Before M.M. Kumar, J

HAKAM SINGH (DECEASED) THROUGH L. RS. AND OTHERS,—*Petitioners/Defendants*

versus

BALJIT SINGH AND OTHERS—*Respondents/Plaintiffs*

C.R. No. 3529 of 1994

29th May, 2006

Code of Civil Procedure, 1908—Order VI Rl. 17—Execution of two sale deeds by father of plaintiffs in favour of his nephews—Challenge thereto—Plaintiffs setting up specific plea with regard to nature of property being ancestral, coparcenary and joint Hindu family—Plaintiffs failing to establish the fact that the property was joint Hindu family and coparcenary property and they acquired right in the suit property by birth—During the pendency of appeal plaintiffs seeking amendment in plaint—Plea sought to be raised by way of amendment already set up in the plaint—Such an amendment is nothing else but ruse to adduce additional evidence—Amendment of such a nature has to be considered as mala fide and the application should have been rejected by 1st Appellate Court—Petition allowed, order of 1st appellate Court set aside.

Held, that the judgment of the trial Court would show that the issue with regard to the nature of the property was fully alive, agitated, contested and decided. The attempt now made is to amend the plaint by incorporating certain sentences in para 7 for the purposes of taking the property to Gandhi son of Khushala, who were their grandfather and great grandfather. Such an amendment is nothing else but ruse to adduce additional evidence because the plea with regard to the ancestral or coparcenary nature of the property had been set up in paras 3, 4 and 5 of the plaint by the plaintiff-respondents. The aforementioned sentences sought to be added are in fact in the nature of additional evidence and not setting up any new plea, which does not exist in paras 3, 4 and 5 of the plaint. Therefore, the amendment of such a nature has to be considered as *mala fide* and the application should have been rejected by the learned lower Appellate Court.

(Para 12)

M.L. Sarin, Senior, Advocate with D.V. Singh, Advocate, *for the petitioners.*

M.L. Saini, Advocate, *for respondent No. 1.*

JUDGMENT

M. M. KUMAR, J.

(1) This petition filed under Section 115 of the Code of Civil Procedure, 1908 (for brevity, 'the Code'). is directed against the order dated 3rd August, 1994, passed by the learned Additional District Judge, Sangrur, allowing the application of the plaintiff-respondents seeking an amendment in the plaint at the stage of appeal filed under Section 96 of the Code, which is pending consideration of the learned lower appellate Court.

(2) Brief facts of the case are that the plaintiff-respondents had filed a suit for joint possession, declaration and permanent injunction by challenging two sale deeds dated 6th March, 1990 executed by their father Gurdev Singh in favour of the defendant-petitioners. The defendant-petitioners are the nephews of Gurdev Singh, who is father of the plaintiff-respondents. One of the sale deed was executed in favour of defendent-petitioner nos. 1 to 4 and the other sale deed has been executed in favour of defendant-petitioner nos. 5 and 6. A specific plea had been taken that the property is ancestral in nature as is evident from the pleadings in paras 2, 4 and 5 of the plaint which reads as under :—

> "3. That previously Jangir Singh deceased was the owner of the suit land shown in part A of the head note of the plaint and it devolved upon him from his father Gandhi and land shown in Part B of the head note of the plaint was purchased by late Jangir Singh son of Khushala out of the joint labour endeavour and income, from the common stock, funds derived by late Jangir Singh with the joint labour and vigil of his sons as a benami transaction, though it was never purchased by his sons from their independent income of their own or by spending the consideration meant from their own pockets. So the property stated in Part "B" of the heading of the plaint became ancestral, coparcenary, joint Hindu family in nature since the time of its purchase (though it was benami purchase) as regards the rights of the plaintiffs as coparcener being born during the life time of their grand father.

4. That the plaintiff and defendant no. 1 constitute Hindu joint family and the plaintiffs are coparceners by birth in the 1/3rd share of their father to the extent of 2/3 share. The defendant no. 1 had no right to alienate his share from the suit land without any legal necessity and except for the benefits of the estate.

