

A.F.R.
HIGH COURT OF MADHYA PRADESH, JABALPUR

First Appeal No.1194/2011

- APPELLANTS** :1. Hafizulla,
S/o Late Sheikh Barkatullah,
aged about 72 years,
Occupation Advocacy.
2. Smt. Hameeda Begum, Wd/o Abdul
Lateef (Died) through LRs.
- (a) Mohd. Anwar
S/o Late Abdul Lateef,
aged about 55 years,
- (b) Smt. Nadra,
W/o Shri Mohd. Sarif,
D/o Late Shri Abdul Lateef,
aged about 52 years,
- (c) Smt. Shakeela,
W/o Shri Shameem,
D/o Late Shri Abdul Lateef
aged about 50 years,
- (d) Smt. Saira,
W/o Shri Naseem,
D/o Late Shri Abdul Lateef
aged about 48 years.
- (e) Smt. Rukhsana,
Wd/o Mohd. Sahodat,
aged about 45 years,
- (f) Smt. Farzana,
Wd/o Mohd. Zaheer,
aged about 40 years.
- (g) Smt. Zaida,
W/o Mohd. Saleem,
aged about 38 years.

All R/o House No.1035,
Ansar Nagar, Jabalpur (M.P)

Versus

- RESPONDENTS** :1. Shri Puran Chand Jain,
S/o Late Sheikhar Chand Jain,
aged about 70 years,

- Running Ajay Electrical Shop,
Adjacent Shyam Talkies Shaheed
Ismark Road, Jabalpur (M.P)
2. Shri Inder Kumar Jain,
S/o Late Sheikhar Chand Jain,
aged about 65 years,
R/o Alongwith respondent No.1 Kudrat
Manzil in front of City Kotwali, Kotwali
Bazar Ahinsha Electrical Shop 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 respondents.

Whether approved for reporting: Yes/No.

J U D G M E N T
(01.02.2017)

Per Anurag Shrivastava, J:-

Being aggrieved by judgment and decree dated 02.12.2011, passed by III Additional Judge to the Court of District Judge, Jabalpur in Civil Suit No.3-A/2010, the appellants/plaintiffs have preferred this First Appeal under Section 96 of Civil Procedure Code, whereby the learned trial Court has dismissed the suit for possession and *mesne* profit with regard to the disputed premises.

2. The facts giving rise to this appeal in narrow compass are that the plaintiff Hafizulla and Smt. Hameeda Begum filed Civil Suit No. 3-A/2010 before the trial Court claiming that they are 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 story 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, in the life time of original tenant Sheikhar Chand Jain, his son Inder Kumar Jain (Defendant No.3) had purchased undivided share of the suit house from the two co-owners Smt. Sona Bi and Smt. Begum Bi by registered sale deed dated 03.02.1982 and 20.09.1982 respectively. In Civil Suit No.147-A/1988 the Court vide judgment dated 30.07.1981 found the *bonafide* need of the plaintiff No.1 Hafizulla established, but suit was dismissed on the ground that plaintiff No.1 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 on the ground that the defendant No.3 Inder Kumar Jain had purchased the undivided share of two co-owners and became co-owner of the suit house, hence the suit for eviction of a co-owner by another co-owner from joint property is not maintainable. Against this, plaintiff filed SLP(C) No.16299/1997 before Hon'ble Supreme Court, which was also dismissed on 15.09.1997 in *limine*.

- 3.** It is further pleaded by appellant/plaintiff that after dismissal of SLP the plaintiff filed Civil Suit No.11-A/2002 against the

defendant for declaration, that two sale deeds dated 03.02.1982 and 20.09.1982 executed in favour of defendant No.3 Inder Kumar Jain as null and void and also ejection of defendant/tenants from suit house. During pendency of this suit plaintiff No.2 Smt. Hameeda Begum filed a separate suit before Rent Control Authority RCA Case No.2A/90(7) 97-98 under Section 23-A of M.P. Accommodation Control Act, for eviction of defendant on the ground of *bonafide* requirement of her son Mohd. Anwar. The Rent Control Authority considering earlier judgment in Civil Suit No.147-A/1998 dismissed the suit on the ground of *res-judicata*. Against this order, Smt. Hameeda Begum preferred a Civil Revision No.1676/2001 before High Court, which was dismissed vide order dated 25.02.2003 on the ground that the judgment of S.A. No.813/1995 has effect of *res-judicata* and the suit is not maintainable.

