IN THE HIGH COURT OF MADHYA PRADESH AT JABALPUR

BEFORE

HON'BLE SHRI JUSTICE ARUN KUMAR SHARMA

ON THE 22nd OF AUGUST, 2022

FIRST APPEAL No. 584 of 2021

Between:-

SHRI AVINASH KUMAR RAY S/O LATE SHRI KIRTIBHANU RAY, AGED ABOUT 71 YEARS, NEPIER TOWN JABALPUR MP (MADHYA PRADESH)

.....APPELLANT

(BY SHRI SUSHIL KUMAR TIWARI, ADVOCATE)

AND

1. **DR. KUMARI CHHAYA RAY S/O LATE SHRI KIRTIBHANU RAJY, AGED ABOUT 75 YEARS, NEPIER TOWN JABALPUR MP (MADHYA PRADESH)**

2. **SHRI PRADEEP CHOUKSEY S/O SHRI BHAIYALAL CHOUKSEY, AGED ABOUT 67 YEARS, OCCUPATION: NOT MENTION 1532, NAPIER TOWN JABALPUR (MADHYA PRADESH)**

3. **SMT. PUSHPA DEVI CHOUKSEY W/O SHRI PRADEEP CHOUKSEY, AGED ABOUT 58 YEARS, OCCUPATION: NOT MENTION 1532, NAPIER TOWN JABALPUR (MADHYA PRADESH)**

.....RESPONDENTS

(BY SHRI MANISH TIWARI, ADVOCATE FOR RESPONDENT NO.1 AND SHRI IMTIAZ HUSAIN, ADVOCATE FOR RESPONDENTS NO. 2 AND 3)

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

ORDER

With the consent of the parties, this appeal is finally heard.

This first appeal under Section 96 of the Code of Civil Procedure has

been filed by the appellant / plaintiff against the common judgment and decree dated 02-08-2021 passed by learned 19th District Judge, Jabalpur, in Regular Civil Suit No. 40-A/14 parties being Avinash Kumar Rai vs. Dr. Kumari Chhaya Rai and two others and also in regular Civil Suit No. 39-A/14 parties being Dr. Kumari Chhaya Rai and two others vs. Avinash Kumar Rai, whereby the civil suit no.40A/14 filed by the appellant / plaintiff has been dismissed whereas the civil suit no.39A/14 filed by the respondents herein (Dr. Kumari Chhaya Rai and two others) has been allowed in part and the decreed the suit according to para 63 of its impugned judgment.

2. The factual assertions as would unveil, are that the parties had filed two different suits against each other with regard to the same property. Since the property in dispute and subject matter of the case were common, therefore, learned trial court tried aforesaid two suits together. However, the civil suit no. 40-A/14 filed by the appellant herein was dismissed and the civil suit no.39A/14 filed by the respondents herein was allowed in part and passed the decree according to para 63 of its judgment. Dr. Ku. Chhaya Rai and two others were defendants in the civil suit no. 40A/14 instituted on 1.6.2009 by the plaintiff Avinash Kumar Rai / appellant herein and Avinash Kumar Rai was defendant in the civil suit no.39A/14 filed on 25.6.2009 by the plaintiffs Dr. Ku. Chhaya Rai and two others / respondents herein. Avinash Kumar Rai and Dr. Kumari Chhaya Rai are real brother and sister. Both the suits were ordered to be consolidated for analogous hearing by the trial Court by order dated 06-07-2011.

3. It is pertinent to mention here that the question of maintainability of this present appeal arising out of the common judgment and decree has already been dealt with earlier vide order dated 24-11-2021 on the preliminary objection of

respondents no. 2 & 3 vide I.A. No. 7253/2021.

4. The facts of the case succinctly stated are that the appellant / plaintiff Avinash filed a civil suit no.40A/14 for declaration to the effect that the appellant is in continuous possession over the disputed portion of the disputed house since 1966 and the portion in which he made a pakka construction for his family, the respondents are not entitled to dispossess the appellant, and also for permanent injunction that the respondents be restrained from transferring and alienating and selling the disputed property to anyone else and also from damaging the disputed portion of the house. Further declaration was sought that sale deed dated 30.09.2010 registered on 4.10.2010 executed by respondent no.1 Dr. Ku. Chhaya Rai in favour of the respondents no. 2 and 3 namely Pradeep Chouksey and Smt. Pushpa Devi Chouksey being illegal be declared null and void and the same is not binding upon the appellant Avinash Kumar Rai.

5. The defendants / respondents herein Dr. Kumari Chhaya Rai and two others also filed a civil suit no.39A/14 for mandatory injunction seeking eviction of Avinash Rai from the suit premises and also for recovery of mesne profits and further Avinash be restrained from interfering in the peaceful possession of the respondents and also for issuing permanent injunction against Avinash to the effect that he be restrained from dispossessing Dr. Kumar Chhaya Rai.

