IN THE HIGH COURT OF MADHYA PRADESH AT JABALPUR

BEFORE

HON'BLE SHRI JUSTICE GURPAL SINGH AHLUWALIA

ON THE 1st OF FEBRUARY, 2023

SECOND APPEAL No. 536 of 2019

BETWEEN:-

MANISH TIWARI S/O LATE SURESH NARAYAN TIWARI, AGED ABOUT 49 YEARS, AADARSH COLONY KHAIRI NAKA NARSINGHPUR, DISTRICT NARSINGHPUR (MADHYA PRADESH)

.....APPELLANT

(BY SHRI P.C.PALIWAL - ADVOCATE)

AND

1.A. **SMT.SAVITA TIWARI, WD/O RAJENDRA KUMAR TIWARI, AGED ABOUT 58 YEARS, HOUSEWIFE, R/O BEHIND JAIN MANDIR, MAHAJANI WARD NARSINGHPUR, DISTRICT NARSINGHPUR (MADHYA PRADESH)**

1.B. **KU.PALAK TIWARI D/O LATE RAJENDRA KUMAR TIWARI, AGED ABOUT 27 YEARS, R/O BEHIND JAIN MANDIR, MAHAJANI WARD NARSINGHPUR, DISTRICT NARSINGHPUR (MADHYA PRADESH)**

1.C. **PRANAV TIWARI, S/O LATE RAJENDRA KUMAR TIWARI, AGED ABOUT 58 YEARS, HOUSEWIFE, R/O BEHIND JAIN MANDIR, MAHAJANI WARD NARSINGHPUR, DISTRICT NARSINGHPUR (MADHYA PRADESH)**

1.D. **SMT.PARUL MISHRA D/O LATE RAJENDRA KUMAR TIWARI, W/O ASHISH MISHRA, AGED ABOUT 28 YEARS, R/O NEAR SHANKAR TEMPLE, ANAND KUNJ GARHA, JABALPUR, P.S.**

GARHA, DISTRICT JABALPUR, M.P.

2. ASHOK KUMAT TIWARI S/O LATE SURESH NARAYAN TIWARI, AGED ABOUT 63 YEARS, RESIDENT OF HOUSE NO 88 KRISHNA CAMPUS, NEAR HINOTIYA SANGAM TENT HOUSE KE PASS 80 FEET ROAD BHOPAL DISTT BHOPAL (MADHYA PRADESH)

3. SMT SEEMA DUBEY W/O SHRI SUNIL DUBEY, AGED ABOUT 47 YEARS, RESIDENT OF FLAT NO 3 PLOT NO 163 ASHIRVAD APARTMENT SHIVHANGA NAGAR AMBAR NORTH EAST THANDE MUMBAI (MAHARASHTRA)

4. AMIT AWASTHI S/O SHRI SUBODH AWASTHI, AGED ABOUT 36 YEARS, RESIDENT OF 406 PUSPALYA SCHOOL GHAMANDI CHOWK KE PASS JABALPUR DISTT JABALPUR (MADHYA PRADESH)

5.A. SMT.JAYA AWASTHI WD/O SHRI SHRI ARVIND AWASTHI, AGED ABOUT 40 YEARS, OCCUPATION TEACHER, RESIDENT OF 947, SANJEEVANI NAGAR, IN FRONT OF SHAHI TALAB, KACHHAPURA JAABALPUR DISTT JABALPUR (MADHYA PRADESH)

5.B. KU.ADHYA AWASTHI D/O SHRI ARVIND AWASTHI, AGED ABOUT 6 YEARS, MINOR THROUGH NEXT FRIEND MOTHER SMT.JAYA AWASTHI WD/O SHRI SHRI ARVIND AWASTHI, AGED ABOUT 40 YEARS, RESIDENT OF 947, SANJEEVANI NAGAR, IN FRONT OF SHAHI TALAB, KACHHAPURA JAABALPUR DISTT JABALPUR

(MADHYA PRADESH)

6. ALOK AWASTHI, SHRI SUBODH AWASTHI, AGED ABOUT 37 YEARS, RESIDENT OF 406 PUSPALYA SCHOOL GHAMANDI CHOWK KE PASS JABALPUR DISTT JABALPUR (MADHYA PRADESH)

7. THE STATE OF MADHYA PRADESH THROUGH COLLECTOR NARSINGHPUR DISTT NARSINGHPUR (MADHYA PRADESH)

.....RESPONDENTS

(SHRI ANKIT SUBHASH NEMA – ADVOCATE FOR THE LEGAL REPRESENTATIVES OF RESPONDENT NO.1)

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This appeal coming on for admission this day, the court passed the following:

JUDGMENT

This second appeal, under Section 100 of CPC, has been filed against the judgment and decree dated 11.12.2018 passed by First Additional District Judge, Narsinghpur in Civil Appeal No.19/2018, arising out of the judgment and decree dated 27.02.2018 passed by the Fifth Civil Judge, Class-II, Narsinghpur in Regular Civil Suit No.9-A/2015.

2. The appellant is the plaintiff, who had filed the suit for declaration of title, permanent injunction as well as the amendment in the revenue record dated 20.05.2013 passed by the Tahsildar, Narsinghpur as null and void. The appellant has lost his case from

both the courts below.

3. According to the plaintiff, the disputed land is Khasra No.89/3, area 0.841 hectares, Khasra No.125/2, 127/2, area 1.035 hectares, situated in Narsinghpur, District Narsinghpur is the disputed property.

4. It is the case of the plaintiff that he is in possession of the disputed property for the last 15-16 years. The property in dispute was the self-acquired property of his father late Shri Suresh Narayan Tiwari. Since the plaintiff had looked after his father for 10 long years and had spent Rs.2,00,000/- lacs on his treatment, therefore, on 20.06.2012 the father of the plaintiff executed a Will in his favour. A house situated in Mahajani Ward, Narsinghpur was bequeathed to the defendant no.1 Rajendra Kumar Tiwari, in which he was residing.

