IN THE HIGH COURT OF MADHYA PRADESH AT JABALPUR

BEFORE

HON'BLE SHRI JUSTICE GURPAL SINGH AHLUWALIA

ON THE 7th OF FEBRUARY, 2023

SECOND APPEAL No. 466 of 2007

BETWEEN:-

DWARIKA PRASAD PATEL S/O BAIJNATH PATEL, AGED ABOUT 55 YEARS, R/O VILLAGE, KANCHANPUR, THANA AND TEHSIL MAIHAR, DISTRICT SATNA (MADHYA PRADESH)

.....APPELLANT

(BY SHRI RAJESH KUMAR PATEL - ADVOCATE)

AND

SMT. MARRI W/O DWARIKA PRASAD PATEL, AGED ABOUT 50 YEARS, VILLAGE KANCHANPUR, THANA AND TEHSIL MAIHAR, DISTRICT SATNA (MADHYA PRADESH)

.....RESPONDENT

(BY SHRI SANJAY KUMAR AGRAWAL - ADVOCATE)

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

JUDGMENT

This second appeal under Section 100 CPC has been filed against the judgment and decree dated 03.03.2007 passed by Second Additional District Judge (Fast Track Court) Maihar, District Satna in Civil Appeal No.9A/2006 thereby reversing the judgment and decree dated 29.01.2005 passed by Civil Judge Class-1 Maihar, District Satna in Civil Suit No.55A/1997.

2. The appellant is the defendant, who lost his case before the First Appellate Court.

3. The facts necessary for disposal of the present appeal in short are that the plaintiff and the appellant are husband and wife. The plaintiff as well as defendant were blessed with one daughter Ramkumari and thereafter, he turned the plaintiff out of his house alongwith his daughter and kept another lady. Accordingly, the plaintiff came back to the house of her father. A social meeting was convened and accordingly, the defendant gave the disputed land to the plaintiff for her maintenance during her lifetime and it was also mentioned in the said document that after her death, the successor of the plaintiff would inherit the property. It is further alleged that on 27.02.1997 the defendant and his second wife Rampatiya trespassed in the house at about 12 in the night and took away the agreement which was kept in the box as well the gold and silver ornaments and an amount of Rs.1400/-. The report of the said incident was lodged by the plaintiff in Police Station Maihar on 28.02.1997 but no action was taken. It was pleaded that the defendant has taken away the original agreement ascertaining that he would forcefully take the possession of the land in dispute and would burn the original agreement and thus, the suit was filed for declaration of title and for a declaration that the plaintiff is entitled to use the said land for maintenance purposes as well as for permanent injunction thereby restraining the defendant from interfering with the peaceful possession of the plaintiff either by himself, through his agents or servants.

4. The defendant/appellant filed his written statement and admitted that the plaintiff is his legally wedded wife. It was claimed that the land in dispute i.e. Araji Nos.198, 898/1, 867/1क situated in Village Katiakhurd and khasra No.898 area 7 bigha (15 decimal) situated in

Kanchanpur belong to the defendant. It was admitted that one daughter Ramkumari was born out of the wedlock of the plaintiff and defendant. It was also admitted that the defendant has kept another lady Rampatiya and married her in the year 1975-76. However, it was denied that after keeping the second lady the plaintiff was turned out of the house. It was also denied that any social meeting was convened and the defendant had executed an agreement and also denied that the possession of the said land was given. Since the defendant has married another lady with the consent of the plaintiff, therefore the plaintiff and Rampatiya were residing in the same house. It was also denied that on 27.02.1997 the defendant and his second wife forcefully took away the agreement. On the contrary, it was pleaded that from the last 4-5 years the plaintiff was having ill will towards the second wife and therefore, the defendant was giving 6 khandi of rice (1khandi = 6 kgs), 6 khandi of wheat apart from groceries, vegetables and also gave 2-3 rooms for her residence. Accordingly, it was prayed that the suit filed by the plaintiff be dismissed.

5. The trial Court after framing issues and recording evidence dismissed the suit on the ground that the agreement is not a registered document. It was held that although the execution of the agreement is proved but the possession of the land in dispute was never given to the plaintiff. It was further held that the suit is barred by time.

6. Being aggrieved by the judgment and decree passed by the trial Court, the plaintiff/respondent preferred an appeal which has been allowed by the First Appellate Court by the impugned judgment and decree.

