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**IN THE HIGH COURT OF MADHYA PRADESH
AT INDORE
BEFORE
HON'BLE SHRI JUSTICE HIRDESH
ON THE 18th OF JANUARY, 2024
SECOND APPEAL No. 409 of 2021**

BETWEEN:-

SURESH RATHORE S/O LATE SHRI JAGANNATH RATHORE, AGED ABOUT 38 YEARS, OCCUPATION: AGRICULTURIST HALMUKAM KANWAR COLONY, TEHSIL BARWAH, PERMANENT ADDRESS BAFAL GAON (MADHYA PRADESH)

.....APPELLANT

(SHRI LOKENDRA JOSHI, LEARNED COUNSEL FOR THE APPELLANT)

AND

- 1. SEWATI BAI W/O SHRI JAGANNATH RATHORE, AGED ABOUT 68 YEARS, GRAM BAFALGAON TEHSIL BARWAH (MADHYA PRADESH)**
- 2. SUMAN W/O SHRI RAJESH, AGED ABOUT 44 YEARS, COLONY NAGAR ARODRAM ROAD ASHOK NAGAR, RATHORE VINAS BHAJAN SANDHYA YASHOD VILA INDORE (MADHYA PRADESH)**
- 3. PUSHPA W/O SHRI JAGDISH, AGED ABOUT 44 YEARS, TILLOR TANKI KE PAS, TILLOR TEHSIL MHOW, DISTT. INDORE (MADHYA PRADESH)**
- 4. JYOTI W/O SHRI ARUN, AGED ABOUT 35 YEARS, TALWADA DEV TEH. THIKARI DISTT BARWANI (MADHYA PRADESH)**
- 5. SONU D/O SHRI JAGANNATH, AGED ABOUT 33 YEARS, BAFALGAON TEH. BARWAH DISTT. KHARGONE (MADHYA PRADESH)**
- 6. STATE OF M.P. THROUGH COLLECTOR KHARGONE (MADHYA PRADESH)**

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

ORDER

This appeal under Section 100 of CPC is filed against the judgment and decree dated 08.01.2021 passed by the learned III Additional District Judge, Badwah, district Mandleshwar in Regular Civil Appeal No.100022/2014 arising out of the judgment and decree dated 31.07.2014 passed by the learned First Civil Judge, Class-II, Badwah in Civil Suit No.28-A/2012 by which the trial Court dismissed the suit of the plaintiff for declaration and injunction of disputed land which was affirmed by the first appellate Court.

2. The brief facts of the case is that plaintiff/appellant filed the civil suit in regard to the disputed land survey no.251/2, 252/2 and 253/1 rakba 6.570 on the basis of the will and pleaded that disputed land was purchased by late Jagannath by his own income. He died on 06.01.1992. In his life time Jagannath executed a will in favour of plaintiff-Suresh on 01.12.1991. So on the basis of the will he was the owner of the disputed land. Defendants no.1 to 5 have filed false application for mutation before the Tehsildar Court. So he filed the suit for declaration and injunction in regard to the disputed property.

3. Defendants denied all the averments made in the plaint and submitted that no will was executed in favour of the plaintiff therefore, prays for dismissal of the suit.

4. On the basis of the pleadings of the parties, learned trial Court framed necessary issues in the matter after taking the evidence of the parties. The trial Court after recording the evidence and upon its appreciation of evidence passed judgment and decree dated 31st July, 2014 whereby the suit

filed by the plaintiff/appellant for declaration of title and permanent injunction was dismissed due to non-proof of the will in accordance with law.

5. The judgment and decree passed by the trial Court was challenged by the plaintiff/appellant against the dismissal of the suit. The first appellate Court affirmed the judgment and decree passed by the trial Court.

6. Being aggrieved by the judgment and decree passed by the Courts below, this second appeal has been filed by the appellant on the ground that the first appellate Court committed grave error of law in affirming the judgment and decree passed by the trial Court. It is further submitted that the Courts below have committed grave error in not granting decree of declaration of title in favour of plaintiff. The Courts below have further committed grave error in not giving any finding with regard to execution of will. It is also submitted that first appellate Court has committed error in rejecting the application under Order 41 Rule 27 of the CPC. Hence, it is submitted that the impugned judgment passed by the first appellate Court is bad in law.

