

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

% *Judgment Reserved on : October 10, 2012*
Judgment Pronounced on : October 18, 2012

+ **RFA(OS) 43-45/2011**
AND
CM No.8011/2011 (cross objections by R-2)

VED PRAKASH Appellant
Represented by: Ms.Mala Goel, Advocate with
Mr.Gaurav Kaushik, Advocate along with appellant
in person.

versus

OM PRAKASH DECEASED
THRU' LRs & ORS. Respondents
Represented by: Mr.Sanjiv Bahl, Advocate with
Mr.Eklavya Bahl, Advocate.

CORAM:
HON'BLE MR. JUSTICE PRADEEP NANDRAJOG
HON'BLE MR. JUSTICE MANMOHAN SINGH

PRADEEP NANDRAJOG, J.

1. Vide impugned judgment dated September 28, 2010, two suits registered as CS(OS) No.1710/2003 and CS(OS) 2261/2007 as also a Testamentary Petition registered as Test.Case No.15/2007 have been decided. CS(OS) 2261/2007 was originally filed in the District Court by late Sh.Harbhagwan Dass but was transferred to the Original side of this Court and renumbered as aforenoted. In the suit he had sought a decree for possession and damages against his son Ved Prakash i.e. the appellant, alleging that the appellant being his son was permitted to reside on the first floor of property bearing Municipal No.E-5, Lajpat

Nagar-III, New Delhi owned by him and had refused to vacate the same in spite of a notice dated February 12, 2002 to vacate the first floor. CS(OS) No. 1710/2003 was filed by Ved Prakash, impleading his brothers Om Prakash, Varinder Kumar and Davinder Sakhuja as defendants, seeking partition of property bearing Municipal No.E-5, Lajpat Nagar-III, New Delhi, pleading that the father of the parties Shri Harbhagwan Dass died interstate on June 20, 2003 and that the mother of the parties had predeceased their father. Testamentary case No.15/2007 was filed by Davinder Sakhuja, pleading that during his life time, Harbhagwan Dass had executed a will dated April 24, 2003.

2. It is apparent that the bone of contention between the parties is the will Ex.DW-1/1 stated to have been executed by late Sh.Harbhagwan Dass (hereinafter referred to as the 'deceased').

3. As per the will Ex.DW-1/1, the deceased had bequeathed the house owned by him in the following manner:-

- | | | | |
|-------|---|---|------------------|
| (i) | Ground Floor | - | Davinder Sakhuja |
| (ii) | First Floor | - | Virender Kumar |
| (iii) | Second Floor and a room on the terrace above. | - | Om Prakash |
| (iv) | Remaining open terrace with right to construct. | - | Ved Prakash |

4. In essence, as per the will Ex.DW-1/1 the deceased had bequeathed roughly 25% share in the property to each son.

5. In case the will Ex.DW-1/1 is held to be the last legal and valid testament executed by the deceased, the four brothers, and in particular Ved Prakash would have a problem. The problem which Davinder,

Varinder and Om Prakash would face would be that they would be saddled with an old construction, literally falling apart, and not being able to reconstruct their respective floors unless all the four brothers join together to reconstruct the property. The problem which Ved Prakash would face is that unless the entire building is reconstructed, as per the current municipal bye-laws he would not be able to construct the third floor for the reason the municipal bye-laws require that only where a building is constructed on stilts can it have four floors.

6. In view of the aforesaid, this Court had suggested to the parties at the hearing of the appeal that they should consider redeveloping the property and Davinder Sakhuja, Virender Kumar, Om Prakash and Ved Prakash could take the ground floor, the first floor, the second floor and the third floor respectively in the newly constructed building and jointly use the stilt parking. They would also then be entitled to construct a basement which they could share as per their convenience.

7. This would have satisfied the respective claims with respect to the share in the property, be it under the will or otherwise. But unfortunately, in spite of learned counsel for the parties making best efforts to convince their clients, probably due to old age and enough ill-will in the family, the four brothers could not agree. And this requires us to decide the appeal on merits.

