

HIGH COURT OF CHHATTISGARH, BILASPUR**Second Appeal No.151 of 2009**

1. Jhadu (dead) through LR's

- (a) Ramlal Paduri, aged 50 yrs
- (b) Bhagwat Padauri, aged 47 yrs
- (c) Bhagoli Padauri, aged 45 yrs
- (d) Vishnudev, aged 42 yrs
- (e) Sudama Paduari, aged 40 yrs
- (f) Lallu Ram, aged 37 yrs

All r/o : S/o Shri Jhadu Ram Agriculturist, Gram-Bedadi, Tah and Distt-Rajnandgaon

(g) Sunderlal Paduri (Dead) S/o Shri Jhadu Ram Through Legal representative

- (i) Vijay Kumar, aged 55 yrs
- (ii) Suresh Kumar, aged 53 yrs
- (iii) Dharmendra, aged 50 yrs

All r/o: S/o Shri Sunderlal Agriculturist, Gram-Bedadi, Distt-Rajnandgaon

(h) Nagin Bai, aged 40 yrs w/o shri Rajjulal Mandavi
r/o: Kadkasa, PO: Amatola, Thana-Chouki, Distt-Rajnandgaon

2.(a) Temin Bai, aged 33 yrs d/o Amar Singh r/o Gram-Khuta Churia Tah-Distt : Rajnandgaon

(b) Jamuna Bai, aged 32 yrs w/o Ramlal r/o Gram-Khuta Churia Tah-Distt: Rajnandgaon

(c) Jam Bai w/o Lekhram aged 30 yrs, Gram-Devegondi Tah-Distt: Rajnandgaon

(d) Manbai w/o Mritram (Dead) aged 30 yrs r/o Kohka Dhaba Dongargaon Tah-Distt: Rajnandgaon

(e) Dashmat Bai w/o Hridyalal aged 35 yrs r/o Gram-Koshkadhaha Dongargaon Tah-Distt: Rajnandgaon

(ee) Manbha Bai w/o Dwarika aged 22 yrs r/o Gram-Pinkapar: Chhuria Tah-Distt: Rajnandgaon

(f) Smt.Roopkunwar Bai w/o Amar Singh, aged 60 yrs r/o Gram-Khuta Churia Tah-Distt: Rajnandgaon

----- Appellants/Defendants**Versus**

1. Virendra Bahadur Singh aged 38 yrs
2. Suresh Bahadur Singh aged 28 yrs
3. Narendra Bahadur Singh aged 27 yrs (Dead)
 - (a) Smt. Madhu Singh Aged 45 yrs, w/o Narendra Bahadur Singh
 - (b) Abhishek Singh aged 22 yrs, s/o Narendra Bahadur Singh
 - (c) Vivek Singh aged 18 yrs s/o Narendra Bahadur Singh
 - (d) Ku. Neha d/o Narendra Bahadur Singh, aged 20 yrs
4. Gajendra Bahadur Singh aged 26 yrs (Dead)
 - (a) Smt. Usha Singh aged 35 yrs, wd/o Gajendra Bahadur Singh
 - (b) Ku. Shweta Singh aged 12 yrs Gajendra Bahadur Singh
 - (c) Ku. Smita Singh aged 09 yrs Gajendra Bahadur Singh

b and c are minors represented through mother : all r/o : Jaistambha Chouk Rajnandgaon CG
5. Rajendra Bahadur Singh aged 25 yrs
6. Devendra Bahadur Singh aged 20 yrs

no. 1 to 6 are s/o Shri Baleshwar Singh all r/o: Gram-Aamgaon, Tah-Distt: Rajnandgaon
7. Smt. Shakun Bai Dr. Dinesh Singh r/o Ghoghar : Distt-Rewa CG

----- Plaintiffs

8. State of CG Through The Collector Distt-Rajnandgaon CG

----- Defendant No.3/Respondent

For Appellants/Defendants:

Mr. Anurag Dayal Shrivastava and
Mr. Abhishek Sharma, Advocates

For Respondents No.1 to 7:

Mr. B. D. Guru and Mr. S. S. Baghel,

Advocates

For Respondent No.8: Mr.Anshuman Rabra, P.L.

Hon'ble Shri Justice Sanjay K. Agrawal

Judgment On Board

6/3/2020

1.The substantial questions of law involved, formulated and to be answered in this second appeal preferred by the appellants/defendants are as under:-

"1. Whether the appellate Court, while reversing the judgment and decree of the trial Court, was justified in holding that the registered will deed dated 30.04.1965 (Ex.P.1) was validly executed in accordance with law by Jugrani Bai in favour of Chhedi Lal, Ayodhya Prasad, Ramdayal, Ramsharan & Ramanand ?

