

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

**RSA No.5023 of 2009 (O&M)
Date of Decision: May 08, 2017**

Tejpal Singh & Ors.

..Appellant(s)

Versus

Kushal Pal Singh & Ors.

...Respondent(s)

CORAM: HON'BLE MRS. JUSTICE ANITA CHAUDHRY

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

Mr. Avnish Mittal, Advocate
for respondent nos.1 to 5.

Mr. Sunil Panwar, Advocate
for respondent nos.7 & 8.

Mr. Sachin Mittal, Advocate
for respondent no.22.

ANITA CHAUDHRY, J.

The appellants are the legal heirs of Daryao Singh. Daryao Singh had died during the pendency of his suit. His legal heirs, the appellants were impleaded as party. The pedigree table set out in the plaint would be necessary. It reads under:-

Chander Singh					
I					
Umrao Singh					
I					
Bhagwan Singh (died in 1974)	Raghu Nath Singh (Dft. No.7)	Harnath Singh (died in 1964)	Amar Singh @ Amir Singh (died on 12.1.92)	Daryao Singh (plaintiff)	Smt. Javtri Devi (deft. no.8)
I					
Jaibir Singh (deft. No.5)					
I					
	Kushal Pal Singh (deft. no.1)	Kuldeep Singh (deft. no.2)	Sandeep Kr. (deft. no.3)	Lalit Kumar (deft. no.4)	

The property in dispute was owned by Amar Singh @ Amir Singh. He owned 162 Kanals of land situated within the revenue estate of village Mehchana, District Gurgaon. Amar Singh did not marry and died on 12.01.1992. The plaintiffs claimed that Amar Singh had left behind the plaintiffs and defendants no.7 & 8 as his legal heirs as the other two brothers namely Bhagwan Singh and Harnath had pre-deceased him. The plaintiffs claim that the property in the hands of Amar Singh was ancestral and they were Rajputs by caste and governed by the agricultural custom in the matters of succession and alienation. According to the custom, no proprietor was competent to transfer the ancestral property without the consent of the immediate collaterals and also without legal necessity and Amar Singh was not competent to transfer the property without their consent. The plaintiffs came to know that a false and fraudulent decree had been obtained in a suit filed in

1989 and a decree was passed on 30.09.1989 and it was void, without jurisdiction and did not affect their reversionary rights. It was pleaded that Amar Singh was more than 80 years old, hard of hearing and had a weak eyesight and was illiterate and simpleton and due to old age he was unable to take any decision and had lost sense of discretion and the decree seems to have been procured by playing fraud and the plaintiffs along with defendants no.1 to 4 were entitled to succeed to his estate. It was pleaded that no decree had been suffered and it was apparent from the fact that Amar Singh later sold 11 Marlas of land in June, 1991 and had he suffered a decree, he could not have sold the property as he was no longer its owner and the sale was not objected to by defendants no.1 to 5. It was pleaded that the sale deed dated 11.06.1991 for an alleged consideration of Rs.25,000/- was also illegal and without consideration or legal necessity and the entry in the revenue record showing defendant no.5 in possession was illegal and unwarranted. It was pleaded that if defendant no.5 was held to be a licensee under Amar Singh then the license stood terminated on account of the decree of 1989 and defendant no.5 was liable to surrender the vacant possession.

The record shows that an application was moved by the plaintiffs to amend the plaint and introduce a plea that the decree had been obtained by presenting a false and fictitious person. That application was allowed in 1997. Amended plaint was filed and para no.6-A was added.

Defendants no.1 to 5 in their amended written statement took the plea of locus standi, estoppel, maintainability, mis-joinder and limitation. It was admitted that Amar Singh had died issueless on 12.01.1992. It was also admitted that Bhagwan Singh and Harnath Singh had pre-deceased Amar Singh. It was denied that they were governed by custom in the matters of succession and alienation. It was pleaded that Amar Singh was the exclusive owner of suit property and it was his self acquired property. It was pleaded that even if the land was held to be ancestral, the plaintiffs and defendants no.7 to 8 were not competent to challenge the decree. It was pleaded that Amar Singh was competent to transfer the land and the sale in favour of defendant no.6 could not be made subject matter of the litigation in the present suit. It was pleaded that Amar Singh was living with defendants no.1 to 5 for over 40 years and after the death of Harnath Singh defendant no.5 got married and the ceremonies were performed by Amar Singh who was the eldest. It was pleaded that Amar Singh during his life time executed registered Will on 05.02.1982 and though it prefer to give his property to them during his life time. It was pleaded that the respondents were aware of the decree and did not have the courage to challenge it during the life time of Amar Singh. It was pleaded that defendant no.5 during the life time of Amar Singh was managing the lands and had installed a tubewell and had raised the construction and they had performed the last rites. It was pleaded that Amar Singh's sister Javitri-defendant no.8 had also been living with defendant no.5 as she had lost her husband

after 3 – 4 years of her marriage and she was also being looked after by Harnath and thereafter, by defendant no.5. It was denied that any fraud had been played.

