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IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH

RSA-1762-1997 (O&M)
Date of decision : 14.12.2016

Bhagwana

... Appellant

Versus

Panmeshwari

... Respondent

CORAM: HON'BLE MR. JUSTICE AMIT RAWAL

Present: Mr. Sanjay Mittal, Advocate
for the appellant.

Mr. Avnish Mittal, Advocate and
Ms. Aparna Singal, Advocate
for the respondent.

AMIT RAWAL, J. (ORAL)

The appellant-defendant is aggrieved of the concurrent findings of fact, whereby the suit seeking following relief has been decreed by both the Courts below:-

“Suit for declaration to the effect that the plaintiff is the owner in possession of the land measuring 22 kanal 2 ½ marlas i.e. 1/4th share comprised in khewat No.107 and of land measuring 9 kanals 19 marals i.e. 1/4th share comprised in khewat No.108 a per jamabandi for the year 1980-81, situated in the revenue estate of Bhageshwari and the registered sale deed No.648 dated 18.06.1981 in respect of Mamkaur vide which Mamkaur has sold 1/8th share in khewat No.107 and 108 in favour of defendant Bhagwana and mutation No.506 dated 5.9.81 in favour of Bhagwana is against law and is not binding on the rights of the plaintiff, since, Smt. Mamkaur had karewa marriage with Udmi after the death of Har Sahaye and the property of Har Sahaye to which she inherited after the death

of Har Sahaye as widow was divested and vested to Smt. Pato and after the death of Smt. Pato according her Will, the plaintiff is owner in possession of this land and mutation No.460 dated 5.9.81 in favour of plaintiff the share of Pato 1/8th share i.e. land measuirng 16 kanals 1 marla has been wrongly entered and it should have been i.e. 1/4th share for land measuring 32 kanals 2 marlas and the revenue entries are liable to be corrected.”

The parties are at loggerheads since 1985, though, the dispute relates back to 1945, when Har Sahaye, who had two wives, namely, Pato and Mamkaur, died. He was having 1/4th share in the land measuring 7 bighas and 15 biswas out of 31 bighas. The respondent-plaintiff challenged the sale deed dated 18.06.1981 allegedly executed by second wife of Har Sahaye, namely, Mamkaur in favour of the appellant-defendant Bhagwana son of Kishan Lal and brother of Har Sahaye. Nathu was the common ancestor, in essence, he had two sons, namely, Har Sahaye and Kishan Lal. The respondent-plaintiff has claimed the title in the property on the basis of the Will dated 14.06.1974 allegedly executed by Pato on the premise that Mamkaur had after demise of Har Sahaye, i.e. after 5-6 years, performed a Karewa marriage with Udmi, relative of Har Sahaye and in this regard, had placed on record Birth Certificate (Ex.PW-2A and 2-B) and also examined PW-7 Roop Chand to contend that Mamkaur had no right and title as she severed her relation in respect of the estate of Har Sahaye and therefore, the sale deed was not valid, though, the sale deed pertained to 1/8th share as on demise of Har Sahaye, 1/8th share each would have devolved upon Pato and Mamkaur.

Mr. Sanjay Mittal, learned counsel appearing on behalf of the

appellant-defendant submits that both the Courts below have committed illegality and perversity in decreeing the suit as the respondent-plaintiff Parmeshwari Devi daughter of Mamkaur did not come into witness box. There is no averment and pleading that she was a *pardanashin* lady. The appellant-defendant has been prevented to cross-examine her with regard to *Karewa* marriage and other related things and therefore, the suit was liable to be dismissed. In support of his contentions, he relies upon the *ratio decidendi* culled out by the Hon'ble Supreme Court in “Vidhyadhar V/s Mankikrao and another”, AIR 1999 SC 1441.

He further submits that PW-7 Roop Chand was the interested person, in essence, there is no compliance of the provisions of Section 50 of the Indian Evidence Act, 1872 (for short 'the 1872 Act'). No resident of village or the other relatives, have been examined to prove the *Karewa* marriage. The statement of PW-8 Hardevi, first wife of Udmi is nothing, but an intentional act to support Mamkaur. The school certificate of Attar Singh did not indicate the parentage of Mamkaur. It only reflected as son of Udmi Ram. Even the witness PW-2 did not depose that Udmi at point of time disclosed that any children were born out of loins of Udmi and Mamkaur. All these factors if had been taken into consideration, could not have resulted into decreetal of the suit, in essence, the sale deed could not have been set aside. Both the Courts below have granted full ownership regarding estate of Har Sahaye by setting aside the sale deed.

He further submits that the suit had been filed on 24.01.1985, whereas the sale deed is of 18.06.1981. The limitation period to challenge a registered document is three years, thus, urges this Court for setting aside the concurrent findings of fact as there is gross illegality and perversity.