5. The defendant no. 1 is the karta (Manager) of the Joint Hindu family property and the 1/3rd share of defendant no. 1 out of the suit land detailed in Part "A" and "B" of the heading of the plaint is ancestral, and joint Hindu family property and which is the coparcenary property among the plaintiffs and defendant no. 1. The plaintiffs and defendant no. 1 constitute a Joint Hindu family coparcenary and are governed by their personal law i.e. Mitakshra School of Hindu Law and Karta of a joint Hindu family had no right to alienate the coparcenary property without any legal necessity and except for the benefit of the estate because the coparceners had (passess) their respective share in the same."

(3) The parties have gone on trial after having fully understood the case. The trial Court in its decision dated 28th August, 1993, under Issue No. 4 has dealt with the aforementioned controversy as is evident from the reading of portion of para 12 of its judgment. It is also evident from the reading of paras 23 and 26 that the plea had already been taken and the plaintiff-respondents had failed to establish the fact that the property was joint Hindu family and coparcenary property in the hands of their father. It has further been held that they failed to prove that they acquired right in the suit property by birth.

(4) Against the judgment of the trial Court, dated 28th August, 1993, the plaintiff-respondents preferred an appeal under Section 96 of the Code. During the pendency of appeal an application under Order VI Rule 17 of the Code was filed by the plaintiff-respondents for incorporating the following amendment in the plaint :—

"In the beginning of para 7, the following sentences are sought to be added.

"It was told by the grandfather of the applicant that the property mentioned in para (A) of the heading of the plaint was devolved from Khushala to Gandhi and then to Jangir Singh, being ancestral property. It was also told by Jangir Singh to the applicants that the property mentioned in para (A) of the heading of the plaint was ancestral in the hands of their sons, grand sons and great grandsons. It was also told to the applicants that he would not like to allow his property to go out of his family i.e. in the hands of his daughters in her in-laws family. Grand father of the applicants was aware of the legal consequences in the light of Hindu Succession Act in the absence of will which was told by the grand father of the applicant to all the members of the family and also disclosed his intention in this respect. The grand father of the applicant told that he intended to execute will with the intention to keep the property in the hands of the male members of his family in each generation i.e. to sons, grand sons and great grand sons but not to his daughters."

The following lines were sought to be added in the last line of para 7 of the plaint :

"With the condition that his sons, grandsons, great grand sons would be the owner of his land being coparcenary after his death. His property would remain ancestral in the hands of the male members of the family. But they cannot sell or transfer to any other person except the male members of their respective family i.e. to their respective sons, grand sons, great grandsons."

The applicants want to add further the following lines :—

"The Will was handed over by Jangir Singh to his elder son Mohinder Singh which is in his possession and should be got produced. Certified copies of jamabandi for the year sammat 1960, 1964-65 BK to 2002 to 2003 BK copy of mutation no. 1117, dated 14th July, 1956 certified copy of sale deed no. 19, dated 5th January, 1957 jamabandi for the year up to 1957-58 regarding land mentioned in para (B) of the plaint. Copy of jamabandi for the year 2002-

2003 BK regarding khasra no. 2507/9—18, 2594/9-1 total 18 bighas 19 biswas and other relevant documents will be produced. Excerpt will be got prepared with the permission of the Court."

(5) The learned lower appellate Court after placing reliance on a judgment of the Hon'ble Supreme Court in the case of **M/s Ganesh Trading Co.** *versus* **Moji Ram, (1),** allowed the application. The operative part of the order of learned lower Appellate Court reads as under :—

".....There is no rule that unless in an application for amendment of the plaint it is expressly averred that the error, omission or misdescription is due to a *bona fide* mistake. The Court has no power to grant leave to amend the plaint. The power to grant amendment of the pleadings is intended to serve the ends of justice and is not governed by any such narrow or technical limitations. The learned counsel for the appellant also placed reliance on the judgment of Hon'ble High Court in Sukhwinder Singh and Co. *Versus* Shri Sohan Singh, 1991 P.L.J. 65 in which it was laid down that prayer for amendment had been rejected mainly for the reason that the petitioner had taken certain inconsistent and contradictory pleas. It has repeatedly been laid down that the provisions of Order 6 Rl. 17 of the Code of Civil Procedure have to be considered liberally unless an irreparable loss is likely to be caused to the respondent, the amendment sought for should, in the normal course be allowed. In the case in hand the applicants have sought the amendment of the plaint clearly alleging that the suit property was ancestral. This plea has already been taken in Para 3 of the plaint, but the applicants now want to explain this aspect of ancestral property and this is not going to prejudice the case of the respondent in any manner. The Apex Court has already laid down that Rules and Procedures are intended to be a hand maid to the administration of justice. A party cannot be refused just relief merely because of some mistake,

