Kalyan Singh, London Trained, ... vs Smt. Chhoti And Ors on 1 December, 1989

Equivalent citations: 1990 AIR 396, 1989 SCR SUPL. (2) 356, AIR 1990 SUPREME COURT 396, 1990 (1) SCC 266, 1990 ALL CJ 18, (1989) 4 JT 439 (SC), (1990) REVDEC 198, (1990) 1 CURLJ(CCR) 233, (1990) 2 CIVLJ 166, (1990) 1 APLJ 49.1, (1990) 16 ALL LR 155, (1990) 1 LJR 241, (1990) MARRILJ 66

Author: K.J. Shetty

Bench: K.J. Shetty, Sabyasachi Mukharji, A.M. Ahmadi

PETITIONER:
KALYAN SINGH, LONDON TRAINED, CUTTER,JOHRI BAZAR, JAIPUR

Vs.

RESPONDENT:
SMT. CHHOTI AND ORS.

DATE OF JUDGMENT01/12/1989

BENCH:
SHETTY, K.J. (J)
BENCH:
SHETTY, K.J. (J)
MUKHARJI, SABYASACHI (J)
AHMADI, A.M. (J)

CITATION:
1990 AIR 396 1989 SCR Supl. (2) 356
1990 SCC (1) 266 JT 1989 (4) 439
1989 SCALE (2)1238
CITATOR INFO :
R 1990 SC1742 (2)

ACT:
Indian Succession Act: Will--Execution and validity--Open to court to look into surrounding circumstances brought out in evidence.
Civil Procedure Code: Order I Rule 8--Representative Suit-Permission of court--Mandatory.
Indian Evidence Act: Sections 63 and 79--Secondary evidence-Correctness and proof of certified copy--Necessity of.

HEADNOTE:

This case is concerned with a garden with temples and other buildings at Jaipur claimed to be the property of Darjee (Tailors) community popularly known as 'Bagichi Darjian'. It was claimed by different persons at different intervals on different grounds. One Narayan, Pujari on the temples was said to have sold the Bagichi in favour of one Khawas Bala Bux. Darjee community filed a suit for cancellation of that sale and declaration of its right to administer the property. The Trial Court dismissed the suit but on appeal District Judge decreed it and this decree was affirmed by the Chief Court of Jaipur. But after 23 years on the death of Narayan his eldest son Bhonrilal-respondent No. 3 herein who became the Pujari attempted to get his name mutated in revenue records as owner of the Bagichi. On behalf of the Darjee community the appellant herein together with one Khawas Suraj Narayan filed a suit in 1951 for his ejectment. This suit was decreed in favour of the Darjee community. Appeal against that decree by Bhonrilal was dismissed by the Senior Civil Judge, Jaipur. Second appeal in the High Court too failed.

However, even before the disposal of the aforesaid Second appeal, Gangaram the younger brother of Bhonrilal started another round of litigation. He filed a declaratory suit claiming the ownership of the Bagichi and temples on the basis of sale deed dated Baishakh Sudi 12th Samvat 1932 (about 1875 A.D.) and a Will purported to be executed in 1916 A.D. in his favour.

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The Trial Judge decreed the suit in his favour. The defendants' appeal was dismissed by the District Judge upholding the validity of the said Sale Deed and the Will. On further appeal, the High Court rejected the validity of the Sale Deed as well as that of the Will which formed the foundation of Ganga Ram's title. But instead of allowing the appeal and dismissing the suit the High Court declined to interfere with the decree of the Court below though holding that the plaintiff's suit was a fruitless exercise.

