

IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH

RSA-1725-2016 (O&M)
Date of Decision: 02.06.2017

Amrit Lal

.....Appellant

Vs.

Savitri and others

.....Respondents

CORAM: HON'BLE MR. JUSTICE AMOL RATTAN SINGH

Present: Mr. Ashwani Bhardwaj, Advocate,
for the appellant.

Mr. Ajay Jain, Advocate,
for the respondents.

AMOL RATTAN SINGH, J.

This is the second appeal of the first defendant in a suit filed by respondents no. 1 to 4 herein (hereinafter referred to as plaintiffs), seeking a decree of declaration that they are owners in possession in equal shares of land measuring 18 kanals 03 marlas, i.e. a total 1/16th share in the following tracts of land:-

(i) Measuring 166 kanals 12 marlas comprised in Khewat No. 66/64 min, Khatoni No. 120 and

(ii) Measuring 123 kanals 16 marlas comprised in Khewat no. 67/64 min, Khatoni No. 122, both tracts of situated in village Nimriwali, District Bhiwani.

2. The plaintiffs claim to have inherited the suit land from their predecessor-in-interest, Rohtash, son of Shree Chand, who was stated to be the

husband of respondent-plaintiff no. 1, Savitri, and the father of the other three

plaintiffs (respondents herein), i.e. Pooja, Pawan and Jyotisana.

Rohtash, who is stated to have died on 03.01.2007, was stated to have inherited the land from his father, Shree Chand, and it was contended that the two defendants in the suit, i.e. the present appellant Amrit Lal son of Shree Chand (brother of Rohtash), and the present respondent no. 5, Inder Singh son of Ami Chand, both had no right, title or interest in the land. (Respondent no.5 is stated to be a person to whom the suit land was mortgaged by the appellant).

It was further prayed in their suit by the plaintiffs, that an earlier judgment and decree dated 15.05.1995, passed by the learned Senior Sub Judge, Bhiwani, in Civil Suit No. 318 of 1995, titled as Amrit Lal vs. Rohtash, qua the suit land measuring 18 kanals 03 marlas, as also the mutation entered consequent thereupon in the revenue record on 19.12.1995, bearing no. 826, were illegal, null and void, being based on a mis-representation, not binding on the rights of the plaintiffs. Subsequent entries in the revenue record, including mortgage deed no. 2146 dated 02.06.2004, and mutation no. 1022 dated 04.11.2004, were also sought to be set aside on the same ground.

Further, the plaintiffs also sought a decree of permanent injunction restraining the present appellant-defendant no. 1 from alienating the suit land in any manner. An alternative relief of possession of the suit land was also sought by the plaintiffs.

3. It was further contended in the plaint that the inheritance of Rohtash, qua the suit land, from his father Shree Chand, was duly reflected by way of mutation no. 725 in the revenue record and that the land in the hands of Shree Chand had been inherited by eight heirs, including Rohtash and appellant-defendant no. 1, Amrit Lal, in equal shares, i.e. a 1/8th share each, as part of ancestral property in which plaintiffs no. 2 to 4 had a birth right, and plaintiff no. 1

had a right to it since her marriage to Rohtash.

4. Still further, it was contended in the suit that when plaintiff-respondent no. 1 approached the Halqa Patwari on 02.10.2007, she came to know that the suit land had already been transferred in the name of the present appellant, vide mutation no. 826 dated 19.12.1995, sanctioned on the basis of the aforementioned judgment and decree dated 15.05.1995.

Therefore, contending that the said judgment and decree was based on a mis-representation, the subsequent mortgage of the suit land by defendant no. 1, leading to mutation entry no. 1022 dated 04.11.2004, was also illegal and therefore, the decree and the mutation entries, all deserve to be set aside.

The suit was thus instituted on 09.10.2007, on the aforesaid averments.

5. Upon notice issued, the present appellant-defendant no. 1 appeared and filed a written statement taking the usual preliminary objections on locus standi, there being no cause of action, maintainability etc., further contending that the suit was hopelessly time barred.

On merits it was contended that Rohtash had never actually married and therefore, neither was plaintiff no. 1 his wife nor were plaintiffs no. 2 to 4 his children. It was further contended that the first plaintiff is actually the legally wedded wife of one Rajbir, son of Mahipal, with whom her marriage still subsists. As such, it was contended by the appellant that the plaintiffs have no legal right or claim of inheritance in the ancestral land held by Rohtash.

Yet further, the stand of the present appellant in his written statement, was that Rohtash had never visited the village since 1996, nor had he remained in contact with either the present appellant or any of his other family members. Thus, the suit land, as per the appellant, having already vested in him by virtue of a

legally valid decree dated 15.05.1995, he was in possession thereof since the date of a family settlement between the parties, resultant upon which mutation no. 826 had been correctly entered in his favour on 19.12.1995.

6. A replication having been filed to the aforesaid written statement, denying the contents thereof and reiterating those of the plaint, the following issues were framed by the learned Additional Civil Judge (Senior Division), Bhiwani:-

“1. Whether the plaintiffs are entitled to the relief of declaration as prayed for on the grounds as alleged in the plaint?

OPP

2. Whether the plaintiffs have no locus standi nor any cause of action to file the present suit? OPD

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

4. Whether the suit of the plaintiff is time barred? OPD

5. Relief.”

7. Thereafter, on the date of the pronouncement of the judgment of the learned Additional Civil Judge, citing Order 14 Rule 5 CPC, the following issues were also framed:-

“6. Whether the suit of the plaintiffs is bad for non-joinder of necessary parties? OPD

7. Whether the plaintiffs have not affixed the ad valorem (sic) court fee stamps on the plaint? OPD”

8. To prove their case, the plaintiffs examined one Smt. Chanda, plaintiff no. 1 Savitri, and Hari Ram, Building Inspector, as Pws 1, 2 and 3 respectively.

