IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

FIRST APPEAL NO. 1354 OF 2016

1) Jamila Gulfam Desai]
(Since deceased) deleted.]

2) Kanij Fatima Alisaheb Mujawar,]
(Since deceased Thr. LRs.)]

2-a) Alisaheb Sikndar Mujawar,]
Age – 72 years, Occupation – Business,]
R/o. Opposite Old Jamkhandi Naka,]
Electric Motor Rewinding Works,]
At Post Banhatti, District – Bagalkot,]
Karnataka.]

2-b) Nayeem Alisaheb Mujawar,]
Age- 41 Years, Occupation- Business,]
R/o. Rockel Building, 100 ft. Road,]
Sangli, Taluka- Miraj, District- Sangli.]

2-c) Sayeem Alisaheb Mujawar,]
Age-35 Years, Occupation- Business,]
R/o. Opposite Old Jamkhandi Naka,]
Electric Motor Rewinding Works,]
At Post Banhatti, District- Bagalkot,]
Karnataka.]

2-d) Tajheen Sherkhan Pathan,]
Age-38 Years, Occupation- Housewife,]
R/o. Kasarwadi, Pune.]

3) Ruksana Ghudulal Bandar,]
Age-60 Years, Occupation-Business,]
R/o. Faujdar Galli, Sangli,]
Taluka -Miraj, District Sangli.]

4) Juber Abdulmujir Shiledar,]
Age-57 Years, Occupation- Household.]

5) Jafrulla Abdulmujir Shiledar,]
Age-54 Years, Occupation- Business,]

6) Sayyad Abdulmujir Shiledar,]
Age-47 Years, Occupation- Business,]

7) Jaibunissa Abdulmujir Shiledar,]
Age-77 Years, Occupation- Business,]
Appellant Nos. 5 to 8 are R/o. Madina]

Mashid Galli, House No. 146. Nalbhag, Sangli, Taluka Miraj, district Sangli.]

Versus

1) Jamir Abdulmujir Shiledar, Age 63 years, Occupation – Business & Agriculture. R/o. Madina Mashid Galli, House No. 146, Nalbhag, Sangli, Taluka Miraj, District Sangli.]

2) Khalil Kamalso Shiledar, Age 77 years, Occupation – Business, R/o. Madina Mashid Galli, House No. 146, Nalbhag, Sangli, Taluka Miraj, District Sangli.] **...Respondents.**

Mr. Chetan Patil i/b Mr. Ajit M. Savagave for the appellant.
Mr. Kuldeep Nikam, Mr. Prasad Avhad and Mr. Om Latpate for the Respondent no.1.

Coram : Sharmila U. Deshmukh, J.

Reserved on : September 6, 2024.

Pronounced on : October 1, 2024.

Judgment . :

1. The present appeal is filed under Section 96 read with Order 41 of the Code of Civil Procedure 1908 by the original Opponents against the judgment dated 29th May 2014 passed by the Civil Judge (Senior Division) Sangli, District Sangli in Miscellaneous Application No.67 of 2009 granting Probate of Will dated 30th July, 1956. For sake of convenience parties are referred to by their status before the Trial Court.

FACTUAL MATRIX:

2. M.A. No.67 of 2009 was instituted under Sections 276 and 278 of the Indian Succession Act, 1925 by the Applicant in respect of Will dated 30th July 1956 of one Ibrahim @ Kamal Babaso Shiledar who expired on 21st February 1975. The Applicant is the grandson of deceased Ibrahim and Opponent Nos 5 10 are the family members being brothers, sisters and mother of the Applicant. The Opponent Nos 1 and 2 are children of the Applicant's deceased paternal aunt, Opponent No. 3 and 4 are the paternal aunt and paternal uncle of the Applicant respectively.

3. The case in the Application was that the deceased Ibrahim during his lifetime had executed Will dated 30th July 1956 in respect of Annexure-A properties, which was registered at Serial No. 1249 with the Joint Sub Registrar, Miraj-1 District Sangli and noted in Index-III. At the time of death of said Ibrahim, Applicant was aged 4 years and was not aware of the execution of Will. After the death of Ibrahim, the Applicant's father and Opponent No 4 suppressed the original Will and mutated their names in the property cards. On 29th July 2005, the Applicant's father expired and while going through his documents, Applicant learnt about the registered Will dated 30th July 1956. Despite all efforts the original Will could not be found and on 15th September 2005 the Applicant obtained certified copy of the

registered Will from the office of Sub Registrar, Miraj-1, District Sangli.

4. Subsequently, the Applicant applied to the circle officer for mutating his name in the records in respect of properties mentioned in the Annexure-A to the Will in which notices were issued to the Opponents. The application came to be dismissed by the Circle Officer and then the SDO holding that the Applicant has to seek his remedies in the appropriate Court of law. As against this, Second Appeal No. 89 of 2008 was filed before the Collector which is pending.

