

(1964) 09 AHC CK 0028
In the Allahabad High Court
Case No : First Appeal No. 474 of 1955

Krishna Kumar Sinha

APPELLANT

Vs

The Kayastha Pathshala (Prayag) Allahabad and another

RESPONDENT

Date of Decision : 10-09-1964

Acts Referred:

Evidence Act, 1872 — Section 3, 67, 68, 68, 69
Succession Act, 1925 — Section 63(c)
Transfer of Property Act, 1882 — Section 3

Citation : (1964) 09 AHC CK 0028

Hon'ble Judges : V.G. Oak, J; Gangeshwar Prasad, J

Bench : Division Bench

Advocate : Kailash Shankar Sinha and N.D. Ojha, for the Appellant; J. Swarup and H. Swarup, for the Respondent

Final Decision : Dismissed

Judgement

Gangeshwar Prasad, J.—This appeal arises out of a suit for possession and mesne profits with respect to three houses situated in Allahabad. The suit was instituted by the Kayastha Pathshala (Prayag) Allahabad (hereinafter called the Pathshala), which claimed to be a society registered under the Societies Registration Act (XXI of 1860), through Dr. Narain Prasad Asthana as its president. The persons against whom the suit was brought were Baleshwar Lal defendant No. 1 and Krishna Kumar Sinha defendant No. 2. Baleshwar Lal died during the pendency of the suit and his widow Smt. Surja Kuar was thereupon substituted in his place. A decree for possession of the houses in suit has been passed by the trial Court against both the defendants and a decree for Rs. 222/- as past mesne profits has been passed against defendant No. 2 only. Pendente lite and future mesne profits have also been made payable by defendant No. 2. This appeal has been preferred by Krishna Kumar Sinha defendant No. 2.

2. The case of the Pathshala was that one Munshi Nawal Kishore was the owner of the houses in suit, which were his self-acquired property. He bequeathed all

his movable and immovable property to the Pathshala by means of a registered will dated 16th July 1943 and thus the Pathshala became the owner of the houses after the death of Munshi Nawal Kishore which took place on 7-4-1945. It was stated that the will had not been delivered to the Pathshala by the testator and for some time the institution had absolutely no knowledge about it. On coming to know of the will the Pathshala succeeded in tracing it out by making enquiries and then moved an application in the court of the District Judge of Allahabad for the grant of letters of administration of the property and credit of Munshi Nawal Kishore. The application was opposed by defendants Baleshwar Lal and Krishna Kumar Sinha. On account of a technical objection raised by Krishna Kumar Sinha to the maintainability of the application the Pathshala applied for its withdrawal and the District Judge granted permission to withdraw the application with liberty to file a regular suit. The defendants were said to be in wrongful possession of the houses in suit and a decree for possession and mesne profits past, pendente lite, and future was claimed against them.

3. The defendants filed separate written statements. Baleshwar Lal defendant No. 1, who was admittedly the brother of Munshi Nawal Kishore's wife, denied that Munshi Nawal Kishore had executed the will under which the Pathshala claimed the property in suit and stated that Munshi Nawal Kishore had bequeathed all his property to him by a will executed in November 1942. He alleged that Munshi Nawal Kishore remained ailing for several years before his death and that during this period he used to live with Munshi Nawal Kishore and to look after him. He had also to go to Ballia on several occasions to bring medicines for Munshi Nawal Kishore and it was in his absence on one of such occasions that the plaintiff managed to get the will dated 16th July 1943 executed in its favour while Munshi Nawal Kishore was on sick bed and was not in a sound state of mind. It was also stated that during the illness of Munshi Nawal Kishore the appellant Krishna Kumar Sinha who belonged to the same village as the deceased came to Allahabad and began living with him. Upon the death of Munshi Nawal Kishore the appellant put forward a claim to the property of the deceased and it led to a dispute between him and the appellant about mutation of names in the municipal records with respect to the houses in suit. An agreement was, however, reached between them by which the names of both of them were entered. It may here be mentioned that it has been observed by the learned Civil Judge in his judgment that Smt. Surja Kuar, who was substituted in place of Baleshwar Lal, did not put in appearance to contest the suit or to substantiate the defence put forward by Baleshwar Lal and it was only Krishna Kumar Sinha who contested the suit at the hearing.

4. The appellant Krishna Kumar Sinha defended the suit on a variety of grounds. He pleaded that the Pathshala is not a juristic person because the society registered under the Societies Registration Act (XXI of 1860) is not the Pathshala but the Governing Council of the Kayastha Pathshala (Prayag) Allahabad and the Pathshala was consequently not entitled to sue. It was also pleaded that Dr. Narain Prasad Asthana through whom the suit had been instituted was not the

duly elected President of the Governing Council of the Kayastha Pathshala (Prayag) Allahabad and no suit could, therefore, be brought through him. It was denied by the appellant that Munshi Nawal Kishore executed the will under which the plaintiff claimed and he put the plaintiff to strict proof of it. It was pleaded by the appellant that Munshi Nawal Kishore formed a joint Hindu family with him and the houses in suit were joint family property belonging to him and Munshi Nawal Kishore and as such the latter was incompetent to bequeath them and the will was invalid and ineffective. Further, the bequest, being in favour of the students of the Kulbhaskar Ashram, was vague and indefinite, and the Kulbhaskar Ashram was also not in existence at the time of the execution of the alleged will. On these grounds as well, according to the appellant the will failed to take effect. Lastly it was pleaded that the bequest was not in favour of the Pathshala and the property comprised in the will did not, therefore, vest even in the Governing Council of the Kayastha Pathshala and the Governing Council too could not maintain a suit with respect to it. As to mesne profits claimed by the plaintiff the appellant alleged that some of the tenants of the houses in suit were not paying rent since the death of Munshi Nawal Kishore, some others were paying rent to Baleshwar Lal and only a sum of Rs. 18/8/- per month was being realised as rent by the appellant himself. The claim of the plaintiff for mesne profits was said to be excessive.

The issues framed by the trial court were as follows:-

- (1) Whether the plaintiff Pathshala is a juristic person and has it been validly registered under the Societies Registration Act?
- (2) Is the suit as framed not maintainable?
- (3) Did Munshi Nawal Kishore duly execute any valid will dated 16-7-1943, or was the same obtained during his illness when he was not in a sound state of mind?
- (4) Was Munshi Nawal Kishore joint with the defendant No. 2 and was the property in dispute the joint family property of Munshi Nawal Kishore and defendant No. 2? If so, to what effect?
- (5) Is the will invalid for the reasons given in paragraph 22 of the written statement of defendant No. 1?
- (6) To what amount of past and future mesne profits, if any, is the plaintiff entitled?
- (7) To what relief if any, is the plaintiff entitled?
- (8) Is Dr. Pyare Lal Srivastava duly and legally elected President of the Kayastha Pathshala (Prayag) Allahabad, if so, has he any rights to sue?

5. Issues Nos. 1, 2 and 8 relate to the frame of the suit and they were decided by the learned Civil Judge in favour of the plaintiff. Questions, which formed the subject matter of these issues, appear to have been keenly contested in the trial

Court but Mr. Bhargava, the learned counsel for the appellant, did not very seriously press them before us. We have, however, to deal with them. Issue No. 1 is the more important of these issues because it concerns the legal status of the Pathshala and its power to institute the suit, but the answer to it appears to be simple.

