

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

+ **RFA No.116/2011**

% **Reserved on : 28th March, 2011**
Pronounced on : 6th April, 2011

SURAJ PRAKASH (DECEASED)
THROUGH L.Rs.

..... Appellants
Through: Mr. R.D.Chauhan, Adv. and
Mr. Arun K. Chauhan, Adv.

VERSUS

USHA RANI & ORS.
Through: Respondents
Ms. Suman Kapoor, Adv.

CORAM:
HON'BLE MR. JUSTICE VALMIKI J.MEHTA

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

VALMIKI J. MEHTA, J (ORAL)

1. This regular first appeal under Section 96 of the Code of Civil Procedure, 1908 (CPC) has been filed by the defendants challenging the judgment and decree dated 16.11.2010 whereby the suit of the respondents/plaintiffs for declaration, possession and injunction was decreed by holding that the deceased Sh. Ved Prakash had married the respondent no.1/plaintiff no.1 in his life-time, and from which wedlock,

the plaintiffs no.2 to 5/respondents no.2 to 5 were born. By the impugned judgment and decree it was also held that the Will dated 23.7.1994 propounded by the appellants/sisters of the deceased Sh. Ved Prakash was liable to be discarded inasmuch as the same was an unnatural Will, as it disinherited the respondents/plaintiffs who were the widow and children of the deceased. A decree for possession has also been passed with respect to the shop belonging to the deceased being Shop No. 11140, Edgah Road, Motia Khan, Delhi and also with respect to 1/5th share of the deceased in the half share of the mother Smt. Indrawati in H.No. 6499, Motia Khan, Sadar Bazar, Delhi. Originally, the suit was filed by the respondents/plaintiffs also against the deceased's brother Sh. Suraj Prakash besides the sisters/appellants, however, Sh. Suraj Prakash, who remained unmarried, died during the pendency of the suit and therefore, the suit was thereafter contested by the appellants/sisters.

2. The facts of the case are that deceased Ved Prakash was a singer of the Nirankari Sect. He married the respondent no.1 on 22.6.1977 in accordance with Hindu rites and ceremonies at Sanatan Dharam Radhey Shyam Mandir, Mehrauli in the presence of various relatives and friends. The marriage was a love marriage and performed without information to the family of Ved Prakash, more so, because the sisters of the deceased Ved Prakash (now the appellants herein) were not married---- the tradition in Hindu families being that daughters ordinarily

get married before the sons. In fact, as already stated above, Sh. Suraj Prakash, the brother of the deceased, Ved Prakash was also not married and he remained a bachelor till he died during the pendency of the suit on 1.6.2003. Four children, all sons were born to the deceased Ved Prakash and the respondent no.1/plaintiff no.1/Smt. Usha Rani namely Sh. Subhash (on 27.6.1978), Sudhir (on 23.4.1980), Abhay @ Amit (on 23.7.1982) and Vivek (on 8.11.1987). The surname/caste of the deceased Ved Prakash and therefore also of the plaintiffs/respondents, was "Chugh". There was raised a slight controversy with regard to the dates of birth of the second and third sons namely, Sudhir and Abhay @ Amit and which aspect is dealt with later in the judgment. After marriage, the couple did not stay at the house of the parents of deceased Ved Prakash on account of opposition from the family and they therefore firstly stayed at 304-305, Jhuggi Jhopadi Colony, Camp No.1, Nangloi, Delhi, and thereafter, they started residing at D-281, Ward No. 2, Garhwali Colony, Mehrauli, New Delhi and at which address the deceased Ved Prakash continued to reside till his death on 8.5.1995. The appellants and the brother Sh. Suraj Prakash (who also owned one other shop) thereafter took forcible possession of the Shop No.11140 belonging to the deceased Ved Prakash. From this shop Sh. Ved Prakash during his life-time was doing a small business of iron works such as manufacture of gates, grills, tanks and drums. The subject suit hence came to be filed

by the respondents/plaintiffs seeking the relief of possession with respect to the immovable properties, declaration with respect to the marriage of the respondent no.1 with Sh. Ved Prakash as also the invalidity of the alleged Will of Sh. Ved Prakash dated 23.7.1994 and injunction against transferring of the immovable properties, and which suit has been decreed by the impugned judgment and decree.

3. The appellants/defendants appeared and contested the suit. The defence was basically two-fold. It was firstly alleged that deceased Ved Prakash, the brother of the appellants/defendants never married the respondent no.1/plaintiff no.1/Smt. Usha Rani. It was also denied that the plaintiffs no.2 to 5 were the children of Sh. Ved Prakash and Smt. Usha Rani. The appellants secondly pleaded that the deceased left behind a Will in their favour dated 23.7.1994 and which Will was got registered by them after the death of Sh. Ved Prakash. As already stated by above, the brother of Sh. Ved Prakash, Sh. Suraj Prakash was originally defendant no.1 in the suit, but since he died as a bachelor, the subject suit was thereafter contested only by the appellants.

