2024:DHC:3678-DB

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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

\+ FAO(OS) 81/2023 & CM APPLs. 35932/2023, 35933/2023
CM APPL. 35934/2023 CM APPL. 38987/2023

SAHIL MARWAH & ANR. ..... Appellants

Through: Mr. Y.P. Narula, Sr. Advocate with Mr. Abhey Narula, Advocate.

versus

VIKAS MALHOTRA & ORS. ..... Respondents

Through: Mr. Sanjeev Mahajan, Advocate with Mr. Pranjal Tandon, Advocates for R-1
Mr. Varun Sarin, Ms. Kanak Bose, Ms. Parul and Ms. Babita Rawat, Advocates for R-2
Ms. Damini Chawla, Advocate for R-3 & R-4

Reserved on: 9th April, 2024

% Date of Decision: 07th May, 2024

CORAM:
HON'BLE THE ACTING CHIEF JUSTICE
HON'BLE MS. JUSTICE MANMEET PRITAM SINGH ARORA

J U D G M E N T

MANMEET PRITAM SINGH ARORA, J:

1. Present appeal has been filed under Section 10 of the Delhi High Court Act, 1966 ('Act of 1966') read with Order XLIII Rule 1 of Code of Civil Procedure, 1908 ('CPC') against the orders dated 14th March, 2023 and 6th July, 2023 ('impugned orders') passed in TEST. CAS. 17/2023 ('probate petition').

2. The Appellants are aggrieved as the learned Single Judge has entertained the probate petition filed along-with a certified copy of the registered Will dated 2nd August, 2019 ('registered Will') on the petitioner's plea in the probate petition that the original Will is presently not available.

The Appellants' objected to the same on the ground that filing of the original Will is mandatory along with the probate petition.

2.1. The learned Single Judge *vide* order dated 14th March, 2023 rejected the objection of maintainability at the threshold and held that the said objection shall be considered after the completion of the pleadings and evidence, if so directed. The Court granted leave to the petitioner therein i.e. Respondent No.1 to place on record verification or the affidavit of one of the attesting witnesses to the Will in accordance with Section 281 of the Indian Succession Act, 1925 ('Act of 1925').

2.2. Further, *vide* subsequent order dated 6th July, 2023, the learned Single Judge issued notice in the said probate petition and directed issuance of citation without waiting for the amended probate petition, in proper form, to come on record.

3. The Appellants, aggrieved by the aforesaid impugned orders, have preferred the present appeal.

Factual Matrix

4. The brief facts to be considered in the present appeal are that as per the Executor, Mr. Vikas Malhotra i.e., Respondent No. 1 herein late Ms. Mala Marwah ('Testatrix') executed a Will dated 2nd August, 2019, which is duly registered with the Sub-Registrar[1] and Respondent No. 1 is the sole executor under the said Will. However, since the original Will was not available with Respondent No. 1, he filed the probate petition along-with a certified copy of the registered Will. In the probate petition, it was duly stated that the original Will is presently not available and is presumed to be lying at the last place of abode of the Testatrix. The relevant paragraph of the probate petition reads as under: -

[1] Sub-Registrar VII at Registration No. 115 in Book No. III Volume No. 565 on pages 132 to 135

> *"5. That Late Ms. Mala Marwah on 02.08.2019 executed her last Will and testament. This Will was duly attested by witnesses. This is the last Will and Testament of the deceased Ms. Mala Marwah.*
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> *The certified copy has been filed alongwith list of document. The original Will at present is not available with the Petitioner and would be probably be somewhere at her last place of abode i.e. 31, Hanuman Road, New Delhi. The property 31, Hanuman Road, New Delhi which at present is in exclusive possession of the Respondent No.2 and his two sons Respondent No.8 and 9."*
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> (Emphasis Supplied)

5. Before the learned Single Judge, the Respondent No. 1 herein relied upon Sections 237 and 276 of the Act of 1925 to contend that a petition seeking probate on the basis of the certified copy of a registered Will is maintainable, where the original Will is not traceable, and a probate would be granted subject to the proof of the validity and the execution of the registered Will.

6. On the other hand, the Appellants contended that filing of the original Will is mandatory along-with the probate petition and non-filing of the original Will, disentitles the petitioner to maintain the probate petition on the basis of the certified copy of the registered Will.

7. The learned Single Judge after considering the law on the subject and the averments made by Respondent No. 1 at paragraph 5 of the probate petition held that the probate petition is not liable to be dismissed in *limine* on the ground of the non-filing of the original Will and further held that the said objection raised by the Appellants would necessarily have to be considered, only, after the parties have filed their responses to the probate petition and led evidence. The relevant para of the impugned order dated 14th March, 2023 reads as under: -

> *'19. In the present case, having considered the objections raised by the learned senior counsel for the respondent nos.4 and 5, in my opinion, the present petition would be maintainable and the objection raised by the learned senior counsel for the respondent nos.4 and 5 would necessarily*

> *have to be considered only once the parties have filed their response to the present petition, and if the Court so warrants and directs, led their respective evidence on the same*. ***For the reasons stated in paragraph 5 of the present petition****, it cannot be said that the petition is liable to be dismissed in limine on the ground of non-filing of the original Will.'*
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> (Emphasis Supplied)

8. The pleadings in the probate petition have since been completed and the matter is pending at the stage of admission/denial of documents.

