



134 IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH

RSA-1161-1991(O&M)

Reserved on : 24.05.2024

Pronounced on : 24.06.2024

Chalti Devi (since deceased)
through her LRs

...Appellant

Vs.

Sh. Inspector Singh and another

...Respondents

CORAM:- HON'BLE MR. JUSTICE ANIL KSHETARPAL

Present: Mr. Amit Jain, Sr. Advocate with
 Mr. Aryaman Thakur, Advocate
 for the appellant.

Mr. R.S. Mamli, Advocate
for appellant No.2.

Mr. M.L. Sarin, Sr. Advocate with
Ms. Hemani sarin, Advocate
for the respondent No.1.

Mr. Virender Kumar, Advocate for
Mr. O.P.S. Tanwar, Advocate
for respondent No.2.

ANIL KSHETARPAL, J.

1. Brief facts of the case:-

1.1 In view of the no objection by the learned counsel representing the
appellant, CM-2598-2020 filed for transposing the proforma respondent as
appellant is allowed.

1.2 In this case the following questions require adjudication:-

1. Once sufficient material evidence is produced by a party, is it



appropriate to draw adverse inference if the party fails to testify in the Court?

2. Whether after the enforcement of Hindu Succession Act, 1956, a widow who inherited life interest in the property of husband becomes the full and absolute owner of the same?

1.3 In this Regular Second Appeal, the plaintiffs through their legal representatives assail the correctness of concurrent findings of fact arrived at by the courts below while dismissing their suit for possession of agricultural land measuring 164 kanals 6 marlas and for recovery of mense profits from the date of the suit till delivery of possession.

1.4 In order to comprehend the issues involved in the present case, some relevant facts, in brief, are required to be noticed.

1.5 Late Sh. Gainda (died on 14.03.1932) and late Sh. Bharat Singh (died on 26.12.1943) sons of Sh. Jugan were joint owners of the suit property. After their death, Smt. Kalawati widow of Sh. Gainda and Smt. Makhmuli widow of Bharat Singh filed a suit on 12.10.1982, against respondent (defendant Sh. Inspector Singh son of Sh. Ganga Ram) for grant of relief of possession on the premise that after the death of Sh. Gainda and Sh. Bharat Singh respectively, they inherited the life interest in the property, which became their absolute property as per Section 14(1) of Hindu Succession Act, 1956. While claiming that the defendant (respondent), who was also residing with them, is their distant relative and was engaged by them to look after their property as their agent, and he eventually, dishonestly and in connivance with the Halqa Patwari, made false entries in the revenue record to claim ownership



of the property. Thus, the plaintiffs prayed for the relief of possession alongwith recovery of *mesne* profits. On notice, the defendant claimed that Sh. Gainda and Sh. Bharat Singh died without having a male child and the plaintiffs surrendered their life estate in favour of the defendant and he has been in possession of the property openly, continuously and adversely to all concerned for more than last 12 years. He also claimed that the plaintiffs are also estopped from claiming any right, title or interest in the suit property after surrendering their rights in favour of defendants. He also made assertion that the plaintiffs cannot question the title of the defendant as their objection is beyond the prescribed period of limitation. The defendant denied that he has played any fraud. In additional plea, he claimed that the parties are Hindu Rajputs by Caste, a predominantly agricultural tribe, and they are governed by the custom prevailing in the tribe in the matters of succession and alienation. Under the prevailing customs, on the death of the person dying without having a son, his nearest male collateral within five degrees succeeds to his estate, excluding his daughter and also the widow. The widow can only claim a right of maintenance for herself from such collateral and she also has an option that permits her to surrender the estate to such collateral and live and reside during her lifetime with him.

1.6 Replication was filed and the trial court identified the issues that required adjudication. The parties were permitted to lead evidence.

1.7 The plaintiff's application for permission to file additional evidence during the pendency of the first appeal in order to produce the 'khatoni istamal' for the year 1952-53, registered Haqdarwar 1952-53, khatoni



Pemaish for the year 1952-53, copies of the Jamabandi for the year 1954-55, 1956-57, 1962-63 and copies of khasra girdawari for the year 1957-58 to 1961-62 has been dismissed on the ground that these documents were available to the plaintiffs when they led evidence but were not produced. The plaintiffs are attempting to fill up the lacuna and the application for additional evidence has been filed after a period of more than 3 years from the date of filing of the appeal.

2. Reasons recorded by the First Appellate Court:-

2.1 On the analysis of the judgment of the First Appellate Court, the following reasons have been recorded, to non-suit the plaintiffs:-

- I) The plaintiffs have failed to step into the witness box, hence, adverse inference is required to be drawn against them.
- II) Defendant has been in possession of the property throughout.
- III) From the entries in the revenue record, it is proved that defendant has been cultivating the suit property as owner and not as a tenant.
- IV) From the oral evidence, it is proved that after the last rites of Sh. Bharat Singh, took place the plaintiffs declared that the defendant will be the owner of the suit property.
- V) The subsequent conduct of the plaintiffs prove that they surrendered their rights in favour of the defendants.
- VI) The defendant has become the owner of the suit property by



way of adverse possession because he is proved to be in possession from 1962-63.

VII) As per answer to question No.28 of a book titled as Customary Law of Ambala District, compiled by Mr.R.B.Whitehead, late Settlement Officer, the property devolves upon the widow for her lifetime and then on the main collaterals. In view of the judgment passed by the Hon'ble Supreme Court in '**Natvarlal Punjabhai and another versus Dadubhai Manubhai and others AIR 1954 S.C. 61**', the surrender of widow's life estate stood proved in favour of defendant.

3. Arguments put forth by the learned counsel representing the parties:-

3.1 Heard the learned counsel representing the parties at length and with their able assistance perused the paper-book alongwith the requisitioned record and the written submissions filed by the learned counsel representing the parties.

