

A.F.R.

HIGH COURT OF MADHYA PRADESH, JABALPUR

First Appeal No.444/2003

APPELLANT : Hafizulla,
S/o Late Sheikh Barkatullah,
aged about 65 years,
Occupation Advocacy, R/o H. No.828,
Badi Omti, Jabalpur (M.P)

Versus

RESPONDENT : Shri Inder Kumar Jain,
S/o Late Sheikhar Chand Jain,
Aged about 55 years, Occupation-
Businessman, R/o H.No.458,
Hanumantal Ward, Behind City Kotwali,
Jabalpur (M.P)

**DB : Hon'ble Shri Justice Rajendra Menon, Acting
Chief Justice.
Hon. Shri Justice Anurag Shrivastava, Judge**

Appellant in person.
Shri Pranay Verma, Advocate for the respondent.

Whether approved for reporting: Yes/No.

J U D G M E N T
(01.02.2017)

Per Anurag Shrivastava, J:-

This appeal under Section 96 of Civil Procedure Code,
has been filed by the appellant/plaintiff against the judgment

A.F.R.

and decree dated 14.07.2003 passed by XVth Additional District Judge, (Fast Track Court) in Civil Suit No.95-A/2002, whereby the trial Court has dismissed the suit on the ground of maintainability and res judicata.

2. The appellant/plaintiff's case is that the plaintiff is a co-owner and landlord of house bearing Nos.667, 667/1 to 667/3 situated at Kotwali ward, Jabalpur known as "Kudarat Manzil" which is a double storied building. This suit house was let out to Sheikhar Chand Jain by registered lease deed dated 01.05.1968 for a period of 10 years @ Rs.150/- per month rent for non-residential purpose. The plaintiffs had instituted the Civil Suit No.147-A/1998 against the original tenant Sheikhar Chand Jain for his eviction from suit house on various grounds under Section 12(1) of M.P. Accommodation Control Act. During pendency of the said ejectment suit, during the life time of original tenant Sheikhar Chand Jain, his son Inder Kumar Jain (Defendant) had purchased undivided 1/16 share of the suit house from the co-owner Smt. Sona Bi by registered sale deed dated 20.09.1982. In Civil Suit No.147-A/1988 the Court vide judgment dated 30.07.1981 found the bonafide need of the plaintiff Hafizulla established, but suit was dismissed on the ground that plaintiff is not absolute owner of the suit house, therefore, the suit is not maintainable. The plaintiff preferred First Appeal and after its dismissal Second Appeal No.813/1995 was filed before High Court. This Second Appeal was also dismissed vide judgment dated 12.05.1997.

A.F.R.

3. It is further averred by the appellant/plaintiff that the defendant Inder Kumar Jain, after purchasing the share of Smt. Sona Bi vide sale deed dated 20.09.1982 has not acted upon it and did not make a claim for partition and possession of the share of Smt. Sona Bi, in suit house within statutory period of limitation under Article 65 of the Limitation Act. 1963, therefore, the sale deed becomes null and void and ineffective.

4. It is further averred that the plaintiff being exclusive owner in possession of the suit house filed a Civil Suit No.196-A/86 against the defendant for declaring the sale deed dated 20.09.1982, which was executed by co-owner Smt. Sona Bi in favour of defendant Inder Kumar Jain, which was dismissed on 23.03.1987 by IV Civil Judge, Class-II, Jabalpur, under Article 59 of the Limitation Act. The plaintiff thereafter filed Civil Appeal No.42-A/87 before V Additional Judge to the Court of District Judge, Jabalpur which was dismissed on 25.11.1987. The plaintiff prefer Second Appeal No.48/1988, which was dismissed on 11.04.1988, under facts and circumstances the plaintiff filed SLP (Civil) No.16178/1990 before the Supreme Court of India against the order of Hon'ble High Court passed in S.A. No.48/1988, which is still pending before Supreme Court of India. The matter is sub-judice being not finally decided in which cause of action arose on 20.09.1982 and action was taken under Article 59 of the Limitation Act.

A.F.R.

5. The plaintiff filed the present suit for declaration that defendant Inder Kumar Jain being a stranger purchaser whose right have been extinguished by passage of time being not acted upon sale deed in which a right of general partition was given to defendant Inder Kumar Jain within statutory period under Section 27 under Article 65 of the Limitation Act and also for decree of mandatory injunction for eviction of defendant from suit house.

6. In the written statement the respondent/defendant has denied the averments of the plaint and say that the suit house is not the exclusive property of appellant/plaintiff. In the year 1951 there was partition of the suit house by registered partition deed dated 25.04.1951 in which southern half portion of the house was allocated to Late Shamsuddin and after his death his son Late Jalaluddin became the absolute owner of his share. Jalaluddin later on executed Tamliknama dated 17.04.1974, in favour of his wife Smt. Begum Bi. Similarly the remaining northern half portion of the house came into share of Barkatulla and after his death it devolve upon his wife Smt. Rafikan Bi, sons Hafizulla (plaintiff), Inayatulla and Habibulla and daughter Smt. Sona Bi.

