

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

**RSA No.3048 of 1987 (O&M)
Date of decision:18.11.2016**

Mukhtiar Kaur ... Appellant
Vs.

Darshan Singh and others ... Respondents

RSA No.3567 of 2005 (O&M)

Harbans Singh ... Appellant
Vs.

Darshan Singh and others ... Respondents

COCP No.2886 of 2011 (O&M)

Darshan Singh ... Petitioner
Vs.

Harbans Singh and others ... Respondents

CORAM: HON'BLE MR. JUSTICE AMIT RAWAL

Present:- Mr. K.S.Cheema, Advocate
for the appellant (in RSA Nos.3048 of 1987 and 3567 of 2005).

Mr. Kanwaljit Singh, Senior Advocate with
Ms. Gurdeep Kaur, Advocate
for the respondents(in RSA Nos.3048 of 1987 and 3567 of
2005) and
for the petitioner in COCP No.2886 of 2011.

AMIT RAWAL J.

This order of mine shall dispose of two Regular Second

Appeals bearing Nos.3048 of 1987 and 3567 of 2005 and Contempt Petition bearing No.2886 of 2011.

Appellant-defendant Mukhtiar Kaur is in Regular Second Appeal No.3048 of 1987 against the judgment and decree rendered by the Lower Appellate Court, whereby, the appeal has been partly accepted and suit of the respondent-plaintiffs has been decreed declaring them as owners of 1/6th share of land measuring 60 bighas 2 biswas and further entitling them to the possession thereof, has been passed in favour of Darshan Singh, Gurcharan Singh, Surjit Kaur, plaintiffs and Ram Lal-defendant.

Mr. K.S.Cheema, learned counsel appearing on behalf of the appellant-defendant submits that the suit, aforementioned, primarily was based on the premise that the parties are Hindu and governed by the principles of Hindu Law stating therein that Guli had three sons, namely, Rakha, Norata Singh and Harnam Singh. Harnam Singh more than 20 years ago had died issueless. After the death of Guli, his property was mutated in equal shares in the names of his sons, Rakha and Norata Singh. Norata Singh also died 15 years back, who had four sons, namely, Dev Raj, Dalip Singh, Amar Nath and Ram Lal. Plaintiffs No.1 and 2, namely, Darshan Singh and Gurcharan Singh are sons of Ram Lal, whereas, plaintiffs No.3 and 4 are daughters of Ram Lal and Surjit Kaur, wife of Ram Lal, instituted the suit on the premise that they all constituted a coparcenary property with their father, Ram Lal, as after the death of Narota, his estate was mutated in equal shares in the names of Dev Raj and Ram Lal, i.e., defendants No2 and

3 respectively. Mukhtiar Kaur was earlier married to Dalip Singh, thereafter, was married with Amar Nath. The land measuring 60 bighas 2 biswas situated in Khanaura is ancestral property and descended from the common ancestor Guli by succession and therefore, plaintiffs No.1 to 5 having equal share with Ram Lal as property, being ancestral, was immune/exempted from attachment/sale in execution of the decree. The sale of the suit land in favour of Mukhtiar Kaur was without consideration and legal necessity against the inherent of Hindu Family, therefore, the same be declared illegal.

He further submitted that the original Intkab, Ex.P1 has not been brought on record as PW5 -Kanungo, in his deposition, stated that he had prepared the excerpt and brought the copy thereof. Even from the perusal of the excerpt, it is evident that certain entries in the jamabandi do not connote the inheritance of the property in favour of Norata Singh from Gulia, in essence, the plaintiffs, thus, failed to prove the semblance of khasra numbers in Ex.P2 and Ex.P3 with the Intkab and therefore, the plaintiffs have miserably failed to prove the property being ancestral in nature as they are not 4th generation in lineage and at the best, they can be treated as 3rd generation as all the revenue record shows inheritance of property from Norata Singh onwards. The trial Court, on the basis of the aforementioned evidence, dismissed the suit, but the Lower Appellate Court, has erroneously reversed the findings.

He also submitted that during the pendency of the appeal, the

respondent-plaintiffs sought the amendment of the plaint qua relief of possession which was also granted.

