

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

**Reserved on 13th of November, 2024
Pronounced on 29th of January, 2025**

Regular Second Appeal No.1704 of 1997 (O&M)

Kulwant Rai

....Appellant

Versus

Satish Kumar @ Mithu and others

....Respondents

CORAM: HON'BLE MR. JUSTICE PANKAJ JAIN

Present : Mr. Rakesh Gupta, Advocate
for the appellant.

Respondents No.2, 4 and 6 proceeded against *ex parte*
vide order dated 05.11.1997.

Mr. M.L. Sarin, Senior Advocate with
Mr. Ritesh Aggarwal, Advocate
for the remaining respondents.

PANKAJ JAIN, J.

Plaintiff is in second appeal.

2. For convenience, the parties hereinafter are referred to by
their original position in the suit i.e. the appellant as the plaintiff and
respondents No.1 to 6 as defendants No.2 to 7.

3. Plaintiff filed suit for declaration claiming that he is owner
in possession of the house described in the headnote of the plaint
shown as ABCD and in the alternate the entire building is a joint Hindu

family and co-pacenary property and the plaintiff is entitled to 1/2 share in the same. Further prayer is that sale deed dated 16.08.1985 executed by Goinda Mal in favour of defendant-Satish Kumar @ Mithu be declared as null and void. As per the case pleaded by plaintiff, he along with his father defendant No.1 constitute a joint Hindu family. They were joint in mess and residence and constituted joint Hindu family. They separated their residence and mess few years back but the property remained joint. The property shown as ABEF in the site plan is ancestral and joint Hindu family property of the plaintiff and defendants No.1 and 2. The same was partitioned by defendant No.1 in the year 1982. Both plaintiff and defendant No.2 were put in possession of their respective shares of suit property. The property was partitioned in the presence of Bhagwant Rai, who is a close relative (brother-in-law of Goinda Mal). Goinda Mal owned two properties i.e. the property in dispute and some land at Jaitu. The land at Jaitu was sold by deceased Goinda Mal. He kept the sale proceeds with him. The suit property was partitioned amongst the plaintiff and defendant No.2.

4. Defendant No.2-Satish Kumar @ Mithu and Goinda Mal filed joint written statement disputing the averments raised in the plaint. It was denied that the property was a joint Hindu family or copacenary property. It was asserted that Goinda Mal was absolute owner of the property in dispute and sold the same to defendant No.2 for a

consideration of Rs.40,000/- vide registered sale deed dated 13.08.1985. Defendant No.2 further mortgaged the property with possession in favour of defendants No.3 to 7 who are in possession thereof.

5. On the basis of the pleadings, suit filed by the plaintiff was put to trial by the Court of First Instance, framing following issues.

- “1. Whether the house append BF is joint Hindu family and coparcenary property of defendants No.1 and 2 and plaintiff is owner of 1/3rd share? OPP
2. Whether in June, 1982, the house in dispute was partitioned and the plaintiff got the rest of the house ABCD except BFDC, which fell to the share of defendant No.2? OPP
3. Whether defendant No.2 purchased the house from defendant No.1 as bonafide purchaser for consideration without notice? OPD
4. If issue No.3 is not proved, whether the plaintiff is entitled to 1/3 share and sale in favour of defendant No. 2 by defendant No. 1 is not valid? OPP.
5. Whether the suit for mere declaration lies? OPP.
6. Relief.”

6. Trial Court while deciding issue w.r.t. nature of the property held that there is no evidence that the property devolved upon Goinda Mal under Section 8 of the Hindu Succession Act. It has come in evidence that Goinda Mal had two sisters, who were not given any share at the time of partition and, thus, the presumption is that the

property was divided between the co-parceners. Trial Court thus held that the property in question being co-parcenary property both plaintiff and defendant No.2 had a right by birth in the property.

7. While deciding issue No.2 in favour of the plaintiff, Trial Court observed that there is overwhelming evidence on record to show that the partition had taken place as claimed by the plaintiff and the same was executed. Defendant No.2-Satish Kumar @ Mithu executed mortgage deeds Exhibit PX/1 and PX/2 showing property of the Kulwant Rai on the southern side of the mortgage shops which shows that the partition was acted upon.

8. On issue No.3, Trial Court found that defendant No.2 could not prove transfer of sale consideration of Rs.43,000/- to Goinda Mal deceased and thus purchase of the house by defendant No.2 being not *bona fide* and without consideration, was not sustainable.

9. While answering issue w.r.t. maintainability of the suit, Trial Court found that it is evident from the documents of defendant No.2 himself that he admits possession of the plaintiff and thus the simple suit for declaration was maintainable. Resultantly, Trial Court decreed the suit filed by the plaintiff.