8. There is enough evidence of ill-will in the family. The deceased was residing on the ground floor of his house and on the first floor his son Ved Prakash was residing. The second floor and a room on the terrace above was in the occupation of Om Prakash. The deceased had visited Davinder who was settled in the United States of America in October-November, 2001 and soon after returning filed the suit seeking ejectment

of Ved Prakash from the first floor. As per Ved Prakash the father filed the suit under the instigation of Davinder, but later on realized his mistake. It was Ved Prakash who was looking after the father. But before the father could withdraw the suit after he realized his mistake, he took the 'A' train to heaven. Thereupon Ved Prakash filed the suit seeking partition of the house belonging to the father and Davinder Sakhuja seeking a probate of the will Ex.DW-1/1.

9. Vide order dated August 03, 2005 a learned Single Judge of this Court directed that the aforesaid 3 cases be consolidated and the suit for partition filed by Ved Prakash i.e. CS(OS) No.1710/2003 be treated as the lead case.

10. Evidence has thus been led in CS(OS) No.1710/2003.

11. We may note at the outset that Davinder Sakhiya, Varinder and Om Prakash accept the will Ex.DW-1/1. Ved Prakash questions the same.

12. Besides examining himself as PW-1, Ved Prakash examined Sh.T.R.Grover, Sh.Vikram Khurana, Sh.Kanwal Kapoor and Sh.Madan Kishore Kharbanda as PW-2, PW-3, PW-4 and PW-5 respectively.

13. In his testimony, Ved Prakash PW-1 stated that his father died interstate and that his relations with his father were cordial and that due to ulcers in both eyes the deceased had extremely poor eyesight and use to wear very high powered glasses. He proved letter Ex.PW-1/5 dated June 07, 1998 written by his father to him to establish cordial relationship between him and his father. He stated that his father had handed him over three blank signed papers, Ex. PW-1/8 (collectively) and had handed over to him an envelope (Ex.DW-1/P-1) containing a death wish Ex.PW-1/9. He further deposed that a will Ex.PW-1/2 dated December 22, 1999

pertaining to a property in East Delhi was executed by his father, but the will became inoperative since the property was acquired during the life time of the father and all residual claims pertaining to alternative plot being allotted stood rejected. He proved Ex.PW-1/5A being a letter dated October 03, 2002 written by the Govt. of NCT of Delhi rejecting request made by the deceased for alternative plot to be allotted. He proved Ex.PW-1/4 and Ex.PW-1/6 the power(s) of attorney dated April 08, 1998 and July 20, 2001 executed by his father in his favour.

14. Mr.T.R.Grover PW-2, an acquaintance of the deceased, deposed that the deceased was suffering from ophthalmic problems and arthritis. Vikram Khurana PW-3, the son of the sister of the wife of Ved Prakash deposed that he was very close to the deceased and had accompanied the deceased to the doctors on several occasions. Kanwal Kapoor PW-4, the husband of the sister of the wife of Ved Prakash deposed that he was very close to the deceased and that on several occasions the deceased had told him that he was not happy with the ways of Om Prakash and that he has great affection for Ved Prakash and Ved Prakash used to look after the medical and other needs of the deceased. Madan Kishore Kharbanda PW-5, a relative of the deceased, deposed that on several occasions the deceased had told him that he would divide the suit property between his 3 sons Om Prakash, Ved Prakash and Virender as his fourth son Davinder is settled abroad and that he has great love and affection for Ved Prakash and Ved Prakash used to look after the medical and other needs of the deceased.

