

IN THE HIGH COURT OF HIMACHAL PRADESH, SHIMLA

RSA No. 27 of 1995

Reserved on : April 12, 2006

Decided on : April 25, 2006

Smt. Mathi and another

.....Appellants.

VERSUS

Laiq Ram and another

.....Respondents.

Coram

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

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

**For the Appellants : Mr. G.D. Verma, Senior Advocate
with Mr. B.C. Verma, Advocate.**

For the Respondents : Mr. V.K. Verma, Advocate.

Surjit Singh, Judge

The present appeal is directed against the judgment and decree, dated 9.12.1994, of the learned District Judge, whereby decree of the trial Court, decreeing the suit filed by late Smt. Madhuri, now represented by her Legal Representatives, appellants herein, has been set aside and the suit dismissed.

2. Facts relevant for the disposal of the appeal may be noticed. Late Smt. Madhuri was the wife of one Shri Dhania. Dhania owned certain landed property, situated in two different villages of Theog Tehsil. Madhuri filed a suit in January, 1988 alleging that Dhania had died about 3-4 months back and on his death she had inherited the suit property, being his sole legal heir. She stated that

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

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they did not have any issue. It was alleged that the defendants, without any right, title or interest in the suit property, threatened to interfere in her possession and also attempted to forcibly oust her from the house of Dhanial. Therefore, she filed a suit for issuance of permanent prohibitory injunction restraining the respondents-defendants from causing any interference in her possession over the suit property, including the house of late Shri Dhanial.

3. Defendants-respondents contested the suit and claimed that Dhanial had executed a Will in their favour on 16.4.1984 and got the same registered with the Sub Registrar and that on the strength of that Will they were the owners of the entire property of Dhanial. They alleged that Dhanial was their father's real brother and that they had been maintaining him as also his wife plaintiff Madhuri as they did not have any issue of their own and that pleased with their services Dhanial executed a Will in their favour. It was also alleged that plaintiff Madhuri was earlier married to one Balial from whose loins she had a daughter and that after the death of Balial, plaintiff Madhuri and the said daughter inherited his (Balial's) estate. Plaintiff, in her replication, denied the execution of Will and further alleged that if the defendants succeeded in proving that there was any Will of Dhanial then the same was the result of fraud and misrepresentation of facts practiced upon Dhanial by the defendants. It was alleged that Dhanial had been sick for quite long a time and had lost his senses some 7-8 years prior to his death and did not understand what was good or bad for him.

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4. Learned trial Court framed the following issues, on the pleadings of the parties:

1. Whether the plaintiff is owner in possession of the suit land as alleged? OPP
2. Whether the plaintiff is entitled for the injunction as alleged? OPP
3. Whether deceased Dhania has executed a valid will in favour of the defendants. If so its effect? OPD
4. Whether the plaintiff is estopped from filing the suit as alleged? OPD
5. Relief.

5. On the conclusion of trial, the trial Court held that the plaintiff was owner in possession of the suit property, she having inherited the same, being the widow of deceased Dhania, and that the execution of the Will set-up by the defendants was shrouded by suspicious circumstances and it could not be said to have been validly executed. Consequently, the suit was decreed.

6. Defendants-respondents appealed against the decree of the trial Court to the Court of District Judge. The learned District Judge held that the Will set-up by the defendants was validly executed and was a genuine one and consequently dismissed the suit of the appellant-plaintiff.

7. Grievance of the plaintiffs-appellants is two fold. First, that the learned District Judge has reversed the well-reasoned finding of the trial Court without making even a reference to the reasoning

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given by the trial Court, leave alone recording sound reasons for dispelling the same and, secondly, the first Appellate Court has simply referred to the testimony of the witnesses examined by the defendants and then passed the impugned decree.

8. I have heard the learned counsel for the parties and perused the record.

9. Learned counsel representing the appellants has drawn the attention of the Court to the judgment of the learned District Judge and submitted that there is not even a passing reference to the reasoning recorded by the trial Court in support of its finding that the Will is not genuine and its execution is shrouded by suspicious circumstances. He urged that the course adopted by the learned District Judge was contrary to the law laid down by the Hon'ble Apex Court and various High Courts in a number of judgments, wherein it has been held that the first Appellate Court must record reasons for disagreeing with the findings and the reasoning of the trial Court. The precedents relied upon by the learned counsel are: ***T.D. Gopalan v. The Commissioner of Hindu Religious and Charitable Endowments, Madras, AIR 1972 Supreme Court 1716; Smt. Sawarni v. Smt. Inder Kaur and others, AIR 1996 Supreme Court 2823; Santosh Hazari Versus Purushottam Tiwari (Deceased) By LRs., (2001) 3 Supreme Court Cases 179; Sidheshwar Singh and others v. Bajrangi Singh and others, AIR 1984 Patna 287; and M/s. H.M. Doyal & Co. and others v. Ram Nath Chitkara and others, AIR 1986 Delhi 101.***

