

**(2011) 03 DEL CK 0562**  
**In the Delhi High Court**  
**Case No : FAO. No. 267 of 2010**

Sheikh Anis Ahmad

APPELLANT

Vs

State and Others

RESPONDENT

**Date of Decision :** 16-03-2011

**Acts Referred:**

Civil Procedure Code Amendment Act, 1976 — Order 14 Rule 2  
Contract Act, 1872 — Section 11  
Evidence Act, 1872 — Section 68  
Muslim Personal Law (Shariat) Application Act, 1937 — Section 2, 3  
Succession Act, 1925 — Section 57, 63

**Citation :** (2011) 5 ILR Delhi 55

**Hon'ble Judges :** Mool Chand Garg, J

**Bench :** Single Bench

**Advocate :** V.B. Andley, Rajinder Mathur, Priyank Sharma and Krushna B. Singh, for the Appellant; K. Datta, for R-3, for the Respondent

## **Judgement**

Mool Chand Garg, J.—This is an appeal filed by the Appellant who sought letters of administration regarding Will dated 20.11.1984 allegedly executed by Mst. Nawab Begum, the deceased testatrix. The third Respondent on the other hand contested the said probate petition. While describing the will relied upon by the Appellant as forged and fabricated, she also set up another Will dated 05.06.1992 alleged to have been executed by Mst. Nawab Begum, the deceased testatrix in her favor bequeathing whole of her property which is a registered document and had been also attested by two witnesses.

2. On the pleadings of the parties, learned ADJ framed the following issues:

1. Whether the deceased Smt. Nawab Begum had executed any valid will dated 5.6.1992 in favour of Respondent No. 3 Mst. Gohar Sultan while in sound and disposing mind and in the presence of at least two attesting witnesses? If so, its effect?

2. If issue No. 1 is not proved then whether Mst. Nawab Begum had executed

any valid will dated 20.11.1984 in favour of Petitioner Sheikh Anis Ahmed while in sound and disposing mind and in the presence of at least two attesting witnesses? If so, its effect?

### 3. Relief.

3. The trial Court vide impugned order accepted the Will set up by the Respondent as genuine and valid even though the only attesting witness examined by the said Respondent has not supported her. While deciding issue No. 1 in favor of the Respondent, the learned ADJ has not given any finding on issue No. 2 on the pretext that the will set up by the third Respondent was later in time and thus superseded the earlier will propounded by the Appellant and thus dismissed the petition filed by the Appellant. However the Court has granted the probate of the Will dated 05.06.1992 in favor of Respondent No. 3.

4. Assailing the aforesaid judgment the Appellant has submitted that Mst. Nawab Begum, the deceased testatrix was the step grandmother of the Appellant who had executed the Will dated 20.11.1984 in his favour in respect of her property bearing No. 4094-4095 and 4096, Urdu Bazar, Jama Masjid, Delhi. It is submitted that Will dated 05.06.1992 (Ex.OW2/1) set up by Respondent No. 3 is a forged and fabricated document. The said will has also not been proved to have been executed by the deceased testator nor attestation thereof has been proved. Thus the said will is neither valid nor legal.

5. It is further submitted that even though it is the case of the third Respondent that the deceased testatrix signed the Will Ex.OW2/1 in presence of two attesting witnesses while only one witness i.e. Malik Mohd. Tanvir was examined as OW3, who has stated that he does not know Nawab Begum and that she did not sign the Will in his presence nor he signed in her presence. Though, he has identified his signatures on the Will but also stated that his signatures were obtained at his house by the husband of Gohar Sultan. He also stated that the other attesting witness Wahid Ali did not sign in his presence nor he signed in the presence of Wahid Ali and also failed to identify the signatures of Wahid Ali. Wahid Ali was not examined as a witness despite his availability. Thus, it is submitted by the Appellant that the third Respondent has not proved the 2nd will in accordance with the provisions of Section 63(c) of the Indian Succession Act, 1925 and Section 68 of the Evidence Act or even otherwise.

6. On the other hand according to the 3rd Respondent, since the Will set up by her was executed by a Muslim, there was no requirement to prove such Will in accordance with Section 63(c) of the Indian Succession Act, 1925 and u/s 68 of the Evidence Act which it is stated was not applicable to Muslims. Admittedly no such plea has been raised by the said Respondent in her written statement. In this regard relevant averments made in the written statement filed by her are reproduced hereunder:

1. That the present petition is liable to be rejected outright as the same is not maintainable in view of the fact that Smt. Nawab Begum, daughter of late Sh.

