

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

**RSA No.1625 of 1994 (O&M)
Decided on: 11.01.2017**

Karan Singh (since deceased) through his LRs and others
....Appellants

Versus

Bhagwani (since deceased) through her LRs
....Respondents

CORAM: HON'BLE MRS JUSTICE REKHA MITTAL

Present : Mr. C.B. Goel, Advocate
for the appellants.

Mr. D.K. Bhatti, Advocate
and Mr. Sandeep Sharma, Advocate
for the respondents.

REKHA MITTAL, J.

The present regular second appeal directs challenge against the consistent findings recorded by the Courts below whereby suit filed by Bhagwani (since deceased) now represented by her legal representatives was decreed by the trial Court vide judgment and decree dated 28.09.1991 and the findings recorded by the trial Court were affirmed in appeal by the District Judge, Sonapat vide judgment and decree dated 09.04.1994.

The facts relevant for disposal of the present appeal are that Bhagwani daughter of Sis Ram filed a suit for declaration claiming that she is the real sister of Mir Singh son of Sis Ram resident of Salimsar Majra, District Sonapat. It is averred that Mir Singh had two sisters namely Bhagwani (plaintiff) and Khazani who died about 3-4

years back. The plaintiff is the only reversioner/legal heir of Mir Singh. Lado – defendant started living with Mir Singh for the past sometime. Mir Singh was unmarried and owner of land measuring 111 kanals situated in village Salimsar Majra. He also had two houses and a *gher*. Mir Singh went missing two days prior to the last Diwali. She made efforts to trace him but failed. Mir Singh was last seen with Lado at Murthal Adda, G.T. Road. FIR No.951 dated 27.03.1983 was lodged under Section 364 IPC. She came to know that Lado obtained a decree against Mir Singh on 02.12.1982 from the Court of Sub-Judge, Sonapat. The decree is not binding upon the plaintiff and liable to be set-aside. Mir Singh never appeared before the Court of Sub-Judge, Ist Class nor thumb-marked the written statement. The decree is the result of misrepresentation and fraud. Lado was not the wife of Mir Singh nor constituted Joint Hindu Family with Mir Singh. Lado was the wife of Hari Singh Chippi resident of village Pinana and she had three daughters from her husband. Lado could not marry Mir Singh nor can claim any right to the suit property through Mir Singh.

The suit was contested by Lado (proforma respondent) (since deceased). She raised preliminary objections *inter alia* that plaintiff has no *locus standi* to file the suit as she is not the daughter of Sis Ram; suit is not maintainable in the present form as no suit lies to set-aside the consent decree under Order 23 Rule 3A of the Code of Civil Procedure (in short 'CPC'). It is further averred that plaintiff is not the legal heir of Mir Singh and has no right to inherit property of Mir Singh. The defendant being the wife of Mir Singh is the sole legal heir to succeed to the property of Mir Singh. She performed *Karewa*

marriage with Mir Singh long ago. She is the absolute owner of the suit land, two houses and a *gher* situated in village Salimsar Majra. The answering defendant has been shown as wife of Mir Singh in the voter list No.294 of the year 1981. Mutation No.1894 was sanctioned in her favour on 06.05.1983. She had been paying the loans taken by her husband. A valid decree dated 02.12.1982 in suit No.951 of 1982 was passed in her favour, binding upon all the heirs of Mir Singh. The plaintiff has no relation with Mir Singh. Love does not care any caste and creed and *Jats* can marry a daughter of any caste. No description of fraud has been given and story of misrepresentation and fraud is wrong.

