object to the submissions being heard in their absence, more so when there is a learned counsel present to take notes of the submissions. The precious time of the court can also be better utilised if the learned counsel refrain from citing multiple case laws on a single point. The same old practices will continue to produce the same old results but as the society needs faster disposal of matters, all of us should change our practices to produce better results."

49. I once again request the learned members of the bar and remind them that besides being a representative of their client, they are also responsible officers of the Court. They should be considerate towards the other litigants also and should cooperate in expeditious dispensation of justice by being precise and concise while preparing pleadings as well as while making submissions before the Court.

(2025) 5 ILRA 986
APPELLATE JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 02.05.2025

BEFORE

THE HON'BLE RAJNISH KUMAR, J.

Second Appeal No. 167 of 2023

Ambika Prasad @ Ambika Prasad Pandey & Ors. ...Appellants
Versus
Shyam Bihari & Ors. ...Respondents

Counsel for the Appellants:
Uma Kant Mishra, Jai Prakash Yadav, Karuna Shankar Mishra, Rajiv Kumar Bajpai

Counsel for the Respondents:
Vyas Narayan Shukla, Vyas Narayan Shukla

Civil Law – Civil Procedure Code, 1908 – Section 100 - Indian Succession Act, 1925 - Section 63 - Indian Evidence Act, 1860 - Sections 63, 68, 69, 70 & 71 - Second Appeal – preferred by the plaintiff-appellants – assailing the judgment and decree passed by the learned Additional District Judge, whereby the appellate court reversed the decree of the trial court – Will – which was executed by the father, excluding one son among his other four sons – property dispute – Original Suit – for cancellation of a Will – Trial Court – upon framing six issues and after appreciation of oral and documentary evidence, arrived at the conclusion that the defendants failed to establish lawful and voluntary execution of the Will – accordingly, the suit was decreed – First Appeal – the appellate court - allowed the appeal - relying primarily on the fact of registration and selective witness testimony - while disregarding the trial court's detailed findings – Second Appeal – Court finds that – proof of Will stands on a higher degree than any other instrument – if there are any suspicious circumstances, whether raised by the other side or otherwise before the court are required to be clarified or removed by the propounder of the Will also, failing which the Will in dispute cannot be said to be valid - the eldest son had specifically alleged that the Will was procured by fraud, at a time when the testator was mentally and physically incapacitated – the trial court had duly considered these aspects and recorded cogent findings – the appellate court, however, failed to consider it and overlooked the finding of the trial court – Held – the first appellate court has allowed the appeal recording illegal and perverse findings - Consequently, the decree passed by the first appellate court is set aside – the judgment and decree of the trial court is restored – no illegality or perversity found in the trial court's findings – Accordingly, the second appeal stands allowed. (Para – 26, 34, 35)

Appeal Allowed. (E-11)

List of Cases cited:

1. Guro (Smt.) Vs Atma Singh & ors.; (1992) 2 SCC 507,

2. Benga Behera & anr.Vs Braja Kishore Nanda & ors.- 2007 All. C.J. 2249,

3. Dhannulal & ors.Vs Ganeshram & anr.- (2015) 12 SCC 301,

4. Bharpur Singh & ors.Vs Shamsher Singh - AIR 2009 SC 1766,

5. Smt. Jaswant Kaur Vs Smt. Amrit Kaur & ors.;AIR 1977 SC 74,

6. K. Laxmanan Vs Thekkayil Padmini & ors.;2009(106) RD 610,

7. Gopal Krishan & ors.Vs Daulat Ram & ors.– Civil Appeal NO(S) 13192 of 2024 - decided on Dt. 02.01.2025,

8. Meena Pradhan & ors.Vs Kamla Pradhan & ors.- 2023 9 SCC 734,

9. Shivakumar & ors.Vs Sharanabasappa & ors.- 2021 (11) SCC 277

(Delivered by Hon'ble Rajnish Kumar, J.)

1. Heard, Sri Jai Prakash Yadav,learned counsel for the plaintiff-appellants and Sri Vyas Narayan Shukla, learned counsel for the defendant-respondents.

2. The instant second appeal under Section 100 of the Civil Procedure Code 1908 (hereinafter referred as CPC) has been filed against the judgment and decree dated 05.10.2023 passed in Civil Appeal No.38/2009 (Shyam Bihari and Others versus Sharda Prasad (deceased) substituted by his legal heirs Ambika Prasad and Others) by the Additional District Judge/F.T.C.-Ist,Sultanpur, whereby the lower appellate court allowed the defendant-respondents first appeal. Consequently, the judgment and decree dated 26.05.2009 passed in suit for cancellation of Will i.e. Regular Suit No.225/2004(Sharda Prasad and others versus Balkrishna and others) filed by the plaintiff-appellants has been set aside and the suit has been dismissed.

