

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

RSA No.2394 of 2011

Date of Decision.21.02.2018

Jaswanti widow of Sh. Ram Parshad

.....Appellant

Vs

Sunil son of Sh. Rameshwar and another

.....Respondents

CORAM:HON'BLE MR. JUSTICE AMIT RAWAL

Present: Mr. Aishwarya Bajaj, Advocate for
Mr. Saurabh Bajaj, Advocate
for the appellant.

Mr. Parminder Singh, Advocate
for the respondents.

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AMIT RAWAL J.(ORAL)

The appellant-defendant is in regular second appeal against the concurrent finding of fact whereby the judgment and decree passed in civil suit bearing No.133 of 1995 and consequential mutation has been set aside and relief of possession has been granted with restraint order against the defendants from alienating the suit property.

The respondent-plaintiff No.1, Sunil son of Rameshwar and Dhanwanti daughter of Rikhi Ram-plaintiff No.2, instituted the suit challenging the aforementioned decree and claiming aforementioned relief on the premise that the plaintiff No.2, Dhanwanti was married with defendant No.2 according to Hindu rites and customs and out of the wedlock, plaintiff No.1 i.e. Sunil was born. The defendant No.2 along with other family members started taunting and passing derogatory remarks against plaintiff No.2 for insufficient dowry and the relationship between

the husband and wife became strained. In other words, plaintiff No.2 was turned out of the matrimonial home. The plaintiffs filed petition under Section 125 Cr.P.C. for maintenance. The Additional Chief Judicial Magistrate vide order dated 6.4.1991 allowed the aforementioned petition by granting maintenance @₹300/- per month from the date of application i.e. 26.7.1990. The aforementioned order was assailed by filing criminal revision petition bearing No.13 of 1992 but the same was dismissed by the Additional Sessions Judge, Karnal vide order dated 18.08.1993. Defendant No.2, Rameshwar was the owner in possession of agricultural land qua 9/40 share out of total land comprising in Khewat No.78, Khatoni No.96, Rect. No.9, Killa No.3/2, 4/1/1, 6/2, 14, 15, 18/2, 23/1, Rect. No.43 and Rect. No.135, total and 38 kanals 19 marlas as per jamabandi for the year 1997-98 situated in village Bhojpur, Tehsil Nissing. However, in order to circumvent the order dated 6/4/1991, a collusive decree dated 10.05.1995 was obtained by defendant No.1 from defendant No.2 in civil suit bearing No.133 of 1995 titled as "Jaswanti Vs. Rameshwar", which could not be passed as the plaintiff No.1 had right by birth owing to the nature and character of the property. The ancestral property could not be alienated or parted with except on account of legal necessity, which had not seen the light of the day.

The aforementioned suit was contested by defendant No.1 i.e. Jaswanti by filing written statement and taken numerous preliminary objections viz; locus standi, limitation etc. On merits, the factum of marriage of plaintiff No.2 with defendant No.2 had not been denied but it was averred that the marriage between defendant No.2 and plaintiff No.2 was dissolved by decree of divorce whereby plaintiff No.2 had foregone the

claim of maintenance in those proceedings. Defendant No.2, Rameshwar, also appeared in response to the notice and filed the written statement by taking identical stands and acknowledged the decree suffered by him in favour of defendant No.1 and denied the nature and character of the property as ancestral.

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

- “1. Whether the judgment and decree dated 10.5.1995 is illegal and not binding upon the interest of the plaintiffs? OPP*
- 2. Whether the proper court fee has been affixed or not? OPP*
- 3. Whether the plaintiffs are estopped from filing the present suit by their own act and conduct? OPD*
- 4. Whether the suit is bad for misjoinder and non joinder of necessary parties? OPD*
- 5. Relief”*

The respondents-plaintiffs in support of their case examined Dhanwanti as PW1 and brought on record following documents and closed the evidence:-

Ex.P1	-	Jamabandi for the year 1971-72
Ex.P2	-	Jamabandi for the year 1971-72
Ex.P3	-	Jamabandi for the year 1976-77
Ex.P4	-	Jamabandi for the year 1992-93
Ex.P5	-	Mutation No.330
Ex.P6	-	Jamabandi for the year 1997-98
Ex.P7	-	Mutation No.122
Ex.P8	-	Mutation No.338
Ex.P9	-	Mutation No.339
Ex.P10	-	Mutation No.340
Ex.P11	-	Mutation No.341

- Ex.P12 - Copy of judgment dated 6.4.1991
- Ex.P13 - Copy of order dated 18.8.1993
- Ex.P14 - Copy of Case No.133/95
- Ex.P15 - Copy of written statement.
- Ex.P16 - Copy of statement of Rameshwar
- Ex.P17 - Copy of Sh. Kuldeep Singh, Adv.
- Ex.P18 - Copy of judgment dated 10.5.1995
- Ex.P19 - Copy of charge sheet Ex.P19.

