

RSA No.326 of 2014 (O&M)
Date of Decision:30.11.2015

CORAM: HON'BLE MR. JUSTICE RAJ MOHAN SINGH

Mr. Gurcharan Dass, Advocate
for the respondents.

- RAJ MOHAN SINGH, J.***

[2]. Plaintiffs filed suit for declaration and permanent injunction of the land as detailed in the headnote of the plaint, alleging that plaintiff No.1 is widow of Sh. Gurmail Singh and plaintiff No.2 is minor daughter of Sh. Gurmail Singh. Plaintiff No.1 has no adverse interest than the plaintiff No.2, therefore, plaintiff No.2 has been represented by plaintiff No.1 as her

mother/guardian and next friend. Plaintiffs further alleged that the agricultural land and house as shown in the plaint constituted Joint Hindu Family ancestral coparcenary properties in the hands of Bachan Singh.

[3]. Bachan Singh had two sons namely Major Singh and Gurmail Singh who had acquired interest in the joint Hindu Family ancestral coparcenary property from their birth being coparceners. 13 Kanals and 17 Marlas of land as shown in the headnote No.1(b) was the joint Hindu family coparcenary property and stood in the name of Jangir Kaur wife of Bachan Singh as a mark of respect. Bachan Singh and his sons were joint in mess, residence and workshop.

[4]. Gurmail Singh was serving on ships and he used to send money to his father and brother. With that money construction was raised on the house as shown in headnote 1(c) of the plaint after demolition of the old house. With the earnings of Gurmail Singh property shown in headnote 1(d) was purchased which was also thrown in the common pool of the joint Hindu family coparcenary property. The earnings of Gurmail Singh were contributed towards joint Hindu family pool. Gurmail Singh, and the plaintiffs were residing along with defendants No.1 to 4 jointly and the members of the joint family had a joint ration card in the name of Major Singh. *Istridhan* of

the plaintiff No.1 was also lying in the house shown in headnote 1(c) of the plaint.

[5]. On the death of Gurmail Singh on 02.04.1994, the share in the joint Hindu family coparcenary property was inherited by the plaintiffs under Section 6 of the Hindu Succession Act. A Will was executed by Bachan Singh in favour of Major Singh and Gurmail Singh. Gurmail Singh had half share before his death. The plaintiffs have inherited the share of Gurmail Singh in joint Hindu family coparcenary property as shown in headnotes of the suit.

[6]. After the death of Gurmail Singh defendants started maltreating the plaintiffs and denied their entitlement in the properties. During the lifetime of Gurmail Singh a collusive suit was filed by Major Singh against Bachan Singh for declaration to the effect that Major Singh is owner of land measuring 71 *Kanals* 13 *Marlas* as shown in headnote No.1(a) of the plaint. In the suit, Major Singh and Bachan Singh admitted the properties to be joint Hindu family ancestral coparcenary property. The suit was filed stealthily and even Gurmail Singh was not shown to be in existence in the suit. The suit was filed on 07.04.1993 and was decreed on 11.05.1993 after admission of the entire suit by Bachan Singh. Another suit was got filed from Kiranjit Kaur wife of Major Singh against Jangir Kaur wife of Bachan Singh. That

civil suit No.27 of 23.2.1993 was also decreed on 17.07.1993 after admission made by Jangir Kaur by way of admitted written statement.

[7]. In these aforesaid suits the fact of properties being joint Hindu family ancestral coparcenary property was admitted. Plaintiffs alleged that the aforesaid judgment and decrees are *void ab initio* and are not binding upon their rights. In both the aforesaid civil suits, Banchan Singh and Jangir Kaur admitted the claim of Major Singh and Kiranjit Kaur in *toto*. Facts were concealed deliberately. Gurmail Singh was not shown being coparcener and member of joint Hindu family and his interest in the said joint Hindu family property. The cases were decided without impleading Gurmail Singh as coparcener. The suit was decided in undue haste. The properties which were subject matter of joint Hindu family coparcenary property could not have been disposed of without considering the interest of Gurmail Singh and in the absence of Gurmail Singh, no family settlement could have been presumed. Both the judgments and decrees being collusive have been claimed to be null and void and in the present suit the consequent mutations have also been claimed to be null and void.

