IN THE HIGH COURT OF MADHYA PRADESH AT JABALPUR

BEFORE

HON'BLE SHRI JUSTICE GURPAL SINGH AHLUWALIA

ON THE 06th OF FEBRUARY, 2023

SECOND APPEAL No. 513 of 2019

BETWEEN:-

1. **RAGHUVANSH S/O LATE BALGOVIND PATEL, AGED ABOUT 46 YEARS, OCCUPATION: AGRICULTURE, R/O VILLAGE MAHUABANDH, TEHSIL SIHAWAL, DISTT. SIDHI (MADHYA PRADESH)**
2. **ASHUTOSH S/O LATE BALGOVIND PATEL, AGED ABOUT 40 YEARS, OCCUPATION: AGRICULTURE R/O VILLAGE MAHUABANDH, TEHSIL SIHAWAL, DISTT. SIDHI (MADHYA PRADESH)**
3. **SMT CHOURASIYA WD/O LATE BALGOVIND PATEL, AGED ABOUT 75 YEARS, OCCUPATION: HOUSEWIFE R/O VILLAGE MAHUABANDH, TEHSIL SIHAWAL, DISTT. SIDHI (MADHYA PRADESH)**

.....APPELLANTS

(BY SHRI MRIGENDRA SINGH – SENIOR ADVOCATE WITH SHRI SOURABH PATHAK - ADVOCATE)

AND

1. **RAMKALI D/O BALGOVIND PATEL W/O PREMLAL PATEL, AGED ABOUT 47 YEARS, OCCUPATION: HOUSE WIFE VILLAGE SIHAWAL TEHSIL SIHAWAL DISTT. SIDHI (MADHYA PRADESH)**
2. **SHIVPRASAD S/O LATE BALGOVIND PATEL, AGED ABOUT 43 YEARS, OCCUPATION: DRIVER RESIDENT OF VILLAGE**

CHITWARIYA NO 5 TEHSIL SIHAWAL DISTT SIDHI MP (MADHYA PRADESH)

3. **BRAHASPATI S/O LATE BALGOVIND PATEL, AGED ABOUT 50 YEARS, OCCUPATION: AGRICULTURE AND SERVICE RESIDENT OF VILLAGE MAHUABANDH TEHSILSIHAWAL DISTT SIDHI MP (MADHYA PRADESH)**

4. **SHIVBAHOR S/O LATE RAJKARAN PATEL, AGED ABOUT 64 YEARS, OCCUPATION: AGRICULTURE RESIDENT OF VILAGE MAHUABANDH TEHSIL SIHAWAL DISTT SIDHI MP (MADHYA PRADESH)**

5. **SMT PARWATIYA D/O LATE RAJKARAN PATEL, AGED ABOUT 61 YEARS, OCCUPATION: HOUSEWIFE RESIDENT OF VILLAGE KAILASHPUR TEHSIL HANUMANA DISTT REWA MP (MADHYA PRADESH)**

6. **SMT VATASIYA D/O LATE RAJKARAN PATEL, AGED ABOUT 59 YEARS, OCCUPATION: HOUSEWIFE RESIDENT OF VILLAGE NAHUABANDH TEHSIL SIHAWAL DISTT SIDHI MP (MADHYA PRADESH)**

7. **SMT GHURIYA D/O LATE RAJKARAN PATEL AND W/O BUDDHA PATEL (DIED) THROUGH LEGAL REPRESENTATIVES**

A) **SHYAMLAL PATEL S/O BUDDHA PATEL, AGED ABOUT 70 YEARS, OCCUPATION: AGRICULTURE RESIDENT OF VILLAGE GHOPARI POST GHOPARI TEHSIL SIHAWAL DISTT SIDHI MP (MADHYA PRADESH)**

B) **SANTOSHIYA D/O BUDDHA PATEL RESIDENT OF VILLAGE**

GHOPARI TEHSIL SIHAWAL DISTT SIDHI MP (MADHYA PRADESH)

C). KRISHNA PATEL S/O BUDDHA PATEL, AGED ABOUT 45 YEARS, OCCUPATION: AGRICULTURE RESIDE44NT OF VILLAGE BANNA MAHATMAN POST PAATI MISIRAN TEHSIL HANUMANA DISTT REWA MP (MADHYA PRADESH)

D) BHELIYA D/O BUDDHA PATEL RESIDENT OF VILLAGESIHAWAL POST SIHAWAL TEHSIL SIHAWAL DISTT SIDHI MP (MADHYA PRADESH)

8. SMT MANOUA D/O LATE RAJKARAN PATEL (DIED) THROUGH LEGAL REPRESENTATIVES

a) CHOTE @ GAURI SHANKAR S/O TEJA PRASAD PATEL, AGED ABOUT 55 YEARS, OCCUPATION: AGRICULTURE RESIDENT OF VILLAGE BAHERA TEHSIL SIHAWAL DISTT SIDHI MP (MADHYA PRADESH)

b) LALLU PRASAD S/O TEJA PRASAD PATEL, AGED ABOUT 50 YEARS, OCCUPATION: AGRICULTURE RESIDENT OF VILLAGE BAHERA TEHSIL SIHAWAL DISTT SIDHI MP (MADHYA PRADESH)

c) BUTWA DEVI W/O SIDDHNATH PATEL, AGED ABOUT 40 YEARS, OCCUPATION: HOUSEWIFE RESIDENT OV VILLAGE BAHERA TEHSIL SIHAWAL DISTT SIDHI MP (MADHYA PRADESH)

9. HEMKARAN @FOUJDAR S/O CHITRASEN PATEL (DIED) THROUGH LEGAL

REPRESENTATIVES

A) SMT GANGI DEVI D/O LATE HEMKARAN PATEL, AGED ABOUT 56 YEARS, RESIDENT OF SUPELA TEHSIL SIHAWAL DISTT SIDHI MP (MADHYA PRADESH)

B) RAMANAND PATEL S/O LATE HEMKARAN PATEL, AGED ABOUT 54 YEARS, RESIDENT OF VILLAGE MAHUABANDH TEHSIL SIHAWAL DISTT SIDHI MP (MADHYA PRADESH)

C) SAWAILAL S/O LATE HEMKARAN PATEL, AGED ABOUT 54 YEARS, RESIDENT OF VILLAGE MAHUABANDH TEHSIL SIHAWAL DISTT SIDHI MP (MADHYA PRADESH)

