IN THE HIGH COURT OF MADHYA PRADESH AT GWALIOR

BEFORE

HON'BLE SHRI JUSTICE ASHISH SHROTI

SECOND APPEAL No. 436 of 2020

CNR No.: MPHC030039802020

ARVIND KUMAR RATHORE

Versus

HARISH KUMAR RATHORE AND ANR

Appearance:

Shri Faiz Ahmed Qureshi - Advocate for the appellant.

Shri Siddharth Sijoria and Shri Madhur Bhargava - Advocates for respondent no.2.

Reserved on : 05.11.2026

Delivered on : 17.11.2026

JUDGMENT

1. The appellant has filed this appeal challenging the judgment and decree dated 12.12.2019 passed by the Fourth Additional District Judge, Guna, in RCA No.200018/2015, arising out of the judgment and decree dated 20.08.2014 passed by Fourth Civil Judge Class-II, Guna, in Civil Suit No.14-A/2014, whereby the learned courts below have dismissed his appellant's suit for declaration and permanent injunction while decreed the counter-claim filed by respondent no.2 for declaration of title, partition and separate possession.

2. For purposes of convenience, the appellant shall be referred to as "plaintiff," while the respondents shall be referred to as "defendants" in this

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order, as per their respective status in the civil suit. The premises in dispute is a double-storeyed house situated at Ward No.15, Anuradha Gali, Guna, having an area of 26 ft. towards North to South and 11.9 ft. from West to East (290.50 sq. ft.). The same shall be referred as 'suit house' in this order.

3. The facts which are not in dispute in this case are that the plaintiff and defendant no.1 are real brothers being sons of late Devchand Rathore. It is also no more in dispute that the suit house was originally owned by one Ramlal son of Dhannalal Rathore, who purchased it in a court auction on 28.10.1960. Ramlal was the uncle of the plaintiff and defendant no.1. Later, the house was sold by Ramlal to one Puranchand Jain on 30.09.1969. It being their ancestral house, the plaintiff and defendant no.1, out of affection, repurchased the house from Puranchand Jain jointly vide sale deed dated 02.11.1999. They were thus the co-owners and in joint possession of the suit house.

4. The defendant no.1 sold his half portion in the house to defendant no.2, constituting 152.75 sq. ft., for a sale consideration of Rs.1,20,000/- vide registered sale deed dated 24.08.2005 (Ex. D/1). The plaintiff claims that he was not aware about the aforesaid sale by defendant no.1, and it is only when he received a legal notice from defendant no.2 on 22.03.2012 (Ex. P/1) he came to know about the sale of half portion of the house by defendant no.1 to defendant no.2. The plaintiff gave a reply to the said notice on 30.03.2012 (Ex. P/2) through his counsel.

5. The plaintiff claims that since he was the joint purchaser of the house, he has a preferential right of purchase of half portion of defendant

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no.1, and therefore, defendant no.1 could not have sold it to defendant no.2 without first giving an offer in this regard to him. He accordingly served a notice to defendant no.1 on 21.05.2012 (Ex. P/5) asking him to cancel the sale deed executed in favour of defendant no.2 and to sell the house to him. The said notice is stated to be served upon defendant no.1; however, no reply was given.

6. Apprehending that defendant no.2 may take steps for taking possession of the half portion of the house, the plaintiff filed the present suit on 18.12.2012 praying for a decree of declaration that the sale deed dated 24.08.2005 executed in favour of defendant no.2 is null and void, and also prayed for a decree of permanent injunction, restraining defendant no.2 from interfering with his possession over the suit house.

7. The defendant no.2 filed his written statement, denying the plaint averments. As per his contention, the total area of the house is 305 sq. ft. and was not the joint family property of the plaintiff, but the jointly purchased property of the plaintiff and defendant no.1. He thus contended that the plaintiff does not have any right of purchase of the disputed portion of the suit house. He also averred that the plaintiff was aware about the sale deed since inception.

8. The defendant no.2 also averred that after the execution of the sale deed, the possession of the half portion of the house was delivered to him and he was using a room at the ground floor of the house as store room. However, when defendant no.2 was not in town, the plaintiff illegally took possession of the said room in the year 2012. The defendant no.2 then gave a

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legal notice to the plaintiff and asked for partition and giving possession to him. However, the plaintiff denied defendant's claim on false grounds and did not agree for partition.

