

IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

RSA No. 1665 of 1987

Date of Decision: 04.07. 2017

Gurbax Singh

.....Appellant

Vs.

Sarwan Singh and others

.....Respondents

CORAM: HON'BLE MR. JUSTICE AMOL RATTAN SINGH

Present: Mr.J.R.Mittal, Sr.Advocate, with
Mr.Kashmir Singh and Mr.Lalit Sharma, Advocate,
for the appellant
Mr.H.R.Bhardwaj, Advocate,
for respondents no.1 to 3.
Mr.Tribhuwan Singla, Advocate,
for respondent no.4.

AMOL RATTAN SINGH, J.

This is the second appeal of one of the two plaintiffs who had filed a suit seeking a declaration to the effect that they are the owners of the suit land, i.e. land to the extent of the 1/3rd share of one Sham Singh, and that the mutation dated 27.07.1981, entered on the basis of the will of Sham Singh dated 25.03.1970, be declared to be null and void.

They also sought a decree of permanent injunction against the seven defendants impleaded in the suit, restraining them from taking forcible possession of land measuring 49 bighas and 06 biswas, as was fully described in the head note of the plaint.

2. As per the plaintiffs, Sham Singh was the owner of a 1/3rd share of land measuring 144 bighas and 10 biswas and that he had died on 12.07.1979, unmarried and issueless. He had executed a registered will on 25.03.1970 in favour of the plaintiffs and defendants no. 1 to 3 (seen to be the brothers of the two plaintiffs as per the memo of the parties). However, it was contended that the

defendants did not serve Sham Singh. He therefore executed another will on 09.07.1979, in favour of the plaintiffs, which was got registered after the death of Sham Singh on 12.07.1979 and was therefore his last testament.

As regards defendant no. 7-Bir Singh, it was averred that he had gifted his share in the suit land to defendants no. 4 and 5, i.e. the sisters of the plaintiffs and defendants no. 1 to 3.

It was further contended that the Assistant Collector Ist Grade, ignoring the will dated 09.07.1979, sanctioned a mutation in favour of the plaintiffs and defendants no. 1 to 3, which, according to the plaintiffs, was not binding on their rights. Consequently, the suit was instituted on 17.08.1981.

3. Upon notice issued, defendants no. 2, 3, 6 and 7 filed a written statement raising preliminary objections on maintainability and the suit being barred by limitation.

On merits, the will dated 25.03.1970 was admitted to have been executed by Sham Singh in favour of the plaintiffs and defendants no. 1 to 3. It was also admitted that Bir Singh, defendant no. 7 (seen to be the uncle of the plaintiffs and defendants no. 1 to 5, i.e. the brother of their father), had given his share in the suit land to defendants no. 4 and 5, i.e. Kartar Kaur and Mukhtiar Kaur. However, it was denied that the defendants did not serve Sham Singh. They also denied the execution of the will dated 09.07.1979 in favour of the plaintiffs, contending that on that date Sham Singh was not of sound health and in fact, was not in his senses as he had been confined to bed for six months prior to his death. Thus, it was contended that the said Will dated 09.07.1979 was a forged document. Consequently, dismissal of the suit was prayed for.

4. The plaintiffs having been filed a replication to the aforesaid written statement, reiterating what they had stated in the plaint and controverting the

averments in the written statement, the learned Sub Judge Ist Class, Barnala, framed the following issues for determination in the suit-

- “1. *Whether the plaintiffs are in possession of the property in dispute as owners? OPP*
 2. *Whether the suit is time barred? OPD*
 3. *Whether the suit is not maintainable in the present form? OPD*
 4. *Whether Sham Singh deceased had executed a valid will on 09.07.1979 registered on 17.08.1979 in favour of the plaintiffs? OPP*
 5. *If issue no. 4 is not proved, whether Sham Singh deceased had executed a valid will in favour of plaintiffs and defendants no. 1 to 3 on 25.03.1970, if so its effect? OPD*
 6. *Whether the plaintiffs are entitled to the injunction prayed for? OPP*
 7. *Relief.”*
5. The 4th issue, with regard to the validity of the will dated 09.07.1979, was taken up first by that Court.

As per the judgment of the learned Sub-Judge, the plaintiffs examined one Hardip Singh as PW-1, the scribe of the said will, Rup Singh as PW-2, a document expert, Jagdish Chand Singla as PW-4, with the first plaintiff (present appellant), Gurbux Singh, testifying as PW-5.