The trial Court framed the following issues for determination:-

1. *Whether the plaintiff is the sister of Mir Singh? If so to what effect? OPP.*
2. *Whether the decree dated 02.12.1982 in suit No.951/92 titled Lado vs Mir Singh is liable to be set-aside on the grounds alleged? OPP.*
3. *Whether the suit is not maintainable in the present form? If so what effect? OPP.*
4. *Whether the defendant performed a Karewa marriage with Mir Singh? If so when and to what effect? OPD.*
5. *Whether the suit is not properly valued for the purpose of court fee and jurisdiction? If so to what effect? OPD.*
6. *Whether the plaintiff has no locus standi to file the present suit as alleged? OPD.*
7. *Relief.*

The learned Sub-Judge decided issue No.1 in favour of the

plaintiff and uphold plea of the plaintiff that she is the daughter of Sis Ram and sister of Mir Singh. Issue No.2 was answered in favour of the plaintiff by holding that decree dated 02.12.1982 in favour of Lado is liable to be set-aside. Issue No.3 is also answered in favour of the plaintiff. *Qua* issue No.4, it is held that Lado is not proved to be a *Jat*, therefore, customary marriage between persons of different community could not be valid in favour of the defendant. Issues No.5 and 6 are also determined against the defendant. Accordingly, suit of the plaintiff was decreed.

Karan Singh and others (appellants herein) were impleaded as defendants being subsequent purchasers of land, on the basis of application dated 09.09.1989 filed by them. As has been noticed hereinbefore, appeal did not find favour with the Court of District Judge, Sonapat and as a result, findings recorded by the trial Court were affirmed.

To assail judgments of the Courts below, counsel for the appellants has argued that the findings are perverse, illegal and result of mis-appreciation of evidence. It is argued that Bhagwani failed to adduce sufficient evidence to establish her relationship with Mir Singh. It is admitted position of the case that Mir Singh had been residing with Lado with whom he performed *Karewa* after death of her earlier husband. Further submitted that the decree dated 02.12.1982 cannot be set-aside as it was suffered by Mir Singh voluntarily on the basis of admitted written statement and statement made in the Court.

Another submission made by counsel is that Bhagwani had no *locus standi* to challenge the decree unless it was proved that Mir

Singh had died. The presumption of death cannot be applied in this case because period of 07 years had not elapsed by the time suit for declaration was filed on 23.05.1983 whereas Mir Singh allegedly went missing two days prior to the last Diwali and FIR was lodged with the police on 27.03.1983.

Counsel for the appellant also pressed into service an objection with regard to maintainability of simplicitor suit for declaration without claiming relief of possession by invoking the provisions of Section 34 of the Specific Relief Act, 1963.

Counsel for the respondents, on the contrary, has supported the consistent findings recorded by the Courts below. It is argued that findings on issues No.1, 2 and 4 relate to questions of fact, not amenable to challenge in second appeal. Further submitted that evidence produced before the trial Court is more than sufficient and reliable to record findings in favour of the plaintiff. It is further argued that the plaintiff cannot be made to suffer by setting-aside the judgments and decrees either on the ground that the suit was pre-mature or the same is not maintainable for want of seeking relief of possession more particularly in the circumstances that no such plea with regard to maintainability of the suit on this count was either raised before the trial Court or the First Appellate Court. In addition, it is submitted that had the defendant raised any such plea before the trial Court, the plaintiff could amend the suit at an appropriate stage in order to do away with any such objection of the defendant.

I have heard counsel for the parties, perused the paperbook and the records but find that the appeal sans merit and deserves to be

dismissed.

Bhagwani appeared in the witness-box and categorically reiterated that she is the daughter of Sis Ram and sister of Mir Singh son of Sis Ram. Ram Chander – PW2 supported plea of Bhagwani in this regard. Lado feigned ignorance about relationship of Bhagwani with Mir Singh. However, Raghu Nath, Sarpanch of Salimsar Majra – DW7 examined by Lado admitted that Bhagwani is the sister of Mir Singh and he knew her. In such circumstances, no fault can be found in the findings of the Courts determining issue No.1 in favour of the plaintiff.