3. Learned counsel for the appellant submitted that the property in dispute belongs to Late Ram Chandra Pandey, who was father of the parties. He was survived by his five sons. The dispute arose in view of an alleged registered Will Deed said to have been executed by Late Ram Chandra Pandey on 02.11.1998 whereby it excluded the plaintiff Shitla Prasad i.e. predecessor-in-interest of plaintiff-appellants and the property was bequeathed to the remaining four sons, out of which three sons have been given 1/5th share each, whereas the youngest son 2/5th share,. Being aggrieved the plaintiff-appellants instituted a suit bearing Regular Suit No.225 of 2004, which after contest came to be decreed on 26.05.2009

4. It is further submitted that the trial court, after dealing with the evidence available on record, clearly returned a finding that the attesting witness of the Will, namely, Ram Sagar Mishra could not prove the due attestation and execution of the Will coupled with the fact that the age of the testator at that point of time was 84 years and was suffering from various ailment. It is also submitted that the sole ground for excluding the plaintiff-appellants as stated in the Will, was that the plaintiff-appellants had their own house in the village of his in-laws and he never resided with the father and the other brothers. Upon evidence, this fact came to be disproved and it was found that the plaintiff-appellants never had any property or in the village of his in-laws. Thus it has been submitted that taking an over all view, the trial court decreed the suit, which has

been upset by the lower appellate court without meeting with the reasons recorded by the trial court while dealing with the evidence of the attesting witness and thus without proving the Will in accordance with law, the lower appellate court has committed an error in allowing the defendant-respondents appeal and dismissing the suit, therefore, the impugned judgment and decree passed by the first appellate court is liable to be set aside and this appeal is liable to be allowed.

5. Shri Vyas Narayan Shukla, learned counsel for the defendant-respondents submitted that the learned trial court, without considering the pleadings, evidence and material on record appropriately, had decreed the suit but the first appellate court apart from the evidence of the attesting witness has taken note of evidence led on behalf of defendant-respondents which included the mutual and common family relatives, who all deposed against the plaintiff-appellants and in view thereof the first appellate court has passed the impugned judgment and decree in accordance with law after considering the pleadings, evidence and material on record, which does not suffer from any illegality or error, which may call for any interference by this Court. This appeal has been filed on misconceived and baseless grounds. The substantial questions of law formulated in this appeal does not arise in this appeal. This appeal is liable to be dismissed.

6. The following substantial questions of law have been formulated in this appeal: by means of the order dated 20.11.2023-

"(A) Whether the lower appellate court was justified in reversing the findings without considering the evidence of the attesting witness Ram Sagar Mishra who in his cross examination could not establish the due execution and attestation of the impugned Will in question dated 02.11.1998?

(B) Whether the lower appellate court committed an error in failing to notice that it is the propounder of the Will who has to establish its execution and attestation in accordance with Section 63 of the Indian Succession Act read with Section 68 of the Indian Evidence Act and once the defendant-respondents witness failed to discharge the initial burden whether in such circumstances the lower appellate court could have allowed the appeal and dismiss the suit?"

7. I have considered the submissions of learned counsel for the parties and perused the records.

8. The suit for cancellation of Will Deed was filed by the predecessor-in-interest of the plaintiff-appellants Sharda Prasad alleging therein that that property in dispute was initially recorded in the name of his father i.e. Late Ram Chandra Pandey. He had 5 sons namely Sharda Prasad, Bal Krishna, Adya Prasad, Ram Awadh and Shyam Bihari. The eldest son Sharda Prasad i.e. the plaintiff joined the Railway Protection Force and was posted in Gujrat. The second son Bal Krishna was working in State Reserve Police Department. Adya Prasad was a teacher in Primary School. Ram Awadh was a practicing lawyer in District Sultanpur and the youngest son Shyam Bihari lived at home and used to drive jeep. Ram Chandra Pandey died on 11.11.2002 after attaining the age of more than 80 years leaving behind all his aforesaid sons as successors. When on information of death of Ram Chandra

Pandey, Sharda Prasad came to Sultanpur, then in the month of December 2002, he came to hear that the Will Deed has been got prepared by his remaining four brothers i.e. the defendant-respondents in collusion with fraud and a case for mutation has been filed. He filed objection in the said case, which is pending. He asked his brothers to get the Sale Deed cancelled but they finally denied to get it done on 01.05.2004,therefore on the same date, he applied for certified copy of the Will Deed, which he got on 06.05.2004. Thereafter he filed the suit for cancellation of Will Deed.

9. The suit was filed on the grounds that his father Ram Chandra Pandey had never executed any Will Deed after thinking and understanding and the Will Deed has been got prepared in the condition of his illness defrauding him. Ram Chandra Pandey was very old and he was suffering from heart ailment, diabetes and high blood pressure for the last 7-8 years prior to his death. His power to think and understand was lost and he was not able to do any work with his wish. The signatures and thumb impression on the Will Deed have been taken from him concealing about the sale deed defrauding him. The witnesses of the Will Deed are the helping hand of each other and involved in the conspiracy. The photograph of Ram Chandra Pandey on Will Deed has been prepared in the condition of his illness without any information to him. The plaintiff always used to serve his father, who was happy with his service, therefore, there was no occasion to execute any Will Deed excluding him. Thus all this work has been done in a fraudulent manner deceiving him. The witnesses of the Will Sri Ravish Chandra Pandey and Sri Ambika Prasad are Advocates by profession and friend of Sri Ram Awadh Pandey,Advocate i.e. defendant no.5. The plaintiff asked for cancellation of Will Deed to the defendant-respondents but they finally denied on 01.05.2004, on account of which cause of action to file suit arose.

