

**IN THE HIGH COURT OF HIMACHAL PRADESH,
SHIMLA.**

**RSA No. 121/1998 and
with Cross Objections No.249/1998**

Reserved on:17.3.2009

Decided on:31.3.2009

RSA No. 121/1998:

Mani Devi and Others.

...Appellants.

Versus

Ram Nath and others.

... Respondents.

Cross Objections No.: 249/1998

Mani Devi and others.

...Non-Objectors.

Versus

Ram Nath and another.

...objectors.

Coram:

Hon'ble Mr. Justice Rajiv Sharma, Judge.

Whether approved for reporting?¹ No.

**For the appellants/ : Mr. Bhupinder Gupta, Sr.Advocate with Ms. Charu
Non-Objectors. Gupta, Advocate.**

**For the Respondents/: Mr. K.D. Sood, Advocate with Mr. Rajnish K.Lal,
Objectors. Advocate for respondents No.1,2,9 & 10.**

¹ Whether reporters of the local papers may be allowed to see the judgment? No.

Rajiv Sharma, Judge.

This Regular Second Appeal has been directed against the judgment and decree dated 29.11.1997 passed by the learned District Judge, Kullu in civil appeal No. 40/1997.

Brief facts necessary for the adjudication of this Regular Second Appeal are that the respondents-plaintiffs (hereinafter referred to as 'the plaintiffs' for convenience sake) filed a suit for declaration to the effect that one Sh. Dine Ram, brother of the present plaintiffs was owner in possession of the suit property as per the details given in paras 2 (a) to (h) of the plaint. Sh. Dine Ram was married to appellant-defendant No.1 (hereinafter referred to as 'defendant No.1' for convenience sake) in the year 1966. He cohabitated with her upto August 1970. In the month of August, 1970, she deserted Sh. Dine Ram and started living with her mother in village Bradha Kothi Kais. Sh. Dine Ram was serving in Indian Army. He had filed earlier suit for restitution of conjugal rights under section 9 of the Hindu Marriage Act. Defendant No.1 Smt. Mani Devi resisted the suit alleging that she was not legally wedded wife of Sh. Dine Ram. Sh. Dine Ram and Mani Devi remained in consistent civil and criminal litigation. Sh. Dine Ram executed the will Ex.PW-2/A on 1.8.1972 whereby he bequeathed his entire property in favour of the plaintiffs in equal shares. However, the will was not registered by the Sub Registrar, Kullu vide order dated 6.9.1989. The Assistant Collector-IIInd Grade on 3.4.1991 passed mutation No. 856 of the suit property in favour of the defendants. The suit was contested by defendants No. 1 to 3. Defendant No.1 though

has admitted that she is married wife of Dine Ram, but she denied that after August 1970, she deserted and neglected him. She denied her illicit relation with Sh. Jeet Ram. She further denied that she never cohabited with Sh. Dine Ram after August, 1970. It is further stated that defendants No.2 and 3, Dehar Singh and Kumari Phula Devi are legitimate son and daughter of Sh. Dine Ram. The plaintiffs filed replication. The suit was decreed by the learned Senior Sub Judge, Lauhal-Spiti at Kullu on 16.5.1997. The defendants preferred an appeal before the learned District Judge, Kullu. The learned District Judge, Kullu dismissed the appeal and upheld the judgment and decree of the trial court. However, the first appellate court has ordered that the plaintiffs should pay the maintenance out of the proceed from the property inherited from Sh. Dine Ram during the life time of Smt. Mani Devi.

The plaintiffs have also filed cross-objections No. 249/1998 for setting aside the findings recorded by the learned District Judge thereby creating a charge on the property inherited by them and to decree the suit in its entirety.

The Regular Second Appeal was admitted on the following substantial questions of law:

1. **“Whether the suit of plaintiff-respondents was it by the provisions of section 100 of the Limitation Act, was it not incumbent for the plaintiff-respondents to have assailed the orders of the Sub Registrar, Kullu, refusing to accept the alleged will within a period of one year as is envisaged under the law?**
2. **Whether the findings of the learned Sub Registrar, Kullu, contained in Exhibit D-3, had the effect of**

constructive resjudicata, being the pronouncement by a competent officer in exercise of the quasi judicial powers, was it not incumbent for the plaintiff-respondents to have challenged the said order within the period of one year for maintaining the present suit?

3. Whether the suit of the plaintiff-respondents is barred by limitation on account of the fact that the suit was filed within the period of three years from the date of death of Shri Dine Ram?
4. Whether the Exhibit DW-2/A the alleged will has not been the proof in accordance with law as envisaged under section 68 of the Evidence Act and Section 63 of the Indian Evidence Act?
5. Whether the findings of both the learned courts below are based on admissible evidence as a document on which reliance has been placed by both the courts below were not proved in accordance with law by leading preliminary evidence therefore?
6. Whether the courts below have acted perversely and arbitrarily and erroneously in not drawing the presumption of legitimacy during the continuance of the marriage as envisaged under law regarding the parentage of the children, are not the findings to the contrary against the basic provisions of law, unless it was established that that the husband and wife had no access during such period?
7. Whether the will Exhibit PW-2/A could have been upheld merely on the ground that the marginal witnesses are dead, by raising the presumption under section 41 of the Indian Evidence Act, was not it incumbent for the propounder of the will to prove the due execution and attestation of the will but also to remove all legitimate suspicious circumstances surrounding the will particularly when the mutation of inheritance was attested in favour of defendant-

appellants being the natural heirs of the were never produced before the Revenue Officer?"

