

(1999) 10 SHI CK 0001

In the High Court Of Himachal Pradesh

Case No : Regular Second Appeal No. 234 of 1993

Prem Singh and Another

APPELLANT

Vs

Padam Singh and Others

RESPONDENT

Date of Decision : 13-10-1999

Acts Referred:

Specific Relief Act, 1963 — Section 38

Citation : AIR 2000 HP 103 : (2001) 1 CivCC 688 : (2001) 4 RCR(Civil) 543

Hon'ble Judges : M.R. Verma, J

Bench : Single Bench

Advocate : Bhupender Gupta, for the Appellant; Jagdish Vats, for the Respondent

Final Decision : Partly Allowed

Judgement

M.R. Verma, J.—This appeal has been directed against the judgment and decree dated 17-4-1993 passed by the learned District Judge, Shimla whereby the judgment and decree passed by the learned Sub Judge, Theog, decreeing the suit of the plaintiffs-appellants (hereinafter referred to as "the plaintiffs") has been set aside and the suit has been dismissed.

2. Brief facts leading to the presentation of this appeal are that the plaintiffs instituted a suit for perpetual Injunction. Case of the plaintiffs as made out in the plaint, briefly, is that the plaintiffs are the owners in possession of the land comprising khasra Nos. 406, 413 and 423 measuring 3 bighas 11 biswas situate in chak Koti, Pargna Dharti, Teh. Thoog (hereinafter referred to as "the suit land"). However, the respondents-defendants (hereinafter referred to as "the defendants") are threatening to interfere with the possession of the plaintiffs over the suit land without any right, title and interest and to achieve their goal of dispossessing the plaintiffs from the suit land they trespassed into the suit land and cut and removed some of the maize therefrom in the last week of the month of September 1980 and are time and again threatening to interfere in the suit land. Hence the suit.

3. The suit was contested. Defendants 1 to 5 in their written statement, raised a preliminary objection that Mohinder Singh has wrongly been described as Bhinder Singh and is a minor who has been sued as a major. On merits, while denying the claim of the plaintiffs, it was averred that Padam Singh defendant is the owner in possession of land comprising khasra Nos. 406 and 413 by virtue of a Will executed in his favour by one Nanda on 20-10-1971 and that said Nanda had given land khasra Nos. 295, 406, 413, 568, 572, 294 and 359 measuring 10 bighas 14 biswas in chak Koti for cultivation much before the execution of the Will. It is further averred that the aforesaid land except khasra No. 423 is in possession of defendant Padam Singh as owner and the other defendants have nothing to do with the suit land. Any interference in the suit land has been denied and the entries in the revenue record in respect of the suit land have been denied being incorrect. Hence the claim as made by the plaintiffs has been denied.

4. Plaintiffs filed replication wherein they requested for striking off the name of defendant No. 6 from the array of defendants and while re-affirming the claim as made out in the plaint, denied the other grounds of defence as taken in the written statement. It has further been averred that before 1971 Nanda and Khaku were the joint owners in possession of the suit land and after the death of Nanda, the plaintiffs are joint owners in possession vide mutation No. 1331. It is claimed that defendant is estopped to challenge the status of the plaintiffs and the execution of the Will by Nanda in favour of defendant Padam Singh has been denied and it is averred that Padam Singh has propounded a false Will after a long time creating doubt about it and that Padam Singh might have obtained the signatures of said Nanda by fraud etc. It is also averred that Nanda was the grandfather of the plaintiffs and they were members of the Joint Hindu Family. The suit property is ancestral and coparcenary property and Nanda had no right to dispose it of by Will. The possession of Padam Singh as claimed in the written statement has also been denied.

5. On the pleadings of the parties, the learned trial Court framed the following issues :

1. Whether the plaintiffs are owners in possession of the land in dispute as alleged? OPP.

2. Whether the plaintiffs are entitled to the relief of injunction prayed for? OPP.

3. Whether the defendant Padam Singh is owner in possession of the land comprised in khasra Nos. 406 and 413 by way of will dated 20-10-1971 as alleged? OPD-1.

