

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

**RSA No.21 of 1988 (O&M)
Date of Decision.20.05.2019**

Thana Singh (since deceased) through LRs ...Appellant

Vs

Malkiat Singh and others ..Respondents

2. RSA No.364 of 1988

Malkiat Singh ...Appellant

Vs

Thana Singh (since deceased) through LRs and others ...Respondents

CORAM:HON'BLE MR. JUSTICE AMIT RAWAL

Present: Mr. I.S. Brar, Advocate
for the appellant in RSA No.21 of 1988 and
for respondent No.1 in RSA No.364 of 1988.

None for the appellant in RSA No.364 of 1988.

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AMIT RAWAL J. (ORAL)

This order of mine shall dispose of two regular second appeals bearing Nos.21 of 1988 and 364 of 1988 arising out of Civil Suit No.354 of 1981 titled as “Malkiat Singh Vs. Thana Singh and others”.

Plaintiff-Malkiat Singh sought possession of 1/4th share of land giving description in head note of plaint alleging that as per jamabandi/revenue record grandfather of plaintiff Jhanda Singh son of Kala Singh had four sons i.e. Bhag Singh, Thana Singh, Jagir Singh and Zora Singh. Bhag Singh pre-deceased his father i.e. during the life time of Jhanda Singh, therefore, entitled to 1/4th share. Plaintiff and Jhanda Singh being Hindus constituted a coparcenary property, which was ancestral and had been in peaceful possession of

land bearing Khasra No.20/6 min, 7, 8, 11/2, 12, 13, 14 min, 81//8/2, 13, 18, 22, 94//1, 2, 3/1 for the last 35 years. However, on death of Jhanda Singh, defendants had taken possession of entire land of Jhanda Singh except khasra numbers as stated above. Will of Jhanda Singh was also propounded.

Defendants No.4 and 5 were proceeded ex parte.

Defendants No.1 to 3 in written statement denied possession of plaintiff. It was alleged that Jhanda Singh, father of the defendants was not owner of khasra Nos.20/22/22, 23, 24, 25 min, 27//2/2, 3/2, 4, 5, 82//6/2, 15, 16, 25 and 83//5 min as defendant No.2 Jagir Singh was declared to be owner in possession of the suit land vide judgment and decree dated 22.12.1972 rendered in Civil Suit No.998 of 1972. Jhanda Singh during his life time executed a registered Will dated 22.6.1978 in respect of his 2/3rd share of land holding of various khasra numbers, in favour of defendants No.1 and 3 in equal shares and vide another Will, plaintiff and his mother Chand Kaur were given right of maintenance out of 1/3rd share of land, thus, not conferred ownership in land or right to alienate by keeping reversionary right, in favour of defendants No.1 to 3, open. Similar suit filed by plaintiff against Jhanda Singh was dismissed and therefore, law of *res judicata* would apply.

On receipt of replication, the trial Court framed following issues:-

1. *Whether the land in dispute is the joint Hindu family coparcenary property? OPP*
2. *Whether Jhanda Singh son of Kala Singh was not*

the owner of the land comprising in khasra No. as mentioned in para No.5 of the written statement? OPD

3. *Whether Jhanda Singh executed a registered Will on 22-6-78 in favour of defendants No.1 and 3, if so, its effect? OPD*

4. *Whether the plaintiff has got no locus standi to file the present suit? OPD*

5. *Whether the plaintiff is estopped by his act and conduct to file the present suit? OPD*

6. *Whether the suit as framed is not maintainable? OPD*

7. *Whether the plaintiff is entitled to 1/4th share from the land in dispute? OPD*

8. *Whether the present suit is barred by the principles of res judicata? OPD*

9. *Relief.*

In support of pleadings, plaintiff brought on record Ex.P1 to P5, Ex.PA to PC i.e. revenue excerpt, jamabandi for the year 1947-48, 1977-78, khatauni ishtemal, khatauni paimash and naqsha haqdarwar and examined Zora Singh as PW1 whereas defendants examined Naib Singh, Lambardar, attesting witness of the Will Ex.D1 as DW1 and Scribe Jugal Kishore as DW3 and Thana Singh, defendant No.1 appeared as DW2.