10. It is true that in the above cited judgments it is held that the First Appellate Court, which even though a Court of fact, has to counter the reasoning recorded by the trial Court for disagreeing with its findings. It is also true that in the present case the first Appellate Court has not specifically countered the reasoning of the trial Court while coming to a different conclusion. But, that alone cannot be a ground for acceptance of the present appeal. No doubt, this Court is not supposed to go into the question of fact, but in a situation like the present one, where the first Appellate Court has failed to discharge its duty of countering the reasoning of the trial Court, this Court, while exercising its power as Second Appellate Court, can look into and reappraise the entire evidence with a view to satisfying itself whether trial Court's reasoning justified its finding or whether the first Appellate Court was right in coming to a conclusion different from that of the trial Court.

11. Defendants examined the scribe and the two attesting witnesses of the Will, besides examining the Sub Registrar with whom the Will, Ex. DA, was got registered. One of the defendants, namely Liaq Ram also entered the witness box. Liaq Ram defendant, while appearing as DW-1, testified that deceased Dhania had been living with the defendants for the last 30 years and the defendants and their father looked after him. He also stated that even plaintiff Madhuri, who was the wife of Dhania, had been living with them and they had been maintaining and looking after her and were still prepared to maintain and look after her as per recitals in the Will. He also stated that Dhania executed a Will in favour of the defendants. He also stated

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that Dhania went to Theog to get the Will executed and that he accompanied him. He stated that the Will was got scribed from Shiv Singh, DW-2, and it was attested by Daulat Ram, DW-4, and Balia Ram, DW-5. DW-2, Shiv Singh, scribe, stated that he had written the Will, as per instructions of Dhania and that after writing the same he read out and explained its contents to Dhania, who after admitting the same to be correct put his thumb impression thereon, and thereafter it was signed by DW-4 Daulat Ram and DW-5 Balia, in the presence of Dhania. In the cross-examination, he stated that Dhania was personally known to him.

12. DW-4 Daulat Ram stated that the Will was got scribed by Dhania from DW-2, Shiv Singh, in his presence and that, after being scribed, the Will was read out and explained to Dhania, who thumb impressed it in his presence and that witness Balia was also present at that time. He stated that thereafter he and Balia attested the Will. Further, he stated that the Will was then presented to the Tehsildar (Sub Registrar) and that Tehsildar also read out and explained the contents of the Will to Dhania, who after admitting the same to be correct thumb impressed it and then it was registered by the Sub Registrar. He stated that Dhania possessed a sound disposing mind, though he was hard of hearing.

13. In the cross-examination, he admitted that he had sworn an affidavit Ex. PX. As per this affidavit, Ex. PX, which is dated 15.1.1988, Dhania had not executed any Will in favour of Liaq Ram and Rama Nand, respondents-defendants. It may be stated that the Will is dated 16.4.1984. When this affidavit was shown to Daulat

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Ram, DW-4, in the course of his cross-examination, in the trial Court, he stated that the Will, Ex. DA, had not been written in his presence but it was read out and explained to Dhania. The witness was re-examined by the first Appellate Court. Before the first Appellate Court, he stated that his statement in the trial Court that the Will had been got scribed in his presence was false. He also stated that he had signed the affidavit, Ex. PX, without going through its contents, though in the trial Court he specifically stated that he had signed the affidavit after going through its contents. The witness is literate and has remained *Pradhan* of the *Panchayat*. The witness has, per his own admission, made a false statement not only in the trial Court but also in the first Appellate Court. Therefore, no support can be derived from his testimony by the plaintiff in support of her claim that the Will is not validly executed.

14. Balia, DW-5, the second attesting witness of the Will, fully supported the case of the defendants. He stated that the Will was got scribed by Dhania from Shiv Singh, DW-2, in his presence and that after writing the Will, Shiv Singh read out and explained the contents to Dhania, who admitted the same to be correct and then thumb impressed it as a token of execution and thereafter it was signed by him and Daulat Ram and both of them signed it in the presence of Dhania.

15. DW-3 Bhagat Ram, Tehsildar, has proved the registration of the Will. He has stated that the Will was presented to him in his capacity as Sub Registrar at Theog and that he registered it and signed the endorsement. As per the endorsement, the Will was

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read out and explained to Dhania and he admitted the same to be correct and then thumb impressed it.

16. The Hon'ble Supreme Court in ***Pentakota Satyanarayana and others v. Pentakota Seetharatnam and others (AIR 2005 Supreme Court 4362)***, vide Para-24, has held that the signatures of the Registering Officer and identifying witnesses affixed to the endorsement of registration, are sufficient attestation of the Will. It has further been held that the endorsement of the Sub Registrar that the executant has acknowledged before him the execution of the Will also amounts to attestation.