They also led the following documents in evidence:-

Ex. P-1 Jamabandi for the year 2002-03;

Ex. P-2 Jamabandi for the year 2002-03;

Ex. P-3 Mutation No. 1022;

- Ex. P-4 Mutation No. 725;*
Ex. P-5 Jamabandi for the year 1997-98;
Ex. P-6 Jamabandi for the year 1992-93;
Ex. P-7 Copy of plaint;
Ex. P-8 Copy of statement of Rohtash;
Ex. P-9 Copy of written statement;
Ex. P-10 Judgment dated 15.05.1995;
Ex. P-11 Decree-sheet;
Ex. P-12 Mutation No. 826;
Ex. P-13 Death Certificate of Rohtash;
Ex. P-14 Jamabandi for the year 1982-83;
Ex. P-15 Jamabandi for the year 1987-88;
Ex. P-16 Certificate of Pooja;
Ex. P-17 Certificate of Jyotsana;
Ex. P-18 Certificate of Pawan;
Ex. P-19 Identity card of Savitri;
Ex. P-20 Identity card of Savitri;
Ex. P-21 Identity card of Rohtash;
Ex. P-22 Identity card of Rohtash and
Ex. P-23 Ration Card.

9. The appellant-defendant no. 1 examined Constable Sandeep, Rattan Lal, Clerk, Advocate Ranjeet Singh, a Deed-writer, Ravinder Kumar Mehta, one Sajjan Singh, and the appellant himself, as Dws 1 to 6 respectively.

He also tendered the following documents in evidence:-

- Ex. D-1 Agreement to sell;*
Ex. D-2 From no. 24.5 (1)/ FIR;
Ex. D-3 Copy of plaint;
Ex. D-4 Statement of Sh. MS Yadav, Advocate;
Ex. D-5 Decree-sheet dated 15.05.1995;
Ex. D-6 Judgment dated 15.05.1995
Ex. D-7 Written statement
Ex. D-8 Statement of Rohtash

Having heard arguments and having considered the pleadings and

evidence before her, the learned Additional Civil Judge first recorded a finding that Rohtash was admittedly the owner in possession of land measuring 18 kanals and 03 marlas, who transferred the property in favour of the appellant, vide the decree dated 15.05.1995, passed in the suit of the appellant against Rohtash (Civil Suit No. 318 of 1995). The contention of the present appellant was that Rohtash being unmarried had validly transferred the ancestral suit property in his hands to his brother, i.e. the appellant, vide the aforesaid decree and that the plaintiffs thereafter had no right, title or interest in it.

11. The learned Additional Civil Judge then went on to examine as to whether plaintiff no. 1 was actually the legally wedded wife of Rohtash or not and if not, would the plaintiffs or any of them still be entitled to the suit property in terms of Section 16 of the Hindu Succession Act, 1956. [It needs to be noticed that the said provision actually relates to the order of succession among legal heirs of a female Hindu and as such, is not applicable. The learned Civil Judge seemingly intended to refer to Section 16 of the Hindu Marriage Act, 1955, which governs the legitimacy of children of void and voidable marriages.]

12. As regards the marital status of plaintiff no.1 with Rohtash, it was first noticed that Chanda, wife of Ram Chander, had also testified in terms of the plaint, that plaintiff no. 1, Savitri, was the wife of Rohtash and that the other three plaintiffs were the children of Rohtash and Savitri.

By way of documentary evidence, it was found that the voter identity card of plaintiff no. 1, Exs. P-19 and P-20, showed her to be the wife of Rohtash son of Shree Chand, which was also reflected in the Ration card, Ex. P-23, where Savitri was shown to be the widow of Rohtash. Further, Exs. P-16 to P-18 were seen by that Court to be the secondary school examination certificates of plaintiffs no. 2 to 4, wherein again they were shown to be the children of Savitri and

Rohtash.

The learned Court went on to record a finding that the defendants had not been able to show that the aforesaid certificates had been 'falsely procured' only for the purpose of the institution of the suit. Hence, it was held that there was no reason to doubt the authenticity of the certificates issued by the Central Board of Secondary Education, or the voter identity card issued by the Election Commission of India.

13. *Per contra*, the appellant had contended that plaintiff no. 1 was earlier married to one Rajbir, and by way of documentary evidence he had relied upon an FIR dated 04.01.1984, which was registered at the instance of Harsarup, father of plaintiff no. 1, against Rajbir, levelling against him allegations of a demand for dowry.

However, it was held by the learned trial Court that the said FIR was not shown to have reached any conclusion, and therefore, by itself, it could not be concluded that Savitri was married to Rajbir, especially as not even Rajbir had been examined by the appellant-defendant.

On the aforesaid findings, it was concluded by that Court that plaintiff no. 1 was the legally wedded wife of Rohtash and plaintiffs no. 2 to 4 were born of that wedlock. Hence, it was further held that Section 16 of the Hindu Succession Act (*sic*, actually Hindu Marriage Act) 'need not be invoked'.

14. Thereafter, going on to examine as to whether the plaintiffs had any right to the suit property, even being the widow and children of Rohtash, it was recorded as a finding that appellant-defendant no. 1 had not denied that the property was indeed ancestral in the hands of Rohtash, yet it was his contention that the plaintiffs had no right in it.