7. Heard learned counsel for the appellant and perused the record.

8. Learned Courts below have recorded categorical finding that plaintiff has been unable to prove the execution of the will in his favour. The Courts below in its judgment gave correct reason that will is not well proved under the provisions of the Evidence Act.

9. Learned counsel for the appellant submitted that the trial Court as well as the first appellate Court have committed error that witness of the execution of the will was not examined. He further submitted that one witness passed away and other witnesses were unable to come to the Court due to depression.

10. Section 68 of the Indian Evidence Act is reproduced hereunder:-

68. Proof of execution of document required by law to be attested.- If a document is required by law to be attested, it shall not be used as evidence until one attesting witness at least has been called for the purpose of proving its execution, if there be an attesting witness alive, and subject to the process of the Court and capable of giving evidence :

[Provided that it shall not be necessary to call an attesting witness in proof of the execution of any document, not being a Will, which has been registered in accordance with the provisions of the Indian Registration Act, 1908 (XVI of 1908), unless its execution by the person by whom it purports to have been executed is specifically denied.]

11. According to **Janki Narayan Bhoir Vs. Narayan Namdeo Kadam reported in AIR 2003 SC 761** the Apex Court held that one of the requirements of due execution of will is its attestation by two or more witnesses which is mandatory. Section 68 of Evidence Act speaks of as to how a document required by law to be attested can be proved. It flows from this Section that if there be an attesting witness alive capable of giving evidence and subject to the process of the Court, has to be necessarily examined before the document required by law to be attested can be used in an evidence.

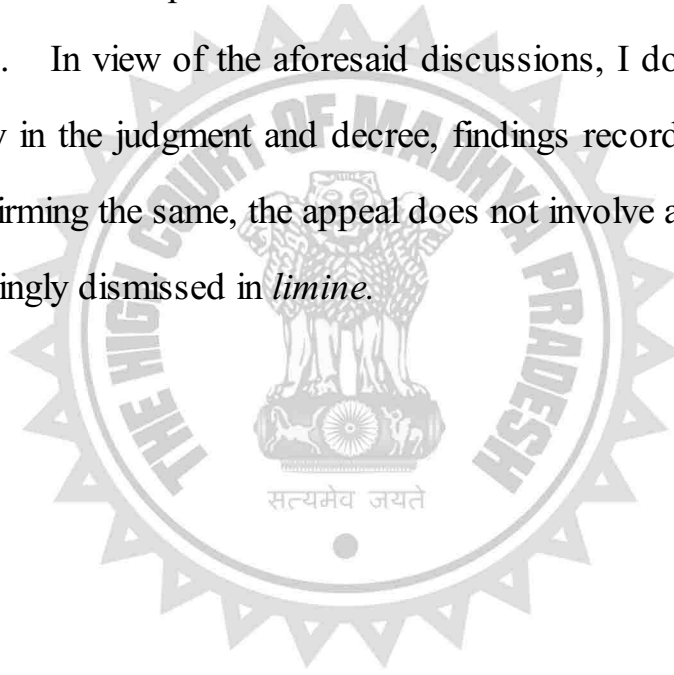
12. In **Hari Narayan Bansal Vs. Dada Dev Mandir Prabandhak Sabha (Barah Gaon) Patam, reported in (2015) 16 SCC 540** empowers this Court to finally dispose of this appeal without framing substantial question of law at the motion stage itself. The observations made by the Apex Court is reproduced herein below:-

“In our opinion, a substantial question of law is not required to be framed if the High Court decides to dismiss the second appeal at an admission stage. Only in a case where the second appeal is admitted or is decided finally by allowing the same, a substantial question of law is

required to be framed by the High Court. In the instant case, no substantial question of law was involved in the second appeal and therefore, the High Court had rightly dismissed the second appeal at the admission stage by passing the impugned order.”

13. As per above discussions in the considered opinion of this Court exercise of powers under Section 100 of CPC can be interfered with the findings of fact only if the same is shown to be perverse and based on no evidence. Hence, it is found that the trial Court as well as first appellate Court have not committed any error in holding that will was not duly proved in accordance with the provisions of Evidence Act.

14. In view of the aforesaid discussions, I do not find any illegality or perversity in the judgment and decree, findings recorded by the Courts below. Thus, affirming the same, the appeal does not involve any substantial of law and is accordingly dismissed in *limine*.



**(HIRDESH)
JUDGE**