

IN THE HIGH COURT OF PUNJAB & HARYANA AT
CHANDIGARH

RSA-2518-1985
Reserved on: 06.11.2024
Date of Pronouncement:- 12.11.2024

Budh Ram (since deceased) through his LRs and others
... Appellants

Versus

Kishan Singh (since deceased) through his LRs and others
... Respondents

CORAM: HON'BLE MR.JUSTICE VIKAS BAHL

Present: Ms.Ashish Aggarwal, Senior Advocate with
Ms.Pooja Sareen, Advocate and
Mr.Karan Singla, Advocate
for the appellants.

Mr.Amit Jain, Senior Advocate with
Mr.Anupam Mathur, Advocate and
Mr.Aryaman Thakur, Advocate
for respondent no.1/plaintiff.

VIKAS BAHL, J.

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CHALLENGE IN THE PRESENT APPEAL:-

2. Defendants no.1 to 4 (presently represented by their legal representatives) have filed the present appeal challenging the judgment and decree dated 30.09.1978 passed by the Senior Sub-Judge, Ambala, vide which the suit for declaration filed by the plaintiff-respondent no.1-Kishan Singh (now represented by his LRs) has been decreed. Challenge is also to the judgment and decree dated 30.01.1985 passed by the Additional District Judge, Ambala, vide which the first appeal filed by the present appellants has been dismissed.

FACTS OF THE CASE:-

3. Brief facts of the present case are that plaintiff/respondent no.1-Kishan Singh (hereinafter to be referred as the ‘plaintiff’) had filed a suit for declaration to the effect that he was the owner of the agricultural land measuring 259 Kanals and 17 Marlas and also the agricultural land measuring 7 kanals and 10 marlas situated in Village Anandpur Jalbera, Tehsil Ambala, as per the jamabandi for the year 1963-64. A prayer was also made for possession of the bara and house in dispute, which was also situated in Village Anandpur Jalbera Tehsil Ambala as per the site plan which was attached along with the plaint. Other prayers were also made in the said suit.

4. It was averred in the plaint that Nathu Ram son of Hira was the last male holder of the property in dispute and he had died issueless on 23.08.1964 and had left behind no other relatives except the plaintiff-



Kishan Singh, who was his father's sister's son. It was further pleaded that Smt. Nandan was the father's sister of the deceased Nathu Ram and was married to one Tilak Ram of Village Rampur Kalan, District Patiala and that the plaintiff, his sister Bishni and one brother Chajju were the children of Nandan and Tilak Ram and that Nandan had died and even Chajju had died issueless and Bishni was married in Village Ambala to Harbans but the said Bishni and her husband had also died. It was averred that according to The Hindu Succession Act, 1956, the plaintiff alone was the legal heir of Nathu Ram son of Hira and nobody else had any right to the inheritance of the said Nathu Ram deceased and that defendants no.1 to 4 had entered into the possession of the bara and the house in dispute illegally. It was further averred that defendants no.1 to 4 were claiming their right to possession of the agricultural land but however they did not have any right and that on the intervention of the village panchayat, the Tehsildar was receiving the *batai* of the land in dispute and had deposited the same in the Government treasury to be paid to the person, who would be ultimately entitled to the same. It was further specifically pleaded that none of the defendants were in possession of the agricultural land and that defendants no.1 to 4 had set up a Will in their favour and defendant no.5 had also set up a Will in her favour but it was averred therein that the factum of execution of the said alleged Wills was strongly refuted and the alleged Wills were un-natural and forged. On the basis of the said averments, the suit was filed.

5. Defendants no.1 to 4/present appellants had filed a written statement in which it was stated that defendants no.1 to 4 were in possession of the land, bara and house belonging to the deceased and were entitled to the said property on the basis of the last Will executed by the



deceased Nathu Ram in favour of the defendants no.1 to 4 on 20.08.1964. It was averred that certain alleged tenants had filed false claims before the Revenue Officer to harass the answering defendants with respect to possession of the suit property and that as far as the Will setup by defendant no.5 was concerned, the same was forged and fabricated. An additional plea was taken to the effect that the present suit was not maintainable in the present form as the plaintiff was not in possession of the suit land. Defendant no.5 had filed her own independent written statement and in para 5 of the written statement, it had been stated that the property which was left by the deceased was under attachment under the orders of the Magistrate First Class in criminal proceedings. Defendant no.5 relied upon a Will dated 19.04.1964 allegedly executed by the deceased in favour of defendant no.5.

6. Replication was filed by the plaintiff to both the said written statements. In the replication filed to the written statement on behalf of defendant Nos.1 to 4, all the averments made in the written statement were stated to be incorrect and it was further stated that the alleged will was unnatural and forged and that the deceased did not execute any such Will and the factum of both the execution and validity of the Will was strongly refuted.

7. The trial Court vide order dated 13.05.1965 framed the following issues:-

- “1. Whether the suit is maintainable in the present form?*
- 2. Whether the plaintiff has locus-standi to file the present suit and is related to the deceased as alleged?*
- 3. Whether the deceased Nathu Ram executed any Will in favour of the defendants no.1 to 4 while in sound and disposing*



mind?

4. *Whether Nathu Ram deceased executed a valid Will in favour of defendant no.5 while in sound and disposing mind?*

5. *Whether Pal Singh son of Hira Singh is a proper party to the suit?*

6. *Whether the suit is collusive?*

7. *Relief.”*

8. With respect to issue no.1, the trial Court observed that the suit was maintainable in the present form and the arguments raised on behalf of the present appellants/defendant Nos.1 to 4 to the effect that the same was not maintainable was rejected. Under Issue no.2, the trial Court, after considering the entire evidence on record observed that the plaintiff had locus standi to file the suit and he was related to the deceased and accordingly, decided the said issue also in favour of the plaintiff and against the defendants. Under Issue no.3, the trial Court again after considering the entire evidence on record, came to the conclusion that there were numerous suspicious circumstances in the execution of the Will and thus, the Will propounded by defendant Nos.1 to 4 could not be stated to be a valid Will and accordingly, the issue was decided in favour of the plaintiff and against defendant Nos.1 to 4. Issue no.4 was also decided in favour of the plaintiff and against defendant no.5 and thus, the plea of defendant no.5 on the basis of Will dated 19.04.1964 was also rejected. It would be relevant to note that against the said finding, neither any appeal was filed by defendant no.5 before the Ist Appellate Court nor any appeal has been filed before this Court. Issue Nos.5 and 6 were also decided in favour of the plaintiff and against the defendants and accordingly, under Issue no.7, the suit of the plaintiff was decreed.

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9. Aggrieved against the said judgment and decree, the present appellants filed an appeal before the First Appellate Court. Vide judgment dated 30.01.1985, the Ist Appellate Court dismissed the said appeal and rejected all the arguments which were raised before the Ist Appellate Court by passing a detailed judgment. The entire evidence, both oral and documentary was re-examined by the Ist Appellate Court before dismissing the said appeal. It is the said judgments of the trial Court as well as Ist Appellate Court which are under challenge before this Court.

ARGUMENTS ON BEHALF OF THE APPELLANTS:-

10. Learned senior counsel for the appellants has submitted that the judgments of the Ist Appellate Court as well as of the trial Court deserve to be set aside and the suit filed by the plaintiff deserves to be dismissed solely on the ground that the suit is not maintainable qua the agricultural land in view of the provisions of Section 34 of the Specific Relief Act. It is submitted that a perusal of the plaint would show that no relief of possession has been sought with respect to the agricultural land and possession has been sought only with respect to one *bara* and one house in question. It is submitted that a perusal of the plaint would further show that it has been pleaded by the plaintiff that the agricultural land was in the possession of the tenants. It is stated that in the written statement filed on behalf of the present appellants-defendants no.1 to 4, it has been specifically pleaded that the suit is not maintainable in the present form as the plaintiff is not in possession of the land in question and thus, on the said ground, the suit was not maintainable.

11. Learned senior counsel for the appellants has referred to the examination-in-chief of PW-1 Kartara son of Kalli Ram to show that he had



stated on 23.05.1966, that the deceased Budh Ram at that time was cultivating the suit land on Chakota and thus, from the above said statement, it is apparent that it is Budh Ram-present appellant no.1, who was admittedly in cultivating possession on 23.05.1966. Reference has also been made to Ex.P1, which is jamabandi for the year 1963-64 to show that in the cultivation column, the name of Nathu son of Heera has been mentioned. Ex.D5, which is an order dated 24.11.1996 passed in Criminal Revision no.783 of 1966 in a petition between the present appellants and Puran etc. (who were stated to be tenants in the suit property), has been highlighted by learned senior counsel for the appellants to show that in the proceedings under Section 145 Cr.P.C., the observations were made in favour of the appellants and the matter was remanded for fresh decision. Further orders passed in the said proceedings have also been referred to by learned senior counsel for the appellants which include the order dated 18.12.1967 which is Mark C. Learned senior counsel for the appellants has also referred to Ex.PW4/1 in which it has been mentioned that on 17.10.1964, the land which was under the ownership of Nathu son of Heera measuring 259 kanals 17 marlas had been taken into possession / custody under Section 145 Cr.P.C. and the receiver had been appointed for the same. Learned senior counsel has further relied upon the application for additional evidence filed by the appellants i.e., CM-9136-C-2014 as well as CM-2007-C-2014 to highlight that mutation no.3 was ordered on 07.04.1967 with respect to ownership in favour of the present appellants and the jamabandi for the year 1985-86 also carried the name of the present appellants in pursuance to the said mutation. It is further argued that a part of the suit land, to the extent of 2 kanals was also acquired and the compensation



regarding the same was also taken by the appellants and with respect to the same, a notice under Section 9 of the Land Acquisition Act, 1894 which was issued on 05.10.1983 and subsequent documents thereto have also been referred to. Reliance has also been placed upon the order Ex.D2 dated 10.10.1966 as well as Ex.D3 which were passed in the application for correction of khasra girdawari to highlight the fact that the tenants were held to be not in possession.

12. Learned senior counsel for the appellants has submitted that on the basis of the above said documents, it is apparent that the plea raised by the plaintiff in the plaint to the effect that the tenants were in possession of the suit property was false and in fact it was Nathu who was earlier in possession and after his death, the possession was of the present appellants-defendants. It is submitted that in such a situation, the non-claiming of relief of possession from the present appellants calls for dismissal of the suit in view of the provisions of Section 34 of the Specific Relief Act, 1963. In support of his arguments, learned senior counsel for the appellants has relied upon the judgment of Allahabad High Court in the case of ***Lachhimi Nath Pathak and another vs. Bholanath Pathak and others*** reported as ***1964 AIR (Allahabad) 383***. Learned senior Counsel for the appellants has further submitted that once the plea under Section 34 of the Specific Relief Act had been raised, it was incumbent upon the Court to give a finding as to whether the plaintiff or the defendant was in possession of the property on the date of the suit and in the present case, neither the trial Court nor the Ist Appellate Court has given any finding regarding the same. It is submitted that in paragraph 12, the trial Court while rejecting the objection raised on behalf of the present appellants has apart from other aspects also observed



that after the death of the deceased-Nathu, the property remained with the tenant and the said finding is perverse. It is further submitted that in paragraph 24 of the judgment of the trial Court, a decree has been passed in favour of the plaintiff to the effect that the plaintiff is owner of the agricultural land as detailed in the head note and is also in possession of the land as per the entries in the revenue record. It is stated that the plaintiff is not shown to be in possession in the revenue record and thus, the said finding is perverse. Learned senior counsel for the appellants in support of his argument has further relied upon the judgments of the Hon'ble Supreme Court in the case of *Venkataraja and others vs. Vidyane Doureradjaperumal (D) Thr. Lrs. and others* reported as *2014(14) SCC 502*, *Executive Officer, Arulmigu Chokkanatha Swamy Koil Trust Virudhunagar vs. Chandran & Ors.* reported as *2017(2) RCR (Civil) 1* and the judgment of Jharkhand High Court in the case of *Basuki Devi and Ors. vs. Smt. Kunti Devi and Ors.* reported *2023(2) JCR 245* as also the judgment of this Court in the case of *Bali Ram vs. Harinderpal Singh and others*, reported as *1982 PLR 740*.

13. Learned senior Counsel for the appellants has next argued that there is no document to establish that Nandan is daughter of Hait Ram or is sister of Hira and that there is further no document to establish that Kishan Singh-plaintiff is son of Nandan and Tilak Ram. In the said regard, learned senior Counsel for the appellants has referred to Ex.P7 which is stated to be the *Kursinama* in which the name of Nandan does not figure and that the said *Kursinama* had not been considered by both the trial Court as well as the First Appellate Court. It is further submitted that the plaintiff is resident



Ambala and that even as per Ex.P5 which is the copy of register of birth produced by the plaintiff, the name of the plaintiff had been mentioned and date of birth had been given but it was nowhere stated as to who was the father or mother of the said Kishan Singh and in the said register, reference had been made to “Police Station Banur” which is in District Patiala.

14. Learned senior Counsel has further referred to cross-examination of PW3-Bakhshi son of Chhajju and has highlighted that in his cross-examination, the said witness had submitted that it was Budh Ram-defendant/present appellant who had performed ceremony of setting fire to the dead body of Nathu and that from the same, it is apparent that it was the present appellant who had performed the last rites of the said Nathu. Learned senior Counsel for the appellants has further submitted that the evidence of none of the witnesses examined by the plaintiff in order to prove his relationship with Nathu meets the requirement of Section 50 of the Indian Evidence Act, 1872. By placing reliance upon the judgment passed by the Hon’ble Supreme Court in the case of **Dolgobinda Paricha Vs. Nimai Charan Misra and others** reported as **AIR 1959 SC 914**, it has been argued that in order to prove the relationship between the parties, a person who has direct knowledge and is personally acquainted with the facts is required to give evidence so as to make it relevant for consideration and the person giving evidence only on the basis of hearsay could not be considered as tendering any relevant piece of evidence for the purpose of proving the relationship. Reference is made to the evidence of PW1 to highlight the fact that in his evidence, he had stated that he was not related to Nathu and that he never visited the Village where Nandan had been married and it was his parents who used to tell him that Nandan was his Bua



just like she was the bua of Nathu and that is why he says that she was bua of Nathu. It is further submitted that PW1 had stated in his examination-in-chief that it was his parents who used to tell him that Hira was son of Hait Ram and Nandan was the daughter of Hait Ram. Learned senior Counsel for the appellants has then referred to the evidence of PW2 and has stated that said PW2-Inder Singh is father-in-law of plaintiff and in his evidence, he had not stated anything about the relationship of Nandan with Nathu or Hira.

