[REPORTABLE]

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL Nos.4181-4182 OF 2015

(ARISING OUT OF SPECIAL LEAVE PETITION(C)NOs. 36311-12/2014

JAGDISH CHAND SHARMA .....APPELLANT

Vs.

NARAIN SINGH SAINI (DEAD) THROUGH HIS LRs & Ors. .....RESPONDENTS

J U D G M E N T

AMITAVA ROY, J.

Leave granted.

1. The genesis of the lingering dissension in the instant proceeding lies in the Will claimed by the appellant herein to have been executed on 22-10-1973 by Nathu Singh (since deceased), the predecessor in the interest of the respondents, thereby bequeathing the property mentioned therein to him (appellant). The judgment and order dated 15-05-2007 passed in P C No. 249/1980 (re-numbered as PC No. 160/2006), by the District Judge, Tis Hazari Court, Delhi, granting Letter of

Administration to him, has been reversed by the High Court of Delhi by its judgment and order dated 02-07-2014 rendered in FAO No. 279 of 2007 as assailed herein.

2. We have heard Mr. Paras Kuhad, Sr. Advocate for the appellant and Mr. Daljeet Singh, Senior Advocate for the respondents.

3. A brief outline of the pleaded facts would portray the rival orientations. The appellant, to reiterate, filed an application under Section 276 of the Indian Succession Act 1925 (for short hereinafter referred to as the Act) with the Will annexed, seeking grant of Letter of Administration. He stated that the Will had been executed by Mr. Nathu Singh on 22-10-1973, as the sole and absolute owner amongst others of Municipal House Tax No. 807 (Private No. A/152 to A/162/1) situated at Sukhdev Nagar, Kotla Mubarakpur, New Delhi, bequeathing the same to him. The appellant stated that the testator nursed great love and affection for him for

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the services rendered by him and was not favourably disposed towards his sons for their disagreeable conduct and activities. It was mentioned that the testator expired on 02-08-1980 at Delhi whereafter, Shri Harswaroop Sharma, resident of 41, Subhash Market, Kotla Mubarkpur, informed him to receive the Will lying in his custody. It was, thereafter, according to the appellant that the application for Letter of Administration was filed. In the petition, he averred the names and particulars of the sons and daughters of the deceased testator and disclosed further that the subject matter of the Will was located in New Delhi. That the Will was executed and made in Delhi was also mentioned. The appellant did provide and sign a verification declaring the correctness of the statements made therein. Further another verification subscribed by Mr. G. C. Kumar, Advocate, Delhi in the capacity of an attesting witness to the Will, was also made.

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4. On the receipt of the notice of the proceedings registered on this petition, objections were filed by Mr. Jaswant Singh (since deceased) son of the testator and also by his other sons and daughters separately. For the sake of brevity the substance of the objections registered by the children of the testator would be synopsised.

5. It was pleaded that the property said to have been bequeathed was ancestral joint Hindu family property and thus, the testator had no authority to execute the Will in favour of the appellant. While denying the claim that the appellant did enjoy the love and affection of the testator, it was asserted that he (appellant) in fact had been appointed by the testator as his rent collector on 11-05-1973 and was endowed with a registered power of attorney. The objectors averred that as the appellant failed to render his sincere services, the power of attorney was revoked. That the appellant did create tenancy in favour of his wife, Shrimati Santosh Kumar Sharma in respect of shop No.F–16 belonging to the testator without

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his knowledge for which he (testator) had instituted a suit against him (appellant) in the year 1975 for recovery of damages was also stated. The objectors did further refer to several complaints made by the testator against the appellant for his unsatisfactory services and misuse of power including misappropriation of rents collected by him. They also stated that the appellant had appeared as a witness in a criminal case against the deceased and was also placed under suspension by his employer where he served as a teacher.

6. The respondents/objectors averred further that the appellant was present at the time of execution of two other Wills by the testator in favour of one Kisan Lal and Vimala Devi and suggested that he (appellant) by playing fraud on him (testator) might have got his Will signed, in the process of getting the above two documents executed. In all, the respondents/objectors assertively emphasized that the facts and circumstances prevailing at the relevant point of time did not at all warrant/justify

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execution of any Will by Mr. Nathu Singh in favour of the appellant by depriving his children. They, in categorical terms, denied the execution of the Will and also the signatures and the thumb impressions of the Mr. Nathu Singh thereon as claimed by the appellant. They averred as well that the testator was conversant only with Hindi language and that the contents of the Will in English had never been read over or explained to him.

7. In his rejoinder, the appellant refuted the respondent's cavil based on jointness of the property. While insisting that the property was the self acquired asset of the deceased, the appellant stated that therefrom the testator, not only, had conveyed portions by way of sale, but also, had gifted some to his children. He categorically denied the allegation of his disagreeable activities and misuse of powers. He instead, did impute fraudulent act of the respondent, Mr. Jaswant Singh in getting his name mutated in the revenue records in place of Mr. Nathu Singh for which, a litigation between the

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two did ensue. He accused the said respondent for being responsible for institution of cases against him by Mr. Nathu Singh.

8. On these competing pleadings, the following issues were framed:

1. Whether Mr. Nathu Singh Saini, deceased executed the Will dated 22-10-1973, validly while possessed of a sound disposing mind?

2. Relief.

8.1 The parties thereafter adduced oral and documentary evidence. Whereas, the appellant examined six witnesses including himself, Mr. G. C. Kumar, Advocate (attesting witness), AW 3 Mr. A. K. Jain, Sub-Registrar, New Delhi and AW 5 Mr. Budh Ram (attesting witness), the respondents offered 8 witnesses in support of their case. Needless to say, the appellant proved amongst the others the Will, Exhibit A-1.

