The High Court of Madhya Pradesh
SA No.105 of 2011
Sarnam Singh and Anr. vs. Gurmej Singh and Others.

Gwalior, dtd. 28/03/2019

Shri KS Tomar, Senior Counsel with Shri Sanjay Singh Tomar, counsel for the appellants.

This appeal has been filed by the appellants, Sarnam Singh and Gurmeet Singh under Section 100 of CPC against the judgment and decree dated 21st January, 2011 passed by First Additional District Judge, Dabra, District Gwalior in Civil Appeal No.21A of 2010, by which the appellate Court has reversed the judgment and decree dated 28th April, 2010 passed by Civil Judge, Class-I, Bhitarwar, District Gwalior in Civil Suit No.61 of 2005, by which the suit filed by the plaintiffs was decreed.

The present appeal has been admitted on the following substantial questions of law:-

> "**i.** Whether learned lower appellate Court has erred in reversing the judgment and decree passed by the trial Court without considering the reasons given by the trial Court in favour of plaintiffs ?
> **ii**. Whether lower appellate Court has failed to consider the effect of absence of counter claim for cancellation of sale deed of appellants in presuming their possession over the suit land?

The necessary facts for disposal of the present appeal in short are that a suit for declaration of title and permanent injunction was filed by the appellants against the respondents for declaration that they are the owners of 1/8th part of the land in question and the mutation order passed in Mutation Case No.1/80-81/A46 be declared as null and void and the plaintiffs are entitled for partition of 1/8th share in the property in question. It is the case of the plaintiffs that the land bearing survey No.53 area, 0.182 hectare, No.54, area 0.481 hectare, No.55 area 0.460 hectare, No. 56 area 0.181 hectare, No. 57 area 0.418 hectare, No.58, area 1.693 hectare, No.59 area 1.819

hectare, No.60 area 0.544 hectare, No.61 area 0.387 hectare, No.62 area 0.543 hectare, No. 63 area 2.215 hectare, No.63:2 area 1.202 hectare, No.106:1 area 1.117 hectare, No.106:3 area 0.417 hectare, No.106:4 area 0.209 hectare, No.106:5 area 0.418 hectare, No.127 area 0.439 hectare, No.442 area 0.941 hectare, No.446 area 0.094 hectare, No.449 area 0.084 hectare, No.450 area 0.241 hectare, No.451 area 0.094 hectare, No. 449 area 0.084 hectare, No. 450 area 0.241 hectare, No. 451 area area 0.146 hectare, No.452 area 0.261 hectare, No.454 area 0.973 hectare, No.455 area 0.752 hectare, No.461 area 0.178 hectare, No.462 area 0.084 hectare, No.464 area 0.167 hectare, No.465 area 0.052 hectare, No.469 area 0.063 hectare, No.472 area 0.063 hectare, No.473 area 0.042 hectare, No.474 area 0.136 hectare, No.477 area 0.042 hectare, No.478 area 0.157 hectare, No.471 area 0.219 hectare, No.480 area 0.063 hectare, No.481 area 0.063 hectare, No.482 area 2.080 hectare, No.484 area 0.063 hectare, No.485 area 0.146 hectare, No.486 area 0.105 hectare, No.487 area 0.052 hectare, No.488 area 0.282 hectare, No.489 area 0.003 hectare, No.491 area 1.003 hectare, No. 494 area 0.345 hectare, No. 495 area 0.084 hectare, No. 500 area 0.031 hectare, No.501 area 0.021 hectare, No.502 area 0.314 hectare, No.503 area 0.230 hectare, No.504 area 0.082 hectare, No.507 area 15.573 hectare, No.508 area 0.470 hectare, No.501:2 area 0.084 hectare, No. 510 area 1.045 hectare, No.512 area 0.334 hectare, No.514 area 0.314 hectare, No.515 area 0.345 hectare, No.520 area 0.146 hectare, No.521 area 0.094 hectare, No.522 area 0.627 hectare, No.523 area 1.361 hectare, No.524 area 0.042 hectare, No.525 area 0.069 hectare, No.529 area 0.356 hectare, No.530 area 0.838 hectare, No.531 area 0.073 hectare, No.529 area 0.356 hectare, No.530 area 0.838 hectare, No.531 area 0.073 hectare, No.532 area 0.020 hectare and No.560 area 0.721 hectare, total area 54,588 hectares, is

