IN THE HIGH COURT OF MADHYA PRADESH
AT JABALPUR

BEFORE

HON'BLE SHRI JUSTICE GURPAL SINGH AHLUWALIA

ON THE 12th OF APRIL, 2023

SECOND APPEAL No. 154 of 2017

BETWEEN:-

SMT. HIRIYA BAI W/O GHAPUVA AHIRWAR, AGED ABOUT 57 YEARS, KUTAURA, MAJRA BHAISAKHERA TEH. GHUVARA DISTT. CHHATARPUR (MADHYA PRADESH)

.....APPELLANT

(BY SHRI JANAKLAL SONI- ADVOCATE)

AND

1. **BUTHA S/O BHAROSA AHIRWAR, AGED ABOUT 60 YEARS, R/O VILL. KUTAURA, MAJRA BHAISAKHERA TEH. GHUVARA DISTT. CHHATARPUR (MADHYA PRADESH)**

2. **KANNU S/O BHAROSA AHIRWAR, AGED ABOUT 58 YEARS, R/O VILL. KUTAURA, MAJRA BHAISAKHERA TEH. GHUVARA DISTT. CHHATARPUR (MADHYA PRADESH)**

3. **MUNNI D/O BHAROSA AHIRWAR, AGED ABOUT 53 YEARS, R/O VILL. KUTAURA, MAJRA BHAISAKHERA TEH. GHUVARA DISTT. CHHATARPUR (MADHYA PRADESH)**

4. **GHAPUVA S/O BHAROSA AHIRWAR, AGED ABOUT 64 YEARS, R/O VILL. KUTAURA, MAJRA BHAISAKHERA TEH. GHUVARA**

DISTT. CHHATARPUR (MADHYA PRADESH)

5. **TIJAIYA D/O BHAROSA AHIRWAR, AGED ABOUT 56 YEARS, R/O VILL. KUTAURA, MAJRA BHAISAKHERA TEH. GHUVARA DISTT. CHHATARPUR (MADHYA PRADESH)**

6. **BHARRA S/O BHAROSA AHIRWAR, AGED ABOUT 54 YEARS, R/O VILL. KUTAURA, MAJRA BHAISAKHERA TEH. GHUVARA DISTT. CHHATARPUR (MADHYA PRADESH)**

7. **PUNIYA AGED ABOUT 68 YEARS, DAUGHTHER OF BHAROSA AHIRWAR, WIFE OF MULUVA AHIRWAR, RESIDENT OF RAMTAURIYA, TAHSIL GHUVARA, DISTRICT CHHATARPUR (MADHYA PRADESH)**

8. **KESHAR BAI, AGED ABOUT 73 YEARS, WIFE OF MUKESH AHIRWAR, RESIDENT OF VILLAGE KUTAURA, MAJRA BHAISAKHERA, TAHSIL- GHUVARA, DISTRICT CHHATARPUR (M.P.)**

9. **STATE OF M.P., THORUGH THE COLLECTOR, CHHATAPUR, DISTRICT CHHATARPUR (M.P.)**

.....RESPONDENTS

(BY MS. SHANTI TIWRI- PANEL LAWYER FOR THE RESPONDENT/STATE)

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 30.11.2016 passed by Additional District Judge, Bijawar, District Chhatarpur in Regular Civil Appeal No.09-A/2015 arising out of judgment and decree dated 16.03.2015 passed by 1st Civil Judge Class-II, Badamalehra, District Chhatarpur in Civil Suit No.14-A/2011.