Despite the admission of the present appellant that the property was

ancestral in nature, the trial Court still went on to differentiate between ancestral and coparcenary property, and eventually held that coparcenary property was necessarily ancestral property though not *vice-a-versa*. In the present case, the property having devolved upon Rohtash from his father, even as per the mutation of inheritance, and a son having been born to Rohtash, it was held to be ancestral property in Rohtash's hand, and as such the plaintiffs were held to have a vested right in it.

An argument having been raised that Rohtash had transferred it to his brother, Amrit Lal, vide the decree dated 15.05.1995, on moveable property having been given in lieu thereof to Rohtash, that argument was also rejected holding that there was no specific pleading as to how much money had been paid to Rohtash as consideration, as per any family settlement.

15. On the aforesaid findings, plaintiff no. 1 was held to be the legally wedded wife of Rohtash, with the other three plaintiffs also found to have been born to him prior to the judgment and decree dated 15.05.1995, looking at their ages at the time of institution of the present suit.

It was therefore held that Rohtash actually had no right to alienate such ancestral property to anyone else, including his brother, i.e. the appellant herein.

As a consequence thereto, it was held that the appellant had no right to mortgage the property vide the mortgage deed dated 02.06.2004, executed by him in favour of the second defendant, who in any case had not bothered to claim his rights in the suit and was proceeded against *ex parte*, vide an order dated 04.02.2008.

16. The appellant herein having tried to also set up a plea of an agreement of sale by Rohtash in his favour on 01.05.1995, that argument was also rejected,

on the ground that the agreement was obviously of no consequence because in the suit instituted by the appellant immediately thereafter (against Rohtash), leading to the decree dated 15.05.1995, his claim to the property was on the basis of a family settlement, thereby abdicating any right on the basis of an agreement of sale. Hence, it was held that Rohtash would have either agreed to sell the land to the appellant, or would have come to a settlement with regard thereto, but not both.

16-A. The contention of the present appellant that he had sold off 12 kanals of land out of the tract of land measuring 123 kanals and 16 marlas, vide a sale deed dated 24.06.1997, and therefore the suit was bad for non-joinder of a necessary party, was an argument also rejected by the trial Court, on the ground that it had not been proved that the land that had been sold to one Umed Singh, was the same as was subject matter of the judgment and decree dated 15.05.1995. This was further elaborated upon by the Court, recording a finding that the appellant had not denied that he had also inherited a share in the aforesaid tract of land, measuring 123 kanals and 16 marlas and hence, he was not able to prove that the 12 kanals that he had sold, was actually out of the suit land measuring 18 kanals and 03 marlas.

Therefore, it was eventually held on that aspect, that had the appellant-defendant no. 1 proved that he had sold 12 kanals to Umed Singh specifically out of the suit land of 18 kanals and 03 marlas, only then would Umed Singh have been a necessary party and the suit bad for non-joinder of such necessary party.

17. On the issue of limitation, the present appellants' contention before the learned Additional Civil Judge is seen to be that the judgment and decree dated 15.05.1995 was within the knowledge of the plaintiffs, and therefore the suit in the present *lis* was instituted beyond limitation.

That argument was again rejected, on the ground that the plaint in the suit which led to the aforesaid decree was dated 01.05.1995, by which date Savitri had been held to be married to Rohtash, and plaintiffs no. 2 to 4 had also been born and therefore, as per the reasoning of the learned Additional Civil Judge, there would be no reason for Rohtash not to mention that fact in the plaint, and that the plaintiffs were actually necessary parties to that suit, with Rohtash deliberately not informing them of the alienation of the property to Amrit Lal. Hence, it was further held that Rohtash had accepted the claim of the present appellant (Amrit Lal) in that suit, without the knowledge of the plaintiffs, and consequently the suit could not be held to be time barred.

18. On the issue of insufficient Court fee, it was held that possession of the suit land was eventually admitted by the plaintiffs to be first with appellant-defendant no. 1 and then with defendant no. 2 as a mortgagee. Therefore, the plaintiffs were liable to be pay court fee accordingly, which was assessed under Section 7 (v) (d) of the The Court Fees Act, 1870, as the property was a definite part of a revenue estate, paying revenue to the Government. On that, a judgment of this Court in **Smt. Mukhtiar Inder Kaur** vs. **S. Avtar Singh** 1989 PLJ 163, was cited, wherein it was held that in a suit for possession of agricultural land which was a part of a khasra number, assessed to land revenue, the court fee would be payable under sub-clause (a) of Section 7(v) and not under sub-clause (d) of the said provision.

19. On the aforesaid findings, the suit of the plaintiffs was decreed in their favour by the learned trial Court, thereby setting aside the judgment and decree dated 15.05.1995, as also the mortgage deed dated 02.06.2004, and all (revenue) entries made pursuant thereto. The appellant was also perpetually restrained from alienating the suit property and the plaintiffs were also held entitled to the relief of

possession, subject to deposit of court fee stamps within two months from the date of the judgment, failing which it was held that the suit of the plaintiffs would be deemed to have been dismissed.

20. The judgment and decree of the learned Additional Civil Judge, Bhiwani, having been challenged by the present appellant, the learned District Judge, Bhiwani (first appellate Court), after noticing the pleadings, the issues framed and the evidence led by the parties, eventually came to the same conclusion as the learned Additional Civil Judge, firstly holding that in terms of the documentary evidence led, plaintiff no. 1 was able to show that she was the widow of the late Rohtash and that the other plaintiffs were his children, with no cogent evidence led by the present appellant to show that plaintiff no. 1 was earlier married to Rajbir, other than the FIR registered at the instance of the plaintiffs' father.