6. As we have noted above the claim of the Pathshala to be a society registered under the Societies Registration Act (XXI of 1860) was repudiated by the appellant and it was stated that the society registered under the Act was the Governing Council of the Kayastha Pathshala (Prayag) Allahabad. Rule 41 of the Rules of the Governing Council of the Kayastha Pathshala (Prayag) Allahabad 1932 (Ex. 1) would, however, show that the plea raised by the appellant is entirely lacking in substance. The rule is in the following terms:

The Governing Council may sue and be sued under the name and style of the Kayastha Pathshala (Prayag) Allahabad through the president for the time being.

7. While, therefore, it is true that the society which has been registered is the Governing Council of the Kayastha Pathshala (Prayag) Allahabad the society has adopted a shorter and more convenient and also the commonly known name for the institution of suit by and against it. It is indisputable that a legal entity may choose to have itself described by a particular name for a particular purpose and it naturally follows that if a legal entity has by proper method given to itself or assumed a name for the purpose of suing and being sued a suit brought in that name must be regarded as a suit by that legal entity, provided of course that it has been instituted by a person empowered to do so. The plea that the plaintiff is not a juristic person and is consequently not entitled to maintain the suit is, therefore, plainly misconceived and unsustainable.

8. We may, in this connection, refer to R. 3 as well of the Rules of the Governing Council which is as follows:

All properties which are held by and in the name of the "Kayastha Pathshala" vest in the Governing Council and similarly all properties acquired hereafter by or in the name of the "Kayastha Pathshala" by way of endowment or otherwise shall vest in the Governing Council of the Kayastha Pathshala.

9. It will thus appear that the registered society has also for the purpose of vesting and acquisition of property recognised and assumed the shorter name. The suit must, therefore, be held to have been properly brought in the name of the Kayastha Pathshala (Prayag) Allahabad.

10. The next question is whether the suit could have been instituted through Dr. Narain Prasad Asthana or continued by Dr. Pyare Lal Srivastava, who subsequently signed and verified the plaint. Rule 41 of the Rules of the Governing Council to which reference has already been made authorises institution of suits through the president for the time being and the controversy in the trial Court centred round the question whether the gentlemen referred to

above were presidents for the time being. It is unnecessary for us to enter into the details of the dispute regarding the presidential office of the Pathshala, and the litigations to which it unfortunately gave rise. These details may be gathered from the judgments of this Court dated 10th May 1949, 6th June 1949, 10th June 1949, 27th June 1949 and 18th July 1951 which are respectively Exs. A-1, 8, 7, 8 and 11 of the record. Briefly stated, the facts that in December 1944 there was an election for the office of the president of the Governing Council, which under the rules is held for a term of five years. Sri. Pyare Mohan was declared to have been elected. He took over charge on 1st January 1945 and thereafter under Rule 46 of the Rules of the Governing Council he appointed Dr. Narain Prasad Asthana as vice-president. A series of suits connected with and involving the legality of the election were then filed which were ultimately referred to the arbitration of Dr. Rajendra Prasad, Sri Mahabir Prasad and Dr. Sachhida Nand Sinha. By their award the arbitrators set aside the election of Sri Pyare Mohan and declared Dr. Narain Prasad Asthana, who had secured the largest number of votes among the validly nominated candidates, as the duly elected president. A decree in terms of the award was passed by the Civil Judge of Allahabad on 3rd February 1947 and Dr. Narain Prasad Asthana entered upon the office of the president and began functioning as such. It was in these circumstances that the present suit was instituted on 5th October 1948 through Dr. Narain Prasad Asthana as president. Subsequently, however, as a result of a compromise between the parties concerned the award of the arbitrators was modified by the High Court on 26th November 1948 and the declaration in the award that Dr. Narain Prasad Asthana should be deemed to have been validly elected as president was deleted. On the following day Dr. Narain Prasad Asthana tendered resignation. Again, in original suit No. 1 of 1949 decided on 10th May 1949 the High Court held that Dr. Narain Prasad Asthana was never the president of the society. Subsequently, on 6th June 1949 the High Court passed an order for the appointment of a receiver for the management of the Pathshala and after some changes in the personnel Dr. Pyare Lal Srivastava was ultimately appointed the receiver and he began acting in that capacity. The plaint of this suit was then ordered to be amended and Dr. Pyare Lal Srivastava signed and verified it as receiver. In 1950 Dr. Pyare Lal Srivastava was unanimously elected as president of the Pathshala and thereupon the High Court by its order dated 18th July 1951 (Ex. 11) cancelled its previous order of appointment of receiver and Dr. Pyare Lal Srivastava was directed to hand over charge to himself as president. Dr. Pyare Lal Srivastava thus entered upon the office of the president of the Pathshala and the plaint was again allowed to be suitably amended, and to be signed and verified by Dr. Pyare Lal Srivastava as president.

11. Whatever objection may, therefore, be raised against the institution of the suit originally through Dr. Narain Prasad Asthana, there is not the slightest doubt that as a result of the amendments subsequently made the Court had before it a suit in proper form on behalf of the juristic person who purported to have brought it, and such defect as the suit might have suffered from at the beginning

had been effectively rectified. But it appears to us that the institution of the suit through Dr. Narain Prashad Asthana must also be considered to have been a valid and proper institution. As stated above, Sri Pyare Mohan, after taking over charge of the office of the president, appointed Dr. Narain Prasad Asthana as a vice-president under R. 46 of the Rules of the Governing Council. It may certainly be urged that the election of Sri Pyare Mohan having been declared invalid by the decree passed on the basis of the award given by the arbitrators the appointment of a vice-president made by him should be deemed to have become totally ineffective. But that decree (Ex. 4) itself provided as follows:

Finally and lastly it is decreed and declared that all the acts done and expenditure incurred purporting to have been done by M. Pyare Mohan as president of the K.P. or under the Orders of the Arbitrators shall be deemed to have been done by him as a duly elected president.

12. Appointment of Dr. Narain Prasad Asthana was an act done by Sri Pyare Mohan as president, and under the above clause of the decree it must be regarded as having retained its validity inasmuch as it will be deemed to have been made by Sri Pyare Mohan as a duly elected president. If, therefore, Dr. Narain Prasad Asthana was the vice-president, he could perform the duties of the president during the vacancy in the office of the president, as provided by Rule 39(c) of the Rules of the Governing Council which is as follows:

If for some reason the office of the president falls vacant before the expiry of the term of five years and the interval between the date of such vacancy and the expiry of the term of which the president was elected does not exceed six months the vice-president shall perform the duties of the president for the remaining term, but if the interval exceeds six months the secretary shall issue notice for the election of the president as soon as practicable and the vice-president shall carry on the duties of the president until the election of another president.....

13. We may here note that in its judgment dated 10th May 1949 (Ex A-1) in original suit No. 1 of 1949 the High Court while holding that Dr. Narain Prasad Asthana never was president of the society and so never had himself tie power to appoint a vice-president observed:

It may be that by virtue of his appointment as vice-president by Mr. Pyare Mohan he (Dr. Narain Prasad Asthana) was entitled under Rule 39(c) of the Societies Rules, to perform the duties of the president.....