5. The deceased Ibrahim while executing the last Will dated 30th July 1956 was of sound and disposing mind. The attesting witnesses are Bapu Bala Jagtap and Sakha Hari Kulkarni who have signed in modi script. On 17th March 1989 Bapu Bala Jagtap expired and the other attesting witness Sakha Hari Kulkarni could not be found despite search. In Annexure A, the property was described as land Survey No.56/2, 56/1 which is now consolidated in Gat No. 233, Survey No. 80/7 consolidated in Gat No. 438 and Survey No. 341/5 consolidated in Gat No.77.

6. The suit came to be resisted by the Opponent Nos.6 to 10 contending that the Applicant was residing with his father till 29th July, 2005 and if the Will was in the custody of his father, in the year 1975 itself the Applicant's father would have propounded the Will and mutated the name of Applicant in the revenue records. The Applicant's

father had filed an application for legal heirship certificate which was granted on 31st March 1979 without production of Will. Subsequent to the death of Ibrahim in the year 1975, Mutation Entry No. 5059 was certified on 2nd November, 1988 mutating the names of legal heirs in revenue records without any objection from the Applicant's father and the Applicant had challenged the Mutation Entry before the Revenue Authorities after considerable delay about which the Deputy Collector has expressed suspicion and appeal filed before the Additional Collector has been dismissed. Since last 20 years the legal heirs of deceased Ibrahim are in occupation and cultivation of the properties to the knowledge of Applicant's father and without a declaration as to the ownership, the Letters of Administration cannot be granted. In respect of Gat No. 777 and Gat No. 898 Mutation Entry No. 2685 was certified on 24th November, 1981 bringing on record the legal heirs which has not been challenged by the Applicant's father. It was contended that after a period of 27 to 28 years, on the basis of suspicious and illegal Will no Letters of Administration can be granted to the Applicant. The original Will has not been produced and the application was opposed on ground of delay and laches.

7. Parties went to trial. The Applicant examined himself, the son of the scribe of testamentary document, namely, Prakash Ramchandra Kulkarni (AW-2) and Sou. Prabhavati Sadashiv Kadam (AW-3) the

daughter of Bapu Bala Jagtap-deceased attesting witness. The Opponents did not lead any oral evidence, however, filed on record certified copies of the relinquishment deed of the maternal aunt and the judgment and order passed by the revenue authorities in the proceedings initiated by the Applicant for recording his name on the basis of the Will.

8. The Trial Court framed and answered the following issues:

S.N.	Points	Findings.
1.	Whether the testator was of sound and disposing state of mind when he made the Will ?	Yes.
2.	Whether the Will was duly executed and attested ?	Yes.
3.	Whether Applicant is entitled for letters of administration ?	No.
4.	What order ?	Petition is partly allowed as per final order.

9. Broadly summarised, the findings of the Trial Court are as under:

[A] On secondary evidence:

AW-1 has specifically deposed that the original Will was not in his possession at any point of time, that he had no knowledge as to in whose possession the original document is and that he is not sure as to whether the Will has been lost or destroyed. Secondary evidence by production of certified copy of Will is allowed.

[B] On proof of execution of Will:

a] The evidence of son of scribe and the daughter of attesting witness proves the attestation and registration of the Will.

b] AW-1 has specificially deposed that the other attesting witness i.e. Sakha Hari Kulkarni could not be traced depsite search. Even the Opponents could have traced the attesting witness Sakha Hari Kulkarni to substantiate that the Applicant has deliberately not examined him which has not been done.

c] When both the attesting witnesses are not available the document has to be proved as it is an ordinary document.

[C] On the sound and disposing mind of testator:

Deceased Ibrahim had executed the Will in the year 1956. He expired in the year 1975 and in the year 1972 he had applied to the Tahsildar for deletion of the name of one Balekhan Mahammad Shiledar from the record of rights of CS No.56/2. Thus, till the year 1972 deceased Ibrahim was in fit state of mind and was performing all ordinary functions. It can therefore be concluded that at the time of execution of Will, the deceased Ibrahim was in sound mental and physical state.

[D] On suspicious circumstances:

Delay:

a] Till the year 1976 the Applicant was residing with his father and thereafter from 1976 till 1992 he was residing separately and again with the father from 1992 till 2005. The Applicant has deposed that during this entire period his father or uncle did not inform him about the existence of Will nor they acted upon it.

b] The evidence of Applicant is that he learnt about the execution of Will from the chit found in the records of his father after his death in the year 2005.

c] Only because of delay, the Will cannot be ignored when it was found to be a genuine Will and the long standing possession of the heirs cannot come across the right of legatee flowing from the testamentary document.

d] The possibility of deliberate suppression by the father and uncle of the Applicant to secure their personal interests and the interest of other legal heirs of deceased Ibrahim cannot be ruled out.

Exclusion of other legal heirs:

The exclusion of other legal heirs without anything more cannot be a suspicious circumstance especially when the bequest is in favour of an offspring.

