IN THE HIGH COURT OF MADHYA PRADESH AT JABALPUR

BEFORE

HON'BLE SHRI JUSTICE GURPAL SINGH AHLUWALIA

ON THE 18th OF APRIL, 2023

SECOND APPEAL No. 734 of 1994

BETWEEN:-

SMT. KAMLA BAI W/O SHRI BABBOO PATEL AGED ABOUT 65 YEARS, OCCUPATION CULTIVATOR RESIDENT OF VILLAGE LOTNA, TAHSIL AND DISTRICT SAGAR (MADHYA PRADESH) (DELETED AS PER ORDER DATE 24/10/2017)

1A. GOMTI BAI D/O BABOOLAL PATEL, RESIDENT OF POST SIHORA, VILLAGE LOTANA, DISTRICT SAGAR

1B. LAXMINARAYAN PATEL S/O BABOOLAL PATEL RESIDENT OF POST SIHORA, VILLAGE LOTANA, DISTRICT SAGAR

1C. SITARAM PATEL S/O BABOOLAL PATEL RESIDENT OF POST SIHORA, VILLAGE LOTANA, DISTRICT SAGAR

1D. RAMKISHAN PATEL S/O BABOOLAL PATEL RESIDENT OF POST SIHORA, VILLAGE LOTANA, DISTRICT SAGAR

1E. MIHILAL PATEL S/O BABOOLAL PATEL RESIDENT OF POST SIHORA, VILLAGE LOTANA, DISTRICT SAGAR

1F. HAIRISHANKAR S/O BABOOLAL PATEL RESIDENT OF POST SIHORA, VILLAGE LOTANA, DISTRICT SAGAR

1G. RAMKUMAR S/O BABOOLAL PATEL RESIDENT OF POST SIHORA, VILLAGE LOTANA,

DISTRICT SAGAR

1H. DHANA BAI PATEL D/O BABOOLAL PATEL RESIDENT OF POST SIHORA, VILLAGE LOTANA, DISTRICT SAGAR

2. RAMESH KUMAR S/O HARINARAYAN DUBEY AGED ABOUT 45 YEARS, PUJARI IN GOPAL TEMPLE AND RESIDENT OF PURVYAU TORI, SAGAR, TAHSIL AND DISTRICT SAGAR, M.P.

.....APPELLANTS

(APPELLANT NO.1 BY SHRI MONESH SAHU – ADVOCATE)
(APPELLANT NO.2 BY SHRI SANJAY PATEL - ADVOCATE)

AND

1. NARMADA PRASAD S/O NATTHOO PATEL, AGED ABOUT 30 YEARS, OCCUPATION CULTIVATOR AND RESIDENT OF VILLAGE TILI MAFI TAHSIL AND DISTRICT SAGAR (MADHYA PRADESH) (DEAD) THROUGH LEGAL REPRESENTATIVES :

1A. JANAKRANI W/O NARMADA PRASAD AGED ABOUT 65 YEARS, R/O GIRDHARIPURAM ROAD, TILI BAI, SAGAR DISTRICT SAGAR (M.P.)

1B. JAGDISH S/O NARMADA PRASAD AGED ABOUT 42 YEARS, R/O GIRDHARIPURAM ROAD, TILI BAI, SAGAR DISTRICT SAGAR (M.P.)

1C. POORAN S/O NARMADA PRASAD AGED ABOUT 32 YEARS, R/O GIRDHARIPURAM ROAD, TILI BAI, SAGAR DISTRICT SAGAR (M.P.)

1D. VARSHARANI D/O LATE NARMADA PRASAD W/O MEHTAB, AGED ABOUT 35 YEARS, R/O GIRDHARIPURAM ROAD, TILI BAI, SAGAR DISTRICT SAGAR (M.P.)

1E. RAMWATI D/O LATE NARMADA PRASAD W/O BAIJNATH, AGED ABOUT 47 YEARS, R/O GIRDHARIPURAM ROAD, TILI BAI, SAGAR DISTRICT SAGAR (M.P.)

