RAJASTHAN HIGH COURT

Jai Raj Singh

Vs.

Shanti Kishan Singh

Civil First Appeal No. 344 of 1999
(A.C. Goyal, J.)

13.02.2004

JUDGEMENT

A. C. Goyal, J.

1. This S. B. Civil First appeal by the appellants-defendants is preferred against the judgment and decree dated 15-9-1999; whereby learned Additional District Judge No. 8*, Jaipur city, Jaipur,* decreed the suit for possession and permanent injunction.

2. On 22-2-1992, the plaintiff Smt. Shanti filed a Civil Suit against her elder son and his wife for possession and permanent injunction with the averments that Plot No. 93, situated in *Dhuleshwar Garden, Jaipur,* was purchased by her vide registered sale deed dated 26-10-1958 (correct year is 1957) from Maharawal Sri Sangram Singh. Constructions on ground floor were raised during the period of 1959 to 1961 and the first floor was got constructed by her in the year 1984, with her own income and loan advanced by the bank and thus it is herself acquired property.

3. That the plaintiff is residing in *Jaipur* since 1959 and in this plot since 1961. Her elder son defendant No. 1 was married to defendant No. 2 in the year 1974. Thereafter both the defendants started residing at Kota in a house which was constructed with the income of joint family.

4. That in the months of May, June 1990, the defendant No. 1 expressed his willingness to shift his family at *Jaipur.* She allowed the defendants to reside on the ground floor and also permitted them to use furniture and other house hold articles. She also continued to reside in remaining portion of the ground floor while Smt. Shobha Singh wife of her younger son Prithvi raj Singh was already residing on the first floor with her children and her younger son Prithviraj Singh was serving in a tea

garden at Assam.

5. That litigation with regard to ancestral properties of her husband and his brothers was going on and for that Prithviraj Singh and her daughter Smt. Jaishree had given power of attorney to the defendant No. 1 in the year 1982. The plaintiff on account of her illness had gone to Assam in November 1990 and returned to *Jaipur* in May 1991. At that time she also signed some blank stamp papers and other papers on pursuance of the defendant No. 1 for execution of power of attorney with regard to litigation of ancestral property and thereafter she came to know that some document was prepared on 28-5-1991 by the defendant No. 1 claiming himself to be the owner of this property.

6. That she again left *Jaipur* in June 1991 and came back to *Jaipur* in September 1991 and at that time the defendants did not allow her to reside on the ground floor and she was beaten by them. Thereafter she asked the defendants to vacate and hand over the vacant possession of the ground floor to the plaintiff but they declined to do so hence the suit.

7. The defendants in their written statement filed on 23-11-1994, denied all the averments /allegations made in the plaint with a plea that this plot was purchased by SriKishan Singh, father of the defendant No. 1 and only on account of the sale deed being in the name of the plaintiff, she is not the owner of this plot. She was having no source of income to pay the price of the plot as well as to incur any expenditure in construction of the house. The ground floor was got constructed by Kishan Singh with his own income and the first floor was constructed with the income of the defendant No. 1 and thus this is joint family property.

8. That late SriKishan Singh was posted as Dy. Supdt. of Police at *Jaipur* from 1959 to 1963 and thereafter he remained posted at Bombay, Dhoulpur and Kota upto 1970 and the plaintiff used to reside with SriKishan Singh and thus it is not correct to say that she was residing at *Jaipur* since 1959. While admitting the facts relating to giving power of attorney to the defendant No. 1 to look after the litigation with regard to ancestral properties, it was pleaded that vide family partition, document dated 28th May 1991, the properties at *Jaipur* and Kota were divided between the plaintiff, the defendant No. 1 and his younger brother Prathvi Raj Singh and thus the defendants are in possession of the ground floor of the plot No. 93 as owner since the date of this family partition and now it is not correct to say that the plaintiff is the owner of this house.

9. During the pendency of this suit the plaintiff Smt. Shanti Devi expired on 30-11-1995. Amended plaint was filed by her son Prathviraj Singh on 26-7-1996 with a plea that Smt. Shanti Devi in her lifetime executed a Will on 29-4-1993 in his favor and thus he is now the sole owner of this property.

10. That vide amended written statement the facts relating to execution of the Will were denied. It was pleaded by the defendants that Smt. Shanti Devi had neither any power nor she was mentally and physically fit to execute any such Will.

11. On the basis of pleadings of parties following issues were framed:--

(Vernacular omitted)

12. After recording the evidence of the parties, learned Additional District Judge No. 8, *Jaipur* city, Jaipur, vide judgment dated 15-9-1999 decided all the issues except Issue No. 2 in favour of the plaintiff and decreed the suit for possession and permanent injunction. Hence this appeal.

13. I have heard learned counsel for the parties. The correctness of the decision on issues Nos. 1, 5 and 9-A has been challenged by learned counsel for the appellants. Thus, it has to be considered and decided as to whether the decision of the trial Court on these three issues is correct?

Issue No. 1 : In order to prove this issue the plaintiff Smt. Shanti Devi had to prove that she was owner of the plot No. 93 situated at Chuleshwar Garden, *Jaipur* along with constructions thereon. It is the case of the plaintiff Smt. Shanti Devi that she purchased this plot from one MaharawalSriSangram Singh vide registered sale deed dated 26-12-1957 and she raised constructions on ground floor in the years 1959 to 1961 and the construction over the first floor was raised by her in the year 1984 out of herself earned money.

