

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

Regular Second Appeal No.3909 of 2011 (O&M)

Date of decision: 13.8.2015

Kamlesh

... Appellant

Versus

Satbir and others

... Respondents

CORAM: HON'BLE MR. JUSTICE RAJIV NARAIN RAINA

Present: Mr.K.C.Rajput, Advocate,
for the appellant.

1. To be referred to the Reporters or not?
2. Whether the judgment should be reported in the Digest?

RAJIV NARAIN RAINA, J.

1. The plaintiff is in second appeal against concurrent findings of fact recorded by both the courts below which have led to the dismissal of the suit instituted in the subordinate court at Sonapat for declaration and possession with respect to the suit property. Her claim to the property in dispute was based on a plea that it was ancestral property in the hands of her grandfather late Gopi Chand.

2. The facts are like this: - Surat Singh predeceased his father Gopi Chand who died on 2nd November, 1976 leaving behind a testamentary disposition of his property by a will dated 30th October, 1976 executed a fortnight before his death. The plaintiff is the daughter of Surat Singh and

~~Soma~~ Soma Kaur. She was a minor when her grandfather Gopi Chand died. She

was born in the year 1972 in village Bhatgaon Maliyan, Tehsil and District Sonipat. Her mother Sama Kaur re-married a man named Prithi who was a resident of village Kasanda. This marriage was solemnized soon after the death of Surat Singh. The plaintiff is the sole legal heir of Surat Singh. She claims that the suit land was ancestral co-parcenary property and her late father Surat Singh had 1/5th share in the total land comprising 139 Kanals as described in the plaint. When she came to know of the testamentary will, she discovered that the property of her father Surat Singh had been inherited by her uncles by virtue of the last will and testament of late Gopi Chand. The beneficiaries under the will were his four remaining sons, i.e., Rattan Singh, Kartar Singh, Chattar Singh and Bhoop Singh. The mutation was sanctioned in their favour as per the will in the revenue record.

3. Chattar Singh died issueless before the suit was filed but the plaintiff did not claim his share in property. The suit was for declaration to the effect that the plaintiff was in joint possession of the suit property and in addition thereto she sought the consequential relief of permanent injunction. When the matter went to trial, the trial Judge framed as many as six issues which are as follows : -

1. Whether the plaintiff is owner in possession of his share, as alleged, if so to what effect? OPP
2. Whether the defendant can be restrained from alienating the suit property, as alleged, if so to what effect? OPP
3. Whether the suit is barred by limitation ? OPD
4. Whether the plaintiff has no locus standi to file the present suit? OPD

5. Whether the suit is bad for mis-joinder or non-joinder of necessary parties? OPD

6. Relief.

4. The validity of the will was not specifically put to trial by framing an issue as to whether it was valid or not? Neither was such an issue claimed by the plaintiff. Nevertheless, the plaintiff in support of her version in the plaint examined one witness and her evidence was thereafter closed by court order. The defendants examined three witnesses in their evidence and produced documentary evidence Ex.D2 and Ex.D3 praying for dismissal of the suit. The defendants denied that the property was ancestral in nature. The burden was on the plaintiff to show to the contrary which she failed to prove by adequate evidence. Indisputably, only the photocopy of the will was produced on record by the plaintiff and though it is marked as an exhibited document but that does not dispense with mode of proof of the will which can only be proved by examining at least one attesting witness as per the provisions of Section 68 of the Indian Evidence Act, 1882.

5. It was the plaintiff's case that the making of the will was surrounded by suspicious circumstances. There was no plausible reason why her grandfather Gopi Chand would wish to exclude her from inheritance of property which would have devolved on her through her father Surat Singh who predeceased Gopi Chand. And if the property was co-parcenary property, then succession would open on the death of Surat Singh and she would become entitled to 1/5th share, and on the death of Chattar Singh without leaving issue, then the share would come to 1/4th share in the entire suit property.

6. The defendants argued that since Surat Singh predeceased Gopi Chand but when the property was not ancestral, then Surat Singh had no birth right in the property of Gopi Chand for the plaintiff to question inheritance by the defendants based on testamentary succession.

7. The trial Judge rightly did not confine his enquiry on the issues framed but crystallized the issues arising in the suit to two fundamental questions. Firstly, whether the suit property was ancestral in nature and Secondly, whether the will dated 2nd November, 1976 was validly executed and if so, its effect?

