

IN THE HIGH COURT OF PUNJAB AND HARYANA AT
CHANDIGARH

RSA No.2938 of 1986

Date of Decision:26.07.2017

Kashmir Singh and others

...Appellants

Vs.

Gurmail Kaur and others

...Respondents

CORAM: HON'BLE MR. JUSTICE AMOL RATTAN SINGH

Present:- Mr. M.L.Saggar, Sr. Advocate, with
Mr. Armaan Saggar, Advocate,
for the appellants.

Mr. Gurpreet Singh, Advocate,
for the respondents.

Amol Rattan Singh, J.

This second appeal was filed by the Legal Representatives of the plaintiff, in a suit instituted by him, seeking a declaration to the effect that he is the owner in possession of the suit land, fully described in the head note of the plaint and the judgment of the learned Subordinate Judge Ist Class, Fatehgarh Sahib, measuring 59 kanals and 16 marlas, situated in village Grangan, Tehsil Kharar, District Ropar, and land measuring 8 kanals and 0 marla, situated in village Shergarh, Tehsil Sirhind, District Patiala.

The description of the land in village Shergarh was given as per the *jamabandi* for the year 1976-77 and was marked at 'X', whereas the land situate in village Grangan, was described as per the *jamabandi* for the year 1969-70 and is stated to have been marked at 'Y' in the head note of the plaint.

The suit of the plaintiff was partly decreed in his favour, to the extent that he was the son of deceased Harbhajan Singh but that defendants no.1 and 2, i.e. the daughters of Harbhajan Singh, holders of a will in their

favour from their father, were also entitled to a part of the suit property, to the extent of the share of Harbhajan Singh, as the land situated in village Shergarh Bara was coparcenary property. Hence, the plaintiff had interest in the land marked at 'X' in the heading of the plaint and he was a co-owner to the extent of a half share therein. Hence, the daughters of Harbhajan Singh, i.e. defendants no.1 and 2, were held entitled to a half share in the said property described at 'X' in the heading of the plaint, i.e. the land at village Shergarh.

As regards the land of village Grangan, described at 'Y' in the plaint, it was held to be not proved that it was coparcenary property, with only a copy of the *jamabandi* for the year 1969-70 having been produced by the plaintiff, and consequently, it also having been willed away by the father of the parties, Harbhajan Singh, to defendants no.1 and 2, the suit of the plaintiff qua that property was dismissed.

It can be stated here itself that it was also found that the entire suit property was not in possession of either the plaintiff or the defendants but in the possession of one Inderjit Singh, to whom the tenancy was given by Harbhajan Singh during his life time. Consequently, the relief of permanent injunction sought by the plaintiff, was also declined.

[Note:- It is to be noticed at this stage that the learned Courts below have sometimes referred to the father of the plaintiff as Bhajan Singh and sometimes Harbhajan Singh, but have not doubted that the plaintiff was indeed the son of the same person, i.e. Harbhajan Singh (@ Bhajan Singh), who is also the father of defendants no.1 and 2 (respondents no.1 and 2 herein].

2. The aforesaid judgment and decree having been appealed against by both the plaintiff as also the defendants, vide separate appeals, the learned

first appellate Court eventually dismissed both the appeals.

However, no second appeal before this Court has been filed by the defendants, and only the plaintiff, now represented by his legal representatives, has filed this second appeal.

3. The facts, as set up in the plaint, are being referred to from the judgments of the Courts below.

The plaintiff contended that he was the son of Harbhajan Singh, and that Bant Kaur @ Banto, defendant no.3, was married to the maternal uncle of the plaintiff, one Sampuran Singh of village Solkhian, Tehsil Ropar, but as she was of a 'wayward nature', Sampuran Singh disliked her and in fact, an application filed by her for maintenance from her husband, was also dismissed.

Sampuran Singh died about 10 years prior to the filing of the suit. It was further stated in the plaint that Bant Kaur had developed illicit relations with the plaintiffs' father, even during Sampuran Singhs' life time.

Defendants no.1 and 2 were contended to have been born from Bant Kaur @ Banto and brought up in the house of the plaintiffs' father, who also arranged for their marriages.

4. It was further averred that the suit land was coparcenary property of the plaintiff and his father and in fact, his father, Harbhajan Singh, had also executed a will in favour of the plaintiff, who in any case was also a Class-I legal heir of Harbhajan Singh.

It was further contended that the plaintiff had gone on 'Darshan' to 'Hazur Sahib' and upon his return, he came to know that defendants no.1 and 2 had got a mutation of inheritance "attested in their name", without any notice to the plaintiff, on the basis of a will set up by the said defendants in

their favour, alleged to have also been executed by Harbhajan Singh.

5. It was lastly contended that the plaintiff was in cultivating possession of the suit land since the life time of his father and that he continued to be in possession thereof.

On the aforesaid averments, the suit was instituted on 18.07.1981, as shown in the judgment of the learned Sub Judge.

6. Upon notice issued to the defendants, they filed a common written statement, pleading that the plaintiff was not the son of Harbhajan Singh and that no will had been executed by Harbhajan Singh in his favour.

It was further averred that defendant no.3 was not the wife of Sampuran Singh, nor had she developed any illicit relations with the father of the plaintiff.

Still further, as per the defendants, Harbhajan Singh had executed a will on 13.07.1965 in favour of defendants no.1 and 2 and hence, the mutation had correctly been sanctioned in their favour.

7. It was also, *inter-alia*, pleaded that Harbhajan Singh actually did have a son by the name of Harjit Singh, i.e. the same name that the plaintiff claimed, from his first wife, Rattan Kaur, with Rattan Kaur having died. Harjit Singh had actually left home about 25/26 years earlier, with his whereabouts not known to those persons would normally have heard of him had he been alive.

Hence, it was the contention of the defendants that Harjit Singh would be legally presumed to be dead.

As regards the plaintiff, it was pleaded that he was actually an imposter who wanted to grab the property of Harbhajan Singh and had therefore filed the suit.

8. A replication having been filed by the plaintiff, reiterating his averments in the plaint and denying those in the written statement, the following issues were framed by the learned Sub Judge 1st Class:-

- “1. Whether the plaintiff is the son of Harbhajan Singh deceased? OPP
2. Whether Bant Kaur defendant no.3 was married to Harbhajan Singh if so its effect? OPD
3. Whether the defendants number 1 and 2 are daughters of Harbhajan Singh? OPD
4. Whether Harbhajan Singh deceased executed valid will dated 13.7.1965 registered on 23.8.65 in favour of the defendants number 1 and 2 if so its effect? OPD
5. Whether the suit for declaration is not maintainable? OPD
6. Whether Harbhajan Singh deceased executed valid will in favour of the plaintiff? OPP
7. Whether the suit property is coparcenary property of the parties? OPP
8. Relief.”

9. As per the judgment of that Court, to prove his case, the plaintiff examined Tara Singh, brother of the late Harbhajan Singh, as PW1, and Gian Singh, Hazura Singh, Labh Singh and Amrik Singh as PWs2 to 5 respectively, and further examined himself as PW6.

He also tendered documents exhibited as Exs.P1 to P23, in evidence.