6. Appellant Avinash averred in the plaint instituted on 01-06-2009 that House No. 1411 (old No. 796) situated at Dr. Barad Road, Napier Town, Jabalpur and marked as ka, kha, ga, gha, da, cha in red color in the map which hereinafter shall be referred as â€œdisputed houseâ€, that he is the brother of the respondent no. 1 Dr. Kumari Chhaya Rai and was residing peacefully along

with his family on a part of the disputed property since 1966 and made a pakka house (permanent construction) with the consent and due permission as a licensee of Dr. Kumari Chhaya Rai / respondent no.1. As the respondent no. 1 is not having her own family because she did not perform marriage, therefore, she was residing with the appellantâ€™s family in the disputed property and the petitioner being real brother was taking care of his sister Dr. Ku. Chhaya Rai. According to her, he paid all electricity bills, telephone bills, property taxes and all other miscellaneous expensive. The appellant was under impression that she would not compel him to reside apart from the disputed portion of the house. The appellant / plaintiff invested his money on its pakka construction and other required maintenance work and because the plaintiff made a pakka house in the shape of permanent construction and therefore, the disputed house is belonging to him and licensee granted by respondent / defendant no. 1 is irrevocable. The defendant no. 1 is estoppel by her conduct in seeking possession over the property in question. Further pleaded that the respondent no.1 expressed her desire that since she is not having any family of her own, therefore, she proposed to transfer the disputed property to the appellant Avinash and in the remaining portion, she will make a Trust in the memory of her father from the consideration of the disputed property agreed to be sold to the appellant. The appellant accepted the proposal offered by respondent no.1. According to her will, he gave Rs.1,50,000/- to her by transaction dated 18-06-2008. This amount was obtained by her in lieu of transferring the disputed portion of the house in favour of the appellant and therefore, the defendant no.1 had no right to transfer the property to anyone-else. Because the defendant no.1 was interested to make a Trust in her area (except the disputed area of plaintiff), the appellant gave a part payment to her to sell the area which she was having in her own possession

to the appellant / plaintiff and thus, the defendant no. 1 had also no right to sell the said area to any other person. But, due to provocation by someone, the defendant no. 1 started creating troubles and endeavored to dispossess the appellant from the disputed property and roped false allegations for taking the possession belonging to the appellant / plaintiff, resulting which, on 24-05-2009 she caused damage to the disputed property with the help of antisocial elements and in this regard, a report was lodged by the appellant / plaintiff on 24-05-2009 in Police station Omti and Mahila Thana as well. While, the appellant / plaintiff is in peaceful possession over disputed house since 1966 and without following due procedure of law, his possession cannot be removed from the part portion of disputed house or cannot be alienated to any other. But, during the pendency of the civil suit, the respondent / defendant no.1 sold the disputed property to the defendants no. 2 & 3 by sale deed dated 30-09-2010 and the same was registered on 04-10-2010.

6.1. From time to time, the plaint was amended and prayed for grant of relief according to prayer of relief clause and on 1-6-2009 certain prayers were made that the appellant / plaintiff be declared possessor-ship since 1966, decree of permanent injunction against the defendants be passed and also prayed for a decree of declaration that the plaintiff has constructed a pakka house and therefore the license granted by the defendant no.1 is irrevocable. Further prayed that the defendant no.1 be restrained not to transfer or alienate the disputed property to anyone else and not to cause any damage to the disputed property and not to dispossess the plaintiff / appellant and his family from the disputed property. Further pleaded that the registered sale dead dated 30-09-2010 which registered on 04-10-2010 be declared void, ineffective and not

binding on appellant / plaintiff and also prayed for decree of permanent injunction against the defendant no. 2 & 3 as well.

7. The respondent / defendant no. 1 filed her written statement and broadly denied the averments of the plaint and contended that she never gave any assurance to the appellant that she will not compel to dispossess him from the disputed portion of the house and there was only one condition that until and unless the appellant purchases his own house, he may reside with his family in the disputed house. But, now the plaintiff has purchased his own house, even then he is residing with his family and the plaintiffâ€™s son who is an advocate is continuing his office in the disputed portion. The defendant no. 1 is running a Yoga Center in the disputed house and wanted to make a trust thereon but the appellant disliked her desire and his wish was that the house be not given to any institute and the same be recorded in his name which was not accepted by her and since then, the plaintiff and his family got angry with her and harassing her. While, there was no any conversation in between them to give any portion of disputed house and he never gave Rs.1,50,000/- or any other amount and in fact, he gave the amount of income of her own agriculture product. Further pleaded that on 30-09-2010 she had sold the disputed property to defendants no. 2 & 3 and given the possession. She had terminated the licensee of the plaintiff and filed a suit against him for recovery of possession. The defendant no.1 has also denied the other facts of plaint regarding her volition in the name of her late father and that is not connected with the sale of property. She never executed any agreement of sale in his favor nor received any amount from the appellant and on compelling circumstances due to act of the plaintiff, she had to purchase a separate house and reside therein. The son of plaintiff tried to take possession of the garage of her house, a report of which was made to the

Police Station and thus, the plaintiff / appellant herein filed a suit on the false and frivolous grounds.

8. The defendants no. 2 & 3 have filed their written statement and pleaded that in the disputed portion, the plaintiff was licensee of defendant no. 1 and the same was terminated and she filed a separate suit for his removal. The defendant no. 1 is the sole owner and occupied the property on the basis of Will written by her late father and with regard to disputed house, oral permission was given by defendant no.1. Defendant no. 1 herself had made the construction and the portion in which the appellant was residing was already a constructed house and the same was given to the plaintiff as her licensee and there was no question to make any construction by the appellant/plaintiff. Further stated that they purchased the disputed property on 30-09-2010 registered on 04-10-2010 and therefore, no question arises to grant permanent injunction against the defendant no.1 and ultimately they prayed for rejection of plaintiffâ€™s plaint.