[8]. It is further alleged that defendant No.2 has acted illegally at the back of Gurmail Singh and the plaintiffs without

their knowledge and has created a mortgage in favour of defendants No.5 on the land measuring 32 *Kanals* 4 *Marlas* as shown in headnote 1(a) of the plaint. The alienation has been made in respect of loan of Rs.1,59,000/- obtained by Major Singh from defendant No.5-Bank. The mortgage in question is bad, illegal and not binding upon the rights of the plaintiffs. The mortgage has been created on the alleged strength of acquiring title on the basis of aforesaid two collusive suits. The mortgage has created shadow on the rights of the plaintiffs in the suit land. With this background the present suit was filed.

[9]. Defendants No.1 to 4 contested the suit. However defendant No.5 was proceeded against *ex parte*. Defendant No.1 died during the pendency of the suit and his LRs were impleaded. The suit was opposed on all the fronts. Defendants alleged that the plaintiffs have concealed material facts and are not entitled to equitable relief being guilty of suppression of facts. Simple suit for declaration is not maintainable without claiming separate possession after partition of HUF property. Answering defendants claimed share to the extent of 1/5th each in the entire suit property on the basis of Hindu Succession Act as they are entitled to 1/5th share on the basis of inheritance.

[10]. After filing of replication the trial Court framed the following issues:-

- “1. Whether the plaintiff is entitled to declaration(s) as prayed for? OPP
2. Whether the judgment(s) and decree(s) dated 11.5.93 and 17.7.93 are illegal, null and void? OPP
3. Whether the plaintiff is entitled to permanent injunction(s) as prayed for? OPP
4. Whether the suit is not maintainable in the present form? OPD.
5. Whether the plaintiff has no locus standi to file the present suit? OPD.
6. Relief.”

[11]. Both the parties led their respective evidence to prove their case on the aforesaid issues.

[12]. Trial Court decreed the suit and the defendants remained unsuccessful before the lower Appellate Court as the lower Appellate Court dismissed the appeal vide judgment and decree dated 31.08.2013.

[13]. The appellant has framed following questions of law in para 16 of the grounds of appeal:-

- “(a) Whether in the facts and circumstances of the case the approach of the learned courts below in proceeding to hold the property to be ancestral coparcenery property merely on the so-called admission rather than on the documentary evidence, which was withheld by

the plaintiff/respondents, is not illegal and unsustainable in law?

- (b) *Whether in the facts and circumstances of the case the property inherited by Bachan Singh from his uncle Ram Singh could be said to be ancestral coparcenary property in the hands of Bachan Singh?*
- (c) *Whether in the facts and circumstances of the case the decrees which were otherwise legal and valid could be ignored by the learned courts below treating the property in question as ancestral coparcenary property?*
- (d) *Whether the approach of the learned courts below in deciding the case without framing specific issues as regards the Wills executed by Bachan Singh and Jangir Kaur is not illegal and unsustainable in law?*
- (e) *Whether the gift made by Bachan Singh in favour of Jangir Kaur could be ignored by the learned court below?*
- (f) *Whether in the facts and circumstances of the case the approach of the learned lower Appellate Court in dismissing the application under Order 41 Rule 27 C.P.C. can be sustained in law?*
- (g) *Whether in the facts and circumstances of the instant case a simpliciter suit for declaration was maintainable?"*

[14]. I have heard learned counsel for both the parties.

[15]. Learned counsel for the appellants has argued that Sunder Singh and Ram Singh were two brothers. Bachan Singh was son of Sunder Singh. Ram Singh was issueless. Bachan Singh had two sons Gurmail Singh and Major Singh and wife Jangir Kaur. Plaintiff No.1 Baljit Kaur is wife of Gurmail Singh and Plaintiff No.2 Harman Preet Kaur Dhillon is the daughter of Gurmail Singh. Kiranjit Kaur is the wife of Major Singh.

