

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

**Regular Second Appeal No.482 of 1986 (O&M)
Date of Decision: January 08, 2016.**

Gulkandi

.....APPELLANT(s).

VERSUS

Dhikkal and others

.....RESPONDENT(s).

CORAM:- HON'BLE MR. JUSTICE SURINDER GUPTA

Present: Mr. Adarsh Jain, Advocate
for the appellant (s).

Mr. Nitin Sarin, Advocate
for respondents No.1 and 2.

SURINDER GUPTA, J.

Plaintiffs Dhikkal daughter of Giasi (defendant) and Mukandi
son of Maha Sukh filed the suit claiming the relief as follows:-

“(1) Declaration that deft No.1 is owner in possession of the agricultural land described in sub paras A & B of para No.2 of the plaint and that the decree dt.1.9.76 in civil suit entitled '*Gulkandi V/s Giasi*' No.454 of 1976 was null and void and has not extinguished his rights of ownership in respect thereof, and that the said decree will not operate against their rights of inheritance on the death of deft No.1.

(2) xxx.....xxx.....

(3) In the alternative, declaration that the alienation of the land in suit by deft. No.1 in favour of deft. No.2 through decree dt. 1.9.76 in civil suit No.454 of 1976 being against custom and authority was null and void and would not operate against the right of succession of the plffs and other heirs of deft. No.1 when the succession would open on his death.”

2. Plaintiffs averred that Giasi had four daughters and no male child. The suit property measuring 18 kanals 10 marlas situated in revenue estate of village Adoupur, Tehsil Palwal and 46 kanals 6-1/3 marlas situated within the revenue estate of village Alik, Tehsil Palwal is the joint Hindu family coparcenary property. Vide judgment and decree dated 01.09.1976 passed in civil suit No.454 of 22.07.1976 titled '*Smt. Gulkandi Vs. Giasi*', the entire suit land was transferred in the name of Gulkandi, defendant No.2 (daughter of Giasi), alleging a family settlement. The plaintiffs challenged the above judgment and decree in favour of Gulkandi on the ground that Giasi was not competent to alienate the suit land without an instrument in writing duly registered; it was a collusive decree against public policy; story of family settlement was baseless and fabricated and this fact was concealed that Giasi had three more daughters; Giasi appeared in the Court and made statement supporting the claim of Gulkandi, defendant No.2 without admitting the alleged family arrangement in the year 1973; the Court also did not make any independent inquiry about the legality and existence of alleged transfer of land by Giasi in favour of Gulkandi in the year 1973; Giasi was under the undue influence of defendant No.2 Gulkandi and the judgment and decree was the result of that undue influence.

3. Plaintiffs further alleged that the parties belong to '*Jat*' tribe (sic community) and in the matter of alienation are governed by agricultural custom, according to which, ancestral property could not be alienated without consideration and legal necessity and could not be transferred by gift. The alienation by decree dated 01.09.1976 is null and void being

4. Defendant No.2 contested the claim of plaintiffs, inter-alia pleading that the suit is barred by limitation and plaintiffs have no locus-standi to file the present suit. While plaintiff No.1 being female was not a reversioner and plaintiff No.2 is not related to defendant No.1. Plaintiffs have no common cause as such, could not file a joint suit. The decree dated 01.09.1976 binds defendant No.1 and also the plaintiffs. All the other averments in the plaint including that the parties were governed by agricultural custom, were denied. It was alleged that the parties are Hindu and are governed by Hindu law.

5. The plaintiffs re-asserted their case and pleadings of the parties led to the framing of issues as follows:-

- (1) Whether the plaintiffs have locus standi to file the present suit?
OPP
- (2) Whether defendant no.1 is governed by custom in the matter of alienation, if so what custom is that? OPP
- (3) Whether the suit land is ancestral property of defendant no.1 qua the plaintiffs? OPP
- (4) Whether decree dated 1.9.1976 in civil suit No.454 of 1981(sic 1976) is null and void, as alleged? OPP
- (5) Whether suit is not within limitation? OPD
- (6) Whether the suit is not maintainable in the present form? OPD
- (7) Whether suit is barred by principle of resjudicata? OPD
- (8) Whether the plaintiffs are estopped from filing the present suit?
OPD
- (9) Whether the suit is barred under Order 23 Rule 3A CPC? OPD
- (10) Relief.

