

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Date of decision: 18th November 2013.

+ **RFA 450/2010, CMs No.12013/2010 (u/O 41 R-27 CPC) & 12014/2010 (u/O 6 R-17 CPC)**

**MANMOHAN (DECEASED) THROUGH LR'S
& ANR.**

..... Appellants

Through: Mr. Dinesh Kapoor, Adv.

Versus

BALDEV RAJ & ORS.

..... Respondents

Through: Mr. Sudhir Nandrajog, Sr. Adv.
with Mr. Shrey Chathly, Adv.

CORAM:

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

RAJIV SAHAI ENDLAW, J.

1. The appeal impugns the judgment and preliminary decree dated 6th March, 2010 of partition (of the Court of Additional District Judge- 02 (North) Delhi in CS No.71/09 filed by the four respondents) declaring the four plaintiffs / respondents and the two appellants/defendants to be each having 1/6th share in property No. 2575 Raghupura No.2, Main Road, Gandhi Nagar, Delhi-32 and further declaring the Will dated 21st March, 1984 of Shri Ram Dayal, being the father of the parties, set up by the two appellants to be null and void and yet further restraining the appellants from alienating the said property.

2. Notice of the appeal was issued and the trial court record requisitioned. The respondent No.2 Shri Somnath died during the pendency of this appeal and his legal representatives were substituted vide order dated 28th September, 2011. The appeal was on 17th November, 2011 admitted for hearing. Mediation attempted remained unsuccessful. The appellant No.1 also died during the pendency of this appeal and his legal representatives were also substituted vide order dated 21st August, 2012. Another mediation attempted between the parties also remained unsuccessful. One of the legal heirs of the appellant No.1 also died during the pendency of the appeal and her legal heirs were also substituted vide order dated 4th July, 2013. The parties to the appeal being senior citizens, the appeal was posted for hearing in the category of regular matters of the senior citizens. The counsel for the appellants and the senior counsel for the respondents have been heard.

3. The counsel for the appellants has argued:

- i. that the land underneath the property was purchased by Shri Ram Dayal, father of the parties by different sale deeds between the years 1956 and 1962;
- ii. construction was raised on the said land during the period 1957 to 1964 and whereafter the father of the parties alongwith his

- family i.e. the parties to the suit resided in the property;
- iii. that the father of the parties Shri Ram Dayal by publication in the newspaper on 4th November, 1963, 16th December, 1973 and 15th August, 1975 disinherited the respondents/plaintiffs;
 - iv. that the father Shri Ram Dayal, in the year 1973 executed and registered his Will bequeathing the entire property save one shop therein which was bequeathed to the appellant No.2 Smt. Prem Kanta and another shop therein which was bequeathed to the respondent/plaintiff No.4 Shri Ramesh Chander, to the appellant No.1;
 - v. that the father Shri Ram Dayal vide Will dated 21st March, 1984 revoked the earlier Will of the year 1973 and disinherited the respondent / plaintiff No.4 Shri Ramesh Chander from the shop bequeathed to him under the 1973 Will and bequeathed the entire property save one shop therein bequeathed to the appellant No.2 Prem Kanta, to the appellant No.1;
 - vi. that the father Shri Ram Dayal died on 13th July, 1990;
 - vii. that father Shri Ram Dayal in his life time instituted certain proceedings for eviction of tenants in some portion of the

property; in one such eviction petition, the father Shri Ram Dayal had filed a power of attorney dated 9th January, 1989 in favour of the respondent /plaintiff No.1 Shri Baldev Raj, authorizing him to pursue the said eviction proceedings;

- viii. that it is owing to the said power of attorney, that the Will dated 21st March, 1984 propounded by the appellants and evidence of bad relations of the respondents/plaintiffs with the father, has been disbelieved;
- ix. that after the death of the father Shri Ram Dayal, the appellant at the asking of the advocate earlier engaged by the father joined in making an application for substituting all the parties as the legal representatives of the father, without mentioning the Will;
- x. that the learned Additional District Judge has considered this as another factor for disbelieving the Will dated 21st March, 1984;
- xi. that the respondents/plaintiffs in the year 1992 instituted the suit for partition from which this appeal arises; though the respondents/plaintiffs had claimed interim relief in the suit but the same was declined to them on the appellant's propounding and producing the Will dated 21st March, 1984;

xii. that the respondents/plaintiffs thereafter sought amendment of the plaint to plead that the said property was constructed from ancestral funds and the respondents/plaintiffs had a right therein from birth and the father was not entitled to Will the same and to also claim the relief therein of declaration of the Will dated 21st March, 1984 propounded by the appellants as null and void and which amendment was allowed.