5. It was further pleaded that after the death of his father, the defendant no.1 also got his name mutated in the revenue records jointly with the plaintiff. The order dated 20.05.2013 passed by the Tahsildar in this regard is vitiated being violative of the mandatory provisions of section 110 of MPLR Code. The appellant came to know about the said illegal mutation on 27.06.2014 when he obtained the photocopy of *Khasra Kist Khantoni* of the year 2012-2013. It was also pleaded that defendants no.1 to 4 are threatening that they would create obstruction in carrying out the agricultural activities and accordingly a suit was filed for the declaration of his title on the basis of Will as well as for permanent injunction and for setting aside the order dated 20.05.2013.

6. The defendants no.1 to 6 filed their written statement and

denied the plaint averments. It was claimed by them that the property in dispute is the ancestral property of Late Shri Suresh Narayan Tiwari and, therefore, all the defendants have equal share in the same after the death of Late Suresh Narayan Tiwari. The names of the plaintiff as well as the defendants no.1 to 6 were jointly recorded in the revenue records. Accordingly, it was prayed that the plaintiff and defendants no.1 to 6 have equal share in the property.

7. After a recovery notice was received from Central Bank of India, Narsinghpur, the plaintiff had sent a notice dated 02.04.2013 through his counsel Shri Ramesh Singh Chauhan and in the said reply also the plaintiff had admitted that the defendants no.1 and 2 have 1/3rd share and in the said notice the plaintiff had not disclosed about execution of any Will in his favour and thus, it was claimed that Late Suresh Narayan Tiwari has never executed any Will and it was claimed that in fact the plaintiff has created a false and forged document of Will and accordingly prayed for dismissal of the suit.

8. The trial court, after framing issues and recording evidence, dismissed the suit by holding that the plaintiff has failed to prove the execution of Will by his father in his favour.

9. Being aggrieved by the judgment and decree passed by the trial Court, the appellant preferred an appeal, which too has been dismissed by the First Appellate Court.

10. Challenging the judgments and decree passed by the Courts below, it is submitted by the counsel for the appellant that the Courts below failed to see that Late Shri Suresh Narayan Tiwari had executed a Will in favour of the appellant. The said Will was executed out of his own volition and accordingly has proposed the

following substantial questions of law :-

> "(i) Whether, the Judgment and decree passed by the courts below is perverse and against the law and facts?"
>
> (ii) Whether, the learned courts below is correct & justified in holding that the plaintiff has not proved, the will Ex.P-1, according to Section 63 of the Succession Act & 68 of the Evidence?
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> (iii) Whether, in the facts and documents on record, the learned courts below is justified in holding that the suit land is a ancestral property and same is not self acquired property of late Suresh Narayan Tiwari without examination of any witness in defence by the defendants?
>
> (iv) Whether, the learned lower appellate court is justified in rejecting the application U/O 41 Rule 27-28 R/w S. 151 of the CPC and U/S 145 of the evidence Act in the facts and circumstances of this case ?"

11. Heard the learned counsel for the parties.

12. The Supreme Court in the case of ***H.Venkatachala Iyengar Vs. B.N.Thimmajamma and others***, reported in ***AIR 1959 SC 443*** has held as under:-

> ***"18.*** *What is the true legal position in the matter of proof of wills? It is well-known that the proof of wills presents a recurring topic for decision in courts and there are a large number of judicial pronouncements on the subject. The party propounding a will or otherwise making a claim under a will is no doubt seeking to prove a document and, in deciding how it is to be proved, we must inevitably refer to the statutory provisions which govern the proof of documents. Sections 67 and 68, Evidence Act are relevant for this purpose. Under Section 67, if a document is alleged to be signed by any person, the signature of the said*

person must be proved to be in his handwriting, and for proving such a handwriting under Sections 45 and 47 of the Act the opinions of experts and of persons acquainted with the handwriting of the person concerned are made relevant. Section 68 deals with the proof of the execution of the document required by law to be attested; and it provides that such a document shall not be used as evidence until one attesting witness at least has been called for the purpose of proving its execution. These provisions prescribe the requirements and the nature of proof which must be satisfied by the party who relies on a document in a court of law. Similarly, Sections 59 and 63 of the Indian Succession Act are also relevant. Section 59 provides that every person of sound mind, not being a minor, may dispose of his property by will and the three illustrations to this section indicate what is meant by the expression "a person of sound mind" in the context. Section 63 requires that 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 that the signature or mark shall be so made that it shall appear that it was intended thereby to give effect to the writing as a will. This section also requires that the will shall be attested by two or more witnesses as prescribed. Thus the question as to whether the will set up by the propounder is proved to be the last will of the testator has to be decided in the light of these provisions. Has the testator signed the will? Did he understand the nature and effect of the dispositions in the will? Did he put his signature to the will knowing what it contained? Stated broadly it is the decision of these questions which determines the nature of the finding on the question of the proof of wills. It would prima facie be true to say that the will has to be proved like any other document except as to the special requirements of attestation prescribed by Section 63 of the Indian Succession Act. As in the case of proof of other documents so in the case of proof of

wills it would be idle to expect proof with mathematical certainty. The test to be applied would be the usual test of the satisfaction of the prudent mind in such matters.