9. The learned Trial Court, on its assessment of the evidence adduced, concluded that the appellant could

prove that the Will dated 22-10-1973 Exhibit A -1 was executed by the testator in a sound disposing state of mind after fully understanding its contents and that it was duly registered. Having held so, it observed that the onus of proving that the document was not a genuine Will did shift to the respondents. On an analysis of the evidence offered by the respondents, the learned Trial Court was of the view that the same was inadequate to displace the validity of the Will. It thus returned a finding that the Will dated 22-10-1973 Exhibit A-1 had been validly executed by the testator with a sound disposing state of mind in presence of two attesting witnesses. Consequently, the Letter of Administration as prayed for, by the appellant vis-à-vis the said Will was granted.

10. Aggrieved, the respondents preferred appeal being FAO 279/2007 in the High Court of Delhi. By the impugned judgment and order, as adverted to herein above, the verdict of the learned Trial Court has been

reversed. The High Court on a threadbare evaluation of the pleadings and the evidence on record, on the touchstone of the relevant provisions of the Act and the Indian Evidence Act, 1872 (for short hereinafter referred to as Act 1872), determined that the Will dated 22-10-1973 had not been proved as per law and that no Probate or Letter of Administration could be granted. Referring to the testimony of the attesting witnesses, the High Court held that they could not prove the execution of the Will as well as the attestation thereof within the meaning of Section 63 (c) of the Act, a mandatory legal edict. The High Court also dismissed the plea based on Section 71 of the Act, 1872 noting that the evidence of the attesting witnesses produced by the appellant, did not only demonstrate lack of intention to attest the Will, but also, rendered the execution of the document and their signatures thereon doubtful. The High Court noticed as well the circumstances attendant on the bequest to render it doubtful in view of the suspicious bearing thereof. It amongst others noted therefore to

arrive at this conclusion, that the deceased/testator was versed only in Urdu and that the Will was drafted in English, and that on the very same day he had executed two other Wills involving different properties with the possibility that the Will in question, was got signed, by representing it to be a part of the other transactions. The history of past litigation between the testator and the appellant involving allegations of his unauthorized acts and misuse of power also did weigh with the High Court to deduce that it was unlikely that the testator would out of natural love and affection bequeath his property or any portion thereof to such a person, by depriving his own children. The decision of the Trial Court was thus interfered with.

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11. Mr. Kuhad has insistently argued that the impugned judgment and order suffers from apparent misreading of pleadings and evidence on the record and is thus liable to be annulled. Relying in particular on the testimony of the witnesses AW 1 and AW 5, the learned senior counsel

has urged that the execution and the attestation of the Will in question have been duly proved as required under Section 63 of the Act. Drawing sustenance from Section 71 of Act 1872, the learned senior counsel has maintained that even assuming that the testimony of AW 1 and AW 5 was deficient vis-à-vis the requirement of the Section 63 (c) of the Act, the appellant having examined both the attesting witnesses, it was permissible for him to prove the execution and attestation of the Will by adducing other evidence. Mr. Kuhad has thus argued that the evidence of AW 3, Sub-Registrar before whom, the Will had been registered on completion of all legal formalities, did as well assuredly establish the execution and attestation of the Will as required by law and thus the High Court had erred in holding to the contrary. As the testimony of AW 3, the Sub-Registrar amply proved all the essentials of Section 63 (c) of the Act, the learned Trial Court had validly granted the Letter of Administration, he maintained. Referring to the evidence of AW 1, Mr. G. C. Kumar, Advocate, Mr. Kuhad urged

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that the verification signed by him at the foot of the application for Letter of Administration did buttress, the correctness of the contents thereof and, thus the stray deviations in his version at the trial ought to have been discarded as inconsequential. In any case, the casualness of the testimony of the attesting witnesses does not adversely impact upon the validity of the Will, as such conduct could have been the yield of an endeavour of the respondents to gain them over. While repudiating the conclusions of the High Court inferring denial of execution by the attesting witnesses and lack of animus on their part to attest the Will as well as the suspicious circumstances noticed by it, to be perverse and opposed to the weight of the materials on record, the learned senior counsel insisted that having regard to the basic requisites of valid Will in law, namely, free and sound disposing state of mind of the testator, understanding of the implication of the bequest, admission of execution thereof by him/her and due attestation thereof, the deductions of the High Court contrary thereto are

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indefensible and are thus liable to be negated. Apart from contending that the respondents had failed to discharge their onus to prove their objections in the face of the overwhelming evidence of execution and attestation of the Will in law, the learned senior counsel has urged that the High Court had fallen in error as well in acting upon the additional evidence adduced before it under Order 41 Rule 27 of the Civil Procedure Code (for short hereinafter referred as Code), without offering an opportunity to the appellant to counter such prayer. The following decisions were relied upon to reinforce the above contentions.

AIR 1955 SC 346 Bhaiya Guruji Dutt Singh Vs Gangotri Dutt Singh, AIR 1959 SC 443 H Venkatachala Iyengar Vs B N Thimmajamma and Others,(1974) 2 SCC 600 Kewal Pati (Smt) Vs State of UP and Others, (1995) 4 SCC 459 Surendra Pal and Ors. Vs. Dr. (Mrs.)Saraswati Arora and Anr.,(2003) 2 SCC 91 Janki Narayan Bhoir Vs. Narayan Namdeo Kadam, (2005) 8 SCC 67 Pentakota

Satyanarayana and Ors. Vs. Pentakota Seetharatnam and Ors., (2013) 7 SCC 490 M.B. Ramesh (D) by LRs. Vs. KM Veeraje Urs (D) by LRs and Ors.

12. Per contra, Mr. Singh has argued that it being apparent on the face of the records that neither the execution nor the attestation of the Will involved had been proved by any of the witnesses, the impugned judgment is unassailable and thus the instant petition is liable to be dismissed in limine. The findings recorded by the High Court being founded on an indepth scrutiny of the materials on record, are unmistakably conclusive and thus this Court would not embark upon a fresh appraisal thereof, he maintained. The learned senior counsel by referring to the evidence of the witnesses AW 1, AW 5 in particular has emphatically pleaded that as the appellant had failed to prove either the execution or the attestation of the Will, Section 71 of the Act of 1872 is inapplicable to the facts of the present case, and thus the testimony of AW 3 is wholly irrelevant. Without prejudice to this, the

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learned senior counsel has urged that the evidence of AW 3 as well falls short of the requirements of Section 63 (c) of the Act and thus, cannot be invoked to the advantage of the appellant. As the evidence of AW 1 and AW 5 does not attract the contingencies enumerated in Section 71 of Act 1872, the version of AW 3, in any view of the matter, is of no avail to the appellant, he asserted. The learned senior counsel maintained that even de hors the additional evidence laid before the High Court under Order 41 Rule 27 of the Code, the findings recorded in the impugned judgment and order are sustainable in law and on facts and thus no interference therewith is called for. Mr. Singh relied on the decisions hereunder to endorse his arguments.

