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IN THE HIGH COURT OF MADHYA PRADESH
AT INDORE

BEFORE
HON'BLE SHRI JUSTICE PRANAY VERMA
ON THE 7th OF JULY, 2022

MISC. PETITION No. 5052 of 2019

Between:-

1. **BHANWARLAL S/O SHRIL LOONSINGH, AGED ABOUT 69 YEARS, OCCUPATION: FARMING, R/O PALSAWADSOON TEHSIL AND DISTRICT SHAJAPUR (MADHYA PRADESH)**
2. **SANTOSH SINGH S/O BHANWARLAL GURJAR OCCUPATION: FARMING, R/O PALSAWADSOON TEHSIL AND DIST. SHAJAPUR (MADHYA PRADESH)**
3. **GULAB SINGH S/O BHANWARLAL GURJAR OCCUPATION: FARMING, R/O PALSAWADSOON. TEH.AND DIST. SHAJAPUR (MADHYA PRADESH)**

(BY SHRI AKASH SHARMA, ADVOCATE)

.....PETITIONERS

AND

1. **TOOFAN SINGH S/O MANGILAL KUMHAR PALSAWADSOON TEHSIL AND DISTRICT SHAJAPUR (MADHYA PRADESH)**
2. **SHANTABAI W/O MANGILAL KUMHAR, R/O PALSAWADSOON, TEH. AND DIST. SHAJAPUR (MADHYA PRADESH)**

.....RESPONDENTS

(BY SHRI JYOTI SWAROOP DAVE, ADVOCATE)

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

ORDER

1. By this petition preferred under Article 227 of the Constitution of India the petitioners have challenged the order dated 28.08.2019 passed by the

Additional Commissioner, Ujjain Division, Ujjain whereby the order dated 29.08.2017 passed by the Sub Divisional Officer, Tehsil and District Shajapur dismissing their appeal as barred by time and the order dated 29.08.2017 passed by the Additional Tehsildar, Tappa Maksi, Tehsil and District Shajapur have been set aside.

2. The facts in brief are that the petitioners made an application under Section 178 of M.P. Land Revenue Code, 1959 (here-in-after referred to as "the Code, 1959") for partition of the lands in dispute before the Additional Tehsildar, Maksi, District Ujjain. The application was allowed by the Additional Tehsildar and the partition as prayed for was permitted and order in that regard was passed in Namantaran Panji No.5 on 15.06.2005.

3. Being aggrieved by the order aforesaid the respondents preferred an appeal under Section 44 (1) of the Code, 1959 before the Sub Divisional Officer, Shajapur. Since the same was barred by time by about 11 years they filed an application under Section 5 of the Limitation Act, 1963 for condonation of delay in filing the appeal. By order dated 29.08.2017 the application under Section 5 of the Limitation Act was rejected by the Sub Divisional Officer and the appeal itself was also consequently dismissed as barred by time. Being aggrieved by the said order the respondents preferred Second Appeal under Section 44 (2) of the Code, 1959 before the Additional Commissioner which has been allowed by him by the impugned order by holding that the partition order passed by the Additional Tehsildar was illegal and had been passed by him by violating the rules as regards partition and various other irregularities were also committed by him.

4. Learned counsel for the petitioners submits that since the first appeal preferred by the respondents was dismissed as barred by time, the second

appellate authority, the Additional Commissioner had no jurisdiction to enter upon merits of the case. He could have only decided the issue as to whether the Sub Divisional Officer had correctly refused to condone the delay in preferring the appeal before him. However by allowing the appeal on merits it has traveled beyond its jurisdiction.

5. Learned counsel for the respondents has submitted that the impugned order is perfectly just and legal. The Additional Tehsildar had passed the partition order in favour of the petitioners in flagrant violation of the rules as regards partition. The partition effected was not legal and in accordance with law. All the co-owners were not heard in the matter. Neither were the proceedings properly registered nor notices served upon interested parties. The order in fact was not passed and the respondents were not made parties therein hence the same has rightly been set aside by the Additional Commissioner.

6. I have heard learned counsel for the parties and have perused the record.

7. When a First Appeal is dismissed by the First Appellate Authority solely upon rejection of an application for condonation of delay in filing the same and Second Appeal is preferred against that order, then the jurisdiction of Second Appellate Authority is confined to consideration of question as to whether the First Appellate Authority has rightly refused to condone the delay. If it holds that delay has rightly been refused to be condoned, then the appeal before it would be dismissed. If it holds that delay has wrongly been refused to be condoned, then it may allow the appeal, condone the delay in preferring the First Appeal and remand the matter back to the First Appellate Authority to decide the Appeal on merits or may pass such appropriate orders as it may deem fit. However, under any circumstance the Second Appellate Authority has

no jurisdiction whatsoever to enter upon merits of the matter and to adjudicate upon the validity of the order passed by the original authority. This is more so since the First Appellate Authority has itself not decided the appeal on merits but has dismissed the same only on ground of delay.

8. The appeal preferred by the respondents before the Sub Divisional Officer had been dismissed by him as barred by time upon rejection of their application under Section 5 of the Limitation Act, 1963 for condonation of delay in filing the same. The appeal had not been dismissed on merits. Thus, the only question for consideration before the Additional Commissioner was as to whether the Sub Divisional Officer had rightly refused to condone the delay. If he had come to the conclusion that the Sub Divisional Officer had erred in refusing to condone the delay, then the only course available to him would have been to remand the matter back to the Sub Divisional Officer for decision of the First Appeal on merits. If he had come to the conclusion that the Sub Divisional Officer had rightly refused to condone the delay and had correctly dismissed the appeal as barred by time, he ought to have dismissed the appeal. In any case he had no jurisdiction whatsoever to have himself entered into the merits of the case and to have considered the legality and validity of the partition order passed by the Additional Tehsildar. In doing so he has exercised jurisdiction not vested in him. The order passed by him hence cannot stand judicial scrutiny and is consequentially set aside.

9. The petition is allowed. The matter is remanded back to the Additional Commissioner to re-hear the parties and to proceed further in accordance with law and in view of the observations as made here-in-above. There shall be no orders as to costs.

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