1F. ANITA D/O LATE NARMADA PRASAD W/O RAJKUMAR, AGED ABOUT 45 YEARS, R/O GIRDHARIPURAM ROAD, TILI BAI, SAGAR DISTRICT SAGAR (M.P.)

1G. REKHARANI D/O LATE NARMADA PRASAD, W/O LATE RAMPRASAD AGED ABOUT 40 YEARS, R/O GIRDHARIPURAM ROAD, TILI BAI, SAGAR DISTRICT SAGAR (M.P.)

1H. ASHA D/O LATE NARMADA PRASAD, W/O BALRAM, AGED ABOUT 38 YEARS, R/O GIRDHARIPURAM ROAD, TILI BAI, SAGAR DISTRICT SAGAR (M.P.)

2. SMT. JAMNABAI WIDOW OF NATTHOO PATEL, AGED ABOUT 70 YEARS, RESIDENT OF VILLAGE TILI MAFI, TAHSIL AND DISTRICT SAGAR, M.P. (DELETED AS PER COURT ORDER DATED 9/9/2011)

3. STATE OF M.P., THROUGH COLLECTOR, SAGAR.

.....RESPONDENTS

(RESPONDENT NO.1 BY SHRI RAVISH AGARWAL – SENIOR ADVOCATE WITH SMT.SANJANA SAHNI - ADVOCATE)

"Reserved on : 06.04.2023"

"Pronounced on : 18.04.2023".

This appeal having been heard and reserved for judgment, coming on for pronouncement this day, the court passed the following:

JUDGMENT

1. This Second Appeal under Section 100 of CPC has been filed against the Judgment and Decree dated 10-10-1994 passed by 4th Additional District Judge to the Court of District Judge, Sagar in Civil Appeal No. 22-A/1992, thereby reversing the Judgment and Decree dated 9-4-1992 passed by 2nd Civil Judge Class 2, Sagar in Civil Suit No. 87-A/1991.

2. The Appeal was admitted on the following Substantial Question of Law :

> "Was the original holder Laxman not competent to execute the Will Ex. P.5, regarding the property alleged to be ancestral."

3. I.A. No. 12009 of 2011 has been filed under Section 100(5) of CPC, whereas I.A. No. 10367 of 2017 has been filed under Order 41 Rule 27 of CPC.

4. The Counsel for the Appellant didnot refer to these applications at all. Thus, it is clear that Counsel for the Appellants was not interested in pressing I.A. No. 12009 of 2011 and I.A. No. 10367 of 2017, accordingly, the same are **dismissed as not pressed.**

5. The facts of the present case in short are that Narmada Prasad filed a suit for declaration of title by pleading *interalia* that Laxman S/o Ram Prasad Patel was the owner of Kh. No 89 and 92. Laxman was the exclusive owner of Kh. No. 158/2 area 1.113, 158/3 area .101 total 1.214 and in Kh. No. 8/2 area .073, 8/5 area .081, 156/1 area .133, 156/5 area .997, 159/5 area .56 157/2 area .324, 147/6 area .340 total area 1.504, Laxman was owner and in possession of .534 hectares. Thus, Laxman had total area of 1.748 hectares. Laxman had no sons. The defendants no.1 (a) and (b) were his daughters. The Plaintiff is the son of younger daughter of Laxman. He was residing with Laxman from the very beginning. He served Laxman and helped him in agricultural activities, whereas the elder daughter of Laxman was residing in her matrimonial house and was not taking care of Laxman. Accordingly, Laxman executed a Will on 27-6-1978 and gave 1/3rd share in the properties mentioned in para 1 of the plaint to his wife Indrani, and bequeathed 2/3rd properties to the plaintiff. Laxman died in the year 1980. The plaintiff

performed his last rites. Thereafter, Indrani also executed a sale deed in favour of plaintiff in respect of 1/3rd share which was given to her by Laxman by Will. Thus, it was claimed that the plaintiff became the owner and in possession of the entire lands mentioned in para 3 of the plaint. In the month of August 1984, when the plaintiff enquired from the Patwari as he was intending to purchase more lands, then he came to know that without the knowledge and notice to the plaintiff, the names of the Wd/o of Laxman, Kamla (Elder daughter) and Jamuna (Younger daughter/mother of plaintiff) have been mutated in the revenue records, whereas they donot have any right or title in the properties. It was further pleaded that Kamla has executed a gift deed in favour of defendant no.3 during the pendency of the suit. Thus, it was prayed that the registered gift deed is null and void to the interest of the plaintiff and for declaration that the plaintiff is the owner and in possession of the properties in dispute.

