

Hameed and ors. Vs. Kanhaiya

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Court : Allahabad

Decided On : Jul-27-2004

Reported in : AIR2004All405; 2005(1)AWC738

Judge : Tarun Agarwala, J.

Acts : [Code of Civil Procedure \(CPC\) , 1908](#) - Sections 100 - Order 6, Rule 2; [Transfer of Property Act, 1882](#) - Sections 54; [Specific Relief Act, 1963](#) - Sections 31, 32, 32(5) and 32(6); [Evidence Act, 1872](#) - Sections 50, 63, 63(1), 65, 66, 79 and 101 to 104; [Registration Act, 1908](#) - Sections 57; Uttar Pradesh Zamindari Abolition and Land Reforms Act, 1951 - Sections 331

Appeal No. : S.A. No. 1717 of 1986

Appellant : Hameed and ors.

Respondent : Kanhaiya

Disposition : Appeal dismissed

Judgement :

Tarun Agarwala, J.

1. The plaintiff, Kanhaiya filed a suit for the cancellation of the sale deed dated 23-12-1981 executed by Sita Ram in favour of the defendants. The suit was filed by Kanhaiya as a minor through his mother and legal guardian Smt. Kailashi Devi

claiming himself to be the son of Sita Ram. The plaintiff alleged that Sita Ram was an illiterate and a simpleton person and was also hard of hearing. He was called to Darjeeling by his nephew Janeshwar and others, who played a fraud upon Sita Ram and got a gift deed executed in their favour, whereby Sita Ram gifted his entire properties in favour of Janeshwar and others. When Sita Ram came to know about the execution of this gift deed, he filed a suit against his nephew being suits No. 234 of 1977 and 235 of 1977 and ultimately on 23-1-1979, a compromise took place wherein Sita Ram got back 60% of his property along with a sum of Rs. 28,000/-. The plaintiff alleged to the defendants were residents of the same village and that the defendant No. 1 used to help his father Sita Ram and was also instrumental in compromising the matter with Janeshwar and others. The plaintiff further alleged that Sita Ram fell ill in December 1981 and that the defendants told Sita Ram to execute a Will in favour of the plaintiff and for this purpose the defendants took Sita Ram to the Sub Registrar's office. The defendants also told Sita Ram to deposit Rs. 28,000/- in the bank, which he got from Janeshwar. The plaintiff alleged that Sita Ram went with the defendant to deposit Rs. 20,000/- in the bank and also to execute a will, but the defendant in addition to the execution of the will also got Sita Ram to execute a sale deed in their favour. The plaintiff alleged that the execution of the sale deed was an outcome of a fraud played by the defendants upon the father of the plaintiff and that in the garb of executing a Will, the defendants fraudulently also got a sale deed executed in their favour. In paragraph No. 16 of the plaint, the plaintiff had alleged various grounds for the cancellation of the sale deed, namely, that the sale deed was executed fraudulently by the defendants and was without any consideration and that Sita Ram had no intention nor did he willingly execute the sale deed in favour of the defendants. The plaintiff further alleged that the witnesses to the sale deed were interested persons and were the henchmen of the defendants. The plaintiff submitted that he was in physical possession of the property in question and prayed that the sale deed executed in favour of the defendants be cancelled.

2. The defendant Nos. 1, 2 and 3 filed their written statement and denied the plaintiff allegations and submitted that the defendants plaintiff had no cause of action nor had any locus standi to file a suit. The defendants contended that the plaintiff was not the son of Sita Ram and therefore, had no locus standi to file the suit against

the defendants. The defendants contended that the plaintiff was an illegitimate child who had no father or mother and that Smt. Kailashi Devi was not the wife of Sita Ram and that she was an impostor. The defendants further contended that they had no knowledge about the filing of suit No. 234 and 235 of 1977 and specifically denied that they ever did pairvi on behalf of plaintiff's father or that they were instrumental in compromising the matter with nephews of Sita Ram. The defendants, however, admitted that Sita Ram was an illiterate person, but contended that he could understand and differentiate between good and bad. The defendants, however, denied that they had ever told Sita Ram to execute a Will in favour of the plaintiff or that they had taken Sita Ram to the Sub Registrar's office for executing a will. The defendants further denied that they had ever told Sita Ram to deposit Rs. 28,000/- in the Bank which he had received from Janeshwar. The defendants contended that Sita Ram consciously and with an open mind, validly executed a sale deed in their favour for a consideration and that the defendants were bona fide purchasers for value. The defendants submitted that they had paid a sum of Rs. 30,100/- to Sita Ram and that the defendant Nos. 4 & 5 paid a sum of Rs. 10,965/- to Sita Ram at the date of the execution of the sale deed, which was duly acknowledged by Sita Ram before the Sub Registrar and only thereafter, the sale deed was executed. The defendants denied the allegation that no consideration was paid to Sita Ram. The defendants further submitted that out of Rs. 41,065/- which was the total consideration, Sita Ram deposited a sum of Rs. 28,000.00 in the bank. The defendants submitted that the sale deed was validly executed and that the suit was liable to be dismissed.

