

**(2022) 03 CHH CK 0056**  
**In the Chhattisgarh High Court**  
**Case No : First Appeal No. 46 Of 2008**

Aarati Mishra

APPELLANT

Vs

Shanti Lata Mishra

RESPONDENT

**Date of Decision :** 23-03-2022

**Acts Referred:**

Constitution Of India, 1950 — Article 136  
Code Of Civil Procedure, 1908 — Section 96, Order 41 Rule 2, Order 18 Rule 4, Order 14 Rule 5, Order 12 Rule 6, Order 41 Rule 11, Order 41 Rule 22  
Hindu Succession Act, 1956 — Section 8, 10, 22, 22(1), 22(2)  
Specific Relief Act, 1963 — Section 27(b), 34  
Limitation Act, 1963 — Section 97  
Transfer Of Property Act, 1882 — Section 3(ii), 41, 43  
Evidence Act, 1872 — Section 101, 102, 111

**Citation :** (2022) 03 CHH CK 0056

**Hon'ble Judges :** Narendra Kumar Vyas, J

**Bench :** Single Bench

**Advocate :** Anand Kumar Gupta, Prafull N. Bharat, Keshav Dewangan, Ashish Shrivastava, Aman Pandey, Rohishek Verma

## Judgement

1. The instant First Appeal has been filed by the appellants/defendants under Section 96 of the Code of Civil Procedure, 1908 challenging the judgment and decree dated 22.02.2008 (Annexure- A/1) passed by learned Ninth Additional District Judge (Fast Track Court) Bilaspur, District- Bilaspur (C.G.) in Civil Suit No. 13A/2008 (Smt. Shantilata Mishra Vs. Smt. Aarati Mishra & others) whereby the suit filed by the plaintiffs for grant of declaration, partition, separate possession to the extent of half share and also for grant of permanent injunction against appellant No. 1 has been partly allowed by the trial Court holding that (i) plaintiff and defendant No. 1 have equally share on the immovable property mentioned at Schedule-A of the plaint as well as on the house constructed over it. (ii) the movable property i.e. old Maruti Car and motor cycle mentioned at Schedule-B of the plaint, the plaintiff and defendant No. 1 have equally share (iii) prayer for payment of Rs. 1,20,000/- as well as half of the profit amounting to Rs. 10,000/-

by defendant No. 1 to the plaintiff in case of selling of movable property or rent earned from utilizing the Schedule-B vehicle as Taxi, has been rejected (iv) the sale-deed dated 03.05.2003 executed by defendant No. 1 in favour of defendant No. 2 & 3 has been declared void to the extent of share of plaintiff and (v) prayer for granting right to preferential right under Section 22 of the Hindu Succession Act, 1956 (for short "the Act, 1956") has been rejected.

2. For the sake of convenience, parties would be referred to hereinafter as per their status shown in the Civil Suit No. 13A/2008 filed before the trial Court.

3. The brief facts, as reflected from plaint averments, are that plaintiff has filed the plaint on 11.07.2000 mainly contending that defendant No. 1- Smt. Aarati Mishra is widow of her son namely Sandeep Mishra. The suit land is situated at Ward No. 11 Ambedkar Nagar, Old Ward No. 8 within the boundaries of Municipal Corporation Bilaspur. It has been contended that son of the plaintiff namely Sandeep Mishra has constructed a house in the year 1992-93, which is valued at Rs. 20,00,000/-, in foregoing paragraphs the same will be called as suit house. The suit house was recorded upto 04.07.2002 in the name of plaintiff's son- Sandeep Mishra. It has been further averred in the plaint that as per provisions of the Act, 1956, the property of a male Hindu dying intestate shall devolve according to the provisions of Section 8 of the Act, 1956. As per Section 10 of the Act 1956, the plaintiffs, defendants No. 1 & 2 are entitled to get equal share of the suit land, other movable and immovable properties as mentioned below:-

S.No.

Description of the property

Value in Rs.

1

Maruti 800 (M.P. 26-2206)

2,50,000/-

2

Hero Honda Splendor (MP 26 KD 1144)

40,000/-

3

Furniture & other domestic appliances

2,00,000/-

4

Law books, Library, Furniture, Showcase etc.

1,00,000/-

5

Colour T.V. (Big size)

18,000/-

6

Tape Recorder, C.D Player

52,000/-

7

Ceiling Fan (10 Nos.)

10,000/-

8

Life Insurance from Life Insurance Co.

1,60,000/-

9

Deposit amount in various banks

1,70,000/-

Total

10,00,000/-

4. It has been further contended that defendant No. 1 is making an attempt to sell the property of her son which has necessitated the plaintiff to file the suit. During pendency of the suit, the plaintiff has filed an application for impleading defendant No. 2 & 3 as party to the case on the ground that defendant No. 1 is taking a step to sell the suit house to them, as such, they are necessary party. Learned trial Court vide its order dated 13.03.2004 has allowed the said application and they have arrayed defendants No. 2 & 3 as party to the case. The plaintiff thereafter filed another application for amendment contending that defendant No. 1 has sold the suit house on 02.05.2003 to defendant No. 2 & 3 through registered sale-deed, in which, the plaintiff has half title and possession and the plaintiff has not given any consent for sale of the property, therefore, it is not binding, void and ineffective. Defendants No. 2 & 3 do not get any right over the suit land. It has been further contended that as per Section 22 of the Act, 1956, the plaintiff has first right to purchase the suit house and he is ready to pay Rs. 4,00,000/- to defendant No. 1 and she will also purchase the share of defendant No. 1. Accordingly, the suit was valued at Rs. 9,25,000/- and ad volerum court fee was affixed.

5. On the basis of above pleadings, the plaintiff has mainly prayed that it be

kindly declared that the plaintiff and defendant No. 1 have equal share over the property as per Sections 8 & 10 of the Act, 1956. It has also been prayed that defendant No. 1 be also restrained from transferring or selling the property mentioned in Schedule – A & B of the plaintiff without partition. It has also been prayed for that the plaintiff has first right to purchase the suit house and defendant No. 1 after taking half of the value be directed to execute sale-deed in favour of the plaintiff. It has also been prayed for that the vacant possession of the suit house from defendant No. 2 to 4 be also given or partition be done and possession of half of the share be also granted.

6. Defendant No. 1 has filed written statement denying the averments made in the plaint mainly contending that it is denied that Late Sandeep Mishra has partitioned from the joint family or he has separated from joint family. It is admitted that his boarding, lodging and source of income of her husband is separate, but it doesn't mean that he was separated from his father and brother or he has no right over the joint family property. The plaintiff has not shown description of partition, therefore, it cannot be said that the partition has been taken place. It is denied that Late Sandeep Mishra has got sell of some part of land of Khasra No. 1/7 from his father or land bearing Khasra No. 1/1 from his mother without any consideration merely on love and affection. It is also contended that the sale-deed has been executed after getting sale consideration before the Sub-Registrar then only sale-deed has been registered. It is denied that object of the sale-deed was to get financial assistance from bank. The plaintiff has not filed any document to demonstrate that right of defendant's husband- Sandeep Mishra has been relinquished which can be done through registered deed only. It has been further contended that defendant No. 1 is sole owner of the suit house and it is in her possession. The suit house has been recorded in her name in the Municipal Corporation's record.

7. It has also been contended that defendant No. 1 has sold the suit house on 03.05.2003 through registered sale-deed and has given possession to the purchaser as she is the only title holder and in possession of the suit house. The plaintiff is not entitled to get half of the share as claimed in the plaint. The plaintiff has no right to challenge the sale-deed executed by her. It is also denied that the plaintiff has preferential right to purchase the suit house as per the provisions of Section 22 of the Act, 1956. It is contended that provisions of the Act, 1956 are not applicable with regard to the property of her husband as he is separated son which has been admitted by the plaintiff also. As such, the plaintiff has no right over the self-acquired property of husband of defendant No. 1 after separation from Joint Hindu Family and would pray for dismissal of the suit. It has been further contended that defendant No. 1 is legally wedded wife and there is no source of her maintenance, as such, she has to sell the property, therefore, the plaintiff is not entitled to get any injunction.

8. Defendant No. 2 & 3, who are newly added respondents, have filed their written statement contending that the plaintiff has no right to get succession in

the property owned by defendant No. 1. It has also been contended by defendant No. 2 in the written statement that defendant No. 1 has sold the house through registered sale-deed dated 03.05.2003 as plaintiff has no preferential right over the suit house. Defendant No. 1 has given possession of the suit house at the time of execution of sale-deed on 03.05.2003. Defendants No. 2 & 3 after verifying the records from Municipal Corporation, Bilaspur, Revenue Department and the documents, wherein it has been mentioned that the house is in the name of defendant No. 1 and she is in possession of the suit house. Defendant No. 2 & 3 are bonafide purchasers of the suit house.

9. It has also been contended that the plaintiff and defendant No. 1 have neither informed them about ongoing legal battle nor filed any suit for getting injunction from the appropriate Court, therefore, plaintiff is restrained from taking this plea. It has also been contended that defendants No. 2 & 3 are not aware whether the court proceeding, which is pending relates to the suit house, therefore, they are bonafide purchasers. They have come to know about the pending suit, when notice was issued by this Court for their appearance, as such, they are bonafide purchasers of the suit house and prayed for dismissal of the suit against them.

