

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

**RSA No.2444 of 1988 (O&M)
Date of decision:31.01.2019**

Kanshi Ram

Vs.

... Appellant

Jawantri (deceased) through LRs and another

... Respondents

CORAM: HON'BLE MR. JUSTICE AMIT RAWAL

Present:- Mr. C.B.Goel, Advocate
for the appellant.

Mr. Sanjiv Gupta, Advocate
for the respondent.

AMIT RAWAL J.

The present Regular Second Appeal at the instance of the appellant-defendant is directed against the judgment and decree dated 1.10.1988, whereby, suit of the respondent-plaintiffs dismissed by the trial Court, has been decreed.

The plaintiff-Jawantri sought the declaration to be exclusive owner being the legal heir of father Gaimda son of Chhaju in respect of land measuring 80 kanals referred to in the plaint (hereinafter called “suit land”). It was alleged that Gaimda, father of the plaintiff was married to Shibi, his wife and out of loins, Jawantri was born. On demise of Gaimda, the land was mutated in the name of mother of Gaimda as mother of the plaintiff, pre-deceased Gaimda. Shibi died in the year 1952. After her demise, mutation of

aforementioned land, was effected in the name of Buli, who was not heir of Shibi but she managed to obtain the mutation. On the basis of her alleged Will dated 13.09.1965, the defendant-Kanshi Ram got the mutation of suit land alongwith other property of Buli in his favour, therefore, all these transfers were not binding upon the plaintiff as Buli had no right to execute the Will. It was disclosed that plaintiff had earlier filed the suit but the same was permitted to be withdrawn in view of order dated 26.11.1977, liberty was granted by the Lower Appellate Court to file fresh suit.

Defendant no.1 opposed the suit by denying that plaintiff was related to Gaimda or Shibi or Bool Chand @ Buli. The earlier suit of the plaintiff and Sher Singh was dismissed by the trial Court on 15.2.1976. The suit was barred by law of limitation as per the provisions of Article 65 of the Limitation Act, 1963 (hereinafter referred to as "1963 Act").

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

- “1. Whether the plaintiff is legal heir of Gaimda and Shibi and is entitled to suit property?OPP
2. Whether Gaimda is governed in matters of alienation; and succession by customary law as alleged in addl.plea no.2 of the written statement? OPD 1
3. Whether Bool Chand executed a valid Will in respect of suit property in favour of defendant no.1, if so, to what effect?OPD.1
4. Whether the plaintiff has no right to challenge the

Will?OPD

5. Whether the suit is within limitation?OPP

6. Relief.”

The plaintiff in support of the aforementioned averments examined four witnesses and tendered into evidence Ex.P1 to Ex.P14, whereas defendants examined three witnesses.

The trial Court non-suited the plaintiff of having not complied with the provisions of Section 50 of Indian Evidence Act, in essence, did not prove herself to be the daughter of Gainda and dismissed the suit.

Mr. C.B.Goel, learned counsel appearing on behalf of the appellant-defendant in support of the memorandum of appeal raised the following submissions:-

The suit in the year 1978 was *ex facie* barred by law of limitation. The plaintiff has abandoned the right to challenge the mutation of 1955. Parties were governed by the custom as custom varied from village to village. The Lower Appellate Court erroneously relied upon the custom by holding that un-married daughter prior to commencement of Hindu Succession Act, had right to succeed to the estate of his father, for, Gainda died in the year 1944-45.

Buli executed a valid Will in favour of the appellant and mutation on the basis of the Will was rightly sanctioned. The plaintiff only filed the suit in 1972. Even if the permission had been granted, the suit was barred by law of limitation.

In support of the aforementioned submissions relied upon para nos.6 and 8 of the Division Bench judgment of this Court rendered in **Sewti Devi Vs. Kanti Parshad and others AIR 1973 Punjab & Haryana 126** and thus, urged this Court for setting aside the judgment and decree under challenge.