D) SMT DALUPIYA D/O HEMKARAN PATEL, AGED ABOUT 49 YEARS, RESIDENT OF VILAGE KADHIYAR TEHSIL SIHAWAL DISTT SIDHI MP (MADHYA PRADESH)

E) AWADHESH PATEL S/O LATE HEMKARAN PATEL, AGED ABOUT 47 YEARS, OCCUPATION: AGRICULTURE RESIDENT OF VILLAGE MAHUABANDH TEHSIL SIHAWAL DISTT SIDHI MP (MADHYA PRADESH)

F) LAKHESHWAR PATEL S/O LATE HEMKARAN PATEL, AGED ABOUT 39 YEARS, RESIDENT OF VILLAGE MAHUABANDH TEHSIL SIHAWAL DISTT SIDHI MP (MADHYA PRADESH)

G) KARMWATI D/O LATE HEMKARAN PATEL, AGED ABOUT 42 YEARS, OCCUPATION: HOUSEWIFE RESIDENT OF VILLAGE BITHOLI TEHSIL SIHAWAL DISTT SIDHI MP (MADHYA

PRADESH)

10. SMT RAMPYARI W/O LATE RAMGARIB PATEL, AGED ABOUT 70 YEARS, OCCUPATION: HOUSEWIFE RESIDENT OF VILLAGE MAHUABANDH TEHSIL SIHAWAL DISTT SIDHI MP (MADHYA PRADESH)

11. JANKI S/O RAMGARIB PATEL, AGED ABOUT 49 YEARS, OCCUPATION: AGRICULTURE RESIDENT OF VILLAGE MAHUABANDH TEHSIL SIHAWAL DISTT SIDHI MP (MADHYA PRADESH)

12. RAMESH PATEL S/O RAMGARIB PATEL, AGED ABOUT 47 YEARS, OCCUPATION: AGRICULTURE RESIDENT OF VILLAGE HAMUABANDH TEHSIL SIHAWAL DISTT SIDHI MP (MADHYA PRADESH)

13. RAMSIYA @ BRIJKISHORE S/O CHITRASEN PATEL, AGED ABOUT 69 YEARS, OCCUPATION: AGRICULTURE RESIDENT OF VILLAGE MAHUABANDH TEHSIL SIHAWAL DISTT SIDHI MP (MADHYA PRADESH)

14. RAJLAL PATEL S/O BHIMMA PATEL DIED THROUGH LEGAL REPRESENTATIVE

a) JAGANNATH S/O LATE RAJLAL PATEL, AGED ABOUT 50 YEARS, OCCUPATION: AGRICULTURE R/O VILLAGE KODOURA, TEHSIL SIHAWAL DISTT. SIDHI (MADHYA PRADESH)

b) RAMADHAR S/O LATE RAJLAL PATEL, AGED ABOUT 47 YEARS, OCCUPATION: AGRICULTURE

R/O VILLAGE KODOURA, TEHSIL SIHAWAL DISTT. SIDHI (MADHYA PRADESH)

c) RAMCHANDRA S/O LATE RAJLAL PATEL, AGED ABOUT 45 YEARS, OCCUPATION: AGRICULTURE R/O VILLAGE KODOURA, TEHSIL SIHAWAL DISTT. SIDHI (MADHYA PRADESH)

d) RAMSHIROMANI S/O LATE RAJLAL PATEL, AGED ABOUT 50 YEARS, OCCUPATION: AGRICULTURE R/O VILLAGE KODOURA, TEHSIL SIHAWAL DISTT. SIDHI (MADHYA PRADESH)

e) BADDU D/O LATE RAJLAL PATEL W/O THAKUR PRASAD PATEL, AGED ABOUT 49 YEARS, OCCUPATION: HOUSEWIFE R/O VILLAGE KODOURA, TEHSIL SIHAWAL DISTT. SIDHI (MADHYA PRADESH)

15. RAMAVTAR S/O BHIMMA PATEL DIED THOUGH LEGAL REPRESENTATIVE

a) SMT. GUJRATIYA W/O RAMAVTAR PATEL, AGED ABOUT 72 YEARS, OCCUPATION: HOUSEWIFE R/O VILLAGE MAHUABANDH TEHSIL SIHAWAL DISTT. SIDHI (MADHYA PRADESH)

b) LAXMAN PATEL S/O LATE RAMAVTAR PATEL, AGED ABOUT 49 YEARS, OCCUPATION: AGRICULTURIST R/O VILLAGE MAHUABANDH TEHSIL SIHAWAL DISTT. SIDHI (MADHYA PRADESH)

c) CHOTELAL PATEL S/O LATE RAMAVTAR PATEL, AGED ABOUT 46 YEARS, OCCUPATION: AGRICULTURIST R/O VILLAGE MAHUABANDH TEHSIL

SIHAWAL DISTT. SIDHI (MADHYA PRADESH)

d) MATUKDHARI PATEL S/O LATE RAMAVTAR PATEL, AGED ABOUT 44 YEARS, OCCUPATION: AGRICULTURIST R/O VILLAGE MAHUABANDH TEHSIL SIHAWAL DISTT. SIDHI (MADHYA PRADESH)

e) RAGHUVANSH PATEL S/O LATE RAMAVTAR PATEL, AGED ABOUT 42 YEARS, OCCUPATION: AGRICULTURIST R/O VILLAGE MAHUABANDH TEHSIL SIHAWAL DISTT. SIDHI (MADHYA PRADESH)

f) MAHENDRA PATEL S/O LATE RAMAVTAR PATEL, AGED ABOUT 38 YEARS, OCCUPATION: AGRICULTURIST R/O VILLAGE MAHUABANDH TEHSIL SIHAWAL DISTT. SIDHI (MADHYA PRADESH)

g) RAJKUMAR PATEL S/O LATE RAMAVTAR PATEL, AGED ABOUT 36 YEARS, OCCUPATION: AGRICULTURIST R/O VILLAGE MAHUABANDH TEHSIL SIHAWAL DISTT. SIDHI (MADHYA PRADESH)

h) SHRIKANT PATEL S/O LATE RAMAVTAR PATEL, AGED ABOUT 32 YEARS, OCCUPATION: AGRICULTURIST R/O VILLAGE MAHUABANDH TEHSIL SIHAWAL DISTT. SIDHI (MADHYA PRADESH)

i) SMT. MUGHUNI D/O LATE RAMVATAR PATEL W/O RAMJATAN PATEL, AGED ABOUT 45 YEARS, R/O VILLAGE NODHIYA TEHSIL SIHAWAL DISTT. SIDHI (MADHYA PRADESH)

j) SMT. CHAMELIYA D/O LATE RAMAVTAR PATEL W/O

RAMSUSHIL PATEL, AGED ABOUT 51 YEARS, R/O VILLAGE NODHIYA TEHSIL SIHAWAL DISTT. SIDHI (MADHYA PRADESH)