9. The respondent no. 1 was the principal plaintiff in civil suit no. 39A/14 and the said suit was filed on the ground that her father late Shri Kirtibhanu Rai was the original owner of the disputed property and he during this life time gave the disputed house to her by registered sale deed dated 21.01.1977 and after the death of her father i.e. on 14.9.1984, she became the sole owner of the house in dispute and her name was recorded in the record of the Municipal Corporation, and paying all kinds of tax of her house. The plaintiff Avinash who is defendant no. 1 in her case was maintaining the agriculture land and actually he gave the income of her own agriculture. She was unmarried and alone and therefore, she used to take help of the plaintiff and in the year 1984 she accorded oral

permission to the appellant for staying in her disputed house till the occupation of his own house. Further stated that she wanted to make a trust and her wish was to entrust the property to the trust which was not likewise the plaintiff and he pressurized her to give the disputed house to him saying that he had paid the amount for that to her and had lodged a false report in the police station that she tried to remove him forcefully and ultimately the plaintiff had filed a suit against her. She averred in her plaint that she received a summon in the civil suit that she terminated his licensee vide notice date 4.9.2009 and prayed to hand over the possession. But the plaintiff failed to do so, resulting which she filed a suit for declaration and mandatory injunction and permanent injunction as well as the decree of the mesne profit against the appellant herein in civil suit no. 39A/14. In support of her plaint, she filed the documents available on record.

10. The appellant / plaintiff filed written statement in civil suit no.39-A/2014 and specifically denied her case and in paragraphs no. 6 and 9 by specific pleadings denied the acceptance of alleged notice of termination of his licensee. No rebuttal and admissible evidence of principal plaintiff of civil suit no.39A/14 in that regard has been adduced by the respondents i.e. plaintiffs of civil suit no.39A/14, by which they could prove their case for granting the decree on the material and facts which were in the personal knowledge of Dr. Kumari Chhaya Rai.

11. The defendants no.2 and 3 were also impleaded as plaintiffs in civil suit no. 39A/14 and they filed their written statements and supporting documents. On the basis of pleadings and documents, the learned court below framed as many as 16 issues according to para 22 of the impugned judgment and recorded the evidence of the respective parties. However, the learned court below has passed the impugned judgment and decree on 2.8.2021 whereby

dismissed the suit of the appellant / plaintiff vide civil suit no. 40A/14 but decreed the civil suit no. 39A/14 filed by the respondents / defendants and accordingly, passed the decree according to operative para 63 of the impugned judgment and directed the appellant / plaintiff to hand over the vacant possession of the disputed house to the defendants no. 2 and 3 within two months and not granted the decree of permanent injunction but decreed the suit that the appellant / plaintiff shall pay the mesne profit at the rate of 100/- per day to the defendants from 14.6.2009 to 25.6.2009 and further till the date of deliver of possession.

12. Learned counsel for the appellant submits that the trial court has committed gross error of law in passing the impugned judgment and decree in favour of the respondents / defendants rather to have dismissed their suit and failed to consider that there is no specific denial of the defendants in respect of the specific averments made by the appellant in his plaint by oral and documentary evidence. Further submitted that the appellant has proved his case by oral and documentary evidence and his continuous possession over the property in dispute since 1966 has been admitted by the respondents and even the respondent / defendant no.1 who is principal plaintiff in the civil suit no. 39A/14 has specifically admitted the continuous possession of the appellant / plaintiff since 1966 and from cross-examination of the plaintiff on behalf of respondent no. 1, it is crystal clear that by putting the certain questions in the cross-examination of the plaintiff, even the defendant no.1 herself has proved his case while on other hand the plaintiff himself has adduced the best evidence and evidence of the others plaintiffâ€™s witnesses who proved that there was continuous permission, consent and agreement of the defendant no.1 whereby

according to her own wish and willingness, she had given the possession on the portion of the disputed house for staying the appellant and his family members as she was not having her own family and wanted to continue the appellant / plaintiff on portion of the disputed house.

13. Further contended that respondent no.1 who is the principal plaintiff in civil suit no. 39A/14 and defendant no.1 in civil suit no. 40A/14 permitted his brother / appellant herein to construct a house on disputed portion of the house belonging to him and therefore, licensee granted by her is irrevocable and the respondent no.1 is estoppel by her conduct for seeking possession of the land in question. Further contended that no cogent and reliable documents and oral rebuttal evidence has been adduced by the defendant no.1 or the defendants no.2 and 3 who came in picture later on during the pendency of the civil suit when they purchased the property vide sale deed dated 30.9.2010 registered on 4.10.2010 and therefore, findings of trial court on the issues decided against the appellant / plaintiff while dismissing his civil suit, are not sustainable and liable to be set-aside.

14. Further contended that looking to Section 60 (b) of the Easements Act, his license cannot be terminated and the license either in oral or in document, is irrevocable. Further invited the attention of this court that there is a grave illegality and perversity in the impugned judgment and decree because the respondent no.1 who is principal plaintiff in civil suit no.39A/14 has not adduced her own evidence to prove her case and therefore, the facts and documents which averted in her plaint have not been proved at all which were in the best knowledge of defendant no.1 herself that the oral permission / license was given to the appellant / plaintiff to remain continue in the disputed portion of the house until occupancy of his own house. She did not take any pain to

enter into witness box to prove her own case or give any rebuttal evidence in the case of the appellant / plaintiff resulting which neither she could be examined nor cross examined by any of the party.