3.2 The gist of the submissions of the learned counsel representing the appellant reads as under:-

"1. In the absence of any registered relinquishment deed in favour of defendant, both the courts have held that since the defendant was in Permissive possession of the land therefore it could be inferred that the plaintiffs have surrendered their rights in his favour.

PW-1 Dhanwant Singh (SPOA) has stated that Kalawati (his maternal grandmother) used to stay in Pardah and defendant used to look after their property being a distant relative. He has also stated that in 1982 the defendant denied the title of the plaintiffs over the suit land. In Cross Examination he has stated that Kalawati used to



give money to the defendant and he used to pay the bill. No suggestion was put to him about plaintiff's surrendering their rights in favour of the defendant.

***PW-2 Shish Pal** has in his testimony stated that plaintiff's used to sell the crop in the village and Inspector Singh never owned the suit land.*

***PW-5 Narain Dass (Laq Clerk)** has stated that in 1972 land was acquired in Nagal totaling 35 Kanal 4 Marla and compensation dated 17/7/1974 amounting to Rs 22,770 was given to plaintiff.*

*Further **DW-1 Inspector Singh** has also admitted that bank account was opened in the name of the plaintiffs and compensation was paid in that account.*

***PW-7 Isam Singh (Ex- Sarpanch)** stated that defendant had no right over the suit land and he only used to look after the land.*

Even from revenue record exhibited on the record Ex D-12 Jamabandi for year 1962-63, Ex D-13 Jamabandi for year 1965-66, Ex P-3 Jamabandi for the year 1970-71, Jamabandi for year 1975-76 Ex P-8, Ex P-4 Jamabandi for year 1980-81, and for the year 1985-86 Ex PW1/A it is proved that the plaintiff's were shown as owners. Further defendant Inspector Singh in his cross examination stated that he never took any steps to record his name as owner in revenue records because he never inspected the same.

*An attempt has been made by the defendant to prove that surrender in his favour took place on day of Pagri ceremony of Bharat, whereby both the plaintiff's declared that defendant will look after the land of Bharat and Gainda. However in Cross Examination **DW-5 Teli Ram** has stated that plaintiff's were not present at the pagri ceremony of Bharat. Therefore in the absence of the plaintiff's no valid surrender could take place in favour of Inspector Singh.*

Further it is well settled that life interest means interest which determines on termination of life and is incapable of being transferred by person to others being personal in nature and life interest is extinguished only on death. (Ranvir Dewan Vs Rashmi Khanna 2018 (1) RCR (Civil) 193 (SC)).

*Supreme Court in **Mummareddi Nagi Reddi Vs Pitti Durairaja Naidu** (AIR 1952 SC 169) has held that no surrender/relinquishment by widow could be made in favour of anybody except next heir of the husband. Widow cannot declare that she is withdrawing from the husband's estate in order that estate might vest in somebody other than next heir of husband. Therefore in presence of the daughters*



plaintiff's could never surrender their interest in favour of defendant.

Defendants have failed to lead any evidence with regard to the nature of the property being ancestral in nature. Therefore the suit land has to be considered as self acquired property of Bharat and Gainda.

It is now settled that even before 1956 widow had right to take self acquired property of her husband and on failure of any male issue, daughter would take the property. If a man departs life without any male issue then (i) His wife; (ii) his daughter, (iii) parents; (iv) brothers; (v) sons of brothers; (vi) others of same gotra. They succeed to inheritance each class upon failure of one preceding. (Arunachala Gounder Vs Ponnuswamy 2022 (2) RCR (Civil) 9 (SC))

2. Defendant in his written statement took additional plea that parties were governed by custom where a person leaving no son, his near collaterals would succeed to the property even excluding the widow and the daughter. In replication the plaintiffs had denied that they were governed by Hindu Law only.

Inspector Singh in his testimony had reiterated the plea taken in written statement. However no independent evidence has been led to prove the existence of custom.

PW 3 Chohel in cross examination stated that around 50 years back near the village whole estate went to girls.

It is well settled that that it is incumbent on the party setting custom to allege and prove the custom on which he relies. It cannot be established by parity of reasoning. Where there is evidence to prove that custom was not valid in numerous instances, custom could not be held to be proved. Custom has to be ancient and continuous. (Salekh Chand Vs Satya Gupta 2008 (13) SCC 119)

3. Finally the defendant has also pleaded that he has become owner of the land in his own right on basis of Adverse Possession being in possession of the land for more than 12 years. The learned trial court fell in error in deciding the plea of adverse possession in favour of the defendant once it had held that the possession was "Permissive."

Once defendant was claiming right on the suit land on basis of surrender in his favour he could not take plea of adverse possession. Further the ingredients of adverse possession were neither pleaded nor proved by the defendant. It is well settled that plea of adverse possession can only be taken where the title of the opposite side is accepted over the land. In the present case it is the case of



the defendant that he was given all the rights over the land after the death of Bharat. There is no evidence that defendant held the land in open and hostile manner denying the title of the plaintiffs before 1982. He has also not taken any steps to get the revenue record in his name. Therefore the defendant has failed to prove the three necessary ingredients to prove adverse possession i.e. nec vi (continuous), nec clam (publically) and nec precario (adverse and hostile to the owner). Reliance is placed on Shri Uttam Chand Vs Nathu Ram (Civil Appeal no. 190 of 2020, decided on 15.1.2020 (SC)), Tribhuvanshankar Vs Amrutlal (2014(1) RCR (C) 206 (SC)), Annakili Vs A. Vedanayagam (AIR 2008 SC 346), Saroop Singh Vs Banto (2005 (4) RCR (C) 599 (SC)).

Therefore it could not be held that the defendant had perfected his title on the suit land on basis of adverse possession.

Conclusion:

Therefore both the courts fell in error in holding that the plaintiffs had surrendered their rights in favour of the defendant in absence of any proof of surrender and custom where distant male relatives can enter in the property of male dying sonless even in presence of widow and daughter.”

3.3 In response, the defendant has also filed a written note of arguments, which reads as under:-

“1) Both the Courts below have returned concurrent findings of fact holding:

(i) Plaintiffs surrendered their life estate in favour of defendant- respondent No.1.