situated in village Khedataka, Tahsil Dabra, District Gwalior. Parmal Singh, Prithvi Singh son of Ranveer Singh and Smt. Baiju Raja, wife of Ranveer Singh, had 1/4th share in the said land and their names were accordingly recorded in the revenue records as "Bhumiswamis". The appellants purchased ½ of the share of Parmal Singh, Prithvi Singh and Baiju Raja by registered sale deed dated 05/11/1982 and 1/8th share was purchased by Satnam Singh and Sher Singh by registered sale deed dated 05/11/1982 and accordingly, the "Bhumiswamis" had handed over the possession of land mentioned in the sale deeds and there onwards, the appellants as well as Satnam Singh and Sher Singh are in possession of their respective lands. It was further pleaded that the defendant No.1 filed an application under Sections 110 and 190 of MP Land Revenue Code against the defendants No.2 to 4 and other co-sharers and in spite of the sale deed registered in favour of the appellants, entered into a compromise with the sellers of the appellants and the sellers of the appellants gave their consent for declaration of defendant No.1 as "Bhumiswami". It was further pleaded that the revenue proceedings which had taken place on the basis of compromise, are null and void to the extent of interest of the appellants because after registration of sale deed the defendant Nos.2 to 4 had no sale-able interest in the property. The appellants, thereafter, challenged the order before the Court of SDO, Pargana Dabra, District Gwalior, in which an interim order has been passed and the appeal was pending on the date of filing of suit. It was further pleaded that out of the property mentioned in the plaint, Mangilal had 1/4th share, Maniram had 1/4th share, and Hanumant had 1/4th share, out of which Mangilal had sold 1/8th share to Lakha Singh and 1/8th share to Maharaj Singh. Lakha Singh and Maharaj Singh, in their turn, sold their share to Vimla Devi and Prabhat Kumar and thus, it is clear that Mangilal has no right or title

in the land in dispute. It was pleaded that under the garb of order passed by Tahsildar, defendant no.1, Mangilal is trying to alienate the property of the appellants and therefore, they have been compelled to file the suit for declaration of title and permanent injunction as well as the plaintiffs are also entitled to get the partition of the property. Accordingly, the suit was filed for declaration that the plaintiffs are the "Bhumiswamis" of 1/8th part of the property mentioned in the plaint and the revenue order passed by Tahsildar is null and void so far as the plaintiffs are concerned and the plaintiffs are entitled to get the property partitioned.

The defendant Nos.1 to 3 filed their written statement. The defendant Nos. 1(aa) to 1 (gha) and the legal representatives of the defendant No.1(d) filed their written statement and denied that the defendants No.2 to 4 are the owners and in possession of the land in dispute. It was also denied that Parmal Singh, Prithvi Singh and Baiju Raja had sold the property to the plaintiffs and Sarman Singh and Gurmeet Singh. The answering defendants admitted that Mangilal (originally the defendant No.1) had filed an application under Sections 110 & 190 of MPLRC and the fact of compromise was accepted and it was denied that the said compromise was fraudulent. The fact of filing an appeal and passing an interim order by the SDO was also denied. It was further pleaded that Hanumant Singh had sold some part of his share to Vimla Devi and Prabhat Kumar. Vimla Devi is the wife of the defendant No.1, whereas Prabhat Kumar is the brother of Vimla Devi. Thus, it was pleaded that they are in cultivating possession of this land. It was further stated that Mangilal had cultivated the share of Maniram, and after his death, the answering defendants are in cultivating possession. In special statement, it was submitted that Ranveer (father of defendants no.2 and 3 and husband of the defendant No.4) was the owner of the land in dispute.

By sale deed dated 25/05/1995, he had sold the said land to Mangilal and the possession was given to him and from thereafter, Mangilal had remained in continuous possession of the same and after his death, the answering defendants are in possession. The defendants No.2 to 4 had filed the suit against the defendant No.1 Mangilal as well as Maniram, Surendra Kumar, Hanumant Singh, Prabhat Kumar and Vimla Devi for declaration of title and permanent injunction. It was dismissed for want of prosecution on 1/7/1970, and, therefore, even if the defendants No.2 to 4 had any right or title, then they have lost the same w.e.f. 1/1/1970. It is further pleaded that the respondents No. 2 to 4 had no right or title to execute the sale deed in favour of the appellants/ plaintiffs. It is further pleaded that the suit filed by the plaintiffs is barred by res judicata. In the revenue proceedings, the defendants No. 2 to 4 had admitted that their suit which was filed for permanent injunction, has also been dismissed for want of prosecution on 1/1/1970 and thus, the defendants No.2 to 4 had admitted the title of the answering defendants in the revenue proceedings and accordingly, the Tahsildar on 17/05/1983 had directed for mutation of name of the defendant No.1 Mangilal as "Bhumiswami". It is further pleaded that as the revenue proceedings were pending and the sale deed has been executed during the pendency of revenue proceedings, therefore, doctrine of *lis pendens* would apply. Thus, it was prayed that the suit be dismissed with cost of Rs.10,000/-.

