IN THE HIGH COURT OF MADHYA PRADESH

AT INDORE

BEFORE

HON'BLE SHRI JUSTICE PAVAN KUMAR DWIVEDI

MISC. APPEAL No. 5721 of 2024

BAGORA DEVELOPERS PRIVATE LIMITED THROUGH DIRECTOR ANANDILAL DAVE

Versus

HARINARAYAN S/O DEVISINGH (DECEASED) THROUGH LRS. CHAMPALAL AND OTHERS

Appearance:

Shri Makbool Ahmad Mansoori - Advocate for the appellant.

Shri Nilesh Agrawal, learned counsel for the respondent No.5.

Heard on **18.8.2025**

Pronounced on **8.10.2025.**

ORDER

This appeal has been preferred by the appellant / defendant No.5 being aggrieved by the judgment and decree dated 15/3/2024 passed by the learned 2nd District Judge, Dr. Ambedkar Nagar, District Indore in RCA. No.9/2019,

whereby while setting aside the judgment and decree dated 15.2.2019 passed by the First Civil Judge Class - I, Dr. Ambedkar Nagar, District Indore in Regular Civil Suit No.15-A/2014, the matter was remanded back to the trial Court to decide the same afresh after affording opportunity to lead evidence to both the parties and getting tested Kamlabai from medical board.

2. Short facts of the case are that the respondents No.1 to 5 filed suit for declaration of title and permanent injunction against the present appellant / defendant No.5 as well as respondents No.6 to 11 with respect to agricultural land situated in Patwari Halka No.27, Khasra No.16 of village Shivnagar, Tehsil Mhow, District Indore admeasuring 2.258 hectares.

3. It was averred in the plaint that late Devi Singh had solemnized two marriages during his lifetime. First with Fulibai out of which wedlock there were two children ie., plaintiff No.1 Harinarayan and plaintiff No.2 Mohan Singh. Second marriage was solmenized with Menabai out of which wedlock there were three children ie., plaintiff No.3 Sohan Singh, plaintiff No.4 Udayram and plaintiff No.5 Radhakishan.

4. It was further averred in the plaint that the plaintiffs and defendant No.1 and 2 *ie.,* Kamlabai and Balmukund are members of one family. Devi Singh being head of the family who had died on 19/4/2006 and his both the wife had died before him around 45 and 10 years ago respectively. It is also stated in the plaint that at the time of filing of suit plaintiffs as well as defendant No.1 and 2

were the successors of late Devi Singh.

5. It was also averred in the plaint that Devi Singh and his brother Rajaram have got the ancestral property partitioned and both of them were in possession of their respective shares of ancestral property. As such the disputed property was received by Devi Singh in partition from his ancestors. As such it is an ancestral property.

6. It is also stated in the plaint that plaintiffs are illiterate persons who live in village. Thus they do not have any knowledge about the revenue records. However, they claim in the plaint that in the suit property plaintiffs as well as defendants No.1 and 2 have 1/5th share.

7. It was also averred that taking advantage of the illiteracy of plaintiffs, Balmukund *ie.,* defendant No.2 has got the name of defendant No.1 Kamlabai mutated in revenue record for the disputed property. The plaintiffs came to know about this fact only when a notice was published in the daily news paper Dainik Bhaskar on 2/9/2010 regarding sale of disputed property. The information about the publication of the said notice was provided by the educated residents of the village. On coming to the terms of this fact plaintiffs contacted with the Patwari of the concerned area and obtained certified copies of the Khasra, trace map and B-1 whereon the plaintiffs came to know that the disputed property is recorded in the revenue record only in the name of defendant No.1 - Kamlabai.

8. It is further stated in the plaint that as soon as the plaintiffs came to know about this fact an objection through their counsel was sent in response to the notice published in the daily news paper. It was alleged in the plaint that the defendant No.1 Kamlabai in connivance with defendants No.2 and 3 is trying to sell the suit property illegally. It is also averred that the defendant No.1 being dumb and unsound mind, defendants No.2 and 3 conspired to get the disputed land sold and for this reason in the notification published in the news paper, the defendant No.3 Gokul has been show as the power of attorney holder of Kamlabai.

9. The plaintiffs claim in the plaint that in accordance with the Hindu Succession Act all of them are entitled for 1/5th share of the disputed land and that they are doing agricultural work on their share of the property. As such they pleaded possession on the disputed property.