15. Being relevant we note the contents of the relevant part of letter Ex.PW-1/5 dated June 07, 1998. It reads as under:-

“Dear Ved

I hope that you must be keeping quite fit with your family members. I am shocked to learn from Om Prakash the misbehavior of Chandan and insult and disrespect meted out to you by the family of Virender's family. They have not only insulted you but blackened my face and cause a slur on my reputation. They are shameless to all sense of honor. They have got no sense of self respect and they are senseless in respecting elders. The problem is that no one in family is sensible. I am very much worried about this and fail to understand how to solve it. I am afraid they would create more problems for me in the remaining days of my life and make my life miserable. I am bearing the price and consequences for not acting upon the advice of your mother. It was befitting for Virender to intervene and should have come to you to tender his apology. I am sure he has not done it. I tender my apology."

16. The document Ex.PW-1/9 reads as under:-

"This is my last wish. I am leaving this world with heavy heart. From Virender's family Virender and Mrs. Chandan can attend my funeral they can accompany to cremation ground and participate in other death rites. In case any other member of his family tries to attend my funeral then my last wish may be read out in the presence of audience. No intimation of my death may be sent to Shri Ascharaj Lal Kumar and other relatives of Vijay who should also intimate to her father to stay away from my death rites. All persons who come for condolence may be entertained either on 1st or 2nd floors I have kept ₹20,000/- in my inner locker of my cupboard to meet my death expenses. No money may be accepted either from my in laws or in laws of my sons.

Through it does not become of me to write his note but I am compelled to do so as I meted out great insult, humiliation and totally ignored and disgraced on the occasion of Chandan's marriage. Even I was told "if you do not participate in the marriage would it not be celebrated.

The family whom I embarrassed at the cost of me and my wife's convenience for a major part of my life misbehaved me. I received a hearty shock."

17. To prove the due execution of the will Ex.DW-1/1, Davinder, the propounder of the will examined himself as DW-1. Sanjay Sachdeva and Virender were examined as DW-2 and DW-3 respectively.

18. Davinder deposed that the will dated April 24, 2003, Ex.DW-1/1, is the last legal and valid testament of the deceased. His brothers Om Prakash and Virender Kumar used to look after the deceased. The deceased was in good health and disposing mind till the time of his death.

19. On being cross examined he stated:-

“I had shifted to United States of America in the year 1976....It is true that I am extremely close to Mr. Om Prakash and Sh. Virender Kumar....I know Mr. Mukesh Luthra who has been our neighbour in Lajpat Nagar. After death of my father I have met Mr. Mukesh Luthra on my every visit to India. He is not my friend though we know each other since long. I do not know which of my brothers or my nephews, has been friend of Mr. Luthra. Mr. Mukesh Luthra may have been a close friend of my brother Mr. Om Prakash, but I do not know....Though my father because of age had weak eye sight but he was comfortable to read and write but I do not know he was using high power lens. I never saw him to use magnifying glass for reading or writing even when I visited in 2002. It is true my father had Ulcer in left eye and that he used to use plastic contact lens for that eye. Contact lens he used was only for the eye Ulcer and not for eye sight. I do not know if because of Ulcer he was not able to read at all from the left eye....I identify signatures of my father at Points A, B, C on the document Ex.PW-1/6. I also identify signatures of my father which seems to be on the documents Ex.PW-1/8 (three papers) at Point A and I identify signatures my mother besides my father on other two paper sheets of this Ex.PW-1/8 on Points B, C and D. I identify handwriting of my father in the postal letter Ex.PW-1/5. Handwriting on the document Ex.PW-1/9 I identify that of my father alongwith his signatures and handwriting on the envelope Ex.DW-1/P-1 seems to be that of my father. The signatures on document Ex.PW-1/2 on

two places seems to be that of my father. I identify signatures of my father on documents Ex.PW-1/4....It could be that letter Ex.PW-1/9 in a sealed envelope Ex.DW-1/P-1 was given by my father to the plaintiff with a direction to open it only after his death. I do not know an Advocate by the name of Sh. Swaran Singh or that he was a good friend of my late brother Sh. Om Prakash. *(Emphasis Supplied)*

20. Relevant would it be to note that Ex.DW-1/P-1 is the envelope in which the death wish Ex.PW-1/9 was kept and it contains an endorsement that the envelope should be opened after the death of the deceased.