14. Ex. 1 is the original registered sale deed dated 26-12-1957 in the name of Smt. Shanti Devi. The sale price of the said plot is Rs. 2,500/- which was paid by Smt. Shanti Devi to MaharwalSriSangram Singh according to this document Ex. 1. In the written statement, it is not denied that the sale deed was executed in the name of Smt. Shanti Devi but it was denied that it was purchased out of her self earned money. According to the written statement, this plot was purchased by late Sh. Kishan Singh husband of late plaintiff Smt. Shanti Devi and only on account of the sale deed being in the name of Smt. Shanti Devi, she cannot be considered to be the sole owner of this plot. It was also pleaded that she was having no source of income to pay the price of

the plot as well as to raise any construction. It was also pleaded that the construction of ground floor was raised by Sh. Kishan Singh and the first floor was got constructed with the income of the defendant -appellant No. 1 and thus this house is the property of joint family.

15. Smt. Shanti Devi expired on 30-11-1995 before recording her statement. P.W. 1 Prithvi Raj Singh is younger son of Smt. Shanti Devi. His statement was recorded on 3-5-1997 and at that time he was 47 years of age. Thus, in the year 1957 when the sale deed Ex. 1 was executed and registered, he was of about 7 years age and when the constructions on ground floor were raised during the period of 1959 to 1969, he was about 10 years old. Thus, learned counsel for the appellants rightly submitted that P. W. 1 had no personal knowledge regarding the income of Smt. Shanti Devi or as to who paid the sale price or who spent the money in construction over the ground floor. Similar is the submission made by learned counsel for the respondents with regard to the statement of Sri Jai Raj Singh D. W. 1. His statement was recorded in November, 1998 at the time when he was 51 years of age and thus he had also no personal knowledge about source of the income of his mother as well as who paid the price of the plot and spent money in constructions raised in the years 1959 to 1961. P. W. 1 stated that his mother Smt. Shanti Devi was a teacher in Saint Xavier School in the year 1957 and her salary certificate is Ex. 3 . Ex. 3 certificate has not been disputed on behalf of the appellants. According to this certificate Smt. Shanti Devi was a teacher in Saint Xavier School and her monthly salary at the time of appointment was Rs. 125/- and at the time of leaving service her gross salary was Rs. 168/- per month. As per this certificate, her total income for a period of 5 months i.e. from 1-7-1957 to December, 1957 comes to Rs. 625/- as submitted by learned counsel for the appellants. According to learned counsel for the appellants, the sale price of the disputed plot Rs. 2,500/- thus was not possessed by her out of her own earnings and this very fact goes to show that the sale price had been paid out of the joint family property. It was also submitted that no account has been produced to prove as to how much amount had been invested by her in construction during the years 1959 to 1961 and during the year 1984. It was also submitted that during trial P. W. 1 improved his case by saying that Smt. Shanti Devi used to run a dairy and had also been doing tuitions and further the evidence in this regard is wholly vague as there is no material available on the record to prove that Smt. Shanti Devi had earnings from these sources also. It was also submitted that the statement of P. W. 2 Smt. NirmalaKumari is also quite vague and she was unable to say as to how much amount had been spent in constructing the ground floor and the first floor. On similar reasonings, as per learned

counsel for the appellants the statement of P. W. 4 SriNanu Ram is also not reliable as he was unable to give the details of the amount spent in the constructions as well as the amount received by him. It was also submitted that there was no reason not to rely upon cogent evidence given by the appellant defendant Jai Raj Singh on this issue. He also referred letters Ex. 11 which was written by Smt. Shanti Devi to her younger son Prithvi Raj Singh and it is stated in this letter that first floor of the disputed house had been rented out by the defendant appellant and vide letter Ex. 14 dated 23-2-1984 Smt. Shanti Devi admitted that the work of roof was got done by the defendant appellant Jai Raj Singh and thus in view of such admission of Smt. Shanti Devi it is fully proved that the appellant defendant Jai Raj Singh had been supervising the work of the first floor and as such a presumption arises that the construction of the first floor had been done out of joint family property. He also referred para 5 of the plaint wherein it is pleaded that a house had been purchased at Kota out of the income of the joint family for the appellant-defendant No. 1 and as such the existence of inference of joint family property stands admitted and a heavy burden lies on the respondent plaintiff to prove that the disputed property was acquired without the aid of joint family property. He placed reliance in this regard to paras 223 (6) and 233 of the Principles of Hindu Law, by Mullah, 12th Edition. Learned counsel for the respondent plaintiffs contended that the trial Court having considered the entire evidence rightly decided this issue and there is no ground ï¿½? to interfere in this appeal. According to learned counsel for the respondent plaintiffs Smt. Shanti Devi belongs to Ex-Jagirdar Family and she was also serving as a teacher and was carrying on other earning activities also and thus it was quite possible for her to pay the sale price of Rs. 2,500/- It was next submitted that P. W. 2 Smt. NirmalaKumari a family friend and also daughter-in-law of Kamdar of MaharawalSriSangram Singh has proved that the sale price was paid by Smt. Shanti Devi and she was also earning money by tuitions and running a dairy. He also referred the statement of P. W. 4 Nanu Ram who along with his father was engaged in construction work over this plot and it is also well proved that she raised a loan of Rs. 30,000/- from the bank for construction of the first floor in the year 1984 and the entire loan was repaid by her. He also referred certain letters to prove that the entire expenditure was made by Smt. Shanti Kishan Singh in raising the constructions over the ground floor as well as the first floor.