15. There is no case of defendant no.1 that she was unable to attend the court proceeding or give her evidence in the court or for some any other reason she had appointed any power of attorney holder to depose on her behalf. Therefore, the adverse inference can be drawn that she has not proved that the suit property was not given to the appellant / plaintiff or she had not given any kind of assurance / permission / license and the appellant / plaintiff was not her licensee or she had terminated licensee. In the absence of her evidence it cannot be presumed that she had proved her case on the basis of facts and averments‚Äô of her plaint (CS No.39A/14) and written statement in civil suit no. 40A/14 which were in her best knowledge. Thus, the trial court has committed gross error of law in granting the decree in favour of the defendants and the learned trial court itself constituted the case in their favour which was not proved by them. The learned trial court has committed gross error of law in relying the statement of DW-1 on behalf of defendant no.1 / principal plaintiff. The evidence of defendant no. 2 goes to indicate that he deposed about the facts which were not in his knowledge and the facts which were in the knowledge of the defendant no.1 / principal plaintiff (in civil suit no.39A/14 and defendant no. 1 in civil suit no.40A/14). The evidence of defendant no.2 cannot be read as the defendant no.1 who did not come in the witness box and no any kind of her examination or cross examination has been done in the case and therefore, the court cannot make out a new case which was pleaded by the party. Further argued that there is admission of possession of the appellant /

plaintiff since 1966 and there is clear admission of defendant no.1 with regard to granting permission which is crystal clear from her written statement and the plaint of her own case. The civil suit was filed by the appellant / plaintiff earlier back and when she received the summons then she issued a notice in illegal manner mala fidely. In the plaint and the evidence it is pleaded that the notice was issued in illegal manner with mala fide intention. Merely mentioning of receiving of notice and about its illegality, it cannot be presumed that the termination of the licensee was accepted until and unless the proof of its contents by adducing the best evidence of termination of its license which was in the knowledge of defendant no.1 but in the present case no any kind of evidence has been adduced by defendant n.1 or other defendants about the facts which were in her knowledge or any evidence in regard to transaction, conversation and execution of Ex.P/1 in between the appellant / plaintiff and defendant no.1. The appellant / plaintiff has proved the document Ex.P/33 regarding his continuous uninterrupted possession since 1966 and by way of his own evidence, and by the evidence of his witnesses PW 2 to PW 4, have clearly proved his case. During the course of arguments, learned counsel has invited the attention of this court that no civil suit has been filed by defendants no.2 and 3 and they never terminated the license of the appellant / plaintiff which could only have been proved by adducing the principal plaintiff / defendant no.1 namely Dr. Kumari Chhaya Rai. Defendants no.2 and 3 have not prayed the relief of mesne profit and without leading the evidence of defendant no.1 the decree of mesne profit cannot be granted in favour of defendants no.2 and 3 on the basis of their unreliable and inadmissible evidence and lastly argued that the admission of defendants could be the best evidence and adverse inference can be drawn against the respondents / defendants and admission

made by the opposite party can be believed by other party and there is no need to prove otherwise.

16. Further submitted that during the pendency of civil suit even after the temporary injunction granted in favour of the appellant / plaintiff by the learned trial court, the suit property cannot be alienated or transferred to any other one principle of Lis pendens is applicable in the present case, because admittedly during the pendency of the civil suit, the defendant no.1 sold the disputed property to the defendants no. 2 and 3 and on the aforesaid submission, he prayed for setting aside the impugned judgment and decree granted in favour of respondents / defendants in their civil suit no. 39A/14 and prayed for allowing of his civil suit no.40A/14 as prayed in the plaint including the amended prayer clause.

17. In order to buttress his contentions, he placed reliance on the decisions of the Honâ€™ble Apex court rendered in the case of **Mulraj vs. Murti Raghonathji Maharaj, AIR 1967 SC 1386 {relevant para 11) and Sri Gangai Vinayagar Temple and another vs. Meenakshi Ammal and others (2015) 3 SCC 624 {relevant para 27} and of the Kerala High Court in the case of O. P. Prakash vs. M. U. Chacko and another, 2015 SCC OnLine Ker 37113 {relevant para 13 and 15} and of this Court rendered in the case of R.P. Shrivastava vs. Smt. Sheela Devi and others, 2007 (4) MPLJ 102 {relevant para 11 and 14}; Bhagwati Devi vs. Jameela Begam and others, 2013 (2) MPLJ 371 {relevant para 11 to 14}; Rambilas vs. Jagatram, 2000 (2) MPLJ 170; Narmada Prasad vs. Bedilal Burman, 2020 (1) MPLJ 217 {relevant para 9 and 11}; Babulal (dead) through L.Rs. Smt. Krishnabai vs. Kalooram and others, 2012 RN 1 {relevant**

para 15}, Bhogiram and others vs. Sher Singh and others, 2020 (2) RN 306 {relevant para 15 and 26}; Pandru vs. Dharam Singh, 2010 (3) MPLJ 477 {relevant para 13 and 15}; and prayed that the present appeal be allowed and the civil suit filed by the appellant be decreed according to the prayer clause including the amended prayer clause.

18. Learned counsel for the defendants no. 2 and 3 / respondents no. 2 and 3 herein has supported the findings of impugned judgment and decree and submitted that learned trial Court has not committed any illegality and perversity in passing the impugned judgment and decree which is based on proper appreciation of pleadings, documents and evidence available on record and submitted that the interference is not warranted in the well reasoned impugned judgment and decree. In order to substantiate his contentions, he relied upon the judgments of the Honâ€™ble Apex Court in the case of **Gowri vs. Shanthi and another, (2014) 11 SCC 664, Balkrishna S. Dalwale (D) by L.Rs. vs. Vithabai C. Rathod (D) by L.Rs. and others, AIR 2010 SC (Supp) 76 and In re R. Gundu Rao AIR 1960 Madras 57, Maniram Saikia vs. Hira Bordoloi and others, AIR 1990 Gauhati 32, Maiianna alias Appaiah v. Smt. Muninanjamma alias Nanjamma, AIR 2001 Karnataka 205, and further relied on the judgments of this court in the case of Ganpat Rao vs. Ashok Rao and others, 2004 (3) MPLJ 571** and prayed that this appeal is bereft of merit and the same be dismissed.

19. Heard the arguments of learned counsel for both the parties at length and perused the impugned judgment and material available on record and the case law cited by learned counsel for both the parties. This court is much impressed with the law laid down in the cases cited by learned counsel for the appellant.