21. Sanjay Sachdeva DW-2, deposed that he was an attesting witness to the will Ex.DW-1/1. He knew the deceased and used to regularly visit the deceased at his residence. In April, 2003 the deceased expressed his desire to execute a will and requested him to become an attesting witness to the will. In view of the request of the deceased he went to the residence of the deceased in the evening of April 24, 2003. After sometime Mr.Mukesh Luthra came at the residence of the deceased. The deceased was having a typed will with him and he informed him that the said will was got prepared by him from Swaran Singh, Advocate. The deceased appended his signatures on the will Ex.DW-1/1 in his presence as also in the presence of Mukesh Luthra. Thereafter Mukesh Luthra appended his signatures on the will Ex.DW-1/1 in his presence as also in the presence of the deceased. Thereafter he signed as an attesting witness. After the execution of the will the deceased told him and Mukesh Luthra that he is desirous of getting the will registered and that they should accompany him to the office of the concerned Sub-Registrar for the purpose of registration of the will. On 20.05.2003 the deceased called him and told him to come to his residence. On 21.05.2003 to go to the office of concerned Sub-Registrar for the purposes of registration of the will. On

21.05.2003 he went to the residence of the deceased wherefrom he and the deceased went to the office of the concerned Sub-Registrar where Mukesh Luthra was already present. On reaching the office of Sub-Registrar the deceased contacted Swaran Singh, Advocate. Mukesh Luthra and Swaran Singh appended their signatures on the will in the office of the Sub-Registrar. The deceased was in good health and disposing mind till the time of his death.

22. On cross-examination, the witness admitted:-

“My acquaintance with Sh. Harbhagwan Dass was by the facts that I had been living in his neighborhood, close to his house and since my childhood when I used to play in the colony park, Sh. Harbhagwan Dass used to visit that park. I know grandson of Sh. Harbhagwan Dass who is Mr. Bharat Sakhuja S/o Sh. Omprakash Sakhuja. I also know Mr. Chandan Sakhuja S/o Sh. Virender Kumar Sakhuja as Chandan Sakhuja is my brother's friend. Mr. Virender Sakuja asked me to come for evidence in this case today.... I know Mr. Mukesh Luthra who also used to play with us. Mr. Bharat Sakhuja is my friend and he might be junior to me by ten years... Sh. Harbhagwan Dass used to use thick lance glasses but only when he needed to read something. May be without glasses he could not read at all.... I do not know what disease if Sh. Harbhagwan Das was suffering in his last days. Sh. Harbhagwan Das used to walk on his own without assistance of anybody but with the assistance of stick and body bended because of old age. It is true I am related to Sh. Bharat Sakhuja. He has been married to my Bua's daughter... I have never been introduced to Advocate Sh. Swaran Singh and cannot recognize him.” (*Emphasis Supplied*)

23. Virender DW-3, the son of the deceased, deposed on the same lines as Davinder. But during cross-examination stated:-

“Mr. Chandan is my son... I have seen Ex. PW-1/8 it bears the signatures of my father at Point ‘A’ and ‘B’ and the

signatures of my mother are at Point 'C' and 'D'....It is correct that my father used to wear very thick glasses. His eye sight was very weak and he had undergone cataract operation in both the eyes. It is correct that he had small ulcers in one eye. I do not remember in which eye, but he used to read newspaper. It is correct that in addition to the thick glasses he used to read using a magnifying glass. It is correct that Ext.PW-1/5 is written by my father and the same in his handwriting. It is also correct that he wrote this letter from USA. I have seen Ext.PW-1/9 and Ext.DW-1/P-1, the handwriting on the same is of my father. It is correct that in para 2 of Ext.PW-1/9 the correction in the word disgrace by adding D has been added by my father and similarly the word and between the words humiliation and totally ignored are also in his handwriting. Signatures are Ext.PW-1/9 are also of my father.” *(Emphasis Supplied)*

24. We note the contents of the will Ex.DW-1/1. It is a computer typed document consisting of two sheets and is in English language. A plan of the terrace is annexed with the will. It reads as under:-

“This is the last will made by me Harbhagwan Das, son of Late Lala Dewan Chand R/o E-5 Lajpat Nagar-III, New Delhi – 110024.

