

(2025) 1 ILRA 685
APPELLATE JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 24.01.2025

BEFORE

THE HON'BLE RAJNISH KUMAR, J.

Second Appeal No. 2 of 2017

Sabhapati Verma ...Appellant
Ved Prakash ...Respondent

Counsel for the Appellant:
Mohammad Aslam Khan

Counsel for the Respondent:

Vikas Vikram Singh, Ankit Pande, Rajeshwar,
Sharad Nandan Ojha, Virendra Bhatt

Civil Law – Civil Procedure Code, 1908 - Sections 99 & 100, - Indian Evidence Act, 1860- Section 68 - Indian Registration Act, 1908 - Section 68, - Indian Succession Act, 1925 - Section 63 - Consolidation of Holdings Act, 1950 - Section 171 - Second appeal - against the judgments and decrees - passed in Regular Suit and Civil Appeal - the appeal raises several substantial questions of law, including whether the will, which was sought to be cancelled on the grounds of fraud, was proved in accordance with Section 68 of the Evidence Act, and whether the lower courts were justified in dismissing the suit without considering the ample evidence on record – Suit – for permanent injunction – during pendency of suit, a will was got executed by the defendant-respondent from their father - subsequently, a prayer for cancellation of Will was added by an amendment - The plaintiff-appellant argued that the will was executed fraudulently, as the father of the parties was an educated person but only his thumb impression was on the will - the will was not proved in accordance with Section 68 of the Evidence Act - The trial court, dismissed the suit on the grounds that the plaintiff-appellant failed to prove ownership and possession of the land in dispute – Civil Appeal - The lower appellate court upheld the trial court's

decision – Second Appeal – court finds that, (i) the will was proved by the attesting witness and the plaintiff-appellant failed to prove the grounds of challenge to the will and further, the will was executed with free will and without any influence or coercion – (ii) the plaintiff-appellant was not the real son of the deceased father and was not entitled to a share in the ancestral property in view of section - 171 of the Act, 1950 – held, . the concurrent findings recorded by the two courts below cannot be set aside by this court in second appeal unless the findings are perverse and without jurisdiction which is not the case herein – hence, impugned the judgments and decrees cannot be reversed or modified in view of Section 99 of the CPC – Second appeal is liable to be dismissed.(Para – 27, 38, 39)

Special Appeal Dismissed. (E-11)

List of Cases cited:

1. Guro (Smt) Vs Atma Singh & ors.; (1992) 2 SCC 507,
2. Sri Devi & ors. Vs Jayaraja Shethy & ors.; 2005 All. C.J. 631,
3. Benga Behera & anr. Vs Braja Kishore Nanda & ors.; 2007 All. C.J. 2249,
4. Santosh Hazari Vs Purushottam Tiwari (Deceased) By LRs.; (2001) 3 SCC 179,
5. Dhirajlal Girdharilal Vs Commissioner of Income-tax, Bombay; A.I.R. 1955 S.C. 271,
6. Dhannulal & ors. Vs Ganeshram & anr.; (2015) 12 SCC 301,
7. Committee of Management, Gangadin Ram Kumar Inter College, Ramgarh Barwan, District Jaunpur Vs Deputy Director of Education & ors.; 2006 (24) LCD 1328,
8. Daya Shankar Singh Vs Deputy Director of Consolidation, Faizabad & ors.; 2014 (32) LCD 2167,
9. (Smt.) Savitri & ors. Vs Surendra Mohan Mohana; 1987 (5) LCD 137,

10. Jhuri Singh Vs Ram Kumar Singh & anr.; 2002 (20) 4 LCD 663,

11. Ram Adhar & ors. Vs Baij Nath; 2002 (20) LCD 701,

12. Savitri Bai & anr. Vs Savitri Bai; (2024) 4 SCC 282,

13. Ratnagiri Nagar Parishad Vs Gangaram Narayan Ambekar & ors.; (2020) 7 SCC 275,

14. St. of Har. Vs Harnam Singh (Dead) through LRs. & ors.; 2022 (156) RD 177,

15. Moinuddin Vs Smt. Kanti & ors.; 2018 (9) ADJ 141,

16. Madhusudan Das Vs Smt. Narayani Bai & ors.; 1983 (1) SCC 35,

17. Faggan (Deceased) & ors. Vs Bhagwan Sahai (Deceased) & anr.; 2008 (7) ADJ 46,

18. Jagdish Singh Vs Nathu Singh; 1992 (1) SCC 647,

19. Hafazat Hussain Vs Abdul Majeed & ors.; (2001) 7 SCC 189.

(Delivered by Hon'ble Rajnish Kumar, J.)

1. Heard Shri Mohd. Arif Khan, learned Senior Advocate assisted by Shri Mohd. Shadab Khan, Advocate holding brief of Shri Mohammad Aslam Khan, learned counsel for the appellant and Dr. R. S. Pandey, learned Senior Advocate assisted by Shri Ankit Pande, learned counsel for the respondent.

2. This second appeal has been preferred under Section 100 of Civil Procedure Code, 1908 (hereinafter referred to as "C.P.C.") against the judgment and decree dated 01.11.2013 passed in Regular Suit No. 1132 of 1988; Sabhapati Verma vs. Ram Kishore (Dead) substituted by legal representative Ved Prakash by First

Additional Civil Judge (Junior Division), Ambedkar Nagar and judgment and decree dated 03.10.2016 passed in Civil Appeal No. 66 of 2013; Sabhapati Verma vs. Ved Prakash by Additional District Judge, Court No. 3, Ambedkar Nagar.

3. The appeal has been admitted on the following substantial questions of law formulated in the memo of appeal:-

" A. Whether the will which was sought to be cancelled by the appellant on the ground of fraud, having not been proved by the respondent in accordance with provisions of Section 68 of the Evidence Act, the learned courts below were justified in law in dismissing the suit?