10. Learned trial Court after pleading of the parties has framed as many as eight issues, which are as under:-

(i) Whether the plaintiff is entitled for declaration of title of half share of suit property mentioned in Schedule-A of the plaint?

(ii) Whether the plaintiff is entitled for getting half share of the properties and the amount deposited in the FDR as mentioned in Schedule-B of the plaint?

(iii) Whether the defendant No. 1 and Late Sandeep Mishra are joint owners of the suit house as it has been constructed from self-acquired inform of Late Sandeep Mishra from his savings, loan from LIC and contribution of defendant No.1 father?

(iv) Whether the plaintiff has valued the suit house properly?

(v) (a) Whether the defendant is getting income to the tune of Rs. 10,000/- by utilizing the Maruti Car and if yes,

(b) Whether the plaintiff is entitled to get Rs. 5000/- per month.

(vi) Relief and cost.

(vii) Whether the suit is barred under Section 34 of the Specific reliefs Act ?

(viii) Whether the plaintiff has preferential right to purchase the suit house?

11. The plaintiff to substantiate her averments examined herself as PW-1 and has not exhibited any document. Defendant No. 1-Aarati Mishra examined herself as DW-1, Ayub Khan (DW-2) & Ratindra Mishra (DW-3), Shivnarayan Shukla (DW-4) exhibited documents namely sale-deed dated 24.09.1991 (D/1), Sale-deed dated 24.09.1991 (D/2), letter written by Sandeep Mishra dated

19.07.1990 (D/3), letter dated 25.01.1993 written by the plaintiff (D/4), documents given by the Municipal Corporation (D/5), receipt of property tax (D/6 & 7), B-1 of the suit house (D/8), Panchshala Khasra (D/9), receipt of Maruti Automobile (D/10 & 11), bill of National Garage (D/12), bill of Saluja Radio (D/13), Kohli Traders (D/14), her letter dated 14.09.1989 (D/15), letter written by her father dated 26.07.1990 (D/16), her letter dated 15.12.1990 & 15.03.1993 (D/17 & 18), Rin Pustika given by Madhya Pradesh Bij Vikas Nigam (D/19 to 22), invoice of Sagar Soya Product (D/23), purchase bill of Bij Vikas Nigam (D/24 to 27) & two bills of Ashok Kumar Vipin Kumar Kesharwani (D/28 & 29).

Defendant No. 2 & 3 examined himself and Paramjeet Saluja.

12. The plaintiff has filed affidavit under Order 18 Rule 4 of the C.P.C. reiterating the stand taken by her in the plaint. She was cross-examined by counsel for defendant No. 1, wherein she has admitted that she is not aware about the property owned by joint family of Sandeep Mishra and Vishnu Bhagwan Mishra. She has admitted that the joint family property will be recorded in the name of Vishnu Bhagwan Mishra. She has also admitted that sale consideration of joint family property will be utilized for joint family only and according to her, no partition has been taken place. She has admitted that property mentioned in Ex. D/1 & D/2 has been sold to Sandeep Mishra. She has further stated that she is not aware whether the sale consideration mentioned in Ex. D/1 & D/2 has been given by Sandeep Mishra or not. She has stated that her husband may have taken. She has also admitted that she has not prepared the plaint, she is not aware who has prepared the plaint. She is not aware what is the pleading made in the plaint. She has also admitted that contents of the plaint have not been written on her instruction, but she has admitted that she has put her signature in the plaint. She has also admitted that who has prepared the plaint or who has typed the plaint, that is not known to her. She has stated that Sandeep Mishra has taken Rs. 1 lac from her, she has denied that the house has been construction from financial assistance from in-laws of her son. She has admitted that Sandeep Mishra has not left and any profession which may generate income to Aarati Mishra for her survival. She has admitted that she has not given any notice to Aarati Mishra at the time selling of the house and she has stated that Aarati Mishra has not asked from her before selling of the suit house.

13. The witness was cross-examined by counsel for defendant No. 2 & 3 wherein she has denied that Sheikh Ayub has contacted her before execution of sale-deed of the house and she has clarified that she has not heard about Sheikh Ayub. She has also denied that Sheikh Ayub has asked her that Aarati is suffering from financial crises, therefore, she intended to sell the house and has also denied that any permission was given to her for sale of the house.

14. Defendant No. 1 has filed an affidavit under Order 18 Rule 4 of the C.P.C. reiterating the stand which she has already taken in the plaint. In the cross-examination, she has admitted that in the exhibited document D/1 & D/2, she

has not enquired about what is written in that documents. She has admitted that after registration of Ex. D/1 & D/2, she has read over it and it is found that her name has not been mentioned. She has clarified that the plaintiff was not ready to record her name in the sale-deed with hope to live peaceful matrimonial life, she has consented for the same. She had denied that no sale consideration was mentioned, therefore, she has not raised any objection.

15. She has admitted that sale-deed has been executed by Sheikh Ayub Khan. She has also admitted that she has not mentioned about the fact that the suit house was inherited by her after death of her husband. This fact has neither been mentioned nor Sheikh Ayub Khan has advised to write the same, but how it has been written, it does not known to her. She has admitted that in the sale-deed, she has put her signature in the register. She has admitted in paragraph 18 of the cross-examination that there was dispute with her mother-in-law with regard to the suit house. She has not talked to the purchaser, but she has explained everything to him. She has advised Ayub Bhai to go to her mother-in-law to inform with regard to sell. Ayub Bhai told that her mother-in-law plaintiff told him that if Aarati Mishra intended to sell the property, she can sell it.

16. She has specifically admitted that the fact of enquiry with her mother-in-law has not been mentioned in the affidavit. She also admitted that she has not given any information in writing to her mother-in-law about selling of the suit house as it is not required as the suit house is of her. She has also admitted that she has not asked from the plaintiff and has also not mentioned what discussion has been done between Ayub Bhai and Shantilata in her examination-in-chief. She has also admitted that when she has recorded her name in the property of Sandeep Mishra, no notice to Shantilata is required, as it is her property.

17. The witness was cross-examined by counsel for defendant No. 2 and she has admitted that she has talked to her father-in-law before selling of the suit house and she has sent Ayub Khan to ask her mother-in-law for sale. Ayub Khan has informed that she has said that she can sell the property.

18. Defendant No. 2 has also examined Ayub Bhai. He has supported the case of defendant No. 1 and in cross-examination, he has denied the fact that plaintiff-Shantilata has not told that the house belongs to Aarati Mishra, if she intends to keep it, she can keep it or she can sell it, she has no concern over it. He has admitted that he has mentioned in clause 4 of examination-in-chief that the draft sale-deed has been prepared on the instruction of Aarati Mishra, but he has clarified that the document writer has prepared the draft. It is also admitted that when the sale-deed was prepared, neither he nor Aarati Mishra was present there. He has admitted that he has friendship with Sandeep Mishra, therefore, he has done mediation. He has admitted that neither the seller nor the purchaser has issued paper publication with regard to sell of the suit house in any newspaper.

19. Defendant No. 3 has also examined Ratindra Mishra, Advocate who was close

friend of Sandeep Mishra and who was witness in the sale deed executed on 24.09.1991 vide Ex. D/1 & D/2. This witness was cross-examined wherein he has admitted that at the time of execution of sale-deed, name of Sandeep Mishra was mentioned as purchaser. It has been also stated that it is not required for the witnesses to say that who has given money that is why he has not written it. Shiv Narayan Shukla, who was father of defendant No. 1 was cross-examined wherein he has denied that he has not given money to his daughter for purchasing the land and construction of house over the suit land. He has admitted that he has not given as loan, but as gift. He has admitted that money which has been given to her has not been returned by Aarati Mishra. He has also admitted that Aarati Mishra has sold the house and the suit is pending before the trial Court. He has admitted that he has not advised her daughter to sell during pendency of the suit. He has also not advised not to take any permission before selling of the house. He has also admitted that when sale-deed was executed, he was there and he has put his signature as witness. Defendant No. 2 & 3 cross-examined themselves and have admitted that the entire sale consideration was given to Aarati Mishra, but he is not aware that whether defendants No. 2 & 3 are not aware about pendency of the suit.

20. Defendants No. 2 & 3 have examined Paramjeet Saluja, who has reiterated the stand which they have taken in their written statement. He has stated that Sheikh Ayub Khan who was mediator in the transaction when asked whether any dispute with regard to the suit house is going on, then Sheikh Ayub Khan has asked to Shantilata and Aarati Mishra, who have informed that there is no dispute with regard to the suit property and then they got the document registered. He has also admitted that he has not read description of the sale-deed. It is also denied that plaintiff- Shantilata has also told him that she has right over the property and she will purchase the suit house after paying the money. She has admitted that mediator of the transaction speaks Hindi. He has not admitted that at the time of execution of sale-deed, mediator Sheikh Ayub Khan was there or not, then he says that he was there at the time of registration of sale-deed. He has said that the sale consideration was given through Bank Draft, through Sheikh Ayub Khan. It is also admitted that Shantilata has created dispute also lodged report in the police where enquiry has been done.

