REPORTABLE

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO.9683 OF 2019
(ARISING OUT OF SPECIAL LEAVE PETITION (CIVIL) NO. 26957 OF 2018)

RAJ KUMARI AND OTHERS ..... APPELLANTS

VERSUS

SURINDER PAL SHARMA ..... RESPONDENT

J U D G M E N T

Leave granted.

2. On account of migration to Delhi on partition, Harbans Lal being a displaced person had vide application dated 13.04.1958, marked as Exhibit DW-1/P-3, applied for a two room accommodation at Gur Mandi, Civil Lines, Delhi with the Municipal Corporation of Delhi. This application records that Harbans Lal was a shopkeeper, Suhagwanti was his wife and Madan Lal, Puran Kumari, Surinder Kumar and Baby were his children. Madan Lal was described as being in service and all other children were described as dependants.

3. Harbans Lal died in 1965.

4. On 15.03.1972, Suhagwanti Devi, being the wife of late Harbans Lal, was issued allotment letter for duplex type tenement under the Redevelopment Scheme at Gur-ki-Mandi for Rs. 14,325/-, which amount was payable in 20 equal annual instalments with interest at the rate of 5% per annum and on default, penal interest at the rate of 8% per annum. Collection charges at the rate of 24% were also payable. The allotment letter had a stipulation that the allottee would have to surrender vacant possession of Quarter No. 27 New Padam Chand Land within 3 days. The allotment letter though not a marked Exhibit is an undisputed document.

5. Suhagwanti Devi expired on 10.10.1999.

6. Raj Kumari daughter of Harbans Lal, who by then was married, on or about 15.10.2004 filed a suit for partition of the tenement and decree of declaration that she and the defendants namely Surinder Pal Sharma, Puran Devi née Kumari, and Santosh Rani (widow of Madan Lal who had by then expired), were owners of 1/4th unspecified and undivided share in the tenement. A decree for rendition of accounts and permanent injunction was also prayed for.

7. The suit was contested by Surinder Pal Sharma, who in his written statement had propounded a registered Will dated 02.01.1992,

purportedly executed by Suhagwanti wherein the tenement had been bequeathed solely and absolutely to him. It was stated that husband of Raj Kumari namely Ramesh Kumar was an attesting witness to the Will. Puran Devi and Santosh Rani despite service did not file their written statements. Santosh Rani during the pendency of the suit expired and was represented by her daughter Veena Malhotra. Puran Devi has also expired and is now represented by her daughter Meenakshi Sharma.

8. The trial court vide judgment dated 17.01.2018 passed a preliminary decree of partition *inter alia* holding that the four siblings were entitled to 1/4th share each in the tenement after recording that Surinder Pal Sharma had failed to prove the purported registered Will of Suhagwanti dated 02.01.1992. The judgment held that Surinder Pal Sharma had failed to examine any of the attesting witnesses to the Will as required vide Section 68 of the Evidence Act and therefore, could not prove that Suhagwanti had signed the Will at her free will in a sound disposing state of mind after having understood its contents. It was also held that as per the testimony of Surinder Pal Sharma the Will marked Exhibit DW-1/2 was attested by one witness only and therefore, mandatory requirement of clause (c) to Section 63 of the Indian Succession Act was not satisfied. The trial court

having perused the Will held that Mr. M.N. Sharma, Advocate had signed as a draftsman and counsel and not as an attesting witness. It was observed that mere registration of the Will, as proved by Parveen Kumar Rana, UDC working in the office of Sub-Registrar, Kashmere Gate, who has deposed as DW-3, would not prove the Will.

9. Aggrieved, Surinder Pal Sharma had filed an appeal before the Delhi High Court, bearing RFA No. 234 of 2018, and by the impugned judgment dated 09.03.2018 has succeeded. Consequently, the judgment of the trial court dated 17.01.2018 has been set aside and the suit has been dismissed.