8. The trial Judge rightly observed in his judgment that the examination of the second question depended on the findings on the first question because the will has been challenged on the ground that the plaintiff inherited 1/4th share in the suit property by virtue of its being ancestral. The trial Judge took the view on the evidence that it was not possible to record a finding that the suit property was ancestral property in the absence of any evidence adduced on record by the plaintiff on whom the onus was. For the property to be held ancestral in nature it must be owned by a common ancestral and that it had descended to the party by inheritance and in no other manner. When the court of first instance was confronted with lack of documentary evidence on the file to conclude whether the suit was ancestral in nature, it followed *a priori* that it was self-acquired property of late Gopi Chand. There was no third possibility to be reckoned with. On these premises, the trial Court held that Surat Singh did not have a share in the suit property and, therefore, the question of inheritance did not arise and neither would the plaintiff have any rights through her late uncle

Chattar Singh as she would in relation to Chattar Singh be at best a Class-II heir or a remote reversioner. When the building block as to the property being ancestral in nature is not laid or proved by evidence, then a construction cannot be erected on the basis of the property being ancestral co-parcenary property in the hands of late Gopi Chand.

9. On the question of limitation, the Court held that the suit was barred by time. For examining this aspect a few things are necessary to be noticed. There was a hurdle in the way of the plaintiff which appears insurmountable. She had filed a suit when she was a minor through her next friend Bahal Singh claiming suit property by inheritance. That suit was dismissed in default under Order 9 Rule 8 of the CPC vide order dated 10th April, 1978, a certified copy of which is Ex.D3. The plaintiff was then confronted with two insuperable legal hurdles; one that the fresh suit was barred under Order 9 Rule 9 CPC which bars filing of a fresh suit. The suit was dismissed in default of appearance of the plaintiff but in the presence of the defendant. The second hurdle was that by the year 1990, the plaintiff had attained the age of majority since she was born in 1972. She had knowledge of the will from that year onwards and would be attributed such knowledge even if she disclaimed it. She could have asserted her rights from the date of cessation of minority but she filed the present suit on 22nd January, 2005 which apparently is time barred. In order to overcome the hurdle of limitation, the plaintiff urged that she was not aware of the will dated 2nd November, 1996 or mutation entered on the basis of the will in favour of her Uncles. These documents came to her knowledge only when she visited the Halqa Patwari along with her husband and, therefore, the suit is not barred

since she had no notice of the devolution of the suit property. This was her defence. The trial court did not accept the argument as a valid one and dismissed the suit both on point of limitation and on merits as well.

10. In the appeal carried, the learned lower appellate court took note of the competing arguments and quite rightly held that the suit was based on title claiming property to be ancestral and that she had asserted her right, title or interest by inheritance in the suit property. Therefore, the suit was not barred by time being a title suit. It is well embodied in law that in a title suit, no limitation is prescribed to claim declarations since true owner remains owner till rights are parted away. Even though this finding went against the defendant but in the main, the suit was dismissed on merits by reversing the finding on limitation recorded by the court of first instance.

11. On issue 5, the trial Judge had found that the plaintiff admitted in her cross-examination that she has two paternal aunts both daughters of Gopi Chand who have been shown in the pedigree table drawn in para. 1 of the plaint. However, the plaintiff has not joined them as parties to the suit and it was argued by the defendants that the suit is bad for non-joinder of necessary parties. In countering this argument, the plaintiff argued that she was claiming her father's right in the suit property. She had challenged the will, hence, the two paternal aunts are not necessary parties who have rights of their own to assert or give up. The trial Court found that the plaintiff is claiming share from her father and her paternal aunts had no concern with the share of Surat Singh. Even in the will, the aunts are not beneficiaries and, therefore, their interest, if any; in the suit property has not been challenged and is not in issue. If the property went by inheritance, then the

paternal aunts would be Class-I heirs of late Gopi Chand and, therefore, the Court held this issue against the defendants. However, on the principal issue, whether the suit property was not proved to be ancestral in nature, the suit failed on 11th August, 2008 on failure of proof by evidence. This was the core failure in the suit. If property is not proved to be ancestral then the logical deduction is that it is self acquired property of the testator.

12. In the appeal carried to the court of learned Additional District Judge, Sonapat, the plaintiff was unable to come around her lack of evidence to prove that the property was ancestral in nature and Gopi Chand was devoid of right to bequeath the entire properties [beyond his share] to his four remaining sons and not have passed on the claimed share to the plaintiff. The court of first appeal noted that the mother of the plaintiff Sama Kaur remarried within three months from the date of death of Surat Singh which occurred in 1975. Gopi Chand died the following year leaving behind the moot testamentary will. Sama Kaur had not opted for partition of property on the death of her husband Surat Singh probably by reason of her remarriage. The appeal court noted that if the will was a forged and fabricated document, the plaintiff did not adduce any evidence to dislodge the same by proof. Besides, the will was a registered document and a presumption of truth attaches to the document to be genuine unless proved otherwise. On these premises, the lower appellate court affirmed the findings of the court of first instance on the merits but not on the point of limitation. Learned counsel for the appellant has not been able to dislodge the findings of the courts below in this appeal by any of the arguments raised before me.

13. It has been lastly argued by Mr. Rajput appearing for the appellant that while the first appeal was pending, the plaintiff had filed an application under Order 41 Rule 27 of the CPC for producing additional evidence.

