

IN THE HIGH COURT OF HIMACHAL PRADESH, SHIMLA

RSA No.174 of 1998

Reserved on : March 12, 2007.

Decided on: March 30, 2007

Jagdish Chand

.....Appellant.

VERSUS

Smt. Kala Devi

.....Respondent.

Coram

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

Whether approved for reporting?

For the Appellant : Mr. Surinder Sharma, Advocate.

For the respondent : Mr. Subhash Sharma, Advocate.

Surjit Singh, Judge

The present appeal is directed against the decree, dated 23.1.1998, of the first Appellate Court, whereby the judgment and decree of the trial Court dismissing the suit of the respondent-plaintiff has been set aside and the suit of the respondent-plaintiff decreed and it has been declared that the respondent-plaintiff is the owner of the suit property.

2. Facts relevant for the decision of the appeal may be summarized thus. Respondent-plaintiff filed a suit for declaration that she had inherited the estate of her husband Nokhu Ram on his death, which took place on 6.12.1990, being his sole legal heir, as he had no son or daughter or any other Class-1 heir and that the Will set-up by the appellant-defendant whereby half of the suit property had allegedly been bequeathed to him by late Nokhu Ram was invalid. It was alleged that Nokhu Ram had no Class-1 heir except

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

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the respondent-plaintiff and, therefore, on his death she had inherited his entire property. It was further alleged that Nokhu Ram had never executed any Will but the appellant-defendant set-up a Will dated 29.10.1990 and claimed that it had been executed by Nokhu Ram, bequeathing his property, in equal shares, to him and the respondent-plaintiff. Nokhu Ram, it was alleged, did not possess a sound disposing mind nor could he speak at the time when the Will was allegedly executed by him, because he had been suffering from cancer of lungs for the last two years and, as such, the question of his having executed any Will could not arise.

3. Appellant-defendant contested the suit and alleged that Nokhu Ram voluntarily executed a Will and that before executing the said Will he had convened a gathering of some persons (named in the written statement) and in that gathering he declared in the presence of the respondent-plaintiff that he wanted to make a Will in respect of his property giving half of it to the respondent-plaintiff and the other half to the appellant-defendant, because the latter had been serving him and had also undertaken to pay his debts and that a few days thereafter he had gone to Sundernagar and got the Will scribed from a Petition Writer in the presence of two witnesses and then executed it and thereafter the witnesses attested it. He further stated that the Will was presented for registration to the Sub Registrar, who read out the contents thereof to Nokhu Ram in the presence of the identifier (of the testator) as also the attesting witnesses and Nokhu Ram, after admitting the contents of the Will to be correct, thumb impressed the same in the presence of the Sub Registrar also.

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4. Some preliminary objections were also raised, which it is not necessary to notice, because the findings of the two Courts below, pertaining to the issues based on such objections, are not in dispute.

5. Trial Court held that the Will set-up by the appellant-defendant was genuine and consequently dismissed the suit. Respondent-plaintiff went in appeal to the Court of District Judge. Appeal has been accepted with the finding that the execution of the Will is shrouded by suspicious circumstances, which have not been explained by the appellant-defendant. Consequently, the suit of the respondent-plaintiff has been decreed and decree declaring her to be owner of the suit property, on account of her having inherited it from her husband, has been passed in her favour and against the appellant-defendant.

6. Appellant-defendant felt aggrieved by the judgment and decree of the first Appellate Court and filed the present appeal in this Court, which was admitted on the following substantial questions of law:

1. Whether the impugned judgment and decree is vitiated for mis-construction and mis-construing the provisions of law more especially Section 63 of the Indian Succession Act vis-a-vis the statements of DWs 1,2 and 4?
2. Whether the impugned judgment and decree can legally be sustained for non-consideration of the statement of DW-3 being totally a dis-interested witness identifying the testator before the Sub Registrar at the time of registration of the Will Ex.DA and also deposing about the perfect mental and physical state of health of the testator?

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3. Whether Will Ex. DA in the facts and circumstances of the case can legally be held to have not been duly executed or cannot be acted upon particularly when the same is a registered document before the Sub Registrar, thus dispelling all the suspicious circumstances?
4. Whether in law minor contradictions in the statements of the witnesses connected with the preparation, execution and registration of the Will can be made basis for non-acceptance of the legal execution and genuineness of the Will?

