

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

**RSA No.707 of 2007 (O&M)
Date of Decision.06.10.2016**

2. RSA No.708 of 2007

Ramesh Kumar

.....Appellant

Vs

Parkash and others

.....Respondents

Present: Mr. S.C. Chhabra, Advocate
for the appellant.

Mr. S.M. Sharma, Advocate
for respondent No.1.

None for respondent Nos.3 and 4.

CORAM:HON'BLE MR. JUSTICE AMIT RAWAL

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AMIT RAWAL J. (ORAL)

This order of mine shall dispose of two regular second appeals.

RSA No.707 of 2007 arising out of Civil Suit No.231-1 of 29.08.1984/25.09.2002 titled as “Ramesh Kumar Vs. Gurbux Kumari and others” (hereinafter called as the “1st suit”) in respect of suit property i.e. two rooms, a kitchen, a bath room, stair case, varandah on the first floor and a room and terrace and *barsati* on the second floor as shown red in the site plan attached to the residential house No.B-II-I situated in Basti Kamboj, Ferozepur City and RSA No.708 of 2007 arising out of Civil Suit No.232-I of 15.04.1985/25.09.2002 titled as “Gurbux Kumari and others Vs. Ramesh Kumar and others” (hereinafter called as the “2nd suit”) in respect of the house consisting of two hall rooms, one baithak, a deori, two kitchen and bath room and court yard on the ground floor and two rooms, verandah and court yard on the first floor situation in Basti Kamboj, Ferozepur City. The 1st suit was for possession and the 2nd suit was also for possession but with different memo of parties.

suit i.e. suit No.1 for possession of the property described above on the basis of two documents namely (i) Ex.P5 i.e the probate granted in case No.8 of 1979 dated 07.05.1980 whereby he has been granted letter of administration in respect of property in 1st suit and (ii) Ex.P4, probate order dated 25.10.1983 in respect of the suit property in 2nd suit.

Mr. S.C. Chhabra, learned counsel appearing for the appellant submits that Sohan Lal and Daropati were the husband and wife and Ramesh Chand was adopted son. The factum of adoption and execution of the Will had already been deliberated upon in the aforementioned probate cases. The aforementioned orders have attained finality. There was a previous round of litigation with regard to Gurbax Kumari who alleged herself to be wife of Sohan Lal. Ramesh Chand being adopted son of Sohan Lal and Daropati filed suit for possession in respect of suit land measuring 117 kanals 11 marlas. Both the Courts below decreed the suit. Regular second appeal was preferred by Gurbax Rani. The aforementioned regular second appeal No.1344 of 1981 was decided on 17.09.1986 holding that Gurbax Rani was not legally wedded wife of Sohan Lal. The matter reached to the Hon'ble Supreme Court in Civil Appeal No.1754 of 1987 arising out of SLP (Civil) No.1463 of 1987 whereby the matter was disposed of on the basis of compromise on 17.08.1987. The copy of the order passed by the Hon'ble Supreme Court in the above-mentioned Civil Appeal has been placed on record as Ex.D1, which has been attached to the paper book of RSA No.707 of 2007.

He further submits that terms of the compromise leaves no manner of doubt that the compromise was without prejudice to the rights and interests of the parties in pending litigation between them in respect of other properties. Ramesh Kumar had relinquished his right and interest in 50 kanals of land mentioned at Sr. No. (A) of the compromise. The 1st suit was decreed

by the trial Court and similarly 2nd suit was dismissed. However, the lower Appellate Court reversed the finding meaning thereby the 1st suit was dismissed and the 2nd suit was decreed. It is in this backdrop of the matter, both the second appeals have been filed by Ramesh Chand.

He further submits that Ex.P4 and P5, orders of this Court, granting the probate to Ramesh Chand had not been controverted. The lower Appellate Court had heavily relied upon the order of the Hon'ble Supreme Court which has been based upon the compromise by branding Gurbax Rani as to be the legally wedded wife of Sohan Lal but failed to notice the clause No.E, which reads as under:-

“E. This compromise is without prejudice to the rights and interest of the parties in pending litigation between them in respect of other properties.”

In essence, drew a presumption that once Ramesh Chand had relinquished the ownership in respect of 50 kanals of land probably in the compromise that Gurbax Rani was the legally wedded wife of Sohan Lal. He submits that Gurbax Rani had failed to lead evidence in terms of Section 50 of the Indian Evidence Act except her own self-serving statement and one Natha Singh who in cross-examination spilled the beans by stating the marriage was performed in Ferozepur which is contrary to the statement of Gurbax Rani, as according to her, it was performed in Delhi. All these facts have escaped notice of the lower Appellate Court and therefore, there is illegality and perversity, thus, urges this Court for setting aside the judgments and decrees under challenge.

Per contra, Mr. S.M. Sharma, learned counsel appearing on behalf of Gurbax Rani i.e. defendant in 1st suit and plaintiff in 2nd suit submits that terms of the compromise as noticed above are sacrosanct between the parties

and the appellant cannot be permitted to volt-face from the same and therefore,

cannot claim right in the property in view of relinquishing the right and interest in respect of land measuring 50 kanals in favour of Gurbax Rani. No sane person would indulge into charity unless and until, there was some relationship. Natha Singh and Gurbax Rani had been consistent in their statement which was sufficient to establish that they are legal heirs of Sohan Lal.

He further submits that the findings of the lower Appellate Court as being last court of fact and law is based upon the appreciation of documentary as well as oral evidence and should not be interfered with, thus, urges this Court for confirming the judgments and decrees under challenge.

I have heard learned counsel for the parties, appraised the paper book and of the view that there is force and merit in the submissions of Mr. Chhabra. Ex.P5 and P4 i.e. Orders dated 07.05.1980 and 25.10.1983 respectively are in respect of property in suit property in 1st suit and 2nd suit, in essence, Ex.P4 for 2nd suit and Ex.P5 for 1st suit. The aforementioned orders have attained finality, in essence, there is no challenge to the same. In my view, the lower Appellate Court has failed to advert the documentary evidence and had gone into arena of conjectures and surmises by heavily relying upon the compromise. The compromise has also not been read in its correct perspective. In fact, it has been read in isolation. The compromise was without prejudice to the pending litigation, in essence, it could not have been read/looked into for adjudication of 1st suit and the 2nd suit.

Gurbax Rani has failed to comply with the ingredients of Section 50 of the Indian Evidence Act, 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 or in prosecutions under section 494, 495, 497 or 498 of the Indian Penal Code.”

There has to be some evidence to show that actually ceremony of *saptapadi* or other ceremonies were held, much less, there was custom prevailing where a man could have two wives. In the absence of the same, an irresistible conclusion is liable to drawn that Gurbax Rani has failed to prove the issue No.1 in 2nd suit.

There is another aspect of the matter. 1st suit has been filed only for possession. No declaration under Section 34 of the Specific Relief Act, 1963 had been sought. Be that as it may be, even if the issue in suit for possession had been framed, the Court could have moulded the relief but as noticed above, in the absence of evidence, the lower Appellate Court has committed illegality and perversity in decreeing the 2nd suit and dismissing the 1st suit. Nothing prevented the Gurbax Rani to challenge the orders under Ex.P4 and P5 by seeking declaration.

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.

For the foregoing reasons, the judgments and decrees passed by the lower Appellate Court are set aside. Both the appeals are allowed. Resultantly, 1st suit is decreed and the 2nd suit is dismissed.

(AMIT RAWAL)
JUDGE

October 06, 2016

Pankaj*

Whether reasoned/speaking Yes

Whether reportable No