10. In appeal preferred by defendant No.2, Lower Appellate Court reversed the findings recorded by the Trial Court holding that property inherited by son from his father after Hindu Succession Act

was not a co-parcenary property and the property having devolved upon plaintiff in terms of Section 8 of the Hindu Succession Act being not an ancestral co-parcenary property, Goinda Mal was exclusive owner of the property. Lower Appellate Court further held that no suggestion was put to defendant No.2 Satish Kumar @ Mithu that he had not paid any money to Goinda Mal and thus the evidence recorded by the Trial Court w.r.t. the sale deed without consideration can't be sustained. Lower Appellate Court thus allowed the appeal preferred by defendant No.2.

11. Learned Counsel for the appellant while assailing the judgment passed by the Lower Appellate Court submits that there is overwhelming evidence on record to prove that the parties i.e. plaintiff and defendant No.2 had partitioned the property in question. The property, in question, was a joint Hindu family property which was partitioned by Goinda Mal in favour of his sons putting them in possession of 1/2 share each. The partition stands fully proved by testimony of PW-6 Sadhu Ram and the close relative of the parties Bhagwant Rai. Thus, Lower Appellate Court wrongly reversed the findings recorded by the Trial Court dismissing the suit filed by the plaintiff. In order to hammer-forth his contention, counsel for the appellant relies upon ratio of law laid down in the case of **Baggar Singh (deceased) and others vs. Nand Kaur and others, 2023(2)**

R.C.R.(Civil) 368, H. Vasanthi vs. A. Santha (Dead) through Lrs. and others, 2023 AIR (Supreme Court) 3873, Kisansing Mohansing Balwar and others vs. Vishnu Balkrishna Jogalekar, 1951 AIR (Bombay) 4, Pushpa Devi vs. The Commissioner of Income-tax, New Delhi, (1977) 4 SCC 184, Damodar Krishnaji Nirgude vs. Commissioner of Income Tax, 1961 SCC Online Bom 122 and Commissioner of Income Tax vs. Dilbagh Rai, 1979(1) ILR Punjab 305.

12. Per contra, Mr. M.L. Sarin, learned Senior Counsel representing the respondent(s) submits that there is no evidence on record that the property was a joint Hindu family property and thus Lower Appellate Court has rightly held that the property, in question, was a self acquired property of Goinda Mal. He further submits that there is nothing on record to suggest the possession of the plaintiff and thus simple suit for declaration was not maintainable. He further submits that a fact admitted need not be proved. He contends that a property that devolved upon father under Section 8 of the Hindu Succession Act, cannot be held to be a co-parcenary property. Where the ancestral and non-ancestral properties are so intermingled that the ancestral and non-ancestral cannot be separated, property shall attain character of self-acquired property. He submits that from partition amongst brothers of Goinda Mal, it has come on record that the

property inherited by Goinda Mal and his brothers, also included the property owned by their mother. The same has not devolved upon them by survivorship but by succession and thus the property cannot be held to be ancestral in the hands of Goinda Mal. Thus, no fault can be found with the findings recorded by the Lower Appellate Court. In support of his arguments, he relies upon ratio of law laid down by Supreme Court in the case of **Diety Pattabhiramaswamy vs. S. Hanymayya and others, AIR 1959 Supreme Court 57, Mara and others vs. Mst. Nikko alias Punjab Kaur and another, AIR 1964 Supreme Court 1821, Commissioner of Wealth-tax, Kanpur, etc. vs. Chander Sen etc., AIR 1986 Supreme Court 1753, Yudhishter vs. Ashok Kumar, AIR 1987 Supreme Court 558, Ram Saran and another vs. Smt. Ganga Devi, AIR 1972 Supreme Court 2685, Vinay Krishna vs. Keshav Chandra and another, AIR 1993 Supreme Court 957 and Executive Officer, Arulmigu Chokkanatha Swamy Koil Trust, Virudhunagar vs. Chandran and others, (2017) 3 SCC 702.**

13. I have heard counsel for the parties and have gone through records of the case.

14. Plaintiff/Kulwant Rai and defendant No.2/Satish Kumar @ Mithu are sons of Goinda Mal/defendant No.1. Plaintiff relies upon partition deed, Exhibit P-1 to claim that the property in dispute was partitioned by Goinda Mal. 1/2 share marked as ABCD in the site plan

was handed-over to the plaintiff. The other share, marked as BFDC, fell to the share of defendant No.2. Defendant No.2 while constructing shops over his partition, applied for sanction of the site-plan wherein partition ABCD was specifically stated to be ownership of the plaintiff. It has been thus contended that the suit land already stood partitioned prior to execution of the sale deed in favour of defendant No.2 by defendant No.1. Title of 1/2 share already vested in the plaintiff and thus defendant No.1 had no right, title or interest left in the property to execute sale deed *qua* 1/2 share in favour of defendant No.2 and sale deed *qua* same, is bad.

