

**IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH**

**RSA No. 2660 of 2015 (O&M)
Date of decision: 07.12.2015**

Rajesh Kumar and another
... Appellants
versus
Gurmeet Singh and another
.... Respondents

2. RSA No. 2006 of 2015 (O&M)

Rajesh Kumar and another
... Appellants
versus
Gurmeet Singh and another
.... Respondents

CORAM: HON'BLE MR. JUSTICE K. KANNAN

Present: Mr. Sanjeev Goyal, Advocate for the appellants.

K.Kannan, J.

CM No. 6765-C-2015

For the reasons mentioned in the application, duly supported by an affidavit, delay of 13 days in refiling the appeal is condoned.

CM is disposed of.

RSA Nos. 2660 & 2006 of 2015

The appeals are against the common judgment in appeal and cross-appeal arising out of the same suit. They are disposed of by the common judgment.

The plaintiff who filed a suit to declare that the sale executed by the father was without legal necessity and not binding was resting his case on a contention that the properties were joint family properties. The trial Court held the property to be ancestral joint family property but finding that there was no necessity, allowed the plaintiff to assail the sale only in respect of his share. The contesting defendants

preferred the appeal and sought to place on record that the great grand father of the plaintiff Bagrawat, was the original owner of half share of the property. He had three sons and one daughter and he made only one of the sons Shankar to be the beneficiary of his half share to the exclusion of others through a registered *Hibanama*. The reference to the *Hiba* had been entered in the *Jamabandi* of the year 1996. Shankar died and his property on intestacy was divided equally amongst the 2nd defendant who was the plaintiff father and his brothers and sisters. The Court found that if the plaintiff's great grand father got the property by *Hiba*, the property obtained on succession under Hindu Succession Act by the plaintiff's father was separate property in his hands, relying upon the judgment of the Hon'ble Supreme Court in Commissioner Wealth Tax Vs. Chander Sen AIR 1986 SCC 1753. If the property was therefore, separate property of father, the sale by him could be impeached by the son.

Learned counsel for the plaintiff is aggrieved against the dismissal of his suit and states that if Bagrawat was the owner of the property, the gift cannot be accepted as valid without proof of gift. Even if the grand father and his brothers had been shown to be exclusive owners, on the death of the grandfather, the property which came to his father, namely, the 2nd defendant ought to be taken as ancestral property vis-a-vis his son. The counsel would state that the *Jamabandi* entry showing the genealogy comprising of three sons and one daughter of Bagrawat must make available the presumption that the entire family owned the property through their father and Shankar's exclusive entitlement cannot be presumed.

The whole argument of the learned counsel is placed on a wrong premise that there is a presumption of existence of joint family property for a joint family. The incident of joint family for Hindus is the normal rule and the presumption does not extend beyond the fact that there exists a joint family. However, if an issue was to be brought

before the Court, of whether the father was competent to execute the sale, the impeaching plaintiff as a son shall prove two aspects: (i) that the property is ancestral and (ii) that the sale was without necessity. Both must exist and if only one is admitted to be shown, the case will fail.

Without any discussion, I am prepared to accept that the father was selling the property without any necessity. If the matter would therefore require consideration of whether the property was ancestral, then it must be understood that the expression is legally loaded. The ancestral property is just not a property coming to a person from a father or grand father. The manner of such devolution is crucial. The property coming from grand father to father on intestate succession will be understood in legal parlance applicable to Hindus as unobstructed heritage. There is another form of devolution as obstructed heritage, which occurs when there is any form of transfer of right otherwise than under natural succession. Consequently, the property obtained by a Hindu male by sale or gift will be taken as property obtained by that person as an obstructed heritage and that property shall be separate property in his hands even vis-a-vis his own son. Consequently, the property that was obtained by the plaintiff's grandfather Shankar by way of Hiba from his father will be separate property and on his death after the Hindu Succession Act, the property inherited by his son namely, the 2nd defendant along with his own brothers and sisters will be the property taken as having devolved on them by the operation of Section 8 of the Hindu Succession Act. Hence the property inherited by father would partake the character of separate property, as held by the Hon'ble Supreme Court in Chander Sen's case (supra). This decision was cited and proved in later decision of the Supreme Court in Yudhishtir Vs. Ashok Kumar, AIR 1987 SCC 558. If the property was, therefore, held by the father on succession along with his own brothers and sisters, that property cannot be said to be ancestral property in his hands vis-a-vis his son, the plaintiff, merely by

the fact that he did not earn the same but got it on succession from his father. The normal understanding of an ancestral property as that which has come from the ancestor and to be treated as such qua his own son will have to be understood and reinterpreted in the light of the change of law that came about by the advent of the Hindu Succession Act, 1956.

There is an argument placed that the *Hiba* was not proved and the court could not have acted on the said document filed at the appellate stage. Assuming that *hiba* was not proved, any property held by the plaintiff's grand father Shankar cannot be even assumed to be joint family property by the mere reference to the genealogy comprising of the plaintiff grandfather Shankar, his two brothers and one sister. A person who asserts that it is a joint family property shall prove the joint family character. The plaintiff must show that Shankar held the property as a co-parcenary allowing for the right by birth to his sons to the exclusion of daughters as per the then law prevailing. The plaintiff could not have succeeded even in the absence of the reference to *Hiba* in favour of the Shankar.

The surviving point for consideration was whether there was anything brought on the record to show that the property held by the 2nd defendant as inherited from his father Shankar, had been impressed with the character of joint family property. A separate property can always be treated as joint family property by merger with admitted joint family properties existing or otherwise by throwing the separate property into the hotchpot. A case of blending or merger or deviations from the understanding of obstructed and unobstructed heritage would require to be specifically pleaded and proved. There can be no presumption that the property inherited by the father under the Hindu Succession Act, 1956 held as such was treated by the father as joint family property along with his sons. Such treatment must be expressly pleaded and there must be evidence of such treatment showing that the father had allowed all his sons to enjoy the properties

not merely under the bounty of the father but as a right obtaining to them by the treatment made possible by the father by his conduct. The contentions made before the Court are far-fetched from what is necessary to be established at the trial. The dismissal of the plaintiff's suit by the Appellate Court was under the circumstances justified and there is no scope for interference.

The proposition of law involved in this case is against the plaintiff and there is nothing new or substantial for consideration in 2nd appeals. The second appeals are consequently dismissed.

(K.KANNAN)
JUDGE

07.12.2015

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