

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

**Reserved on 3rd of October, 2024
Pronounced on 17th December, 2024**

Regular Second Appeal No.1338 of 1994 (O&M)

Gurnam Singh (since deceased) through his LRs and others

....Appellants

Versus

Harpal Singh and others

....Respondents

CORAM: HON'BLE MR. JUSTICE PANKAJ JAIN

Present: Mr. K.R. Dhiman, Advocate
for the appellants.

Mr. Aakash Singla, Advocate
for respondents No.1 to 3.

Respondent No.4 proceeded against *ex parte*
vide order dated 30th of August, 1994.

Mr. Solomon Partap Singh, Asstt. Advocate General, Punjab.

PANKAJ JAIN, J.

Defendants No.2 and 3 are in second appeal.

2. For convenience, the parties hereinafter are referred to by their original position in the suit i.e. the appellants as the defendants No.2 and 3 and respondents No.1 to 3 as the plaintiffs.

3. Plaintiffs filed suit seeking decree of declaration to the effect that they along with defendant No.1 Kirpal Singh are owners in possession of land measuring 86 Kanal 16 Marlas as described in the headnote of the

plaint and that sale deed dated 31st of May, 1971 executed by defendant No.1 in favour of defendants No.2 and 3 is illegal, null and void and not binding upon the rights of the plaintiffs. Alternate prayer made was for grant of decree for possession *qua* the land in question.

4. It was pleaded by the plaintiffs that they along with defendant No.1 are sons of Gurbax Singh. Gurbax Singh transferred land in dispute in favour of plaintiff No.1 Harpal Singh and defendant No.1 Kirpal Singh by Tamlik, sanctioned vide mutation No.248 dated 7th of December, 1953. The transfer was made in favour of plaintiff No.1 by Gurbax Singh their father with the condition that if any child was born to him after execution of Tamlik, new born child shall also be entitled to the property in equal share along with plaintiff No.1 Harpal Singh and defendant No.1 Kirpal Singh. Satpal Singh (plaintiff No.2) was born on 24th of September, 1954. Gurmit Singh (plaintiff No.3) was born on 13th of June, 1960. On the basis of Tamlik, they also became co-owners of the land in dispute along with plaintiff No.1 and defendant No.1. It was further pleaded that after death of Gurbax Singh, plaintiff No.1 Harpal Singh became Karta of family. The land in dispute was a joint Hindu Family Property in which plaintiffs and defendant No.1 Kirpal Singh had equal shares. Kirpal Singh had no right to transfer the same. However, Kirpal Singh in the sale deed dated 31st of May, 1971 sold the land measuring 86 Kanals 16 Marlas to defendants No.2 and 3 for Rs.42,500/-.

5. Defendant No.1 Kirpal Singh was proceeded *ex parte*. Defendants No.2 and 3 denied the allegations made in the plaint. It was denied that the plaintiffs are sons of Gurbax Singh. It was further pleaded that land in dispute was sold in favour of defendants No.2 and 3 by Kirpal Singh for the benefit of estate and owing to legal necessity. They further pleaded that they are *bona fide* purchasers for consideration and without notice.

6. On the basis of the pleadings, suit filed by the plaintiffs was put to trial, framing following issues:

- “1. Whether plaintiffs and defendant No.1 are the sons of Gurbux singh and are governed by Hindu Law? OPP
2. Whether plaintiffs No.2 & 3 were born on 24.9.54 and 13.6.60 and according to the terms of the Tamlik as incorporated in mutation No.248 plaintiffs and the defendant No.1 became the owners of the land in dispute in equal shares? OPP
3. Whether plaintiffs, defendant No.1 and their father were coparceners and members of joint Hindu family and Gurbux Singh was the karta of that coparcenary and after his death plaintiff No.1 is the Karta? OPP
4. Whether the suit land is coparcenary of the family and plaintiffs and defendant No.1 were owners in equal shares? OPP
5. Whether defendant No.1 was not competent to alienate the suit land and the sale deed dated 31.8.71 is without consideration, and legal necessity and in effective as against the rights of the plaintiffs and is liable to be cancelled? OPP
6. Whether the plaint does not disclose any cause of action? OPD