14. Institution of suits for possession of property belonging to the institution will certainly constitute one of the duties of the president and the present suit should, in these circumstances, be regarded as having been instituted by the Pathshala through the president. However, as we have said above, after the election of Dr. Pyare Lal Srivastava as president-a fact which has been proved by Dr. Pyare Lal Srivastava himself as P.W. 8 and which is not in dispute-the plaint was amended and it was allowed to be signed and verified by him. No question of

limitation was involved and the amendment allowed to be made by the Court and the signature and verification of Dr. Pyare Lal Srivastava on the plaint cured it of such defect as it might have had.

15. Coming to the merits of the case, the first question naturally is whether the plaintiff has proved due execution of the will on which its claim to the property in suit is founded. Due execution obviously implies testamentary capacity and knowledge as well as formal execution and attestation. Since, however, Baleshwar Lal defendant had also pleaded in his written statement that the will was got executed during the illness of Munshi Nawal Kishore when he was not in a sound state of mind the learned Civil Judge formulated a separate question in regard to this matter and incorporated it in issue No. 3. The findings of the learned Judge on this issue are that the will was duly executed by Munshi Nawal Kishore and he was in a sound state of mind at the time of its execution. In recording his findings on this issue he has relied on the testimony of Ram Bharose Lal P.W. 1, Lalta Prasad P.W. 2 and Sri Bishambhar Nath P.W. 3. Ram Bharose Lal is the scribe of the will and he worked as a document writer in the office of the Sub-Registrar. He has stated that he knew Munshi Nawal Krishore from before the execution of the will and that he wrote out the will in accordance with his instructions. He has proved that all the witnesses to the deed affixed their signatures on it in his presence and in that of the testator and the testator affixed his signature in the presence of all the witnesses. Lalta Prasad is one of the marginal witnesses of the will and also the person who identified Munshi Nawal Kishore before the Sub-Registrar when it was presented for registration. He too has proved that he and the other witnesses to the deed affixed their signatures on the deed of will in the presence of the testator and the testator affixed his signature on it in their presence. He has also stated that he knew the testator since 1910 as he too was an employee in Government Estate Allahabad where the testator was a Zildar. Nothing which may in any manner tend to shake the credit of these witnesses has been elicited in their cross-examination and we have no hesitation in accepting their testimony. In fact their testimony was not subjected to any criticism by Mr. Bhargava and all that he contended in this connection was that the statements of these witnesses fall short of proving proper attestation of the will. The argument of rue learned counsel was that although both of these witnesses stated that the other marginal witness of the will signed in the presence of the testator they did not identify the signature of the other witness on the will and the attestation of the will by the other witness cannot consequently be said to have been proved.

16. The first objection to the entertain-ability of the argument advanced by the learned counsel is that the will was allowed to be marked as an exhibit in the case by the trial Court without any protest on the part of the appellant, and the cross-examination of the witnesses produced by the plaintiff to prove attestation of the deed of will does not show that their statement in regard to this matter was being challenged. If a document is inherently inadmissible it cannot, obviously, be accepted in evidence merely because no objection to its

admissibility was taken at an earlier stage. Where however, a document is admissible in its intrinsic nature and the objection to its acceptance in evidence consists only in the fact that it has not been proved in the proper manner the objection must be taken before the document is made a part of the record and marked as an exhibit so that the defect if any in its proof may be repaired. We are supported in this view by the case of AIR 1943 83 (Privy Council) where their Lordships of the Privy Council observed as follows:

Where the objection to be taken is not that the document is in itself inadmissible but that the mode of proof put forward is irregular or insufficient it is essential that the objection should be taken at the trial before the document is marked as an exhibit and admitted to the record, A party cannot lie by until the case before a Court of appeal and then complain for the first time of the mode of proof.

17. It is not therefore, open to the appellant to urge at this stage that attestation of the will in question has not been duly proved.

18. Secondly, it will be seen that no question as to proper proof of attestation has been raised in the grounds of appeal. Mr. Bhargava urged that ground No. 9 relating to the validity of the will is comprehensive enough to include the question of proper proof of attestation; but in our view ground No. 9 has nothing to do with the formal proof of the document or its attestation. It may also be mentioned that the judgment of the learned Civil Judge shows that this question was not raised before him even in arguments. In these circumstances the appellant is not entitled to raise the question now. We may, however, examine the merits of the objection because Mr. Bhargava has dwelt upon it at length.

19. The will is on the face of it a document attested by two marginal witnesses and in view of the fact that Lalta Prasad one of the attesting witnesses has identified one of the signatures as his and has further stated that the other attesting witness also signed the deed, the obvious conclusion is that the other signature on the margin is that of the other attesting witness.

20. It is not necessary that attesting witnesses should be able to identify the signature of each other or even to know each other and as such there can be no basis for the requirement that the witnesses should identify each other's signature. An attesting witness, supposing that he is unacquainted with the signature of the other attesting witness, cannot truly speaking identify the signature of such other witness, and if he states that he does, the only meaning attributable to such a statement is that as the deed bears the signatures of two persons as attesting witnesses and one of the signatures is his, the other signature must necessarily be that of the other witness. Such a statement amounts to no more than an inference which is hardly evidence and which is also too obvious to need evidence. The law as to attestation of wills is contained in section 63(c) of the Succession Act and the mode of proving documents required by law to be attested has been laid down in Ss. 68 to 72 of the Evidence Act. Nothing in these provisions makes it a necessary element in the proof of

attestation that the signatures of all the attesting witnesses of a will should be identified, and it is not permissible to add to the statutory requirements of the mode of proving it.

21. Of course it has to be proved that each of the attesting witnesses saw the testator signing the will or received from the testator a personal acknowledgment of his signature and that each of the witnesses signed the will in the presence of the testator. This has been satisfactorily proved by the plaintiff. To repeat what we have already noted above. Ram Bharose Lal P.W. 1 the scribe of the will, has testified in clear terms to the fact that all the witnesses affixed their signatures on the document in his presence and in the presence of the testator and further that the testator affixed his signature in the presence of the scribe and all the witnesses. Again, Lalta Prasad P.W. 2, one of the attesting witnesses, has deposed that the testator signed in the presence of all the attesting witnesses and all the witnesses signed in his presence. He has also identified his own signature on the will. He has certainly not stated expressly or in so many words that he himself saw the other attesting witness signing in the presence of the testator, but that is the obvious meaning of the statement that he and the other attesting witness signed in the presence of the testator, because he must be deemed to have been deposing to what he had seen and was competent to depose to. It is, however, not necessary that this fact should be proved by an attesting witness because u/s 63(c) of the Succession Act it is not necessary that more than one witness be present at the same time, and if therefore, the fact is proved by any other evidence the requirement of law is fully satisfied. In the present case it has been expressly stated by the scribe of the will that all the attesting witnesses signed in his presence and in the presence of the testator. No room is, therefore, left for the argument that any ingredient of the legal proof of attestation is wanting.