10. The suit was contested by the defendant-respondents by filing a common written statement denying the averments made in the plaint and alleging therein that the plaintiff Sharda Prasad after getting service had gone to Gujrat. Thereafter he never came back to meet his father in Pure Jaddupur, Pargana Meeranpur, District Sultanpur. However he used to come to his in-laws house(Sasural) in Pratapgarh. His children have also started residing with his maternal grandfather and the marriage of his children have also been solemnized from there. He never came even to attend the marriage of the sons and daughters of the defendant-respondents. He also did not come at the time of death of their mother and father. The father of the parties had called to the plaintiff to discuss about the execution of the Will Deed but he had not come, therefore, a day prior to the execution of the Will Deed on 02.11.1998, he called both the witnesses of the Will Deed, namely, Sri Ram Sagar Mishra and Sri Ravish Chandra Pandey, advocate and after discussing with them in front of the defendant-respondents decided to execute the Will Deed. Accordingly, Will Deed was executed on 02.11.1998, in which 1/5th share each has been given to the defendant-respondents no.1 to 3 and 2/5th to the defendant no.4 as he used to live with the father and look after him. It has also been averred that father of the parties was more than 80 years of age at the time of death on 11.11.2002 and despite telegram given to the plaintiff, he had neither come nor paid any money for his last rites and he had also not come at the time of death of their

mother despite information given to him. The father of the parties was not happy with the plaintiff on account of the aforesaid, therefore, he had executed the aforesaid Will Deed.

11. The replication was filed by the plaintiff Sharda Prasad with the permission of the Court denying the averments made in the written statement and stating that the plaintiff came into service at the age of 18 years 3 months. He further averred that he never left his wife and children in his in-laws house in Village Dhannipur, rather he had left them with his parents in Village Pure Jaddupur to look after them and for help in the homely as well as agricultural works. He and his family used to go to his in-laws house only occasionally or on some invitation. He also reiterated the averments made in the plaint and also stated that he had paid money for education etc. of his brothers and also tried to get them employed. He also stated that he had come not only at the time of death of his mother but at the time of death of his father also. The Will Deed has been got executed in collusion by the respondents with the witnesses of the Will by defrauding their father.

12. After exchange of pleadings, 6 issues were framed by the trial court. Thereafter the oral as well as documentary evidence was adduced by the parties. In the oral evidence, the plaintiff Sharda Prasad appeared as P.W.1, Sita Ram as P.W.2 and Sri Krishna Kumar Tiwari as P.W.3. On behalf of the defendant-respondents, Balkrishna Pandey appeared as D.W.1, Tribhun Narayan Mishra as D.W.2, Sher Bahadur as D.W.3 and Ram Sagar Mishra as D.W.4.

13. Considering the evidence, pleadings and material on record, the trial court decreed the suit on the ground that the defendant-respondents have failed to remove the doubt in execution of Will Deed disclosed by the plaintiff-appellants and completely failed to prove that it was executed by Ram Chandra Pandey with his sweet Will and in good health in accordance with law and cancelled the Will Deed dated 02.11.1998 by means of the judgment and decree dated 26.05.2009.

14. Being aggrieved, the defendant-respondents filed a civil appeal, which has been allowed by the first appellate court after framing the point of determination on the ground that the disputed Will is registered and the same has been proved by the evidence of the witness of the Will Ram Sagar Mishra and set aside the judgment and decree dated 26.05.2009 passed by the trial court and dismissed the suit. Hence, this Second Appeal has been filed, which has been admitted on the aforesaid substantial questions of law.

15. In view of the pleadings of the parties and arguments advanced before this Court and the aforesaid substantial questions of law involved in this appeal,this Court has to consider as to whether the Will Deed in question has been executed by the deceased Ram Chandra Pandey in accordance with law and it's execution has been proved by the propounder of the Will Deed i.e. the defendant-respondents in accordance with law or not and the doubts raised by the plaintiff-appellants have been clarified and removed by the defendant-respondents or not.

16. Section 63 of the Indian Succession Act, 1925 provides the manner, in which a will shall be executed, which is extracted here-in-below:-

"63. Execution of unprivileged wills.—Every testator, not being a soldier

employed in an expedition or engaged in actual warfare, [or an airman so employed 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 acknowledgment of his signature or mark, or of the signature of such other person; and each of the witnesses shall sign the will in the presence of the testator, but it shall not be necessary that more than one witness be present at the same time, and no particular form of attestation shall be necessary."

17. Sections 68 to 71 of the Indian Evidence Act provides as to how a will is required to be proved, which are extracted here-in-below:-

***"68. Proof of execution of document required by law to be attested**.—If a document is required by law to be attested, it shall award 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.]

