

HIGH COURT OF CHHATTISGARH AT BILASPUR**Second Appeal No. 180 of 2007**

1. Peelak Ram Goel (died) through LRs. :-

A. Smt. Sawan Bai, Aged about 60 years, W/o Late Peelak Ram Goel.

B. Indrajeet Goel, Aged about 38 years, S/o Late Peelak Ram Goel.

C. Ranjeet Goel, Aged about 32 years, S/o Late Peelak Ram Goel.

D. Chandra Shekhar Goel, Aged about 27 years, S/o Late Peelak Ram Goel.

All R/o Village Sendri, Tahsil and District Bilaspur, Chhattisgarh.

E. Smt. Sangeeta Adil, Aged about 35 years, D/o Late Peelak Ram Goel, W/o Shankar Adil, R/o Village Daldali, Tahsil Masturi, Distt. Bilaspur, Chhattisgarh.

F. Smt. Reena Koshle, Aged about 24 years, D/o Late Peelak Ram Goel, W/o Shiv Kumar Koshle, R/o Village Kesla, Tahsil Bilha, District Bilaspur, Chhattisgarh.

---Appellants/LRs. Of Defendant No. 4

Versus

1. Jaysu, S/o Chhatlal, Aged about 27 years.

2. Dharam Lal S/o Chhotelal, Aged about 19 years.

Both are R/o Village Ramtala, Tahsil and District Bilaspur, Chhattisgarh.

--- Plaintiffs

3. Sona Bai D/o Sukham Rohidas, Presently residing at village Salka, Tahsil and District Bilaspur, Chhattisgarh. **--- Defendant No. 1**

4. Atal Shrivastava, S/o J.P. Shrivastava, R/o Tilaknagar, Bilaspur, Tahsil and District Bilaspur, Chhattisgarh. **--- Defendant No. 2**

5. State of Chhattisgarh, Through the Collector, Bilaspur, District Bilaspur, Chhattisgarh.

-- Defendant No. 3

--- Respondents

For Appellant	:-
	Mr. Ravindra Agrawal, Advocate
For Respondent No. 1	:-
	Mrs. Renu Kochar, Advocate
For Respondent No. 2	:-
	Mr. Akhtar Hussain, Advocate
For Respondent No. 3/State	:-
	Mr. Akash Pandey, Panel Lawyer

Hon'ble Shri Justice Sanjay K. Agrawal

Judgment on Board

23/01/2020

1. This second appeal preferred by the appellant/defendant No. 4 was admitted for hearing on the following substantial question of law :-

"Whether the lower appellate Court was justified in holding that decree dated 21/7/97 was genuine and last Will executed by the deceased Agashia Bai ?"

(For the sake of convenience, parties would be referred hereinafter as per their status and ranking shown in the suit before the trial Court.)

2. Suit land admeasuring 4.09 acres in total situated at Village Ramtala, Bilaspur was held by Agashia Bai and her daughter Sona Bai. The two plaintiffs – Jaysu and Dharam Lal brought a suit on 11/05/2001 for declaration of title and partition stating *inter alia* that the suit land was originally held by Agashia Bai, who prior to her death on 31/01/1999, executed a Will dated 21/07/1997 (Ex. P/1) in favour of the plaintiffs and alienated half of the suit land in their favour. During the pendency of the suit, defendant No. 1 – Sona Bai sold some part of the suit land in favour of one Peelak Ram Goel by registered sale deed dated 17/03/2003, who was later added as a party/defendant No. 4 to the suit at the instance of the plaintiffs by order dated 25/06/2003 passed by the trial Court.

3. Defendant No. 1 filed his written statement denying the Will dated 21/07/1997 (Ex. P/1) executed by Agashia Bai in favour of the plaintiffs branding it as a suspicious document and prayed for dismissal of the suit. Defendant No. 4, the subsequent purchaser, also filed his written statement stating that he has purchased part of the suit land from Sona Bai by registered

sale deed dated 17/03/2003 and his name has duly been recorded in the revenue records and the appeal of the plaintiffs has been dismissed by the Sub-divisional Officer and the Collector, as such, plaintiffs are not entitled for any declaration and partition.