2. Whether legatees are entitled to execute the registered deed of sale dated 23.08.1971 (Ex.P.2) in favour of plaintiff Malti Bai ?"

[For the sake of convenience, the parties would be referred hereinafter as per their status shown and nomenclature in the suit before the trial Court].

2. The suit property was originally held by Jagrani Bai and Rampyare, but Jagrani executed a Will dated 30.4.1965 in the names of Chhedi Lal, Ayodhya Prasad, Ramdayal, Ramsharan & Ramanand and in turn, they sold the suit property to plaintiff Malti Devi by sale deed dated 23.8.1971 (Ex.P-2). Smt.Malti

Devi moved an application for mutation, the defendants objected that they have entered into agreement to sale with Shambhunath Choubey, power of attorney holder of Rampyare, which was rejected and the matter was taken up to the Board of Revenue vide Ex.P-5 holding that Jagrani Bai could not have executed sale deed of the entire property in favour of Chhedi Lal, Ayodhya Prasad, Ramdayal, Ramsharan & Ramanand, leading to filing of the suit by plaintiff-Malti Devi for declaration of title, possession and permanent injunction.

3. The defendants filed their written statement and denied the averments made in the plaint stating inter-alia that they entered into agreement to sale of land with Shambhunath Choubey, who was power of attorney holder of Rampyare and also denied the execution and attestation of Will in favour of those five persons and they claimed that they are in possession of the suit land since 1960 and as such, prayed for dismissal of suit.

4. During the course of trial, certified copy of the Will dated 30.04.1965 was put to evidence, which was objected on behalf of the plaintiff stating inter-alia that it is certified copy of the Will, therefore, no foundation for laying secondary

evidence was made and therefore, it cannot be relied upon and it cannot be marked as exhibit. The trial Court in para-3 of statement of Ravishankar Tiwari (PW-2) recorded the objection reserving to be decided at appropriate time and permitted the said Will to be marked as exhibit and ultimately, it was marked and exhibited and thereafter the trial Court after appreciating the evidence available on record dismissed the suit holding in para-24 that original Will has not been filed, but certified copy of the Will has been filed, however, permission to lead secondary evidence of that document has not been granted holding that Will has not been proved in accordance with Section 63(c) of the Succession Act, 1925 read with Section 68 of the Indian Evidence Act, 1872. On appeal being preferred by the legal representatives of the plaintiff, the first appellate Court reversed the judgment and decree of the trial Court holding that though certified copy of the Will has not been produced, but certified copy has been obtained from the office of the Sub-Registrar and that has been proved by witness of office of Sub-Registrar, as such, Will has been proved in accordance with law. Questioning the judgment and decree of the first appellate Court,

this second appeal under Section 100 of the CPC has been filed by the appellants/defendants, in which substantial questions of law have been formulated by this Court, which have been set-out in the opening paragraph of this judgment.

5. Mr. Anurag Dayal Shrivastava, learned counsel for the appellants/defendants, would submit that certified copy of the Will is a document covered by Section 74 (2) of the Evidence Act and unless foundation is laid for leading secondary evidence of this document under Section 65(f) of the Evidence Act, will was inadmissible in evidence and as such, the first appellate Court has committed gross legal error in relying upon such document reversing the finding of the trial Court without addressing and meeting with the reasonings of the trial Court and as such, finding recorded by the first appellate Court on the said issue deserves to be set aside and consequently, the substantial question of No.2 be answered in favour of the defendants and thereby appeal be allowed by dismissing the suit.

6. Mr. B.D. Guru, learned counsel for the respondents No.1 to 7/plaintiffs, would submit that the first appellate Court is absolutely justified in holding that execution and attestation of Will (Ex.P-1) has

been duly proved by the plaintiffs in accordance with Section 63(c) of the Succession Act read with section 68 of the Evidence Act and as such, both the substantial questions of law be answered in favour of the plaintiffs and against the defendants.