3. The defendant Nos. 4 and 5 also filed their separate written statement, making similar averments as made by the defendant Nos. 1, 2 and 3. The defendant Nos. 4 and 5 submitted that they had paid a sum of Rs. 10,965/- to Sita Ram towards the sale consideration and that they were bona fide purchasers for value.

4. The trial Court after framing the issues dismissed the suit holding that the sale deed was validly executed by Sita Ram and that due consideration was paid to him by the defendants. The trial Court further held that the suit was not maintainable and that the plaintiff had no right to file the suit. The trial Court held that the plaintiff was not the son of Sita Ram and was not his heir and, therefore,

he had no right or locus standi to file the suit. The trial Court further found that Smt. Kailashi Devi was not the legally wedded wife of Sita Ram. The trial Court further found that the defendants had proved the execution of the sale deed and that the defendants were bona fide purchasers for value. The trial Court further held that Rs. 28,000/- deposited by Sita Ram in the bank was part of the sale consideration and that the plaintiff failed to prove that the amount of Rs. 28,000.00 was the same amount given to Sita Ram by Janeshwar pursuant to the compromise arrived in suit No; 234 and 235 of 1977.

5. Aggrieved by the judgment of the trial Court, the plaintiff filed an appeal, which was allowed and the judgment and decree of the trial Court was set aside, the suit of the plaintiff was decreed and the sale deed dated 23-12-1981 was cancelled.

6. The appellate Court held that sale deed was a fictitious and a forged document and was also executed without any consideration. The appellate Court found that Sita Ram had never executed any sale deed and that the evidence given by Shyam Narain Tripathi DW-1 and Hamid DW-2 were unreliable. The appellate Court found that though the sale deed stated that the total consideration was for Rs. 41,065/-, only Rs. 30,000.00 was alleged to have been paid to Sita Ram before the Sub-Registrar and came to the conclusion that no consideration was in fact paid to Sita Ram and that the sum of Rs. 28,000.00 deposited in the account of Sita Ram was not part of the sale consideration. The appellate Court also found that the plaintiff was still in possession of the property in dispute and that the plaintiff was the son of Sita Ram and that Smt. Kailash Devi was the second wife of Sita Ram. The appellate Court further upheld that Sita Ram executed a Will in favour of his son, the plaintiff and that this Will had been duly proved by the witness.

7. Aggrieved by the decision of the appellate Court, the defendant has now filed the present second appeal. At the time of admission of the Second Appeal, the following substantial question of law was formulated, namely:--

1. Whether the learned lower appellate Court erred in law in reversing the judgment and decree of the trial Court and finding that the minor plaintiffs mother Kailashi Devi is the second wife of Sita Ram, when this factor was never pleaded

in the plaint by the plaintiff and the factum of marriage either by custom or in accordance with any other provisions of law and had not been proved by the plaintiff in his evidence?

2. Whether the learned lower appellate Court erred in law in ignoring the provisions contained under Section 331 of the U. P. Z. A. and L. R. Act according to which the present Suit by the plaintiff is not maintainable in the Civil Court?

3. Whether the learned lower appellate court was justified in accepting the certified copy of the alleged Will dated 23-12-1981 without compliance with the provisions contained in Section 65 of the Indian Evidence Act?

8. Heard Sri A.K. Mishra, the learned counsel for the appellant at length and Sri Manish Dev Singh, the learned counsel holding the brief of Sri Shashi Nandan, Senior. Counsel for the opposite party.

9. The learned counsel for the appellant contended that the sale deed was validly executed by Sita Ram and that due consideration was paid to him. The learned counsel contended that out of the sum of Rs. 41,065, a sum of Rs. 28,000.00 was deposited by Sita Ram in the bank. This deposit of Rs. 28,000/- was part of the sale consideration and was not the amount paid by the Janshwar pursuant to the decree passed in suit Nos. 234 and 235 of 1977. The learned counsel for the appellant further submitted that no fraud was played upon Sita Ram and that Sita Ram had executed the sale deed knowingly and willingly. The learned counsel further submitted that the appellant had strongly contended that Smt. Kailashi Devi was an imposter and was not the second wife of Sitaram and that the plaintiff was not the son of Sita Ram or of Smt. Kailashi Devi and therefore, the plaintiff had no right or locus standi to file the suit. The learned counsel further contended that the plaintiff had not been able to prove that he was the son of Sita Ram. The learned counsel for the appellant further submitted that the certified copy of the Will could not be taken into consideration or read in evidence unless there was compliance of Section 65 of the Evidence Act. The learned counsel for the appellant also contended that the suit filed by the plaintiff was not maintainable. The suit was filed for the cancellation of the sale deed, which were agricultural plots and therefore, the provision of Section 331 of U. P. Z. A. and L. R. Act would come into

existence.