Though no reference is made to him at all in the judgments of both the Courts below, a 'Peshi Kanungo' (a revenue official), is seen to have been examined as PW-3.

The defendants are seen to have also examined five witnesses, i.e. a registration clerk, Siya Ram, as DW-1, petition writer Jai Sham Dass as DW-2, one Bholu Singh/Gholu Singh, son of Bhagat Singh, an agriculturalist (and resident of the village of plaintiff Gurbux Singh and most of the defendants), as DW-3, one Sham Singh of the same village (also an agriculturalist) as DW-4, and defendant

no. 2, Kartar Singh as DW-5.

[Note:- It is to be noticed that DW-3 is referred to as Gholu Singh in the judgment of the learned courts below, but as pointed out from the record of the courts below, he is shown to be Bholu Singh as DW-3 with the letter 'B' typed over the word 'G' in the record. Hence, he is being referred to as Bholu Singh/Gholu Singh in this judgment.]

6. It was found by the learned trial Court that PW-1, Hardip Singh, produced a sale deed stated to have been executed by Sham Singh, for the purpose of comparison of this thumb impression on the will set up by the plaintiffs, Ex. P-2.

PW-2 Rup Singh testified that he had scribed the said will, at the instance of Sham Singh, and that it was read over to him, after which he thumb marked it in the presence of DW-3 Bholu Singh/Gholu Singh, and Mehar Singh Lambardar, who attested it in the presence of this witness, i.e. PW-2.

The witness admitted that Sham Singh died three or four days thereafter.

It was also found to have been admitted on behalf of the plaintiffs that Mehar Singh, Lambardar, had also died, but his statement, Ex. PW-3/A, made before the Assistant Collector, Ist Grade, Barnala, on 26.05.1981, was tendered in evidence by the plaintiffs. The statement was to the effect that he and Bholu Singh/Gholu Singh, Panch, and Rup Singh were present when Sham Singh had executed a will in favour of plaintiffs Gurbux Singh and Nahar Singh, because of the fact that they used to look after him and he was very happy with their services.

7. Discussing the aforesaid evidence, the learned Sub Judge at the outset itself held the will, Ex. P-2, set up by the plaintiffs, to be a forged document, giving the following reasoning for his conclusion.

It was stated that firstly, the will was seen to have been scribed on paper that had been thumb marked by Sham Singh, which could be seen from the fact that first there were wider spaces between the written lines and subsequently, when the scribe, realizing that lesser space would be left nearing the thumb impression, the spacing started getting narrower between the lines. The learned Sub Judge found that there was no explanation from either the plaintiffs or the scribe, Rup Singh, for the discrepancy in spacing.

Further, that Court found that Sham Singh had admittedly died three days after the will was scribed, i.e. on 12.07.1979. An inference was therefore taken in favour of the defendants, on their contention that Sham Singh had remained ill six months prior to his death and that his thumb impression was obtained when he was in such a state.

The next suspicious circumstance taken by that Court, was that the will was got scribed from Rup Singh, who was only a student, with the services of a regular petition writer or “some respectable persons”, not having been obtained. No explanation was forthcoming on that issue either.

Per contra, the previous will dated 25.03.1970 was found to have been scribed by a regular deed writer and was also a registered will. An inference was therefore drawn that the executant of the will was fully aware of the 'intricacies of law' and it was therefore, a valid and a genuine document. Thus, it was held that had Sham Singh desired to execute another will, he would have requisitioned the services of a regular deed writer at that time also, and would have got it registered himself.

Another fact which was taken to be a suspicious circumstance by the learned Sub Judge, was that in the will set up by the plaintiffs, the month and year of the previous will was given as March 1970. The court drew an inference that

Sham Singh admittedly being an illiterate person, could not have been expected to remember the month and year of the execution of the earlier will after a lapse of 09 years. Hence, the inference taken was that the month and the year (March 1970) were written at the instance of the plaintiffs.

8. Still further, the testimony of DW-3, Bholu Singh/Gholu Singh, was found to be wholly against the plaintiffs. This witness stated that his signatures were actually obtained on the will after Sham Singh had died and that they were obtained in the Tehsil office on the pretext that it was a document pertaining to Mehar Singh, Lambardar, giving his land on '*Batai*'.

The learned trial Court held that with the plaintiffs not even having stated that Bholu Singh/Gholu Singh had been won over by the defendants, that testimony had to be accepted.

