

**IN THE HIGH COURT OF MADHYA PRADESH
AT JABALPUR**

BEFORE

HON'BLE SHRI JUSTICE DWARKA DHISH BANSAL

FIRST APPEAL No. 574 of 1997

Between:-

- 1. KAPOOR CHAND S/O MANGALJEET (DEAD)
THROUGH HIS LRS**
- 1(A). ARUN KUMAR S/O LATE KAPOOR CHAND
JAIN AGED 43 YEARS, OCCUPATION: TYPIST
R/O GANJHI BAZAR, BEGAMGANJ DISTT:
RAISEN ((MADHYA PRADESH)**
- 1(B). KU. ANJANA BAI D/O LATE KAPOOR CHAND
JAIN AGED 42 YEARS, R/O BEGAMGANJ
PRESENTLY UDASIN VATKA ASHRAM SOUTH
TUKOGANJ, INDORE (MADHYA PRADESH)**
- 1(C). SMT. RAJKUMARI JAIN W/O ARUN KUMAR
JAIN, AGED 35 YEARS, R/O GANDHI BAZAR,
BEGAMGANJ, DISTT. RAISEN (MADHYA
PRADESH)**
- 1(D). KU. PRITIBHA JAIN, AGED 7 YEARS
MINOR AND D/O ARUN KUMAR JAIN R/O
GANDHI BAZAR, BEGAMGANJ, RAISEN
(MADHYA PRADESH)**
- 1(E). KU. PRAGYA JAIN, AGED 3 YEARS
MINOR AND D/O ARUN KUMAR JAIN R/O
GANDHI BAZAR, BEGAMGANJ, RAISEN
(MADHYA PRADESH)**

.....APPELLANTS

**(BY SHRI IMTIYAZ HUSAIN-SENIOR ADVOCATE
WITH SHRI MOHD. SAJID AND SHRI RAVIKANT
PATEL-ADVOCATES)**

AND

- 1. LAXMI CHAND S/O INDERCHAND AGED 69**

YEARS (DEAD) THROUGH HIS LRS

1(A). SMT. LAXMI BAI, D/O LATE LAXMI CHAND,
W/O KAMLESH KUMAR JAIN, AGED 40 YEARS,
R/O KALOOPURA MOHALLA, AHMEDABAD
(GUJARAT)

1(B). CHANDMAL S/O LAXMI CHAND JAIN AGED 39
YEARS

1(C). RAKESH KUMAR S/O LAXMI CHAND JAIN
AGED 25 YEARS

1(D). BRIJESH KUMAR, S/O LAXMI CHAND JAIN,
AGED 22 YEARS

ALL R/O NEAR KISHAN MOHALLA GAIRAT
GANJ, DIST.. RAISEN (M.P.)

.....RESPONDENTS

.....
Reserved on : 05.08.2022

Delivered on : 16.08.2022
.....

This appeal coming on for final this day, Court passed the following:

JUDGMENT

This first appeal has been filed by appellants/plaintiffs challenging the judgment & decree dated 21.08.1997 passed by Addl. District Judge, Begumganj (Raisen) in Civil Suit No. 10-A/1988 whereby suit for possession of house and damages filed by original plaintiff Kapoorchand (now his representatives) has been dismissed.

2. In short the facts are that Mangaljeet was owner of the suit property, who died after leaving two sons namely Inderchand, Kapoorchand and one daughter Bhuribai, who died issueless. The present

appellants are descendants of original plaintiff Kapoorchand and the defendants are descendants of Inderchand. It is alleged that in his lifetime, Mangaljeet partitioned his property in which he gave one portion of house to plaintiff Kapoorchand and another portion was given to Inderchand and kept middle portion for himself, in which till his death daughter Bhuribai remained in possession. This middle portion only is in dispute. It is alleged that by way of registered deed (*Tamleeknama*) dated 06.01.1947 (Ex.P/1A) Bhuribai was given life interest in the disputed property and she was not having any right to alienate/transfer the suit property to any other person and it was specifically mentioned in the deed dated 06.01.1947 that after death of Bhuribai the property would fall to Kapoorchand. It is alleged that after death of Bhuribai, the defendants took possession on the house illegally, therefore, the suit was filed by Kapoorchand for possession claiming himself to be the exclusive owner on the basis of Deed (Ex.P/1A).

