

IN THE HIGH COURT OF PUNJAB AND HARYANA AT
CHANDIGARH

RSA No.3746 of 2013 (O&M)
Date of Decision: March 8, 2017

Ram Piari

... Appellant

Vs.

Sarla Mukherjee and others

... Respondents

CORAM: HON'BLE MR. JUSTICE AMOL RATTAN SINGH

Present:- Mr. R.L. Batta, Senior Advocate with
Mr. Nikhil Batta, Advocate, for the appellant.

Ms. Sapna Seth, Advocate,
Mr. Navdeep Klair, Advocate
for Mr. Kajal Chandra, Advocate
for respondent no.1.

Mr. M.L. Sarin, Senior Advocate with
Mr. Ritesh Aggarwal, Advocate and
Ms. Ankita Sambyal, Advocate
for respondents No.6 and 7.

Amol Rattan Singh, J.

This is the second appeal filed by the first defendant (now represented by her LRs) in a suit filed by respondent no.1 herein, i.e. Sarla Mukherje.

2. Both, the plaintiff, as also defendant no.1 (appellant herein) were sisters, with the other respondents herein also being legal representatives of the other two sisters of the plaintiff-respondent no.1 (hereinafter to be referred to as “the plaintiff”). In her suit, the plaintiff sought possession of 1/4th share of the suit property by partition thereof and further sought rendition of accounts in respect of the said property from the 1st defendant.

The suit property is a house bearing No.EH-197-A, Civil Lines, Jalandhar, originally owned by the father of the parties, i.e. the late Dwarka Nath Mishra. The dispute actually revolves around the validity of the will stated to have been executed by Shri Dwarka Nath Mishra on 26.09.1989.

Dwarka Nath Mishra is stated to have been ill towards the end of his life and was getting treatment in Delhi and Jalandhar and eventually passed away on 20.12.1990.

3. He had four daughters, i.e. Sarla Mukherjee (plaintiff), Smt. Ram Piari Mishra (defendant no.1), Smt. Ram Dulari and Smt. Swarn Kumari.

Both Ram Dulari and Swarn Kumari died in the year 1986, with Ram Dulari leaving behind defendants no.2 to 5 as her natural legal heirs and Swarn Kumari leaving behind defendants no.6 and 7 as her legal representatives.

It was contended in the suit that, therefore, the plaintiff was owner to the extent of $\frac{1}{4}$ th share of the suit property, with $\frac{1}{4}$ th share coming to defendant no.1, $\frac{1}{4}$ th share to defendants no.2 to 5 and $\frac{1}{4}$ th share to defendants no.6 and 7.

It was further stated that defendant no.1 was in possession of the house as co-owner for herself and on behalf of the defendants. However, despite being requested several times for partition of the property and delivery of $\frac{1}{4}$ th share thereof to the plaintiff, the first defendant had not done so and eventually, in November, 2001, she flatly refused. Further stating that the first defendant was also liable to pay $\frac{1}{4}$ th of the rental income of the property to the plaintiff, which the said defendant was using, the suit was filed on 20.11.2002. It was also alleged that defendant no.1 had refused to allow any person on behalf of the plaintiff to enter the premises to prepare the plan and

to take measurement of the property.

4. Upon notice issued, defendant no.1 appeared and filed her written statement. Defendants no.2 and 3 appeared but did not file their written statement and consequently their defence was struck off and defendants no.4, 5 and 7 did not respond to the notice and were, therefore, proceeded against *ex parte*.

Defendant no.6 appeared and filed a separate written statement, admitting to the contents of the plaint and prayed that the suit be decreed in terms of the prayer made.

5. In her written statement, defendant no.1 took preliminary objections with regard to the suit not being maintainable, not properly valued, jurisdiction etc.

She further stated that the suit property had been bequeathed in favour of the plaintiff and defendant no.1 in equal shares as per the last valid will executed by their father Shri Dwarka Nath Mishra, the will being a document duly registered in the office of the Sub-Registrar, Jalandhar, on 20.11.1989.

A further preliminary objection on the ground of limitation was also raised.

On merits, the ownership of Shri Dwarka Nath Mishra over the suit property was admitted, further stating that defendant no.1 (appellant herein) along with her youngest son had been living with Shri Dwarka Nath Mishra in the house and had been looking after him even after he fell down and suffered injuries in his house.

He was stated to have been initially treated at Patel Hospital, Jalandhar, from where he was shifted to Delhi, where he died.

Thus, it was contended that the plaintiff and defendant no.1 have equal shares of the suit property and that the late father had excluded defendants no.2 to 7 from inheritance of the property.

Yet further, it was contended in the written statement that the plaintiff was not entitled to claim possession or for any rendition of accounts, being bound by the will left behind by the deceased and that the property had never been rented out. On the other hand, a hefty amount for its repair had been spent by defendant no.1 for the period of 12 years after the death of Shri Dwarka Nath Mishra.

Lastly, it was denied that the plaintiff had ever approached defendant no.1 seeking any partition of the property.

6. A replication to the written statement of defendant no.1 was filed by the plaintiff, after which the following issues were framed by the learned Civil Judge (Jr. Divn.), Jalandhar:-

- “1. Whether Dwarka Nath Mishra, executed a legal and valid will dated 26.9.89 registered on 20.11.89 in favour of defendant no.1 and plaintiff? OPD-1
2. If issue no.1 is not proved, whether plaintiff is entitled to possession of 1/4th share on petition? OPP
3. Whether the plaintiff is entitled to possession of the suit property? OPP
4. Whether the plaintiff is entitled to rendition of accounts? OPP
5. Whether the suit is not properly valued for the purpose of court fee and jurisdiction? OPP
6. Whether the plaintiff has concealed the material facts. If so its effect? OPD
7. Whether the suit is barred by limitation? OPD
8. Relief.”

7. In support of her plea, the plaintiff stepped into the witness box

as PW-1 and closed her evidence, whereas the first defendant (appellant herein) examined one Harjinder Singh as DW-1, Harwinder Singh Sandhu as DW-2, Onkar Nath Mishra (her son) as DW-3, Jagdish Chander, a Clerk in the office of the Sub-Registrar, Jalandhar, as DW-4, Sohan Lal Bhumbak, SDM, Derabassi as DW-6 (the former Sub-Registrar, Jullundur).

She also tendered various documents in evidence, including the will of Dwarka Nath Mishra as Ex.D-1, and the Punjabi version thereof as Ex.D-2.

8. The plaintiff having testified in terms of her plaint, DW-1 testified to the effect that he was one of the marginal witnesses to the will executed by the late Dwarka Nath Mishra, which he stated was executed in his presence by the testator and that he had signed on both the English and the Punjabi version thereof.

Similarly, DW-2, who is the son of DW-1, testified to being another marginal witness to the will, which he also stated was executed in his presence.

DW-3, Onkar Nath, is the son of the first defendant and testified as her attorney, to the effect that a valid registered will was executed.

DW-4, a Clerk from the office of the Sub-Registrar, also testified that the will (Ex.D-1) and its Punjabi version (Ex.D-2) were registered with the office of the Sub-Registrar, Jalandhar, which had been executed by the late Dwarka Nath Mishra.

The Registrar in whose presence the will was registered, i.e. Sohan Lal Bhumbak, appeared as DW-6 and testified to the effect that he had registered the will.

He also proved the endorsements on the English and Punjabi

versions of the Will, as Exs. DW-6/1, DW-6/2 and DW-6/3.

9. The argument on behalf of the plaintiff was that the will was surrounded by suspicious circumstances with regard to its execution, registration and attestation and that it was a forged document, which could be seen from the cross-examination of both, DW-1 and his son DW-2, with DW-1 having stated that when the will was scribed, an Advocate and the son of DW-1, i.e. DW-2, were present and that the will was written at home and the grand-son of Dwarka Nath Mishra had gone to the Court to get it typed.

The learned Civil Judge having considered the aforesaid and other arguments, as also having appraised the evidence, recorded a finding that DW-2, Harjinder Singh, had stated that he had not seen the original will but only its certified copy.