16. I have considered the rival submissions, entire evidence oral as well as documentary and the findings of the trial Court. It is settled law that property purchased or acquired out of the income of joint family or with the assistance of ancestral property will be taken as ancestral property. A careful consideration of the

entire evidence goes to show that this issue has been rightly decided in favor of the plaintiff respondents. It is not in dispute that Smt. Shanti Devi belongs to a Jagirdar family. The defendant appellant Jai Raj Singh himself stated that his grandfather was a Jagirdar and late Sh. Kishan Singh was also serving in police. As stated hereinabove, Smt. Shanti Devi was serving as a teacher since 1957 and she was also earning by tuitions and with the help of dairy and she was also doing a part time job in All India Radio. According to the statement of P. W. 2 Smt. NirmalaKumari, this plot was purchased through her father-in-law who was working as Kamdar of MaharawalSriSangram Singh who sold this plot to Smt. Shanti Devi. According to the statement of Smt. NirmalaKumari the sale price was paid by Smt. Shanti Devi and construction was also raised by Smt. Shanti Devi. She has admitted that Smt. Shanti Devi was her friend and she was earning from tuitions as well as from dairy. P. W. 4 Nanu Ram has also supported the plaintiff respondent's case. He stated that in the year 1960-61 he along with BhoorJi and his father was engaged in construction of this house and all the expenses were made by Smt. Shanti Devi and she used to make the payments to them. His statement cannot be discarded only on the grounds that he did not give the details of the total expenditure as his statement was recorded in January, 1998 while the said construction work was carried out in the year 1960-61. There can be no good reason not to rely upon his statement as he appears to be an independent witness. The learned trial Judge rightly did not rely upon the statement of the defendant appellant Jai Raj Singh as he stated in examination -in-chief that there was no source of income of her mother during the years 1956 to 1958 while in cross-examination he admitted this part of his statement to be wrong as his mother was serving as a teacher. Secondly his statement is also contrary to the pleadings. In para 2 of the written statement it was pleased that the entire money in construction of ground floor was spent by his father while the first floor was constructed with his own income and Smt. Shanti Devi did not obtain any loan from the bank, while in his statement before the trial Court he admitted this fact that a loan of Rs. 30,000/- was obtained by his mother in the year 1984 from the bank. It was also admitted by him that his mother used to recover the rent from the tenants as owner. It was also admitted by him that the entire income of his father was being spent in house expenses. P. W. 5 Sri Vijay Kumar Assistant Manager in the Indian Overseas Bank stated that a sum of Rs. 30,000/- was advanced as loan in February, 1984 to Smt. Shanti Devi for construction of the house and the entire loan was repaid by Smt. Shanti Devi vide receipts Ex. 16 to Ex. 24. He has also proved the loan account Ex. 25 and the certificate Ex. 4 to this effect that a loan of Rs. 30,000/- was advanced to Smt. Shanti Devi on 13-2-1984. It is

significant to say here that according to the statement of D. W. 1 Jai Raj Singh a sum of rupees about 35 to 40 thousands was spent in raising the construction over the first floor. Learned counsel for the respondents also referred certain letters to prove this fact that issue No. 1 was rightly decided in their favor. Vide Ex. 7 a loan of Rs. 3,750/- was also sanctioned in the name of Smt. Shanti Devi against the F. D. R. in March, 1984. Ex. 8 is a letter dated 29-3-1984 written by the appellant Jai Raj Singh to the respondent Prithvi Raj Singh wherein it was admitted by the appellant Jai Raj Singh that Mama (Smt. Shanti Devi) is busy in construction and all credit goes to her without any contribution from them. This letter was written in the last week of March, 1984. It is also stated in this letter that Jai Raj Singh is going to shift to Kunadi from Kota on account of much expenses at Kota and thus the statement of the appellant Jai Raj Singh contained in this letter is contrary to the pleadings wherein he pleaded that first floor was constructed with his income. Ex. 13 is a letter written on 5-2-1984 by Smt. Shanti Devi to Prithvi Raj Singh wherein it is stated that she is going to start the construction over first floor by Sh. BhoorJi. It is significant to say here that the statement of P. W. 4 Nanu Ram finds support from this letter as he stated that BhoorJi was also engaged in construction of this house. Ex. 14 letter also supports the case of the plaintiff respondent that it was Smt. Shanti Devi who got the house constructed. The contention of learned counsel for the appellants is that vide this letter Smt. Shanti Devi admitted that roof work was got done by Jai Raj Singh. No doubt, it is so mentioned in this letter but no such inference from this letter can be drawn that it was appellant Jai Raj Singh who spent the money in construction over the first floor. It is also not in dispute that father of the appellant Jai Raj Singh as well as the respondent Prithvi Raj Singh died in April, 1982. Thus, in view of the entire discussion made hereinabove, this issue was rightly decided in favor of the plaintiff -respondents.

17. Now comes issue No. 5. While dealing with the issue No. 1 it has already been held that the plot No. 93 was the property of Smt. Shanti Devi and thus not the property of joint family consisting of Smt. Shanti Devi and her both sons Jai Raj Singh and Prithvi Raj Singh.

18. Ex. A-2 is the document of family settlement. According to learned counsel for the appellants, it is only memorandum of previous oral family settlement between the parties and thus it was not required to be registered compulsorily and the learned trial Court has committed illegality by treating this document as a document making the partition of the property between the parties.

