Gurdev Kaur & Ors vs Kaki & Ors on 18 April, 2006

Equivalent citations: AIR 2006 SUPREME COURT 1975, 2007 (1) SCC 546, 2006 AIR SCW 2404, 2006 (4) AIR KANT HCR 78, 2006 (4) SCALE 436, 2006 (2) HRR 15, (2006) 2 CURLJ(CCR) 144, (2006) 5 ALLMR 140 (SC), (2006) 1 MARRILJ 668, 2006 (5) ALL MR 140, 2006 HRR 2 15, (2007) 1 CTC 334 (SC), (2007) 1 RENTLR 673, (2007) 2 MPLJ 1, 2006 (7) SRJ 34, (2007) 2 ICC 311, (2007) 1 CIVLJ 397, (2007) 2 MAH LJ 863, (2007) 1 RAJ LW 636, (2007) 3 BOM CR 869, 2006 (2) ALL CJ 1481, 2006 ALL CJ 2 1481, 2006 (1) MARR LJ 668, (2006) 2 RECCIVR 561, (2006) 4 CIVILCOURTC 625, (2006) 4 MAD LW 942, (2006) 5 SCJ 506, (2006) 3 SUPREME 631, (2006) 3 ICC 114, (2006) 4 SCALE 436, (2006) 4 CAL HN 1, (2006) 2 CURCC 212, (2006) 1 HINDULR 625, (2006) 3 ALL WC 2373, (2006) 2 LANDLR 399, (2006) 2 WLC(SC)CVL 326, (2006) 2 UC 1315, (2006) 2 ALL RENTCAS 500, (2007) 2 ANDHLD 20, MANU/SC/2699/2006, (2007) 1 CAL LJ 103

Bench: Ruma Pal, Dalveer Bhandari

```
           CASE NO.:
Appeal (civil)  2083 of 2006

PETITIONER:
Gurdev Kaur & Ors.

RESPONDENT:
Kaki & Ors.

DATE OF JUDGMENT: 18/04/2006

BENCH:
Ruma Pal & Dalveer Bhandari

JUDGMENT:
```

J U D G M E N T [Arising out of SLP (C) No. 20797 of 2003] Dalveer Bhandari, J.

Leave granted.

Judges must administer law according to the provisions of law. It is the bounden duty of judges to discern legislative intention in the process of adjudication. Justice administered according to individual's whim, desire, inclination and notion of justice would lead to confusion, disorder and chaos. Indiscriminate and frequent interference under Section 100 C.P.C. in cases which are totally devoid of any substantial question of law is not only against the legislative intention but is also the

main cause of huge pendency of second appeals in the High Courts leading to colossal delay in the administration of justice in civil cases in our country.

Despite declaration of law in numerous judgments, it is evident that the scope and ambit of Section 100 C.P.C. has not been properly appreciated and applied in a large number of cases. We are, once again making a serious endeavour to discern legislative intention, ambit and scope of interference under Section 100 C.P.C.. We plan to carry out this exercise by critically examining important judgments decided before and after 1976 amendment in the Section 100 C.P.C.. This effort is made with the hope that in future the High Courts would decide according to the scope of Section 100 C.P.C. and this Court may not be compelled to interfere with the judgments delivered under Section 100 C.P.C..

Brief factual background This appeal is directed against the judgment of the Punjab & Haryana High Court dated 1.8.2003 passed in Civil Regular Second Appeal 885 of 1983. By this judgment the High Court has set aside the concurrent findings of facts of the Courts below. The High Court consequently cancelled the mutation of the property belonging to the deceased Chanan Singh in favour of his wife Bhagwan Kaur and directed that the property be mutated in favour of the heirs of the deceased Chanan Singh in accordance with the Hindu Succession Act, 1956. This Court on 3.11.2003, while issuing notice on the Special Leave Petition, directed the status-quo be maintained in the meantime. Now this appeal has been placed before us for final adjudication.

Brief facts, which are necessary to dispose of this appeal, are recapitulated as under:

> The case relates to the validity of the Will of the deceased, Chanan Singh. The relationship between the parties is as follows. The deceased Chanan Singh, s/o Hira Singh died on 6.2.1969. He had two wives. The first wife was Sham Kaur, who died before Chanan Singh and the second wife was Bhagwan Kaur. From the first wife Sham Kaur he had two daughters Kaki and Har Kaur. Har Kaur also died on 29.9.1984. Kaki and Har Kaur are the plaintiffs in the Civil Suit filed before the Subordinate Judge, 1st Class, Barnala Bhagwan Kaur also had three daughters - Dalip Kaur, Gurdev Kaur and Mukhtiar Kaur. Chanan Singh deceased did not have a son either from Bhagwan Kaur or from Sham Kaur.

The plaintiffs Kaki and Har Kaur filed a suit for joint possession of the property of deceased Chanan Singh. It is not disputed that the deceased Chanan Singh had two wives Bhagwan Kaur and Sham Kaur. According to the plaintiffs Kaki and Har Kaur, the deceased Chanan Singh did not execute any Will out of his free will because he was not in a position to protect his own welfare and in fact he was not in a position to execute any Will at all.

