

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

+ **OMP No. 16/2017**

Reserved on:15.01.2019
Pronounced on:10.05.2019

RENU JAIN AND OTHERS

.....Petitioners

Through Mr. Rajat Wadhwa & Mr.
Himanshu Nailwal, Advocates.

Versus

KAMLA VATI JAIN AND OTEHRS

..... Respondents

Through Mr. Abhimanyu Kumar Singla &
Mr. Siddhant Srivastava, Advocates for
respondent Nos. 1, 3, 4 & 5.

Mr. Sachin Aggarwal, Advocate for
respondent No.2.

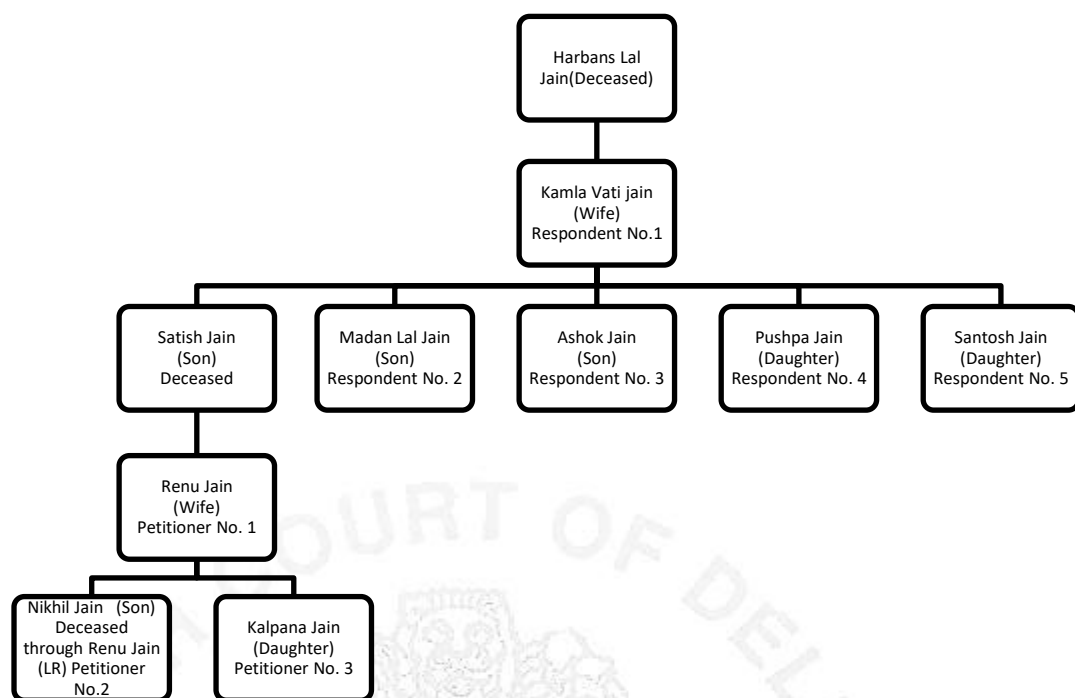
CORAM:

HON'BLE MR. JUSTICE RAJIV SHAKDHER

RAJIV SHAKDHER, J.:

1. The instant petition has been preferred under Section 34 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the “1996 Act”) to assail the interim Award dated 28 March 2017, as modified by the order dated 3 July 2017 passed by the Arbitral Tribunal.

2. The disputants, who are parties to the instant litigation, are family members of, one, late Harbans Lal Jain. In order to explain the *inter se* relationship of disputants, it would help if one were to refer to the family tree as set out hereafter:-



3. The dispute between the parties to the proceedings essentially veers around the following immovable and movable properties of late Harbans Lal Jain:

- (i) 20, Banarsidass Estate, Lucknow Road, Delhi, admeasuring 1,000 sq. yds. (in short, 'BD Estate')
- (ii) Shop No. 315-317, Gali Chhapa Khana, Sadi Bazar, Delhi, admeasuring about 1,000 sq. feet.
- (iii) Factory premises bearing no. D-12, Manufactures Cooperative Industrial Estate Ltd., Udyog Nagar, Rohtak Road, Delhi, admeasuring 3,000 sq yds.
- (iv) Shop no. 15, M2K Multiplex, Rohini, New Delhi, admeasuring 1648 sq feet.