Per contra, Mr. Avnish Mittal, learned counsel assisted by Ms. Aparna Singal, learned counsel appearing on behalf of the respondent-plaintiff submits that the statement of PW-7 Roop Chand cannot be discarded, but has been rightly appreciated, for, there had been a compliance of the provisions of Section 50 of the 1872 Act. The appellant-defendant failed to prove the due execution of the sale deed as none of the attesting witnesses have been examined. Mamkaur had, on performance of *Karewa* marriage severed her relation and therefore, she could not have any right to succeed to the estate of Har Sahaye, qua his 1/4th share out of 1/8th share. In support of his contentions, he relies upon the following *ratio decidendi* culled out in the judgments rendered by the Hon'ble Supreme Court and as well as by this Court:

1. ***“Smt. Patori and another V/s Chuhar Ram” 1983 LLR 320;***
2. ***“Kanhiya and others V/s Mohabata and others” 1960 PLR 494;***
3. ***“H. Lakshmaiah Reddy and others V/s L. Venkatesh Reddy” 2015 (2) RCR (Civil) 997;***
4. ***“Mohinder Singh (died) and rep. by his LRs and another V/s Kashmira Singh” 1985 PLJ 82;***
5. ***“Mangal Singh and others V/s Smt. Ratno” 1967 AIR (SC) 1786; and***
6. ***“Bhim Sain V/s Kaushalya Devi @ Prem Lata and others” 2009 (4) RCR (Civil) 48.***

To further rebut the arguments of Mr. Sanjay Mittal, Mr. Avnish Mittal submits that there is no limitation in asserting the right qua title, as Mamkaur did not vest with the ownership and therefore, the sale deed was *void* and *void* document can always be challenged at any point of time. No sane person/the wife of the living husband would depose against

her husband or the second wife. The concurrent findings of fact cannot be interfered until and unless there is gross illegality and perversity. The judgments and decrees of both the Courts below are perfectly in order as the entire estate had fallen to Pato and therefore, she validly bequeathed her estate in favour of the respondent-plaintiff. Even the Death Certificate (Ex.P-13) proved the factum, after demise of Har Sahaye, Mamkaur is the wife of Udmi,, thus, urges this Court for affirming the findings under challenge.

I have heard the learned counsel for the parties and appraised the paper book and of the view that there is a merit and force in the submissions of Mr. Sanjay Mittal viz-a-viz the fact that the sale deed dated 18.06.1981 (Ex.PW-4/B/1) executed by Mamkaur qua her 1/8th share being the registered document carries a presumption of truth. The suit was filed in the year 1985. The alleged cause of action definitely would be from the date, but no explanation has come forth, thus, Pato could not have bequeathed the entire estate of Har Sahaye in favour of the respondent-plaintiff, at the best, her Will would be valid to the extent of 1/8th share only. The provisions of Section 50 of the 1872 Act had not been complied with, which reads as under:-

“50. Opinion on relationship, when relevant.—When the Court has to form an opinion as to the relationship of one person to another, the opinion, expressed by conduct, as to the existence of such relationship, or any person who, as a member of the family or otherwise, has special means of knowledge on the subject, is a relevant fact:

Provided that such opinion shall not be sufficient to prove a marriage in proceedings under the Indian Divorce Act, 1869 (4 of 1869) or in prosecutions under section 494, 495, 497 or 498 of the Indian Penal Code (45 of 1860).”

No doubt PW-7 Roop Chand, being the brother of Mamkaur deposed, but the language of the provisions of law, aforementioned, is clear and unambiguous. Though, the existence of relationship can be proved by a family member or person who is a member. No villager or any other relatives other than the brother (being intervenor) to prove the *Karewa* marriage, has been examined. Even the Birth Certificates do not show the parentage of the children alleged to have been born out of loins of Udmi and Mamkaur, proving sons of Mamkaur. The Death Certificate had only been tendered, but no Chowkidar has been examined. Mere submission of information to the office maintaining the records of Birth and Death, it is a self-serving act. All these factors, in my view, have not been taken care of, thus, the *ratio decidendi* culled out in the judgments relied upon by Mr. Avnish Mittal, would not come into aid of his client, as Mamkaur had been shown to be owner of the property to the extent i.e. as per the jamabandi (Ex.P-5, Ex.P-6 & Ex.P-7). This fact was in the knowledge of the plaintiff, but such entries were never sought to be corrected, in fact, on demise of Har Sahaye, vide Ex.P-10 the mutation was effected in favour of Pato and Mamkaur.

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 V/s. 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 V/s. 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.

For the foregoing reasons, the judgments and decrees of both the Courts below are not sustainable in the eyes of law and the same are hereby set aside in part, in essence, the Will dated 14.06.1974 shall be construed to be valid in respect of 1/8th share of Pato in favour of respondent-plaintiff. However, the sale deed dated 18.06.1981 (Ex.P-4/B/1) in favour of the appellant-defendant is held to be valid.

Decree sheet is ordered to be drawn.

Resultantly, the appeal stands allowed in the aforementioned terms.

14.12.2016
Yogesh Sharma

(AMIT RAWAL)
JUDGE

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Whether speaking/reasoned Yes/ No

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Whether Reportable Yes/ No