

# IN THE HIGH COURT OF HIMACHAL PRADESH, SHIMLA

**RSA No. 28 of 1995**

**Reserved on : April 17, 2006**

**Decided on : April 25, 2006.**

---

**Sarwan Kumar**

**.....Appellant.**

**VERSUS**

**Ashok Kumar**

**.....Respondent.**

---

***Coram***

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

***Whether approved for reporting?* Yes.**

**For the Appellant : Mr. G.D. Verma, Senior Advocate  
with Mr. Romesh Verma, Advocate.**

**For the Respondent : Mr. Dushyant Dadwal, Advocate.**

---

**Surjit Singh, Judge**

Appellant Sarwan Kumar, hereinafter called “defendant”, has preferred this appeal against the judgment and decree, dated 6.12.1994, of the Additional District Judge, whereby decree, dated 16.4.1993, passed by the trial Court, in favour of respondent-Ashok Kumar, herein after called “plaintiff”, in a suit for declaration and in the alternative for possession, instituted by him against the appellant-defendant, has been affirmed.

**2.** Respondent Ashok Kumar filed a suit for declaration that on the basis of a Will, dated 27.8.1987, executed in his favour by late Smt. Sita Devi he had acquired ownership of certain moveable and immoveable property, described in the plaint, forming part of the

---

***Whether the reporters of the local papers may be allowed to see the Judgment?***

...2...

estate of said Sita Devi and that the possession of the said property was also with him. He stated that Sita Devi was his father's real sister and that she had executed the Will in respect of her estate in his favour. He claimed that the possession of the suit property was with him. In the alternative it was stated that in case the Court found that the plaintiff was out of possession, in that situation a decree for possession be passed, in addition to the decree for declaration.

**3.** Suit was contested by the appellant-defendant. He denied that Sita Devi had executed any Will in favour of the plaintiff and alleged that in fact a Will had been executed in his favour by Sita Devi on 26.8.19987 and on the basis of that Will he had been in possession of the suit property as its owner. It was alleged that the plaintiff had no cause of action nor did he have any locus standie to file the suit. Maintainability of the suit was also challenged. Further, the plaintiff was alleged to be estopped to file the suit.

**4.** Trial Court framed various issues on the pleadings of the parties and then proceeded to try the suit. Ultimately, it was held that the Will set-up by the defendant-appellant was shrouded by suspicion and that the Will propounded by the plaintiff was duly and validly executed. Consequently, the suit was decreed and a decree declaring the plaintiff as owner of the suit land and also for its possession was passed in his favour. Defendant filed an appeal. Learned Additional District Judge has dismissed the appeal.

**5.** The grievance of the appellant-defendant is that the Will propounded by the plaintiff has not been duly proved and the trial court as also the first Appellate Court have misread and misconstrued

...3...

the evidence. It is alleged that the attestation is not in accordance with the provisions of Section 63 of the Indian Succession Act. Further, it is alleged that the Will is shrouded by suspicion. Also, it is alleged that the Will set-up by the appellant-defendant is a valid and lawfully executed one and its execution stands proved to the hilt. It is also the grievance of the appellant that all the legal heirs of Sita Devi having not been impleaded, the suit was bad for non-joinder of necessary parties and, hence, the decree is liable to be set aside.

**6.** The appeal was admitted on the following questions by this Court:

1. Whether there has been no compliance of provision of section-63 of the Indian Succession Act in regard to execution and proof of exhibit P-1?
2. Whether exhibit P-1, alleged Will is surrounded by suspicious circumstances and the same is rendered invalid?
3. Whether the appellant has proved exhibit DW-2/A and same is the only Will of the deceased Smt. Sita Devi?
4. Whether the suit filed by Respondent was incompetent in the absence of all the necessary parties and that the legal heirs of late Smt. Sita Devi who but for the will have succeeded the deceased being the legal heirs?

