

(2013) 06 SHI CK 0118

In the High Court Of Himachal Pradesh

Case No : Regular Second Appeal No. 336 of 2002

Shri Vishal Puri and Others

APPELLANT

Vs

Shri Ashok Kumar and Others

RESPONDENT

Date of Decision : 25-06-2013

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 26 Rule 9, Order 41 Rule 27, 151
Penal Code, 1860 (IPC) — Section 420, 467

Citation : (2013) 2 ShimLC 1197

Hon'ble Judges : Rajiv Sharma, J

Bench : Single Bench

Advocate : Bhupender Gupta and Mr. Neeraj Gupta, for the Appellant; Rajnish K. Lall, Advocate, vice, Mr. Sanjeev Sood, Advocate, for respondents Nos. 1, 2, 3(a), 3(b), 4, 5, 7(a), 7(b) to 11 and 12, for the Respondent

Final Decision : Dismissed

Judgement

Rajiv Sharma, J.—This Regular Second Appeal is directed against the judgment and decree, dated 25.03.2002, passed by the learned District Judge, Hamirpur, H.P., in Civil Appeal No. 61 of 1990. "Key facts" necessary for the adjudication of this Regular Second Appeal, are that the predecessor-in-interest of the appellants-plaintiffs, Smt. Ajudhia Devi (hereinafter referred to as "the plaintiff" for the sake of convenience) has filed a suit claiming herself to be the owner in possession of the land entered in Khata No. 37, Khatoni No. 75, Khasra No. 442/426, 240/1, measuring 1 K-19 Marlas, as per Jamabandi for the year 1968-69, situated in Village Gaura Khurd, Tappa Bajuri, Tehsil and District Hamirpur to an extent of 1/8 share by virtue of written testament (will) allegedly executed by her father, late Lachhman Dass on 04.01.1963 in her favour and also 7/8 share in the land entered in Khata No. 37, Khatauni No. 75, Khasra Nos. 442/426-240/1, measuring 1 K-19 M, as per Jamabandi for the year 1968-69, situated in Village Gaura Khurd, Tappa Bajuri, Tehsil and District Hamirpur, H.P. According to her, the mutation No. 380 sanctioned by Assistant Collector, 2nd Grade, Hamirpur on 07.07.1971 qua the inheritance of her father in respect of

the suit land is stated to be void.

2. The suit was contested by the respondents-defendants (hereinafter referred to as "the defendants" for the sake of convenience). According to them, the plaintiff was not the daughter of deceased Lachhman Dass, as such, the plaintiff has no locus standi to file the suit. Shri Dina Nath, husband of the plaintiff has no right, title or interest in the suit land. The suit land was stated to be self acquired property of deceased Lachhman Dass. Thus, there was no question of the same being allegedly acquired benami by him from Dina Nath. A case filed by Dina Nath against the deceased Lachman in the year 1956 was dismissed and the decree in Civil Suit No. 144 of 56 qua the land in dispute was passed in favour of the deceased Lachman Dass and the plaintiff was bound by the decree. The execution of a will in favour of the plaintiff by deceased Lachman Dass, was denied. A case under Sections 467 and 420 of the Indian Penal Code was registered by the defendant No. 1 against the plaintiff that she in connivance with her husband had managed a forged will in her favour qua the property left behind by deceased Lachhman Dass. However, the husband of the plaintiff has made a statement that no such will was ever executed by him in favour of his wife. Mutation No. 380 in favour of the defendants was stated to have been rightly sanctioned.

3. The replication was filed by the plaintiff. Learned Senior Sub Judge, Hamirpur, H.P. framed the issues on 14.05.1976. The suit was decreed on 22.03.1983. In appeal, bearing Civil Appeal No. 59 of 1983, learned District Judge, Hamirpur, H.P. vide judgment, dated 21.11.1988, set aside the judgment and decree, dated 22.03.1983 and remanded the matter to the trial Court. On 21.11.1988, the learned District Judge, Hamirpur, H.P. has also framed the issues. The learned Senior Sub Judge, Hamirpur, H.P. has partly decreed the suit on 31.03.1990.

4. The predecessor-in-interest of the appellants, Smt. Ajudhia Devi, has also preferred an appeal against the judgment and decree, dated 31.03.1990, passed by the learned Senior Sub Judge, Hamirpur, H.P. The same was dismissed on 25.03.2002. Hence this Regular Second Appeal.

5. This Regular Second Appeal was admitted on the following substantial questions of law on 10.09.2002:

1. Whether the Lower Appellate Court has committed procedural illegality and irregularity in dismissing the application of the plaintiff-appellant for leading additional evidence?

2. Whether the Lower Appellate Court has further exceeded its jurisdiction in a highly illegal, perfunctory manner rejecting the prayer of the plaintiff-appellant for appointment of the Local Commissioner to ascertain the change in circumstances and further to ascertain the true factual position existing at present at the spot on account of long pendency of the proceedings?

