IN THE HIGH COURT OF MADHYA PRADESH AT JABALPUR

BEFORE

HON'BLE SHRI JUSTICE ARUN KUMAR SHARMA

ON THE 24th OF AUGUST, 2022

SECOND APPEAL No. 650 of 2015

Between:-

1. **SMT. USHA W/O GOPAL KANOJIYA, AGED ABOUT 45 YEARS, GURRAIYA NAKA CHHINDWARA (MADHYA PRADESH)**

2. **SMT. RUKHMANI W/O HARICHANDRA KANOJOYA, AGED ABOUT 43 YEARS, R/O GURRAIYA NAKA, CHHINDWARA (MADHYA PRADESH)**

.....APPELLANTS

(BY SHRI JAIDEEP SIRPURKAR, ADVOCATE)

AND

1. **SARUBAI W/O BHADDA MALI, AGED ABOUT 74 YEARS, GURRAIYA ROAD NEAR NEW VEGETABLE MARKET CHHINDWARA (MADHYA PRADESH)**

2. **VIMLABAI W/O RAJU HANVATKAR, AGED ABOUT 40 YEARS, GURRAIYA ROAD NEAR NEW VEGETABLE MARKET CHHINDWARA (MADHYA PRADESH)**

3. **EKNATH S/O BHADDA MALI, AGED ABOUT 38 YEARS, GURRAIYA ROAD NEAR NEW VEGETABLE MARKET CHHINDWARA (MADHYA PRADESH)**

4. **BABBLU S/O BHADDA MALI, AGED ABOUT 27 YEARS, GURRAIYA ROAD NEAR NEW VEGETABLE MARKET CHHINDWARA (MADHYA PRADESH)**

5. **KU KALPANA D/O PANDHARI, AGED ABOUT 18 YEARS, GURRAIYA ROAD NEAR NEW VEGETABLE MARKET CHHINDWARA (MADHYA PRADESH)**

6. **MUKESH S/O PANDHARI, AGED ABOUT 14**

YEARS, OCCUPATION: MIONR THROUGH MOTHER NATURAL GUARDIAN SMT. SUBHADERA GURRAIYA ROAD NEAR NEW VEGETABLE MARKET CHHINDWARA (MADHYA PRADESH)

7. NITESH S/O PANDHARI, AGED ABOUT 17 YEARS, OCCUPATION: MIONR THROUGH MOTHER NATURAL GUARDIAN SMT. SUBHADERA GURRAIYA ROAD NEAR NEW VEGETABLE MARKET CHHINDWARA (MADHYA PRADESH)

8. COLLECTOR THE STATE OF MADHYA PRADESH CHHINDWARA CHHINDWARA (MADHYA PRADESH)

9. NAYAB TAHSILDER CHHINDWARA CHHINDWARA (MADHYA PRADESH)

10. SMT. BHARTI W/O DR. K.C.JAIN GULABRA CHHINDWARA (MADHYA PRADESH)

.....RESPONDENTS

(BY SHRI SUSHIL KUMAR TIWARI, ADVOCATE FOR RESPONDENTS NO. 1 TO 7.)

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

ORDER

The appellants / defendants having lost in both the courts below have filed the instant appeal.

2. The instant Second appeal under Section 100 of the Code of Civil Procedure has been preferred by the appellants / defendants being aggrieved by the judgment and decree dated 25.02.2013 passed by First Additional District Judge, Chhindwara (MP) in Civil Appeal No.30-A/12, whereby learned First Appellate Court has affirmed the judgment and decree dated 7.8.2009 passed by First Civil Judge Class-I, Chhindwara (MP) in Civil Suit No.21-A/08.

3. The facts of the case, succinctly stated are that the respondents no. 1 to 7 / plaintiffs filed a suit for declaration of the land bearing khasra no.570/7 area

0.085 hectare situated in Mouja Chhindwara, district Chhindwara to be undivided joint Hindu Family property and also for partition of 1/7th share in the land in dispute in favour of the respondents no. 1 to 7 / plaintiff separately because no partition has taken place. Claim in the suit was based on the allegation that the suit property was jointly owned by one Pandhari, Eknath and Sarubai and was not partitioned. Thereafter, the suit property devolved upon the respondents no. 1 to 7, however, name of the respondents no. 1 to 7 was not mutated in the revenue records. However, fraudulently, sale deeds dated 26.7.1991 and 23.10.1998 were got executed in favour of the respondent no.10 and the appellants, respectively. It was further alleged that the appellants are trying to take possession of the suit property and raise construction thereon.

