IN THE HIGH COURT OF MADHYA PRADESH AT JABALPUR

BEFORE

HON'BLE SHRI JUSTICE GURPAL SINGH AHLUWALIA

ON THE 25th OF APRIL, 2023

SECOND APPEAL No. 329 of 2010

BETWEEN:-

POONAMCHAND (NOW DEAD) THROUGH LEGAL REPRESENTATIVES

1. **ANIL S/O LATE SHRI POONAMCHAND RATHORE, AGED ABOUT 36 YEARS, R/O VILLAGE MOONDI TEHSIL & DISTRICT KHANDWA (MADHYA PRADESH)**

2. **UMA BAI W/O LATE POONAMCHAND, AGED ABOUT 60 YEARS, LAOK NAYAK NAGAR, DISTT. INDORE (MADHYA PRADESH)**

3. **BHAGWATI BAI W/O LAKHAN RATHORE DAUGHTER OF LATE POONAMCHAND, AGED ABOUT 32 YEARS, R/O RAJ NAGAR, DISTT. INDORE (MADHYA PRADESH)**

4. **SMT. SUNITA BAI W/O ASHOK DAUGHTER OF LATE POONAMCHAND, AGED ABOUT 28 YEARS, R/O SIVARIA TANDA, DISTT. KHANDWA (MADHYA PRADESH)**

.....APPELLANTS

(BY SHRI SANJAY SARWATE- ADVOCATE)

AND

1. **BASANTI BAI W/O LATE AMAR CHAND RATHORE, AGED ABOUT 67 YEARS, R/O PUNASA ROAD, MOONDI, TEHSIL & KHANDWA (MADHYA PRADESH)**

2. **JAGDISH S/O LATE AMAR CHAND RATHORE, AGED ABOUT 35 YEARS, R/O PUNASA ROAD, MOONDI, TEHSIL & KHANDWA (MADHYA PRADESH)**

3. **DINESH S/O LATE AMAR CHAND RATHORE, AGED ABOUT 30 YEARS, R/O PUNASA ROAD, MOONDI, TEHSIL & KHANDWA (MADHYA PRADESH)**

4. **LATA BAI, D/O LATE AMAR CHAND RATHORE, AGED ABOUT 32 YEARS, R/O PUNASA ROAD, MOONDI, TEHSIL & KHANDWA (MADHYA PRADESH)**

5. **URMILA BAI D/O LATE AMAR CHAND RATHORE, AGED ABOUT 35 YEARS, R/O PUNASA ROAD, MOONDI, TEHSIL & KHANDWA (MADHYA PRADESH)**

6. **ANOKHILAL S/O RUKHDU RATHORE, AGED ABOUT 47 YEARS, R/O VILLAGE MOONDI, TEHSIL AND DISTT. KHANDWA (MADHYA PRADESH)**

7. **ASGAR ALI S/O SAKKAT HUSAIN BOHRA, R/O MOHALLA GHASPURA, TAHSIL AND DISTRICT KHANDWA (MADHYA PRADESH)**

8. MANSOOR ALI S/O SAIFUDDIN DAUAD BOHRA, R/O MOHALLA GHASPURA, TAHSIL AND DISTRICT KHANDWA (MADHYA PRADESH)

9. STATE OF M.P. THROUGH COLLECTOR KHANDWA (MADHYA PRADESH)

.....RESPONDENTS

(BY SHRI ARVIND SONI- ADVOCATE FOR RESPONDENT NOS. 1 TO 4)

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

JUDGMENT

This Second Appeal under Section 100 of CPC has been filed against the judgment and decree dated 11.01.2010 passed by 1st Additional Judge to the Court of 4th Additional District Judge, Fast Track, District Khandwa in Civil Appeal No.37-A/2009 arising out of judgment and decree dated 12.04.2007 passed by 2nd Civil Judge Class-I, Khandwa in Civil Suit No.55-A/2006.

