

IN THE HIGH COURT OF HIMACHAL PRADESH, SHIMLA

**RSA No. 25 of 1995.**

**Judgement reserved on : 5.4.2006.**

**Date of decision : 25.4.2006**

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**Smt. Giano Devi alias Giani Devi**

**...Appellant.**

**Versus**

**Sh. Anant Ram & Ors.**

**...Respondents.**

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***Coram***

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

Whether approved for reporting?<sup>1</sup> Yes

**For the appellant:** Mr. H.K.Bhardwaj, Advocate with Mr.  
H.K.Paul, Advocate.

**For respondents :** Mr. Lokesh Kumar, Advocate vice  
Mr. Shrawan Dogra, Advocate.

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**Surjit Singh, Judge.**

This is plaintiffs' regular second appeal against the judgment and decree of the first appellate Court, whereby their appeal, against the judgment and decree of the trial Court dismissing their suit for declaration

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

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and injunction, has been disallowed and the decree of the trial Court affirmed. The appeal was admitted on the following three questions:-

1. Whether exhibit DW-2/A fulfil the legal requirement or not?
2. Whether the ancestral property could have been bequeathed in toto in presence of widow and daughter (natural heirs) to the nephews or not?
3. What is the effect of principle of cognate or agnate? Whether daughter gets right of inheritance by birth, in ancestral property?

2. Facts relevant for the disposal of the appeal, may be noticed. Appellants / plaintiffs Satya Devi and Giano Devi filed a suit for declaration that they were owners in possession to the extent of 1/5<sup>th</sup> share of land, measuring 38 Bighas 6 Biswas, bearing Khasra Nos. 4, 8, 12, 18, 24, 31, 45, 55, 64, situate in village Nalog, Pargana Ajmerpur, Tehsil Ghumarwin, District Bilaspur, H.P., as they had inherited the same on the death of Pohlo, who was the husband of plaintiff Satya Devi and father of plaintiff Giano Devi. It was pleaded that defendants Anant Ram and Nand Lal, respondents No. 1 and 2 herein, had set up a Will, allegedly executed by Pohlo in their favour and were threatening to dispossess the plaintiffs / appellants from the suit land on the strength of the said Will. It was further alleged that Pohlo had never executed any Will and that if any Will executed by Pohlo was found to exist, the same was a result of fraud, undue influence and coercion exercised by the defendants / respondents on Pohlo. It was alleged that earlier the defendants / respondents had filed a suit claiming title to the suit property on the strength of the Will but that suit had been withdrawn without seeking leave of the Court to file a fresh one

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on the same cause of action and, therefore, they were estopped from taking the stand that there was a valid Will, executed by Pohlo in their favour.

3. The defendants / respondents contested the suit. They alleged that the suit was not maintainable as the mutation on the strength of the Will had already been attested in their favour. It was alleged that Pohlo had made a valid Will in their favour, because they had looked after and maintained him after plaintiff Satya Devi, his wife, left him to manage the property, which she inherited from her father. As regards plaintiff No. 2, it was alleged that she had been married off by Pohlo during his life time and that in fact she was the daughter of Satya from her previous husband and not from the loins of Pohlo. Plea of estoppel was also raised. Learned trial Court framed various issues and ultimately concluded that Pohlo had executed a valid Will in favour of the defendants / respondents and on the strength of that Will, they had succeeded to Pohlo's share in the suit property. Issues based on preliminary objections were found against the defendants / respondents. As regards the plaintiffs / appellants' plea that the defendants / respondents were estopped from setting up the plea because of the withdrawal of the earlier suit filed by them, the Court returned the finding that though a suit had been filed by the defendants / respondents, its withdrawal was of no consequence and did not estop them from raising the plea in defence that they were owners of the suit property on the strength of the Will. The plaintiffs / appellants went in appeal to the District Judge, but were unsuccessful.

4. During the course of arguments, learned counsel for the appellants did not make any submission with regard to questions No. 2 and 3, as reproduced hereinabove, and confined his arguments only to one of

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the formulated questions, i.e. question No. 1, though he did raise an additional point, viz. the defendants / respondents having withdrawn their earlier suit seeking declaration of their title to the suit property on the basis of the Will, were debarred from raising the said plea by way of defence, because of the bar contained in Order 23 Rule 1(4) of the Code of Civil Procedure.

