

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% *Date of Judgment: 08.02.2011*

+ **R.S.A.No.138/2004 & C.M.Nos.7537/2004 & 13354/2009**

ASHUTOSH SHARMA & ORS

.....Appellants

Through: Mr. Dharmendra Kumar Mishra,
Mr. Gunjan Sharma, Ms. Rakhi
Rawat & Mr. Sudhir Chaudhary,
Advocates.

Versus

SMT. SITA DEVI & ORS.

.....Respondents

Through: Mr. Ved Prakash Trikha,
Advocate for respondents No.
11 & 12.
Mr. Kunal Soni, Advocate for
respondent No. 13.

CORAM:

HON'BLE MS. JUSTICE INDERMEET KAUR

1. Whether the Reporters of local papers may be allowed to see the judgment?
2. To be referred to the Reporter or not? Yes
3. Whether the judgment should be reported in the Digest? Yes

INDERMEET KAUR, J. (Oral)

1 This appeal has impugned the judgment and decree dated 24.01.2004 which has endorsed the findings of the trial Judge dated 19.01.2002 whereby the suit filed by the plaintiffs (seeking a declaration to the effect that they be declared the owners/heirs of late Har Prasad Sharma in terms of his Will and the amount of Rs.92,500/- having fallen to the share of the deceased be released to them) had been dismissed.

2 The plaintiffs are the descendants of Hira Lal. Hira Lal had four sons namely (i) Chhuttan Lal, (ii) Kanwal Lal, (iii) Bala Prasad

& (iv) Har Prasad Sharma. Admittedly Kanwar Lal & Chhuttan Lal had predeceased Har Prasad Sharma. Har Prasad Sharma had died on 13.12.1983. As per the plaintiffs, he had left a Will dated 20.08.1973 in favour of sons of Bala Prasad who was the only surviving brother of Har Prasad Sharma at the time of his death. The contention of the appellants/ plaintiffs is that at the time of death of Har Prasad Sharma, their father Bala Prasad was the only surviving heir of Har Prasad Sharma; he fell in Entry II of Class II of the Schedule of the class of heirs under the Hindu Succession Act, 1956 (hereinafter referred to as the 'said Act'). Attention has been drawn to the provisions of Sections 8 & 9 of the said Act. It is pointed out that when Har Prasad died, he was not having any other legal heir except his brother Bala Prasad. The order of succession as per Section 9 postulates that the heirs in the first entry shall be preferred to those in the second entry and so on. Contention is that on the death of Har Prasad Sharma, Bala Prasad was the only surviving heir of Har Prasad Sharma and after the death of Bala Prasad the property would have fallen to the share of his sons who are the appellants/ plaintiffs. It is submitted that defendants No. 2 & 3 who are from the families of Kanwar Lal and Chhuttan Lal (other predeceased brothers of Har Prasad Sharma) had no right to object to the Will left by Har Prasad Sharma as they had fallen in the subsequent entry i.e. entry IV of the class II heirs in the Schedule. In these circumstances the judgments of the two courts below holding that it was incumbent upon the plaintiffs/ appellants to have proved the Will of Har Prasad Sharma are illegal findings and are liable to be set aside. It is pointed out that Bala Prasad who was the only successor of Har Prasad Sharma at the

time of his death had filed his written statement wherein he had given a no objection to the Will of Har Prasad Sharma. The second written statement filed on behalf of the legal heirs of deceased defendant No. 1 which was contrary to the earlier version of defendant No. 1 could not have been read. It was in fact incumbent upon the courts below to have adverted to the provisions of Order XII Rule 6 of the Code of Civil Procedure (hereinafter referred to as the 'Code') and decreed the claim of the plaintiffs in terms of the categorical admission of defendant No. 1 who had given a no objection to the Will of Har Prasad Sharma. The legal heirs of families of Chhuttan Lal and Kanwar Lal who were arrayed as defendants No. 2 & 3 had no right to object to the Will; their objections could not have been considered.

3 This is a second appeal. It had been admitted on 27.10.2010. The following two substantial questions of law were formulated. They read as under:-

- 1. Whether legal representatives of the deceased defendant No. 1 could have adopted a stand different from their deceased father, if so its effect?*
- 2. Whether the defendants No. 2 & 3 have the locus standi to challenge the will of the deceased Har Prasad Sharma and admittedly they fall in Class II entry-IV of the Schedule of the Hindu Succession Act, 1956? If so, its effect.*

4 Defendant No. 1 is Bala Prasad. His legal representatives are the appellants/ plaintiffs. The remaining legal representatives of Bala Prasad i.e. his daughters (arrayed as Defendant No. 1 (a), (b), (c), (f), (g) & (h) had filed written statement wherein they had contested the Will of Har Prasad. Learned counsel for the appellants has rightly pointed out that a legal representative

cannot take a stand different from that of the deceased; he having been impleaded as a legal representative only and in the same capacity which was being occupied by the deceased. For this proposition, reliance has been placed upon AIR (30) 1943 Calcutta 613 Surendra Narain Sarbadhikari Vs. Bholanath Roy Chowdhury as also a judgment of the High Court of Punjab AIR (38) 1951 Punjab 389 Durga Dass Vs. Ram Rakha Mal. There is no dispute to this proposition. A contrary plea cannot be set up by a legal representative which is in conflict and opposed to what has been taken up by the deceased; he is not permitted to set up a new case. Such a contrary plea is not tenable. This position is only however qua the written statement of defendant No. 1.