Kalyan Singh the defendant challenged the decree of the High Court in this Court on two counts. Firstly that the suit against Bhonrilal was of a representatives character which could not be nullified by the present suit against individuals. Secondly the High Court after discarding the Sale Deed and the Will ought to have non-suited the plaintiff since there was no other material whatever to support the title. While allowing the appeal and modifying the judgment and decree of the High Court, this Court,

HELD: In the absence of permission under Order I Rule 8 CPC to file a representative suit which is mandatory any member of the community may successfully bring a suit to assert his right in the community property or for protecting

such property. Such a suit need not comply with the requirements of Order I Rule 8 C.P.C. and the suit against Bhonrilal even if it was not a representatives suit on behalf of the Darjee Community would be a suit of this category. [363D-E]

It is essential that trust worthy and unimpeachable evidence should be produced before the Court to establish genuineness and authenticity of the Will. It must be stated that the factum of execution and validity of the Will cannot be determined merely by considering the evidence produced by the propounder. In order to judge the credibility of witnesses and disengage the truth from falsehood the Court is not confined only to their testimony and demeanour. It would be open to the court to consider circumstances brought out in the evidence or which appear from the nature and contents of the documents itself. It would be also open to the Court to look into surrounding circumstances as well as inherent improbabilities of the case of reach a proper conclusion on the nature of the evidence adduced by the party. [366E-F]

The Will in the instant case, constituting the plaintiff as a sole legatee with no right whatever to the testator's wife seems to be unnatural. It casts a serious doubt on the genuineness of the Will. The Will has not been produced for very many years before the Court or

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public authorities even though there were occasions to produce it for asserting plaintiff's title to the property. The plaintiff was required to remove these suspicious circumstances by placing satisfactory material on record. He has failed to discharge his duty. This Court concurs with the conclusion of the High Court and rejects the Will as not genuine. [368A-B]

Section 63 of the Evidence Act mentions five kinds of secondary evidence. Clauses (1), (2) and (3) refer to copies of documents; clause (4) refers to counter-parts of documents and clause (5) refers to oral accounts of the contents of documents. Correctness of certified copies referred to in clause (1) is presumed under section 79 but that of other copies must be proved by proper evidence. A certified copy of a registered sale deed may be produced as secondary evidence in the absence of the original. [369B-C]

H. Venkatachala lyengar v. B.N. Thimmajamma & Ors., [1959] Supp. I SCR 426; Rani Purnima Devi & Anr. v. V. Kumar Khagendra Narayan Dev & Anr., [1962] 3 SCR 195; Smt. Indu Bala Bose & Ors. v. Manindra Chandra Bose & Anr., [1982] 1 SCC' 20 and Mst. Biro v. Atma Ram & Ors., AIR 1937 PC 101.

JUDGMENT:

CIVIL APPELLATE JURISDICTION: Civil Appeal No. 135 I(N) of 1973.

From the Judgment and Decree dated 14.3.1973 of the Rajasthan High Court in S.B. Civil Second Appeal No. 201 of 1966.

K.K Jain, Pramod Dayal and A.D. Sanget for the Appellant. U.N. Bachavat, Sushil Kumar Jain, Sudhanshu Atreya and L.C. Agarwala for the Respondents.

The Judgment of the Court was delivered by K. JAGANNATHA SHETTY, J. This appeal by special leave is from the judgment of the Rajasthan High Court dated March 14, 1973 in S.B. (Civil) 2nd Appeal No. 201of 1966. The case has a long history. It is concerned with a garden (baghichi) with temples of Sri Satyanarayanji, Sri Mahadeoji and other buildings at Motidungri Road in Jaipur. The local Darjees (Tailors) claim that it is their community property. According to them it is known as 'Baghichi Darjian' since it belongs to Darji community. The property however, was the subject-matter of several litigations. It was claimed by different persons at different intervals on different grounds. One Narayan was admittedly 'Pujari' of the Temples. There was allegation that Narayan purported to have sold the Baghichi in favour of one Khawas Bala Bux. The Panchas of Darjian community filed a suit for cancellation of the sale-deed and posses- sion of the baghichi. The suit was also for declaration of the right to administer the trust of the temples and the other properties. Narayan was the first defendant in that suit. He did not contest the suit. He was, however, summoned and his statement was recorded on July 8, 1925, wherein he admitted that he was only the Pujari of the temples. The other defendants in the suit set up rival title to the property relying upon the sale deed of Samvat 1932 in the name of Raghunath. The trail court dismissed the suit but on appeal the District Judge decreed it. That decree was af- firmed by the former Chief Court, Jaipur by judgment Ex. A8 dated September 15, 1928.

