

IN THE HIGH COURT OF PUNJAB AND HARYANA AT
CHANDIGARH

(1) RSA No.537 of 2013 (O&M)
Date of Order:26th March, 2018

Umesh Kumar ..Appellant

Versus

Bhulle and others ..Respondents

(2) RSA No.538 of 2013 (O&M)

Kamal Singh and others ..Appellants

Versus

Bhulle and others ..Respondents

CORAM: HON'BLE MR. JUSTICE ANIL KSHETARPAL

Present: Mr. Pawan Kumar, Sr. Advocate, with
Mr. Vipin Kumar, Advocate and
Mr. Vikram Punia, Advocate,
for the appellant(s)

Mr. Harkesh Manuja, Advocate, with
Mr. Satpal Bhasin, Advocate,
for respondent nos.1,2,4 to 10, 13 to 16, 18 to 20,
23, 25 and 26.

ANIL KSHETARPAL, J.

By this judgment, Regular Second Appeal Nos.537 and 538 of 2013 are being decided which are arising from the same suit.

Plaintiff-appellant is in Regular Second Appeal No.538 of 2013 against the judgment and decree passed by the learned first appellate court, reversing the judgment and decree passed by the learned trial court whereas RSA No.537 of 2013 has been filed by Umesh Kumar, who claims to be a purchaser from the plaintiffs.

In the considered opinion of this Court, following substantial

questions of law arise for adjudication:-

- (i) *Whether entry of mutation with regard to transfer of the title without notice to the owner give rise to a cause of action to file a suit?*
- (ii) *Whether a person entering into permissive possession can claim perfection of his title by way of adverse possession in the absence of pleadings and evidence to the fact from which date the possession became adverse, open and hostile?*
- (iii) *Whether a suit filed by the owner claiming declaration challenging the change of mutation sanctioned without notice and hearing can be held to be barred by limitation?*

BRIEF FACTS:-

Originally the land was owned by Late Sh. Budhu son of Yadu. Late Sh. Budhu was having a son Late Sh. Khema who had pre-deceased him. Late Sh. Khema had a wife Chandro and a daughter Chameli. Late Sh. Budhu died on 16.12.1938. On the death of Budhu, land was mutated on 16.12.1938, Ex.P2, in favour of Late Smt. Chandro, daughter-in-law of pre-deceased son Late Sh. Khema. Chandro, re-married through customary marriage i.e. krewa marriage with one Mansa, a relative of Late Sh. Khema.

A mutation was entered and sanctioned on 29.04.1940 when Chandro is alleged to have appeared before the competent authority and requested that the land be transferred/mutated in favour of Chameli, her daughter from Khema till her marriage. The mutation was sanctioned and Chameli was recorded as owner of the property. The jamabandi for the year

1943-44, records that Chameli is the owner and various collaterals of her father Khema are in possession as “Gair Marusi. With regard to some of the collateral, lease money has been specified in the appropriate column.

Chameli, got married. Although, the date of the marriage is not clear, however, it is asserted that the marriage took place before consolidation of holdings and before coming into force of the Hindu Succession Act, 1956. On 22.03.1960, in the absence of Chameli, a mutation was sanctioned with respect to the land inherited from Budhu in favour of collaterals. It is recorded in the aforesaid mutation that since Chameli has been married, therefore, the land is being transferred in favour of collaterals.

It is the case of the plaintiffs, who are children of Chameli that these relatives were paying “Batai” (lease money) and the plaintiffs did not come to know of the change of ownership by way of mutation. Hence, they filed the suit for declaration with consequential relief of joint possession was filed on 27.01.2005. It may be significant to note that in the consolidation of holdings, which took place in the village in 1965-66, the entire land inherited from Budhu merged with different khewats of these collaterals who are defendants in the suit.

Defendants contested the suit. Learned trial court after appreciation of evidence found that Chameli was owner of the property as per mutation dated 29.09.1940 and the mutation sanctioned in favour of defendants-collaterals is illegal, as Chameli was the absolute owner of the property. With these findings, the suit was decreed.

Learned first appellate court affirmed the findings to this extent that Chameli was absolute owner of the property. However, first appellate

court while accepting the appeal filed by the defendants, dismissed the suit filed by the plaintiffs while assigning primarily two reasons:-

- (i) defendants have perfected their title by way of adverse possession.
- (ii) the suit filed by the plaintiffs is beyond limitation, as mutation was sanctioned in favour of the defendants in the year 1960 and thereafter consolidation of holdings took place and the land in dispute was merged with the share of each of the defendants.

Now the stage is set for considering the questions of law:-

QUESTION NOS.(i) & (iii)

It is the finding of fact by the courts below that Chameli, the owner, was not given any notice and hence no opportunity of hearing was granted to her or to her legal heirs before sanctioning the mutation in the year 1960, deleting her name from the column of ownership in the revenue record. The mutation is sanctioned only for fiscal purpose and updating the revenue record, for collection of land revenue etc. Sanction of mutation does not amount to transfer of title. Mutation is sanctioned by the revenue authorities in exercise of their powers under the Punjab Land Revenue Act, 1887 It is only an executive function of the revenue authorities. Hence, entry of mutation and sanction thereof would not give any rise to the cause of action to the owner to file a suit.

In view thereof, question no.(i) and (iii) are answered in favour of the plaintiffs-appellants.

