

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

+ **TEST CAS. 44/1999**

KRISHAN DASS GUPTA Petitioner
Through: Mr. Prakash Gautam, Advocate

versus

STATE & OTHERS Respondents
Through: Mr. Jagjit Singh, Advocate for
the respondents No.2, 4 and 7.
Mr. S.N. Gupta and Mr. S.S.
Shukla, Advocates for the
respondent No.3.

+ **TEST CAS. 51/2004**

RAM KUMAR GUPTA Petitioner
Through: Mr. S.N. Gupta and Mr. S.S.
Shukla, Advocates

versus

STATE & OTHERS Respondents
Through: Mr. Jagjit Singh, Advocate for
the respondents No.2 and 6.
Mr. Prakash Gautam, Advocate
for the respondent No.3.

% Date of Decision : February 16, 2012

CORAM:
HON'BLE MS. JUSTICE REVA KHETRAPAL

J U D G M E N T

: REVA KHETRAPAL, J.

1. Both the aforesaid probate petitions have been filed for grant of Letters of Administration in respect of the last will of late Shri Bhikhu Ram Gupta, who died on 04.10.1998, leaving behind him three sons and four daughters. The deceased testator was the owner of a double storey house built on Plot No.21/32, Shakti Nagar, Delhi. The admitted case of the parties is that the said plot was purchased and the construction raised thereon out of the exclusive savings and earnings of the deceased testator and as such, the deceased testator had complete right to dispose of and bequeath the said property in accordance with his own desire. The three sons of Shri Bhikhu Ram Gupta had been living with him in the aforesaid property from the time of its purchase till the date of his death. Insofar as the four daughters of Shri Bhikhu Ram Gupta are concerned, it is the common case of the parties that the testator had discharged all his obligations towards his daughters, who were married and well placed in life.

2. The first probate petition, being TEST CASE No.44/1999, is filed by one of the sons of late Shri Bhikhu Ram Gupta, namely, Shri Krishan Dass Gupta for grant of Letters of Administration in respect of the will of his father dated 6th March, 1992. The second probate petition, being TEST CASE No.51/2004, has been filed by the youngest son of late Shri Bhikhu Ram Gupta, namely, Shri Ram Kumar Gupta, who has staked his claim to the grant of Letters of Administration in respect of the estate of his deceased father premised on the will dated 21st September, 1998. Succinctly, the assertions made in both the aforesaid probate petitions are as follows.

TEST CASE No.44/1999

3. In the aforesaid probate case, the petitioner Shri Krishan Dass Gupta has asserted that the petitioner and the respondent Nos.2 and 3, who are the other two sons of the deceased testator, had been staying in the house of the deceased testator with their families in their respective portions from the very beginning. The testator, with a view to ensure peace and harmony in the family, had got executed a Memorandum of Family Agreement/Settlement dated 02.10.1991, in terms of which it was specified that the various portions as indicated

in the site plan annexed with the Memorandum were with the respective parties (that is, the petitioner and the respondent Nos.2 and 3), and it was agreed in the Memorandum of Family Settlement that the parties will continue to enjoy possession of their respective portions. It was also elaborated in the said family agreement that if and when the said house gets demolished due to an act of God (including earthquake), or by the mutual consent of the three sons of the deceased testator, the land upon which the premises have been built shall vest in the ownership of the three sons in equal proportion, namely, one-third each. The aforesaid Family Agreement/Settlement was signed by the testator as well as his three sons, the petitioner and the respondent Nos.2 and 3 therein. The respondent Nos.4 to 7, the married daughters of the testator, had also appended their signatures on the agreement, which was drafted by an Advocate. It was made clear that the agreement would be binding upon all the members.

4. It is further asserted in the petition that since the deceased testator was growing old, with a view to ensure harmony in the family both during his lifetime as well as after his death, he had executed a

will dated 06.03.1992 in terms of which he had expressed his desire and bequeathed his immovable property in the following manner:-

- A. The respondent No.2, the eldest son, namely, Shri Mahavir Prasad was to become the complete owner of the portion of the said house wherein he was residing along with his family, which has been shown in ORANGE colour in the annexed site plan, which was at the ground, mezzanine and first floor of the house.
- B. The petitioner, the second son, namely, Shri Krishan Dass Gupta was to become the complete owner of the portion in his possession, which was shown in GREEN colour in the annexed site plan, which was at the ground, mezzanine, first and barsati floor.
- C. The respondent No.3, the youngest son, namely, Shri Ram Kumar Gupta was to inherit the complete ownership of the portions shown in RED in the annexed site plan, which was at the ground, mezzanine and barsati floor.

D. Regarding the portions, such as, Chowk, Roof, Staircase, Water tank, Passage, etc. as shown and kept blank in the site plan, these were to remain in the common ownership of the three sons of the deceased testator.

5. It is the case of the petitioner that all this was done by the deceased testator with a view to ensure that after his death, his three married sons could continue to enjoy the ownership and possession of the portions in which they were residing during the lifetime of the deceased testator. Accordingly, the will dated 06.03.1992 was executed by the deceased testator, which was also got registered with the Sub-Registrar, Delhi on 17.03.1992 by the deceased testator himself. The said will is signed by the deceased testator and it is stated that the witnesses had appended their signatures after having seen the testator put his signatures as well as thumb impression thereon. The present petition had been filed to obviate any possible conflict amongst the brothers and to ensure that the wishes of the deceased testator are given full legal effect.

6. The respondent No.2, Shri Mahavir Prasad filed his reply to the aforesaid petition, wherein he admitted the execution of the registered

will dated 06.03.1992. He further admitted that before the execution of the said registered will dated 06.03.1992, the deceased Shri Bhikhu Ram Gupta along with all his legal heirs had entered into a Family Settlement dated 02.10.1991, whereby the shares of the legal heirs in the property belonging to late Shri Bhikhu Ram Gupta had been demarcated and all the legal heirs of the deceased had occupied and possessed their respective portions as per the Family Settlement. The respondent No.2 further stated that Shri Bhikhu Ram Gupta had expired on 04.10.1998 and was not in his senses for about six months before his death. He admitted that will dated 06.03.1992 had been registered on 17.03.1992 by his deceased father and stated that he had no objection to the grant of probate of the said will executed by his father.

7. The respondent Nos.4 and 7 filed identical replies to the reply filed by the respondent No.2, stating therein that they had no objection to the grant of probate of the will dated 06.03.1992.

8. Objections to the petition were filed by the respondent No.3 alone, opposing the grant of Letters of Administration of the will dated 06.03.1992 on the ground that the said will stood revoked by a

subsequent will dated 21st September, 1998 duly executed by late Shri Bhikhu Ram Gupta and attested by two attesting witnesses, viz., Shri Jagannath Aggarwal, husband of the respondent No.5, namely, Sheela Devi, resident of 2/7, East Punjabi Bagh-26 and Shri Vijay Kumar Gupta, resident of 18/16, Shakti Nagar, Delhi-7. It was asserted that it was specifically stated in the will dated 21.09.1998 that late Shri Bhikhu Ram Gupta had cancelled his earlier will dated 06.03.1992. Therefore, the petitioner's claim for Letters of Administration deserved dismissal, as the will dated 06.03.1992 relied upon by the petitioner was cancelled/revoked under Section 70 of the Indian Succession Act, 1925 by a subsequent will dated 21.09.1998 of the testator, duly and validly executed by him and which was also properly attested and registered. It was alleged that the petitioner had intentionally concealed the material fact that late Shri Bhikhu Ram Gupta had executed his subsequent will dated 21.09.1998 in view of the fact that the respondent No.3, that is, Shri Ram Kumar Gupta had been made the sole beneficiary to the estate of late Shri Bhikhu Ram Gupta by virtue of his last will and testament. The requisite mutation in the records of the Municipal Corporation of Delhi had also been

made in the name of Shri Ram Kumar Gupta in respect of the property in question on 28.07.1999, which was in the knowledge and information of the petitioner and the other respondents from the very inception, and the same had never been challenged by any of them in any Court of law. Further, the said will dated 21.09.1998 was not only properly attested by two independent witnesses Shri Jagannath Aggarwal and Shri Vijay Kumar Gupta, but was also registered on 11.01.1999 before the Sub Registrar, Sub Division Sadar, Delhi and it was specifically mentioned by the deceased therein that he was cancelling/revoking his earlier will dated 06.03.1992.