3. The defendants appeared and filed written statement denying the plaint allegations and claimed themselves to be owner of the suit property on the basis of Will (Ex.D/3) allegedly executed by Bhuribai in favour of Lakhmichand (Laxmichand). Denying all other allegations, the defendants prayed for dismissal of the suit.

4. On the basis of pleadings, learned trial Court framed as many as 13 issues and recorded evidence of the parties. After taking into consideration the entire evidence available on record, learned trial Court held that the house in question was not given for residence to Bhuribai and it is not proved that Bhuribai had no right to transfer. It is held that the deed dated 06.01.1947 (Ex.P/1A) is also not proved to have been executed by Mangaljeet, hence the plaintiff is not owner of disputed house. It is also held that the defendants have not forcibly taken

possession on 25.07.1986, therefore, the plaintiff is not entitled to vacant possession of the disputed house.

5. Learned counsel for the appellants/plaintiffs submits that learned trial Court has neither framed any issue with regard to Will (Ex.D/3) nor recorded any finding to the effect that the Will (Ex.D/3) is a genuine document executed by Bhuribai in favour of the defendant. He submits that undisputedly the disputed house belonged to father of original plaintiff and defendant 1. He submits that by way of registered deed dated 06.01.1947 (Ex.P/1A), the property was given for residence to Bhuribai and as she was having only life interest, therefore, after her death, it would fall to the plaintiff and as she was not owner of the property therefore, she could not bequeath the same in favour of defendant Lakhmichand. He submits that in any case in absence of proof of Will (Ex.D/3) and the plaintiff being son of Mangaljeet, is entitled for decree in his favour with regard to 1/2 share as well as preliminary decree of partition and separate possession.

6. In support of argument of alternative claim of 1/2 share and partition, the learned counsel placed reliance on provision contained in Order 7 Rule 7 CPC so also on the decisions in the case of ***Rajendra Tiwary Vs. Basudeo Prasad and another AIR 2002 SC 136; Kashi Prasad Vs. Banshidhar and other AIR 2001 MP 185; Rangappa Vs. Jayamma 1987(2) Kar.L.J. 369; Ramnarayan Shrinarayan Agarwal and others Vs. Mangeram Radheshyam Hardoi Firm 1979 MPLJ 150 (DB); and Gangaram Ramchandra Vs. Butrusao and others AIR 1952 Nagpur 202.***

7. The respondents despite service of summons and issuance of SPC have not appeared, therefore, case has been heard in absence of the respondents.

8. The following points for consideration are arising in the appeal:-

(i) Whether the plaintiff is entitled for decree of exclusive possession in his favour on the basis of *Tamleeknama*/deed dtd. 6.1.1947 (Ex.P/1A) ?

(ii) Whether in absence of proof of will (Ex.D/3) allegedly executed in favour of the defendant Lakhmichand, the plaintiff is entitled for decree of 1/2 share in the disputed house ?

(iii) Whether in absence of relief of declaration of 1/2 share, partition and separation possession, the plaintiff can be granted such relief at the stage of first appeal ?

9. From bare perusal of pleadings of the parties, it is undisputed fact that Mangaljeet was owner of the disputed house. In the light of findings recorded by learned trial Court with regard to issue No.4, this Court has examined the evidence with regard to execution of *Tamleeknama*/ settlement deed dated 06.01.1947 (Ex.P/1A) in detail. First of all, the original deed is not on record and the copy of deed available on record is said to be a certified copy of its original, but it does not bear any seal or signature of the authority certifying it. Witness (PW1) has been called to prove the deed (Ex.P/1A) but he has not stated in clear words that the deed (Ex.P/1A) is a certified copy of its original. At the same time in cross examination he states that “*seal sikke nahin lage hain*”. If testimony of this witness is seen in its entirety, then it itself makes the deed (Ex.P/1A) doubtful. Ultimately learned trial Court has found that the plaintiff has not been able to establish execution of deed dated 06.01.1947 (Ex.P/1A), therefore, the claim of exclusive ownership of the

plaintiff over the suit property is not found to be proved. Considering all these, in my considered opinion the learned trial Court has not committed any illegality in holding the deed (Ex.P/1A) to be not proved and that the plaintiff is not exclusive owner of the property.

