

IN THE HIGH COURT OF DELHI AT NEW DELHI

Judgment reserved on: December 03, 2010
Judgment delivered on: 08.03.2011

RFA No. 361/2004

Smt. Lalita Sharma Appellant
Through: Mr. Alok Kumar, Advocate.

Vs.

Smt. Sumitra Sharma Respondent.
Through: Mr. J.R. Bajaj, Advocate.

CORAM:

HON'BLE MR. JUSTICE KAILASH GAMBHIR

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

KAILASH GAMBHIR, J.

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1. By this appeal filed under Section 96 of the Code of Civil Procedure, 1908 the appellants seek to challenge the judgment and decree dated 29.4.2004 passed by the learned

trial court in a suit filed by the respondents for partition and declaration which was decreed in favour of the respondents and against the appellants.

2. Brief facts of the case relevant for deciding the present appeal are that Smt. Vidyawanti was the widow of Sh. Brij Lal Sharma who was the owner of the property bearing Quarter no.28/20, Old Rajinder Nagar, New Delhi and after his death vide conveyance deed and lease dated 31.10.67 the said property was mutated in the name of Smt. Vidyawanti. Smt. Vidyawanti died on 5.2.90 and was survived by 4 sons and 1 daughter. The respondent no.1/plaintiff no. 1 is the widow of Sh.Yash Pal Sharma, one of the son's of Smt. Vidyawanti and plaintiff no.2 and 3/respondent no.2 and 3 are the son and daughter of Sh.Yash Pal Sharma. The appellant no.1 is the widow of defendant no.1 and appellant no.2 is the widow of defendant no.2, appellant no.3 and 4 being the children of appellant no.2. The bone of contention between the parties is that the appellants allege that Smt.Vidyawanti died leaving behind a will dated 22.12.1987

bequeathing her property in favour of defendant no.1 and 2 while the respondent no.1 to 3 alleged that she died intestate. Therefore a suit for partition and declaration of the said property was filed by the respondent no.1 to 3 which vide judgment and decree dated 29.4.2004 was decreed in favour of the respondents and against the appellants. Feeling aggrieved with the same, the appellants have preferred the present appeal.

3. Mr. Alok Kumar, learned counsel for the appellants assailing the said judgment and decree dated 29.4.2004, vehemently argued that the appellants could successfully prove and establish the execution of the holograph Will dated 22.12.1987 through defence evidence especially with the help of the evidence of two attesting witnesses and also by adducing the evidence of hand writing expert who in his evidence has proved that the signatures of the testator, late Smt. Vidya Wanti, on the holograph Will were genuine after the same were compared with her

admitted signatures on the rent agreements Ex. PW1/D1 and Ex. PW1/D2.

4. Learned counsel for the appellants further submitted that the learned trial court has given unnecessary weightage to the minor variations and discrepancies in the evidence of the said two attesting witnesses who were cross examined after a gap of 16 years. The contention of the counsel for the appellant was that it is but natural that due to such a long gap, minor discrepancies would arise in natural course but such minor discrepancies could not have the effect of disbelieving their testimonies deposing their personal presence at the time of execution of the Will in question and also their having duly witnessed the execution of the said Will. In support of his argument, counsel for the appellant placed reliance on the judgment of the Apex Court in *Shashi Kumar Banarjee Vs. Subodh Kumar Banarjee*, AIR 1964 SCC 529.

5. Counsel for the appellants also submitted that the learned trial court gave undue weightage to the insertion of

the registration details of the lease deed by the testator in the said holograph Will without taking the help of the said registered lease deed. The contention raised by the counsel was that there was nothing unusual on the part of the testator to have remembered such details at the time of setting down her hands at the holograph Will. Counsel for the appellants also submitted that the respondent no.1 (plaintiff) was duly confronted with the two documents i.e. Rent agreement and agreement regarding security which were duly signed and executed by late Smt. Vidya Wanti and the same pertain to almost the same contemporaneous period as that of the period of the Will and she had duly identified the signatures of late Smt. Vidyawanti on the said two documents proved on record as Ex. PW1/D2 and Ex. PW1/D2. The contention of the counsel was that with the said categorical admission of the respondent no.1 with regard to the signatures of late Smt. Vidyawanti on the said two agreements has not left any scope to dispute the signatures of Smt. Vidyawanti on the holograph Will. Counsel also submitted that the hand writing expert Mr. V.C. Misra

DW-4, in his report proved on record as Ex.DW-4/1, further proved this fact that the signatures of late Smt. Vidyawanti on the Will duly tallied with her admitted signatures on rent agreement and agreement regarding security receipt Ex. PW1/D1 & Ex. PW1/D2 respectively. The contention raised by the counsel was that the learned trial court committed grave illegality in not only ignoring the report of the said hand writing expert i.e. Ex. DW-4/1 but also ignoring the admission of the respondent no.1 with regard to the signatures of Smt.Vidyawanti on Ex. PW1/D1 & Ex. PW1/D2 on the wrong analogy that the said documents could not be looked into for any purpose, the same being beyond pleadings.

6. Counsel further submitted that the appellants were well within their legal right to confront the respondent No. 1 with the said documents Ex. PW1/D1 and Ex. PW1/D2 in terms of Order VIII Rule 1A(4) CPC and that no objection was raised by the respondents when the said documents were exhibited in the cross-examination of

respondent no.1. Counsel also submitted that the appellants were not required under law to have pleaded those documents in their written statement as under Order VI Rule 2 CPC, the pleadings are required to contain only a concise statement of material facts and not evidence. In support of his argument counsel placed reliance on the judgment of Gujarat High Court in *Amit M. Pathakji Vs. Bhavnaben Amitkumar Pathakji AIR 2007 Guj 192*. Counsel for the appellants also submitted that the respondent no.1 in para 13 of the plaint herself admitted the fact that the first floor of the suit property was under the tenancy of a tenant namely, Sh. Vinod Kukreja, and therefore the confrontation of those documents i.e. Rent agreement and agreement regarding security in her cross-examination could not have been of any surprise to the respondent No.1.

