

**IN THE HIGH COURT OF PUNJAB AND HARYANA AT
CHANDIGARH**

RSA No.1498 of 1986 (O&M)

Date of Decision: 13.06.2017

Surinder Singh (since deceased and now represented by his legal heirs)

...Appellants

Vs.

Piara Singh and others

...Respondents

CORAM: HON'BLE MR. JUSTICE AMOL RATTAN SINGH

Present:- Mr. Harminder Singh, Advocate, for the appellants.

Mr. S. N. Saini, Advocate, for the respondents.

Amol Rattan Singh, J.

This regular second appeal has been put up for re-hearing after an application (CM no.1852-C of 2015) filed by respondent no.1 in this appeal, was allowed vide an order dated 19.08.2015, by a co-ordinate Bench that had earlier allowed this appeal, setting aside the impugned judgment of the learned first appellate Court dated 13.03.1986, by which the judgment of the learned Sub Judge Ist Class, Phillaur, dated 21.03.1985, dismissing the suit of the respondents-plaintiffs (respondents no.1 and 2 herein) was reversed.

The judgment and decree of this Court in the present second appeal, dated 16.11.2014, was thus recalled by the same Bench as had allowed the appeal, in view of the fact that the said judgment and decree had been passed in the absence of respondent no.1 or his counsel, and the reason for such absence was accepted by the Court.

Consequently, the matter had then been heard in length by this Court, with it being argued by counsel for the appellants as well as by

respondent no.1.

2. It needs to be stated here that during the pendency of the appeal, the appellant Surinder Singh had died, and he is shown to have been later on represented by his legal representatives i.e. his widowed mother, his own widow and his four daughters (including two minor daughters).

The widowed mother of the original appellant, Surinder Singh, i.e. Maya, is also stated to have died during the pendency of the appeal, with the remaining legal representatives being the widow and daughters of Surinder Singh.

As regards the respondents in the appeal, i.e. the two plaintiffs, Piara Singh and Swaran Singh, both sons of Hazara Singh, though Mr. Som Nath Saini, Advocate, had been shown to be representing both as per the interim orders dated 20.03.2014 and 03.09.2014. Thereafter, Mr. Saini was stated to have appeared only in COCP no.157 of 2004 but not in the appeal, as per his statement recorded vide the order dated 30.09.2014.

It was also recorded in that order that a perusal of the order dated 26.11.2002 showed that respondents no.1 and 2 (i.e. the plaintiffs in the suit), had actually been proceeded against *ex parte*, they not having appeared despite service of notice upon them.

Respondents no.3 and 4 in the appeal have been shown to be only proforma respondents, with respondent no.3, Ajit Singh, being defendant no.2 in the suit and the father of appellant Surinder Singh and respondent no.4, Bachan Kaur wife of Kishan Singh (defendant no.3 in the suit), seen to be the sister of the plaintiffs and Ajit Singh, as per the plaint itself.

In the same order dated 30.09.2014, it was also recorded that Shri H. C. Ahuja had thereafter filed his power of attorney on behalf of

respondent no.1 Piara Singh, but he too has not appeared on subsequent dates.

3. Eventually in the order by which the application filed under Order 41 Rule 21 CPC was allowed, i.e. the order dated 19.08.2015, it is recorded that counsel for the applicant-respondent no.1 had stated that initially he had engaged Shri Satya Parkash Jain as his counsel, who expired in the year 1990, after which he had engaged Shri H.C. Ahuja, Advocate, but he too had passed away about five years earlier. In these circumstances, it was stated that the non-representation of respondent no.1 either himself or through his counsel, was not intentional at the time when this appeal had been first decided on 16.11.2014. Consequently, the application had been allowed vide the order dated 19.08.2015, as already stated, with respondent no.1 duly represented by Mr. S.N. Saini, Advocate. Respondent no.2, though a co-plaintiff with respondent no.1, is never seen to have been represented after having been proceeded against *ex parte* vide the order dated 26.11.2002, with respondents no.3 and 4.

4. Coming to the facts of the case, as taken from the judgments of the Courts below, leading up to the filing of this regular second appeal.

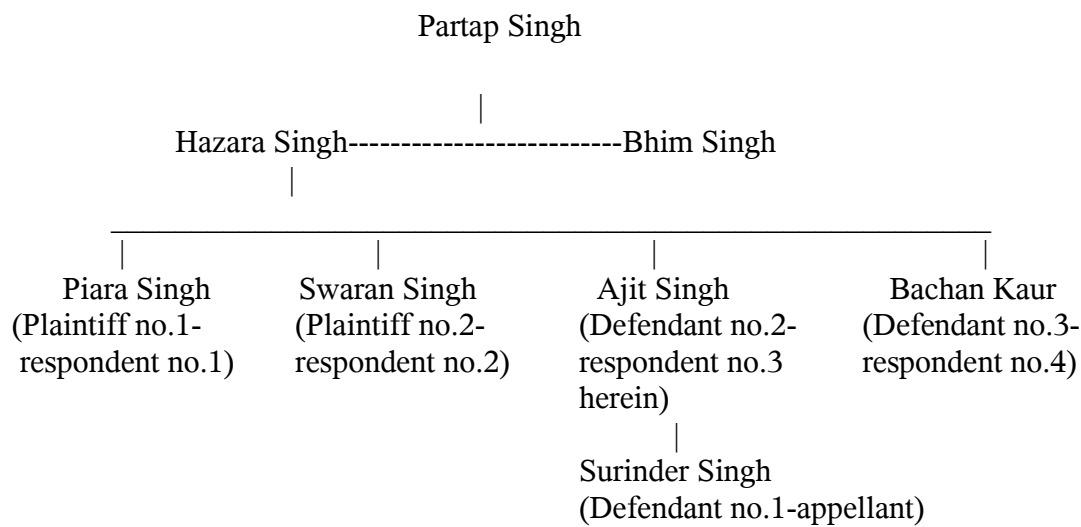
The two plaintiffs aforesaid, Piara Singh and Swaran Singh sons of Hazara Singh, had filed the suit for possession by way of partition through metes and bounds, of a $\frac{2}{3}$ rd share out of the half share of land bearing khewat no.703, khatoni no.1167, khasra no.683, alongwith the structures constructed thereupon, situated in village Ruka Khurd, after declaring that the plaintiffs and their brother, defendant no.2 (Ajit Singh), are the owners of the suit property, they being the heirs of their father, Hazara Singh, by virtue of a will executed by Hazara Singh on 18.04.1977, in their favour. The plaintiffs also sought a consequential relief by way of restraint on the defendants from

dispossessing them (the plaintiffs) illegally and forcibly from the suit property.