(v) Various valuable assets in the form of cash, shares, bank balances, fixed deposits, and interest accrued thereon, as set out below:

- Senior Citizen Scheme Post office Rs.15,00,000/-
- MIS Post office Rs.6,00,000/-
- Interest A/c Rs.1,28,000/-
- Loans Rs.5,00,000/-
- P.P.F. Rs.5,67,012/-
- N.S.C. Rs.30,000/-
- Saving Account Rs.50,000/-

(Collectively referred to as “movable assets”)

4. The petitioners, who are the original claimants, sought relief before the Arbitral Tribunal, essentially, based on a registered Will dated 14 August 1986 (hereafter referred to as “Will”), purportedly, executed by late Harbans Lal Jain (Exhibit CW-1/1) and the Partnership Deed dated 1 April 2000 concerning the partnership firm M/s Universal Woolen Mills (India) (hereafter referred to as “firm”). The firm had three partners i.e. Harbans Lal Jain, Madan Lal Jain/respondent No. 2 and Nikhil Jain, son of the petitioner No. 1. It is the case of the petitioners that each of these partners had one-third share in the firm.

4.1 On the other hand, respondent No. 3/Ashok Jain set up an oral family settlement of 20 December 1979, which, according to him, was recorded in a Memorandum of Settlement (Exhibit DW-3/1) dated 9 April 1980 (hereafter referred to as “MOS”).

5. The main plank of the petitioners' case before the Arbitral Tribunal was that the division of assets of late Harbans Lal Jain should take place as per the terms of the Will and insofar as the firm was concerned, respondent No.2/Madan Lal Jain should render accounts in terms of the Partnership Deed dated 1 April 2000.

5.1 Concededly, the Will was not tested in a probate proceeding. The petitioners took the stand that insofar as Delhi was concerned, it need not be tested in a probate proceeding. The petitioners, thus, to obtain relief before the Arbitral Tribunal, relied upon the Will and the purported admissions made by respondent No. 1/Kamla Vati Jain, respondent No. 3/Ashok Jain, respondent No.4/Pushpa Jain and respondent No. 5/Santosh Jain with regard to the existence of the Will in their Statement Of Defence ("SOD") filed before the Arbitral Tribunal.

5.2 Thus, based on the pleadings, the following issues were struck by the Arbitral Tribunal:-

*“(A) **ISSUE NO. 1:** Whether the Will dated 14.08.1986 was executed by Late Shri Harbans Lal Jain and is a validly executed Will?”*

*(B) **ISSUE NO. 2:** Whether a Family Arrangement / Memorandum of Settlement dated 09.04.1980 was executed by the parties and is a final and binding settlement between the parties/their LRs?*

*(C) **ISSUE NO. 3:** Whether the Claimant No. 2 and Respondent No. 2 are (sic: is) entitled to 50% share each in the Shop No. 15, M2K Multiplex, Rohini, New Delhi?*

*(D) **ISSUE NO.4:** Whether Respondents Nos. 4&5 have misappropriated the movable assets of late*

Shri Harbans Lal Jain and are liable to render accounts thereof and hand over the same to the rightful owners?

*(E) **ISSUE NO.5:** Whether the life estate, if proved in favour of Respondent No. 1, has become her permanent/absolute estate?*

*(F) **ISSUE NO.6:** Whether the firm M/s. Universal Woolen Mills automatically dissolved after the death of late Shri Harbans Lal Jain? Who are its partners and after dissolution what are the shares of its partners?*

*(G) **ISSUE NO.7:** Relief?"*

6. The Arbitral Tribunal after recording the evidence and analyzing the same in the background of the pleadings filed by the parties returned the following findings of fact:

(i) The Will (Exhibit CW-1/1) was neither proved as having been executed by late Harbans Lal Jain nor was it a valid Will in the eyes of law.