(1977) 1 SCR 925 Smt. Jaswant Kaur Vs Smt. Amrit Kaur and Ors., (2001) 9 SCC 503 Neki Ram and Ors. Vs. Ama Ram Godara and Ors., (2003) 2 SCC 91 Janki Narayan Bhoir Vs. Narayan Namdeo Kadam.

13. The contentious pleadings and the assertions based thereon in the backdrop of the evidence as a whole have been duly analysed by us. The competing perspectives notwithstanding, the purport and play of Section 63 of the Act read with Sections 68 and 71 of Act 1872 as deciphered by various judicial enunciations would have a decisive bearing on the process of resolution of the irreconcilable issues that demand to be addressed. It would thus be apt, nay, imperative to refer to these legal provisions before embarking on the appreciation of the evidence to the extent indispensible. Section 63 of the Act and Sections 68 and 71 of the Act 1872, are thus extracted hereunder for ready reference.

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Indian Succession Act, 1922

> "63. Execution of unprivileged Wills.- Every testator, not being a soldier employed in an expedition or engaged in actual warfare, [1][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 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 by present at the same time, and no particular form of attestation shall be necessary.

Indian Evidence Act 1872

68. Proof of execution of document required by law to be attested- If a document is required by law to be attested, it shall not be used as evidence until one attesting witness at least has been called for the purpose of proving its execution, if there be an attesting witness alive, and subject to the process of the Court and capable of giving evidence;

Provided that it shall not be necessary to call an attesting witness in proof of the execution of any document, not being a Will, which has been registered in accordance with the provisions of the Indian Registration Act, 1908 (16 of 1908), unless its execution by the person by whom it purports to have been executed is specifically denied.

71. Proof when attesting witness denies the execution.-If the attesting witness denies or does not recollect the execution of the document, its execution may be proved by other evidence.

14. As would be evident from the contents of Section 63 of the Act that to execute the Will as contemplated therein, the testator would have to sign or affix his mark to it or the same has to be signed by some other person in his presence and on his direction. Further the signature or mark of the testator or the signature of the person signing for him has to be so placed that it would appear that it was intended thereby to give effect to the writing as Will. The Section further mandates that the Will shall have to be attested by two or more witnesses each of whom has seen the testator sign or affix his mark to it or has seen some other persons sign it, in the presence and on the direction of the testator, or has received from the testator, personal acknowledgement of a signature or mark, or the signature of such other persons and that each of the witnesses has signed the Will in the presence of the testator. It is, however, clarified that it would not be necessary that more than one witness be present at the same time and that no particular form of attestation would be necessary.

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15. It cannot be gainsaid that the above legislatively prescribed essentials of a valid execution and attestation of a Will under the Act are mandatory in nature, so much so, that any failure or deficiency in adherence thereto would be at the pain of invalidation of such document/instrument of disposition of property.

15.1. In the evidentiary context Section 68 of the Act 1872 enjoins that if a document is required by law to be attested, it would not be used as evidence unless one attesting witness, at least, if alive, and is subject to the process of Court and capable of giving evidence proves its execution. The proviso attached to this Section relaxes this requirement in case of a document, not being a Will, but has been registered in accordance with the provisions of the Indian Registration Act 1908 unless its execution by the person by whom it purports to have been executed, is specifically denied.

15.2. These statutory provisions, thus, make it incumbent for a document required by law to be attested

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to have its execution proved by at least one of the attesting witnesses, if alive, and is subject to the process of Court conducting the proceedings involved and is capable of giving evidence. This rigour is, however, eased in case of a document also required to be attested but not a Will, if the same has been registered in accordance with the provisions of the Indian Registration Act, 1908 unless the execution of this document by the person said to have executed it denies the same. In any view of the matter, however, the relaxation extended by the proviso is of no avail qua a Will. The proof of a Will to be admissible in evidence with probative potential, being a document required by law to be attested by two witnesses, would necessarily need proof of its execution through at least one of the attesting witnesses, if alive, and subject to the process of the Court concerned and is capable of giving evidence.

15.3 Section 71 provides, however, that if the attesting witness denies or does not recollect the execution of the

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document, its execution may be proved by other evidence. The interplay of the above statutory provisions and the underlying legislative objective would be of formidable relevance in evaluating the materials on record and recording the penultimate conclusions. With this backdrop, expedient it would be, to scrutinize the evidence adduced by the parties.

15.4 As hereinbefore mentioned, the appellant has endeavoured to prove the execution and attestation of the Will, Ex. A–1 through AW 1 Mr. G. C. Kumar and AW 5 Mr. Budh Ram. He has examined as well AW 3 Mr. A. K. Jain, Sub Registrar, New Delhi before whom the Will was registered on the very same day of its execution i.e., 22-10-1973.

