

IN THE HIGH COURT OF PUNJAB & HARYANA, CHANDIGARH

RSA No.1748 of 1990(O&M)
Date of Decision: 10.02.2015

Harbhajan Singh (since deceased) through LRs

..... APPELLANT

VERSUS

Parduman Singh and others

..... RESPONDENTS

PRESENT: - Ms. Alka Sarin, Advocate
for the appellant(s).

Mr. Adarsh Jain, Advocate
for respondents No.1 to 3.

Mr. M.S. Bedi, Advocate
for respondent No.4.

CORAM: **HON'BLE MR. JUSTICE SHEKHER DHAWAN**

- 1) Whether Reporters of the local papers may
be allowed to see the judgment?
- 2) To be referred to the Reporters or not?
- 3) Whether the judgment should be reported in
the Digest?

SHEKHER DHAWAN, J.

This is defendant's second appeal whereby
judgment and decree dated 02.06.1990 have been assailed.

The Additional District Judge, Gurdaspur while accepting the appeal of plaintiffs-respondents with costs reversed the findings recorded by the Additional Senior Sub Judge, Batala.

For convenience sake, hereinafter, reference to parties is being made as per their status in civil suit.

The detailed facts are already recapitulated in the judgments of the courts below and are not required to be reproduced. In brief, the facts relevant for disposal of this second appeal are to the effect that plaintiffs Parduman Singh and others and defendants No.2 and 3 are son and daughter of Harbans Singh defendant No.1. Plaintiffs Parduman Singh and others had filed suit for joint possession of the land which is joint Hindu Family ancestral and coparcenary property of the plaintiffs and defendants in equal shares i.e. $1/7^{\text{th}}$ share each. Harbans Singh was the owner of the property. He had performed two marriages during his life time i.e. one with Smt. Balbir Kaur and other with Smt. Parkash Kaur. Plaintiffs Parduman Singh, Paramjit Singh, Kulwinder Singh and Malook Singh were born out of wedlock of Harbans Singh and Smt. Balbir Kaur whereas Harbhajan Singh and Jagiro @ Jagir Kaur (defendants No.2 and 3) were born out of wedlock of Harbans Singh and Smt. Parkash Kaur. Harbans Singh defendant No.1 had performed

marriage with Smt. Balbir Kaur prior to the enactment of Hindu Marriage Act, 1955 (hereinafter referred to as 'the Act'). Smt. Parkash Kaur died about 9/10 years back prior to the filing of the Civil Suit. The parties to the litigation are members of Joint Hindu Family and are governed by Hindu Law in the matters of alienation and succession. There is no contrary evidence available on file that the parties were governed by customary Law. The suit property was not self acquired property of Harbans Singh.

It is the case of the plaintiffs that both the parties to the litigation are having 1/7th share each in the disputed land being co-parceners. To the contrary version of defendant No.2 that the suit land had fallen to the share of Smt. Parkash Kaur in pursuance of maintenance order and thereafter compromise was entered into between the parties. The plaintiffs have taken the stand that such a transfer on the basis of maintenance order is null and void and not binding upon the plaintiffs and even the mutation, if any, on the basis of such maintenance order is illegal. As per plaintiffs, Smt. Parkash Kaur had no right to execute any will regarding ancestral property.

Defendant No.1 Harbans Singh was proceeded against ex parte before the Court of First Instance whereas the suit was contested by defendant No.2. Parties had

another round of litigation as Harbans Singh defendant No.1 had earlier filed a suit in respect of suit land after the death of Smt. Parkash Kaur. The said suit was dismissed by Mr. A.C. Aggarwal, Sub Judge, Batala. The said judgment delivered by the Court of Sub Judge, Batala was maintained upto this Court.

Defendant No.2 has also taken the plea that the plaintiffs are taking self contrary pleas as they are claiming inheritance through Smt. Parkash Kaur on the one hand and at the same time they are challenging title of Smt. Parkash Kaur. As per defendant No.2, mutation had already been sanctioned in favour of Smt. Parkash Kaur and the plaintiffs cannot challenge the same after lapse of more than 25 years. The suit is bad for mis-joinder of the parties and cause of action. As per defendant No.2, Smt. Parkash Kaur was the absolute owner of the disputed land and in her capacity, as such, she had executed registered Will dated 18.06.1965 in his favour during her life time out of love and affection. The same was held to be valid upto this Court. As per defendant No.2, the plaintiffs are not the legal heirs of Smt. Parkash Kaur and they have no right or locus standi to challenge the Will in favour of defendant No.2, who is the only son of the deceased. The mutation sanctioned in favour of defendant No.2 is valid one. The plaintiffs have no

interest in the disputed land and they are not entitled to the joint possession.