***69. Proof where no attesting witness found**.—If no such attesting witness can be found, or if the document purports to have been executed in the United Kingdom, it must be proved that the attestation of one attesting witness at least is in his handwriting, and that the signature of the person executing the document is in the hand writing of that person.*

***70. Admission of execution by party to attested document**.—The admission of a party to an attested document of its execution by himself shall be sufficient proof of its execution as against him, though it be a document required by law to be attested.*

***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."*

18. The aforesaid section 68 provides that 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 he is alive and capable of giving evidence. Section 69 provides that if no such attesting witness can be found, 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 hand writing of that person. In case of admission of a party to an attested document of its execution, it shall be sufficient proof of its execution against him as per section 70. In case the attesting witness denies or does not recollect the execution of the document, its execution may be proved by other evidence as per section 71. In this case Section 68 is applicable because one of the attesting witness had appeared to prove the Will.

19. The Hon'ble Supreme Court, in the case of ***Guro (Smt.) vs. Atma Singh and others; (1992) 2 SCC 507,*** has held that the law is well settled that the mode of proving a will does not ordinarily differ from that of proving any other document except as to the special requirement prescribed in the case of a will by Section 63 of the Indian Succession Act. The relevant paragraph 3 of the said judgment is extracted herein-below:-

"3. WITH regard to proof of a will the law is well settled that the mode of proving a will does not ordinarily differ from that of proving any other document except as to the special requirement prescribed in the case of a will by Section 63 of the Indian Succession Act. The onus of proving the will is on the propounder and in the absence of suspicious circumstances surrounding the execution of the will, proof of testamentary capacity and signature of the testator as required by law is sufficient to discharge the onus. ***Where, however there were suspicious circumstances, the onus would be on the propounder to explain them to the satisfaction of the court before the will could be accepted as genuine. Such suspicious cir- cumstances may be a shaky signature, a feeble mind and unfair and unjust disposal of property or the propounder himself taking a leading part in the making of the will under which he receives a substantial benefit****. The presence of suspicious circumstances makes the initial onus heavier and the propounder must remove all legitimate suspicion before the document can be accepted as the last will of the testator. (S. Venkalachala lyengar v. B.N. Thimmajamma1, Rani Purnima Devi v. Kumar Kilagendra Narayan Dev2, Jaswant Kaur v.Amrit Kaur3)."*

20. The Hon'ble Supreme Court, in the case of ***Benga Behera and another vs. Braja Kishore Nanda and others; 2007 All. C.J. 2249*** relied by learned counsel for the appellant, has held that the requirement of the proof of execution of a will is the same as in the case of certain other documents, for example Gift or Mortgage and at least one attesting witness has to be examined to prove execution and attestation of the will and it is to be proved that the executant had signed and/or given his thumb impression in presence of at least two attesting witnesses and the attesting witnesses had put their signatures in presence of the executant. It has further been held that existence of suspicious circumstances itself may be held to be sufficient to arrive at a conclusion that the execution of the will has not duly been proved.

21. The Hon'ble Supreme Court, in the case of ***Dhannulal and others vs. Ganeshram and another; (2015) 12 SCC***

301, has held that the proof of a will stands in a higher degree in comparison to the other documents. The relevant paragraph 19 is extracted hereinbelow:-

"19. Proof of a Will stands in a higher degree in comparison to other documents. There must be a clear evidence of the attesting witnesses or other witnesses that the contents of the Will were read over to the executant and he, after admitting the same to be correct, puts his signature in presence of the witnesses. It is only after the executant puts his signature, the attesting witnesses shall put their signatures in the presence of the executant."

22. The Hon'ble Supreme Court, in the case of ***Bharpur Singh and Others Vs. Shamsher Singh;AIR 2009 SC 1766***, has held that a will must be proved having regard to the provisions contained in clause (c) of Section 63 of the Indian Succession Act, 1925 and Section 68 of the Indian Evidence Act, 1872 and in a case where the Will is surrounded by suspicious circumstances, it would not be treated as the last testamentary disposition of the testator. The relevant paragraph 11 is extracted here-in-below:-

"11. The legal principles in regard to proof of a will are no longer res integra. A will must be proved having regard to the provisions contained in clause (c) of Section 63 of the Indian Succession Act, 1925 and Section 68 of the Indian Evidence Act, 1872, in terms whereof the propounder of a will must prove its execution by examining one or more attesting witnesses. Where, however, the validity of the Will is challenged on the ground of fraud, coercion or undue influence, the burden of proof would be on the caveator. In a case where the Will is surrounded by suspicious circumstances, it would not be treated as the last testamentary disposition of the testator."

23. A three judge Bench of the Hon'ble Supreme Court, in the case ***of Smt. Jaswant Kaur Vs. Smt. Amrit Kaur and Others;AIR 1977 SC 74***, while considering the relevant provisions of Section 63 of the Indian Succession Act and 68 of the Evidence Act held as under in paragraphs-9 and 10. Award

"9. In cases where the execution of a will is shrouded in suspicion, its proof ceases to be a simple lis between the plaintiff and the defendant. What, generally, is an adver- sary proceeding becomes in such cases a matter of the court's conscience and then the true question which arises for consideration is whether the evidence led by the pro- pounder of the will is such as to satisfy the conscience of the court that the will was duly executed by the testator. It is impossible to reach such satisfication unless the party which sets up the will .offers a 'cogent and convinc- ing explanation of the suspicious circumstances surrounding the making of the will.

