

Dhianu Vs. Thunia

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Court : Himachal Pradesh

Decided On : Jul-31-2008

Reported in : 2008(2)ShimLC374

Judge : Kuldip Singh, J.

Appellant : Dhianu

Respondent : Thunia

Advocate for Pet/Ap. : Mr. B.N. Mehta

Disposition : Appeal allowed

Judgement :

Kuldip Singh, J.

1. The defendant has come in appeal against judgment, decree dated 28.2.2005 passed by learned Additional District Judge (Fast Track Court), Una in Civil Appeal No. 74/97 RBT 90/04/1997 partly allowing the appeal by holding that Will Ext.PW-2/A in favour of Thunia and Will Ext. DW-3/A in favour of Dhianu are wrong and illegal. The estate of Sihnu testator shall devolve as per natural succession. The respondent/ plaintiff has filed the cross objections.

2. The facts, in brief, are that respondent Thunia filed suit for declaration that he has succeeded to the entire estate of Sihnu and is owner in possession of the suit

land more specifically detailed in the judgment of the trial Court, on the basis of Will dated 10.8.1990 Ext. PW-2/A, the entries in the name of appellant/defendant Dhianu vide mutation No. 699 dated 23.5.1991 are wrong, fictitious, illegal and not binding on the rights of the respondent/plaintiff.

3. The appellant/defendant contested the suit and has pleaded that Sihnu had executed registered Will dated 18.7.1990 Ext.DW-3/A in his favour and on the basis of said Will mutation was sanctioned on 23.5.1991 in presence of respondent/plaintiff. The replication was filed. The learned Sub Judge Court No. 2 Una held that Sihnu has executed Will dated 18.7.1990 Ext.DW-3/A in favour of appellant/defendant, the respondent/plaintiff has failed to prove that Sihnu had executed Will dated 10.8.1990 in his favour and dismissed the suit on 21.4.1997. In appeal the lower appellate Court held that execution of both the Wills have not been proved. He has held that estate of Sihnu would devolve as per natural succession. Dhianu defendant has assailed judgment, decree dated 28.2.2005 of the lower appellate. Court by way of second appeal, respondent/plaintiff has filed the cross objections. The appeal has been admitted on the following substantial questions of law:

(i) Whether the findings of learned 1st appellate Court has ignored the evidence on record and has de hors the evidence on record and perverse?

(ii) Whether both the Wills executed by Shri Seehnoo are illegal and invalid in the eyes of law?

(iii) Whether in existence of registered Will the estate of Shri Seehnoo can be devolved to the natural successors were as he died issueless?

(iv) Whether the misreading of the oral as well as the documentary evidence itself amounts to substantial question of law?

4. I have heard Mr. B.N. Mehta, learned Counsel for the appellant and Mr. Sanjeev Sood, vice Mr. K.D. Sood, Advocate learned Counsel for the respondent and gone through the record. It has been submitted on behalf of the appellant that execution of Will dated 18.7.1990 Ext.DW-3/A has been proved on record. The learned lower

appellate Court has not considered that the Will dated 18.7.1990 is registered and to a registered document presumption under Section 60 of the Indian Registration Act, 1908 is attached. He has also submitted that as far as Will dated 10.8.1990 Ext.PW-2/A is concerned, the two Courts below have concurrently held that Sihnu had not executed Will Ext.PW-2/A. This is a finding of fact and in second appeal the respondent by way of cross objections cannot assail such finding of fact. He has submitted that no suspicious circumstance has been proved on record so as to throw out the Will Ext.DW-3/A. It has been submitted that learned lower appellate Court has drawn wrong inference from the material on record and has erred in returning the finding that execution of Will dated 18.7.1990 Ext.DW-3/A has not been proved. The learned Counsel appearing on behalf of the respondent has submitted that the two Courts below have erred in returning the finding that Will dated 10.8.1990 has not been proved. He has submitted that respondent/plaintiff has proved execution of Will dated 10.8.1990 and, therefore, respondent/plaintiff is entitled to inherit the estate of Sihnu on the basis of Will Ext.PW-2/A. The learned Counsel for the respondent has submitted for acceptance of cross objections.