10. It was also averred that the so called will executed by late Devi Singh in favour of Kamlabai is a forged document.

11. The appellant / defendant No.5 as well as defendants No.1 to 3 (respondents No.6 to 8 here) as well as defendants No.6 and 7 (respondents No.10 and 11 here) filed their separate written statement in the suit thereby denying the pleadings of the plaint. The defendants pleaded that Devi Singh and his brother Rajaram were two members of the family who by consent got partition done around 55 years ago in which Devi Singh got land in villages

Shivnagar and Gokanya. Later on Devi Singh, during his lifetime, had partitioned his share of land amongst members of his family around 40 years ago. Plaintiffs No.1 and 2 were given their share and since then they are cultivating their share of land till now. Similarly Devi Singh during his lifetime had also by oral partition had given land to plaintiffs No.3 and 4 as well as to defendant No.2 and they all are in possession of their respective share of agricultural land. They are cultivating the same separately. It was also averred in W.S. that Devi Singh kept one share of the land with him which he was cultivating on his own. Defendant No.1 (respondent No.6 herein) Kamlabai was helping Devi Singh in cultivation of the said land. It was also averred that as Kamlabai was having difficulty in speaking hence, she could not get married. She lived with her father Devi Singh and was taking his care because of which Devi Singh before his death executed a registered will in favour of Kamlabai. All the members of family were aware about this registered will. It is only for the reason that now rates of the land have increased thus they are trying to grab the share of the land of Kamlabai.

12. Kamlabai had executed a registered sale deed in favour of the appellant's / defendant No.6 on 26/10/2010 pursuant to which mutation order was passed by the revenue authority on 6/3/2007. The suit was filed by the plaintiffs / respondents No.1 to 5 for declaring the said sale deed as null and void and for permanent injunction.

13. The learned trial Court based on pleadings framed as many as seven issues out of which issue No.1 was with respect to 1/5th share of the plaintiff in the suit property and issue No.5 was with respect to registered will in favour of Kamlabai.

14. The learned trial Court after considering the evidence available on record has discussed the evidence in detail from para 11 to 30 and in para Nos.31, 32 and 33 it recorded its conclusions / findings. The issue No.5 was decided against the defendants inasmuch as it was found by the learned trial Court that the registered will was not proved. However, issue No.1 was decided against the plaintiffs in para 32 by holding that the plaintiffs have failed to establish their 1/5th share in the suit property. As regards the validity of the sale deed this issue was also decided against the plaintiffs in para 34.

15. Plaintiffs in civil suit did not try to establish unsoundness of Kamlabai by leading evidence of any nature whatsoever. They simply led evidence of themselves by getting examined before the trial Court. Not even a single step was taken for either deposing with respect to unsoundness mind of Kamlabai or by praying for mental test of Kamlabai by an expert.

16. The plaintiffs / respondents No.1 to 5 being aggrieved by the judgment and decree dated 15/2/2019 filed Regular Civil Appeal No.9/2019. Before the learned appellate Court the respondents No.1 to 5 filed an application under Order 41 Rule 27 for the first time thereby requesting for medical examination

of Kamlabai for verifying her mental status inasmuch as she is mentally unsound or not.

17. The learned trial Court after recording respective submissions of the parties from para 1 to 9 proceeded to record its conclusions from para 11 to 23. However, on bare perusal of the conclusions drawn by the learned first appellate Court it comes to the fore that there is no discussion at all about the findings recorded by the learned trial Court. It has not been mentioned in any of the paragraph that for what reasons the conclusions drawn by the trial Court are not correct. On the contrary an elaborate discussion has been made on the application filed by the respondents No.1 to 5 from para 11 onwards. Thus it is seen that infact the only discussion is with respect to application filed by the respondents No.1 to 5 under Order 41 Rule 27 of the CPC. As such, by recording a conclusion that the Court feels that the medical examination of Kamlabai is necessary in the facts of the case. The matter was remanded back to the learned trial Court vide judgment and decree dated 15/3/2024.

18. Learned counsel for the appellant criticizing the impugned judgment submits that while considering the application filed under Order 41 Rule 27 by respondents No.1 to 5 / appellants therein the Court was enjoined to consider the ingredients of Order 41 Rule 27 but the learned first appellate Court did not pay even a slightest of consideration for the requirement that whether the conditions of Rule 27 have been fulfilled by the respondents No.1 to 5 /

plaintiffs or not. He submits that this application was only for filling the lacuna of plaintiff. They failed to establish unsoundness of mind of Kamlabai in the trial before the original Court. Hence in order to take a second chance for filling that lacuna application under Order 41 Rule 27 was filed which is not permissible under the law. It has also been argued that for remanding a case in terms of Order 41 Rule 23-A, the findings of the trial Court are required to be reversed which has not been done by the appellate Court in the present case. Once the plaintiffs have failed to prove their case they cannot be given second chance in such a casual manner.