(1) AIR 1978 S.C. 484

negligence, inadvertence or even infraction of the rules or procedure. The Court always gives leave to amend the pleadings of party, unless it is satisfied that the party applying was acting *male fide* or that by his blunder, he had caused injury to his opponent which may not be compensated for by an order of costs. However, negligent or careless may have been the first omission, and, however, late the proposed amendment, the amendment may be allowed if it can be made without injustice to the other side. As said above, no injustice would be caused to the respondents by allowing the proposed amendment. Consequently, the application under Order VI Rules 17 of the Civil Procedure Code moved by the appellants is allowed and amendment in the plaint is allowed, but subject to payment of Rs. 400 as costs. ....."

(6) Mr. M. L. Sarin, learned counsel for the defendant-pertitioners has raised two fold submissions before me. Firstly, he has urged that the amendment sought is aimed at setting up the plea with regard to the coparcenary and ancestral character of the petitioners. According to the learned counsel the aforementioned plea has already been clearly incorporated in the plaint, as is evident from reading its paras 3, 4 and 5, which have already been produced in the preceding para. Learned counsel has maintained that it is only a ruse to overcome the difficulty of adducing additional evidence and a novel method has been discovered by filing an application under Order IV Rule 7 of the Code. The argument appears to be that the amendment is *mala fide* and is impermissible in law. He has then submitted that if the amendment is allowed then the plaintiff-respondents should not be permitted to adduce any additional evidence. In support of his submission, learned counsel has placed reliance on a judgment of the Hon'ble Supreme Court in the case of **Kenchegowda** *versus* **Siddegowda, (2),** and a judgment of this Court in the case of **Jangir Singh** *versus* **Mohinder Kaur and others (3).**

(7) Mr. M. L. Saini, learned counsel for the respondents has argued that the amendments are liberally allowed and in the absence of elaborating the plea by incorporating amendment it would not be possible to bring facts of the case before the Court on the basis of the pleadings as project in paras 3, 4 and 5 of the plaint. According to

(2) (1994) 4 S.C.C. 294
(3) 1993 (2) P.L.R. 512

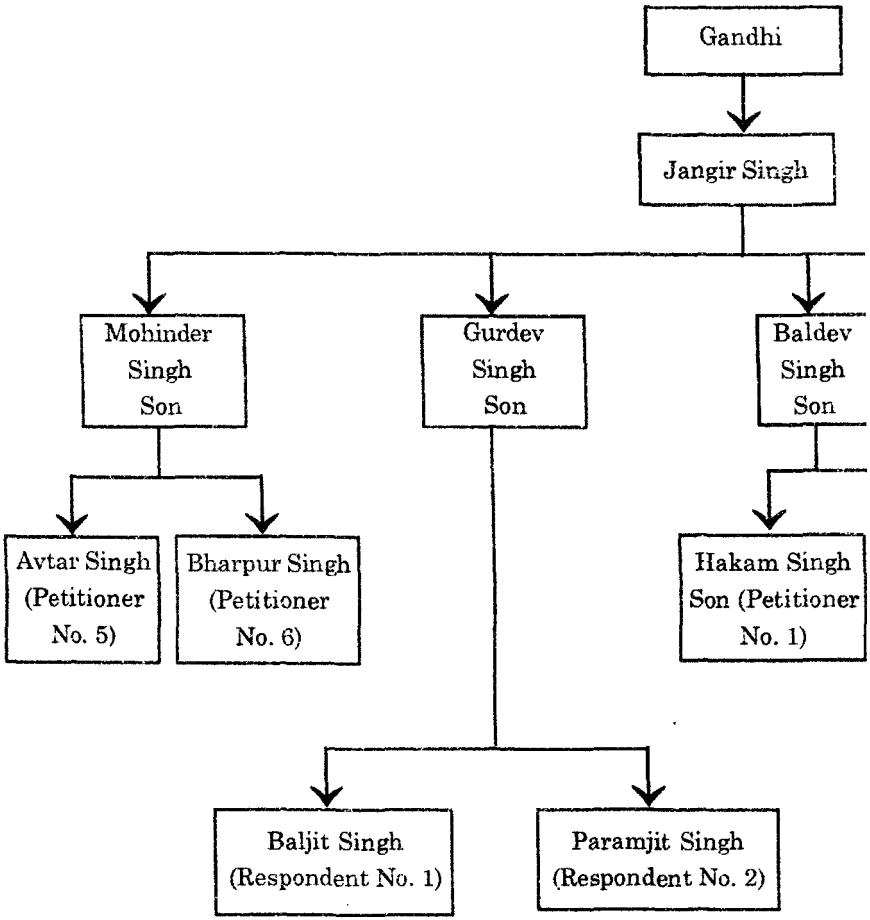
the learned counsel it would be in the interest of justice to permit the plaintiff-respondents to adduce evidence on the plea now raised by way of amendment. Learned counsel has maintained that the pleas now raised are not in the nature of additional evidence but are the substantive plea. In support of his submission, the learned counsel has placed reliance on two judgments of the Supreme Court in the cases of **Sampath Kumar** *versus* **Ayyakannu and another, (4), Punjab National Bank** *versus* **Indian Bank and another (5),** and a judgment of this Court in the case of **Tarlochan Singh** *versus* **Bhagwant Singh and others, (6),**

