

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

+ **FAO 124/2009**

Reserved on : 25.11.2010
Date of Decision :02.12.2010

MADAN MOHAN Appellant
Through Mr. Rakesh Mahajan, Mr. Abhay
Mani Tripathi, Advs.

versus

JAWAHAR LAL & ANR ... Respondents
Through Mr. K.K. Srivastava, Adv.
for R-1,4 & 6
Mr. R.K. Bedi, Adv. for R-2.

CORAM:
HON'BLE MR. JUSTICE MOOL CHAND GARG

1. Whether the Reporters of local papers may be allowed to see the judgment?
2. To be referred to Reporter or not?
3. Whether the judgment should be reported in the Digest?

: **MOOL CHAND GARG,J**

1. The lis subject matter of this appeal revolves around two Wills, one dated 23-09-1973 (hereinafter referred as 'first Will') and the other dated 17-11-1986 (hereinafter referred to as the 'second Will') both allegedly executed by deceased Smt. Roop Rani, who was the mother of Late Sh. Ajudhia Prakash and Jawahar Lal. Both the Wills are registered. Both sides have filed separate probate petitions with respect to their respective Wills and both are opposing grant of probate to each other.
2. After framing of issues, evidence was led by both the sides. Evidence of handwriting expert and finger print experts was also recorded. After conclusion of evidence and hearing the parties, the learned ADJ observing that both the Wills were executed by Late Smt. Roop Rani and both were registered held that the Will dated 17.11.1986 being later in time and proved as a valid and genuine Will, granted probate with respect to the second Will in favour of the respondents and dismissed the probate petition filed by Late Sh. Ajudhia Prakash, now represented by the present appellant as his son/legal heir seeking probate of first Will. It is this order dated 17.11.2008 of the learned ADJ which is impugned in this appeal.
3. According to the appellant, the second Will allegedly executed by Late Smt. Roop Rani is not a valid and genuine will and is surrounded by various suspicious circumstances. He relies upon the the first will and

prays that the order passed by the learned ADJ be set aside and probated be granted in his favour on the basis of the Will dated 23.09.1973.

4. On the other hand, the respondents support the judgment of the learned ADJ and submit that since the Will dated 17.11.1986 was a later Will which was also duly registered and which stands proved to have been executed by Late Smt. Roop Rani while having a sound and disposing mind, the appeal should be dismissed.

5. Brief factual matrix of the case are that Smt. Roop Rani, wife of Sh. Jugal Kishore was the owner of the 40% share in the property bearing No. 2051-2056, Ward No. 5, Kinari Bazar, Delhi. She died on 22-11-1990. At the time of her death, she left behind four sons and three daughters besides her husband. Appellant, Sh. Ajudhia Prakash, who is one of the sons of the deceased, filed probate petition bearing No 122/08/91 for grant of probate claiming to be a beneficiary under Will dated 23.09.1973. On the other hand Sh. Jugal Kishore, husband of the deceased and respondent, another son of the deceased while admitting the execution of the first will contested the petition filed by Late Sh. Ajudhia Prakash on the ground that Late Smt. Roop Rani had executed another registered will dated 17-11-1986 hence the first will cannot be given any effect.

6. At the stage of framing of issues, both the petitions were consolidated and evidences were ordered to be recorded in common. On the basis of pleadings of the parties in both the cases, following issues were framed.

“1. Whether the Will dated 17.11.1986 propounded by the petitioner Sh. Jawahar Lal is the last and genuine Will of Late Smt. Roop Rani wife of Shri Jugal Kishore and was it duly executed by her while she was in sound disposing mind?

2. If issue no. 1 herein above is decided in negative then whether the earlier Will dated 23.09.1973 propounded by the objector Sh. Ajudhia Parkash in PC No.101/94 (old number) is the last and genuine Will of the deceased Smt. Roop Rani wife of Sh. Jugal Kishore and was it duly executed by her while she was in sound disposing mind?

