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IN THE HIGH COURT OF PUNJAB AND HARYANA AT
CHANDIGARH

RSA-654-1988 (O&M)
Reserved on: 15.01.2025
Date of decision: 27.03.2025

NATHU RAM AND OTHERS

..Appellants

Versus

LILA DEVI AND OTHERS

..Respondents

CORAM: HON'BLE MR. JUSTICE ANIL KSHETARPAL

Present: Mr. Avnish Mittal, Advocate
Mr. D.K. Sharma, Advocate
for the appellants.

Mr. V.K. Jindal, Advocate
with Mr. Akshay Jindal, Advocate
Mr. Pankaj Gautam, Advocate
for the respondents.

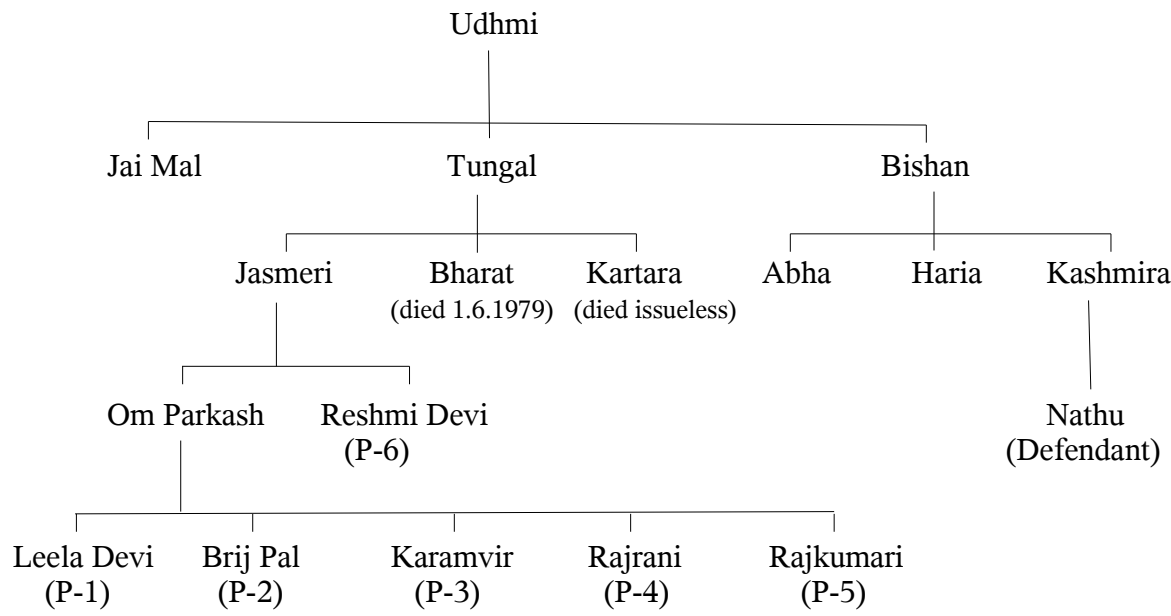
ANIL KSHETARPAL, J.

1. **Factual Matrix:-**

1.1 The defendant assails the correctness of concurrent findings of fact arrived at by the Courts below while decreeing plaintiffs suit for grant of decree of possession with respect to land measuring 28 kanal and 4 marlas located in Village Marwa Khurd, Jagadhari. In fact, the First Appellate Court has slightly modified the trial Court decree.

1.2 The dispute in this litigation is with respect to property left behind by late Sh. Bharat Singh, who died on 01.06.1979.

1.3 At this stage, it will be appropriate to draw a family tree to understand the *inter se* relationship of the parties.



1.4 The plaintiffs claim the property on the basis of natural succession, whereas, defendant-appellant claims the property on the basis of Will dated 28.07.1970, allegedly executed by Sh. Bharat Singh. The plaintiffs also claim that the property is ancestral in nature and the parties were governed by customary law, hence, it could not be bequeathed through Will. The residential house of Sh. Bharat Singh is in possession of the plaintiffs.

