

REPORTABLE

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**
FAO (OS) No.237 OF 2009 & CM No.8309/2009

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Reserved On: 29th April, 2010.
Date of Decision: 14th July, 2010.

DESH RAJ GUPTA

. . . Appellant

through :

Mr. Anoop G. Chaudhary, Sr.
Advocate and Mrs. June
Chaudhary, Sr. Advocate with
Mr. Manish Vashisht, Mr.
Sameer Vashisht and Ms.
Aashita Yadav, Advocates.

VERSUS

STATE AND OTHERS

. . . Respondents

through:

Mr. A.S. Chandhiok, Senior
Advocate with Mr. Vikas
Dhawan, Mr. Abhimanyu and
Ms. Anita Lal, Advocates for
the Respondent No.2.
Mr. Manish Kumar, Advocate
for the respondent Nos. 5 &
6.

CORAM :-

HON'BLE MR. JUSTICE A.K. SIKRI
HON'BLE MR. JUSTICE AJIT BHARIHOKE

1. Whether Reporters of Local newspapers may be allowed to see the Judgment?
2. To be referred to the Reporter or not?
3. Whether the Judgment should be reported in the Digest?

A.K. SIKRI, J.

1. The genuineness and validity of purported Will dated 28.02.1985 got registered on 29.05.1985 of Lala Hansraj Gupta, Ex. Mayor of Delhi is the subject matter of the present appeal. After the death of Lala Hansraj Gupta (hereinafter referred to as 'the testator') on 03.07.1985, the appellant (one of his sons) filed the probate case No.62/1985 in October, 1985, propounding that Will. Some other legal heirs had challenged the veracity thereof. The

learned Single Judge has returned his findings holding that the purported Will, in his opinion, is not a genuine Will which has resulted in the dismissal of the probate petition. Assailing that judgment, present appeal is preferred by the appellant.

2. The testator had a family consisting of wife, four married sons and two married daughters. Names of his children and few grand children are mentioned in the opening part of the Will. Family chart is as under:

“Family Chart

Lala Hans Raj Gupta (died on 3rd July, 1985)

Des Raj Gupta (Son)S1	Shiv Raj Gupta (Son)s2	Rajendra Kumar Gupta (Son)S3	Mahendra Kr. Gupta (Son)S4	Angira Gupta (Wife)
Ravi Raj Uday Raj (Grandson)	Jayant (Grandson)	Sanjay (Grandson)	Arti Avanti Geeta Kirti (Grand-daughters)	

Daughters of Lala Hans Raj

Pratibha (Gopal, Sarita, Amita, Nalini) Great Granddaughters (Amita, Sarita, Arti)”	Shashi (Karuna & Vikram)
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3. The testator has given Rs.15,000/- each of his grandsons and daughters and great grand children (children of his sons) and Rs.5,000/- each to grand children of his daughters as a token remembrance. Main bequeath, insofar as interests are concerned, relates to his interest and share in M/s. H. G. Gupta and Sons as well as M/s. Mridul Enterprises Partnership, two partnership firms and his shares and other interest in M/s. Hansraj Gupta and Company Private Limited. He also had a share in two properties, viz., No.20, Barakhamba Road, New Delhi and residential property, i.e., 3, Amrita Shergil Marg, New Delhi. As per this Will, his interest and shares in these properties devolved are as under:

- “4. My interest and share in H.G. Gupta & Sons and M/s Mridul Enterprises Partnership and their respective

goodwill be transferred to my grandsons Ravi Raj Gupta and Uday Gupta in the proportion of 3 to 1 and it is my fervent desire that this partnership may continue as a link between the family far as long as possible.

8. All my shares and other interests that I have in M/s. Hans Raj Gupta & Co. Pvt. Ltd. with that after my death the same may devolve on my son Shri Desh Raj Gupta and grandson Shri Ravi Raj Gupta equally. I wish that the said company be managed and controlled by my son Shri Ravi Raj Gupta as is being done today and none of my other legal heirs should raise any objection thereto.
10. That my share in property No.20, Barakhamba Road, New Delhi and 3, Amrita Shergil Marg, New Delhi shall after my death devolve upon my 4 sons in equal shares."

One trust, viz., Hansraj Gupta Charity Trust was also created in respect of which Will provides as under:

- "9. After clearing all the aforesaid liabilities the executors shall make over all my movable assets or shares to Hans Raj Gupta Charity Trust of which I am also a trustee.
11. That the value of my interest in all other immovable properties shall devolve upon the aforesaid Hans Raj Gupta Charity Trust.
12. Whatever other immovable property or share of immovable properties owned by me shall be made over to Hans Raj Gupta Charity Trust together with an obligation thereon to use them in pursuance of objective of that trust."

The testator had some unascertained contingent liabilities in the form of personal guarantees given by him for some limited company. He made provision in respect of these liabilities as well as by declaring as to who would own such liabilities. The gist of the Will, thus, is as under:

- ✓ Rs. 15,000 to each grandson, granddaughters, great-grandson & great granddaughters;
- ✓ Rs.5,000 to children of daughters;

- ✓ The firm named H.G. Gupta & M/s. Mridul Enterprises to Raviraj & Uday (sons of Des Raj Gupta) in proportion of 3:1;
- ✓ Central Distillery and Breweries to Shivraj Gupta;
- ✓ Rampur Engineering Co. Ltd. to Rajendra Gupta;
- ✓ Property No.20 at Barakhamba Road and 3, Amrita Shergil Marg, New Delhi respectively to four sons (S1, S2, S3, S4) equally.

4. The Will is stated to be drafted by one Mr. S.K. Tiwari, Advocate. There are three witnesses to this Will, viz., Ms. Angira Gupta (wife of the testator), Mr. M.P. Tiwari and Mr. S.K. Tewari. Mr. S.K. Tewari signed the Will in dual capacity i.e., both as a witness and as a drafting counsel. Three sons of the testator, viz., Desraj Gupta (the appellant), Shiv Raj Gupta and Rajendra Kumar Gupta (Objectors) were appointed as the executors.

Re: The Petition:

5. In the petition filed by the appellant, it was stated by the appellant that the Will was executed on or around 28.05.1985 and registered on 29.05.1985. It was described as the last will and testament of the departed testator. The petitioner also alleged that since other two executors had renounced their positions as executors by taking stand in legal proceedings in a case pending before sub-judge, Delhi, to the effect that the said Will was not a genuine Will, the petitioner was the only executor left, who could file the petition. The petition at its bottom bears endorsements of 3 witnesses namely Smt. Angira Gupta, Sh. M.P.Tiwari and Sh.S.K.Tiwari, Advocate. Smt. Angira Gupta, wife

of the deceased, appended an endorsement that she was present at the time of execution of the "Will" dated 28th May, 1985 by late Lala Hansraj Gupta and saw him reading and affixing signatures to the "Will" and she signed the "Will" as an attesting witness in presence of the testator and in presence of other 2 witnesses. The endorsement by other 2 witnesses was also to the same effect. However, the endorsement is signed by Smt. Angira Gupta on 8th October, 1985 while by Sh.M.P.Tiwari and Sh.S.K.Tiwari signed it on 30th September, 1985.

Re: The Objections:

6. After receipt of the notice of the petition, two brothers, viz., Shiv Raj Gupta and Rajendra Kumar Gupta as well as two sisters, viz., Shashi Jai Kishan and Pratibha Khandelwal (all of whom were arrayed as respondent Nos. 3, 4, 6 and 7 respectively) filed their objections. The objections were primarily of two types; (i) the testator was seriously ill on the alleged date of the execution of the Will and was not in a sound disposing mind and therefore this Will was invalid and (ii) There was no valid and proper execution and registration of the Will. In fact, the objectors went to the extent of denying the execution of the Will as is clear from the following:

"i) In the reply filed by Mr. Shivraj Gupta, in paragraph 3 of the Preliminary Objections, it has been stated as under:-

"3. ...In fact the deceased never read, understood or was told **or executed the said Will and the petition is liable for dismissal.**

In para-wise reply, it has been stated as under:-

"2. ...Paragraph 5 of the Petition is substantially correct. **However, it is denied that any Will was executed and as such the question of answering respondent having been named as an Executor or his having renounced his position in the Will does not arise...**"

7. ...Para 7 of the Will is wrong and denied. **It is stated that Lala Hans Raj Gupta never executed any Will at all...**

7. The widow of the testator, viz., Ms. Angira Gupta was impleaded as respondent No.1, who had also verified the petition. She filed her reply supporting the petition by taking the position that it was a genuine Will. Fourth brother, Mahinder Kumar Gupta, who was impleaded as the respondent No.5 also went along with the appellant by supporting the petition.

Re: The Issues:

8. On the basis of pleadings, following three issues were framed:
- 1) Whether the Will dated 28th May, 1985 was duly executed and attested and is the last Will and testament of the deceased? OPP.
 - 2) Whether the two executors of late Shri H.R. Gupta have renounced their position as such? If so, to what effect? OPP.
 - 3) Relief.

Re: The Evidence:

9. In order to prove the Will, the appellant examined only three witnesses. The star witness of the appellant was Mr. S.K. Tiwari, Advocate (PW-1), who is stated to have drafted the Will. The second witness was D.N. Gupta, who was Sub-Registrar at the time when Will was executed. We may point out at this stage itself that because of illness of the testator, he could not go to the office of the Sub-Registrar for the registration of the Will. The case set up by the appellant was that request was made to the Sub-Registrar for registering the Will by visiting the residence

of the testator. D.N. Gupta, Sub-Registrar had deputed one Satish Kwatra, reader in his office, for this purpose, who had allegedly completed the formalities of the registration. Satish Kwatra was, however, not produced as a witness and instead D.N. Gupta appeared as PW-2, who stated in his examination-in-chief, in the form of a sworn affidavit, that his reader was directed by him to visit testator's residence and confirmed that he had executed the Will. Third witness produced by the appellant was Dr. S.M. Singh, who had attended the testator when he was admitted to AIIMS for his treatment. We may also point out at this stage itself that the testator was admitted to AIIMS for prostrate operation on 13.04.1985. At this time, he was 82 years of age and was suffering from various elements including diabetes. Prostrate operation was conducted on 17.04.1985. The testator was discharged on 24.05.1985 "on his own request". From 24.05.1985 onwards, he was at home, but still suffering from certain ailments. He was attended to by one Dr. Madan Lal at his residence. The Will in question is alleged to have been executed on 28.05.1985 and registered on 29.05.1985. Dr. Singh (PW-3) has thus deposed about his condition when he was in AIIMS. Dr. Madan Lal was not produced as witness by the appellant. On the contrary, Dr. Madan Lal was cited as a witness by the objector. However, he also did not produce Dr. Madan Lal as a witness. Much controversy is raised as to who was supposed to produce this witness and consequence of non-production, which shall be dealt at a later stage.

10. We may also point out at this stage itself that Ms. Angira Gupta though named as witness of the appellant, was/could not be produced, as she had passed away in the meantime. A passionate plea was made by the learned counsel for the appellant that verification of Ms. Angira Gupta on the probate petition as well as her reply affirming the execution of the Will be treated as relevant statement under Section 32 of the Indian Evidence Act.
11. On behalf of the objectors, evidence was led only by Shiv Raj Gupta. He appeared himself as RW-1. Other witness produced by him was one Dr. Rakesh Gupta as RW-2. Though Dr. Rakesh Gupta never examined the testator, his deposition is in the form of expert opinion on the medical condition of the testator based on the medical record of the testator produced by the appellant.

Re: Judgment of the Learned Single Judge:

12. The learned Single Judge decided the issue No.1 against the appellant thereby accepting the objections and holding that the Will in question was not the genuine Will of the testator. Learned Single Judge has disbelieved the testimony of PW-1. His finding in this behalf are summarized as under:

- (i) As per PW-1, the testator had called him sometime in the second week of May 1985 through Mrs. Angira Gupta (when the testator was in AIIMS), as he wanted to see him to get his Will drafted. When he visited AIIMS the next day, he was instructed by the testator to draft out a Will. Two-three days thereafter, PW-1

took the draft Will to the testator. The testator did not approve that Will and suggested certain alteration and modifications. After carrying out those alteration and modifications, he again took the Will to the testator, who asked him to leave the same in the custody of his wife, Angira Devi. He also said him that he would get in touch with PW-1 when he would be in a position to get the same registered. After the testator was shifted from hospital to his residence, PW-1 again received a call from the wife of testator. The testator told him to go to adjoining TV Room where the Will was lying in a drawer. PW-1 went to the TV Room and brought the Will, which he found to be another Will which was already drafted by the testator. The same was lying in the drawer along with a typed copy.