Thereafter, for about 23 years there was no problem and there was no rival claimant to the property. But the dispute started after the death of Narayan. His eldest son Bhonrilal respondent 3 herein, made attempts to get his name mutated in the revenue records as owner of the baghichi. It appears that Bhonrilal after the death of his father was acting as Pujari of the temples. The Darjian community authorised Kalyan Singh, the appellant herein, as well as one khawas Suraj Narayan to bring an action for ejectment of Bhonrilal. In 1951 they instituted a suit for his ejectment. In that suit Bhonrilal admitted the Panchayat's right to the baghichi but raised a number of other pleas including his title by adverse possession. In 1966 the Munsif Court (West Jaipur) decreed the suit in favour of the Darji community. In 1958 the appeal against that decree was dismissed by the senior civil Judge, Jaipur City. Bhonrilal preferred Second Apeal No. 8C of 1958 in the High Court of Rajasthan and obtained stay of delivery of possession on depositing mesne profits at Rs.25 per month. On September 15, 1960, the High Court dismissed the second appeal. Thus the title of the Darjee community in respect of the baghichi was again recog- nised.

Even before disposal of the aforesaid second appeal, Ganga Ram the younger brother of Bhonrilal started another round of litigation. On December 12, 1959, he brought a declaratory suit claiming that he is owner of the property consisting of baghichi and temples. In this appeal we are concerned with the fight claimed by him. The suit was pri- marily against the present appellant Kalyan Singh and Suraj Narayan, since deceased. Bhonrilal was also impleaded as the third defendant. Ganga Ram based his title to the property under a sale deed dated Baishakh Sudi 12th Samvat 1932 (about

1875 A.D.) and also on a will dated Asaj Sudi 12th Samvat 1973 (about 1916 A.D.). It was further alleged that the bagichi belonged to Bhagala and Girdhari and they sold the same to Raghunath Brahmin. Raghunath constructed the temple of Sri Satyanarainji and other buildings. Raghunath had only one son called Gaurilal and he was issueless. Garuilal executed a will giving all his properties to Ganga Ram. It was alleged that the earlier suit against Bhonrilal was collusive between the parties. With these allegations, Ganga Ram prayed for the following reliefs:

> "(a) the plaint of the plaintiff be decreed and the plaintiff be declared as the owner of the aforesaid property. The plaintiff is the owner of the property mentioned in Para No. 1.

had obtained on 20.8. 1956 against the Defend- ant No. 3 and was upheld by the Senior Civil Judge on 6.2. 1958, is null and void against the claim of the plaintiff."

The appellant the first defendant in the suit denied plaintiff's title to the baghichi. He also denied the title of Bhagala and Girdhari. It was maintained that the baghichi was community property of Darjees and Narayan was only a 'Pujari' of the temples. Narayan continued as Pujari till his death in 1950 and thereafter his eldest son Bhonrilal was acting as Pujari. Reference was made to the judgment of the Chief Court of Jaipur in the first suit against Narayan and judgments in the second suit against Bhonrilal. In view of those litigations and judgments rendered therein, it was claimed that the present suit was barred by principle of res]udicata. It was also specifically stated that the suit against Bhonrilal was not collusive but brought on behalf of the Darjee community in a representative capacity. The trial Judge on considering the evidence produced by the parties decreed the suit declaring the plaintiff as owner of the suit property. It was also declared that the plaintiff is not bound by the judgment and decree dated September 15, 1928 of the Chief Court of the erstwhile State of Jaipur. But no reference was made to the judgment and decree obtained in the suit against Bhonrilal. No declara- tion was given that it was not binding on the plaintiff though that relief was specifically sought for. Perhaps the plaintiff did not press that point. Kalyan Singh and Suraj Narayan appealed to the District Court. The learned District Judge dismissed the appeal. He also did not refer to the judgment in the suit against Bhonrilal. He only examined the validity of the said Sale deed and Will and held that they were proved to have been executed. The de- fendants approached the High Court in Second Appeal No. 201/41 Before the High Court, they sought to produce addi- tional evidence. They moved an application under Order 41 Rule 27 C.P.C. to accept a certified copy of the judgment dated September 15, 1928 of the Chief Court of the erstwhile Jaipur State and a copy of the statement of Narayan recorded in that suit. The High Court accepted the judgment of the Chief Court of Jaipur State, but rejected the Statement of Narayan.