9. It may be noted at this juncture that the respondent No.3 in the written statement/objections filed by him admitted that a document had been executed on 02.10.1991 purporting to be a Memorandum of Family Agreement/Settlement prior to the execution of the will dated 06.03.1992. However, it was stated that the said document not being registered was not admissible in evidence as the same was compulsorily registerable under the Indian Registration Act, 1908. It was further stated that because there was no oral family settlement prior to the written settlement, no partition could be made of the

property in question by the said document without the same having been registered. The present petition had been filed to harass and humiliate the respondent No.3, knowing fully well that the will dated 06.03.1992 had been revoked by the testator by his subsequent and last will dated 21.09.1998, in view of the fact that none else except the respondent No.3 had looked after him and cared for him during his last days when he was completely confined to bed and required personal care and comfort every moment, including fulfillment of his smallest desire for good food and day-to-day medical care and other needs.

10. It may be mentioned at this stage that pursuant to a preliminary objection raised by the respondent No.3 that the probate petition was not maintainable as there was no executor named in the will dated 06.03.1992, the petitioner sought amendment of the petition to convert the prayer for grant of probate to the prayer for grant of Letters of Administration. The said amendment was allowed by the Court by an order dated 24.10.2000 and thereafter amended written statement filed to the amended petition.

11. In the replication filed by the petitioner to the written statement of the respondent No.3, it was submitted that the alleged will dated 21.09.1998 had been executed by the testator just prior to his death, that is, only 13 days before his death when the deceased was not in a position to use his mental and physical faculties and, as such, could not be said to have executed the same in a sound state of mind and/or of his own free will. It was submitted that the circumstances surrounding the execution of the alleged will itself show that the same had been procured by the respondent No.3 by exerting undue influence and/or by coercion, and as such, was void in terms of Section 61 of the Indian Succession Act. It was categorically denied that the petitioner was aware of the fact that the will dated 06.03.1992 (Ex.PW6/3) had been revoked and/or cancelled by the testator by way of a subsequent will dated 21.09.1998 set up by the respondent No.3. It was submitted that the will dated 21.09.1998 was apparently 'bogus' and had been set up with the alleged thumb impression of the testator, though the testator used to sign important documents and not just put his thumb impression thereon. Even the registration of the said alleged will was after three months of the death of the testator.

There are also several contradictory statements in the will which were reflective of the fact that the will dated 21.09.1998 was not executed by the testator in a sound state of mind and/or of his own free will but under some undue influence and/or coercion. It was submitted that it was within the knowledge of everyone knowing the deceased that a few months before his death he had lost his mental balance. He was 86 years of age and in a poor physical condition. The possibility of procuring the thumb impression of the testator immediately at the time of the death also could not be ruled out as the testator never in his lifetime signed any document by only putting his thumb impression. The testator during his lifetime used to sign either in Hindi and/or in Urdu with which he was well conversant. Further, in the alleged last will dated 21.09.1998, the testator has stated *“I have signed this will after having the same being read over and explained to me in Hindi”* while, in fact, the will does not bear the signature of the testator and instead bears his thumb impression. Then again, it is submitted in paragraph 2 of the alleged will by the testator that this *“is my first and last will”* while in the latter part of the will the testator has stated: *“I hereby cancel my will dated 06.03.1992”*.

Further, it was submitted that the registration of the will after the death of the testator, by the respondent No.3, itself shows the malafide intention of the respondent No.3 to grab the entire property of the deceased.

12. On the pleadings of the parties, the Court on 10.02.2003 framed the following issues for consideration:-

- “1. Whether the two Wills dated 06.03.1992 and 21.09.1998 which have been set up by petitioner and respondent No.3 respectively are the valid Wills?*
- 2. Whether the present petition is not maintainable in view of Section 278(1)(d) of the Indian Succession Act, 1925?*
- 3. Whether the present petition is not maintainable in view of Section 235 of Indian Succession Act?*
- 4. Whether the petition has been properly verified in the manner as provided in Section 281 of Indian Succession Act, 1925?*
- 5. Whether the Will dated 6.3.1992 has been revoked/cancelled by the testator Shri Bhiku Ram Gupta by his subsequent Will dated 21.9.1998?*
- 6. Whether the petitioner is entitled for Letter of Administration in respect of Will dated 6.3.1992?*
- 7. Whether the family settlement dated 2nd October, 1991 is valid and if so its effect?*
- 8. Relief?”*

13. After the framing of the aforesaid issues, the petitioner filed his affidavits by way of evidence and the case was set down for cross-examination of the petitioner's witnesses. At this juncture, on 20th November, 2004, the respondent No.3, Shri Ram Kumar Gupta filed Probate Case No.51/2004 praying for grant of Letters of Administration in respect of the estate of late Shri Bhikhu Ram Gupta on the basis of his last will dated 21.09.1998 in favour of the petitioner. Both the cases were ordered to be listed together on the no-objection given by the respondent No.3, Shri Ram Kumar Gupta.

14. It also deserves to be noted at this stage that the respondent No.3 admitted his signatures on the Family Settlement as well as the site plan attached with the Family Settlement before the Court on 30.01.2003 and the said documents were exhibited as Ex.P1/3 and Ex.P2/3. It was also noted by the Court that the other respondents had no objection to the grant of probate to the petitioner. So far as the documents of the respondent No.3 were concerned, that is, will dated 21.09.1998 and mutation letter dated 28.07.1999, the same were denied by the petitioner.

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15. The aforesaid probate case instituted on 20th November, 2004 by the petitioner, Shri Ram Kumar Gupta (the respondent No.3 in Test Case No.44/1999), as already stated hereinabove, is premised on the alleged will of late Shri Bhikhu Ram Gupta dated 21.09.1998. The petitioner is the sole beneficiary/legatee under the said will to the exclusion of all other heirs of the deceased. The said will was duly registered on 11.01.1999 with the Sub-Registrar, Sub-Division Sadar, Delhi vide registration No.205, Book No.III, Volume No.28 on pages 194-197, after the demise of Shri Bhikhu Ram Gupta, who died on 04.10.1998.

16. The petitioner, who is the youngest son of the deceased testator, has set up a case that the deceased testator revoked/cancelled his earlier will dated 06.03.1998 by executing his subsequent and last will dated 21.09.1998, as it was only the petitioner, his wife and children who were serving the testator, late Shri Bhikhu Ram Gupta. It is asserted in the petition that late Shri Bhikhu Ram Gupta had even during his lifetime executed a General Power of Attorney in favour of the petitioner for dealing with his property at Shakti Nagar and

contesting the Court cases against the tenants for their eviction. Late Shri Bhikhu Ram Gupta during his lifetime had also filed an eviction petition bearing No.E120/1991 under Section 14(1)(h) of the Delhi Rent Control Act against Shri Murari Lal titled as ***“Bhikhu Ram Gupta vs. Murari Lal”*** and it was during the pendency of the said petition that late Shri Bhikhu Ram Gupta had executed a General Power of Attorney in favour of the petitioner Shri Ram Kumar Gupta. After the death of Shri Bhikhu Ram Gupta, on the basis of his last will dated 21.09.1998 and the aforesaid General Power of Attorney, the petitioner was substituted as petitioner in place of Shri Bhikhu Ram Gupta in the aforementioned eviction petition. The tenant Shri Murari Lal also expired during the pendency of the petition, and his legal representatives Shri Nanak Chand and others were substituted in his place. The said case was later on decided as SLP (Civil) No.9347/2004 titled as ***“Nanak Chand and Others vs. Ram Kumar Gupta”***, in favour of Shri Ram Kumar Gupta (the petitioner herein) vide orders dated 26.07.2004.

17. It is further stated on the basis of the last will dated 21.09.1998 of the testator, the petitioner had filed eviction petition No.E-

177/00/99 under Section 14(1)(a) of the Delhi Rent Control Act against Ms. Manju Gupta and Ms. Nimmi Gupta, tenants in respect of barsati floor of the suit premises, titled as “***Ram Kumar Gupta vs. Shri Ram Kumar Gupta through LRs***” and the same was decreed in favour of the petitioner vide orders dated 12.12.2003. The petitioner thereafter filed execution petition bearing No.2/04 against the aforesaid tenants, whereupon Ms. Nimmi Gupta had handed over the vacant and physical possession to the petitioner.

