

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

**RSA No.111 of 2012 (O&M)
Date of Decision:21.12.2018**

Suresh Kumar and others Appellants

Vs

Luv Kumar and others Respondents

CORAM: *HON'BLE MR. JUSTICE RAJ MOHAN SINGH*

Present:Mr. Rajesh Arora, Advocate
for the appellants.

Mr. N.D. Achint, Advocate
for respondents No.1 to 5 and 15.

Mr. Amit Jain, Advocate
for respondents No.11 and 12.

Mr. Sandeep Verma, Advocate for
Mr. Minderjeet Yadav, Advocate
for respondents No.6, 8, 13, 14, 16, 17 and 18.

Mr. Atul Yadav, Advocate
for respondent No.24 (in CM No.3077-C of 2014).

RAJ MOHAN SINGH, J.

CM No.3077-C of 2014

Prayer made in this application is for impleadment of
the applicant as respondent No.24.

For the reasons mentioned in the application, the same
is allowed. Applicant-Attar Singh is ordered to be impleaded as

party respondent No.24.

Amended memo of parties is taken on record.

RSA No.111 of 2012 (O&M)

[1]. Plaintiffs No.3, 5, 6 and 8 have preferred this Regular Second Appeal against the concurrent judgments and decrees passed by the Courts below in a suit for declaration with permanent injunction.

[2]. Brief facts of the case are that the plaintiffs filed a suit for declaration with permanent injunction with the averments that the suit land as shown in the plaint was originally owned and possessed by Jawala Parshad predecessor-in-interest of the plaintiffs, defendants No.1 to 4 and proforma defendants No.8 to 13. He was Karta of the joint Hindu family and the land was ancestral in the hands of Jawala Parshad qua the plaintiffs and proforma defendants No.8 to 13. Jawala Parshad inherited the land from his father Chhaju Ram in the year 1918, who was owner in possession of the same.

[3]. Plaintiffs further averred that the land was ancestral and coparcenary property of Jawala Parshad and his sons namely Hari Singh, Surat Singh, Karan Singh and Jagdish as they had constituted a joint Hindu family and Hindu Undivided Family. Jawala Parshad and the sons had birth right in the suit

property being coparceners. At the time of death of Jawala Parsad, he had only $\frac{1}{5}$ th share being one of the coparceners and all the four sons were having $\frac{1}{5}$ th share each in the suit property. The suit property was jointly owned and possessed by the coparceners at the time of death of Jawala Parshad. $\frac{1}{5}$ th share of Jawala Parshad was inherited by his sons and daughters in equal shares being notional share of Jawala Parshad and the remaining $\frac{4}{5}$ th share was owned and possessed by his sons exclusively being coparceners. Only notional share of $\frac{1}{5}$ th belonging to Jawala Parshad was available for inheritance by the legal heirs in accordance with law and the same was to be devolved upon them as per law of Succession.

[4]. Plaintiffs averred that due to mistake of revenue staff, a mutation No.180 of inheritance was wrongly sanctioned on 14.05.1967 and the entire land was mutated in favour of all the sons and four daughters in equal shares to the extent of entitling them $\frac{1}{8}$ th share each. Infact all the four sons inherited $\frac{9}{40}$ share each and daughters inherited $\frac{1}{40}$ share each because the daughters could have succeeded only to the extent of $\frac{1}{5}$ th share belonging to Jawala Parshad on notional basis of coparcenership. Mutation No.180 was claimed to be illegal, null and void. Defendants No.1 to 4 never remained in possession of

any share of the suit property at any point of time. It was further pleaded that due to wrong recording of mutation, defendants No.1 to 4 took illegal benefit of the same and sold $1/8^{\text{th}}$ share out of the suit land in excess of $1/40^{\text{th}}$ share in favour of defendants No.5 to 7 and the same was also claimed to be illegal. The sale deeds were executed on 04.11.1997 and 05.11.1997 and mutations were also sanctioned accordingly. All the three sale deeds in respect of 14 Kanals 7 Marlas of land each in favour of defendants No.5 to 7 were claimed to be illegal, null and void.