7. Whether the suit of the plaintiffs is based upon contradictory and mutually destruction pleads and as such is bad and liable to be dismissed? OPD
8. Whether Gurbux Singh was survived by his widow, and daughters? If so to what effect? OPD
9. Whether the suit is bad for non-joinder of necessary parties? OPD
10. Whether the suit is within limitation? OPP
11. Whether defendants No.2 & 3 are the bonafide purchasers of the suit land for consideration with notice? OPD
12. Whether the suit land has not been properly described? If so, to what effect? OPD
13. Whether the suit is properly valued for the purposes of court fee and jurisdiction? OPP
14. Relief.”

7. Trial Court decided issue No.1 in favour of the plaintiffs. Issue No.2 was decided against the plaintiffs relying upon ratio of law laid down by Apex Court in the case of ‘**Raja Bajrang Bahadur Singh vs. Thkurain Bakhatraj Kuer**’, (1952) 2 SCC 383 holding that no interest could be created in favour of an unborn person.

8. Issue Nos.3 to 10, 12 and 13 were decided as given up.

8.1. While returning finding on issue No.11, Trial Court came to the conclusion that the sale in favour of defendants No.2 and 3 was for consideration and was without notice. They were held to be *bona fide* purchasers for consideration without notice. Deciding issue No.11 in favour of defendants, Trial Court dismissed the suit filed by the plaintiffs.

9. In appeal preferred by the plaintiffs, Lower Appellate Court reversed the finding on issue No.2 holding that creation of interest in favour of an unborn person was not invalid in terms of Section 20 of the Transfer of Property Act, 1882. While reversing finding on issue No.11, Lower Appellate Court held that Gurnam Singh and Swaran Singh cannot be said to have acted as *bona fide* when they purchased land including shares of Satpal Singh, Gurmit Singh and Harpal Singh from Kirpal Singh alone. Sale by one co-sharer in excess of his share is ineffective *qua* the rights of other co-sharers, who were not party to the sale. Resultantly, Appellate Court decreed the suit filed by the plaintiffs *qua* share of Harpal Singh, Satpal Singh and Gurmit Singh and allowed the appellants to enforce sale deed against Kirpal Singh and seek adjustment of the entire area at the time of partition of entire *Khata*.

10. Ld. Counsel for the appellants while assailing the judgments and decrees passed by the Courts below submits that the suit preferred was barred by time. Sale deed was executed on 31st of May, 1971. Suit challenging the same was instituted on 23rd of February, 1981, despite the fact that Harpal Singh was signatory to the agreement Exhibit D-1 and was in the knowledge of the sale deed. He further submits that the suit was barred for having filed only *qua* 86 Kanals 16 Marlas whereas the land under Tamlik was 345 Kanals 2 Marlas. He submits that the plaintiffs filed the present suit in collusion with defendant No.1 to defeat the right of the vendees for consideration. All the four brothers first sold their respective

shares of land and, thereafter, filed suits against each other in connivance. He submits that firstly Harpal Singh sold land measuring 88 Kanals 10 Marlas vide sale deeds dated 1st of February, 1968 and 2nd of February, 1968. The same was challenged by Kirpal Singh being minor through his mother. Despite the fact that Gurmeet Singh and Satpal Singh were there, yet they were not made party to the suit. He further submits that the land under Tamlik is 345 Kanals 2 Marlas as is evident from judgment, Exhibit P-10, yet suit was filed only *qua* part of land measuring 86 Kanals 16 Marlas which is subject matter of the sale deed in favour of the defendants and has been challenged in the instant suit, which shows the malicious intention of the plaintiffs. He contends that in third suit Gurmeet Singh and Satpal Singh have challenged sale deeds executed by Harpal Singh and Kirpal Singh claiming joint possession of 1/2 share in land measuring 386 Kanals 16 Marlas. In the said suit, Harpal Singh and Kirpal Singh have remained *ex parte*. The said suit was dismissed under Order II Rule 2 CPC with the observation that the plaintiffs could have claimed the said relief in the present suit. He further submits that even if the case of the plaintiffs is to be accepted even then Kirpal Singh sold 86 Kanals 16 Marlas to the appellants which is less than his share i.e. 87 Kanals.

