

A LACHHMI NARAIN SINGH (D) THROUGH LRS & ORS.

v.

SARJUG SINGH (DEAD) THROUGH LRS. & ORS.

(Civil Appeal No. 5823 of 2011)

B AUGUST 17, 2021

**[SANJAY KISHAN KAUL AND HRISHIKESH ROY, JJ.]**

- Deeds and Documents: Wills and Codicils – Revocation of Will – Probate – On facts, testator executed a Will in favour of applicant – Probate proceedings by applicant – Objector's case that Will favouring the applicant was revoked and cancelled by a registered deed – Trial court held that the applicant not entitled to get the Will probated as the same was revoked – In appeal, the High Court granted probate holding that the Will favouring the applicant was not cancelled – High Court disbelieved the registered deed of cancellation whereby, the Will was revoked by the testator – On appeal, held: High Court erred by ignoring the material evidence in disbelieving the Cancellation Deed and holding that the applicant was entitled to grant of probate of the Will – Probate applicant never raised any objection regarding the mode of proof before the trial court, thus, there is merit in the case of the objectors – Furthermore, the trial court was right in holding that the testator was medically fit and had cancelled the Will himself – Also genuineness of the Cancellation deed cannot be doubted only due to the fact that same was not signed and the testator as a literate person, affixed his thumb impression which was proved to be genuine by the expert – Thus, the order of High Court set aside.*

**Allowing the appeal, the Court**

- HELD: 1.1** In allowing the appeal of the probate applicant, the High Court referred to the health condition of the testator-R who suffered from paralysis before his death and had opined that it would not be possible for the testator to visit the Sub-Registrar's Office, to cancel the Will. Inference was accordingly drawn on his impersonation, at the Sub-Registrar's Office. Such conclusion was reached even though, neither any suggestion nor any cross-examination was put to the objector's witnesses, regarding impersonation of the testator at the Sub-Registrar's Office. It is

also important to record that Report of Handwriting Expert and Deed of Cancellation were both marked without objection, when the documents were tendered in the trial Court. The High Court failed to give due weightage to the evidence of OW-3, OW-4 and OW-5 who led evidence on genuineness of the cancellation deed. Instead, erroneous presumption was drawn on impersonation and incapability of the testator, to visit the office of the Sub-Registrar to register the Cancellation Deed. That apart, the probate applicant never opposed the acceptance and marking of the concerned cancellation deed, in the trial Court. Therefore, in the face of the Expert's Report, when the Deed of Cancellation were marked without any objection before the trial court, those cannot be treated as inadmissible and should have been accepted as genuine, particularly in view of the testimony of OW-3-5, who stood firm on execution of the registered revocation deed by the testator. [Para 14-16][219-F-H; 220-A-D]

1.2 On the issue of testator's thumb impression on the cancellation deed, it is telling that all the four deeds executed by the testator in his lifetime, contained his thumb impression and not his signature. Therefore, adverse presumption on genuineness of the cancellation deed cannot be drawn merely because the testator chose to append his thumb impression. That apart, the Report of the handwriting expert (OW-3) clearly indicates that the thumb impression on all the documents placed before the Expert's opinion are of the same person-R. Since the Expert's Report was marked in Court, without objection from the applicant, the genuineness of the same cannot be allowed to be questioned before the appellate Court. A contrary inference was erroneously drawn by the High court by referring to the health condition of the testator, when the revocation deed was registered. The key characteristic of thumb impression is that every person has a unique thumb impression. Forgery of thumb impressions is nearly impossible. Therefore, adverse conclusion should not be drawn for affixing thumb impression instead of signing documents of property transaction. Therefore, genuineness of the Cancellation deed cannot be doubted only due to the fact that same was not signed and R as a literate person, affixed his thumb impression. This is more so in this case since the testator's thumb impression was proved to be genuine by the expert. [Para 17, 18][220-D-H]

