

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

RSA No.559 of 1999 (O&M)

Date of Decision.31.08.2018

Kashmir Singh

.....Appellant

Vs

Balbir Singh and others

.....Respondents

CORAM:HON'BLE MR. JUSTICE AMIT RAWAL

Present: Mr. Dinesh Ghai, Advocate
for the appellant.

Mr. Amarjit Markan, Advocate
for the respondents.

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AMIT RAWAL J.

The appellant-plaintiff is aggrieved against the judgment and decree dated 30.11.1998 passed by the lower Appellate Court whereby judgment and decree dated 25.05.1995 of the trial Court decreeing the suit has been set aside. In other words, the suit has been dismissed.

It would be in the fitness of things to refer the facts necessary for adjudication of the present regular second appeal. The appellant-plaintiff instituted the suit for declaration against his brothers-defendant Nos.1 to 5 and his father Shanker Singh who was arrayed as defendant No.6 alleging that the property in dispute was purchased by defendant No.6 by selling the ancestral property and during his life time, defendant Nos.1 to 5 transferred the suit property in their favour by playing a fraud on defendant No.6, therefore, the decree dated 07.08.1990 passed in civil suit bearing No.1143 was null and void. It was alleged that the property at the hands of defendant

No.6 was ancestral, thus, during the life time, could not pass on right and title to defendant Nos.1 to 5 by playing fraud upon the plaintiff, because there was no legal necessity.

The aforementioned suit was contested by the respondents-defendants denying the character and nature of the property to be ancestral. It was alleged that on 14.02.1982, a family settlement was arrived at between the parties whereby the plaintiff had got a plot and a sum of ₹25,000/- in cash.

Since the parties were at variance, the trial Court framed the following issues:-

- “1. Whether the suit land mentioned in the heading of the plaint is an ancestral property? OPP*
- 2. Whether the plaintiff along with defendants 1 to 5 is co-sharer in possession of the suit land? OPP*
- 3. Whether decree dated 7.8.90 suffered by defendant No.6 in favour of defendants 1 to 5 ignoring the right of plaintiff is bad? If so whether the mutation dt. 28.12.90 made in furtherance thereof is also against law, fact, based on fraud etc. and are liable to be set aside? OPP*
- 4. Whether the defendants are not authorized to alienate or transfer the 1/6th share of the plaintiff to any other person?OPP*
- 5. Whether the suit is liable to be dismissed with special cost u/s 35-A, CPC? OPD*
- 6. Whether the suit is not maintainable in the present form? OPD*

7. *Whether the plaintiff has no cause of action to bring this suit? OPD*
8. *Whether the plaintiff is estopped from bringing the present suit by his own act and conduct? OPD*
9. *Whether the plaintiff has not disclosed the facts regarding family partition, hence, is not entitled to the discretionary relief of injunction? OPD*
10. *Whether the suit is bad for non-joinder and mis-joinder of necessary parties? OPD*
11. *Whether the suit has not been properly filed for the purposes of court fees and jurisdiction? OPD*
12. *Whether the suit is time barred? OPD*
13. *Whether the civil court has no jurisdiction to entertain and try this suit? OPD*
14. *If issue No.2 is not proved whether property in dispute has already been got partitioned? OPD*
15. *Whether the plaintiff is not in possession of any specific portion of the suit land, hence, this suit is barred by the provisions of Specific Relief Act? OPD*
16. *Relief.”*

The appellant-plaintiff examined PW1 Risal Singh, Assistant V.R.K., Hisar, Kashmir Singh, plaintiff, examined himself as PW2, Yashpal Chand Jain, handwriting and finger print expert as PW3, Mehnga as PW4 and Vijay Kumar Ahlmad as PW5 and tendered into evidence Ex.P1 to Ex.P5, Ex.PW3/A, PW3/B, PB and Mark PA.

On the other hand, defendants examined DW1 Shanker Singh, defendant No.6, DW2 Dhup Singh, DW3 Kesar Singh, DW4 Satnam Singh and three more witnesses DW5 to DW7 and tendered into evidence Ex.D1 and D2.