10. The High Court held that the Will was attested by two witnesses namely Ramesh Kumar and Mr. M.N. Sharma, Advocate and thus, satisfies the requirement of clause (c) to Section 63 of the Indian Succession Act. It was also observed that Surinder Pal Sharma had made all efforts to summon the attesting witness Mr. M.N. Sharma, Advocate, through court notices, but he did not appear. In light of Section 71 of the Evidence Act, the Will should be treated as proved as the same was registered and the presumption under Section 114 of the Evidence Act would apply. Accordingly, it should be presumed that the Sub-Registrar, who was holding a public office, had validly carried out the registration after

ascertaining that the Will was attested by the two witnesses including Mr. M.N Sharma, Advocate. Reliance was placed on the judgment of this Court in ***M.B. Ramesh (Dead) by LRs.*** v. ***K.M. Veeraje Urs (Dead) by LRs. and Others***[1] which we shall subsequently advert to. The contention of the first appellant before us, namely Raj Kumari, that Surinder Pal Sharma had forged her signature for obtaining mutation in the Municipal Corporation record was brushed aside observing that at best it would show that the mutation was illegal but this would have no bearing on the question of attestation and validity of the Will.

11. Raj Kumari, Meenakshi Sharma and Veena Malhotra have preferred the present appeal before this Court with a prayer that the preliminary decree of partition passed by the trial court should be restored and the impugned judgment of the High Court dated 09.03.2018 passed in RFA No. 234 of 2018 should be set aside.

12. We would first expound the law relating to the execution and proof of Wills under the Indian Succession Act and the Evidence Act. Clause (c) of Section 63 of the Indian Succession Act reads as follows:

> "**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

[1] (2013) 7 SCC 490

> or engaged, or a mariner at sea, shall execute his will according to the following rules—
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> (a)-(b) * * *
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> (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 acknowledgment 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."

As per the mandate of clause (c), a Will is required to be attested by two or more witnesses each of whom should have seen the testator sign or put his mark on the Will or should have seen some other person sign the Will in his presence and by the direction of the testator or should have received from the testator a personal acknowledgment of his signature or mark, or of the signature of such other person. The Will must be signed by the witness in the presence of the testator, but it is not necessary that more than one witness should be present at the same time. No particular form of attestation is necessary. Thus, there is no prescription in the statute that the testator must necessarily sign the Will in the presence of the attesting witnesses only or that the attesting witnesses must put their signatures on the Will

simultaneously, that is, at the same time, in the presence of each other and the testator.

13. The need and necessity for stringent requirements of clause (c) to Section 63 of the Indian Succession Act has been elucidated and explained in several decisions. In ***H. Venkatachala Iyengar*** v. ***B.N. Thimmajamma and Others.***[2] dilating on the statutory and mandatory requisites for validating the execution of the Will, this Court had highlighted the dissimilarities between the Will which is a testamentary instrument vis-à-vis other documents of conveyancing, by emphasising that the Will is produced before the court after the testator who has departed from the world, cannot say that the Will is his own or it is not the same. This factum introduces an element of solemnity to the decision on the question where the Will propounded is proved as the last Will or testament of the departed testator. Therefore, the propounder to succeed and prove the Will is required to prove by satisfactory evidence that (i) the Will was signed by the testator; (ii) the testator at the time was in a sound and disposing state of mind; (iii) the testator understood the nature and effect of the dispositions; and (iv) that the testator had put his signature on the document of his own free will. Ordinarily, when the evidence adduced in support of the Will is disinterested, satisfactory and sufficient to prove the sound and

[2] AIR 1959 SC 443

disposing state of mind of the testator and his signature as required by law, courts would be justified in making a finding in favour of the propounder. Such evidence would discharge the onus on the propounder to prove the essential facts. At the same time, this Court observed that it is necessary to remove suspicious circumstances surrounding the execution of the Will and therefore no hard and fast or inflexible rules can be laid down for the appreciation of the evidence to this effect.