7. Challenging the judgment and decree passed by the First Appellate Court, it is submitted by the counsel for the appellant that the

agreement Ex.P/2 is an unregistered document and therefore, it cannot be looked into even for collateral purposes. Even otherwise the suit was filed for specific performance of contract and if the agreement Ex.P/2 is considered to be executed by the defendant, still it is clear that it was executed on 23.06.1981 whereas the suit was filed on 10.07.1997. Therefore, the suit was barred by limitation. It is further submitted that the appellate Court erroneously held that the possession of the land was also given.

8. It is next contended by the counsel for the appellant that the appellant has filed I.A. No.1424/2023, an application under Order 41 Rule 27 CPC. The respondent/plaintiff had filed an application under Section 125 Cr.P.C. In the said proceedings it was never claimed by the respondent/plaintiff that the land in dispute was given to her by way of maintenance. It is further submitted that even in the plaint as well as in the evidence, the plaintiff did not claim that the land in dispute was given by way of maintenance and therefore, the First Appellate Court erred in law by decreeing the suit and accordingly proposed the following substantial question of law:

> A. Whether the Lower Appellate Court was justified in holding that document Exhibit P-2 was admissible in evidence and convey right, title or interest to the suit property in favour of the respondent/plaintiff?
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> B. Whether the Lower Appellate Court was justified by applying section 14 of the Hindu Succession Act while the respondent/plaintiff was not in possession over the suit property?
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> C. Whether the Lower Appellate Court was justified in holding the respondent/plaintiff as a owner of the

suit property on the basis of unregistered document Exhibit P-2.?

D. Whether the Lower Appellate Court was justified by setting aside the well finding judgment and Decree passed by the trial court.

9. Heard the learned counsel for the appellant.

10. Considered I.A. No.1424/2023. In this application, the appellant has not assigned any reason as to why the judgment passed by Judicial Magistrate First Class Maihar, District Satna in Criminal Case No.11/1998 was not filed before the Court below. The order under Section 125 of Cr.P.C. was passed on 11th January, 2002, whereas the suit was dismissed on 29.01.2005. Thus, it is clear that during the pendency of the suit, the order under Section 125 of Cr.P.C. had already come in existence. The said document was neither filed before the trial Court nor before the appellate Court. Order 41 Rule 27 CPC reads as under:

> **27. Production of additional evidence in Appellate Court.-** (1) The parties to an appeal shall not be entitled to produce additional evidence, whether oral or documentary, in the Appellate Court. But if—
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> (a) the Court from whose decree the appeal is preferred has refused to admit evidence which ought to have been admitted, or
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> (aa) the party seeking to produce additional evidence, establishes that notwithstanding the exercise of due diligence, such evidence was not within his knowledge or could not, after the exercise of due diligence, be produced by him at the time when the decree appealed against was passed, or

> (b) the Appellate Court requires any document to be produced or any witness to be examined to enable it to pronounce judgment, or for any other substantial cause, the Appellate Court may allow such evidence or document to be produced, or witness to be examined.
>
> (2) Whenever additional evidence is allowed to be produced by an Appellate Court, the court shall record the reason for its admission.

11. It is clear from clause 'a' and 'aa' of Order 41 Rule 27 CPC that the litigant has to plead and prove that in spite of due diligence, the document was not in his possession. There is not a single whisper in that regard. Furthermore, the appellant himself was a party to 125 proceedings and therefore, the factum of 125 proceedings was well within his knowledge. Thus, it is clear that the appellant has failed to make out a good ground for taking copy of order dated 11th January, 2002 passed in Criminal Case 11/1998 by JMFC Maihar, District Satna on record. Furthermore, it is case of the appellant that the plaintiff had not taken a defense in her proceedings under Section 125 of Cr.P.C. that the appellant had given any land for maintenance. The said submission made by the counsel for the appellant *per se* false and misleading. In paragraph 3 of the said order, it is specifically mentioned as under:

> लेकिन 6 साल पहले आवेदिका के पिता ने पंचायत लगवाया पंचायत में अनावेदक ने आवेदिका को भरण पोषण बतौर कुछ खेत दिया था लेकिन उसमें भी खेती बाड़ी नहीं करने देता है।