3. Relief.”

7. It may be observed here that even though parties were litigating regarding the execution of the Will by Late Smt. Roop Rani but factually, none of the parties were seriously contesting the execution of the Will in question, even though, the appellant has taken a stand that second Will propounded by Sh. Jawahar Lal and others is a forged and fabricated document.

8. To prove his case, the appellant examined OW-1, Sh. Sunil Mittal to prove the signatures of one of the deceased attesting witness on the first Will. Sh. Madan Mohan, son/legal heir of Sh. Ajudhia Prakash who is the present appellant stepped into witness box as OW-2. On the written request of the appellant, both the Wills were sent to *CFSL* for comparison of signatures and thumb impression of the deceased Smt. Roop Rani. Both the reports did not favour appellant. Thereafter, he summoned OW-3 Sh. B.K.Chadha (finger print expert of *CFSL*) and OW-4 Sh. D.R.Handa (handwriting expert of *CFSL*) for examination. However, nothing could be brought out in the cross-examination of these witnesses to the support the case of the appellant or to put any suspicion on the case of the respondents, who relied upon the second Will.

9. On the other hand, respondents had examined his son/attorney Sh.V.K. Malhotra as PW-1, Sh. Shatrughan Poddar from office of Sub-Registrar as PW-2 besides PW-3, Sh. Sushil Kumar Ahluwalia, one of the attesting witnesses of the second Will.

10. After recording the evidence, the learned ADJ formed an opinion that none of the parties were in fact, seriously disputing the execution of the two Wills left by Late Smt. Roop Rani. However, the ADJ holding that the Second Will dated 17.11.1986 was proved to have been duly executed by the deceased testatrix, granted probate of the said Will in favour the respondent and also holding that the second Will supersedes the first Will dismissed the first probate petition.

11. The learned ADJ has observed that the second Will exhibit PW-1/3 had signatures and thumb impression of testatrix, it was attested by Sh. Jugal Kishore, husband of the testatrix (since deceased) and Sh. Sushil Kumar Ahluwalia (PW-3) also proved the attestation of the Will and registration thereof on the same day. In view of that, the learned ADJ held that the second Will was free from any suspicious circumstances and since it was later in time, it supersedes the first Will and, therefore, granted probate with respect to the Second Will in favour of the respondent and dismissed the probate petition filed by the appellant qua the first Will. It is against this order passed by the learned ADJ, the appellant has come in appeal before this Court. The appellant has raised following objections which were raised by him in the objections filed to the grant of probate of the Second Will by the respondents. The objections are that:-

- “i) The Will dated 17.11.1986 is surrounded by suspicious circumstances in as much as there was a delay of more than one and half years in propounding the will and the records show that Smt. Roop Rani expired on 22.11.1990

while the probate petition was filed by the respondent on 11.05.1992.

- ii) The deceased Smt. Roop Rani was of advanced age of about 80 years at the time of execution of the will, no medical certificate has been obtained to show that she was of sound and disposing mind at the time of execution of the will.
- iii) That the only attesting witness PW-3 appearing in this case, nowhere stated that he had put his signatures on the alleged will in the presence of the testatrix and/or the other attesting witness Mr. Jugal Kishore. Also, according to the appellant PW-3 is not a believable witness as he had been changing stands while deposing as a witness in as much as he had stated that "his grandfather was to go to kashmere gate" "for having his will registered", "the will was signed by him in my presence". But suddenly he shifts his stand probably on being pegged and says "the will was of grandmother and I had taken both his grandmother and grandfather to Kashmere gate". Further in chief-examination PW-3 stated that "the Joginder Pal, Advocate also signed in my presence", but in cross-examination he stated that "I had never met the lawyer of the executant and I do not know the name of the said lawyer" Hence for all this purpose evidence of PW-3 cannot be believed and have to be rejected.
- iv) That the appellant also raised doubts about the reports given by the finger print expert of CFSL and the handwriting expert in as much as according to the appellant the finger print expert during his cross examination has not ruled out the possibilities of perjury of the finger prints and thumb impressions. In regards to handwriting expert, appellant contends that the report of the handwriting expert cannot be relied upon because he had not adopted any scientific method and has given the report on the surmises and conjectures.
- v) Appellant had also raised objection that the will dated 17.11.1986 was drafted by Shri. M. Atiq Mirza Beg R/O Room No 3 Jama Masjid Delhi-110006, who was not called in witness box by the respondent."