4. Learned trial Court, upon consideration of oral and documentary evidence on record, declined to accept the Will dated 21/07/1997 (Ex. P/1) executed by Agashia Bai in favour of the plaintiffs and ultimately, vide its judgment and decree dated 30/12/2005, dismissed the suit against which the plaintiffs preferred an appeal under Section 96 of the CPC wherein learned first appellate Court interfered with the judgment and decree of the trial Court and allowed the appeal of the plaintiffs by accepting the Will (Ex. P/1). Assailing the judgment and decree of the first appellate Court, this second appeal under Section 100 of the CPC has been preferred by the appellant/defendant No. 4 in which substantial question of law has been formulated and set out in the opening paragraph of this judgment.

5. Mr. Ravindra Agrawal, learned counsel for the appellant/defendant No. 4 (now, his LRs.) would

submit that the first appellate Court is absolutely unjustified in holding that execution and attestation of the Will (Ex. P/1) has been proved in accordance with law though both the attesting witnesses namely Pirit Ram (P.W. 3) and Shyam Sunder (P.W. 5) have been examined before the trial Court and by their statements, it is quite clear that the Will is not duly proved in accordance with Section 63(c) of the Succession Act, 1925 read with Section 68 of the Evidence Act, 1872, as such, the second appeal deserves to be allowed by setting aside the impugned judgment and decree passed by the first appellate Court.

6. Mrs. Renu Kochar and Mr. Akhtar Hussain, learned counsel for respondent/plaintiff No. 1 and respondent/plaintiff No. 2 respectively, would submit that the suit land was transferred by defendant No. 1 Sona Bai in favour of defendant No. 4 during the pendency of the suit and though defendant No. 4 had been added as a party/defendant to the suit at the instance of the plaintiffs by order dated 25/06/2003, but since defendant No. 1 did not prefer an appeal against the judgment and decree of the first appellate Court, therefore, it has become final

and defendant No. 4 has no right to prefer an appeal before this Court under Section 100 of the CPC and the appeal itself is not maintainable and deserves to be dismissed. In alternative, learned counsel for the respondents/plaintiffs submit that if the appeal is found to be maintainable, even then, the execution and attestation of the Will (Ex. P/1) has duly been proved in accordance with law and no exception can be taken on the execution and attestation of the Will, as has been found established by learned first appellate Court. Therefore, the second appeal is liable to be dismissed being non-maintainable and if otherwise, on merits.

7. I have heard learned counsel for the parties, considered their rival submissions made hereinabove and went through the records with utmost circumspection.

8. Firstly, the objection raised by learned counsel for respondents/plaintiffs with regard to the maintainability of the appeal is being considered. True it is that the suit land was transferred by defendant No. 1 Sona Bai in favour of defendant No. 4 during the pendency of the suit by registered sale deed dated 17/03/2003,

but at the same time, he was impleaded as a party/defendant in the suit at the instance of the plaintiffs by order dated 25/06/2003 passed by the trial Court, as such, Section 52 of the Transfer of Property Act, 1882 would attract. The question is as to what would be the effect of *lis pendens* ?

9. The Supreme Court, in the matter of **A. Nawab John and Ors. v. V.N. Subramaniam**¹, has clearly held that the effect of Section 52 of the Transfer of Property Act is not to render transfers effected during the pendency of a suit by a party to the suit void; but only to render such transfers subservient to the rights of the parties to such suit, as may be, eventually, determined in the suit. In other words, the transfer remains valid subject, of course, to the result of the suit. The *pendente lite* purchaser would be entitled to or suffer the same legal rights and obligations of his vendor as may be eventually determined by the Court.

