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MP-3606-2023

IN THE HIGH COURT OF MADHYA PRADESH  
AT INDORE

BEFORE

HON'BLE SHRI JUSTICE VIJAY KUMAR SHUKLA

ON THE 9<sup>th</sup> OF JANUARY, 2025MISC. PETITION No. 3606 of 2023*SMT. LEELABAI AND OTHERS**Versus**SMT. UMABAI AND OTHERS*

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Appearance:

*Shri Jitendra Bharat Mehta, learned counsel for the petitioners.*

*Shri Kushal Goyal, learned Deputy Advocate General for the respondents/State.*

*Shri Bheemsen Soni, learned counsel for the respondent No.6.*

*Shri Veer Kumar Jain, learned senior counsel assisted by Shri Akshat Pahadia, learned counsel for the respondent No.12.*

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ORDER

The present petition is filed under Article 227 of the Constitution of India challenging the orders dated 13.02.2020 and 30.07.2022 passed by Civil Judge, Junior Division, Alirajpur in Civil Suit No.63A/2014 and MJC No.8/2021 whereby the application filed under Order XIV Rule 1 (2)(5) CPC for trying the issue No.8 regarding *res-judicata* as preliminary issue has been allowed.

02. The facts draped in brevity are that the plaintiffs filed Civil Suit No. 63-A/2014 in the Court of Civil Judge Junior Division, Alirajpur for declaration, partition & possession. The defendant no.12/ respondent no. 12



is contesting defendant and he had filed his written statement and denied all the plaint allegations and filed counter claim also. The learned trial Court framed the issues. The plaintiffs' suit was stayed as defendant nos. 1 to 7 have filed suit for partition which was earlier in point of time. It was dismissed. Hence the proceedings of the case was again started. During the trial defendant no.12 filed application U/O 6 R. 17 C.P.C. and amended his written statement and contended that the present suit is barred by *res-judicata*. The application was allowed. Thereafter an additional issue with respect to *res-judicata* was framed by the learned trial Court. The defendant no. 12 filed an application U/O 14 R. 1 (2) (5) C.P.C. for trying aforesaid issue as preliminary issue. The petitioners opposed the application by filing their reply. The learned Trial Court after hearing the parties allowed the application and directed parties to lead evidence on this issue by impugned order dtd. 13/02/2020. The petitioners preferred review application for reviewing order of Annexure-P/1. The case was registered as M.J.C. No. 8/2021. The defendant no. 12 opposed the application by filing reply. The aforesaid review was dismissed by the learned trial court.

03. Counsel for the petitioners argued that the trial Court has committed an error by directing issue No.8 regarding *res-judicata* to be decided as preliminary issue and simultaneously he directed the parties may lead evidence. It is argued that it is settled law that an issue cannot be tried as preliminary issue if evidence is required for the same. The order is contrary to the judgment passed by the Apex Court in the case of *Sathyanath & Anr. vs. Sarojamani (2022) 7 SCC 644, Ramesh B. Desai & Ors. vs. Bipin Vadilal*



*Mehta & Ors. (2006) 5 SCC 638* and also the judgment passed by the Full Bench in the case of *Ramdayal Umraomal vs. Pannalal Jagannathji 1979 MPLJ 736*.

04. Per contra counsel for the respondent No.12 submitted that one of the daughter-in-law of Mishrilal namely Umabai Wd/o Jagannath Rathore has filed a Civil Suit for declaration, partition, possession and permanent injunction on a plea that she has a 1/3rd share in the land bearing survey No.35/1 area, 2.31 hectare, Gram-Lakahkot, Dist. Alirajpur as the same is being an ancestral property and is belonging to Shri Mishrilalji. The said suit was filed after impleading the answering respondent and as also the present petitioner including other respondents as defendants to the suit. The said suit was filed in the Court of Additional Civil Judge, Class-II, Alirajpur and was registered as C.S. No.08-A/2014. The said suit was contested by the answering respondent by way of filing a detailed and exhaustive written statement and it was pleaded that the property in question was falling into his share in view of the Family Settlement dated 20.08.1991 and prayed for dismissal of the suit. The trial Court after full fledged trial has decreed the suit filed by the plaintiff namely Umabai. The answering respondent being aggrieved by the aforesaid judgment and decree has filed a regular civil appeal before the District Judge, Alirajpur bearing CRA No.06/2018 which was allowed by the appellate Court vide its judgment & decree dated 06.09.2018 and it was held that the family settlement dated 20.08.1991 was executed between the parties and these facts were admitted by the parties in there3 respective depositions. That, Umabai being aggrieved by the aforesaid



