

IN THE HIGH COURT OF PUNJAB AND HARYANA AT
CHANDIGARH

RSA No.2806 of 2016 (O&M)
Date of Decision: June 02, 2016

Ms. Rajpati Appellant

Vs.

Smt. Ram Murti and others Respondents

CORAM: HON'BLE MR. JUSTICE AMOL RATTAN SINGH

1. To be referred to the Reporters or not?
2. Whether the judgment should be reported in the Digest?

Present: Mr. N.S.Dalal, Advocate
for the appellant.

Amol Rattan Singh, J.

This is the second appeal by the surviving plaintiff before the learned Additional Civil Judge (Senior Division), Sonapat, in a suit instituted by the present appellant and her mother, seeking a decree of declaration of their title over the suit land and further seeking a declaration that the judgment and decree dated 19.11.2003, passed in Civil Suit No.355 of 1993 and the judgment dated 11.10.2005, passed by the first appellate Court, against the judgment of the Civil Judge in the aforesaid suit, are not binding upon the plaintiffs.

They further sought a decree of permanent injunction against the respondents-defendants (hereinafter to be referred to as the defendants) from alienating or otherwise encumbering the plaintiffs' share in the suit property.

2. The facts, as taken from the judgment of the learned Civil Judge, are that the plaintiffs, i.e. the mother and daughter (of whom the daughter is the surviving plaintiff, now appellant) claimed that Ram Sarup @ Chhota, grand-father of the present appellant and father-in-law of the late plaintiff No.1, was the owner in possession of some agricultural land situated in the revenue estate of village Sehri, which was ancestral and co-parcenary in the hands of the said Ram Sarup. He had six sons and one daughter, of whom Pehlada was the father of the present appellant (husband of her mother, the late plaintiff No.1).

Pehlada pre-deceased his father Ram Sarup, in the year 1953-54 but before his death, Ram Sarup partitioned the ancestral land and gave a 1/6th share to each of his five living sons and retained the share of Pehlada himself, on behalf of the plaintiffs and for their benefit and use.

It was claimed that Ram Sarups' decision was respected by all and the family partition was also duly reflected in a decree dated 07.03.1981.

However, later the plaintiffs came to know about the fraud played by some of the defendants, who claimed their ownership on the share of Pehlada, on the basis of a will stated to have been executed by Ram Sarup. The said will was challenged by the plaintiffs in a civil suit, which was, however, dismissed. The appeal against the said judgment was also dismissed on 11.10.2005, but by observing therein that the matter may have been different had the plaintiffs claimed their right under Section 14(1) of the Hindu Succession Act, 1956.

Hence, the plaintiffs filed the suit out of which this second appeal arises, challenging the aforesaid judgments and raising the plea of the suit land being ancestral, and consequently, their right in it.

3. Upon notice issued to them, the defendants appeared and filed a written statement raising preliminary objections of maintainability, the suit being barred on the plea of *resjudicata* and under Order 2 Rule 2 CPC, by limitation, as also challenging the *locus* of the plaintiffs, alongwith other preliminary objections.

It was further contended that the plaintiffs had concealed material facts with regard to a compromise reached on 18.03.1983.

On merits, the allegations were again all disputed, to the effect that the property was actually the self-acquired property of Ram Sarup and as such, he was free to will it away, as he pleased.

The will already having been proved to be genuine in the previous round of litigation, the dispute could not be raised afresh.

Still further, it was contended that Ram Sarup had also suffered a consent decree dated 07.03.1981, in favour of his remaining five sons and had given them a 1/6th share each of his total holding land of 136 Kanals and 16 Marlas, retaining a 1/6th share for himself. It was stated by the defendants that, in fact, before the suit earlier filed by the two plaintiffs, resulting in the judgments and decrees dated 19.11.2003 and 11.10.2005, plaintiff No.1 Chalti Devi had also instituted the civil suit No.239 of 1982, which was compromised vide the aforesaid compromise deed dated 18.03.1983.

