IN THE HIGH COURT OF JUDICATURE AT BOMBAY
TESTAMENTARY & INTESTATE JURISDICTION

TESTAMENTARY SUIT No. 52 OF 1995
IN
TESTAMENTARY PETITION NO. 689 OF 1994

Naval Raghunath Adsul ...Plaintiff
vs
Deepak Raghunath Adsul & Ors. ...Defendants

Ms.R.C. Nichani for Plaintiff.
Mr.R.V. Govilkar with Ms.Shaba N. Khan for Defendant No.1.
(Defendant No.2 deleted)
Mr. H.T. Pawar with Mr.Yadnesh Aher for Defendant Nos.3(a) to 3(d).

CORAM : S.C. GUPTE, J.

DATE : 7 AUGUST 2019

JUDGMENT :

The testamentary suit seeks letters of administration with the will annexed to the property and credits of deceased Raghunath Maruti Adsul, who died in Mumbai on 26 December 1992.

2 The deceased was a Hindu. He was residing in Mumbai at the time of his death. According to the Plaintiff, the deceased had made his last will and testament at Mumbai on 8 January 1991; the will was registered with the Sub-Registrar of Assurances under Registration No.P/64/91 of Book No.III, 142 to 144. The Plaintiff is a son of the deceased and claims to be the sole beneficiary under the will, which does not name any executor. The assets of the deceased disclosed in the plaint include a plot of land along with a house standing thereon at Khar in Mumbai and monies in bank and household goods. The deceased was survived by two sons, one of

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them being the Plaintiff and the other Defendant No.1, and three daughters, one of them being Defendant No.2, and three grand daughters (daughters of the deceased's pre-deceased daughter). Defendant No.2 has been deleted from the cause title after her death. Defendant Nos.3(a) to 3(d), who are her heirs, have been added as parties to the suit.

3 The Defendants contest the will claiming it to be forged, bogus and fabricated. The Defendants dispute the signature of the deceased on the will and also submit that, even assuming that the signature belonged to him, the deceased was not aware of the contents of the will and did not understand their implication. The Defendants also question the mental capacity or disposing state of mind of the deceased to comprehend such implication. According to them, at the time of making of the purported will, the deceased had suffered a paralytic stroke; he had lost his memory and was not physically and mentally fit to execute the will. Defendant No.2 also claims that their deceased father Raghunath had, during his lifetime, made a family arrangement/partition, allotting the ground floor to Defendant No.1 and the first floor to the Plaintiff.

4 Based on the pleadings of the parties, the following issues have been settled by the Court :

> 1. Whether the Plaintiff proves that the Will dated 8th January 1991 is genuine and duly executed Last Will and Testament of deceased Raghunath Adsul?
>
> 2. Whether Defendant No.2 proves that the deceased father had made family arrangement/partition in the year 1982 thereby allotting the ground floor to the Defendant No.1 and first floor to the Plaintiff?

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3. Whether Defendants prove that the alleged Will dated 8th January 1991 executed by deceased Raghunath Adsul is forged and fabricated document?

4. Whether Defendants prove that the deceased Raghunath Adsul was not of a sound condition of mind during the year 1990-91?

5. What order?

5 In addition to documentary evidence, the Plaintiff has led oral evidence of himself as the propounder of the will and of one A.K. Mudhawa, a fellow member of the co-operative housing society where the Plaintiff and Defendant No.1, along with their deceased father, were residing. The Defendants have, in addition to documentary evidence, examined Defendant No.1 (son of the deceased testator), Defendant No.3(b) (son of deceased Defendant No.2, daughter of the deceased testator), one Arvind Gajanan Pendse and one C.S.R. Murthy, a handwriting expert.

