

IN THE HIGH COURT OF HIMACHAL PRADESH, SHIMLA

RSA No. 28 of 2008

Reserved on: 25.4.2026

Date of Decision: 15.6.2026

Vidya Devi and ors.

...Appellants

Versus

Joginder Singh & ors.

...Respondents

Coram

Hon'ble Mr Justice Rakesh Kainthla, Judge.

Whether approved for reporting?¹ No.

For the Appellants : Mr Rahul Gathania, Advocate.

For Respondent Nos. 1, 2, 4 and 5 : Mr Neeraj Gupta, Senior Advocate, with Mr Ajeet Pal Singh Jaswal, Advocate.

Name of respondent No.3 stands deleted.

For Respondents No.6 & 7 : None.

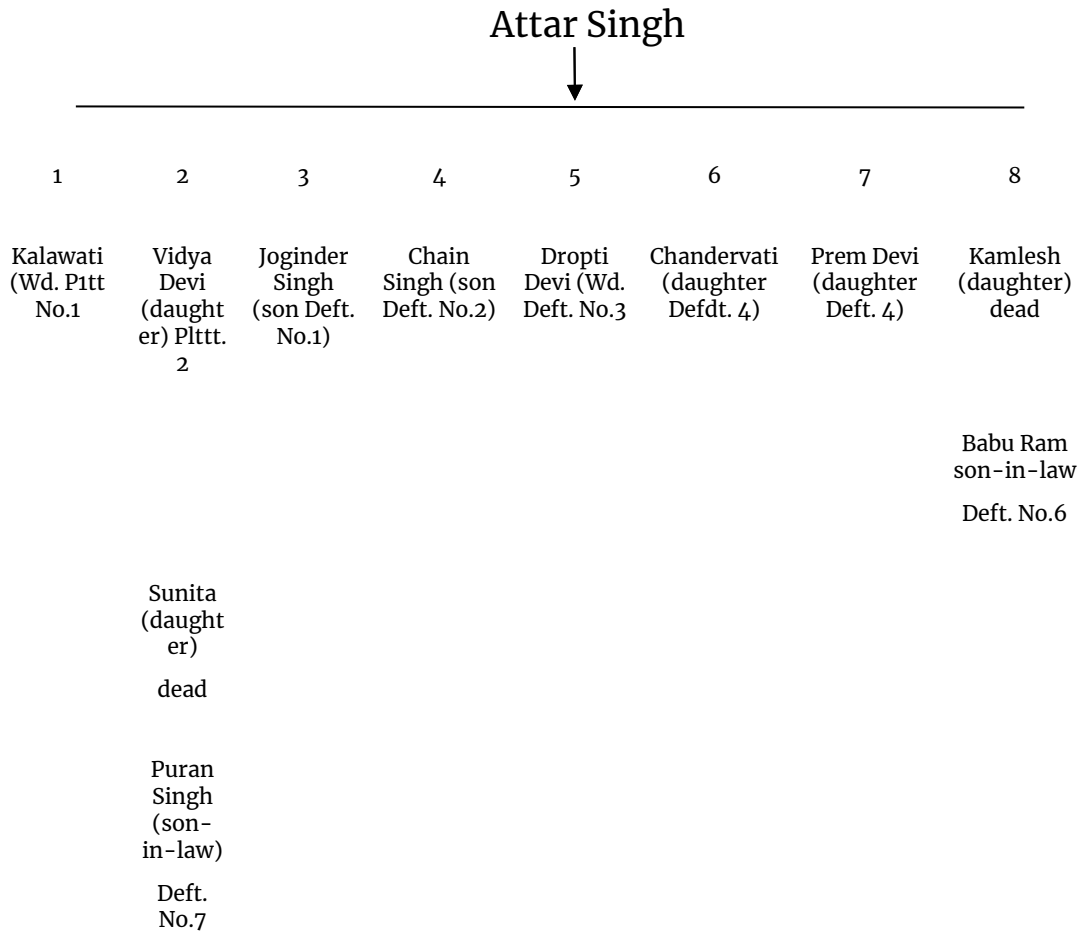
Rakesh Kainthla, Judge

The present appeal is directed against the judgment and decree dated 29.10.2007, passed by the learned District

¹ Whether reporters of Local Papers may be allowed to see the judgment? Yes.

Judge, Solan, District Solan, H.P., (learned Appellate Court), vide which the judgment and decree dated 12.5.2005, passed by the learned Civil Judge, Senior Division Kandaghat, Camp at Solan, District Solan, H.P., (learned Trial Court) were set aside. (*The parties shall hereinafter be referred to in the same manner as they were arrayed before the learned trial Court for convenience*).

2. Briefly stated, the facts giving rise to the present appeal are that the plaintiff had filed a civil suit before the learned Trial Court for seeking joint possession of the suit land described in the head note and para-1 of the plaint and a declaration that Will dated 23.6.1984 stated to have been executed by Attar Singh in favour of defendants No.1 and 2 is fake, fictitious and forged which does not affect the rights of the plaintiff and proforma defendants over the suit land and Mutation No. 33, 123 and 118 and orders passed by the revenue authorities regarding the implementation of the Will in the revenue record do not affect the plaintiff's rights. It was asserted that Attar Singh was the co-owner in possession of the suit land. The relationship between the parties is as follows:



Attar Singh died on 10.8.1984 at PGI, Chandigarh, due to the injuries sustained by him in an accident on 3.8.1984, leaving plaintiffs, defendants and proforma defendants as his legal heirs. Defendants No. 1 and 2 propounded a Will dated 23.6.1984, stated to have been executed by Attar Singh. They got the mutation of Attar Singh's inheritance sanctioned in their favour. The defendants and proforma defendants No. 3 to 5 and wives of proforma defendants No.6 to 7 had filed a claim petition without impleading the plaintiffs as parties. The plaintiffs filed

an application under Order 1 Rule 10 of CPC for their impleadment, which was allowed. The compensation was awarded to the plaintiffs and the defendants. The defendants are threatening to deprive the plaintiff of their share based on the entries in the revenue record. Hence, the suit was filed to seek the relief mentioned above.

