

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

RSA No.173/2001

Reserved on:6.5.2009

Decided on:30.6. 2009

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**Smt. Bhikhi.**

**...Appellant.**

**Versus**

**Smt. Giri.**

**...Respondent.**

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*Coram*

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

*Whether approved for reporting ?<sup>1</sup>. No.*

**For the appellant : Mr. Rajnish K. Lal, Advocate vice Mr. K.D. Sood,**  
**Advocate.**

**For the Respondent : Mr. Raman Sethi, Advocate**

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**Rajiv Sharma, J.**

This Regular Second Appeal has been directed against the judgment and decree dated 5.3.2001 passed by the learned District Judge, Kullu in civil appeal No. 120/1999.

Brief facts necessary for the adjudication of this Regular Second Appeal are that the appellant-plaintiff (hereinafter referred to as 'the plaintiff' for convenience sake) claimed that the suit property was owned and possessed by one Param having elder brother Niku. The plaintiff's mother was legally married wife of said Sh. Niku and out of the wedlock four children, namely, Riraki, Jabna, Nirat Ram and Lambi were born.

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

After one year of the death of her husband Sh. Niku, Smt Tilli married Param and plaintiff was born out of this wedlock. Sh. Param during the subsistence of marriage with Smt. Tilli, brought respondent-defendant (hereinafter referred to as 'the defendant' for convenience) and kept her as concubine. The marriage between defendant and Param was in contravention of the Hindu Marriage Act, 1955. Sh. Param died on 19.9.1994. He executed a valid will dated 17.10.1988 bequeathing his entire property to the plaintiff after his death. She sought declaration that she is the sole owner in possession of the property and the defendant has no interest and liable to be prohibited to interfere from the suit land. The suit was contested by the defendant. According to the defendant she is widow of Param and her marriage with Param was solemnized after the death of Smt. Tilli. He executed a valid will dated 6.7.1994 bequeathing his movable and immovable property to the defendant which was bequeathed to the plaintiff. It was further averred that the will dated 17.10.1988 set up by the plaintiff was forged. The learned Sub Judge dismissed the suit on 4.9.1999. The appellant preferred an appeal before the learned District Judge, Kullu. He also dismissed the appeal on 5.3.2001. The present Regular Second Appeal has been directed against the judgment and decree dated 5.3.2001. The same was admitted on the following substantial questions of law:

- 1. Whether the court below has misread and misconstrued the basic documents of title Ex.D-1, will dated 6.7.94 executed by Param when his will dated 17.10.1988 Ex.PA in favour of the plaintiff was also upheld to be genuine and valid?**
- 2. Whether the order dated 21.11.98 allowing the additional evidence in respect of the will Ex.D-1 is sustainable in law when the ingredients of leading secondary evidence under section 65 of the Evidence Act had not been made out?**

3. **Whether the court below have misconstrued the pleadings of the parties and wrongly dismissed the suit of the plaintiff in its entirety when even under the will Ex.D-1 the plaintiff was given 7 ½ bighas of land of which she was in possession?**
4. **Whether the presumption of marriage of Param with Tilli and the legitimacy of the plaintiff as daughter of Param could be raised on account of long co-habitation, the birth of the plaintiff from the said wedlock coupled with the evidence of conduct and performance of ceremonies of marriage in the facts of this case?**

Mr. Rajnish K. Lal has strenuously argued that the judgments and decrees passed by both the courts below are not sustainable in the eyes of law. He has supported the execution of will dated 17.10.1988. He further contended that the will Ex.D-1 dated 6.7.1994 is shrouded with suspicious circumstances and has been wrongly declared valid by both the courts below.

Mr. Raman Sethi has supported the judgments and decrees passed by both the learned courts below.

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

Since all the substantial questions of law are inter-linked and inter connected, therefore, the same are being taken up together for determination to avoid repetition of discussion of the evidence.

There are two wills executed by Sh. Param. One is dated 17.10.1988 set up by the plaintiff and another is dated 6.7.1994 set up by the defendant. The will dated 17.10.1988 is Ex.PA. The will dated 6.7.1994 is Ex.D-1.

The plaintiff has proved the execution of will by producing Sh. Tek Singh (PW-2) attesting witness and Sh. Chuhan Ram (PW-3) as scribe. According to these witnesses, the will was executed by Sh. Paras and the

contents of the same were explained to him and after understanding the same to be correct, he appended his thumb impression in presence of the witnesses. Sh. Param got the will registered.

The defendant had moved application under section 65 of the Evidence Act for leading secondary evidence to prove the will dated 6.7.1994. The application was allowed on 21.11.1998 by the trial court. Thereafter she produced herself as DW-1 and also examined two witnesses. DW-2 Sh. Jindu Ram is the scribe of the will and DW-3 Sh. Ved Ram is the attesting witness. She also tendered in evidence Ex.D-2, copy of family register and Ex.D-3 and D-5 copies of electoral lists for the year 1988. Ex.D-4 is the electoral list for the year 1998. Ex.D-6 is the copy of mutation No. 3420 dated 29.5.1996. The will Ex.D-1 was scribed by Sh. Jindu Ram. It was attested by Sh. Ved Ram (DW-3). It has come on record that after the death of Sh. Param, the plaintiff and defendant on 7.5.1996 claimed inheritance respectively on the basis of will executed by Sh. Param in their favour. They produced the will at that time. The defendant has lodged FIR under section 380/34 of the Indian Penal Code dated 14.6.1996. PW-1 has admitted sanction of mutation of property of Param Ram in her presence and that the Tehsildar before sanctioning mutation questioned her and she admitted sanction of mutation to be correct. She also conceded that mutation of inheritance of Param sanctioned on the basis of will was correctly sanctioned though she denied bequeathing 0-7-10 bighas of land alongwith house under that will to her. The copy of mutation is Ex.D-6 which was sanctioned on 18.8.1995. It has not been challenged by the plaintiff. The defendant was able to prove by leading cogent and specific evidence the valid execution of will dated 6.7.1994. The minor contradictions in the statements of DW-2

and DW-3 have rightly been discarded by the learned first appellate court. It has come in the record that the defendant has served Sh. Param.

The plaintiff has also failed to prove that she is the legitimate daughter of Param. In Ex.P-1 Param had shown Tilli as his Bhabhi. In will dated 6.7.1994, he has admitted Giri his wife. The defendant has been shown as wife in Ex.D-2 and Ex.D-5.

Accordingly, in view of the observations made hereinabove, the application preferred by defendant under section 65 of the Indian Evidence Act has rightly been allowed by the trial court permitting her to lead secondary evidence to prove the execution of will Ex.D-1. The will i.e. Ex. D-1 is later in time.

Consequently, there is no merit in this Regular Second Appeal and the same is dismissed. There will, however, be no order as to costs.

30.6. 2009  
\*awasthi\*

**(Rajiv Sharma ), J.**