

IN THE HIGH COURT OF PUNJAB AND HARYANA AT
CHANDIGARH

**CM No.13515-C of 2018 in
CM Nos.6872-73-C of 2014 in
XOBS No.12-C of 2018 in/and
RSA No.2892 of 2014**

Date of Decision-18.09.2018

Hari Kishan and others ... Appellants

Versus

Rati Ram and others ... Respondents

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

Present: Mr. Vinod S. Bhardwaj, Advocate
for the appellants.

Mr. Ram Avtar Sheoran, Advocate
for the cross-objectors.

RAJ MOHAN SINGH, J.

[1]. Vide this order, I intend to dispose of RSA No.2892 of 2014 along with cross objections No.12-C of 2018.

[2]. Appeal was once decided by the Co-ordinate Bench on 27.05.2014 by not condoning the delay of 531 days in filing the appeal. Against the said order, appellants preferred Civil Appeal No.579 of 2016 arising out of SLP (C) No.36352 of 2014 titled Ram Kumar and others Vs. Rati Ram and others in the Hon'ble Supreme Court. Vide order dated 16.01.2017, the Hon'ble Apex Court allowed the appeal, thereby setting aside the order dated 27.05.2014 passed by the High Court and remanded the case to the High Court subject to payment of costs of

Rs.75,000/- to be paid by the appellants. The said amount was to be disbursed to the respondents on proper identification. The appeal was ordered to be heard on merits.

[3]. Plaintiffs/respondents filed a suit for declaration, challenging the Civil Court decree dated 08.01.1991 passed in Civil Suit No.918 of 1991 titled Hari Kishan and others Vs. Bharat Singh and others. Plaintiffs claimed that the aforesaid decree was fraudulent, null and void. The transfer of ancestral property was effected by the father of plaintiffs No.1 to 6 and husband of plaintiff No.7. Plaintiffs further claimed that they were owners in possession of 23 kanals 11 marlas being 471/2930 share out of total land measuring 146 kanals 10 marlas situated in the revenue estate of village Mori, Tehsil Dadri, District Bhiwani. Udmi was predecessor-in-interest of the parties. He had two sons namely Hari Narain and Bharat Singh. Plaintiffs are family members of Bharat Singh, whereas defendants are family members of Hari Narain. Father of the plaintiffs namely Bharat Singh was owner to the extent of half share in the total land measuring 146 kanals 10 marlas i.e. 73 kanals 5 marlas. Plaintiffs and their father formed joint Hindu family and the land was joint Hindu family property with Bharat Singh as its Karta. After the death of Bharat Singh, the property was to be devolved upon the plaintiffs being coparceners of the joint Hindu family. Defendants

got transferred 23 kanals 11 marlas of land in their favour vide collusive decree dated 08.01.1991 passed in Civil Suit No.918 of 1991. Plaintiffs challenged the same on the ground of fraud. The property being ancestral property of the plaintiffs, therefore, the transfer was claimed to be illegal, null and void.

[4]. The suit was contested by the defendants on the ground that the decree in question was executed on the basis of family settlement. No fraud was practiced by the defendants upon Bharat Singh for execution of Civil Court decree. Replication was not filed.

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

“1) Whether impugned judgment/decreed dated 08.01.1991 and consequent impugned mutation No.803 dated 15.07.1998 are illegal on the grounds taken in the plaint? OPP

2) If issue No.1 is proved, whether plaintiffs are owners in possession of the suit land? OPP

3) If above issues are proved, whether plaintiffs are entitled for injunction on the grounds taken in the plaint? OPP

4) Whether the suit is not maintainable in the present form? OPD

5) Whether plaintiffs have no locus-standi to file the present suit? OPD

6) Whether plaintiffs have not come to the Court with clean hands? OPD

7) Whether plaintiffs are estopped to file the present suit by his own act and conduct? OPD

8) Relief.”

[6]. Plaintiffs got examined PW1 Kanwal Singh, (Advocate), PW 2 Anil Bhagal (Advocate), PW 3 Deepak Jain (Handwriting and Fingerprint Expert) and PW 4 Rati Ram (plaintiff No.1). Defendants did not examine any witness in their evidence.