7. The defendants have not denied the factum of tenancy of Sheikhar Chand Jain, the institution of ejectment suit Civil Suit No.147-A/1985 and Second Appeal No.813/1995 and its results. It is further pleaded by the defendant that the they had purchased the southern half portion of suit house, which came in the share of Late Smt. Begum Bi, vide sale deed

A.F.R.

dated 02.02.1982 executed by Smt. Begum Bi with consent of her husband Jalaluddin and came into possession of this part of house. Later on Hambida Bi, has filed a Civil Suit No.151-A/1988 challenging the aforesaid sale deed dated 02.02.1982. In this suit 12th ADJ, Jabalpur has dismissed the suit by holding that the sale deed dated 02.02.1982 is valid and defendant absolute owner of southern half portion of suit house. It is further pleaded that, the defendant has purchased the share of Smt. Sona Bi in the northern half portion of the house vide sale deed dated 20.09.1982 and became co-owner of that part of the house also.

8. As per defendant, he is in possession of the suit house. He has absolute right on half southern part of the house and he is co-owner of the remaining half northern part of the house. Therefore, he cannot be termed as stranger purchaser. Since, he is in possession, therefore, provision of Section 27 and Article 65 of Limitation Act is not applicable. His right will not get extinguished only on the ground of not claiming partition. The judgment and decree in Civil Suit No.147-A/1985 and Second Appeal No.813/1995 are binding upon the plaintiff and has effect of res judicata. Therefore, the suit of plaintiff is liable to be dismissed.

9. The trial Court framed the issue and decided the issues No. 8 and 9 as preliminary issues, which reads as under:-

1. *Whether plaintiff's suit is not maintainable as barred by principle of res judicata?*

A.F.R.

2. *Whether the present suit is not maintainable under Order II Rule 2 of CPC in view of previously decided Civil Suit No.126-A/1986 (Hafizulla Vs. Inder Kumar Jain)?*

10. The trial Court has arrived at a finding that the findings recorded in the previously instituted suit No.147-A/1988 and its Second Appeal No.813/1995 has effect of res judicata on the present suit. Therefore, the suit is not maintainable. The trial Court by passing impugned judgment dated 14.07.2003 on aforesaid issues dismissed the suit.

11. It is argued by Shri Hafizulla (appellant) that in Second Appeal No.813/1995 arising out of eviction Civil Suit No.147-A/1988, the Hon'ble High Court in a whimsical way dismissed the appeal by holding that the respondent is a co-owner and suit is not maintainable against the co-owner when the finding is not subject matter of the appeal and the sale deed dated 20.09.1982 is itself an illegal deed on the date of its execution and thereafter the appellant filed the instant suit under Section 27 read-with Article 65 of the Limitation Act, 1961.

12. It is further argued by Shri Hafizulla that after the death of original tenant Shikhar Chand Jain the tenancy right devolved upon his LRs i.e. wife Champa Bai and sons Puran Chand and Inder Kumar Jain (defendants), therefore, there is no merger of tenancy because Inder Kumar Jain had purchased only part of the property. There is no determination of tenancy on the ground of merger. Therefore,

A.F.R.

status of Inder Kumar Jain remains as tenant and he is liable to be evicted under Section 12(1) of M.P. Accommodation Control Act. The decision in Second Appeal No.813/1995 is *per-in-curium* in the light of judgment of Apex Court in **Pramod Kumar Jaiswal and others Vs. Bibi Husnbano AIR 2005 SC 2857**. Appellant is in constructive possession being co-owner and landlord of the suit house and the respondent who is stranger purchaser of undivided share of the suit house whose right has been extinguished by passage of time under Section 27 read with Article 65 of Limitation Act.

13. It is further submitted by Shri Hafizulla that the tenancy was only for ten years. After this period, the possession of tenants becomes unauthorized. Inder Kumar Jain is a stranger purchaser of undivided share of Sona Bi in the suit house. Suit house is dwelling house of undivided family where stranger purchaser cannot be given joint possession with other co-owners. He has also relied upon decision of Apex Court in **M.V.S. Manikayala Rao Vs.M. Narasimhaswani and Others AIR 1966 SC 471**. wherein it is observed by the Apex Court that "it is clear that in the absence of a clear acknowledgement of the right of the alienee or participation in the enjoyment of the family property by the alienee, the possession of non-alienating coparceners would be adverse to the alienee, from the date of on which he became entitled to sue for general partition and possession of his alienor's share.

A.F.R.

14. It is further argued by Shri Hafizulla that the suit house is a dwelling house which belongs to undivided family of the plaintiff. Inder Kumar Jain is not the member of family of plaintiff, but a stranger, therefore, he cannot enter into joint possession with members of undivided family. Inviting the attention of this Court towards provisions of Section 44 of Transfer of Property Act, and Section 4 of the Partition Act. Shri Hafizulla argued that, Inder Kumar Jain has no right to remain in possession of suit house and if he has wrongly been given the possession of house then he is liable to be evicted and mandatory injunction to evict him can be issued. He relied upon case laws, ***Dorab Cawasji Warden Vs. Coomi Sorab Warden, AIR 1990 SC 867, Bhuban Mohan Guha and another Vs. Brojendra Chandra Ghose and Others, (28) AIR 1941 Calcutta 311, Dulal Chandra Chatterjee vs. Gosthabehari Mitra, AIR 1953 Calcutta 259 (Vol.40 C.N.94), Ashim Ranjan Das Vs. Sm. Bimla Ghosh and Others, AIR 1992 Calcutta 44. Shivaji and another Vs. Hiralal and Others, 1985 MPLJ 10, Ramdayal vs. Manaklal, AIR 1973 Madhya Pradesh 222 (V 60 C 51) F.B. Alka Gupta Vs. Narender Kumar Gupta, AIR 2011 SC 9, Vibhar Murthy Vs. Sushila Bai (1996) 3 SCC 644 and Narashimaha Murthy Vs. Susheelabai (Smt.) (1996) 3 SCC 644.***