9. The defendant no.2 also filed a counter-claim whereby he claimed a decree of declaration of his ownership over the portion of the house purchased by him and also sought for a decree of partition and separate possession.

10. The plaintiff filed written statement to the counter-claim filed by defendant no.2. In substance, he reiterated the averments already made by him in the plaint. As per his contention, the sale deed executed by defendant no.1 in favour of defendant no.2 is null and void since inception.

11. The learned trial court, after taking oral and documentary evidence from both the sides, dismissed the suit vide judgment and decree dated 20.08.2014. The trial court held that the house was the joint property of the plaintiff and defendant no.1, and if the plaintiff wanted to purchase the defendant's share, he ought to have given an offer for the same. It was held that in absence of any offer given by the plaintiff, he has no preferential right of purchase of the house. The learned trial court also held that defendant no.2 became owner of the half portion of the house upon execution of the sale deed on 24.08.2005.

12. The plaintiff challenged the judgment and decree passed by the trial court by filing an appeal. The learned first appellate court, vide impugned judgment and decree dated 12.12.2019, has affirmed the trial court judgment and decree and has dismissed the appeal. The learned appellate

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court has considered the plaintiff's claim *vis-à-vis* Section 22 of the Hindu Succession Act, 1956 (hereinafter referred to as "the Act of 1956"), and came to hold that since the property was not the joint family property, the provisions of Section 22 of the Act of 1956 are not attracted. The plaintiff has thus filed the present appeal before this Court.

13. The appeal was admitted by this Court vide order dated 23.09.2026 on the following substantial question of law:

> *"1) Whether the judgment and decree passed by both the Courts suffered from irregularity inasmuch as provisions of Section 4 of The Partition Act, 1893 was not complied with?"*

14. The learned counsel for the plaintiff submitted that the courts below erred in dismissing the plaintiff's suit without considering the provisions of Section 4 of the Partition Act, 1893 (hereinafter referred to as "the Act of 1893"). As per his contention, the plaintiff, being the joint owner of the dwelling house, the trial court ought to have given him an option to purchase the half portion of defendant no.1. The learned counsel submitted that the judgment and decree passed by both the courts below suffers from material illegality and deserves to be set aside.

15. On the other hand, learned counsel for the defendants supported the impugned judgment and decree. It is his contention that the plaintiff never based his claim upon Section 4 of the Act of 1893, and it is for the first time before this Court, the issue is being raised. As per his contention, no new issue can be allowed to be raised at the second appellate stage for which there is no foundation laid in the pleadings and in the evidence. He argued

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that a litigant cannot approbate and reprobate, take inconsistent or shifting stands and blow hot and cold to suit his convenience. In support of his submissions, learned counsel relied upon ***Suzuki Parasrampuria Suitings (P) Ltd. v. Official Liquidator, (2018)10 SCC 707***. He also relied upon ***Kondiba Dagadu Kadam v. Savitribai Sopan Gujar, (1999)3 SCC 722***, to say that a question of law which is neither pleaded nor arises for consideration from factual matrix, cannot be permitted to be raised as a substantial question of law in a second appeal.

16. Learned counsel further submitted that the plaintiff filed the suit challenging defendant's sale deed and sought to defeat defendant's claim on the basis of case set up in plaint originally. Both the courts have concurrently rejected his stand. Therefore, plaintiff now cannot be allowed to shift his stand to Section 4 of Act of 1893. The learned counsel invoked doctrine of election to say that plaintiff, having elected to file suit challenging defendant's sale deed, is now stopped from basing his claim on preferential right to purchase disputed house. In support of his submission, he referred to ***Joint Action Committee of Air Line Pilots' Assn. of India v. DG of Civil Aviation, (2011)5 SCC 435***.

17. The learned counsel also submitted that by virtue of Section 2 & 3 of Act of 1893, the defendant no.2 also has a right to purchase the present suit property. Referring to judgment and decree passed by trial court, he submitted that an issue in this regard was actual framed, however, the court declined to answer the same as the same was not found to be appropriate stage.