**7.** I have heard the learned counsel for the parties and gone through the record.

**8.** Learned counsel for the appellant-defendant urged that the father of the plaintiff had taken active part in the execution of the Will and that this circumstance made the execution of the Will highly doubtful. He further submitted that the Will was presented for registration within a week of the death of Sita Devi and this reflected unnatural conduct of the plaintiff, which too creates a very strong suspicion about the genuineness of the Will. Learned counsel also urged that recital in the Will that the testatrix had been looked after and maintained by the plaintiff was proved to be false, whereas the recital in the Will set-up by the appellant-defendant that the testatrix was maintained, served and looked after by the defendant was proved to be true and this circumstance not only rendered the Will set-up by the respondent-plaintiff doubtful, but also lent assurance that the Will set-up by the appellant-defendant was genuine.

**9.** Both the Courts below have dealt with the evidence led by the respondent-plaintiff in proof of the Will, Ex. P-1, set-up by him in sufficient detail and have come to a concurrent finding that the Will was executed by deceased Sita Devi and it was duly attested by two witnesses, namely PW-3 Piare Lal and PW-4 Chatra Ram. The Will was scribed by PW-2 Girdhari Lal, an Advocate practising at Palampur. The Advocate was called to the house of the testatrix through PW-5 Milap Chand, who is a son of a sister of the testatrix. I have been taken through the testimony of all these witnesses. Their does not seem to be any inconsistency, contradiction or discrepancy, worth noticing, in the testimony of these witnesses. No doubt, there are a few contradictions in the testimony of these witnesses, but they

do not pertain to the execution of the Will. Such contradictions are on the point as to who used to serve and look after the testatrix and who performed her last rites and rituals.

**10.** The argument put forth by the learned counsel for the appellant-defendant that Bidhi Chand actively participated in the execution of the Will is without merit. Firstly, the oral evidence led by the respondent-plaintiff suggests that the testatrix has sent for the scribe and the witnesses through her sister's son PW-5, Milap Chand, and, therefore, it cannot be said that respondent-plaintiff took active part in the execution of the Will, though he was present in the house of the testatrix on the relevant date; secondly, the mere presence of the father of the plaintiff at the house of the testatrix at the time of execution of the Will does not amount to active participation. A person is said to actively participate in the execution of a Will if he instructs the scribe with regard to the manner of disposition or connives with the scribe or the witnesses.

**11.** The second contention that the Will was presented for registration within a week of the death of the testatrix and that this itself is a suspicious circumstance, because it is indicative of the anxiety of the respondent-plaintiff, can also not be accepted, because firstly, there is no evidence on record in support of this contention and, secondly, even if it be assumed that the Will was presented for registration soon after the death of the testatrix, that would not be a suspicious circumstance nor unnatural conduct. A beneficiary under the Will would like to make the Will public at the earliest available opportunity after the death of the testator so that no adverse

inference is drawn about the validity of the Will on account of the late production.

**12.** As a matter of fact, the Will propounded by the plaintiff-respondent nowhere recites that he (the plaintiff) had been rendering services to the testatrix. The Will simply recites that the plaintiff is the son of a brother of the testatrix and because of this relationship and also on account of his living with her, she had developed special affection for him and so she wanted to bequeath her entire property to him. Therefore, the contention of the learned counsel that the Will contains a false recital about the rendering of service by the plaintiff also carries no weight.