19. *However, there is one important feature which distinguishes wills from other documents. Unlike other documents the will speaks from the death of the testator, and so, when it is propounded or produced before a court, the testator who has already departed the world cannot say whether it is his will or not; and this aspect naturally introduces an element of solemnity in the decision of the question as to whether the document propounded is proved to be the last will and testament of the departed testator. Even so, in dealing with the proof of wills the court will start on the same enquiry as in the case of the proof of documents. The propounder would be called upon to show by satisfactory evidence that the will was signed by the testator, that the testator at the relevant time was in a sound and disposing state of mind, that he understood the nature and effect of the dispositions and put his signature to the document of his own free will. 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, courts would be justified in making a finding in favour of the propounder. In other words, the onus on the propounder can be taken to be discharged on proof of the essential facts just indicated.*

20. *There may, however, be cases in which the execution of the will may be surrounded by suspicious circumstances. The alleged signature of the testator may be very shaky and doubtful and evidence in support of the propounder's case that the signature, in question is the signature of the testator may not remove the doubt created by the*

appearance of the signature; the condition of the testator's mind may appear to be very feeble and debilitated; and evidence adduced may not succeed in removing the legitimate doubt as to the mental capacity of the testator; the dispositions made in the will may appear to be unnatural, improbable or unfair in the light of relevant circumstances; or, the will may otherwise indicate that the said dispositions may not be the result of the testator's free will and mind. In such cases the court would naturally expect that all legitimate suspicions should be completely removed before the document is accepted as the last will of the testator. The presence of such suspicious circumstances naturally tends to make the initial onus very heavy; and, unless it is satisfactorily discharged, courts would be reluctant to treat the document as the last will of the testator. It is true that, if a caveat is filed alleging the exercise of undue influence, fraud or coercion in respect of the execution of the will propounded, such pleas may have to be proved by the caveators; but, even without such pleas circumstances may raise a doubt as to whether the testator was acting of his own free will in executing the will, and in such circumstances, it would be a part of the initial onus to remove any such legitimate doubts in the matter.

21. *Apart from the suspicious circumstances to which we have just referred, in some cases the wills propounded disclose another infirmity. Propounders themselves take a prominent part in the execution of the wills which confer on them substantial benefits. If it is shown that the propounder has taken a prominent part in the execution of the will and has received substantial benefit under it, that itself is generally treated as a suspicious circumstance attending the execution of the will and the propounder is required to remove the said suspicion by clear and satisfactory evidence. It is in connection with wills that present*

such suspicious circumstances that decisions of English courts often mention the test of the satisfaction of judicial conscience. It may be that the reference to judicial conscience in this connection is a heritage from similar observations made by ecclesiastical courts in England when they exercised jurisdiction with reference to wills; but any objection to the use of the word "conscience" in this context would, in our opinion, be purely technical and academic, if not pedantic. The test merely emphasizes that, in determining the question as to whether an instrument produced before the court is the last will of the testator, the court is deciding a solemn question and it must be fully satisfied that it had been validly executed by the testator who is no longer alive.

22. *It is obvious that for deciding material questions of fact which arise in applications for probate or in actions on wills, no hard and fast or inflexible rules can be laid down for the appreciation of the evidence. It may, however, be stated generally that a propounder of the will has to prove the due and valid execution of the will and that if there are any suspicious circumstances surrounding the execution of the will the propounder must remove the said suspicions from the mind of the court by cogent and satisfactory evidence. It is hardly necessary to add that the result of the application of these two general and broad principles would always depend upon the facts and circumstances of each case and on the nature and quality of the evidence adduced by the parties. It is quite true that, as observed by Lord Du Parcq in Harmes v. Hinkson, 50 Cal WN 895: [AIR 1946 PC 156] "where a will is charged with suspicion, the rules enjoin a reasonable scepticism, not an obdurate persistence in disbelief. They do not demand from the Judge, even in circumstances of grave suspicion, a resolute and impenetrable incredulity. He is never required to*

close his mind to the truth". It would sound platitudinous to say so, but it is nevertheless true that in discovering truth even in such cases the judicial mind must always be open though vigilant, cautious and circumspect."

13. The Supreme Court in the case of ***Babu Singh and others Vs. Ram Sahai alias Ram Singh***, reported in ***(2008) 14 SCC 754*** has held as under:-

*"**14.** In terms of Section 68 of the Act, although it is not necessary to call more than one attesting witness to prove due execution of a will but that would not mean that an attested document shall be proved by the evidence of one attesting witness only and two or more attesting witnesses need not be examined at all. Section 68 of the Act lays down the mode of proof. It envisages the necessity of more evidence than mere attestation, as the words "at least" have been used therein. When genuineness of a will is in question, apart from execution and attestation of will, it is also the duty of a person seeking declaration about the validity of the will to dispel the surrounding suspicious circumstances existing, if any. Thus, in addition to proving the execution of the will by examining the attesting witnesses, the propounder is also required to lead evidence to explain the surrounding suspicious circumstances, if any. Proof of execution of the will would, inter alia, depend thereupon.*

***15.** The court, while granting probate of the will, must take into consideration all relevant factors. It must be found that the will was product of a free will. The testator must have full knowledge and understanding as regards the contents thereof. For the said purpose, the background facts may also be taken note of. Where, however,*

a plea of undue influence was taken, the onus therefore would be on the objector and not on the offender(See Savithri Vs. Karthyayani Amma).

17. *It would apply, inter alia, in a case where the attesting witness is either dead or out of the jurisdiction of the court or kept out of the way by the adverse party or cannot be traced despite diligent search. Only in that event, the will may be proved in the manner indicated in Section 69 i.e. by examining witnesses who were able to prove the handwriting of the testator or executant. The burden of proof then may be shifted to others.*

18. *Whereas, however, a will ordinarily must be proved keeping in view the provisions of Section 63 of the Succession Act and Section 68 of the Act, in the event the ingredients thereof, as noticed hereinbefore, are brought on record, strict proof of execution and attestation stands relaxed. However, signature and handwriting, as contemplated in Section 69, must be proved."*

14. The Supreme Court in the case of ***Kavita Kanwar Vs. Pamela Mehta and others***, reported in ***(2021) 11 SCC 209*** has held as under:-

*"**24.8.** We need not multiply the references to all and other decisions cited at the Bar, which essentially proceed on the aforesaid principles while applying the same in the given set of facts and circumstances. Suffice would be to point out that in a recent decision in Shivakumar v. Sharanabasappa (2021) 11 SCC 277, this Court, after traversing through the relevant decisions, has summarised the principles governing the adjudicatory process concerning*

proof of a will as follows : (SCC pp. 309-10, para 12)