Sheikh Mohammed Abdullah and wife of late Sh. Iqbal Ahmad was the owner of the property bearing No. 217, situated at Gali Garhaya, Bara Bazar, Jama Masjid, Delhi-110006 and also property bearing No. 4904, 4095 and 4096 situated at Urdu Bazar, Jama Masjid, Delhi-110 006 and being the absolute owner of the aforesaid properties executed a Will dated 5th day of June, 1992 in favour of her only daughter Smt. Gohar Sultan and as such the Petitioner herein above has no right, lien in the properties referred to here above.

2. That even otherwise the will referred to hereinabove in para 1 of preliminary objection was duly executed on 5th day of June, 1992 and being the last Will and a registered Will, properties mentioned in the said Will devolved upon Smt. Gohar Sultan. The said Will was duly registered with the Registrar of documents and stands mutated in favour of the legal heir and successor by virtue of that Will i.e. Smt. Gohar Sultan, Therefore, petition deserves outright rejection.

xxx 4. That the contents of para 4 of the petition are absolutely wrong and therefore denied. It is denied that Mst. Nawab Begum aforesaid executed her last valid Will dated 20th of November, 1984. However, it is stated that a copy of the said Will has not been furnished to the objector. Contents of remaining para are absolutely wrong and therefore denied as Smt. Nawab Begum never executed any Will dated 20th November, 1984.

5. That the contents of para 5 of the petition as stated are absolutely wrong and, therefore, denied. The said Will dated 20th November, 1984 was never executed by Smt. Nawab Begum and therefore question of bequeathing the properties No. 4094 to 4096 in Bazar Machhli Walan, Urdu Bazar, Jama Masjid, Delhi does not arise and the claim of the Petitioner is based on a false and fabricated Will, therefore, the petition is not maintainable.

7. It is also the case of the Appellant that, even if for the sake of argument the submission of Respondent No. 3 is accepted that a will executed by a Muslim could be oral and there is no need to examine any attesting witness to prove its execution as there is no requirement that such a Will should be attested also, it is submitted that the aforementioned submission of Respondent No. 3 is not the foundation of the Impugned judgment nor such a plea has even been noticed by the Addl. District judge. Rather the written statement of the Respondent as quoted above shows that the case of the Respondent is that Will dated 05.06.1992 has been proved in accordance with the provisions contained in Section 63(c) of the Indian Succession Act. The Will relied upon is a registered document and has been attested by the two attesting witnesses. However, the solitary witness to prove the execution and attestation of the will has not supported the said Respondent. It is, thus, stated that the case of Respondent No. 3 that the 2nd Will was not required to be attested by two witnesses cannot be accepted. Even if Section 63(c) is not applicable in the case of a Muslim, the dispensation of proof as required under the Evidence Act is not ousted. Moreover case is required to be proved as pleaded. A plea which has not been raised cannot be relied upon.

8. There is no dispute that Mst. Nawab Begum was step grandmother of Anis Ahmed, the Appellant. She is said to have executed Will dated 20.11.1984 in favour of the Appellant. Respondent No. 3 filed a reply/objections dated 10.08.1994 to the aforesaid will and inter alia pleaded that the deceased testatrix executed a Will dated 05.06.1992 in her favour bequeathing all her movable and immovable properties to her including property at Urdu Bazar. She has denied execution of the Will dated 20.11.1984, Ex.P-1 as propounded by the Appellant. She has also pleaded that the Will dated 20.11.1984 is a forged and fabricated document. However she has not led any evidence in this regard.

9. The objections filed by Respondent No. 3 were replied to by the Appellant. In their reply it was specifically stated that Mst. Nawab Begum did not execute will dated 05.06.1992 as alleged. The will propounded by her in any case is forged and fabricated. It is even otherwise illegal and void inter alia because it is in respect of the entire movable and immovable properties left by the deceased and is violative of the rule that a Mohammedan cannot by Will dispose of more than a third of surplus of his assets after payment of funeral expenses and debts and bequests in excess of one third cannot take effect unless the heirs consent thereto after the death of the testatrix. In this case Nawab Begum widow of Iqbal Ahmad died leaving Sultan Ahmad only son of Iqbal Ahmad (her step son) as her heir and his consent was not obtained after the death of Nawab Begum. After the death of Iqbal Ahmad, his only son Sultan Ahmad maintained Nawab Begum in all respects. It is also stated that the Appellant and Gohar Sultan both have applied for the mutation of the suit property in their respective names in the Municipal records but the matter is still pending there before the municipal authorities.