10. Now the second question to be decided is, as to whether after death of Bhuribai, the defendants or the defendant 1-Lakhmichand became owner of the suit property on the basis of Will (Ex.D/3). From bare perusal of Will, it is clear that there are two attesting witnesses of the Will namely Jagdish Prasad and Veera. Apparently, none of the two attesting witnesses or even the scribe has been examined to prove the Will in question, therefore, the claim of defendants of their exclusive ownership cannot be said to have been established by them.

11. It is also apparent that despite there being dispute about execution of Will (Ex.D/3) between the parties, learned trial Court has not framed any issue with regard to Will in question, but the same being in issue, this Court has examined the entire judgment & decree passed by learned trial Court as well as the entire evidence available on record but it appears that the defendants have not even tried to prove the execution and attestation of the Will by examining any of the witnesses to the Will, which as per section 63 of the Indian Succession Act and section 68 of the Evidence Act was necessary. In absence of which, the Will (Ex.D/3) of the favour of defendant 1- Laxmichand cannot be said to be a genuine document.

12. As the property belonged to Mangaljeet, therefore, in absence of proof of Will by Bhuribai or any other document by Mangaljeet either in favour of plaintiff or defendants, the disputed property would fall to the share of both the sons, namely Kapoorchand and after his death to the present appellants over 1/2 equal share and similarly another 1/2 share

would devolve upon another son Inderchand or his legal heirs i.e. the defendants. Accordingly, it is held that the plaintiff Kapoorchand is having 1/2 share in the suit property.

13. Now another question arises for consideration is, as to what relief can be granted in favour of the plaintiff, who has filed the suit for recovery of exclusive possession of house and has not sought relief of declaration of title over 1/2 share and partition along with separate possession of it.

14. While considering the scope of order 7 rule 7 CPC, Supreme Court in the case of *Rajendra Tiwary AIR 2002 SC 136 (supra)* held as under :

“11. In *Firm Srinivas Bam Kumar vs. Mahabir Prasad & Ors. (AIR 1951 SC 177)* it is laid down by this Court:

"Ordinarily, the Court cannot grant relief to the plaintiff on a case for which there was no foundation in the pleadings and which the other side was not called upon or had an opportunity to meet. But when the alternative case, which the plaintiff could have made, was not only admitted by the defendant in his written statement but was expressly put forward as an answer to the claim which the plaintiff made in the suit, there would be nothing improper in giving the plaintiff a decree upon the case which the defendant himself makes. A demand of the plaintiff based on the defendant's own plea cannot possibly be regarded with surprise by the latter and no question of adducing evidence on these facts would arise when they were expressly admitted by the defendant in his pleadings. In such circumstances, when no injustice can possibly result to the defendant, it may not be proper to drive the plaintiff to a separate suit,"

14. Where the relief prayed for in the suit is a larger relief and if no case is made out for granting the same but the facts, as established, justify granting of a smaller relief. Order VII Rule 7 permits granting of such a relief to the parties. However, under the said provisions a relief larger than the one claimed by the plaintiff in the suit cannot be granted.”

15. In the case of **Kashi Prasad AIR 2001 MP 185 (supra)** co-ordinate bench of this court held as under :

“5. In the case of *Bhoniram v. Rajubai* reported in 1979 MPLJ (SN) 14, where the plaintiffs had sued for declaration of exclusive title while the facts proved entitling the plaintiffs only to a share, it was pointed out that he could be granted declaration to the share by taking recourse to Order 7 Rule 7 of CPC.

7. I am of the considered opinion that where, both the Courts below have recorded finding on the basis of evidence, available on record that plaintiff has 1/7th joint share in the property, the learned appellate Court should not have refused the same on technical ground that it was not specifically sought for in the relief clause of plaint, particularly, in order to avoid further

vexatious, litigation between the parties, the First Appellate Court should have exercised discretion in the interest of justice.”

