

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

1. RSA No.1074 of 2007 (O&M)
Date of decision : 15.12.2016

Harinder Singh and others ...Appellants

Versus

Lal Singh and others
(deceased through LRs) ..Respondents

2. RSA No.668 of 2007 (O&M)
Date of decision : 15.12.2016

Sukhdev Singh ...Appellant

Versus

Lal Singh and others
(deceased through LRs) ..Respondents

CORAM: HON'BLE MR. JUSTICE AMIT RAWAL.

Present: Mr. Amarjit Markan, Advocate with
Mr. Kanwal Goyal, Advocate for the appellant.

Mr. Alankar Narula, Advocate for
Mr. Prateek Gupta, Advocate for appellants
(In RSA No.668 of 2007)

Ms. Nupur Chaudhary, Advocate for respondents
(In RSA No.1074 of 2007)

AMIT RAWAL, J. (Oral)

This order of mine shall dispose of aforementioned regular second appeals filed at the instance of the defendant and one is by the LRs of defendant No.2, who are aggrieved of the judgment and decree rendered by the lower Appellate Court, whereby suit of the respondent-plaintiff

seeking following relief, has been decreed, in essence, judgment and decree of the trial Court, dismissing the suit, has been set aside:-

“Suit for joint possession of 1/6th shares in the land comprising khewat/khatauni No.56//113, khasra Nos.6//22/2-6, 23/2/0, 16, 10//24/0-7, 12//2(4-12), 3/6-12, 7/8-0, 8/7-12, 9/8-0, 11/3-11, 12/8-0, 13/7.19, 19/8-0, 20/7-14, 16//1/1-10, 2/6-16, 3/5-9, 9/8-0, 10/6-14, 12/1/0-14, 26/1-2, 20//6/4-0, 14/2(1-0), 15/8-0, 16/8-0, 17/8-0, 23/4-0, 24/8-0, 25/8-0, 19//9/2(5-16), 10/2(5-16), 8/2 (7-2), 11//6-17, 12/7-12, 13/4-11, 14/2-0, 19/5-15, 20/8-0, 21/8-0, 22/8-0, 23/6-18, 26/1-3, 33//3/5-4, 4/8-0, 5/6-17, 7/8-14, 34//1 (8-14), 2/3-16, 93/0-13, 137/3(0-16), 172/0-2, 79/4-2, total measuring 278 kanals 12 marlas situated at Village Rathian, Tehsil and District Patiala.”

Mr. Amarjit Markan, learned counsel assisted by Mr. Kanwal Goyal, learned counsel appearing on behalf of appellant(s) submits that suit primarily is based upon the nature and character of the property at the hands of Gurbux Singh being ancestral. Gurbux Singh during his lifetime, had executed a registered gift deed dated 30.07.1962 in favour of the defendant No.1 and a mutation dated 07.02.1963 in this regard was also sanctioned. Gurbux Singh died on 19.04.1992 and the present suit has been filed on 21.04.1993. The Gift deed being registered one, has been proved as secondary evidence as original was not available and signature of donee was available on the record of the Registrar which has been examined by an expert and proved through the testimony of DW2-Sher Singh. Respondents-plaintiffs failed to prove the nature and character of the property being ancestral. The excerpts brought on record did not connect the property

having devolved upon Gurbux Singh from his grand father Kahan Singh, rather it is only from Bishan Singh i.e. grandfather of the plaintiff, father of Gurbux Singh. As per para No.221 of 21st Edition of Mulla's Hindu Law, for asserting the right in the property being ancestral, there has to be three generation as the parties asserting to be fourth one.