4. I may note that this case was first argued before this court on 17.3.2011 and then was adjourned to 18.3.2011. On 18.3.2011, there appeared to be a possibility of settlement, a settlement which had in fact been mooted since the beginning, that the respondents will give up their claim in the residential house and the appellants will give up their claim

to the Shop No. 11140. The original counsel for the appellants and the counsel for the respondents seemed to have agreed to such a stand and consequently this court passed the following order:-

“Counsel for the parties have taken a very fair stand on the suggestion of the Court and which will resolve this litigation in which there are old sisters of the deceased on the one hand and the stated widow and children of the deceased on the other hand.

List on 21st March, 2011 at 2:30 pm.”

5. On 21.3.2011, however, certain developments took place. The old counsel was replaced by new counsel for the appellants and it was contended that compromise was not possible. The entering appearance of a counsel, midstream during the course of final arguments was not appreciated, more so as the counsel sought adjournment as he was not prepared. Having no option but to adjourn the matter, this court adjourned the matter subject to payment of costs on 21.3.2011 and passed the following order:-

“New counsel appears for the appellants and the earlier counsel Mr. R.K.Jain therefore seeks discharge. He is accordingly discharged.

This case was argued at great length on 18.3.2011, and thereafter, it was fixed for today for resolving this litigation by a compromise, however, counsel for the appellants states that compromise is not possible. Counsel for the appellants states that he has been recently engaged and therefore seeks time. In my opinion, this is a totally unacceptable stand of the appellants and even of the counsel for appellants who

has entered appearance in the middle of final arguments in an RFA which was substantially heard on behalf of the appellants. Only in the interest of justice, and subject to payment of costs of Rs.10,000/- to be paid to the respondents within a period of 3 days from today, list this case for arguments on 28.3.2011.

It is made clear that under no circumstances this case will be adjourned on the next date. It is further made clear that the present counsel must take instructions as to the arguments which have already been heard on behalf of the appellants in the case and the new counsel for the appellants will not be allowed to argue the case afresh and he will have to compromise his arguments from the stage as left by the earlier counsel”

6. The case was then further argued on behalf of the appellants on 28.3.2011, and which arguments were rebutted by the counsel for the respondents, and who also raised other arguments in support of the impugned judgment.

7. The case was argued in two chapters on behalf of the appellants. The first chapter was argued by the original counsel Sh. R.K.Jain and which arguments pertained to factum as to whether the deceased Ved Prakash had married Sh. Usha Rani or not and whether the plaintiffs no.2 to 5 were the children born from the wedlock. The new counsel Mr. R.D.Chauhan argued the second chapter with respect to the issue of the existence and validity of the alleged Will dated 23.7.1994 of the deceased Ved Prakash.

8. The respondents/plaintiffs in the trial court examined as many as 13 witnesses. PW-1 was one Sh. P.S.Popli, who was a permanent resident of Mehrauli, who not only witnessed the marriage, but had seen Sh. Ved Prakash and Smt. Usha Rani along with their children residing in their house at Mehrauli. PW-2 Sh. Madan Lal Anand was also present at the time of marriage of Sh. Ved Prakash and Smt. Usha Rani and was also witness to the residence of the family of Sh. Ved Prakash at Mehrauli. PW-3 Sh. Daya Chand deposed to the factum of the residence of the family at Mehrauli and that he attended the last rites of Sh. Ved Prakash and also the fact that the dead body was brought to the residence at Mehrauli. He further deposed that the last rites were performed by Sh. Subhash, the eldest son of Sh. Ved Prakash and Smt. Usha Rani and of cremation having been performed at the Shamshaan Ghat, at Mehrauli in the presence of Satsangis and other persons. PW-4 was Smt. Kamla Devi who deposed on the same lines as PW-3 Sh. Daya Chand. PW-5 Smt. Premwati corroborated the version of PW-4. PW-6 Sh. Ramesh Chand deposed with respect to the business of drum manufacturing done by Sh. Ved Prakash at the Shop bearing no.11140 and also that he was married to Smt. Seema @ Jyoti, the younger sister of plaintiff no.1/Smt. Usha Rani. He also deposed to the factum of the dead body of Sh. Ved Prakash having been brought to the residence at Mehrauli. PW-7 Smt. Bindra Devi, the mother of plaintiff no.1, deposed with respect to the

