

IN THE HIGH COURT OF HIMACHAL PRADESH AT SHIMLA  
ON THE 31<sup>st</sup> DAY OF MAY, 2022  
BEFORE  
HON'BLE MR. JUSTICE SANDEEP SHARMA  
REGULAR SECOND APPEAL No. 49 of 2020

**Between:-**

DAVINDER SINGH, SON OF LATE  
SHRI BIDHI CHAND, RESIDENT OF  
SANJAY MARG, CHILGARI,  
DHARAMSHALA, TEHSIL  
DHARAMSHALA, DISTRICT KANGRA,  
H.P.

.....APPELLANT/PLAINTIFF

(BY MR. SANDEEP DATTA, ADVOCATE)

AND

RAJINDER SINGH, SON OF LATE  
SHRI BIDHI CHAND, RESIDENT OF  
SANJAY MARG, CHILGARI  
DHARAMSHALA, TEHSIL  
DHARAMSHALA, DISTRICT KANGRA,  
H.P.

.....RESPONDENT/DEFENDANT

(BY MR. ADARSH K. VASHISTA,  
ADVOCATE)

*Whether approved for reporting? Yes.*

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*This appeal coming on for orders this day, the Court passed the following:*

**JUDGMENT**

Instant Regular Second Appeal filed under Section 100 of the Code of Civil Procedure, lays challenge to judgment dated 19.11.2018, passed by learned Additional District Judge-III, Kangra at Dharamshala,

District Kangra, H.P., in Civil Appeal No.20-D/XIII/18, affirming the judgment and decree dated 29.06.2017, passed by learned Civil Judge (Junior Division-I) Dharamshala, H.P in Civil Suit No.54/2010, titled as *Davinder Kumar vs. Rajinder Kumar*, whereby suit for declaration with permanent prohibitory injunction having been filed by the appellant/plaintiff (hereinafter referred to as the plaintiff) came to be dismissed.

2. Precisely, the facts as emerge from the record are that the plaintiff filed suit for declaration to the effect that the he is owner in possession of land bearing Khata No.67, Khatauni No.84, Khasra No.179/2019, measuring 0-04-00 Hect, to the extent of  $\frac{1}{2}$  share, situate at Mohal Pat, Mouza and Tehsil Dharamshala, District Kangra, H.P. (hereinafter to as suit land) being son and legal heir of late Sh. Bidhi Chand, who died on 03.08.2010 and Will dated 04.10.2008, allegedly executed by late Sh. Bidhi Chand in favour of defendant Rajinder Kumar, is result of fraud, coercion and misrepresentation, hence the same is null and void. Besides above, plaintiff also sought relief of permanent prohibitory injunction restraining the defendant to interfere in the suit land and from dispossessing him, changing the nature and alienating the suit land. Plaintiff averred in the suit that he as well as defendant are the sons of late Sh. Bidhi Chand and their mother had died on 11.01.2010. Plaintiff claimed that he being legal heir of late Bidhi Chand, has right of succession over the estate of late Sh. Bidhi Chand. He also claimed that deceased Bidhi Chand had made arrangement of his movable and immovable property between the plaintiff and defendant during his lifetime and in terms of this arrangement, he had given possession of one-

one room to the parties out of three rooms' house. He claimed that after that he constructed second room, kitchen, bathroom etc. adjoining to the given room with the permission and consent of his father. He also claimed that deceased Bidhi Chand was living separately during his lifetime and it is he only, who served and looked after him. He also claimed that he performed the last rites of his father. Plaintiff averred that he came to know about the execution of Will dated 04.10.2008 after the death of his father in the month of August, 2010 when defendant came to proclaim openly that he is owner of the suit property. He alleged that deceased Bidhi Chand was not in good state of mind and as such, defendant taking undue advantage of his health, got the Will dated 04.10.2008 executed in his favour fraudulently. Aforesaid claim put-forth by the plaintiff came to be resisted and contested by defendant, who in his written statement besides taking preliminary objections of maintainability, cause of action, locus standi, estoppel, concealment of material facts and valuation, admitted that parties are sons of deceased Bidhi Chand and their mother died on 11.01.2010. However, defendant specifically denied that plaintiff and he are having succession right over the estate/property of deceased Bidhi Chand. He claimed that late Sh. Bidhi Chand executed a valid registered Will dated 04.10.2008 in his favour, bequeathing thereby suit property in his favour. He specifically denied factum with regard to execution of family arrangement, if any, made by late Bidhi Chand thereby giving one-one room to plaintiff and him during his life time. He claimed that plaintiff has occupied one room in the house situate on the suit land, which was owned and possessed by deceased Bidhi Chand and