As regards Regular Second Appeal bearing No.3567 of 2005, he submitted that it has arisen out of filing of civil suit No.128 of 1998 titled as Darshan Singh and others vs. Harbans Singh, whereby, the plaintiffs had sought relief of permanent injunction restraining the defendant from interfering into the peaceful possession over the land measuring 9 bighas 19 biswas comprised in khewat No.190-191 khatauni no.345 khasra no.1179 min (4-14), 1180 min(5-5) situated at village Khanaura Tehsil Nabha. The suit was dismissed by the trial Court, but the Lower Appellate Court has erroneously decreed the same and therefore, the findings of the Lower Appellate Court are not sustainable in the eyes of law as the plaintiffs failed to establish the possession.

This Court, while issuing notice of motion, also granted the status quo order. The Lower Appellate Court totally misread document Ex.D3, copy of the rapat roznamcha dated 15.09.1987. He has drew the attention of this Court to the order dated 07.10.1988 passed by this Court in C.M.No.3084 of 1988 in RSA No.3048 of 1987, whereby, the application was ordered to be dismissed as withdrawn with liberty to Mukhtiar Kaur to take appropriate steps, in essence, the plaintiffs, in the aforementioned suit failed to establish the possession.

He further submitted that the respondent-plaintiffs were never put into physical possession. Only symbolic possession was given, vide

warrant of possession dated 10.09.1987. In fact, Mukhtiar Kaur continued to be in physical possession and after that, it is in possession of the appellant. Even in RSA No.3048 of 1987, there is an order of status quo regarding the possession.

Per contra, Mr. Kanwaljit Singh, learned Senior Counsel assisted by Ms. Gurdeep Kaur, Advocate appearing on behalf of the respondents submitted that khasra numbers mentioned in jamabandi, Ex.P6, connected with the khasra numbers mentioned in the Intkab. No objection had been taken by the plaintiffs regarding the exhibition of the excerpt, much less, production of the original. It is too late in a day to raise such argument. In fact, Mukhtiar Kaur had filed a suit under the Hindu Adoption and Maintenance Act claiming the maintenance which was dismissed by the trial Court and decreed by the Lower Appellate, whereby, the property stood attached and she was held entitled to maintenance @ ₹75/- per marla against Ram Lal and Dev Raj and the charge was also created on the property, but since Dev Raj and Ram Lal did not make the payment, the property was put to auction which was sold for a sum of Rs.10,000/- to Dalip Singh. Dalip Singh did not deposit the amount and the property was again re-auctioned which was purchased by Mukhtiar Kaur. It is the said property which has been challenged by the respondent-plaintiffs as they had right by birth in the property, for, the entire property could not have been attached and thus, urges this Court for affirming the findings under challenge.

He further submitted that Harbans Singh, the LR of Mukhtiar

Kaur, has no right to succeed to her estate as the application for bringing on record her legal representatives was allowed, subject to all just exceptions, thus, the Will is yet to be proved, therefore, so long Will is not proved, cannot pursue the appeal.

He also submitted that the injunction was only confined to the land measuring 9 bighas 19 biswas comprised in khewat no.190-191 khatauni no.345 khasra no.1179 min (4-14), 1180 min (5-5) situated in village Khanaura Tehsil Nabha, district Patiala. As per the order dated 05.08.1988, Ex.P2 passed by the Assistant Collector Grade II, Nabha, the entry in the khasra girdawari regarding the suit land was recorded in favour of the respondent-plaintiffs. Mukhtiar Kaur assailed the aforementioned order but the same was dismissed in default. Even the application seeking restoration of the same, vide order dated 01.07.1993, Ex.P3 was also dismissed. The appeal filed by Harbans Singh with regard to entries in khasra girdawari in favour of the respondent-plaintiffs, was dismissed. The findings rendered by the Lower Appellate Court being the last Court of fact and law are based upon the appreciation of oral and documentary evidence, much less do not call for interference and prays for dismissal of the appeals.