4. It is further averred that in Civil Suit No.11-A/2002 the Additional District Judge (Fast Track) Jabalpur, relying upon the finding of Second Appeal No.813/1995 as well as Civil Revision No.1676/2001 dismissed the suit on the ground of *res-judicata*. Against this, the plaintiffs filed First Appeal No.451/2003 before High Court. This appeal was allowed by Division Bench of this Court and decreed the suit of the plaintiffs by holding that the decision of Civil Suit No.147-A/1985 and S.A. No.813/1995 does not operate as *res-judicata* and decree of eviction of defendants from suit house was passed.
5. It is further pleaded that, against the order dated 25.02.2003 of Civil Revision No.1676/2001, the plaintiff Hameeda Begum filed Civil Appeal No.1180/2006 before Supreme Court.

Similarly, against the order dated 27.02.2009 passed by High Court in F.A. No.451/2003, the defendant filed Civil Appeal No.5312/2010. Hon'ble Supreme Court by passing a common order on 13.07.2010 allowed the defendants' appeal C.A No.5312/2010 and by setting aside the judgment and decree passed in F.A. No.451/2003, and thereby dismissed the plaintiffs' suit on the ground of *res-judicata* and constructive *res-judicata* with an observation that the decision of ***Promod Kumar Jaiswal Vs. Bibi Husn Bano and Others (2005) 5 SCC 492*** will not apply as *precedent* in inter party suit. Hon'ble Supreme Court vide common order dated 13.07.2010 dismissed Smt. Hameeda Begum's Civil Appeal No.1180/2006 on the ground of *res-judicata*.

6. It is further pleaded by plaintiffs that the findings of Supreme Court passed in C.A. No.1180/2006 and C.A. No.5312/2010 vide common dated 13.07.2010 confirming findings of S.A. No.813/1995 in judgment dated 12.05.1997 holding that the defendant No.3 Inder Kumar Jain became the co-owner, hence the suit is not maintainable against the co-owner is *coram non-judice*. Since, SLP (C) No.16299/1997, which was preferred by plaintiffs against the judgment dated 12.05.1997 of S.A. No.813/1995 was dismissed by Supreme Court on 15.09.1997 in *limine*. Therefore, this judgment shall not operate as *res-judicata*. It is also settled law that the principle of *res-judicata* or constructive *res-judicata* is not applicable, if the decision has been rendered in rent cases. The binding precedent laid down by the Supreme Court in the matter of ***Promod Kumar Jaiswal Vs. Bibi Husn Bano (2005) 5 SCC 492*** is fully applicable in the instant suit.

- 7.** It is further pleaded that, suit house is bonafidely required by plaintiff No.1 Hafizulla and his son Mohd. Shafiqullah, who are Advocate for their Office for non-residential purpose. The suit house was let out on 01.05.1968 for a period of 10 years for non-residential purpose in which defendant running Electrical goods shop having occupied total area 2025 Sq.ft. The suit house is situated at market place having rental value at present Rs.2000/- per day. The defendants become tress passer after expiry of lease period. Therefore, by filing instant suit the plaintiffs sought the relief of declaration that the defendant No.1 to 3 are tenant/co-tenant in suit house and decree of eviction under Section 12 (1) (f) of M.P. Accommodation Control Act, 1961 and *mesne* profit @ Rs.1000/- per day from the date of filing of the suit till eviction of tenants/defendants.

- 8.** In the written statement filed by the defendants, it is denied that the suit house is a dwelling house. It is further pleaded that the disputed house was the property of Late Sheikh Dullu. After his death, his property was partitioned among his sons in 1951 and the suit house was given in share of his sons Shamsuddin and Barkatullah. In this partition, the half north part of the suit house came in share of Barkatullah and remaining south part was given 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 her part of house.