4. On summons being issued, the appellants / defendants entered their appearance and filed written statement and broadly denied the allegations levelled in the suit. It was stated that the partition was affected in family of the respondents no. 1 to 7 under which the suit property fell into the share of Pandhari who sold his divided share to the appellants. It was further stated that the appellants are in possession of the suit property on which a house is built.

5. The trial Court on the basis of the pleadings of the parties, framed issues and after recording the evidence and hearing both the parties, decreed the plaintiffsÃ¢Â€Â™ suit vide judgment and decree dated 7.8.2009 holding that the suit property is undivided joint family property and respondents no. 1 to 7 have 1/7th share in the suit property. It was further held that the sale deeds executed in favour of the appellants as well as respondent no. 10 is void and also directed for demolition of the construction and handing over vacant possession of the suit property to the respondents no. 1 to 7 / plaintiffs. Being aggrieved thereof, First appeal preferred by the appellants / defendants has

been dismissed by learned First Additional District Judge, Chhindwara vide impugned judgment and decree dated 25.02.2013. Feeling aggrieved, the appellants / defendants have preferred the instant second appeal.

6. Learned counsel for the appellants / defendants contended that learned both the courts below have committed error in passing the impugned judgment and decree. The partition had already taken place. The sale deeds were rightly executed in favour of the appellants and respondent no.10. In order to substantiate his contention, has placed reliance on the judgments of the HonÃ¢Â€Â™ble Apex Court in the case of **Executive Officer vs. Chandran and others, 2017 (3) MPLJ, 306, Hardeo Rai vs. Sakuntala Devi and others, (2008) 7 SCC 46 and Peethani Suryanarayana and another vs. Repaka Venkata Ramana Kishore and others (2009) 11 SCC 308** and prayed that second appeal be allowed by setting aside the judgments and decree passed by both the courts below.

7 . *Per contra*, learned counsel for the respondents no. 1 to 7 argued in support of the impugned judgments and decree passed by the both the courts below and also contended that once a concurrent finding of fact has been recorded by both the courts below that the property in dispute is still joint and no partition has taken place, therefore, none of the parties has a right to sell a specific part of his share. In order to buttress his contention, he has placed reliance on a judgment of the HonÃ¢Â€Â™ble Apex Court in the case of **Vineeta Sharma vs. Rakesh Sharma and others, 2021 (1) MPLJ 209 (relevant para 81) and this court in the case of Parmal Singh (dead) through L.Rs. and others vs. Ghanshyam and another, 2020 (2) MPLJ 133 (relevant para 13) and Ram Singh and others vs. Kapooribai and**

others, 2015 RN 98 (relevant paras 3, 4 & 5) and prayed that no substantial question of law is involved in this second appeal and the same be dismissed.

8. I have bestowed my anxious consideration to the rival contentions of both the parties and minutely perused the judgments passed by both the courts below.

9. The Supreme Court in the case of **Narayanan Rajendran and Another vs. Lekshmy Sarojini and others in Civil Appeal No.742 of 2001** has broadly discussed about the admissibility of the second appeal. The Court observed as under:-

> "38. In Kamti Devi (Smt.) and Anr. v. Poshi Ram (2001) 5 SCC 311 the court came to the conclusion that the finding thus reached by the first appellate court cannot be interfered with in a second appeal as no substantial question of law would have flowed out of such a finding."

10. The Supreme Court taking into consideration the principles of law in the cases of **Thiagarajan v. Sri Venugopalaswamy B. Koil [(2004) 5 SCC 762], Commissioner, Hindu Religious & Charitable Endowments v. P. Shanmugama [(2005) 9 SCC 232], State of Kerala v. Mohd. Kunhi [(2005) 10 SCC 139] and Madhavan Nair v. Bhaskar Pillai [(2005) 10 SCC 553],** has observed that the High Court has no jurisdiction in second appeal to interfere with the findings of fact.