SUBSTANTIAL QUESTIONS OF LAW No. (i) to (iv):

5. The substantial questions of law No. (i) to (iv) are interconnected, therefore, all are being disposed of collectively. PW-3 Naseeb Chand has stated that Ext.PW-2/A is the certified copy of original Will which he had seen. This Will was got written by Sihnu from Rattan Chand. The Will was read over to him and after accepting its correctness he put his thumb mark on the Will. The witnesses also signed the Will. Sihnu first of all thumb marked the Will, thereafter Sham Lal signed the Will and then he signed the Will and ultimately Rattan Chand signed the Will. He has also admitted that Garja Ram filed a case against him and Bachitar Singh for preparing forged power of attorney, volunteered that he was acquitted in that case.

6. PW-4 Shan Lal has stated that he has seen the original of Ext.PW-2/A which is signed by him as witness. He has forgotten the name of the person who had scribed the Will. The Will was got written at the instance of Sihnu who after

accepting it to be correct put his thumb mark on it. The witnesses also signed the Will. In cross examination, he has stated that his house is at a distance of 40 kilometers from Lathiani. Sihnu died 3-4 months after the execution of Will and he did not attend his funeral. He has stated that he and plaintiff are working in the same department. Rattan Chand, scribe of Will Ext. PW-2/A, has not been examined. PW-1 Thunia Ram has stated that suit land is 10 Kanals 10 Marias. He is resident of Bilaspur. Sihnu has executed Will dated 10.8.1990 in his favour in consideration of services rendered by him and his family to Sihnu. He performed the last rites of Sihnu. In cross examination, he has stated that defendant had shown registered Will and, therefore, the mutation was attested in his favour.

7. PW-3 Naseeb Chand in his statement has nowhere stated that how he and PW-4 Sham Lal were present at the time of preparation of Will Ext.PW-2/A. He has not stated that who called them when the Will was got scribed by Sihnu from Rattan Chand. PW-3 in his statement has not stated that testator signed the Will in presence of the attesting witnesses of the Will and the attesting witnesses have signed the Will in presence of testator. He has given general type of statement that Will Ext.PW-2/A was signed by Sihnu, Sham Lal witness, Rattan Chand scribe as well as by him also. The statement of PW-3 is not in accordance with Section 63 of the Indian Succession Act. The propounder of the Will is required to prove the Will in accordance with law. The statement of PW-4 Sham Lal is more cryptic. He has also not stated that how he was present when the Will Ext.PW-2/A was being prepared. He has not even stated that PW-3 Naseeb Chand was present when the Will Ext.PW-2/A was prepared. He does not know the name of person who had written the Will. He is resident of a place 40 kilometers away from Lathiani. He was working in the department of plaintiff. PW-3 and PW-4 have not identified their respective signatures as well as thumb mark of Sihnu on Will Ext.PW-2/A. PW-3 was even prosecuted for preparing forged power of attorney. The two Courts below have come to the conclusion that execution of Will Ext.PW-2/A has not been proved by respondent/ plaintiff. The learned Counsel for the respondent/cross objector has failed to point out how the inference drawn by the learned two Courts below regarding the execution of Will Ext.PW-2/A is wrong. The two Courts below after due appreciation of the evidence on record have concurrently held that execution of Will Ext.PW-2/A has not been proved and such finding requires no

interference.

8. Now the question is of execution of Will Ext.DW-3/A dated 18.7.1990.' The trial Court held that Sihnu had executed Will Ext.PW-3/A in favour of appellant/defendant but learned first appellate Court has held that execution of Will Ext.PW-3/A has not been proved. DW-2 Dhianu has stated that Sihnu was his uncle (Mama) in relation. Sihnu had been living with him. Sihnu had executed a Will in his favour. DW-3 Subhash Chand has stated that original of Will Ext.DW-3/A was scribed by him which he had written on the instructions of Sihnu. Mehar Chand and Sant Ram witnesses were also present at that time. The Will was read over to testator and after accepting its correctness he thumb marked the Will. Thereafter, the witnesses signed the Will. He has entered the Will at Sr. No. 337 on 18.7.1990 in his register. Sihnu had also thumb marked the register.