2. The facts necessary for disposal of the present appeal, in short, are that the plaintiffs/respondents filed a civil suit for declaration of title and possession pleading *inter alia* that the ancestral land bearing Khasra No. 66, area 0.22 Decimal situated in Village Mundi, Tehsil Khandwa, District East Nimar was recorded in the name of Sakharam, who is father of the defendants No. 1 and 2 and father-in-law of the plaintiff No. 1. In the revenue record of the year 68-69, the said land was

recorded in the name of Rukhdu and Sakharam, S/o Kaluji. A family partition took place between Rukhdu and Sakharam and accordingly 11 decimal of land situated on the western side went to the share of Rukhdu and 11 decimal of land situated on the Eastern side went to the share of Sakharam. Sakharam was in cultivating possession of the land in dispute and after his death, his son Amarchand came in possession of the same. Rukhdu has also expired and Amarchand has also expired. The plaintiffs are the legal representatives of Amarchand; whereas, the defendants No. 1 and 2 are the legal representatives of Rukhdu. However, in the year 1989, the defendants in connivance with the revenue authorities got the land recorded in the name of the defendants No. 1 and 2 only. It was claimed that the defendants have no right or title to get their names recorded in respect of 11 decimal of land which was situated on the eastern side and went to the share of Sakharam. Accordingly, the suit was filed for declaration of title and possession in respect of the said land.

3. It was further pleaded that in the month of July 2004 when the plaintiff No. 1 came back from the pilgrimage, then she found that the Hut which was already constructed on the disputed land was demolished and the lock was broke open by the defendants No. 1 and 2. Accordingly, the plaintiff No. 1 lodged a report and criminal case is pending. It was further claimed that the defendants No. 1 and 2 had forcibly taken possession of the land in dispute. The plaintiffs tried to get their land back but they did not succeed and accordingly, the suit was filed.

4. Later on, the plaintiffs had came to know that the defendant No. 2 Anokhilal by a registered sale deed dated 22.03.1991 has alienated their own share i.e. 11 decimal of land to Dasharath S/o Nawal Singh. The

plaintiffs have also came to know that the defendants No. 1 and 2 have alienated 3 decimal of the disputed land to the defendants No. 3 and 4 by registered sale deed dated 24.09.1992. Thus, it was claimed that the defendants No. 1 and 2 have forcibly taken possession of the entire property and are trying to alienate the same. The defendants No. 1 and 2 have also constructed a house on the land which went to the share of Sakharam which was inherited by his son Amarchand. The plaintiff issued a notice on 20.09.2005 which was replied by the defendants No. 1 and 2 thereby claiming their right over the land in dispute and also denied the title of the plaintiffs and accordingly, the suit was filed for declaration of title and possession.

5. The defendants No. 1 and 2 filed their written statement and denied the plaint averments. It was admitted that Khasra No. 66, area 0.22 was in the joint ownership of Sakharam and Rukhdu. However, it was claimed that 0.09 decimal of the land was alienated by Sakharam himself to one Pannalal, who was placed in possession. Pannalal enjoyed the said property during his lifetime and after his death, his son Ashok is in possession of the same. Therefore, it was claimed that Pannalal had already alienated his share during his lifetime and the remaining property which went to the share of the Rukhdu has remained in which the plaintiffs have no right or title. It was admitted that Sakharam, Rukhdu and Amarchan have died about 40, 45 and 20 years back. It was claimed that since Sakharam had already alienated 0.09 decimal of land to Pannalal, therefore, no title of Sakharam was left in the remaining land. The allegation of causing damage to the Hut and breaking open of the lock in the month of July, 2004 was also denied. It was further claimed that the plaintiffs have deliberately not impleaded Ashok, S/o Pannlal as defendant. The plaintiffs have not challenged the

ownership and mutation of the defendants No. 1 and 2. It was further claimed that the defendants No. 1 and 2 are in possession of the land in dispute for the last more than 12 years, therefore, they have perfected their title by way of adverse possession.