22. In support of his contention that attestation of the will has not been properly proved Mr. Bhargava placed reliance on the following case- Salaik Chand and Others Vs. Mt. Tamiz Bano and Others, , Vishnu Ramkrishna Wani Vs. Nathu Vithal Wani, ; Jagannath v. Mt. Dhiraja, AIR 1918 Oudh 120.

23. In the first case the question at issue was whether execution of a hypothecation bond by the alleged executant had been proved. The plaintiffs had produced two witnesses to prove the signature of the executant. The first witness, who was one of the plaintiffs and was only a lad of 12 years at the time of the alleged execution of the bond, was not regarded reliable witness. The second witness, who was an attesting witness to the deed, was illiterate and on account of his illiteracy he could not have been in a position even to fix the identity of the deed on which, according to his statement, the executant had signed. His statement regarding the execution of the deed in question was obviously valueless. The case, therefore, turned upon its own facts. In the instant case the situation is very different inasmuch as the scribe and the marginal witnesses have identified the deed of will, have proved their own

signatures thereon and have further testified to the fact that the other attesting witness also signed the deed. In our view, therefore, the case of *Salaik Chand and Others Vs. Mt. Tamiz Bano and Others*, does not support the contention of the learned counsel.

24. In the second case the facts were that Dr. Pillai, an attesting witness called to prove a will alleged to have been made by one Ganga Bai, stated that he went to the house of Ganga Bai after she had placed her thumb-mark on the will and when he went near her she acknowledged before him that the thumb-mark on the document was hers. He also stated that Onkar Lahnu, one of the attesting witnesses, was there when he arrived, but he had not seen Onkar Lahnu seeing the testatrix putting her thumb impression and he was not in a position to say that Onkar Lahnu signed the will in the presence of the testatrix. It was in these circumstances that it was held by their Lordships that the evidence of Dr. Pillai fell short of the mandatory requirements of S. 68 of the Evidence Act. In the present case it has been proved by clear evidence that the testator signed in the presence of both the attesting witnesses who also signed in the presence of the testator.

25. The third case involved the execution of a deed of further charge. The signature of one of the attesting witnesses of the deed had been proved by secondary evidence but there was nothing to prove the further fact of execution by the alleged executant. It was urged that the registration endorsement should be treated as evidence of the fact of execution, but the Court did not regard it as sufficient proof of execution in view of the suspicious circumstances attending the execution. Obviously the case has no application here.

26. The authorities relied upon by the learned counsel do not, therefore, bear out his contention, and the evidence led by the plaintiff in proof of due attestation of the will cannot be said to be deficient in any legal requirement. We may refer in this connection to the case of *Naresh Charan Das Gupta Vs. Paresh Charan Das Gupta*, as indicating the manner in which evidence relating to the attestation even of a will may be examined and interpreted. Dealing with the argument on the question of attestation in that case their Lordships of the Supreme Court observed as follows:

It was also argued for the appellant that there was no proof that the will was duly attested as required by S. 68, Indian Succession Act, and that it should therefore, be held to be void. P.Ws. 1 and 2 are the two attestors, and they stated in examination-in-chief that the testator signed the will in their presence, and that they attested his signature. They did not add that they signed the will in the presence of the testator. Now, the contention is that in the absence of such evidence it must be held that there was no due attestation. Both the Courts below have held against the appellant on this contention.

The learned Judges of the High Court were of the opinion that as the execution and attestation took place at one sitting at the residence of P.W. 1, where the

testator and the witnesses had assembled by appointment, they must all of them have been present until the matter was finished, and as the witnesses were not cross-examined on the question of attestation it could properly be inferred that there was due attestation. It cannot be laid down as a matter of law that because the witnesses did not state in examination-in-chief that they signed the will in the presence of the testator, there was no due attestation. It will depend on the circumstances elicited in evidence whether the attesting witnesses signed in the presence of the testator. This is a pure question of fact depending on appreciation of evidence. The finding of the Court below that the will was duly attested is based on a consideration of all the materials, and must be accepted. Indeed, it is stated in the judgment of the Additional District Judge that "the fact of due execution and attestation of the will was not challenged on behalf of the caveator at the time of the hearing of the suit. This contention of the appellant must also be rejected.

27. We may also refer to the case of AIR 1944 40 (Oudh) where only one of the three attesting witnesses to a deed of mortgage executed by a lady was produced to prove execution and he was unable to point out the lady's signature upon the deed. The question was whether in view of his inability to do this he had proved her signature within the meaning of Sections 67 and 68 of the Evidence Act. The question was decided in the affirmative and we may quote below a portion of the head-note of the report:

Because a witness is unable to point to the signature on a document of the person whose signature he purports to have attested it does not necessarily follow that he has failed to prove that signature within the meaning of Sections 67 and 68. According to the definition of "attested" in Section 3, T.P. Act, it is only necessary for the person attesting to have seen the other person sign or affix his mark on the instrument in his presence, or to have received from the executant a personal acknowledgment of his signature or mark. If either of these conditions is satisfied then there is valid attestation, and there is nothing in the Evidence Act which indicates that it is necessary for the attesting person in order to prove execution to point to the signature or mark made by the executant. That this is not necessary is clear from the fact that a person can attest merely on receiving acknowledgment from the executant of his signature or mark. Such an attesting witness is competent to prove execution as well as any other attesting witness, though he might not be able to point to the signature or mark of the executant.

28. It may be mentioned that in the above case reference was made to *Salaik Chand and Others Vs. Mt. Tamiz Bano and Others*, and contrary to the view expressed therein by one of the learned judges constituting the Bench it was observed that there was no reason why the word "proved" in Section 3 of the Evidence Act should not be construed according to the definition, in relation to matters covered by sections 67 and 68 of the Evidence Act. In the instant case we are not called upon to decide that question and we do not, therefore, express

any opinion thereon. Upon an examination of the evidence regarding the attestation of the will we are clearly of the view that even if an objection as to the proper proof of attestation were entertainable it is altogether devoid of merit and it must be held that the plaintiff has satisfactorily proved the formal execution and due attestation of the will.

29. Regarding the testamentary capacity of Munshi Nawal Kishore also there can be no doubt. Ram Bharose Lal the scribe of the will has stated that he had scribed the will as instructed by the testator, and that the testator was in his proper senses and sound health when the will was executed. Lalta Prasad an attesting witness of the will has also proved that the testator was possessed of a sound disposing mind when he executed the will. The correctness of the statements does not appear to have been questioned by the appellant and no cross-examination was directed against this part of the testimony of the said witnesses. The evidence of these two witnesses is clear, convincing and reliable and has not been shown to suffer from partiality or any other defect. It has further received valuable corroboration from the statement of Sri Bishambhar Nath P.W. 4, a lawyer of Allahabad of 28 years standing. Sri Bishambhar Nath has stated that he was the standing counsel of the Crosthwaite College and Munshi Nawal Kishore was a Karinda of the zamindari owned by the college. In connection with the work of the zamindari Munshi Nawal Kishore used to visit his place very often. Munshi Nawal Kishore told him that he wanted to make a will of his entire property in favour of the Kayastha Pathshala and obtained his opinion in the matter. He advised Munshi Nawal Kishore to make a will. The witness has further stated that in those days Munshi Nawal Kishore was in good state of health and had a sound understanding This is said to have happened twelve years before the statement (which was recorded on 15th August 1955). In cross-examination Sri Bishambhar Nath has also said that within a year of the obtaining of his opinion Munshi Nawal Kishore told him that he had executed a will in favour of the Kayastha Pathshala, The only reason suggested on behalf of the appellant for not accepting the testimony of Sri Bishambhar Nath is that he was one of the trustees of the Pathshala. This cannot, however, be sufficient for rejecting it or looking upon it with suspicion. The learned Civil Judge has observed that his evidence deserves weight and must be accepted as true and trustworthy, and we endorse this observation. Coupled with the oral evidence of these three witnesses is the circumstance that the testator went to the Registration Office, taking, according to the statement of the scribe, one or the attesting witnesses with himself and got the will written out registered.