Appellant-defendant no.1, Surinder Singh, is the nephew of the respondent-plaintiffs, being the son of defendant no.2, Ajit Singh.

Thus, with the aforesaid prayers, the suit was instituted on 24.09.1983 in the Court of the learned Sub Judge Ist Class, Phillaur.

5. The genealogical table showing the relationship of the parties to each other is reproduced below:-



As per the plaintiffs, they and defendant no.2 were brothers, with defendant no.1 being the son of defendant no.2 Ajit Singh. Defendant no.3 Bachan Kaur, was the sister of the plaintiffs and defendant no.2.

The suit property was stated to be measuring 1 kanal 2 marlas in all, owned by Hazara Singh and Bhan singh (both deceased).

As per the plaintiffs, Hazara Singh and Bhan Singh had effected a partition of the suit property, by way of which Hazara Singh was allotted a ½ share falling towards the eastern side. The plaintiffs, as averred, were stated to be living with their father Hazara Singh before he died and as such, he had executed the aforesaid will in their favour and in favour of his son Ajit Singh (defendant no.2), and consequently the suit property was inherited by all three

of them, to the exclusion of Hazara Singhs' daughter, Bachan Kaur-defendant no.3.

6. However, it was further averred in the plaint that defendants no.1 and 2, Surinder Singh and his father Ajit Singh, “at the back of the plaintiffs”, got a half share in the suit property mutated in favour of defendant no.1, (present appellant Surinder Singh), vide mutation no.5894, “against law and facts”.

The plaintiffs were stated to have learnt about the sanction of the aforesaid mutation only after obtaining a *jamabandi* from the Halqa Patwari.

It was yet further averred that the plaintiffs were actually put in possession of a portion of the suit property by their father, Hazara Singh, himself, and they continued to remain in such possession even at the time of the institution of the suit. The plaintiffs not being able to pull along with their brother, defendant no.2 Ajit Singh, they therefore, sought a partition of the property by metes and bounds, seeking a 2/3rd share thereof, but defendants no.1 and 2 not agreeing to such partition, the suit had been instituted on 24.09.1983.

7. As per the judgment of the learned Sub Judge, the suit was contested by defendant no.1 “on the one hand and defendant no.3 on the other hand”, who filed separate written statements.

The first defendant (present appellant), in his written statement raised preliminary objections about vagueness and ambiguousness of the plaint, also raising the other usual objections with regard to under valuation and jurisdiction etc.

He further stated that the suit property had been inherited by him as per a registered will dated 18.04.1983, executed by Hazara Singh, i.e. his

grand-father, in lieu of services rendered by him to Hazara Singh and as such, the plaintiffs were debarred from filing this suit on account of their act and conduct, which was also contended to be bad for non-joinder and mis-joinder of necessary parties.

On merits, it was firstly denied by the present appellant-defendant no.1 that the plaintiffs were in possession of the suit property and in fact, it was averred that plaintiff no.2 (Swaran Singh) had renounced the world about 35 years ago and had become a Sadhu, who had severed all ties with his family and was therefore not entitled to inherit the suit property in any case.

It was further contended that the aforesaid registered will was executed by Hazara Singh of his own free will, in a sound disposing mind.

It was further stated in the written statement of the present appellant-defendant no.1, that earlier an old building was standing on the suit land which had since fallen down and he (the present appellant) had constructed a new building thereupon, by spending a large amount of money from his own pocket, with the consent of Hazara Singh.

The will propounded by the plaintiffs, dated 18.04.1977, was denied by the present appellant-defendant no.1 in his written statement.

8. Defendant no.3, Bachan Kaur, in her written statement also took the usual preliminary objections and as regards non-joinder of necessary parties, she stated that the heirs of Bhan Singh since deceased, who were owners of a half share of the suit property, had not been impleaded.

Defendant no.3 also strongly refuted the execution and validity of the will dated 18.04.1977 and further, claimed that she was actually in possession of the suit property as a co-sharer with the plaintiffs and defendant

no.2, Ajit Singh (father of the present appellant), being their sister.

9. Upon the aforesaid pleadings, the following issues were framed by the learned Sub Judge:-

- “1) Whether the plaintiffs are owners of 2/3 share of the property in dispute? OPP
- 2) Whether the plaintiffs are entitled to the partition and possession of their share in the suit property as alleged in the plaint? OPP
- 3) Whether the mutation in favour of defendant no.1 is illegal and null and void? OPD-1
- 4) Whether the deceased Hazara Singh executed a valid will of dated 18.4.83 in favour of defendant no.1? OPD-1
- 5) Whether Swaran Singh plaintiff no.2 has renounced the world. If so, its effect? OPD
- 6) Whether defendant no.1 raised construction on the suit property as alleged in the written statement, if so, its effect? OPD-1
- 7) Whether deceased Hazara Singh executed a valid will of dated 18.4.77 in favour of his sons? OPD
- 8) Relief.”

10. Of the aforesaid issues, the learned Sub Judge took up the 1st, 3rd and 7th issues together, all pertaining to the rights of the plaintiff in the suit property on the basis of the will propounded by them, dated 18.04.1977, their entitlement to partition and possession of the suit property, and on the validity of the mutation in favour of present appellant-defendant no.1.