15. Learned counsel for the respondents submits that after dismissal of SLP against the judgment of Second Appeal No.813/1995, the dispute was finally resolved. The decision of S.A. No.813/1995 is final and binding upon the

A.F.R.

parties and the findings shall operate as res-judicata. All the grounds raised by the appellants/plaintiffs had been considered in S.A. No.813/1995. Therefore, subsequent suits for the same relief shall be barred by principle of res-judicata and constructive res-judicata. The law of precedents are not applicable here. After getting defeated in original Civil Suit No.147-A/1998 and its Second Appeal No.813/1995, the plaintiffs have instituted multiple litigations for the same relief on the same grounds, wherein similar questions for adjudication have been raised for consideration. These suits are not maintainable and have been filed only to harass the defendants. The details of said suits are as under:-

(a) the plaintiff Hafizulla had filed a Civil Suit No.39-A/1999 before 11th Additional District Judge, for declaration that the judgment and decree passed in earlier Second Appeal No.813/1995 be declared as null and void and a decree of eviction be granted in favour of plaintiffs against the defendants namely Smt. Champa Bai, Puran Chand Jain and Inder Kumar Jain. This suit has been dismissed by the trial Court and thereafter, the First Appeal No.537/1999 has also been dismissed by co-ordinate Bench of this Court vide judgment dated 12.07.2013. **(see Hafizulla Vs. Puran Chand Jain and another 2013 (3) JLJ 186).** Thereafter, the Review Petition No.659/2013 has also been dismissed vide order dated 23.06.2014.

A.F.R.

(b) Plaintiff Hafizulla had filed another case Civil Suit No.3-A/2010 against defendants Puran Chand Jain and Inder Kumar Jain for declaration that the defendants are tenants in the suit house, decree for eviction of defendants from suit house and mesne profit. This suit was dismissed by the trial Court on 02.12.2011 and against this First Appeal No.1194/2011 has been filed by plaintiff in this Court.

(c) Plaintiff Hamida Begum had filed a Civil Suit No.94-A/2002 on 06.07.1998, for eviction of Inder Kumar Jain from suit house and mesne profit on the ground that Inder Kumar Jain is stranger purchaser, who cannot claim joint possession with other co-landlord/co-owner. His possession is unauthorized. This suit was also dismissed by 15th Additional District Judge, Fast Track Court, vide order dated 14.07.2003 on the ground of res-judicata. Against this order, plaintiffs have filed First Appeal No.664/2006 before this Court.

(d) Plaintiff Hafizulla has filed the Civil Suit No.24-A/2002 against Smt. Champa Bai, Puran Jain and Inder Kumar Jain on 08.05.1998 for declaration that the defendants are tress-passer in suit house and decree for eviction on the ground of Section 12(1)(f) of M.P. Accommodation Control Act and also for grant of mesne profit. This suit has been dismissed by 15th Additional District Judge, vide order dated 14.07.2003 on the ground of res-judicata. Against this, the plaintiffs have

A.F.R.

preferred the First Appeal No.512/2003 before this Court.

16. To appreciate the arguments of Shri Hafizulla, it would be proper to consider the facts and findings of the earlier Civil Suit No.147-A/1998 and Second Appeal No.813/1995. It is not disputed that Barkatulla, Amina Bi, Jalaluddin and Hamida Bi had granted the lease of building "Kudrat Manzil" to Shikhar Chand Jain by registered lease deed dated 01.05.1968. All the lessors instituted a Civil Suit No.147-A/1988 against the original tenant Shikhar Chand Jain for eviction on various grounds under Section 12(1) M.P. Accommodation Control Act. Later on name of the lessors other than Hamida Bi and Hafizulla were deleted from the array of the plaint. During pendency of the said ejectment suit in the life time of the original tenant Shikhar Chand Jain, his son Inder Kumar Jain has purchased a portion of the suit house from Smt. Begum Bi wife of Jalaluddin by a registered sale deed dated 03.02.1982. Thereafter, Inder Kumar Jain further purchased an undivided share of Smt. Sona Bi in the suit house from her vide registered sale deed dated 20.09.1982. During the pendency of the Civil Suit No.147-A/1988 the defendant Shikhar Chand Jain had died. His wife Smt. Champa Bai and his son Puran Chand Jain and Inder Kumar Jain were brought on record as legal heirs. In the said suit, the IX Civil

A.F.R.