According to the learned Single Judge, this part of testimony puts a question mark on his deposition that the testator had asked him to draft a Will inasmuch as if the testator had already drafted the Will which was lying in his room and he wanted to finalize that Will only, there was no question of requesting PW-1 to draft another Will.

- (ii) According to PW-1, the testator wanted his opinion on the Will, which the testator had already prepared. At the request of the testator, PW-1 read out the Will. The testator suggested certain alterations, which he carried out and took the Will again to the testator. PW-1 was, however, asked to draft another Will by

carrying out some alterations as suggested by the testator. He got another Will retyped after taking care of those suggestions and went with that draft Will to the testator. The testator approved it and signed the same. Mr. M.P. Tiwari, father of PW-1 had also gone with him at the request of the testator. He also signed as attesting witness. As per this witness, final draft of the Will was approved by the testator either on 24th, 25th or 26th May, 1985 and the Will was to be registered on 29.05.1985. However, when the witness was asked about the date on which it was actually signed, his answer was that though the date mentioned in the Will of its execution was 28.05.1985, but the Will was not signed by the testator on that date. He had kept the Will with himself and signed the same on 28.05.1985 in the morning whereafter it was gone for registration. The date on which the testator or witnesses signed the Will was thus not clear (even the petition filed by the appellant is not categorical about it and states that Will was signed on or around 28.05.1985).

- (iii) PW-1 was not a reliable witness as he had been associated with the appellant for long. According to the learned Single Judge, it has come on record that PW-1 had worked as Junior of L.R. Gupta from 1965 to 1970-71. He also admitted that he has worked as apprentice with Rampur Engineering Company Ltd. to which the testator was the Chairman and the appellant was the

Technical Director/Managing Director. He was an Advocate/Legal Advisor as well. Even his father was working with Lala Hansraj Gupta since 1940-42. PW-1 who is the only attesting witness examined to prove the “Will”, in his attestation of the Probate Petition at the foot had verified that he was present at the time of the execution of the “Will” dated 28th May, 1985. He was one of the witnesses of the “Will” dated 28th May, 1985. However, when he appeared in the court he stated that the „Will“ was not executed on 28th May, 1985 but was actually executed on 29th May, 1985. Further, he put attestation to the Probate Petition even before the petitioner himself had signed the Petition. The petitioner signed and verified the Petition on 8th October, 1985, whereas PW-1 and his father Sh.M.P.Tiwari attested the Petition on 30th September, 1985. Not much could have been inferred from this, but the very fact that Sh.S.K.Tiwari, PW-1 attested the Petition as an attesting witness of the “Will” even before signatures of the petitioner on the petition were appended, shows that Sh.S.K.Tiwari was out to oblige the petitioner and had signed the petition even before signing of it by the petitioner, who signed it after 8 days of the signing by Sh.S.K.Tiwari. This tendency of obliging is reflected in his evidence when in his examination-in-chief he testified about physical and mental health of the deceased. His testimony seems to be of a person who was out to repay

the debts of obligations than the testimony of a truthful witness.

- (iv) The medical record of the testator during the period he was admitted in AIIMS Hospital as well as thereafter revealed that the testator was diagnosed as a case of Benign Hyperplasia Prostate with NIDDM with Emphysema Chest. He was not even fully recovered even on 24.05.1985 when he was discharged on his request and not because of his stability in the condition or on medical advice. The medical report further shows that the testator was suffering from uncontrolled diabetes and recurrent troublesome hyponatremia. His urinary tract infection was under control and for hyponatremia, blood plasma and human albumin transfusion was being done. Even on the date of discharge, he had been bleeding from the rectum and two units of blood were transfused into his body. Even at the time of discharge, it was stated to the hospital authorities that the appellant was taking the testator home for three days with doctor's permission, i.e., from 24.05.1985 to 27.05.1985 and he would be brought back to the Hospital on Sunday night, i.e., on 28.05.1985. The learned Single Judge, thus, concluded that the testator, health-wise, was in a bad condition. He could not walk himself; he could not sit of his own and needed help to make him sit in bed. With such physical condition of the testator, the learned Single Judge disbelieved the testimony of PW-1 to the effect that when he went to the

testator in his house on 28.05.1985, the testator was playing with his grand children. He also disbelieved the version of PW-1 that the grandchild was in the lap of testator, which according to the Trial Court, was not possible keeping in view the serious health condition of the testator, who was bleeding from piles; whose hemoglobin was very less; who was having sugar, urinary tract infection and blood and saline solution were infused in his body.

- (v) The learned Single Judge also commented upon the testimony of Dr. S.M. Singh (PW-3) by observing that his statement in the Court is contrary to the hospital record. In this behalf, the Trial Court has observed that the hospital record shows that the testator was discharged from hospital against medical advice. Explanation given by the PW-3 that it was because of the reason that the testator was adamant and insisted on being discharged and he would not eat till discharged was not the reason mentioned in the discharge slip. On the contrary, it was the petitioner and his son who got the testator discharged from the hospital against the medical advice with an assurance that the testator would be brought back within three days. It is also commented by the Trial Court that PW-3 had admitted that the room in which the testator was admitted was kept reserved for a couple of days so that when he is brought back, the testator is admitted in the same room, which shows that when the testator was discharged from the hospital, there was

every chance that his condition may become precarious and for this reason room was kept reserved. The view of the learned Single Judge, therefore, that the testimony of the PW-3 regarding mental state of the testator that “his will power was strong and he was mentally alert” was not acceptable. In this behalf, the learned Single Judge has also made following remarks:

“Although, this witness remembered about the patient having stopped taking food 20 years back, when the was asked whether payment had been made at the time of discharge, the witness failed to remember this. His attention was drawn to the medical record where he had written that the payment would be made by the family on next date and the responsibility was of his (the witness). The witness was asked if he had personal relationship with Lala Hansraj Gupta, the witness denied this and stated that he knew him only as a patient. He was asked why did he give this undertaking that he would be responsible for making payment. The witness stated that a relationship got created because the patient remained admitted for 41 days in the hospital under his supervision.”

(vi) On the basis of medical records, and particularly the fact that the testator was suffering from hyponatremia, the learned Single Judge concluded that sodium level of the testator was less than the normal range. When confronted with literature contained in Harrison’s ‘Principal of Internal Medicines’ and Merck’s ‘Manual of Medical’ describing the consequence of hyponatremia, PW-3 had concurred with the observations contained in the aforementioned books. The learned Single Judge noted that in such cases sodium level goes down. It results in neurology dysfunction, leading to swelling of brain cells. The severity of symptoms is related both the degree of hyponatremia and to the rapidity with which it develops. As a result, patients may be lethargic, confused, stuporous, or comatose. If hyponatremia

develops rapidly the signs of hyperexcitability such as muscular twitches, irritability, and convulsions may occur. In view of this medical history of the aforesaid medical literature, the learned Single Judge concluded that the testator was not in a sound disposing mind to execute the will. For this purpose, testimony of Dr. Rakesh Gupta (RW-2) was also relied upon and the discussion contained in the judgment goes as under:

“Although, this witness remembered about the patient having stopped taking food 20 years back, when he was asked whether payment had been made at the time of discharge, the witness failed to remember this. His attention was drawn to the medical record where he had written that the payment would be made by the family on next date and the responsibility was of him (the witness). The witness was asked if he had personal relationship with Lala Hansraj Gupta, the witness denied this and stated that he knew him only as a patient. He was asked why he gave this undertaking that he would be responsible for making payment. The witness stated that a relationship got created because the patient remained admitted for 41 days in the hospital under his supervision.”

(vii) The learned Single Judge also drew adverse inference against the appellant for not examining Dr. Madan Lal who according to the learned Single Judge was in a better position to give general condition of the testator, as he looked after him from 24.05.1985 onwards and crucial dates being 28th and 29th May, 1985.

(viii) The learned Single Judge also questioned the circumstances under which the appellant and his son got the testator discharged at the crucial juncture in order to get the said Will prepared. It is also the view of the Trial Court that the manner in which the entire thing was kept as guarded secret by the appellant, creates doubt about

the genuineness of the Will. Some of the observations of the Trial Court in this behalf are as under:

“In the present case, the testator was under treatment in the hospital. He was a well-known personality and was being taken care of by the Doctors in a very well manner in a private room of a hospital of repute. The Doctor who did not even know him personally, allowed the discharge of the patient without payment of the bill merely because he was sure that the payment from family of such a well-known personality will not be withheld. There was no necessity for the patient to move to his home for executing the „Will“. The activity of the execution of the „Will“ gained momentum soon after discharge of the patient from the hospital. The evidence of PW-1 shows that the „Will“ in question was finalized within 3 days of the discharge of the patient. The patient came home sometime on 24th May and the „Will“ got finalized on 28th May.”

(ix) The manner in which medical certificate was obtained from Dr. Madan Lal for bringing the sub-Registrar to the residence of the testator to get the Will registered is also treated to be the suspicious circumstance by the learned Single Judge. It is clear from the following:

“20. PW-1 Mr. S. K. Tiwari, Advocate had prepared the „Will“ allegedly at the instance of the deceased. He was known to entire family. It is not his case that instructions were given to him not to disclose about the „Will“. But when he obtained certificate from Dr. Madan Lal, who was treating the deceased at homes, he did not disclose that he was obtaining a certificate so that the „Will“ may be registered. Although, he obtained the certificate from Dr. Madan Lal about inability of Lala Hansraj Gupta to move out of his house, but he did not ask the doctor to be a witness to the „Will“ and to append there that Lala Hansraj Gupta was mentally sound. If the services of doctor had not been readily available, the case would have been different. When the services of doctor were readily available and the doctor was all along present at the home of Lala Hansraj Gupta and doctors were present at AIIMS hospital, asking a doctor to put it on record that Lala Hansraj Gupta was in sound mental health would have been a most appropriate thing known to an Advocate.”

(x) Another doubt nurtured by the learned Single Judge arose from the circumstance in which second Will was prepared and registered on 29.05.1985. The learned Single Judge has commented that the first Will was

finalized in the hospital and it is not known how the properties were bequeathed. Further, no explanation came on record as to what prompted the preparing of second Will when first Will was finalized only a week ago, which created grave doubt about the mental soundness of the testator as well as the genuineness of the Will.

(xi) That the appellant himself took imminent part in the execution of Will, which confers a substantial benefit on him, is also taken as a suspicious circumstance showing doubt on the genuineness of the said Will. The learned Single Judge noted in the behalf is as under:

“In the present case, it was the petitioner and his son who brought Lala Hansraj Gupta to their home. PW-1 was an Advocate working for Lalaji and the petitioner and had also been looking after some of the legal work of the petitioner. The petitioner is a major beneficiary under the „Will“. The petitioner, who had assured in the hospital that Lalaji would be re-admitted in the hospital after 3 days, did not get Lala Hansraj Gupta re-admitted. The petitioner did not appear in the witness box. All these factors create doubts about genuineness of the ‘Will’.”

13. The aforesaid, according to the learned Single Judge, are the suspicious circumstances, which prove that Will in question propounded by the appellant is not genuine and valid.
14. The appellants have questioned the approach and wisdom of the learned Single Judge in dealing with the various aspects of the case in the impugned judgment in the manner noted above. There is virtually a challenge to each and every aspect of the aforesaid findings by the appellant.

Law Generally: Relating to Wills:

15. Before we analyze the evidence produced by the appellant in support of the Will and the objectors in support of their objections in an attempt to create suspicion to the genuineness of the Will, we deem it proper to state in brief the principles of law, which are required to be kept in mind. This becomes essential as these principles would help in analyzing the evidence in a proper perspective and to decide as to whether the findings of the learned Single Judge are correct or else, it is case where the appellant has been able to prove the genuineness of the Will.
16. In two judgments pronounced by a learned Single Judge of this Court, the entire gamut of law relating to Wills has been revisited. The learned Judge summarized the legal position on this aspect and culled out legal principles from various pronouncements of the Supreme Court, High Courts and even Privy Council. With such erudite and laborious assignment already accomplished in those judgments, our task is made easier and we would do no better than extracting relevant portions from those judgments. The first case is entitled ***K.L. Malhotra, L.R*** Vs. ***Smt. Sudershan Kumari*** in FAO No.289 of 1998 decided on 01.04.2008. The learned Judge noted the principles of law in the following manner:

“25. 'Will' as defined under Section 2(h) of the Indian Succession Act means 'the legal declaration of the testator with respect to his property which he desires to be carried into effect after his death'. The essential characteristic of a will, as is well known, is that it is a mere declaration of an intention so long as the testator is alive, a declaration which may be revoked or varied by the testator during his lifetime; it is a disposition that requires the testator's death for its consummation and is but ambulatory or without fixed effect until the happening of this event. The document is a will if it contains specific words of bequest to come into effect after the death of the testator.

