

Appellate Court was partly upheld and partly set aside.

2. Relevant facts in brief giving rise to the present appeals are as under:

(a). Beli Ram was the owner in possession of the land in dispute. Tota Ram, plaintiff is the nephew of Beli Ram, being his brother's son. According to the plaintiff, he had been cultivating the land in question for more than three decades and had also been taking care of Beli Ram. In 1988, out of natural love and affection, Beli Ram executed a registered Will dated 12.12.1988 bequeathing the suit land in favour of the plaintiff Tota Ram. Beli Ram died on 11.07.1994. As the plaintiff had continued in possession from the time when Beli Ram was alive, he remained in possession even after death of Beli Ram. However, as the defendant started interfering with the possession of the suit land, the plaintiff made enquiry and he came to know that defendant no.1, Vikram Singh, on the basis of another Will dated 16.05.1994 had got his name mutated in the revenue records vide mutation Entry No.201. Further, Vikram Singh had transferred

the land in suit in favour of defendant no.2, Smt. Saroj Kumari and also defendant nos.4 and 5, Pankaj Kumar and Pawan Kumar respectively.

(b) In view of the interference in possession, Tota Ram instituted a suit for a decree of declaration with consequential relief of permanent prohibitory injunction that he was the owner in possession of land in dispute and that the defendants had no right or title to it. It was further prayed that the mutation Entry No.201 dated 17.01.1996 and Entry No. 207 dated 07.06.1996 should also be declared as false, fictitious and illegal.

(c). In the plaint, Vikram Singh was impleaded as defendant no.1., Smt. Saroj Kumari as defendant no.2, Pankaj Kumar and Pawan Kumar as defendant Nos.4 and 5. Defendant no.3, Smt. Dharni Devi, being daughter of Beli Ram was also impleaded but no relief was claimed against her as she had not put up any claim with respect to the property of Beli Ram including the land in suit. According to the plaint allegations, Beli Ram had executed the Will in sound mind and good health, out of

love and affection on 12.12.1988 in favour of the plaintiff, who had been taking care of Beli Ram throughout and had also been cultivating the land in suit for the last more than 30 years. It was further stated that the second Will dated 16.05.1994, set up by defendant no.1 was forged and fictitious and surrounded with suspicion, as such, it did not confer any right, title or interest upon the defendant no.1 or the vendees through him i.e. Defendant nos.2, 4 and 5.

(d). The defendants contested the suit and filed their written statements and led evidence. Defendant Nos.4 and 5 filed a separate written statement. They denied the plaintiff allegations and stated that the Will dated 16.05.1994 was a genuine document voluntarily executed by Beli Ram in a healthy and disposing mind and the same was duly registered. The Will dated 12.12.1988 was denied. According to them, the entries in the revenue records were made after due verification. They also claimed to be in possession of the land purchased by them. Separate written statements were

filed by defendant nos.1 and 2 on same lines as of defendants 4 and 5. Dharni Devi, Defendant no.3, filed a written statement admitting the claim of the plaintiff and also the Will dated 12.12.1988.

4. The Trial Court framed 12 issues which read as follows:

1. *Whether the plaintiff is the owner in possession of the suit land as alleged?*
2. *Whether late Shri Beli Ram executed a valid "Will" on 12.12.1988 in favour of the plaintiff as alleged? OPP*
3. *Whether the mutations No.201 and 207 are wrong and illegal as alleged? OPP*
4. *Whether the plaintiff is entitled to be injunction prayed for? OPP*
5. *Whether the plaintiff has a cause of action? OPP*
6. *Whether the plaintiff has the locus-standi to sue? OPP*
7. *Whether the suit is bad for non-joinder of the necessary parties? OPD*
8. *Whether the suit is time barred? OPD*
9. *Whether the suit is not maintainable in the present form? OPD*
10. *Whether late Shri Beli Ram executed a valid "Will" on 16.05.1994 in favour of the defendant no.1 as alleged. If so, its effect? OPD*
11. *Whether the defendants No.2, 4 and 5 Bona*

fide purchasers for consideration as alleged. If so, its effect? OPD

12. Whether the defendants are entitled to special costs u/s 35-A of CPC as claimed. If so, their quantum?

13. Relief.”

5. Before the Trial Court, the plaintiff-Tota Ram examined three witnesses and placed on record the Will dated 12.12.1988, which he duly proved and was marked as Ext. DW-2/(A).

6. On the other hand, the defendants examined five witnesses and also proved their Will dated 16.05.1994, which was marked as Ext.DW-3/(A). The Trial Court recorded the following findings on the issues as incorporated in paragraph 7 of the judgment, which are reproduced hereunder:

Issue no.1	:	No
Issue no.2	:	No
Issue no.3	:	No
Issue no.4	:	No
Issue no.5	:	No
Issue no.6	:	No
Issue no.7	:	No

Issue no.8	:	No
Issue no.9	:	No
Issue no.10	:	No
Issue no.11	:	No
Issue no.12	:	Not pressed
Relief	:	The suit of the plaintiff is dismissed as per operative part of the judgment.

7. On the above findings, the Trial Court, vide judgment dated 30.09.2004, dismissed the suit.

8. Aggrieved by the same, plaintiff-Tota Ram preferred an appeal under Section 96 of the Code of Civil Procedure, 1908 before the District Judge, Hamirpur, which was registered as Civil Appeal No.110 of 2004. The appellate Court framed point for determination as to whether the judgment and decree under appeal is legally sustainable and to what relief if any, the appellant would be entitled to. The District Judge did not agree with the findings and the conclusions of the Trial Court and, accordingly, decreed the suit against defendants 1, 2, 4 and 5. It held

that the Will dated 12.12.1988 was a valid and genuine document and plaintiff was entitled to a declaration on the basis of the same, that he was in possession of the land in question and accordingly enjoined the defendants 1, 2, 4 and 5 from interfering in his possession. It further found that the Will dated 16.05.1994 was surrounded with suspicious circumstances and as such could not be relied upon. It was held to be an invalid document. It also set aside the mutation Entry Nos.201 and 207.

