

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

**RSA No.6237 of 2014 (O&M)**

**Date of Decision: 05.07.2017**

**Surender Kumar**

**...Appellant**

**Vs.**

**Dr. Chander Mohan and another**

**...Respondents**

**CORAM: HON'BLE MR. JUSTICE AMOL RATTAN SINGH**

Present:- Mr. S.S.Dinapur, Advocate  
for the appellant.

Mr. M.G.Bagga, Advocate,  
for the respondents.

**Amol Rattan Singh, J.**

This is the second appeal of the first defendant in a suit filed by his brother, seeking a declaration that he is the owner of the suit property to the extent of a 1/3<sup>rd</sup> share therein, on the basis of the will of their father dated 12.01.1983 and that after such declaration, he be given possession of his share of the suit property, by way of a partition thereof. The suit property is stated to be House no.2821, Iqbal Ganj Road, Sadar Bazar, Ambala Cantt.

The second defendant in the suit was the 3<sup>rd</sup> brother of the plaintiff and the present appellant, with the said brother having taken a stand identical to that of the plaintiff.

Hence, even the first appeal filed against the judgment and decree of the learned Civil Judge (Junior Division), Ambala, in favour of

the plaintiff, was challenged only by the present appellant-defendant no.1, impleading the second defendant as respondent no.2 in that appeal, as also in the present second appeal.

2. As per the respondent-plaintiff (hereinafter to be referred to as the plaintiff), the father of the parties, i.e. the late Shri Krishan Gopal, was residing with his family consisting of the mother of the parties, three brothers who are the parties to the lis and their sisters, after which all the children of Shri Krishan Gopal got married, with the plaintiff and the second defendant being posted to different places, being in service, and the present appellant continuing to reside in the house with Shri Krishan Gopal and his wife, i.e. the mother of the parties, Smt. Vidya Wanti.

3. As per the plaintiffs' case, the aforesaid will was executed by Shri Krishan Gopal on 12.01.1983, attested by Shri Mahender Singh and Shri Inderjit Singh, scribed by Shri Makhan Lal, deed-writer.

It was contended that vide his last testament, Shri Krishan Gopal bequeathed the said house firstly to his wife, Smt. Vidya Wanti and upon her death, to his three sons, i.e. the plaintiff and two defendants, in equal shares, with no share given to the daughters.

After Shri Krishan Gopal, Smt. Vidya Wanti continued to reside in the house alongwith the present appellant, with the plaintiff and the second defendant visiting their mother and staying in the house after short intervals.

Smt. Vidya Wanti died on 09.08.1996, after which the present appellant continued residing in the house, with the names of Shri Krishan Gopal and Smt. Vidya Wanti still existing in the record of rights (jamabandi) maintained by the Municipal Council, Ambala Sadar, but as

per the plaintiff actually it was the joint property of the plaintiff and the defendants.

4. After retirement from service, the plaintiff is contended to have asked the present appellant-defendant no.1 to demarcate the property in three parts so as to enable him to put it to use as he was interested in living in his fathers' house, but the appellant defendant no.1 refused to do so, despite several requests from his elder brother, i.e. the plaintiff.

Consequently, a notice is stated to have been served by the plaintiff upon the present appellant on 23.04.2007, asking him to demarcate the plaintiffs' 1/3<sup>rd</sup> share in the house as per the wishes of their father, but even on receipt of the notice on 05.05.2007, the appellant did not do the needful.

5. Lastly, it was contended in the suit that a part of the suit property was under the tenancy of different tenants, with the appellant herein collecting the rent from all of them, including the share of the plaintiff.

Therefore, it was further averred in the plaint that the appellant-defendant no.1 was also liable to give a rendition of accounts in respect of the rent, after the death of Smt. Vidya Wanti, i.e. the mother of the parties.

On the aforesaid averments, the suit came to be instituted by respondent no.1 herein, on 12.09.2008.

6. Upon notice given to the defendants, the present appellant-defendant no.1 filed his written statement pleading that the suit was not maintainable, being bad for non-joinder of necessary parties as also it seeking partial partition of the total estate of Shri Krishan Gopal and Smt.

Vidya Wanti.

On merits, it was averred that no such will as alleged had ever been executed by Shri Krishan Gopal and the copy of the will tendered by the plaintiff was a fabricated document and it did not confer any right on the plaintiff to claim a 1/3<sup>rd</sup> share in the estate of the parents of the parties.

It was further averred that neither the plaintiff nor the second defendant ever visited the house after their marriage and employment and in fact, it was only the present appellant-defendant no.1 who was supporting and looking after his parents and that, further, a family settlement had been arrived at, in which the present appellant had been given the house in question. He also contended that after the death of Shri Krishan Gopal, the plaintiff continued to remain in possession of the property given to him in the family settlement, to the exclusion of other legal heirs of Krishan Gopal and Smt. Vidya Wanti.

7. It was next averred in the written statement that the present appellants' ownership of the suit property was further proved from the fact that he had been investing money in it and improving upon the property by way of construction and reconstruction thereof, to the knowledge of the other legal heirs of Shri Krishan Gopal.

As per the appellant, no request had ever been made to him for partition of property and in any case it being a compact unit, it could not be partitioned as claimed by the plaintiff.

8. Thereafter, the appellant is also shown in the judgments of the Courts below, to have contended in his written statement that if the family settlement is not proved, the plaintiff in any case would be entitled to only a 1/7<sup>th</sup> share in the property in question, i.e. alongwith his brothers and

sisters.

9. Lastly, on the issue of rendition of accounts, it was contended by the appellant that he was not liable to any such rendition, he being the owner of the suit property in his own right, but pleading in the alternative that if eventually it was held that rendition of accounts is due, then he would be entitled to adjustment of the total investment made by him in the suit property.

On the aforesaid averments, dismissal of the suit was prayed for.