10. After framing issues the trial Court directed Respondent No. 3 to lead her evidence first. She examined N.C. Bajaj, Adv. as OW1, herself as OW2 and Malik Mohd. Tanvir one of the attesting witnesses as OW3 to prove the execution and attestation of the Will Ex.OW2/1. As noticed above, the said witness has not supported the case of the Respondent.

11. On the other hand, the Appellant has examined Md. Yasin, PW1, Dr. Fazul Rehman, PW2 son of the other attesting witness Dr. Moinuddin Baqai who had died in the meantime, and himself as PW3 to prove the due execution of the Will dated 20.11.1984, Ex.P1. However the impugned judgment has not made any reference to the evidence of the Appellant. It only proceeds on the basis of the evidence of the objector which is deficient in proving the execution of the Will propounded by her inasmuch as the only attesting witness has not supported her case. Yet the learned ADJ has accepted the execution of the Will Ex.OW2/1 on the basis of the statement of the 3rd Respondent and on account of its registration.

12. Holding that the 3rd Respondent has proved the execution of the 2nd will successfully the Id. ADJ decided Issue No. 1 in her favour. Consequently without returning any finding on issue No. 2 the Id. ADJ has also dismissed the petition

filed by the Appellant presuming that the Will dated 20.11.1984 Ex.P1 relied upon by the Appellant stands superseded by the Will dated 05.06.1992. In view of that it has been held that the Appellant was not entitled to the grant of letters of administration and thus, has dismissed the suit.

13. According to the Appellant,

i) The Will Ex.OW2/1 dated 05.06.1992 is legally not proved.

ii) Gohar Sultan had tried to show that the deceased Nawab Begum signed the Will Ex.OW2/1 in the presence of the two attesting witnesses namely Malik Mohd. Tanvir and Wahid Ali and those attesting witness signed in her presence. In short according to Gohar Sultan, the requirement of Section 63(c) of the Succession Act was fully complied with though only attesting witness Malik Mohd. Tanvir examined as OW3 has not supported her. She has not examined the 2nd witness namely Wahid Ali though he was present in Court on 17.03.2004 for being examined as a witness.

iii) OW3 Malik Mohd Tanvir has deposed that he does not know Nawab Begum and she did not sign the Will in his presence nor he (Mohd. Tanvir) signed in her presence. He has identified his signatures on the Will but says that his signatures were obtained at his house by the husband of Gohar Sultan. OW3 has also stated that the other attesting witness Wahid Ali did not sign in his presence nor he signed in the presence of Wahid Ali. He does not identify the signatures of Wahid Ali.

iv) Will dated 05.06.1992 is an irrevocable Will.

v) Will dated 05.06.1992 bequeath more than 1/3rd of the property of Nawab Begum and the consent of her relations were not obtained after her death.

vi) The provisions of Section 63(c) of the Indian Succession Act and Section 68 of the Evidence Act have not been satisfied. The Appellant relies upon the following judgments in this regard.

1. Surinder Kumar Grover Vs. State and Others, How a Will is to be executed, attested and proved.

2. Girja Datt Singh Vs. Gangotri Datt Singh, How a Will is to be executed, attested and proved.

3. Yumnam Ongbi Tampha and Ibemma Devi Vs. Yumnam Joykumar Singh and Others, Attesting witness failing to prove attestation by other attesting witness. Profounder taking active part in execution of the Will which confer substantial benefit on him, is a suspicious circumstances which must be explained by satisfactory evidence.

4. Janki Narayan Bhoir Vs. Narayan Namdeo Kadam,

5. Smt. Indu Bala Bose and Others Vs. Manindra Chandra Bose and Another,

6. Bhagat Ram and Another Vs. Suresh and Others, Registration of the Will does not dispense with the need of proving execution and attestation. Endorsement made by Registrar are relevant for registration purpose only.

14. It has been submitted by the Appellant that in view of the conduct of the Respondent and her pleadings, the Will relied upon by her being not an oral Will but a registered document allegedly attested by two witnesses should have been proved in accordance with the aforementioned guidelines. However this has not been done and as such the findings on Issue No. 1 is not sustainable. It is submitted that Respondent No. 3 is even otherwise estopped from saying that the Will dated 05.06.1992 does not require attestation or that provisions contained u/s 63(c) of the Indian Succession Act and Section 68 of the Evidence Act only applies qua the Will executed by a Hindu in view of her own deposition.