That during the pendency of the appeal, a contempt petition has been filed, whereby, the appellant-defendants under the garb of status quo order wanted to take forcible possession and the entry in the revenue record for the jamabandi for the year 2006-07 was changed to be in favour of *Makbuja Malkan*. This fact was brought to the notice of the appellant-

defendant in the contempt petition but he feigned ignorance and it is in this aspect of the matter, the contempt petition has been filed.

In reply, it is stated that it was an agricultural land and the respondent-plaintiffs were never put in possession of the same. In fact, under the garb of the status quo order, it is the respondent-plaintiff and petitioner in contempt petition wanted to take forcible possession, thus, in this background of the matter, contempt petition was filed to put pressure mentally and psychologically.

In rebuttal, Mr. Cheema submits that the respondents have already filed a suit challenging the Will executed in favour of Harbans Singh. Moreover, the objections were filed by Ram Lal and Dev Raj before the Executing Court in respect of the decree passed by the Lower Appellate Court. They were proceeded against ex parte before the Lower Appellate Court, which had allowed the suit. Even the application for setting aside the same was filed, resulting into dismissal.

I have heard learned counsel for the parties and appraised the judgments and decrees of the Courts below and of the view that there is force and merit in the submissions of Mr. Cheema.

The statement of PW5 -Kishan Chand, retired Kanungo, who brought on record the excerpt, reads as under:-

“I have prepared the excerpt in respect of the suit land which is Ex.P1. I have prepared Ex.P1 according to the revenue record which is correct and the relevant copies of jamabandi

are Ex.P2.

Further examination of the witness deferred as he has not brought the original of the copies of the jamabandi.”

His examination-in-chief was deferred on account of insufficient record but on the next date also, he brought the following record:-

“Ex.P3 and Ex.P4, Ex.P5, Ex.P6, Ex.P7, Ex.P8, Ex.P9, Ex.P10, Ex.P11 are the copies of the revenue record which are correct according to the revenue record. My report Ex.P1 may be read as a part of my statement.”

From the perusal of the aforementioned statement, it is evident that he had not brought the original excerpt which is statutory requirement of law as per the ratio decidendi culled out by this Court in **Banta Singh and others vs. Phuman Singh and others 1972 PLJ 275**. Even to a specific question in the cross-examination, he answered as under:-

“I have not brought the original record of the copies produced by me along with me. I cannot deny if Guli sold his property to his sons”.

Thus, the plaintiff miserably failed to prove the devolution of the property upon Norata from Guli. The character of the property being ancestral has not been established as the plaintiff would be “Third” generation instead of “Fourth” which is requirement of law as per the Hindu Law by Mullah 21st Edition Para 221.

I cannot remain unmindful of the fact that Ram Lal and Dev Raj in a proceeding initiated by Mukhtiar Kaur for recovery of the maintenance, did not pay maintenance and the property was auctioned and purchased by Mukhtiar Kaur. The objections filed by them have also been dismissed. Having failed to achieve their objective, they filed the suit through their sons, therefore, also sought the declaration enuring the benefits of defendants No.1 and 2.

The trial Court on the basis of preponderance of evidence rightly dismissed the suit but the Lower Appellate Court has partly decreed the suit in the manner indicated above without noticing the contents of the Intkab. Even Intkab is not correct as per the record which fact is evident from para 2 of the same, wherein it is stated that *“there is no note in the jamabandi regarding mutation on the basis of the inheritance neither any record in this regard has been found.”* Thus, the excerpt is incomplete. This fact has not been noticed by the Lower Appellate Court, thus, there is illegality and perversity. Seeking amendment of the suit claiming possession itself shows that the respondent-plaintiffs were not in possession and therefore, rightly so, the civil suit for injunction as indicated above was dismissed but the Lower Appellate Court has also not noticed this fact and erroneously decreed the suit. The aforementioned suit was filed against Harbans Singh and in those proceedings, the respondent-plaintiffs did not object to pursuing the cause of Mukhtiar Kaur. It is only for the first time in these appeals, have challenged the allowing of the application of LRs.