10. In his written statement, the second defendant, respondent no.2 herein, admitted all the contents of the plaint and further stated that the will dated 12.01.1983 had been disclosed by Shri Krishan Gopal to his wife, Smt. Vidya Wanti, as also to the parties to the suit and that as per his said will, the house in question as also the moveable assets of their father, were all bequeathed first to their mother and after her death to the sons in equal share.

Further, defendant no.2 stated that a mutation was also sanctioned in the record of the Municipal Council on the strength of the said will and since then the name of Smt. Vidya Wanti was in existence in the record of rights maintained by the Municipal Council, Ambala Sadar.

Hence, it was further contended that the suit property was joint between the three parties to the lis till it was partitioned by metes and bounds and that the present appellant-defendant no.1 had been allowed to reside in the house only as a care taker till actual partition thereof.

11. A replication was filed by the plaintiff to the written statement of the present appellant, denying the contents thereof and further

stating that no family settlement ever took place and it was for that reason that the present appellant was half heartedly taking an alternative plea of the plaintiff having only a 1/7<sup>th</sup> share in the suit property.

It was also contended that the appellant had become dishonest and wanted to grab the share of the plaintiff and defendant no.2 because of his greed.

12. From the pleadings of the parties, the following issues were framed by the learned Civil Judge:-

- “1. Whether the plaintiff is entitled to suit for declaration as prayed for? OPP
2. Whether the suit of the plaintiff is bad for non-joinder of necessary parties? OPP
3. Whether the suit is not maintainable in the present form? OPP
4. Relief.”

13. In support of his suit, the plaintiff examined Bhushan Ahuja, House Tax Clerk of the Municipal Committee as PW1, Naresh Chander, the son of one Shri Harish Chand, Clerk to Shri Umesh Mittal, Advocate as PW2, the second defendant, Man Mohan as PW3, one Sarwan Singh son of Mohinder Singh (one of the attesting witness to the will) as PW4, and the plaintiff himself as PW5.

Other than the affidavits of the witnesses by way of their examination-in-chief, the following documents were exhibited by the plaintiff, as shown in the judgment of the learned Civil Judge:-

|                                                                                                                                                                                                   |             |
|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-------------|
| Letter dated 08.09.2009 from the office of M.C. Ambala Sadar about sanctioning of mutation in the name of Smt. Vidya Wanti on the dint of will executed by late Shri Krishan Gopal on 07.04.1993. | Ex.P1       |
| Certified copy of Will dated 12.01.1983 under the hand and seal of Executive Officer, M.C. Ambala Sadar on the basis of which the mutation was sanctioned on 07.04.1993.                          | Ex.P2       |
| Attested copy of House Tax Assessment Register issued by M.C. Ambala Sadar stating Smt. Vidya Wanti as owner of H.No.2821.                                                                        | Ex.P3       |
| Copy of letter of M.C. Ambala Sadar dated 21.04.2011 stating therein that no objection was ever received qua sanctioning of mutation on the dint of Will dated 12.01.1983.                        | Ex.P4       |
| Attested copy of Pass Book of Punjab National Bank, Timber Market, Ambala Cantt vide which joint account was opened.                                                                              | Ex.PW3/1    |
| Photocopy of death certificate of Krishan Gopal dated 05.12.1942 (sic)                                                                                                                            | Ex.PW5/1    |
| Photocopy of death certificate of Vidya Wanti dated 09.08.1995.                                                                                                                                   | Ex.PW5/2    |
| Legal Notice dated 23.04.2007                                                                                                                                                                     | Ex.PW5/3    |
| Postal receipt                                                                                                                                                                                    | Ex.PW5/4    |
| Acknowledgment duly signed by the defendant no.1                                                                                                                                                  | Ex.PW5/5    |
| Site plan of House no.2821                                                                                                                                                                        | Mark PW5/6” |

[Note:-It is to be noticed that in the judgment of the learned Civil Judge, the date of death as per the death certificate of Shri Krishan Gopal (Ex.PW5/1) is shown to be 05.12.1942. However, a perusal of the record of the evidence before that Court shows that it is 05.12.1992, which is obviously also the correct date as the parties to the *lis* are relying upon a will of Shri Krishan Gopal dated 12.01.1983.

Similarly, it is seen that against Ex.P1 in the said judgment, due to a typographical error, the date of the will of Shri Krishan Gopal is

shown to be 07.04.1993. However, again on Ex.P2, the date of the will is shown to be 12.01.1983.]

14. The present appellant-defendant no.1 examined himself as DW1, one Rajiv Kohli, a tenant in the suit property, as DW2, and one Chander Bhan, another tenant in the suit property, as DW3.

He also tendered the following documents in evidence:-

|                                           |                          |
|-------------------------------------------|--------------------------|
| Photocopy of Claim Form                   | Mark DW1/B               |
| Photocopy of Multi Benefit Deposit Scheme | Mark DW1/C & Mark DW1/D  |
| Photocopy of deposit Receipt              | Mark DW1/E & Mark DW1/F” |

15. On the crucial first issue, the learned Civil Judge found that though the original will had not been produced and only a certified copy thereof had been produced, the certified copy having been obtained from the Public Information Officer-cum-Executive Officer of the Municipal Council, Ambala Sadar, in fact, a mutation had been sanctioned in favour of Smt. Vidya Wanti on the basis of the said will, with the plaintiff and the second defendant unable to produce it because the original copy was handed over to defendant no.1 (the present appellant), he being the only local resident in Ambala, living in the suit property itself.

PW1, Bhushan Ahuja, House Tax Clerk in the Municipal Committee, had testified in respect of the municipal record brought by him, maintained in that office in the regular course of business, in which Ex.P3 was seen by the trial Court to be an attested copy of the house tax assessment register showing Vidya Wanti as the owner of the suit property.