3. The suit was opposed by filing a written statement taking preliminary objections regarding the lack of *locus standi*, the suit having not been properly valued for Court fees and jurisdiction, and the suit being barred by the provisions of Order II Rule 2 of the CPC. The contents of the plaint were admitted to the extent that Attar Singh was owner-in-possession of the suit land. The rest of the plaintiff's claim was denied. It was asserted that the plaintiffs are not related to Attar Singh. Kalawati is not the widow, and Vidya Devi is not the daughter of Attar Singh. Defendants are the legal heirs of Attar Singh. Attar Singh had executed a Will in his sound disposing state of mind. Therefore, it was prayed that the suit be dismissed.

4. A replication denying the contents of the written statement and affirming those of the plaint was filed.

5. Learned Trial Court framed the following issues on 17.8.1995: -

1. Whether the plaintiffs are joint owners with the owners and proforma defendants and defendants in the suit land? OPP.
2. Whether the plaintiffs are entitled for the relief of permanent prohibitory injunction, as prayed for? OPP.
3. Whether the deceased Attar Singh executed a valid Will in favour of defendants No.1 and 2 as alleged, if so, its effect? OPD 1 and 2.
4. Whether the plaintiffs have no *locus standi* to file this suit? OPD 1 & 2.
5. Whether the suit is barred under Order 2 Rule 2 CPC? OPD1 and 2.
6. Whether the suit is not properly valued for the purpose of the court fee and jurisdiction? OPD 1&2.
7. Relief.

6. The parties were called upon to produce the evidence, and the plaintiffs examined Sheesh Ram (PW1), Prem Dutt (PW2), Satya Pal (PW3), Rajesh Kumar (PW4) and Trilochan Kumar (PW5). The defendant No.1 examined himself (DW1), Amar Singh (DW2) and Geeta Ram (DW3).

7. The learned Trial Court held that the admitted signatures and the signatures on the Will were sent to a handwriting expert who opined that the same person had not authored them. The execution of the Will was shrouded in

suspicious circumstances. Attar Singh was hale and hearty and had no reason to execute any Will in favour of any person. The plaintiffs were held to be the legal heirs of Attar Singh in the previous proceedings, and this finding has attained finality. Their status cannot be disputed in the present proceedings. Hence, the learned Trial Court answered Issue No.1 in the affirmative, Issues Nos. 2 to 6 in the negative and decreed the suit filed by the plaintiff.

8. Being aggrieved by the judgment and decree passed by the learned Trial Court, the defendants filed an appeal which was decided by the learned District Judge, Solan (learned appellate Court). The Appellate Court concurred with the findings recorded by the learned Trial Court that the plaintiffs are the legal heirs of deceased Attar Singh. However, it held that Attar Singh had executed a Will in his sound disposing state of mind. The execution and attestation of the Will were proved by satisfactory evidence. The statement of the expert was not sufficient to cast a doubt about the validity of the Will. The plaintiffs did not appear in the witness box, and they only examined their attorney. An adverse inference has to be drawn against them for their non-appearance. They had earlier filed a

civil suit for the recovery of an *ex gratia* payment made to the legal heirs of the deceased. They could have assailed the validity of the Will at that time, but they failed to do so; hence, the present suit was barred by the provisions of Order II Rule 2 of the CPC. Learned Trial Court failed to consider all these aspects. Hence, the appeal was allowed, and the judgment and decree passed by the learned Trial Court were set aside.

9. Being aggrieved by the judgment and decree passed by the learned Appellate Court, the plaintiffs have filed the present appeal, which was admitted on the following substantial questions of law on 22.10.2008: -

1. Whether the findings of the Court below are based on wrong assumptions and ignoring material evidence and drawing wrong inferences when on the material on record, it was established that the Will was shrouded with suspicious circumstances, there were wrong recitals in the will, the propounder took active part in the execution of the Will and the fact that the witnesses were of different villages, the testator was not in sound disposing mind and also the signatures of Attar Singh on the Will were found to be not genuine by the handwriting expert?
2. Whether the Court below is right in drawing an adverse inference against the appellant for not appearing as their own witness when their attorney "Ghar Jawai" had deposed all the facts which facts were within his knowledge?
3. Whether, on the material on record, the findings that the suit was barred by Order 2 Rule 2 CPC are sustainable in

law when the motor accident claims case related to wholly different issues and the present claim could not have been entertained or decided?

10. I have heard Mr Rahul Gathania, learned counsel for the appellants/plaintiffs and Mr Neeraj Gupta, learned Senior Advocate, assisted by Mr Ajeet Pal Singh Jaswal, learned counsel for respondents No. 1, 2, 4 and 5.