-Reference may be made to the Trial Court's findings at page 49 to 53 of the paper book.

-Reference may be made to the Lower Appellate Court's judgment - para 14 at page 75 of the paper book.

-Reference may also be made to para 18 of the Lower Appellate Court's judgment at page 83 of the paper book.

(ii) Evidence of surrender:

-Reference may be made to para 19 of the Lower Appellate Court's judgment at page 85 of the paper book.

-Subsequent conduct of plaintiffs in favour of surrender:

Reference may be made to para 21 of the Lower Appellate Court's judgment at page 87 of the paper book.



- These are findings of fact.
- Reference may be made to para 22 of the Lower Appellate Court's judgment at page 91 of the paper book.
- No ground for interference in 2nd appeal.

Reference may also be made to the following judgment:

1959 SC 57 **Judgment No.1**

[Deity Pattabhiramaswamy vs. S. (Para 13) (Case of ownership) Hanymayya and others]

2) ON MERITS

None of the plaintiffs appeared in the witness box only their attorneys (their sons) appeared they could not know if the plaintiffs had surrendered their life estate in 1943-so adverse inference to be drawn against the plaintiffs.

-Reference may be made to Para 14 of the Lower Appellate Court's judgment at page 75 of the paper book.

-Reference may also be made to Para 15 of the Lower Appellate Court's judgment at page 77 of the paper book.

-Further reference may be made to Para 20 of the Lower Appellate Court's judgment at page 87 of the paper book.

Reference may be made to the following judgments:

1934 Lahore 63(2) **Judgment No.2**

[Bishan Das vs. Gurbakhsh Singh (DB) & Anr]

2018(1) PLR 734 **Judgment No.3**

[Smt. Viniti Sangwan vs. Laxmi Devi]

-Reference may be made to Question 1 in para 12 at page 745 of this judgment.

2010 (10) SCC 512 **Judgment No.4**

[Man Kaur(dead) by LRs vs. Hartar Singh Sangha] [Paras 14 and 18(c)]

3) The defendants are in possession as shown in the Revenue Records.



- Reference may be made to para 16 of the Lower Appellate Court's judgment at page 77 of the paper book
- Entry is "Basharah Malkan Rihayash Yakja Wa Khurd Nosh" (earlier record).
- For 1980-81-"Bawajah Rishtedari
- Also "Basharah Malkan, Bila Malkana Mal"

Reference may be made to the following judgment:

1983 Rev. LR 281

Judgment No.5

[Mukat Singh vs. Smt. Jawala
Devi]

(B.S. Yadav)
Para 9

- Entry was "Basharah Malkan Rihayash Yakja" and some were Basharah Malkan.
- Respondents is the same.
- Respondent-defendants are in possession as owners.
- Respondent-defendants are not acting as agents of Kalawati and Makhmuli as pleaded in plaint.
- Reference may be made to paras 2 & 3 of the at back of page 5 of the record. Reference may be made to para 17 of the Lower Appellate Court's judgment at page 79 of the paper book.

4) Parties are governed by custom

Parties are Rajputs and Agriculturists of Ambala Dist.

Admitted by PW-3-Read Chohal Singh - cross examination at page 257 (back) of the record.

- Reference may be made to para 18 of the Lower Appellate Court's judgment at page 83 of the paper book.
- Reference may also be made to the Trial Court's findings at page 53 of the paper book.
- Reference may be made to Question No.28 of Customary Law of Ambala District (Mr. R.B. Whitehead)

4(A) Even if the parties are governed by Hindu Law, surrender of life estate is recognized.

- Reference may be made to of the Lower Appellate Court's discussion at page 83 (bottom) of the paper book.
- Reference may also be made to the Trial Court's judgment at page 53 of the paper book.
- Reference may be made to the amended written statement at page 41 of the paper book- Respondents' case is of surrender by the plaintiffs.



Reference may be made to the following judgments:

AIR 1954 SC 61 [Natvarlal Punjabhai and another vs. Dadubhai Manubhai & others]	Judgment No.6 (Three Judges) (Paras 8, 9, 17 & 19- similar case)
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Followed with approval

AIR 1918 PC 196 (Privy Council) [Rangasami Gounden vs. Naciappa Gojnden]	Judgment No.7
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5) Evidence of Surrender:

- (i)
 - Reference may be made to para 19 of the Lower Appellate Court's judgment at page 85 of the paper book.
 - Reference may also be made to the Trial Court's judgment at page 49 of the paper book.
 - DW5, Telu Ram was present at the Pagri ceremony of Bharat Singh when surrender took place.
- Reference may be made at page 301 (back) of the record.

Corroborated by:

- DW6-Hukam Singh (husband of Vidyawati) who was son in law of Kalawati (plaintiff) and Gainda
- Reference may be made to page 85 (mid).
- (ii) Respondent has been meeting the maintenance expenses of plaintiff.
- (iii) Respondent arranged marriages of the three daughters of Bharat Singh & Makhmuli and paying maintenance expenses and also arranged & financed the marriages of Vidyawati and Chalti Devi, daughters of Kalawati, plaintiff.
- Reference may be made to DW2, Bhanwar Singh
- (noticed by the Lower Appellate Court in para 19 at bottom of page 85 of the paper book.)

6) Subsequent conduct of Plaintiffs.

- (i) Compensation for damaged crops taken by the respondent- defendant.
 - Reference may be made to para 21 of the Lower Appellate Court's judgment at page 87 of the paper book.
 - Defendant's signature is on the revenue stamp in Register brought by PW4, Rameshwar Dayal.
- (ii) Part of land was acquired: Compensation was paid to defendant-respondent.
 - Reference may be made to page 17 (mid).



-Reference may be made to passbooks - Ex.D7/1 to DW7/3 (at page 153 of the record).