B. Whether the learned courts below ignoring the ample evidence on record as mentioned in the judgment passed by the Trial Court and even without discussing the same were justified in law in dismissing the suit?

C. Whether Ram Kishore who was a Gazetted Officer and the will bearing his thumb impression does not create a suspicion about the due execution of the will in favour of the respondent and the respondent having not proved the will in accordance with the provisions of Section 68 of the Evidence Act, the learned courts below were justified in law in dismissing the suit?

D. Whether from the ample evidence on record including the sale deed, copies of the judgments, high school certificate wherein the parentage of the appellant was mentioned as Ram Kishore, the

said evidence could be ignored and the learned courts below merely by relying upon the statement of Smt. Sursati mother of the appellant and respondent who was win over, were justified in law in dismissing the suit?

E. Whether it was not incumbent upon learned courts below to have discussed and dealt with the oral and documentary evidence on record filed by the parties while dismissing the suit?

F. Whether substantial documentary evidence which has been placed before the Trial Court including certified copies of certain public records besides the copy of the judgment of earlier suit and the oral evidence it was not the duty of lower appellate court sitting as a court of first appeal to deal with all issues and the evidence lead by the parties before recording its findings and dismissing the appeal ignoring that the appeal is a valuable right and the parties have a right to be heard both on questions of law and facts?

G. Whether the judgment and decree passed by the learned courts below is not only against the facts and circumstances of the case but also the evidence on record?"

4. Learned counsel for the plaintiff-appellant submitted that the father of the parties was trying to sell the ancestral property without consent of the plaintiff-appellant, who was a co-tenure holder, therefore, the suit for permanent injunction was filed. During pendency of the suit, a will was got executed by the defendant-respondent from the father Ram Kishore in a fraudulent manner, which is

apparent from the facts that the father of the parties was an educated person but only his thumb impression was put on the will and he expired after two days of execution of will, therefore, there is sufficient shroud of suspicion, which could not be removed by the defendant-respondent, therefore, the learned courts below wrongly and illegally dismissed the suit and the appeal filed by the plaintiff-appellant. Even otherwise the will has not been proved by the defendant-respondent in accordance with the provisions of Section 68 of the Indian Evidence Act. The learned courts below have passed the judgment and decree without considering the evidence and material on record. The lower appellate court also without considering the questions of law and facts as a trial court, as appeal is a valuable right of the appellant, dismissed the appeal. He further submitted that the judgments relied by the parties had not been considered by the lower appellate court and without considering the same, the appeal has been dismissed on the ground that they are not applicable on the facts and circumstances of the case. Thus, learned counsel for the plaintiff-appellant submitted that the judgment and decrees passed by the learned courts below are liable to be set aside and the suit filed by the plaintiff-appellant is liable to be allowed. Learned counsel for the plaintiff-appellant relied on **Guro (Smt) vs. Atma Singh and others; (1992) 2 SCC 507, Sri Devi and others vs. Jayaraja Shethy and others; 2005 All. C.J. 631, Benga Behera and another vs. Braja Kishore Nanda and others; 2007 All. C.J. 2249, Santosh Hazari vs. Purushottam Tiwari (Deceased) By LRs.; (2001) 3 SCC 179, Dhirajlal Girdharilal vs. Commissioner of Income-tax, Bombay; A.I.R. 1955 S.C. 271, Dhannulal and others vs. Ganeshram and another;**

(2015) 12 SCC 301, **Committee of Management, Gangadin Ram Kumar Inter College, Ramgarh Barwan, District Jaunpur vs. Deputy Director of Education and others**; 2006 (24) LCD 1328, **Daya Shankar Singh vs. Deputy Director of Consolidation, Faizabad and others**; 2014 (32) LCD 2167, (Smt.) **Savitri and others vs. Surendra Mohan Mohana**; 1987 (5) LCD 137, **Jhuri Singh vs. Ram Kumar Singh and another**; 2002 (20) LCD 663 and **Ram Adhar and others vs. Baij Nath**; 2002 (20) LCD 701.

5. Per contra, learned counsel for the defendant-respondent submitted that a suit for permanent injunction was filed by the plaintiff-appellant, which was amended during pendency of the suit and the prayer for cancellation of will deed executed in favour of the defendant-respondent was added but neither the possession of the plaintiff-appellant has been proved nor he could prove the grounds of challenge to the will. The will was proved by the attesting witness in accordance with Section 68 of the Indian Evidence Act. The reason for execution of will has been disclosed in the will itself, therefore, the alleged fraud and suspicious circumstances in execution of will does not exist and the same stands removed. The reason for thumb impression on the will has been disclosed and proved by the defendant-respondent. He further submitted that the learned courts below have passed the judgment and decrees after considering the pleadings, evidence and material on record. There is no illegality or error in the impugned judgment and decrees passed by the courts below. The appeal has been filed on misconceived and baseless grounds and it lacks merit. The substantial questions of law formulated in this appeal are not involved in this appeal. He relied on **Savitri Bai and another vs.**

Savitri Bai; (2024) 4 SCC 282, **Ratnagiri Nagar Parishad vs. Gangaram Narayan Ambekar and others**; (2020) 7 SCC 275, **State of Haryana vs. Harnam Singh (Dead) through LRs. and others**; 2022 (156) RD 177, **Moinuddin vs. Smt. Kanti and others**; 2018 (9) ADJ 141, **Madhusudan Das vs. Smt. Narayani Bai and others**; 1983 (1) SCC 35 and **Faggan (Deceased) and others vs. Bhagwan Sahai (Deceased) and another**; 2008 (7) ADJ 46.