11. Mr Rahul Gathania, learned counsel for the appellants/plaintiffs, submitted that the learned Appellate Court erred in reversing the well-reasoned judgment of the learned Trial Court. The Will was shrouded in suspicious circumstances, and the learned Appellate Court had not discussed the circumstances pointed out by the learned Trial Court. The relationship between the plaintiffs and Attar Singh was held to be proved, and the plaintiffs were not required to depose anything more. An adverse inference could not have been drawn against the plaintiffs for their non-appearance. The pleadings in the previous case were not filed, and the learned Appellate Court erred in holding that the suit was barred by the provisions of Order II Rule 2 of the CPC. Hence, he prayed that the present appeal be allowed, the judgment and decree passed by the learned Appellate Court be set aside, and the judgment and

decree passed by the learned Trial Court be restored. He relied upon the judgment titled *Bipin and ors. Vs. Rudranarayan Misra and ors. MANU/OR/0056/1978, Gurbux Singh Vs. Bhooralal, AIR 1964 SC 1810, Ramji Jankiji and another Vs. Mauni Baba Kale Kambalwala Jai Siyaram Desji and others, AIR 1978 Patna 48 and Ranju Ram & anr. Vs. Tulsi Ram and others 2024 (Suppl.) Him. L.R. (HC) 2411* in support of his submission.

12. Mr. Neeraj Gupta, learned Senior Advocate for respondents No.1, 2, 4 and 5, submitted that the learned Trial Court erred in holding that the Will was shrouded in suspicious circumstances. Learned Appellate Court had rightly held that the execution and attestation of the Will were proved as per the law. The plaintiffs had filed a civil suit to claim their share of the *ex gratia* payment. They had knowledge about the Will propounded by the defendants. They were required to challenge the Will in the previous proceedings, but they failed to do so. Hence, the learned Appellate Court had rightly held that the suit was barred by the provisions of Order II Rule 2. The findings regarding the validity of the Will are pure questions of fact, and this Court should not interfere with the pure questions of fact. Hence, he prayed that the present appeal be dismissed.

13. I have given a considerable thought to the submissions made at the bar and have gone through the records carefully.

Substantial Question of Law No.1:

14. The law relating to the execution of the Will was explained by the Hon'ble Supreme Court in *Meena Pradhan v. Kamla Pradhan*, (2023) 9 SCC 734: (2023) 4 SCC (Civ) 449 as under:

“10.1. The court has to consider two aspects: firstly, that the will is executed by the testator, and secondly, that it was the last will executed by him.

10.2. It is not required to be proved with mathematical accuracy, but the test of satisfaction of the prudent mind has to be applied.

10.3. A will is required to fulfil all the formalities required under Section 63 of the Succession Act, that is to say:

(a) The testator shall sign or affix his mark to the will, or it shall be signed by some other person in his presence and by his direction, and the said signature or affixation shall show that it was intended to give effect to the writing as a will;

(b) It is mandatory to get it attested by two or more witnesses, though no particular form of attestation is necessary;

(c) Each of the attesting witnesses must have 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 such signatures;

(d) Each of the attesting witnesses shall sign the will in the presence of the testator; however, the presence of all witnesses at the same time is not required.

10.4. For the purpose of proving the execution of the will, at least one of the attesting witnesses, who is alive, subject to the process of court, and capable of giving evidence, shall be examined;

10.5. The attesting witness should speak not only about the testator's signatures but also that each of the witnesses had signed the will in the presence of the testator;

10.6. If one attesting witness can prove the execution of the will, the examination of other attesting witnesses can be dispensed with;

10.7. Where one attesting witness examined to prove the will fails to prove its due execution, then the other available attesting witness has to be called to supplement his evidence;

10.8. Whenever there exists any suspicion as to the execution of the will, it is the responsibility of the propounder to remove all legitimate suspicions before it can be accepted as the testator's last will. In such cases, the initial onus on the propounder becomes heavier;

10.9. The test of judicial conscience has evolved for dealing with those cases where the execution of the will is surrounded by suspicious circumstances. It requires consideration of factors such as awareness of the testator as to the content as well as the consequences, nature and effect of the dispositions in the will; a sound, certain and disposing state of mind and memory of the testator at the time of execution;

the testator executed the will while acting on his own free will;

10.10. One who alleges fraud, fabrication, undue influence, etc., has to prove the same. However, even in the absence of such allegations, if there are circumstances giving rise to doubt, then it becomes the duty of the propounder to dispel such suspicious circumstances by giving a cogent and convincing explanation.

10.11. Suspicious circumstances must be “real, germane and valid” and not merely “the fantasy of the doubting mind [*Shivakumar v. Sharanabasappa* [*Shivakumar v. Sharanabasappa*, (2021) 11 SCC 277]]”. Whether a particular feature would qualify as “suspicious” would depend on the facts and circumstances of each case. Any circumstance raising suspicion, legitimate in nature, would qualify as a suspicious circumstance, for example, a shaky signature, a feeble mind, an unfair and unjust disposition of property, the propounder himself taking a leading part in the making of the will under which he receives a substantial benefit, etc.”

