

**IN THE HIGH COURT OF MADHYA PRADESH
AT JABALPUR**

BEFORE

HON'BLE SHRI JUSTICE DWARKA DHISH BANSAL

FIRST APPEAL No. 690 of 2009

BETWEEN:-

**ARUN KUMAR NIGAM S/O LATE SURAJ
PRASAD NIGAM, AGED ABOUT 77 YEARS,
OCCUPATION: ADVOCATE R/O 2245/1, WRIGHT
TOWN, JABALPUR (MADHYA PRADESH)**

.....APPELLANT

(BY SHRI K.S JHA - ADVOCATE)

AND

- 1. THE STATE OF MADHYA PRADESH THROUGH
COLLECTOR, JABALPUR (M.P)**
- 2. PUBLIC WORK DEPTT., THROUGH
SUPREINTENDENT ENGINEER, NARMADA
CIRCLE, JABALPUR (M.P)**
- 3. SMT. CHANDRAMUKHI (DELETED)**
- 4. SMT. INDU DEVI (DELETED)**
- 5. SMT. SOMDEVI (DELETED)**
- 6. SMT.SHASHIDEVI (DELETED)**
- 7. SMT.SUMAN (DELETED)**
- 8(A) SMT.UMA DEVI (DELETED)**
- 8(B) RAMAKANT NIGAM (DELETED)**
- 8(C). SHRIKANT NIGAM (DELETED)**
- 8(D). DIVYAKANT NIGAM, AGED ABOUT 41 YEARS,
S/O L.P NIGAM**

- 8(E). KAMALKANT, AGED ABOUT 36 YEARS,
S/O L.P NIGAM
- 8(F). VISHWAKANT, AGED ABOUT 38 YEARS,
S/O L.P NIGAM
- 8(G). VINAYKANT (DELETED)
- 8(H). ASHWANIKANT S/O L.P.NIGAM, AGED ABOUT 32
YEARS,
- 8(I). ANJANIKANT S/O L.P.NIGAM, AGED ABOUT 30
YEARS,
- 8(J). DR.PURNIMA NIGAM (DELETED)
- 8(K). SMT. UTTAMA NIGAM D/O L.P. NIGAM, AGED
ABOUT 40 YEARS
- 8(L). SMT.PRATIMA (DELETED)

RESPONDENTS NO.8(A) TO 8(L) RESIDENT OF
MARHATAL 211, JABALPUR)

....RESPONDENTS

*(SHRI SANDEEP DUBEY – PANEL LAWYER FOR RESPONDENT
1/ STATE AND SHRI INDRA KUMAR PATEL – ADVOCATE FOR
RESPONDENT 11 - 12)*

Reserved on	: 20.03.2024
Pronounced on	: 08.04.2024

J U D G M E N T

This first appeal has been preferred by the appellant-Arun Kumar Nigam against the final award dtd. 15.09.2009 passed by 2nd Additional District Judge, Jabalpur in Land Acquisition MJC No. 43/2004 whereby compensation of Rs. 76,118-50 ps. along with interest @ 6% p.a. has been awarded holding all the legal heirs of Suraj Prasad Nigam to be entitled for the compensation.

2. Instant appeal was admitted for final hearing on 30.11.2009 and is listed today for orders but looking to the date of institution of original MJC (which is 30.01.1963) and with the consent of counsel for the parties, is heard finally.

3. Although impugned award passed by Court below has been challenged in its entirety but main thrust is about findings recorded by Court below in respect of execution and proof of Will dtd. 18.11.1964 (Ex.LR-1) and competency of Suraj Prasad Nigam to execute the said Will as well as in respect of exclusive ownership of Suraj Prasad Nigam over the Tank in question i.e. in respect of issue no. 5A, 8, 12 and 13.

4. As per learned Counsel for the appellant, relevant facts in short are as under :-

-Disputed Tank was settled by the State Government exclusively in favour of Suraj Prasad Nigam (in short 'S.P. Nigam') under Section 5 of the M.P. Abolition Of Proprietary Rights, Act 1950, which has been so recorded in the exclusive name of Suraj Prasad Nigam as bhumiswami in Jamabandi/ Khatauni of the year 1958-59.

