

IN THE HIGH COURT OF HIMACHAL PRADESH, SHIMLA.

RSA No.318/1997

Reserved on: 23.5.2008

Decided on.30.5.2008

Smt. Nim Dassi.

...Appellant.

Versus

Sh. Ram Chand.

...Respondent.

Coram

The Hon'ble Mr. Justice Rajiv Sharma, J.

Whether approved for reporting ?¹. No.

For the appellant : Mr. Raman Sethi, Advocate.

For the respondent : Mr. Janesh Gupta, Advocate vice Mr. Neeraj Gupta, Advocate

Rajiv Sharma, J.

This Regular Second Appeal is directed against the judgment and decree dated 29.3.1997 passed by the learned Additional District Judge, Kullu in civil appeal No.37 of 1996.

The brief facts necessary for the adjudication of this appeal are that the appellant-plaintiff (hereinafter referred to as the plaintiff for convenience sake) filed a suit for permanent prohibitory and mandatory injunction. Respondent-defendant (hereinafter referred to as the defendant for convenience sake) contested the suit filed by the plaintiff. The learned trial court dismissed the suit on 15.11.1996. The plaintiff preferred an appeal against the judgment and decree dated 15.11.1996 before the learned Additional District

¹ *Whether the reporters of Local Papers may be allowed to see the judgment?* No.

Judge, Kullu. The learned Additional District Judge, Kullu dismissed the appeal on 29.3.1997. The plaintiff has filed the present Regular Second Appeal against the judgment and decree dated 29.3.1997 passed by the learned Additional District Judge, Kullu. The Regular Second appeal was admitted on the following substantial questions of law:

- 1. Whether the learned courts below have totally misdirected themselves and have totally misconstrued and misread the evidence, especially document Ex.PW-2/A?**
- 2. Whether misreading of Ex.PW-2/A has led to total injustice and affected the rights of the parties?**
- 3. Whether the defendant/respondent could be permitted to say that he is the owner of the suit property without producing on record any document to show that he is recorded as owner of the same?**
- b) Whether the courts below have totally misdirected themselves by not taking into consideration the fact the mother of the appellant who was the owner of the entire property and even assuming that only half had been gifted to the appellant she had to succeed to the other half, being the only natural heir of Smt. Shiru, her mother?**
- 4. Whether the appellant/plaintiff was only owner of the half share, at least she was entitled to a decree for joint possession and the suit could not have been dismissed?**

Mr. Raman Sethi, Advocate had strenuously argued that the judgments rendered by both the courts below are not sustainable in

the eyes of law. He also contended that there is misreading of the evidence by the learned appellate court below since according to him he has referred the document Ex.PW-2/A as a will though it was a gift.

Mr. Janesh Gupta, Advocate vice Mr. Neeraj Gupata, Advocate had supported the judgments and decrees passed by the courts below.

I have heard the learned counsel for the appellant and perused the record carefully.

During the course of hearing, the learned counsel for the appellant has addressed his arguments only to the mis-reading of Ex.PW-2/A by the appellate court.

The plaintiff Nim Dassi has appeared as PW-1. PW-2 Sh. Diwan Chand is the witness of gift deed Ex.PW-2/A. It has been stated by PW-1 Nim Dassi that her father was having two wives out of which one was her mother and the other was the mother of Sh. Sadh Ram, who is the father of defendant and his brother Prem Chand. She has admitted that her father used to reside at village Shirar where the suit land is situated and in village Shirar there was no land of her father except the suit land, but she added that after the death of her father, the suit land came in her possession. She has also admitted as noticed by the learned trial court that her father, who was the father of said Sh. Sadh Ram also used to reside in the house built over the suit land and now the defendant is

residing in the hut/shed which was constructed by his father Sh. Sadh Ram.

What emerges from the evidence led by the parties is that the plaintiff's father had two wives and the father of the defendant Sh. Sadh Ram was the son of Phimi Ram from his second wife and the plaintiff is the daughter of Sh. Phimi Ram from the first wife.

Now, the Court has to advert to the gift deed Ex.PW-2/A. I have seen Ex.PW-2/A and it is evident from the contents thereof that the plaintiff had been gifted half share by Smt. Shiru measuring 14 x 8 haths. Thus the contention of the plaintiff that the gift was to the entire suit land is factually incorrect. It has also come, as noticed above, in the evidence of the plaintiff herself that the father of the defendant used to reside over the portion of the suit land by constructing *Tapra* (shed) over it and after his death the defendant and his brother Prem Chand are residing there. In view of the fact that only half share was gifted to the plaintiff and the defendant has been living in the house constructed by his father Sadh Ram, disproves the contention of the plaintiff that she was in exclusive possession of the suit land.

DW-1 Ram Chand has testified before the trial court that he was in possession of the disputed land and his version has been supported by DW-2 Mahinder Mahant. It has also come in the statement of DW-1 that the house was constructed 2 ½ years ago at the time of recording of his statement on 27.8.1996. Thus the

construction was carried out in the year 1994. The version of Ram Chand has been duly supported by Sh. Mahinder Mahant.

In view of the observations made hereinabove, there is no misreading of the evidence, more particularly, Ex. PW-2/A as argued by the learned counsel for the plaintiff. The findings of both the courts below are upheld being based on true construction and proper reading of the evidence i.e. oral as well as documentary. However, before parting with the judgment, it is necessary to clarify that what the learned Additional District Judge meant while he referred the document Ex.PW-2/A was in fact gift and not will as noticed in the judgment. I have examined the document Ex.PW-2/A, it is a gift made by Smt. Shiru in favour of the plaintiff.

There is no question much less any substantial question of law involved in the second appeal and this Court will not interfere with the concurrent findings of the facts recorded by the courts below.

Consequently, there is no merit in the appeal and the same is dismissed. There shall be no order as to costs.

(Rajiv Sharma), Judge

May 30, 2008

Awasthi