6 The central controversy in the suit, covered by Issue Nos.1, 3 and 4, is whether the deceased Raghunath had duly executed the will set up by the Plaintiff. Execution of a will, it is trite to say, must be proved, in the first place, by offering proof of the signature of the deceased and the two attesting witnesses in keeping with Section 63 of the Indian Succession Act. Even if it is proved, however, that the deceased had in fact signed the instrument, that circumstance alone is not sufficient to prove the execution of the will, for the deceased may not have known that what he has signing was a testamentary instrument; he may not have known the contents of the instrument; he may have signed the instrument under a misrepresentation, coercion or fraud, factors which vitiate every execution. Besides, he may

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not be in a sound mental condition to know the consequences of execution or in other words, in a disposing state of mind. These are all matters of pleadings. If the defendant contests these matters, these must be proved in the trial. The responsibility of tendering such proof is primarily on the plaintiff, though special facts alleged in their behalf ought to be proved by the defendant. Lastly, even in the absence of pleadings of the defendant to that effect, as our Courts have noted, wherever there are suspicious circumstances surrounding execution of a will, its propounder nevertheless has to prove these matters so as to dispel the suspicions.

7 In our case, these are all matters of contest, squarely raised in the pleadings and in fact framed as issues, as noted above, and need to be considered and assessed in the light of the evidence led by the parties. Besides, and even otherwise, learned Counsel for the Defendants submits that there are suspicious circumstances surrounding the execution of the will and its propounding in the suit herein. To be precise, they are said to be : (i) the wife of the deceased testator being kept out of the bequest, (ii) attesting witnesses being strangers to the family, (iii) the draftsman of the will, an advocate, himself being an attesting witness, (iv) no examination of attesting witnesses and (vi) the very text of the will. Learned Counsel for the Defendants submits that these matters create serious suspicions about the genuineness of the will and the Plaintiff has failed to discharge the onus of dispelling the suspicions.

8 Coming now to the execution of the will, which is also registered with the Sub-Registrar of Assurances, it must be noted at the outset that registration of a will by a testator, by itself, is a strong circumstance bearing on the proof of its execution and supporting its

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genuineness. No document is registered unless the person/s executing the document or his/their representatives/assigns/agents appear before the registering officer. A will can only be presented for registration during his lifetime by the testator himself and if so presented, under Section 41 of the Registration Act, is registered in the same manner as any other document. The registering officer has to satisfy himself, under Sub-section (3) of Section 34 of the Registration Act, about the will being executed by the testator by whom it purports to have been executed; and (b) the identity of the person appearing and presenting the will as the testator. On the other hand, a will presented by any other person after the testator's death (who, under Section 40 of the Registration Act, must be claiming as executor or assign or otherwise under the will) is registered, if the registering officer is satisfied (a) that the will was executed by the testator; (b) that the testator is dead; and (c) the person presenting the will is entitled to present the same under Section 40. The registration of the will during the purported testator's lifetime, when proved, thus, establishes two important facts, which go a long way in supporting the genuineness of the will. The first is that the person, who claims to be the testator, has himself presented the will for registration and the second that the will has been actually executed by him.

9 The registration of the will, in the present case, is contested by the Defendants. The Defendants submit that the will produced by the Plaintiff is not the registered will of the deceased. The Defendants have examined one Tukaram Dhondu Mundhe, a junior clerk working in the Record Section in the office of Sub-Registrar of Assurances in support of their case. The witness produced a true copy of the will dated 8 January 1991 executed by Raghunath Maruti Adsul and registered with the Sub-

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Registrar and certified copies of the Day Book Register noting *inter alia* the lodgment of the will for registration. The documents have been respectively admitted in evidence as Exhibits “C-3” and “C-4 (colly.)”. The evidence of the witness, in the light of the documentary evidence of the registered will, indicates the following. The original will was lodged for registration; an entry was made in the Day Book; the name of the testator was entered in the Day Book; the will was entered in Book No.III; and a photocopy of the original will was sent as part of the registration process to Pune, as was customary then. (The outward book in this behalf, however, was not available with the Sub-Registrar’s office.) An attempt was made by learned Counsel for the Defendants to cast a shadow of suspicion on the document produced by the Plaintiff as the registered will (Exhibit P-6), comparing the same with the document produced by the witness as a certified copy of the registered will (Exhibit C-3). There is, however, no substance in the Defendants’ contentions in this behalf. The Defendants place reliance on the fact that Exhibit P-6 does not bear the stamp of the Sub-Registrar's office on each page; and there is no reference number mentioned on Exhibit P-6. These are not in any way determinative of the genuineness of the registration or of the will; these circumstances can be very easily explained. In the very first place, a copy of the will that is retained in the Sub-Registrar’s office and from which certified copies are made is necessarily different from the original will lodged for registration and which is returned to the party presenting it. That is in keeping with the procedure followed by the Sub-Registrar’s office whenever a will is brought for registration. In the first place, the execution of the will is not done in the Sub-Registrar’s office. The will is executed elsewhere and presented to the Sub-Registrar’s office for registration. The original executed will is returned by the office after making an endorsement of registration on it,