30. As against this the appellant has led evidence to prove that old age and illness had combined to greatly impair the memory and understanding of Munshi Nawal Kishore and he was not of sound mind at the time of the execution of the will. Before we examine that evidence we think it necessary to mention a few matters which have to be borne in mind in judging it. Firstly, it will be seen that nowhere in the elaborate written statement filed by the defendant there is the slightest suggestion that Munshi Nawal Kishore was not possessed of a sound

mind or that he suffered from weakness of understanding or failing memory, and the plaintiff has only been put to strict proof of the will in dispute. The appellant, according to his case, formed a joint Hindu family with Munshi Nawal Kishore and was living with him at Allahabad since 1943. The state of Munshi Nawal Kishore's health and his power of understanding must, therefore, have been fully in the knowledge of the appellant, but still no plea as to want of testamentary capacity in Munshi Nawal Kishore was taken by the appellant. It is true that the person who propounds a will must satisfy the conscience of the Court as to the fact that "the instrument so propounded is the last will of a free and capable testator"; but, in judging whether the proof given by the propounder should create the required satisfaction, the Court will take into account that no plea of the testator's incapacity to make the will has been taken by the person opposing the will although he must necessarily have been aware of the incapacity if it had really existed. It would not be seen that in the objection (Ex. 17), dated 19th October 1946 filed by the appellant against the grant of letters of administration to the plaintiff also he had not disputed the testamentary capacity of the testator or even the execution of the will. Then, to none of the three witnesses examined by the plaintiff to prove that Munshi Nawal Kishore had a sound disposing mind at the time of the execution of the will was any suggestion made on behalf of the appellant that Munshi Nawal Kishore was bed ridden and had lost his power of understanding. In fact, as we have noted above, the testimony of the witnesses on this part of the case was not at all challenged in cross-examination. At no stage, therefore, before the appellant began leading his evidence he had given any indication that his case was that at the time of the execution of the will in question the testator was not in a sound state of mind.

* * * *

[After considering evidence in paras 30 to 31 the judgment proceeded].

32. Obviously, therefore, the evidence produced by the appellant does not establish that Munshi Nawal Kishore was not of a sound mind at the time of the execution of the will or at any other time, nor does it render the truth of the testimony of the witnesses examined by the plaintiff as to the testamentary capacity of Munshi Nawal Kishore in any manner doubtful.

33. The appellant has failed to establish even the physical disability of Munshi Nawal Kishore. Only Krishna Kumar Sinha, the appellant, himself deposed to the stroke of paralysis and as we have said above his statement is not corroborated even by his mother. Although the appellant has stated that Munshi Nawal Kishore was treated by a doctor and a "Hakim" he has not even been able to tell their names, leave aside producing them as witnesses. The case that Munshi Nawal Kishore got a stroke of paralysis in 1940 appears to have been thought of at a late stage only on the basis of the entry in the death register of the Municipal Board showing that Munshi Nawal Kishore died of paralysis.

34. It is true that Munshi Nawal Kishore was an "old man of 70 years of age" as

he had described himself in the will and his physical and mental faculties could not possibly have remained unaffected by age. But the law does not require that a person, in order to be capable of making a will, must be possessed of his mental powers at their best and unimpaired in any degree by old age or disease. What is required for the validity of a will is that the testator should have been able, at the time of making it, to comprehend the nature and effect of the disposition, should have sufficient memory and intelligence to form a proper judgment regarding it, and should have freely decided to make it. Whether or not a testator had the required capacity has naturally to be ascertained with reference to the disposition in question. Testamentary capacity has to be judged not by an absolute standard but as relative to a particular testamentary act.

35. The will in the present case is neither a long nor a complicated document and the entire property movable and immovable has been bequeathed by means of it to the Kayastha Pathshala. The contents of the will are free from all complexity and the language employed therein is one that is commonly used. Munshi Nawal Kishore had retired as a zildar of the Govt. Estate at Allahabad and the language of the will must have been quite familiar to him. There was an earlier will in favour of Baleshwar Lal, his wife's brother, of which only he from amongst the persons present at the time of the execution of the will could have knowledge and the will in question specifically revoked the earlier will. There is also an expression in the will of a sense of disappointment that Baleshwar Lal and his wife, who were expected to live with him and look after him, had gone away after the execution of the will in favour of Baleshwar Lal in November 1942 and had also taken away that will with themselves. There is in the end a direction that after his death the ornaments of his deceased wife and the household goods should be sold and from the proceeds thereof two rooms should be built in the Kulbhaskar Ashram, one in his name and the other in the name of his wife, and stone slabs bearing the inscription detailed in the will should be fixed thereon. From the nature of the disposition and the recitals made in the will we have no doubt that the mental capacity of Munshi Nawal Kishore was adequate to the making of it and it was an outcome of his free and spontaneous act guided by memory and understanding.

36. Mr. Bhargava has urged that there are certain suspicious circumstances surrounding the will which indicate that it was not executed in the manner alleged by the plaintiff and that it was not freely made by the testator. Firstly he has drawn attention to the fact that the age of the testator as given in the will is 79 years, whereas, according to Ram Bharose Lal P.W. 1 the scribe of the will, the testator was only about 60 years at the time of its execution. It will be noted that there is a wide range of difference between the estimates made by the witnesses about the age of the testator.