9. Coming to the statement of the late Mehar Singh, Lambardar, i.e. Ex. PW-A, the statement having been made before the Assistant Collector as already noticed, it was held that though the said statement was admissible in evidence under Section 32 of the Indian Evidence Act, however, since the said witness could not be brought into the witness box and therefore tested under the stress of cross-examination, therefore, seeing all the other suspicious circumstances surrounding the will set up by the plaintiff, the said document, i.e. Ex. PW-3/A, did not carry any weight.

10. On the aforesaid reasoning, the will dated 09.07.1979, registered on 17.08.1979 (after the death of Sham Singh), was held by the learned Sub Judge, to be not a valid document, and consequently, not the last testament of the deceased.

11. Issue no. 4 having been decided as aforesaid, as regards the validity of the will dated 25.03.1970, the said will, being a registered will and not denied even by the plaintiffs in any case, was held to be a validly executed will by Sham Singh.

Issue no.5 was therefore decided accordingly.

12. On issue no. 1 (wrongly numbered as 6 while deciding the issue in the judgment), pertaining to whether the plaintiffs were in possession of the suit property as owners thereof, it was held that the will set up by them not having been held to be a valid will, they could not be held to be exclusive owners of the suit property, earlier belonging to Sham Singh, but owners of a 2/5th share therein, on the basis of the will dated 25.03.1970.

13. Issues no. 2 and 3, on the suit being within limitation and maintainable or not, were decided in favour of the plaintiffs against the defendants, and issue no. 6, as to whether the plaintiffs were entitled to a decree of permanent injunction, was decided against the plaintiffs, on the ground that once they had been held to be co-sharers in the suit land along with the first three defendants, no injunction could be ordered against a co-sharer.

14. On the aforesaid findings, the suit of the plaintiffs was dismissed by the learned Sub Judge.

15. Both the plaintiffs filed an appeal against the aforesaid judgment and decree, which was decided by the learned Additional District Judge, Barnala, vide the impugned judgment dated 15.10.1986.

16. It is seen that the first appellate Court, after noticing the pleadings and the issues framed, as also the evidence led by the parties before the trial Court, went on to discuss that when the thumb impression on the mortgage deed Ex. P-1, testified to by PW-1 Hardip Singh, was compared with the thumb impression on the will set up by the plaintiff, it would found to be the thumb impression of the same person, as per the testimony of PW-2, Jagdish Chand Singla.

However, going on to discuss that the only marginal witness to the said will as was examined, i.e. Bholu Singh/Gholu Singh, not having testified in

favour of the stand of the plaintiffs, the registration of the will (though after the death of Sham Singh), was not of much significance, as under Section 68 of the Indian Evidence Act, at least one of the attesting witnesses to a will had to testify to the effect that it was duly executed by the testator.

17. As regards the statement, Ex. PW-3/A, of the other attesting witness, i.e. the late Mehar Singh, who could not be examined, as he had died, that piece of evidence was rejected by the first appellate Court for the same reason as it had been by the learned Sub Judge, to the effect that with Mehar Singh not having faced cross-examination in respect of the said document, even that document could not be accepted in favour of the will set up by the plaintiffs.

It is seen that the learned first appellate Court actually erred thereafter, in stating that Sham Singh died three months after the execution of the will dated 09.07.1979 and that within one and half months of his death, the will was registered, whereas it could have been registered during his life time itself. Factually, of course, it is not even the case of the defendants that Sham Singh remained alive for three months after 09.07.1979, and in fact he died within three days thereafter, i.e. on 12.07.1979.

18. It was further noticed by the learned first appellate Court that in the original will, marked as R-1 in the mutation file attached with the suit file, the thumb impression of Sham Singh was seen at the bottom, whereas the attestation by the two witnesses, by their signatures/thumb impressions along with the signature of the scribe, were above the testators' thumb impression, thereby giving an impression that the thumb impression was already present on a blank paper and the will was scribed later thereupon.

Thereafter, the same reasoning with regard to the line spacing becoming lesser towards the end of the recital of the will, was also noticed by the

learned first appellate Court in its judgment.

Thus, on the aforesaid reasoning, which essentially is the same as that of the learned Sub Judge, with the addition of the spacing of the signatures/thumb impressions noticed by the first appellate Court, the validity of the will propounded by the plaintiffs was negated by that Court also.

The remaining issues are also seen to have decided in the same manner as they were decided by the learned Sub Judge, including the validity of the admitted will dated 25.03.1970 executed by Sham Singh, in favour of the plaintiffs and defendants no. 1 to 3.