15. This position was reiterated in *Gurdial Singh v. Jagir Kaur*, 2025 SCC OnLine SC 1466, wherein it was observed:

“11. A Will has to be proved like any other document subject to the requirements of Section 63 of the Indian Succession Act, 1925 and Section 68 of the Indian Evidence Act, 1872, that is, examination of at least one of the attesting witnesses. However, unlike other documents, when a Will is propounded, its maker is no longer in the land of the living. This casts a solemn duty on the Court to ascertain whether the Will propounded had been duly proved. Onus lies on the propounder not only to prove due execution but to dispel from the mind of the court all suspicious circumstances which cast doubt on the free disposing mind of the testator. Only when the

propounder dispels the suspicious circumstances and satisfies the conscience of the court that the testator had duly executed the Will out of his free volition without coercion or undue influence, would the Will be accepted as genuine. In *Smt. Jaswant Kaur v. Smt. Amrit Kaur* (1977) 1 SCC 369, this Court, referring to *H. Venkatachala Iyengar v. B.N. Thimmajamma* 1959 Supp (1) SCR 426, enumerated the principles relating to proof of Will:—

“10. *****

“1. Stated generally, a will has to be proved like any other document, the test to be applied being the usual test of the satisfaction of the prudent mind in such matters. As in the case of proof of other documents, so in the case of proof of wills, one cannot insist on proof with mathematical certainty.

2. Since Section 63 of the Succession Act requires a will to be attested, it cannot be used as evidence until, as required by Section 68 of the Evidence Act, 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.

3. Unlike other documents, the will speaks from the death of the testator, and therefore, the maker of the will is never available for deposing as to the circumstances in which the will came to be executed. This aspect introduces an element of solemnity in the decision of the question whether the document propounded is proved to be the last will and testament of the testator. Normally, the onus which lies on the propounder can be taken to be discharged on proof of the essential facts which go into the making of the will.

4. Cases in which the execution of the will is surrounded by suspicious circumstances stand on a different footing. A shaky signature, a feeble mind, an unfair and unjust disposition of property, the propounder himself taking a leading part in the making of the will under which he receives a substantial benefit and such other circumstances raise suspicion about the execution of the will. That suspicion cannot be removed by the mere assertion of the propounder that the will bears the signature of the testator or that the testator was in a sound and disposing state of mind and memory at the time when the will was made, or that those like the wife and children of the testator who would normally receive their due share in his estate were disinherited because the testator might have had his own reasons for excluding them. The presence of suspicious circumstances makes the initial onus heavier and, therefore, in cases where the circumstances attendant upon the execution of the will excite the suspicion of the court, the propounder must remove all legitimate suspicions before the document can be accepted as the last will of the testator.

5. It is in connection with wills, the execution of which is surrounded by suspicious circumstances, that the test of satisfaction of the judicial conscience has been evolved. That test emphasises that in determining the question as to whether an instrument produced before the court is the last will of the testator, the court is called upon to decide a solemn question, and by reason of suspicious circumstances, the court has to be satisfied fully that the will has been validly executed by the testator.

6. If a caveator alleges fraud, undue influence, coercion, etc., in regard to the execution of the

will, such pleas have to be proved by him, but even in the absence of such pleas, the very circumstances surrounding the execution of the will may raise a doubt as to whether the testator was acting of his own free will. And then it is a part of the initial onus of the propounder to remove all reasonable doubts in the matter.”

The Court further held:—

“9. In cases where the execution of a will is shrouded in suspicion, its proof ceases to be a simple lis between the plaintiff and the defendant. What, generally, an adversary proceeding becomes in such cases a matter of the court's conscience, and then the true question which arises for consideration is whether the evidence led by the propounder of the will is such as to satisfy the conscience of the court that the will was duly executed by the testator. It is impossible to reach such satisfaction unless the party that sets up the will offers a cogent and convincing explanation of the suspicious circumstances surrounding the making of the will.”

12. Similarly, in *Ram Piari v. Bhagwant* (1993) 3 SCC 364, this Court held that when suspicious circumstances exist, Courts should not be swayed by the due execution of the Will alone:

“3.Unfortunately, none of the courts paid any attention to these, probably because they were swayed with due execution even when this Court in *Venkatachaliah case* [AIR 1959 SC 443: 1959 Supp (1) SCR 426] had held that, proof of signature raises a presumption about knowledge, but the existence of suspicious circumstances rebuts it.....”

13. There is no cavil when suspicious circumstances exist and have not been repelled to the satisfaction of the Court, the Court would not be justified in holding that the

Will is genuine since the signatures have been duly proved and the Will is registered. (*AIR 1962 SC 567*).

16. Learned Trial Court had rightly held that the mere attestation and execution of the Will is not sufficient, and the propounder is required to remove the suspicious circumstances surrounding the execution of the Will.

17. The Will (Ex.DW2/A) propounded by the defendants is unregistered. It reads that Attar Singh was suffering from eczema, which was spreading despite treatment. He had handed over all his affairs to Joginder Singh. He had one wife, Dropti Devi, two sons, Joginder Singh and Chain Singh and four daughters, Chander Devi, Kamlesh Devi, Premi and Sunita. He was executing a Will in favour of his sons, Joginder Singh and Chain Singh, who would take care of their mother.

18. Learned Courts below have concurrently held that plaintiff Kalawati was married to Attar Singh and Dropti was their daughter. Thus, the recital in the Will that Attar Singh had only one wife, two sons and four daughters is incorrect, for which no satisfactory explanation has been provided.