[F] On issuance of Probate :

a] The relief of grant of Letters of Administration cannot be granted as the properties have been administered by the legal heirs since the death of testator.

b] The Applicant is not entitled to the relief of Letters of Administration which will be in lieu of decree of possession.

SUBMISSIONS:

10. Mr. Chetan Patil, learned counsel appearing for the Appellant would submit that the judgment is not sustainable on 3 counts. Firstly, the original Will-Deed was not produced and the ingredients of Section 65(c) of the Indian Evidence Act were not satisfied. Secondly, the Will is required to be proved as per Section 68 of the Indian Evidence Act and the daughter of the deceased attesting witness was examined and for the purpose of securing the presence of other attesting witness there are no steps which are shown to have been taken. Thirdly, Will is executed in suspicious circumstances as the properties are bequeathed in favour of only one grandson which suspicious circumstances has not been satisfactorily explained by the Applicant. Elaborating on his submissions, he canvasses that the case of Applicant was that upon the death of his father in the year 2005, while going through documents he learnt about the Will executed by Ibrahim, dated 30th July 1956 and admittedly certified copy of Will is produced and not the original Will. He would submit that in the cross-examination it was brought on

record that the Applicant has not seen the original Will nor he has called anybody to produce the same. He submits that clause (c) of Section 65 of the Indian Evidence Act permits secondary evidence where it is shown that the document is lost or destroyed. Pointing out to the findings of Trial Court, he submits that the Trial Court has held that the Applicant is not sure as to whether the Will has been lost or destroyed. He submits that as the requirements of Section 65(c) of the Indian Evidence Act are not met and it is not shown as to whether the Will is lost or destroyed, no secondary evidence could have been led.

11. He would further submit that in respect of the attesting witnesses, the Respondent No 1 has deposed that attesting witness Sakha Hari Kulkarni was not found despite search. He submits that there is no deposition as to the efforts taken to trace the other attesting witness and in the absence of any such efforts being demonstrated, the Will cannot be held to be proved by relying upon the evidence of the daughter of deceased attesting witness.

12. He would further submit that the Will is in respect of 3 properties and the same have been bequeathed to one grandson. He submits that the admitted position is that the wife of testator was alive and was dependent upon the testator and that in the cross examination the Applicant has admitted that there were other grandchildren also. He submits that there is no explanation as to why

the Applicant had been bequeathed the property to the exclusion of wife and other heirs. He submits that it is admitted by the Applicant in the cross examination that the deceased had affection for all his children and grand children and in the year 1956, the deceased had 7 to 8 grand sons. He submits that it is further admitted that the deceased Ibrahim has not executed the Will in respect of other properties.

13. He submits that in the application, relief sought was only about the Letters of Administration or Letters of Administration with Will annexed and no relief for Probate was sought. He submits that despite thereof, the Trial Court has granted Probate after observing that the Letters of Administration could not be granted. He submits that the relief not prayed for cannot be granted. He relies upon following case laws :

[a] ***Banga Behera v. Braja Kishore Nanda [(2007) 9 SCC 728;***

[b] ***Rakesh Mohindra v. Anta Beri [(2016) SCC 483];***

[c] ***H. Siddiqui v. A. Ramalingam [(2011) 4 SCC 240];***

[d] ***Babu Singh v. Ram Sahai [(2008) 14 SCC 754];***

[e] ***Kavita Kanwar v. Pamela Mehta [(2021) 11 SCC 209];*** and

[f] ***Bharat Amratlal Kothari v. Dosukhan Samadkhan Sindhi [(2010) 1 SCC 234].***

14. *Per contra* Mr. Kuldeep Nikam, learned counsel appearing for the legal heirs of the deceased Applicant would submit that the present case is in peculiar facts where there is considerable time gap of about 50 years from the date of execution of Will in the year 1956 till the

application was filed upon discovery of the Will in the year 2005. He would further submit that the Will has been duly proved in accordance with Section 69 of the Indian Evidence Act as the legal heir of the scribe has identified the handwriting and signature of the scribe as well as the daughter of deceased attesting witness has identified the signature of attesting witness. He would further submit that the Trial Court has come to a specific finding that the testator was of fit and sound disposing mind at the time of execution of Will which fact has not been disputed by the Appellants.

15. On the aspect of secondary evidence, he submits that the Will was a registered Will and the registration has not been disputed as held by the Trial Court in paragraph 26. He submits that the Will of the year 1956 was not traceable due to the time gap and therefore the certified copy was procured and secondary evidence was led. He would further submit that the suspicious circumstances put up by the Opponents was as regards the delay and the exclusion of other legal heirs. He submits that only 3 properties are given to the Applicant and it is the specific case of Opponents that other properties are not included on mentioned in the Will-Deed which shows that there are other properties involved which did not form part of Will.

16. He submits that in the application the Applicant has prayed for Probate as well as the Letters of Administration which word “Probate”

appears to have been scored out in the compilation of documents tendered.