-Notification under Section 4 of the Land Acquisition Act, 1894 (in short 'the Act of 1894') was published on 09.05.1960 and on 14.06.1960 notification under Section 6 of the Act of 1894 was published. Later on 27.03.1962 award was passed by Land Acquisition Officer (in short 'LAO') in respect of acquiring the land of S.P. Nigam.

-On 02.08.1962 an application for reference under Section 18 read with Section 30 of the Act of 1894 was filed by Suraj Prasad Nigam to

the Collector. On 21.01.1963 case was referred by LAO to District Judge, Jabalpur. On 30.01.1963 reference case was registered at the instance of Suraj Prasad Nigam.

-On 18.11.1964 a registered Will was executed by S.P. Nigam in favour of Smt. Kamlesh Nigam W/o Arun Kumar Nigam (in short 'A.K.Nigam') in respect of his properties except a House situated at Village Kodia, which was bequeathed to Laxmi Prasad Nigam (in short 'L.P. Nigam').

-On 28.11.1966 Suraj Prasad Nigam had died.

-On 14.11.1967 an application under Order 1 Rule 10 read with Order 22 Rule 1 CPC was filed by Smt. Kamlesh Nigam for her impleadment on the basis of Will dated 18.11.1964 executed by Late Suraj Prasad Nigam in her favour.

5. The respondent L.P. Nigam/his legal heirs denied claim of Suraj Prasad Nigam as well as of Smt. Kamlesh Nigam, thereupon reference Court ordered enquiry.

6. On the basis of averments of rival parties, Court below framed as many as 15 issues and proceeded to record evidence of the parties.

7. In support of her claim, Smt. Kamlesh Nigam on 07.09.1973 examined three witnesses to the Will dtd. 18.11.1964 namely Abdul Shakur Siddiqui (AW1); Sunder Lal Shrivastava (AW2) and Vireshwar Prasad Shrivastava (AW3). Original Will in sealed cover and another empty envelop used for deposited Will, was also produced from the Registrar Office before the Court. However, neither Smt. Kamlesh Nigam

nor A.K. Nigam came in witness box nor original Will has been placed on record.

8. On 08.11.1973 an application under Order 19 Rule 1 of CPC was filed by L.P. Nigam for cross-examining A.K. Nigam, which was rejected by the Court observing that A.K. Nigam has not been cited as a witness by L.P. Nigam in the list of witnesses. On 03.10.1975 an application for amendment was filed by L.P. Nigam challenging the Will dtd. 18.11.1964, however, no document or any witness was produced by L.P. Nigam during his lifetime to prove the allegations regarding Will dt. 18.11.1964 and in the month of January' 1989 L.P. Nigam expired without adducing any evidence in support of his objection. On 23.07.1994 again time was granted to L.Rs. of L.P. Nigam to produce evidence in denial of Will dated 18.11.1964, however, on 02.09.1994 Smt. Purnima Nigam D/o L.P. Nigam was examined in support of the case pleaded by L.P. Nigam.

9. After hearing the parties, and after taking into consideration the aforesaid material available on record, Reference Court passed the impugned award on 15.09.2009 rejecting the claim of Smt. Kamlesh Nigam.

10. Aforesaid award dtd. 15.09.2009 has been challenged by the appellant-Arun Kumar Nigam by filing instant first appeal.

11. Learned Counsel for the appellant in support of his case, advanced following arguments :

-He submits that due execution and attestation of Will dtd. 18.11.1964 is duly proved by examination of Abdul Shakur Siddiqui

(AW1) as well as by examination of attesting witnesses namely Sunder Lal Shrivastava (AW2) and Vireshwar Prasad Shrivastava (AW3).

-Despite giving opportunities continuously from the year 1973 to 1988 no evidence was adduced by the Objector-L.P. Nigam in rebuttal to the evidence adduced by the appellant and solitary witness Smt. Purnima Nigam D/o L.P. Nigam was examined on 02.09.1994 but no suspicious circumstances were spelt out from her testimony.

-Questioned Will is a registered Will, which was duly deposited before the Registrar by the testator Suraj Prasad Nigam himself. Deposit Receipt signed by S.P. Nigam has been filed along with application filed under Order 41 Rule 27 CPC (IA No.6028/2023).