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

Answer to substantial question of law No.1:-

8. It is case of the original plaintiff Malti Devi that Jagrani Bai executed a Will with respect to her property by Will deed dated 30.4.1965 (Ex.P-1) in favour of Chhedi Lal, Ayodhya Prasad, Ramdayal, Ramsharan & Ramanand and transferred the suit land and it was registered on 1.5.1965 and thereafter by sale deed dated 23.8.1971 she has purchased the suit land from Chhedi Lal, Ayodhya Prasad, Ramdayal, Ramsharan & Ramanand and became owner thereof. When she moved an application for mutation, the defendants objected that they have entered into agreement to sale with Shambhunath Choubey, power of attorney holder of Rampyare, which was rejected and the matter was taken up to the Board of Revenue and its decision vide Ex.P-5 leading to filing of the

suit.

9. In order to prove her case, the plaintiff has filed certified copy of the Will obtained from the office of Sub-Registrar and said certified copy of the Will was put in evidence while plaintiff witness No.2 Ravishankar Tiwari (PW-2) was being examined. When the plaintiff tried to mark the said document, objection with regard to non-laying foundation for leading secondary evidence of the Will was raised. On 7.12.90, the trial Court though allowed the document i.e. Will to be marked as exhibit reserving the objection of the plaintiff to be decided at appropriate time and ultimately, while deciding the suit, upheld the objection vide para-24 of its judgment holding that no permission has been granted to lead secondary evidence.

10. It would be appropriate to notice Sections 62, 63, 64, and 65 of the Evidence Act which state as under:-

"62. Primary evidence.—Primary evidence means the document itself produced for the inspection of the Court. Explanation 1.—Where a document is executed in several parts, each part is primary evidence of the document;

Where a document is executed in counterpart, each counterpart being executed by one or some of the parties only, each counterpart is primary evidence as against the parties executing it.

Explanation 2.—Where a number of

documents are all made by one uniform process, as in the case of printing, lithography, or photography, each is primary evidence of the contents of the rest; but, where they are all copies of a common original, they are not primary evidence of the contents of the original.

63. Secondary evidence.—Secondary evidence means and includes—

- (1) certified copies given under the provisions hereinafter contained;
- (2) copies made from the original by mechanical processes which in themselves insure the accuracy of the copy, and copies compared with such copies;
- (3) copies made from or compared with the original;
- (4) counterparts of documents as against the parties who did not execute them;
- (5) oral accounts of the contents of a document given by some person who has himself seen it.

64. Proof of documents by primary evidence.—Documents must be proved by primary evidence except in the cases hereinafter mentioned.

65. Cases in which secondary evidence relating to documents may be given.—Secondary evidence may be given of the existence, condition, or contents of a document in the following cases:—

- (a) When the original is shown or appears to be in the possession or power—
of the person against whom the document is sought to be proved, or of any person out of reach of, or not subject to, the process of the Court, or
of any person legally bound to produce it, and when, after the notice mentioned in section 66, such person does not produce it;
- (b) when the existence, condition or contents of the original have been proved to be admitted in writing by the person against whom it is proved or by his representative in interest;
- (c) when the original has been destroyed or

lost, or when the party offering evidence of its contents cannot, for any other reason not arising from his own default or neglect, produce it in reasonable time;

(d) when the original is of such a nature as not to be easily movable;

(e) when the original is a public document within the meaning of section 74;

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

(g) when the originals consists of numerous accounts or other documents which cannot conveniently be examined in Court, and the fact to be proved is the general result of the whole collection.

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

In case (b), the written admission is admissible.

In case (e) or (f), a certified copy of the document, but no other kind of secondary evidence, is admissible.

In case (g), evidence may be given as to the general result of the documents by any person who has examined them, and who is skilled in the examination of such documents."

- 11.** Section 61 of the Indian Evidence Act, 1872 (for short, 'the Evidence Act') provides for proof of contents of documents and the contents of documents may be proved either by primary or by secondary evidence. Section 62 of the Evidence Act states that primary evidence means the document itself produced for the inspection of the Court. Secondary evidence, as a general rule is admissible only in the absence of primary evidence and secondary evidence has been defined in Section 63 of the

Evidence Act. Essentially, secondary evidence is an evidence which may be given in the absence of that better evidence which law requires to be given first, when a proper explanation of its absence is given. The definition in Section 63 is exhaustive as the section declares that secondary evidence "means and includes" and then follow the five kinds of secondary evidence. Section 64 of the Evidence Act provides that documents must be proved by primary evidence except in the cases mentioned in Section 65. Section 65, however permits secondary evidence to be given of the existence, condition or contents of documents under the seven exceptional cases in which secondary evidence is admissible. The conditions laid down in the said section must be fulfilled before secondary evidence can be admitted. Secondary evidence of the contents of a document cannot be admitted without non-production of the original being first accounted for in such a manner as to bring it within one or other of the cases provided for in the section. (See J. Yashoda v. K. Shobha Rani.)¹