Chanan Singh died on 6.2.1969 in Barnala and the defendant Bhagwan Kaur got the mutation of inheritance of Chanan Singh sanctioned from the concerned authority on the basis of the alleged Will dated 18.1.1969. The case of the plaintiffs is that they never received any notice about the sanctioning of mutation and this has been carried out by defendant Bhagwan Kaur in connivance with the revenue authorities.

According to the plaintiffs, the parties are governed by the Hindu Succession Act. The plaintiffs were entitled to 1/3rd share in the inheritance of Chanan Singh. According to the plaintiffs, the defendants are in illegal possession of the suit land and that the defendants had threatened to alienate the suit land on 6.3.1980.

The defendants in the written statement had admitted the relationship of the plaintiffs with the deceased Chanan Singh. The defendant Bhagwan Kaur alleged that she is the owner and in possession of the suit land on the basis of the Will dated 18.1.1969 executed by her husband in her favour.

The defendant Bhagwan Kaur also alleged that she was the only one who all through stayed and looked after the deceased Chanan Singh during his life time. She further stated that Chanan Singh had got his all daughters married after spending huge amount of money in their marriages. She also alleged that the daughters of Chanan Singh never served him during his lifetime. In fact the plaintiffs had never even visited him. The deceased Chanan Singh had executed a valid Will in her favour out of his free will on 18.1.1969 because of the life long service rendered by her. She prayed that the suit filed by the plaintiffs be dismissed.

The Trial Court, on the basis of the pleadings of the parties and documents on record, framed eleven issues. The plaintiffs produced five witnesses and the defendants produced three witnesses in support of their respective stands before the Trial Court. The plaintiffs had also examined K.C. Jaidka, Handwriting Expert. In the cross-examination he stated that the Will bears the thumb impression of the right hand of the deceased, but the usual practice is of obtaining the thumb impression of left hand on the Will.

According to the plaintiffs the Will is alleged to have been attested by three witnesses and only one attesting witness was examined by the defendants and even that witness had not fully supported the case of the defendants. The Will is not a registered document and is written at the house of the deceased Chanan Singh. He was about 70 years of age at the time of execution of the Will and, according to the plaintiffs, he could not protect his own interest and welfare. The propounder of the Will was present at the time of the execution of the Will. According to the plaintiffs, the defendants had failed to discharge the onus regarding execution of the Will by leading cogent evidence.

On the contrary, it was argued by the defendants that Exhibit D-1 is a natural document and had been executed by the deceased Chanan Singh in favour of his wife Bhagwan Kaur. It is an admitted case of the parties that the deceased Chanan Singh had no son and all his daughters were married long ago. In order to protect the interest of his wife Bhagwan Kaur and to ensure that she does not have to depend on anyone for her maintenance and welfare the deceased Chanan Singh had executed the Will in favour of his wife Bhagwan Kaur. The deceased Chanan Singh had put left hand thumb impression on the Will. The defendants had examined Amar Singh D.W. 1 and Mittar Singh, D.W.2 who is the scribe of the Will, deposed that the Will was scribed by him at the instance of Chanan Singh. Amar Singh D.W.1 and other attesting witnesses of the Will did not fully support the defendant Bhagwan Kaur as she had filed a suit against one Jangir Singh and the attesting witnesses had resiled at the instance of the said Jangir Singh.

The mutation on the basis of the Will was entered immediately after the death of Chanan Singh and, according to the defendants, the Will was shown to the plaintiffs at that time. It is further submitted that the plaintiffs have filed this suit at the instance of the said Jangir Singh. It was submitted by the defendants that, in these circumstances, the Court could rely on that part of the statement which seemed to be true. According to the defendants they have proved execution of the Will beyond doubt and the plaintiffs' suit deserves to be dismissed.

In the Will, the deceased, Chanan Singh had recited that he has had five daughters and all of them were married. He has further recited that he had spent huge amount in their marriages, even more than the share which the daughters could have got in the inheritance of the deceased Chanan Singh. It is also mentioned that his wife defendant Bhagwan Kaur alone used to reside with him and dutifully served her husband. Whereas, the plaintiffs Kaki & Har Kaur never visited the deceased, Chanan Singh.

According to the Trial Court, in this background, it has to be seen whether the deceased had in fact executed the Will out of his free will or not? It is mentioned that in the ordinary course when a person has no son and all his daughters are happily married, the normal anxiety is to ensure the future of his wife, particularly when she alone had stayed with him all his life and look after him till the last. The Trial Court did mention in the judgment that Amar Singh D.W.1 did not support the case of the defendant. He was declared hostile. The counsel for the defendants sought permission to cross- examine him. In the cross-examination it is clearly stated that Bhagwan Kaur used to take care of the deceased, Chanan Singh. He also stated that the deceased Chanan Singh might have executed the Will giving the entire property to his wife, Bhagwan Kaur. He also stated that the deceased Chanan Singh had put his thumb impression in his presence on the Will. He also stated in his statement that the testator Chanan Singh could converse at the time of the execution of the said Will meaning thereby that he was in sound disposing mind at the time of the execution of the Will.

