

(2012) 10 SHI CK 0013

In the High Court Of Himachal Pradesh

Case No : Regular Second Appeal No. 352 of 2001

Bhadri and Another

APPELLANT

Vs

Smt. Suma Devi and Others

RESPONDENT

Date of Decision : 19-10-2012

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 2 Rule 2
Succession Act, 1925 — Section 63

Citation : AIR 2013 HP 4

Hon'ble Judges : Kuldip Singh, J

Bench : Single Bench

Advocate : Shrawan Dogra and Umesh Kanwar, for the Appellant; M.S. Guleria, for the Respondent

Final Decision : Dismissed

Judgement

Kuldip Singh, J.—This appeal is directed against judgment, decree dated 24.4.2001 passed by learned District Judge. Mandi, in Civil Appeal No. 34 of 1997 affirming judgment, decree dated 25.2.1997 passed by learned senior Sub Judge, Mandi in Civil Suit No. 91/90 (187/92). Smt. Narvada daughter of Ghungar, mother of respondents had filed a suit for declaration and joint possession against appellants and one Hima that Will dated 28.1.1988 of late Ghungar in favour of appellants Nos. 1 and 2 is wrong, illegal and void. The further pleaded case was that suit land measuring 71-15-13 bighas in Mauza Panyali/146 Illaqua Bagra was recorded in the joint ownership and possession of Ghungar deceased and Hima. Smt. Narvada and appellant No. 3 are the daughters, appellant No. 1 is widow and appellant No. 2 is son of deceased Ghungar and are entitled to inherit his estate.

2. Ghungar father of Smt. Narvada was an old man and he used to remain ill and was confined to bed for more than one year prior to his death. Ghungar was also not in sound disposing state of mind on account of his illness. Ghungar died on 1.11.1988. The appellant No. 1 claimed to have inherited along with appellant

No. 2 the entire estate of Ghungar of Muhal Panyali on the basis of Will allegedly executed by Ghungar. It has been alleged that Ghungar had not executed any Will. The Will projected by the appellant Nos. 1 and 2 was their creation in collusion with marginal witnesses. The Will is shrouded by suspicious circumstances. Smt. Narvada had cordial relations with her father. The Will was the result of undue influence and coercion. The Will dated 28.1.1988 was invalid document.

3. The appellants contested the suit by filing written statement, they took preliminary objections of better particulars, valuation, mis-joinder, Order 2, Rule 2 CPC. On merits, it has been alleged that the suit land was partitioned prior to filing of the suit. Hima defendant was unnecessarily impleaded, Ghungar was not confined to bed. Ghungar had asked Smt. Narvada in Magh Bikrami 1988 A.D. that she had already been married but still if she wanted some property that could be given to her otherwise he would bequeath the property in favour of appellant Nos. 1 and 2. Smt. Narvada did not claim any property. Ghungar bequeathed his entire property in favour of appellant Nos. 1 and 2 in full senses, the Will dated 28.1.1988 is genuine. Ghungar and Hima, defendant were co-owners. Ghungar applied for partition and on his failure in partition proceedings, Hima persuaded Smt. Narvada to file the suit. Ghungar had executed the Will of the suit property in favour of the appellant Nos. 1 and 2, he bequeathed his land in Muhal Chahari in favour of Sunder Singh. The defence of Hima was struck off by the order of the Court.

4. The replication was filed. On the pleadings of the parties, the following issues were framed:-

1. Whether the Will No. 23 dated 28.1.1988 purported to have been executed by late Ghungar Ram in favour of the defendant Nos. 1 and 2 is invalid, null and void as alleged? If so, its effect? OPP
2. Whether the Will in dispute is an outcome of collusion of the defendant No. 1 with the defendant No. 2 in collaboration with the scribe and marginal witnesses as alleged? If so, its effect? OPP
3. Whether the Will in dispute is prepared under highly suspicious circumstances and is the result of undue influence and coercion as alleged? OPP
4. Whether the suit is bad for mis-joinder of necessary parties? OPD
5. Whether the suit is barred by the principle of Order 2, Rule 2 CPC? OPD
6. Whether the suit has not been rightly valued for the purpose of Court fee and jurisdiction? If so, what is correct valuation? OPD
7. Whether the better particulars as sought by the defendants have not furnished? If so, its effect? OPD
8. Whether the suit land has not been rightly described as per the latest revenue entry and the land has since been partitioned? If so, its effect? OPD

9. Relief.

The issue Nos. 1 to 3 were answered in affirmative, issues Nos. 4 to 8 in negative and the trial Court decreed the suit on 25.2.1997. The appeal filed by the appellants was dismissed by the learned District Judge on 24.4.2001, hence second appeal which has been admitted on the following substantial question of law:-

Whether the suspicious circumstances relied upon by the Courts below are either nonexistent or untenable?