Mr. Bhupender Gupta, Senior Advocate has strenuously argued that the judgments and decrees passed by both the courts below are not sustainable. He also contended that the execution of will Ex.PW-2/A has not been proved in accordance with law. He lastly contended that the courts below have come to a wrong conclusion that Sh. Dehar Singh and Phula Devi were illegitimate children.

Mr. K.D. Sood, Advocate has supported the judgment and decree passed by the trial court and as far as the judgment and decree passed by the first appellate court is concerned, he submitted that the learned District Judge could not create charge on the plaintiffs' property for the purpose of maintenance. He has supported the cross-objections filed against this portion of the judgment and decree of the first appellate court.

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

Since all the substantial questions of law are interconnected and interlinked, therefore, the same are taken up together for determination to avoid repetition of discussion of evidence.

The will in question was executed on 1.8.1972. Sh. Dine Ram was serving in the Indian Army. He came back in the year 1970. It is also not in dispute that the Sub-Registrar, Kullu refused to register the will on 6.9.1989. The mutation of the property was attested in favour of the defendants on 3.4.1991.

The will was scribed by one Sh. Chuhru Ram (PW-2). He has deposed that he has scribed the will at the instance of Sh. Dine Ram. The contents of the same were read over to him and he has understood the same. He further deposed that Sh. Nirat Ram and Chhapey Ram were the marginal witnesses. Sh. Nirat Ram and Chhapey Ram have died and PW-3 Sh. Yog Raj has identified the signatures of Sh. Nirat Ram. PW-3 was the Pradhan of the Gram Panchayat and Nirat Ram was the Panch from 1960 to 1968. PW-1 Ram Nath has deposed that the relation between his brother Sh. Dine Ram and appellant Mani Devi were strained. According to him, she had started living in her parents' house after August, 1970 and she was living in adultery. He then deposed that his brother had also filed petition under section 9 of the Hindu Marriage Act for restitution of conjugal rites. Smt. Mani Devi had filed petition against his brother under section 125 of the Code of Criminal Procedure for maintenance. He has identified the signatures of his brother. Defendant No.1 (DW-1) has deposed that her husband died in young age. She could not explain how he died. DW-2 Mangal Chand is an interested witness. He has been disinherited by deceased Sh. Dine Ram. There is tangible evidence on record to establish that Sh. Dine Ram was in sound physical and mental health at the time of execution of the will on 1.8.1972. The plaintiffs have proved the execution of the will in accordance with law. The fact that the will has not been registered by the Sub Registrar on 6.9.1989 will not in any manner dilute the validity of the will. The plaintiffs have produced the scribe and one witness, who had identified the signatures of the marginal witness Nirat Ram.

Sh. Dine Ram is the real brother of the plaintiffs. Sh. Dine Ram and Smt. Mani Devi had strained relations. There were civil and criminal litigation going on between them. In fact, in a petition filed under section 9 of the Hindu Marriage Act initially defendant Mani Devi had denied being legally wedded wife of Sh. Dine Ram. However, it was admitted by her counsel that she was legally wedded wife of Dine Ram. She has also instituted proceedings against Sh. Dine Ram for maintenance. The maintenance was allowed to her. It is also proved on record that she started living in her parents' house after August, 1970. It is evident from Ex.PX-5 that one son was born to Mani Devi at Bradha on 20.5.1972. In this entry the name of the mother is recorded as Mani Devi daughter of Lala and in place of name of father *Bald Ul-Haram* is recorded. It has not been explained why the name of Dine Ram was not recorded in the birth register. Similarly in Pariwar register Ex.PX-6, Fula Devi is shown to be daughter of Mani Devi but the name of Dine Ram is not recorded. In Ex.PX-7, i.e. the copy of Pariwar register, the name of the father has not been recorded. These entries have not been rebutted by the appellants. Accordingly, the defendants have failed to prove that a child was born to Dine Ram after execution of the will. In these circumstances, the findings recorded by both the courts below are upheld with regard to the legitimacy of the children.

Mr. K.D. Sood, Advocate has strenuously argued that the first appellate court could not create charge on the suit property after dismissing the appeal. I am of the considered opinion that the order passed by the learned first appellate court is justifiable on the basis of

the order passed under section 488 (125 new) of the Code of Civil Procedure Ex.PX-18. Smt. Mani Devi is the wife of Sh. Dine Ram. The plaintiffs are bound to pay maintenance to her out of the proceed of the suit property inherited by the plaintiffs. This portion of the judgment is upheld.

In view of the aforesaid reasoning, there is no merit in this Regular Second Appeal as well as in the cross-objections and the same are dismissed. There shall, however, be no order as to costs.

(Rajiv Sharma), J.

31.3. 2009.

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