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18. In rejoinder, the counsel for the plaintiff placed reliance upon the Apex Court judgment in the case of ***Ghantesher Ghosh Vs. Madan Mohan Ghosh & others***, reported in ***(1996)11 SCC 446***, to say that the claim under Section 4 of the Act of 1893 can be raised even in the execution proceedings, and therefore, the contention of the respondents' counsel that issue cannot be raised a second appellate stage, is not acceptable.

19. Considered the submissions and perused the record.

20. Even though the suit was filed by plaintiff challenging the sale deed of defendant no.2, the basis of such challenge was his preferential right to purchase the share of defendant no.1 in suit house. The plaintiff averred that the disputed house is a joint family property. The pleading made in paragraph 4 of the plaint are relevant in this regard which is as under:

> "4. इस कारण श्री देवचंद जी के निधन के पश्चात् परिवार की स्थिति थोड़ी सुधरने के पश्चात् वादी तथा प्रतिवादी कमांक 1 द्वारा उक्त विवादित भवन, पुश्तैनी होने के कारण संयुक्त हिन्दु परिवार के सदस्य होने की हैसियत से श्री पूरनचंद जी जैन से दिनांक 02. 11.1999 के विकय पत्र के माध्यम से पुनः संयुक्त हिन्दु परिवार के सदस्यों के रूप में संयुक्त रूप से कय कर लिया था और संयुक्त रूप से आधिपत्य भी प्राप्त कर लिया था। इस प्रकार वादी तथा प्रतिवादी कमांक 1 विवादित भवन के संयुक्त हिन्दु परिवार के सदस्य होकर सहस्वामी एवं आधिपत्यधारी हैं। <u>प्रतिवादी कमांक 1 को किसी भी स्थिति में उक्त विवादित भवन में अपना अंशभाग वादी की सहमति के बिना विक्रय करने का अधिकार नहीं है और यदि प्रतिवादी क्रमांक 1 अपना अंशभाग विकय भी करना चाहे तो, वैसी स्थिति में प्रतिवादी कमांक 1 आबद्ध है कि, वह अपने अंशभाग का विक्रय प्रस्ताव सर्वप्रथम रूप से वादी को प्रदान करें तथा वादी के अस्वीकार करने पर ही किसी अन्य तृतीय पक्ष को अपना अंशभाग अंतरित करने का अधिकार प्रतिवादी कमांक 1 को प्राप्त है</u>।"

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21. Even though the plaintiff has averred in the plaint about his preferential right to purchase the share of defendant no.1, it was based upon the provisions of Section 22 of the Act of 1956. Section 22 of the Act of 1956, enables a heir to purchase share of another heir in the property of an intestate in preference to an stranger. This provision thus, applies to an immovable property of an intestate which devolves upon two or more heirs specified in Class -I of the Schedule. However, as noted above, in the case in hand, the property was purchased by the plaintiff and defendant no.1, and therefore, the question of its devolving upon them from their father does not arise. The learned appellate court is, therefore, justified in holding that the provisions of Section 22 of the Act of 1956 are not attracted in the case.

22. The entire controversy now revolves around Section 4 of the Act of 1893 which provides as under:

> ***"4. Partition suit by transferee of share in dwelling-house;***
>
> *(1) Where a share of a dwelling-house belonging to an undivided family has been transferred to a person who is not a member of such family and such transferee sues for partition, the Court shall, if any member of the family being a shareholder shall undertake to buy the share of such transferee, make a valuation of such share in such manner as it thinks fit and direct the sale of such share to such shareholder, and may give all necessary and proper directions in that behalf.*
>
> *(2) If in any case described in sub-section (1) two or more members of the family being such shareholders severally*

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undertake to buy such share, the Court shall follow the procedure prescribed by sub-section (2) of the last foregoing section."

23. It is thus evident from the aforesaid that where a share of a dwelling house belonging to an undivided family is transferred to a stranger, and such transferee sues for partition, the court is required to make a valuation of such share if the other shareholder of the dwelling house undertakes to buy the share of such transferee. The aforesaid provision is made specifically for a dwelling house, clearly with an intention that a stranger is not allowed to intrude into a house wherein the other shareholder is already residing. In order to attract provisions of Section 4, following ingredients are required to be satisfied:

i. the property should be a dwelling house belonging to an 'undivided family';

ii. the person claiming right should be a member of undivided family and a shareholder in the property;

iii. the share of property has been sold to an stranger by one shareholder;

iv. a suit for partition has been filed by such stranger;

v. the person claiming right has given an undertaking before the Court to purchase share which has been sold to a stranger.