4. It has been inquired from the counsel for the appellants, whether the Will dated 21st March, 1984 propounded by the appellants to deny the relief claimed by the respondents/plaintiffs of partition, has been disbelieved or has been held to be not proved by the appellants/defendants.

5. Though the counsel for the appellants/plaintiffs replied ambiguously but on perusal, the impugned judgment shows the learned Additional District Judge to have in this regard found / observed/ held –

- a. That the appellants/defendants were required to prove the Will as per Section 68 of the Indian Evidence Act 1872;
- b. that it was the case of the appellants/defendants that both witnesses to the Will had died;
- c. that the appellants/defendants however did not produce the death

certificates of the witnesses;

- d. that even if it was to be presumed that both the witnesses were dead, the appellants/defendants were required to prove the Will as per Section 69 of the Evidence Act;
- e. that the appellant/defendant No.1 nowhere deposed in his examination-in-chief that he identified the signatures of his father on the Will or that he had seen the father signing the Will;
- f. that the appellant/defendant No.1 further crushed his own case by admitting in cross examination that none of the signatories of the Will had signed in his presence;
- g. that even though the Will dated 21st March, 1984 is registered but the Supreme Court in *Gurdial Kaur Vs. Kartar Kaur* AIR 1998 SC 2861; *Kashi Bai Vs. Parvati Bai* (1995) 6 SCC 213 and in *Bhagwan Kaur Vs. Kartar Kaur* (1994) 5 SCC 135 has held that even the Will which has been duly registered is required to be proved as per the Evidence Act and where none of the witnesses to the Will depose that the testator had signed the Will before them and they had attested it, execution of the Will cannot be held to be proved in accordance with law.

Accordingly, it was held that the appellants/defendants have failed to prove that the father Shri Ram Dayal executed the Will dated 21st March, 1984 of the suit property in favour of the appellants/defendants.

6. The counsel for the appellants/defendants also does not dispute that the appellants/defendants did not examine either of the two attesting witnesses to the Will. He however contends that notwithstanding the same, the Will has been proved not only as per Section 68 but also as per Section 69 of the Evidence Act. It is contended that since the Will is registered, the Sub-registrar who has registered the Will also becomes an attesting witness. Reliance in this regard is placed on *Pentakota Satyanarayana vs. Pentakota Seetharatnam* (2005) 8 SCC 67. It is argued that since registration of the Will is not disputed and in any case has been proved by examining the witnesses from the office of the sub-Registrar, the Will stands proved under Section 68 of the Evidence Act. To buttress the contention that the Will also stands proved under Section 69, it is argued that the appellant/defendant No.1 in cross examination stated that he was present at the time of registration and from which it has to be inferred that the Will was executed by the father Shri Ram Dayal as well as by both the witnesses to the Will and the sub-Registrar put his signature thereon, in the presence of the

appellant/defendant No.1 and which amounts to proof of attestation by the attesting witness and of the signatures of the father. It is yet further contended that since the evidence with respect to the Will was being led after a long gap of time, all surroundings facts and circumstances become relevant for determining whether the Will has been proved or not. It is argued that the appellant/defendant No.1 was not cross examined on his statement, of both attesting witnesses being dead and the said fact also thus stands proved and the appellant/defendant No.1 could not be expected to get the death certificates of the attesting witnesses who were strangers to the appellants/defendants. Reliance is further placed on –

- I. ***K.M. Varghese Vs. K.M. Oommen*** AIR 1994 Kerala 85 (DB) laying down that the rules of execution and attestation of a document not compulsorily registerable are complied if the executant actually admits the execution before the sub-Registrar and the identifying witnesses and it is enough if the testator admits the execution before the sub-Registrar and the identifying witnesses and also holding that the certificate of registration is prima facie evidence of its execution and requires no further proof and the evidence of the Registrar is not necessary.

