

IN THE HIGH COURT OF HIMACHAL PRADESH
SHIMLA.

RSA No. 115 of 1996

Date of Decision : December 29, 2007

Deepeshwar Singh

...Appellant

Versus:

Tulsi Devi and others

...Respondents.

Coram:

The Hon'ble Mr. Justice Sanjay Karol, Judge.

*Whether approved for reporting?*¹ Yes

For the appellant : Mr. Rajesh Mandhotra, Advocate.

For the respondents : Mr. Bhupinder Gupta, Sr. Advocate
with Mr. Neeraj Gupta, Advocate.

Sanjay Karol, J. (Oral)

The present appeal arises out of the judgment and decree dated 19.10.1995 passed by the Additional District Judge, Kullu, Distt. Kullu, H.P. in Civil Appeal No. 5 of 1995 titled as Deepeshwar Singh v. Tulsi Devi and others dismissing the appellant's appeal and upholding the judgment and decree dated 26.11.1994 passed by the Senior Sub Judge, Lahaul Spiti District at Kullu exercising the powers of Sub Judge Ist Class, Kullu.

¹ Whether reporters of Local Papers may be allowed to see the judgment?

For the purpose of convenience, the appellant herein is referred to as 'the defendant' and the respondents herein are referred to as 'the plaintiffs'.

As per the case of the plaintiffs, their predecessor-in-interest Shri Saran Dass was owning and possessing various properties in Villages Teel, Karwahadhar and other villages of Tehsil Banjar, District Kullu, H.P. Along with his family i.e. the plaintiff was ordinarily residing in village Teel but was also owning and possessing a house in village Karwahadhar which is also the defendant's village. His live stock had died due to lightening therefore, on 3rd of June, 1986, till about 11.00 P.M. Shri Saran Dass along with his family members had performed 'pooja' (hawan) at his house in village Teel and thereafter on 4th of June, 1986 to purchase bullocks he left for village Bachhut, which is quite far off and in an opposite direction from villages Teel and Karwahadhar. On 11th of June, 1986, the plaintiffs learnt about his death and his body having been cremated by the police. The last rites of the deceased were performed by the plaintiffs. As his sole surviving legal heirs, the plaintiffs owned and possessed the properties of Shri Saran Dass which are the subject-matter of the suit.

On the strength of the Will dated 4.6.1986 registered before the Sub Registrar on 10.4.1990 purportedly executed by Shri Saran Dass in favour of the defendant, he started interfering with the plaintiffs' possession. Consequently, the plaintiffs filed

Civil Suit No. 76 of 1990 titled as Tulsi Devi and others vs. Deepeshwar before the Sub Judge Ist Class, Kullu seeking declaration to the effect that the plaintiffs being legal heirs of deceased Shri Saran Dass were owning and possessing the properties as such and that the defendant had got no right, title or interest in the same. A declaration was also sought to the effect that the Will dated 4th of June, 1986 being forged, fictitious and surrounded with suspicious circumstances was not binding on the plaintiffs. A consequential relief of injunction was also sought against the defendant.

It was specifically alleged that the Will was forged, fictitious and surrounded by suspicious circumstances. The relations between the parties were not cordial since long and, therefore, there was no reason for Shri Saran Dass to have executed the Will in favour of the defendant, totally excluding the legal heirs out of the estate. Prior litigation being Civil Appeal No.39/83 titled as Saran Dass v. Puran Chand & others was pending in the Court of learned District Judge, Mandi in which defendant's father was arrayed as a respondent. In the said case, after the death of Shri Saran Dass, the learned District Judge had carried out spot inspection on 15th June, 1986 which fact was in the knowledge of the defendant and no steps were taken by him to substitute himself as a legal representative of Shri Saran Dass whereas the plaintiffs were impleaded as the legal representatives. The defendant was employed as a Clerk in the office of an Advocate and had managed things in his favour.

The defendant resisted the suit on the ground that Shri Saran Dass had two brothers Paras Ram and Jiwan Ram. He being the son of Paras Ram was the nephew of the deceased who had full faith in him and used to narrate good and bad events of his life. On 3rd of June, 1986, Shri Saran Dass had stayed with him in his house at Karwahadhar and had informed him that he had called Jeet Ram to accompany him to Banjar (Tehsil office) to execute the Will of his estate. However, in the morning of 4th June, 1986, the defendant's brother Chander Singh informed Shri Saran Dass that there was a message from his wife Tulsi Devi (plaintiff) that some people from the village were going to purchase Bullocks, therefore, he should accompany them. Shri Saran Dass accordingly changed his mind of going to Banjar and expressed his desire of executing the Will in the village itself and accordingly requested Shri Teja Singh, Pradhan, Gram Panchayat, Bahu, who happened to be there to scribe the same and also requested S/Shri Nure Ram and Jeet Ram to witness the same. As Shri Saran Dass had no male issue, the Will was executed in his favour out of love and affection and also for clearing the loans and getting his two un-married daughters married and performing his last rites.