- 9.** It is further averred by the defendants that Barkatulla, Amina Bi, Jalaluddin and Hamida Bi had granted the lease of building "Kudarat 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) Accommodation Control Act. Later on name of the lessors other than Hamida Bi and Hafizulla were deleted from the array of the plaintiffs. 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 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.
- 10.** The defendants have 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*.
- 11.** In written statement the defendants have not denied the averments in plaint regarding ejection suit filed by Smt. Hameeda Bi before Rent Control Authority under Section 23(a) of M.P. Accommodation Control Act and Civil Suit No.11-A/2002 filed by the plaintiffs before Additional District Judge (Fast Track), Jabalpur and its results. It is stated that,

the decisions of Hon'ble Supreme Court in C.A No.1180/2006 and C.A. No.531/2010 dated 13.07.2010 finally resolved the controversy. It is held that the decision of Civil Suit No.147-A/1985 and S.A. No.813/1995 dated 12.05.1997 have the effect of *res-judicata* in present suit. The plaintiff has filed so many suits and proceedings for eviction of the defendants repeatedly on same grounds and misusing the process of Court. By giving details of various litigation in paras No.1(e) to 1(m) of the written statement, the defendants submit that all the issues raised in present suit has already been decided finally in earlier litigation, therefore, the present suit is not maintainable on the ground of *res-judicata*. 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.

12. The trial Court after recording the evidence of the parties vide impugned judgment dated 02.12.2011 dismissed the suit holding that in view of common order dated 13.07.2010 of Hon'ble Apex Court in Civil Appeal No.1180/2006 and Civil Appeal No.5312/2010, the findings of S.A. No.813/1995 shall operate as *res-judicata* in instant suit, therefore, the suit is not maintainable, the possession of defendant Inder Kumar Jain in suit house is as of a co-owner, therefore, the plaintiffs are not entitled to claim *mesne profit*. Against this, the plaintiffs have preferred present appeal.

13. Heard learned counsel for the parties and perused the record.

1. For disposal of this appeal, the following questions arises for consideration:-

- i) Whether, finding of S.A. No.813/1995 vide judgment dated 12.05.1997 shall have the effect of Res-judicata in instant suit?
- ii) Whether, the appellants/plaintiffs are entitled for claiming *mesne* profit from the defendants?

- 14.** To understand the controversy, details of the facts of previous litigations between the parties are worth mentioning.
- 15.** The disputed house bearing Nos.667, 667/1 to 667/3 situated at Kotwali ward, Jabalpur known as "Kudrat Manzil" belongs to Late Sheikh Dullu. After death of Sheikh Dullu this property was inherited by his sons namely Barkatulla and Sheikh Shamsuddin. At present, Barkatulla and Sheikh Shamsuddin both 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.
- 16.** 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 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.

- 17.** 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 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 had also upheld the *bonafide* need of the appellants but dismissed the appeal by giving following finding:

“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.”

Thus, the judgments and decree passed by the Courts below were confirmed. Against this judgment in second appeal, the plaintiffs preferred SLP (Civil) No.16299/1995 before the Hon'ble Supreme Court, which was dismissed on 15.09.1997 in *limine*.

- 18.** Shri Hafizulla/appellant has submitted that the previous Civil Suit No.147-A/1985 has been filed for eviction of tenant on the ground of *bonafide* requirement of landlord under Section 12(1)(f) of M.P. Accommodation Control Act. In this Suit tenancy was admitted and no question of title of landlord was raised. Therefore, decision of this suit out of which Second Appeal No.813/1995 cannot operate as res judicata in the subsequent suit which is filed for eviction on the basis of title. The instant suit is based on title also, apart from the ground under Section 12(1)(f) of the M.P. Accommodation Control Act and also on fresh cause of action. Inder Kumar Jain has purchased the share of one of co-owner during pendency of previous suit in 1982 in the life time of his father Sheikhar Chand Jain, who was the original tenant. After the death of Sheikhar Chand Jain the tenancy right devolved upon the LRs of Sheikhar Chand Jain i.e. wife Champa Bai, and sons Puran Chand Jain, Inder Kumar Jain etc.. Therefore, Inder Kumar Jain is not the only person who inherited the tenancy. There is no merger of tenancy by virtue of Section 111(d) of Transfer of Property Act, because, Inder Kumar Jain had purchased only part of property. The Apex Court has laid down in ***Pramod Kumar Jaiswal and others Vs. Bibi Husnbano and Others, AIR 2005 SC 2857*** thus:-