During the course of hearing, Mr. Cheema brought to the notice of this Court regarding the challenge to Will executed by Mukhtiar Kaur in favour of Harbans Singh. If that is so, genuinity and authenticity will be seen in the aforementioned pending suit and the consequential effect of the same can be looked into at any point of time. It has to be seen whether the respondent-plaintiff has been able to succeed/establish the foundation of the suit, the answer is in “Negative”. Khasra numbers mentioned in Ex.P6 do not relate to khasra girdawaris of Gulia. It is with regard to Norata, thus, there is no connection of khasra numbers stated to have been inherited by Norata from Gulia along with other brothers Harnam Singh and Rakha.

No doubt, this Court, on earlier occasions had been framing the substantial questions of law while deciding the appeals but in view of the ratio decidendi culled out by five learned Judges of the Hon'ble Supreme Court in **Pankajakshi (dead) through LRs and others Vs. Chandrika and others AIR 2016 SC 1213**, wherein the proposition arose as to whether in view of the provisions of Section 97(1) CPC, provisions of Section 41 of the Punjab Courts Act, 1918 would apply or the appeal i.e. RSA would be filed under Section 100 of Code of Civil Procedure so there is need to frame the substantial questions of law or not. The Constitutional Bench of Hon'ble Supreme Court held that the decision in **Kulwant Kaur and others Vs. Gurdial Singh Mann (dead) by LRs and others 2001(4) SCC 262** on applicability of Section 97(1) of CPC is not a correct law, in essence, the provisions of Section 41 of the Punjab Courts Act, 1918 had been restored

back.

For the sake of brevity, the relevant portion of the judgment of five learned Judges of the Hon'ble Supreme Court in Pankajakshi 's case (supra) reads thus:-

*“Since Section 41 of the Punjab Act is expressly in conflict with the amending law, viz., Section 100 as amended, it would be deemed to have been repealed. Thus we have no hesitation to hold that the law declared by the Full Bench of the High Court in the case of **Ganpat [AIR 1978 P&H 137 : 80 Punj LR 1 (FB)]** cannot be sustained and is thus overruled.” [at paras 27 - 29]”*

“27. Even the reference to Article 254 of the Constitution was not correctly made by this Court in the said decision. Section 41 of the Punjab Courts Act is of 1918 vintage. Obviously, therefore, it is not a law made by the Legislature of a State after the Constitution of India has come into force. It is a law made by a Provincial Legislature under Section 80A of the Government of India Act, 1915, which law was continued, being a law in force in British India, immediately before the commencement of the Government of India Act, 1935, by Section 292 thereof. In turn, after the Constitution of India came into force and, by Article 395, repealed the Government of India Act, 1935, the Punjab Courts Act was continued being a law in force in the territory of India immediately before the

commencement of the Constitution of India by virtue of Article 372(1) of the Constitution of India. This being the case, Article 254 of the Constitution of India would have no application to such a law for the simple reason that it is not a law made by the Legislature of a State but is an existing law continued by virtue of Article 372 of the Constitution of India. If at all, it is Article 372(1) alone that would apply to such law which is to continue in force until altered or repealed or amended by a competent Legislature or other competent authority. We have already found that since Section 97(1) of the Code of Civil Procedure (Amendment) Act, 1976 has no application to Section 41 of the Punjab Courts Act, it would necessarily continue as a law in force.”

Therefore, I do not intend to frame the substantial questions of law while deciding the appeal aforementioned.

In my view, the plaintiff has failed to establish the nature and character of the property being ancestral. Accordingly, the judgment and decree of the Lower Appellate Court is set aside and that of the trial Court is restored and suit is dismissed. Suit for injunction is also dismissed as the plaintiff has sought the possession by way of amendment in the appeal filed against the judgment and decree of the trial Court seeking setting aside of the sale and as well as inheritance by birth. Resultantly, no cause of action survives in the contempt petition.

Thus, both RSA bearing Nos.3048 of 1987 and 3567 of 2005
are allowed and Contempt Petition is dismissed.

(AMIT RAWAL)
JUDGE

November 18, 2016
savita

Whether Speaking/Reasoned	Yes/No
Whether Reportable	Yes/No