9. DW-4 Mehar Chand has stated that he has seen the original Will which was scribed by DW-3 at the instance of Sihnu. Sihnu was capable of understanding his welfare. The Will was read over to Sihnu in presence of witnesses and after accepting its correctness Sihnu put his thumb mark and witnesses also signed. He has signed the Will as witness. The Will was presented to the Sub Registrar who read over the Will and after accepting its correctness Sihnu put his thumb mark. The defendant was serving Sihnu. DW-5 Sant Ram another attesting witness of Will Ext.DW-3/A has corroborated the statement of DW-4 regarding the execution and registration of Will Ext.DW-3/A.

10. The learned lower appellate Court in the impugned judgment has devoted more time in discussing the relationship of Sihnu with defendant. The learned lower appellate Court has also observed that DW-4 Mehar Chand and defendant Dhianu accompanied from Lathiani to Bangana for execution of Will and defendant Dhianu played an active role for the execution of Will by purchasing the papers for the execution of Will as well as for the expenses of the marginal witnesses were also defrayed by the defendant which is a suspicious circumstance to the execution of Will Ext.DW-3/A and defendant has not been able to remove the same. The learned lower appellate Court has ultimately discarded the Will Ext.DW-3/A by observing that defendant could not prove to be related to the

testator and the defendant being beneficiary of Ext.DW-3/A has taken active role for getting the Will executed by defraying expenses of the witnesses including providing papers to the scribe. The testator had been in possession of the land of abadi as non occupancy tenant over which DW-4 Mehar Chand was having 1/4th share as co-owner and, therefore, according to learned lower appellate Court DW-4 is an interested witness. It has also been observed that defendant has not proved that he ever looked after or rendered any service to the testator during his life time. On these grounds the lower appellate Court discarded the Will Ext.DW-3/A.

11. The lower appellate Court has not appreciated that Sihnu was having no near relative to look after him. He died issueless. Dhianu claimed that Sihnu was his uncle (Mama) in relation. The learned lower appellate Court has not considered the fact that Will Ext.DW-3/A is a registered document. There is an endorsement of the Sub Registrar on the Will which was read over to testator at the time of registration and he accepted its correctness. In *Rabindra Nath Mukherjee v. Panchanan Banerjee (Dead) by LRs. and Ors.* : AIR 1995 SC1684 , the Supreme Court has held that where a Will is registered and the Sub Registrar certifies that the same had been read over to the executor who, on doing so, admitted the contents, the fact that the witness to the document are interested loses significance. It has also been held that somebody has to take necessary steps in such matter, but he happens to be one close to the executor some eye brow is bound to rise. Even so if there be other circumstances on record to show the voluntary character of the document, the eye brows should drop down. The Will Ext.DW-3/A is a registered Will, therefore, suspicion raised by the learned lower appellate Court regarding attesting witness DW-4 Mehar Chand loses significance. The learned lower appellate Court has not raised suspicion regarding other attesting witness DW-5 Sant Ram. The circumstance that Dhianu defrayed the expenses of the witnesses and arranged papers to the scribe is also not of much significance so as to throw out Will Ext.DW-3/A in view of other facts which have come on record. Each and every circumstance cannot be termed as suspicious circumstance. Only such circumstance which creates doubt about the execution of Will can be termed as suspicious. The execution of Will Ext.DW-3/A has been proved by both attesting witnesses, even DW-3 scribe has proved the factum of

scribing of Will Ext.DW-3/A at the instance of Sihnu.

12. The learned lower appellate Court has not recorded a finding that the Will was not actually presented to the Sub Registrar and the Will was registered by the Sub Registrar without reading to the testator in presence of witnesses. In view of the registration of the Will presumption under Section 60 of the Registration Act is attached. Therefore, suspicious circumstances highlighted by the learned lower appellate Court regarding the execution of the Will Ext.DW-3/A pales into insignificance. The respondent/plaintiff is not in line of natural succession of Sihnu, he is a stranger and, therefore, he cannot question the execution of Will Ext.DW-3/A. The respondent could stand on the basis of Will Ext.PW-2/A but execution of Will Ext.PW-2/A has not been proved as observed above. The, execution of Will Ext.DW-3/A has been proved on record. The contrary finding recorded by learned lower appellate Court is liable to be set aside and is accordingly set aside. The substantial questions of law No. (i) to (iv) are decided in favour of the appellant and against the respondent/ cross-objector. No other point was urged.

13. The result of the above discussion, the appeal is allowed and cross objections are dismissed. Impugned judgment and decree are set aside and suit of the respondent/plaintiff dismissed with no order as to costs.

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