1078.

IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

Regular Second Appeal No.443 of 1988 (O&M)
Date of decision: 02.12.2015

Smt. Sardari @ Ishro and others ... Appellants

versus

Jagir Singh (deceased, through his LRs) and others.
.... Respondents

CORAM: HON'BLE MR. JUSTICE K. KANNAN

Present: Mr. K.S. Boparai, Advocate, and
Mr. S.S.Dinarpur, Advocate,
for the appellants.

Mr. Birender Singh Rana, Senior Advocate,
with Mr. Vivek Goel, Mr. Gagandeep Rana, Ms. Anu Singh, and Mr. Baljit Singh, Advocates, f
or respondents 1(i) to 1 (iii).

Ms. Alka Sarin, Advocate,
for the remaining respondents.

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1. Whether reporters of local papers may be allowed to see the judgment ? **Yes.**
2. To be referred to the reporters or not ? **Yes.**
3. Whether the judgment should be reported in the digest ? **Yes.**

K.Kannan, J. *(Oral)*

1. The appellants are the plaintiffs whose claim for a share in the property has been dismissed by the two courts below. The 1st plaintiff and the mother of the plaintiffs 2 to 4 are sisters. They are the children of Jagir Singh through his wife Jiwani. The 1st

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2015.12.08 10:45
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defendant is the son of Sada Ram-the father of the 1st plaintiff and the defendants 5 to 8 are the sons of the 1st defendant. Defendants 2 to 4 are the representatives of Jagir Kaur, who is the sister of the 1st defendant.

2. The suit was rested on a plea that the properties in two villages Badheri and Sukhpura were ancestral properties and on the death of the father on 01.01.1983, each of the daughters became entitled to 1/4th share along with the defendants 1 and 2, who like the 1st plaintiff, were each entitled to 1/4th share. The defendants denied generally the averment in the plaint that the properties are ancestral and contended that the 1st defendant and defendants 5 to 8 got the suit properties by virtue of a decree passed in Case No.321 of 1977. The decree purported to secure to the benefit of defendant No.1 and their sons' right to all the properties which according to the averments in the plaint then filed was claimed by them on the ground that their father Sada Ram was addicted to habits of gambling and wine and that the property should be handed over to them on account of “acceleration of succession” (sic).

3. At the trial, the defendants had also set up a case of a Will as alleged to have been executed by the father but the court discarded the defence as without pleading and hence of no merit. Although the trial court had decreed the suit, the appellate court reversed the decision and held that the plaintiffs cannot have any

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right in the property which was already given a way in the decree to the defendants. Even while affirming the finding of the trial court that the appellate court found that the properties in Badheri was ancestral and the subsequent acquisition at Sukhpura had been made out of the income from the said properties. The court also found that a decree had been suffered by the father allowing for transmission of all the properties in suit to be enjoyed in favour of the plaintiffs there and the defendants herein and that the father left behind no estate to succeed in favour of the plaintiffs.

4. The learned counsel for the appellants would contend that although the plaintiffs had stated that the properties were ancestral, in the suit filed by one Jai Ram, who was the son of Jiwani through her first husband contending that the properties in the Village Sukhpura had been purchased by him in the name of Sada Ram and the latter had filed a written statement contending that it was actually purchased by him out of his funds. The counsel would rely on this statement as constituting an admission that the property was a separate property of the father and there could have been no transfer of right in favour of his son through a decree, for, that would amount to a transfer of chance on succession which will be invalid. The further contention is that the decree itself cannot operate to transfer right in the property in favour of the 1st defendant, if the 1st defendant or his sons did not have any pre-existing right in

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2015.12.08 10:45
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the property.

5. The counsel for the respondents points out that the whole edifice of the plaintiff's claim was on the basis that the properties were ancestral in character and if they were ancestral, the 1st defendant as the only other co-parcener along with his father had an equal right in the property with his father and there was no bar for the father to efface himself as regards his own entitlement and allow the same to be enjoyed by his grandsons. The decree which was passed in the year 1977 was on an admission made by the father as regards the arrangement said to have been made in the presence of some friends and relatives and hence, the property that belonged to them and recognized as such under the decree cannot be made a subject of partition.