3-A. Whether the defendants are estopped from challenging the status of the plaintiff as alleged? OPP.

3-B. Whether the claim of the defendant is barred by limitation as alleged? OPP.

3-C. Whether the suit land is ancestral and coparcenary as alleged, if so its

effect? OPP.

4. Relief.

6. By the judgment dt. 31-12-1986. the learned trial Judge held issue Nos. 1 and 2 in favour of the plaintiffs and Issue No. 3 against the defendants whereas the other Issues were not pressed and consequently decreed the suit.

7. Feeling aggrieved, the defendants filed an appeal against the judgment and decree of the learned trial Court in the Court of the learned District Judge, Shimla, who, vide the impugned judgment, set aside the Judgment and decree passed by the learned trial Judge and dismissed the suit. Hence the present appeal.

8. I have heard the learned counsel for the parties and have also gone through the record.

9. This appeal has been admitted for hearing on the following substantial questions of law :

"(1) Whether the statements made by the witnesses in previous proceedings are substantive evidence or can merely be utilised for contradicting the witnesses. Whether such statements are admissible without proving that the maker of such evidence either are not able to appear in the Court or are not alive?

(2) Whether mere proof of execution and attestation of the Will is sufficient to disallow the onus on propounder of the Will to explain satisfactorily the other suspicious circumstances surrounding the execution of the Will?"

10. The first question supra was raised in relation to the following documents :

(a) statements of PW-1 Leela Devi, next friend of the minor plaintiff Prem Singh Exs, D-1, DH and DW-10/B (wrongly marked as PW-10/B) made in her capacity as such;

(b) Statements of DW-10 ASI Devinder Datt Ext.D-2, PW-2 Tulsi Ram Exs. D-3 and DJ and that of Mohan Lal Ex.DW-10/C (wrongly marked as PW-10/C); and

(c) affidavits Exs. DW-5/A to DW-5/C purporting to be sworn by Sohan Singh (PW-4), Amar Singh (DW-4) and Bishan Singh (DW-3).

11. There is no dispute that PW-1 Leela Devi had allegedly made statements Exs. D-1, and DH in connected proceedings in the suit under Order 39, Rules 1 and 2 and 2-A CPC and Ex.DW-10/B before the police in her capacity as next friend of plaintiff Prem Singh. In case any of the aforesaid statements contained an admission which suggests any inference as to any fact in issue or relevant fact in the suit, these could be proved by the defendants against the plaintiff within the ambit and scope of Section 18 read with Section 21 of the Indian Evidence Act (hereinafter referred to as "the Act"). However, the learned counsel for the defendants has not pointed out any such admission therein nor do I find any. Therefore, these statements could not be produced and proved as substantive

evidence but could only be used u/s 145 of the Act for contradicting the maker by confronting her with them in her cross-examination which has not been done.

12. The statement Ex.D-2 of Devinder Singh (DW-10), statements Exs. D-3 and DJ of PW-2 Tulsi Ram not being admissions within the scope of Section 18 read with Section 21 of the Act, and both of the makers Of these statements having been produced and examined as witnesses at the trial could not be used for a purpose other than confronting and contradicting them in their cross-examinations within the scope of Section 145 of the Act. However, these statements have not been used for the permissible purpose u/s 145 of the Act but were independently produced and sought to be proved which is not permissible.

13. Statement Ex.DW-10/C purporting to have been made by one Mohan Lal who has not been examined, could not be admitted in evidence as the statement was not made by him in a capacity under which it could be treated as "admissible" u/s 18 read with Section 21 of the Act nor it is shown to be a statement of the nature which could be admissible in evidence u/s 32 of the Act.