Judge Class-II vide judgment dated 30.07.1991 had found bonfide need of the plaintiff Hafizulla established for his profession of Advocate under Section 12(i)(f) of the Act, but dismissed the suit on the ground that the suit for eviction at the instance of two co-landlords was not maintainable as a portion of undivided house had been purchased by Inder Kumar Jain from Smt.Sona Bi. Aggrieved by the judgment and decree the appellants have filed First Civil Appeal before XII ADJ, registered as Civil Appeal No.61-A/1995, which was dismissed on 28.11.1995. Thereafter, Second Appeal No.813/1995 was filed by plaintiff, in which the high court had also upheld the bonafide need of the appellants but dismissed the appeal on the ground that the "defendant Inder Kumar Jain had purchased the undivided share of Smt. Sona Bi and Smt. Begum Bi by sale deeds dated 02.02.1982 and 20.09.1982 and have become the co-owner of the property. His share qua sole owner has not been specified. It would be most unjust and inequitable to throw out a co-owner from the possession of the suit accommodation merely because as the tenant he had purchased the share of the co-owner. His legal rights to retain possession till partition qua co-owner cannot be whittled down therefore, the suit is not maintainable." The judgment and decree passed by the Courts below were confirmed. Against this order, the plaintiffs preferred SLP (Civil)

A.F.R.

No.16299/1995 before the Hon'ble Supreme Court, which was dismissed on 15.09.1997 in *limine*.

17. It is also not disputed that after dismissal of Second Appeal No.813/1995, the plaintiff Hafizulla filed another **Civil Suit No.11-A/2002** against the defendant for declaration of sale deeds dated 03.02.1982 and 20.09.1982 said to be executed in favour of Inder Kumar Jain as null and void and also ejection of defendant/tenant from suit house under Section 12(1)(f) of the Act. This suit was dismissed by Additional District Judge (Fast Track), District Jabalpur on the ground of res judicata. Against this the plaintiff filed the **First Appeal No.451/2003** before this Court. The Coordinate Bench of this Court has formulated following questions and recorded its finding as under:-

Questions for determination in FA no.451/2003

- i) *Whether, due to execution of sale deed dated 02.02.1982 and 20.09.1982 tenancy stood extinguished by merger as postulated under Section 111 (d) of TP Act or in other words purchaser of part of property Inder Kumar Jain and other defendants who have not purchased property continue to be the tenant and bound to comply with the requirements of Rent Controlling Act and are liable to be evicted on the grounds contemplated under the MP Accommodation Control Act?*
- ii) *Whether, even by filing suit for partition the plaintiffs can recover possession of entire property from defendants No. 1, 2 and 3, particularly when only part*

A.F.R.

of tenanted premises has been purchased by Inder Kumar Jain, or the remedy is to recover the possession on the ground under Section 12 (1) of the MP Accommodation Control Act?

- iii) Whether, the present suit can be said to be based on fresh cause of action and genuine requirement of plaintiff under Section 12(1)(f) of MP Accommodation Control Act and considering the relief for declaration that sale deeds are null and void whether the decisions in previous civil suit of which S.A. No.813/1995 arose and the decision in CR No.1676/2001 (Hameeda Begum Vs. Champabai Jain) can be said to be res-judicata and binding inter se parties, more so in view of decision in Pramod Kumar Jaiswal and others Vs. Bibi Husn Bano (Supra) on question of law?*
- iv) Whether, the sale deeds dated 02.02.1982 and 20.09.1982 can be declared null and void due to failure of Inder Kumar Jain to sue for partition and separate possession within 12 years of purchasing the property by applying Article 65 of Limitation Act?*
- v) In case defendant Inder Kumar is not tenant and in case of co-owner whether he can retain the possession of the entire house whereas he had purchased smaller portion vide registered sale deeds dated 02.02.1982 and 20.09.1982 from one of the co-owner?*

Findings

- a. The Court gave the finding that "in Inder Kumar Jain, the interest of lessee in the whole of the property has not vested, at the same time, he has purchased only part of property. There is no merger of tenancy into co-ownership right..... It cannot be said that defendant No.3 is occupying the entire premises as co-owner, even entire property has not been purchased, even part of the property cannot be said to be possessed by defendant No.3 as co-owner as there was no partition.However, where the transferee of a share of dwelling house belonging to an undivided family is not a member of the family, nothing in this section shall be deemed to entitle him to joint possession or other common or part enjoyment of the house. As Inder Kumar Jain is not a member of the plaintiffs' family, he has no right by virtue of Section 44 to claim to be in joint possession or other common or party enjoyment of the dwelling house.....In the instant*

A.F.R.

case, one of three legal heirs of the tenant only one had purchased part of the property not all the co-tenants, tenancy continues and there is a need as on date of filing of suit which has been found, thus, eviction can be made from the entire property as tenancy continues."

Finding on question No.2

i. The Court has arrived at finding that the status of Inder Kumar Jain, also continues to be a tenant and he cannot be said to be in possession as co-owner, he is in possession with other legal heirs of the tenant, consequently when status continues as tenant, obviously the recourse has to be for eviction under M.P Accommodation Control Act.

Finding on question No.3.

The Court opined that in the instant case there is a fresh cause of action with respect to necessity of plaintiff No.2 and law of land is available in the shape of decision of Apex Court in Pramod Kumar Jaiswal and Others (supra) taking into the consideration the intendment of Section 111 (d) of T.P. Act. Earlier decision rendered by this Court where not on the question of law of merger of tenancy into co-ownership and Section 111 (d) of T.P. Act were not considered. The present suit is based on question of title and fresh cause of action under Section 12(1)(f) of the Act, therefore, previous decision cannot be said to operate as res judicata.

Finding on question No.4.