During the pendency of the appeal in the High Court Suraj Narain died and his name was deleted from the appeal memo. Ganga Ram also died and his wife and son were brought on record as his legal representatives.

The principal question argued before the High Court related to the validity of sale deed (Ex. 3) and will (Ex.

4) which formed the foundation of Gangaram's title to the suit property. The High Court rejected both the documents. The sale deed Ex. 3 was rejected as inadmissible in evi- dence. The will Ex. 4 was disregarded in view of the suspi- cious circumstances surrounding its execution. These conclusions would have been sufficient for allowing the appeal and dismissing the suit. But the High Court did not do that and instead rounded off the discussion as follows:

> "The plaintiff is undoubtedly in possesion of the Baghichi and it cannot be gainsaid that he was not a party to the previous litigation and he is not claiming the property though his father Narayan or his brother Bhonrilal. Apart from everything, the suit does not seem to have been filed against Kalyan Singh and another in a representative capacity in ac- cordance with Order 1 Rule 3 Civil Procedure Code. There was no application for permission to sue them in their representative capacity. Therefore, in spite of my having reached the conclusion regarding the document Ex. 3 and 4 against the plaintiff respondents I am not inclined to interfere with the decree of the court below though I do feel that the litiga- tion against Kalyan Singh and another in their individual capacity was a fruitless exercise. ' ' Kalyan Singh the defendant has now appealed challenging the decree of the High Court.
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> Counsel for the appellant has a two fold contention. In the first place, it was argued that the Darjee community in their representative suit against Bhonrilal has obtained a decree declaring their title to the property and that decree could not be nullified by the present suit against individu- als. The High Court instead of holding that the plaintiffs suit was a fruitless exercise, ought to have dismissed the suit. Secondly, it was urged that the High Court after discarding the sale deed Ex. 3 and will Ex. 4 ought to have non-suited the plaintiff since there is no other material whatever to support his title to the property. Normally, these contentions would have been accepted without much discussion, but we have to consider the submis- sions of counsel for the respondents. He challenged the correctness of the findings on all material points. It is, therefore, necessary to examine the judgment in greater detail.
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> We will first consider whether the previous suit against Bhonrilal was a representative suit on behalf of the Darjee community. It was argued for the respondents that it was only a suit on behalf of the 'Panchayat Darjian' and not a representative suit on behalf of the Darjee community. Our attention was drawn to the trail court order dated November
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> 16. 1962 in the present suit. Thereunder the trial court has rejected an application for amendment of written statement. It was observed that the defendants in the affidavit have not denied allegations of the plaintiff that the suit against Bhonrilal was not in a representative capacity. But the Court made that observation only on perusing the affida- vits of parties for a limited purpose of considering the amendment application and not on an issue arising out of pleadings in the suit. In fact, the court has not framed any issue on that controversy although the defendant in the written statement has asserted that it was a representative suit on behalf of the Darjee community. The

view expressed in the order dated November 1962 is therefore, unacceptable. Counsel for the appellant however, relied upon state- ments from judgments in the previous suit in support of his contention that it was representative suit on behalf of the Darjee community. Ex. A-2 is the judgment of the trial court. It begins with a sentence: "This is a representative suit by the plaintiffs Kalyan Singh and Suraj Narayan on behalf of the Panchayat Darjian for recovery of possession of the baghichi." But this statement may not help counsel for the appellant, since the suit was said to be on behalf of the 'Panchayat Darjian' and not Darjee community. Ex. A-4 is the High court judgment in the second appeal arising out of that suit. There the High court has stated: "That the suit was brought by Kalyan Singh and another against Bhonrilal by the representatives of Darjee community." Here again we do not find much support to the appellant. The suit might have been instituted by representatives of the Darjee community, but that by itself was not sufficient to constitute the suit as a representative suit. For a representative suit, the court's permission under Order 1 Rule 8 of the Code of Civil Procedure is mandatory. One does not know whether any such permission was obtained. The pleading in that suit or the order obtained under Order 1 Rule 8 has not been produced. There is no other evidence to support the contention of either of the parties. In the absence of necessery material the conclusion one way or the other as to the nature of the previous suit will not be justified.