19. The copy of the judgement passed by learned MACT-II, Solan and Sirmour (Ex. P2) shows that Dropdi, etc. had filed a

claim petition which was allowed and the money was disbursed in favour of Dropdi, Kalawati and other legal heirs. Para-13 of the judgement shows that the status of Dropdi and Kalawati being the windows of the deceased was not challenged. An attempt was made to challenge the apportionment before this Court in FAO (MVA) No. 100 of 1986 titled Dropdi Vs. HRTC decided on 7.11.1986, but this Court held that no evidence was led to challenge the status of respondent No. 4, Kalawati, as the widow of the deceased. Similarly, Kalawati and Vidya filed a civil suit for recovery of their share of the *ex gratia* amount. Judgement (Ex. P24) shows that the defendants had disputed the status of Kalawati and Vidya, but they had not set up any Will stated to have been executed by Attar Singh in their favour. It was laid down by the Hon'ble Supreme Court in *Kalyan Singh v. Chhoti*, (1990) 1 SCC 266: 1989 SCC OnLine SC 340 that where the Will was not set up at the earliest opportunity, it is a suspicious circumstance. It was observed at page 273:

“19. There is yet another circumstance which tells against the genuineness of the will. The will purports to have been executed in 1916, and Gangaram instituted the suit in 1959. The will had not seen the light of the day till the institution of the suit. It is not as if Gangaram or his brother or father had no opportunity to produce the will

to assert rights over the property in question. The plaintiff has stated in his evidence that his father Narayan handed over the will to him. Narayan was, therefore, aware of the execution of the will. Yet he did not disclose it to the court in the suit against him. His statement was recorded on July 8, 1925, wherein he had admitted that he was only the pujari of the temple, and the wife of Baldeo sold the property. He did not say that his son Gangaram became the owner of the property under the will executed by Gaurilal. In the second suit, Bhonrilal set up an independent title to the property by adverse possession. That claim was totally destructive of Gangaram's title. It cannot be said that Gangaram was ignorant of that litigation till he filed the suit. His evidence does not lead to that inference. In fact, the plaint averments and his statements in the court lead to the contrary. Gangaram, however, made no attempt to produce the will in that suit. In the long period of 43 years, no one made any attempt to rely upon the will against the claim of the Darjee community when the community representatives have successfully brought two suits. This would not have been the natural conduct of a person if the will had been really in existence.”

20. Similarly, it was held in *Chandan v. Longa Bai*, 1997 SCC OnLine MP 159: (1998) 2 MP LJ 113 that where the Will was not mentioned in an application claiming inheritance, it was a suspicious circumstance. It was observed at page 135:

“39...There is a document on record, Ex. P/16C, which purports to be an application on behalf of Harbo Bai, addressed Adhyakash Nagarpalika, Bhind. In this document, she had prayed that her name be entered in place of her father-in-law, Ayodhya Prasad, who had died, as she was the widow and sole heir in possession. There is nothing in this document to show that she ever claimed to be a legatee of Ayodhya Prasad under the Will.

Had it been a fact that there was any Will in existence when that application was given, she must have mentioned that Ayodhya Prasad had executed the Will in her favour. Again, there is another document on record dated 27-12-1957, which is a copy of an application for a succession certificate moved before the Court of the District Judge, Bhind. In this document, there is also no mention of the existence of any Will. However, it appears that Ex. D/1 is a registered document. It can be inferred that it was in existence, but as it was not a genuine document, but a manufactured one, it was not mentioned in the application. Harbo Bai should not have applied for a succession certificate, but she must have come forward with an application for claiming a right under the Will if a *bona fide* Will was in existence. But it was not done. It again shows a very important circumstance against the genuineness of the alleged Will.”

21. The claim petition was filed in the year 1984, and the civil suit was filed in the year 1987. However, the defendants had not set up the Will stated to have been executed by Attar Singh in their favour. They had an opportunity to set up the will to defeat the claim projected by Kalawati regarding the estate of Attar Singh. The failure to set up the Will by the defendants in their favour to defeat the claim propounded by Kalawati and Vidya Devi as the legal heirs makes it highly suspicious that the Will existed at the time of filing the previous claim petition and the suit.

22. Geeta Ram (DW3) stated that Attar Singh had executed a Will which was scribed by Chatar Singh. Amar Singh, Shiv Singh, Dropti Devi, and he were present. Attar Singh had called him. The Will was written as per the wishes of Attar Singh. It was read over and explained to him (Attar Singh), who acknowledged its correctness and put his signature. The witnesses also put their signatures. He attested the Will. Dropdi Devi put her thumb mark. Shiv Singh signed the Will. He had put his seal on the Will. He stated in his cross-examination that Attar Singh was hale and hearty. He had eczema on his neck and no other disease. He had a relationship with Attar Singh. He remembered the date of execution of the Will because the Will was prepared by him and it bore his signature. He had not made any entry in the Panchayat record regarding the attestation of the Will, even though such entries are normally made in the Panchayat record.

23. The statement of this witness that Attar Singh had minor eczema on his neck and no other problem falsifies the contents of the Will that the eczema had spread to the whole body of Attar Singh and it was incurable. Further, Geeta Ram has not provided any explanation as to why he had not entered the

Will in the Panchayat register, even though he used to enter such Wills in the register. These two circumstances create a doubt about the genuineness of the Will.

24. Amar Singh (DW2) stated that the Will was executed in his presence. It was written by Chander Dutt. Geeta Ram, Shiv Singh and Dropdi were present at the time of the execution of the Will. Attar Singh put his signature on the Will. Geeta Ram, Shiv Singh and Chander Dutt, etc., were present at that time. They also put the signatures. He had also put his signature on the Will. Pradhan attested the Will. He stated in his cross-examination that Attar Singh had called the witnesses himself. The witnesses Chander Dutt and Geeta Ram were present, and the Will was being written at the time of his arrival. It was read over and explained to Attar Singh. Chander Dutt had explained that the Will was executed in favour of the sons, and they would have the responsibility of marrying their sisters. The witness who used to sign in English had put their signature in English, and the other witnesses had put their signatures in Hindi.