15.5. Be that as it may, AW 1 Mr. Kumar deposed on oath that he was enrolled as a lawyer in or about 1971 and used to assist his father who was a deed writer in Urdu language. The witness stated that he used to come to Tis Hazari Court for attending his cases. He testified

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to have seen the Will Ex. A-1 which he claimed had been drafted by him. He failed to remember as to whether the testator, Mr. Nathu Ram Singh had come to his father in his presence or that his father had given him instructions to write the Will. The witness even failed to remember whether the Will had been given to him by his father or to the testator. He also could not recall as to whether he was present when the testator had signed the Will. The witness, however, admitted that Ex. A-1 did bear his signatures as an attesting witness but deposed that due to lapse of time, he did not remember whether any other person was also present and had attested the document when he had signed it. He, however, stated to have been present in the office of the Sub Registrar when the Will, Ex. A-1 was presented for registration. He also admitted to have signed the document on the backside thereof in the presence of the clerk of the office. The witness stated that he had also identified the testator before the Sub Registrar but clarified that it was as per the prevalent practice for an identifying witness to do so. He added by

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stating that he had signed the document only in that capacity. The witness deposed further, that he could not say whether the thumb impression and the signatures of the testator at the time of the registration and appearing on the back of page one of the Will had been obtained in his presence or not. He even failed to recall as to whether the contents of the Will had been read over and explained to the testator by him or by his father.

15.6 This witness was declared hostile and was cross-examined on behalf of the appellant in course whereof he deposed that he could not say whether he had signed the Will in presence of the testator. When confronted, he admitted to have signed the certificate at the foot of the application in Section 276 of the Act praying for grant of Letter of Administration but denied to have done so as an attesting witness of the Will. He stated instead that he had put his signatures as the appellant wanted him to do so. He even denied to have read the contents of the certificate. He refuted the

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suggestion that he had made a false statement in Court being won over by the respondents.

16. AW 2 Shri. Harswaroop has stated on oath that in November, 1973, the testator had handed over to him one Will with a direction to deliver it to the appellant upon his death. According to this witness, he did so after the demise of Mr. Nathu Singh and handed over the Will to the appellant. The witness stated to have seen the Will Ex. A-1, bearing the signature of Mr. Nathu Singh at several places. He claimed of being conversant with the handwriting and signature of the Mr. Nathu Singh. Admittedly, however, this witness is neither one to the execution of the Will, nor the attestation thereof as obligated by law.

17. Before reverting to AW 3 in the ordinary sequence, the testimony of AW 5 figuring in the chain of attestation as presented by the appellant would be referred to. This witness, Mr. Budh Ram claimed to have known the deceased/testator. He stated on oath that he had seen

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the document Ex. A-1 and identified his signatures thereon. He deposed to have signed the document in presence of the testator. He, however, hastened to add that he had not seen the testator signing the Will. He denied to have appeared before the Sub Registrar or to have identified the testator before the said authority. He stated that he had signed the document outside the office. Though, he asserted that testator was mentally alert on the date on which he (witness) had signed the Will, he clarified that he did not do so on the asking of the testator. The witness, however, admitted the presence of the testator at that time.

17.1 In cross-examination, the witness disclosed that the appellant was also present on the date on which he had signed the document and that he did not know the contents of the said document. He stated further that he had not been told that any Will was executed by Mr. Nathu Singh and that he was to attest it. Noticeably, this witness had not been declared to be hostile.

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18. AW 3 Mr. A. K. Jain who at the relevant time was the Sub Registrar, New Delhi, on oath, stated that the Will Ex. A-1 had been presented before him for registration on 22-10-1973. According to this witness, the testator was identified before him by one Mr. Budh Ram and Mr. G. C. Kumar, Advocate. The witness stated that these persons did sign the document in his presence as identifying witnesses on the back of page No. 1 of Ex. A-1. He deposed as well that the testator was read out the contents of the document and was asked as to whether he was executing the Will himself and that on his acknowledgement in the affirmative, he (witness) made his endorsement on the document in his own hand. While proving his endorsement, the witness iterated that the testator had admitted the execution of the Will and also proved his (testator) signatures and thumb impressions thereon.

18.1 In his cross-examination, the witness stated that he did not know the testator personally and that he had

made his endorsements on the Will in the capacity of a registering authority only. He admitted that on the very same date, another document purporting to be a Will executed by Mr. Nathu Singh was also presented for registration for which the identifying witnesses had been the same.

19. The testimony of AW 4 Mr. Ramchander Sharma is to the effect that the appellant had borne the expenses for the firewood of the funeral pyre of the deceased Nathu Singh. The testimony of AW 7 Mr. M. S. Santosh Goel and AW 8 Mr. Satish Kumar being insignificant vis-à-vis issues involved is not necessary to be dilated upon.

20. AW 6 Mr. Jagdish Chander Sharma, appellant deposed that he had joined the deceased Mr. Nathu Singh, in the year 1952 on the recommendation of his brother-in-law. He stated that the deceased entrusted him the duty to realise rent of his property and also to look after the matters pertaining to litigation in connection therewith. The witness stated that in the

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process, he was also made the attorney of the deceased and while realising rent used to accompany Mr. Jaswant Singh, his (Nathu Singh) son. He referred to some differences between the father and the son with regard to alleged wrong doings of the latter qua immovable properties resulting in institution of a suit by Mr. Nathu Singh against Mr. Jaswant Singh. According to this witness, Mr. Jaswant Singh was inimically disposed towards him for which he made a complaint against him in his department for which he was placed under suspension. He stated that Mr. Nathu Singh thereafter, in the interest of his job, cancelled his power of attorney but asked him to look after the property and to realise the rents. According to the witness, Mr. Jaswant Singh out of his persisting animosity caused a raid to be conducted in his house, and after the demise of Mr. Nathu Singh did openly intimidate him of dire consequences. He denied to have visited the office of the Sub Registrar on 22-10-1973 and insisted that AW 1 Mr. G. C. Kumar, Advocate had signed the certificate of the

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petition under Section 276 of the Act. He also asserted that AW 1 had attested the Will after seeing the same. According to this witness, the relationship of Mr. Nathu Singh with his sons was strained as they had been endeavouring to take over the possession of his properties. The witness identified the signature of the testator on the Will Ex. A-1.

21. In his detailed cross-examination, the witnesses referred to several legal proceedings, civil and criminal instituted by the testator which according to him, however, did fizzle out with time without yielding any adverse verdict against him. While mentioning that Mr. Nathu Singh used to dispose of his properties by executing Wills, the witness also mentioned about litigations between him and his son Mr. Jaswant Singh. He admitted that at the time of death of the testator, his wife, sons, daughters and several grand children were alive. In categorical terms, he stated that the testator had no quarrel with his wife and daughters. He also

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mentioned about gift of properties by Mr. Nathu Singh to his sons.