I am 90 years of age and possess good and normal health and I am attending to my duties regularly, but life being always uncertain I have thought it proper to make this will so that there is no dispute after my death regarding my estate.

I own a three storeyed house bearing No.E-5 Lajpat Nagar-III, New Delhi constructed on a plot of land measuring 200 square yards, which is my absolute and self acquired property.

I also owned plot measuring 200 square yards bearing No.25 in Block No.1 Gali No.4 Khasra No.637 in village Chandrawali alias Vishwas Nagar Shahdara Delhi. This too was my self acquired property.

I have four sons Shri Om Prakash, Ved Prakash, Virender Kumar and Davinder Sakhuja. Three of my sons are living in Delhi and my fourth son Davinder Sakhuja is in America.

So long as I am alive I shall continue to be sole owner of my properties both moveable and immovable and can deal with them as I like. However on my death, house No.E-5, Lajpat Nagar-III, New Delhi shall devolve as under:-

- | | | |
|------------------|---|--|
| Davinder Sakhuja | - | Ground Floor |
| Virender Kumar | - | First Floor |
| Ved Prakash | - | Portion of the Third Floor
(Terrace) as shown in green in the
attached plan of Third Floor
(Terrace) |
| Om Prakash | - | Second Floor and one room with
almirah and attached bath
and open space as
shown in red in attached Third
Floor (Terrace) plan for his life
and after his death to his son
namely Bharat Sakhuja as absolute
owner. |

The portion shown in yellow on the plan of Third Floor (Terrace) shall be common between my aforesaid two sons, Om Prakash and Ved Prakash.

Ved Prakash shall be entitled to raise construction on the property bequeathed to him.

The common places like passage, staircase, front courtyard and other easements would be commonly enjoyed by all the co-owners of the property. I may also mention, that if my aforesaid sons, or any of my sons wishes to sell their/his respective portion of the house, they/he would not sell to any outsider but would first offer to Shri Davinder Sakhuja or to his wife Smt. Kiran Bala Sakhuja and then to other co-owners of the property. it is only his/her and other co-

owners refusal in writing they/he would be entitled to sell to an outsider.

I owned plot No.25, Block No.-1, Gali No.4 Khasra No.637 in village Chandrawali alias Vishwas Nagar, Shahdara, Delhi.

It has been acquired by Government of National Capital Territory of Delhi vide notification No.8(7)97/LB/LA7413 dated 17/8/98 and vide award No.14/2000-2001/East dated 14/8/2000. Its compensation of Rs.682486.46 as per said award has been paid to me. In case the payments of enhancement and other claims are not made to me in my life time my son Om Prakash shall alone be entitled to claim and receive the said payments and other claims and he shall be alone entitled to receive payments of such enhancement and such other claims.

If any other alternative plot is allotted to me because of acquisition of the said plot, the said alternative plot shall devolve upon my son Ved Prakash exclusively and absolutely.

That my movable assets like furniture, all household items etc. would devolve on my son Shri Davinder Sakhuja.

Besides the properties herein before mentioned I bequeath all movable and immovable properties which I may be owning and possessing at the time of my death to my son Davinder Sakhuja exclusively and absolutely.

Wills and memorandum to the wills executed by me prior to this WILL may be treated as cancelled.

I appoint my son Shri Davinder Sakhuja as the executor of my will.