6. The defendants no. 1(a) and 3 filed their joint written statement and admitted that Laxman was the owner and in possession of the lands in dispute. He didnot have any son. Kamla and Jamuna were his two daughters. But it was denied that the plaintiff had resided with Laxman from very beginning. It was also denied that he had taken care of Laxman. It was claimed that the plaintiff had never helped Laxman in agricultural activities. It was denied that any Will was executed by Laxman thereby bequeathing 1/3rd Share to his wife Indrani and remaining 2/3rd to plaintiff. During the life time of Laxman, Indrani had only 1/4th share therefore, Laxman had no right or title to give 1/3rd share to his wife Indrani. The sale deed dated 30-6-1984 is a sham document. The Will is a forged and concocted document. If there was any Will, then

the plaintiff would have certainly produced the same at the time of mutation of names of widow and two daughters of Laxman. The mutation of names of Widow and two daughters of Laxman was rightly done in accordance with succession law. Kamla had 1/3rd share which She has gifted to defendant no.3 Ramesh who is in possession of the same. The plaintiff has not given the details of all the properties. It was further pleaded that at the time of mutation of names of Widow and two daughters of Laxman namely Kamla and Jamuna, the plaintiff himself had signed as a witness. It was further pleaded that in the mutation register, the plaintiff had signed as a witness on 30-5-1984 and didnot produce any Will and didnot pray for mutation of his name. Even when Kamla and Jamuna had taken loan from the Bank, no objection was raised by the plaintiff. Which clearly means that the so called Will was not in existence till that time. The Plaintiff had signed the loan documents as a witness and the loan amount has not been repayed and the properties are still mortgaged with the bank.

7. Ms. Indrani and Januna filed their joint written statement and admitted the plaint averments. After the death of Laxman, the Patwari didnot give any notice to anybody and didnot enquire. The plaintiff is the owner of the entire land.

8. The defendant no.2 denied the plaint averments for want of knowledge.

9. The Trial Court after framing issues and recording evidence, dismissed the suit.

10. Being aggrieved by the Judgment and Decree passed by the Trial Court, the plaintiff preferred an appeal, which has been allowed by the impugned Judgment and Decree.

11. Challenging the Judgment and Decree passed by the First Appellate Court, it is submitted by the Counsel for the Appellants that since, the land in dispute was the ancestral properties of Laxman, therefore, he had no right or authority to execute the Will.

12. Per contra, it is submitted by the Counsel for the Respondent, that it was not the case of anybody that the properties in dispute were the ancestral properties of Laxman S/o Ram Prasad Patel. Even otherwise, Laxman was the sole coparcener and he was competent to execute the Will.

13. Heard the learned Counsel for the parties.

14. The Plaintiff had not pleaded that the properties in dispute were the ancestral properties of Laxman. Even it was not pleaded by the defendants that the properties in dispute were the ancestral properties of Laxman. However, the Counsel for the Appellants by referring to para 17 of the cross-examination of Narmada Prasad (P.W.1) submitted that the plaintiff himself had admitted that some of the properties are ancestral properties of Laxman and some were purchased by him. Narmada Prasad (P.W.1) had claimed that 3 acres of land was purchased by Laxman.

15. Even assuming that most of the lands in dispute were ancestral properties of Laxman, but neither of the parties have given details of any other coparcener. Thus it can be held that Laxman was the sole coparcener.