14. The affidavits Ex. DW-5/A to Ex.DW-5/C could also not be taken into account for any purpose other than the purpose provided u/s 145 of the Act. Though the alleged deponents have been examined as witnesses in the suit but the affidavits aforesaid are sought to be proved by examining other witnesses instead of putting these affidavits to the makers. It has though been suggested to PW-4 Sohan Singh in his statement that he had sworn an affidavit but he was not confronted with the affidavit Ex.PW-5/A purporting to have been sworn by him. There is no dispute that Sohan Singh (PW-4) is the father of plaintiff Prem Singh. Had the affidavit Ex.DW-5/A been sworn in by him, for and on behalf of plaintiff Prem Singh under lawful authority, any admission therein relevant to the involved issues could be proved by the defendants. However, no such authority has been pleaded or proved.

15. These affidavits have not been filed pursuant to the orders of the Court permit-ting leading of evidence by the parties by way of affidavits, and the plaintiff has no opportunity to cross-examine the deponents. All the deponents are alive and were examined as witnesses in the suit. These affidavits are not put to any of them, u/s 145 of the Act.

16. Therefore, the statements Exs. D-1, D-2, D-3, DH, D-5, DW-10/B, DW-10/C and affidavits Exs. DW-5/A to DW-5/B are no evidence on which the Court could act.

17. The learned trial Judge though has considered these documents but the ultimate conclusions arrived at by him were not based on these documents. The lower appellate Court has not considered and relied on the statements Exs. D-1, D-2, D-3, DH, DJ. DW-10/B and DW-10/C which means that it had by necessary implication not accepted these statements as evidence and rightly so.

However, the first appellate Court laid reliance on the affidavits Exs. DW-5/A to DW-5/C particularly Ex.PW-5/A to hold that defendant Padam Singh was in possession of the suit land vide paras 23 and 35 of the impugned judgment.

18. The question which, therefore, arises for determination is whether after exclusion of the impermissible evidence aforesaid, taken into account by the lower appellate Court, can its findings that defendant is in possession of the suit land be sustained. Be it stated that the answer to the aforesaid question is dependent on the due proof of the Will Ex.DW-2/A propounded by defendant Padam Singh.

19. The learned trial Judge held that the Will Ex.DW-2/A had been fabricated by defendant Padam Singh and the other evidence in support of his case has also been fabricated by him. On the contrary, the learned District Judge in the impugned judgment concluded that the Will Ex.DW-2/A is genuine. It is in view of these contradictory findings that the substantial question of law No. 2 supra arises for determination.

20. So far as the legal position is concerned, the onus of proving a Will to be genuine and valid on the propounder shall, in the ordinary circumstances, stand discharged once it is established on the basis of satisfactory evidence (i) that the testator at the time of execution of the Will was in a sound and disposing state of mind and understood the nature and effect of the disposition and (ii) that the Will was signed by the testator of his own free will in the presence of the attesting witnesses as required under the law. However, when there are suspicious circumstances surrounding the execution of the Will, the onus will be on the propounder to explain them satisfactorily so as to render the Will acceptable as genuine. This view regarding the position of law is fully supportable on the basis of the decisions of the Hon"ble Supreme Court in this regard.

21. In case H. Venkatachala Iyengar Vs. B.N. Thimmajamma and Others, the Apex Court held as follows :

"20. There may, however, be cases in which the execution of the Will may be surrounded by suspicious circumstances. The alleged signature of the testator may be very shaky and doubtful and evidence in support of the propounder's case that the signature in question is the signature of the testator may not remove the doubt created by the appearance of the signature; the condition of the testator's mind may appear to be very feeble and debilitated; and evidence adduced may not succeed in removing the legitimate doubt as to the mental capacity of the testator; the dispositions made in the Will may appear to be unnatural, improbable or unfair in the light of relevant circumstances; or, the Will may otherwise indicate that the said dispositions may not be the result of the testator's free will and mind. In such cases the Court would naturally expect that all legitimate suspicions should be completely removed before the document is accepted as the last Will of the testator. The presence of such suspicious circumstances naturally tends to make the Initial onus very heavy; and, unless It

is satisfactorily discharged, Courts would be reluctant to treat the document as the last Will of the testator. It is true that if a caveat is filed alleging the exercise of undue influence, fraud or coercion in respect of the execution of the will propounded, such pleas may have to be proved by the caveators; but, even without such pleas circumstances may raise a doubt as to whether the testator was acting of his own free will in executing the Will, and in such circumstances, it would be a part of the Initial onus to remove any such legitimate doubts in the matter.