26. A will is a solemn document. By it, a dead man entrusts to the living to carry out his wishes and since it is impossible that he can be called either to admit or deny his signatures or to explain the circumstances in which it was executed, duty of care is cast on the shoulders of the court while considering a probate case.

27. The rules governing the propounding of a will are two. First, the onus probandi lies in every case upon the party propounding the will and he must satisfy the conscience of the Court that the instrument so propounded is the last will of the testator. Second, if a party actively participates in the execution of a will under which he takes a benefit, it is a circumstance to excite the suspicion of the Court and calls upon the court to be vigilant and zealous in examining the evidence on record.

28. The strict meaning of the term 'onus probandi' is this, that if no evidence is given by the party on whom the burden is cast, the issue must be found against him. In all cases the onus is imposed on the party propounding the will. It is in general discharge by proof of capacity and the fact of execution from which the knowledge of and assent to the contents of the instrument are assumed.

29. The nature of proof required to prove a will is not different from those required to prove other documents except the requirement of attestation prescribed under Section 63 of the Indian Succession Act. The proof is to be tested on the usual satisfaction of a prudent mind. What distinguishes a will from other document is that the testator would not be available to testify the same as his last will. This introduces an element of solemnity in the decision. Even then the Court has to proceed with the enquiry in the same manner as is done in respect of any other document. The propounder is called upon to show by satisfactory evidence that (1) the will was signed by the testator in the presence of two attesting witnesses; (2) at the relevant time he was in sound and disposing state of mind; (3) he understood the nature and effect i.e., the content of the disposition; (4) he put the signature to the document of his own free will. The onus of the propounder can be said to be discharged on proof of the above essential facts.

30. However, in a case surrounded by suspicious circumstances viz.: the disposition may appear to be unnatural, improbable or unfair in the light of the relevant circumstances; or there may be indications that the disposition was not the result of the testator's free will and mind, such suspicious circumstances make the initial onus very heavy; and unless satisfactorily discharged, the Court would be reluctant to treat the document as the last will of the testator. Where the propounder takes a prominent part in the execution of the will conferring benefit upon him, that is a suspicious circumstance attending the execution of the will; the propounder is required to remove the doubt by clear and satisfactory evidence. In other words the propounder must satisfy the conscience of the Court that the document is the last will and testament of the testator.

31. Where the caveator alleges undue influence, fraud and coercion, the onus is on him to prove the same. Even if there is no such plea but the circumstances give rise to doubts, it is for the propounder to satisfy the conscience of the Court. If the propounder is able to satisfy the conscience of the Court, the Court shall grant the probate, even if the will cuts off, wholly or in part, near relations. It is the will of the testator that is reflected in the will. Being the testator's own property, he has the liberty to deal with it absolutely. It is not for the Court to find out justification or equity or otherwise in the action of the testator. It is not for the Court to make it fair or to sermonize. It is not for the Court to refuse the grant on account of the fact that the disposition is not just and fair or is unnatural or improbable when the conscience of the Court is clear about the proof of the execution of the will on the face of the evidence, satisfactorily sufficient, to remove the suspicious circumstances.

32. As the wills are too frequently made by the sick and dying, the degree of understanding and memory which the law requires is such as may be

reasonably expected from persons in that condition. Therefore, it is wrong to suppose that those qualities of mind should be possessed by the testator in the highest degree, position or to the same extent as before the illness in order to enable him to validly make his will. Section 59 of the Indian Succession Act requires that the testator should have a sound mind. The sound mind referred to does not mean that the testator should have his mental faculty in their fullest vigour, but means that he should have the capacity to understand the nature of his property; memory to remember the relations and persons normally having claims on his bounty and has also a judgment. As observed by their Lordships of Privy Council in the decision reported as *Judah v. Isolyne* AIR 1945 PC 174, the fact that the testator was unwell when he executed the will is a long way from saying that he had no testamentary capacity. The testator does not have to be found in perfect state of health to have his will declared valid. It is sufficient to prove that he was able to outline the manner in which his estate was to be disposed of.

33. The general principles governing the presumption of due execution and attestation are, if a will appears on the face of it to have been duly executed and attested in accordance with the requirements of the Act, the maxim '*omnia presumuntur rite esse acta*' applies, unless it is clearly proved that the will in fact, was not duly executed. The Court of probate has long been accustomed to give great weight to the presumption of due execution arising from the regularity *ex facie* of the testamentary paper produced where no suspicion of fraud has occurred.

34. Where once it has been proved that a will has been executed by a person of competent understanding, the burden of proving that it was executed under undue influence is on the party who alleges it. The Privy Council laid it down in the decision reported as *Mst. Gontibai v. Kanchhedilal* AIR 1949 PC 272 that undue influence in order to invalidate a will must amount to coercion or fraud. Its extents must be established and it must also appear that it was actually exercised on the testator.

35. The burden of proving undue influence is not discharge by merely establishing that the person had power unduly to overbear the will of the testator. It must be shown that in any particular case that power was, in fact, exercised and that it was by means of exercise of that power that the will was obtained. This was observed by the Calcutta High Court in the decision reported as *Chandra Majumdar v. Akhil Chandra Majumdar* AIR 1960 Cal 551. Relying upon the decision of the Hon'ble Supreme Court in the decision reported as *Naresh Charan Das Gupta v. Paresh Charan Das Gupta and Anr.* AIR 1955 SC 363 it was observed that it is elementary that law does not regard or characterize every interest which is brought to bear upon a testator as undue. It is open to a person to plead his case before the testator and to persuade him to make a disposition in his favour and if the testator retains his mental capacity and there is no element of fraud or coercion, the will cannot be attacked on the ground of undue influence. Not all importunities are undue influence. While making said observation, the Hon'ble Supreme Court in *Naresh Charan Das Gupta's* case (*supra*) quoted the observation of Lord Penzance in the decision reported as *Hall v. Hall* 1868 (1) P & D 481 "but all influences are not unlawful. Persuasion, appeals to the affections or ties of kindred, to a sentiment of gratitude for past services, or pity for future destitution, or the like - these are all legitimate and may be fairly pressed on a testator. On the other hand, pressure of whatever character, whether acting on the fears or the hopes, if so exerted as to overpower the volition without convincing the judgment, is a species of restraint under which no valid will can be made. In a word, a testator may be led, but not driven; and his will must be the offspring of his own volition, and not the record of some one else's".

36. The golden rule in interpreting a will is to give effect to the testator's intention as ascertained from the language, which he has used. The overriding duty of a Court is to construe the language which the testator has in fact employed giving due weight to all the words and rejecting

none to which a meaning can reasonably be assigned. The Court is entitled to put itself into the testator's arm chair to construe a will and to form an opinion apart from the decided cases and then, to see whether those decisions require any modification of that opinion and not to be guided by considering as to how far the will in question resembles other wills upon which the decisions have been given. The proposition that the will has to be read as a whole cannot be disputed. Whether there is a will on the basis of the document, the probate Court certainly will not proceed to consider as to whether or not the disposition of the property was good or bad. The primary duty of the probate Court is to see first whether *prima facie*, the document constituted a will."

Other judgment is dated 21.11.2007 in FAO No.874 of 2003 entitled ***Jagdish Lal Bhatia and Others Vs. Madan Lal Bhatia and Anr.*** In this judgment, the Court dealt with the legal burden of proof when a will is propounded and also spelt as to what would constitute suspicious circumstances and what form of affirmative proof should be sought by the court to satisfy the judicial conscience that the document propounded is the last legal and valid custom of the testator. This reads as under:

"I. The legal burden to prove due execution always lies upon the person propounding a will. The propounder must satisfy the judicial conscience of the court that the instrument so propounded is last will of a free and capable testator.

II. The onus is discharged by the propounder adducing *prima facie* evidence proving the competence of the testator and execution of the will in the manner contemplated by the law. The contestant opposing the will may bring material on record meeting such *prima facie* in which event the onus would shift back on the propounder to satisfy the Court affirmatively that the testator did know well the contents of the will and in sound disposing capacity executed the same. (see the decision of the Supreme Court in *Madhukar D. Shende v Tarabai Aba Shedge* AIR 2002 SC 637).

III. No specific standard of proof can be enunciated which must be applicable to all the cases. Every case depends upon its circumstances. Apart from other proof, conduct of parties is very material and has considerable bearing on evidence as to the genuineness of will which is propounded. Courts have to be vigilant and zealous in examining evidence. Rules relating to proof of wills are not rules of laws but are rules of prudence.

IV. Expanding on the care and caution to be adopted by the courts, and presumptions to be raised, in the decision reported as (1864) 3 Sw & Tr. 431 *In The Goods of Geale*, it was opined that where a person is illiterate or semi literate or the will is in a language not spoken or understood by the executor, the court would require evidence to affirmatively establish that the testator understood and approved all the contents of the will.

V. One form of affirmative proof is to establish that the will was read over by, or to, the testator when he executed it. If a testator merely casts his eye over the will, this may not be sufficient.

VI. Courts have to evaluate evidence pertaining to the circumstances under which the will was prepared. If a will is prepared and executed under circumstances which raise a well grounded suspicion that the executor did not express his mind under the will, probate would not be granted unless that suspicion is removed.

VII. A word of caution. Circumstances can only raise a suspicion if they are circumstance attending, or at least relevant to the preparation and execution of the will itself.

VIII. Another point that has to be considered is about the improbability in the manner in which the instrument is scripted. Instance of suspicious circumstances would be alleged signatures of testator being shaky and doubtful, condition of the testator's mind being feeble and debilitated, bequest being unnatural, improbable and unfair.

IX. Suspicious circumstances are a presumption to hold against the will. Greater is the suspicion more heavy would be the onus to be discharged by he who propounds the will.

X. A will is normally executed by a person where he intends to alter the rule of succession or where he desires a particular form of inheritance and to that extent, nature of bequest is not of much substance to invalidate a will, but consistent view taken by the courts is that this could be treated as a suspicious circumstance. What weightage has to be attached to this suspicion would depend upon case to case.

XI. Suspicion being a presumptive evidence, is a weak evidence and can be dispelled."

17. Thus, the first and foremost thing which is to be borne in mind is that legal burden to prove the due execution always lies upon the person propounding the Will. The propounder has to lead evidence proving the competence of testator as well as execution of the Will in the manner contemplated in law. The propounder is called upon to show by satisfactory evidence that the Will was signed by the testator, that the testator at the relevant time was in sound and disposing state of mind and that he was acting of his own free will in executing the will.

