

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

RSA No. 4956 of 2015 (O&M)

Date of Decision: 12.02.2016

Mohinder Singh (deceased) through his LRs and another

.....Appellants

Vs.

Laxmi Bai and another

.....Respondents

CORAM: HON'BLE MR. JUSTICE AMOL RATTAN SINGH

Present: Mr. Sandeep jasuja, Advocate,
for the applicants-appellant.

AMOL RATTAN SINGH, J.

This is the second appeal filed by the plaintiffs with plaintiff No. 1 now being represented by his five legal representatives (in place of appellant No. 1).

2. The suit was filed seeking declaration against the respondents (with consequential relief for permanent injunction), to the effect that the appellant-plaintiffs are exclusive owners in possession of 15 marlas of land described in detail in the plaint, situated in village Padli, Tehsil Nuh, District Mewat, as per the '*Jamabandi*' for the year 2001-02.

The appellants are the sons of Wariyam Singh, with both the respondents being their sisters.

As per the plaint filed, Wariyam Singh is stated to have had no source of income, and during his life time, the appellants got their sisters married. It was further contended that

on 13.05.1974, the appellants purchased some land out of their own money, vide sale deed bearing '*Vasika*' No. 160, though the land was purchased by them in the name of their father. That land is the suit property subject matter of the present appeal. The father of the appellants and respondents (Wariyam Singh), is stated to have died on 20.07.1998.

The land was earlier stated to have been mortgaged in favour of Harbans Lal and Ashwani Kumar, for a total sum of Rs. 14,000/-, which was redeemed by the appellants on 27.08.2007. However, as per the appellants, the respondents-defendants, in collusion with each other, fraudulently got a mutation entered in their name on 08.04.2008, qua the suit land, by which they were shown to be owners in possession of 1/4th share each, along with the appellants.

Thus, the appellants also sought that the said mutation bearing no. 960 be declared to be null and void and the respondents be restrained from alienating the land further.

3. In the written statement filed by respondent No. 1, she, in her preliminary objection admitted that she and her sisters had no concern with the said property and in fact, admitted the entire claim of the appellants, except to the extent that she had threatened to alienate the property. She also submitted that she had no objection to the suit being decreed in favour of the appellants.

However, respondent No. 1 was thereafter, proceeded against *ex parte*, vide order dated 20.11.2012.

4. Respondent No. 2 filed a separate written statement opposing the suit on the preliminary ground of non-maintainability and stated thereafter, that their father had bequeathed his ownership rights, on account of occupancy rights in favour of the respondents-defendants.

An alternative plea was taken that the respondents have become owners by way of adverse possession, because appellant No. 2, upon entering the witness box in another case titled **Dano Bai vs. Gobind Singh**, had admitted the possession of Dano Bai (respondent No. 2).

On merits, it was denied that the appellants are exclusive owners and in fact it is the respondents who were owners, in possession thereof. It was denied that the father of the parties did not have any source of income and further, that respondent No. 2 had rendered service to her father, who used to live with her up-to to his last breath.

It was yet further contended that the sale deed dated 13.05.1974 did not give any right to the appellant and that the land had not been purchased by the appellants with their money.

5. Consequently, the following issues were framed by the learned Civil Judge (Junior Division), Nuh, in the suit filed by the appellants-plaintiffs.

"1. Whether the plaintiffs are entitled to declaration? OPP

2. Whether the plaintiffs are entitled to injunction, if any? OPP

3. Whether the suit of the plaintiffs is not maintainable? OPD

4. Whether the plaintiffs have concealed the true and material facts from the Court? OPD

5. Whether plaintiffs have no cause of action to file the present suit? OPD

6. Relief."

6. The appellants examined three witnesses, of which appellant No. 2 was the first; one Noor Mohammad, appeared as PW2 and Hasnu as PW-3. All these witnesses tendered their respective affidavits in evidence, in support of which they testified in terms of the pleadings in the plaint.

Documentary evidence in the form of the sale deed dated 13.05.1974, one 'Vasika' No. 1377 dated 26.02.1981, 'Vasika' No. 700 dated 17.06.1981 and a photo copy of the mutation register, a photo copy of the death certificate of Wariyam Singh and photocopies of the 'Jamabandis' (Record of Rights) for the year 2005-06, were also tendered in evidence, as exhibits.

The judgment and decree of the learned Civil Judge (Senior Division), Nuh, dated 24.11.2011, titled as **Dano Bai** vs. **Gobind Singh** was produced as Mark 'A'.