- A      **1.3 As regards the implication of the conduct of the objectors, who did not produce the original deed of cancellation, they also failed to take any steps to produce the original (reported to be in possession of YK). On this, the probate applicant neither objected to production of certified copy nor insisted on production of the original Cancellation Deed. As can be seen, the probate objectors never objected to presentation of the certified copy of Cancellation Deed. Before the trial Court, probate applicant primarily argued that R was keeping ill-health and it was not possible for him to have gone alone to the Sub-Registrar's office for getting the Cancellation Deed registered. When this was the submission and the concerned deed was introduced and marked without protest, the High court in the face of overwhelming evidence in support of the genuineness of the cancellation deed, should not have drawn an adverse inference against the objectors by referring to the health condition of the testator. In such scenario, where no protest was registered by the probate applicant against production of certified copy of the Cancellation Deed, he cannot later be allowed to take up the plea of non-production of original cancellation deed in course of the appellate proceeding. The main contention of probate applicants was that the mode of proof of Cancellation deed was inadequate, however, such was not the stand of the probate applicants before the trial court. The objection as to the admissibility of a registered document must be raised at the earliest stage before the trial court and the objection could not have been taken in appeal, for the first time. [Para 19, 20][221-A-F]**
- F      **1.4 It is clear that plea regarding mode of proof cannot be permitted to be taken at the appellate stage for the first time, if not raised before the trial Court at the appropriate stage. This is to avoid prejudice to the party who produced the certified copy of an original document without protest by the other side. If such objection was raised before trial court, then the concerned party could have cured the mode of proof by summoning the original copy of document. But such opportunity may not be available or possible at a later stage. Therefore, allowing such objection to be raised during the appellate stage would put the party (who placed certified copy on record instead of original copy) in a**
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jeopardy & would seriously prejudice interests of that party. It A  
would also be inconsistent with the rule of fair play. [Para 24][223-D-G]

1.5 The High Court had erred by ignoring the material evidence in disbelieving the Cancellation Deed and on that score declaring that the applicant is entitled to grant of probate of the Will. Given the fact that Probate applicant never raised any objection regarding the mode of proof before the trial court, there was no occasion for the High Court to say that it was the duty of defendant to produce original deed of cancellation. [Para 25][223-G-H; 224-A]

1.6 On the basis of the examination, the trial court was right in holding that the testator was medically fit and had cancelled the Will himself. The evidences of the relevant OWs have withstood the scrutiny of the trial court and those have remained unshaken and should be trusted. Considering the omission of the probate applicants to raise objection regarding mode of proof before the trial court, there is merit in the case of the objectors. The order of High Court is set aside and the judgment of the First Additional District Judge. [Para 26, 27][224-C-E]

*Padman v. Hanwanta AIR 1915 PC 111; Gopal Das v. Sri Thakurji AIR 1943 PC 83; R.V.E Venkatachala Gounder v. Arulmigu Visweswaraswami & V.P Temple (2003) 8 SCC 752 : [2003] 4 Suppl. SCR 450; Dayamathi Bai v. KM Shaffi (2004) 7 SCC 107 : [2004] 3 Suppl. SCR 336; Babu Anand Behari v. Dinshaw & Co. AIR 1946 PC 24 – referred to.*

Case Law Reference

AIR 1915 PC 111	referred to	Para 20	
AIR 1943 PC 83	referred to	Para 21	
[2004] 3 Suppl. SCR 336	referred to	Para 23	G
[2003] 4 Suppl. SCR 450	referred to	Para 24	
AIR 1946 PC 24	referred to	Para 25	

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- A CIVIL APPELLATE JURISDICTION: Civil Appeal No. 5823 of 2011.

From the Judgment and Order dated 15.04.2009 of the High Court of Patna in Appeal from Original Decree No. 127 of 1974.

- B Ms. Sreoshi Chatterjee, Shiv Kumar Pandey, Chandrashekhar A. Chakalabbi, Awanish Kumar, Anshul Rai for M/S. Dharmaprabhas Law Associates, Advs. for the Appellants.

Abhay Kumar, Adv. for the Respondents.

The Judgment of the Court was delivered by

- C **HRISHIKESH ROY, J.**

1. This appeal arises out of the judgment and order dated 15.04.2009 of the Patna High Court whereby the appeal filed by the probate applicant was allowed in his favour by concluding that the Will favouring Sarjug Singh was not cancelled. Thus, the appellate Court

- D reversed the Trial Court's decision which held that the applicant is disentitled to get the Will probated as the same was revoked. The High Court to give the impugned verdict against the objectors, disbelieved the registered deed of cancellation dated 02.02.1963 (Exbt C) whereby, the Exbt 2 Will, was revoked by the testator.