10. The admitted position, as culled out from the facts are, that two documents were executed, namely a Will and a sale deed. The Will was prepared and presented before the Sub-Registrar on 23-12-1981. The said Will was registered on 24-12-1981. The second, document is the sale deed dated 23-12-1981, presented before the Sub-Registrar on 24-12-1981, which was eventually registered on 26-12-1981. An important aspect and a vital link is the deposit of Rs. 28,000.00 in the bank account of Sita Ram on 23-12-1981. Another important aspect that has to be kept in mind is, that Sita Ram died on 2-1-1982 i.e. within 10 days of the execution of the aforesaid two documents. The death of Sita Ram by itself creates a suspicious circumstance surrounding the execution of the two documents.

11. The suit has been filed for the cancellation of the sale deed. The plaintiff has alleged that Sita Ram had no intention to execute the sale deed and that he had gone with Hamid defendant. No. 1 to get a Will executed and to deposit the money in the bank. The defendants fraudulently also got a sale deed executed in their favour. The plaintiff has alleged that no consideration was paid to Sita Ram. On the other hand the defendants have categorically stated that Sita Ram consciously and willingly executed a sale deed in their favour and had received a sum of Rs. 41,065 before the Sub Registrar. The defendants have also stated that out of this amount, Sita Ram deposited Rs. 28,000/- in his bank account.

12. The defendants have categorically stated that on 23-12-1981 only one document was executed which was the sale deed. The defendants have categorically decided that any Will was executed on 23-12-1981. The fact, however, remain that a Will dated 23-12-1981 was executed, which was presented before the Sub-Registrar on the same day and was duly registered on 24-12-1981. This Will has been proved by the attesting witness, PW-4, Vijay Shanker, who deposed that the Will was executed in his presence by Sita Ram, The statement of DW2, Hamid that only the sale deed was executed on 23-12-1981 has been disbelieved by the lower appellate Court for the reason that on 23-12-1981 a Will was also executed which was duly registered on 24-12-1981, The registration of

the Will is a proof of the existence of the Will. The defendants, therefore, cannot deny the fact that no Will was executed or registered on 23-12-1981. The execution and registration of the Will on 23-12-1981 proves the allegations of the plaintiff, namely, that the plaintiff had gone with Hamid to get the Will executed and also to deposit Rs. 28,000.00 in the bank, which he received from Janeshwar pursuant to the compromise decree.

13. The sale deed was also presented on 24-12-1981 and the same was registered on 26-12-1981. The question to be answered, is, whether the sale deed was validly executed. Hamid, DW2 stated that only the sale deed was executed by DW 1, Shyam Narain Tripathi Advocate also stated that only the sale deed was executed and that he was the attesting witness only to sale deed. Both these statements of the DW1 and DW2 have been found to be unreliable by the lower appellate Court. The statement of Hamid has been disbelieved on the ground that he made a specific averment that only one document, i.e., the sale deed was executed, whereas two documents were executed and registered and therefore, the lower appellate court found that the said witness was not stating the correct facts. The statement of Shyam Narain Tripathi, Advocate was also disbelieved by the lower appellate Court. He made a categorical statement that he was the attesting witness only to the sale deed and that he had placed his signatures only on one document, i.e., the sale deed. The evidence that has come on record was that Shyam Narain Tripathi was an attesting witness in the Will as well as in the sale deed, and therefore, the lower appellate Court also found his statement to be unreliable. At this stage, what is surprising, is that this witness, Shyam Narain Tripathi appeared as a witness of the defendants and gave the statement in their favour, whereas this witness was an advocate of Sita Ram and pleaded his case against Janeshwar, which was ultimately compromised and Rs. 28,000.00 was paid to Sita Ram. Sita Ram also had complete faith in him. The lower appellate Court on the basis of the appreciation of the evidence on the record, came to the conclusion that a fraud was played by the Advocate along with Hamid, and in the garb of executing a Will, they had also got a sale deed executed in favour of the defendants. This conclusion arrived at by the lower appellate Court does not require any interference from this Court. I find that the lower appellate Court had come to this conclusion on the basis of the appreciation of the evidence on the

record and, being a last fact finding Court, the finding arrived at by the lower appellate Court cannot be dislodged by this Court in a Second Appeal nor can it be reappreciated, merely because another opinion could be arrived at. The learned counsel, however, drew the Court's attention on the evidence and statement given by these witnesses, which was perused in detail and, in my view, the findings arrived at by the lower appellate Court is just and proper and is not for this Court to again reappreciate the evidence and arrive at a different opinion.