18. It is asserted that late Shri Bhikhu Ram Gupta had made the petitioner a nominee in the year 1985 with the Delhi Swastik Cooperative Urban Thrift and Credit Society Ltd., 26/102, Shakti Nagar, Delhi-110007 in the Society A/c. No.913 and had also opened a joint Saving Bank Account No.16772 in Canara Bank, Shakti Nagar Branch, Delhi with the petitioner in the year 1989. The respondent Nos.2 to 6 were fully aware of all the aforesaid facts and never raised any objection to the same and thus had given their implied consent to the last will dated 21.09.1998. After the death of Shri Bhikhu Ram Gupta, the intentions of the respondent No.3, Shri Krishan Dass Gupta (the petitioner in Test Case No.44/1999) became fraudulent

and, therefore, he filed a probate case before the Court relying upon the will dated 06.03.1992, which had been revoked in the last will dated 21.09.1998.

19. A reply to the aforesaid petition was filed by Smt. Sheela Devi, the respondent No.4 (the respondent No.5 in Test Case No.44/1999), stating that she had no objection if the relief prayed for by the petitioner was granted to him. No other reply was filed to the present petition nor any issues framed, presumably on the tacit understanding between the parties that both petitions, which involved identical facts, would be heard and tried together. It is on this basis that the case proceeded to trial.

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20. In the course of evidence recorded in Test Case No.44/1999, the petitioner examined PW1 Shri K.R. Sharma (one of the attesting witnesses to the will dated 06.03.1992), PW2 Shri Vijay Kumar Goel, PW3 Shri Bali Ram Gupta, PW4 Shri Lal Chand (the neighbours of the parties), PW5 Smt. Kamlesh Goel (daughter of the testator), apart from examining himself as PW6 Shri Krishan Dass Gupta. The respondent No.3 Shri Ram Kumar Gupta, examined RW2 Shri

Bhajan Lal Gupta (Manager, Delhi Swastik Cooperative Urban Thrift and Credit Society), RW3 Shri Arjun Singh (Record Keeper, MCD), RW4 Jai Narain (an official from the office of the Sub-Registrar, Kashmere Gate), RW5 Baldev Raj Batra (a clerk from the Canara Bank), RW6 Jagan Nath Aggarwal (one of the attesting witnesses to the will dated 21.09.1998) apart from examining himself as RW1.

21. In Test Case No.51/2004, the petitioner Shri Ram Kumar Gupta examined himself as PW1, PW2 Shri Jagan Nath Aggarwal (the attesting witness of will dated 21.09.1998), PW3 Shri Baldev Raj Batra (a clerk from the Canara Bank), PW4 Shri Bhajan Lal Gupta (Manager, Delhi Swastik Cooperative Urban Thrift and Credit Society) and PW5 Shri Arjun Singh (Record Keeper, MCD).

22. Detailed arguments were addressed by Mr. Prakash Gautam, the counsel for Shri Krishan Dass Gupta (the petitioner in Test Case No.44/1999), Mr. Jagjit Singh, the counsel for Shri Mahavir Prasad, Smt. Ram Kali and Smt. Kamlesh Goel (son and daughters of the deceased testator) and Mr. S.N. Gupta, the counsel for Mr. Ram Kumar Gupta (objector).

23. After hearing the parties at length and scrutinizing the entire evidence on record, my findings on the issues which were framed in Test Case No.44/1999 and are common to both the probate petitions are recorded below. For the sake of convenience and to avoid prolixity, the issues are not being dealt with *in seriatim* and it is proposed to first deal with Issue Nos.2, 3 and 4 which relate to the preliminary objections raised against the maintainability of the petition premised on the will dated 06.03.1992 and thereafter to deal with Issue No.7 pertaining to the admissibility of the Family Settlement and then with Issue Nos.1, 5 and 6 relating to validity of the two wills propounded in the two petitions.

24. ISSUE NO.2

“2. Whether the present petition is not maintainable in view of Section 278(1)(d) of the Indian Succession Act, 1925?”

25. The aforesaid issue was framed in view of preliminary objection No.4 raised in the written statement of the respondent No.3, which reads as follows:-

“4. That the said Letters of Administration case is also not maintainable because the petitioner has not complied with Section 276(1)(d) of Indian Succession Act, 1925 which

states that the amounts of assets which are likely to come to the petitioner's hand must be stated and annexed in the petition."

26. The aforesaid preliminary objection was not pressed at the time of arguments. In any case, the onus of proving the issue was upon the respondent No.3 and he miserably failed to discharge the same. This issue is accordingly decided against the respondent No.3.

27. ISSUE No.3

"3. Whether the present petition is not maintainable in view of Section 235 of Indian Succession Act?"

28. The aforesaid issue was framed pursuant to preliminary objection No.6 in the written statement of the respondent No.3 and the onus of proving the same was squarely upon the respondent No.3.

29. For the purpose of deciding the aforesaid issue, it is necessary to advert to the provisions of Section 235 of the Indian Succession Act, 1925, which read as follows:-

"235. Citation before grant of administration to legatee other than universal or residuary.—

Letters of administration with the Will annexed shall not be granted to any legatee other than an universal or a residuary legatee, until a citation has been issued and published in the manner hereinafter mentioned, calling on

the next-of-kin to accept or refuse letters of administration.”

30. Mr. S.N. Gupta, the learned counsel for the respondent No.3/objector, on the basis of the provisions of the aforesaid Section strenuously contended that the said Section mandates that Letters of Administration with the will annexed shall not be granted to any legatee, until a general citation has been issued and published calling on the next-of-kin to accept or refuse the said Letters of Administration. Reliance was placed by him upon the judgment of the Bombay High Court in the case of ***B.B. Paymaster and Others vs. Mrs. Baurawa Sangappa Kodapatti and Others, AIR 2005 Bombay 48***, wherein a learned Single Judge of the Bombay High Court with reference to the provisions of Section 283 of the Succession Act (39 of 1925) relating to issuance of citation made the following observations:-

“The section vests a discretion in the Judge in the matter of issuing citations. The said discretion is required to be exercised with utmost care considering the fact that the finding of the Probate Court as regards execution of the Will operates in rem. In a case where Probate of a Will is asked for, a special citation ought to be served upon those persons whose interests are directly affected by the Will. The

practice of issuing only a general citation and ordering publication thereof in a newspaper or ordering affixing the citation in conspicuous part of Court house may tend to encourage fraud. Though the section does not make it obligatory to serve a special citation, it is desirable to serve special citation on the persons who would have been entitled to inherit the property of the deceased as per the law of intestate succession and who have been excluded from succession by the Will. Whenever it is disclosed in the Probate Petition itself that there are persons claiming to have any interest in the estate of the deceased, the Court will have to exercise discretion under Section 283 by directing service of citation on such persons.

9. A Court of Probate has to act cautiously and with utmost care. When the learned trial Judge has taken a note of the fact that the said close relatives of the deceased were alive who may be interested in the estate of the deceased as they were her heirs as per the said Act of 1956, he ought to have issued citations to the said persons named in the Probate Application.”

31. Mr. Prakash Gautam, the learned counsel for the petitioner, on the other hand, contended that Section 235 has no application to a case where a legatee applies for Letters of Administration, and most certainly has no application to a case when special citation had been issued to all the legal representatives of the deceased and it was no one's case that any person who would have been entitled to inherit the

property of the deceased as per the law of intestate succession was not before the Court. The object of issuance of citation, it was contended, was to ensure that all those with beneficial interest in the estate of the deceased were represented before the Court. In the present petition, it was not the case of the respondent No.3/objector that there was any other person having a beneficial interest in the estate who was not represented before the Court, and in any case he was estopped from raising such a plea in view of the fact that though general citation by publication in a newspaper had been issued in the petition filed by him, being Test Case No.51/2004, no other person had come forward to raise a claim to the estate of the deceased. Reliance was placed by Mr. Gautam upon the following Division Bench judgment of the Madras High Court in *Soundararaja Peter and Others vs. Florance Chellaih and Others*, AIR 1975 Madras 194. In paragraph 7 of the said decision, the Madras High Court discussed the law with regard to Section 235 of the Succession Act as follows:-

“The only further question is whether she can get letters of administration without the citation and the publication in the manner contemplated by Section 235. Section 235 specifically refers to the case of an universal or a residuary legatee applying for letters of administration