-With a view to show that S.P. Nigam was physically able and competent to execute the Will, he submits that the testator – Suraj Prasad Nigam was physically and mentally sound to execute the Will, who himself was appearing and filing applications in Reference proceedings. On 07.02.1965 Suraj Prasad Nigam filed duly signed Vakalatnama and appointed Advocate to represent his case. On 08.02.1965 he filed application for withdrawal of amount deposited in CCD. On 28.04.1965 Suraj Prasad Nigam filed reply to the objection filed by Laxmi Prasad Nigam contesting the same and denied averments made therein. On 05.12.1965-10.02.1966 application under Order 12 Rule 8 CPC was filed by L.P. Nigam for production of documents which was served upon Suraj Prasad Nigam. On 07.05.1966 an application for examining government employee was filed by Suraj Prasad Nigam duly signed by himself. On 01.08.1966 Suraj Prasad Nigam filed application for examining himself on commission. Order sheet dtd. 25.10.1966 shows that L.P. Nigam

appeared before the Court and signed, but did not raise any allegation regarding poor mental health of Suraj Prasad Nigam, who ultimately died on 28.11.1966.

-Learned Counsel submits that Testator was of sound state of mind and health who by executing Will gave property to L.P. Nigam also, which has already been sold by him executing sale deed dtd. 06.09.1974. On one hand he is disputing the Will and on the other hand taking advantage of the Will, sold the property given to him under Will. Copy of sale deed dated 06.09.1974 executed by L.P. Nigam in favour of Indra Singh has been placed on record by filing application (IA No.11507/2011) under Order 41 Rule 27 CPC.

-Learned Counsel submits that there was strain relationship between Suraj Prasad Nigam and L.P. Nigam and even during his lifetime, he was denying rights of L.P. Nigam over the suit property. Testimony of Purnima Nigam also proves that S.P. Nigam had no trust on his son L.P. Nigam. A civil suit was also filed making specific allegations that S.P. Nigam did not like L.P. Nigam.

-By filing application (IA 5442/2024) under Order 41 Rule 27 CPC a copy of civil suit (Civil Suit No. 4-A/1967, new no. 34-A/1984) filed by L.P. Nigam against Arun Kumar Nigam and others, has been placed on record to show that Will dtd. 18.11.1964 was challenged in the suit, which was dismissed under Order 9 Rule 8 CPC on 01.07.1987, as such the objection is barred under Order 9 Rule 9 CPC. Such dismissal of suit has also been suppressed by objector.

-Learned Counsel submits that reasons have been mentioned in Will for bequeathing disputed property to Smt. Kamlesh Nigam and at the

same time House at village Kodia was bequeathed to L.P. Nigam which is subsequently sold by L.P. Nigam. In this regard, he placed reliance on the decisions in the case of *Leela Rajagopal & Ors. v. Kamala Menon Cocharan & Ors.* **(2014) 15 SCC 570** (Para 13-16) and *Mahesh Kumar (Dead) By LRs. v. Vinod Kumar and others* **(2012) 4 SCC 387** (Para 31, 47-50).

-He submits that Suraj Prasad Nigam was exclusive owner of 'Tank' in question, which was settled by the State Government exclusively in favour of Suraj Prasad Nigam under Section 5 of the M.P. Abolition Of Proprietary Rights Act, 1950. In para 10 of the impugned judgment specific finding has been recorded that disputed Tank was settled in favour of Suraj Prasad Nigam under Section 5 of the Act, 1950 and such settlement was never challenged by L.P. Nigam or any other person. Settlement of Tank itself is a sufficient proof of title of Suraj Prasad Nigam, whose name is exclusively recorded in Jamabandi Khatauni of the year 1958-59, which is deemed to be Record of Rights and is sufficient proof of title. In this regard and in support of his proposition that settlement entry is sufficient proof of title, he placed reliance on the provision contained in Sec. 123(1) of the M.P. Land Revenue Code, 1959; Notification dtd. 17.12.1960 and decision in the case of *Sunderlal Biharilal Pawar and others v. Smt. Meena Mahengya and others* **1980 MPLJ 839** (Para 23). Accordingly, he submits that entire burden is on the objector to prove that the disputed Tank is a property of joint Hindu family, but no evidence is led by the objector(s) to prove the same and Reference Court wrongly shifted burden on the claimant to prove that the same is not joint Hindu family property.

