

IN THE HIGH COURT OF PUNJAB & HARYANA AT CHANDIGARH.

RSA No.5061 of 2013 (O&M)
Date of decision:10.8.2016

Prem Singh and others

... Appellants

versus

Roshan and others

... Respondents

CORAM: HON'BLE MR. JUSTICE AMOL RATTAN SINGH.

Present: Mr. Harsh Garg, Advocate,
for the appellants

...

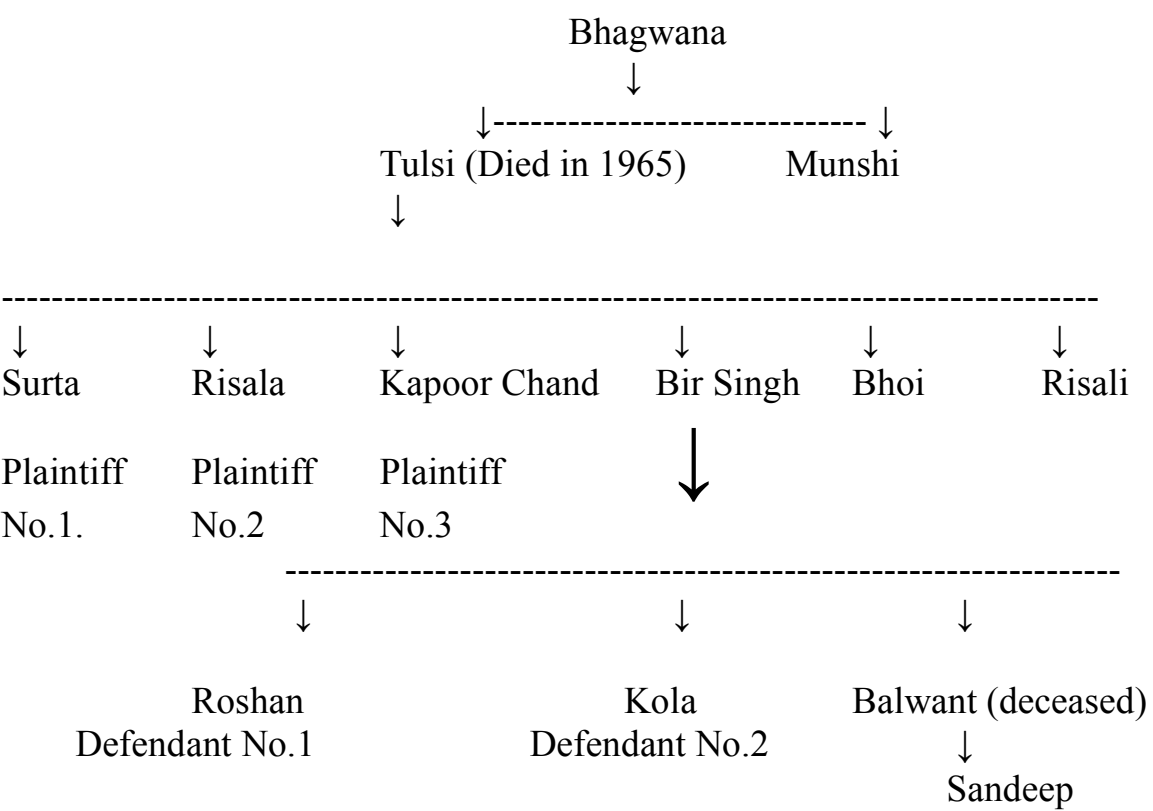
AMOL RATTAN SINGH, J.

1. This second appeal has been filed by the legal representatives of the second plaintiff in a suit filed by three plaintiffs seeking a declaration that the mutation of inheritance bearing No. 834, in favour of one Man Kaur, after the death of the father of the plaintiffs, i.e. after the death of Tulsi, in the year 1965, be declared to be null and void. They also sought a declaration that the subsequent release deeds dated 09.01.2001 and 23.03.2001, executed by defendants No. 4 to 13, who are all successors-in-interest of Man Kaur, be also declared to be null and void and the subsequent entries in the 'Jamabandies' (Records of Rights) and mutation entries based on the aforesaid release deeds, be also declared to be illegal and null and void, *ab initio*.