QUESTION NO.(ii)

Defendants have only examined one witness i.e. Bhulle son of

Mansa as DW1. He has admitted that after the death of Budhu, Chandro became owner in possession. He further admitted that after Chandro re-married, the property was transferred in favour of the daughter Chameli. He further admitted that they were cultivating the land as collaterals of Budhu, although, this witness has denied that they were paying any lease money to Chameli. However, in the present case, defendants have failed to plead and prove how they have perfected their title by adverse possession. For proving perfection of the title by adverse possession, the person has to show as to on what date, he came in to possession, what was the nature of possession, whether factum of possession was known to the other party, how long his possession continued and his possession was open, hostile and undisturbed. It is also well settled that if a person continues to be in possession, he has to plead and prove from which date his possession became adverse. Every possession is not a adverse possession, howsoever long it may be. It is not in dispute that the defendants are related and collaterals of late Sh. Budhu. One of the requirement of adverse possession is that possession commenced wrong. When the commencement and continuance of possession is legal and proper, referable to a permission, their cannot be any adverse possession. Reference in this regard can be made to the judgment passed by the Hon'ble Supreme Court reported as **Achal Reddi vs Ramakrishna Reddiar And Ors, 1990 (4) SCC, 706**. Once the defendants have admitted the ownership of Chandro and claimed that they are in possession, as collaterals, being relatives, their possession is permissibe and hence not adverse. Further revenue record shows that their possession was "Gair Marusi" and in the colum of rent, with respect to certain portions of land, Batai(lease money has been mentioned). Reference

in this regard can be made to the jamabandies for the years 1943-44 and 1955-56. The revenue record carries presumption of truth unless rebutted. In the present case, the presumption has not been rebutted. It is the positive case of the plaintiffs that they were being paid the lease money by the defendants.

In view of the aforesaid discussion, question no (ii) is also answered in favour of the plaintiffs-appellants.

Although, defendants have not filed an appeal, however, learned counsel for the defendants has submitted that Chameli was not the complete owner of the property. He has drawn attention of the Court to the mutation sanctioned in the year 1940 in favour of Chameli, wherein Chandro has made a statement that the property be transferred in favour of Chameli till her marriage. He has submitted that Chameli got married before coming into force of the Hindu Succession Act, 1956 and as per custom, the land was rightly transferred in favour of the collaterals.

On the other hand, learned counsel for the appellants has contested this position.

As previously noticed, exact date of marriage of Chandro has not come on record. As per the mutation, sanctioned in the year 1960 in favour of the defendants-respondents, Chameli appears to have been married before enforcement of the Hindu Succession Act, 1956. He submitted that hence as per custom, the land was rightly mutated in favour of collaterals-defendants. In the present case, parties are Rajputs. Although, custom has been pleaded and asserted by only witness examined by the defendant Bhulle, but apart from it, no evidence has been produced on file to prove custom to that effect. Both the courts have not recorded any

finding about existence of custom to this effect.

Still further, a reading of mutation sanctioned in favour of Chameli on 28.09.1940, establishes that no doubt Chandro, when appeared before the competent authority, she requested that the land be transferred in favour of Chameli till her marriage, however, the order passed by the competent authority does not establish that Chameli was given only limited estate till her marriage. Although, the sanctioning officer, refers to a custom but that is only with respect to divesting of title from Chandro on account of re-marriage.

The mutation sanctioned in favour of the defendants does not refer to any custom governing the parties to this effect. Still further, as per the provisions of the Hindu Widow's Re-marriage Act, 1856, rights of widow in the deceased husband's property to cease on her marriage if the re-marriage is without express permission to re-marry. Section 2 of the Hindu Widow's Re-marriage Act, 1856 is extracted as under:-

2. Rights of Widow in deceased husband's property to cease on her remarriage:-*All rights and interests which any widow may have in her deceased husband's property by way of maintenance, or by inheritance to her husband or to his lineal successors, or by virtue of any will or testamentary disposition conferring upon her, without express permission to remarry, only a limited interest in such property, with no power of alienating the same, shall upon her re-marriage cease and determine as if she had then died; and the next heirs of her deceased husband or other persons entitled to the property on her*

death, shall thereupon succeed to the same.

A careful reading of the aforesaid provision clearly indicate that on re-marriage of the widow without express permission, the property goes to the next heir of her deceased husband. This act does not provide that the next heir would get only a limited estate.

It may be significant to note that the Hindu Window's Re-marriage Act, 1856 came to be repealed by the Hindu Widows' Re-marriage Repeal Act, 1983 with effect from 31.08.1983.

Learned counsel for the respondents thereafter has relied upon a Division Bench judgment of this Court reported as **Hari Dass v. Hukmi, 1963 PLR, 1103** to content that the agricultural property is not governed by the Hindu Women's Rights to Property Act, 1937. The aforesaid judgment is dealing with the entirely different Act i.e. Hindu Women's Rights to Property Act, 1937, whereas widow's re-marriage is governed by Hindu Widows' Re-marriage Act , 1856.

In view of the aforesaid discussion, the judgment and decree passed by the learned first appellate court is set aside and the judgment and decree passed by the learned trial court is restored.

The regular second appeals are allowed.

26th March, 2018
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(ANIL KSHETARPAL)
JUDGE

Whether speaking/reasoned
Whether reportable

: Yes/No
: Yes/No