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and after comparing the same with its photocopy. This photocopy is sent for scanning to the Photo Zinco Press at Pune, under a procedure going by the name of “Pi.” It is this photocopy on which various endorsements are made; it is this document which is retained in the Sub-Registry; and whenever certified copies are applied for they are made by photocopying this document. This is what was precisely done in the present case. After comparing the original (Exhibit P-6) with its photocopy, Exhibit P-6 was registered in the office of the Sub-Registrar and returned to the person presenting it. The examination of Tukaram Dhondu Mundhe makes this very clear. (See particularly Q.Nos.56 to 66.) The reference number and the stamp of Sub-Registrar’s office on each page reflected on Exhibit “C-3” and Exhibits “C-7” and “C-8” are thus correctly appearing on them, but not on Exhibit “P-6”. The latter was not what was retained by the Sub-Registrar’s office and from which certified copies have been made; the former documents (Exhibits “C-3” and “C-7” and “C-8”) are certified copies made from the photocopy of the original (Exhibit “P-6”) retained by the registering office and on which endorsements were made. There is no difference whatsoever between the text of “P-6” and the texts of “C-3”, “C-7” or “C-8”. These latter (C-3, C-7 and C-8) clearly appear to be photocopies of the same document (namely, P-6). The evidence of the Clerk in the Sub-Registrar’s office clearly establishes that what was retained by the Sub-Registry for its records was a photocopy of P-6; and it was this photocopy, which was sent to Pune for preserving the same. Various endorsements including the description and the mention of the signatures of the testator and the two witnesses and the stamp of the Sub-Registry on each page and other registration details were separately made on this photocopy for registration purposes. It is this document which was retained in the Sub-Registry; and it is this document from which certified true

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copies have been made for giving to the parties/producing in court. The identity of the will, namely, Exhibit "P-6", registered with the Sub-Registrar's office is, thus, firmly established and there is no occasion for any doubt.

10 The fact that the will was registered during the lifetime of the deceased testator in the present case is, thus, clearly proved. Such proof supports both execution and presentation of the will for registration by the testator himself. These are also supported by the oral and documentary evidence of execution discussed below.

11 On the execution of the will, the Plaintiff has led oral evidence of himself as its propounder. The Plaintiff has identified the signature of his deceased father on the will. As far as the two attesting witnesses are concerned, the Plaintiff has deposed that both had expired. Their death certificates have been produced (Exhibits P-3 and P-7). So far as the signatures of these witnesses are concerned, the Plaintiff, in the premises, mainly relies on the endorsements on the original registered will (Exhibit P-6) about the identity of the witnesses and their identification of the deceased testator. The absence of either of the two attesting witnesses for proving the will has thus been adequately explained, and a strong proof of signatures, in terms of the registered will with its endorsements, has been duly tendered. The signatures of the deceased testator and the two attesting witnesses may, accordingly, be treated as proved.