15. With respect to evidence of PW3 i.e. Bakshi son of Chhajju, learned senior Counsel for the appellants has submitted that in his cross-examination, he had stated that he had no relationship with Nandan or his husband and that he had not seen the father of Nathu as both the parents of Nathu had died before he became major and that it had been stated that he had heard from another person that Nathu had become unconscious about 10-12 days before his death. It is submitted that there is nothing on record to show that he had any direct knowledge so as to specifically depose with respect to the relationship of Nandan with Nathu or Hira. With respect to PW5, it has been argued that the said witness in his examination-in-chief has stated that he does not know the name of Nathu's father and in his cross-examination, has stated that he has no information about relationship of Kishan with Nathu and that he never visited Jalbera and at the end, he has stated that it could not be said whether Nandan was real sister of Nathu's father.

16. With respect to PW6, learned senior counsel for the appellant has submitted that in his cross-examination, he could not tell the name of any person who told him that Nandan and Nathu belonged to village Jalbera



and that he did not join the marriage of son of the plaintiff. It is submitted that in response to an answer to a Court question, the Court was pleased to make a note to the effect that the witness could not give any explanation as to why he remembered the Neonda of Nathu and not of any other person. With respect to evidence of PW7, it has been argued that he is the real nephew of the plaintiff and is an interested witness and he has not stated in his evidence as to what is the source of his information and thus, cannot be relied upon. With respect to evidence of PW8, it is argued that in the cross-examination, the said witness had stated that he had no relationship with Kishan Singh and he does not know the father's name of Nathu and in the first place, he had stated that he never visited Jalbera, whereas, in the later part of cross-examination, he had stated that he saw his father Nathu in village Jalbera.

17. With respect to evidence of PW9, learned senior counsel for the appellant has highlighted that the said person is from a different village i.e. Rampura and had stated that he visited the house of Kishan Singh only once at the time of marriage of Khushal Singh and he does not know the women folk of his house and thus, the said witness cannot be relied upon. With respect to evidence of PW10, it has been argued that he is known to plaintiff Kishan Singh as is apparent from the examination-in-chief and had further in his cross-examination stated that he did not see Nandi in the marriage of Khushal Singh and Nathu never addressed Nandi as Bua in his presence. With respect to PW11, learned senior counsel for the appellant has submitted that the said witness is an interested witness as the plaintiff is the brother of his wife. Similarly, with respect to PW12, it has been stated that he is also an interested witness, inasmuch as, in his examination-in-chief he



had stated that the plaintiff is his sister's husband.

18. Learned senior counsel for the appellants has argued that in the present case, from the evidence of PW3, it has come about that Nathu had performed three marriages and two of his wives had died during his life time, whereas, the third had been turned out of the house by Nathu about 20 years back and that her name was Bhulli. It is submitted that in case Nathu had a third wife then the plaintiff could raise no claim to the property and thus, the finding of the 1st Appellate Court in para 33 would be without any basis. It is stated that there was no plea raised by the plaintiff to the effect that the said Bhulli had died and thus, no finding could have been returned with respect to the same under Sections 107 and 108 of the Evidence Act.

19. It is next submitted that the Will dated 20.08.1964, which as per their case, had been executed by deceased Nathu in favour of defendants no.1 to 4, had been duly proved on the record. It is submitted that to prove the said Will, the appellant had produced three attesting witnesses i.e. DW2 Ram Gopal, who was member panchayat, DW-3 Ram Kishan of village Jalbera and DW6 Dr. Sat Pal Soni in whose presence the Will (Ex.D1) was subscribed. It is further submitted that even DW21-Shanti Sarup Jain, who was the handwriting expert, had duly proved his handwriting report. It is stated that a perusal of evidence of the said witnesses shows that the Will had been duly proved. It is further stated that the last rites of the deceased were performed by the appellants, which fact shows that it is the appellants who were taking care of Nathu. It is further submitted that the trial Court as well as the Ist Appellate Court have rejected the will in an illegal manner and have taken into consideration the points which are not relevant. It is submitted that the will was duly proved as per Section 68 of the Evidence



Act.

ARGUMENTS ON BEHALF OF CONTESTING RESPONDENT

NO.1-PLAINTIFF:-

20. Learned senior counsel for respondent no.1-plaintiff has submitted that the present appeal is not maintainable and the objection raised on behalf of the appellants with respect to Section 34 of the Specific Relief Act, 1963 is completely misconceived. It is submitted that in the present case, it is not in dispute that Nathu, the admitted owner of the property, had died on 23.08.1964 and the proceedings under Section 145 Cr.P.C. were initiated on 16.10.1964 i.e., within two months of the death of Nathu as is apparent from a perusal of Ex.PW4/1. It is further submitted that the possession was also taken by the receiver on 17.10.1964 and thus, when the plaintiff had filed the suit on 11.02.1965, on that day, the defendants were not in possession and thus, the question of seeking possession from the defendants does not arise. It is argued that a perusal of Section 34 of the Specific Relief Act 1963 would show that a person is entitled to institute a suit against any person denying his title etc. and in such a situation, the Court can grant declaration with respect to the right of the plaintiff and in such a suit, he need not claim any further relief. It is submitted that in the present case, it was only the defendants, who were denying the title of the plaintiff by setting up an unregistered Will which was subsequently registered after the death of Nathu and thus, the declaration was to be sought against the defendants. It is submitted that the question of seeking possession from the defendants does not arise as the defendants were not in possession on the date of the suit and thus, the case is not hit by the proviso



neither the Tehsildar who was appointed as a receiver nor the State was a party to the suit, thus, the question of claiming possession against a person who was not a party thereto, does not arise.

21. It is submitted that with respect to the averments made in the plaint to the effect that the tenants were in possession, it is stated that it is not in dispute that as per the khasra girdawari with respect to the year 1964, it was the tenants, who were shown to be in possession and the said khasra girdawari had not been corrected till the date of filing of the instant suit i.e. 11.02.1965 and thus, the averment with respect to the tenants being in possession was on the basis of the said revenue record i.e., khasra girdwari. It is submitted that a reading of the entire plaint moreso paragraph 6 would show that it is pleaded that the Tehsildar received Batai of the land in dispute and deposited the same in the government treasury declaring that whosoever is ultimately found entitled to the same, it would be paid to the said person. It is further submitted that in the documents which were produced by the defendants, there is no finding that the defendants were in possession of the suit property on the date of filing of the suit, nor there is any revenue record showing that the possession was there of the defendants immediately prior to the institution of the suit and it is the date of the institution of the suit which is the relevant date for determining the entitlement for seeking the relevant relief. It is further stated that even the correction of the khasra girdawari which was earlier in the name of the tenants, was only done in the name of Nathu, who has been held to be the predecessor-in-interest of the present plaintiff. It is also argued that there is no order on record to show that even in the proceedings under Section 145



defendants-appellants cannot even take the plea that the subsequent alleged possession of the defendants could relate back to the date of initiation of proceedings under Section 145 Cr.P.C. Learned senior counsel for the respondent-plaintiff has further argued that the proceedings under Section 145 Cr.P.C. have culminated in view of the statement made on behalf of the appellants herein and in the said proceedings, there is no finding that the present appellants-defendants herein were in possession of the property at the time of initiation of proceedings under Section 145 Cr.P.C. It is further highlighted that in the said order dated 18.12.1967, it is nowhere said/directed that the possession is being handed over to the defendants. It is submitted that even in case as an interim measure, the Tehsildar had leased out the property to the defendants, the same would not show that on the date of initiation of proceedings under Section 145 Cr.P.C., the defendants were in possession, moreso in the absence of any specific finding regarding the same and thus, the defendants cannot take the plea that they were in possession of the property at the time of initiation of said proceedings under Section 145 Cr.P.C. and at the time of filing of the suit. In support of his arguments, learned senior counsel for the respondent has relied upon the judgments of the Hon'ble Supreme Court of India in the case of ***Deo Kuer and another vs. Sheo Prasad Singh and others*** reported as ***1966 AIR (Supreme Court) 359*** and in the case of ***Akkamma & Ors. vs. Vemavathi & Ors.*** reported as ***2022 (1) R.C.R. (Civil) 299*** and judgment of Allahabad High Court in the case of ***Jagdish vs. Rajendra*** reported as ***1975 AIR (Allahabad) 395***.

22. Learned senior counsel for respondent no.1 has submitted that with respect to Smt. Nandan being the sister of Hira and the plaintiff Kishan



being son of Nandan, the pleadings and the evidence on record fully establish the relationship. Reference in this regard has been made to para 3 of the plaint where specific averments have been made by the plaintiff to the effect that Smt. Nandan was the father's sister of the deceased and was married to Tilak Ram of village Rampur Kalan, district Patiala and that the plaintiff was one of the children of Nandan and even the details of the other children were also given and the said specific averments in plaint were not specifically denied as were required to be denied in view of the provisions under Order 8 Rule 3 & 5 of CPC and were only vaguely denied, amounting to an evasive denial. It is further submitted that the reason for Nandan to be residing in District Patiala was that she was married to Tilak Ram, who was a resident of village Rampur Kalan in district Patiala and the said aspect has not been specifically denied.

23. Learned senior counsel for respondent no.1 has further highlighted that a perusal of the evidence of DW-11 Budh Ram, who is defendant no.1 in the suit, would show that he has specifically admitted that he is not related to Nathu and that Nathu used to tell him that his father had a sister. It is argued that from the said cross-examination the stand taken by the appellant stands falsified as it had been the case of the appellant that the said Nathu had no sister. It is further submitted that reliance upon the *Kursinama* by the appellant to state that there is no sister of Nathu stands falsified from the abovesaid admission made by DW-11 and that a perusal of the *Kursinama* (Ex.P7) would show that the same is only showing the male lineal descendents and no female has been shown in the said chart.

24. The first piece of oral evidence which has been highlighted by learned senior counsel for the respondent-plaintiff to prove the relationship



in question is the evidence of PW-1, Kartara son of Kalli Ram, who is stated to be 70 years of age as on 23.05.1966 and thus on the date of death of Nathu, which took place in the year 1964, was around 68 years of age. It is further submitted that the said Kartara was the resident of village Jalbera, which is the same place where Nathu used to reside and it has come in the cross-examination of the said witness that the house of Nathu was about one furlong from his house and, thus, the said Kartara had specific knowledge about the relationship of Nathu and the plaintiff and also Nandan. It is submitted that the said witness has specifically stated in his examination-in-chief that Nathu son of Hira, was of his village and he died about 1 $\frac{3}{4}$ years ago and that the said Hira had a sister, which was named as Nandan and that Hait Ram was the father of Hira and Nandan and had further stated that the plaintiff Kishan Singh and Nandan used to visit their village at the house of Nathu and that Nathu used to address Nandan as his Bua and even the said PW-1 used to address her as Bua. It is further stated by him in his cross-examination that Hait Ram had only one daughter named Nandan, and Nandan had only one son i.e. Kishan Singh plaintiff and that he saw Kishan Singh plaintiff in village Jalbera, where he used to come frequently. It has been submitted that the said evidence has rightly been relied upon by both the Courts to establish their relationship.

25. It is further submitted that even PW-2 Inder Singh son of Garja Singh has specifically stated that he had seen Nathu Ram at the time of marriage of his son and that his daughter was married to the son of the plaintiff Kishan Singh and that he had visited the house of the plaintiff at Rampur about 2 or 4 times and there he had met Nathu. It is submitted that

counsel for defendant no.4 had not put any question to said Inder Singh and



thus the examination-in-chief of said Inder Singh had gone unrebutted.

26. Learned senior counsel for the respondent has next referred to the evidence of PW-3 Bakhshi son of Chhajju, who was stated to be 65 years of age as on 16.06.1966 and who was also the resident of village Jalbera, which is the same village where the said Nathu resided and even in the examination-in-chief he had specifically stated that he knew Nathu , who was of his village and that his father's name was Hira and that Hira had a sister, whose name was Nandan and that Hira and Nandan's father's name was Hait Ram and Nandan was married at village Rampur to one Tilak Ram. It is further specifically stated by him that Kishan Singh along with Nandan used to visit their village and stay with Nathu and Kishan Singh used to address Nathu as Bhai and Nathu also used to address Nandan as Bua.

27. Learned senior Counsel for the respondent has next referred to the evidence of PW5-Mal Singh son of Dasaunda Singh, who was stated to be 70 years of age as on 07.07.1966 and was a resident of Rampur which is the matrimonial home of Nandan and has highlighted that he had specifically stated that he knew the plaintiff and his mother Nandan and her brother's son Nathu and that the said Nathu came to Kishan Singh-plaintiff on the occasion of the marriage of his son and he used to stay there for 10-12 days and he used to call Nandan as his Bua and used to address Krishan-plaintiff as his brother. It was further pointed out that it was specifically stated in his evidence that on the marriage of Khushal Singh son of plaintiff, Nathu gave Rs.21/- as *Nankay* (shagun from maternal side) and that Nandan also used to visit Jalbera and stay there for one month or so with Nathu. It is

also pointed out that PW6-Allah Dia was also 65 years of age and was



resident of Village Rampur and his evidence is also on similar lines as that of PW5 and thus, is relevant. Reference has also been made to the evidence of PW7-Pritam son of Harbans who was related to the plaintiff as plaintiff was his real maternal uncle and he in his examination-in-chief had specifically stated that Nathu used to visit Nandan on the occasion of marriages etc. and also used to stay with her for a month or so and that Nathu used to address Nandan as his Bua.