The grand-son of Dwarka Nath Mishra, i.e. Onkar Nath Mishra, DW-3, appearing for his mother, holding her power of attorney, was found to have stated that the will was executed in his presence and his mothers' and that his grand-father, Dwarka Nath Mishra, had scribed it on a plain paper at house no. 179, Civil Lines, Jalandhar, with this witnesses' brother also present. However, it was further found that he had not stated that he got the will typed after rough notes were given to him by his grand-father, as Ex.D-1 as well its Punjabi translation, Ex. D-2, were both typed documents both registered by the Sub-Registrar.

10. Other than the above, it was held by the learned Civil Judge that there were other suspicious circumstances surrounding the will, inasmuch as, the Sub-Registrar, DW-6, had testified that the will was registered at the house of the executant, i.e. Dwarka Nath Mishra and the clerk who appeared from that office, DW-4, had also testified to that effect, but when cross-

examined he stated that in order to get a document registered outside the tehsil office, an application was to be moved before the Sub-Registrar. He admitted that if no such application is moved, then none of the revenue officers could get the document registered. This witness had also admitted that no application was available on the file by which a request had been made to the Sub-Registrar that the executant wishes to execute the will at home.

11. Another reason for disbelieving the will, as given in the judgment of the learned Civil Judge, was that as per the marginal witnesses thereto, DW-1 and DW-2, the will was executed on 26.09.1989 and thereafter registered on 20.11.1989. Though the will being registered on a subsequent date was not held to be a suspicious circumstances by that Court, but the fact that one Shri Ved Vyas, Advocate, was shown to have been present at the time of its execution as also its registration was found to be suspicious. The presence of Shri Ved Vyas at the time of execution of the will was also seen to be revealed from the statement of DW 1 and 3, to the effect that there were three marginal witnesses to the document who had signed it on 26.09.1989. However, it was found by the Court that under the signatures of Shri Ved Vyas, the date given was 20.11.1989 which showed that he had signed it on that date. Therefore, it was held that when the will was executed on 26.09.1989, a witness could not have signed it on 20.11.1989, which created suspicion with regard to its registration.

Yet further, with no hand-writing expert having been examined by either party, the Court itself compared the signatures of the executant and held that the signatures of Dwarka Nath Mishra, on the English version of the will Ex. D-1, on the Punjabi translation Ex. D-2 and on the endorsements of

registration, Ex. D4/A, DW6/2 and DW6/3, did not tally with each other.

12. Recording findings as above, it was held by the learned Civil Judge that the will in question was surrounded by suspicious circumstances and consequently could not be held to be a legal and valid will.

Thus, issue no. 1 was decided in favour of the plaintiff.

13. Having held as above, the natural consequence thereof was that all the four daughters of the late Shri Dwarka Nath Mishra were held entitled to a 1/4th share of his property with an equal right to its possession to that extent, with two of the daughters having been succeeded by their respective legal heirs.

Issues no. 2 and 3 were therefore, decided as such.

14. Issue no. 4 pertaining to entitlement of the plaintiff to rendition of accounts from defendant no.1 (present appellant), was however held in favour of the defendant, in view of the fact that the suit property had never been found to have been generating any income, it being a residential house.

The two formal issues with regard to court fee and jurisdiction and concealment of material facts were also held against the plaintiff, but with the issue on limitation being decided in her favour, holding that there was no limitation prescribed for filing a suit for possession based on the title of the plaintiff in the property, unless the defendant took a plea of adverse possession, which had not been taken in the written statement of the first defendant.

15. On the aforesaid findings, the suit of the plaintiff was decreed with costs in her favour, with a preliminary decree of partition also passed, holding that she was entitled, along with defendant no. 1, defendants no. 2 to 5 and defendant no.6 and 7, to have the suit property partitioned in equal

shares to the extent of 1/4th share each, by metes and bounds.

16. The present appellant (defendant no. 1) having challenged the aforesaid judgment and decree before the first appellate court, that court also, after noticing the pleadings, the issues framed and the evidence adduced, recorded a finding that though throughout the progress of the case, defendant no. 1 was claiming exclusive ownership on the basis of the will, however, in para no. 5 of her preliminary objections, she had herself written that the deceased had bequeathed the suit property in favour of the plaintiff and herself, i.e. appellant-defendant no. 1. Thus, it was held that though the appellants' case was that she had become the exclusive owner of the property, on the basis of the will, she had contradicted herself in her own written statement, wherein in paragraph 4, she had again reiterated that both she and the plaintiff had inherited the property to the exclusion of defendants no. 2 to 7.

On the basis of aforesaid, it was also held that the appellant-defendant having admitted that the plaintiff was entitled to a half share of the suit property, the suit in any case could not be held to be time barred. Repelling an argument that no proper opportunity had been granted to the appellant-defendant to lead evidence, it was found that 24 opportunities had been so given and further, it was not stated as to which issue was not properly framed or had been omitted to be framed.

17. On the aspect of there being no application to the Sub-Registrar for registering the will at the home of the executant, the first appellate Court found that during the pendency of the appeal information had been sought through the Right to Information Act, upon which the Sub-Registrar had disclosed that an amount of Rs. 100/- was deposited for the visit of the Sub-

Registrar to register the will of the testator, and an entry in that respect was made at serial no. 677 (in the register). However, an application moved under Order 41 Rule 27 CPC, seeking to lead that document by way of evidence, was dismissed. It was held that even if the entry at serial no. 677, with regard to the amount having been deposited, was held to be proved, it would not help the appellant as the trial court had formed its opinion not due to non-production of the entry with regard to the fee being paid, but due to non-production of the application.

18. Other than the above, the lower appellate court held that there were other suspicious circumstances also which did not favour the acceptance of the will, inasmuch as, admittedly the testator was 90 years of age and was not keeping good health, having been under treatment, as admitted by both parties.

The finding of the lower court on the date '20.11.1989' appearing beneath the signatures of Shri Ved Vyas, Advocate, were upheld by the appellate Court also, as were the findings of the lower court on the issue of the signatures of the executant being different on the original will and on its translation. Largely, the other findings of the trial Court, including with regard to the English and Punjabi version of the will not having been compared with the rough notes prepared at the instance of the testator, were also upheld by the lower appellate court, holding that the testimony of DW-1 that a rough note was prepared, was contradicted by DW-3, who stated that Shri Dwarka Nath Mishra had himself written out the will, but later failed to state as to whether it was got typed in Punjabi or English. In fact, it was found that DW-3, i.e. the grand-son of the testator, had categorically deposed that Ex. D-1 was the only will executed by Shri Dwarka Nath Mishra.

Hence, finding that the rough notes, if any were prepared, were not made part of the record and there was a discrepancy as to whether there were two or three marginal witnesses present at the spot, and further, that defendant no. 1, despite having been admitted to be hale and hearty by her son (DW-3), did not step into the witness box to testify, the will was held to be not free of suspicious circumstances.

Lastly, it was also found strange by the first appellate court that the testator had not given any reason for disinheriting the legal heirs of his deceased daughters, though it was admitted that relations with them were also cordial.

19. For all the aforesaid reasons, the first appeal filed by the present appellant was dismissed by the lower appellate Court.

20. Along with the second appeal filed before this Court, by defendant no. 1, Ram Piari, an application under Order 41 Rule 27 CPC has been filed (CM No. 10116-C-2013), seeking to lead by way of additional evidence, five documents, the first of which is seen to be an affidavit of Shri Yashpal Sharma, Sub Registrar-cum-APIO, Jalandhar-I, stating to the effect that Shri Onkar Nath Mishra, i.e. the son of appellant-defendant no. 1 (now her first legal representative) had filed an application on 17.09.2010, seeking information relating to a will dated 26.09.1989 and that the said application under the RTI Act had been replied to on 25.10.2010, advising the applicant to obtain a certified of the will by applying to HRC branch/Suwidha Centre.

Thereafter, Onkar Nath Mishra had again filed an application on 15.11.2010 in which he had clearly mentioned the information required by him. That application was replied to by the Tehsildar Jalandhar on 08.03.2011, advising the applicant to get the information from the office of

the Sub-Registrar, Jalandhar, after which another application was filed by Onkar Nath Mishra on 15.03.2011, which was replied to stating that since the application filed by the late Shri Dwarka Nath Mishra during his lifetime to get his will dated 26.09.1989 registered by examining him at his residence, “was of misc. nature, therefore, the record of these kind of application is not maintained by the office of Sub-Registrar, Jalandhar”.