(ii) The MOS (Exhibit DW-3/1) stood proved. The MOS recorded the oral family settlement of 20 December 1979. The family settlement had been arrived at between late Harbans Lal Jain, respondent No. 2/Madan Lal Jain, late Satish Jain, and respondent No. 3/Ashok Jain with respect to BD Estate. BD Estate would devolve upon the Legal Representatives (LRs) of Harbans Lal Jain and Satish Jain, and on respondent No.2/Madan Lal Jain as also respondent No. 3/Ashok Jain in the manner indicated in the site plan appended to the MOS.

(iii) Shop No. 15, M2K Multiplex, Rohini, New Delhi (in short 'Rohini Shop') was purchased by late Harbans Lal Jain in his own name and since the Will was not proved and there was no reference to this shop in the MOS, it would devolve upon all six (6) LRs of late Harbans Lal Jain i.e. respondent No.1/Kamla Vati Jain, his two sons, respondent No.2/Madan Lal Jain and respondent No.3/Ashok Jain, his two daughters respondent No.4/Pushpa Jain and respondent No.5/Santosh Jain and the widow and daughter of late Satish Jain.

(iii)(a) In all (according to the Arbitral Tribunal) there would be six shares, out of which five parts would go to late Harbans Lal Jain's widow and his sons and daughters while the sixth part would be shared jointly by petitioner Nos. 1 and 3.

(iv) The petitioners had failed to prove that respondent No. 1/Kamla Vati Jain, respondent No.4/Pushpa Jain and respondent No.5/Santosh Jain had misappropriated the assets, which included movables as well as cash and jewellery belonging to late Harbans Lal Jain.

(v) Since the Will had not been proved, there was nothing on record to show that a life interest had been created in favour of respondent No.1/Kamla Vati Jain in the estate of late Harbans Lal Jain. Therefore, respondent No.1/Kamla Vati Jain would be entitled to her share in certain properties of late Harbans Lal Jain in her capacity as his Class I legal heir.

(vi) The firm was first constituted in 1962. At that point in time, it consisted of four partners, namely, late Harbans Lal Jain, respondent No.2/Madan Lal Jain, Banarasi Dass and Vijay Kumar. This firm was dissolved on 3 May 1966.

(vi)(a) A new firm was constituted on 30 May 1966, which had only two partners i.e. late Harbans Lal Jain and respondent No.2/Madan Lal Jain. However, this firm was also dissolved and, on 9 April 1970, another firm was formed, which had not only late Harbans Lal Jain and respondent No.2/Madan Lal Jain as its partners but also included late Satish Jain.

(vi)(b) On 7 April 1971, yet another firm was created, which had late Harbans Lal Jain and his three sons as partners. This firm was dissolved on 31 March 1983 with the retirement of respondent No.3/Ashok Jain. Resultantly, on 1 April 1983, a new firm was constituted with late Harbans Lal Jain, respondent No.2/Madan Lal Jain, and late Satish Jain as partners.

(vi)(c) After the death of Satish Jain on 16 October 1998, petitioner No.1/Renu Jain was taken in as a partner with the execution of Partnership Deed dated 19 October 1998. Late Nikhil Jain, who was then a minor, was inducted as a partner to the profits of the firm.

(vi)(d) Upon attaining majority, late Nikhil Jain was taken as a full partner vide Partnership Deed dated 1 April 2000. At this point in time, the firm comprised late Harbans Lal Jain, respondent No.2/Madan Lal Jain and late Nikhil Jain.

(vi)(e) After the death of Harbans Lal Jain, the firm was dissolved on 20 February 2008. Since then, the firm was run and managed exclusively by respondent No.2/Madan Lal Jain. The Income-Tax Returns of respondent No.2/Madan Lal Jain showed that he was managing the entity Universal Woolen Mills i.e. the firm as a partnership firm. This aspect was admitted to by respondent No.2/Madan Lal Jain in his cross-examination held on 11 November 2013. Thus, after the death of Harbans Lal Jain and, thereafter, post the demise of Nikhil Jain, the accounts between the partners with regard to the firm had not been settled even though respondent No.2/Madan Lal Jain was running and managing the firm. Furthermore, respondent No.2/Madan Lal Jain had not shared the sum of Rs.30,00,000/- which he had received upon maturity of bonds that were taken in the name of the firm.