22. The testimony of RW 1 Mr. Ramesh Kumar, RW 2 Mr. M. S. Rao and RW 4 Mr. Ramesh Chander Sharma being not of any determinative significance is not being referred to. RW 3 Mr. Narayan Singh Saini, son of the testator deposed that his(testator) family comprised of his wife, Smt. Chanderwati, three sons and three daughters. He stated that during the life time of the testator, he had executed three separate gift deeds conveying property to each of his sons. That Mr. Nathu Singh had a host of grand children was also stated by this witness. He mentioned in particular that the testator had a very cordial relationship with the children till he died so much so that they along with the grand children used to congregate on all family functions. He averred that the testator had appointed the appellant as his attorney for collecting rent from his tenants. Thereby, the testator had also authorized the appellant to prepare documents

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with regard to the properties which he intended to sell from time to time. The witness deposed that the testator eventually had to cancel the power of attorney as the appellant was found indulging in interpolation of tenancies without his consent and with malafide intention misappropriated his properties. He stated further that at the time of his death, the testator was aged ninety years. He reiterated that the Will in question was deceitfully inserted amongst other documents to procure the signature of the testator.

23. The version of RW 5 Mr. Gulab Chand and RW 6 Mr. Bhupesh Gupta is also of not any consequence vis-à-vis the issues involved. RW 7 Mr. Ram Chander Saini deposed on oath that he used to represent Mr. Nathu Singh in various legal proceedings including one instituted against the appellant. He denied the suggestion that Mr. Nathu Singh had a very cordial relationship with the appellant.

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24. RW 8 Mr. Rajinder Singh, grandson of Mr. Nathu Singh, in his statement on oath expressed his ignorance about any litigation between his grandfather and his father Mr. Jaswant Singh.

25. The fascicule of the evidence viewed as hereinabove qua the execution and the attestation of the Will thus can be compartmentalised into two slots. The first comprising of the testimony of AW 1 Mr. G. C. Kumar and Mr. Budh Ram and the other of AW 3 Mr. A. K. Jain, Sub Registrar, New Delhi.

26. Evident it would be from the deposition of AW 1 that though he owned to be the author of the document, having drafted it, he could not recall whether he did so on the instruction of the testator. He did not remember as well as to whether the Will had been handed over by him to his father or the testator. He failed to recollect also whether he was present when the testator had signed the Will, Ex. A-1. Though, he admitted that the document did bear his signatures as an attesting witness

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at two places being point “A” and “B”, he could not recall whether there was any other person also present and had similarly attested the document when he had signed at point “A”. He was categorical in stating that he was present in the office of the Sub Registrar when the Will was presented for registration and had signed on the back page thereof but clarified that he did so only as an identifying witness. He could not say as to whether the signatures and thumb impressions of the testator at point “Y” and “Y–1” on the back page of the Will had been obtained in his presence or not. He also could not state whether the contents of the Will were read over and explained to the testator by him or his father. He was candid to assert that he was not sure as to whether he had signed the Will in presence of the testator or not or whether the testator had signed the document in his presence. He was unequivocal in stating that he had signed the certificate at the foot of the petition for grant of Letter of Administration as he was asked to do so by the appellant and he did not do so in the capacity of an

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attesting witness to the Will. He even denied to have gone through the contents of the certificate before subscribing thereto.

27. The evidence of AW 1, as a whole is, therefore clearly deficient vis-à-vis with the requirements of Section 63 (c) of the Act. Noticeably, he does not deny either the execution of the Will or has not failed to recollect the said event. In clear terms, this witness stated that though he had signed the document, he was not sure that he did so in the presence of any other person attesting the same. He could not also remember as to whether he was present when the testator had signed the Will. He clarified in no uncertain terms that his signatures on the Will before the Sub Registrar were only as an identifying witness. His is thus not a stance of either denial of the execution of the Will or of failure to recollect such execution as contemplated in Section 71 of the Act 1872.

28. To cap it all, he even endeavoured to represent that he had signed the certificate at the foot of the application

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for the Letter of Administration not voluntarily but on being insisted upon by the appellant. He was categorical in his testimony to the effect that he had not signed the certificate acknowledging the fact that he was an attesting witness. The evidence of AW 1 Mr. G. C. Kumar, Advocate thus does not inspire confidence to be acted upon in proof of the execution and attestation of the Will, EX. A-1.

29. AW 5 Mr. Budh Ram was categorical in owning his signatures on the Will at points "C" AND "Y-2" and claimed to have to put the same in the presence of the testator. He, however, was unhesitant in testifying that he had not seen the testator signing the document at the points "B", "Y-1". He denied to have appeared before the Sub Registrar or to have identified the testator before the said authority. His unambiguous statement on oath is that he had signed the document outside the office of the Sub Registrar. His evidence as well cannot be construed to be one of denial of execution of the Will. This witness,

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as his evidence would clearly demonstrate, also did neither falter nor, was equivocal so as to suggest that he failed to recollect the execution of the document. The conditions, precedent for application of Section 71 of the Act 1872, therefore, are also not available in the context of the evidence of this witness.

29.1 On a cumulative assessment of the evidence of AW 1 and AW 5, we are of the unhesitant opinion that Section 71 of the Act, is not invocable in the facts and circumstances of the case so as to permit the propounder/appellant to resort to any other evidence to prove the execution and attestation of the Will involved as comprehended therein. The account of the relevant facts bearing on the execution and attestation of the Will as provided by these witnesses though is thoroughly inadequate qua the prescriptions of Section 63 (c) of the Act does not amount to denial of execution or failure to recollect the said event as contemplated in this provision.

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30. The above notwithstanding, expedient it would be, in the face of the protracted controversy, to examine as well the evidence of AW 3, Mr. A. K. Jain Sub Registrar, New Delhi, refuge whereof has been sought for by the appellant under Section 71 of the Act, in the alternative.