6. The defendants No. 3 and 4 filed their separate written statement and it was denied that the property in dispute was the joint property of Sakharam and Rukhdu. All the adverse plaint averments were denied. It was submitted that although the plaintiffs have claimed that the defendants No. 1 and 2 have alienated 11 decimal of the land to Dashrath by registered sale deed dated 22.03.1991 but neither any partition deed has been filed nor the aforesaid registered sale deed has been filed. Dashrath was also a necessary party and in his absence the effective decree cannot be passed. The suit has been undervalued. It was pleaded that the plaintiffs have claimed that the defendants No. 1 and 2 had got their name mutated in the year, 1989; whereas, the suit has been filed after 16 years and thus it is barred by time. It was further claimed that the suit is barred by time as the same has been filed after 14 years of execution of sale deed by the defendants No. 1 and 2 in favour of the defendants No. 3 and 4. The defendants No. 3 and 4 have taken possession of 1200 sq.ft. of land after purchasing the same by registered sale deed dated 24.09.1992 and accordingly it was prayed that the suit be dismissed.

7. The trial Court after framing issues and recording evidence, dismissed the suit.

8. Being aggrieved by the judgment and decree passed by the trial Court, the plaintiffs preferred an appeal, which has been allowed by the impugned judgment and decree.

9. Challenging the judgment and decree passed by the First Appellate Court, it is submitted by the counsel for the appellant that Poonamchand, who was one of the respondent before the First Appellate Court had died on 08.01.2010 but his legal representatives were not brought on record, therefore, the First appeal filed by the respondents/ plaintiffs had abated. It is further submitted that the suit filed by the plaintiffs was barred by time and was bad on account of non joinder of necessary parties and also did not disclose the cause of action and accordingly, proposed the following substantial questions of law:-

> "(A) Whether the finding that Sakharam was the owner of suit property, is arrived at by misreading of pleading and relying on an inadmissible evidence?
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> (B) Whether the learned appellate court correct in law in reserving the judgment of learned trial court?
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> (C) Whether the suit is barred by limitation?
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> (D) Whether the learned appellate court correct in law in saying that plaintiff has valued the suit properly?
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> (E) Whether the learned appellate court correct in law in allowing the application under Order 41 Rule 27 C.P.C. and taking documents into consideration?
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> (F) Whether the decree passed by the learned appellate court is nullity as Poonamchand died on 8-1-2010 before passing of impugned judgment?
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> (G) Whether the suit is maintainable for non-joinder of necessary parties?"

10. Heard learned counsel for the parties.

11. It is submitted by the counsel for the appellants that one of the respondent Poonamchand expired on 08.01.2010; whereas, the impugned judgment and decree was passed by the First Appellate Court on 11.01.2010. The legal representatives of Poonamchand were not brought on record, therefore, it is clear that the appeal as abated and relied upon the judgment passed by the Supreme Court in the case of **Gurnam Singh (Dead) Through Legal Representatives and others v. Gurbachan Kaur (Dead) by Legal Representatives** reported in **(2017) 13 SCC 414** has held as under:

> **13.** The short question which arises for consideration in this appeal is whether the impugned order allowing the plaintiff's second appeal is legally sustainable in law? In other words, the question is whether the High Court had the jurisdiction to decide the second appeal when the appellant and the 2 respondents had expired during the pendency of appeal and their legal representatives were not brought on record?
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> **14.** In a leading case of this Court in Kiran Singh v. Chaman Paswan [Kiran Singh v. Chaman Paswan, AIR 1954 SC 340], the learned Judge Venkatarama Ayyar, J. speaking for the Bench in his distinctive style of writing laid down the following principle of law being fundamental in nature: (AIR p. 342, para 6)
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>> "*6.* … It is a fundamental principle well established that a decree passed by a court without jurisdiction is a nullity, and that its invalidity could be set up whenever and wherever it is sought to be enforced or relied upon, even at the stage of execution and even in

collateral proceedings. A defect of jurisdiction, whether it is pecuniary or territorial, or whether it is in respect of the subject-matter of the action, strikes at the very authority of the court to pass any decree, and such a defect cannot be cured even by consent of parties."