[16]. Learned counsel for the appellants contends that the properties in question are not proved to be ancestral properties in terms of revenue record. Since Bachan Singh inherited the properties from Sunder Singh, therefore, ancestral nature of the properties in the context of three generations was not appreciated by the Courts below. Jangir Kaur got the land in question by way of gift in the year 1964-65, therefore, the property which was subject matter of suit in which Jangir Kaur suffered the decree is not proved to be ancestral. In the excerpt Jangir Kaur obtained the property by way of gift.

[17]. Merely on the basis of pleadings of the judgments and decrees dated 11.05.1993 and 17.07.1993, the properties have been held to be ancestral properties and the Courts below have wrongly relied to hold the properties to be joint Hindu family ancestral coparcenary property. The affidavit on record shows

that the properties could not be proved to be ancestral properties for want of evidence of descendance from three generations and the property in favour of Jangir Kaur was acquired by way of gift, therefore, the properties said to be ancestral in civil court decrees by Major Singh and Kiranjit Kaur could not have operated as estoppel for proving the property to be self-acquired property in the present case.

[18]. Bachan Singh and Jangir Kaur also executed Wills dated 24.06.1994 and 15.09.1994 in favour of Major Singh and Kiranjit Kaur. These Wills have not been challenged, nor amendment has been carried out in the plaint, no issue has been framed. Since no evidence was led by the defendants, therefore, the Wills were not proved on record.

[19]. Learned counsel for the appellants further states that Gurmail Singh died on 02.04.1994 and the plaintiffs claimed through Gurmail Singh who never challenged gift in favour of his mother. According to excerpt Bachan Singh got the property from Ram Singh uncle, therefore, the property cannot be held to be ancestral property in the hands of Bachan Singh. The requirement of three lineage descendent has not been shown in excerpt Ex.PW-3/1. Major Singh is found to be in possession on the spot. Plaintiffs have not claimed the relief of joint possession, therefore, simple suit for declaration is not

maintainable under Section 34 of the Specific Relief Act.

[20]. On the other hand, learned counsel for the respondents has argued that the defendants/appellants cannot breath hot and cold in the same breath at the time of taking benefit of the judgments and decrees dated 11.05.1993 and 17.07.1993. Specific pleadings were made that properties are joint Hindu family coparcenary ancestral properties. Having successful in obtaining desired relief in aforesaid decrees, the defendants cannot be allowed to take summersault by taking the plea that the properties are not proved to be ancestral properties. The civil court decrees were passed in the absence of Gurmail Singh.

[21]. Statement of PW-4 Krishan Singh, Special Kanungo has to be read in the present context, who after going through the revenue record prepared a *Intkhaff* report/excerpt as PW-4/1 regarding the whole property i.e. 71 *Kanals* 13 *Marlas* and 13 *Kanals* 17 *Marlas*. As per Mutation No.2606, regarding inheritance dated 29.08.1948 of Sunder Singh son of Gurmukh Singh in favour of Bachan Singh son of Sunder Singh showed that Bachan Singh inherited the property of his father on 29.08.1948 and para No.11 states that mutation No.3443 is in respect of gift of land measuring 13 *Kanals* 17 *Marlas* by Bachan Singh and Jangir Kaur. The property is joint Hindu

family coparcenary property and coupled with admission made by Major Singh and Kiranjit Kuar while obtaining civil court decrees, clinching the issue in its entirety.

[22]. In the pleadings of the civil court decrees, Major Singh and Kiranjit Kaur claimed that the properties are joint Hindu family coparcenary properties and they are governed by Hindu Law. Bachan Singh became owner of the property on 29.08.1948 as per mutation No.2606 from Sunder Singh. As per law the joint Hindu family coparcenary property devolves by way of survivorship and husband of the plaintiff No.1 and Major Singh being grandsons of Sunder Singh also inherited the share by birth and became coparceners in joint Hindu coparcenary property.