*"6. Ownership of the property which is the subject matter of tenancy is certainly a larger estate than the tenancy itself and naturally larger than the sub-tenancy. If the sub-tenant acquires the entire interest of the owner in the whole of the estate forming the subject matter of sub-tenancy, the sub-tenancy merges into ownership and the estate of sub-tenant stands enlarged into that of a full owner. The sub-tenant cannot be the owner and the sub-tenant both at the same time. Of course, the situation would have been different if the sub-tenant would not have acquired the entire estate of the owner or the ownership interest in the entire estate forming subject matter of sub-lease, as was the case in *Badri Narain Jha and Others Vs. Rameshwar Dayal Singh and Others*, AIR 1951 SC 186 or in *Shaikh Faquir Baksh Vs. Murli Dhar and Others*, AIR 1931 PC 63.*

- 19.** Shri Hafizulla, further argued that in the instant case the interests of the leasee and the lessor in the whole of the property do not become vested at the same time in one person in the same right, therefore, there is no determination of tenancy on the ground of merger. In view of the above case law of Hon'ble Apex Court, the tenancy of respondent did not come to an end, their position as tenant continued and they are bound to comply with the requirement of Rent Control Act., and liable to be evicted under the grounds mentioned in Section 12(1) of M.P. Accommodation Control Act. The decision of Civil Suit No.147-A/85 and Second Appeal No.813/1995 are per in curium in the light of judgment of Apex Court in ***Pramod Kumar Jaiswal*** (supra), which has effect of binding precedent. This is a pure question of law, whether due to execution of alleged sale deeds dated 02.02.1982 and 20.09.1982 in favour of Inder Kumar Jain the tenancy stood extinguished by merger under Section 111 (d) of Transfer of Property Act? Hon'ble Apex

Court in **Isabella Johnson (Smt.) Vs. M.A. Susai (1991) 1 SCC 494 : AIR 1991 SC 993** following the decision in **Mathura Prasad Bajoo Jaiswal Vs. Dossibai N.B. Jeejeebhoy (1970) 1 SCC 613** has laid down that, "it is well settled that there will be no estoppel on a pure question of law and in this case the question of jurisdiction is pure question of law." Shri Hafizulla contends that in earlier suit the decision rendered by this Court in S.A No.813/1995 was not on the question of law of merger of tenancy into co-ownership and Section 111 (d) of Transfer of Property Act was not considered, thus it cannot be said to be operating as *res judicata* in the present suit based on fresh cause of action of ejection of tenant and title. In **Employees Welfare Association Vs .Union of India and Others AIR 1990 SC 334** the Apex Court has laid down that "the decision on an abstract question of law or question of jurisdiction would not operate as *res judicata* in a subsequent suit or proceeding if the cause of action is different." In **Jaisingh Jairam Tyagi and Others Vs. Mamanchand Ratial Agrawal and Others (1980) 3 SCC 162** the Apex Court has laid down "the decision cannot operate *res judicata* against legislative mandate/direction. Decision cannot be permitted to attain special rule or law in derogation of the rule declared by legislature."

- 20.** It is further argued by Shri Hafizulla that the SLP filed against the decision of S.A.No.813/1995 was dismissed by Apex Court in *limine* vide order dated 15.09.1997. Apex Court in **Fuljit Kaur Vs. State of Panjab and Others, AIR 2010 SC 1937** has laid down that:-

"8. *There is no dispute to the settled proposition of law that dismissal of the Special Leave Petition in limine by this Court*

does not mean that the reasoning of the judgment of the High Court against which the Special Leave Petition has been filed before this Court stands affirmed or the judgment and order impugned merges with such order of this Court on dismissal of the petition. It simply means that this Court did not consider the case worth examining for the reason, which may be other than merit of the case. Nor such an order of this Court operates as res judicata. An order rejecting the Special Leave Petition at the threshold without detailed reasons therefore does not constitute any declaration of law or a binding precedent."

Similar view is also expressed in case law ***Saurashtra Oil Mill Association, Gujarat Vs. State of Gujarat and another, AIR 2002 SC 1130*** , ***Y. Satyanarayan Reddy Vs. Mandal Revenue Officer, A.P. AIR 2010 SC 1440*** and ***Subhadra Rani Pal Choudhary Vs. Sheirly Weigal Nain and Others, AIR 2005 SC 3011***. In ***Rattiram and Others Vs. State of M.P through Inspector of Police AIR 2012 SC 1485***, it is held that:-

"It is settled rule that if a decision is given per incuriam the Court can ignore it."