20. This court in **Awadh Bihari Asati and others v. Shyam Bihari Asati**

and others 2004 (1) MPLJ 225 has held that it is well settled that admission made by the opposite party is the best evidence on which other party can rely upon. Similar view has also been taken by Honâ€™ble the Apex court in **Ahmedsaheb v. Sayed Ismail, AIR 2012 SC 3320** in which it has been observed that it is needless to emphasize that admission of a party in the proceedings either in the pleadings or oral is the best evidence and the same does not need any further corroboration.

21. It is settled position of law that in the absence of the pleadings, no evidence can be looked into and also vice versa in the absence of any proof or evidence on record mere on the basis of the pleadings and documents of the parties as placed on record, no inference can be drawn to adjudicate the matter. The provision of Order 6, Rule 2 of the Code of Civil Procedure is very specific on this point that evidence cannot be looked into beyond the pleadings as per various interpretations of the different Courts. It shows that pleadings cannot take the place of proof until it is not proved by reliable evidence by examining the witnesses.

22. The documents produced by the plaintiff as sale deed and other papers are not the public documents. So without proper proof on record, they could not have been relied upon by the Courts below.

23. Beside this, the parties are also bound to prove those facts which they know. According to the pleadings of the plaint, the respondent no.1/ plaintiff had knowledge about the dispute as pleaded by her and she herself has not entered in witness box to prove such facts in support of her pleadings as such she have not discharged her burden to prove her case as per provision of Sections 101 and 102 of the Evidence Act. In that absence of it, there are

sufficient circumstances to draw an adverse inference against the respondents. This view is fully fortified on a decided case in the matter of **Martand Pundharinath Chaudhari v. Budhabai Krishnarao Deshmukh reported in AIR 1931 Bombay 97** in which it is held as under:â€"

> â€œIt is the bounden duty of a party personally knowing the facts and circumstances to give evidence in his own behalf and to submit to cross-examination and his non-appearance as a witness would be the strongest possible circumstances which will go to discredit the truth of his case AIR 1927 P.C 230, Rel on.â€ (Placitinum).

24. The aforesaid question was answered by this Court also in the matter of **Gulla Kharagit Carpenter v. Harsingh Nandkishore Rawat reported in 1970 MPLJ 586 : AIR 1970 M.P 225** in which it was held as under:â€"

> â€œWhen a material fact is within the knowledge of a party and he does not go into the witness box without any plausible reason, an adverse inference must be drawn against him. A presumption must be drawn against a party who having knowledge of the fact in dispute does not go into the witness box, particularly when a prima facie case has been made out against him.â€

25. In view of the aforesaid principle, on examining the case at hand, non-entrance of the respondent no.1- plaintiff in witness box to prove her case as per pleadings are sufficient circumstances to draw an adverse inference against her that she has no case against the appellant - defendant but by ignoring this principle the case was considered by the lower court on pleadings of the plaint and formal evidence of the defendants no. 2 and 3, is not sustainable under the

law as such in the absence of evidence of principal plaintiff, the suit should have been dismissed.

26. The Apex Court in the case of **S. Kesari Hanuman Goud vs. Anjum Jehan and others (2013) 12 SCC 64 in para 23** has held that â€œIt is a settled legal proposition that the power of attorney holder cannot depose in place of the principal. Provisions of Order III, Rules 1 and 2 CPC empower the holder of the power of attorney to â€œactâ€ on behalf of the principal. The word â€œactsâ€ employed therein is confined only to â€œactsâ€ done by the power-of-attorney holder, in exercise of the power granted to him by virtue of the instrument. The term â€œactsâ€, would not include deposing in place and instead of the principal. In other words, if the power-of-attorney holder has preferred any â€œactsâ€ in pursuance of the power of attorney, he may depose for the principal in respect of such acts, but he cannot depose for the principal for acts done by the principal, and not by him. Similarly, he cannot depose for the principal in respect of a matter, as regards which, only the principal can have personal knowledge and in respect of which, the principal is entitled to be cross-examined.

27. In **Man Kaur (dead) by Lrs vs. Hartar Singh Sangha (2010) 10 SCC 512** the Honâ€™ble Apex Court has held the legal position as to who should give evidence in regard to matters involving personal knowledge can be summarized as follows :-

> (a) An attorney holder who has signed the plaint and instituted the suit, but has no personal knowledge of the transaction can only give formal evidence about the validity of the power of attorney and the filing of the suit.
> (b) If the attorney holder has done any act or handled any transactions, in pursuance of the

power of attorney granted by the principal, he may be examined as a witness to prove those acts or transactions. If the attorney holder alone has personal knowledge of such acts and transactions and not the principal, the attorney holder shall be examined, if those acts and transactions have to be proved.

(c) The attorney holder cannot depose or give evidence in place of his principal for the acts done by the principal or transactions or dealings of the principal, of which principal alone has personal knowledge.

(d) Where the principal at no point of time had personally handled or dealt with or participated in the transaction and has no personal knowledge of the transaction, and where the entire transaction has been handled by an attorney holder, necessarily the attorney holder alone can give evidence in regard to the transaction. This frequently happens in case of principals carrying on business through authorized managers/attorney holders or persons residing abroad managing their affairs through their attorney holders.

(e) Where the entire transaction has been conducted through a particular attorney holder, the principal has to examine that attorney holder to prove the transaction, and not a different or subsequent attorney holder.

(f) Where different attorney holders had dealt with the matter at different stages of the transaction, if evidence has to be led as to what transpired at those different stages, all the attorney holders will have to be examined.