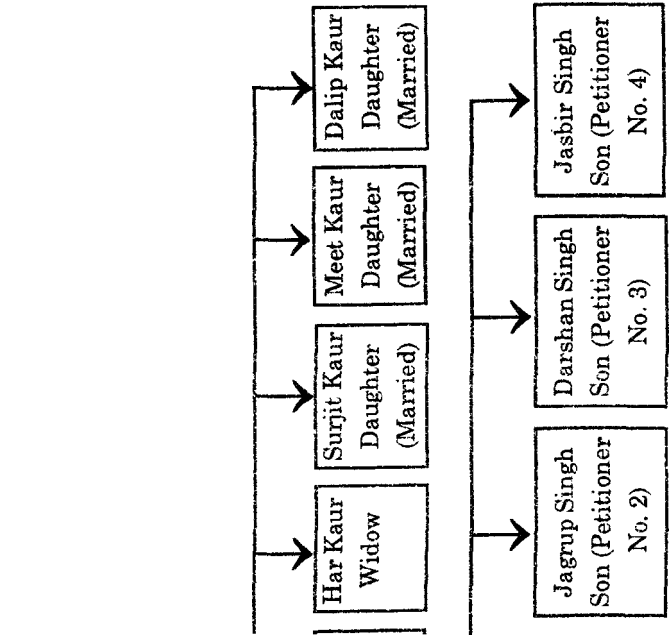
(8) I have thoughtfully considered the submissions made by the learned counsel for the parties and am of view that this petition deserves to be accepted. A perusal of paras 3, 4 and 5 of the plaint would show that a specific plea with regard to the nature of the property in question being ancestral coparcenary joint Hindu family has been set up. The aforementioned paras of the plaint have already been produced in the opening part of this judgment. After the perusal of those paras no doubt is left that the property is comparcenary ancestral joint Hindu family property, has been set up by the plaintiff-respondents. It is also pertinent to notice that the corresponding paras of the written statement filed by the defendant-petitioners have been vehemently denied by taking the plea that the plaintiff-respondents never constituted a joint Hindu family and they had no connection with the property in dispute. Accordingly, Issue No. 4 was framed, which was to the following effect :—

> "Whether the plaintiffs (respondents) have any *locus standi* to file the present suit ?