7. In defence, respondent No. 2 examined one Nihal Singh as DW-1 and Ajad son of Somi Khan as DW-2. These witnesses also tendered their affidavits in evidence to support the written statement of respondent-defendant No. 2.

A photocopy of a special power of attorney, a certified copy of a 'Rapat Rojnamcha', a certified copy of register 'Intkal' (mutation) and a photocopy of a certificate dated 03.01.1977

bearing no. 116382, were also tendered as documentary evidence.

8. The appellants largely relied upon the mortgage deed bearing '*Vasika*' No. 1377 dated 26.02.1981 (Ex. P-2), by which the land was mortgaged in favour of one Harbans Lal, by Wariyam Singh, as already noticed.

A suit for permanent injunction filed by respondent No. 2, Dans Bai, against the appellant-plaintiff No. 2, Gobind Singh, in respect of rect No. 18///18, which was claimed to be in her possession and permanent injunction was consequently sought against the second appellant, was also sought to be relied upon. The said suit is stated to have been dismissed on 24.11.2011 and as such, was relied upon [though not exhibited the learned Civil Judge (Junior Division)], and consequently, it was submitted that respondent No. 2 obviously was not in possession of the suit land.

The witness examined by respondent No. 2, as DW-2, stated that he had seen Wariyam Singh in possession of the suit land for 40 years and filed his affidavit to support the contention.

As regards the judgment and decree dated 24.11.2011, it was stated that it was in respect of some other property and further, an appeal was pending against the said judgment.

Other than that, a plea with regard to the rights of daughters to succeed under Section 6 of the Hindu Succession Act, 1956 (for short 'the Act') was relied upon by respondent

No. 2.

9. The learned Civil Judge first held that the appellants had failed to prove by any evidence on record that the suit property was purchased by them from their own money. Thereafter, he went on to uphold that in terms of Section 6 of the Act, after the amendment (in force with effect from 09.09.2005) daughters of a co-parcener have acquired equal rights as the sons of a co-parcener. He went on to reproduce sub-section (1) of Section 6 of the Act as per the amended provisions.

Thereafter, it was held by that Court that it was not the case of the appellants that the suit land stood partitioned by them before 20.12.2004. Hence, with no partition having been effected before that date, as provided in the proviso to sub-section (1) of Section 6 of the Act, the effect was that daughters and sons are held entitled to inherit the property of their father in equal shares.

Issue No. 1 was, thus, decided in that manner by the learned Civil Judge (Junior Division), in favour of the respondents, against the appellant-plaintiffs.

10. On the issue of entitlement of the appellants through an injunction (issue No. 2), it was held that the appellants have failed to prove their possession of the suit property or that the respondents had no right, title or interest over it and yet further, it was held that possession of one co-parcener is deemed to be possession of all co-parceners, as each co-parcener holds the property for and on behalf of others.

11. Other than that, it was held that even in the cross-examination of PW1 (appellant-plaintiff No. 2), he had admitted the possession of respondent-defendant No. 2 over the suit land despite trying to thereafter, improve upon the said statement.

12. Holding as above, the suit of the plaintiffs-appellants was dismissed, on the ground that they neither could deny the title of the respondents, nor could they prove themselves to be in sole possession, to the exclusion of specifically respondent No. 2 and further, in view of the provisions of Section 6 of the Hindu Succession Act, 1956.

13. In the first appeal filed by the appellants, the learned Additional District Judge, Mewat, from the evidence as was led before the Civil Judge, found that factually only 10 kanals-10 marlas, of the suit land measuring 15 kanals-15 marlas, had been purchased by the father of the appellants and respondents, and the remaining $\frac{1}{3}^{\text{rd}}$ of the land, consisting of 5 kanals-5 marlas, was purchased by one Hukam Singh son of Sher Singh.

However, the first appellate Court agreed with the finding of the lower Court that the appellants had not been able to prove that the land had been purchased from their own income in the name of their father, as other than their bald statement to that effect, no evidence in support thereof was produced by them. It was further found that even in the sale deed (dated 13.05.1974), there is no recital to the effect that for the land purchased to the extent of $\frac{2}{3}^{\text{rd}}$ and $\frac{1}{3}^{\text{rd}}$ share, by Wariyam Singh and Hukum Singh respectively, for a total consideration of

Rs. 2,850/-, any part of that consideration was paid by the sons of Wariyam Singh, i.e. the appellants.

Hence, it was held that Wariyam Singh, father of both the parties, was absolute owner of $2/3^{\text{rd}}$ share of the suit land, as also reflected in the '*Jamabandi*', Ex. P-6.

