(X) The directions of the Supreme Court in the All India Judges' case be strictly complied with within the time frame fixed by the Court ;

(XI) High Court Judges who have not been allotted government residential accommodation so far. be provided such accommodation on a priority basis.

As the administration would now make allotments in terms of this judgment, the interim stay granted is hereby vacated. All other connected matters are also directed to be disposed of in terms of this judgment.

S.C.K.

Before Hon'ble M. L. Koul, J.

BABRU S/O CHET RAM, R/O BALOUTI.—*Petitioner.*

versus

BASAKHA SINGH S/O CHET RAM, R/O BALOUTI BHOH AND OTHERS.—*Defendants.*

Regular Second Appeal No. 1448/79.

19th May, 1995.

Hindu Succession Act, 1986—*Abrogation of customary Succession—Succession governed by Hindu Succession Act—Joint Family property—Succession of such property.*

Held, that by virtue of section 4, the Punjab Agriculture Custom so far as it was applicable to the Hindus in the matters of succession, has been completely abrogated and now all the Hindus defined in section 2 of the Succession act are not governed by the rules of customary Law in the matters of Succession to the property.

(Para 8)

Further, held that in a mitakshara co-operenary interest of the deceased in the property shall devolve by survivor ship upon the surviving members of the co-parcenary and not in accordance with Hindu Succession Act.

(Para 8)

L. N. Verma. Advocate. *for the appellant.*

Yogesh Kumar Sharma, Advocate, *for the respondents.*

JUDGMENT

M. L. Koul, J.

(1) Appellant Babru (hereinafter referred to as defendant No. 1) is holding the ownership of 230 bighas and 19 biswas of land situate in Village Bhoj Mataur tehsil Naraingarh on the basis of a registered Will executed by his father Chet Ram on 16th June, 1970 who died on 18th December 1972.

(2) Against the said defendant No. 1 and his mother Muni Devi defendant No. 2 (widow of Chet Ram), a suit for possession was preferred by Basakha Singh and others (hereinafter referred to as the plaintiffs) in the Court of Senior Sub Judge, Ambala alleging therein that the property in question was ancestral and this property had devolved upon the father of defendant No. 1 from their common ancester Bhagwan Singh who happened to be the father of the deceased Chet Ram. Therefore, the plaintiffs along with the defendants were entitled to the said ancestral property as owners according to the custom prevalent between the parties and the said Chet Ram could not create an interest in favour of defendant No. 1 by way of a bequeath debaring the plaintiffs to get the property in question devolved upon them in favour of the defendants as per their shares by way of inheritance. The will was challenged being against the custom and, therefore, as the Will was deemed to be *null* and *void* against their interest, a suit for possession was filed before the trial Court. Subsequently, during the trial of the case, it was found that the land in question was not actually 230 bighas and 19 biswas, but it was 119 bighas and 1 biswa only and such a factual position of the property was not disputed by the parties. Hence a decree for possession as per shares was passed by the trial Court in favour of the plaintiffs against defendants No. 1 and 2. However, the suit of the plaintiff Nos. 2, 3 and 7 was dismissed on the ground that they had entered into a compromise in favour of the defendant No. 1 and had surrendered their interest in the property.

(3) On the trial of the case, it was found that the Will Ex. P.1 was executed by the testator in favour of the defendant No. 1 but it was held that the said Chet Ram being a Hindu male holder of the property, governed by Punjab Customary Law, was not free to dispose of his ancestral immovable property by Will and his reversionaries had a right to challenge the said bequeath, the same being against law. It was thus held that the Will was not binding upon the plaintiffs.

(4) There was no dispute with regard to the property being ancestral for no evidence was led by the defendants to show that some of the property involved was self-made by Chet Ram or the defendant Nos. 1 and 2. It was vehemently argued by the learned counsel for defendant No. 1 that the lands in question were so mixed up that it could not be ascertained as to which portions of the disputed land were ancestral and which were non-ancestral. Once the ancestral and non-ancestral portions of the land cannot be separated. they must be regarded as non-ancestral. In this regard, to strengthen his argument, reliance was laid on a Supreme Court judgment in *Mara and others* v. *Mst. Nikho alias Punjab Kaur and others* (1), wherein it has been held that "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."

(5) In the instant case, no evidence is available to show that defendants No. 1 and 2 have held some portions of the land which are non-ancestral in nature and the whole land in their possession has not devolved upon them by way of bequeath executed by Chet Ram father of defendant No. 1. Both the courts below have concurrently held that the land in question was ancestral and change in numbers by consolidation or otherwise does not mean that some of the portions of the land were non-ancestral which got mixed up with the ancestral property and, therefore, the whole land could be declared to be non-ancestral in nature. In view of the evidence on the record, the argument of learned counsel for defendant No. 1 does, in no manner, weigh with the Court, firstly for the fact that in the circumstances of the case, the above mentioned ruling of the apex Court has no bearing on the merits of the case and secondly, it is concurrently found that the subject matter in dispute is squarely found to be ancestral land and in no manner whatsoever, one can find that some of the portions of the land was non-ancestral and as such the whole land is to be deemed to be non-ancestral having regard to the concurrent finding of the courts below that it is ancestral in nature.

(6) The second argument of the learned counsel for the defendant No. 1 is that by virtue of Sections 2 and 4 of the Hindu Sucession

(1) A.I.R. 1964 S.C. 1821.