9. Aggrieved by the judgment of the first appellate Court, the defendants preferred Second Appeal under Section 100 of CPC, which was registered as RSA No.392 of 2005 before the High Court of Himachal Pradesh. The High Court confirmed the finding of the First Appellate Court that the Will dated 12.12.1988 was a valid and genuine document. It also found that the second Will dated 16.05.1994 in favour of defendant no.1, Vikram Singh was not a genuine document and was shrouded with suspicion. However, the High Court felt that the

purchasers from defendant no.1 were entitled to benefit of Section 41 of the Transfer of Property Act, 1882¹ and, accordingly, saved the transactions in their favour. They were entitled to retain the land covered under their respective sale deeds and the remaining land covered under the Will, would stand declared in the ownership of the plaintiff, Tota Ram and that the defendant no.1, Vikram Singh would not be entitled to claim any such benefit over the remaining land. The High Court also set aside the mutation Entry No.201 but saved it with respect to the transfers made in favour of defendants 2, 4 and 5. It further restored the mutation Entry No.207 in favour of defendant Nos.2, 4 and 5.

10. Aggrieved by the same, the legal heirs of Tota Ram i.e. his three sons, three daughters and widow have filed Civil Appeal No.8187 of 2023 to challenge the judgment of the High Court to the extent it saved the transactions in favour of defendants 2, 4 & 5. The other Civil Appeal

¹ In short, TP Act

No.8188 of 2023 has been filed by Vikram Singh (defendant no.1) with respect to the declaration of his Will dated 16.05.1994 to be an invalid document shrouded with suspicion.

11. We have heard learned counsel for the parties. On behalf of the plaintiffs-appellants, the submission is that the High Court fell in serious error in extending the benefit of Section 41 of the TP Act to the defendants 2, 4 and 5. Neither there was any specific pleading, nor any issue framed, nor any evidence led with respect to such relief. None of the purchasers namely defendants 2, 4 and 5 entered the witness box. The High Court has carved out a completely new case which is unsustainable in law.

12. Section 41 of the TP Act reads as follows:

“41. Transfer by ostensible owner.

Where, with the consent, express or implied, of the persons interested in immoveable property, a person is the ostensible owner of such property and transfers the same for consideration, the transfer shall not be voidable on the ground that the

transferor was not authorised to make it:
provided that the transferee, after taking reasonable care to ascertain that the transferor had power to make the transfer, has acted in good faith.”

A plain reading of the above provision clearly requires the consent, be it express or implied, of the persons interested in the immovable property.

13. In the present case, the plaintiff, Tota Ram, was definitely interested in the immovable property having a registered will of 1988 in his favour and we do not find either in the pleadings or in the evidence, that he had given, his consent, expressly or impliedly, to Vikram Singh, defendant no.1, to transfer the property, in favour of defendant nos. 2, 4 and 5. Nowhere in the written statements filed by defendants 1, 2,4 and 5 have they pleaded, that defendant no. 1 had obtained the consent, either express or implied, from the plaintiff before making the transfers. Further the proviso to section 41 of the TP Act requires that the transferees to take reasonable care in ascertaining that the transferor had

power to make the transfer and that they had acted in good faith. This again would require specific pleading and evidence by the transferees. As already recorded above, even at the cost of repetition, defendants 2,4 and 5, the purchasers, from defendant no. 1, neither pleaded such facts nor entered the witness box to prove such facts as required under the proviso. The relief granted by the High Court relying upon section 41 of the TP Act was thus completely unwarranted, misplaced and against the pleading and evidence on record.

14. Once the High Court had held that the Will dated 12.12.1988 was genuine and *bona fide* and duly proved and, further that the Will dated 16.05.1994 was not a valid document being shrouded with suspicious circumstances, there was no occasion for the High Court to have shown any kind of sympathy with the purchasers i.e. defendants 2, 4 and 5. Once the Will itself was held to be invalid, no right accrued in favour of defendant no.1, and if defendant no.1 did not receive any right, title or interest under the Will dated 16.05.1994, there was no

question of defendants 2, 4 and 5 getting any better right, title or interest than defendant no.1 their vendor. We find substance in the aforesaid submission as from the pleadings, evidence and material on record, we find that the submission on behalf of the plaintiffs-appellants is fully substantiated. As such, the appeal filed by the plaintiffs-appellants deserves to be allowed.

15. Insofar as the appeal filed by the defendant no.1 is concerned, we are more than clear that the findings recorded by the first Appellate Court and the High Court on the validity of the second Will dated 16.05.1994 being shrouded with suspicious circumstances, is well reasoned and based on evidence on record. The defendant no.1 had completely failed to dispel and clear the clouds surrounding the Will dated 16.05.1994. The first Appellate Court has dealt with in great detail on the said aspect, which finding has been affirmed by the High Court. The same being a pure finding of fact, we are not inclined to interfere with the same. As such, the appeal filed by the defendant no.1, Vikram Singh is liable to be

dismissed.

16. In view of the above, the Appeal No.8187 of 2023 is allowed. The judgment of the High Court to the extent it extends benefit to the defendant nos.2, 4 and 5 is set aside and that of the first Appellate Court decreeing the suit in totality is affirmed. The Appeal No.8188 of 2023 is, hereby, dismissed.

.....**J**
(VIKRAM NATH)

.....**J**
(PRASHANT KUMAR MISHRA)

NEW DELHI
JULY 10, 2024