As regards the original ownership of Hazara Singh over the suit property, that was found to be not doubted

In respect of the will dated 18.04.1977, it was found that, even as per the testimony of the first plaintiff (respondent no.1 herein), Piara Singh,

and that of Bhagat Ram (PWs1 and 2 respectively), corroborated by the testimony of appellant-defendant no.1 Surinder Singh (DW1), both the persons claimed to be the attesting witnesses to the aforesaid will, and the scribe thereof, had all died. Hence, the learned Sub Judge went on to examine as to whether, in the aforesaid circumstances, the will was proved in terms of Section 69 of the Indian Evidence Act, 1872, by which it is stipulated that if no attesting witness can be found to prove a document in terms of Section 68 of the said Act, then the document must be proved by showing that the attestation of at least one witness of the document is in his hand writing, and the signature of the person executing the document, is in the hand writing of that person, i.e. the executor of the document (testator/testatrix in the case of a will).

11. However, it was found by that Court that no evidence had been led by the plaintiffs to prove either the signatures of one attesting witness to the will dated 18.04.1977, or to prove the signature of the testator, i.e. Hazara Singh.

The plaintiffs had, however, examined Jagdish Rai, stated to be the son of the scribe of the will, Chaman Lal, who identified the writing on the will and the signature of the scribe, to be in the hand of his father, Chaman Lal.

Other than the fact that the signatures of at least one of the attesting witness to the will and of the testator were not found to have been proved, the learned Sub Judge also found that the will, Ex.P2, was of a highly “suspicious nature,” inasmuch as plaintiff no.1 Piara Singh had deposed that he had found the will after the death of his father from amongst other documents 'pertaining' to his father. That Court went on to hold that if Hazara

Singh had actually intended to divert natural succession, thereby excluding his daughter Bachan Kaur (defendant no.3), from inheritance, he would have handed over the will long before his death, to any of his legatees. Thus, it was found strange by that Court that Hazara Singh would have kept his will as a guarded secret even from the beneficiaries thereof.

In the aforesaid circumstance, non-registration of the will was also found to be suspicious by the Court.

12. On the other hand, it was held that as regards issue no.4, i.e. the will set up by defendant no.1 in his favour, dated 18.04.1983 (Ex.D1 before the trial Court), that will was duly proved by examining its scribe Mohinder Singh as DW2, and the attesting witnesses thereto, Karam Singh and Mohan Lal, as Dws4 and 5 respectively. The testimonies of these witnesses were found to have been consistent, to the effect that Hazara Singh had executed the said will, Ex.D1, in a sound disposing mind.

13. Citing the principle contained in the judgment of the Supreme Court in **Indu Bala Bose and others v. Manindra Chandra Bose and another** AIR 1982 SC 133, it was found by the learned Sub Judge that the will dated 18.04.1983 had been duly proved by its scribe and the attesting witnesses thereto, further strengthened by the fact that it was also a registered will.

The testimony of the present appellant-defendant no.1, Surinder Singh, to the effect that his grand-father, Hazara Singh, had lived with him for about 12/13 years before his death and was therefore looked after by him, and that he had died in his house, with rituals also performed by him, was accepted to be a true testimony, because during cross-examination the present appellant had also given the names of the doctors by whom his grand-father

had been treated.

Further, one Manak Singh also testified as DW3, to the effect that the expenditure of the religious ceremony performed after the death of Hazara Singh was borne by the present appellant-defendant no.1 and that plaintiff Piara Singh used to reside in a different house from that of his father, Hazara Singh. Similarly, DW4, one of the attesting witness to the will, also deposed to the same effect, further stating that Hazara Singh did not have amicable relations with his sons Ajit Singh and Piara Singh (Ajit Singh being the father of appellant-defendant no.1).

Mohan Lal, the other attesting witness to the will, also deposed that Hazara Singh used to live with the appellant-defendant Surinder Singh.

14. Yet further, it has been recorded in the judgment of the learned trial Court that plaintiff Piara Singh in his cross-examination had deposed that after the death of Hazara Singh, the holy book, Shri Guru Granth Sahib, was recited by DW3 Manak Singh.

Therefore, with Manak Singh having testified as a witness for the first defendant, and not for plaintiff Piara Singh, his testimony was found to be creditworthy, whereas the testimonies of the plaintiff and PW2 Bhagat Ram, to the effect that Hazara Singh was being served by the plaintiffs and defendant no.2, father of the first defendant, were disbelieved.

15. It was also held by the trial Court that there was “ample evidence on record that Swaran Singh renounced the world and turned into an ascetic “long long ago” (Swaran Singh being the second plaintiff as already noticed). Hence, it was held that Swaran Singh in any case could not have rendered services to his father, Hazara Singh, after he renounced the world.

16. Further, the learned Sub Judge recorded that even Piara Singh

had admitted in his testimony that the last remains of Hazara Singh were taken to Kiratpur Sahib by appellant-defendant Surinder Singh. Though the explanation given by plaintiff Piara Singh was that Surinder Singh had taken those last remains because Hazara Singh had given him a sum of Rs.1000/- for that purpose, however, further in his cross-examination, the plaintiff could not tell as to in what manner the entire expenditure had been incurred, for performing the rituals after the death of Hazara Singh, and in fact he stated that Surinder Singh had knowledge of the same.

The plaintiff also found to be unable to state as to whether his father had any bank deposit or not.

On the aforesaid reasoning, it was held by the trial Court that it was proved that Hazara Singh actually used to live with Surinder Singh and that Surinder Singh had rendered services to him, with Piara Singh living separately from his father.

17. A contention made before that Court that the will was registered in a perfunctionary manner, as the contents of the will were not read over by the registering officer to the testator, even as per the testimony of DW5 Mohan Lal, that argument was rejected, holding that at the beginning of his cross-examination Mohan Lal had deposed that at the asking of the Sub-Registrar, Hazara Singh had stated that he wishes to make a will in favour of Surinder Singh. Thus, it was held by the court that Hazara Singh very well knew the nature of the document that he was going to execute and get registered.

The contention that no reason had been assigned in the will by the testator for disinheriting his sons and daughter (in favour of his grandson), was also rejected, as the will, Ex.D1, was found to have been made in

favour of Surinder Singh stating in clear terms that it was being so made in lieu of the services rendered by him, and because the testator was very pleased with him.

18. On the aforesaid grounds, the will dated 18.04.1983, in favour of appellant-defendant no.1 Surinder Singh, was held to be not surrounded by suspicious circumstances and otherwise also validly proved.

