

**RSA-216-1989 (O&M) AND
RSA-429-1989 (O&M)**

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

Date of decision : 30.05.2019

1.

RSA-216-1989 (O&M)

Amar Nath and others

... Appellants

Versus

Parkash Wati and others

... Respondents

2.

RSA-429-1989 (O&M)

Parkash Wati and others

... Appellants

Versus

Amar Nath and another

... Respondents

CORAM: HON'BLE MR. JUSTICE AMIT RAWAL

Present: Mr. Ashish Aggarwal, Senior Advocate with
Mr. Parunjeet Singh, Advocate and
Mr. Fateh Saini, Advocate
for the appellant in RSA-216-1989 and
for the respondent in RSA-429-1989.

Mr. S.N. Saini, Advocate
for respondent Nos.8 to 11 in RSA-216-1989.

AMIT RAWAL, J. (ORAL)

This order of mine shall dispose of two regular second appeals,
aforementioned, arising out of **Civil Suit No.500 CS of 1981** titled as
“Parkash Wati and others V/s Amar Nath and others” seeking following
relief:-

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"Suit for declaration that plaintiffs are the co-owners to the extent of 4/9 shares in ½ share of land measuring 102 kanals 6 marlas Khewat No.1; Khatauni No.1, Khasra Nos.11/16/2, 14/21/3, measuring (1 kanal 2 marlas), Khewat No.1, Khatauni No.2; Khasra Nos.9/23, 9/24, 9/25, 11/4 measuring (28 kanals); Khewat No.1 Khatauni No.3; Khasra Nos.11/5, 11/16, 22/1, 23/5 measuring (31 kanals 5 marlas); Khewat No.1 Khatauni No.4 Khasra No.225 measuring 17 kanals Khewat No.1, Khatauni No.5; Khasra Nos.9/21, 9/22, 9/23 min, 11/14/2, 11/15/1, 13/25/2, measuring (24 kanals 17 marlas); Khewat No.1; Khatauni No.6 Khasra no.13/24/1 measuring (7 kanals 13 marlas), Khewat no.1 Khatauni No.7; Khasra No.226 (measuring 1 kanal 3 marlas), Khewat No.1, Khatauni No.8; Khasra Nos.13/24/2, 13/25/1, 13/26 measuring (19 marlas); Khewat No.77, Khatauni No.99; Khasra Nos.14/21/2; measuring 1 kanal 5 marla); Khewat No.123; Khatauni No.162 Khasra Nos.14/21/4 measuring 4 kanals 10 marlas); Khewat No.137; Khatauni No.169; Khasra Nos.14/21/1 measuring 12 marlas) situated in village Arnauli, Tehsil Jagadhri, District Ambala recorded in jamabandi 1975-76 with all the rights in Shamlat-deh (Patti) and for joint possession."

It was alleged that Bishamber Dass son of Pt. Asa Ram, was owner to the extent ½ share in the land measuring 102 kanals 6 marals. On 22.08.1979, died leaving behind the parties as his legal heirs and successors-in-interest. The defendants are the children from the first wife i.e. Narati, who had also died and out of wedlock of Bishamber Dass and Narati, two sons, namely, Amar Nath and Agya Ram and three daughters, namely, Lila Wati, Purna Devi and Sunehri, were born. After demise of first wife, he married plaintiff No.1 and out of wedlock, three daughters i.e. plaintiff Nos.2 to 4, were born. The property was ancestral, therefore, had

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the share in the property.

The defendants contested the suit, but admitted the factum of ownership of Bishamber Dass and denied the plaintiffs to be second wife and the children. The plaintiffs had, thus, no title, right and interest in the property. The allegations of the Will propounded by the defendants were also an act of insinuation were also denied. In fact, Bishamber Dass, during the life-time, executed a Will dated 14.10.1977 (Ex.D1).

Since parties were at variance, trial Court framed following issues:-

- 1. Whether the plaintiffs are also legal heirs of the deceased Bishamber Dass? OPP*
- 2. Whether the plaintiffs have 4/9th share in the land owned by deceased Bishamber? OPP*
- 3. Whether Sh. Bishamber deceased executed valid sale deed dated on 14.10.77 in favour of the defendant? OPD*
- 4. Whether the plaintiffs have no locus standi to file the present suit? OPD*
- 5. Whether the property left behind by Sh. Bishamber deceased at the time of his death were ancestral, if so its effect, OPD*
- 6. Whether Sh. Om Parkash the attorney of the plaintiff is real person behind the suit, if so its effect, OPD*
- 7. Relief.*

Plaintiffs in support of their case examined five witnesses and brought on record Ex.P1 to Ex.P8 i.e. jamabandi for the year 1975 and mutation, copy of statements of various witnesses recorded in the mutation proceedings before the Collector, power of attorney. On the other hand, defendants examined five witnesses and closed evidence.

The trial Court, noticing evidence of PW2-Baij Nath and PW3-

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Shiv Ram, found that Parkash Wati was the wife of Bishamber Dass and rendered the finding on issue No.1, in favour of the plaintiffs and despite the fact that defendants have been able to prove the Will and declared the plaintiffs to be owner to the extent of 13/36th share, in the suit property.