12. I have heard the submissions of the parties and have also perused the written synopsis filed by the appellant.

13. A perusal of the judgment goes to show that all the objections have been met by the learned ADJ on the basis of the evidence available on record. It would be relevant to take note of some of the observations made by the learned ADJ in this regard:

"The relief to the petitioner cannot be denied merely on the ground that his petition was later in time or counter blast of petition of the respondent or he waited for several months in filing this petition after appearing in the case filed by the respondent. The law of limitation is not applicable in probate proceedings, otherwise also, even if it is presumed that limitation of three years as prescribed under Art 137 of

limitation Act is applicable, then also petition filed by the petitioner is within period of limitation to be counted from the date of death of testatrix and is not suffering from any delay or laches. The case law cited by counsel for the respondent titled as **Vijay kumar Tiwari Vs State 151(2008)DLT 513** is not applicable in the present facts and circumstance of the case because in that case before High court, the delay was coupled with various suspicious circumstances which is not the position in the present matter.”

14. It may be observed here that the second Will has been propounded by the respondents soon after they received the notice of the first probate petition filed by the appellant. In this regard, reference can be made to paragraph 8 of the second petition filed by the respondents wherein they have stated that:

“8. That Shri Ajudhia Parkash, one of the sons of the deceased has filed a petition being Probate Case No.6/1991 for the grant of probate/letter of administration in respect of the aforesaid estate of the deceased on the basis of the Will alleged to have been executed by her on 23.09.1973. The petitioner who has received notice of the said Probate Case is filing separate reply to the said petition of Ajudhia Parkash. ”

15. It is, thus, clear that need for filing the second petition with respect to the later Will arose only after respondents received a notice of the filing of the probate petition by the appellant, who propounded the first Will despite existence of the second Will.

16. It may be observed here that in Delhi normally probate is not required and, therefore, issue of limitation only arises when right to sue arises. Reference in this regard can be made to the judgment delivered by the Supreme Court in the case of Kunvarjeet Singh Khandpur Vs. Kirandeep Kaur, 2008 (TLS) 46042.

17. In this case, right to sue arose in favour of the respondents only when they received the notice of the first probate petition. In any event, the second petition has been filed within three years of the death of the deceased testatrix and, therefore, the issue of limitation has rightly been negated by the learned ADJ.

18. As far as the second objection regarding the testatrix being not of sound and disposing mind at the time of execution of the second Will, it has been observed by the learned ADJ that:

“In his objections, respondent has nowhere taken any ground or defence that at the time of alleged execution of the second Will, testatrix Smt. Roop Rani was not having sound disposing mind or was not keeping good health . No medical evidence in this regard is produced by him. The suggestions given to PW-1 regarding illness of testatrix as well as her physically and mentally unwell position which are denied by the witness are

contradictory from the pleadings of the respondent so in such circumstances, it is held that on 17-11-1986 when the second Will purported to have been executed, testatrix Smt. Roop Rani was in full senses and was capable to understand the nature of disposition. The arguments raised by counsel for the respondent that deceased was not got examined from any doctor before execution of the Will Ex.PW1/3 has no force as it is not mandatory that Will must bear the certificate of any doctor regarding sound mind position of the testator. Mere old age of testatrix at the time of execution of the second Will is no guarantee that her mental capacity was also affected to such an extent to make her unfit to execute it. Case law cited by counsel for the respondent titled as Satish Chander vs. State AIR 2005 Delhi 125 is totally distinguishable from the facts and circumstances of present case. When there was no defence raised regarding bad physical or mental condition of the testatrix by the respondent, then no question of producing any medical certificate of fitness arises on the part of the petitioner.”(Respondent referred to herein is Late Sh. Ajudhia Prakash, deceased father of the appellant)