14. In ***Jaswant Kaur*** v. ***Amrit Kaur and Others***[3], it was held that suspicion generated by disinheritance is not removed by mere assertion of the propounder that the Will bears the signature of the testator or that the testator was in sound and disposing state of mind when the Will disinherits those like the wife and children of the testator who would have normally received their due share in the estate. At the same time, the testator may have his own reasons for excluding them. Therefore, it is obligatory for the propounder to remove all the legitimate suspicions before a Will is accepted as a valid last Will of the testator. Earlier, in ***Surendra Pal and Others.*** v. ***Dr. (Mrs.) Saraswati Arora and Another***[4], this Court had observed that the propounder should demonstrate that the Will was signed by the testator and at the relevant time, the

[3] (1977) 1 SCC 369
[4] (1974) 2 SCC 600

testator was in a sound and disposing state of mind and had understood the nature and effect of the dispositions, that he had put his signature on the testimony of his own free will and at least two witnesses have attested the Will in his presence. However, suspicion may arise where the signature is doubtful or when the testator is of feeble mind or is overawed by powerful minds interested in getting his property or where the disposition appears to be unnatural, improbable and unfair or where there are other reasons to doubt the testator's free will and mind. The nature and quality of proof must commensurate with such essentiality so as to remove any suspicion which a reasonable or prudent man may, in the prevailing circumstances, entertain. Where coercion and fraud are alleged by an objector, the onus is on him to prove the same and on his failure, probate of the Will must necessarily be granted when it is established that the testator had full testamentary capacity and had in fact executed the Will with a free will and mind. In ***Rabindra Nath Mukherjee and Another*** v. ***Panchanan Banerjee (Dead) by LRs. and Others***[5], this Court had observed that the doubt would be less significant if the Will is registered and the Sub-Registrar certifies that the same was read over to the executor who, on doing so, had admitted the contents. In each case, the court must be satisfied as to the mandate and

[5] (1995) 4 SCC 459

requirements of clause (c) to Section 63 of the Indian Succession Act.

15. In ***Jagdish Chand Sharma*** v. ***Narain Singh Saini (Dead) Through LRs. and Others***[6], this Court referring to Section 63 of the Indian Succession Act had illustrated that the provisions contemplate that in order to validly execute the Will, the testator would have to sign or affix his mark to it or the same has to be signed by some other person in his presence and on his direction. Further, the signature or mark of the testator or signature of the person signing for him has to be so placed that it was intended to give effect to the writing as a Will. Section 63 mandates that the Will should be attested by two or more witnesses each of whom has seen the testator sign or affix his mark to it or has seen some other person sign it in the presence and on the direction of the testator, or has received from the testator a personal acknowledgement of his signature or mark, or the signature of such other person and each of the witnesses has signed the Will in the presence of the testator, though it is not necessary that more than one witness be present at the same time and that no particular form of attestation is necessary. The execution and attestation of the Will are mandatory in nature and any failure and

[6] (2015) 8 SCC 615

deficiency in adhering to the essential requirements would result in invalidation of the instrument of disposition of the property.

16. Sections 68 and 71 of the Evidence Act, which relate to proof of documents required by law to be attested, read 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 not 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.
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> * * *
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> **71. Proof when attesting witness denies the execution**.—If the attesting witness denies or does not recollect the execution of the document, its execution may be proved by other evidence."

17. In ***Jagdish Chand Sharma*** (supra) referring to Sections 68 and 71 of the Evidence Act, it was observed:

> "22.2. These statutory provisions, thus, make it incumbent for a document required by law to be attested to have its execution proved by at least one of the attesting witnesses, if alive, and is subject to the process of the court conducting the proceedings involved and is capable of giving evidence. This rigour is, however, eased in case of a document also required to be attested but not a will, if the same has been registered in accordance with the provisions of the Registration Act, 1908 unless the execution of this document by the person said to have executed it denies the same. In any view of the matter, however,

the relaxation extended by the proviso is of no avail qua a will. The proof of a will to be admissible in evidence with probative potential, being a document required by law to be attested by two witnesses, would necessarily need proof of its execution through at least one of the attesting witnesses, if alive, and subject to the process of the court concerned and is capable of giving evidence.

22.3. Section 71 provides, however, that if the attesting witness denies or does not recollect the execution of the document, its execution may be proved by the other evidence. The interplay of the above statutory provisions and the underlying legislative objective would be of formidable relevance in evaluating the materials on record and recording the penultimate conclusions. With this backdrop, expedient it would be, to scrutinise the evidence adduced by the parties.