14. The lower appellate Court came to the conclusion that no consideration was paid by the defendants to Sita Ram, even though the sale deed showed that a sum of Rs. 30,000.00 was paid by the defendants to Sita Ram. The lower appellate Court came to the conclusion that even though a payment of Rs. 30,000.00 to Sita Ram was indicated in the sale deed to have been paid to Sita Ram, the same was not actually paid to Sita Ram and that it had been paid to some imposter posing himself to be Sitaram before the Sub Registrar when the sale deed was presented. Sri S.N. Tripathi deposed and stated that Rs. 30,000.00 was paid by Hamid to Sita Ram before the Sub Registrar and Rs. 11,065.00 was paid by Kalun Uddin to Sita Ram before the Sub Registrar. Therefore, the total sale consideration was Rs. 41,065.00. However, the Sub Registrar's recorded payment of only Rs. 30,000.00. Therefore, there is a contradiction in the statement given by Sri Shyam Narain Tripathi and the amount recorded by the Sub Registrar in the sale deed. The fact that Sita Ram never received the money was proved by the statement of Hamid who stated that all the 5 defendants paid Rs. 41,065.00 to Sita Ram before the Sub Registrar on the date when the sale deed was presented for registration. This witness, namely, Hamid, further stated that the amount was counted by Sita Ram before the Sub Registrar and after the execution of the sale deed he along with Sita Ram went to the bank and deposited Rs. 28,000.00 in Sita Ram's A/c. The intention of the witness was to prove the execution of the Will to the effect that Sita Ram voluntarily and willingly, in a sound frame of mind, executed the sale deed and that he had received valuable consideration for the execution of the sale deed. The witness wanted to co-relate the amount deposited in the bank with the consideration paid by them before the Sub-Registrar towards the sale deed. The insistence of DW1 that a portion of the amount given to Sita Ram was deposited in Sita Ram's bank account on the same date when the sale

deed was presented before the Sub Registrar has become fatal and has destroyed their defence. The witness categorically stated that the amount of Rs. 41,065/- was paid to Sita Ram before the Sub Registrar on the date of the presentation of the sale deed. Sita Ram counted the money and thereafter, Sita Ram and Hamid went to the bank and out of Rs. 41,065/- deposited Rs. 28,000.00. This assertion is wholly incorrect. The sale deed was presented before the Sub Registrar at 3.45 P. M. on 24-12-1981, whereas it has come on record that Rs. 28,000.00 was deposited in the bank on 23-12-1981. If the amount of Rs. 28,000.00 was deposited on 23-12-1981, this amount could not relate towards the sale consideration inasmuch the sale consideration was paid to Sita Ram before the Sub Registrar on the date of the presentation of the sale deed i.e. at around 3.45 P. M. on 24-12-1981. Thus, if the amount was paid by the defendants to Sita Ram on 24-12-1981, it was not possible for Sita Ram to deposit a portion of that amount a day earlier i.e. on 23-12-1981. The defendants, therefore, miserably failed to prove that they had, paid Rs. 41,065.00 towards the sale consideration to Sita Ram. Another aspect which has to be taken note of is that the defendants categorically stated that the amount was deposited on the same date in the bank after the presentation of the sale deed on 24-12-1981. It is submitted that this statement is wholly incorrect. Admittedly the sale deed was presented on 24-12-1981 at 3.45 p.m. No bank is open for doing transaction at 3.45 p.m. Thus, in my opinion, no amount was deposited on 24-12-1981.

15. In view of the aforesaid the appellate Court came to the conclusion that no consideration was paid by the defendants to Sita Ram and that the sale deed was fraudulently executed without any consideration. I am in full agreement with the said finding. The appellate Court correctly came to the conclusion that Sita Ram along with Hamid, went to the, Sub Registrar to execute a Will on 23-12-1981, Shyam Narain Tripathi, Advocate was involved in the preparation of the Will and fraudulently prepared another document on that date, namely, the sales deed, the will was presented on 23-12-1981 in which Sita Ram appeared and acknowledged of the execution of the Will before the Sub Registrar and thereafter went with Hamid and deposited Rs. 28,000.00 in the bank which Sita Ram received from Janeshwar. It has also come on record that Sita Ram went back to his village the same date. The sale deed dated 23-12-1981 was presented on the next day, i.e.

24-12-1981 and another person was placed before the Sub-Registrar, who was shown to have received the sale consideration. The aforesaid view of the lower appellate Court in my view is wholly plausible, being based on evidence and concrete reasoning and I find no plausible ground to interfere with the said findings.