18. Wherever the Will is surrounded by suspicious circumstances, it also becomes the burden of the propounder to adduce

satisfactory evidence to completely remove all legitimate suspicions before the document is accepted as the last Will of the testator. This was so held by the Apex Court, half a century ago, in the case of ***H. Venkatachala Iyengar Vs. B.N. Thimma Juumma*** [AIR 1959 SC 443]. Relevant portion of this judgment reads as under:

“18. What is the true legal position in the matter of proof of wills ? It is well-known that the proof of wills presents a recurring topic for decision in courts and there are a large number of judicial pronouncements on the subject. The party propounding a will or otherwise making a claim under a will is no doubt seeking to prove a document and, in deciding how it is to be proved, we must inevitably refer to the statutory provisions which govern the proof of documents. Sections 67 and 68 of the Evidence Act are relevant for this purpose. Under section 67, if a document is alleged to be signed by any person, the signature of the said person must be proved to be in his handwriting, and for proving such a handwriting under sections 45 and 47 of the Act the opinions of experts and of persons acquainted with the handwriting of the person concerned are made relevant. Section 68 deals with the proof of the execution of the document required by law to be attested; and it provides that such a document shall not be used as evidence until one attesting witness at least has been called for the purpose of proving its execution. These provisions prescribe the requirements and the nature of proof which must be satisfied by the party who relies on a document in a court of law. Similarly, sections 59 and 63 of the Indian Succession Act are also relevant. Section 59 provides that every person of sound mind, not being a minor, may dispose of his property by will and the three illustrations to this section indicate what is meant by the expression "a person of sound mind" in the context. Section 63 requires that the testator shall sign or affix his mark to the will or it shall be signed by some other person in his presence and by his direction and that the signature or mark shall be so made that it shall appear that it was intended thereby to give effect to the writing as a will. This section also requires that the will shall be attested by two or more witnesses as prescribed. Thus the question as to whether the will set up by the propounder is proved to be the last will of the testator has to be decided in the light of these provisions. Has the testator signed the will ? Did he understand the nature and effect of the dispositions in the will ? Did he put his signature to the will knowing what it contained ? Stated broadly it is the decision of these questions which determines the nature of the finding on the question of the proof of wills. It would prima facie be true to say that the will has to be proved like any other document except as to the special requirements of attestation prescribed by section 63 of the Indian Succession Act. As in the case of proof of other documents so in the case of proof of wills it would be idle to expect proof with mathematical certainty. The test to be applied would be the usual test of the satisfaction of the prudent mind in such matters.

19. However, there is one important feature which distinguishes wills from other documents. Unlike other documents the will speaks from the death of the testator, and so, when it is propounded or produced before a court, the testator who has already departed the world cannot say whether it is his will or

not; and this aspect naturally introduces an element of solemnity in the decision of the question as to whether the document propounded is proved to be the last will and testament of the departed testator. Even so, in dealing with the proof of wills the court will start on the same enquiry as in the case of the proof of documents. The propounder would be called upon to show by satisfactory evidence that the will was signed by the testator, that the testator at the relevant time was in a sound and disposing state of mind, that he understood the nature and effect of the dispositions and put his signature to the document of his own free will. Ordinarily when the evidence adduced in support of the will is disinterested, satisfactory and sufficient to prove the sound and disposing state of the testator's mind and his signature as required by law, courts would be justified in making a finding in favour of the propounder. In other words, the onus on the propounder can be taken to be discharged on proof of the essential facts just indicated.

20. There may, however, be cases in which the execution of the will may be surrounded by suspicious circumstances. The alleged signature of the testator may be very shaky and doubtful and evidence in support of the propounder's case that the signature in question is the signature of the testator may not remove the doubt created by the appearance of the signature; the condition of the testator's mind may appear to be very feeble and debilitated; and evidence adduced may not succeed in removing the legitimate doubt as to the mental capacity of the testator; the dispositions made in the will may appear to be unnatural, improbable or unfair in the light of relevant circumstances; or, the will may otherwise indicate that the said dispositions may not be the result of the testator's free will and mind. In such cases the court would naturally expect that all legitimate suspicions should be completely removed before the document is accepted as the last will of the testator. The presence of such suspicious circumstances naturally tends to make the initial onus very heavy; and, unless it is satisfactorily discharged, courts would be reluctant to treat the document as the last will of the testator. It is true that, if a caveat is filed alleging the exercise of undue influence, fraud or coercion in respect of the execution of the will propounded, such pleas may have to be proved by the caveators; but, even without such pleas circumstances may raise a doubt as to whether the testator was acting of his own free will in executing the will, and in such circumstances, it would be a part of the initial onus to remove any such legitimate doubts in the matter.

21. Apart from the suspicious circumstances to which we have just referred, in some cases the wills propounded disclose another infirmity. Propounders themselves take a prominent part in the execution of the wills which confer on them substantial benefits. If it is shown that the propounder has taken a prominent part in the execution of the will and has received substantial benefit under it, that itself is generally treated as a suspicious circumstance attending the execution of the will and the propounder is required to remove the said suspicion by clear and satisfactory evidence. It is in connection with wills that present such suspicious circumstances that decisions of English courts often mention the test of the satisfaction of judicial conscience. It may be that the reference to judicial conscience in this connection is a heritage from similar observations made by ecclesiastical courts in England when they exercised jurisdiction with reference to wills; but any objection to the use of the word 'conscience' in this context would, in our opinion, be purely technical and academic, if not pedantic. The test merely emphasizes that, in determining the question as to whether an instrument produced before the court is the last will of the

testator, the court is deciding a solemn question and it must be fully satisfied that it had been validly executed by the testator who is no longer alive.”

Re: The Arguments:

19. Keeping in view the aforesaid parameters, which are relevant for proving the execution, attestation and genuineness of the Will, we proceed to note and discuss the arguments on various aspects, which fall for considerations. Mr. Chaudhary made his submission under different heads, as under:

Re: Valid Execution:

20. We may state at this stage that though Mr. Anoop Chaudhary, learned Senior Counsel, appearing for the appellant argued that there was no challenge by the objector in his written statement either to the execution of the Will or the signature of the diseased testator, this submission is not borne from the record. On the contrary, as already pointed out above, the objector has specifically denied the execution of the Will by the testator. In fact, issue No. 1 framed by the Court encompasses this aspect specifically. Moreover, the law to this effect, as noted above, is clear, viz., it is obligatory on the part of the propounder of the Will to prove due attestation and execution of the will. This is so even when the case is *ex parte* or all other respondents/interested persons have given no objection and supported the Will. It is because of the reason that these proceedings are *in rem*. Therefore, it has to be examined as to whether there was proper execution of the Will or not.
21. On merits, the learned Senior counsel had contended that in any case from the evidence of PW-1, execution was amply proved.

He argued that PW-1 had given the graphic description leading to the preparation and execution of the Will, *inter alia*, **deposing** to the following effect in this regard, which had not been rebutted by the objector and there was no challenge in the cross-examination of PW-1 either:

- (i) Alteration about the deletion of the name of Shri Mahender Kumar Gupta with direction to get the Will retyped..... and signed the same by the testator.
- (ii) Certificate by Dr. Madan Lal on directions of Lalaji.
- (iii) Once in the morning when he executed the Will and again in the afternoon and when he signed on the back side of the Will.
- (iv) The Will was signed first and thereafter the Original of PW1/D-1. These were signed with the same pen by Lala Hansraj Gupta.
- (v) Reason for appointing Mr. Tewari for drafting of Will.
- (vi) The signatures which were appended by Lala Hansraj Gupta on the Will were his normal signatures and were appended in the presence of PW-1.
- (vii) Discussion of preparation of Will started in 1982 and continued in 1983, 1984 and were finalized in 1985.

Specifically, there was no suggestion to the following testimony:

- “(i) That Lalaji after reading the Will himself approved of it and signed the same.
- (ii) Lalaji, my father Shri M.P. Tewari, Smt. Angira Gupta and myself, we all signed the Will at one and the same time in the presence of each other.”

- (iii) Lalaji signed the Will, as I have stated above, in the presence of Smt. Angira Gupta, my father Shri M.P. Tewari and myself and all the three of us signed the same as attesting witnesses at the request of Lalaji.”

21. On the contrary, submitted the learned counsel, there was admission of RW-1/Shivraj Gupta in his statement inasmuch as he categorically gave the following answers:

“Yes, it is correct that I have not taken the plea that the Will is forged. Yes, the Will of Lala Hansraj Gupta has been signed by Shri M.P. Tewari as an attesting witness.”

22. He, thus, argued that due execution of the registered Will dated 28.05.1985 was duly proved as per the provisions of Section 63(c) of the Indian Succession Act, read with Section 68 of the Indian Evidence Act, but no finding in this regard was given by the learned Single Judge in spite of specific issue being framed in this regard.
23. Additionally, it was also submitted that Mrs. Angira Gupta in the Probate Petition had verified the probate petition and in that verification, she had clearly mentioned that she was the attesting witness of the Will. According to the learned counsel, this was also a piece of evidence under Sections 281 and 282 of the Indian Succession Act read with Section 193 IPC. It was also submitted that there was no specific denial in the written statement of the objectors of this fact and, therefore, it should be treated as admitted on the application of the provisions of Order VIII, Rule 5 Code of Civil Procedure. He also pointed out that Smt. Angira Gupta in her written statement as well, had specifically stated that the testator had executed the Will in sound disposing mind and of his own free will and desire and this

is also a relevant fact under Section 32(3) of the Indian Evidence Act, since Smt. Angira Gupta was excluded from being a beneficiary under the said Will.

24. Mr. Chaudhary also endeavored to draw support from the written statement filed by the respondent No.6, wherein he has supported the case of the petitioner and accepted the execution of the Will. His submission was that as he was one of the respondents, the aforesaid statement in the written statement should be treated as admission under Section 17 and 18 of the Indian Evidence Act, which would make it a substantive evidence even if the party is not confronted with the statement, in view of the law laid down by the Apex Court in the case of **Bharat Singh and Anr. Vs. Bhagirathi** [AIR 1966 SC 405].
25. The aforesaid arguments would demonstrate that main thrust is on the testimony of PW-1 to prove the execution of the Will, the only witness which is examined is Mr. S.K. Tewari (PW-1). However, the learned Single Judge has held that this witness is unreliable for various reasons stated in the impugned judgment. The central issue, therefore, would be as to whether PW-1 is trustworthy or not. Before we proceed to discuss that aspect, we want to make certain comments on the arguments of the learned Senior Counsel for the appellant predicated on so-called graphic description relating to preparation and execution of the Will as well as arguments relating to the unchallenged and unrebutted testimony of PW-1 in cross-examination.
26. No doubt, PW-1 has stated in detail as to how the Will was drafted pursuant to purported instructions of the testator and

has also narrated the circumstances in which the Will was signed. Giving such an account by itself would not lead to the conclusion that the Will was prepared and drafted at the instance of the testator. Ultimately, the litmus test is in finding out the credit worthiness of such a narration of so-called events given by the PW-1, which again brings us back to the question as to whether PW-1 is giving the account of events truthfully or not.

27. The Learned Single Judge has doubted the veracity of the statement of PW-1 to the effect that he was instructed by the testator to draft the Will and draft Will was prepared and shown to the testator at the instance of the testator. In this behalf, learned Single Judge took note of the fact that when PW-1 had gone with the draft Will, which was prepared at the direction of the testator, the testator instead of looking into the same, asked PW-1 to take out the Will which was lying in the drawer in the adjacent TV room. Remark of the learned Single Judge is that when the testator had already prepared a draft Will, there was no question of giving instructions to PW-1 to prepare the Will. This is a very material circumstance pointed out by the learned Single Judge, which puts question mark on the truthfulness of the statement of PW-1 that he was asked to prepare the draft Will. If the testator had already prepared the Will, he could have shown the same to PW-1 at the outset with instruction to make the necessary changes which he wanted rather than asking him to prepare a draft Will and then not even looking at the said Will prepared by PW-1. No satisfactory answer was given to this aspect commented upon by the learned Single Judge.

28. Similarly, we do not find much substance in the arguments of the learned Senior Counsel for the appellant that on certain material aspects, the testimony of PW-1 remained unchallenged and unrebutted. The examination-in-chief of PW-1 runs into seven pages. Thereafter, he was cross-examined at length on various dates, which is spread over 43 pages. When we see the tenor and the depth of this cross-examination, it becomes clear that from almost every relevant aspect the PW-1 was cross-examined. Attempt of the counsel for the respondent, while cross-examining the PW-1 was to shake his credibility by questioning him on all possible aspects including execution, registration as well as medical condition – physical as well as mental – of the testator. The statement of PW-1 as well as his cross-examination is to be read as a whole. When we read the evidence of PW-1, we find that there was through cross-examination by the objectors in an attempt to prove the following:

- (a) Intimate connection of PW-1 with the appellant.
- (b) PW-1 was associated even in drafting and filing the probate proceedings, which he did at the instance of the appellant so much so he signed the declaration without going into the petition.
- (c) It was not certain as to whether the Will was executed and signed on 28.05.1985 or 29.05.1985 and there was some contradiction in this behalf.
- (d) The version of PW-1 that on 29.05.1985, he took medical certificate from Dr. Madan Lal on the request of the testator, was not correct.

(e) The sound and disposing mind of the testator.