12 The Defendants have led the evidence of one C.S.R. Murty, who is a handwriting expert. The witness claims to have examined the signature of the testator appearing on the disputed registered will (Exhibit

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"C-3" and what he calls an registered will (Exhibit "P-6") and compared the same to the signatures of the deceased on documents marked as A-1 and A-2 to A-10 to his report and opined that the person, who made signatures on documents marked as A-1 to A-10, did not sign the will dated 8 January 1991 (either "C-3" or "P-6"). The witness has made a report containing *inter alia* the reasons for his opinion and has deposed to the same and its correctness in his examination- in-chief. (As noted above, we are concerned here with the original registered will, being Exhibit P-6.) The witness claims to have taken photographs from these documents for the purposes of such comparison. It is admitted by the witness in his cross-examination that he had taken a photocopy of what was tendered in evidence as Exhibit C-3, which is a certified copy of the will referred to above. That certified copy itself, as we have noted above, is but a photocopy of what was retained by the Sub-Registrar's Office as a copy of the registered will in its record. This copy itself consists of a photocopy of the original will. In other words, the comparison of the deceased testator's signature is made from a document which is a photocopy of a photocopy. The other document, signature of the testator from which was compared with the other signatures, was Exhibit "P-6", which the witness has referred to as an unregistered will. Even there, he appears to have compared the photocopied signature with other signatures. As regards the documents, which were used for this comparison, there is nothing on record to prove that the signatures on these documents belong to the deceased. The signature appearing on Exhibit A-1, which is said to be a photocopy of a General Power of Attorney, is treated by the witness as the signature of the deceased on the basis of the information purportedly given to him by a Court Official. The documents at A-2 to A-10, signatures on which are used for comparison, are said to have been purportedly given to the

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witness by Defendant Nos. 1 and 3(a), who engaged him for his handwriting opinion. These documents are themselves not proved for the alleged signatures of the deceased contained in them. These documents themselves are mere photo copies and nobody has proved the signatures appearing on them as the signatures of the deceased. In other words, the alleged fact that the signatures on these documents do not match with the signature either on the certified copy of the registered will or on the will produced as Exhibit P-6, does not prove that the signature on the disputed will does not belong to the deceased testator. The only basis, on which the witness claims to have compared the signature of the testator on the disputed will with the signatures appearing on Exhibits A-1 to A-10 to his handwriting report, is his client's instructions [instructions of Defendant Nos. 1 and 3(a)] that the signatures appearing on Exhibits A-1 to A-10 are of the deceased R.M. Adsul. The handwriting expert's evidence, thus, offers no contrary proof that the deceased did not sign the will set up by the Plaintiff.

13 Learned Counsel for the Defendants, however, submit that proof of the signatures alone is not sufficient. It is submitted that it must be further established that the deceased testator had actually understood the contents and implication of the instrument which he signed; and that he was in a disposing state of mind. It is submitted that these matters have not been proved by the Plaintiff. It is submitted that the suspicious circumstances, referred to in this behalf by the Defendants, have not been dispelled by leading of any cogent evidence.

14 The oral evidence led by the Plaintiff, through himself and his witness A.K. Mudhawa, clearly supports the Plaintiff's case on the testamentary capacity or disposing state of mind of the deceased as well as

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his undertaking of the contents of the will. The deceased was admittedly an educated person. He had obtained a diploma in sanitary inspection after completion of his school education from Raja Rammohan Roy English School at Girgaon. Defendant No.1 has himself confirmed in his cross-examination (Question 88) that the deceased was holding a diploma as a Sanitary Inspector. It is nobody's case that the deceased did not know English language. The evidence of the Plaintiff as well as Mudhawa establishes that the deceased was a managing committee member of the society in which the house property of the deceased was situated; he was attending its meetings. The evidence establishes that he had attended the managing committee meeting of 13 January 1991 and on that date, which was closely proximate to the date of the execution of the will, he was in a sound physical and mental health. (The will was executed by the deceased on 8 January 1991 and presented for registration soon thereafter.) About a month before the execution of the will, the deceased had even changed the nomination for his membership of the society. The evidence of the physical and mental state of the deceased and his activities in December 1990/ January 1991, as deposed to by the Plaintiff and his witness Mudhawa, thus, clearly establishes that the deceased was in a sound physical and mental condition and in a position to know the contents of the will.