10. The defendants examined Jaswant Singh, Tarlochan Singh, Harbans Lal, Baswa Singh, Ujaggar Singh and Gursharan Kaur (Librarian, Rajindera Hospital, Patiala), as DWs1 to 6 and further examined Ujaggar Singh, Sucha Singh, Hazara Singh, Baldev Singh Patwari, Madan Lal, Patwari and Joginder Pal Bansal, Clerk, as DWs7 to 12 respectively. Defendant no.3 Bant Kaur and defendant no.1 Gurmail Kaur, examined themselves as DWs13

and 14 respectively.

They also tendered certain documents in evidence, which were exhibited as Exs.D1 to D13.

11. Appraising the aforesaid evidence, on the first issue of whether the plaintiff was the son of Harbhajan Singh, the learned Sub Judge noticed the arguments on behalf of the defendants that the real name of the father of the defendants no.1 and 2 was Harbhajan Singh son of Manak Singh and not Bhajan Singh and the fact that the plaintiff did not even know as to in what circumstances his father had died, showed that he was not actually the person he pretended to be.

The testimonies of PWs1, 3, 5 and 6, to the effect that he was the son of Harbhajan Singh, were attacked by the defendants on the ground that the said testimonies did not prove the relationship of the plaintiff with the late Harbhajan Singh @ Bhajan Singh, even in terms of Section 50 of the Indian Evidence Act, 1872, as the witnesses did not prove, by conduct, the said relationship. This was further elaborated to submit before that Court that the plaintiff himself, as PW6, did not even utter a single word regarding his relationship with deceased Harbhajan Singh. Similarly, Tara Singh, brother of Harbhajan Singh, also did not state under what circumstances his brother had died.

12. However, the aforesaid contentions were rejected by the learned Sub Judge on the ground that with the brother of the late Harbhajan Singh, (Tara Singh), as also Amrik Singh son of Inder Singh son of Uggar Singh, i.e. the brother of the father of the late Harbhajan Singh, had deposed that the plaintiff, Harjit Singh, was the son of Harbhajan Singh. Further, Ex.P20 was a School Leaving Certificate showing Harjit Singh to be the son of Harbhajan

Singh.

The aforesaid evidence having remained unrebutted (other than by the oral contention of the defendants), the factum of the plaintiff being the son of Harbhajan Singh @ Bhajan Singh was accepted by the learned Sub Judge, as the defendants' witness, Jaswant Singh, could not prove that he was either a member of the family of Harbhajan Singh or that he had any special means of knowing that family.

Hence, the evidence of the plaintiff on that issue was accepted, with Jaswant Singhs' evidence held to be not admissible even in terms of Section 50 of the Evidence Act.

13. On the issues no.2 and 3, as to whether defendant no.3 Bant Kaur was married to Harbhajan Singh and whether defendants no.1 and 2 were Harbhajan Singhs' daughters, it was held that as regards the marriage of Bant Kaur to Harbhajan Singh, it was not proved anywhere, but defendants no.1 and 2 had proved that they were the daughters of Harbhajan Singh.

To draw his conclusion as regards the first issue, the learned trial Court relied upon an order passed by the Sub Divisional Magistrate, Ambala, on 13.08.1951, Ex.P23, in a case titled Smt. Jaswant Kaur @ Bant Kaur v. Sampuran Singh, the said case being an application under Section 488 of the Code of Criminal Procedure, 1898 (presently Section 125 of the Code of 1973).

In that order, the learned SDM had clearly held that Sampuran Singh had two wives, one being Prem Kaur and the other Jaswant Kaur @ Bant Kaur and that Bant Kaur had been turned out from the house of Sampuran Singh on the instigation of Prem Kaur.

The learned Sub Judge concluded that defendant no.3 in the

present *lis*, was the said Jaswant Kaur @ Bant Kaur.

However, as regards defendants no.1 and 2 being the daughters of Harbhajan Singh, that was held to be proved by their matriculation certificates (Exs. DW5/A, DW5/B and DW5/C), in which they were shown to be daughters of Harbhajan Singh.

That documentary evidence was found to be corroborated by the testimonies of Bant Kaur herself and the first defendant Gurmail Kaur, read with the finding in the order dated 13.08.1951 (Ex.P23), that even Sampuran Singh had alleged in those proceedings that Bant Kaur was residing with Harbhajan Singh.

14. On the issue of the will set up by the defendants as Ex.D1, i.e. issue no.4, it was found that though the original will had not been produced on the ground that it had been lost, however, by way of secondary evidence, its certified copy had been duly proved, with the attesting witness of the will, Tarlochan Singh (DW2), having deposed to its execution by Harbhajan Singh deceased.

It was also found to be proved that the defendants had served Harbhajan Singh, who had died of 'Tetanus' in the Rajindera Hospital, Patiala.

The aforesaid conclusion was arrived at also in view of the testimony of DW6 Gursharan Kaur, who proved the admission of Harbhajan Singh in the Rajindera Hospital, Patiala, on 25.05.1981.

The will was also found to be a registered one, executed on 13.07.1965, registered on 15.07.1965, with the beneficiaries thereof being defendants no.1 and 2, Gurmail Kaur and Surinder Kaur. Consequently, that issue was decided in favour of the defendants.

15. The 5th issue, on whether the suit for declaration was

maintainable or not, it was found that it had been proved that one Inderjit Singh was a tenant on the suit property, as was also admitted to by defendant no.3 herself and consequently, actually none of the parties to the *lis* was in the possession of the suit land.

Simply on that finding, it was held by the learned Sub Judge that a “suit for mere declaration was maintainable”, and the issue was decided in favour of the plaintiff.

16. On the issue of whether Harbhajan Singh had executed a valid will in favour of the plaintiff, i.e. his son Harjit Singh, no evidence whatsoever having been found to be led by the plaintiff, to prove that contention, issue no.6 was decided against him.

17. On issue no.7, i.e. whether the suit property was coparcenary in nature or not, it was found, as already noticed, that as regards the land situate in village Shergarh Bara, that was coparcenary property, the conclusion having been derived from Ex.P13, which was found to be a copy of a mutation showing the said land to have been inherited by the plaintiffs' father, alongwith the other property, from his grand-father (the name of the grand-father at that stage of the judgment given as Harnam Singh, though in the plaint itself the plaintiff showed himself to be the son of Bhajan Singh son of Harnam Singh son of Manak Singh, resident of the same village, i.e. Shergarh, Tehsil Sirhind).

It may be noticed here at this stage itself, that the translation of the aforesaid mutation of inheritance showed that the name of the owner is given as Harnam Singh son of Sheru, upon whose passing away his sons and successors' names were entered, as the new owners thereof, in different shares, including Kartar Singh son of Bishan Singh, Uggar Singh, Jata Singh, Bhajan

Singh, Tara Singh and Mewa Singh, sons of Manak Singh. Thus, Harnam Singh was obviously not the grand-father of the plaintiff but an immediate relative of his father, Bhajan Singh, with his father having succeeded to the said land by way of inheritance as part of coparcenary property. (That part would be looked at after discussing the arguments of learned counsel for the parties in the present *lis*).

Bhajan Singh was found to have inherited a total of 55 bighas of land “from his grand-father”.

The property was also found to have been incorporated in the *jamabandi* for the years 1986-87 Bikrami and 1990-91 Bikrami (Exs.P9 to P12 and Ex.P15 respectively).

In consolidation proceedings also, it was found that 48 bighas and 13 biswas came to the share of Bhajan Singh, by way of an oral partition, with mutations no.44 and 46 also sanctioned thereafter.