21. Apart from the suspicious circumstances to which we have just referred in some cases the Wills propounded disclose another Infirmary. Propounders themselves take a prominent part in the execution of the wills which confer on them substantial benefits. If it is shown that the propounder has taken a prominent part in the execution of the Will and has received substantial benefit under it. that itself is generally treated as a suspicious circumstance attending the execution of the Will and the propounder is required to remove the said suspicion by clear and satisfactory evidence. It is in connection with Wills that present such suspicious circumstances that decisions of English Courts often mention the test of the satisfaction of judicial conscience. It may be that the reference to judicial conscience in this connection is a heritage from similar observations made by ecclesiastical Courts in England when they exercised jurisdiction with reference to Wills; but any objection to the use of the word "conscience" in this context would, in our opinion, be purely technical and academic, if not pedantic. The test merely emphasizes that, in determining the question as to whether an instrument produced before the Court is the last Will of the testator, the Court is deciding a solemn question and it must be fully satisfied that it had been validly executed by the testator who is no longer alive."

22. In case Surendra Pal and Others Vs. Dr. (Mrs.) Saraswati Arora and Another, the Hon"ble Apex Court held as under (Para 7) :

"The propounder has to show that the will was signed by the testator, that he was at the relevant time in a sound disposing state of mind, that he understood the nature and effect of the dispositions, that he put his signature to the testament of his own free will and that he has signed it in the presence of the two witnesses who attested it in his presence and in the presence of each other. Once these elements are established, the onus which rests on the propounder is discharged. But where there are suspicious circumstances, the onus will be on the propounder to explain them to the satisfaction of the Court before the Will could be accepted as genuine; and where the caveator alleges undue influence, fraud and coercion the onus is on him to prove the same. If the caveator does not discharge the burden which rests upon him in establishing the circumstances which show that the Will had been obtained by fraud or undue influence, a probate of the Will must necessarily be granted if it is established that the testator had full testamentary capacity and had in fact executed it validly with a free will and mind."

23. The appellate Court has relied on the statements of DW-2 Udham Singh scribe, DW-3 Bishan Singh and DW-4 Amar Singh attesting witnesses of the Will Ex.DW-2/A vide paras 30 and 35 of the impugned Judgment so far as they relate to the due execution of the Will. The execution of the Will being a finding of fact, does not call for interference by this Court.

24. Even otherwise, the plaintiffs challenged the Will in question on the grounds (i) that defendant Padam Singh has propounded a false Will as Nanda deceased did not execute any Will in favour of said defendant (ii) that the defendant had obtained the signature of Nanda by fraud etc. (iii) that the property in dispute being ancestral could not be disposed of by Will and (iv) that the Will has been set up after a long period which renders it doubtful.

25. There is no evidence to prove that signature of Nanda were obtained on the Will Ex. DW-2/A by fraud etc. The Will in fact is not signed but thumb marked by the testator and its execution is duly proved in view of the statements of DWs Udham Singh, scribe, Bishan Singh and Amar Singh, attesting witnesses. Also there is no evidence to prove that the land in suit was ancestral and Nanda could not bequeath it, rather issue on this count was not pressed for the plaintiff and thus stood abandoned. After discussion of the material evidence on record, the learned District Judge has concluded that the propounder of the Will had submitted the will to the Tehsildar concerned immediately after the death of the testator vide application Ex.DX for attestation of mutation of the bequeathed land in his favour. These findings of fact based on evidence do not call for any interference. Thus, the contention for the plaintiffs that the "will" was kept concealed for an exceptionally long period does not hold good.

