

IN THE HIGH COURT OF MADHYA PRADESH AT JABALPUR

BEFORE

HON'BLE SHRI JUSTICE PURUSHAINDRA KUMAR KAURAV

MISC. PETITION No.4536 of 2021

Between:-

- 1. AKHILESH SINGH, S/O SHRI SANAND SINGH, AGED ABOUT 45 YEARS, OCCUPATION : BUSINESS, RESIDENT OF PANNA RAOD, PATERI, TEHSIL RAGHURAJ NAGAR, DISTRICT SATNA (M.P.)**
- 2. VYAST KUMAR DIWAKAR, S/O SHRI SUMITCHAND DIWAKA, AGED ABOUT 45 YEARS, OCCUPATION : BUSINESS, R/O PUSHPARAJ COLONY, TEHSIL RAGHURAJ NAGAR, DISTRICT SATNA (M.P.).**

.....PETITIONERS

(BY SHRI ABHISHEK SINGH - ADVOCATE)

AND

- 1. KRISHAN BAHADUR SINGH S/O SHRI RAJENDRA SINGH, AGED ABOUT 54 YEARS, OCCUPATION AGRI AND BUSINESS RESIDENT OF PANNA ROAD, PATERI, TEHSIL RAGHURAJ NAGAR, DISTRICT SATNA (M.P.).**
- 2. RAMASREY KACHI S/O SHRI MANOHAR KACHI, AGED ABOUT 79 YEARS, R/O KHUZARI TOLA, NEAR TILAK SCHOOL, SATNA, PRESENTLY AT; ARJUN NAGAR, PATERI, SATNA (M.P.).**
- 3. SIYA PRATAP SINGH S/O SHRI INDRAPAL SINGH, AGED ABOUT 30 YEARS, RESIDENT OF AMODHA KALA, WARD NO.1, RAGHURAJ NAGAR, DISTRICT SATNA.**
- 4. KAMLENDRA SINGH S/O SHRI GOVIND SINGH, AGED ABOUT 33 YEARS, AGED ABOUT 33 YEARS, R/O CIVIL LINES, DISTRICT SATNA; PRESENTLY AT VILLAGE MARYADPUR, POST GAURI, TEHSIL HANUMANA, DISTRICT REWA (M.P.).**

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5. **KAMLENDRA SINGH S/O SHRI VIJAY BAHADUR SINGH, AGED ABOUT 36 YEARS, R/O BHARHUT NAGAR, TEHSIL RAGHURAJ NAGAR, DISTRICT SATNA.**
6. **AVANISH SINGH S/O SHRI SHYAM KISHORE SINGH AGED ABOUT 30 YEARS, R/O PUSHPANAJALI COLONY, TEHSIL RAGHURAJ NAGAR, DISTRICT SATNA (M.P.).**
7. **BHASKAR SINGH PARIHAR, S/O SHRI DIWAKAR SINGH PARIHAR, AGED ABOUT 55 YEARS R/O AHARI TOLA, CIVIL LINES, DISTRICT SATNA (M.P.).**
8. **SHAKUNTALA DEVI W/O LATE SUKHDEV URMALIYA AGED ABOUT 48 YEARS, R/O GRAM BAGAHA TEHSIL RAGHURAJ NAGAR, DISTRICT SATNA (M.P.).**
9. **ASHWANI S/O LATE SHRI SUKDEV URMALIYA, AGED ABOUT 28 YEARS, R/O GRAM BAGAHA, TEHSIL RAGHURAJ NAGAR, DISTRICT SATNA (M.P.).**
10. **SHIVENDRA DEV S/O LATE SHRI SUKDEV URMALIYA, AGED ABOUT 22 YEARS, R/O GRAM BAGAHA, TEHSIL RAGHURAJ NAGAR, DISTRICT SATNA (M.P.).**
11. **RASHMI D/O LATE SHRI SUKDEV URMALIYA, AGED ABUT 25 YEARS, R/O GRAM BAGAHA, TEHSIL RAGHURAJ NAGAR, DISTRICT SATNA (M.P.).**
12. **STATE OF MADHYA PRADESH THROUGH COLLECTOR, DISTRICT SATNA (M.P.).**

....RESPONDENTS

(BY SHRI DEVENDRA SINGH - ADVOCATE FOR RESPONDENT NO.1 AND SHRI PRATYUSH SHRIVASTAVA, PANEL LAWYER FOR RESPONDENT NO.12/STATE.)

Reserved on : 15.02.2022
Delivered on : 25.02.2022

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ORDER

This petition under Article 227 of the Constitution is filed at the instance of defendant No.6 and 7 against the impugned order dated 30.11.2021 (Annexure P/9) passed by IVth District Judge, Satna.