10. In the matter of **Raj Kumar v. Sardari Lal and Ors.**², the doctrine of *lis pendens* and the rights and obligations of the transferee *pendente lite*

¹ (2012) 7 SCC 738

² (2004) 2 SCC 601

have been explained by their Lordships of the Supreme Court in paragraph 5 of the report which states as under :-

"5. The doctrine of *lis pendens* expressed in the maxim 'at *lite pender nihil innovetur*' (during a litigation nothing new should be introduced) has been statutorily incorporated in [Section 52](#) of the Transfer of Property Act 1882. A defendant cannot, by alienating property during the pendency of litigation, venture into depriving the successful plaintiff of the fruits of the decree. The transferee *pendente lite* is treated in the eye of the law as a representative-in-interest of the judgment-debtor and held bound by the decree passed against the judgment-debtor though neither has the defendant chosen to bring the transferee on record by apprising his opponent and the Court of the transfer made by him nor has the transferee chosen to come on record by taking recourse to Order 22 Rule 10 CPC. In case of an assignment creation or devolution of any interest during the pendency of any suit, Order 22 Rule 10 CPC confers a discretion on the Court hearing the suit to grant leave for the person in or upon whom such interest has come to vest or devolve to be brought on record. Bringing of a *lis pendens* transferee on record is not as of right but in the discretion of the Court. Though not brought on record the *lis pendens* transferee remains bound by the decree."

11. Thereafter, in paragraph 13, their Lordships have held that the *lis pendens* transferee though not having been joined in the suit as a party. Such a person can prefer an appeal being a person aggrieved and he is liable to be proceeded against in execution of the decree, he can file

an appeal against the decree though not a party to the suit or decree.

12. Similarly, in a recent decision rendered in the matter of Madhukar Nivrutti Jagtap and Ors. v. Smt. Pramilabai Chandulal Parandekar and Ors.³, the Supreme Court has relied upon the earlier decisions including A. Nawab John (supra) and has held that the effect of doctrine of *lis pendens* is not to annul all the transfers effected by the parties to a suit but only to render them subservient to the rights of the parties under the decree or order which may be made in that suit. Its effect is only to make the decree passed in the suit binding on the transferee, i.e. the subsequent purchaser. Nevertheless, the transfer remains valid subject, of course, to the result of the suit. Paragraph 51 of the report states as under :-

“Hence, the effect of Section 52 *ibid.*, for the purpose of the present case would only be that the said sale transactions in favour of the appellants shall have no adverse effect on the rights of the plaintiffs and shall remain subject to the final outcome of the suit in question. However, the High Court, while holding that the said transactions were hit by *lis pendens*, has proceeded to observe further that the sale deeds so made in favour of the present appellants were illegal. These

further observations by the High Court cannot be approved for the reasons foregoing. "

13. Thus, from the aforesaid pronouncements of the Supreme Court, it is quite vivid that the effect of the doctrine of *lis pendens* by the transfer of the suit land during the pendency of the suit (Section 52 of the Transfer of Property Act would attract) but it would not have the effect to annul the transfer so made by the party to the suit, but would be bound by decree which may be ultimately passed by the Court in the suit and the transfer so made would remain valid subject to the outcome of the suit and the transferee *pendente lite* can prefer an appeal as the decree is said to be executed against him. Therefore, the objection raised by learned counsel for the respondents/plaintiffs that the appellant/defendant No. 4 being the transferee *pendente lite* cannot prefer an appeal against the judgment and decree of the first appellate Court deserves to be and is accordingly rejected and the appeal is thus, held to be maintainable.

14. Now, coming to the substantial question of law. Plaintiffs have relied upon the Will deed dated 21/7/97 (Ex. P/1) executed by deceased Agashia

Bai in their favour which is said to have been attested by two witnesses namely Pirit Ram (P.W. 3) and Shyam Sunder (P.W. 5). The short question for consideration would be whether execution and attestation of the Will (Ex. P/1) by Agashia Bai in favour of the plaintiffs has been proved and established by the plaintiffs in view of the provisions contained under Section 63(c) of the Succession Act read with Section 68 of the Evidence Act ?

15. It is trite law that a will as an instrument of testamentary disposition of property being a legally acknowledged mode of bequeathing a testator's acquisitions during his lifetime, to be acted upon only on his/her demise, it is no longer *res integra*, that it carries with it an overwhelming element of sanctity. [See **Jagdish Chand Sharma v. Narain Singh Saini (Dead) through Legal Representatives and others**⁴.]