16. **VEERBHADRA S/O CHITRASEN PATEL, AGED ABOUT 49 YEARS, OCCUPATION: AGRICULTURE R/O VILLAGE KAILASHPUR, TEHSIL HANUMANA DISTT. REWA (MADHYA PRADESH)**

17. **STATE OF M.P. THROUGH THE COLLECTOR, SIDHI DISTT. SIDHI (MADHYA PRADESH)**

.....RESPONDENTS

(RESPONDENTS NO.1 & 2 BY SHRI PUSHPENDRA KUMAR VERMA – ADVOCATE,
RESPONDENT NO.17/STATE BY SHRI R. MATHAI – PANEL LAWYER)

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 30/11/2018 passed by Second Additional Judge, Sidhi to the Court of First Additional District Judge, Sidhi (M.P.) in Regular Civil Appeal No.30/2018 arising out of the judgment and decree dated 19/05/2017 passed by First Civil Judge Class-1, Sidhi, District – Sidhi (M.P.) in Civil Suit No.4A/2006.

2. The appellants are the defendants who have lost their case from both the Courts below.

3. The plaintiffs filed a suit for partition and possession as well as for declaring the mutation order dated 18/09/1988 as null and void as well as for mesne profits at the rate of Rs.22,500/- per year.

4. The case of the plaintiffs was that the plaintiffs and the defendants are legal representatives of Baramdeen Patel. The defendant No.1 – Balgovind was married to Mudhuni and the plaintiffs are the children born out of the said wedlock. It is their case that later on the defendant No.1 developed illicit relationship with daughter of Mahaveer Patel. As a result he started harassing the mother of the plaintiffs and when the plaintiffs were 5 & 6 years old respectively, they were turned out of their house by the defendant No.1. Thereafter, the plaintiffs were residing in the house of their maternal grandparents and in the meanwhile, the mother of the plaintiffs also expired. When the plaintiffs were aged around 14 – 15 years, then they along with the respectable members of the society went to the house of defendants No.1 to 5 and requested the defendant No.1 to allow to stay in the house and as well as give their share. However, the defendant No.1 denied the same. On 14/01/1996, plaintiffs again went to the house of the defendants No.1 to 5 and demanded their share. However, they got annoyed and plaintiffs were forcibly turned out of the house. It is the case of the plaintiffs that they do not have any dispute with defendants No.6 to 18 because the joint property was already partitioned and they had already separated from the defendants No.1 to 5 and are in possession of their respective shares. The property shown in schedule-B is the disputed property and it was claimed that the plaintiffs have 1/2 share in the property in dispute and accordingly the suit was filed for declaration of title as well as for partition and for declaring the mutation order dated 18/09/1988 as null and void.

5. The defendants No.1 to 5 filed their written statement and claimed that the property shown in schedule-B is the joint family property of defendants No.1 to 5. The said property was given to the defendants

No.3 to 5 by registered family settlement dated 22/01/1988. The defendant No.1 had 1/8 share whereas his Aunt Mus. Chourasiya widow of Kuisa has 1/8 share. Kuisa had no issues and accordingly, the defendant No.1 and his Aunt Chourasiya by the family settlement has already granted the property to the defendants No.3 to 5. It was claimed that the plaintiffs are not the children of the defendant No.1. It was their case that the plaintiffs are the illicit children of one Ramsundar Patel. It was further claimed that since the mother of the plaintiffs was already pregnant at the time of the marriage with the defendant No.1, therefore she herself deserted the defendant No.1. Hemkaran – defendant No.12 and Mus. Budhni – defendant No.6 have already expired and their legal representatives have not been impleaded as party and therefore the suit suffers from non-joinder of necessary party.

6. The other defendants have not filed any written statement.

7. The Trial Court after framing issues and recording evidence, decreed the suit and it was held that the plaintiffs are the children of defendant No.1 and they have half share in the property in dispute. However, mesne profit was denied.

8. Being aggrieved by the judgment and decree passed by the Trial Court, the appellants preferred an appeal which too has been dismissed with a clear observation that the family settlement dated 12/01/1988 executed by Balgovind is null and void, whereas the said family settlement in respect of share of Late Chourasiya is valid. The plaintiffs are entitled for 2/3rd share in the share of the defendant No.1 and in respect of remaining land they have 12/15th share whereas the defendants No.3 to 5 have 3/15 share in the property and accordingly, the mutation order dated 14/08/1996 to the extent mentioned above was

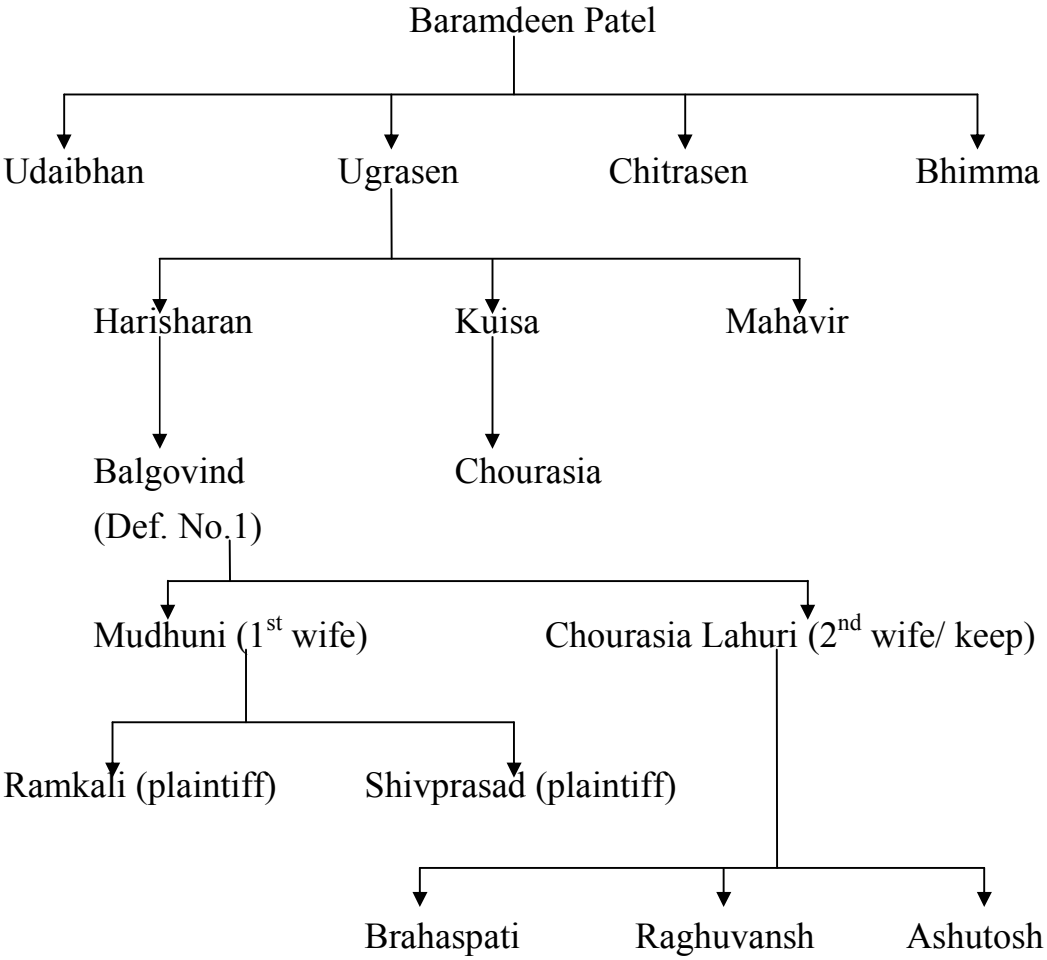
also declared as null and void.