2. It must be noticed at the outset that defendants No. 11, 12 and 13 (present respondents No. 13, 14 and 15), were the children of Man Kaur;

defendant-respondent No.4 is the widow of Puran son of Man Kaur; defendants No. 5, 6 and 7 were the sons of Puran and defendants No. 8, 9 and 10 were the daughters of the said Puran. Presently, defendant No. 4, Vidhya Devi, is respondent No. 4 in this appeal, defendants No. 5 and 6 are respondents No. 5 and 6 and after the death of defendant No. 7-Rajbir Singh, son of Puran, his widow Kavita and two minor children are respondents No. 7 to 9 herein. Defendants No. 8, 9 and 10 are respondents No. 10, 11 and 12, being the daughters of Puran, son of Man Kaur.

A genealogical table to understand the relationship of the parties, as per the pedigree table drawn up by the plaintiffs themselves, [reproduced herein below from paragraph 3 of the judgment of the learned Additional Civil Judge (Sr. Division) Kaithal], is as under:-



3. From the aforesaid table, it is seen that the plaintiffs before the Additional Civil Judge were Surta, Risala and Kapoor Chand, all sons of Tulsi, though their siblings Bir Singh, Bhoi and Risali were not plaintiffs. The sons of Bir Singh, i.e. Roshan and Kola were impleaded as defendants

No. 1 and 2 and the third son of Bir Singh, Balwant having died, his minor son Sandeep was impleaded as defendant No. 3, through his uncle, Roshan-defendant No.1.

4. It was contended by the plaintiffs that Tulsi had died in the year 1965 leaving behind only these six children as his legal heirs but one Man Kaur had been wrongly shown as his daughter and due to that, the land in the ownership of Tulsi was also mutated to her in an equal share, vide the aforesaid mutation No. 834, sanctioned by the Assistant Collector (Grade II) on 22.02.1966.

5. This was the basic mutation entry challenged by the plaintiffs, due to which the suit land came to the ownership of Man Kaur and was made subject matter of the relinquishment deeds referred to earlier, which became the bone of contention.

It was contended that Man Kaur was actually not the daughter of the Tulsi and as such, the 1/7th share shown to have been mutated in her favour, vide the aforesaid mutation of inheritance, was illegal null and void, as was the mutation of inheritance in favour of Man Kaur's children, upon her death, and consequently, the release/relinquishment deeds No. 1632/1 dated 09.01.2001 and 1992/1 dated 23.03.2001, executed in favour of defendants no.1 to 3 by defendants no.4 to 13, were also illegal null and void, as the said defendants were not the owners of the land, Man Kaur not having been the daughter of Tulsi.

7. It was further contended that the defendants had also filed a partition petition on 24.04.2001, pursuant to which the suit land had been finally partitioned, vide order dated 12.04.2007 and the defendants had been

allotted specific shares, with the plaintiffs having been allegedly dispossessed from the said 1/7th share of the suit land falling to Man Kaur.

They thus contended that they only came to know of the inheritance of Man Kaur and the release deeds executed by defendants No. 4 to 13 in favour of defendants No. 1 to 3, when the said defendants (Nos. 1 to 3), try to take forcible possession of the suit land from the plaintiffs in the month of January 2001.

The said defendants refusing to admit the claim of the plaintiffs to the extent of a 3/4th share in the entire land of Tulsi, the suit was filed on 21.04.2001.

8. Upon notice issued, defendant No. 1-Roshan appeared and filed a written statement whereas all the other defendants were proceeded against *ex parte*. In his reply, the said defendant raised a preliminary objection with regard to maintainability, limitation and the usual objections with regard to Court fee, jurisdiction etc. On merits it was contended that the pedigree table shown by the plaintiffs was not complete and in fact Tulsi, son of Bhagwana had two wives, namely Jiwani from whom he had three sons Surta, Risala and Kapor Chand (the plaintiffs) and two daughters Bhoi and Risali, and a second wife, Bhulli, from whom he had one son, Bir Singh and one daughter Man Kaur.