28. It is submitted that even PW8 Arjan son of Mansa, who is stated to be a resident of village Azizpur which is situated at a distance of 1¼ miles from Rampur, had also given specific evidence with respect to the relationship of the plaintiff with Nathu and Nandan, which is also relevant to prove their relationship. It has been pointed out that to a similar effect is the evidence of PW9, who was a resident of a village adjacent to the Village Rampur and had also specifically stated that he attended the marriage of Khushal Singh, son of the plaintiff and that Nathu son of maternal uncle of Kishan Singh had also attended the marriage. It is argued that even PW10 Babu Singh had given evidence in the same manner as PW8 and PW9 and the said Babu Singh was a resident of Bohori and he had attended the marriage of Chhatero daughter of Kishan Singh (plaintiff), which was also attended by Nathu. It is submitted that evidence of PW11 Jamiyat Singh is relevant for proving the relationship, inasmuch as, he was 70 years of age as on 06.10.1966 and had specifically stated that the plaintiff's mother was Nandan, who belonged to village Jalbera and that Nathu was Nandan's brother's son and that he met Nathu in Kishan Singh's house and that Nathu addressed Kishan Singh as his brother and that he attended the wedding of daughter of Kishan Singh which was also attended by Nathu, who



contributed Rs.35/- by way of “Neonda” in her marriage and the entries regarding the same were written by him and the original bahi was duly exhibited as PW11/1 and the true translation of the same has been exhibited as Ex.PW11/T. It is further submitted that PW12 Jiwa Singh son of Bhagwana had also proved the relationship of the parties and he was also a relative of the plaintiff Kishan Singh and thus, had personal knowledge about the relationship of the parties and in addition to other aspects, he had further stated that Nathu had left behind no other relative except the plaintiff.

29. Learned senior Counsel for the respondents has further stated that PW13-Kishan Singh-plaintiff had given elaborate evidence with respect to the relationship of the parties and also on all other relevant aspects and no question in the cross-examination has been put to the plaintiff with respect to the relationship between Nandan and Nathu or the plaintiff’s relationship with Nandan and thus, the said fact along with pleadings as well as other evidence would clinchingly show that the plaintiff was the son of Nandan and Nandan was the sister of Hira and was Bua of Nathu as Nathu was son of Hira and thus, the relationship of the parties was duly established.

30. Learned senior Counsel for the respondents has submitted that a perusal of Section 50 of the Indian Evidence Act, 1872 would show that the phrase used in the said Section is to the effect that “any person”, who either “as a member of the family” or “otherwise”, has special means of knowledge as to the existence of the relationship, can give evidence with respect to the said relationship and the said provision does not restrict that

the evidence only of the members of the family is relevant. It is further



submitted that even Illustration (a) to Section 50 of the Indian Evidence Act would clearly show that even in case friends have received and treated two persons as husband and wife then the same would be a relevant fact and thus, even the evidence of the said friends would be relevant to prove the relationship. It is submitted that in the present case, the present plaintiff has produced several witnesses from both the villages where the deceased Nathu was residing and where Nandan his Bua was married and the said witnesses had clearly deposed that they had seen the said Nathu calling Nandan as his Bua and thus, the said witnesses who had witnessed the said conduct had special means of knowledge to give evidence with respect to the said relevant fact. It is submitted that both the Courts have concurrently found on the basis of the said evidence that the relationship between the said parties is proved and that there is no perversity or illegality in the said finding so as to call for interference in the present Regular Second Appeal. In support of his arguments, learned senior Counsel for the respondents has relied upon the judgment of the Coordinate Bench of this Court passed in RSA-619-1968 decided on 22.11.1978 titled as **Baljit Kaur Vs. Tara Singh** reported as **1979 CLJ (Civil), 416** to contend that the finding of relationship is a finding of fact and the same is not to be interfered with by the Court in the Regular Second Appeal.

31. Further reliance has also been placed upon the judgment of the Full Bench of this Court in RSA-444-1965 decided on 31.01.1972 titled as **Amar Singh etc. Vs. Chhajju Singh etc.** reported as **1972 PLR 625** in support of his arguments to the effect that a witness could appear in the Court to make a statement in order to prove the conduct of another, in case



person to another.

32. Learned senior Counsel for the respondent no.1 has further submitted that apart from the fact that due execution of the Will has not been proved, there were several suspicious circumstances calling for rejection of the Will. It is submitted that the said circumstances are as follows:-

- i) None of the beneficiaries under the Will are related to the testator. In this regard, it is submitted that the said fact is not a disputed fact and even DW11-Budh Ram in his cross-examination has reiterated the said fact.
- ii) It is stated that there is nothing on record to even remotely show that defendant no.4 is related to defendant Nos.1 to 3 and thus, the question of execution of the Will in favour of different persons, not related to each other, casts a very serious suspicion on the execution of the Will.
- iii) It is pointed out that there is no plea taken in the written statement filed by defendant Nos.1 to 4/present appellants to the effect that they were rendering any service to the deceased-Nathu in lieu of which the deceased might have executed a Will in their favour. The sole defendant (i.e., defendant no.1-Budh Ram) who appeared in the witness-box as DW11 also did not give any evidence with respect to any service rendered by defendant Nos.1 to 4 to the said deceased.
- iv) As per the record, the deceased was not keeping good health and had died within three days of the execution of the alleged Will, inasmuch as the alleged Will is stated to have been executed on 20.08.1964 whereas the death of the deceased had taken place on



23.08.1964. It is further pointed out that as per Ex.P3 which is a copy of the register of death, the date of death of deceased Nathu son of Hira Ram was mentioned as 23.08.1964 and it was stated that he had been sick for the last 6 years.

v) The beneficiaries i.e., defendants no.1 to 4 have actively participated in the execution of the Will. The said fact is apparent from the evidence of witnesses. Reference has been made to the evidence of DW-1 Bodh Parkash, Scribe, in which he had specifically stated that defendants no.1 to 4 were also present at the time when the Will was scribed and the same was done at the shop of Dr.Satpal. A further reference to the evidence of DW-11 Budh Ram shows that in his cross-examination, the said witness had stated that he was present at the time of execution of the Will.

vi) DW-1 Bodh Parkash, deed writer, who had scribed the Will Ex.D1, had specifically stated in his cross-examination that the attesting witnesses had not put their attestation mark in his register nor they were asked to do so.

vii) The deceased-Nathu was admittedly a resident of Jalbera and Jalbera is at a distance of 4 miles from Ambala city and yet the Will was scribed at Ambala City at the shop of Dr.Satpal. In the said regard, evidence of DW-1 scribe has been highlighted where he had stated that Jalbera is 4 miles from Ambala City. Reference has also been made to the evidence of DW-11 Budh Ram defendant no.1, who in his cross-examination had stated that when a person starts from Anantpur Jalbera, the Court falls in the way before one reaches to Dr. Satpal Soni's Clinic.



viii) PW-14 Agya Ram Sharma, Inspector of Police (retired), who had worked in the Fingerprint Bureau, Phillaur for 32 years, had proved on record the report of the Bureau as Ex.PW14/2 in which it has been stated that the thumb impression Mark X could not be compared on account of being ink smudged and fade. (page 535/336 of the record of the trial Court).

ix) DW-11 Budh Ram in his cross-examination had stated that no rough Will was written and the scribe went on writing what was stated by Nathu and had further admitted that Nathu was illiterate. It is submitted that a perusal of the Will, would show that certain technical words have been used in the said Will which could not have been dictated by an illiterate person. Reference in this regard has been made to paragraph 26 of the judgment of the Appellate Court which observations have not been rebutted or disputed on behalf of the appellants.

x) DW-11 Budh Ram defendant had further in his cross-examination stated that he did not suggest on the said date that the Will should be registered before the Sub Registrar. It is to be noted that once as per the case of defendants no.1 to 4, such an effort was made to take everybody from village Jalbera to Ambala City, then it is surprising that the Will was not got registered during the life time of the deceased and thus, the registration of the Will after the death of the deceased would not in any way further the case of defendants no.1 to 4.

xi) It is further submitted that DW-11 in his cross examination had stated that the Will was scribed in the consulting room of Dr.Satpal



and while the Will was being scribed, the doctor was attending his clients also and was also watching the scribing of the Will. It is stated that on the other hand, DW-6 Dr.Satpal Soni had stated that the Will was executed in his consulting room and that he had reached the room after the Will had been scribed and that he did not know the name of the person, who had scribed the Will and had further stated that in between the consulting room and in the sitting room, there was a door and a curtain had been hung behind the door and the person sitting in the consulting room was not visible from the outside.

33. It has been pointed out that DW6 Dr.Satpal Soni had stated that he had signed the Will (Ex.D1) with his blue ink and had further admitted that in the other proceedings he had stated that he had signed with black ink and that further he did not know as to who had paid the fees to the scribe and that he did not see any jamabandi and further he did not notice whether other witnesses had put their thumb marks or signatures and that his signatures were not obtained by the scribe in his register. It is further highlighted that the said witness had stated that it was defendant no.1 Budh Ram who had told him that Nathu was to be given some medicine and also wanted to execute a Will and that he attested the Will as a medical expert but did not issue any certificate of medical fitness to Nathu or Budh Ram and that that he did not know the meaning of the word “Miker” and did not follow what was written in the said Will nor made any effort to know its contents. It is argued that DW2 Ram Gopal son of Mangal Singh, who was stated to be one of the attesting witnesses of the Will, had been found to be a very clever witness and the said fact had been recorded by the Court after putting questions to him. In response to the Court question, the said witness



had stated that Nathu had died in the village on the 3rd/4th day of the execution of the Will (Ex.D1) on account of illness and thereafter had immediately stated that he cannot say that he died on account of illness and that Nathu was brought to Ambala City in a Tonga and that it is thereafter that the said observations had been made by the Court. It is further stated that DW2 had stated that his house was at a distance from the house of Nathu and that he belonged to a different Patti.

34. It is argued that DW3 Ram Kishan son of Chetu, who is stated to be an attesting witness to the Will Ex.D1, had stated in his cross-examination that Nathu was ill with Asthma for about 2 or 3 months before his death and that he was an old man of 75 years of age and was rather spent up and had been suffering from Asthma since long and thus, he had also proved that said Nathu was not well. It has been pointed out that the said DW3 had stated in his cross-examination that he did not know any relation of Nathu and that he did not see Nathu's father and did not know where Nathu was married and had further stated that all the persons including the scribe had reached the shop of Dr. Satpal together, which evidence was contrary to the evidence of DW2 Ram Gopal, who had specifically stated that the scribe had come to the shop of Dr. Satpal after his reaching there. It is submitted that the abovesaid witnesses produced by the defendant Nos.1 to 4 are not trustworthy and do not prove the due execution of the Will, nor explain the various suspicious circumstances.

35. Learned senior counsel for respondent no.1 has relied upon the judgment of the Hon'ble Supreme Court in case titled as ***"B. Venkatamuni Vs. C.J. Ayodhya Ram Singh and others:, reported as 2007 AIR (Supreme Court) 311*** in support of his argument to the effect that the Will does not



stand proved by proof of legal formalities without looking into the suspicious circumstances surrounding the Will. Reliance has also been placed upon the judgment of the Hon'ble Supreme Court in case titled as *“Thangam and another Vs. Navamani Ammal”, reported as 2024 INSC 164* and upon the judgment of the Hon'ble Supreme Court in case titled as *“Rur Singh (D) Th. LRS. & Ors. Vs. Bachan Kaur, reported as 2009(11) SCC 1* to argue that the finding on a Will is a finding of fact and calls for no interference. It would be relevant to note that the only contesting respondent in the present case is respondent No.1 who is the plaintiff. Respondent No.2 was co-defendant as she was defendant No.5 in the main suit and she had setup her own Will allegedly executed by deceased Nathu in her favour and the trial Court had rejected her claim and no further appeal was filed by her before the First Appellate Court nor any appeal has been filed before this Court and thus, apparently she is not a necessary party. Respondent Nos.3 and 4 in the present case are widow and son of Ram Partap and the said Ram Partap was defendant No.3 in the main suit and Bant Singh son of Ram Partap through his legal representatives as well as Bant Kaur daughter of Ram Partap who are appellant Nos.4 and 5 in the present appeal and Mewa son of Ram Partap through his legal representatives, represented the estate of the said Ram Partap and thus, even the other LRs of defendant No.3 i.e., respondent Nos.3 and 4 are not necessary parties.

REBUTTAL ARGUMENTS ON BEHALF OF THE APPELLANTS:-

36. Learned senior counsel for the appellant in rebuttal has submitted that the statement of PW13 had been recorded in vernacular as well as in English language and a perusal of the statement of PW13



that his age has been recorded as 85 years, whereas, in the birth certificate produced (Ex.P5), his date of birth has been recorded as 27.04.1988. It is further submitted that as per the respondents, the said Kishan Singh/plaintiff had died on 13.01.1991, as is apparent from CM-1062-C-1999, which was filed for bringing on record LRs. of the deceased Kishan Singh. It is argued that in the said circumstances, the plaintiff would have died at an age of more than 110 years.

37. It is further pointed out by learned senior Counsel for the appellants that PW13-Kishan Singh-plaintiff in his cross-examination, had stated that a month before his death, Nathu had stayed with him and that he was in perfect health for the last time he stayed with him and that Nathu remained ill for only 2-3 days and thus, it could not be said that Nathu was ill at the time of execution of the Will.

FINDINGS:-

38. This Court has heard the learned senior counsel for the appellants and learned senior counsel for respondent no.1 and has perused the paper book.

THREE SUBSTANTIAL ISSUES ARISING IN THE PRESENT RSA:-

39. On the basis of arguments raised on behalf of the appellants and the contesting respondent no.1, the following three substantial issues arise for consideration before this Court:-

- i) Whether the suit of the plaintiff qua the agricultural land was maintainable in the light of the provisions of Section 34 of the Specific Relief Act, 1963.
- ii) Whether the concurrent findings of the trial Court and the Ist Appellate Court to the effect that Nandan is the sister of



Hira and Kishan plaintiff is the son of Nandan, suffer from any illegality / perversity so as to call for interference by this Court.

iii) Whether the findings of the trial Court and the Ist Appellate Court on issue no.3, discarding the Will propounded by defendants no.1 to 4 in their favour allegedly executed by the deceased Nathu Ram, call for an interference in the present appeal.