> *"12. ... 12.1. Ordinarily, 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. Alike the principles governing the proof of other documents, in the case of will too, the proof with mathematical accuracy is not to be insisted upon.*
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> *12.2. Since as per Section 63 of the Succession Act, a will is required to be attested, it cannot be used as evidence until at least one attesting witness has been called for the purpose of proving its execution, if there be an attesting witness alive and capable of giving evidence.*
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> *12.3. The unique feature of a will is that it speaks from the death of the testator and, therefore, the maker thereof is not available for deposing about the circumstances in which the same was executed. This introduces an element of solemnity in the decision of the question as to whether the document propounded is the last will of the testator. The initial onus, naturally, lies on the propounder but the same can be taken to have been primarily discharged on proof of the essential facts which go into the making of a will.*
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> *12.4. The case in which the execution of the will is surrounded by suspicious circumstances stands on a different footing. The presence of suspicious circumstances makes the onus heavier on the propounder and, therefore, in cases where the circumstances attendant upon the execution of the document give rise to suspicion, the propounder must remove all legitimate suspicions before the document can be accepted as the last will of the testator.*

12.5. If a person challenging the will alleges fabrication or alleges fraud, undue influence, coercion et cetera 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 execution of the will may give rise to the doubt or as to whether the will had indeed been executed by the testator and/or as to whether the testator was acting of his own free will. In such eventuality, it is again a part of the initial onus of the propounder to remove all reasonable doubts in the matter.

12.6. A circumstance is "suspicious" when it is not normal or is 'not normally expected in a normal situation or is not expected of a normal person'. As put by this Court, the suspicious features must be "real, germane and valid" and not merely the "fantasy of the doubting mind".

12.7. As to whether any particular feature or a set of features qualify as "suspicious" would depend on the facts and circumstances of each case. A shaky or doubtful signature; a feeble or uncertain mind of the testator; an unfair disposition of property; an unjust exclusion of the legal heirs and particularly the dependants; an active or leading part in making of the will by the beneficiary thereunder et cetera are some of the circumstances which may give rise to suspicion. The circumstances abovenoted are only illustrative and by no means exhaustive because there could be any circumstance or set of circumstances which may give rise to legitimate suspicion about the execution of the will. On the other hand, any of the circumstances qualifying as being suspicious could be legitimately explained by the propounder. However, such suspicion or suspicions cannot be removed by mere proof of sound and disposing state of mind of the

> *testator and his signature coupled with the proof of attestation.*
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> *12.8. The test of satisfaction of the judicial conscience comes into operation when a document propounded as the will of the testator is surrounded by suspicious circumstance(s). While applying such test, the court would address itself to the solemn questions as to whether the testator had signed the will while being aware of its contents and after understanding the nature and effect of the dispositions in the will?*
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> *12.9. In the ultimate analysis, where the execution of a will is shrouded in suspicion, it is a matter essentially of the judicial conscience of the court and the party which sets up the will has to offer cogent and convincing explanation of the suspicious circumstances surrounding the will."*

15. The Supreme Court in the case of ***Dhanpat Vs. Sheo Ram (Deceased) through Legal Representatives and others,*** *reported in* ***(2020) 16 SCC 209*** has held as under:-

> ***"23.*** *Now, coming to the question as to whether the defendants have proved the due execution of the will, reference will be made to a judgment reported as H. Venkatachala Iyengar v. B.N. Thimmajamma , AIR 1959 SC 443 : 1959 Supp (1) SCR 426 . This Court while considering Section 63 of the Act and Section 68 of the Evidence Act laid down the test as to whether the testator signed the will and whether he understood the nature and effect of the dispositions in the will. The Court held as under : (AIR p. 451, para 18)*
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> *"18. ... Thus the question as to whether the will set up by the propounder is proved to be the last will of the testator has to be decided in the light of these provisions. Has the testator signed the will? Did he understand the nature*

and effect of the dispositions in the will? Did he put his signature to the will knowing what it contained? Stated broadly it is the decision of these questions which determines the nature of the finding on the question of the proof of wills. It would prima facie be true to say that the will has to be proved like any other document except as to the special requirements of attestation prescribed by Section 63 of the Succession Act. As in the case of proof of other documents so in the case of proof of wills it would be idle to expect proof with mathematical certainty. The test to be applied would be the usual test of the satisfaction of the prudent mind in such matters.

24. *This Court in a judgment reported as Beni Chand v. Kamla Kunwar , (1976) 4 SCC 554 held that onus probandi lies in every case upon the party propounding a will, and he must satisfy the conscience of the court that the instrument so propounded is the last will of a free and capable testator. The Court held as under : (SCC p. 559, para 9)*

"9. The question which now arises for consideration, on which the Letters Patent Court differed from the learned Single Judge of the High Court, is whether the execution of the will by Jaggo Bai is proved satisfactorily. It is well settled that the onus probandi lies in every case upon the party propounding a will, and he must satisfy the conscience of the court that the instrument so propounded is the last will of a free and capable testator. [See Jarman on Wills (8th Edn., p. 50) and H. Venkatachala Iyengar v. B.N. Thimmajamma, AIR 1959 SC 443 : 1959 Supp (1) SCR 426] By "free and capable testator" is generally meant that the testator at the time when he made the will had a sound and disposing state of mind and memory. Ordinarily, the burden of proving the due

execution of the will is discharged if the propounder leads evidence to show that the will bears the signature or mark of the testator and that the will is duly attested. For proving attestation, the best evidence would naturally be of an attesting witness and indeed the will cannot be used as evidence unless at least one attesting witness, depending on availability, has been called for proving its execution as required by Section 68 of the Evidence Act."

16. If the facts of the present case are considered, the Will is Ex.P.1. This unregistered Will was purportedly executed on 20.06.2012. The testator died on 26.06.2012 i.e. just six days after the execution of so called Will. The appellant has examined himself as P.W.1, Smt. Surekha Tiwari W/o plaintiff (P.W.2), Manoj Kumar Patel (P.W.3) as attesting witnesses. Arvind Kumar Verma (P.W.4) is the scribe of the Will (Ex.P.1).