Bir Singh having expired, his share in Tulsis' land was inherited by his three sons, Roshan, Kola and Balwant and with Balwant also having died, his share was inherited by his son Sandeep and daughter Sonia.

As such, it was contended in the written statement of defendant No. 1 that Tulsis' property had been inherited by his aforesaid four sons and

three daughters, i.e. Surta, Risala, Kapoor Chand, Bir Singh, Bhoi, Risali and Man Kaur, in equal shares, which was correctly reflected in mutation entry No. 834 sanctioned on 22.02.1966, in the presence of the plaintiffs.

Man Kaur having been married to another Risala in village Aibli, she had three sons namely Puran, Ram Chander and Banarsi and one daughter, Kaso. Man Kaur died in 1986 and consequently, mutation No. 1594 was also correctly sanctioned in favour of her aforesaid four children on 25.10.1986.

Thereafter, all the heirs of Man Kaur, vide the impugned registered release deeds dated 09.01.2001 and 23.03.2001, relinquished the 1/7th share of Man Kaur, in favour of defendant Nos. 1 to 3, i.e. the two sons and grand-son of Bir Singh, upon which mutation nos.3138 dated 15.01.2001 and 3143 dated 03.05.2001 were duly sanctioned and as a consequence thereof, defendant Nos. 1 to 3 were in possession of Man Kaur's 1/7th share of her father's property, i.e. the land owned by Tulsi.

9. Yet further, it was admitted that partition proceedings had also been effected, with specific parcels of land allotted to the co-sharers, in respect of which a '*Roznamcha*' entry bearing No. 702 was entered on 01.06.2007 (during the pendency of the suit). The plaintiffs had filed an appeal against that entry before the Collector on 07.06.2007, which was dismissed on 14.06.2007. Thereafter Risala and Kapoor Chand, i.e. plaintiffs No. 2 and 3, had filed another suit on 21.06.2007, along with an application seeking an interim stay. That application was dismissed on 25.06.2007, with the appeal filed against that order also dismissed with costs on 10.08.2007.

That suit itself was dismissed-in-default on 04.03.2008.

Consequently, the first defendant prayed that the suit earlier filed, (out of which this second appeal arises), be also dismissed by the learned trial Court.

10. Upon a replication having been filed by the plaintiffs, reiterating their stand in the plaint, the following issues were framed by the learned Additional Civil Judge:-

“1. Whether mutation no. 834 dated 22.02.1966 sanctioned in favour of Man Kaur to the extent of 1/7th share is illegal, null and void as alleged in para no. 3 of the plaint? OPP

2. Whether release no. 1632/1 dated 09.01.2001 and release deed no. 1992/1 dated 23.03.2001 are illegal, null and void and not binding on the rights of the plaintiffs and are liable to be set aside on the grounds, as alleged in para no. 4 of the plaint? OPP

2-A Whether the mutation no. 834, 3138 and 3143 entered on the basis of release deeds mentioned in para nos. 1 and 2 of the application are illegal, null and void and subsequent revenue record is liable to be corrected? OPP

2-B Whether plaintiff has been dispossessed by the orders of A.C. II Grade during the pendency of the present proceedings from his specific share, if so to what effect? OPP

3. Whether the suit of the plaintiff is not maintainable in the present form? OPD

4. Relief.”

11. Documentary as well as oral evidence was led by both sides, on an appraisal of which the learned Additional Civil Judge finally came to the conclusion that the share of Tulsi had been admittedly inherited by seven persons, including Man Kaur, to the extent of a 1/7th share each, duly

entered vide mutation No. 834, sanctioned on 22.02.1966, and the '*Karewa*' marriage contracted by Tulsi (mother of Man Kaur and Bir Singh) was also admitted. The dismissal of the civil suit filed in the year 2007 was also found to have been a factually correct averment by the first defendant.