Per contra, Mr. Sanjiv Gupta, learned counsel appearing on behalf of the respondents submitted that customary law in Punjab is no longer res integra. The said law has been thrashed out by a Co-ordinate Bench of this Court in **Surjit Kaur Vs. Inder Singh (since deceased) through Lrs and others 2014(2) Punjab Law Reporter 788**. By referring to paragraph 7, emphasis was laid to custom no.2 to contend that virgin daughters would exclude the right of collateral and Buli was collateral and on similar lines judgment of the Hon'ble Supreme Court rendered in **Kehar Singh and others Vs. Chanan Singh and others 1968 AIR (SC) 806**.

To buttress the arguments, it was contended that presumption in favour of collateral is adverse to the female rights and inconsistent with the custom. DW1 and DW3, both of them, admitted that plaintiff was the daughter of Gainda. Since she was minor at that time, mutation was sanctioned in the name of mother of Gainda, i.e. grandmother of the plaintiff. On her demise, Buli being the collateral of Gainda, could not have obtained the mutation in his favour. There is no limitation for claiming the title on the basis of inheritance as mutation does not confer the title.

In support of the aforementioned submissions, relied upon the Division Bench judgment of this Court rendered in **Ibrahim alias Dharam Vir Vs.Smt. Sharifan alias Shanti 1980 AIR (Punjab) 25** and thus, urged this Court for upholding the judgment and decree of the Lower Appellate Court by dismissing the appeal.

I have heard the learned counsel for the parties, appraised the judgments and decrees as well as record of both the Courts below and the law cited at bar with their able assistance and of the view that following substantial questions of law arise for adjudication of the present appeal:-

- i) Whether the mutation in favour of collateral would be adverse to un-married female?
- ii) Whenever right and title is asserted on the basis of inheritance, the suit can be said to be barred by law of limitation?
- iii) Whether the present suit was hit by *akin to res judicata*?"

In order to answer the aforementioned questions, it would be in the fitness of things to give brief uncontroverted facts:-

The plaintiff alongwith Sher Singh had filed previous suit bearing No.750 of 1972 for possession of land measuring 159 kanals on the various grounds which was dismissed by the trial Court, vide judgment and decree dated 13.02.1976, Ex.D2. However, the Lower Appellate Court, vide judgment dated 26.11.1977, Ex.P14, granted permission to file the suit and the present suit was filed on 11.04.1978. The plaintiff, thus, asserted her

right in 1972. Mr. Sanjiv Gupta, Advocate submitted that she attained the majority somewhere in 1970 and thereafter, within three years instituted the first suit in 1972. DW1 and DW3 both of them in cross-examination admitted the plaintiff to be daughter of Gaiinda. It is sufficient requirement of law that plaintiff has been proved to be daughter of Gaiinda. Execution of the Will by Buli Chand in favour of Kanshi Ram in such circumstances would be immaterial as the question which is required to be determined whether the customary law at the relevant point of time i.e. in the year 1955 was prevalent or not.

It would be in the fitness of things to extract paragraphs 7 and 8 of Division Bench judgment of this Court rendered in Surjit Kaur's case (supra) and as well as paragraph 4 of the judgment rendered by the Hon'ble Supreme Court in Kehar Singh's case (supra):-

“7. The learned counsel appearing on behalf of the legal representatives of the 3rd respondent refers me Rattigen's Customary Law, 16th Edition, Page 847. The Book answers the question No.43 thus:-

“If the attestation of last Settlement was correct, a great change in the position of the daughter has taken place. Then the daughter, whether married or unmarried, was not allowed by any tribe in almost any circumstances to rank as an heir. Now the custom is as follows:-

(1) Male lineal issue and widows exclude all daughters (all tribes); but among Mohammedan Rajputs a daughter vowed to celibacy ranks as a son;

(2) Virgin daughters exclude collaterals (all tribes);

(3) Married daughters have no rights of succession whatsoever, save that-

(a) Hindu Jats of Pargannahs Jagraon-

Akalgarh and Raekot-Hathur say that failing collaterals of sixty degree married daughters succeed, and

(b) Awans, Gujars, Dogars, Labanas and some Mohammedan Rajputs, Jats and Arains allow a married daughter who has not left her father's house (*doli nahin nikali gai*) to succeed on failure of male lineal descendants to and hand on the inheritance to her children.”