The defendants No.7, 9 to 12 also filed separate written statements and did not dispute that the names of Parmal Singh, Prithvi Singh and Baiju Raju were recorded as "Bhumiswamis". The sale deed dated 05/11/1982 executed by the defendants No. 2 to 4 in favour of the appellants was also denied. It was further pleaded that the property in dispute is a joint Hindu Family Property and until and unless the same is

partitioned, a specific portion of land can not be sold. It was further pleaded that prior to execution of sale deed in favour of the appellants, the defendant No.1 Mangilal was in possession of the land in dispute as *Sikmi* and when Mangilal agreed to leave 12 bigha of land in favour of Parmal in the revenue proceedings, then Parmal Singh entered into a compromise and accordingly, Mangilal was declared as "Bhumiswami" of the land in dispute. It was further pleaded that out of the entire land mentioned in the plaint, Mangilal became the "Bhumiswami" of half of the land. The fact that the compromise was entered in a fraudulent manner was also denied. It was further pleaded that Parmal Singh and others had no right to execute the sale deed. It was further pleaded that the order passed by the Tahsildar is correct.

The defendants No.13 to 16 also filed their separate written statements and they have also denied the execution of sale deed in favour of the appellants. They also denied that any possession was given by the appellants. It was further pleaded as the property has not been partitioned, therefore, even other wise, the defendants no. 2 to 4 had no right or title to sell any specific portion of land. The trial Court by order dated 25/09/2009 framed the following issues :-

(1) Whether the plaintiffs are entitled for declaration that the plaintiffs are title holder and in possession of 1/8th part of the land in dispute ?

(2) Whether the plaintiffs are entitled for decree of permanent injunction against the defendants ?

(3) Whether the plaintiffs have properly valued the suit ?

(4) Whether the plaintiffs have paid the proper Court fee ?

(5) Whether the suit is barred by principle of *res judicata ?*

(6) Whether the suit is barred by time ?

The trial Court after recording the evidence of the parties, decreed the suit and held that the plaintiffs are the owners and are in possession of half of one forth share of Parmal Singh, Prithvi Singh and Baiju Raja and the defendants were restrained from interfering with the peaceful possession of the plaintiffs. It was fur ther held that the plaintiffs are entitled to get the land partitioned from the revenue Court.

Being aggrieved by the judgment and decree dated 28th April, 2010, the defendants filed an appeal which has been allowed by the First Additional District Judge, Dabra, District Gwalior by judgment and decree dated 21st January, 2011 passed in Civil Appeal No.21-A of 2010 and held that although Parmal Singh, Prithvi Singh and Baiju Raja had 1/4th share in the property but since they were not in possession of the land in dispute, therefore, no possession was delivered to the plaintiffs and, therefore, the suit was barred under Section 34 of the Specific Relief Act as they had not sought consequential relief of possession.

Challenging the judgment and decree of reversal passed by the First Appellate Court, it is submitted by the counsel for the appellants that even if the appellate Court was of the view that the plaintiffs are not in possession of the land purchased by them, then instead of dismissing the appeal as not maintainable in absence of any consequential relief of possession, the appellate Court should have given an opportunity to the plaintiffs to amend the plaint and to seek relief of possession.

To buttress his contention, the learned Senior Counsel for the appellants has relied upon the judgment passed by the Supreme Court in the case of **Mst. Rukhmabai vs. Lala Laxminarayan and Others,** reported in **AIR 1960 SC 335** as well as the judgments passed by this Court in the case of **Kalyan Singh vs. Vakil Singh and others,** reported in **1990 MPJR 177** and **Munni Devi (Smt.) Shanti**

Kumar and Others, reported in **2014 RN 428**.

None appears for the respondents.

Heard the learned Senior Counsel for the appellants.

It has been admitted by learned senior counsel for the appellants that the land in dispute is a joint Hindu Family Property of which the defendant Nos.2 to 4 were the co-sharers and they had 1/4th share in the property mentioned in the plaint and out of that, the defendant No.2 to 4 had sold ½ portion to the appellants. Thus, it cannot be said that the appellants have no right or title in the said land.

It is the case of the appellants that the land in dispute is a joint Hindu Family Property. Thus, it is clear that the co-sharer can sell his share but he cannot sell a specific portion of the property and similarly, the purchaser cannot purchase any specific portion of property. The purchaser of joint property cannot claim the possession of a specific portion of land but he is required to file a suit for partition and only after getting the property partitioned, he can claim any specific portion falling to the share of his seller. In the present case, the plaintiffs have prayed that they were placed in possession of specific portion of the land and the said pleading has been found to be incorrect. Even if the plaintiffs are permitted to amend their plaint, then still they cannot claim that they were placed in possession of specific portion of land mentioned in the sale deed.