I have made this will of my own free accord without any pressure from any one after fully understanding the purport and consequences there of. This will is to have effect upon my death. No one would be entitled to object to this will. If

anyone objects, the objections would not be tenable but the same would be the source of trouble to my soul as well.

I have made and signed this will on 24th April 2003 at New Delhi in the presence of witnesses mentioned hereunder, who have also signed in my presence.

Sd/-
TESTATOR

This will has been signed by Shri. Harbhagwan Das in our presence after fully understanding the same and we have also signed this will as witness in his presence and in the presence of each other.” *(Emphasis Supplied)*

25. Vide impugned judgment dated September 28, 2010 the learned Single Judge has held that the will dated April 24, 2003 Ex.DW-1/1 is the last legal and valid testament of the deceased. In so holding, the learned Single Judge has held that:- (i) the evidence of Sanjay Sachdeva DW-2, that the deceased had executed the will Ex.DW-1/1 in his presence and that he had attested the will Ex.DW-1/1 is trustworthy; (ii) there is nothing on record to indicate that the deceased was not in a sound state of mind at the time of the execution of the will Ex.DW-1/1; (iii) the execution of the will Ex.DW-1/1 is not surrounded by any suspicious circumstances; and (iv) there is nothing suspicious with respect to the fact that the bequest made by the deceased in favor of Ved Prakash was worthless for it was impermissible to raise construction over the third floor of the property at the time of the execution of the will for the reason the relations between the deceased and Ved Prakash were strained, which is clearly discernible from the fact that the deceased and Ved Prakash were embroiled in litigation against each other.

26. In view of aforesaid finding returned by him, the learned Single Judge has dismissed Suit No.1710/2003 filed by Ved Prakash; decreed Suit No.2261/2007 filed by the deceased in respect of possession of the first floor of the suit property but has rejected the claim for damages/mesne profits for lack of evidence and has granted the probate of the will Ex.DW-1/1.

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

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

29. The rules governing the propounding of a will are two. First, the *onus probandi* lies in every case upon the party propounding the will and he must satisfy the conscience of the Court that the instrument so propounded is the last will of the testator. Second, if a party actively participates in the execution of a will under which he takes a benefit, it is

a circumstance to excite the suspicion of the Court and calls upon the court to be vigilant and zealous in examining the evidence on record.

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

31. The onus is discharged by the propounder adducing prima facie evidence proving the competence of the testator and execution of the will in the manner contemplated by the law. The contestant opposing the will may bring material on record meeting such prima facie in which event the onus would shift back on the propounder to satisfy the Court affirmatively that the testator did know well the contents of the will and in sound disposing capacity executed the same.

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

(4) he put the signature to the document of his own free will. The onus of the propounder can be said to be discharged on proof of the above essential facts.

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

34. Cases in which the execution of the will is surrounded by suspicious circumstances stands on different footing. In such cases, the initial onus upon the propounder of the will rests very heavy; and unless satisfactorily discharged, the Court would be reluctant to treat the document as the last will of the testator. Where the propounder takes a prominent part in the execution of the will conferring benefit upon him, that is a suspicious circumstance attending the execution of the will; the propounder is required to remove the doubt by clear and satisfactory evidence. In other words the propounder must satisfy the conscience of the Court that the document is the last will and testament of the testator.

35. It is in connection with wills, the execution of which is surrounded by suspicious circumstances that the test of satisfaction of judicial conscience has been evolved. The test emphasizes that in determining the question as to whether an instrument produced in the court is the last will of the testator, the court is called upon to decide the solemn question and by reason of suspicious circumstances the court has to be satisfied fully that the will has been validly executed by the testator.

36. When the will is stated to be shrouded in suspicion, its proof ceases to be a simple lis between the litigating parties. An adversarial proceeding in such cases becomes a matter of Court's conscience and propounder of the will has to remove all suspicious circumstances to satisfy that will was duly executed by the testator for which cogent and convincing explanation of suspicious circumstances shrouding the making of the will must be offered. (See the decision of the Supreme Court reported as (1977) 1 SCC 369) Jaswant Kaur v Amrit Kaur.)