(iii) *Electricity bills in respondent-defendant's name (Sapattar Singh)*

-Ex.D28 at page 205 of the record, Ex D29 in name of Sappatar Singh)

-Reference may be made to Lower Appellate Court's discussion at the bottom of page 89 of the paper book.

7) Finding of fact given after appraising oral evidence:

-Reference may be made to para 22 of the Lower Appellate Court's judgment at page 91 of the paper book.

8) Suit is time barred.

-Reference may be made to the finding of the Lower Appellate Court in para 23 at page 93 of the paper book.

Defendant-Respondent has become owner by adverse possession.

-Reference may be made to the finding of the Lower Appellate Court at the bottom of page 23 at page 93 of the paper book

9) Jamabandi is NOT a document of title:

Reference may be made to the following judgment:

1993(4) SCC 349

Judgment No.7A

*[Guru Amarjit Singh vs.
Rattan Chand & Ors.]*

10) Application for additional evidence was rightly dismissed by the Lower Appellate Court.

-Reference may be made to para 12 of the Lower Appellate Court's judgment at page 73 of the paper book.

-Document to be produced listed in para 8 of the Lower Appellate Court's judgment at page 67 of the paper book.

Reasons given by the Lower Appellate Court for application: declining the application:

(i) Documents were always available to plaintiff why not produced earlier in Trial Court - Suit filed in 1982 i.e. on 12.10.1982.

(ii) Appeal filed in 1987 and Application under order 41 rule 27 filed in 1990

-Delay is enough to dismiss such applications.



Reference may be made to the following judgments.

1986 (2) PLR 452 **Judgment No.8**

[Khem Chand & Ors vs. Kamal Kishore] (Paras 7 & 8)

1976 PLR 398 (SC) **Judgment No.9**

=1976 SC 1053 (Para 10)

[Natha Singh & others vs. The Financial Commissioner Taxation Punjab & Ors.]

1980 SC 446 **Judgment No.10**

[Smt. Pramod Kumari Bhatia vs. Om Prakash Bhatia & Ors.]

2012 (8) SCC 148 **Judgment No. 12**

[Union of India vs. Ibrahim Uddin ^ (Paras 36 to 49) Anr.]

2017 (4) SCC 760 **Judgment No.12**

[Satish Kumar Gupta & Ors. vs. State of Haryana & Ors.]” (Paras 19 & 20)

3.4 Learned counsel representing the appellants has also filed the additional synopsis, relevant extract whereof reads as under:-

“3. Whether the courts below erred in declaring that the defendant is owner in possession of land on basis of adverse possession?

That it is a settled principle of law that the party which alleges custom must plead and prove the same. Custom cannot be established by analogy. Existence of custom has to be proved by evidence of long usage having obtained the force of law. Reference can be made to the decision of Hon'ble Supreme Court in Salekh Chand(dead) by LR's Vs Satya Gupta and others 2008(2) RCR civil 827. The defendant has failed to lead any evidence that here was a custom amongst the parties was surrender of limited estate in favour of collateral. Whether both the courts below fell in error in holding that the plaintiffs had surrendered their right in



favour of the defendant after death of Gainda and Bharat?

Both the courts have assumed on mere conjectures and surmises that since the defendant was in permissive possession of the land therefore it could be inferred that the plaintiff's have surrendered their rights in his favour. Genda and Bhartu died on 14.03.1932 and 26.12.1943 respectively. It is submitted that in the entire revenue record produced on record till date the plaintiffs are recorded to be owners of the land. Had there been any valid surrender of rights in favour of the defendant in the year 1932 or 1943, the defendant would have got the revenue record regarding ownership corrected in his favour. Still further the alleged surrender of limited is not supported by any oral evidence.

PW-1 Dhanwant Singh (SPA of plaintiffs) has stated that Kalawati (his maternal grandmother) used to stay in Pardah and defendant used to look after their property being a distant relative. He has also stated that in 1982 the defendant denied the title of the plaintiffs over the suit land. In Cross Examination he has stated that Kalawati used to give money to the defendant and he used to pay the bill. No suggestion was put to him about plaintiff's surrendering their rights in favour of the defendant. (Note: a specific assertion has been made in SPA Ex P-1 that due to old age she is unable to manage the property)

PW-2 Shish Pal has in his testimony stated that the defendant was helping the plaintiff in cultivating the land. Plaintiff's used bear the expenses of cultivation and used to sell the crop in the village and Inspector Singh never owned the suit land.

PW-5 Narain Dass (Land acquisition officer) has stated that in 1972 land was acquired in Nagal totaling 35 Kanal 4 Marla and compensation dated 17/7/1974 amounting to Rs 22,770 each was given to plaintiffs.

(DW-1 Inspector Singh has also admitted that bank account was separately opened in the name of the plaintiffs and compensation was paid in that account.)

PW-7 Isam Singh (Ex- Sarpanch) stated that defendant had no right over the suit land and he only used to look after the land and was never the owner. He further submitted that at the time of receipt of compensation for the acquired land, the plaintiffs had



put, in his presence and defendant did not any impression in respect of that payment. He further clarified that defendant separately received compensation in respect of his own land.

DW-1 Inspector Singh (Defendant)- *defendant in the statement alleged that after the death of Bhartu, all the relatives had gathered and in the presence of the plaintiffs acknowledged that defendant would be the expenses and would be the owner of the land in dispute. However cross-examination, he admitted that after the death of Bhartu, no mutation was sanctioned in his favour. He further admitted that he never approached the patwari for entering its ownership in the revenue record. He further admitted that when the land was given for partition, no writing was executed nor any statement was made before the patwari. He further admitted that originally the plaintiffs were having a joint bank account with the defendant, however at the time of receipt of compensation for acquired land, both the plaintiffs opened separate bank accounts in their own name and the compensation was deposited in the said accounts.*

DW-5 Teli Ram- *has admitted in his cross examination that stated that some relatives assembled at the time of pagri ceremony of Bhartu, however plaintiffs were not present at the pagri ceremony of Bhartu as they were not required there. He further admitted that he had litigation with PW7 and that litigation defendant number one has appeared as witness in his support.*