7. Based on the above submissions, counsel submitted that the appellants fully succeeded in discharging their onus on Issue No. 2 to prove the factum of execution of the said holograph Will which was executed by late Smt.

Vidyawanti in a natural course in the presence of two witnesses and therefore, the learned trial court ought to have decided the said issue in favour of the appellants and against the respondents.

8. Counsel for the appellants further went on to assail the findings of the learned trial court on Issue No. 3, which relates to the affidavit dated 7.8.91 Ex. PW2/D2 alleged to have been executed by the respondent no.1 wherein in terms of clause 5, the respondent has confirmed the fact of execution of the said Will and her no objection if the said Will is acted upon. The contention raised by the counsel was that the appellants had duly proved the execution of the said affidavit by respondent no.1 by getting the records summoned from the office of the L & D.O. Counsel also submitted that the appellants also proved the signatures of respondent no.1 on the affidavit through the evidence of the hand writing expert who proved the signature of the respondent no.1 by comparing her signatures on the said affidavit i.e. Ex.PW2/D2 with her

admitted signatures on the plaint and vakalatnama filed by her before the learned trial court. Counsel also submitted that the hand writing expert was not cross-examined by the respondents to rebut his report pertaining to the signatures of the respondent no.1 on the said affidavit. Counsel also submitted that the learned trial court failed to give any specific finding on the said affidavit filed by the respondent no.1. Counsel also submitted that the said affidavit signed by the respondent no.1 was duly attested by the Executive Magistrate in the presence of the respondent no.1 and therefore there was no room to doubt the execution of the said affidavit. Counsel also submitted that the execution of the said affidavit by respondent no.1 is a clear admission on her part so far the execution of the said holograph Will by late Smt. Vidyawanti is concerned and therefore the importance of the said affidavit could not have been ignored by the learned trial court. Counsel also submitted that the failure on the part of the respondents to cross-examine the said hand writing expert pertaining to the signatures of the respondent no.1 on the affidavit was sufficient enough to

prove the said document in view of the settled legal principle that failure of the opponent to cross-examine the witness on any material point would lead to acceptance of such a fact or point. In support of his arguments, counsel for the appellants placed reliance on the judgment in *Sarwan Singh vs. State of Punjab AIR 2002 SC 3652*.

9. Based on the above submissions, counsel for the appellants submitted that the appellants had successfully proved the due execution and attestation of the Will dated 22.12.1987. Giving justification to divest the respondents from the legacy of the said Will, counsel submitted that during the lifetime of late Smt. Vidyawanti the respondents took a separate residence while the appellants continued to live with late Smt. Vidyawanti taking care of her and also spending money towards the upkeep and development of the property. Counsel thus submitted that the learned trial court committed grave illegality in accepting the case of the respondents while not giving credence to the unimpeached

evidence of the appellants proving the said holograph Will dated 22.12.1987 Ex. DW1/1.

10. Opposing the present appeal, Mr. Bajaj, learned counsel for the respondents fully supported the findings given by the learned trial court in the impugned judgment. Counsel submitted that the appellants failed to dispel various suspicious circumstances surrounding the execution of the said Will even including the signatures of late Smt. Vidyawanti. The contention of the counsel was that late Smt.Vidyawanti never used to sign as '*Vidyawanti*' and this fact itself would clearly show that the appellants had fabricated the said Will. Counsel for the respondents also submitted that the admission on the part of the respondent no.1 with regard to the fact of admitting the signatures of late Smt. Vidyawanti on rent agreement and agreement relating to security Ex. PW1/D1 and PW1/D2 have to be read as a whole and not in isolation. Counsel also submitted that the respondents had raised objections to the exhibition of the

said documents in the cross-examination of PW-1 i.e. respondent no.1.

11. I have heard learned counsel for the parties at considerable length and gone through the records.

12. The main and crucial question which falls for consideration in the present appeal is that whether the propounders of the Holograph Will i.e. appellants herein could successfully prove on record the genuineness of the said Will left by late Smt. Vidyawanti. In case this court comes to the conclusion that the appellants were successful in proving the genuineness of the said Will then all other questions raised by the appellants would become secondary and in the alternative if this Court comes to the conclusion that the appellants have failed to prove the genuineness of the said Will then also the other related issues such as execution and signing of the affidavit dated 7.8.91 by respondent No. 1 and the mutation of the said property in the name of defendant Nos. 1 and 2 would become less relevant.

13. Under Section 2(h) of the Indian Succession Act, 1925, the Will is defined as *“a legal declaration of the intention of a testator with respect to his property which he desires to be carried out into effect after his death”*. As would be evident from the definition of Will envisaged under Section 2(h) of the Indian Succession Act, through a Will a person can direct his/her estate to be distributed after his/her death in a manner expressed by him/her in the said document. In the absence of execution of a Will, the property of a person devolves upon the legal heirs in the order of succession as envisaged under Part V of the Indian Succession Act. This legal right of the legal heirs to succeed to any movable or immovable property left by the deceased can be divested through the said instrument of Will, otherwise under law the order of succession will prevail in the absence of any Will left by a deceased person. The Will is thus a very vital document through which the persons who are otherwise legally entitled to succeed to any movable or immovable assets can be divested of the same. The Wills thus often become a cause of serious and nefarious legal

battle amongst the legal heirs and such a battle is not easily resolved because the person who has signed the Will is no more there to say that this was executed by him/her.