It was found that Ex.P4 was a copy of the letter of the

Executive Officer of the Municipal Committee, dated 21.04.2011, stating therein that no objection was ever received qua sanctioning of the mutation on the basis of the will dated 12.01.1983. The mutation is stated to have been sanctioned on 07.04.1993, i.e. about 15 years prior to the institution of the suit, in the name of Smt. Vidyawanti, but the present appellant had kept totally silent with regard to the mutation sanctioned on the basis of the said will.

16. That Court further went on to hold, citing a judgment of the Supreme Court in **Meenakshi Ammal v. Chander Shekhar** AIR 2005 SC 52, that when a question arises as to whether a will is genuine or forged, the nature of the will should be looked at to see that it was a reasonable one. The learned Civil Judge then went on to hold that the terms contained in the will appeared to be natural and probable.

Thereafter, it was held that the plaintiff had produced the best evidence available to him to prove the will in terms of Section 69 of the Indian Evidence Act, 1872, in view of the fact that none of the two attesting witnesses, i.e. Mohinder Singh and Inderjit Singh, were available; Mohinder Singh having died and Inderjit Singh found to have shifted out of Ambala permanently about 20 years earlier. Thus, the plaintiff examined PW4 Sarwan Singh, the son of the late Mohinder Singh, who identified the signatures of his father (in Urdu), on the will Mark P-2.

This witness also testified that Inderjit Singh had shifted to Delhi about 20-22 years earlier.

17. It was next found by that Court that the plaintiff also examined PW2 Naresh Kumar, Clerk to Shri Umesh Mittal, Advocate, who deposed on oath that he knew Makhan Lal, deed-writer, and had got

several documents executed through him and was familiar with his hand-writing and that the will, Mark P-2, was actually in the hand writing of Makhan Lal, who died about 20 years earlier.

18. A contention having been raised on behalf of the present appellant that the plaintiff had not summoned the record of the Notary Public or the Notary himself, who would identify his signatures on the will (which was seen to be a notarized document, as per its certified copy Mark P-2), that contention was rejected by citing a judgment of this Court in **Banarsi Dass v. Maman Chand** AIR 1992 P&H 145, wherein it was held that when a true photo copy of an original document is produced, bearing the attestation of a Notary, it was not necessary to produce the Notary as a witness.

It was further found that the attestation itself showed that the document had been compared with the original. Yet further, it was seen that though summons were issued to the Notary, Avtar Singh, they had been received back with the report that he had died.

19. An objection was also raised before that Court that secondary evidence had been allowed to be led vide an order of the trial Court dated 11.11.2010, subject to the condition that the plaintiff would not only prove the existence of the will at the first instance, but also prove that it was in the possession of defendant no.1, failing which the application (seeking to lead secondary evidence), would be deemed to have been dismissed. It was, therefore, contended before the learned Civil Judge that it not having been proved that the document was actually with defendant no.1, the condition set out in the said order was not fulfilled and therefore, secondary evidence should not have been allowed to be led at all, in the

form of a photostat copy of the will set up by the plaintiff.

That argument was rejected by the Court on the ground that the plaintiff and the 3<sup>rd</sup> defendant had both testified that the original will was handed over to the present appellant as he was a local resident of Ambala Cantt. The relation between the parties at that time were found to have been cordial, even after the death of their parents, with the marriage of the daughter of the plaintiff having been solemnized in Ambala Cantt. in the year 2001, which was not denied by the present appellant.

The learned Court went on to record that as a matter of fact, it was the present appellant himself who was instrumental in getting the mutation sanctioned in favour of their mother in the records of the municipality in the year 1993.

Hence, the stand of the plaintiff and the second defendant that the original will was handed over to the appellant-defendant no.1, was accepted by that Court, further holding that he did not produce the same only to deny the rights of his two brothers.

20. The learned trial Court went on to hold that the appellant, contrary to his stand in his written statement, was not able to prove any family settlement by which the house in question came to his share, and in fact not even the date of the settlement had been stated in the written statement. Hence, with the plaintiff and defendant no.2 having denied the settlement and the present appellant not even having examined his sisters to prove the settlement, it was held that no such family settlement actually took place.

21. Thereafter, the learned Civil Judge went on to record a finding that the appellant-defendant no.1, as DW1, had admitted that there

were two shops running in the premises in question and that he had been receiving the rent thereof after the death of his mother. The tenancy was also admitted by the tenants who appeared as DWs2 and 3, further stating in their cross-examination that they had been paying rent @ of Rs.550/- per month to the present appellant, after the demise of his mother in 1995.

Accordingly, it was held that the present appellant was also liable to render accounts qua the total rental income of the house, from 1995 onwards, to the plaintiff.

22. Issue no.1 having been decided in favour of the plaintiff as above, holding him entitled to the declaration as prayed for, the second issue, of the suit being bad for non-joinder of necessary parties, was also decided in favour of the plaintiff, holding that since the will set up by the plaintiff and defendant no.2 had been accepted by the court, the daughters not having been given any right in the suit property by the said will, they were not necessary parties in the suit.

23. The 3<sup>rd</sup> issue is seen to have been taken by the learned trial court to be including the issue of partial partition, though that was not specifically stated in the issues framed, but has been discussed while considering the issue itself.

It was found that though the present appellant in his written statement had averred that a plot had also been left behind by his parents at Rohni, Delhi, which was in the possession of the second defendant, with FDRs and a locker also existing, the house in Rohni was owned and possessed by the second defendant, with him having paid all the installments for the same. A plot in Pachkula was found to have been purchased by the plaintiff out of his own funds, standing in the name of his

wife, Smt. Tirapta.

Therefore, holding that the will in question only pertained to the house that was subject matter of the suit, the suit itself was held to be not bad on account of any partial partition sought.

24. On the aforesaid findings, the suit of the plaintiff was decreed in his favour, by way of a preliminary decree entitling him to have the property partitioned to the extent of 1/3<sup>rd</sup>, by metes and bounds, also holding that the present appellant was liable to render accounts qua the rented income of the house.