8. The reproduced portion will show that if the parties are Jats and failing the collateral of 6th degree, the married daughters would succeed. Clause (2) says virgin daughter would exclude collateral. In this case, we have seen that the succession must be taken as opening on the day when the mother went missing in the year 1936, the plaintiff must

have been 8 years at that time. That she married subsequently to Niranjana Singh could hardly be material, for, on the basis of custom as shown by the defendant himself, an unmarried daughter would exclude a collateral. I have examined the customary law in the manner which has been set forth in defence by the counsel. I may also examine the plaintiff's status under Mitakshara, as applied and brought out in Mulla's Hindu law. The daughter was the 5th in line in the order of succession, Nos.1, 2 and 3 being son, grandson and great grandson and after 1937, the 4th in the line was the widow, who took it, as what was known popularly of the widow's estate. The next in the order of succession was the daughter. (Mulla on Hindu law, 21st edition, page 145). At the time, when the property was taken by the daughter, it was only a limited right but by virtue of Section 14(1) that right had become also an absolute right to the property. Therefore, I have no difficulty in discarding the contention raised by the defendants to hold that the plaintiff had proved her heirship to the property of which her father Hira Singh was admittedly the last male owner.

V. Plea of adverse possession

(a) Documentary evidence does not show defendant's possession before 1959."

Paragraph 4 of Kehar Singh's case (supra)

"4. On the question of custom the respondents relied upon the statements in paragraph 23 of Rattigan's Digest of Customary Law (14th Edn.), a book of unquestioned authority in the Punjab, State. In para 23, p. 132 it is stated that (1) a daughter only succeeds to the ancestral landed property of her father, if an agriculturist, in default :-(1) of the heirs mentioned in the preceding paragraph (viz., male lineal descendants, widow or mother), or (2) of near male collaterals of her father, provided that a married daughter sometimes excludes near male collaterals in certain circumstances specified in the paragraph, (2) But in regard to the acquired property of her father, the daughter is preferred to collaterals. It is further stated at p. 152 that "the general custom of Punjab is that a daughter excludes collaterals in succession to self-acquired property of her father and the initial onus, therefore, is on the collaterals to show that the general custom in favour of the daughter's succession to the self-acquired property of her father, has been varied by a special custom 654excluding daughters".

This being the legal position of the parties -the question arises whether the defendants had discharged the onus ,of proving the existence of a special custom excluding the daughters. On this point the appellants relied upon the answers to ,Questions 48 and 49 in the Compilation of the Customary Law of Ferozepore district by M.M.L. Currie, Settlement Officer. These ,questions and answers are comprised in the Riwayat-i-am of the settlement of Ferozepore district of 1914 and are reproduced below :

"Question 48-Under what circumstances are daughters entitled to inherit ? Are they excluded by the sons or near male kindreds of the deceased ? If they are excluded by the near male kindred, is there any fixed limit of relationship within which such near male kindred must stand towards the deceased in order to exclude his daughter ? If so, how is the limit ascertained? If this depends on descent from a common ancestor, state within how many generations relatively to the deceased such common ancestor must come?

Answer-At last settlement Mr. Francis wrote "Except a few Sayyads all tribes say that a daughter can never succeed. Some Sayyads say that an unmarried daughter can succeed like a son; but no

instances are given.'