19. As regards the stand taken by the appellant that PW-3 was not a reliable witness, it has been observed by the learned ADJ that the said witness had taken the deceased testatrix along with her husband to the office of Sub-Registrar for the purpose of execution of the Will and its registration. He has categorically deposed that Smt. Roop Rani and Sh. Jugal Kishore signed the Will in his presence as well as in the presence of his lawyer. He also deposed that the Will was in English and interpreted in Hindi by Sh. Joginder Pal. Despite all this, there is no cross-examination of the said witness on the aspect of interpretation of the Will to the testatrix and others. He has also not challenged the factum of PW-3, testatrix and another witness Sh. Jugal Kishore having signed the Will in his presence. No question has been put to the witness on this aspect in his cross-examination. Here also, It would be appropriate to take note of the observations made by the learned ADJ while discussing the testimony of PW-3. It has been stated that:

“PW-3 had taken testatrix Smt. Roop Rani and her husband Sh. Jugal Kishore to office of Sub-Registrar for purposes of execution of the Will. According to this witness, both Smt. Roop Rani and Sh. Jugal Kishore signed on the Will in his presence as well as in presence of their lawyer. He also deposed that Will was in English but interpreted in Hindi by the said lawyer. He also identified signatures of testatrix, witness Sh. Jugal Kishore, lawyer Sh. Joginder Pal as well as his own signatures on the second Will.

No cross examination of PW-3 was done on the aspect of interpretation of the will to the testatrix and others. Respondent has not challenged the fact stated by this witness that testatrix and another witness Sh. Jugal Kiahore had signed on the will in his presence even by putting any suggestion to the contrary in his cross examination. Similarly there is no cross examination of fact deposed regarding identification of signatures of testatrix and witnesses on the

Will. When a particular fact deposed by a witness is not disputed or challenged at all, then is presumed to have been admitted. Accordingly, it is held that testatrix before execution of the will Ex. Pw 1/3 had understood its contents and nature of disposition.

The words uttered by PW-3 that he never met the lawyer of the executant and did not know his name has to be read along with subsequent portion of the cross-examination when he said that he met lawyer first time on examination of the will. From these two portions of the cross execution of the will, he had never met or know the advocate Sh. Joginder Pal. Hence giving of name of this advocate in examination in chief and from picking of one portion of the cross examination regarding having not met the lawyer earlier cannot be said as was contradiction in his statement to disbelieve him.

Mere fact that date of -17-11-1986 was given to PW-3 by the counsel or the petitioner in his examination in chief is not sufficient to discard his whole of the statement and to make him unreliable witness. The statement of this witness was recorded in court in year 1999 after a gap of about 13 years of the execution of the will. No one can deny this aspect that memory fades with the passage of time. The will was shown to the witness at the end of his examination in chief. No opportunity was given to him to refresh his memory. Hence in that situation, even if date of execution of the will is given by PW-3 at the suggestion or instance of the advocate of the petitioner at the time of recording of his examination in chief, then it is of no consequence.

PW-3 also in response to the question put in the cross examination stated that except four of them, none was present at the time of registration of the Will before Sub-Registrar. Thus fact of appearance before Sub-Registrar for the purposes of registration of the Will is also established and this fact is not disputed further by putting any other question. The Will Ex. PW1/3 is a registered Will. PW-2 has proved its registration as per his office record. Absence of personal knowledge about its registration on the part of PW-2 does not draw presumption that it was not properly or legally registered as per provisions of Indian Registration Act. The document which is registered draws a presumption of its due execution. Respondent has failed to rebut this presumption also which is in favour of the petitioner. It is not mandatory as per law to get the Will registered. Even if the present Will Ex. PW-1/3 is treated as unregistered or improperly registered, then its due execution would not suffer any setback from the statement of W-2 wherein he denied having no personal knowledge about it.