40. This Court would be adjudicating each of the above said three substantial issues separately.

FINDING WITH RESPECT TO SUBSTANTIAL ISSUE NO.1:-

i) Whether the suit of the plaintiff qua agricultural land was maintainable in the light of the provisions of Section 34 of the Specific Relief Act, 1963.

41. The first plea raised on behalf of the appellants for setting aside the judgment and the decree of the trial Court and the Ist Appellate Court is to the effect that the suit of the plaintiff in the form, in which it was filed was not maintainable qua the agricultural land in view of the provisions of Section 34 of the Specific Relief Act. Before considering the said argument, it would be relevant to refer to Section 34 of the Specific Relief Act, 1963 which is reproduced hereinbelow:-

“34. Discretion of court as to declaration of status or right.— Any person entitled to any legal character, or to any right as to any property, may institute a suit against any person denying, or interested to deny, his title to such character or right, and the court may in its discretion make therein a declaration that he is so entitled, and the plaintiff need not in such suit ask for any further relief: Provided that no court shall make any such



declaration where the plaintiff, being able to seek further relief than a mere declaration of title, omits to do so.

Explanation.—A trustee of property is a “person interested to deny” a title adverse to the title of some one who is not in existence, and for whom, if in existence, he would be a trustee.
”

A perusal of the above provision would show that any person entitled to any legal character or to any right as to any property, has the right to institute a suit against any person denying the same and the Court in its discretion can make a declaration that he is so entitled and in such a suit, the plaintiff is not required to seek any further relief. The emphasis of the learned senior counsel for the appellants is on the proviso which provides that no Court would make any declaration where the plaintiff, being able to seek further relief than a mere declaration of title, omits to do so. It is the case of the appellants that the plaintiff-respondents should have filed the suit for possession with respect to the agricultural land also. The said arguments have been vehemently opposed on behalf of the respondent-plaintiff and have been rejected by the trial Court as well as the Ist Appellate Court.

42. It is not in dispute in the present case that Nathu is the admitted owner of the property and had died on 23.08.1964. It is also not in dispute that vide order dated 17.10.1964, the suit land which was under the ownership of the said Nathu son of Heera had been taken in possession / custody by the Government in the proceedings under Section 145 Cr.P.C., and a receiver was appointed in the said proceedings. The said fact is apparent from Ex.PW4/1, which is the document, which has been jointly



counsel for respondent no.1 and the same has been jointly submitted along with its true translation, which has been taken on record as Mark X on 29.10.2024 by this Court. The translated copy as given by both the senior counsels, reads as under:-

“18th October 1964, According to 6th Kartak Shaka Sammat 1896

As per the order of Ld.Magistrate Ist Class, Ambala on 17.10.64 the land under the ownership (Bila Rahan) of Nathu son of Hira r/o Anandpur Mabrah measuring 259K-17M. The government has taken in its possession / custody u/s 145 / Cr.P.C. of Police Station, Sadar, Ambala on which Mahall, Ambala, has been appointed as Receiver.

SD/- In Eng.
Tehsildar

1. *Note: As per application of applicant copy has been prepared.*
2. *Copy is correct as per original.*
3. *Fee has been received under rule 0-40.*

SD/- In Eng.
Tehsildar 1.3.66”

43. It is also not in dispute that the suit was filed on 11.02.1965, on which date, the said proceedings under Section 145 Cr.P.C. were continuing and thus, it could not be said that the defendants were in possession of the suit land and rather the same was under the possession and control of the receiver/State. The said receiver / State was not a party to the suit and thus, the question of the plaintiff seeking possession with respect to the agricultural land did not arise. As is apparent from Section 34 of the Specific Relief Act, 1963 which has been reproduced hereinabove, a person



a situation, the court has power to grant the said declaration with respect to the right of the plaintiff and in such a suit, no further relief is required to be prayed for. In the present case, as per the case in the plaint, it is only the defendants, who are denying the title of the plaintiff by setting up Wills in their favour and thus, the declaration has been sought by impleading the defendants as parties. Since it is proved beyond doubt that on the date of the filing of the suit, the defendants were not in possession of the agricultural land, thus, the question of the plaintiff seeking any relief of possession from them does not arise and it cannot be said that in the said facts and circumstances, the plaintiff was in a position to seek further relief of possession from the defendants and thus, the suit would be maintainable in the form and would not be barred in view of the provisions of Section 34 of the Specific Relief Act.

44. In this regard, it would be relevant to take note of the judgment of the Hon'ble Supreme Court in the case of ***Deo Kuer and another (supra)*** in which the Hon'ble Supreme Court while considering a similar plea as has been raised on behalf of the appellants herein, observed that the suit would not be hit by the proviso to Section 42 of the Specific Relief Act, 1877, (which was para materia to the proviso to Section 34 of the Specific Relief Act, 1963) and had further observed that in a suit for declaration of title or property which stands attached under Section 145 of the Cr.P.C., it was not necessary to ask for further relief of delivery of possession as it is the Magistrate who has the possession and not the defendant and the defendant is not in a position to deliver the possession to the plaintiff. It was further observed that relief claimed in the suit was against the defendant only and



possession. The relevant portion of the said judgment is reproduced hereinebelow:-

“3. The only point argued in this appeal was whether in view of the attachment, the appellants could have in their suit asked for the relief for delivery of possession to them. If they could not, the suit would not be hit by the proviso to Section 42. The parties seem not to dispute that in the case of an attachment under Section 146 of the Code as it stood before its amendment in 1955, a suit for a simple declaration of title without a prayer for delivery of possession is competent. The respondents contend that the position in the case of an attachment under Section 145 of the Code is different, and in such a case the magistrate holds possession for the party who is ultimately found by him to have been in possession when the first order under the section was made. It was said that a suit for declaration of title pending such an attachment is incompetent under the proviso to Section 42 unless recovery of possession is also asked for. It appears that the attachment under Section 145 in the present case is still continuing and no decision has yet been given in the proceedings resulting in the attachment.

4. In our view, in a suit for declaration of title to property filed when it stands attached under s. 145 of the Code, it is not necessary to ask for the further relief of delivery of possession. The fact if it be so, that in the case of such an attachment, the magistrate holds possession on behalf of the party whom he ultimately finds to have been in possession is, in our opinion, irrelevant. On the question however whether the magistrate actually does so or not, it is unnecessary to express any opinion in the present case.

5. The authorities clearly show that where the defendant is not in possession and not in a position to deliver possession to the plaintiff it is not necessary for the plaintiff in a suit for



a declaration of title to property to claim possession: see [Sunder Singh Mallah Singh Sanatan Dharm High School, Trust v. Managing Committee, Sunder Singh-Mallah Singh Rajput High School](#), 65 Ind App 106. Now it is obvious that in the present case, the respondents were not in possession after the attachment and were not in a position to deliver possession to the appellants. The magistrate was in possession, for whomsoever, it does not matter, and he was not of course a party to the suit. It is pertinent to observe that in [Humayun Begam v. Nawab Shah Mohammad Khan](#), AIR 1943 Privy Council 94 it has been held that the further relief contemplated by the proviso to Section 42 of the Specific Relief Act is relief against the defendant only. We may add that in [K. Sundaresa Iyer v. Sarvajana Sowkiabil Virdhi Nidhi Ltd.](#), ILR (1939) Madras 986, it was held that it was not necessary to ask for possession when property was in custodia legis. There is no doubt that property under attachment under Section 145 of the Code is in custodia legis. These cases clearly establish that it was not necessary for the appellants to have asked for possession.

6.....The suit for a declaration without a claim for the relief for possession would still be competent in the view taken in the cases earlier referred to, which is, that it is not necessary to ask for the relief of delivery of possession where the defendant is not in possession and is not able to deliver possession, which, it is not disputed, is the case when the property is under attachment under Section 145 of the Code. We think that [Dukkan Ram's](#) AIR 1961 Patna 425 case had not been correctly decided. We may add that no other case taking that view was brought to our notice.

7. For these reasons, we hold that the suit out of which this appeal has arisen was competent. We, therefore, allow the appeal but as the merits of the case had not been gone into by the High Court, the matter must go back to that Court for



decision on the merits. The appellant will get the costs here and below.”

45. The Hon'ble Supreme Court of India in the case of ***Akkamma & Ors. (supra)*** had observed that once the ownership of the original plaintiff was proved, then the plaintiff was entitled to a declaration to the said effect and there was no bar in granting such a decree for declaration and the same could not be denied on the reasoning that no purpose would be served in giving such a declaration as the said declaratory decree would be non-executable and the same being non-executable could not be the reason alone for non grant of declaration. It has further been observed that grant of the said declaratory decree cannot be refused solely on the ground that the plaintiff has failed to establish his case for further consequential relief and that there was no bar in the Specific Relief Act 1963 in granting a standalone declaratory decree. The relevant portion of the said judgment is reproduced hereinbelow:-

“17.....There is no bar in the [Specific Relief Act, 1963](#) in granting standalone declaratory decree. The Trial Court came to a positive finding that the original plaintiff was the owner of the suit property. But it held that in absence of declaration of relief of possession by the plaintiff, declaration of title cannot be granted. We have already expressed our disagreement with this line of reasoning. It seems to be a misconstruction of the provisions of [Section 34](#) of the 1963 Act. The Trial Court and the High Court have proceeded on the basis that the expression “further relief” employed in that proviso must include all the reliefs that ought to have been claimed or might have been granted. But in our view, that is not the requirement of the said proviso.....



18. *The High Court has proceeded on the footing that in the subject-suit, the original plaintiff must have had asked for relief for recovery of possession and not having asked so, they became disentitled to decree for declaration and possession. But as we have already observed, the proviso to Section 63 of the 1963 Act requires making prayers for declaration as well as consequential relief. In this case, if the relief on second count fails on merit, for that reason alone the suit ought not to fail in view of aforesaid prohibition incorporated in [Section 34](#) of the 1963 Act.*

19. ***.....But as the Trial Court found ownership of the original plaintiff was proved, in our view the original plaintiff was entitled to declaration that he was the absolute owner of the suit property. There is no bar in granting such decree for declaration and such declaration could not be denied on the reasoning that no purpose would be served in giving such declaration. May be such declaratory decree would be non-executable in the facts of this case, but for that reason alone such declaration cannot be denied to the plaintiff. Affirmative finding has been given by the Trial Court as regards ownership of the original plaintiff over the subject property. That finding has not been negated by the High Court, being the Court of First Appeal. In such circumstances, in our opinion, discretion in granting declaratory decree on ownership cannot be exercised by the Court to deny such relief on the sole ground that the original plaintiff has failed to establish his case on further or consequential relief.***

20. *In these circumstances, we sustain the judgment of the High Court that the plaintiffs were not entitled to injunctive relief as prayed for and also the rejection of the plaintiffs' plea for introduction of relief for possession. But at the same time, we set aside that part of the judgment by which it has been held that the plaintiffs were disentitled to declaration of ownership of the property. We accordingly hold that the plaintiffs are*



entitled to declaration that they are owners of the suit property and there shall be a decree to that effect.”

Thus, in view of the law laid down in the abovesaid judgment, the arguments raised on behalf of learned counsel for the appellants to the effect that the decree passed in favour of the plaintiff deserves to be set aside on the ground that the same is not executable, is rejected.

46. To the similar effect, it is the judgment of the Allahabad High Court in the case of ***Jagdish (supra)*** in which it was observed that on the date when the suit was instituted by the plaintiff, the plaintiff was not required to claim the relief of possession as the property was in the possession of the Court.

47. In addition to the above, it would also be relevant to note that there is no finding in the proceedings under Section 145 Cr.P.C. to the effect that the present appellants-defendants no.1 to 4 were in possession of the agricultural land in question on the date of institution of the said proceedings or even on the date of the suit. A perusal of the orders Ex.D2, D5 as well as Mark C which have been relied upon by the learned senior counsel for the appellants would show that in none of the said orders, there was any finding to the effect that the present appellants were in possession of the suit property on the date of institution of the said proceedings or the suit. Ex.D2 is an order dated 10.10.1966 passed by the Assistant Collector 2nd Grade, Ambala in a case which was instituted on 09.07.1965 i.e., after the institution of the suit which was instituted on 11.02.1965. In the said order, the plaintiff was not a party and the same pertains to an application for correction of khasra girdawari relating to Khariff 1964 in respect of the suit land, which was stated to be filed by the present appellants against one



Puran, Inder, Nourata and Shantu. In the said application, the corrections of the entries in the khasra girdawari relating to Khariff 1964 were sought and it was observed by the Assistant Collector Ist Grade, Ambala that it was the case of both the sides that the admitted owner of the land in dispute was Nathu, who had died on 23.08.1964 when the crop had already been sown and the earlier crops had also been sown by Nathu himself and thus, it was observed that it was natural that crops in dispute were also cultivated by him and thus, the girdawari should have been recorded in his name and not in the name of the tenants and accordingly, it was ordered that girdawari for the kharif 1964 harvest be recorded in the name of Nathu deceased, who had actually sown the crop. In the said order, there is no finding that the present appellants are or were in possession on the date of institution of the proceedings or even the suit. A perusal of the said order also explains the averments made in the plaint to the effect that prior to the Tehsildar having been appointed, the agricultural land was in possession of the tenants inasmuch as, it is not disputed that the khasra girdawari for Khariff 1964 on the date of filing of the suit i.e., 11.02.1965 was in favour of the said tenants and its correction was only carried out on 10.10.1966 i.e., after the filing of the suit.