10. There is a long line of decisions bearing on the nature and standard of evidence required to prove a will. Those decisions have been reviewed in an elaborate judgment of this Court in R. Venkatachala Iyengar v.B.N. Thirnmajamma & Others. (1) The Court, speaking through Gajendragadkar J., laid down in that case the following positions :- -

1. Stated generally, a will has to be proved like any other document, the test to be applied being the usual test of the satisfaction of the prudent mind in such

matters. As in the ease of proof of other documents, so in the case of proof of wills, one cannot insist on proof with mathematical certainty.

2. Since section 63 of the Succession Act requires a will to be attested, it cannot be used as evidence until, as required by section 63 of the Evidence Act, one attesting witness at least has .been called for the purpose of proving its execution, if there be an attesting witness alive and subject to the process of the court and capable of giving evidence.3. Unlike other documents, the will speaks from the death o[the testator and therefore the maker of the will is never available for deposing as to the circumstances in which the will came to be executed. This aspect introduces an element of solemnity in the deci- sion of the question whether the document propounded is proved to be the last will and testament of the testator. Normally, the onus which lies on the propounder can be taken to be discharged on proof of the essential facts which go into the making of the will.

4. Cases in which the execution of the will is surround- ed by suspicious circumstances stand on a different footing. A shaky signature, a feeble mind, an unfair and unjust disposition of property, the propounder himself taking a leading part in the making of the will under which he re- ceives a substantial benefit and such other circumstances raise suspicion about the execution of the will. That suspicion cannot be removed by the mere assertion of the propounder that the will bears the signature of the testator or that the testator was in a sound and disposing state of mind and memory at the time when the will was made, or that those like the wife and children of the testator who would normally receive their due share in his estate were disin- herited because the testator might have had his own reasons for excluding them. The presence of suspicious circumstances makes the initial onus heavier and therefore, in cases where the circumstances attendant upon the execution of the will excite the suspicion of the court, the propounder must remove all legitimate suspicions before the document can be accepted as the last will of the testator.

5. It is in connection with wills, the execution of which is surrounded by suspicious circumstance that the test of satisfaction of the judicial conscience has been evolved. That test emphasises that in determining the question as to whether an instrument produced before the court is the last will of the testator, the court is called upon to decide a solemn question and by reason of suspicious circumstances the court has to be satisfied fully that the will has been validly executed by the testator. 6. If a caveator alleges fraud, undue influence, coer- cion etc. in regard to the execution of the will, such pleas have to be proved by him, but even in the absence of such pleas, the very circumstances surrounding the execu- tion' of theaward will may raise a doubt as to whether the testa- tor was acting of his own free will. And then it is a part of the initial onus of the propounder to remove all reasona- ble doubts in the matter."

24. The Hon'ble Supreme Court, in the case of ***K. Laxmanan versus Thekkayil Padmini and Others;2009(106) RD 610*** relied by learned counsel for the petitioner has held that the onus of proving the Will is on the propounder who has to prove the legality of the execution and genuineness of the said Will by proving absence of suspicious circumstances surrounding the

said Will and also by proving the testamentary capacity and the signature of the testator and once the same is proved, it could be said that the propounder has discharged the onus. It has further been held that if there are suspicious circumstances regarding the execution of the Will, the onus is also on the propounder to explain them to the satisfaction of the Court and only when such responsibility is discharged, the Court would accept the Will as genuine. Even when there are no such pleas, but circumstances give rise to doubt, it is on the propounder to satisfy the conscience of the Court. Suspicious circumstances arise due to several reasons such with regard to genuineness of the signature of the testator, the conditions of the testator's mind, the dispositions made in the Will being unnatural, improbable or unfair in the light of relevant circumstances or there might be other indications in the Will to show that the testator's mind was not free.

25. The Hon'ble Supreme Court, in a recent judgment and order dated ***02.01.2025 passed in Civil Appeal NO(S) 13192 of 2024 (Gopal Krishan and Others versus Daulat Ram and Others)*** relied by learned counsel for the respondent considering the judgment of the Hon'ble Supreme Court in the case of ***Meena Pradhan and others versus Kamla Pradhan and Others;2023 9 SCC 734 and Shivakumar and others versus Sharanabasappa and Others; 2021 (11) SCC 277*** observed that requisites for proving a Will are well established and they have been reiterated in the aforesaid judgments and reproduced the principles summarised in the same. The relevant paragraph 8 is extracted here-in-below:-

"8. The requisites for proving of a Will are well established. They were recently reiterated in a Judgment of this Court in Meena Pradhan and others v. Kamla Pradhan and Another9. See also Shivakumar and Others v. Sharanabasappa and Others10. The principles as summarised by the former are reproduced as below:-

"10.1. The court has to consider two aspects : firstly, that the will is executed by the testator, and secondly, that it was the last will executed by him;

10.2. It is not required to be proved with mathematical accuracy, but the test of satisfaction of the prudent mind has to be applied.

