

NAFR

HIGH COURT OF CHHATTISGARH, BILASPUR**First Appeal No.163 of 2017****Reserved on 19.03.2021****Pronounced on 31.03.2021**

- Kamal Narayan Gupta Presently Aged About 67 Years, S/o Late Manrakhan Lal Gupta, Agriculturist, R/o Guptapara, Aarang, Tehsil Aarang, District Raipur, ChhattisgarhPlaintiff,

---- Appellant**Versus**

1. Shiv Narayan Gupta, S/o Late Manrakhan Lal Gupta, Presently Aged About 73 Years, R/o Aarang, Tehsil Aarang, Raipur, ChhattisgarhDef. No. 1,
2. Vyas Narayan Gupta, S/o Late Manrakhan Lal Gupta, Presently Aged About 72 Years, R/o Aarang, Tehsil Aarang, Raipur, ChhattisgarhDef. No. 2,
3. Jai Narayan Gupta S/o Late Manrakhan Lal Gupta, Presently Aged About 69 Years, R/o Aarang, Tehsil Aarang, Raipur, ChhattisgarhDef. No. 3,
4. Smt. Kusum Gupta, W/o Rajendra Prasad Gupta, Presently Aged About 60 Years, D/o Late Manrakhan Lal Gupta, R/o Juna Bilaspur, Krishna Nagar Ward, Bilaspur, District Bilaspur, ChhattisgarhDef. No. 4,

Note: Smt. Anusuiya Bai, Wd/o Late Manrakhan Lal Gupta, R/o Aarang, Tehsil Aarang, District Raipur (C.G.), who was the defendant number 5 in the suit has died on 17.01.2017 i.e., after passing of the impugned judgment and decree and in view of the will dated 10.10.2005, executed by her, the below mentioned respondent numbers 5 and 6 are added in her place.

5. Sandeep Kumar Gupta, S/o Kamal Narayan Gupta, Aged About 36 Years R/o Ward No.9, Guptapara, Aarang, District Raipur, Chhattisgarh,
6. Sagar Gupta, S/o Kamal Narayan Gupta, Aged About 28 Years R/o Ward No.9, Guptapara, Aarang, District Raipur, Chhattisgarh,
7. State Of Chhattisgarh, Through Collector, Raipur, District Raipur, ChhattisgarhDef. No.6,

---- Respondents

For Appellant	:	Shri Sumesh Bajaj, Advocate.
For Respondents 1,3, 5 & 6:	:	None, though served.
For Respondent 2	:	Shri Ashutosh Shukla, Advocate.
For Respondent 4	:	Notice has already been dispensed with.
For Respondent 7/State	:	Shri Udhaw Sharma, G.A.

Hon'ble Shri Justice Sanjay S. Agrawal**C.A.V. Judgment/Order**

1. This Appeal has been preferred by the Plaintiff Kamal Narayan Gupta under Section 96 of the Code of Civil Procedure, 1908 (hereinafter referred to as 'CPC'), questioning the legality and propriety of the judgment and decree dated 21.12.2016 passed by the 2nd Additional District Judge, Raipur in Civil Suit No.28-A/2011, whereby, the Plaintiff's claim for partition and separate possession has been dismissed. The parties to this appeal shall be referred hereinafter as per their description before the Court below.
2. Briefly stated the facts of the case are that a suit for partition and separate possession has been instituted by the Plaintiff claiming 1/6th share with regard to the following ancestral properties situated at village Aarang, Tehsil Aarang, District Raipur:-

Khasra No.	Area (in hectare)
1923/3	0.226
2655	0.550
2655/3	0.311
2939/2	0.069

3. Along with aforesaid claim, he prayed for partition and separate possession with regard to the double-storeyed house being Municipal House No. 13/10 situated at Narmadapara, Station ward, Raipur. The said properties are referred hereinafter as the suit property "A" & "B" respectively.
4. According to the Plaintiff, his brother Shiv Narayan Gupta, defendant No.1, while questioning the authenticity of a deed of Will dated 24.12.1998, said to have been executed in his favour by father Manrakhan Lal Gupta, had instituted a suit for partition