16. Thus, I am in complete agreement, with the findings of the lower appellate Court to the effect that the sale deed was fraudulently executed by the defendants without Consent and knowledge of Sita Ram and that no consideration was paid to Sita Ram.

17. The learned counsel for the appellant laid much stress on the locus standi of the plaintiff, namely Kanhaiya and his mother Kailashi Devi and strongly contended that Kanhaiya was not the son of Sita Ram nor Kailashi Devi was the second wife of Sita Ram. The appellant contended that this fact, namely, that Kailashi Devi was the second wife and the factum of marriage either by custom or otherwise had neither been pleaded in the plaint nor had been proved by the plaintiff in his evidence. Learned counsel for the appellant contended that except for a bald statement in the plaint that the plaintiff was the son of Sita Ram, there is no averment of the factum of the marriage of Smt. Kailashi Devi with Sita Ram nor any evidence has been given by the plaintiff to prove the marriage of Sita Ram with Kailashi Devi. Further no evidence had been led to show that the plaintiff was the son of Sita Ram. The learned counsel for the appellant further submitted that the plaintiff ought to have produced the relatives of Sita Ram to prove the second marriage of Sita Ram and that the factum of marriage of Kailashi Devi with Sita Ram and plaintiff being the son of Sita Ram was a relevant fact which was not only required to be pleaded, but was also required to be proved by evidence by the plaintiff. The learned counsel submitted that since no evidence as contemplated under Section 50 and Section 32(5) & (6) of the Indian Evidence Act was given by the plaintiff and that no member of the family of Sita Ram came forward to prove the factum of marriage of Sita Ram with Kailashi Devi, it could not be assumed that Smt. Kailashi Devi was the second wife of Sita Ram and that the plaintiff was the son of Sita Ram. In support of his submission, the learned counsel had placed reliance upon a decision of the Supreme Court in : AIR 2002 SC2063 in which it

was held that a matter which is required to be proved by evidence cannot be assumed. Further reliance was made on the decisions in : AIR 1959 SC914 , : AIR1968 All58 , : AIR 1977 SC2002 , and : AIR1973 Ori1 .

18. For facility, Section 50 and Section 32(5) and (6) of the Evidence Act are quoted hereunder.

'50. Opinion on relationship, when relevant --7 When the Court has to form an opinion as to the relationship of one person to another, the opinion, expressed by conduct, as to the existence of such relationship of any person who, as a member of the family or otherwise, has special means of knowledge oh the subject, is a relevant fact.

Provided that such opinion shall not be sufficient to prove a marriage in proceedings under the Indian Divorce Act (IV of 1969); or in prosecutions under Sections 494, 495, 497 or 498 of the Indian Penal Code (XLV of 1860)'.

'32. Cases in which statement of relevant fact by person who is dead or cannot be found, etc., is relevant Statements, written or verbal, or relevant facts made by a person who is dead, or who cannot be found, or who has become incapable of giving evidence or whose attendance cannot be procured without an amount of delay or expense which under the circumstances of the case appears to the Court unreasonable, are themselves relevant facts in the following cases :--

(5) Or relates to existence of relationship.-- When the statement relates to the existence of any relationship by blood, marriage or adoption between persons as to whose relationship by blood, marriage or adoption the person making the statement had special means of knowledge, and when the statement was made before the question in dispute was raised.

(6) Or is made in Will or deed relating to family affairs.-- When the statement relates to the existence of any relationship by blood, marriage or adoption between persons deceased, and is made in any Will or deed relating to the affairs of the family to which any such deceased person belonged, or in any family pedigree, or upon any for tombstone, family portrait or other thing on which such statement are

usually made, and when such statement was made, before the question in dispute was raised.'

19. The learned counsel contended that in view of Section 50 of the Evidence Act, the opinion of the family members and relatives of Sita Ram became relevant and, there fore, the plaintiff was required to produce the relatives of Sita Ram to establish the relationship of the plaintiff with Sita Ram as well as the relationship of Sita Ram with Smt. Kailashi Devi.

20. There is no quarrel with the proposition that relevant facts are riot only required to be pleaded but are also required to be proved. The first question that arise for consideration is, what is the relevant fact. Whether it was a relevant fact for the plain tiff to state his lineage, his relationship with Sita Ram and with Smt. Kalishi Devi and whether he was also required to prove it by evidence.

Order VI Rule 2 C. P. C. reads as under

'2. Pleading to state material, facts and not evidence.--

(1) Every pleading shall contain, and contain only, a statement in a concise form of the material facts on which the party pleading relies for his claim or defence, as the case may be, but not the evidence by which they are to be proved.

(2) Every pleading shall, when necessary, be divided into paragraphs, numbered consecutively, each allegation being, so far as is convenient, contained in a separate paragraph.