10.3. A will is required to fulfil all the formalities required under Section 63 of the Succession Act, that is to say:

(a) The testator shall sign or affix his mark to the will or it shall be signed by some other person in his presence and by his direction and the said signature or affixation shall show that it was intended to give effect to the writing as a will;

(b) It is mandatory to get it attested by two or more witnesses, though no particular form of attestation is necessary;

(c) Each of the attesting witnesses must have seen the testator sign or affix his mark to the will or has seen some other person sign the will, in the presence and by the direction of the testator, or has received from the testator a personal acknowledgment of such signatures;

(d) Each of the attesting witnesses shall sign the will in the presence of the testator, however, the presence of all witnesses at the same time is not required;

10.4. For the purpose of proving the execution of the will, at least one of the attesting witnesses, who is alive, subject to the process of court, and capable of giving evidence, shall be examined;

10.5. The attesting witness should speak not only about the testator's signatures but also that each of the witnesses had signed the will in the presence of the testator;

10.6. If one attesting witness can prove the execution of the will, the examination of other attesting witnesses can be dispensed with;

10.7. Where one attesting witness examined to prove the will fails to prove its due execution, then the other available attesting witness has to be called to supplement his evidence;

10.8. Whenever there exists any suspicion as to the execution of the will, it is the responsibility of the propounder to remove all legitimate suspicions before it can be accepted as the testator's last will. In such cases, the initial onus on the propounder becomes heavier;

10.9. The test of judicial conscience has been evolved for dealing with those cases where the execution of the will is surrounded by suspicious circumstances. It requires to consider factors such as awareness of the testator as to the content as well as the consequences, nature and effect of the dispositions in the will; sound, certain and disposing state of mind and memory of the testator at the time of execution; testator executed the will while acting on his own free will;

10.10. One who alleges fraud, fabrication, undue influence et cetera has to prove the same. However, even in the absence of such allegations, if there are circumstances giving rise to doubt, then it becomes the duty of the propounder to dispel such suspicious circumstances by giving a cogent and convincing explanation;

10.11. Suspicious circumstances must be "real, germane and valid" and not merely "the fantasy of the doubting mind [Shivakumar v. Sharanabasappa, (2021) 11 SCC 277]". Whether a particular feature would qualify as "suspicious" would depend on the facts and circumstances of each case. Any circumstance raising suspicion legitimate in nature would qualify as a suspicious circumstance, for example, a shaky signature, a feeble mind, an unfair and unjust disposition of property, the propounder himself taking a leading part in the making of the will under which he receives a substantial benefit, etc."

26. In view of above, proof of Will stands on a higher degree than any other instrument. The Will not only is required to be proved in accordance with Section 68 to 71 of Indian Evidence Act to have been executed in accordance with Section 63 of Indian Succession Act but if there are any suspicious circumstances, whether raised by the other side or otherwise before the Court are also required to be clarified or removed by the propounder of the Will also, failing which the Will in dispute cannot be said to be valid and last Will of the executor. However, the suspicious

circumstances must be 'real, germane and valid'. Whether a particular feature would qualify as 'suspicious' would depend on the facts and circumstances of each case. Any circumstance raising suspicion legitimate in nature would qualify as suspicious circumstance, for example, a shaky signature, a feeble mind, an unfair and unjust disposition of property, the propounder himself taking a leading part in the making of the Will under which he receives a substantial benefit etc. Thus, merely because the Will Deed is registered, it will not hold good and valid.

27. Adverting to the facts of the present case, the Will was executed on 02.11.1998 by father of the parties Ram Chandra Pandey at the age of 84 years. The plaintiff-appellants alleged that he was seriously ill and suffering from heart disease, diabetes and high blood pressure for about 7-8 years prior to the date of execution of the Will,therefore, he was not in a position to think independently and understand. There is a dispute in regard to ailments and physical condition of the father of the parties because the plaintiff-appellants deposed that he was seriously ill on account of the aforesaid ailments. On the other hand, the defendant-respondents have denied. The plaintiff-appellant also stated that he used to give money to his brothers for the treatment of his father and whenever he was at home he used to go with him to Triyugi Narayan Vaidya in Sultanpur. However, he could not disclose the date and time.

28. D.W.1 Bal Krishna Pandey denied about his ailments, and stated that no treatment of his father was done, whereas D.W.2 Tribhuvan Narayan Mishra stated in his evidence that his maternal uncle had fell ill several times prior to his death and on account of old age he had several diseases. When he used to come to know about the ailments, he used to go to see him at his place. He also stated that my maternal uncle used to read Ramayan after putting spectacles on his eyes but it is not so that he could not see or hear. He used to hear less. Sometimes he had giddiness and for treatment he used to go to Sultanpur. His power to think and understand was not lost. He was fit. The learned trial court, while considering the above, has recorded that undisputedly, the photograph of Ram Chandra Pandey on the Will Deed is without spectacles, whereas D.W.2 has admitted that he used to wear spectacles and he used to hear less. It has further been recorded that the signatures on the Will Deed are not uniform, which is not disputed among the parties,therefore, it appears that on account of physical condition, his hands must be shaking and at the time of execution of Will Deed on 02.11.1998, he was aged about 84 years and he had fell ill several times prior to his death and also was not able to hear and see properly. Thus, it is apparent that at the time of execution of Will Deed, Ram Chandra Pandey was not fit physically and mentally.