11. The Supreme Court in para 40 has observed that "where special leave petition was filed against a judgment of the High Court interfering with findings of fact of the lower appellate court. This court observed that to say the least the approach of the High Court was not proper. It is the obligation of the courts of

law to further the clear intendment of the legislature and not frustrate it by excluding the same. This court further observed that the High 5 Court in second appeal cannot substitute its own findings on re-appreciation of evidence merely on the ground that another view was possible."

12. From perusal of the record, it is found that there are concurrent findings of the Courts below against the appellant. This Court would not examine correctness of findings of facts in exercise of appellate Power in Second Appeal. Since this Court do not find any the impugned decisions are not being contrary to law nor that decision having failed to determine some material issue of law. Further that this Court do not find any substantial error or defect in procedure provided by the Court or any other law for the time being in force, which may possibly have produced error or defect in the decision of the case upon the merit. In terms of Section 100 of CPC, an appeal cannot be admitted merely because the appellant has shown that an arguable or prima facie valid points of law arises in the second appeal, but that the Court has to be satisfied that the decision of the lower appellate Court on a point of law was erroneous and that in order to do justice between the parties (appellant and the respondents). It is essential that a further hearing should be given to both the parties. In a case of and S**antosh Hazari v. Purushottam Tiwari (deceased) (2001) 3 SCC 179** the court reiterated the statement of law that the High Court cannot proceed to hear a second appeal without formulating the substantial question of law. These judgments have been referred to in the later judgment of **K. Raj and Anr. v. Muthamma (2001) 6 SCC 279.** A statement of law has been reiterated regarding the scope and interference of the court in second appeal under Section 100 of the Code of Civil Procedure.

13. In respect of exercise of jurisdiction under Section 100 of Code of Civil

Procedure, Hon'ble Apex Court in **Gurnam Singh vs. Lehna Singh, reported in (2019) 7 SCC 641** held as under :-

> "13.1 .....The existence of Ã¢Â€Â˜a substantial question of lawÃ¢Â€Â™ is a sine qua non for the exercise of the jurisdiction under Section 100 of the CPC. As observed and held by this Court in the case of Kondiba Dagadu Kadam (Supra), in a second appeal under Section 100 of the CPC, the High Court cannot substitute its own opinion for that of the First Appellate Court, unless it finds that the conclusions drawn by the lower Court were erroneous being:
> (i) Contrary to the mandatory provisions of the applicable law;
> OR
> (ii) Contrary to the law as pronounced by the Apex Court;
> OR
> (iii) Based on inadmissible evidence or no evidence.
> It is further observed by this Court in the aforesaid decision that if First Appellate Court has exercised its discretion in a judicial manner, its decision cannot be recorded as suffering from an error either of law or of procedure requiring interference in second appeal. It is further observed that the Trial Court could have decided differently is not a question of law justifying interference in second appeal.

14. HonÃ¢Â€Â™ble the Apex court in the case of **Vineeta (supra)** in para no. 81 has held as under :-

> Ã¢Â€Âœ It is settled proposition of law that without partition, only undivided share can be sold but not specific property, nor joint possession can be disrupted by such alienation. Whether the consent of other coparcener is required for sale or

> not, depends upon by which School of Mitakshara law, parties are governed, to say, in Benares School, there is a prohibition on the sale of property without the consent of other coparceners. The Court in the abovesaid decision made general observation but was not concerned with the aspect when the partition was completed, the effect of intervening events and effect of statutory provisions as to partition, as such, it cannot be said to be an authority as to provisions of section 6 as substituted and as to enlargement of the right by operation of law achieved thereunder. Shares of coparceners can undergo a change in coparcenary by birth and death unless and until the final division is made. The body of coparcenary is increased by the operation of law as daughters have been declared as a coparcener, full effect is required to be given to the same. The above decision cannot be said to be an authority for the question involved in the present matters.