judgment & decree has preferred a Second Appeal No.2258/2018 before the Hon'ble High Court of Madhya Pradesh, Bench at Indore which was dismissed vide order dated 08.02.2019 after affirming the judgment & decree dated 06.09.2018. That, Umabai being aggrieved by the judgment of the High Court has also preferred an appeal before the Hon'ble Supreme Court of India (Diary No.30794/2022) which was also dismissed by the Hon'ble Supreme Court of India vide its order dated 14.12.2022. From the aforesaid facts and judgments of a competent court of law it is crystal clear that the family settlement dated 20.08.1991 is said to be proved and arrived between the parties. Now the second daughter-in-law namely, Leelabai Wd/o Rameshchandra who was also party to the C.S. No.8-A/2014 has claimed 1/3rd share in the property in question and asserts that the property in question is ancestral property of Mishrilal. The said suit is pending before the Additional Civil Judge, Class-II, Alirajpur. The same has been contested by the answering respondent by way of filing a detailed and exhaustive written statement and it was pleaded that the property in question was falling into his share in view of the Family Settlement dated 20.08.1991. It is also pleaded that the suit is barred by *res-judicata* and prayed for dismissal of the suit. After dismissal of the second appeal by the Hon'ble High Court, the answering respondent has raised a defence of *res-judicata* and a additional issue was framed in respect of the plea of *res-judicata* on 05.10.2019 which can be evident from Annexure R/9. Thereafter an application was moved under Order XIV Rule 1(2)(5) of the Code of Civil Procedure, 1908 for determining the issue of *res-judicata* as a preliminary issue which was



allowed by the trial Court vide its order dated 13.02.2020 and has directed the parties to lead evidence in respect of the preliminary issue only and has fixed a date 26.02.2020. At this stage, it is pertinent to mention here that vide the same order dated 13.02.2020 (Annexure R/10) the trial Court has also decided an application filed by the petitioner under section 45 r/w 67 of the Evidence Act. The said application was dismissed by the trial Court. The petitioner being aggrieved by the aforesaid order dated 13.02.2020 whereby an application filed by the petitioner under section 45 r/w 67 of the Evidence Act has been rejected, has preferred a Miscellaneous Petition before the Hon'ble High Court which was registered as MP No.1315/2020. It is pertinent to mention here that the MP No.1315/2020 filed by the petitioner was also dismissed by the Hon'ble Court vide its order dated 13.10.2022. The answering respondent in compliance of the order dated 13.02.2020 has filed his evidence under Order XVIII Rule 4 of the CPC, 1908 and was also cross-examined by the petitioner. The petitioner till today has not lead any evidence in compliance of the order dated 13.02.2020 and is only delaying the proceedings on one or the other ground. To be more precise the petitioner has taken as many as 30 adjournments to record her evidence including by way of filing the frivolous applications. The answering respondent further submits that the trial Court on 18.07.2023 has closed the rights of the petitioner to lead evidence on the preliminary issue and has fixed the matter for arguments on preliminary issue of *res-judicata*.

05. It is argued by learned counsel for the respondent No.12 that the petitioner has challenged the order dated 13.02.2020 by way of filing the



present petition on 23.06.2023 i.e. after the delay of 3 & 1/2 years. The order impugned dated 13.02.2023 was in two parts: one is where an application filed by the answering respondent for determining the issue of res-judicata as preliminary issue is being allowed and second where an application filed by the petitioner under section 45 of the Evidence Act was rejected. The petitioner had filed a petition MP No.1315/2020, but has chosen not to challenge the order dated 13.02.2020 so far it was relating to allowing the application filed by the respondents for deciding the preliminary issue first regarding *res-judicata*.