- E RELEVANT FACTS

2. Rajendra Singh (since deceased) had executed a Will on 14.09.1960 (Exbt 2) in favour of the applicant Sarjug Singh. The executant died issueless on 21.08.1963 leaving behind his sister Duler Kuer, wife of late Thakur Prasad Singh and nephew Yugal Kishore Singh and also

- F the probate applicant Sarjug Singh. The case of the applicant is that the testator's wife died long ago and therefore Rajendra Singh who was issueless bequeathed his property in village Pojhi Bujurg and Pojhi Kapoor, District-Saran, Bihar by executing the Will (Ext.2) favouring the respondent Sarjug Singh (since deceased).

- G 3. In the probate proceeding initiated by Sarjug Singh i.e. Probate Case No. 19/1967, objection was filed by Shyam Sunder Kuer alias Raj Bansi Kuer (claiming to be the second wife and widow of the testator). Khedaran Kuer also opposed the applicant and she claimed to be the widow of Jamadar Singh who was the son of late Jag Jitan Singh (brother of the testator Rajendra Singh). According to the objectors, the Will

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favoring Sarjug Singh was revoked and cancelled by a registered deed dated 02.02.1963 (Exbt. C). It was also the objector's contention that Raj Bansi Kuer was in possession of all assets belonging to late Rajendra Singh and she along with Khedaran Kuer, sold several plots of land to the appellants. Eight of the vendees who took possession after such purchase, appeared in the probate proceedings and supported the case of the objectors.

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4. It is relevant to state that the validity of the Will in favour of the applicant Sarjug Singh was never seriously challenged but the objectors pleaded that the concerned Will was cancelled by a registered deed on 02.02.1963 (Exbt. C) by the testator himself. The applicant however claims that the testator was in very poor health, paralytic and was not in a position to attend the Sub-Registrar's office on 02.02.1963 to execute the registered cancellation deed (Ext. 'C'). The applicant also challenged the genuineness of the testator's thumb impression on the cancellation deed of the Will.

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5. In the Probate case filed by Sarjug Singh, the learned First Additional District Judge, Chapra firstly concluded that the Will (Ext. 2) is a genuine document. However, by referring to the evidence laid by the objectors, the learned Judge then held that the Will (Ext. 2) was cancelled on 02.02.1963 under a registered deed (Ext. C), a few months before Rajendra Singh died on 21.08.1963, at Patna hospital. The Court also referred the death certificate (Ext. F) to conclude that the same does not indicate that the testator was suffering from paralysis. This observation was made by the trial Court to reject the contention of the applicant to the effect that Rajendra Singh was paralytic and was incapable of cancelling the Will a few months before he died. The learned Judge then considered the sale deeds produced by the objector Shyam Sunder Kuer and observed that she was dealing with Rajendra Singh's property as his legal heir and this according to the Court was also indicative of the fact that the Will for which probate was sought, was revoked by the testator himself.

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6. The learned trial Court while examining the genuineness of the cancellation deed dated 02.02.1963 (Ext. 'C') referred to the evidence of the handwriting expert, Hassan Raza (OW-3), the attesting witness of cancellation deed, Jagarnath Prasad (OW-4) and the scribe of the cancellation deed Shashinath Mishra (OW-5). The OW-3 as an expert, compared the admitted thumb mark of Rajendra Singh on the deed of

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- A gift dated 23.7.1947 in favour of Jugal Kishore Singh (Ext. 1) and on the Will dated 14.09.1960 in favour of Sarjug Singh (Ext. 2) with the thumb impression registered at Chapra Registration Office and recorded the following:-

B “8. ....xxx...*The expert who examined these thumb marks is of the opinion that all these thumb impressions tally. O.W.3 S.E.T. Hassan Raza is the Expert and Ext. B is his report. There is nothing in his cross-examination to discard his evidence and report .....xxx....*”

- After referring to the testimony of the attesting witness and the C scribe of the cancellation deed, the trial Court concluded as below:-

D “10. ....xxx...*There is no evidence on the side of the applicant nor there is any suggestion to the attesting witness O.W. 4 and Shashinath Mishra the scribe O.W. 5 to the effect that some body also had impersonated Rajendra Singh before the Sub-Registrar ....xxx....*”

7. On the above analysis, the learned trial Court, under its judgment dated 14.12.1973 concluded that the Will has been revoked and the applicant Sarjug Singh is disentitled to get the Will probated.