Submissions of counsel for parties

9. Learned counsel for Respondent No. 1 has raised preliminary objections to the maintainability of the present appeal, firstly, on the ground of limitation and secondly, on the ground that no appeal against the impugned orders is maintainable under Section 10 of the Act of 1996 or under Order XLIII Rule 1 of CPC. He stated that an order issuing notice in a probate petition does not satisfy the test of judgment to maintain an appeal under Section 10 of the Act of 1996. He stated that the Act of 1925 is a self-contained code and the provisions of appeal are provided in the said Act; and the impugned orders are not appealable thereunder.

10. Learned senior Counsel for the Appellants stated that if the original Will is not filed with the probate petition, the 'presumption in law' is that it may have been destroyed by the Testatrix. In this regard, he relied upon Section 70 of the Act of 1925 to support his plea. He further stated that in the absence of the original Will, the attesting witness cannot verify the probate petition as per the requirement of Section 281 of the Act of 1925. He stated that the verification by the attesting witness has to be necessarily of the original Will and the certified copy of the registered Will cannot be relied upon by the attesting witness for the purpose of verification.

10.1 He stated that as per Section 68 of the Indian Evidence Act, 1872 ('Act of 1872') a registered Will has no presumption attached to it and,

therefore, it cannot be the basis of maintaining the application for probate. He stated that a certified copy of the Will obtained from the office of Sub-Registrar is not a substitute for the original Will.

10.2 He stated that during the pendency of this appeal, a Court Commissioner was appointed in a separate suit proceeding between the parties, who reported that no 'Will' was found at the place of abode of the Testatrix. He stated that, thus, the claim of the Respondent No. 1 i.e., Executor in the probate petition at paragraph 5 that the original Will could be available at the last place of abode of the Testatrix is proven to be not correct. He stated that the legatees i.e., Respondent Nos. 3 and 4 as well have filed an affidavit in the underlying probate petition, stating that they do not have the original Will. He stated that in these facts, the probate petition filed by Respondent No. 1 on the basis of a certified copy of the Will is not maintainable and should be dismissed at the threshold.

10.3 He relied upon the written submissions dated 25th January, 2024 and judgments therein.

10.4 With respect to the objection on maintainability of the present appeal, he relied upon the judgment of Supreme Court in ***Delhi Electric Supply Undertaking vs. Basanti Devi and Another***[2] to contend that the present appeal is maintainable. He relied upon C.M. Application 38987 of 2023 for seeking condonation of delay in filing the present appeal.

11. Learned counsel for Respondent No. 1 stated that in view of the authoritative judgment of Supreme Court in ***Durga Prashad vs. Debi Charan and Others***[3]**,** the presumption of revocation on account of the unavailability of the original Will is a weak one and is rebuttable on the

[2] AIR 2000 SCC 43, Paragraph 17, 18 and 19
[3] (1979) 1 SCC 61

slightest possible evidence. He stated that since the original Will is not traceable the natural corollary is that it is lost. He stated that since the issue of proof of the Will has to be decided after the parties lead their evidence, this issue of existence of the said document will be decided conclusively in the proceedings. He stated that the present appeal is nothing but an attempt to obstruct the probate proceedings. He stated that the Appellants have mischievously delayed filing of their replies to the probate petition merely on the ground of the pendency of the present appeal. He stated that the probate petition is maintainable in view of Section 237 of the Act of 1925.

11.1. He stated that the reliance placed by the learned senior counsel for the Appellants on the affidavits of Respondent Nos. 3 and 4 as well as the report of the Court Commissioner is misplaced. He stated that a meaningful reading of the affidavits shows that the original Will is presently not traceable. He stated that the reference to the report of the Court Commissioner dated 09th September, 2022 is misleading and it does not prove that the original Will is not available at the last place of abode. He stated that no reliance was placed on the said report at the time of the hearing before the learned Single Judge when the impugned orders were passed and, therefore, it cannot be relied upon in this appeal.

11.2. He stated that to raise the presumption of revocation under Section 70 of the Act of 1925, it is imperative that the Appellants must first admit the existence of the Will dated 02nd August, 2019. He stated that without admitting its existence, the Appellants cannot raise the said defence. He relies upon his written submissions dated 9th April, 2024.

12. Learned counsel for Respondent No. 2 stated that he adopts the legal submissions of Respondent No. 1. He stated that, in addition, the Appellants herein have not filed an affidavit with respect to the custody of the Will

dated 2nd August, 2019. He stated that the Appellants have not asserted in their objections that they do not have the custody of the Original Will.