Other evidence, in the form of a *Naksha Haqdarwar* and proceeding register (*Kitab Karwai Ishtemal*), all proved that the same land eventually came to Bhajan Singh as 60 bighas and 18 biswas 'standard area', reflected in a copy of the *Misal Hakiat* (the document describing the total area of each holding of a holder of an estate, under the terms of settlement of a village).

Thus the property at Shergarh ('X' in the plaint), was held to be coparcenary property.

18. However, (again as already noticed), as regards the property mentioned at serial 'Y' in the head note of the plaint, i.e. the land situated at village Grangan, Tehsil Kharar, District Ropar, measuring 59 kanals and 16 marlas, no document had been shown to be led by way of evidence to prove

that the said land was also ancestral and coparcenary, with only a copy of the *jamabandi* for the years 1969-70 having been led by way of evidence.

19. Thus, on the aforesaid findings, the suit of the plaintiff was partly decreed in his favour, to the extent of his share in the coparcenary property in village Shergarh Bara, holding that even vide the will executed by late Harbhajan Singh in favour of defendants no.1 and 2, he could not have willed away the plaintiffs' share in his property, but only to the extent of his share therein.

The suit of the plaintiff qua the property of the village Grangan was therefore dismissed, it not having been found to be coparcenary property, with the will bequeathing it to defendants no.1 and 2, having been held to be proved.

20. The plaintiff and the defendants both having filed their respective appeals before the learned first appellate Court, that Court, after noticing the pleadings of the parties, the issues framed by the learned Sub Judge and the evidence adduced on both sides, found that as regards the grievance of the plaintiff, he admitted in his testimony before the trial Court that he was about 2/2½ years old when his mother died and that he had joined the Army in 1954, from where he retired in 1974 and that he remained unmarried and was a Amritdhari Sikh, who did not consume liquor.

He had also admitted that he was in Gurdwara Nanded Sahib (Maharashtra) when his father had died and therefore, the learned first appellate Court drew an inference therefrom that he actually had no links with his father and was probably annoyed with him because of his second marriage with Bant Kaur, from whose wed-lock the defendants-respondents Gurmail Kaur and Surinder Kaur were born.

Hence, it was held that in that background, the execution of a will by Bhajan Singh in favour of his daughters sounded natural and probable, with the will also being a registered will, the attested copy of which was proved as Ex.D1.

It was also found that even as per the recital in the will, it was stated that the testator had a grown up son from his first wife, who had gone to bad habits and was in the bad company, who could not take care of his interests or that of the family, and for that reason, he (the testator) was excluding him from the benefit of his estate.

21. The execution of the will was again held to have been proved, by the deposition of one of the attesting witnesses, DW2 Tarlochan Singh, to the effect that Bhajan Singh was known to him and that the will was executed at his instance, signed by Bhajan Singh in his presence, as also in the presence of the other witnesses, and that an entry was made in the register of the petitioner also, with the will was then presented before the Sub-Registrar, before whom Bhajan Singh had admitted to its correctness.

The learned Additional District Judge also found that there was actually no serious challenge made to the genuineness of the will, or to its 'voluntary nature' or to the fact that it was duly attested.

Hence, the finding of the learned Sub Judge on issue no.4, i.e. the validity of the will set up by the defendants, was upheld.

22. The finding of the lower Court that defendants no.1 and 2 were the daughters of the late Bhajan Singh was also upheld, holding that there was overwhelming evidence to support such finding.

That Court referred to the recital in the will itself to that effect, the testimonies of the defendants, as also the entry in the admission register of

the Government Primary School, Shergarh Bara, proved by DW5 Ujagar Singh, who was also seen to have brought the original application forms submitted by Bhajan Singh. Similarly, the matriculation examination certificates were also referred to by the first appellate Court.

23. However, as regards the finding of the learned Sub Judge on defendant no.3 Bant Kaur not having been proved to have been the legally wedded wife of Bhajan Singh, that finding was upset by the first appellate Court, holding that the testimony of DW1 Jaswant Singh had been wholly ignored by that Court, wherein he had deposed that he had attended the marriage of Bhajan Singh and Bant Kaur, with this witness also testifying about the birth of the two daughters thereafter.

As regards the order of the learned Sub Divisional Magistrate, Ambala, dated 13.08.1951, Ex.P23, it was held that the said litigation was with some 'other lady', i.e. Jaswant Kaur @ Bant Kaur who was the applicant in that application. It was held that Sampuran Singh had died on 08.08.1977, with his property mutated in favour of his son Raghbir Singh on the basis of a registered will dated 06.03.1979, evident from a certified copy of the mutation, Ex.D2. Further, a perusal of the pedigree table given therein, showed that Jaswant Kaur wife of Sampuran Singh had already died.

On the aforesaid finding, it was held that actually Bant Kaur, defendant no.3, was the legally wedded wife of Harbhajan Singh @ Bhajan Singh.

[It is to be noticed here that while recording the aforesaid finding in 20 paragraph of its judgment, the learned first appellate Court has held that the application for maintenance, dated 07.02.1950, filed by Jaswant Kaur @ Bant Kaur, under Section 448 Cr. P.C. (old), was allowed. As a matter of fact,

from a perusal of the said document, Ex.P23, it was actually dismissed; on the ground that the respondent therein, i.e. Sampuran Singh, was prepared to take the applicant back into his house.

However, it was held that eventually that would make no difference, as Bant Kaur was not a beneficiary of the will of Bhajan Singh and as was noticed in the earlier part of the judgment of the first appellate Court nothing would devolve even on reversal of the finding of the learned Sub Judge on the issue of the marriage of Bant Kaur and Bhajan Singh].

24. As regards the grievance of the plaintiff on the finding of the learned Sub Judge qua the land at village Grangan, measuring 59 kanals and 16 marlas, not being coparcenary property, the plaintiffs' contention was rejected, with that finding of the lower Court upheld, for the same reason, that other than *jamabandi* for the year 1969-70, no revenue record was produced of any earlier period showing that the said land had devolved upon Bhajan Singhs' father, Manak Singh, from his father.

Hence, it was held that it could not be presumed that the land was inherited by Bhajan Singh from his father (and therefore was ancestral or coparcenary property).

25. On the aforesaid findings, the first appeal of the present appellant-plaintiff Harjit Singh, i.e. Civil Appeal no.259T/85/12-2-85, was dismissed.

26. As regards the appeal of the defendants, seen to be Civil Appeal no.97 of 14-3-1985, it was held by the learned first appellate Court that only two findings of the learned Sub Judge had been challenged therein, the first being that the plaintiff had been wrongly held to be the son of Bhajan Singh and secondly, that there was no basis for the finding that defendant no.3 Bant

Kaur was not the wife of Bhajan Singh.

The second grievance of the defendants in their appeal before that Court, has been seen to have been reversed; however as regards the finding on the plaintiff being the son of Harbhajan Singh @ Bhajan Singh, it was found by the first appellate Court that Ex.P21 was a document showing the birth entry on the birth of a son to Harbhajan Singh on 06.02.1989 (Bikrami), and that PW1 Tara Singh, brother of Harbhajan Singh, had duly supported the plaintiff that he was, in fact, Harbhajan Singhs' son, as had PW5 Amrik Singh; with the School Leaving Certificate of the plaintiff, Ex.P20, also showing him to be a student of Government High School Grangan from 19.04.1947 to 14.10.1948, with his fathers' name recorded as Harbhajan Singh and his date of birth as 15.05.1935.