25. In the first appeal filed by the present appellant against that judgment and decree, it is seen that the learned Additional District Judge, Ambala, after noticing the pleadings and issues framed, as also the evidence led by the parties to the *lis*, eventually came to the same conclusion, essentially on the same reasoning.

As regards the original will not having been produced, other than the reasoning given by the trial Court, of the mutation having been sanctioned in favour of the mother of the parties on 07.04.1993, on the basis of the will, it was noticed that a copy of the will was filed in the Municipal Committee itself and that the present appellant was fully aware of the same, he not having raised any objection with regard to the sanctioning of the mutation at any time thereafter, even though the plaintiff and defendant no.2 were not residing at Ambala and he himself was residing in the same house.

26. It was further noticed by the learned first appellate Court that in fact the present appellant-defendant no.1 had admitted that there was a joint account between him and his brothers, in which the rent of the two

shops existing on the premises, was deposited. Hence, it was held by that Court that the appellant was always aware about the “jointness of the property” and the three brothers having an equal right in it.

Ex.PW3/1 was found to be a document of the Punjab National Bank showing the plaintiff and the two defendants to being joint owners of the account number given in the document.

27. That Court also reiterated what had been found by the learned trial Court, that the appellant himself took the will to the Municipal Council to get the entries changed (in favour of his mother), he being a local resident but thereafter took a plea with regard to the non-existence of the will. It was further found that the certified copy of the will was delivered to the plaintiff from the Municipal Committee, stating therein that it was on that basis that the mutation had been sanctioned in the name of Smt. Vidya Wanti.

Consequently, it was held by the learned first appellate Court that the certified copy of the will was obtained by the plaintiff from the proper source and was duly proved by him by way of secondary evidence.

28. The record of the assessment register of the Municipal Council was also found to have been tendered in evidence, showing the property to be owned by the mother of the parties.

Further inference against the appellant was taken by the first appellate Court upon him having found to have acknowledged the legal notice served upon him, issued by the plaintiff, vide the acknowledgement Ex.PW5/5, but him not having replied to refute the contents thereof.

The factum of the hand writing of the scribe and the signatures of one of the attesting witnesses having been identified was also

noticed by that Court, and on the aforesaid reasoning it was held that the will of 1983, relied upon by the plaintiff, had been correctly held to be proved by the learned trial Court.

On the aforesaid findings, the first appeal of the present appellant was dismissed.

29. In this second appeal, notice was essentially issued on the contention of learned counsel for the appellant that the condition incorporated in the order of the trial Court dated 11.11.2010, while granting permission to lead secondary evidence on the will, was not fulfilled, except by the “bald statement” of the plaintiff and the second respondent-defendant, to the effect that the will was handed over to the appellant-defendant no.1.

30. In his grounds of appeal, learned counsel for the appellant has framed the following questions of law for consideration of this Court:-

- “a) Whether as per order dated 11.11.2010 passed by the learned trial Court, it was incumbent upon the plaintiff-respondent to prove the fact that the will was in possession of the appellant?
- b) Whether once the plaintiff failed to prove that the will was in possession of the appellant, the application to lead secondary evidence was required to be dismissed?
- c) Whether once the plaintiff failed to prove that the will was in possession of the appellant, the leading of evidence with regard to validity of the will is inconsequential and useless?
- d) Whether once the plaintiff failed to prove that the will was in possession of the appellant and the will was not proved, the suit filed by the plaintiff deserves to be dismissed?
- e) Whether in the absence of any will, all the legal heirs of

Krishan Gopal are required to be impleaded as a party?

- f) Whether the judgments and decrees passed by the Courts below are illegal, unjust, perverse, unsustainable in the eyes of law and liable to be set aside?
- g) Whether manifest and grave injustice has been caused to the appellant?”

In addition, at the time of arguments, Mr. Dinarpur, learned counsel for the appellant, submitted that the following questions of law would also arise for the consideration of this Court:-

- “(i) Whether the requirements of Section 68 of the Indian Evidence Act, 1872, have been complied with or not in proving the will in question? and
- (ii) Whether, if the will is to be accepted as having been validly executed by the father of the parties, i.e. the late Krishan Gopal, his widow, i.e. the mother of the parties, Smt. Vidya Wanti, had become the absolute owner of the suit property and therefore after her death, the property would devolve upon all her children in equal share, or whether she would be still stated to be only a limited owner thereof, with a life interest in it after which the property would devolve upon those named in the will by the late Krishan Gopal?

31. As regards the questions framed at Serial no.(c) and (d) above, it is seen to be actually a single questions bifurcated into two and would be taken up as such, with the questions at Serial no.(f) and (g) being simply formal questions, arising as a cumulative result of the other questions and therefore not questions of law, but issues consequential to the reasoning taken by the Courts below, which has been challenged by

way of the other questions raised.

32. Addressing arguments, Mr. S. S. Dinarpur, learned counsel for the appellant, after giving the factual background as contained in the pleadings, reiterated the stand of the appellant-defendant no.1 and submitted with regard to the issue framed at Sr. no.(ii) hereinabove, to the effect that Smt. Vidya Wanti had become the sole owner of the property after the death of her husband and after her death, it would devolve by natural succession upon all her legal heirs and even if the will in question were to be accepted, such natural succession would not be governed by the remaining conditions contained in the will.

On this he further submitted that since the testator had specially named his wife, Smt. Vidya Wanti, to be a “similar owner” as himself, in possession of the house, then she would be entitled to alienate and transfer the property and consequently, even if the will is to be accepted by this Court as having been validly proved, the condition laid down therein would be in violation of Section 14(1) of the Hindu Succession Act, 1956, because once Smt. Vidya Wanti had become the sole owner of the suit property, then upon her death, all her legal heirs would become equally entitled to it and not just the parties to this *lis*.

In this respect, Mr. Dinarpur relied upon a judgment of the Supreme Court in **Mauleshwar Mani v. Jagdish Prasad** 2002 (2) RCR (Civil) 77.