15. The Appellant submits that even if one has to rely upon Section 57 of the Indian Succession Act, there is no bar for a Mohammedan to take recourse to provisions contained u/s 63(c) and Section 68 of the Evidence Act. It is submitted that the Respondents cannot set up a new case in appeal. Reference has been made to the following judgments in this regard:

1. Sayeeda Shakur Khan and Ors. v. Sajid Phaniband & Nr. 2007 (1) HLR 71 Will made by a Muslim married under Special Marriage Act. All rigours of Indian Succession Act applicable.

2. Mohd. Yusuf Vs. Board of Revenue and Others, Muslim Will. Attesting witnesses not examined Execution of the Will not proved.

3. Asma Beevi and Anr. v. M. Ameer Ali and Ors. 2008 (6) MLJ 92 Section 63 of the Indian Succession Act is not strictly applicable under Mohammedan Law to establish the execution of a Will since a Will need not be in writing under Islamic Law

16. Moreover, in the present case, the provisions of Muslim Law are not available for the benefit of Respondent No. 3 inasmuch as:

i) The Respondent cannot change her stand and introduce a new case completely.

ii) Muslim Personal Law does not apply to the case in hand.

iii) The Court cannot make out a new case for the Respondent which has not been pleaded and, therefore, the case cannot be decided by this Court merely on the plea of the Respondent that some of the provisions of Indian Succession Act were not applicable to her.

17. It is also the case of the Appellant that Muslim Personal Law (Shariat) Application Act, 1937 which was promulgated to make provisions for the application of Muslim Personal Law to muslims enacted Sections 2 and 3 which read as under:

2. Application of Personal law to Muslims.-

Notwithstanding any custom or usage to the contrary, in all questions (save questions relating to agricultural land) regarding intestate succession, special property of females, including personal property properly inherited or obtained under contract or gift or any other provision of Personal Law, marriage, dissolution of marriage, including talaq, ila, zihar, lian, khula and mubaraat, maintenance, dower, guardianship, gifts, trusts and trust properties, and wakfs (other than charities and charitable institutions and charitable and religious endowments) the rule of decision in cases where the parties are Muslims shall be the Muslim Personal Law (Shariat).

### 3. Power to make a declaration.-

1) Any person who satisfies the prescribed authority--

(a) that he is a Muslim, and

(b) that, he is competent to contract within the meaning of Section 11 the Indian Contract Act, 1872 (9 of 1872 ), and

(c) that he is a resident of [the territories to which this Act extends].

(2) xxx xxx xxx

18. In this case neither there is any plea nor any evidence is available to show that the deceased testator filed any declaration as required u/s 3 reproduced above. Even otherwise when the Will in question is in writing and signed by the testatrix and the witnesses, the pleas put forward by the third Respondent are of no consequence. Consequently, the provisions of the Indian Succession Act only will apply.

19. In the absence of any plea regarding applicability of Muslim Personal Law, the Court cannot make out a new case for the Respondent and thus cannot remand the case and direct the trial Court to examine the question of applicability of Muslim Personal Law and its effect on the Will dated 05.06.1992.

20. In support of his aforesaid submission, the Appellant has relied upon the following judgments:

- i) M.P. Shreevastava Vs. Mrs. Veena, ,
- ii) State of Gujarat Vs. Ramji Mandir Trust, Baroda and Others, ,
- iii) Siddu Venkappa Devadiga Vs. Smt. Rangu S. Devadiga and Others, ,
- iv) Smt. Ramawati Devi v. Omkar Chand Gupta, AIR 1978 NOC 199,
- v) Baruha Singh v. Achal Singh and Ors. AIR 1961 SC 1897.

21. As regards, evidence which is required to be led so as to prove oral Wills or to which Section 57 applies it has been submitted that all such cases are to be scrutinized with greatest care and strict proof regarding execution of the oral Will must be proved to the complete satisfaction of the Court. Reference has been

made to the following judgments:

1. AIR 1931 285 (Privy Council)
2. AIR 1937 179 (Privy Council)
3. Ganesh Prasad Vs. Hazari Lal and others
4. Shanti Lal Vs. Mohan Lal, .

22. It has been submitted that even otherwise the 3rd Respondent has not made out any case for the grant of probate in this case in her favor in as much as, in her statement she has herself stated that the deceased testatrix executed the Will wherein she was shown as sole beneficiary and that she and her husband played a prominent part in the execution of the Will. The Will was got registered after six months of the date of death of the testatrix and the 3rd Respondent has signed the will only at that time.

