

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

CMPMO No.199 of 2008.

Date of decision:30.04.2009

Kanshi Ram

...Petitioner

Versus

Prem Singh & Others

...Respondents

Coram

The Hon'ble Mr.Justice Dev Darshan Sud,J.

Whether approved for reporting ?¹ No.

For the Petitioner: Mr.T.S. Chauhan, Advocate.

For Respondents 1 & 2: Mr.J.R. Poswal, Advocate.

For Respondents 3 to 9: Mr.Trilok Jamwal, Advocate.

Dev Darshan Sud,J.

This petition has been preferred by the defendant against the order passed by the learned Civil Judge(Junior Division), Bilaspur in an application under Order 8 Rule 8-A read with Section 151 of the Code of Civil Procedure. The application was instituted on 18th March, 2008 and decided on 23rd June, 2008.

I must express my anguish in the manner in which the proceedings have been conducted. Order 8 Rule 8-A has been deleted by the Code of Civil Procedure (Amendment) Act, 1999 (46 of 1999) by Section 18 of the Amending Act with effect from

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

Yes.

1.7.2002. However, I am examining the claim of the parties on merits and exercising powers of superintendence under Article 227 of the Constitution of India. The application which was filed, pleads that the suit involves the determination of the rights of the parties on the basis of a will executed by late Surinder Singh. The question regarding this will is involved in the present case as also in case in ***suit No.106-1/2001, titled: Krishan Lal vs. Kanshi Ram***. It is pleaded that an application was made before the learned District Judge for transfer and consolidation of both cases in order to avoid contradictory findings. This application was allowed on 8.1.2008. The petitioner thereafter pleads that application under Section 10 of the Code of Civil Procedure was filed for staying the adjudication of the suit out of which the present case arises as it was instituted at later point of time. The petitioner then urges that transferred suit No.106-1/2001 which was pending before the learned trial Court was intentionally got dismissed in default by Krishan Lal plaintiff though the evidence of the petitioner herein, (defendant in the suit) was present in Court and the presence of the witnesses was marked. In these circumstances, he could not lead evidence in order to prove the will and for this purpose, he sought permission to lead additional evidence to prove the will of late Shri Sunder Ram. The application, if read as a whole, seeks permission to lead additional evidence.

The learned Court holds that the applicant-defendant had filed a will in the case which was dismissed and not in this

case. Now, he seeks to fill in the lacunae in this case. This reasoning of the Court cannot be accepted. Once the two suits had been consolidated to avoid contradictory findings, recording of the evidence in both suits was required. The fact that the suit was dismissed in default is not disputed and the Court record that the evidence on behalf of the defendant in the dismissed suit was present in Court was also a matter of fact. It is also not disputed that in the case dismissed for default, the petitioner was the defendant and could not insist his evidence being recorded. In the circumstances, there was no justification for upholding the order passed by the trial Court. It is accordingly quashed and set aside. The application filed by the defendant herein for leading additional evidence is allowed. The trial Court is directed that he shall be given an opportunity to the defendant herein to lead additional evidence as prayed for. The plaintiffs will be accorded a chance to rebut this evidence. There shall be no order as to costs.

April 30, 2009.
(aks)

(Dev Darshan Sud)
Judge.