marriage of Sh. Ved Prakash and Smt. Usha Rani/plaintiff no.1 on 22.6.1977 at Sanatan Dharam Radhey Shyam Mandir, Mehrauli as per Hindu rites and ceremonies and that the marriage was a love marriage against the wishes of the family of Sh. Ved Prakash. She also deposed that PW-1 and PW-2 and others had attended the marriage and that the couple was not allowed to stay at the premises of the parents of Sh. Ved Prakash and therefore they first resided at Nangloi and thereafter shifted at Mehrauli. Most of the aforesaid witnesses also deposed to the fact that deceased Ved Prakash was suffering from respiratory problems and Asthama for which he was being treated. The plaintiff no.1/respondent no.1/widow Smt. Usha Rani deposed as PW-8. She proved the birth certificates of two of her children from the Safdarjang Hospital and also the date of birth and parentage of the children in the school records. She also deposed generally in accordance with the plaint with respect to the marriage, ailment and treatment of Ved Prakash for Tuberculosis, residence of the parties at Nangloi and then at Mehrauli, the death of Sh. Ved Prakash and performing of the last rites at Mehrauli and that Sh. Ved Prakash never executed the alleged Will dated 23.7.1994 bequeathing the property to the defendants/appellants. PW-9 and PW-10 were the witnesses from the Municipal Corporation of Delhi and Safdarjang Hospital, who brought the official records of the birth of the children of the parties. PW-11 was a witness from the Life Insurance Corporation

(LIC) and who deposed to the fact that the deceased Ved Prakash had taken an LIC policy, and in which policy, the respondent no.1 Smt. Usha Rani was the nominee and that payment under the policy was made to Smt. Usha Rani. He proved the policy and the premium notice, both of which contain the address of Ved Prakash of Mehrauli.

9. On behalf of the appellants/defendants, evidence was led of four witnesses. Defendant No.3/Appellant No.3/Smt. Sudesh deposed as DW-1 and she corroborated her stand in the written statement. She proved the death certificate duly corrected by the Registrar, Birth and Death amending the residence from Mehrauli to the Edgah Road address. She also proved certain documents pertaining to the telephone connection in the name of Sh. Ved Prakash at Edgah Road and also LPG connection at the same address. She also proved the Driving Licence issued and application to election registrar showing the residence of Sh. Ved Prakash at Edgah Road. She also exhibited certain documents pertaining to the medical record of deceased Ved Prakash. DW-2 Sh. Surender Nath deposed with respect to the residence of the deceased Ved Prakash at Edgah Road Premises. DW-3 Sh. Babul Lal was the attesting witness to the Will dated 23.7.1994 allegedly executed by Sh. Ved Prakash. He deposed that he basically knew Sh. Suraj Prakash, who was the brother of the deceased Ved Prakash. This witness also deposed with respect to the due execution of the will by the deceased Ved

Prakash and also the attesting witnesses including himself. Notably this witness did not depose to the fact that the deceased was in sound disposing mind at the time of execution of the Will. DW-4 was one Sh. Surender Pal Singh, who deposed with respect to the residence of the deceased Ved Prakash at Edgah Road Premises.

10. For the sake of convenience, I am giving at one place some relevant exhibited documents relied upon by the trial court and which are as under:-

Plaintiffs' exhibits

PW-8 Smt. Usha Rani

- (i) Ex.PW8/1 (Birth certificate of 1st child dated 27.6.1978)
- (ii) Ex.PW8/2 (Birth certificate of 2nd child dated 23.4.1980 page 751 of the trial court record)
- (iii) Ex.PW8/2 (School Leaving Certificate of Subhash)
- (iv) Ex.PW8/2 (School Leaving Certificate of Sudhir, Page No.777 of the trial court record)
- (v) Ex.PW8/6 (Death Certificate of Ved Prakash)
- (vi) Ex.PW8/7-11 (Medical records of the treatment of Ved Prakash)
- (vii) Ex.PW8/30 (Letter of LIC to plaintiff)
- (viii) Ex.PW8/32 (Marriage card of eldest son)

PW-9 Sh. Shiv Kumar (Witness from South Zone MCD)

- (ix) Ex.PW9/A (Extract of Register recording birth of Rahul showing his parentage)
- (x) Ex.PW9/B (Date of Birth Certificate of Rahul)

PW-10 Sh. Narender Pal Singh (Witness from Safdarjang Hospital)

- (xi) Ex.PW10/A (Extract of Register of Safdarjang Hospital showing birth of son of the plaintiff wife of deceased Ved Prakash on 27.6.1978)
- (xii) Ex.PW10/B (Extract of Register of Safdarjang Hospital showing birth of son of the plaintiff wife of deceased Ved Prakash on 23.4.1980)