- 21.** In ***Union of India and another Vs. Maniklal Banerjee AIR 2006 SC 2844***:- it is observed by Hon'ble Apex Court in para No.17, 18 and 19 as "dismissal of Special Leave Petition by Supreme Court would not mean that any law within meaning of Article 141 was laid down thereby- Moreover, said decision rendered per incuriam as statutory provisions relevant for determining issue was not taken into consideration. It would not create any binding precedent."

22. In case law ***Narmada Bachoo Andoland Vs. State of M.P*** ***AIR 2011 SC 1989*** while explaining the doctrine of Per Incuriam Hon'ble Apex Court in para No.63 observed that the Courts are not to perpetuate an illegality, rather it is the duty of the Courts to rectify mistakes. While dealing with a similar issue, this Court in *Hotel Balaji & Ors. Etc. Vs. State of A.P & Ors. Etc. etc.*, AIR 1993 SC 1048 : (1993 AIR SCW 3) observed as under:-

"To perpetuate an error is no heroism. To rectify it is the compulsion of judicial conscience."

23. ***Sajjadanashin Sayed Md. B.E Edr. (D) by L.Rs Vs. Musa Dadabhai Ummer and Others, AIR 2000 SC 1238:-***

"The words used in S.11 CPC are "directly and substantially in issue". If the matter was in issue directly and substantially in a prior litigation and decided against a party then the decision would be res judicata in a subsequent proceedings. Judicial decisions have however held that if a matter was only 'collaterally or incidentally' in issue and decided in an earlier proceeding, the finding therein would not ordinarily be res judicata in a later proceeding where the matter is directly and substantially in issue. A collateral or incidental issue is one that in ancillary to a direct and substantive issue: the former is an auxiliary issue and the latter and principal issue. The expression 'collaterally or incidentally' in issue implies that there is another matter which is 'directly and substantially' in issue."

(Paras 12, 14)

24. ***N.R. Narayan Swamy Vs. Rancis Jagan, AIR 2001 SC 2469:-***

"Karnataka Rent Control Act (22 of 1981) Ss 45, 21. Houses and Rents Eviction successive suits can be filed by landlord on ground of bona fide requirement or non-payment of rent. First suit

withdrawn as not pressed. Second suit not barred either by O.23, R.1(4) of Civil P.C or by S.45 of Karnataka Act. 2000 (3) Kant LJ 561 Reversed.

In eviction proceedings under the Rent Act the ground of bona fide requirement or non-payment of rent is a recurring cause and, therefore, landlord is not precluded from instituting fresh proceedings. In an eviction suit on the ground of bona fide requirement the genuineness of the said ground is to be decided on the basis of requirement on the date of the suit. Further, even if a suit for eviction on the ground of bona fide requirement is filed and is dismissed it cannot be held that once a question of necessity is decided against the landlord he will not have a bona fide and genuine necessity ever in future. In the subsequent proceedings, if such claim is established by cogent evidence adduced by the landlord, decree for possession could be passed.

- 25.** *Per contra*, 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 and also in Civil Revision No.1676/2001. 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 the 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 some of litigations 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.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.
- (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 preferred the First Appeal No.512/2003 before this Court.

26. To appreciate, the arguments of Shri Hafizulla it would be appropriate to consider the decision rendered in previous litigation between the parties, in respect of the suit property. This is the fifth round of litigation. First round is Civil Suit No.147-A/1998 filed by the plaintiff for eviction under Section 12(1)(f) of the Act against defendants, this suit was dismissed and First Appeal and Second Appeal No.813/1995 was also dismissed. The details of this litigation are given in paras No.16 and 17 of judgment.

27. After dismissal of S.A. No.813/1995 and SLP, one of the plaintiff Smt. Hamida Begum filed a separate suit before Rent Control Authority RAC No.2-A/90(7) 1997-98 for eviction of the defendant under Section 23-A of the Act. The RCA has dismissed the suit on the ground of res judicata. Against this plaintiff Hamida Begum filed a Civil Revision No.1676/2001 before High Court. The Coordinate Bench of this High Court formulated the following questions and by giving findings against the plaintiff dismissed it vide order dated 25.02.2003.