Hence from the statement of PW-3, fact of drafting of the Will signing of the same by testatrix and witnesses after understanding its contents, appearance before Sub-Registrar for the purpose of its registration and its due execution as per requirement of section 63 of Indian Succession Act is fully established. Nothing material has come on record in his cross examination to doubt his veracity and truthfulness. His statement cannot be discarded merely on the ground that he happens to be a friend of son of the petitioner. On this score only, he cannot be termed as an interested witness so too reject his testimony. Slip of tongue while giving statement in court by

PW-3 at one occasion that grandfather of PW-1 had to go to Kashmere gate for having '*his will*' registered can be ignored when at the later part of the examination in chief he corrected himself and stated that Will was of the grandmother and he had taken both grandmother(SMY. Roop Rani) and grandfather (Sh. Jugal Kishore) of Sh V.k, Malhotra(pw-1) to the office of Sub- Registrar.

Statement of PW-3 also cannot be discarded simply on the ground that at the time of registration, his signatures were not taken on the back side of first page of the will where Sub registrar made his endorsements. When this witness is specifically saying that he had appeared before sub- registrar at the time of registration on which there is no cross examination, then simple absence of his signatures taken on back side of the page has no relevance because he has attested the will at the time of the execution. Moreover registration is not required or necessary in case of Will. If execution of will is established. Then improper registration has no meaning. Accordingly it is held that second will dated 17-11-1986 Ex PW1/3 has been proved by PW-3 being the last and genuinely executed Will of Smt. Roop Rani. It is also held that it was executed in sound disposing mind position by her."

20. In regard to the objection that the deed writer was not present or had not been examined, it was observed that:

"The will was drafted by a deed writer. PW-3 in his cross examination stated that Will was drafted when he reached there. This version of PW-3 was not disputed in further cross examination. From this fact, it is also established that drafting of the Will had taken place in presence of this attesting witness. The examination of person who drafted or typed the Will is not mandatory. Even mentioning of the name and putting signatures by typist on the Will is also not necessary. Hence no adverse inference can be drawn against m the petitioner for non examination of the deed writer who drafted the Will. Similarly, if that deed writer had not appeared before Sub-Registrar at the time of registration of the Will, then it cannot be held that Will is not genuine. As per procedure and practice, executants and witness are normally required to appear before Sub-Registrar at the time of registration and there is no necessity that deed writer or typist or even the person who read over and explained the contents of the document to the party must also appear before Sub-Registrar. The Will also cannot be looked into doubt merely on the ground that deed writer had given his Jama Masjid address on the Will whereas it was drafted in the office of the Sub-Registrar situated in Kashmere Gate."

21. In the light of the aforesaid deposition made by PW-3 and the report of the handwriting expert and finger print experts that the second Will was executed by Late Smt. Roop Rani and the said Will was later in time, the learned ADJ rightly came to the conclusion that the second Will was the last and final Will of Late Smt. Roop Rani and, therefore, rightly granted probate with respect to the second Will and in the circumstances, when there is a second Will available rightly dismissed the first probate petition. Even though experts have been examined to prove the finger prints and handwriting of the deceased testatrix, the very fact that the appellant has

not brought on record any material, book, journal or guidelines to rebut the findings or opinion given by these experts or to show that manner and procedure adopted by them in identifying the finger prints were contrary to any practice or rules. Moreover, the experts who have appeared in this case are officials coming from CFSL. They were called upon to give their report about the signatures and thumb impression of the deceased testatrix on the two Wills and on both the Wills they have opined that the thumb impression and signatures are that of the testatrix. Despite findings having been given against the appellant, no effort has been made by the appellant to produce any other handwriting expert in rebuttal so as to rebut the testimony of other witnesses.