17. He would further submit that the Apex Court in the case of ***Kavita Kanwar v. Pamela Mehta (supra)*** relied upon by Mr. Patil has held that only because the respondent therein was not included in the process of execution of Will because of unequal distribution of assets etc., it cannot be the reason for viewing the Will with suspicion and what is required is the satisfaction of the Court that the document propounded as Will indeed signifies the last free wish and desire of testator and is duly executed in accordance with law and in such case the Will shall not be disapproved merely for one doubtful circumstance here or another factor there.

18. In rejoinder Mr Patil submits that Section 69 of the Indian Evidence Act will not apply in the present case as it is only where the attesting witness cannot be traced despite diligent search that Section 69 the Indian Evidence Act can be applied.

POINTS FOR DETERMINATION:

19. Following points arise for determination:

[i] Whether in the absence of deposition as regards the efforts taken to search the second attesting witness, the Will dated 30th July, 1956 executed by deceased Ibrahim could not be said to be proved.

[ii] Whether the evidence of the legal heir of one deceased attesting witness was sufficient to prove execution of the Will dated 30th July, 1956.

[iii] Whether the foundation had been laid for leading secondary evidence under Section 65(c) of Indian Evidence Act, 1872 and thus Will was proved by production of certified copy of Will dated 30th July, 1956 .

[iv] Whether the Applicant who is the propounder of the Will has discharged the burden of removing the suspicious circumstances surrounding the Will of deceased Ibrahim dated 30th July, 1956.

[v] Whether the Trial Court was right in granting Probate of the Will dated 30th July, 1956.

AS TO POINT NOS (i) AND (ii):

20. Both the points are interlinked and are therefore considered together. The Applicant has examined the son of the scribe and the daughter of the one of the attesting witness to prove execution of the Will, both of whom were deceased. The contention of Mr. Patil is that the other attesting witness Shaka Hari Kulkarni was alive and there is no deposition to show that efforts were made to trace him.

21. Section 68 of Indian Evidence Act, 1872 deals with proof of execution of document required by law to be attested and Section 69 governs the situation where no attesting witness is found and reads thus:

> "68. 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."
>
> "69. If no such attesting witness can be found, or if the document purports to have been executed in the United Kingdom, it must be proved that the attestation of one attesting witness atleast is in his handwriting, and that the signature of the person executing the document is in the handwriting of that person."

22. The difference between Section 68 and Section 69 of Evidence Act is that in the former if there is an attesting witness alive, at least one attesting witness is required to be called to prove the execution whereas in the latter case it is must be proved that the attestation of one attesting witness at least is in his handwriting.

23. In the present case the Applicant has deposed that the Will has been executed by his grandfather and has identified the signature of his grandfather occurring on start of page 1, end of page 2 and middle of page 3 of the Will. He has examined the son of scribe, i.e., Ramchandra Kulkarni who has admittedly expired. He has further deposed that he obtained information about the persons who have attested the Will in Modi script that one of the signature was of Sakha Hari Kulkarni and the other was of Bapu Bala Jagtap. He has further deposed that despite search he has not been able to obtain information about Sakha Hari Kulkarni. In cross examination he has deposed that he is not conversant with Modi script and obtained

information about the signatures of the attesting witness from person conversant with Modi script. He has further deposed that at that time he became aware that both the attesting witnesses have expired.

24. In view of the deposition of the Applicant, it is evident that Section 69 of Evidence Act applies as one attesting witness has expired and other attesting witness cannot be found or is dead. It is not the case of the Opponents in the cross examination that Section 68 applies as the second attesting witness is alive. For satisfying ingredients of Section 69, it is sufficient if it is proved that the attestation of at least one attesting witness is in his handwriting. In case of ***Babu Singh vs Ram Sahai***(supra), the Apex Court was concerned with the issue of Section 68 and Section 69 of Evidence Act where one attesting witness was dead and the other attesting witness was admittedly alive. As no efforts were made to compel the appearance of the second attesting witness who was admittedly alive, the Apex Court held that the Will was not proved. The facts of that case indicates that in that case Section 68 of Evidence Act was applicable as one of the attesting witness was admittedly alive. The Apex Court in that context considered that Section 69 will not apply. The said decision does not lay down any proposition of law sought to be canvassed by Mr. Patil that details of the search taken to trace the attesting witness are required to be deposed or established by the Respondent No 1. The

facts of that case being clearly distinguishable are not applicable to the present case.

25. Coming to the present case, the Will has been executed in the year 1956 and it is nobody's case that the Applicant was acquainted with the other attesting witness. The Applicant has proved the document as required by Section 69 of Indian Evidence Act, 1872 by examining the daughter of one attesting witness who has proved that the signature of attesting witness is that of her father. It is the specific case of the Applicant that despite search the other attesting witness could not be found and in the cross examination he has deposed that the other attesting witness has expired.