[7]. Trial Court held the land to be ancestral on the basis of admission made by the parties. The specific averments made by the plaintiffs were not rebutted by the defendants in the written statement and the property was held to be ancestral property of the plaintiffs. Ingredients of fraud were not proved with reference to any evidence on record. Since the land was held to be ancestral, therefore, Bharat Singh had no absolute right to transfer the shares of plaintiffs No.1 to 3 in the suit property. It was held that the Civil Court decree was not required to be compulsorily registered as the defendants were having semblance of interest of the property owned and possessed by Bharat Singh to the extent of shares of plaintiffs No.1 to 3. It was held that the transfer made by Bharat Singh was illegal, however, it was also held that Bharat Singh was having 1/4th share in addition to 1/4th share each held by plaintiffs No.1 to 3. To the extent of transfer of 1/4th share made by Bharat Singh vide Civil Court decree, the same was held to be valid and the suit was

decreed only to the extent of shares of plaintiffs No.1 to 3 vide judgment and decree dated 21.08.2010.

[8]. Both the parties went in appeal before the Lower Appellate Court. Lower Appellate Court also endorsed the findings qua ancestral nature of land, however held that all the plaintiffs were having $1/8^{\text{th}}$ share each in the suit property and $1/8^{\text{th}}$ share was held by Bharat Singh. To the extent of $1/8^{\text{th}}$ share held by Bharat Singh, the decree was held to be valid. The judgment and decree to the extent of shares of the plaintiffs was held to be illegal and judgment and decree passed by the trial Court was modified to that extent.

[9]. Both the appeals were clubbed and were decided by common judgment and decree dated 12.09.2012 by the Lower Appellate Court. The decision of the trial Court was affirmed in pith and substance subject to the modification as mentioned above viz-a-viz the share of Bharat Singh in the joint Hindu family property.

[10]. The appeal was remanded by the Hon'ble Apex Court to the High Court for decision on merits after condoning delay of 531 days subject to deposit of costs of Rs.75,000/- by the appellants. As per order dated 14.09.2017, it can be noticed that the amount of costs has already been deposited by the appellants in the registry of the Court.

[11]. Perusal of the grounds of the appeal filed by the appellants would show that the same are totally misplaced. The grounds of appeal have been filed with an impression that the appellants are the plaintiffs, whereas actual position is otherwise. The grounds taken by the appellants are to the effect that the Courts below have failed to appreciate that the suit filed by the plaintiffs ought to have been decreed in toto as the collusive decree under challenge is an act of fraud played upon the deceased Bharat Singh and the fraud has been proved by the plaintiffs. The present appellants have been treated to be plaintiffs in the grounds of appeal.

[12]. Appellants formulated the following substantial questions of law in the grounds of appeal:-

“i) Whether the decree Ex.P2 dated 08.01.1991 suffered by the deceased Bharat Singh in favour of the respondents/defendants was mandatorily required to be registered to have evidentiary value in contemplation of Section 17 of the Registration Act?

ii) Whether the deceased Bharat Singh could suffer the decree in favour of the respondents/defendants qua the property which was admittedly ancestral in nature in his hands?

iii) Whether the judgment and decree passed by the Courts below are liable to be set-aside being based upon surmises and conjectures and against the settled canons of law?

iv) Whether the impugned judgment and decree are perverse to the facts and law and thus liable to be set aside?”

[13]. The present regular second appeal could have been appreciated on the basis of grounds taken by the appellants in the grounds of appeal, but since the Hon'ble Apex Court has remanded the case to this Court for decision on merits after framing substantial questions of law, therefore, I deem it appropriate not to take cognizance on the grounds of appeal. On due consideration of the case, following substantial questions of law on merits of the case can be framed:-

(1) Whether the daughters of a male Hindu who had expired prior to 09.09.2005 would be entitled to share in the ancestral property as per Hindu Succession Act, 1956?

(2) Whether Act No.39 of 2005 being an amendment of substantive provision would be having prospective effect on the right conferred on a daughter of a coparcener?

(3) Whether rights under Hindu Succession (Amendment) Act, 2005 are available to living daughters of a coparcener who had died prior to 09.09.2005?