(9) Under Issue No. 4, there is detailed discussion by the learned trial Court as to whether the property in hands of Gurdev Singh, father of the plaintiff-respondents, was joint Hindu family coparcenary property or he was holding the suit property as an absolute owner. Before referring to the discussion, it would be appropriate to advert to the pedigree table, which is reproduced as under :—

(4) 2002 (2) P.L.J. 445
(5) 2003 (1) P.L.J. 458
(6) 2003 (1) P.L.J. 357


Gandhi
Jangir Singh
Mohinder Singh Son
Gurdev Singh Son
Baldev Singh Son
Avtar Singh (Petitioner No. 5)
Bharpur Singh (Petitioner No. 6)
Hakam Singh Son (Petitioner No. 1)
Baljit Singh (Respondent No. 1)
Paramjit Singh (Respondent No. 2)


Har Kaur
Widow
Surjit Kaur
Daughter
(Married)
Meet Kaur
Daughter
(Married)
Dalip Kaur
Daughter
(Married)
Jagrup Singh
Son (Petitioner
No. 2)
Darshan Singh
Son (Petitioner
No. 3)
Jasbir Singh
Son (Petitioner
No. 4)

(10) The trial Court proceeded on the assumption that the parties are governed by Hindu Law in the matter of succession. The trial Court also examined the argument of the plaintiff-respondents that since grandsons and great grandsons acquired interest in the coparcenary property by way of birth. It was agreed between the parties that the Mitakashara Law being customary law for the Hindus was to apply with regard to the manner in which the property is to be treated in the hands of the heirs. Accordingly, it was held that sons have to devolve as per Section 6 of the Hindu Succession Act, 1956. The trial Court found that the plaintiffs were not able to prove on record that earlier the suit property was recorded in the name of Gandhi, father of Jangir Singh, although averments have been made in para 3 of the plaint. The trial Court proceeded to observe as under :—

> ".....Plaintiffs got proved excerpt as well as application Ex. P-2 and Ex. P-1 respectively from Chiranji Lal Patwar Moharrar PW. 1, but sorry to day (say ?) that this excerpt starts from ownership of Jangir Singh from the year 1957-58 and finished at the ownership of present defendants as well as Mohinder Singh and Baldev Singh. No doubt, in copy of the jamabandi for the year 1957-58 Ex. PC, it has been recorded that previously Jangir Singh, son of Gandhi was owner of entire property, but sorry to say that there is no document on the file to prove the mode of inheritance of property by Jangir Singh from his father Gandhi. There is no dispute to the proposition of law that present plaintiffs were required to prove minimum inheritance continuously by three generations. Plaintiffs are admittedly sons of Gurdev Singh defendant No. 1. Gurdev Singh certainly is son of Jangir Singh. Plaintiffs have proved that their father Gurdev Singh got property from his father Jangir Singh, but plaintiffs have failed to prove the source from which Jangir Singh got property. It was duty of the plaintiffs to prove third generation. Another aspect, which needs consideration is that Gurdev Singh defendant No. 1 got property from his father Jangir Singh by way of will dated 30th October, 1971. Hence it cannot be presumed that Gurdev Singh got property from his father Jangir Singh by way of survivorship. It has been argued by learned

counsel for plaintiffs that we are to see the intention of the testator. Even if Jangir Singh bequeathed his entire property in favour of his three sons and one widow, still it is to be presumed that Gurdev Singh, his brothers and mother got property from Jangir Singh by way of survivership because in absence of will, by Jangir Singh property was to be inherited by sons and widow by way of survivership....."

(11) The trial Court also rejected the argument of the plaintiff-respondents that the Will dated 30th October, 1971 made by Jangir Singh in favour of Gurdev Singh and his two brothers would not be ancestral to show that the property in the hands of Gurdev Singh was self-acquired property of Jangir Singh, testator. The argument of the defendant-petitioners was accepted which was to the effect that the property which Jangir Singh had Willed to Har Kaur (mother of Gurdev Singh) had got blended with the property which devolved on Gurdev Singh and, therefore, it must be recorded as a self-acquired property. These findings have been recorded in para 18 and 19 of the judgment, which reads as under :—

"18. I have considered the arguments and have gone through the entire law placed before me. Admittedly plaintiffs are sons of Gurdev Singh, admittedly Gurdev Singh got the suit property from his father by way of will. Plaintiffs have not proved on record any document to show that Jangir Singh got suit property from his father Gandhi by way of survivership. It is also admitted fact that Gurdev Singh never got suit property from his father Jangir Singh by way of survivership. Rather it was received by Gurdev Singh from Jangir Singh by way of testamentary succession. The best law available on this point is Udhishtar *versus* Ashok Kumar *(Supra)* reported is 1987(1) C.L.J.-653, wherein it was held by Hon'ble Apex Court of this Country that whenever, one gets property from his ancestor by way of succession, then such property never remains Hindu Undivided coparcenary property and becomes absolute property of such person. It is necessary that property must develove by way of survivership. In case same is to be alleged as coparcenary property. I would also like to mention here that there are some differences between succession in Hindus and succession in Jat Sikhs.

