

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

RSA No.926 of 2017 (O&M)

Date of decision:25.3.2019

Saroj Bala and others

... Appellants

Vs.

Amarjit Singh and another

... Respondents

CORAM: HON'BLE MR. JUSTICE AMIT RAWAL

Present:- Mr. Arun Abrol, Advocate
for the appellants.

AMIT RAWAL J. (Oral)

The present Regular Second Appeal is directed against the concurrent finding of fact and law whereby suit of the appellant-plaintiffs for declaration to be owners in possession over 1/4th share out of land measuring 123 kanals 6 marlas with consequential relief of permanent injunction restraining defendant no.1 from alienating the suit property; with further decree of declaration of sanction of mutation no.4030 in favour of Probod Raj to the extent of 1/5th share from the estate of Bishamber Dass to be illegal, null and void, has been dismissed by the trial Court and affirmed in appeal.

The aforementioned relief was claimed on the premise that Bishamber Dass son of Bholu died in the year 2007 leaving behind plaintiffs no.1 and 2, daughters, plaintiff no.3 son and plaintiff no.4 wife. He was having another son namely Probod Raj, who was missing for the

last 30 years and presumed to be dead. However, on demise of Bishamber Dass, the mutation was sanctioned in the name of all the legal representatives including Probod Raj alleging themselves to be legal heirs.

The aforementioned suit was contested by defendant no.1 and 16 (arrayed later on). An application under Order 1 Rule 10 read with Section 151 of Code of Civil Procedure was submitted by defendant no.1 by saying that plaintiffs erroneously not arrayed him, though he was Probod Raj. On contest by the plaintiffs, the application was allowed by the trial Court, vide order dated 18.10.2012.

The plaintiffs in support of the averments examined five witnesses including PW3-Kalasho Devi, mother whereas defendants examined two witnesses and brought on record aadhar card, birth certificate, school certificate and copy of order dated 28.12.2010, Ex.D4.

Mr. Arun Abrol, learned counsel appearing on behalf of the appellants submitted that the Courts below have not taken into consideration the testimony of PW3-Kalasho Devi as she did not identify defendant no.1 for claiming himself to be legal representative as he was not heard for the last 30 years. The Courts below could not have rejected the suit on the ground of not claiming the declaration as per the provisions of Section 108 of Indian Evidence Act. The documents of the defendants proved that they were not based upon the true facts. PW4-Devi Bhagat also stated in the same lines as of PW3-Kalasho Devi. All these facts, if had been looked into cumulatively, the suit could not have been dismissed.

I am afraid the aforementioned arguments are not sustainable, for, the suit seeking declaration qua ownership to the extent of 1/4th share out of the total land, in the absence of relief under Section 108 of Indian Evidence Act, was not maintainable. The plaintiffs were required to seek the declaration under the aforementioned provisions of Act and after that could have claimed the aforementioned relief.

It is a matter of record that Bishamber Dass died in the year 2007 and mutation of inheritance in favour of the daughters and living son and mother besides Probod Raj was sanctioned, though the present suit was filed in the year 2009. The plaintiffs did not examine any other relative in support of the statement of Kalasho Devi. There are cases where the mother has gone to the extent of un-recognition.

If at all, there was some truth in averments, nothing prevented the plaintiffs to examine any relative as per the provisions of Section 50 of Indian Evidence Act.

On the contrary, the defendants had placed on record school certificate to establish that plaintiff erroneously branded himself as Probod Raj. If at all, Probod Raj was not heard for the last 30 years, mutation on demise of Bishamber Dass could not have been entered in 2007.

I cannot remain oblivious of the fact that order of trial Court impleading Probod Raj was also not assailed in appeal before the Lower Appellate Court which is mandatory requirement of law as per the provisions of Order 43 Rule 1-A of Code of Civil Procedure.

Keeping in view the aforementioned observations, the findings of fact and law, in my view, cannot be said to be suffering from illegality and perversity.

Resultantly, the regular second appeal is dismissed.

March 25, 2019

savita

(AMIT RAWAL)
JUDGE

Whether Speaking/Reasoned	Yes/No
Whether Reportable	Yes/No