PW3 Jarnail Singh, who had brought the excerpt did not state or aver that it was original excerpt, as original excerpt according to him was in vernacular i.e. in urdu language and got it translated from Ajaib Singh but Ajaib Singh has not been examined, in essence, plaintiffs have failed to discharge the onus as enshrined under Section 101 of the Indian Evidence Act. The factum of the gift deed Ex.P1 was in the knowledge of the plaintiffs as wayback in the year 1987 as certified copy of the same was applied by giving a different book volume number yet the suit has been filed in the year 1993, therefore, it was hit by provisions of Article 59 of the Limitation Act. Even if it treated to be an Act of fraud even then the factum of the same was in their knowledge and, therefore, provisions of Article 56 would not help them as registration of the document was in the knowledge in the year 1987. In support of his contention regarding the property being not ancestral, has relied upon following case law:-

- i) *Tehal Singh and another Vs. Shamsher Singh (since deceased) through LRs, 2016(2) LAR 87,*
- ii) *Hawa Singh Vs. Daya Nand and others, 2010(2) PLR 567,*
- iii) *Gurmail Singh Vs. Rajbir Singh and another, 2014(4) RCR (Civil) 397,*

and urges this Court for setting aside the findings rendered by

the lower Appellate Court as the trial Court after examining the evidence, dismissed the suit.

Ms. Nupur Chaudhary, learned counsel appearing on behalf of respondent-plaintiff submits that jamabandi brought on record shows that property had devolved upon Gurbux Singh from Bishan Singh, therefore, presumption qua inheriting from Kahan Singh cannot be ruled out. The gift deed has not been proved by the defendants as original had not seen the light of the day. Suit cannot be said to be barred by law of limitation as there is categoric averments that the acquisition of the gift deed came to the notice only on the demise of Gurbux Singh as they had approached the office for getting the property mutated. All these factors have been taken care of by the lower Appellate Court and, thus there is no illegality and perversity. In fact, fraud had been played upon Gurbux Singh by the defendant-beneficiary of the gift deed. The factum of the gift deed was not disclosed throughout the lifetime of Gurbux Singh, therefore, suit cannot be said to be barred by law of limitation and thus urges this Court for affirming the findings under challenge.

I have heard learned counsel for the parties and appraised the paper book and of the view that there is force and merit in the submissions of Mr. Markan, for, excerpt and the jamabandi brought on record do not connect or remotely show that the land had fallen from Kahan Singh, the great grandfather of the plaintiff. It reflects only from Bishan Singh i.e. grandfather. Even the original excerpt which is statutory requirement of law as per the High Court Rules and Orders, much less, ratio decidendi culled out in *Banta Singh and others Vs. Phuman Singh and others*, 1972 PLJ 275,

could not be looked into. Lower Appellate Court being last Court of facts and law was enjoined upon obligation to examine all these facts but having failed to do so, in my view, abdicated and thus, findings declaring the property being ancestral is fallacious and perverse. As per para No.221, as noticed above, of the Mulla's Hindu Law, requirement of law has not been complied with.

Even, if the appellant-defendants have not taken the plea of limitation or given up, Section 3 of the Limitation Act cannot preclude any party to raise the plea of limitation at any stage of the matter. The facts as noticed above would reveal that the respondent-plaintiff had applied for certified copy of the gift deed way back in the year 1987 and yet remain silent and chose to file the suit after six years i.e. in 1993, thus, suit was hopelessly barred by law of limitation as it neither fall within the ambit of Sections 56 and 58 of the Limitation Act.

It is in this conspectus of the matter, trial court dismissed the suit but the lower Appellate Court did not notice all these facts.

PW3 Jarnail Singh also deposed that it was not the original excerpt but was got translated through Ajaib Singh who has not been examined and excerpt has also not been examined. In my view, respondents-plaintiffs have failed to discharge the onus, much less, foundation of the suit and no original record has come on record.

All these factors, in my view, have not been care of, thus, there is gross illegality and perversity.

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 appeals, aforementioned.

Resultantly, judgment and decree of the lower Appellate Court is set aside and that of the trial Court is restored.

Appeals, accordingly, are allowed.

15.12.2016

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(AMIT RAWAL)
JUDGE

Whether speaking/reasoned:-

Yes/No

Whether reportable:-

Yes/No