6. I have considered the submissions of learned counsel for the parties and perused the records.

7. The plaintiff-appellant filed a suit for permanent injunction with the allegation that the father of the plaintiff-appellant i.e. the defendant-respondent namely Ram Kishore, who was the original defendant-appellant, is angry with him as he has opened a clinic in Makhdoom Nagar, therefore, he is not able to give most of his time at home, on account of which, without any reason, he is threatening to sell the land in dispute only to destroy the part of property of the plaintiff-appellant. During pendency of the suit, Ram Kishore died on 27.01.1991, therefore, the defendant-respondent, who is the legal representative of Ram Kishore and brother of the plaintiff-appellant was substituted. Subsequently, the suit was amended adding a prayer for cancellation of will deed dated 25.01.1991 on the ground that the will had been got executed by the defendant-respondent playing fraud with the deceased Ram Kishore, which has been registered on 30.01.1991 in the office of the Sub-Registrar, Akbarpur. It was further alleged that the deceased was an educated person as he had retired from the post of a Gazetted Officer but his thumb impression

had been put on the will. Since the plaintiff-appellant was looking after his father, therefore, there was no need of any will. The plaintiff-appellant and defendant-respondent were born from his mother Smt. Sursati Devi and father Ram Kishore.

8. The suit was contested by the defendant-respondent alleging therein that after death of the married wife of his deceased father Ram Kishore, he married to Smt. Sursati, who had come to house of his father after death of his first husband Ram Achal Verma resident of Mauza Ganeshpur, Pargana and Tehsil Akbarpur with his son born from Ram Achal Verma namely Pudai alias Sabhapati and since Ram Kishore was looking after his education etc., therefore, his name was also recorded as father as he was treating him as his son. On the request of mother Smt. Sursati, the deceased Ram Kishore had purchased 11 biswa land for Sabhapati in Mauza Salahpur Razore, Pargana and Teshil Tanda, Ambedkar Nagar and also gave the house in the said village to the plaintiff-appellant. After some time, 7.25 bigha agricultural property and two biswa abadi land was also purchased by the father of the defendant-respondent Ram Kishore for Sabhapati and his wife on the ground that he would not claim any share in the ancestral property of the defendant-respondent. Subsequently, he started threatening to take half share in whole land, on account of which, the quarrel started between the father of the defendant-respondent and the plaintiff-appellant, therefore after consultation with his wife Sursati, he executed a will in favour of the defendant-respondent and accordingly, he is in possession and title holder of the land in dispute, thus, the suit is liable to be dismissed.

9. On the basis of pleadings of parties, following 5 issues were framed:-

"अ. क्या वादी विवादित सम्पत्ति का स्वामी एवं आधिपत्यधारी है?

ब. क्या वाद अवमूल्यांकित है तथा प्रदत्त न्यायशुल्क अपर्याप्त है?

स. क्या उभय पक्ष एक ही परिवार के सदस्य हैं तथा विवादित सम्पत्ति में वादी का 1/2 हिस्सा है?

द. क्या वादी किसी अन्य अनुतोष को पाने का अधिकारी है?

य. क्या वादपत्र में वर्णित कारणों के आधार पर दस्तावेज वसीयतनामा निरस्त किये जाने योग्य है?"

10. After framing of the aforesaid issues, documentary as well as oral evidence was adduced by the parties. In oral evidence, the plaintiff-appellant appeared himself as P.W. 1 and got examined Phool Chandra as P.W. 2. On behalf of the defendant-respondent, he himself appeared as D.W. 1, Smt. Sursati Devi as D.W. 2 and Rajmani i.e. attesting witness of the will deed as D.W. 3

11. After considering the pleadings of the parties, evidence and material on record, the trial court dismissed the suit on the grounds that the plaintiff-appellant has failed to prove himself to be the owner and in possession of the land in dispute and the plaintiff-appellant was born from previous husband of his mother Smt. Sursati, therefore, he could get the share in the land of deceased Ram Kishore only on the basis of will and the will in favour of the predecessor-in-interest of the defendant-respondent has been proved by the attesting witness in accordance with law and the reasons for execution of the will have been disclosed in will, therefore, the will is neither forged nor liable to be set aside. Being aggrieved, civil appeal was filed before the lower appellate court, in which the following point of determination was

made by the lower appellate court in the impugned judgment and decree while deciding the appeal;-

"क. क्या अधीनस्थ न्यायालय द्वारा पक्षकारों के अभिवचन तथा उनके द्वारा प्रस्तुत अभिलेखीय एवं मौखिक साक्ष्य के विश्लेषण में कोई त्रुटि की गयी है?"

12. The learned lower appellate court, after considering the pleadings, evidence and material on record, dismissed the appeal as it could not find any illegality or error in the judgment and decree passed by the trial court.

13. In view of the pleadings of the parties and arguments advanced before this Court and the aforesaid substantial questions of law involved in this appeal, the first question for consideration is as to whether the will deed executed by the deceased Ram Kishore, who was original defendant in the suit, in favour of the defendant-respondent has been proved in accordance with law or not. The will is required to be proved in accordance with Section 68 of the Indian Evidence Act, which provides the proof of execution of document required by law to be attested, which is extracted hereinbelow:-

"68. Proof of execution of document required by law to be attested.

If a document is required by law to be attested, it shall not be used as evidence until one attesting witness at least has been called for the purpose of proving its execution, if there be an attesting witness alive, and subject to the process of the Court and capable of giving evidence:

[Provided that it shall not be necessary to call an attesting witness in proof of the execution of any document, not being a Will, which has been registered in accordance with the provisions of the Indian Registration Act, 1908 (XVI of 1908), unless its execution by the person by whom it purports to have been executed is specifically denied.]"