The Trial Court stated that the other attesting witness of the Will Pundit Raghbar Dayal was also present when he had put a thumb mark in the Will. He further stated that Pundit Raghbar Dayal was present at the time of execution of the Will. This witness has stated that Bhagwan Kaur was present at the time of execution of the Will but she had not uttered any word and Chanan Singh was sitting at the time of the execution of the Will. According to the Trial Court, requirement of law is that for the purpose of proving the attesting document, at least one attesting witness is required to be examined by the party. It is not the requirement of the law that the attesting witness must also support him on every aspect. The requirement of law is that the testator should put his mark on the Will in the presence of the attesting witnesses and the attesting witnesses should attest the Will in the presence of the testator, has been fulfilled in the present case, as is evident from the statement of Amar Singh D.W.1.

The plaintiffs argued before the Trial Court that the deceased Chanan Singh was under the influence of the defendant Bhagwan Kaur, but according to the Trial Court it was not the pleaded case of the plaintiffs in the plaint. Therefore, no significance was attached to this submission. The Trial Court also stated that the Will in the present case was immediately produced before the revenue authorities and was not kept secretly. The plaintiffs have admitted that this Will was shown to the

daughters of Chanan Singh immediately after his death, but the plaintiffs have alleged that the Will was in favour of the daughters. It was also not the pleaded case of the plaintiffs in the plaint. Thus, the Trial Court after evaluating the entire evidence on record held that the Will Exhibit D-1 was duly executed by the deceased Chanan Singh in favour of his wife Bhagwan Kaur and was a natural document.

The relevant part of the Will reads as under:

> "I have already incurred expenditure on the marriages, Chhaks (presents given to the bride by her maternal uncles or grand parents) and Chhuchaks (articles given on the birth of daughter's child) ceremonies of my five daughters, more than the value of their share in the property. All of them are Abad (Happy) in their respective matrimonial houses. Now my wife Smt. Bhagwan Kaur takes care of me. I, having been pleased with her services, want to devolve my entire property upon my wife Smt. Bhagwan Kaur."

When execution of the Will is fully proved then in order to ascertain the wishes of the testator we have to look to the text of the Will. The intention of the testator has to be discerned from the language used in the Will. In view of such clear and unambiguous language used in this Will perhaps, no other interpretation was possible. The Trial Court clearly arrived at a conclusion that the deceased Chanan Singh had executed the Will in favour of his wife, Bhagwan Kaur.

Aggrieved by the order of the Subordinate Judge, Grade II, Barnala, the appellants filed an appeal before the learned Additional District Judge, Barnala. After hearing counsel for the parties, the learned Additional District Judge dismissed the appeal on the following reasons:

> 1. The Trial Court correctly came to a definite finding that the propounder of the Will proved that the testator was in a sound disposing mind when he had executed the Will in question.
>
> 2. The Appellate Court observed that if the conscience of the Court is satisfied on the point of due execution of the Will because the testator was in a sound disposing mind, in that event even if the Will is not registered, the same has to be upheld as a valid and genuine document.
>
> 3. The Appellate Court also observed that in the case in hand, Bindraban, the scribe and Amar Singh, D.W.1, attesting witness examined by Bhagwan Kaur defendant, have amply proved that Chanan Singh, (who was about 70 years of age), was in sound disposing mind when he dictated the terms of the Will and after admitting its contents to be correct, had affixed his thumb impression in their presence.

The Additional District Judge also stated that there is nothing on record to show that the appellants (who were plaintiffs in the Trial Court) ever visited the deceased Chanan Singh or rendered any service to him during his life time. In the said judgment, it is also noted that the Will was not

challenged for a period of 11 years since its execution in 1969. He also stated that it is evident from the mutation order that Bhagwan Kaur, after the death of Chanan Singh promptly produced the Will before the revenue authorities and on that basis they sanctioned the mutation in respect of the land in dispute in her favour. According to the Appellate Court, it is unbelievable that the appellants remained ignorant of the attestation of the mutation or the attestation of the Will set up by Bhagwan Kaur.

In the Appellate Court's judgment, it is also mentioned that Bhagwan Kaur uninterruptedly remained in peaceful possession of the entire suit land since the death of the deceased Chanan Singh in 1969 till this date. It is also mentioned in the judgment that Bhagwan Kaur, as is evident from the certified copy of the judicial record of this case, remained interlocked in civil proceedings with Jangir Singh, tenant, which are still pending and in all probability the present suit was got instituted at the behest of Jangir Singh.

The Appellate Court also observed that, in view of the facts and circumstances of the case, the learned Trial Court was fully justified in upholding the Will as a genuine and valid document and the mutation attested on its basis was unexceptionable. The learned Additional District Judge, by a comprehensive judgment, affirmed all the findings of the Trial Court and dismissed the appeal with costs.