- II. ***Subhash Nayyar Vs. Registrar, University of Delhi*** 202 (2013) DLT 257 to contend that proof of signature of the attesting witness is evidence of everything on the face of the document and of that the said attesting witness saw the executants make his mark.
- III. ***Gulzar Ali Vs. State of Himichal Pradesh*** (1998) 2 SCC 192 and ***Mobarik Ali Ahmed Vs. The State of Bombay*** AIR 1957 SC 857 laying down the modes of proof of handwriting.
- IV. ***Harminster Khullar Vs. Swaran Kanta Juneja*** 202 (2013) DLT 222 where the undersigned held the Will to be proved even without any attesting witness being examined and on the basis of admissions.
- V. Judgment dated 25th October, 2013 of the undersigned in RFA No.765/2006 titled ***Surender Rode Vs. Madan Mohan Rode*** laying down that though Section 69 of the Evidence Act requires fulfillment of two conditions but the emphasis therein is on fulfillment only of the condition of proof of attestation by one of the attesting witnesses.
- VI. ***Sarat Chandra Mondal Vs. Panchanan Mondal*** AIR 1953 Cal

471 laying down that the presumption under Section 90 of the Evidence Act as to documents 30 years old applies to Wills also.

VII. Pages 638 and 639 of Monir's Commentary on the Indian Evidence Act to contend that proof of the authorship of the document may be by direct or circumstantial evidence including by internal evidence afforded by the contents of the documents; it is argued that the content of the Will, of the respondents / plaintiffs having left the property in the year 1970 and of the father Shri Ram Dayal having disinherited them, is proved independently also and thereby the contents of the Will stand proved; attention is also invited to the passage at page 639, that acquaintance with handwriting is enough proof of evidence.

7. Attention of the counsel for the appellant was however invited to ***M.B. Ramesh Vs. K.M. Veeraje URS*** (2013) 7 SCC 490 *inter alia* holding that the presumption regarding documents which are 30 years old does not apply to Will.

8. Though the counsel for the appellants/defendants contended that the judgment of the Calcutta High Court in ***Sarat Chandra Mondal*** (supra) is based on a judgment of the privy council and which would prevail but the

said contention has to be noted to be rejected.

9. The senior counsel for the respondent/plaintiff has argued:

- (i) that even if the Registrar were to be treated as an attesting witness, still for it to be held that the Will has been proved under Section 68 of the Evidence Act, the Registrar has to enter the witness box and which has not happened; thus *Pentakota Satyanarayana* (supra) is not applicable;
- (ii) that the appellant/defendant No.1 in his affidavit by way of examination-in-chief nowhere identified the signatures of the father Shri Ram Dayal on the Will dated 21st March, 1984;
- (iii) that the appellant/defendant No.1 in his cross examination had expressly admitted that none of the signatories of the Will had signed in his presence;
- (iv) that the explanation to Section 47 of the Evidence Act provides that a person is said to be acquainted with the handwriting of another person when he has seen that person write, or when he has received documents purporting to be written by that person in answer to documents written by himself or under his authority and addressed to that person, or when, in the ordinary course of

business, documents purporting to be written by that person have been habitually submitted to him; that none of these conditions are satisfied in the evidence of the appellant/defendant No.1;

- (v) that the respondents/plaintiffs by inquiring from the appellant/defendant No.1 in cross examination whether he had filed any death certificate of the attesting witnesses, have challenged the deposition of the appellant/defendant no.1 of the attesting witnesses having died;
- (vi) that the appellant/defendant No.1 in cross examination identified the father Shri Ram Dayal in the photographs of wedding of the children of the respondents/plaintiffs and which falsifies the contents of the Will, of relationship between the father and the respondents/plaintiffs being sour;
- (vii) that registration does not dispense with the proof of the Will as required by Section 68 of the Evidence Act – it is for this reason only that the proviso to Section 68 has expressly been made inapplicable to Wills.

10. The counsel for the appellants/defendants, in rejoinder, has argued-

- (a) that Sections 35, 58, 59 and 60(2) of the Registration Act 1908

prescribe the procedure for registration and which places the Registrar in the position of an attesting witness;

(b) that Section 114(e) of the Evidence Act raises the presumption of the said procedure of registration having been followed;

(c) that the appellant/defendant No.1 in his affidavit by way of examination-in-chief in para 2 has deposed that the father Shri Ram Dayal had executed the Will dated 21st March, 1984 and in para 24 that the Will bears his thumb impression and signatures and it thus cannot be said that the appellant/defendant No.1 has not identified the signatures and thumb impression of the father on the Will dated 21st March, 1984;