12. Thus, it is clear that the plaintiff had taken a specific stand that the defendant had given her disputed land for maintenance purposes but it was her claim that the appellant is not permitting her to carry out the agricultural activities. Thus, considered from every angle, this Court is of the considered opinion that not only the appellant has failed to make

out a case under Order 41 Rule 27 CPC for taking the additional evidence on record but has also failed to prove the relevancy of the document which is sought to be filed alongwith I.A. No.1424/2023. The Supreme Court in the case of **State of Karnataka and another Vs. K.C. Subramanya and others** reported in **(2014) 13 SCC 468** has held as under:

> **4.** However, we do not feel impressed with this argument and deem it fit to reject it in view of Order 41 Rule 27(1)(aa) which clearly states as follows:
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> **"27. (1)(a)** * * *
>
> **(aa)** the party seeking to produce additional evidence, establishes that notwithstanding the exercise of due diligence, such evidence was not within his knowledge or could not, after the exercise of due diligence, be produced by him at the time when the decree appealed against was passed, or
>
> **(b)** * * *"
>
> On perusal of this provision, it is unambiguously clear that the party can seek liberty to produce additional evidence at the appellate stage, but the same can be permitted only if the evidence sought to be produced could not be produced at the stage of trial in spite of exercise of due diligence and that the evidence could not be produced as it was not within his knowledge and hence was fit to be produced by the appellant before the appellate forum.
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> **5.** It is thus clear that there are conditions precedent before allowing a party to adduce additional evidence at the stage of appeal, which specifically incorporates conditions to the effect

that the party in spite of due diligence could not produce the evidence and the same cannot be allowed to be done at his leisure or sweet will.

13. The Supreme Court also in the case of **Union of India Vs. Ibrahim Uddin and another** reported in **(2012) 8 SCC 148** has held as under:

Order 41 Rule 27 CPC

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 41 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, the provision does not apply, when on the basis of the 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 [AIR 1963 SC 1526], Municipal Corpn. of Greater Bombay v. Lala Pancham [AIR 1965 SC 1008], Soonda Ram v. Rameshwarlal [(1975) 3 SCC 698 : AIR 1975 SC 479] and Syed Abdul Khader v. Rami Reddy [(1979) 2 SCC 601 : AIR 1979 SC 553]*)

48. To sum up on the issue, it may be held that an application for taking additional evidence on record at a belated stage cannot be filed as a matter of right. The court can consider such an application with circumspection, provided it is covered under either of the prerequisite

> conditions incorporated in the statutory provisions itself. The discretion is to be exercised by the court judicially taking into consideration the relevance of the document in respect of the issues involved in the case and the circumstances under which such an evidence could not be led in the court below and as to whether the applicant had prosecuted his case before the court below diligently and as to whether such evidence is required to pronounce the judgment by the appellate court. In case the court comes to the conclusion that the application filed comes within the four corners of the statutory provisions itself, the evidence may be taken on record, however, the court must record reasons as on what basis such an application has been allowed. However, the application should not be moved at a belated stage.

14. Accordingly, I.A. No.1424/2023 is hereby rejected.

15. The next contention of the counsel for the appellant is that the plaintiff did not plead in her plaint that the land in dispute was given to her by way of maintenance. Again the submission made by the counsel for the appellant is *per se* false and misleading. The relevant part of paragraph 3 of the plaint reads as under:

> और वह अपने मायके ग्राम इटमा में अपने पिता के घर चली गयी तब उसके पिता ने आपसी सामाजिक बैठक लगवाई तब प्रतिवादी वादिया को अपनी उक्त विवादित अराजियात को बतौर गुजारा मालिक भूमि स्वामी की हैसियत से कब्जा करने व उसमें फसल बोने व उसका उपयोग करने की आजीवन शर्त के साथ इकरार नामा तहसील न्यायालय अमरपाटन में उपस्थित होकर दस्तावेज स्टाम्प में गवाहानों के समक्ष दिनांक 23.06. 1981 को निस्पादित किया और उक्त सभी विवादित अराजियातों में कब्जा दखल भी सौंप दिया।

16. Faced with such a situation, the counsel for the appellant next contended that even otherwise the plaintiff did not say anything about the said agreement in her evidence. Accordingly, the counsel for the appellant was directed to read out the evidence of the plaintiff Marri

(P.W.-1). In paragraph 1 of her evidence, the plaintiff Marri (P.W.-1) has specifically stated as under:

> तब मैं अपने पिता के घर ग्राम इटमा चली गयी। तब मेरे पिता ने सामाजिक बैठक लगवाई उक्त बैठक में प्रतिवादी द्वारका ने यह कहा था कि वह 6 एकड़ जमीन मुझे देगा। उक्त जमीन के बावत अमरपाटन कचेहरी में गवाहों के समक्ष लिखा पढ़ी करकर मुझे दिया था। तथा जमीन भी मुझे दिया था।

17. Thus, all the three statements made by the counsel for the appellant that the plaintiff did not disclose that the land in dispute was given to her by way of maintenance were found to be incorrect but unfortunately the counsel for the appellant instead of meeting out the pleadings and evidence continued with the submission that he was not making any false statement.