14. A Holograph Will is a Will written out entirely by a testator in his own handwriting. A Holograph Will, like any other Will requires attestation as per the mandate of Section 63 of the Indian Succession Act, 1925 and unless the Holograph Will like any other Will fulfills the legal requirement of its attestation by two witnesses, the Will cannot be said to be validly executed. Hence as per provisions of Section 63 of the Succession Act, for the due execution of a will:

- (1) the testator should sign or affix his mark to the will;
 - (2) the signature or the mark of the testator should be so placed that it should appear that it was intended thereby to give effect to the writing as a will;
 - (3) the will should be attested by two or more witnesses,
- and

(4) each of the said witnesses must have seen the testator signing or affixing his mark to the will and each of them should sign the will in the presence of the testator.

15. It is also a settled legal position that the Will is such a document which has to be proved by its propounder beyond the shadow of any doubt or suspicious circumstances. The principles which govern the proving of a Will are well settled. The Constitution Bench of Hon'ble Supreme Court laid down the principles of proving a Will in the matter of ***Shashi Kumar Banerjee & Ors. Vs. Subodh Kumar Banerjee, AIR 1964 SC 529*** and held as under:

"4. The principles which govern the proving of a will are well settled. The mode of proving a will does not ordinarily differ from that of proving any other document except as to the special requirement of attestation prescribed in the case of a will by Section 63 of the Indian Succession Act. The onus of proving the will is on the propounder and in the absence of suspicious circumstances surrounding the execution of the will, proof of testamentary capacity and the signature of the testator as required by law is sufficient to discharge the onus. Where however there are suspicious circumstances, the onus is on the propounder to explain them to the satisfaction of the court before the court accepts the will as genuine. Where the caveator alleges undue influence, fraud and coercion, the onus is on him to prove the same. Even where there are no such pleas but the circumstances give rise to doubts, it is for the propounder to satisfy the conscience of the court. The suspicious circumstances may be as to the genuineness of the signature of the testator, the condition of the testator's mind, the dispositions made in the will being unnatural improbable or

unfair in the light of relevant circumstances or there might be other indications in the will to show that the testator's mind was not free. In such a case the court would naturally expect that all legitimate suspicion should be completely removed before the document is accepted as the last will of the testator. If the propounder himself takes part in the execution of the will which confers a substantial benefit on him, that is also a circumstance to be taken into account, and the propounder is required to remove the doubts by clear and satisfactory evidence. If the propounder succeeds in removing the suspicious circumstances the court would grant probate, even if the will might be unnatural and might cut off wholly or in part near relations. It is in the light of these settled principles that we have to consider whether the appellants have succeeded in establishing that the will was duly executed and attested."

16. Dealing with the legal position in the matter of proving the Will which is surrounded by suspicious circumstances, the Apex Court in ***H. Venkatachala Iyengar Vs. B.N. Thimmajamma & Ors. AIR 1959 SC 443 (1)*** held as under:

"21. 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.

22. 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.

22. It is obvious that for deciding material questions of fact which arise in applications for probate or in actions on wills, no hard and fast or inflexible rules can be laid down for the appreciation of the evidence. It may, however, be stated generally that a propounder of the will has to prove the due and valid execution of the will and that if there are any suspicious circumstances surrounding the execution of the will the propounder must remove the said suspicions from the

mind of the court by cogent and satisfactory evidence. It is hardly necessary to add that the result of the application of these two general and broad principles would always depend upon the facts and circumstances of each case and on the nature and quality of the evidence adduced by the parties. It is quite true that, as observed by Lord Du Parcq in Harnes v. Hinkson "where a will is charged with suspicion, the rules enjoin a reasonable scepticism, not an obdurate persistence in disbelief. They do not demand from the Judge, even in circumstances of grave suspicion, a resolute and impenetrable incredulity. He is never required to close his mind to the truth". It would sound platitudinous to say so, but it is nevertheless true that in discovering truth even in such cases the judicial mind must always be open though vigilant, cautious and circumspect."

(emphasis supplied)

17. In the matter of ***Joyce Primrose Prestor Vs. Vera Marie Vas & Ors., (1996) 9 SCC 324***, the Hon'ble Apex Court took a view that in the case of holograph Will the presumption is all the more a greater presumption and held as under:

12. While the presumption in the case of ordinary Wills is as stated above, in the case of "holograph Wills", the presumption is all the more - a greater presumption. Ex.P-1 is a "holograph will". It is one which is wholly in the handwriting of the testator. The Calcutta High Court Ajit Chandra Majumdar v. Akhil Chandra Majumdar : AIR1960Cal551 stated about such a Will, thus:

The whole of this Will was written in the hand by the testator himself in English. The handwriting is clear and firm. The law makes a great presumption in favour of the genuineness of a holograph will for the very good reason that the mind of the testator in physically writing out his own Will is more apparent in a holograph will than where his signature alone appears to either a typed script or to a script written by somebody else.

The writing of the Will and Signature of the testator are admitted. There is also due and proper attestation in accordance with the relevant statutory provisions. No suspicious circumstance appears on the face of the document, Ex.P-1. The Will appears to be moderate and rational. Viewed from the above angle, there is a great presumption - even bordering on actual proof of the due execution and attestation of the Will.

.....

15. In applying the above general principles to particular cases, the nature of the Will, the pleadings of the parties in the case, facts admitted or proved and the presumptions available in law, will have to be carefully given effect to. The case of a "holograph Will" which is admittedly in the handwriting of the testator, is a special case which will require a different approach in considering the evidence in the case to find whether the Will has been duly executed and attested. The approach to be made in such cases has been stated by the Constitution Bench in Shashikumar Banerjee's case, (supra) at page 532 paragraph (5). In that case, the Court referred to certain undisputed preliminary facts as follows : The testator, a well-known wealthy lawyer, who died at the age of 97, had executed a Will when he was 93 years old. He had made provision for his heirs by executing a number of documents, and the Will referred to the remaining property. The Will was witnessed by two persons. The entire Will was in the handwriting of the testator, corrected in various places and corrections were initialled by him. It was admitted that the signature at the bottom of the Will was of the testator. The dispositions were very clear and detailed and it could not be said to be an unnatural document. There was no evidence to show that the profounder took any part in the execution of the Will. After stating these preliminary facts, the Court stated the approach to be made in the case of a "holograph Will", thus;