The appellants-defendants preferred the appeal before the lower Appellate Court i.e. Appeal No.84 of 1983. The lower Appellate Court also affirmed the findings of the trial Court regarding authenticity and genuinity of the Will and found the plaintiffs to be the legal representatives of Bishamber Dass and modified the judgment and decree by conferring Parkash Wati to be owner in possession as co-sharer to the extent of 1/4th, in entire estate of the deceased. The other regular second appeal bearing RSA No.429 of 1989 has been filed by plaintiffs against findings of lower Appellate Court, on issue No.3, which was decided in favour of the defendants.

Mr. Ashish Aggarwal, learned Senior Counsel assisted by Mr. Parunjeet Singh, learned counsel appearing on behalf of the appellants submitted that judgments and decrees of the Courts below are not sustainable in the eyes of law, as, both PW-2 and PW-3 are not relatives and there is no compliance of the provisions of Section 50 of the Indian Evidence Act. The plaintiffs have not been able to prove the nature and character of the property as ancestral, as no excerpt or pedigree table has been placed on record except jamabandi for the year 1975, which reflected the ownership of Bishamber Dass. Perhaps, the claim can only be set up, if the property was from 3rd generation and they were 4th generation in lineage. The sisters of the appellants did not dispute Will and rather supported case

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of the appellants-defendants, being beneficiaries of the Will. Neither copy of electoral roll and birth certificate were placed on record nor examined village Chowkidar.

Mr. Som Nath Saini, learned counsel appearing on behalf of the respondents submitted that there is categoric admission, in the written statement, qua the nature and character of the property as ancestral, though in the replication, the plaintiffs denied the same. Decree of the trial Court regarding finding on issue No.3, viz-a-viz Will, merged into the lower Appellate Court, therefore, the appeal would be maintainable, even otherwise, can assail the findings as per the provisions of Order 41 Rule 33 of the Code of Civil Procedure.

It was next contended that the contents of the Will reveals that the testator had acknowledged the existence of the plaintiffs i.e. daughters from Parkash Wati. There is a compliance of Section 50 of the Indian Evidence Act as it is not necessary to examine any relative or otherwise, who had special means of knowledge of marriage, which has been proved through the testimony of PW3-Shiv Ram. Agya Ram-DW-5, admitted that his father had given the house to Parkash Wati.

I have heard learned counsel for the parties, appraised the paper book as well as records of the Courts below and of the view that the following Substantial Question of Law arises for determination:

- 1. Whether the judgments and decrees of the Courts below are suffering from illegality and perversity.*

The contents of the Will Ex.D1, read out in detailed, reveals the existence of the daughters. Shiv Ram, though admitted in cross-

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examination that he was not relative of Bishamber Dass, but the tenor and mode of examination-in-chief and cross-examination reveals that Bishambar Dass had performed the marriage with Parkash Wati, even had gone to the marriage as well as had been given the ration half-half to both the wives. The Hindu Marriage Act in 1956, prohibits the second marriage, during the lifetime of first wife, but the marriage was forty years old i.e. somewhere in the year 1936, therefore, there was no bar to performing the *Kreva* as Parkash Wati, was married, as per the testimony of Shiv Charan. All these factors do not leave any doubt in the mind of the Courts below that Bishambar Dass, had married to Parkash Wati and out of wedlock, plaintiff Nos.2 to 4 were born.

Now the question which revolves is that once the contents of the Will are accepted by the plaintiffs and there is no challenge to the findings, on issue No.3, by filing any appeal under Section 96 of the Code of Civil Procedure and even RSA would not be maintainable, but the in absence of any evidence, in rebuttal, the plea under Order 41 Rule 33 of CPC cannot be taken. The plaintiffs cannot be permitted to blow hot and cold. Both the Courts below, in my view, abdicated in not noticing this fact, though the defendants, in the written statement, accepted the property to be coparcenary, which was not denied in replication. Onus shifted upon the plaintiffs to establish the nature and character of the property as ancestral. No pedigree table or excerpt had seen the light of the day to prove that Bishamber Dass inherited interest from his grandfather and therefore, the plaintiffs had right by birth. Bishamber Dass died in 1979. Even if, it is ancestral property, the daughters before the amendment in Section 6 of the

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Hindu Succession Act i.e. in the month of September 2005, did not have the right in the ancestral property. Dehors of the fact that the lower Appellate Court has only granted 1/4th right to the widow, but ignored to notice that the finding qua validity of Will is final, thus, judgments and decrees, under challenge, are not sustainable in the eyes of law. The Substantial Question of law as framed above, is answered in favour of the appellants-defendants and against the respondents-plaintiffs.

Resultantly, RSA No.216 of 1989 is allowed and RSA No.429 of 1989 is dismissed being not maintainable.

30.05.2019
Yogesh Sharma

**(AMIT RAWAL)
JUDGE**

Whether speaking/reasoned

Yes/ No

Whether Reportable

Yes/ No