An argument also having been raised before that Court that as a matter of fact the property had not devolved upon Rohtash by natural inheritance but on the basis of a will dated 12.02.1988, executed by his father Shree Chand in favour of all his legal heirs, that argument was also held to be of no consequence, firstly because though a mutation pursuant to the will was in fact accepted by the plaintiffs, however, none of the witnesses to the Will were examined.

The remaining part of the judgment of the learned District Judge also shows that the same reasoning as was given by the learned Civil Judge, was given by the first appellate Court also. Consequently, the first appeal filed by the present appellant was dismissed.

21. Before this Court, learned counsel for the appellant has framed the following questions of law:-

“(i) Whether the plaintiffs respondents are entitled to the relief of declaration as prayed for on the grounds as alleged in

the plaint?

(ii) Whether the impugned judgments and decrees are sustainable in the eyes of law where the learned courts below fails to considering the fact that the respondents are not able to prove that they have a legal right upon the property of the deceased Rohtash?

(iii) Whether the respondent-plaintiff no.1 is legally wedded wife and has the right upon the suit land?

(iv) Whether photostat copies of the documents are admissible in the eyes of law?

(v) Whether the respondents-plaintiffs are estopped from filing the present suit after a lapse of the prescribed limitation period?

(vi) Whether the evidence adduced by appellant has been appreciated by both the learned courts below in its true perspective?”

22. As a matter of fact, the essential questions of law that are really to be determined, are those framed at serial no. (ii) to (v) and arguments were also addressed on both sides accordingly, except on the question at (iv) hereinabove, on which no argument was addressed by either learned counsel; thereby obviously not pressing the question.

23. On the first question, which would necessarily include as to whether the property was ancestral in nature or not, Mr. Ashwani Bhardwaj, learned counsel for the appellant, first submitted that it was never proved that the said property was passed on for three generations to Rohtash and therefore, it could not be considered to be ancestral property.

On the aforesaid contention learned counsel cited the following two judgments:-

1. **Gulab** vs. **Mam Chand** (2009) 2 R.C.R. 428 and

2. **Balbir Singh** vs. **Bant Singh** (1996) 3 R.C.R. (Civil) 351.

24. Mr. Bhardwaj next submitted that Rohtash during his life time never challenged the decree dated 15.05.1995 and therefore, the plaintiffs also never having challenged it during Rohtashs' life time, were precluded from doing so after his death.

The next argument raised by learned counsel was that the respondents could not actually prove that they are the widow and children of Rohtash and therefore, especially in the face of the FIR registered at the instance of the first plaintiffs' father, stating that her husband, Rajbir, was demanding dowry from them, that should have been accepted as evidence enough of plaintiff no. 1 having been married to Rajbir, with no divorce from him so as to establish a legal marriage with Rohtash.

25. In response to the aforesaid arguments, Mr. Ajay Jain, learned counsel appearing for the respondents-plaintiffs first referred to the findings in the judgment of the learned Additional Civil Judge on the marital status of plaintiff no. 1 to submit in terms thereof, on the basis of documents led by way of evidence before that Court.

On the issue of the suit land being ancestral land, learned counsel first referred to paragraph 21 of the aforesaid judgment, to submit that the issue had been gone into in detail by that Court, distinguishing ancestral and co-parcenary property, with the appellant himself also having admitted that it was indeed ancestral property.

26. On that admission of the appellant-defendant no. 1, learned counsel pointed to paragraph 2 of the plaint, (by producing a copy thereof), wherein, in addition to describing the property, the plaintiffs have specifically averred that the property was inherited by Rohtash from his father Shree Chand, and that in the hands of Shree Chand, it was ancestral and co-parcenary property, devolving upon

him from his forefathers.

Mr. Jain then pointed to the reply to the aforesaid paragraph 2, from the written statement of the appellant-defendant no.1, wherein it is simply stated “that para no. 2 of the plaint being matter of record, as not disputed”.

He therefore submitted that the admission of the appellant himself, of the property being both ancestral and co-parcenary, in fact there remained no dispute on that issue and consequently, Rohtash would have no right to alienate it to anyone other than his own wife and children.

Learned counsel again pointed to paragraph 21 of the judgment of the trial Court, wherein a finding is recorded that as per the *Jamabandi* Exs. P-14 and P-15, Shree Chand was shown as a co-sharer in the suit land and thereafter, a mutation of inheritance, Ex. P-4, was sanctioned, in favour of the heirs of Shree Chand, thereby showing that Rohtash had inherited it from his father. Thus, learned counsel submitted that once a son was born to Rohtash, the suit land became ancestral property in the hands of Rohtash, apart from the fact that the nature of the property being both ancestral and co-parcenary, was not denied by appellant-defendant no. 1.

27. On the issue of the suit having been instituted beyond limitation, Mr. Jain referred to Article 109 of the Schedule to the Limitation Act, 1963, wherein it is stipulated that in a property governed by Mitakshara law, any suit instituted to set aside the alienation of ancestral property, by the father of the plaintiffs, must be filed within 12 years from the date when the alienee takes possession of the suit property.