33. He next submitted that no loss of the will dated 12.01.1983 was pleaded by the plaintiff in his pleadings, including the fact that the will ever remained in the possession of the present appellant. In fact, he

submitted that the said stand was not even taken in the replication filed in response to the averment of the present appellant in his written statement, that no such will had been executed. Even the date on which the original will was handed over to the appellant-defendant no.1 was not given in the pleadings.

Elaborating on this further, learned counsel submitted that even in the notice issued, it was nowhere stated that it was the appellant-defendant no.1 who was in possession of the original will.

He next submitted that the factum of the will having been notarized was also not pleaded.

Hence, he submitted that the secondary evidence led in the form of the certified copy of the will, was beyond pleadings.

He also cited various judgments on the issue of evidence led beyond pleadings not being acceptable.

34. Next, Mr. Dinarpur submitted that the application dated 12.10.2009 moved by the plaintiff, to lead secondary evidence, was not a bonafide application, especially as it was filed on 12.10.2009, i.e. more than one year after the institution of the suit.

35. As regards the testimony of PW1, Bhushan Ahuja, to the effect that the mutation dated 07.04.1993 was sanctioned in favour of Smt. Vidya Wanti on the basis of the will in question, learned counsel submitted that the said testimony does not go to state as to whether the application was made by the appellant.

He further submitted that unless a will is a registered will, the municipality would not have sanctioned a mutation without giving notice to all the legal heirs. Hence, in fact, he contended that even the said

mutation was without any legal basis.

36. Mr. Dinarpur next submitted that even the mandatory condition of Section 66 of the Indian Evidence Act, 1872, is not seen to be met with, inasmuch as, no notice was given by the plaintiff to the appellant to produce the original will and as such, the application seeking to lead secondary evidence should have been rejected by the learned Civil Judge.

Learned counsel then submitted that with no death certificate of Mohinder Singh, attesting witness to the will propounded, having been produced, simply the statement of his son, PW4 Sarwan Singh, could not have been accepted to hold that Mohinder Singh had died.

37. Learned counsel next submitted that the will was surrounded by suspicious circumstances inasmuch as, neither the stamp of the deed-writer was there on the will, nor his licence number. Further, Makhan Lal, the person who is stated to have scribed the will, had a son as can be seen from the cross-examination of PW2 Naresh Chander, who was otherwise contended to be conversant with the hand writing of Makhan Lal. Therefore, as per Mr. Dinarpur, it was incumbent upon the plaintiff to have actually examined the son of Makhan Lal to identify his hand writing.

He further submitted that even the register of the deed-writer was not produced in Court, to prove that the will was actually written out by Makhan Lal.

Learned counsel for the appellant next submitted that Krishan Gopal being an educated person, in a government job, if he had gone to the Tehsil to get the will scribed, there was no reason for him not to get it registered also.

38. On the aforesaid contentions, learned counsel submitted that

this appeal deserves to be allowed with the judgments and decrees of the Courts below set aside and the suit of the plaintiff dismissed.

39. In response to the aforesaid arguments, Mr. M. G. Bagga, learned counsel for the respondent-plaintiff, submitted that as regards the leading of secondary evidence, the Courts below made no error in view of the fact that the will itself being contended to be in the possession of the person against whom the terms thereof were to be applied, there was no choice with the plaintiff but to seek leading of such evidence.

He further submitted that simply because the application seeking secondary evidence was filed one year after the suit was instituted, did not alter the fact that, in fact, the mutation was entered in the record of the Municipal Council in favour of the mother of the parties alone, which was never challenged by the appellant, despite him being a local resident and therefore, obviously fully aware as to in whose name the property was standing. Hence, he submitted that the testimony of PW1, i.e. the House Tax Clerk, to the effect that the mutation had been sanctioned upon an application being moved, alongwith a copy of the will annexed thereto, was a testimony correctly accepted by the Courts below.

40. As regards the contention of Mr. Dinarpur that no averment had ever been made in the pleadings that the will was in possession of the appellant, the very fact that an attested copy of the will was relied upon, with the appellant-defendant denying the existence thereof but not denying the mutation sanctioned in favour of the mother of the parties in the municipal records, showed that he very much knew of the existence of the will, which was in his possession. In fact he never raised an issue by way of filing a civil suit or even by any communication to the plaintiff,

defendant no.2, or his sisters, that the property should be mutated in the name of all the heirs of Krishan Gopal upon his death.

41. As regards the contention of Mr. Dinarpur that no notice under Section 66 of the Evidence Act was issued, learned counsel submitted that an application for directing the appellant-defendant no.1 to produce the original will was filed before the learned trial Court and as such, the prayer to lead secondary evidence was only an alternative to the first application, in case the original will was not produced by the present appellant. Hence, he submitted that the aforesaid application having been moved, obviously, that was enough notice to the appellant to produce the original will.

Mr. Bagga further contended that the condition contained in the said order dated 11.11.2010 is obviously seen to be fulfilled, from the fact that once it was proved that the sanctioning of the mutation in favour of the mother of the parties was on an application filed to that effect, on the basis of a will, there would have been no other method with the plaintiff to prove that the will was actually in the possession of the appellant, the parties being brothers and in cordial relations with each other, till the appellant refused to partition to the suit property.

On the aforesaid contentions, learned counsel sought dismissal of the appeal.

42. Having heard learned counsel on both sides and having considered the judgments of the Courts below, though otherwise this Court may not have reason to doubt the contention of the plaintiff inasmuch as the copy of the will propounded by the respondent-plaintiff, is not seen to be an unnatural bequeathment of the property of the father of the parties to

the lis, with the daughters all having been named in the document and reasons given for their exclusion therefrom, (except to the extent of grant of Rs.1000/- each for the living daughters); however, what does need consideration is the argument of Mr. Dinarpur to the effect that it was not pleaded anywhere, either in the plaint, or in the replication filed, that the original will was in the possession of the appellant-defendant no.1. The question therefore is with their being no specific plea to that effect, would the application for leading secondary evidence in the form of a copy of the will obtained from the Municipal Council be maintainable?