Learned trial Court settled the following issues and the parties were put to trial:

- “1. Whether the plaintiffs have locus standi to file the present suit regarding the suit property? OPP
2. Whether Parkash Kaur was not owner of the suit property and, therefore, she was not competent to execute the will in favour of the defendants? OPP
3. Whether the parties are governed by custom and not by Hindu Law? OPD (onus objected to)
4. Whether the suit is within limitation? OPP
5. Whether the suit is barred by the principle of resjudicata between the parties? OPD
6. Whether the suit has been filed in accordance with directions regarding withdrawal of the earlier suit? OPP
7. Whether the plaintiffs are entitled to the joint possession prayed for by them? OPP
8. Relief.”

The learned Court of First Instance after appreciating the facts, evidence available on file and law points involved in the case decided issue No.5 regarding the present suit being barred on the principle of res judicata against the plaintiffs and in favour of defendant No.2. Issues No.2,3,4 and 7 were also decided against the plaintiffs whereas Issue No.6 was decided in favour of the

plaintiffs and consequently the suit of the plaintiffs was dismissed.

The plaintiffs preferred an appeal and remained un-successful before learned Additional District Judge, Gurdaspur and hence the present Regular Second Appeal before this Court.

When the appeal was admitted, no substantial question of law was framed. Even no proposed substantial question of law has been placed on record during the pendency of appeal. Learned counsel for the appellant took the plea that the substantial question of law can be settled even at the stage of Regular Second Appeal if the Court comes to the conclusion that there are some substantial questions of law which require determination and decision by the Court. Such a law was laid down by Hon'ble the Supreme Court in case of **Santosh Hazari Vs. Purushottam Tiwai (Dead) by LRs.**, 2001(2) JT 407 that if substantial questions of law not framed at the time of admission of appeal, the same can still be settled and controversy between the parties can be settled during the hearing of the Regular Second Appeal.

In the case in hand, the following substantial questions of law are involved:

1. Whether the finding of the Court given in

Exhibits D2 to D6 operates as resjudicata?

2. Whether the findings of the Courts below are perverse and liable to be set aside.?

I have heard Ms. Alka Sarin, Advocate for the appellant, Mr. Adarsh Jain, Advocate for respondents and 1 to 3 and Mr. M.S. Bedi, Advocate for respondent No.4 and perused the record.

Ms. Alka Sarin, learned counsel for the appellant mainly took the plea that most of the facts are not disputed that Harbans Singh had performed two marriages i.e. one with Smt. Balbir Kaur and and second with Smt. Parkash Kaur. Defendant No.2 Harbhajan Singh was born out of wedlock of Harbans Singh and Smt. Parkash Kaur. Maintenance allowance @ ₹35/- per month was ordered in favour of Smt. Parkash Kaur on 04.11.1954. Subsequently, compromise was entered into between Harbans Singh and Smt. Parkash Kaur on 23.08.1955 and on the basis of same, 7-1/2 acre of land was given to Smt. Parkash Kaur. Subsequently, there were proceedings under Sections 107 and 151 of the Code of Criminal Procedure and compromise was arrived at between the parties on 10.03.1959. The possession of 7-1/2 acre of land was given to Smt. Parkash Kaur on the same day. Even an application was filed for recalling of maintenance order and said application was

dismissed. Subsequently, on 18.05.1965, Smt. Parkash Kaur executed a Will in favour of her son Harbhajan Singh. Mutation was sanctioned on the basis of said Will.

Learned counsel for the appellant also took the plea that earlier round of litigation was initiated at the instance of Harbans Singh. Learned Court of First Instance as well as learned Court of First Appeal recorded specific findings that land was belonging to Harbans Singh. Even RSA was filed before this Court and the same was dismissed.

Learned Court of First Instance in the present case while recording findings on Issue No.5 rightly came to the conclusion that the present litigation was barred as per principles of res judicata and the same findings have been reversed by the learned Court of First Appeal without any basis.