13. Learned counsel for Respondent Nos. 3 and 4 stated that she adopts the legal submissions of Respondent No. 1. She stated that the judgments relied upon by the Appellants are inapplicable in the facts of this case. She stated that in those judgments, the Court refused to grant probate as the execution of the propounded Will could not be proved, post-trial, by the petitioner(s) therein. She stated that none of those judgments dismissed the probate petition at the stage of admission on the ground that original Will has not been filed with the probate petition.

Findings and Analysis

14. We have heard the learned counsel for the parties and perused the record.

15. The Respondent No. 1 [Executor] has filed the underlying probate petition along with a certified copy of the registered Will and has pleaded in the probate petition that the original Will is presently untraceable, and it is presumed that the same is lying somewhere at the last place of abode of the deceased Testatrix. The learned Single Judge *vide* impugned orders has issued notice in the probate petition and observed that the consequence of the unavailability of the original Will would be considered after the parties have filed their replies, and led their respective evidence.

16. The point in law raised by the Appellants lies within a very narrow scope. The Appellants contended that since the probate petition has been filed without the original Will, a presumption would have to be drawn that the Testatrix had revoked the Will by destroying it before her death and for this proposition relied upon Section 70 of the Act of 1925. The Appellants further contended that the non-filing of the original Will disentitles the

Respondent No. 1 from maintaining the probate petition based on the certified copy of the registered Will as the executor/applicant or the attesting witness cannot verify the probate petition as per Section 281 of the Act of 1925. The Appellants contended that a certified copy of the registered Will is of no consequence and it is not a substitute for the filing of the original Will.

Section 70 of the Indian Succession Act of 1925

17. In our considered opinion, the Appellants' objection to the maintainability of the probate petition filed with a certified copy of the registered Will, due to the absence of the original Will is misconceived, in the facts of this case. The Appellants' contention that the absence of the original Will raises a presumption of revocation by Testatrix is incorrect and this issue is no longer *res-integra* in view of the authoritative pronouncement of the Supreme Court in ***Durga Prashad vs. Debi Charan***[4] (supra). In the said case, the High Court[5] by its impugned judgment while accepting the genuineness of the registered Will, non-suited the propounder only on the ground that the original Will was not found on the death of the testatrix despite every attempt to search for; and drew a presumption that the testatrix therein had revoked the Will by destroying it before her death. In view of this presumption, the High Court refused to grant probate to the appellants therein.

17.1. The High Court therein concluded that the Will was a genuine document and was duly executed by the testatrix, who had a sound disposing mind and no fraud or undue influence at all had been practiced in the execution of the Will, which was witnessed by the attesting witnesses,

[4] Paras 6, 17, 18, 19, 20 and 23
[5] Pt. Devi Charan v. Durga Pershad, 1967 SCC OnLine Del 27

however, the High Court refused the grant of probate on the basis of the 'presumption' of revocation due to original Will being untraceable.

17.2. The Supreme Court reversed the judgment of the High Court and unequivocally held that in the absence of the original Will, '*no presumption*' of its revocation can be drawn as a general rule of law. The Supreme Court held that the more reasonable presumption to be drawn is that the Will was mislaid, lost or stolen rather than that it was revoked. The Supreme Court held that even if in the facts and circumstances of a particular case such a presumption of revocation may be drawn, the same can be rebutted by the propounder even by leading the slightest evidence. The relevant paras of the judgment of the ***Durga Prashad vs. Debi Charan*** (supra) as regards '*no presumption*' read as under: -

> *6. In view of this categorical finding of the High Court it is manifest that the point in dispute lies within a very narrow compass.* ***The High Court while accepting the genuineness of the will has non-suited the appellant only on the ground that as the will was not found on the death of the testatrix despite every attempt to search for it, a presumption would have to be drawn that the testatrix had revoked the will by destroying it before her death.*** *In view of this presumption the High Court held that the will appears to have been revoked and consequently refused to grant probate to the appellant.*
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> *.....*
>
> *17.* ***The question as to whether or not a presumption should be drawn in such cases as a rule of law is extremely doubtful.*** *Moreover, even if any such presumption is drawn the said presumption is rebuttable and may be rebutted either by direct or circumstantial evidence.....*
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> *18. The serious question for us to determine is whether the ratio of this case can be applied to Indian conditions with full force. This matter was clearly considered by the Privy Council in the case from India in Padman v. Hanwanta [AIR 1915 PC 111 : 17 Bom LR 609 : 13 ALJ 801] where the Privy Council sounded a note of caution in applying the aforesaid presumption to this country having regarding to the nature and habits of the people of our country. While approving the observations of the Chief Court Their Lordships in the aforesaid case observed as follows:*
>
> *"We think that the more reasonable presumption in this case is that the will was mislaid and lost, or else was stolen by one of the*

> *defendants after the death of Daula . . . Their Lordships think that it was perfectly within the competency of the learned Judges to come to that finding. Much stress has been laid on the view expressed by Baron Parke, in Welch v. Phillips that when a will is traced to the possession of the deceased and is not forthcoming at his death, the presumption is that he has destroyed it. In view of the habits and conditions of the people of India this rule of law, if it can be so called, must be applied with considerable caution. In the present case the deceased was a very old man and, towards the end of his life, almost imbecile. There is nothing definite to show that he had any motive to destroy the will or was mentally competent to do so. On the other hand, the circumstances favour the view the Chief Court has taken that the will was either mislaid or stolen."*

The Privy Council made it very clear that the more reasonable presumption in a case like this should be that the will was mislaid, lost or stolen rather than that it was revoked. *The Privy Council further endorsed the fact that the presumption of English Law should be applied to Indian conditions with considerable caution.* ***The High Court in the instant case does not appear to have kept in view the note of warning sounded by the Privy Council in the aforesaid case****.*

19. There are a large number of authorities of the Indian High Courts which take the view that even if the presumption is applied it should be applied with very great caution. Before however dealing with these authorities we would like to scan the English law on the point.