6. Learned Sub Judge 1st Class, Palwal returned the finding on issue No.3 that the suit land is ancestral property of Giasi. On issue No.2 as

to whether defendant No.1 is governed by custom in the matter of alienation, if so, what custom is that, the entire matter was discussed in para 12, which reads as follows:-

“12. Secondly, I have perused the pleadings in the plaint and oral testimony led by the plaintiffs, it is clear from the pleadings and oral testimony that defendant no.1 Giasi belongs to 'Jat' tribe and is governed by agricultural custom in the matter of alienation and according to which ancestral property could not be alienated without consideration and legal necessity and could not be transferred by gift.”

7. Based on the above evidence, learned Sub Judge set aside the decree dated 01.09.1976 with the observations as follows:-

“Fourthly, the decree dated 1.9.76 in civil suit No.594 of 1981 (sic No.454 of 1976) is null and void in respect of the suit land by defendant No.1 in favour of defendant No.2 because the suit land being ancestral and defendant No.1 is governed by agricultural customs in the matter of alienation and according to which the ancestral property could not be alienated without consideration and legal necessity and could not be transferred by gift. Therefore, the defendant No.1 had no right to transfer the suit land by gift or any other manner in favour of defendant No.2 being ancestral in nature and defendant No.1 are governed being the Jat tribe. Therefore, defendant No.1 had no right to transfer or alienate the suit land in favour of defendant No.2 because plaintiff No.1 is the daughter of defendant No.1 and plaintiff No.2 is the collateral of defendant No.1.”

8. The first Appellate Court endorsed the finding of learned Sub Judge that the parties are governed by agricultural custom as per which the ancestral property cannot be alienated except for consideration and legal necessity.

9. Not satisfied, defendant No.2 Gulkandi has filed this regular second appeal against the concurrent findings of the Courts below.

10. I have heard learned counsel for the parties and have perused the record and the judgments of the Courts below with their assistance.

11. Both the Courts below have set aside the judgment and decree suffered by Giasi (defendant No.1) in favour of his daughter Gulkandi (appellant-defendant No.2) on the ground that the parties belong to 'Jat' community and are governed by custom under which ancestral land could not be alienated except for consideration and legal necessity. While reaching this conclusion, both the Courts below have relied on the testimony of PW1 Mukandi, who is alleged to be a collateral of Giasi and one Surajmal PW2.

12. Learned counsel for the respondents has raised preliminary objection against this second appeal arguing that the finding of the Courts below that parties are governed by customs is a finding of fact which cannot be interfered in the second appeal. He has relied on the observations in case of *Gokal Chand Vs. Sanwal Das and others A.I.R. 1924 Lahore 473*; *Muhammad Kamil and others Vs. Musammat Imtiaz Fatima (1909) I.L.R.31 557(Privy Council)* and *Municipal Board, Benares Vs. Kandhaiya Lal and others A.I.R. 1931 Allahabad 499*.

13. The arguments advanced by learned counsel for the respondents that the question of existence of customs is a question of fact has merits. However, if the finding of fact is erroneous not based on any evidence on record or on wrong interpretation of the evidence, this Court can look into and re-appreciate the entire evidence to reach the conclusion about the legality and validity of the findings of the Courts below. Hon'ble Apex Court in case of *Municipal committee, Hoshiarpur Vs. Punjab State Electricity*

and 103 of Civil Procedure Code (for short-CPC) has observed as follows:-

“22. Thus, it is evident that Section 103 C.P.C. is not an exception to Section 100 C.P.C. nor is it meant to supplant it, rather it is to serve the same purpose. Even while pressing Section 103 C.P.C. in service, the High Court has to record a finding that it had to exercise such power, because it found that finding(s) of fact recorded by the court(s) below stood vitiated because of perversity. More so, such power can be exercised only in exceptional circumstances and with circumspection, where the core question involved in the case has not been decided by the court(s) below.

