

**IN THE HIGH COURT OF MADHYA PRADESH
AT JABALPUR**

BEFORE

HON'BLE SHRI JUSTICE DWARKA DHISH BANSAL

ON THE 4th OF MARCH, 2024

MISC. APPEAL No. 1706 of 2018

BETWEEN:-

**KAMTA PRASAD TIWARI S/O LATE SHRI BALA
PRASAD TIWARI, AGED ABOUT 64 YEARS,
OCCUPATION: FARMER VILLAGE CHINDHAI
PIPARIYA P.S. AND TAHSIL BARHI (M.P)**

.....APPELLANT

(BY MS. TULIKA GULATEE - ADVOCATE)

AND

- 1. RAMJI TIWARI S/O LATE SHRI BALA PRASAD
TIWARI, AGED ABOUT 56 YEARS, VILLAGE
CHINDHAI PIPARIYA P.S. AND TEHSIL BARHI
(MADHYA PRADESH)**
- 2. SMT. ASHA BAI W/O SHRI RAMJI TIWARI, AGED
ABOUT 52 YEARS, R/O VILAGE CHINDHAI
PIPARIYA P.S. AND TAHSIL BARHI (MADHYA
PRADESH)**
- 3. SMT. CHAINA BAI W/O SHUKHNANDAN
TIWARI, AGED ABOUT 63 YEARS, R/O VILAGE
CHINDHAI PIPARIYA P.S. AND TAHSIL BARHI
(MADHYA PRADESH)**
- 4. GEETA BAI W/O AWDHESH PRASAD
BADGAIYAN D/O LATE SHRI SUNDAR LAL,
AGED ABOUT 61 YEARS, R/O VILLAGE UTAMAT,
TAHSIL RAMNAGAR, (MADHYA PRADESH)**
- 5. SMT. UMA BAI W/O SHRI CHHUTKAI BADGAIYA
D/O LATE SHRI SUNDAR LAL, AGED ABOUT 61**

**YEARS, R/O VILLAGE UTAMAT, TAHSIL
RAMNAGAR, (MADHYA PRADESH)**

- 6. STATE OF M.P. THR. COLLECTOR DISTT-KATNI
(MADHYA PRADESH)**
- 7. SMT. RAMVATI D/O LATE SHRI BALA PRASAD
TIWARI W/O SHRI RUDRADATTA MISHRA,
AGED ABOUT 52 YEARS, R/O VILLAGE JAGUA
P.S.AND TAHSIL BARHI (MADHYA PRADESH)**
- 8. SMT. DULARI BAI D/O LATE SHRI BALAL
PRASAD TIWARI W/O SHRI NATHULAL
DWIVEDI R/O VILLAGE JAGUA, POST RAPTA,
TAHSIL BEOHARI (MADHYA PRADESH)**

....RESPONDENTS

***(MS. MANJULA VERMA – ADVOCATE FOR RESPONDENTS 1-2, SHRI
YADVENDRA DWIVEDI – PANEL LAWYER FOR RESPONDENT
6/STATE)***

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

ORDER

This misc. appeal has been preferred by plaintiff 1 challenging the judgment and decree dated 07.03.2018 passed by First Additional Judge to the Court of First Additional District Judge, Katni, in Civil Appeal No.100025/2015 reversing judgment and decree dated 20.08.2015 passed by First Civil Judge Class-II, Katni, in Civil Suit No.42-A/2012 whereby trial Court decreed the suit filed by appellant - Kamta Prasad Tiwari and respondents 7-8 Smt. Ramvati & Smt. Dulari Bai, holding them to be entitled for $\frac{1}{4}$ share each and separate possession over the suit property, at

the same time disputed Will dated 26.04.2010 propounded by defendant 2 was also declared null and void, which in civil appeal filed by defendant 2-Smt Ashabai Tiwari, has been reversed and matter has been remanded to trial Court for decision of civil suit afresh.

2]. Facts in short are that the plaintiffs instituted a suit for declaration of $\frac{1}{4}$ share each, for partition and separate possession as well as for declaring the Will dated 26.04.2010 null and void allegedly executed in favour of defendant 2 by late Muniya Bai, (mother of plaintiffs 1-3 and defendant 1- Ramji Tiwari), on the premise that the land in question belonged to Muniya Bai and the plaintiffs and defendant 1 being her sons and daughters are having equal $\frac{1}{4}$ share in the property. The defendant 2-Smt. Ashabai Tiwari is wife of Shri Ramji Tiwari.

3]. By filing joint written statement, the defendants 1-3 admitted the suit property belonging to late Muniya Bai and it was contended that defendant 2-Asha Bai is exclusive owner of the land on the basis of Will dated 26.04.2010 executed by late Muniya Bai. On *inter alia* contentions the suit was prayed to be dismissed.

4]. On the basis of pleadings of the parties, trial Court framed as many as five issues and issue no 4 was framed in respect of veracity of the Will

dtd. 26.04.2010 allegedly executed by late Muniya Bai in favour of defendant 2- Smt. Ashabai Tiwari.