2. The appellant is the plaintiff who has lost her case from both the Courts below.

3. The facts of the case, in short, are that the plaintiff filed a suit that Bharosa who is her father-in-law had executed a Will in favour of the plaintiff on 04/12/2002. It was also mentioned in the Will that the testator has 6 sons and all the sons are married. The last rites of the testator were performed by the plaintiff and after the death of testator, the plaintiff is in possession of the property in dispute. The defendants in connivance with Patwari and Revenue Officers have obtained an order of mutation dated 06/07/2004 in revenue case No. 20A-6/2003-04 which is null and void to the interest of the plaintiff. It was further pleaded that without any information to the plaintiff, an order of partition has been obtained on 30/11/2006 in case No. 2A-27/2005-06. It was claimed that the mutation and partition will not confer any title on the defendants. On 13.07.2011, the defendants tried to take possession of the property in dispute which has compelled the plaintiff to file the suit for declaration of title. It was claimed that the defendants were already given lands by their father and during the lifetime of their father, namely Bharosa, they had separated. The plaintiff had kept her father-in-law with her and after the death of Bharosa, the plaintiff has become

the owner and in possession of the lands in dispute. The defendants No.5 and 7 by sale-deed dated 17.04.2009 have alienated the Khasra No.121, 123/2, 125/2, 138/3, 131 area 0.225 aare in favour of defendant Kesar Bai and Khasra no.138/2 and 139 area 0.222 aare has been alienated to Puniabai and Tijiya. Thus, it was claimed that the sale-deeds are null and void to the interest of the plaintiff.

4. The defendants No.1, 2, 3, 5 and 6 filed their joint written statement and claimed that the property in dispute was not the self-acquired property of Bharosa but he had inherited from his father Bahora. The property in dispute is an ancestral property. The plaintiff by playing fraud on Bharosa got the Will prepared. Bharosa had 6 sons and one daughter and during his lifetime he had never stayed with the plaintiff. All the sons had taken care of Bharosa. Since the property in dispute is the ancestral property of Bharosa, therefore he has no right to execute the Will. The defendants also justified the order of mutation dated 06.07.2004, as well as the partition proceedings done by the Tehsildar. It was pleaded that even the husband of the plaintiff was a party to those proceedings and thus, the plaintiff was aware of the partition proceedings. The defendants are in possession of the lands in dispute even prior to the order of partition. The Tahsildar had found that the Will is doubtful and therefore, the property was mutated in the names of all the legal representatives. The defendant No.7 Puniabai had executed a sale deed in respect of Khasra No. 121, 123/2, 125/2, 138/3, 131 area 0.225 hectare in favour of Kesharbai for a consideration of Rs.31,500/- and Khasra No. 138/2, 139 area 0.222 hectare have been alienated by Tijiya in favour of Kesharbai for a consideration of Rs.31,500/-. Thus, the total valuation of the suit is Rs.63,000/-, which is

beyond the pecuniary jurisdiction of the trial Court. Thus, it was claimed that the suit be dismissed.

5. The trial Court, after framing issues and recording evidence, came to a conclusion that the disputed properties are not the self acquired properties of Bharosa. Although, Bharosa had executed a Will in favour of the plaintiff on 04.12.2002, but Will is not valid as Bharosa had no right to execute the Will. Consequently it was held that the plaintiff is not entitled for declaration on the basis of Will and the suit filed by the plaintiff was also barred by limitation. It was held that the sale deeds of suit lands executed in favour of Kesarbai are valid.

6. Being aggrieved by the judgment and decree passed by the trial Court the appellant preferred an appeal, which to has been dismissed by the First Appellate Court.

7. Challenging the judgment and decree passed by the Courts below, it is submitted by the counsel for the appellant that the Courts below have wrongly held that Bahora i.e. father of Bharosa was the original owner of the suit property and accordingly it has been wrongly held that the suit property was not the self acquired property of Bharosa. Even otherwise, Bharosa had right to execute a Will of his undivided share and the appellant acquired the title to the suit property to the extent of the share of Bharosa. It is further held that without there being any cross objection by the respondents, the Appellate Court should not have held that the Will is a suspicious document and suit was wrongly held to be barred by time.

8. Per contra, it is submitted by the respondents that even if a written cross-objection is not filed, the decree holder can always raise verbal cross-objection and thus, the First Appellate Court did not commit any mistake by ignoring that the Will is a suspicious document.

9. Heard learned counsel for the parties.

10. The first question for consideration is as to whether in absence of written cross-objection a decree holder can verbally challenge the findings in an appeal filed by the judgment debtor or not?