Defendant no.6 filed his written statement and pleaded that the sale deed in his favour was legal and he had raised construction and the plaintiff had taken active part in the transaction and had raised no objection.

On the pleadings of the parties, following issues were framed:-

1. Whether the suit land detailed in para no.2 of the plaint was ancestral in the hands of deceased Amar Singh? OPP
2. Whether plaintiff, defendants no.1 to 5, 7 and 8 are governed by any agricultural custom prevailing in district Gurgaon (Hr.), if so what is that custom of its effect? OPP
3. Whether civil court decree passed in suit no.1008 of 1989 title as “Kushal Pal Vs. Amir Singh” passed by Sh. R.S. Behmani the then ASSJ, Gurgaon vide judgment and decree dated 30.09.1989 in respect of suit land is illegal, unauthorised, without jurisdiction, void and so not binding on the rights of the plaintiff on the grounds taken in para no.6 of the plaint? OPP
4. Whether sale deed dated 11.06.1991 executed by Amir Singh in favour of defendant no.6 is also illegal, unauthorised, without consideration and legal necessity? OPP
5. Whether defendant no.5 was licensee of Amir Singh deceased on

the suit land and the same stood terminated on his death or earlier? OPP

6. Whether the Amir Singh has bequeathed suit land & other property by executing will dated 05.02.1982 in favour of defendants no.1 to 4? OPP
7. Whether the suit is barred by time? OPD
8. Whether the suit is bad for mis joinder of parties and cause of action? OPD
9. Whether the plaintiff has no locus standi, cause of action to file the present suit? OPD
10. Whether the suit is not maintainable in the present form? OPD
11. Whether plaintiff is estopped by his act and conduct to file the present suit? OPD
12. Whether the suit is not properly valued for purposes of court fee of jurisdiction? OPD
13. To what relief, if any, the plaintiff is entitled? OPD

The record shows that a statement was made later giving up defendant no.6. The plaintiff did not want to challenge the sale deed dated 11.06.1991 or the mutation entered with respect to this sale. The statement was made on 06.01.2003.

The trial Court held that the plaintiffs had failed to prove that the parties were governed by custom. It was held that provisions of Hindu Succession Act were applicable and Amar Singh was the absolute owner of the property. The decree suffered by Amar Singh was

upheld. It was held that the plaintiffs had failed to prove that the decree was illegal. It noted that the plaintiffs had failed to examine any Handwriting Expert to show that the decree was not suffered by Amar Singh. It was held that the plaintiffs had failed to prove that Jaibir Singh-defendant no.5 was a licensee. Issue no.6 was decided in favour of the plaintiffs as it was observed that the attesting witness to the Will had not been examined and the Will was not proved. The suit was found to be within limitation. It was held that the decree did not require registration. The suit was dismissed.

Aggrieved by the judgment an appeal was preferred by the plaintiffs. Cross-objections were preferred by defendants no.1 to 5. It would be relevant to refer to para nos.17 to 19 of the judgment, which reads as under:-

“17. It has transpired from the statement of Shri S.S. Chauhan, Advocate DW2 that he had appeared for the plaintiffs Khushal Pal etc., and had instituted the suit and copy of the plaint Ex.PW4/A is proved in his statement. He has also stated that Shri Attar Singh, Advocate had filed the written statement and he identifies the signatures of Shri Attar Singh, Advocate on the written statement and copy of that written statement is proved as Ex.PW/A by Vijay Kumar Clerk PW1 or Ex.PW4/B as proved by Shri S.S. Chauhan, Advocate. It is categorically stated by Shri S.S. Chauhan, Advocate in his statement that he was knowing Amar Singh for the last 4 or 5 years even prior to the impugned judgment and decree. It is also stated by him that he had seen Amar Singh for the first time in