*and prohibits the grant of letters of administration unless citation has been issued and published in the manner prescribed. **On the face of it Section 235 does not apply to a case where a legatee applies for letters of administration. Apart from this, when all the legatees are before the Court and there being no other person having beneficial interest under the Will, no citation or publication appears to be necessary having regard to the object of such a citation and publication.** Admittedly in this case all the legatees mentioned in the will in question are before court and they are the plaintiff and defendants 4 to 6. Defendants 4 to 6 have not raised any objection for the grant of either probate or letters of administration to the plaintiff and they in fact sail together. It is only defendants 1 to 3 who get no beneficial interest under the Will who are questioning the grant of probate or letters of administration. Therefore Section 235 does not stand in the way of the grant of letters of administration in favour of the plaintiff in the circumstances of this case.”*

32. The objection with regard to issuance of citation by publication raised by the learned counsel for the respondent No.3, in my opinion, is wholly misconceived. It is well settled that want of citation by itself will not vitiate the grant of probate/Letters of Administration. All the more so, in a case where the omission to issue citation has not resulted in prejudice to any person who claims a beneficial interest in the estate of the deceased. It also cannot be lost sight of that the law

vests a judicial discretion in the Court to revoke a grant where the Court may have *prima facie* reason to believe that the omission to issue citation has resulted in injustice to a party (or parties) who ought to have been cited, and for this reason it is necessary to have the will proved afresh in the interest of such a party (or parties). In the present case, it is not even the contention of the respondent No.3/objector that all the parties having beneficial interest in the estate of the deceased testator are not before the Court. In these circumstances, there can be no question of prejudice having been caused to anyone by the omission to issue citation in newspapers and want of citation, thus, will not bar the grant of Letters of Administration to the petitioner, subject of course to the petitioner establishing the genuineness of the will propounded by him.

33. Issue No.3 is accordingly decided in the negative against the respondent No.3.

34. ISSUE NO.4

“4. Whether the petition has been properly verified in the manner as provided in Section 281 of Indian Succession Act, 1925?”

35. The aforesaid issue was framed in view of the preliminary objection No.2, having been taken by the respondent No.3 that the petition is not maintainable because the petition is not properly verified in the manner and to the effect as provided in Section 281 of the Indian Succession Act, 1925. At the time of hearing, however, this issue was not seriously pressed, presumably for the reason that it is settled law that the provisions of Section 281 are not mandatory but only directory and no petition can be dismissed on the score that it is filed without the verification of at least one of the two attesting witnesses to the will.

36. In the case of *Nand Kishore Rai and Another vs. Mst. Bhagi Kuer and Others*, AIR 1958 All 329, it was observed as under:

“Verification of a petition required under S. 281 similar to verification required of pleadings, including a plaint, under O.6 R.15, Civil Procedure Code and has no greater effect or value. Omission to verify, or defective verification of, a pleading is a mere irregularity within S.99.C.P.C., and is never fatal. The provision of S. 281 of the Succession Act is less drastic than that of O.6 R.15 and an omission to verify, or a defective verification of, a petition for probate cannot have a more serious effect than that of a plaint. The provision in S.281 is merely directory and not mandatory, i.e. non-compliance with it is

not intended to lead to the rejection of the petition.”

37. Apart from the aforesaid legal position, it was pointed out by the learned counsel for the petitioner that the original petition filed by the petitioner, Shri Krishan Dass Gupta was duly verified by one of the attesting witnesses to the will, namely, Mr. I.L. Bansal by filing an affidavit in this regard.

38. In view of the above, this issue needs no further consideration and must of necessity be decided in the affirmative.

39. ISSUE NO.7

“7. Whether the family settlement dated 2nd October, 1991 is valid and if so its effect?”

40. At the outset, it may be noted that the family settlement dated 2nd October, 1991 and the site plan annexed thereto (Ex.P1/3 and Ex.P2/3) have been proved in evidence by PW6 Shri Krishan Dass Gupta, in the course of his testimony, as Ex.PW6/1 and Ex.PW6/2 respectively. In the entire pleadings of the objector, there is no specific denial to the execution of the family agreement/settlement as well as the site plan, which bears the signatures of the petitioner as well as of all the respondents, that is, the three sons and the four

daughters of late Shri Bhikhu Ram Gupta. The aforesaid documents also bear the signatures of late Shri Bhikhu Ram Gupta on each and every page and thus there can conceivably be no doubt about the authenticity of the said documents.

41. Mr. S.N. Gupta, the learned counsel for the respondent No.3/objector has, however, argued that the family settlement is of no consequence being inadmissible in evidence, in view of the fact that it falls in the category of documents which require compulsory registration, but is admittedly unregistered. Mr. Prakash Gautam, the learned counsel for the petitioner, on the other hand, relying upon the three Judge Bench judgment of the Supreme Court in the celebrated case of *Kale and Others vs. Deputy Director of Consolidation and Others*, AIR 1976 SC 807, contended that though indubitably under Section 17 of the Registration Act, a document creating or extinguishing a right, title or interest in immovable property requires compulsory registration and in the absence thereof cannot be relied upon to assert a right, title or interest in immovable property, but this is part of substantive law. The law of evidence recognizes estoppel, and thus an unregistered family settlement which bonafide resolves

family disputes by a fair and equitable distribution of the properties, if acted upon by the parties, the doctrine of estoppel can be invoked to estop a party from urging to the contrary. The following pertinent observations in **Kale's** case (*supra*) were relied upon:-

“40. Assuming, however, that said document was compulsorily registrable the Courts have generally held that a family arrangement being binding on the parties to it would operate as an estoppel by preventing the parties after having taken advantage under the arrangement to resile from the same or try to revoke it. This principle has been established by several decisions of this Court as also of the Privy Council. In **Kanhai Lal v. Brij Lal**, 45 Ind App 118 at p.124 = (AIR 1918 PC 70 at p.74) the Privy Council applied the principle of estoppel to the facts of case and observed as follows:

“Kanhai Lal was a party to that compromise. He was one of those whose claims to the family property, or to shares in it, induced Ram Dei, against her own interests and those of her daughter, Kirpa, and greatly to her own detriment, to alter her position by agreeing to the compromise, and under that compromise he obtained a substantial benefit, which he has hitherto enjoyed. In their Lordships' opinion he is bound by it, and cannot claim as a reversioner.

41. In the decision reported as **AIR 1972 SC 2069, S. Shanmugam Pillai vs. K. Shanmugam Pillai**, Their Lordships observed:

“Equitable principles such as estoppel, election, family settlement, etc. are not mere technical rules of evidence. They have an important purpose to serve in the administration of justice. The ultimate aim of law is to secure justice. In the recent time in order to render justice between the parties, courts have been liberally relying on those principles.”

42. Dealing with the issue of estoppel where a party challenges a family settlement by and under a document which requires registration, Their Lordships in **Kale’s** case (*supra*) proceeded to elucidate the law as follows:-

*“The High Court further erred in law in not giving effect to the doctrine of estoppel which is always applied whenever any party to the valid family settlement tries to assail it. The High Court further erred in not considering the fact that even if the family arrangement was not registered it could be used for a collateral purpose, namely, for the purpose, of showing the nature and character of possession of the parties in pursuance of the family settlement and also for the purpose of applying the rule of estoppel which flowed from the conduct of the parties who having taken benefit under the settlement keep their mouths shut for full seven years and later try to resile from the settlement. In **Shyam Sunder v. Siya Ram**, AIR 1973 All 382, 389 it was clearly held by the Allahabad*

High Court that the compromise could have been taken into consideration as a piece of evidence even if it was not registered or for that matter as an evidence of an antecedent title. The High Court observed as follows:

The decision in Ram Gopal v. Tulshi Ram, AIR 1928 All 641 (FB) is clear that such a recital can be relied upon as a piece of evidence.

x x x x x

It is clear, therefore, that the compromise can be taken into consideration as a piece of evidence.

x x x To sum up, therefore, we are of the view that the compromise could have been relied upon as an admission of antecedent title.”

43. The learned counsel for the petitioner also referred to and relied upon the judgment of a learned Single Judge (Hon’ble Mr. Justice Pradeep Nandrajog) of this High Court in the case of ***Amarjeet Lal Suri vs. Moti Sagar Suri & Ors., 119 (2005) DLT 295***, wherein the Court after referring to the law laid down by the Supreme Court in ***Kale’s*** case (*supra*) held as follows:-

“44. A bona fide family settlement which resolves family disputes and rival claims by a fair and equitable division of the properties, if acted upon would bind the parties and even if partition is under an unregistered document, the document is evidence of conduct of the parties. Estoppel can be invoked to estop a party from urging to the contrary.”