48. Even a perusal of Ex.D5, which was also relied upon on behalf of the appellants would show that the same is an order dated 24.11.1966 passed in criminal revision by a Co-ordinate Bench of this Court, in which, the plaintiff was not a party. The said revision arises from the proceedings under Section 145 of Cr.P.C. and a perusal of the said order would show that it was observed that the trial magistrate after recording the evidence of the parties had observed that earlier the tenants were in possession of the



property and while doing so, had primarily relied upon the khasra girdawri relating to kharif 1964 and since the said khasra girdawari with respect to kharif 1964 had been corrected vide Ex.D2, it was suggested by both the parties that the matter be remanded to the trial Magistrate for recording the evidence of the parties and to give a fresh finding regarding possession. Even in the said proceeding, there was no finding that the present appellants were in possession of the suit property at the time of institution of the suit or at the time of institution of the proceedings under Section 145 CrPC.; Mark 'C' which is the order dated 18.12.1967 passed by the Magistrate Ist Class Ambala and which has been passed after the said remand order dated 24.11.1966 and has been relied upon on behalf of the appellants would also show that in the said case, the respondent/plaintiff was not a party. Moreover, even in the said proceedings no adjudication was done as the counsel appearing for the present appellant/defendants, who were respondents therein had stated that since the correction of khasra girdawari had been carried out and the very purpose for which the proceedings had been instituted had been lost, thus, it was contended on behalf of the said counsel that there was no reason to keep the case pending and in view of said statement made the case was filed. Even in the said order, there is no finding that at the time of institution of the said proceedings or the present suit the present appellants were in possession of the suit property.

49. Even the jamabandi (Ex.D1) for the year 1963-64 which has been relied upon on behalf of the appellant would show that in the cultivation column the name of Nathu son of Hira has been mentioned and the same also does not show the possession of the present appellants. The



evidence i.e. CM-9136-CI-2014 as well as CM-2007-CI-2014 and CM-1662-C-2015 which shows that a very small part of the suit land i.e. 2 kanal was acquired regarding which notice under Section 9 of the Land Acquisition Act, 1894 was issued on 05.10.1983 and as per the case of the appellants the compensation was received by the appellants and further mutation was also entered into on 07.04.1967 after the institution of the suit, would also not further case of the appellants as none of the said documents even remotely show that the present appellants/defendants no.1 to 4 were in possession of the suit property on the date of the institution of the suit or even on the date of institution of the proceedings under Section 145 CrPC. Thus, the documents attached with the abovesaid applications have been considered by this Court and the same do not call for interfering with the concurrent finding of fact of both the Courts.

50. From the evidence and documents on record, it is apparent that immediately after the death of Nathu on 23.08.1964, there was a dispute and the proceedings under Section 145 CrPC were initiated on 16.10.1964 and the possession was taken over by the receiver/State on 17.10.1964 and there is no finding in the proceedings under Section 145 CrPC or any evidence to show that on the date of institution of the said proceedings under Section 145 CrPC or on the date of suit, the defendants were in possession and thus, the question of seeking possession from the defendants in the suit does not arise. It is also not disputed before this Court that the Tehsildar had as an interim measure leased out the property to the defendants in pursuance of auction conducted during the pendency of the suit and the said interim possession of the defendants cannot be considered to be the possession of defendants on the date of institution of suit or on the date when the



proceedings under Section 145 CrPC were instituted. Since, it is proved beyond doubt that on the date of the suit, it was the receiver who had the possession, then, once the ownership of the plaintiff stands established by the judgment of the Civil Court, then, as a necessary corollary, the entitlement to the said possession would be of the plaintiff as the property was “in custodia legis”.

51. The trial Court in para 11 under Issue no.1 had correctly observed that the documents as well as the orders passed by the Tehsildar show that the deceased was in self cultivation of the land till the date of his death and even the jamabandi (Ex.P1) indicated the possession of the deceased and thereafter, the *Batai* was being deposited in the Government Treasury and the same was to be given to the person who was entitled and that the specific averments to the said effect in para 6 of the plaint had not been specifically denied and that PW1-Kartara had also stated that the land was being leased out by the Tehsildar. It has been further rightly observed that after the death of the deceased there was a dispute among the parties and the property became attached and once the plaintiffs have been found to be entitled to inherit the property of the deceased, then, it is the plaintiff who should be entitled to declaration and possession. Admittedly, the jamabandi Ex.P1 for the year 1963-64 shows that Nathu son of Hira was shown in the cultivation column with respect to the suit land and the said jamabandi was the last jamabandi prepared prior to the filing of the suit and since it has been held that the plaintiff is entitled to inherit his estate thus, the jamabandi entries are also required to be rectified in the name of the plaintiff and thus, the decree passed by the trial Court cannot be faulted



conclusion that the defendants could not prove that they were in possession of the suit land at the time of death of Nathu or at the time of institution of the proceedings under Section 145 CrPC or at the time of filing of the suit and thus, rightly upheld the findings of the trial Court.

52. The judgments relied upon by learned senior counsel for the appellant on the said aspect are completely on different facts. In the case of ***Lachhimi Nath Pathak and another (supra)*** passed by the Allahabad High Court and relied upon by the appellants, a perusal of the factual matrix would show that in the said case, prior to the filing of the suit for declaration, the proceedings under Section 145 CrPC had culminated and the possession had been delivered to the defendants and in spite of the said fact, no prayer for possession was made and that the plaintiffs therein had claimed ownership of the disputed land on the ground of adverse possession. Even in the case of ***Venkataraja and others (supra)***, it would be relevant to note that in the said case the respondents no.3 to 10 therein who were tenants and residing in the suit property were parties and were in a position to deliver the possession, whereas, admittedly in the present case, it was the receiver who was in possession, who was not a party to the suit and the defendants who were not in possession at the time of the institution of the suit could not have possibly delivered possession. It is in the said background, it was observed by the Hon'ble Supreme Court that since respondents no.3 to 10 were admittedly in possession of the suit property and they were parties in the case that the plaintiff should have sought the consequential relief of possession also. Even the said case was on different facts. The case of ***Basuki Devi and Ors (supra)*** which was a case decided



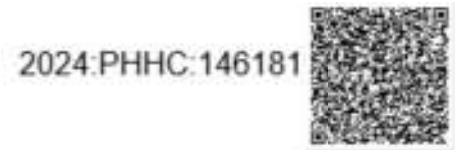
inasmuch as, it was observed in para 13 that the plaintiffs were not found to be in possession of the suit land and as far as the plea of “custodia legis” was concerned, no evidence had been brought on record to show that the suit land was in “custodia legis”. On the other hand, in the present case it is not in dispute that on the date of the suit, the property was in “custodia legis”. In the case of ***Executive Officer, Arulmigu Chokkanatha Swamy Koil Trust Virudhunagar (supra)***, there was no issue with respect to attachment of proceedings under Section 145 Cr.P.C. and thus, the peculiar facts which arise in the present case had not arisen in the abovesaid case. The judgment of the Co-ordinate Bench of this Court in the case of ***Bali Ram (supra)*** was with respect to an aspect where the amendment was allowed by the appellate Court and the plaintiff was permitted to amend the suit so as to implead the prayer of possession. The said judgment is not even remotely applicable to the present case.

53. In the said circumstances, the decree passed by the trial Court and upheld by the 1st Appellate Court is absolutely in consonance with the law and deserves to be upheld. The substantial issue no.1 is decided in favour of the respondents and against the appellants.

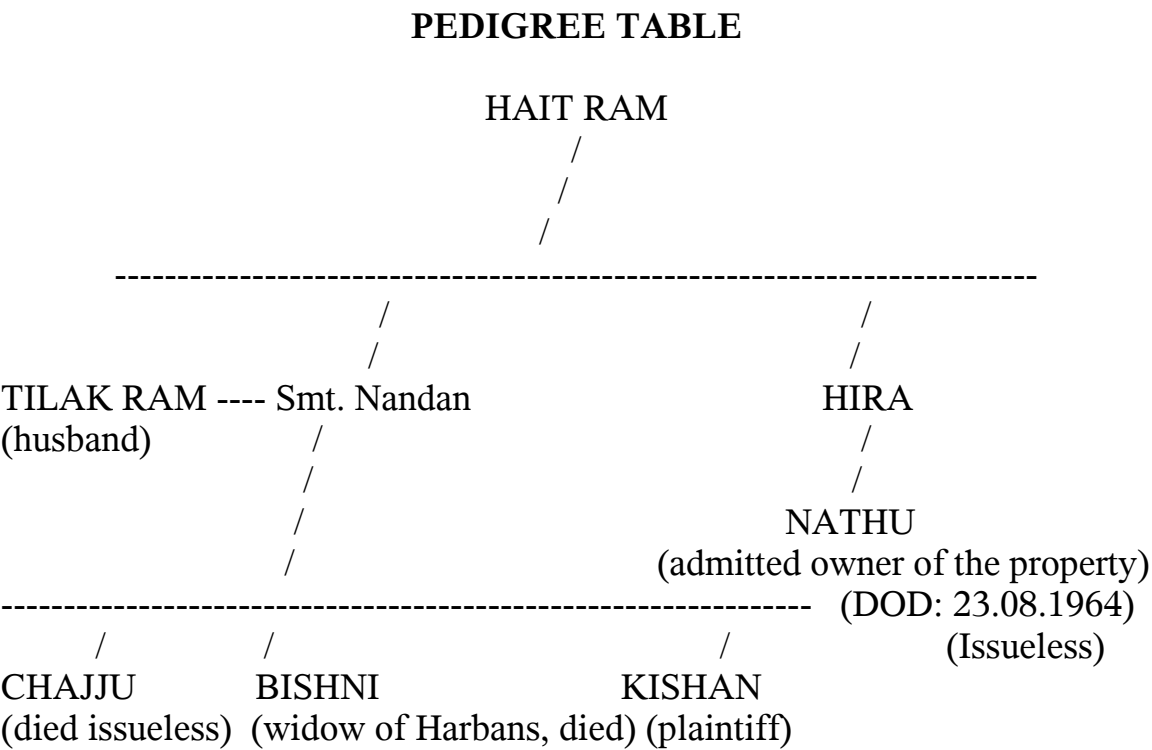
FINDING WITH RESPECT TO SUBSTANTIAL ISSUE NO.2:-

ii) Whether the concurrent findings of the trial Court and the Ist Appellate Court to the effect that Nandan is the sister of Hira and Kishan plaintiff is the son of Nandan, suffer from any illegality / perversity so as to call for interference before this Court.

54. On the basis of pleadings and the evidence on record, the plaintiff had tried to establish his relationship with Nathu by averring that



plaintiff was son of Nandan. The relationship sought to be pleaded by the plaintiff can be best explained by the following pedigree table:-



55. Before adjudicating the abovesaid substantial issue, it would be necessary to refer to Section 50 of the Indian Evidence Act, 1872. Section 50 of the Indian Evidence Act, 1872 along with Illustration ‘(a)’ and ‘(b)’ is reproduced hereinbelow:-

“50. Opinion on relationship, when relevant. —*When the Court has to form an opinion as to the relationship of one person to another, the opinion, expressed by conduct, as to the existence of such relationship, of any person who, as a member of the family or otherwise, has special means of knowledge on the subject, is a relevant fact:*

Provided that such opinion shall not be sufficient to prove a marriage in proceedings under the Indian Divorce Act, 1869 (4 of 1869), or in prosecutions under section 494, 495, 497 or 498 of the Indian Penal Code (45 of 1860).

Illustrations

(a) The question is, whether A and B, were married.

The fact that they were usually received and treated by



their friends as husband and wife, is relevant.

(b) The question is, whether A was the legitimate son of B. The fact that A was always treated as such by members of the family, is relevant.”

A perusal of the above provision would show that when the Court has to form an opinion as to the relationship of one person to another, the opinion expressed by the conduct as to the existence of such relationship of any person who could either be a member of the family or otherwise has special means of knowledge on the subject, is a relevant fact and thus, as per the said provision, evidence of even a person who is not a member of the family but has special means of knowledge is also relevant and the said aspect is further clarified by Illustration ‘(a)’ which further enumerates that where the question which is to be determined is as to whether A and B are married then the fact that they were usually received and treated “by their friends” as husband and wife would also be relevant.

56. In the present case, the trial Court as well as the Appellate Court, after taking into consideration the oral evidence as well as documentary evidence have concurrently found that the relationship stands established. This Court has also gone through the evidence of both the parties and is of the opinion for the reasons to be detailed hereinafter that the said concurrent finding of fact is legal and is not required to be interfered with in the present Regular Second Appeal. Some of the pleadings and evidence which have been considered by the trial Court and the Appellate Court are also being referred to by this Court in the subsequent paragraphs.

57. The plaintiff in para 3 of the plaint had made specific pleadings



and was married to Tilak Ram of Village Rampur Kalan, District Patiala and the plaintiff, his sister Bishni and one brother Chajju were the children of Nandan wife of Tilak Ram and that Chajju had died issueless and Bishni was married at Village Ambala to Harbans. Para 3 of the plaint in the said regard is reproduced hereinbelow:-

“3. That Shrimati Nandan was the father's sister of the deceased and was married to Tilak Ram of village Rampur Kalan, District Patiala and the plff, his sister Bishni and one brother Chhaju are the children by Smt.Nandan wife of Tilak Ram. Smt. Nandan died on 6-9-91 and whereas Chhaju died issuleess. Smt. Bishni was married at village Ambala to Harbans. Both Smt. Bishni and her husband died leaving behind four sons and one daughter. Dila Ram one the sons of Smt. Bishni died issuleess while Teja and Dh Ram have also died leaving behind Ajmer and Shera respectively. Prita son and Chinto daughter of Smt. Bishni alive.”

58. In the written statement filed by defendant Nos.1 to 4, although, the averments made in para 3 of the plaint were stated to be not correct and denied and it was also stated that relationship of the plaintiff or other persons stated by him with the deceased was denied but there was no specific denial with respect to specific averments made in the plaint, nor in the written statement, it was pleaded that the plaintiff belongs to some other family. Para 3 of the said written statement is reproduced hereinbelow:-

“3. Para No.3 of the plaint is not correct and denied. It is false and frivolous to the knowledge of the plaintiff. The relationship of the plaintiff or other persons stated by him with the deceased, is denied.”