The Court held that the defendant are enjoying premises as tenant they are in possession of suit house, therefore, it cannot be said that plaintiff have perfected the title by adverse possession. It cannot be said that, sale deed have become void for the reasons that there is failure to sue within a period of 12 years on the strength of sale deed.

Finding on question No.5.

- 1. The Court relying upon the decision in Ram Dayal Vs. Manaklal 1973 MPLJ 650 held that a co-owner cannot retain the possession on the portion of the property in excess of the share purchased by him.*
- 2. After considering the case on above point the Coordinate Bench of this Court has allowed the appeal and passed the*

A.F.R.

decree of eviction in favour of plaintiff on the ground of 12(1)(f) of the Act.

18. Against the order dated 27.02.2009 in First Appeal No.451/2003, the defendant filed a Civil Appeal No.5312/2010 before Supreme Court. Hon'ble Supreme Court vide order dated 13.07.2010 has recorded following findings:-

"Learned counsel for the respondents herein relied on the judgment of this Court in Pramod Kumar Jaiswal & Others Vs. Bib Husn Bano & Others (2005) 5 SCC 492 and urged that the tenancy will not be extinguished on purchase of a share of a co-owner. In our opinion, there is a difference between the doctrine of precedent and doctrine of res judicata. So far as res judicata is concerned, this principle applies when the earlier judgment was inter partes. The judgment inter partes is binding on the parties even if it is a wrong judgment. On the other hand the doctrine of precedent is totally different. That doctrine states that a judgment of a higher Court or larger bench or a co-ordinate bench is binding, and that judgment is binding even if it is not inter partes. The judgment in Pramod Kumar Jaiswal's case (supra) would have applied if the judgment in the first suit (Suit No.147-A/1988) was not inter partes. Since, it was inter partes, the principle of res judicata or constructive res judicata will apply and not the principle of precedents. Even assuming that the judgment in the first suit was erroneous, yet it is binding on the parties since it was inter partes. Even if a point was not raised in the first suit, the doctrine of constructive res judicata bars any subsequent suit."

Thus, Hon'ble Apex Court allowed the appeal of defendants and set aside the decree of eviction passed against them in First Appeal No.5312/2010. Thus, the controversy is finally resolved by Hon'ble Apex Court.

A.F.R.

19. Now in light of above previous litigations between the parties, we will consider whether the decisions of Civil Suit No.147-A/1998 and its Second Appeal No.813/1995 shall operate as res-judicata in instant suit? The present suit is filed seeking relief of declaration that the sale deed executed by Sona Bi dated 20.09.1982 in favour of defendant as null and void and decree for eviction of defendants. In present suit and earlier Civil Suit No.147-A/1998 the parties are same, suit property is same and in both the suits the defendant Inder Kumar Jain is in possession, claiming himself as a co-owner by virtue of sale deed executed in his favour by one of the co-owner/landlord Smt. Sona Bi. In both the suits the substantial question regarding status of Inder Kumar Jain as co-owner and maintainability of the suit by a co-owner against another co-owner are involved. Thus, it is clear that the present suit involves the matter directly and substantially in issue, which was in issue directly and substantially in former suit.

20. It is argued by Shri Hafizullah that the earlier suit was filed under Section 12(1) of Accommodation Control Act relating to dispute between landlord and tenant where the question of title was collaterally and incidentally in issue. In tenancy suit, question of title cannot be adjudicated by the Court exercised in jurisdiction under Rent Control Act for eviction of tenant.

A.F.R.

21. This argument cannot be accepted. Although the earlier suit was filed for eviction of the tenant under Section 12(1) of Accommodation Control Act, but when Inder Kumar Jain claimed right in the property on the basis of sale deed executed in his favour by one of co-landlord/co-owner, the question of title was raised and involved directly and substantially for adjudication, which the trial Court was competent to decide.

22. In previous litigation as described earlier in paras 16 & 18, the Civil Suit No.11-A/2002 had been filed by the plaintiffs against the defendants for declaration of sale deed dated 20.09.1982 executed in favour of Inder Kumar Jain by one of co-owner Smt. Sona Bi as "null and void" and for eviction of defendants on the ground of bonafide need u/s Section 12(1)(f) of M.P. Accommodation Control Act. In this civil suit also the defendant Inder Kumar Jain had raised the same defence as in instant suit. Thus in this suit, the question of title of Inder Kumar Jain by virtue of the sale deeds, right to remain in possession of suit property and maintainability of suit for eviction under Section 12(1)(f) of the Act, were raised for adjudication. This suit was filed by the plaintiff on the basis of title. The grounds for eviction in both suits (C.S. No.11-A/2002 and C.S. No.3-A/2010) are also same. Most of the grounds, which have been raised during argument by Shri Hafizulla in the instant suit, were also raised in the earlier suit, which were considered by the

A.F.R.

Co-ordinate Bench of this Court in deciding the First Appeal No.451/2003. Against the judgment dated 27.02.2009 of First Appeal, Hon'ble Apex Court in Civil Appeal No.5312/2010, vide order dated 13.07.2010 has categorically held that the judgment passed in Civil Suit No.147-A/1998 shall operate as res judicata and thereby disallowing all the grounds raised by the plaintiff in his support, allowed the appeal of defendant and dismissed the decree passed in favour of plaintiffs in First Appeal No.451/2003 and upheld the finding of trial Court in Civil Suit No.11-A/2002. Therefore, when the decision passed in earlier Civil Suit No.147-A/1998 operates as res-judicata in Civil Suit No.11-A/2002, then same decision shall also have the effect of res-judicata in present litigation because similar questions are involved in present suit.