Further, it was stated that since the other information sought by the applicant was more than 21 years old, it had been destroyed as records more than 10 years old were destroyed.

Similarly, as regards the last piece of information sought by the applicant, it was stated in the affidavit of the Sub-Registrar (the said affidavit being one filed before the State Information Commission, Punjab, on an appeal filed by Onkar Nath Mishra), that the said information was already present on the back of the Will in the shape of endorsements and as such, was already in possession of the applicant as was clear from his first application dated 17.09.2010.

20-A. The second document that is sought to be led by way of additional evidence before this Court is a report of a hand- writing expert, Dr. Jassy Anand, to the effect that in the said experts' opinion, the disputed signatures on the will dated 20.11.1989 as also those on the certified copies of the Sub-Registrar, on the copy of the will in English also of the same date and the signatures on the certified copy of the Registrars' copy of the will written in Gurmukhi, also dated 20.11.1989, were all signed by Shri Dwarka Nath, when compared with the holographic English will dated 12.03.1980, with the sale deed dated 18.07.1952 and with the Order Form of the Bank of India, dated 04.10.1989.

Thus, as per hand-writing expert, the disputed and standard signatures were of the same person.

20-B. The next document that is sought to be led by way of additional evidence is a copy of a will dated 12.03.1980, the appended copy of which does not carry any signature but is stated to be a will executed by the late Shri Dwarka Nath, in which it is stated that the executant owns a house (EH197A) in the Civil Lines, Jalandhar, which he continued to be the owner of during his life time and after his passing, his eldest daughter, Smt. Ram Pyari would be sole owner of everything contained in it. The said document stated that she could sell the house at any time and use the sale proceeds on the expenses of sale and necessary repair to the house and taxes payable on it, and to distribute the remaining net amount of sale proceeds between herself, her sister Swarn Kumari, her sister Sarla Kumari (respondent-plaintiff), all to the extent of 1/4th share each and the remaining 1/4th share was to be given to charity. The charity amount was also to be divided with half the amount to be given to a well recognized hospital to be spent on poor patients and the other half to a brilliant student whose parents could not pay for his education, which would be paid for through the D.A.V. College, Jalandhar, Managing Committee. This copy of the will dated 12.03.1980, is sought to be shown as one of the documents on which the signatures of Shri Dwarka Nath were stated to be his standard signatures, compared by the hand-writing expert-cum-document examiner.

20-C. The next document that is sought to be led by way of additional evidence is seen to be a copy of a sale deed dated 18.07.1952, also one of the documents from which the standard signatures of the late Shri Dwarka Nath were taken to be compared, by the expert. The said sale deed is stated to be in

respect of the purchase of the plot on which the house, which forms the suit property (together with the plot), was purchased by Shri Dwarka Nath Mishra.

20-D. The last document that is sought to be led by way of additional evidence is an Order Form of the Bank of India dated 04.10.1989, pertaining to Saving Account no.14820-A, which is also a document from which the hand-writing expert compared the signatures of the late Shri Dwarka Nath.

21. When his appeal initially came up for hearing before this Court on 23.09.2013, notice had been issued and status quo regarding possession and alienation of the property as it obtained on that date, was ordered to be maintained.

22. The following questions have been framed by learned counsel for the appellant as substantial questions of law, in the grounds of appeal filed:-

- “(i) Whether the execution of the will Ex. D-1 and D-2 has been duly proved by attesting witnesses namely Harjinder Singh, D1 and HS Sandhu, D2 in view of provisions of Section 68 of the Indian Evidence Act and Section 63 of the Indian Succession Act, 1925?
- (ii) Whether the execution of the will Ex. D-1 and Ex. D-2 has been proved as per Sections 64 and 65 of the Indian Evidence Act?
- (iii) Whether the will, Ex. D1 and Ex. D2 was executed disposing mind by the testator and there were any suspicious circumstances?
- (iv) Whether the will is a natural document as the testator was in his old age and was looked after by his daughter Ram Piari who is the beneficiary of the will?
- (v) Whether the judgments and decrees of the courts below are liable to be set aside being illegal?
- (vi) Whether the registration of the will Ex. D-1 and

Ex. D-2 has been duly proved by the evidence of DW1, DW2 and DW6.”

23. Of the aforesaid, the legal questions that require to be adjudicated upon are actually only as are contained in the first two clauses hereinabove, i.e. clauses (i) and (ii), whereas question no.(iii) and (iv) are actually questions of fact. Question no.(v) is a formal question, though otherwise 'technically' a legal question and question no.(vi) is also more a question of fact than of law.

24. Addressing arguments before this Court, Mr. R. L. Batta, learned senior counsel appearing for the appellant, first referred to the will, Ex.D1, from the trial Court record, to submit that it was executed on 26.09.1989 and registered on 20.11.1989.

Learned senior counsel further pointed to the fact that the endorsement behind the document by the Sub-Registrar duly states that the executant and the witnesses have been identified. However, the Courts below yet disbelieved the will because the date shown by Shri Ved Vyas (3rd witness) below the will itself, is shown to be 20.11.1989 and not 26.09.1989.

Mr. Batta submitted that as a matter of fact, Shri Ved Vyas, Advocate, should not have signed the will at all on 20.11.1989 at the time of its registration, as a witness thereof, but obviously did so only to show that he was a witness to its registration.

Learned senior counsel then referred to the testimony of the Sub-Registrar who had registered the will (posted elsewhere at the time of his deposition), i.e. his testimony as DW6.

As per the said testimony, the witness had deposed that he had been posted as Sub-Registrar, Jalandhar, from 1989 to 1991 and that he had

seen the original will, which was presented before him in the house of the testator, i.e. in the house of Shri Dwarka Nath Mishra, with Shri Ved Vyas, Advocate, having identified the testator as also witnesses no.1 and 2.

The Sub-Registrar further testified to the effect that the will had been read over to the executant by this witness himself (DW6) and thereafter the executant had signed it after admitting to its contents in the presence of DW6 (Sub-Registrar).

The testimony further read to say that the will was signed in the presence of both Harwinder Singh Sandhu and Harjinder Singh (attesting witnesses no.1 and 2).

Yet further, DW6 deposed that his Reader had written the endorsement on the back of the will, beneath which the witness identified his signatures. He further testified that the certified copy of the original will was Ex.D1 and the endorsement thereon was Exs.DW4/1 and DW6/1.

He also testified to the effect that the executant was in his full senses at the time of execution of the will, further testifying that as per law, if a document is scribed in a language which was not the State language, then the document was to be translated into the State language and presented alongwith the original document. Hence, he further deposed, that it was for this reason that there were two copies of will, one in English and one in Punjabi, with the testator having signed on all the copies in the presence of the witness.

He further went on to identify the certified copy of the Punjabi version of Ex.D1 as Ex.D2, alongwith the endorsements thereon.

25. Learned senior counsel next pointed to the testimonies of DWs1 and 2, i.e. the two attesting witnesses to the will, who are stated to be father

and son and neighbours of the testator, Shri Dwarka Nath Mishra. He submitted that as per these testimonies also, Shri Dwarka Nath Mishra had executed the will in his complete senses and the factum of Shri Ved Vyas, Advocate, being present, is also mentioned in the testimony of DW1.

26. Other than the above, Mr. Batta also wished to refer to the affidavit which the appellant (through her LRs) now wished to lead in evidence before this Court, by way of the application filed under Order 41 Rule 27 of the CPC. The said affidavit (Annexure A-8) is that of Yashpal Sharma, Sub-Registrar-cum-APIO, filed before the State Information Commission, Punjab, in an appeal filed by the LR of the original appellant, (presently the first appellant), Onkar Nath Mishra (as has already been referred to earlier in this judgment).

Whether or not that can be referred to and whether or not the application itself should be allowed, will be dealt with further ahead, upon appraising the arguments raised on both sides.

27. Thus, Mr. Battas' arguments in favour of the will being valid, are that firstly, the testator was in good health, as testified to by two attesting witnesses to the will, as also by the Sub-Registrar who had registered it.

He next submitted that the testator had died more than one year after executing the will and therefore, simply because he was in an advanced age, does not alter the fact that he was in a sound disposing mind when he executed it.

Further, learned senior counsel submitted that the 3rd witness having signed on the will on the date of its registration cannot be taken to be a suspicious circumstance.

