

(2006) 04 SHI CK 0014

In the High Court Of Himachal Pradesh

Case No : Regular Second Appeal No. 373 of 1995

Smt. Shakuntla and Others

APPELLANT

Vs

Sh. Surinder Chand and Others

RESPONDENT

Date of Decision : 10-04-2006

Acts Referred:

Limitation Act, 1963 — Article 113

Citation : AIR 2006 HP 108 : (2006) 2 ShimLC 9

Hon'ble Judges : K.C. Sood, J

Bench : Single Bench

Advocate : Ajay Kumar, for the Appellant; Bhupender Gupta and Neeraj Gupta, for the Respondent

Final Decision : Allowed

Judgement

K.C. Sood, J.—This second appeal arises out of the judgment and decree of reversal rendered by learned Additional District Judge, Kullu on July 11, 1995. This second appeal was admitted by Goel J. on July 15, 1997 with the observations :

Admit on substantial questions of law at Nos. 4, 5 and 8 mentioned at page 10 of the paper book.

Substantial questions of law at page 10 reads:

4. Whether in the absence of specific plea as to which religion the plaintiff belong, findings in the matter of regulation of succession could not be recorded?
5. Whether in the matter of succession, the parties to the suit are governed by custom or by the provision of Hindu Succession Act. In case of custom, what are the particulars of the custom and whether the same is valid?
8. Whether the parties to the suit in the matter of succession are governed by the custom known as Rewaj-e-Zamindara, if so, the same has been specifically pleaded or proved?

2. When the appeal was being heard, learned Counsel for the appellants wanted to raise the question of limitation and some other questions. An application for that purpose, was filed by the applicants saying that in addition to question Nos. 4, 5 and 8, questions No. 2, 6, 7 and 9 as set out in the memo of appeal were substantial questions of law. By my order dated September 27, 2005,¹ partly allowed the application holding that so far question Nos. 6, 7 and 9 were concerned, they overlap and pertain to appreciation of evidence and therefore cannot be said to be substantial questions of law. However, in addition to the substantial questions of law on which the appeal had been admitted, the following substantial question of law was framed :

Whether the trial Court erred in holding that the suit of the plaintiff was within the period of limitation?

Necessary facts.

3. Surinder Chand, the respondent No. 1 in this appeal, filed a suit before the learned Senior Sub Judge, Lahaul and Spiti Districts Keylong at Kullu in October, 1989 for declaration to the effect that the plaintiff and his brothers proforma defendant No. 4 Shamsher Singh inherited the suit property after the death of their father Shri Partap Chand in equal shares and they are the owners in possession of this property and entitled to be recorded as such in the revenue record to the exclusion of their sisters Smt. Shakuntla, Smt. Damyanti and Smt. Manorma, defendants No. 1, 2 and 3 and the entries in the revenue record showing to the contrary are wrong and not binding on the plaintiff and defendant No. 4. The defendants No. 1 to 3 have no right, title or interest in the suit property and to cause any unlawful interference with the possession of the plaintiff and his brother defendant No. 4 Shamsher Singh. A consequential relief for injunction to restrain the defendants No. 1 to 3 from claiming any right, title or interest over the suit property and from causing any unlawful interference with the possession, enjoyment and ownership of the plaintiff in respect of suit land in any manner was also sought.

4. The case of the Plaintiff as disclosed in the plaint is:

5. The parties to the suit are the sons and daughters of late Shri Partap Chand who originally belonged to District Lahaul and Spiti. The parties are "Bodh Tribe" of District Lahaul and Spiti which is a scheduled tribe under the constitution. Partap Chand himself was the Member of Punjab Scheduled Tribe Advisory Council and therefore, the provisions of the Hindu Marriage or Hindu Succession Act are not applicable to them. Partap Chand died in February, 1964 leaving behind his widow Nima Devi, two sons, namely, Surinder Chand plaintiff and Shamsher Singh defendant No. 4 and three daughters Shakuntla, Damyanti and Manorma, the defendant in the suit. Smt. Shakuntla and Damyanti were married and were living with their respective husbands. The parties being "Bodh" are governed by tribal custom of District Lahaul and Spiti known as "Rewaj-e-Zamindara in the matter of marriage, divorce, succession and alienation etc. This