The trial Court without noticing the fact that the plaintiff did not prove nature and character of the property to be ancestral deduced and treated the same as ancestral on the premise that Shanker Singh had purchased the suit property after selling the agricultural land, thus, decreed the suit. The appeal preferred before the lower Appellate Court as noticed above has been allowed. Though it has been held that nature of the property was ancestral but it was observed that family settlement Ex.D1 and the receipt Ex.D2 propounded by the defendants had been proved. Resultantly, the suit was dismissed.

Mr. Dinesh Ghai, learned counsel appearing on behalf of the appellant submitted that the concurrent finding of fact with regard to nature and character of the property as ancestral has been proved but the lower Appellate Court has erroneously ignored the testimony of the expert, for, signatures on the settlement had been proved but not on the receipt showing payment of ₹25,000/-. Therefore, the defendants did not honour the settlement. The best possible piece of evidence, thus, has been withheld. The decree was not for the purpose of discharge of legal necessity and therefore, land being ancestral could not be alienated and transferred by way of collusive decree. Ex.D1 and D2 were false and fabricated documents. It has not been proved on record that Kashmir Singh had relinquished the right in the property in dispute.

Ex.D1 and D2 are inadmissible evidence and cannot have

the character of the family partition or settlement, much less, arrangement. The aforementioned documents created a right for the first time, therefore, required registration as per Section 17 (b) of the Registration Act. In support of aforementioned contention, relied upon judgment of Hon'ble Supreme Court rendered in **Bhoop Singh Vs. Ram Singh and others (1996-1) Vol.CXII PLR 559**. The appellant, thus, had a right by birth vis-à-vis 1/6th share.

Defendants failed to examine scribe of Ex.D1 and D2. Therefore, no such evidence has come on record, though the same was read over to the plaintiff. In view of the aforementioned submissions, relied upon ratio decidendi culled out by Hon'ble Supreme Court in **Smt. J. Yashoda Vs. K. Shobha Rani 2007(2) RCR (Civil) 840**. Mere exhibition of the document does not dispense with its proof and in support of the same, relied upon judgment of Hon'ble Supreme Court in **Narbada Devi Gupta Vs. Birendra Kumar Jaiswal and another 2003(2) RCR 564**.

Yashpal Chand Jain, PW3 stated that Ex.D2 did not bear signature of the plaintiff. On the contrary, defendant No.6, Shanker Singh, who appeared as DW1 stated that Ex.D1 and D2 were written and scribed by one person whereas Dhup Singh stated otherwise. The plot mentioned in Ex.D1 is measuring 3 kanals 4 marlas and except 26 marlas, the remaining plot has been sold by Shanker Singh to Karam Singh and only 26 marlas were given to the appellant-plaintiff. In the replication, the plaintiff mentioned that he had constructed his house only on a small portion of plot about 15/16 years ago and therefore, question of giving plot to the plaintiff in the year 1982 did not arise,

thus, the judgment of the lower Appellate Court is liable to be set aside.

Mr. Amarjit Markan, learned counsel appearing on behalf of the respondents submitted that though respondents-defendants had not filed cross objection as per Order 41 Rule 22 CPC but by taking the aid of Order 41 Rule 33 CPC can always assail the finding of the trial court, much less, of the lower Appellate Court vis-a-vis character of the property as ancestral. In order to lend support to the aforementioned argument, he submitted that the plaintiff miserably failed to prove the nature and character of the property as ancestral as no excerpt, pedigree table were placed on record, which is essential requirement of law, as per the judgment rendered by this Court in **Banta Singh V. Phuman Singh 1972 PLJ 275.** The appellant-plaintiff has not denied relinquishment of right in the property by taking one plot instead his focus had been only on the receipt of ₹25,000/-. The suit during the life time of the father was not maintainable unless it had been proved that the property was ancestral and collusive decree was without legal necessity. In support of aforementioned submissions, relied upon judgment of this Court in **Chain Singh Vs. Rajender and others 2016 (159) AIC 828; Som Nath and another Vs. Puran Singh and others 2017 (1) ICC 209 and Raj Kumar and others Vs. Dasondhi Ram and others 2016(4) PLR 492.**

He supported the judgment of lower Appellate Court by referring to the testimony of DW1 that amount of ₹25,000/- was paid to the plaintiff on 15.06.1982. DW3, Kesar Singh stated that he was

present at the time of the family settlement as well as execution of the receipt, which was also endorsed by Dhup Singh. Their expert in the cross-examination, mentioned that signature on Ex.D2 resembled with the specimen signatures, thus, urges this Court for upholding the judgment by treating the property to be self-acquired.

