IN THE HIGH COURT OF MADHYA PRADESH AT INDORE

BEFORE

HON'BLE SHRI JUSTICE ALOK AWASTHI

MISC. PETITION No. 5657 of 2018

FAKIRCHAND S/O LATE DHURJI NAI DECEASED THRU. LRS SMT. SUNDRBAI AND OTHERS

Versus

RAMCHANDRA S/O LATE NATHAJI NAI DECEASED THRU. LRS SMT. SAMPATBAI AND OTHERS

Appearance:

Shri A. K. Chitale, learned Senior Counsel assisted by Shri Sandeep Kochatta, learned counsel for the petitioners.

Shri Sukh Lal Gwaliory, learned counsel for the LRs. of respondent No.1.

Shri A. K. Sethi, learned Senior Counsel assisted by Shri Harish Joshi, learned counsel for respondents No.2 & 3.

RESERVED ON : 10.12.2025

DELIVERED ON : 10.02.2026

ORDER

The petitioners before this Court have filed the present petition under Article 227 of the Constitution of India being anguished by the order dated 30.06.2017 passed by the Ist Additional District Judge, Ratlam, whereby Miscellaneous Appeal No.01/2015 filed under Order XLIII Rule 1(k) of the Code of Civil Procedure, 1908 has been dismissed and judgment and decree passed by the Ist Civil Judge, Class - I, Ratlam in Civil Suit No.114-A/1994

has been affirmed.

02. Draped in brevity, the relevant facts are that predecessor of present petitioners Shankarlal filed a civil suit for partition joint family property and the agricultural land bearing Khata No.358, Survey Nos.191, 464 and 466 admeasuring 7.320 hectare against his brother Ramchandra, mother Smt. Nathi Bai and another pre-deceased brother Dhuraji through his legal heirs on 05.10.1982.

03. During the pendency of the civil suit and after a lapse of ten years, Shankarlal (original plaintiff) died on 19.12.1992. It is an admitted position that Shankarlal was unmarried and died issueless. He was being looked after by his nephew Fakirchand. During the life time, Shankarlal executed a Will in favour of Fakirchand on 05.03.1994. By the said will, the original plaintiff bequeathed all his properties including the land in question to Fakirchand. Therefore, on the basis of said bequest, an application under Order XXII Rules 3 & 9 of the CPC along with an application under Section 5 of the Limitation Act for substitution of name of the petitioners' ancestor Fakirchand in place of original plaintiff was filed on 07.05.1993. An application under Order XXII Rule 10 was also filed on the same day.

04. The aforesaid applications came up for consideration on 16.02.1995. Since no one marked presence of behalf of the original plaintiff, the suit was dismissed for want of prosecution. Thereafter, Fakirchand submitted an application under Order IX Rule 9 of the CPC for restoration of the civil suit. The defendants opposed the said application and prayed for rejection of the same.

05. Vide order dated 08.07.1996, the learned trial Court has rejected the application by holding that the said application is not maintainable by not interfering with the earlier order.

06. Being aggrieved by the aforesaid order, Fakirchand filed a miscellaneous civil appeal under order XLVIII Rule 1 of the CPC before the Court of IVth Additional District Judge, Ratlam which came to be rejected vide order dated 18.03.2002.

07. Feeling aggrieved by the order dated 18.03.2002, a civil revision was preferred before this Court i.e. Civil Revision No.528 of 2022, which came to be allowed vide order dated 20.07.2005 by setting aside the orders passed by the Courts below. It was further directed to the trial Court to decide the partition suit in accordance with law.

08. In pursuant to the aforesaid order, the matter again came up for consideration before the learned trial Court and the same was partially allowed vide order dated 15.05.2006. Being aggrieved, the respondents / defendants approached this Court by way of petition under Article 227 of the Constitution of India i.e. Writ Petition No.4563 of 2006 which came to be allowed by observing thus:-

> *"8. The impugned order is accordingly not liable to be sustained, it is, therefore, set aside. As a consequence, the petition is allowed and the impugned order is set aside. The trial court is directed to decide the question whether Fakirchand is a legal representative of Shankarlal on the strength of the will alleged to have been executed by Shankarlal on 05.03.1984. Let the inquiry to this effect be held in accordance with law, preferably within a period of three months from the date of production of this order by the trial court and depending upon the outcome of of the inquiry, appropriate orders permitting Fakirchand to become the plaintiff*

be passed. Record of the case requisitioned by this Court be forthwith sent back to the concerned trial court to enable him to decide the issue as directed above. Parties to appear before the trial court on 27.11.2006. Depending upon the outcome of the inquiry, if occasion arises, the suit be then disposed of within 6 months because it is one of the old pending in court since 1982."

