

IN THE HIGH COURT OF HIMACHAL PRADESH, SHIMLA

RSA No. 432 of 1994.

Judgement reserved on : 13.4.2006.

Date of decision : 25.4.2006

Mohinder Lal and others

...Appellants.

Versus

Tule Ram and others

...Respondents.

Coram

The Hon'ble Mr. Justice : **Surjit Singh, Judge.**

Whether approved for reporting? Yes

For the appellants: Mr.Bhupender Gupta, Senior Advocate with
Mr. Janesh Gupta, Advocate.

For respondents : Ms. Sweta Julka, vice Mr. Ankush Dass
Sood, Advocate, for respondents No.
1 & 3 to 5.

Surjit Singh, Judge.

The present appeal was admitted on the following substantial
questions of law:-

- “1. Whether the findings of the courts of facts (both courts)
holding the suit to be within limitation is vitiated by non-
consideration of the oral as also the documentary
evidence produced by the parties?

2. Whether the document purporting to be partition deed-cum-Will being unregistered, is inadmissible in evidence and both the courts below have given a wrong approach thereto by acting upon it and consequently holding the plaintiff to be the exclusive owner in possession of the property in dispute?

2. Facts relevant for determining the aforesaid questions, may be noticed. Respondent Tule Ram, hereinafter called plaintiff, filed a suit for declaration that he was owner in possession of 3 Bighas 10 Biswas of land, bearing Khasra No. 901, situate in Phati Rot-I, Kothi Bhallan, Tehsil and District Kullu, as the said land had been given to him by his father through a Will-cum-partition deed, executed in the year 1964. By way of further relief, he prayed for issuance of permanent prohibitory injunction, restraining his brothers Rishi Ram, Chune Ram, Baman Dev and two sons (Thakar Datt and Ram Krishan) of pre-deceased brother Uttam Chand and the present appellants, who are the legal heirs of his sister Chander Mani, who all were impleaded as defendants, from causing any interference in his possession. Facts constituting the cause of action, as per plaint, are thus. Hari Chand, father of the plaintiff and defendants Rishi Ram, Chune Ram, Baman Dev and grand-father of defendants Thakar Datt and Ram Krishan and the father of Chander Mani, predecessor of the present appellants, who were impleaded as defendants No. 6 to 9, owned the above described land and certain other property. He executed a Will in respect of the suit property in favour of the plaintiff and defendant Baman Dev, a brother of the plaintiff, on 13.11.1964 and put them in possession thereof. On the same day he executed three more Wills, whereby rest of the property, owned and possessed by Hari Chand, was bequeathed to his remaining three sons,

namely Rishi Ram, Chune Ram and Uttam Chand, father of defendants Thakar Datt and Ram Krishan. No part of his estate was bequeathed by Hari Chand in favour of his daughter. Another son of Hari Chand, named Tikam Ram had been unheard of for the last twenty years and so nothing was given to that son under the Will-cum-partition papers. Hari Chand died some-time in the year 1965 and on his death the suit land was mutated in favour of all the sons and the daughter of Hari Chand in accordance with the law of inheritance. The plaintiff could not lay claim to the suit property at the time of the attestation of mutation, because the Will that had been executed by late Hari Chand, was not available with him as it had been retained by Hari Chand. After sometime a partition between the plaintiff and Baman Dev, his brother, took place and in that partition suit land fell to plaintiff's share. Thus, he became exclusive owner in possession. In the month of Chaitra, 1988 when the plaintiff was reading some **Puran** books of his father on the first day of the new **Samvat**, he found the four documents executed by Hari Chand in the form of Will-cum-partition deed in the said **Puran** book. In June 1988 defendant No. 1 Rishi Ram threatened to interfere in the possession of the plaintiff. So the suit was filed.

3. Present appellants, who are the legal heirs of Chander Mani, a daughter of Hari Chand, filed a separate written statement in which they pleaded that the suit was barred by time, the suit property was jointly owned and possessed by the plaintiff and the defendants and without getting the property partitioned, the plaintiff was not entitled to the relief of injunction. The plaintiff was alleged to have not approached the Court with clean hands. It was also alleged that without making the entire immovable property of late Hari Chand as the subject matter of the suit, the plaintiff

was not entitled to the relief claimed by him. On merits, it was denied that any Will was executed by Hari Chand in favour of his sons, as alleged in the plaint.