Further the fact that the will is a holograph will and admittedly in the hand of the testator and in the last paragraph of the will the testator had stated that he had signed the will in the presence of the witnesses and the witnesses had signed it in his presence and in the presence of each other raise strong presumption of its regularity and of its being duly executed and attested. On these facts there is hardly any suspicious circumstance attached to this will and it will in our opinion require very little evidence to prove due execution and attestation of the will. There is no doubt about the genuineness of the signature of the testator, for it is admitted that the signature at the foot of the will is his. The condition of the testator's mind is also

not in doubt and he apparently had full testamentary capacity right upto March 1947, even though he was an oldman of about 97 when he died on April 1, 1947 There is nothing to show that the dispositions were not the result of the free will and mind of the testator. Further, the profounder (namely, the appellants) had nothing to do with the execution of the will and thus there are really no suspicious circumstances at all in this case. All that was required was to formally prove it, though the signature of the testator was admitted and it was also admitted that the whole will was in his handwriting. It is in the background of these circumstances that we have to consider the evidence of the two attesting witnesses...

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The question that arose for consideration in this case, is largely one of fact, the decision of which depended upon the appreciation of the oral evidence adduced in the case. The weight or importance that should be given to the finding of the trial Judge who had occasion to watch the demeanour of the witnesses and assess their credibility and the restraints that should be observed by the Appellate Court in such cases, have been stated by this Court in more cases than one, vide Sarju Pershad Ramdeo Sahu v. [Jwaleshwari Pratap Narain Singh and Ors.](#) : [1950]1SCR781 , Madhusudan Das v. [Smt. Narayani Bai and Ors.](#) : [1983]1SCR851 , Etc. It need hardly be stated that the onus is on the appellant to show that the judgment appealed against is wrong. It is for the appellant to show where the assessment of the court below has gone wrong and not merely seek a reassessment of the evidence. We regret to note that the High Court in the instant case, has not at all borne in mind the above salient principles of law in reappreciating the entire evidence in this case through a microscope, as it were, and drawing its own "inferences" and "impressions".

18. As would be seen from the aforesaid principles of law laid down by the Hon'ble Apex court, the conscience of the Court has to be satisfied by the propounder of the Will so

as to dispel any suspicion or unnatural circumstances surrounding such Will. The existence of suspicious circumstances makes the onus of proof very heavy on the propounder of the Will. Before any Will is accepted as a genuine Will left by the testator, the propounder is required to remove all such suspicious circumstances surrounding the Will. Here the pivotal question is with regard to the authenticity of the signatures of the testator and as laid down by the Apex Court in the case of ***Pushpavathi vs. Chandraraja Kadamba (1973) 3 SCC 291*** that where the signature of the testator is challenged as a forged signature and the Will does not come from the custody of a public authority or a family Solicitor the fact that the dispositions made in the Will were unnatural, improbable or unfair, would undoubtedly create some doubt about the Will, especially, when the document is unregistered and comes from the custody of a person who is the major beneficiary under the Will. Thus in the background of these circumstances, the appellants being the propounders of Will have a very heavy onus to discharge.

19. In the present case, the appellants are the propounders of the Will of late Smt.Vidyawanti. It is not in dispute between the parties that the name of the testator was ***“Smt.Vidyawanti”*** and not ***“Smt. Vidyawati”***. The Will propounded by the appellant is a holograph Will which means that the Will was written by the testator Smt. Vidyawanti herself. The suspicious circumstances which abounds the said Will can be enumerated as follows:-

- (i) The Will has been executed on 22.12.1987 on a stamp paper of Rs.2/- which was purchased in the name of Smt. Vidyawanti on 13.08.1987. The suspicious circumstance which arises in this regard is that there is no requirement of a Will being reduced on a stamp paper, although there is no bar as well, but the question is why the Will was reduced on a stamp paper which was purchased on 13.08.1987 not for the purposes of using the same for the execution of the Will.

- (ii) The propounders of the Will have not brought on record the handwriting of the testator so as to get it compared with the handwriting on the holograph Will through a handwriting expert.
- (iii) The failure of the appellants to produce on record any document to show that late Smt. Vidyawanti used to append her signature as *Vidyawanti*. This suspicion arises on account of the fact that on the lease deed and the conveyance deed proved on record as Ex DW 3/1 and DW 3/2 Smt.Vidyawanti had signed as '*Vidyawati*' and not as '*Vidyawanti*'.
- (iv) To give the exact registration details of the lease deed in the said holograph Will without taking the help of or consulting the lease deed.
- (v) Use of different pen and different ink for writing of the holograph Will and for signing the said Will.

20. Besides the above suspicious circumstances, there are other surrounding circumstances as well which create a

doubt about the genuineness of the said Will. Material discrepancies in the statements of the two attesting witnesses, DW1 and DW2 also create enough suspicion about the genuineness and authenticity of the said holograph Will Ex.DW-1/1. The appellants i.e. the propounders of the holograph Will have not succeeded to dispel the said suspicious circumstances and, therefore, such suspicious circumstances clearly create a doubt about the genuineness and authenticity of the said holograph Will. Dealing with the above enumerated circumstances, firstly no explanation has come forth from the side of the appellants as to why the Will was executed on a stamp paper which was not even purchased for the purpose of using the same for execution of the said holograph Will. There is no requirement in law that a Will has to be executed on a stamp paper, yet considering the fact that an old stamp paper was used by the testator, certainly an explanation was called for from the propounders of the said Will as to why the said Will was written on a stamp paper not meant for the said purpose.