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

8. It may be stated at the very outset that the first Appellate Court has not taken into account the entire evidence on record while reversing the well reasoned finding of the trial Court and reaching the conclusion that the execution of the Will is shrouded by suspicious circumstances. It has not even noticed very material evidence adduced by the appellant-defendant.

9. Appellant-defendant examined a witness, named Ganga Ram DW-4. The witness stated that he was the *Purohit* of deceased Nokhu Ram and that once in the month of Kartik on 4th Parvishte, 1990, he was called to his house by Nokhu Ram and at that time Sukh Ram, Tota Ram and respondent-plaintiff Kala Devi were also there. He further testified that appellant-defendant Jagdish Chand, who is the nephew of deceased Nokhu, was also present and in the presence of all these persons Nokhu said that he wanted to make a Will in respect of his property in favour of appellant-defendant Jagdish Chand and his wife respondent-plaintiff Kala Devi, in equal

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shares. Respondent-plaintiff Kala Devi agreed to this wish of Nokhu. No doubt, in the cross-examination a suggestion was put to this witness that Nokhu made no mention of his desire to make a Will on the aforesaid date, but he replied to this suggestion by saying that Kala plaintiff, who was present in the Court at that time, be asked whether he expressed desire to make the Will or not, meaning thereby that he not only denied the suggestion but challenged the respondent-plaintiff to deny the fact. Appellant-defendant also testified this fact in his deposition as DW-1. Kala Devi entered the witness-box as PW-1 after DW-4 Ganga Ram and DW-1 Jagdish Chand (appellant-defendant) had been examined. She did not challenge, even impliedly, the testimony of Ganga Ram and DW-1 Jagdish Chand with respect to the aforesaid fact. The testimony of DW-4 Ganga Ram and DW-1 Jagdish Chand proves beyond any pale of doubt, that Nokhu had expressed his intention to make Will in respect of his estate in favour of the appellant-defendant and the respondent-plaintiff, in equal shares, in the presence of respondent-plaintiff Kala Devi and she even assented to his desire. The first Appellate Court has completely ignored this fact.

10. Again, the appellant-defendant examined a witness, named PW-3 Shri J.P. Sharma, Advocate, practicing at Sundernagar, who testified that Nokhu had approached him on 29.10.1990, around 3 p.m., for identifying him to the Sub Registrar, Sundernagar, in connection with the registration of his Will and that on his request he accompanied him to the Office of the Sub Registrar and identified him to the Sub Registrar and put his signature on the Will. The first Appellate Court has observed that in the Will one Shri B.K. Pathak,

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Advocate, is named as identifier at the time of the execution of the Will but he had not been examined. Shri J.P. Sharma, Advocate, is also named as identifier not only in the Will but also before the Sub Registrar and his signatures appear both on the Will as also below the endorsement regarding registration as identifier. In the endorsement of the Sub Registrar also Shri J.P. Sharma, Advocate, is named as identifier of the testator. There is no reason to disbelieve the testimony of PW-3 Shri J.P. Sharma, Advocate, or the endorsement made by the Sub Registrar on the Will. This evidence has also not been considered, not even taken note of, by the first Appellate Court, though, a finding has been returned that the testator had not been identified and possibility of someone else having been produced before the Sub Registrar cannot be ruled out. Had the first Appellate Court cared to go through the evidence with the expected degree of thoroughness, it would not have returned the aforesaid finding.

11. As a matter of fact, it is made out from the evidence of the respondent-plaintiff herself that Nokhu was present at Sundernagar on the day of the execution of the Will. The story put forward by the respondent-plaintiff is that on the relevant date she had gone to her parents' place to fetch someone to help her in mowing the grass, leaving behind her husband's sister Santi to take care of him and that in her absence appellant-defendant took Nokhu to Sundernagar on the pretext of getting him treated and that when she returned around 5 in the evening she found Nokhu was not there and about an hour thereafter Nokhu was brought on his back by the appellant-defendant and when she noticed his thumb smeared with

ink and enquired about the same, appellant-defendant told her that Nokhu had executed a Will, bequeathing his property in equal shares, to her and himself (appellant-defendant). She examined Santi as PW-2 to seek corroboration. Santi stated that on the relevant date Kala had gone to her parents' place to assist them in mowing grass, leaving her at her house to take care of Nokhu and that in her absence Jagdish Chand, appellant-defendant, came and carried Nokhu on his back. Respondent-plaintiff also examined another witness, namely PW-3 Bardu, who stated that on the relevant day Jagdish Chand brought Nokhu on his back and for some time they took rest in the open space in front of his shop at Sundernagar. The testimony of these three witnesses proves the fact that on the date and at the time of execution of the Will Nokhu was at Sundernagar. This fact has also been overlooked by the first Appellate Court.