5. Smt. Narvada died during the pendency of appeal and her legal representatives were brought on record. Hima Ram was impleaded as respondent No. 2 in the appeal but his name was ordered to be deleted on 2.5.2012 from the array of the respondents.

6. I have heard the learned counsel for the parties and have also gone through the record. It has been submitted by the learned counsel for the appellants that Ghungar had executed Will Ex. D-2 dated 28.1.1988. The learned Courts below have erred in rejecting the Will Ex. D-2 on the ground of suspicious circumstances. The alleged suspicious circumstances relied by the learned Courts below are non-existent or untenable. It has been proved on record that Ghungar had executed Will Ex. D-2 voluntarily. The learned counsel for the respondents has supported the impugned judgment, decree. He has submitted that on appreciation of evidence, the learned Courts below have not accepted the Will. The findings of the learned Courts below are based upon appreciation of evidence which require no interference in second appeal. He has submitted for dismissal of the appeal.

7. The trial Court has held that the Will is shrouded by suspicious circumstances. The execution of the Will has otherwise not been proved according to trial Court. It has been ultimately held that Will is the result of collusion and undue influence and is prepared under highly suspicious circumstances. The lower Appellate Court has affirmed the findings of the trial Court.

8. Ex. D-2 is the Will dated 28.1.1998 and has been registered on 28.1.1998. The Will bears the thumb mark of Ghungar. It also bears the signatures of two attesting witnesses Sunder Singh and Manohar Lal. Bhagi Rath Sharma has been shown as scribe and Dina Nath Sharma, Advocate identifier on the Will. In order to appreciate rival contentions, it is necessary to refer evidence. DW-1 Smt. Bhadri has stated that Smt. Narvada is the daughter of Ghungar from his previous wife. Ghungar had gone to Mandi for executing the Will but before that he went to the house of Sunder who is her uncle (Mama) in relation. After this Will, Ghungar had executed another Will in favour of Sunder Singh of Village Chahari as Sunder Singh had borne the expenses of litigation and treatment charges of Ghungar. In cross-examination, she has stated that the Will in question was executed with her approval in her favour and in favour of her son. Sunder Singh in whose favour Will of Chahari village property had been executed

by Ghungar is the same person, who is an attesting witness in the Will in question. Ghungar was illiterate, he was suffering from Asthama. Manohar Lal second attesting witness was called from the shop of Sunder Singh. Manohar Lal was living with Sunder Singh.

9. DW-2 Dina Nath, Advocate has stated that Ghungar had approached him for executing a Will, thereafter the Will was got scribed from petition writer. Manohar Lal attesting witness was working as Clerk with him. The Will was read over to Ghungar, who after accepting its correctness put his thumb mark, thereafter attesting witnesses signed the Will. He signed the Will as identifier. All of them went to Sub-Registrar, where the Will was read over and after admitting the correctness of the Will, Ghungar again put his thumb mark on the Will.

10. DW-3 Mohan Singh has stated that he remained President, Gram Panchayat, Barswan from 1984 to 1991. Ghungar was resident of his Panchayat. He was ailing a few months before his death. He met Ghungar two days before his death and he used to meet him earlier also. Even before that, Ghungar had talked to him about the Will three-four months prior to his death. Ghungar told that he wanted to bequeath his property of Chahari village in favour of Sunder Singh. He had also told that he had executed Will of his Panyali property in favour of his wife and son. He was 71/75 years old and suffering from asthma for the last 4-5 years. He was helpless due to old age and illness.

11. DW-4 Sunder Singh has stated that Ex. D-2 was scribed by petition writer Bhagi Rath, it was read over to Ghunger, who thumb marked the Will, thereafter he and Manohar Lal witnesses put their signatures. They went to Tehsil, there also the Will was read over and he signed and Ghunger put his thumb mark, before Tehsildar, Ghunger admitted the correctness of the Will. He has tailoring shop on hospital road, Bhadri was with Ghunger. Manohar Lal witness was working in his shop. Bhagi Rath, petition writer is the brother of Dina Nath Sharma, Advocate. Bhadri is the daughter's daughter of his uncle (Taya), he is uncle (Mama) of Bhadri in relation.

12. DW-5 Manohar Lal, Advocate, has stated before his enrollment as an Advocate, he was Clerk of Dina Nath Sharma, Advocate. He also worked as typist in the Court Compound. He and Sunder Singh are the witnesses of the Will Ex. D-2 which was thumb marked by Ghunger.