21. Secondly, the appellants have also not produced any of the writing of late Smt. Vidyawanti so as to prove the writing of late Smt.Vidyawanti on the said holograph Will Ex. DW1/1 as the comparative writing of late Smt. Vidyawanti could have been the best proof to prove the fact that the said Will was written by late Smt.Vidyawanti herself. However, it is not in dispute between the parties that late Smt. Vidyawanti was an illiterate lady as she had studied up to 3rd or 4th standard. As per the appellants and the two attesting witnesses, late Smt. Vidyawanti had written the said will herself in their presence. Although, self written will by the testator can be taken to be more genuine in comparison to the typed out wills but for proving the hand written will or holograph will the hand writing of the testator either should not be in dispute and if it is in dispute then the propounder has to prove such writing of the testator with the help of some cogent evidence including some other writings of the testator. No such evidence was led by the propounders in the present case to prove the hand writing of the testator and therefore the propounders failed to dispel the said

suspicious circumstance as to whether the writing on the holograph will was that of Smt. Vidyawanti or not.

22. The appellants have further failed to produce any cogent and reliable evidence on record to prove the fact that late Smt. Vidyawanti used to sign as ***Vidyawanti*** and not as ***Vidyawati***. The handwriting expert examined by the appellants failed to carry out any comparison to compare the signatures of the testator on the Ex.DW-1/1 with her admitted signatures on the lease deed and the conveyance deed proved on record as Ext.DW-3/1 and DW-3/2. No doubt, DW-4 Shri V.C.Mishra in his report proved on record as Ex.DW-4/1 has given the opinion to confirm the signatures of late Smt.Vidyawanti on the holograph Will as genuine after comparing the same with her signatures on the rent agreement and agreement regarding security proved on record as Ex. PW-1/D1 and Ex. PW-1/D2, but certainly the comparison of signatures of late Smt.Vidyawanti on the holograph Will with her admitted signatures on Ex.DW-3/1 and DW-3/2 would have helped the appellants to prove the

authenticity and genuineness of her signatures. Both the lease deed and the conveyance deed are registered documents duly executed by the President of India in favour of late Smt.Vidyawanti and, therefore, the genuineness and authenticity of the signatures of late Smt.Vidyawanti cannot be of any doubt so far these two documents are concerned. So far the rent agreement and the agreement related to security Ex. PW1/D1 and PW1/D2 are concerned, the signatures of late Smt. Vidyawanti were confronted by the appellants during the cross-examination of respondent no.1 and the admission on the part of respondent no.1 of such signatures of late Smt.Vidyawanti on these documents in any case cannot be put at a higher pedestal than the failure of the appellants to prove the signatures of late Smt. Vidyawanti on the holograph Will on comparing the same with her signatures on the registered documents i.e. the lease deed and the conveyance deed Ex. DW 3/1 and DW 3/2.

23. The learned counsel for the appellant also laid much emphasis on the fact that PW-1 Smt.Sumitra Sharma in

her cross-examination has admitted that the signatures on the agreements Ex.PW-1/D1 and PW-1/D2 are the signatures of Smt.Vidyawanti and, therefore, such an admission on the part of the respondent/plaintiff was good enough to prove the signatures of late Smt.Vidyawanti on the Will Ex DW 1/1. This argument of learned counsel for the appellant was not accepted by the learned trial court on the premise that the admission must be read as a whole, as the law does not permit an admission to be truncated and piecemeal. The learned trial court also referred to the written statement filed by the appellants wherein no such plea was taken by them that such an agreement was signed by late Smt.Vidyawanti in favour of the tenants during her lifetime. It is an admitted fact that the appellants did not refer to any such rent agreement executed by late Smt. Vidyawanti in favour of the tenant in their written statement, but at the same time this Court is not in agreement with the finding of the learned trial court that since in the written statement those agreements were not referred to by the appellant, therefore, the same cannot be looked into for any purpose whatsoever. The

counsel for the appellant placed reliance on the judgment of the Gujarat High Court in ***Amit M. Pathakji (supra)*** to support his argument that the finding arrived by the learned court is perverse. Undoubtedly order VIII Rule 1A of CPC casts an obligation on the defendant to produce documents upon which relief is claimed but sub rule 4(a) of rule 1A of order VIII carves out an exception which gives the right to the defendant to produce any document for presenting to the plaintiff's witnesses. The judgment cited by the appellant above reiterates the said legal position and applies the same not only to the plaintiffs' witnesses but also to the plaintiff himself. In the present case, the appellants have confronted these documents to the respondent No.1/plaintiff No.1 in her cross-examination and such a right to confront any document to a witness certainly flows from Order VIII Rule 1A(4) of the CPC. To this extent, the finding of the learned trial court is incorrect and cannot be appreciated. However, this Court does not find anything wrong in the reasoning given by the learned trial court where it said that the admission must be read as a whole and not in a truncated and piecemeal

manner. The respondents/plaintiffs in their plaint themselves have taken a very categorical stand that late Smt.Vidyawanti never wrote, signed or executed the alleged holograph Will. They have also said that the alleged signatures of late Smt.Vidyawanti as '**Vidyawanti**' appearing on the alleged Will differs from her signatures as '**Vidyawati**' appearing on the lease deed and conveyance deed. They have further averred that as a matter of fact Smt. Vidyawati never signed as '**Vidyawanti**' and she always signed as '**Vidyawati**'. In her cross examination, PW-1 Smt. Sumitra Sharma also deposed that her mother-in-law used to append her signature as '**Vidyawati**' only. It would be thus evident that the respondent Smt. Sumitra Sharma was consistent in her entire deposition that her mother-in-law Smt. Vidyawanti used to sign only as '**Vidyawati**' and not as '**Vidyawanti**'. This consistent stand of the respondent No.1 in the plaint, in her examination-in-chief and in her cross-examination thus cannot be ignored when pitted against her said admission of identifying the signatures of late Smt.Vidyawanti on the rent agreement and agreement regarding security.

