

IN THE HIGH COURT OF HIMACHAL PRADESH
SHIMLA

RSA No. 361 of 2012.

Reserved on : 24th October, 2018.

Decided on : 31st October, 2018.

Rukmani Devi & Ors.**Appellants/defendants.**

Versus

Rajinder Singh**Respondent/Plaintiff.**

Coram:

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

*Whether approved for reporting?*¹ Yes.

For the Appellants: Mr. Suneel Awasthi, Advocate.

For Respondent: Mr. Y. P. Sood, Advocate.

Sureshwar Thakur, Judge.

Both the learned Courts below under concurrently recorded pronouncement, upon, Civil Suit No. 249 of 2008, hence decreed the plaintiffs' suit for declaration. Being aggrieved, therefrom, the

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

defendants/appellants have instituted the instant appeal before this Court.

2. Briefly stated the facts of the case are that plaintiff Rajinder Singh filed a suit for declaration to the effect that the Will of 12.1.1999 executed by late Sh. Tulsi Ram be declared null and void and in addition to this, he also sought the relief of injunction against the respondents by restraining them from dispossessing him from the land measuring 1-6-0 bighas, bearing Khasra No.1203/1157, situated in mauja Garoroo, Tehsil Jogindernagar, District Mandi, H.P. The plaintiff has instituted the suit on the ground that he is the only son of late Sh. Tulsi Ram from his first wife, and, thereafter Tulsi Ram married with defendant No.1, and, out of this wedlock three daughters i.e. defendant No.2 to 4, were born. According to the plaintiff, his father had given land measuring 1-6-0 bighas to him. Upon which, he constructed his house by spending Rs.2 lacs in the year

1986, and, the remaining part of the suit land is being used by courtyard by the plaintiff. It has been further pleaded that Sh. Tulsi Ram, at the instigation of the defendants, had filed another suit for possession and mesne profits regarding the suit land, and, the court framed the following issue in the said suit "Whether the defendant has spent about two lacs for construction of his house in the year 1986, if so its effect", and, this issue was decided in favour of the plaintiff, and, the suit was dismissed by the learned Court of Civil Judge (Sr. Division), Jogindernagar on 16.12.2003., The appeal preferred against the said judgment and decree was also dismissed on 22.9.2007. Sh. Tulsi Ram died on 19.7.2008, and, he performed all his last rites. The defendants then started threatening him that they have one Will of Sh. Tulsi Ram in their favour. When the plaintiff searched the record regarding the Will of 12.1.1999, then, he came to know about the said Will, which is stated to be result of

fraud, mis-representation and coercion on the part of the defendants. The plaintiff asserted the fact that he is in possession of the suit land. On these submission, the plaintiff prayed that the suit be decreed, and, the Will of 12.1.1999 may be declared as null and void. In addition to this, the plaintiff also sought the relief of permanent prohibitory injunction.

3. The defendants contested the suit and filed written statement, wherein, they have taken preliminary objections, inter alia, maintainability, suit is liable to be stayed under Section 10 CPC, estoppel etc. On merits, the suit has been contested on the ground the suit land was purchased/acquired by Sh. Tusli Ram, and, he built his house over it. On these submission, the defendants prayed for dismissal of the suit.

4. The plaintiff filed replication to the written statement of the defendant(s), wherein, he denied the

contents of the written statement and re-affirmed and re-asserted the averments, made in the plaint.

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

1. Whether the Will dated 12.01.1999, executed by late Sh. Tulsi Ram is null and void qua the suit land, and, the same is result of fraud and undue influence, as alleged?OPP.
2. Whether the plaintiff is the only son of late Sh. Tulsi Ram and has given the suit land to construct the house in the year 1986 by spending Rs. Two lacs and remaining land was used as court yard and kitchen garden, as alleged?OPP.
3. Whether Sh. Tulsi Ram had sold the ancestral land at Sandhol and have constructed house at Garoroo of Jogindernagar, as alleged?OPP.
4. Whether the suit of the plaintiff is not maintainable in the present form? OPD.
5. Whether the plaintiff has no cause of action to file the present suit?OPD.

6. Whether the present suit is liable to be stayed under Section 10 of CPC? OPD.
7. Whether the plaintiff is estopped by his own act and conduct to file the present suit?OPD.
8. Relief.

6. On an appraisal of evidence, adduced before the learned trial Court, the learned trial Court decreed the plaintiff's suit. In an appeal, preferred therefrom, by, the defendants/appellants herein, before the learned First Appellate Court, the latter Court dismissed, the, appeal, and, affirmed the findings recorded by the learned trial Court.

7. Now the defendants/appellants herein, have instituted the instant Regular Second Appeal, before, this Court, wherein they assail the findings, recorded in its impugned judgment and decree, by the learned first Appellate Court. When the appeal came up for admission, this Court, on 7.12.2012 admitted the appeal

instituted by the defendants/appellants against the judgment and decree, rendered by the learned first Appellate Court, on the hereinafter extracted substantial question of law:-

1. Whether the findings of the Courts below regarding non compliance of Section 63 of the Indian Succession Act in proving the Will dated 12.1.1999, Ex.PW1/A is not in accordance with law."