15. The question, therefore, is whether the impugned judgment/order is a nullity because it was passed by the High Court in favour of and also against the dead persons? In our considered opinion, it is a nullity. The reasons are not far to seek.

16. It is not in dispute that the appellant and the two respondents expired during the pendency of the second appeal. It is also not in dispute that no steps were taken by any of the legal representatives representing the dead persons and on whom the right to sue had devolved, to file an application under Order 22 Rules 3 and 4 of the Code of Civil Procedure, 1908 (for short "the Code") for bringing their names on record in place of the dead persons to enable them to continue the lis.

17. The law on the point is well settled. On the death of a party to the appeal, if no application is made by the party concerned to the appeal or by the legal representatives of the deceased on whom the right to sue has devolved for substitution of their names in place of the deceased party within 90 days from the date of death of the party, such appeal abates automatically on expiry of 90 days from the date of death of the party. In other words, on 91st day, there is no appeal pending before the Court. It is "dismissed as abated".

18. Order 22 Rule 3(2) which applies in the case of the death of appellant-plaintiff and Order 22 Rule 4(3)

which applies in the case of the respondent-defendant provides the consequences for not filing the application for substitution of legal representatives by the parties concerned within the time prescribed. These provisions read as under:

18.1.Order 22 Rule 3(2)

> **"3. (2)** Where within the time limited by law no application is made under sub-rule (1) the suit shall abate so far as the deceased plaintiff is concerned, and, on the application of the defendant, the court may award to him the costs which he may have incurred in defending the suit, to be recovered from the estate of the deceased plaintiff."

18.2.Order 22 Rule 4(3)

> "**4. (3)** Where within the time limited by law no application is made under sub-rule (1), the suit shall abate as against the deceased defendant."

19. In the case at hand, both the aforementioned provisions came in operation because the appellant and the two respondents expired during the pendency of the second appeal and no application was filed to bring their legal representatives on record. As held above, the legal effect of the non-compliance with Rules 3(2) and 4(3) of Order 22 of the Code, therefore, came into operation resulting in dismissal of second appeal as abated on the expiry of 90 days from 10-5-1994 i.e. on 10-8-1994. The High Court, therefore, ceased to have jurisdiction to decide the second appeal which stood already dismissed on 10-8-1994. Indeed, there was no pending appeal on and after 10-8-1994.

20. In our considered view, the appeal could be revived for hearing only when firstly, the proposed legal representatives of the deceased persons had filed an

application for substitution of their names and secondly, they had applied for setting aside of the abatement under Order 22 Rule 9 of the Code and making out therein a sufficient cause for setting aside of an abatement and lastly, had filed an application under Section 5 of the Limitation Act seeking condonation of delay in filing the substitution application under Order 22 Rules 3 and 4 of the Code beyond the statutory period of 90 days. If these applications had been allowed by the High Court, the second appeal could have been revived for final hearing but not otherwise. Such was not the case here because no such applications had been filed.

21. It is a fundamental principle of law laid down by this Court in *Kiran Singh case [Kiran Singh v. Chaman Paswan, AIR 1954 SC 340]* that a decree passed by the court, if it is a nullity, its validity can be questioned in any proceeding including in execution proceedings or even in collateral proceedings whenever such decree is sought to be enforced by the decree-holder. The reason is that the defect of this nature affects the very authority of the court in passing such decree and goes to the root of the case. This principle, in our considered opinion, squarely applies to this case because it is a settled principle of law that the decree passed by a court for or against a dead person is a "nullity" *(see N. Jayaram Reddy v. LAO [N. Jayaram Reddy v. LAO, (1979) 3 SCC 578] , Ashok Transport Agency v. Awadhesh Kumar [Ashok Transport Agency v. Awadhesh Kumar, (1998) 5 SCC 567] and Amba Bai v. Gopal [Amba Bai v. Gopal, (2001) 5 SCC 570]).*

22. The appellants are the legal representatives of Defendants 2 and 4 on whom the right to sue has devolved. They had, therefore, right to question the legality of the impugned order inter alia on the ground of

> it being a nullity. Such objection, in our opinion, could be raised in appeal or even in execution proceedings arising out of such decree. In our view, the objection, therefore, deserves to be upheld. It is, accordingly, upheld.”