29. Thus, the length and breadth of the cross-examination clearly suggests that on all relevant aspects, the witness was questioned and cross-examined. The clear intention was to question the execution of the Will also not only on the ground that the testator was not in a sound disposing mind, who could make a Will, but endeavour was also to project that the testator was totally under the control of the appellant. The Will even if signed by the testator, was not drafted under his instruction or understood by him. Whether the objectors have succeeded in their attempt or not is a different question, which will be addressed at a later stage. What is pointed out at this juncture is that the plea of the appellant that there is no cross-examination concerning the execution of the Will, is not correct.
30. We also do not agree with the submission of the learned counsel for the appellant that as there is no specific denial of attestation by Smt. Angira Gupta and S.K. Tewari, it should be treated as admission under Order VIII, Rule 5 Code of Civil Procedure. The written statements/objections are read in their entirety. It is already pointed out above that in the objections, specific plea was taken that the testator never executed any Will at all and veracity of the Will was also challenged on various other grounds.
31. Likewise, written statement of respondent No.6 cannot come to the aid of the appellant, the propounder of the Will. The respondent No.6 has supported the case of the appellant. Merely because he is arrayed as a respondent, would not mean that he is a contesting party. If he sides with the appellant by accepting the execution of the Will by the testator, such an admission

would be binding qua respondent No.6 only and not qua other respondents, who had specifically questioned the execution and opposed the probate petition.

32. We would now like to deal with the verification at the foot of the petition by Smt. Angira Gupta/respondent No.2 as well as her written statement. It was argued that if the verification is proved to be wrong, it entails penal consequences under Section 193 IPC and thus, it should be treated as evidence *moreso* when verification is statutorily required under Sections 281 and 282 of the Indian Succession Act. Section 280 of the Indian Succession Act requires that the petition for probate is to be signed and verified by the petitioner (propounder of the Will). Section 281 mandates verification of the petition for probate to be signed by at least once of the witnesses to the Will. As per the Will projected, Smt. Angira Gupta, Mr. S.K. Tewari and Mr. M.P. Tewari were the attesting witnesses. Therefore, it was legal requirement that one of them or all of them sign the verification in that capacity. To attach such attestation, penal consequences for false declaration are provided under Section 282 of the Indian Succession Act, which treats wrong declaration as offence under Section 193 of the IPC. That, however, would not mean that such a declaration would partake the character of 'evidence' for the purpose of proving the Will. Requirement of law to prove the execution of the Will is crystal clear. Section 63 of the Succession Act specifies the requirements of valid execution, which include that such a Will has to be attested by two or more witnesses. The manner in which these witnesses as well as testator have to sign is also mentioned in Section 63 (c) of the

Act. Thus, before a Will is treated as proved in a Court of law, it is incumbent that one of the attesting witnesses comes in the witness box and testify to that effect. Such witness would be subject to cross-examination as well. In case, there are objections to the valid execution, it is only on the basis of the statement of attesting witness on oath in the Court of law, who has undergone the cross-examination as well, that the Court would return the finding as to whether the Will is proved or not. If verification by the attesting witness is treated as requisite evidence fulfilling the requirement of proving, then there would not be any need to produce attesting witness to the Will as witness in the Court in cases where there is no objection to Will. Thus, we reject the argument that the verification by Smt. Angira Gupta and Mr. M.K. Tewari at the foot of the petition be treated as 'evidence' and on that basis, it should be held that execution of the Will as required under Section 63(c) of the Indian Succession Act stands proved.

33. Next aspect to be dealt with is as to whether written statement of Smt. Angira Gupta can be treated as relevant fact under Section 32 (3) of the Indian Evidence Act. To appreciate this arguments, let us first go through the said provision of Section 32(3), which is as under:

32. Case in which statement of relevant fact by person who is dead or cannot be found, etc. is relevant - Statements, written or verbal, of relevant facts made by a person who is dead, or who cannot be found, or who has become incapable of giving evidence, or whose attendance cannot be procured without an amount of delay or expense which, under the circumstances of the case, appears to the Court unreasonable, are themselves relevant facts in the following cases -

(1)

(2)

(3) Or against interest of maker - When the statement is against the pecuniary or proprietary interest of the person making it, or when, if true it would expose him or would have exposed him to criminal prosecution or to a suit for damages."

First requirement is that such a statement has to be proved. That could be done, in the instant case, by the propounder by appearing as a witness and proving the written statement as a document. This is clear from reading of Section 158 of Indian Evidence Act, which is to the following effect:

"158. What matters may be proved in connection with proved statement relevant under Section 32 or 33 - Whenever any statement relevant under Section 32 or 33 is proved, all matters may be proved either in order to contradict or to corroborate, or in order to impeach or confirm the credit of the person by whom it was made, which might have been proved if that person had been called as a witness and had denied upon cross-examination the truth of the matter suggested."

The least that was required was to confront the respondent (PW-1) with the said written statement of Smt. Angira Gupta. That has not been done. No doubt, the written statement is a part of Court record. However the aforesaid exercise was still necessary as only then the objector/respondent could have stated his version/explanation with opportunity to explain as to why such a written statement be not treated as relevant fact. This becomes important because of the following circumstances:

(1) Though the written statement was filed by Smt. Angira Gupta in February 1986, she died nine years thereafter, i.e., in March, 1995. The appellant had shown her as a witness in the list of witnesses. During the pendency of the probate proceedings in I.A. No.534/1989 filed by the appellant seeking

permission to examine Smt. Angira Gupta by appointing a Commissioner. This application was allowed on 07.08.1989. Despite this, she could not be examined for which the respondent/objector blames the appellant and goes to the extent of arguing that the appellant intentionally sought it that Smt. Angira Gupta was not examined. Reliance is placed on the following portion of cross-examination of RW-1:

“...Question: Whether any of the members of the family tell you that the Will was executed by Lalaji under coercion and pressure brought upon him by Deshraj Gupta and Family members?

Ans: AS mentioned earlier, I was not present at the time when the Will was supposedly executed. The only person who could have reflected on this situation was Bibiji and she was not brought before the Commission as a witness by Shri Deshraj Gupta in spite of 2/3 times fixed by the Commissioner. A Commissioner was appointed by the High Court to go to 3, Amrita Shergill Marg for her evidence. You (Shri L.R. Gupta) were also present. But she was not brought out, therefore her evidence could not be recorded...”

- (2) Admittedly, Smt. Angira Gupta did not know or understand English language. Verification is in English. It is only in cross-examination, it could be elicited as to whether she understood what she was signing. Since she passed away and therefore, could not be examined as a witness, the respondent was also denied chance to give his version qua the said written statement, as nobody appeared and deposed about the said written statement in his testimony. This denied objectors even an opportunity to cross-examine the propounder and/or any other witnesses

who could have brought on record, the said written statement as a piece of evidence.

(3) Most glaring aspect pointed out by the learned counsel for the respondent was that the petition as well as written statement of Smt. Angira Gupta (respondent No.2) and respondent No.6 had been drafted by the same lawyer engaged by the appellant/propounder. On this premise, arguments of the respondent was that no independent advice was given to Smt. Angira Gupta, clarity could have come on this aspect also.

(4) We, therefore, are not inclined to accept the submission of the appellant that written statement of Smt. Angira Gupta be looked into as relevant fact under Section 32(3) of the Evidence Act.

34. With this discussion, we are left with the testimony of PW-1 regarding the execution. The learned Single Judge has not believed the version of the PW-1. For this purpose in the impugned judgment, comments are made not only on the deposition of PW-1 qua execution, but in respect of registration of the Will and sound disposing mind of the testator. As cumulative effect of this will have to be seen in appreciating the arguments of the contesting parties on this aspect, we defer discussion of this aspect at this stage and shall take up the same at a later stage.

Re: Sound Disposing Mind:

35. Mr. Chaudhary, learned Senior Counsel for the appellant submitted that the appellant had produced sufficient and satisfactory evidence to conclusively prove that the testator was in sound disposing mind at the time when he executed the Will in question. His submission was that that the learned Single Judge has confused the matter by mixing up the physical condition of the testator with the mental condition. He argued that even if the testator was suffering from certain diseases and physically frail because of his old age, at the same time he was in sound disposing mind with agile brain at the time when he gave instructions to PW-1 to prepare the Will; when he discussed the draft prepared by the counsel and suggested that modifications; and when he signed the said Will. The learned counsel took lot of efforts in referring to various pieces of evidence and also the circumstances which according to the appellant were sufficient to show the sound mental disposition of the testator. This may be noted below in capsulated form:

(a) General: (i) Earlier in the holograph Will, the testator had bequeathed his share in business and immovable property to Hansraj Gupta Charity Trust. In the present Will his share in Hansraj Gupta Company Pvt. Ltd. was bequeathed to the appellant and Mr. Ravi Raj Gupta equally.

(ii) Similarly, his share in Mridul Enterprises was bequeathed to Ravi Raj and Uday Raj in the ratio of 3:1 respectively. This also shows the consciousness

application of mind by the testator because Mridul Enterprise was a partnership firm consisting of the appellant, his son Uday Raj and the testator.

(iii) That departure from the holograph and the present Will wherein the testator showed the categorical awareness of the fact that claims in regard to the Indo Swedish firm was time barred and which fact was specifically incorporated in the present Will.

(iv) The departure from the contents of the holograph concerning Estate Duty about which S.K. Tewari has clearly stated that on his suggestion only the point regarding the abolition of Estate Duty was excluded from the present Will.

(v) The specific concern of the testator, "I wish that the company M/s. Hansraj Gupta & Co. Pvt. Ltd. be managed and controlled by my grandson Ravi Raj Gupta as is being done today and none other legal heirs should raise any objection thereto."

(b) Medical Records: (i) The normal level of sodium level is 130 upwards, any fall from 130 is called Hyponatremia (low sodium content in the blood).

(ii) After prostate operation on 17.04.1985 for enlarged prostate, the sodium level of the testator had fallen down to 116 on 24.05.1985 and because of that he became drowsy.

(iii) Sodium level on 03rd May, 1985 was 128 meq and on 20th May, 1985 129 meq. Above. 125 meq/q there are rarely clinical symptoms in the patient and because of that only the doctors did not consider it necessary to test the sodium level of the testator after 20th May, 1985 till 17th June, 1985. According to the Merck Manual, "Hyponatremia itself is often of a little significance and requires no specific treatment and it rarely causes clinical symptoms when plasma sodium is above 125 meq per liter."

(iv) Testator was admitted in the AIIMS for the treatment of prostate on 17.04.1985 and he was not suffering from any mental disorder.

(v) Testator got himself discharged at his request from the hospital on 24.05.1985 as per the discharge summary (Ex. P-2).

(vi) Dr. S.M. Singh appeared as PW-3 to prove sound state of mind of the testator till the day of discharge from the hospital. His clear deposition was that the testator was healthy and with full mental faculties when he was brought to the hospital and at the time of the discharge his will power was strong and he was mentally alert.

(c) Challenge to Findings of the learned Single Judge: Mr. Chaudhary submitted that the learned Single Judge had arrived at erroneous conclusion on sound

disposition mind of the testator by drawing certain inferences contrary to the record or which could not be valid ground. In this behalf, his submission was:

(i) The learned Single Judge ignored the fact that the instruction to prepare the Will was initially given by the testator either on 13th or 14th May, 1985 when there was no problem of hyponatremia.

(ii) There was no evidence to show that he was discharged from the hospital against the medical advice; only the discharge sheet shows that the testator was suffering from uncontrolled diabetes & recurrent troublesome hyponatremia.

(iii) In any case, hyponatremia can be controlled by the medicines. Also on the last date, i.e., the date of discharge he was bleeding from rectum and two units of blood were transferred to him.

(iv) Ex.-95 dated 24.05.1985 signed by Dr. N.P. Singh records that the "3.00 PM patient permitted to go home at his request."

(v) Nurse reports on 25.05.1985 that the patient looks comfortable, sleeping fairly well. On 29.05.1985 records that the testator was seen by Dr. Madan Lal.

(vi) Patient was in hospital for last 41 days and he desperately wanted to go to his home and as a

protest, he had even reason he had refused to take any diet and medicine.

(vii) The petitioner was staying with the testator. It was very natural for him to take his father back to the residence.

(viii) Ex.P-2, the discharge summary of 24.05.1985 which records diabetes and hyponatremia were correctly managed.

(ix) Ex.P-40 which is a medical record of 25.04.1985, i.e., a week after the operation indicates that Sr. Neurology is called when the patient showed the clinical symptoms namely "Pt. drowsy, responds to painful stimuli by avoidance, responds to commands on coaxing". The Neurologist after investigation opined that there was no focal neurological deficit.