(3) Dates, sums and numbers shall be expressed in a pleading in figures as well as in words.'

21. From the aforesaid, it is clear that the material and relevant facts are required to be pleaded in the plaint and failure to plead a single material fact will lead to an incomplete cause of action which could be struck off under Order 6 Rule 16 C. P. C.

22. In my view, the fact that Kailashi Devi is the second wife of Sita Ram or that the marriage between them was performed as per Hindu customs or otherwise is

not required to be pleaded in a suit for the cancellation of the sale deed and, in my view, these are not relevant facts for the purpose of the case. It is enough for the plaintiff to state that Smt. Kailashi Devi is his mother and that he is the son of Sita Ram. The plaintiff is not required to state anything further. There is a presumption of law in his favour that he is the son of Sita Ram or Kailashi Devi. It is only when the defendant denies this relationship, that an issue arises, which is then required to be proved.

23. The next question is, who is to prove this fact. It is settled law that the burden to prove a fact is upon the person who alleges that fact. In the present case, the defendant appellant had alleged that the plaintiff was not the son of Sita Ram and that Smt. Kailashi Devi was not the second wife of Sita Ram and that Kailashi Devi was an imposter and that there was no second marriage of Sita Ram with Kailashi Devi either in accordance with the local customs or Hindu rites. In my view, these allegations were required to be proved by the defendants themselves. The contention that the relatives of Sita Ram, should have been produced by the plaintiff to prove the factum of marriage is wholly erroneous. In my view the onus was upon the defendants to prove the allegations they had made and they should have produced the relatives of Sita Ram to prove the factum of marriage or non-marriage of Sita Ram with Kailashi Devi. The plaintiff was not required to give evidence under Section 50 of the Evidence Act.

24. However, in the present case, ample evidence has come on record, which shows that the plaintiff was the son of Sita Ram. The first piece of evidence is the family register maintained under the Panchayat Raj Act, which has been filed and which indicates that the plaintiff is the son of Sita Ram. The second on-set evidence is the certified copy of the Will, which indicates that the plaintiff is the son of Sita Ram. The statement of Sita Ram in the Will is a piece of admissible evidence as held by the Supreme Court in : [1980]1SCR998 . Not only this Section 16 of Hindu Marriage Act, 1955 contemplates, that notwithstanding that a marriage is null and void, a child of such marriage would be legitimate and has a valid right to succeed to the property of his father. In my view, the statement of Sita Ram in the Will by itself is sufficient to prove that the plaintiff is the son of Sita Ram and that he had the locus standi to file and maintain the suit. On the other hand, no

evidence has been filed by the defendants to prove that the plaintiff was not the son of Sita Ram or that smt. Kailashi Devi was not the second wife of Sita Ram.

25. Section 32(5) and (6) of the Evidence Act has no application to the present controversy. In any case the onus was upon the defendants to prove their allegations. My attention was invited to illustration (k) to Section 32, which in my opinion is relevant and which is quoted hereunder.

'(k) The question is, whether A , who is dead, was the father of B. A statement by A that B was his own son, is a relevant fact.'

26. From the aforesaid, it is clear that the statement of Sita Ram in the Will acknowledging the plaintiff as his son is a relevant fact which the plaintiff has not only pleaded but also proved it by evidence, proving its execution by producing the attesting witness. Thus, the argument raised by the learned counsel for the appellants fails. Consequently the lower appellate Court rightly reversed the judgment of the trial Court. Question No. 1 of the substantial question of law is accordingly decided.

27. Much emphasis has been laid by the learned counsel for the appellant on the acceptance of the certified copy of the will by the Court below. The learned counsel submitted that the certified copy of the will could not be accepted ordered in the evidence or read in evidence nor could it be treated as a secondary evidence until and unless the provisions of Sections 65 and 66 of the Evidence Act was complied with. The learned counsel submitted that the original will was not produced by the plaintiff, and view of Section 65(a) of the Evidence Act, since the original will was not in the possession of the plaintiff, the procedure contemplated under Section 66 of the Evidence Act was required to be followed. Since the procedure under Section 66 of the Evidence Act was not followed, a certified copy of a registered will could not be accepted as secondary evidence, in support of his contention, the learned counsel has referred uper the following decisions, namely : AIR1973 Ori65 , : AIR1936 All422 , , : AIR1986 Cal430 , AIR 1953 Cal 6, AIR 1931 Bom 33, : AIR1971 Mad471 , : AIR 1954 SC606 , : [1976]1SCR246 , AIR 1954 Mad 487 (Sic) AIR 1929 Rangoon 277.

28. Brief proceeding any further, it must be kept in mind that the main relief in the suit was for the cancellation of the sale deed. The suit was not for a declaration that plaintiff is the son of Sita Ram. This issue has only been decided as an ancillary relief.