The appellants, aggrieved by the judgment of the Trial Court and the Appellate Court, preferred second appeal under Section 100 C.P.C. before the High Court of Punjab and Haryana.

The learned Single Judge of the High Court set aside the concurrent findings of facts arrived at by the Courts below predominantly on the ground that, in the normal circumstances, a prudent man would have bequeathed the property in favour of his legal heirs. However, in the present case, the testator has disinherited the plaintiffs. The findings arrived at by the High Court are totally erroneous. The Court does not sit in appeal over the testator's decision. The Court's role is limited to examining whether the instrument propounded as the last Will of the deceased is or is not that by the testator and whether it is the product of the free and sound disposing mind. Amar Singh D.W.1, in the examination-in-chief, did not support the case of the defendants. He was declared hostile and the counsel for the defendants sought permission to cross-examine him. In the cross-examination, he clearly stated that Bhagwan Kaur used to take care of the deceased Chanan Singh. He also stated that the deceased Chanan Singh might have executed the will giving the entire property to his wife Bhagwan Kaur. He also stated that the deceased Chanan Singh had put his thumb mark on the Will in his presence. He also stated in his statement that the testator Chanan Singh could converse at the time of execution of the will, meaning thereby that he was in sound disposing mind at the time of execution of the will.

The learned Single Judge of the High Court did not take into consideration the entire statement of Amar Singh D.W.1 in proper perspective while setting aside the concurrent findings of the Courts below. The findings of the High Court are erroneous and contrary to record.

The question which now arises for our adjudication is whether, according to the true delineated scope of Section 100 of the Code of Civil Procedure, the High Court was justified in interfering with the concurrent findings of fact.

We deem it appropriate to reproduce Section 100 C.P.C. before amendment.

Section 100 of the Code of Civil Procedure, 1908 (for short, C.P.C.) corresponds to Section 584 of the old Civil Procedure Code of 1882. The Section 100 (prior to 1976 amendment) reads as under :

> "100. Second appeal (1) "Save where otherwise provided in the body of this Code or by any other law for the time being in force, an appeal shall lie to the High Court from every decree passed in appeal by any Court subordinate to a High Court on any of the following grounds, namely :
>
> (a) the decision being contrary to law or to some usage having the force of law;
>
> (b) the decision having failed to determine some material issue of law or usage having the force of law;
>
> (c) a substantial error or defect in the procedure provided by this Code or by any other law for the time being in force, which may possibly have produced error or defect in the decision of the case upon the merits.
>
> (2) An appeal may lie under this section from an appellate decree passed ex parte."

A reference of series of cases decided by the Privy Council and this Court would reveal true import, scope and ambit of Section 100 C.P.C..

Cases decided prior to 1976 amendment both by the Privy Council and the Supreme Court dealing with the scope of Section 100 C.P.C.

The Privy Council, in Luchman v. Puna [(1889) 16 Calcutta 753 (P.C.)], observed that a second appeal can lie only on one or the other grounds specified in the present section.

The Privy Council, in another case Pratap Chunder v. Mohandranath [(1890) ILR 17 Calcutta 291 (P.C.)], the limitation as to the power of the court imposed by sections 100 and 101 in a second appeal ought to be attended to, and an appellant ought not to be allowed to question the finding of the first appellate court upon a matter of fact.

In Durga Chowdharani v. Jawahar Singh (1891) 18 Cal 23 (PC), the Privy Council held that the High Court had no jurisdiction to entertain a second appeal on the ground of erroneous finding of fact, however gross or inexcusable the error may seem to be. The clear declaration of law was made in the said judgment as early as in 1891. This judgment was followed in the case of Ramratan Shukul v. Mussumat Nandu (1892) 19 Cal 249 (252) (PC) and many others. The Court observed :

> "It has now been conclusively settled that the third court...cannot entertain an appeal upon question as to the soundness of findings of fact by the second court, if there is evidence to be considered, the decision of the second court, however unsatisfactory it might be if examined, must stand final."

In the case of Ram Gopal v. Shakshaton [(1893) ILR 20 Calcutta 93 (P.C.)], the Court emphasized that a court of second appeal is not competent to entertain questions as to the soundness of a finding of facts by the courts below.

The same principle has been reiterated in Rudr Prasad v. Baij Nath [(1893) ILR 15 Allahabad 367]. The Court observed that a judge to whom a memorandum of second appeal is presented for admission is entitled to consider whether any of the grounds specified in this section exist and apply to the case, and if they do not, to reject the appeal summarily.