4. Defendant No. 1 Rishi Ram filed a separate written statement. He though admitted that the Will, as alleged by the plaintiff, was written and it had been signed by Hari Chand, yet he pleaded that when its contents were read out and explained to him, he expressed certain doubts about the equitable distribution of his estate among his sons and required the plaintiff to tear off the Will executed in his favour and the plaintiff gave him an impression that it had been destroyed. It was alleged that the document had never been acted upon. It was denied that the plaintiff was in possession of the suit land. On the contrary, it was alleged that initially the suit land was though a **Ropa** (a piece of land where there is enough water and paddy is grown), later on, during the life time of Hari Chand himself, it was washed away in floods and long after the death of Hari Chand, the defendant reclaimed it and also constructed water channel and spent more than Rs.15,000/- for effecting development over it. Therefore, he claimed that he was the owner in possession of the suit land. He also alleged that the suit was barred by time.

5. The learned trial Court framed various issues on the pleadings of the parties and thereafter tried the suit. At the end of the trial it was held that Hari Chand had willed away the suit property to the plaintiff and put him in possession thereof during his life time and thus the plaintiff was the exclusive owner of the suit property under the Will. Other issues, except the one based on the alternative plea of adverse possession of the plaintiff,

were also found in favour of the plaintiff and subsequently the suit was decreed.

6. Two appeals were filed against the decree of the trial Court, one by respondent Rishi Ram, who was impleaded as defendant No. 1 in the main suit, and the second one by the present appellants. The first appellate Court has dismissed both the appeals. Rishi Ram, defendant has not filed further appeal. However, the present appellants have filed the regular second appeal. The appeal, as already stated above, was admitted on two specific substantial questions of law, formulated by this Court. The questions have been reproduced hereinabove.

7. As regards the first question, admittedly, Hari Chand had died in the year 1965. The suit was filed in July, 1988. Soon after the death of Hari Chand, mutation was attested in respect of his estate in accordance with the rules of inheritance. No claim was made at the time of attestation of mutation, by the plaintiff, that there was any Will in his favour. Plaintiff Tule Ram, while in the witness box, admitted in no uncertain terms that he was present when the mutation of inheritance of the estate of his father was attested and that as per that order of mutation, the estate of his deceased father was mutated in favour of himself, all his brothers and even his sister Chander Mani, the predecessor of the present appellants. He explained that because the Will had been lost and so he could not lay claim to the suit property on the basis of the Will at the time of the attestation of the mutation. However, the fact remains that the plaintiff, as per own averments, was aware even at the time of the attestation of the mutation that there had been a Will in his favour.

8. Learned counsel for the appellants / defendants urged that the limitation for filing a suit for declaration, based on a Will, is three years per Article 113 of the Limitation Act and that the present suit having been filed long after the expiry of three years period from the date of death of Hari Chand, the alleged testator, was clearly barred by time. In my considered view, a suit claiming title to the property of a deceased person or a portion of such property on the strength of a Will, is in the nature of a suit for a legacy against an executor and the limitation for such suit is twelve years, per Article 106 of the Limitation Act, 1963. No doubt, in a suit of the present type where the defendants are co-heirs with the plaintiff, they are not strictly covered by the term “executor”, but they are executors de son tort, as held by a Division Bench of Lahore High Court in **Gurubakhsh Singh vs. Bhagwan Singh**, 1924 Lahore 561. Limitation for a suit for a legacy is twelve years from the date when the legacy becomes deliverable. Section 337 of the Indian Succession Act, 1925 says that an executor is not bound to pay or deliver any legacy until the expiration of one year from the testator’s death. The testator in the present case died in the year 1965. Exact date of death is not known. The suit was filed in the year 1988. Limitation is to be counted from a day one year after the death of the testator. Thus, the limitation is to be counted from the year 1966. The suit was filed in the year 1988. Thus, the suit having been filed more than twelve years after the limitation began to run, was barred by time when filed.

9. As regards the second question formulated by this Court, though the document Ext. P-1, produced by the plaintiff, is given the nomenclature ‘Will’, yet a bare reading of this document leaves no doubt

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that through this document the predecessor of the parties gave the suit property by way of family partition to the plaintiff, defendant Baman Dev and their missing brother Tikam Ram, in the present. Therefore, the document required compulsory registration, the value of the property given thereby apparently being more than Rs.100/-. Thus, the document was inadmissible in evidence and the Courts below were not right in decreeing the plaintiff's claim on the strength of this document.

10. In view of the above stated position, the appeal is accepted and the judgment and decree of the trial Court, as affirmed by the learned District Judge, are set aside and the suit of the plaintiff / respondent Tule Ram is dismissed.

April 25, 2006 (BC)

**(Surjit Singh)
Judge**

