents themselves have relied upon one mortgage deed executed by Maula Baksh in favour of Bismillah Bai Ex.D-1. According to the respondents after acknowledgment partition was written on 26.08.1967, Maula Baksh had mortgaged the property with Smt. Bismillah Bai for an amount of Rs.10,000/-. Therefore, it is clear that the property had gone to the share of Maula Baksh.

22. Considered the aforesaid submissions made by counsel for the respondents.

23. From plain reading of this mortgage deed Ex.D-1, it is clear that it was stated by Maula Baksh that partition has taken place a lot of years ago and this property has to come to his share. Whereas, according to the respondent, the acknowledgment of partition was executed by the parties on 26.08.1967 Ex.D-5. Therefore, now the only question for consideration is that when the partition took place amongst the legal representatives of Chand Khan. Respondents have not come up with a case that when actual partition took place. Even in the mortgage deed Ex. D-1, it is merely mentioned that years ago a partition had taken place and the property in dispute had gone to the share of Maula Baksh. The respondents have relied upon the record of Municipal Council Guna of Samvat 2004 (Ex. D-24), Samvat 2005 (Ex. D-25) and Samvat 2009 (Ex.D-26) to show that the name of Maula Baksh was recorded in the record of Municipal Council Guna. Samvat 2004 would mean 1947, Samvat 2005 would mean 1948 and so on. If the property had already gone to the share of Maula Baksh in a partition which took place in the year 1947, then why a joint mortgage deed was executed by Maula Baksh and Chand Khan in favour of Smt. Manik Bai on 11.10.1956 (Ex. P-3c). Similarly, a joint rent note was also executed by Chand Khan and Maula Baksh ExP-4, which was executed on 11.10.1956 (Ex.P-4). Another joint



mortgage deed was executed by Chand Khan, Nanne Khan and Maula Baksh on 4.07.1956 as Ex. P-8. If the property had gone exclusively to the share of Maula Baksh then why the joint mortgage deeds were being executed by Maula Baksh along with Chand Khan and Nanne Khan has not been explained by the respondents. There is another important aspect of the matter which has remained unexplained by the respondents. According to the respondents themselves Maula Baksh had mortgaged the property with Bismillah Bai by mortgage deed dated 16.09.1967 (Ex.D-1). However, the respondents have not clarified that when the mortgage was redeemed. Unless and until there is a specific evidence to show that mortgage deed was redeemed at a later stage by Maula Baksh, even then he would not have any right to alienate the property or to enter into an agreement to sale with Ghasilal. Although an attempt was made by Shri Santosh Agrawal by referring to the evidence of Ahmed Husain and submitted that in paragraph 15, it was admitted by Ahmed Husain that the amount of mortgage might have been refunded by Maula Baksh but once Ahmed Husain (PW-2) had not stated that the amount was refunded by Maula Baksh, the statement made by Ahmed Husain that the amount of mortgage might have been refunded by Maula Baksh cannot be said to be an admission on the part of Ahmed Husain (PW-2) to the effect that the mortgage in favour of Bismillah Bai, Ex. D-1 was got redeemed by Maula Baksh. Even otherwise the respondents have themselves relied upon the suit filed by Bismillah Bai against Maula Baksh by which Bismillah Bai had claimed that since the mortgage has not been redeemed therefore after auctioning the house in dispute, the outstanding amount of Rs.14,784.20/- be paid to the plaintiff, namely, Bismillah Bai (Ex.D-10).

Possession of the person to whom the property in partition had

**gone.**

24. Further Shri Santosh Agrawal by referring to the evidence of Ahmed Husain (PW-2) submitted that Ahmed Husain categorically admitted in his cross examination that after the partition, the respective parties are in possession of their specific share. Therefore, it is submitted that since Maula Baksh was in possession of the house in dispute from the date of partition, therefore, it is clear that the said house had gone to the share of Maula Baksh.