(d) not only so, the appellant/defendant No.1 in his affidavit by way of examination-in-chief has also referred to the comparative signatures of the father on other documents and has deposed that the signatures on the Will dated 21st March, 1984 can be compared with the signatures on other documents;

(e) that the deposition in cross examination of the appellant/defendant No.1 that he had gone to Registrar's office at the time of registration of the Will is enough proof of identification of the

signatures, not only of father Shri Ram Dayal but also of both attesting witnesses, on the Will;

(f) that the respondents/plaintiffs in cross examination of the appellant/defendant no.1 did not give any suggestion of the signatures not being of the attesting witnesses or of the father;

(g) that the photographs of wedding shown to the appellant/defendant no.1 in cross examination are of weddings after 21st March, 1984 and otherwise the factum of the father Shri Ram Dayal having not participated in the weddings of the children of the respondents/plaintiffs held prior to 21st March, 1984 stands admitted in the pleadings of an application at page 1109 of the trial court record;

(h) that the respondents/plaintiffs had instituted the suit claiming only the relief of partition, without claiming the relief of possession on the plea of being in joint possession of the property alongwith the appellant/defendant No.1 but the learned Additional District Judge despite holding that the respondents/plaintiffs were not in joint possession and that the appellants/defendants alone were in possession of the property erred in still passing the preliminary decree

for partition;

(i) that since the respondents/plaintiffs had not claimed the relief of possession despite being not in possession of the property, the suit for partition ought to have been dismissed; reliance in this regard is placed on:

- (i) ***Ram Saran Vs. Smt. Ganga Devi*** (1973) 2 SCC 60;
- (ii) Judgment dated 10th February, 2012 of this Court in RFA No.365/2008 titled ***Shri Vijay Kumar Vs. M/s Prahlad Swaroop Anil Kumar***;
- (iii) Judgment dated 16th January, 2009 of this Court in CS(OS) No.427/2006 titled ***Smt. Pushpa Saroha Vs. Shri Mohinder Kumar***;
- (iv) Judgment dated 22nd February, 2011 of this Court in RFA No.405/2001 titled ***Shri Harphool Singh Vs. Smt. Daropati***;
- (v) Judgment dated 8th May, 2012 of this Court in RFA No.865/2003 titled ***Shri Man Mohan Batra Vs. Shri Bharat Bhushan Batra***;
- (vi) Judgment dated 28th February, 2012 of this Court in RFA

No.465/2010 titled *Gulab Chaudhary Vs. Govinder Singh Dahiya*; and

(vii) Judgment dated 20th January, 2011 of this Court in RFA No.158/2000 titled *Shri Sukhbir Singh Vs. Smt. Bhagyawanti*.

11. The counsel for the appellants/defendants has further contended:

- (a) that even if the Will dated 21st March, 1984 were to be held to be not proved, under section 70 of the Indian Succession Act, 1925, the 1973 Will of the father will stand revived and the appellant/defendants have filed applications under Order 6 Rule 17 and under Order 41 Rule 27 of the CPC to take the said plea and proved the 1973 Will; reliance in this regard is placed on *Venkatanarayana Pillay Vs. Subbammal* AIR 1915 Privy Council 37 and *Tajo Ram Nath Vs. Baneswar Nath* AIR 1962 Assam 106; reliance is also placed on certain other judgments on the aspect of Order 6 Rule 17 and Order 41 Rule 27 of the CPC but need is not felt to give particulars thereof;
- (b) that proceedings for probate of the 1973 as well as 21st March, 1984 Wills are pending and that either the present appeal should be

clubbed with the probate proceedings or should await the outcome of the probate proceedings; reliance is again placed on certain judgments in this respect; on inquiry it is informed that the said probate proceedings were initiated after the impugned judgment.

12. I will first take up the aspect of proof of the Will dated 21st March, 1984.

13. A Bench of two Judges of the Supreme Court in ***Pentakota Satyanarayana*** supra undoubtedly held that the signatures of the Registering Officer and of the identifying witnesses affixed to the registration endorsement on a Will are sufficient attestation within the meaning of Section 68 of the Evidence Act. It was held that the endorsement by the Sub Registrar that the executants have acknowledged execution before him also amounts to attestation; the signatures of the executants and of the identifying witnesses are taken by the Sub Registrar and thereafter the Sub Registrar signs the document; this aspect introduces an element of solemnity in the decision of the question as to whether the document propounded is proved or not.