23. Shri Hafizulla has further submitted that in the sale deed dated 20.09.1982, there was a condition that the purchaser Inder Kumar Jain shall file a suit for partition of the share of Smt. Sona Bi in disputed house. Since no suit for partition was filed by Inder Kumar Jain within 12 years of sale deed, therefore, his right on the property gets extinguished, as per Section 27 and Article 65 of the Limitation Act and his possession becomes unauthorized. He has also relied upon decision of Apex Court in ***M.V.S. Manikayala Rao Vs.M. Narasimhaswani and Others AIR 1966 SC 471***. wherein it is observed by the Apex Court that "it is clear that in the absence of a clear

A.F.R.

acknowledgment of the right of the alienee or participation in the enjoyment of the family property by the alienee, the possession of non-alienating coparceners would be adverse to the alienee, from the date of on which he became entitled to sue for general partition and possession of his alienor's share".

It is further contended by Shri Hafizulla that the original lease was granted for ten years. After expiry of this period the possession of the defendant becomes illegal and unauthorized. Inder Kumar Jain has purchased only a small share of property from Smt. Sona Bi, therefore, his possession on entire property cannot be treated as valid possession. He has relied upon case law ***Wuntakal Yalpi Chenabasavana Gowd Vs. Rao Bahadur Y. Mahabaleswarappa and another, AIR 1954 SC 337 (Vol. 41, C.N 31).***

24. To decide this issue we have to consider as to nature of possession of the defendants Inder Kumar Jain in suit house. Firstly we will consider whether by not filing suit for partition, the right of Inder Kumar Jain gets extinguished in suit house? The relevant Section 27 of Limitation Act provides for extinguishment of rights which reads as under:-

"At the determination of the period hereby limited to any person for instituting a suit for possession of any property, his right to such property shall be extinguished."

A.F.R.

25. The general principle is that limitation bars the remedy and does not extinguish the right itself. This Section is an exception to this general principle so far as suits for possession of property are concerned, and provides that, the bar of the remedy shall operate to extinguish the right. This Section in terms, apply only where suits for possession of property become barred by limitation. The suit for possession referred in the Section is the suit in respect of which the period of limitation is prescribed by the schedule of Limitation Act.

26. Article 65 of Limitation Act provides for the period of limitation for filing the suit for recovery of possession. The period of limitation for filing a suit for recovery of possession of immovable property or any interest therein based on title is, **twelve years** when the possession of defendant becomes adverse to the plaintiff.

27. A person who take a transfer from a co-tenant or co-owner steps into the shoes of his transferor. He becomes as much as a co-tenant or a co-owner as is transferor was, before the transfer. It follows that the possession of the alienee in such cases is not adverse to the other co-owner unless it could be shown that there has been an ouster. In the case of adverse possession as against the co-owner it must be proved that other co-owner has ousted him openly denying his title and to the knowledge of the other co-owner. Thus to extinguish the right of defendant Inder

A.F.R.

Kumar in suit property, it is necessary to prove that he has been ousted or dispossessed from the suit house for more than 12 years. The period of limitation shall start from the date of his dispossession.

28. Hon. Supreme Court in ***Wuntakal Yalpi Chenabasavana Gowd Vs. Rao Bahadur Y. Mahabaleshwarappa and another, AIR 1954 SC 337 (Vol. 41, C.N 31)*** held as under:-

Once it is held that the possession of a co-sharer become adverse to the other co-sharer as a result of ouster, the mere assertion of his joint title by the dispossessed co-sharer will not interrupt the running of adverse possession. He must actually and effectively break up the exclusive possession of his co-sharer by re-entry upon the property or by resuming possession in such manner as it is possible to do. A mere mental act on the part of the person dispossessed unaccompanied by any change of possession cannot affect the continuity of adverse possession of the deseizor. It may also check the running of time if the co-sharer who is in exclusive possession acknowledges the title of his co-owner or discontinues his exclusive possession of the property.

29. Therefore, it is for the co-owner who has been ousted from the property to bring a suit for possession or seek re-entry upon the property to interrupt the running of adverse possession, otherwise his right gets extinguished under Section 27 read with Article 65 of the Limitation Act. In present case Inder Kumar Jain is in possession of house as

A.F.R.

co-owner. Since he is in possession of the property and as he is not ousted from it, his right does not get affected on the ground of adverse possession. Secondly, in sale deed executed by Sona Bi in favour of Inder Kumar Jain the stipulation for purchaser to seek the partition of share purchased, will not be binding on Inder Kumar Jain. When Sona Bi had sold away her share in suit house then she had no right to impose any further condition on purchaser for claiming partition of share purchased. It is for purchaser to decide when to claim partition or file suit for partition. Thus on this ground also the right of Inder Kumar Jain on suit house does not get extinguished, he is enjoying the premises as co-owner. Moreover, the plaintiffs objection regarding adverse possession had been considered by co-ordinate Bench of this Court in third round of litigation in deciding the First Appeal No.451/2001 and while answering the question for determination No.4, came to conclusion that

"defendants are enjoying premises as tenant, they are in possession of suit house, therefore, it cannot be said that plaintiffs have perfected the title by adverse possession. It cannot be said that, sale deed has become void for the reasons that there is failure to suit within a period of 12 years on the strength of sale deed."

