

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

RSA No.328 of 2017 (O&M)
Date of Decision.29.05.2018

Kamla

.....Appellant

Vs

Ram Kumar and others

.....Respondents

CORAM:HON'BLE MR. JUSTICE AMIT RAWAL

Present: Mr. Manoj Swarup, Advocate
Mr. Ankit Swarup, Advocate
Mr. Nitin Jain, Advocate and
Ms. Tanya Swarup, Advocate
for the appellant.

Mr. Adarsh Jain, Advocate
for the respondents.

-. -

AMIT RAWAL J.

The present regular second appeal is at the instance of appellant-plaintiff against the judgments and decrees of the Courts below whereby the suit of the appellant-plaintiff seeking declaration to be owner in possession of the land detailed in para No.1(a) to (c) of the plaint, for, the defendants have no right, title and interest by laying challenge to the impugned judgment and decree dated 24.4.1986 passed in civil suit bearing No.155 of 5.3.1986 titled as “Raj Kumar and others Vs. Bhuley” and impugned mutation No.1665 dated 14.2.1987, Will dated 31.12.2010 and subsequent mutation to be illegal, null and void, has been dismissed by both the Courts below.

Succinctly the facts as emanated from the pleadings of the parties to the *lis* are that the plaintiff filed the aforementioned suit on the ground that she is owner in possession of the agricultural land

described in the plaint (hereinafter called as the suit land) to the extent that 1/6th share, which worked out to be 9 kanals 2 marlas situated in the revenue estate of Village Devli, Tehsil Palwal, District Palwal. It was averred that the plaintiff was owner in possession of the total agricultural land measuring 13 kanals 0 marlas to the extent of 1/3rd share i.e. 4 kanals 7 marlas in the same very village on the premise that one Bhuley son of Ram Lal, father of the plaintiff was owner in possession of the suit land, who died on 10.04.2011 at village Devli. The plaintiff is the only daughter and legal heir of Bhuley, thus, inherited all the estate of Bhuley including the land in dispute being class I heir. On death of her father, she went to the village Patwari for getting entered and sanctioned the mutation of inheritance but was astounded to notice that the land of her father had already been entered and recorded in the name of defendants and on making enquiry acquired the knowledge of judgment and decree dated 24.4.1986 on the basis of which the said mutation was entered. The said decree was nothing but fraud having been played upon Bhuley as he was a simpleton person, for, the pedigree table given in the plaint did not incorporate the name of the appellant-plaintiff as legal heir.

The aforementioned decree was on the pretext of some family settlement. In fact, father of the plaintiff never entered into any alleged family settlement with the defendants with regard to the suit land or ever relinquished any right, title or interest qua his share in the suit land. All such things were an act of fraud, cheating and deception. The suit land at the hands of Bhuley was ancestral joint

family property and no family settlement took place, therefore, he could not have suffered decree in favour of nephews without any legal necessity. Rather in the aforementioned suit, there was a pleading that Bhuley was unmarried and had no issue. It was a concealment of factual aspect. The defendants also propounded a Will dated 31.12.2010, for, at the relevant point of time Bhuley was ill and suffering from various diseases, thus, he was not in a position to think good and bad. In fact, the plaintiff is still in actual physical possession of the suit land.

The aforementioned suit was contested by raising numerous preliminary objections qua maintainability, locus standi, cause of action and limitation. On merit, it was denied that the plaintiff was owner in possession of the suit land but the factum of Bhuley being owner to the extent of his share in the suit land was not denied. It was averred that the defendants are owners in possession of the suit land, for, Bhuley had already transferred the suit property vide decree aforementioned. Even mutation to that effect was already entered. The factum of the property being coparcenary property was emphatically denied, much less, possession of the plaintiff. The allegations of bogus Will were also denied.