20. Jarman on Wills while dwelling on this aspect of the matter observed as follows:

> *"If a will is traced into the testator's possession, and is not found at his death, the presumption is that he destroyed it for the purpose of revoking it; but the presumption may be rebutted.... Where the will makes a careful and detailed disposition of the testator's property, and nothing happens to make it probable that he wishes to revoke it, the presumption raised by the disappearance of the will may be rebutted by slight evidence, especially if it is shown that access to the box, or other place of deposit where the will was kept, could be obtained by persons whose interest it is to defeat the will."*

It is, therefore, clear that even if a presumption of the revocation of the will is drawn from the fact that it was not found on the death of the testatrix it cannot be laid down as a general rule and can be rebutted even by slight evidence particularly where it is shown that some party had access to the place of deposit. The Privy Council has doubted whether this presumption is a rule of law at all.

....

23. ***Thus, it is manifest that in the first place when the will is traced to the possession of the testator but not found at the time of death, no***

> ***presumption can be drawn as a rule of law but in the facts and circumstances of a particular case such a presumption may be drawn and can be rebutted even by slight evidence****."*
>
> (Emphasis Supplied)

17.3. In view of the aforesaid exposition of law by the Supreme Court, the loss/unavailability of the original registered Will, thus, does not *ipso facto* attract the presumption of revocation by destruction. The act of revocation of the Will by the Testator/Testatrix is strictly governed by Section 70 of the Act of 1925. The operation of the said provision is attracted to a factual matrix where the execution of the Will by the Testator/Testatrix is established and the objector raises a plea that the Will after its execution was revoked by the Testator/Testatrix by one of the modes set out in the said provision. However, to raise the plea of revocation, the objector will have to plead this defence specifically by setting out the particulars of the mode of revocation and then prove the same in accordance with the law.

17.4. In this regard, the Supreme Court also examined the strict scope of Section 70 of the Act of 1925 and categorically held that the 'onus to prove' that the Will has been revoked lies on the objector who relies on the revocation. The relevant para of ***Durga Prashad vs. Debi Charan*** (supra) reads as under: -

> *"25. Against this background we shall now deal with the authorities of the Indian High Courts. But before we do that it may be necessary to extract Section 70 of the Act:*
>
> > *"No unprivileged will or codicil, nor any part thereof shall be revoked otherwise than by marriage, or by another will or codicil, or by some writing declaring an intention to revoke the same and executed in the manner in which an unprivileged will is hereinbefore required to be executed, or by the burning, tearing or otherwise destroying the same by the testator or by some person in his presence and by his direction with the intention of revoking the same."*
>
> *A perusal of this section would clearly reveal two important features. In the first place, the section has been couched in negative terms having a mandatory content. Secondly, the section provides the mode and the very*

*circumstances under which an intention to revoke can be established. In these circumstances, therefore, the **onus** is **on the objector** who relies on the revocation to prove that the will had been revoked after it has been proved to have been duly executed. Under Section 70 of the Act, the will can be revoked inter-alia, by burning, tearing or otherwise destroying and **unless any of the circumstances has been proved by the objector by cogent evidence, the question of the revocation of the will, will naturally not arise**."*

(Emphasis Supplied)

17.5. Thus, if the Appellants herein are desirous of raising the plea of revocation of the registered Will dated 02nd August, 2019, the onus of proving revocation will have to be discharged by the Appellants. Section 70 of the Act of 1925 provides the mode and circumstances under which an intention to revoke can be established. The Appellants herein will have to thus, plead and thereafter, lead cogent evidence to prove the mode and the circumstances to establish revocation of the Will in question by the Testatrix, in accordance with the said provision. In the absence of a plea and particulars of the revocation in the objections, the question/issue of revocation will not otherwise arise for adjudication in these proceedings.

17.6. The Supreme Court in ***Durga Prashad vs. Debi Charan*** (supra) summarised the legal position on the consequence of unavailability of the original Will vis-à-vis grant of probate, at para 31 of the said judgment, which reads as under: -

"31. The correct legal position may therefore be stated as follows:

1) *That where a will has been properly executed and registered by the testator but not found at the time of death the question whether the presumption that the testator had revoked the will can be drawn or not will depend on the facts and circumstances of each case. Even if such a presumption is drawn it is rather a weak one in view of the habits and conditions of our people.*
2) *That the presumption is a rebuttable one and can be rebutted by the slightest possible evidence direct or circumstantial. For instance, where it is proved that a will was a strong and clear disposition evincing the categorical intention of the testator and there was nothing to indicate the presence of any circumstance which is likely*

to bring about a change in the intention of the testator so as to revoke the will suddenly, the presumption is rebutted.