25. The statement of this witness is highly vague. He could not tell who had put the signatures first and in which

language. He made a vague statement that the witnesses who used to sign in English had put their signatures in English, and other witnesses had signed in Hindi.

26. The Will was sent to the handwriting expert. He opined that the signatures on the Will were different from the admitted signatures. This is also apparent from the fact that the signatures on the account opening forms (Ex.PW5/A and Ex.PA) and the signatures of the certified copy of the statement of Attar Singh are quite different from the signatures put on the Will. Learned Appellate Court had rightly held that the reliance cannot be placed upon the report of the handwriting expert alone. However, in the present case, the circumstances surrounding the execution of the Will provided ample corroboration to the statement of the handwriting expert that the admitted signatures and the signatures on the Will were quite different.

27. Therefore, the learned Appellate Court had erred in ignoring the circumstances surrounding the execution of the Will and holding that mere execution and attestation of the Will

were sufficient to prove the Will. Therefore, this substantial question of law is answered accordingly.

Substantial Question of Law No.2:

28. The learned Appellate Court held that the plaintiffs did not appear in the witness box, which made their case highly suspicious. This finding cannot be sustained. The Appellate Court held that the relationship between the parties was duly proved. The plaintiffs would have inherited the estate of Attar Singh by their relationship alone, and once the relationship was proved, they were not required to lead any other evidence. The burden was upon the defendants to prove that the deceased had executed a Will in their favour to dislodge the claim of the plaintiffs. An adverse inference can only be drawn when some fact is in the exclusive knowledge of the party, and the party does not appear before the Court to prove the fact. In the present case, no such exclusive knowledge was found by the learned Appellate Court, and an adverse inference could not have been drawn. Hence, the substantial question of law is answered accordingly.

Substantial Question of Law No.4:

29. Learned Appellate Court held that the suit was barred by the provisions of Order II Rule 2. This finding cannot be sustained. The pleadings in Civil Suit No. 118 of 1995 were not brought on record. It was laid down by the Hon'ble Supreme Court in *Gurbux Singh v. Bhooralal*, (1964) 7 SCR 831: AIR 1964 SC 1810 that a bar under Order II Rule 2 of CPC cannot be invoked without filing the copies of the pleadings. It was observed: -

“7. Learned Counsel for the appellant, however, urged that in his plaint in the present suit, the respondent had specifically referred to the previous suit having been for mesne profits and that as mesne profits could not be claimed except from a trespasser there should also have been an allegation in the previous suit that the defendant was a trespasser in wrongful possession of the property and that alone could have been the basis for claiming mesne profits. We are unable to accept this argument. In the first place, it is admitted that the plaint in the present suit was in Hindi and that the word ‘mesne profits’ is an English translation of some expression used in the original. The original of the plaint is not before us, and so it is not possible to verify whether the expression ‘mesne profits’ is an accurate translation of the expression in the original plaint. Apart from this, we consider that learned Counsel's argument must be rejected for a more basic reason. Just as in the case of a plea of res judicata, which cannot be established in the absence of the record of the judgment and decree which is pleaded as estoppel, we consider that a plea under Order 2 Rule 2 of the Civil Procedure Code cannot be made out except on proof of the plaint in the previous suit, the filing of which is said to create the bar. As the plea is basically founded on the identity of the cause of action in the two suits, the defence

which raises the bar has necessarily to establish the cause of action in the previous suit. The cause of action would be the facts which the plaintiff had then alleged to support the right to the relief that he claimed. Without placing before the Court the plaint in which those facts were alleged, the defendant cannot invite the Court to speculate or infer by a process of deduction what those facts might be with reference to the reliefs which were then claimed. It is not impossible that reliefs were claimed without the necessary averments to justify their grant. From the mere use of the words 'mesne profits', therefore, one need not necessarily infer that the possession of the defendant was alleged to be wrongful. It is also possible that the expression 'mesne profits' has been used in the present plaint without a proper appreciation of its significance in law. What matters is not the characterisation of the particular sum demanded but what, in substance, is the allegation on which the claim to the sum was based and as regards the legal relationship on the basis of which that relief was sought. It is because of these reasons that we consider that a plea based on the existence of a former pleading cannot be entertained when the pleading on which it rests has not been produced. We therefore consider that the order of remand passed by the learned Additional District Judge, which was confirmed by the learned Judge in the High Court, was right. The merits of the suit have yet to be tried, and this has been directed by the order of remand, which we are affirming."

30. A similar view was taken in *Bengal Waterproof Ltd. v. Bombay Waterproof Mfg. Co.*, (1997) 1 SCC 99, wherein it was held:

"7. A mere look at the said provisions shows that once the plaintiff comes to a court of law for getting any redress, basing his case on an existing cause of action, he must include in his suit the whole claim pertaining to that cause of action. But if he gives up a part of the claim based on

the said cause of action or omits to sue in connection with the same, then he cannot subsequently resurrect the said claim based on the same cause of action. So far as sub-rule (3) of Rule 2 of Order 2 CPC is concerned, bar of which appealed to both the courts below, before the second suit of the plaintiff can be held to be barred by the same it must be shown that the second suit is based on the same cause of action on which the earlier suit was based and if the cause of action is the same in both the suits and if in the earlier suit plaintiff had not sued for any of the reliefs available to it on the basis of that cause of action, the reliefs which it had failed to press in service in that suit cannot be subsequently prayed for except with the leave of the court. It must, therefore, be shown by the defendants for supporting their plea of bar of Order 2, Rule 2, sub-rule (3) that the second suit of the plaintiff filed in 1982 is based on the same cause of action on which its earlier suit of 1980 was based and that because it had not prayed for any relief on the ground of passing off action and it had not obtained leave of the court in that connection, it cannot sue for that relief in the present second suit. So far as this plea of the defendants is concerned, there is a threshold bar against them for their failure to bring on record the pleadings of the earlier suit, which unfortunately has not been properly appreciated by the courts below. A Constitution Bench of this Court in the case of *Gurbux Singh v. Bhooralal* [(1964) 7 SCR 831: AIR 1964 SC 1810] speaking through Ayyangar, J., in this connection has laid down as under:

“In order that a plea of a bar under Order 2, Rule 2(3), Civil Procedure Code should succeed the defendant who raises the plea must make out (1) that the second suit was in respect of the same cause of action as that on which the previous suit was based, (2) that in respect of that cause of action, the plaintiff was entitled to more than one relief, (3) that being thus entitled to more than one relief the plaintiff, without leave obtained from the

Court, omitted to sue for the relief for which the second suit had been filed. From this analysis, it would be seen that the defendant would have to establish primarily and to start with, the precise cause of action upon which the previous suit was filed, unless there is an identity between the cause of action on which the earlier suit was filed and that on which the claim in the later suit is based there would be no scope for the application of the bar. No doubt, a relief which is sought in a plaint could ordinarily be traceable to a particular cause of action, but this might, by no means, be the universal rule. As the plea is a technical bar, it has to be established satisfactorily and cannot be presumed merely on the basis of inferential reasoning. It is for this reason that we consider that a plea of a bar under Order 2, Rule 2, Civil Procedure Code can be established only if the defendant files in evidence the pleadings in the previous suit and thereby proves to the Court the identity of the cause of action in the two suits. It is common ground that the pleadings in C.S. No. 28 of 1950 were not filed by the appellant in the present suit as evidence in support of his plea under Order 2, Rule 2, Civil Procedure Code. The learned trial Judge, however, without these pleadings being on the record, inferred what the cause of action should have been from the reference to the previous suit contained in the plaint as a matter of deduction. At the stage of the appeal, the learned District Judge noticed this lacuna in the appellant's case and pointed out, in our opinion, rightly, that without the plaint in the previous suit being on the record, a plea of a bar under Order 2, Rule 2, Civil Procedure Code was not maintainable.”

8. In view of the aforesaid authoritative pronouncement of the Constitution Bench of this Court, the learned trial

Judge as well as the learned Single Judge of the High Court ought to have held that the plea raised by the defendants in the present case is barred at the threshold, as the defendants had not produced on the record of the trial court the pleadings in the first suit. Thus, there is a complete bar against the defendants from raising the bar of Order 2, Rule 2, sub-rule (3) against the plaintiff in the present case. In this connection, we may refer to one submission made by the learned counsel for the defendants, which appealed to the learned Single Judge of the High Court. He submitted that the averments in the second suit of the plaintiff were that the first suit was misconceived and proper relief was not prayed for. Therefore, it can be inferred that the second suit was hit by the bar of Order 2, Rule 2, sub-rule (3) CPC, and he further submitted that at least in the counter filed in reply to the special leave petition, the defendants have produced a copy of the plaint in the first suit. We fail to appreciate how this effort on the part of the defendants can be of any avail to them. Firstly, the Constitution Bench of this Court in *Gurbux Singh case [(1964) 7 SCR 831: AIR 1964 SC 1810]* has clearly ruled that there cannot be any inference about the bar of Order 2, Rule 2, sub-rule (3) CPC which may be culled out from plaint in the second case and secondly once the plea of bar of Order 2, Rule 2, sub-rule (3) was not available to the defendants in the suit in the absence of the pleadings in the earlier suit being brought on the record by them in support of their case before the trial court they had missed the bus especially when even before the High Court no attempt was made by the defendants to produce the pleadings in the earlier suit by way of an application for additional evidence. Therefore, it is too late in the day for the defendants to contend that, along with the counter in the special leave petition before us, they had produced a copy of the plaint in the earlier suit. In the light of the clear pronouncement of the Constitution Bench in the case of *Gurbux Singh [(1964) 7 SCR 831: AIR 1964 SC 1810]*, it must be held that it was not open to the defendants to

raise the contention of the bar of Order 2, Rule 2, sub-rule (3) CPC in the present case and, therefore, the learned Single Judge of the High Court was clearly in error in non-suiting the plaintiff on that ground.

31. This position was reiterated in *S. Nazir Ahmad Vs. State Bank of Mysore 2007 (11) SCC 75*, and it was held: -

9. Now, we come to the merit of the contention of the appellant that the present suit is hit by Order 2 Rule 2 of the Code in view of the fact that the plaintiff omitted to claim relief based on the mortgage, in the earlier suit OS No. 131 of 1984. Obviously, the burden to establish this plea was on the appellant. The appellant has not even cared to produce the plaint in the earlier suit to show what exactly was the cause of action put in the suit by the Bank in that suit. That the production of pleadings is a must is clear from the decisions of this Court in *Gurbux Singh v. Bhooralal [AIR 1964 SC 1810 : (1964) 7 SCR 831]* and *Bengal Waterproof Ltd. v. Bombay Waterproof Mfg. Co. [(1997) 1 SCC 99: AIR 1997 SC 1398: 1996 Supp (8) SCR 695]* From the present plaint, especially Paras 10 to 12 thereof, it is seen that the Bank had earlier sued for recovery of the loan with interest thereon as a money suit. No relief was claimed for recovery of the money on the foot of the equitable mortgage. In that suit, the Bank appears to have attempted in execution to bring the mortgaged properties to sale. The appellant had objected that, since the suit was not on the mortgage, the mortgaged properties could not be sold in execution without an attachment. That objection was upheld. The Bank was therefore suing in enforcement of the mortgage by deposit of title deeds by the appellant.