Learned counsel for the appellant also took the plea that even if the disputed land was ancestral, karta of Joint Hindu Family Property could alienate the same for legal necessity. In the case in hand, the land was transferred by Harbans Singh in favour of Smt. Parkash Kaur for satisfaction of payment of maintenance amount order and that is always considered to be a legal necessity as the compromise was arrived so to avoid lawful liability.

While arguing on this point, Mr. Adarsh Jain, learned counsel for the respondents had taken the plea that principles of res judicata are not applicable in the present case as the plaintiffs-respondents are litigating in their own rights. The nature of suit land being ancestral nature was not even discussed by the Court of First Instance in the present case. In that, the nature of suit property being ancestral property, the same could not be alienated except to the extent of his share i.e. $1/6^{\text{th}}$ or $1/7^{\text{th}}$ as Harbans Singh was owner to the extent of $1/7^{\text{th}}$ share. There were no pleadings regarding legal necessity nor the same were proved before the Courts below and as such there is no question of present suit being barred on the principle of res judicata.

In support of his arguments, learned counsel for respondents No.1 to 3 placed reliance upon judgment from Hon'ble the Supreme Court of India in the case of **Byathaiah (KUM) and others Vs. Pentaiah (KUM) and others**, (2000)9 SCC 191 that it transpires from the record that earlier litigation was between original vendors and original vendees. If the appellant-plaintiffs were claiming independent right over the suit properties which according to them could have been alienated by the vendors in favour of the vendees as they did not claim through their father

and uncle, the original vendors but they were claiming independent right over suit properties and as such the suit could not be said to be barred by res judicata between the parties.

Reliance was also placed upon another judgment from Hon'ble Supreme Court of India in case of **Isabella Johnson (SMT) Vs. M.A. Susai (Dead) by LRs.** (1991) 1 SCC 494 wherein the Law was laid down that rule of res judicata under Section 11 of the Code of Civil Procedure, 1908 is not applicable to decision on pure question of law.

In **Harbans Singh and others Vs. Sant Hari Singh and others** (2009) 2 SCC 526, Hon'ble Supreme Court of India observed that as per provisions of Section 96 and 100 of Code of Civil Procedure, the requirement of law of filing separate appeals in connected suits having same issues and parties for taking the plea of res judicata. The pre-condition is that the parties in both the suits/pleadings should be same. The parties must be claiming under other parties/institutions/committees.

Reliance was also placed upon judgment from Hon'ble the Supreme Court in case of **Mst. Sugani Vs. Rameshwar Das and another**, 2006(4) RCR(Civil) 319. While deciding second appeal under Section 100 of Code of Civil Procedure, if two inferences are possible from a given

set of circumstances then view drawn by lower Appellate Court is binding on the High Court in second appeal and High Court cannot substitute its opinion for the opinion of the first appellate court unless it is found that conclusion drawn by the first appellate Court is erroneous being contrary to the mandatory provisions of law applicable.

I have given my thoughtful consideration to the arguments advanced by the learned counsel for the parties and of the considered view that most of the facts in this are are not disputed. Harbans Singh had performed two marriages i.e. one with Smt. Balbir Kaur and second with Smt. Parkash Kaur. Plaintiffs Parduman Singh and others were born out of wedlock of Harbans Singh and Smt. Balbir Kaur whereas defendant No.2 Harbhajan Singh was born out of wedlock of Harbans Singh and Smt. Parkash Kaur. Harbans Singh had chosen to remain away from the proceedings and was proceeded against ex parte before the learned Court of First Instance. He had not contested the litigation before the learned Court of First Appeal as well. The nature of suit property is Joint Hindu Family Property as it is not a case of either party that suit property was self acquired property of Harbans Singh. Parties are governed by Hindu Law because there is no contrary pleadings or evidence available on file that the parties were being