(4) Whether the nature of property being ancestral could be presumed only on the basis of admission made by the parties without proving the same by means of excerpt,

pedigree table and in terms of Volume 1, Chapter 9, Rules 5 and 6 of the High Court Rules and Orders?

(5) Whether the Civil Court decree dated 08.01.1991 suffered by Bharat Singh stood vitiated on account of fraud committed upon Bharat Singh?

(6) Whether the Civil Court decree dated 08.01.1991 passed in Civil Suit No.918 of 1991 titled Hari Kishan and others Vs. Bharat Singh and others required compulsory registration for want of pre-existing rights of the defendants in the suit property?

[14]. 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.

[15]. 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.

[16]. Perusal of the record would show that Bharat Singh was having three sons namely Rati Ram, Suresh, Balwan and three living daughters namely Ram Kaur, Chanderpati, Murti Devi besides widow Smt. Bhateri Devi at the time of his death. All the sons were living at that time and had constituted a joint Hindu family, where the father Bharat Singh was having an interest in the Mitakshara coparcenary property. The said interest would devolve by survivorship upon the surviving members of the

coparcenary and not in accordance with Hindu Succession Act.

The aforesaid controversy is no more *res integra* as the Hon'ble Supreme Court in **Prakash and others Vs. Phulavati and others, 2015(4) RCR (Civil) 952** has set at rest the controversy by holding in the aforesaid manner:-

*“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.”

[17]. The ratio of the aforesaid judgment would show that the amendment in question is prospective in nature. Right of living daughters of a coparcener can only be appreciated in terms of Hindu Succession (Amendment) Act, 2005 if coparcener is also living on 09.09.2005.

[18]. In the light of aforesaid proved facts, questions No.1 to 3 as formulated have to be answered being covered by the dictum of **Prakash and others case (supra)**. The aforesaid judgment has been reiterated by the Hon'ble Apex Court in the subsequent judgment rendered in **Danamma @ Suman Surpur and another Vs. Amar and others, 2018(1) RCR (Civil) 863**. On the strength of aforesaid legal position, the judgment and decree rendered by the Lower Appellate Court would run counter to Section 6 of the Hindu Succession Act, 1956. The Hindu Succession (Amendment) Act, 2005 would not apply qua the daughters as the date of death of Bharat Singh is proved to be 15.07.1996 i.e. prior to commencement of Hindu Succession (Amendment) Act, 2005. Therefore, daughters of Bharat Singh would not be entitled to any share as per Section 6 of the Act of 1956 as they were not coparceners under the said Act. Act No.39 of 2005 is prospective in its operation and Bharat Singh had died on 15.07.1996, therefore, questions No.1 to 3 are decided in favour of the appellants.

[19]. As regards substantial question of law No.4, it is true that the property being ancestral in nature has to be proved in terms of its devolution/descendance from generations, in essence, last generation should be fourth generation. The burden lies upon the plaintiffs to prove the ancestral nature of land in

question. Mere assertion in the plaint and admission thereof in the written statement would not clothe the Court to presume ancestral nature of the property. The ancestral nature of the property has to be proved in terms of excerpt, pedigree table and as per requirement of Volume 1, Chapter 9, Rules 5 and 6 of High Court Rules and Orders. As per para No.232 of Mullah's Law, the plaintiffs who have asserted that the property was ancestral in nature, have to prove that the same has devolved upon them from three generations, in essence, they are the fourth generation. The admission of the defendants would not change the legal position. There is no dispute with regard to aforesaid proposition.

[20]. In the instant case, it has to be appreciated whether the aforesaid principle applies to both the parties or the plaintiffs alone. Defendants were the plaintiffs of Civil Suit No.918 of 1991. As per pleadings of the said suit, the plaintiffs therein (defendants in the present suit) had themselves pleaded that the property was ancestral in nature. Their pleadings resulted in passing of Civil Court decree dated 08.01.1991. It was in the present suit that the plaintiffs (respondents herein) challenged the aforesaid decree dated 08.01.1991 on the basis of fraud, legal position and unregistered nature of the decree. The assertion made by the plaintiffs cannot be presumed to have been denied in the context

of earlier pleadings of the beneficiaries of the decree dated 08.01.1991.