5 Substantial question of law No. 1 is answered accordingly.

6 This Court shall now advert to substantial question of law No. 2. Defendants No. 2 & 3 have specifically in their written statements stated that the Will of Har Prasad Sharma is forged and fabricated; no such Will had been made by him. The question which has to be answered as to whether defendants No. 2 & 3 had the locus standi to challenge this Will of Har Prasad Sharma.

7 Counsel for the appellant has placed reliance upon AIR 1928 Madras 803 M.K. Sowbhagiammal & Anr Vs. Komalangi Ammal & Anr as also another judgment of the Calcutta Bench reported in AIR 1932 Calcutta 734 Nabin Chandra Guha Vs. Nibaran Chandra Biswas & Others to support his submission that only a person who has some interest in the estate of the deceased and is prejudicially affected by the Will can oppose the grant of probate/letter of administration. Both these judgments, which have been relied upon by the counsel for the appellant, were in probate petitions which

were pending before the concerned Court; it was in this context that persons who could be objectors had been gone into. In AIR 1923 Madras 131 L.S. Rajamanikam Vs. W.H. Farraru another judgment relied upon by the learned counsel, the Court while dealing the objections in a probate petition had held that before a person can be permitted to contest a Will, he must show that he has some interest in the property of the deceased, the possibility of having an interest in the result of Will being set aside would be sufficient.

8 Admittedly, defendants No. 2 & 3 are from the families of Chhuttan Lal and Kanwar Lal; they fall in entry IV of Class of Schedule of the said Act. Section 8 of the Hindu Succession Act lays down the general rule of succession in the case of males. Schedule attached to the said Act has specified the heirs in Class I and Class II. In Class II, there are nine entries. A brother of a deceased falls in entry No. 2. Admittedly Bala Prasad was the only surviving brother of Har Prasad Sharma at the time of death of Har Prasad Sharma. Applying the order of succession, Bala Prasad would have succeeded to the estate of Har Prasad Sharma if Har Prasad Sharma had died inte-state. However, this is only in the case of intestacy . The plaintiffs are relying upon the Will dated 20.08.1973 of the deceased Har Prasad Sharma; they claim their rights in terms of the aforementioned Will. Defendants No. 2 & 3 who are from the families of Chhuttan Lal and Kanwar Lal fall in entry IV of class II being sons of the brother of the deceased. They had contested the Will. Nothing in law prevented them from doing so. Section 8 of the said Act has laid down the general rule of succession in the case of males and Section 9 has laid down the

order of succession amongst heirs in the Schedule. These provisions are to be adhered to only when the estate devolves by succession. This order of succession would not apply in the case of a testamentary dispute. There is no legal hurdle or bar for the heirs falling in entry IV of the Class II of the Schedule to contest the Will of Har Prasad Sharma. They could legally have done so.

9 Judgments relied upon by the learned counsel for the appellants were proceedings in a probate petition. The present is simplicitor a suit for declaration; the plaintiffs had based their claim on a Will; in the written statement, the defence taken was that the Will was forged and fabricated; nothing prevented the defendants No. 2 & 3 from raising this defence. The judgments relied upon by learned counsel for the appellant have no application to this proposition.

10 Substantial question of law No. 2 is answered accordingly.

11 The impugned judgment has endorsed the findings of the trial Judge. It has non-suited the plaintiffs for the reason that the plaintiffs were not able to prove the Will of Har Prasad Sharma. This was while dealing with issue No. 4. Issue No. 4 reads as follows:-

“Whether late Shri Har Prasad had ever executed any Will? OPP”

12 Both the fact finding courts had held that the Will Ex. PW-1/1 has not been proved in accordance with law; the attesting witnesses PW-1 & PW-3 were not credible. Testimony of PW-1, the attesting witness had been discarded, not being trustworthy. Requirement of Section 63 of the Indian Succession Act, 1925 and Section 63 of the Indian Evidence Act, 1872 had not been

established. There were fact findings endorsed by the two courts which cannot be gone into by the second appellate Court. Even otherwise, the substantial questions of law which have been formulated by this Court have been answered. They are against the appellants and in favour of the respondents as aforenoted. There is no merit in this appeal.

Appeal as also pending applications are dismissed.

INDERMEET KAUR, J.

FEBRUARY 08, 2011

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