(vi)(f) Thus, late Harbans Lal Jain and late Nikhil Jain were equal partners along with respondent No.2/Madan Lal Jain under the Partnership Deed dated 1 April 2000. Since respondent No.2/Madan Lal Jain had been running and managing the firm, he would have to render accounts to the LRs of late Harbans Lal Jain and late Nikhil Jain.

(vii) The pleadings and the evidence on record show that Shop Nos. 316-317, Gali Chapa Khana, Sadar Bazar, Delhi were disposed of by late Harbans Lal Jain during his lifetime and hence could not be divided between the parties. Insofar as shop No. 315, Gali Chapa Khana, Sadar Bazar, Delhi was concerned, it was in the possession of respondent No.2/Madan Lal Jain. This shop was

owned by late Harbans Lal Jain. Therefore, this asset would have to be shared amongst his Class I legal heirs. Thus, respondent Nos. 1 and 3 would get jointly one-sixth share and respondent Nos. 1 to 5 would get a separate one-sixth share in the shop.

(viii) Likewise, movable assets referred in paragraph 3 above would be shared amongst the LRs of late Harbans Lal Jain. While petitioner Nos. 1 and 3 would jointly get a one-sixth share, the remaining legal heirs (i.e. respondent Nos. 1 to 5) of late Harbans Lal Jain would have a separate share in the movable assets. Since respondent No.1/Kamla Vati Jain and late Nikhil Jain had drawn certain amounts—the amounts already withdrawn by them would be adjusted against their shares.

(ix) Insofar as shop bearing Nos.35-36, M2K Multiplex, Rohini is concerned, no evidence is found that they were purchased from the funds of the family or those of the firm.

7. In the foreground of the findings recorded and the reliefs given in the impugned award, arguments on behalf of the petitioners were advanced by Mr. Rajat Wadhwa, while those on behalf of the respondent Nos. 1, 3, 4 and 5 were advanced by Mr. Abhimanyu Kumar Singla.

7.1 Insofar as respondent No.2/Madan Lal Jain was concerned, submissions were made by Mr. Sachin Aggarwal.

8. As noticed above, the main thrust of the submissions advanced by Mr. Wadhwa on behalf of the petitioners was that the learned Arbitrator had erred in coming to the conclusion that the execution of the Will had not been proved both on facts and in law. The argument was that the Will was

a registered document, the execution of which had not been denied by respondents, save and except respondent No.2/Madan Lal Jain. Since, in Delhi, there was no mandatory requirement of having a Will probated, its execution was proved by examining one of the two attesting witnesses i.e. Dev Raj Jain (CW-3) and by having the Sub-Registrar's office produce the original registered Will.

8.1 It was emphasized that if the learned Arbitrator had any doubt as regards the testimony of Dev Raj Jain (CW-3), it ought to have relied upon the provisions of Section 71 of the Indian Evidence Act, 1872 (in short 'Evidence Act') which, *inter alia*, provides that where an attesting witness denies or does not recollect the execution of the documents, its execution may be proved by other evidence. In support of this submission, reliance was placed by Mr. Wadhwa on the following judgments (i) ***Janki Narayan Bhoir versus Narayan Namdeo Kadam***, (2003) 2 SCC 91(at page 87 & 99 paragraphs 7 and 11); and (ii) ***M.B. Ramesh (D) By LRs versus K.M.Veeraje Urs (D) by LRs and Others***, (2012) 8 SCR 573 (paragraphs 16 to 25).

9. In view of the fact that most of the respondents, except one (i.e. respondent No.2/Madan Lal Jain), had admitted to the execution of the Will, the learned Arbitrator ought to have relied upon the same in passing the Award. The submission was that admission was the best evidence and, therefore, no further proof of execution of the Will was required. In support of this contention, reliance was placed on the judgment of the Supreme Court in ***United India Insurance Company Limited versus Samir Chandra Chaudhary***, (2005) 5 SCC 784 (in paragraph 11).

10. The learned Arbitrator erred in basing his finding and conclusions on the MOS as it was beyond the scope of reference. The MOS was not adverted to by the respondents in their written statement filed in the suit (i.e. CS(OS) No. 1579/2009) instituted by the petitioners, which was subsequently referred to the Arbitrator for adjudication by this Court.