Further, it was seen that the defendants had not actually denied that Harbhajan Singh did have a son from his first wife; their sole contention being that he had not been heard of for a long time and therefore it was presumed that he had died. That also had to be accepted as even in the will, Ex.D1 itself, the testator had admitted to having an unmarried son, Harjit Singh.

That Court also found that the plaintiff having remained in the Army for 20 years from 1954 to 1974, he obviously was not registered as a voter in his village, and because he was not having cordial relations with his father, he was also away to Gurdwara Nanded Sahib, when his father died.

27. On the aforesaid findings, even having reversed one of the findings of the learned Sub Judge, as regards the validity of marriage of defendant no.3 with the plaintiffs' father, it was held that since it did not make any difference to the suit of the plaintiff or the findings qua the suit land itself,

the appeal of the defendants was also dismissed.

28. Against the aforesaid dismissals, presently only it was submitted to this Court, as recorded in the order dated 30.11.2016, that earlier defendants no.1 and 3, i.e. Gurmail Kaur and Bant Kaur, had filed RSA nos.3079 and 3217 of 1986 respectively, against the aforesaid judgment and decree of the learned first appellate Court. But those appeals had been dismissed for non-prosecution vide an order dated 04.02.2004 and thereafter, applications for restoration were filed by the appellants in each case.

Consequently, upon this appeal having been adjourned on that date, the Registry of this Court was directed to put up the case files of the aforesaid two second appeals also, alongwith the present appeal.

A perusal thereof reveals that RSA no.3079 of 1986 was, as a matter of fact, filed by all three defendants, i.e. Gurmail Kaur, Surinder Kaur and Bant Kaur and after having been admitted to regular hearing, was dismissed for non-prosecution vide an order dated 04.02.2004.

RSA no.3217 of 1986 was also dismissed for the same reason, on that very date. Thereafter, two applications were filed in each case on behalf of the appellants, the first seeking condonation of a delay of 2738 days (in each case) in filing the application for restoration of the appeal, and the second being the application for restoration itself.

Notice had been issued in those applications, but eventually, as recorded in the order dated 02.06.2011, learned counsel for the applicants-appellants had sought withdrawal of the applications in order to file other applications, giving therein better particulars to seek condonation of the delay.

Despite liberty having been granted, no such application was thereafter filed in either case.

29. Thus, with those appeals having been dismissed for non-prosecution as aforesaid, and never having been restored, the present appeal of the plaintiff is the only which is to be adjudicated upon by this Court.

The findings in favour of the plaintiff (present appellant), effectively qua him being entitled to his share of the coparcenary property in village Shergarh Bara, i.e. other than Bhajan Singhs' own share in that property, this Court is not required to go into the correctness or otherwise of that finding of both the Courts below.

It is only qua the findings against the plaintiff, in respect of which arguments have been addressed by learned counsel for the appellant, that this Court is to adjudicate.

30. It is also to be noticed here that appellant-plaintiff Harbhajan Singh @ Bhajan Singh having died, his legal representatives were impleaded as the appellants, the application for such impleadment having been allowed vide an order of this Court, dated October 23rd, 2008.

The said legal representatives are shown to be Kashmir Singh and Jasbir Singh, sons of Mewa Singh, and Jagtar Singh, Gulab Singh and Jaspal Kaur, sons and daughter respectively of Mohinder Singh son of Mewa Singh son of Manak Singh.

Thus, obviously, Mewa Singh being the son of Manak Singh, he was a brother of Harbhajan Singh @ Bhajan Singh and the present appellants are consequently, the immediate collaterals of plaintiff Harjit Singh, he himself shown to be unmarried even in the judgments of the Courts below.

31. The questions of law that would arise for adjudication of this Court in this second appeal, are:-

(i) Whether the learned Courts below correctly decided that

the will set up by the defendants, dated 13.06.1965, was duly proved by leading secondary evidence, even in the absence of the original will;

- (ii) Whether those courts correctly held that defendants no.1 and 2 are the daughters of the late Bhajan Singh, especially in the face of the finding of the learned trial court that defendant no.3 was not proved to be his legally wedded wife and whether the first appellate Court has erred in reversing that finding?
- (iii) Depending on how the two questions hereinabove are answered, how would the suit property devolve upon the parties to the *lis*?

As regards the finding on the property in village Grangan not being coparcenary property, learned counsel for the appellants submitted that the said finding is not under challenge in this appeal but as the will is under challenge, the plaintiffs' right to 1/3rd of that property is also in issue.

32. Addressing arguments for the appellants, Mr. M.L.Saggar, learned senior counsel, first submitted that defendant no.1 was born to defendant no.3, Bant Kaur on 21.08.1956 and defendant no.2 was born to her on 02.02.1959, as per their school admission certificate, entered in the register, a copy of which is Ex.DW5/C.

However, though learned counsel obviously wanted to draw an inference that therefore these two daughters born to Bant Kaur could not have been the daughters of Harbhajan Singh, that argument could not really be substantiated.

33. Arguing further on the issue of defendants no.1 and 2 not being the daughters of Harbhajan Singh and defendant no.3 not being his wife, Mr. Saggar submitted that the defendants' witnesses falsely deposed to say that

Prem Kaur and Jaswant Kaur @ Bant Kaur were the same person, whereas they were different ladies as is very clear even from the order of the Sub Divisional Magistrate, Ambala, 13.08.1951, Ex.P23, which proves that Jaswant Kaur @ Bant Kaur is the wife of Sampuran Singh and is actually defendant no.3.

Learned senior counsel submitted that therefore without any divorce from Sampuran Singh proved, simply the testimony of one witness, to the effect that he was present at the wedding between defendant no.3 and Harbhajan Singh, did not prove a legal marriage, even if the witness was to be believed at face value for any reason.

He further submitted that the order of the Sub Divisional Magistrate, Ambala, has never been challenged, in which very clearly even Sampuran Singh, respondent in the case before the SDM, did not deny that Jaswant Kaur @ Bant Kaur was his wife, but that she was his second wife and a wayward person living with Harbhajan Singh, despite which he was still willing to take her back.

34. Hence, the contention of Mr. Saggar is that with defendant no.3 in any case not proved to be the legally wedded wife of the plaintiffs' father, the finding of the learned lower appellate Court on that issue has to be reversed, restoring that of the learned Sub Judge and further, as per learned senior counsel, the presumption would therefore be that defendants no.1 and 2 were not the children of Harbhajan Singh but of Sampuran Singh.

Eventually though, learned Senior Counsel very fairly submitted that the said question is not seriously pressed by the appellants.

35. Mr. Saggar next submitted that the defendants set up a will the original of which they could not produce and consequently, without actually

proving any loss of the original will, the application for leading secondary evidence in respect thereof, should not have been allowed by the learned trial Court and in fact, the learned lower appellate Court has not even dealt with that aspect, despite it having been raised in the grounds of appeal before that Court.

He submitted that simply the registration of a Daily Diary Report on the loss of the original will, Ex.D6, dated 15.01.1982, during the pendency of the suit, could not have been accepted as evidence enough of the loss of the original will, to allow the defendants to produce a wholly unsubstantiated will and claim it to be a valid will.

Mr. Saggar submitted that with no signature or thumb impression of Harbhajan Singh available on what was stated to be a certified copy of the will, Ex.D1, the will cannot be said to have been proved to be a true will in any manner, even with the person alleging to be one of the attesting witnesses thereto, having testified to its authenticity.