09. Thereafter, the learned trial Court vide order dated 24.11.2007 rejected the application for substitution of name of Fakirchand in place of name of original plaintiff vide order dated 24.11.2007. Consequently, the suit was also dismissed for want of legal representative of original plaintiff Shankarlal.

10. Being anguished by the aforesaid order, Fakirchand approached the District Judge by way of an application under Order XLIII Rule 1(k) of the CPC on 01.01.2010 and the same was registered as Miscellaneous Appeal No.1/2015. During the pendency of the appeal, Fakirchand died on 02.10.2011. The petitioners, being the legal representatives of the deceased submitted an application under XXII Rule 3 of the CPC for substitution of their names and the same was allowed by permitting to substitute the names of petitioners in appeal memo. Thereafter, the matter was adjourned for more than 20 years and the matter was reserved for judgment on 30.06.2017. Vide judgment dated 30.06.2017, the learned District Judge has dismissed the appeal.

11. Being aggrieved by the aforesaid judgment, the petitioners again approached this Court by way of Civil Revision No.112 of 2017 which was disposed of vide order dated 24.10.2018 by permitting the petition to file a writ petition as civil revision was not maintainable. Hence, present

miscellaneous petition.

12. The first submission of the learned Senior Counsel for the petitioners is regarding **'Application for Transposition of name of Fakirchand as plaintiff in place of original plaintiff Shankar'** and it is being submitted that the Apex Court in the case of ***Dwarika Prasad v/s Nirmala*** *reported in* ***(2010) 2 SCC 107*** has held that in a suit for partition of the joint properties, every defendant is also in the capacity of the plaintiff and would be entitled to decree in his favour, if it is established that he has a share in the properties. Therefore, the suit for partition of the joint properties filed by the late father of respondent No.1 could not have been dismissed as withdrawn without notice to another brother, who was also entitled to a share in the properties. Further in the case of ***Azgar Barid v/s Nazambi reported in (2022) 5 SCC 334***, it has been held that in a suit for partition, the position of the plaintiff and the defendant can be interchangeable. Each party adopts the same position with the other parties. It is further held that so long as the suit is pending, a defendant can ask the Court to transpose him as a plaintiff and a plaintiff can ask for being transposed as a defendant.

13. The second argument of learned Senior Counsel for the petitioners is regarding **'Will required to be proved in only a summary enquiry'** and **'Will duly proved by Examining attesting witness but held suspicious due to non-examination of advocate'**. To elaborate the aforesaid submissions, learned Senior Counsel has taken the prop of the judgment delivered in the case of ***Ram Bai Padmakar v/s Runmini Bai reported in (2003) 8 SCC 537***, in which the Apex Court has held thus:-

"9. The learned District Judge has observed that Smt. Yamunabai was very old when she executed the Will and she was hard of hearing and was unable to walk. He further observed that Chhaya Dighe who typed the Will and one Shri Tiwari, Advocate, who was present at the time of preparation and execution of the Will, were not examined and these facts together created a doubt regarding the authenticity of the Will. As discussed earlier, in view of Section 63 of Indian Succession Act the proviso to Section 68 of the Evidence Act, the requirement of law would be fully satisfied if only one of the attesting witness is examined to prove the Will. That this had been done in the present case by examining PW2 Raghunath Govind Sogale cannot be disputed. No infirmity of any kind had been found in the testimony of this witness. Chhaya Dighe merely typed the Will and she is not an attesting witness nor it is anybody's case that Smt. Yamunabai had put her thumb impression on the Will in her presence, therefore, her examination as a witness was wholly redundant. The mere non examination of the Advocate who was present at the time of preparation or registration of the Will cannot, by itself, be a ground to discard the same. The fact that Smt. Yamunabai was hard of hearing or that she was unable to walk does not lead to an inference that her mental faculties had been impaired or that she did not understand the contents of the document which she was executing. It is important to note that Smt. Yamunabai personally came to the office of the Sub-Registrar and her death took place after a considerable period i.e. 3 years and 9 months after the execution of the Will. No evidence has been adduced by the defendants to show that at the time of the execution of the Will she had been suffering from any such ailment which had impaired her mental faculties to such an extent that she was unable to understand the real nature of the document which she was executing. We are, therefore, clearly of the opinion that the finding recorded by the learned District Judge, which has been affirmed by the High Court in second appeal, is not based upon a correct application of legal principles governing the proof and acceptance of Will and the same is completely perverse. The aforesaid finding is accordingly set aside. The finding recorded by the trial Court that Will is genuine is hereby restored."