25. Considered the submissions made by counsel for the respondents.

26. The respondents themselves have relied upon the mortgage deed dated 16.09.1967 Ex.D-1, which was executed in favour of Bismillah Bai. In this mortgage deed it is specifically stated by Maula Baksh that he is issueless and widow of his younger brother Chand Khan and children of Chand Khan are residing in the house. Therefore, the possession of the widow and sons of Chand Khan was admitted by Maula Baksh while executing the mortgage deed Ex. D-1. However, it is submitted by counsel for the respondent that it is specifically mentioned in the mortgage deed that the widow and sons of Chand Khan were residing in this disputed property with the permission of Maula Baksh. Thus, it is the contention of the counsel for the respondents that although widow of Chand Khan and sons of Chand Khan might be residing in the disputed property but it was with the permission of Maula Baksh. However, no such suggestion was given by respondents to Ahmed Husain (PW-2). On the contrary, a specific suggestion was given to Ahmed Husain (PW-2) in paragraph 10 of his cross examination that the parties were in peace possession of their respective share after partition. Furthermore, the mortgage deed Ex. D-1 was not countersigned by the widow and sons of Chand Khan. Therefore, if the suggestion given to Ahmed Husain (PW-2) in paragraph 10 of his cross examination and mortgage deed (Ex. D-1) are



considered conjointly then it is clear that Maula Baksh had also admitted that the widow and children of Chand Khan are residing in the disputed property. Since the mortgage deed was not countersigned by the widow and children of Chand Khan, therefore, it cannot be said that the recital in the mortgage deed that they were residing with the permission of Maula Baksh is binding on the widow and sons of Chand Khan.

Whether the application filed by appellants under Order 21 Rule 97 CPC is maintainable or not ?

27. It is submitted by counsel for the respondents that the decree for specific performance of contract was challenged by Ghanshyam by filing civil first appeal No.33/1981, whereas the mesne profit part of the decree was challenged by Fatima Bee by filing civil first appeal No.45/1981. It is not out of place to mention here that Fatima Bee was the widow of Maula Baksh. It appears that Fatima Bee died during the pendency of the appeal and accordingly Mohommad Husain was substituted as legal representative of Fatima Bee. Although it was argued by counsel for respondent No.1 that even the appellants were also substituted as legal representatives of Fatima Bee but Shri Santosh Agrawal could not point out from any document to show that the appellants were also ever substituted as legal representatives of Fatima Bee. From Ex.D-28, it appears that Maula Baksh had challenged the decree for specific performance of contract. During the pendency of appeal, Maula Baksh expired and accordingly his widow Smt. Fatima Bee was substituted as his legal representatives. Fatima Bee also expired on 11.09.1995 and accordingly an application was filed for taking legal representatives of Fatima Bee on record. The said application is Exhibit D-28. According to the said application, Mahila Anwari Begum, Iqbal Husain, Ajay Husain, Sharit Husain and Irshad Husain were substituted as legal representatives of Fatima Bee.



The appellants were never substituted as legal representatives of Fatima Bee. Iqbal Husain had appeared as a witness in support of his written statement. A specific question was put to Iqbal Husain as to whether the application Ex. D-28 bears his signatures or not. In paragraph 12 of his cross examination, he has specifically stated that the application Ex.D-28 does not bear his signatures. He further stated that Shri N.K Mody was never his counsel. However, he admitted that the details of this application and his father name has been rightly mentioned. He denied that application Ex. D-28 was filed before the High Court under his signatures. He denied that the application Ex.D-28 was filed in an appeal which was pending before the High Court. Whether Iqbal Husain and others whose names were mentioned in application Ex.D-28 were rightly substituted as legal representatives of Fatima Bee or not, is not to be decided in this case because admittedly the appellants were never substituted as the legal representatives of Fatima Bee. Thus, it cannot be said that merely because the widow and sons of Mohommad Husain were substituted as legal representatives of Fatima Bee, therefore, the application filed by the appellants under Order 21 Rule 97 CPC was not maintainable.

28. There is another aspect of the matter. According to the parties, Maula Baksh had died issuess. After the death of his widow Fatima Bee, why only widow and children of Mohommad Husain were impleaded as legal representatives and why the appellants were also not impleaded as legal representatives of Fatima Bee has also not been explained by Shri Santosh Agrawal counsel for the respondent. Thus, it is clear that respondents or Maula Baksh or the parties were suppressing the facts and were filing incomplete applications before the Courts at different stages.

Civil Suit for declaration filed by appellants.

It is next contended by counsel for the respondents that the appellants



had also filed a civil for claiming their title but ultimately they got it dismissed by order dated 06.05.1999 for want of prosecution. Therefore, the application filed under Order 21 Rule 97 CPC was not maintainable.

29. Considered the submissions made by counsel for the respondents.

30. The suit filed by the appellants was dismissed for want of prosecution by order dated 06.05.1999 (Ex. D-6). In paragraph 10 of the application filed under Order 21 Rule 97 CPC, it is mentioned by the applicants themselves that “they have already filed a suit for declaration of title and permanent injunction against the respondent No.1 Ghasilal, Ghanshyamdas and Mohommad Husain which is pending before the Trial Court. However, after amendment in the CPC, they would withdraw the said suit.” The application under Order 21 Rule 97 CPC was filed in the month of January 1997, whereas the suit was dismissed for want of prosecution by order dated 06.5.1999 (Ex. D-6). Therefore, it is clear that not only the appellants had already disclosed the pendency of the suit which was filed by them for declaration of title and permanent injunction but the said suit was also dismissed during the pendency of the application filed under Order 21 Rule 97 of CPC.