1.5 The defendant contested the suit claiming that plaintiffs are neither in possession of the house nor they are in possession of the agricultural land. The Will dated 28.07.1970 bequeathing the entire property in favour of defendant was executed by Sh. Bharat Singh while specifically excluding the plaintiffs from inheritance. The last rites of Sh. Bharat Singh were also performed by the defendant and defendant also denied applicability of custom. It was claimed that Sh. Bharat Singh being the issueless proprietor had right to bequeath the property by way of testamentary disposition. The defendant is within fourth degree ancestry as he is the great grand-son of Sh. Udhmi and hence had preferential right even if the property is ancestral because the plaintiffs are in the fifth degree ancestry.



1.6 The trial Court partly decreed the suit. It was held that except land measuring 4 marla comprised in Khasra No.56//1/2, the remaining property is ancestral, which could not be disposed of as per customary law by way of testamentary disposition, hence, the suit was decreed qua 28 kanals land. The First Appellate Court dismissed the defendants' appeal, whereas, allowed the cross-objections filed by the plaintiffs.

2. Analysis of the First Appellate Court's judgment:-

2.1 This Bench has heard the learned counsel representing the parties at length and with their able assistance perused the paperbook.

2.2 In the opinion of the Court, it would be appropriate to first of all decide about the validity of Will executed on 28.07.1970, allegedly executed by Sh. Bharat Singh. The aforesaid Will is part of the requisitioned record. A careful perusal of the Will Ex.D-1 proves that it has been scribed on a judicial paper, thumb marked by Sh. Bharat Singh at two different locations. Firstly, Sh. Bharat Singh thumb marked it on left hand margin, whereas, he has also thumb marked it at the bottom of the page. It is attested by two attesting witnesses namely Sh. Genda Ram, who has appended his LTI and signed by Sh. Chaudhary Arjan Singh, Sarpanch, Gram Panchayat, Dharamkot. Both the attesting witnesses namely Sh. Genda Ram and Sh. Arjan Singh have been examined. Sh. Fakir Chand, scribe has also been examined. Both the witnesses have stated that the Will was scribed on the instructions of Sh. Bharat Singh, who signed the same after it was read over by the scribe. DW-2 Sh. Fakir Chand has stated that the Will is scribed by him and it has been entered in his register. Sh. Bharat Singh not only signed the Will but also signed in his register at Serial No.703 dated 28.07.1970, which was brought by him. DW-3 Sh. Arjan Singh stated that he has signed Ex.D-1, which was scribed on the instructions of Sh. Bharat Singh and Sh.



Bharat Singh signed the will while accepting it to be true after the scribe had read over the Will. Similarly DW-4 Sh. Genda Ram has stated that the Will was scribed in his presence, who has appended his thumb impression and Sh. Bharat Singh was hail and hearty at the time of execution of the Will. The Will was scribed by Sh. Bharat Singh in favour of his nephew Sh. Nathu, who used to serve him.

2.3 The First Appellate Court has misread the evidence while observing that none of the attesting witness states that Sh. Bharat Singh thumb marked the Will in their presence. Once, it has been stated by both the witnesses that they thumb marked/signed the Will in the presence of Sh. Bharat Singh, it was for the plaintiff to prove that Sh. Bharat Singh did not thumb mark the will in their presence. In fact, on careful reading of the deposition, it becomes evident that Sh. Arjan Singh while appearing as DW-3 has categorically stated that Sh. Bharat Singh signed the Will after the scribe read over the Will. Obviously, the Will was executed in the presence of Sh. Arjan Singh. Similarly, the statement of Sh. Genda Ram is also to the effect that the will was scribed in his presence and he thumb marked the same. He has also stated that after understanding the Will, which was read over by the scribe, Sh. Bharat Singh thumb marked the Will. Thus, the Court has erred in reading the evidence.

2.4 The second reason assigned by the First Appellate Court is equally incorrect as the entry in the scribe's register was not required to be signed by the witnesses. The First Appellate Court has erred in making some such observations without referring to any rules. The entry in the register was thumb marked by the executant.

2.5 The next reason assigned by the First Appellate Court is also incorrect because Sh. Arjan Singh's statement is categorical that the Will was



signed by him and Sh. Bharat Singh thumb marked the Will after the scribe had read over the same. He was not required to disclose the place where the Will was scribed in the presence of Sh. Genda Ram. If there was any doubt, it was for the plaintiff to question the witness during his cross-examination. Similarly, the Court has also erred in observing that Sh. Genda Ram has not stated who scribed the Will and where it was scribed. As per Section 63(c) of the Indian Succession Act, 1925, the Will is required to be executed by the executant and it is to be attested by two witnesses. It is not required that attesting witness should disclose the place where it was executed and when it was executed. If there is any doubt it is for the other party to question the witness.