3. Whether both the Courts below have misread the relevant evidence,

misapplied the correct law, based their findings in an erroneous and perverse manner by taking into consideration such circumstances which were irrelevant for holding the will Ex. P1 to be not genuine, fair disposition and not proved in accordance with law?

6. Mr. Bhupender Gupta, learned Senior Advocate has vehemently argued that the plaintiff has duly proved the execution of the will, dated 04.01.1963, Ex. P1. He also contended on the basis of the substantial questions of law framed that the applications filed under Order 41 Rule 27 and under Order 26 Rule 9 read with Section 151 of the CPC have been wrongly rejected.

7. Mr. Rajnish K. Lall, learned counsel for the respondents has supported the judgments and decrees passed by the learned 1st Appellate Court on 25.03.2002.

8. I have heard the learned counsel for the parties and gone through the pleadings carefully.

9. Since all the substantial questions of law are interconnected and interlinked, the same are taken up together for determination to avoid the repetition of discussion of evidence.

10. PW-2 has stated that Lachhman Dass was his brother-in-law. A will was scribed/written by him at the instance of Shri Lachhman Dass in favour of the plaintiff. The same was read over and explained. Shri Lachhman Dass has put his signatures on the will after admitting the same to be correct. According to him, the testator was in sound state of mind at the time of execution of the will.

11. PW-3, the plaintiff has deposed that Lachhman Dass was her father and a will was executed by him in her favour. In her cross-examination, she has admitted that PW-2 was her maternal uncle and the defendant No. 1 is the second wife of his father, Lachhman Dass.

12. PW-4 has deposed that Mulkhi Ram was his grand father, who has died. He has seen him reading, writing and signing. Ex. P1 bears Milkhi Ram's signatures. PW-5 has deposed that Lachhman Dass was not on good terms with defendant No. 1.

13. The marginal witness of the will, dated 04.01.1963 is Shri Anant Ram (PW-6). According to him, the will was executed by Shri Lachhman Dass. It was scribed by PW-2. According to him, Sh. Lachhman Dass was not in a position to explain or to narrate anything at the time of execution of the will, i.e. Ex. P1, since he was not capable of opening his mouth. He further deposed that when he signed the will Ex. P1, it had already been written. He has also stated that when he has put his stamp and signatures on the paper, i.e. Ex. P1, the portion C to C was not there on Ex. P1. He also admitted that when he reached, the will Ex. P1, had already been written. He also admitted that defendant No. 1 has filed a private complaint against him regarding will Ex. P1. He also admitted that PW-2 wrote only one paper. The contents of will Ex. P1, were not read over in his presence. He also specifically stated that signatures encircled "A" were not on

Ex. P1 when he signed it. According to PW-7, plaintiff has served Shri Lachhman Dass. PW-8 has also supported the version of PW-7.

14. The will Ex. P1 is an unregistered document. For the first time, it was produced in the year 1969. The husband of plaintiff, Shri Dina Nath, has denied the execution of any will in favour of his wife when his statement was recorded in a Criminal Case u/s 467 /420 of the Indian Penal Code vide Ex. D3.

15. PW-6, Sh. Anant Ram, has admitted that when he signed on Ex. P1, he did not find the signatures of other attesting witnesses on the same. PW-2, who has scribed the will Ex. P1 is in close relation of plaintiff. There is no explanation why the natural heirs have been excluded from inheritance. PW-6, Sh. Anant Ram, has not seen the testator signing the will. The will was not written in the presence of PW-6. It has not been explained by the plaintiff how the signatures of Sh. Milkhi Ram were obtained on Ex. P1. When PW-6, Shri Anant Ram, has signed on Ex. P1, he has not seen the signatures of Milkhi Ram on the will. Shri Lachhman Dass was unwell at the time when the will was executed.

16. The plaintiff has also moved an application under Order 41 Rule 27 of the CPC for placing on record the copy of Jamabandi for the year 1951-1952. The same was rejected by the learned District Judge, Hamirpur, H.P. at the time of final hearing of the appeal. Though initially, the land as detailed in the head-note of the plaint, was in the ownership and possession of the husband of the plaintiff, Shri Dina Nath, however, it is stated that Shri Dina Nath himself has alienated the same in favour of his father-in-law deceased Lachhman. But, no material has been placed on record by the plaintiff that such transaction was benami. The suit land in head note "B" was transferred to the deceased by the husband of the plaintiff. Thus, the Jamabandi for the year 1951-1952 was not required to be placed on record to adjudicate the controversy between the parties.

17. There was no dispute that the construction existed on the spot, was raised by the defendants. Therefore, the Local Commissioner was not required to be appointed under Order 26 Rule 9 of the Code of Civil Procedure. The applications filed under Order 41 Rule 27 and under Order 26 Rule 9 read with Section 151 of the CPC have correctly been decided by the learned 1st Appellate Court. Learned 1st Appellate Court has correctly appreciated the oral as well as documentary evidence led by the parties. Consequently, there is no substantial question of law involved in this Regular Second Appeal. Accordingly, in view of the observations and analysis made hereinabove, there is no merit in this Regular Second Appeal and the same is dismissed, so also the pending application(s), if any. No costs.