21. Learned trial Court after appreciating the evidence and material on record has passed the impugned judgment and decree which is being challenged by the plaintiff so far as it relates to denial of preferential right to purchase the house by filing the cross appeal. Defendants No. 1, 2 & 3 have filed appeal assailing the entire judgment and decree passed by the trial Court before this Court under Section 96 of the C.P.C.

22. Learned counsel for defendant/appellant No. 1 would submit that the learned trial Court has not considered the evidence, material on record and has given erroneous finding. He would further submit that the learned trial Court has committed error in holding that the suit house does not belong jointly with

defendant No. 1 merely on the ground that her name has not been mentioned in the sale-deed. This finding is perverse as according to Section 10 of the Act, 1956, it was for the plaintiff to prove that the property was solely owned by deceased-Sandeep Mishra and not by appellant No. 1, which, she failed to prove the same. To substantiate his submission that property belongs to appellant No. 1 with her husband jointly, he would submit that the suit property was purchased from financial assistance provided by father-in-law of deceased- Sandeep Mishra. Learned Senior counsel for the appellant would submit that the witness examined by appellant No. 1 namely Shiv Narayan Mishra has clearly deposed the evidence with regard to financial assistance by them for purchase of suit house. This was not subjected to cross-examination still the trial court has given perverse finding.

23. He would further submit that the trial Court after examining the evidence in paragraph 9 to 13 has held that the land was purchased with financial assistance given by Shiv Narayan Shukla who is father of appellant No. 1 and her uncle-Hari Narayan Shukla. Even after recoding the said finding, the court below committed an error in holding that the suit house did not jointly belong to appellant No. 1 with deceased Sandeep Mishra only on the ground that her name has not been mentioned in the sale-deed. He would further submit that the evidence was placed on record of the trial Court by way of Ex. D/3 to D/6, which are the revenue record, wherein, the name of appellant No. 1 has been recorded to establish that thought defendant No. 1- Aarati Mishra is owner of the suit property, still the trial Court has not given a finding that Aarati Mishra is joint owner of the suit property, which is perverse and contrary to the record.

24. He would further submit that the plaintiff while examining before the trial Court has admitted in her cross-examination at paragraph 19 & 20 that the plaint which has been filed before the trial Court has neither been drafted nor under whose instruction the plaint has been drafted. In view of such admission, it is quite vivid that the plaint has not been filed before the trial Court, therefore, the suit demolished on this evidence itself. To substantiate the submission, he would rely upon the judgment rendered by Hon'ble High Court of Madhya Pradesh in Pradumn Singh & others Vs. Shivraj Singh ILR 2014 MP 424 wherein it has been held that affidavit prepared by the counsel and the witnesses merely signing it, it can be inferred that statement produced on behalf of the witnesses is not his actual statement.

25. Learned counsel for the appellant would submit that the pleadings made in the plaint with regard to the facts of the case have not been proved though it was incumbent upon the plaintiff to discharge his burden with regard to prove of the facts which she miserably failed to do. To substantiate the submission, he would rely upon the judgment rendered by Hon'ble the Supreme Court in Rangamal Vs. Kuppuswami & another (2011) 12 SCC 220 wherein it has been held by Hon'ble the Supreme Court that party who pleads has to prove his case, the burden of proving facts always lies upon the person who asserts. He would also rely upon the judgment rendered by Hon'ble the Supreme Court in

Corporation of City of Bangalore Vs. Juleka Bee & others (2008) 11 SCC 306 wherein it has been held that respondent No. 1 who was plaintiff before the trial Court claiming title for suit property, therefore, burden of proof was on her to prove her title which she failed to do, therefore, the learned trial Court has committed illegality in allowing the suit in part in favour of the plaintiff. This is gross illegality, as such, the judgment and decree passed by the trial Court deserves to be set aside.

26. He would further submit that a relief of preemptory right on the basis of Section 22 of the Act, 1956 was claimed by the plaintiff by way of amendment which was declined by the learned trial Court against which on 15.06.2009 a cross appeal has been filed before this Court. He would submit that the cross appeal is barred by limitation and no application for condonation of delay has been filed, as such, the cross appeal filed by the plaintiff deserves to be dismissed as barred by limitation. To strengthen this submission, he would submit that the judgment and decree was pronounced on 22.02.2008, the appeal was filed on 20.03.2008, notices were received by the plaintiff on or before 22.06.2008. The limitation to file an appeal is 30 days from the date of decree, the cross appeal ought to have been filed on or before 20.07.2008. The cross appeal has been filed on 15.06.2009 that too without any application for condonation of delay. In absence of any such application, the cross appeal dated 15.06.2009 is not maintainable and the same may kindly be rejected.

27. He would further submit that plea of preemption is basically under Section 22 of the Act, 1956 which prescribes preferential right to acquire property in certain cases. It provides that if any one of heirs specified in Class-I proposes to transfer his or her interest then the other heir shall have a preferential right to acquire the said interest. To exercise the said right, an application under Section 22 (2) of the Act, 1956 should be moved before the concerned court for fixation of price of proposed transfer. In absence of any such application, the plaintiff has no right to claim any preferential right, as such also, his cross appeal for preferential right is not maintainable before this Court. In support of his submission, he placed reliance upon the judgments reported in AIR 1981 MP 250 & AIR 1995 Gau 88. He would submit that the amendment for preferential right/ claim was made after the said property was already sold out. Section 97 of the Limitation Act provides limitation of one year to enforce a right of preemption. As per the plaint pleading, the sale-deed was executed on 02.05.2003 whereas the amendment application was allowed on 20.11.2004 i.e. after the prescribed period of limitation, therefore, the prayer for preferential right deserves to be rejected by this Court. In support of his submission, he placed reliance upon the judgment rendered by Hon'ble the Supreme Court reported in (1980) 2 SCC 329.

28. He would further submit that during pendency of present appeal, plaintiff-Shantilata Mishra had expired and in her place respondent No. 1 to 4 namely Sujata Sharma, Ku. Sangeeta Mishra, Soumitra Mishra & Satyam Mishra were substituted. All these respondents i.e. respondent No. 1 to 4 are brothers and

sisters of deceased- Sandeep Mishra i.e. Class-II heir, entry II Sr. No. 3 to 4 and as such they cannot claim right of preemption. Not only this, after death of Shantilata Mishra, respondents No. 1 to 4 including the predeceased son Sandeep Mishra would be heirs of Shantilata Mishra and they will take 1/5th share each, as such, Aarati Mishra would also succeed to 1/5th share (after the death of Shantilata Mishra as a share of predeceased son) apart from ½ share being Class-I heir of deceased Sandeep Mishra, therefore, he would pray that the judgment and decree passed by the trial Court may kindly be set aside.

29. Learned Senior counsel for appellants No. 2 & 3 would submit that appellants No. 2 & 3 are bonafide purchasers and despite the pleading raised by them in their written statement and evidence adduced by them to this effect, the trial Court has not framed any issue, therefore, they have filed an application on 13.06.2011 under Order 41 Rule 2 of C.P.C. before this Court contending that the appellants may be permitted to argue on the following points in final argument:- (a) Court below should have held that the appellants No. 2 & 3 are bonafide purchasers for consideration without notice. (b) Trial Court should have framed issue on said point and allowed to lead evidence to defendants No. 2 & 3 on said points.

30. He would further submit that they have taken specific plea as they are bonafide purchasers, but no issue has been made by the trial Court, therefore, they would submit that at the time of final hearing of the case, they may kindly be allowed to argue on the following points mentioned hereinabove.

31. This Court while considering the application under Order 41 Rule 2 of the C.P.C. vide order dated 15.10.2014 held that the said application will be considered at the time of final hearing, therefore, this Court while hearing the appeal has given an ample opportunity to appellants No. 2 & 3 to make their submission with regard to bonafide purchasers. Accordingly, they have submitted their arguments on the point without framing of issue and would submit that the matter be kindly remitted back to the trial Court for framing of issue and deciding the case afresh whether defendants No. 2 & 3 are bonafide purchasers or not.

32. Learned counsel for defendants No. 2 & 3 would submit the record of the court below would reflect that prior to execution of sale-deed by defendants No. 2 & 3, they have intimated Shantilata Mishra that they are purchasing the property on which she had neither objected nor informed that she is successor of deceased Sandeep Mishra, as such, appellants No. 2 & 3 are entitled to get benefit under Section 27 (b) of the Specific Relief Act, 1963 being the bonafide purchaser without notice. To substantiate this submission, he has relied upon the judgment reported in Jagannath Vs. Jagdish Rai & others 1998 Supreme Appeal Reporter (Civil) 359.