22. Now coming to the testimony of the expert witnesses and their reports regarding signatures and thumb impression of the deceased Roop Rani on the second Will as well as the first Will being that of the testatrix even though, the appellant has tried to assail the reports given by these two witnesses and have also assailed their opinion in the cross-examination wherein they have stood by their reports. In this regard also the learned ADJ has discussed the evidence of the experts in detail. The observations made by the learned ADJ in this regard is reproduced hereunder:

“The reports of OW-3 and 4 who are experts in finger print and handwriting also goes against the respondent. He signatures and thumb impression of testatrix on the second will were got compared from the first admitted will at the specific request of the respondent. The defence of forgery of signatures and thumb impressions of the deceased on the second will sated 17-11-1986 falls on the ground from the reports of two independent govt officials who are experts in forensic science belonging to CFSL which is very reputed and well known laboratory being maintained by CBI. Respondent has failed to challenge the vast experience, expertise in the respective field and qualifications of these experts in their cross-examination. OW-3 and 4 had no motive to give any false report or to favour the petitioner unnecessary. These two witnesses were cross examined at length by respondent who tried to bring on record certain lacunas and loopholes in their reports but in my opinion, that is not sufficient to discard their reports.

Respondent in his objections had only disputed signatures of the deceased on will WX. PW 1/3 but has not uttered any word about forgery of her thumb impressions also. Similarly in the cross examination of PW-1, even no suggestion regarding forgery of thumb impressions was put. It is also not the case of the respondents that thumb impressions on this will were either obtained under force or under intoxication or are of dead woman. OW-3 in his report EX. OW 3/1 found that thumb impressions of Smt. Roop Rani on admitted first will EX. OW 2/1 tally with two thumb impressions on the second will EX. PW 1/3

Counsel for the respondent pointed out that the thumb impressions on the will EX. OW2/1 are smaller in size whereas it is somehow big in size in second will. When disputed thumb impressions tally with admitted impressions then simple difference in size of impression does not matter because the size of thumb impression can change due to change of physique and fatness as well as impact and force used to put it on paper. The design, pattern and characteristics of loops and ridges of thumb impressions of deceased Smt. Roop Rani in both the wills were found similar. Though as per OW-3 ridges become weak due to age but its basic characteristics remain the same. The science of identification of finger prints is almost perfect and it is hardly possible to copy the finger prints. In case of forgery, the same is easily detectable as stated by OW-3. If minimum 8 ridge characteristics become unimportant and those different finger impressions are held as similar and of the same person as per this witness and according to him this decision was taken in the conference of All India Forensic Experts. This aspect of statement of OW-3 is not challenged by the respondent by placing on record any journal, research paper, reputed book or contrary opinion of any other expert. When basic and minimum 8 characteristics were found by the expert in the thumb impressions of the testatrix in the will EX. PW1/3 after making comparison with the first will EX. OW2/1, THEN USE OF 'Theory of Mathematical probabilities' was not required. Tracing out these similarities from full or partial impressions, it was not necessary that same ridge characteristics should be marked in both impressions. Moreover most of the cross examination of this witness was on theoretical aspect and was hardly with reference to pointing out the thumb impressions in question. Respondent is not able to pin point how and in which manner thumb impressions of the deceased were not tallying with each other on both wills. Natural variations in thumb impressions occurring while affixing the same on paper or object, pressure used, nature of object or paper or ink used etc. though bring some slight changes but if sufficient number of characteristics are found similar. Then opinion of expert cannot be ignored. Respondent also failed to point out which of the core, loop or ridge of thumb impressions of both wills was not tallying with each other if such natural variations are taken into consideration and also failed to show how the report of this expert is incorrect. Respondent is also not able to prove any fact of cross examination of this witness that thumb impressions of the testatrix were manipulated or forged on will EX. PW1/3. Now mentioning in the report, dissimilarities in between admitted and disputed thumb impressions is not sufficient to discard the opinion because the opinion of this expert was based upon sufficient number of similarities which leads to the inference that the thumb impressions on both the wills were of the same person. Nothing has been brought on record by the respondent that qualifications and experience of this witness was not sufficient to make him a competent expert witness. Even nothing is brought on record to show that opinion of this witness was ever discarded or rejected by any court and was not of the standard expected from an expert. Certain facts relating to making ground work preparation before examination are not described in the report which in my opinion is otherwise highly irrelevant and not sufficient to reject the opinion of this witness. In view of the report of this independent expert and examination of the witnesses of the petitioner any ground of