26. Admittedly one attesting witness has expired and the other attesting witness was not known to the Respondent No 1 and it is suffice to depose that the person could not be traced in spite of taking efforts, in which case the provisions of Section 69 will be applicable and the attestation of atleast one attesting witness must be proved. It also needs to be noted that there was no reason for the Applicant to not take efforts to trace the other attesting witness as it would have made his task easier instead of examining the daughter of attesting witness who has expired. If the whereabouts of other attesting witness are not known to the Applicant, then it cannot be said that no efforts had been made to trace the other attesting witness.

27. Considering the applicability of Section 69 of Evidence Act to the facts of the present case, in my view, the Will has been proved by proving the attestation of one attesting witness to be in his handwriting. Accordingly, I answer Point No (i) and (ii) in favour of the Respondent No 1.

AS TO POINT NO (iii):

28. To address the objection of Mr. Patil that there is no foundation laid for leading secondary evidence as contemplated by Section 65(c) of the Indian Evidence Act, it will be necessary to take into consideration the time gap. The Will was executed on 30th July 1956 when the Applicant was about 4 years of age and in the application filed in the year 2009, it is the specific case of the Applicant is that it is only in the year 2005 upon the death of his father, while going through his documents, he became aware of the Will dated 30th July 1956. The original Will-Deed has not been produced by the Applicant and it is deposed that despite due search the original Will could not be found and therefore the certified copy of Will from the office of Sub Registrar Miraj No.1 District Sangli was obtained. Section 65 of Indian Evidence Act, 1872 provides for the cases in which secondary evidence may be permitted to be given of the existence, condition or contents of a document. Sub Section (c) of Section 65 reads thus:

> *"(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."

29. Mr Patil, would lay emphasis on the observations of the Trial Court noting that the Applicant is not sure as to whether the Will is lost or destroyed to oppose applicability of Section 65(c). In the evidence the Applicant has deposed that after the death of his father on 29th July, 2005 while going through his documents he became aware of the registered Will dated 30th July, 1956. He has further deposed that despite due search the original Will was not found. It is therefore his specific case that the Original Will is not traceable. In the cross examination he has stated that he has not seen the Original Will or its photocopy. The suggestion was given to the Respondent No 1 that he has filed the present application on the basis that the original Will was in existence and has been lost, which was accepted by the Respondent No 1.

30. Mr. Patil has not pointed out from the cross examination any admission of Applicant that he is not sure whether the original Will was lost or destroyed. On the contrary in the cross examination, it is the Opponents own case that the Applicant has filed the application on basis of certified copy of Will on an understanding that the Original Will is in existence and has been lost.

31. Apart from the above, another reason to uphold the applicability

of Sub-Section (c) of Section 65 of Indian Evidence Act, 1872 is the second clause of Section 65(c) which has been accepted by the Trial Court to admit secondary evidence. Section 65(c) of the Indian Evidence Act is not limited to cases only where the document is lost or destroyed but also applies to the cases where for any other reason the party is unable to produce the original document in reasonable time before the Court which reason is not arising from his own default or neglect. On a plain reading of Section 65(c), in my view, Section 65(c) consists of two clauses, which are independent of each other. Where the party seeking to tender secondary evidence is unable to tender the original document as the same is lost or destroyed, the position is governed by the first clause. The second clause covers cases where the party offering evidence is unable to produce the original document within a reasonable time for any other reason "not arising from his own default or neglect". In event the first clause applies, the Court may admit the certified copy of original document as secondary evidence and where the second clause applies, the Court can allow the certified copy of the original document to be admitted into evidence on being satisfied that the non production of original document is not a result of the party's own default or neglect. In my view, in the instant case, both the clauses have been satisfied.

32. Admittedly, in the present case the Will was not within the

knowledge of Respondent No 1 and it is nobody's case that he was in possession of the original Will. In event the Applicant was in possession of the original and thereafter proposes to lead the secondary evidence then the burden would be upon him to show that the original has been lost or destroyed. The Trial Court though holding that the Applicant is not sure whether the Will has been lost or destroyed has considered the latter part of Section 65(c) of Indian Evidence Act and has permitted secondary evidence of the Original Will.

33. In the case of ***Banga Behera v. Braja Kishore Nanda*** (supra) the respondent No. 1 therein had not stated how the Will was lost and after considering the provisions of Section 65(c) of the Indian Evidence Act, the Apex Court held that it was obligatory on the part of party to establish the loss of original Will beyond all reasonable doubt. The distinguishing feature in that case is that the respondent No. 1 therein had accepted in his evidence that he had obtained the registered Will from the office of Sub Registrar and after receipt of the same, he had shown it to one Sarujumani Dasi and thereafter had not tendered any explanation as to how the Will was lost and in fact had admitted that he cannot say as to where and how the original Will was lost. It was in the facts of that case the Apex Court held that it was obligatory to establish the loss of original Will beyond all reasonable doubt. In the

present case it is the specific deposition that the Will was not traceable and certified copy was obtained therefore the expression "for any other reason" occurring in Section 65(c) of the Indian Evidence Act permitting the leading of secondary evidence would also apply in the present case.