Trial Court while upholding Will Ex.D1 and holding the property to be coparcenary, decreed suit for possession of 1/5th share in suit land subject to the adjustment and preservation of his separate

possession in specific khasra numbers as detailed in para No.2 of judgment. Two appeals were filed before the lower Appellate Court i.e. appeal No.127 of 1985 by defendants and appeal No.170 of 1985 (cross objections) by Malkiat Singh claiming $1/4^{\text{th}}$ share instead of awarding $1/5^{\text{th}}$ share . Lower Appellate Court after noticing evidence on record modified judgment and decree of trial Court by granting possession of $7/30^{\text{th}}$ share out of land measuring 365 kanals 4 marlas in favour of plaintiff, keeping in view interest of daughter, subject to adjustment, preservation of separate possession and dismissed cross-objections of the plaintiff-Malkiat Singh.

Mr. I.S. Brar, learned counsel appearing on behalf of the appellant in RSA No.21 of 1988 submitted that courts below have not taken into consideration the fact that parties were Jat by caste and were not governed by Hindu law. Revenue excerpt do not show that Jhanda Singh inherited property from his great grandfather, thus, was not ancestral. Jhanda Singh sold 116 kanals 14 marlas and sale was successfully pre-empted by his three sons and grand son Malkiat Singh. Once due execution of Will Ex.D1 has been proved, effect should have been given in full as per provisions of Section 30 of the Hindu Succession Act. Jhanda Singh could make valid disposition by Will of his own interest in the coparcenary property, therefore, $1/5^{\text{th}}$ share as granted by the trial Court and as per the Will out of 248 kanals 10 marlas was required to be upheld.

In other Regular Second Appeal bearing No.364 of 1988 filed by Malkiat Singh, this Court on 31.01.2019 had issued notice to Malkiat Singh at the address given in the memo of parties, as the

lawyer representing him died. Registered notice had been sent but there is no appearance.

I have heard learned counsel for the appellant in RSA No.21 of 1988 and appraised paper book.

In view of judgment rendered by Constitution Bench of Hon'ble Supreme Court in *Pankajakshi (dead) through LRs and others Vs. Chandrika and others (2016) 6 SCC 157* reiterated in *Kirodi (since deceased) through his LR Vs. Ram Parkash and others* passed in Civil Appeal No.4988 of 2010 on 10.05.2019, in State of Punjab and Haryana, a second appeal being filed under Section 41 of Punjab Courts Act do not require formulation of a substantial question of law.

The total land in this case is 440 kanals 16 marlas having three parcels of land i.e. 248 kanals 10 marlas, 75 kanals 12 marlas and 116 kanals 14 marlas. Defendants attempted to belie status of property as ancestral by pleading custom of Jat community. Except pleadings, no evidence is brought on record, therefore, argument of Mr. Brar on this account is hereby rejected. There is no pleading in written statement with regard to pre-emption and amendment sought was declined vide order dated 21.08.1987. Revenue excerpt Ex.P1 reflects that common ancestor was Kala Singh father of Jhanda Singh. Thana Singh, Jagir Singh, Zora Singh and Bhag Singh were three generations being sons of Jhanda Singh and Malkiat Singh was 4th generation being son of Bhag Singh and grandson of Jhanda Singh, therefore, land measuring 365 kanals 4 marlas of land was coparcenary. No contrary evidence has been led by defendants. As

per Will Ex.D1, land measuring 248 kanals 10 marlas was bequeathed in favour of Thana Singh and Zora Singh and vide Ex.D4 gave limited share to Malkiat Singh and his mother. As per the provisions of Section 30 of the Hindu Succession Act, a person cannot bequeath Will regarding coparcenary property but it will not preclude Karta or owner regarding his own share. So at the time of execution of Will by Jhanda Singh, Thana Singh, Jagir Singh, Zora Singh his sons and Malkiat Singh, grandson were alive. He could execute the Will qua 1/5th share but the Will could only be looked for his share only.

In view of the fact that the land measuring 365 kanals 4 marlas was ancestral, Jhanda Singh, Thana Singh, Jagir Singh, Zora Singh and Bhag Singh became co-owners of land and were entitled to 1/5th share, which was to be distributed amongst his six heirs including two daughters. Every one would get 1/6th share out of 1/5th share of Jhanda Singh i.e. 1/30th share. The aforementioned finding of the lower Appellate Court, in my view, is correct.

In view of aforementioned circumstances, I do not find any illegality and perversity in the judgment and decree rendered by the lower Appellate Court, much less, no ground is made out for interference. Resultantly, RSA No.21 of 1988 is dismissed and RSA No.364 of 1988 is dismissed for non-prosecution.

(AMIT RAWAL)
JUDGE

May 20, 2019
Pankaj*

Whether speaking/reasoned	Yes
Whether reportable	No