(x) He also submitted that it was improper on the part of the learned Single Judge to rely upon the testimony of Rekesh Gupta (RW-2) who never examined the testator, but gave his opinion as an expert on the basis of medical records ignoring the testimony of Dr. S.M. Singh, who had examined the testator. Such an approach, according to him, was clearly erroneous.

36. Mr. Chandhiok, learned Senior Counsel appeared for the respondent No.2/objector, Shiv Raj Gupta, countered the

aforesaid submission. He was joined by Mr. Vikas Dhawan, advocate and also Mr. Manish Kumar, Advocate who appeared for the respondent Nos. 5 and 6. The main thrust of the submission of the objectors was on the general sickness of the testator apart from hyponatremia, on the basis of which it was argued that this sickness had affected his mental dispositions and the testator did not understand or fully comprehend the nature and effect of the Will. It was also argued that these facts were to be considered along with other suspicious circumstances highlighted by the respondents, which would clearly show that the Will in question could not be the one depicting his desire and intention. The entire medical history of the testator right from the date of admission in AIIMS, i.e., 13.04.1985 and thereafter at the residence was referred to in support. The hyponatremia level of the testator on all these dates was highlighted drawing the attention of the court to the fact that clinical manifestation of hyponatremia as well as the ailment was no longer in dispute. He referred to the following statements of Dr. S.M. Singh (PW-3) in cross examination in his support:

"A. I agree with the commentary given at Page 829 Column II i.e.

..."Hyponatremia in hyponatremia, the level of sodium in the blood is too low. Hyponatremia occurs when sodium has been overdiluted in the body. Sodium can be overdiluted when people drink enormous amounts of water – as people with certain psychiatric disorders occasionally do – or when people who are hospitalized receive large amounts of water intravenously. In either case, the amount of fluid taken in exceeds the kidney's capacity to eliminate the excess intake of smaller amounts of water-sometimes as little as 1 quart a day can lead to hyponatremia in people whose kidneys are not functioning normally, such as people with kidney failure, Hyponatremia also occurs in people with heart failure or cirrhosis. Excessive chronic loss of fluids, as occurs with chronic diarrhea, can also result in hyponatremia."

Q. Do you also agree with the commentary given in another book "Harrison's Principle of International Medicines" at pages 203-204 column 1?

A. "Clinical manifestations Neurologic dysfunction is the principal clinical manifestation of hyponatremia. It is due to intracellular movement of water, leading to swelling of brain cells. The severity of symptoms is related both the degree of hyponatremia and to the rapidity with which it develops. In chronic hyponatremia, the degree of brain swelling caused by any given reduction in body fluid osmolality is reduced because solute, largely potassium chloride, is lost from the cells. Patients may be lethargic, confused, stuporous, or comatose. If hyponatremia develops rapidly, signs of hyperexcitability such as muscular twitches, irritability and convulsions may occur. Hyponatremia rarely causes clinical symptoms when plasma sodium is above 125 meq per liter, although symptoms may occur at higher levels if the decrease in concentration has been rapid..."

The normal range of sodium level for a normal person ranges from 136-1520 meq/l. Even as per the testimony of Dr. S.M. Singh, the normal range of sodium is 130-149. The relevant extract of Dr. S.M. Singh's cross-examination is at p.70, Volume II, which reads as under:

"...Q. What is the normal range of sodium level for a normal man?

Ans. Normal range of sodium level has been mentioned 130 to 149 meq/l.

Vol. In the discharge sheet it is mentioned that the patient had hyponatremia.

Q. What is hyponatremia?

Ans. It means the quantity of sodium level is less than the normal range.

Q. What are the consequences of the lower sodium level?

Ans. I am not able to answer this question as this case is 22 years old..."

37. He pointed out that while Lala Hansraj Gupta was admitted in AIIMS, his sodium level was last checked on 20.05.1985 and was 129 meq/l which was again less than the normal range. After 20.05.1985 and till Lalaji was discharged, his sodium level as per the records as not checked. This fact itself discredits the statement made in the discharge summary that "hyponatremia was corrected". If the sodium level had not been checked at the

time of discharge and the latest report on sodium level recorded below normal, there was no justification to record in the Discharge Summary that “Hyponatremia was corrected”.”

38. Mr. Chandhiok also submitted that even otherwise, condition of the testator was very serious on the date of discharge. The testator was discharged on 24.05.1985. On the night of 23.05.1985, the testator had started bleeding. Two units of bloods had to be transfused on the last day in the Hospital and this fact was recorded in the Discharge Summary. Mr. Shivraj Gupta was cross examined regarding his stay in the hospital on the night of 23rd – 24th May, 1985. The relevant extract reads as under:

“...Q. You have stated in your deposition that you stayed on the night of 23rd and 24th May, 1985 and knew the condition of Lalaji on those days. In what condition you found Lalaji on that night.

Ans. Lalaji was bleeding profusely through the rectum. Three times his sheets had to be changed. On my approaching Dr. S.M. Singh, two units of blood were administered to Lalaji. Most of the night, he did not know whether I was there or not. He was in a comatose condition. I even went to the extent to remove part of his beard because I felt it was creating discomfort to him. He did not even notice, which made me feel totally bad about his physical and mental condition...”

39. In this backdrop submitted the learned Senior counsel, the onus to prove that the testator was in sound disposing mind, was upon the appellant, viz., the propounder of the Will. It was for him to satisfy the conscience of the Court that the instrument so propounded is the last Will of a free and capable testator. Reference was made under Section 59 of the Indian Succession Act and particularly Explanation 4 thereof, as per which no person can make a Will while he is in such state of mind, whether arising from intoxication or from illness or from any other cause

that he does not know what he is doing. His submission was that illustrations to Section 59 make it clear that a mere perception of what is going on in the immediate neighborhood and an ability to answer familiar questions but without competent understanding as to the nature of his property or persons who are kindred to him or in whose favour it would be proper that he should make his Will, will not be the enough proof of a sound mind within the meaning of Section 59 of the Indian Succession Act. The statutory explanations are not intended to be exhaustive to give practical illustrations to explain a sound disposing mind.

40. It was finally argued that the appellant failed to lead any evidence on physical as well as mental health of the testator after his discharge on 24.05.1985. It was submitted that Dr. Singh was concerned with the testator only upto 24.05.1985. Will in question was purportedly executed and registered on 28.05.1985 and/or 29.05.1985. It was, therefore, incumbent upon the testator to show the sound mental condition of the testator as on these dates. The propounder, however, failed to do so.
41. We have considered the aforesaid rival submissions. Medical condition of the testator, at the time when the Will is purportedly executed, is not in dispute. What required to be considered is the effect of this medical condition on the mental faculties of testator to find out as to whether he could be in sound disposing mind at the relevant time. In order to have full canvass and complete picture thereupon to enable us to glance all the nuances, following aspects need a brush of paint:

- (1) Medical condition of the testator while in the hospital.

- (2) Hyponatremia specifically effect, if any, of the medical condition on the mental faculties of the testator.
- (3) Circumstances of discharge from the hospital on 24.05.1985.
- (4) Medical condition on 28th /29th May, 1985 and thereafter.
- (5) Suspicious circumstances.
- (6) Re: Discharge of onus by the propounder.

42. We shall begin with tracing the medical history of the testator during that period and then link it to the mental condition in which he could be on 28.05.1985.

Re: Medical condition of the Testator while in AIIMS:

43. Complete medical record of the testator was filed by the appellant in the Trial Court. The said record was filed before us also in Volume- IV which runs into 432 pages. This record reveals that on 13.04.1985, the testator was admitted to AIIMS. He was 82 years of age at that time. On 17.04.1985, the testator was operated for prostrate. However, during post operative period, certain complications developed like (i) urinal tract infection, (ii) failure of control of diabetes and (iii) bleeding piles. Perhaps these were the reasons that the testator was not discharged from the hospital within few days after surgery for enlarge prostrate on 17.04.1985. Instead, he continued to remain in hospital for more than one month for treatment of these complications. This would clearly signify that even if the testator was initially admitted in the hospital because of his enlarge prostate, the

ailment was not confined to that alone. He was treated for other ailments including ones mentioned above for which he remained in the hospital.

44. In the hospital, there was a regular blood transfusion of the testator, i.e., on 09th, 13th, 15th and 23rd May, 1985. In fact on 23.05.1985, that is one day before he was discharged from hospital, he was administered two units of blood. As we shall notice later, this continued even after his discharge, when he was at his residence. This would show that the patient was suffering from anemia as well.

Re: Hyponatremia specifically effect, if any, of the medical condition on the mental faculties of the testator.

45. Coming to the disease hyponatremia specifically, again it is not in dispute that the testator was suffering from this disease as well. The appellant has argued that his hyponatremia was controlled and there was no problem as such on 24.05.1985 (when he was discharged) or thereafter. The respondents have joined the issue on this aspect. What the medical record reveals? On 17.04.1985 when the testator was admitted to hospital, his sodium level was 118 meq/l. As per the statement of the appellant's own witness Mr. B.N. Gupta (PW-2), normal range of sodium level for a normal man is 130-149 meq/l. When sodium level is below the normal range, patient would be suffering from illness called hyponatremia. Thus indubitably on 17.04.1985, the testator was hyponatremic. Medical record further reveals that sodium level has been swinging up and down during the period he remained in the hospital and thereafter. However, sodium level was not

checked after 20.05.1985. The appellant pleads that it is because of the reason sodium level was controlled and there was no reason to record/check it thereafter. According to the learned counsel, even the discharge summary on 24.05.1985 records that diabetes and hyponatremia were correctly managed. It is difficult to accept this submission. First of all, sodium level was lastly checked on 20.05.1985 and from that date to 24.05.1985 (when the testator was discharged) it was not checked. Even on 20.05.1985, sodium level was below (though marginally) the desired level, i.e., 129 meq/l as against normal range which is 130 to 149 meq/l. What needs to be emphasized is that in such a situation it was not proper not to measure sodium level on 21.05.1985 and thereafter and then record that it was managed.

46. Even subsequent history of this ailment belies that claim. Though it is not known as to what was the sodium level on 24.05.1985, as it is not recorded, medical record reveals that the sodium level of the testator from 25.05.1985 was as under:

Date	Sodium Level
25.05.1985	130 meq/l
29.05.1985	122.1 meq/l
01.06.1985	118.9 meq/l
05.06.1985	122.5 meq/l
10.06.1985	120.6 meq/l
14.06.1985	128 meq/l

17.06.1985	121.9 meq/l
18.06.1985	127 meq/l
20.06.1985	124 meq/l

47. This would demonstrate that hyponatremia was not corrected, though it is so stated in the Discharge Summary on 24.05.1985. Further, such a statement has appeared without even measuring sodium level of the patient on that day or even immediately preceding date.
48. Be as it may, the most relevant dates are 28th and 29th May, 1985. The sodium level on these dates is much below the normal level. This condition continues even after 29.05.1985 till the demise of the testator. When we take the overall condition of the testator from 17.04.1985, it is difficult to accept that hyponatremia was corrected. May be on few days, it went above 125 meq per liter. However, the swings in the sodium level before 24.05.1985 rapidly and frequently going down below normal and after 24.05.1985 would indicate that the testator had not recovered from this illness.

Re: Circumstances of discharge from the hospital on 24.05.1985.

49. The medical record, thus, proves that though the testator was initially admitted in the hospital in AIIMS for enlarged prostate operation, diagnosis in the hospital revealed him as suffering from acute diabetic as well as hyponatremic. Accepting his old

age and frailed health, he was a case of acute anemic as well who needed regular blood transfusion.

50. In this backdrop, we proceed to examine as to whether his discharge from hospital on 24.05.1985 was proper? The Discharge Summary on 24.05.1985 clearly records that the patient wanted to go home “at his request, calculated risk explained”. It is clear that the doctors attending him had not certified that that patient had recovered and was fit to be discharged. The authorities at AIIMS were cautious enough to put the remarks that the testator was going home not only at this request, but there was calculated risk on such a move. We, therefore, do not find any infirmities in the finding of the learned Single Judge that the discharge of the testator was against the medical advice. Maybe, the patient had become irritated who was in the hospital for more than one month by that time and wanted to go home. However, that would not mean that even the doctors at AIIMS found that it was risky to discharge him, still the appellant would take such a risk in making the patient leave the hospital. The appellant was in a better position to clear the mist. He, however, chose not to appear in the witness box. He chose to take risk insofar as life of his father was concerned, but could not afford to take the risk of facing onslaught of cross-examination at the hands of the objectors.
51. Even if we presume that he was temporarily taken home so that there is a change in atmosphere, he was never brought back to the hospital. It is in spite of the fact that while at residence, the medical condition of the patient, as demonstrated from the records, did not show any sign of improvement.