19. According to learned counsel for the appellants, in order to construe the nature of a

document, the same has to be read as a whole and the heading of the document is of no significance in constructing the same and applying the said principle to the document Ex. A-2 dated 28-5-1991. The nature of the document is a memorandum incorporating the terms and conditions already by learned counsel for the appellants that it is evident from the contents of this document that the parties had previously partitioned their immovable property and had already taken possession of the same as owners and this document was executed as a record of the same. It was also submitted that this document was executed at Kota relating to the properties situated at Kota and *Jaipur* and if the parties had intended to do family arrangement or partition by this document, they would have stipulated that the parties would take possession of the properties which have fallen to their respective shares and thus this document falls in the category of memorandum which does not require any registration. He placed reliance upon *TekBahadurBhujil v. Debi Singh Bhujil AIR* [1]*Kale v. Deputy Director of Consolidation* [2]and *Roshan Singh v. Zile Singh* [3]In all these three judgments the Hon'bleSC has held that family arrangement can be arrived at orally. Its terms may be recorded in writing as a memorandum of what had been agreed upon. The memorandum need not be prepared for the purpose of being used as a document on which future title of the parties is to be founded. It is generally prepared as a record of what had been agreed upon. Per contra, learned counsel for the respondents contended that a bare reading of this document Ex. A-2 shows that it is partition in praesenti and not a memorandum of partition made in the past and thus it is clearly a deed of partition. Hence, it was rightly held inadmissible in evidence in absence of its registration. Reliance is placed upon *Siromani v. Hemkumar*[4]wherein it was held that a document effecting the partition of joint family properties and value of more than Rs. 100/- by metes and bounds, registration of such document is compulsory and in absence of such registration it is inadmissible in evidence to prove title of any of the coparceners to any of the property. Similar view was taken by the Hon'bleSC in Kale case (supra), *ParmanandSetia v. Somlal, D. N. J. (Raj) 2003 (1) 107 (AIR 2003 Rajasthan 54)* and *Smt. Chanderwati v. Lakshmi Chand,* [5]

20. I have considered the rival submissions in the light of the judgments mentioned hereinabove. I have gone through the entire contents of this document Ex. A-2 and it leaves no room for doubt that the immovable properties were partitioned by the parties to this document vide this document Ex. A-2. It is not merely a heading of this document which indicates it to be a partition deed, rather the entire contents of this document clearly reveal that this is a document by which the parties agreed to effect the partition of the immovable properties as mentioned in this document and thus the

learned trial Judge rightly held this document to be a partition deed and inadmissible in evidence in absence of its registration as it is not disputed that such a partition deed of immovable properties was compulsorily registrable.

21. Learned counsel for the appellants next submitted that even if this document is taken to be inadmissible in evidence then it can be looked into for collateral purpose i.e. the nature of the possession of the appellants as owner and secondly this document operates as an estoppels against the respondents. It was also contended that the trial Court did not consider the evidence of the parties on the point of execution of this document Ex. A-2.

22. It is correct to say that the learned trial Judge did not consider the evidence with regard to execution of this document on the ground that this document is not admissible in evidence. Since the evidence is on record, this Court has to consider the evidence of the parties on the point of execution of this document. In para 6 of the written statement, it is pleased that this document was executed on 28-5-1991 and the defendant No. 1 Jai Raj Singh, his younger brother Prithvi Raj Singh and their mother Smt. Shanti Devi put their signatures on this document in presence of Nand Kishore, Surendra Singh Rathore and Shiv Raj Singh advocate and this document was attested by Sh. Narendra Singh notary public and stamps of Rs. 60/- were purchased by Smt. Shanti Devi and an entry was made by the notary public in the register. These facts were repeated in para 8 of the written statement also. In para 8 of the plaint plaintiff Smt. Shanti Devi pleaded that on her return from Assam during May, 1991 the defendant-appellant No. 1 pressed her and her younger son Prithvi Raj Singh to give him power of attorney with regard to properties under litigation and represented that if the power of attorney would not be given, all the cases relating to properties situated at Kunadi would be spoiled and on the said representation of the appellant defendant No. 1 the plaintiff Smt. Shanti Devi signed some blank stamp papers and thereafter she came to know that the said blank stamp papers were used by the appellant- defendant No. 1 in preparing Ex. A-2. P.W. 1 Prithvi Raj Singh admitted in cross-examination that Ex. A-2 bears his as well as his mother's signatures but their signatures were obtained on blank stamp papers. In view of such admission of the plaintiff Sh. Prithvi Raj Singh learned counsel for the appellants rightly submitted that burden lies on the respondents to prove that they did not execute this document and their signatures were obtained on blank stamp papers. A reading of the entire statement of the plaintiff does not prove this fact that they signed Ex. A-2 when it was blank. On the other hand its execution has been well proved by the appellant-defendants. D.W. 5 Narendra Singh,