18. Be that whatever it may be.

19. It is next contended by the counsel for the appellant that since the agreement is an unregistered agreement, therefore, the same cannot be looked into.

20. From the plain reading of agreement Ex.P/2, it is clear that the land in dispute was given by way of maintenance to the plaintiff. The relationship of husband and wife of the plaintiff and defendant is undisputed. It is also undisputed fact that during the subsistence of first marriage, the defendant has performed second marriage.

21. It is the case of the plaintiff that she was turned out of her matrimonial house whereas it is the case of the defendant that the plaintiff continued to stay in her matrimonial house but for 5-6 years back she started feeling uncomfortable with the second wife of the defendant and therefore, she was given 2-3 rooms for her residence purposes apart from food grains, groceries etc.

22. Both the Courts below have given a concurrent finding of fact that agreement Ex.P/2 was executed by the defendant. No perversity in the fact finding could be pointed out by the counsel for the appellant. Thus, it is clear that the appellant had executed the agreement Ex.P/2 thereby giving the disputed lands to the plaintiff by way of her maintenance.

23. Section 14 of Hindu Succession Act reads as under:

> **14. Property of a female Hindu to be her absolute property.**—(1) Any property possessed by a female Hindu, whether acquired before or after the commencement of this Act, shall be held by her as full owner thereof and not as a limited owner.
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> *Explanation.*—In this sub-section, "property" includes both movable and immovable property acquired by a female Hindu by inheritance or devise, or at a partition, or in lieu of maintenance or arrears of maintenance, or by gift from any person, whether a relative or not, before, at or after her marriage, or by her own skill or exertion, or by purchase or by prescription, or in any other manner whatsoever, and also any such property held by her as *stridhana* immediately before the commencement of this Act.
>
> (2) Nothing contained in sub-section (1) shall apply to any property acquired by way of gift or under a will or any other instrument or under a decree or order of a civil court or under an award where the terms of the gift, will or other instrument or the decree, order or award prescribe a restricted estate in such property.

24. Thus, it is clear that any property possessed by a female Hindu, whether acquired before or after the commencement of the Act, shall be held by her as full owner thereof and not as a limited owner. Therefore, the crux of the matter is that the female should be in possession of land

given in lieu of maintenance. By referring to agreement Ex.P/2, it was submitted that it was nowhere mentioned that the possession of the land was also given. It was once again submitted that neither in the plaint nor in the evidence the plaintiff had pleaded that the possession of the land was given.

25. From plain reading of agreement Ex.P/2, it is clear that it was specifically mentioned that the land in dispute is being given to the plaintiff by way of her maintenance. The necessary implication of this recital would be that the possession was also given. Otherwise there was no point in executing an agreement by way of maintenance and thereafter, not giving the land to the plaintiff.

26. So far as the contention of the counsel for the appellant that the plaintiff had not pleaded in her plaint that the possession of the land in dispute was also given to her is concerned, the same is incorrect. As already pointed out in paragraph 3 of the plaint, it was specifically mentioned that after executing the agreement the possession of the land in dispute was also given. Similarly Marri (P.W.-1) in paragraph 1 of her evidence has also admitted that the land was also given after the execution of the agreement. Thus, it is clear that the possession of the land in dispute was also given to the plaintiff after the agreement Ex.P/2 was executed.

27. Under these circumstances, this Court is of the considered opinion that the provisions of Section 14 of Hindu Succession Act would apply in its full force and by virtue of section 14(1) of the Hindu Succession Act, the plaintiff had become the full owner thereof and not a limited owner.

