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

(121)

**RSA-2687-2022(O &M)
Reserved on: - 19.12.2022
Date of Decision: - 20.02.2023**

Krishna(deceased)through LRs and others

.....Appellants

Versus

Kapil and others

.....Defendants

CORAM: HON'BLE MR. JUSTICE ALOK JAIN

Present: Mr. Amit Jain, Senior Advocate with
Mr. Dhruv Mittal, Advocate for the appellants.

ALOK JAIN, J. (Oral)

The present Regular Second Appeal has been preferred by the plaintiff whose suit seeking declaration to the extent that the Release Deed (Dastbardari) bearing Vasika No. 1696/1 dated 06.02.2007 is *void abinitio* and is not binding upon the plaintiffs stands dismissed by the Courts below.

The dispute in short was that one Surat Singh executed a release deed dated 06.02.2007 in favour of his two grandsons(defendants herein) qua the entire property to the exclusion of other children and grandchildren. The basis of the suit was that the land in the hands of Surat Singh was ancestral and coparcenary property and hence Surat Singh was not competent to transfer the suit property.

The learned trial Court after examining the entire evidence, returned a finding that the plaintiffs had filed misleading pleadings as on one side they demanded to be declared as owner in possession and on the

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other hand stated “if the plaintiff’s possession was not found then in that eventuality decree of possession be also granted.” It was also recorded that the appellant-plaintiff had prayed that the decree passed in Civil Suit No. 640 of 2008 be declared null and void. The learned trial Court duly formulated the issues with respect to the entitlement of plaintiffs to the decree of declaration as prayed for and further if the said declaration is accorded, whether the plaintiffs are entitled to decree of permanent injunction. In order to substantiate the issues framed, the parties lead evidence. The learned trial Court duly held that even if the alienation by way of relinquishment deed is set aside, still the suit of the plaintiff is not maintainable as in that eventuality, the defendants were held entitled to get the land by virtue of the Will dated 04.05.1999, which was never challenged. In the light of the pleadings and the evidence adduced, the learned trial Court dismissed the suit by holding as under:

“It has been provided under Section 17(1)(a) of the Registration Act 1908 that instrument of gift of immoveable property requires compulsory registration. Moreover, Section 123 of the Transfer of Property Act further provided that for the purpose of making a gift the transfer must be effected by a registered instrument. The combined effect of both the Sections are that an instrument of gift must be reduced into writing and requires compulsory registration. An oral gift of the immoveable property cannot be said to be valid in the eyes of law. In the case in hand, Sh. Surat Singh inherited the suit

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property from his father in family settlement which does not change the nature of the property from ancestral to separate property. Therefore, the property in the hands of Sh.Surat Singh is said to be ancestral property. Now the question arises whether the plaintiffs can be declared owner in possession of the suit property relating to their respective share. The plaintiff filed the suit for declaring them owners of the suit property after setting aside the relinquishment deed dated 06.02.2007. The plaintiffs claimed that they will declare owner in possession of the suit property, but in para No.11 of the plaint, it is stated that plaintiff No.11 and plaintiff No.8 have purchased 26K-6M out of the suit property, which clearly shows that plaintiffs are not in possession of the suit property rather the suit property is in possession of the defendants. The plaintiffs have filed a misleading pleading, as one side they have demanded that they be declared owner in possession of the suit property and on the other hand in clause (iv) of their relief clause it has been stated that "if the plaintiffs possession was not found or held that the dispossessed legally or illegally during pendency of suit in that eventuality a decree of possession be also granted to them." It appears that plaintiffs have filed the present suit on false and frivolous grounds. The plaintiffs have also prayed that a decree passed in Civil Suit No.640 of 2008 be declared null and void. But it is pertinent to