29. The defendant No.5 Ram Awadh was an Advocate in Sultanpur and one of the witness of the Will Deed Sri Ravish Chandra Pandey, Advocate must be working with Ram Awadh Pandey and known to him. D.W.1 Bal Krishna Pandey himself has admitted that Ram Chandra Pandey had called the witnesses of Will before execution of Will Deed to discuss with them and discussed before all his four sons i.e. the defendants and his relatives. He also stated that his father was not happy with the plaintiff and all of them expressed their opinion that if any part of the property

in dispute is given to the plaintiff, then he would sell it to somebody else, on account of which the family property would go waste. Thus the defendants actively participated in taking decision, for execution of Will by their father in their favour.

30. D.W.2 has stated in his evidence that in November 1998 his maternal uncle Ram Chandra Pandey had called him. He was very upset on account of behaviour of the plaintiff Sharda Prasad and his family members towards his parents. He also stated that before execution of Will, he had told him and also shown him the Will Deed and thereafter got it registered. He also stated that his maternal uncle had consulted him also about the Will Deed. He also stated that he had never given any opinion to his maternal uncle not to give anything to the plaintiff Sharda Prasad, rather he had given an opinion to give something to the plaintiff, if he comes. He also stated that he had advised 15 days or 1 month prior to execution of Will Deed.

31. D.W.4 Ram Sagar Mishra, Advocate who is a witness of Will Deed, stated that the Will was executed in accordance with law. He stated that Ram Chandra Pandey had not taught him. He does not know as to whether he was teacher or not in Primary School, Uttari. He always used to live at home and do agricultural work. His house is about 11/4 km away from the house of Ram Chandra Pandey. He stated that there were two other witnesses of Will besides him and he does not know as to whether the signatures on the Will Deed are of Ram Chandra Pandey or not. All the three witnesses including Bal Krishna Pandey had signed the Will Deed. He also stated that he had reached in the registry office in Tehsil at 11:00 a.m. and Ram Chandra Pandey and Bal Krishna Pandey had reached prior to him. He also stated that besides him, the witnesses Ram Chandra Pandey, Ram Awadh, Shyam Bihari, Adya Prasad had also come to Tehsil. He had put signatures on the Will Deed before Arjinavees and another in the registry office and one at other place but this other place has not been disclosed. Considering the above, the learned trial court has recorded that from the evidence of D.W.4 it is apparent that at the time of execution of Will Deed, all the defendants and all the witnesses were present but no independent person was present for advice to Ram Chandra Pandey. Thus, it is apparent that Ram Chandra Pandey who was aged about 84 years at the time of execution of Will was a weak and ill person and he had no independent advisor and he was in undue influence of the defendant-respondents. This Court is in agreement with the said findings recorded by the trial court for the reason that the presence of defendant-respondents i.e. all the beneficiaries of the Will at each and every place i.e. at the time of decision by Ram Chandra Pandey to execute the Will and at the time of execution of Will and admission of D.W.1 that all the defendants including relatives had advised not to give any share to the plaintiff Sharda Prasad, itself creates suspicion in regard to the execution of Will with independent wish and mind by Ram Chandra Pandey. D.W.2 has specifically stated that he had not advised not to give anything, rather advised to give some share. The witness i.e. D.W. 4 also does not seem to be knowing Ram Chandra Pandey earlier.

32. It is also noticed that D.W.1 has admitted in paragraph 8 of his affidavit of examination-in-chief that the Will Deed

was written as told by Ram Chandra Pandey and thereafter it was read over and told to him and others present,thereafter,the Will Deed was signed firstly by Ram Chandra Pandey before the witnesses and thereafter the witnesses Ravish Chandra Pandey and Ram Sagar Mishra had signed on the Will Deed. Thereafter in the registry office also firstly Ram Chandra Pandey made his thumb impression and identifying him the witnesses had also made their thumb impression. D.W.2 has stated in his evidence that the Will Deed was shown to him by his maternal uncle, when he had gone to his house. Therefore there is contradiction in the evidence of the D.W,1 and D.W.2 in regard to the place and time of preparation of Will Deed also. D.W.4 Ram Sagar Mishra, who is witness of the Will Deed also could not prove the execution of Will in view of the discrepancy as discussed above in his evidence and in his cross examination also he could not prove the execution of Will in accordance with law. It is also noticed that he has said that the Will was signed by him and two other witnesses but there are only two witnesses in Will. Thus he could not prove execution of Will in accordance with law.