12. It is well settled law that foundation must be first laid for reception of secondary evidence.

1(2007) 5 SCC 730

13. In the matter of H. Siddiqui (Dead) by LRs. v.

A. Ramalingam², their Lordships of the Supreme Court have laid down the principles of law regarding granting of secondary evidence as under:-

"12. The provisions of Section 65 of the 1872 Act provide for permitting the parties to adduce secondary evidence. However, such a course is subject to a large number of limitations. In a case where the original documents are not produced at any time, nor has any factual foundation been laid for giving secondary evidence, it is not permissible for the court to allow a party to adduce secondary evidence. Thus, secondary evidence relating to the contents of a document is inadmissible, until the non-production of the original is accounted for, so as to bring it within one or other of the cases provided for in the section. The secondary evidence must be authenticated by foundational evidence that the alleged copy is in fact a true copy of the original. Mere admission of a document in evidence does not amount to its proof. Therefore, the documentary evidence is required to be proved in accordance with law. The court has an obligation to decide the question of admissibility of a document in secondary evidence before making endorsement thereon. (Vide *Roman Catholic Mission v. State of Madras*³, *State of Rajasthan v. Khemraj*⁴, *LIC v. Ram Pal Singh Bisen*⁵ and *M. Chandra v. M. Thangamuthu*⁶.) "

14. Similarly, in the matter of Kaliya v. State of

Madhya Pradesh⁷, the Supreme Court has held that the party has to lay down the factual foundation to

2(2011) 4 SCC 240

3 AIR 1966 SC 1457

4(2000) 9 SCC 241

5(2010) 4 SCC 491

6(2010) 9 SCC 712

7(2013) 10 SCC 758

establish the right to give secondary evidence where the original document cannot be produced and held as under: -

"13. Section 65(c) of the 1872 Act provides that secondary evidence can be adduced relating to a document when the original has been destroyed or lost, or when the party offering evidence of its contents cannot, for any other reason, not arising from his own default, or neglect, produce it in reasonable time. The court is obliged to examine the probative value of documents produced in the court or their contents and decide the question of admissibility of a document in secondary evidence. (Vide *H. Siddiqui v. A. Ramalingam* (supra) and *Rasiklal Manikchand Dhariwal v. M.S.S. Food Products*⁸.) However, the secondary evidence of an ordinary document is admissible only and only when the party desirous of admitting it has proved before the court that it was not in his possession or control of it and further, that he has done what could be done to procure the production of it. Thus, the party has to account for the non-production in one of the ways indicated in the section. The party further has to lay down the factual foundation to establish the right to give secondary evidence where the original document cannot be produced. When the party gives in evidence a certified copy/secondary evidence without proving the circumstances entitling him to give secondary evidence, the opposite party must raise an objection at the time of admission. In case, an objection is not raised at that point of time, it is precluded from being raised at a belated stage. Further, mere admission of a document in evidence does not amount to its proof. Nor mere marking of exhibit on a document does not dispense with its proof, which is otherwise required to be done in accordance with law. (Vide *Roman Catholic Mission v. State of Madras* (supra), *Marwari*

*Khumhar v. Bhagwanpuri Guru Ganeshpuri*⁹,
R.V.E. Venkatachala Gounder v. Arulmigu
*Viswesaraswami and V.P. Temple*¹⁰, *Dayamathi*
*Bai v. K.M. Shaffi*¹¹ and *LIC v. Rampal Singh*
Bisen (supra).)"

15. The Supreme Court also in the matter of **Lakhi Baruah and others v. Padma Kanta Kalita and others**¹²

with reference to Section 90 of the Evidence Act has clearly held that foundation having not been laid for admission of secondary evidence under Section 63 by proof of loss or destruction of the original and the copy having not been produced from proper custody, presumption would not be available. It has been observed as under: -

"17. The position since the aforesaid Privy Council decisions being followed by later decisions of different High Courts, is that presumption under Section 90 does not apply to a copy or a certified copy even though thirty years old: but if a foundation is laid for the admission of secondary evidence under Section 63 of the Evidence Act, 1872 by proof of loss or destruction of the original and the copy which is thirty years old is produced from proper custody, then only the signature authenticating the copy may under Section 90 be presumed to be genuine."