DW-6 Hukam Singh-*the courts below have relied upon his testimony, while dismissing the suit on the ground that this witness is son-in-law of the plaintiff. However, in his examination in chief, this witness has specifically stated that his wife has died and he has entered into a second marriage. In order to prove that this witness is deposing falsely as he has not got any share in the property, he was specifically questioned in the cross examination that he was nursing a grudge against the plaintiffs as the entire property was given to the other daughter and that he was having strained relations with the plaintiff.*

Even from revenue record exhibited on the record Ex D-12 Jamabandi for year 1962-63, Ex D-13 Jamabandi for year 1965-66, Ex P-3 Jamabandi



*for the year 1970-71, Jamabandi for year 1975-76 Ex P-8, Ex P- 4 Jamabandi for year 1980-81, and for the year 1985-86 Ex PW1/A it is proved that the plaintiffs were shown as owners. Defendant is shown in column of possession as gair marusi to the effect "**Bawajeh Ristedari - no rent**" or "**Bavajah Yekja Rehayash We Khurdonosh Koi Langan Ada Nahin Hota**" or "**Bashara MalkanBila Malkana.**"*

Supreme Court in Mummareddi Nagi Reddi Vs Pitti Durairaja Naidu (AIR 1952 SC 169) has held that no surrender/relinquishment by widow could be made in favour of anybody except next heir of the husband. Widow cannot declare that she is withdrawing from the husband's estate in order that estate might vest in somebody other than next heir of husband. Therefore in presence of the real daughters (Para 14 of appellate court), plaintiffs could never surrender their interest in favour of defendant who was a 3rd degree collateral. The judgment relied upon by the respondents i.e. 1954 AIR 61 SC is distinguishable on facts as there was a registered relinquishment deed executed therein, which is not the situation in the present case.

Mere non appearance of the plaintiffs in the witness box is not material in as much as the plaintiffs have filed the suit with plea of ownership and specific denial in the replication to the claim of the defendants. The onus on issues no 2, 5 and 7 were on the respondents and they have failed to lead any cogent evidence of surrender/relinquishment in the instant case.

Defendants have failed to lead any evidence with regard to the nature of the property being ancestral in nature. Therefore the suit land has to be considered as self acquired property of Bhartu and Gainda. Even otherwise limited estate, if any, has become absolute in view of section 14(1) of Hindu Succession Act 1956.

It is now settled that even before 1956 widow had right to take self acquired property of her husband and on failure of any male issue, daughter would take the property. (Arunachala Gounder Vs Ponnuswamy 2022 (2) RCR (Civil) 9 (SC))

Whether the courts below erred in declaring that the defendant is owner in possession of land on basis of adverse possession?



Finally the defendant has also pleaded that he has become owner of the land in his own right on basis of Adverse Possession being in possession of the land for more than 12 years. It is a settled principle of law that the plea of adverse possession amounts to indirect admission of title.

Further the ingredients of adverse possession were neither pleaded nor proved by the defendant. There is no evidence that defendant held the land in open and hostile manner denying the title of the plaintiffs and when the possession of defendant became adverse to the plaintiffs.

Even from revenue record exhibited on the record Ex D-12 Jamabandi for year 1962-63, Ex D-13 Jamabandi for year 1965-66, Ex P-3 Jamabandi for the year 1970-71, Jamabandi for year 1975-76 Ex P-8, Ex P-4 Jamabandi for year 1980-81, and for the year 1985-86 Ex PW1/A it is proved that the plaintiffs were shown as owners. Defendant is shown in column of possession as gair marusi to the effect "Bawajeh Ristedari -no rent" or "Bavajah Yekja Rehayash We Khurdonosh Koi Langan Ada Nahin Hota" or "Bashara Malkan Bila Malkana." Thus the possession of the defendant was always permissive in nature.

*Therefore the defendant has failed to prove the three necessary ingredients to prove adverse possession i.e. nec vi (continuous), nec clam (publically) and nec precario (adverse and hostile to the owner). Reliance is placed on **Shri Uttam Chand Vs Nathu Ram (Civil Appeal no. 190 of 2020, decided on 15.1.2020 (SC))**, **Tribhuvanshankar Vs Amrutlal (2014(1) RCR (C) 206 (SC))**, **Annakili Vs A. Vedanayagam (AIR 2008 SC 346)**, **Saroop Singh Vs Banto (2005 (4) RCR (C) 599 (SC))**. Therefore it could not be held that the defendant had perfected his title on the suit land on basis of adverse possession."*

4. Analysis of the reasons recorded by the First Appellate Court:-

4.1 It is considered appropriate at this stage to examine, analyse and discuss the reasons recorded by the Courts below while dismissing the plaintiff's suit. First of all, the Courts have erred in failing to frame the correct question for adjudication. In this case, the defendant asserts that prior to the



applicability of Hindu Succession Act, 1956, the parties were governed by custom, which gives only life estate to the widows. The defendant in this case was required to prove that in fact the both the widows namely Smt. Kalawati and Smt. Makhmuli surrendered/relinquished their rights on the day the last rites of Sh. Bharat Singh were performed. It is not the case of the defendant that the widows executed a registered deed of surrender in his favour. The defendant claims that Smt. Kalawati and Smt. Makhmuli, i.e. the plaintiffs, surrendered their rights orally. For this purpose, both the courts have relied upon answer to question No.28 and the judgment of the Hon'ble Supreme Court in *Natvarlal Punjabhai's case* (Supra). Question No.28 and its answer given in the book 'Customary law of Ambala District (Supra)' is extracted as under:-

“Question 28. If a man die leaving a widow or widow's The order of succession son or sons, daughter or daughters, where there are sons and widow. brothers or other relatives, upon whom will the inheritance devolve?

1887.-The replies vary in details, but the general sense is that land devolves upon-

- (a) male lineal descendants;
- (b) the widow for her lifetime;
- (c) own brothers;
- (d) male collaterals, reckoned downwards from the great great-grandfather;
- (e) failing collaterals, on the daughters.