As regards the testator of the will having excluded the legal heirs

of his two daughters who had already pre-deceased him, Mr. Batta submitted that the late Shri Dwarka Nath Mishra lived with only one daughter and had another one living who visited him off and on from Delhi. Therefore, he divided the property equally amongst them, giving a life estate in the whole property to the daughter who was living with him. Hence, there was nothing unusual or unnatural in the desire of the testator.

28. Mr. Batta next submitted that the suit filed by respondent no.1 herein, i.e. Sarla Mukherjee, was so filed 12 years after the death of her father, the father admittedly having died on 20.12.1990 and the suit having been instituted on 20.11.2002. Hence, learned senior counsel submitted that the filing of the suit was obviously an after thought, possibly because the suit property could not be divided during the life time of Smt. Ram Piari, i.e. the appellant-defendant no.1.

In fact, he submitted that only respondent no.1, Sarla Mukherjee, contested the will and pursued the suit seriously, with the LRs of the other daughters all having been proceeded against *ex parte*, except one of the sons of Smt. Swarn Kumari, i.e. defendant-respondent no.6 Rakesh Kumar Vashishth, who also, after filing his written statement in favour of the respondent-plaintiff, never appeared to contest the suit, or to even follow it up in appeal.

Though respondent-defendant no.2, Satish Kumar Mehta, one son of the 3rd daughter, Ram Dulari, is seen to have appeared through counsel before the first appellate Court, however, his defence had already been struck off by the learned Civil Judge, alongwith that of his brother Vijay Kumar Mehta, they never having filed a written statement in reply to the plaint.

Still further, Mr. Batta submitted that this was for the reason that

the other two daughters of the late Shri Dwarka Nath Mishra were well placed and as such, their LRs are not obviously interested in the suit property. Now, however, seeing that the plaintiff has succeeded in her suit before both the courts below, respondents-defendants no.6 and 7 have again come up before this Court at this stage of second appeal, to contest it, never having seriously contested it at any stage before.

In any case, Mr. Batta reiterated, that exclusion of the mother of respondents- no.6 and 7 from the suit property, as also the mother of respondents no.2 to 5, by Shri Dwarka Nath Mishra, was natural because one daughter was constantly looking after him and the only other daughter who was alive, i.e. respondent-plaintiff Sarla Mukherjee, was visiting him.

29. In support of his contention that simply because the executant of the will was old, the will could not be discarded as being suspicious, Mr. Batta cited a judgment of a co-ordinate Bench in **Shingara Singh v. Nasib Kaur and others** 2015(3) PLJ 589.

On the testator excluding natural heirs from his will, learned senior counsel cited two judgments, one of a co-ordinate Bench of this Court in **Chanchal Singh v. Rattan Kaur and others** 1988(1) PLR 666 and another of the hon'ble Supreme Court in **Satya Pal Gopal Das v. Panchu Bala Dasi** AIR 1985 SC 500.

30. Of the respondents represented before this Court, i.e. respondents no.1, 6 and 7, arguments were addressed by Mr. M.L. Sarin, learned senior counsel appearing for respondents no.6 and 7, i.e. the son and daughter of the 4th daughter of the late Shri Dwarka Nath Mishra, Smt. Swarn Kumari.

Ms. Sapna Seth, appearing on behalf of respondent no.1, i.e. plaintiff Sarla Mukherjee, had stated on 11.08.2016, that the said respondent

is sanguine that her rights in any case were duly protected one way or the other, as though she had filed the suit seeking only a 1/4th share in the property, which had been decreed to that effect, however, whether this appeal succeeds or not, her rights stand protected because if the will of her father is accepted to be a true will, then 50% of the suit property would come to her.

31. Mr. Sarin first submitted that both the Punjabi and English versions of the will, i.e. Exs.D1 and D2, have been signed by Shri Ved Vyas, Advocate, on a date different from the date of execution of the will which the beneficiary thereof is claiming that it was actually executed on. That is to say, that though the will is stated to have been executed on 26.09.1989 and registered on 20.11.1989, both the Punjabi and the English versions thereto actually contain the hand written date “20/11/89” below the will, above the signatures of the witnesses.

Similarly, Shri Ved Vyas, Advocate, has specifically written the date “20/11/1989” beneath his signatures on both, the English as well as the Punjabi version of the will, i.e. Exs. D1 and D2 respectively. Hence, Mr. Sarin submitted that that itself is a suspicious circumstance, with the type written date given in the second last paragraph of the will shown as “26th day of September, 1989” in the English version and the same being given in the Punjabi version of the will.

32. Mr. Sarin next submitted that the two attesting witnesses, to the actual execution of the will, were both, father and son and therefore, were not independent witnesses, as admittedly they were also neighbours of Shri Dwarka Nath Mishra, living opposite his house. He contended that Shri Ved Vyas actually cannot be taken to be a witness.

Mr. Sarin next submitted that Shri Ved Vyas was also Smt. Ram

Piaris' lawyer.

33. Learned senior counsel next submitted that this Court, in 2nd appeal would not reverse a finding of fact. On that, Mr. Sarin cited a judgment of the Privy Council in Manindra Chandra Lala v. Mahaluxmi Bank Ltd. AIR 1945 PC 105.

It needs notice that the said judgment of the Privy Council was not dealing with a case where a finding of fact had been reversed by the High Court in second appeal but in first appeal, an application for probate having been filed before the learned District Judge, in respect of a will, by which the testator conferred authority upon his widow to adopt three sons successively, one by one, one after the death of another, from amongst the existing and future sons of the brother of the testator.

Without going into the further facts of that case, it is suffice to notice that the first Court in that case (District Judge), had found the will to be perfectly believable and had therefore allowed the application seeking probate of the will, which finding was reversed by the High Court, one of the reasons being the delay in filing the application.

The Privy Council, on the other hand, found the reasoning given by the learned trial Court, in the circumstances of the case, to be good reasoning and thereby set aside the order of the High Court, restoring the judgment and decree of the District Judge.

34. Mr. Sarin next relied upon a judgment of the Supreme Court in Deity Pattabhiramaswamy v. S. Hanymayya and others AIR 1959 SC 57, wherein it was held that the scope of Section 100 of the Code of Civil Procedure is wholly limited to consideration of an issue of law and no matter how gross the error on facts may be, the High Court would not exercise

jurisdiction to set it aside, it having no such jurisdiction under Section 100 of the Code.

To hold as above, a judgment of the Judicial Committee, in Durga Chowdhry v. Jawahir Singh, 17 Ind App 122 (PC) was referred to by their Lordships.

On the same point, Mr. Sarin also cited another judgment of the Supreme Court in V.S. Mane v. R.V. Ganeshkar AIR 1995 SC 2086, wherein it was held that the High Court was not right in re-appraising evidence in second appeal and coming to the conclusion that the will was not genuine or was not proved. (Reference paragraph 17 of the said judgment).

35. On the facts of the present case, Mr. Sarin referred to the finding of the Courts below with regard to the testimony of DW2, i.e. the second attesting witness to the will (Harwinder Singh Sandhu), who in his cross-examination was found (by those courts) to have stated that he had not seen the original document (the will), except the certified copy. (Mr. Batta interjected to say that the statement was only in the context of the certified copy of the will on the judicial record and not as regards the original will never having been actually seen by the witness).

36. Coming to the contention of Mr. Batta that respondents no.6 and 7 had never seriously contested the suit filed by respondent no.1 and as such are precluded from doing so at the stage of second appeal, Mr. Sarin pointed to an order of this Court dated 31.03.2014, wherein it was noticed that counsel for the appellant (Mr. Batta) had contended that respondent no.1 was the only contesting respondent. However, thereafter, in an order dated 14.05.2015, the prayer of respondents no.6 and 7 to be admitted to be a contesting party, was granted by this Court, in the presence of learned counsel for the appellant.

Thereafter, the order of this Court dated 11.08.2016 was referred to by Mr. Sarin, wherein learned counsel for respondent no.1 (i.e. the plaintiff) had stated, as already noticed, that in fact, the said respondent is sanguine that her rights in any case were duly protected one way or the other, as though she had filed the suit seeking only a 1/4th share in the property, which had been decreed to that effect, however, whether this appeal succeeds or not, her rights stand protected because if the will of her father is accepted to be a true will, then 50% of the suit property would come to her.