9. Challenging the judgment and decree passed by the First Appellate Court, it is submitted by the counsel for the appellants that the Courts below committed a material illegality by holding that the plaintiffs are the children of the defendant No.1. In fact at the time of marriage of their mother, Mudhuni was already pregnant and thereafter she all alone left the house of the defendant No.1. Thereafter, Mudhuni started living with Ramsundar Patel and the plaintiffs are the illicit children from Ramsundar Patel. It is further submitted that the appellants had filed an application for conducting DNA test which should have been allowed and proposed the following substantial questions of law:-

> "1. Whether, the learned lower court erred in relying upon the documents Ex.P/1, P/2, P/18, P/19 and P/20 to prove the paternity of the plaintiffs?
>
> 2. Whether, in view of the facts and circumstances of the case, it would have been appropriate for the learned lower court to direct the holding of a DNA examination, to determine the veracity f the allegation(s), which constitute one of the grounds, on which the concerned party would either succeed or lose?
>
> 3. Whether the learned lower court rightly held that in the 1/8 share of Balgovind Patel, the plaintiffs and Balgovind Patel constituted a coparcenary and therefore each of them had 1/3rd share, while the defendant no.3, 4 and 5 were also the part of coparcenory, and therefore the share of each coparcenor should have been 1/6?"

10. Heard the learned counsel for the appellants.

11. The family tree as per the plaintiffs is as under:-



12. The property belongs to Baramdeen and the plaintiffs as well as the defendants No.1 to 5 are the descendants of Ugrasen S/o Baramdeen. Thus, Ugrasen had 1/4th share in the property of Baramdeen.

13. It is submitted that the Court below should have directed for conducting DNA Test.

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

15. The Supreme Court in the case of **Bhabani Prasad Jena Vs. Convenor Secretary, Orissa State Commission For Women And Another** reported in **(2010) 8 SCC 633** has held has under:-

> **"16.** This Court then finally concluded thus: (*Goutam Kundu case* (1993) 3 SCC 418 : 1993 SCC (Cri) 928, SCC p. 428, para 26)

> "(*1*) That courts in India cannot order blood test as a matter of course.
>
> (*2*) Wherever applications are made for such prayers in order to have roving inquiry, the prayer for blood test cannot be entertained.
>
> (*3*) There must be a strong prima facie case in that the husband must establish non-access in order to dispel the presumption arising under Section 112 of the Evidence Act.
>
> (*4*) The court must carefully examine as to what would be the consequence of ordering the blood test; whether it will have the effect of branding a child as a bastard and the mother as an unchaste woman.
>
> (*5*) No one can be compelled to give sample of blood for analysis."

18. While dealing with the aspect as to whether subjecting a person to a medical test is violative of Article 21 of the Constitution of India, it was stated that the right to privacy in terms of Article 21 of the Constitution is not an absolute right. This Court summed up the conclusions thus: (*Sharda case* [(2003) 4 SCC 493], SCC p. 524, para 81)

> "*1*. A matrimonial court has the power to order a person to undergo medical test.
>
> *2*. Passing of such an order by the court would not be in violation of the right to personal liberty under Article 21 of the Indian Constitution.
>
> *3*. However, the court should exercise such a power if the applicant has a strong prima facie case and there is sufficient material before the court. If despite the order of the court, the respondent refuses to submit himself to medical examination, the court will be entitled to draw an adverse inference against him."

19. In *Banarsi Dass* v. *Teeku Dutta* [(2005) 4 SCC 449] this Court was concerned with a case arising out of a succession certificate. The allegation was that Teeku Dutta was not the daughter of the deceased. An application was made to subject Teeku Dutta to DNA

test. The High Court held that the trial court being a testamentary court, the parties should be left to prove their respective cases on the basis of the evidence produced during trial, rather than creating evidence by directing DNA test. When the matter reached this Court, few decisions of this Court, particularly, *Goutam Kundu* [(1993) 3 SCC 418 : 1993 SCC (Cri) 928] were noticed and it was held that even the result of a genuine DNA test may not be enough to escape from the conclusiveness of Section 112 of the Evidence Act like a case where a husband and wife were living together during the time of conception. This is what this Court said: (*Banarsi Dass case* [(2005) 4 SCC 449] , SCC pp. 454-55, para 13)

> "*13*. We may remember that Section 112 of the Evidence Act was enacted at a time when the modern scientific advancements with deoxyribonucleic acid (DNA) as well as ribonucleic acid (RNA) tests were not even in contemplation of the legislature. The result of a genuine DNA test is said to be scientifically accurate. But even that is not enough to escape from the conclusiveness of Section 112 of the Evidence Act e.g. if a husband and wife were living together during the time of conception but the DNA test revealed that the child was not born to the husband, the conclusiveness in law would remain irrebuttable. This may look hard from the point of view of the husband who would be compelled to bear the fatherhood of a child of which he may be innocent. But even in such a case the law leans in favour of the innocent child from being bastardised if his mother and her spouse were living together during the time of conception. Hence the question regarding the degree of proof of non-access for rebutting the conclusiveness must be answered in the light of what is meant by access or non-access as delineated above."