4. Upon a replication having been filed by the plaintiffs, controverting the contentions in the written statement, the following issues were framed by the Civil Judge:-

1. Whether the plaintiffs are entitled for a decree of declaration to the effect that they are the owners and in possession of the estate belonging to Sh. Pehlada including the land bearing Khata number 6, khatoni number 4 and also of the land situated with in the Lal Dora of village Sehri, which he had inherited from his father being the coparcerner and which has further been inherited by the plaintiffs under Section 14 of the Hindu Succession Act who are full onwers thereof without any restriction in the inheritance of the said estate? OPP
2. Whether the plaintiffs are entitled for a decree of declaration to the effect that judgment and decree dated 19.11.2003 passed by the learned CJ(JD), Sonapat, in suit number 355 of 1993, affirmed by the order dated 11.10.2005, passed by the learned ADJ, Sonapat, in appeal number 43 of 2003, is of no effect and consequences so far as the right of the plaintiffs under Section 14 of the Hindu Succession Act are concerned? OPP
3. If issue numbers 1 and 2 are proved in affirmative, whether the plaintiffs are entitled for permanent injunction restraining the defendants from alienating the property in dispute in any manner or to create an third interest over the property in dispute in any manner over the suit property? OPP
4. Whether the suit of the plaintiffs is barred by the principles of res-judicata? OPP
6. Whether the plaintiffs have no locus standi to file the

present suit? OPD

7. Whether the suit of the plaintiffs is bad for joinder of unnecessary parties? OPD

8. Relief."

5. The present appellant as a witness testified in terms of her plaint and further examined Defendant No.10 (present respondent No.10), Samunder Singh, as PW2. This witness testified in terms of his affidavit, that during his life time, the late Pehlada was owner in possession of 26 Kanal 9 Marlas of land and after his death, the plaintiffs became owners in possession thereof. He also testified that the suit land was ancestral, co-parcenary property.

A former Sarpanch of the village, Birbal, was examined as PW3 and also testified that though he did not know how much land was owned and possessed by the late Pehlada, however, Pehlada was owner in possession of the suit property, which was now owned, possessed and cultivated by the plaintiffs.

He further stated that though he had heard that Ram Sarup had wrongly given Pehladas' land to his other sons, he could not help the plaintiffs even though he was summoned by them.

6. The defendants examined defendant No.16, Girdhari Lal son of Ram Sarup as DW1, who also testified in terms of his affidavit and the written statement. A Judicial Record-Keeper was examined as DW2, who testified in favour of the certified copy of the judgments and decrees in earlier litigation between the parties and one Ram Karan, Head Teacher of a Government Primary School in the village, was examined as DW3, who

testified that as per the record of the school, the present appellant, Raj Pati, daughter of Prahlad Singh, was born on 05.06.1953.

7. The learned Civil Judge, after appraising the aforesaid evidence, came to the conclusion that there was nothing on record to prove that the property was ancestral in the hands of Ram Sarup, as nothing had been shown as to how Ram Sarup had acquired the property in dispute. Citing a judgment of this Court in **Gulab Singh v. Mam Chand and others, (2009 (2) RCR (Civil) 428)**, that Court held that to prove that any property is ancestral, the onus was on the party so asserting, and upon that onus not being discharged, it would be presumed to be non-ancestral.

Hence, the plaintiffs having not led any evidence in that regard, the property was to be treated as self-acquired, in the hands of Ram Sarup, who would be free to dispose it of in any manner that he pleased.

8. It was also held that the consent decree dated 07.03.1981, by which Ram Sarup retained a 1/6th share of the suit property, followed by his will, ousted the plaintiffs from the suit property and as regards the execution, attestation and genuineness of the will, there could be no doubt that the findings of fact in the previous litigation, were binding upon both parties. Even the question of the competence of the testator was duly raised and considered by the Courts, in that *lis*.