59. Order VIII Rule 3 CPC provides that it shall not be sufficient for a defendant in his written statement to deny generally the grounds alleged by the plaintiff and the defendant is required to specifically deal



with each allegation of fact which he does not admit to be true except all the averments regarding damages.

60. Further defendant no.1-Budh Ram had appeared in the witness-box as DW11 and in his cross-examination, had specifically stated that he is not related to Nathu and that Nathu used to tell him that his father had a sister but he did not disclose the name of the said sister. From the above evidence, it is apparent that even as per DW11, Nathu had admitted the fact that his father Hira had a sister although in the said evidence, it had been stated by DW11 that the said sister was resident of Malikpur. The case thus projected on behalf of the appellants to the effect that Hira father of Nathu had no sister stands falsified from the said admission of defendant No.1. Relevant portion of the said evidence of DW11 is reproduced hereinbelow:-

“DW11 on SA

Budh Ram defendant No.1 as his own witness on S.A.

xxx xxx

I am not related to Nathu. Nathu used to tell me that his father’s sister was at Malikpur, but he did not disclose his name.”

61. Several witnesses have been examined on behalf of the plaintiff who have proved the relationship between the plaintiff and Nathu. PW11 Jamiyat Singh who on the date of his evidence i.e. on 06.10.1966 was stated to be 70 years of age had specifically stated that he knew the plaintiff-Kishan Singh as the said plaintiff-Kishan Singh was brother of his wife and further i.e. his brother Inder Singh was married to the daughter of Kishan Singh’s father’s sister. Since, the said Jamiyat Singh was related to the plaintiff and his evidence was very inspiring also thus, he had special means of knowledge with respect to the relationship and the said PW11

Jamiyat Singh had specifically stated in his evidence that the plaintiff’s



mother was Nandan who belonged to Jalbera and that Nathu was Nandan brother's son and that he had met Nathu personally in Kishan Singh's house and that it is the said Nathu who used to address Nandan as Bua and further addressed the plaintiff-Kishan Singh as his brother and that he had joined the marriage of Nachatro daughter of the plaintiff and even Nathu had also attended that marriage and had further given evidence to the effect that Nathu had contributed Rs.35/- by way of "Neonda" in her marriage and the entries relating to the same were written by him and that he had seen the original bahi which was duly produced and exhibited as Ex.PW11/1. Counsel for the defendant Nos.1 to 4/present appellants did not conduct any cross-examination of the said witness although cross-examination was conducted by counsel for defendant no.5 which also could not shake the evidence of the said witness. Relevant portion of the evidence of said witness is reproduced hereinbelow:-

"PW11

Jamiayat Singh son of Harnam Singh, 70 years, Zamindari, Manauli on S.A.

I know Kishan Singh of Rampur who is the bother of my wife. My brother Inder Singh was married to the daughter of Kishan Singh's father's sister, Kisshan Singh's mother waw Nandan She belongs to village Jalbera. Her brother was Nanda. Nathu was Nandans brother's son. I met Nathu in Kishan Singh's house and he also visited the marriages and thereto I met him- Nathu addressed as Bhua, and addressed Kishan Singh as his brother. I Joined the marriage of Nachhetro daughter of Kishan Singh, Nathu also attended that marriage. Nathu contributed Rs.35/- in by way of Naunda in her marriage. The entries were made relating to that Naunda. I wrote those entries. I have seen the original bahi in which Ex.P.W.11/1 is the entry relating to this



Naunda. Its true transliteration is EX.P.W.11/1/T.

xxn:- by counsel for defendants Nos.1 to 4-Nil.

RO & AC

6/10/66

SSJ”

62. Even in the cross-examination conducted by counsel for defendant no.5, the said witness PW11 had reiterated the fact that he had met Nathu at the house of Kishan Singh and even the month of the said meeting had been mentioned. A perusal of Ex.PW11/1 would show that there are several entries which have been made indicating the amount given by various relatives/guests at the time of marriage of Nachatro daughter of Kishan Singh-plaintiff and an amount of Rs.35/- had been mentioned in front of the name of Nathu. The said document had been produced by PW11 and had been duly exhibited and there is nothing to either disbelieve or discredit the said witness. The said witness being 70 years of age and also being her relative and having met Nathu when Nathu attended marriage in the family of Kishan Singh is an important witness the evidence of whom has been rightly considered by the Courts for the purpose of establishing relationship between the plaintiff and the said Nathu.

63. Even PW7-Pritam son of Harbans Singh is the relative of plaintiff-Kishan Singh as he is the son of Bishni and Harbans who is the sister of Kishan-plaintiff. The said witness also has, apart from the fact of describing his relationship, has also specifically stated that Kishan Singh's mother was Nandan and Nandan was also his maternal grandmother and that she belonged to Jalbera and that Nathu used to come to Nandan on the occasion of marriages and even otherwise used to stay with her for months at a stretch and he used to address her as Bua. Further in cross-examination

conducted by defendant no.5, the said PW7 had stated that he attended the



marriage of Nathu which had taken place about 30 years prior to the date of his testimony. Even to the said evidence in chief, no cross-examination was conducted on behalf of counsel for defendant Nos.1 to 4. Relevant portion of the evidence of PW7 is reproduced hereinbelow:-

“PW7

Pritam son of Harbans son of Bhagwan Das, 50 years, Zamindari, of Umralla on S. A.

I know the plff: He is my real maternal uncle. My mother was Bishni and she was the real sister of Kishan Singh plaintiff. Kishan Singh's mother was Nandan and was my maternal grand mother. She belonged to Jalbera, Nandan was the daughter of Hira. Again said I do not know her father's name. Hira was the father of Nathu, Nathu was her brother's son. Nathu generally came to Nandan on the occasions of marriage and other also used to stay with her for month at a stretch. Nathu addressed Nandan as his Bhua (Aunti)

Xxn:- by counsel for defets No.5:- I have not seen Hira. I attended the marriage of Nathu in village Jalbera. I do not know in which Village Nathu was married. Nathu was married about 30 years back.

Xxn:- by counsel for defdt Nos.1 to 4. Nil

RO&AC

4/8/66

SSJ”

64. PW-12 Jiwa Singh was also relative of plaintiff Kishan Singh as the said plaintiff was Jiwa Singh's sister's husband and the said witness had also specifically stated that the plaintiff's mother was Nandan and she was the daughter of Hait Ram and had a brother called Heera, whose son was Nathu and that Nathu had left behind no other relation except the



plaintiff and the said Nathu had been visiting the plaintiff and used to address her as Bua. In the cross-examination conducted by defendants no.1 to 4, the said witness had specifically stated that he had gone to Nathu, 5 to 6 months prior to his death and he had gone to enquire about the prices of sugarcane crusher at Ambala City and even stayed with him for the night. The relevant portion of PW-12 Jiwa Singh is reproduced hereinbelow:-

“P.W.12.

Jiwa Singh son of Bhagwana, 50 years, Zamindari resident of Alipur on S.A.

I know Kishan Singh. He is my sister's husband. My sister was married to him about 40 or 45 years ago. The plff's mother was Mst. Nandan. She belonged to Nandpur Jaiver. She was the daughter of Hait Ram. Nandan had a brother Hira. Hira's son was Nathu who died about 3 years ago. Nathu left behind no other relation except the plaintiff.

Kishan Singh has two sons and 3 daughter alive whereas the 4th daughter of Kishan Singh died. His two sons and two daughters are married. Nathu had been visiting the plaintiff. Nathu addressed Nandan as his Bhua (Anti) and addressed Kishan Singh as Bai. Nathu attended the marriage of Kishan Singh's sons and daughters and gave Naunda in those marriages. Nathu left beind land, which was in the cultivation possession of the tenants. I am also a Mukhtar of the plaintiff. When Kishan Singh filed the suit the land had been auctioned by the Tehsildar to the members of the committee of village Jalvera. Naurata was the Sarpanch and Bachna is a panch of that committee. At that time the tenants were cultivating the land.....

xxn:- by Sh. Ram Sarup Counsel for defdt Nos.1 to 4.

I had gone to Nathu 5 or 6 months before he died. I had come to enquire about the prices of Sugar Cane crusher at ambala city and after making enquiries went to stay with him for the night.”



65. In addition to the above said relatives / family members, the plaintiff had recorded the statements of several elderly persons who knew Nathu personally.

66. PW-3 Bakhshi son of Chhajju, who was 65 years of age on the date of his evidence i.e., 16.06.1966 and was resident of village Jalbera had specifically stated that Nathu was of his village and that he knew him and that the father's name of Nathu was Hira and that Hira had a sister, whose name was Nandan and that the plaintiff was the son of Nandan and had further stated that the plaintiff along with Nandan used to visit village Jalbera and used to stay with Nathu and used to address Nathu as Bhai. The relevant portion of his examination-in-chief is reproduced hereinbelow:-

“P.W.3.

Bakhshi son of Chhajju, 65 years, Zamindari, resident of village Jalbera, on S.A.

I knew Nathu of my village. His father's name was Hera. Nathu died about two years ago. Hera had a sister whose name was Nandan. Hera and Nanda's father was Hait Ram. Nandan was married at village Rampur to one Tilak Ram. I know the plaintiff Kishan Singh. He is the son of Mst. Nandan. Kishan Singh along with Nandan used to visit our village and stay with Nathu. He used to address Nathu as Bhai. Nathu used to address Nandan as Bhuha. The land in dispute is being occupied by the Govt. and was leased out by them during the last harvest.”

67. Further in his cross-examination, the said PW-3 had stated that Nathu was ill for about 12 months before his death and was even unconscious for about 10 to 12 days before his death and that he had gone to enquire about the health of Nathu about 3 days before his death. The relevant portion of the said cross-examination is reproduced hereinbelow:-



“XXXn- by Shri B.B. Gupta, counsel for defdt. No.5.

Nathu died of Asthama. He remained ill for about 12 months before his death. He was unconscious for about 10 or 12 days before his death. His tenant Puran used to take him in tonga to the Doctor for the treatment during this period of 10 or 12 days when he was unconscious. I went to inquire of the health of Nathu about 3 days before his death.”

68. Even the evidence of the above said witness, who was personally known to Nathu and had also visited Nathu when he was ill and being resident of the same village, he also had special means of knowledge with respect to the relationship of Nathu with the plaintiff.

69. Even PW-6 Allah Dia son of Attru, who was stated to be 65 years of age on the date of his evidence i.e., 07.07.1966, had specifically stated that he knew the plaintiff Kishan Singh and that Kishan Singh's mother was Nandan and that he had seen her and further that even he knew Bishni, who was the sister of Kishan and that Nathu had attended the marriage of the daughter of Kishan Singh from the maternal side and he gave Rs.35/- as “Naunda”. It was further stated by him that Nathu had even attended the marriage of Kishan Singh's son Kushal Singh. The relevant portion of evidence of PW-6 is reproduced hereinbelow:-

“P.W.6.

Allah Dia son of Attru, 65 years, Green Seller of Rampur on S.A.

I know Kishan Singh of V. Rampur. Kishan Singh's mother was Nandan. I have seen her. She belonged to village Jalbera. I know Bishana of village Jalbera who was her brother. Kishan Singh had a daughter Chhatroo/Batroo. She was married. Nathu attended her marriage from her maternal side. Nathu was the brother's son of Nandan. Neonda was taken on the occasion of the marriage of the daughter of



Kishan Singh. Nathu gave Neonda Rs.35/- or 36/-.

Kishan Singh's son Khushal Singh was married about 8 or 9 years ago. Nathu attended this marriage also on behalf of the maternal side. Neonda was taken on this marriage also. Nathu gave Neonda at Rs.20 or Rs.21/-. Whenever Nathu visited our village he stayed with Kishan Singh Lambardar and addressed Nandan as Bhuha."

70. In the cross-examination, the said witness had stated that he had given Rs.8/- as Naunda at the time of marriage of Chhataro and that Jamiat had made the entries in the bahi regarding payment of Naunda at the time of marriage of Chhataro.

71. Further PW-9 Sarwan Singh had stated that he knew the plaintiff and had attended the marriage of Khushal Singh son of Kishan Singh and had further stated that Nathu son of maternal uncle of Kishan Singh had also attended the said marriage and that Nandan was the mother of Kishan Singh and she was from village Jalbera and that Nathu used to address Nandan as Bhua and Kishan Singh as Bhai. Importantly in the cross-examination, he had stated that Nathu had passed from his village and had stayed with him for one night.

72. PW-1 Kartara son of Kalli Ram was stated to be 70 years of age on the date of his evidence i.e., 23.05.1966 and he was resident of Jalbera and had specifically stated in his examination-in-chief that he knew Nathu son of Hira, who was of his village and that said Hira had a sister named Nandan and that Hait Ram was the father of Hira and Nandan and that Nandan was married in village Rampur with Tilak Ram and that the plaintiff is the son of Tilak Ram. It was further specifically stated that Kishan Singh and Nandan used to visit their village Jalbera at the house of

Nathu and Nathu used to address Nandan as his Bua and that even he (PW1)



also used to address her as his Bua. In the cross-examination, the said witness had stated that the house of Nathu was about one furlong from his house and Nathu was about his age and Nandan was older from Nathu by 20 years. The relevant portion of his evidence is reproduced hereinbelow:-

“P.W. 1.

Kartara son of Kalli Ram, 70 years, R/o Jalwehra, Zamindari, on S.A.

I knew Nathu son of Hira of my village. He died about 1 ¾ years ago. Hira had a sister named Nandan. Hait Ram was the father of Hira and Nandan. My parents used to tell me that Hira was the son of Hait Ram and Nandan was the daughter of Hait Ram. Nandan was married at village Rampur with Tilak Ram. Nandan died about 30 or 35 years back. The plaintiff is the son of Tilak Ram and Nandan. Kishan Singh and Nandan used to visit our village at the house of Nathu. Nathu used to address Nandan as his (Bhuha). I also used to address her as Bhua.

73. Relevant portion of his cross-examination is reproduced hereinbelow:-

“The house of Nathu is about one furlong from my house. Nathu was of about my age. Nandan was older than Nathu by 20 years.”