[5]. The suit was contested by defendants No.1, 2 & 9 denying that Jawala Parshad had only $1/5^{\text{th}}$ share being only coparcener at the time of his death. Mutation No.180 dated 14.05.1967 was claimed to be legal. Concept of coparcenership of joint Hindu family was denied in the community of Ahirs as they were governed by customary laws in the matter of succession and alienation in District Gurgaon and the State of Punjab and Haryana. All the heirs of Jawala Parshad had inherited the property in equal shares. Father of the plaintiffs and other sons of Jawala Parshad never challenged the mutation of inheritance despite notice after the death of Hari Singh and his widow in equal shares. Similarly defendants No.5 and 6 also contested the suit. All the customary pleas were

taken.

[6]. Both the parties went to trial on the following issues:-

- “1) *Whether mutation of inheritance of Jawala Parsahd No.180, sale deeds dated 4.11.97 and 5.11.97 are illegal, null and void and are liable to be set aside on the grounds as alleged? OPP*
- 2) *Whether plaintiffs are entitled for relief of permanent injunction on the grounds as alleged? OPP*
- 3) *Whether the suit of the plaintiff is not maintainable in the present form? OPD*
- 4) *Whether the plaintiffs have no locus standi to file the present suit? OPD*
- 5) *Whether present suit is time barred? OPD*
- 6) *Whether suit is barred under Order 2 Rule 2 CPC? OPD*
- 7) *Relief.”*

[7]. Both the parties led their respective evidence in order to prove their case.

[8]. The trial Court dealt with issues No.1, 2 and 5 jointly. Plaintiffs have produced on record excerpt from the year 1877 to 2002-03 (Ex.P1/A). The said excerpt was proved by PW-1 Kanwar Lal, Moharrar Patwari. Perusal of the excerpt would show that Jawala Parshad inherited the suit property from his fore-fathers and the land was ancestral property in the hands of Jawala Parshad. Factum of property being ancestral in the hands of Jawala Parshad was not refuted by the defendants at the time of arguments before the trial Court. It was so recorded by the trial Court that learned counsel for the defendants at the

time of arguments did not argue that the property in the hands of Jawala Parshad was not joint Hindu family property. The trial Court held that sons of Jawala Parshad had pre-existing right in the suit property. Admittedly, Jawala Parshad died in the year 1967. Prior to Hindu Succession (Amendment) Act 2005, a daughter was not considered as coparcener and she did not have any right by birth in the joint Hindu family/coparcenary property. As per provisions of Hindu Law and Hindu Succession Act, Jawala Parshad had $\frac{1}{5}$ th share only at the time of his death and the remaining land was owned and possessed by his sons being coparceners to the extent of $\frac{1}{5}$ th share each. The daughters of Jawala Parshad namely Sita, Shanti, Vijay and Kamlesh had to inherit only $\frac{1}{5}$ th share of Jawala Parshad being notional share along with four brothers after the death of Jawala Parshad. After the death of Jawala Parshad his sons inherited $\frac{9}{40}$ ($\frac{1}{5} + \frac{1}{40}$) share each while his daughters inherited $\frac{1}{40}$ th share each in the suit land.

[9]. The trial Court held that the mutation No.180 dated 14.05.1967 was not sanctioned as per law. Since the mutation was sanctioned on 14.05.1967 during life time of Jawala Parshad and husband of plaintiff No.8 i.e. Hari Singh and the said mutation was never challenged by any of the coparceners during life time of Jawala Parshad. Hari Singh died on

21.09.1996 and he had survived for a period of about 29 years after sanctioning of the mutation and the suit was filed only on 30.08.1999. The trial Court further held that the suit could have been filed within a period of three years after sanctioning of the mutation. Trial Court dismissed the suit only on the ground of limitation.