D.W. 6 Shiv Raj Singh, D.W. 7 Jagdish Kumar Gupta and D.W. 9 Nand Kishore have supported the statement of the defendant-appellant Jai Raj Singh on this point. D.W. 5 Narendra Singh is a notary public at Kota. He stated that this document was attested by him on 28-5-1991 at Kota. It was also stated by him that he read over this document in presence of Jai Raj Singh, Prithvi Raj Singh and Smt. Shanti Devi and they were identified by Sh. Shiv Raj Singh Advocate and all the three parties to this document put their signatures on this document in his presence and thereafter he attested the same. D.W. 6 Sh. Shiv Raj Singh an Advocate stated that he was appearing as counsel in the cases of these parties and at the instance of all the three parties this document was got prepared by him and it was got attested by the notary public and he identified all of them in presence of the notary public and he put his own signatures also. D.W. 7 Jagdish Kumar Gupta stated that Ex. A-2 document was typed by him and for this work advocate Sh. Shiv Raj Singh came to him. D.W. 9 Sh. Nand Kishore is a witness to Ex. A-2. He stated that all the three parties signed this document in his presence and thereafter he also signed as a witness and it was signed by the parties after getting it typed and this document was got attested from the notary public D.W. 5 Narendra Singh. All these witnesses have been cross-examined in detail but nothing affecting their testimony adversely has come out. Thus, its execution is well proved. Learned counsel for the respondents contended that this document cannot be treated as a family settlement because there was no dispute between the parties at that time; that no property was given to mother Smt. Shanti Devi and there is no proof that any cash amount was given to her as stated by D.W. 6; that Smt. Jai Shree sister of Jai Raj Singh and Prithvi Raj Singh is not a party to this document. But on the basis of these submissions, it cannot be said that this document Ex. A-2 which has already been held as a document affecting the partition of the properties was not executed and thus the respondents completely failed to ï¿½? prove this fact that their signatures were obtained on blank stamp papers.

23. Now other two submissions made by learned counsel for the appellants are considered. First is that this document can be looked into for collateral purpose of determining the nature of the possession of the appellants as owner. Reliance is placed upon *Tejraj v. Mohanlal,* [6] wherein it was held that an unregistered document though inadmissible in evidence under Section 49 of the Registration Act can be looked into for the collateral purpose of determining the character of possession of the person who claims to be in separate possession of the property under that document and where the possession of a person is more than 12 years old, he can claim adverse possession by showing that the nature of his possession was exclusive and there was an ouster.

Similar view was taken in *Rikhi Ram v. Sada Ram,* [7]*C. S. KumaraswamiGounder v. AravagiriGounder,* [8] and Roshan Singh case (supra). Per contra learned counsel for the respondents submitted that the appellants were residing at Kota since 1974 and according to para 7 of the plaint the appellant-defendant No. 1 expressed his desire to shift his family at *Jaipur* for education of their children and further that his wife is also getting employment at *Jaipur* and thereupon the plaintiff Smt. Shanti Devi allowed them to occupy ground floor and also to use furniture and other household articles belonging to her. The defendant-appellants in para 5 of the written statement admitted this fact that both of them were residing at Kota since 1974. It was also admitted in para 6 of the written statement that the defendants continued to reside at Kota till 1990 and thus the defendant-appellants admitted this fact that they resided at Kota till 1990. In para 6 of the written statement it was further pleaded that how they are residing in the premises on ground floor since June, 1991 in accordance with this partition. The appellant-defendant Jai Raj Singh clearly admitted in his statement that he along with his wife resided at Kota from 1974 to 1991 and thus this fact is not in dispute that the appellant- defendants are residing on the ground floor of the disputed house since 1991. In view of the above facts, this submission of learned counsel for the appellants cannot be accepted that the appellants have become the owner of the ground floor of the house on the basis of this document Ex. A.2. It has to be kept in mind that this house as per decision on issue No. 1 has been held to be the property of sole ownership of late Smt. Shanti Devi and therefore, this submission is without any merit that the appellants were residing in this house as owner according to this document Ex. A-2.

24. The second submission is that Ex. A-2 dated 28-5-1991 operates as an estoppel against the respondents, hence they have no right to challenge it as this family arrangement is binding on them as they have taken advantage under this document Ex. A-2. Reliance is placed upon Kale case (supra) wherein it was held that assuming that the said document was compulsorily registrable, the family arrangement being binding on the parties to it would operate as an estoppel by preventing the parties after having taken advantage under the arrangement to resile from the same. The facts of this case in brief are that one Lachman was the tenant and the tenure holder of the property in dispute which consists of 19.73 acres of land contained in Khatas Nos. 5 and 90 and 19.24 acres of land comprising Khatas Nos. 53 and 204. Lachman died in the year 1948 leaving behind three daughters and the appellant No. 1 Kale is the son of eldest daughter MusamatTikia. Thus after the death of Lachman the family consisted of his two unmarried daughters HarPyari and Ram Pyari and his married daughter's son Kale

under the U. P. Tenancy Act, 1939 which applied to the parties that only unmarried daughters inherit the property. The first round of dispute appears to have arisen soon after the death of Lachman in the year 1949 when PanchayatAdalat held that HarPyari having been married had lost her right and Ram Pyari was also an heir so long as she was not married and after her marriage the legal heir to the property of Lachman would be the appellant Kale. In the year 1952 the U.P. Zamindari Abolition and Land Reforms Act, 1950 was made applicable to the tenure holders also and vide amendment in the year 1954 the list of heirs enumerated under the statute "unmarried daughters" was substituted by "daughter" only. Thereafter the appellant Kale filed a petition before NaibTehsildar after the marriage of Ram Pyari with a prayer that he was the sole heir to the estate of Lachman. The NaibTehsildar accepted the contention of the appellant. Thereafter, Smt. HarPyari and Ram Pyari filed an application before the NaibTehsildar for setting aside his order dated December 5, 1955 and during the pendency of the matter a compromise was arrived at under which the appellant Kale was allotted Khatas No. 5 and 90 whereas the respondents Nos. 4 and 5-Har Pyari and Ram Pyariwere allotted khatas Nos. 53 and 204 as between them. Thereafter, the parties remained in possession of the property allotted to them and thus the dispute between the parties was finally settled and both the parties accepted the same and took benefit thereunder. Thereafter, the dispute arose in the year 1964 when the proceedings for revision of the records were started and respondents Nos. 4 and 5 were entered in Form C.H. 5 as persons claiming co- tenure-holders to the extent of 2/3rd share with the appellant Kale who was entered as having 1/3rd share in all the Khatas. In view of these facts, the Hon'bleSC held that though the family arrangement was not registered, it could be used for a collateral purpose namely for the purpose of showing the nature and character of possession of the parties and further the parties after having taken advantage under the arrangement cannot resile from the same. But in the instant case, the respondents have not taken any advantage under this document Ex. A-2 and thus the principle of estoppel is not applicable in the instant case against the respondents. Thus, this issue is decided against the appellants.