74. The said witness was thus, apparently a neighbour of Nathu and was residing in the same village and was an elderly person and thus, the Courts have rightly relied upon the evidence of the said witness on the aspect of proof with respect to the relationship.

75. PW-8 Arjan son of Mansa had also stated in his evidence that he knew Kishan Singh and had been on visiting terms with the said Kishan Singh and that Kishan Singh's mother was Nandan and she belonged to village Jalbera and that he knew Nathu who came at the time of marriage



further stated by him that he had contributed 'Naunda' in the marriage of Khushal who was the son of the plaintiff and Nathu also visited at the time of marriage of Khushal Singh and gave Naunda at the time of the marriage. Thus, the said witness along with the other witnesses have specifically stated that Nathu had been visiting the plaintiff at the time of marriage of the son and daughter of the plaintiff and that the said witnesses had also participated in the marriage ceremony and had also seen Nathu addressing the plaintiff Kishan as brother and Nandan as his Bua and thus their evidences have been rightly relied upon by the Courts. In addition to the above, the plaintiff had also examined PW-2 Inder Singh, who was a relative of the plaintiff Kishan Singh as his daughter was married to the son of Kishan Singh and even he in his examination-in-chief had stated that he saw Nathu Ram at the time of marriage of his son and that he had visited the house of Kishan Singh at Rampur about 2/4 times and had met Nathu there. It would be relevant to note that the counsel for defendant nos.1 to 4 had not conducted any cross-examination of the said PW2.

76. Even PW-10 Babu Singh had stated that he knew Kishan Singh and that he attended the marriage of daughter of Kishan Singh and that Nathu son of Nandi's brother had also attended the said marriage and he used to address Nandi as Bua. In his cross-examination conducted by defendant no.5, he had further stated that he had attended the marriage of Khushal Singh and in the said marriage also, Nathu was present. It would be relevant to note that counsel for defendant nos.1 to 4 had not conducted any cross-examination of the said witness in spite of opportunity. Even PW-5 Mal Singh who was 70 years of age on the date of his evidence i.e.,



reiterated the evidence given by the other witnesses. It has further been stated by the said witness that he knew Nathu, who was the son of the brother of Nandan and that Nathu used to come to Kishan Singh on the occasion of marriages and used to stay with him for 10/12 days and that said Nathu had come to the marriage of the daughter of Kishan Singh, as well as his son. In the cross-examination he had stated that he knew Nathu for the last 30 years. In addition to the above, the plaintiff had himself appeared in the witness box as PW-13 and had reiterated the entire case and had further specifically stated that his mother was Nandan and Tilak Ram was his father and further that Hait Ram was the father of Nandan and Nandan had one brother by the name of Hira, whose son was Nathu and Nathu died issueless and Nathu used to come and to stay with him for months in his village and the marriage of his children was also attended by Nathu.

77. The evidence of the abovesaid witnesses when taken in totality, clearly establishes the relationship between the plaintiff Kishan and Nathu. It is further fortified from the fact that from the side of the appellants nothing has been shown to this court to suggest that the said plaintiff Kishan belonged to some other family and was not the son of Nandan or that the said Nandan was not the sister of Hira. The fact that Nathu is the son of Hira is not in dispute. In the said circumstances, the trial Court as well as the Appellate Court have rightly decided issue no.2 in favour of the plaintiff and against the defendant. The trial Court has further rightly observed that since the relationship of the plaintiff and Nathu is established, thus, the plaintiff would be the only surviving heir to inherent the property



witnesses has been correctly appreciated by the trial Court. Even the Ist Appellate Court has considered the evidence on record and has rightly come to the conclusion that Kishan Singh was the son of Nandan who was the father's sister of Nathu deceased and was a blood relation of the deceased and was entitled to succeed to the estate of Nathu as provided for by the provisions of The Hindu Succession Act.

78. With respect to the argument of learned senior counsel for the appellants to the effect that in the *Kursinama*, the name of Nandan, being sister of Hira has not been mentioned, the explanation offered on behalf of the respondent/plaintiff to the effect that in Ex.P7, the name of only male descendents has been mentioned, is apparently correct and a perusal of Ex.P7 would show that there is no reference to any female member of the family. The argument raised on behalf of the appellants to the effect that certain witnesses were members of the family and were thus interested witnesses, also does not call for excluding their evidence inasmuch as in order to prove the relationship between the members in a family, the best evidence would be given by the persons who are relatives and thus, it cannot be said that the evidence of the said witnesses cannot be considered, nor any law supporting the said contention has been referred to. In fact, a perusal of Section 50 of the Indian Evidence Act which has been highlighted on behalf of the appellants would show that the opinion as to the existence of a relationship could be that of a member of the family. Further the minor discrepancies pointed out on behalf of learned counsel for the appellants also do not call for setting aside the concurrent findings of fact which are based on due appreciation of evidence, which evidence has also been considered by this Court.



79. Reliance placed upon the judgment of the Hon'ble Supreme Court in the case of ***Dolgobinda Paricha*** (*supra*) in the said regard also does not further the case of the appellants. In the said case, the evidence of one Dharanidhar Mishra, who was not directly related to the family of Loki Nath and was a friend of Loki Nath and had lived in the neighborhood, was under consideration which showed that he knew Loki Nath and had further attended the marriage ceremonies of members of the family on account of which it was found to be relevant under Section 50 of the Indian Evidence Act and was taken into consideration for the purpose of proving the relationship of the plaintiffs being the sons of the daughters of Loki Nath Paricha by his first wife Satya Bhama. It would be relevant to note that on the basis of the evidence of the two witnesses one being Dharanidhar Mishra and the other being Janardan Mishra, the said findings had been arrived at. The relevant portion of the said judgment is reproduced as under:-

“xxx xxx xxx

We may in this connection refer to one of our own decisions, Sitaji v. Bijendra Narain Choudhary wherein the following observations were made:

" A member of the family can speak in the witness-box of what he has been told and what he has learned about his own ancestors, provided what he says is an expression of his own independent opinion (even though it is based on hearsay derived from deceased, not living, persons) and is not merely repetition of the hearsay opinion of others, and provided the opinion is expressed by conduct. His sources of information and the time at which he acquired the knowledge (for example, whether before the dispute or not) would affect its weight but not its admissibility. This is therefore legally admissible evidence which,



if believed, is legally sufficient to support the finding".

It is true that Dharanidhar Misra was not directly related to the family of Lokenath. He was, however, distantly related to Haripriya. He was a friend of Lokenath Parichha and lived in the same neighbourhood. His evidence showed that he knew him and the members of his family quite well. That being the position, his evidence that he attended the marriage ceremonies and the Upanayan ceremonies of several members of the family undoubtedly showed his opinion as expressed by his conduct.

xxx xxx xxx”

80. It would be relevant to note that the Full Bench of this Court in the case of ***Amar Singh (supra)***, had after considering the judgment of the Hon'ble Supreme Court in the case of ***Dolgobinda Paricha*** framed two questions. The two questions were initially framed by Hon'ble Justice Suri in para 1 of the judgment and were also framed by Hon'ble Justice H.R. Sodhi in para 15 of the judgment and were ultimately answered in para 54 of the judgment. The relevant portions of the said judgment is reproduced herein-below: -

“C.G. Suri, J. An important question of law that keeps arising in a large number of cases and which has also arisen in this second' appeal is whether, in cases where it becomes necessary to prove the relationship of one person to another, a witness appearing in Court can make a statement to prove the conduct of another having special means of knowledge about the disputed relationship when that conduct expresses the opinion of that person about the relationship. Is it necessary that the statement of the witness is to be confined only to his own conduct as expressive of his own opinion with regard to the existence of the disputed relationship ?

xxx xxx xxx

H. R. Sodhi, J.



*(15) The following **two questions** of law have been referred to Full Bench by my brother Suri, J : —*

*(1) **Is it necessary that the statement of a witness is to be confined only to his own conduct as expressive of his own opinion with regard to the existence of the disputed relationship ?***

*(2) **Whether in cases where it becomes necessary to prove the relationship of one person to another, a witness appearing in Court can make a statement to prove the conduct of another having special means of knowledge about the disputed relationship when that conduct expresses the opinion of that person about the relationship ?***

Xxx xxx xxx

ORDER OF THE FULL BENCH

*(54) **In accordance with the unanimous decision, the second question, as framed by Sodhi J., and the first part of the question, as framed by Suri J., are answered in the affirmative. In accordance with the opinion of the majority, the answer to the first question, as, framed by Sodhi J., and the second part of the question as framed by Suri J., are answered in the negative.”***

A perusal of the above-said judgment would show that as per the unanimous decision of the Full Bench, the second question as framed by Hon'ble Justice H.R. Sodhi which was to the effect that “Whether in cases where it becomes necessary to prove the relationship of one person to another, a witness appearing in Court can make a statement to prove the conduct of another having special means of knowledge about the disputed relationship when that conduct expresses the opinion of that person about the relationship?”, which question was also in fact the first part of the question framed by Hon'ble Justice Suri, was answered in the affirmative and thus, it was held that for proving the relationship of one person to



another, a witness appearing in Court could make a statement to prove the conduct of another having special means of knowledge about the disputed relationship when the conduct expresses the opinion of that person about the relationship. In the present case, as is apparent from the finding of the trial Court and 1st Appellate Court as well as the evidence on record, substantial part of which has been discussed in earlier part of the judgment, it is apparent that the finding of fact arrived at by the Courts is in accordance with law and deserves to be upheld.

81. Moreover, it has been observed in the case of ***Balbir Singh (supra)*** by the Co-ordinate Bench of this Court that a finding proving relationship, is a finding of fact and in a second appeal, it is not open to reverse the concurrent finding of fact, especially when there is some evidence in support of the said finding. The relevant portion of the said judgment is reproduced herein-below: -

“In any event whether the appellant is proved to be the son of Lachhman Singh, or not is a pure finding of fact. Sitting in second appeal, it is not open to me to reverse a concurrent finding of fact, especially when there is a some evidence in support of such a finding.”

FINDINGS WITH RESPECT TO ISSUE NO.3 AND

CONCLUSIONS:-

iii) Whether the findings of the trial Court and the Ist Appellate Court on issue no.3, discarding the Will propounded by defendants no.1 to 4 in their favour allegedly executed by the deceased Nathu Ram call for an interference in the present appeal.

82. Both the trial Court as well as the Ist Appellate Court had concurrently discarded the Will propounded by the appellants/defendant



that there were several suspicious circumstances which were not explained calling for rejection of the Will. This Court has considered the entire material on record and is also of the opinion that the concurrent finding of the trial Court and the Appellate Court on the said aspect is in accordance with law and does not call for any interference. In the said regard, following circumstances are required to be noted:-

- (i) It is not in dispute that the beneficiaries which are stated to be four in number i.e., defendant Nos.1 to 4/present appellants are not related to the testator. Apart from the fact that the said aspect is not disputed before this Court, a perusal of evidence of DW11-Budh Ram (defendant no.1) would also fortify the same. The said Budh Ram in his cross-examination had stated that he was not related to Nathu.
- (ii) There is nothing on record to show that defendant no.4 is related to defendant Nos.1 to 3 and thus, the execution of the Will in favour of different persons who are not related to each other without there being any specific evidence to show any special service to the deceased casts a serious suspicion on the execution of the Will. Admittedly, defendant no.4 is the son of Munshi and defendant Nos.1 to 3 are sons of Nand Ram.
- (iii) A perusal of the written statement filed by defendant Nos.1 to 4/present appellants would show that there are no averments of their rendering any service to the deceased, in lieu of which deceased might have executed a Will in their favour, in spite of the fact that he was not related to the beneficiaries.
- (iv) It has come on record that the deceased was not keeping good health and had died within three days of the execution of the alleged



Will dated 20.08.1964, as admittedly Nathu Ram had died on 23.08.1964. Moreover, a perusal of Ex.P3, which is the copy of the register of death which shows that the information regarding his death had been given on 15.09.1964, specifically record that the deceased was sick for the last 6 years. PW-3 in his cross-examination, which had been reproduced hereinabove, had stated that the deceased was unconscious for 10 to 12 days before his death.

(v) It has come on record that defendants no.1 to 4 were present at the time of the execution of the Will and had actively participated in the execution of the Will. DW-6 Dr. Satpal Soni, who was a registered medical practitioner of Ambala City, had been examined by the defendants, who in his cross-examination had stated that Budh Ram defendant no.1 had told him that Nathu was to be given some medicine and also wanted to execute a Will. The relevant portion of the said cross-examination of DW-6 is reproduced hereinbelow:-

“D.W.6 on S.A.

Dr. Satpal Soni, Regd: Medical Practitioner Ambala City on S.A.

.....Xxn:- by counsel for the plaintiff.

The parties to the will all of sudden dropped in my clinic and there was no time or place fixed previously. My consulting room is about 2 yards from my sitting place. When they came to me, Budh Ram told me that Nathy was to be given some medicine and also wanted to executed a Will. I directed them to go inside my consulting and write out the Will.”

