

IN THE HIGH COURT OF PUNJAB AND HARYANA AT
CHANDIGARH

R.S.A.No.2120 of 1986 (O&M)

Date of Decision: November 28th, 2017

Smt.Prem Wati

...Appellant

Versus

Jharkhandi (since deceased) through L.Rs

...Respondents

CORAM: HON'BLE MR.JUSTICE AMIT RAWAL

Present: Mr.Amit Jain, Advocate,
for the appellant.

Ms.Alka Sarin, Advocate,
for the respondents.

AMIT RAWAL, J.

CM No.10551-C of 2011

1. Prayer in the application is for impleading the L.Rs of Premwati appellant, who is stated to have died on 25.6.1992.
2. For the reasons mentioned in the application, which is supported by an affidavit, the persons mentioned in Para 1 of the application are impleaded as L.Rs of Premwati appellant for the purpose of prosecuting this appeal only.
3. CM stands disposed of.

R.S.A.No.2120 of 1986

4. Appellant-defendant is in Regular Second Appeal against the concurrent findings of fact, whereby the suit filed by the plaintiff-respondent claiming himself to be Jharkhandi grand-son of Dal Singh and son of Nau Nihal Singh for possession of the suit property mentioned in

paragraph 1 of the plaint, had been decreed by both the Courts below.

5. Before I could advert to the rival contentions of the learned counsel representing the parties, it would be appropriate to give brief preface of the matter.

6. Plaintiff-respondent instituted the suit, aforementioned, on 3.5.1982 claiming possession on the premise that on 30.10.1974, defendant Premwati had obtained mutation No.1668 sanctioned in her favour in collusion with revenue officials and amended vide order dated 19.9.1975. It had further been averred that the revenue authorities were misinformed about the death of the plaintiff on 19.8.1964, whereas he was alive by alleging that he was born from the loins of Batto wife of Nau Nihal Singh in the year 1947. The relations of Batto and Nau Nihal Singh were strained and Nau Nihal Singh turned out Batto from his house. He thereafter entered into a second marriage with Premwati-defendant. On the other hand, Batto entered into a Karewa marriage with Harchandi son of Parshadi, resident of Village Boraka, Tehsil Palwal, District Faridabad in the year 1950 or 1951. The suit land had been given to the plaintiff, by his grand-father Dal Singh after his birth for his livelihood and, therefore, the aforementioned mutation was liable to be set-aside on the following grounds:-

- a) Plaintiff had been shown to be owner in possession of the suit land in the jamabandis for the year 1954-55, 1960-1964, 1969-70 and 1974;
- b) Defendant was not the real mother of the plaintiff;
- c) No notice was given by the revenue authorities for making enquiry with regard to the death of the plaintiff;
- d) Mutation had been procured by concealing material facts;

e) Defendant was step-mother of the plaintiff as relation of her husband Nau Nihal Singh had gone strained with the mother of the plaintiff.

7. The aforementioned suit was contested by the appellant-defendant by filing written statement raising as many as six preliminary objections on the premise that plaintiff is not Jharkhandi but Pahlad. The suit was not within limitation, much less was liable to be dismissed being false and frivolous. On merits, it was stated that plaintiff, in fact, was Pahlad son of Harchandi and had no right, title or interest in the suit land. Jharkhandi son of the defendant was born from the loins of Nau Nihal Singh son of Dal Singh, who unfortunately died on 19.8.1964 at Village Shanker Garhi, Tehsil Mant, District Mathura, i.e., at the residence of his maternal grand-father and, therefore, he could not have been alive. The description of the pedigree table was emphatically denied.

8. From the facts stated in Paragraph 3 of the written statement, it was narrated that Batto had married to Nathi son of Sullar resident of Village Jatoli and after his death, she entered into Karewa marriage with Harchandi son of Parshadi, resident of Village Boraka, Tehsil Palwal. Batto became unchaste after the death of her previous husband Nathi and Nau Nihal Singh, the husband of the defendant, developed illicit relations with her. Nau Nihal Singh was a man of questionable habits and in this regard, Dal Singh, the father of Nau Nihal Singh and grand-father of Jharkhandi, out of annoyance, gifted away some agricultural land to Jharkhandi in the year 1950. Thereafter, on 19.8.1964 he died. Batto had never been the wife of Nau Nihal Singh, husband of the defendant.