11. Per contra, Mr. Aakash Singla, Advocate representing respondents No.1 to 3 submits that so far as finding recorded by the Trial Court on issue No.2 is concerned, the same now stands fully covered by ratio of law laid down by Supreme Court in favour of the plaintiffs in the

case of ‘**Devaru Ganpathi Bhat vs. Prabhakar Ganapathi Bhat**’, (2004) 2 SCC 504. He further submits that plaintiffs fully proved their title over the suit land. Plea of *bona fide* purchaser is not available to the defendants No.2 & 3 once the plaintiffs have been able to prove their title. He submits that respondents No.1 to 3/plaintiffs have no objection w.r.t. sale of share of Kirpal Singh.

12. I have heard counsel for the parties and with their able assistance, have carefully gone through records of the case.

13. So far as issue w.r.t. transfer in favour of an unborn person and the acquisition of title *qua* immoveable property by unborn person is concerned, the same has been laid to rest by Apex Court in ***Devaru Ganapathi Bhat's*** case (supra) observing as under :

“9. The answer to the second question hinges upon the interpretation of Sections 13 and 20 of the Act, which read as under:

"13. *Transfer for benefit of unborn person* - Where, on a transfer of property, an interest therein is created for the benefit of a person not in existence at the date of the transfer, subject to a prior interest created by the same transfer, the interest created for the benefit of such person shall not take effect, unless it extends to the whole of the remaining interest of the transferor in the property.

20. *When unborn person acquires vested interest on transfer for his benefit.* - Where, on a transfer of property, an interest therein is created for the benefit of a person not then living, he acquires upon his birth, unless as contrary intention appears from the terms of the transfer, a vested

interest, although he may not be entitled to the enjoyment thereof immediately on his birth."

10. The contention of learned counsel for the appellant is that since the donor did not create the interest of the entire property survey No. 306 for the benefit of unborn male child, namely, the respondent, the interest sought to be created under the gift deed is invalid. In support, learned counsel places reliance on the observations made in para 14 of the decision of *Raj Bajrang Bahadur Singh v. Thakurain Bakhtraj Kuer* [AIR 1953 Supreme Court 7] which reads as under :

"14. Of course this by itself gives no comfort to the defendant; she has to establish, in order that she may be able to resist the plaintiff's claim, that the will created an independent interest in her favour following the death of Dhuj Singh. As we have said already, the testator did intend to create successive life estates in favour of the successive heirs of Dhuj Singh. This, it is contended by the appellant, is not permissible in law and he relied on the case of *Tagore v. Tagore* [18 W.R. 359]. It is quite true that no interest could be created in favour of an unborn person but when the gift is made to a class or series of persons, some of whom are in existence and some are not, it does not fail in its entirety, it is valid with regard to the persons, who are in existence at the time of the testator's death and is invalid as to the rest. The widow, who is the next heir of Dhuj Singh, was in existence when the testator died and the life interest created in her favour should certainly take effect. She thus acquired under the will an interest in the suit properties after the death of her husband, commensurate with the period of her own natural life and the plaintiff consequently has no present right to possession."

11. The brief facts of the relied decision are that a will was executed by one Raja Bisheshwar Bux Singh. The will, inter

alia, stated that after the death of the testator his younger son and his heirs and successors, generation after generation, may not feel any trouble and that there may not be any quarrel between them, therefore, it was being executed with respect to certain village so that after the death of the testator, his younger son may enjoy the said properties. The younger son and his heirs, without power of transfer, shall exercise other rights in respect of the said properties. When the will was executed, the defendant, being the wife of the younger son of Raja Bisheshwar Bux Singh was already there. On the construction of the will, it was held that the younger son had only a life interest in the properties under the terms of his fathers's will. Had it been an absolute interest, the property would have reverted to the elder son of the testator. Construing the will, it was held that the testator did intend to create successive life interest in favour of the successive heirs of his younger son that was held to be not permissible in law. Under these circumstances, the Court observed that no interest could be created in favour of an unborn person. The decision relied upon has no applicability in the facts and circumstances of the instant case. The present is not a case where any successive interest has been created under the gift deed.