14. According to the aforesaid Section 68, a will is required to be proved at least by one attesting witness, which has been registered in accordance with the provisions of the Indian Registration Act, 1908. Section 63 of the Indian Succession Act provides the manner in which a will is required to be executed, which is extracted hereinbelow:-

"63. Execution of unprivileged Wills.—

Every testator, not being a soldier employed in an expedition or engaged in actual warfare, or an airman so employed or engaged, or a mariner at sea, shall execute his Will according to the following rules:—

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

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

(c) The Will shall be attested by two or more witnesses, each of whom has seen the testator

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

15. The Hon'ble Supreme Court, in the case of **Guro (Smt.) vs. Atma Singh and others (Supra)**, has held that the law is well settled that the mode of proving a will does not ordinarily differ from that of proving any other document except as to the special requirement prescribed in the case of a will by Section 63 of the Indian Succession Act. The relevant paragraph 3 of the said judgment is extracted hereinbelow:-

"3. WITH regard to proof of a will the law is well settled that the mode of proving a will does not ordinarily differ from that of proving any other document except as to the special requirement prescribed in the case of a will by Section 63 of the Indian Succession Act. The onus of proving the will is on the propounder and in the absence of suspicious circumstances surrounding the execution of the will, proof of testamentary capacity and signature of the testator as required by law is sufficient to discharge the onus. Where, however there were suspicious circumstances, the onus

would be on the propounder to explain them to the satisfaction of the court before the will could be accepted as genuine. Such suspicious circumstances may be a shaky signature, a feeble mind and unfair and unjust disposal of property or the propounder himself taking a leading part in the making of the will under which he receives a substantial benefit. The presence of suspicious circumstances makes the initial onus heavier and the propounder must remove all legitimate suspicion before the document can be accepted as the last will of the testator. (S. Venkalachala lyengar v. B.N. Thimmajamma¹, Rani Purnima Devi v. Kumar Kilagendra Narayan Dev², Jaswant Kaur v. Amrit Kaur³).

16. Similar view has been taken by the Hon'ble Supreme Court, in the case of **Sri Devi and others vs. Jayaraja Shetty and others (Supra)**. In this case, the executor of the will was 80 years of age and he died within 15 days of the execution of the will and court found that except this nothing has been brought on record to show that the testator was not in good health or not possessed of his physical or mental faculties and the appellants have failed to bring out anything which could have put a doubt regarding the physical or mental incapacity of the testator to execute the will and dismissed the appeal.

17. The Hon'ble Supreme Court, in the case of **Benga Behera and another vs. Braja Kishore Nanda and others (Supra)**, has held that the requirement of the proof of execution of a will is the same as in the case of certain other documents,

for example Gift or Mortgage and at least one attesting witness has to be examined to prove execution and attestation of the will and it is to be proved that the executant had signed and/or given his thumb impression in presence of at least two attesting witnesses and the attesting witnesses had put their signatures in presence of the executant. It has further been held that existence of suspicious circumstances itself may be held to be sufficient to arrive at a conclusion that the execution of the will has not duly been proved.

18. The Hon'ble Supreme Court, in the case of Dhannulal and others vs. Ganeshram and another (Supra), has held that the proof of a will stands in a higher degree in comparison to the other documents. The relevant paragraph 19 is extracted hereinbelow:-

"19. Proof of a Will stands in a higher degree in comparison to other documents. There must be a clear evidence of the attesting witnesses or other witnesses that the contents of the Will were read over to the executant and he, after admitting the same to be correct, puts his signature in presence of the witnesses. It is only after the executant puts his signature, the attesting witnesses shall put their signatures in the presence of the executant."

19. This Court, in the case of **Daya Shanker Singh vs. Deputy Director of Consolidation, Faizabad and others (Supra)**, after considering several judgments of the Hon'ble Supreme Court, held that attestation of the will in the manner stated in Section 63 of the Succession Act is not an empty formality. It

means signing a document for the purpose of testifying the signatures of the executant. The attesting witness should put his signature on the will *animo attestandi*. It is not necessary that more than one witness be present at the same time and no particular form of attestation is necessary. Since a will is required by law to be attested, its execution has to be proved in the manner laid down in the section and the Evidence Act, which requires that at least one attesting witness has to be examined for the purpose of proving the execution of such a document. The attesting witness should speak not only about the testator's signature or fixing his mark to the will but also that each of the witnesses had signed the will in the presence of the testator. Similar view has been taken by the Hon'ble Supreme Court, in the case of **Savitri Bai and another vs. Savitri Bai (Supra)**.

20. Adverting to the facts of the instant case, the will was executed by the deceased Ram Kishore in favour of the defendant-respondent disclosing therein that the present wife of the deceased was earlier married to Ram Achal Verma resident of Mauza Ganeshpur, Pargana and Tehsil Akbarpur, District-Faizabad. Smt. Sursati, after his death, came to the house of Ram Kishore. She came with Pudai @ Sabhapati, who was born from her first husband. There is one son Ved Prakash born from deceased Ram Kishore and Smt. Sursati. Ram Kishore has purchased the land for Sabhapati and his wife. House has also been given so that there may not be any quarrel in future. He has executed the will deed in favour of Ved Prakash. The will was challenged on the ground that there was no free will by the executor and the will was forged and fabricated. The will was executed in unconscious mind and there are thumb impressions on the will,

while executant of the will was a retired doctor. As such, the reasons and circumstances for execution of will has been disclosed in the will itself. It has also been disclosed that the will is being executed with free will and without any influence or coercion.