19. He also emphasized on the fact that the sale deed in question was executed on 26/10/2010 and now in the year 2025 the appellants are praying for examination of the mental status of Kamlabai. He submits that there is no technology available which can verify the status of mental soundness of Kamlabai in the year 2010 after these long 14 years. There is no such mechanism for ascertaining the same. In support of his submissions he placed reliance on the following judgments :- *P. Purushottam Reddy V/s. Pratap Steel Ltd*. *(2002) 2 SCC 686*, *Municipal Corporation Hyderabad V/s. Sunder Singh*, *(2008) 8 SCC 485*, *Kannathal & Ors. V/s. Arulmighu* *(2007) 2 CTC 49*, *Sudesh Kohi (Smt.) V/s. Smt. Chandramani Mishra ILR* *(2019) M.P. 1441*, *Union of India V/s. Ibrahim Uddin* *(2012) 8 SCC 148* and *Mangal Prasad Tamoli (Dead) by LR's V/s. Narvadeshwar Mishra (Dead) by LR's & Ors.*

(2005) 3 SCC 422.

20. Learned counsel for the appellants submits that this entire exercise is an effort to blackmail the appellant who is a bonafide purchaser, who purchased land after having paid entire sale consideration and before purchase a public notice was issued in daily news paper Dainik Bhaskar. This all is being done in view of the escalation of the prices of the land so as to extract illegally money from the appellant who is a developer.

21. Per contra, learned counsel for respondents No.1 to 5 submits that appellant is not a bonafide purchaser. Kamlabai is a mentally retarded person thus she was not capable of executing a sale deed. The suit land is an ancestral property thus it has to be divided equally amongst all the legal heirs of Class I. He further argued that Kamlabai was not examined earlier for the reason that she was not in the control of respondents No.1 to 5 plaintiffs. He also submits that no new case was made out by the respondents No.1 to 5 before the appellate Court. It was their pleading in plaint also that Kamlabai is unsound of mind. He further submits that the defendants in all fairness should have produced Kamlabai before the trial Court which was not done deliberately. He also points out that the appellant defendant No.5 did not file any reply to application under Order 41 Rule 27 before the trial Court.

22. The learned counsel further submits that specific findng has been recorded by the learned appellate Court in para 20 and 21 to the effect that

there is a necessity of remand and there is an error by the trial Court in drawing the conclusions without verifying the mental conditions of Kamlabai. He further submits that technicality should not come in the way rendering complete justice. The plaintiffs were required to prove their case only on preponderance of probability and not beyond reasonable doubt and the medical examination will clarify the mental status of Kamlabai. Learned counsel refers to the provisions of Order 41 Rule 1(b) and points out that if the appellate Court requires any document to be produced or witness to be examined to enable it to pronounce judgment or for any substantial cause, then the same can be done hence in the present case a proper judgment and decree has been passed by the first appellate Court in which no interference is warranted.

23. Heard the learned counsel for the parties and perused the record.

24. From perusal of the pleadings in the plaint which are available on ERP it is seen that the case of the plaintiffs before the trial Court was that it was defendant No.2 who had hatched this conspiracy and deliberately he got the name recorded in the revenue record for the suit property. Though it was averred in para 6 of the plaint that the defendant No.1 cannot speak and she is unsound of mind. However beyond these two line pleadings there was no efforts by the plaintiffs to prove this fact by leading appropriate evidence and even by moving an application for examination of Kamlabai by an expert.

They led their evidence only on the aspect of conspiracy by defendant No.2 through out the trial. Once they failed in trial and realized that they will not be able to prove their case on the strength of evidence which has come on record before the trial Court, this new strategy was adopted in filing an application under Order 41 Rule 27 before the first appellate Court and requesting for the first time for a medical examination of defendant No.1 Kamlabai. Before the judgment and decree of the trial Court, no such application was filed by the plaintiffs / respondents No.1 to 5 during the entire trial. It is thus clear that it was failure on the part of the plaintiffs for which they do not deserve any second chance.