19. On the 5th issue, of whether Swaran Singh had renounced the world and had turned an ascetic 30 to 35 years earlier, the testimony of DW4, Karam Singh, was wholly believed, with even one of the plaintiffs' witness, Bhagat Ram, having admitted in his cross-examination to that effect, though as per this witness, Swaran Singh become a Sadhu about 25 years earlier. This witness also stated in his cross-examination that plaintiff Swaran Singh lived in a Dera, situated about 2 to 3 furlongs from the Dera of Chowk Mehta. In fact, the first plaintiff, Piara Singh, himself had also admitted that Swaran Singh had become a Sadhu, belonging to the *Ramta* sect.

Consequently, that issue was held to have been proved, that Swaran Singh had turned an ascetic for a very long period.

20. The next issue, as to whether the first defendant had raised any construction on the suit property, as alleged in his written statement, was also decided in favour of appellant-defendant no.1, on the ground that no evidence had been led on that issue at all.

21. On the aforesaid findings, it was held that the plaintiffs had no right, title or interest in the suit property, which was inherited by appellant-defendant no.1 Surinder Singh by virtue of a registered will dated 18.04.1983, executed in his favour by his grand-father Hazara Singh, and consequently, the suit of the plaintiff was dismissed with costs.

22. The judgment and decree of the learned trial Court having been challenged by the two plaintiffs (with plaintiff no.2 Swaran Singh having filed it through plaintiff no.1 Piara Singh as his attorney), before the first appellate Court, that Court at the outset depicted a genealogical table showing the relations of the plaintiffs and the defendants to each other.

Thereafter, after noticing the pleadings of the parties and the issues framed by the learned Sub Judge, the first appellate Court went on to hold, in terms of its appreciation of the evidence led before the lower court, and the arguments raised before it, that the suit of the plaintiffs actually deserves to be decreed in their favour.

That conclusion was arrived at by the first appellate Court on the reasoning given hereinafter.

23. As per that Court, the plaintiffs could not have proved the will by way of production any of the witnesses or the scribe of the will, all of them having died. Hence, it was held that they did what they could best do, by examining the son of the scribe of the will, i.e. Jagdish Rai, who stated as PW3 that his father had expired three months earlier, i.e. during the pendency of the suit, and that he had seen him (his father, Chaman Lal) signing and writing, on the basis of which he identified the signatures and hand writing of his father on the will. This witness was also found to have stated that Bhan Singh was the Lamberdar of the village, who had also died (Bhan Singh being shown to be one of the attesting witnesses to the will dated 18.04.1977, Ex.P2). Similarly, the other witness, Sharm Singh son of Dharam Singh, had also died and that his (PW3s') father, Chaman Lal, used to maintain the register pertaining to the deeds written by him. This register was found to have been produced by the first appellate Court, in which the will dated

18.04.1977 was found to have been entered at Sr. no.56.

On the aforesaid reasoning, it was held that the plaintiffs could not be faulted for non-production of the attesting witnesses to the will, and therefore the other surrounding circumstances were also necessary to be taken into consideration.

24. Thereafter, the learned first appellate Court went on to discuss the will itself, i.e. Ex.P2, noticing that the testator had specifically stipulated therein that after his death, his three sons, Swaran Singh, Ajit Singh and Piara Singh would become the owners of his property, i.e. a plot situated in the Nayi Aabadi, Rurka Khurd, giving therein the details of the boundaries of the said plot. It was also found by that Court that the will also gave therein the shares owned by the sons of the testator, with his intention being made very clear by the testator. He also mentioned his daughter in the said will, disinheriting her from claiming any right in the property.

As regards the will propounded by the present appellant-defendant no.1, Surinder Singh, i.e. Ex.D1, dated 18.04.1983, the learned first appellate Court found that not even a passing reference had been made to the plaintiffs and defendants no.2 and 3, i.e. the sons and daughters of the testator. Hence, no reason for such disinheritance had been given, with the previous will, Ex.P2, also not mentioned in the subsequent will at all.

25. On the aforesaid reasoning, it was held by that Court that the will, Ex.P2, “on the face of it sounds natural as compared to the will, Ex.D1”.

An argument raised on behalf of the appellant-defendant that until the contrary is established, the testator was presumed to have a mental capacity to make a valid will and therefore, the second will could not be rejected, was an argument which was not accepted by that Court for the same

reason, that the first will seemed to be a more naturally executed will than the second.

26. The reasoning of the learned Sub Judge that the will dated 18.04.1977 was not a genuine will and was surrounded by suspicious circumstances, was reversed by the first appellate Court, holding that, in its opinion, it was the second will which was surrounded by suspicious circumstances.

In that context, it was noticed by the court that the appellant herein, Surinder Singh, as DW1 had stated in his cross-examination that his father, Ajit Singh, used to pick quarrels with his grand-father. He further stated that his father also never used to give food to Hazara Singh, further leading to more quarrels.

Hence, it was held by the lower appellate Court that in such circumstances Hazara Singh could not be accepted to have a soft corner for the son of Ajit Singh, i.e. Surinder Singh, and therefore he would not disinherit his other two sons.

Further, it was found that Surinder Singh in his cross-examination had admitted that Hazara Singh was 65-66 years of age when he died and had remained sick for 10 to 15 days before that and further, that he was illiterate.

On that reasoning, it was held that it can be safely concluded “that Hazara Singh was not in a sound disposing mind at the time of the execution of the alleged will, Ex.D1”.

27. Consequently, for those reasons, the will dated 18.04.1977, propounded by the plaintiffs, was held to be a genuine will, and the will propounded by the appellant-defendant herein, as also the mutation

sanctioned on the basis of that will, were held to be illegal, null and void.

28. As regards the finding of the trial Court on issue no.5, with regard to Swaran Singh having become an ascetic, that finding was also reversed, holding that Swaran Singh duly executed a power of attorney, Ex.P1, in favour of his brother Piara Singh, to proceed with the suit and as such just because he was living in a Dera, it could not be said that he had renounced the world and had ceased all ties with it.