30.1 This witness, to reiterate, was the Sub Registrar at Asaf Ali road, New Delhi on the date on which, as he had testified, the Will was laid before him for registration. Incidentally, it was on the very same date of its execution i.e. 22-10-1973. He deposed that the testator Mr. Nathu Singh was identified before him by AW 1 Mr. G. C. Kumar, Advocate, AW 1 and Mr. Budh Ram AW 5. According to this witness, these two persons did sign the document in his presence as identifying witnesses on the back of page No. 1 thereof. He stated further that the contents of the Will were read out to the testator and he was asked as to whether he did execute the same himself. The witness deposed that to this, the testator acknowledged in the affirmative whereupon he (witness) endorsed the same.

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The witness proved his endorsements at the portions encircled "S" and "S-1". He also stated that the testator had signed and put his thumb marks as "Y" and "Y-1" in his presence in acknowledgement of the execution of the Will by him.

30.2 In cross-examination, the witness admitted that he had made his endorsements in the capacity of a registering authority only. While admitting that on the very same date another document, purporting to be a Will executed by the same testator had also been presented before him for registration, he admitted that both the identifying witnesses of the Will involved were also the identifying witnesses of the other Will.

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31. A plain perusal of the Will presented in course of the arguments would reveal that the space therein meant to mention the age and the date of execution thereof had remained vacant till it was produced for registration. This was though as claimed by the appellant, the document had already been executed by the testator by putting his

signature at points “B” on both the pages along with the signatures of the attesting witnesses AW 1 and AW 5 as well. On the back of page No. 1 of the Will, there are two signatures and thumb impressions “Y” and “Y-1” said to be of the testator beneath the stamped endorsements in the official proforma signed by AW 3. On the same page, the signature of AW 1 Mr. G. C. Kumar, Advocate, and thumb impression of AW 5 Budh Ram are also available at points “X” and “Y-2” respectively.

31.1 Noticeably, though the official endorsements, as above seem to suggest that those signified admission of execution of the document by the testator before AW 3, the evidence of this witness on oath, does neither prove nor demonstrate in unmistakable terms that both the identifying witnesses had seen the testator put his signatures and thumb impressions for the execution of the Will. His testimony also does not establish that the witnesses AW 1 and AW 5 had put their signature/thumb impression before the Sub Registrar in presence of the

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testator. This assumes significance not only as per the non-relaxable mandate of Section 63 (c) of the Act but also for the version of AW 1 that he had signed the document at the time of registration only as an identifying witness and that he did not remember as to whether the thumb impressions and the signatures of the testator at "Y" and "Y-1" were obtained in his presence or not. The testimony of AW 5 to the effect that his signature as well as thumb impression at "Y-2" though made in presence of the testator was taken outside the Sub Registrar's office is significant as the same, if accepted, would mean that he had not seen the testator signing the Will either at point "B" or putting his signature and thumb impression at "Y" and "Y-1" on the backside of page No. 1 of the Will. To reiterate, he stated on oath that he had not identified the testator before the Sub Registrar. Evidently, AW 3 was not present at the time of initial execution of the Will and thus could not have witnessed the said event.

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32. In the overall perspective thus, the testimony of AW 3, in our estimate, does not conform to the imperatives of the Section 63 (c) of the Act. His narration on affirmation at the trial, does not either by itself meet the essentialities of Section 63 (c) of the Act or can be construed to be a supplement of the evidence of AW 1 and AW 5 to furnish the proof of execution and attestation of the Will as enjoined by law.

33. The evidence of AW 1, AW 3 and AW 5, anlaysed collectively or in isolation, does not evince *animo attestandi,* an essential imperative of valid attestation of a Will. As Section 71 of the Act, 1872 by no means can be conceived of to be a diluent of the rigour of Section 63 of the Act, the testimony of these witnesses fall short of the probative content to construe Ex. A-1 to be a validly executed and attested Will as envisaged in law.

34. In Bhaiya Guruji Dutt Singh (supra), the testimony of the two attesting witnesses was found wanting in credibility for which the propounder did fall back on the

admission of the testator about the execution of the Will involved at the time of registration in presence of two persons Mr. Mahadeo Prasad and Mr. Nageshur, who also had appended their signatures at the foot of the endorsement of the Sub Registrar. These signatures were contended to be enough to prove due attestation of the Will. It was held that mere signatures of these two persons appearing at the foot of the endorsement of registration could not be presumed to have been made as attesting witnesses or in the capacity of attesting witnesses and absence of *animo attestandi* was underlined.

35. This Court in H. Venkatachala Iyengar (supra) while dilating on the statutory requisites of valid execution of a Will, observed that unlike other documents this testamentary instrument speaks from the death of the testator and by the time when it is produced before a Court, the testator had departed from his temporal state and is not available to own or disown the same. It was

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thus emphasised that this does introduce an element of solemnity in the decision on the question as to whether the document propounded is proved to be the last Will and testament of the departed testator. In this context, it was emphasised that the propounder would be required to prove by satisfactory evidence that (i) the Will was signed by the testator, (ii) he at the relevant time was in a sound and disposing state of mind, (iii) he understood the nature and effect of the dispositions, and that (iv) he put his signature to the document of his own free will. It was observed that ordinarily when the evidence adduced in support of the Will is disinterested, satisfactory and sufficient to prove the sound and disposing state of the testator's mind and his signature as required by law, the court would be justified in making a finding in favour of the propounder signifying that he/she had been able to discharge his/her onus to prove the essential facts. The necessity of removal of the suspicious circumstances attendant on the execution of the Will, however, was underlined as well. That no hard and fast or inflexible

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rule can be laid down for the appreciation of the evidence to this effect was acknowledged.