10.1 Furthermore, the MOS was also not relied upon or referred to by the respondents in their reply to the Section 9 petition (i.e. OMP No. 541/2009) filed by the petitioners.

10.2 Besides this, the respondents had neither set up a claim or counterclaim based on the purported MOS.

10.3 Since the learned Arbitrator relied upon the MOS, which did not fall within the ambit of reference made to him, he had fallen foul of the provisions of Section 34(2)(iv) of the 1996 Act. In support of this submission, reliance was placed on the judgment of the Supreme Court in ***Rajinder Krishan Khanna and Others versus Union of India and Others***, (1998) 7 SCC 129 (at paragraphs 4 to 7, 9, 11 to 17).

11. On the other hand, Mr. Sachin Aggarwal on behalf of the respondent No.2/Madan Lal Jain stated that both the Will and the MOS were fabricated documents and hence had no legal sanctity in the eyes of law.

11.1 According to the learned counsel, respondent No.3/Ashok Jain had illegally taken possession of the barsati floor and the flat (shown in his name) and, therefore, misled not only the Arbitral Tribunal but also this Court.

11.2 I must indicate herein that insofar as respondent No.2/Madan Lal Jain is concerned, the written submissions were filed on his behalf, only on 6 March 2019. Furthermore, the written submissions made assertions which were not articulated in the Court by Mr. Sachin Aggarwal; an aspect which I will touch upon hereafter.

11.3 Moving further, a stand was taken on behalf of respondent No. 2/Madan Lal Jain that both the Will and the MOS were fabricated documents. It was contended that respondent No.3/Ashok Jain had illegally taken possession of a portion of BD Estate. In other words, the argument was that the learned Arbitrator had legitimized the possession of a portion of the BD Estate by respondent No.3/Ashok Jain based on assumptions and presumptions, which were not borne out from the evidence on record.

12. As indicated above, there are aspects which are referred to in the written submissions on behalf of respondent No.2/Madan Lal Jain, which were not put forth during the course of the arguments before this Court. These aspects pertain to the following:

- (i) The alleged non-sharing of accounts by respondent No.1, respondent Nos. 3 to 5, and the petitioner with regard to assets of late Harbans Lal Jain available in the form of cash, monies credited to his bank accounts and assets stored in the lockers maintained by him. (See paragraph 3 above. The petitioners have brought up this aspect.)
- (ii) Consideration received on the sale of immovable properties described as D, 28 DLF Industrial Area, Moti Nagar, Najafgarh

Road, Delhi alongwith machinery and shop No. 316, Gali Chapa Khana, Sadar Bazar, Delhi.

- (iii) Two shops sold by late Nikhil Jain located in M2K, Rohini, Delhi, which were bought out of purported consideration received from the sale of property described as 12D, Udyog Nagar, Delhi.
- (iv) Sum of Rs.25 lakhs given as a gift to late Nikhil Jain. Late Nikhil Jain's failure to account for funds drawn from the Public Provident Fund Account of late Harbans Lal Jain.
- (v) As late Satish Kumar Jain and respondent No.3/Ashok Jain were running parallel businesses, respondent No.2/Madan Lal Jain was not obliged to render accounts qua the firm i.e. Universal Woolen Mills.

12.1 To my mind, these aspects adverted to above cannot be considered in the instant Section 34 petition at the behest of respondent No.2/Madan Lal Jain. I have referred to these aspects in view of the fact that there is an assertion qua some assets in the written submissions in respect of which no arguments were advanced before me. Given the position that the Section 34 petition is filed against an interim award, if these aspects still survive adjudication before the learned Arbitrator, respondent No.2/Madan Lal Jain, to my mind, would then be advised to press the same in the pending arbitration proceedings.

13. Insofar as Mr. Abhimanyu Kumar Singla was concerned, he relied upon the Award in support of his submissions. Learned counsel submitted that as correctly found by the learned Arbitrator, the Will was not proved

and, therefore, the assets of late Harbans Lal Jain could only be distributed in accordance with the terms of the MOS, which had been proved.