[10]. The lower Appellate Court affirmed the findings recorded by the trial Court. That is how the present appeal came to be filed before this Court.

[11]. Perusal of the record would show that notice of motion was issued on 09.01.2012. Thereafter, Mr. N.D. Achint, Advocate appeared by way of filing memorandum of appearance on behalf of respondents No.1 to 5, 9 & 15. Mr. Amit Jain, Advocate appeared on behalf of respondents No.11 and 12. Mr. Minderjeet Yadv, Advocate represented respondent No.7/caveator. Thereafter in the order dated 03.09.2012 passed by this Court, it was recorded that respondent No.19 was served by way of affixation which was treated to be a sufficient service. Respondents No.20 to 23 were also served with the notices. Respondents No.19 to 23 were proceeded against *ex parte*. Fresh notices were issued to respondents No.6, 8, 10, 13, 14 and 16 to 18 on their correct addresses. On 01.04.2013, it was recorded that respondent No.10 had refused to receive notice

and affixation was done. Respondent No.5 was proceeded against ex parte. Thereafter for unserved respondents, an application under Order 5 Rule 20 CPC for substituted service was allowed and the unserved respondents were served through publication in 'The Indian Express' newspaper. Despite service, none appeared on behalf of the respondents except the respondents represented by the Advocates as shown in the memorandum of parties.

[12]. Appellants have framed following substantial questions of law in para no.11 of the grounds of appeal:-

- “i) Whether coparcenary Hindu Joint Family property is to be devolved among surviving coparceners with equal share?*
- ii) Whether wrong mutation entries confer right of title?*
- iii) Whether the Ld. Courts below failed to appreciate the pleadings and evidences in right perspective?*
- iv) Whether cause of action accrues from the date of execution of the illegal sale deeds?*

[13]. On due consideration of aforesaid questions, I hereby proceed to consider the following substantial questions of law which do arise for consideration of the Court:-

- 1. Whether the suit property is proved to be ancestral/joint Hindu family property in the hands of Jawala Parshad?*

2. *Whether ancestral/joint Hindu family property would devolve upon the surviving coparceners only by survivorship particularly when Jawala Parshad died prior to enforcement of the Hindu Succession (Amendment) Act 2005?*
3. *Whether cause of action accrued to the plaintiffs to challenge the mutation only when their possession was threatened and the suit is within limitation?*

[14]. In order to answer the aforesaid questions, firstly the property has to be proved as ancestral property in the hands of Jawala Parshad. The trial Court vide judgment and decree dated 06.03.2010 has held in categorical words that the property was proved to be ancestral property in the hands of Jawala Parshad and the aforesaid fact was not refuted by learned counsel for the defendants at the time of arguments and the property was held to be a coparcenary property/joint Hindu family property in the hands of Jawala Parshad and other coparceners. Jawala Parshad died in the year 1967 and the property was required to be devolved upon by way of survivorship on the coparceners minus the womenfolk under Section 6 of the Hindu Succession Act. The trial Court also held that mutation No.180 dated 14.05.1967 was not in accordance with law. The aforesaid findings were not assailed by the defendants by way of filing any cross-objection in the appeal

filed by the plaintiffs before the lower Appellate Court. Defendants sought to address arguments on the ground that as per Excerpt (Ex.P-1) and other revenue record. On the death of Chhaju Ram $\frac{1}{4}^{\text{th}}$ share of Shoeji, pre-deceased son of Chhaju Ram was mutated in the name of her widow Manbhar as life estate which on her death was succeeded by remaining three brothers of Sheoji namely Mani Ram, Ram Narain and Jawala Parshad. Mani Ram had also died issueless and on his death his $\frac{1}{3}^{\text{rd}}$ share was inherited by his remaining two brothers namely Jawala Parshad and Ram Narain in equal shares. The ancestral nature of property was denied in the aforesaid manner and also it was claimed that when ancestral and non-ancestral properties were mixed up, it could not be opined that the property was ancestral in the hands of Jawala Parshad. The character of the property would not change from non-ancestral to ancestral on the basis of admission made by the parties. First of all consideration has to be made on the nature of property.