The custom has now changed completely, most tribes admitting that a daughter is entitled to succeed till marriage in the absence of a widow or male lineal descendants. The following groups, however, do not admit that a daughter can succeed :- Dogars of Fazilka, Nipals, Sayyads of Ferozepore, Zira and Muktsar, Bodlas (unless there are no collaterals in the 5th degree), Chishtis (unless no collaterals in the 7th degree), Pathans of Ferozepore (except the Kasuria group), Rajputs of Fazilka, Wattus of Zira and Fazilka, Moghals except in Ferozepore, Mahtams, Sodhis, Bagri Jats, Kumhars and Suthars, Bishnois and the following Jat Sikhs in Fazilka Tahsil-Dhaliwals, Sidhhus, Gils and Sandhus.

The Kasuria Pathans state that a daughter succeeds if there are no sons, and the Arians state that she excludes collaterals who do not come within the 4th degree.

Question 49- Is there any distinction as to the rights of daughters to inherit (i) the immovable or ancestral, (ii) the movable or acquired property of their father ?

Answer-There is no distinction. A father can of course gift his movable or acquired property to his daughter."

In the present case, there is no proof of any instance for or against the right of inheritance of a daughter of a deceased last male holder of the, Sidhu tribe of Jats, either in the Muktsar Tahsil or in the whole district of Ferozepore. At least, none was brought to the notice of the lower courts by the plaintiff or the defendants. It was contended on behalf of the appellants that the Riwaj-i-am of 1914 was entitled to a presumption as to the existence of a custom even though not supported by proof of instances and it must therefore be held that the defendants have discharged the initial onus of proving that the general custom has been varied by a special custom enabling them to exclude the married daughter. The real controversy in this appeal is, however, on the question whether the entries in the Riwaj-i-am on which the defendants rely refer at all to non-ancestral property or not. In Mst. [Raj Kaur v. Talok Singh](#)(1) Sir Donald Johnstone, the Chief Justice held that the Riwaj-i-am as compiled, did not cover self-acquired property and that where the Riwaj-i-am talked about succession to land without discrimination between ancestral and self-acquired land, the rule laid down could only be taken to apply to ancestral property. This case related to property in Ferozepore district,

though with regard to a different tehsil and different sub-caste of Jats, but the important point is that the questions of the Riwaj-i-am of 1878 in that case were exactly in the same language as questions 48 and 49 of the Riwaj-i-am of 1914. A similar view was taken by Shadilal and Wilberforce, JJ. in *Budhi Prakash v. Chandra Bhan*(2). The view was followed by other judges of the Lahore High Court in [Narain v. Mst. Gaindo](#)(3), and *Fatima Bibi v. Shah Nawaz* (4) . [In Abdul Rahman v. Mst. Natho](#)(5) it was observed by the High Court as follows :

" According to the Customary Law of the district, collaterals within the fifth degree exclude daughters, but it has been consistently held by this Court that Riwaj-i- am refer only to ancestral land unless there is a clear statement to the contrary. It is unnecessary to refer to the numerous decisions on this point. Customary law is in fact usually only concerned with protecting ancestral property, while self-acquired property can be disposed of as the owner pleases, that is, reversioners are usually concerned only with property ancestral qua them."

The decision of this case was affirmed by the Full Bench of the Lahore High Court in *Mst. Hurmate v. Hoshiaru*(1). *Din Mohammad, J.* delivering the leading judgment in this case,,

observed as follows :

"In my view, the *raison d'etre* of those cases which lay down that the Manuals of Customary Law were ordinarily concerned with ancestral property only is quite intelligible. Collaterals are, as stated by Addison, J. in [Abdul Rehman v. Mst. Natho](#) (2) really speaking interested in that property only which descends from their common ancestor and this is the only basis of the agnatic theory. What a maleholder acquires himself is really no concern of theirs. It is reasonable, therefore, to assume that when manuals- of customary law were originally prepared and subsequently revised, the persons questioned, unless specifically told to the contrary, could normally reply in the light of their own interest alone and that, as stated above, was confined to the ancestral property only. The fact that on some occasions the questioner had particularly drawn some distinction between ancestral and non-ancestral property would not have put them on their guard in every case, considering their lack of education and lack of intelligence in general. Similarly, the use of the terms 'in no case' or 'under no circumstances' would refer to ancestral property

only and not be extended so as to cover self-acquired property unless the context favoured that construction."