31. Now, the only question for consideration is that what would be the effect of dismissal of suit filed by the appellants for want of prosecution.

32. The application filed under Order 21 Rule 97 CPC has to be tried as a full fledged civil suit. The appellants have already disclosed the pendency of the civil suit filed by them for declaration of title and permanent injunction and they had expressed that they would withdraw the said suit and ultimately the suit was dismissed for want of prosecution by order dated 06.05.1999 (Ex.D-6). Where the suit is dismissed for want of prosecution, then a fresh suit is not barred provided that it is filed within a period of limitation. Since the application filed under Order 21 Rule 97 CPC was already pending,



therefore, it is held that the dismissal of the suit filed by the appellants for declaration of title and permanent injunction in respect of the property in dispute will not have any adverse effect on the maintainability of the application filed under Order 21 Rule 97 CPC.

33. No other arguments were advanced by counsel for the parties.

34. From the discussion made above, it is clear that a suggestion was given to Ahmed Husain (PW-2) that after the partition, the parties which got the property remained in possession and even otherwise it is clear from the mortgage deed Ex.D-1 that Maula Baksh had specifically admitted that the widow and children of Chand Khan are in possession of the property in dispute. It is the case of the appellants that after the partition, a house situated in the street of Koteswar Mandir, a kuccha house adjoining to the house situated in the street of Koteswar temple, a plot admeasuring 40 x 60 square feet situated in Nadi Moholla, a house situated in Jatpur, a plot admeasuring 30 x 50 feet situated in Jatpura, another plot admeasuring 40 x 60 feet in Jatpura went to the share of Maula Baksh, whereas a kuccha house situated in Bhagwan pujari ki gali and the disputed property went to the share of Chand Khan and pucca house situated in Nadi Moholla went to the share of Nanne Khan. The fact that Maula Baksh received the properties mentioned above has not been denied by the respondents. Therefore, it was obligatory on the part of the respondents to explain that when Maula Baksh had received the aforesaid properties in partition then why he was not residing in the houses which he got in partition and why he was residing along with widow and children of Chand Khan in the property in dispute. As already pointed out Maula Baksh was issueless and therefore, the contention of the appellants that he was residing along with the appellants in the disputed house appears to be more plausible. Both the parties have miserably failed to prove that on what



date the partition took place. It is the case of the appellants that partition took place sometime in the year 1947 i.e. immediately after the independence when there was a helter skelter. Even according to Ex. D-14 which is the record of Municipal Council Guna the name of Maula Baksh was recorded in the revenue record in place of Kale Khan. Therefore, it is clear that some partition must have taken place in the year 1947 and therefore, the stand taken by the appellants that the partition took place in the year 1947 appears to be more plausible. As already pointed out that there is nothing on record to suggest that on whose order, the name of Maula Baksh was recorded in the revenue records of Municipal Council Guna and since it is the case of appellants that Maula Baksh was a councillor therefore, he got his name mutated in the municipal records in a clandestine manner also appears to be plausible. Thus, it is clear that in fact the house in dispute had gone to the share of Chand Khan and after his death the property went to the share of the widow and children of Chand Khan and Maula Baksh had no right or title to enter into an agreement to sale the said property to Ghasilal. Therefore, this Court is of the considered opinion that the Trial Court has committed a material illegality by rejecting the application filed by the appellants under order 21 Rules 97, 98, 99 and 100 of CPC.

35. Accordingly the order dated 15.12.2010 passed by IV Additional District Judge (Fast Track) Guna in MJC No. 09/09 is hereby **set-aside**. Application filed by the appellants under Order 21 Rules 97, 98, 99 and 101 of CPC is allowed and it is held that since Maula Baksh was not the owner of the disputed house, therefore, he had no right to enter into an agreement to sale the said house to Ghasilal and judgment and decree passed by District Judge Guna on 24.04.1981 in civil original suit No.4A/1979 and the judgment passed by High Court in F.A. No.33/1981 is not binding on the appellants.



36. Accordingly, the appeal is **allowed**.

37. Decree be drawn accordingly.

No order as to costs.

(G.S. Ahluwalia)
Judge

Aman