17. According to Surekha Tiwari (P.W.2), Manoj Kumar Patel (P.W.3) and Arvind Kumar Verma (P.W.4), the Will was executed in the house of the propounder of the Will. Surekha Tiwari (P.W.2) denied that the property in disputed was the ancestral property of Late Shri Suresh Narayan Tiwari. She also admitted that she has never seen the sale deeds by which Shri Suresh Narayan Tiwari had purchased the property in dispute. She denied that Shri Suresh Narayan Tiwari had got the property in partition. She further admitted that Late Suresh Narayan Tiwari has an ancestral house situated in Mahajani Ward, Narsinghpur. She further stated that the Will was typed on a computer and claimed that another attesting witness Manoj was not present but later on he came there during the dictation of the Will. She denied that the Will was not executed by

her father-in-law.

18. Manoj Kumar Patel (P.W.3) has stated that the Will was executed sometimes between 11 to 12 P.M. He denied that a rough draft was prepared by the Advocate and thereafter, Manish Tiwari had got it typed from the typist sitting in the Court premises. He denied as to whether Shri Suresh Narayan Tiwari was admitted in the hospital or not.

19. Arvind Kuamr Verma (P.W.4) is the scribe of the Will, who stated that Suresh Narayan Tiwari had come to the Court for getting the Will executed. Thereafter, this witness and Shri Suresh Narayan Tiwari went to the village and reached there at about 2.00 P.M. The Will was dictated in the village itself. However, he was not in a position to point out the owner of the house where the Will was dictated. He further stated that the Will was prepared on a plain paper in handwriting and the handwritten Will was not signed by Shri Suresh Narayan Tiwari and thereafter, he handed over the said document to Shri Suresh Narayan Tiwari and he further claimed that he does not know that what was done by Shri Tiwari thereafter. He admitted that he has not received any summons from the Court and he has come to the Court at the request of the counsel for the plaintiff. He also stated that he did know that Suresh Narayan Tiwari was not keeping well. He also expressed his ignorance that Shri Suresh Naryan Tiwari was hospitalized in the hospital at Jabalpur. He denied that Will was prepared in Jabalpur. He denied for want of knowledge that Suresh Narayan Tiwari was admitted in Jabalpur Hospital from 17.06.2012 to 25.06.2012. This witness also expressed his ignorance about the date of death of Suresh Narayan Tiwari. He once again reiterated that the Will was prepared on a plain paper and

was written in his hand-writing. He further admitted that he does not know about the Will, which has been presented in the suit. However, he admitted his signatures from D to D on Will (Ex.P.1). He further admitted that the handwritten Will, which was prepared by him in the village, was not signed by him. He also expressed his ignorance as to whether Suresh Narayan Tiwari had signed the Will (Ex.P.1) in his presence. He specifically deposed that Surekha Tiwari (P.W.2) and Manoj Kumar Patel (P.W.3) did not sign the Will in his presence. Thereafter, he specifically deposed that Suresh Narayan Tiwari had not signed the Will (Ex.P.1) in his presence. In re-examination by the plaintiff, this witness admitted that the Will contained the signatures of Suresh Narayan Tiwari, Surekha Tiwari and Manoj Patel. Accordingly, the trial Court asked certain questions under Section 165 of Indian Evidence Act and it was deposed by this witness that he had prepared the draft of Will and obtained the signatures of Suresh Narayan Tiwari on the same and handed over the same to him. He further admitted that at the time of preparation of draft Will nobody else except him and Suresh Narayan Tiwari, was present. He further stated that Will, Exhibit P/1 was not typed in his presence. He came back from village at about 3.00 P.M. He further expressed that he does not recollect that from whom the Will was got typed. On the basis of the draft Will, Manish Tiwari/plaintiff had prepared the Will. He further stated that he had handed over the Will to the plaintiff.

20. In view of the evidence of Arvind Kumar Verma (P.W.4), it is clear that initially a draft of Will was prepared and at that time except Arvind Kumar Verma (P.W.4) and Suresh Narayan Tiwari nobody else was present. The copy of that draft Will has not been

produced. It is also not known as to whether the typed Will (Ex.P.1) was ever read over to the testator. The testator also died within 6 days of executing Will. Furthermore, there is a material discrepancy with regard to the timings of preparation of Will.

21. Although the defendants did not examine any witness and they were proceeded ex parte after the closure of the evidence of the plaintiff but it is well established principle of law that the plaintiff has to stand on his own legs and he cannot take advantage of the weakness of the defendants. The burden is on the propounder to prove the Will by removing all suspicious circumstances. If the evidence of Surekha Tiwari (P.W.2) and Manoj Kumar Patel (P.W.3) is considered in the light of the evidence of Arvind Kumar Verma (P.W.4), it is clear that the courts below did not commit any mistake by disbelieving the Will relied upon by the appellant.

22. It is well established principle of law that even if the concurrent finding of fact is erroneous, still the same cannot be interfered with by the High Court in exercise of powers under section 100 of CPC.

23. The Supreme Court in the case of ***Damodar Lal Vs. Sohan Devi and others*** reported in ***(2016) 3 SCC 78*** has held as under :-

> *"**8.** "Perversity" has been the subject-matter of umpteen number of decisions of this Court. It has also been settled by several decisions of this Court that the first appellate court, under Section 96 of the Civil Procedure Code, 1908, is the last court of facts unless the findings are based on evidence or are perverse.*
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> ***9.** In Krishnan v. Backiam, it has been held at para 11 that: (SCC pp. 192-93)*
>
> *"11. It may be mentioned that the first appellate court under Section 96 CPC is the last court of*

facts. The High Court in second appeal under Section 100 CPC cannot interfere with the findings of fact recorded by the first appellate court under Section 96 CPC. No doubt the findings of fact of the first appellate court can be challenged in second appeal on the ground that the said findings are based on no evidence or are perverse, but even in that case a question of law has to be formulated and framed by the High Court to that effect."