In this regard, the judgment cited by Mr. Dinarpur, in **U. Sree v. U. Srinivas** 2013(1) RCR (Civil) 883, needs to be referred to, wherein an earlier judgment in **Ashok Dulichand v. Madahavlal Dube** (1975) 4 **SCC 664** was cited. In *Dubes'* judgment, it was held as follows:-

“In order to bring his case within the purview of clause (a) of Section 65, the appellant filed applications on July 4, 1973, before Respondent 1 was examined as a witness, praying that the said respondent be ordered to produce the original manuscript of which, according to the appellant, he had filed photostat copy. Prayer was also made by the appellant that in case Respondent 1 denied that the said manuscript had been written by him, the photostat copy might be got examined from a handwriting expert. The appellant also filed affidavit in support of his applications. It was, however, nowhere stated in the affidavit that the original document of which the photostat copy had been filed by the appellant was in the possession of respondent 1. There was also no other material on the record to indicate that the original document was in the possession of Respondent 1. The appellant further failed to explain as to what were the circumstances under which the photostat copy was prepared and who was in possession of

the original document at the time its photograph was taken. Respondent 1 in his affidavit denied being in possession of or having anything to do with such a document.”

43. In the present case, most definitely there is no pleading to the effect that the appellant was in possession of the original will, prior to the applications filed seeking that the original will be produced by the appellant and in the alternative secondary evidence may be allowed to be led. However, in the aforesaid judgment, it has also been held that “There was also no other material on the record to indicate that the original document was in the possession of Respondent 1.”

In the present case, however, in the opinion of this Court, there was other material placed on record in the form of the reply of the Public Information Officer of the municipality, stating to the effect that an application had been filed by Smt. Vidya Wanti, seeking transfer of the ownership to her name on the basis of a will. The said letter is shown to be Ex.P4 before the trial Court and PW1 is shown to have testified to its veracity, on the basis of the record from the municipality.

Hence, in my opinion, even though specifically there was no pleading to the effect that the original will was given to the appellant herein, he being a local resident, however, that would not be fatal to the case of the plaintiff, in the circumstances that the mutation having been shown from the municipal record to have been entered on the basis of a will and such mutation never having been challenged by the appellant for 15 years right till the date of the filing of the suit and even thereafter, alongwith the fact that a joint account was proved to have existed in the

name of the three brothers, in the Punjab National Bank, therefore, the property being jointly held, in terms of the will, was a correct inference taken by the Courts below.

In the aforesaid circumstances, the application seeking that the appellant to be directed to produce the will, and in the absence thereof, the copy provided by the municipality be allowed to be led by way of secondary evidence, would be maintainable in terms of Section 65(a) of the Indian Evidence Act, which reads as follows:-

“65. Cases in which secondary evidence relating to documents may be given.—Secondary evidence may be given of the existence, condition, or contents of a document in the following cases:—

- (a) When the original is shown or appears to be in the possession or power— of the person against whom the document is sought to be proved, or of any person out of reach of, or not subject to, the process of the Court, or of any person legally bound to produce it, and when, after the notice mentioned in section 66, such person does not produce it;
- (b) when the existence, condition or contents of the original have been proved to be admitted in writing by the person against whom it is proved or by his representative in interest;
- (c) when the original has been destroyed or lost, or when the party offering evidence of its contents cannot, for any other reason not arising from his own default or neglect, produce it in reasonable time;
- (d) when the original is of such a nature as not to be easily movable;
- (e) when the original is a public document within the meaning of section 74;
- (f) when the original is a document of which a certified copy is permitted by this Act, or by any other law in force in 1[India] to be given in evidence2; 1[India] to be given in evidence;"
- (g) when the originals consists of numerous accounts or other documents which cannot conveniently be examined in Court, and the fact to be proved is the general result of the whole collection. In cases (a), (c) and (d), any secondary evidence of the contents of the document is admissible. In case (b), the written admission is admissible. In case (e) or (f), a certified copy of the document, but no other kind of secondary evidence, is admissible. In case (g), evidence may be given as to the

general result of the documents by any person who has examined them, and who is skilled in the examination of such documents.”

(Emphasis

applied)

Thus, even if it appears that the original document is in the possession of the person against whom it is sought to be proved, an application for leading secondary evidence qua that document would be maintainable and, in the opinion of this Court, was correctly held so by the learned trial Court.

44. Coming then to the contention of Mr. Dinarpur that even the condition laid down in the order by which by which secondary evidence was allowed to be led, was not complied with, I see no substance in that argument either.

A perusal of the said order from the record of the learned trial Court, shows that the condition put in the said order (dated 11.11.2010), was that, firstly, the existence of the will must be proved, and second, it must be shown to be in the possession of the opposite party.

The contention of learned counsel is that it was not proved that the will was in the possession of the appellant other than by way of the testimonies of the plaintiff and defendant no.2. That contention is not found to be sound, inasmuch as, no doubt the testimonies are to the aforesaid effect, but with the inference accepted because of the circumstances already enumerated hereinabove, that the original will was indeed being hidden by the appellant himself, the conditions prescribed in the aforesaid order dated 11.11.2010, would be seen to be duly met with. If it were to be held to the contrary, then it would mean that despite

circumstances existing, in the form of non-objection to the mutation in favour of Smt. Vidya Wanti, the existence of a joint bank account and the non-proving of the family settlement projected by the appellant, he still has to be held to be not in possession of the will and therefore secondary evidence could not be led. In such a situation, the purpose of leading secondary evidence itself would be defeated, with the appellant taking benefit of his own wrong in suppressing the will.