9. The learned Civil Judge also noticed an argument on behalf of the plaintiffs, that though defendant Girdhari, as DW1, had stated that the suit land was purchased by Ram Sarup, he had not placed any sale deed on record, and as such, an adverse inference needs to be taken against the

defendant, for withholding evidence. While referring to the judgment of the Supreme Court in Preadip Buragohain v. Pranati Phukan, (2010) 11 SCC 108, it was held that despite the ratio of the said judgment, since Girdhari Lal was not put a question in cross-examination, as to in whose possession the sale deed was, and not having been asked to produce it, no adverse inference could be drawn against the defendants. Further noticing the testimony of defendant No.10, in favour of the plaintiffs, it was found that plaintiff Chalti Devi had performed a Kareva marriage with the father of Samunder Singh, i.e. Risal Singh and as such, the said defendant actually had crossed over to the side of the plaintiffs and had testified that a 1/6th share of the land belonging to Ram Sarup should be given to the plaintiffs. However, he even denied knowing the contents of his own affidavit, tendered by way of his examination-in-chief.

10. As regards the claim of the plaintiffs under Section 14(1) of the Hindu Succession Act, it was held that no documentary evidence was led by the plaintiffs to even prove their possession over the property. They had pleaded that the suit land was given to them by way of a family compromise and that all the terms of the alleged compromise deed dated 18.03.1983, had not been spelt out in the plaint. However, it was found by the Court that certified copies of the compromise were exhibited as Exs.D9 and D10 alongwith the order of the Court, in the first suit filed by Smt. Chalti Devi, dated 18.03.1983 (Ex.D6). As per these documents, it was found that land measuring 15 kanals 8 marlas was given to plaintiff Chalti Devi, to maintain herself during her life time and as such, it was a limited estate given to her,

restricting her from alienating or encumbering the same. In fact, that suit had been disposed of in terms of the very same agreement.

11. Referring to the judgments and decrees which were sought to be declared to be not binding on the rights of the plaintiffs, i.e. the ones dated 19.11.2003 and 11.10.2005, the learned Civil Judge found that a plea was specifically taken by the plaintiffs, that the thumb impressions of plaintiff Chalti Devi had been fraudulently obtained in the compromise deed dated 18.03.1983.

On a reading of the plaint filed in the previous *lis*, resulting in the decree dated 19.11.2003 (Ex.D1 in the present *lis* before the Civil Judge), the Civil Judge observed that in view of the above contention, the compromise itself was doubted by the plaintiffs.

On the aforesaid finding, it was held that the plaintiffs could not therefore claim their right under Section 14(1) of the Hindu Succession Act, on the basis of the said compromise. (Obviously, as possession is an essential condition to claim a right under Section 14, it would seem that the Court inferred that the possession of the suit land, claimed by the plaintiffs, was on the basis of the said compromise deed, and since they doubted the compromise itself, their possession was not proved).

12. Further considering the claim under Section 14(1) of the Act of 1956, that Court held that Section 14(2) of the Act lays down the limitations to the operation of sub-section 1 thereof, inasmuch as, the right conferred on a female Hindu, under Section 14(1) would not apply, under sub-section (2), to any property acquired by her by way of a gift or under a will, or any other

instrument or under a decree or order of a Civil Court, or even by an award by which a restricted estate is conferred upon her.

Hence, while holding that neither had it been proved that the suit property was ancestral property in which the plaintiffs had an inheritable right, nor could it be conferred upon them by way of absolute ownership, even under Section 14(1) of the Act of 1956, the claim of the plaintiffs was negated.

13. The claim of the plaintiffs was equally negated by that Court on the touchstone of Order 2 Rule 2 of the Code of Civil Procedure, 1908. It was held that in Suit No.355 of 1993, the plaintiffs had, as already noticed, taken a specific plea, that the thumb impressions of Chalti Devi were obtained fraudulently on the compromise deed dated 18.03.1983; hence, the earlier suit (having been based upon a challenge to the will of Ram Sarup and a denial of the compromise deed of 1981), another suit on the same cause of action, taking a different plea, i.e. under Section 14 of the Act of 1956, was not maintainable.