29. In order to deal with the arguments of the learned counsel for the appellant, it is necessary to refer to some of the provisions of the Evidence Act and the Indian Registration Act.

30. Chapter V of Part II of the Evidence Act relates to 'Proof of Documentary Evidence'. Section 61 of the Evidence Act requires that the contents of a document may be proved either by primary or by secondary evidence. Section 62 states that primary evidence means the production of the original document. Section 63 relates to secondary evidence, which includes certified copies made from the original. Section 64 contemplates proof of documents by primary evidence. Section 65 contemplates cases where secondary evidence could be given. Section 65(a) and (f) of the Evidence Act reads as under :--

'65. Cases in which secondary evidence relating to documents may be given - Secondary evidence may be given of the existence, condition or contents of a document in the following cases-(a) When the original is shown or appears to be in the possession or power--

of the person against whom the document is sought to be proved, or

of any person out of reach of, or not subject to, the process of the Court, or

of any person legally bound to produce it,

and when, after the notice mentioned in Section 66, such person does not produce it:

'(f) When the original is a document of which a certified copy is permitted by this Act, or by any other law in force in India, to be given in evidence;'

'In cases (a), (c) and (d), any secondary evidence of the contents of document is admissible.'

31. Section 79 of the Evidence Act reads as under:

'79. Presumption as to genuineness of certified copies.-- The Court shall presume to be genuine every document purporting to be a certificate, certified copy or other document, which is by law declared to be admissible as evidence of any particular fact and which purports to be duly certified by any officer of the Central Government or of a State Government, or by any officer in the State of Jammu and Kashmir who is duly authorized thereto by the Central Government.

Provided that such document is substantially in the form and purports to be executed in the manner directed by law in that behalf.

The court shall also presume that any officer by whom any such document, purports to be signed or certified, held, when he signed it, the official character which he claims in such paper.'

32. At this stage the provision of Section 57 of the Registration Act becomes relevant which is quoted hereunder.

'57. Registering Officers to to allow inspection of certain books and indexes and to give certified copies of entries.-- (1) Subject to the provisions payment of the fees payable in that behalf, the Books Nos. 1 and 2 and the indexes relating to Book No. 1 shall be at all times open to inspection by any person applying to inspect the same: and, subject to the provisions of Section 62, copies of entries in such books shall be given to all persons applying for such copies.

(2) Subject to the same provisions, copies of entries in Book No. 3 and in the Index relating thereto shall be given to the persons executing the documents to which such entries relate, or to their agents and after the death of the executants (but not before) to any person applying for such copies.

(3) Subject to the same provisions, copies of entries in Book No. 4 and in the Index relating thereto shall be given to any person executing or clearing under the documents to which such entries respectively refer or to his agent or representative.

(4) the requisite search under this section for entries in Books Nos. 3 and 4 shall be made only by the registering officer.

(5) All copies given under this section shall be signed and sealed by the registering officer, and shall be admissible for the purpose of proving the contents of the original documents.'

33. From the aforesaid provisions, it is clear, that the provisions of the Sections 65(a) and 66 of the Evidence Act are not applicable at all. Section 65(a) contemplates that where the original appears to be in possession of the person against whom the document is sought to be proved, in such a situation, secondary evidence could be led provided the procedure contemplated under; Section 66 of the Act is followed.

34. In the present case, the plaintiff has stated in para 17 of the plaint that he never received the original Will. Thus Clause (a) of the Section 65 is not applicable. Consequently the provisions of Section 66 of the Evidence Act was not required to be followed. Consequently the decisions cited by the learned counsel for the appellants are not applicable.

35. On the other hand from a combine reading of Section 63(1), 65(f), and Section 79 of the Evidence Act read with Section 57 of the Registration Act, it is clear that a certified copy of the will is admissible in evidence for the purpose of proving the contents of the original documents.

36. In *Kalyan Singh v. Smt. Chho* : AIR 1990 SC396 , the SC held that correctness of a certified copy under Section 63(1) of the Evidence Act is presumed under Section 79 and that a certified copy could be produced as a secondary evidence.

37. In *Parsa Singh v. Smt. Parkash Kaur* , it was held that a certified copy of a will is admissible only for proving the contents of the original.

38. In *Banwari Lal v. Triloki*, AIR 1930 SC 419, the SC held that the statement made by a testator in the will is certainly a piece of admissible evidence.

39. In , it was held that a copy certified by the Registrar shall be admissible for the purpose of proving the contents of the original.

40. From the aforesaid, it is clear, that certified copy of the will is admissible in evidence and can be considered for the purpose of proving the contents of the documents. The appellate Court was justified in accepting the certified copy of the will and rightly considered the contents of the will to arrive at a finding that the plaintiff was the son of Sita Ram. Thus, I hold that there was no necessity of compliance of Section 65(a) and 66 of the Evidence Act and the appellate Court was justified in accepting the certified copy of the Will. The issue of law is decided accordingly.

