
(2011) 10 SHI CK 0046

In the High Court Of Himachal Pradesh

Case No : Regular Second Appeal No. 490 of 2003

Gulzari Lal and Others

APPELLANT

Vs

Lali Devi and Others

RESPONDENT

Date of Decision : 17-10-2011

Acts Referred:

Citation : (2011) 10 SHI CK 0046

Hon'ble Judges : Kuldip Singh, J

Bench : Single Bench

Final Decision : Dismissed

Judgement

Kuldip Singh, Judge

1. The Defendants have filed this appeal against judgment, decree dated 14.08.2003 passed by learned District Judge, Mandi, in Civil Appeal No. 88 of 2001, reversing judgment, decree dated 03.11.2001 passed by learned Sub Judge, Court No. 2, Mandi, in Civil Suit No. 345/99/94. The learned District Judge allowed the appeal and decreed the suit of the Plaintiffs which was dismissed by the learned trial Court. The parties in this judgment are indicated as Plaintiffs and Defendants.

2. The facts, in brief, are that Plaintiffs had filed a suit for declaration that the Will dated 29.05.1992 allegedly executed by Tulsia alias Seta is wrong, illegal and they have prayed joint possession of the suit property, more specifically, described in the plaint. It has been pleaded that Plaintiffs No. 1 to 4 and Defendants No. 1 to 3 are daughters, widow and sons of Tulsia and, therefore, entitled to inherit and succeed the estate of Tulsia. It has been alleged that Tulsia was weak and old and was suffering from tuberculosis and cancer. He was confined to bed for about 5 years prior to his death. Tulsia was not in sound disposing state of mind and due to protracted illness, he died on 24.06.1992. The Defendants on the basis of the Will allegedly executed by late Tulsia in their favour inherited his entire movable and immovable properties and got attested

mutation in their favour. The mutation in favour of Defendants is also wrong and illegal.

3. Tulsia was aged about 72 years at the time of alleged execution of the Will. He was illiterate and was suffering from serious diseases. Tulsia was taken to Mandi in a taxi by Defendant No. 2 on the understanding that he will get him X-rayed, however, fabricated Will was prepared. In any case, the alleged Will is the outcome of fraud, undue influence, coercion and misrepresentation. The Plaintiff No. 4 is the widow, who has been deprived of the property without any sound and cogent reason.

4. The suit was contested by Defendants by filing written statement, they have pleaded that Tulsia had executed a Will in their favour on 29.05.1992 in sound disposing state of mind and on account of his free will and volition in presence of witnesses, which was read over and explained to Tulsia. It has been denied that Tulsia was bed-ridden and was suffering from various diseases. The Defendants had prayed for dismissal of the suit.

5. The Plaintiffs filed replication and reiterated their stand taken in the plaint. On the pleadings of the parties, the following issues were framed:

1. Whether late Shri Tulsia executed a valid Will in favour of the Defendants? OPD.

2. Relief.

The issue No. 1 was answered in affirmative and the suit was dismissed by learned Trial Court on 03.11.2001. The learned District Judge on 14.08.2003 allowed the appeal and decreed the suit, hence second appeal which has been admitted on following substantial question of law:

Whether the presence of beneficiary and exclusion of some of legal heirs are not suspicious circumstances of the Will in question?

6. I have heard Learned Counsel for the parties and have also gone through the record. It has been submitted on behalf of the Appellants/Defendants that the learned District Judge has mis-construed and mis-interpreted the evidence regarding the execution of the Will. The Defendants have proved execution of the Will Ex. DA on record. There are no suspicious circumstances in the execution of the Will. The Learned Counsel for the Plaintiffs have supported the impugned judgment, decree and has submitted that learned District Judge has rightly appreciated the material on record and no fault can be found with the impugned judgment, decree. He has prayed for dismissal of the appeal.

7. PW-1 Dr. R.P. Tandon has proved Ex.P-1 certificate of illness of Tulsi Ram. In the certificate, it has been certified that Tulsi Ram aged 73 years was suffering from permanent tuberculosis as per record dated 07.03.1992. PW-2 Smt. Lali Devi is the daughter of Tulsi Ram and has stated that Tulsi Ram has left behind three daughters and three sons and a widow. She was married in the year 1994.

The mother is living with her and father also used to live with her. The brothers after their marriage are living separately. At the time of death of her father, he was living with her. Tulsi Ram was suffering from tuberculosis since 1985. Later on, he was inflicted with cancer also. She spent on his treatment. The Defendants did not incur any expenses on the treatment of their father.

8. PW-2 continued Tulsi Ram was 72 years at the time of his death on 24.06.1992. He stopped talking three months prior to his death and he was also not eating anything. The daughters of Tulsi Ram were looking after him. He was passing urine and stools in the bed and was not able to recognize anybody. The Will is forged. Tulsi Ram has not executed any Will. Tulsi Ram was taken to hospital on the pretext of getting X-rays, but instead a forged Will was got prepared. In cross-examination, she has stated that her father was working in Electricity Board. Kamla has education only up to 5th standard and is serving in Electricity Board on daily wages. She denied the suggestion that Defendants looked after the parents. She denied that Tulsi Ram never wanted to give anything to the daughters and his wife. She denied that Tulsi Ram got the Will executed of his own voluntarily.

9. PW-3 Sewak Ram has stated that Tulsia used to live with his daughters and wife. The daughters used to look after him. At the time of execution of the Will, he was not in his senses and he used to talk only through gestures. He was not in fit state of mind. In cross-examination, he has shown his ignorance that Tulsi Ram of his own executed the Will and got it registered before the Sub Registrar. He used to visit Tulsi Ram in the hospital when he was admitted.