Equally, the suit would be barred on the principle of *res-judicata*, under Section 11 of the Code itself, as first, a suit was filed leading to the alleged compromise and decree dated 18.03.1983, after which a second suit was filed in the year 1993, claiming title to the suit property on the basis of a family partition, denying the terms of compromise and thereafter, the third suit was filed, seeking title to the property under a different provision of law.

Referring to the observation of the first appellate Court in the

previous round of litigation, i.e. in the judgment dated 11.10.2005 (arising out of Civil Suit No.355 of 1993), to the effect that had the plaintiffs filed the suit basing their claim under Section 14 of the Act of 1956, that would be decided as and when the controversy arose, it was noticed that even in that judgment, the Court had observed that plaintiff No.1 had been given a limited estate, but had not considered the issues of constructive *res-judicata*, estoppel and the bar under Order 2 Rule 2 CPC.

14. Consequently, holding that the plaintiffs were not entitled to the suit property either in terms of Section 14 of the Hindu Succession Act, nor on the contention that it was ancestral property, it not having been proved to be so and further, in view of the the bar opertaing under Order 2 Rule 2 CPC, the suit of the plaintiffs was dismissed.

15. In the first appeal filed by the plaintiffs (with plaintiff No.1 Chalti Devi shown to have died by the time the judgment in that appeal was delivered), the learned District Judge, Sonapat, observed that the foundation of the present *lis* was based upon the observation made by the first appellate Court in the previous round of litigation, i.e. in the judgment dated 11.10.2005 (Ex.D16), to the effect that any right of Chalti Devi, which ripened into a full onwership by virtue of Section 14(1) of the Act of 1956, would be determined as and when the controversy would arise. Hence, it was contended by the plaintiffs that since that plea was not taken in the previous round of litigation but was duly noticed by the Additional District Judge in the first appeal in that round, therefore, the next round of litigation, i.e. the present one, was instituted seeking fructification of such right, since

the occasion had now arisen, as claimed.

16. Negating the above claim, it was held that the parties were actually in litigation since the year 1982 and when the plaint, Ex.D4, was filed on 17.08.1982, Chalti Devi had claimed that the property in dispute was the self-acquired property of Ram Sarup (with no dispute that the property in question in that suit and the present suit was the same). They had also claimed that the father of the appellant, Pehlada, had actually died in the year 1954, though in their replication, the plaintiffs had denied that and had stated that he had died after the Act of 1956 came into effect. (However, during the course of arguments, before the appellate Court, it was admitted that he had actually died before 1956 and as such there was no dispute on that fact).

The contention that plaintiff No.2 not being a party to that litigation, would not be bound by the result thereof, was also negated by the first appellate Court, on the ground that she was actually arrayed as defendant No.17 in that *lis* and the suit was eventually decided on the basis of a compromise dated 18.03.1983 (Ex.D10) and on the basis of the statements of the parties (Exs.D11 and D12 in the present suit before the Civil Judge).

Hence, with no claim having been raised in the first round of litigation in 1982 that the property was either ancestral or even Hindu Undivided Family property and in fact, a contrary averment of it being the self-acquired property of Ram Sarup having been made, it was held that then, even in the suit instituted in 1983, a plea based on the property being

ancestral in nature, could not have been raised.

In fact, in that suit, the plaintiffs had sought a decree of declaration to the effect that they are owners in possession of the suit land and that the will in favour of the defendants, dated 25.02.1987 and the compromise and decree dated 18.03.1983, are illegal and based upon a fraud, because of which the plaintiffs were not bound by the said compromise, or the decree. The plaintiffs had also claimed that Ram Sarup had divided the suit property measuring 135 kanals and 16 marlas between his six sons 20 years earlier, giving 28 kanals and 9 marlas to each of them but thereafter had given his own share to his surviving sons, though a civil Court decree dated 07.03.1981.