16. In order to consider the plea raised at the bar, it would be appropriate to notice Section 63 of the Indian Succession Act, 1925 and Section 68 of the Evidence Act, 1872.

17. Section 63 of the Act of 1925 provides as under:-

4(2015) 8 SCC 615

"63. Execution of unprivileged Wills.—

Every testator, not being a soldier employed in an expedition or engaged in actual warfare, or an airman so employed or engaged, or a mariner at sea, shall execute his will according to the following rules:-

(a) The testator shall sign or shall affix his mark to the Will, or it shall be signed by some other person in his presence and by his direction.

(b) The signature or mark of the testator, or the signature of the person signing for him, shall be so placed that it shall appear that it was intended thereby to give effect to the writing as a will.

(c) The will shall be attested by two or more witnesses, each of whom has seen the testator sign or affix his mark to the Will or has seen some other person sign the Will, in the presence and by the direction of the testator, or has received from the testator a personal acknowledgement of his signature or mark, or of the signature of such other person; and each of the witnesses shall sign the Will in the presence of the testator, but it shall not be necessary that more than one witness be present at the same time, and no particular form of attestation shall be necessary."

18. As per the provisions of Section 63 of the Succession Act, 1925 for due execution of a will

(1) the testator should sign or affix his mark to the will; (2) the signature or the mark of the testator should be so placed that it should appear that it was intended thereby to give effect to the writing as a will; (3) the will should be attested by two or more witnesses; and

(4) each of the said witnesses must have seen the testator signing or affixing his mark to the will and each of them should sign the will in the presence of the testator.

19. The above-stated provision of attestation of will under Section 63(c) of the Succession Act, 1925 by two or more witnesses has been held to be mandatory by Their Lordships of the Supreme Court in the matter of Janki Narayan Bhoir v. Narayan Namdeo Kadam⁵.

20. Section 68 of the Evidence Act, 1872 provides as under:-

"68. Proof of execution of document required by law to be attested.—If a document is required by law to be attested, it shall not be used as evidence until one attesting witness at least has been called for the purpose of proving its execution, if there be an attesting witness alive, and subject to the process of the Court and capable of giving evidence:

Provided that it shall be necessary to call an attesting witness in proof of the execution of any document, not being a Will, which has been registered in accordance with the provisions of the Indian Registration Act, 1908 (16 of 1908), unless its execution by the person by whom it purports to have been executed is specifically denied."

21. By the aforesaid provision, a document required by law to be attested to have its execution

proved by at least one of the attesting witnesses if alive and it is subject to process of the court conducting the proceedings involved and is capable of giving evidence. However, proviso to Section 68 of the Evidence Act, 1872 is not available in case of will.

22. In the matter of Girja Datt Singh v. Gangotri Datt Singh⁶, Their Lordships of the Supreme Court have held that in order to prove the due attestation of will, the propounder of will has to prove that 'A' and 'B', the two witnesses saw the testator sign the will and they themselves signed the same in the presence of the testator. Their Lordships while considering Section 68 of the Evidence Act, 1872 further held that from the mere signature of two persons appearing at the foot of the endorsement of registration of will it cannot be presumed that they had appended their signature to the document as an attesting witness or can be construed to have done so in their capacity as attesting witness. It was pertinently observed as under:-

"In order to prove the due attestation of the will Ex. A-36 Gangotri would have to prove that Uma Dutt Singh and Badri Singh saw the deceased sign the will and they

themselves signed the same in the presence of the deceased. The evidence of Uma Dutt Singh and Badri Singh is not such as to carry conviction in the mind of the Court that they saw the deceased sign the will and each of them appended his signature to the will in the presence of the deceased. They have been demonstrated to be witnesses who had no regard for truth and were ready and willing to oblige Gur Charan Lal in transferring the venue of the execution and attestation of the documents Ex. A-23 and Ex. A-36 from Gonda to Tarabganj for reasons best known to themselves."