12. The learned Civil Judge then went on to examine whether the '*Karewa*' marriage contracted between Tulsi and Bhuli was valid or void. From an examination of the impugned mutation no. 834 (Ex. P-6), as also the translation of another mutation bearing no.174 (Ex. P12/T), it was found that as a matter of fact, Bhuli was earlier the wife of Partap, cousin of Tulsi. Hence, it was held that since a '*Karewa*' marriage can only take place between the wife of an elder brother and his younger brother, if the latter is unmarried, and that no '*Karewa*' marriage is permissible with the wife of a stranger, hence, since Bhuli was not the wife of Tulsis' elder brother, therefore, the '*Karewa*' marriage between Bhuli and Tulsi was void *ab initio*.

Man Kaur was admittedly born from the aforesaid marriage, as was Bir Singh.

13. However, as regards the plaintiffs' claim that Man Kaur was not entitled to inherit a share in Tulsis' property, being an illegitimate daughter (reference paragraph no. 48 of the judgment of the Additional Civil Judge), relying upon the amended Section 16 of the Hindu Marriage Act, 1955 (as amended w.e.f. 27.05.1976), it was held that in terms of Section 16 (3) thereof, Man Kaur and Bir Singh would still be entitled to acquire property of their parents, though not from coparcenary property.

It was further found by the learned trial Court that after the

death of Bhgwana (father of Tulsi) a half share of Bhagwanas' property was inherited by Tulsi (the other half being inherited by Tulsis' brother Munshi) and as such, Man Kaur, in terms of Section 16 (3) aforesaid was to be considered a legitimate daughter, entitled to inherit a share from her fathers' property.

Hence it was held that mutation no. 834, Ex. P6, was correctly sanctioned in 1966, to the extent of a 1/7th share each to Man Kaur as also Bir Singh.

The law cited on behalf of the plaintiffs, from a judgment in **Krishnakumari Thampuran vs. Palace Administration Board** 2007 (1) Civil Court Cases 405 (Kerala), was held to be not applicable to the instant case, in view of the fact that the property in question was not coparcenary property but that of Tulsi, and consequently, all his children were held equally entitled to it.

14. Other than that, it was held that from a perusal of the mutations and specifically from the '*Jamabandi*' for the year 1998-99 (Ex. P-3), it was obvious that plaintiff no. 2, Risala, had mortgaged his share of the property to take a loan on 26.04.1997. Hence, he being aware of his own limited share, was obviously aware of the share inherited by Man Kaur but he still remain silent thereafter.

However, even having noticed as above, the learned Civil Judge held that since the plaintiffs' specific contention was that they were in actual possession of the suit land and the suit was filed only when they were being dispossessed, pursuant to the warrants of possession executed by the revenue authorities, the suit was not time barred and was within limitation,

having been filed within three months of such threat of dispossession.

It was also held by that Court that the partition by the revenue authorities had been correctly effected and in any case jurisdiction qua partition of agricultural property did not lie with the Civil Court and the plaintiffs having duly availed of their remedy of appeal before the revenue authorities, that order could not be interfered with.

15. As regards the Civil Suit filed in the year 2007, that suit was held to be barred under Section 10 of the Code of Civil Procedure, 1908, with the suit being subsequently adjudicated upon (out of which this appeal arises), being a previous suit and hence, it was neither barred by the principle of res-judicata nor under Order 2 Rule 2 CPC.

Consequently, though the issues of limitation and maintainability of the suit were decided in favour of the plaintiffs, however, the inheritance of Man Kaur to Tulsis' property having been held to be fully legal and valid, the main issues were decided against the plaintiffs and the suit dismissed.

16. Only the LRs of the second plaintiff (who seems to have died during the pendency of the suit), filed an appeal before the learned Additional District Judge, Kaithal, who also, on the same reasoning dismissed that appeal, citing Section 16 (3) of the Hindu Marriage Act, 1955.