3) *That in view of the fact that in our country most of the people are not highly educated and do not in every case take the care of depositing the will in the banks or with the Solicitors or otherwise take very great care of the will as a result of which the possibility of the will being stolen, lost or surreptitiously removed by interested persons cannot be excluded, the presumption should be applied carefully.*
4) *That where the legatee is able to prove the circumstances from which it can be inferred that there could be absolutely no reason whatsoever for revoking the will or that the act of revoking the will was against the temperament and inclination of the testator, no presumption of revocation of the will can be drawn.*
5) ***That in view of the express provision of Section 70 of the Act the onus lies on the objector to prove the various circumstances viz. marriage, burning, tearing or destruction of the will**.*
6) ***When there is no obvious reason or clear motive for the testator to revoke the will and yet the will is not found on the death of the testator it may well be that the will was misplaced or lost or was stolen by interested persons**."*

(Emphasis Supplied)

17.7. Applying the aforesaid legal principle to the facts of the present case, it is imperative that the Appellants plead the facts essential for alleging revocation of the Will dated 2nd August, 2019 in terms of Section 70 of the Act of 1925 in the objections and the onus to prove the said facts will lie on the objectors/Appellants.

17.8. The plea of the Appellants that the original Will is untraceable, as it was destroyed by the Testatrix with the intention to revoke the Will has to be pleaded and proved by the Appellants. For raising the said plea, the Appellants have to necessarily, first, admit that the Will in question was executed by the Testatrix and thereafter, plead that it was revoked by destruction of the Will and prove this defence.

17.9. However, in the objections filed by the Appellants in the underlying probate petition, there is admittedly, no pleading by the Appellants that the Testatrix had executed the registered Will and thereafter, revoked it at any

time in a manner envisaged by Section 70 of the Act of 1925. In the absence of the requisite pleading, the issue of revocation cannot arise for consideration in the probate proceedings.

17.10. In fact, it has been held by the Division Bench of the High Court of Calcutta that if revocation is not pleaded, the Court will not presume revocation from the fact that the Will, which is a registered one, is not forthcoming. It was observed that this is because loss of the Will is no destruction. The Court also observed that plea of revocation cannot be entertained at the behest of a party who denies execution of the Will. Pertinently, the Court was considering the scope of Section 24 of the Probate and Administration Act, 1881[6] which is *para materia* with Section 237 of the Act of 1925[7]. (Re: ***Sarat Chandra Basack v. Golap Sundari Dasya***[8]). The relevant portion reads as under:

> *" **Coxe, J.**: – …..If the objector had been frank and truthful about the matter and had admitted the execution but pleaded revocation, I could not have agreed with the view of my brother Ray that Letters of Administration should be granted. The objector however takes up the impossible attitude that this Will, which is a registered Will, was never executed and therefore he does not plead revocation. That being so, it is difficult for me to hold that the Will has been revoked, when that plea has not been taken, and I therefore will not dissent from the decision of my learned colleague. The Appeal will be allowed and Letters of Administration with a copy of the Will annexed will be granted. Costs of all Courts to be paid out of the estate.*
>
> ....
>
> ***Ray, J.**:– …..Sec. 24 of the Probate and Administration Act runs thus: When the Will has been lost or mislaid since the testator's death, or has been destroyed by wrong or accident and not by any act of the testator, etc., etc. It*

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[6] Section 24. ***Probate of copy or draft of lost will***.—When the will has been lost or mislaid since the testator's death, or has been destroyed by wrong or accident and not by any act of the testator, and a copy or the draft of the will has been preserved, probate may be granted of such copy or draft, limited, until the original or a properly authenticated copy of it be produced.

[7] Section 237. ***Probate of copy or draft of lost will***.—When a will has been lost or mislaid since the testator's death, or has been destroyed by wrong or accident and not by any act of the testator, and a copy or the draft of the will has been preserved, probate may be granted of such copy or draft, limited until the original or a properly authenticated copy of it is produced.

[8] 1913 SCC OnLine Cal 235

appears to me that the words 'since the testator's death' qualify only the verb 'mislaid'. They have no reference to the word 'lost,' otherwise, what would happen if the Will has been lost before the testator's death? The loss of the Will would not operate as revocation—vide sec. 57. To establish revocation you must show destruction by the testator. ***Loss is no destruction.*** *Then the words 'since the testator's death' have no reference to the succeeding clause of the sentence. The Will could not have been destroyed by any act of the testator since his death. The second clause is independent by itself. Then the words in this clause "and not by any act of the testator" have no special meaning. For, if the Will has been destroyed by any act of the testator, it has been revoked and it is a dead thing. In the succeeding section the words used are "when the Will has been lost or destroyed, etc., etc". The former section refers to cases when a copy of the Will is available and the latter when no copy is available. This is the only difference. In neither of these sections any rule of law has been laid down and none tending to defeat the applicant's suit. Revocation must be proved by the party who sets it up. The facts proved and admitted preclude a presumption in favour of the objector and there is no evidence that the Will has been actually destroyed....."*