Similarly, before amendment in 1976, this Court also had an occasion to examine the scope of Section 100 C.P.C.. In Deity Pattabhiramaswamy v. S. Hanymayya and Others [AIR 1959 SC 57], the High Court of Madras set aside the findings of the District Judge, Guntur, while deciding the second appeal. This Court observed that notwithstanding the clear and authoritative pronouncement of the Privy Council on the limits and the scope of the High Court's jurisdiction under section 100, Civil Procedure Code, "some learned Judges of the High Courts are disposing of Second Appeals as if they were first appeals. This introduces, apart from the fact that the High Court assumes and exercises a jurisdiction which it does not possess, a gambling element in the litigation and confusion in the mind of the litigant public. This case affords a typical illustration of such interference by a Judge of the High Court in excess of his jurisdiction under Section 100, Civil Procedure Code. We have, therefore, no alternative but to set aside the judgment of the High Court which had no jurisdiction to interfere in second appeal with the findings of fact arrived at by the first appellate Court based upon an appreciation of the relevant evidence.

In M. Ramappa v. M. Bojjappa [(1963) SCR 673], the Andhra Pradesh High Court interfered with the finding recorded by the Appellate Court which, in turn, had itself reversed the Trial Court's finding on the same question of fact. While setting aside the decree of the second Appellate Court, this Court observed :

> "It may be that in some cases, the High Court dealing with the second appeal is inclined to take the view that what it regards to be justice or equity of the case has not been served by the findings of fact recorded by courts of fact, but on such occasions it is necessary to remember that what is administered in courts is justice according to law and considerations of fair play and equity however important they may be, must yield to clear and express provisions of the law. If in reaching its decisions in second appeals, the High Court contravenes the express provisions of section 100, it would inevitably introduce in such decisions an element of disconcerting unpredictability which is usually associated with gambling; and that is a reproach which judicial process must constantly and scrupulously endeavour to avoid."

It may be pertinent to mention that as early as in 1890 the Judicial Committee of the Privy Council stated that there is no jurisdiction to entertain a second appeal on the ground of an erroneous finding of fact, however, gross or inexcusable the error may seem to be and they added a note of warning that no Court in India has power to add, or enlarge, the grounds specified in Section 100 of the Code of Civil Procedure.

Even before the amendment, interference under Section 100 C.P.C. was limited, which has now been further curtailed, which we would be dealing in cases decided by this Court after the amendment.

We have given reference of a large number of cases decided by the Privy Council and this Court to clearly understand the ambit and scope of Section 100 before amendment.

The Amendment Act of 1976 has introduced drastic changes in the scope and ambit of Section 100 C.P.C. A second appeal under Section 100 C.P.C. is now confined to cases where a question of law is involved and such question must be a substantial one. Section 100, as amended, reads as under:

> "100. Second appeal.
>
> (1) Save as otherwise expressly provided in the body of this Code or by any other law for the time being in force, an appeal shall lie to the High Court from every decree passed in appeal by any Court subordinate to the High Court, if the High Court is satisfied that the case involves a substantial question of law.
>
> (2) An appeal may lie under this section from an appellate decree passed ex parte.
>
> (3) In an appeal under this section, the memorandum of appeal shall precisely state the substantial question of law involved in the appeal.
>
> (4) Where the High Court is satisfied that a substantial question of law is involved in any case, it shall formulate that question.
>
> (5) The appeal shall be heard on the question so formulated and the respondent shall, at the hearing of the appeal, be allowed to argue that the case does not involve such question:
>
> Provided that nothing in this sub-section shall be deemed to take away or abridge the power of the Court to hear, for reasons to be recorded, the appeal on any other substantial question of law, not formulated by it, if it is satisfied that the case involves such question."
>
> Cases decided after 1976 amendment In Bholaram v. Amirchand (1981) 2 SCC 414 a three- Judge Bench of this Court reiterated the statement of law. The High Court, however, seems to have justified its interference in second appeal mainly on the ground that the judgments of the courts below were perverse and were given in utter

> disregard of the important materials on the record particularly misconstruction of the rent note. Even if we accept the main reason given by the High Court the utmost that could be said was that the findings of fact by the courts below were wrong or grossly inexcusable but that by itself would not entitle the High Court to interfere in the absence of a clear error of law.
>
> In Kshitish Chandra Purkait v. Santosh Kumar Purkait [(1997) 5 SCC 438], a three judge Bench of this Court held: (a) that the High Court should be satisfied that the case involved a substantial question of law and not mere question of law; (b) reasons for permitting the plea to be raised should also be recorded; (c) it has the duty to formulate the substantial questions of law and to put the opposite party on notice and give fair and proper opportunity to meet the point. The Court also held that it is the duty cast upon the High Court to formulate substantial question of law involved in the case even at the initial stage.
>
> This Court had occasion to determine the same issue in Dnyanoba Bhaurao Shemade v. Maroti Bhaurao Marnor (1999) 2 SCC 471. The Court stated that the High Court can exercise its jurisdiction under Section 100 C.P.C. only on the basis of substantial questions of law which are to be framed at the time of admission of the second appeal and the second appeal has to be heard and decided only on the basis of the such duly framed substantial questions of law.