Accordingly, the first appeal of the plaintiffs was also dismissed.

19. In this second appeal, it is first seen that when notice was issued in the year 1987, respondents no. 1 and 8 were ordered to be proceeded against *ex parte*, they not having responded to the summons served upon them, and respondents no. 4, 6 and 7 were also thereafter, vide an order dated 26.02.1988, proceeded against *ex parte*, they having refused to accept the notice issued. Respondent no. 5, i.e. one of the two sisters of the main contesting parties, could not be served despite notice issued time and again to her.

(However, she is also not seen to have been a party to the written statement filed on behalf of defendants no. 2, 3, 6 and 7, with no other written statement filed by either her or defendant no. 1, Sarwan Singh).

Despite having been proceeded against *ex parte*, it is seen that thereafter respondent no. 1 however have been represented by the same learned counsel as respondents no.2 and 3. Respondent no. 4, i.e. the other sister of the contesting parties, has also been represented by her counsel.

Respondent no. 6 is seen to be the mother of the appellant-plaintiff and the first five respondents. Respondent no. 7, Bir Singh, is the defendant who is

stated to have gifted his share in the property to respondents no. 4 and 5 herein, i.e. the sisters of the plaintiffs and first three respondents, and respondent no.8 in this second appeal is the second plaintiff, Nahar Singh, who though was an appellant in the first appeal, has chosen not to file a second appeal.

20. The following questions of law have been framed by learned counsel for the appellants in this second appeal, for consideration of this Court:-

“i) Whether the will dated 09.01.1989 in favour of appellant/plaintiff has been wrongly discarded without applying mind to the facts of the will being registered and attested in accordance with law and the thumb impression and signature of the witness having been proved?

ii) Whether the conclusion drawn by the courts below discarding the said will is contrary to the evidence on record?”

(Obviously the date given in question no. 1 hereinabove is incorrect, as the date of the will is 09.07.1979, as has been shown in the judgments of the courts below and as is also obvious from the document itself, Ex. P-2 present in the record of the learned trial Court).

As a matter of fact both the questions are essentially the same question, as to whether the will set up by the plaintiffs has been correctly or erroneously held to be a not validly proved document, by the courts below.

21. Mr.J.R.Mittal, learned Senior Counsel appearing for the appellant, made his arguments as follows:-

(i) That even though one of the attesting witnesses, Gholu Singh, appeared for the defendants as DW3, he did not deny his signatures on the will but only stated that they were obtained after Sham Singh had died, and further, his denial with regard to his appearance before the Sub Registrar is belied by the fact that his signatures are actually present on the reverse of the

document, at the time of its registration on 17.8.1979, and

- (ii) the other attesting witness, Mehar Singh, having died, even though no person was examined to prove his signatures on the will, his statement before the revenue Court, i.e. Ex.PW3/A, was very much led by way of evidence, by which he supported the will in favour of the plaintiff-appellant.

Thus, the contention is that the statement of a dead person would be admissible in evidence in terms of Sections 32 and 71 of the Indian Evidence Act, 1872.

Learned Senior Counsel relied upon the following two judgments of coordinate Benches of this Court in support of the above contention.

(i) Lila Dhar vs. Smt. Badho 1994(1) PLR 525;

(ii) Davinderjit Kashyap vs. Bhupinderjit Kashyap and others 2011(2) PLR 650.

22. Learned counsel for respondents no.1 to 3, on the other hand, submitted that the first will of 1970, in favour of the plaintiff and respondents no.1 to 3, was got registered by Sham Singh himself, whereas the second will is shown to have been executed three days before his death and registered only thereafter.

He further submitted that the statement of one of the attesting witnesses, Mehar Singh, recorded in the document, Ex.PW3/A, was made before the revenue Court in summary proceedings and was therefore not admissible in evidence before the civil Court.

He submitted that to the contrary, the only surviving attesting witness of the purported will deposed that he signed the will presuming it to be some other document and did not realise that it was the will of Sham Singh, who in fact had already died when this witnesses' signatures were obtained.

Lastly, he submitted, as has been observed by the learned Sub-Judge, that the scribe of the will set up by the plaintiff, was a student, whereas the earlier will of 1970 was scribed by a regular document writer.

Hence, it is contended that the 2nd will is accompanied by wholly suspicious circumstances and was rightly disbelieved by both the Courts below.