The defendant No.1 herself stepped into the witness box as DW1, Sham Lal as DW2 and Rattan Lal as DW3 and brought on record documentary evidence of copy of judgment dated 27.11.1991 as Ex.D1, copy of statement of Dhanwanti as Ex.D2 and copy of statement of Rameshwar as Ex.D3.

In rebuttal, the plaintiffs produced application under Section 125(3) Cr.P.C as Ex.P20, order dated 8.5.1996 as Ex.P21, order dated 2.7.1996 as Ex.P22, order dated 29.4.1997 as Ex.P23, order dated 10.11.1998 as Ex.P24, order dated 27.11.1991 as Ex.P25, order dated 8.11.2002 as Ex.P26, order dated 14.2.2006 as Ex.P27, statement of Vinay Bansal, Advocate as Ex.P28, order dated 27.2.2006 as Ex.P29, petition dated 31.3.2008 as Ex.P30 and agreement dated 2.8.1996 as Ex.P31.

On the preponderance of evidence, the trial Court decreed the suit by holding that the property was ancestral in nature and therefore, Rameshwar, defendant No.2, could not transfer the property by virtue of collusive decree. The appeal preferred against the judgment and decree of the trial Court also met with the same fate.

Mr. Ashwarya Bajaj for Mr. Saurabh Bajaj, learned counsel appearing on behalf of the appellant submitted that the judgments and decrees of both the Courts below are not only perverse but erroneous and

fallacious, for, the plaintiffs have miserably failed to prove the nature and character of the property as ancestral. For proving the property being ancestral, original excerpt was required to be produced, which has not seen light of the day. In support of this contention, he relied upon the judgment of this Court in *Banta Singh and others Vs. Phuman Singh and others* 1972 PLJ 275 to contend that it is only the original excerpt containing the pedigree table to show that the property had fallen at the hands of Rameshwar from three generations. He also referred to paragraph 221 of Mulla's 21st Edition to contend that no evidence to prove the lineage from three generations has been brought on record. The Courts below have only relied upon the bald statement of the plaintiffs that the property was ancestral in nature. Jamabandies as noticed above, did not show that the property at the hands of Rameshwar had fallen from his forefathers and plaintiff being the 4th generation in lineage would have right by birth.

He further submitted that the courts below have committed illegality and perversity in not referring the written statement of Rameshwar, who candidly acknowledged the decree in favour of defendant No.1. There was no proof of attachment of the property in lieu of decree dated 06.04.1991 binding the defendant No.2 not to alienate the suit property. Copy of judgment dated 27.11.1991, Ex.D1 and statement of Dhanwati Ex.D2 as a whole were not looked into, therefore, the judgments and decrees passed by the Courts below are not sustainable in the eyes of law.

Per contra, Mr. Parminder Singh, learned counsel appearing on behalf of the respondents-plaintiffs submitted that the relationship of the parties i.e. plaintiff No.1 being son and plaintiff No.2 being wife of

defendant No.2, Rameshwar has not been controverted. It has categorically come on record that the property in dispute was purchased by Rameshwar from the sale proceeds of the ancestral property, which has not been denied by leading direct and cogent evidence, therefore, adverse inference was liable to be drawn against the appellant-defendant. There was a maintenance decree dated 6.4.1991 and in order to thwart the same, defendant No.2 intentionally and in collusion with defendant No.1 suffered the decree. It is in this background of the matter, the decree aforementioned was challenged in the present suit. The concurrent finding of fact cannot be tinkered with unless and until there is gross illegality and perversity, thus, urges this Court for upholding the judgments and decrees under challenge.

I have heard learned counsel for the parties, appraised the paper book, records of the courts below and of the view that there is force and merit in the submissions of Mr. Ashwarya Bajaj, for, the plaintiffs have miserably failed to prove the nature and character of the property to be ancestral and had fallen to the share of Rameshwar from three generations and the plaintiff being the 4th generation had right by birth.

It is an essential requirement to place on record the original excerpt of the pedigree table to show the lineage and connect the property in dispute to be the ancestral. Having failed to do so, mere statement or bald assertion in the evidence would not clothe the property to be ancestral property. The defendant No.2, Rameshwar himself filed the written statement and was candid enough to give a statement that he suffered a decree in favour of defendant No.1 and no fraud had been played upon him, much less, proved. The decree dated 6.4.1991 did not envisage any attachment to the property causing any impediment to defendant No.2 being

owner of the property in alienating the same. Ex.D2 is the statement of plaintiff No.2, Dhanwanti wherein in the divorce proceedings she had forgone the right of maintenance owing to dissolution of marriage.

In my view, the respondent-plaintiff No.1 did not have any right by birth in the property as onus to prove the same being ancestral has not been discharged. All these facts have been ignored and gone unnoticed before the Courts below, thus, there is illegality and perversity.

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.

In view of the aforementioned, the judgments and decrees passed by the Courts below are set aside and the second appeal is allowed. Decree sheet shall be prepared accordingly.

(AMIT RAWAL)
JUDGE

February 21, 2018
Pankaj*

Whether reasoned/speaking Yes

Whether reportable No