33. He would further submit that Section 43 of the Transfer of Property Act, 1882 (for short "the Act, 1882") provides for transferor having spes successionis

selling the property. It provides where a person transfer property representing that he has a present interest therein, whereas he has, in fact only a spes successionis the transferee is entitled to benefit of Section 43, if he has taken the transfer on the faith of that representation and for consideration. Defendant No. 1-Smt. Aarati Mishra represented herself to be wife of deceased Sandeep Mishra and has represented that she alone had interest in the property. Based on the said representation, the present appellants No. 2 & 3 acted and purchased the property for said consideration, therefore, benefit of Section 43 would be available to them. Not only this, the evidence on record would clearly show that prior to the said sale-deed, plaintiff-Smt. Shantilata Mishra was contacted by defendant No. 1- Aarati Mishra and also by one Sheikh Ayub Khan, who was examined as DW-2. Sheikh Ayub Khan in paragraph 3 of his deposition has stated that Paramjeet Saluja had asked me to have a talk with Shantilata Mishra and their relatives on which, Smt. Shantilata Mishra had revealed that the house belongs to Aarati Mishra and she has no objection nor they intend to purchase the same, as such, defendants No. 2 & 3 are bonafide purchasers. The learned trial Court has committed illegality in holding that defendants No. 2 & 3 are not the bonafide purchasers and they can recover the sale consideration by taking legal recourse against defendant No. 1. In support of his submission, he relied upon the judgment reported in AIR 1962 SC 847.

34. Learned counsel for respondent/plaintiff would submit that despite the specific plea raised by defendants No. 2 & 3 that they are bonafide purchasers, the trial Court has not committed any illegality in not framing the issue as the parties have led evidence to substantiate their pleadings and after considering the pleadings, material on record, the trial Court has decided that defendants No. 2 & 3 are not the bonafide purchasers. He would further submit that with regard to framing of additional issues, there is provision under Order 14 Rule 5 of the C.P.C. but the appellants No. 2 & 3 have neither moved an application for framing of additional issue nor non-framing of issue has been challenged before the appropriate forum, as such, they have missed the opportunity and after completion of trial, the plea of non-framing of issue cannot be raised as from the record it is quite vivid that no prejudice has been caused to them. He would rely upon the judgment rendered by Hon'ble High Court of Delhi in Jagmohan Lal & others Vs. Harikishan Lal 1994 (29) DRJ (DB) & Bindoo Bihari Jaina Vs. Raja Bahadur Singh ILR (2009) Delhi 82.

35. Learned Senior counsel for defendant No. 1 would submit that in view of the several admissions made in the statement of Shantilata Mishra, the original plaintiff is not entitled for any kind of relief from the Court and further the entire civil suit also ought to have been dismissed on account of the admission of the plaintiff in her statement. This submission was vehemently objected by learned counsel for the plaintiff and would submit that the appellants/defendants had not taken any steps by moving appropriate application under Order 12 Rule 6 of the C.P.C. for so called admission made by the respondent/plaintiff in her statement in order to get a decree and judgment on admission under the aforesaid

provision, as such, the learned trial Court has rightly proceeded to pass the decree and judgment on the basis of pleadings. It is well settled principles of law that the judgment on admission under the provisions of Order 12 Rule 6 of the C.P.C. shall not be automatically or in routine manner should be passed. He would rely upon the judgment rendered by Hon'ble the Supreme Court in Hari Steel & General Industries Limited Vs. Daljit Singh & others (2019) 20 SCC 425 & Himani Alloys Limited Vs. Tata Steel Limited (2011) 15 SCC 273.

36. With regard to the contention of protection granted under Section 43 of the Act, 1882, learned Senior counsel for the plaintiff would submit that the trial Court while holding that defendants No. 2 & 3 are not the bonafide purchasers, as such, they cannot claim the benefit of protection granted under this Section. He would further submit that defendants No. 2 & 3 have not demonstrated that they have purchased the property in good faith and without notice of the fact, therefore, this submission made by defendants with regard to the application under Section 43 of the Act, 1882 is not applicable.

37. With regard to submission made by learned Senior counsel for defendants No. 2 & 3 that the provisions of Section 22 of the Act, 1956 is not applicable, he would further submit that appellant/defendant No. 1- Aarati Mishra in her deposition before the court below at paragraph 21 & 22 has categorically deposed that she has not informed or noticed to the respondent/plaintiff-Shantilata Mishra with regard to her intention to sell the property in question. He would further submit that it is well settled principles of law that under the provisions of Section 22 of the Act, 1956, if one of the co-heirs in Class-I category proposes to transfer his/her interest in the property or business the other shall have the preferential right to acquire the interest proposed to be transferred. There was no such proposal by the appellant/defendant-Aarati Mishra with regard to transfer of her interest to property prior to execution of sale-deed vide order dated 03.05.2003 in respect of appellants/defendant No. 2 & 3 Paramjeet Saluja & Satvinder Kaur respectively.

38. In support of his submission, he placed reliance upon the judgments in Vishwanath Gupta & others Vs. Virendra Nath Agrawal & others 2007 (4) MPLJ 281, Haren Sarma Vs. On the death of respondent No. 1 His Legal Heirs Renu Borthakur Wife & others (2007) 3 Gauhati Law Reports 410, Ganesh Chandra Pradhan Vs. Rukmani Mohanty & others AIR 1970 Ori 65, Madan Lal & others Vs. Braham Dass & others AIR 2008 HP 71. He would submit that the cross appeal filed by him may kindly be allowed and the judgment and decree passed by the trial Court may kindly be dismissed.

39. I have heard learned counsel for the parties, perused the documents placed on record with utmost satisfaction.

40. From the material placed before the trial Court, evidence adduced and submissions made by learned counsel for the parties at bar, following points emerged for determination by this Court are :-

(1) Whether the finding recorded by the learned trial Court with regard to bonafide purchaser without framing any issue, is legal and justified ?

(2) Whether the finding recorded by the trial Court that suit house is self-acquired property of Late Sandeep Mishra, is perverse and contrary to the record ?

(3) Whether defendants No. 2 & 3 being bonafide purchasers are entitled to get protection of Section 43 of the Transfer of Property Act, 1882 ?

(4) Whether deceased Shantilata Mishra being legal heir of Class-I is entitled to get preemption right to purchase the property as per Section 22 of the Act, 1956 ?

(5) Whether the cross appeal/ objection filed by the plaintiff is barred by limitation and in absence of any application for condonation of delay, the same is liable to be rejected by this Court ?

41. Learned Senior counsel for defendants No. 2 & 3 would submit that the learned trial Court has held that defendants No. 2 & 3 are not the bonafide purchasers, but no issue was framed, therefore, this is material irregularity committed by the trial Court which goes to the route of the case, therefore, the judgment and decree passed by the trial Court, deserves to be set aside on this count alone and the matter may be remanded back to the trial Court to decide the issue afresh.

42. This Court while deciding this point has also considered the application filed by defendants No. 2 & 3 under Order 41 Rule 2 of the C.P.C. which was filed on 13.06.2011 as this Court vide order dated 15.10.2014 directed that the application filed under Order 41 Rule 2 of the C.P.C. will be decided at the time of final hearing of the appeal.

43. From perusal of the record, it is quite vivid that defendants No. 2 & 3 have taken specific plea that they are bonafide purchasers and cross-examination of witnesses was also done, wherein, they have clearly stated that defendants No. 2 & 3 have not published notice in the newspaper, therefore, they are not the bonafide purchasers. Learned counsel for defendants No. 2 & 3 would rely upon the judgment rendered by Hon'ble the Supreme Court in *The Jumma Masjid, Mercara Vs. Kodimaniandra Deviah* (1962) AIR SC 847.

44. The submission made by learned Senior counsel for defendants No. 2 & 3 that there was no proper issue has been framed by the learned trial Court with regard to bonafide purchasers, therefore, the judgment and decree passed by the trial Court deserves to be set aside by this Court is incorrect proposition of law and facts. As from evidence and the material placed on record, it is quite vivid that defendants No. 2 & 3 have taken specific plea on bonafide purchaser and also led evidence in their support, the parties went to trial knowing fully well what they were required to prove. They have adduced evidence of their choice in support of their respective claims, evidence has been considered by court below.

The appellants cannot now turn around and say that the evidence should not be looked into. This is against well accepted principle, as such, the contention made by learned Senior counsel for defendants No. 2 & 3 that the matter may be remanded back deserves to be rejected.

45. Hon'ble the Supreme Court in Kali Prasad Agarwall & others Vs. Bharat Coking Coal Limited & others (1989) AIR (SC) 1530 : (1989) Sup 1 SCC 628, has held at paragraphs 16 & 17 as under:-

"16. It was, however, urged for the appellants that there is no proper pleading or issue for determination of the afore- said question and the evidence let in should not be looked into. It is too late to raise this contention. The parties went to trial knowing fully well what they were required to prove. They have adduced evidence of theft choice in support of the respective claims. That evidence has been considered by both courts below. They cannot now turn round and say that the evidence should not be looked into. This is a well accepted principle.

17. In Kunju Kesavan v. M.M. Philip & Others, [1964] 3 SCR 634, this Court has stated (as summarised in the headnote at p. 637):

"The parties went to trial, fully understanding the central fact whether the succession as laid down in the Ezhava Act applied to Bhagavathi Valli or not. The absence of an issue, therefore, did not lead to a material sufficient to vitiate the decision. The plea was hardly needed in view of the fact that the plaintiff stated in his replication that the "suit property was obtained as makka- thayam property, by Bhagavathi Valli under the Ezhava Act". The subject of exemption from Part IV of the Ezhava Act, was properly raised in the trial court and was rightly considered by the High Court."