21. Rajmani, one of the attesting witnesses appeared as D.W. 3. The attesting witness stated in his examination-in-chief that the whole document was written in his presence, thereafter, all presented before the Registrar, where thumb impressions were got put wherever required. He stated that Ram Kishore was ill but he used to stand up on his own. He was able to see and hear. He was also able to read. He was asked by Ram Kishore for witness on the will. Ram Kishore had read the will. At the time, the will was signed, his hand used to shake and Radhe Shyam was second witness to the will. The will was executed in favour of Ved Prakash. Ram Kishore had told that he is making a will of his land in favour of his younger son Ved Prakash. The will was written on the asking of Ram Kishore. Ram Kishore had put his thumb impression. The will was read over. In the Registry Office, the thumb impression of Ram Kishore and others got put. It is wrong to say that Ram Kishore had not executed the will with his consent. It is also wrong to say that the Ram Kishore was not able to see and hear at the time of execution of will. Thus, the execution of will was proved by the attesting witness D.W. 3 in accordance with the Section 68 of Indian Evidence Act read with Section 63 of the Indian Succession Act. Merely because it has not been said by the attesting witness as to out of the two witnesses, who had put first, it cannot be said that the will is not proved because he stated that all were present in the Registry Office, when they put signatures. It has also been

stated that Ram Kishore used to come to his shop at Araiya. He had told that Pudai @ Sabhapati has filed a suit claiming right for his share, whereas, he has given to Sabhapati and his wife 8 bigha land and abadi and executed the registered will so that there may not be any dispute of ancestral property. Nothing could be extracted in cross-examination, which may create any doubt about his testimony or that the will was not executed in accordance with law.

22. Learned trial court, after considering the evidence of the attesting witness and the evidence of the plaintiff-appellant Sabhapati, who admitted in his evidence that the photo on the will is of his father, photo is original but stated that the thumb impressions are forged, however the same has not been proved by any documentary evidence or expert opinion, came to the conclusion that the will is neither forged nor liable to be set aside as the plaintiff-appellant has failed to prove his grounds of challenge to the will. The learned lower appellate court recorded a finding that the attesting witness Rajmani, who has been examined as D.W. 3, has proved the execution of the will.

23. Now the question arises as to whether the plaintiff-appellant is the real son of the deceased Ram Kishore or not and he is entitled for half of the share of the ancestral property in dispute or not. Deceased Ram Kishore, while executing the will had disclosed in it that the plaintiff-appellant was born out of the wedlock of Ram Achal Verma and Smt. Sursati, who had come to his house after death of his first husband with her first son Pudai @ Sabhapati i.e. the plaintiff-appellant.

24. Smt. Sursati appeared as D.W. 2. She admitted in her evidence that her

first marriage was solemnized with Ram Achal Verma, resident of Mauza Ganeshpur, Pargana and Tehsil Akbarpur. Out of the said wedlock, one son namely Pudai @ Sabhapati was born. After death of her first husband, she was married to Ram Kishore resident of Salahpur Razore. One son and three daughters were born from her and Ram Kishore. Sabhapati was born in Ganeshpur and he has his farming in Ganeshpur. She had brought Pudai @ Sabhapati with her to the house of Ram Kishore. On her request, her husband Ram Kishore got Sabhapati educated. She further stated that on her request, her husband also purchased 11 biswa land in the name of Pudai @ Sabhapati in Mauza Salahpur Razore, Pargana and Teshil Tanda, District Ambedkar Nagar and also gave house and on her request, he also purchased eight bigha land in Araiya and Salahpur Razore and two biswa land for abadi in the name of Pudai @ Sabhapati and his wife so that there may not be any quarrel in regard to his ancestral property in future. Sabhapati filed a suit for rights, therefore, for protection of his property her husband executed a registered will deed. She also stated that after death of her husband, her younger son Ved Prakash is the owner and in possession of the land in dispute and doing farming on the same. In cross-examination, she stated that her husband was ill for one-two month prior to his death. During illness, he used to walk. When he died, she was with her in the hospital. Her husband was admitted in hospital for 15 days. He was able to stand up with the help of his stick. He had problem of eyesight and hearing. Thus, the mother of the plaintiff-appellant admitted that the plaintiff-appellant was born out of her wedlock with her previous husband Ram Achal Verma and she has brought him to the house of her second husband Ram

Kishore. Therefore, once the mother of the plaintiff-appellant admitted that he was born out of wedlock with Ram Achal Verma, it cannot be said that he was the real son of the deceased Ram Kishore, merely because he has been shown his father in High School Certificate and other documents, which may have been because after death of his father, he came with his mother to the house of the deceased Ram Kishore, who treated him as his son and also purchased land etc. for him as told by the witnesses, which has not been disputed.

25. The learned trial court, after considering the evidence of the mother of the plaintiff-appellant, who is D.W. 2, and also copy of Parivar Register 89ga, in which Smt. Sursati has been shown as wife of Ram Achal and Pudai @ Sabhapati as son of Ram Achal, has recorded a finding that the plaintiff-appellant was not the real son of the deceased Ram Kishore, thus, Sabhapati cannot be co-tenureholder of the property of the deceased Ram Kishore and his name is also not recorded as such in record of rights. Thus, in absence of any will in his favour, it cannot be said that the plaintiff-appellant is entitled for 1/2 share in the property of the deceased Ram Kishore.

26. In view of above, since the plaintiff-appellant is not the real son of the deceased Ram Kishore, he is legally not entitled for share in the ancestral property in dispute of the deceased Ram Kishore and he was not co-tenureholder of the land in dispute. The learned trial court, after considering the Khatauni of the land in dispute in paper 51ga and 54ga, has recorded a finding that the name of the defendant Ram Kishore son of Dalthamman, Mauja Salahpur Rajore Haal Vaarid Araiya is recorded and the name of

the plaintiff-appellant is not recorded, therefore, he has failed to prove that he is owner and in possession of the land in dispute. He has also failed to give any evidence in regard to possession on the land in dispute in his evidence, thus, he is not entitled for injunction.

27. Learned trial court and the lower appellate court, after considering the evidence, material and findings recorded by the trial court and that 'Maternity is certainty and paternity is surmise' and in view of the admission of Smt. Sursati, mother of the plaintiff-appellant, held that the claim of the plaintiff-appellant that he is son of the deceased Ram Kishore instead of Ram Achal, is not tenable. Besides it, his name is also recorded in the paper 89ga as son of Ram Achal and name of Ram Kishore is recorded in the Khatauni, thus, the courts below have passed the judgment and decrees, after considering the pleadings, evidence and material on record in accordance with law. Thus, there is no illegality or error in the findings recorded by the learned courts below.