14. Learned counsel submits that the trial lawyer failed to guide the plaintiff properly and did not take any adequate, timely and appropriate steps during the pendency of the appeal to produce evidence to show that the property was ancestral in nature, given that there was abject failure to do so before the trial court where the evidence of the plaintiff was closed by court order.

15. Learned counsel submits that the very purpose of adducing evidence under Order 41 Rule 27 of the CPC is to fill up lacunas in the evidence. If there is no lacuna, there is no necessity of tendering additional evidence. Though it cannot be said that this proposition of law is incorrect but then much would depend on the nature of the documents sought to be produced and their relevance to the facts-in-issue.

16. From the record of the court below produced by the learned counsel, it is pointed out that an application for framing additional issue was preferred on 3rd August, 2009 to the effect as to whether the property was ancestral in nature or not and to permit the parties to lead evidence in support thereof. The application was contested for the reason and on the ground that the nature of the property being ancestral or otherwise was the fact-in-issue and evidence was led accordingly by both the parties before the trial court who knew that the fate of the case turned on this fact. Both the parties knew the cases against each other from the beginning and adduced

their evidence accordingly. To support this argument, learned counsel in the first appeal court relied on the rulings in **Tika and others v. Ram Chander and others**; 2003 (3) LJR 45, **Jagir Singh v. Hukam Chand**; 2006 (2) LJR 750 and **Kannan [dead] by LRs and others v. V.S.Pandurangam [dead] by LRs and others**; 2008 (1) LJR 707. As I read them I fail to see as to how any of the rulings helps the appellant on facts. Therefore, I would not make much of this application under Order 41 Rule 27 of the CPC since no prejudice has been caused to the plaintiff who knew from the very outset the case she had to propound and upon which the fate of the suit entirely depended. But she failed to avail opportunities to lead evidence which had to be closed by court order.

17. I have also been taken through the application dated 22nd November, 2010 under Order 41 Rule 27 of the CPC for production of revenue record pertaining to the land in dispute relating to the predecessor-in-interest of Mukhram @ Handa. This application was also contested by the defendants. Learned counsel refers for the first time in this appeal to mutation No.506 entered in the year 1898 in the record of rights and the mutation No 1 recorded on 19th May, 1907 from where he asserts that the property came from Mukh Ram to Udami and Udmi to Gopi Chand and Gopi Chand's brothers who were all five siblings. I find these papers are mostly Urdu documents of which no translation is available on record and neither has anything specifically been pointed out by the learned counsel during arguments from amongst the documents which were essential to the adjudication of the controversy and therefore might have needed translation in Hindi or in English language to understand and if they establish a claim

to the property being ancestral nature. In absence of anything relevant shown from these papers I can hardly make anything of them unless they are meant to add to confusion more confounded.

18. The court of first appeal has dealt with the application for additional evidence in para. 13 of the judgment in its correct perspective rooted to the justifications in Order 41 Rule 21 of the CPC. The appeal court is of the view that the plaintiff availed several opportunities for adducing evidence but she failed to do so and her evidence was closed by court order against which adverse orders she did not seek remedy in revisional jurisdiction of this Court at the appropriate time. If the documents are ancient and are in Urdu, then the property description has changed in the year 1956 at the time of consolidation but merely placing the documents on record is not sufficient to conclude their relevance. They are also not proved to relate to the suit property which is now claimed to be transferred from Mukh Ram to Udmi and Udmi to Gopi Chand etc. The appeal court has refused to reopen the trial afresh citing restrictive provisions of Order 41 Rule 27 of the CPC. The appeal court has taken the pain of supporting his arguments on the strength of case law. Especially of the Supreme Court in **Haryana State Industrial Development Corporation v. M/s Cork Manufacturing Co.**, AIR 2008 SC 56: (2007) 8 SCC 120 holding that the document which could not be produced due to inadvertence or lack of proper legal advice, is no ground for allowing additional evidence. Learned Additional District Judge, Sonipat has also relied on the single bench decision of this Court in **Roshan Lal v. Ganpat and others** 2000 (2) PLR 39 reiterating the law by observing that if we read the language of Order 41

Rule 27 of the CPC it says in categorical terms that no party to the appeal as the right to lead additional evidence unless it brings his case squarely within the requisites of Order 41 Rule 27 of the CPC of the appellate Court comes to the conclusion that for the just decision of the case, sortie additional evidence is required. Meaning thereby, that on he mere wish of the litigant, the application under Order 41 Rule of the 27 of the CPC cannot be allowed. For these reasons, the application for additional evidence was rightly rejected. The judgment in appeal does not suffer from any error, perversity, irrationality or fundamental flaw in its reasoning which is found to be one which is sound in law and in the facts.

19. For the foregoing reasons, I find no cogent or valid ground to entertain this appeal for regular hearing as no questions of law or fact are involved in the second appeal, much less substantial questions of law.

20. No interference is warranted and accordingly the appeal stands dismissed.

(RAJIV NARAIN RAINA)
JUDGE

August 13, 2015
Paritosh Kumar