46. Therefore, the contention of learned counsel for the appellants that the trial Court committed illegality in not framing issue with regard to bonafide purchasers is erroneous and incorrect application of law. Accordingly, it is rejected and as non-framing of issue does not so fatal, which vitiate the trial.

47. Hon'ble High Court of Andhra Pradesh in Mohd. Kareemuddin Khan (Died) & others Vs. Syed Azam (1997) 2 ALT 625 has held at paragraph 7 as under:-

"7.....The position of law is well settled that where parties adduce evidence in respect of a matter for which an issue has not been struck and both sides are well aware of the dispute which relates to the issue, the defect of non- framing of the issue is cured and there will be no inherent lack of jurisdiction in the Court to go into that question and decide that aspect of the matter. It was observed in Kali Prasad v. M/s. Bharat Coking Coal Ltd. AIR 1989 SC 1530....."

48. Learned Senior counsel for defendants No. 2 & 3 would further submit that since they are protected under Section 43 of the Act, 1882 as they have purchased the property in good faith for consideration without notice of existence of option. Section 3(ii) of the Act, 1882 defines 'a person is said to have notice' of fact when he actually knows the fact or when, but for willful absenteeism from

an enquiry or search which he ought to have made or gross negligence, he would have known it. But, from the evidence adduced by defendants No. 2 & 3, it is reflected on record that before execution of the sale-deed no paper publication of notice was issued by them. Defendant No. 1 was contesting the case before the trial Court since November, 2000, in the evidence, she has admitted that it is not required for him to inform plaintiff about the present sale proceedings. It is also pertinent to mention here that Ayub Bhai, who was the mediator in the transaction is known to the plaintiff and defendant No. 1, has informed the plaintiff as stated by him about the sale-deed to be executed, but this cannot be presumed that this fact is not known to the defendants No. 2 & 3 that litigation is going on in the court. Despite knowing this fact, they have purchased the property, therefore, they cannot be granted benefit of Section 43 of the Act, 1882. Section 43 of the Act, 1882 reads as under:-

"43. Transfer by unauthorised person who subsequently acquires interest in property transferred.—Where a person [fraudulently or] erroneously represents that he is authorised to transfer certain immoveable property and professes to transfer such property for consideration, such transfer shall, at the option of the transferee, operate on any interest which the transferor may acquire in such property at any time during which the contract of transfer subsists. Nothing in this section shall impair the right of transferees in good faith for consideration without notice of the existence of the said option."

49. In support of his submission, he placed reliance upon the judgment rendered by Hon'ble Supreme Court in Jumma Masjid (Supra), wherein it has been held at paragraph 4 as under:-

"4. The suit out of which the present appeal arises was instituted by the appellant on January 2, 1945, for recovery of a half-share in the properties that had been held by Gangamma and for mesne profits. In the plaint, the title of the appellant to the properties is based both on the gift which Gangamma is alleged to have made on September 5, 1932, and on the release deed executed by Santhappa, the reversioner, on March 3, 1933. With reference to the title put forward by the respondents on the basis of Ex. III and Ex. IV, the claim made in the plaint is that as the vendors had only a spes successionis in the properties during the lifetime of Gangamma, the transfer was void and conferred no title. The defence of the respondents to the suit was that as Santhappa had sold the properties to Ganapathi on a representation that he had become entitled to them as reversioner of Nanjundappa, on the death of Ammakka in 1910, he was estopped from asserting that they were in fact the self-acquisitions of Basappa, and that he had, in consequence, no title at the dates of Ex. III and Ex. IV. The appellant, it was contended, could, therefore, get no title as against them under the release deed Ex. A, dated March 3, 1933."

50. The said judgment rendered by Hon'ble Supreme Court has also been considered in case reported in Ram Pyare Vs. Ram Narain & others (1985) 2 SCC 162.

51. Learned Senior counsel for the legal representatives of the plaintiff would submit that defendant No. 1- Aarati Mishra who is sole owner of the property, has clearly deposed before the trial Court that she is only sole owner of the property and even she has not sought permission nor intimated factum of selling of the property to the plaintiff-Shantilata. Even in the cross-examination, she has admitted that it is not required to inform about selling of the property to anyone, however, defendants No. 2 & 3 in the cross-examined made an effort to dilute the admission made by Aarati Mishra by asking her that Sheikh Ayub Khan who is mediator of the transaction has talked to Shantilata, then she has said that she has no objection, if Aarati Mishra intended to sell the property. It is not in dispute that the suit was filed prior to the sale was executed on 08.05.2003 whereas the suit is pending since November, 2000. Defendant No. 1-Aarati Mishra is duly presenting in the proceeding, therefore, this contention that they are not aware of the proceeding, contention of Senior counsel for the appellants No. 2 & 3 has been recorded in negative by the learned trial Court. It is pertinent to mention here that defendants No. 2 & 3 are also residents of Bilaspur and this fact cannot be ignored by this Court that they are not residing far away from the suit house and the proceedings are pending before the trial Court wherein defendant No. 1 is participating in the case and during pendency of the suit, the property has been sold, as such, the evidence adduced by defendants No. 2 & 3 that they are not aware about ongoing litigation is far away from truth which has rightly been disbelieved by the learned trial Court.

52. Even defendants No. 2 & 3 have admitted in their cross-examination that no paper publication of notice was given before execution of sale-deed, which shows that they have not acted in good faith and knowing fully about ongoing litigation, they have purchased the property, therefore, they cannot get any protection under Section 43 of the Act, 1882. It is well settled legal position that a bonafide purchaser means the person has purchased the property in a good faith without any notice of the real title over the purchase property, purchase that property from a person who himself not having good title over that property. It means firstly he should acted in good faith, secondly, he must be honestly in his intention and thirdly, he purchased the property with a false notice of false title over the purchased property. As such, the judgment cited by learned Senior counsel in Jumma Masjid (Supra) is distinguishable from the facts and circumstances of the present case.

53. Hon'ble the Supreme Court in Sukhwinder Singh Vs. Jagroop Singh Civil Appeal No. 760 of 2020 (Decided on 28.01.2020), has examined the entire law on bonafide purchaser and has held at paragraph 11 & 12 as under:-

"11. Further, in a circumstance where the defendant No.2 had contested the suit and had put forth the contention that he was a bonafide purchaser without notice and through his evidence had deposed that he had no knowledge of agreement entered into between the defendant No.1 and defendant No.2, that aspect required appropriate consideration. However, the Courts below have on the

contrary concluded that the defendants No.1 and 2 being of the same village, the defendant No.2 would have knowledge of the agreement entered into by the defendant No.1 in favour of the plaintiff. Such conclusion is only an assumption and there is no evidence with regard to the knowledge of defendant No.2 even if he was from the same village. In addition, the Lower Appellate Court has concluded that since the defendant No.1 has not caused appearance in spite of notice having been issued and he not being examined as a witness it could be gathered that there is connivance amongst the defendants to defeat the rights of the plaintiff. Such assumption is also not justified since the defendant No.2 had purchased the property for a consideration under a registered document and the defendant No.2 was also put in possession of the property. In that circumstance the defendant No.1 who had lost interest in the property, if had not chosen to appear and defend the suit the same cannot be a presumption of connivance in the absence of evidence to that effect.

12. In the background of the above consideration, the plaintiff in any event was not entitled to a decree for specific performance and possession of the property against the defendant No.1. In the circumstance the declaration of the Sale Deed dated 11.06.2004 executed by the defendant No.1 in favour of the defendant No.2 to term the same as null and void as claimed by the plaintiff also did not arise. Despite the said position what is necessary to be taken note is that the sale in favour of the defendant No.2 was on 11.06.2004 i.e. subsequent to the date of the suit agreement dated 03.01.2004. Despite holding that the defendant No.2 is a bonafide purchaser, what cannot be lost sight is that the defendant No.1 had received a sum of Rs.69,500/- from the plaintiff as far back as on 03.01.2004. That apart if the transaction was concluded at that stage the plaintiff would have been entitled to the benefit of the land. Even as per the ground at (Para x) raised by the defendant No.2 in this appeal, it would indicate that there has been considerable appreciation in the market price. Though in the normal circumstance the return of the advance received and the compensation for denial of the property was to be paid by the defendant No.1, as noted, the defendant No.1 having lost interest in the property has not appeared in the instant proceedings nor is there any material to indicate that he has benefited from the appreciation since even as per the contention of the plaintiff he has sold the property for a lesser price. In that situation the plaintiff cannot be left 'high and dry'. If that be the position the defendant No.2 who has benefited from the property will have to repay the advance and compensate the plaintiff in the peculiar facts of the instant case. In that circumstance the defendant No.2 (the appellant herein) is required to be directed to pay a sum of Rs.3,50,000/- only which is inclusive of the advance amount of Rs.69,500/- to the plaintiff (the respondent No.1 herein) in full quit of all claims. The said amount is also to be directed to be paid by the defendant No.2 to the plaintiff within a period of three months failing which the same should carry interest at 12% per annum till payment. The plaintiff should also be entitled to withdraw the amount of Rs.70,500/- stated to have been deposited by him before the Trial Court."