37. In the decision reported as (2009) 3 SCC 687 Bharpur Singh & Ors v Shamsher Singh the Supreme Court held that the following circumstances shroud the execution of a will with suspicion:-

“Suspicious circumstances like the following may be found to be surrounded in the execution of the Will:

- i. The signature of the testator may be very shaky and doubtful or not appear to be his usual signature.
- ii. The condition of the testator's mind may be very feeble and debilitated at the relevant time.
- iii. The disposition may be unnatural, improbable or unfair in the light of relevant circumstances like exclusion of or absence of adequate provisions for natural heirs without any reason.
- iv. The dispositions may not appear to be the result of the testator's free will and mind.
- v. The propounder takes a very prominent part in the execution of the Will.
- vi. The testator used to sign blank papers.
- vii. The Will did not see the light of the day for long.

viii. Incorrect recital of essential facts.”
(*Emphasis Supplied*)

38. Keeping the aforesaid legal position in mind, we proceed to test the correctness of the conclusion arrived by the learned Single Judge that the will dated April 24, 2003, Ex.DW-1/1, is the last legal and valid testament of the deceased.

39. Ved Prakash deposed that the deceased had handed over to him the blank papers Ex.PW-1/8 after signing the same to him. Davinder Sakhuja and Virender Kumar have admitted in their respective testimonies that the signatures contained in the papers (blank) Ex.PW-1/8 are those of the deceased. It could thus logically be inferred that the deceased had the habit of signing blank papers. In this view of the matter, the possibility that the signatures of the deceased were obtained on blank papers and subsequently the will Ex.DW-1/1 was typed on said papers cannot be ruled out. At this juncture, it would again be useful to note that it was held by the Supreme Court in Bharpur Singh's (case) that the habit of the testatrix signing blank papers is a circumstance which shrouds the will with suspicion.

40. Furthermore, the eyesight of the deceased was very weak at the time of the execution of the will, as evident from the deposition of Virender Kumar that despite the fact that the deceased used to wear thick glasses he used to read by using a magnifying glass. In view thereof, the possibility that the deceased appended his signatures on the will Ex.DW-1/1 without knowing its contents cannot be ruled out.

41. Such being the position, we have to scrutinize the evidence led for proof of the will Ex.DW-1/1 and circumstances appearing on the record

regarding the execution of the will Ex.DW-1/1 with extreme caution and circumspection.

42. The deceased was aged 90 years at the time of the execution of the will Ex.DW-1/1, as recorded in the will Ex.DW-1/1. In view of the age of the deceased at the time of the execution of the will it can reasonable be assumed that the deceased was in a frail health at that time. The will was executed on 24.04.2003. The deceased expired on 20.06.2003. The short interval of about 2 months between the execution of the will and the death of the deceased also points towards the frail health of the deceased at the time of the execution of the will.

43. It is further emerging on the record that the deceased was fairly immobile at the time of the execution of the will. Sanjay Sachdeva DW-2, an attesting witness to the will has deposed that the back of the deceased was bent and that he used to walk with the help of a stick.

44. As already noted herein above, the will is a computer typed document and consists of 2 sheets. A plan of third floor (terrace) of the suit property is annexed with the will. There is no evidence as to when the petitioner got the will typed from Swaran Singh as deposed to by DW-2. Which draughtsman he contacted to prepare the site plan of the terrace and when did the draughtsman visit the house to draw the site plan sketch? No answers are forthcoming. Swaran Singh has not been examined as a witness. These unanswered questions raise a further doubt to the genuineness of the will.