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mention here that a civil suit which has been previously decided is having the effect of res judicata and this court has no jurisdiction to set aside the decree already passed by another Court of concurrent jurisdiction the proper recourse available to the plaintiffs were to file an appeal against the said judgment. The plaintiffs claiming that they have the share in the ancestral property but it is well settled law that if a person claim himself as co-sharer in the suit property then the suit is not maintainable unless he asked for the partition of the suit property. In the case in hand, the plaintiffs did not ask for declaration after getting the suit property partition. As discussed above the suit property was ancestral property or joint property and no co-sharer can be declared owner of a specific area unless the partition has been effected by meets and bounds. Therefore, in this case, the plaintiff cannot be declared owners in possession of the suit property unless the partition has been effected. The plaintiff failed to aver and prove that the partition of the suit property has taken place. The question whether the relinquishment deed dated 06.02.2007 is null and void remained undecided as the suit of the plaintiff is found to be not maintainable. In view of the above discussion this court is of the considered opinion that the plaintiff failed to discharge the onus. Issues No.1 and 2 are decided against the plaintiffs and in favour of the defendants.”

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On an appeal filed by the appellant-plaintiff before the First Appellate Court, the same also came to be dismissed and the findings of the learned trial Court that the suit property was ancestral in nature was discarded and it was held that the suit property in the hands of deceased Surat Singh was self-acquired property as he had inherited the same along with his brothers from his father Udmi by execution of oral gift deed dated 05.03.1949. It was further held that the learned trial Court fell in error in recording that the oral Gift Deed executed in year 1949 to be bad in eyes of law, without considering the fact that the Transfer of Property Act, 1955 came in force later on and hence the First Appellate Court returned the finding that the oral Gift Deed which is duly incorporated in the revenue record is absolutely legal and valid.

Learned Senior Counsel for the appellant has contended that the First Appellate Court fell in error inasmuch as it reverses the findings of the trial Court declaring the land/suit property to be ancestral, in the absence of any appeal against the said finding by the defendant. Mr. Jain has further submitted that Udmi allegedly executed an oral gift whereby his entire land holding was equally divided into four parts i.e. between himself and his three sons including Surat Singh being one of them. Mr. Jain has further argued that as per Mitakshara Law and the settled position of law, Udmi by his act and conduct never wanted to change the nature of land for the reason that the entire land was equally divided and had Udmi died *intestate*, in that situation also, the property would have devolved upon all the sons in equal portion. He submits that in fact, it is a case of

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accelerated succession and therefore without there being any partition of the said land, the same shall remain as ancestral.

Learned counsel for the appellant has reiterated that once the learned trial Court had returned the finding that the suit land was ancestral in the hands of Surat Singh and in the absence of any appeal by the defendants, the learned First Appellate Court fell in error in reversing the said finding. Mr. Jain has vehemently argued which is summarized as below:

Once it is established that Udmi father of Surat Singh was holding the land as ancestral property and even taking the oral gift executed equally between Udmi and his three sons, it will not change the nature of land from ancestral to self-acquired for the reason that the same was not partitioned rather only an accelerated succession. The fact that Udmi equally divided the entire land in four shares, three for his sons and one for himself. Even going by the Mitakshara Law, on the demise of Udmi then also all the sons would have got the same share. He has further contended that even otherwise $\frac{1}{4}$ th share retained by Udmi would still remain ancestral in the hands of Surat Singh after the demise of Udmi. He also contends that it is not only the oral gift which has to be seen but also the surrounding circumstances need to be considered to assess the correct intent of the person giving the gift. In the present case seeing the circumstances, Udmi gave equal share to all his sons and hence he reiterates that the intention was never to change the nature of land. Since the land was held to be ancestral land, the relinquishment deed executed in

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2007 by Surat Singh in favour of his two grandson and to exclusion of all other coparceners deserves to be set aside.

After hearing the learned Senior Counsel at length and perusing the record, it transpires that as per the pedigree table, one Mamraj bequeath his property to his son Udmi who had four sons. Udmi in his lifetime executed a Gift Deed in the year 1949 and divided his estate in favour of his sons equally. The act of the father to equally distribute his estate during his lifetime cannot be equated as accelerated succession merely on the basis that had Udmi expired intestate, then also the partition would have taken place in the same manner. This analogy deserves to be negated for the reason that had the transfer deed not been done equally among brothers, there could have been a possibility of triggering of the litigation in the year 1949 itself. The intention of the father to equally distribute the land, which he did, cannot be equated with accelerated succession. Therefore, the arguments raised by the learned Senior counsel that it was not a simplicitor case of transfer but was a case of accelerated succession does not hold good in the present set of circumstances. There is nothing on record to show that Udmi had any reason not to distribute his estate in equal shares to all his children therefore the share which fell to Surat Singh from Udmi could not be declared as ancestral property and became his self-acquired property. Consequently, Surat Singh was well within his rights and the nature of property becoming self-acquired upon the execution of the oral gift deed, entitled Surat Singh to execute the impugned Dastbardari executed vide Vasika No. 1696/1 dated 06.02.2007.