2.6 The First Appellate Court has also erred in observing that the plaintiff has not specifically replied to para 4, wherein, it was stated by the plaintiff that Sh. Bharat Singh had lost mental equilibrium for more than 10 years prior to his death. In para 4, the defendant has stated that the mutation entry in the revenue record is correct. In fact, the pleadings of the party have to be read in entirety. The defendant while filing the written statement has claimed that the property was bequeathed in his favour as the plaintiff No.1 had cheated the executant. Reply to one para cannot be read in isolation of the entire written statement. The defendant in the additional pleas has claimed that the Will is executed in accordance with law. Moreover, it was for the plaintiff to prove that Sh. Bharat Singh was not in sound disposing mind. Sh. Bharat Singh died on 01.06.1979, whereas, the Will was executed on 28.07.1970 i.e. 9 years before his death. No medical evidence has been produced to prove that Sh. Bharat Singh was not in sound disposing mind for the last 10 years. The plaintiff has not appeared in evidence to prove his case. His attorney has appeared. Hence, adverse inference is required to be



drawn against him.

2.7 Consequently, the finding of the First Appellate Court doubting the validity of the Will is erroneous and therefore, set aside.

2.8 This Bench now focus on the second issue i.e. ‘Whether the suit property is ancestral in nature?’

2.9 A bare perusal of the family tree proves that the plaintiffs are claiming the property through Smt. Jasmeri sister of Sh. Bharat Singh. In order to restrict the suits to challenge alienation on the basis of custom, State of Punjab has notified the Punjab Custom (Power to Contest) Act, 1920 (in short ‘1920 Act’).

2.10 Section 6 of the ‘1920 Act’ reads as under:-

“6. Limitation on the right to contest alienations and appointment of heirs.

- Subject to the provisions contained in section 4 and notwithstanding anything to the contrary contained in section 5, Punjab Laws Act, 1872, no person shall contest any alienation of ancestral immovable property or any appointment of an heir to such property on the ground that such alienation or appointment is contrary to custom, unless such person is descended in male lineal descent from the great-great-grand-father of the person making the alienation or appointment.”

2.11 It is evident that such power to contest was restricted to descendent in male lenient descent from great grand-father of the person making the alienation of appointment. Female descendents or collaterals were excluded from contesting an alienation of immovable property. Hence, the suit filed by the plaintiffs on the ground that the Will was an alienation or appointment of heir was against customary law was not maintainable.

2.12 Moreover, the First Appellate Court itself has held that Sh. Bharat Singh inherited some part of the property from his brother Sh. Kartara, who also died unmarried and issueless. The property inherited from Sh. Karata could not be considered as ancestral. Moreover, the custom is



required to be pleaded and proved. The burden of proof to prove custom is on the plaintiff, who is pleading the same. The reliance can be placed on **Harihar Prasad Singh and others Vs. Balmiki Prasad Singh and others, (1975) 1 SCC 212.** It has been laid down that the specific family custom is required to be pleaded in a particular case and then proved.

2.13 In this case, the plaintiffs have only asserted that alienation of ancestral property was not permissible. However, no evidence in its support has been led. Neither the plaintiffs have alleged specific instances nor they have disclosed the specific custom.

2.14 Additionally, both the Courts have overlooked that Sh. Bharat Singh was unmarried and hence issueless. Hence, the plaintiffs were required to prove what was the custom with regard to issueless proprietor. The First Appellate Court also overlooked the fact that unless and until the property is proved to be ancestral joint Hindu Family property, the same is required to be treated as self-acquired property of a person. Mere admission in the earlier suit would not establish the nature and character of the property as ancestral. Similarly, admission regarding the nature of property as ancestral would not absolve the plaintiffs to prove the same. These propositions of law are required to be elaborated.

3. **Decision:-**

3.1 For the reasons stated above, the appeal is allowed.

3.2 The judgments passed by both the Courts are set aside resulting in dismissal of the plaintiffs suit.

3.3 All the pending miscellaneous applications, if any, are also disposed of.

27th March, 2025

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Whether speaking/reasoned

Whether reportable

: Yes/No

: Yes/No

**(ANIL KSHETARPAL)
JUDGE**