52. In this scenario, three important aspects need to be noted at this juncture, viz.:

- (i) The testator was got discharged by the appellant and his son who even signed consent form and gave the undertaking.
- (ii) Will in question crops up within four days of the discharge when the testator was still sick (by no means, it is suggested that a person who is suffering from illness cannot execute the Will). This could be happen even in the hospital if the testator so desired. This, however, creates a suspicious circumstance, viz., getting the patient discharged on a date when he is not fully recovered and Doctors have not advised so, that too by the propounder of the Will and the Will purportedly getting executed within four days thereafter. Had the Will been executed while he was in the hospital, Doctors attending him would have been in a position to certify whether the testator was in a sound disposing mind or not. Not only that is not done, as is clear, even when the testator was attended by Doctor Madan Lal at his residence, no certification from him is obtained to the effect that he was in sound disposing mind.
- (iii) It has come on record that the patient was got discharged and taken home for a period of three days with an intention to bring him back. This would mean that he was to be brought back on 27.05.1985. Even the room was kept locked for him. However,

this was never done even when the patient had not recovered from the ailments which he was suffering.

However, he was never readmitted to the hospital.

We shall discuss these aspects in detail at a later stage while dealing with the issues as to whether the appellant has been able to give satisfactory explanation to the suspicious circumstances or not. At this juncture, these aspects are highlighted to demonstrate that the circumstances in which the testator was discharged, do not augur well with the appellant.

Re: Medical Condition on 28th /29th May, 1985 and thereafter:

53. As pointed out above, the most relevant dates are 28.05.1985 and 29.05.1985 when the Will in question is purportedly executed and registered. Medical records for these dates have also been discussed above. It shows that even after the discharge of the testator and while he was at his residence, he was given blood transfusion. Further, he continued to suffer from hyponatremia as well. ON 29.05.1985, it was 120.1 meq/l.

Re: Effect of the medical condition on the mental condition of the testator, if any:

54. Having regard to the medical condition of the testator viz. the ailments with which he was suffering, as described above, can it be said that the testator was having sound and disposing mind on 28th or 29th May, 1985? Here is a person who is 82 years of age. He remained in the hospital from 17.04.1985 till 24.05.1985. During this period, he got operated for enlarge prostate. He was suffering from diabetes. He was a case of

acute anemesis, who needed blood transfusion at regular intervals. Above all, he was a case of hyponatremia as well.

55. What would be the mental condition of a frail person at this ripe and advanced age suffering from so many ailments? More particularly, when some of these ailments had direct bearing on his mental state including acute anemesis warranting blood transfusion at regular intervals and hyponatremia. The consequences of hyponatremia are accepted by the appellant's own witness Dr. S.M. Singh (PW-3). It is an accepted case that hyponatremia occurs when sodium level has been overdiluted in the body. It could be the result of drinking enormous amount of water, as people with certain psychiatric disorders occasionally do. In Harrison's Principle of International Medicines, the adverse effects of hyponatremia are as under:

"Clinical manifestations & Neurologic dysfunction is the principal clinical manifestation of hyponatremia. It is due to intracellular movement of water, leading to swelling of brain cells. The severity of symptoms is related both the degree of hyponatremia and to the rapidity with which it develops. In chronic hyponatremia, the degree of brain swelling caused by any given reduction in body fluid osmolality is reduced because solute, largely potassium chloride, is lost from the cells. Patients may be lethargic, confused, stuporous, or comatose. If hyponatremia develops rapidly, signs of hyperexcitability such as muscular twitches, irritability and convulsions may occur. Hyponatremia rarely causes clinical symptoms when plasma sodium is above 125 meq per liter, although symptoms may occur at higher levels if the decrease in concentration has been rapid..."

56. It is clear that severe hyponatremia has causal connection with brains and it causes brain swelling. Patient becomes lethargic, confused, stuporous, or comatose. Thus, the physical condition and the ailments from which the testator was suffering would normally have bearing on his mental state of affairs.

57. It is not at all suggested that it had definitely led to the condition where the testator was not in a fit mental condition to understand or fully comprehend the nature and effect of the Will. What is highlighted is that in this scenario, onus is on the propounder of the Will, i.e., the appellant becomes very onerous to prove that the testator was mentally competent to execute the Will. To executing the Will is not merely a physical act, but a mental act on the part of the testator. Thus, the duty was cast upon the appellant to demonstrate on record that the testator fully understood and comprehended the nature and disposition of the Will. Whether the propounder of the Will has satisfactorily discharged his burden, is the question? If not, the effects of the ailments which normally occur. On the mental capacity, as per medical science, shall have to be presumed.
58. According to the appellant, PW-1, Mr. S.K. Tewari and PW-3, Dr. S.M. Singh have deposed on the soundness of the mental condition of the testator. Insofar as Dr. S.M. Singh is concerned, he has accepted the clinical manifestation of hyponatremia as well as the ailments itself. The relevant portion of his cross-examination on this aspect had already been reproduced above. As per his own testimony, patient becomes lethargic, confused, stuporous, or comatose. If hyponatremia develops rapidly the signs of hyperexcitability such as muscular twitches, irritability, and convulsions may occur. Admittedly, Dr. S.M. Singh had attended the patient only till 24.05.1985 when he was discharged from AIIMS. We have already observed that it is difficult to believe, on the basis of medical history, that

hyponatremia was corrected by that date. We have also pointed out glaring suspicious circumstances in which the testator was discharged from the hospital on 24.05.1985.

59. More emphatically, no evidence of post discharge on the mental health of the testator has been led, apart from PW-1. The Doctor who treated the testator after his discharge at his residence was Dr. Madan Lal. He has not been produced. Though there was much debate as to whether it was for the appellant or the respondents/objectors to produce Dr. Madan Lal, in view of the fact that initially onus is upon the propounder of the Will, we are of the opinion that it was for the appellant to examine Dr. Madan Lal, as per the appellant had examined the testator even few minutes before the execution of the alleged Will.

60. This leads us only with the evidence of PW-1, who has made some statements about the mental condition of the testator. We are, however, of the opinion that his testimony is not worthy of reliance at least for two reasons:

- (1) He appeared to be interested witness as rightly concluded by the learned Single Judge.
- (2) When so many suspicious circumstances exist, which create doubt on the genuineness of the Will, mere statement of PW-1, who is not a medical person or expert in the field, is not sufficient to dislodge those suspicious circumstances.

Re: Unreliability of PW-1

61. Some of the glaring circumstances, which is creeping in the testimony of PW-1, as brought out during his cross-examination, discredit his testimony making him unreliable and difficult to accept. We reproduce below few of them:

- (a) He has stated that sometime in the second week of May 1985, probably on 13th /14th May, 1985, he was summoned by the testator and was asked to draft the Will for him. However, when he went with his draft to the testator, he did not approve that draft and suggested certain alteration and modifications. When PW-1 again went back to the testator with his draft, the testator did not even look into the Will prepared by PW-1 and instead asked him to go to the adjoining TV room where the Will was lying in a drawer. This testimony puts a question mark on his deposition that the testator had called him and asked him to draft a Will inasmuch as if the testator already had a draft lying at home, he would have told his son/ wife to get the Will from home and given it to witness for getting it fairly typed and registered. This aspect has already been discussed above and highlighted by the learned Single Judge.
- (b) PW-1 further testified that the testator wanted his opinion on that Will with some changes pointed out by him. At request of the testator, he read out the Will after incorporating the alterations which the testator wanted and some he also suggested regarding estate duty. He was asked to draft

another Will. So the PW-1 drafted another Will and took that draft to the testator. Some more alterations were suggested by the testator and the Will was got retyped and again the witness went there on the next day in the morning with the draft of the Will and the testator after reading it approved it and signed the same. The testator was at that time 82 years of age. He was got discharged from the hospital only for three days before, at the instance of the petitioner himself and within these three days, the second Will was prepared and it was registered on 29.05.1985. The first Will was finalized in the hospital. It is not known that how properties were bequeathed in the first Will. It is also not known what prompted the preparing of a second Will, when first Will was finalized only a week back. This creates grave doubt about the mental soundness of the testator and about genuineness of the Will.

- (c) There are some doubts about the execution of the Will, viz., whether it was on 28.05.1985 or 29.05.1985. PW-1 in his attestation to the probate petition at the foot had verified that he was present at the time of the execution of the Will dated 28.05.1985. In his testimony, however, he has stated that Will was not executed on 28.05.1985, but was actually executed on 29.05.1985 and registered on the same day.

- (d) PW-1 made an attestation to probate petition even before the petitioner himself had signed the petition. He has accepted that he had attested the petition on 30.09.1985 whereas the propounder/appellant had signed and verified on 08.10.1985. It is not a comment on the irregularity in signing the attestation before the petitioner signs the petition. It is a reflection on the conduct of PW-1, as brought out by the learned Single Judge. The account given by PW-1 about the registration of Will also does not inspire the consequences. It is understandable that because of sickness of the testator, intention could be to get the Will registered by calling the Sub-Registrar at the residence. However, the narration of circumstances in which this was given casts suspicion. Dr. Madan Lal, who was attending the testator at the residence from whom PW-1, as per his version obtained a certificate about the illness of the testator. Strangely, he did not disclose the purpose for which he was seeking the certificate. Although he had obtained the certificate from him about inability of the testator to move out of his house, he did not ask Dr. Madan Lal to be a witness to the Will and opined that the testator was mentally sound. This, notwithstanding, the fact that Dr. Madan Lal was very much available and was present.
- (e) PW-1 has stated that he did not disclose to anyone including wife of the testator, sons and their wives

about the purpose of visit when he was purportedly asked by the testator to come to the hospital allegedly for preparation of the Will. When the testimony of PW-1 along with cross-examination is ready in its entirety, it gives an impression that on vital aspect the witness either falters or did not give satisfactory reply or evaded the answers. Some of these pointed out by the learned counsel for the objectors are as under:

“Signing, Attestation and Registration of the Will: I do not recollect having told anybody that the will was signed and attested on 29.05.1985.

It is correct that the last paragraph of the Will indicates that it was signed and executed on 28.05.1985.

I had noticed that the date i.e. 28.05.1985 had been typed in the draft. (Question: According to you this Will was signed and executed on 29.05.1985. Why did you not show this date at least under you own signatures?).

I did not have any authority from L. Hans Raj to present this Will before the Sub-Registrar, but I was authorized by Lalaji orally to do it.

Both versions, i.e., one contained in the declaration (of the Probate Petition) and the other in Examination-in-Chief that the Will was executed on 29.05.1985 is correct.

I did accompany the representative of the Sub-Registrar to the Sub-Registrar office on 29.05.1985.

I do not remember the date on which I took back the will.

The suggestion that I represented to the Sub-Registrar that the testator was seriously ill and was likely to die any moment and therefore his Will should be registered on that very day is not correct.

It is not correct that because of my representation the officers said that he had no time to go and he will send one of his subordinates.

After the formalities were complete at the residence of Lalaji, Shri Kwatra had given me the receipt which was duly signed by him in presence of Lalaji to collect the document on the date written on the receipt under his signature and therefore I had no occasion to see as to who signed the documents and at what time. Whether he had any authority or not that I do not know.

I had not read over the Will in the presence of the witness but they might have read it themselves before they put their signatures (on 29th May).

My father had gone through the Will curiously before signing it. I cannot say about Bibiji. She knew only a bit of English. The original of Ex.P.W. 1/D1 was also signed in the presence of the attesting witnesses. The Will was signed first and thereafter the original of PW1/D1. These were signed with the pen by Lala Hans Raj Gupta. I do not remember whether the witness also signed with the same pen. (Question: I put it to you that the subject matter of the Will was not known to any of the attesting witness).

Background of Shri S.K. Tewari and his father Mr. M.P. Tewari: M/s. H.G. Gupta and Sons, M/s. Madho Ram Budh Singh and I think I have represented in a case of M/s. Mridula Enterprises (Q. Which firm).