Thereafter, this Court, in the presence of learned counsel for the appellant, had observed that the only contesting respondents therefore, were respondents no.2 to 7, of whom only respondents no.6 and 7 were represented before the Court.

37. Coming back next to the factual position, Mr. Sarin referred to another judgment of the Supreme Court, on the issue of what would constitute valid requirements to prove a will, in terms of Section 63 of the Indian Succession Act, 1925.

Learned senior counsel referred to **Girja Datt v. Gangotri Datt** AIR 1955 346 on that issue, wherein, after referring to Section 63(c) of the aforesaid Act, it was held as follows, in the context of the signatures of two witnesses to a document executed by the deceased, registered in the presence of those two witnesses.

It was held by their Lordships that:-

“One could not presume from the mere signatures of Mahadeo Pershad and Nageshur appearing at the foot of the endorsement of registration that they had appended their signatures to the document as attesting witnesses or can be construed to have done so in their capacity as attesting witness. Section 68, Indian

Evidence Act requires an attesting witness to be called as a witness to prove the due execution and attestation of the will. This provision should have been complied with in order that Mahadeo Pershad and Nageshur be treated as attesting witnesses. This line of argument therefore cannot help Gangotri.”

Mr. Sarin submitted that thus simply because the signatures of DWs1 and 2 appeared at the bottom of the will set up by the appellant, that did not fulfil the condition stipulated in Section 68(c) of the Act of 1925.

38. Learned senior counsel next referred to a judgment of the Supreme Court in **H. Venkatachala Iyengar v. B. N. Thimmajamma and others** AIR 1959 SC 443, wherein it was held that the burden of proof of the will is wholly on the propounder thereof and it is the duty of the Court to ascertain the true state of affairs and intention of the testator.

Mr. Sarin then submitted that if the propounder of the will helps in its execution, that itself is a suspicious circumstance. Thus, he submitted that undoubtedly with the first legal representative of the original appellant, i.e. present appellant no.1, having admitted to his presence and that of his mother at the time when the will was executed, the document became wholly suspicious.

39. Learned counsel next referred to the testimony of DW1, as noticed by the courts below, to the effect that a rough draft was prepared and the grand-son of the executor (i.e. present appellant no.1 Onkar Nath Mishra), had got the will typed out in English and Punjabi, on the basis of that rough draft.

On the other hand, appellant no.1, i.e. Onkar Nath Mishra, as DW3, did not say so that he had got it typed, as noticed by the learned first

appellate Court in paragraph 13 of its judgment, further noticing that the witness did not know whether he got it typed in Punjabi or English.

40. Mr. Sarin next submitted that it was never established that an application was ever moved for calling the Registrar home and in fact, the person shown to be the 3rd witness, i.e. Ved Vyas, Advocate, never testified as a witness to clarify with regard to the fact as to whether it was registered even on 20.11.1989, either at the home of the testator, or elsewhere.

41. Learned senior counsel next submitted that with no counter-claim filed for a half share of the suit property, by defendant no.1, to the plaintiffs' claim for a 1/4th share thereof, in any case the appellants' share in the property cannot be allowed in terms of the will set up.

Lastly, in relation to the will, Mr. Sarin submitted that appellant-defendant no.1 having remained silent for 13 years in respect of the will, and only having stated that such a will was in existence, since 1989, for the first time in her written statement, that itself was a suspicious enough circumstance to reject the will. In that context, he cited a judgment of the Supreme Court in **Jaswant Kaur v. Amrit Kaur and others AIR 1977 SC 74**, wherein while discarding the will in question, it was held, as one of the reasons for discarding it, that it was un-understandable why the document was kept as a closely guarded secret for over 2½ years after the testators' deaths. (Reference paragraph 14 of the judgment).

42. Finally, on the application filed for leading additional evidence, under Order 41 Rule 27 CPC, Mr. Sarin submitted that the documents now sought to be led by way of evidence at the stage of second appeal, was only to fill in a lacuna by the present appellants and consequently, the application cannot be allowed at this stage.

On that issue, learned senior counsel cited a judgment of the Supreme Court in **State of U.P. v. Manbodhan Lal Srivastava** AIR 1957 SC 912. In that case, additional evidence was sought to be led before the Supreme Court itself, in two cross-appeals arising out of a common judgment of the Allahabad High Court in two writ petitions filed before it. Thus the Supreme Court was actually the 'first Court of appeal' in that case.

It was held by the Apex Court that when there had been sufficient opportunity for the State Government to place all the relevant material before the High Court itself, there was no reason that the said material should be accepted as additional evidence at the appellate stage.

43. With arguments of learned counsel for respondents no.6 and 7 concluded, Mr. Batta, learned counsel for the appellant, by way of rebuttal, first referred to the judgment of the learned Civil Judge, to reiterate that respondents no.6 and 7 had, in fact, no locus to contest this appeal, virtually as the sole respondents, when they had been proceeded against *ex parte* even before the trial Court.

He next referred to the judgment of the learned first appellate Court, wherein again, other than respondent no.1, i.e. plaintiff Sarla Mukherjee, the only contesting respondent to the appeal filed by the present appellant, was defendant no.2, Satish Kumar Mehta, son of a pre-deceased daughter of Shri Dwarka Nath Mishra, with all the other respondents, including respondents no.6 and 7, shown to be, in fact, “proforma respondents”.

44. Mr. Batta next pointed to the will, Ex.D1, to submit that it had actually been signed in the presence of witnesses and as such, contrary to what learned senior counsel had argued, it had not been signed by them at

some later stage, even as per the recital in the last paragraph of the document.

Mr. Batta then, while reiterating the reasons for exclusion of the deceased daughters from the will, submitted that one daughter, Ram Dulari, had died in the year 1986, i.e. six years before the testator and the other Swarn Kumari had also died in the year 1986, with obviously their children not being much in touch with their grand-father, so as to kindle a natural desire in him to bequeath something to them from his estate.

He further submitted in this regard that Swarn Kumari was married in Delhi, as was respondent no.1- plaintiff, with one daughter married in Amritsar. Thus, with only Ram Piari living in Jalandhar, he gave her a life interest in the property, after which her progeny, and the other surviving daughter, were to get the benefit of the estate equally.

Mr. Batta also again referred to the testimony of the Sub-Registrar, DW6, to submit that it was an elaborate testimony with regard to registration of the will in the presence of the first two witnesses and Shri Ved Vyas, Advocate, who identified those witnesses. Hence, he submitted that there was actually no suspicious circumstance towards the execution of the will, and as such, the judgments of the learned Courts below were wholly perverse in that regard, with the Courts having gone wholly against natural human behaviour, in respect of a person bequeathing his property to his living daughters, who were obviously of some service to him in his old age.

Learned senior counsel also cited a judgment of the Supreme Court in **Bhura and others v. Kashi Ram (1994) 2 SCC 111**, wherein it was held that:-

“We have perused the entire will and we find that even though it is not happily worded it does bring out his intention. It is settled law that the courts must make all efforts to determine the real

intention of the testator by reading the will as a whole and giving effect to the intentions of the testator. Construction, which would advance the intention of the testator has to be preferred and as far as possible effect is required to be given to every disposition contained in the will, unless the law prevents such effect being given to it.”

45. Having considered the detailed arguments advanced before this Court, as also the judgments of the Courts below, as pointed to by both learned counsel, first of all this Court needs to go into the issue whether at this stage of a second appeal, the application filed by the appellant (now through her LRs) under Order 41 Rule 27 CPC, for leading additional evidence, should be allowed or not.

It needs to be reiterated that before the first appellate Court also an application to lead additional evidence had been filed, but not in respect of the documents now sought to be led by way of additional evidence.

That application was to place on record information received under the RTI Act from the Sub-Registrar, to the effect that an amount of Rs.100/- was deposited for the visit of the Sub-Registrar to register the will of the testator at his home.

Presently, as already noticed, the five documents sought to be led by way of additional evidence are:-

- i) An affidavit filed by the Sub-Registrar before the State Information Commission, pertaining to information sought in the year 2010, by the present first appellant (Onkar Nath Mishra) relating to the will dated 26.09.1989;
- ii) The report of the forensic expert pertaining to the signatures of the testator, Shri Dwarka Nath Mishra, on the will, compared with signatures claimed to be his standard signatures on certain documents;

- iii) A document stated to be a will dated 12.03.1980, also stated to have been executed by Shri Dwarka Nath Mishra;
- iv) A sale deed dated 18.07.1952 pertaining to purchase of the suit property, on which the signatures of Shri Dwarka Nath Mishra are stated to be present; and
- v) An Order Form pertaining to saving bank account no.1422-A, stated to be that of the late Shri Dwarka Nath Mishra, also upon which his signatures are stated to be present.