41. The last submission raised by the learned counsel for the appellant was with regard to the maintainability of the suit. The learned counsel submitted that the property involved in the present suit was an agricultural land and in view of Section 331 of U. P. Z. A. and L. R. Act, only a suit for declaration could be filed before the revisional Court and that a suit filed before the trial Court was not maintainable. In support of his contention the learned counsel has placed reliance on 2002 (5) AWC 4262 (sic) 1996 RD 156 and : [2003]1SCR918 .

42. In my view; the contention of the learned counsel is devoid of any merit. It may be stated here that a specific issue was framed by the trial court with regard to the maintainability of the suit. The said issue was decided in favour of the plaintiff and the trial Court held that the suit was maintainable.

43. Even though the suit was dismissed the defendants could have filed a cross appeal or objected to the findings arrived at by the trial Court on this issue before the appellate Court under Order 41 Rule 22 CPC, but the same was neither objected nor argued by the defendants before the appellate Court. Since the defendants did not challenge the findings on the maintainability of the suit before the appellate Court the said findings became final and it was no longer open to the defendants to challenge the said finding in the second appeal. This issue was not the subject matter of the order under appeal and therefore this Court cannot allow this question to be raised at this stage.

44. In any case, in my view, the suit for cancellation of the sale deed was maintainable before the Civil Court. From a reading of the contents of the plaint, it is clear that the suit was not for adjudicating the rights of the plaintiff as Bhumidhars of the land in dispute, but was for cancellation of the sale deed on account of fraud and for non payment of any consideration.

45. The cause of action set up in the plaint clearly indicates that the suit was not for a declaration of any right but was for cancellation of the sale deed on account of a fraud being played by the defendants upon the father of the plaintiff. Thus, in my view, Section 331 of U. P. Z. A. & L. R. Act is not applicable. Even otherwise a decree for a declaration is not an effective alternate relief against a decree for cancellation of the sale deed. If Section 33 of U. P. Z. A. and L. R. Act is allowed to pervade, the provisions of Section 31 of the [Specific Relief Act, 1963](#) would be rendered otiose.

46. Section 31 of the Specific Relief Act 1963 reads as under :

'31. When cancellation may be ordered.-- (1) Any person against, whom a written instrument is void or voidable, and who has reasonable apprehension that such instrument, if left outstanding may cause him serious injury, may sue to have it adjudged void or voidable; and the Court may, in its discretion, so adjudge it and order it to be delivered and cancelled.

(2) If the instrument has been registered under the Indian Registration Act 1908 (16 of 1908), the Court shall also send copy Of its decree to the officer in whose office the instrument has been so registered; and such officer shall note on the copy of the instrument contained in his books the fact of its cancellation.'

47. In *Batasar v. Udai Narain Upadhy* 1971 RD 90, the scope of Section 331 was considered along with Section 31 of the Specific Relief Act. This Court held-

'It is for the plaintiff to decide whether for better protection of his interest he would prefer to have an instrument in writing void against him cancelled or to ignore it and recorded to seek other relief to secure his interest. I do not think under the scheme of Section 31, Specific Relief Act a Court would be justified in the exercise

of its discretion to refuse the relief to a plaintiff merely for the reason that the instrument in writing sought to be cancelled being void against the plaintiff could always be ignored in the eye of law and a decree for its cancellation was not necessary if that were so then the right conferred by Section 31 to have an instrument in writing void against the plaintiff cancelled will be rendered nugatory and illusory.'

'..... To my mind, the object of the cancellation of an instrument in writing under Section 31, Specific Relief Act will always be to remove the cloud on the title of the plaintiff inasmuch as by the cancellation of the instrument the right and interest of the plaintiff in such property would become secure (sic). Since the object of cancellation of a sale deed in respect of agricultural holding is for securing of his rights and interests by the plaintiff in that land, then to say any plaint presented before the civil Court based on a cause of action on which relief for cancellation could be obtained is a facade or camouflage, would amount to defeating the right of a plaintiff conferred under Section 31, Specific Relief Act to obtain the equitable relief of cancellation.....'

48. Similar view was also taken in *Jai Singh v. II Additional District Magistrate, Nagar*, 2001 (45) All LR 579 : 2001 All LJ 2621.

49. In view of the aforesaid, I am of the view that a suit for cancellation of the sale deed which may be void or voidable in respect of agricultural land was maintainable in the civil Court. The question of law framed is decided accordingly.

50. In view of the aforesaid, there (sic) in the appeal and is accordingly dismissed. However, there shall be no order as to cost.