- E 8. Aggrieved by the rejection of the Probate case by the Trial Court, the applicant Sarjug Singh filed the First Appeal No. 127 of 1974 before the High Court. During the pendency of the appeal, on 21.03.2002, Sarjug Singh died but no application was filed for substitution of the deceased appellant.

- F 9. The High Court addressed the core issue on whether the testator had cancelled the Will. Then the Court noted the precarious health condition of the testator and the failure of the objectors to produce the original of the cancellation deed and non-presentation of the material witness. On such consideration, the appellate Court held that the deed cancelling the Will should not be taken into evidence. The learned Judge G also noted that the validity of the Will was never seriously questioned and the objectors had stated that the Will was cancelled by the testator himself. The High Court accordingly granted the probate and reversed the finding of the trial Court. The subsequent purchasers of the assets who supported the objector's case in the probate proceedings, have then filed the present appeal.

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10. In course of the proceedings before this Court, suggestion was earlier made to the parties for amicable settlement of the rival claims and accordingly time was granted to the counsel to obtain instructions. But when the case was taken up for final hearing, the Court is informed by the respondents' counsel that they failed to reach any acceptable settlement and the appeal should therefore be heard.

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11. Insofar as the non-substitution of the deceased Sarjug Singh before the High Court and non-substitution of legal heirs of other contesting parties, the same need not detain us at this point, in view of the proceeding on 13.04.2021 in this Court where, the parties have agreed that although the appeal before the High Court was decided against a dead person and the legal heirs of the present appellants were belatedly brought on record, since all legal heirs of the contesting parties are represented, the case should be decided on its legal merit. In view of such consensus, taking note of the amended memo of parties which were filed, we have proceeded to adjudicate the appeal.

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#### DISCUSSION AND DECISION

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12. We have heard Ms. Sreoshi Chatterjee, the learned counsel appearing for the appellants/objectors. The legal heirs of Sarjug Singh (probate applicant) are represented by the learned counsel Mr. Abhay Kumar.

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13. The merit of the claim of either party in the present matter will hinge around the core issue as to whether Rajendra Singh had actually revoked the Will in favour of Sarjug Singh and his physical and mental capacity to execute the Cancellation Deed (Ext. C) and also whether thumb impression of Rajendra Singh on the registered document dated 02.02.1963 is genuine or not.

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14. In allowing the appeal of the probate applicant, the High Court referred to the health condition of Rajendra Singh who suffered from paralysis before his death and had opined that it would not be possible for the testator to visit the Sub-Registrar's Office, to cancel the Will. Inference was accordingly drawn on his impersonation, at the Sub-Registrar's Office. Such conclusion was reached even though, neither any suggestion nor any cross-examination was put to the objector's witnesses, regarding impersonation of the testator Rajendra Singh at the Sub-Registrar's Office. It is also important to record that Ext. B (Report of Handwriting Expert) and Ext. C (Deed of Cancellation) were both

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- A marked without objection, when the documents were tendered in the trial Court.

15. The High Court in our assessment, failed to give due weightage to the evidence of OW-3, OW-4 and OW-5 who led evidence on genuineness of the cancellation deed. Instead, erroneous presumption

- B was drawn on impersonation and incapability of the testator, to visit the office of the Sub-Registrar to register the Cancellation Deed.

16. That apart, the probate applicant never opposed the acceptance and marking of the concerned cancellation deed, in the trial Court. Therefore, in the face of the Expert's Report (Ext. B), when the Deed

- C of Cancellation (Ext. C) were marked without any objection before the trial Court, those cannot be treated as inadmissible and should have been accepted as genuine, particularly in view of the testimony of OW-3, OW-4 and OW-5, who stood firm on execution of the registered revocation deed by the testator, Rajendra Singh.