14. The third argument of learned Senior Counsel for the petitioners is regarding 'Only summary enquiry regarding will required at the time of bringing legal representatives on record and for this purpose, reliance has been placed upon a judgment delivered in the case of ***Dashrath Rao Kate v/s Brijmohan Srivastav*** *reported in* ***(2010) 1 SCC 277***, in which it has been held

thus:-

> *"21. As a legal position, it cannot be disputed that normally, an enquiry under Order 22 Rule 5 CPC is of a summary nature and findings therein cannot amount to res judicata, however, that legal position is true only in respect of those parties, who set up a rival claim against the legatee. For example, here, there were two other persons, they being Ramesh and Arun Kate, who were joined in the civil revision as the legal representatives of Sukhiabai. The finding on the will in the order dated 9-9-1997 passed by the trial court could not become final as against them or for that matter, anybody else, claiming a rival title to the property vis-à-vis the appellant herein, and therefore, to that extent the observations of the High Court are correct. However, it could not be expected that when the question regarding the will was gone into in a detailed enquiry, where the evidence was recorded not only of the appellant, but also of the attesting witness of the will and where these witnesses were thoroughly cross-examined and where the defendant also examined himself and tried to prove that the will was a false document and it was held that he had utterly failed in proving that the document was false, particularly because the document was fully proved by the appellant and his attesting witness, it would be futile to expect the witness to lead that evidence again in the main suit.*
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> *25. Dr. Kailash Chand, learned counsel appearing for the respondent, also relied on ruling in Vijayalakshmi Jayaram v. M.R. Parasuram [AIR 1995 AP 351] . It is correctly held by the Andhra Pradesh High Court that Order 22 Rule 5 is only for the purpose of bringing legal representatives on record for conducting of proceedings in which they are to be brought on record and it does not operate as res judicata. However, the High Court further correctly reiterated the legal position that the inter se dispute between the rival legal representatives has to be independently tried and decided in separate proceedings. Here, there was no question of any rivalry between the legal representatives or anybody claiming any rival title against the appellant-plaintiff. Therefore, there was no question of the appellant-plaintiff proving the will all over again in the same suit.*
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> *26. The other judgment relied upon is the Full Bench judgment of the Punjab and Haryana High Court in Mohinder Kaur v. Piara Singh [AIR 1931 P&H 130]. The same view was reiterated. As we have already pointed out, there is no question of finding fault with the view expressed. However, in the peculiar facts and circumstances of this case, there will be no question of non-suiting the appellant-plaintiff, particularly because in the same suit, there would be no question of repeating the evidence, particularly when he had asserted that he had become owner on the basis of the will (Ext. P-1)."*

15. Reliance has also been placed upon a judgment delivered in the

case of ***Suryakant Gupta v/s Rajaram Gupta reported in 1998 (1) JLJ 307***, in which it has been held thus:-

> *"13. A legal representative is a person who, in law, represents the estate of the deceased person. In certain cases, this has to be determined by examining the will executed by the deceased who was a party to the suit. The persons who are natural heirs can also claim to be the legal representative by succession to the property and consequently, can challenge the will. Such applications can be decided only by determining prima facie, who are legal representatives. A detailed inquiry may not be called for because the determination whether the person is a legal representative or not by virtue of a will is likely to impinge upon the merits of the case. In reality, this question can only be decided by the trial Court by trying the case on merits. It is also well established that there can be no piece-meal trial. For this reason, this Court is of the view that the safest course would have been to permit the applicant to bring all the legal representatives on record including the wife and the two daughters of the deceased Rajaram Gupta, apart from his sons. In case, the Plaintiff succeeds to prove his will at the stage of trial, he would definitely got the share of Rajaram Gupta by virtue of the will and all other legal consequences shall ensue thereafter. By adopting the aforesaid course all the legal representatives of late Rajaram Gupta shall have an opportunity to contest the case on merits during the course of the trial. No harm shall be done to the applicant by not permitting him to raise the points involved in this revision because there is no substantial injury to the applicant nor the impugned order occasion failure of justice in any manner and the applicant does not suffer any irreparable injury."*

16. Learned Senior Counsel has also placed reliance upon a judgment delivered in the cases of ***Jawaharlal v/s Saraswati Bai Babulal Joshi*** *reported in* ***AIR 1987 BOM. 277*** in which it has been as under:-

