

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

RSA No.2990 of 2011 (O&M)

Date of Decision.04.11.2016

Balihar Singh

.....Appellant

Vs

Sarabjit Kaur and others

.....Respondents

2. RSA No.2991 of 2011 (O&M)

Kulwinder Kaur and another

.....Appellants

Vs

Sarabjit Kaur and others

.....Respondents

Present: Mr. Vikas Bahl, Senior Advocate with
Ms. Samaya Singh, Advocate and
Ms. Japneet Kaur, Advocate
for the appellant(s).

Mr. Sandeep Jain, Advocate
for the respondents.

CORAM:HON'BLE MR. JUSTICE AMIT RAWAL

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AMIT RAWAL J. (ORAL)

C.M. No.8236-C of 2011 in RSA No.2990 of 2011

C.M. No.8239-C of 2011 in RSA No.2991 of 2011

The applications for impleading the legal representatives of deceased-Bachittar Singh are allowed subject to all just exceptions and the legal representatives are ordered to be brought on record.

RSA Nos.2990 and 2991 of 2011

The appellants-defendants are aggrieved of the concurrent finding of fact whereby the suit of the respondent-plaintiff Bachittar Singh against his father-defendant Nos.2 and other defendants seeking declaration that the judgment and decree dated 2.4.1990 to be declared as void, illegal,

aside in respect of the land described hereunder:-

(i) Land measuring 66 kanals 12 marlas comprised in khata No.142/196, 197, 198, khasra Nos.2465/845 (min), 2465/845-925 min, 2470/1606 min, 2465/845-1786, 2470/1606-925, being $\frac{1}{2}$ share of land measuring 133 kanals 4 marlas situated at village Mehmoodpur.

(ii) House as shown red in the site plan attached with the plaint and bounded as follows:-

East: House of Jagat Singh

West: Street

North: Street

South: property of Pakhar situated at Mehmoodpur.

(iii) House as shown red in the site plan attached with the plaint and bounded as follows:-

East: Street

West: Street

North: House of Ajit Singh and others

South: Street situated at village Mehmoodpur.

on the premise that the property at the hands of Swaran Singh-defendant No.2 was ancestral/coparcener in nature has been decreed. The plaintiff came to India in December, 1997 and was apprised that defendant No.1 has been recorded as owner of the suit property on the basis of judgment and decree dated 2.4.1990. The aforementioned judgment and decree could not be executed by Swaran Singh being Karta of the family except for legal necessity. Legal necessity was never in existence as having right by birth in the aforementioned property.

Mr. Vikas Bahl, learned Senior Counsel assisted by Ms. Samaya Singh and Ms. Japneet Kaur, Advocates submits that the respondent-plaintiff has failed to lead evidence, much less, the Courts

below have failed to notice that the documentary evidence brought on record is only with regard to the estate of Ghanaya, father of Swaran Singh-defendant No.2 but not of three generations and the plaintiff being the 4th generation only would have a right by birth. The mutation Ex.P29 and jamabandi Ex.P28 only prove the land in the hands of Ghanaya and not Chetu Ram, great grand father of the plaintiff and therefore, requirements of law as per para 221 of 21st Edition of Mulla Hindu Law, have not been complied with and the Courts below have erroneously set aside the judgment and decree, in essence, the onus has not been discharged, thus, the findings rendered by both the Courts below are liable to be set aside by formulating the substantial questions of law as drawn in the memorandum of appeal.

Per contra, Mr. Sandeep Jain, learned counsel appearing for the respondents-plaintiffs submits that the aforementioned documentary evidence Ex.P28, jamabandi for the year 1986-87, Ex.P29, Mutation and Ex.P30, translation of the mutation, irresistibly prove that the property at the hands of Swaran Singh was ancestral. Swaran Singh was Karta of the joint family and he could not have executed a sale deed except for legal necessity as he has right by birth.

He further submits that in the previous round of litigation, the appellant-defendant had admitted the nature and character of the property as ancestral and therefore, there is no limitation with regard to the title and objection of the defendant qua limitation has rightly been rejected. He says that the appellant-defendant is estopped to raise such pleas in view of the provisions of Section 115 of the Indian Evidence Act. In support of his contention, he relies upon the judgments of Hon'ble Supreme Court in

Gannmai Anasuya and others Vs. Parvatini Amarendra Chowdhary and others 2007(2) ACJ 744 (SC) and judgments of this Court in *Jaila Singh (dead) through LR Vs. Avtar Singh (dead) through LRs and others (2006) 1 LH(P&H) 758; Sarabjeet Kaur Vs. Gurmel Kaur 2009(1) LH(P&H) 474* and *Dasa Singh and another Vs. Jasmer Singh 2003(2) RCR (Civil) 361.*

He further submits that alienation of the ancestral property by an ex parte decree without impleading one of the heirs is not sustainable in the eyes of law and rightly has been set aside. In support of his contention, he relies of judgment of this Court in *Anguri Devi Vs. Moti Ram 2003(1) RCR (Civil) 443.*

In rebuttal, Mr. Vikas Bahl, learned Senior Counsel relies upon the following laws to contend that in the absence of original excerpts and pedigree table, much less, compliance of the High Court Rules and Orders as culled out in judgment of this Court in *Banta Singh & others Vs. Phuman Singh and others 1972 PLJ 275*, the judgment is not applicable. He also relies upon ratio decidendi culled out in the judgment of this Court in *Gurmial Singh Vs. Rajbir Singh and another 2014(4) RCR (Civil) 397* to contend that the admission of the nature and character of the property would not suffice the requirement of law. It has to be proved through direct and cogent evidence.

I have heard learned counsel for the parties, appraised the paper book and of the view that there is force and merit in the submission of Mr. Bahl, learned Senior Counsel, for, the respondent-plaintiff has miserably failed to prove on record the original pedigree table/Intqal, much less, compliance of High Court Rules and Orders as referred to in the judgment cited in *Banta Singh & others Vs. Phuman Singh and others* (supra).

Even mutation Ex.P29 of the year 1992 is only with regard to Ghanaya and not of great grand father and therefore, the respondent-plaintiff has not been able to prove the nature and character of the property at the hands of his father-Swaran Singh to be ancestral/coparcenary. Ghanaya is his grand father, thus, two generations preceding to the plaintiff would be Ghanaya and Swaran Singh whereas there has to be Three, as per para 221 of 21st Edition of Mulla Hindu Law.

It is settled law that admission in the other proceedings regarding the nature and character of the property as ancestral would not clothe or change the texture or nature of the property as ancestral. All these aspects have not been taken into consideration by both the Courts below.

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 Courts below are set aside and both the second appeals are allowed. Decree sheet shall be prepared accordingly.

(AMIT RAWAL)
JUDGE

November 04, 2016
Pankaj*

Whether speaking/reasoned	Yes
Whether reportable	No