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

“1. Whether the plaintiff is entitled to the decree of declaration to the effect that he is owner in possession of the suit land detailed in para No.1(a) to (c) of the plaint and impugned judgment and decree dated 24.4.1986

passed in civil suit No.155 of 5.3.1986 and impugned mutation No.1665 dated 14.2.87 and will dated 31.12.2010 bearing Vasika No.565 and its subsequent mutation if any are illegal, null and void, ineffective and are liable to be set aside? OPP

2. Whether the plaintiff is entitled to the decree for permanent injunction, restraining the defendants from alienating the suit lands to anybody else and from creating any charge over the same illegally and unlawfully and also from interfering into his peaceful possession? OPP

3. Whether the suit of plaintiffs is not maintainable in the present form? OPD

4. Whether the plaintiff has no locus standi and cause of action to file the present suit? OPD

5. Whether the suit is time barred? OPD

6. Relief.”

The plaintiff in support of her pleadings examined three witnesses and tendered into evidence following documents:-

- | | |
|-------|--|
| Ex.P1 | Jamabandi for the year 1984-85 |
| Ex.P2 | Jamabandi for the year 1984-85 |
| Ex.P3 | Mutation No.1665 dated 14.1.1987 |
| Ex.P4 | Judgment dated 24.4.1986 |
| Ex.P5 | Decree dated 24.4.1986 |
| Ex.P6 | Copy of plaint titled as Raj Kumar and others Vs. Bhuley |
| Ex.P7 | Will |

Ex.P8 FIR No.316 dated 25.8.2011

Ex.P9 Jamabandi for the year 2004-2005.

On the other hand, defendants examined eight witnesses namely Ram Kishore, ARC as DW1, Tirath Sharma as DW2, Bhajan Lal as DW3 and Raj Kumar himself as DW4, Ram Kumar as DW5, Kasim Hussain Advocate as DW6, Jugal Kishore as DW7 and Mahesh Kumar as DW8 and tendered into evidence documents Ex.D1 to D9.

The trial Court on the preponderance of evidence dismissed the suit by taking note of the decree and as well as the Will and the fact that she availed the remedy as late as in the year 2011 when the suit aforementioned was filed. The appeal laid before the lower Appellate Court also met with the same fate.

Mr. Manoj Swarup, Mr. Ankit Swarup, Mr. Nitin Jain and Ms. Tanya Swarup, learned counsel appearing on behalf of the appellant in support of the memorandum of appeal raised the following submissions:-

(i) The attention of the Court had been drawn to the copy of the plaint Ex.P6 annexed as Annexure P-2 with the present appeal where in the pedigree table, Bhuley son of Ram Lal son of Ramjas was shown issueless. Bhuley, Umed and Ratiram all three were brothers being sons of Ram Lal whereas Umed had three sons Raj Kumar, Ram Kumar and Krishan Kumar but the name of the plaintiff being daughter of Bhuley had not been reflected. In para 3 of the plaint there was an averment that defendant

Bhuley was unmarried and had no issue. The defendants in the present suit had not denied the status of the plaintiff being daughter of Bhuley. Para 3 of the plaint in the previous suit and written statement filed by Bhuley Ram was admitted. The courts below have not appreciated the fact of filing the suit in the year 2011, for, the ingredients of fraud and misrepresentation as per the provisions of Order 6 Rule 4 CPC have been proved to the hilt.

(ii) The entire focus of the Courts below had been on the cross-examination of the appellant-plaintiff, Kamla wherein she in her cross-examination admitted that her father had disclosed the factum of suffering of consent decree and the Will, meaning thereby, she had knowledge thereof but no explanation has come forward in filing the suit in the year 2011. The plaintiff did not have any right to file the suit as Bhuley died on 10.04.2011 and the right to claim the share in the estate of the Bhuley arose only after his demise, for, the character and nature of the property at the hands of Bhuley was coparcenary/ancestral.

(iii) Since Bhuley died in 2011 and owing to the amended provisions of Section 6 of the Hindu Succession Act, she became coparcener in 2005 and during life time of her father, had no locus to challenge the aforementioned consent decree as being reversioner.

The plaintiff, Kamla had been subjected to cross-examination with regard to the specific averment in the examination-in-chief qua fraud and mis-representation and therefore, her statement in examination-in-chief is deemed to have been admitted.