(vi) Reference can also be made to evidence of DW-1 Bodh Parkash, Scribe as well as to the evidence of DW-11 Budh Ram who had stated that defendants were present at the time of execution of the



Will. The trial Court in paragraph 17 had while relying upon the judgment of the Hon'ble Supreme Court in the case of ***H. Venkatachala Iyengar vs. B.N. Thimmajamma and others***, reported as ***AIR 1959 Supreme Court 443*** had observed that the Hon'ble Supreme Court in the said judgment had held that where the propounders themselves had taken a prominent part in the execution of the Will which confers substantial benefits to the said propounders, the same would be a suspicious circumstance required to be satisfactorily explained. No explanation with respect to the aforesaid suspicious circumstance has been given on behalf of the appellants.

vii) The deceased Nathu was admittedly a resident of Jalbera and Jalbera is at a distance of 4 miles from Ambala City and yet the Will was scribed at Ambala City at the shop of Dr. Satpal. Further DW-11 Budh Ram defendant no.1 had stated that when a person would start from Jalbera and had to go to Dr. Soni's, Clinic, then the Court would fall in the way before one reaches the said clinic. However, in spite of the same, the Will was not executed either in Jalbera or even in the Court but was executed in the clinic of Dr. Satpal Soni. The same was done in spite of the fact that the deceased was not keeping good health on the date of alleged execution of the Will. The relevant portion of the evidence of DW-11 on the said aspect is reproduced hereinbelow:-

“Xxn”- by the plaintiff's counsel:-

When we starts from Anandpur Jalbera, Courts falls in the way if one goes to Dr. Soni's clinic. I did not know Bodh Parkash earlier. I do not know the distance of Bodh Parkash's house from the shop of Dr. Satpal. No rough Will



was written. The scribe went on writing what was stated by Nathu. Nathu was illiterate. Nathu died at the age of 70 or 80 years. Nathu died from the 4th day of the making of the Will. I do not know Kishan Singh. It is wrong to suggest that the land of Nathu was cultivated by the tenants. On the date when the Will was executed, I did not suggest that the same be got registered before the Sub Registrar. I cannot tell as to how many persons thumb marked and how many signed.”

....

Xxn:- by counsel for defendant no.5:-

I was present at the time of the execution of the Will. Nathy deceased told the name of his father as also of his grand father to the petitioner writer Bodh Parkash. Bodh Parkash accordingly wrote those very names in the Will. My father died when I was about 10 years of age. I do not know whether any meals were served to the brahmin or the brotherhood. Nathu brought us from Jalbera to Ambala in tongas. The name of that Tongawalas I do not know. Ram Gopal, myself, Ram Kishan, Ram Partap, Bakhshi Ram, Ram Chand, accompanied Nathu deceased. Ajmer also was with us. All the aforesaid persons except Nathu are alive. Nathu told us in the village that he wanted to execute a Will in their favour. We all reached at the shop of Sadhu Ram in Anaj Mandi Ambala City. Thereafter we went to the shop of Dr.Satpal. Previous to the occasion I never accompanied Nathu deceased to the shop of Dr. Satpal.”

From the above said reproduced evidence of DW-11, it is also apparent that Nathu was illiterate and that as per the case of DW-11 Budh Ram, the scribe was writing what was stated by Nathu. Reference to the Will as well as to the finding of the Ist Appellate Court in paragraph 26, which has not been refuted before this Court would show that several words were used in the Will which included the words “Mikkar”, “Haduld Jail” and “Malkiat wa Makbu Ja



Billa Sarakat Giri” etc. and thus, it could not be stated that the said Will was dictated by an illiterate person and thus, the Courts while discarding the Will came to the conclusion that the same was written at the instance of Budh Ram and others.

viii) DW-11 Budh Ram had further in his cross-examination stated that he did not suggest that the Will should be registered before the Sub Registrar and thus the Will was not registered before the death of the deceased and it is surprising that once everyone including defendants no.1 to 4 had made such an effort to take everybody from village Jalbera to Ambala City, then also the Will was not got registered till the life time of the deceased and subsequent registration of the Will after the death of the deceased would not in any way justify the non-registration of the Will prior to the death of the deceased.

ix) DW1 Bodh Prakash, Deed Writer, who had scribed the Will (Ex.D1), had specifically stated in his cross-examination that the attesting witnesses had not put their attestation in his register nor they were asked to do so. Moreover, as has been observed in para 18 of the judgment of the trial Court, which fact has not been rebutted, DW1 had not scribed the document in place of his profession but had scribed the same at a different place.

x) DW11 in his cross-examination had stated that the Will was scribed in the consulting room of Dr. Satpal Soni and while the Will was being scribed Dr. Satpal Soni had attended his clients and was also watching the Will. The evidence on the said aspect has already been reproduced herein above. On the other hand, DW6 Dr. Satpal



Soni had stated that the Will was executed in his consulting room and that he had reached the room after the Will had been scribed and he did not know the name of person who had scribed the Will and had further stated there was a door and a curtain behind the door and the persons sitting in the consulting room were not visible from the outside. Thus, the said evidence of DW6 is contrary to the evidence of DW11. The relevant portion of his evidence on the said aspect is reproduced herein below: -

“D.W.6 on S.A.

Dr. Satpal Soni Regd. Medical Practitioner Ambala City on S.A.”

xxx xxx xxx

Ex.D1 was executed in my consulting room. I reached that room after the will had scribed. I did not see any rough draft of the Will. I did not know the name of the petitioner writer who had scribed the will. Nathy had come to me for taking medicine as usual, because he was an asthmatic patient.”

xxx xxx xxx

In between my consulting and sitting room there is a door. Persons sitting in my consulting room are not visible from outside. I do no remember whether. I administered the medicine to Nathu before or after the execution of the Will.

xxx xxx xxx

Nathu had got my attestation on the Will lest a question may arise later that he was not in proper senses at the time of the making of the Will and I attested the Will as a Medical expert. I did not think it proper to write on the will that Nathy was in proper senses to make the will.

xxx xxx xxx

I do not know the meaning of the word 'Miker'. I did not



follow what is written in the said Will nor did I make any effort to know it is contents. I do not remember if any other person present there asked the petitioner to explain the contents of the Will i.e. the meaning of the words contained in the Will. I did not issue a certificate of medical fitness to Nathu or Budh Ram.”

Further a perusal of the above-said evidence would show that the above-said witness did not issue any medical fitness certificate certifying the fitness of Nathu on the date of the execution of the Will.

xi) DW3 Ram Kishan son of Chetu, who is stated to be an attesting witness had stated that in his cross-examination that Nathu was ill with Asthma for about 2 or 3 months before his death and that he was an old man of 75 years of age and was rather spent up and had been suffering from Asthma since long and thus, he had also proved that the said Nathu was not well. Further DW3 has also stated in his cross-examination that he did not know any relation of Nathu and that he did not see Nathu's father and did not know where Nathu was married and had further stated that all the persons including the scribe had reached the shop of Dr. Satpal together, which evidence was contrary to the evidence of DW2 Ram Gopal, who had specifically stated that the scribe had come to the shop of Dr. Satpal after his reaching there. The relevant portion of the evidence of DW3 is reproduced herein below:-

“Nathu was ill with asthma for about 2 or 3 months before his death. He was an old man of 76 years of age and rather spent up.

xxx xxx xxx

He died 8 days after the execution of Ex.D1. I did not know any relation of Nathu.”



XXX XXX XXX

I did not see Nathu's father. I do not know where Nathu was married.

XXX XXX XXX

The scribe was called by Nathu. In fact all of us including the scribe had reached the shop of Dr. Satpal together.”

xii) DW2 Ram Gopal son of Mangal Singh, who was also stated to be one of the attesting witness of the Will, has been found to be a very clever witness and the said fact has been recorded by the Court after putting questions to him. In response to the Court question, the said witness had stated that Nathu had died in the village on the 3rd/4th day of the execution of the Will (Ex.D1) on account of illness and thereafter had immediately stated that he cannot say that he died on account of illness and that Nathu was brought to Ambala City in a Tonga and that it is thereafter that the said observations had been made by the Court. The relevant portion of evidence of DW2 is reproduced herien below: -

“The scribe had come to the shop of Dr. Satpal after he reaching there. I had put my signatures on Ex.D.1.

xxx xxx xxx

Q. by Court: - Nathu died in the village on the 3rd or 4th day of the execution of the Will Ex.D1 died of illness. I cannot say if he died of any illness. Nathu had been brought to Ambala City in a Tonga. Defdts Nos.1 to 4 used to look after him. I never saw Nathu ill. (N.B. The witness appears to me very clever.”

It would be relevant to note that the argument raised on behalf of the appellants is to the effect that the said note is not there in the evidence which has been recorded in the vernacular, but it has not been disputed that even the evidence which has been recorded in English, has



also been signed by the trial Judge and a perusal of para 18 of the judgment of the trial Court would show that the trial Court has also taken into consideration the note which duly records that the witness appears to be very clever.

83. The trial Court has taken into consideration the evidence of both the parties and has found that the Will is surrounded by numerous suspicious circumstances which have not been explained and that the said Will could not be stated to be a valid Will. With respect to the handwriting expert DW21, it has been observed that the genuineness of thumb impression of the postal authorities which has been taken as the standard thumb impression has not been proved. While observing the said fact, the evidence of DW18 Chuni Lal Bhatia, who had stated that the thumb impressions were not obtained in his presence and that he did not know Nathu Ram, had been taken into consideration. Even the evidence of R.N. Sharma who was the Town Inspector, to the effect that the thumb impression of Nathu was never taken in his presence and that he did not know the said Nathu Ram personally, had been taken into consideration. In view of the same, the evidence of DW21 has been rightly excluded. The said finding of the trial Court has not been shown to be illegal or perverse. Further, in para 20, the trial Court has also taken into consideration the fact that the plaintiff had got the thumb impressions examined from the Finger Print Bureau, Phillaur and as per the report of the Director, the thumb impressions are incapable of comparison and the report was duly exhibited as Ex.PW14/1 and Ex.PW14/2 by the said Inspector, who had appeared as PW14. The finding of the trial Court in para 20 has also not been shown to be perverse or illegal.



84. The trial Court had highlighted several suspicious circumstances in addition to the suspicious circumstances which have been highlighted in the preceding paragraphs in the present judgment and there is no satisfactory explanation offered by the appellants even to the said circumstances. The Ist Appellate Court had also considered the evidence of the parties and had observed that the Will is not the result of a free, sound and disposing mind and even the suspicious circumstances surrounding the same have not been explained. It had been further observed that apparently Nathu's one leg was in the grave and as per the case of the defendants, they had taken him in tonga to the clinic of Dr. Satpal Soni, who cannot be stated to be very close to the deceased and the same was done only apparently to keep him alive for some time so as to procure the thumb impressions in order to forge a Will. The finding of the Courts on the aspect of Will is also in accordance with law and does not call for any interference by this court and accordingly even the third substantial issue which arises in the present case is decided against the appellants and in favour of the respondents.

85. Before parting with the judgment, it would be relevant to deal with one more submission raised on behalf of the learned senior counsel for the appellants on the aspect of PW-3 having stated in his cross-examination that Nathu performed three marriages and that two of his wives had died during his life time while the third wife was turned out by him 20 years back, whose name was Bhulli and thus, in the presence of Bhulli, the plaintiff did not have right to succeed to the estate of Nathu. In this regard, it would be relevant to note that no such plea has been taken by defendants no.1 to 4 in their written statement. No issue with respect to the fact of there being a third legally married wife of Nathu who was living or of Nathu



having any other legal representative, was framed by the Court. Neither the said Bhulli nor any children of Bhulli have made any claim to the property in question, nor have they moved any application before any revenue authority for entering mutation in their favour nor have challenged the mutation proceedings. The judgments of the trial Court or of the Ist Appellate Court decreeing the suit of the plaintiff and declaring them to be owners have not been challenged by any of them. Even the proceedings under Section 145 Cr.P.C. have not been contested by them. The argument is thus sought to be raised solely on the basis of two lines in the evidence of PW-3 Bakhshi, who was not the plaintiff but one of the witness of the plaintiff. The Ist Appellate Court in paragraph 33 of its judgment had rightly observed that there is nothing on record to show that the said Bhulli was legally married to Nathu, nor any evidence has been led as to whether she is alive. It has further been rightly observed that even as per the evidence of PW-3, on which reliance has been placed upon on behalf of the appellants to raise the said plea, it is apparent that said PW-3 had stated that even the said Bhulli was turned out of the house by Nathu 20 years back. There is nothing on record to show that anyone has heard about the said Bhulli in the last 20 years as on 16.06.1966, when the evidence of said PW-3 was recorded or even further thereafter. In such a situation, the Ist Appellate Court had rightly invoked the provision of Section 108 of the Indian Evidence Act which requires that whenever there is a question as to whether a man is alive or dead, and it has come about that he has not been heard of for seven years by those who would naturally have heard of him if he had been alive, the burden of proving that he is alive is on the person who affirms it. In the present case, the sole evidence which has come on



record of PW-3 shows that the said Bhulli was turned out 20 years back and there is no evidence that she is alive, although several witnesses have been examined by both the parties. At any rate, even the fact as to whether the said Bhulli was legally wedded wife of Nathu, is not established. Accordingly, the concurrent finding of the trial Court as well as the Ist Appellate court does not deserve to be set aside on the said ground.

86. Even the plea raised on behalf of the appellants that in the vernacular, the age of PW-13 is shown to be 85 years which would be in contradiction to the birth certificate and also to the averments made in the civil miscellaneous application does not call for setting aside the judgments of the trial Court as well as the Ist Appellate Court and it would further be relevant to mention that the evidence of PW-13 has also been recorded in English language on 09.11.1966 which statement has been duly signed by the trial Judge which does not record that the age of the plaintiff Kishan was 85 years at the time of giving the said evidence. Moreover, perusal of Ex.P5 which is the birth certificate of said Kishan Singh would show that the same carries the term “Maghar” which would depict the relevant month and thus, it is apparent that the said birth certificate is not in accordance with the English Calendar but as per the “Hindu Samwat Calendar”. Moreover, learned senior counsel for respondent no.1 has also submitted that as per his instructions, said Kishan Singh had died very old and was more than 100 years of age at the time of his death and thus, the circumstance highlighted by the learned senior counsel for the appellants to suggest that the age of the plaintiff in the said circumstances would be 110 years on his death, also cannot be stated to be such a circumstance so as to call for setting aside the judgments of the trial Court as well as the Ist Appellate Court.

87. Keeping in view the above said facts and circumstances, this Court is of the opinion that the judgments of the trial Court as well as the Ist Appellate Court are in accordance with law and deserve to be upheld and the present regular second appeal deserves to be dismissed and is accordingly dismissed.

88. All the pending miscellaneous applications, if any, shall stand disposed of in view of the abovesaid judgment.

(VIKAS BAHL)
JUDGE

November 12, 2024
Davinder Kumar/Pawan/Naresh

Whether speaking / reasoned	Yes/No
Whether reportable	Yes/No