As per learned counsel, even that person, Tarlochan Singh, was not a natural witness, he not being a resident of the same village as Harbhajan Singh

Thus, he submitted that with the will disproved, the coparcenary property at village Shergarh would devolve entirely upon the plaintiff, and the self-acquired property of Harbhajan Singh, at village Grangan, was to devolve upon him to the extent of a 1/3rd share, even if this Court eventually comes to a finding that defendants no.1 and 2 were correctly held to be the daughters of Harbhajan Singh, though that finding is also under challenge.

36. Upon being put a query by the Court, as to why, even if the will is held to be not proved, the defendants would not acquire an equal interest

with the plaintiff, at least as regards the share of Harbhajan Singh in the coparcenary property at village Shergarh Bara, as per the unamended Section 6 of the Hindu Succession Act, 1956, Mr. Saggar submitted that the proviso to Section 6 only entitles a 'female Class-I heir' to inherit the share of the deceased in the coparcenary property, if such share has been bequeathed to her by a will and testament of the deceased coparcener and therefore, if the will in question is held to be not validly proved, then the respondents-defendants would not be entitled to any share in the property at Shergarh.

In this context, Mr. Saggar relied upon the following two judgments:-

- i) **Dhanpat v. Ajit Singh and others 2012(2) HLR 70; and**
- ii) **Harischandra Vithoba Narawade & others v. Smt. Vastalabai 2005(2) CLJ 149.**

37. In response of the aforesaid arguments, Mr. Gurpreet Singh, learned counsel appearing for the respondents-defendants, first reiterated what has been held by the learned lower appellate Court, to the effect that Jaswant Kaur @ Bant Kaur referred to in the order of the Sub Divisional Magistrate, Ambala, Ex.P23, is not the same person as defendant no.3. Mr. Gurpreet Singh further pointed to the testimony of DW1, Jaswant Singh son of Kapoor Singh, resident of village Shergarh Bara, to submit that obviously this person knew Harbhajan Singh well, being a resident of the village in which a part of the suit land is situate, and having actually testified that he knew Harbhajan Singh who had died about two years earlier, and even with regard to who had brought back the body of Harbhajan Singh to the village (from the hospital at Patiala).

Learned counsel for the respondents further submitted that the

testimony of this witness is specifically to the effect that he witnessed the marriage of defendant no.3 with Harbhajan Singh in the year 1947, which is obviously before the order of the SDM, Ambala, dated 13.08.1951, and hence, the presumption drawn by the learned Sub Judge from simply that order, does not hold good.

He further submitted that in fact there was no question put in the cross-examination of this witness that defendant no.3 was actually Sampuran Singhs' wife, or that defendants no.1 and 2 were Sampuran Singhs' daughters.

In this context itself, Mr. Gurpreet Singh also pointed to the testimony of DW3 Harbans Lal, as also to the will Ex.D1, to submit that they have both been referred to as the daughters of Harbhajan Singh.

Mr. Gurpreet Singh also reiterated the findings of both the courts below on the fact that, as per the admission certificate and matriculation certificates of defendants no.1 and 2, they were shown to be the daughters of Harbhajan Singh.

38. On the authenticity of the will set up by the defendants, learned counsel for the respondents-defendants submitted that even if the testator described his son to be a drunkard and a wayward person in the will, that did not take away the authenticity of the will, as it is quite possible that the testator did not even know of his sons' whereabouts, if it is to be accepted that the plaintiff was indeed Harbhajan Singhs' son and had joined the Army in the year 1954.

He further submitted that it is also possible that the testator may have simply made that statement in order to oust his son from his estate, which in any case proved the testators' desire to bequeath his property to only his daughters.

39. Mr. Gurpreet Singh next submitted that if the marriage of Bant Kaur with Harbhajan Singh is held to be proved, as has been held by the learned lower appellate Court, then defendants no.1 and 2, as his daughters, would also be entitled to a share in the coparcenary property even prior to the amendment in the Hindu Succession Act, in 2005. Therefore, he submitted that a 7/12th share of the entire suit property would go to the three respondents jointly.

Alternatively, learned counsel submitted that if defendant no.3 is not held to be legally wedded wife of Harbhajan Singh, even then defendants no.1 and 2 would still be entitled to their fathers' estate, by way of natural succession.

In this context, Mr. Gurpreet Singh cited the following judgments of the Supreme Court:-

- “i) **Gurupad Khandappa Magdum v. Hirabai Khandappa Magdum and others** AIR 1978 SC 1239;
- ii) **Basavarajappa v. Gurubasamma & Ors.** (2005) 12 SCC 290;
- iii) **Madhukar D. Shende v. Tarabai Aba Shedage** AIR 2002 SC 637;
- iv) **Janki Narayan Bhoir v. Narayan Namdeo Kadam** (2003) 2 SCC 91; and
- v) **Velamuri Venkata Siv Aprasad (Dead) by LRs v. Kothuri Venkateswarlu (Dead) by LRs. and others** (2002) 2 SCC 139.

40. In rebuttal, Mr. Saggar, learned senior counsel appearing for the appellants, first submitted that the appeals filed by the daughters and the third defendant, both having been dismissed in default, this Court even under Order 41 Rule 33 CPC, would not interfere with the findings of fact arrived at by the learned Courts below as regards the factum of Bant Kaur being not the legally

wedded wife of Harbhajan Singh. In this context, he submitted that this would be so in the context of the finding of fact by the Court which actually appraised the evidence first hand, i.e. the learned Sub Judge, and not the finding of fact recorded by the lower appellate Court, to the contrary, on this issue.

Lastly, Mr. Saggar submitted that even the kith and kin who deposed as witnesses for the plaintiff, testified to the effect that defendant no.3 Bant Kaur, was actually married to Sampuran Singh.

41. Having considered the arguments of learned counsel for the parties, as also the judgments of the learned Courts below, the first question that is to be answered by this Court is as to whether those courts correctly decided that the will set up by the defendants, Ex.D1, dated 13.06.1965, was duly proved to be a valid will, especially as the original will was not produced and the document produced was shown to be a certified copy thereof, stated to have been obtained from the office of the Sub-Registrar, Kharar (then District Ropar), which was led by way of secondary evidence.

The said copy was pointed to by learned senior counsel for the appellant from the records of evidence led before the learned Sub Judge. It is seen that it is a typed copy (in *Gurmukhi*/Punjabi), on two pages of stamp paper worth Rs.1.25 paise, on which the seal of the Sub-Registrar is duly present, as is the stamp of attestation of the said authority.

However, as has been rightly pointed out by learned senior counsel, though the said copy otherwise would seem to be genuine, to the extent that the typing on it is very neatly done, with the names of the testator, the witnesses, and the deed-writer appearing (at least on the copy), at the right places, with the endorsement pertaining to the registration of the will on

15.07.1965, also appearing on the reverse of the first page, and another endorsement of the Sub-Registrar, by way of a certificate, also appearing behind the second page of the will; however, neither the signatures nor the thumb impressions of either the testator or the witnesses, or even the deed writer, are seen on the document.

Similarly, both the endorsements of the Sub-Registrar, though give the name of the officer and his designation as such authority (Sub-Registrar), they do not show the signatures of the officer.

The endorsement in hand by the stamp vendor, is however seen on the reverse of both the pages, with the stamp vendors' stamp also seen to be signed by him. The signatures of the person who is shown to have purchased the stamp paper, (one Baldev Singh son of Supinder Singh), is also seen on the reverse of the first page, i.e. the Rupee One stamp paper.