10. *In Gurvachan Kaur v. Salikram, at para 10, this principle has been reiterated: (SCC p. 532)*

"10. It is settled law that in exercise of power under Section 100 of the Code of Civil Procedure, the High Court cannot interfere with the finding of fact recorded by the first appellate court which is the final court of fact, unless the same is found to be perverse. This being the position, it must be held that the High Court was not justified in reversing the finding of fact recorded by the first appellate court on the issues of existence of landlord-tenant relationship between the plaintiff and the defendant and default committed by the latter in payment of rent."

24. The Supreme Court in the case of ***Pakeerappa Rai Vs. Seethamma Hengsu Dead by L.R.s and others*** reported in ***(2001) 9 SCC 521*** has held as under :

"2..... But the High Court in exercise of power under Section 100 CPC cannot interfere with the erroneous finding of fact howsoever gross the error seems to be....."

25. The Supreme Court in the case of ***Randhir Kaur Vs. Prithvi Pal Singh and others***, reported in (***2019) 17 SCC 71*** has held as under :-

*"**15.** A perusal of the aforesaid judgments would show that the jurisdiction in second appeal is not to interfere with the findings of fact on the ground that findings are erroneous, however, gross or inexcusable the error may seem to be. The findings of fact will also include the findings on the basis of documentary evidence. The jurisdiction to interfere in the second appeal is only where there is an error in law or procedure and not merely an error on a question of fact.*

***16.** In view of the above, we find that the High Court could not interfere with the findings of fact recorded after appreciation of evidence merely because the High Court thought that another view would be a better view. The learned first appellate court has considered the absence of clause in the first power of attorney to purchase land on behalf of the plaintiff; the fact that the plaintiff has not appeared as witness.*

***17.** A perusal of the findings recorded show that the learned first appellate court has returned a finding that the plaintiff was ready and willing to perform the contract and that the defendants cannot take plea that they were not aware that Dhanwant Singh was power-of-attorney holder. Therefore, the findings recorded by the first appellate court cannot be said to be contrary to law which may confer jurisdiction on the High Court to interfere with the findings of fact recorded by the first appellate court.*

***18.** The learned counsel for the respondents have not raised any argument that the first appellate court has failed to determine some material issue of law which may confer jurisdiction on the High Court to interfere with the findings of fact nor is there any substantial error or defect in the procedure provided by the Code of Civil Procedure or by any other law for the time being in force which may possibly have produced error or defect in the decision on merits. Therefore, the High Court was not within its jurisdiction to interfere with the findings of fact only for the reason that the plaintiff has failed to prove power of attorney in favour of Dhanwant Singh."*

26. The Supreme Court in the case of ***Gurdev Kaur Vs. Kaki*** reported in ***(2007) 1 SCC 546*** has held as under :

> "**46.** In *Bholaram* v. *Ameerchand* a three-Judge Bench of this Court reiterated the statement of law. The High Court, however, seems to have justified its interference in second appeal mainly on the ground that the judgments of the courts below were perverse and were given in utter disregard of the important materials on the record particularly misconstruction of the rent note. Even if we accept the main reason given by the High Court the utmost that could be said was that the findings of fact by the courts below were wrong or grossly inexcusable but that by itself would not entitle the High Court to interfere in the absence of a clear error of law.
>
> **47.** In *Kshitish Chandra Purkait* v. *Santosh Kumar Purkait* a three-Judge Bench of this Court held: (*a*) that the High Court should be satisfied that the case involved a substantial question of law and not mere question of law; (*b*) reasons for permitting the plea to be raised should also be recorded; (*c*) it has the duty to formulate the substantial questions of law and to put the opposite party on notice and give fair and proper opportunity to meet the point. The Court also held that it is the duty cast upon the High Court to formulate substantial question of law involved in the case even at the initial stage.
>
> **48.** This Court had occasion to determine the same issue in *Dnyanoba Bhaurao Shemade* v. *Maroti Bhaurao Marnor*. The Court stated that the High Court can exercise its jurisdiction under Section 100 CPC only on the basis of substantial questions of law which are to be framed at the time of admission of the second appeal and the second appeal has to be heard and decided only on the basis of such duly framed substantial questions of law.
>
> **49.** A mere look at the said provision shows that the High Court can exercise its jurisdiction under Section 100 CPC only on the basis of substantial questions of law which are to be framed at the time of admission of

the second appeal and the second appeal has to be heard and decided only on the basis of such duly framed substantial questions of law. The impugned judgment shows that no such procedure was followed by the learned Single Judge. It is held by a catena of judgments by this Court, some of them being, *Kshitish Chandra Purkait* v. *Santosh Kumar Purkait* and *Sheel Chand* v. *Prakash Chand* that the judgment rendered by the High Court under Section 100 CPC without following the aforesaid procedure cannot be sustained. On this short ground alone, this appeal is required to be allowed.

50. In *Kanai Lal Garari* v. *Murari Ganguly* this Court has observed that it is mandatory to formulate the substantial question of law while entertaining the appeal in absence of which the judgment is to be set aside. In *Panchugopal Barua* v. *Umesh Chandra Goswami* and *Santosh Hazari* v. *Purushottam Tiwari* the Court reiterated the statement of law that the High Court cannot proceed to hear a second appeal without formulating the substantial question of law. These judgments have been referred to in the later judgment of *K. Raj* v. *Muthamma*. A statement of law has been reiterated regarding the scope and interference of the Court in second appeal under Section 100 of the Code of Civil Procedure.

51. Again in *Santosh Hazari* v. *Purushottam Tiwari* another three-Judge Bench of this Court correctly delineated the scope of Section 100 CPC. The Court observed that an obligation is cast on the appellant to precisely state in the memorandum of appeal the substantial question of law involved in the appeal and which the appellant proposes to urge before the Court. In the said judgment, it was further mentioned that the High Court must be satisfied that a substantial question of law is involved in the case and such question has then to be formulated by the High Court. According to the Court the word substantial, as qualifying "question of law", means—of having substance, essential, real, of sound worth, important or considerable. It is to be understood as something in contradistinction with—technical, of no substance or

consequence, or academic merely. However, it is clear that the legislature has chosen not to qualify the scope of "substantial question of law" by suffixing the words "of general importance" as has been done in many other provisions such as Section 109 of the Code and Article 133(1)(*a*) of the Constitution.