PW-11, Smt. Chamoli (Witness from LIC office)

- (xiii) Ex.PW11/A (Policy No. 74610146 dated 25.2.1991 issued by LIC)
- (xiv) Ex.PW 11/B (Premium Notice)

Defendants Exhibits

DW-1 Sh. Sudesh

- (i) Ex.DW1/1 (Will of Ved Prakash)
- (ii) Ex.DW1/3 (Copy of Ration Card)
- (iii) Ex.DW1/4A (Gas Connection in the name of Ved Prakash at Edgah address)
- (iv) Ex.DW1/5 (Telephone bill/connection of Ved Prakash at Edgah Address)
- (v) Ex.DW1/6 (Driving Licence of Sh. Ved Prakash)
- (vi) Ex.DW1/7 (Copy of unfiled application to election register)
- (vii) Ex.DW1/8 & Ex.DW1/9 (Bills of items purchased by the Ved Prakash)
- (viii) Ex.DW1/10 (Medical Card)
- (ix) Ex.DW1/11 (Correspondence of Ved Prakash at Edgah address)
- (x) Ex.DW1/12 (Cash Memos of shop)
- (xi) Ex.DW1/13-15 (Death Certificates of Nirmal Chand, Balbir Sahay and Vijaya)

11. On behalf of the appellants, it was argued that there were various inconsistencies with respect to the statements of the witnesses of the respondents/plaintiffs concerning the age of Smt. Usha Rani at the

time of marriage and also as to the differences in ages between deceased Ved Prakash and Smt. Usha Rani. It was also pleaded that there was inconsistencies in the dates of birth with respect to the second and third sons as shown in the plaint as also certain affidavits filed on behalf of the respondents/plaintiffs, and as compared to the dates of birth shown in the official record being the hospital record and the school record. The counsel for the respondents however countered that these minor inconsistencies cannot shake the fact that Sh. Ved Prakash and Smt. Usha Devi were in fact married and from which wedlock respondents no.2 to 5 were born. She placed strong reliance on the official record being the record from the hospital showing the date of birth of first and second child at Safdarjang Hospital on 27.6.1978 and 23.4.1980. It was argued that there was a typographical mistake in the plaint when the date of birth of the second son Sudhir was shown as 23.4.1982 instead of 23.4.1980. It was argued that a typing mistake cannot prejudice the respondents/plaintiffs. It was stated that the fact that there were typing mistakes in the plaint becomes clear from the fact that in one place, the death of the deceased Ved Prakash is written as 8.5.1995 whereas in two other places in the plaint, it is written as 8.5.1996, though the admitted fact is that Sh. Ved Prakash died on 8.5.1995. It was argued that showing of minor inconsistencies is like making a mountain out of a molehill. It was argued that independent

witnesses have deposed with respect to their presence at the time of marriage being PW-1 Sh. P.S.Popli and PW-2 Madan Lal Anand besides the evidence of the plaintiff no.1 herself and her mother Smt. Bindra Devi as PW-7. It was argued very strenuously that the evidence led on behalf of the appellants/defendants was miserably lacking with respect to the fact that if the deceased was in fact living with them at Edgah Road, how come the appellants/defendants were not party to any last rites of the deceased and why the body was in fact brought to Mehrauli where the last rites were performed by the eldest son. It was argued that if really the parties were not married, and the deceased was living at Edgah Road, and not in Mehrauli where the dead body was brought, there would have been furore/hue and cry if the body of the deceased Ved Prakash was not taken to Edgah Road. It was argued that the very fact that no one on behalf of the appellants attended the last rites showed that they really had no concern with the deceased except the intention to grab the properties of the deceased under the fabricated Will, which has in fact been got registered only after the death of the deceased. It was argued that the fact that the Will is a fabricated document becomes clear from the circumstances that nothing has been shown and proved on record as to why the deceased would have disinherited his widow and children as admittedly no bad relations were averred or proved. It was further argued that once it is shown that respondent/plaintiff and Sh. Ved

Prakash were married and there were children of the parties it is enough to hold the Will to be fabricated in which Ved Prakash has stated himself to be a bachelor. It has been argued that the trial court has given the correct findings and conclusions, which the respondents relied upon, and this court should not interfere with the detailed findings and conclusions because no illegality or perversity has been shown in the impugned judgment. It has been argued that grave injustice will be caused to the widow and children of the deceased in case the impugned judgment is set aside. It was also argued that there was no reason for the witness Sh. Babu Lal to be an attesting witness to the will because, as rightly held by the trial court, attesting witness to a Will has to be someone who is very closely associated with the maker of a Will and he cannot be simply an acquaintance, and that too an acquaintance not of the deceased Ved Prakash but of Sh. Suraj Prakash, brother of the deceased.