It was emphasised that DNA test is not to be directed as a matter of routine and only in deserving cases such a direction can be given.

20. Recently, in *Ramkanya Bai* v. *Bharatram* [(2010) 1 SCC 85] decided by the Bench of which one of us, R.M. Lodha, J. was the member, the order of the High Court directing DNA test of the child at the instance of the husband was set aside and it was held that the High Court was not justified in allowing the application for grant of DNA test of the child on the ground that there will be possibility of reunion of the parties if such DNA test was conducted and if it was found from the outcome of the DNA test that the son was born from the wedlock of the parties.

21. In a matter where paternity of a child is in issue before the court, the use of DNA test is an extremely delicate and sensitive aspect. One view is that when modern science gives the means of ascertaining the paternity of a child, there should not be any hesitation to use those means whenever the occasion requires. The other view is that the court must be reluctant in the use of such scientific advances and tools which result in invasion of right to privacy of an individual and may not only be prejudicial to the rights of the parties but may have devastating effect on the child. Sometimes the result of such scientific test may bastardise an innocent child even though his mother and her spouse were living together during the time of conception.

22. In our view, when there is apparent conflict between the right to privacy of a person not to submit himself forcibly to medical examination and duty of the court to reach the truth, the court must exercise its discretion only after balancing the interests of the parties and on due consideration whether for a just decision in the matter, DNA test is eminently needed. DNA test in a matter relating to paternity of a child should not be directed by the court as a matter of course or in a routine manner, whenever such a request is made. The court has to consider diverse aspects including presumption under Section 112 of the Evidence Act; pros and cons of such order and the test of "eminent need" whether it is not possible for the court to reach the truth without use of such test."

16. The Supreme Court in the case of **Ashok Kumar Vs. Raj Gupta and Others** reported in **(2022) 1 SCC 20** has held as under:-

> "**11.** In circumstances where other evidence is available to prove or dispute the relationship, the court should ordinarily refrain from ordering blood tests. This is because such tests impinge upon the right of privacy of an individual and could also have major societal repercussions. Indian law leans towards legitimacy and frowns upon bastardy. The presumption in law of legitimacy of a child cannot be lightly repelled.
>
> **12.** This Court in *Kamti Devi* v. *Poshi Ram*, (2001) 5 SCC 311 : 2001 SCC (Cri) 892, while determining the question of standard of proof required to displace the presumption in favour of paternity of child born during subsistence of valid marriage held : (SCC p. 316, para 10)
>
> > "*10*. We may remember that Section 112 of the Evidence Act was enacted at a time when the modern scientific advancements with deoxyribonucleic acid (DNA) as well as ribonucleic acid (RNA) tests were not even in contemplation of the legislature. The result of a genuine DNA test is said to be scientifically accurate. But even that is not enough to escape from the conclusiveness of Section 112 of the Act e.g. if a husband and wife were living together during the time of conception but the DNA test revealed that the child was not born to the husband, the conclusiveness in law would remain irrebuttable. This may look hard from the point of view of the husband who would be compelled to bear the fatherhood of a child of which he may be innocent. But even in such a case the law leans in favour of the innocent child from being bastardised if his mother and her spouse were living together during the time of conception. Hence the question regarding the degree of proof of non-access for rebutting the conclusiveness must be answered in the light of what is meant by access or non-access as delineated above."

13. The presumption of legitimacy of a child can only be displaced by strong preponderance of evidence, and not merely by balance of probabilities. The material portion of the Court's opinion is produced hereinbelow: (*Kamti Devi* v. *Poshi Ram*, (2001) 5 SCC 311 : 2001 SCC (Cri) 892, SCC p. 316, para 11)

> "*11*. … But at the same time the test of preponderance of probability is too light as that might expose many children to the peril of being illegitimatised. If a court declares that the husband is not the father of his wife's child, without tracing out its real father the fallout on the child is ruinous apart from all the ignominy visiting his mother. The bastardised child, when grows up would be socially ostracised and can easily fall into wayward life. Hence, by way of abundant caution and as a matter of public policy, law cannot afford to allow such consequence befalling an innocent child on the strength of a mere tilting of probability. Its corollary is that the burden of the plaintiff husband should be higher than the standard of preponderance of probabilities. The standard of proof in such cases must at least be of a degree in between the two as to ensure that there was no possibility of the child being conceived through the plaintiff husband."

14. It was also the view of the Court that the normal rule of evidence is that the burden is on the party that asserts the positive. But in instances where that is challenged, the burden is shifted to the party, that pleads the negative. Keeping in mind the issue of burden of proof, it would be safe to conclude that in a case like the present, the court's decision should be rendered only after balancing the interests of the parties i.e. the quest for truth, and the social and cultural implications involved therein. The possibility of stigmatising a person as a bastard, the ignominy that attaches to an adult who, in the mature years of his life is shown to be not the biological son of his parents may not only be a heavy cross to bear but would also intrude upon his right of privacy.

> **15.** DNA is unique to an individual (barring twins) and can be used to identify a person's identity, trace familial linkages or even reveal sensitive health information. Whether a person can be compelled to provide a sample for DNA in such matters can also be answered considering the test of proportionality laid down in the unanimous decision of this Court in *K.S. Puttaswamy (Aadhaar-5 J.)* v. *Union of India*, (2019) 1 SCC 1, wherein the right to privacy has been declared a constitutionally protected right in India. The Court should therefore examine the proportionality of the legitimate aims being pursued i.e. whether the same are not arbitrary or discriminatory, whether they may have an adverse impact on the person and that they justify the encroachment upon the privacy and personal autonomy of the person, being subjected to the DNA test."

17. The defendants had not disputed the marriage of Mudhuni with the defendant No.1. However, they have claimed that the plaintiffs are the children born out of the illicit relationship of Ramsundar Patel and Mudhuni. Thus, the defendants have specifically admitted that Mudhuni is the Biological mother of the plaintiffs.

18. Section 112 of the Evidence Act provides that if any person was born during the continuance of a valid marriage between his mother and any man, or within two hundred and eighty days after its dissolution, the mother remaining unmarried, shall be conclusive proof that he is the legitimate son of that man, unless it can be shown that the parties to the marriage had no access to each other.