54. From the above stated provisions of Section 41 of the Act, 1882, it is quite vivid that the transfer by ostensible owner. Where, with the consent, express or implied, of the persons interested in immovable property, a person is the ostensible owner of such property and transfers the same for consideration, the transfer shall not be voidable on the ground that the transferor was not authorized to make it: provided that the transferee, after taking reasonable care to ascertain that the transferor had power to make the transfer, has acted in good faith.

55. Hon'ble the Supreme Court in *Hardev Singh Vs. Gurmail Singh (Dead) by Lrs.* (2007) 2 SCC 404, has examined provisions of Sections 41 & 43 of the Act, 1882 and has held that Section 43, on the other hand, embodies a 'rule of feeding the estoppel' and enacts that a person who makes a representation shall not be heard to allege the contrary as against a person who acts thereupon and it is immaterial whether the transferor acts bona fide or fraudulently in making the representation. [See *Jumma Masjid, Mercara v. Kodimaniandra Deviah*, AIR 1962 SC 847 : 1962 Supp.2 SCR 554.] In order to get the benefit of the said provision, the conditions which must be satisfied are :- (1) the contract of transfer was made by a person who was competent to contract; and (2) the contract would be subsisting at the time when a claim for recovery of the property is made.

56. From perusal of records, it is quite vivid that the suit was filed in the year 2000 and defendant No. 1 has already participated in the suit and no public notice was given by defendants No. 2 & 3 as accepted by defendants No. 2 & 3 in their cross-examination. Defendants No. 2 & 3 have stated that they don't know about ongoing litigation which cannot be taken into consideration as the mediator Sheikh Ayub Khan who was mediating for sale transaction is known to the plaintiff and defendants. It is quite vivid that Sheikh Ayub Khan was aware of the proceedings about ongoing litigation still sale-deed was executed. The mediator Ayub Khan who was said to be good friend of Late Sandeep Mishra, is well aware of the ongoing pending litigation and it cannot be presumed that the said dispute could not brought to notice of defendants No. 2 & 3. It is quite vivid that ongoing sale litigation has been pending since November, 2000 and present appellant/defendant No. 1 is participating in the proceeding and no public notice has been given, therefore, the submission that defendants No. 2 & 3 are bonafide purchasers, is incorrect, as such, the finding recorded by the trial Court to that extent that they are not the bonafide purchasers is proper and justified which does not warrant any interference by this Court.

57. To substantiate that he has made attempt to ascertain the ownership of property and to ascertain that defendant No. 1 was authorized to sell the property, the revenue records were considered which demonstrate that name of defendant No. 1 was solely written as owner, therefore, defendants No. 2 & 3 are bonafide purchasers. It is well settled by Hon'ble the Supreme Court that the revenue record does not confer any right over the title of the immovable property. Hon'ble the Supreme Court in *Prabhagiya Van Adhikari Awadh Van*

Prabhag Vs. Arun Kumar Bhardwaj (Dead) through Lrs. & others 2021 SCC Online 868, has held at paragraph 26 as under:-

"26. This Court in a judgment reported as Prahlad Pradhan and Ors. v. Sonu Kumhar and Ors. [(2019) 10 SCC 259] negated argument of ownership based upon entries in the revenue records. It was held that the revenue record does not confer title to the property nor do they have any presumptive value on the title. The Court held as under:

"5. The contention raised by the appellants is that since Mangal Kumhar was the recorded tenant in the suit property as per the Survey Settlement of 1964, the suit property was his self-acquired property. The said contention is legally misconceived since entries in the revenue records do not confer title to a property, nor do they have any presumptive value on the title. They only enable the person in whose favour mutation is recorded, to pay the land revenue in respect of the land in question. As a consequence, merely because Mangal Kumhar's name was recorded in the Survey Settlement of 1964 as a recorded tenant in the suit property, it would not make him the sole and exclusive owner of the suit property." "

58. Therefore, the submission that on the basis of revenue records that defendant No. 1 is sole owner of the property and the fact that ongoing litigation is not known to them, cannot be accepted, therefore, the finding recorded by the trial Court with regard to bonafide purchaser is legal and justified and does not warrant any interference by this Court.

59. Submission of learned counsel for the defendants that the plaintiff has failed to prove her case and burden has been shifted to the defendants by the trial Court is illegality and erroneous one. On the other hand, learned Senior counsel for the legal representative of the plaintiff would submit that the learned trial Court after appreciating the evidence, material on record, has recorded finding that the property belongs to Late Sandeep Mishra and has taken into consideration the sale-deed Ex. D/1 & D/2 recorded in the name of Late Sandeep Mishra. The factum of recording name of Late Sandeep Mishra in the revenue record, is not in dispute, but defendant No. 1 has further submitted that in the sale-deed, name of Late Sandeep Mishra was only recorded, she has given her consent and she has not made any objection in recording her name just to maintain the peace and harmony in the family. This evidence does not refute that only name of Sandeep Mishra has been recorded in the sale-deed Ex. D/1 & D/2, which is a registered document.

60. It is well settled legal position that the burden of proof lies upon defendant No. 1, if the dispute is about registered sale-deed. Hon'ble the Supreme Court in Rattan Singh & others Vs. Nirmal Gill & others etc. Civil Appeal Nos. 3681 to 3684 (Decided on 16.11.2020) has held at paragraph 32 as under:-

"32. To appreciate the findings arrived at by the Courts below, we must first see on whom the onus of proof lies. The record reveals that the disputed documents

are registered. We are, therefore, guided by the settled legal principle that a document is presumed to be genuine if the same is registered, as held by this Court in Prem Singh and Ors. v. Birbal and Ors. The relevant portion of the said decision reads as below:

"27. There is a presumption that a registered document is validly executed. A registered document, therefore, prima facie would be valid in law. The onus of proof, thus, would be on a person who leads evidence to rebut the presumption. In the instant case, Respondent 1 has not been able to rebut the said presumption."

(emphasis supplied)

In view thereof, in the present cases, the initial onus was on the plaintiff, who had challenged the stated registered document."

61. Therefore, contention of learned Senior counsel for the defendant No. 1 that the trial Court has shifted burden of proof to defendant No. 1 is erroneous and not liable to be accepted and the same is liable to be rejected.

62. Learned counsel for defendants No. 2 & 3 would further submit that father of defendant No. 1 has given amount to purchase plot and for construction of house over it, but name of Late Sandeep Mishra was recorded in the sale-deed, therefore, it is bounded duty to discharge the burden by defendant No. 1- Aarati Mishra that this property was purchased by Late Sandeep Mishra with the financial assistance provided by defendant No. 1 father and her uncle.

63. The defendant just to dilute the effect of sale-deed has made an attempt to record evidence of her father who has said that he has given money to purchase the property, but the same was purchased in the name of Sandeep Mishra only. The sale-deed was executed in the year 1991 and the suit was filed in the year 2000 about after 10 years, but there is no material on record to demonstrate that they have raised any objection with regard to non-inclusion of her name in the sale-deed. Even otherwise, it is well settled that the burden lies upon defendant No. 1 to discharge his burden as she has stated that she has purchased the property from financial assistance provided by her father and uncle.

64. Hon'ble the Supreme Court in Rattan Singh (Supra), at paragraph 41 has held as under:-

"41. The High Court, however, went on to observe that defendants had abused their position of active confidence, in the following words:

".....

The entire exercise indeed smacks of connivance, misrepresentation and fraud. This Court would be failing in its duty, if the necessary inference is not drawn from the evidence on record. Present is a clear-cut case of an unsuspecting sister being defrauded by her own step brothers/bhabi in whom she had reposed

implicit trust. It is a clear case of misuse and abuse of the position of confidence held by the step brothers of the plaintiff. ...”

The requirement regarding shifting of burden onto the defendants had been succinctly discussed in *Anil Rishi v. Gurbaksh Singh* [(2006) 5 SCC 558], wherein this Court had held that for shifting the burden of proof, it would require more than merely pleading that the relationship is a fiduciary one and it must be proved by producing tangible evidence. The relevant extract of the said decision is reproduced as thus:

“8. The initial burden of proof would be on the plaintiff in view of Section 101 of the Evidence Act, which reads as under:

“101. Burden of proof.—Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts, must prove that those facts exist.

When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person.

“9. In terms of the said provision, the burden of proving the fact rests on the party who substantially asserts the affirmative issues and not the party who denies it. The said rule may not be universal in its application and there may be an exception thereto. The learned trial court and the High Court proceeded on the basis that the defendant was in a dominating position and there had been a fiduciary relationship between the parties. The appellant in his written statement denied and disputed the said averments made in the plaint.

10. Pleading is not evidence, far less proof. Issues are raised on the basis of the pleadings. The defendant-appellant having not admitted or acknowledged the fiduciary relationship between the parties, indisputably, the relationship between the parties itself would be an issue. The suit will fail if both the parties do not adduce any evidence, in view of Section 102 of the Evidence Act. Thus, ordinarily, the burden of proof would be on the party who asserts the affirmative of the issue and it rests, after evidence is gone into, upon the party against whom, at the time the question arises, judgment would be given, if no further evidence were to be adduced by either side.