34. In ***Rakesh Mohindra vs Anita Beri*** (supra) the Apex Court considered Section 65 of the Indian Evidence Act and held that in cases where the original documents are not produced at anytime nor has any factual foundation been laid for giving secondary evidence, it is not permissible for the Court to allow the party to adduce the secondary evidence. What the Apex Court has held is that the secondary evidence relating to the contents of document is inadmissible until non production of the original is accounted for so as to bring it within one or the other case provided for in the Section. As noted above the Applicant has duly accounted for the non production of original Will permitting the leading of secondary evidence.

35. In case of ***H. Siddiqui (dead) By Lrs vs A. Ramalingam***(supra), the Apex Court was considering the issue of secondary evidence in context of denial of execution of power of attorney by one of the party and as to whether the power of attorney has been proved. In that context, the Apex Court held that mere admission of a document in evidence does not amount to its proof and admissibility of the

document in secondary evidence has to be decided before making endorsement thereof. There is no quarrel with the said proposition of law, however, its relevance has not been demonstrated in the present case.

36. Accordingly, I answer Point No (iii) in the affirmative.

AS TO POINT NO (iv) :

37. The suspicious circumstances raised by the Opponents has been summarised in paragraph 42 of the Trial Court's judgment i.e. delay of almost 50 years as Ibrahim expired in the year 1975 and no steps were taken by the Applicant or his father though they were residing together to propound the Will, there is no reason mentioned in the Will for excluding other heirs of deceased Ibrahim especially when there were other grandchildren apart from the present Applicant and that other properties are not included or mentioned in the Will.

38. On the aspect of delay, the Applicant has specifically deposed that he became aware of the existence of the Will in the year 2005 after death of his father when he was going through his documents and thereafter certified copy was obtained. From the cross examination nothing has been pointed out to demonstrate that the Applicant was aware of the existence of the Will prior to the year 2005.

39. Another circumstance which favours the acceptance of the explanation for delay is that there is no reason for the Applicant's

father to not propound the Will on death of Ibrahim as the same would be more beneficial to the Applicant and his father by reason of bequest in favour of the Applicant. The fact that the Applicant's father did not propound the Will and instead permitted the properties to be mutated in the names of other heirs would in fact rule out the allegation of suspicious circumstances on ground of delay.

40. In so far as the exclusion of other legal heirs is concerned, the properties bequeathed by the Will are Gat No 233, 438 and 77. In the cross examination of Applicant, the case of the Opponents is that the deceased owned properties bearing Survey No CTS No 959/1A, 959/1B, 668, 1978 and Gat No 308/1 and also CTS No 146, 446 and 680 and Gat Nos. 233, 438 and 77. Considering the specific case of the Opponents that the deceased was owner of several properties, the factum of bequest of some of the properties in favour of the Applicant cannot raise any suspicion as there were other properties for the benefit of the other legal heirs and thus there is no exclusion of other legal heirs.

41. In ***Kavita Kanwar vs Pamela Mehta*** (supra), the Apex Court noted the principles summarised in ***Shivakumar vs Sharanabasappa (2021) 11 SCC 277*** as under:

> "12……..12.1. Ordinarily, 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. Alike the principles governing the proof of other documents, in the case of Will

too, the proof with mathematical accuracy is not to be insisted upon.

12.2. Since as per Section 63 of the Succession Act, a Will is required to be attested, it cannot be used as evidence until at least one attesting witness has been called for the purpose of proving its execution, if there be an attesting witness alive and capable of giving evidence.

12.3. The unique feature of a Will is that it speaks from the death of the testator and, therefore, the maker thereof is not available for deposing about the circumstances in which the same was executed. This introduces an element of solemnity in the decision of the question as to whether the document propounded is the last Will of the testator. The initial onus, naturally, lies on the propounder but the same can be taken to have been primarily discharged on proof of the essential facts which go into the making of a Will.

12.4. The case in which the execution of the Will is surrounded by suspicious circumstances stands on a different footing. The presence of suspicious circumstances makes the onus heavier on the propounder and, therefore, in cases where the circumstances attendant upon the execution of the document give rise to suspicion, the propounder must remove all legitimate suspicions before the document can be accepted as the last Will of the testator.

12.5. If a person challenging the Will alleges fabrication or alleges fraud, undue influence, coercion et cetera 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 give rise to the doubt or as to whether the Will had indeed been executed by the testator and/or as to whether the testator was acting of his own free will. In such eventuality, it is again a part of the initial onus of the propounder to remove all reasonable doubts in the matter.

12.6. A circumstance is “suspicious” when it is not normal or is ‘not normally expected in a normal situation or is not expected of a normal person’. As put by this Court, the suspicious features must be ‘real, germane and valid’ and not merely the ‘fantasy of the doubting mind.’