forgery of thumb impression was taken. There is no hesitation to say that thumb impressions of the deceased on will Ex.PW1/3 are genuine and not forged. Non identification by this witness of one thumb impression Q-5 which on the face of it is blurred, amudged and unclear itself is not a ground to discard his opinion in respect of other thumb impressions of the testatrix put on the same document. Q-3 has specifically denied that besides comparison of patterns, the examination of cores also become necessary. Respondent has not brought on any record any material, book, journal or guidelines to rebut the findings or opinion given by this expert or to show that manner and procedure adopted by him in identifying the finger prints were contrary to any practice or rules. Accordingly I find no ground to reject the report submitted by Q-3 and is held that second will Ex. PW1/3 is containing genuine thumb impressions of the deceased Smt. Roop Rani.

The report QW-4 handwriting expert Ex. QW 4/1 is also reliable as this witness took help of latest techniques in comparing signatures. The alphabets/words *“Roop rani” in the signatures in the first will are joint whereas it is separate in the second will but it does not prove forgery because slight difference in signatures takes place with the passage of time whereas general characters do not change. It is a fact that human hand does not act like a machine to reproduce exact similar writing. Two handwritings and signatures even done at the same time by a same person may differ slightly. Hence in such situation where line quality of signatures is similar, then simple one tilt or rectangular stroke in first will is not a reason to presume forgery. Non taking of enlarge photographs of signatures by this witness is also not a ground to reject his report especially when he used other scientific instruments such as Twin Video Comparator, VSC-4 and Stereo Zoom Microscope in comparing the signatures in original position. Otherwise also obtaining of enlarged photographs in each and every case is not compulsory because some of the features, qualities, standards etc, cannot be studied from the photograph, There are certain limitations in comparisons through photography method. Hence use of latest techniques and instruments by this witness which is not described as inappropriate or unsuitable was justified for making comparison of the signatures. Non taking of measurement of signatures how creates dent in the report is not explained by the respondent. According to this witness, line quality of signatures on both wills is similar and on the face of it, no dissimilarity can be traced out even if it is compared by naked eye. Hence in that situation, occurring of some natural tremors in signatures in the second will due to old age factor does not lead to any inference of any forgery. Accordingly, i find no ground to reject the report of this expert also and it is held that signatures of Smt Roop rani on the second will Ex. Pw 1/3 are genuine.”*

It may be observed here that this Court has also examined the signatures and thumb impression of Smt. Roop Rani on the two Wills and a comparison thereof goes to show that the signatures as well as the thumb impression appears to be that of Smt. Roop Rani even by naked eyes.

23. It may be observed here that Section 68 of Indian Evidence Act requires examination of only one attesting witness of the Will in court. PW-1 in his statement alleged that advocate Sh. Joginder Pal who also signed on the will has expired. Though he has not brought anything on record to prove his death but that is immaterial and would not affect the case in any manner because another attesting witness PW-3 has been examined to prove the Will whose statement is held as reliable and inspiring in presence of PW-1 but he had identified signatures of his grandfather Sh. Jugal kishore (since deceased) attesting witness of the Will. Sh Jugal Kishore had also supported the case of respondents and opposed the petition of the appellant by filing objections. OW-2 neither admitted nor denied signatures of Sh. Jugal kishore on the second will as one of the attesting witness. In fact, he had not specifically disputed his signatures. Sh. Jugal Kishore had in his affidavit supported respondent and affirmed his signatures being one of the attesting witnesses and even in his objections to the petition of the appellant relied upon the second will. However, he expired during pendency of the proceedings and could not give evidence but court certainly can get some support from his pleadings and affidavits filed on record.

24. It is also pertinent to mention that PW-1(Sh V.K.Malhotra) in his statement has alleged that relation of the appellant with his parents have become strained and were not good during their life time and his grandfather Sh. Jugal Kishore had disowned him in the year 1987 by issuing notice through advocate Sh. B.K.Chaudhary and by publication of notice in the newspaper Statesman. When this fact is not disputed in the cross examination at all nor there is any denial of receipt of notice of advocate or absence of publication in the newspaper, then mere non-proving of notice of advocate and citation in the newspaper by the respondent is of no consequences. It is not in dispute that testatrix was living with her husband Sh. Jugal Kishore. The issue of advocate's notice and publication in the newspaper was done at the instance of Sh. Jugal Kishore and not at the instance of tetatrix Smt. Roop Rani but that would not matter.