24. The Apex Court in the case of ***Gautam Paul v. Debi Rani Paul*, *(2000)8 SCC 330***, held that held that before the right of pre-emption, under Section 4, is exercised the conditions laid down therein have to be complied

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with. One of the conditions noted is that the stranger must sue for partition. Section 4 does not provide the co-sharer a right to pre-empt where the stranger does nothing after purchasing the share. In other words, Section 4 is not giving a right to a co-sharer to pre-empt and purchase the share sold to an outsider anytime he/she wants and such right accrues only when stranger sues for partition.

25. In the case in hand, admittedly the property is a dwelling-house belonging to undivided family of plaintiff and defendant no.1. It is also not in dispute that the plaintiff and defendant no.1 have half and half share in the property. The defendant no.1 has sold his share to defendant no.2 who is a stranger to the family. Further, the defendant no.2 has filed a counter claim seeking a relief of partition among other relieves. Thus, all the ingredients except one mentioned at serial no.(v) above, are satisfied.

26. The Apex Court in the case of ***Ghantesher Ghosh (supra)*** was dealing with an issue as to whether Section 4 of the Act of 1893 can be pressed in service in execution proceedings arising out of a final decree for partition by one of the co-owners of a dwelling house. The Apex Court, after taking note of Statement of Objects and Reasons for enacting Act of 1893 in para 4, held in para 17 held as under:

> **4.** It is in the background of these rival contentions that we address ourselves to the consideration of this question. Before we refer to the cleavage of judicial opinion amongst different High Courts on the scope and ambit of Section 4 of the Act, it would be profitable to have a look at the provision itself. The Statement of

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Objects and Reasons for enacting the Partition Act, 1893 amongst others, provided as under:

> *"It is also proposed in the Bill to give the Court the power of compelling a stranger who has acquired by purchase a share in a family dwelling house when he seeks for a partition, to sell his share to the members of the family who are the owners of the rest of the house at a valuation to be determined by the Court. This provision is only an extension of the privilege given to such shareholders by Section 44, paragraph 2 of the Transfer of Property Act, and is an application of a well-known rule which obtains among Muhammadans everywhere and by customs also among Hindus in some parts of the country."*
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> **** *** ****

17. As a result of the aforesaid discussion, it must be held that Section 4 of the Act can validly be pressed in service by any of the co-owners of the dwelling house belonging to the undivided family pending the suit for partition till final decree is passed and thereafter even at the stage of execution of the final decree for partition so long as the execution proceedings have not effectively ended and the decree for partition has not been fully executed and satisfied by putting the shareholders in actual possession of their respective shares. Beyond that stage, however, Section 4 will go out of commission."

27. Obvious from the Statement of Object and Reasons for enacting Act of 1893, the legislature had in view that a stranger to the family who becomes the transferee of an undivided share of one of the co-owners in a dwelling house belonging to undivided family could not claim a right of joint

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possession or common or part enjoyment of the house with other co-owner(s) of the dwelling house. The legislative intent apparently was that such stranger should be kept away from the common dwelling house occupied by other co-sharer(s) so as to ensure peaceful enjoyment of the common dwelling house by the remaining co-owner(s) being members of the same family sharing a common a home.

28. At this stage, it is profitable to refer to pre-existing Section 44 of Transfer of Property Act, 1882, which provides as under:

> *"44. **Transfer by one co-owner**.—Where one of two or more co-owners of immovable property legally competent in that behalf transfers his share of such property or any interest therein, the transferee acquires, as to such share or interest, and so far as is necessary to give effect to the transfer, the transferor's right to joint possession or other common or part enjoyment of the property, and to enforce a partition of the same, but subject to the conditions and liabilities affecting, at the date of the transfer, the share or interest so transferred.*
>
> *Where the transferee of a share of a dwelling house belonging to an undivided family is not a member of the family, nothing in this section shall be deemed to entitle him of joint possession or other common or part enjoyment of the house."*

29. The second part of Section 44 puts a restriction on right of a transferee to have joint possession or other common or part enjoyment of the dwelling-house with co-sharer of his transferor. This was considered by