10. PW-4 Mani Ram has stated that Tulsia used to live with Lali etc. The mother of Lali was also living with her, so also her sisters. Tulsia was his uncle and his mental condition was not good. He was not in a position to move about and used to remain on the bed. He used to pass urine and stools in the bed. The sons of Tulsi Ram were not looking after him. They were living separately. Tulsia was not in a position to speak. He does not know why Tulsia got the Will executed. Tulsia was not in a position to get the Will executed. In cross-examination, he has stated that his house was at a distance of 30 kilometres from the house of Tulsia, but volunteered that he used to visit Tulsia. One son of Tulsia is Naib Tehsildar. He denied that Tulsia and his wife used to live with their sons. He has shown his ignorance that Tulsia executed Will of his entire property in favour of his three sons.

11. DW-1 Gulzari Lal has stated that his father during his lifetime executed a Will in favour of his three sons namely Gulzari Lal, Garib Dass and Roop Singh. At the time of execution of the Will, he was not present on the spot, but his brother was there. He and his brothers used to pay `200/- per month each to their mother. He has stated that Tulsia, his wife used to live with Plaintiffs, where Tulsia died. He was suffering from tuberculosis and cancer. Garib Dass and Chet Ram talked to each other.

12. DW-2 Pushap Ram identified Tulsia on 29.05.1992 on Will Ex. DA and he put signatures Ex.DW2/A in token of identification. Tulsia in his presence had presented the Will before the Sub Registrar for registration which was read over to him.

13. DW-3 Chet Ram has stated that document writer scribed the Will on the instructions of Tulsia, who put his thumb mark after understanding the same. Thereafter, he and Tara Chand put their signatures in presence of Tulsia. Tulsia also put his thumb mark in his presence on Ex. DA. Tulsia before Tehsildar also admitted the correctness of the Will and put his thumb mark. He was in sound disposing mind at the time of execution of the Will. In his cross-examination, he has stated that his house is at a distance of 35 kilometres from the house of Tulsia. Garib Dass was present at the time of execution of the Will. He denied that Tulsia was suffering from cancer and T.B. DW-4 Bhagi Rath, document writer, has stated that the Will was got scribed by Tulsia. Ex. DA is the Will dated 29.05.1992.

14. The Defendants have put up the case that the Will is thumb marked by Tulsia. In other words, it has been established that Tulsia was illiterate. There is no endorsement on the Will at the time of scribing the Will by document writer that the Will was read over and explained to Tulsia and after understanding its contents, Tulsia put his thumb mark over the Will. DW-1 Gulzari Lal has stated that Tulsia was about 70-75 years old and he was suffering from tuberculosis and cancer. PW-2 and PW-4 have stated that Tulsia was bed-ridden and he even used to pass stools and urine in the bed. DW-3 Chet Ram attesting witness of the Will is a resident of 35 kilometres from the house of Tulsia. It is not the case of the Defendants that no other person enjoying confidence of Tulsia was available nearby as witness on the Will. Chet Ram in his statement has even denied that Tulsia was suffering from cancer and tuberculosis. DW-1 Gulzari Lal has admitted that Tulsia was suffering from cancer and tuberculosis.

15. DW-3 Chet Ram has not stated that Tehsildar read over the Will to the testator. It has come in evidence that Garib Dass, who was Naib Tehsildar at that time, was also present at the time of execution of the Will. DW-1 Gulzari Lal has stated that Garib Dass and Chet Ram had talk with each other. It has come on record that Tulsia along with his wife used to live with Plaintiffs and they were looking after Tulsia. In presence of this evidence, the statement in the Will that Gulzari, Garib Dass and Roop Singh were looking after the testator and her wife, is incorrect. It has further been stated in the Will that the testator has full confidence that his sons will continue to serve him during his lifetime and, therefore, he wants to give the property to them. The very foundation of the Will is proved to be correct.

16. In addition to this, no provision has been made by the testator in the Will for his wife nor for any daughter. It has not been denied that one daughter namely Lali is physically challenged and even for that daughter also no provision has been made in the Will. It has been submitted that Lali is owner of some land, but

ownership of the land has nothing to do with the provision which is expected from a father to be made for his physically challenged daughter. There is nothing on record nor it is the case of the Defendants that testator was not having good relations with his daughters and wife. No legal acceptable reason has been given in the Will to exclude the daughters and the wife by the testator.

17. The Defendants have not examined any doctor to prove the mental and physical condition of the testator at the time of alleged execution of the Will. This is relevant inasmuch as the Plaintiffs have led positive evidence that testator was neither physically nor mentally fit at the time of alleged execution of the Will. He was bed-ridden. He stopped eating. He was not in a position to speak and communicate. He used to pass stools and urine in the bed. He died on 24.06.1992 and the alleged Will is dated 29.05.1992. In view of this evidence on record, it is reasonable to infer that physical and mental condition of testator was not fit to execute the Will on 29.05.1992.

18. The Defendants have also not examined Sub Registrar to prove that, in fact, the Will was read over and explained to Tulsi Ram at the time of registration of the Will. The learned District Judge has rightly appreciated the material on record in rejecting the Will. In second appeal, the reappreciation of the evidence is not possible unless it is shown that the judgment of the lower appellate Court is perverse or the judgment is based upon some inadmissible evidence or irrelevant material has been considered. In order to satisfy myself, I have gone through the evidence and I am of the opinion that the view taken by learned District Judge is correct and it emerges from the evidence on record. The substantial question of law noticed above is decided against the Appellant.

19. No other point was urged.

20. In view of above discussion, the appeal fails and is accordingly dismissed with no order as to costs.