(Emphasis Supplied)

17.11. In our considered opinion the plea of non-execution of Will and revocation of Will cannot stand together; as the act of revocation by a Testator/Testatrix pre-supposes execution of the Will by the said Testator/Testatrix. In the facts of the present case the Appellants are raising the specific plea of non-execution of the Will by Testatrix and, therefore, it is precluded from raising the plea of revocation. The Appellants are at liberty to challenge the validity of the Will on the grounds of non-fulfilment of the essential conditions mentioned in Section 59 and 63 of the Act of 1925 but they are precluded from raising the ground of revocation under Section 70 of the Act of 1925 due to their principal stand of non-execution of the Will in the first instance. The objector cannot be permitted to take such inconsistent stands, which are mutually destructive as they lack bona fide and interfere in the adjudicatory process.

17.12. In the facts of the present case, the Appellants have not admitted the existence of the subject Will dated 2nd August, 2019 nor pleaded the

circumstances of the revocation in accordance with Section 70 of the Act of 1925. In the absence of the said essential averments, the Appellants herein are precluded from raising the plea of revocation by relying upon Section 70 of the Act, 1925.

Section 237 of the Indian Succession Act of 1925

18. Where the original of the Will is untraceable, in addition to proving the due execution of the Will and validity of the Will to the satisfaction of the Court, the propounder will have to prove the circumstances set out in Section 237 of the Act of 1925 for relying upon the copy of the Will. The circumstances to be proved by propounder for permitting reliance on a copy of the Will are set out in Section 237 of the Act of 1925 and the same have to be proved to the satisfaction of the Probate Court.

In the absence of the specific plea of revocation with particulars thereto by the objector, the unavailability of the original Will entitles the propounder/executor to plead in the probate petition loss of the original Will as contemplated under Section 237 of the Act of 1925 and satisfy the conscience of the Court that the instrument so propounded is the last Will of a free and capable testator.

18.1. The permissibility of proving and relying upon the certified copy of the registered Will, when the original Will is lost was considered and upheld by the Supreme Court in ***Dhanpat vs. Sheo Ram***[9]**.** In the facts of that case, the execution of the registered Will was not disputed by the plaintiff therein; the defendants pleaded that the original Will was lost and, therefore, produced the certified copy of the registered Will and proved its validity in accordance with law. The relevant paras of the aforesaid judgment read as under:

[9] (2020) 16 SCC 209

*"**14.** In support of the findings recorded by the High Court, Mr Manoj Swarup, learned Senior Counsel for the respondent-plaintiff argued that in terms of Section 69 of the Succession Act, 1925, a will is required to be attested by two witnesses who have seen the testator and in which the testator and two of the attesting witnesses sign in presence of each other. It is argued that Maha Singh, DW 3 had not deposed that all three were present at the same time, therefore, the finding of the High Court has to be read in that context, when the will was found to be surrounded by suspicious circumstances as the second attesting witness was not examined. It is also argued that the **original will** has **not** been produced and no application for leading secondary evidence was filed. Therefore, the secondary evidence could not be led by the defendant to prove the execution of the will.*

...

***16.** The defendants produced a certified copy of the will obtained from the office of the Sub-Registrar. The defendants also produced the photocopy of the will scribed by DW 4 D.S. Panwar.*

...

***19.** Even though, the aforesaid judgment is in respect of the loss of a sale deed, the said principle would be applicable in respect of a will as well, subject to the proof of the will in terms of Section 68 of the Evidence Act. In the present case as well, the will was in possession of the beneficiary and was stated to be lost. The will is dated 30-4-1980 whereas the testator died on 15-1-1982. There is no cross-examination of any of the witnesses of the defendants in respect of loss of original will. Section 65 of the Evidence Act permits secondary evidence of existence, condition, or contents of a document including the cases where the original has been destroyed or lost. The plaintiff had admitted the execution of the will though it was alleged to be the result of fraud and misrepresentation. **The execution of the will was not disputed by the plaintiff but only proof of the will was the subject-matter in the suit. Therefore, once the evidence of the defendants is that the original will was lost and the certified copy is produced, the defendants have made out sufficient ground for leading of secondary evidence**.*

...

***22.** There is no requirement that an application is required to be filed in terms of Section 65(c) of the Evidence Act before the secondary evidence is led. A party to the lis may choose to file an application which is required to be considered by the trial court but if any party to the suit has laid foundation of leading of secondary evidence, either in the plaint or in evidence, the secondary evidence cannot be ousted for consideration only because an application for permission to lead secondary evidence was not filed.*

...