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57.1. Viewed in premise, Section 71 of the 1872 Act has to be necessarily accorded a strict interpretation. The two contingencies permitting the play of this provision, namely, denial or failure to recollect the execution by the attesting witness produced, thus a fortiori has to be extended a meaning to ensure that the limited liberty granted by Section 71 of the 1872 Act does not in any manner efface or emasculate the essence and efficacy of Section 63 of the Act and Section 68 of the 1872 Act. The distinction between failure on the part of an attesting witness to prove the execution and attestation of a will and his or her denial of the said event or failure to recollect the same, has to be essentially maintained. Any unwarranted indulgence, permitting extra liberal flexibility to these two stipulations, would render the predication of Section 63 of the Act and Section 68 of the 1872 Act, otiose. The propounder can be initiated to the benefit of Section 71 of the 1872 Act only if the attesting witness/witnesses, who is/are alive and is/are produced and in clear terms either denies/deny the execution of the document or cannot recollect the said incident. Not only, this witness/witnesses has/have to be credible and impartial, the evidence adduced ought to demonstrate unhesitant denial of the execution of

the document or authenticate real forgetfulness of such fact. If the testimony evinces a casual account of the execution and attestation of the document disregardful of truth, and thereby fails to prove these two essentials as per law, the propounder cannot be permitted to adduce other evidence under cover of Section 71 of the 1872 Act. Such a sanction would not only be incompatible with the scheme of Section 63 of the Act read with Section 68 of the 1872 Act but also would be extinctive of the paramountcy and sacrosanctity thereof, a consequence, not legislatively intended. If the evidence of the witnesses produced by the propounder is inherently worthless and lacking in credibility, Section 71 of the 1872 Act cannot be invoked to bail him (the propounder) out of the situation to facilitate a roving pursuit. In absence of any touch of truthfulness and genuineness in the overall approach, this provision, which is not a substitute of Section 63(*c*) of the Act and Section 68 of the 1872 Act, cannot be invoked to supplement such failed speculative endeavour.

57.2. Section 71 of the 1872 Act, even if assumed to be akin to a proviso to the mandate contained in Section 63 of the Act and Section 68 of the 1872 Act, it has to be assuredly construed harmoniously therewith and not divorced therefrom with a mutilative bearing. This underlying principle is inter alia embedded in the decision of this Court in *CIT* v. *Ajax Products Ltd.*"

After referring to ***H. Venkatachala Iyengar*** (supra), this Court in ***Jaswant Kaur*** (supra) had laid down the following propositions of law:

"(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 68 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.
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> (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."

18. In ***M.B. Ramesh*** (supra) reference was made to the view expressed by the Division Bench of the Bombay High Court in ***Vishnu Ramkrishna*** v. ***Nathu Vithal and Others***[7] wherein it was observed:

> "27. […] We are dealing with the case of a will and we must approach the problem as a court of conscience. It is for us to be satisfied whether the document put forward is the last will and testament of Gangabai. *If we find that the wishes of the testatrix are likely to be defeated or thwarted merely by reason of want of some technicality, we as a court of conscience would not permit such a thing to happen*. We have not heard Mr Dharap on the other point; but assuming that Gangabai had a sound and disposing mind and that she wanted to dispose of her property as she in fact has done, the mere fact that the propounders of the will were negligent—and grossly negligent—in not complying with the requirements of Section 63 and proving the will as they ought to have, should not deter us from calling for the necessary evidence in order to satisfy ourselves whether the will was duly executed or not."
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> (emphasis supplied)

[7] AIR 1949 BOM 266

The judgment in ***M.B. Ramesh*** (supra) also refers to ***Janki Narayan Bhoir*** v. ***Narayan Namdeo Kadam***[8] in which with reference to Sections 68 and 71 of the Evidence Act, it was observed:

> "22. […] *6.* … It is true that although a will is required to be attested by two witnesses it could be proved by examining one of the attesting witnesses as per Section 68 of the Evidence Act.
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> 11. … Aid of Section 71 can be taken only when the attesting witnesses, who have been called, deny or fail to recollect the execution of the document to prove it by other evidence. …
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> 12. … Section 71 has no application when the one attesting witness, who alone has been summoned, has failed to prove the execution of the will and the other attesting witness though available has not been examined."