23. There is no prohibition on entertaining a second appeal even on a question of fact provided the Court is satisfied that the findings of fact recorded by the courts below stood vitiated by non-consideration of relevant evidence or by showing an erroneous approach to the matter i.e. that the findings of fact are found to be perverse. But the High Court cannot interfere with the concurrent findings of fact in a routine and casual manner by substituting its subjective satisfaction in place of that of the lower courts. (*Vide: Jagdish Singh v. Natthu Singh, AIR 1992 SC 1604; Karnataka Board of Wakf v. Anjuman-E-Islmail Madris-Un-Niswan, AIR 1999 SC 3067; and Dinesh Kumar v. Yusuf Ali, AIR 2010 SC 2679*).

24. If a finding of fact is arrived at by ignoring or excluding relevant material or by taking into consideration irrelevant material or if the finding so outrageously defies logic as to suffer from the vice of irrationality incurring the blame of being perverse, then the finding is rendered infirm in the eyes of law. If the findings of the Court are based on no evidence or evidence which is thoroughly unreliable or evidence that suffers from the vice of procedural irregularity or the findings are such that no reasonable person would have arrived at those findings, then the findings may be said to be perverse. Further if the findings are either ipse dixit of the Court or based on conjecture and surmises, the judgment suffers from the additional infirmity of non-application of mind and thus, stands vitiated. (*Vide: Bharatha Matha & Anr. v. R. Vijaya Renganathan & Ors., AIR 2010 SC 2685*)”

14. Where the Court has ignored material evidence on record or acted on no evidence or have drawn wrong inference from the proved evidence by applying law erroneously, this Court may interfere with the concurrent findings of the Courts below. It was so held in ***Hero Vinoth (minor) Vs. Sehshammal 2006(2) R.C.R. (Civil) 677.***

15. On perusal of lower Court record and judgments of Courts below, I find that the substantial questions of law, which require determination in this appeal, are as follows:-

(i) *Whether plaintiff No.2 Mukandi has any locus standi to file the suit?*

(ii) *Whether the plaintiffs have led any cogent and convincing evidence to establish that the parties are governed by custom prevalent among 'Jat' of village Adoupur or in their community restraining the alienation of the ancestral property except for consideration and legal necessity.*

(iii) *Whether the Courts below have misread and misconstrued the evidence on record and the conclusion drawn are perverse, calling for interference in this second appeal."*

16. Learned counsel for the appellant-defendant No.2 has argued that firstly, respondent-plaintiff No.2 Mukandi had no locus-standi to file the suit with respondent-plaintiff No.1 Dhikkal. Even, as per the admission by plaintiff No.2, the suit property, in the event of the consent decree suffered by Giasi being ignored, would revert to daughters of Giasi and not to him, as such, he had no locus standi to file the suit. Dhikkal plaintiff No.1 has not appeared as witness in this case, as such, statement of plaintiff No.2 Mukandi cannot be given any weight in the absence of the testimony of interested party in the suit.

17. Learned counsel for the respondents-plaintiffs has argued that the suit was filed by Dhikkal, daughter of Giasi with Mukandi, a collateral of Giasi and being collateral, Mukandi has locus standi to file the suit. Both the Courts below have rightly recorded the finding to this effect.

18. During the course of arguments, learned counsel for appellant has not disputed that the suit land was ancestral property in the hands of Giasi. Learned lower Court did not record any finding on the locus standi of Mukandi, plaintiff No.2 to file this suit. While appearing as PW1, Mukandi, plaintiff No.2 has admitted that the land is now inherited by the daughters. In view of his statement, he has no locus standi to lay any claim with regard to the suit land which at one point of time was owned by Giasi. Even if, the entire claim of the plaintiffs be believed, the property after the death of Giasi will devolve upon his daughters and plaintiff No.2 Mukandi being collateral had no locus standi to file the instant suit. The first Appellate Court while justifying the locus standi of plaintiff No.2 has observed that the decree obtained by male reversioner shall ensure the benefit of female reversioner.