12. It was finally argued that the appellants are sufficiently provided for because they have taken in their control, ownership and possession of the shop, which was owned by the brother Sh. Suraj Prakash. It was argued that the respondent no.1/ widow and the children are rightful inheritors of the properties of the deceased, who would otherwise be caused grave injury and prejudice.

13. Mr. Chauhan, Advocate, on behalf of the appellants, raised arguments that the trial court has fallen into an error in not considering

the Will merely because the record was not summoned from the office of the Sub-Registrar. It was further argued that the shop in question namely Shop No.11140 was already let out to a tenant and therefore no decree for possession can be passed with respect to the shop. The counsel for the appellants relied upon an affidavit filed on 21.3.2011 after he entered appearance as a new counsel and in which affidavit this fact is mentioned with respect to the shop being in tenancy and hence disentitlement to the claim of the relief of possession qua the shop.

14. I have heard the counsel for the parties and have perused the record.

15. In my opinion, the appeal is liable to be dismissed. I am of the opinion that the respondent no.1 was the wife of the deceased Ved prakash and that the respondents no.2 to 5 are the sons/children from their marriage. I am of the opinion that the Will dated 23.7.1994 is not a genuine document and has been rightly discarded/disbelieved by the trial court.

16. Let me now turn to the first issue of whether there was a marriage between the deceased Ved Prakash and Smt. Usha Rani/respondent no.1. In my opinion, there can be no doubt whatsoever with respect to the marriage of Sh. Ved Prakash and Smt. Usha Rani for the following reasons:-

(i) Various independent witnesses such as PW-1 Sh. P.S.Popli and PW-2 Sh. Madan Lal Anand have deposed to the factum of marriage and their presence at the temple where the marriage was solemnized. There is absolutely no reason to disbelieve these independent witnesses who have no personal interest in the matter. In fact these witnesses also have deposed to the factum of Sh. Ved Prakash and Smt. Usha Rani living together as husband and wife for many years together along with their children at the Mehrauli address. The depositions of the independent witnesses are in addition to the statements of respondent no.1 as PW-8 and her mother Smt. Bindra Devi as PW-7 who have deposed in detail with regard to the marriage and the four sons born from the marriage.

(ii) The marriage is proved not only on account of the witnesses who have deposed to the factum of marriage, but in law, persons who live together as husband and wife are presumed to be married. This is the presumption necessarily to be drawn under Sections 50 & 114 of the Evidence Act, 1872. All the witnesses PW1 to PW-7 have deposed to Sh. Ved Prakash and Smt. Usha Rani living together as husband and wife, firstly at Nangloi, and thereafter at Mehrauli address, for as long as 17 years.

(iii) PW-1 Sh. P.S.Popli, PW-4 Smt. Kamla Devi and PW-5 Smt. Premwati were in fact living in the immediate neighbourhood of Sh. Ved Prakash

and Smt. Usha Rani and have seen them living together as husband and wife with their children the plaintiffs no.2 to 5/respondents no.2 to 5.

(iv) The authentic public records and the school records of the children, which have been exhibited, show the children to be the children of Sh. Ved Prakash and Smt. Usha Rani. Even the birth certificates issued by the Municipal Corporation of Delhi show the children as the children of Sh. Ved Prakash and Smt. Usha Rani. All these records and certificates of the hospitals, schools and Municipal Corporation of Delhi have been exhibited as duly noted in the judgment of the trial court. After all, there are as many as four children from the marriage and therefore to say that Sh. Ved Prakash and Smt. Usha Rani were never married would be a complete travesty of justice.

(v) The deceased Ved Prakash took out an LIC policy in which the nominee was Smt. Usha Rani. The LIC policy has been duly proved on record by summoning the witnesses from the LIC. This LIC policy has been exhibited as Ex.PW-11/A. The premium notice issued with respect to the policy is Ex.PW11/B. In fact, LIC has paid the amount under the policy to Smt. Usha Rani/Nominee/Respondent No.1/Plaintiff No.1. The policy and the premium notice show the residence of Ved Prakash at Mehrauli.

17. I therefore hold that the trial court has arrived at the correct finding and conclusion that marriage was solemnized between Sh. Ved Prakash and Smt. Usha Rani, and who gave birth to four children namely the plaintiffs no.2 to 5.