[15]. Perusal of the record would show that Excerpt Ex.P-1 produced by PW-1 Kanwar Lal Moharrar Patwari, proved that the suit property was a coparcenary property. The aforesaid fact was admitted by DW-2 i.e. defendant No.9 in cross-examination wherein factum of suit land as coparcenary property was admitted by defendant No.9. Even defendant No.9 filed a Civil

Suit No.800/97/99 Ex.PW-2/9 to Ex.PW-2/12. The said suit was for declaration in which defendant No.9 being plaintiff of the suit admitted that the suit property was coparcenary property of the Hindu undivided family. In the said suit, defendant No.1 filed admitted written statement and also stated before the Court that the property was coparcenary property. Defendant No.1 Sita Bai at the time of execution of release deed Ex.PW-2/13 in favour of defendant No.9 admitted the fact that the property was the coparcenary property. On the basis of said admission, the stamp duty was waived. In order to prove the aforesaid fact, the plaintiffs have produced PW-3 Rajbir Singh, Reader-cum-Registration Clerk, Farrukh Nagar, who admitted in his evidence that the property was proved to be ancestral property and on the basis of said assertion, stamp duty was waived because in respect of said fact, a certificate was to be taken from Halqa Patwari and said certificate was obtained from Halqa Patwari at the time of registration of the release deed.

[16]. On the basis of aforesaid evidence, the trial Court admitted the assertion of the plaintiffs that the property was coparcenary/joint Hindu family property and mutation No.180 Ex.PW-2/2 was wrong and illegal and on the basis of said illegal mutation, defendant No.4 Vijay Lakshmi sold excess share out of her 1/40th share in favour of defendants No.5 to 7 vide sale

deeds dated 04.11.1997 (Ex.PW-2/3) and 05.11.1997 (Ex.PW-2/4 & Ex.PW-2/5). On the basis of said sale deeds, mutation No.657 to 659 (Ex.PW-2/6 to Ex.PW-2/8) were sanctioned in respect of excess area than the area which was devolved upon defendant No.4.

[17]. Learned counsel for the appellants submitted that the land in dispute was received by Chhaju Ram from his father Ram Dhan being adopted son. Ram Dhan was the *mama* (maternal uncle) of the Chhaju Ram. Mutation No.9 dated 21.04.1890 was sanctioned in respect of devolution of property from Ram Dhan to Chhaju Ram. After the death of Chhaju Ram, mutation No.108 dated 13.06.1948 (Ex.PW-2/A) was sanctioned in favour of Smt. Manbhar widow of Sheoji, Mani Ram, Ram Narain and Jawala Parshad in equal shares. Vide mutation No.257 dated 02.07.1935 after the death of widow of Sheoji namely Manbhar, the property went to heirs of Chajju Ram namely Mani Ram, Ram Narain and Jawala Parshad. Mutation No.257 dated 02.07.1935 was sanctioned on the basis of pedigree table. After death of Mani Ram, mutation No.291 was sanctioned in which Mani Ram was shown to have died issueless and the property initially went to Chhaju Ram and thereafter came to Ram Narain and Jawala Parshad. The nature of land being coparcenary had not changed at any point of time till date.

Learned counsel by relying upon **Sunehri Devi vs. Lachhmi, 2004(2) R.C.R. (Civil) 795** contended that when ancestral property is mixed with self acquired property in a common hotchpotch, the entire property would be treated to be ancestral property.

[18]. I have considered the submissions made by learned counsel for the parties and have considered the material on record.