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Apex Court in the case ***H. Vasudeva Pai vs. Kamarunnisa*, *(2011) 15 SCC 768***, wherein Court held as under:

> *6. This Court pointed out that in order to attract the second para of Section 44, the subject-matter of the transfer has to be a dwelling house belonging to an undivided family and the transfer should be of a share in the same to a person who is not a member of the family. In order to satisfy the first ingredient, the plaintiff would have to show that the suit property is a dwelling house and it belongs to an undivided family.*
>
> *7. With regard to the restriction on the rights of a transferee for joint possession, this Court pointed out that the dominant purpose of the second para of Section 44 of the Transfer of Property Act is that there is a danger of an injury or violation of the corresponding rights of the other members of the family and an irreparable harm to the plaintiff and the Court's interference would be necessary to protect the interest of the plaintiff. After referring to Sultan Begam v. Debi Prasad [ILR (1908) 30 All 324 : 5 All LJ 352] , Nil Kamal Bhattacharjya v. Kamakshya Charan Bhattacharjya [AIR 1928 Cal 539] and, Kshirode Chunder Ghoshal v. Saroda Prosad Mitra [(1910) 7 IC 436 : (1910) 12 Cal LJ 525] (vide IC para 23), this Court observed that the proposition of law stated in Udayanath Sahu v. Ratnakar Bej [AIR 1967 Ori 139 : 33 Cut LT 1163] was a correct statement of law. We may mention that all these judgments noted by this Court were cases*

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where a stranger to the family attempted to get joint possession of the dwelling house on the ground that the stranger had purchased an undivided share in the property. This Court pointed out in Dorab Cawasji case [(1990) 2 SCC 117] that the provisions of Section 4 of the Partition Act were pari materia with the provisions of Section 44 of the Transfer of Property Act, 1882. It was observed that the notions of the coparcener property of a Hindu joint family were wholly irrelevant in considering Section 44 of the Transfer of Property Act and what is relevant for the purpose of such proceeding is whether the dwelling house belonged to an undivided family. Says, the Court:

> *"We have already pointed that even if the family is divided in status in the sense that they were holding the property as tenants in common but undivided qua the property, that is the property had not been divided by metes and bounds, it would be within the provisions of Section 44 of the Act" (vide SCC pp. 131-32, para 24)."*

Thus, the object of Section 4 of Act of 1893 as also that of Section 44 of TP Act, is to avoid danger of an injury or violation of the corresponding rights of the other members of the family and an irreparable harm to the plaintiff from a stranger to the family.

30. The question is as to whether the plaintiff should be denied relief only because he has not given an undertaking before the trial Court as required under Section 4 of the Act of 1893. The learned counsel for defendant no.2 has vehemently argued that such an undertaking cannot be allowed at second appellate stage.

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31. As held by Apex Court in the case of ***Ghantesher Ghosh (supra)***, right under Section 4 of Act of 1893 can be claimed even at the stage of execution of partition decree, the plaintiff in the instant can also be allowed to submit such an undertaking in the execution proceedings, particularly when all other ingredients for attracting Section 4 are satisfied. It is placed on record that the plaintiff has submitted undertaking required under Section 4, in this appeal vide I.A. No.10401/2026. The contention of defendant's counsel is thus not acceptable and is thus rejected.

32. The respondents' counsel also contended that the plaintiff has filed a simplicitor suit challenging defendant's sale deed and, therefore, he cannot be allowed to change his stand of claiming right under Section 4 of Act of 1893 at second appellate stage. However, as noted above, the plaintiff has asserted his preferential right to purchase the property as gathered from averments made in para 4 of plaint. He has though challenged defendant's sale deed, the basis of such challenge is his preferential right of purchasing share of defendant no.1. Therefore, there is no shift of stand contrary to what is asserted in plaint. The defendant therefore does not get any benefit o f ***Suzuki Parasrampuria Suitings (supra)***. The contention of defendant's counsel is thus not accepted.