23. On the other hand Respondent No 3 in their written synopsis, has claimed that the testatrix is her mother and that neither Section 63(c), nor Section 68 of the Evidence Act are applicable on a Mohammedan Will and the validity of the Will is in no way affected due to non-attestation by witnesses or failure to prove attestation. The Respondent No. 3 has relied on the following cases:

- i) Sarabai Amibai Vs. Mahomed Cassum Haji Jan Mahomed,
- ii) Abdul Hameed Vs. Mohammed Yoonus and Others,
- iii) Asma Beevi and Ors. v. S. M. Amneer Ali and Ors., 2008 (6) MLJ 92 Mad.

24. I have heard the parties and would like to observe that though the Respondent No. 3 had tried to show that that the requirement of Section 63(c) of Indian Succession Act were fully complied with, one of the witnesses examined namely the statement of OW3 Malik Mohd. Tanvir deposed that he did not know the deceased Testatrix and did not sign the Will in his presence nor he signed in her presence, therefore it cannot be held that provisions of 63(c) of Indian Succession Act and Section 68 of the Evidence Act have been satisfied.

25. It has been held by the Apex Court in the case of Girja Datt Singh Vs. Gangotri Datt Singh, that Section 63(c) of the Indian Succession Act requires the Will to be attested by two or more witnesses, each of whom has seen the testator sign or affix his mark on the Will or has seen some other person sign the Will, in the presence and by the direction of the testator or has received from the testator a personal acknowledgement of his signature or mark, or of the signature of such other person; and each of the witnesses shall sign the Will in the presence of the testator. Similarly the requirement of Section 68 of the Evidence Act, is that at least one of the attesting witness should be called as a witness to prove the due execution and attestation of the Will.

26. Further, it has also been observed that if attesting witness fails to prove attestation by other attesting witness or the propounder takes active part in

execution of the Will which confer substantial benefit on him would lead to suspicious circumstance which has to be explained by satisfactory evidence. Even registration of the Will does not dispense with the need of proving execution and attestation. The following judgments can be referred for this purpose:

- (1) Yumnam Ongbi Tampha and Ibemma Devi Vs. Yumnam Joykumar Singh and Others,
- (2) Janki Narayan Bhoir Vs. Narayan Namdeo Kadam,
- (3) Smt. Indu Bala Bose and Others Vs. Manindra Chandra Bose and Another,
- (4) Bhagat Ram and Another Vs. Suresh and Others,

27. Further the Respondent herself relied, acted and based her case upon Section 63(c) of the Indian Succession Act and Section 68 of the Evidence Act, hence the issue No 1 as decided on those wholesome provisions of law, the provisions of Section 57 of the Indian Succession Act would not be a bar and would not come in the way of deciding issue No. 1 against the said Respondent. More so, Respondent is also now stopped from saying that the Will dated 5.06.1992 does not require attestation and the provisions of Section 63(c) of Indian Succession Act and Section 68 of the Evidence Act are mandatory only as far as a Hindu Will is concerned as there is no bar to a Mohammedan taking recourse to those provisions for making a Will but once he has taken that recourse all the rigors of the Indian Succession Act will then be applicable. In this regard it would be appropriate to make a reference to an Allahabad High Court judgment in the case of Mohd. Yusuf Vs. Board of Revenue and Others, , wherein it had been held:

It would appear that the attesting witnesses were not examined to prove the Will. There is not an iota of evidence on record to show that the witnesses were dead or were not traceable on the date fixed for evidence. It is borne out from the record that the attesting witnesses were not called by issuing notices to prove Will. The Scribe in his cross-examination, it would appear, has stated that Will was not registered in his presence and he did not go to the office of Sub-Registrar at the time of Registration. No doubt, a scribe can be said to be an attesting witness, provided the two attesting witnesses are dead or incapable to give evidence even after being summoned for giving evidence if the test laid down by the Apex Court is fully satisfied to the effect that the witnesses should have put his signature *animos attestandi* i.e. for the purpose of attesting and he has seen executant sign and has received from him a personal acknowledgement of his signatures at the time of registration. This clearly goes to prove that scribe in the present case does not satisfy the requirements laid down by the Apex Court and cannot be said to be an attesting witness.