42. The question therefore is that even with one of the persons stated to be the attesting witness thereof, i.e. Tarlochan Singh (DW2), whose name appears at the end of the recital of the will, as also beneath the endorsement of the Sub-Registrar behind the first page of the will, having testified to its authenticity, can it be held to be duly proved in terms of Section 63 of the Indian Succession Act, 1925 and Sections 68 or 69 of the Indian Evidence Act, 1872.

The said provisions are reproduced hereinunder:-

Indian Succession Act, 1925

“63. Execution of unprivileged Wills. —Every testator, not being a soldier employed in an expedition or engaged in actual warfare, [or an airman so employed or engaged,] or a mariner at sea, shall execute his Will according to the following rules:-

(a) The testator shall sign or shall affix his mark to the Will, or it shall be signed by some other person in his presence and by his direction.

(b) The signature or mark of the testator, or the signature of the person signing for him, shall be so placed that it shall appear that it was intended thereby to give effect to the writing as a Will.

(c) The Will shall be attested by two or more witnesses, each of whom has seen the testator sign or affix his mark to the Will or has seen some other person sign the Will, in the presence and by the direction of the testator, or has received from the testator a personal acknowledgement of his signature or mark, or the signature of such other person; and each of the witnesses shall sign the Will in the presence of the testator, but it shall not be necessary that more than one witness be present at the same time, and no particular form of attestation shall be necessary.”

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.”

43. A perusal of Section 63(a) would show that, first of all, it is necessary that the testator shall sign or affix his mark to the will, or get that done by some other person in his own presence and on his directions.

Thus, in the opinion of this Court, with the copy of the will, even though it is shown to be produced from the office of the Sub-Registrar where it was registered, not carrying the thumb mark or signatures of the testator or of any other person on the testators' directions in his presence, the said copy could not have been held to be a will validly proved on that score alone.

The copy states to the effect that Harbhajan Singh affixed his thumb impression on the will at three places, i.e. beneath the endorsement of the Sub-Registrar behind the first page of the will and beneath the end of the recital of the second page of the will, above the signatures (in *Gurmukhi*) of Tarlochan Singh, Lamberdar, and again above the signatures of the second witness, Sarwan Singh, Lamberdar, on the same page. Yet, even the copy, it not being a photo copy, does not carry any of the thumb impressions or signatures.

44. The conditions stipulated in Section 63(b) of the Succession Act of 1925, can obviously not be determined from the certified copy of the will, the original thumb impression of the testator not seen to be affixed anywhere. Hence, whether on the original will it was affixed at the correct place or not, cannot be commented upon at all.

As regards the conditions stipulated in Section 63(c), though one of the persons stated to be the attesting witness to the will, i.e. DW2

Tarlochan Singh, testified to the effect that Harbhajan Singh had executed the will which was written by the deed-writer at Kharar in his presence and was read over to Harbhajan Singh, who thereafter signed it in the presence of this witness and the other attesting witness, and therefore Section 68 of the Indian Evidence Act, 1872, may be seen to be complied with, however, in the opinion of this Court, Section 63(c) of the Succession Act cannot be seen to be strictly complied with, in view of the fact that the first part of the said provision states that “the will shall be attested by two or more witnesses,”.

Thus, when the certified copy of the will produced by the defendants, is not seen to be showing the signatures or thumb impressions of any of the two witnesses at all, the testimony of one of the persons shown to be an attesting witness, though would seem to show fulfilment of a part of the condition contained in clause (c), the provision in entirety, would not be seen to be complied with.

45. Hence, even though the copy of the will is seen to have been produced from the custody of the Sub-Registrar before whom it is stated to have been registered on 15.07.1965, and hence, the testimony of DW8, seen to be a person from the office of the Sub-Registrar/office of the Deputy Commissioner, Ropar, may be accepted as evidence of registration of the document, however, it cannot be made the basis to accept the will to have been duly proved in terms of Section 63 of the Indian Succession Act, 1925.

46. This is to be further seen with the fact that the recital in the will is to the effect that Harjit Singh son of the testator (Harbhajan Singh), born from his first wife Rattan Kaur, is a person prone to bad habits, keeping bad company, a liquor and drug addict, who knows nothing of his welfare (*Nafaanuksaan*), and who brings a bad name to the family and may squander away

the property.

In the face of that recital in the will is the fact the learned lower appellate Court found that the plaintiff had served in the Army for 20 years.

It has not been shown to this Court that the averment made by the plaintiff and the finding of the learned first appellate Court, that the plaintiff had served in the Army from 1954 to 1974, was found to be rebutted in any way, with the copy of the service certificate of the appellant also pointed out from the record of the learned Courts below, by learned senior counsel, even though it is not clear as to whether the said document was a duly exhibited document or not.

Even so, it is not shown to this Court from any part of the evidence led before the Courts below, that the averment made by the plaintiff to that effect, duly accepted by the lower appellate Court, was ever refuted.

Even the argument of learned counsel for the respondents-defendants before this Court, is to the effect that the late Harbhajan Singh may have stated as above in his will (as regards his sons' alleged waywardness), only to either oust him from the property or because he did not know the whereabouts of his son. Obviously, therefore, it is not actually disputed that the plaintiff did serve in the Army for 20 years.

47. In that situation, it is very difficult to accept the truth of the recital shown in the certified copy of the will set up, whereby the plaintiffs' father describes him to be a wayward person, given to drinking and drugs, who knew nothing of his welfare and was likely to squander away his property if it was bequeathed to him.

Hence, with the said recital itself being contrary to the accepted position, of the plaintiff not found to be a wayward person by any yardstick,

further makes the authenticity of the will doubtful.

No doubt, immediately after the aforesaid recital in the will, the testator (Harbhajan Singh), is shown to have stated that his current wife, Bant Kaur has borne him two daughters, i.e. the first and second defendants, who served him whole heartedly.

Though that part of the will is not at all disbelievable in view of the fact that it was also proved before the courts below that it was the defendants who were looking after Harbhajan Singh even at the time of his death, with the plaintiff not present anywhere near there, yet, seen with the fact that neither the thumb mark or signatures of the testator, or any of the witnesses, including the attesting witness who testified as DW2, nor of the deed-writer or the Sub-Registrar, are seen on the copy of the will produced in Court, as also the fact that the character of the plaintiff has been depicted in a wholly 'untrue light', in the opinion of this Court, the will cannot be accepted to be a will duly proved to have been executed by Harbhajan Singh.

48. In this context, the judgment of the Supreme Court in **Bharpur Singh and others v. Shamsheer Singh** (2009) 3 SCC 687, can be referred to, wherein, after discussing the settled law on how a will is to be accepted to be duly proved, it was observed as follows:-

“17. Suspicious circumstances like the following may be found to be surrounded in the execution of the will:

- i) The signatures of the testator may be very shaky and doubtful or not appear to be his usual signature.
- ii) The condition of the testator's mind may be very feeble and debilitated at the relevant time.
- iii) The disposition may be unnatural, improbable or unfair in the light of relevant circumstances like exclusion of or absence of adequate provisions for the natural heirs without

any reason.

iv) The dispositions may not appear to be the result of the testator's free will and mind.

v) The propounder takes a prominent part in the execution of the will.

vi) The testator used to sign blank papers.

vii) The will did not see the light of the day for long.

viii) Incorrect recitals of essential facts.”