32. It was laid down by the Hon'ble Supreme Court in *Syed Mohd. SalieLabbai v. Mohd. Hanifa, (1976) 4 SCC 780*, that the respective pleadings of the parties in the previous suit have

to be brought on record to determine the case of the parties. The recitals in the pleadings cannot be inferred from the judgment. It was observed (at page 790):

“8. In the instant case, according to the plaintiffs-respondents, the identity of the subject matter in the present suit is quite different from that which was adjudicated upon in the suits that formed the basis of the previous litigation. In our opinion, the best method to decide the question of res judicata is first to determine the case of the parties as put forward in the respective pleadings of their previous suits and then to find out as to what had been decided by the judgments which operate as res judicata. Unfortunately, however, in this case, the pleadings of the suits instituted by the parties have not at all been filed, and we have to rely upon the facts as mentioned in the judgments themselves. It is well settled that pleadings cannot be proved merely by recitals of the allegations mentioned in the judgment.”

33. This position was reiterated in *V. Rajeshwari v. T.C. Saravanabava*, (2004) 1 SCC 551: 2003 SCC OnLine SC 1405, wherein it was observed at page 556:

“12. The plea of res judicata is founded on proof of certain facts and then by applying the law to the facts so found. It is, therefore, necessary that the foundation for the plea must be laid in the pleadings, and then an issue must be framed and tried. A plea not properly raised in the pleadings or issues at the stage of the trial, would not be permitted to be raised for the first time at the stage of appeal [see *(Raja) Jagadish Chandra Deo Dhabal Deb v. Gour Hari Mahato* AIR 1936 PC 258: 1936 All LR 786, *Medapati Surayya v. Tondapu Bala Gangadhara Ramakrishna Reddi* [AIR 1948 PC 3 : (1947) 2 MLJ 511] and

Katragadda China Anjaneyulu v. Kattaragadda China Ramayya [AIR 1965 AP 177 : (1965) 1 An LT 149 (FB)]]. The view taken by the Privy Council was cited with approval before this Court in *State of Punjab v. Bua Das Kaushal* (1970) 3 SCC 656. However, an exception was carved out by this Court, and the plea was permitted to be raised, though not taken in the pleadings nor covered by any issue, because the necessary facts were present to the mind of the parties and were gone into by the trial court. The opposite party had ample opportunity to lead the evidence in rebuttal of the plea. The Court concluded that the point of res judicata had throughout been in consideration and discussion, and so the want of pleadings or plea of waiver of res judicata cannot be allowed to be urged.

13. Not only does the plea has to be taken, but it has to be substantiated by producing copies of the pleadings, issues and judgment in the previous case. Maybe, in a given case, only a copy of the judgment in the previous suit is filed in proof of plea of res judicata, and the judgment contains, in exhaustive or in requisite details, the statement of pleadings and the issues which may be taken as enough proof. But as pointed out in *Syed Mohd. Salie Labbai v. Mohd. Hanifa* (1976) 4 SCC 780, the basic method to decide the question of res judicata is first to determine the case of the parties as put forward in the respective pleadings of their previous suit and then to find out as to what had been decided by the judgment which operates as res judicata. It is risky to speculate about the pleadings merely by a summary of recitals of the allegations made in the pleadings mentioned in the judgment. The Constitution Bench in *Gurbux Singh v. Bhooralal* AIR1964 SC 1810 : (1964) 7 SCR 831, placing on a par the plea of res judicata and the plea of estoppel under Order 2 Rule 2 of the Code of Civil Procedure, held that proof of the plaint in the previous suit, which is set to create the bar, ought to be brought on record. The plea is basically founded on the identity of the cause of action in

the two suits, and, therefore, it is necessary for the defence that raises the bar to establish the cause of action in the previous suit. Such pleas cannot be left to be determined by mere speculation or inferring by a process of deduction what were the facts stated in the previous pleadings were. Their Lordships of the Privy Council in *Kali Krishna Tagore v. Secy. of State for India in Council (1887-88) 15 IA 186: ILR 16 Cal 173* pointed out that the plea of res judicata cannot be determined without ascertaining what were the matters in issue in the previous suit and what was heard and decided. Needless to say, these can be found out only by looking into the pleadings, the issues and the judgment in the previous suit.”

34. Similar are the judgments in *Gurbux Singh* (supra), *Ramji Jankiji and another* (supra) and *Ranju Ram & anr.* (supra).

35. In the present case, the pleadings in the previous suit have not been brought on record, and it cannot be said that the provision of Order II Rule 2 will apply to the present case. Hence, this substantial question of law is answered accordingly.

Final order:

36. In view of the above, the present appeal is allowed, and the judgment and decree passed by the learned Appellate Court are ordered to be set aside, while the judgment and decree passed by the learned Trial Court are ordered to be restored.

37. Pending application(s), if any, also stand(s) disposed of.

38. Records of the learned Courts below be sent down forthwith.

(Rakesh Kainthla)
Judge

15th June, 2026
(Chander)