45. We now look to the recitals of the will.

46. The will records that Ved Prakash shall be entitled to the alternative plot, if any, allotted to him in lieu of acquisition of his plot. It

has come on record that the claim made by the deceased for allotment of an alternative plot in lieu of acquisition of his plot was rejected by the government on 03.10.2002, much before when the will was executed on 24.04.2003. When the claim for allotment of alternative plot stood rejected on 03.10.2002, why would the deceased make a bequest of the alternative plot on 24.04.2003? The answer probably is that the deceased never consciously made the will and somebody who did not know the correct facts, and on the belief that the claim for alternative plot was pending, either got the will typed and obtained the signatures of the deceased thereon or used blank signed papers. We highlight that in Bharpur Singh's case (supra), an incorrect recital is also indicative of a suspicious will.

47. The learned Single Judge has discussed a possible reason for an unequal bequest in favour of Ved Prakash, who actually when the will was executed got virtually nothing inasmuch as under the building bye-laws then in force he could not construct anything on the terrace, and even as of today cannot construct the third floor unless the entire building is re-developed.

48. The matter of relations between the deceased and Ved Prakash is not as simple as it appears to be. The relations between the deceased and Ved Prakash were very good till the year 2001 evidenced by the fact that the deceased had executed power of attorneys Ex.PW-1/4 and Ex.PW-1/6 dated April 08, 1998 and July 20, 2001 in favor of the deceased; written letter Ex.PW-1/5 dated June 07, 1998 to Ved Prakash from USA and handed over blank papers signed by him to Ved Prakash. The relations between them appear to have turned sour in the year 2002 evidenced from the fact that the deceased instituted a suit for possession of the first floor

of the suit property. But here is the catch. Ved Prakash has explained that this happened when his father returned from the United States of America after visiting Davinder. But we have evidence on record that the death wish Ex.PW-1/9 was handed over by the deceased to Ved Prakash in the envelope Ex.DW-1/P-1. A person hands over a death wish to a near and dear one with whom relations are cordial. Thus, nothing much turns on the fact that the deceased had sued Ved Prakash for ejectment. The death wish brings out a fairly deep rancour of the deceased with the family members of Virender Kumar and in particular the children of Virender who were debarred as per the death wish to even attend the funeral of the deceased. The attesting witness to the will Sanjay Sachdeva being the son of the sister of Virender assumes importance in this context.

49. In view of as many as 5 suspicious circumstances surrounding the execution of the will Ex.DW-1/1 viz. (i) the deceased had the habit of signing blank papers; (ii) the eyesight of the deceased was very weak at the time of the execution of the will Ex.DW-1/1; (iii) absence of evidence regarding the preparation of the will Ex.DW-1/1; (iv) recording of incorrect recitals in the will Ex.DW-1/1; and (v) the attesting witness to the will Ex.DW-1/1 is related to the greatest beneficiary under the will, we feel it proper to hold that the will dated April 24, 2003 Ex.DW-1/1 is not the last legal and valid testament of the deceased.

50. It may be true that the will is an apparently registered document, but we find that no witness has been summoned from the Sub-Registrar's office to prove the will being validly registered. That apart, a will being registered merely adds strength to a will and by itself does not make the evidence conclusive of the will being executed.

51. We conclude by setting aside the impugned judgment and decree dated September 28, 2010 and as a consequence dismiss Test.Cas.No.15/2007 as also CS(OS) No.2261/2007 and Cross-Objection No.8011/2011. We pass a preliminary decree in CS(OS) No.1710/2003 declaring Ved Prakash, Om Prakash, Varinder Kumar and Davinder Sakhuja having 25% share each in property bearing Municipal No.E-5, Lajpat Nagar-III, New Delhi and as a consequence restore CS(OS) No.1710/2003 for further proceedings towards a final decree.

52. Ved Prakash would be bound with the concession recorded in the order dated October 10, 2012 and thus we direct money deposited by Ved Prakash in the appeal be paid over to Varinder Kumar.

53. Parties shall bear their own costs all throughout.

(PRADEEP NANDRAJOG)
JUDGE

(MANMOHAN SINGH)
JUDGE

OCTOBER 18, 2012
dk/skb