16. Now the question for consideration is that whether a sole surviving coparcener can execute a Will or not?

17. If the ancestral property is in the hands of a sole surviving coparcener, then the said property turns into separate property. The Supreme Court in

the case of **Rohit Chauhan Vs. Surinder Singh and others** reported in **(2013) 9 SCC 419** has held as under :

> **11.** We have bestowed our consideration to the rival submissions and we find substance in the submission of Mr Rao. In our opinion coparcenary property means the property which consists of ancestral property and a coparcener would mean a person who shares equally with others in inheritance in the estate of common ancestor. Coparcenary is a narrower body than the joint Hindu family and before the commencement of the Hindu Succession (Amendment) Act, 2005, only male members of the family used to acquire by birth an interest in the coparcenary property. A coparcener has no definite share in the coparcenary property but he has an undivided interest in it and one has to bear in mind that it enlarges by deaths and diminishes by births in the family. It is not static. We are further of the opinion that so long, on partition an ancestral property remains in the hand of a single person, it has to be treated as a separate property and such a person shall be entitled to dispose of the coparcenary property treating it to be his separate property but if a son is subsequently born, the alienation made before the birth cannot be questioned. But, the moment a son is born, the property becomes a coparcenary property and the son would acquire interest in that and become a coparcener.

18. Before the amendment in Section 6 of Hindu Succession Act, if the sole surviving coparcener had a male child then he cannot claim himself to be a sole surviving coparcener. However, after the amendment in Section 6 of Hindu Succession Act, even if a sole surviving coparcener is having a female child, then he cannot bequeath his property, by treating himself to be a sole surviving coparcener as his daughter would also be a coparcener.

19. Thus, if a female is born prior to amendment in Section 6 of Hindu Succession Act, still She will have coparcenary rights in the property. In

the present case, admittedly Laxman had two daughters namely Kamla and Jamuna. Now the only question for consideration is that whether Laxman can be treated as a sole surviving coparcener under the facts and circumstances of the case or not?

20. Section 6 of Hindu Succession Act (as amended in the year 2005) reads as under :

> **6. Devolution of interest in coparcenary property**.—(1) On and from the commencement of the Hindu Succession (Amendment) Act, 2005, in a Joint Hindu family governed by the Mitakshara law, the daughter of a coparcener shall,—
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> (*a*) by birth become a coparcener in her own right in the same manner as the son;
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> (*b*) have the same rights in the coparcenary property as she would have had if she had been a son;
>
> (*c*) be subject to the same liabilities in respect of the said coparcenary property as that of a son,
>
> and any reference to a Hindu Mitakshara coparcener shall be deemed to include a reference to a daughter of a coparcener:
>
> Provided that nothing contained in this sub-section shall affect or invalidate any disposition or alienation including any partition or testamentary disposition of property which had taken place before the 20th day of December, 2004.
>
> (2) Any property to which a female Hindu becomes entitled by virtue of sub-section (1) shall be held by her with the incidents of coparcenary ownership and shall be regarded, notwithstanding anything contained in this Act, or any other law for the time being in force, as property capable of being disposed of her by testamentary disposition.
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> (3) Where a Hindu dies after the commencement of the Hindu Succession (Amendment) Act, 2005, his interest in the property of a Joint Hindu Family governed by the Mitakshara law, shall devolve by testamentary or intestate succession, as the case may be, under this Act and not by survisorship, and the coparcenary property shall be deemed to have been divided as if a partition had taken place and,—
>
> (*a*) the daughter is allotted the same share as is allotted to a son;

(*b*) the share of the pre-deceased son or a pre-deceased daughter, as they would have got had they been alive at the time of partition, shall be allotted to the surviving child of such pre-deceased son or of such pre-deceased daughter; and

(*c*) the share of the pre-deceased child of a pre-deceased son or of a pre-deceased daughter, as such child would have got had he or she been alive at the time of the partition, shall be allotted to the child of such pre-deceased child of the pre-deceased son or a pre-deceased daughter, as the case may be.

Explanation.—For the purposes of this sub-section, the interest of a Hindu Mitakshara coparcener shall be deemed to be the share in the property that would have been allotted to him if a partition of the property had taken place immediately before his death, irrespective of whether he was entitled to claim partition or not.