(g) Where the law requires or contemplated the plaintiff or other party to a proceeding, to establish or prove something with reference to his `state of mind' or `conduct', normally the person concerned alone has to give evidence and not an attorney holder. A landlord who seeks eviction of his

> tenant, on the ground of his `bona fide' need and a purchaser seeking specific performance who has to show his `readiness and willingness' fall under this category. There is however a recognized exception to this requirement. Where all the affairs of a party are completely managed, transacted and looked after by an attorney (who may happen to be a close family member), it may be possible to accept the evidence of such attorney even with reference to bona fides or `readiness and willingness'. Examples of such attorney holders are a husband/wife exclusively managing the affairs of his/her spouse, a son/daughter exclusively managing the affairs of an old and infirm parent, a father/mother exclusively managing the affairs of a son/daughter living abroad

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28. In **Janki Vashdeo Bhojwani and another vs. Indus Ind Bank Ltd and others (2005) 2 SCC 217** the same view is also expressed in the following manner :-

> 12. In the context of the directions given by this Court, shifting the burden of proving on the appellants that they have a share in the property, it was obligatory on the appellants to have entered the box and discharged the burden by themselves. The question whether the appellants have any independent source of income and have contributed towards the purchase of the property from their own independent income can be only answered by the appellants themselves and not by a mere holder of power of attorney from them. The power of attorney holder does not have the personal knowledge of the matter of the appellants and therefore he can neither depose on his personal knowledge nor can he be cross-examined on those facts which are to the personal knowledge of the principal.

13. Order 3 Rules 1 and 2 CPC, empowers the holder of power of attorney to "act" on behalf of the principal. In our view the word "acts" employed in Order III, Rules 1 and 2 CPC, confines only in respect of "acts" done by the power of attorney holder in exercise of power granted by the instrument. The term "acts" would not include deposing in place and instead of the principal. In other words, if the power of attorney holder has rendered some "acts" in pursuance to power of attorney, he may depose for the principal in respect of such acts, but he cannot depose for the principal for the acts done by the principal and not by him. Similarly, he cannot depose for the principal in respect of the matter which only the principal can have a personal knowledge and in respect of which the principal is entitled to be cross-examined.

14. Having regard to the directions in the order of remand by which this Court placed the burden of proving on the appellants that they have a share in the property, it was obligatory on the part of the appellants to have entered the box and discharged the burden. Instead, they allowed Mr. Bhojwani to represent them and the Tribunal erred in allowing the power of attorney holder to enter the box and depose instead of the appellants. Thus, the appellants have failed to establish that they have any independent source of income and they had contributed for the purchase of the property from their own independent income. We accordingly hold that the Tribunal has erred in holding that they have a share and are co-owners of the property in question. The finding recorded by the Tribunal in this respect is set aside.

15. Apart from what has been stated, this Court in the case of Vidhyadhar vs. Manikrao and Another, (1999) 3 SCC 573 observed at page 583 SCC that "where a party to the suit does not appear in the witness-box and states his own case on oath and does not offer himself to be cross-examined by the other

side, a presumption would arise that the case set up by him is not correct".

16. In civil dispute the conduct of the parties is material. The appellants have not approached the Court with clean hands. From the conduct of the parties it is apparent that it was a ploy to salvage the property from sale in the execution of Decree.

17. On the question of power of attorney, the High Courts have divergent views. In the case of Shambhu Dutt Shastri Vs. State of Rajasthan, 1986 2WLL 713 it was held that a general power of attorney holder can appear, plead and act on behalf of the party but he cannot become a witness on behalf of the party. He can only appear in his own capacity. No one can delegate the power to appear in witness box on behalf of himself. To appear in a witness box is altogether a different act. A general power of attorney holder cannot be allowed to appear as a witness on behalf of the plaintiff in the capacity of the plaintiff.

18. The aforesaid judgment was quoted with the approval in the case of Ram Prasad Vs. Hari Narain & Ors. AIR 1998 Raj. 185. It was held that the word "acts" used in Rule 2 of Order III of the CPC does not include the act of power of attorney holder to appear as a witness on behalf of a party. Power of attorney holder of a party can appear only as a witness in his personal capacity and whatever knowledge he has about the case he can state on oath but be cannot appear as a witness on behalf of the party in the capacity of that party. If the plaintiff is unable to appear in the court, a commission for recording his evidence may be issued under the relevant provisions of the CPC.

19. In the case of Dr. Pradeep Mohanbay Vs. Minguel Carlos Dias reported in 2000 Vol.102 (1) Bom.L.R.908, the Goa Bench of the Bombay High Court held that a power of attorney can file a complaint under Section 138 but cannot depose on

behalf of the complainant. He can only appear as a witness.

29. In view of the aforesaid discussion and the principle of law laid down as regard to who can depose on behalf of the original principal plaintiff has been regarding the facts, documents and material which are in the personal knowledge of the principal plaintiff and the facts, documents and material were not in the personal knowledge of the witness who came in the witness box and the principal plaintiff did not come in the witness box to prove her own case.

30. On perusal of the plaint, documents and evidence available on record, it is evident that there is an admission that the defendant no. 2 had no knowledge about any kind of acts or transaction or execution of the documents prior to the year 2010. The admission would be best evidence and thus, in view of the aforesaid admission, the other party is not required to adduce and prove the case because the plaintiff is bound on her own admission and presumption can be drawn against the plaintiff. In **Awadh Bihari Asati and others v. Shyam Bihari Asati and others 2004 (1) MPLJ 225** it has been held that it is well settled that admission made by the opposite party is the best evidence on which other party can rely upon. Similar view has also been taken by Honâ€™ble the Apex court in **Ahmedsaheb v. Sayed Ismail, AIR 2012 SC 3320** in which it has been observed that it is needless to emphasize that admission of a party in the proceedings either in the pleadings or oral is the best evidence and the same does not need any further corroboration.