17. Further, it was found that the decree dated 07.03.1981 was "practically challenged" vide the suit dated 16.08.1982. However, Ram Sarup had retained a 1/6th share with himself, giving his surviving five sons also a 1/6th share each, by way of the decree dated 07.03.1981, leaving out the plaintiffs. Yet, the plaintiffs raised their claim for the first time in respect of the said property (as held by the lower appellate Court), in the suit instituted in 1983, decided vide judgment dated 19.11.2003.

18. Next, it was held by the first appellate Court that the judgment dated 07.03.1981 having become final, with no specific challenge to the family partition on the basis of which the said decree was passed, dividing the property in 1/6th shares, the share retained by Ram Sarup, in any case had to be treated to be his self-acquired property, he not having given any share of it to the widow and daughter of his pre-deceased son, Pehlada.

Yet further, the decree dated 07.03.1981 not even having been challenged in the suit instituted in the present *lis*, no observation made by the appellate Court in the previous round of litigation, i.e. in the judgment dated 11.10.2005, could enure to the benefit of the plaintiffs, they never having raised any objection to the decree dated 07.03.1981.

19. Finally, further discussing in great detail, the effect of each round of litigation, the learned first appellate Court observed that instead of challenging the judgment and decree dated 11.10.2005, by way of a second appeal, the plaintiffs chose to institute yet another suit, this time basing their claim under Section 14 of the Act of 1956, simply on the observation made by the first appellate Court in the previous round of litigation (without ever having raised that plea earlier).

20. Thus, on the merits of whether the suit property was ancestral/co-parcenary or not, it was held that with the plaintiffs admitting the decree dated 07.03.1981, there being a severance of the suit property, the 1/6th share retained by Ram Sarup became his absolute property, which he had a right to will away to any person. Otherwise also, it was held that no "meaningfull evidence" was led to show that Ram Sarup was actually the Karta of co-parcenary property which would devolve upon the plaintiffs.

Yet further, holding that even if it was accepted to be co-parcenary property, with Ram Sarup as the Karta, the plaintiffs would still acquire only a life time interest in it and not a perpetual interest.

Further, again holding that the plea of Section 14 of the Act of 1956, not having been taken in the previous round of litigation, and as such,

the principle of *res-judicata*, as also the bar under Order 2 Rule 2 CPC, would apply, the first appeal was dismissed.

21. Before this Court, Mr. N.S.Dalal, learned counsel for the appellant, very vehemently and at pains argued that on merits the appellant has, what he contends to be, a fool proof case, inasmuch as, if an application under Order 41 Rule 27 CPC had been allowed by the learned lower appellate Court, thereby enabling the appellant-plaintiff to lead additional evidence in the form of excerpts and other revenue records prior to the year 1947, to prove that the suit property was ancestral property, then by virtue of Section 6 of the Hindu Succession Act, 1956, the applicant-plaintiff would have an indefeasible right in the suit property, which is a 1/6th of the share of the ancestral property falling to her father, the late Pehlada, who had died in the year 1954 (but with her grand-father, Ram Sarup, having remained alive till at least 1988). (Though in the judgment of the learned Civil Judge, initially it has been stated that Ram Sarup died in 1987, however, learned counsel upon query to him, has submitted that he possibly died in the year 1988, or in any case well before 2005, though after 1956).

22. Having considered the above, though the issue of a family of two surviving women, being the widow and daughter of a son of land owner, being left without any property by the land owner, does jar the conscience of the Court, however I am unable to agree with the contention of learned counsel, because with this being the third round of litigation, any application filed under Order 41 Rule 27 CPC, would naturally have been dismissed by an appellate Court, such evidence never having been produced

by the plaintiffs in the suits earlier filed by them.