24. It is also pertinent to mention that the appellant in her cross examination stated that Smt. Vidyawanti used to sign both as '**Vidyawati**' and '**Vidyawanti**' but however the appellants have failed to produce any cogent evidence before the court to prove this fact. So far the signatures of late Smt.Vidyawanti as appearing on the registered lease deed and conveyance deed are concerned, the same have not been denied by the appellants and on both these documents late Smt.Vidyawanti had signed as '**Vidyawati**'. Now the question whether late Smt.Vidyawanti used to sign as *Vidyawanti* as well, the only document which was produced by the appellants at the stage of cross-examination of the respondent No.1 was the rent agreement and the agreement relating to security and as already discussed above, the authenticity of these documents cannot be parallel to the documents produced on record by the respondent i.e. registered lease deed and conveyance deed. Certainly, the appellants could have produced some more strong and reliable evidence to prove this fact that late Smt.Vidyawati used to sign as *Vidyawanti* as well. No explanation has come

forth from the side of the appellants that as to why they did not summon the pension records from the State Bank of India, Padam Singh Road, Karol Bagh, New Delhi, where the husband of late Smt. Vidyawanti being a govt. servant was maintaining his pension account and which was being maintained by late Smt. Vidyawanti herself after his death. The appellant No.1 Smt. Lalita Sharma in her cross-examination has disclosed this fact that the account in the State Bank of India was in the name of Smt. Vidyawanti and she herself used to operate that account. She also stated that she may have some documents at the residence containing the number of the said bank account. It would be important to reproduce the following lines from her cross-examination as follows:-

“My father-in-law was a Govt. servant. Vidyawanti used to get pension after the death of Sh. Brij Lal Sharma and she used to deposit the same in an account with State Bank of India, Padam Singh Road, Karol Bagh, New Delhi. That account was in the name of Vidyawanti and she herself used to operate that account. I do not remember the number of the said bank account. However, I may have some documents at my residence containing the number of the said bank account.”

It would be manifest from above that had Smt. Vidyawanti been signing in two different manners i.e. *Vidyawanti* and *Vidyawati*, then her signatures appearing in her pension account would have clearly thrown some light on the said issue and because of withholding of the same by the appellants, an adverse inference can be drawn against the appellants. Hence, it can be safely assumed that the production of the said records by the appellants from the State Bank of India would have proved fatal to the case set up by the appellants in their defence. It is otherwise also not a matter of course and rather it can be considered as an unusual situation that any person is signing in two different manners. This aspect arouses more curiosity in the face of the fact that an old lady who had to frequently sign some documents for receiving pension of her late husband would append her signatures differently on different documents.

25. Another suspicious circumstance which stares on the validity and genuineness of the said holograph Will is that how late Smt. Vidyawanti could give the registration details

of the lease deed without consulting the said deed or its copy thereof. Both the attesting witnesses i.e. DW-1 and DW-2 in their respective depositions took a stand that late Smt. Vidyawanti had given the details of the registration of the lease deed without consulting any document. The registration details of the lease deed given by late Smt. Vidyawanti in the said holograph Will are; Date 27.1.1968 in Book No. 490, Volume No. 1908 on pages 50 to 52. It is inconceivable that an old lady of 62 years who was practically an illiterate lady could remember the registration details of the lease deed by heart and thus writing of such registration details without consulting the actual document also creates suspicion about the genuineness of the said holograph Will.

26. The above suspicion regarding the intrinsic evidence with regard to the will and as rightly held by the learned trial court is fortified by the fact that a different pen was used to write and sign the said document which is highly improbable as the executant would normally sign the will with the same

pen after writing out the contents thereof and then pass it on to the attesting witnesses which is not the situation in the present case.

27. With regard to the discrepancies in the depositions of the two attesting witnesses i.e. DW-1 Shri Rattan Lal and DW-2 Shri S.K. Bhatia, the argument of the counsel for the appellants was twofold; firstly was that such discrepancies were minor in nature and secondly that with such a long gap it was but natural for such discrepancies to crop up. To examine the argument of the counsel for the appellants, it would be apt to refer to the discrepancies which surfaced in the cross-examination of the said two attesting witnesses.

DW-1 Shri Rattan Lal in his deposition deposed as under:

“.....Shri S.K. Bhatia was already sitting there when I reached at 28/20, Old Rajinder Nagar.

.....

I had signed the will as attesting witness before it was signed by Smt. Vidyawanti. Thereafter Vidyawanti signed the will and lastly Shri S.K. Bhatia signed the will.”

DW-2 Shri S.K. Bhatia in his cross-examination deposed as follows:

“.....When I went there Shri Rattan Lal was at the residence of Vidya Wanti. Again said myself and Rattan Lal entered the house of Vidya Wanti almost simultaneously.

.....She took out a stamp paper which she already had and wrote the contents of her will in her own hand writing, signed the same. Then it was signed by Shri Rattan Lal and after him I signed that will as one of the attesting witnesses after going through the contents of the will.”

28. Under Section 63 (c) of the Indian Succession Act 1925, as discussed above, an unprivileged will is required to be attested by two or more witnesses and each of such witnesses must have seen the testator sign or affix his mark to the will or have received from the testator his personal knowledge of his signatures or mark on the will. Section 63(c) reads as under:

“63 (c) The will shall be attested by two or more witnesses, each of whom has seen the testator sign or affix his mark to the will or has seen some other person sign the will, in the presence and by the direction of the

testator, or has received from the testator a personal acknowledgment of his signature or mark, or of the signature of such other person; and each of the witnesses shall sign the will in the presence of the testator, but it shall not be necessary that more than one witness be present at the same time, and no particular form of attestation shall be necessary."