12.7. As to whether any particular feature or a set of features qualify as “suspicious” would depend on the facts and circumstances of each case. A shaky or doubtful signature; a feeble or uncertain mind of the testator; an unfair disposition of property; an unjust exclusion of the legal heirs and particularly the dependants; an active or leading part in making of the Will by the beneficiary thereunder et cetera are some of the circumstances which may give rise to suspicion. The

> circumstances above-noted are only illustrative and by no means exhaustive because there could be any circumstance or set of circumstances which may give rise to legitimate suspicion about the execution of the Will. On the other hand, any of the circumstance qualifying as being suspicious could be legitimately explained by the propounder. However, such suspicion or suspicions cannot be removed by mere proof of sound and disposing state of mind of the testator and his signature coupled with the proof of attestation.
>
> 12.8. The test of satisfaction of the judicial conscience comes into operation when a document propounded as the Will of the testator is surrounded by suspicious circumstance(s). While applying such test, the Court would address itself to the solemn questions as to whether the testator had signed the Will while being aware of its contents and after understanding the nature and effect of the dispositions in the Will?
>
> 12.9. In the ultimate analysis, where the execution of a Will is shrouded in suspicion, it is a matter essentially of the judicial conscience of the Court and the party which sets up the Will has to offer cogent and convincing explanation of the suspicious circumstances surrounding the Will."

42. The guidelines summarised above would indicate that an unfair disposition of property or unjust exclusion of the legal heirs and particularly of the dependents would amount to suspicion which depends upon the facts and circumstances of each case. In paragraph 28 the Apex Court has held as under:

> "There is no doubt that any of the factors taken into account by the Trial Court and the High Court, by itself and standing alone, cannot operate against the validity of the propounded Will. That is to say that, the Will in question cannot be viewed with suspicion only because the appellant had played an active role in execution thereof though she is the major beneficiary; or only because the respondents were not included in the process of execution of the Will; or only because of unequal distribution of assets; or only because there is want of clarity about the construction to be carried out by the appellant; or only because one of the attesting witnesses being acquaintance of the appellant; or only because there is no evidence as to who drafted the printed part of the Will and the note for writing the opening and

> concluding passages by the testatrix in her own hand; or only because there is some discrepancy in the oral evidence led by the appellant; or only because of any other factor taken into account by the Courts or relied upon by the respondents. The relevant consideration would be about the quality and nature of each of these factors and then, the cumulative effect and impact of all of them upon making of the Will with free agency of the testatrix. In other words, an individual factor may not be decisive but, if after taking all the factors together, conscience of the Court is not satisfied that the Will in question truly represents the last wish and propositions of the testator, the Will cannot get the approval of the Court; and, other way round, if on a holistic view of the matter, the Court feels satisfied that the document propounded as Will indeed signifies the last free wish and desire of the testator and is duly executed in accordance with law, the Will shall not be disapproved merely for one doubtful circumstance here or another factor there."

43. It is thus clear that individual factor may not be decisive but after all the factors are taken together if the conscience of the Court is not satisfied that the Will in question truly represents the last will of Testator, the Will cannot get approval of the Court. What is thus required is the satisfaction that the Will constitutes the last free wish and desire of the testator.

44. In the present case, the Will has been executed in the year 1956 at the time when the Applicant was about 4 years of age and therefore there is no question of any undue influence or coercion exerted by the Applicant in execution of Will. It also cannot be stated that the Applicant's father had exerted any influence in the execution of Will for the simple reason that if that would have been the position, then the Applicant's father would have the knowledge about the Will and

would have propounded the same as the same would be beneficial to the Applicant who was his son.

45. The evidence brought by the Applicant makes it clear that he had no knowledge of the existence of the Will till the year 2005. The Will is in respect of part of the property of the deceased which he bequeaths to his grandson who at that time was about 4 four years of age. It is perfectly normal for a person to have some special affection for a particular grandson and would want to bequeath some part of his property exclusively to that grandson. In this case, considering that there were other properties left for the enjoyment of the other legal heirs, it cannot be said that there has been an unfair bequest raising suspicion about the authenticity of the Will.

46. I have perused the Will, which is registered and has been attested by two witnesses. The testator has given the details of the properties and has further stated that the Applicant is his grandson and the property is bequeathed to him. As the Will speaks from the death of testator, heavy duty is cast upon the Court to be satisfied that the document propounded is the last Will and testament of the departed testator. In the present case, I have no doubt that the Will was the last Will and testament of the deceased Ibrahim who had made the same while in sound and disposing mind and there are no suspicious circumstances surrounding the Will. The Applicant has duly

proved the execution of the Will by examining the son of the scribe of the Will and the daughter of the attesting witness.