13.1 A large part of Mr. Abhimanyu Kumar's submissions were predicated on the findings and conclusion recorded in the impugned award.

Reasons

14. I have heard learned counsel for the parties and perused the record.

14.1 To my mind, the two principal submissions arise for consideration. First, whether the learned Arbitrator was correct in law in holding that the Will was not proved. Second, whether the learned Arbitrator's reliance on the MOS was legally tenable. The remaining submissions pertain to factual issues and are based primarily on the appreciation of the material placed before the learned Arbitrator and these need not detain me.

15. In my view, the finding and the conclusion reached by the learned Arbitrator vis-à-vis the Will are unimpeachable. Admittedly, the petitioners had produced before the learned Arbitrator only one of the two attesting witnesses i.e. Dev Raj Jain (CW-3). A perusal of the testimony of Dev Raj Jain (CW-3) would show that he had neither seen the testator i.e. late Harbans Lal Jain signing in his presence nor did he see the other attesting witness i.e. Sushil Kumar appending his signatures on to the Will. As a matter of fact, Dev Raj Jain (CW-3) found it very difficult to even identify his own signatures on the Will. The following extracts from Dev Raj Jain (CW-3's) testimony will establish this aspect of the matter:-

“(The witness has been shown the registered Will dated 14th of August, 1986 registered on 26.08.1986 brought from the office of the Sub-

Registrar, Kashmere Gate, Delhi. The witness has taken considerable time in examining his signatures as well as the signatures of the testator on the said Will.)

The signatures on this Will as a witness may or may not be mine. I am not in a position to identify the signatures of Late Shri Harbans Lal on this Will. I had gone to the office of the Sub-Registrar, Kashmere Gate, Delhi for being a witness to the Will to be executed by Shri Harbans Lal. We had gone inside the office of the Sub-Registrar, where my signatures were obtained on a Will and I was sent out. The Will was not read over to me. One Sushil Kumar was also present at that time but I am not in a position to identify his signatures. The signatures of Sushil Kumar were not obtained in my present[sic: presence]

XXX by Shri Sankalap Goswami, Ld. Counsel for the respondents no. 1, 4 and 5.

Shri Harbans Lal had told me that he was making a Will in favour of his wife Smt. Kamla Vati Jain. I know that Smt. Kamla Vati Jain had no source of income in those days. It is true that late Shri Harbans Lal Jain was maintaining her. Shri Harbans Lal Jain, had told me that he was bequeathing his entire property in favour of his wife, so that he is in a position to maintain herself after his death.

XXXXX

....Shri Harbans Lal Jain, had not signed the Will in the office of the Sub-Registrar in my presence as Mr. Sushil Kumar and myself were sent out after signing.”

(emphasis is mine)

15.1 Based on this evidence, to my mind, the learned Arbitrator correctly appreciated the requirements of law while making the following observations in the impugned Award:-

“81. Upon consideration of the evidence on record and submissions made by Learned Counsel for the Parties, I am of the considered view that the Will Exhibit CW-1/1 dated 14.08.1986 cannot be termed as an admitted Will for the reason that all the parties to the present proceedings have not admitted the execution or the validity of the same. Respondent No.3 Ashok Jain had specifically denied this Will in his Affidavit of Admission/Denial of documents.

82. Even if this Will had been admitted by all the Parties, the Tribunal was still under a duty to examine as to whether it was executed or not by the Testator in accordance with the provisions of Section 63 of the Succession Act and Section 68 of the Indian Evidence Act. The reason being that a ‘Will’ is a document, the proof of which requires a special nature of evidence.

83. Section 59 of the Indian Succession Act provides that a person of sound mind, not being a minor may dispose of the property, by will and Section 63 requires that the Testator shall sign or fix a mark to the Will or it shall be signed by some other person in his presence under his direction and signature/mark so made should convey that it was intended to give effect to the document as a ‘Will’. The provisions also require that the Will has to be attested by two or more witnesses, each of whom should have seen the Testator sign the Will or affix his mark and each of the witnesses also should have signed the Will in the presence of the Testator. These essentials for a valid execution and attestation of a Will, are mandatory in nature and any failure or

deficiency in adhering thereto would invalidate the document being propounded as a Will.