The decision of the Full Bench of the Lahore High Court was approved by the Judicial Committee in Mst. [Subhani v. Nawab and Ors.](#)(3) in which the controversy arose with regard to the interpretation of questions 16 and 17 and the answers thereto in Wilson's Manual of Customary Law which are reproduced below

"Question 16 (p. 48)-Under what circumstances are daughters entitled to inherit ? Are they excluded by the sons or by the widow, or by the near male kindred of the, deceased ? If they are excluded by the near male kindred, is there any fixed limit of relationship within which such near kindred must stand towards the deceased in order to exclude his daughters ? If so, how is the limit ascertained ? If it depends on descent from a common ancestor, state within how many generations relatively to the deceased such common ancestor must come.

Answer 16-All Musalmans.

A married daughter in no case inherits her father's estate or any share in it. An unmarried daughter succeeds to no share in presence of agnate descendants of the deceased, or of her own mother; but if there be no agnate

descendants and no sonless widow, the un married daughters succeed in equal shares to the whole of their father's property, movable and immovable, till their marriage, when it reverts to the agnate heirs. If there be a widow and daughters of another wife who has died, the unmarried daughters of the deceased wife succeed to their mother's share till their marriage.

Question 17 (p. 49)-Is there any distinction as to the rights of daughters to inherit (1) the immovable or ancestral, (2) the movable or acquired, property of their father?

Answer 1.7-All Musalmans.

As regards the right of the daughter to inherit, no distinction is made between the movable and immovable ancestral and acquired, property of the father. If she inherits at all she takes the, whole estate."

It was held by the Judicial Committee that though in the answers to question No. 17 in Wilson's Manual no distinction was made between ancestral and non-ancestral or between movable and immovable property, and the rule was stated as a wide generalization (in answer to question No. 16) that a married daughter in no case inherits her father's estate or any share in it, it must be taken in view of the numerous decisions of the Punjab courts that the Riwaj-i-am which states the rule in

such wide and general terms governs ancestral property only. It should be noticed that Questions 16 and IT of the Wilson's Manual are couched in similar language to Questions 48 and 49 of the Riwaj-i-ani with which we are concerned in the present appeal. In view of these authorities we have therefore come to the conclusion that the entries in the Riwaj-i-ani with regard to Questions 48 and 49 on which the appellants rely do not refer at all to non-ancestral property and are therefore not relevant evidence to establish a special custom among the Sidhu Jats of Muktsar Tahsil of Ferozepore district entitling collaterals for succession to non-ancestral property in preference to daughters. It follows therefore that the appellants have not discharged the onus which lay upon them of proving that the general custom has been varied by a special custom enabling the collaterals to exclude the daughters. It is manifest therefore that the customary law among the Sidhu Jats of Muktsar Tahsil of Ferozepore district as regards non-ancestral property is the same as recorded generally for the State of Punjab in paragraph 23 of Rattigan's Digest i.e., a daughter is preferred to collaterals.”

On perusal of the aforementioned provisions of the customary law, virgin daughter is not barred to inherit the right of her father, rather collateral is excluded. Once the defendants admitted the plaintiff to be daughter of Gainda, mutation which does not confer title in favour of Buli

after demise of Shibi, grandmother of plaintiff, was nonest, illegal, null and void in the eyes of law.