25. It is seen from the findings recorded by the trial Court that many of the witnesses of plaintiffs for example (P.W.1) Manohar, (P.W.2) Bahadur, (P.W.3) Ramesh and (P.W.4) Rajendra have admitted partition of the ancestral property of Devi Singh and the fact of separate possession and cultivation for each member of the family. When this fact became clear to the respondents No.1 to 5 plaintiffs, they moved this application for the first time. Significantly the sale deed was executed on 26/10/2010 and application under Order 41 Rule 27 was moved by the plaintiffs for the first time before the first appellate Court on 24/9/2021 ie., after eleven years of execution of the sale deed. As such it would not be possible now to examine the medical condition of the respondent No.6 / defendant No.1 Kamlabai on the date of execution of sale deed on

26.10.2010 at this late stage. The first appellate Court while remanding the matter back has not reversed the findings of trial Court on any of the issue recorded by it. The Hon'ble Apex Court while considering this aspect in the case of *P. Purushottam Reddy* (supra) has held in para 10 and 11 thus :-

> *"10. The next question to be examined is the legality and propriety of the order of remand made by the High Court. Prior to the insertion of Rule 23A in Order 41 of the Code of Civil Procedure by CPC Amendment Act 1976, there were only two provisions contemplating remand by a court of appeal in Order 41 of CPC. Rule 23 applies when the trial court disposes of the entire suit by recording its findings on a preliminary issue without deciding other issues and the finding on preliminary issue is reversed in appeal. Rule 25 applies when the appellate court notices an omission on the part of the trial court to frame or try any issue or to determine any question of fact which in the opinion of the appellate court was essential to the right decision of the suit upon the merits. However, the remand contemplated by Rule 25 is a limited remand in as much as the subordinate court can try only such issues as are referred to it for trial and having done so the evidence recorded together with findings and reasons therefore of the trial court, are required to be returned to the appellate court. However, still it was a settled position of law before 1976 Amendment that the court, in an appropriate case could exercise its inherent jurisdiction under Section 151 of the CPC to order a remand it such a remand was considered pre-eminently necessary ex debito justitiae, though not covered by any specific provision of Order 11 of the CPC. In cases where additional evidence is required to be taken in the event of any one of the clause of Sub-rule (1) of Rule 27 being attracted such additional evidence oral or documentary, is allowed to be produced either before the appellate court itself or by directing any court subordinate to the appellate court to receive such evidence and send it to the appellate court. In 1976, Rule 23A has been inserted in Order 41 which provides for a remand by an appellate court hearing an appeal against a decree if (i) the trial court disposed of the case otherwise than on a preliminary point, and (ii) the decree is reversed in appeal and a retrial is considered necessary. On twin conditions being satisfied, the appellate court can exercise the same power of remand under Rule 23A as it is under Rule 23. After the amendment all the cases of wholesale remand are covered by Rule 23 and 23A. In view of the express provisions of these rules, the High Court cannot have recourse to its inherent powers to make a remand because as held in Mahendra v. Sushila (AIR 1965 SC 365 at p. 399), it is well settled that inherent powers can be availed of ex debito justitiae only in the absence of express provisions in the Code. It is only in exceptional cases where the court may now exercise the power of remand de hors the Rules 23 and 23A.*
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> *To wit the superior court, if it finds that the judgment under appeal has not disposed of the case satisfactorily in the manner required by Order 20 Rule 3 or*

Order 11 Rule 31 of the CPC and hence it is no judgment in the eye of law, it may set aside the same and send the matter back for re-writing the judgment so as to protect valuable rights of the parties. An appellate court should be circumspect in ordering a remand when the case is not covered either by Rule 23 or Rule 23A or Rule 25 of the CPC. An unwarranted order of remand gives the litigation an undeserved lease of life and, therefore must be avoided.

11. In the case at hand, the trial court did not dispose of the suit upon a preliminary point. The suit was decided by recording findings on all the issues. By its appellate judgment under appeal herein, the High Court has recorded its finding on some of the issues, not preliminary, and then framed three additional issues leaving them to be tried and decided by the trial court. It is not a case where a retrial is considered necessary Neither Rule 23 nor Rule 23A of Order 41 applies. None of the conditions contemplated by Rule 27 exists so as to justify production of additional evidence by either party under that Rule.