44. In the case of *Tek Bahadur Bhujil vs. Debi Singh Bhujil and Others*, AIR 1966 SC 292, the Supreme Court enunciated the law with regard to family arrangement as follows:-

“12. Family arrangement as such can be arrived at orally. Its terms may be recorded in writing as a memorandum of what had been agreed upon between the parties. The memorandum need not be prepared for the purpose of being used as a document on which future title of the parties be founded. It is usually prepared as a record of what had been agreed upon so that there be no hazy notions about it in future. It is only when the parties reduce the family arrangement in writing with the purpose of using that writing as proof of what they had arranged and, where the arrangement is brought about by the document as such, that the document would require registration as it is then that it would be a document of title declaring for future what rights in what properties the parties possess. The document Exhibit 3 does not appear to be of such a nature. It merely records the statements which the three brothers made, each referring to others as brothers and referring to the properties as joint property. In fact the appellant, in his statement, referred to respondents 1 and 2 as two brother co-partners; and the last paragraph said:

"We, the three brothers, having agreed over the above statement and having made our own statements in the presence of the Panch called by us, and signed and

kept a copy of each of this document as proof of it."

The document would serve the purpose of proof or evidence of what had been decided between the brothers. It was not the basis of their rights in any form over the property which each brother had agreed to enjoy to the exclusion of the others. In substance it records what had already been decided by the parties. We may mention that the appellant and respondent No. 1, even under this arrangement, were to enjoy the property in suit jointly and it is this agreement of theirs at the time which has later given rise to the present litigation between the two. The document, to our mind, is nothing but a memorandum of what had taken place and, therefore, is not a document which would require compulsory registration under Section 17 of the Registration Act."

45. In view of the aforesaid law laid down by the Supreme Court in *Tek Bahadur Bhujil's* case (*supra*), the validity of the family settlement dated 2nd October, 1991 in the present case cannot be questioned on the ground that it required registration. The respondent No.3, who has acted upon and availed of the benefits of the family settlement, cannot be allowed to urge to the contrary and is in fact estopped from doing so. The document being nothing but a memorandum of what had taken place, the document would not require compulsory registration under Section 17 of the Registration

Act. It is also equally well settled that a compromise of family arrangement is based on the assumption that there is an antecedent title of some sort in the parties and the agreement clinches and defines what that title is (*Sahu Madho Das and Others vs. Mukhand Ram and Anr.*, AIR 1955 SC 481). If this line of reasoning is accepted as it was in the case of *Tek Bahadur Bhujil (supra)*, the necessary corollary is that by family arrangement no title passes from one in whom it resides to the person receiving it and as no title passes no conveyance is necessary.

46. In view of the aforesaid, I have no hesitation in upholding the validity of the family settlement which, it is stated, at the risk of repetition, was nothing but a memorandum of what had already taken place between the parties. It is not in dispute that the parties were living in their demarcated portions prior to their entering into the family settlement. It is also the undisputed position that the parties continue to do so till date. It is, therefore, too late in the day to challenge the sanctity of the family settlement. As noticed above, rules of evidence recognize estoppel. Substantive law and the law of evidence of which the rules of estoppel are an integral part, operate in

their respective fields. A conveyance of title requires registration of the written instrument but a grant may be fed by estoppel and may confer sanctity to even an oral agreement between the parties, initially acted upon by the parties, acquiesced in and taken advantage of, but later on sought to be discarded on the ground that it lacked registration under the substantive law.

47. Issue No.7 is accordingly decided by upholding the family settlement. The effect of upholding its validity, needless to state, is that it lends authenticity to the will dated 6th March, 1992 as the said will is on identical lines with the family settlement and the will having been executed less than six months of the family settlement leads to the inference that the testator merely executed the will to place matters beyond the pale of controversy and with a view to clinch the whole matter.

48. ISSUE NOS.1, 5 and 6

ISSUE NO.1

“1. Whether the two Wills dated 06.03.1992 and 21.09.1998 which have been set up by petitioner and respondent No.3 respectively are valid Wills?”

ISSUE NO.5

“5. Whether the Will dated 6.3.1992 has been revoked/cancelled by the testator Shri Bhiku Ram Gupta by his subsequent Will dated 21.9.1998?”

ISSUE NO.6

“6. Whether the petitioner is entitled for Letter of Administration in respect of Will dated 6.3.1992?”

49. All the aforesaid issues are being dealt with together as common questions of fact and law are involved.

50. At the outset, it may be noted that though an application for clubbing of both the probate cases was filed by the respondent No.3, Shri Ram Kumar Gupta along with permission for joint trial and evidence, being IA No.2902/2005 (in Test Case No. 51/2004), no formal orders were passed thereon. However, various orders passed by the Court from time to time, including order dated 11.05.2006, reflect that both the cases were directed to be listed and tried together having regard to the overlapping issues in the two cases, which relate to the two wills purportedly executed by late Shri Bhikhu Ram Gupta. Later, an application being, I.A. No. 12870/2011 was also filed by

Krishan Das Gupta seeking appropriate orders/directions with the prayer for clubbing of both the testamentary petitions, wherein vide order dated 16.08.2011, again a direction was passed by this Court for listing the two matters together.

51. Further, issues arising out of both the testamentary cases were framed in TEST. CASE No.44/1999 and issues were not separately framed in TEST. CASE No.51/2004. The entire evidence was also recorded in the first case, both with regard to the will dated 06.03.1992 and with regard to the will dated 21.09.1998. Then again, though separate affidavits by way of evidence were filed in both the cases, all the witnesses were cross-examined only in TEST. CASE No.44/1999.

52. Adverting first to the will dated 06.03.1992, it is the case of the petitioner Shri Krishan Dass Gupta that the said will was executed by the testator to ensure that the Family Agreement/Settlement arrived at on 02.10.1991 remained effective even after his death. As noticed hereinabove, the said Family Settlement as well as the site plan annexed therewith is signed by the testator as well as by all the seven progeny. It is mentioned in the aforesaid Family Settlement that the

same was arrived at after “mutual discussions”, and it is an undisputed fact that the said Family Settlement was acted upon during the lifetime of the testator and even after his demise.

53. In the pleadings filed by him, Shri Ram Kumar Gupta, who has propounded the will dated 21.09.1998, has admitted the Family Agreement/Settlement as well as the site plan annexed therewith. Further, there is no denial by him to the execution and registration of the will dated 6th March, 1992 (Ex.PW6/3). His only contention is that the earlier will, that is, the will dated 6th March, 1992 had been superseded by the subsequent will dated 21.09.1998 executed by his father during his last days. It may be noted that even otherwise the execution of the will dated 06.03.1992 stands duly proved on record through the testimonies of PW1 Shri K.R. Sharma, an attesting witness to the will, who has categorically deposed that late Shri Bhikhu Ram Gupta signed the will in his personal presence as well as in the presence of another witness Shri I.L. Bansal, who also signed the will in his presence as a witness to the making of the said will. He further stated that he had personally gone to the Tis Hazari Courts on 17.03.1992 along with late Shri Bhikhu Ram Gupta for getting the

will registered in the Court records. The testimony of this witness has emerged unshaken after his cross-examination, in the course of which he stated that the testator had signed on every page of the will. As noticed hereinabove, the other attesting witness to the will was Shri I.L. Bansal, who has filed his affidavit in support of the petition. The will dated 06.03.1992 propounded by Shri Krishan Dass Gupta [apart from the fact that it has not been denied by Shri Ram Kumar Gupta, who is the sole objector in TEST CASE No.44/1999 to the grant of Letters of Administration] thus stands duly proved.