06. Counsel for the petitioner submitted that the petitioner had filed an application under section 151 CPC and after dismissal of the said application, he filed review of the said order and, therefore, he did not challenge the said order. It is further argued that the petitioner has challenged both the original orders as well as the order passed in the review.

07. After hearing learned counsel for the parties, the issue which arises for consideration that whether the validity of an order dated 13.02.2020 can be examined after period of three years when the petitioner had chosen not to challenge the same though he challenged the same impugned order in respect of condonation of other application and, therefore, the validity of the order impugned cannot be examined considering the conduct of the petitioner and the principles of estoppel by conduct.

08. From the facts floating on the record, it is pellucid that the impugned order was passed on 13.02.2020 whereby the application filed by the respondent No.12 under Order 14 Rule 1 (2) (5) of CPC. He succumbed



himself to the proceedings before the trial Court. The respondent had adduced the evidence and the petitioner also cross-examined those witnesses. The petitioner had taken as many as 30 adjournments for evidence, but did not adduce evidence and the trial Court by order dated 18.07.2023 closed the rights of the petitioner to lead evidence on the preliminary issue and the case was fixed for arguments on preliminary issue of *res-judicata*. The order closing the right of the petitioner to lead evidence was challenged in M.P. No.4786/2023. In the said petition also, the said order was not challenged. The petition was allowed and the petitioner was given right to lead evidence. The review filed by the petitioner was dismissed on 30.07.2020 prior to filing of the subsequent petition M.P. No.4786/2023. The petitioner challenged the order passed in the present petition which was filed on 27.06.2023 after participating in the evidence for the purpose of preliminary issue which has already been recorded and the case is fixed for arguments on preliminary issue. This Court stayed the proceedings of the trial Court on 28.08.2023. From the record also, it is manifest that the petitioner filed an application under section 10 of CPC for stay of the present suit on the ground that in respect of the same suit land, a suit for partition has been filed as Civil Suit No.8A/2014 (Umabai vs. Damodar). Thus, application filed by the petitioner was allowed and the proceedings of the present suit was stayed by the trial Court. The said suit has travelled up to the Supreme Court and the decree of partition has been affirmed between the same parties and, therefore, the application was filed by the respondent No.12 to decide the issue of *res-judicata* as preliminary issue.



09. In the application filed under section 10 CPC by the petitioner it was stated that the decree passed in the suit for partition would be binding between the parties and, therefore, the proceedings of present suit be stayed. After the affirmation of decree of partition by the Hon'ble Supreme Court the petitioner decided to challenge the order impugned after period of 3 years. This Court finds force in the contention of the counsel for the respondent No.12 that while passing the impugned order to decide the issue of *res-judicata* as preliminary issue, the Court has observed that the parties may lead the evidence to the said issue. That, does not mean that the Court had passed an order for recording of the evidence. It was liberty to the parties to adduce the evidence if they desire so otherwise the Court is of the view that matter can be decided while deciding the issue of *res-judicata* as preliminary issue. The said observation in the order has to be read only to the effect that the evidence was required to be adduced for the purpose of *res-judicata*. The petitioner succumbed to the proceedings without challenging the impugned order for period of 3 years though the same order was challenged in the petition in respect of other part of the order. After closing of the evidence for the purpose of *res-judicata* when the matter was fixed for arguments on the said issue, the petition has been filed.

10. In view of the aforesaid facts, this Court refrains from examining the impugned order in detail on merit considering the conduct of the petitioner in view of the principle of "estoppel by conduct" of the petitioner. The petitioner had chosen not to challenge the said order for a period of 3 years and even after dismissal of review petition, the order was not





challenged in subsequent petition and the order was challenged in the present petition after about one year. My view is fortified by the judgment of the Apex Court in the case of *Supdt. of Taxes, Dhubri & Ors. vs. M/s. Onkarmal Nathmal Trust (1976)1 SCC 766* wherein the Apex Court in para-23 held that the doctrine of estoppel by conduct comes into play in view of the facts of the case where litigant by words or conduct willfully causes the other party to believe in the existence of certain state of things and induces him to act on that belief or to alter his own previous position. Para-23 of the judgment is reproduced as under:-