5]. Record shows that in support of plaint averments, the plaintiffs examined Kamta Prasad Tiwari (PW-1), Chandrabhan Prasad Tiwari (PW-2) and produced documentary evidence (Ex.P/1 to Ex.P/7). As the plaintiffs challenged execution of Will dtd. 26.04.2010, therefore, they themselves filed certified copy of Will dated 26.04.2010 (Ex.P/5). As against the case of plaintiffs, the defendants examined Ramji Tiwari (DW-1), Yunendra Kumar Tiwari (DW-2) and Chaina Bai (DW-3), however no documentary evidence was produced by the defendants.

6]. Upon due consideration of the aforesaid material available on record, trial Court vide judgment and decree dated 20.08.2015 decreed the suit holding the plaintiffs to be entitled for $\frac{1}{4}$ share each and also held the Will dated 26.04.2010 to be null and void.

7]. Against judgment and decree dated 20.08.2015 defendant 2-Smt. Ashabai Tiwari preferred civil appeal and during pendency of appeal two applications under Order 6 Rule 17 CPC dated 18.07.2017 and under Order 41 Rule 27 CPC dated 02.02.2018 were filed, which were replied by the plaintiffs with the prayer of dismissal of the applications.

8]. After hearing the parties, first appellate Court has vide judgment and decree dated 07.03.2018, without taking into consideration the merits and demerits of judgment and decree passed by trial Court, allowed both the applications and remanded the matter to trial Court for decision of civil suit afresh, against which this misc. appeal has been preferred by the plaintiff 1- Kamta Prasad Tiwari.

9]. Learned counsel for the appellant/plaintiff 1 submits that although in the impugned judgment, first appellate Court in paragraphs 11 & 12, has mentioned that defendant 2 has filed certified copy before first appellate Court, but no certified copy has been placed on record and only a photocopy of the Will has been placed on record. She further submits that without coming to conclusion that on the basis of available evidence, judgment and decree passed by trial Court is sustainable or not, first appellate Court vide impugned judgment and decree, after allowing the applications under Order 6 Rule 17 CPC and under Order 41 Rule 27 CPC, has set aside the judgment and decree of trial Court and matter has been remanded. Learned counsel further submits that just with a view to fill up the lacuna in the case, remand cannot be ordered. In support of her submissions learned counsel placed reliance on decisions of Supreme Court in the case of Hameed (Dead) by LRs And Others vs.

Kummottummal Kunhi P.P Amma And Others (2007) 15 SCC 155 & Ravi Kumar and Another vs. Nagar Palaika Parishad Ganj Basoda 2016 SCC OnLine MP 6404 and prays for allowing the misc appeal.

10]. Learned counsel appearing for the respondents 1-2, supports the impugned judgment of remand and prays for dismissal of misc. appeal.

11]. Heard learned counsel for the parties and perused the record.

12]. In the present case, ownership of the disputed property with late Muniya Bai is not in dispute and on that basis instant civil suit was filed by the plaintiffs claiming declaration over $\frac{1}{4}$ share each and by filing written statement the defendants 1-2 on the premise of Will dated 24.06.2010 contended that the defendant 2 is exclusive owner of the suit property.

13]. Although the plaintiffs have challenged the Will in question alleging it to be null and void, but in the aforesaid circumstances the entire burden to prove the Will was on the defendant 2 who took the plea of Will in her favour but for the reasons best known to her or to the defendants 1-3, the defendant 2 did not come in witness box and no attesting witness to the Will has been examined. Further no documentary evidence has been produced on record.

14]. By way of application under Order 41 Rule 27 CPC it has been contended that because original Will is in record of S.D.O, therefore, certified copy is being produced and first appellate Court has also taken the said fact to be true and permitted the defendant 2 to bring the certified copy of the Will on record, but upon perusal of record of first appellate Court, this Court does not find any certified copy of Will on record and only a photocopy is available in the record of first appellate Court at page no.18, therefore, statement of facts mentioned in paragraphs 11 & 12 of the impugned judgment becomes incorrect.

15]. Perusal of paragraphs 9 to 17 of impugned judgment passed by first appellate Court also depicts that first appellate Court has not come to any conclusion that on the basis of available evidence, judgment and decree passed by trial Court is sustainable or not, or there is any illegality in it and just by allowing the applications under Order 6 Rule 17 CPC and Order 41 Rule 27 CPC, judgment and decree passed by trial Court has been set aside by the impugned judgment and decree.

16]. Upon due consideration of the material available on record and in the considered opinion of this Court, impugned judgment and decree of remand passed by first appellate Court, is not sustainable and deserves to

be and is hereby set aside with the direction that first appellate Court itself, shall decide the appeal on its own merits.

17]. With the aforesaid, this misc. appeal succeeds and is hereby **allowed.**

18]. Pending application(s), if any, shall stand disposed off.

(DWARKA DHISH BANSAL)

JUDGE

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