13. The Hindu Will is required to be executed as provided in Section 63 of the Indian Succession Act, 1925 (for short "Act"). DW-4 Sunder Singh and DW-5 Manohar Lal are the attesting witnesses of Will Ex. D-2. The learned counsel for the respondents has relied *Girja Datt Singh Vs. Gangotri Datt Singh*, . In that case the contention was that Uma Dutt Singh and Badri Singh were the attesting witnesses. The Supreme Court has held that in order to prove due attestation of the Will, Gangotri Datt Singh would have to prove that Uma Dutt Singh and Badri Singh saw the deceased signed the Will and they themselves signed the same in the presence of the deceased.

14. In Lt. Col. L.H.M. Gregory Vs. General Public and Others, it has been held as follows:

.....It is well settled that the mode of proving the will does not ordinarily differ from that of proving any other document except as to the special requirement of attestation prescribed in the case of a will by Section 63 of the Act. These requirements are that the testator shall sign or shall affix his mark to the will at such a place in the will that it shall appear that it was intended thereby to give effect to the writing as a will and the will shall be attested by two or more witnesses, each of whom has seen that testator sign or affix his mark to the will and each of the witnesses shall sign the will in the presence of the testator but shall not be necessary that more than one witness be present at the time and no particular form of attestation shall be necessary.

15. The statements of DW-4 and DW-5 are general in nature and short of requirement of Section 63 of the Act. The two Courts below have considered this aspect. The learned District Judge has considered the statements of DW-4 and DW-5 in terms of Section 63 of the Act and has held that in the statements of DW-4 and DW-5 specific words as per Section 63 of the Act are missing. The perusal of statements of DW-4 and DW-5 attesting witnesses indicates that they have not fulfilled the requirement of Section 63 of the Act for proving the Will. DW-4 and DW-5 have not stated that Ghunger put his thumb mark on Will in their presence and they signed the Will in presence of Ghunger. The execution of Will Ex. D-2 has not thus been proved.

16. The two Courts below have also held that the Will is shrouded by suspicious circumstances. The contention is that either the so called suspicious circumstances are nonexistent or untenable. DW-1 Smt. Bhadri has stated that Will in question was executed with her approval in her favour and in favour of her son. She has admitted relation of DW-4 Sunder Singh with her. She has also stated that Ghunger was illiterate and was suffering from asthma. Ghunger had executed another Will in favour of Sunder Singh. DW-4 Sunder Singh has stated that Bhadri was with Ghunger at the time of execution of the Will. It has come on record that DW-4 Sunder Singh attesting witness of the Will was running a tailoring shop. DW-5 Manohar Lal at that time was working with him. It can be safely assumed that before execution of the Will, the testator is expected to arrange atleast two attesting witnesses.

17. DW-1 Smt. Bhadri has stated that Ghunger had gone to Mandi for executing the Will but before that he went to the house of Sunder. There is nothing on record that at the instance of Ghunger the other attesting witness of the Will was also called or arranged. It appears since DW-5 Manohar Lal was working at that time with DW-4 Sunder, therefore, he became second attesting witness of Will Ex. D-2. DW-4 Sunder Singh has admitted that Smt. Bhadri is daughter's daughter of his uncle (Taya). Thus, DW-4 is not a distant relative of Smt. Bhadri the beneficiary of the Will. It has come on record that there is another Will of Ghunger in favour of Sunder Singh after the Will Ex. D-2. The participation of

Smt. Bhadri in the execution of the Will in which she is a beneficiary has been proved on record. She has stated that the Will has been executed with her approval in her favour and in favour of her son.

18. Ghunger was illiterate and was suffering from asthma. There is a recital in routine at the end of the Will that Will was read over to Ghunger but not by way of separate certificate of the scribe that contents of Will were read over to Ghunger who admitted the contents and then put his thumb mark on the Will. The Will has been registered but the Sub Registrar who registered the Will has not been examined. The burden of explaining suspicious circumstances is always on the propounder of the Will.

19. In the written statement a plea has been taken that in the beginning of Magh Bikrami 1988 A.D. the plaintiff was asked by Ghunger in presence of witnesses that sufficient dowry had been given to Narvada and in spite of that if she wanted any part of the property that could be given to her by way of Will or gift, otherwise Ghunger would bequeath the entire property in favour of appellant Nos. 1 and 2. It has been further 10 pleaded that since Smt. Narvada refused to take any property of Ghunger, therefore, the Will was executed on 28.1.1988. There is no recital in the Will Ex. D-2 that Smt. Narvada ever refused to take any part of the property of Ghunger.

