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**IN THE HIGH COURT OF MADHYA PRADESH
AT INDORE**

**BEFORE
HON'BLE SHRI JUSTICE VIVEK RUSIA**

ON THE 9th OF MAY, 2023

MISC. PETITION No. 300 of 2023

BETWEEN:-

1. MOHAMMED SHAFI S/O MOHAMMED KHAN,
AGED ABOUT 59 YEARS, OCCUPATION:
AGRICULTURE R/O LAL IMLI NEAR JAMA
MASJID UJJAIN (MADHYA PRADESH)
2. MOHAMMAD ZAKIR S/O MOHAMMED KHAN,
AGED ABOUT 44 YEARS, OCCUPATION:
AGRICULTURIST R/O LAL IMLI NEAR JAMA
MASJID UJJAIN (MADHYA PRADESH)
3. MOHAMMED SHAKIR S/O MOHAMMED KHAN,
AGED ABOUT 42 YEARS, OCCUPATION:
AGRICULTURIST R/O LAL IMLI NEAR JAMA
MASJID UJJAIN (MADHYA PRADESH)

....PETITIONER

(BY SHRI MANISH KUMAR JOSHI-ADVOCATE)

AND

1. CHAND KHAN S/O KARIM KHAN, AGED ABOUT 80
YEARS, OCCUPATION: AGRICULTURIST R/O H.NO.
9 KHUDIRAM BOSS ROAD UJJAIN (MADHYA
PRADESH)
2. BHAYYU S/O KARIM KHAN, AGED ABOUT 60
YEARS, OCCUPATION: AGRICULTURIST HOUSE
NO. 9, KHUDIRAM BOSS ROAD UJJAIN (MADHYA
PRADESH)
3. AGNIPATH REAL ESTATE PVT. LTD. THROUGH
AUTHORISED SIGNATORY YASHPALSINGH
THAKUR S/O VIJAY SINGH THAKUR, AGED ABOUT
27 YEARS, OCCUPATION: BUSINESS VILLAGE
MANGROLA TEHSIL AND DISTRICT UJJAIN
(MADHYA PRADESH)
4. COLLECTOR DISTRICT UJJAIN COLLECTORATE

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DISTRICT UJJAIN IIIRD FLOOR PRASHASNIK
SANKUL BHAWAN NEAR KOTHI PALACE UJJAIN
(MADHYA PRADESH)

.....RESPONDENTS

*(BY SHRI VEER KUMAR JAIN SENIOR ADVOCATE ALONGWITH VAIBHAV JAIN,-ADVOCATE)
(BY SHRI YOGESH SAXENA, LEARNED COUNSEL FOR THE RESPONDENT [R-1 & R-2].*

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

ORDER

(1) Petitioners/defendants have filed this petition under Article 227 of the Constitution of India challenging the validity of order dated 10.01.2023 passed in R.C.S.A/2/2014 whereby application filed under order 6 Rule 17 of C.P.C. seeking amendment in the written statement and application under order 8 Rule 1 of C.P.C. seeking permission to file document has been rejected.

Facts of the case in short are as under:-

(2) Respondent Nos. 1 and 2 being plaintiff filed suit for declaration and permanent injunction for the land survey No.641 area 3.20 hectare and 643/1 area 2.06 situated at Village Matanakala, Tehsil & District Ujjain in order to challenge the validity of sale deed dated 13.01.2014 executed by defendant Nos.1 to 3 (petitioners) in favour of defendant No.4 (respondent No.3). The Civil Suit is pending since 2014. According to the plaintiff, the suit land was purchased by Kareem Khan who died in the year 1980. His wife Jawa Bai had no issue. Father of the plaintiff used to live in Kareem Khan's house. The mother of plaintiff Faizanbai and Jawa Bai were real sister. After the death of Kareem Khan, the name of Jawa Bai was mutated in the revenue record as owner who died in the year 1996. During her life time, she declared the plaintiffs her legal heirs and executed a oral Hiba in their favour. After the death of Jawa

Bai, the plaintiff moved an application for mutating their name and case was registered by the Naib Tehsildar and after recording the evidence, the order was passed on 07.08.1996 in favour of the plaintiff. Thereafter, the plaintiffs sold the land survey No.643 area 0.13 RA to Shantabai on 26.06.2000. The plaintiffs also received compensation for Gas Pipeline for the said land. According to the plaintiff in the month of January 2014, some miscreants tried to take possession of the land. They disclosed that the defendant No.4 has purchased the land from the defendant No.1 to 3. They further enquired and found that the defendant No.1 to 3 filed an appeal before the SDO against the order dated 07.08.1996 and on the basis of forge service report the order of mutation got set aside and got recorded their name in the revenue record vide order dated 19.08.2013. Thereafter, they filed an appeal before the SDO, where stay has been granted. Therefore, sale deed dated 13.01.2014 is void and not binding on the plaintiffs.

(3) The defendant No.1 to 3 i.e. petitioners appeared and filed the written statement admitting the execution of sale deed 13.01.2014 in favour of defendant No.4. According to the defendants their grand father Nathu Kha was real brother of Kareem Khan who died without issue and they are the son of Mohhamad Khan therefore, they had inherited the property of Kareem Khan after the death of Jawa Bai. They have denied the execution of oral Hiba. The defendant No.4 also filed written statement and prayed for dismissal of suit. They also filed cross appeal seeking declaration that they have become owner of the suit and the plaintiffs be restrained not to interfere in their peaceful possession.

(4) Thereafter issues were framed and plaintiffs gave evidence and witnesses were cross examined.