"One could not presume from the mere signature of Mahadeo Pershad and Nageshur appearing at the foot of the endorsement of registration that they had appended their signatures to the document as attesting witnesses or can be construed to have done so in their capacity as attesting witnesses. Section 68, Indian Evidence Act requires an attesting witness to be called as a witness to prove the due execution and attestation of the will. This provision should have been complied with in order that Mahadeo Pershad and Nageshur be treated as attesting witnesses. This line of argument therefore cannot help Gangotri."

23. In the matter of H. Venkatchala Iyengar v. B. N.

Thimmajamma and others⁷ the Supreme Court speaking through Gajendragadkar, J., elaborately laid down the principles relating to the nature and standard of evidence required to prove a will. It was held as under:-

"(1) Stated generally, a will has to be proved like any other document, the test

to be applied being the usual test of the satisfaction of the prudent mind in such matters. As in the case of proof of other documents, so in the case of proof of wills, one cannot insist on proof with mathematical certainty.

(2) Since [Section 63](#) of the Succession Act requires a will to be attested, it cannot be used as evidence until, as required by [Section 63](#) of the Evidence Act, one attesting witness at least has been called for the purpose of proving its execution, if there be an attesting witness alive, and subject to the process of the court and capable of giving evidence.

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

(4) Cases in which the execution of the will is surrounded by suspicious circumstances stand on a different footing. A shaky signature, a feeble mind, an unfair and unjust disposition of property, the propounder himself taking a leading part in the making of the will under which he receives a substantial benefit and such other circumstances raise suspicion about the execution of the will. That suspicion cannot be removed by the mere assertion of the propounder that the will bears the signature of the testator or that the testator was in a sound and disposing state of mind and memory at the time when the will was made, or that those like the wife and children of the testator who

would normally receive their due share in his estate were disinherited because the testator might have had his own reasons for excluding them. The presence of suspicious circumstances makes the initial onus heavier and therefore, in cases where the circumstances attendant upon the execution of the will excite the suspicion of the court, the propounder must remove all legitimate suspicions before the document can be accepted as the last will of the testator.

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

(6) If a caveator alleges fraud, undue influence, coercion, etc. in regard to the execution of the will, such pleas have to be proved by him, but even in the absence of such pleas, the very circumstances surrounding the execution of the will may raise a doubt as to whether the testator was acting of his own free will. And then it is a part of the initial onus of the propounder to remove all reasonable doubts in the matter."

24. The principle laid down in the above-stated judgment has been followed with approval in Smt. Jaswant Kaur v. Smt Amrit Kaur and others⁸, Surendra Pal and others v. Dr. (Mrs.) Saraswati

Arora and another⁹, Yumnam Ongbi Tampha Ibema Devi v. Yumnam Joykumar Singh and others¹⁰ and Jagdish Chandra Sharma (supra).

25. In the matter of Ramesh Verma (dead) Through Legal Representatives v. Lajesh Saxena (dead) by Legal Representatives and another¹¹, the Supreme Court has again reiterated the need of proving the attestation of will in accordance with Section 63(c) of the Succession Act, 1925 read with Section 68 of the Evidence Act, 1872.

26. In Surendra Pal (supra), the Supreme Court while re-stating the guidelines regarding the nature and extent of burden of proof on the propounder of a will held that propounder has to show that the will was signed by the testator; that he was at the relevant time in a sound disposing state of mind; that he understood the nature and effect of the dispositions; that he put his signature to the testament of his own free will; and that he has signed it in the presence of the two witnesses who attested it in his presence and in the presence of each other. Once these elements are established, the onus which rests on the

9(1974) 2 SCC 600

10(2009) 4 SCC 780

11(2017) 1 SCC 257

propounder is discharged. It was further held that in cases where the propounder has himself taken a prominent part in execution of a will which confers on him substantial benefit that is itself one of the suspicious circumstances which he must remove by clear and satisfactory evidence.