12. The Supreme Court in the case of **Amba Bai and others v. Gopal and others** reported in **(2001) 5 SCC 570** has held as under:

> **“7.** In the instant case, the deceased Radhu Lal, the second appellant died on 14-12-1990 and his death was not brought to the notice of the Court and the learned Single Judge disposed of the appeal on merits by dismissing the second appeal on 25-3-1991. As the judgment in the second appeal was passed without the knowledge that the appellant had died, the same being a judgment passed against a dead person is a nullity. When the second appellant Radhu Lal died on 14-12-1990, his legal representatives could have taken steps to get themselves impleaded in the second appeal proceedings and as it was not done, the second appeal should be taken to have abated by operation of law. Therefore, the question that requires to be considered is that when there was abatement of the second appeal, could there be a merger of the same with the decree passed by the first appellate court?
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> **8.** Before considering the question of merger, we have to consider the effect of abatement. When the second appeal had abated and the legal representatives of the appellant were not brought on record, the decree, which was passed by the first appellate court, would acquire finality. A similar matter came up before this Court in *Rajendra Prasad v. Khirodhar Mahto [1994 Supp (3) SCC 314]* wherein it was held that as a consequence of

the abatement of the appeal filed against final decree in a partition suit, the preliminary decree would become final. In that case, the appellants and Tapeshari Kuer filed a suit for partition of immovable properties, including Plaint 4 and 5 properties. The property originally belonged to one Bishni Mahto. He had two sons, namely, Sheobaran Mahto and Ramyad Mahto. Tapeshari Kuer was the daughter of Ramyad Mahto. Plaint 4 and 5 properties were not partitioned between these two sons of Bishni Mahto. Ramyad Mahto, the father of Tapeshari Kuer died and she succeeded to the one-half of the undivided share of the two sons of Bishni Mahto. Tapeshari Kuer had executed a gift deed in favour of the appellants bequeathing her undivided interest inherited from her father in respect of Plaint Item 4 property. The trial court decreed the suit declaring the half share of Tapeshari Kuer in Plaint 5 of the property. The appellants who had joined as Plaintiffs 1 and 2 were held to have half share in Plaint Item 4 by virtue of the gift deed executed by her. The defendants in the suit filed an appeal and pending appeal, Tapeshari Kuer died. Her legal heirs were not brought on record. The appellate court gave a finding that Tapeshari Kuer was not the daughter of Ramyad Mahto and the appellant did not acquire any interest in the undivided share. The suit was dismissed. Original Plaintiffs 1 and 2 filed the second appeal before the High Court. The second appeal was dismissed as the heirs of Tapeshari Kuer were not brought on record. Original Plaintiffs 1 and 2 carried the matter to this Court by special leave. It was contended that Plaintiffs 1 and 2 were entitled to the benefit of preliminary decree. Ultimately, this Court held that whether Tapeshari Kuer was the daughter of Ramyad Mahto or not was required to be gone into only when her legal representatives were brought on record. It was held that the decree against a dead person was a nullity and,

therefore, the declaration by the first appellate court that Tapeshari Kuer was not a daughter of Ramyad Mahto was not valid in law. The High Court had held that the decree of the appellate court was a nullity and the respondent did not file any appeal against that part of the decree, the result was that the preliminary decree became final.