16. In the case of **Ramnarayan Shrinarayan Agarwal and others 1979 MPLJ 150** (supra) Division Bench of this Court held as under :

“11. The conclusion we have thus reached may be summarized thus: Thus Court’s power to grant declaratory decrees is not limited to the terms of section 34 (present) or section 42 (old) of the Specific Relief Act. Declaratory decrees can well be made by the Courts under the general provisions of the Code of Civil Procedure as section 9 or Order 7, Rule 7 of the Code. The exercise of jurisdiction to grant such declaratory reliefs beyond the terms of that section shall depend upon the facts of each case. Such a declaration may be granted when it is essential as a step to a relief in some other case or when a declaration in itself is a substantial relief and has immediate coercive effect.”

17. In the case of **Rangappa Vs. Jayamma 1987(2) Kar.L.J.369** (supra) co-ordinate bench of Karnataka High Court held as under :

8. 1. The provisions of Order VII Rule 7 of the C.P.Code are so widely worded that they do enable the Court to pass a decree for partition in a suit for declaration of title to immoveable property and possession thereof where it turns out that the plaintiff is not entitled to all the interest claimed by him in the suit property. In such a situation there is nothing unusual in giving relief to the parties by directing partition of the suit property according to the shares of the parties established in the suit. The normal rule that relief not founded on the pleadings should not be granted is not without an exception, Where substantial matters constituting the title of all the parties are touched in the issues and have been fully put in evidence, the case does not fall within the aforesaid rule. The Court has to look into the substance of the claim in determining the nature of the relief to be granted. Of course, the Court while moulding the relief must take care to see that relief it grants is not inconsistent with the plaintiff’s claim, and is based on the same cause of action on which the relief claimed in the suit, that it occasions no prejudice or causes embarrassment to the other side; that it is not larger than the one claimed in the suit, even if, the plaintiff is really entitled to it, unless he amends the plaint; that it had not been barred by time on the date of presentation of the plaint.

8.2. No doubt the plaintiff has sought for exclusive title and he has not been able to prove his exclusive title; but has been able to prove that he is entitled to a half share in the suit properties. When a party claims exclusive title to the suit property and is able to establish that he is entitled to half of the suit property, it will not be unusual for the Court to pass a decree for partition and possession of his half share. In fact such a relief flows from the relief prayed for in the plaint that he is the exclusive owner of the entire property. When a larger relief is claimed and what is established is not the entire relief claimed in the suit but a part of it, as whole includes a part, larger relief includes smaller relief, and it also arises out of the same cause of action. Therefore in the instant case, nothing prevented the Court to pass a decree for partition, in order to avoid another suit for partition and to give relief to the party in conformity with the right he had established.

18. In the case of **Gangaram Ramchandra AIR 1952 Nagpur 202** (supra) Division Bench held as under :

“26. The lower Courts have given the pltfs., a decree for partition. It was contended that no suit for partition of a joint family dwelling house will lie and reliance was placed on S. 4, Partition Act, 1893. It was also contended that a suit for possession cannot be converted into one for partition.

27. As regards the second point, we can see, no reason why a suit for exclusive possession of 16 annas cannot be turned into a suit for partition and possession of such share as may be determined to belong to the pltf. If the defts. contend, or it is found that the pltf. is not entitled to the whole but only to a part.”

19. In the light of concurrent view taken by Division Bench of Nagpur High Court, Division Bench of this Court and the view taken by Karnataka High Court, even in absence of relief of declaration of 1/2 share and partition, this Court does not find any difficulty in passing such decree in favour of the plaintiff/appellant.

20. Accordingly, first appeal is **allowed partly** and the suit stands decreed for 1/2 share in the disputed house. There shall be a preliminary decree for partition and separate possession of the plaintiffs/appellants' half share in the suit property, which being house property, shall be partitioned through a court commissioner.

21. However, no order as to costs.

(DWARKA DHISH BANSAL)

JUDGE

Pallavi