village Mechana on the occasion of the marriage of the son of Jaibir. It is proved from the statement of Shri S.S. Chauhan, Advocate that Amar Singh had appeared in the court and had made the statement before the court and he had seen Amar Singh in the court on the day when the written statement was filed and the suit was decreed. Vijay Kumar Clerk has also deposed about the written statement filed by Shri A.S. Yadav, Advocate on behalf of Amir Singh. Thus it is proved from the evidence adduced on the file that Amir Singh has filed the written statement admitting the claim of Khushal Pal Singh etc., defendants and he has also appeared before the court. It is also proved from the statement of R.P. Gupta Inspector Food and Supply DW3 that ration card Ex.DW3/1 was prepared and issued by the food and supply department. A perusal of the ration card shows that Amir Singh is recorded as jointly residing with Jaibir Singh etc. Smt. Javitri Devi is also recorded as residing with Jaibir Singh etc., defendants. It is proved from the evidence adduced on the file that Amir Singh was residing with Jaibir Singh defendant no.5 prior to the suffering of decree in question in favour of defendants Khushal Pal Singh etc. It has also transpired from the statement of Ved Parkash Deed Writer DW4 that Amir Singh had executed a Will in favour of Khushal Pal Singh etc., defendants and that Will is proved as Ex.DW4/1 in the statement of scribe. It is also deposed by Ved Parkash Deed Writer that he also made an entry about this Will in his register as Sl. No.68 of 3.2.82 and his register entry also bears the thumb impression/signatures of Amir Singh. In the statement of Shri V.D. Gaur,

Tehsildar DW9 it is also proved that the Will Ex.DW4/1 was registered and the same was made by Amir Singh s/o Umrao Singh in favour of Khushal Pal etc. sons of Jaibir. This Will is registered Will. At this juncture it may be mentioned that Will in question might not have been strictly proved in accordance with law because one of the attesting witness has not been examined by the defendants to prove the execution of the Will in question but this fact goes a long way that Amir Singh had made a registered Will regarding his property in favour of the replying defendants in the year 1982 much before suffering the impugned judgment and decree in their favour and thus this circumstance at least dispels the allegations of fraud or misrepresentation considerably. There is attached presumption of correctness to the registered Will.

18. It has also transpired from the statement of Ram Murti Parshad Assistant Manager DW5 that account number 4468 was opened in favour of Khushal Pal Singh minors through Amir Singh on 18.2.75 and in cross examination this witness has admitted that 20.1.67 is mentioned as date under the signatures of Amar Singh but it is stated by this witness that this is the date of birth mentioned. Amar Singh had got opened the accounts in the name of the minor and this fact also shows that Amar Singh was already having fancy for the contesting defendants.

19. In the statement of Sube Singh photographer DW6 photographs Ex.D1 to Ex.D11 etc. are proved and from the statement of photographer and the other evidence adduced on the file it has transpired that on the death of Amar Singh it was only Jaibir fther of the

contesting defendants who performed the necessary Kirya ceremonies. Daryao Singh etc., never came forward on this occasion also. Rajender Singh son of Raghunath Singh has also stated about this fact that plaintiffs and Daryao never rendered any services to Amir Singh. Jaibir Singh was tied Pagri on the death of Amir Singh. It is also stated by him that Jaibir Singh and his sons used to render services to Amir Singh. It is also stated by him that Amir Singh died eight years ago and jaibir was also residing with Jaibir Singh defendant no.5. Rajender Singh is son of Raghunath Singh one of the real brothers of Daryao Singh plaintiff. In other words he is the nephew of Daryao Singh plaintiff and is a teacher. There are no reasons to disbelieve his statement. His statement also finds corroboration from the statement of Javitri Devi DW8 who has also categorically stated that Amar Singh died issueless and used to reside with Harnath Singh and then he used to reside with Jaibir Singh son of Harnath Singh and with the children of Jaibir Singh. It is also stated by her that Jaibir Singh and his children used to render services to her and to Amir Singh. It is also proved from the evidence adduced by the defendants that Amir Singh was not hard of hearing. He was of good mental health. Joint residence of Amar Singh with the defendants is proved and love and affection with the defendants in whose favour impugned judgment and decree was passed is also proved. It is also proved that the defendants in whose favour impugned judgment and decree dated 30.9.89 was passed were members of the family of Amir Singh. They were son and grand sons of his real brother Harnath Singh. Ex.P6 is the copy of the

decree sheet in question. Mutation was sanctioned on the basis of the impugned judgment and decree on 2.1.1990.”

The Appellate Court dismissed the appeal as well as the cross-objections.

The appellants along with the appeal have filed an application under Order 41 Rule 27 CPC seeking permission to get the thumb impressions of Amar Singh on the written statement and the vakalatnama examined by an Expert to prove that it was a case of impersonation.