28. It is also to be observed that the Respondent had never taken this plea before the trial Court that provisions of Hindu Law relating to attestation and execution of the Will would not be applicable to Mohammedan rather she has

relied her case on those provisions hence the Respondent cannot change her stand in the appeal and introduce a new case. In this regard would like to quote an Apex Court Judgment, in the case of M.P. Shreevastava Vs. Mrs. Veena, wherein it has been held that:

It was never argued on behalf of the Appellant in the Court of First Instance and the High Court that attempts proved to have been made by the Respondent to resume conjugal relations could not in law amount to satisfaction of the decree, and we do not think we would be justified at this stage in allowing that question to be raised for the first time in this Court.

29. In another case of State of Gujarat v. Ranji Mandir Trust Baroda and Others, the Division Bench of Gujarat High Court has observed that:

1to3. xxxx

4. To grant or not to grant leave to urge this new plea of "Act of State" is the question we must resolve at the threshold in our opinion, whether or not the Municipal Court has jurisdiction, to try the suit from the standpoint of the plea of "Act of State" is a mixed question of law and facts. Such a plea must in, the first, place be raised in the written statement. An issue must be framed on this question and parties must have an opportunity to adduce evidence on this plea. It is possible that in a given case a pointed issue may not be raised and yet the parties may have understood that defence of "Act of State" was sought to be urged and parties may adduce evidence on the point. So far as the present case is concerned, apart from the fact that there was no such plea in the written statement and no such issue was raised, the parties never realized that the defence of "Act of State" was sought to be relied upon by the State in order to defeat the present suit. This position is incapable of being disputed having regard to the fact that even the learned Govt. Pleader who appeared in the trial Court did not raise any such contention and did not urge any argument in the context of this plea. Under the circumstances, we are faced with the question whether we should permit the learned Assistant Govt. Pleader to urge this plea at this juncture. At the cost of repetition it may be stated that even now the State has not come forward with an application for leave to amend the written statement. If the State had applied for the amendment of the written statement and if. the Court had granted it, the matter would have had to be remanded to the trial Court in order to enable the Plaintiff to lead evidence in order to establish that there was sufficient recognition of his rights either in express terms or by implication or, by conduct.

30. It is also pertinent to mention that even the appellate court has no power to make out a new case which was not been pleaded by the Respondent before the trial court and the decision of the appellate court cannot be based on the grounds outside the plea of the Respondents. Hence the matter cannot be remanded back to the trial court to examine the question of applicability of the Muslim Personal Law and its effect on Will dated 5.06.1992. In this regard would

like to make reference to an Apex Court judgment, in the case of Siddu Venkappa Devadiga Vs. Smt. Rangu S. Devadiga and Others, , wherein it was held that:

We have also examined the plaint and we find that it was clearly pleaded there that Shivanna was the absolute owner of the Purshottam Restaurant until his death on September 8, 1938, that the Defendant was "employed" by him in that business, that the Defendant came to Bombay soon after the death of Shivanna passing to be a friend and well-wisher of the Plaintiffs and that possession of the Purshottam Restaurant was given to him on his assurance that he would look after the interests of the Plaintiffs and would carry on the business on their behalf. The Plaintiffs pleaded further that when the Defendant refused to render accounts and totally excluded them from the control and management of the business, it became necessary for them to take action against him. It was further stated in the plaint that the Plaintiffs first filed a criminal complaint against the Defendant but it was dismissed for want of appearance, & thereafter filed the present suit alleging that Shivanna was the absolute owner of the restaurant and was the tenant of the premises where it was being carried on. As has been stated, the Defendant traversed that claim in his written statement and pleaded that the business always belonged to him as owner. There was thus no plea that the business was "benami" for Shivanna. We also find that the parties did not join issue on the question that the business was "benami". On the other hand, the point at issue was whether Shivanna was the owner of the business and the tenancy rights of the premises where it was being carried on. It is well-settled, having been laid down by this Court in *Trejan and Co. Ltd. v. PW. N.H. Nagappa Chettiar* 1956 SCR 789 and *Baraba Singh Ms. Achal Singh* AIR 1961 SC 1097 that the decision of a case cannot be based on grounds outside the plea of the parties, and that it is the case pleaded which has to be found. The High Court therefore went wrong is ignoring this basic principle of law, and in making out an entirely new case which was not pleaded and was not the subject matter of the trial.