It is submitted by the learned senior counsel for the appellants that it has been specifically mentioned that the possession of the land has been handed over to the purchaser, therefore, there is no reason to disbelieve the same. The recital of delivery of possession in the sale deeds is not decisive factor. The question of possession is a pure question of fact which can be ascertained on the basis of evidence led by the

parties. Thus, where the recital in the sale deeds that the possession of the land mentioned therein has been delivered and when the said recital is contrary to law, as specific portion of the land cannot be sold and the possession of the same cannot be delivered to the purchaser, then this Court is of the considered opinion that the recital in the sale deeds that the possession of the land in dispute has been handed over to the purchaser is of no importance and cannot be taken note of.

The Supreme Court in the case of ***Mst. Rukhma Bai*** (supra) has held that the plea of non-maintainability of suit in absence of consequential relief cannot be allowed to be raised before the Supreme Court for the first time, and this plea should have been raised at the earliest so that the plaintiff can amend the plaint.

The defendants had specifically pleaded in their written statement that the plaintiffs are not in possession of the property in dispute. Therefore, the plaintiffs had the choice of either seeking prayer for possession or to go ahead with the suit by taking the risk of dismissal of their suit in view of proviso to Section 34 of Specific Relief Act. As the plaintiffs themselves took the risk, therefore, they cannot say that the Appellate Court should have granted an opportunity to amend the plaint for seeking relief of possession. Even otherwise, the Supreme Court in the case of ***Mst. Rukhma Bai*** (supra) has not held that a plaintiff should not be non-suited in the light of proviso to Section 34 of the Specific Relief Act, and if the plaintiff is not found to be in possession of the suit property, then he should be given an opportunity to amend the plaint.

The Supreme Court in the case of **Union of India vs. Ibrahim Uddin and another** reported in **(2012) 8 SCC 148** has held as under:-

"***Section 34 of the Specific Relief Act, 1963***

55. The Section provides that courts have discretion as to declaration of status or right, however, it carves out an exception that a court shall not make any such declaration of status or right where the complainant, being able to seek further relief than a mere declaration of title, omits to do so.

56. In Ram Saran v. Ganga Devi (1973) 2 SCC 60, this Court had categorically held that the suit seeking for declaration of title of ownership but where possession is not sought, is hit by the proviso of Section 34 of Specific Relief Act, 1963 (hereinafter called 'Specific Relief Act') and, thus, not maintainable. In Vinay Krishna v. Keshav Chandra AIR 1993 SC 957, this Court dealt with a similar issue where the plaintiff was not in exclusive possession of property and had filed a suit seeking declaration of title of ownership. Similar view has been reiterated observing that the suit was not maintainable, if barred by the proviso to Section 34 of the Specific Relief Act. *(See also: Gian Kaur v. Raghubir Singh (2011) 4 SCC 567).*

57. In view of above, the law becomes crystal clear that it is not permissible to claim the relief of declaration without seeking consequential relief.

58. In the instant case, suit for declaration of title of ownership had been filed though, the plaintiff/respondent no. 1 was admittedly not in possession of the suit property. Thus, the suit was barred by the provision of Section 34 of the Specific Relief Act and, therefore, ought to have been dismissed solely on this ground. The High Court though framed a substantial question on this point but for unknown reasons did not consider it proper to decide the same. "

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85.12. The suit was barred by the proviso to Section 34 of of the Specific Relief Act, for the reason that plaintiff/respondent No.1, admittedly, had not been in possession and he did not ask for restoration of possession or any other consequential relief. "

The Supreme Court in the case of **Venkataraja and Others vs. Vidyane Doureradjaperumal (Dead) Through Legal Representatives and Others,** reported in **(2014) 14 SCC 502** has held as under:-

"**27.** In view of the above, it is evident that the suit filed by the appellants/plaintiffs was not maintainable, as they did not claim consequential relief. The respondent nos. 3 and 10 being admittedly in possession of the suit property, the appellants/plaintiffs had to necessarily claim the consequential relief of possession of the property. Such a plea was taken by the respondents/defendants while filing the written statement. The appellants/plaintiffs did not make any attempt to amend the plaint at this stage, or even at a later stage. The declaration sought by the appellants/plaintiffs was not in the nature of a relief. A worshipper may seek that a decree between the two parties is not binding on the deity, as mere declaration can protect the interest of the deity. The relief sought herein, was for the benefit of the appellants/plaintiffs themselves."

Under these circumstances, where the suit was filed without seeking prayer for possession, then this Court is of considered opinion that the appellate Court did not commit any mistake in allowing the appeal and dismissing the suit.

Accordingly, the substantial questions of law framed by this Court are answered in negative.

The appeal fails and is hereby **dismissed.**

(G. S. Ahluwalia)
Judge

MKB