The last three of the aforesaid documents are wished to be led by way of additional evidence in respect of the signatures of Shri Dwarka Nath Mishra on these documents, to be accepted as his standard signatures, which were taken to be such, by the forensic expert, while comparing them with the signatures of Shri Dwarka Nath Mishra on the will in question, on both, its English and Gurmukhi versions.

46. Order 41 Rule 27 CPC reads as under:-

“27. Production of additional evidence in Appellate Court.-

(1) The parties to an appeal shall not be entitled to produce additional evidence, whether oral or documentary, in the Appellate Court. But if—

(a) the court from whose decree the appeal is preferred has refused to admit evidence which ought to have been admitted, or

[(aa) the party seeking to produce additional evidence, establishes that notwithstanding the exercise of due diligence, such evidence was not within his knowledge or could not, after the exercise of due diligence, be produced by him at the time when the decree appealed against was passed, or]

(b) the Appellate Court requires any document to be produced or any witness to be examined to enable it to

pronounce judgment, or for any other substantial cause, the Appellate Court may allow such evidence or document to be produced, or witness to be examined.

(2) Whenever additional evidence is allowed to be produced, by an Appellate Court, the court shall record the reason for its admission.”

Though clauses (a) and (aa) restrict acceptance of additional evidence in an appeal, to the two situations given therein, however, sub-clause (b) allows the appellate Court to take additional evidence virtually in all circumstances, in order to pronounce judgment.

Even so, the judgment of the Supreme Court in N. Kamalam v. Ayyasamy (2001) 7 SCC 503 can be referred to, wherein their Lordships, cited from Municipal Corporation of Greater Bombay v. Lala Pancham (AIR 1965 SC 1008), as follows:-

“This provision does not entitle the High Court to let in fresh evidence at the appellate stage where even without such evidence it can pronounce judgment in a case. It does not entitle the appellate court to let in fresh evidence only for the purpose of pronouncing judgment in a particular way. In other words, it is only for removing a lacuna in the evidence that the appellate court is empowered to admit additional evidence. The High Court does not say that there is any such lacuna in this case. On the other hand what it says is that certain documentary evidence on record supports ‘in a large measure’ the plaintiffs’ contention about fraud and mala fides. We shall deal with these documents presently but before that we must point out that the power under clause (b) of sub-rule (1) of Rule 27 cannot be exercised for adding to the evidence already on record except upon one of the grounds specified in the provision.”

Thus, this Court is to see as to whether, even *de hors* the

additional evidence sought to be led before this Court, it can come to a conclusion as to whether or not the judgments of the Courts below are erroneous or are to be upheld.

In this regard, it needs to be stated that there are actually only two main documents essentially which the present appellants wish to lead by way of additional evidence. The first is the affidavit of the Sub-Registrar before the State Information Commission, obviously to show that they had been trying for a long time to get information with regard to the will of Shri Dwarka Nath Mishra, specifically the application filed to get the will registered at his residence, and that it was only because the said application was never given to them, it having been destroyed as per the aforesaid affidavit, that it could not be led by way of evidence before the lower Courts.

The said affidavit is seen to be dated 16.09.2011 and refers to the first application filed under the RTI by the present first appellant (Onkar Nath Mishra) on 17.09.2010.

The second document that is sought to be actually relied upon, is the report of the forensic expert dated 23.08.2013, stating that the signatures of Shri Dwarka Nath Mishra on the two versions of the wills, i.e. one in English and the other in Punjabi, and those on the documents which carried what was stated to be his standard signatures, match each other.

The remaining three documents are those documents, as already noticed earlier, from which the standard signatures were accepted by the expert.

47. The first thing which needs to be noticed by this Court is that the affidavit of the Sub-Registrar dated 16.09.2011, relates to the period when the first appeal of the present appellant/their mother (defendant no.1) was

pending before the lower appellate Court. Even the date on which the first application was filed, seeking information with regard to the application filed in the Registrars' office, for getting the will registered at Shri Dwarka Nath Mishras' residence, is an application dated 17.09.2010, which is also after the judgment and decree of the learned trial Court had been delivered. Thus, the first application filed under the RTI Act was also to try and counter the reasoning given by the trial Court to the effect that the will was surrounded by suspicious circumstances, one such circumstance being that no application seeking to bring the Registrar home to register the will, was produced, and as such, even the testimony of the Sub-Registrar himself, to the effect that he had registered the will at the residence of Shri Dwarka Nath Mishra, was not creditworthy.

The report of the forensic expert is obviously again to counter the finding of the trial Court to the effect that the three signatures of Shri Dwarka Nath Mishra do not tally with each other *inter se*, the three signatures, as referred to in the judgment of the learned Civil Judge (paragraph 12 thereof), being those on Ex.D1 (the will in English), on the wills' Punjabi translation (Ex.D2) and the signatures on the endorsement behind the English version, pertaining to the registration of the will. (As a matter of fact, the signatures of the late Shri Dwarka Nath Mishra are also seen beneath the endorsement behind the Punjabi version of the will, that too having been shown to be registered by the Sub-Registrar under his stamp and signature; however, the learned trial Court, even while discussing that the testators' signatures were available on the endorsements behind both versions of the will, as also beneath the recitals in the actual wills, has eventually stated that the three signatures do not *inter se* tally with each other).

48. It is to be stated here that as regards the forensic experts' report, obviously it does not constitute irrefutable evidence to the effect that the signatures of Shri Dwarka Nath Mishra are genuine. Whether to accept that report or not, even if it is allowed to be led by way of evidence, would eventually be up to the Court, seeing that very often such reports serve the need of the person who has sought the advise of the learned expert.

That apart, to hold that the signatures are genuine, the old documents which are alleged to be containing the actual signatures of the late Shri Dwarka Nath Mishra, i.e. what is stated to be his Order Form seeking to withdraw Rs.1400/- from his bank account, dated 14.10.1999, the sale deed by which the suit property was bought on 22.07.1952, and what is stated to be his previous will dated 12.03.1980, would also need to be scrutinized, if allowed by way of additional evidence, to determine their authenticity, with witnesses to be produced, who would support the genuineness of those documents.

49. This Court does not, in fact, feel the necessity to allow additional evidence of such kind to be led at the stage of second appeal, because even *de hors* such evidence, it would not hamper pronouncement of judgment, on the aspect of whether or not the will has been proved, firstly in terms of Section 63 (c) of the Indian Succession Act and secondly, whether or not it is surrounded by suspicious circumstances.

Hence, as regards the application filed by the appellant seeking to lead additional evidence in the form of the aforesaid documents, i.e. Civil Miscellaneous Application No.10114-C of 2013, I see no ground to entertain the application, which is therefore dismissed.

50. Coming then to the main issues in this appeal; first of course, it is

a matter of some surprise that even after the late appellant-defendant no.1 Smt. Ram Piari filed her written statement to the suit, to the effect that there was a will executed by Shri Dwarka Nath Mishra, bequeathing half the property in favour of the plaintiff and half in favour of Smt. Ram Piari, the plaintiff (Sarla Mukherjee) did not withdraw the suit in terms of the stand taken in the written statement, by which she was given double the amount of the property than she had claimed in the suit. That is to say, in the suit she had laid claim to $\frac{1}{4}^{\text{th}}$ of the suit property, being one of the 4 daughters of Shri Dwarka Nath Mishra, whereas as per the will set up by defendant no.1 in her written statement, the plaintiff would get half the suit property (instead of $\frac{1}{4}^{\text{th}}$).

51. That having been said, even though before this Court, the stand of learned counsel for respondent no.1 was that eventually she is not now concerned with the outcome of the appeal, she not standing to lose either ways, she has not withdrawn her suit accepting the stand taken in the written statement. That could have been done easily by her, with no counter claim filed by those who are now contesting this appeal, i.e. respondents no.6 and 7 (son and daughter of the 4th sister of the plaintiff).