[23]. The contention of the defendants that they became absolute owner by virtue of Section 8 of Hindu Succession Act is not tenable as in 1948, no such Act was in force. The admission made by a party is a substantive piece of evidence by fact, which was duly admitted during course of civil court decrees passed in which defendants themselves were the beneficiaries. Such admission is always admissible in evidence irrespective of whether party making the same appears in the witness box or not or whether such party which appeared as witness was confronted with the statement. Reference can be made to

Union of India vs. Moksh Builders and Financiers Ltd. and Ors., AIR 1977 Supreme Court 409 and **Thamma Venkata Subamma (dead) by LRs vs. Thamma Rattamma & Ors., AIR 1987 Supreme Court 1775**, wherein it was held that gift of undivided share by a coparcener is void. Plea of the defendants that Jangir Kaur got the land by way of gift in the year 1964-65 from Bachan Singh in respect of undivided share in coparcenary property is squarely hit by the aforesaid analogy.

[24]. Since Gurmail Singh was one of the coparceners in joint cultivating possession, who was shown to be in mess and residence and workshop and ration card was also prepared on the address, therefore, in terms of essence of coparcenary, there was community of interest and unity of possession. Member of joint Hindu family has no definite share in the coparcenary property, but he has an undivided interest in the property which is always subject matter of enlargement by death and diminished by birth in the family. The interest in the coparcenary property accrues to a son from the date of his birth and his interest is always equal to that of his father. Since Gurmail Singh was not impleaded in the suits in which defendants/appellants were the beneficiaries, therefore, the decrees are not binding upon the rights of the Gurmail Singh and plaintiffs.

[25]. The properties are found to be joint Hindu family ancestral coparcenary properties of joint Hindu family of Bachan Singh. Plaintiffs have succeeded Gurmail Singh, who was one of the coparceners. Judgment and decree dated 11.05.1993 and 17.07.1993 are illegal, void, collusive and not binding upon the rights of the plaintiffs. Undisputedly, plaintiff No.1 is widow of Gurmail Singh and plaintiff No.2 is the minor daughter. Bachan Singh had no right whatsoever to confer proprietary rights of his son Gurmail Singh on Major Singh in complete exclusion of Gurmail Singh, who was having right from his birth in joint Hindu family property. The conceded position is that the civil court decrees suffered in favour of Major Singh and Kiranjit Kaur were on the basis of alleged family settlement. In the absence of Gurmail Singh, no such family settlement could have been presumed.

[26]. The contention of the learned counsel for the appellants that the trial Court has not framed the issue regarding validity of the Wills set up by defendants No.2 to 4 and, therefore, case was liable to be remanded, also yielded no result. The omission to frame issue in terms of Order 14 Rule 1 CPC cannot vitiate the trial inasmuch as that the parties to the litigation were in full knowledge of rival cases and the evidence in support of respective pleadings were in refutations of pleadings of other

side. The case of the defendants before the trial Court was that Jangir Kaur and Bachan Singh executed Will in favour of Major Singh and Kiranjit Kaur.

[27]. Admittedly, during the proceedings before the trial Court, defendants had moved an application for framing additional issue in respect of aforesaid Wills. The said application was rejected on 23.01.2008 by observing that neither defendant No.2 while appearing as DW-5, nor Harchand Singh Dhillon attesting witness of the Will examined as DW-3 uttered anything in respect of execution of said Wills. Therefore, despite knowing well that the execution of Will was in their favour by Bachan Singh and Jangir Kaur, they did not lead any evidence. Even DW-3 Harchand Singh Dhillon did not utter a single word in respect of execution of said Wills.

[28]. The defendants should have led evidence irrespective of the fact that there was no issue on the validity of the said Wills. Since parties knew each other's case, therefore, there was no such impediment for the defendants to lead evidence. It is also a settled principle of law that absence of any specific issue, whether vitiates the trial or not depends upon the facts and circumstances of each case.

[29]. In the present case, looking at the relationship *inter se* between the parties they were in knowledge of cases of each

other. The defendants knowing their case fully well went to trial after understanding their ground and did not lead evidence regarding the Will. Absence of any such issue does not vitiate the trial. The onus was always on the defendants to lead evidence in order to prove the Wills. Despite availing opportunities, they did not adduce any evidence to prove the Wills in question, therefore, the fact that issue with regard to the alleged Wills have not been framed is wholly inconsequential.