and separate possession with regard to the ancestral properties by alleging *inter alia* that the same have never been partitioned in 1978-79 and only for its better management, the revenue papers were recorded in 1982-83 in the name of father, sons and their wives to whom houses were also given. It is pleaded further that the said suit, registered as Civil Suit No. 44-A/04 “Shiv Narayan Gupta vs. Vyas Narayan Gupta and others”, was dismissed by the trial Court vide judgment and decree dated 31.08.2006 while upholding the validity of the alleged Will dated 24.12.1998, except with regard to the above mentioned suit property “A” as it was not forming the part of it, and accordingly held that the legal representatives of father Manrakhan Lal Gupta have 1/6th share each with regard to the said suit property “A”.

5. With regard to property “B”, it is pleaded by the Plaintiff that it was the self-acquired property of his father, who purchased it under a registered deed of sale from one Ramkumar Dani on 26.10.1959, where Defendant No.2 Vyas Narayan Gupta has been residing since 1997 with the permission of his father. It is pleaded further that since it was not being permitted to be used by the said Defendant, therefore, he has been constrained to claim 1/6th share and separate possession of it.
6. Defendant No.2 – Vyas Narayan alone has contested the claim by submitting *inter alia* that the alleged suit property “B” (suit house) was purchased in 1959 for him and since then he has been residing therein. It is contested further on the ground that the entire ancestral and self-acquired property owned by father

Manrakhan Lal Gupta was partitioned in 1978-79, therefore, the claim as made seeking partition thereof is not maintainable and liable to be dismissed.

7. After considering the evidence led by the parties and in view of the findings recorded in an earlier instituted suit, being Civil Suit No.44-A/2004, whereby the Plaintiff Kamal Narayan has been held to be entitled for 1/6th share in relation to the suit property "A", it has been held by the trial Court that the part of the Plaintiff's said claim with regard to the suit property "A" is hit by the principles of res judicata. In so far as the suit property "B" is concerned, it was held by drawing an inference based upon the admission of the Plaintiff that since father had partitioned his ancestral and self-acquired properties in 1978-79, therefore, the suit property "B" has fallen in share of Defendant No.2 Vyas Narayan Gupta. In consequence, the trial Court has dismissed the claim, which has now been impugned by way of this appeal.
8. Shri Sumesh Bajaj, learned counsel appearing for the appellant submits that although the ancestral and self-acquired properties held by father was partitioned in 1978-79, but the suit property "B" (suit house) purchased by father under the registered deed of sale, dated 26.10.1959 remained with him and was never put in partition, therefore, upon his sad demise on 07.11.1999, it was inherited by all of his heirs in equal shares. While inviting attention to the statement of Plaintiff and his brother Vyas Narayan, as well as the "Vyavastha Patra" (family arrangement) executed by father Manrakhanlal Gupta, marked as Ex.P.3, it is contended by him that the statements of theirs have not only

been misinterpreted but in omission to take note of the said document, the trial Court has committed a serious illegality in drawing the inference that the entire self-acquired property of father was partitioned in 1978-79 and in which the suit property “B” has come in share of Defendant No.2 Vyas Narayan Gupta. It is contended further, while drawing attention to the findings recorded in an earlier suit, being Civil Suit No.44-A/2004, vide judgment and decree dated 31.08.2006 (Ex.D.17), that the suit property “B” (suit house) was not found to be partitioned, the finding of the trial Court in this regard is, therefore, liable to be set aside. With regard to suit property “A”, it is contended that since it was not the subject matter of the earlier suit, therefore, the trial Court has committed a serious illegality in refusing the said claim holding it to be barred by principles of res judicata and has placed his reliance upon the decision rendered by the Supreme Court in the matter of **Ramesh Chand Ardawatiya** vs. **Anil Panjwani** reported in **AIR 2003 SC 2508**.

9. On the other hand, learned counsel appearing for Respondent No.2 (Defendant No.2) has supported the findings as recorded by the trial Court.
10. I have heard learned counsel for the parties and perused the entire record carefully.
11. The questions which arise for determination in this appeal are:
 - (A) Whether the part of the Plaintiff's claim with regard to suit property “A” could be held to be barred by the principles of res judicata?