But that does not mean that the plaintiff could succeed ignoring the judgment and decree in the suit against Bhonri- lal. It must be stated that any member of a community may successfully bring a suit to assert his right in the commu- nity property or for protecting such property by seeking removal of encroachments thereform. Such a suit need not comply with the requirements of Order 1 Rule 8. The suit against Bhonrilal even if it was not a representative suit on behalf of the Darjee community would be a suit of this category. Kalyan Singh and another claimed that the baghichi was their community property and Bhonrilal was a trespasser. They brought the suit to recover possession from Bhonrilal. The suit was decreed. The rival title claimed by Bhonrilal by adverse possession was negatived. So long as that decree operates it would be futile to decree the present suit. The observation of the High Court that the present suit is a fruitless exercise could therefore, be sustained on this ground if not for the reasons stated.

The validity of the will may now be considered. On this question, the High Court said:

"Having read the evidence of these witnesses I am satisfied that according to the ordinary standard of proving a document the document Ex. 4 can be said to have been proved. Howev- er, there are two disturbing elements sur- rounding the execution of the will. The first striking feature of this will is that even though the wife of Gaurilal was living at the time as she had survived him, no provision whatsoever had been made regarding her by Gaurilal in the alleged will Ex. 4. Then the second striking feature is that even though litigation had been going on almost for years this

will had not been referred to by anyone. In the first suit Narain was a defendant he had not contested the suit and the proceedings remained ex parte against him. However, he was called by the Court and his statement was recorded. The judgment of the Jaipur Chief Court shows that he had laid no claim to the property and took the position that he was a Pujari at the baghichi. Then subsequently when suit was filed by the Darzi community against Bhonrilal, no reference came to be made to this will Ex. 4 Learned counsel for the re- spondents, as I have already observed, sug- gested that Narain or Bhonrilal could not be expected to make any reference to the will as that would be detrimental to the stand taken by them. The argument, no doubt, looks attrac- tive, but if it is examined in the light of none other than the statement of Ganga Ram himself it cannot stand the scrutiny. Gangaram had referred to the earlier litigation in the plait, but when he entered the witnesses box he had taken a somersault. He was asked wheth- er he was aware of the previous litigation and he said, he did not know of it. He was then questioned with reference to para 5 of the plaint as to how the facts had been mentioned by him therein and he kept mum and had no answer. He also admitted that it was Narain who had given him the document, Ex. 4 some 5 or 7 years after the death of Gaurilal i.e. some 30 or 35 years back. In that situation there was no mention of the alleged will in any of the two previous suits. It is also remarkable that even upto the High Court Bhonrilal had asserted his own possession over the property and had also obtained a stay order on payment of mesne profits vide Ex. A-

7.

XXXXX XXXXXX XXXXXXX The will is, therefore, not free from suspi- cion and it has not been dispelled. My con- science in this regard is not satisfied and therefore, I am unable to hold that Ex. 4 was the last will of Gaurilal in favour of Ganga Ram".

Counsel for the respondents however, urged that the plain- tiff has proved its execution by producing one of the attestors and the scribe and their evidence has not been disbelieved by the High Court. We were referred, in particular, to the evidence of plaintiff PW 3, Ramdeo PW 4 and Sham Sunder PW

7. We have perused their testimony and we are of the opinion that it is far from satisfactory. The plaintiff has deposed that Gaurilal was issueless and hence executed the will bequeathing the property to him. Ramdeo claims to be the attesting witness to the will. He has stated that the plaintiff was 10-11 years old when the will was executed. But the plaintiff himself has deposed that he was then a boy of 2-3 years. Ramdeo has given his age as 55 years when he deposed in the court on January 5, 1962. If we go by that age Ramdeo must have been a boy of 9 years when he attested the will in 19 16 Sham Sundar claims to be the scribe of the will. He has deposed that after he wrote the will attestation was made by witnesses but he has not named any one of them. He has not even referred to Ramdeo as an attesting witness. It was said that the plaintiff was adopted son of Gaurilal, and was thus the object of his affection for the exclu- sive bequest. But there is no reference in the will that he was the adopted son. The plaint also makes no reference to his adoption by Gaurilal.