Above finding has not been challenged in appeal. Thus, aforesaid objection had been rejected by the Division Bench of this Court in above appeal. In Second Appeal No.813/1995 also the Court has given finding

A.F.R.

that the possession of defendant Inder Kumar Jain in suit house is lawful and he is entitled to retain the possession till suit for partition and possession is filed by the plaintiffs. He cannot be evicted by other co-owner i.e. plaintiffs without getting property partitioned. This finding operate as res-judicata, therefore, on this ground also the plea of adverse possession of plaintiffs cannot be accepted.

30. It is argued by Shri Hafizulla that, the suit house is a dwelling house which belongs to undivided family of the plaintiff. He is not the member of family of plaintiff, but a stranger, therefore, he cannot enter into joint possession with members of undivided family. Inviting the attention of this Court towards provision of Section 44 of Transfer of Property Act., and Section 4 of the Partition Act. Shri Hafizulla argued that, Inder Kumar Jain has no right to remain in possession of suit house and if he has wrongly been given the possession of house then he is liable to be evicted and mandatory injunction to evict him can be granted. He relied upon case laws, ***Dorab Cawasji Warden Vs. Coomi Sorab Warden, AIR 1990 SC 867, Bhuban Mohan Guha and another Vs. Brojendra Chandra Ghose and Others, (28) AIR 1941 Calcutta 311, Dulal Chandra Chatterjee vs. Gosthabehari Mitra, AIR 1953 Calcutta 259 (Vol.40 C.N.94), Ashim Ranjan Das Vs. Sm. Bimla Ghosh and Others, AIR 1992 Calcutta 44. Shivaji and another Vs. Hiralal and Others, 1985 MPLJ 10, Ramdayal vs. Manaklal, AIR 1973 Madhya Pradesh 222 (V 60 C 51)***

A.F.R.

F.B. Alka Gupta Vs. Narender Kumar Gupta, AIR 2011 SC 9, Vibhar Murthy Vs. Sushila Bai (1996) 3 SCC 644 and Narashimaha Murthy Vs. Susheelabai (Smt.) (1996) 3 SCC 644.

31. Section 4 of Partition Act provides that, where a share of a dwelling house belonging to an undivided family has been transferred to a person who is not a member of such family and such transferee sues for partition, the Court shall, if any member of the family, being a shareholder shall undertake to buy the share of such transferee make a valuation of such share in such manner as it thinks fit and direct the sale of such share to such share holder. This Section gives the right of pre-emption to the co-owners to purchase the transferred share of the stranger transferee.

32. Section 44 of Transfer of Property Act., provides that the transferee of share of dwelling house, if he/she is not a member of that family, gets no right to joint possession or common enjoyment of the house. In case law ***Gautam Paul Vs. Debi Rani Paul and Others, AIR 2001 SC 61,*** it is observed that where a stranger purchases the share in a dwelling house of undivided family from one of co-owner then he gets no right to joint possession of house. The only manner in which an outsider can get possession, is to sue for possession and claim separation of his share.

33. Thus, for application of Section 4 of Partition Act and Section 44 of Transfer of Property Act, it is necessary to prove

A.F.R.

that the disputed house is **dwelling house** of undivided family of plaintiff. Hon'ble Apex Court in case law ***Dorab Cawasji Warden Vs. Coomi Sorab Warden, AIR 1990 SC 867*** while considering section 44 of Transfer of Property Act and Section 4 of Partition Act observed that, Section 44 of T.P. Act and Section 4 Partition Act are complementary to each other. Terms 'undivided family' and 'dwelling house' have the same meaning in both the Sections.

34. The expression "**Dwelling House**" is not defined in the Act. As per dictionary the dwelling house is:-

Merriam Webster- A house or sometimes part of a house that is occupied as a residence in distinction from a store, office, or other building and that may legally include associated or connected buildings within same curtilage.

35. ***In Maniklal Singh Vs. Gauri Shanker Shah AIR 1958 Calcutta 245***, it is held that:- In determining whether a house is a dwelling house under Section 4 it has to be first found out whether the house in question was used by members of family for residential purpose.

If in fact a house is used for residential purposes by members of the family then it can be decisively termed as a dwelling house. A dwelling house may be tenanted in certain circumstances.

The test which is essential is that the house must have been meant for residential purposes though temporarily

A.F.R.

it might be used for other purposes according to exigency of circumstances.

36. ***Bikal Swain Vs. Iswar Swain, AIR 1959 Orissa 173***, it is held that:- It is incumbent upon plaintiff to plead that there was in existence an undivided dwelling house and he must prove that a share thereof was transferred to defendant before he can claim privilege under Section 4. Where the finding of Court was that there was no dwelling house belonging to undivided family in existence on date of transfer plaintiff is not entitled to benefit of Section 4.

37. ***Tejpal Khandewlal and Others Vs. Mst. Purnima Bai and Others, AIR 1976 Orissa 62 (DB)***, it is held that where, however, a house is used or is intended to be used not for residential purpose but for letting out business, industrial or other purpose, it is not a dwelling house. Take for instance, certain houses are constructed by the members of the family for being used as shop-room or for being tenanted to others. Those houses are not dwelling house even though one can dwell therein comfortably.