Practically the case in which there will be no collateral is so exceedingly rare that the daughters never inherit. The stricter Muhammadan tribes state the custom as somewhat modified by Muhammadan Law. Thus the Saiyads of Kharar and Naraingarh recognise daughters as having rights next after the widow, while the Rains of Naraingarh say that the mother of the deceased succeeds even before his brothers. It is very doubtful how far these modifi- cations really represent any actual custom, or how



far they would be admitted if a dispute should come into court.

The question has been treated generally as if the land was the only property to be considered, and for all practical purposes this is the case, but the Rors of Pipli add that movable property will be kept for the daughter's marriage or divided after payment of funeral expenses. The farming stock, however, goes with the land, and a man's remaining movable property is usually of little value.

1918.-The replies are much as before. The Sheikhs of Buriya appear to be the only tribe who prefer Muhammadan Law to custom. A soneless widow in the presence of the sons is always entitled to maintenance, and her claim to a son's share may be recognised."

4.2 It is evident that the defendant has based his entire case on Clause (b) of para 1887, which has been extracted above. The evidence produced by the defendant is not sufficient to prove custom. He was required to prove that the parties were governed by custom by leading cogent evidence. Secondly, it is also not proved that the parties were governed by customs and not the Hindu Law. Even otherwise, Clause (b) provides that the widow would become owner for her lifetime. In this cases, both the plaintiffs namely Smt. Kalawati and Smt. Makhmuli filed the suit. Smt. Kalawati died on 29.03.1990, whereas Smt. Makhmuli died during the pendency of the second appeal. Hindu Succession Act was notified in the year 1956. On that day, both the plaintiffs were alive. Section 14(1) of the Hindu Succession Act 1956 provides that any property possessed by a female Hindu whether acquired before or after the commencement of this Act shall be held by her as a full owner thereof and not as a limited owner. Explanation to Sub Section (1) of Section 14 of Hindu Succession Act, 1956 includes the limited ownership received by a female Hindu by inheritance. Thus, Smt. Kalawati and Smt. Makhmuli became full



owners of the property on enactment of the Hindu Succession Act, 1956.

4.3 The judgment relied upon by the learned counsel representing the appellant in *Natvarlal Punjabhai's case* (Supra) is not applicable to the facts of the matter at hand. The aforesaid case has been decided in the peculiar facts of that case. The dispute was with respect to the property left behind by Sh. Shankar Bhai who died sonless while leaving behind his widow Smt. Bai Kashi, who executed a deed of surrender in favour of the plaintiffs relinquishing her widow's estate in favour of the husband's nearest reversioners. In that context, the Hon'ble Supreme Court held that the surrender is not really an act of alienation of widow of her rights in favour of the reversioner. In that context, the Hon'ble Supreme Court upheld the deed of transfer while dismissing the defendant's appeal.

4.4 The courts have also erred in drawing adverse inference against the plaintiffs for their failure to testify in the court. The concept of adverse inference is provided under illustration (g) of Section 114 of the Indian Evidence Act, 1872. It simply lays down that the evidence which could be and is not produced, would if produced, be unfavourable to the person who withholds it which, in simple words signify that the person is withholding the evidence because it is unfavourable. In other words, it enables the court to presume the existence of any fact on account of fact that evidence has been withheld from the court. While analyzing the aforesaid provision, the Hon'ble Supreme Court in 'Pandurang Jivaji Apte Vs. Ram Chander Gangadhar Astekar (dead) by Lrs and others', 1981 (4) SCC 564 held that where the material evidence is insufficient or absent, then only, the court can draw



adverse inference. In this case, it has been specifically asserted that both the plaintiffs according to their social practice used to remain behind the curtain or veil. They appointed their grandson Sh. Dhanwant Singh as a Special Power of Attorney who appeared as PW1. His statement to the effect that both the plaintiffs remain behind the veil has not been challenged in the cross-examination. Moreover, the primary onus to prove that according to custom the plaintiffs could not become owners and they surrendered their rights to the defendant was on the defendant. Moreover, the plaintiffs in the oral evidence examined as many as seven witnesses apart from producing the documentary evidence. It is not the findings of the courts below that the evidence produced by the plaintiff was insufficient or absent. Hence, both the courts erred in drawing adverse inference.

4.5 The next reason assigned by the courts is also erroneous. It is the case of the plaintiffs that they permitted the defendant who was a relative of their respective husbands to cultivate the land on their behalf. In the revenue record, plaintiffs are recorded as the owners whereas the defendant is recorded to be in possession on behalf of the plaintiffs. Both the courts have also erred in assuming that the possession of the defendant is recorded as adverse. In fact, a perusal of the revenue record shows that in the jamabandi 'Ex.D12' for the year 1962-63, Ex.D13 for the year 1965-66 and jamabandi for the year 1975-76 Ex.P8, 1980-81 Ex.P4, 1985-86 Ex.PW1/A, the defendant is recorded to be in possession being relative of the plaintiffs. He is also recorded to be in possession with the permission of the owners (the plaintiffs). Hence, both the courts have erred in recording that the defendant is in possession as the owner.