***25.** In view of the aforesaid judgments, at least one of the attesting witnesses is required to be examined to prove his attestation and the attestation by another witness and the testator. In the present case, DW 3 Maha Singh*

deposed that Chandu Ram had executed his will in favour of his four grandsons and he and Azad Singh signed as witnesses. He deposed that the testator also signed it in Tehsil office. He and Azad Singh were also witnesses before the Sub-Registrar. In the cross-examination, he stated that he had come to Tehsil office in connection with other documents for registration. He deposed that Ext. D-4, the will, was typed in his presence. He denied the question that no will was executed in his presence. There was no cross-examination about his not being present before the Sub-Registrar. ***Once the will has been proved then the contents of such document are part of evidence.*** *Thus, the requirement of Section 63 of the Act and Section 68 of the Evidence Act stands satisfied. The witness is not supposed to repeat in a parrot like manner the language of Section 68 of the Evidence Act. It is a question of fact in each case as to whether the witness was present at the time of execution of the will and whether the testator and the attesting witnesses have signed in his presence. The statement of the attesting witness proves the due execution of the will apart from the evidence of the scribe and the official from the Sub-Registrar's office."*

(Emphasis supplied)

18.2. In the underlying probate petition, the Respondent No. 1 has duly pleaded the unavailability of the original Will at paragraph 5 of the probate petition and has produced the certified copy of the registered Will. The said pleadings are sufficient at this initial stage to entertain the probate petition filed along with the certified copy of the registered Will so as to entitle the Respondent No. 1 to lead secondary evidence of the Will.

18.3. Moreover, in case of registration of a document including a Will, after the document is admitted to registration, its duplicate copy is pasted in the books maintained by the Sub-Registrar. This duplicate copy mandatorily bears the signatures in original of the executant, the witnesses, the Registering Officer and presentor as per Section 52 of the Registration Act of 1908 ('Act of 1908') and Rule 39[10] of The Delhi Registration Rules, 1976

[10] 39. **Pasting of documents into Book.**– When a document has been admitted to registration and the necessary endorsements have been recorded, it shall be handed over to the duplicating clerk to copy out the endorsements on the duplicates and the Registering Officer shall see that no unnecessary delays occur, and that the documents are pasted in the books in the order of their admission. Thereafter, the several endorsements made in the office (including the certificate of registration prescribed by section 60 of the Act), the several signatures of the Registering Officer, presentor, executants and witnesses examined shall all be copied on the duplicate at proper places.

('1976 Registration Rules'). The duplicate copy so pasted in the books before the Sub-Registrar is, therefore, executed like a mirror copy of the original Will presented for registration. The duplicate copy registered with the Sub-Registrar is in effect a mirror copy of the original document and has the same effect in law as the original document in its operation unless its revocation is proved by the objector. Further, as per Section 57(2) of the Act of 1908 and Rule 18 of the 1976 Registration Rules copies of the registered Will are provided to any person after the death of its executant and the said copy is statutorily admissible for proving the contents under Section 57 (5) of the Act of 1908. The admissibility of certified copy of the registered Will is, thus, statutorily recognised and, therefore, the contention of the Appellants that a certified copy of the registered Will cannot be relied upon for seeking probate is incorrect. As noted above, the executor/applicant's obligation to prove the circumstances of loss of the original Will under Section 237 of the Act of 1925 remains, however, the loss of the original Will does not disentitle him/her from applying for probate. The high-probative value of a certified copy of the registered Will in proving the initial existence of the original Will is inarguable and, therefore the underlying probate petition is maintainable.

18.4. The probative value and admissibility of certified copy of a registered document has been explained by the Supreme Court in its recent pronouncement in ***Appaiya vs. Andimuthu***[11], wherein after considering Section 74 (2) of the Act of 1872 and Section 57 (5) of the Act of 1908, the Court held that certified copy of the sale deed is admissible in evidence for proving the contents of the original sale deed. The Supreme Court has held that documents registered before the Sub-Registrar are public documents

[11] 2023 SCC Online 1183

within the meaning of Section 74 (2) of the Act of 1872. The relevant para 30 reads as under:

> *"**30.** Having regard to all the aforesaid circumstances and in the light of the various provisions of the Evidence Act mentioned hereinbefore we will firstly consider the question whether the appellant/plaintiff had succeeded in proving the contents of Ext.A1. Going by Section 65(e) when the original of a document is a public document within the meaning of Section 74, secondary evidence relating its original viz., as to its existence, condition or contents may be given by producing its certified copy. Ext.A1, indisputably is the certified copy of sale deed No. 1209/1928 dated 27.08.1928 of SRO Andipatti. In terms of Section 74(2) of the Evidence Act, its original falls within the definition of public document and there is no case that it is not certified in the manner provided under the Evidence Act. As noticed hereinbefore, the sole objection is that what was produced as Ext.A1 is only a certified copy of the sale deed and its original was not produced in evidence. **The hollowness and unsustainability of the said objection would be revealed on application of the relevant provisions under the Evidence Act and the Registration Act, 1908.** It is in this regard that Section 77 and 79 of the Evidence Act, as extracted earlier, assume relevance. Section 77 provides for the production of certified copy of a public document as secondary evidence in proof of contents of its original. Section 79 is the provision for presumption as to the genuineness of certified copies provided the existence of a law declaring certified copy of a document of such nature to be admissible as evidence. When that be the position under the aforesaid provisions, taking note of the fact that the document in question is a registered sale deed, falling within the definition of a public document, the question is whether there exists any law declaring such certified copy of a document as admissible in evidence for the purpose of proving the contents of its original document. Subsection (5) of Section 57 of the Registration Act is the relevant provision that provides that certified copy given under Section 57 of the Registration Act shall be admissible for the purpose of proving the contents of its original document. **In this context it is to be noted that certified copy issued thereunder is not a copy of the original document, but is a copy of the registration entry which is itself a copy of the original and is a public document under Section 74(2) of the Evidence Act and Sub-section (5) thereof, makes it admissible in evidence for proving the contents of its original.** There is no case that foundation for letting in secondary evidence was not laid and as noted earlier, both the trial Court and the First Appellate Court found it admissible in evidence. Thus, the cumulative effect of the aforementioned sections of the Evidence Act and Section 57(5) of the Registration Act would make the certified copy of the sale deed No. 1209/1928 dated 27.08.1928 of SRO Andipatti, produced as Ext.A1 admissible in evidence for the purpose of proving the contents of the said original document. **When this be the position in the***

> ***light of the specific provisions referred hereinbefore under the Evidence Act and the Registration Act, we have no hesitation to hold that the finding of the High Court that the certified copy of Ext.A1 owing to the failure in production of the original and proving through an independent witness is inadmissible in evidence, is legally unsustainable****. In the other words, the acceptance of the admissibility of Ext.A1 found in favour of the appellant/plaintiff by the trial Court and confirmed by the First Appellate Court was perfectly in tune with the provisions referred hereinbefore and the High Court had committed an error in reversing the finding regarding the admissibility of Ext.A1"*
>
> (Emphasis supplied)

18.5. In view of the aforesaid enunciation of law laid down by Supreme Court, the judgment of Full Bench of High Court of Punjab and Haryana in ***Gutari vs. Shiv Charan and Others***[12] relied upon by the Appellants, holding that documents registered before the Sub-Registrar are not public documents within the meaning of Section 74 (2) of the Act of 1872, can no longer be considered good law.

19. For the same reasons, we also do not find merit in the submission of the Appellants that certified copy of the registered Will cannot be verified by the executor/applicant or the attesting witness as per Section 281 of the Act of 1925.

20. The judgments relied upon by the Appellants are not applicable in the facts of this case as in those judgments[13], the Court after perusing the evidence led by the parties concluded that the propounder therein had failed to prove the due execution of the Will by the Testator/Testatrix. In the remaining judgments[14] relied upon by the Appellants, where the proceedings were at the initial stage, the Court directed the propounder to file the original Will as it was admittedly readily available and in the custody of the

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[12] 1979 SCC OnLine P&H 503

[13] Delhi Sikh Gurdwara Management Committee v. Manmeet Singh and Anr, 2017 SCC OnLine Del 9049; Ramesh Dutt Salwan v. State & Ors. 1988 RLR 387; Ashwani Kumar Aggarwal v. B.K. Mittal; (2014) 211 DLT 524; Ashok Kothari v. Dipti Bavishi AIR 2007 Cal 21

propounder; and the Court found no just grounds for exempting the filing of the original Will. The said judgments do not substantiate the plea raised by the Appellants that if the original Will is not filed with the probate petition, the same cannot be entertained at the threshold or that no probate can be granted on the certified copy of Will.

21. It is needless to state that the onus of proving the due execution of the Will dated 2nd August, 2019 in the underlying probate petition rests on Respondent No. 1 i.e., the party propounding the 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 by leading evidence in accordance with law. (Re: ***Beni Chand vs. Kamla Kunwar***[15]).

22. With respect to the Respondent No. 1's objection on maintainability of the appeal, we observe that it is well-settled by itself an order of the Single Judge issuing notice simplicter in a probate petition is not appealable, as the said order does not decide the matter in controversy conclusively and, therefore, does not satisfy the test of 'judgment' under the Act of 1966. However, since in the present case, the Appellants have pressed their objections with regard to the maintainability of the probate petition before the learned Single Judge as well as before this Court; and invited adjudication of the said objections which are hereby decided finally, we are inclined to entertain this appeal. With the dismissal of the said objections, we direct that the Appellants will be precluded from raising these objections again in the probate proceedings. We are, therefore, not inclined to dismiss the appeal on the plea of maintainability.

23. CM APPL. 38987 of 2023 is allowed for the reasons stated therein

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[14] Madav Prasad Birla (D), 2004 SCC OnLine Cal 516, HPS Chawla v. State 1986 RLR 213
[15] (1976) 4 SCC 554

and the delay in filing the present appeal is condoned.

24. Accordingly, we find no merit in the present appeal and the same is dismissed along with pending applications.

MANMEET PRITAM SINGH ARORA, J

ACTING CHIEF JUSTICE

MAY 07, 2024/*rhc/ms/mg*