-Learned counsel also submits that partition was already affected vide Partition Deed dated 23.02.1961 amongst Suraj Prasad Nigam and his sons Laxmi Prasad Nigam and Arun Kumar Nigam. This partition deed dtd. 23.02.1961 was challenged by L.P. Nigam by filing Civil Suit No.4-A/1967 (New no. 49-A/1972 and 34-A/1984), which was dismissed on 01.07.1987 under Order 9 Rule 8 CPC after framing of issues. Specific issue regarding partition deed dtd. 23.02.1961 was framed in that suit. Apparently partition deed dtd. 23.02.1961 was executed after issuance of notification under Section 4 & 6 of the Land Acquisition Act, by virtue of which, the land in question vested with the State Govt. and the same became a moveable property at the hands of its owner, since the same was quantifiable by compensation amount.

-Further, page 2 of partition deed provided that the moveable properties which are in possession of respective persons, the same shall belong to those respective persons, thus the tank in question which was in possession of Suraj Prasad Nigam became his absolute property by this partition. Partition deed has been filed along with application (IA No. 11507/2011) under Order 41 Rule 27 CPC.

-Learned Counsel also submits that disruption of joint Hindu family is admitted by L.P. Nigam by way of Para 4 of the Objection filed by L.P. Nigam in reference proceedings and L.P. Nigam is claiming compensation as a 'tenant in common' and not as 'joint tenant', hence is admitting that in the year 1960 there has been unequivocal intention to separate.

-Learned Counsel submits that issue of partition/joint family property and validity of Will is beyond the scope and jurisdiction of

Reference Court and Reference Court exceeded its jurisdiction by deciding issue No. 5(A), 8, 12 and 13. Reference proceedings are confined only to 'Tank' in question, whereas the Reference Court has adjudicated rights of parties in respect of other properties also which were never the subject matter before the Reference Court. The objector has also categorically mentioned in his objection that such disputes are beyond the scope of reference proceedings.

-The dispute regarding Partition/joint family properties and validity of Will could have been decided in appropriate proceedings before the competent court(s) of jurisdiction, whereas the Reference Court has in cursory manner decided the aforesaid issues without any oral or documentary evidences which has seriously prejudiced the rights of the parties.

-By placing reliance on the decision in the case of Shyamlal @ Kuldeep v. Sanjeev Kumar & Ors. **(2009) 12 SCC 454**, learned counsel submits that a male Hindu governed by Mitakshara is not debarred from making Will of ancestral/coparcenary property. As such even otherwise, assuming, though not admitting that property is ancestral property, still Suraj Prasad Nigam was capable of executing the Will of ancestral property as per Section 30 of the Hindu Succession Act, 1956.

With the aforesaid submissions, learned Counsel submits that the aforesaid findings recorded by Reference Court are liable to be set-aside as the same are 'coram-non-judice'.

12. Learned counsel appearing for the respondents supports the impugned award and prays for dismissal of the appeal with the contention that in the present case only dispute is about genuineness of the Will,

which has rightly been decided by learned Reference Court against the appellant, holding that the appellant has not been able to prove due execution and attestation of the Will in question. In support of his submissions learned Counsel placed reliance on the decisions in the case of Ramesh and others vs. Sajjan Bai and others **2023(4)MPLJ 351** and Maansingh & Others v. Kamal Singh and Another **2020(3) JLJ 150**.

13. Heard learned counsel for the parties and perused the record available.

14. Following points for determination are involved in the instant appeal :-

(i) Whether the appellant has been able to prove due execution and attestation of Will in question dtd. 18.11.1964 as well as to remove suspicious circumstances ?

(ii) Whether, non-examination of beneficiary under the Will (Smt. Kamlesh Nigam), unknown Scribe of Will as well as A.K. Nigam (husband of Smt. Kamlesh Nigam) who took effective participation in execution of Will, is fatal to the case of appellant or applicant-Smt. Kamlesh Nigam ?

(iii) Whether the appellant is entitled to get the entire awarded amount ?

15. In the present case property in dispute is only a 'Tank' which as per documentary evidence belonged to Suraj Prasad Nigam and has been acquired by the State Govt., regarding which award was passed by Land Acquisition Officer on 27.03.1962 and upon filing application for reference under Section 18 r/w Section 30 of the Act of 1894 by Suraj Prasad Nigam to the Collector/Land Acquisition Officer, case was

referred to the District Judge, Jabalpur on 21.01.1963 and reference case was registered on 30.01.1963 at the instance of Suraj Prasad Nigam, in which L.P. Nigam filed objection but A.K. Nigam did not file any objection.