Hence, the contention of Mr. Jain is to the effect that the suit in the present *lis* was instituted on 09.10.2007, whereas the mutation sanctioning transfer of the land to the appellant on the basis of the decree dated 15.05.1995, came to be

entered in the revenue record on 19.12.1995, before which in any case he cannot be held to have been in possession of it, with Rohtash obviously being in such possession as a co-sharer. Actually, as per learned counsel, possession if any with the appellant, would have come about only after the mutation was sanctioned, but even if it is to be taken from the date of the mutation, the suit was instituted 11 years and about 10½ months after such possession and thus, would be within limitation, other than the fact that the plaintiffs came to know of the decree dated 15.05.1995 only after the death of Rohtash.

On the aforesaid arguments, learned counsel for the respondents-plaintiffs prayed for dismissal of the appeal.

28. In rebuttal, Mr. Bhardwaj, learned counsel for the appellant submitted that the mutation of inheritance, Ex. P-4, actually states that it is on the basis of a will in favour of Rohtash's father, and therefore, the ancestral nature of the land would 'break' the moment a will was executed.

Learned counsels' contention therefore is that once the property came to Rohtash by way of a will, regardless of the earlier nature of the property, it would cease to be ancestral and would have to be treated to be self-acquired property in the hands of Rohtash, which he would have a right to alienate to any person whom he chose to.

29. Having heard arguments of both learned counsel and having considered the judgments of the Courts below, in my opinion, this appeal cannot succeed.

Coming to the question of law that first needs to be determined, that is question no.(iii) framed by learned counsel for the appellant, i.e. as to whether the respondent-plaintiff no.1, Savitri, has been correctly held to be the legally wedded wife of the late Rohtash or not. In fact, as a matter of fact, the question framed at

Sr. no.(ii) can only be decided if the question on the marital status of respondent no.1 herein is held to be that of a legally wedded wife of the late Rohtash.

30. On that question, I do not find reason enough to hold that respondent no.1 was not the legally wedded wife of Rohtash, in the absence of any substantial evidence having been led to the contrary by the appellant-defendant, other than the FIR stated to have been lodged at the instance of the first respondents' father.

Undoubtedly, an FIR registered by the respondent-plaintiffs' father, alleging therein that his daughters' husband, Rajbir, was making a demand for dowry, with the FIR stated to have been registered in the year 1984, would otherwise be a very strong piece of evidence against the plaintiffs to show that plaintiff no.1 was actually married to Rajbir at least at that point of time, and with no divorce decree having been produced before the Courts below, the inference would be that plaintiff no.1, even if she was living with Rohtash after having performed any marriage ceremony, such marriage would therefore be void.

However, I find myself in agreement with the reasoning given by the Courts below, to the effect that with no other evidence whatsoever having been led by the defendant, either in the form of the testimony of Rajbir, or by any documentary evidence to the effect that plaintiffs no.2 to 5 (respondents herein), were not the children of Rohtash, a simple FIR led by way of evidence cannot be held to have negated the documentary evidence led by the plaintiffs, by which documents the inference to be taken would be that respondent-plaintiff no.1 was indeed Rohtash's widow and respondents no.2 to 5 were his children.

Even presuming that a ration card and a voter identity card may possibly have been made simply on the statement of the first plaintiff to the effect that she was Rajbir's widow/wife, this Court would not negate the secondary school examination certificates in respect of respondents-plaintiffs no.2 to 4

herein, showing therein that they were the children of Rohtash and Savitri.

I also agree with the reasoning given by the Courts below to the effect that with the age of respondents-plaintiffs no.2 to 4 being shown to be 23 years, 21 years and 17½ years respectively, at the time of the institution of the suit on 09.10.2007, the children were all born before the issuance of the decree dated 15.05.1995, in the suit filed by present plaintiff.

Thus, the eldest child would have been born in 1984, the next in 1986 and the last between the years 1989 and 1990. Nothing has been pointed out to this Court that the age shown in the memo of parties before the learned Additional Civil Judge, of plaintiffs no.2 to 4, i.e. the three children of plaintiff no.1, was not borne out by the certificates issued by the Central Board of Secondary Education that were led by way of evidence by the respondents-plaintiffs, (as Exs.P16 to P18 before the trial Court).

That being so, the children are seen to be born prior to the institution of the suit in 1995 by the present appellant against the late Rohtash, leading to the decree dated 15.05.1995, in favour of the present appellant.

Consequently, in the face of the documentary evidence led by way of Board certificates, a ration card and a voter identity card, supported by the oral testimony of PW1, Smt. Chanda, with no evidence other than the FIR, Ex.D2, led to the contrary, this Court would also hold that it was duly proved that respondent-plaintiff no.1 was the legally wedded wife of the late Rohtash and that respondents-plaintiffs no.2 to 4 were his children, all born before the decree dated 15.05.1995 was suffered by Rohtash in favour of the present appellant-defendant no.1.

31. Though no witness is seen to have been examined by the plaintiff to strictly prove the certificates issued by the Central Board of Secondary Education,

but even so, simply the registration of an FIR, even if duly proved, in the opinion of this Court, would not also strictly prove that plaintiff no.1 was indeed legally married to one Rajbir, before she got married to Rohtash, with no divorce having taken place with Rajbir.

Consequently, this Court agrees with the findings of the Courts below that the marriage between Rohtash, brother of the appellant, to respondent-plaintiff no.1, was duly proved.

32. Though once having held that, there would be no reason to go on to Section 16 of the Hindu Marriage Act, 1955, as was also held by the learned Additional Civil Judge in her judgment and decree, however, this Court considers it still necessary to notice that as per the said provision, children born of even a null and void marriage in terms of Section 11 (and Section 5 (i)) of the same Act, would still be considered to be legitimately born children, as if the marriage between their parents was valid.