[19]. From the Excerpt Ex.P-1 which was proved by PW-1 Kanwar Lal Moharrar Patwari and the admission made by DW-2 and defendant No.9 in the suit and admission made before the Sub-Registrar at the time of relinquishment deed, the nature of property is proved to be ancestral coparcenary/undivided Hindu joint family property. The findings recorded by the trial Court were based on the admitted position coupled with factual position in view of aforesaid record. The said findings were sought to be refuted only by way of arguments before the lower Appellate Court without filing any cross-objection or cross-appeal.

[20]. Since Chhaju Ram was adopted son of Ram Dhan, who was maternal uncle of Chhaju Ram, therefore as *Bhanja* of Ram Dhan, Chajju Ram ceased to be son of his biological father and

Ram Dhan was adoptive father for all intents and purposes and thereafter the property devolved upon the coparceners as narrated in the preceding para of the judgment which is based on legal evidence on record. The assertion made by the defendants before the lower Appellate Court in my considered opinion cannot sustain and the property is proved to be ancestral/joint Hindu family property in the hands of Jawala Parshad. In view of aforesaid discussion, substantial question of law No.1 is decided in favour of the appellants.

[21]. As regards question No.2, this issue is no more *res integra* in view of authoritative judgment of the Hon'ble Apex Court in **Parkash and others vs. Phulavati and others, 2015 (4) R.C.R. (Civil) 952**. The controversy on the aforesaid provision has been set at naught in the following manner in para nos.17,18, 23 and 24 of the aforesaid judgment:-

*“17. The text of the amendment itself clearly provides that the right conferred on a 'daughter of a coparcener' is 'on and from the commencement of Hindu Succession (Amendment) Act, 2005'. Section 6(3) talks of death after the amendment for its applicability. In view of plain language of the statute, there is no scope for a different interpretation than the one suggested by the text of the amendment. An amendment of a substantive provision is always prospective unless either expressly or by necessary intendment it is retrospective **Shyam Sunder Vs. Ram Kumar, 2001(3) R..C.R. (Civil) 754 : (2001) 8 SCC 24,***

Paras 22 to 27. In the present case, there is neither any express provision for giving retrospective effect to the amended provision nor necessary intendment to that effect. Requirement of partition being registered can have no application to statutory notional partition on opening of succession as per unamended provision, having regard to nature of such partition which is by operation of law. The intent and effect of the Amendment will be considered a little later. On this finding, the view of the High Court cannot be sustained.

18. *Contention of the respondents that the Amendment should be read as retrospective being a piece of social legislation cannot be accepted. Even a social legislation cannot be given retrospective effect unless so provided for or so intended by the legislature. In the present case, the legislature has expressly made the Amendment applicable on and from its commencement and only if death of the coparcener in question is after the Amendment. Thus, no other interpretation is possible in view of express language of the statute. The proviso keeping dispositions or alienations or partitions prior to 20th December, 2004 unaffected can also not lead to the inference that the daughter could be a coparcener prior to the commencement of the Act. The proviso only means that the transactions not covered thereby will not affect the extent of coparcenary property which may be available when the main provision is applicable. Similarly, Explanation has to be read harmoniously with the substantive provision of Section 6(5) by being limited to a transaction of partition effected after 20th December, 2004. Notional partition, by its very nature, is not covered either under proviso or under sub-section 5 or under the*

Explanation.

23. *Accordingly, we hold that the rights under the amendment are applicable to living daughters of living coparceners as on 9th September, 2005 irrespective of when such daughters are born. Disposition or alienation including partitions which may have taken place before 20th December, 2004 as per law applicable prior to the said date will remain unaffected. Any transaction of partition effected thereafter will be governed by the Explanation.*

24. *On above interpretation, Civil Appeal No.7217 of 2013 is allowed. The order of the High Court is set aside. The matter is remanded to the High Court for a fresh decision in accordance with law. All other matters may be listed for hearing separately for consideration on 24th November, 2015.”*