14. Though the senior counsel for the respondents / plaintiffs was satisfied with the proposition of law laid down in ***Pentakota Satyanarayana***

supra and chose only to distinguish the same on facts but finding the proposition laid down therein to be out of the ordinary and in conflict with Section 63 of the Succession Act, 1975, I have looked further and find that a Bench of three Judges of the Supreme Court, as far back as in ***M.L. Abdul Jabbar Sahib Vs. M.V. Venkata Sastri and Sons*** (1969) 1 SCC 573, though not in the context of a Will, to have held that the essential conditions of a valid attestation under Section 3 of the Transfer of Property Act, 1882 are, (1) that the attesting witnesses have seen the executant sign the instrument or have received from him a personal acknowledgment of his signature and; (2) that they have put their signatures on the document with a view to attest or to bear witness to this fact, in the presence of the executant. It was emphasized that it is essential that the witness should have put his signature *animo attestandi*, i.e. for the purpose of attesting that he has seen the executant sign or has received from him a personal acknowledgment of his signature. It was yet further held that if the person puts his signature on the document for some other purpose, e.g., to certify that he is a scribe or as an identifier or a registering officer, he is not an attesting witness. Reliance was placed on ***Girja Datt Singh Vs. Gangotri Datt Singh*** A.I.R. 1955 SC 346 also by a Bench of three Judges, holding that the two persons who had

identified the testator at the time of the registration of the Will and had appended their signatures at the foot of the endorsement by the Sub-Registrar, were not attesting witnesses as their signatures were not put *animo attestandi*. It was yet further held after examining the provisions of The Indian Registration Act, 1908 that the registering officer puts his signature on the document in discharge of his statutory duty and not for the purpose of attesting it or certifying that he has received from the executant a personal acknowledgment of his signature and thus cannot be recorded as an attesting witness.

15. The aforesaid view was re-affirmed in ***Dharam Singh Vs. Aso*** 1990 Supp (1) SCC 684, also of a three Judges Bench.

16. The question again came up in ***Bhagat Ram Vs. Suresh*** (2003) 12 SCC 35 before a bench of two Judges. After noticing the earlier judgments in ***Dharam Singh & M.L. Abdul Jabbar Sahib*** (supra), it was held that in those cases, the Registrar had signed the document in discharge of his statutory duty and the evidence adduced in those cases did not show the registering officer having signed the document with the intention of attesting it or that the registering officer signed it in the presence of the executant. However, finding that in the facts and circumstances of some other

judgments of the High Court of Punjab and Haryana, it had been held that the Registrar may fulfil the character of an attesting witness if on entering into the witness box as required by Section 68 of the Evidence Act, he proves by his testimony the execution of document by deposing to have witnessed himself the proceedings as contemplated by Section 63 of the Succession Act, he can be a attesting witness and it was further held that the certificate of registration under Section 60 of the Registration Act raises a presumption under Section 114 (e) of the Evidence Act that the Registrar had regularly performed his duty and therefore the facts spelled out by the endorsement made under Section 58 and 59 of the Registration Act may be presumed to be correct without formal proof thereof. It was further held that the Registrar of Deeds who has registered a document in discharge of his statutory duty, does not become an attesting witness to the deed solely on account of his having discharged the statutory duty relating to the registration of a document; however, a Registrar can be treated as having attested to a Will if his signature or mark appears on the document akin to the one placed by an attesting witness and he has seen the testator sign or affix his mark to the Will or has received from the testator a personal acknowledgement of his signatures. It was thus held, that to be an attesting

witness, the Registrar should have attested the signature of testator in manner contemplated by Section 63(c) of Succession Act. It was yet further held that a Registrar of Deeds before he can be termed as an attesting witness shall have to be called in the witness box and the Court must feel satisfied by his testimony that what he did satisfies the requirement of being an attesting witness.

17. Unfortunately, the aforesaid earlier judgments were not noticed in *Pentakota Satyanarayana* and even though a reading of the said judgment does not show the registering officer to have been summoned as a witness in that case, the Registrar was held to be an attesting witness.

18. In the aforesaid state, I am unable to accept the proposition as laid down in *Pentakota Satyanarayana* that mere registration of a Will makes the Registrar an attesting witness and even without being examined in the Court, the factum of registration can be a proof of valid attestation of the Will.