The validity of remand has to be tested by reference to Rule 25. So far as the objection as to maintainability of the suit for failure of the plaint to satisfy the requirement of Forms 47 and 48 of Appendix A of CPC is concerned, the High Court has itself found that there was no specific plea taken in the written statement. The question of framing an issue did not, therefore, arise. However, the plea was raised on behalf of the defendants purely as a question of law which, in their submission, strikes at the very root of the right of the plaintiff to maintain the suit in the form in which it was filed and so the plea was permitted to be urged. So far as the plea as to readiness and willingness by reference to Clause (c) of Section 16 of the Specific Relief Act, 1963 is concerned, the pleadings are there as they were and the question of improving upon the pleadings does not arise in as much as neither any of the parties made a prayer for amendment in the pleadings nor has the High Court allowed such a liberty. It is true that a specific issue was not framed by the trial court. Nevertheless the parties and the trial court were very much alive to the issue whether Section 16(c) of the Specific Relief Act was complied with or not and the contentions advanced by the parties in this regard were also adjudicated upon. The High Court was to examine whether such finding of the trial court was sustainable or not - In law and on facts. Even otherwise the question could have been gone into by the High Court and a finding could have been recorded on the available material in as much as the High Court being the court of first appeal all the questions fact questions of fact and law arising in the case were open before it for consideration and decision."

26. In a later decision of *Union of India V/s. Ibrahim Uddin* (supra) the Hon'ble Apex Court has held in para 36, 37 and 38 as under :-

"36. The general principle is that the Appellate Court should not travel outside the record of the lower court and cannot take any evidence in appeal. However, as an exception, Order XLI Rule 27 CPC enables the Appellate Court to take additional evidence in exceptional circumstances. The Appellate Court may

permit additional evidence only and only if the conditions laid down in this rule are found to exist. The parties are not entitled, as of right, to the admission of such evidence. Thus, provision does not apply, when on the basis of evidence on record, the Appellate Court can pronounce a satisfactory judgment. The matter is entirely within the discretion of the court and is to be used sparingly. Such a discretion is only a judicial discretion circumscribed by the limitation specified in the rule itself. (Vide: K. Venkataramiah v. A. Seetharama Reddy & Ors., AIR 1963 SC 1526; The Municipal Corporation of Greater Bombay v. Lala Pancham & Ors., AIR 1965 SC 1008; Soonda Ram & Anr. v. Rameshwaralal & Anr., AIR 1975 SC 479; and Syed Abdul Khader v. Rami Reddy & Ors., AIR 1979 SC 553).

37. The Appellate Court should not, ordinarily allow new evidence to be adduced in order to enable a party to raise a new point in appeal. Similarly, where a party on whom the onus of proving a certain point lies fails to discharge the onus, he is not entitled to a fresh opportunity to produce evidence, as the Court can, in such a case, pronounce judgment against him and does not require any additional evidence to enable it to pronounce judgment. (Vide: Haji Mohammed Ishaq Wd. S. K. Mohammed & Ors. v. Mohamed Iqbal and Mohamed Ali and Co., AIR 1978 SC 798).

38. Under Order XLI , Rule 27 CPC, the appellate Court has the power to allow a document to be produced and a witness to be examined. But the requirement of the said Court must be limited to those cases where it found it necessary to obtain such evidence for enabling it to pronounce judgment. This provision does not entitle the appellate Court to let in fresh evidence at the appellate stage where even without such evidence it can pronounce judgment in a case. It does not entitle the appellate Court to let in fresh evidence only for the purpose of pronouncing judgment in a particular way. In other words, it is only for removing a lacuna in the evidence that the appellate Court is empowered to admit additional evidence."

27. In view of the above law, it is clear that it was incumbent upon the first appellate Court that before remanding the matter back to the trial Court it must deal with each and every finding recorded by the trial Court and after reversing the same, if required, then only the matter should be remanded back to the trial Court.

28. The Hon'ble Apex Court has repeatedly held that power of remand must be exercised very cautiously and sparingly, it should not be resorted in a casual

manner.

29. In the present case, the application filed by the plaintiffs / respondents No.1 to 5 at such later stage for the first time under Order 41 Rule 27 for examination of mental status of Kamlabai, if entertained, then it would not be nothing but providing them second opportunity to fill lacuna in their evidence which is not permissible under the law. Thus in view of the above law as laid down by the Hon'ble Apex Court as well as analysis made by this Court, the impugned judgment and decree is not sustainable in the eyes of law. Hence the same is hereby set aside. The matter is remanded back to the first appellate Court for deciding the appeal on its own merits considering the evidence available on record.

30. Accordingly, the appeal stands allowed and disposed off.

(PAVAN KUMAR DWIVEDI)
JUDGE

SS/-