52. In *Kamti Devi* v. *Poshi Ram* the Court came to the conclusion that the finding thus reached by the first appellate court cannot be interfered with in a second appeal as no substantial question of law would have flowed out of such a finding.

53. In *Thiagarajan* v. *Sri Venugopalaswamy B. Koil* this Court has held that the High Court in its jurisdiction under Section 100 CPC was not justified in interfering with the findings of fact. The Court observed that to say the least the approach of the High Court was not proper. It is the obligation of the courts of law to further the clear intendment of the legislature and not frustrate it by excluding the same. This Court in a catena of decisions held that where findings of fact by the lower appellate court are based on evidence, the High Court in second appeal cannot substitute its own findings on reappreciation of evidence merely on the ground that another view was possible.

54. In the same case, this Court observed that in a case where special leave petition was filed against a judgment of the High Court interfering with findings of fact of the lower appellate court. This Court observed that to say the least the approach of the High Court was not proper. It is the obligation of the courts of law to further the clear intendment of the legislature and not frustrate it by excluding the same. This Court further observed that the High Court in second appeal cannot substitute its own findings on reappreciation of evidence merely on the ground that another view was possible.

55. This Court again reminded the High Court in *Commr., HRCE* v. *P. Shanmugama* that the High Court has no jurisdiction in second appeal to interfere with the finding of facts.

56. Again, this Court in *State of Kerala* v. *Mohd. Kunhi* has reiterated the same principle that the High Court is not justified in interfering with the concurrent findings of fact. This Court observed that, in doing so, the High Court has gone beyond the scope of Section 100 of the Code of Civil Procedure.

57. Again, in *Madhavan Nair* v. *Bhaskar Pillai* this Court observed that the High Court was not justified in interfering with the concurrent findings of fact. This Court observed that it is well settled that even if the first appellate court commits an error in recording a finding of fact, that itself will not be a ground for the High Court to upset the same.

58. Again, in *Harjeet Singh* v. *Amrik Singh* this Court with anguish has mentioned that the High Court has no jurisdiction to interfere with the findings of fact arrived at by the first appellate court. In this case, the findings of the trial court and the lower appellate court regarding readiness and willingness to perform their part of contract was set aside by the High Court in its jurisdiction under Section 100 CPC. This Court, while setting aside the judgment of the High Court, observed that the High Court was not justified in interfering with the concurrent findings of fact arrived at by the courts below.

59. In *H.P. Pyarejan* v. *Dasappa* delivered on 6-2-2006, this Court found serious infirmity in the judgment of the High Court. This Court observed that it suffers from the vice of exercise of jurisdiction which did not vest in the High Court. Under Section 100 of the Code (as amended in 1976) the jurisdiction of the Court to interfere with the judgments of the courts below is confined to hearing of substantial questions of law. Interference with the finding of fact by the High Court is not warranted if it invokes reappreciation of evidence. This Court found that the impugned judgment of the High Court was vulnerable and needed to be set aside."

27. The Supreme Court in the case of ***Municipal Committee, Hoshiarpur Vs. Punjab SEB,*** reported in ***(2010) 13 SCC 216*** has held as under:-

> "**16.** Thus, it is evident from the above that the right to appeal is a creation of statute and it cannot be created by acquiescence of the parties or by the order of the court. Jurisdiction cannot be conferred by mere acceptance, acquiescence, consent or by any other means as it can be conferred only by the legislature and conferring a court or authority with jurisdiction, is a legislative function. Thus, being a substantive statutory right, it has to be regulated in accordance with the law in force, ensuring full compliance with the conditions mentioned in the provision that creates it. Therefore, the court has no power to enlarge the scope of those grounds mentioned in the statutory provisions. A second appeal cannot be decided merely on equitable grounds as it lies only on a substantial question of law, which is something distinct from a substantial question of fact. The court cannot entertain a second appeal unless a substantial question of law is involved, as the second appeal does not lie on the ground of erroneous findings of fact based on an appreciation of the relevant evidence. The existence of a substantial question of law is a condition precedent for entertaining the second appeal; on failure to do so, the judgment cannot be maintained. The existence of a substantial question of law is a sine qua non for the exercise of jurisdiction under the provisions of Section 100 CPC. It is the obligation on the court to further clear the intent of the legislature and not to frustrate it by ignoring the same. (Vide *Santosh Hazari* v. *Purshottam Tiwari*; *Sarjas Rai* v. *Bakshi Inderjit Singh*; *Manicka Poosali* v. *Anjalai Ammal*; *Sugani* v. *Rameshwar Das*; *Hero Vinoth* v. *Seshammal*; *P. Chandrasekharan* v. *S. Kanakarajan*; *Kashmir Singh* v. *Harnam Singh*; *V. Ramaswamy* v. *Ramachandran* and *Bhag Singh* v. *Jaskirat Singh*.)
>
> **17.** In *Mahindra & Mahindra Ltd.* v. *Union of India* this Court observed[*]:

"*12*. … it is not every question of law that could be permitted to be raised in the second appeal. The parameters within which a new legal plea could be permitted to be raised, are specifically stated in sub-section (5) of Section 100 CPC. Under the proviso, the Court should be 'satisfied' that the case involves a 'substantial question of law' and not a mere 'question of law'. The reason for permitting the substantial question of law to be raised, should be 'recorded' by the Court. It is implicit therefrom that on compliance of the above, the opposite party should be afforded a fair or proper opportunity to meet the same. It is not any legal plea that would be alleged at the stage of second appeal. It should be a substantial question of law. The reasons for permitting the plea to be raised should also be recorded." [*Kshitish Chandra Purkait* v. *Santosh Kumar Purkait*, (1997) 5 SCC 438, pp. 445-46, para 10]