19. In the present case, the case of the plaintiffs was that when they were 5 and 3 years old respectively, they were turned by the defendant No.1 out of his house. It is not the case of the defendants that the marital tie of defendant No.1 with Mudhuni was broken, therefore the continuance of valid marriage between the defendant No.1 and Mudhuni

is an undisputed fact.

20. Direction for conducting a DNA test should not be given in a very light manner and should be directed only when a very strong *prima facie* case is made out pointing out an eminent need for the same. Conducting a DNA test is also violative of privacy of a person. Unless and until the Court comes to a conclusion that without DNA test, it will not be possible for it to come to the truth, the DNA test should not be directed.

21. Under these circumstances, this Court is of the considered opinion that if the First Appellate Court rightly did not direct for holding the DNA test, and therefore, it cannot be said that any illegality was committed by it. Further the legitimacy of children should not be questioned frivolously. Their right to live their lives with dignity has to be maintained.

22. No other argument is advanced by the counsel for the appellants.

23. Both the Courts below have given a concurrent finding of fact that the plaintiffs are the children of defendant No.1. The said finding is based on sound appreciation of evidence.

24. Even otherwise, it is well established principle of law that this Court in exercise of powers under Section 100 of CPC cannot interfere with the findings of fact unless and until they are perverse and contrary to the record. Merely because a second view is possible, cannot be a ground to interfere with the concurrent findings of fact.

25. The Supreme Court in the case of ***Damodar Lal Vs. Sohan Devi and others*** reported in ***(2016) 3 SCC 78*** has held as under :-

> "**8.** "Perversity" has been the subject-matter of umpteen number of decisions of this Court. It has also been settled by several decisions of this Court that the first appellate court, under Section 96 of the Civil

Procedure Code, 1908, is the last court of facts unless the findings are based on evidence or are perverse.

9. In Krishnan v. Backiam, it has been held at para 11 that: (SCC pp. 192-93)

> "11. It may be mentioned that the first appellate court under Section 96 CPC is the last court of facts. The High Court in second appeal under Section 100 CPC cannot interfere with the findings of fact recorded by the first appellate court under Section 96 CPC. No doubt the findings of fact of the first appellate court can be challenged in second appeal on the ground that the said findings are based on no evidence or are perverse, but even in that case a question of law has to be formulated and framed by the High Court to that effect."

10. In Gurvachan Kaur v. Salikram, at para 10, this principle has been reiterated: (SCC p. 532)

> "10. It is settled law that in exercise of power under Section 100 of the Code of Civil Procedure, the High Court cannot interfere with the finding of fact recorded by the first appellate court which is the final court of fact, unless the same is found to be perverse. This being the position, it must be held that the High Court was not justified in reversing the finding of fact recorded by the first appellate court on the issues of existence of landlord-tenant relationship between the plaintiff and the defendant and default committed by the latter in payment of rent."

26. The Supreme Court in the case of ***Pakeerappa Rai Vs. Seethamma Hengsu Dead by L.R.s and others*** reported in ***(2001) 9 SCC 521*** has held as under :

> "2..... But the High Court in exercise of power under Section 100 CPC cannot interfere with the erroneous finding of fact howsoever gross the error seems to be....."

27. The Supreme Court in the case of ***Randhir Kaur Vs. Prithvi Pal Singh and others***, reported in (***2019) 17 SCC 71*** has held as under :-

> "**15.** A perusal of the aforesaid judgments would show that the jurisdiction in second appeal is not to interfere with the findings of fact on the ground that findings are erroneous, however, gross or inexcusable the error may seem to be. The findings of fact will also include the findings on the basis of documentary evidence. The jurisdiction to interfere in the second appeal is only where there is an error in law or procedure and not merely an error on a question of fact.
>
> **16.** In view of the above, we find that the High Court could not interfere with the findings of fact recorded after appreciation of evidence merely because the High Court thought that another view would be a better view. The learned first appellate court has considered the absence of clause in the first power of attorney to purchase land on behalf of the plaintiff; the fact that the plaintiff has not appeared as witness.
>
> **17.** A perusal of the findings recorded show that the learned first appellate court has returned a finding that the plaintiff was ready and willing to perform the contract and that the defendants cannot take plea that they were not aware that Dhanwant Singh was power-of-attorney holder. Therefore, the findings recorded by the first appellate court cannot be said to be contrary to law which may confer jurisdiction on the High Court to interfere with the findings of fact recorded by the first appellate court.
>
> **18.** The learned counsel for the respondents have not raised any argument that the first appellate court has failed to determine some material issue of law which may confer jurisdiction on the High Court to interfere with the findings of fact nor is there any substantial

> error or defect in the procedure provided by the Code of Civil Procedure or by any other law for the time being in force which may possibly have produced error or defect in the decision on merits. Therefore, the High Court was not within its jurisdiction to interfere with the findings of fact only for the reason that the plaintiff has failed to prove power of attorney in favour of Dhanwant Singh."

28. The Supreme Court in the case of ***Gurdev Kaur Vs. Kaki*** reported in ***(2007) 1 SCC 546*** has held as under :

> "**46.** In *Bholaram* v. *Ameerchand* a three-Judge Bench of this Court reiterated the statement of law. The High Court, however, seems to have justified its interference in second appeal mainly on the ground that the judgments of the courts below were perverse and were given in utter disregard of the important materials on the record particularly misconstruction of the rent note. Even if we accept the main reason given by the High Court the utmost that could be said was that the findings of fact by the courts below were wrong or grossly inexcusable but that by itself would not entitle the High Court to interfere in the absence of a clear error of law.
>
> **47.** In *Kshitish Chandra Purkait* v. *Santosh Kumar Purkait* a three-Judge Bench of this Court held: (*a*) that the High Court should be satisfied that the case involved a substantial question of law and not mere question of law; (*b*) reasons for permitting the plea to be raised should also be recorded; (*c*) it has the duty to formulate the substantial questions of law and to put the opposite party on notice and give fair and proper opportunity to meet the point. The Court also held that it is the duty cast upon the High Court to formulate substantial question of law involved in the case even at the initial stage.
>
> **48.** This Court had occasion to determine the same issue in *Dnyanoba Bhaurao Shemade* v. *Maroti Bhaurao Marnor*. The Court stated that the High Court can exercise its jurisdiction under Section 100 CPC

only on the basis of substantial questions of law which are to be framed at the time of admission of the second appeal and the second appeal has to be heard and decided only on the basis of such duly framed substantial questions of law.