5. As regards the question pertaining to the validity of the Will, both the Courts below have concurrently held, after discussing the evidence threadbare, that Pohlo had executed the Will in favour of the defendants / respondents. Admittedly, plaintiff / appellant Satya Devi had started living at her father's place after her father died and she inherited his property. The other plaintiff, namely Giano Devi, who is not the natural daughter of deceased Pohlo, she admittedly having born when her mother Satya Devi was the wife of another person, had also not been living with deceased Pohlo as she had been married off by Pohlo. Thus, Pohlo, who did not have any issue of his own, became totally dependent upon the defendants / respondents, who are his real brother's sons, for his maintenance and other services. It has come in the evidence that Pohlo had been having joint residence with the father of the defendants / respondents. It has also come in evidence that last rites and rituals of Pohlo were performed by the defendants / respondents. The Will Ext. DW-2/A is duly proved by the scribe DW-3 J.R. Sharma, Advocate and DW-2 Roop Singh, one of the marginal witnesses. The will is duly registered with the Sub-Registrar of Documents. As held by the Hon'ble Supreme Court in **Pentakota Satyanarayana and others vs. Pentakota Seetharatnam and others,**

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(AIR 2005 SC 4362), vide para 24, endorsement of registration also constitutes attestation of the Will.

6. The plaintiffs / appellants tried to show, during the course of the trial, that Pohlo did not possess a sound disposing mind and, therefore, he was incapable of making Will. They examined one of the brothers of Pohlo, namely PW-2 Banshi Ram, who stated that Pohlo was not in good state of health and had turned mad about two years before his death. The testimony of the witness cannot be believed for a number of reasons. Firstly, no such plea has been taken by the plaintiffs / appellants in the plaint; secondly, plaintiff / appellant Satya Devi, while in the witness box as PW-1, herself did not say that Pohlo had gone mad or did not possess sound disposing mind or was not in a good state of health. Further, no suggestions were put to defendant Nand Lal, who appeared as DW-1, or the scribe of the Will or the attesting witness of the Will that Pohlo was not in a right frame of mind or was not in good physical health when the Will was executed.

7. It was urged by the learned counsel for the plaintiffs / appellants that Pohlo used to execute his writings by putting his signatures but the Will is thumb-impressed. This alleged suspicious circumstance is explained in the Will itself. It is got recorded in the Will itself by the testator that on account of weak eye-sight, he is unable to put his signatures and so he has authenticated the Will by putting his thumb impression.

8. Learned counsel then argued that the defendants / respondents had actively participated in the execution of the Will and this circumstance remained unexplained. A reading of the evidence shows that one of the defendants / respondents accompanied the testator to the office

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of the scribe, who happens to be an Advocate, in connection with the execution of the Will. This, in my considered view, does not amount to participation, much less active participation in the execution of the Will. The beneficiary can be said to take a leading or active role in the execution of the Will, if he instructs the scribe with regard to the manner of the disposition or does anything for procuring the execution and the registration of the Will. When the testator was living with the defendants / respondents and was being looked after and maintained by them, it was but natural that he would have asked one of them to accompany him to Ghumarwin, a Sub-divisional headquarter, for the purpose of execution of the Will. Thus, this is not a suspicious circumstance.

9. In view of the above stated position, the finding of the two Courts below that the Will is valid and genuine, calls for no interference.

10. The second point, raised by the learned counsel for the plaintiffs / appellants, has no sound legal basis. Order 23 Rule 1 (4) of the Code of Civil Procedure, bars fresh suit on the same cause of action, where the earlier suit is withdrawn without leave of the Court. The defendants / respondents, who had withdrawn their earlier suit, did not file any fresh suit. Provision of Order 23 Rule 1 (4) or for that matter any other provision of Order 23, does not bar taking of a plea as a ground of defence, which constitutes the cause of action in the suit filed by the plaintiff earlier and which had been withdrawn without leave of the Court, to file a fresh suit on the same cause of action. This apart, the suit instituted by the respondents / defendants had been withdrawn, because during the pendency of that suit mutation based on the Will, had been attested in their favour and they felt satisfied as regards their claim to the suit property by

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the order of mutation. The evidence on record shows that initially the mutation of the estate of Pohlo had been attested in favour of the plaintiffs / appellants. The defendants / respondents challenged that order of mutation by filing appeal before the superior Revenue Officer and simultaneously filed the suit in the Civil Court. During the pendency of the suit their appeal against the order of mutation was accepted and because of the acceptance of that appeal, mutation attested in favour of the plaintiffs / appellants was set aside and fresh mutation, based on the Will of Pohlo, was attested in favour of the defendants / respondents. It was because of this development during the pendency of the suit, instituted by the defendants / respondents, that that suit was withdrawn.

11. As a result of the above stated position, appeal is dismissed.

**April 25, 2006 (BC)**

**( Surjit Singh )  
Judge**