31. In **Moolchand vs. Radha Sharan and another, 2006 (2) MPLJ 600** on the basis of the principles enumerated in paragraphs 9 to 12 and on the basis of the principle laid down in the case of **Gulla Kharagit Carpenter Vs.**

Harsingh Nandkishore Rawat, 1970 MPLJ 586 = AIR 1970 MP 225 and in Martand Pundharinath Chaudhari vs. Budhabai Krishnarac Deshmukh AIR 1931 Bombay 97, in which it has been held that non-entrance of the respondents â€“ plaintiffs in witness box to prove their case as per pleadings are sufficient circumstances to draw an adverse inference against them that they have no case against the appellant but by ignoring this principle the case was considered on merits only on pleadings of parties which is not sustainable under the law as such in the absence of evidence the suit should have been decreed.

32. The principle laid down in the aforesaid case laws is fully applicable in the present case and in absence of non-entrance of principal plaintiff Dr. Kumari Chhaya Rai in the witness box to prove her case as per plaint and the documents executed much prior to the year 2010; in which, in absence of evidence of principal, the opportunity to cross examine her has not been given to the appellant / plaintiff.

33. In view of the aforesaid submissions of both the parties, and the law laid down on the aforesaid decisions, it is seen that in the plaint of the appellant/ plaintiff, there was specific pleadings of construction in the permanent nature with due permission of defendant no. 1 Dr. Kumari Chhaya Rai and looking to other specific pleadings including the amended pleadings of the plaint and prayer clause as well, it is crystal clear that the plaintiff / appellant has adduced the specific pleading with regard to the permission for making construction in the permanent nature and there is admission that during the pendency of the civil suit, the disputed property has been sold to the defendants no.2 and 3 by sale deed dated 30.9.2010 registered on 4.10.2010. It is evident that no rebuttal evidence has been adduced by the defendant no.1 i.e. principal plaintiff in civil

suit no. 39A/14 who is respondent no.1 / defendant no.1 in the civil suit no. 40A/14 as she did not appear in the witness box and no explanation has been given by oral or documentary evidence that at the relevant time she was unable to attend the court and had given the power to defendants no.2 and 3 to depose the evidence of facts which were within her personal knowledge. It is evident from the record that no counter civil suit has been filed by the defendants no. 2 and 3 to grant any relief in their favour and admittedly, they entered as plaintiffs no. 2 and 3 on or after 4.10.2010 and they had no nexus in between the defendant no.1 and defendants no. 2 and 3 about any kind of earlier transaction, execution of documents in between the appellant / plaintiff and defendant no.1 or any kind of fact of giving the permission or termination of licensee ever and therefore, in absence of evidence of best personal knowledge regarding the facts on which decree has been granted in favour of the defendants no.2 and 3, the evidence of defendants no. 2 and 3 as the case may be, is not admissible in the eyes of law.

34. Apart from above, it is evident from the record that the appellant / plaintiff has adduced the documentary evidence and the evidence with regard to permanent construction and transaction in between the plaintiff and defendant no. 1 regarding the wishes of selling the disputed property to the appellant / plaintiff according to Ex.P/1 admitted by the defendants themselves. From para 11 of the plaintiff namely Avinash Rai, the documents Ex.P/1 to P/38 have been proved and in para 14 a question as regard to Ex.P/1 on behalf of the defendants no.2 and 3 was put up which has been accepted by this witness and thus, by putting this question, the execution of Ex.P/1 has not been specifically denied by the defendants. This witness has proved as to how and on what

manner he made the permanent construction on the disputed property which was within the knowledge of defendant no.1 and she gave permission for that. Surprisingly, on behalf of the defendant no.1, in para 22 of cross examination of this witness, the possession of the appellant / plaintiff since the year 1966 has been proved and from this para also, a letter indicating the yearning of the defendant no. 1 to give the disputed property to the appellant / plaintiff has been proved. On perusal of evidence of plaintiffâ€™s witness Phoolchand Patel (PW-4), the work of pakka construction in between the year 1986-87 has come on record. He also deposed about the interest / longing of defendant no.1 for giving the property voluntarily to the appellant / plaintiff and receiving an amount of Rs.2,50,000/- through two different cheques and by cash also, as she was keenly interested to make a trust and for that against the disputed property she had taken the money. In cross examination of para 4 he admitted that pakka construction was made in the portion of Avinash Rai and apart from that, he admitted that there was oral agreement to sell the property having area 3000 sq. ft. to the appellant / plaintiff Avinash at the rate of Rs.1000/- sq. ft. His further evidence of Para 7 reveals that he had a witness of the act done in between the appellant and defendant no.1 and specifically in para 8 he admitted that the construction of disputed house was made by the plaintiff. The evidence of other plaintiffâ€™s witness namely Suresh Singh Chouhan who constructed the pakka house on behalf of plaintiff in the year 1986-87 and had obtained the costs of Rs.2,50,000/-, stated that the construction was made in the presence of sister of plaintiff namely Dr. Kumari Chhaya Rai. In the cross examination of para 4 to 9 reveals that no any other rebuttal or contrary evidence came on his deposition that he was not the witness of construction of pakka house and in para 11 and 14 of his evidence, the construction of pakka / permanent house

and work of its maintenance was accepted. Ramakant Tripathi (PW-3) who was independent witness also proved possession of the plaintiff / appellant. This witness has also proved the agreement and transaction in between the appellant and defendant no.1. and again in cross-examination on behalf of defendant no.1, the possession of the appellant / plaintiff has been proved.