26. The plaintiff also relied on the alleged suspicious circumstance that the marginal witnesses of the Will Ex.DW-2/A are closely related to defendant Padam Singh, the beneficiary under the Will. This circumstance cannot be treated as suspicious because the execution of a Will in the natural course will be attested by known persons which may include the near relations of the beneficiary. There is no evidence whatsoever to show that defendant Padam Singh himself was present at the time of execution of the Will and acted to bring about the Will in a manner which may render it a suspicious document. The learned District Judge has, therefore, rightly concluded that the Will in question is duly executed valid Will of deceased Nanda.

27. It is in the Will Ex.DW-2/A itself that land thereby bequeathed i.e. Kh.Nos. 295, 406, 413, 568, 572, 294 and 359 measuring 10-14 bighas situate in chak Koti was given to Prem Singh defendant by Nanda the testator for cultivation even prior to the execution of the Will and the legatee was in the cultivating possession thereof. This statement contained in the Will Ex.DW-2/A is admissible u/s 32 (7) read with Section 13 (a) of the Act. The relevant statement in the Will Ex.DW-2/A clearly and unambiguously recognises that Padam Singh was put in possession of the bequeathed land by the testator as a cultivator even prior to the execution of the Will and he was in the cultivating possession thereof at the

time of execution of the Will. Once the Will is held to be validly and lawfully executed by the testator the correctness of the aforesaid contents thereof which even otherwise finds corroboration from the statements of DWs Padam Singh, Udham Singh, Bishan Singh and Amar Singh cannot be doubted. Thus the contents of the Will itself proves the possession of defendant Padam Singh over the bequeathed property. This conclusion is further strengthened by the fact that defendants vide para 2 of their written statement had averred that "Nanda had given Kh. Nos. 295, 406, 413. 568, 572, 294 and 359 kisas 7 measuring 10 bighas and 14 biswas situate in chak Koti for cultivation much before the execution of the Will referred to above. The original Will is attached herewith. The Will relates to the khasra numbers referred to above. Except khasra No. 423 it is the defendant Padam Singh who is in possession of the land in suit as owner." Thus, the defendants set up the Will in respect of the land more than the land in suit. In the corresponding para 2 of the replication there is no specific denial about Padam Singh being in possession and having been bequeathed the land over and above the land khasra Nos. 406 and 413.

28. Thus, in the totality of admissible evidence on record, the learned District Judge had rightly concluded that the Will in question is genuine.

29. It may, however, be pointed out that out of the suit land comprising Khasra Nos. 406, 413 and 423 measuring 3 bighas and 11 biswas, only the land Khasra Nos. 406 and 413 was bequeathed, vide Ex.DW-2/A to defendant Padam Singh. Land Kh, No. 423 was neither admitted to have been given to him earlier for cultivation nor was bequeathed to him by the said Will. A perusal of the evidence on record makes it clear that he is neither in possession of the land Kh. No. 423 nor he has any title thereto. In his statement as DW-1, Padam Singh has claimed the ownership and possession of the entire suit land including Khasra No. 423 of which he is not proved to be the owner nor in possession. The intention to interfere with this land is thus, manifest in his statement by raising an unsustainable claim of ownership and possession thereto. Therefore, the suit of the plaintiffs could not have been dismissed in entirety as has been done by the learned District Judge, but deserved to be partly decreed in respect of land Khasra No. 423.

30. As a result, this appeal is partly allowed and the impugned judgment and decree is modified to the extent that the suit of the plaintiffs for permanent injunction restraining the defendants from interfering with the possession of the plaintiffs over the land Khasra No. 423 measuring 0-19 bighas, is decreed and the impugned judgment and decree to the extent the suit is decreed hereinabove, are set aside, but are maintained in respect of land Khasra Nos. 406 and 413. The appeal is accordingly disposed of.