29. The appeal of the respondents-plaintiffs was thereafter allowed by the first appellate Court, decreeing their suit, granting a preliminary decree for possession by way of partition by metes and bounds as had been prayed for, also declaring the plaintiffs-defendants to be owners of the estate of Hazara Singh, to the extent of a 1/3rd share each therein, as per the *jamabandi* for the years 1978-79. The consequential relief of permanent injunction, restraining the defendants from dispossessing the plaintiffs illegally and forcibly from the suit land, was also passed by the learned first appellate Court.

In the penultimate paragraph of the judgment, an application filed under Order 41 Rule 27 CPC, seeking permission to lead additional evidence (without referring as to by whom it had been filed), was held to have been rendered infructuous and was therefore dismissed. (The said application is seen to be filed by the plaintiffs, appellants before that Court, seeking to examine one witness to the will).

30. Before this Court, learned counsel for the appellants-defendants has framed the following questions of law in this second appeal:-

- “1. Whether the will, both the attesting witnesses whereof had already died, can be said to be proved without complying with the provisions of Section 69 of the Evidence Act,

1872?

2. Whether the Ld. First Appellate Court could legally reverse the findings on issues no.1 to 4 and 7 returned by the Ld. Trial Court without even referring to Section 69 of the Evidence Act, 1872 and considering and reversing the findings derived at by the Trial Court?
3. Whether the Ld. First Appellate Court traveled beyond the pleadings while observing that Hazara Singh was not in sound disposing mind at the time of execution of the Will Ex.D/1?
4. Whether the alleged Will Ex.P/1 having not been legally proved, could be accepted in law?
5. Whether the judgment and decree of reversal passed by the Ld. First Appellate Court is perverse and as such is liable to be set aside?
6. Whether the impugned judgment and decree can be legally sustained, the same being the result of non-reading and mis-reading of the pleadings and evidence on record?"

Of the aforesaid questions, actually the questions framed at Sr. No.1, 2 and 4 are a part of the same question, as to whether the will, Ex.P1, could be held to be duly proved without recourse to Section 69 of the Evidence Act by the learned first appellate Court. Consequently, that is framed as a single question of law by this Court.

The question framed at sr. no.3 above would be also a question to be examined by this Court, and cumulatively thereafter, questions no.5 and 6 would be a single question as a consequence of the aforesaid two questions and therefore not really a substantial question of law.

31. Addressing arguments for the appellant-defendant no.1, Mr. Harminder Singh, Advocate, after referring to the facts of the case, in essence submitted on Section 69 of the Evidence Act not having been referred to at all

by the learned lower appellate Court. He submitted that as per law well settled, a will must be proved strictly and therefore, the signatures/thumb marks of the testator and the attesting witnesses not having been identified by any person, simply the testimony of the son of the scribe, identifying the signatures of his father on the will, would not substitute for the strict conditions stipulated in Sections 68 and 69 of the Evidence Act.

Learned counsel then referred to paragraph 12 of the judgment of the learned Sub Judge, holding to the above effect.

32. He next referred to paragraph 13 thereof, wherein that Court had described the first will (of 1977) to be surrounded by highly suspicious circumstances and thereafter the reasoning given by that Court for believing the second will (of 1983), propounded by the appellant herein. He specifically pointed to the finding of that Court that other than the appellant-defendant, the attesting witnesses of the second will, the scribe thereof, and the person who had recited the prayer from the Guru Granth Sahib, after the death of Hazara Singh, i.e. Manak Singh, had been duly examined, whose testimonies were accepted by that Court, in the light of the cross-examination of the first plaintiff himself.

33. Mr. Harminder Singh next submitted that in the face of the aforesaid findings of the trial Court, the learned lower appellate Court simply reversed those findings on the ground that the natural heirs of Hazara Singh were not mentioned in the will of 1983, which by itself was held to be too suspicious a circumstance to believe the will.

He submitted that in the face of the fact that the said will was duly proved by the testimony of both attesting witnesses and the scribe, and was also a registered will, subsequent to the first will, with it also having been

proved that Hazara Singh was actually living with the appellant, i.e. his grand-son, not being looked after by any of his own sons, the rationale for excluding the testators' immediate legal heirs, was very obvious.

34. Mr. Harminder Singh also thereafter referred to Ex.D4 from the record of the trial Court, which is seen to be a copy of an entry in the register of Gurdwara Patal Puri, Kirat Pur Sahib, where the ashes of a deceased person are immersed in the river by a large number of the Sikh community. The said entry, at Sr. no.13053, is shown to be in respect of the ashes of Hazara Singh son of Kartar Singh, though the age of the deceased, given therein, is 90 years, with his village being Rurka Khurd and the date of death given as 19.08.1983. The person who had brought the ashes to be immersed in the river is shown to be Surinder Singh and his relationship with the deceased is shown to be that of a grand-son.

Hence, learned counsel submitted that the appellant-defendant was residing with Hazara Singh, looking after him, whereas his own children, including the father of the appellant, were not doing so. Therefore, he submitted that Hazara Singh executing a will in favour of his grand-son was only natural, as was held by the learned Sub Judge.

35. In response to the aforesaid arguments, Mr. S.N. Saini, learned counsel for respondent-plaintiff no.1, first referred to paragraph 15 of the judgment of the learned lower appellate Court, wherein reasoning is given for holding the will dated 18.04.1983 to be surrounded by suspicious circumstances and therefore, not a valid will, (as have already been noticed by this Court), to the effect that no reference whatsoever has been made in that will to the sons and daughter of the testator and as to why he was disinheriting them.

Mr. Saini next referred to the will itself, Ex.D1, from the record of the lower Court, to submit that the signatures of the witnesses are not appearing below the will but on the side margin.

Learned counsel next submitted that the recital in the will is to the effect that it was the testators' first and last testament.

Mr. Saini next submitted that it was strange that the previous will of the year 1977 did not refer to other properties of the testator, whereas the will propounded by the appellant suddenly spoke of different properties, including land, house and “*taur*” etc.

