

HIGH COURT OF MADHYA PRADESH, JABALPUR

First Appeal No.512/2003

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

Versus

RESPONDENTS :1. Shri Puran Chand Jain, S/o Late Sheikhar Chand Jain, aged about 60 years.

2. Shri Inder Kumar Jain S/o Late Sheikhar Chand Jain, Aged about 55 years.

All R/o- H.No.458, Behind City Kotwali, Hanumantal Ward, Tashil and District Jabalpur (MP)

**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 respondents.

Whether approved for reporting: Yes/No.

J U D G M E N T
(01.02.2017)

Per Anurag Shrivastava, J:-

This appeal has been filed by the appellant/plaintiff against the judgment and decree dated 14.07.2003 passed

by XV Additional District Judge, in Civil Suit No.24-A/2002, whereby the trial Court has dismissed the suit on the ground its maintainability and *res-judicata*.

2. The appellant/plaintiff is co-owner of suit house bearing Nos.667, 667/1 to 667/3 situated at Kotwali ward, Jabalpur known as "Kudrat Manzil" which is given on rent to Late Shri Sheikhar Chand Jain by registered lease deed dated 01.05.1968 for ten years.
3. It is further pleaded that the plaintiff and co-owner Hamida Bi had instituted a Civil Suit No.147-A/1988 against the original tenant Sheikhar Chand Jain for eviction on various grounds under Section 12(1) of M.P. Accommodation Control Act. During the pendency of the Civil Suit No.147-A/1988 the defendant Sheikhar 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 above suit the IX Civil 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(1)(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. 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, the 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. Therefore, he cannot be evicted at the instance of other co-owners without partition of the property.

- 4.** It is further pleaded by plaintiff that the tenancy of defendants has been terminated and it is found proved that the suit house is *bonafidely* required by the plaintiff for his profession of Advocate, therefore, the possession of defendants become unauthorized in the suit house. The suit house is situated in market place. The market value of house is at present not less than Twenty Five lacs and rental value is not less than Fifteen Thousand per month. Therefore, plaintiff prayed for decree of vacant possession of the suit house on the ground under Section 12(1)(f) of M.P. Accommodation Control Act, as found proved in Second Appeal No.813/1995 by this Court, alongwith the decree of *mesne* profit @ Rs.100/- per day from the date of decree till vacant possession handed over by defendants to plaintiff.
- 5.** In the written statement filed by the defendants, it is denied that the suit house is a dwelling house. It is pleaded that the

suit house belongs to Barkatulla and his brother Shamsuddin. Later on house was partitioned in 1951, in which the half north part of the suit house came in share of Barkatullah and remaining south part was allocated to Shamsuddin. After the death of Shamsuddin, his son Jalaluddin inherited his share in suit house and later on, he had gifted his share to his wife Begam Bi by executing Tamleefnama dated 17.04.1974 with the consent of Barkatullah. Thus, Begam Bi was the owner of half south portion of the house.

- 6.** It is averred by the defendant that Barkatulla, Amina Bi, Jalaluddin and Hamida Bi had let out the suit house to Sheikhar Chand Jain. A Civil Suit No.147-A/1988 has been instituted against the original tenant Sheikhar Chand Jain for eviction on various grounds under Section 12(1) of M.P. Accommodation Control Act. During pendency of the suit, original tenant Sheikhar Chand Jain died and his LRs were brought on record as successor tenants. One of LRs of Sheikhar Chand Jain, his son Inder Kumar Jain had purchased the share of Smt. Begam Bi vide order sale deed dated 03.02.1982 and share of Smt. Sona Bi vide sale deed dated 20.09.1982 in suit house. It is claimed that by virtue of these sale deeds, Inder Kumar Jain became the co-owner of the suit house and retains possession in the suit house as co-owner. Inder Kumar Jain had been impleaded in Civil Suit No.147-A/1998 as purchaser of share of co-owner not as a LRs of deceased Sheikhar Chand Jain.

- 7.** The defendant has admitted that Civil Suit No.147-A/1988 was dismissed by the trial Court on 30.07.1991, thereafter, first appeal No.61-A/1995 and Second Appeal No.813/1995 filed by the plaintiffs also dismissed. It is further averred that, the findings of Second Appeal No.813/1995 shall have the effect of *res judicata* in the present suit.
- 8.** The defendant has denied the allegation that his possession in suit house is as trespasser. It is stated that the defendant is in possession of the suit house as co-owner not as a trespasser or tenant of the plaintiff. Plaintiff is not the sole owner of the house, therefore, he cannot file a suit for ejectment of defendant. The defendant cannot be termed as stranger purchaser who has no right to retain possession of disputed house. The defendant has given a particulars of various suits filed by plaintiff and her sister Hamida Bi for eviction of defendant, declaration of sale deed dated 02.02.1982 and 20.09.1982 as null and void and for other reliefs, in written statement para No.11 and 15 and stated that all the suits have been dismissed by the Courts. It is further pleaded that since, defendant No.3 Inder Kumar Jain is possessing the suit house as co-owner, therefore, plaintiffs are not entitled to get any *mesne* profit. The plaintiffs' suit is not maintainable and is liable to be dismissed.
- 9.** The trial Court framed the issue and decided the issue No.7 as preliminary issues, which reads as under:-