36. That a propounder has to demonstrate that the Will was signed by the testator and that he was at the relevant time in a sound disposing state of mind and that he understood the nature and effect of the disposition and further that he had put his signature to the testament on his own free will and that he had signed it in presence of two witnesses who had attested it in presence and in the presence of each other, in order to discharge his onus to prove due execution of the said document was reiterated by this Court amongst others in Surendra Pal and Ors. (supra) It was held as well that though on the proof of the above facts, the onus of the propounder gets discharged, there could be situations where the execution of a Will may be shrouded by suspicious circumstances such as doubtful signature, feeble mind of the testator, overawed state induced by powerful and interested quarters, prominent role of the

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propounder, unnatural, improbable and unfair bequests indicative of lack of testator's free will and mind etc. In all such eventualities, the conscience of the Court has to be satisfied and thus the nature and quality of proof must be commensurate to such essentiality so much so to remove any suspicion which may be entertained by any reasonable and prudent man in the prevailing circumstances. It was propounded further that where the caveator alleges undue influence, fraud and coercion, the onus, however, would be on him to prove the same, and on his failure, probate of the Will must necessarily be granted if it is established that the testator had full testamentary capacity and had in fact executed it validly with a free will and mind.

37. In Jaswant Kumar (supra) this Court held that suspicion generated by the distrustful circumstances cannot be removed by the mere assertion of the propounder that the Will bears the signature of the testator or that the testator was in a sound and disposing

state of mind and memory when the Will was made or that those like the wife and children of the testator, who would normally receive their due share in the estate, were disinherited because the testator might have had seen reasons for excluding them. It was underscored that it was obligatory for the propounder to remove all legitimate suspicions before the document could be accepted as the last Will of the testator.

38. In Ravindra Nath Mukharji and Another (supra) this Court entertained the view that the, witnesses to the Will, if interested for the propounder is perceived to be a suspicious circumstance, the same would lose significance if the document is registered and the Sub Registrar does certify that the same had been read over to the executor who on doing so admits the contents.

39. In Pentakota Satyanarayan and Others (supra) the testator P. Mr. Ram Murthi had admitted the execution of the Will involved. He, however, expired while the suit was pending. The Will was registered and the signature of the

testator was identified by two witnesses whereupon the Sub Registrar had signed the document. In this textual premise, it was held that the signatures of the registering officer and of the identifying witnesses affixed to the registration endorsement did amount to sufficient attestation within the meaning of the Act. It was held as well that the endorsement of the Sub Registrar that the executant had acknowledged before him the execution, did also amount to attestation. The facts revealed that the Will was executed before the Sub Registrar on which the signature of the testator as well as signature and the thumb impression of the identifying witnesses were taken by the said authority, whereafter the latter signed the deed. In general terms, it was observed that registration of the Will per se did not dispense with the need of proving its execution and the attestation in the manner as provided in Section 68 of the 1872 Act. It was enunciated as well that execution consisted of signing a document, reading it over and understanding and

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completion of all formalities necessary for the validity of the act involved.

39.1 The facts as obtained in this decision are distinguishable from those in hand and are incomparable on many counts. No anology can be drawn from this case to conclude that the testimony of AW 3 even if read with that of AW 1 and AW 5 can sum up to prove valid execution and attestation of the Will as stipulated by Section 63 (c) of the Act.

40. Janki Narayan Bhoir (supra) witnessed a fact situation where one of the attesting witnesses of the Will, though both were alive at the relevant time, was produced to prove the execution thereof. The scribe of the document was also examined. The attesting witness deposed that he had not seen the other witness present at the time of execution of the Will and further he did not remember as to whether he along with the latter were present either when the testator had put his signature on the Will or that he had identified the person who had put

the thumb impression on the document. The issue raised before this Court was that the evidence of the said attesting witness had failed to establish the attestation of the Will by the other attesting witness who though available had not been examined and thus the Will was not proved. The contrary plea was that though Section 63 of the Act required attestation of a Will by at least two witnesses, it could be proved by examining one attesting witness as per Section 68 of the 1872 Act and by furnishing other evidence as per the Section 71 thereof. While dwelling on the respective prescripts of Section 63 of the Act and Sections 68 and 71of Act 1872 vis-à-vis a document required by law to be compulsorily attested, it was held that if an attesting witness is alive and is capable of giving evidence and is subject to the process of the Court, he/she has to be necessarily examined before such document can be used in evidence. It was expounded that on a combined reading of Section 63 of the Act and Section 68 of the 1872 Act, it was apparent that mere proof of signature of the testator on the Will

was not sufficient and that attestation thereof was also to be proved as required by Section 63 (c) of the Act. It was, however, emphasised that though Section 68 of the 1872 Act permits proof of a document compulsorily required to be attested by one attesting witness, he/she should be in a position to prove the execution thereof and if it is a Will, in terms of Section 63 (c) of the Act, viz, attestation by two attesting witnesses in the manner as contemplated therein. It was exposited that if the attesting witness examined besides his attestation does not prove the requirement of the attestation of the Will by the other witness, his testimony would fall short of attestation of the Will by at least two witnesses for the simple reason that the execution of the Will does not merely mean signing of it by the testator but connotes fulfilling the proof of all formalities required under Section 63 of the Act. It was held that where the attesting witness examined to prove the Will under Section 68 of 1872 Act fails to prove the due execution of the Will, then the other available attesting witness has to be called to

supplement his evidence to make it complete in all respects.

41. Qua Section 71 of 1872 Act, it was held to be in the form of a safeguard to the mandatory provision of Section 68 to cater to a situation where it is not possible to prove the execution of the Will by calling the attesting witnesses though alive i.e. if the witnesses either deny or do not recollect the execution of the Will. Only in these contingencies by the aid of Section 71, other evidence can be furnished. It was further clarified that Section 71 of Act 1872 would have no application to a case where one attesting witness who alone had been summoned fails to prove the execution of the Will and the other attesting witness though available to prove the execution of the same, for reasons best known, is not summoned before the Court.