Reply to the application was filed by the respondents. It was pleaded that the application has been moved at the belated stage and the appellants want to fill in the lacuna which could not be allowed and an attempt is being made to reopen the controversy, which was legally not permissible and the initial burden was on the plaintiffs to prove that the decree was procured and having lost in both the Courts the plaintiffs cannot be allowed to fill the lacuna.

I have heard both the sides at length.

The record of Civil Suit no.1008 of 25.09.1989 titled as Kushalpal Singh Vs. Amar Singh, decided on 30.09.1989 was called for and had been received.

The submission on behalf of the appellants is that the property was ancestral in the hand of Amar Singh and he could not give it to the grand children of Harnath by a civil Court decree. It was

urged that the defendants had also set up a Will which was not proved as no attesting witness was examined. It was urged that both the Courts below have rejected the Will and the decree had been procured by fraud and this becomes more evident as Amar Singh had sold a part of the land on 11.06.1991. It was urged that if he had given the entire property by a court decree in 1989, he would not have sold a part thereof in 1991. It was urged that Amar Singh was very old and had a weak mind and fraud had been played upon him and someone else had appeared to make a statement and therefore, the counsel who was representing him failed to step into the witness box. It was urged that the defendants had engaged an expert who had taken the photographs but purposely that report was not placed on the record nor they had examined the expert. It was urged that the decree was passed in five days. It was urged that strangely the property was given to the grand son of Harnath in the presence of his father and the grand son did not have any antecedent title or claim and it had been given a colour of family settlement and it required registration. It was urged that they had filed an application seeking permission to lead additional evidence and they may be permitted to get the thumb impressions on the written statement and the power of attorney compared from an independent agency so that they are able to prove that it was a case of impersonation. Reliance was placed upon ***Jagdish Vs. Rajwanti 2008(1) RCR (Civil) 677, Smt. Badami Vs. Bhali 2013(1) RCR (Civil) 821, Santosh Vs. Jagat Ram and another 2010(2) RCR (Civil) 206, Gurdev Kaur Vs. Jaspal Singh***

and others 2007(1) RCR (Civil) 621, North Eastern Railway Admn., Gorakhpur Vs. Bhagwan Das (D) by LR. 2008(3) SCC 593, Gurcharan Singh and others Vs. Angrez Kaur and another 2008(4) RCR (Civil) 178, Phool Patti and another Vs. Ram Singh (Dead) through LRs and another 2015(1) RCR (Civil) 606 and Easwari Vs. Parvathi and others 2014 (3) RCR (Civil) 955.

On the other hand, the submission on behalf of the respondents was that the plaintiffs had approached the Court with a plea that the property was ancestral in the hands of Amar Singh and they were governed by a custom prevailing in Punjab and Haryana according to which a proprietor could not alienate ancestral land without the consent of the immediate collaterals and also without consideration or legal necessity but except for the bare statement of the plaintiff, there is no evidence and no instance was proved nor any evidence led to show that the land was ancestral. It was urged that a Will had been executed by Amar Singh in 1982 and they were unable to examine the attesting witness as the lawyer Sh. Dwarka Nath, Advocate had died. It was urged that Maan Singh was summoned but he failed to appear and bailable warrants were issued and the case was adjourned for almost a year to procure his presence and the Court had closed their evidence. It was urged that they had examined a Scribe as well as the Sub-Registrar and the Sub-Registrar's statement could be considered as he had stated that the testator had put his thumb impressions in his presence and the contents had been read over to the testator. It was urged that Amar

Singh and his sister Javitri who had become a widow at young age, were living with Harnath's family and in order to confirm his resolve to hand over the property to his brother's grand son, a family settlement was affected and a decree was suffered by Amar Singh. It was urged that since the plaintiffs had taken a plea of fraud initially and thereafter of impersonation, they knew what their case was and they had to prove that someone else had appeared and the thumb impressions on the written statement and on the statement made in the Court were not of Amar Singh. It was urged that a wrong statement had been made that Amar Singh did not appear to make a statement and this fact can be verified from the record. It was urged that the judgment refers to the fact that the statement was recorded and Amar Singh was represented by a counsel. It was urged that the ration card is available which was proved by the witness from the Food & Supply Department and it would show that Javitri and Amar Singh were living with the family of Harnath and Javitri had stepped into the witness box to support their case. It was urged that not a single instance had been referred or proved to show that they were governed by custom and what the custom was. It was urged that a decree cannot be challenged only on the ground that it was not registered and this plea was never taken in the plaint. It was also submitted that Amar Singh remained alive for almost over two and a half years but did not challenge it and it could not be challenged by the plaintiffs. It was urged that the decree merely recognizes a pre-existing family settlement and it was not required to be registered and