The findings on issues No.2 and 4 are inter-related. To derive benefit of the decree dated 02.12.1982, it was enjoined upon Lado to prove that she could perform *Karewa* marriage with Mir Singh. Lado has failed to establish that her earlier marriage with Hari Singh was no longer subsisting by the time she allegedly performed *Karewa* with Mir Singh. Counsel for the appellant is not in a position to substantiate plea of the defendant (Lado) that she could perform *Karewa* with Mir Singh as *Karewa* marriage permitted under customary law can be performed only with a relative of previous husband. This apart, counsel for the appellants has not referred to any document or text on customary law permitting *Karewa* between a male *Jat* with a female of some other caste in District Sonapat. That being so, no error much less illegality can be noticed in the findings of Courts that alleged marriage of Lado with Mir Singh was not valid. The mere entry in the records by the election staff for the purpose of preparing the voter list is not a sufficient evidence of marriage. As a matter of fact, marriage was

required to be proved in accordance with the provisions of the Hindu Marriage Act or under the customary law which the defendant miserably failed to do.

The next question that arises for consideration is whether the decree dated 02.12.1982 can still hold the field albeit marriage between Mir Singh and Lado is not legal. The answer is clearly in the negative. Under the circumstances, there is no basis for the allegations in the suit instituted in the year 1982 that Lado and Mir Singh constituted a Joint Hindu Family for Mir Singh to suffer a decree in favour of Lado. Even otherwise, B.N. Srivastava – PW10 has proved that the person who appeared as Mir Singh in Civil Suit No.951 of 1982 titled Lado vs Mir Singh was not the same person who had thumb-marked loan documents relating to loan taken by Mir Singh. The findings of the trial Court on issue No.2 duly affirmed in appeal do not warrant intervention.

Plea of the appellants that suit could not be filed unless it was proved that Mir Singh had died or had not been heard for the last 07 years on the date of filing of suit does not carry much weight because the defendant did not produce any evidence that Mir Singh was alive at the time of filing of suit. The litigation is pending for the past more than 33 years. Till date, nobody has come up with evidence that Mir Singh was alive. Allowing such a plea or holding the suit to be premature at this belated stage would amount to travesty of justice. Had the trial Court non-suited the plaintiff on the ground of suit being premature, the plaintiff could file another suit after expiry of a period of 07 years from the date Mir Singh was last seen. In this view of the matter,

unsuccessful appellants cannot be allowed to harp on this issue for setting-aside the judgments and decrees passed in favour of the plaintiff.

Much stress has been laid by counsel for the appellants that findings on issue No.3 are perverse as simplicitor suit for declaration could not be filed. The trial Court did not record any elaborate findings and disposed of issues No.3 and 6 together. However, the Appellate Court while deciding issue of maintainability held that since Bhagwani is the real sister of Mir Singh, so suit for declaration is maintainable. Though the Courts below did not record findings on this issue in a proper manner but the appellants cannot succeed in the second appeal on this ground. No such objection was raised by the defendant in the written statement that suit for declaration is not maintainable without seeking a decree for possession. On the contrary, the defendant raised a preliminary objection *"That the suit is not maintainable in the present form, as no suit lies to set-aside the consent decree under Order 23 Rule 3(a) CPC."* Once no objection was taken by the appellants either in the trial Court or before the First Appellate Court that suit for declaration without claiming possession is not maintainable, hence no such objection can be allowed to be raised for the first time in the second appeal. In this context, reference can be made to judgment of the Allahabad High Court ***"U.P. State Electricity Board, Lucknow vs Ram Barai Prasad and another"***, AIR 1985 (Allahabad) 265 wherein the High Court has relied upon judgment of Hon'ble the Supreme Court ***"Rukhmabai vs Lala Laxminarayan and others"***, 1960 AIR (SC) 335. This apart, had such an objection been

raised by the defendant at the earliest point of time, the plaintiff could have asked for necessary amendment to comply with the provisions of Section 34 of the Specific Relief Act. In the circumstances, it is not justified in allowing the appellants to raise the plea for the first time in the High Court.

For the foregoing reasons, the appeal fails and is accordingly dismissed leaving the parties to bear their own costs.

January 11, 2017.
yakub

(REKHA MITTAL)
JUDGE

Whether speaking/reasoned

Yes/No

Whether reportable:

Yes/No