(iv) The consent decree of 1986 required registration, for, the nephews did not have a pre-existing right in the estate of Bhuley. There was no occasion for the Bhuley to execute the registered Will dated 31.12.2010, owing to the existence of the consent decree. The Will was invalid as the requirement of Section 63(c) of the Indian Succession Act and Section 68 of the Indian Evidence Act had not been complied with. There were two witnesses of the Will but only Bhajan Lal appeared as DW3, as the other witness Uday Chand, Advocate did not appear in the witness box. Even Bhajan Lal did not depose as per the provisions of Section 63(c) of the Indian Succession Act, for, in examination-in-chief, he did not state that he appended signatures on the instructions of Bhuley. He had not been coherent and consistent in the examination-in-chief, for, according to Jugal Kishore, he typed the Will but he did not type names of the attesting witness but wrote them by hand but Bhajan Lal stated that he was present at the time when the Will was written. There were similar other discrepancies which gone unnoticed, thus, the Will was

surrounded by suspicious circumstances. Therefore, there is abdication.

(v) He also drew attention of this Court to the application bearing No.758-C of 2017 under Order 41 Rule 27 CPC read with Order 42 Rule 1 CPC for permission to placed on record revenue record by way of additional evidence to show that the property at the hands of Bhuley was ancestral. In the jamabandi for the year 1908-1909, entry was recorded in the name of grandfather Ram Lal son of Ramjas and thereafter Bhuley son of Ram Lal.

(vi) In order to buttress his arguments, he drew attention of the Court to the pleadings in para 5 (a) of the present plaint and as well as the written statement wherein the nature and character of the property as ancestral has been admitted. It was further pointed out that the defendants came out with a story that they had disclosed the factum of Kamla being daughter of Bhuley to the counsel but the counsel did not incorporate the same in the previous plaint, thus, urges this Court for setting aside the judgments and decrees under challenge.

Per contra, Mr. Adarsh Jain, learned counsel appearing on behalf of the respondents-defendants submitted that the actual truth surfaced in the cross-examination of Kamla as she admitted that she was aware of the execution of the consent decree passed in the year 1986 as well as the Will but had not given any explanation for

not challenging the consent decree. Since 1986, Bhuley remained alive upto April, 2011 but did not challenge the consent decree, therefore, the plea of fraud and misrepresentation at the instance of the appellant-plaintiff cannot be permitted, for, there was no locus standi or cause of action. The defendants have discharged the onus by proving the Will, being propounders, as Bhajan Lal DW3, attesting witness of the Will had been examined. The defendants were subjected to cross-examination after filing of the suit in 2011, therefore, a person with passage of time does not remember whether factum of existence of appellant-plaintiff as daughter of Bhuley was mentioned to the counsel or not and therefore, it cannot be fatal to the adjudication of the *lis*, for, all intents and purposes Bhuley remained alive for 25 years after passing of consent decree but did not even raise the element of fraud what to talk about mis-representation. The suit was nothing but an act of greed and rightly so, had been dismissed. He drew attention of this Court to the cross-examination of Kamla (Annexure P-7) wherein she categorically stated that she acquired knowledge of the decree of 1986 but deliberately did not file the suit for setting aside the consent decree during the life time of Bhuley. There was also admission with regard to factum of execution of the Will, which was told to her by her father and the factum of possession of the defendants over the suit property, thus, urges this Court for upholding the concurrent finding of fact as there is no illegality and perversity.

I have heard learned counsel for the parties, appraised the paper book and of the view that there is force and merit in the

submissions of Mr. Swarup for the following reasons:-

(i) The defendants in the present suit have not denied the appellant-plaintiff, Kamla to be daughter of Bhuley.

(ii) As per the averments in the plaint of previous suit (Ex.P6) attached as Annexure P-2 with the present appeal, there is no reference of her in the pedigree table, thus, the element of fraud cannot be ruled out. It is settled law that there is no limitation to challenge any decree in case it has been obtained by playing fraud, for, fraud vitiates everything.