Even otherwise, the plea of the property being ancestral, has been found to be wholly contradictory to the plea taken by the late 1st plaintiff in the suit instituted by her in 1982, wherein she specifically is found to have pleaded that it was self-acquired property of Ram Sarup. This is also other than that fact that the said plea was again available to her at the time when she instituted the second suit in 1993.

23. This is also apart from the fact that the plaintiffs have obviously taken different pleas in the three different suits filed by them between 1982 till 2007, i.e. the last being the suit out of which the present second appeal arises.

In the suit filed in 1982 by the mother of the present appellant, i.e. plaintiff No.1, as per the finding of the learned lower appellate Court, the plea taken in that was that the suit property was the self-acquired property of Ram Sarup. That suit was eventually disposed of on a compromise between the present appellants' mother cum co-plaintiff, Chalti Devi, and Ram Sarup, leading to the decree dated 18.03.1983, granting a life interest to plaintiff No.1 (the mother of the present appellant), to maintain herself during her life time.

Undoubtedly, in the second round of litigation, i.e. in the suit instituted in the year 1993, the compromise was challenged, stating that it was based upon a fraud, further challenging the will of Ram Sarup, by which he bequeathed his 1/6th share in the suit property, (such 1/6th share being the only part of the suit property remaining in his possession after the

decree dated 07.03.1981), to his surviving five sons, to the exclusion of the plaintiffs. No plea with regard to either the suit property being ancestral in the hands of Ram Sarup, nor with regard to any right under Section 14 of the Act of 1956, was pleaded in the second round of litigation either, as can be seen from the judgments of the Courts below.

Thereafter, simply on the basis of what was observed by the first appellate Court in the previous round of litigation, i.e. in the appeal arising from the suit filed in 1993, the plaintiffs chose to take a plea under Section 14 of the Hindu Succession Act, in a third round of litigation, i.e. in the suit instituted in the present *lis*. The said observation made by that Court, in its judgment dated 11.10.2005, is as follows:-

"This is a different matter if the rights of Smt. Chalti (appellant No.1) have ripened into full ownership in the said land by virtue of Section 14(1) of the Hindu Succession Act and the question would be determined as and when the controversy would arise."

24. As to why that observation was made is not understandable, inasmuch as, firstly, the life interest conferred upon plaintiff No.1 was so conferred by a consent decree passed in the year 1983. Hence, whether such consent decree was actually obtained by fraud as contended, or whether it was based upon a genuine compromise, that issue was alive even at the time of filing of the suit in 1993. Hence, if any such plea, on the basis of possession of the plaintiffs, or either of them, of the suit land, was to be taken in terms of Section 14(1), then such plea was fully available at the time of filing of the second suit in 1993. The observation made by the

learned Judge in that judgment, that the question would be determined "as and when the controversy would arise", can only be construed to mean that he meant that once plaintiff No.1, Chalti Devis' life interest expired with her death. Obviously, other than the fact that such an observation was not founded on any sound principle, such life interest either having been created by the compromise of 1983, or if that decree was to be set aside being based upon a 'fraudulent compromise', then by virtue of the fact that by Ram Sarup having willed away the property, the right conferred under Section 14(1) would have been deemed to have been taken away under Section 14 (2).

Therefore, if the will was being challenged, alongwith the decree of 1983, in the previous suit instituted in 1993, then the claim under Section 14(1) of the Act of 1956, was in any case available to the plaintiffs at that time also.

Hence, I find no error in the judgment of the learned Courts below, in holding that a third suit instituted, taking for the first time therein, a plea based upon a right arising under the aforesaid provision, would be barred under Order 2 Rule 2 CPC, as in any case, such plea was always available to the plaintiffs at least since 1993, or ever since they claimed possession of the suit property prior to that date.

25. Consequently, finding no error in the judgments of the Courts below, the appeal is dismissed *in limine* but with no order as to costs.

June 02, 2016

dinesh

**(AMOL RATTAN SINGH)
JUDGE**