Considering the pleadings of the parties, the trial Court framed the following issues:-

- 1) Whether the plaintiffs are owners in possession of the land in suit? OPP
- 2) Whether the plaintiffs are entitled to the relief of permanent prohibitory injunction? OPP

- 3) Whether the deceased Shri Saran Dass executed a valid Will in favour of the defendant as alleged? OPD
- 4) Whether the plaintiffs are estopped from filing the present suit by their acts and conduct? OPD
- 5) Whether the defendant is entitled to compensatory cash? OPD
- 6) Whether the suit in the present form is not maintainable? OPD
- 6A) Whether the defendant is estopped from claiming any right on the basis of alleged Will? OPP
- 7) Relief.

In support of its case, the parties examined their respective witnesses (3 witnesses of the plaintiffs and 5 witnesses of the defendant). The trial Court decreed the plaintiffs suit in terms of its decree dated 26.11.1994 and decided issues No. 1, 2 & 6A in favour of the plaintiffs holding that they are the owners in possession of the suit land and that the Will propounded by the defendant was not the genuine Will of Shri Saran Dass and in any case was shrouded with suspicious circumstance.

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

- 1) Whether the lower Appellate Court has mis-read the oral evidence?
- 2) Whether the lower Appellate Court has mis-read the documentary evidence?
- 3) Whether the will in dispute has been duly proved having been executed in accordance with law?

The defendant assailed the same by filing Civil Appeal No. 5 of 1995 which was also dismissed vide impugned judgment

and decree dated 19.10.1995 passed by the Additional District Judge, Kullu, H. P. Thus, there is concurrent finding of fact which has now been assailed by the appellant.

Learned counsel for the appellant has assailed the impugned judgment on the ground that the findings of the Court below are erroneous for the reason that in the absence of a male heir it was quite natural for the deceased Shri Saran Dass to have executed a Will in favour of the defendant, for the purposes of clearing the loans, getting his two un-married daughters married and performing his last rites. It was not a case where the legal heirs have been totally excluded out of the estate as 4 bighas of land was bequeathed in favour of the plaintiff No.1 Tusli Devi, wife of Shri Saran Dass. The execution of the Will duly stands proved through the evidence of the defendant's witnesses whose versions are consistent, cogent and reliable.

Learned counsel for the respondents has supported the judgments for the reasons set out therein.

Plaintiffs have examined Smt. Durga Devi (PW-1), Shri Dhani (PW-2) and Shri Khub Ram (PW-3). From the statements of these witnesses, it is clear that the relations between the parties were certainly not cordial and there was civil litigation pending between Saran Dass and Paras Ram (father of the defendant) in which he was arrayed as a proforma respondent and in the said litigation the defendant had not taken any steps for getting himself impleaded as legal representative of Shri Saran Dass. The deceased Shri Saran Dass was owning and possessing houses

and properties at various places. On 3rd of June, 1986, upto 11.00 P.M. Shri Saran Dass had performed pooja along with the plaintiffs in his house in village Teel and in the morning of 4th June, 1986 for the purpose of purchasing bullocks he had left for village Bachhut which is a far off place and in opposite directions both from villages Teel and Karwahadhar. Last rites of the deceased were performed by the plaintiffs alone and as his surviving legal heirs they were owning and possessing the suit property.

From the testimony of the defendant's witnesses; S/Shri Deepeshwar Singh (DW-1), Teja Singh (DW-2), Nure Ram (DW-3), Jeet Ram (DW-4) & Ram Lal (DW-5) what emerges is that on the asking of the deceased the Will was scribed by DW-2 and witnessed by DW-3 & DW-4. The pendency of the civil litigation and the presence of the father of the defendant at the time of spot visit by the learned District Judge is not disputed. The fact that the defendant was present and had taken active part in preparation of the Will in question is clearly borne out from the statements of the defendant's witnesses. The defendant has admitted that the deceased was living with the plaintiffs and not with him. It has not been proved that the defendant was looking after Shri Saran Dass. In addition to the defendant, there were other male descendants from the family of his brother of deceased Shri Saran Dass.

In a case titled as *H. Venkatachala Lyengar v. B. N. Thimmajamma and others* (1959 Supreme Court 443), the Apex Court has held as under:-

“Apart from the suspicious circumstances above referred to in some cases the Wills propounded disclose another infirmity. Propounders themselves take a prominent part in the execution of the Wills which confer on them substantial benefits. If it is shown that the propounder has taken a prominent part in execution of the Will and has received substantial benefit under it, that itself is generally treated as a suspicious circumstance attending the execution of the Will and the propounder is required to remove the said suspicion by clear and satisfactory evidence.”