25. Now issue No. 9-A is taken up. Section 63 of the Indian Succession Act, 1925 (in short the Act, 1925) provides for execution of Wills while Section 68 of the Indian Evidence Act, 1872 (in short the Act, 1872) provides the mode of proof of execution of a document required by law to be attested. The relevant provisions are reproduced as under:-

Section 63 of the Act, 1926. Execution of unprivileged Wills. Every testator, not

being a soldier employed in an expedition or engaged in actual warfare, (or an airman so employed or engaged) or a mariner at sea, shall execute his Will according to the following rules :-

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

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

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

Section 68 of the Act, 1872 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).

26. The Will pleaded by the respondent-plaintiff Prithvi Raj Singh Ex. 15 is the registered Will dated 29-4-1993. During the pendency of the suit plaintiff Smt. Shanti Devi expired on 30-11-1995 and Sh. Prithvi Raj Singh was impleaded as plaintiff No. 1/1 as her legal heir and vide amended plaint Sh. Prithvi Raj Singh pleaded in para 18(ka) that Smt. Shanti Devi in her lifetime executed a Will in his favor on 29-4-1993 and on the basis of this Will he is the sole owner of this property. The defendants vide amended written statement denied the execution of this Will and also pleaded that

Smt. Shanti Devi had no power to execute the Will and further she was not mentally and physically fit to execute this Will.

27. P.W. 1 Prithvi Raj Singh stated that his mother executed this Will Ex. 15 in his favor for the plot No. 93 and each page of Ex. 15 bears her signatures as well as the signatures of his sister Jai Shree which are respectively A to B and C to D. In cross-examination he denied the suggestion that he got this Will executed by putting his mother under pressure. It was also stated by him that at the time of execution of this Will he was in Assam and thus this Will was not signed in his presence but at that time his mother's health was good and she was not ill. P.W. 3 Sh. Man Mohan is one of the three attesting witnesses of Ex. 15. He stated that this Will was executed and registered on 29-4-1993 and this Will got executed by Smt. Shanti Devi in the name of her son Prithvi Raj Singh. It was also stated by him that it was prepared at the instance of Smt. Shanti Devi and she herself read it over in presence of the Registrar and she signed it before the Registrar in his presence and he also put his signatures in her presence and other attesting witnesses. Jai Shree and KalyanSahai also signed this Will at that time. It was also stated by him that all of them signed this document at the instance of Smt. Shanti Devi and Smt. Shanti Devi signed it and also put her thumb impressions in their presence. D.W. 1 Jai Raj Singh clearly admitted the signatures of his mother Smt. Shanti Devi and sister Smt. Jai Shree on this document Ex. 15, although according to his statement Smt. Shanti Devi had no authority to execute this Will and she was mentally and physically weak and unable to understand and thus she was not in a position to execute this Will. It was also stated by him that he came to know later on about execution of this Will in favor of Prithvi Raj Singh by his mother on 29-4-1993. He further admitted in his statement that his mother wanted him to vacate the ground floor of this house and he decline to do so. He further admitted that his mother wanted in give this entire house to Prithvi Raj Singh.

28. Learned counsel for the appellants submitted that it cannot be presumed from the signatures of two persons appearing at the foot of the document that they had appended their signatures as attesting witnesses or they signed the Will in their capacity as attesting witnesses and he placed reliance upon *GirjaDatt Singh v. GangotriDatt Singh*, [9]wherein it was held that it cannot be presumed from the signatures of two persons that they appended their signatures as attesting witnesses as Section 68 of the Evidence Act requires an attesting witness to be called as a witness to prove due execution and attestation of the Will. Similar view was taken in *T. VenkatSitaramRao v. T. Kamakshiamma,*[10]*N. Kamalam (Dead) v. Ayyasamy,* [11]and

BhagwanKaur v. Kartar Kaur,[12.] It was also submitted that the execution of a Will should be proved beyond suspicious circumstances and according to learned counsel for the appellants; following are the suspicious circumstances surrounding the execution of the Will Ex. 15.

1. The evidence of the propounder is false. He disavows all knowledge of the execution of the Will and says that on the date of the execution of the Will, he was in Assam which is not believable.

2. The propounder does not state as to when did he come to know about the execution of the Will in his favor.

3. It is not known as to who prepared the draft of the Will and where.

4. It is not believable that a lady will herself get the draft of the Will prepared and will herself go to the office of the Registrar for getting the Will registered without the assistance of the male member of the family.

5. It is also not believable that Smt. Shanti Kishan Singh will ask P.W. 3 Man Mohan Dhapu on telephone to come to the office of Sub-Registrar.