Undoubtedly though, sub-section (3) of Section 16 of the Act of 1955 stipulates that no children begotten in a marriage which is otherwise null and void, would have a right to any property of any person, other than that of their parents, which property they would be incapable of possessing or acquiring, by virtue of not being legitimate children of the parents.

In other words, a child begotten in a marriage which is otherwise null and void, even for the reason that either parent had a spouse living at the time of the second marriage, would have no right to coparcenary or other property of either parent, except that property which is of their own parents. Thus, even ancestral property falling specifically to the share of a person, would devolve upon the son (and after 2005 also to the daughter) of that person, even if his children are born in a marriage otherwise void.

In the present case, the suit property was not proved to be coparcenary property but was proved to be ancestral property and 18 kanals 03 marlas was the share that Rohtash inherited as his own share in the larger property held by his father, Shree Chand, which larger tract devolved as 8 shares to the 8 legal heirs of Shree Chand. Hence, in the present case, even if for any reason the marriage of respondent-plaintiff no.1 were found to have been not validly proved, the children of Rohtash, i.e. respondents no.2 to 4 herein, would be entitled to the property held by him as his own share of ancestral property. (The suit property being ancestral shall be discussed further herein also).

However, in such a case, respondent-plaintiff no.1 may not have been entitled to any share in Rohtash's ancestral property, if it were held that her marriage to him was not a legally valid marriage.

33. Yet, this Court having upheld the findings of the Courts below on respondent-plaintiff no.1 having been legally married to the late Rohtash, if the property is found to be ancestral property even by this Court, as it has been held by the Courts below, then naturally she too would be entitled to the property as a class-1 heir of Rohtash.

Thus, the question of law on the first plaintiff being the legally wedded wife and then widow of Rohtash, is decided in favour of the respondents-plaintiffs against the appellant.

34. Coming next to the question as to whether the respondents-plaintiffs have any legal right upon the property of deceased Rohtash.

In this context, at the outset it needs to be stated that if the suit property is held to be self-acquired property of Rohtash, then the decree suffered by him on 15.05.1995, in favour of the appellant, i.e. his brother, cannot be held to be a decree that is null and void and not binding upon the respondents-plaintiffs.

However, if on the other hand, it is found by this Court also that the suit property was indeed ancestral property in the hands of Rohtash, which he could not validly have alienated in the manner that he pleased, then the findings of the Courts below again have to be upheld, that the aforesaid decree cannot be binding upon the rights of the respondents-plaintiffs, qua that property.

35. Before going on to discuss the nature of ancestral property, the plea of the appellant before the Courts below, despite his admission to the property being ancestral and coparcenary, must be examined.

The appellant, despite his aforesaid admission, raised the following three pleas to contend that the property could not have been alienated:-

- i) That it was property which fell to him by way of a family settlement and therefore, was decreed in his favour with Rohtash having suffered that decree voluntarily on 15.05.1995;
- ii) That there was an agreement of sale executed by Rohtash in his favour in respect of the suit property; and
- iii) That the property had come to Rohtash by way of a will of their father, Shree Chand.

First of course, even though an admission *per se* in civil proceedings, may not be 'acceptable' in terms of Section 23 of the Indian Evidence Act, 1872, however firstly, the admission shown to have been made by the appellant-defendant in paragraph no.2 of his written statement, is not seen to be subject to any condition, and further, the evidence led by the parties, as referred to by the Courts below, needs to be discussed.

As regards the family settlement stated to have been executed between the parties, no specific family settlement is seen to have been led by way of evidence before the Courts below. However, the contention is that the judgment

and decree dated 15.05.1995 was based upon a family settlement.

Firstly, it has been held by the Courts below that no specific consideration given to Rohtash by the appellant was proved, in lieu of which such family settlement was arrived at, so as to hold that the land was transferred to the appellant as a consequence of such consideration.

It needs to be stated in this context that if the appellant had proved that consideration was indeed paid to Rohtash and that Rohtash had suffered a decree in favour of the appellant in terms of any family settlement, for any legal necessity in favour of his family, the issue may have been different. No such consideration having been proved to have been paid by Rohtash to the appellant, and no legal necessity shown, especially with the suit by the present appellant having been instituted without impleading even the son of Rohtash (present respondent no.3), I see no error in the judgments of the Courts below in that respect also.

Thus, even any family settlement entered into by Rohtash, to the detriment of his children, would not be permissible, once the property is held to be ancestral property. Therefore, any family settlement would only be valid if it is held that the property was indeed not ancestral property.

36. As regards the agreement of sale on the basis of which also the appellant claimed his right to the property over and above the respondents-plaintiffs, I also see no error in what was held by the Additional Civil Judge, that a suit subsequently having been filed, seeking that the suit property be transferred to the appellant on the basis of a family settlement and not on the basis of any agreement of sale, the agreement of sale itself would be nullified, unless it was also subject matter of the suit between the appellant and the late Rohtash, (leading to the decree dated 15.05.1995), with consideration proved to have been paid to Rohtash. Nothing to that effect has been argued before this Court on behalf of the

appellant.

Moreover, what holds good in respect of the family settlement, holds good even moreso with regard to an agreement of sale, i.e. that an agreement of sale also could not have been entered into by Rohtash if the property was ancestral property in his hands, his son and the other two children having acquired a right in such property by birth.

Of course, if due consideration was received by Rohtash, in lieu of such property, then such consideration may have been deemed to be ancestral property, provided the ancestral land was sold for the benefit of his family. That question, however, does not arise, the Additional Civil Judge having held that there was no such consideration proved to have been passed in terms of any agreement of sale, (which otherwise also would be nullified, with the plea of a family settlement having been taken by the appellant after the agreement of sale, in the suit that he filed against Rohtash).