The appellant himself stated that Munshi Nawal Kishore died at the age of 65 or 66 years, while according to Deo Narain Singh D.W. 5, he died at the age of eighty. Sri Bishambhar Nath P.W. 4 has stated that Munshi Nawal Kishore could be

60 or 65 years old at the time of the talk about the will with him. In the extract of the death register of the Municipal Board Allahabad (Ex. 2) the age of the deceased is given as 84 years. It may be that Munshi Nawal Kishore did not look as old as he really was and that may account for this difference in the estimates, but to whatever reason it may be due, nothing turns on it and no conclusion can be drawn from it. The second circumstance on which emphasis has been laid by the learned counsel for the appellant is that the plaintiff on its own showing, did not know of the will during the life time of the testator and could trace it out only a little before filing the application for grant of letters of administration. It has been very rightly observed by the learned Civil Judge that this circumstance "instead of raising any suspicion about the will goes to confirm this conclusion that Nawal Kishore executed this will Ex. 10 out of his own free mind, and as his independent act without any outside influence." If the will had been got executed by resort to machination or other improper means by some person he would certainly have arranged to secure for the Pathshala the custody of the will and would not have left it to be discovered and traced out after the death of the testator. Admittedly the testator was issueless and his wife was dead. He felt that Baleshwar Lal his wife's brother, had been unfaithful to him inasmuch as instead of living with him and caring for him in his old age he had gone away with the will executed in his favour. There was nothing unnatural, therefore, in the choice which the testator made as to the fit object of his bounty. He had also consulted Sri Bishambhar Nath P.W. 4 about making a will of his property in favour of the Pathshala and he had been advised to make a will. There is no reason whatsoever to suppose that there was any element of influence, importunity or persuasion in his advice which the testator had himself sought. It does appear that the testator did not keep the will with himself after receiving it back from the Registration Office. But, he could not be sure in whose hands the will would fall after his death and he might have desired to keep it out of the reach of such persons as might have been interested in destroying or suppressing it. The reason why he did not deliver it to the Pathshala might have been that he did not want to put the will out of his own reach at once. On these matters, however, we can only speculate, but there is nothing in them which may excite any reasonable suspicion against the validity of the will. The plaintiff's evidence does not certainly indicate from whose custody the will was recovered but the absence of this evidence does not in our opinion, affect the case. The original will is before the court it is a registered will; it has been proved to bear the signature of the testator and the appellant, who must be familiar with the handwriting of the testator, has not denied the signature. The circumstance, therefore, that the will had not been delivered to the Pathshala and did not come to its knowledge in the life time of the testator does not at all raise any doubt against the will. Indeed it shows that the plaintiff had no hand in bringing it into existence. Lastly, it was urged that it is wrongly stated in the will that the testator was alone and nobody was left in his family and this misstatement indicates that somebody other than the testator got this recital made in the will. This argument was based on the fact that according to the finding of the learned Civil Judge the appellant formed

a joint Hindu family with the testator. The family pedigree given by the appellant in his written statement has certainly been accepted as proved and it has further been held that there was no separation in the family. But even so, considering the circumstances of the life of the testator it is not difficult to understand why he stated in the will that nobody was left in his family. We agree with the learned Civil Judge that it is quite likely that the testator meant that "he had no issues of descendants in his direct line" The facts pointed out on behalf of the appellant do not, therefore, show that the circumstances attending the execution of the will are suspicious in any degree.

37. We may here mention that the principles which should be kept in mind and followed by a court in pronouncing upon the execution and validity of a will have been exhaustively laid down by their Lordships of the Supreme Court in *H. Venkatachala Iyengar Vs. B.N. Thimmajamma and Others*, . We have considered the evidence and the circumstances of the case in the light of these principles and we find that it has been satisfactorily established that the will in question was duly executed by Munshi Nawal Kishore in a sound state of mind and that the disposition was the result of his free will.

38. The next issue of importance in the case is issue No. 4. But before taking it up we may briefly dispose of issue No. 5. Among the reasons for the invalidity of the will enumerated in paragraph 22 of the written statement of the appellant reason (a) is the subject matter of issue No. 4 and the other reasons are covered by issue No. 5. Mr. Bhargava confined his arguments to reason far and did not press the other reasons mentioned in the said paragraph and did not challenge the findings of the learned Civil Judge regarding them We have ourselves examined those reasons and we find no substance in them.

39. The question now to be considered is whether the houses in suit were the joint family property of the appellant and Munshi Nawal Kishore. The family pedigree given by the appellant in his written statement was proved by Brahma Deo D.W. 4 and Smt. Raghubanshi Devi D.W. 8 and since there was no evidence in rebuttal the learned Civil Judge accepted the case of the appellant regarding his relationship with Munshi Nawal Kishore. Relying on the presumption of jointness as well as the un-rebutted statements of the witnesses examined by the appellant the learned Judge also accepted that Munshi Nawal Kishore formed a joint family with his uncles. Ram Lal and Girja Lal, and also with the appellant who is the grandson of Girja Lal. The family pedigree may here be noted in order to facilitate reference.

40. We too would accept that the appellant was related to Munshi Nawal Kishore in the manner alleged by him and that Munshi Nawal Kishore was a member of a joint family with Ram Lal, Girja Lal and the appellant. But the fact that the property in dispute was joint family property has still to be proved by the appellant and this fact according to the finding of the learned Civil Judge he has totally failed in proving.

41. The principles governing the determination of the question whether a particular property in the possession of a member of a joint Hindu family is his self-acquired and separate property or joint family property are well settled. We may only refer to the case of Appalaswami v. Suryanarayanamurti, AIR 1947 PC 189 where their Lordships of the Privy Council laid down the law in the following terms"

The Hindu law upon this aspect of the case is well settled. Proof of the existence of a joint family does not lead to the presumption that property held by any member of the family is joint, and the burden rests upon anyone asserting that any item of property was joint to establish the fact. But where it is established that the family possessed some joint property which from its nature and relative value may have formed the nucleus from which the property in question may have been acquired, the burden shifts to the party alleging self-acquisition to establish affirmatively that the property was acquired without the aid of the joint family property: See Babubhai Girdharlal Vs. Ujamlal Hargovandas, , C.V. Vythinatha Aiyar Vs. C.V. Varadaraja Aiyar and Others, .

42. In Shrinivas Krishnarao Kango Vs. Narayan Devji Kango and Others, their Lordships of the Supreme Court accepted this statement of the law and further observed as follows:

Whether the evidence adduced by the plaintiff was sufficient to shift the burden which initially rested on him of establishing that there was adequate nucleus out of which the acquisitions could have been made is one of fact depending on the nature and the extent of the nucleus. The important thing to consider is the income which the nucleus yields. A building in the occupation of the members of a family and yielding no income could not be a nucleus out of which acquisitions could be made, even though it might be of considerable value. On the other hand, a running business in which the capital invested is comparatively small might conceivably produce substantial income, which may well form the foundation of the subsequent acquisitions. These are not abstract questions of law but questions of fact to be determined on the evidence in the case.

43. It is admitted by the appellant and it was accepted, by his learned counsel before us in arguments that the houses in suit were purchased and constructed by Munshi Nawal Kishore and it was also conceded that the case of the appellant that the houses partook of the nature of joint family property rests entirely on the existence of a nucleus of joint family property with the aid of which the houses were or could have been acquired and constructed. But before we go to the evidence as to the alleged nucleus reference to some matters appears necessary.

44. Upon the death of Munshi Nawal Kishore an application (Ex. 15) dated 19th April 1945 was filed by Baleshwar Lal for the entry of his name in municipal records over the houses in suit, with the allegation that he had become their owner under a will executed by Munshi Nawal Kishore deceased. On 30th April

1945 the appellant too made an application (Ex. 14) to the Executive Officer. Municipal Board Allahabad, praying that his name be recorded in the municipal papers in place of the name of Munshi Nawal Kishore as he was the sole heir of the deceased. We do not attach any importance to the use of the expression "heir" in this application because it might have been used loosely for "survivor". However, there was a compromise between the two claimants and on 29th October 1945 they filed a joint application (Ex. 12) that the names of both of them be entered jointly over all the three houses. The appellant admitted having entered into this compromise in his objection (Ex. 17) against the grant of letters of administration to the Pathshala. Yet in his examination-in-chief in this case he stated:

Previously I had given an application for mutation of my name in the municipality. One or two months thereafter my maternal uncle Baleshwar Lal came to me and said that my application was not traceable, that I should affix my signature on a piece of paper and hand it over to him and that he would make another application. I affixed my signature on a plain paper and handed it over to him. I had never given my acceptance that the houses in dispute might be recorded against the name of Baleshwar Lal.