28. Learned counsel for the plaintiff-appellant relying on the case of **Dhirajlal Girdharilal vs. Commissioner of Income-tax, Bombay (Supra)** argued that the mind of the lower appellate court was affected by the irrelevant material. The Hon'ble Supreme Court has held in the case that it is well established that when a court of fact acts on material, partly relevant and partly irrelevant, it is impossible to say as to what extent the mind of the court was affected by the irrelevant material used by it in arriving at its finding. Such a finding is vitiated because of the use of inadmissible material and thereby an issue of law arises. It cannot be disputed that issue of law may arise on use of inadmissible material.

However, in a second appeal unless the said issue of law is substantial on the basis of pleadings, evidence and material on record, it cannot be said that it is a substantial question of law involved in the second appeal and the second appeal can be entertained, heard and decided only on the substantial question of law involved in the second appeal. Learned counsel for the plaintiff-appellant has failed to point out any inadmissible material in this appeal, which may have been considered by the courts below. The said judgment has been relied by a Division Bench of this Court in the case of **Committee of Management, Gangadin Ram Kumar Inter College, Ramgarh Barwan, District Jaunpur vs. Deputy Director of Education and others (Supra)**. However, the said judgments are not applicable on the facts and circumstances of the case in hand.

29. The Hon'ble Supreme Court, in the case of **Santosh Hazari vs. Purushottam Tiwari (Deceased) By LRs. (Supra)**, has dealt with the power of the High Court under Section 100 Code of Civil Procedure, 1908 in a second appeal and the phrase "substantial question of law" as occurring in amended Section 100 as it has not been defined in the Code, held that the word substantial, as qualifying "question of law", means of having substance, essential, real and of sound worth, important and considerable. It has further been held that substantial question of law on which a second appeal shall be heard need not necessarily be a substantial question of law of general importance. The relevant paragraph Nos. 10 to 12 are extracted hereinbelow:-

"10. At the very outset we may point out that the memo of second appeal filed by the plaintiff-

appellant before the High Court suffered from a serious infirmity. Section 100 of the Code, as amended in 1976, restricts the jurisdiction of the High Court to hear a second appeal only on substantial question of law involved in the case. An obligation is cast on the appellant to precisely state in the memorandum of appeal the substantial question of law involved in the appeal and which the appellant proposes to urge before the High Court. The High Court must be satisfied that a substantial question of law is involved in the case and such question has then to be formulated by the High Court. Such questions or question may be the one proposed by the appellant or may be any other question which though not proposed by the appellant yet in the opinion of the High Court arises as involved in the case and is substantial in nature. At the hearing of the appeal, the scope of hearing is circumscribed by the question so formulated by the High Court. The respondent is at liberty to show that the question formulated by the High Court was not involved in the case. In spite of a substantial question of law determining the scope of hearing of second appeal having been formulated by the High Court, its power to hear the appeal on any other substantial question of law, not earlier formulated by it, is not taken away subject to the twin conditions being satisfied: (i) the High Court feels satisfied that the case involves such question, and (ii) the High Court

records reasons for its such satisfaction.

11. Even under the old Section 100 of the Code (pre-1976 amendment), a pure finding of fact was not open to challenge before the High Court in second appeal. However the Law Commission noticed a plethora of conflicting judgments. It noted that in dealing with second appeals, the Courts were devising and successfully adopting several concepts such as, a mixed question of fact and law, a legal inference to be drawn from facts proved, and even the point that the case has not been properly approached by the Courts below. This was creating confusion in the minds of the public as to the legitimate scope of second appeal under Section 100 and had burdened the High Courts with an unnecessarily large number of second appeals. Section 100 was, therefore, suggested to be amended so as to provide that the right of second appeal should be confined to cases where a question of law is involved and such question of law is a substantial one. (See Statement of Objects and Reasons). The Select Committee to which the Amendment Bill was referred felt that the scope of second appeals should be restricted so that litigations may not drag on for a long period. Reasons, of course, are not required to be stated for formulating any question of law under sub-section(4) of Section 100 of the Code; though such reasons are to be recorded under proviso to sub-section (5) while exercising power to hear on any other

substantial question of law, other than the one formulated under sub-section(4).

12. *The phrase substantial question of law, as occurring in the amended Section 100 is not defined in the Code. The word substantial, as qualifying question of law, means - of having substance, essential, real, of sound worth, important or considerable. It is to be understood as something in contradistinction with - technical, of no substance or consequence, or academic merely. However, it is clear that the Legislature has chosen not to qualify the scope of substantial question of law by suffixing the words of general importance as has been done in many other provisions such as Section 109 of the Code or Article 133(1)(a) of the Constitution. The substantial question of law on which a second appeal shall be heard need not necessarily be a substantial question of law of general importance. In Guran Ditta & Anr. Vs. T. Ram Ditta, AIR 1928 Privy Council 172, the phrase substantial question of law as it was employed in the last clause of the then existing Section 110 of the C.P.C. (since omitted by the Amendment Act, 1973) came up for consideration and Their Lordships held that it did not mean a substantial question of general importance but a substantial question of law which was involved in the case as between the parties. In Sir Chunilal V. Mehta & Sons Ltd. Vs. The Century Spinning and Manufacuring Co., Ltd., (1962) Supp.3 SCR 549, the Constitution*

Bench expressed agreement with the following view taken by a Full Bench of Madras High Court in Rimmalapudi Subba Rao Vs. Noony Veeraju, ILR 1952 Madras 264:-

"[W]hen a question of law is fairly arguable, where there is room for difference of opinion on it or where the Court thought it necessary to deal with that question at some length and discuss alternative views, then the question would be a substantial question of law. On the other hand if the question was practically covered by the decision of the highest court or if the general principles to be applied in determining the question are well settled and the only question was of applying those principles to the particular facts of the case it would not be a substantial question of law."

and laid down the following test as proper test, for determining whether a question of law raised in the case is substantial:

"The proper test for determining whether a question of law raised in the case is substantial would, in our opinion, be whether it is of general public importance or whether it directly and substantially affects the rights of the parties and if so whether it is either an open question in the sense that it is not finally settled by this Court or by the Privy Council or by the Federal Court or is not free from difficulty or calls for discussion of alternative views. If the question is settled by the highest court or the general principles to be applied in

determining the question are well settled and there is a mere question of applying those principles or that the plea raised is palpably absurd the question would not be a substantial question of law."