18. I do not give any weight at all to the argument that there are contradictions in the dates of birth with respect to the two sons Sh. Sudhir and Sh. Abhay i.e., plaintiffs no.3 and 4/respondents no.3 and 4 because once the hospital records, birth certificates and school certificate have been filed and proved then mentioning of different years in the plaint and in an affidavit cannot detract from the finality of the marriage and that the plaintiffs no.3 and 4/respondents no.3 and 4 were in fact the children of Sh. Ved Prakash and Smt. Usha Rani. I may note that in the plaint there is a typing mistake not only as to the year of birth of Sudhir, but also with regard to the year of death of Sh. Ved Prakash because in one place the correct year is written as 1995 but at two other places instead of 1995, the year is 1996 is typed. At best, this typing mistake shows the lack of application of the Advocate who was conducting the case in the trial court, however, and surely, it cannot be held on the basis of such fragile arguments that there was no marriage between Sh. Ved Prakash and Smt. Usha Rani. Similarly, there may be certain inconsistencies with respect to the ages of Smt. Usha Rani and the difference in the ages of Smt. Usha Rani and Sh. Ved Prakash, as per

the depositions of witnesses, however, once again this cannot take away from the fact that it has otherwise been proved that the parties were married and they had as many as four children. I, therefore, reject the argument that certain inconsistencies in the depositions of witnesses show that the witnesses are not credible. The trial court has dealt with these arguments of inconsistency in detail in its judgment and has rejected the arguments raised in such basis. The trial court has dealt with this aspect in paras 38 to 40 of the impugned judgment and decree and with which findings I am in agreement with. Finally, I may state that a civil case, and conclusions therein, are based on balance of probabilities. There are always facts and evidences which favour one party and other facts and evidences which favour the other party. Ultimately, all these facts are put in a melting pot in order to determine the final picture which has to emerge and the final conclusions which have to be arrived at. Accordingly, I agree with the trial court that inconsistencies cannot take away the fact that it has otherwise been more than amply proved on record that Smt. Usha Rani and Sh. Ved Prakash were married and they had four children.

19. Let me now turn to the second aspect with regard to the validity of alleged Will dated 23.7.1994. Firstly, this is not a registered Will as is ordinarily understood because the Will was not got registered by the deceased Ved Prakash himself but the will was only got registered

by the appellants/defendants after the death of Sh. Ved Prakash. Also, the very fact that Sh. Ved Prakash has described himself as an unmarried person in the Will is more than enough to negate the validity of the Will because Sh. Ved Prakash was very much married and out of the wedlock, four sons were born. The most important and telling aspect is that there is not a shred of evidence on record and no reason is forthcoming as to why the deceased Ved Prakash would disinherit his wife and children. One of the most important aspect with regard to the fact that appellants are not stating correctly that deceased Ved Prakash was residing at Edgah Road with them is that not a single witness on behalf of the appellants/defendants has deposed that the dead body of Sh. Ved Prakash was brought to the Edgah Road residence where the appellants were living or that anyone on behalf of the appellants or the appellants themselves performed the last rites of Sh. Ved Prakash and which clearly shows the Ved Prakash was living with his family at Mehrauli. I, for me, would attach no evidentiary value to the amendment in the residential address made in the death certificate from Mehrauli address to Edgah Road address as the same was done without any notice to the plaintiffs/respondents and only on an ex parte application of the appellants. No doubt, there are records proved by the appellants with respect to telephone connection, LPG connection and driving licence showing the address of the deceased Ved Prakash at Edgah Road, but it

is not uncommon to find that a telephone connection or a gas connection or driving licences and so on continue to remain of the old addresses in spite of persons having shifted inasmuch as either benefits are sought to be taken of such connections at the old address or for convenience simply or because of not wanting to make an effort/find time. So far as Ex.DW1/7 is concerned the trial court has wrongly referred to the same as the election identity card, however, the same is only an application which was never filed before the Election Commission. At best, the evidence, including some medical record, filed by the appellants shows that the deceased Ved Prakash continued to maintain relations with the sisters namely the appellants and his brother late Sh. Suraj Prakash, however, maintaining relations with these persons cannot be any negation of existence of his wife Smt. Usha Rani and his children and for disinheriting them. The appellants have also surprisingly examined only one of the attesting witnesses to the Will namely Sh. Babul Lal as DW-3. I agree with the argument of the learned counsel for the respondents that Will being an extremely important document, the testator will naturally choose a witness with whom he is very close and who would ultimately be required to depose in support of the Will. The attesting witness Sh. Babu Lal who appeared as DW-3 admits having only occasional acquaintance with the deceased Ved Prakash and stated that he in fact had close relations only with Sh. Suraj Prakash who was the