Thus, with the decrees of the Courts below standing as they are, this Court now is to examine as to whether, firstly, the will stood proved in terms of the Indian Succession Act and the Evidence Act, and then, even if strictly in terms thereof it is seen to have been not disproved, would it still be acceptable as a genuine will, free of all suspicion, so as to reverse the findings of the learned Courts below.

52. Coming first to Section 63 of the Indian Succession Act and Sections 64 and 68 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

“64. Proof of documents by primary evidence.- Documents must be proved by primary evidence except in the cases hereinafter mentioned.”

XXXXX

XXXXX

XXXXX

“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.]”

Thus, as regards Section 63 (a) of the Act of 1925, the testator is required to sign or affix his mark on the will or direct some other person to do so on his behalf.

In the present case, the signatures being genuine or not being a separate issue, at least what is purported to be the signature of the testator, is present on both, the English and the Punjabi versions of the will. Thus, the said provision would stand complied with, if the signature is genuine.

As regards Section 63(b), it requires that the signature or mark of the testator, or of such other person who has signed/affixed his mark on his direction, shall be so affixed at such a place on the will, so as to appear that the testator actually was giving effect to the recital in the will.

In this context, it needs to be said that as regards the English version of the will, the word “Executor” does appear a little distant from the place where the recital in the will ends and in fact, the testator instead of signing above it, is seen to have signed below it (again presuming that the signature is his).

However, in the Punjabi version of the will, there is no translation of the word “Executor” given, but what is stated to be the testators' signature, does appear almost immediately below the last line of the contents

of the will. Hence, at least as per the Punjabi version, the condition set out in clause (b) of Section 63 stands fulfilled and by extension, the little distance from the last line of the will in English, would also not then be unacceptable. It needs to be noticed here that though it is appropriate to authenticate a will by signing it on each page (by the testator), however, there is no statutory requirement for that.

Coming then to clause (c) of Section 63 of the Act, the will in English as well as Punjabi, is seen to be attested by three witnesses, i.e. H.S. Sandhu, Harjinder Singh Sandhu and Ved Vyas, Advocate. (However, with the word “Sandhu” missing in the case of the second attesting witness, from the English version of the will).

The last two paragraphs of the will read to say (in the first person qua the testator), that he had put his signatures on the will in the presence of the witnesses on the 26th day of September, 1989, at Jalandhar city and that it has been signed by him in the presence of the witnesses, who are present at the same time. Hence, as regards the recital in the will having been signed by the testator in the presence of each of the witnesses, and each of the witnesses having signed it in the presence of the testator, the conditions stipulated in the aforesaid clause stand fulfilled.

It may be stated here that clause (c) does not actually require that the testator must sign in the presence of witnesses, or that the witnesses must sign in each others' presence. All that is required is that even if the testator has not signed in their presence, he must acknowledge to each of them that he has signed the will, or has authorised some other person to sign it on his behalf and that such person has signed it (or has affixed his mark thereto).

However, in the present case, as per the recital contained in the

will, the testator is shown to have signed in the presence of witnesses and they in his. Therefore, that issue does not arise.

53. Coming to whether the document, i.e. the will, was proved as primary evidence in terms of Section 64 of the Indian Evidence Act. Though in the record of the trial Court, only the certified copies thereof were placed on record, however, it is not recorded anywhere in the judgment of that court, that the original will was not actually produced in Court and, in fact, as pointed out by learned senior counsel appearing for the appellant, DW1, i.e. H.S. Sandhu, is seen to have testified that he had seen the original will in the Court as also the certified copy of it, Ex.D1. He also testified to the effect that he had seen the Punjabi translation of the will as was registered on 20.11.1989 and its certified copy, Ex.D2. He further testified that the originals of both these documents bear his signatures as a witness.

Similarly, DW2 also testified to the same effect in the very same words, in his examination-in-chief (by way of affidavit in the case of both the witnesses).

In his cross-examination, this witness has not stated anywhere that he had not seen the original will, though he did state that the rough notes that were made in Punjabi, before the will was typed in Punjabi and later on in English, were seen by him on the date of the execution of the will only, but saying that he did not know the date when the notes were actually made.

Further, as regards DW2, in fact, it needs to be noticed that the trial Court has wholly misread his statement made in cross-examination. That Court recorded a finding that DW2 had deposed that he had not seen the original will but only the certified copy thereof. The cross-examination of DW2, in that context, reads as follows:-

“The affidavit given by me as of my evidence was got written myself. I made reference in my affidavit regarding the will where I put my signature as witness. I had seen the original will in the Judl file on the day of filing the affidavit. I have seen the Judl file original will is not where volunteer there is certified copy. I have not seen any other original document of will except certified copy.”

Hence, what this witness stated was that he had seen the original will in the judicial file on the date that he had executed his affidavit (i.e. by way of examination-in-chief); but thereafter, he had not seen the original will but only its certified copy.

Therefore, to that extent, the finding of the learned Courts below is wholly erroneous.

Consequently, as regards what is purported to be the original will, it was duly proved at least in terms of Section 64 of the Evidence Act, before the trial Court.

Thus, with the document that is stated to be the original will, duly having been produced before the learned trial Court, Section 65 of the Evidence Act would not apply.

54. Coming next as to whether the document purported to be the will was duly proved to have been executed in terms of Section 68 of that Act.

The said provision provides that a document that is by law required to be attested, cannot be used in evidence until one attesting witness has been called for the purpose of execution of the will, if such witness is alive and capable of giving evidence. This is mandatory in the case of a will, even if the will is a registered document.

In the present case, two of the three persons who were shown to

be attesting witnesses to the document, as per the document itself, duly testified as DWs1 and 2, to the effect that the will had been executed by the late Shri Dwarka Nath Mishra in their presence on 26.09.1989, with it having been read over to him also in their presence, and that he also signed it in their presence and they too signed it in his presence.

55. Consequently, as regards proving the document itself, i.e. the English and Punjabi versions of the will set up, as were led in evidence as Exs. D1 and D2 respectively, the documents are seen to have been duly proved in terms of Section 63 of the Indian Succession Act and Sections 64 and 68 of the Indian Evidence Act.

As such, the first and second questions of law framed in this appeal, are answered in the affirmative, in favour of the appellant, strictly as regards the document which was stated to be the will of the testator.

56. However, the question then is that with the 'technical aspect' of the provisions by which a will can be proved, having been held to be in favour of the document having been proved, can it still be said to be a will not surrounded by suspicious circumstances, so as to finally accept it as a genuine will executed by the late Shri Dwarka Nath Mishra?

57. In this regard, a very important aspect is that the Sub-Registrar himself testified to the effect that he had gone to the house of the testator to register it. His clerk testified to the same effect but admitted that for a Sub-Registrar to do so, an application had to be moved before the Registrar. That application was never led by way of evidence and in fact, though the present appellants have tried to lead additional evidence to show that they had tried to obtain the said application, firstly, all such efforts to try and obtain it were made after the decree of the learned Civil Judge had been passed and

secondly, even if that is for the reason that at an earlier point of time the application itself was not considered a necessary document to be led by way of evidence, with the Sub-Registrar himself having deposed that he had registered it, and thus the suspicion in the mind of the Courts below on account of that fact, is to be discarded, on the ground that though such application was not on record earlier but the appellant was willing to lead evidence to the effect that a fee was paid, to bring the Registrar home, as per the application filed under Order 41 Rule 27 CPC before the first appellate Court, the other suspicious circumstances referred to by the courts below, to discard the will, need to be looked at.

58. Learned counsel for respondents no.6 and 7 pointed to the fact that though the typed recital in the second last paragraph of the will (both English and Punjabi versions thereof), gives the date of execution as September 26th, 1989, that date is not coming at any place, in either the English or the Punjabi version, alongwith the signatures or even above the signatures of the witnesses or the testator. The only date coming written immediately above the signatures of the witnesses, as also the testator, is “20/11/89”. The said date has been written in hand at two places in both the wills, (English and Punjabi versions), i.e. firstly immediately below the recital contained in the will and thereafter, immediately beneath the signatures of the 3rd witness, Shri Ved Vyas, Advocate.