the Apex Court on numerous occasions had held that it is only necessary to show that the parties were related to each other in some way and had a possible claim to the property or even semblance of a claim which can be effective and that is sufficient to uphold the decree. It was urged that the plaint refers to the fact that a settlement had been effected in 1987 and a decree was passed in 1989 and the judgments referred to by the appellants are not applicable as they were unable to prove fraud. It was urged that the appellants cannot be permitted to fill up the lacuna nor additional evidence can be allowed at this stage and it was their duty to lead evidence as they knew what their case was. Reliance was placed upon *Hari Singh V. Gurcharan Singh* 2003(3) RCR (Civil) 632, *Gurdev Singh and others V. Kartar Singh and others* 2003(2) RCR (Civil) 655, *Raj Kali V. Jitender* 2010 (5) RCR (Civil) 790, *Parminster Singh V. Gurnam Singh and others* 2014(1) HLR 350, *Kale and others Vs. Deputy Director of Consolidation and others* 1976 AIR (SC) 807, *Ram Charan Das Vs. Girja Nandini Devi and others* 1966 AIR (SC) 323, *Jagdish V. Ram Karan* 2003(1) RCR (Civil) 657, *Smt. Dipo V. Wassan Singh and others* 1983 AIR (SC) 846, *Pandurang Jivaji Apte Vs. Ram Chandra Gangadhar by LRs and others* 1981 AIR (SC) 2235, *Bhim Sain V. Kaushalya Devi and others* 2009(4) RCR (Civil) 47, *Ram Saran V. Deep Kumar and others* 2007(1) RCR (Civil) 618, *Pushpa Devi V. Rajinder Singh & Ors.* 2006(3) RCR (Civil) 479, *Murti Vs. Jai Ram & Ors.* 2012(3) RCR (Civil) 574 and *Harpal & Ors. V. Ram Piari & Ors.* 1981 PLJ 492.

Taking up the application filed under Order 41 Rule 21 CPC first, it is necessary at this stage to refer to the provisions contained in Order 41 Rule 27 CPC, which reads as under:-

Production of additional evidence in Appellate Court.-

(1) The parties to an appeal shall not be entitled to produce additional evidence, whether oral or documentary, in the Appellate Court. But if—

(a) the court from whose decree the appeal is preferred has refused to admit evidence which ought to have been admitted, or

(aa) the party seeking to produce additional evidence, establishes that notwithstanding the exercise of due diligence, such evidence was not within his knowledge or could not, after the exercise of due diligence, be produced by him at the time when the decree appealed against was passed, or

(b) the Appellate Court requires any document to be produced or any witness to be examined to enable it to pronounce judgment, or for any other substantial cause, the Appellate Court may allow such evidence or document to be produced, or witness to be examined.

(2) Whenever additional evidence is allowed to be produced, by an Appellate Court, the court shall record the reason for its admission.

The issue regarding additional evidence was examined in detail in ***Union of India Vs. Ibrahim Uddin and another 2013 AIR (SCW) 2752*** and it would be relevant to quote para nos.25 to 28, which reads as under:-

25. The general principle is that the Appellate Court should not travel outside the record of the lower court and cannot take any evidence in appeal. However, as an exception, Order XLI Rule 27 CPC enables the Appellate Court to take additional evidence in exceptional

circumstances. The Appellate Court may permit additional evidence only and only if the conditions laid down in this rule are found to exist. The parties are not entitled, as of right, to the admission of such evidence. Thus, provision does not apply, when on the basis of evidence on record, the Appellate Court can pronounce a satisfactory judgment. The matter is entirely within the discretion of the court and is to be used sparingly. Such a discretion is only a judicial discretion circumscribed by the limitation specified in the rule itself. (Vide: [K. Venkataramiah v. A. Seetharama Reddy & Ors.](#), AIR 1963 SC 1526; [The Municipal Corporation of Greater Bombay v. Lala Pancham & Ors.](#), AIR 1965 SC 1008; [Soonda Ram & Anr. v. Rameshwaralal & Anr.](#), AIR 1975 SC 479; and [Syed Abdul Khader v. Rami Reddy & Ors.](#), AIR 1979 SC 553).