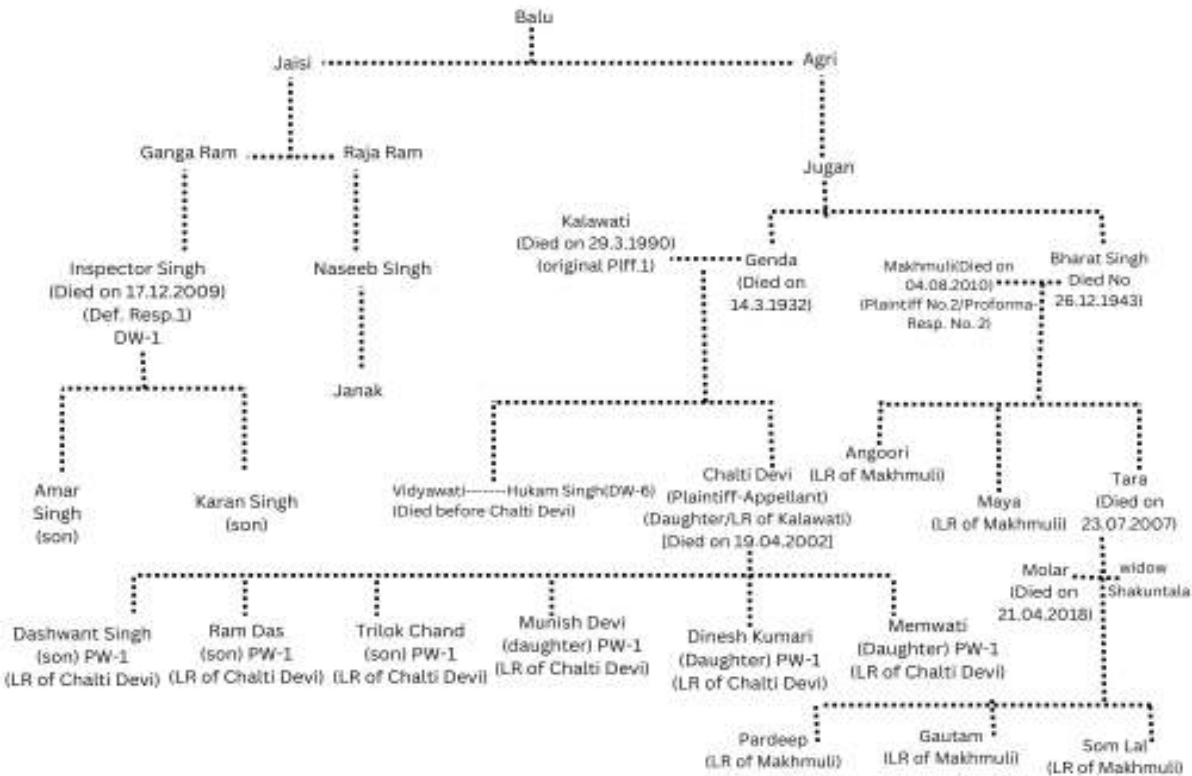
No doubt, the defendant is recorded to be in possession, however, that is on behalf of the plaintiffs. Similarly, the courts have erred in observing that the defendant has been cultivating the land as owner and not as a tenant. In the remarks column of the jamabandi the entry 'Bashara Malkan Bila Malkana', literally means that the person is in possession with the permission of the owner as defined in dictionary of revenue terms compiled by Sh. Gurdial Singh Jaswal and Smt. Asha Kumari Jaswal Advocates while combining the glossary of historical use and judicially interpreted terms used in the revenue record and documents.

4.6 The courts have also erred in observing that the plaintiffs by surrendering their rights declared that the defendant will be owner of the property at the time of last rites of Sh. Bharat Singh. It may be noted here that Sh.Teli Ram (DW-5) has admitted that the plaintiffs were not present at the last rites of Bhartu @ Bharat Singh, and therefore, the statement made by the defendant that the plaintiff surrendered their rights with respect to the property holds no firm ground. Moreover, any relinquishment of ownership or right, title or interest in immovable property worth more than Rs.100/- shall only be by way of a registered relinquishment deed. Section 17(1) (b) of the Registration Act,1908 provides for the mandatory registration of the non-testamentary instruments, which purport or operate to create, declare, assign, limit or extinguish anyright, title or interest, whether vested or contingent of the value of Rs.100/- and upward to an immovable property. The language expressed in the provision covers all the possible documents/non-testamentary instruments which create, declare, assign or extinguish any right, title or



interest in the property. Transfer of life interest in the immovable property results in creation of right in favour of defendant as well as extinguishment or limiting the rights of the plaintiffs. It also falls in the definition of assignment because the plaintiffs assigned their right to the defendant. An instrument assigning or relinquishing any right in the immovable property worth more than Rs. 100/- is required to be registered. It is not the case of the defendant that there was a family settlement.

4.7 Even otherwise, the great grandfather of the defendant was the common ancestor. The plaintiffs are two daughters-in-law of the defendant’s cousin. The *inter se* relationship between the parties can be depicted by a following pedigree table of the family as produced by the learned counsel representing the defendant:-



4.8 It is evident that the defendant is not the only reversioner. There is no evidence that how Inspector Singh, the defendant had preferential rights over the rights of persons including Sh. Raja Ram, Sh. Janak, Sh. Nasib, who



were also the members of the family.

4.9 Even otherwise, the evidence of the plaintiff's surrendering their rights is not reliable. It is the defendant's case that the plaintiffs surrendered their rights at the last rites ceremony of Sh. Bharat Singh. Sh. Bharat Singh died on 26.12.1943. The property was mutated in favour of the plaintiffs and not the defendant. The defendant admitted that he never approached the area Patwari for entering his name in the ownership column of the revenue record. Moreover, Sh.Teli Ram (DW-5) has admitted that plaintiffs were not present at the time of last rites. Similarly, the courts have erred in relying upon the deposition of Sh.Hukam Singh (DW-6), who is the former son-in-law of one of the plaintiff. The wife of Sh. Hukam Singh died and he performed second marriage. He was not present at the time when Sh. Bharat Singh died. Moreover, in **'Mummaredi Regi Reddi and others vs. Pitti Durairaja Naidu'** AIR 1952 (Supreme Court)109, the Hon'ble Supreme Court held that no surrender or relinquishment by a widow could be made in favour of anybody except the next heir of her husband. At the time of death of Sh. Bharat Singh, plaintiff No.1 Smt. Makhmuli had three daughters Angoori, Maya and Tara. Furthermore, it is not the defendant's case that the property in the hands of Sh. Bharat Singh and Sh. Gaimda was ancestral or coparcenary property. In the absence of evidence with respect to the aforesaid fact the property will have to be treated as the self acquired property. In these circumstances, the widows would become owners of the property. Moreover, answer to question No.28 in the 'Ambala District Customary Law', does not provide any restriction on the rights of widows to alienate the property. The



widows shall continue to be owner of the property till they are alive, i.e. during their lifetime.

