

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

R.S.A.No.1022 of 1992 (O&M)

Date of Decision: November 28th, 2018

Sheo Lal (since deceased) through L.Rs.

...Appellant

Versus

Gindori & another

...Respondents

CORAM: HON'BLE MR.JUSTICE AMIT RAWAL, JUDGE

**Present: Mr. Sanjay Mittal, Advocate,
for the appellant.**

None for the respondents.

AMIT RAWAL, J.

Appellant-plaintiff has not been successful in claiming declaration and permanent injunction to be sole owner in possession of the land comprising of Khewat No.110, Khatouni No.137 and 147 Kitta 22 measuring 101 kanals 14 marlas.

It was alleged that Kirpa was the owner of land measuring 32 acres. He had three sons, namely, Ram Kishan, Kishan Lal and Kesho. Krishan Lal was unknown for the last many years, so his property, on his demise, was inherited by his two sons to the extent of ½ share. Ram

Kishan had one son Hukma, whereas other son Kesho had one son Harji. Bhana and Gopal are the sons of Hukma, whereas Sheo Lal is the son of Fatta son of Harjee. Plaintiff Sheo Lal is the son of Fatta. Bhana and Gopal, as per the averments, were issueless and had gifted their entire half share in favour of Ram Sarup (sister's son) vide gift deed dated 28.04.1960. The aforementioned land consisted of three Khewats bearing No.109, 110 and 111. Mutation regarding the gift deed was also entered. Ram Sarup, on 09.07.1968, filed a petition seeking partition before the revenue court, wherein plaintiff Sheo Lal, Bhana and Gopal were also impleaded as party. The aforementioned application was allowed. Ram Sarup was given 16 killas (127 kanals) and plaintiff Sheo Lal 128 kanals vide instrument of partition dated 17.03.1969. For the reasons best known, Bhana and Gopal, who were residing in different village, executed a Will dated 20.06.1976 in favour of Gindori, daughter of their maternal uncle. There was a mistake in the column of possession in Khewat Nos.110 and 111. Sheo Lal was wrongly recorded in possession of 1/4th share and Bhana and Gopal as 1/4th share, though 1/2 share in the entire holding had already been mutated in the name of Ram Sarup. Taking the advantage of the aforementioned Will, on the demise of testators, Gindori allegedly obtained mutation bearing No. 1540 and 1541 dated 15.01.1982 qua possessory rights of 1/4th share in Khewat

Nos.110 and 111.

The defendants opposed the suit alleging that the plaintiff as well as defendant No.2 Ram Sarup had no concern with the suit land and supported mutation Nos.1540 and 1541. Defendants had never been in possession of the land bearing Khewat Nos.110 and 111.

On the basis of the variance in the pleadings of the parties to the lis, the trial court framed the following issues:-

- “1) Whether Kishan Lal has not been heard of. If so since when and to what effect? OPP
- 2) Whether mutation No.1540 and 1541 dated 15.1.82 are against facts, illegal and not binding upon the plaintiff? OPP
- 3) If issue No.1 is decided in favour of the plaintiff to him much share the plaintiff is entitled in the estate of Kishan Lal? OPP
- 4) Whether Bhana and Gopal had executed gift deed in favour of the defendant No.2 regarding some land other than the suit property? If so to what effect? OPD
- 5) Whether deceased Bhana and Gopal had executed a valid will in favour of defendant No.1 on 20.6.74? If so to what effect? OPD
- 6) Whether plaintiff has no locus standi to bring the suit? OPD
- 7) Whether plaintiff is estopped from bringing the present suit by his act and conduct? OPD
- 8) Whether suit is barred by limitation? OPD

9) Whether suit is false and frivolous and contesting defendant is entitled for compensatory costs? OPD

10) Relief.”

Plaintiff, over and above the oral evidence, brought on record documents Ex.P1 to Ex.P12 including the judgment dated 17.08.1966, whereby suit laying challenge to the Will was dismissed and various other revenue records, i.e., the instrument of partition etc. On the other hand, defendants brought on record 25 documents, i.e., jamabandies etc.

On the preponderance of the evidence, the trial court dismissed the suit. Appeal taken before the Lower Appellate Court has also been dismissed.

Mr. Sanjay Mittal, learned counsel representing the appellant-plaintiff, in support of the memorandum of appeal, submitted that Bhana and Gopal had left with no title and interest after execution of the gift deed in respect of their half share. The factum of partition has not been looked into where half share of the suit property owned by common ancestor was partitioned amongst two decedents. Sheo Dutt, husband of Gindori, in a suit culminated into judgment dated 30.08.1977 (Ex.P7) suffered a statement that Ram Sarup was given half share as she and Ram Sarup had been in cultivating possession. The aforementioned suit was withdrawn with the permission to file a fresh one, but no fresh suit was

filed, therefore, there is illegality and perversity.