I have heard learned counsel for the parties, appraised the paper book, records of the Courts below and the judgments cited at bar and of the view that there is no force and merit in the submissions of Mr. Ghai and the reason is not one but many.

The plaintiff has miserably failed to prove the nature and character of the property as ancestral for want of following documents:-

- (i) Original excerpt
- (ii) Pedigree table

This view of mine is derived from the judgment rendered by this Court in **Banta Singh Vs. Phuman Singh 1972 PLJ 275.**

Bare pleading in the plaint that Shanker Singh had sold the ancestral property and purchased another property for proving the property to be ancestral is not sufficient. The plaintiff ought to have proved that he was fourth generation in lineage i.e. defendant No.6 inherited the property from his grandfather.

Provisions of Order 41 Rule 33 CPC are no longer *res integra*. For the sake of brevity, Order 41 Rule 33 CPC is reproduced as under:-

“33. Power of Court of Appeal— The Appellate Court shall have power to pass any decree and make any order which ought to have been passed or made and to pass or

make such further or other decree or order as the case may require, and this power may be exercised by the Court notwithstanding that the appeal is as to part only of the decree and may be exercised in favour of all or any of the respondents or parties, although such respondents or parties may not have filed any appeal or objection and may, where there have been decrees in cross-suits or where two or more decrees are passed in one suit, be exercised in respect of all or any of the decrees, although an appeal may not have been filed against such decrees:

Provided that the Appellate Court shall not make any order under section 35A, in pursuance of any objection on which the Court from whose decree the appeal is preferred has omitted or refused to make such order.”

The aforementioned provisions of law can always be pressed into service as exercise of power under Order 41 Rule 33 CPC, in view of ratio decidendi culled out by Hon'ble Supreme Court in **C. Cheriathan Vs. P. Narayanan Embranthiri and others 2009(1) RCR (Civil) 708.**

Coming to the point of relinquishment of right, Kashmir Singh has not denied receipt of any plot but agitated issue on the amount of ₹25,000/-. If at all, he knew that the property was ancestral, he would not have settled for one plot and ₹25,000/- vis-a-vis land holding of 81 kanals and odd marlas. During all this period, he remained silent and woke up only when Shanker Singh suffered a decree in favour of his other sons i.e. defendant Nos.1 to 5. Plaintiff and defendant Nos.1 to 5 are siblings. Shankar Singh emphatically stated that the property was not ancestral. Therefore, for all intents and purposes, the suit property has to be self-acquired. The interest of

the plaintiff had been taken care of way back in the year 1982.

In my view, filing of the suit was nothing but an act of aggrandizement. It is also settled law that if the property has not been proved to be ancestral, the suit instituted against the father during his life time challenging the collusive decree suffered by him is not maintainable. There is no dispute to the judgments relied upon by Mr. Ghai but piece of evidence as noticed above, does not leave any manner of doubt that the plaintiff has not complied with aforementioned documentary requirements. The judgments with regard to admissibility of evidence would be meaningless once the nature and character of the property has not been proved to be ancestral. In other words, the plaintiff has not been able to discharge the onus as per Section 100 of the Indian Evidence Act.

As an upshot of my finding, the finding rendered by the lower Appellate Court is perfectly legal and justified as the same is based upon correct appreciation of fact and law, much less, no substantial question of law arises for consideration by this Hon'ble Court.

The second appeal is dismissed.

(AMIT RAWAL)
JUDGE

August 31, 2018
Pankaj*

Whether speaking/reasoned Yes

Whether reportable No