84. *Sections 68 and 71 of the Evidence Act provide that atleast one of the attesting witnesses, if he is alive and capable to giving evidence, should prove the execution of the Will, and in case, none of the Witnesses is available, the Propounder may prove the execution of the Will by other evidence. This rule would also apply when the attesting witness denies or does not recollect the execution of the Will.*

85. *In the present case, when CW-3 made a highly vague statement in regard to the execution of the Will (Ex. CW-1/1), it was incumbent upon the Claimants to lead some other evidence to establish that the Will was signed by Late Shri Harbans Lal Jain, in the presence of two witnesses and the two witnesses had also signed the Will, in his presence, and in the presence of each other.....*

86. *Mere Registration of a Will does not establish the essential requirements of Section 63 of the Indian Succession Act or Section 68 of the Indian Evidence Act. Sometimes a Will may be registered even without apprising the Testator about its contents. The legal position, therefore, is that the propounder of a Will has to establish that the Will was signed by the Testator, he was in a sound disposing state of mind at the time of signing of the Will, had put his signatures on the Will out of his free Will and had signed it in the presence of two witnesses, who also had signed it in his presence and in the presence of each other.*

87. *In this case, the Claimants have not at all succeeded in establishing that the Will (Exhibit CW-1/1) was signed by Late Shri Harbans Lal Jain and at that time, he was in a sound disposing state of mind and had voluntarily made this Will. The testimony of CW3 instead of proving the requirements of Section 63 of the Indian Succession Act and Section 68 of the*

Indian Evidence Act negates that the Will in question was signed in his presence by the Testator and two attesting witnesses also had signed the Will in the presence of the Testator and each other. There is no evidence on record to show that at the time of execution of this Will, Late Shri Harbans Lal Jain was in sound disposing mind or had executed this Will voluntarily.

88. After the statement of CW-3, the Claimants could have led other evidence in terms of Section 71 of the Indian Evidence Act to prove the essential requirements of execution of Will but no efforts were made. If the Will Exhibit CW-1/1 was being made voluntarily and in a sound disposing mind by Late Shri Harbans Lal Jain, there was no reason for him, not to sign the Will in the presence of attesting witnesses, nor there was any good reason for sending them out of the Room of the Sub-Registrar, before signing the Will in question. All these factors make the Will (Exhibit CW-1/1) a suspicious and unreliable document, especially in view of the fact that Respondent No. 3, Shri Ashok Jain was being divested of the estate of Late Shri Harbans Lal Jain.

89. The other witnesses examined by the parties, before this Tribunal have no personal knowledge in regard to the execution of the Will (Exhibit CW-1/1).

90. I, therefore, have no hesitation in rejecting the Will (Exhibit CW-1/1) and holding that it is not proved on record that it was executed by Shri Harbans Lal Jain and all essential requirements of law were complied with."

(emphasis is mine)

15.2 The argument advanced by Mr. Wadhwa that admission was the best evidence has been correctly negated by the learned Arbitrator. Will represents a right *in rem*. (See **Booz Allen & Hamilton Inc. versus SBI**

Home Finance Limited and Others, (2011) 5 SCC 532, at page 546 in paragraphs 36 to 38). Therefore, in my view, even if all parties were to admit execution of the Will, a court or a tribunal is required to independently examine as to whether or not the document conforms to the provisions of Section 63 of the Indian Succession Act and Section 68 of the Evidence Act. In this case, the evidence on record clearly shows that those requirements were not met. Given the fact that Dev Raj Jain (CW-3) had deposed that he had neither seen the testator i.e. late Harbans Lal Jain or the other attesting witness i.e. Sushil Kumar appending their signatures on the Will in his presence, the learned Arbitrator could not have come to any other conclusion but the conclusion he reached, which is, that the document placed before him was not the last Will and testament of late Harbans Lal Jain. What made matters worse was that the petitioners, who were propounders of the Will, could not produce any other tangible evidence, save and except the admissions of respondent Nos. 1, 4 and 5, who were beneficiaries under the Will, to prove its execution.