Highlighting the aforesaid aspects in ***M.B. Ramesh*** (supra), it was held that:

> "28. As stated by this Court also in *H. Venkatachala Iyengar* and *Jaswant Kaur*, while arriving at the finding as to whether the will was duly executed, the Court must satisfy its conscience having regard to the totality of circumstances. The Court's role in matters concerning wills is limited to examining whether the instrument propounded as the last will of the deceased is or is not that by the testator, and whether it is the product of the free and sound disposing mind [as observed by this Court in para 77 of *Gurdev Kaur* v. *Kaki*]. In the present matter, there is no dispute about these factors."

[8] (2003) 2 SCC 91

19. In ***Jagdish Chand Sharma*** (supra) reference was made to the facts of the case in ***M.B. Ramesh*** (supra) to observe that on consideration of the totality of circumstances emerging from the narration given by the attesting witness, the omission on the part of this witness to specifically state about the signature by the other attesting witness on the Will in the presence of the testatrix would amount to failure to recollect the fact which deficiency could be replenished with the aid of Section 71 of the Evidence Act. It was observed that the validity of the Will in ***M.B. Ramesh*** (supra) was upheld in the context of the attendant singular facts.

20. On the question of need to examine the second attesting witnesses when one attesting witness falters, way back in 1921 in ***Dhira Singh*** v. ***Moti Lal and Others***[9], two judges of the Patna High Court had held that where the attesting witness was neither summoned nor examined under the provisions of Section 68 of the Evidence Act, recourse to Section 71 is impermissible. Under the provisions of Section 68 of the Evidence Act, it is incumbent on the plaintiff/propounder to call the attesting witness even though he may be the defendant/opposite side. It was observed:

> 1. […] Section 68 requires 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 called for the purpose of proving its execution, and Section 71 enacts that if the attesting witness denies or

[9] 63 Ind. Cas. 266

> does not recollect the execution of the document, its execution may be proved by other evidence.
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> 2. A case on all fours with the present case is that of Tula Singh v. Gopal Singh 38 Ind. Cas. 604 : 1 P.L.J. 389 : 2 P.L.W. 353. In that case the learned Judges decided that Section 68 of the Evidence Act was imperative and so long as there was a witness alive and subject to the process of the Court, no document which is required by law to be attested can be used in evidence until such witness has been called. The fact that, when sailed (*sic* – assailed), he will prove hostile, does not excuse the party producing the document from this duty. The learned Subordinate Judge was, therefore, wrong in thinking that it was not necessary to call the defendant No. 2.

21. Majority of earlier judgments like ***Vishnu Ramkrishna*** (supra) follow the ratio in ***Dhira Singh*** (supra), with a few exceptions like ***Mt. Manki Kaur*** v. ***Hansraj Singh and Others***[10]. The issue was resolved beyond controversy and debate in ***Janki Narayan Bhoir*** (supra) wherein it has been held that clause (c) of Section 63 of the Indian Succession Act requires and mandates attestation of a Will by two or more persons as witnesses, *albeit* Section 68 of the Evidence Act gives concession to those who want to prove and establish a Will in the court of law by examining at least one attesting witness who could prove the execution of the Will viz., attestation by the two witnesses and its execution in the manner contemplated by clause (c) to Section 63 of the Indian Succession Act. However, where one attesting witness examined fails to prove

[10] AIR 1938 Pat 301

due execution of the Will, then the other available attesting witness must be called to supplement his evidence to make it complete in all respects to comply with the requirement of proof as mandated by Section 68 of the Evidence Act. It was held:

> "11. Section 71 of the Evidence Act is in the nature of a safeguard to the mandatory provisions of Section 68 of the Evidence Act, to meet a situation where it is not possible to prove the execution of the will by calling the attesting witnesses, though alive. This section provides that if an attesting witness denies or does not recollect the execution of the will, its execution may be proved by other evidence. Aid of Section 71 can be taken only when the attesting witnesses, who have been called, deny or fail to recollect the execution of the document to prove it by other evidence. Section 71 has no application to a case where one attesting witness, who alone had been summoned, has failed to prove the execution of the will and other attesting witnesses though are available to prove the execution of the same, for reasons best known, have not been summoned before the court. It is clear from the language of Section 71 that if an attesting witness denies or does not recollect execution of the document, its execution may be proved by other evidence. However, in a case where an attesting witness examined fails to prove the due execution of will as required under clause (*c*) of Section 63 of the Succession Act, it cannot be said that the will is proved as per Section 68 of the Evidence Act. It cannot be said that if one attesting witness denies or does not recollect the execution of the document, the execution of will can be proved by other evidence dispensing with the evidence of other attesting witnesses though available to be examined to prove the execution of the will. Yet another reason as to why other available attesting witnesses should be called when the one attesting witness examined fails to prove due execution of the will is to avert the claim of drawing adverse inference under Section 114 Illustration (*g*) of the Evidence Act. Placing the best possible evidence, in the given circumstances, before the Court for

> consideration, is one of the cardinal principles of the Indian Evidence Act. Section 71 is permissive and an enabling section permitting a party to lead other evidence in certain circumstances. But Section 68 is not merely an enabling section. It lays down the necessary requirements, which the court has to observe before holding that a document is proved. Section 71 is meant to lend assistance and come to the rescue of a party who had done his best, but driven to a state of helplessness and impossibility, cannot be let down without any other means of proving due execution by "other evidence" as well. At the same time Section 71 cannot be read so as to absolve a party of his obligation under Section 68 read with Section 63 of the Act and liberally allow him, at his will or choice to make available or not a necessary witness otherwise available and amenable to the jurisdiction of the court concerned and confer a premium upon his omission or lapse, to enable him to give a go-by to the mandate of law relating to the proof of execution of a will."

This judgment overruled the judgment of ***Manki Kaur*** (supra) and approved the ratio of ***Vishnu Ramakrishna*** (supra) to the effect that Section 71 of the Evidence Act can be requisitioned when the attesting witnesses who were being called have failed to prove the execution of the Will by reason of either denying their own signatures, denying the signature of the testator or due to bad recollection as to the execution of the document. Section 71 has no application when only one attesting witness who was called and examined has failed to prove the execution of the Will and the other available attesting witness was not summoned.

22. The ratio in ***Janki*** was reiterated in ***Benga Behera and Another*** v. ***Braja Kishore Nanda and Others***[11]. This judgment also examines the issue and question whether a Sub-Registrar in the matter of registration of documents under the provisions of Indian Registration Act, 1908 can possibly be treated as a witness. Reference was made to Sections 52 and 58 of the Registration Act to observe that the duty of the Registering Officer is to endorse the signature of every person presenting the document for registration and to make an endorsement to that effect, that is, to endorse only the admission or execution by the person who presented the document for registration. The Registering Officer can also endorse and certify the payment of money or delivery of goods made in the presence of the Registering Officer in reference to the execution of the document. The expression 'attesting witness' within the meaning of Section 3 of the Transfer of Property Act and Section 63 of the Indian Succession Act means "bearing witness to a fact". The two valid conditions of attestation of documents are – (i) two or more attesting witnesses have seen the executant sign the instrument; (ii) each of them has signed the instrument in the presence of the executant. Further and importantly, attestation requires *animus attestandi*, that is, a person puts his signature on a document with the intent to attest it

[11] (2007) 9 SCC 728

as a witness. If a person puts his signature on a document only in discharge of a statutory duty, he may not be considered as an attesting witness as was held in ***Dharam Singh*** v. ***Aso and Another***[12]. Similarly, a scribe or an advocate who has drafted the document may not be the attesting witness as was held by this Court in ***Jagdish Chand Sharma*** (supra), for attestation requires that the witness should have put his signature *animus attestandi*, that is, for the purpose of attesting that he has seen the executant sign or has received from him a personal acknowledgement of his signature.