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As regards the arguments, that the learned First Appellate Court could not reverse the finding qua the property having being declared as “ancestral” in the absence of any appeal by the respondents, the same also deserves to be negated for two reasons: firstly, there was no cogent evidence available before the learned trial Court especially in terms of any revenue record or excerpts from the revenue record produced and proved to establish that the land was ancestral. Further the learned First Appellate Court was well within its powers under Order 41 Rule 4 and Order 41 Rule 33 of CPC to set aside the said finding. For the ready reference provisions of Order 41 Rule 4 & Order 41 Rule 33 of CPC are reproduced herein below: -

“Rule 33 – Power of Court of Appeal.

The Appellate Court shall have power to pass any decree and make any order which ought to have been passed or made and to pass or make such further or other decree or order as the case may require, and this power may be exercised by the Court notwithstanding that the appeal is as to part only of the decree and may be exercised in favour of all or any of the respondents or parties, although such respondents or parties may not have filed any appeal or objection and may, where there have been decrees in cross-suits or where two or more decrees are passed in one suit, be exercised in respect of all or any of the decrees, although an appeal may not have been filed against such decrees:

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Provided that the Appellate Court shall not make any order under section 35A, in pursuance of any objection on which the Court from whose decree the appeal is preferred has omitted or refused to make such order.”

A perusal of the above provisions clearly empowers the learned First Appellate Court to do complete justice between the parties by passing such order or decree which ought to have been passed or made, although not all the parties affected by the decree had appealed. In the present case also the learned First Appellate Court has rightly held that once the property was legally and validly gifted by an oral gift deed in the year 1949, which was duly incorporated in the revenue record to be legal and valid, the character of the ancestral property had changed to that of self-acquired property qua Surat Singh. Therefore, the finding recorded by the learned trial Court that the property was ancestral property was rightly negated by the learned First Appellate Court while holding the same to be a self-acquired property after execution of the gift deed in the year 1949.

In fact, this Court in **2014(4) RCR(Civil) 534 – Bant Kaur Vs. Baldev Singh** has held that there is no dispute that in the PEPSU Govt., oral gift was permissible and Rapat Rojnamcha has also been made to that effect in the record of revenue authorities. Coupled with the law laid down by Hon’ble Supreme Court of India in the case of **1953 AIR (SC) 495 - C. N. Arunachala Mudaliar Vs. C. A. Muruganatha Mudaliar**, wherein it has been held where the property is received by a person through gift, the property loses the character being ancestral property and the same is self-

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acquired property in the hands of the beneficiary.

The fact that the heirs of Balwan Singh (son of Surat Singh) also filed a suit assailing the validity of impugned deed of relinquishment, during the lifetime of late Surat Singh, during its pendency, Surat Singh expired, resultantly, the said suit was dismissed for non-prosecution on 23.09.2011, therefore, the plaintiffs were barred from raising the same claim again.

In fact, the appellants-plaintiffs had only filed a suit for declaration to the effect that the deed of Dastbardari bearing Vasika No. 1696/1 dated 06.02.2007 is *void ab initio*, inoperative and not binding upon the plaintiffs with a relief of permanent injunction against the defendants. Both the learned courts below have extensively dealt with the entire matter and rather the First Appellate Court has rightly corrected the error in the trial Court judgment. Finding no infirmity in the orders passed by both the Courts below, rather the same being detailed and self-explanatory, detailing out the correct position of law, the present appeal also deserves to be dismissed.

In light of the above, finding no merit in the present appeal and upholding the findings recorded by the First Appellate Court, the present appeal is dismissed.

(ALOK JAIN)
JUDGE

20th February, 2023

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Whether speaking/reasoned:-	Yes/No
Whether Reportable:-	Yes/No