custom, according to the plaintiff, was being continuously followed by the parties from time of their forefathers. Under the custom, pleads plaintiff, "in the presence of sons of the deceased, the female heirs, i.e., widow and daughters are not entitled to inherit the estate of deceased and only sons are entitled to inherit the entire estate". After the death of Partap Chand, the plaintiff Surinder Chand and his brother Shamsheer Singh alone were entitled to inherit the properties of their father, under the aforesaid custom, i.e. "Rewaj-e-Jamindara" and therefore only the plaintiff and his brother Shamsheer Singh inherited the property subject-matter of dispute. They are exclusive owners in possession of the land in equal shares to the exclusion of defendants No. 1 to 3. After the death of Partap Chand, due to the mistake on the part of the revenue agency, a mutation was attested and sanctioned showing the inheritance, in respect of the suit property, not only in favour of two brothers Surinder Chand and Shamsheer Chand but also the female heirs. This mutation was attested and sanctioned behind the back of plaintiff Surinder Chand and defendant No. 4 Shamsheer Singh and therefore they are not bound by this mutation. It is the case of the plaintiff that he came to know about this only on March 31, 1989 when he obtained copy of the Jamabandis in respect of the suit property and prior to that, "he had no notice and knowledge of wrong entries and wrong mutation". It is the further case of the plaintiff that he and his brother defendant No. 4 are in possession of this land exclusively since the death of their father Partap Chand and defendants No. 1 to 3 are not in possession of this land. It is pleaded that the revenue entries are wrong and are therefore, liable to be corrected. It is also the case of the plaintiff that taking advantage of the wrong revenue entries, the defendants No. 1 to 3 have started interfering with the peaceful possession of the plaintiff and defendant No. 4.

6. Defendant Nos. 3 and 4 do not contest the suit. The suit is resisted only by two sisters, i.e., defendant Nos. 1 and 2 Smt. Shakuntla and Smt. Danyanti alias Danwanti. Several preliminary objections are raised including that the suit is barred by the period of limitation and therefore liable to be dismissed on this ground alone. Their father, explain the contesting defendants, expired on 28.2.1964 and mutation of inheritance was sanctioned/attested in favour of the parties as also Nima Devi, their mother, vide mutation No. 1043 dated 23.12.1964 and therefore the suit after lapse of 26 years of the death of their father is patently beyond the period of limitation. It is denied that the plaintiff and defendant No. 4 are in exclusive possession of the suit land. Defendants No. 1 and 2 maintain that the possession is joint as co-sharers and co-heirs. The suit, according to the defendants No. 1 and 2, has been filed by the Plaintiff in collusion with defendants No. 3 and 4 on the basis of false and concocted allegations. Defendants No. 1 and 2 have also taken the plea of estoppel because of the act and conduct of the Plaintiff. The plaintiff Surinder Chand along with Manorma and Shakuntla executed a general power of attorney on 16.1.1974 in respect of the suit property and other property in favour of Shamsheer Singh defendant No. 4 where in joint possession and ownership of the suit property of

defendants No. 1 and 2 along with the plaintiff and defendants No. 3 and 4 was unambiguously admitted which clearly show that both the plaintiff and defendants No. 3 and 4 acknowledged the share of defendants No. 1 and 2 over the suit property. This apart, estate of Partap Chand share of which was inherited by Nima Devi, their mother, also devolved upon the plaintiff and the defendants and mutation to this effect was attested on 21.1.1969 by the Assistant Collector in the presence of Shamsher Singh and therefore it is not open to the Plaintiff and defendants No. 3 and 4 to say that the defendants No. 1 and 2 are not joint owners in possession of this property.