(B) Whether the suit property "B" (suit house) was put in partition effected in 1978-79 and has fallen in share of Defendant No.2 – Vyas Narayan Gupta?

12. From perusal of the record, it appears that a suit for partition and separate possession has been made by the Plaintiff claiming 1/6th share with regard to the suit property "A" & "B" (suit house) situated at village Aarang, Tahsil Aarang, District Raipur and Narmadapara, Station ward, Raipur, on the premises that it was never put in partition and remained with his father and upon his sad demise on 07.11.1999, it was inherited by all his legal heirs in equal shares. It was, however, denied by Defendant No.2 Vyas Narayan Gupta on the ground that since the entire ancestral and self-acquired property owned by father had already been partitioned in 1978-79 and since the said property "B" was purchased for his residence, therefore, the claim as made is liable to be dismissed.
13. Admittedly, the suit property "A" which was not forming the part of Will, dated 24.12.1998, purported to have been executed in Plaintiff's favour by his father Manrakhan Lal Gupta, was never put in partition effected in 1978-79 and that is the reason why it was held in an earlier suit, being Civil Suit No.44-A/2004, vide judgment and decree dated 31.08.2006 (Ex.D.17) that all the heirs of said Manrakhan Lal have acquired 1/6th share each upon his sad demise on 07.11.1999. Since the earlier said suit instituted by Plaintiff's brother Shiv Narayan Gupta seeking partition was dismissed as the entire property of father was not included by him in his claim, therefore, the Plaintiff's claim

seeking 1/6th share with regard to the suit property “A” could neither be held to be suffered by the principles of res judicata, as held by the trial Court, nor could he be precluded from claiming such a claim in view of the principles laid down by the Supreme Court in the matter of **Ramesh Chand Ardawatiya vs. Anil Panjwani** (supra) wherein it was held at para 28 as under:-

“28. Looking to the scheme of O. VIII as amended by Act No. 104 of 1976, we are of the opinion, that there are three modes of pleading or setting up a counter-claim in a civil suit. Firstly, the written statement filed under R.1 may itself contain a counter-claim which in the light of R. 1 read with R. 6-A would be a counter-claim against the claim of the plaintiff preferred in exercise of legal right conferred by R. 6-A. Secondly, a counter-claim may be preferred by way of amendment incorporated subject to the leave of the Court in a written statement already filed. Thirdly, a counter-claim may be filed by way of a subsequent pleading under R. 9. In the latter two cases the counter-claim though referable to R. 6-A cannot be brought on record as of right but shall be governed by the discretion vesting in the Court, either under O. VI R. 17 of the CPC if sought to be introduced by way of amendment, or, subject to exercise of discretion conferred on the Court under O. VIII R. 9 of the CPC if sought to be placed on record by way of subsequent pleading. The purpose of the provision enabling filing of a counter-claim is to avoid multiplicity of judicial proceedings and save upon the Court's time as also to exclude the inconvenience to the parties by enabling claims and counter-claims, that is, all disputes between the same parties being decided in the course of the same proceedings. If the consequence of permitting a counter-claim either by way of amendment or by way of subsequent pleading would be prolonging of the trial, complicating the otherwise smooth flow of proceedings or causing a delay in the progress of the suit by forcing a retreat on the steps already taken by the Court, the Court would be justified in exercising its discretion not in favour of permitting a belated counter-claim. The framers of the law never intended the pleading by way of counter-claim being utilized as an instrument for forcing upon a re-opening of the trial or pushing back the progress of proceeding. Generally speaking, a

counter-claim not contained in the original written statement may be refused to be taken on record if the issues have already been framed and the case set down for trial, and more so when the trial has already commenced. But certainly a counter-claim is not entertainable when there is no written statement on record. There being no written statement filed in the suit, the counter-claim was obviously not set up in the written statement within the meaning of R. 6-A. There is no question of such counter-claim being introduced by way of amendment; for there is no written statement available to include a counter claim therein. Equally there would be no question of a counter-claim being raised by way of 'subsequent pleading' as there is no 'previous pleading' on record. In the present case, the defendant having failed to file any written statement and also having forfeited his right to filing the same the Trial Court was fully justified in not entertaining the counter-claim filed by the defendant-appellant. A refusal on the part of the Court to entertain a belated counter-claim may not prejudice the defendant because in spite of the counter-claim having been refused to be entertained he is always at liberty to file his own suit based on the cause of action for counter-claim."