As would be evident from the plain language of the aforesaid provision, the testator must sign the will in the presence of the attesting witnesses or who personally acknowledge his signatures to the attestators. Attestation as provided by the section is thus not an empty formality. It means signing a document for the purpose of testifying of the signatures of the executant. The attesting witness should put his signature on the will *animo attestandi* which means that the attestator has personally seen the testator signing the will or he has personally received acknowledgment of his signatures. It would be pertinent to refer to the judgment of the Apex Court in the case of ***N.Kamalam vs. Ayyasamy (2001) 7 SCC 503*** wherein the court has held that:

"The Latin expressions onus probandi and animo attestandi are the two basic features in the matter of the civil court's exercise of testamentary jurisdiction. Whereas onus probandi lies in

every case upon the party propounding a will, the expression animo attestandi means and implies animus to attest: to put it differently and in common parlance, it means intent to attest. As regards the latter maxim, the attesting witness must subscribe with the intent that the subscription of the signature made stands by way of a complete attestation of the will and the evidence is admissible to show whether such was the intention or not.

.....

The signature of the attesting witness as noticed above on a document, requiring attestation (admittedly in the case of a will the same is required), is a requirement of the statute, thus cannot be equated with that of the scribe. The Full Bench judgment of the Madras High Court in H. Venkata Sastri and Sons v. Rahilna Bi wherein Ramachandra Iyer, J. speaking for the Full Bench in his inimitable style and upon reliance on Lord Campbell's observation in Burdett v. Spilsbury has the following to state pertaining to the meaning to be attributed to the word "attestation": (AIR pp. 113-14, paras 3-4)

"(3) ... The definition of the term 'attested' which is almost identical with that contained in Section 63(c) of the Indian Succession Act, has been the result of an amendment introduced by Act 27 of 1926. Prior to that amendment it was held by this Court that the word 'attested' was used only in the narrow sense of the attesting witness being present at the time of execution. In Shamu Patter v. Abdul Kadir Ravuthan the Privy Council accepted the view of this Court that attestation of a mortgage deed must be made by the witnesses signing his name after seeing the actual execution of the deed and that a mere acknowledgement of his signature by the executant to the attesting witness would not be sufficient. The amending Act 27 of 1926 modified the definition of the term in the Transfer of Property Act so as to make a person who merely obtains an acknowledgement of execution and affixed his signature to the document as a witness, an attester..... It is, therefore, necessary first to ascertain the meaning of the word 'attest' independent of the statute and adopt it in the light of the extended or qualified meaning given herein. The

word 'attest' means, according to the Shorter Oxford Dictionary 'to bear witness to, to affirm the truth of genuineness of, testify, certify'. In *Burdett v. Spilsbury* Lord Campbell observed at p. 417:

'What is the meaning of an attesting witness to a deed? Why, it is a witness who has seen the deed executed, and who signs it as a witness.'

The Lord Chancellor stated,

'the party who sees the will executed is in fact a witness to it, if he subscribes as a witness, he is then an attesting witness'.

The ordinary meaning of the word would show that an attesting witness should be present and see the document signed by the executant, as he could then alone vouch for the execution of the document. In other words, the attesting witness must see the execution and sign. Further, attestation being an act of a witness, i.e., to testify to the genuineness of the signature of the executant, it is obvious that he should have the necessary intention to vouch it.

(4) After the amendment of Section 3 by Act 27 of 1926, a person can be said to have validly attested an instrument, if he has actually seen the executant sign, and in a case where he had not personally witnessed execution, if he has received from the executant a personal acknowledgement of his signature, mark etc. Thus of the two significant requirements of the term 'attest', namely, (1) that the attestor should witness the execution, which implies his presence, then, and (2) that he should certify or vouch for the execution by subscribing his name as a witness, which implies a consciousness and an intention to attest, the amending Act modified only the first; the result is that a person can be an attesting witness, even if he had not witnessed the actual execution, by merely receiving personal acknowledgement from the executant of having executed the document and putting his signature. But the amendment did not affect in any way the necessity for the latter requirement, namely,

certifying execution which implies that the attesting witness had the animus to attest."

29. Hence, in the light of the aforesaid principles relating to attestation the factual scenario has to be analysed. In the facts of the present case, DW-1 Shri Rattan Lal in his cross-examination has deposed that he had first signed the will and later it was signed by the testator Smt. Vidyawanti. The said witness nowhere has deposed that late Smt. Vidyawanti had signed the will in his presence and in front of him. The requirement of Section 63 (c) is that the attestator must see the testator signing the will and not vice-versa. So the signing of DW-1 as an attesting witness on the holograph Will prior to the signing of the testator late Smt. Vidyawanti cannot be treated as a minor discrepancy but is rather a major flaw as signing of the attesting witness Shri Rattan Lal prior to the signing of the will by the testator does not fulfill the mandate and requirement of Section 63(c) of the Indian Succession Act, 1925. Inconsistency in the deposition of the two witnesses where they do not

support each other about the fact as to who had put his signatures first and also about who reached first and who reached later at the premises of the testator will create enough doubt on the genuineness of the said will.

30. The counsel for the appellants placed reliance on the judgment of the Apex Court in the case of ***Shashi Kumar (supra)*** in support of his argument that minor variations in the depositions of the attesting witnesses would not go to the extent to disregard their testimony. The judgment in the case of Shashi Kumar has to be appreciated with its peculiar facts and circumstances as there it was not the fact of the execution of the will which was under scanner but the date of execution. In that case it was an admitted fact that the Will was written in the handwriting of the testator and the signatures on the said will were also the admitted signature of the testator coupled with the fact that in the last paragraph of the will the testator had stated that he had signed the will in the presence of the witnesses and the witnesses had signed it in his presence and thus it is these

factors which led to the court to overlook the discrepancies arising in the depositions of the attesting witnesses. It is also important to note that in that case the propounders had nothing to do with the execution of the will and thus there were actually no suspicious circumstances at all in that case. In the background of such facts the evidence of the attesting witnesses were considered and the intrinsic evidence relating to the contents of the will also pointed towards the execution of the will. Whereas in the facts of the case at hand the handwriting of the testator and what are her admitted signatures are itself in dispute coupled with the fact that the intrinsic evidence with regard to the contents of the will also point towards the defendants being the beneficiaries. With all these circumstances being suspicious and untrustworthy towards the execution of the will, the evidence of two attesting witnesses had to be examined. The discrepancy is with regard to the sequence in which the two witnesses DW1 and DW2 reached the house of the testator and also the sequence of the appending of the signatures of the three persons. The aforesaid discrepancies therefore, cannot be

treated as minor discrepancies. This court also does not find any substance in the plea raised by the counsel for the appellant that due to lapse of time such discrepancies are bound to occur in natural course. Such discrepancies in any circumstances cannot be brushed aside by dubbing them conjectural.