7. It is denied that the parties are governed by "Rewaj-e-Zamindara" as claimed in the plaint as they are Thakurs and not agriculturist by occupation. On merits, the allegations are controverted. It is denied that the parties are Bodh Tribes. However, it is admitted that their father was member of the Punjab Schedule Tribes Advisory Council but in the matter of succession, they being Thakurs are not governed by "Rewaj-e-Jamindara". It is also the case of the present appellants, as pleaded in the written statement, that though they are not governed by the custom as alleged by the plaintiff which bars the daughters/ female from inheriting the estate of their father but even if such custom is proved, it is unjust, unreasonable and contrary to the public policy and law.

8. On the pleadings of the parties, several issues were settled by the learned trial Court. Learned trial Court by judgment dated 11.11.1993 dismissed the suit of the plaintiff holding that the plaintiff and defendants are not governed by custom alleged by the plaintiff and the mutation attested in favour of all the legal heirs of late Partap Chand in respect of the suit property was not illegal, void or inoperative. It was also held that the suit was not beyond the period of limitation. The plaintiff and defendant No. 4 were also not found to be in exclusive ownership or possession of the suit property.

9. Dis-satisfied, the plaintiff carried an appeal before the learned Additional District Judge who by his impugned judgment dated 11.7.1995 allowed the appeal holding that the plaintiff was governed by tribal custom of Kullu under which married daughters are excluded to inherit the estate of their father and even the unmarried daughter inherits estate only till her marriage and accordingly held that the mutation attested in favour of all the legal heirs, including the present appellants, was wrongly attested, is illegal and not binding on the plaintiff. The suit was decreed.

10. So far the question of limitation is concerned, learned trial Judge held the suit to be within limitation as no argument or any evidence in support was led.

11. learned Counsel for the appellant submits that as the suit was dismissed, therefore, they could not assail the findings before the learned District Judge on this question.

12. Aggrieved, the defendants No. 1 and 2 are in this second appeal.

13. Heard Mr. R.L. Sood, learned Senior Advocate with Mr. Ajay Kumar, Advocate, Counsel for the appellants and Mr. Bhupinder Gupta, learned Senior Counsel with Mr. Neeraj Gupta, Advocate, for the respondent No. 1 who alone contested this appeal.

First the question of limitation.

14. Even though the learned District Judge did not set aside the findings of the trial Court, yet the parties once again addressed this question before me. The plaintiff in para 11 of the plaint states that the cause of action arose in his favour on 30.5.1989 when the plaintiff came to know about the wrong entries for the first time and then on 1.8.1989 when the defendants allegedly threatened to interfere in the suit property and refused to admit the claim of the plaintiff.

15. Shamsher Singh. Defendant No. 4, the brother of the plaintiff, for whose benefit this suit has also been filed, made a statement before the trial Court that the power of attorney which was executed in his favour had been lost by him and he could not locate the same. However, in his cross-examination, the plaintiff specifically admits that the defendants No. 1 and 3 had given a General Power of Attorney to defendant No. 4. He also admits that they had also given a general power of attorney to manage the property at Mukerian in Punjab in the year 1974. A reading of the power of attorney Exhibit-DI clearly shows, the parties are described as children of Partap Chand, Rajput by caste and acknowledges that the parties have inherited the properties from their father in District Kullu and in Mukerian in Punjab and they have authorized the defendant No. 4 Shamsher Singh to look after the said property. Thus, there is clear acknowledgement of this power of attorney about the inheritance of the properties by all the children of deceased Partap Chand and his widow. Mutation in respect of the property in dispute was admittedly attested on 21.1.1969 in favour of the parties to the suit. It is submitted that the plaintiff was minor at that time. The contention is fallacious. The plaintiff in his cross-examination candidly admits that he was present at the time of attestation and sanction of mutation of inheritance and therefore was well aware of the attestation of the mutation of inheritance which he now wants to avoid. In his statement on oath in the Court on 28.9.1991, he gave his age as 45 years and, therefore, when the mutation was attested in the year 1969, he was more than 23 years of age. In this mutation, he admitted the joint ownership of the parties and the property in suit and cannot now turn around and say that when his father died, he was minor. The evidence clearly shows that the plaintiff was not only aware of the rights of the defendants No. 1 and 2 but also admitted joint ownership of the parties over the suit property. The plaintiff, in view of the evidence on record, was admittedly born in the year 1946 and was more than 18 years of age at the time of the death of his father, i.e. 28.2.1964. The entries in the revenue record were made in his presence. This fact is also admitted by him in the power of attorney executed by him (Exhibit-DI). It is not given to the Plaintiff to say that he was not aware of the entries when the mutation of inheritance was attested in respect of the property in