6. It is also not known as to who identified Shanti Kishan Singh before the Sub-Registrar although according to the endorsement of the Sub-Registrar the executant was identified by Smt. Jai Shree and one Man Mohan S/o Hari Ram Suthar (P.W. 3), but P.W. 3 Man Mohan does not agree to this and also does not prove his signatures of identification.

7. P.W. 3 Man Mohan Dhapu says that the draft of the Will was shown to him in the office of Sub-Registrar, when he reached there, whereas according to the contents of the Will he had signed the Will at house No. 93 Dhuleshwar Garden, Jaipur.

8. P.W. 3 Man Mohan Dhapu says that the execution of the Will was done in the office of Sub Registrar and Jaishree also signed the same there. He also says that he signed after Jaishree whereas according to the contents of the Will, the execution and attestation of the Will was done at House No. 93, *Dhuleshwar Garden, Jaipur.* Thus here is a Will with no attesting witness of the execution of the same at 93, *Dhuleshwar Garden, Jaipur.*

9. P.W. 3 Man Mohan Dhapu says in the same breath that - "Registrar KeYehaPrithvi Singh Gaye The, Nehi Gaye."

10. As per para No. 8 of the plaint, Smt. Shanti Kishan Singh was suffering from nervous break down and high blood pressure from November 1990 and was unable to go here and there, but the propounder says that she was not sick and thus he has tried to conceal her illness.

11. The propounder has not produced any evidence to prove that at the time of the execution of the Will dated 29-4-1993, the executant Smt. Shanti Kishan Singh was in a sound state of body and mind.

29. He placed reliance upon *Smt. InduBala v. Manindra Chandra Bose,* [13]wherein it was held that the mode of proving a Will does not ordinarily differ from that of proving any other document except to the special requirement of attestation. The onus of proving the Will is on the propounder and in the absence of suspicious circumstances surrounding the execution of the Will, proof of testamentary capacity and the signature of the testator as required by law is sufficient to discharge the onus. Where however there are suspicious circumstances, the onus is on the propounder to explain them to the satisfaction of the Court before the Court accepts the Will as genuine. Even where circumstances give rise to the doubts, it is for the propounder to satisfy the conscience of the Court. The suspicious circumstance may be as to the genuineness of the signatures of the testator, the condition of the testator's mind, the dispositions made in the Will being unnatural, improbable or unfair in the light of the relevant circumstances or there may be other indications in the Will to show that the testator's mind was not free. In such a case, the Court would naturally expect that all legitimate suspicions should be completely removed before the document is accepted as the last Will of the executor. If the propounder himself takes a prominent part in the execution of the Will which confers a substantial benefit on him that is also a circumstance to be taken into account and the propounder is required to remove the doubts by clear and satisfactory evidence. Per contra, learned counsel for the respondents submitted that no evidence was required to prove the execution of the Will as the same has been admitted by the defendant- appellant Jai Raj Singh himself, even though P.W. 3 Man Mohan as attesting witness has proved due attestation of this Will and there are no suspicious circumstances surrounding the execution of this Will. He placed reliance upon *NareshCharan Das Gupta v. PareshCharan Das Gupta,* [14]wherein it was held that when once it has been proved that a Will has been executed by a person of competent understanding, the burden of proving that it was executed under undue influence is on the party who alleges it. In *DhrubaSahu (Dead) and after him NalumoniSahu v. ParamanandaSahu,* [15]it was held that when the document

appears to have been executed and attested at the same sitting, it would not be necessary for the attesting witness to state in his deposition that he had signed as a witness in the presence of the executants. In *Gori v. Munshi Ram* [16]it was held that when there is no cross-examination to show that the attestation took place at a different time and place and therefore, it cannot be held that the evidence of a witness does not prove the factum of compliance. In *Mst. SusilaSa v. Durju,* [17]it was held that endorsement by registering authority as to payment of money gives rise to initial presumption as to payment of consideration of the document. In *Baburajan v. Parukutty,* [18]it was held that when it is proved that the Will was presented for registration by testator himself after acknowledging execution of the same and there are no vitiating circumstances to rebut the presumption arising out of the registration, the finding of execution of the Will does not call for any interference. It was held in *Narayan v. The Chamber of Commerce Ltd. Kishangarh,* [19]that there is presumption that registration proceeding were regular and honestly carried out and unless it is shown that the person admitting registration before the Registrar is an imposter, it should be taken that the executant admitted the signature in the mortgage deed and thus presumption of genuineness arises. Similar view was taken in *Syed Wallinddin v. Mst. RafiqaBabi,* [20] In *RamabaiPadmakarPatil (Dead) Through LRs. v. Rukminibai Vishnu Vekhande*[21]it was held that mere fact that the entire property was given to only one of the natural heirs, a widow daughter to the exclusion of others, is not a suspicious circumstance when it was ï¿½? done with a view to make the provision for the widow and if one of the attesting witnesses is examined and no infirmity is found in his testimony, non-examination of the other attesting witnesses is not ground to discard the Will. Similar view was taken by the Hon'bleSC in *Madhukar D. Shende v. Tarabai Aba Shedage,* [22]