When cross-examined on this point the appellant said:

I do not remember if Baleshwar Lal had also given any application in the municipality for getting his name recorded and that both of us had been summoned together in the municipality. I and Baleshwar Lal had not made any joint application to the Municipal Board. I do not remember if Baleshwar Lal had obtained my signature on one blank paper or several blank papers. The municipal Board had made enquiries on my application. I had been to the Municipal Board in connection with my application. I left the matter in the hands of Baleshwar Lal for doing pairvi. Later on I came to know that both my name and the name of Baleshwar Lal had been recorded in the Municipal Board. This I came to know in March or April 1946. I did not raise any objection even after I came to know of it.

45. These statements show that the appellant has scanty regard for truth and his testimony does not deserve any credence. He felt that the compromise into which he so readily entered with Baleshwar Lal might be regarded as a little inconsistent with his claim and he, therefore, invented a falsehood and tenaciously stuck to it.

46. Then, in the objection (Ex. 17) filed by the appellant on 19-6-1946 against the grant of letters of administration to the Pathshala we find that although the appellant claimed to be the surviving member of a joint family he did not challenge the validity of the will on the ground that the property comprised in it was joint family property. The will had been filed in Court and the objection of the appellant shows that he had seen it. In these circumstances it is natural to expect in the objection some mention of the fact that the houses bequeathed

under the will were joint family property and the bequest was, therefore, invalid.

47. It has also to be mentioned that quite apart from the existence of nucleus of joint family property, the appellant attempted to prove that the various members of the family used to pool their separate earnings, the major contributor to the pool having been Ram Lal who did some business at Hyderabad (Sind) and used to send Rs. 200 or 250 per month to Munshi Nawal Kishore. The evidence on this point is extremely meagre and unsatisfactory and is in a large major hearsay. It has accordingly been rejected by the learned Civil Judge. Mr. Bhargava has not placed any reliance on it and he has based his arguments only on the evidence relating to the nucleus of joint family property.

48. It has been tried to be established by the appellant that (1) the family was possessed of considerable agricultural land in village Manipur (Bihar) and the saving from the income of the land used to be sent to Munshi Nawal Kishore and kept by him; (2) a substantial portion of this land was sold and the money obtained by sale was utilised by Munshi Nawal Kishore for the purchase and construction of the houses in suit; and (3) the ancestral house in village Manipur (Bihar) had fallen down and a sum of Rs. 500 realised from the sale of the materials of that house was brought by Munshi Nawal Kishore to Allahabad for the construction of the houses in suit.

49. The first thing to be noted in connection with this part of the case is that no sale deed for the houses in suit has been filed and it is not known when and for what price they were purchased. The mother of the appellant, according to the evidence, had been living with Munshi Nawal Kishore since 1939 and the appellant himself since 1943. Still no document relating to the houses in dispute has been produced by the appellant. All that we have in evidence is that the houses were purchased and constructed by Munshi Nawal Kishore, and the time of the sale and purchase of the construction was, according to the appellant, 1929 or 1930 and according to Smt. Reghubansi Devi the appellant's mother, 30 or 35 years prior to her statement in this case. The amount spent in the construction of the houses has also not been indicated and we have before us only their value on the date of the suit which was given as Rs. 12,480 in annexure "A" of the plaint and accepted by the appellant as correct. Even if it were possible to conceive of a reason for the non production of the title deeds regarding the houses in suit, there can be no acceptable explanation on behalf of the appellant for not producing any documentary evidence about the sale of the agricultural land the price of which is said to have been utilized for the acquisition of the houses in suit. The land sold was, according to the evidence, in the residential village of the appellant and it is, therefore not possible to believe that the appellant could not have obtained information about the sale deeds. Then the most significant feature of the case is that no extracts from the village records have been filed by the appellant to show the existence of the agricultural land owned by the family. Referring to this feature of the case the learned Civil Judge has observed that

in the absence of documentary evidence which could be conclusive on the point it can not be possible to accept and rely upon the oral evidence and to hold that the family possessed 50 bighas or so of tenancy land.

It was contended by Mr. Bhargava that this approach to the case was not correct and even in the absence of any documentary evidence the oral evidence ought to have been accepted. We are unable to accede to this contention. Having regard to the fact that the existence of this land was one of the most vital matters in the case, and the question whether the houses in suit were impressed with the character of joint family property was dependent entirely upon the existence or otherwise of the land, the non-production of any sale deed and at any rate of extracts from village records gives rise to the inference that such sale deeds do not exist and no entries in the village records about the existence of any land in possession of the family are to be found to support the case of the appellant.

50. It was urged that if a fact sought to be proved by a party admits of proof by oral evidence and there is no statutory prohibition against the reception of such evidence it is open to him to prove it by means of oral evidence and there can be no justification in law for drawing an inference adverse to him from the fact that no documentary evidence has been produced, even if documentary evidence of a clear and almost conclusive character should be in existence. Whether or not an adverse inference from the non-production of the best evidence by a person on whom the burden of proving a fact lies should be drawn is not, however, a matter of an inflexible rule but is dependent upon the circumstances of each individual case. In inferring the existence or non-existence of a certain fact from the omission of a party to produce a particular evidence, the Court follows the same mental process which is followed and is indeed implicit in all inferences. The question always is whether the existence of a fact or a state of thing makes the existence of another fact or state of things so likely that it may be presumed to exist; and even in deciding whether an inference adverse to a party should be drawn from the non-production of a particular evidence or type of evidence the Court is really answering the above question. Naturally the answer must vary according to the circumstances. The nature of the fact required to be proved and its importance in the controversy; the usual and commonly recognised mode of proving it; the nature, quality and cogency of the evidence which has not been produced and its accessibility to the party concerned have all to be taken into account. And it is only when all these matters have been duly considered that an adverse inference may be drawn. But the proposition that the Court is never justified in drawing an adverse inference from the non-production of a particular type of evidence is manifestly untenable.

51. In *Hiralal and Others Vs. Badkulal and Others*, their Lordships of the Supreme Court had before them a case in which the defendants had produced the account books in their possession. Dealing with the non-production of the account books, their Lordships observed:

The defendants had written the accounts in their own books from which the true

balance could be ascertained. An inference from the statement of Hiralal can easily be raised that the balance entry of Rs. 34,000 also existed in his own books. Mr. Bindra tried to get out of this situation by urging that it was no part of the defendants' duty to produce the books unless they were called upon to do so and the onus rested on the plaintiffs to prove their case. This argument has to be negated in view of the observations of their Lordships of the Privy Council in AIR 1917 6 (Privy Council), which appositely apply here.