Thus, though the typed part of the will shows it to be executed on September 26, 1989, the hand-written date is 20.11.89. One possibility is that the will was actually signed on the 26th day of November by at least the testator and was also signed in his presence by the first two witnesses, i.e. Harjinder Singh and Harwinder Singh Sandhu. In fact, that is what had been

argued by Mr. Batta, learned senior counsel for the appellant, that it was only natural that the witnesses who signed at the first and the second place, signed it on the same date as is given in the typed part, i.e. September 26, 1989 and the third witness, i.e. Shri Ved Vyas, was actually a witness only at the time of the registration of the will on 20.11.1989 and he, both beneath his name and immediately below the will, wrote that date (20/11/89); though correctly he should not have done so below the recital of the will.

Though that contention is not otherwise unbelievable, with the two witnesses who testified in Court having deposed that they had signed in the presence of the testator, however, as per Mr. Sarin, what lends a doubt to that argument is the fact that DW1, Harjinder Singh, in his cross-examination, stated that when the will was executed, one lawyer was also present, whose name he does not know and that the lawyer was also accompanied by a client of his

In the affidavit of this witness, DW1, (that was submitted as his examination-in-chief), he has stated that the will was executed on 26.09.1989 by Shri Dwarka Nath Mishra, which was read over to him in the presence of this witness as also the other attesting witness, i.e. Harwinder Singh Sandhu (DW2). Thereafter, as per the said affidavit, it was got registered at the residence of the testator, also in the presence of the first two attesting witnesses and in the presence of Shri Ved Vyas, Advocate, on 20.11.89 and that they had all signed the will in English, as also its Punjabi translation. He also identified the original will and its certified copy as Ex.D1 and its Punjabi version and its certified copy as Ex.D2.

The affidavit by way of examination-in-chief, of DW2, Harwinder Singh Sandhu, being almost identical to that of his father, DW1, it

is seen that in his cross-examination, this witness was not cross-examined as regards the time and place of the execution of the will, though, as already noticed, he stated that he had seen the original will on the judicial file on the date that he had filed his affidavit, but thereafter it was not available on the judicial file, though its certified copy was available.

Be that so, as already held, Section 63(c) of the Act of 1925 does not specifically require that the testator must sign in the presence of the witnesses, only that the testator must acknowledge to the witnesses his signature or mark on the will and thereafter, at least two witnesses are required to sign the will in the presence of the testator, though even both witnesses need not sign it at the same time, as long as each has signed in the presence of the testator, after the testator has acknowledged that the signature or mark on the will is his own or that of a person who has so affixed it on his direction.

59. Hence, the condition stipulated in Section 63(c) of the Indian Succession Act, stands fulfilled, as already held, with the will propounded in favour of defendant no.1 and the plaintiff, seen to be signed by three witnesses, i.e. more than two witnesses, two of whom testified that they had signed it in the presence of the testator and that the testator had also signed it in their presence (as per the affidavits of both DWs 1 and 2, led by way of their examination-in-chief).

Therefore, even as regards the different dates, i.e. September 26, 1989 and 20.11.1989, it is very plausible that having been executed on 26th of September, 1989, but having been registered on the 20th of November of that year, the latter date was also written in hand on the document.

60. Looking next at the doubt with regard to the difference in the testators' signatures, as found by the learned Courts below.

Though now a report of a handwriting expert was sought to be led by way of additional evidence, which application has been rejected by this Court, it must be stated that though, to the naked eye, the signatures of the testator beneath the endorsement of the will in its English version, i.e. behind the first page of Ex.D1, (with the endorsement being Exs. DW6/2 and DW4/2), is seen to be matching the signatures on the endorsement behind the first page of the Punjabi version of the will (that endorsement being Ex.DW6/3); however, there is a certain discrepancy even there, and definitely there is some discrepancy between the signatures beneath the endorsement in the English version and the signature of the executor on that version of the will itself.

It also needs to be noticed that the signatures beneath the endorsement are slightly shaky, whereas the signature below the word "Executor", on the English version, is not seen to be so. The signatures of the testator beneath the Punjabi version of the will and beneath his endorsement behind the first page, in that respect are more akin to the signatures beneath the endorsement on the back of the first page of the English version, though of course not seen to be identical, inasmuch as, the loop beneath, in all three cases, is slightly different, which of course, could possibly be due to the minor discrepancy that occurs in the same persons' signatures at any point of time.

Therefore, this Court would even overlook even some slight discrepancy in signatures, putting it to the fact that very rarely are two signatures of the same person also wholly and absolutely identical, as long as

most parts of such signatures are largely matching, subject of course to a handwriting expert giving good reasons to say that the signatures are different, and such expert not being liable to be disbelieved for any reason.

61. However, even accepting the signatures of the testator to be matching, simply assigning the differences therein to be natural, especially in view of the advanced age of the testator, there is yet another very important reason which would militate against this Court accepting the will to have been executed in the manner that it was purported to have been executed.

That is the fact that the will never saw the light of day for a period of 13 years after the death of Shri Dwarka Nath Mishra, till the suit in the current *lis* was instituted by respondent no.1 herein, on 20.11.2002. In reply to the said suit, in her written statement dated 30.10.2003, i.e. 13 years after Shri Dwarka Nath Mishras' death, defendant no.1 came out for the first time stating that a will had been executed by him in favour of her and one sister of hers (the plaintiff), to the exclusion of the legal heirs of the pre-deceased sisters.

62. Two possible inferences can be drawn from the aforesaid concealment of the will for 13 years. One, that defendant no.1 and possibly her children, being resident of Jalandhar, wished to retain the entire property for themselves, with no one having agitated for it for 12 years, and therefore they did not disclose that half of it had been bequeathed by Shri Dwarka Nath Mishra in favour of the plaintiff, though such bequeathment would operate only after the death of defendant no.1, i.e. Ram Piari. (As per the will set up, Smt. Ram Piari, was given the right to occupy the whole house for the period of her life, with even the right to rent it out or sell any part given to her. But after her death, half the property would go to Smt. Sarla Mukhrejee or her

heirs, with the heirs of Ram Piari succeeding to the other half).

Thus, possibly it was for the reason that defendant no.1 and/or her children did not wish to part with any part of the property, that they did not disclose the will till the plaintiff actually laid a claim to 1/4th of such property, also seeking an equal share for the legal heirs of the deceased sisters.

63. The second, slightly stretched out reason could be, that seeing the possibility that a sole heir shown in the will, to the exclusion of all other daughters/their legal heirs, may have been a very suspicious circumstance, the will was set up to try and appease the sister who had laid claim to 1/4th of the property, with a half share instead, still retaining a half share for the sister who was actually in occupation of the house. In that case, naturally, those who testified in favour of the will would have to be held to be in connivance with the beneficiary of a “set up” will.

64. Either of the two situations can only be conjectured at by this Court in the circumstances, but with the document not having been produced for 13 years after the death of Shri Dwarka Nath Mishra, the authenticity of the will gets completely undermined, and it therefore becomes a wholly suspicious document.

Consequently, it must be stated that this Court would otherwise have not disbelieved the will, despite even the slight discrepancies in the signatures of the testator and the different dates given on the document, as it could easily have been executed on September 26, 1989 and registered on 20.11.1989, with the latter date also hand-written on the document, in view of the fact that it was actually registered on 20.11.1989. However, the document not having been produced for 13 years after the death of the person who is

stated to have executed it, i.e. the purported testator, then despite two persons stated to be the attesting witnesses having testified in its favour, alongwith a Sub-Registrar who is stated to have registered the will, this Court would consider the delay a very suspicious circumstance to accept the will to have been truly executed by the late Dwarka Nath Mishra.

What Mr. Batta has said with regard to a person bequeathing his property to the only two living children, with one of them serving him on a daily basis, on account of being in the same city, and the other visiting him occasionally, with the children of the other daughters not being anywhere around, is not an unsound argument, but the concealment of the will for 13 years is wholly illogical and therefore, even if such concealment was due to initial greed for the whole property, in the opinion of this Court, that does make the will a suspicious document, not authentic enough to exclude all other natural heirs from the property.

65. For the aforesaid reason, even while disagreeing with the other reasons given by the Courts below, I see no ground to reverse the decrees of those Courts, and therefore, this appeal is dismissed, with costs of Rs.5000/-.

March 8, 2017
nitin/dinesh

(AMOL RATTAN SINGH)
JUDGE

Whether speaking/reasoned	Yes
Whether Reportable	Yes