33. So far as the plea of the defendant-respondents is that Ram Chandra Pandey had not given any share to the plaintiff Sharda Prasad because his wife and children used to live in his in-laws house and also purchased property there is concerned, which has been denied by the plaintiff-appellants,the defendant-respondents failed to adduce any evidence in regard to the purchase of any property at the place of in-laws house or their names in the Rashan Card or voter list of the said place. Thus the witnesses of the plaintiff-appellants proved the case and the doubt raised by them could not be clarifed and removed by the defendant-respondents.

34. The trial court, recording the aforesaid findings decreed the suit on the ground that the doubts raised in execution of Will Deed raised by the plaintiff-appellants could not be removed by the defendant-respondents.

35. On being challenged before the first appellate court, the first appellate court allowed the appeal on the ground that Will Deed is registered, which has been proved by the witness Ram Sagar Mishra without setting aside the findings recorded by the learned trial court, whereas as discussed above, neither D.W.4 Ram Sagar Mishra, the witness of the Will Deed could prove the execution of Will in accordance with Section 63 of Indian Evidence Act as per Section 68 of the Indian Evidence Act nor the doubts raised by plaintiff-appellants in regard to the execution of Will Deed could be clarified and removed by the defendant-respondents by any cogent evidence, whereas it is settled law in regard to the Will that not only it is to be proved in accordance with Section 68 of Indian Evidence Act that Will has been executed in accordance with Section 63 of Indian Sucession Act but the doubts, if any, raised and even if not raised arise before the court, the same are liable to be clarified and removed by the propounder of the Will by producing cogent evidence.The first appellate court failed to consider it and passed the impugned judgment and order without considering the findings recorded by the trial court and setting aside them. Thus, This Court is of the view that the first appellate court has allowed the appeal recording illegal and perverse findings,therefore the judgment and decree passed by the first appellate court is liable

to be set aside and the appeal is liable to be allowed upholding the judgment passed by the trial court, which has been passed in accordance with law by a reasoned and speaking order and does not suffer from any illegality or perversity.

35. The Second Appeal is, accordingly, **allowed** with costs. The judgment and decree dated 05.10.2023 passed in Civil Appeal No.38/2009 (Shyam Bihari and Others versus Sharda Prasad (deceased) substituted by his legal heirs Ambika Prasad and Others) by the Additional District Judge/F.T.C.-Ist,Sultanpur is hereby set aside and the judgment and decree dated 26.05.2009 passed in Regular Suit No.225/2004(Sharda Prasad versus Balkrishna and others) is upheld.

(2025) 5 ILRA 1000
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 01.05.2025

BEFORE

THE HON'BLE SUBHASH VIDYARTHI, J.

Application U/S 482 No. 3726 of 2025

Aditya Murti ...Applicant
Versus
C.B.I./A.C.B. Lko. ...Opp. Party

Counsel for the Applicant:
Purnendu Chakravarty, Ambrish Singh Yadav, Amit Jaiswal Ojus Law, Pranjal Jain

Counsel for the Opp. Party:
Anurag Kumar Singh

Applicant is an accused in an FIR lodged by CBI-not based on any private complaint-Applicant is seeking permission to travel abroad for attending the wedding ceremony of a relative in USA and to enjoy a family pleasure trip in France-. This purpose is not an essential purpose like revalidation of a Green Card. proceedings against the applicant have been initiated by an FIR lodged by the Central Bureau of Investigation and the trial Court has charged him for commission of offences under Section 120-B read with Section 420 I.P.C. and Section 13(2) read with Section 13(1) (d) of the Prevention of Corruption Act. The trial pending since 2011 has now reached the stage of defence evidence. At this stage, he wants to travel abroad merely to attend the wedding ceremony of a grand-son of his father's sister, who is not his immediate family member. After attending the wedding at San Diego, California, USA, the applicant wants to have a family pleasure trip to France. 18. An accused person who has been enlarged on bail can be granted permission to travel abroad for some pressing necessity like medical Page 9 of 11 treatment, attending essential official duties and the like. An accused person who has been enlarged on bail cannot seek permission as of right to travel to another country merely for attending the marriage of a relative and having a pleasure trip to another country. Wedding of a relative in a foreign country and pleasure trip to another country are not at all essential purposes for an under-trial accused person's visit abroad. 19. Merely, because the trial Court had earlier granted permission to the applicant to travel abroad for non-essential objects on numerous, he does not get a right to travel abroad for non-essential objects this time also, when the trial has reached the stage of defence evidence. 20. The learned counsel for the applicant submitted that this reason has not been assigned by the trial Court and the trial Court has merely rejected the application on the ground that since the trial has reached at the stage of defence evidence, the applicant cannot be granted permission for travel abroad. 21. While exercising the inherent powers of this Court recognized by Section 528 BNSS, this Court's power is not confined to scrutiny of the reasons assigned by the trial court. Besides seeking quashing of the order passed by the trial Court, the applicant has requested this Court to pass an order granting him permission to travel abroad and in these circumstances, this Court can certainly to look into the justification of the prayer made by the applicant so as to assess whether the permission sought can be granted