12. However, the story that Nokhu was taken away in the absence of respondent-plaintiff Kala does not appear to be correct. Kala Devi herself states that she had gone to her parents' place to bring some one to assist her in mowing grass growing in her own fields. PW Santi, however, says that Kala had gone to her parents' place to assist them in mowing the grass from their land. Again, Kala says that she left her place at 9 in the morning and it was in her absence that Jagdish Chand, appellant-defendant, took her husband to Sundernagar. But, PW-3 Bardu says that Jagdish, carrying Nokhu on his back, reached Sundernagar in front of his shop at 8 or 9 a.m., meaning thereby that the story of the respondent-plaintiff that Nokhu

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had been taken to Sundernagar, after she left for her parents' place at 9 a.m. is not true.

13. The suspicious circumstances noticed by the first Appellate Court which, according to it, make the execution of the Will suspicious are (a) Nokhu did not possess the physical and the mental capacity to execute the Will, (b) attesting witnesses hail from villages, which are at a distance of about 15 kms from the village of the testator and there are contradictions in their testimony as to when and where they were approached by Nokhu Ram to attest the execution of the Will, (c) Nokhu Ram used to authenticate the documents by putting his signature but the Will is thumb impressed, and (d) Nokhu had not been identified before the scribe.

14. As regards circumstance (a), the first Appellate Court has observed that Nokhu had been suffering from cancer for the last about 2½ years and about one year prior to his death (Nokhu died about a month after the execution of the Will) his speech had been affected and manifestly he was not in sound disposing mind to execute the Will or to understand the effect of the disposition. The evidence on record does not support this finding of the first Appellate Court. No doubt, Kala, in her examination-in-chief as PW-1, stated that Nokhu had been rendered incapable of speaking about 2½ years before his death, but in the cross-examination she stated that he fell ill only a year before his death. Not only this, in reply to another question on behalf of the appellant-defendant, she stated that when Nokhu was brought back by Jagdish with his (Nokhu's) thumb smeared with ink, she asked Nokhu what document he had executed but he kept quiet. Now, if he was unable to speak and that too for

about 2½ years, as testified by her, how could she have expected a reply from him to her question as to why his thumb was ink-smerged. PW-2 Santi stated that Nokhu had been unable to speak for about a year before his death and his mental capacity had also been affected.

15. To the witnesses of the defendant, including the defendant, however, suggestions were thrown in the cross-examination that Nokhu had been unable to speak for about two months before his death. Reference in this behalf may be made to the cross-examination part of the testimony of DW-1 Jagdish Chand, appellant-defendant, and DW-2 Sant Ram, one of the attesting witnesses of the Will. The contradiction in the testimony of the respondent-plaintiff and her witness Santi and the suggestions put to DW-1 Jagdish Chand and DW-2 Sant Ram, with regard to duration for which Nokhu Ram was unable to speak before his death, makes it clear that the story about his having been rendered speechless, on account of illness, is cooked-up. Appellant-defendant led evidence that Nokhu was able to speak and was in his senses right up to the date of his death. One of the witnesses of the appellant-defendant, namely PW-4 Ganga Ram, stated that on the fourth day of the month of Kartik, 1990, Nokhu had expressed his desire in the presence of respondent-plaintiff and Sukh Ram, Tota Ram and himself to Will away his property in equal shares to the appellant-defendant and respondent-plaintiff. The Will is dated 29.10.1990. The date corresponds to the 7th day of Kartik. As already noticed, Ganga Ram's testimony about his having been called by Nokhu Ram, and expressing his desire to make the will in presence of two other

persons, named Sukh Ram and Tota Ram, has not been challenged. A suggestion was put to him that Nokhu did not say anything about his intention to execute the Will. No suggestion was put to the witness that in fact Nokhu was unable to speak and, hence, the question of his having expressed the intention of executing the Will did not arise.