Before coming into force of Hindu Succession Act, Jat Sikhs were required to prove ancestral nature of the property and they were also required to trace part of common ancestor i.e. first consolidation, whereas Mitakshara law was applicable to Hindus and they were not required to prove back this property was of property. Even if, now Jat Sikhs are Governed by Hindu Law, still, it is duty of every Jat Sikh to trace back property at least to the time of coming into force of Hindu Succession Act and required to prove that a person holding property at the time of coming into force of the Act was common ancestor of the parties alleging and contesting the rights in the property. It is duty of the party alleging coparcenary nature of property and they should prove that person holding property at the time of coming into force of Hindu Succession Act got the same from his father by way of survivership. Especially this is must in Jat Sikhs, because Mitakashara Law became applicable to them only after coming into force Hindu Succession Act. There is lot of difference between property received by survivership and property received by way of testamentary succession. In case of survivership, deceased is presumed to be alive and he survivers (survives ?) through his share inspite of the fact that he is dead. So share in case of property received by survivership cannot be decided, unless and until actual partition is effected of the joint holding amongst coparcenors. Whereas in case of property received by testamentary succession shares are always defined. Deceased is never presumed to be owner of any share. In the instant case, shares of three sons of Jangir Singh have been defined, as is evident from revenue record placed on the file. Hence it can be presumed that in the instant case defendant No. 1 got the suit property by way of succession not by way of survivership. Hence it cannot be held to be coparcenary property.

(19) From entire above discussion, it can easily be concluded that plaintiffs have badly failed to establish that suit property was joint Hindu Family coparcenary property in the hands of defendant No. 1 and have failed to prove that they acquired right in the suit property by way of birth in suit property. Hence plaintiffs have no *locus standi* to file this suit. This issue stands decided against the plaintiffs and in favour of the defendants."

(12) The above extracted paras of the judgment of the trial Court would show that the issue with regard to the nature of the property was fully alive, agitated, contested and decided. The attempt now made is to amend the plaint by incorporating certain sentences in para 7 for the purposes of taking the property of Gandhi son of Khushala, who were their grandfather and great grandfather. Such an amendment is nothing else but ruse to adduce additional evidence because the plea with regard to the ancestral or coparcenary nature of the property had been set up in paras 3, 4 and 5 of the plaint by the plaintiff-respondents. The aforementioned sentences sought to be added are in fact in the nature of additional evidence and not setting up any new plea, which does not exist in paras 3, 4 and 5 of the plaint. Therefore, the amendment of such a nature has to be considered as *mala fide* and the application should have been rejected by the learned lower Appellate Court. In support of the aforementioned conclusion, reliance can be placed on para 18 of the judgment of the Hon'ble Supreme Court in the case of Punjab National Bank *(supra).* According to para 18 of the judgment, an amendment which is time barred or where it changes the nature of the suit or if it is *mala fide,* then such amendment cannot be allowed. Therefore, this petition deserves to be allowed.

(13) The argument of the plaintiff-respondents that the law of amendment is liberal, has not impressed me because there is no necessity to incorporate an amendment because the plea sought to be raised by way of amendment has already been set up in paras 3, 4 and 5 of the plaint. Therefore, the judgment of the Hon'ble Supreme Court in the case of Sampath Kumar *(supra),* on which reliance has been placed, has no applicability to the facts of the present case. The other argument that the case of the plaintiff-respondents cannot proceed without amendment is also liable to be rejected for the aforementioned reason and, therefore, I do not find any substance in the argument raised by the learned counsel for the plaintiff-respondents.

(14) For the reasons aforementioned, this petition succeeds. The order dated 3rd August, 1994, passed by the learned lower Appellate Court is set aside. The parties through their counsel are directed to appear before the learned lower Appellate Court on 20th June, 2006.

R.N.R.

8056/HC—Govt. Press, U.T., Chd.