11. The fact that the defendant was in a dominant position must, thus, be proved by the plaintiff at the first instance.

xxx xxx xxx xxx xxx

14. But before such a finding is arrived at, the averments as regards alleged fiduciary relationship must be established before a presumption of undue influence against a person in position of active confidence is drawn. The factum of active confidence should also be established.

15. Section 111 of the Evidence Act will apply when the bona fides of a transaction is in question but not when the real nature thereof is in question. The

words "active confidence" indicate that the relationship between the parties must be such that one is bound to protect the interests of the other.

16. Thus, point for determination of binding interests or which are the cases which come within the rule of active confidence would vary from case to case. If the plaintiff fails to prove the existence of the fiduciary relationship or the position of active confidence held by the defendant-appellant, the burden would lie on him as he had alleged fraud. The trial court and the High Court, therefore, in our opinion, cannot be said to be correct in holding that without anything further, the burden of proof would be on the defendant."

(emphasis supplied)"

65. Defendant No. 1 has examined Ratindra Mishra who is an Advocate as well as attesting witness of the sale-deed. To substantiate contention that Aarati Mishra has purchased the land and constructed the house after taking loan from LIC and money taken from her father, this fact has been said by Late Sandeep Mishra and in the cross-examination, he has admitted that he was not present at the time of execution of sale-deed and he was aware that in the sale-deed, name of only Sandeep Mishra is recorded. He has also stated that it is not required for attesting witnesses to mention in the sale-deed who has paid the money, therefore, he has not been mentioned in the sale-deed.

66. Learned counsel for the appellant would submit that the cross appeal/objection was delayed and no objection with regard to condonation of delay has been filed, therefore, cross-appeal should have been rejected by this Court. I have gone through the record of this Court, wherein it is reflected that this Court has admitted the appeal on 01.04.2008 and notice was directed to be issued to defendants No. 2 & 3, the notice was returned unserved on 14.04.2009 as reflected in the record. Thereafter, learned counsel for the appellant has filed Vakalatnama on 01.05.2009, the 30 days limitation for filing cross appeal expired on 01.06.2009 on that time, the Summer Vacation was going on. The plaintiff has filed cross objection on 15.06.2009 on the first date of opening of the Court after Summer Vacation as reflected from records, the appeal was listed before this Court for final hearing on 17.09.2009, therefore, there is no delay in filing of the cross appeal, therefore, the contention raised by learned Senior counsel for the appellant that cross objection is barred by limitation and no application for condonation of delay has been filed, therefore, cross appeal may kindly be dismissed, is incorrect on the facts and law, therefore, deserves to be rejected.

67. The point whether the cross appeal is barred by limitation or not for examining this, it is necessary for this Court to extract provisions of Order 41 Rule 22 of the C.P.C.

"Order 41 Rule 22 of C.P.C. -

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.

[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.]

(2) Form 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.

(3) Omitted.

(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."

68. Hon'ble the Supreme Court in Mahadev Govind Charge & others Vs. Special Lad Acquisition Officer, Upper Krishna Project, Jamkhandi, Karnataka (2011) 6 SCC 321, while interpreting the cross objection as per Order 41 Rule 22 of the C.P.C. has held that limitation will be considered on the date of notice of the date fixed for hearing the appeal. Hon'ble the Supreme Court has held at paragraph 59 & 60 as under:-

"59. If we examine the provisions of Order 41 Rule 22 of the Code in its correct perspective and in light of the above stated principles then the period of limitation of one month stated therein would commence from the service of notice of the day of hearing of appeal on the respondent in that appeal. The hearing contemplated under Order 41 Rule 22 of the Code normally is the final hearing of the appeal but this rule is not without any exception. The exception could be where a party respondent appears at the time of admission of the appeal, as a caveator or otherwise and argues the appeal on merits as well as while passing of interim orders and the Court has admitted the appeal in the presence of that party and directs the appeal to be heard finally on a future date actual or otherwise, then it has to be taken as complete compliance of the

provisions of Order 41 Rule 22 of the Code and thereafter, the appellant who has appeared himself or through his pleader cannot claim that period mentioned under the said provision of the Code would commence only when the respondent is served with a fresh notice of hearing of the appeal in the required format. If this argument is accepted it would amount to travesty of justice and inevitably result in delay while causing serious prejudice to the interest of the parties and administration of justice. Such interpretation would run contra to the legislative intent behind the provisions of Order 41 Rule 11 of the Code which explicitly contemplate that an appeal shall be heard expeditiously and disposed of as far as possible within 60 days at the admission stage. All the provisions of Order 41 of the Code have to be read conjunctively to give Order 41 Rule 22 its true and purposive meaning.

60. Having analytically examined the provisions of Order 41 Rule 22, we may now state the principles for its applications as follow:

(a) Respondent in an appeal is entitled to receive a notice of hearing of the appeal as contemplated under Order 41 Rule 22 of the Code;

(b) The limitation of one month for filing the cross-objection as provided under Order 41 Rule 22 of the Code shall commence from the date of service of notice on him or his pleader of the day fixed for hearing the appeal.

(c) Where a respondent in the appeal is a caveator or otherwise puts in appearance himself and argues the appeal on merits including for the purposes of interim order and the appeal is ordered to be heard finally on a date fixed subsequently or otherwise, in presence of the said respondent/caveator, it shall be deemed to be service of notice within the meaning of Order 41 Rule 22. In other words the limitation of one month shall start from that date.

69. In view of the said legal position and from perusal of records, it is quite clear that the cross appeal was filed within limitation, therefore, contention that the cross appeal is belated one and no application for condonation of delay has been filed, also deserves to be answered in negative.

70. Now the finding with regard to point No. 5 whether the finding recorded by the learned trial Court that plaintiff Shantilata has preferential right over the suit house or not being Class-I heirs of Late Sandeep Mishra, whether she is entitled to get first right to purchase the property or not to have to be considered by this Court.

71. From appreciation of evidence, material on record, the learned trial Court even after recording of the finding that father of defendant No. 1 has given the money for construction of the house, but Aarati Mishra has failed to prove that it is Stri Dhan by recording evidence to this effect, as such, it cannot be held that defendant No. 1 is the joint owner of the property. The learned trial Court while recording this finding has given reason which is not illegal or contrary to the evidence, which warrants any interference by this Court, therefore, it is clearly

established that the defendant No. 1 has failed to prove that she is the joint owner of the suit house. It is well settled legal position of law that if the parties to the lis asserts the facts, it is for them to prove by recording cogent evidence. Defendant No. 1 was claiming herself to be joint owner of the property, therefore, it is incumbent on her to prove the same, which she failed to prove.

72. Learned counsel for legal representatives of the plaintiff would submit that finding recorded by the trial Court regarding Section 22 of the Act, 1956 is perverse and contrary to the evidence and the law, therefore, the same may kindly be rejected. The trial Court while deciding the issue with regard to preferential right over the purchased property, has given weightage to the evidence of the plaintiff wherein she has stated that she is not aware about the claim without interpreting Section 22 of the Act, 1956. Section 22 of the Act, 1956 is as under:-

“22. Preferential right to acquire property in certain cases.—

(1) Where, after the commencement of this Act, an interest in any immovable property of an intestate, or in any business carried on by him or her, whether solely or in conjunction with others, devolves upon two or more heirs specified in class I of the Schedule, and any one of such heirs proposes to transfer his or her interest in the property or business, the other heirs shall have a preferential right to acquire the interest proposed to be transferred.

(2) The consideration for which any interest in the property of the deceased may be transferred under this section shall, in the absence of any agreement between the parties, be determined by the court on application being made to it in this behalf, and if any person proposing to acquire the interest is not willing to acquire it for the consideration so determined, such person shall be liable to pay all costs of or incident to the application.

(3) If there are two or more heirs specified in class I of the Schedule proposing to acquire any interest under this section, that heir who offers the highest consideration for the transfer shall be preferred. Explanation.—In this section, “court” means the court within the limits of whose jurisdiction the immovable property is situate or the business is carried on, and includes any other court which the State Government may, by notification in the Official Gazette, specify in this behalf.”

73. The issue with regard to Section 22 of the Act, 1956 has come up for consideration before Hon'ble High Court of Himachal Pradesh in Madan Lal & another Vs. Braham Dass & others AIR 2008 HP 71, wherein at paragraph 16 held as under:-

“16.....Expressed in other words, it would mean, when an heir proposed to transfer his or her interest in the property inherited the legal consequences which would necessarily emerge would be these:

(a) In the remaining co-heirs a right of preference to acquire such interest

proposed to be transferred in preference to any other person accrues. Such right may be availed of or may be given up.

(b) A corresponding legal obligation on the intending transferor would stand imposed not to transfer the interest in violation of the preferential right of the other Class I co-heirs.

(c) A statutory notice is given to all intending transferees that Class I co-heirs have a preferential right and until that is exhausted either by its exercise or by its non-exercise in spite of notice they are not free to take the transfer.