AS TO POINT NO (v):

47. The contention of Mr. Patil is that a relief not prayed for has been granted by the Trial Court. Mr. Patil has tendered the certified copy of the M.A. No 67 of 2009 filed by the Applicant. To appreciate the submission of Mr. Patil, I have carefully perused the application. The title of the application shows that the application is filed under Section 276, 278 of Indian Succession Act. In paragraph 9, it is pleaded that properties in respect of which the Probate or Letters of Administration have been asked for are listed in the Annexure thereto. In paragraph 15, it is pleaded that the Applicant is ready to pay the Court fees for grant of Probate or Letters of Administration. In prayer clause (a), some words appear to have been scored off by using whitener and the prayer clause seeks letters of administration or letters of administration with Will annexed.

48. In the impugned judgment, the Trial Court has observed that the Petition is for probate and letters of administration. While deciding Issue No 3, the Trial Court has considered whether probate or letters of administration ought to have been granted and has thereafter granted probate and rejected the prayer for Letters of Administration. The pleadings in the application when read as a whole alongwith the

impugned judgment does not support the submission of Mr. Patil that no relief of grant of Probate was sought. There is nothing cogent brought to the notice of this Court that the application was restricted to grant of letters of administration. In light of the discussion above, the reliance placed by Mr.Patil on the decision of ***Bharat Amratlal Kothari vs Dosukhan Samdkhan Sindhi*** (supra) is clearly misplaced.

49. Despite the above, the relief of grant of Probate needs to be interfered with for the reasons stated hereinafter. Chapter I of Part IX of Indian Succession Act, 1925 deals with grant of probate and letters of administration. The persons who can apply for grant of Probate and for Letters of Administration are set out in Section 222 and Section 232 of the Indian Succession Act, 1925 which reads thus:

> *"**222. Probate only to appointed executor.—**(1) Probate shall be granted only to an executor appointed by the will.*
> *(2) The appointment may be expressed or by necessary implication."*
>
> *"**232. Grant of administration to universal or residuary legatees.—** When—*
> *(a) the deceased has made a will, but has not appointed an executor, or*
> *(b) the deceased has appointed an executor who is legally incapable or refuses to act, or who has died before the testator or before he has proved the will, or*
> *(c) the executor dies after having proved the will, but before he has administered all the estate of the deceased,*
> *an universal or a residuary legatee may be admitted to prove the will, and letters of administration with the will annexed may be granted to him of the whole estate, or of so much thereof as may be unadministered."*

50. The expression "Executor" has been defined under Section 2(c) as a person to whom the execution of the last Will of a deceased person, is by the testator's appointment, confided. The deceased

Ibrahim had not appointed an executor of his Will dated 30th July, 1956. As Section 222 of Indian Succession Act, 1925 restricts the grant of Probate only to an executor granted by the Will, the Applicant was entitled to letters of administration with the Will annexed.

51. In ***Vatsala Srinivasan v. Narisimha Raghunathan [AIR 2011 Bom 76]***, Division Bench of this Court held in paragraphs 17 & 18 as under:

> "17. Under the Indian Succession Act, 1925 the effect of the grant of letters of administration is to entitle the administrator to all rights belonging to the intestate as effectually as if the administration had been granted at the moment after his death. Under the Act, probate of a will, when granted establishes the will from the death of the testator and renders valid intermediate acts of the executor as such. Where an executor is named in the will probate can be granted only to an executor named in the will. On the other hand where the will does not appoint an executor a universal or residuary legatee may be admitted to prove the will. .....
>
> 18. Both a proceeding for the grant of probate as well as a proceeding for the grant of letters of administration with the Will annexed is initiated for protecting the interest of the legatees under the will. The essence of the enquiry in both the proceedings is the same and relates to the genuineness and authenticity of the will....."

52. In the present case, the pleadings in the application seek both Probate or Letters of Administration. The Trial Court has failed to notice Section 222 and Section 232 of the Indian Succession Act, 1925 and has declined to grant letters of administration as the properties were being administered by the legal heirs of the deceased, their names have been recorded in record of rights and successive mutation entries have been certified. In view of the restriction under Section

222 of Succession Act, probate could not be granted to the Applicant. The Applicant was entitled to grant of Letters of Administration with Will annexed and therefore the impugned judgment will have to be modified to grant Letters of Administration with Will annexed. The Point No (v) is answered accordingly.

CONCLUSION:

53. Having regard to the discussion above, the impugned judgment and order of the Trial Court is modified as under:

: ORDER :

(a) The impugned Judgment dated 29th May, 2014 is partly modified.

(b) The Applicant is granted Letters of Administration with Will annexed dated 30th July, 1956 of deceased Ibrahim alias Kamal Babaso Shiledar.

(c) The matter is remitted to the Trial Court only for the purpose of issuing the Letters of Administration with Will annexed in favour of the Applicant.

(d) The First Appeal stands dismissed with the above modification.

[Sharmila U. Deshmukh, J.]

54. At this stage, request is made for continuation of *status quo* order which is operating in favour of the Appellant for a period of 6 weeks. The said request is opposed. As the *status quo* order is operating in favour of the Appellant since long, I am inclined to continue the *status quo* for a period of 6 weeks from today.

[Sharmila U. Deshmukh, J.]