Except for Rampur Engineering Company Ltd., I have not worked anywhere any capacity at any time (Q: Have you worked as an employee in anyone of the other companies or the firms with which Shri Desh Raj Gupta has connections?

I am retained by Rampur Engineering Company Ltd. and Hans Raj Gupta and Company P. Ltd. but I do not know whether Shri Desh Raj Gupta has any connection with any of these two concerns except as shareholder.

My father has not resigned from all the companies. It is however, correct that from some of the companies he has resigned and in his place Shri Shiv Dutt has been appointed as a Secretary. He has been appointed as Secretary by Shri Shiv Raj Gupta.

I might have drafted the partnership deed of M/s. H.G. Gupta and Sons after the retirement of Shri Desh Raj Gupta.

The reason on account of which Lala Hans Raj Gupta selected me for appointing me as a retainer in two of his companies Rampur Engineering Ltd. and Hans Raj Gupta P. Ltd. The same reason must have prevailed on that account. (Q. What was the special reason of selecting you for drafting the Will when he himself according to your own statement was MA, LLB and other eminent lawyers as his friends and advisors more senior than yourself)."

62. Keeping in view the aforesaid interest of PW-1, learned Single Judge has made following observations in the impugned judgment:

"Counsel for the petitioner in this case was Mr. L.R. Gupta and the witness S.K. Tewari admitted during cross-examination that he at one point of time had worked as junior of L.R. Gupta from 1965 to

1970-71. He also admitted that he worked as an apprentice with Rampur Engineering Company Ltd. of which Lala Hansraj Gupta was the Chairman and Sh. Des Raj Gupta was the Technical Director/Managing Director. The cross-examination of witness showed that he had been associated with Des Raj Gupta for a long. The petitioner in the capacity of an Advocate/Legal Advisor had been on good terms with Lala Hansraj Gupta also. Not only he, but his father was working with Lala Hansraj Gupta since 1940 or 1942 and the witness knew almost all the family members of Lala Hansraj Gupta and also knew that Sh. Rajender Kumar Gupta and Sh. Ravi Gupta were not on talking terms.

Apart from above circumstances, another circumstances which throws doubt on the genuineness of the Will is that the petitioner himself took eminent part in the execution of the "Will" which conferred a substantial benefit on him. In the present case, it was the petitioner and his son who brought Lala Hansraj Gupta to their home. PW-1 was an Advocate working for Lalaji and the petitioner and had also been looking after some of the legal work of the petitioner. The petitioner is a major beneficiary under the Will. The petitioner, who had assured in the hospital that Lalaji would be re-admitted in the hospital after three days, did not get Lala Hansraj Gupta re-admitted. The petitioner did not appear in the witness box. All these factors create doubts about genuineness of the Will. I therefore, come to the conclusion that the "Will" dated 28.05.1985 allegedly executed on 29th May, 1985 was not a genuine and valid "Will" of Late Lala Hansraj Gupta. The issue is decided accordingly."

63. Further, the propounder has not been able to lead any satisfactory evidence to remove the suspicious circumstances. That apart, the suspicious circumstances, which are projected by the objectors are the following:

- (a) Signature on the Will: The alleged signatures of the testator on 29.05.1985 at the time of registration of the alleged Will is very shaky and, in fact, unrecognizable. At two places on the back of the first page of the Will, Lalaji is alleged to have signed when the representative of the Sub-Registrar had visited his residence for registration. Both these signatures alleged to be that of Lalaji, are, on the fact of it, very shaky and doubtful.
- (b) Manner of discharge from AIIMS: The procedure and manner in which Lalaji was discharged from the hospital on 24.05.1985 with Deshraj Gupta, the propounder of the Will

signing a hand-written note with the endorsement "I am taking the patient home for 3 days by docto's permission from 4.00 pm on 24.05.1985 to 27.05.1985 10.00 am."

Consent Form signed by Ravi Raj Gupta (son of the propounder) with the endorsement "we will bring the patient on Sunday". On this Consent Form, Dr. S.M. Singh (WP-3) endorses, "payment will be paid by them tomorrow. Responsibility is mine". No explanation has been put forward by the propounder as to why Lalaji did not himself sign any document of discharge, when it is alleged that the discharge was sought by Lalaji on his own. It is pertinent to note that Lalaji signed on the consent form for being operated on 17.04.1985 and is also claimed to have signed at 8-9 places on the alleged Will on 29.05.1985.

- (c) Room was kept reserved in AllIMS for three days as a special circumstance due to Lalaji being a borderline case.
- (d) Serious doubt with regard to the condition of mind of the testator: Discussed under "sound and disposing mind".
- (e) Disposition being unnatural and unfair: The wife of the testator as well as the daughters of the testator have been totally excluded from the disposition and the propounder and his sons getting substantial benefit under the Will.

The Supreme Court in a catena of cases has held that the Court must satisfy its conscience as regards the execution of the Will by the testator and the Court would not refuse to probe deeper into the matter only because the signatures of the testator of the Will is otherwise proved.

(See ***Niranjan Umedchandra Joshi Vs. Mrudula Jyoti***

Rao and Ors., (2006) 13 SCC 433; **B. Venkatamuni Vs. C.J. Ayodhya Ram Singh & Ors.**, (2006) 13 SCC 449 and **Apoline D'Souza Vs. John D'Souza**, (2007) 7 SCC 225).

- (f) The propounder, Deshraj Gupta having retired from family business:

“...It is correct that during the life time of Lala Hansraj his sons, daughters and grand children constituted a happy family, excepting Shri Desh Raj Gupta, the petitioner herein, who had retired from all the business of the family...”

“...He was discussing business matters with Rajendra Gupta as well. While I say this because in 1971, Deshraj Gupta asked for a partition from the family business. He opted out of the partnership of H.G. Gupta & Sons and resigned from the Board of Directors of Rampur Engineering Company Ltd. and Hansraj Gupta & Co. Pvt. Ltd. A situation came in the joint meeting of the family with Lalaji and all the four sons. It was decided that I be given the charge to head and manage the business when he became the Mayor of Delhi, as he would not have the time to be able to manage the family business. Deshraj Gupta the elder son was upset and he opted to get out of the business. He was not reconciled to the fact a younger brother appointed to head the family business. He sent his resignation from the Board of Directors of the Companies. He even opted out of the partnership firm – HG Gupta & Sons. He resigned from the partnership and asked for money to be paid to him from the share of the firm in 1971. An auditor, G.S. Mathur (Lalaji's auditor) was appointed and all the firms audited to work out to see what would be his share, which was subsequently paid to Desh Raj Gupta. Thereafter, he was not concerned with any business of the family. The payment has been confirmed by Deshraj Gupta in Suit No.1794 of 1986...”

Once Deshraj Gupta, propounder of the Will, had retired, taken a share and started his own business, the disposition in his favour and in favour of his children coupled with the fact that neither Smt. Angira Gupta nor his daughters have received any benefit clearly shows that the disposition is unnatural and unfair. Also the contention of the appellant is that the main objector, viz., Shivraj Gupta has “neither given details not explained in his evidence as to how and in what manner the petitioner has been a major beneficiary, especially in view of the fact that the petitioner was

recipient of only 50% of the share of 20% of the testator in Hansraj Gupta & Co. Pvt. Ltd. The rest of the benefits received by the petitioner/appellant are the same as the objector and other sons namely $\frac{1}{4}^{\text{th}}$ of the testator's share in the 2 immovable properties i.e. 3, Amrita Shergil Marg and 20, Barakhamba Road. It may be noted that it is settled law that the onus is on the propounder to prove the execution and the sound mental capacity of the testator. At the same time the suspicious circumstances which surrounds the Will have to be removed by the propounder of the Will. Thus the question of the Objector lending any evidence is wholly misplaced and ill conceived. Even otherwise, from the mere reading of the Will it transpires that the major share in the properties of the testator has either been given to Mr. Deshraj himself or to his sons.

Para 3 of the alleged Will reads as follows:-

“ My interest and share in H.G. Gupta & sons and M/s Mridul Enterprises partnership and their respective goodwill be transferred to my grandsons, Raviraj Gupta and Uday Gupta in the proportion of 3 to 1 and it is my fervent desire that this partnership may continue as a link between the family far as long as possible”

Para 8 of the alleged Will reads as follows:-

“8. All my shares and other interests that I have in M/s Hansraj Gupta and Co. Pvt. Ltd. I wish that after my death the same may devolve upon my son Shri Desh Raj Gupta and grandson Shri Ravi Raj Gupta equally. I wish that the

said company be managed and controlled by my grandson Shri Ravi Raj Gupta as is being done today and none of my other legal heirs should raise any objection thereto”.

It becomes quiet evident from the bare reading of the above paras of the alleged Will that the major share in the estate of the testator has either been given to Mr. Deshraj himself or to his sons in particular his entire share and interest in i) H.G. Gupta & Sons; ii) Mridul Enterprises; and iii) M/s Hansraj Gupta & Co. Pvt. Ltd.

(g) Will kept secret from all except the Propounder

The Will is alleged to have been executed on 28th May, 1985/29th May, 1985. Lalaji died on 3rd of July, 1985. On 29th July, 1985, the Propounder circulates the Will to the brothers of the family. The Will is further alleged to be in the custody of Angira Gupta, however, in her reply, no such statement is made. S.K. Tewari, had kept a copy of the Will before allegedly handing it over to Angira Gupta. However, the propounder acted upon the Will on 12 of July, 1985. In the cross examination of Shri Shiv Raj Gupta this fact has emerged on the record of the probate proceedings, which are extracted below:-

“Ques: On what basis you say that no member of the family other than Petitioner and his family were aware of the existence of the Will?

Ans: Lalaji expired on 3rd July, 1985 and on 12th July, 1985 the Partnership of Mridul Enterprise was altered to suit to Shri Deshraj Gupta and his family. It was only on 29th July, 1985 that Shri Deshraj Gupta circulated the Will to all brothers of the family. Therefore, this proves the fact that only he was aware of the alleged Will much before others.”

The onus was on Deshraj Gupta i.e. the Propounder to lead satisfactory evidence and discharge the burden placed on

him to dispel all suspicious circumstances. **This Will was kept a secret.**

- (h) Medical Condition (pre and post discharge) - Both Physical and Mental: Though we may not agree with all the aforesaid submission, we find that circumstances relating to discharge of the patient from AIIMS, keeping of Will as secret and physical and mental condition of the testator are very serious objections, which create doubt about the genuineness of the Will. In this hue, when we find that disposition in the Will to the benefit of the propounder who along with his sons is main beneficiary that too when he had retired from the family business long ago, casts further doubt. In such scenario, it was for the appellant to adduce satisfactory by examining evidence to dispel these suspicions. Instead, the appellant was satisfied by examining PW-1 on the aspects of execution and mental health. He examined PW-3 who attended to the testator only while testator was in the hospital till 24.05.1985. Dr. Madan Lal who was very material witness was not examined. The Supreme Court has in **Niranjan Umedchandra Joshi** (supra) has held that what was the frame of mind of the deceased could have been best stated by the Doctor who was attending on him. So much so certificate issued by Dr. Madan Lal on the basis of which Sub-Registrar was requested to visit the residence of the testator for registration of the Will has also been withheld. The propounder also did not examine Satish Kwatra, instead examined D.N. Gupta, who had only deputed Satish

Kwatra and had no occasion to see the testator. Above all, neither the appellant as propounder of the Will, nor his son dared to enter the witness box who was in a better position to dispel, if at all, the aforesaid suspicious circumstances. If this is the quality of evidence examined by the appellant by not caring to examine the relevant and most material witnesses on these aspects, we have no hesitation to come to the findings that the appellant has failed to discharge his burden and erasing the suspicious circumstances.

64. Much case law was cited on either side in support of respective contentions. Legal position contained in these judgments cannot be disputed. In fact, we have already given proper narration on this. Applying principles to the facts of this case, it is, therefore, not necessary to deal with each and every judgment cited by the counsel for the parties to avoid unnecessary burning of this judgment.
65. The upshot of the aforesaid discussion would be to agree with the findings of the learned Single Judge. Finding no merit in this appeal, we accordingly dismiss the same with costs.

(A.K. SIKRI)
JUDGE

(AJIT BHARIHOKE)
JUDGE

JULY 14, 2010.
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