A mere look at the said provision shows that the High Court can exercise its jurisdiction under Section 100 C.P.C. only on the basis of substantial questions of law which are to be framed at the time of admission of the second appeal and the second appeal has to be heard and decided only on the basis of such duly framed substantial questions of law. The impugned judgment shows that no such procedure was followed by the learned Single Judge. It is held by a catena of judgments by this Court, some of them being, Kshitish Chandra Purkait v. Santosh Kumar Purkait (1997) 5 SCC 438 and Sheel Chand v. Prakash Chand (1998) 6 SCC 683 that the judgment rendered by the High Court under Section 100 C.P.C. without following the aforesaid procedure cannot be sustained. On this short ground alone, this appeal is required to be allowed.

In Kanai Lal Garari v. Murari Ganguly (1999) 6 SCC 35 the Court has observed that it is mandatory to formulate the substantial question of law while entertaining the appeal in absence of which the judgment is to be set aside. In Panchugopal Barua v. Umesh Chandra Goswami (1997) 4 SCC 713 and Santosh Hazari v. Purushottam Tiwari (2001) 3 SCC 179 the Court reiterated the statement of law that the High Court cannot proceed to hear a second appeal without formulating the substantial question of law. These judgments have been referred to in the later judgment of K. Raj and Anr. v. Muthamma (2001) 6 SCC 279. A statement of law has been reiterated regarding the scope and interference of the Court in second appeal under Section 100 of the Code of Civil Procedure.

Again in Santosh Hazari v. Purushottam Tiwari (deceased) by Lrs. (2001) 3 SCC 179, another three-Judge Bench of this Court correctly delineated the scope of Section 100 C.P.C.. The Court observed that an obligation is cast on the appellant to precisely state in the memorandum of appeal

the substantial question of law involved in the appeal and which the appellant proposes to urge before the Court. In the said judgment, it was further mentioned that the High Court must be satisfied that a substantial question of law is involved in the case and such question has then to be formulated by the High Court. According to the Court the word substantial, as qualifying "question of law", means of having substance, essential, real, of sound worth, important or considerable. It is to be understood as something in contradistinction with technical, of no substance or consequence, or academic merely. However, it is clear that the legislature has chosen not to qualify the scope of "substantial question of law" by suffixing the words "of general importance" as has been done in many other provisions such as Section 109 of the Code of Article 133(1) (a) of the Constitution.

In Kamti Devi (Smt.) and Anr. v. Poshi Ram (2001) 5 SCC 311 the Court came to the conclusion that the finding thus reached by the first appellate court cannot be interfered with in a second appeal as no substantial question of law would have flowed out of such a finding.

In Thiagarajan v. Sri Venugopalaswamy B. Koil [(2004) 5 SCC 762], this Court has held that the High Court in its jurisdiction under Section 100 C.P.C. was not justified in interfering with the findings of fact. The Court observed that to say the least the approach of the High Court was not proper. It is the obligation of the Courts of law to further the clear intendment of the legislature and not frustrate it by excluding the same. This Court in a catena of decisions held that where findings of fact by the lower appellate Court are based on evidence, the High Court in second appeal cannot substitute its own findings on reappreciation of evidence merely on the ground that another view was possible.

In the same case, this Court observed that in a case where special leave petition was filed against a judgment of the High Court interfering with findings of fact of the lower Appellate Court. This Court observed that to say the least the approach of the High Court was not proper. It is the obligation of the Courts of law to further the clear intendment of the legislature and not frustrate it by excluding the same. This Court further observed that the High Court in second appeal cannot substitute its own findings on reappreciation of evidence merely on the ground that another view was possible.

This Court again reminded the High Court in Commissioner, Hindu Religious & Charitable Endowments v. P. Shanmugama [(2005) 9 SCC 232] that the High Court has no jurisdiction in second appeal to interfere with the finding of facts.

Again, this Court in the case of State of Kerala v. Mohd. Kunhi [(2005) 10 SCC 139] has reiterated the same principle that the High Court is not justified in interfering with the concurrent findings of fact. This Court observed that, in doing so, the High Court has gone beyond the scope of Section 100 of the Code of Civil Procedure.

Again, in the case of Madhavan Nair v. Bhaskar Pillai [(2005) 10 SCC 553], this Court observed that the High Court was not justified in interfering with the concurrent findings of fact. This Court observed that it is well settled that even if the first appellate court commits an error in recording a finding of fact, that itself will not be a ground for the High Court to upset the same.

Again, in the case of Harjeet Singh v. Amrik Singh [(2005) 12 SCC 270], this Court with anguish has mentioned that the High Court has no jurisdiction to interfere with the findings of fact arrived at by the first appellate court. In this case, the findings of the Trial Court and the lower Appellate Court regarding readiness and willingness to perform their part of contract was set aside by the High Court in its jurisdiction under Section 100 C.P.C.. This Court, while setting aside the judgment of the High Court, observed that the High Court was not justified in interfering with the concurrent findings of fact arrived at by the Courts below.