30. Learned counsel for the plaintiff-appellant also relied on the judgment in the case of **(Smt.) Savitri and others vs. Surendra Mohan Mohana (Supra)** in regard to the person, who sets up a title to property by purchase must prove that his vendor had a title in the property sold. It is not applicable in the facts and circumstances of the case in hand.

31. In the case of **Ram Adhar and others vs. Baij Nath (Supra)**, a co-ordinate Bench of this Court has held that where the findings by the court of facts was vitiated by non-consideration of relevant evidence or by erroneous approach into the matter, the High Court is not precluded from recording proper findings as held by the Hon'ble Apex Court in **Jagdish Singh vs. Nathu Singh; 1992 (1) SCC 647**.

32. A co-ordinate Bench of this Court, in **Jhuri Singh vs. Ram Kumar Singh and another (Supra)**, after considering the facts and circumstances of the case, has remanded the matter for issuing fresh commission and thereafter deciding the appeal in accordance with law, considering the judgment of the Hon'ble Apex Court to the effect that the rule of non-interference in concurrent findings of the lower courts is not an absolute rule of universal application. What must be examined is whether its conclusions are justifiable according to the parameters of consideration for interference in second appeal as held in **Hafazat Hussain vs. Abdul Majeed and others; (2001) 7 SCC 189**.

33. The Hon'ble Supreme Court, in the case of **Ratnagiri Nagar Parishad vs. Gangaram Narayan Ambekar and others (Supra)**, held that the initial burden of proof was on the plaintiffs to substantiate their cause, which they had failed to discharge. In such a case, the weakness in the defence cannot be the basis to grant relief to plaintiffs and to shift the burden on the defendants, as the case may be. Thus, understood, the findings and conclusions reached by the first appellate court will be of no avail to the plaintiffs.

34. The Hon'ble Supreme Court, in the case of **State of Haryana vs. Harnam Singh (Dead) through LRs. and others (Supra)**, has held that a detailed factual inquiry to come to its finding by the High Court was impermissible while hearing an appeal under Section 100 of the Code of Civil Procedure, 1908. It has further been held that the finding of the trial court and the first appellate court ought not to have been interfered with by the High Court as we do not find perversity in the impugned judgment of the first two courts of facts. It has also held that the factual finding recorded by the two courts below cannot be interfered by the High Court unless the same is without jurisdiction and perverse.

35. A co-ordinate Bench of this Court, in **Moinuddin vs. Smt. Kanti and others (Supra)**, has held that the finding of the lower appellate court is based on the proper appreciation of the material on record and the relevant law and the Hon'ble Apex Court has held that this Court cannot interfere even in the wrong finding of the facts recorded by the lower appellate court unless it is shown to be perverse.

36. The Hon'ble Supreme Court, in the case of **Madhusudan Das vs. Smt. Narayani Bai and others (Supra)**, has

held that in an appeal against the trial court decree, when the appellate court considers an issue turning on oral evidence, it must bear in mind that it does not enjoy the advantage which the trial court had in having the witnesses before it and of observing the manner in which they gave their testimony, therefore, the appellate court can interfere only on very clear proof of mistake by the trial court. The relevant paragraph 8 is extracted hereinbelow:-

"8. The question whether the appellant was in fact adopted by Jagannathdas and Premwati has been determined essentially on the basis of oral testimony, and reference has been made to a few documents only in supplementation of the oral evidence. At this stage, it would be right to refer to the general principle that, in an appeal against a trial Court decree, when the appellate Court considers an issue turning on oral evidence it must bear in mind that it does not enjoy the advantage which the trial Court had in having the witnesses before it and of observing the manner in which they gave their testimony. When there is a conflict of oral evidence on any matter in issue and its resolution turns upon the credibility of the witnesses, the general rule is that the appellate Court should permit the findings of fact rendered by the trial Court to prevail unless it clearly appears that some special feature about the evidence of a particular witness has escaped the notice of the trial Court or there is a sufficient balance of improbability to displace its opinion as to where the credibility lies. In this connection,

reference may usefully be made to W.C. Macdonald v. Fred Latimer, AIR 1929 Privy Council 15, 18 where the Privy Council laid down that when there is a direct conflict between the oral evidence of the parties, and there is no documentary evidence that clearly affirms one view or contradicts the other, and there is no sufficient balance of improbability to displace the trial Court's findings as to the truth of the oral evidence, the appellate Court can interfere only on very clear proof of mistake by the trial Court. In Watt v. Thomas, 1947 AC 484, 486 it was observed : it is a cogent circumstance that a Judge of first instance, when estimating the value of verbal testimony, has the advantage (which is denied to Courts of appeal) of having the witnesses before him and observing the manner in which their evidence is given". This was adverted to with approval by the Privy Council in Sara Veeraswami v. Talluri Narayya (deceased), AIR 1949 Privy Council 32 and found favour with this Court in Sarju Parshad v. Raja Jwaleshwari Pratap Narain Singh, 1950 SCR 781, 783. It seems to us that this approach should be placed in the forefront in considering whether the High Court proceeded correctly in the evaluation of the evidence before it when deciding to reverse the findings of the trial court. The principle is one of practice and governs the weight to be given to a finding of fact by the trial court. There is, of course, no doubt that as a matter of law if the appraisal of

the evidence by the trial court suffers from a material irregularity or is based on inadmissible evidence or on a misreading of the evidence or on conjectures and surmises the appellate court is entitled to interfere with the finding of fact. Our attention has been drawn by the respondents to The Asiatic Steam Navigation Co. Ltd., v. Sub-Lt. Arbinda Chakravarti, (1959) Supp 1 SCR 979 but nothing said therein detracts, in our opinion, from the validity of the proposition enunciated here."