15.3 Pertinently, as noticed above, respondent No.2/Madan Lal Jain had disputed and continues to dispute the execution of the Will. Thus, the argument advanced on behalf of the petitioners that the learned Arbitrator should have taken recourse to other evidence as contemplated under Section 71 of the Evidence Act to prove the Will, is an argument, which is, completely unsustainable in the facts of this case. The judgments cited by Mr. Wadhwa on this point qua this submission are clearly distinguishable on facts.

16. Insofar as the family settlement is concerned, which is the main pivot of the impugned Award, once again, in my opinion, the conclusion reached by the learned Arbitrator cannot be faulted.

16.1 The learned Arbitrator has found, as a matter of fact, that the MOS bears the signature of, one, R.C. Jain in his capacity as a witness. R.C. Jain is the husband of respondent No.5/Santosh Jain, one of the daughters of late Harbans Lal Jain.

16.2 Learned Arbitrator also found, as a matter of fact, that in the cross-examination of R.C. Jain the signatures of late Harbans Lal Jain, late Satish Jain or respondent No.2/Madan Lal Jain found on the MOS were not put in issue. Furthermore, learned Arbitrator found that the oral settlement dated 20 December 1979 which formed the basis of the MOS was neither questioned by those who were parties to the MOS nor by those who were not parties to the MOS.

16.3 As a matter of fact, the learned Arbitrator returns a finding that there was no suggestion made with regard to the non-existence of the oral settlement in the cross-examination of respondent No.3/Ashok Jain. The learned Arbitrator rightly came to the conclusion that without assailing the oral settlement dated 20 December 1979, which was, as indicated above, the basis of the MOS, the settlement could not be dislodged. Thus, the conclusion reached by the learned Arbitrator based on the material placed before him that the MOS was not a forged or fabricated document, but only recorded the oral settlement dated 20 December 1979, in my opinion, is a conclusion which will have to be sustained. Thus, the arguments advanced

on behalf of the respondent No.2/Madan Lal Jain to the contrary are completely untenable and, therefore, will have to be rejected.

17. Before I conclude, I must also advert to the argument advanced by Mr. Wadhwa that the fact that since the impugned Award dealt with the MOS, had fell foul of Section 34(2)(iv) of the 1996 Act. In my view, the argument is specious, to say the least, in view of the fact that based on the pleadings filed before the learned Arbitrator, a specific issue had been framed with regard to the MOS. In my opinion, the MOS was undoubtedly a matter in issue and, therefore, was rightly dealt with and adjudicated upon by the learned Arbitrator. It would be pertinent to note that one of the reliefs claimed in the suit pertained to BD Estate, which dealt with the MOS. The prayer made in that behalf reads as follows:-

“(vii) Issue an order of Permanent Injunction restraining the Defendants from interfering in the peaceful possession of the Plaintiffs over entire Ground Floor & Barsati Floor of the said House Property bearing No.20, Banarsi Dass Estate, Lucknow Road, Delhi (subject to life interest of the Defendant No. 1 in terms of the WILL dated 14.08.1986 of Late Sh. Harbans Lal Jain);”

18. Furthermore, as is evident, upon perusal of the record the rights of signatories to the MOS, which included late Satish Jain, the husband of petitioner No.1 and father of late Nikhil Jain and petitioner No.3 as also respondent No.2/Madan Lal Jain are embedded in the MOS. As a matter of fact, as noted by the learned Arbitrator, the Will for whatever it was worth, in fact, did refer to the MOS and sought to revoke the same. The learned Arbitrator, apart from other material, took this factor into account a swell to form a view that the MOS was a genuine document.

19. Thus, having regard to the state of pleadings and the evidence placed before the learned Arbitrator, notwithstanding the fact that respondent No.3/Ashok Jain both in the written statement filed in CS(OS) No. 1579/2009 and in the reply filed to OMP No. 541/2009 had not adverted to the same, gave the learned Arbitrator, in my opinion, the jurisdiction to rule upon the existence, the genuineness and/ or legal validity of the MOS.

20. Thus, for the foregoing reasons, I find no good reason to interdict the impugned interim Award. The petition is, accordingly, dismissed.

(RAJIV SHAKDHER)
JUDGE

MAY 10, 2019
VKR



न्यायमेव जयते