23. The third contention of the Solicitor General is that the respondents waived service of a notice within two years of the expiry of the return period by reason of the order of injunction obtained by them. Waiver is either a form of estoppel or an election. The doctrine of estoppel by conduct means that where one by words or conduct willfully causes another to believe in the existence of certain state of things and induces him to act on that belief, or to alter his own previous position, the former is concluded from averring against the latter a different state of things as existing at that time. The fundamental requirement as to estoppel by conduct is that the estoppel must concern an existing state of facts. There is no common law estoppel founded on a statement of future intention. The doctrine of promissory estoppel is applied to cases where a promiser has been estopped from acting inconsistently with a promise not to enforce an existing legal obligation. This doctrine differs from estoppel properly so called in that the presentation relied upon need not be one of present fact. The second requirement of an estoppel by conduct is that it should be



unambiguous. Finally, an estoppel cannot be relied on if the result of giving effect to it would be something that is prohibited by law. Estoppel is only a rule of evidence. One cannot found an action upon estoppel. Estoppel is important as a step towards relief on the hypothesis that the defendant is estopped from denying the truth of something which he has said.

11. In the case of *Motilal Padampat sugar mills Company Ltd. vs. State of UP & Ors. AIR 1979 SC 621*, the Supreme Court discussed the doctrine of *res-judicata* by conduct as under:-

“21. In fact, we must never forget that the doctrine of promissory estoppel is a doctrine whose foundation is that an unconscionable departure by one party from the subject matter of an assumption which may be of fact or law, present or future, and which has been adopted by the other party as the basis of some course of conduct, act or omission, should not be allowed to pass muster. And the relief to be given in cases involving the doctrine of promissory estoppels contains a degree of flexibility which would ultimately render justice to the aggrieved party. The entire basis of this doctrine has been well put in a judgment of the Australian High Court reported in *The Commonwealth of Australia v. Verwayen* 170 C.L.R. 394, by Deane, J. in the following words:

1. While the ordinary operation of estoppel by conduct is between parties to litigation, it is a doctrine of substantive law the factual ingredients of which fall to be pleaded and resolved like other factual issues in a case. The persons who may be bound by or who may take the benefit of such an estoppel extend beyond the immediate parties to it, to their privies, whether by blood, by estate or by contract. That being so, an estoppel by



conduct can be the origin of primary rights of property and of contract.

2. The central principle of the doctrine is that the law will not permit an unconscionable-or, more accurately, unconscientious departure by one party from the subject matter of an assumption which has been adopted by the other party as the basis of some relationship, course of conduct, act or omission which would operate to that other party's detriment if the assumption be not adhered to for the purposes of the litigation.

3. Since an estoppel will not arise unless the party claiming the benefit of it has adopted the assumption as the basis of action or inaction and thereby placed himself in a position of significant disadvantage if departure from the assumption be permitted, the resolution of an issue of estoppel by conduct will involve an examination of the relevant belief, actions and position of that party.

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8. The recognition of estoppel by conduct as a doctrine operating consistently in law and equity and the prevalence of equity in a Judicature Act system combine to give the whole doctrine a degree of flexibility which it might lack if it were an exclusively common law doctrine. In particular, the prima facie entitlement to relief based upon the assumed state of affairs will be qualified in a case where such relief would exceed what could be justified by the requirements of good conscience and would be unjust to the estopped party. In such a case, relief framed on the basis of the assumed state of affairs represents the outer limits within which the relief appropriate to do justice between the parties should be framed.



12. In view of the aforesaid facts and enunciation of law, this Court is not inclined to interfere with the impugned order. The parties have already led evidence in respect of the issue of *res-judicata*. The case was fixed for arguments on the said issue. The petition is **dismissed**. As a consequence of dismissal of the petition, the stay order dated 28.08.2023 staying the trial stands vacated. The parties are directed to argue the matter on the preliminary issue of *res-judicata* on the date fixed by the trial Court.

(VIJAY KUMAR SHUKLA)  
JUDGE

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