37. A co-ordinate Bench of this Court, in **Faggan (Deceased) and others vs. Bhagwan Sahai (Deceased) and another (Supra)**, has observed that the Apex Court deprecated the liberal construction and generous application of provisions of Section 100, C.P.C. as the Hon'ble Supreme Court was of the view that only because there is another view possible on appreciation of evidence that cannot be sufficient for interference under Section 100, C.P.C. The relevant paragraph 18 is extracted hereinbelow:-

"18. The Apex Court depreciated the liberal construction and generous application of provisions of Section 100, C.P.C. Hon'ble Supreme Court was of the view that only because there is another view possible on appreciation of evidence that cannot be sufficient for interference under Section 100, C.P.C. For ready reference, extract of paragraph 7 of the case of Veerayee Ammal v. Seeni Ammal, (2002) 1 SCC 134 is quoted below:

."7..... We have noticed with distress that despite amendment, the provisions of Section 100 of the Code have been liberally construed and generously applied by some Judges of the High Courts with the result that objective intended to be achieved by the amendment of Section 100 appears to have been frustrated. Even before the amendment of Section 100 of the Code, the concurrent finding of facts could not be disturbed in the second appeal. This Court in Paras Nath Thakur v. Mohani Dasi held: (AIR p. 1205 para 3).

'It is well settled by a long series of decisions of the Judicial Committee of the Privy Council and of this Court, that a High Court, on second appeal, cannot go into questions of fact, however, erroneous the findings of fact recorded by the Courts of fact may be. It is not necessary to cite those decisions. Indeed, the learned Counsel for the plaintiff-respondents did not and could not contend that the High Court was competent to go behind the findings of fact concurrently recorded by the two Courts of fact'."

38. In view of above, since it has been proved that the plaintiff-appellant was not the real son of deceased Ram Kishore and his name was not recorded as co-tenureholder in the record-of-rights, therefore, he is not entitled for half of the share as claimed by him. The will has also been executed by the deceased Ram kishore in favour of the predecessor-in-interest of the defendant-respondent, which was proved, however, even if there is any

discrepancy in the findings recorded by the courts below, it will not make any difference because since the plaintiff-appellant has failed to prove that it has not been executed in accordance with law. Even otherwise he is not entitled for any share in the ancestral property of the deceased Ram Kishore, therefore he could not have challenged the will deed executed in favour of the father of the defendant-respondent and even if it is set aside, the plaintiff-appellant would not get any right over the property of the deceased Ram Kishore in view of Section 171 of the Act of 1950.

39. It is also settled law as disclosed above that the concurrent findings recorded by the two courts below cannot be set aside by this Court in second appeal unless the findings are perverse and without jurisdiction, which is not the case herein because the learned courts below have passed the judgment and decrees in accordance with law after considering pleadings, evidence and material on record by passing a reasoned and speaking orders and dealing the same and the same are not perverse and without jurisdiction. Even otherwise any defect in the findings recorded by the courts below in regard to the will which does not affect the merits of the case regarding claim of half share in the property in dispute or the jurisdiction of the court because the plaintiff-appellant has also failed to prove the title and possession on the land in dispute, cannot be a ground for interference by this Court. Thus, impugned judgment and decrees cannot be reversed or modified in view of Section 99 of CPC. The aforesaid substantial questions of law formulated in this appeal are answered accordingly. Thus, the appeal has been filed on misconceived and baseless grounds and is liable to be dismissed.

40. The second appeal is dismissed. No order as to costs.

(2025) 1 ILRA 701

APPELLATE JURISDICTION

CIVIL SIDE

DATED: ALLAHABAD 16.01.2025

BEFORE

THE HON'BLE KSHITIJ SHAILENDRA, J.

Second Appeal No. 12 of 2018

Prem Chand & Ors.	...Appellants
Versus	
Charat Kumar Bansal	...Respondent

Counsel for the Appellants:

Sri Jagdish Prasad Mishra, Sri Prem Prakash Chaudhary

Counsel for the Respondent:

Sri Nipun Singh, Sri Sumit Daga

Civil Law – Code of Civil Procedure, 1908 – Section 100 - Order XLI Rule 5 - Order XLII Rule 1 - Order XLIII Rule 1 - Code of Civil Procedure (UP Amendments) – Section 115, 115(4)- Second Appeal – Appeal is pending at admission stage - **issue of Summoning VIS-À-VIS Retaining or Returning the Original Record** - The respondent's counsel raised an issue regarding the return of the original record of the first Appellate Court and the trial court, which had been summoned by the High Court without admitting the appeal - **Legislative Mandate on Stay of Proceedings** - The court discussed the legislative mandate under Order XLI Rule 5 of the Code of Civil Procedure and U.P. amendments in Section 115 of C.P.C., which St. that mere filing of an appeal or revision does not operate as a stay against the proceedings – court finds that, - the Supreme Court, in the case of Asian Resurfacing of Road Agency P. Ltd., directed that photocopies or scanned copies of records should be summoned instead of the original records – However, the Supreme Court's decision in Asian Resurfacing was later reversed by the Constitution Bench in a case of High Court Bar Association, Allahabad Vs St. of