

IN THE HIGH COURT OF MADHYA PRADESH
AT JABALPUR

BEFORE

HON'BLE SHRI JUSTICE VIVEK AGARWAL

ON THE 19th OF DECEMBER, 2022

MISC. PETITION No. 6181 of 2022

BETWEEN:-

1. AKHILESH KUMAR ALIAS HANSU S/O LATE VISHWANATH JI, AGED ABOUT 57 YEARS, RAMGANJ WARD KHADWA DISTRICT KHANDWA (MADHYA PRADESH)
2. SANJAY KUMAR S/O LATE VISHWANATH JI, AGED ABOUT 54 YEARS, OCCUPATION: CAST BRAMHAN SELF EMPLOYED R/O RAMGANJ WARD KHADWA DISTRICT KHANDWA (MADHYA PRADESH)

.....PETITIONERS

(BY SHRI AVINASH ZARGAR - ADVOCATE)

AND

1. SHRI SARADCHANDRA BHATE S/O SHRI VISWANATH JI BHATE, AGED ABOUT 65 YEARS, BEHIND DR. SUBHASH JAIN JAWAHARGANJH KHADWA TEHSIL AND DISTRICT KHANDWA (MADHYA PRADESH)
2. SMT. MADHURI W/O LATE PRAMOD JI SHARMA, AGED ABOUT 62 YEARS, R/O VISHRANT WADI MOHAN BHATI NEAR SETHIA HOSPITAL DS PARK FLAT NUMBER 2 PUNE (MAHARASHTRA)

.....RESPONDENTS

(NONE)

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This petition coming on for admission this day, the court passed the following:

ORDER

This Miscellaneous Petition under Article 227 of the Constitution of India is filed by the petitioners/plaintiffs being aggrieved of order Annexure P/1 dated

28.10.2022 passed in Regular Civil Suit No.118A/2021 by learned V Civil Judge (Junior Division) Khandwa rejecting an application under Order XIV Rule 5 of the Code of Civil Procedure, 1908 refusing to amend issues as were framed by the Trial Court earlier.

2. Brief facts leading to the present Miscellaneous Petition are that the petitioners/plaintiffs filed a suit seeking declaration of title in respect of the property detailed in Schedule A,B,C to the plaint on the basis of a Will. Through amendment, the petitioners/plaintiffs provided the details of till treatment received by the parents of the petitioners/plaintiffs at the hands of the respondent/defendant No.1 and his wife, who happens to be the real brother and sister-in-law of the petitioners/plaintiffs. After the amendment was incorporated, now an additional issue on the plea of ouster is sought to be raised on the ground that as an alternative, the plea of ouster is maintainable and should be allowed to be taken by the petitioners/plaintiffs.

3. Reliance is placed on the judgment in ***B.R. Patil Vs. Tulsa Y. Sawarkar and others [2022 Live Law (SC) 165]***, wherein dealing with the aspect of ouster, it is held that three elements are necessary for establishing the plea of ouster in the case of co-owner (i) declaration of hostile animus, (ii) long and uninterrupted possession of the person pleading ouster, and (iii) exercise of right of exclusive ownership openly and to the knowledge of other co-owner.

4. In fact, this aspect of alternative or inconsistent pleadings is dealt with by Supreme Court in ***G. Nagamma and another Vs. Siromanamma and another [(1996)2 SCC 25]***.

5. The expression '*Alternative*' means the one or the other of two things. A party to litigation may include in his pleadings two or more set of facts and

claim relief in the alternative. "*Inconsistent*" on the other hand means mutually repugnant, contradictory or irreconcilable establishment of one necessarily implies abrogation or abandonment of other. The plaintiff may rely upon several different reliefs in the alternative. Similarly, the defendant can also raise several defences in the alternative. In instance for a suit for possession is maintainable on the basis of title or in the alternative on the basis of lease.

6. In case of *C. Mohammed Vs. Ananthachari (AIR 1988 Kerala 298)*, it is held that "it may be permissible in the plaint to advance an inconsistent plea of ownership and easement alternatively, but it is necessary that the plaintiff should press one of them only either at the stage of evidence or a subsequent stage. When the dominant and servient tenement are in the ownership and possession of the same person acts done by him on servient tenement are clearly referable to his possession of that tenement and hence, there cannot be any easement by prohibition.

7. In case of *Praful Manohar Rele Vs. Krishanabai Narayan Ghosalkar and others [(2014) 11 SCC 316]*, Apex Court held that "4.4 super added to all these factors is the fact that the appellate Court had granted relief to the appellant not in relation to the alternative plea raised by him, but on the principal case set up by the plaintiff. If plaintiff succeeded on the principal case set up by him whether or not the alternative plea was contradictory or inconsistent or even destructive of the original plea paled into insignificant." Thus, it is evident that trial Court erred in not allowing framing of an issue on the basis of alternative plea of ouster overlooking the fact that parties can plead inconsistent or alternative plea, but not to the extent of mutual destructive to each other.

8. Thus, petition deserves to be allowed and is allowed. Impugned order is set aside. Matter is remitted to the trial Court to frame the additional issue on

the plea of ouster and proceed with the trial.

(VIVEK AGARWAL)
JUDGE

A.Praj.