9. It was also stated that, in fact, the proceedings for partition

sought by Jharkhandi son of Premwati were filed by none else, but Pahlad son of Harchandi and vide order dated 18.5.1967, the aforementioned application for partition was dismissed by the revenue Court holding that the petition was filed by Pahlad and not Jharkhandi and relegated the parties to approach the Civil Court for the purpose of claiming title, whereas the suit was filed in 1982, thus, was barred by limitation.

10. The aforementioned assertions in the written statement were in routine denied in the replication. Since the parties were at variance, the trial Court framed the following issues:-

1) Whether Jharkandi grand son of Dal Singh and son Nau Nihal Singh is still alive and the present suit is brought by him?

OPP.

2) Relief.

11. Mr.Amit Jain, learned counsel representing the appellant-defendant submitted the present appeal involves the substantial questions of law as both the Courts below have failed to advert to the cross-examination of the plaintiff, much less the documents, particularly order dated 18.5.1967 (Ex.DW4/D) passed by the Revenue Court which had attained finality. From the cross-examination of Jharkhandi, it surfaced that his name in the voter card was actually Pahlad and his wife's name Mohna. The voter list, Ex.DW4/C, also proved his father as Harchandi. School certificate (Ex.DW3/A), which was not objected to, proved him to be Pahlad son of Harchandi. No evidence qua the marriage of Batto with Nau Nihal Singh has been led or brought on record and, therefore, there was no compliance of the provisions of Section 50 of the Indian Evidence Act. If at all, he was alive, there should have been ration card in his name and many other

documents to prove that he was actually Jharkhandi and had not died.

12. Referring to the statements of witnesses examined by the plaintiff, he submitted that PW-2 Mohinder Singh was none else but the uncle, i.e., Chacha (brother of Dal Singh). PW-4 Bhola Ram Lambardar in cross-examination admitted that he did not attend the marriage of Batto with Nau Nihal Singh. PW-6 Moti Ram was also none else but the brother of Batto. PW-7 Harchandi also admitted that plaintiff was called as Pahlad. He admitted that when Batto came to him, only Jharkhandi was with her. He did not make any effort to get him admitted in any school. The factum of ration card was admitted by him, but he feigned ignorance regarding the name being reflected in the voter list. He also admitted that Premwati was the wife of Nau Nihal Singh. All these factors, if read together, there was no occasion for the Courts below to decree the suit.

13. The Courts below heavily relied upon the statement of Nau Nihal Singh by observing that his face resembled with Jharkhandi. Such an observation in the absence of cogent and direct evidence was not sufficient to decree the suit and, thus, urged this Court for allowing the appeal and setting-aside the judgments involving the following substantial questions of law:-

- i) Whether the judgments of the Courts below suffer from illegality and perversity in view of the averments made here-in-above, particularly non-reference and non-advertence to the cross-examination of PW-1 and admission of Harchandi PW-7 in cross-examination;
- ii) Whether the plaintiff had been able to prove himself as Pahlad as Jharkhandi in the absence of any evidence.

14. Per contra, Ms.Alka Sarin, learned counsel for the respondent-plaintiff, submitted, that the concurrent findings of fact cannot be interfered with until and unless the direct and cogent evidence had not been adverted to, resulting into perversity. Both the Courts below have been cogent and consistent, for, had examined the oral and documentary evidence threadbare, therefore, there was no occasion for the Courts below to form a different opinion than the one arrived at. The entire evidence was recorded by the trial Judge in his own hand right from the first witness of the plaintiff to the last person put in the witness box by the defendant.