[21]. In view of peculiar facts of the present case, the nature of land being ancestral in nature cannot be denied. Even otherwise, the testimonies of the plaintiffs' witnesses have proved the nature of the land being ancestral and there is no denial by the defendants by leading any evidence on record. The cumulative effect of pleadings in the plaint of decree dated 08.01.1991, the pleadings of the present suit and the admission made by the defendants would show that the land in question was ancestral coparcenary property of the plaintiffs. On legal parameter, the question has to be decided as per its formulation, but the present case is distinguishable on facts and is capable of being considered differently.

[22]. For the reasons recorded hereinabove, the legal position is reiterated as per the substantial question of law, however, the facts and circumstances of the case would bring out the case from the ambit of substantial question of law.

[23]. As regards substantial question of law No.5, it is a settled principle of law that plea of fraud has to be pleaded and proved as required in a criminal trial. Though the plaintiffs have pleaded that the decree dated 08.01.1991 was the result of fraud, however, the plaintiffs could not lead any cogent evidence to

prove the factum of fraud on record. Therefore, the decree dated 08.01.1991 cannot be said to be fraudulent, however the same has to be tested on other legal parameters. For the reasons recorded hereinabove, substantial question of law No.5 answered in negative.

[24]. Question No.6 can be appreciated in the light of ratio of **Bhoop Singh Vs. Ram Singh Major and others, (1996) AIR (SC) 196** and **Kale Vs. Deputy Director of Consolidation, 1976 AIR (SC) 807**. The family settlement has wide connotation so as to include any semblance of interest of close collateral dependency upon happening or non-happening of an event. In the instant case, the defendants are descendants of Hari Narain brother of Bharat Singh. Out of total land measuring 146 kanals, 10 marlas, both the brothers namely Hari Narain and Bharat Singh were having one half share to the tune of 73 kanals, 5 marlas. In so far as share of Bharat Singh was concerned, defendants had no pre-existing rights as the plaintiffs were alive. Defendants had no pre-existing rights in the land of plaintiffs No.1 to 3. Even as per interpretation attached to Section 6 of the Hindu Succession Act, 1956, when a male Hindu dies after the commencement of the Act, having at the time of his death an interest in a Mitakshara coparcenary property, then his interest in

the property shall devolve by survivorship upon the surviving members of the coparcenary and not in accordance with the Act.

[25]. Since at the time of death of Bharat Singh, the plaintiffs No.1 to 3 were the surviving members of the coparcenary, therefore, plaintiffs No.1 to 3 were surviving members of the coparcenary. The share of Bharat Singh would have devolved upon them by survivorship and not in accordance with Act i.e. on the basis of class I heir as per schedule. As per explanation No.1 attached with the aforesaid Section, it can be appreciated that the interest of Bharat Singh as 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. Therefore, by excluding the daughters from the array of claimants, in view of proviso to Section 6 of the Act and as per date of death of Bharat Singh to be 15.07.1996, Bharat Singh was having notional share of $1/4^{\text{th}}$ and that share would be deemed to be his self acquired property capable of being transferred as per decree dated 08.01.1991. To that extent, it can be held that decree was valid despite being unregistered.

[26]. Since decree to the extent of shares of plaintiffs No.1 to 3 was illegal, therefore, the decision rendered by the trial Court has to be restored. Consequently, the cross objections filed by

the plaintiffs/respondents have to be disposed of in the light of legal position on record and the same are accordingly dismissed. The appeal is allowed. Impugned judgment and decree passed by the Lower Appellate Court is set aside and that of trial Court is restored. The amount of costs to the tune of Rs.75,000/- if not disbursed by the registry of this Court be disbursed as per shares of the plaintiffs/respondents in accordance with law.

[27]. Since the appeal has been decided on merits, therefore, pending applications are disposed of accordingly.

(RAJ MOHAN SINGH)
JUDGE

18.09.2018

Prince

Whether Reasoned/Speaking

Yes/No

Whether Reportable

Yes/No