Further holding that the property being the self acquired property of Wariyam Singh, Section 6 of the Act of 1956 was not applicable, as it was not co-parcenary property. However, since Wariyam Singh died intestate on 20.07.1998, as per his death certificate, Ex. P-5, Section 8 of the Act would apply to the suit property, to the extent of $2/3^{\text{rd}}$ share thereof, as regards its devolution upon the parties to the lis. All of the parties being Class I heirs of the late Wariyam Singh, at the time of his death in the year 1998, with no other Class I heir surviving, the learned first appellate court held that the revenue authorities had committed no error in sanctioning mutation No. 960 (Ex. P-4), showing the property divided in equal shares amongst all for children of Wariyam Singh, i.e. the appellants and the respondents.

14. Consequently, agreeing with the final conclusion of the learned lower Court, the first Appellate Court also dismissed the appeal filed by the appellant-plaintiffs.

15. Before this Court, learned counsel for the appellants, though did not draw much attention to the fact that respondent No. 1 had surrendered the suit land in favour of the appellants, submitted that since Section 6 of the amendment Act could not

be made applicable to a succession which opened before 20.12.2004, the reasoning adopted by the learned Civil Judge was wholly erroneous, and further, since respondents cannot be treated to be co-parceners in the land, the succession having opened before the amendment to Section 6 came into force, w.e.f. 09.09.2005, the daughter had no right to succeed to the property.

16. He also relied upon a judgment of the Madras High Court in **Valliammal vs. Muniyappan** (2009) 5 RCR (Civil) 261, to submit that the provisions incorporated by the amendment of 2005, in the Act, cannot apply to property, the succession to which opened prior to the date of amendment in the Act.

17. Having considered the aforesaid arguments of Mr. Sandeep Jasuja, learned counsel for the appellants and the judgments of the Courts below, it is obvious that the learned Civil Judge (Junior Division) wholly misapplied the provisions of Section 6 of the Act to the case in hand, in holding that the appellants and respondents were all coparceners in the property, even while holding that the proviso to sub-section (1) of Section 6 did not apply to the case.

That Court was in complete error in interpreting the provisions of Section 6 in a manner to say that where partition of a property had not been effected before 20.12.2004, the daughters would still be coparceners in such property.

Strangely, the learned Civil Judge did not appreciate the fact that before the amendment of the Hindu Succession Act,

in 2005, daughters could not be coparceners even in ancestral property.

18. That having been said, the reasoning adopted by the learned lower Appellate Court, to the effect that the property not having been proved to have been purchased by the appellants with their money, and it being the self acquired property of the father of the parties to the *lis*, it would devolve equally upon all his Class I heirs, in terms of Section 8 of the Act, the succession having opened in 1998, i.e. after 1956.

19. Though of course, respondent No. 1 has abandoned her right in favour of her brothers, i.e. the appellants, and in fact in her written statement admitted their entire plaint, to the effect that it was property purchased by them in their fathers' name and later redeemed them by paying off the mortgage entered into by their father; however, I am in agreement with the learned lower appellate Court, that there is no evidence led whatsoever to that effect, by the appellants.

Hence, the property being a self acquired property of the father of the appellants and the respondents, it had to devolve in terms of Section 8 of the Act, according to which, property of a male Hindu dying intestate, shall devolve firstly upon the heirs being the relatives specified in Clause I of the Schedule and thereafter, if there be no heirs of Class I, then in the manner provided by Clauses (b), (c) and (d) of Section 8 of the Act.

In the present case, the appellants and respondents all

being heirs of Class I of the late Wariyam Singh, being his two sons and two daughters, respectively, the property purchased by him, i.e. $2/3^{\text{rd}}$ of the suit land, naturally would devolve equally upon all of them, there being no will even claimed, to the contrary.

20. It may be also said here that no issue has been raised with regard to the finding of fact recorded by the learned lower Appellate Court that, as a matter of fact, the share of Wariyam Singh, father of the parties to the *lis*, was only 10 kanals-10 marlas of the suit land, and not the entire 15 kanals-15 marlas.

21. In view of what has been discussed hereinabove, I find no merit in the appeal, which is, consequently, dismissed *in limine*, with no orders as to costs.

CM Nos. 11831-C-2015 and CM No. 11832-C-2015

In view of the fact that the appeal has actually been dismissed on merits, without notice having being issued, the question of condoning the delay of 198 days in re-filing the appeal and a 5 days in filing the appeal is rendered academic.

**(AMOL RATTAN SINGH)
JUDGE**

February 12, 2016
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