28. The Supreme Court in the case of **V. Tulasamma and others Vs. Sesha Reddy (Dead) by L.Rs. reported** in **1977 (3) SCC 99** has held as under:

> 58. For these reasons and those given hereto before we choose to prefer the view taken by Palekar, J., in *B.B. Patil v. Gangabai* which appears to be more in consonance with the object and spirit of the 1956 Act. We, therefore, affirm and approve of the decisions of the Bombay High Court in B.B. *Patil v. Gangabai*; of the Andhra Pradesh High Court in *Gadem Reddayya v. Varapula Venkataraju*; of the Mysore High Court in *H. Venkanagouda v. Hanamangauda*; of the Patna High Court in *Sumeshwar Mishra v. Swami Nath Tiwari*; of the Punjab High Court in *Sharbati Devi v. Pt. Hiralal* and Calcutta High Court in *Sasadhar Chandra Day v. Tara Sundari Dasi* and disapprove the decisions of the Orissa High Court in *Narayan Patra v. Tara Patrani*; Andhra Pradesh High Court in *Gopisetti Kondaiah v. Gunda Subbarayudu*; Madras High Court in *S. Kachapalaya Gurukkal v. V. Subramania Gurukkal* and *Gurunadham v. Sundrarajulu*; of the Allahabad High Court in *Ram Jag Missir v. Director of Consolidation, U.P.*; and in *Ajab Singh v. Ram Singh* of the Jammu and Kashmir High Court.
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> 73. In the circumstances, we reach the conclusion that since in the present case the properties in question were acquired by the appellant under the compromise in lieu or satisfaction of her right of maintenance, it is sub-section (1) and not sub-section (2) of Section 14 which would be applicable and hence the appellant must be deemed to have

> become full owner of the properties notwithstanding that the compromise prescribed a limited interest for her in the properties. We accordingly allow the appeal, set aside the judgment and decree of the High Court and restore that of the District Judge, Nellore. The result is that the suit will stand dismissed but with no order as to costs.

29. Under these circumstances, this Court is of the considered opinion that the registration of agreement Ex.P/2 was not required.

30. So far as the question of limitation is concerned, it is submitted by the counsel for the appellant that since the suit was filed for specific performance of contract, therefore, the period of limitation was 3 years from the date of execution of agreement.

31. So far as agreement dated 23.06.1981 Ex.P/2 is concerned, it is true that the suit was titled as a suit for specific performance of contract but in the relief clause it was prayed that the plaintiff be declared as *bhumiswami* as well as be declared that she is entitled to enjoy the property during her lifetime and permanent injunction was sought. By no stretch of imagination, it can be said that the suit was for specific performance of contract.

32. It is further submitted by the counsel for the appellant that the appellant had perfected his title by way of adverse possession.

33. In order to claim the defense of adverse possession, it is necessary for the defendant to accept the ownership of the true owner. Without accepting the true ownership of the true owner, the defendant cannot claim that he had perfected his title against the true owner. Even otherwise this Court has already come to a conclusion that the possession of the land was also given after the execution of the

agreement Ex.P/2, therefore, there is no question of perfection of title by way of adverse possession.

34. It is next contended by the counsel for the appellant that since the respondent is getting Rs.400/- in proceedings under Section 125 of Cr.P.C., therefore, she is entitled for maintenance in accordance with agreement Ex.P/2.

35. Although this Court has refused to take the order dated 11th January, 2002 passed by JMFC Maihar, District Satna in Criminal Case No.11/1998 on record and has rejected the application filed under Order 41 Rule 27 CPC but the submission made by the counsel for the appellant that if a lady is getting a maintenance under one provision of law, then she cannot get maintenance under another provision of law is misconceived.

36. The Supreme Court in the case of **Rajnesh Vs. Neha and another** reported in **(2021) 2 SCC 324** has held that if a wife is getting maintenance under one provision of law, then while ascertaining the quantum of maintenance under another provision, the Court shall take into the consideration the maintenance amount which the wife is getting in previously instituted proceeding.

37. There is no law that if a wife is getting maintenance under one provision of law, then she cannot get the maintenance amount at all under another provision of law. Even otherwise that situation would not arise in the present case. The agreement Ex.P/2 was executed on 23.06.1981 whereas the application under Section 125 of Cr.P.C. was filed on 29.04.1998. Thus, it is clear that the plaintiff was getting the maintenance by virtue of pre-existing agreement.

38. No other argument is advanced by the counsel for the appellant.

39. As no substantial question of law arises in the present appeal, the appeal fails and is hereby **dismissed**.

(G.S. AHLUWALIA)
JUDGE

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