16. During reference proceedings, Suraj Prasad Nigam had died on 28.11.1966. Subsequently, on the basis of Will dated 18.11.1964 of Suraj Prasad Nigam, an application under Order 1 Rule 10 r/w Order 22 Rule 1 CPC was filed by Smt. Kamlesh Nigam for her impleadment but without ordering her impleadment, Reference Court proceeded to enquire into the genuineness of Will and by the impugned award it has been held that the Will is not proved to have been executed by Suraj Prasad Nigam and is surrounded by several suspicious circumstances, which have also not been removed.

17. As has been mentioned above, the counsel for the appellant has by challenging the findings on issue no. 5A, 8, 12 and 13, raised several grounds in favour of genuineness of the Will as well as competency of Suraj Prasad Nigam to execute the Will, but in the present case, only question is about genuineness of Will. Even if the property in dispute belonged to Suraj Prasad Nigam or it be treated belonging to joint Hindu family, the applicant (Smt. Kamlesh Nigam) in the application under Order 1 Rule 10 CPC claiming on the basis of Will, would get relief only upon proving due execution and attestation of Will. Appellant-A.K. Nigam himself did not file any objection and he on the basis of his substitution on basis of another Will executed by Smt. Kamlesh Nigam, has filed instant appeal.

18. It is pertinent to mention here that for the reasons best known to the

applicant/appellant, the applicant- Smt. Kamlesh Nigam in whose favour questioned Will is said to have been executed or her husband A.K. Nigam who was present at the time of execution of Will and took effective participation in execution of the Will, has not come in witness box and has not offered herself/himself to be cross examined by the non-applicants/respondents, who could dispel several suspicious circumstances because they were the only persons who were well aware of the reality. In the case of *Vidhyadhar v. Manikrao and another* (1999) 3 SCC 573, Hon'ble Supreme Court has held as under :-

“16. Where a party to the suit does not appear into the witness box and states his own case on oath and does not offer himself to be cross examined by the other side, a presumption would arise that the case set up by him is not correct as has been held in a series of decisions passed by various High Courts and the Privy Council beginning from the decision in *Sardar Gurbaksha Singh v. Gurdial Singh*, AIR 1927 PC 230. This was followed by the Lahore High Court in *Kirpa Singh v. Ajaipal Singh*, AIR 1930 Lahore 1 and the Bombay High Court in *Martand Pandharinath Chaudhari v. Radhabai Krishnarao Deshmukh*, AIR 1931 Bombay 97. The Madhya Pradesh High Court in *Gulla Kharagjit Carpenter v. Narsingh Nandkishore Rawat*, AIR 1970 Madh Pra 225, also followed the Privy Council decision in *Sardar Gurbakhsh Singh's case* (AIR 1927 PC 230) (supra). The Allahabad High Court in *Arjun Singh v. Virender Nath*, AIR 1971 Allahabad 29 held that if a party abstains from entering the witness box, it would give rise to an inference adverse against him. Similarly, a Division Bench of the Punjab and Haryana High Court in *Bhagwan Dass v. Bhishan Chand*, AIR 1974 Punj and Har 7, drew a presumption under Section 114 of the Evidence Act against a party who did not enter into the witness box.”

19. In the case of *Iqbal Basith and others v. N. Subbalakshmi and others* (2021) 2 SCC 718, also the Hon'ble Supreme Court has reiterated the same view and held as under :-

“9. The present suit was instituted by the appellants in 1974 seeking permanent injunction as the respondents attempted to encroach on their property. The suit schedule property was described as no. 44/6. The respondents in their written statement claimed ownership and possession of property no. 42, acknowledging that other properties lay in between. A feeble vague objection was raised, but not pursued, questioning the title of the appellants. The respondents raised no genuine objection to the validity or genuineness of the government documents and the registered sale deeds produced by the appellants in support of their lawful possession of the suit property. The original defendant no. 1 did not appear in person to depose, and be cross-examined in the suit. His younger brother deposed on the basis of a power of attorney, acknowledging that the latter had separated from his elder brother. No explanation was furnished why the original defendant did not appear in person to depose. We find

no reason not to draw an adverse inference against defendant no. 1 in the circumstances.

