

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

**RSA No.5791 of 2017 (O&M)
Date of decision:20.05.2019**

Vinod Bansal @ Vinod Kumar ... Appellant

Vs.

Sahil and another ... Respondent

CORAM: HON'BLE MR. JUSTICE AMIT RAWAL

Present:- Mr. B.S.Sohal, Advocate
for the appellant.

AMIT RAWAL J. (Oral)

C.M.No.15320-C of 2017

For the reasons stated in the application which is duly supported by an affidavit, delay of 60 days in re-filing the appeal is condoned.

C.M. stands allowed.

RSA No.5791 of 2017 (O&M)

The appellant-defendant no.1 is in regular second appeal against the judgment and decree of the Lower Appellate Court whereby suit for declaration seeking ownership to the extent of 9/56 share in the land in dispute with consequential relief of mandatory injunction seeking restraint from alienation, dismissed by the trial Court, has been decreed.

The plaintiff claimed that he was owner to the extent of aforementioned share in the suit property being adopted child of Shiv

Kumar, brother of defendants with a direction to hand over the possession as the defendants were the real uncles of plaintiff. The plaintiff was minor at that time and could not look after the property inherited by him, thus, defendants undertook to look after the same till he attained the majority and denied the share and as well as possession.

The defendants contested the suit and asserted that plaintiff was duly adopted by defendant no.1 after the death of his father and re-marriage of mother and thus, the plaintiff had all the rights as per Hindu Customs being adopted child of defendant no.1.

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

- “1. Whether the plaintiff is entitled a decree for declaration as prayed for?OPP*
- 2. If issue no.1 is proved, then whether the plaintiff is entitled to the relief of mandatory injunction as well as permanent injunction, as prayed for on the grounds mentioned in the plaint?OPP*
- 3. Whether the suit is not maintainable in the present form?OPD*
- 4. Whether the plaintiff has not come to the Court with clean hands and suppressed the true and material facts from the Court?OPD*
- 5. Whether the plaintiff is estopped from filing the present suit by his own act and conduct?OPD*

6. *Whether the plaintiff has no cause of action to file and maintain the present suit?OPD*

7. *Relief.*

The plaintiff in support of the averments examined four witnesses and brought on record the various documents. On the other hand, defendant examined himself as DW1 and closed the evidence.

The trial Court noticing the fact that at the time of death of Shiv Kumar, plaintiff was minor but there were two other co-sharers of this property besides plaintiff's father i.e. defendants no.1 and 2 held that the suit was not maintainable and the remedy was to seek partition and denied the relief of mandatory injunction. The Lower Appellate Court reversed the findings.

Learned counsel appearing on behalf of the appellant submitted that factum of adoption has been proved on record much less during the life time of defendant no.1, was not maintainable as he was adopted on 20.08.2002 vide adoption deed Mark A. The Lower Appellate Court has ignored the aforementioned fact on the premise that defendant no.1 had already a son, thus, in such situation, there was no bar for adoption. The remedy in such circumstances was to seek partition.

I am afraid the aforementioned arguments are not sustainable as until and unless the share of the appellant being non-adopted or adopted by Shiv Kumar is not determined, the suit for partition was not maintainable. The adoption deed was also invalid. In such circumstances, the respondent-plaintiff being son of Shiv Kumar, had the ownership right alongwith his

uncle i.e. brother of his father and after determination of the share, claimed the partition.

Thus, findings of Lower Appellate Court being the last Court of fact and law cannot be said to be suffering from illegality and perversity. No substantial question of law arises for adjudication of the present appeal.

Resultantly, the regular second appeal is dismissed.

May 20, 2019

savita

Whether Speaking/Reasoned

Whether Reportable

(AMIT RAWAL)

JUDGE

Yes/No

Yes/No