

IN THE HIGH COURT OF HIMACHAL PRADESH
SHIMLA

RSA No. 371 of 2005
Reserved on : 28.9.2016
Decided on : 30.9.2016

Savitri DeviAppellant.
Versus
Surender Pal & another.Respondents.
Coram:

The Hon'ble Mr. Justice Sureshwar Thakur, Judge.

*Whether approved for reporting?*¹ Yes.

For the Appellant: Mr. Vijay Bhatia, Advocate.

For the Respondents: Mr. Abhinandan Thakur, Advocate vice
Mr. J.R Thakur, Advocate for the
respondents.

Sureshwar Thakur, Judge

The instant Regular Second Appeal is directed against the impugned judgment and decree rendered by the learned Presiding Officer/Additional District Judge-1, Fast Track Court, Hamirpur, H.P in Civil Appeal No. 43 of 1999/148 of 2004 , whereby the judgment and decree rendered by the learned Sub Judge, Hamirpur, H.P. in Civil Suit No. 237 of 1992 of 25.5.1999 stood affirmed.

2. The brief facts of the case are that the suit land comprising of Khata No. 53 Khatoni No. 53 Khasra Nos. 8, 103, 183, 185, 186, 11,13,14 Kita 8 measuring 17 Kanals 15 marlas,

¹ Whether reporters of the local papers may be allowed to see the judgment?

situated in Tika BairiBrahmna, Tappa Mewa Tehsil Bhoranj, District Hamirpur, H.P. Khata No. 308, Khatoni No. 381 Khasra No. 111, 135 and 136 kita 3, measuring 9 Kanalas 1 marla, situated in Tika Gharsah Tappa Mewa, Tehsil Bhoranj, District Hamirpur, H.P and Khata No. 115, Khatoni No. 122, Khasra No. 397 measuring 1 kanal 5 marlas, situated in tika Bhukker, Tappa Mewa, Tehsil Bhoranj, District Hamirpur, H.P. was owned and possessed by the deceased Sihnu who was grandfather of the respondents herein (for short "the plaintiffs"). It is averred by the plaintiffs that they and their father Ram Singh were looking after the deceased and because of his love and affection he had executed a registered will in favour of the plaintiffs on 4.7.1989 qua the suit land owned by him. They have further averred that the defendant had left the house of their father in the year 1978 and had never turned up to join matrimonial home and on the contrary she started residing in her parental home in village Mundkhar. They further averred that the defendant at the time of her residing in their house used to quarrel with the deceased and had been misbehaving with him because of which she was having strained relations with the deceased and because of these reasons the deceased had executed the will in their favour on 4.7.1998. They have

further averred that the defendant is also alleging will to have been executed by the deceased in her favour which is altogether false and fictitious and fabricated. They have averred further that the defendant has got the mutations No. 251,1142 and 720 of 18.6.1992 sanctioned in her favour qua the suit property in connivance with the revenue officials and all these mutations are illegal, null and void. They have prayed for declaring them to be owners in possession of the suit property and have also prayed to restrain the defendant from interfering in the suit land and from changing its nature or alienating it in any manner on the basis of wrong mutations.

3. The defendant/appellant herein contested the suit and filed written-statement. She in her written-statement has averred that the suit is not maintainable in the present form as the plaintiffs are out of possession of the suit land. She has also averred further that the act and conduct of the plaintiffs are bar to the present suit and that the suit has not been properly valued for the purpose of Court fee and jurisdiction. She has further averred that the plaintiffs are son of Ram Singh from the second wife which marriage is illegal, null and valid and therefore they cannot succeed to estate of the deceased. On merits, she has specially averred that she is residing in the

house of the deceased Sihnu who was her father-in-law and that she had been looking after him nicely during his life time and he had executed valid will qua his estate in her favour as well as in favour of the plaintiffs on 22.6.1991 vide which he had bequeathed half of the suit property in her favour. In brief she has denied the case of the plaintiffs as a whole.

4. The plaintiffs filed a replication to the written-statement filed by the defendant and reasserted the stand taken in the plaint.