16. At this state, it would be appropriate to notice Sections 51, 52, 55, 57 of the Registration Act, 1908 (for short 'the Act of 1908') which state as under:-

9(2000) 6 SCC 735
 10(2003) 8 SCC 752
 11(2004) 7 SCC 107
 12(1996) 8 SCC 357

"51. Register-books to be kept in the several offices.—(1) The following books shall be kept in the several offices hereinafter named, namely:—

A—In all registration offices—

Book 1, "Register of non-testamentary documents relating to immovable property".

Book 2, "Record of reasons for refusal to register".

Book 3, "Register of wills and authorities to adopt", and

Book 4, "Miscellaneous Register".

B—In the offices of Registrars—

Book 5, "Register of deposits of wills".

(2) In Book 1 shall be entered or filed all documents or memoranda registered under sections 17, 18 and 89 which relate to immovable property, and are not wills.

(3) In Book 4 shall be entered all documents registered under clauses (d) and (f) of section 18 which do not relate to immovable property.

(4) Nothing in this section shall be deemed to require more than one set of books where the office of the Registrar has been amalgamated with the office of a Sub-Registrar.

"52. Duties of registering officers when document presented.—(1) (a) The day, hour and place of presentation, the photographs and finger prints affixed under section 32A, and the signature of every person presenting a document for registration, shall be endorsed on every such document at the time of presenting it;

(b) a receipt for such document shall be given by the registering officer to the person presenting the same; and

(c) subject to the provisions contained in section 62, every document admitted to registration shall without unnecessary delay be copied in the book appropriated therefor according to the order of its

admission.

(2) All such books shall be authenticated at such intervals and in such manner as is from time to time prescribed by the Inspector-General.

55. Indexes to be made by registering officers, and their contents.—(1) Four such indexes shall be made in all registration offices, and shall be named, respectively, Index No. I, Index No. II, Index No. III and Index No. IV.

(2) Index No. I shall contain the names and additions of all persons executing and of all persons claiming under every document entered or memorandum filed in Book No. 1.

(3) Index No. II shall contain such particulars mentioned in section 21 relating to every such document and memorandum as the Inspector-General from time to time directs in that behalf.

(4) Index No. III shall contain the names and additions of all persons executing every will and authority entered in Book No. 3, and of the executors and persons respectively appointed thereunder, and after the death of the testator or the donor (but not before) the names and additions of all persons claiming under the same.

(5) Index No. IV shall contain the names and additions of all persons executing and of all persons claiming under every document entered in Book No. 4.

(6) Each Index shall contain such other particulars, and shall be prepared in such form, as the Inspector-General from time to time directs.

57. Registering officers to allow inspection of certain books and indexes, and to give certified copies of entries.—

(1) Subject to the previous payment of the fees payable in that behalf, the Books Nos. 1 and 2 and the Indexes relating to Book No. 1 shall be at all time open to inspection by any person applying to inspect the same; and, subject to the provisions of section 62, copies of entries

in such books shall be given to all persons applying for such copies.

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

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

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

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

17. Sections 74 and 75 of the Evidence Act state as under:-

"74. Public documents.—The following documents are public documents :—

(1) Documents forming the acts, or records of the acts—

(i) of the sovereign authority,
(ii) of official bodies and tribunals, and
(iii) of public officers, legislative, judicial and executive, of any part of India or of the Commonwealth, or of a foreign country;

(2) Public records kept in any State of private documents.

75. Private documents.—All other documents are private."

18. A conjoint reading of the aforesaid provisions would show that certified copy of the registered

document extracted from Book-III is not a public document. It is true copy kept in the office of Sub-Registrar as original document. The registered document returned to the executants by the Registrar after registration is private document and as such, certified copy of the registered document copied from Book-III and issued by Registering Officer is neither public document nor certified copy of a private document but it is a certified copy of a public document covered by Section 74(2) of Evidence Act.

- 19.** The Madhya Pradesh High Court in the matter of **Smt. Rekha Rana and Ors. v. Smt. Ratnashree Jai**¹³ summarized the legal position in this regard as under:-

"18.2 If the person producing the certified copy of a registered instrument, without establishing the existence of any of the grounds under Clause (a), (b) or (c) of Section 65, seeks to mark the certified copy, then it will not be secondary evidence of the original sale deed, but only be secondary evidence of the entries in a public document, that is the entries in Book I in the Registration Office which issued the certified copy. Such certified copy marked without laying foundation for receiving secondary evidence, though admissible for the purpose of proving the contents of the original document, will not be proof of execution of the original document.