14. In the instant case, there is no question of the application of the doctrine of merger. As the second appellant Radhu Lal died during the pendency of the appeal, and in the absence of his legal heirs having taken any steps to prosecute the second appeal, the decree passed by the first appellate court must be deemed to have become final. By virtue of the order passed by the first appellate court, the plaintiff's suit for specific performance was decreed. Failure on the part of the legal heirs of Radhu Lal to get themselves impleaded in the second appeal and pursue the matter further shall not adversely affect the plaintiff decree-holder as it would be against the mandate of Rule 9 Order 22 of the Code of Civil Procedure. The impugned order is, therefore, not sustainable in law and the same is set aside and the appeal is allowed. The executing court may proceed with the execution proceedings. Parties to bear their respective costs."

13. Considered the submissions made by the counsel for the appellants.

14. From the order-sheets of the appellate Court, it is clear that the final arguments were heard on 04.01.2010 and the case was fixed for delivery of judgment on 11.01.2010. According to the appellants, Poonamchand expired on 08.01.2010 i.e. after the case was reserved for judgment.

15. The order 22 Rule 6 of C.P.C. provides that there shall not be any abatement by reason of death after hearing and the judgment in such

case shall have the same force and effect, as if it had been pronounced before the death took place. Under these circumstances, this Court is of the considered opinion that the appeal had not abated by the reason of death of Poonamchand on 08.01.2010.

16. It is next contended by the counsel for the appellants that the suit suffers from non joinder of necessary parties and accordingly the suit itself was not maintainable.

17. Considered the submissions made by the counsel for the appellants.

18. During the course of arguments, it was fairly conceded by the counsel for the appellants that objection was raised by the appellants in the written statement that Ashok is a necessary party and the suit suffers from non joinder of necessary parties. Thus, the only question for consideration is as to whether a decree can be reversed on account of non joinder of necessary parties or not?

19. Section 99 of the C.P.C. reads as under:-

> "99. **No decree to be reversed or modified for error or irregularity not affecting merits or jurisdiction**.- No decree shall be reversed or substantially varied, nor shall any case be remanded, in appeal on account of any misjoinder [or non-joinder] of parties or causes of action or any error, defect or irregularity in any proceedings in the suit, not affecting the merits of the case or the jurisdiction of the Court:
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> [Provided that nothing in this section shall apply to non-joinder of a necessary party.]"

20. It is the case of the defendants that Sakharam had sold his land to Pannalal and after death of Pannalal, his son Ashok is in possession of land. The defendants have examined Ashok (D.W.-3). He claimed that

his father Pannalal had purchased 9 decimal of land from Sakharam, S/o Kaluji. In cross-examination he admitted that he has not produced any sale-deed to show that 9 decimal of land was purchased by his father from Sakharam. He further admitted in cross-examination that 9 decimal of land is a different land. He further claimed that 9 decimal of land was received by him in his family partition but he fairly admitted that he has not filed any partition deed. Thus, in absence of any sale deed, the appellants have failed to prove that the Sakharam had alienated his share to Pannalal. Thus, it is clear that Ashok was not a necessary party.

21. So far as the question of limitation is concerned, the First Appellate Court has elaborately considered this aspect.

22. It is the case of the parties that the land in dispute belongs to Sakharam i.e. father of Amarchand and Rukhdu. In *Adhikar Abhilekh* of the year 1968-69 (Ex.-P/1), the names of Rukhdu and Sakharam were recorded in the revenue records. Similarly, in the Khasra Panchshala of the years 1988-89 to 1991-92, the names of Rukhdu and Sakharam, S/o Kalu were recorded.

23. It is the case of the plaintiffs that a partition took place between Rukhdu and Sakharam and accordingly 11 decimal of land went to the share of Rukhdu; whereas, 11 decimal of land went to the share of Sakharam. The plaintiffs are legal representatives of Sakharam; whereas, the defendants are the legal representatives of Rukhdu. Thus, one thing is clear that the property was jointly owned by Rukhdu and Sakharam and there was a partition during their lifetime and 11 decimal of land went to the share of Sakharam and 11 decimal of land went to the share of Rukhdu.