14. In view of the aforesaid principles laid down by the Supreme Court, the Plaintiff cannot be held to be precluded from instituting a suit claiming 1/6th share with regard to suit property "A" nor his claim as such could be held to be barred by the principles of res judicata. The finding of the trial Court is, therefore, liable to be and is hereby set aside.
15. Now, in order to ascertain the question as to whether the suit property "B" (suit house) was put in partition effected in 1978-79 and has fallen in share of Defendant No.2 – Vyas Narayan Gupta, it is necessary to examine the evidence led by the parties and the findings recorded in an earlier instituted suit being Civil Suit No.44-A/2004 vide judgment and decree dated 31.08.2006 (Ex.D.17).

16. According to the statement of Plaintiff – Kamal Narayan Gupta, the father had effected partition with regard to the entire ancestral and of his self-acquired property including the house in 1978-79 and based upon it, the trial Court has held that the suit property “B” (suit house) came in share of Defendant No.2 – Vyas Narayan Gupta. However, the entire evidence of him should have been taken into consideration by the trial Court before arriving at such a conclusion. Upon examination of his further evidence, it would, however, show that the suit property “B”, purchased by his father from Ramkumar Dani under a registered deed of sale dated 26.10.1959, was in occupation of his said brother Vyas Narayan Gupta and he was residing therein since 1997 with the permission of his father. It reflects further from his testimony that it was not given to him in partition. When a suggestion was put to him with regard to the factum of partition of this particular house, it was denied by him specifically, as reflected from paragraph 9 of his testimony. If we examine the statement of said Vyas Narayan Gupta, particularly para 12 of his testimony, then it would reveal that he got the house, which was situated at village Arang. That apart, while controverting the Plaintiff's version, it is stated by him at paragraph 23 of his testimony that he obtained the alleged suit house under the document styled as “Vyavastha Patra” (family arrangement) (Ex.P.3) purported to have been executed by father Manrakhani Lal Gupta in his favour on 19.05.1997. He, thus, tried to set up his interest upon it on the strength of the said “Vyavastha Patra”. However, a bare perusal of its recitals would demonstrate the fact otherwise as it reveals from it that he

purchased the said suit property "B" from his father for a sale consideration of Rs.70,000/- under the said unregistered document.

17. Pertinently to be noted here further at this juncture that in the suit, being Civil Suit No. 44-A/2004 instituted by Plaintiff's another brother, namely, Shiv Narayan Gupta against his mother, brothers and sister for partition, it was observed by the said trial Court vide its judgment and decree dated 31.08.2006 (Ex.D.17) that the suit house, situated at Narmadapara, Station Road, Raipur, was not given by his father Manrakhan Lal Gupta to any of his sons in partition.
18. In view of the aforesaid evidence led by the parties, it cannot be held that the suit property "B", a double-storeyed Municipal House No. 13/10, situated at Narmadapara, Station ward, Raipur, as shown in red colour in plaint map, was included in the partition effected in 1978-79 and came in share of Defendant No.2 Vyas Narayan Gupta under the said "Vyavastha Patra" (Ex.P.3), as alleged by him.
19. Consequently, the appeal is allowed and the judgment and decree dated 21.12.2016 passed by the 2nd Additional District Judge, Raipur, in Civil Suit No.28-A/2011 is hereby set aside and, instead the Plaintiff's claim is accordingly decreed entitling him to 1/6th share over:-

- (1) the suit property "A" (described in plaint para 4), situated at village Aarang, Tahsil Aarang, District Raipur, that is :

Khasra No.	Area (in hectare)
1923/3	0.226
2655	0.550
2655/3	0.311
2939/2	0.069
Total 4	1.156 hectares

(2) the suit property “B” (suit house), i.e., a double-storeyed Municipal House No. 13/10, situated at Narmadapara, Station ward, Raipur, as shown in red colour in plaint map, and these properties shall be the part of this decree.

20. No order as to costs.

21. A decree be drawn accordingly.

Sd/-
(Sanjay S. Agrawal)
Judge