52. Their Lordships then quoted the following passage from the Privy Council case:

A practice has grown up in Indian procedure of those in possession of important documents or information lying by, trusting to the abstract doctrine of the onus of proof, and felling, accordingly, to furnish to the Courts the best material for its decision. With regard to third parties this may be right enough—they have no responsibilities for the conduct of the suit; but with regard to the parties to the suit it is to their Lordships' opinion, an inversion of sound practice for those desiring to rely upon a certain state of facts to withhold from the Court the written evidence in their possession which would throw light upon the proposition.

53. These decisions were followed in *Devji Shivji Vs. Mohanlal Odhabji Thacker and Others*, and it was observed:

If a party to an action is in possession of the best evidence, which one way or other is decisive on the facts in issue then there is a heavy duty cast upon him to assist the Court with the same and that notwithstanding what the abstract doctrine of the onus of proof may suggest about it. And in case he fails to produce it without any reasonable justification, whether called upon to do so or not, then in law it is open to the Court to draw an adverse inference against him for that reason.

54. It will be noted that in each of the above cases the onus of proving the fact in question was not on the party who had withheld the documents relating thereto, and yet an adverse inference was drawn against him. In the instant case it is obvious and was also conceded that the burden lies on the appellant to prove the existence of nucleus of joint family property and consequently the observations made in the above cases apply here with greater force. We may also refer to *Ridhikaran Ramadhin Vs. French Motor Car Company Ltd. and Others*, where it was stated:

If a party to a case does not produce a document which is the best evidence in support of his contention an inference can be drawn that if produced, it would be against his contention. It is only in the case of non-production of document irrelevant to the case that such an inference cannot be drawn unless the party is asked to produce the document and he fails to do so.

55. It does not make any difference that the documents relevant in the present case are not account books, nor does it make any difference in principle that the

inference drawn in the present case is not that the documents, if produced, will not support the plaintiff but that no such documents exist. In our opinion, the circumstances of the case and the authorities mentioned above amply justify an adverse inference against the appellant. When we examine the oral evidence, however, we find that even if it is judged on its intrinsic merit without taking into account the fact of the non-production of any documentary evidence it is so contradictory, improbable and unsatisfactory that it is not possible to place any reliance on it.

[After considering evidence in Paras 56 to 61 the judgment proceeded.]

56. It would thus appear that the statements of these witnesses are so discrepant, so much opposed to probabilities and so artificial and unnatural that it is not possible to place any reliance on them. A remarkable feature of the evidence is that all the witnesses, excepting Krishna Kumar Sinha and Smt. Raghuband Devi, have, on a set pattern, spoken to having heard or over-heard conversations of the members of the family or to have received information from Munshi Nawal Kishore himself regarding his affairs. On the basis of this evidence it is not possible to hold that any land belonging to the family was sold and the price obtained by sale was spent on the purchase and construction of the houses in suit. It is inconceivable that the family should have decided to dispose of its ancestral agricultural land of considerable value in order to acquire or build houses in Allahabad a place with which the family had no connection whatsoever except that Munshi Nawal Kishore was in service there. In fact it is not possible to hold on this evidence that the family had any agricultural land at all and the question of sale does not, therefore, arise. The story that the ancestral house had fallen down and that a sum of Rs. 500 was obtained from the sale of the materials of the house and it was brought by Munshi Nawal Kishore to Allahabad does not also deserve any credence and it appears to have been introduced with the object that even a residential house, which could not otherwise have formed a nucleus for acquisition of any property, may also serve that purpose. The evidence relating to the existence of nucleus of joint family property is, in our opinion, entirely untrustworthy and deserves to be discarded.

63. Reference was made to the fact that Munshi Nawal Kishore was drawing a very small salary of Rs. 15 or 20 per month and it was urged that he could not have, therefore, been in a position to purchase and construct the houses in suit without drawing upon some other source of income. As we have observed above, it is not known when the purchases took place and for what price, and the market value of the houses in 1948 can be of little help in determining the money spent in their purchase or construction. Besides, it is unrealistic to judge the financial resources of persons employed as Ziledars etc. from their salaries. We may in this connection draw attention to an observation in *Shrinivas Krishnarao Kango Vs. Narayan Devji Kango and Others*, the case to which we have already referred in an earlier part of the judgment. At page 382 of the report their Lordships, while considering a similar argument, said:

After 1901, Deviji built a house on S. Nos. 642, 644 and 645 at a cost estimated between Rs. 2000 and 4000. Thus sums amounting about Rs. 30,000 had been invested in the acquisition of these properties and construction of the houses. Where did this money come from?

The evidence is that Siddopant was a Tehsildar in the State of Hyderabad and was in service for a period of 40 years before he retired on pension. Though there is no precise evidence as to what salary he was drawing, it could not have been negligible, and salary is the least of the income which Tehsildars generally make.

64. However, the defendants having totally failed to prove the existence of any nucleus it is unnecessary to enquire into or speculate about the earnings or resources of Munshi Nawal Kishore.

65. It was contended by Mr. Bhargava that since there is no evidence in rebuttal on behalf of the plaintiff, the evidence produced by the appellant regarding the nucleus of joint family property is entitled to acceptance despite its infirmities. We, however fail to see how a finding regarding the existence of nucleus of joint family property can be recorded on the basis of the evidence produced by the appellant in this case. It is true that in judging the acceptability of an evidence the absence of contrary evidence is also a factor to be taken into consideration, but the falsity of even an un-rebutted evidence may be so patent or the evidence may be so unworthy of credence or so unsatisfactory that the Court cannot regard the fact which is sought to be proved by such evidence as having been proved. An evidence may be destroyed or it may be said, sufficiently rebutted by its inconsistencies, its improbabilities and its inherent defects and thus cease to be a fit basis for a finding. For the rejection of such evidence no evidence in opposition is necessary. We may here refer to the following observation of Deasi, C.J. in *Sri A.C. Agrawal Vs. Union of India (UOI)* and Another,

We are aware of no law that the allegations made by a party unless contradicted should be accepted by the Court. Courts always disbelieve even uncontradicted allegations if they find them to be contradicted. Moreover an allegation can be contradicted not only directly but also by adverse circumstances.

66. The fact that the plaintiff has not led evidence in rebuttal of the evidence led by the appellant in support of his plea regarding the existence of nucleus of joint family property cannot, therefore, be a sufficient ground for the acceptance of the evidence produced by the appellant when it is so utterly unworthy of belief.

67. It must, therefore, be held that the houses in suit were the self-acquired property of Munshi Nawal Kishore and were not joint family property. The learned counsel for the appellant did not attempt to argue that the houses acquired the nature of joint family property by being thrown into the common stock. In fact, there was no common stock into which the property could have been thrown and even if the evidence of the appellant that Munshi Nawal Kishore spent the income derived from the houses in suit on him, his brother and his mother, this conduct

of Munshi Nawal Kishore could not amount to an abandonment of his exclusive right in the houses and it could not import to the houses the character of joint family property. The result is that Munshi Nawal Kishore was competent to bequeath the houses in suit to the plaintiff and the plaintiff is the owner of the houses under the will dated 16th July 1943.

68. No other point has been pressed before us on behalf of the appellant. The decree passed by the trial Court must, therefore be confirmed.

69. The appeal is dismissed with costs.