2. A Civil Suit No.1-A/2014 is pending before the trial court seeking decree of specific performance of contract dated 17.1.2017 and declaring the sale deed dated 15.03.2013 and 17.04.20013 executed in favour of defendants No.4 and 5 to be null and void to the extent of share of the plaintiff and for permanent injunction against the defendants. The petitioners in the present petition are defendants No.6 and 7 in the civil suit. In the trial court, the evidence of defendant No.1 was recorded. However, defendant No.6 was not given opportunity to cross examine defendant No.1 and the statement of defendant No.1 was against the defendant No.6 and, therefore, his prayer for cross-examination was accepted by this Court, vide order dated 08.01.2020 passed in W.P.No.10710/2017.

3. In pursuance to the order passed by this court, on 05.03.2020, the learned trial court appointed the Court Commissioner to record the statement of D.W.1 as the said witness was unable to stand on his legs because of his old age. It appears that on the said date the cross-examination of D.W.-1 was conducted and evidence was filed by the Court Commissioner. It appears that respondent No.1/ plaintiff on the same date filed an application before the trial court seeking direction to first testify/ verify the mental and hearing condition of D.W.1, who, according to him was impaired. On 26.11.2021, the trial court questioned D.W.1 and it was found that D.W.1 although was of old age but he was able to hear and answer the question as per his

understanding. On 30.11.2021, an objection of respondent No.1 to the said effect was rejected. The trial court, however, has rejected the cross-examination of D.W.1 recorded on 05.03.2020 on the ground that respondent No.1/ plaintiff was not noticed and said cross-examination was conducted in his absence.

4. Learned counsel appearing for the petitioners submits that several calls were given to the counsel for the plaintiff. Counsel for D.W.1 was very much present. The presence of counsel for the plaintiff is immaterial as he had already cross-examined D.W.1. He placed reliance on the provisions of Order XVIII Rule 19 and Order XXVI Rule 4A of C.P.C to contend that evidence once recorded before the Commissioner shall form part of the court record, therefore, rejection of such evidence is *per se* illegal.

5. Learned counsel appearing for the respondents, however, opposed the petition and they submit that cross-examination of defendant No.1 in absence of plaintiff is a palpable error and, therefore, the same has rightly been corrected by the learned trial court and any other view would amount to miscarriage of justice.

6. I have heard learned counsel for the parties and perused the record.

7. The order dated 30.11.2021 clearly shows that cross-examination of D.W.1 was conducted in the absence of plaintiff. Thereafter, the matter was directed to be proceeded after recording the statement of D.W.1 in the presence of the parties.

8. Although the cross-examination of Defendant No. 1 by Co-Defendant No. 6 was conducted by the Commissioner in the absence of the plaintiff but nothing has been brought on record by the plaintiff to show that any irregularity was committed by the Commissioner while

recording evidence, nor he has been able to show any malafide on behalf of Commissioner nor has been able to show any prejudice which might have been caused to him by recording of evidence in his absence. Even at the first opportunity available while filing objection application in the lower court, the plaintiff has only raised objection regarding the mental and hearing condition of DW-1, but has not taken any ground regarding any irregularity or malafide on the part of the Commissioner while conducting cross-examination.

9. The conduction of cross-examination in the absence of the Plaintiff being only an irregularity does not vitiate the proceeding and on this basis only refusal to take on record the cross-examination is not warranted. However, when a Co-defendant cross-examines another Defendant, the order of cross-examination is that first the Co-defendant/Co-defendants will cross-examine the Defendant and then the Plaintiff will cross-examine. However, in this case the Plaintiff had first cross-examined the DW-1 and then Co-defendant No. 6 had cross-examined.

10. Thus, in the present case, not only by refusing to take on record the cross-examination conducted by Commissioner but also the order in which the cross-examination has been conducted by Co-defendant and Plaintiff, the trial court has committed a palpable error which warrants interference by this Court under Article 227 of the Constitution of India.

Hence, the order of the trial court so far as it relates to refusal to take on record the cross-examination by defendant No. 6, is hereby set aside and it is directed that the cross-examination of defendant No.1 by co-defendant No. 6 conducted on 05-03-2020 shall form a part of the record with a further direction that the plaintiff, if so desires, shall be

given an opportunity to further cross-examine the defendant No. 1 on any new fact/facts, if appeared during the cross-examination by defendant No. 6, which were not covered in the previous cross-examination done by the plaintiff.

11. With the aforesaid directions, the present writ petition is disposed of.

(PURUSHAINDR KUMAR KAURAV)
JUDGE

MKL.

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