In the case of H. P. Pyarejan v. Dasappa [(2006) 2 SCC 496] delivered on 6.2.2006, this Court found serious infirmity in the judgment of the High Court. This Court observed that it suffers from the vice of exercise of jurisdiction which did not vest in the High Court. Under Section 100 of the Code (as amended in 1976) the jurisdiction of the Court to interfere with the judgments of the Courts below is confined to hearing of substantial questions of law. Interference with the finding of fact by the High Court is not warranted if it invokes reappreciation of evidence. This Court found that the impugned judgment of the High Court was vulnerable and needed to be set aside.

Legislative Background in the 54th Report of the Law Commission of India submitted in 1973 The comprehensive 54th Report of the Law Commission of India submitted to the Government of India in 1973 gives historical background regarding ambit and scope of Section 100 C.P.C.. According to the said report, any rational system of administration of civil law should recognize that litigation in civil cases should have two hearings on facts one by the Trial Court and one by the Court of Appeal.

In the 54th Report of the Law Commission of India, it is incorporated that it may be permissible to point out that a search for absolute truth in the administration of justice, however, laudable, must in the very nature of things be put under some reasonable restraint. In other words, a search for truth has to be reconciled with the doctrine of finality. In judicial hierarchy finality is absolutely important because that gives certainty to the law. Even in the interest of litigants themselves it may not be unreasonable to draw a line in respect of the two different categories of litigation where procedure will say at a certain stage that questions of fact have been decided by the lower courts and the matter should be allowed to rest where it lies without any further appeal. This may be somewhat harsh to an individual litigant; but, in the larger interest of the administration of justice, this view seems to us to be juristically sound and pragmatically wise. It is in the light of this basic approach that we will now proceed to consider some of the cases which were decided more than a century ago.

The question could perhaps be asked, why the litigant who wishes to have justice from the highest Court of the State should be denied the opportunity to do so, at least where there is a flaw in the conclusion on facts reached by the trial Court or by the Court of first appeal. The answer is obvious that even litigants have to be protected against too persistent a pursuit of their goal of perfectly satisfactory justice. An unqualified right of first appeal may be necessary for the satisfaction of the defeated litigant; but a wide right of second appeal is more in the nature of a luxury.

The rational behind allowing a second appeal on a question of law is, that there ought to be some tribunal having jurisdiction that will enable it to maintain, and, where necessary, re-establish,

uniformity throughout the State on important legal issues, so that within the area of the State, the law, in so far as it is not enacted law, should be laid down, or capable of being laid down, by one court whose rulings will be binding on all courts, tribunals and authorities within the area over which it has jurisdiction. This is implicit in any legal system where the higher courts have authority to make binding decisions on questions of law.

It may be relevant to recall the statement of Douglas Payne on "Appeals on Questions of Fact" reported in (1958) Current Legal Problem 181. He observed that the real justification for appeals on questions of this sort is not so much that the law laid down by the appeal court is likely to be superior to that laid down by a lower court as that there should be a final rule laid down which binds all future courts and so facilitates the prediction of the law. In such a case the individual litigants are sacrificed, with some justification, on the altar of law-making and must find such consolation as they can in the monument of a leading case.

Historical perspective The predecessors of the High Courts in their Civil appellate jurisdiction were the Sadar Divani Adalats. The right of appeal to the Sadar Divani Adalat was very wide initially, but came to be severely curtailed in the course of time. The "Conwallis Scheme", for example, made provision for two appeals in every category of cases, irrespective of its value. By 1814, this was reduced to one appeal only. Only in cases of Rs.5,000 or over, there could be two appeals; one to the Provincial Court of Appeal and second to the Sadar Divani Adalat. As Lord Hastings observed, -

> "The facility of appeal is founded on a most laudable principle of securing, by double and treble checks, the proper decision of all suits, but the utopian idea, in its attempt to prevent individual injury from a wrong decision, has been productive of general injustice by withholding redress, and general inconvenience, by perpetuating litigation".

Arrears The primary cause of the accumulation of arrears of second appeal in the High Court is the laxity with which second appeals are admitted without serious scrutiny of the provisions of Section 100 C.P.C. It is the bounden duty of the High Court to entertain second appeal within the ambit and scope of Section 100 C.P.C.

The question which is often asked that why a litigant should have the right of two appeals even on questions of law. The answer to this query is that in every State there are number of District Courts and courts in the District cannot be final arbiters on questions of law. If the law is to be uniformly interpreted and applied, questions of law must be decided by the highest Court in the State whose decisions are binding on all subordinate courts.

Rationale behind permitting second appeal on question of law The rationale behind allowing a second appeal on a question of law is, that there ought to be some tribunal having a jurisdiction that will enable it to maintain, and, where necessary, re-establish, uniformity throughout the State on important legal issues, so that within the area of the State, the law, in so far as it is not enacted law, should be laid down, or capable of being laid down, by one court whose rulings will be binding on all courts, tribunals and authorities within the area over which it has jurisdiction. This is implicit in any

legal system where the higher courts have authority to make binding decisions on question of law.