15. Relevant para no. 13 of the case of **Parmal Singh (supra**) is reproduced herein below :-

> It is well established principle of law that unless and until the property is partitioned, the co-sharer can only sell to the extent of his share, but he cannot sell any specific portion of the land. Accordingly, it is directed that in case if defendants No. 1, 2 and 3 files a suit for partition within a period of three months from today, then the purchaser shall continue to remain in possession of the land purchased by him by sale deed dated 21-8-1997, till the actual partition is done. The specific piece of land would be decided only after the partition is done between the defendant No.1 and the plaintiffs.

16. Relevant paragraphs no.3, 4 & 5 of the case of **Ram Singh (supra)** are reproduced herein below :-

> 3. The only thing additionally joint by the Courts below was, also passing a subsequent order in consequent to the aforesaid declaration by exercising the power under Order 7 Rule 7 CPC whereby the Courts below not only directed partition of the property amongst the respondents/plaintiffs, but also further directed the revenue authorities to get partition effected and then pass necessary entries and orders.
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> 4. According to the counsel for appellant, this order could not be passed. However, learned counsel for the respondents has brought to my notice, the judgment delivered by Division Bench of Karnataka High Court in case of Smt Neelawwa Vs. Smt Shivawwa reported in AIR 1989 Karnataka 45.
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> Para 8.1 of the aforesaid Division Bench judgment is relevant, which is reproduced herein:
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> "8.1 The provisions of Order VII. Rule 7 of the CPC, are so widely worded that they do enable the Court to pass a decree for partition in a suit for declaration of title to immovable property and possession thereof where it S.A. No.1584/2005 turns out that the plaintiff is not entitled to all the interest claimed by him in the suit property. In such a situation, there is nothing unusual in giving relief to the parties by directing partition of the suit property according to the share of the parties established the suit. The normal rule that relief not founded on the pleadings should not be granted is not without an exception. Where substantial matters constituting the title of all the parties are touched in the issued and have been fully put in evidence, the case does not fall within the aforesaid rule. The Court has to look into the substance of the claim in determining the nature of

> the relief to be granted. Of course, the Court while moulding the relief must take care to see that relief it grants is not inconsistent with the plaintiff's claim, and is based on the sa me cause of action on which the relief claimed in the suit, that I occasions no prejudice or causes embarrassment to the other side; that it is not larger than the one claimed in the suit, even if the plaintiff is really entitled to it, unless he amends the plaint; that it had not been barred by time on the date of presentation of the plaint."
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> 5. The counsel for appellants on the other hand submits that suit filed by the respondents which was not coupled with the relief of possession was not maintainable under Section 37 of the Specific Relief Act. However, so far as the S.A. No.1584/2005 appellants are concerned, they are found to be forgers and any plea taken by them is of no consequence and therefore they cannot be even heard on this point.

17. From perusal of the record, I find that the judgments and decree passed by the Courts below are well reasoned and passed after due appreciation of oral as well as documentary evidence on record. The learned counsel for the appellants has failed to show that how the findings of facts recorded by the Courts below are illegal, perverse and based on no evidence. Learned both the courts below have legally and rightly dealt with the issue involved in the matter with regard to the property in dispute. The Supreme Court in number of cases has held that in exercise of powers under Section 100 of Code of Civil Procedure can interfere with the finding of fact only if the same is shown to be perverse and based on no evidence. Some of these judgments are Ã¢Â€Â“ **Hajazat Hussain Vs. Abdul Majeed and others (2011) 7 SCC 189, Union**

of India Vs. Ibrahim Uddin (2012) 8 SCC 148 and vishwanath Agrawal Vs. Saria Vishwanath Agrawal (2012) 7 SCC 288.

18. For the reasons aforesaid, I find no merit in the instant second appeal. Concurrent finding recorded by the courts below in favour of the plaintiffs / respondents no. 1 to 7 is fully justified by the evidence on record. Defendants-appellants have taken contradictory and untenable stand. The same has been rightly discarded. Concurrent finding recorded by the courts below is not based on misreading or mis-appreciation of evidence nor it is shown to be illegal or perverse in any manner so as to call for interference in second appeal. No question of law, much less substantial question of law, arises for adjudication in the instant second appeal. Accordingly, the appeal is dismissed in limine. Consequently, interim order dated 17.10.2016 stands vacated.

A copy of this order along with record be sent back to the courts below for information and its compliance.

(ARUN KUMAR SHARMA)
JUDGE

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