Further however, it was also held by the learned first appellate Court, that since the plaintiffs failed to establish their title on the suit land, i.e. to the share that came to Man Kaur, the suit filed in the year 2001 would be hit by limitation because limitation would not run against the plaintiffs

only if they had established their ownership to the suit land.

Other than that, it was held that the plaintiffs had actually failed to even show their possession over the suit land and therefore, no cause of action arose to them in the year 2001.

The suit was, however, held to be not barred on the principle of res-judicata, but on a different reasoning to that given by the learned Civil Judge; inasmuch as, though a suit instituted later but decided prior to the suit instituted earlier, would still operate as res-judicata on the earlier suit, if still pending, however, in the instant case the suit filed in the year 2007 having been dismissed only in-default, it was held that the said principle would not apply.

17. Thus, reversing the finding on the suit being maintainable on grounds of limitation, but upholding the finding of the trial Court on merits, to the effect that Man Kaur was very much entitled to inherit the suit land from her father, the first appeal was also dismissed.

18. Before this Court, Mr. Harsh Garg, learned counsel for the appellants, had submitted that once the Courts below came to the conclusion that the '*Karewa*' marriage between Tulsi and Bhuli was not a valid marriage and was, in fact, void *ab initio*, that would make Man Kaur and Bir Singh illegitimate children of Tulsi, who would not be entitled to inherit the suit property upon Tulsis' death in the year 1965.

He, therefore, submitted that the suit of the plaintiffs deserves to have been decreed in their favour and on this short principle alone, this appeal deserves to be allowed and the judgments and decrees of the Courts below set aside.

19. Having considered the aforesaid argument, as also the judgments of the Courts below, it is seen that those learned Courts dismissed the suit of the plaintiffs essentially relying upon Section 16 (3) of the Hindu Marriage Act, 1955.

The said provision as it stands today, after the amendment effected w.e.f. 27.05.1976, reads as under:-

“[16 Legitimacy of children of void and voidable marriages. (1) Notwithstanding that marriage is null and void under section 11, any child of such marriage who would have been legitimate if the marriage had been valid, shall be legitimate, whether such child is born before or after the commencement of the Marriage Laws (Amendment) Act, 1976 (68 of 1976)*, and whether or not a decree of nullity is granted in respect of that marriage under this Act and whether or not the marriage is held to be void otherwise than on a petition under this Act.

(2) Where a decree of nullity is granted in respect of a voidable marriage under section 12, any child begotten or conceived before the decree is made, who would have been the legitimate child of the parties to the marriage if at the date of the decree it had been dissolved instead of being annulled, shall be deemed to be their legitimate child notwithstanding the decree of nullity.

(3) Nothing contained in sub-section (1) or sub-section (2) shall be construed as conferring upon any child of a marriage which is null and void or which is annulled by a decree of nullity under section 12, any rights in or to the property of any person, other than the parents, in any case where, but for the passing of this Act, such child would have been incapable of possessing or acquiring any such rights by reason of his not being the legitimate child of his parents.”]

20. Firstly, in the opinion of this Court, what is to be seen is not the

Hindu Marriage Act as it stands after 27.05.1976, but as it stood in the year 1965, when Tulsi died and his property devolved upon his seven children including Man Kaur in equal shares, as per the impugned mutation No. 834, sanctioned on 22.02.1966.

21. Consequently, this Court vide order dated 12.07.2016, had directed learned counsel for the appellants to produce a copy of the unamended Section 16 of the Act of 1955, which he has produced and which is seen to read as under:-

“16. Legitimacy of children of void and voidable marriages:

Where a decree of nullity is granted in respect of any marriage under Section 11 or Section 12, any child begotten or conceived before the decree is made who would have been the legitimate child of the parties to the marriage if it had been dissolved instead of having been declared null and void or annulled by a decree of nullity shall be deemed to be their legitimate child notwithstanding the decree of nullity:

Provided that nothing contained in this section shall be construed as conferring upon any child of a marriage which is declared null and void or annulled by a decree of nullity any rights in or to the property of any person other than the parents in any case where, but for the passing of this Act, such child would have been incapable of possessing or acquiring any such rights by reason of his not being the legitimate child of his parents.”