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

- 10.** The trial Court has arrived at the finding that the finding of previously instituted suit No.147-A/1988 and its Second Appeal No.813/1995 has effect of *res judicata* on present suit. Therefore, the suit is not maintainable. The trial Court by passing impugned judgment dated 14.07.2003 on aforesaid issue, 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 by whimsical way dismissed the appeal by holding that the respondent is a co-owner and suit is not maintainable against the co-owner. Whereas Inder Kumar Jain is son and LRs of original tenant Sheikhar Chand Jain, who inherits the tenancy after death of Sheikhar Chand Jain and came into possession of the suit house as tenant. Inder Kumar Jain is not the only person who inherited the tenancy. Other LRs of Sheikhar Chand Jain as his wife Smt. Champa Bai and son Puran Chand Jain are also as legal heirs inherited the tenancy, therefore, there is no merger of tenancy by virtue of Section 111(d) of Transfer of Property Act. Inder Kumar Jain has purchased only a part of suit house. When it is found proved that the suit house is required *bonafidely* for profession of plaintiff and ground mentioned under Section 12(1) (f) of M.P. Accommodation Control Act is made out then the possession of defendant become unauthorized and illegal, therefore, they are liable to be evicted. The judgment rendered in Second Appeal No.813/1995 does not operate as *res judicata* in present suit

because earlier suit was a tenancy suit, whereas present suit is based upon title of plaintiff.

12. Learned counsel for the respondents submits that after dismissal of SLP against the decision of S.A. No.813/1995, becomes final and binding upon the parties and the findings thereof 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 is 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 as per learned counsel for the respondents 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.

- (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) Co-owner Hamida Begum had filed a Civil Suit No.94-A/2002, for decree of eviction from the suit house and *mesne* profit against the defendants before XV Additional District Judge, Jabalpur, which has been dismissed on 14.07.2003 on the ground of *res judicata*, considering the earlier litigation Civil Suit No.147-A/1988. Against this First Appeal No.664/2006 has been preferred by Hamida Begum before this Court.
- (d) Plaintiff Hafizulla had filed another Civil Suit No.95-A/2002 on 20.08.1997 against defendant Inder Kumar Jain for declaration of the sale deed dated 20.09.1982 executed by Smt. Sona Begum in favour of Inder Kumar

Jain as null and void, and for grant of mandatory injunction to evict Inder Kumar Jain from suit house. This suit was dismissed by the trial Court and against this, First Appeal No.444/2003 has been filed by plaintiff in this Court.

- 13.** It is further argued by the learned counsel for the respondent that the plaintiff Hafizulla had 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 have been executed by Hamida Bi and Smt. Sona Bi in favour of defendant as null and void and also for decree of eviction of the defendant from suit house under Section 12(1)(f) of M.P. Accommodation Control Act. This suit was dismissed by Additional District Judge, on the ground of *res judicata* in respect of earlier Civil Suit No.147-A/1998. The plaintiff preferred First Appeal No.451/2003 in High Court, which has been allowed and a decree for eviction of defendant has been passed by Co-ordinate Bench of this Court. Against this judgment and decree the defendants had filed Civil Appeal No.5312/2010 before Hon'ble Supreme Court. Hon'ble Apex Court, allowed the appeal and set aside the decree vide order dated 13.07.2010. Therefore, decision of Hon'ble Apex Court is binding upon the plaintiff wherein it is held that the findings of earlier Civil Suit No.147-A/1998 shall have effect of *res judicata* in subsequent suits.
- 14.** We have perused the decisions of this Court rendered in F.A. No.451/2003 dated 27.02.2009 and Civil Revision

No.1676/2001 dated 25.02.2003 and common order of Hon'ble Apex Court dated 13.07.2010 in Civil Appeal No.1180/2006 and Civil Appeal No.5312/2010.

- 15.** 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 Sheikhar 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 Sheikhar 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 Sheikhar 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 Sheikhar 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 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(1)(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 this 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) No.16299/1995 before the Hon'ble Supreme Court, which was dismissed on 15.09.1997 in *limine*.

- 16.** 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 which is allowed by coordinate bench of this Court and vide judgment dtd.27 02 2009 a decree of eviction in favour of plaintiffs had been passed .
- 17.** 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 coordinate 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.

- 18.** 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 eviction of defendant on the ground that his possession is illegal and he is a trespasser and a decree for *mense profit*. 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. Moreover, in the present suit and earlier Civil Suit No.11-A/2002 the parties, subject matter and issues are same. Both the suits have been filed for eviction of defendant on almost same grounds. Therefore, when earlier decision of Civil Suit No.147-A/1998 operates as *res judicata* to Civil Suit No.11-A/2002 then the findings of Civil Suit No.147-A/1998 shall also operate as *res judicata* in present suit. The findings of trial Court in this regard is correct.

19. Shri Hafizulla argued that the possession of defendant is adverse to plaintiff, he has not filed suit for partition of his share purchased, therefore, his right on suit house gets extinguished under Section 27 of Limitation Act. Therefore, on this ground also he is liable to be evicted. This is not acceptable.

20. 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.

21. 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 co-owner. Since he is in possession of the property as he is not ousted from it, his right does not get affected on the ground of adverse possession. In Second Appeal No.813/1995 also the Court has given finding 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.

22. Most of grounds as agitated by Shri Hafizulla regarding *res judicata* has been elaborately considered by us in deciding the First Appeal No.1194/2011 filed by plaintiff Hafizulla

against defendants for eviction and *mesne* profit in respect of disputed house.

- 23.** 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

Vin**