Unless such an interpretation is given to the provisions of Section 22(1) of the Act, the preferential right contemplated therein would really be an airy one and the true legislative intention cannot be given effect to. I would, therefore, interpret Sub-section (1) of Section 22 in the aforesaid manner and would hold that the transferor heir must propose or notify his intention to transfer to the other class 1 co-heirs and a transfer made without following that procedure would be vulnerable even after it is completed on proof by the co-heir who has the preferential right that the transfer was made without notice of the proposal of transfer to him.

Such an interpretation of the Section may be sufficient for the purposes of meeting the present problem in this case. But I think it proper to also indicate that such interpretation could not solve the entire problem that arises on account of an imperfect provision in the Section of the Act. I would recall the criticism offered by the commentator in Mulla's Hindu Law. If the intention is to put an embargo on strangers getting into possession what would be the justification to prohibit a simple mortgage? It is, therefore, proper that clarification be made by amendment clearly circumscribing the limit of the exercise of the preferential right. It may cover cases of sale, gift, or other forms of transfer which involve transfer of possession.

The second objection has been that the transfer has been concluded and title has already passed into the hands of the vendee. On the interpretation I have adopted of Section 22 of the Act the right could also be exercised against the vendee if opposite parties 1 and 2 had not notified their intention to make the alienation to the petitioner. That would be a question of fact. There had been allegation by the opposite parties that it was the father, that is, the present guardian of the petitioner who had arranged the sale. If that fact is found to have been proved it is quite possible that the plaintiff may have to suffer in the particular case as having notice of the fact of alienation. To what extent knowledge of the father would take away the right of the petitioner would depend upon the facts of each case and, therefore, a finding on that score would be necessary. If it is found that the father had no knowledge or knowledge of the father does not preclude the petitioner son from exercising the right, the application would certainly be maintainable even after the completion of the transfer. These aspects have not been determined by the learned Munsif. I would,

therefore, remit the matter to the learned Munsif for a fresh disposal. He would determine these questions and then dispose of the case afresh. This civil Revision Is allowed, the impugned order is vacated and the matter is remitted to the learned Munsif for a fresh disposal. Both the parties would bear their own costs upto this stage and further costs would abide he result."

74. Whether the claim of preferential right has been made out or not by the plaintiff has to be considered by this Court on the basis of material placed before the trial Court. The learned trial Court has recorded its finding that Late Sandeep Mishra was owner of the property as evident from the document Ex. D/1 & D/2. Defendant No. 1 has failed to prove that she is sole owner of the property. It is proved from the evidence, material on record that Late Sandeep Mishra expired an intestate and defendant No. 1 has not intimated about sale of the suit house to the plaintiff before selling to defendants No. 2 & 3, as such, there is clear violation of Section 22 of the Act, 1956. The learned trial Court has also recorded a finding that defendants No. 2 & 3 are not the bonafide purchasers as no public notice was issued before execution of the sale-deed. They have also failed to establish that they have not noticed about the fact of ongoing litigation between Aarati Mishra and the plaintiff. This evidence has not been considered by the trial Court while negative the claim of the plaintiff, therefore, the finding recorded by the trial Court that no case for invoking Section 22 of the Act, 1956 by the plaintiff is erroneous one and deserves to be set aside by this Court.

75. Section 22 of the Act, 1956 has come up for consideration before Division Bench of High Court of Calcutta in Pabitra Kumar Maity Vs. Shyamali Manna & others C.A.N. No. 11623 of 2017 in F.A.T. 661 of 2017 (Decided on 08.04.2021), wherein it has been held at paragraph 17, 18 & 20 as under:-

"17. A distinction is sought to be made on interpretation of Section 22 of the said Act that the word 'proposes to transfer' appearing in sub-Section(1) of Section 22 of the Act must be read conjointly with the provision contained in sub-Section(2) thereof and, therefore, the consideration plays a vital role in bringing the incident of transfer within the conntour of the said provision. In our opinion, Sub-Section 1 and 2 of Section 22 of the Act contemplates different eventualities and does not override the integral facet on the preferential right. Sub- Section(1) expounded the right of the heir specified in Class-I of the schedule to invoke preferential right to acquire the interest of the other heir who transferred his or her interest in the property or business to third party. Sub-Section(2) can be visualised as the consequential steps for acquisition of such share and does not control sub-Section(1) thereof. The moment the transfer is affected by a well recognised mode of transfer, sub-Section(2) requires acquisition of such share upon payment of the consideration either on the basis of an agreement subsequently arrived or in absence thereof the consideration determined by the court. The element of "transfer" divest the executant of the deed of all his right which came to be vested upon the recipient thereof may be by way of a gift which does not contain the consideration. Such right of the recipient cannot be

taken without the payment of the consideration and precisely for such reason sub-Section(2) has been incorporated. The vested right can only be divested by well recognised mode of transfer. The hypothetical example can be made in this regard when 'A' gifted his immovable property to 'B' out of love and affection. B in turn wanted to sale the said property to any stranger as such deed of gift is not conditional one. He is entitled to receive the consideration although he acquired the right, title and interest by way of a gift which admittedly does not contain consideration.

18. In the light of the above, Section 2 should be interpreted when the court deprives a stranger to the property acquiring an interest by way of a gift and such right is being vested upon the heir specified in Class-I of the Schedule. It is anomalous when a co-sharer who gifted the property and the donee who received the property shall not be entitled to any consideration if the property by the operation of the law is directed to be given to the co-sharer or the heir is specified in Class-I of the Schedule. The proper meaning which can be assigned to sub- Section(2) of Section 22 is the moment the Court finds that an heir is entitled to a preferential right under sub-Section(1), in absence of any agreement, the consideration so determined shall pass to the stranger purchaser. Any other interpretation would render the provision otiose and redundant. The word 'transfer' has to be given a pragmatic meaning and not in conjunction with the consideration appearing in sub- Section(2) of Section 22 of the Act. If any restrictive meaning of the word transfer is given, it would be a premium to the heir divesting his right by way of a gift to wriggle out of mischief of the provision contained in sub-Section(1) of Section 22 of the Act.

20. So far as the concluded transfer is concerned, we do not find any restriction having put under Section 22 to have its restricted applicability in case of proposed transfer if the transfer has been affected without his knowledge, still the heir can maintain the proceeding invoking the preferential right enshrined under Section 22 of the Act. We thus modifying the decree of the Trial Court to the extent that plaintiff has a preferential right in respect of Ka(1) Schedule Property."

76. The appellant- Shyamali Manna has filed Special Leave to Appeal C No. 11609 of 2021 before Hon'ble the Supreme Court, which has been dismissed on 16.08.20221 observing as under:-

"In view of the aforesaid factual scenario, where obviously the endeavour of a gift is only as a subterfuge to get over the rigors of Section 22 of the Hindu Succession Act, we are not inclined to exercise jurisdiction under Section 136 of the Constitution of India leaving the question of law open."

77. Learned counsel for the appellants would submit that since application for determination of market value has not been submitted by the plaintiff, therefore, there is no scope of invoking of Section 22 (2) of the Act, 1956, which provides that any interest in the property of the deceased may be transferred under this

section shall, in the absence of any agreement between the parties, be determined by the court on application being made to it in this behalf, and if any person proposing to acquire the interest is not willing to acquire it for the consideration so determined, such person shall be liable to pay all costs of or incident to the application.

78. It is quite vivid that defendant No. 1 has sold the property on valued herself at Rs. 8 lacs as reflected from the sale-deed, therefore, the contention made by learned counsel for the plaintiff before the trial Court that she is ready to pay Rs. 4 lacs in compliance of Section 22 (2) of the Act, 1956 as the property was valued by defendant No. 1 herself as reflected in the sale-deed and the said transaction has been done during pendency of the suit, wherein market value has been fixed, therefore, contention raised by the learned Senior counsel for the appellant that finding recorded by the trial Court that the application filed under Section 22 of the Act, 1956 is not maintainable in view of non-submission of Section 22 (2) of the Act, 1956 is erroneous one and liable to be rejected. Therefore, the appeal filed by defendants No. 2 & 3 is liable to be dismissed and the cross appeal filed by legal representative of the plaintiff deserves to be allowed.

79. The judgment and decree passed by the trial Court so far as denial of preferential right to the original plaintiff is modified and it is held that the legal representatives of the plaintiffs are entitled to get preferential right over the suit property.

80. Since it is affirmed that defendants No. 2 & 3 are not bonafide purchasers and legal representative of the plaintiff have preferential right over the suit house, they are directed to pay Rs. 4 lacs to defendant No. 1, who in turn will execute the sale-deed in their favour. Defendants No. 2 & 3 may take recourse against defendant No.1- Aarati Mishra for recovery of the amount as paid by them, as held by the learned trial Court. Accordingly, this part of judgment and decree of the trial Court while passing the judgment and decree, is affirmed.

81. Accordingly, the First Appeal filed by defendants No. 1 to 3 is dismissed and the cross appeal filed by legal representatives of the plaintiff is allowed. No order as to costs.

82. A decree be drawn up accordingly.