4.10 The courts have also erred in assuming that the subsequent conduct of the plaintiffs prove that they have surrendered their rights. At this stage, it is significant to note that on two different occasions, the owners were entitled to receive compensation. Firstly, the compensation was paid on account of damage caused to the crop owing to hail storm. In this situation, the compensation was found to be payable to the plaintiffs. The compensation was also released to the plaintiffs although it was received by the defendant. However, it is evident that in the cultivation column of the revenue record, the name of the defendant was entered and since the damages were paid for the loss of crop, hence, the same were paid to the defendant. In the other case, some part of the land was acquired. Compensation was again found to be payable to the owners. Hence, the amount of Rs.22,780/- each, was released to both the plaintiffs. This amount was deposited in the separate accounts of the plaintiffs which was subsequently transferred to the Bank account of the defendant. It is clearly evident that the defendant was managing the entire affairs with respect to the property because the plaintiffs were pardanashin females. Hence, the subsequent conduct of the plaintiffs is not sufficient to assume that they surrendered their rights in the property.

4.11 The last reason assigned by the courts also lacks substance. There is no evidence that the defendant's possession over the suit property was adverse/hostile to the plaintiffs. It is the case of the plaintiffs that the defendant was in possession on their behalf. For proving acquisition of title by



way of adverse possession, the defendant was required to prove three necessary ingredients namely; *nec vi* (i.e. without force), *nec clam* (i.e. without secrecy) and *nec precario* (i.e. without permission). The defendant being a relative of the plaintiffs is proved to be in permissible possession and not in the hostile possession. It is not the case of the defendant that on the death of Sh. Bharat Singh, he forcibly entered the possession of the property. Rather it is the case of the defendant that he entered possession because the plaintiffs surrendered their rights. Hence, the possession of the defendant was permissive.

5. Discussion by this Court:-

5.1 Now this Court proceeds to examine the arguments of the learned counsel representing the defendant. The first argument put forth by the learned counsel has no substance because in this case the findings of the fact arrived at by the courts below are perverse. Both the courts have failed to advert to the real issue involved in the present case. The courts have wrongly interpreted the answer to question No.28. The Regular Second Appeals in the States of Punjab, Haryana and Union Territory Chandigarh are governed by Section 41 of the Punjab Courts Act, which gives wider powers to the High Court to interfere. This issue has been examined in **RSA No.5792 of 2019, decided on 30.01.2024**. Hence, there is no merit in the first submission.

5.2 The second submission is based on the plea of adverse inference. It may be noted here that illustration (g) of Section 114 of Indian Evidence Act, 1872 confers discretion on the courts to draw adverse inference in case a party withholds the evidence. In this case, the plaintiffs lead their evidence.

Moreover, it was for the defendant to prove that the parties were governed by



custom and the rights were surrendered by the plaintiffs. In such circumstances, there is no occasion by the courts to draw adverse inference, particularly, when the plaintiffs have examined as many as seven witnesses including Sh. Dhanwant Singh grandson of Smt. Kalawati. The judgments relied upon by the learned counsel representing the appellants are in the peculiar facts of those cases and do not mandate that the court must draw adverse inference.

5.3 Submission No.3 has already been discussed in detail and needs no further discussion. The judgment in **Mukand Singh's case** (supra) is in the context of relationship of landlord and tenant and it was held that the entry in the revenue record to the effect that the possession is 'Bewajah Yekja Rehayash' does not prove tenancy.

5.4 Submission No. 4 has also already been examined and needs no reiteration. Sh. Chauhal Singh has admitted that the income of the parties is based upon agricultural land, however, he did not admit that as per custom the widow only had life interest without any right of alienation. Moreover, the defendant was failed to prove that the plaintiff surrendered their life interest in his favour. Hence, the submission has no substance.

5.5 Submission No.5 has also been already analyzed in detail. Hence, it needs no further deliberation.

5.6 Similar is the position with regard to submissions No.6 and 7. With reference to submission No.8 it may be noticed that the plaintiffs suit is based upon their ownership. They have filed a suit for possession which shall be governed by Article 65 of the Schedule attached to the Limitation Act, 1963. It provides that the period of 12 years would begin to run when the



possession of the defendant becomes adverse to the plaintiffs. In this case the defendant has failed to prove that his possession has become adverse at any point in time. Hence, the suit is not time barred. The First Appellate Court has erred while recording that the suit filed by the plaintiffs was filed beyond the prescribed period of limitation because the defendant's possession as owner is proved from the year 1962-63. The revenue record does not prove that the defendant was in adverse possession as in the revenue record the plaintiffs are recorded as the owners.

5.7 As far as submission No.9, it may be noted that a jamabandi is not a document of title, however, it is the evidence of title. There is no dispute that the property was previously owned by Sh. Gaimda and Sh. Bharat Singh. The plaintiffs are widows of aforesaid two owners. Hence, they are the legal heirs of Sh. Gaimda and Sh. Bharat Singh. It is not the case of the defendant that Sh. Gaimda and Sh. Bharat Singh were not the owners. Hence, the judgment relied upon by the learned counsel representing the defendant is not applicable.

5.8 With reference to argument No. 10, it may be noted that the First Appellate Court has erred in dismissing the application for additional evidence, however, this Court does not find that there was any necessity to decide this issue because the evidence which has already been led is sufficient to decree the plaintiffs' suit. Hence, this argument is not decided.

6. Decision:-

6.1 Keeping in view the aforesaid facts and discussion, the result is inevitable. The judgments passed by both the courts below are set aside being



erroneous and perverse, and the suit filed by the plaintiffs shall stand decreed.

6.2 The appeal stands allowed.

24.06.2024
neeraj

(ANIL KSHETARPAL)
JUDGE

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