16. In the light of the above evidence, first Appellate Court's finding that Nokhu Ram was unable to speak for about one year before his death and, therefore, manifestly he was not having sound disposing mind, cannot be upheld.

17. Minor contradictions in the statements of the attesting witnesses as to who went to call them, from where and on which date, are of little consequence in the face of the evidence and the circumstances, discussed hereinabove, and also the evidence regarding the execution of the Will, which is going to be discussed in the later part of the judgment.

18. It has also been observed by the first Appellate Court that Sant Ram witness is brother-in-law of appellant Jagdish Chand and the other witness is resident of a village 15 kms. away from the village of the testator. Now, when Ganga Ram's testimony proves that only three-four days before the execution of the Will Nokhu had expressed his intention to this effect in presence of other two persons and also the respondent-plaintiff, relationship of one of the attesting witnesses with appellant-defendant or the fact that the other attesting witness hails from a distant village becomes immaterial.

19. It has further been observed by the first Appellate Court that the Will is thumb marked, whereas Nokhu used to sign the

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documents, which he intended to authenticate/execute. It is the admitted case of both the parties that Nokhu Ram had been suffering from cancer of lungs for about a year before his death. The sickness is supposed to have made him physically so weak that he might not have been in a position to hold the pen in his fingers with the grip requisite to write his name or even to move his hand to write his signature. Admittedly, Nokhu Ram was illiterate. The documents, which are signed by him, including the sale deed, Ex. PW-4/A, show that even before he fell sick he was unable to write his name in free flow. Sale deed, Ex. PW-4/A, executed in November, 1987, which bears the signature of Nokhu, suggests that he signed his name with great difficulty. After having suffered from cancer of lungs for one year, perhaps he found it impossible to sign his name and so instead of authenticating the Will by signing, he thumb impressed it.

20. Another circumstance noticed by the first Appellate Court is that appellant Jagdish Chand took active and prominent part in the execution of the Will. This circumstance would not have weighed with the first Appellate Court had it taken note of the fact that only 3-4 days before the execution of the Will Nokhu Ram had expressed his intention of the disposition of his property in the manner mentioned in the Will, to Ganga Ram, his own wife respondent-plaintiff Kala and two other persons named by Ganga Ram.

21. As regards the evidence about the execution of the Will, DW-2 Sant Ram testified that Nokhu Ram got the Will scribed from a Petition Writer, who after writing the same read out and explained its contents to Nokhu Ram who thereafter put his thumb impression.

Though, the witness did not say that thereafter he put his signature on the Will as an attesting witness, he did say that he put his signature in the presence of Nokhu Ram and scribe and he nowhere said that he signed the Will before it was thumb impressed by Nokhu Ram. Jagdish Chand DW-1 very categorically stated that first Nokhu put his thumb impression and thereafter Chaudhary Ram and Sant Ram witnesses attested it.

22. In any case, DW-3 Shri J.P. Sharma, Advocate, stated that he knew Nokhu Ram personally and that on his asking he identified him before the Sub Registrar and also put his signature below the endorsement of registration as identifier in the presence of the Sub Registrar. The Will is registered and bears the endorsement of the Sub Registrar to the effect that he had read out the Will, word by word, and had also explained its contents to the testator, who had been identified by Shri J.P. Sharma, Advocate, and that the testator, who was in full senses, admitted that the document had been scribed at his instance and was executed by him. The Hon'ble Supreme Court in *Pentakosta Satyanarayana and others v. Pentakota Seetharatnam and others*, AIR 2005 Supreme Court 4362, has held that the signatures of the Registering Officer and of the identifying witnesses affixed to the registration endorsement are sufficient attestation within the meaning of the Indian Succession Act. It has further been held that the endorsement of the Sub Registrar that the executant has acknowledged before him the execution, amounts to attestation.

23. As a sequel to the above discussion, it is held that the execution of the Will propounded by the appellant-defendant stands

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established beyond any shadow of doubt. All the substantial questions of law, on which this appeal was admitted, are, therefore, answered in favour of the appellant-defendant and against the respondent-plaintiff and it is held that deceased Nokhu Ram had lawfully and validly executed the Will in favour of the appellant-defendant Jagdish Chand and respondent-plaintiff Kala Devi. Consequently, the appeal is accepted. Judgment and decree of the first Appellate Court are set aside and those of the trial Court restored.

March 30, 2007_(sd)

(Surjit Singh), J.