10. In *Iswar Bhai C. Patel vs. Harihar Behera*, (1999) 3 SCC 457 this Court observed as follows:-

"17.....Having not entered into the witness-box and having not presented himself for cross-examination, an adverse presumption has to be drawn against him on the basis of the principles contained in Illustration (g) of Section 114 of the Evidence Act, 1872.""

20. Trial Court has disbelieved the case of Will propounded by the applicant/appellant on the grounds viz.:(i) Suraj Prasad Nigam was physically and mentally infirm on the date and at the time of execution of Will; and (ii) Will was not read over and explained to Suraj Prasad Nigam nor it was read by him. Learned counsel submits that at the time of execution of Will Suraj Prasad Nigam was mentally and physically fit, therefore, the said requirement of reading over and explaining the Will in the language which testator knew or acquainted with or signing by him after understanding the contents of the Will, was rightly not fulfilled.

21. Just few minutes ago of signing the Will, attesting witness Sunderlal Shrivastava (AW-2) who is an Advocate and has no relation with Suraj Prasad Nigam was called by Arun Kumar Nigam, who never met previously with Suraj Prasad Nigam, before whom the Will was also not typed nor was read over to Suraj Prasad Nigam. This witness in paragraph 4 of his statement has stated that while signing on Will, Suraj Prasad Nigam was sufficiently old, was about 85 years of age, his hands were shivering, who was also ill, but he was capable of understanding the things. With a view to assess his understanding, the witness asked S.P. Nigam as to whether he has read the Will and that he is giving entire property to younger daughter-in- law, then he said 'Okay I understood'.

Except these words nothing was asked or told to Suraj Prasad Nigam by anybody in presence of this witness.

22. Another attesting witness Vireshwar Prasad Shrivastava (AW-3) is also an Advocate who was called by Sunderlal Shrivastava (AW-2). Vireshwar Prasad Shrivastava has stated that he did not go to the office of Sub-Registrar with his free will. This witness also never met previously with Suraj Prasad Nigam and before whom also the Will was not typed, nor was read over to Suraj Prasad Nigam. This witness in paragraph 6 of his statement has stated that at the time of signing on Will, hands of Suraj Prasad Nigam were shivering, and he used to speak intermittently. With a view to assess his understanding, this witness asked him as to whether in the Will he has made provision about both the sons and that there is no problem in this, then he said that he has already done management of elder son and now is executing this Will. Except the aforesaid, nothing was asked or told to Suraj Prasad Nigam by anybody in presence of this witness.

23. It is undisputed fact on record that testator was of 85 years of age and was suffering from serious ailment. It is apparent fact on record that Will was not dictated by Suraj Prasad Nigam and was not typed also in presence of Suraj Prasad Nigam. Attesting witness Sunderlal Shrivastava (PW-2) in para 1 of his statement has stated that Arun Kumar Nigam took out the Will from a bag and gave it to Suraj Prasad Nigam, which was signed by testator and attesting witnesses.

24. It is very much surprising that no one has stated as to who typed the Will in question, when and where it was typed. As per attesting witness, it was Arun Kumar Nigam, who before execution, took out the

Will from his bag, meaning thereby it was Arun Kumar Nigam (younger son of Suraj Prasad Nigam and husband of Objector-Smt. Kamlesh Nigam, in whose favour Will was executed) who participated effectively in execution of Will, therefore, Arun Kumar Nigam as well as Scribe of the Will become necessary witnesses and their non-examination is fatal to the case of appellant.

25. Had Arun Kumar Nigam or Smt. Kamlesh Nigam or the Scribe, been brought in witness box, reality could have come on record. In my considered opinion when it is not on record as to who typed/drafted the Will, itself raises serious doubts about validity and authenticity of the Will. Further, the lack of clarity on crucial details, such as where the Will was prepared and whether the testator was in a sound state of mind, casts doubts on the legitimacy of the Will.

26. It is well settled that propounder of the Will has the burden of removing all the suspicious circumstances surrounding its execution. If the propounder fails to do so, the Will cannot be considered as duly proved. The absence of information about typing of the Will is a significant suspicious circumstance which the propounder has not adequately addressed. All this was possible only by examination of propounder i.e. Smt. Kamlesh Nigam (who died only on 09.01.2009) or by her husband Arun Kumar Nigam (the appellant) (who took effective participation in execution of Will) and by the Scribe.