- D 17. On the issue of testator's thumb impression on the cancellation deed, it is telling that all the four deeds executed by Rajendra Singh in his lifetime, contained his thumb impression and not his signature. Therefore, adverse presumption on genuineness of the cancellation deed cannot be drawn merely because the testator chose to append his thumb impression.

- E That apart, the Ext. B Report of the handwriting expert (OW-3) clearly indicates that the thumb impression on all the documents placed before the Expert's opinion are of the same person i.e. of Rajendra Singh. Since the said Ext. B was marked in Court, without objection from the applicant, the genuineness of the same cannot be allowed to be questioned before the appellate Court. A contrary inference according to our opinion, was F erroneously drawn by the High court by referring to the health condition of the testator, when the revocation deed was registered.

18. The key characteristic of thumb impression is that every person has a unique thumb impression. Forgery of thumb impressions is nearly impossible. Therefore, adverse conclusion should not be drawn for

- G affixing thumb impression instead of signing documents of property transaction. Therefore, genuineness of the Cancellation deed cannot be doubted only due to the fact that same was not signed and Rajendra as a literate person, affixed his thumb impression. This is more so in this case since the testator's thumb impression was proved to be genuine by the expert.

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19. Next, we need to consider the implication of the conduct of the objectors, who did not produce the original deed of cancellation. They also failed to take any steps to produce the original (reported to be in possession of Yugal Kishore Singh). On this, the probate applicant neither objected to production of certified copy nor insisted on production of the original Cancellation Deed. Mr. Abhay Kumar, learned counsel however contended that even the Trial Court had not pressed for production of the original Cancellation Deed. As can be seen, the probate objectors never objected to presentation of the certified copy of Cancellation Deed. Before the trial Court, probate applicant primarily argued that Rajendra was keeping ill -health and it was not possible for him to have gone alone to the Sub- Registrar's office for getting the Cancellation Deed registered. When this was the contention of the applicant and the concerned deed was introduced and marked without protest, the High court in the face of overwhelming evidence in support of the genuineness of the cancellation deed, should not have drawn an adverse inference against the objectors by referring to the health condition of the testator.

20. In such scenario, where no protest was registered by the probate applicant against production of certified copy of the Cancellation Deed, he cannot later be allowed to take up the plea of non-production of original cancellation deed in course of the appellate proceeding. As already noted, the main contention of probate applicants was that the mode of proof of Cancellation deed was inadequate. However, such was not the stand of the probate applicants before the Trial Court. The objection as to the admissibility of a registered document must be raised at the earliest stage before the trial court and the objection could not have been taken in appeal, for the first time. On this we may draw support from observations made by Justice Ameer Ali in *Padman v. Hanwanta*<sup>1</sup> where the following was set out by the Privy Council

*"The defendants have now appealed to His Majesty-in-Council, and the case has been argued on their behalf in great detail. It was urged in the course of the argument that a registered copy of the Will of 1898 was admitted in evidence without sufficient foundation being laid for its admission. No objection, however, appears to have been taken in the first court against the copy obtained from the Registrar's office*

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<sup>1</sup> AIR 1915 PC 111

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- A *being put in evidence. Had such objection been made at the time, the District Judge, who tried the case in the first instance, would probably have seen that the deficiency was supplied. Their Lordships think that there is no substance in the present contention.” (emphasis in original)*
- B 21. A similar view was taken by George Rankin, J. in the decision of Privy Council in *Gopal Das v. Sri Thakurji*<sup>2</sup> where it was held that Objection as to the mode of proof must be taken when the document is tendered and before it is marked as an exhibit. It cannot be taken in appeal. Objection as to mode of proof should be taken before a document is admitted and marked as exhibit. In present case probate applicant never raised any objection in regards to mode of proof of cancellation deed before the Trial Court, as is evident from perusal of records and this must be held against him.
- C 22. In support of our above conclusion, we may usefully refer to the ratio in *R.V.E Venkatachala Gounder v. Arulmigu Visweswaraswami & V.P Temple*<sup>3</sup> where Justice Ashok Bhan while dealing with the aspect of disallowing objection as to mode of proof at appellant stage as a rule of fair play to avoid prejudice to the other side, said as follows:-
- E “**20.** .... *In the latter case, the objection should be taken when the evidence is tendered and once the document has been admitted in evidence and marked as an exhibit, the objection that it should not have been admitted in evidence or that the mode adopted for proving the document is irregular cannot be allowed to be raised at any stage subsequent to the marking of the document as an exhibit. The latter proposition is a rule of fair play. The crucial test is whether an objection, if taken at the appropriate point of time, would have enabled the party tendering the evidence to cure the defect and resort to such mode of proof as would be regular. The omission to object becomes fatal because by his failure the party entitled to object allows the party tendering the evidence to act on an assumption that the opposite party is not serious about the mode of proof. On the other hand, a prompt objection does not prejudice the party tendering the evidence, for two reasons: firstly, it enables the court to apply*