42. This Court underlined that Section 71 of the Act 1872 was meant to lend assistance and come to the rescue of a party who had done his best, but driven to a

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state of helplessness and impossibility and cannot be let down without any other opportunity of proving the due execution of the document by other evidence. That, however, Section 71 cannot be invoked so as to absolve the party of his obligation under Section 68 read with Section 63 of the Act and to liberally allow him, at his will or choice, to make available or not, necessary witness otherwise available and amenable to jurisdiction of the Court, was highlighted in emphatic terms. That no premium upon such omission or lapse so as to enable him to give a go-bye to the mandates of law relating to proof of execution of a Will, as contemplated by these statutory provisions, was precisely underlined. In the facts and circumstances of that case, as the second attesting witness though available had not been summoned, the benefit of Section 71 of Act 1872 was not extended. The Will was thus held to be not proved for the failure of the attesting witness so produced, to testify as per the ordainment of Section 63 (c) of the Act.

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43. In M. B. Ramesh (dead) by LRS (supra), one Smt. Nagammanni had executed a Will. One of the attesting witnesses P. Basavaraje Urs, in his evidence, stated about the presence of the other witness (naming him), the testatrix, himself and one Sampat Iyengar to be present when the Will was written. He deposed further that one Mr. Narayan Murthi was the scribe. This witness proved that the Will was signed by Smt. Nagammanni and that he had signed the document too in her presence. On a consideration of the totality of the circumstances emerging from the narration of the attesting witness, this Court held that the omission on the part of this witness to specifically state about the signature of the other witness on the Will in presence of the testatrix did amount to his failure to recollect the said fact and thus the deficiency could permissibly be replenished by the aid of Section 71 of the Act 1872. In no uncertain terms, this Court did hold that the issue of validity of the Will was to be considered in context of the attendant singular facts.

44. The legal propositions adumbrated by the judicial pronouncements, adverted to hereinabove, do not admit of any exception. However, these are of no avail to the appellant herein in the conspectus of present facts. The evidence of the witness AW 1, AW 3 and AW 5 does not exhibit either denial of the execution of the Will or their failure to recollect the said phenomenon and thus, does not attract the applicability of Section 71 of the Act 1872.

45. A Will as an instrument of testamentary disposition of property being a legally acknowledged mode of bequeathing a testator's acquisitions during his lifetime, to be acted upon only on his/her demise, it is no longer res integra, that it carries with it an overwhelming element of sanctity. As understandably, the testator/testatrix, as the case may be, at the time of testing the document for its validity, would not be available, stringent requisites for the proof thereof have been statutorily enjoined to rule out the possibility of any manipulation. This is more so, as many a times, the

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manner of dispensation is in stark departure from the prescribed canons of devolution of property to the heirs and legal representatives of the deceased. The rigour of Section 63 (c) of the Act and Section 68 of 1872 Act is thus befitting the underlying exigency to secure against any self serving intervention contrary to the last wishes of the executor.

45.1 Viewed in premise, Section 71 of the 1872 Act has to be necessarily accorded a strict interpretation. The two contingencies permitting the play of this provision, namely, denial or failure to recollect the execution by the attesting witness produced, thus a fortiori has to be extended a meaning to ensure that the limited liberty granted by Section 71 of 1872 Act does not in any manner efface or emasculate the essence and efficacy of Section 63 of the Act and Section 68 of 1872 Act. The distinction between failure on the part of a attesting witness to prove the execution and attestation of a Will and his or her denial of the said event or failure to

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recollect the same, has to be essentially maintained. Any unwarranted indulgence, permitting extra liberal flexibility to these two stipulations, would render the predication of Section 63 of the Act and Section 68 of the 1872 Act, otiose. The propounder can be initiated to the benefit of Section 71 of the 1872 Act only if the attesting witness/witnesses, who is/are alive and is/are produced and in clear terms either denies /deny the execution of the document or cannot recollect the said incident. Not only, this witness/witnesses has/have to be credible and impartial, the evidence adduced ought to demonstrate unhesitant denial of the execution of the document or authenticate real forgetfulness of such fact. If the testimony evinces a casual account of the execution and attestation of the document disregardful of truth, and thereby fails to prove these two essentials as per law, the propounder cannot be permitted to adduce other evidence under cover of Section 71 of the 1872 Act. Such a sanction would not only be incompatible with the scheme of Section 63 of the Act read with Section 68 of

the 1872 Act but also would be extinctive of the paramountcy and sacrosanctity thereof, a consequence, not legislatively intended. If the evidence of the witnesses produced by the propounder is inherently worthless and lacking in credibility, Section 71 of Act 1872 cannot be invoked to bail him (propounder) out of the situation to facilitate a roving pursuit. In absence of any touch of truthfulness and genuineness in the overall approach, this provision, which is not a substitute of Section 63 (c) of the Act and Section 68 of the 1872 Act, cannot be invoked to supplement such failed speculative endeavour

45.2 Section 71 of the 1872 Act, even if assumed to be akin to a proviso to the mandate contained in Section 63 of the Act and Section 68 of the 1872 Act, it has to be assuredly construed harmoniously therewith and not divorced therefrom with a mutilative bearing. This underlying principle is inter alia embedded in the decision of this Court in the Commission of Income Tax,

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Madras Appellant Versus Ajax Products Limited Respondent AIR 1965, Supreme Court 1358.

46. The materials on record, as a whole, also do not, in our comprehension, present a backdrop, in which, in normal circumstances, the testator would have preferred the appellant to be the legatee of his property as set out in the Will, Ex. A-1, by denying his wife, children and grand children who were alive and with whom he did share a very warm affectionate and cordial relationship. Viewed in this context, the bequest is exfacie unnatural, unfair and improbable thus reflecting on the testator's cognizant, free, objective and discerning state of mind at the time of the alleged dispensation. The suspicious circumstances attendant on the disposition, in our opinion, do militatively impact upon the inalienable imperatives of solemnity and authenticity of any bequest to be effected by a testamentary instrument.

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47. In the wake of the determinations made herein above, we are of the unhesitant opinion that the challenge laid in the instant appeal lacks in merit.

48. The High Court, in our estimate, has appropriately appreciated the law and the facts in the right perspective and the impugned decision does not call for any interference. The appeals are dismissed.

49. No cost.

.....J.
(Kurian Joseph)

.....J.
(Amitava Roy)

New Delhi
Dated: May 01, 2015

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