5. On the pleadings of the parties, the learned trial Court struck following issues inter-se the parties at contest:-

1. *Whether the suit is not maintainable in the present form? OPD*
2. *Whether Sihnu deceased executed a valid will dated 22.6.1991 qua his half share in the suit land in favour of the defendant ?OPD*
3. *Whether the suit is not properly valued for the purpose of Court fee and jurisdiction, if so, what is its value for this purpose? O.P Parties.*
4. *Whether the plaintiffs are entitled to inherit the property of Sihnu as alleged? OPP*
5. *Whether the plaintiffs are entitled to the relief of injunction as prayed for? OPP*
- 5 (A) *Whether Sihnu deceased had executed a valid will in favour of the plaintiffs on 4.7.1989, if so, to what effect? OPP*
- 5(B) *Whether the suit is barred under Order 2 Rule 2 CPC?OPD*
6. *Relief.*

6. On an appraisal of the evidence adduced before the learned trial Court, the learned trial Court decreed the suit of the plaintiffs. An appeal stood preferred therefrom by the aggrieved defendant/appellant herein before the learned first Appellate Court. The latter Court on an appraisal of evidence adduced before it affirmed the judgment and decree of the learned trial Court. In sequel, the appeal preferred by the defendant/appellant herein before the first Appellate Court came to be dismissed.

7. The defendant/appellant herein standing aggrieved by the judgment and decree rendered by the first appellate Court has hence instituted the instant Regular Second Appeal herebefore.

8. When the appeal came up for admission on 3.8.2005, this Court admitted the appeal on the hereinafter extracted substantial question of law:-

“(4) Whether the impugned judgment and decree is the result of complete misreading, mis-interpreting and mis-appreciation of provision of Order 2 Rule 2 CPC?.”

Substantial question of Law No. (4):-

9. PW-2/A comprises the testamentary disposition of deceased Sihnu Ram. It, on completion of its execution in the manner enshrined in Section 63 of the Indian Succession Act stood presented besides accepted for registration on 4.7.1989 by

the Registering Officer concerned. Both the Courts below concurrently concluded qua PW-2/A holding legal efficacy. However, subsequent thereto deceased testator executed Ex. DW-2/A vis-à-vis his estate qua the defendant/appellant. However, DW-2/A is an unregistered testamentary disposition of deceased Sihnu Ram. Since Ex.DW-2/A stood executed by the deceased testator subsequent to execution Ex. PW-2/A, the former would hold prevalence vis-à-vis the latter, significantly when there occurs a recital therein qua the deceased testator revoking his previous testamentary disposition comprised in Ex.PW-2/A. However for within the mandate of the statutory parameters imputing validation to DW-2/A an allusion is imperative to the testification of DW-2, its scribe who therein has unequivocally communicated qua his scribing it at the instance of the deceased testator also to the testification of DW-3 a marginal witness thereto who therein deposes qua satiation standing begotten of the statutory tenets engrafted in Section 63 of the Indian Succession Act (for short “the Act”) whereupon it is amenable for its being construed to be proven to be validly and duly executed nonetheless the deposition of both DWs 2 and 3 qua the relevant fact stands undermined given DW-3 standing employed as a Munshi by DW-2. Also the effect, if any, of proof

lent by DW-3 a marginal witness qua DW-2/A standing hence proven to be validly and duly executed by the deceased testator wanes in the face of apparent contradictions occurring inter-se his testimony vis-à-vis the testimony of DW-2 the scribe of Ex.DW-2/A wherefrom it stands tenably concluded by both the Courts below qua hence their simultaneous presence at the relevant time standing undermined wherefrom proof, if any, qua valid and due execution of DW-2/A testified by DW-3 a marginal witness thereto, subsides. The reason for making the aforesaid inference emanates from DW-2 testifying in his cross-examination qua the paper for scribing the will standing carried by him and of his charging Rs.40/- and Rs.50/- for scribing it. Also he testifies in his cross-examination qua his entering Ex. DW-2/A in his register. However the aforesaid deposition of DW-2 stands controverted by DW-3, a marginal witness to DW-2/A wherein he contrarily deposes of DW-2 not charging any fee from the deceased testator for scribing DW-2/A. Also he contradicts DW-2 by testifying qua his carrying the relevant paper, pen and register significantly when as afore-stated the aforesaid factum qua the carrying of the relevant papers stands testified by DW-2 to stand carried by him. The aforesaid contradictions are not minimal rather are major, they belie the