30. I have considered the rival submissions, evidence and the judgments relied upon and am of the view that the decision of the trial Court on this issue does not call for any interference. All the circumstances said to be suspicious by learned counsel for the appellants taken individually and collectively do not create any doubt regarding the genuineness of the Will Ex. 15. The first circumstance pointed by learned counsel for the appellants does not create any suspicion as during the proceedings of the suit Smt. Shanti Devi died in November, 1995 and thereafter Sh. Prithvi Raj Singh was impleaded as a legal heir and vide amended plaint he came with the case that this Will was executed and registered in his favor on 29-4-1993. According to the statement of Sh. Prithvi Raj Singh he was in Assam at that time and his absence at that time is not suspicious at all. The appellant-defendant Jai Raj Singh himself admitted in cross-

examination that it is correct to say that his brother Prithvi Raj Singh was serving in Assam from 1974 to 1997. The second circumstance is also not a suspicious one. Although the plaintiff did not clarify as to when he came to know about the execution of this Will but it is also significant to say here that not a single question was put to him in cross-examination. Similarly it is also not a suspicious circumstance that it was not made clear that as to who prepared the draft of the Will. P.W. 3 Sh. Man Mohan clearly stated that draft of Ex. 15 was got prepared under instructions of Smt. Shanti Devi, Fourth circumstance is also not a suspicious circumstance in any way as it is admitted position that Smt. Shanti Devi was an educated lady as she served as a teacher in the school and therefore, there was no unnatural for her to get the draft of the Will prepared and to present the same in the office of the Registrar for its registration. Likewise, the fifth circumstance is also not a suspicious circumstance as there was nothing wrong in informing P.W. 3 Sh. Man Mohan. Regarding sixth circumstance P.W. 3 Sh. Man Mohan stated in cross-examination that he does not remember as to who identified Smt. Shanti Devi before the Registrar but this part of the statement of P.W. 3 does not create any suspicion about the genuineness of this document and from the endorsement of the Sub-Registrar it is evident that P.W. 3 Man Mohan and Smt. Jai Shree who is sister of both the appellant No. 1 and the respondent Prithvi Raj Singh signed this Will before the Registrar. According to seventh circumstance P.W. 3 Sh. Man Mohan stated that the Will was shown in the office of the Registrar when he reached there and he signed the same there while according to last para at page 4 and the first para at page 5 of the Will, this Will was prepared and signed at plot No. 93, *Dhuleshwar Garden, Jaipur* and according to learned counsel for the appellants this is a material contradiction between the oral testimony of P.W. 3 and the contents of the Will. No doubt this contradiction is available on the record but keeping in view the entire evidence as discussed hereinabove, this discrepancy does not create any doubt with regard to genuineness of this document as this possibility cannot be ruled out that this Will was prepared at the residence of Smt. Shanti Devi and thereafter they went to the office of Sub-Registrar for its registration. The ninth suspicious circumstance relates to the statement of P.W. 3 Man Mohan which is as under:-

"Registrar keyahanPrithvi Raj Singh Gaye TheNahi Gaye"

A careful consideration of this statement goes to show that perhaps it was a question put to him that whether Sh. Prithvi Raj Singh went to the office of the Registrar and the reply was in negative. Any way, this part of the statement of P.W. 3 does not at all

indicate that he was not definite regarding presence of Prithvi Raj Singh at that place. Thus this is also not a suspicious circumstance at all. The circumstances No. 10 and 11 are also of no help to say that at the time of execution of this Will Smt. Shanti Devi was not mentally and physically fit to execute this Will. As stated hereinabove, P.W. 1 Prithvi Raj Singh was in Assam at the time of execution of this Will and thus he was not in a position to say about the mental and physical health of his mother Smt. Shanti Devi, though according to him she was physically well at that time. Further a reading of the entire statement of P.W. 3 Man Mohan goes to show that Smt. Shanti Devi was mentally and physically fit to execute the Will and not even a suggestion was given to him that Smt. Shanti Devi was mentally or physically ill and unable to understand this document and it is also significant to say here that this Will was executed on 29-4-1993 by Smt. Shanti Devi who expired in November, 1995. The case of the appellant-defendant is that Smt. Shanti Devi was put under pressure to execute this Will but the defendants have failed to lead any evidence to prove this allegation at all. D.W. 1 Jai Raj Singh admitted in his statement that his mother was not suffering from any ailment except that of blood pressure and thus the submission made by learned counsel for the appellants that Smt. Shanti Devi was not mentally and physically fit to execute the Will is devoid of merit. Thus, it is held that this issue was rightly decided in favor of the plaintiff-respondents.

31. In view of the entire discussion made hereinabove, this appeal is liable to be dismissed. Consequently, this appeal is dismissed. Costs are made easy.

Appeal dismissed.

Cases Referred.

1. 1966 SC 292
2. AIR 1976 SC 807
3. AIR 1988 SC 881
4. AIR 1968 SC 1299
5. AIR 1988 Delhi 13
6. AIR 1955 Raj 157
7. AIR 1977 Punjab and Haryana 94
8. AIR 1974 Mad 239
9. AIR 1955 SC 346
10. AIR 1978 Ori 145
11. (2001) 7 SC Cases 503: (AIR 2001 SC 2802)

12. (1994) 5 SC Cases 135
13. AIR 1982 SC 133
14. AIR 1955 SC 363
15. AIR 1983 Ori 24
16. AIR 1956 Punjab 145
17. AIR 1977 Ori 178
18. AIR 1999 Ker 274
19. 1969 RLW 107
20. 1986 RLR 954
21. (2003) 8 SC Cases 537: (AIR 2003 SC 3109)
22. (2002) 2 SC Cases 85: AIR 2002 SC 637