after his death, he is the owner in possession of the suit land and property, as per registered Will dated 04.10.2008. Defendant also denied the factum with regard to construction of one room, kitchen, bathroom etc. as claimed by the plaintiff, with the permission and consent of deceased Bidhi Chand. He also denied that deceased Bidhi Chand was living separately during his lifetime, but claimed that he was living with him and his family. He also claimed that he looked after his father and rendered all services to him during his lifetime and in lieu of his services, his father executed a registered Will dated 04.10.2008 in his favour. Defendant denied that deceased Bidhi Chand was not able to understand the minor things of life due to his extreme old age and illness. He claimed that deceased Bidhi Chand remained in service in M.C. Dharamshala and he was in good state of mind. He contended that Will dated 04.10.2008 was dictated by deceased Bidhi Chand and after reading the same, signed the Will in the presence of witnesses, who *inter alia* signed the same in the presence deceased Bidhi Chand and as such, Will being valid and genuine, is binding upon the parties.

3. Plaintiff by way of replication refuted the stand taken by defendant in the written statement and re-asserted his claim as set up in the plaint. On the basis of pleadings adduced on record by respective parties, following issues were framed :-

- “1. *Whether the plaintiff is the owner in possession of land bearing Khata No.67, Khatauni No.84, Khasra No.179/2019, measuring 0-04-00 Hect to the extent of ½ share being owner and legal heir of late Sh. Bidhi Chand, as alleged? OPP*
2. *Whether Will dated 04.10.2008 is illegal, null and void, as alleged? OPP.*

3. *Whether the plaintiff is entitled for the relief of permanent prohibitory injunction, as alleged? OPP.*
4. *Whether the plaintiff is entitled for the relief of mandatory injunction, as alleged? OPP.*
5. *Whether the suit is not maintainable in the present form, as alleged? OPD.*
6. *Whether the defendant is the owner of the suit land and property as per the registered Will dated 04.10.2008 executed by late Sh. Bidhi Chand, as alleged? OPD.*
7. *Whether the plaintiff has got no cause of action and locus standi to file the present suit, as alleged? OPD.*
8. *Whether the plaintiff is estopped from suing by his act and conduct, as alleged? OPD.*
9. *Whether the plaintiff has concealed the material facts from the court and has not come to the court with clean hands, as alleged? OPD.*
10. *Whether the suit is not properly valued for the purpose of court fee and jurisdiction, as alleged? OPD.*
11. *Relief"*

4. Plaintiff in support of his claim besides examining himself as PW-3, also examined two witness namely PW-1, Ashwani Kumar and PW-2 Kamla Devi and closed his evidence. Defendant also examined himself as DW-1 and two other witnesses namely Balraj Singh, DW-2 and S.K. Shastri, DW-3. Record reveals that none of the witnesses adduced on record by the plaintiff came present for cross-examination despite repeated opportunities and as such, evidence of the plaintiff was closed by court order. Learned trial court on the basis of the evidence as well as pleadings adduced on record, dismissed the suit of the plaintiff. Being aggrieved and dissatisfied with the

aforesaid judgment and decree passed by learned trial court, plaintiff preferred appeal in the Court of learned Additional District Judge-III, Kangra at Dharamshala, District Kangra, H.P., which also came to be dismissed vide judgment dated 19.11.2018. In the aforesaid background, plaintiff has approached this Court in the instant proceedings, praying therein to decree his suit after setting aside the judgments and decrees passed by courts below in suit and thereafter in appeal.

5. Today, matter came up for admission of the appeal, but with the consent of the both the parties, this Court after having perused the record, deemed it fit to dispose it of, at admission stage.

6. Having heard learned counsel representing the parties and perused material available on record *vis-à-vis* reasoning assigned by learned Courts below while passing impugned judgments and decrees dated 19.11.2018 and 29.06.2017, respectively, this Court finds no force in the submission of Mr. Sandeep Datta, learned counsel representing the plaintiff that both the courts below have failed to appreciate the evidence in its right perspective, as a consequence of which, findings detriment to the interest of plaintiff came to the fore, rather this Court after having scanned entire evidence on record, finds that plaintiff miserably failed to prove the plea set up by him in the plaint by leading cogent and convincing evidence. Interestingly, in the case at hand, though plaintiff examined three witnesses in support of his claim, but since, none of the plaintiff's witnesses turned up for cross-examination, version put-forth by them in their examination-in-chief, rightly came to be ignored by the courts below. Though, in the case at hand,

plaintiff claimed that deceased Bidhi Chand before alleged execution of Will dated 04.10.2008, had made some family arrangement, whereby one room each was given to both plaintiff and defendant, but interestingly, such family arrangement, if any, never came to be proved in accordance with law. Similarly, plaintiff claimed that Will dated 04.10.2008, allegedly executed by deceased Bidhi Chand in favour of the defendant, is a result of fraud, coercion and misrepresentation, but he was unable to prove such claim of him by leading positive evidence. Mere assertion made if any, with regard to fraud, coercion and misrepresentation, is not sufficient to prove that Will dated 04.10.2008, sought to be relied upon by the defendant, is fictitious, rather onus to prove that Will in question is a result of fraud is/was on plaintiff. Though, as has been taken note hereinabove, plaintiff as well as other two witnesses adduced on record by him, stated in examination-in-chief that Will dated 04.10.2008, is a result of fraud, but since, these witnesses never turned up for cross-examination, statement, if any, made by them in examination-in-chief rightly came to be ignored by the courts below having no evidentiary value.