19. I also find another two Judge Bench of the Supreme Court in *Benga Behera Vs. Braja Kishore Nanda* (2007) 9 SCC 728 to have, faced with the question whether a certificate by Sub Registrar at the time of registration proved attestation, held that in view of Sections 52 & 58 of the Registration

Act the only duty cast on the Registering authority is to endorse on the Will, i.e. to endorse only the admission of execution by the person who presented the document for registration; the compliance with that provision leads to the legal presumption that the document was registered and nothing else; if an authority in performance of a statutory duty signs a document, he does not become an attesting witness within the meaning of Section 3 of the Transfer of Property Act, 1882 and Section 63 of the Succession Act; to 'attest' is to bear witness to a fact; "*animus attestandi*" is a necessary ingredient for proving the attestation; if a person puts his signature on a document only in discharge of his statutory duty, he may not be treated to be an attesting witness. No doubt the earlier judgment in *Pentakota Satyanarayana* was not noticed.

20. The view taken in *Benga Behera* supra is also in consonance with *M.B. Ramesh* supra which holds that Section 71 of the Evidence Act which permits a party to lead other evidence in certain circumstances cannot be read to absolve a party of his obligation under Section 68 of the Evidence Act r/w Section 63 of the Succession Act and that aid of Section 71 can be taken only when the attesting witnesses deny or fail to recollect execution of the document, to prove it by other evidence and not when the attesting

witness has failed to prove the execution of the Will.

21. I may with respect add, that a Will under Section 41 of the Registration Act when presented for registration by the testator is registrable in the same manner as any other document. Sections 32 to 35 prescribe the procedure for registration of documents and permit presentation of a document for registration not only by the person executing the document but also by the representative or attorney of such person and the Registrar is only required to satisfy that they admit its execution. The requirements of Section 63 of the Succession Act are different. The Will is required to be attested by two or more witnesses, each of whom seen the testator sign and who have themselves signed in the presence of and at the direction of the testator at the same time. An admission by the person signing the Will and by the witnesses of having signed the Will is not an admission of the fulfilment of the conditions of Section 63 of the Evidence Act; more importantly, the Registrar cannot be said to be signing “at the direction of the testator”. The said requirement of Section 63(c) has not been discussed in *Pentakota Satyanarayana*.

22. In the facts of the present case, though the appellants / defendants had summoned a witness from the office of the Sub-Registrar to prove the

factum of registration, but have not examined the Registrar who has registered the document. In the absence of his testimony satisfying the conditions of proof of Will, he cannot be considered as an attesting witness. The argument of the counsel for the appellants / defendants of the Will having been proved under Section 68 of the Act, has thus but to be rejected.

23. As far as the contention of the counsel for the appellants / defendants of the Will having been proved under Section 69 of the Evidence Act, the same has two requirements i.e. (i) proof of attestation in the handwriting of one attesting witness; and, (ii) proof of signatures of the executant being in his handwriting. This Court in *Subhash Nayyar* and *Harinder Khullar* supra has held that proof of signatures of at least one of the witnesses being in his handwriting is the main component of the said provision. I am unable to accept the contention of the counsel for the appellants / defendants that the signatures of either of the two attesting witnesses to the Will have been identified in their respective handwriting. No person acquainted with the signatures of the said witnesses was produced. The appellant / defendant No.1 in his affidavit by way of examination-in-chief did not utter a word in identification of the signature of either of the attesting witnesses. In cross-examination, he expressly admitted that none of the persons whose

signatures are affixed on the document had signed in his presence. In fact, he clearly stated that he did not identify either of the attesting witnesses. The counsel for the appellants / defendants however wants me to hold that the signatures of the attesting witnesses stand proved merely from the appellant in his cross examination having also stated that he was present at the time of registration. However, the said statement has to be read along with the statement, of none of the signatories of the document having signed in his presence. Even if it were to be believed that the appellant / defendant no.1 was present at the time of registration, though the same is also doubtful inasmuch as if the appellant / defendant No.1 had been present, he would not have feigned ignorance of the attesting witness, the presence in the Registrar's office at the time of registration without seeing all the signatories signing the document is no identification of the handwriting of either of the attesting witnesses. Thus the most important ingredient of Section 69 of the Evidence Act has not been satisfied.