37. Coming then to the crucial question of whether the suit property can be held to have been self-acquired in the hands of Rohtash, on the basis of any will executed by his father, dividing his property amongst his legal heirs. It has been noticed by the lower appellate Court that a mutation having been entered pursuant to a will, was in fact accepted as a fact by the plaintiffs, but that Court still went on to hold that the acceptance of the entry of mutation would not mean that any will was proved to have been executed by Shree Chand in favour of his legal heirs. I find absolutely no error in that finding, in view of the fact that mutation does not confer any title, it just, *prima-facie*, reflects a contention as to title, on the basis of a particular document or in respect of a natural inheritance.

In the case of a mutation by way of natural inheritance, no document would come into play, unless that document is to contradict the factum of natural

inheritance. In the present case, no will actually having been proved before the Courts below by the appellant, as was stated to have been executed by his father Shree Chand, simply the entry of a mutation on the basis of a will, would not prove that a will was actually executed and duly proved.

38. It also needs to be stated in this regard that, in the opinion of this Court, if a property is otherwise not denied to be ancestral property in the hands of a person but such person still executes a will in favour of those persons who would naturally succeed to such property, such will would not change the actual nature of the property (as being ancestral), simply because the person executing the will, by way of abundant precaution wanted to ensure that it actually devolves upon those whom it would naturally devolve upon as ancestral property.

In the present case however, the appellants' own admission that it was indeed ancestral and coparcenary property, would in any case lead to an inference that the property was ancestral even in the hands of Shree Chand, and he could not have willed it away as he wanted to. However, the will itself not having been proved, that issue is actually rendered to be academic.

39. Coming then to the question of whether the property was actually ancestral in the hands of Rohtash, and therefore could not have been alienated by him to his brother, i.e. the appellant, by suffering a decree in his favour.

Once it has been held, and as a matter of fact admitted by the appellant himself, that the suit property came to Rohtash from their father, and no will of Shree Chand having been proved, the property would become ancestral property in the hands of Rohtash, the moment a son was born to him.

In this context, the following passage from Mulla's Hindu Law, 22nd Edition (Lexis Nexis Publication) can be referred to:-

“221. Ancestral property.- (1) *Property* inherited from paternal ancestor.- All property inherited by a male Hindu from his father,

father's father or father's father's father, is ancestral property. The essential feature of ancestral property according to *Mitakshara* law is that the sons, grandsons and great-grandsons of the person who inherits it, acquire an interest, and the rights attached to such property at the moment of their birth. Thus, if A inherits property, whether movable or immovable, from his father or father's father, or father's father's father, it is ancestral property, as regards his male issue. If A has no son, son's son, or son's son's son in existence at the time when he inherits the property, he holds the property as absolute owner thereof, and he can deal with it as he pleases. However, if he has son's, sons' sons or sons' sons' sons in existence at the time, or if a son, son's son or son's son's son is born to him subsequently, they become entitled to an interest in it by the mere fact of their birth in the family, and A cannot claim to hold the property as absolute owner nor can he deal with the property as he likes. The position has been materially affected after s 8 of the Hindu Succession Act, 1956, came into force.

A father cannot change the character of the joint family property into absolute property of his son by merely making a will and bequeathing it or part of it to the son as if it was the self-acquired property of the father. In the hands of the son, the property will be ancestral property and the natural or adopted son of that son will take interest in it and be entitled to it by survivorship, as joint family property. However, an affectionate gift of his self-acquired property by a father is not *ipso facto* ancestral property in the hands of the son.

A person inheriting property from his three immediate paternal ancestors holds it, and must hold it, in coparcenary with his sons, son's sons, and son's son's sons, but as regards other relations, he holds it, and is entitled to hold it as his absolute property. The result is that if a person inheriting property from another one of his three immediate paternal ancestors has no son, son's son, or son's son's son, the property is his absolute property, and no relations of his are entitled to any interest in it in his lifetime.

Property inherited by a Hindu male from his father, father's father, or father's father's father, is ancestral as regards his male issue,

even though it was inherited by him after the death of a life-tenant. Thus, if a Hindu settles the income of his property on his wife for her life, and the property after her death passes to his son as his heir, it is ancestral property in the hands of the son as regards the male issue of such son.”

Hence, any property as comes to a person even from his father, becomes ancestral property in his hands the moment a son is born to him, if before the birth of a son he has not already disposed it of. In the present case, as already discussed, respondent-plaintiff no.3 herein, i.e. Pawan son of Rohtash, would have been born in the year 1986, he being 21 years old at the time of the institution of the suit in the current *lis*, in the year 2007. Thus he was born about nine years prior to the alienation of the land by Rohtash, vide the decree dated 15.05.1995.

Therefore, the property having become ancestral in the hands of Rohtash in the year 1986 itself, he could not have alienated it, thereby depriving his legal heirs from such ancestral suit property.

40. In this context an ancillary question would also arise, as to whether it would then only be the son, i.e. respondent-plaintiff no.3, who would be entitled to the suit property.

In that context, even in the above passage from Mulla, Section 8 of the Hindu Succession Act, 1956, has been referred to, to say that ancestral property in the hands of a person would thereafter devolve as per Section 8, first to his class-1 heirs.