36. Learned counsel then referred to the testimony of DW1, i.e. the appellant Surinder Singh, wherein he stated that he and his father were living together. Thereafter, he admitted that his father used to quarrel a lot with his grand-father. Thus, learned counsel actually reiterated what was held by the lower appellate Court as one of the reasons to disbelieve the second will, on the ground that Hazara Singh would not exclude his own children from the property to favour a grand-son whose father admittedly used to fight with the testator.

Mr. Saini next referred to the testimony of DW4 Karam Singh, i.e. one of the attesting witness to the will, to submit that whereas this witness stated that the appellants' father used to live separately from the appellant, the appellant himself stated that his father lived with him.

Learned counsel then also referred to the testimony of DW5 Mohan Lal, another attesting witness, who in his cross-examination, stated that when the will was executed, Hazara Singh had weak eye sight and also could not hear properly, though he used to walk about.

Mr. Saini in this context then again referred to the testimony of

DW4, Karam Singh, wherein he is shown to have stated that Hazara Singh was 60-65 years old at the time of execution of the will, which is also stated in the will dated 18.04.1983 itself; however, in the will dated 18.04.1977, i.e. six years earlier, Ex.P1, Hazara Singhs' age is shown to be 70 years. He pointed out that as per the register at Gurdwara Patal Puri, Kiratpur Sahib, Hazara Singhs' age on the date of his death, on 19.08.1983, was shown to be 90 years. Thus, he submitted that the testimony of the attesting witness and the statement in the will itself, that Hazara Singh was 65 or 66 years old, was a deliberate attempt by the appellant-defendant to show that Hazara Singh was in his complete senses when he executed the will, whereas even as per other attesting witness, i.e. DW5, he was hard of hearing and could not see properly.

Therefore, Mr. Saini submitted that that too was a highly suspicious circumstance.

37. Next, learned counsel for the respondents-plaintiffs referred to the dismissal of the application filed before the learned first appellate Court (under Order 41 Rule 27 CPC), contending that by the said application, additional evidence was sought to be led, by producing a witness to identify the signatures of the attesting witnesses to the will of 1977, and in the form of documentary evidence. However, on specific query, learned counsel submitted that he did not know as to what was the documentary evidence sought to be produced.

It needs to be noticed at this stage itself that an actual perusal of the said application, available at page 51 of the record of the learned first appellate court, shows that the evidence that was sought to be led was not in the form of any documents to prove the signatures, but by examining at least

one witness to the will of 1977, though no name of any witness is give in the application.

38. Lastly, Mr. Saini reiterated that the will of 1977, dividing the property of the testator in 3 equal parts, between his three sons, was a more naturally acceptable will than the one alleged to have been executed in 1983, in which only one grand-son has been made the beneficiary of the will.

Mr. Saini cited a judgment of the Supreme Court in **Bharpur Singh v. Shamsher Singh** (2009) 3 SCC 687, submitting that the parameters laid down therein, as regards proving a will, would be the parameters adopted by the learned lower appellate Court in the present *lis* and not those adopted by the learned Sub Judge. Consequently, learned counsel prayed for dismissal of the appeal.

39. In rebuttal to the aforesaid arguments, Mr. Harinder Singh first pointed to the will, Ex.D1 (of 1983), and then to the general power of attorney executed by plaintiff no.2 Swaran Singh in favour of plaintiff no.1 Piara Singh (Ex.P1), to submit that even in the said instrument (power of attorney), the witnesses had signed in the side margins of the document and not below it, as is the practice very often adopted.

Hence, he submitted that the contention of the respondents-plaintiffs to the effect that the will was a suspicious document even on that ground, is a wholly erroneous argument.

Learned counsel for the appellant next read the endorsement stamped behind the will Ex.D1, to the effect that it had been heard and understood by the executant.

It needs to be stated here that the said stamp is not fully visible but the first line does read to say that it has been heard and understood,

though not clearly as to by whom.

40. Having considered the arguments of both learned counsel as also the judgments of the learned Courts below, it first has to be held that as regards the will propounded by the respondents-plaintiffs, dated 18.04.1977 (Ex.P1), it most definitely cannot be held to have been proved in terms of Sections 68 and 69 of the Indian Evidence Act, 1872. The said provisions read as follows:-

Indian Evidence Act, 1872

“68. Proof of execution of document required by law to be attested.- If a document is required by law to be attested, it shall not be used as evidence until one attesting witness at least has been called for the purpose of proving its execution, if there be an attesting witness alive, and subject to the process of the Court and capable of giving evidence:

[Provided that it shall not be necessary to call an attesting witness in proof of the execution of any document, not being a Will, which has been registered in accordance with the provisions of the Indian Registration Act, 1908 (16 of 1908), unless its execution by the person by whom it purports to have been executed is specifically denied.]”

“69. Proof where no attesting witness found.—If no such attesting witness can be found, or if the document purports to have been executed in the United Kingdom, it must be proved that the attestation of one attesting witness at least is in his handwriting, and that the signature of the person executing the document is in the handwriting of that person.”

Thus, as per Section 68, if an instrument/document is proved to be a registered document, even the witnesses to such document need not be examined, if the document is not a will. Hence, as regards a will, at least one attesting witness thereto must prove its execution, if such

an attesting witness is alive and capable of giving evidence.

In the present case, though as per the application filed under Order 41 Rule 27 CPC before the learned first appellate Court, the respondents-plaintiffs had sought to examine at least one attesting witness, obviously they could not do so and eventually that application was dismissed on the date of pronouncement of the judgment in the appeal itself by that Court, stating that it had been rendered infructuous, in view of the fact that the appeal of the plaintiffs had been allowed (even without leading any additional evidence). Though the argument of any counsel before this Court on that count could have been that since the appeal of the plaintiffs was allowed, hence, no challenge was required to the dismissal of their application seeking to lead additional evidence, yet in the opinion of this Court, by way of abundant precaution it lay upon the plaintiffs who were propounding the will dated 18.04.1977, to nonetheless make good their averment in the application and insist upon examining one of the attesting witnesses to that will. That not having been done, obviously the condition stipulated in Section 68 of the Evidence Act has not been met with.