**13.** Learned counsel for the appellant-defendant argued that the Will bears no mention of the earlier Will, i.e. Will dated 26.8.1987, which the testatrix executed in favour of the defendant, only a day before the alleged execution of the Will, Ex. P-1, set-up by the plaintiff and this by itself is a very string suspicious circumstance. In fact, the Will, dated 26.8.1987, set-up by the defendant, which is Ex. DW-2/A, does not appear to be a genuine one. According to the appellant-defendant, who appeared as DW-1, this Will was got scribed by Sita Devi from one Raj Kumar and it was attested by Basant Ram and Murli Ram. He stated that the testatrix had asked him to call Raju for scribing the Will. Raj Kumar, DW-2, stated that he had scribed the Will, Ex. DW-2/A, on the asking of Sita Devi and thereafter he read out and explained the contents to Sita Devi, who then put her signature and thereafter the Will was signed by Basant Ram and Murli. In cross-examination, he stated that he belonged to a

Schedule Caste while Sita Devi was *Brahmin* by caste. He has also admitted in the cross-examination that the defendant is his class-fellow. He has denied the suggestion that the Will was prepared after the death of Sita Devi and that too when it came to light that Sita Devi had executed a Will in favour of the respondent-plaintiff. Basant Ram, DW-4, stated that he and the other witnesses had attested the Will, after it was signed by Sita Devi in their presence and that they too signed in the presence of Sita Devi. Basant Ram further stated that he is on good terms with the defendant. Second witness Murli, DW-4, in his cross-examination, has admitted that for the last 8-10 years he is working as labourer for the defendant. The scribe, being a friend and class-fellow of the defendant, and one of the witnesses namely, Murli DW-4, being his servant, cannot be said to be disinterested witnesses.

**14.** There are certain contradictions in the statements of the scribe and the witnesses of the Will set-up by the defendant, which create reasonable doubt about the genuineness of the Will. Defendant Sarwan Kumar in his testimony as DW-1 stated that at the time of the execution of the Will, scribe sat on the bench, the testatrix on a cot while he himself sat on a mat and Murli, attesting witness, was doing work nearby. However, DW-2 Raj Kumar, the scribe, stated that he, Basanta and Murli sat on the bench, while Sita Devi and defendant Sarwan sat on a cot. DW-3 Basant Ram and DW-4 Murli stated that they, Raj Kumar, Murli and defendant Sarwan sat on a bench while Sita Devi sat on a cot.

**15.** The defendant and all his witnesses admitted that there is a *Panch* and a *Nambardar* in the village, but neither of them was called to attest the Will. Further all the witnesses of the defendant, including the defendant, have stated that it took only 15-20 minutes to write and attest the Will but they have given different timings when they were free after executing the Will. According to the defendant, who appeared as DW-1, the Will was written at 12 or 12.30 p.m., but DW-3 Basant Ram says that it was written around 2 p.m.

**16.** Again, DW-2 Raj Kumar, the scribe, says that one or two women were also there when the Will was scribed. Other witnesses say that only the scribe, the attesting witnesses, the testatrix and Sarwan Kumar were there.

**17.** Sarwan Kumar, in his cross-examination, admits that Piare Lal, Member *Gram Panchayat*, who has attested the Will, Ex. P-1, is his relative. He does not say that he has any enmity with him. He has not offered any explanation for not calling him to attest the Will set-up by him. Similarly, he has not attributed any motive to Piare Lal for deposing about the execution of Will Ex. P-1 set-up by the plaintiff.

**18.** It is not in dispute that Sita Devi was in sound disposing mind at the time of the execution of the Will set-up by the respondent-plaintiff. Execution of the Will is duly proved by the scribe and the attesting witnesses. Therefore, the concurrent finding of the two Courts below about the validity and the genuineness of the Will, Ex. P-1, set-up by the respondent-plaintiff, cannot be said to be the result of mis-appreciation or misconstruction of evidence.



...9...

**19.** Coming to the contention that the suit was bad for non-joinder of necessary parties, i.e. all the legal heirs of deceased Sita Devi, it may be pointed out that no such plea was raised by the appellant-defendant in the written statement, nor did he lead any evidence indicating that there was or were any legal heir(s) of deceased Sita Devi, in addition to the plaintiff and the defendant. Thus, the contention is unfounded.

**20.** As a sequel to the above discussion, the appeal is dismissed.

**April 25, 2006(sd)**

**( Surjit Singh )  
Judge.**