20. DW-1 in her statement has not stated that Smt. Narvada before execution of Will Ex. D-2 ever told Ghunger that she did not want any share in the property of Ghunger. DW-3 Mohan Singh has stated that he used to meet Ghunger off and on, but he has also not stated that Ghunger ever told him that Smt. Narvada did not want any share in his property. The appellants have not led any worth-believing evidence that before execution of Will Ex. D-2, Smt. Narvada ever told Ghunger that she did not want any share in his property. There is no explanation in Will Ex. D-2 why Ghunger had not given any share of his property to Smt. Narvada.

21. DW-3 Mohan Singh has stated that Ghunger was helpless on account of his illness and old age. This shows that Ghunger was not in clear state of mind what to do and what not to do. In Ramchandra Rambux Vs. Champabai and Others, it has been held that in all cases in which a will is prepared under circumstances which arouse the suspicion of the Court that it does not express the mind of the testator, or that it was prepared under highly suspicious circumstances, it is for the propounder of the will to remove the suspicion. It has further been held that where propounder has taken a prominent part in the execution of the will which confers substantial benefits on him, that itself is generally treated as a suspicious circumstance attending the execution of the will. DW-1 beneficiary of the will in clear terms has stated that Will Ex. D-2 has been executed by Ghunger with her approval in her favour and in favour of her son. The participation of DW-1 in the execution of the Will has been established. This indicates that DW-1 a beneficiary participated in the execution of the Will and Ghunger had given whole of the Panyali property to DW-1 and her son.

22. The learned counsel for the appellants has relied *Biru Ram Vs. Barkha Ram* on the point that mere presence of beneficiary at the time of the execution of the Will is no ground to hold that he prevailed upon the Will of the testator. In the present case, it is not the case of mere presence of the beneficiary. It has been proved that DW-1 beneficiary has participated in the execution of the Will and she prevailed upon the Will of Ghunger for preparing the Will in favour of DW-1 and her son. The learned counsel for the appellants has also relied *Kartar Kaur Vs. Kewal Singh and Another* and has submitted that deprivation of natural heirs by the testator should not raise any suspicion, because the whole idea behind execution of Will is to interfere with the normal line of succession. In the present case, it is pleaded case of the appellants that Ghunger asked Smt. Narvada whether she would like to have some share in his property by way of will or gift. According to appellants, Smt. Narvada declined to have any share in the property of Ghunger. The appellants failed to prove that Smt. Narvada ever represented to Ghunger that she did not want any share in his property. In these circumstances, even as per pleaded case of appellants, Ghunger wanted to give some share from his property to Smt. Narvada his daughter, but ultimately in Will Ex. D-2 no share was given to Smt. Narvada. In these circumstances, some explanation was required in the Will Ex. D-2 from Ghunger why he thought for not giving any share to Smt. Narvada. Therefore, *Kartar Kaur (supra)* is not applicable in the facts and circumstances of the present case.

23. The learned counsel for the appellants has relied *Shakuntala Devi Vs. Savitri Devi and Others*, *Dhyan Chand Vs. Smt. Savitri Devi and Others*, and *Deep Ram and Others Vs. Sh. Laxmi Nand and Others*, and has submitted that once the execution of the Will has been proved then exclusion of the natural heirs or that no reasons were assigned for exclusion of natural heirs would not amount to suspicious circumstance. It has also been submitted that law does not require that the Will must contain details of all legal heirs. It has been submitted that when law does not require something to be done then judicial scrutiny cannot be made to disprove an act which law does not require to be done.

24. It may not be necessary in every case to explain the exclusion of natural heirs in a Will but it depends upon the facts and circumstances of the case. In the case in hand it was projected by the appellants in defence that Ghunger wanted to give some share to Smt. Narvada but did not give any share to Smt. Narvada in the Will because she refused to take any share in the property of Ghunger. The appellants failed to prove that Smt. Narvada ever refused to take any share in the property of Ghunger then natural and irresistible conclusion is that Ghunger wanted to give some share to Smt. Narvada. The explanation is missing in the Will Ex. D-2 why no share has been given to Smt. Narvada, this creates suspicion. It was for the appellants to explain this suspicion, which they have failed to explain. Therefore, the appellants cannot take benefit of *Shakuntala Devi Vs. Savitri Devi and Others*,

25. The two Courts below have concurrently held against the execution of Will

Ex. D-2. It is not a case where inadmissible evidence has been relied or material evidence which goes to the root of the case has been ignored by the two Courts below. In Deep Ram and Others Vs. Sh. Laxmi Nand and Others, it has been held that execution of Will being question of fact and cannot be interfered with in second appeal. The view taken by the two Courts below emerges from the evidence on record. There is no merit in the appeal. The aforesaid question of law is decided against the appellants. In view of above, the appeal fails and is accordingly dismissed with no order as to costs.