(iii) Had the factum of Kamla being daughter of Bhuley been disclosed in the previous suit, the Presiding Officer or the Court could have issued notice to Kamla or confronted such fact to Bhuley and there might had been likelihood that the suit could have been thrown out on account of non-joinder of proper party. No explanation has come forth on behalf of the defendants that once they had decree in their favour, what was the occasion for Bhuley to execute the Will dated 31.12.2010. The statement of Bhajan Lal, DW3 is at attached as Annexure P-10 with the paper book. On plain and simple reading of the statement in examination-in-chief, it is revealed that he did not depose that he appended his signatures on the instructions of testator Bhuley. For the sake of brevity, his examination-in-chief is extracted herein below:-

“I, Bhajan Lal son of Hukmi age 72 years occupation agriculture resident of village Devli Tehsil and District Palwal state on oath as under:-

1. That I am permanent resident of village Devli Tehsil Palwal. I knew Bhule son of Ram Lal resident of village Devli Tehsil Palwal in person who has since expired. The parties to the suit are also personally known to me. The Will dated 31.12.2010 executed by Bhule son of Ram Lal No.565/3 is seen which had been got typed by Jugal Kishore Sharma, Advocate as dictated by Bhule and after it had been typed it was read over and explained to Bhule and the witnesses. After hearing and understanding it and admitting it as correct, at first Bhule had signed and affixed his thumb impression on this Will in my presence and in the presence of other witness Udai Chand. Then I had signed and affixed my thumb impression on it in the presence of Bhule and other witness Udai Chand and thereafter Udai Chand Advocate had signed it in the presence of Bhule and myself and then Jugal Kishore Sharma Advocate had signed it as drafted by. This Will is Ex.D-10 on which I identify my signatures. I, Bhule and Udai Chand Advocate had appeared with this Will before the Sub Registrar, Palwal. Sub Registrar had also read over and explained this Will. After hearing, understanding and admitting it as correct Bhuley and we the witnesses

had signed it in the presence of Sub Registrar.”

(iv) Section 63(c) of the Indian Succession Act lays down three conditions to be complied with for proving the Will viz; (i) the Will should have been attested by two or more witnesses, each of whom had seen the testator either sign or affix his mark to the Will or seen some other person signing the Will in the presence; (ii) by the direction of the testator, or has received from the testator a personal acknowledgment of his signature or mark, or the signature of such other person; and (iii) each of the witnesses shall sign the Will in the presence of the testator, but it shall not be necessary that more than one witness be present at the same time, and no particular form of attestation shall be necessary. This view of mine is derived from the ratio decidendi culled out by Hon'ble Supreme Court in **Janki Narayan Bhoir Vs. Narayan Namdeo Kadam 2003(1) RCR (Civil) 409.**

(v) Once the defendants have not been able to prove the Will and as well as support the consent decree after having admitted the status of the appellant-plaintiff being daughter, the impugned decree dated 24.04.1986 conferring 1/3rd share of Bhuley in favour of defendants cannot be sustainable in the eyes of law. There is no limitation for assailing the decree having been obtained by fraud in respect of claim qua title, thus, there is no force and merit in the argument of Mr. Jain that Kamla

had knowledge of the decree of 1986 and as well as the Will, for, she could not challenge the aforementioned Will as Bhuley died in the year 2011.

(vi) Now coming to the submission of Mr. Swarup with regard to nature and character of the property being ancestral by referring to the averment in the plaint and corresponding para in the written statement, appellant-plaintiff has not discharged the onus in proving the nature and character of the property as ancestral at the hands of Bhuley. Even if the additional evidence is taken on record, Bhuley had inherited the property from his first generation i.e. Ramlal whereas as per para 221 of 21th Edition of Mulla's Hindu Law, for claiming right in the property, there has to be three generations in lineage and the person who is asserting right is the 4th generation, therefore, I am not able to subscribe the view expressed during the course of hearing and the same is hereby rejected.

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.

As an upshot of my finding, both the Courts below have not appreciated the provisions of Section 63(c) of the Indian Succession Act as well as the contents of previous plaint by virtue of which judgment and decree of the year 1986 came to be passed and therefore, there is illegality and perversity. The judgments and decrees passed by both the Courts below are set aside and the suit of the appellant-plaintiff is decreed. The decree sheet be prepared accordingly.

(AMIT RAWAL)
JUDGE

May 29, 2018
Pankaj*

Whether reasoned/speaking Yes

Whether reportable Yes