Before this Court, it has been throughout the case and in fact even before the Courts below, (despite the aforesaid application under Order 41 Rule 27), that the witnesses to the will of 1977 had died and therefore could not be examined.

In such a situation, the respondents-plaintiffs were bound to lead evidence in terms of Section 69 of the Evidence Act, to prove that the signatures of one of the attesting witnesses to the will was in the hand writing of that witness, and that the signature of the testator, on the document, was actually his. It however needs specific notice in this context that the will,

Ex.P2, is seen to be not signed by either the testator, i.e. Hazara Singh, or any of the two witnesses, i.e. Bhan Singh and Dharam Singh. All three of them have affixed their thumb impressions on the will and therefore, such thumb impressions, in terms of Section 69 of the Act of 1872, would need to have been proved by examining at least a fingerprint expert, which was not done by the plaintiffs.

41. In this context, the judgment of the Supreme Court cited by Mr. Saini, learned counsel for the respondents, (though obviously to the disprove the other will dated 18.04.1983), needs to be referred to, wherein, it has been held by their Lordships as follows (in *Bharpur Singhs'* case, supra):-

“The provisions of Section 90 of the Indian Evidence Act keeping in view the nature of proof required for proving a will have no application. A will must be proved in terms of the provisions of Section 63(c) of the Indian Succession Act, 1925 and Section 68 of the Indian Evidence Act, 1872. In the event the provisions thereof cannot be complied with, the other provisions contained therein, namely, Sections 69 and 70 of the Indian Evidence Act providing for exceptions in relation thereto would be attracted. Compliance with statutory requirements for proving an ordinary document is not sufficient, as Section 68 of the Indian Evidence Act postulates that execution must be proved by at least one of the attesting witness, if an attesting witness is alive and subject to the process of the Court and capable of giving evidence. {See *B. Venkatamuni v. C.J. Ayodhya Ram Singh & ors.* [(2006) 13 SCC 449]}.”

42. This Court is not oblivious to the fact that if a testator, or the attesting witnesses to a will, have no standard signatures or thumb impressions, by way of any bank account or any other documents earlier admitted to have been executed by such persons (testator/attesting witness as

the case may be), naturally there would be nothing to compare the thumb impressions/or even signatures. However, the onus therefore is upon the person executing the will even if he is accepted to be illiterate, to try and ensure that there is some admitted mark/signatures of his, available for comparison at the time when his will comes into operation, if such will is doubted at any stage. If the testator at the time of executing it, does not that take precaution, then the natural consequence thereof would obviously flow, by the will not being believed, if it is doubted by any person.

In the opinion of this Court, the statutory provision of the Evidence Act, as also of Section 63 of the Indian Succession Act, 1925, pertaining to the manner of execution of a will, cannot be 'overridden' on the ground that the testator as also the attesting witnesses were completely illiterate, and therefore did not take precautions to ensure that their standard marks/signatures were available for comparison when the occasion arose. In fact, this would be especially so when a person executing a will is executing it to divert natural succession as per his desire, to ensure that it is given effect to. He would then, normally, consult a knowledgeable person before executing it.

In any case, it being settled well that a will must be proved in terms of Section 63 of the Act of 1925 and thereafter as per Section 68, or alternatively Section 69 of the Evidence Act, the will set up by the respondents-plaintiff dated 18.04.1977, Ex.P2, cannot be accepted to have been duly proved by them.

43. Though otherwise the reasoning of the learned Additional District Judge, to the effect that the said will specifically gave the names of the four children of the testator and, as was the usual practice at that time, the

suit property was shown to be equally divided between three sons, with nothing left to the married daughter, the recital in the will cannot be stated to be illogical. Yet, for the reason already stated, that the will must be proved in terms of Section 63 of the Act of 1925 and Sections 68 or 69 of the Act of 1872, the will set up by the plaintiffs in their favour and in favour of defendant no.2, cannot be held to have been duly proved as per law.

44. As regards the conditions set out in Section 63 of the Indian Succession Act, if the will had been otherwise proved by examining the witnesses, it may have been held that the conditions laid down in clauses (a) and (b) of that provision were seemingly met with, with the thumb impression of the testator seen approximately at a correct position, and with the thumb impressions of the two attesting witnesses also at seemingly correct places below the writing in the will.

However, as regards clause (c) of Section 63 of the Act of 1925, with none of the witnesses being present to testify before the trial court, with regard to them having seen the testator affix his mark on the will (or acknowledging to them that he had so affixed it), the condition stipulated in that provision would also not be seen to be met with.

That provision, in the absence of any available attesting witnesses, would have been seen to be complied with, by resorting to Section 69 of the Evidence Act as already stated, but that not having been done, it has to be held as aforesaid, that the will dated 18.04.1977, produced as Ex.P1 by the plaintiffs, was not a will duly proved and therefore, the finding of the learned first appellate Court on that issue cannot be sustained and has to be set aside.

45. Coming then to the will dated 18.04.1983, Ex.D1, propounded by

the appellant-defendant in his favour. As regards the will having been proved in terms of Section 68 of the Evidence Act, and in fact Section 63 of the Indian Succession Act, there would seem to be no manner of doubt that with both the witnesses to the will, i.e. Karam Singh and Mohan Lal, having testified that it was executed in their presence by Hazara Singh, the conditions stipulated in the aforesaid provisions were duly met with by the appellant.

As regards the contention of Mr. Saini that the witnesses not having signed beneath the will but in the left margin thereof, I see no reason to hold that that in any manner would negate either clause (b), or even clause (c) of Section 63 of the Act of 1925. As per clause (b) of the aforesaid provision, the signature or mark of the testator, or that of the person signing for him, should be placed to appear that it was intended thereby to give effect to the writing on the will. As regards Hazara Singhs' thumb impression, it is seen to be appended immediately below where the recital in the will ends. It is also seen to be appended in the left margin of the will, with the signatures of the two attesting witnesses appearing on the left and right of that thumb impression.

Thus, with the said will also being a registered will, it would lend additional authenticity to the fact that it had been executed by Hazara Singh in the presence of the aforesaid two witnesses, after which it was registered in the office of the Sub-Registrar, Phillaur.