15 Let us now consider the so called suspicious circumstances and whether the Plaintiff, through evidence led at the trial, has been able to dispel the suspicions. The very first circumstance, as noted above, is said to be the fact that the deceased did not bequeath any property to his wife or give anything to his other children. It may be noted at the outset that the will itself explicitly sets out the reasons why no bequest was made in favour of either the daughters or the other son of the deceased (Defendant No.1

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herein). The narration in the will suggests that the deceased had spent sufficient monies for education, welfare and marriages of his daughters and did not desire to give them anything more; his daughters were said to be well placed in life. As regards Defendant No.1, the other son of the deceased, the will narrates that he had no love, affection or respect for the deceased. The will recounts that in spite of repeated requests of the testator in that behalf, Defendant No.1 did not care to contribute anything towards municipal taxes, society dues, etc. of the house property of the deceased. The will narrates that the testator was finding it difficult to maintain himself and his wife Lalita. The will posits that Defendant No.1 was given to fits of anger and abusing the testator in most filthy language, going to the extent of even assaulting him. Whilst describing his predicament on account of the behavior of Defendant No.1, the deceased writes in the will that his life had become completely unbearable on account of this behaviour and that, in the premises, he did not desire to give anything to Defendant No.1. What the deceased testator has written in the will is corroborated by oral and documentary evidence led by the Plaintiff. The Plaintiff in his oral evidence has indicated that the deceased and his wife had maintained diaries. The diaries have been produced in evidence. (Incidentally, these diaries even refer to the execution of the will.) The Plaintiff has deposed to the existence of the diaries as well as their authenticity including the handwriting of the deceased and his wife Lalita. The diaries extensively narrate the ill-treatment given to them by their son Deepak (Defendant No.1), and the NC complaint made by the deceased against the latter. All this evidence has practically gone unchallenged. So far as the Plaintiff himself is concerned, the will narrates that it was he who, out of natural love, affection and respect for the deceased, paid monies and maintained the deceased and his wife, as also spent monies

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required for maintaining the house property. The will narrates that it was the Plaintiff who had made the life of the deceased and his wife livable and only on account of him, they were able to live peacefully in their house property, Raghukul, in a sound state of health in body and mind. The deceased appears to have heartily lauded the role played by the Plaintiff in the lives of himself and his wife Lalita. The intention to give the house property exclusively to the Plaintiff is further fortified by the fact that the deceased had, just a few days prior to the execution of the will, changed the original nomination in respect of the house property in the records of the society. The original nomination was in favour of both sons of the deceased, namely, the Plaintiff and Defendant No.1. That was changed in December 1990, i.e. just about a month prior to the making of the will, by nominating the Plaintiff as a sole nominee. (The nomination has been duly registered in the records of the society.) There is also oral evidence on record to suggest that the maintenance of the house property was in fact being looked after by the Plaintiff. Defendant No.2, in his cross-examination (Questions 34 to 38), admits that he had nothing to show that he was paying any amount towards the maintenance of property during the lifetime of his father and that after the demise of his father, he had not paid any amount towards maintenance or society charges. In the premises, there is adequate explanation why the deceased testator made a bequest only in favour of the Plaintiff and not his other children. As far as the deceased's wife is concerned, evidently, she was an old lady as of the date of the will. The deceased and his wife were both living with the Plaintiff. It was the Plaintiff, who was maintaining them, and discharging all outgoings in respect of their residential property. The narration of the deceased in his will, as noted above, hails the Plaintiff's role in making the life of the deceased testator and his wife livable and the love, affection and

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respect the Plaintiff had for them. It is natural, in the circumstances, that the deceased did not deem it necessary to leave any particular property to his wife Lalita; the deceased expected the Plaintiff, as his sole legatee, to look after and take care of his wife Lalita. There is, accordingly, nothing unusual in the circumstance that the deceased did not bequeath any property to his wife Lalita.