54. As regards the will dated 21st September, 1998 propounded by Shri Ram Kumar Gupta, the said will is stated to be attested by two witnesses, namely, Shri Jagannath Aggarwal, husband of Smt. Sheela Devi, one of the daughters of the testator, and one Shri Vijay Kumar Gupta, neighbor of the testator. In order to prove the said will, RW-6 Shri Jagannath Aggarwal filed his affidavit by way of evidence to state that he was a witness to the will dated 21.09.1998 (Ex.RW-3/1) and had signed the same in the presence of Shri Vijay Kumar Gupta and the testator; and Shri Vijay Kumar Gupta had also signed the same in his presence as a witness. He further deposed that the testator

had put his thumb impression upon the said will in his presence and in the presence of Shri Vijay Kumar Gupta in his full conscience (*sic.* consciousness) and at the time of execution of the said will, the testator was mentally fit and knew the repercussions of the said will. In the said will, he stated, all the sons and daughters except the deponent (*sic.* Shri Ram Kumar Gupta) were excluded from the inheritance to the estate of Shri Bhikhu Ram Gupta. He further deposed that Shri Bhikhu Ram Gupta “*being bed ridden and ill*” was very weak at the time of the execution of the said will dated 21.09.1998 and his hand used to shake while writing or signing, therefore, late Shri Bhikhu Ram Gupta had put his thumb impression on the said will. He along with Shri Vijay Kumar Gupta and Shri Ram Kumar Gupta had gone to the office of the Sub-Registrar for the registration of the will.

55. In the course of his cross-examination, however, RW-6 Shri Jagannath Aggarwal admitted that before signing the will he had not read the will. Late Shri Bhikhu Ram Gupta had told him that he had prepared a will and he (Shri Jagannath Aggarwal) signed the same without any enquiry as the testator was his father-in-law. On a query

put to him, he stated that he had signed on the last page of the will only once. However, on being confronted with the certified copy of the will dated 21.09.1998, which was filed along with the written statement of Shri Ram Kumar Gupta, he stated that both the signatures at Mark 'X' were his signatures. In further cross-examination, he stated that one of the two thumb impressions on the original will (Ex.RW-3/1) at page 4 at Point 'M' was the thumb impression of late Shri Bhikhu Ram Gupta and he could not say who had affixed the other thumb impression at Point 'N'.

56. Apart from examining Shri Jagannath Aggarwal (RW-6) as the attesting witness of the will dated 21.09.1998, Shri Ram Kumar Gupta examined himself as RW-1. In his affidavit by way of evidence, he stated:

“That during his lifetime of Shri Bhiku Ram Gupta executed a will dated 06.03.1992. However, during his last days Shri Bhiku Ram Gupta executed another will dated 21.09.1998, thereby revoking the earlier will dated 06.03.1992 in the subsequent will dated 21.09.1998 itself.”

57. In cross-examination, however, RW-1 Shri Ram Kumar Gupta took a somersault and stated:-

*“In will dated 06.03.1992, I do not know what was my share in that will. **I had no knowledge of any will dated 06.03.1992 during the lifetime of my father.**”*

58. In his affidavit by way of evidence, RW-1 stated that late Shri Bhikhu Ram Gupta in his will dated 21.09.1998 had not provided any right/interest in his estate to any of his sons and daughters and had made him the sole beneficiary because:-

*“.....in the last days of Shri Bhiku Ram Gupta, none else except the deponent looked after and cared Shri Bhiku Ram Gupta, as at that time he was **completely confined to his room and bed permanently** and required personal care and comfort every moment including his smallest desire of good food.....”*

59. In his cross-examination, however, he stated that:-

*“**the condition of my father was good before his death. Due to old age, he was weak. The relations during the lifetime of my father with other sons were normal.**”*

60. In further cross-examination, Shri Ram Kumar Gupta stated that the registration of the will had been got effected after the demise of his father on 11.01.1999 on account of the fact that due to ill health/old age, his father was not in a position to go to the Sub-Registrar for registration. He admitted that the will was not executed

in his presence and he could not say who had drafted the will. He categorically denied the suggestion that his father had lost his memory during his last days and the further suggestion that the will had been got executed by him by exerting undue influence and by fraud.

61. Apart from examining himself as the propounder of the will, Shri Ram Kumar Gupta produced in the witness box RW-2 Bhajan Lal Gupta, the Manager of – The Delhi Swastik Cooperative Urban Thrift and Credit Society Ltd., who proved on record the membership of the testator in the said society vide membership No.913 as reflected in document dated 29.10.1977 (Ex.RW-2/1) and who deposed that Shri Ram Kumar Gupta was the nominee of the said membership account of Shri Bhikhu Ram Gupta. The witness proved on record the application for change of membership dated 18.03.1991 as Ex.RW-2/2, copy of the resolution of the Managing Committee dated 20th March, 1991 as Ex.RW-2/3, the loan application of Shri Bhikhu Ram Gupta as Ex.RW-2/4, the loan bond as Ex.RW-2/5, another loan application as Ex.RW-2/6 and loan bond as Ex.RW-2/7. He also proved on record a certificate to the effect that the remaining

loan amount of ₹ 20,110/- was paid by Shri Ram Kumar Gupta as Ex.RW-2/8, out of which ₹ 10,806/- was paid by Shri Ram Kumar Gupta and the balance of ₹ 10,304/- was adjusted from the membership fund of late Shri Bhikhu Ram Gupta.

62. Shri Ram Kumar Gupta next produced in the witness box RW-3 Arjun Singh, Record Keeper, Municipal Corporation of Delhi, who proved on record letter Ex.RW-3/2, whereby the property of late Shri Bhikhu Ram Gupta stood mutated in the name of Shri Ram Kumar Gupta. In cross-examination, however, the witness admitted that as per the records of the MCD, objection to the mutation had been received on behalf of Shri Krishan Dass Gupta on 15.09.1999, on which no action had been taken by the MCD.

63. RW-4 Shri Jai Narain from the office of the Sub-Registrar, Kashmere Gate, Delhi was next summoned in the witness box to prove on record Ex.RW-3/1, that is, the will dated 21.09.1998 registered on 11.01.1999. In the course of his cross-examination, however, it was admitted by the witness that there were no signature of the attesting witnesses on the original will dated 21.09.1998, but

there were signatures of the attesting witnesses on the record file. In further cross-examination, RW-4 admitted that:-

*“The page No.4 of the Will Ex.RW-3/1 does not tally with the office record. As per office record available with me on page No.4 bears **both additional two signatures of each witness and one thumb impression.**”*

64. RW-5 Baldev Raj Batra, a clerk from the Canara Bank was also summoned to prove on record the Account Opening Form of Saving Account No.16772 stated to be a joint account of Shri Bhikhu Ram Gupta and Shri Ram Kumar Gupta as Ex.RW-5/A. He proved on record the statement of account for the period from 01.01.2006 to 17.04.2006 as Ex.RW-5/B and in cross-examination stated that the bank had not been informed about the death of the account holder Shri Bhikhu Ram Gupta (who died on 04.10.1998).

65. Relying upon the testimonies of the aforesaid witnesses, the learned counsel for Shri Ram Kumar Gupta strenuously urged that the execution of the will dated 21.09.1998 stood conclusively proved whereunder Shri Ram Kumar Gupta had been made the sole beneficiary to the estate of his father, who, all along had favoured his younger son, as was clear from the fact that he had given him a

General Power of Attorney in his favour on the basis of which the eviction order (Ex.PW-1/5) was obtained, evicting the tenant. The father had also chosen to open a joint bank account with him and to nominate him for the membership of the Cooperative Society of which he was the member. He further urged that a false case was sought to be set up by Shri Krishan Dass Gupta that the deceased was not in a sound disposing mind at the time of the execution of the will of 1998 though the existence of the said will was not denied by the other legal representatives of the deceased.

66. Rebutting the aforesaid contentions raised on behalf of Shri Ram Kumar Gupta, Mr. Prakash Gautam, Advocate on behalf of Shri Krishan Dass Gupta submitted that the entire story of execution of the will dated 21.09.1998 was shrouded in suspicious circumstances. The alleged will had been executed just prior to the death of late Shri Bhikhu Ram Gupta, that is, only 13 days prior to his death, when the deceased was not in a position to use his mental and physical faculties, and as such, could not be said to have executed the will in sound state of mind and/or of his own free will. The will had been set up with the alleged thumb impression of the testator though the

testator used to sign important papers and not just affix his thumb impression, as was clear from the fact that the Family Settlement and the will dated 6th March, 1992 were signed by the testator on each and every page of the same. This singular circumstance was sufficient to prove that the will in question was a “bogus” one. It was for the respondent No.3 to establish that the will set up by him had been executed by the testator in a sound state of mind and of his own free will and not under any undue influence and/or coercion. This the respondent No.3 had miserably failed to establish. From a bare perusal of the will dated 21.09.1998, it was clear that the signature of the witnesses as well as the thumb impression of the testator had been obtained fraudulently and/or on a blank sheet of paper either under duress, coercion and/or while the testator was not in a sound state of mind. The possibility of procuring the thumb impression of the testator immediately at the time of his death also could not be ruled out as the testator never in his lifetime signed any document by putting his thumb impression and was always signing each and every document either in Hindi and/or in Urdu, with which he was well conversant. Even in the alleged will set up by the respondent No.3,

the testator has stated: *“I have signed this will after having the same being read over and explained to me in Hindi”* though the will does not bear the signature of the testator, and instead his thumb impression purports to be affixed.