38. ***Janki Ammal and Others Vs. PAK Natrajan and Others, AIR 1989 Madras 99***, it is held that Partition Act. Section 4 and Transfer of Property Act Section 44(2). Dwelling house belonging to undivided family house which is completely tenanted to tenants cannot be said to be a dwelling house within the meaning of Section 44(2) of Transfer of Property Act.

A.F.R.

39. In the case law relied upon by appellant Hafizulla ***Narashimaha Murthy Vs. Susheelabai (Smt.) (1996) 3 SCC 644*** it is observed that the expression "dwelling house" though not defined in the Act, the context would indicate that it is referable to the dwelling house in which the intestate Hindu was living at the time of his/her death; he/she intended that his/her children would continue it as his or her permanent abode. On his or her death, the members of the family can be said to have continued to preserve the same to perpetuate his/her memory.

40. It is not disputed that the suit house was given on rent to Shiekhhar Chand Jain in the year 1968. In first round of litigation a Civil Suit No.147-A/1998, it is found proved that the suit house was let out for business purposes, where defendants are running an electric shop. It is also found proved that this house is required for legal profession of plaintiff Hafizulla under Section 12(1)(f) of M.P. Accommodation Control Act. In subsequent Civil Suit No.3-A/2010 and RCA case No.2A/90(7)97-98, it is pleaded by plaintiff that suit house was let out for business purposes and it is bonafidely required for business purposes. Thus, from pleading and evidence of both the parties, it is established that the suit house is being used for business purposes since, 1968 and still the plaintiff wants to use it for his profession of Advocacy. The house is not being used for residential purpose since more than 45 years and in future the plaintiff is not intending to use it as residence. It was completely let out to

A.F.R.

tenant and considering the long period of tenancy, it cannot be said that it had been given on rent temporarily. It is also important to note that in present suit, it is not pleaded by the plaintiff that the disputed house is a dwelling house. Therefore, it cannot be said that the disputed house is a dwelling house within a meaning of Section 4 of Partition Act and Section 44 of Transfer of Property Act. Hence, the provisions of above acts are not applicable in respect of disputed house.

41. In case law ***Dorab Cawasji Warden Vs. Coomi Sorab Warden, AIR 1990 SC 867***, it is held by Hon'ble Apex Court considering the provision of Section 44 of Transfer of Property Act, that the possession of purchaser of a share of co-owner in dwelling house of undivided family is not legal, it will cause irreparable injury to other co-owners therefore, mandatory injunction against the purchaser for eviction can be issued. This case law relates to dwelling house of undivided family. ***Bhuban Mohan Guha and another Vs. Brojendra Chandra Ghose and Others, (28) AIR 1941 Calcutta 311***, it is held that mere fact that purchaser has obtained the possession of the house of family, cannot defeat the claim of member of family under Section 4 of Partition Act for seeking pre-emption. ***Dulal Chandra Chatterjee vs. Gosthabehari Mitra, AIR 1953 Calcutta 259 (Vol.40 C.N.94)***, it is observed by "Hon'ble Court that mere grant of tenancy cannot possibly have the effect of making a house, which is otherwise a residential house of the members of the undivided family owning it, cease to be a dwelling house.....

A.F.R.

the creation of tenancy does not terminate the possibility of the owners of the house returning to its occupation." ***Ashim Ranjan Das Vs. Sm. Bimla Ghosh and Others, AIR 1992 Calcutta 44*** it is held that purchaser of undivided share of co-sharer can be restrained from entering into joint possession with other co-owners in joint family property. The remedy of stranger purchaser is to file a suit for partition is ask back his money from co-sharer. ***Shivaji and another Vs. Hiralal and Others, 1985 MPLJ 10*** it is held that a suit for eviction against tress-passer can be filed by some co-owners. Jointers of all co-owners are not necessary. ***Ramdayal vs. Manaklal, AIR 1973 Madhya Pradesh 222 (V 60 C 51)***, it is observed that where the property in possession of the purchaser from a coparcener is not in excess of the share of the coparcener, the Court can, in a decree for possession passed in suit filed another coparcener direct that "the execution of the decree so far as it directs the purchaser to deliver the possession to the plaintiff be stayed for a specific period, the purchaser files a suit for general partition against the plaintiffs. ***F.B. Alka Gupta Vs. Narender Kumar Gupta, AIR 2011 SC 9*** relates to application of Order 2 Rule 2 of CPC.

Since the disputed house is not a dwelling house and it is finally resolved by Hon'ble Apex Court that the findings of Civil Suit No.147-A/1988 and Second Appeal No.513/1995 shall have the effect of res-judicata and constructive res-judicata, therefore, the case laws relied upon by plaintiff is not applicable in facts and circumstances of the present case.

A.F.R.

42. Thus, learned trial Court has not committed any illegality in holding that the plaintiffs' suit is barred by res-judicata and not maintainable and resultantly, dismissed the suit. There is no illegality or substantial error found in the findings of trial Court. Resultantly, this appeal is hereby **dismissed**. The appellants shall bear the cost of respondents.

(RAJENDRA MENON)
Acting Chief Justice

(ANURAG SHRIVASTAVA)
Judge

Rashid