> *"6. Shri Lohia urged that such an enquiry is necessary in respect of the categories mentioned in Rr. 1 to 9 of O. 212, Civil P. C. before thelegal representatives are allowed to be brought on record so that the suit can be continued when a party to the suit dies and there is no reason why an exception should be made in the case of person covered by R. 10 Now, R. 5 requires that where a question*

arises as to whether any person is or not a legal representative of a deceased plaintiff or a deceased defendant, such question shall be determined by the Court The opening words of Sub-r. (1) make it clear that the cases covered by R. 10 are a class part the form cases covered by Rules 1 to 9 and the option to continue the suit is dependent upon the leave the of Court which the party does not have an absolute right to ask for. Another difference as pointed out in Mulls Commentary on Civil Procedure Code, Eleventh Edition at page 720, lies in the consequences of not bringing the assignee or transferee of record. The suit does not become defective by an assignment pendente lite and the assignee is not precluded form recovering the debt due. The trial of a suit cannot be arrested merely by reason of the devolution of the interest of the plaintiff. The successor in interest maywith the leave of the Court continue may with the leave of the court continue the suit. If the does not the original plaintiff may. The assignor does not by reason of the assignment lose his right does not continue the proceedings. The position does not obtain in respect of the categories which are covered by Rr. 1 to 4 of PO. 22 Civil P. C. Invies of this difference an full- scale enquiry about the existence and validity of the assignment of devolution would not be necessary at the stage of granting leave. It is expected that the existence or otherwise or the rights or attacks or defences, which may be open to other parties on merits should be gone into at the stage of granting leave These have to be dealt with at a later stage when the suit comes for trial."

17. In view of the above, learned Senior Counsel has submitted that the present miscellaneous be allowed and the impugned judgment be set aside being unsustainable in the eyes of law.

18. Learned Senior Counsel appearing on behalf of respondents No.2 & 3 argued in support of the impugned judgment and it is submitted that finding of fact arrived at by the Courts below cannot be disturbed under Article 227 of the Constitution of India as held by the Apex Court in the case of ***M/s Puri Investments v/s M/s Young Friends and Co. & Others*** *reported in* ***2022 LiveLaw (SC) 279***. It is further submitted that the original will was

never produced before the Court below only the copy was filed. The petitioners failed to establish the authenticity of the will. Hence, the present miscellaneous petition is liable to be dismissed as re-appreciation of evidence is not permissible.

19. Learned counsel for respondent No.1 borrowed the arguments advanced by learned Senior Counsel and prayed for dismissal of the miscellaneous petition.

20. I have heard learned counsel for the parties at length and perused the record.

21. Paragraph - 11 of the impugned judgment passed by the learned District Judge reveals that Mohammad Farooq Ansari (PW-2), in his cross-examination stated that the name of the person who prepares a document is written on the document, however, his name is not mentioned in the document as the typist nor is 'drafted by Mr. Lashkari, Advocate' written on it. He could not say whether Mr. Lashkari signed the document or not. Advocate Ghanshyam Lashkari did not tell him to mention that he had drafted the document, hence, he did not disclose about the information. Further he has stated that Mr. Lashkari had registered many documents at the Registrar's Office, hence, he does not know as to why this document is not registered. Fakirchand stated that he was with Shankarlal, however, this witness has stated that when he met with Shankarlal, no one was there. This reveals contradiction between the statements of Fakirchand and this witness. When the will was typed, this witness, Mr. Lashkari and Shankarlal were there. When the will was being typed, Mohanlal was working on his

machine and he was called when the typing was completed. Further it has been deposed that he does not know about the age written in the will nor about the survey number and he does not have complete information. He has deposed that in the will, there is difference between the thumb impression on first and second page. In the cross-examination, he has admitted that upper part of the thumb impression on the first page is broader and the thumb impression on the last page is thicker.

22. Considering all the circumstances, the learned District Judge has dismissed the applications filed by the petitioner by holding that the evidence presented by the petitioners is not credible and the fact that Shankarlal executed the will in favour of the Fakirchand on 05.03.1984 is not acceptable. It has also been held that Fakirchand is not the legal representative of Shankarlal.

23. This Court also does not find any ground to interference with the finding of facts arrived at by the Courts below. Before this Court also, the petitioners failed to establish that Shankarlal executed the will in favour of Fakirchand on 05.03.1984. Hence, no case for interference is called for.

