

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

RSA No.6608 of 2016 (O&M)

Date of decision : 06.10.2018

Smt. Usha Malik and another

...Appellants

Versus

Virender Kumar Malik and others

...Respondents

CORAM: HON'BLE MR. JUSTICE ANIL KSHETARPAL

Present: Mr. M.L. Gupta, Advocate for the appellants.

ANIL KSHETARPAL, J. (ORAL)

Defendant Nos.3 and 4-appellants are in the Regular Second Appeal against the concurrent findings of fact arrived at by both the Courts below.

The limited dispute in the present case is whether Smt. Shanti Devi, validly adopted a daughter of a son of her husband from previous marriage in the year 1974. Hukam Chand Malik was initially married with Smt. Shanti (hereinafter to be referred as “first wife”) and four children were born namely Virender Kumar, R.P. Malik, Late Sh. M.P. Malik and Prem Saluja. It is alleged that Smt. Shanti (first wife) died and thereafter Hukam Chand Malik again married with another woman of the same name i.e. Shanti Devi (second wife) but no child was born.

Hukam Chand Malik is stated to have died on 12.09.1990. The plaintiff namely Virender Kumar Malik filed a suit for declaration claiming

that he is entitled to a share in the property in dispute i.e. Kothi No.147-E, Model Town, Hisar.

Originally the suit was filed only against impleading Usha Malik and Davender Malik, widow and son of late Sh. M.P. Malik. However, later on Manju Bharti daughter of Sh. M.P. Malik filed an application under Order 1 Rule 10 CPC and became party. Defendant Nos.3 and 4 i.e. widow and son of M.P. Malik has claimed the exclusive rights on the ground that it was given to late Sh. M.P. Malik by their father.

The main contest between the parties is with respect to the fact that whether Manju Bharti i.e. defendant No.5 is adopted daughter of Hukam Chand Malik and Shanti (second wife).

Both the Courts after appreciating the evidence have held that the case put up by defendant Nos.3 and 4-appellants is not proved on file. However learned trial Court upheld the adoption of Manju Bharti in the year 1974.

Learned First Appellate Court after re-appreciating the evidence found that the alleged adoption in the year 1974 is in violation of Section 11(ii) of the Hindu Adoptions and Maintenance Act, 1956 (hereinafter to be referred as “the Act of 1956”) as Hukam Chand Malik was having a daughter-Prem Saluja and, therefore, he or his wife were not entitled to adopt. Still further, the First Appellate Court has found that adoption by Shanti Devi (second wife) during the lifetime of her husband-Hukam Chand Malik was not permissible in absence of his consent.

The Court has further found that the property is not ancestral and, therefore, it would devolve upon all class-1 heir equally.

Learned counsel for the appellants submitted that since adoption is by a registered document, therefore, there is a presumption of valid adoption as per Section 16 of the Act of 1956. However, on being pointed out, learned counsel for the appellants admitted that on the day the alleged adoption is stated to have taken place, Hukam Chand Malik and Shanti Devi had a daughter. It may further be noted here that Manju Bharti is not the appellant before this Court. Learned First Appellate Court has ordered that all class-1 heirs would be entitled to 1/4th share in the property.

Learned counsel for the appellants further argued that the plaintiff has only filed a suit for declaration and partition of the property has not been sought. He submitted that in absence of further relief, the suit was not maintainable under Section 34 of the Specific Relief Act.

This Court has considered the submissions, however, find no substance in it. Since the title to the property was in dispute, the plaintiff have not chosen to file a suit seeking partition of the property. The suit for partition would be maintainable once dispute with regard to the title of the property is resolved. Proviso to Section 34 of the Specific Relief Act, 1963 cannot be invoked in such situation.

There is another aspect of the argument of the learned counsel for the appellants i.e. the relief of possession has not been sought. Every co-owner is deemed to be in possession of the property and the actual possession could not be decreed by the Court unless there is partition.

Learned counsel for the appellants further pointed out that learned trial Court had passed a decree for partition which has not been modified by the Appellate Court. The argument of the learned counsel for

the appellants is factually incorrect. The Appellate Court has modified the decree passed by the trial Court and it has been ordered as under:-

“29. Resultantly appeal is dismissed holding that in the suit property only plaintiff and defendant No.1 and defendant No.2 to the extent of 1/4th share each and defendants No.3, 4 and 5 jointly to the extent of remaining 1/4th share are entitled to inherit the suit property. The parties are left to bear their own costs. Decree sheet be prepared accordingly. Trial Court record alongwith copy of judgment be sent back. After due compliance, appeal file be consigned to record room.”

The judgment of the trial Court has merged into the judgment of the First Appellate Court and, therefore, there is no substance in the argument of the learned counsel for the appellants.

Hence, there is no ground to interfere with the concurrent findings of fact arrived at by both the Courts below.

Regular Second Appeal is dismissed.

All the pending miscellaneous applications, if any, are disposed of, in view of the abovesaid judgment.

06.10.2018

Pawan

**(ANIL KSHETARPAL)
JUDGE**

Whether speaking/reasoned:- Yes/No

Whether reportable:- Yes/No