brother of the deceased. DW-3 clearly admits in his cross examination that he did not have any intimacy with Sh. Ved Prakash and knew Sh. Ved Prakash only as a brother of Sh. Suraj Prakash. This, in my opinion, clearly casts doubts on the genuineness of the Will because it cannot be expected that Sh. Ved Prakash required only a normal acquaintance of his and a close acquaintance of his brother Sh. Suraj Prakash to attest to the Will and not someone else who was very close to him, especially, keeping in view that he was married and had children. Sh. Ved Prakash would surely have chosen a witness, if the Will was genuine, who was known to his wife and children, and Sh. Babu Lal admits that he does not know, at all, the wife and children of Sh. Ved Prakash. On the aspect that if there are unnatural circumstances then such Will cannot be accepted by courts, there are various judgments of the Supreme Court, and some of the judgments of the Supreme Court with its relevant observations read as under:-

(i) Adivokka v. Hanamavva Kom Venkatesh, (2007) 7 SCC 91

24. The disposition made in the will is unfair, unnatural and improbable as no sane person, save and except for very cogent reasons, would disinherit his minor children. DW 1 does not state as to from where and how he obtained possession of the original will.

27. We may, however, notice that in *B. Venkatamuni v. C.J. Ayodhya Ram Singh*² this Court upon considering a large number of decisions opined that proof of execution of will shall strictly be in terms of Section 63 of the Succession Act. It was furthermore held:

"15. It is, however, well settled that compliance with statutory requirements itself is not sufficient as would appear from the discussions hereinafter made."

It was observed: (SCC p. 458, para 19)

"19. Yet again Section 68 of the Evidence Act postulates the mode and manner of proof of execution of document which is required by law to be attested stating that the execution must be proved by at least one attesting witness, if an attesting witness is alive and subject to the process of the court and capable of giving evidence."

28. It was emphasised that where there are suspicious circumstances, the onus would be on the propounder to remove suspicion by leading appropriate evidence stating: (SCC pp. 459-60, paras 22-25)

"22. ... However, having regard to the fact that the will was a registered one and the propounder had discharged the onus, it was held that in such circumstances, the onus shifts to the contestant opposing the will to bring material on record meeting such prima facie case in which event the onus shifts back on the propounder to satisfy the court affirmatively that the testator did not (*sic*) know well the contents of the will and in sound disposing capacity executed the same.

23. Each case, however, must be determined in the fact situation obtaining therein.

24. The Division Bench of the High Court was, with respect, thus, entirely wrong in proceeding on the premise that compliance with legal formalities as regard proof of the will would subserve the purpose and the suspicious circumstances surrounding the execution thereof is not of much significance.

25. The suspicious circumstances pointed out by the learned District Judge and the learned Single Judge of the High Court, were glaring on the face of the record. They could not have been ignored by the Division Bench and in any event, the Division Bench should have been slow in interfering with the findings of fact arrived at by the said courts. It applied a wrong legal test and thus, came to an erroneous decision."

(Underlining added)

(ii) Kalyan Singh v. Chhoti, (1990) 1 SCC 266

“20. It has been said almost too frequently to require repetition that a will is one of the most solemn documents known to law. The executant of the will cannot be called to deny the execution or to explain the circumstances in which it was executed. It is, therefore, essential that trustworthy and unimpeachable evidence should be produced before the court to establish genuineness and authenticity of the will. It must be stated that the factum of execution and validity of the will cannot be determined merely by considering the evidence produced by the propounder. In order to judge the credibility of witnesses and disengage the truth from falsehood the court is not confined only to their testimony and demeanour. It would be open to the court to consider circumstances brought out in the evidence or which appear from the nature and contents of the documents itself. It would be also open to the court to look into surrounding circumstances as well as inherent improbabilities of the case to reach a proper conclusion on the nature of the evidence adduced by the party.”

(iii) *Seth Beni Chand v. Kamla Kunwar, (1976) 4 SCC 554*

“9. The question which now arises for consideration, on which the Letters Patent Court differed from the learned Single Judge of the High Court, is whether the execution of the will by Jaggo Bai is proved satisfactorily. It is well-settled that the *onus probandi* lies in every case upon the party propounding a will, and he must satisfy the conscience of the court that the instrument so propounded is the last will of a free and capable testator.¹ By “free and capable testator” is generally meant that the testator at the time when he made the will had a sound and disposing state of mind and memory. Ordinarily, the burden of proving the due execution of the will is discharged if the propounder leads evidence to show that the will bears the signature or mark of the testator and that the will is duly attested. For proving attestation, the best evidence would naturally be of an attesting witness and indeed the will cannot be used as evidence unless at least one attesting witness, depending on availability, has been called for proving its execution as required by Section 68 of the Evidence Act. But where, as in the instant case, the circumstances surrounding the execution of the will are shrouded in suspicion, it is the duty and the function of the propounder to remove that suspicion by leading satisfactory evidence. The testatrix was advanced in age being past eighty years of age, the will contains provisions which are prima facie unnatural since the only son is disinherited under it and the testatrix died five days after