11. Under Order 41 Rule 22 of C.P.C. reads as under:-

> "22. **Upon hearing respondent may object to decree as if he had preferred a separate appeal-** (1) Any respondent, though he may not have appealed from any part of the decree, may not only support the decree [but may also state that the finding against him in the Court below in respect of any issue ought to have been in his favour; and may also take any cross-objection] to the decree which he could have taken by way of appeal provided he has filed such objection in the Appellate Court within one month from the date of service on him or his pleader of notice of the day fixed for hearing the appeal, or within such further time as the Appellate Court may see fit to allow.
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> [**Explanation**- A respondent aggrieved by a finding of the Court in the judgment on which the decree appealed against is based may, under this rule, file cross-objection in respect of the decree in so far as it is based on that finding, notwithstanding that by reason of the decision of the Court on any other finding which is sufficient for the decision of the suit, the decree, is, wholly or in part, in favour of that respondent.]
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> (2) From of objection and provisions applicable thereto- Such cross-objection shall be in the form of a memorandum, and the provisions of rule 1, so far as they relate to the form and contents of the memorandum of appeal, shall apply thereto.

> (4) Where, in any case in which any respondent has under this rule filed a memorandum of objection, the original appeal is withdrawn or is dismissed for default, the objection so filed may nevertheless be heard and determined after such notice to the other parties as the Court thinks fit.
>
> (5) The provisions relating to appeals by indigent persons shall, so far as they can be made applicable, apply to an objection under this rule."

12. A decree holder can assail the findings by filing cross-objection. However if the decree granted in favour of the decree holder is not liable to be modified even after setting aside the findings, the filing of cross-objection in writing is not necessary and the decree holder can always assail the findings by verbally challenging the same before the Appellate Court. However, where the decree is liable to be modified, then the cross-objection in writing is mandatory.

13. The Supreme Court in the case of **Hardevinder Singh Vs. Paramjit Singh and Others**, reported in **(2013) 9 SCC 261** has held as under:-

> "**20.** In *Sahadu Gangaram Bhagade* v. *Collector*, it was observed that: (SCC p. 689, para 8)
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> "*8.* … the right given to a respondent in an appeal is to challenge the order under appeal to the extent he is aggrieved by that order. The memorandum of cross-objection is but one form of appeal. It takes the place of a cross-appeal."
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> In the said decision, emphasis was laid on the term "decree".
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> **21.** After the 1976 Amendment of Order 41 Rule 22, the insertion made in sub-rule (1) makes it permissible to file a cross-objection against a finding. The difference is basically that a

respondent may defend himself without taking recourse to file a cross-objection to the extent the decree stands in his favour, but if he intends to assail any part of the decree, it is obligatory on his part to file the cross-objection. In *Banarsi* v. *Ram Phal* , it has been observed that the amendment inserted in 1976 is clarificatory and three situations have been adverted to therein. Category 1 deals with the impugned decree which is partly in favour of the appellant and partly in favour of the respondent. Dealing with such a situation, the Bench observed that in such a case, it is necessary for the respondent to file an appeal or take cross-objection against that part of the decree which is against him if he seeks to get rid of the same though he is entitled to support that part of the decree which is in his favour without taking any cross-objection. In respect of two other categories which deal with a decree entirely in favour of the respondent though an issue had been decided against him or a decree entirely in favour of the respondent where all the issues had been answered in his favour but there is a finding in the judgment which goes against him, in the pre-amendment stage, he could not take any cross-objection as he was not a person aggrieved by the decree. But post-amendment, read in the light of the Explanation to sub-rule (1), though it is still not necessary for the respondent to take any cross-objection laying challenge to any finding adverse to him as the decree is entirely in his favour, yet he may support the decree without cross-objection. It gives him the right to take cross-objection to a finding recorded against him either while answering an issue or while dealing with an issue. It is apt to note that after the amendment in the Code, if the appeal stands withdrawn or dismissed for default, the cross-objection taken to a finding by the respondent would still be adjudicated upon on merits which

> remedy was not available to the respondent under the unamended Code."