18. The circumstances narrated hereinbefore are not exhaustive. Subject to offer of reasonable explanation, existence thereof must be taken into consideration for the purpose of arriving at a finding as to whether the execution of the will had duly been proved or not.

It may be true that the will was a registered one, but the same by itself would not mean that the statutory requirements of proving the will need not be complied with.”

49. Consequently, even the observation of the lower appellate Court to the effect that the validity of the will having been executed by Harbhajan Singh was not seriously under challenge, is a finding which is not acceptable, with nothing pointed out to that effect from the grounds of appeal filed by the plaintiff, before that Court. (In fact those grounds of appeal have not been referred to or found in the record of the Courts below).

It is to be noticed that on the other hand, before this Court, the first substantive challenge in the grounds of appeal pleaded here, is that both the Courts below have erred in upholding the validity of the aforesaid will.

Consequently, the finding of the Courts below on issue no.4 framed by the learned Sub Judge is reversed, and the said issue is decided in favour of the plaintiff and against the defendants.

50. In view of the aforesaid discussion, the first question of law posed before this Court is answered to the effect that the courts below erred in

holding that the will set up by the defendants on 13.07.1965, shown to be registered on 15.07.1965, was a duly proved will, which in the opinion of this Court, was not validly proved to be a will executed by Harbhajan Singh, father of the plaintiff and defendants no.1 and 2, even in terms of Section 63 of the Indian Succession Act, 1925.

[It is to be stated here that though in issue no.3 it has been stated that the will was registered on 23.8.65, a perusal of the said document itself, Ex.D1, shows that it was shown to be registered on 15.07.1965, having been executed on 13.07.1965].

51. Coming then to the next question of law framed, as to whether, firstly, Courts below correctly held that defendants no.1 and 2 are the daughters of the late Harbhajan Singh @ Bhajan Singh, especially as the learned Sub Judge had specifically held that defendant no.3, Bant Kaur, was not proved to be his legally wedded wife.

Actually upon arguments having been addressed before this Court, with learned senior counsel having submitted that the said issue of defendants no.1 and 2 being the daughters of Harbhajan Singh not being seriously pressed in this appeal, nothing further needs to be stated by this Court. Yet, in view of the overwhelming evidence shown to be led before those Courts, in the form of the admission register, duly proved by an official of the school concerned, as also the matriculation certificates of defendants no.1 and 2, in all of which Harbhajan Singh is shown to be their father, simply because the marriage of defendant no.3 with Harbhajan Singh was held to be not validly proved, the presumption that children born during the validity of a marriage would be presumed to be those of the husband of the woman, is a presumption that stood well rebutted and as such, defendants no.1 and 2

cannot be held to be the daughters of Sampuran Singh (contended by the plaintiff to be the husband of defendant no.3), and are to be held to be the daughters of Harbhajan Singh, i.e. the father of the plaintiff, which, now in any case is not being disputed.

52. However, on the issue of whether defendant no.3 was proved to be the legally wedded wife of Harbhajan Singh, it is to be seen as to whether the said issue was correctly decided by the learned Sub Judge, as per the evidence led before that Court, or was correctly decided by the learned Additional District Judge, who reversed that finding and held her to be Harbhajan Singhs' legally wedded wife.

It is first to be noticed that most of the witnesses for the plaintiff, as were shown to be his fathers' relatives, including his fathers' brother (PW1 Tara Singh), his grand-fathers' brother (PW5 Amrik Singh), are shown to have testified to the effect that defendant no.3 was not the legally wedded wife of Harbhajan Singh.

On the other hand, defendant no.3 herself (as DW13) and the other defendants' witnesses, are stated by the learned lower appellate Court to have deposed that she was his legally wedded wife, with one of the such witnesses (DW1 Jaswant Singh), having testified to even having attended the marriage in the year 1947.

53. The learned Sub Judge had essentially arrived at a conclusion that Bant Kaur was actually the wife of Sampuran Singh, though living with Harbhajan Singh, on the basis of the order of the learned Sub Divisional Magistrate, Ambala, dated 13.08.1951, Ex.P23, which has already been noticed in detail earlier.

The learned Additional District Judge on the other hand, held

that, firstly, it had not been even proved that defendant no.3 Bant Kaur was the same woman who was the applicant/petitioner before the SDM, Ambala, in the application moved under Section 488 of the old Criminal Procedure Code.

That Court further went on to observe that one Raghbir Singh, on the basis of a registered will dated 06.03.1969, had been entered as the beneficiary to Sampuran Singhs' estate vide a copy of the mutation led as Ex.D2 by the defendants, in which a pedigree table was given, showing that Jaswant Kaur, wife of Sampuran Singh, had already died.

Hence, with defendant no.3 being alive, the learned first appellate Court came to the conclusion that defendant no.3 was actually a different person and not Sampuran Singhs' second wife Jaswant Kaur @ Bant Kaur, as referred to in the order of the learned SDM, Ambala.

54. In the opinion of this Court, the first appellate Court erred on that aspect of the case and therefore, reversal of the finding of the Sub Judge on that issue was incorrect.

This is for the reason that Sampuran Singh is shown to be the maternal uncle of the plaintiff, as per the testimonies of the witnesses of the plaintiff, including himself. In the order of the learned Sub Divisional Magistrate, Ambala, dated 13.08.1951, Ex.P23, the allegation by the respondent in that case, i.e. Sampuran Singh, was that though the petitioner Jaswant Kaur @ Bant Kaur was his wife, she was living in adultery with Harbhajan Singh.

It is not in doubt that the plaintiffs' fathers' name is shown at some places as Harbhajan Singh and some places as Bhajan Singh. Bhajan Singh, in fact, is even shown to be a witness for the petitioner in that case, i.e.

for Jaswant Kaur @ Bant Kaur, and eventually the SDM held that though it was difficult to prove adultery having been committed, or not committed, however, since the petition was one seeking a maintenance of Rs.80/- from respondent Sampuran Singh and Sampuran Singh had agreed to take his wife back provided she lived a chaste life, the petition/application was actually dismissed.

Erroneously, the learned first appellate Court in the present *lis* has held that the petition was allowed.

55. In the aforesaid circumstances, this Court would agree with the finding of the learned Sub Judge, that with the allegation being even in that petition that Jaswant Kaur @ Bant Kaur, being the wife of Sampuran Singh, was living with adultery with the plaintiffs' father, and the entire case of the plaintiff in his plaint is also to the same effect, with his fathers' brother, PW1 Tara Singh, as also PW5 Amrik Singh, both having testified to the effect that Bant Kaur was actually the wife of Sampuran Singh, who was the maternal uncle of the plaintiff, I see no reason to disagree with the finding of that Court (the learned Sub Judge).

DW1 Jaswant Singhs' testimony with regard to him having attended the marriage of Bant Kaur with the plaintiffs' father Harbhajan Singh, firstly, cannot be believed, the remaining part of his testimony to the effect that the plaintiff in fact was not Harbhajan Singhs' son, already having been disbelieved by the Courts below.

Secondly, with this Court having accepted that the order of the SDM, Ambala, dated 13.08.1951, actually pertains to an application filed by defendant no.3, seen with the testimony of the brother of Harbhajan Singh, i.e.