governed by customary law and the same has not been proved on the file. Both the parties had performed marriage before enactment of Hindu Marriage Act. There was dispute regarding payment of maintenance allowance between Harbans Singh and Smt. Parkash Kaur and maintenance allowance @ ₹35/- per month was ordered on 04.11.1954. Thereafter, compromise was arrived at between Harbans Singh and Smt. Parkash Kaur and 7-1/2 acre of land was given to Parkash Kaur in lieu of maintenance allowance. As nature of the suit property was ancestral property in the hands of Harbans Singh, he could certainly transfer the land in favour of Smt. Parkash Kaur in the discharge of payment of legal debt and same is always considered to be legal necessity. More so, the plaintiffs-respondents cannot challenge entitlement of Smt. Parkash Kaur as they are claiming their title to the suit land through Smt. Parkash Kaur. The legal necessity for transfer of 7-1/2 acre of land in favour of Smt. Parkash Kaur had also arisen because there were proceedings under Sections 107 and 151 of the Code of Criminal Procedure and, thereafter, compromise was arrived at between the parties on 10.03.1959. The possession of said land measuring 7-1/2 acre was given to Smt. Parkash Kaur on 10.05.1959 and mutation was recorded in the revenue record.

Subsequently, Smt. Parkash Kaur had executed Will in favour of Harbhajan Singh and said fact find recorded in revenue record as mutation was sanctioned in his favour. Smt. Parkash Kaur had acquired the property in lieu of maintenance as per pleadings of Section 14(1) of the Hindu Succession Act, 1956. The property became absolute property of Smt. Parkash Kaur on commencement of the Act as the same was possessed by her. Such a law was laid down by Hon'ble the Supreme Court in case of **Nazar Singh and others Vs. Jagjit Kaur and others**, (1996) 1 SCC 35. Identical Law was laid down by Hon'ble the Supreme Court in case of **V.Tulasamma and others Vs. Sesha Reddy (DEAD) by LRs**, (1977) 3 SCC 99.

Learned Court of First Instance had rightly come to the conclusion that the present suit is barred on the principles of res judicata. The said findings recorded under issue No.5 reversed by the learned Court of First Appeal without any material or evidence available on file. The earlier round of litigation at the instance of Harbans Singh who is none else but father of plaintiffs Parduman Singh and others. The parties to the present litigation are asserting their right to the property through Harbans Singh only. The plaintiffs have assailed their claim only on the ground that the land in dispute was ancestral property of their father

and, as such, they were entitled to joint possession. The said issue was decided in previous suit. Section 11 of the Code of Civil Procedure bars subsequent suit on same issue if the matter is substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim their title.

Learned Court of First Instance had rightly observed that matter in issue in the former suit as well as in the present suit was the same. At the same time, the litigation in the earlier suit as well as in the present litigation is between the parties to the litigation as the plaintiffs are none else but sons of Harbans Singh and they are claiming title through their father and they are deriving their title to the disputed land through him. The earlier round of litigation at the instance of Harbans Singh had attained finality upto this Court.

Learned Court of First Instance had rightly observed that the plaintiffs could not have preferred their claim to the disputed land had they not been sons of Harbans Singh. The reasoning given by the Court of First Appeal while reversing the findings recorded under Issue No.5 are without justified ground and the same are perverse and are liable to be reversed. Merely giving the reasoning that the plaintiffs were not parties to the suit of Harbans

Singh does not make out a case that the present litigation is not covered as per principles of res judicata. Section 11 of the Code of Civil Procedure makes it ample clear that the former suit should be between the same parties or between the parties under whom they or any of them claim, litigating under the same title. The present case is certainly covered under the later part because the plaintiffs are claiming their title and litigating under the title of Harbans Singh only. Learned Court of First Appeal has completely ignored these facts while recording the findings and as such the said findings are hereby reversed.

The other reasoning given by learned Court of First Appeal in the present case are that copies of pleadings were not placed on the file.

The same reasoning is without any basis because facts to that extent were not disputed between the parties that the plaintiffs are sons of Harbans Singh and there was earlier round of litigation.

In view of the above, the findings recorded by learned Court of First Appeal on issue No.5 are reversed. The present litigation is barred as per principles of res judicata and as such the plaintiffs have no locus standi to file the suit regarding the suit property. The findings on Issues No.2,3 and 4 recorded by learned Court of First

Appeal are also reversed.

Consequently, the present Regular Second Appeal is accepted and the judgment and decree dated 02.06.1999 passed by the learned Court of Additional Sessions Judge, Gurdaspur are set aside and judgment and decree dated 07.09.1987 passed by the learned Court of First Instance is restored and suit of the plaintiffs stands dismissed. Costs made easy.

**(SHEKHER DHAWAN)
JUDGE**

February 10, 2015
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