67. Mr. Jagjit Singh, the learned counsel for the respondent Nos.2, 4 and 7 in support of the aforesaid contentions of the learned counsel for the petitioner urged that in the light of the evidence on record that the testator used to affix his signatures on each and every document, it was incumbent upon the propounder of the will dated 21.09.1998 to have examined an expert witness to prove the thumb impression of the deceased testator on the will. This was rendered all the more imperative on account of the fact that the said will was executed 13 days before the death of the testator, when he had admittedly lost all his faculties and even according to the objector Shri Ram Kumar Gupta was confined to bed on a permanent basis, was wetting his bed, had shaking hands and limbs, and according to the testimonies of PWs 1 to 6 had lost his memory and was unable to identify even the family members.

68. Mr. Singh also highlighted the fact that not only was the will executed 13 days before the death of the testator, it was registered not during the lifetime of the testator but three months after his death, and all this further renders the execution thereof suspicious. Even otherwise, it was highly improbable that late Shri Bhikhu Ram Gupta who throughout his lifetime had acted upon the Family Settlement dated 02.10.1992 and had executed the will dated 6th March, 1992 to ensure its implementation would have changed his will just 13 days prior to his death, and that too in the absence of any family member. Mr. Singh highlighted that while will dated 06.03.1992 had been executed by the testator and got signed by him from each and every member of his family, that is, all his seven children, the will dated 21.09.1998 sought to be propounded by the objector was not signed by any sibling of the objector. Further, the objector in his testimony had admitted that no family member was present at the time of the execution of the will. Only the two attesting witnesses Shri Jagannath Aggarwal and Shri Vijay Kumar Gupta, according to the objector, were present at the time of the signing of the will. Further, though the attesting witness to the will, Shri Jagannath Aggarwal is the husband

of one of the daughters of late Shri Bhikhu Ram Gupta, namely, Smt. Sheela Devi, the latter has neither chosen to object to the grant of Letters of Administration in respect of the will dated 06.03.1992, nor has appeared in the witness box to support the will dated 21.09.1998, but has remained a stoically silent spectator throughout.

69. Mr. Jagjit Singh, the learned counsel for the respondent Nos.2, 4 and 7 also invited my attention to the testimonies of PW2 Shri Vijay Kumar Goel, PW3 Shri Bali Ram Gupta, PW4 Shri Lal Chand, PW5 Smt. Kamlesh Goel and PW6 Shri Krishan Dass Gupta.

70. PW2 Shri Vijay Kumar Goel deposed that his residence was located near the house of late Shri Bhikhu Ram Gupta, who expired on 04.10.1998, and stated:-

*“During his last days Shri Bhiku Ram Gupta was very weak physically and **had lost his memory and was not able to recognize anybody.** Last time I saw him approximately 3-4 months prior to his death on 04.10.1998. I noticed that he was not even in a position to speak. He was physically very weak and had a major memory loss.”*

71. PW3 Shri Bali Ram Gupta, who deposed that he had been residing in the house next to that of the deceased testator and was a close friend of late Shri Bhikhu Ram Gupta, stated:-

*“Before his death for the last approximately six months, he had **lost his mental senses and was not even able to recognize me** during his last days when I last visited his house around 2 months prior to his death and was physically very weak at the time of his death. About six months before his death, he was in no physical and mental condition to read and/or write any document. His behaviour had also become abnormal and there was major memory loss which he had been suffering from. I know that on a number of occasions he had left the house and had been wandering on the street and was brought back home by others, known as well as unknown from general public.”*

72. PW4 Shri Lal Chand also a neighbor of late Shri Bhikhu Ram

Gupta testified:-

*“Before his death, for the last five-six months, he had **lost his mental senses and was not even able to recognize anybody** because of old age and falling physical and mental health. The deceased Shri Bhiku Ram Gupta was physically very weak at the time of his death. I even attended his last rites.”*

He further deposed:-

*“That on one day in summer in May-June, 1998 I have seen him in his bare essential clothes, moving absent mindedly unconsciously near my residence. I informed this to his family members and then they had brought him to the house. He had already **lost his mental senses** during this period.”*

73. PW5 Smt. Kamlesh Goel, daughter of late Shri Bhikhu Ram Gupta with regard to the mental faculties of her father stated:-

“Before his death for the last six months, he had lost his mental senses and was not able to recognize even his family members and was mostly confined to his bed. He died of his old age and was physically very weak at the time of his death. Last time I met him on Dushera festival 10-12 days before his death and he was not able to recognize me.”

74. PW6, Shri Krishan Dass Gupta, in the course of his testimony also stated that for six to seven months prior to his death, there was a marked deterioration in the physical as well as mental health of late Shri Bhikhu Ram Gupta, who was suffering from memory loss and could not even recognize his children, friends, relations, etc. Sometimes he would leave the house of his own and would not know his way back. On a number of occasions, he had been brought back on information received from someone known to him in the neighbourhood. He stated that the deceased at the time of the alleged will dated 21.09.1998 was in such a bad condition that he often used to wet his bed and had to be lifted to go to the bathroom to attend the

call of nature. He was rapidly losing weight and was only 50 kgs. at the time of his death.

75. As noticed hereinabove, Shri Ram Kumar Gupta himself in his affidavit by way of evidence admitted that Shri Bhikhu Ram Gupta was at the time of execution of the will “*completely confined to his room and bed permanently*”.

76. The testimonies of the petitioner’s witnesses, who are/were neighbours of the testator, having emerged unscathed after cross-examination and the objector himself having admitted that late Shri Bhikhu Ram Gupta was confined to bed on a permanent basis and could not even affix his signature on the will, I am constrained to hold that the will dated 21.09.1998 even assuming that the same bears the thumb impression of the testator, was not executed by the testator in a sound disposing state of mind. A sound disposing state of mind is a *sine qua non* for the execution of a testament. Late Shri Bhikhu Ram Gupta, as is clear from the evidence of his daughter (an independent witness) and of his neighbours (also independent witnesses), appears to have lost his memory at least six months prior to the execution of the will. The fact that he used to roam around the vicinity of his

house and forget the way to his home and had to be brought back by someone or the other, and the further fact that during his last days he was confined to bed, unable to attend to the call of nature or even to identify the faces of his near and dear ones is clearly reflective of the fact that the health of the deceased had deteriorated to such an extent that he had more or less lost his mental faculties.

77. As regards the legal principles governing the proving of wills, it has been held by a five-judge Bench of the Supreme Court in ***Shashi Kumar Banerjee v. Subodh Kumar Banerjee*, AIR 1964 SC 529** that:

“The principles which govern the proving of a Will are well settled; (see H. Venkatachala Iyengar v. B.N. Thimmajamma : AIR1959SC443 and Rani Pumima Debi v. Khagendra Narayan Debi : [1962]3SCR195 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 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 a probate, even if the will might be unnatural and might cut off wholly or in part near relations....”

78. The aforesaid principles find mention in numerous subsequent decisions, (See *Smt Jaswant Kaur v. Smt Amrit Kaur* 1977(1)SCR925; *Madhukar D. Shende v. Tarabai Aba Shedage* (2002) 2 SCC 85; *Daulat Ram and Ors. v. Sodha and Ors.* (2005)1SCC40; *Sridevi and Ors v. Jayaraja Shetty and Ors.* (2005) 8 SCC 784; *Pentakota Satyanarayana and Ors. v. Pentakota*

Seetharatnam and Ors AIR2005SC4362; Niranjan Umeshchandra Joshi v. Mrudula Jyoti Rao and Ors (2006) 13 SCC 433; Savithri and Ors. v. Karthyayani Amma and Ors (2007) 11 SCC 621 and Balathandayutham v. Ezhilarasan (2010) 5 SCC 770).