25. Appellant herein instead of specifically denying, neither admitted nor denied the fact of disowning of his father through notice of advocate as well as publication in newspaper. It is also admitted by appellant in his cross examination that Sh. Jugal Kishore had filed a civil suit for injunction against him and his father in the Hon'ble High Court. Father of the appellant was having his separate kitchen whereas Sh. Jugal Kishore was having joint mess with the respondent as admitted by appellant. From this

fact, it can be assumed that even food was not being provided by the appellant to his parents and infact he was living separately from them. Testatrix being wife of Sh. Jugal Kishore thus had good and sufficient reasons to change the will and to exclude appellant from benefits of her estate. In such changed circumstances, the revocation of first will and execution of second will in favour of the respondent cannot be said as unnatural act or conduct.

26. The Ld. ADJ had also observed that:

“Petitioner himself had not stepped into the witness box but his son as well as attorney PW-1 has been examined. The court has to see whether the evidence led by the parties is sufficient to prove the case or not. Simple examination of attorney and non-appearance of petitioner personally in court is not sufficient to throw away the case. When the second will in question is established on record and respondent has failed to prove his defence, then in that circumstance will EX. PW1/3 cannot be discarded simply of the reasons that due to non-examination of petitioner, adverse inference has to be taken against him in view of the judgment of the supreme court given in the case **Shri Ishwar Bhai Chand Patel Vs Harihar Behara AIR 1999 Supreme Court 1341**. Admittedly, will in question is not executed in presence of PW-1. He admittedly being not an expert to compare the signatures and thumb impression. He even neither disclosed the nature of documents nor produced any such document on basis of which he was able to identify signatures or thumb impressions of the deceased or his grandfather. Even if the statement of PW-1 is totally ignored being not competent witness or is treated as deposed on basis of hearsay evidence and it is also held for sake of arguments that he was not able to identify signatures and thumb impression of her grandmother on the will, then also it would not favour the respondent in any manner as will EX PW1/3 is duly proved from the statement of PW-3 .”

Even for the sake of arguments, we ignore these reports of two experts and reject their opinion, then also the second will is duly proved from the statement of PW-3 who is truthful and reliable witness.

27. Appellant had also raised few technical objections like the verification clause of the objection filed in petition no 122/08/91 was not signed by Sh. Jugal Kishore but it was only a technical defect and which is not sufficient to reject the merits. Moreover, as per provisions of Order VI Rule 15(1) CPC, verification of the pleadings by one of the parties is sufficient compliance.

28. In this regard reference has been made to an Apex Court judgment, in the case of Shashi Kumar Bannerjee Vs Subodh Kumar Bannerjee AIR 1964 SC 529 wherein it was held that if the propounder succeeds in removing the suspicious circumstances, the court would grant probate

even if the will might be unnatural and might cut off wholly or in part the near relation which is not the situation in this case even otherwise.

29. As discussed above, while granting the probate of the second Will in favour of the respondents, the learned ADJ has considered all aspects of the matter which removes all suspicious circumstances with respect to the execution and attestation of the second Will, which is also duly registered and goes to show that none of the suspicious circumstances as cited by the appellant have been proved by him which may cast any cloud over the rights of the respondents to obtain probate of the Second Will which was the last and final Will and was later in time to the execution of the first Will by the testatrix. The second Will was propounded by the respondent right in time when they were confronted with the probate petition filed by the appellant first on the basis of the first Will.

30. In these circumstances, the judgment and order delivered by the learned ADJ dated 17.11.2008 is upheld and the appeal is dismissed with no orders as to costs.

31. A copy of this order be sent to the ADJ along with the record.

C.M.1539/2009(stay)

Interim order stands vacated.

The application is disposed of.

MOOL CHAND GARG, J

DECEMBER 02, 2010

'anb'