[30]. The argument that the simple suit for declaration is not maintainable without seeking relief for possession is also wholly inconsequential. Plaintiffs have been proved to be co-sharers in the suit land. Even if co-sharer is not found to be in possession of the suit land, the relief of joint possession is in-built mechanism. However co-sharer would be deemed to be in possession of every inch of land till the land is partitioned by metes and bounds. Therefore, suit for declaration without seeking possession would be competent.

[31]. Apparently, gift was executed by Bachan Singh in favour of his wife in respect of ancestral properties. This gift deed was executed by him in the capacity of *Karta* of joint Hindu family which was consisting of himself, his wife and two sons. The gift executed by the coparcener in respect of undivided share is void as Bachan Singh had no right to execute any such

gift or confer any proprietary right in respect of his wife in complete exclusion of his sons, who had birth right in the property, therefore, in view of aforesaid embargo, the claim of the defendants that the property devolved upon Jangir Kaur by way of gift also stand negated.

[32]. Even as per stand of Jangir Kaur in collusive decree, grant of gift deed was not made in the pleadings. Jangir Kaur is alleged to have transferred the land in favour of Kiranjit Kaur not on the basis of her ownership derived from the gift. The resume of facts of the suits titled as Major Singh vs. Bachan Singh and Kiranjit Kaur vs. Jangir Kaur shows that admittedly Major Singh filed a suit against his father Bachan Singh that he was owner in possession of land measuring 71 *Kanals* 13 *Marlas* described in title of the plaint. Copy of the plaint Ex.PW-8/11 shows that the suit property was claimed to be joint Hindu family ancestral coparcenary property and his father had given to him the property by way of family settlement. The stand of Jangir Kaur in said suit was also not in respect of the property having derived by her on account of gift.

[33]. Looking to the entirety of the facts and circumstances of this case, I am of the considered opinion that there cannot be any legal consideration on the substantial questions so framed by the appellant. As discussed in preceding part, the admission

in the pleadings is conclusive so as to attract the property to be ancestral coparcenary property and such admission cannot be withdrawn. The property is rightly held to be ancestral property in the hands of Bachan Singh on the basis of evidence. Therefore questions No.(a) and (b) do not arise at all.

[34]. Question No.(c) is a question of fact. The decrees being collusive in the absence of Gurmail Singh could not have been treated to be valid and binding on the rights of the plaintiff because Gurmail Singh being coparcener acquired right in the property by birth and that right could not have been snatched by way of any such collusive decree passed on alleged family settlement in the absence of Gurmail Singh.

[35]. Question No.(d) is equally non-existent in view of the fact that no evidence was led, even the attesting witness of the Wills appeared in the case and not an *iota* of word has been uttered by him in his submission. Parties knew the case of each other, therefore, framing of issue was not required at all.

[36]. Question No.(e) is equally inconsequential in view of the fact that gift in respect of undivided share of Hindu coparcenary property could not have been made by the *Karta*. Secondly even in the pleadings of Jangir Kaur, factum of gift has not been pleaded for acquiring title in respect of the suit property which was suffered in favour of Kiranjit Kaur.

[37]. With regard to question No.(f), the application under Order 41 Rule 27 was rightly rejected by the lower Appellate Court. Fact and circumstances do not warrant any such evidence.

[38]. Question No.(g) is also inconsequential inasmuch as that once the plaintiffs are proved to be co-sharers in joint possession, simpliciter suit for declaration is maintainable as the concept of possession is in-built mechanism in a suit for declaration based on co-sharership. Each co-sharer would be deemed to be in possession of every inch of land till such land is partitioned by metes and bounds. Since Gurmail Singh was one of the coparceners, he was having birth right in the property and after his death plaintiffs No.1 being widow and plaintiff No.2 being minor daughter have inherited the share of Gurmail Singh. Being co-sharers in the property they have every right to seek declaration and they would be deemed to be in joint possession of every inch of land.

[39]. Consequently in considered opinion of this Court, no fault can be found in the judgments and decrees passed by the Courts below, accordingly this appeal is dismissed.

November 30, 2015

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(RAJ MOHAN SINGH)
JUDGE