24. It is the case of the plaintiffs that later on, the entire land was recorded in the name of Rukhdu and the name of Sakharam was deleted.

Whereas, it is the case of the defendants that Sakharam had alienated his share to Pannalal and at present Ashok, who is the son of Pannalal is in possession of the land which was alienated by Sakharam. Poonamchand (D.W.-1) has admitted that Sakharam and Rukhdu were real brothers. He expressed his ignorance as to whether any partition had taken place between Sakharam and Rukhdu but claimed that 22 decimal of land is the private property of his father Rukhdu. He admitted that he has not filed any document to show that Sakharam had alienated his share to Pannalal Rathore but claimed that he has produced the witnesses. He further admitted that his brother Anokhi has alienated 11 decimal of land to Dashrath, S/o Nawal Singh Rajput. However, he denied that he had taken his share in consideration amount.

25. Once, it is undisputed fact that 22 decimal of land was the joint property of Sakharam and Rukhdu, who were the real brothers and the plaintiffs are the legal representatives of Sakharam and the appellants are the legal representatives of Rukhdu and in absence of any evidence that Sakharam had alienated 9 decimal of land to Pannalal, this Court is of the considered opinion that the appellants have failed to prove their defense that they are the owner of the land in dispute.

26. So far as the question of period of limitation is concerned, it is the case of the plaintiffs that in the year 1989, Rukhdu in connivance with the revenue authorities had got his name recorded in the revenue records whereas prior to that, the name of Rukhdu and Sakharam were jointly recorded. It is also the case of the plaintiffs that in the 1st Week of July, 2004 when she came back from pilgrimage, then she found that Hut was demolished and the defendants No. 1 and 2 had forcibly taken possession of the same.

27. The suit was filed on 25.10.2005. Thus, within one year from her dispossession. The defendants have failed to prove that they were in possession of the land even prior to year, 2004. The finding regarding possession is pure finding of fact. The First Appellate Court has considered the evidence of Poonamchand (D.W.-1). In paragraph 14 of his cross-examination he has admitted that out of 22 decimal of land, 11 decimal of land has been alienated by his father Anokhilal to his brother Dashrath, therefore, it is clear that in fact no right of the defendants was left in the Khasra No. 66, area 11 decimal which went to the share of Rukhdu. Although, the defendants had given suggestion to Basanti Bai that the house of Poonamchand was constructed on the disputed land about 15-20 years back but the said suggestion was denied. Even the defendants have not filed any documents to show that they had constructed their house over the suit land about 15-20 years back. Even Poonamchand (D.W.-1) has not stated in his evidence that he is in possession by constructing a house over the land in dispute.

28. Thus, it appears that only after dispossessing the plaintiff Bashanti Bai, the defendant Poonamchand had constructed a house over it. Even Poonamchand in paragraph 16 of the cross-examination has categorically admitted that he has recently constructed a house on the land which was lying vacant and the house was constructed about 1 year back but he claimed that the land is in possession for the last 50 years.

29. If, the evidence of Bashanti Bai (P.W.-1) and Poonamchand (D.W.-1) are considered, then it is clear that Bashanti Bai is right in submitting that recently Poonamchand has constructed his house over the land in dispute. Therefore, it is clear that the defendants have failed to prove that the plaintiffs were not dispossessed in the year 2004. On the contrary there is ample evidence on record to show that the

defendants were dispossessed in the month of July, 2004. Therefore, it cannot be said that the suit was barred by time.

30. As no substantial question of law arises in the present appeal, therefore, the judgment and decree dated 11.01.2010 passed by 1st Additional Judge to the Court of 4th Additional District Judge, Fast Track, District Khandwa in Civil Appeal No.37-A/2009 is hereby **affirmed**.

31. The appeal fails and is hereby **dismissed**.

(G.S. AHLUWALIA)
JUDGE

ashish