23. Returning to the facts of the present case, it is submitted by Surinder Pal Sharma, the respondent before us, that summons/notice were issued to Mr. M.N. Sharma, Advocate to appear as a witness but he could not be served and hence was not examined. Ramesh Kumar, it is submitted, was not summoned or examined as he was none other than the husband of Raj Kumari and would not have supported execution of the Will. The High Court has accordingly held that the Will being registered was proved in terms of section 71 of the Evidence Act. This finding of the High Court is unacceptable, for recourse to Section 71 of the Evidence Act is impermissible without examination of Ramesh Kumar. It would not matter if Ramesh Kumar is husband of Raj

[12] 1990 Suppl SCC 684

Kumari. Section 71 of the Evidence Act would come into operation, once and if all the attesting witnesses deny or do not recollect the execution of the document, that is, the Will. In that event, the execution can be proved by other evidence. The respondent accepts that Ramesh Kumar though a witness was not summoned and asked to depose as a witness and therefore, it cannot be said that Ramesh Kumar as an attesting witness had denied or did not recollect execution of the Will.

24. Even on the question of "other evidence" we have grave and serious reservations. It is apparent that late father of Raj Kumari and Surinder Pal Sharma and grandfather of appellants Meenakshi Sharma and Veena Malhotra being a displaced person had applied for a two-room accommodation which was allotted to his wife Suhagwanti on 15.03.1972 as by then he had expired. One of the terms and conditions of the allotment was that the possession of the tenement would be issued on the payment of the first instalment and on giving an undertaking that she would vacate the quarter at Padam Chand Land within three days from the allotment letter. It has also come on record that Madan Lal, the eldest sibling was earning and in service at the time of allotment. There is also evidence that Madan Lal had contributed and

financially helped at the time of marriage of his sisters namely Raj Kumari and Puran Devi.

25. There is no doubt that the Will was registered but there are several circumstances which cast doubt on the Will. Raj Kumari in her cross-examination with reference to the disputed Will of Suhagwanti has stated:

> "Q. I put to you that mother namely Smt. Suhagwanti had executed a Will in favour of your brother Mr. Surender Pal and it was attested by your husband Sh. Ramesh Kumar as attesting witness?
>
> My mother had obtained signature of my husband who is totally illiterate on a document on the pretext that she intend to disowned my niece Ms. Veena Malhotra, who had married at her own. My mother had told this fact to me on the same day when she returned from the Office of Sub Registrar.
>
> It is correct that my husband has signed in the office of Sub Registrar. Vol. But his signatures were obtained under the pretext as I have above stated.
>
> It is correct that photo of my mother is pasted on Mark A. I cannot identify signature of my husband on Mark A. I have never seen my husband signing any document. It is wrong to suggest that my husband has signed at point B on Mark A. It is wrong to suggest that my husband has signed at point B on Mark A. It is wrong to suggest that instalments of suit property were paid by my brother Sh. Surender Pal Sharma. Vol. My mother used to pay instalment and after her death Surender Pal has paid 1 or 2 instalments. Again said, I used to accompany my mother to Town Hall for making the payment of instalments."

26. Before filing the civil suit, Raj Kumari had issued a legal notice dated 25.09.2000 (Exhibit P-1/1) in which she had stated that Suhagwanti has died intestate leaving behind four children, that is, Raj Kumari, Surinder Pal Sharma, Madan Lal, represented through his wife Santosh Rani, and Puran Devi. Further, after the death of Suhagwanti, she had repeatedly requested Surinder Pal Sharma to partition the property with metes and bounds and give her due share. Surinder Pal Sharma had thereafter responded to the legal notice vide undated letter marked Exhibit PW-1/2 accepting that Raj Kumari was his sister and that the tenement was allotted to their mother. He, however, had claimed that the tenement belongs to him as an absolute owner and therefore, there was no question of partition. The relevant portion of the said reply reads as under:

> "For the reason that the said property is absolutely belong to me, during the life time of my respected mother Smt. Suhagwanti and the said property is belong to me being the absolute ownership, thus no question is arisen of partition of the said property. It is in my possession during the life time of my mother and is totally stands in all Govt. records in my name.
>
> Thus it is not compulsory to me to give the reply of your client's further notice or any letter and she is fully known about it. If you wish to approach the higher authority it is the responsibility of your client to bear all costs, legal expenses, whatsoever and also bear my expenditure whatever may be suffer or gone to me in this connection."