16 There is nothing to suggest that the attesting witnesses were strangers to the family. Advocate D.B Joshi, who is one of the witnesses to the will, was said to be a friend of the deceased. The Plaintiff's evidence in that behalf does inspire confidence. Advocate D.B. Joshi was the one who had drafted the will. So far as the other attesting witness, A.G. Pendse, is concerned, there is no evidence about his familiarity with the deceased save and except the Plaintiff's own word. But then, even from the Defendant's side, there is nothing but a bare statement that Pendse was not known to the family. The Defendants have even led the evidence of one A.G. Pendse who declined any knowledge of the deceased testator and denied the alleged description of Pendse in the will as someone working with Bank of Maharashtra, Bandra Branch. That is neither here nor there. It is imminently possible that a person by the same surname and initials actually exists and he did not work with Bank of Maharashtra or knew the deceased, as did the real A.G. Pendse. What is important to note is that the real A.G. Pendse, the attesting witness, not only signed the testamentary instrument as a witness but even personally appeared in this court and signed an affidavit before the Associate of this court. Even the registration details indicate that questions were put by the Sub-Registrar to the witnesses, and their identity as well as their knowledge of the testator was ascertained before the Registrar put his signature under the

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endorsement of identification.

17 There is nothing unusual about Advocate Joshi, the draftsman of the will, himself offering to be a witness to the execution of the instrument. There is nothing at all in law to question the authority of the draftsman to be the attesting witness of the instrument. And there is nothing in the facts brought on record to question his signature as a witness.

18 There is nothing in the text of the will to indicate any unusual circumstance. The narration in the will is consistent with the diaries maintained by the deceased and his wife Lalita as well as the steps taken by the deceased immediately prior to the execution of the will.

19 The Plaintiff has, accordingly, proved the execution of the will. The signatures of the deceased and the two attesting witnesses have been duly proved; so also, the testamentary capacity of the deceased. The Plaintiff has proved that the deceased was in a sound state of physical and mental health at the time he executed the will. The deceased testator was perfectly in a position to understand the contents and implications of the testamentary instrument. These exists no unexplained suspicious circumstance. The Plaintiff has accordingly made out a case of genuineness of the will.

20 The case law relied upon by the Defendants does not detract from this position. Mr.Govilkar, for Defendant No.1, relied on the judgments of the Supreme court in **Ramesh Verma vs Lajesh Sexena**[1]**, B.**

1 **(2017) 1 SCC 257**

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Venkatamuni vs. C.J. Ayodhya Ram Singh[2] **Syed Askari Hadi Ali Augustine Imam vs. State (Delhi Administration)**[3]**, Anil Kak vs. Kumari Sharada Raje**[4]**, and K. Laxmanan Vs. Thekkayil Padmini**[5]**.** Mr. Pawar, learned Counsel appearing for Defendant Nos. 3(a) to 3(d) referred to the cases of **Niranjan Umeshchandra Joshi vs. Mrudula Jyoti Rao**[6], **Balathandayutham s. Ezhilarasan**[7], **Shashi Kumar Banerji vs. Subodh Kumar Banerjee**[8] and **Guro vs. Atma Singh**[9]. All these cases generally affirm the principles of law concerning due execution of a will and the manner and mode of its proof. What they posit is that the propounder has to show that the will was not only signed by the testator, but that the testator was in a sound and disposing state of mind at the relevant time; he had understood the nature and effect of the disposition and thereafter, put his signature to the document of his own free will. Whilst assessing these matters, the totality of the circumstances has to be borne in mind; and suspicious circumstances surrounding the execution of will, if any, have to be explained so as to satisfy the conscience of the court. All these matters essentially involve questions of appreciation of evidence, each case having to be determined on its own facts. All these matters, as explained above, have been duly established, and no suspicious circumstance remains unexplained.

21 Both Mr.Govilkar and Mr.Pawar, appearing respectively for Defendant No.1 and Defendant Nos.3(a) to 3(d), rely on cases of

2 **(2006) 13 SCC 449**
3 **(2009) 5 SCC 528**
4 **(2009) 7 SCC 695**
5 **(2009) 1 SCC 354**
6 **(2006) 13 SCC 433**
7 **(2010) 5 SCC 770**
8 **AIR 1964 SCC 529**
9 **(1992) 2 SCC 507**