Act, Punjab Agriculture Custom, so far as it was applicable to the Hindus, is no longer in force so far as the matters of succession are concerned which are now governed by the provisions of the Hindu Succession Act. According to the learned counsel, the property in question has devolved upon the defendant No. 1 by execution of a bequeath by the last holder of the property namely Chet Ram. The said Chet Ram did not die as an intestate in respect of the property bequeathed by him as he had made a testamentary disposition capable of taking effect under law by virtue of which the property in question devolved upon the defendant No. 1 as an owner.

(7) No doubt Section 4 of the Hindu Succession Act does away with the rule of custom relating to the devolution of the property by succession and, therefore, after the Hindu Succession Act came into force, no Hindu can be subjected to be governed by the rules of customary law and the succession to the property held by a Hindu must be regulated by the provisions of the Hindu Sucession Act. In the present case, the succession has opened after the Act came into force and the parties with regard to succession are governed by the Hindu Succession Act, 1956 and as such the Will in question will be governed by the Succession Act but it is to be borne in mind as to whether the land in question for the purposes of succession is also covered by Section 6 of the Act as well. We have not to read Sections 4 and 6 of the Succession Act in isolation but same are to be read together as complimentary to each other.

(8) By virtue of Section 4, the Punjab Agriculture Custom so far as it was applicable to the Hindus in the matters of succession, has been completely abrogated and now all the Hindus defined in Section 2 of the Succession Act are not governed by the rules of customary law in the matters of succession to the property. The legal position, therefore, emerges that after the passing of the Succession Act, all the Hindus as defined in Section 2 of the Act are governed with regard to the matters of succession both by Hindu Law and the provisions of Hindu Succession Act, 1956 as well. In no manner. Hindu Succession Act has abolished the concept of Joint Hindu Family and the Joint Hindu Family Property. This Act, in no no manner, interferes with the special rights of those who are members of the mitakshara co-parcenary except in the manner and to the extent mentioned in Sections 6 and 30 of the Act. After coming into force of the Act, the Hindus who were previously governed by rules of customary law in matters of succession like other Hindus, form Joint Undivided Hindu Family including mitakshara co-parcenary and the sons, grand-sons and great-grand-sons of the

holders of the joint co-parcenary property, for the time being, acquire interest therein by birth. On a close reading of the Sections 6 and 30 of the Act, the mandate of the law under these two Sections emphatically appears to have envisaged that when any male Hindu who dies after the commencement of this Act, having at the time of his death, an interest in a mitakshara co-parcenary property, his interest in the property shall devolve by survivorship upon the surviving members of the co-parcenary and not in accordance with this Act. It indicates that any Hindu may dispose of by Will or other testamentary disposition, any property which solely belongs to him and is not ancestral in nature. Once the said property has devolved upon him from an ancestor, he could not, in any manner, dispose of that property by way of a testamentary disposition for his interest in the said ancestral property shall devolve by survivorship upon the surviving members of the co-parcenary and not in accordance with this Act. I feel fortified in my view by a Full Bench judgement of this Court in *Pritam Singh* v. *Assistant Controller, Estate Duty, Patiala* (2). A comprehensive exposition of the law on the subject has been laid down showing that although Section 4 of the Hindu Succession Act does away with the rule of custom so far as succession is concerned, but in no manner, empowers last holder of the ancestral property to create an interest in favour of any surviving member of the co-parcenary by testamentary disposition unless the property so bequeathed is self-created by a male Hindu or has fallen to his ownership irrespective of succession as a member of the Joint Hindu Family as laid down in Section 6 of the Succession Act. In the same manner in *Kaur Singh* v. *Jaggar Singh* (3), it has been held that a male proprietor governed by the Punjab Customary Law has absolute powers of disposal over his non-ancestral property but the ancestral property can only be disposed of for necessity or as an act of good management. In the case in hand, no such proposition of law was raised or entertained for consideration that the common ancestor deceased Chet Ram was holding some non-ancestral property which he bequeathed in favour of defendant No. 1 or the property so held by him being ancestral was disposed of out of necessity or for an act of good management. It is crystallised that the ancestral property is that property which is held by the common ancestor and comes down by descent to his heirs, and all other property is non-ancestral. There is a concurrent finding of both the

(2) 1976 P.L.R. 343.
(3) A.I.R. 1961 Pb. 489.

courts that the property in question is ancestral and some change in the fields numbers with regard to the property held by Chet Ram by jamabandi 68 and 69, found changed in jamabandi 87 and 88 does not, in any manner, show that some of the numbers were non-ancestral. It is concurrently held by both the courts below that the property was ancestral and, therefore, in no manner, it could devolve upon defendant No. 1 by way of a bequeath. As such the findings of the courts below that the property could not devolve upon the defendant No. 1 by a Will are upheld though for different reasons given above by this Court, the Will is held to be void *ab initio* and it, in no manner, affects the mode of succession with regard to the devolution of the property in question upon the plaintiffs. Another lame argument advanced by the learned counsel for defendant No. that the lady plaintiffs were not entitled to suit for possession in presence of the male heirs, is of no avail for the fact that the trial Court and the First Appellate Court have held that the land having originated from a common ancestor, would devolve upon the heirs as per the Hindu Law and the Succession Act as held above. Hence this argument does not carry any weight and the same is shelved as non-existent on the ground that a reversionary is competent to sue with regard to ancestral property which has devolved upon a co-percenary by way of a testamentary disposition of the last holder.

(9) Hence the appeal fails and the same is dismissed. However it has been found that the shares have not been properly fixed the trial Court in accordance with law, the learned counsel defendant No. 1 is at liberty to agitate this point before the Trial Executing Court who shall see that the decree is rectified and executed as per the shares in accordance with the law of succession governing the parties.

S.C.K.

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