24. Though there is no unequivocal deposition of the appellant / defendant No.1, neither in his examination-in-chief nor in cross examination, identifying the signatures of the testator but from the deposition in para 24 of the affidavit by way of examination-in-chief of the

testator having signed the document and further deposition of the signatures of the testator thereon being comparable with the signatures of the testator on other documents, I am inclined to hold that the appellant / defendant No.1 has proved the signature of the testator. However, in this respect also there is a disturbing fact. The original Will is nowhere on the Trial Court record. The appellant / defendant No.1 in his affidavit by way of examination-in-chief has sought to put exhibit mark on a certified copy thereof and has further deposed "I have brought the original Will". However, on the day when the said affidavit by way of examination-in-chief was tendered, it is nowhere recorded that the original Will had been brought on that date. In fact, the Will was not even exhibited on that date and the proceedings on that date refer only to the certified copy of the Will. There is no reference to the original Will in the cross examination also. Exhibit mark was ultimately put on the Will during the testimony of the witness from the Sub-Registrar's office but there is nothing to suggest that the original was before the Court on that date also. Of course, the counsel for the appellants / defendants states that the original is in possession of the appellants / defendants and can be produced even now. The Supreme Court in *Benga Behera* supra has held that a document upon which a title is based is required to be proved by

primary evidence and for secondary evidence to be given under Section 65(c) of the Evidence Act, loss of the original Will is required to be proved and it is obligatory on the part of the propounder of the Will to establish the loss of the original Will beyond a reasonable doubt. The proof of a Will on the basis of a certified copy thereof was not held to be sufficient compliance with the requirements of law.

25. Thus the Will cannot be said to have been proved under Section 69 of the Act also.

26. Once the Will on the basis of which the appellants / defendants claimed to be exclusive owners of the property is held to be not proved, the entire edifice of the case of the appellants / defendants falls.

27. Before parting with this subject, I may observe that the contention of the counsel for the appellants / defendants that it was for the respondents to in cross examination quiz the appellants / defendants with respect to signatures of the executants and the attesting witnesses is misconceived. It is often found that a Will not proved in accordance with law by the propounder thereof in his examination-in-chief gets proved by excessive cross examination by the challenger. Once the propounder of the Will has not proved the Will in accordance with law, no fault can be found in the

challenger not exhaustively cross examining the witnesses of the propounder in this regard and the answers in which cross examination may ultimately prove the Will.

28. The probate proceedings in the present case have admittedly been filed after the impugned judgment. Even after filing the probate proceedings, no application was filed for stay of decision in the present appeal. It is in fact only in rejoinder arguments that attention to the said applications and submissions with respect thereto was made. The judgments relied upon by the counsel for the appellants / defendants of primacy of probate proceedings when simultaneously with the probate proceedings civil proceedings in which also the Will was an issue was pending, would in the circumstances have no application. I have enquired from the counsel for the appellants / defendants as to what is the difference in adjudication of the validity of a Will probate proceedings and in a civil suit qua the Will. It is not as if, the suit has been decided by a Court not competent to try a contentious probate proceedings. The suit has been decided by the Court of the Additional District Judge and it is not in dispute that the said Court is also the competent Court to try probate proceedings. In fact, probate proceedings are stated to be pending before another Court of Additional

District Judge only. Once in a civil suit competent to adjudicate the validity of the Will, the said validity has been decided and the propounder is unable to prove the Will he / she cannot thereafter have a second round by seeking probate of the Will. Reliance if any required can be placed on ***Dinesh Chand Vs. State*** MANU/DE/7106/2007.

29. As far as the claim of the appellants / plaintiffs for an opportunity to plead and prove the 1973 Will is concerned, the appellants / plaintiffs having set up a case of the alleged 1973 Will having been revoked by the Will of 21.03.1984 and having failed to prove the Will dated 21.03.1984, cannot now have a second round. I have been unable to find any such procedure prescribed in any law. The judgments cited are not found to be holding so. Section 70 of the Succession Act to which reference was made also does not support such a proposition. A revocation of Will is not necessarily required to be by a subsequent Will and under Section 70 can also be by destruction thereof. The appellants/defendants are bound by their admission of the father Sh. Ram Dayal having revoked the 1973 Will and cannot be permitted to take an inconsistent stand. The parties have already been litigating since the year 1992 i.e. for the last over two decades and the law of amendment of pleadings and law permitting additional evidence to be led cannot be

permitted to be exploited for perpetuating a litigation.

30. There is thus no merit in the appeal which is dismissed. However, in the facts, no costs.

Decree sheet be drawn up.

RAJIV SAHAI ENDLAW, J.

NOVEMBER 18, 2013

M/pp/gsr