27. The Supreme Court in Yumnam Ongbi Tampha Ibema Devi (supra) has clearly held that the attestation of will is not an empty formality. Highlighting the importance of attestation of Will it was held it means signing a document for the purpose of testifying of the signatures of the executant. The attesting witness should put his signature on the will *animo attestandi* and it was held as under:-

"13. Therefore, having regard to the provisions of Section 68 of the Evidence Act and Section 63 of the Succession Act, a will to be valid should be attested by two or more witnesses in the manner provided therein and the propounder thereof should examine one attesting witness to prove the will. The attesting witness should speak not only about the testator's signature or affixing his mark to the will but also that each of the witnesses had signed the will in the presence of the testator."

28. In Janki Narayan Bhoir (supra), the Supreme Court while considering Section 63(c) of Succession

Act, 1925 and Section 68 of the Evidence Act, 1872 held that mere proof of signature of the testator on the will was not sufficient, the attestation thereof is also to be proved as required by Section 63(c) of the Act Succession Act, 1925. It was observed as under : -

"10. Section 68 of the Evidence Act speaks of as to how a document required by law to be attested can be proved. According to the said Section, a document required by law to be attested shall not be used as evidence until one attesting witness at least has been called for the purpose of proving its execution, if there be an attesting witness alive, and subject to the process of the Court and capable of giving an evidence. It flows from this Section that if there be an attesting witness alive capable of giving evidence and subject to the process of the Court, has to be necessarily examined before the document required by law to be attested can be used in an evidence. On a combined reading of Section 63 of the Succession Act with Section 68 of the Evidence Act, it appears that a person propounding the will has got to prove that the will was duly and validly executed. That cannot be done by simply proving that the signature on the will was that of the testator but must also prove that attestations were also made properly as required by Clause (c) of Section 63 of the Succession Act. It is true that Section 68 of Evidence Act not say that both or all the attesting witnesses must be examined. But at least one attesting witness has to be called for proving due execution of the Will as envisaged in Section 63 although Section 63 of the Succession Act requires that a will has to be attested at least by two witnesses, Section 68 of

the Evidence Act provides that a document, which is required by law to be attested, shall not be used as evidence until one attesting witness at least has been examined for the purpose of proving its due execution if such witness is alive and capable of giving evidence and subject to the process of the Court. In a way, Section 68 gives a concession to those who want to prove and establish a will in a Court of law by examining at least one attesting witness even though will has to be attested at least by two witnesses mandatorily under Section 63 of the Succession Act. But what is significant and to be noted is that that one attesting witness examined should be in a position to prove the execution of a will. To put in other words, if one attesting witness can prove execution of the will in terms of Clause (c) of Section 63, viz., attestation by two attesting witnesses in the manner contemplated therein, the examination of other attesting witness can be dispensed with. The one attesting witness examined, in his evidence has to satisfy the attention of a will by him and the other attesting witness in order to prove there was due execution of the will. If the attesting witness examined besides his attestation does not, in his evidence, satisfy the requirements of attention of the will by other witness also it falls short of attestation of will at least by two witnesses for the simple reason that the *execution of the will* does not merely mean the signing of it by the testator but it means fulfilling and proof of all the formalities required under Section 63 of the Succession Act. Where one attesting witness examined to prove the will under Section 68 of the Evidence Act fails to prove the due execution of the will then the other available attesting witness has to be called to supplement his evidence to make it complete in all respects. Where one attesting witness is examined and he fails to prove the

attestation of the will by the other witness there will be deficiency in meeting the mandatory requirements of Section 68 of the Evidence Act."