14.1. Reliance is being placed upon ratio of law laid down in ***H. Vasanthi's*** case (supra) to submit that there is no prohibition to effect a partition otherwise than through an instrument in writing by duly complying with the requirement of law. Division of the property may also be effected only through a settlement or oral understanding. The oral understanding between the parties can be well inferred from overwhelming evidence in form of mortgage deed and site plan, which shows that the property, in question, was indeed partitioned between the plaintiff and defendant No.2. Plaintiff having proved on record Exhibits PW5/A, PW5/B and PW5/C furnished by defendant No.2 in the Municipal Committee, it stands proved that 1/2 share marked as

ABCD came to the share of plaintiff and thus, Trial Court rightly held plaintiff to be owner of 1/2 share.

15. Ld. Counsel for the appellant further relying upon ratio of law laid down in the case of **Venkat S/o. Baburao Gaimale vs. Anitha W/o. Umakanth and others, 2020(1) Kar. L.R. 492** submits that the plaintiff is being denied his share without any valid reason and thus the suit for declaration simpliciter would be maintainable.

16. On being put to specific query w.r.t. nature of the property in the hands of defendant No.1, counsel for the plaintiff claims that the same was a joint Hindu family property. Since the same was partitioned vide Exhibit P-1, the said fact stands proved.

17. In the considered opinion of this Court, partition Exhibit P-1 and further documents Exhibits PW5/A, PW5/B and PW5/C are not enough to prove the nature of property in hands of defendant No.1. The nature of the property would be ascertained by the source of acquisition of estate by defendant No.1. In terms of document Exhibit PW/B, appellant/plaintiff-Kulwant Rai inherited the aforesaid property from his father Goinda Mal, who received the same from his father Harditta Mal. As per Exhibit P-1, Goinda Mal and his brothers inherited the property from Harditta Mal and Rajo Devi,. Meaning thereby, Goinda Mal inherited joint properties of Harditta Mal and their mother Rajo Devi. The only property inherited by Goinda Mal is the present plot. It

has not come on record as to which property was inherited from Harditta Mal and which property was inherited from Rajo Devi. Meaning thereby, the property inherited is from the common pool from which it is not ascertainable as to which property has come from Rajo Devi and which property has come from Harditta Mal. The precise situation has been canvassed by the Supreme Court in the case of *Mara and others vs. Mst. Nikko alias Punjab Kaur and another* (supra) wherein Apex Court observed as under :

“7. Now, it has been ruled in the Punjab consistently that where lands are so mixed up that the ancestral and non-ancestral portions cannot be separated they must be regarded as non-ancestral, unless it is shown which are ancestral and which are not. This was laid down by the Privy Council in **Attar Singh v. Thakar Singh, 35 Ind App. 206 (PC)**. It was held by Mr. Justice Kapur (as he then was) in **Indar Singh v. Gulzara Singh, AIR 1951 Punjab 345** basing himself upon **Saif-ul-Rahman v. Mohammad Ali Khan, ILR 9 Lahore 95** and **Jagtar Singh v. Raghbir Singh, ILR 13 Lahore 165** that land ceases to be ancestral if it comes into the hands of an owner otherwise than by descent. Once these conclusions are reached, it is quite obvious that the decision of the District Judge not to apply the answer to question No. 52 to non-ancestral land was right. It may be mentioned that the answers to questions refer to ancestral property only and this is now firmly established. In fact, it was not denied at the hearing.”

18. In view of above, this Court finds it hard to agree with the submission made by counsel representing the appellant that the property in hands of Goinda Mal was a joint Hindu family property. There was no joint nucleus that led to acquisition of the property. Rather the same was inherited by Goinda Mal from his parents namely Harditta Mal and Rajo Devi, which is in-severable. The inevitable conclusion is that the property in hands of Goinda Mal was his self-acquired property. Partition propounded by the plaintiff, cannot be read to vest any right, title or interest in him. Goinda Mal was within his right to deal with the same in whatsoever manner he liked. There being no cloud on his competence to execute the sale deed in favour of defendant No.2, this Court finds that the suit preferred by the plaintiff/appellant sans merit and deserves dismissal.

19. As a sequence of the discussion held herein-above, instant second appeal is ordered to be dismissed.

20. Pending application(s), if any, shall also stand disposed off.

January 29, 2025

Dpr

(Pankaj Jain)

Judge

Whether speaking/reasoned : Yes/No

Whether reportable : Yes/No