There is no denial to the fact that limitation would not be arrested in case title is asserted on the basis of inheritance. The aforementioned view of mine is fortified from the ratio decidendi culled out in paragraphs 6 to 8 of the judgment rendered by Division Bench of this Court in Ibrahim's case (supra). The same reads thus:-

“6. While controverting the aforesaid findings of the learned single Judge, it was contended by Mr. Aggarwal, learned counsel for the appellant, that cause of action arose to the plaintiff in April, 1969, when the defendant actually threatened to take forcible possession of the land from the plaintiff and that mere sanction of the mutation with respect to half share of the land in dispute in the name of the defendant did not give any cause of action to the plaintiff, especially when he had continued to be in exclusive possession of the land without any interference of any kind by the defendant. On the other hand, it was contended by Mr. Kapur, learned counsel for the respondent, that a cloud was actually cast on the right of the plaintiff in the year 1957 when after the death of Akbar mutation of inheritance was sanctioned in favour of the plaintiff, the defendant and their mother in equal shares; that the right to sue first accrued to the plaintiff on the date when

the said mutation was sanctioned and that the suit having been filed beyond the period of three years was clearly barred by time.

7. After giving our thoughtful consideration to the entire matter, we find that there is considerable force in the contention of the learned counsel for the appellant.

8. It may be observed at the outset that the word 'first' occurring in [Art. 58](#) of the Act is of no significance at all for deciding the issue of limitation so far as the facts of the case in hand are concerned as the main point that requires determination is whether mere entry of a mutation in the name of the defendant would furnish a cause of action to the plaintiff to file a suit for declaration or not. There is no dispute that mutation was sanctioned in favour of the defendant after the death of Akbar and in case such an entry furnishes a cause of action, then certainly the suit would be barred by limitation. Even Mr. Aggarwal very fairly conceded this proposition. But what was argued by him was that mere entry of a mutation did not furnish any cause of action and in support of his contention he relied on a Division Bench judgment of this Court in *Niamat Singh v, Danbari Singh etc*, (1956) 58 PLR 461. In our view, the contention of the learned counsel has considerable force. The plaintiff continued to be in possession of the entire property

even after the sanction of the mutations in the name of the defendant after the death of her father Akbar or her mother Smt. Nanhi or her uncle Bhiku. The defendant was never given any share in the rent, nor was she given any produce out of the land of her share. In this situation, no cloud was cast on the title of the plaintiff by mere entry of the mutation in the name of the defendant. Further, there is no proof on the record to show that before April, 1969, by any act or assertion of the defendant the right of the plaintiff was ever actually jeopardised, The defendant is occupying e house in the village. The assertion of the plaintiff is that it was given by him to her out of compassion, while the plea of the defendant is that she occupied it as of right. Be that as it may, the fact remains that so far as the agricultural land is concerned, the defendant after the sanction of the mutations never asserted her right to her share in the land in dispute, nor did she ever get any rent or produce and that it was in the year 1969 that she tried to assert her right and interfere with the possession of the plaintiff. In this situation, mere entry of a mutation in the name of the defendant would not furnish any cause of action to the plaintiff. This view of ours finds full support from the judgment of the Division Bench in Niamat Singh's case. Thus, we do not agree with the learned single Judge that the cause of action arose when the

mutation was entered in the name of the defendant and consequently, reverse the finding on issue No. 4 and hold that the snit filed by the plaintiff is within limitation.”

In view of the findings rendered in Ibrahim, the ratio decidendi culled out in the judgments relied upon by Mr. C.B.Goel, would pale into insignificance.

As an upshot of my findings, the Lower Appellate Court being the last Court of fact and law has correctly reversed the judgment and decree of the trial Court which did not advert to all the aforementioned facts and provisions of law except laid focus on the applicability of provisions of Section 50 of Indian Evidence Act. The substantial questions of law aforementioned are answered in the above said manner.

Resultantly, the appeal is dismissed.

(AMIT RAWAL)
JUDGE

31.01.2019
savita

Whether Speaking/Reasoned	Yes/No
Whether Reportable	Yes/No