(4) After the commencement of the Hindu Succession (Amendment) Act, 2005, no court shall recognise any right to proceed against a son, grandson or great grandson for the recovery of any debt due from his father, grandfather or great grandfather solely on the ground of the pious obligation under the Hindu law, or such son, grandson or great-grandson to discharge any such debt:

Provided that in the case of any debt contracted before the commencement of the Hindu Succession (Amendment) Act, 2005, nothing contained in this sub-section shall effect—

(*a*) the right of any creditor to proceed against the son, grandson or great-grandson, as the case may be; or

(*b*) any alienation made in respect of or in satisfaction of, any such debt, and any such right or alienation shall be enforceable under the rule of pious obligation in the same manner and to the same extent as it would have been enforceable as if the Hindu Succession (Amendment) Act, 2005 had not been enacted.

Explanation.—For the purposes of clause (*a*), the expression "son", "grandson" or "great-grandson" shall be deemed to refer to the son, grandson or great-grandson, as the case may be, who was born or adopted prior to the commencement of the Hindu Succession (Amendment) Act, 2005.

(5) Nothing contained in this section shall apply to a partition, which has been effected before the 20th day of December, 2004.

Explanation.—For the purposes of this section "partition" means any partition made by execution of a deed of partition duly registered under the Registration Act, 1908 (16 of 1908) or partition effected by a decree of a court.

21. The Supreme Court in the case of **Vineeta Sharma Vs. Rakesh Sharma** reported in **(2020) 9 SCC 1** has held as under :

137. Resultantly, we answer the reference as under:

137.1. The provisions contained in substituted Section 6 of the Hindu Succession Act, 1956 confer status of coparcener on the daughter born before or after the amendment in the same manner as son with same rights and liabilities.

137.2. The rights can be claimed by the daughter born earlier with effect from 9-9-2005 with savings as provided in Section 6(1) as to the disposition or alienation, partition or testamentary disposition which had taken place before the 20th day of December, 2004.

137.3. Since the right in coparcenary is by birth, it is not necessary that father coparcener should be living as on 9-9-2005.

137.4. The statutory fiction of partition created by the proviso to Section 6 of the Hindu Succession Act, 1956 as originally enacted did not bring about the actual partition or disruption of coparcenary. The fiction was only for the purpose of ascertaining share of deceased coparcener when he was survived by a female heir, of Class I as specified in the Schedule to the 1956 Act or male relative of such female. The provisions of the substituted Section 6 are required to be given full effect. Notwithstanding that a preliminary decree has been passed, the daughters are to be given share in coparcenary equal to that of a son in pending proceedings for final decree or in an appeal.

137.5. In view of the rigour of provisions of the Explanation to Section 6(5) of the 1956 Act, a plea of oral partition cannot be accepted as the statutory recognised mode of partition effected

> by a deed of partition duly registered under the provisions of the Registration Act, 1908 or effected by a decree of a court. However, in exceptional cases where plea of oral partition is supported by public documents and partition is finally evinced in the same manner as if it had been affected (*sic* effected) by a decree of a court, it may be accepted. A plea of partition based on oral evidence alone cannot be accepted and to be rejected outrightly.

22. In the present case, the Civil Suit as well as the Regular Civil Appeal were already decided much prior to the amendment in Section 6 of Hindu Succession Act, therefore, the amendment in Section 6 of Hindu Succession shall not apply, in the light of proviso to Section 6(1) of Hindu Succession Act.

23. Thus, it is clear that on the date of execution of Will, Laxman was the sole surviving Coparcener in respect of the property which was admitted by the plaintiff to be ancestral property.

24. Accordingly, Laxman was competent to execute the Will in favour of the plaintiff.

25. Thus, the Substantial Question of Law is answered in **Negative.**

26. No other argument is advanced by the Counsel for the parties.

27. *Ex consequenti*, the Judgment and Decree dated 10-10-1994 passed by 4th Additional District Judge to the Court of District Judge, Sagar in Civil Appeal No. 22-A/1992 is hereby **affirmed.**

28. The Appeal fails and is hereby **dismissed.**

(G.S. AHLUWALIA)
JUDGE

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