27. By placing reliance on the decisions in the case *Narendra Nath Nanda v. State & Ors.* **2017 SCC OnLine Del 7004**; *Savita Dattatraya Karandikar v. Nishikant Sadashiv Karandikar and others* **2009(6) Mh.L.J. 431**; and *Sridevi and others v. Jayaraja Shetty and others* **(2005) 2 SCC**

784, learned counsel for the appellant tried to say that when sufficient evidence is available on record to prove the Will, non-examination of propounder of the Will is not fatal and in his/her absence, other material evidence is required to be considered.

28. In the case of Narendra Nath Nanda (**supra**) it was not a case of propounder that he was present when Will was executed, but here entire work has been done by the appellant-Arun Kumar Nigam himself, who is husband of objector-Smt. Kamlesh Nigam and son of Suraj Prasad Nigam and nothing has been brought on record by any of the witnesses, as to who typed/drafted the Will. Even otherwise, testimony of the attesting witnesses is not sufficient to prove due and valid execution and attestation of the Will, because both the witnesses did not know about Suraj Prasad Nigam and they were brought to the office of Sub-Registrar by Arun Kumar Nigam only for the purpose of execution of Will. As such, other two decisions in the case of Savita Dattatraya Karandikar (**supra**) and Sridevi and others (**supra**) are also not applicable to this case being distinguishable on facts.

29. In view of the aforesaid discussion and the discussion made by Court below in paragraphs 18 to 32 of impugned award, the findings recorded by Court below on issue no. 5A, 8, 12 and 13 do not appear to be illegal or perverse. Further, perusal of certified copy of Will (Ex.LR-1) shows that it does not contain even description of property allegedly bequeathed in favour of Smt. Kamlesh Nigam. It is significant to mention here that dismissal of respondent's suit under Order 9 Rule 8 CPC does not mean that despite being propounder, Smt. Kamlesh Nigam or the appellant is not liable to prove the Will in accordance with law.

30. After death of Smt. Kamlesh Nigam on 09.01.2009, the appellant-claimant no.2 (Arun Kumar Nigam) on the basis of another Will of Smt. Kamlesh Nigam was brought on record in place of Smt. Kamlesh Nigam vide interim order dtd. 06.07.2009 passed by Court below and after passing of the award on 15.09.2009, instant appeal was filed on 03.11.2009 challenging the entire award. Although, prayer has been made to the effect that the impugned award be suitably modified and the entire awarded compensation be granted in favour of the appellant, along with all consequential benefits, but despite valuing the appeal at Rs.40,975/- no argument has been advanced with respect to enhancement of claim, resultantly, no argument in reply has been done on behalf of the State Govt. As such in the present case, only dispute is with respect to entitlement of awarded amount, on the basis of Will in question executed by Suraj Prasad Nigam.

31. Tank in question in fact belonged to Hanuman Prasad Nigam who was survived by Suraj Prasad Nigam and Laxmi Prasad Nigam and Arun Kumar Nigam are sons of Suraj Prasad Nigam, who were born prior to coming into force of the Hindu Succession Act, 1956. As admittedly the Tank belonged to Hanuman Prasad Nigam, therefore, merely upon its settlement in the name of Suraj Prasad Nigam, it cannot be said that it was self-acquired property of Suraj Prasad Nigam. As such, no illegality appears to have been committed by learned Court below while deciding issue no.5A.

32. From perusal of memo of first appeal, it is clear that on the applications of the appellant and vide interim orders dtd. 10.01.2014, 30.08.2022, 07.09.2022 and 20.03.2024 names of respondents 3,4,5,6,7,

8(A),(B),(C), (G),(J)&(L) have been deleted, certainly at the risk of the appellant and all these persons were claiming through main claimant-late Suraj Prasad Nigam. As to whether, interests of the aforesaid persons are common to appellant or not, is not clear, therefore, the impugned award has become final against the aforesaid persons.

33. In the light of aforesaid discussion, issues involved in the present case and looking to the scope of first appeal, the additional documents placed on record by way of filing applications under Order 41 Rule 27 CPC being not relevant, do not give any benefit to the case of the appellant, therefore, are hereby dismissed.

34. Resultantly, declining interference in the impugned award, first appeal filed at the instance of Arun Kumar Nigam (husband of Smt. Kamlesh Nigam), fails and is hereby dismissed.

35. However, no order as to costs.

36. Pending application (s), if any, shall stand disposed off.

(DWARKA DHISH BANSAL)
JUDGE

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