Nor there is any other material to lend credence to such relationship. On the contrary, the Temple register shows that he was the son of Narayana. Even if we proceed on the plea that the plaintiff was adopted son of Gaurilal, there seems to be little reason to justify the bequest exclusively m his favour. It is now not in dispute that Gaurilal's wife was living at the time of execution of the will, but no provision was made for her maintenance. In the normal course, the wife would be the first to be thought of by the husband executing a will. She should have been the first beneficiary of her husband's bounty unless there was odium or embittered feelings between them. But there is no such evidence and it was not even the plaintiff's case that their relationship was strained. Why then she should be excluded altogether? It is indeed baf- fling since it runs counter to our societal values. Yet there is another circumstance which tells against the genuineness of the will. The will purports to have been executed in 1916 and Gangaram instituted the suit in 1959. The will had not seen the light of the day till the institu- tion of the suit. It is not as if Gangaram or his brother or father had no opportunity to produce the will to assert rights over the property in question. The plaintiff has stated in his evidence that his father Narayan handed over the will to him. Narayan was therefore, aware of the execution of the will. Yet he did not disclose it to the court in the suit against him. His statement was recorded on July 8, 1925 wherein he had admitted that he was only the Pujari of the temple and the wife of Baldeo sold the property. He did not say that his son Gangaram became owner of the property under the will executed by Gaurilal. In ,he second suit, Bhonrilal set up independent title to the property by adverse posses- sion. That claim was totally destructive of Gangaram's title. It cannot be said that Gangaram was ignorant of that litigation till he filed the suit. His evidence does not lead to that inference. In fact the plaint averments and his statements in the court lead to the contrary. Gangaram, however, made no attempt to produce the will in that suit. In the long period of 43 years, none made any attempt to rely upon the will against the claim of the Darji community when the community representatives have successfully brought two suits. This would not have been the natural conduct of person if the will had been really in existence. It has been said almost too frequently to require repe- tition that a will is one of the most solemn documents known to law. The executant of the will cannot be called to deny the execution or to explain the circumstances in which it was executed. It is, therefore, essential that trustworthy and unimpeachable evidence should be produced before the court to establish genuineness and authenticity of the will. It must be stated that the factum of execution and validity of the will cannot be determined merely by considering the evidence produced by the propounder. In order to judge the credibility of witnesses and disengage the truth from false- hood the court is not confined only to their testimony and demeanour. It would be open to the court to consider circum- stances brought out in the evidence or which appear from the nature and contents of the documents itself. It would be also open to the court to look into surrounding circum- stances as well as inherent improbabilities of the case to reach a proper conclusion on the nature of the evidence adduced by the party.

In H. Venkatachala lyengar v. B.N. Thimmajamma & Ors., [1959] Supp. 1 SCR 426 Gajendragarkar, J., as he then was, has observed that although the mode of proving a will did not ordinarily differ from that of proving any other docu- ment, nonetheless it requires an element of solemnity in the decision on the question as to whether the document pro- pounded is proved as the last will and testament of departed testator. Where there are suspicious circumstances, the onus would be on the propounder to explain them to the satisfac- tion of the court before the will could be accepted as genuine. Where there are suspicious circumstances, 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. These principles have been reiterated in the subsequent decisions of this Court in Rani Purnima Devi & Anr. v. V. Kumar Khagendra Narayan Dev & Anr., [1962] 3 SCR 195 and Smt. Indu Bala Bose & Ors. v. Manindra Chandra Bose & Anr., [1982] 1 SCC 20.