31. Further, the Will, Ex.OW2/1 is not an oral Will. Admittedly, it is a written Will attested by two witnesses. This fact has also been so stated by the objector. Since the only attesting witness examined on behalf of the objector has not proved the Will, the other circumstances which can be inferred from the statement of the Respondent itself are suspicious so as to bely the case of Respondent No. 3 inasmuch as in her cross examination she has admitted that she and her husband played a prominent part in the execution of the Will. The Will was got registered after about 6 months of the date of death of the deceased testatrix. She has also admitted that all the movable and immovable properties of Nawab Begum were bequeathed to her. She has also admitted that the relationship of Nawab Begum with Sultan Ahmad and his sons Anis Ahmad were very cordial till her death but neither Sultan Ahmad nor Anis Ahmad were called at the time of the execution of the Will.

32. There are many other suspicious circumstances surrounding the said Will. Though the Will purports to be attested by two witnesses out of whom only one was examined as a witness he too does not prove the Will. OW3 Malik Mohd. Tanvir has appeared as a witness but he has stated that he does not know Nawab Begum. She did not sign the Will in his presence. He himself signed the Will at his residence. He is a friend of the husband of Gohar Sultan. He has not identified the signatures of the other witnesses on the Will.

33. Respondent No. 3 has stated that the executants and the attesting witnesses signed the Will in the office of the sub-Registrar even though the Will was produced for registration after six months of the death of the deceased testatrix. She also deposed that both the attesting witnesses were present in the office of the Sub-Registrar at the time of the registration of the Will. However, no independent witness has appeared to identify the signatures of the executants. The Respondent has stated that Mr. M.N. Sharma, Advocate has taken instructions from Nawab Begum for the drafting of the Will and he brought the duly typed on 05.06.1992. Strangely Mr. M.N. Sharma, Advocate has not been produced as a witness. Mr. M.N. Sharma, Advocate has not signed the original Will as a drafter of the Will or in any other capacity. This statement of Respondent No. 3 itself causes suspicion about her case.

34. A bare perusal of the order passed by the Addl. District Judge goes to show that the Addl. District Judge has not decided issue No. 1 in favour of the Appellant treating the Will dated 05.06.1992 as a Will executed by the Muslim which does not require attestation to be proved in accordance with Section 63(c) of the Indian Succession Act. Rather the Court has presumed that the execution and attestation of the Will has been proved according to Section 63(c) of the Indian Succession Act read with Section 68 of the Evidence Act.

35. Despite registration of the aforesaid Will after six months of the death of the deceased, the Court has extensively relied upon the statement made by Respondent No. 3 who is the propounder and beneficiary under the Will even though the only attesting witness examined on behalf of the Respondent has not supported the case of the third Respondent inasmuch as the said witness not only stated that he was unable to identify the signatures of deceased testator as he was not knowing the said lady. He was also not able to identify signatures of Wahid Ali or any other witness including Gohar Sultan on the Will in question.

36. Even Dr. N.C. Bajaj who appeared as OW1 has not stated that the Will in question was executed in his presence or that it was signed by the two witnesses in his presence. He was only a witness to the execution of the Will which was produced for registration after the death of the deceased testator. According to Smt. Gohar Sultan who appeared as OW2, the Will in question was prepared by one M.N. Sharma, Advocate but the said M.N. Sharma has not been examined by the third Respondent as a witness to prove the Will in question.

37. It may be observed here that even if Gohar Sultan is to be presumed to be a

witness to the registration of the Will she has not stated her presence at the time of execution of the Will, nor it has been so stated by OW3 or OW1. Admittedly, the registration has taken place after the death of the deceased.

38. In these circumstances, the observation made by the Addl. District Judge relying upon the statement of Shri N.C. Bajaj as a second attesting witness is of no consequence

39. It is thus, clear Respondent No. 3 has failed to prove the Will dated 05.06.1992 as the onus to prove Issue No. 1 was not discharged by Respondent No. 3. It was thus incumbent upon the learned ADJ to have also gone into the evidence led on behalf of the Appellant qua the Will dated 20.11.1984 and to have returned the finding on Issue No. 2 also.

40. In this regard reference has been made to a Division Bench judgment of this Court, in the case of Smt. Satya Devi Vs. Rati Ram and Others, , Wherein it has been held that:

Rule 2 of Order 14 of the Code was substituted by the CPC Amendment Act, 1976. The amended provision says that notwithstanding that a case may be disposed of on a preliminary issue, the Court shall, subject to the provisions of Sub-rule (2), pronounce judgment on all issues. After issues have been framed it is the mandate of law that judgment must be pronounced on all issues. The only exception to this rule is in Sub-rule (2), which provides that an issue of law may be tried as a preliminary issue but the same must relate to jurisdiction of the Court or to a bar to the suit created by any law for the time being in force. Only in these two eventualities issues of law may be tried as preliminary issues and not in any other eventuality. The Trial Court thus acted with material irregularity in exercise of its jurisdiction in proceeding to dispose of the suit merely on recording findings on only one issue. The issue so decided was not an issue of law but a mixed issue of law and fact. Such practice on the part of the Court to dispose of suits at the very threshold without further trial on other issues must be deprecated.