Questions in Civil Revision no.1676/2001:-

- i) Whether, a co-owner (co-landlord) can file a suit for eviction against the tenant even if the other co-owner objects to the eviction of the tenant?*
- ii) Whether, the tenant who has purchased the undivided share of one of the co-owners is liable to eviction at the instance of other co-owners and then it is for him to bring a suit for partition and separate possession?*
- iii) Whether, the decision in the second appeal on the aforesaid pure questions of law operates as res-judicata in the subsequent eviction proceeding under Section 23-A of the Act on a different cause of action (bonafide need of the son of the applicant)?*

Findings:-

- 1. A co-owner/landlord cannot institute a suit or proceeding for eviction against the tenant, the change of forum or the concept of bonafide need does not make the slightest difference.*
- 2. If a tenant who has purchased the property from a co-owner and gets into the shoes of the co-owner need not file a suit for partition and separate possession and there is no obligation on his part to handover possession and thereafter sue for partition and separate possession. Any co-owner who wants to have possession, by meets and bounds may file a suit*

for partition and claim separate possession and thereafter seek eviction of the tenant from the part of reversion falling to his share after partition.

3. *The judgment rendered in the Second Appeal No.48/88 operates as re judicata despite pure questions of law decided therein. We may also add here that the judgment having been delivered intere se parties, the same would have been otherwise binding on us, in view of the law laid down by this Court in the Case of Shyamacharan Vs. Sheojee Bai, 1964 MPLJ 502 as well as the conception in the case of State of M.P. Mulamchand, 1973 MPLJ 832 that the doctrine of res judicata over weighs the binding precedent.*
4. *Thus, a Civil Revision No.1676/2001 was dismissed, vide order dated 25.02.2003.*

28. The plaintiff filed third round of litigation in Civil Suit No.11-A/2002 against the defendant for declaration of as 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 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

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 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

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

29. Against the order dated 25.02.2001 in Civil Revision No.1676/2001, the plaintiff Hamida Begum filed a Civil Appeal No.1180/2006 before Supreme Court. The defendant had also filed Civil Appeal No.5312/2010 in Supreme Court against the order dated 27.02.2009 passed by High Court in First Appeal No.451/2003. Hon'ble Apex Court decided both the Civil Appeals No.1180/2006 and C.A. No.5312/2010 by common order dated 13.07.2010 by recording 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.451/2003 and also dismissed the appeal of Hamida Begum and up held the order passed by this Court in Civil Revision No.1676/2001. Thus, the controversy is finally resolved by Hon'ble Apex Court.

- 30.** Now in light of above previous litigations between the parties, we will consider whether the decisions of Civil Suit No.147-A/1998 and Second Appeal No.813/1995 shall operate as res-judicata in instant suit? The present suit is filed seeking relief of declaration that the defendants are tenants/co-tenants in the suit house and a decree for eviction of them on the ground of Section 12(1)(f) of the Act, and also for recovery of *mesne profit*. In present suit No.3-A/2010 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, his right to remain in possession of house 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.

- 31.** It is argued by Shri Hafizulla 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.
- 32.** 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.
- 33.** In third round of litigation as described earlier in para 28, 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 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. 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 and parties are making claim under same rights.

- 34.** Hon'ble Apex Court ***Ramadhar Vs. Bhagwandas (2005)***
13 SCC 1 observed that:

"the expression 'matter in issue' under Section 11 of the Code of Civil Procedure,

1908 connotes the matter directly and substantially in issue actually or constructively. A matter is actually in issue when it is an issue directly and substantially and a competent court decides it on merits. A matter is constructively in issue when it 'might and ought' to have been made a ground of defence or attack in the former suit. Explanation IV to section 11 of the Code by a deeming provision lays down that any matter which 'might and ought' to have been made a ground of defence or attack in the former suit, but which has not been made a ground of defence or attack, shall be deemed to have been a matter directly and substantially in issue in such suit.

