

HIGH COURT OF MADHYA PRADESH, JABALPUR

First Appeal No.664/2006

APPELLANT: Smt. Hameeda Begum (Dead)
through LRs.
Smt. Farzana Begum Widow of
Mohammad Zaheer, Aged about 55
years, R/o Bhaji Mandi Kamti,
(Maharashtra) at present H.No.828,
Badi Omti, Jabalpur (M.P)

Versus

RESPONDENT : Shri Inder Kumar Jain S/o Late
Sheikhar Chand Jain, Aged about 56
years, R/o- H.No.458, Behind City
Kotwali, Hanumantal Ward, Jabalpur
(M.P.)

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

Shri Hafizullah Khan, Advocate for the appellant.
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 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.94-A/2002, whereby the trial Court has dismissed the suit on the ground of maintainability of suit and *res-judicata*.

2. The appellant/plaintiff has filed the suit against the respondent/defendant alleging that the suit house bearing Nos.667, 667/1 to 667/3 situated at Kotwali ward, Jabalpur known as "Kudrat Manzil" is ancestral property of Barkatulla and Sheikh Shamsuddin. At present, Barkatulla and Sheikh Shamsuddin are dead. Barkatulla legal heirs wife Smt. Rafiquan Bi, sons Hafizullah (plaintiff), Inayatullah, Habibullah and daughter Smt. Sona Bi had inherited the interest of Late Barkatulla in the property. Similarly, the other co-owners were also legal heirs of Shamsuddin as his wife Smt. Amina Bi, son Jalaluddin and daughter Hamida Bi. Smt. Begum Bi is wife of Jalaluddin. 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 for ten years. During life time of original tenant Sheikhar Chand Jain, his son defendant Inder Kumar Jain had purchased a portion of suit house from co-owners Hamida Bi and Sona Bi by registered sale deed dated 02.02.1982 and 20.09.1982 respectively. Plaintiff Hafizulla being a joint owner of suit house filed a Civil Suit No.31-A/1997 before XI ADJ, Jabalpur and another Civil Suit No.17-A/1997 before District Judge, Jabalpur against the defendants for declaration that the sale deeds dated

02.02.1982 and 20.09.1982 as in effective on the ground that the defendant being a stranger purchaser who has not brought the suit for partition of the house, therefore, his right on the suit house have been extinguished by passage of time under Article 65 of Limitation of Act. In above civil suits, the defendant has filed the written statement, wherein inter alia pleaded that after purchased of the share of Hamida Bi and Sona Bi, the defendant has become the co-owner of the property, therefore, he cannot be evicted.

- 3.** It is further pleaded that the plaintiff has 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(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. 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 property.

- 4.** It is further pleaded by the plaintiff that earlier suit No.147-A/1998 relates to the dispute between landlord and tenant no question of title was raised in it, whereas, in the present suit which is for possession and mesne profit, the question of title of plaintiff involves. Therefore, the findings in the earlier suit and Second Appeal No.813/1995 shall not operate as *res judicata*, in the present suit. It is further pleaded that the possession of defendant in suit house is as tress-passer, who has no right to claim joint possession with other co-owners, therefore, he is liable to be evicted. The defendant is unauthorizedly in possession of suit house, 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 alongwith mesne profit @ Rs.500/- per day from the date of decree till vacant possession handed over by defendant 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 and she was receiving the rent @ Rs.75/- per month from Sheikhar Chand Jain for his part of 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.

- 7.** The defendant has admitted that the 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. Against this plaintiffs filed SLP before Apex Court which was dismissed in *limine*. 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 of the tenant of the plaintiff. Plaintiff Hamida Begum is not the sole owner of the house, therefore, she cannot file a suit for ejectment of defendant. The defendant cannot be termed as stranger purchaser with no right to retain possession of disputed house. The defendant has given a particulars of various suits filed by plaintiff and her brother Hafizulla 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.2(b), 3(a), 6, 9, 10, 11 and 12 and stated that all the suits have been dismissed by the Courts. 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.

The trial Court framed the issue and decided the issues No. 7 and 10 as preliminary issues, which reads as under:-

1. *Whether plaintiff's suit is not maintainable as barred by principle of res judicata?*
2. *Whether the present suit is not maintainable under Order II Rule 2 of CPC in view of previously decided Civil Suit?*

9. The trial Court has arrived at the finding that the finding of the previously instituted suit No.147-A/1988 and in 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.

10. It is argued by Shri Hafizulla, learned counsel for the 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 when the finding is not subject matter of the appeal and the sale deed dated 20.09.1982 is itself 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.

11. It is submitted by the learned counsel for the appellant that the tenancy was only for ten years. After this period, the possession of tenants becomes unauthorized. 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.***

- 12.** 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 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 coordinate 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) 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 preferred the First Appeal No.512/2003 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 learned counsel for the appellant, 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 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 ejection 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(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, the Second Appeal No.813/1995 was filed by plaintiff, in which the high court 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 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.

- 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 issue directly and substantially, which was the 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, learned counsel for the appellant 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.***

It is further contended by Shri Hafizulla, learned counsel for the appellant that the original lease was granted for the 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).***

- 20.** 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."

- 21.** The 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 become adverse to the plaintiff.
- 22.** A person who takes 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 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.

- 23.** 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.

- 24.** 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. 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 the 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. 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.

- 25.** It was argued by Shri Hafizulla, learned counsel for the appellant 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) 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.***

26. 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 an 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.

- 27.** 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.
- 28.** Thus, for application of Section 4 of Partition Act and Section 44 of Transfer of Property Act, it is necessary to prove that the disputed house is **dwelling house** of undivided family of plaintiff.
- 29.** It is not disputed that the suit house was given on rent to Sheikhar 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. Thus, it is evident 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 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. The case laws relied upon by the appellant relates to dwelling house. Therefore, these case laws are not applicable in the instant case.

- 30.** 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**