18. In *Madamanchi Ramappa* v. *Muthaluru Bojjappa* this Court observed: (AIR pp. 1637-38, para 12)

"*12*. … Therefore, whenever this Court is satisfied that in dealing with a second appeal, the High Court has, either unwittingly and in a casual manner, or deliberately as in this case, contravened the limits prescribed by Section 100, it becomes the duty of this Court to intervene and give effect to the said provisions. It may be that in some cases, the High Court dealing with the second appeal is inclined to take the view that what it regards to be justice or equity of the case has not been served by the findings of fact recorded by courts of fact; but on such occasions it is necessary to remember that what is administered in courts is justice according to law and considerations of fair play and equity however important they may be, must yield to clear and express provisions of the law. If in reaching its decisions in second appeals, the High Court contravenes the express provisions of Section 100, it would inevitably introduce in such decisions an element of disconcerting

unpredictability which is usually associated with gambling; and that is a reproach which judicial process must constantly and scrupulously endeavour to avoid."

19. In *Jai Singh* v. *Shakuntala* this Court held as under: (SCC pp. 637-38, para 6)

"*6*. … it is only in very exceptional cases and on extreme perversity that the authority to examine the same in extenso stands permissible — it is a rarity rather than a regularity and thus in fine it can be safely concluded that while there is no prohibition as such, but the power to scrutiny can only be had in very exceptional circumstances and upon proper circumspection."

20. While dealing with the issue, this Court in *Leela Soni* v. *Rajesh Goyal* observed as under: (SCC p. 502, paras 20-22)

"*20*. There can be no doubt that the jurisdiction of the High Court under Section 100 of the Code of Civil Procedure (CPC) is confined to the framing of substantial questions of law involved in the second appeal and to decide the same. Section 101 CPC provides that no second appeal shall lie except on the grounds mentioned in Section 100 CPC. Thus it is clear that no second appeal can be entertained by the High Court on questions of fact, much less can it interfere in the findings of fact recorded by the lower appellate court. This is so, not only when it is possible for the High Court to take a different view of the matter but also when the High Court finds that conclusions on questions of fact recorded by the first appellate court are erroneous.

21. It will be apt to refer to Section 103 CPC which enables the High Court to determine the issues of fact:

* * *

22. The section, noted above, authorises the High Court to determine any issue which is necessary for the disposal of the second appeal provided the evidence on record is sufficient, in any of the

following two situations: (*1*) when that issue has not been determined both by the trial court as well as the lower appellate court or by the lower appellate court; or (*2*) when both the trial court as well as the appellate court or the lower appellate court have wrongly determined any issue on a substantial question of law which can properly be the subject-matter of second appeal under Section 100 CPC."

21. In *Jadu Gopal Chakravarty* v. *Pannalal Bhowmick* the question arose as to whether the compromise decree had been obtained by fraud. This Court held that though it is a question of fact, but because none of the courts below had pointedly addressed the question of whether the compromise in the case was obtained by perpetrating fraud on the court, the High Court was justified in exercising its powers under Section 103 CPC to go into the question. (See also *Achintya Kumar Saha* v. *Nanee Printers*.)

22. In *Bhagwan Sharma* v. *Bani Ghosh* this Court held that in case the High Court exercises its jurisdiction under Section 103 CPC, in view of the fact that the findings of fact recorded by the courts below stood vitiated on account of non-consideration of additional evidence of a vital nature, the Court may itself finally decide the case in accordance with Section 103(*b*) CPC and the Court must hear the parties fully with reference to the entire evidence on record with relevance to the question after giving notice to all the parties. The Court further held as under: (*Bhagwan Sharma case*, SCC p. 499, para 5)

"*5*. … The grounds which may be available in support of a plea that the finding of fact by the court below is vitiated in law, does not by itself lead to the further conclusion that a contrary finding has to be finally arrived at on the disputed issue. On a reappraisal of the entire evidence the ultimate conclusion may go in favour of either party and it cannot be prejudged, as has been done in the impugned judgment."

23. In *Kulwant Kaur* v. *Gurdial Singh Mann*this Court observed as under: (SCC pp. 278-79, para 34)

> "*34*. Admittedly, Section 100 has introduced a definite restriction on to the exercise of jurisdiction in a second appeal so far as the High Court is concerned. Needless to record that the Code of Civil Procedure (Amendment) Act, 1976 introduced such an embargo for such definite objectives and since we are not required to further probe on that score, we are not detailing out, but the fact remains that while it is true that in a second appeal a finding of fact, even if erroneous, will generally not be disturbed but where it is found that the findings stand vitiated on wrong test and on the basis of assumptions and conjectures and resultantly there is an element of perversity involved therein, the High Court in our view will be within its jurisdiction to deal with the issue. This is, however, only in the event such a fact is brought to light by the High Court explicitly and the judgment should also be categorical as to the *issue of perversity vis-à-vis the concept of justice*. Needless to say however, that perversity itself is *a substantial question* worth adjudication — what is required is a categorical finding on the part of the High Court as to *perversity*. …
>
> The requirements stand specified in Section 103 and nothing short of it will bring it within the ambit of Section 100 *since the issue of perversity will also come within the ambit of substantial question of law as noticed above*. The legality of finding of fact cannot but be termed to be a question of law. We reiterate however, *that there must be a definite finding to that effect in the judgment of the High Court so as to make it evident that Section 100 of the Code stands complied with*."

28. As no perversity could be pointed out by the counsel for the

appellant, no substantial question of law arises in the present appeal.

29. *Ex consequnti*, the judgment and decree dated 11.12.2018 passed by First Additional District Judge, Narsinghpur in Civil Appeal No.19/2018 and the judgment and decree dated 27.02.2018 passed by the Fifth Civil Judge, Class-II, Narsinghpur in Regular Civil Suit No.9-A/2015 are hereby **affirmed.**

30. The appeal fails and is hereby **dismissed.**

(G.S. AHLUWALIA)
JUDGE

TG/-