PW1 Tara Singh, the marriage ceremony allegedly performed in 1947 cannot

be accepted to have been actually performed, simply on the basis of the oral testimony of Jaswant Singh.

56. Consequently, the second question of law is answered to the effect that as regards the findings of the Courts below that defendants no.1 and 2 were the daughters of Harbhajan Singh, with their mother being defendant no.3 Bant Kaur, who was living with Harbhajan Singh, those findings are accepted, (that in any case not now being a challenge pressed in this appeal, and even otherwise on merits found to be a correct finding).

However, as regards the finding of the lower appellate court to the effect that defendant no.3 was proved to be legally wedded wife of Harbhajan Singh, that finding is reversed and that of the learned Sub Judge is upheld, holding that though Bant Kaur was admittedly living with Harbhajan Singh, even as per the case of the plaintiff himself, and that thereafter, she bore two daughters, i.e. defendants no.1 and 2, her marriage to Harbhajan Singh is not legally proved, she being shown to be the wife of Sampuran Singh, with no divorce in any case even pleaded by the defendants who of course denied her being the wife of Sampuran Singh altogether.

57. Having answered the first two questions of law raised in this appeal, as aforesaid, the last question is as to in what manner the property would then devolve upon the plaintiff and the defendants, with the will set up by the defendants having been held to be not validly proved by this Court and therefore, the property to now devolve by natural succession.

Mr. Saggar, learned senior counsel for the appellants, already having stated that as regards the non coparcenary nature of the suit property at village Grangan, the appellants do not now dispute that issue (with no evidence led to show that it was actually coparcenary property), the first part

of the last question of law would be as to how the coparcenary property at village Shergarh Bara, is to devolve on the parties to the *lis*.

58. Section 6 of the Hindu Succession Act, 1956, lays down the method by which coparcenary property is to devolve, in a Mitakshara coparcenary.

The amendment of 2005 not being applicable in this case, Harbhajan Singh @ Bhajan Singh, i.e. the father of the plaintiff and defendants no.1 and 2, having died on 01.06.1981, as is the accepted case with both parties, the unamended Section 6 is reproduced as follows:-

“6. Devolution of interest in coparcenary property.- When a male Hindu dies after the commencement of this Act, having at the time of his death an interest in a *Mitakshara* coparcenary property, his interest in the property shall devolve by survivorship upon the surviving members of the coparcenary and not in accordance with this Act:

Provided that, if the deceased had left him surviving a female relative specified in class I of the Schedule or a male relative specified in that class who claims through such female relative, the interest of the deceased in the *Mitakshara* coparcenary property shall devolve by testamentary or intestate succession, as the case may be, under this Act and not by survivorship.

Explanation 1.-For the purposes of this section, the interest of a Hindu *Mitakshara* coparcener shall be deemed to be the share in the property that would have been allotted to him if a partition of the property had taken place immediately before his death, irrespective of whether he was entitled to claim partition or not.

Explanation 2.-Nothing contained in the proviso to this section shall be construed as enabling a person who has separated himself from the coparcenary before the death of the deceased or any of his heirs to claim on intestacy a share in the interest

referred to therein.”

Hence, though as per the substantive part of the provision itself, the interest of a male Hindu, who has an interest in *Mitakshara* coparcenary property at the time of his death, is to devolve by survivorship upon the surviving members of the coparcenary, yet, the proviso to the section stipulates that as regards the interest of such male Hindu, in the coparcenary property, it would not devolve upon the surviving coparceners, but, if he has a living female relative as is specified in Class I of the Schedule to the Act, (or any male relative through such female relative), such interest of the deceased male Hindu would devolve not the surviving coparceners but by any testament executed by the deceased prior to his death, or by way of intestate succession (qua the deceaseds' own share in such property).

Hence, in the present case, the will set up by the defendants in their favour not having been held to be validly proved by this Court, and defendants no.1 and 2 being surviving Class I female relatives specified in the Schedule to the Act, i.e. the daughters of Harbhajan Singh, Harbhajan Singhs' own share in the coparcenary property at Shergarh Bara would devolve equally upon his surviving Class I heirs, i.e. his son, plaintiff Harjit Singh and his daughters defendants no.1 and 2, Gurmail Kaur and Surinder Kaur.

This Court already having held that the marriage of defendant no.3 with Harbhajan Singh not having been proved, she would not therefore be his widow and therefore would not fall within the list of Class I heirs specified in the Schedule.

59. Consequently, while plaintiff Harjit Singh would be exclusively entitled to his own share in the coparcenary property held by his father, however, as regards Harbhajan Singh's share in such coparcenary property, at

village Shergarh Bara, that was to devolve equally upon his three surviving Class I heirs, i.e. the plaintiff and the first two defendants.

60. Coming then to the self acquired part of the suit property, held by Harbhajan Singh in village Grangan.

That would devolve upon his legal heirs, in terms of Section 8 of the Hindu Succession Act, 1956, which reads as follows:-

“8. General rules of succession in the case of males.-The property of a male Hindu dying intestate shall devolve according to the provisions of this Chapter-

- (a) firstly, upon the heirs, being the relatives specified in class I of the Schedule;
- (b) secondly, if there is no heirs of class I, then upon the heirs, being the relatives specified in class II of the Schedule;
- (c) thirdly, if there is no heir of any of the two classes, then upon the agnates of the deceased; and
- (d) lastly, if there is no agnate, then upon the cognates of the deceased.”

Thus, to repeat again, as Harbhajan Singh had three relatives specified in Class I of the Schedule to the Act, i.e. the plaintiff and the first two defendants, the suit property situate at village Grangan, was to devolve equally upon the plaintiff and defendants no.1 and 2, at the time of Harbhajan Singhs' death in 1981.

61. Consequently, with all three questions of law raised in this appeal having been answered as aforesaid, this appeal is allowed to the extent that the findings of the Courts below on issue no.4, as regards the validity of the will dated 13.07.1965, set up by the defendants, are reversed and decided in favour of the appellant-plaintiff and against the defendants.

As regards the finding of the lower appellate Court on issue no.2,

the said finding is reversed and that of the Sub Judge is upheld, holding in favour of the plaintiff that defendant no.3 was not proved to have been legally married to Harbhajan Singh and consequently, even though the will in favour of her daughters has been disbelieved by this Court, defendant no.3 Bant Kaur would not be entitled any part of the property of the late Harbhajan Singh.

62. As a consequence of the aforesaid discussion, alongwith the appeal, the suit of the plaintiff is partly allowed, holding him entitled to his own share in the coparcenary property situate at village Shergarh Bara, Tehsil Sirhind, District Patiala, as described in clause 'X' in the head note of the plaint. He would be further entitled to a 1/3rd share of his fathers' share in that coparcenary property, with defendants no.1 and 2 also entitled to a 1/3rd share each out of the share of Harbhajan Singh in the said part of the suit property.

As regards that part of the suit property, as is mentioned in at clause 'Y' in the plaint and the head note of the judgment of the learned Sub Judge, i.e. the suit property situated at village Grangan, Tehsil Kharar, District Ropar, it would be deemed to have devolved equally to the extent of a 1/3rd share each, for the plaintiff and defendants no.1 and 2.

The parties are left to bear their own costs in this appeal, which is partly allowed as above.

A decree-sheet be drawn up accordingly.

July 26, 2017

dinesh

(AMOL RATTAN SINGH)

JUDGE

1. Whether speaking/reasoned?

Yes/No

2. Whether reportable?

Yes/No