Mr. Bhardwaj relied upon a judgment of a Single Bench of the Himachal Pradesh High Court, in Biasan Devi and others vs. Parkash and others, 2011 (5) RCR (Civil) 274.

23. In rebuttal, Mr. Mittal, learned Senior Counsel appearing for the appellant, submitted that as regards the statement of the deceased witness, Mehar Singh, Ex.PW3/A, even if it was made before a revenue authority in summary proceedings, the fact remains that it was a statement made by an attesting witness and as such would be admissible in evidence and believable in terms of Sections 32 and 71 of the Indian Evidence Act, 1872.

24. Having considered the aforesaid arguments of learned counsel on both sides, as also the judgments of the learned courts below, I find myself unable to agree with the arguments of Mr. Mittal, learned Senior Counsel for the appellant-plaintiff no. 1, for the reasons given hereinafter.

As per well settled law, a will must be first proved to have been executed in terms of Section 63 of the Indian Succession Act, 1925, which reads as follows:-

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.”

Thereafter, it must be proved in terms of Section 68 of the Indian Evidence Act, 1872, and in the absence of an attesting witness to the will, the provisions of Section 69 of that Act are to be resorted to.

Both the said provisions, i.e. Sections 68 and 69 of the Indian Evidence Act are reproduced 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.”*

24-A Thus, as per clause (a) of Section 63 of the Succession Act, the testator is required to sign or affix his mark on a will, or to direct another person to do so in his own presence.

Therefore, as regards Section 63 (a), though 'literally' the condition stipulated therein would seem to be fulfilled, with the thumb impression of the late Sham Singh on the document not having been doubted even by the courts below, however, it having been held that it was obtained prior to the writing of the will, effectively even Section 63 (a) of the Act of 1925 would not be seen to be complied with, although those courts have not specially referred to the said provision.

As regards Section 63 (b), the learned courts have held that the thumb impression appears at an unnatural place on the will, Ex. P-2 (the original of which was produced as Mark R-1 with the file pertaining to the mutation entered on the basis of the will). Though this Court would have no reason to discard that finding of fact, however, even if for the sake of argument it is to be taken that the signature or mark of the testator does appear immediately below the recital of the will and therefore, is at a place where it normally should be, however, clause (c) of Section 63 of the said Act would still not be seen to be complied with, inasmuch as, though two witnesses are shown to have attested the will, one of those witnesses specifically deposed that he had actually appended his signatures thereto after

Sham Singh had died, thinking it to be a different document altogether.

Thus, with the other witness, i.e. Mehar Singh, Lumbardar, having already died and therefore, not examined, in the opinion of this Court, even the necessary condition stipulated in clause (c) of Section 63 of the Indian Succession Act, is not seen to be complied with, in the will in question dated 09.07.1979.

25. As regards the compliance of Section 68 of the Evidence Act, the plaintiffs could not examine any attesting witness to the will propounded by them and in fact, one of the attesting witnesses as already fully noticed, i.e. Bholu Singh @ Gholu Singh, was examined by the respondents-defendants as DW3, who testified wholly against the plaintiffs. Hence, qua the plaintiffs, Section 68 of the Evidence Act is not seen to be complied with to prove the will in their favour.

Undoubtedly, in the event of the death of the other attesting witness, i.e. Mehar Singh, the plaintiffs could have led evidence in terms of Section 69 of the Evidence Act by producing a witness, who identified the signatures of Mehar Singh on the will, but that is not seen to have been done. Though PW-3, (his testimony is seen to have been signed as Om Parkash), a 'Peshi Kanungo' (a revenue official), is seen to have testified in respect of Ex. PW-3/A, to the effect that Mehar Singh had affixed his thumb impression on the said document, which as already noticed, is to the effect that Sham Singh had executed a will in favour of the plaintiffs in his presence, because of the love and affection he had for them on account of their services rendered to him, the testimony of the said witness is in respect of a document in which Mehar Singh, i.e. the other attesting witness, is shown to have testified in favour of the will; but even that statement is not a testimony pertaining to the fact that Mehar Singh actually thumb marked the will himself.

Hence, it cannot be held that even the condition stipulated in Section

69 of the Evidence Act was fulfilled in this case, with the thumb mark of Mehar Singh, on the will itself, not having been proved.

26. Even if, for the sake of argument, it were to be proved that Mehar Singhs' thumb impression was actually his, I still find no reason to disagree with the reasoning given by the learned courts below to reject the validity of the will dated 09.07.1979, on account of the suspicious circumstances surrounding it.