There is no representation on behalf of the respondents despite service. The appeal is of 1992. Accordingly, I proceed to decide the appeal on merits.

The genesis of the judgments and decrees of both the courts below for declining the relief as sought, had been that third brother Krishan Lal had been missing and the possession regarding his share continued in the names of Bhana and Gopal and transfer/initiation of possessory rights was permissible in law. Vide mutation No.1540 Ex.P5, possessory rights were transferred in favour of Gindori. The aforementioned reasoning is not sustainable, for, the courts below, while assigning the reasons, had not taken into consideration instrument of partition dated 17.03.1969 (Ex.P12) and the statement of husband of Gindori. It is not the case that Bhana and Gopal had inherited the rights of Krishan Lal missing brother and could execute the Will dated 26.06.1976 in favour of Gindori. In other words, once they did not have the right, they could not have passed the better title.

In the revenue record, possession of 1/4th share is of Sheo Lal and another 1/4th share of Bhana and Gopal. The suit was not in accordance with the adoption deed. It appears that by taking the advantage of the entries, mutation Nos.1540 and 1541 on the basis of the

Will sanctioned in favour of Gindori.

No doubt, this Court, on earlier occasions had been framing the substantial questions of law while deciding the appeals but in view of the ratio decidendi culled out by five learned Judges of the Hon'ble Supreme Court in **Pankajakshi (dead) through LRs and others Vs. Chandrika and others AIR 2016 SC 1213**, wherein the proposition arose as to whether in view of the provisions of Section 97(1) CPC, provisions of Section 41 of the Punjab Courts Act, 1918 would apply or the appeal i.e. RSA would be filed under Section 100 of Code of Civil Procedure and decision thereof could be without framing the substantial questions of law. The Constitutional Bench of Hon'ble Supreme Court held that the decision in **Kulwant Kaur and others Vs. Gurdial Singh Mann (dead) by LRs and others 2001(4) SCC 262** on applicability of Section 97(1) of CPC is not a correct law, in essence, the provisions of Section 41 of the Punjab Courts Act, 1918 had been restored back. For the sake of brevity, the relevant portion of the judgment of five learned Judges of the Hon'ble Supreme Court in Pankajakshi 's case (supra) reads thus:-

“Since Section 41 of the Punjab Act is expressly in conflict with the amending law, viz., Section 100 as amended, it would be deemed to have been repealed. Thus we have no hesitation to hold that the law declared by the Full Bench of the High Court in the case of Ganpat [AIR 1978 P&H 137 : 80 Punj LR 1 (FB)] cannot be sustained and is thus overruled.” [at

paras 27 - 29]”

“27. Even the reference to Article 254 of the Constitution was not correctly made by this Court in the said decision. Section 41 of the Punjab Courts Act is of 1918 vintage. Obviously, therefore, it is not a law made by the Legislature of a State after the Constitution of India has come into force. It is a law made by a Provincial Legislature under Section 80A of the Government of India Act, 1915, which law was continued, being a law in force in British India, immediately before the commencement of the Government of India Act, 1935, by Section 292 thereof. In turn, after the Constitution of India came into force and, by Article 395, repealed the Government of India Act, 1935, the Punjab Courts Act was continued being a law in force in the territory of India immediately before the commencement of the Constitution of India by virtue of Article 372(1) of the Constitution of India. This being the case, Article 254 of the Constitution of India would have no application to such a law for the simple reason that it is not a law made by the Legislature of a State but is an existing law continued by virtue of Article 372 of the Constitution of India. If at all, it is Article 372(1) alone that would apply to such law which is to continue in force until altered or repealed or amended by a competent Legislature or other competent authority. We have already found that since Section 97(1) of the Code of Civil Procedure (Amendment) Act, 1976 has no application to Section 41 of the Punjab Courts Act, it would necessarily continue as a law in force.”

Therefore, I do not intend to frame the substantial questions of

law while deciding the appeal, aforementioned.

For the reasons stated above, the judgments and decrees of the courts below are hereby set-aside. Appeal is allowed. Suit of the plaintiff is decreed. Decree sheet be prepared accordingly.

November 28th, 2018
ramesh

(AMIT RAWAL)
JUDGE

Whether speaking/reasoned
Whether Reportable:

Yes/No
Yes/No