49. A mere look at the said provision shows that the High Court can exercise its jurisdiction under Section 100 CPC only on the basis of substantial questions of law which are to be framed at the time of admission of the second appeal and the second appeal has to be heard and decided only on the basis of such duly framed substantial questions of law. The impugned judgment shows that no such procedure was followed by the learned Single Judge. It is held by a catena of judgments by this Court, some of them being, *Kshitish Chandra Purkait* v. *Santosh Kumar Purkait* and *Sheel Chand* v. *Prakash Chand* that the judgment rendered by the High Court under Section 100 CPC without following the aforesaid procedure cannot be sustained. On this short ground alone, this appeal is required to be allowed.

50. In *Kanai Lal Garari* v. *Murari Ganguly* this Court has observed that it is mandatory to formulate the substantial question of law while entertaining the appeal in absence of which the judgment is to be set aside. In *Panchugopal Barua* v. *Umesh Chandra Goswami* and *Santosh Hazari* v. *Purushottam Tiwari* 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* v. *Muthamma*. 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.

51. Again in *Santosh Hazari* v. *Purushottam Tiwari* another three-Judge Bench of this Court correctly delineated the scope of Section 100 CPC. The Court observed that an obligation is cast on the appellant to precisely state in the memorandum of appeal the substantial question of law involved in the appeal and which the appellant proposes to urge before the Court.

In the said judgment, it was further mentioned that the High Court must be satisfied that a substantial question of law is involved in the case and such question has then to be formulated by the High Court. According to the Court the word substantial, as qualifying "question of law", means—of having substance, essential, real, of sound worth, important or considerable. It is to be understood as something in contradistinction with—technical, of no substance or consequence, or academic merely. However, it is clear that the legislature has chosen not to qualify the scope of "substantial question of law" by suffixing the words "of general importance" as has been done in many other provisions such as Section 109 of the Code and Article 133(1)(*a*) of the Constitution.

52. In *Kamti Devi* v. *Poshi Ram* 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.

53. In *Thiagarajan* v. *Sri Venugopalaswamy B. Koil* this Court has held that the High Court in its jurisdiction under Section 100 CPC was not justified in interfering with the findings of fact. The 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 in a catena of decisions held that where findings of fact by the lower appellate court are based on evidence, the High Court in second appeal cannot substitute its own findings on reappreciation of evidence merely on the ground that another view was possible.

54. In the same case, this Court observed that in a case 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 Court in second appeal cannot

substitute its own findings on reappreciation of evidence merely on the ground that another view was possible.

55. This Court again reminded the High Court in *Commr., HRCE* v. *P. Shanmugama* that the High Court has no jurisdiction in second appeal to interfere with the finding of facts.

56. Again, this Court in *State of Kerala* v. *Mohd. Kunhi* has reiterated the same principle that the High Court is not justified in interfering with the concurrent findings of fact. This Court observed that, in doing so, the High Court has gone beyond the scope of Section 100 of the Code of Civil Procedure.

57. Again, in *Madhavan Nair* v. *Bhaskar Pillai* this Court observed that the High Court was not justified in interfering with the concurrent findings of fact. This Court observed that it is well settled that even if the first appellate court commits an error in recording a finding of fact, that itself will not be a ground for the High Court to upset the same.

58. Again, in *Harjeet Singh* v. *Amrik Singh* this Court with anguish has mentioned that the High Court has no jurisdiction to interfere with the findings of fact arrived at by the first appellate court. In this case, the findings of the trial court and the lower appellate court regarding readiness and willingness to perform their part of contract was set aside by the High Court in its jurisdiction under Section 100 CPC. This Court, while setting aside the judgment of the High Court, observed that the High Court was not justified in interfering with the concurrent findings of fact arrived at by the courts below.

59. In *H.P. Pyarejan* v. *Dasappa* delivered on 6-2-2006, this Court found serious infirmity in the judgment of the High Court. This Court observed that it suffers from the vice of exercise of jurisdiction which did not vest in the High Court. Under Section 100 of the Code (as amended in 1976) the jurisdiction of the Court to interfere with the judgments of the courts below is confined to hearing of substantial questions of law. Interference with the finding of fact

> by the High Court is not warranted if it invokes reappreciation of evidence. This Court found that the impugned judgment of the High Court was vulnerable and needed to be set aside."

29. The Supreme Court in the case of ***Municipal Committee, Hoshiarpur Vs. Punjab SEB,*** reported in ***(2010) 13 SCC 216*** has held as under:-

> "**16.** Thus, it is evident from the above that the right to appeal is a creation of statute and it cannot be created by acquiescence of the parties or by the order of the court. Jurisdiction cannot be conferred by mere acceptance, acquiescence, consent or by any other means as it can be conferred only by the legislature and conferring a court or authority with jurisdiction, is a legislative function. Thus, being a substantive statutory right, it has to be regulated in accordance with the law in force, ensuring full compliance with the conditions mentioned in the provision that creates it. Therefore, the court has no power to enlarge the scope of those grounds mentioned in the statutory provisions. A second appeal cannot be decided merely on equitable grounds as it lies only on a substantial question of law, which is something distinct from a substantial question of fact. The court cannot entertain a second appeal unless a substantial question of law is involved, as the second appeal does not lie on the ground of erroneous findings of fact based on an appreciation of the relevant evidence. The existence of a substantial question of law is a condition precedent for entertaining the second appeal; on failure to do so, the judgment cannot be maintained. The existence of a substantial question of law is a sine qua non for the exercise of jurisdiction under the provisions of Section 100 CPC. It is the obligation on the court to further clear the intent of the legislature and not to frustrate it by ignoring the same. (Vide *Santosh Hazari* v. *Purshottam Tiwari*; *Sarjas Rai* v. *Bakshi Inderjit Singh*; *Manicka Poosali* v. *Anjalai Ammal*; *Sugani* v. *Rameshwar Das*; *Hero Vinoth* v. *Seshammal*; *P. Chandrasekharan* v. *S. Kanakarajan*;

Kashmir Singh v. *Harnam Singh*; *V. Ramaswamy* v. *Ramachandran* and *Bhag Singh* v. *Jaskirat Singh*.)