33. The learned counsel for defendant also argued that a question of law which is neither pleaded nor arises for consideration from factual matrix, cannot be permitted to be raised as a substantial question of law in a second appeal. However, as discussed above, the plaintiff's right to purchase the share of defendant no.1, is pleaded in para 4 of plaint. Further, all ingredients

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of Section 4 are satisfied, as detailed above. Therefore, it cannot be said that the issue about Section 4 does not arise from factual matrix of this case. The judgment in the case of ***Kondiba Dagadu Kadam (supra),*** therefore does not apply in the facts of this case. The contention of defendant's counsel stands rejected.

34. For the reason stated above, the judgment rendered in the case of ***Joint Action Committee of Air Line Pilots' Assn. of India (supra)*** relied upon by defendant's counsel is also not applicable in the facts of this case as the doctrine of election is not attracted.

35. The respondents' counsel then submitted that by virtue of Section 2 of the Act of 1893, an option is required to be given to defendant no.2 also to purchase the disputed house. For ready reference, Section 2 reads as under:

> ***"2. Power to Court to order sale instead of division in partition suits.***
>
> *Whenever in any suit for partition in which, if instituted prior to the commencement of this Act, a decree for partition might have been made, it appears to the Court that, by reason of the nature of the property to which the suit relates, or of the number of the shareholders therein, or of any other special circumstance, a division of the property cannot reasonably or conveniently be made, and that a sale of the property and distribution of the proceeds would be more beneficial for all the shareholders, the Court may, if it thinks fit, on the request of any of such shareholders interested individually or collectively to the*

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extent of one moiety or upwards, direct a sale of the property and a distribution of the proceeds."

36. From reading Section 2 of the Act of 1893, it is gathered that a general provision is made in respect of properties of joint family among the co-sharers. When read with Section 4 of the Act of 1893, it is evident that Section 2 postulates partition of undivided family property among co-sharers, being members of family, and not among family member and a stranger. The defendant no.2, obviously a stranger, is therefore, not entitled to invoke Section 2 of Act of 1893.

37. It has come in the evidence that the disputed house is a *kachcha* construction of bricks and mud having a total area of 290.50 sq. ft. Admittedly, the plaintiff is residing in the said disputed house. The defendant no.2 has purchased only 152.75 sq. ft. of the house. It is thus evident that the house is not susceptible to convenient partition by metes and bound. Further, the house in question is more beneficial for the residence of the plaintiff rather than defendant no.2, who is a stranger to the family. There is nothing available on record to suggest that the disputed house is constructed in such a manner that it can be separated half and half easily. For this reason also, it would be proper that the plaintiff is given an option to purchase the house sold to defendant no.2.

38. Considering the aforesaid, the substantial question of law is answered holding that the plaintiff is entitled to an opportunity to buy the share of defendant no.1 which has been sold to defendant no.2. The learned courts below also could not consider this aspect as no one pressed into

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service provisions of Act of 1893.

39. It is informed by learned counsel for the parties that the execution proceedings for partition are still pending as there is an interim order passed in the present second appeal on 22.02.2022. Therefore, the exercise to conduct valuation of the share of the house sold to defendant no.2, as provided in Section 4 of the Act of 1893, can be done by the executing court. Therefore, instead of remanding the case to the trial court for carrying out valuation for the purposes of Section 4 of the Act of 1893, the plaintiff is given liberty to submit his undertaking before the executing court whereunpon the executing court shall undertake the exercise of valuation of property of defendant no.2, in accordance with Section 4 of the Act of 1893.

40. Considering the discussion made above, the judgment and decree dated 12.12.2019 passed by the Fourth Additional District Judge, Guna, in RCA No.200018/2015, and the judgment and decree dated 20.08.2014 passed by Fourth Civil Judge Class-II, Guna, in Civil Suit No.14-A/2014 passed by both the courts are set aside, and instead, the following decree is passed:

(i) It is declared that the plaintiff is entitled to an opportunity to submit his undertaking as provided in Section 4 of Partition Act, 1893, before the executing court;

(ii) the plaintiff shall accordingly submit his undertaking before executing court in terms of Section 4 of Partition Act, 1893, and the executing court shall make valuation of the share sold to defendant no.2 and give option to plaintiff to purchase the

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same at such valuation from defendant no.2;

(ii) For this purpose, the learned executing court shall afford opportunity to both the parties to place material on record for purposes of determining value of property.

41. With the aforesaid, the appeal is **allowed**. The parties shall bear their respective cost.

(ASHISH SHROTI)
JUDGE

Anil*

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