(5) On 09.01.2023, the defendant No.1 to 3 moved an application under Order 6 Rule 17 of C.P.C. proposing the amendment to the effect that on the basis of sale deed dated 13.01.2014, the defendant No.4 has illegally got mutated its name in the revenue record and against which an appeal has been filed. The defendants are also seeking amendment in the written statement to the effect that the defendant No.1 to 3 executed the sale deed without any sale consideration and forgery was committed with them, therefore, the sale deed is not binding on them. They also filed an application under Order 8 Rule 1 of CPC for taking the documents on record specially the an order dated 14.07.2022 passed by Sub Divisional Officer (Rural) under provision of Madhya Pradesh Kuchakra of Parigraha and Mukti Adhiniyam.

(6) However, by the aforesaid order dated 14.07.2022, the Sub Divisional Officer did not find any ground to interfere with the sale deed and dismissed as not maintainable. The defendants have failed to prove that the amount given by defendant No.4 was not as a loan and the sale deed was executed as security. The application was opposed by the petitioner as well as defendant No.4. The learned District Judge vide impugned order dated 10.01.2023 has dismissed the application, hence, this petition before this Court.

I have heard learned counsel for the parties.

(7) The plaintiffs filed the suit in the year 2014 challenging the sale deed executed by defendant No.1 to 3 in favour of respondent No.4 on the basis of oral Hiba. The defendant No.1 to 3 filed written statement specifically admitting the sale of land to the defendant No.4 by way of registered sale deed and receipt of Rs.3,43,73,000/-. The written statement was filed in the year 2014-15. Thereafter, the issues were framed, the plaintiffs have examined their witnesses

and they were cross examined. At the stage of defendants' evidence, now the present application under Order 6 Rule 17 of CPC has been filed virtually withdrawing the admission of execution of sale deed and receipt of sale consideration. The learned Civil Court has rightly placed reliance upon the judgment passed by Apex Court in case of ***Modi Spinning & Weaving Mills Co vs Ladha Ram & Co (1976) 4 SCC 320*** that the provision Order 6 Rule 17 of CPC prohibits for bringing a new case by way of amendment and written statement. The learned Court has also rightly placed reliance upon the judgment ***Shiromani Gurdwara Prabhandak vs Jaswant Singh (1991) 11 SCC 690*** that at the belated stage the defendant cannot be permitted for inconsisting and contrary averment.

(8) Shri Jain, learned Senior counsel appearing for the respondent No.3 submits that now by way of amendment, the present petitioners are trying to create controversy with defendant No.4 and virtually a counter claim against the defendant No.4 in suit filed by the respondent No.1 and 2 plaintiffs. The Apex Court in its recent judgment passed in case of ***Damodhar Narayan Sawale (d) through LRs Vs. Tejrao Bajirao Mhaske reported 2023 SCC Online SC 566*** has held that the defendant could not be permitted to raise counter-claim against the co-defendant because by virtue of Order VIII Rule 6A, it could be raised by defendant against the claim of the plaintiff. Relevant portion of the judgment is reproduced below:

31 Thus, a careful scanning of the impugned judgment would reveal that virtually, the High Court considered the validity of the sale deed dated 04.07.1978 executed by the second defendant in favour of the first defendant Civil Appeal No.930 of 2023 under "the Fragmentation Act", without directly framing an issue precisely on the same and

though the trial Court also arrived at a finding on this issue without framing it as a Civil Appeal No.930 of 2023 specific issue. The indisputable fact is that the said sale deed dated 04.07.1978 was admittedly, executed and registered about nine (9) months prior to the execution and registration of Ext. 128 sale deed. Ext. 128 would reveal that it involves the entire extent of 3 acres 20 guntas in Survey No. 20/2 of Gangalgaon village and the first defendant is also an executant of the same. The observation and finding of the High Court in the first limb of paragraph 24 of the impugned judgment that the second defendant did not dispute the sale of one acre of land to the plaintiff as per Ext. 128 for the consideration of Rs. 3000/- would indicate that the balance amount of Rs. 7000/- was the consideration for the balance extent of land covered under Ext. 128. Since the validity of the sale deed dated 04.07.1978 was not an issue/question that could be raised by the second defendant against the first defendant in the subject suit and was rightly, not raised as an issue, the first defendant not only did not dispute the sale of such extent to the plaintiff but admitted the joint execution of Ext. 128 and receipt of sale consideration, as incorporated in Ext. 128 and since the second defendant got no case that he had assailed the validity of the sale deed dated 04.07.1978 either before any competent authority or competent Civil Court Civil Appeal No.930 of 2023 this question needs no further elaboration. An inter-se dispute on the validity of the sale deed dated 04.07.1978, if at all between the second and first defendants, could not have been considered in the subject-suit, for the reasons already mentioned as it would amount to adjudication of right or a claim, by way of counter-claim by one defendant against his co-defendant. Finding on its voidness under the Fragmentation Act was already held as unsustainable by us."

(9) Thus, Shri Jain, learned Senior counsel has rightly submitted that by

way of amendment now the defendant No.1 to 3 have submitted a counter claim against the defendant No.4 by disputing the execution of sale deed and receipt of sale consideration. Such amendment cannot be permitted to be brought on record. The document filed alongwith an application under Order 8 Rule 1 of CPC to support the propose amendment. Since the proposed amendment have been declined, therefore, said documents are also not liable to be taken on record.

In view of above, Misc. Petition is dismissed with cost of Rs. 5000/- to be deposited Legal Service Authority, Ujjain.

Praveen



(VIVEK RUSIA)
JUDGE