41. In another judgment delivered by the Single Bench of this Court, in the case of LIC Housing Finance Ltd. Vs. Pearl Developers (P) Ltd. and Others, , it was held that:

Order 14 Rule 2 of the CPC provides that notwithstanding that a case may be disposed of on a preliminary issue, the court shall pronounce judgment on all issues. In view of the said mandatory provision of law and the judgments aforesaid cited by the senior counsel for the PDPL, there can be no dispute with the proposition that a judgment which fails to pronounce on each and every issue framed would suffer from material irregularity and would be no judgment

42. Now coming to the judgments referred by Respondent No 3 reliance has been placed upon a Bombay High Court judgment, in the case of Sarabai Amibai Vs. Mahomed Cassum Haji Jan Mahomed, , wherein it was held:

The testator was a Cutchi Memon and in some respects Cutchi Memons are governed by Hindu law. Further, the document in question is not attested. But I think it is quite clear, and at any rate there is an express authority of this Court precisely in point, that Cutchi Memons are governed by Mahomedan law as regards the execution of their wills, and that under Mahomedan law no attestation is necessary. The case I refer is *In re Aba, Satar* (1905) 7 Bom L.R. 558 and is a decision of Mr. Justice Tyabji. So far, therefore, as that point is concerned, I think no difficulty arises

43. In another judgment delivered by Madras High Court, in the case of *Abdul Hameed Vs. Mohammed Yoonus and Others*, , wherein it has been held that:

The testator being a Cutchi Memon the provisions of the Mahomedan law with regard to wills apply. That a Cutchi Memon is governed by the Mahomedan law in this respect was held in *Sarabai Amibai Vs. Mahomed Cassum Haji Jan Mahomed*, and the contesting Respondents have not disputed the correctness of the decision. It is also accepted, as it must be, having been accepted by the Judicial Committee, that by the Mahomedan law no writing is required to make a will valid and no particular form even of verbal declaration is necessary as long as the intention of the testator is sufficiently ascertained

44. In another judgment delivered by Madras High Court, in the case of *Asma Beevi v. M. Aeer Ali*, 2008(6) MLJ 92, Wherein it has been held that:

The Village administration officer, D.W.3 has been the scribe of the Will, who has deposed that the deceased Mohammed Ismail signed in the Will in his presence and attestors Lateef and Ganesa Iyer have also signed as witnesses to the Will in his presence. However, no motive has been attributed against D.W.3 and D.W.4 to disbelieve the evidence of the scribe and the other witness. On the facts and circumstances, I am of the view that there is no error on the part of the trial Court holding that the Will, Exhibit B-38 has been established as a genuine document. I am of view that Section 63 of the Indian Succession Act is not strictly applicable under the Mohammedan Law to establish the execution of a Will, since a Will need not be in writing, under the Islamic Law and accordingly, the Will, Exhibit B-38 has been established as a genuine document executed by Mohammed Ismail , father of the Appellants and Respondents 1,2 and 4.

45. All the aforesaid judgments are not of any help to the case of the third Respondent inasmuch as in the absence of any plea taken by the third Respondent that the Will in question had been executed by a muslim or that provisions of Section 63(c) of the Indian Succession Act was not strictly applicable to his case or that the Will was an oral will or that it was not required to be attested, the judgments cannot be of any help to the case of the third Respondent.

46. In view of that the Judgment/order passed by the ADJ in respect of issue No. 1 cannot be sustained. Consequently, the appeal is allowed. However, as the ADJ has not given any finding on issue No. 2 despite availability of evidence, the case

is remanded back to the ADJ to decide Issue No. 2 on the basis of the evidence led on behalf of the Appellant and to return a fresh finding on issue No. 3. Parties to appear before the Addl. District Judge on 28.03.2011. The Addl. District Judge will decide the matter afresh taking into consideration the observation made by this Court above within a period of one year from the date of appearance of the parties.

47. With these observations, the appeal is disposed of with no orders as to costs.

48. TCR be sent back along with a copy of this order.