19. The reason as given above, rather shows that plaintiff No.2 has no locus standi and the first Appellate Court was under the impression that he will ensure the benefit of female heir of Giasi i.e. plaintiff No.1. Plaintiff No.2 is not an attorney or guardian of plaintiff No.1. Being major, plaintiff No.1 is competent to watch her interest and she has not authorised plaintiff No.2 to protect her interest in the suit property.

20. The above discussion leads to only conclusion that plaintiff No.2 has no locus standi to file the present suit and the findings of first

Appellate Court on issue No.1 are partly reversed to the above extent.

Plaintiff No.1 being daughter has locus standi to file the present suit.

21. Both the Courts below relying on the statement of plaintiff No.2 Mukandi PW1 and Suraj Mal PW2 have concluded that the parties being '*Jat*' are governed by custom. In view of the observations above that plaintiff No.2 has no locus standi to file the present suit, the only relevant claim to be considered in this case is of plaintiff No.1 Dhikkal. She has not appeared as witness to claim the existence of any custom in her family or village. In the absence of statement of plaintiff No.1 who has locus standi to file the present suit, the statement of other witnesses carry no force. Even testimony of Mukandi PW1 and Surajmal PW2 even if relied, fail to prove existence of custom as alleged by plaintiff(s). On perusal of their statements, I find that there was absolutely no reason for the Courts below to reach the conclusion about the existence of any customs among '*Jats*' restraining Giasi from giving suit land to his daughter Gulkandi under the decree dated 01.09.1976. Mukandi while appearing as PW1, has stated that they belong to '*Jat*' community, which is depended on agriculture. They follow '*Zimidara*' custom under which ancestral land cannot be alienated. He has admitted that the land among '*Jats*' is inherited by the daughters. The other witness is Suraj Mal PW2, who has also stated that '*Jats*' of village Adoupur follow '*Zimidara*' custom.

22. After coming into force of Hindu Succession Act in the year 1956, the devolution of the property of a Hindu as defined under the above Act are governed by the provisions contained therein. Section 4 of the above Act prescribes as follows:-

“(1) Save as otherwise expressly provided in this Act,--

- (a) any text, rule or interpretation of Hindu law or any custom or usage as part of that law in force immediately before the commencement of this Act shall cease to have effect with respect to any matter for which provision is made in this Act;
- (b) Any other law in force immediately before the commencement of this Act shall cease to apply to Hindus in so far as it is inconsistent with any of the provisions contained in this Act."

23. Perusal of the above makes it clear that any custom in force immediately before the commencement of the Act shall cease to have any effect in the matter of succession, which is governed by provisions contained in Hindu Succession Act.

24. The suit land was ancestral property in the hands of Giasi who had no male issue. He was the last coparcener, as such, was competent to alienate the same. He had devolved suit land to his daughter Gulkandi (appellant) before amendment of Section 6 of Hindu Succession Act vide Act No.39 of 2005 which came into force w.e.f. 09.09.2005, as such, even plaintiff No.1 has no locus standi to challenge the alienation made by her father.

25. Both the Courts have relied on one line testimony of PW1 Mukandi and PW2 Suraj Mal that '*Jats*' are governed by '*Zimidara*' custom, prohibiting them from alienating the ancestral land.