17. In *Mahindra & Mahindra Ltd.* v. *Union of India* this Court observed[*]:

> "*12*. … it is not every question of law that could be permitted to be raised in the second appeal. The parameters within which a new legal plea could be permitted to be raised, are specifically stated in sub-section (5) of Section 100 CPC. Under the proviso, the Court should be 'satisfied' that the case involves a 'substantial question of law' and not a mere 'question of law'. The reason for permitting the substantial question of law to be raised, should be 'recorded' by the Court. It is implicit therefrom that on compliance of the above, the opposite party should be afforded a fair or proper opportunity to meet the same. It is not any legal plea that would be alleged at the stage of second appeal. It should be a substantial question of law. The reasons for permitting the plea to be raised should also be recorded." [*Kshitish Chandra Purkait* v. *Santosh Kumar Purkait*, (1997) 5 SCC 438, pp. 445-46, para 10]

18. In *Madamanchi Ramappa* v. *Muthaluru Bojjappa* this Court observed: (AIR pp. 1637-38, para 12)

> "*12*. … Therefore, whenever this Court is satisfied that in dealing with a second appeal, the High Court has, either unwittingly and in a casual manner, or deliberately as in this case, contravened the limits prescribed by Section 100, it becomes the duty of this Court to intervene and give effect to the said provisions. It may be that in some cases, the High Court dealing with the second appeal is inclined to take the view that

> what it regards to be justice or equity of the case has not been served by the findings of fact recorded by courts of fact; but on such occasions it is necessary to remember that what is administered in courts is justice according to law and considerations of fair play and equity however important they may be, must yield to clear and express provisions of the law. If in reaching its decisions in second appeals, the High Court contravenes the express provisions of Section 100, it would inevitably introduce in such decisions an element of disconcerting unpredictability which is usually associated with gambling; and that is a reproach which judicial process must constantly and scrupulously endeavour to avoid."

19. In *Jai Singh* v. *Shakuntala* this Court held as under: (SCC pp. 637-38, para 6)

> "*6.* ... it is only in very exceptional cases and on extreme perversity that the authority to examine the same in extenso stands permissible — it is a rarity rather than a regularity and thus in fine it can be safely concluded that while there is no prohibition as such, but the power to scrutiny can only be had in very exceptional circumstances and upon proper circumspection."

20. While dealing with the issue, this Court in *Leela Soni* v. *Rajesh Goyal* observed as under: (SCC p. 502, paras 20-22)

> "20. There can be no doubt that the jurisdiction of the High Court under Section 100 of the Code of Civil Procedure (CPC) is confined to the framing of substantial questions of law involved in the second appeal and to

> decide the same. Section 101 CPC provides that no second appeal shall lie except on the grounds mentioned in Section 100 CPC. Thus it is clear that no second appeal can be entertained by the High Court on questions of fact, much less can it interfere in the findings of fact recorded by the lower appellate court. This is so, not only when it is possible for the High Court to take a different view of the matter but also when the High Court finds that conclusions on questions of fact recorded by the first appellate court are erroneous.
>
> *21*. It will be apt to refer to Section 103 CPC which enables the High Court to determine the issues of fact:
>
> * * *
>
> *22*. The section, noted above, authorises the High Court to determine any issue which is necessary for the disposal of the second appeal provided the evidence on record is sufficient, in any of the following two situations: (*1*) when that issue has not been determined both by the trial court as well as the lower appellate court or by the lower appellate court; or (*2*) when both the trial court as well as the appellate court or the lower appellate court have wrongly determined any issue on a substantial question of law which can properly be the subject-matter of second appeal under Section 100 CPC."

21. In *Jadu Gopal Chakravarty* v. *Pannalal Bhowmick* the question arose as to whether the compromise decree had been obtained by fraud. This Court held that though it is a question of fact, but because none of the courts below had pointedly addressed the question of whether the compromise in the case was obtained by perpetrating fraud on the court, the High Court was justified in exercising its powers under Section 103

CPC to go into the question. (See also *Achintya Kumar Saha* v. *Nanee Printers*.)

22. In *Bhagwan Sharma* v. *Bani Ghosh* this Court held that in case the High Court exercises its jurisdiction under Section 103 CPC, in view of the fact that the findings of fact recorded by the courts below stood vitiated on account of non-consideration of additional evidence of a vital nature, the Court may itself finally decide the case in accordance with Section 103(*b*) CPC and the Court must hear the parties fully with reference to the entire evidence on record with relevance to the question after giving notice to all the parties. The Court further held as under: (*Bhagwan Sharma case*, SCC p. 499, para 5)

> "*5*. … The grounds which may be available in support of a plea that the finding of fact by the court below is vitiated in law, does not by itself lead to the further conclusion that a contrary finding has to be finally arrived at on the disputed issue. On a reappraisal of the entire evidence the ultimate conclusion may go in favour of either party and it cannot be prejudged, as has been done in the impugned judgment."

23. In *Kulwant Kaur* v. *Gurdial Singh Mann* this Court observed as under: (SCC pp. 278-79, para 34)

> "*34*. Admittedly, Section 100 has introduced a definite restriction on to the exercise of jurisdiction in a second appeal so far as the High Court is concerned. Needless to record that the Code of Civil Procedure (Amendment) Act, 1976 introduced such an embargo for such definite objectives and since we are not required to further probe on that score, we are not detailing out, but the fact remains that while it is true that in a second appeal a finding of fact, even if erroneous, will generally not be disturbed but where it is found that the findings

> stand vitiated on wrong test and on the basis of assumptions and conjectures and resultantly there is an element of perversity involved therein, the High Court in our view will be within its jurisdiction to deal with the issue. This is, however, only in the event such a fact is brought to light by the High Court explicitly and the judgment should also be categorical as to the *issue of perversity vis-à-vis the concept of justice*. Needless to say however, that perversity itself is *a substantial question* worth adjudication — what is required is a categorical finding on the part of the High Court as to *perversity*. …
>
> The requirements stand specified in Section 103 and nothing short of it will bring it within the ambit of Section 100 *since the issue of perversity will also come within the ambit of substantial question of law as noticed above*. The legality of finding of fact cannot but be termed to be a question of law. We reiterate however, *that there must be a definite finding to that effect in the judgment of the High Court so as to make it evident that Section 100 of the Code stands complied with*."

30. As no perversity could be pointed out by the counsel for the appellants, no substantial question of law arises in the present appeal.

31. *Ex consequenti*, the judgment and decree dated 30/11/2018 passed by Second Additional Judge, Sidhi to the Court of First Additional District Judge, Sidhi (M.P.) in Regular Civil Appeal No.30/2018 arising out of the judgment and decree dated 19/05/2017 passed by First Civil Judge Class-1, Sidhi, District – Sidhi (M.P.) in Civil Suit No.4A/2006,

is hereby **affirmed.**

32. Accordingly, the appeal fails and is hereby **dismissed**.

(G.S. AHLUWALIA)
JUDGE

shubhankar