What emerges from the material on record is that the execution of the Will Ext.D1 dated 4.6.1986 is shrouded with suspicious circumstances and does not appear to be the genuine Will of Shri Saran Dass. Even as per the defendant's evidence, he took active part in the preparation and execution of the Will. The same was propounded by him as a beneficiary of the same. A perusal of the Will would show that all the legal heirs have been excluded from the Will and only a limited right of life long interest has been given to plaintiff No.1, wife of deceased Shri Saran Dass and that too for a small portion of 4 bighas of land. The suit land is more than 30 bighas. That the relations between the parties were not cordial and there was pending litigation between the parties duly stand proved on record. The Will is conspicuously

silent about the same. It is not the case of the defendant nor is it so recorded in the Will that the deceased was residing with the defendant or being looked after by him. It has also not been established by the defendant that he was having a special relationship with the deceased. Therefore, the recital in the Will that the Will is executed out of love and affection is obviously false and incorrect in contrary to the attending circumstances of the family. Bare perusal of Ext.D1 itself raises suspicion with regard to the execution of the Will by the deceased. The findings of the first Appellate Court are recorded herein with approval:-

"Its opening line have been written with close space whereas the remaining lines in both the pages are having wider space. It clearly shows that the Will was not actually got scribed by the testator in his presence but it was scribed behind his back and in this regard obtaining of his signatures on a blank paper in advance cannot be ruled out, as the Will having a detailed subject matter was written in two pages and to cover the signatures of the testator it was written in two types of spaces. To my mind the above circumstances clearly goes to show that the Will Ext.D1 is shrouded by suspicious circumstances and cannot be said to be a Will executed at the instance of late Shri Saran Dass."

The fact that the Will was executed by Shri Saran Dass on 4th June, 1986 at village Karwahadhar is doubtful also for the reason that the plaintiffs have proved the presence of deceased Shri Saran Dass at his village Teel on 3.6.1986 where

he along with his family members was performing 'Pooja' till about 11.00 P.M. and in the morning of 4th June, 1986 had left to buy the bullocks in a totally opposite direction when on 10.6.1986 he was found dead. Therefore, the defendant's evidence that the deceased Shri Saran Dass had stayed with him in the night of 3rd of June, 1986 and had executed a Will on 4th June, 1986 is obviously incorrect.

As per the version of DW-1, in the night of 3.6.1986 the deceased had informed him that he had called Shri Jeet Ram to accompany him on 4.6.1986 for the purposes of executing the Will at Banjar. The defendant's other witnesses have proved that the Will was executed in the morning hours after about 10.30 A.M.. It has come on record that Banjar was only at a walkable distance of 1½ kms. from Karwahadhar. DW-1 has stated that at about 8.30 A.M. his brother, Shri Chander Singh had informed Shri Saran Dass that his wife had sent a message that people from the village were going to purchase bullocks therefore, he should accompany them. Therefore, Shri Saran Dass decided to execute the Will at village Teel itself and requested Shri Teja Singh (DW-2) Pradhan, Gram Panchayat, who happened to be there by chance to scribe the Will. However, from his statement, it is clear that Shri Saran Dass had waited for more than two hours for the witnesses to arrive and only then the Will was executed. Therefore, the version of the defendant that the deceased had modified his original plan of visiting Banjar and getting the Will executed there does not appear to be correct as

the walk able distance to Banjar (Tehsil Headquarter) could have been conveniently covered within 15 to 20 minutes. The deceased had left village Teel to fetch the bullocks, therefore, the version of DW-1 that message was sent by plaintiff No.1 and conveyed by Shri Chander Singh brother of defendant does not appear to be true and correct.

The last rites of deceased Shri Saran Dass have been performed by the plaintiffs alone. It is not the case of the defendant that even after the death of the deceased he looked after the plaintiffs, got the un-married daughters of Shri Saran Dass married. It is also not his case that during the life time of Shri Saran Dass he got performed the marriage ceremonies of the eldest daughter.

Defendant in his cross examination has admitted that Shri Saran Dass was educated and was a teacher. Therefore, what was the need for him to have requested Shri Teja Singh (DW-2) to scribe the Will or leave the Will with the defendant particularly when he had changed his mind to return back to village Teel. No special reason has been given in the Will for making the defendant as sole beneficiary particularly when there were other legal descendants through the brothers of Shri Saran Dass. The reason of excluding legal heirs and making the defendant sole beneficiary also does not appear to be genuine for the simple reason that the Will could have been executed by Shri Saran Dass in his own village and there was no need for him to have travelled all the way to Karwahadhar and inform the

defendant the fact that he was on his way to Tehsil Banjar to execute the Will there. The relations between the deceased and the plaintiffs were extremely cordial and they were living together. Assuming that the Will was executed by Shri Saran Dass in village Teel in the presence of the defendant's witnesses, he could have easily carried the same to his village Teel and given it to his wife. Further, there is nothing on record to show that there were any debts or loans of the deceased Saran Dass which were got cleared by the defendant.

The version of the defendant that the Will was executed by Shri Saran Dass obviously is false, concocted and in any case shrouded by suspicious circumstances.

For the aforesaid reasons, it cannot be said that deceased Shri Saran Dass had executed the Will in favour of the defendant and that he is entitled to the estate of the deceased in terms of the Will. The present appeal is dismissed and the substantial questions of law as framed are answered accordingly.

**(Sanjay Karol),
Judge.**

**December 29, 2007.
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