31. Therefore, the coagulated situation that emerges from the above stated is that the disputed signatures of late Smt.Vidyawanti on the alleged Will appeared as '**Vidyawanti**' while on the lease deed and conveyance deed, both being registered documents, her signatures appeared as '**Vidyawati**' whereas on the agreements confronted by the respondent No.1 in the cross examination and proved on record as Ex. PW1/D1 and Ex. PW 1/D2 the signatures of late Smt.Vidyawanti appeared as '**Vidyawanti**'. The appellants have not disputed the signatures of late Smt.Vidyawanti on the lease deed and conveyance deed and as already discussed above, her signatures on the lease deed and conveyance deed can be taken as more authentic than her signatures

appearing on the rent agreements with the tenants. In the background of such facts, where the appellants have failed to dispel such suspicious circumstances surrounding the execution of the alleged holograph Will by late Smt. Vidyawanti, this court is of the considered view that the said Holograph Will Ex. DW1/1 cannot be taken to be the Will executed by Smt. Vidyawanti.

32. So far the plea raised by the counsel for the appellants that execution of the affidavit dated 7.8.91 Ex. PW 2/D2 by the respondent No.1 herself which was alleged to have been attested by the Executive Magistrate is concerned, this court finds the said plea devoid of any merit. The contention of the counsel for the appellant was that the handwriting expert had proved the signatures of the respondent no.1 on the affidavit by comparing them with the admitted signatures of the respondent on the plaint and vakalatnama and as there was no cross examination of the expert on this point therefore the same is accepted as per the judgment in the case of ***Sarwan Singh (supra)***.

Undoubtedly, there can be no dispute with the legal position reiterated in the abovesaid judgment that whenever the opponent has declined to avail himself of the opportunity to put his case in cross-examination it must follow that the evidence tendered on that issue ought to be accepted. But this would not be of any help to the case of the appellant as the evidence of the handwriting expert, even if accepted going by this legal position, is rendered futile in the event the appellants have not been able to prove the execution of the Will itself. Hence, the execution of the said affidavit by the respondent is as doubtful as the execution of the Will by late Smt. Vidyawanti. As already discussed above, this court could have believed the execution of the said affidavit by the respondent-plaintiff only when the appellants could have succeeded in establishing the genuineness and authenticity of the holograph Will. Once the appellants have not succeeded in establishing the genuineness of the said Will and the fact that the respondents throughout have been disputing the execution of any such Will by late Smt. Vidyawanti, there could have been no occasion for the

respondent plaintiff to execute such affidavit forsaking her right in the said property in favour of the appellants. The situation that emerges defies commonsensical notion that the respondent after executing an affidavit admitting the existence of a will which is in the favour of the defendants is concurrently disputing the execution of the said will.

33. The delicate structure of proof evolved by a legally trained mind cannot stand on a weak foundation. The evidence produced must be weighty and persuasive and not so frail which can be demolished by the pelting of stones of suppositions and hypothesis. It is a settled legal position that in civil matters one has not to prove the case beyond reasonable doubt but the Court has to examine the facts based on the preponderance of probabilities. It has also been held by the Apex Court in the case of ***Anil Kak vs. Sharada Raje (2008) 7 SCC 695*** that the matters relating to execution of wills and granting of probate are judgments in rem and thus the court should satisfy its conscience before passing an order. The court is expected to adopt a rational

approach while deciding matters of this nature and when it has to satisfy its conscience, existence of suspicious circumstances would play a prominent role in rendering the decision. This court also in the case of ***Sanjiv Sapra vs. State*** MANU/DE/2745/2009 after analyzing all the law on the subject held that the usually it is the cumulative effect, rather than a stray circumstance, which would weigh in concluding that a will is shrouded in suspicion. Ultimately, it is the conscience of the court, which should be satisfied that the will is a genuine document, and expresses what is intended by the testatrix or testator, apart from being satisfied that the technical legal requirements mandated by the joint operation of Section 63 of the Succession Act, and Section 68 of the Evidence Act, are fulfilled. Thus adopting a rational approach and taking into consideration the preponderance of probabilities in the facts of the present case, this Court is of the view that the appellants have failed to prove on record with the help of any cogent evidence that late Smt. Vidyawanti used to sign as Vidyawanti and not as Vidyawati and once having taken such a view, the holograph

Will dated 22.12.1987 Ex. DW1/1 propounded by the appellants cannot be accepted to be a genuine Will duly signed by late Smt.Vidyawanti.

34. Taking into consideration the aforesaid totality of the circumstances, this court does not find that late Smt. Vidyawanti had executed the said holograph Will dated 22.12.1987, so as to bequeath her immovable property bearing quarter no.28/20, old Rajinder Nagar, New Delhi in favour of the husband of appellant no.1 and 2 (defendant No. 1 and 2) and hence is the judgment and decree dated 29.4.04 passed by the learned trial court is accordingly upheld.

35. In the light of the above discussion, this court does not find any merit in the present appeal and the same is hereby dismissed.

March 08, 2011

KAILASH GAMBHIR, J