6. The substantial questions which were framed directed a consideration of whether a father could suffer a decree admitting the right of son and grandson in the whole of the property to extinguish his own right to the property. If the son and the grandson had a right in the property as members of a coparcenary, then it would be competent for the *karta* to forsake his own claim and allow for the sons and grandson to take the whole of the property. If the father had, therefore, filed a written statement admitting to the claim of the son and grandsons, it would constitute an estoppel for the father to claim the right in the property. If the plaintiff's own claim to the suit

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2015.12.08 10:45
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property was on the basis that the properties in suit belonged to the estate of the father left behind by him, unless it was shown that the properties were available and retained by the father as such till his lifetime, the claim to a right by the daughters cannot arise.

7. There is a practical difficulty of the plaintiffs making a claim when an estoppel that would operate to the father would equally apply to them if they were pressing for the reliefs through heir father. It was evident that the appellants are conscious of such a fetter that could be imposed upon them and, therefore, the counsel wanted to place reliance on a document containing an assertion made by the father that the property purchased in Sukhpura was his self-acquisition. I must state that I cannot pick out a statement in a suit filed by the 1st plaintiff's step-brother Jai Ram as constituting a final declaration as regards the character of property, without minding the circumstances under which such a statement was made and without reference to the plaintiff's own pleadings. The suit proceeds on a clear assertion that the properties belonged ancestrally. The trial court's decree was also on such a basis. When the defendants appealed that there was no attempt by the defendants to contend that there were separate properties but they were contending for a position that their own right in the property got affirmed through a decree passed in the year 1977. Even in the second appeal filed there is no reference to the fact that the findings

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2015.12.08 10:45
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regarding the ancestral character of property was wrong. In fact such a ground could not be even urged which would run counter to the plaintiff's own assertion in the plaint. If the plaintiff's admission in the plaint must be discarded and the plaintiff would want the written statement filed by Sada Ram as constituting an admission, it must be noticed that the admission in order that it operates as an estoppel or binding declaration must be to the person who claimed the benefit of such admission or must be a person through whom the plaintiff's claim. The so-called admission was in the suit filed by Jai Ram and the present suit is by the plaintiffs, making no attempt to source their right through him. It cannot, therefore, be used even as an admission in the manner contemplated under Section 23 of the Evidence Act. There is another fundamental principle of law that an admission must be construed as a whole and ought not to be truncated. If the assertion made by Sada Ram was that he had himself purchased the property, it was in the context of Jai Ram making a plea of benami purchase in the name of his mother's second husband. A plea in response to a benami purchase must, therefore, be restricted only to the properties covered in that suit. The issue in a case of benami would have only required a consideration on whether Jai Ram could prove that he had any motive to purchase the property in the name of his step-father. The presumption is always that ostensible owner is also the real owner.

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It has been considered by the appellate court that the purchase in the name of Sada Ram with reference to the properties in Sukhpura was out of the income from Badheri village. If we must examine the statement by Sada Ram with reference to his purchase, it must be seen in the context of how the trial court has itself assessed the nature of purchase and the character of all the properties in both the villages.

8. I have no doubt in my mind that if the character of properties were ancestral as stated by the plaintiffs, there is no prohibition in law for the father to allow for the properties to be taken by the sons and grandsons during his own lifetime and that can be brought about by a mere oral assertion forsaking his right. If such a right forsaken is also recorded through a statement and a decree was passed in terms therefor, it would mean that the father left no estate for succession by the plaintiffs. This would also answer the second question which was raised of whether the father left any estate. He did not.

9. There is no scope for admitting any claim for the plaintiffs. The decision dismissing the plaintiff's suit was correct and it requires no interference at the hands of this court. The second appeal is dismissed.

(K.KANNAN)
JUDGE

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