making the will. There can be no dispute that these are gravely suspicious circumstances. But the propounder has, in our opinion, offered an explanation of these circumstances which ought to satisfy a prudent mind. Ultimately, that is the test to adopt for one cannot insist on mathematical proof even where the circumstances attendant on the execution of the will raise a suspicion as regards its due execution. The burden in testamentary cases is of a different order than in other cases in the sense that an attesting witness must be called, wherever possible, to prove execution, the propounder must remove the suspicion, if any, attaching to the execution of the will and if there be any doubt regarding the due execution, he must satisfy the conscience of the court that the testator had a sound and disposing state of mind and memory when he made the will. "Reasonable scepticism, not an obdurate persistence in disbelief nor a resolute and impenetrable incredulity" is demanded of the testamentary Judge: "He is never required to close his mind to the truth." Gajendragadkar, J. who spoke for the court in *Iyengar case* noticed these observations of Lord Du Parc with approval and said:

"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."

20. To add to the above aspect of Will being an unnatural Will, I must add that the Will contains an ex facie incorrect statement that Ved Prakash is a bachelor. I may finally add that the attesting witness Sh. Babu Lal did not depose as to the state of mind of deceased Sh. Ved Prakash at the time of making of the Will considering the fact that it is mandatory to depose that the testator was in a sound disposing mind at the time of making of the Will. It is quite possible that during a period of ill health, which the deceased was suffering from, and when the deceased would not be understanding what he is doing, the alleged Will must have been got signed, considering the fact that the deceased had

continued to maintain relations with the appellants. I, therefore, fully agree with the findings and conclusion of the trial court that the Will propounded by the appellants was not a genuine Will of the deceased and the same had to be therefore disbelieved/discarded.

21. Learned counsel for the appellant Sh. R. D.Chauhan, Advocate sought to argue that it made no difference if the record was not summoned from the Sub-Registrar to show that the Will was registered. I fail to understand this argument, and do not find any substance in this argument, because issue is not with regard to the registration of the Will, but the issue is with regard to the validity and due execution of the Will. The appellants had led the evidence of one of the attesting witness which has been disbelieved by the trial court and I have also held the Will not to be genuine. At best, the evidence which would have been summoned from the Sub-Registrar office would have shown that the Will was registered after the death of Sh. Ved Prakash, and even if, I accept this fact, the same will not make any difference to the conclusion for holding that the Will dated 23.7.1994 is not a genuine document and is to be disbelieved.

22. The final argument raised by Sh. R.D.Chauhan, Advocate on behalf of the appellants is clearly an argument of desperation that the decree for possession could not have been passed as there was tenant in the premises. I note that in the entire trial court record, there is

absolutely no such pleading or evidence led on behalf of the appellants on this respect. In fact, even the grounds of appeal filed in this court do not state this fact. Quite clearly, the tenant is a set up person so as to deny the benefits of the decree to the respondents. Such alleged tenant who has no authority and independent right in the said premises would naturally be liable to be thrown out in the execution proceedings once he is in possession of the shop without having appropriate legal right, title or interest in the property. Further and admittedly, Sh. Ved Prakash never inducted any tenant in the premises and the appellants who did not have any rights in the Shop bearing No.11140, cannot thus create any tenancy with respect to the premises. This argument therefore raised on behalf of the appellants that the decree for possession could not be validly passed because there was a tenant in the premises is accordingly rejected.

23. In view of the above, I do not find any merit in the appeal. The detailed and exhaustive judgment of the trial court contains the correct findings and conclusions which are not required to be interfered with as the same are neither illegal nor perverse. No injustice has been caused by the impugned judgment. I agree with the argument of the learned counsel for the respondents that the appellants are not satisfied with one shop belonging to the other deceased brother Sh. Suraj Prakash which they now own and they want to now misappropriate the rightful

dues of the widow and the children of Sh. Ved Prakash. Appeal is therefore dismissed, leaving the parties to bear their own costs. Trial court record be sent back.

CM No.3898/2011 (Stay)

Since the main appeal is dismissed, no orders are required to be passed in this application and the same stands disposed of.

MARCH 06, 2011
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VALMIKI J. MEHTA, J.