

620-A

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

RSA Nos.1288 of 2001

Decided on : December 09, 2015

RAJBIR

....Appellant

VERSUS

SUSHILA AND OTHERS

....Respondents

CORAM : HON'BLE MR. JUSTICE AMIT RAWAL

Present: Mr. S.S. Narula, Advocate
for the appellant.

Mr. Gorakh Nath, Advocate
for the respondents.

AMIT RAWAL, J (ORAL)

The appellant-plaintiff is in the Regular Second Appeal against the judgment and decree of both the Courts below whereby a suit for declaration with consequential relief of possession has been dismissed.

The case set up by the plaintiff was that great grand father Ami Lal was a mortgagee with possession of land measuring 23 bighas 09 biswas and the mortgagors were none else but Smt. Dano and Dhapo sisters of Ami Lal. The aforementioned mortgage was affected on 23.05.1922 for a consideration of Rs.2,000/-. After the death of Smt. Dhapo, her half share was inherited by Smt. Dano. Ami Lal died on 20.05.1925 and his mortgagee rights were inherited by his three sons

namely Tek Chand, Dharma and Jugti. After the death of Dharma, his share i.e. 1/3rd share got inherited by Chhattar Singh, defendant No.7 who is none else but father of the appellant-plaintiff. After the consolidation in the year 1954-1955, the present killa numbers as described in para 3(a) of the suit were allotted.

Chhattar Singh filed a suit against Dano for foreclosure and the same was decreed by judgment and decree dated 18.08.1970 and therefore Chhattar Singh had become exclusive owner of the property to the extent of 1/3rd share which he derived from Dharma. Thus, the mortgagee rights at the hands of Chhattar Singh was ancestral in nature. Chhattar Singh in collusion with the defendant No.1 to 6 suffered judgment and decree dated 19.04.1986 in their favour as they were born from the wedlock of Chhattar Singh and Smt. Giano. The Courts below have erroneously declined the right on the ground that it is the Chhattar Singh who had become exclusive owner in the year 1970 when the decree was passed in his favour and therefore the property at his hands would not be ancestral in nature, thus, prays that the following question of law arise for determination by this Court:-

- i) Whether the appellant-plaintiff would have a right to share the mortgagee rights of his great grand father which converted in to ownership of Ami Lal by seeking the foreclosure of the mortgagee or not?

Mr. Gorakh Nath, learned counsel appearing on behalf of the respondent Nos.1 to 7 submits that the concurrent findings of fact cannot be interfered under Section 100 of the Code of Civil Procedure, much less, no substantial question of law has been framed or even arise for

determination. Since, Chhattar Singh acquired the ownership of the property for the first time in the year 1970. The nature and character of the property cannot be ancestral but it would be deemed to be a self acquired.

I have heard learned counsel for the parties and appraised the paper book.

I am of the view that the appeal deserves to be allowed for the following reasons:-

i) Ami Lal had during his lifetime sought the foreclosure of his mortgage and ultimately succeeded, thus had become the owner. All his sons would have got equal share and ultimately Chhattar Singh who is none else but grand son of Ami Lal would have also inherit the share in property and thus the appellant-plaintiff as per settled law would have right by birth in respect of such share. However, in this present case, Ami Lal and Dharmo did not get the mortgagee rights, it is only Chhattar Singh who got the mortgagee rights to the extent of 1/3rd share as noticed above, Ami Lal had three sons. Therefore, Dharmo got only 1/3rd share.

In my view, the appellant-plaintiff being son of Chhattar Singh would have a right to the extent of 1/3rd share as the property at the hands of Chhattar Singh was ancestral, for, as it has fallen from three generations and appellant-plaintiff being the 4th generation.

The character and the nature of the property being ancestral has been described in paragraph 232 of the Hindu Law by Mulla.

Keeping in view the afore mentioned facts, I am of the view that both the judgment and decree of both the Courts below are not

sustainable and are hereby set aside.

Accordingly, the substantial question of law is answered in favour of the appellant-plaintiff.

The decree sheet be prepared.

Accordingly, Regular Second Appeal is allowed.

December 09, 2015
rajneesh

(AMIT RAWAL)
JUDGE