15. She further submitted that the provisions of Section 50 of the Indian Evidence Act have been proved to the hilt through the testimony of the witnesses, who unequivocally stated that Jharkhandi son of Batto was born from the wedlock of Nau Nihal Singh. Harchandi deposed that Jharkhandi was born in 1947 from Nau Nihal Singh, but due to the strained relations, Batto left Nau Nihal Singh and performed Karewa marriage. No documentary evidence had been placed on record to prove that Jharkhandi had actually died on 19.8.1964. In case he was born in 1947, his age could have been "17", whereas in the school certificate was written as "22". Statement of DW-1 had been found to be worth of any reliance on account of the fact that death of Jharkhandi was registered at the village as no proof of treatment of the child from any Doctor or Hakim had been proved on record. Since the defendant admitted the birth of child out of the relationship, it is irresistibly proved that the plaintiff was actually Jharkhandi, born out of the loins of Batto wife of Nau Nihal Singh.

16. It was also argued that there is no force in the submission of the learned counsel for the appellant that the suit was barred by limitation on

the premise, that limitation would start only when the right was infringed. In support of her submissions, relied upon the judgment rendered in **Daya Singh & Anr. Versus Gurdev Singh (Dead) by L.Rs & Ors., 2010 (1) Supreme To-day 14.** As regards the interference to the concurrent findings of fact, learned counsel relied upon the ratio decidendi culled out in **Sheel Chand Versus Prakash Chand, (1998) 6 SCC 683 (Para 7), Municipal Committee, Hoshiarpur Versus Punjab State Electricity Board and others, (2010) 13 Supreme Court Cases 216 (Paras 16 & 29)** and urged this Court for dismissal of the appeal by upholding the judgments under challenge., much less no substantial question of law is involved.

17. I have heard the learned counsel for the parties, appraised the paper book and is of the view that the substantial question of law framed above are liable to be answered in “favour” of the appellant-defendant not for one reason but many other reasons also.

18. Both the Courts below have failed to advert to the cross-examination of PW-1. It is settled law that when the trial Court fails to advert to the cross-examination of a witness, the Lower Appellate Court, being the last Court of law and fact, is enjoined upon an obligation to notice and refer each and every documentary evidence, much less also draw the points for determination as prescribed under Order 41 Rule 31 of the Code of Civil Procedure;

19. I would be committing a fallacy in case I do not advert to the cross-examination of PW-1 as he unequivocally, admitted that his name in the voter list was Pahlad, but also called as Jharkhandi and his wife's name was/is Mohna and father's name as Harchandi. The translation of relevant portion of his cross-examination reads as under:-

“Name of my wife is Mohna. The name of the father of Harchandi was Parshadi. It is correct that I, Mohna and Harchandi live in village Boraka where our vote has been registered. Our vote has not been registered in Village Jatoli neither any ration card, which in fact had been made at Village Boraka. The Karta of our house is Harchandi. It is correct that my vote has been made in the name of Pahlad in village Boraka. I am called as Pahlad. I am also called Jharkhandi. It is correct that regarding this land, I had filed a petition for partition before the Tehsildar in 1966 which was dismissed.”

20. PW-3 Mohar Singh in cross-examination admitted that plaintiff is also called as Pahlad. For the sake of brevity, his translated cross-examination reads as under:-

“I do not remember the date and year of the birth. He is also called as Pahlad.”

21. PW-4 Bhola Ram, to a specific question in the cross-examination, stated that I do not know as to how many children out of the loins of Harchandi and Batto were born. PW-7 Harchandi, in examination-in-chief, submitted that he knows Jharkhandi and Nau Nihal. Mother of Jharkhandi is Batto and father Nau Nihal Singh. Batto, in the year 1952-53, had performed Karewa marriage with him and out of that relationship, two daughters were born and no son was born, but in cross-examination admitted that a ration card is prepared, but feigned ignorance whether the plaintiff's name was recorded in the ration card and as well as registration of name in the voter list. The translation of his vernacular cross-examination reads thus:-

“Our ration cards are now prepared. I do not remember whether plaintiff's name was recorded in the ration card and also with regard to his name in the voter list.”

To a specific question in the cross-examination, he submitted that the name of the wife of Nau Nihal Singh was Premwati, i.e., defendant.

22. The Courts below had relied upon the admission of DW-4 Nau Nihal holding that face of Jharkhandi was similar to him. The witness further stated that face of lawyer resembled him and not that of Jharkhandi, but such admission has not been adverted to. The Courts below should not have drawn the inference regarding the similarity of face of plaintiff alleging himself to be Jharkhandi with Nau Nihal Singh-DW-4 by ignoring the aforementioned evidence, extracted above.