The principle underlying Explanation IV is that where the parties have had an opportunity of controverting a matter, that should be taken to be the same thing as if the matter had been actually controverted and decided. The object of Explanation IV is to compel the plaintiff or the defendant to take all the grounds of attack or defence in one and the same suit"

.....(Para No.21 and 22)

Therefore, all the grounds which have been raised in instant appeal by the plaintiff/appellant deemed to have been considered and decided against him by Hon'ble Apex Court in C.A.5312/2010. The principle of constructive *res judicata* will be applicable in instant case.

- 35.** Hon'ble Calcutta High Court in ***Indu Bhusan Jana Vs. Union of India, AIR 2000 Calcutta 24*** observed that "upon an order attains finality, it matters little as to whether it was erroneous. A party aggrieved by an order has to work out his remedies within the legal frame work. If an issue or the entire lis is concluded upon a finding being rendered and such finding remains unchallenged if it no longer open to the

party to undo the effect thereof at any subsequent stage or collaterally unless it is demonstrated that the finding was obtained by fraud or the Court lacked jurisdiction to pass the order. The hierarchy in the judiciary exist to afford litigant to climb up the ladder in persuit of justice and to right a wrong committed at lower level. But if a litigant accepts an order, he does to his prejudice and binds himself thereby.".....(Para 11)

- 36. *Hon'ble Apex Court in M. Nagbushana Vs. State of Karnataka, AIR 2011 SC 1113*** has held that "res judicata is not technical doctrine, but a fundamental principle which sustain rule of law in ensuring finality in litigations. Its principle seeks to promote honesty and fair administration of Justice and to prevent abuse in the matter of accessing Court for agitating on issues which have become final between the parties."
- 37.** Thus, following the above verdict and decision of Hon'ble Apex Court in CA no. 5312/2010, which is binding upon this Court, we hold that the judgment in Civil Suit No.147-A/1998 have effect of res judicata in the instant suit also. In view of above decision it can also be concluded that not only the judgment passed in Second Appeal No.813/1995, but also the judgments in Civil Revision No.1676/2001 and Civil Suit No.11-A/2002 are also having effect of *res judicata* in the instant suit.
- 38.** Therefore, in the instant case the trial Court has rightly come to the conclusion that the judgment in Civil Suit No.147-A/1998 and Second Appeal No.813/1995 shall operate as *res judicata* in the instant suit and the findings that the

defendant Inder Kumar Jain has purchased the undivided share of Smt. Sona Begum by sale deed dated 20.09.1982 and became the co-owner of the property. His share qua co-owner has not been specified, therefore, he has legal right to retain possession of suit house till partition. He cannot be evicted by other co-owner without getting property partitioned.

39. Now we will consider the claim of **Mense Profit** as raised by the plaintiff/appellant. Section 2(12) of Civil Procedure Code, defines the Mesne Profits as under:-

"Mesne Profits" of property means those profits which the person in wrongful possession of such property actually received or might with ordinary diligence have received therefrom, together with interest on such profits, but shall not include profits due to improvements made by the person in wrongful possession.

Therefore, to claim *mesne* profit it is necessary to prove that the person against whom the claim is made must be in the wrongful possession of such property and he has received profits therefrom.

40. Shri Hafizulla has 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 and unlawful. 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". It is further contended by Shri Hafizulla, 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. Mahabaleshwarappa and another, AIR 1954 SC 337 (Vol. 41, C.N 31).***

41. Shri Hafizulla further argued that the defendants possession on the suit property is illegal and adverse to plaintiffs, therefore, they are entitled to pay *mesne* profit at the present rate of rent. Shri Hafizulla has relied on various case laws ***Amar Singh Vs. Chandra Shekhar Rao, AIR 1984 M.P 1 (F.B). Jagat Narayan Singh Vs. Rabinder Mohan Bhandari and Others, AIR 1992 Calcutta 216. Vinod Khanna and Others Vs. Bakshi Sachdev (Deceased) through L.R.s and Others, AIR 1996 Delhi 32. State of Maharashtra and another Vs. M/s Super Max International Pvt. Ltd and Others, AIR 2010 SC 722 and Atma Ram Properties (P) Ltd. Vs. Federal Motors (P) Ltd, (2005) 1 SCC 705.***
42. Shri Hafizulla further submitted that in W.S. the defendants have not specifically denied the averments of plaint made in

respect of *mesne* profit, therefore, the pleadings in this regard shall be treated as admitted by the defendants and a decree for *mesne* profit can be passed in favour of plaintiff. He relied on case law ***Sushil Kumar Vs. Rakesh Kumar, AIR 2004 SC 230.***

- 43.** To decide this issue we have to consider as to nature of possession of the defendants including Inder Kumar Jain in suit house. If their possession is found as unauthorized or unlawful then only they will be liable to pay *mesne* profit. First 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."