26. The Appellate Court should not, ordinarily allow new evidence to be adduced in order to enable a party to raise a new point in appeal. Similarly, where a party on whom the onus of proving a certain point lies fails to discharge the onus, he is not entitled to a fresh opportunity to produce evidence, as the Court can, in such a case, pronounce judgment against him and does not require any additional evidence to enable it to pronounce judgment. (Vide: [Haji Mohammed Ishaq Wd. S. K. Mohammed & Ors. v. Mohamed Iqbal and Mohamed Ali and Co.](#), AIR 1978 SC 798).

27. Under Order XLI , Rule 27 CPC, the appellate Court has the power to allow a document to be produced and a witness to be examined. But the requirement of the said Court must be limited to those cases where it found it necessary to obtain such evidence for enabling it to pronounce judgment. This provision does not entitle the appellate Court to let in fresh evidence at the appellate stage where even without such evidence it can pronounce judgment in a case. It does not entitle the appellate Court

to let in fresh evidence only for the purpose of pronouncing judgment in a particular way. In other words, it is only for removing a lacuna in the evidence that the appellate Court is empowered to admit additional evidence. [Vide: Lala Pancham & Ors. (supra)].

28. It is not the business of the Appellate Court to supplement the evidence adduced by one party or the other in the lower Court. Hence, in the absence of satisfactory reasons for the non- production of the evidence in the trial court, additional evidence should not be admitted in appeal as a party guilty of remissness in the lower court is not entitled to the indulgence of being allowed to give further evidence under this rule. So a party who had ample opportunity to produce certain evidence in the lower court but failed to do so or elected not to do so, cannot have it admitted in appeal. (Vide: [State of U.P. v. Manbodhan Lal Srivastava](#), AIR 1957 SC 912; and [S. Rajagopal v. C.M. Armugam & Ors.](#), AIR 1969 SC 101).”

Thus from the above it is clear that an application for additional evidence can only be allowed if it fulfills the conditions laid down under Order 41 Rule 27 C.P.C. The application cannot be allowed to remove a lacuna in the evidence. The appellants have unable to give any satisfactory reasons as to why they could not produce the expert's evidence before the trial Court. It would be relevant to mention here that the LRs of plaintiff Daryao Singh had moved an application on 17.05.1997, which is tagged with the summoned file of Civil Suit No.1008 of 25.09.1989, decided on 30.09.1989, where they had pleaded that they had challenged the decree in a civil suit and the decree was obtained by producing some other person in place of Amar Singh and

therefore, they wanted to get the thumb impression compared. The zimni orders thereafter show that the file was called for but no-one appeared on behalf of the applicant. Later on Court notices were issued to the applicant and the matter was adjourned 12 times and the notice was duly served but no-one appeared and the application was dismissed in default on 15.12.1998. The plaintiffs had taken a specific plea and had got the plaint amended when they had taken an additional plea that the decree was procured by impersonation, therefore, the plaintiffs were to lead evidence in the affirmative. The plaintiffs are guilty of remissness in the lower Court and they are not entitled to any indulgence nor they can be permitted to remove a lacuna. The Court cannot let in fresh evidence only for the purposes of pronouncing judgments in a particular way. The application cannot be allowed and is dismissed.

Both the Courts below have held that the plaintiffs had failed to prove that the property was ancestral. The plaintiffs had raised a plea that they were Rajputs and were covered by the agricultural custom in the matters of alienation and succession. The plaintiffs did not produce any evidence that the parties to the suit were governed by custom. No general or special custom had been proved. The only evidence on the record is the oral statement of the plaintiffs. No evidence was led to show that the property had come down from the ancestor. The burden of proving that the plaintiffs follow the customary law was on the plaintiffs who asserted this fact but there is no

satisfactory evidence I affirm the findings of the trial Court on the issue and hold that the parties to the suit were not governed by the custom and the property was not proved to be ancestral.

The testator had died issueless. The property in his hands could not be ancestral since he had no male issue and he was competent to give the property in the manner he liked. Reference may here be made to ***Biru Ram Vs. Barkha Ram 1997(1) RCR (Civil) 545.***