79. In the case of *Vidya Sagar Soni v. State and Ors, AIR 2006 Delhi 354*, this court extensively dealt with the legal burden of proof when a will is propounded, what would constitute *suspicious circumstances* and what form of affirmative proof should be sought by the court to satisfy the judicial conscience that the document propounded is the last and valid testament. The principles were culled out as under:

“7. A will is a solemn document, being written by a person who is dead and who cannot be called in evidence to testify about the due execution of the will. It is the living who have to establish the will. It naturally throws a heavy burden on the court to satisfy its judicial conscience that the burden of proof of due execution is fully discharged and every suspicious circumstance explained.

8. No specific standard of proof can be enunciated which must be applicable to all the cases. Every case depends upon its own circumstances. Apart from other proof,

*conduct of parties is very material and has considerable bearing on evidence as to the genuineness of the will which is propounded. Courts have to be vigilant and zealous in examining evidence. Rules relating to proof of wills are not rules of Laws but are rules of prudence. Normally, a will is executed by a person where he desirous, to either alter the normal rule of succession, or where he desirous to settle his estate in a particular manner amongst the legal heirs. Therefore, though to be kept in mind, as to what is the nature of bequest too much importance cannot be attached to the disproportionate nature of a bequest. However, as observed AIR 1995 SC 1684, **Rabindra Nath Mukherjee and Anr. v. Panchanan Banerjee (dead) by LRs**, disproportionate nature of a bequest is no doubt a suspicious circumstance to be kept in mind, but, being a mere suspicion, it is capable of being dispelled by other evidence to show voluntary character of the document.*

9. Therefore, the first rule to appreciate evidence is to peruse the will. Normally, if there is rationality in a will, a presumption arises about due execution. Of course, being a presumption, it is rebuttable.

*10. As observed in **Smt. Kamla Devi v. Kishori Lal Labhu Ram and Ors.**, the omission of a close relation from the bounty of a testator raises a presumption in favor of*

some undue influence. The probative force of such a testament rises and falls in inverse ratio to its unreasonableness.

*11. The more unreasonable an instrument is, the less probative value it carries. Where the terms of a will are unusual and the evidence of testamentary capacity doubtful, or due execution doubtful, the vigilance of the Court will be roused and before pronouncing in favor of the will, **the court would microscopically examine the evidence to be satisfied beyond all reasonable doubt that the testator was fully conversant of the contents and executed the will fully aware of what he was doing.***

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

13. This affirmative proof of the testator's knowledge and approval must be strong enough to satisfy the court, in the particular circumstances, that the will was duly executed.

14. One form of affirmative proof is to establish that the will was read over by, or to, the testator when he executed it. If a testator merely casts his eye over the will, this may not be sufficient. [see 1971 P.62 Re Moris). In the report published as (1867) 1 P.D.359 Goodacr v. Smith, it was held that another form of affirmative proof is to establish that the testator gave instructions for his will and that the will was drafted in accordance with those instructions.

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

16. As held in the report published as (1838) 2 P.C. 480 Barry v. Butlin, a classic instance of suspicion circumstances is where the will was prepared by a person who took a substantial benefit under it."

80. In *Shri Prem Sagar Vs State and Ors* (FAO No 98/2007, decided on 02.04.2007), this court while dismissing the appeal held that the execution of Will dated 23.04.1983 was surrounded by the suspicious circumstances and no sound reasoning was given by

propounder of the will to explain the existing suspicious circumstances. It was further observed by the Court that the propounder failed to explain as to why the testator had thumb marked on his Will whereas it was proved on record that he was fully capable of signing in Urdu, nor any effort was made to get the thumb impression of the deceased/testator compared with his admitted thumb impression by a finger expert.

81. In the light of the above law and my findings on facts, there is no manner of doubt that in the instant case the circumstances surrounding the execution of the will dated 21.09.1998 render the said will suspicious, to say the least. For the sake of recapitulation, the same are enumerated hereunder:-

- (i) The will dated 21.09.1998 was executed just 13 days before the death of the deceased.
- (ii) The aforesaid will was registered three months after the death of the testator by the propounder himself, i.e., on 11.01.1999.

- (iii) The will dated 21.09.1998 was sought to be propounded in the year 2004, seven years after the alleged bequest, and six years after probate of the will dated 06.03.1992 was sought.
- (iv) It is not known as to who was the scribe of the will. On a specific query put to the propounder of the will, he stated that he did not even know who had typed the will.
- (v) The will does not bear the signature of the testator, though the testator used to affix his signature on all the documents executed by him either in Hindi or in Urdu.
- (vi) Even the thumb impression affixed by the testator on the will dated 21.09.1998 is affixed in the reverse direction and the possibility of the said thumb impression having been procured after the death of the testator cannot be ruled out.
- (vii) Although the testator had got the signatures of each and every family member affixed on his will dated 06.03.1992, the will dated 21.09.1998 does not bear the signature of any family member.

- (viii) Admittedly no family member was present at the time of the execution of the will dated 21.09.1998, except the attesting witness RW6 Shri Jagannath Aggarwal.
- (ix) RW4 Jai Narain, who appeared from the office of the Sub-Registrar, in the course of his cross-examination admitted that page 4 of the will Ex.RW-3/1 does not tally with the office record available with him, which on page 4 bears additional two signatures of each witness and one thumb impression.
- (x) RW6 Shri Jagannath Aggarwal, the attesting witness, in his cross-examination stated that he had signed on the last page of the will only once, but when confronted with the certified copy of the will dated 21.09.1998, which was filed along with the written statement of the respondent No.3 (Shri Ram Kumar Gupta), stated that both the signatures at Mark 'X' on the will were his signatures.
- (xi) The bequest made in the will is highly improbable in the light of the Family Settlement admittedly executed during

the lifetime of the testator on 02.10.1991, which is signed by the testator and all the seven children of the testator.

(xii) In the course of his cross-examination, RW1 Shri Ram Kumar Gupta himself admitted that the relations of the testator with his other children ***“were normal during his life-time”***.

(xiii) No reason is cited in the will dated 21.09.1998 for cancellation of the will dated 06.03.1992, which will was executed by the testator when he was admittedly in a sound disposing mind.

(xiv) In paragraph 2 of the alleged will, the testator has mentioned that this is his ***“first and last will”*** while in the later part of the will the testator has stated: ***“I hereby cancelled my will dated 06.03.1992.”*** If the testator in fact executed the will, this shows the state of mind of the testator.

(xv) RW1 Shri Ram Kumar Gupta, in the course of his cross-examination, stated that the photocopy of the will had been annexed by him with his written statement dated

07.01.2000. (The will dated 21st September, 1998 Ex.RW3/1 was the original will on which the witnesses had put their signatures at the place Mark 'Z' in the original will filed by him.) He, however, stated that he could not say anything regarding the signatures of the witnesses at place 'Z1' in the photocopy of the will placed on record.

(xvi)PW2 to PW6 have in one voice deposed that the testator six months prior to his death had lost his memory, and was not in his senses, could not identify anyone and would roam around aimlessly, more often than not losing his way home, and at the time of his death was entirely confined to bed unable to answer even the call of nature.

82. Taken cumulatively all the aforesaid circumstances are sufficient to show that the will dated 21.09.1998 is covered with the shroud of suspicion. The propounder has failed to allay the suspicion aroused by the facts and circumstances surrounding the execution thereof. The judicial conscience of the Court, therefore, is not satisfied that the will was executed by the testator of his own free will and while possessed of all his mental faculties. Even the affixation of

the thumb-impression of the testator on the will is not established beyond a shadow of doubt.

83. In view of the aforesaid, I find that the Will dated 6th March, 1992 (Ex.PW6/3) executed by late Shri Bhikhu Ram Gupta is proved to be his last will and testament; signed and executed by him while he was possessed of a sound disposing mind. The testator has not appointed any executor of his Will. Hence, the petitioner will be entitled to the grant of Letter of Administration of the estate of late Shri Bhikhu Ram Gupta upon his fulfilling the requisite formalities.

84. Accordingly, Letters of Administration in respect of Will dated 6th March, 1992 along with a copy of the Will annexed therewith is granted in favour of the petitioner on his furnishing the stamp paper required for the purpose and filing affidavit, etc. The Registry shall prepare the necessary Letters of Administration on his doing so.

85. TEST. CASE No.44/1999 and TEST. CASE No.51/2004 stand disposed of accordingly.

**REVA KHETRAPAL
(JUDGE)**

February 16, 2012
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