Substantial question of Law No.1:

8. Deceased testator one Tulsi Ram, under, a testamentary disposition, borne in Ex. PW1/A, hence bequeathed his properties, vis-a-vis, the legatees named therein. For Ex.PW1/A, to acquire a pervasive aura of validity, the legatees constituted thereunder also the propounder thereof, was hence, enjoined to adduce cogent proof, in satiation of the ingredients borne, in, Section 63, of, the Indian Succession Act, provisions whereof stand extracted hereinafter:-

"63 Execution of unprivileged Wills. —Every testator, not being a soldier employed in an

expedition or engaged in actual warfare,¹² [or an airman so employed or engaged,] or a mariner at sea, shall execute his Will according to the following rules:—

- (a) The testator shall sign or shall affix his mark to the Will, or it shall be signed by some other person in his presence and by his direction.
- (b) The signature or mark of the testator, or the signature of the person signing for him, shall be so placed that it shall appear that it was intended thereby to give effect to the writing as a Will.
- (c) The Will shall be attested by two or more witnesses, each of whom has seen the testator sign or affix his mark to the Will or has seen some other person sign the Will, in the presence and by the direction of the testator, or has received from the testator a personal acknowledgement of his signature or mark, or the signature of such other person; and each of the witnesses shall sign the Will in the presence of the testator, but it shall not be necessary that more than one witness be present at the same time, and no particular form of attestation shall be necessary."

Whereupon alone the Will, can be constituted to be validly, and, duly executed by the deceased testator. A perusal of the afore extracted provisions, unfolds, that it being incumbent upon the propounder of the Will, to prove hence its valid and due execution by (i) ensuring stepping into the witness box, of, both the marginal witnesses thereto or one of them; (ii) and the marginal witness stepping into the witness box, making a clear testification qua the deceased testator rather embossing his signatures or thumb impression thereon, imperatively in his presence, and, thereafter the marginal witness(es) also rendering a testification qua his/their in the presence, of, the deceased testator hence doing likewise. Reemphasizingly, the stepping into the witness box, of, the marginal witness(es) to Ex.PW1/A, is, statutorily imperative. The defendants have examined DW-3, Sh. D.K. Chauhan, the marginal witness to EX.PW1/A. He in his examination, though, has made echoings qua

EX.PW1/A being scribed at the instance of the deceased testator. He further testified qua his along with the scribe and identifier, rather appending their respective signatures, upon, Ex.PW1/A, in, their respective presence. He has acquiesced to a suggestion meted to him, during, the course of his cross-examination, that Tulsi Ram had orally disclosed to him qua his giving the suit land to Rajinder Singh, and, his constructing, a, house thereon. However, this witness nowhere, in his testification, rather testifies qua the deceased testator embossing, his signatures/thumb impressions, upon, EX.PW1/A in his presence, as well as, in the presence, of, other marginal witness thereto. He has also omitted to make any echoing in his examination-in-chief qua his embossing his signatures thereon, in, the presence of the deceased testator. The other marginal witness to Ex.PW1/A, stood, not examined by the defendant, for, proving, the valid and due execution of Ex.PW1/A, on the ground

of his being won over, hence, the ingredients of Section 63, of, the Indian Succession Act, visibly, remain unsatiated. Furthermore, evidence has also come on record, that, plaintiff Rajinder Singh, has, also constructed a house, upon, the suit land, and, more over the attesting witness, to, Ex.PW1/A, DW-3 has also in his cross-examination, unfolded qua Tulsi Ram rather disclosing to him qua Rajinder Singh, hence constructing a house, upon, the suit land. Moreover, DW-1, the scribe of Will Ex.PW1/A has also unraveled, in his cross-examination, qua deceased Tulsi Ram, hence, disclosing him, qua his giving the land to Rajinder Singh, in, the year 1986, and, his also constructing a house thereon. Consequently, when the deceased testator had already given the suit property to Rajinder Singh, and, the latter had constructed a house thereon, hence, there was no occasion, for, the deceased testator, to, make a bequest of the aforesaid suit property, vis-a-vis, beneficiaries

thereof. Moreover, in these circumstances, every possibility, of, Will of the deceased testator being dominated, by its beneficiaries hence cannot be ruled out. For the foregoing reasons, this Court is constrained to hold, that, the statutory ingredients borne in Section 63 of the Indian Succession Act, standing not proven, vis-a-vis, the valid and due execution, of, Ex.PW1/A.

9. The above discussion, unfolds, that the conclusions as arrived by the learned first Appellate Court as also by the learned trial Court, being based, upon a proper and mature appreciation of evidence on record. While rendering the findings, the learned first Appellate Court as well as the learned trial Court, have not excluded germane and apposite material from consideration. Accordingly, the substantial question of law is answered in favour of the respondent/plaintiff, and, against the appellants/defendants.

10. In view of the above discussion, there is no merit in the present Regular Second Appeal, and, it is dismissed accordingly. In sequel, the judgements and decrees rendered by both the learned Courts below are affirmed and maintained. Decree sheet be prepared accordingly. All pending applications also stand disposed of. No order as to costs. Records be sent back forthwith.

31st October, 2018.
(jai)

(Sureshwar Thakur)
Judge.