17. There does not seem to be any serious discrepancy, contradiction or inconsistency in the testimony of the scribe, the two attesting witnesses and the Sub Registrar, who registered the Will. In fact, Sub Registrar was not cross-examined at all by the plaintiff. Thus, the execution of the Will stands proved. There is absolutely no evidence in support of plaintiff's alternative plea that the Will is the result of fraud, misrepresentation and undue influence.

18. The "suspicious circumstances" which, according to the trial Court, shrouded the execution of the Will are:

- a) Witnesses do not say that the testator signed the Will in their presence, after admitting the contents to be correct;
- b) DW-4, Daulat Ram, had sworn an affidavit, Ex. PX, that Dhania had not executed any Will in favour of the defendants;

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- c) Balia, DW-5, has admitted that Dhania had weak eye-sight and had remained sick for about two years before his death;
- d) testimony of Shiv Singh, the Scribe, regarding execution of the Will is stereotype;
- e) testimony of DW-1, Liaq Ram defendant, that Dhania was having a joint mess with the defendants and their father and is contradicted by DW-5 Balia; and
- f) defendants took active part in the execution of the Will.

19. As regards circumstance (a), a bare reading of the testimony of the scribe, DW-2, and the two attesting witnesses as also the endorsement recorded by the Sub Registrar on the Will, clearly show that the contents of the Will had been read out and explained to Dhania, the testator, twice; once, when the Will was scribed and it was executed by Dhania outside the Sub Registrar's Office and, second, time in the Office of the Sub Registrar, when it was presented for registration. The witnesses have categorically stated that both the times Dhania admitted the contents of the Will to be correct and then put his thumb impression by way of execution. Not only this, the scribe and the attesting witnesses have further stated that the Will was written, as per instructions of Dhania himself.

20. Coming to circumstance (b), Daulat Ram himself has testified, both in the trial Court as also in the first Appellate Court, that Dhania had executed the Will. In the first Appellate Court, he has gone to the extent of saying that he had signed the affidavit Ex. PX,

without going through its contents. In any case, Daulat Ram is proved to be a liar, because he has made self-contradictory statements with regard to the execution of the Will as also swearing of the affidavit, Ex. PX, and, therefore, on the basis of his testimony, the Will cannot be disbelieved. If an attesting witness of a Will or for that matter any other witness makes a false statement or turns hostile, that by itself is no ground for holding that the attestation is not proved or the same is doubtful. The Court, by referring to other evidence on record, can still return a finding that the document is duly attested.

21. As regards circumstance (c), it is true that Balia, DW-5, has stated that the testator had weak eye-sight, but he has no-where said that he did not possess a sound disposing mind. A weak eye-sighted person, for that matter even a blind person, is supposed to have a sound disposing mind, unless contrary is alleged and established. In the present case, Madhuri herself entered the witness box and she did not say that the deceased did not possess a sound disposing mind. As regards the testimony of Balia that Dhania had been sick for two years before his death, suffice it to say that this again is not a suspicious circumstance. The Will was executed in the year 1984 Dhania died in 1988. That means at the time of the execution of the Will he was not sick.

22. As regards circumstance (d), Shiv Singh, DW-2, scribe of the Will, is a licensed Petition Writer. He is supposed to be knowing as to what is expected of him when he is in the witness box to testify with regard to the execution of a Will, because he must have appeared in the courts several times to prove the documents scribed

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by him. In any case, whatever he has stated in his testimony is as per requirement of law and, therefore, his statement cannot be discarded, by being branded as stereotype.

23. Next suspicious circumstance [circumstance (e)] noticed by the trial Court is that DW-5 Balia contradicts DW-1 Liaq Ram that the testator had a joint mess with them and they used to cultivate his land even during his life time. This, in my view, is not a suspicious circumstance. At the most, this is a case of exaggeration by DW-1, Liaq Ram, to strengthen his case. This statement has nothing to do with the execution of the Will.

24. Last suspicious circumstance [circumstance (f)] noticed by the trial Court is the so-called active participation by Liaq Ram, DW-1, one of the beneficiaries, in the execution of the Will. Learned counsel, by drawing the attention of the Court to the testimony of DW-1, Liaq Ram, submitted that Liaq Ram paid the bus fare for the transportation of the witnesses and also defrayed the expenses of writing and registration of the Will. No doubt, Liaq Ram has made such a statement, but at the same time he has stated that he used to handle the cash of the testator and it was out of his (testator's) funds that he made the aforesaid payments.

25. Thus, none of the so-called suspicious circumstances noticed by the trial Court is, in fact, a suspicious circumstance making the execution of the Will doubtful.

26. As a result of the above discussion, appeal is dismissed.

April 25, 2006(sd)

**(Surjit Singh)
Judge.**