35. On the other hand, on behalf of defendants, only the evidence of defendant no.2 namely Pradeep Chouksey has been adduced. On perusal of his evidence, vide para 1 to 11 it is quite evident and crystal clear that almost about in all evidence he deposed about the fact which was in the personal knowledge of defendant no.1 who is principal plaintiff of civil suit no.39A/14. This witness first time came in picture when he purchased the disputed property during the pendency of civil suit on 30.9.2010 and he had no knowledge about all other earlier facts prior to 30.9.2010 or the date of registration of sale deed on 4.10.2010. From para 13 of his deposition it is evident that he had knowledge about the notice published in the daily newspaper Dainik Bhaskar about the pendency of the civil suit with regard to the property in dispute and temporary injunction granted by the learned court below. It may be seen that the civil suit was filed on 1.6.2009 and publication was made on 21.10.2009. Para 15 which is most important in the present case, this witness admitted that he was not known to Dr. Kumari Chhaya Rai prior to 30.6.2010 vide Ex.P/34 and he had no knowledge about any kind of conversation or transaction or permission for grant of oral license or termination of licensee ever done in between the appellant / plaintiff and defendant no.1 prior to 30.9.2010 and admitted that he had no knowledge about the facts which were in the personal knowledge of defendant no.1 and in para 16 he admitted the possession of appellant / plaintiff

namely Avinash Rai. From para 16, 17 and 21 it reveals that this defendant had prior knowledge about pendency of the civil suit and temporary injunction was granted, even then the defendants no. 2 and 3 had purchased the property in question, which is barred by the principle of *Lis pendens* under Section 52 of the Transfer of Property Act. In para 23 again he admitted the possession of appellant and nature of construction. In para 25 he admitted that he had no knowledge about termination of licensee and personally he had not issued any notice about that. He is not power of attorney holder of defendant no.1 and defendant no.1 has not authorized him to depose on her behalf. In para 27 he admitted that he never filed any separate civil suit or any counter plaint for declaring him to be owner of the property; recovery of possession and for grant of mesne profit. Looking to his evidence and conduct of defendant no. 2 there is no doubt that he was not authorized to depose about the facts or documents which were in the personal knowledge of defendant no.1 which were the basic foundation of the civil suit no.39A/14 in which the impugned judgment and decree has been passed and this witness has not proved any documents as regard to the termination of oral licensee or as regard to the rebuttal evidence against the appellant / plaintiff.

36. The learned court below has overlooked and not appreciated the specific pleadings and prayer clause of appellant / plaintiff, his documentary and oral evidence as stated herein-above on its proper perspective and merely on the basis of technicalities i.e. some very minor omissions which are not in material in nature and are not destroying the case of the appellant / plaintiff, held that the appellant / plaintiff has not proved the case and absolutely failed to consider that the defendants are duty bound to prove their own case i.e. civil suit no.39A/14, on which basis, they sought relief from the court of law. The

learned court below has failed to appreciate that the case of the appellant was fully covered under Section 60 (b) of the Easements Act and under the provisions of law laid down on the decisions cited by the appellants / plaintiff and decisions of this court rendered in the case of SA No.1342/18 decided on 9.5.2022 regarding the principle whether the evidence of witness who had no knowledge about the facts of principle plaintiff is authorized to depose on behalf of the principal plaintiff or whether the evidence of such witness is admissible according to the principle enumerated by this court relying the decisions of Apex Court in number of cases.

37. It is axiomatic from the evidence of the respondents no. 2 and 3 that they purchased the property in dispute during the pendency of the civil suit and interim injunction was also granted by the lower court with regard to the disputed property. From the evidence of the respondents 2 and 3 it is also evident that this fact was well within the knowledge of the respondents no. 2 and 3 that the property which they are going to purchase is *sub-judice* in the competent court of law and interim injunction is also granted with regard to the property in dispute. Despite of the fact that the *lis* is pending between the parties, the respondent no.1 had sold the property to the respondents no. 2 and 3. It is also pertinent to mention here that the respondents no.2 and 3 had purchased the property in dispute having knowledge of the *lis* or dispute between the parties. Thus, it is crystal clear that the property in question was sold during the pendency of the civil suit and under this circumstances, the provisions of Section 52 of the Transfer of Property Act is fully applicable and in such circumstances, the property in question sold by the respondent no. 1 to the respondents no. 2 and 3 on 30.9.2010 registered on 4.10.2010 is itself void,

ineffective and also against the interest and right of the appellant.

38. On the aforesaid discussion, the case of the appellant / plaintiff is supported by the other decisions cited herein-above in respect of Section 60 (b) of Easements Act and in respect of adverse inference under Section 114 of the Evidence Act against the defendants due to non-entry of principal plaintiff / respondent no.1 herein. The law is very settled that the principle of admission of opposite party would be the best evidence and then no need to prove otherwise. This appeal is allowed. Impugned judgment and decree dated 02-08-2021 passed by learned 19th District Judge, Jabalpur is hereby set-aside. Consequently, the civil suit no. 39-A/14 filed by the respondents herein instituted on 25.6.2009 against the appellant is hereby rejected and the civil suit no.40-A/14 filed by the appellant herein instituted on 1.6.2009 against the respondents is hereby allowed.

39. Office is directed to prepare a decree as per the prayer clause of the plaint as well as amended prayer clause made by the appellant herein in his civil suit no.40-A/14 parties being Avinash Kumar Rai vs. Dr. Kumari Chhaya Rai and others). All pending IAs stand disposed of.

(ARUN KUMAR SHARMA)
JUDGE

JP/-