7. To the contrary, defendant Rajinder Kumar while deposing as DW-1, successfully proved on record factum with regard to execution of Will dated 04.10.2008 in his favour by deceased Bidhi Chand. During cross-examination by learned counsel for the plaintiff though this witness admitted that there is a house constructed over the suit land, but specifically stated that house was constructed after the year 2000 by his father. He admitted that when his father was alive, he had given one room to him and one room to his

brother and one room was kept by him for his own use. However, self-stated that his brother resides at Kotla with his wife. He also stated that his brother used to fight with his father, regarding which FIR was registered by his father. He denied that plaintiff constructed one room, kitchen and bathroom with the house, which is constructed on the suit land with the consent of his father, rather he self-stated that his father had constructed the house and had done repair work. While specifically denying that plaintiff used to look after his father, he admitted that at the time of death of his father, plaintiff was present in the house. He specifically denied claim of the plaintiff that he had performed the last rites of his father. While denying allegations of the plaintiff that he did not look after his father, this witness admitted that one of the witnesses of Will namely Om Parkash, is his father-in-law. He denied that he had prepared fictitious Will in connivance with his father-in-law. He stated that after the death of his father, he found the Will in the trunk of his father. He denied that his father was not having good health when he expired. DW-2, Balraj Singh, who had brought the original record regarding Will Ext.DW-2/A, categorically stated that same is correct as per original. During cross-examination conducted upon this witness, he admitted that he had not entered the Will in register nor the same has been prepared in his presence. DW-3, S.K. Shastri, stated that Ext. DW-2/A bears his signatures in red circle. He stated that Will has been written by Yogeshwar Lal, Document Writer, whose signatures are in red circle Ext. DW-3/B and he identifies his signatures, as he has worked with him. He stated that Yogeshwar Lal, Document Writer has expired. He deposed that Will was written as per the



dictation of Bidhi Chand and after that it was read over to Bidhi Chand, who after admitting it to be correct, signed the same. He stated that Bidhi Chand signed the Will in his presence and in the presence of Om Parkash. During his cross-examination, while admitting that he never visited the house of Bidhi Chand, this witness also admitted that when Yogeshwar Lal had written the Will, he was not present there. He admitted that Bidhi Chand had called him to be witness in the Will. He also admitted that Yogeshwar Lal had entered the Will in his register at Licence No.8, Document No.134, dated 04.10.2008. He deposed that he did not know that Om Parkash is relative of defendant Rajinder. He admitted that when the Will was prepared, Bidhi Chand was of 66 years old. He categorically deposed that at the time of preparation of Will, Bidhi Chand was in sound disposing state of mind. He specifically denied that Will was falsely prepared. If the statements made by witnesses adduced on record by defendant, are read in conjunction, it clearly, reveal that defendant successfully proved the execution of Will dated 04.10.2008 in his favour by deceased Bidhi Chand. Section 63 of Indian Succession Act, provides for the execution and attestation of the Will and there are three necessary ingredients for valid execution of Will:-

1. It must be writing.
2. It must be duly signed by testator; and
3. It must be duly attested by at least two persons.

8. Though, by now, it is well settled that onus is upon the propounder of the Will to show by satisfactory evidence that Will has been executed by the testator as contemplated under Section 63 of the Act, but if

allegation of fraud, coercion or misrepresentation is levelled by opposite party, then onus is upon that party to prove factum with regard to fraud, coercion or misrepresentation. However, in the instant case, plaintiff miserably failed to prove that Will dated 04.10.2008, is a result of fraud, coercion and misrepresentation. On the other hand, defendant successfully proved that Will was signed by testator and at the time of execution of the Will, testator was in sound and disposing state of mind; and he could understand the nature and effect of putting signatures on the documents of his own free will. At this stage, Mr. Sandeep Datta, learned counsel for the plaintiff argued that bare perusal of Will Ext. DW-2/A, clearly reveals that same is result of fraud, coercion and misrepresentation and its execution is not proved because only one witness, i.e. DW-3, S.K. Shastri, has signed the same. He also argued that otherwise as per procedure, photographs of testator as well as other two attested witnesses were required to be clicked together, but in the instant case, photos of testator and other marginal witnesses have been clicked separately and as such, factum with regard to execution of Will Ext. DW-2/A, is highly doubtful. This Court is not impressed by the aforesaid submission made by learned counsel for the plaintiff being totally contrary to the provisions of law. Section 63(c) of Indian Succession Act and Section 3 of the Transfer of Property Act, do not provide for a particular form of attestation, but definitely in terms of Section 68 of the Indian Evidence Act at least one of the attesting witnesses should be examined to prove the 'due execution' of the Will. In the case at hand, defendant has examined DW-3 S.K. Shastri to prove valid execution of Will Ext. DW-2/A in

his favour. For a valid attestation of the Will, four conditions must be specified:

1. The Will must be attested by at least two witnesses.
2. Each of these must either see the testator, sign or affix his mark on the Will or must see some other person sign the Will in the presence and by direction of the testator or must receive from the testator a personal acknowledgement of his signature or mark or the signatures of such other person.
3. Each of them must sign the Will.
4. They must have signed in the presence of testator.

If any of these four conditions is not satisfied, the attestation is bad and the will is invalid.

9. In the case at hand, as has been discussed in detail, Will in question has been attested by two witnesses and one of the witness has categorically deposed before this Court that he saw the testator signing or affixing his mark on the Will and testator signed the Will in his presence. Though, in the case at hand, plaintiff with a view to demonstrate that Will Ext. PW-2/A is shrouded with suspicion averred in the plaint that deceased Bidhi Chand, was unable to understand the minor things on account of long ailment and he was not in sound state of mind to depose, but such claim of him never came to be proved in accordance with law.

10. To the contrary, DW-3, S.K. Shastri, stated that he was present at the time of execution of Will and contents of Will were read over and explained to deceased Bidhi chand and thereafter, he put his signatures on the same in the presence of marginal witnesses. DW-3, specifically stated that Will was written by Yogeshwar Lal and his signatures are in red circle

Ext. DW-3/B. DW-2, Registration Clerk, who had brought the register in which entry of Will was made, categorically stated that same is true, as per record. Testimony of witnesses adduced on record by defendant remained un rebutted and as such, by no stretch of imagination, it can be concluded that judgments and decrees passed by courts below thereby dismissing the suit of the plaintiff, are not based upon the proper appreciation of evidence led on record by respective parties.

11. Having perused the material available on record, this Court is fully satisfied and convinced that both the Courts below have very meticulously dealt with each and every aspect of the matter and there is no scope of interference, whatsoever, in the present matter. No question of law much less substantial arises in the instant case for adjudication. Besides above, this Court sees no reason to interfere in the concurrent finding of facts and law recorded by the court below, especially when learned counsel representing the appellant has been not able to point out any perversity in the findings recorded by the Court below.

12. Hon'ble Apex Court in ***Laxmidevamma and Others vs. Ranganath and Others***, (2015)4 SCC 264, it has been held as under:

***“16. Based on oral and documentary evidence, both the courts below have recorded concurrent findings of fact that the plaintiffs have established their right in A schedule property. In the light of the concurrent findings of fact, no substantial questions of law arose in the High Court and there was no substantial ground for reappreciation of evidence. While so, the High Court proceeded to observe that the first plaintiff has earmarked the A schedule property for road and that she could not have full-fledged right and on that premise proceeded to hold that declaration to the plaintiffs’***

***right cannot be granted. In exercise of jurisdiction under Section 100 CPC, concurrent findings of fact cannot be upset by the High Court unless the findings so recorded are shown to be perverse. In our considered view, the High Court did not keep in view that the concurrent findings recorded by the courts below, are based on oral and documentary evidence and the judgment of the High Court cannot be sustained.”***

***(p.269)***

13. Aforesaid exposition of law clearly suggests that High Court, while excising power under Section 100 CPC, cannot upset concurrent findings of fact unless the same are shown to be perverse. In the case at hand, this Court while examining the correctness and genuineness of submissions having been made by the parties, has carefully perused evidence led on record by the respective parties, perusal whereof certainly suggests that the Courts below have appreciated the evidence in its right perspective and there is no perversity, as such, in the impugned judgments and decrees passed by both the Courts below. Moreover, learned counsel representing the appellant was unable to point out perversity, if any, in the impugned judgments and decrees passed by both the Courts below and as such, same do not call for any interference.

14. Having scanned the entire pleadings as well as evidence led on record, this Court finds no illegality and infirmity in the impugned judgments and decrees passed by learned courts below, which otherwise appear to be based upon proper appreciation of evidence as well as law and as such, same are upheld.

15. The present appeal fails and same is accordingly dismissed. Interim directions, if any, are vacated. All miscellaneous applications are disposed of.

**(Sandeep Sharma)**  
**Judge**

**31<sup>st</sup> May, 2022**  
(reena)