It is seen from the above, that the proviso to the aforesaid unamended Section 16, stipulated that a child begotten from a marriage that is subsequently declared to be null or void, or a nullity, though would be considered to be a legitimate child, he/she would not inherit any rights to

any property that he/she would have no right to inherit as an illegitimate child, except rights to the property of his or her parents.

Hence, even if it were to be accepted, in terms of the finding of the Courts below, that the *Karewa* marriage stated to have been performed by Tulsi with Bhulli, from which two children, i.e. Man Kaur and Bir Singh, were born, was a marriage void ab initio, i.e. it was not a marriage, firstly, it would still not affect the legitimacy of the children and it also did not take away the rights of those children to inherit the property of their own parents, though they may not have had any rights in coparcenary property, except to the extent of their parents/fathers' share thereof.

That issue, of the nature of the property, need not be gone into as learned counsel has very fairly, on query, submitted that the property was not proved to be ancestral. (Which is also seen to be factually correct from the judgments impugned herein). Though it was contended to be so, but therefore, it had to be accepted as the self acquired property of Tulsi, even though falling to him from his father, i.e. though inherited from his father, it was not shown to have devolved upon Tulsi from at least 3 generations in the male line of descent and as such, it could not be held to be coparcenary property.

That being so, upon the death of Tulsi in 1965, all property, as vested in him, would have gone by natural succession to all his children, legitimate or illegitimate, even in terms of the unamended Section 16, with nothing shown to the contrary, even from any provision of the Hindu Succession Act, 1956.

22. The aforesaid being the position in law, i.e. that Man Kaur

continuing to hold the status of a legitimate child of Tulsi, even with her mothers' '*Karewa*' marriage to Tulsi not being a valid marriage, (as held by the Courts below), she nevertheless would still be entitled to an equal share in her fathers' own property (as fell to his own share) and as such, the mutation of inheritance entered in her favour on 22.02.1966, was very much valid and legal.

23. That being so, upon her death, the suit property would devolve equally upon her children, there being no issue at all of any will having been executed by her. Hence, if her children voluntarily thereafter, executed release/relinquishment deeds in favour of the children of her brother, i.e. defendants No. 1 to 3, such relinquishment also cannot be faulted in any manner and the learned Civil Judge as also the first Appellate Court, correctly held those issues against plaintiffs.

24. I am also in agreement with the judgment of the learned lower appellate Court to the effect that the plaintiffs not having established their title to the suit property, inasmuch as the inheritance of Man Kaur in the year 1965 being a legal and valid inheritance, the question of possession of the suit land, or a declaration to declare the earlier mutations to be null and void, would be governed by Articles 58 and 59 of the Schedule to the Limitation Act, as per which the limitation for filing any suit for declaration is 3 years from the date that the right to sue first accrues.

It has been specifically noticed by the learned Civil Judge that even knowledge of the revenue record showing Man Kaur to be an owner to the extent of 1/7th share in the suit property was necessarily known to the father of the present appellants (plaintiff No. 2 Risala), at least in the year

1997, with him having mortgaged his entire share to obtain a loan. Hence, a suit filed in the year 2001 was in any case barred by time. This is of course other than the fact that knowledge of the mutation dated 22.02.1966 and subsequent revenue entries for a period of 35 years thereafter, cannot be held to be not within the knowledge of the plaintiffs.

Hence, the finding of the learned first appellate Court, that the suit was also barred by limitation, is also upheld.

25. Consequently, finding no merit in the present appeal, the same is dismissed *in limine*, with no order as to costs.

10.8.2016
pk/nitin

(AMOL RATTAN SINGH)
JUDGE

Whether speaking/reasoned	Yes/No
Whether Reportable	Yes/No