24. The Apex Court in the case of ***Shalini Shyam Shetty v/s Rajendra Shankar Patil*** *reported in* ***(2010) 8 SCC 329*** in paragraph 49 held as under:-

> *"49. On an analysis of the aforesaid decisions of this Court, the following principles on the exercise of High Court's jurisdiction under Article 227 of the Constitution may be formulated:*
> *(a) A petition under Article 226 of the Constitution is different from a petition under Article 227. The mode of exercise of power by High Court under these two Articles is also different.*
> *(b) In any event, a petition under Article 227 cannot be called a writ*

petition. The history of the conferment of writ jurisdiction on High Courts is substantially different from the history of conferment of the power of Superintendence on the High Courts under Article 227 and have been discussed above.

(c) High Courts cannot, on the drop of a hat, in exercise of its power of superintendence under Article 227 of the Constitution, interfere with the orders of tribunals or Courts inferior to it. Nor can it, in exercise of this power, act as a Court of appeal over the orders of Court or tribunal subordinate to it. In cases where an alternative statutory mode of redressal has been provided, that would also operate as a restrain on the exercise of this power by the High Court.

(d) The parameters of interference by High Courts in exercise of its power of superintendence have been repeatedly laid down by this Court. In this regard the High Court must be guided by the principles laid down by the Constitution Bench of this Court in Waryam Singh (supra) and the principles in Waryam Singh (supra) have been repeatedly followed by subsequent Constitution Benches and various other decisions of this Court.

(e) According to the ratio in Waryam Singh (supra), followed in subsequent cases, the High Court in exercise of its jurisdiction of superintendence can interfere in order only to keep the tribunals and Courts subordinate to it, 'within the bounds of their authority'.

(f) In order to ensure that law is followed by such tribunals and Courts by exercising jurisdiction which is vested in them and by not declining to exercise the jurisdiction which is vested in them.

(g) Apart from the situations pointed in (e) and (f), High Court can interfere in exercise of its power of superintendence when there has been a patent perversity in the orders of tribunals and Courts subordinate to it or where there has been a gross and manifest failure of justice or the basic principles of natural justice have been flouted.

(h) In exercise of its power of superintendence High Court cannot interfere to correct mere errors of law or fact or just because another view than the one taken by the tribunals or Courts subordinate to it, is a possible view. In other words the jurisdiction has to be very sparingly exercised.

(i) High Court's power of superintendence under Article 227 cannot be curtailed by any statute. It has been declared a part of the basic structure of the Constitution by the Constitution Bench of this Court in the case of L. Chandra Kumar vs. Union of India & others, reported in (1997) 3 SCC 261 and therefore abridgement by a Constitutional amendment is also very doubtful.

(j) It may be true that a statutory amendment of a rather cognate provision, like Section 115 of the Civil Procedure Code by the Civil Procedure Code (Amendment) Act, 1999 does not and cannot cut down the ambit of High Court's power under Article 227. At the same time, it must be remembered that such statutory amendment does not

correspondingly expand the High Court's jurisdiction of superintendence under Article 227.

(k) The power is discretionary and has to be exercised on equitable principle. In an appropriate case, the power can be exercised suo motu.

(l) On a proper appreciation of the wide and unfettered power of the High Court under Article 227, it transpires that the main object of this Article is to keep strict administrative and judicial control by the High Court on the administration of justice within its territory.

(m) The object of superintendence, both administrative and judicial, is to maintain efficiency, smooth and orderly functioning of the entire machinery of justice in such a way as it does not bring it into any disrepute. The power of interference under this Article is to be kept to the minimum to ensure that the wheel of justice does not come to a halt and the fountain of justice remains pure and unpolluted in order to maintain public confidence in the functioning of the tribunals and Courts subordinate to High Court.

(n) This reserve and exceptional power of judicial intervention is not to be exercised just for grant of relief in individual cases but should be directed for promotion of public confidence in the administration of justice in the larger public interest whereas Article 226 is meant for protection of individual grievance. Therefore, the power under Article 227 may be unfettered but its exercise is subject to high degree of judicial discipline pointed out above.

(o) An improper and a frequent exercise of this power will be counter-productive and will divest this extraordinary power of its strength and vitality."

25. In light of the aforesaid judgment as no patent illegality has been committed by the Courts below and the order passed by the Courts below neither suffer from any jurisdictional error nor from any perversity, this Court does not find any reason to interfere with the order passed Court below.

26. Resultantly, Miscellaneous Petition stands dismissed. However, liberty is reserved to the petitioners to file a fresh partition suit, if so advised.

(ALOK AWASTHI)
JUDGE

Ravi