19. We may summarize the position thus:

(i) Production and Marking of a certified copy as secondary evidence of a public document under Section 65(e) need not be preceded by laying of any foundation for acceptance of secondary evidence. This is the position even in regard to certified copies of entries in Book I under Registration Act relation to a private document copied therein.

(ii) Production and marking of a certified copy as secondary evidence of a private document (either a registered document like a sale deed or any unregistered document) is permissible only after laying the foundation for acceptance of secondary evidence under clause (a), (b) or (c) of Section 65.

(iii) Production and marking of an original or certified copy of a document does not dispense with the need for proof of execution of the document. Execution has to be proved in a manner known to law (Section 67 and 68 and ensuing sections in chapter V of Evidence Act)."

20. The Supreme Court in the matter of Benga Behera and another v. Braja Kishore Nanda and others¹⁴ held as under:-

"32. In a case of this nature, it was obligatory on the part of the first respondent to establish the loss of the original will beyond all reasonable doubt. His testimony in that behalf remained uncorroborated.

33. Furthermore, secondary evidence, inter alia, could be led by production of a certified copy given in terms of the provisions of the Indian Registration Act. In support of the proof of the will, purported xerox copy and a certified copy thereof have been produced. In the xerox copy, an endorsement has been made by an advocate that the executant was his client and it was written by his clerk in his office on his dictation, whereas in the

14 (2007) 9 SCC 728

certified copy there is no such endorsement of the advocate.

34. A question has also been raised as to whether a certificate by Sub-Registrar at the time of registration proves attestation. A Sub-Registrar in the matter of registration of a document acts under the provisions of the Registration Act, 1908 (the 1908 Act). Section 52 of the 1908 Act prescribes the duty of Registering Officer when a document is presented in terms thereof. The signature of every person presenting a document for registration is required to be endorsed on every such document at the time of presentation. Section 58 prescribes the particulars to be endorsed on documents admitted to registration, such as :

(a) Signature of the person admitting the execution of the document;

(b) Any money or delivery of goods made in presence of Registering Officer in reference to the execution of the document shall be endorsed by the Registering Officer in the document presented for Registration.

Therefore this is the only duty cast on the Registering authority to endorse on the will, i.e. to endorse only the admission or execution by the person who presented the document for registration. The compliance of this provision leads to the legal presumption that the document was registered and nothing else."

21. Reverting to the facts of the present case in light of principles of law laid down by the Supreme Court and the High Court of Madhya Pradesh in the above-stated judgments (supra), it is quite vivid that the plaintiff has simply filed certified copy of the Will which is a document covered within the

meaning of Section 74(2) of the Evidence Act and has not laid any foundation for admission of secondary evidence under Section 63 (c) read with Section 65(f) of the Evidence Act by proof of loss or destruction of the original document. In absence of foundation for leading secondary evidence and despite objection, it has been marked as exhibit at the instance of the plaintiff. It is well settled that mere marking or exhibiting the document party to lis is not dispensed with the proof of document and the Court is at liberty to examine its admissibility in evidence. In view of above, the trial Court rightly held Will (Ex.P-1) to be inadmissible in evidence and same is not duly established. Even otherwise, certified copy (Ex.P-1) of Will does not bear the signature of attesting witness and therefore, signatures of attesting witnesses cannot be identified and therefore, evidence to that extent, to the extent of existence and identification of signature is completely without any basis. The trial Court has clearly recorded in para-24 of the judgment that without laying foundation for leading secondary evidence, certified copy of the Will cannot be taken as secondary evidence under Section 65(f) of the

Evidence Act and as such, the first appellate Court is totally unjustified in reversing the judgment and decree of the trial Court without meeting its reasoning, as such, it is liable to be set aside. The 1st substantial question of law is answered in favour of the defendants and against the plaintiffs.

Answer to substantial question of law No.2:-

22. The plaintiff has failed to prove the due execution and attestation of Will (Ex.P-1) that Jagrani Bai has validly executed the Will in favour of legatees from whom she has purchased by sale deed dated 23.8.1971 (Ex.P-2) and therefore, no valid title was conferred to the plaintiff by sale deed (Ex.P-2) executed by said person in her (plaintiff) favour.
23. As a fallout and consequence of the above-stated discussion, the judgment and decree of the first appellate Court is set aside and that of the trial Court is hereby restored.
24. The second appeal is allowed to the extent indicated hereinabove leaving the parties to bear their own cost(s).
25. Decree be drawn-up accordingly.

Sd/-

(Sanjay K.Agrawal)
Judge