27. First of all, of course, is the testimony of the only living attesting witness thereof, i.e. Bholu Singh/Gholu Singh, to the effect that he did not attest the document in the presence of the testator and in fact attested it after his death, thinking it to be a document by which the other attesting witness was giving his land on '*Batai*' (sharecropping) to someone else.

The plaintiffs not having stated that Bholu Singh had been won over, there is no reason to hold that the conclusion drawn by the learned courts below, because of that, is erroneous in any manner.

Further, the fact that the testator died within three days after the will was shown to have been executed, with its registration also done after his death, (though of course a will is not a compulsorily registrable document), would both definitely be suspicious circumstances in the opinion of this Court also, when seen with all other circumstances.

Of course, the reasoning of the learned Sub Judge to the effect that the month and the year of the previous will are given in the second will and with the testator being an illiterate person he would not remember that nine years later, is not sound reasoning in the opinion of this Court, as a person can remember the month and date of his previous will, especially if it is read out to him. However, the fact that the first will, written nine years earlier, was admittedly at the instance of the testator and was so written by a 'regular' deed writer and the second one

simply by a student, though again not an essential condition for a will to be valid, however, does also lend suspicion to the document, on the reasoning given by the learned Civil Judge, to the effect that when a man is fully aware that a will should normally be written out by a professional and has actually got such a will scribed earlier, it would be unnatural for him to get it scribed from any other person.

Therefore, with the learned courts below also having held, after seeing the original document, that the line spacing in the initial part of the will was far more than that in the latter part of the document, giving the impression that the will was scribed only to fit the recital above the already existing thumb impression of the testator, this Court would not interfere with the findings, in the circumstances.

Lastly, the fact that by the will dated 25.03.1970, the testator (Sham Singh) equitably distributed his land amongst all his nephews, including the two plaintiffs, would also be a fact that would not be discarded by this Court, to hold that in the entire set of circumstances seen together, the second will was correctly held to be not validly proved by the learned courts below.

28. It needs also to be noticed here that though the courts below have not referred to the will dated 25.03.1970 as an exhibited document, however, as has been noticed by those courts, the plaintiffs themselves, in their plaint itself, admitted to the execution of that document by Sham Singh and as such, with the defendants in any case not disputing it, it has correctly been held to be a valid will by the courts below, while deciding issue no. 5.

29. As regards the argument of Mr. Mittal, learned counsel for the appellant, that the second will was also a registered document and therefore with Ex. PW-3/A duly proved by PW3, giving therein the testimony of Mehar Singh before the Assistant Collector Ist Grade in favour of the will set up by the

plaintiffs, the will also stood proved, the said argument is not acceptable, in view of the what has been held hereinabove. The will having been registered subsequent to the death of the testator, would hold absolutely no meaning, unless the will itself was duly proved in terms of Section 63 of the Indian Succession Act and Sections 68 and 69 of the Indian Evidence Act, 1872, further without any suspicious circumstances surrounding it.

Hence, the judgment cited by Mr. Mittal in **Lila Dhars'** case (supra), does not come to his rescue, as in that case the testator had put this thumb impression before the Sub-Registrar who had also signed the endorsement. In the opinion of this Court, though in such a case the will is still required to be proved in terms of the aforesaid provisions of the Acts of 1925 and 1872; however that situation in any case does not arise in the present case, the testator having died before the will was registered.

Therefore, simply because a document (Ex.PW3/A) may otherwise be admissible in evidence under Section 32 (6) and (7) of the Evidence Act, that does not discharge the onus on the beneficiary of the will to prove it in terms of Section 68 or at least Section 69 of the Evidence Act, other than in terms of Section 63 of the Succession Act of 1925.

Thereafter also, in terms of what has been held by the Supreme Court in numerous judgments including **Anil Kak** vs. **Kumari Sharda Raje and others** (2008) 7 SCC 695 and **Jaswant Kaur** vs. **Amrit Kaur and others** (1997) 1 SCC 369, not just strictly proving of the document itself is to be seen by the Court to hold a will to be valid, but also the circumstances surrounding its execution, including the state of mind of the testator, the manner of execution of the document, the contents thereof etc.

30. In view of the discussion hereinabove, I find no error in the judgments

of the learned courts below and consequently, this second appeal is dismissed, but with the parties left to bear their own costs.

July 4, 2017
nitin

(AMOL RATTAN SINGH)
JUDGE

Whether speaking/reasoned	Yes
Whether Reportable	Yes