14. The Supreme Court in the case of **Prabhakar Gones Prabhu Navelkar (Dead) Through Legal Representatives and Others Vs. Saradchandra Suria Prabhu Navelkar (Dead) Through Legal Representatives and Others**, reported in **(2020) 20 SCC 465** has held as under:-

> "We have already referred to the law laid down by this Court in regard to Order 41 Rule 22 of the Code of Civil Procedure. In an appeal if the respondent does not want any change in the decree of the lower court, it is not necessary for him to file an appeal or cross-objection to merely support the decree already passed without any variation in the decree but by challenging the correctness of the findings in the judgment. The appellants are correct in contending that if a challenge is made to a decree by a respondent then necessarily the respondent must file either an appeal or a cross-objection."

15. Now, the only question for consideration is as to whether the First Appellate Court should have reversed the findings given by the trial Court with regard to the Will or not?

16. The suit filed by the plaintiff was dismissed with a finding that Bharosa had executed a will, although he had no right to execute the same. The aforesaid finding with regard to the execution of Will was set aside by the First Appellate Court. Even after the said finding was set aside, there was no effect on the decree which was ultimately passed by the trial Court. Under these circumstances, this Court is of the considered opinion that the First Appellate Court did not commit any

mistake by reversing the findings given by the trial Court with regard to the execution of Will even in absence of a written cross- objection.

17. Both the Courts below have given a concurrent finding of fact that Bahora i.e. father of Bharosa was the original owner of the suit property. This finding is necessarily a concurrent finding of fact. It is well established principle of law that even if an erroneous finding of fact has been recorded by the Courts below, still it cannot be interfered with by the High Court under Section 100 of C.P.C. unless and until the concurrent findings of facts are perverse being based on no evidence or based on inadmissible evidence or on account of rejection of admissible evidence or on flimsy grounds. However, the counsel for the appellant could not point out any perversity in the findings recorded by the First Appellate Court to the effect that the execution of Will has not been proved by the propounder of the same. Once, the execution of the Will is not proved, the question of bequeathing his share will also not arise.

18. Furthermore, all the suspicious circumstances which are attached to a Will have not been removed by the propounder. Badri Prasad Pandey (P.W.-3) who is scribe of the Will, has nowhere stated that he had read over the Will to the testator after writing the same. However, Badri Prasad Pandey (P.W.-3) has also admitted that he was not informed by the testator that the land in question was not mortgaged. Hiria Bai (P.W.-1) has admitted that Bharosa was not keeping well for the last 13 to 14 years and he was being treated at Chhatarpur, Ghuvara, Tikamgarh. She has further admitted that Bharosa was weak and, therefore, she used to take him on bullock cart because Bharosa was not in position to walk. Thus, if the First Appellate Court has come to a conclusion that the mental and physical fitness of the testator could not be proved by the appellant, then it cannot said that the said finding is not

based on the evidence. Hiria Bai (P.W.-1) has also stated that Bharosa had other lands also which were mutated in the names of his sons but the details of such lands were not given by Hiria Bai. Further, Badri Prasad Pandey (P.W.-3) had stated that he had noted down the khasra numbers from the Rin Pustika, but surprisingly did not notice the fact that in the Rin Pustika itself it was mentioned that the lands are under mortgage, therefore, the statement of the Badri Prasad Pandey (P.W.-3) that he had mentioned the khasra numbers after looking at the Rin Pustika, was false.

19. Under these circumstances, this Court is of the considered opinion that the findings given by the First Appellate Court with regard to execution of Will are based on sound appreciation of evidence.

20. As no substantial question of law arises in the present appeal, accordingly, the judgment and decree dated 30.11.2016 passed by Additional District Judge, Bijawar, District Chhatarpur in Regular Civil Appeal No.09-A/2015 is hereby **affirmed**.

21. The appeal fails and is hereby **dismissed**.

(G.S. AHLUWALIA)
JUDGE

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