dispute. It is not possible to believe him. He has taken a specific plea that he was not aware of these entries. The suit was filed in the year 1989.

16. However, suit for declaration under Article 113 of Second Schedule to the Limitation Act, 1963 can only be filed within three years. The limitation started running when the right to sue accrued, i.e., when mutation of inheritance was attested. In this case, the fact that the contesting defendants inherited the property in dispute from their father along with the plaintiff and non-contesting defendants No. 3 and 4 was to the knowledge of the plaintiff and therefore, the suit is clearly barred by the period of limitation. The question is accordingly answered.

Question No. 2.

Whether in the matter of succession, the parties to the suit are governed by custom or by the provision of Hindu Succession Act. In case of custom, what are the particulars of the custom and whether the same is valid?

17. The question in view of the pleading of the parties is recast as follows :

Whether the parties are governed by custom in the matter of inheritance as claimed by the plaintiff?

18. It is the specific case of the plaintiff that the parties are "Bodh" and governed by custom "Rewaj-e-Zamindara" under which only male sons inherit to the exclusion of female heirs. Firstly, it is not proved that the parties are "Bodh". It is significant to note that in the power of attorney Exhibit DI, the father of the parties described himself as Thakur and not Bodh. This power of attorney (Exhibit DI) as already noticed is signed by the Plaintiff. In the old revenue record in terms of Exhibit D2 to D4, the ancestors of the parties Raj Bahadur and Amar Chand are described as Thakurs. There is no evidence to show that the ancestors of the parties changed their religion and became "Bodh".

19. Secondly there is no evidence on record which may prove custom as pleaded.

20. In order to prove custom, it is necessary for the party who alleges custom to prove it to be an ancient, certain, reasonable and having been followed constantly without deviation. The custom has to be construed strictly. The custom, as pointed out in *Ramalakshmi Amtnal v. Sivanatha Perumal* (1872) 14 Moo. Ind. App. 570, *Siromani and Anr. v. Hemkumar and Ors.* 1968 SC 1299 , *Harihar Prasad Singh and Others Vs. Balmiki Prasad Singh and Others*, , must be proved by the party who alleges such custom by clear and unambiguous evidence as it is only by such evidence that Courts can be assured of its existence and the fact that it possesses the condition of antiquity and certainty on which alone their legal title to recognition depends. It is settled position of law that wherever the evidence shows the custom alleged was not allowed, uniformly, the custom cannot be said to be proved. Mulla in his *Principles of Hindu Law* observed:

A custom derives its force from the fact that it has, from long usage, obtained the force of law.

Mulla further observed:

All that is necessary to prove is that the usage has been acted upon in practice for such a long period and with such invariability as to show that it has, by common consent, been submitted to as the established governing rule of a particular locality.

Now the custom alleged by the Plaintiff in his plaint is that under the "Rewaj-e-Zamindar" by which custom the parties are governed, only male heirs to the exclusion of female heir, inherit. There is no evidence to this effect.

In fact, the plaintiff in his statement merely says :

We belong to Bodh community and are Schedule Tribes. My father was tribal chief in both community and was given Thakur as title. The family name is not Thakur and we are governed by the custom of Lahaul under which the property is inherited only by sons and not by married daughters. Only unmarried daughter and widow inherits till their life time.