46. Having said that, what is now to be seen is whether what was held by the learned lower appellate Court, to the effect that the said will was not free from suspicious circumstances and in fact, it was the first will (of 1977) that would be seen to be free of such suspicion, was a finding correctively arrived at by that Court or not; or is the finding of the learned

Sub Judge, the correct finding, holding the will dated 18.04.1983, Ex.D1, was free of suspicion, also having been duly proved.

47. Though otherwise, there is no doubt that a will diverting natural succession would normally refer to the natural heirs of the testator and give reasons for their exclusion, but that by itself may not be reason enough to hold a will to be invalid. To that extent, I agree with learned counsel for the appellant, as also the Sub Judge, Phillaur, that the testator having stated in the will that his grand-son, i.e. appellant Surinder Singh, having looked after him and he being very happy with his services, was bequeathing all his property to him, that would be reason enough for him to do so.

This would especially be so as even the first plaintiff, when he testified as PW1, admitted in his cross-examination that the last rites of Hazara Singh, i.e. immersion of his ashes at Kiratpur Sahib, were performed by the appellant, and though he tried to say it was because Hazara Singh had left a sum of Rs.1000/- with Surinder Singh to do so, however, Piara Singh also could not give the details of the expenses incurred on any religious ceremony after the death of Hazara Singh, and admitted that it would be known to the appellant, Surinder Singh.

Thus, with the other witnesses for the appellant-defendant also having testified that Hazara Singh was indeed living with the appellant and not with the plaintiffs, I would not agree with the finding of the lower appellate Court that Hazara Singh would not be inclined to execute a will in favour of a grand-son, even whose father (i.e. Hazara Singhs' son, i.e. Ajit Singh) admittedly used to quarrel with him.

Simply put, just because the son of the testator was not on good terms with him, would not necessarily mean that the son of that son was also

not on good terms with his grand-father and *vice versa*.

48. What does however lend suspicion to the said will is the fact that in the will Hazara Singh is shown to be 65-66 years old, whereas the appellant himself, at the time of immersion of his grand-fathers' ashes at Kiratpur Sahib, even as per his own evidence to that effect, Ex.D4, got an entry made in the register in the said Gurdwara, that his grand-fathers' age was 90 years at the time of his death.

However, this Court would still not discard the will on that count, with the will at least not shown to be executed in the presence of the appellant-grand-son of the testator. Hence, whatever age of Hazara Singh may have been given at the time of its execution, cannot be attributed to the appellant.

49. The question then is, with the appellant admitting his grand-fathers' age to be 90 years at the time of his death, would a will executed four months earlier be acceptable to be a will of a person in a sound disposing mind, especially in the light of the testimony of the appellants' own witness, DW5, stating to the effect that when the will was executed Hazara Singh could neither hear properly, nor see, i.e. his eye sight was also weak.

Thus, in the aforesaid circumstances, though this Court has already held that simply non-mentioning of all the natural heirs, i.e. the sons and daughters of the testator, by itself may not be enough to hold that a will is not free of suspicion, can it be held with both circumstances seen together, that it is not free of suspicion?

50. It also cannot be lost sight of, that a 90 year old man living with his grand-son, with obviously that grand-son being the only person actually looking after him, the first two sons, i.e. the plaintiffs, admittedly living away

from their father, such a grand-son would naturally have some influence over his grand-father, especially if he was of such an advanced age.

It also must be said that though plaintiff no.2, Swaran Singh, was proved to have been living in a Dera and having become a Sadhu at least 25 years earlier, that would not necessarily mean that he had actually severed all worldly connections, especially, as rightly held by the lower appellate Court, as he had executed a power of attorney in favour of his brother, plaintiff Piara Singh, to institute and pursue the suit on his behalf also. Very obviously, he having declared himself to be a Sadhu, and by living away from his family, had not lost the desire to succeed to his fathers' property as per his share.

51. Even so however, this Court, even while holding that the appellant would have influence over his grand-father, he being the person he was residing with and looking after him, yet, with nothing proved that the appellant was actually actively involved in the execution of the will, either before the Sub-Registrar or otherwise, and two independent witnesses having testified that Hazara Singh had actually executed the will as per his own desire, this Court would not on account of non-mentioning of his sons and daughters in the will, or even his advanced age, hold that the will is invalid, on account of any suspicious circumstances.

52. In the opinion of this Court, though the suspicious circumstances definitely need to be weighed, however, what eventually weighs in favour of the appellant, is the fact that the two sons of Hazara Singh (the plaintiffs), did not even know about Hazara Singhs' affairs, including the money spent on his last rites, and whether he had a bank account or not, and as per even the 1st plaintiff, the appellant knew of these things.

Further, the appellant being the person who even immersed his

grand-fathers' ashes, and the person who had, even as per the plaintiff, recited the prayers as per the last rites (Manak Singh), having testified that Hazara Singh lived with the appellant and not the plaintiffs, it would be natural for him to bequeath his property to his grandson and not to his sons and daughters, as the appellant obviously looked after him, contrary to the indifferent/belligerent attitude of Hazara Singhs' three sons towards him.

53. Consequently, in view of what has been held hereinabove, as regards the first question of law, it is held that the will propounded by the respondents-plaintiffs was not duly proved even in terms of Section 63(c) of the Indian Succession Act, read with Section 68 and 69 of the Evidence Act, whereas the will dated 18.04.1983, though surrounded by some suspicious circumstances, cannot be held to be an invalid will, such circumstances being overruled by the fact that it was only the appellant who was proved to have been looking after his grand-father. This is in addition to the fact that the primary requirement of proving a will to be valid in terms of Section 63 of the Indian Succession Act and Section 68 of the Evidence Act, was duly met with by the appellant.

54. Hence, this appeal succeeds, with the judgment and decree of the learned lower appellate Court set aside and that of the learned Sub Judge Ist Class, Phillaur, dated 21.03.1985, restored.

The parties are, however, left to bear their own costs.

A decree sheet be drawn up accordingly.

June 13, 2017
dinesh

(AMOL RATTAN SINGH)
JUDGE

1. Whether speaking/reasoned?	Yes
2. Whether reportable?	Yes