45. Consequently, as regards the questions of law framed at serial nos.9 (a) to (d), as reproduced in paragraph 30 of this judgment, they are answered to the effect that the factum of the original will being in possession of the appellant, or he having destroyed it, was duly proved, even in terms of the conditions set in the order dated 11.11.2010, of the trial Court, and therefore secondary evidence was correctly allowed to be led in respect of the will.

46. Having held so, the question at serial no.(e) becomes superfluous, because with the daughters of the testator having been specifically excluded from the testators' property (other than grant of Rs.1000/- each to them), by the said will, they were then not necessary parties to the suit.

Next coming to the question raised by Mr. Dinarpur at Serial no.(i) at the time of arguments, as is reproduced also in para of 30 hereinabove, on whether the will was proved in terms of Section 68 of the Indian Evidence Act, 1872.

47. Before going on to that question, it needs to be stated that the will must first be seen to have been executed in the manner prescribed in Section 63 of the Indian Succession Act, 1925, which reads as follows:-

“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.”

In the will in question (seen to be exhibited as Mark P-2, it not being the original will and being subject matter of the application for leading secondary evidence), it is signed by the testator on every page, including immediately below the end of the recital on the last page. Hence, clauses (a) and (b) of Section 63 would be seen to be complied with.

As regards clause (c) of the aforesaid provision, the will is seen to be attested by two witnesses, Mahender Singh and Inderjit Singh, each of whom has signed four pages of the will 'alternatively', i.e. Mahender Singh has appended his signatures in the side margin of the will next to the testator on the first page, with Inderjit Singh having done so on the 2<sup>nd</sup> page and 3<sup>rd</sup> page. The last page is again seen to be attested by Mahender Singh, and Inderjit Singhs' signature does not appear on that page, just as Mahender Singhs' was not present at pages no.2 and 3.

There being no specific condition in clause (c) that each page of the will must be attested by both the witnesses, in the opinion of this Court if the will is otherwise not disbelievable, the requirement of Section 63(c) would also be fulfilled in the present case.

48. Coming then to whether Section 68 of the Indian Evidence Act was complied with to prove the will in question. The said provision is reproduced hereinunder:-

**“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.]”

Very obviously, in the present case, neither of the two attesting witnesses testified to the will having been executed by the testator. Mohinder Singh was stated to have died, with his son, PW4, Sarwan Singh, aged 61 years, seen to have testified to the veracity of his fathers' signatures on the will. Though Mr. Dinarpur has also raised an argument in this context that with no death certificate of Mohinder Singh having been produced, it could not have been accepted that he had died simply on the statement of his son, it is not shown from the judgments of the Courts below, or even from the testimony of the said witness, from the

record of the trial Court, that any question was put to him in cross-examination that his father had not actually died. Moreover, it is also not seen to be an argument raised before the courts below; hence, the testimony of that witness with regard to his fathers' death or even recognizing his fathers' signatures, cannot be discarded and was correctly accepted by the Courts below, in the opinion of this Court.

As regards non-production of the second attesting witness, or anybody to recognize his signatures, he stated to be not residing in Ambala for the past 20 to 22 years and having sold his house too, with that evidence also not shown to be refuted, I do not see any reason to take an inference against the plaintiff due to non-examination of the second attesting witness, he not being traceable, as contended before the courts below.

Thus, with the two attesting witnesses themselves not produced, but with the son of one of them produced, in the opinion of this Court, though the condition of Section 68 of the Evidence Act was obviously not complied with, the alternative method of proving a document, including a will, as is provided in Section 69 of that Act, was duly complied with.

As regards the signatures of the testator himself, the plaintiff and defendant no.2, though equal beneficiaries of the will, (alongwith the appellant), both testified to the signatures being that of the testator, i.e. their father, with again no evidence shown to be led to the contrary by the appellant.

Hence, in the opinion of this Court, the conditions prescribed in Section 69 were complied with and therefore, the will, even by its copy

led as secondary evidence, was duly proved to have been executed by the late Shri Krishan Gopal.

Consequently, the question of law framed at Serial no.(i) in paragraph 30 hereinabove is answered to the effect that the requirement of Section 68 read with Section 69 of the Indian Evidence Act, 1872, was duly complied with by the plaintiff, in proving the will in question.

49. Coming to the last question raised by Mr. Dinarpur, at sr. no. (ii) in paragraph 30, i.e. that with the mother of the parties, Smt. Vidya Wanti having been vested with complete rights to even dispose of the property by her husband Shri Krishan Gopal, could the testator still bequeath the suit property to the three sons, after the death of his wife to the exclusion the other heirs, i.e. his daughters, virtually making it again a limited estate in the hands of his wife?

50. In the opinion of this Court, there would be no bar on the testator of a will prescribing the terms of his bequeathment, contingent upon the condition given in the will itself. Undoubtedly, the late father of the parties bequeathed the house in question first to his wife upon his death; but further stating that if she did not dispose of it in the manner that she wished, then after her death he wished that the property devolve upon his three sons equally, to the exclusion of his daughters, whom he stated that he had married off as per custom and had given them accordingly. Thus, in the opinion of this Court, if Smt. Vidya Wanti had disposed the property in any manner that she wished to in her life time, or had even executed a will bequeathing it in a manner other than her husband had 'stipulated' upon her death, the matter would have been different.

In that case, she having been given complete rights to dispose

of the property in any manner that she liked during her life time, she would be entitled to so bequeath it as she wished, whether to her sons and daughters or to anyone other than them, or in different proportions to all/any of them.

However, she having chosen not to have done that, the implication would be that she accepted her husbands' desire and agreed with it to the effect that she would remain the complete owner of the property, but upon her death, in the absence of any alienation made by her, the property would go in the manner that her husband had wished to it go.

51. However, the aforesaid view of this Court is actually contrary to the law settled on the issue, even as per the judgment cited by Mr. Dinarpur, in *Mauleshwar Manis'* case (supra), where their Lordships adjudicated upon the following principles in the context of the facts of that case, which are not being gone into in detail. But the principle contained therein would still apply even to this case.