H <sup>2</sup>AIR 1943 PC 83

H <sup>3</sup>(2003) 8 SCC 752

*its mind and pronounce its decision on the question of admissibility then and there; and secondly, in the event of finding of the court on the mode of proof sought to be adopted going against the party tendering the evidence, the opportunity of seeking indulgence of the court for permitting a regular mode or method of proof and thereby removing the objection raised by the opposite party, is available to the party leading the evidence. Such practice and procedure is fair to both the parties. Out of the two types of objections, referred to hereinabove, in the latter case, failure to raise a prompt and timely objection amounts to waiver of the necessity for insisting on formal proof of a document, the document itself which is sought to be proved being admissible in evidence....." (emphasis in original)*

23. This Court in the opinion written by Justice S. H. Kapadia in *Dayamathi Bai v. KM Shaffi*<sup>4</sup> has similarly held that objection as to the mode of proof falls within procedural law. Therefore, such objections could be waived. Moreover, objection is to be taken before the document is marked as an exhibit and admitted in Court.

24. In view of the foregoing discussion, it is clear that plea regarding mode of proof cannot be permitted to be taken at the appellate stage for the first time, if not raised before the trial Court at the appropriate stage. This is to avoid prejudice to the party who produced the certified copy of an original document without protest by the other side. If such objection was raised before trial court, then the concerned party could have cured the mode of proof by summoning the original copy of document. But such opportunity may not be available or possible at a later stage. Therefore, allowing such objection to be raised during the appellate stage would put the party (who placed certified copy on record instead of original copy) in a jeopardy & would seriously prejudice interests of that party. It will also be inconsistent with the rule of fair play as propounded by Justice Ashok Bhan in the case of *R.V.E. Venkatachala* (Supra).

25. In consequence of above, we are of the considered opinion that the High Court had erred by ignoring the material evidence in disbelieving the Cancellation Deed and on that score declaring that the applicant is entitled to grant of probate of the Will (Ext. 2). Given the fact that Probate applicant never raised any objection regarding the mode

<sup>4</sup>(2004) 7 SCC 107

- A of proof before the trial court, there was no occasion for the High Court to say that it was the duty of defendant to produce original deed of cancellation. The reliance therefore on the opinion of Lord Thankerton in *Babu Anand Behari v. Dinshaw & Co.*<sup>5</sup> is found to be unjustified. This is because in that case, the authenticity of some extract of power of attorney, was questioned but in the present case the certified copy of the registered cancellation deed is produced and most importantly, the same was not objected. Moreover, the plea of mode of proof was never raised before the trial Court and therefore High Court's reliance on aforementioned case to support the applicant is unacceptable.
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- C 26. On the basis of the above examination, it is our considered opinion that the Trial Court was right in holding that Rajendra was medically fit and had cancelled the Will himself. It is also seen that the evidences of the relevant OWs have withstood the scrutiny of the Trial Court and those have remained unshaken and should be trusted. Considering the omission of the probate applicants to raise objection
- D regarding mode of proof before the trial court, we find merit in the case of the objectors.

27. For the above reasoning, we allow the present appeal set aside the impugned order of High Court and restore the judgment of the First Additional District Judge Chapra, with no order as to costs.

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Nidhi Jain

Appeal allowed.

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<sup>5</sup> AIR 1946 PC 24