Clearly, Surinder Pal Sharma had not propounded and referred to the Will in his reply, which defence was taken by him for the first time in his written statement. This is also clear from the cross-examination of Surinder Pal Sharma wherein he had accepted as correct that the Will was not challenged by Raj Kumari in the court of law as she had come to know about the Will during the pendency of the present case (please refer page 97 of the paper book). Surinder Pal Sharma thus accepts that bestowal in his favour vide a written Will, was not known or within the knowledge of Raj Kumari, a surprising statement as Ramesh Kumar is husband of Raj Kumari. Equally intriguing is the statement of Surinder Pal Sharma in his cross-examination that he had not informed his lawyer while drafting the reply (to the legal notice) that he was in possession of the Will executed by his mother. Surinder Pal Sharma in his cross examination had accepted that in 1972, he was studying in Class VI and was hardly 11 to 12 years of age (This statement is at variance with the age of Surinder Pal Sharma in Exhibit DW-1/P-3 but we would accept the statement in the oral testimony). Surinder Pal Sharma had claimed that he would repair cycles and had contributed to the payments towards instalments of the quarter. It is in this aforesaid factual background that we would examine the Will, its wordings and contents.

27. The purported Will dated 02.01.1992 is a rather short and an odd one. For the sake of completeness, we would like to reproduce the same in its entirety.

> “ **WILL DEED**
>
> THIS “WILL DEED” is executed on this 2nd day of Jan. 1992 at Delhi by Shrimati Suhag Wanti aged about 65 year w/o Late Shri Harbans Lal R/o H. No. 26, Duplex Flat, Gur Mandi, Delhi – 7 hereinafter called the Testator.
>
> IN FAVOUR OF
>
> Shri Surinder Lal Sharma S/o Late Shri Harbans Lal R/o H.No. 26, Duplex Flat, Gur Mandi, Delhi-7, hereinafter called the Testimony.
>
> LIFE IS BUT SHORT AND UNCERTAIN, God know when it may come to end. Hence I with my free will and consent and without any force or compulsion from others and in my sound estate of mind to make this will as under:-
>
> Whereas I the Testator is the owner and in the possession of built up property bearing No.26, built on a piece of land area measuring 80 Ft. situated in the abadi known as Duplex Flat, Gur Mandi, Delhi-7, and bounded as under:-
>
> East……..Other property
> West……Other property
> North……. Road
> South……. Road
>
> Whereas I the Testator hereby bequeath that after my death the aforesaid property shall got and devolve to the aforesaid testimony, shall be the sole and absolute owner of the above mentioned property.
>
> Witnesses:- TESTATOR
> Sd/- Sd/-
> Shri Ramesh Kumar Smt. Suhagwati
> S/o Shri Ram Lal Sharma

R/o H.N. 10/4, Gandhi Nagar, Geeta Colony,
Delhi. ”

28. The Will which purportedly makes the bequest, is oddly described as a Will Deed. This possibly explains why Surinder Pal Sharma had claimed in his reply, that he was the owner of the tenement even during the lifetime of the mother Suhagwanti. It is in this context that we have read the different portions of the testimony of Raj Kumari and Surinder Pal Sharma; the notice and the reply to hold that there exists grave doubt whether the “Will Deed” was executed and is a “Will” as it purports to be. The marriage of Veena Malhotra as per her wish is not challenged. The testator was an illiterate lady. Even if we are to accept signatures of the testator and the witnesses, we cannot ignore “other evidence” that Suhagwanti and her family members did not understand the true nature of the document executed. There are substantial and good reasons to legitimately suspect and question execution of the Will, which Surinder Pal Sharma, as the propounder of the Will, has not been able to repel and remove so as to satisfy this Court that the Will was validly executed. For these reasons, we would hold that execution of the Will has not been proved by “other evidence” in terms of Section 71 of the Evidence Act.

29. Looked and examined from all angles, we are satisfied that the present appeal should be allowed and the judgment of the High Court should be set aside. Accordingly, we restore the judgment and decree dated 17.01.2018 passed by the court of Additional District Judge-03, North District, Rohini District Courts, New Delhi. There would no order as to costs.

.....J.
(S. ABDUL NAZEER)

.....J.
(SANJIV KHANNA)

NEW DELHI;
DECEMBER 17, 2019