The Privy Council in Mr. Biro v. Atma Ram & Ors., AIR 1937 PC 10 1 had an occasion to consider an analogous case where the wife was practically disinherited and there was unexplained delay in producing the will in public. There the alleged will by a testator gave only a life estate to his daughter who was the only child and who was to get some property at her marriage. The bulk of the estate was vested in the widow of the testator and three other women, namely, his mother, his step-mother and his paternal aunt. These women though entitled under the Hindu Law only to mainte- nance, were made joint owners equally with the widow of the testator. None of the devisees could get the estate parti- tioned or alienate it for necessity. It was however, provid- ed that the lady, who survived the other three devisees, would become the absolute owner of the estate. The widow of the testator would not get her husband's estate, if she predeceased any of her co-devisees. The will was not pro- duced until 22 years after its execution though there were occasions to produce it, had it been in existence. Consider- ing these circumstances, the Privy Council observed (at

104):

> "It is most unlikely that a person having a wife and a minor unmarried daughter, who should be the objects of his affection, would make a will which would practically disinherit them.
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> That the testament is unnatural and runs counter to the ordinary sentiments of persons, having a status in society similar to that of Harbans Lal, cannot be seriously disputed. But this is not the only circum- stances which tells against its genuineness. The will purports to have been executed on 24th August 1900, and the testator died within a month of that date. But it is strange that it was not produced until 1922, after the com- mencement of the present litigation. During this long period of 22 years, which inter- vened, there were occasions when the widow or her advisers could have produced the document, if it had been in existence; but they did not do so ..... "

,The will in the present case, constituting the plaintiff as a sole legatee with no right whatever to the testator's wife seems to be unnatural. It casts a serious doubt on genuine- ness of the will. The will has not been produced for very many years before the court or public authorities even though there were occasions to produce it for asserting plaintiff's title to the property. The plaintiff was re- quired to remove these suspicious circumstances by placing satisfactory material on record. He has failed to discharge his duty. We therefore, concur with the conclusion of the High Court and reject the will as not genuine. This takes us to the validity of the sale deed Ex. 3. The High Court rejected the document with the following observations:

> "Ex. 3 is neither a certified copy given under any of the provisions of the Evidence Act nor is it a copy made from the original by any mechanical process. It also does not

> appear to have been made or compared from the original as there is no verification or endorsement of the kind and it does not come under clauses 1 or 5 of section 63 either. No one has given the oral account of the contents of the original document. If in place of primary evidence secondary evidence is admitted without any objection at the proper time then the parties are precluded from raising the question that the document has not been proved by primary evidence but by second- ary evidence. But where there is no secondary evidence as contemplated by Section 66 of the Evidence Act then the document cannot be said to have been proved either by primary evidence or by secondary evidence."

The basis of the plaintiff's title relates back to the sale deed dated Baisakh Sudi 12 Samvat 1932 (1875 A.D.). It was said to be a registered sale deed by which Bhagala Girdhari purported to have sold the baghichi to Raghunath Brahmin. The plaintiff has not produced the original sale deed. Nor a certified copy of it has been produced. All that we find from the record is an ordinary copy of a sale deed Ex. 3 produced by Gopal Prasad PW 1. Gopal Prasad has stated that Ex. 3 was a copy submitted by the parties along with the original sale deed for registration. The original sale deed was said to have been returned to the party after its registration and a copy was kept in the file. But Gopal Prasad has no personal knowledge about the registration of the sale deed, nor he has produced the register to indicate that that sale deed was registered and a copy was kept in the record. Ex. 3 produced by him does not bear any endorsement to the effect that it was a true copy of the original.

The High Court said, and in our opinion very rightly, that Ex. 3 could not be regarded as secondary evidence. Section 63 of the Evidence Act mentions five kinds of sec- ondary evidences. Clause (1), (2) and (3) refer to copies of documents; clause (4) refers to counterparts of documents and clause (5) refers to oral accounts of the contents of documents. Correctness of certified copies referred to in clause (1) is presumed under Section 79; but that of other copies must be proved by proper evidence. A certified copy of a registered sale deed may be produced as secondary evidence in the absence of the original. But in the present case Ex. 3 is not a certified copy. It is just an ordinary copy. There is also no evidence regarding contents of the original sale deed. Ex. 3 cannot, therefore, be considered as secondary evidence. The appellate Court has a right and duty to exclude such evidence.

In the result, the appeal is allowed, modifying the judgment and decree of the High Court. The judgment and decree of the trial court as affirmed by the District Court are set aside and the plaintiff's suit is dismissed. Since the original plaintiff died leaving behind his widow during pendency of the appeal before the High Court, we make no order as to costs.

R.N.J. Appeal allowed.