26. In case *Salekh Chand (dead) by LRs Vs. Satya Gupta and Ors 2008(13) SCC 119*, Hon'ble Apex Court dealt with the concept of proof of custom and in the process discussed the definition of custom as given in the Hindu Code prior to the enactment of Hindu Succession Act in the year 1956, as follows:-

"It would be desirable to refer to certain provisions of the Act, and the Hindu Code which governed the field prior to the enactment of the Act. Section 3(a) of the Act defines 'custom' as follows

"3. Definitions.- In this Act, unless the context otherwise requires, -

(a) the expressions, 'custom' and 'usage' signify any rule which, having been continuously and uniformly observed for a long time, has obtained the force of law among Hindus in any local area, tribe, community, group or family: Provided that the rule is certain and not unreasonable or opposed to public policy; and Provided further that, in the case of a rule applicable only to a family, it has not been discontinued by the family;"

"Custom defined.-- Custom is an established practice at variance with the general law.

Nature of custom.- A custom varying the general law may be a general, local, tribal or family custom.

Explanation 1.- A general customs includes a custom common to any considerable class of persons.

Explanation 2.- A custom which is applicable to a locality, tribe, sect or a family is called a special custom.

Custom cannot override express law -

(1) Custom has the effect of modifying the general personal law, but it does not override the statute law, unless it is expressly saved by it.

(2) such custom must be ancient, uniform, certain, peaceable, continuous and compulsory.

Invalid Custom - No custom is valid if it is illegal, immoral, unreasonable or opposed to public policy.

Pleading and proof of custom (1) He who relies upon custom varying the general law must plead and prove it.

(2) Custom must be established by clear and unambiguous evidence."

(See Sir H.S. Gour's Hindu Code Volume 1, Fifth Edition.)

Custom must be ancient, certain and reasonable as is generally said. It will be noticed that in the definition in Clause (a) of Section 3 of the Act, the expression 'ancient' is not used, but what is intended is observance of custom or usage for a long time. The English rule that '

a custom, in order that it may be legal and binding, must have been used so long that the memory of man runneth not to the contrary' has not been strictly applied to Indian conditions. All that is necessary to prove is that the custom or usage has been acted upon in practice for such a long period and with such invariability and continuity as to show that it has by common consent been submitted to as the established governing rule in any local area, tribe, community, group or family. Certainty and reasonableness are indispensable elements of the rule. For determination of the question whether there is a valid custom or not, it has been emphasized that it must not be opposed to public policy. I shall deal with the question of public policy later on."

27. In order to reach a conclusion regarding existence of custom as alleged by the plaintiffs, the Courts below were required to look into as to whether the plaintiffs have been able to prove that the custom has been acted upon in practice for such a long period with such invariability to show that it has, by consent, been submitted so as to establish governing rules of a particular locality or community. Hon'ble Apex Court in the aforesaid case has observed as follows:-

"A custom, in order to be binding must derive its force from the fact that by long usage it has obtained the force of law, but the English rule that "a custom in order that it may be legal and binding, must have been used long that the memory of man runneth not to the contrary" should not be strictly applied to Indian conditions. All that is necessary to prove is that the usage has been acted upon in practice for such a long period and with such invariability as to show that it has, by common consent, been submitted to as the established governing rule of a particular locality. A custom may be proved by general evidence as to its existence by members of the tribe or family who would naturally be cognizant of its existence, and its exercise without controversy, and such evidence may be safely acted on when it is supported by a public record of custom such as the Riwaj-i-am or Manual of Customary Law."

28. When examined on the principles laid down above, I find that both the Courts below have erroneously placed reliance on the statements of Mukandi PW1 and Suraj Mal PW2. They have not given any instance of existence of custom, where it was followed. There is not even a single instance on record produced or proved by the plaintiffs under which any alienation of ancestral land by the last coparcener was held to be invalid, on the plea as raised by plaintiffs in this case.

29. Even during the course of arguments, learned counsel for the respondents-plaintiffs has not been able to refer to any such custom among 'Jats' of village Adoupur, Tehsil Palwal, otherwise 'Jats' of village Adoupur are Hindus and like other Hindus' are governed by the provisions of Hindu Succession Act, 1956 relating to intestate succession. The plaintiffs have utterly failed to discharge the burden heavily placed on them that they are governed by any custom. The findings of the Courts below are perverse, without any evidence on record and not sustainable in the eyes of law, as such, are reversed.