simultaneous presence at the relevant time of DWs 2 and 3 also hence belie the factum of DW-3 a marginal witness thereto throughout the process of its standing scribed and signatured by the deceased testator, his remaining present alongwith the latter besides with DW-2 wherefrom it is to be concluded of his depositing a doctored version qua satiation standing begotten of the statutory principles engrafted in Section 63 of the Act for a will being construable to be clinchingly proven to be validly and duly executed. Momentum to the aforesaid conclusion spurs from the factum of DW-2 depositing qua the will standing written in a separate room adjacent to the house of Bachittar Singh in contradiction whereof DW-3 deposes of DW-2/A standing executed inside the room of the deceased. Also though the deposition of any marginal witness to DW-2/A was sufficient under law to prove its valid and due execution yet with this Court erecting the inference aforesaid qua the testimony qua the relevant factum probandum rendered by PW-3 wanting in probative vigor it was imperative for the defendant/appellant herein to examine other marginal witness thereto, who however remained un-examined. In sequel for want of their examination it has to be concluded qua an adverse inference being draw-able qua the defendant/appellant herein.

10. Be that as it may preponderantly DW-2 deposes qua his scribing the earlier will Ex.PW-2/A also he testifies qua his entering it in his register. However when he also scribed PW-2/A also when he was maintaining a register to enter the documents scribed by him, as evident from his recording in his register an apposite entry qua Ex.PW-2/A also a "will" of the deceased testator which stands propounded by the plaintiffs/respondents herein whereas the factum of his not entering DW-2/A in his apposite register, obviously spurs an inference of it being a suspicious circumstances pronouncing upon the factum of Ex.DW-2/A standing stained with a vice of invalidity.

11. The rule of estoppel against institution of a successive suit qua a cause of action which stood enjoined to be espoused by the plaintiffs in the earlier suit especially given its occurrence/accrual at the stage contemporaneous to the institution of the previous suit whereupon hence it stood enjoined to be embodied thereat, would hold sway with its fullest might, only on evident display of the previous lis holding congruity vis-à-vis the contesting litigants hereat also with evident display of the relevant earlier contest standing anvilled upon alike cause of action which stands agitated subsequently.

However the might of the rule of estoppel constituted in Order 2 Rule 2 CPC fades, in the trite factum of the previous suit occurring inter-se one Ram Singh alias Gopi through whom the plaintiffs being minors institute the extant suit vis-à-vis the defendant. Conspicuously hence with want of congruity inter-se the contesting parties thereat vis-à-vis the contesting parties hereat forcefully undermines the might of the rigor of the provisions of Order 2 Rule 2 CPC.

12. Moreover with the relief canvassed therein by Savitri Devi who stands hereat impleaded as a defendant standing comprised in hers seeking to restrain Ram Singh from contracting a second marriage when stands read in coagulation with the trite factum of the estate of deceased testator Sihnu opening for succession on his demise i.e on 18.7.1991 besides with the earlier suit of the defendant/appellant herein whereon orders stood rendered by Sr. Sub Judge, Hamirpur on 11.12.1978 stood obviously vis-à-vis the extant suit instituted much earlier also when obviously there was no occasion thereat for the plaintiffs' propounding the testamentary disposition of the deceased testator, sequels an inference of the aforesaid cause of action not occurring contemporaneously with the institution of the previous suit by the defendant herein against

Ram Singh through whom extantly the plaintiffs being minors sue nor also there was any preemptory obligation cast upon them to also include in the previous suit the aforesaid cause of action, significantly when it did not arise or occur thereat preponderantly also the non-inclusion therein of the deceased testator executing qua his estate a testamentary disposition vis-à-vis the plaintiffs comprised in Ex.PW-2/A would not warrant attraction qua it of the principle of estoppel nor would the inclusion by the plaintiffs of the aforesaid cause of action in the extant suit which arose subsequently would render it to be not maintainable, its attracting the embargo of the provisions of Order 2 Rule 2 CPC. The substantial question of law is answered accordingly.

13. Consequently, I find no merit in this appeal, which is accordingly dismissed and the judgment and decree of the learned trial Court and as affirmed by the learned Appellate Court is maintained and affirmed. Records be sent back forthwith. All pending applications stand disposed of accordingly. No costs.

30th September, 2016
(priti)

(Sureshwar Thakur),
Judge.