In the opinion of this Court, as a matter of fact, especially after the amendment in the Hindu Succession Act w.e.f. 09.09.2005, it would not just be upon a birth of a male child but even a female child, that the property would have to be treated ancestral; however, in the present case that issue again does not arise,

respondent-plaintiff no.3 having been born well prior to 15.05.1995, i.e. the date of the earlier decree.

41. As regards the judgments cited by the learned counsel for the appellant in *Balbir Singhs' case* (supra); in that case, a co-ordinate Bench of this Court held that upon property found to be ancestral property, the defendant-plaintiff (as the case would be), would get an interest in it by birth and it could not be passed on by suffering a consent decree, but if it was non- ancestral property, there being no pre-existing right therein, a consent decree would not be barred.

In the present case, no will of Shree Chand having been proved, I do not see how the said judgment is applicable to the facts of this case.

42. To conclude on that question, no will of Shree Chand having been duly proved by the appellant, bequeathing his property in favour of his heirs, and it being admitted by the appellant to be ancestral property, it is held that the suit property was ancestral in the hands of Rohtash, and therefore he could not have alienated it to the appellant vide the judgment and decree suffered by him on 15.05.1995.

43. Coming to the last question, of limitation, which needs to be considered by this Court, (in the absence of any arguments addressed with regard to the admissibility of any photostat documents), i.e. whether the suit in the current *lis* was barred by limitation or not.

In this context, firstly I agree with learned counsel for the respondents-plaintiffs that Article 109 of the Schedule to the Limitation Act lays down a limitation of 12 years, beyond which suits relating to setting aside a fathers' alienation of ancestral property cannot be filed.

As per the said Article, the period of limitation is to start running from the date when the alienee, (in this case the appellant), takes possession of the suit

property.

Thus, though the decree that the respondents-plaintiffs sought the nullification of is dated 15.05.1995, and seen from that date the suit was instituted about four months and 24 days after limitation would have run out, however, since the period of limitation is to start running from the date that the alienee takes possession of the suit property, I see no flaw in the arguments of learned counsel, that such possession at best can be deemed to have been taken by the alienee on the date that a mutation was entered in his favour qua the ownership of the suit land, on the basis of the decree in his favour. As a matter of fact, unless the contrary is specifically proved, possession would normally be taken after the entry of ownership is entered. Especially where the land alienated is by a co-sharer, in favour of another co-sharer, the earliest date that such deemed possession can be inferred, in the absence of evidence to the contrary, would be the sanction of the mutation entry. The mutation entry admittedly having been made on 19.12.1995, vide mutation no.826, the limitation to institute the suit would end on 18.12.2007. Thus, the suit in the current *lis* having been instituted on 09.10.2007, was within limitation by about two months, no evidence having been led to the contrary to show even to this Court, that possession qua the share of Rohtash was already with the appellant earlier.

One way of looking at would be that every co-sharer in a piece of land is deemed to be in possession of every square inch of such land, and possession was also therefore of the appellant; however, in the opinion of this Court, once a transfer is made by a co-sharer in favour of the another co-sharer, with the former completely giving up his share to the extent of the transfer made, possession of the latter, i.e. the transferee, qua the share transferred to him, can only be accepted from the date the transfer is reflected in the revenue record, at best. If course, the

transferred tract of land was in the exclusive possession of the person to whom it was being transferred, limitation would run from the date of alienation, but in the present case, no such evidence having been led to show such earlier possession of the appellant, I find no fault in the argument of learned counsel for the respondents.

44. In *Gulabs'* case, cited by Mr.Bhardwaj, the father had remained alive for six years after he transferred the property, with the decree never having been challenged in his life time. It was held that a suit after his death would not lie, challenging such alienation by a Court decree.

In the present case, undoubtedly, Rohtash in fact remained alive for more than 11½ years after the decree dated 15.05.1995, he having died on 03.01.2007 (as accepted before the Courts below); however, the plaintiffs are stated to have come into knowledge of the alienation only about nine months after his death, i.e. in October 2007. Firstly, I do not find the explanation illogical because if they went to the village only after his death and discovered that the property had been sold, (with the appellant himself admitting that Rohtash never visited the village after 1996), thereafter, their knowledge of alienation of the suit land would have come about only at that time.

Yet further, the declaration of title sought by the respondents-plaintiffs in the suit in the present *lis*, was based on title by way of inheritance of the suit property from Rohtash and therefore, even in terms of Article 65 of the Schedule to the Limitation Act, the limitation would run out 12 years from the date when the defendant proved that his possession of the suit property had become adverse to the plaintiffs. In the present case, there is obviously no claim to the suit property by the appellant-defendant on the basis of any adverse possession of such property. Hence, the claim of the plaintiffs being based upon an interest in the suit

property on the basis of their title to it, they having come into inheritance of the suit property upon the death of Rohtash in 2007, in the opinion of this Court, there would be no limitation to institute such a suit, other than in terms of Article 65 of the Schedule to the Limitation Act.

Consequently, it is held that the suit instituted in the current *lis* was instituted within limitation.

45. As regards the question of photostat copies being acceptable in evidence or not, nothing has been shown to this Court as to which were the photostat copies that were led by way of evidence before the trial Court by the plaintiffs and therefore, no argument having been made on that question at all, it need not be gone into by this Court, though otherwise it may have been a necessary question of law to be gone into.

46. Hence, in the light of the entire discussion hereinafore, I find no reason to allow this appeal, which is consequently dismissed, but with the parties left to bear their own costs.

June 02, 2017.

nitin/dinesh

(AMOL RATTAN SINGH)
JUDGE

Whether speaking/reasoned

Yes

Whether Reportable

Yes