[22]. According to Section 6 of Hindu Succession Act, when a male Hindu dies after the commencement of Hindu Succession Act, 1956, having at the time of his death an interest in a Mitakshara coparcenary property, his interest in the property shall devolve by survivorship upon the surviving members of the coparcenary and not in accordance with the Act. As per proviso to the aforesaid Section, if the deceased had left him surviving a female relative specified in class I of the Schedule or a male relative specified in that class who claims through such female relative, the interest of the deceased in the Mitakshara coparcenary property shall devolve by testamentary or intestate succession, as the case may be, under the Act and not by

survivorship. The interest of a Hindu Mitakshara coparcener shall be deemed to be the share in the property that would have been allotted to him if a partition of the property had taken place immediately before his death, irrespective of whether he was entitled to claim partition or not. The aforesaid explanation points out towards notional share of Hindu Mitakshara coparcener before his death. The proviso would not be construed as enabling a person who has separated himself from the coparcenary before the death of the deceased or any of his heirs to claim on intestacy a share in the interest.

[23]. As per Hindu Succession (Amendment) Act, 2005, where a Hindu dies after the commencement of the Act, his interest in the property of a joint Hindu family shall devolve by testamentary or intestate succession and not by survivorship and the coparcenary property shall be deemed to have been divided as if a partition had taken place.

[24]. The ratio of **Parkash and others'** case (supra) would show that the amendment in question is prospective in nature. Right of living daughter of coparcener can only be appreciated in terms of Hindu Succession (Amendment) Act, 2005 if coparcener is also living on 09.09.2005. Admittedly, Jawala Parshad died in the year 1967. The amendment does not apply to the present *lis*. The aforesaid view as laid down in Parkash

and others' case (supra) has also been reiterated by the Hon'ble Apex Court in a subsequent judgment rendered in **Danamma @ Suman Surpur and another vs. Amar and other, 2018(1) R.C.R. (Civil) 863.**

[25]. In view of aforesaid legal position, it can be observed that the Hindu Succession (Amendment) Act, 2005 would not apply qua the daughters after the demise of Jawala Parshad. Under Section 6 of the Hindu Succession Act, 1956 all the living coparceners/sons would be entitled to 1/5th share each and notional partition to the extent of 1/5th share would go to Jawala Parshad to which all the heirs of Jawala Parshad would succeed in terms of Section 8 of the Hindu Succession Act in equal shares. Act No.39 of 2005 is prospective in its operation. The property is proved to have descended from generations. In essence the last generation should be fourth generation and the plaintiffs have proved the property to be ancestral/coparcenary property with reference to Excerpt (Ex.P-1), admission, and exhibited records where the defendants themselves have approached the Court by relying upon nature of property to be ancestral property. For the reasons recorded hereinabove, I deem it appropriate to answer substantial question No.2 in favour of the appellants.

[26]. As regards, question No.3, it can be seen that in view of

Satbir and others vs. Ram Niwas and others, 2017(4) R.C.R.

(Civil) 481 mere entry in the mutation would not give rise to cause of action for filing a suit. Limitation would not start from the date on which mutation was sanctioned, rather it would start on the date on which possession is threatened. Plaintiffs are proved to be in possession as on date. In view of law laid down by the Division Bench of this Court in **Ibrahim alias Dharam Vir vs. Sharifan alias Shanti, 1979 PLJ 469**, it can be safely held that cause of action accrued in favour of the plaintiffs on the date when their possession was threatened and not from the date on which sale deeds were executed and mutation were sanctioned in favour of the defendants. The aforesaid proposition of law was also endorsed in **Gurcharan Singh and others vs. Surjit Kaur and others, 2005(3) R.C.R. (Civil) 628**.

For the reasons recorded above, I deem it appropriate to answer question No.3 in favour of the appellants.

[27]. For the reasons recorded above, impugned judgments and decrees passed by the Courts below are hereby set aside. Appeal is allowed, decreeing the suit of the plaintiffs with costs throughout.

December 21, 2018

Atik

Whether speaking/reasoned

Whether reportable

(RAJ MOHAN SINGH)
JUDGE

Yes/No

Yes/No