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Lalitaben Jayantilal Popat vs. Pragnaben Jamnadas Kataria[10], **B. Raghuvir Acharya vs. Central Bureau of Investigation**[11], **Babu Singh vs. Ram Sahai alias Ram Singh**[12], **Janki Narayan Bhoir vs. Narayan Namdeo Kadam**[13], and **Jagdish Chand Sharma vs. Narain Singh Saini**[14] to contend that *Animo Attestandi* is an essential condition for valid attestation of a will under Section 63(c) of the Succession Act and its want invalidates the document. It is submitted that it must be proved that not only did the testator sign the will, but that the two attesting witnesses attested his signature by signing the will in the presence of each other or each in the presence of the testator after having seen the testator sign. No doubt this is a mandatory requirement of law, but this requirement, as I have explained above, is clearly satisfied in the present case. The two witnesses have not only signed the will as attesting witnesses, having seen the testator sign the same and in the presence of each other, but even attended the office of Sub-Registrar and affirmed their identity, their signatures and their knowledge of the testator.

22 Relying on these cases and, in particular, the case of **Babu Singh** (supra), it is submitted that at least one attesting witness ought to have been examined. There is indeed no such mandatory requirement of law. Like any other proof of execution, what needs to be proved is that the testator signed the will in the presence of the two witnesses and his signature was attested by each of the two either in the presence of each other or in the presence of the testator. For proving this, the attesting witnesses, no doubt, have to be examined. Section 68 of the Evidence Act

10 **(2008) 15 SCC 365**
11 **(2014) 14 SCC 693**
12 **(2008) 14 SCC 754**
13 **AIR 2003 SC 761**
14 **(2015) 8 SCC 615**

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mandates that if a document is required by law to be attested, it shall not be used in evidence until one attesting witness at least has been called for the purpose of proving its execution. It may be sufficient, though, that one only of the two attesting witnesses is examined for such proof; he may speak of the execution as well as attestation of himself and the other witness. Whether the evidence of one attesting witness is sufficient or both attesting witnesses should be examined, would be a matter of appreciation of evidence. But that is only when the attesting witnesses are alive and subject to the process of the court and capable of giving evidence. If not, Section 69 of the Evidence Act mandates that it must be proved that the attestation of one attesting witness at least is in his handwriting and that the signature of the person executing the document is in the handwriting of that person. This can be done by leading any evidence admissible in law. **Babulal**'s case also states the law exactly in these terms. As noted above, the signatures of the attesting witnesses as well as the deceased testator have been duly proved in the present case *inter alia* through the evidence of registration.

23 The Plaintiff has, in the premises, proved the execution of the will in accordance with the provisions of Section 63 of Indian Succession Act. The Plaintiff has proved the testamentary capacity of the deceased testator and his understanding of the nature of the disposition, and his signature on the document of his own free will after understanding the contents. The so called suspicious circumstances have all been adequately explained. There is no contrary proof tendered by the Defendants to dislodge the Plaintiff's case on any of these issues. Issue Nos.1, 3 and 4 are, accordingly, answered in favour of the Plaintiff.

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24 So far as Issue No.2 is concerned, the only evidence of the purported family arrangement is a bare word of Defendant Nos.1 and 3(b) and even there, there are no particulars as to how, when and in what manner the alleged family arrangement was made. Besides, and even otherwise, it is legally not possible to create rights in favour of anyone in respect of a self-acquired immovable property by way of a family arrangement. Any such rights, during the lifetime of the owner, can only be created by a registered instrument of transfer. (It is not in dispute that the deceased testator was the absolute owner of the property.) The very essence of a family arrangement is compromise of pre-existing rights, actual or asserted, by members of a family by agreeing to a distribution of family wealth. That element is completely missing in the present case. Neither the Plaintiff nor Defendant No.1 or any of their sisters has any pre-existing right to the residential house, either actual or even asserted. There is no question of any compromise or arrangement between them. Issue Nos.4 is, accordingly, answered against Defendants and in favour of the Plaintiff.

25 The testamentary suit is, accordingly, decreed by ordering grant of Letters of Administration with the will annexed of the property and credits of deceased Raghunath Maruti Adsul in favour of the Plaintiff, having effect throughout the State of Maharashtra.

(S.C. GUPTE, J.)

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