The analysis of cases decided by the Privy Council and this Court prior to 1976 clearly indicated the scope of interference under Section 100 C.P.C. by this Court. Even prior to amendment, the consistent position has been that the Courts should not interfere with the concurrent findings of facts.

Now, after 1976 Amendment, the scope of Section 100 has been drastically curtailed and narrowed down. The High Courts would have jurisdiction of interfering under Section 100 C.P.C. only in a case where substantial questions of law are involved and those questions have been clearly formulated in the memorandum of appeal. At the time of admission of the second appeal, it is the bounden duty and obligation of the High Court to formulate substantial questions of law and then only the High Court is permitted to proceed with the case to decide those questions of law. The language used in the amended section specifically incorporates the words as "substantial question of law" which is indicative of the legislative intention. It must be clearly understood that the legislative intention was very clear that legislature never wanted second appeal to become "third trial on facts" or "one more dice in the gamble". The effect of the amendment mainly, according to the amended section, was:

> (i) The High Court would be justified in admitting the second appeal only when a substantial question of law is involved;
>
> (ii) The substantial question of law to precisely state such question;
>
> (iii) A duty has been cast on the High Court to formulate substantial question of law before hearing the appeal;
>
> (iv) Another part of the Section is that the appeal shall be heard only on that question.

The fact that, in a series of cases, this Court was compelled to interfere was because the true legislative intendment and scope of Section 100 C.P.C. have neither been appreciated nor applied. A class of judges while administering law honestly believe that, if they are satisfied that, in any second appeal brought before them evidence has been grossly misappreciated either by the lower appellate court or by both the courts below, it is their duty to interfere, because they seem to feel that a decree following upon a gross misappreciation of evidence involves injustice and it is the duty of the High Court to redress such injustice. We would like to reiterate that the justice has to be administered in accordance with law.

When Section 100 C.P.C. is critically examined then, according to the legislative mandate, the interference by the High Court is permissible only in cases involving substantial questions of law.

The Judicial Committee of the Privy Council as early as in 1890 stated that there is no jurisdiction to entertain a second appeal on the ground of an erroneous finding of fact, however, gross or

inexcusable the error may seem to be and they added a note of warning that no Court in India has power to add to, or enlarge, the grounds specified in Section 100.

The High Court seriously erred in interfering with the findings of facts arrived at by the Trial Court and affirmed by the first Appellate Court.

The High Court in the impugned judgment has observed as under :-

> "In the normal circumstances a prudent man would have bequeathed the property in favour of his legal heirs. However, in the present case, the testator has disinherited the plaintiffs."

The High Court also observed that "no father in normal circumstances would like to disinherit the daughters."

The High Court has clearly deviated from the settled principle of interpretation of the Will. The Court does not sit in appeal over the right or wrong of the testator's decision. The Court's role is limited to examining whether the instrument propounded as the last Will of the deceased is or is not that by the testator and whether it is the product of the free and sound disposing mind. It is only for the purpose of examining the authenticity or otherwise of the instrument propounded as the last Will, that the Court looks into the nature of the bequest.

The learned Single Judge of the High Court has not even properly appreciated the context of the circumstances. The contents of the Will have to be appreciated in the context of his circumstances, and not vis-`-vis the rules for intestate succession. It is only for this limited purpose that the Court examines the nature of bequest. The Court does not substitute its own opinion for what was the testator's Will or intention as manifested from a reading of the written instrument. After all, a Will is meant to be an expression of his desire and therefore, may result in disinheritance of some and grant to another. In the instant case, wife of the testator Bhagwan Kaur alone had lived with the deceased and only she had looked after him throughout his life. The other daughters were all happily married a long time ago and in their weddings the testator had spent huge amount of money. In his own words, he had spent more than what they would have got in their respective shares out of testator's property.

If a Will appears on the face of it to have been duly executed and attested in accordance with the requirements of the Statute, a presumption of due execution and attestation applies.

It may be pertinent to mention that in the memorandum of second appeal filed before the High Court no substantial question of law was formulated. Similarly, the High Court in its judgment has not formulated question of law before hearing the appeal.

Despite repeated declarations of law by the judgments of this Court and the Privy Council for over a century, still the scope of Section 100 has not been correctly appreciated and applied by the High Courts in a large number of cases. In the facts and circumstances of this case the High Court

interfered with the pure findings of fact even after the amendment of Section 100 C.P.C. in 1976. The High Court would not have been justified in interfering with the concurrent findings of fact in this case even prior to the amendment of Section 100 C.P.C.. The judgment of the High Court is clearly against the provisions of Section 100 and in no uncertain terms clearly violates the legislative intention.

In view of the clear legislative mandate crystallized by a series of judgments of the Privy Council and this Court ranging from 1890 to 2006, the High Court in law could not have interfered with pure findings of facts arrived at by the courts below. Consequently, the impugned judgment is set aside and this appeal is allowed with costs.