23. Filing of the application before the revenue authorities to seek partition of the land is also an admitted fact. The order passed on the said application proved on record as Ex.DW4/D, which reads thus:-

“This is an application for partition filed by Shri Jhar Khandi s/o Nau Nihal Singh s/o Subedar Dal Singh against Nau Nihal Singh and others for the partition of land measuring 20 bighas 11 Biswas situated in village Hassanpur. Notices were issued to the respondents and they have filed an objection, that the question of title is involved and the partition cannot proceed till the question of title is decided by the competent court.

I have heard the arguments of the learned counsel of both the parties. The main points on which the respondents base their case are as under:-

1. The applicant is mis personifying himself. He is not Jharkhandi the applicant, but he is Pahlad s/o Har Chandi r/o village Boraka where illegal wife of Nau Nihal Singh is residing and has given birth to a son there from Harchandi. They have also filed a copy of the death register of village

Shankar Garhi District Mathura from which it is evident that Jharkhandi s/o Nau Nihal Singh aged 22 years resident of Hassanpur died on 19.8.1964. The respondents have also produced a copy of voters list of village Boraka, where Prahlad s/o Har Chandi is a voter at S.No.1375 House No.34. I have examined the applicant to-day. He has not been able to give the whereabouts of his mother, who is alive and is residing in village Boraka. He has not been able to give the name of his step mother, married wife of Nau Nihal Singh his father. As per statement of the applicant it is quite evident that he is trying to hide some facts which in the normal course should be known to him. The matter therefore really complicated and it is not fully proved beyond doubt that the applicant is Jharkhandi. The matter needs further investigation, which is not the function of Revenue Officer trying the partition suits.

The second objection raised by the respondents is that the applicant is not in possession of the land under partition. By the perusal of the Revenue record this objection is also established fact.

The third objection is that the gift made by the grandfather of the applicant in favour of the applicant is invalid. This objection is not established by the Revenue Record. Any way I hold that there is definitely a question of title and certain complications, which need further clarification and the Revenue Officer is not entitled to examine and give findings on those points.

I, therefore stay the proceedings u/s 117 of the Land Revenue Act and order the parties to get the question of title decided by the Civil Court.”

24. In my view, the plaintiff has miserably failed to prove that he

was actually Jharkhandi because in all the documentary evidence, had been shown as son of Harchandi and his wife as Mohna and in the death certificate Ex.DW4/B, which was not objected to, shown that Jharkhandi had died on 19.8.1964. The aforementioned evidence had not been controverted by any other documents to prove that the plaintiff was actually Jharkhandi and not Pahlad and as to whether he was born from the loins of Premwati wife of Nau Nihal Singh or from Batto. An attempt had been made to comply with the provisions of Section 50 of the Indian Evidence Act by examining the witness aforementioned, who, definitely would be interested one, for, as per cross-examination extracted above, had not been consistent and cogent with regard to the fact that plaintiff was actually Jharkhandi and not Pahlad. Rather Nau Nihal Singh admitted that plaintiff was called as Pahlad. Thus, in my view, the ingredients of Section 50 of the Indian Evidence Act have not been fulfilled to establish on record that the plaintiff was actually Jharkhandi. Thus, in my view, it is a fit case where concurrent findings can be interfered with, in view of the perversity as noticed above.

25. There is no dispute to the ratio decidendi culled out in the judgments relied upon, but the fact remains that non-advertance to the evidence both documentary and oral itself would result into perversity and, therefore, would be a substantial question of law.

26. As regards the suit being barred by law of limitation, I am in agreement with the contention of Ms.Sarin that cause of action only accrues when the right was infringed and, therefore, the suit cannot be said to be barred by limitation.

27. As an upshot of my findings, the substantial questions of law,

framed above, are answered in favour of the appellant-defendant and against the respondent-plaintiff. The impugned judgments are hereby set-aside. Resultantly, the suit is dismissed. Appeal stands allowed. Decree sheet be prepared accordingly.

November 28, 2017
ramesh

(AMIT RAWAL)
JUDGE

Whether speaking/reasoned

Yes/No

Whether Reportable:

Yes/No