- 44.** 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 provide 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.
- 45.** 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.

- 46.** 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 the 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.

- 47.** 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.

48. Therefore, it is for the co-owner who has been ousted from the property, has 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. The findings of earlier suit in this regard are binding as *res-judicata* in present suit. Since he is in possession of the property in other words 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.

49. 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."

Thus, the 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 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. Therefore, on this ground also the plea of adverse possession of plaintiffs cannot be accepted.

- 50.** 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. Simply giving house on rent does not change its nature as dwelling house, 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.

These are the new grounds raised in argument by appellant, although it may be deemed to be considered under constructive *res judicata*, but we think it proper to consider the case of plaintiff in this angel also.

- 51.** 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.

- 52.** 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.

53. 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, since the defendant has specifically denied this fact in written statement. The burden to prove this fact lies upon 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 of Partition Act are complementary to each other. Terms 'undivided family' and 'dwelling house' have the same meaning in both the Sections.

54. 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.

55. There are certain case laws with reference to Section 4 of Partition Act and Section 44 of Transfer of Property Act as given under:-

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

56. *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.

57. *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.

58. *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.

59. 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 were running an electrical 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.11-A/2002 and RCA case No.2-A/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/office of advocate. In the present suit plaintiff Hafizulla (PW-1) and his son M. Shafiqulla (PW-2) in evidence have not stated that the suit house is a dwelling house, used for residential purposes. Thus, from pleading and evidence of 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 tenant and considering the long period of tenancy, it cannot be said that it had been given on rent temporarily. Therefore, it cannot be said that the disputed house is a dwelling house within the 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. Therefore, the case law relied upon by plaintiff are not applicable in facts of present case because mainly they relates to dwelling house.

60. As far as, nature of possession of other defendants except Inder Kumar Jain is concerned, they have inherited the tenancy after the death of original tenant Sheikhar Chand Jain. In earlier Civil Suit 147-A/1998 and Second Appeal No.813/1995, it is found that, the suit for eviction at the instance of plaintiffs was not maintainable as portion of undivided house had been purchased by Inder Kumar Jain, and have become co-owner of the property. Relying upon the case law ***Sk. Sattar Sk. Mohd. Choudhary Vs. Gundappa Amabadas Bukate, reported in (1996) 6 SCC 373***, wherein it is held that:-

A co-sharer cannot initiate action for eviction of the tenant from the portion of the tenanted accommodation nor can he sue for his part of the rent. The tenancy cannot be split up either in estate or in rent or any other obligation by unilateral act of one of the co-owners. If, however, all the co-owners or the co-lessors agree among themselves and split by partition the demised property by metes and bounds and come to have definite, positive and identifiable shares in that property, they become separate individual owners of each severed portion and can deal with that portion as also the tenant thereof as individual owner/lessor.

61. The Second Appeal No.813/1995 was dismissed. It was decided in earlier litigation that plaintiffs alone cannot unilaterally file a suit for eviction against the defendants, without the consent of other co-owner and the suit is not maintainable. Therefore, without seeking partition the plaintiff suit for eviction of the defendants/tenants is not maintainable. Since, tenancy cannot be terminated unilaterally by some of the co-owners/landlords without consent of other co-owner/landlord, therefore, the possession of tenant in suit house cannot be considered as unlawful or unauthorized. Thus, they are not liable to pay *mesne* profit. Alternatively it can be inferred that, the other

tenants/defendants are occupying the property in joint possession with co-owner Inder Kumar Jain, therefore, on this ground also their possession cannot be termed as unauthorized.

- 62.** Consequently, in the light of above discussions, the possession of defendants in the suit house is neither illegal nor unauthorized. Therefore, they are not liable to pay any *mesne* profit to plaintiffs.
- 63.** Thus, learned trial Court has not committed any illegality in dismissing 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**