Both the Courts below had held that the Will had not been proved as none of the attesting witnesses had been examined. The finding is not correct and needs to be reversed for the reasons below. The Will was registered. There were two attesting witnesses to the Will namely Dwarka Nath Advocate and Maan Singh. Dwarka Nath Advocate had died. The defendants summoned Maan Singh but he chose not to appear and coercive process was issued to procure his presence but he avoided the process. Bailable warrants were issued some time in October, 2000 and his presence could not be procured even till November, 2002. The evidence was closed by Court order. It was the duty of the Court to procure the presence and if the bailable warrants could not be served even for two years, it was clear that he was avoiding the process and non-bailable warrants should have been issued. Maan Singh did not want to appear and had been managed by the plaintiffs. Maan Singh was avoiding the witness box as it would have been difficult for him to face the cross-examination or deny his signatures. The defendants had examined the scribe of the Will. They

got a local commissioner appointed to get the statement of the Sub-Registrar as he was old and suffering from diseases and was unable to move. Both the scribe and the attesting witnesses identified the signatures of the testator. The issue whether a Will can be said to be duly proved on the basis of the statement of the Sub-Registrar alone without examining any other witness was considered in ***Ram Sharan Vs. Deep Kumar and others 2007(1) RCR (Civil) 618***. The provisions of Section 60 of the Registration Act were considered and a finding was returned that when the Sub-Registrar testifies that the parties had signed and thumb marked the Will in his presence and the contents were read over, the Will in question was held to be valid. The Will is registered and the testator had put his thumb impression before the Sub-Registrar when it was registered on 05.02.1982. Additionally, the Sub-Registrar had stated that the testator had executed the Will free from pressure and he was fully conscious.

Registration of a document is a solemn act which is performed in the presence of a competent official appointed to act as a Registrar. The Registrar had appended a certificate which is relevant piece of evidence to prove its execution. There is a presumption that a registered documents is validly executed unless contrary is proved. The plaintiff had set up the plea that it was obtained by fraud. They could not lead any evidence. They failed to examine the handwriting expert. It was very easy for them to get the thumb impressions/signatures compared as in 1991 Amar Singh had sold a property vide sale deed

Ex.DX. The sample signatures/thumb impression were available for comparison but the plaintiffs did not choose to take that risk. The reasons are obvious. There is ample material on record to show that Amar Singh's widowed sister namely Javitri and Amar Singh were living with Harnath's family. The ration card is available. Javitri, real sister of Amar Singh appeared to support the contesting defendants. There was no reason to doubt the Will. No suspicious circumstances were set up.

The plaintiffs had taken a plea that the decree was obtained by fraud. As already discussed above, the decree was not challenged by Amar Singh during his life time. He had died three years later. There is no evidence of fraud. The decree could not be ignored only on the ground that it was not registered. The submission on behalf of the appellant that the defendants did not have any antecedent right or even a semblance of right in the presence of the father, has to be rejected. A party taking benefit under a family settlement has to show that he has a claim or share in the property and is related to one another in some way and has a possible claim or even semblance of a claim on some other ground which can also be "affection". It has been held in ***Jagdish Vs. Ram Karan 2003(1) RCR (Civil) 657*** that a decree based on a family settlement is not required to compulsorily registered.

In ***Bhoop Singh Vs. Ram Singh Major and others, 1995(3) RRR 541 (SC)***, the Hon'ble Apex Court was dealing with the decree vide which the title in the suit property was sought to be

conveyed and transferred to a person without any pre-existing title through the decree itself. In the prayer made in Bhoop Singh's case (supra) may be noticed:

"It is ordered that a declaratory decree in respect of the property in suit fully detailed in the heading of the plaint to the effect that the plaintiff will be the owners in possession from today in lieu of the defendant after his death and the plaintiff deserves his name to be incorporated as such in the revenue papers, is granted in favour of the plaintiff against the defendant, in view of the written statement filed by the defendant admitting the claim of the plaintiff to be correct. Pleader's fee fixed Rs. 16/-. It is further ordered that there is no order as to costs."

It is thus apparent that in Bhoop Singh's case (supra) the Hon'ble Supreme Court of India had held that when the conveyance or transfer was in presentii being effected through a consent decree, then the same was not permissible and in such a situation such consent decree was compulsorily registerable. However, if a plaint in the suit was filed on the basis of a past transaction or past family settlement for the recognition thereof through a declaration, then the declaration sought was merely with regard to the existing facts on the date of the filing of the suit.

In Bhoop Singh's case (supra), the Hon'ble Apex Court had noticed the law laid down in *Tek Bahadur v. Debi Singh, A.I.R, 1966 S.C. 292* and observed as follows:

"14. In *Tek Bahadur v. Debi Singh, A.I.R. 1966 S.C. 292*, the Constitution Bench of this Court considered the validity of the family arrangement and the question was whether it requires to be compulsorily registered under Section 17. This Court, while upholding oral family arrangement, held that registration would be necessary only if the terms of the family arrangement are reduced into writing. A distinction should be made between the document containing the terms and recital of family arrangement made under the document and a mere memorandum prepared after the family arrangement had already been made either for the purpose of record or for information of the Court for making necessary mutation. In such a case the memorandum itself does not create or extinguish any rights in immovable properties and therefore does not fall within the mischief of *Section 17(2)* of the Registration Act. It was held that a memorandum of family arrangement made earlier which was filed in the Court for its information was held not compulsorily registrable and therefore it can be used in evidence for collateral purpose, namely, for the proof of family arrangement which was final and binds the parties. The same view was reiterated in *Maturi Pullaiah v. Maturi Narshimham, A.I.R. 1966 S.C. 1836*, wherein it was held that the family arrangement will need registration only if it creates any interest in immovable property in present time in favour of the parties mentioned therein. In case where no such interest is created the document will be valid, despite it being non-registered and will not be hit by *Section 17* of the Act."

In Bhoop Singh's case the Hon'ble Apex Court was only dealing with a situation where the title was being conveyed and transferred for the first time through the consent judgment and decree and not a case where the said decree was based upon a past transaction.

In ***Bachan Singh v. Kartar Singh and Ors., (2002-2)131***

P.L.R. 512 (Supreme Court). The Hon'ble Supreme Court of India in Bachan Singh's case held that if the claim of the defendant was admitted by the plaintiff and on the basis of the said admission, a decree was passed and if there was no fraud in passing the decree, then the said decree was good and valid and could not be ignored on the ground that the same was not registered.

In ***Gurdev Singh and others V. Kartar Singh and others 2003(2) RCR (Civil) 655*** it was held as under:-

“14. I have considered the rival contentions on the issue. No doubt in Tek Bahadur's case (supra) it has been laid down that the Court has to examine in each case whether parties have pre-existing right to immovable property this judgment does not deal with the parameters for determining when a person can be said to be having pre-existing right whether pre-existing right can exist only when a person has a share in the estate or whether such right can be put forward by a member of the larger family by claiming that such right was created under any oral family settlement, which is subsequently admitted in Court proceedings. In my view, the pre-existing right could also cover a claim of a member of larger family under an oral arrangement which is subsequently confirmed in Court proceeding. In this view of the matter, I am of the view that the appellate Court was justified in holding that the decree Exhibit D-2 was not void. I, therefore, hold that RSA 330 of 1981 is also liable to be dismissed.”

Family settlement has to be understood in a wider sense to include within its fold not only close relations or legal heirs but even those persons who may have some sort of antecedent title or a claim so that future disputes are sealed forever and the Courts have to lean in favour of upholding a family arrangement and those cannot be disturbed on technical grounds. A family settlement can be oral in which case no registration is required and registration is necessary only if the terms of the family arrangement are reduced in writing. A perusal of the plaint Ex.PW4/A of the suit filed in 1989 shows that there a reference to the settlement in 1987. Amar Singh had admitted to the settlement which had taken place earlier. In the presence of the grand father the grand son did not have a claim or title but when the other side had relinquished in favour of such a person and had acknowledged him to be the owner then the antecedent title has to be presumed and the family settlement has to be upheld.

The fact that the counsel who was representing Amar Singh was not examined is not a ground to set aside the decree. The defendants had proved the plaint, the written statement and the copy of the judgment and decree. They had also examined their lawyer who had appeared on their behalf. He had identified the signatures of A.S. Yadav, Advocate who was representing the other side. If the plaintiffs had any doubts, they could have summoned the counsel as their own witness.

A submission was also made that had the decree been suffered by Amar Singh, he would not have sold the property in 1991. This argument also needs to be rejected. It was a small piece of land measuring 11 Marlas, which had been sold by Amar Singh though he had suffered decree in favour of the grand son earlier. Amar Singh could have his own reasons for selling the small piece. All was well between the family. They were staying together. The plaintiffs' plea that because Amar Singh had sold a property in 1991 will not be a circumstance to show that the decree of 1989 was obtained without his knowledge.

The argument of the appellants that Amar Singh was old and was incapable of understanding has also to be rejected as the plaintiffs themselves have accepted that Amar Singh had sold 11 Marlas of land in 1991. The plaintiff had given up their claim. An issue was specifically framed. They admit that the sale was made. Amar Singh was in a fit state of mind in 1991 therefore, to say that he was not in good health in 1989 is difficult to accept.

After giving my thoughtful consideration to the rival contentions and in view of the reasons given above. I find no merit in the appeal and is dismissed.

The summoned file and the trial Court record be sent back.

(ANITA CHAUDHRY)
JUDGE

May 08, 2017

sunil

Whether speaking/reasoned : Yes

Whether reportable : Yes