29. The principle of law laid down in Janki Narayan

Bhoir (supra) has been followed with approval in

Jagdish Chandra Sharma (supra) by which it was

held as under:-

"52. While dwelling on the respective prescripts of Section 63 of the Act and Sections 68 and 71 of Act 1872 vis-à-vis a document required by law to be compulsorily attested, it was held Janki Narayan Bhoir (supra) that if an attesting witness is alive and is capable of giving evidence and is subject to the process of the Court, he/she has to be necessarily examined before such document can be used in evidence. It was expounded that on a combined reading of Section 63 of the Act and Section 68 of the 1872 Act, it was apparent that mere proof of signature of the testator on the Will was not sufficient and that attestation thereof was also to be proved as required by Section 63 (c) of the Act. It was, however, emphasised that though Section 68 of the 1872 Act permits proof of a document compulsorily required to be attested by one attesting witness, he/she should be in a position to prove the execution thereof and if it is a Will, in terms of Section 63 (c) of the Act, viz., attestation by two attesting witnesses in the manner as contemplated therein. It was expounded that if the attesting witness examined besides his attestation does not prove the requirement of the attestation of the Will by the other witness, his testimony would fall short of attestation of the Will by at least two witnesses for the simple reason that the execution of the Will does not merely mean signing of it

by the testator but connotes fulfilling the proof of all formalities required Under Section 63 of the Act. It was held that where the attesting witness examined to prove the Will Under Section 68 of 1872 Act fails to prove the due execution of the Will, then the other available attesting witness has to be called to supplement his evidence to make it complete in all respects."

30. Similarly, in Gopal Swaroop (supra), it has been held as under: -

"21. That brings us to the third requirement, namely, that the will must be attested by two or more witnesses each of whom has seen the testator signing and affixing his mark to the will or has seen some other person signing in the presence and by the direction of the testator. ..."

31. Reverting to the facts of the present case in light of the principle of law rendered by their Lordships of the Supreme Court in the above-noted judgments *qua* execution and attestation of Will by a testator, the following factual position would emerge on the face of the record :-

(a). Testatrix Agashia Bai is said to have executed a registered Will in respect of her property in favour of both the plaintiffs namely, Jaysu and Dharam Lal on 21/07/1997 vide Ex. P/1.

(b). The Will dated 21/07/1997 is said to be attested by two witnesses namely, Pirit Ram (P.W. 3) and Shyam Sunder (P.W. 5).

32. Pirit Ram (P.W. 3) in his statement filed under Order 18 Rule 4 of the CPC has only stated that in the Will executed by Agashia Bai (Ex. P/1), he has only signed as a witness, nothing further has been stated by him. He has not stated that whether the Will prepared by Agashia Bai was read or explained to him or whether the Will was executed in his presence or in the presence of the other witness Shyam Sunder. He has also not stated whether he signed the Will in the presence of testatrix Agashia Bai. It appears from his statement that he only signed the Will as a witness and not with the intention of attesting the Will which lacks *animo attestandi*. Likewise, in the statement of the other witness Shyam Sunder (P.W. 5), he has stated that Agashia Bai executed the Will 5-8 years prior to the filing of his affidavit for which he has signed as a witness and nothing has been stated as to whether the testatrix Agashia Bai was of sound and disposing mind on the date of making the Will and whether he signed the Will in the presence of Agashia Bai or the other witness Pirit Ram with the intention of attesting the Will. They (both the attesting witnesses) have also not stated as

to whether they have seen Agashia Bai signing the Will, as such, the requirement of Section 63(c) of the Succession Act is totally lacking in the statements made by both the attesting witnesses and particularly, the intention of attesting witnesses i.e. *animo attestandi* is absolutely lacking. In that view of the matter, it cannot be held that the Will dated 21/07/1997 (Ex. P/1) is said to have been proved in accordance with the provisions contained under Section 63(c) of the Succession Act read with Section 68 of the Evidence Act.

33. The submission of learned counsel for the respondents/plaintiffs is not acceptable to the facts of the present case in light of the findings recorded herein-above as it is not a case that both the attesting witnesses and the testatrix have proved the execution and attestation of the Will in accordance with law. In view of the aforesaid analysis, I am unable to hold that the first appellate Court was justified in reversing the judgment and decree of the trial Court and therefore, the substantial question of law is answered in negative, as such, the impugned judgment and decree passed by the first

appellate Court is hereby set aside and that of the trial Court is restored.

34. The second appeal is accordingly allowed leaving the parties to bear their own cost(s).

35. Decree be drawn-up accordingly.

Sd/-
(Sanjay K. Agrawal)
Judge

Harneet