

# PUNJAB AND HARYANA HIGH COURT

Kalu

Vs

Nand Singh

Second Appeal No. 650 of 1965

(C.G. Suri, J.)

23.02.1973

## JUDGMENT

### C.G. Suri, J.

1. The following pedigree table will be of help in stating the facts of this regular second appeal filed by Kalu defendant :-



2. The dispute relates to a one-third share in the joint khata of the parties which had belonged to Karma son of Gulab Karma died without leaving any widow or issue in 1961 and a dispute has arisen about succession to his one-third share in the joint Khata between his brother Nand Singh plaintiff on one side and the sons and a grandson of a predeceased brother of the deceased, namely Munshi son of Gulab. As Munshi's sons and grandson were described to have gone into unlawful possession of the land. Nand Singh plaintiff claiming to be the nearest heir under Hindu Succession Act, 1956, had filed this suit for the Possession of Karma's one-third share in the joint holding. It had been alleged in paragraph 6 of the plaint that before the coming into force of the said Act, the parties who are Jats were governed by Punjab Customary Law in matters of succession to and alienations of property and that Karma had no right to make a will of the land in dispute which was ancestral in his hands qua the plaintiff. In support of the plea of custom, it, had been further averred in this paragraph that the members of the family were de

pendent on agriculture and cultivated lands with their own hands. The deceased was described to have made an unauthorised will dated 26-02-1957 in favour of his deceased brother's grandson Kalu who was a minor at the time of the filing of this suit in 1961.

3. In the written statement filed on behalf of the defendant appellant, it had been denied that the parties were ever governed by customary law in such matters, Kalu appellant set up the registered will. Exhibit D. 1. dated 26-02-1957 and denied that the land in dispute was ancestral in nature.

4. The trial Court framed following two issues in the first instance :-

(1) Whether the land in dispute is ancestral qua the Plaintiff and Karma deceased.

(2) Whether Karma executed a valid will in favour of defendant No. 1.

5. After the parties had examined their entire evidence, it was brought to the notice of the Court during arguments that there was no issue regarding the parties being governed by custom. A third issue with regard to the application of customary law to the case was therefore, added but the parties contented themselves with the evidence that had already been examined in the case. The counsel for the parties further conceded before the trial Court that the effect of the due execution of the will would be that all non-

ancestral property of the deceased was to go to Kalu defendant appellant as the legatee under the will and that the ancestral land was not to be affected by the will and was to go to the legal heirs of the deceased as if he had died intestate.

6. The trial Court found that the registered will, Exhibit D. 1. had been duly proved, 6/7th share out of the one-third share of Karma in the joint holding was found to be ancestral qua the plaintiff-respondent in the hands of the deceased. The suit was therefore, decreed in respect of this ancestral part of the land in dispute while it was dismissed in respect of only a 1/7th Part of Karma's one

third share in the joint holding. The judgement and decree of the trial Court was affirmed by the power appellate Court and the first appeal filed by Kalu was dismissed with costs. Kalu, has therefore, come up in second appeal.

7. The concurrent findings of fact of the two Courts below that the registered will, Exhibit D. 1. had been duly executed by the deceased while he was of sound disposing mind and that the land in dispute was ancestral and non-ancestral in the ratio of 6:1 are findings of fact, and cannot easily be disturbed in the second appeal. Shri Puran Chand, the learned counsel for the appellant, had nothing much to urge against these findings of fact.

8. In view of the definition of "intestate" as given in clause (g) of Sub-Section (1) of Section 3 of the Hindu Succession Act. Karma is to be deemed to have died intestate in respect of the ancestral property which he could not dispose of by will under the general customary law of Punjab. Shri Puran Chand argued that there was no proof that the parties were governed by custom in such matters before the coming into force of the Hindu Succession Act. The parties are admittedly Jats by birth and are residing in a rural area. One has only to look up the jamabandi and the registered will. Exhibit D.1, if any proof is needed on these points. It is also the common case of the parties that they own a good deal of agricultural land. The Jamabandis further show that all this land is khud kasht or magbooza malkan or self-cultivated. We have all the essential incidents of an agricultural community before us. As regards the proposition of law that the Hindu Succession Act does not enlarge the powers of a male proprietor to make any transfers inter vivos or by testament, we have only to refer to a Division Bench

ruling of this Court in *Kaur Singh v. Jaggar Singh*<sup>1</sup>, which was later affirmed by a Full Bench in *Joginder Singh v. Kehar Singh*<sup>2</sup>, As Karma had died in 1961. succession to his property would be governed by the provisions of that Act Sections 8, 9 and 10 would be fully applicable as Karma is to be taken to have died "intestate" in respect of the ancestral property in view of the definition of that word in clause (g) of Section 3(1) of the Act As regards the non-ancestral or self-acquired property of Karma, the will. Exhibit D. 1. shall have full effect. The concession made by the counsel for the parties in the trial Court, therefore, represented the correct position of the law and the case has been rightly decided by both the Courts below.

9. Shri Puran Chand then relied upon the decision of a Single Bench of this Court in *Daljit Singh v. Tulla Ram*<sup>3</sup>. The appellant could have claimed the benefit of this ruling if he were to prove that he had been rendering services to the deceased. There was no such plea taken by the appellant in his written statement. No evidence could be or has been examined to show that the appellant was rendering any services to the deceased. There is no doubt a recital to that effect in the will, Exhibit D. 1. but this cannot be treated as admissible evidence on a fact which had never been pleaded by the party concerned. The appellant was a minor at the time of the making of this will in 1957. He was shown to be a minor even at the time of the filing of this second appeal in 1965. A minor of about ten years of age could not possibly have started rendering any services worth the name during his infancy. In any case this Plea on a question of fact had to be specifically taken and proved.

10. I see no grounds for interference and dismiss the appeal. Shri Sarin, the learned counsel for the respondents, does not press for an order as to costs.

Appeal dismissed.

Cases Referered.

1 AIR 1961 Pun 489

2 ILR (1965) 2 Punj 438 : ( AIR 1965 Punjab 407 (FB))

3 1965 Cur LJ 867 (Punj)