The following questions were raised by learned counsel for the parties, for consideration of the Supreme Court:-

“(1) Whether under the will Jamuna Prasad bequeathed an absolute estate in favour of his second wife Smt. Sona Devi or restricted right?

(2) Whether the subsequent bequeath in the will in favour of the sons of the daughters of Jamuna Prasad is invalid if it is found that Jamuna Prasad bequeathed an absolute interest in the property in favour of his second wife Smt. Sone Devi? and

(3) Whether all the sons of all the daughters of Jamuna Prasad would inherit under the Act, if it is found that Jamuna Prasad bequeathed an absolute estate in favour of his second wife Smt. Sona Devi?”

After discussing the wordings of the will in that case, it was held as follows:-

“8. The first part of the will provided that after the death of the testator or author of the will, his wife whose name is Smt. Sona Devi would be entitled to the entire assets and properties of Jamuna Prasad with the right of transfer. The second part of the will is that after the death of Smt. Sona Devi nine sons of daughters' would inherit the property. Here what we are concerned with is whether Smt. Sona Devi has acquired an absolute estate or a limited estate under the will. In this connection the employment of words “Pane Ki Musthak” and “ba Akhtiar Intekal” in the will which means entitlement of properties with the right of transfer are very relevant. It is obvious from the aforesaid clause that the testator conferred on an estate by providing that the wife would be entitled to get the property with right of alienation. Where the property has been given by a testator to the devisee with a right of alienation such bequeath is a conferment of an absolute estate. Thus the first devisee was to get the property with a right of transfer under the will and under subsequent clause the very same property was to go to the nine sons of the daughters after the death of the first devisee. The will, therefore, gave in the express term inheritable estate with power of alienation to Smt. Sona Devi. We are, therefore, very clear in our mind that what was given to Smt. Sona Devi was an unlimited and an absolute estate.”

(Emphasis applied by this Court)

Hence, with the right of transfer also given in the present case, by the late Krishan Gopal to his wife Smt. Vidya Wanti, then, in terms of the ratio of the aforesaid judgment, it has to be taken to be an unlimited

and absolute estate vesting in her.

52. Eventually, it was held in the aforesaid judgment that once such an estate is bequeathed to any person, the second part of the will becomes inoperative, as can be seen from the observations in paragraphs 10 and 11 of the aforesaid judgment which are reproduced as follows:-

“10. In ***Ramkishorelal and another v. Kamalnarayan, 1963 Suppl. 92) SCR 417***, it was held that in a disposition of properties, if there is a clear conflict between what is said in one part of the document and in another where in an earlier part of the document some property is given absolutely to one person but later on, other directions about the same property are given which conflict with and take away from the absolute title given in the earlier portion, in such a conflict the earlier disposition of absolute title should prevail and the latter directions of disposition should be disregarded. In ***Radha Sunder Dutta v. Mohd. Jahadur Rahim and others*** (supra), it was held where there is conflict between the earlier clause and the later clauses and it is not possible to give effect to all of them, then the rule of construction is well established that it is the earlier clause that must override the later clauses and not vice versa. In ***Rameshwar Bakhsh Singh and others v. Balraj Kaur and others, AIR 1935 Privy Council 187***, it was laid down that where an absolute estate is created by will in favour of devisee, the clauses in the will which are repugnant to such absolute estate cannot cut down the estate, but they must be held to be invalid.

11. From the decisions referred to above, the legal principles that emerge, *inter alia*, are

- (1) Where under a will, a testator has bequeathed his an absolute interest in the property in favour of his wife, any subsequent bequeath which is repugnant to the first bequeath would be invalid; and
- (2) Where a testator has given a restricted or limited

right in his property to his widow, it is open to the testator to bequeath the property after the death of his wife in the same will.”

53. Hence, the question of law framed at Serial no.(ii) in paragraph 30 is answered to the aforesaid effect, that in view of the ratio of the law laid down in *Mauleshwar Manis'* case (supra), the subsequent part of the will of Krishan Gopal, bequeathing the suit property to his three sons to the exclusion of the other heirs of his wife, is not a legally sound bequeathment and consequently, Smt. Vidya Wanti having been given an absolute estate by her husband in the suit property, he could not have thereafter put a condition in the will that after Smt. Vidya Wantis' death, if the property was alienated by her, it would devolve upon only his three sons to the exclusion of other legal heirs.

54. Before concluding this judgment, it needs to be noticed that it has never been in dispute at any stage (with the appellant-defendant no.1 and all parties admitting) that Smt. Vidya Wanti had seven children including the three sons who are parties to the *lis* and four daughters. Hence, each of them would have a 1/7<sup>th</sup> share in the properties that were subject matter of the will of Krishan Gopal, to the extent that such properties continued in the possession of Smt. Vidya Wanti at the time of her death.

55. In view of what has been held hereinabove, this appeal is partly allowed, to the extent that the judgments and decrees of learned Courts below are set aside to the extent that they grant the respondent-plaintiff a 1/3<sup>rd</sup> share in the suit property. Instead, the suit is decreed to the

extent that the respondent-plaintiff is held entitled to a 1/7<sup>th</sup> share in the estate of Smt. Vidya Wanti, as bequeathed to her by her husband Krishan Gopal, to the extent that the estate remained with her at the time of her death.

Therefore, as regards the rendition of accounts to be given by the appellant herein, to the respondent-plaintiff, such rendition of accounts would be given, but again upon finalization thereof, a 1/7<sup>th</sup> share in the rental income of the suit property would vest in the respondent-plaintiff and not a 1/3<sup>rd</sup> share therein.

56. Consequently, the judgments and decrees of the Courts below are modified to the aforesaid extent, with the parties left to bear their own costs in the present appeal.

A decree sheet be drawn up accordingly.

**July 05, 2017**  
dinesh

**(AMOL RATTAN SINGH)**  
**JUDGE**

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