12. There is no ban on the transfer of interest in favour of an unborn person. Section 20 permits an interest being created for the benefit of an unborn person who acquires interest upon his birth. No provision has been brought to our notice which stipulates that full interest in a property cannot be created in favour of unborn person. Section 13 has no applicability to the facts and circumstances of the present case. In the present case, the donor gifted the property in favour of the appellant, then living, and also stipulated that if other male children are later born to her brother they shall be joint holders with the appellant. Such a stipulation is not hit by Section 13 of the Act. Creation of such a right is permissible under Section 20 of the Act. The respondent, thus, became entitled to the property on his birth. In this view, there is also no substance in the second contention.

14. In view of above, finding on issue No.2 as recorded by the Lower Appellate Court is affirmed in favour of the plaintiffs w.r.t. 1/4 share in the land transferred by Gurbax Singh in favour of Harpal Singh and Kirpal Singh. However, the question involved in the *lis* is:

“Whether the plaintiffs are entitled to claim share in the land sold by Kirpal Singh in favour of defendants No.2 & 3 i.e. the present appellants vide sale deed dated 31st of May, 1971 or not?”

15. It is admitted case of the parties that Gurbax Singh by Tamlik sanctioned vide mutation No.248 dated 7th of December, 1953 transferred 345 Kanals in favour of Kirpal Singh and Harpal Singh. Their transfer was with the condition that any child born to Gurbax Singh after Tamlik shall also be entitled for equal share. Satpal Singh and Gurmit Singh were born after Tamlik. Having decided issue No.2 in favour of plaintiffs, Satpal Singh and Gurmit Singh along with Harpal Singh and Kirpal Singh all became owners to the extent of 1/4 share each in the suit land. Suit was only filed *qua* land measuring 86 Kanals 16 Marlas sold by Kirpal Singh. Admittedly, the said land is less than the share of Kirpal Singh i.e. 87 Kanals. Trite it is that even if specific Khasra numbers are sold out of joint land, the same still is sale of share in the joint holding. It is not disputed by the plaintiffs that

subject matter of sale deed challenged in the suit, is less than the entitlement of Kirpal Singh.

16. In view of above, the present suit seeking declaration to the effect that sale deed executed by Kirpal Singh in favour of the defendants itself was not maintainable once the share sold by him was less than the share of Kirpal Singh. Plaintiffs cannot be declared to be co-owners in 1/4 share of Kirpal Singh, rather they are co-sharers to the extent of 1/4 share in the total landholding measuring 345 Kanals. Though Appellate Court rightly held that the sale deed made by Kirpal Singh is valid *qua* his share but instead of relegating the defendants No.2 & 3/appellants, who are *bona fide* purchasers to the partition, Lower Appellate Court should have been alive to the abuse of the process at the hands of the plaintiffs by claiming share in 86 Kanals 10 Marlas only instead of claiming their share in total land measuring 345 Kanals.

17. In view of above, the present appeal is allowed.

18. To make it further clear, it is hereby ordered as under:

- (i) Suit for declaration filed by the plaintiffs to the effect that they are owners in possession of 1/4 share in the land measuring 86 Kanals 16 Marlas, which is subject matter of sale deed in favour of defendants No.2 & 3 executed by defendant No.1, is held to be not maintainable. Sale in favour of appellants is not beyond the share of Kirpal Singh.

(ii) Plaintiffs are at liberty to protect their respective shares in total land measuring 345 Kanals.

18. Ordered accordingly.

19. Pending application(s), if any shall also stands disposed off.

December 17, 2024

Dpr

(Pankaj Jain)

Judge

Whether speaking/reasoned : Yes

Whether reportable : Yes