30. Learned counsel for the respondents-plaintiffs has argued that even if, there was no custom, the decree suffered by Giasi was bad as collusive and not registered.

31. Above argument of learned counsel for the respondents-plaintiffs has also no merits. Giasi after marrying his daughters, was living with one of his daughter Gulkandi. In the absence of any male heir, Gulkandi had pre-existing rights in the property which Giasi recognized through the decree 01.09.1976, as such, the same did not require registration

SCC (5) 709.

32. As to whether a consent/compromise decree pertaining to immovable property, requires registration, was a point before the Hon'ble Apex Court in case of *Phool Patti and another Vs. Ram Singh (Dead) through LRs and another 2009(13) SCC 22*. In this case, a reference was made to larger Bench observing inconsistency in decisions of the Apex Court in cases *Bhoop Singh Vs. Vs. Ram Singh (Major)* (supra) and *K. Raghunandan Vs. Ali Hussain Sabir 2008(3) RCR (Civil) 699* with the observations as follows:-

“9. It was then urged by the learned counsel for the appellant that there was violation of the Section 17 of the Registration Act, 1908.

10. In this connection, it may be noted that Section 17(2)(vi) of the Registration Act states that “nothing in clauses (b) and (c) of sub-section(1) of Section 17 applies to :

“any decree or order of a Court except a decree or order expressed to be made on a compromise and comprising immovable property other than that which is the subject-matter of the suit or proceeding.”

(emphasis supplied)

11. In our opinion the exception mentioned in Section 17(2)(vi) means that if a suit is filed by the plaintiff in respect of property A, then a decree in that suit in respect of immovable property B (which was not the subject-matter of the suit at all) will require registration. This is the view taken by this Court in *K. Raghunandan & Ors. vs. Ali Hussain Sabir & Ors. 2008(3) RCR (Civil) 699; 2008(9) Scale 215*.

12. However, a different view was taken by this Court in *Bhoop Singh vs. Ram Singh Major 1995(3) RRR 541; 1995(5) SCC 709* in which it is stated that :

“.....We would think that the exception engrafted is meant to cover that decree or order of a court, including a decree or order expressed to be made on a compromise, which declares the pre-existing right and does not by itself create new right, title or interest in praesenti in immovable property of the value of Rs.100 or upwards.....”

(emphasis supplied)

13. In our opinion there seems to be inconsistency between the decisions of this Court in **Bhoop Singh's case (supra)** and **K. Raghunandan's case (supra)** in so far as the interpretation to the exception in clause (vi) of Section 17(2) of the Registration Act is concerned. *Prima facie* it seems to us that the decision in **Bhoop Singh's case (supra)** does not lay down the correct law since Section 17(2)(vi) on its plain reading has nothing to do with any pre existing right. All that seems to have been stated therein is that if a decree is passed regarding some immovable property which is not a subject-matter of the suit then it will require registration. As already explained above, if a suit is filed in respect of property A but the decree is in respect of immovable property B, then the decree so far as it relates to immovable property B will require registration. This seems to be the plain meaning of clause (vi) of Section 17(2) of the Registration Act."

33. On reference, Three Judges' Bench of Hon'ble Apex Court observed that there was no inconsistency between the above two judgments. While deciding the appeal vide judgment dated 06.01.2015 (**Phool Patti and another Vs. Ram Singh (Dead) through LRs and another 2015(2) SCC (Civil)248**), the view taken by the Division Bench while making the reference was endorsed. The transfer of land in family settlement by consent decree which was not got registered, was held to be valid.

34. In view of my discussion above, the substantial questions of law framed in this appeal are answered in favour of the appellant. This appeal has merits and the same is accepted. Judgment and decree of Courts below are set aside and the suit filed by plaintiffs is dismissed with costs throughout.

January 08, 2016.
Sachin M.

(SURINDER GUPTA)
JUDGE