21. Now even this statement of the Plaintiff is in variance to the pleadings. In the plaint the custom set up is that of "Rewaj-e-Zamindara" under which only the sons inherit their father to the exclusion of females including daughters and widow. He does not give any instance whatsoever of such custom. In cross-examination he admits that his father were three brothers, namely, Partap Chand his father, Abhey Chand and Prithi Chand. Name of his grand-father was Amar Chand and great grand father was Hari Chand. He admits categorically that property of Abhey Chand was inherited by his daughter as well as Angmo. In his own words :

"It is correct that share of Abhey Chand was inherited by his daughter Parwati as also Angmo (though he maintains that this was done wrongly).

22. He also admits that Parwati is a married woman. Though PW2 Shoram Ram says, under the custom of Lahaul, the inheritance of the property goes to the sons alone but in cross-examination he admits that the share of the property of Abhey Chand, brother of the father of the plaintiff, was inherited by his daughter Parwati.

23. No other evidence was led by the plaintiff to prove the custom alleged by him that only male children inherit the property under the custom by which the parties are governed. I hardly need to emphasize that it is always for the plaintiff, who alleges the custom, to prove the same.

24. As observed earlier, the custom has to be proved and established and shown to have been followed invariably for a long time a practice which is irregular cannot be said to be custom. The Supreme Court in *Mohammad Baqar and Ors. v. Naim-un-Nisa Bibi and Ors.* 1956 SC 548, held that the burden of proving a custom in

derogation of the general law being heavily on the party who sets it up, it is incumbent on him to prove by clear and cogent evidence that there is a family custom excluding the females from taking as heirs

25. Mr. Gupta, learned Senior Counsel for respondent No. 1 contends that the parties are tribal and tribal custom of Kullu Sub Division of which Lahaul Spiti was part clearly shows that only eldest son inherits to the exclusion of others. This custom submits Mr. Gupta is recorded in Rewaj-i-am (Tribal custom) Kullu Sub Division. The argument is misplaced. The custom set up by the plaintiff in his plaint is that after the death of a person his male issues alone inherit to the exclusion of widow and daughter.

The Rewaj-i-am (Tribal Custom) which was first drawn up in 1866 by the then Settlement Officer was revised by Bachittar Singh, Assistant Settlement Officer, Kullu in 1952. Chapter IV of the book relates to Succession. In answer to question No. 40, it is stated that in "Waziri Spiti", the eldest son inherits while the younger one becomes lamas. The three younger brothers are entitled to maintenance only, while the remaining get nothing. This is not the custom pleaded. Under the recorded custom "Riwaj-e-am" (Tribal custom) "only eldest son inherits to the exclusion of other heirs". Now plaintiff is younger son and cannot inherit under this custom. He should, under the custom, have become "Lama" "a monk". The plaintiff cannot be permitted to try to prove a custom which he has not pleaded. In any event, this custom does not take the case of the plaintiff any further. It is now well settled, as pointed out in *Gurdit Singh v. Ms Angrez Kaur and Ors.* 1968 SC 142 that entries in the Riwaj-i-am are entitled to an initial presumption. The Apex Court in *Jai Kaur and Ors. v. Sher Singh and Ors.* 1960 SC 1118 held that where the Riwaj-i-am affects adversely the rights of females who had no opportunity whatever of appearing before the revenue authorities, the presumption would be weak, and only a few instances would suffice to rebut it. Assuming that entries in the tribal custom of Kullu Sub Division are applicable in the present case but then it would only raise weak presumption when the female had no opportunity to appear before the Settlement Officer. Instances have been given where this custom has not been followed. From whatever angle we may look, the plaintiff has failed to prove the custom pleaded by him that sons succeeds to the property of their father to the exclusion of daughters or widow mother. The question is accordingly answered.

Question No. 3 :

Whether the parties to the suit in the matter of succession are governed by the custom known as Rewaj-i-Zamindara, if so, the same has been specifically pleaded or proved?

26. I have already said that the plaintiff has not proved even remotely the custom known as Rewaj-i-Zamindara, pleaded by him. The question is accordingly decided.

27. In result, the appeal is allowed. The impugned judgment and decree of the

learned Additional District Judge, Kullu, dated 11th July, 1995 is set aside. The suit of the plaintiff shall stand dismissed with costs.