

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

% *Judgment Reserved on : January 20, 2014*
Judgment Pronounced on : March 19, 2014

+ **RFA (OS) 12/2011**

COMMODORE T S KHURANA & ANR. Appellants
Represented by: Mr.Vijay K.Gupta, Advocate with
Mr.Mehul Gupta, Advocate

versus

VICE ADMIRAL I S KHURANA (RETD.)
& ORS. Respondents
Represented by: Mr.Manish Sharma, Advocate with
Ms.Shivanshi Gupta, Advocate for
R-1
Ms.Kanchan Kaur Dhodi,
Advocate for R-2
Mr.K.P.Mavi, Advocate for R-3

CORAM:
HON'BLE MR. JUSTICE PRADEEP NANDRAJOG
HON'BLE MR.JUSTICE JAYANT NATH

PRADEEP NANDRAJOG, J.

1. The dispute in the present appeal is between the children of Late Dr.Pooran Singh (hereinafter referred to as the 'Deceased'). The genealogy tree of the family of Late Dr.Pooran Singh is as under:-

Dr.Pooran Singh
I (Jaswant Kaur) wife
I

I I I I I
T.S. Khurana Jasbir Kaur Inderjit Singh Manjit Singh Manmohan Singh
(Son) (Dauther) (Son) (Son) (Son)
Plaintiff No.1 Plaintiff No.2 Def No.1 Def No.2 Def No.3

2. In the year 1993 Commodore T.S.Khurana (Retd) and Dr.Jasbir Kaur Khera instituted a suit seeking partition of property bearing Municipal No.C-511, Defence Colony, New Delhi (hereinafter referred to as the 'Suit Property') and division of the movable assets of the deceased.

3. Commodore T.S.Khurana and Dr.Jasbir Kaur Khera were the plaintiffs. Their brothers Inderjit Singh, Manjit Singh and Manmohan Singh were impleaded as defendants Nos.1, 2 and 3 respectively. In our decision we shall be referring to the parties by their nomenclature in the suit.

4. It was pleaded in the plaint that the deceased was residing in an area which is now in Pakistan and owned ancestral properties there. On the partition of the country in the year 1947 he migrated to India. In lieu of the ancestral properties left behind by him in Pakistan the deceased was allotted a plot of land ad-measuring 350 square yards bearing Municipal No.C-511, Defence Colony, New Delhi on which he constructed a building comprising a ground floor, a first floor, a second floor and a terrace which construction was supervised by plaintiff No.1 and his wife who also contributed towards the construction of the building. The mother of the parties expired on February 15, 1985. After the death of his wife the deceased was a shattered man and completely lost his bearings. The plaintiff No.1 was his favourite son and that he disliked defendant No.3 because of his rebellious ways and violent nature. This caused a strain between the plaintiff No.1 and defendant No.3. On one occasion the defendant No.3 had even slapped the wife of the plaintiff No.1. In the year 1987 the plaintiff No.1 retired from the Indian Navy and when he expressed an intention to stay with the deceased he was welcomed to reside in the suit property. But, the wife of

the defendant No.3 made life miserable for the plaintiff No.1 forcing him to move out of the suit property. On the other hand the defendants No.1 to 3 forced the deceased to let them reside in the suit property. During the last days of his life the deceased was suffering from senile dementia and ultimately expired on June 28, 1992. During the last days of his life the deceased was a bundle of nerves; totally incoherent and confused and dependent on others for his daily needs. A letter dated November 12, 1991 written by the defendant No.1 to the plaintiff No.1 was a testament of the deteriorating health of the deceased. The deceased was admitted in a hospital on various occasions for the period from July 21, 1991 till his death on June 28, 1992. The defendants Nos.1 to 3 took advantage of the ill-health of the deceased and made him write on dotted lines and created Wills dated February 12, 1991, January 04, 1992 and January 14, 1992 in their favour. Had the deceased executed a Will out of his own free will he would have definitely told the plaintiff No.1 of the same since he was his favourite son. The fact of the matter was that the deceased had died intestate and had not executed any Will out of his own free will during his lifetime. Being class-I heirs of the deceased, the plaintiffs and other children of the deceased i.e. the defendants Nos.1 to 3 became entitled to 1/5th (20%) share each in the suit property and movables owned by the deceased. So pleading, the plaintiffs prayed that the suit property be partitioned by metes and bounds as also the movable estate of the deceased.

5. In their written statements, the defendants Nos.1 to 3 pleaded that the properties left behind by him in Pakistan were the self-acquired properties of the deceased and not ancestral. They pleaded that the Will dated January 14, 1992 was the last legal and valid testament of the

deceased whereunder he had bequeathed the suit property in favour of the defendants Nos.1 to 3. The Will dated January 14, 1992 was executed by the deceased out of his own free will and in a state of sound disposing mind. Additionally, the defendant No.2 pleaded that he had contributed a sum of ₹80,000/- towards the construction of the suit property and that relations between the plaintiff No.1 and deceased were strained during the last years of life of the deceased.

6. In the replication filed, the plaintiffs pleaded that Will Ex.T-D2/1 dated January 14, 1992, was not executed by the deceased out of his own free will and accord. They pleaded that the deceased was not enjoying good health and was not in a state of sound disposing mind on the date of the execution of the Will or any other Will since he was suffering from senile dementia. Taking advantage of the ill-health of the deceased and his weak mental condition the defendants Nos.1 to 3 made the deceased to sign the Will Ex.T-D2/1, under which they were the major beneficiaries. In essence, it was alleged by the plaintiffs that Will Ex.T-D2/1 and/or any other Will alleged to have been executed by the deceased are contrived documents.

7. Thereafter, the plaintiffs amended the plaint. The amendment made by the plaintiffs was that Inderjit Singh Khurana, defendant No.1 had admitted that it is the Will dated January 04, 1992 which is the last legal valid testament executed by the deceased.

8. In the written statement filed to the amended plaint, the defendant No.2 pleaded that Will dated January 04, 1992 was not executed by the deceased out of his own free will and accord. That the plaintiff No.1 and

defendant No.1 had coerced and pressurized the deceased to sign on the Will dated January 04, 1992.

9. The defendants Nos.1 and 3 chose not to file any written statement(s) to the amended plaint.

10. On the pleadings of the parties following issues were settled by the learned Single Judge:-

“i. Whether property No. C-511, Defence Colony, New Delhi, was the ancestral property, as alleged by the plaintiff? (OPP)

ii. Whether the Will dated 14.1.92 was validly executed last Will by late Dr.Pooran Singh as alleged? (OPD- 2 & 3)

iii. Whether the Will dated 4.1.92 was the last Will of late Sh. Pooran Singh, as alleged by defendant No.1? (OPD-1)

iv. Whether the plaintiffs are entitled to a decree of partition and rendition of accounts mesne profits, as prayed? (OPP)

v. Relief.”

11. On behalf of the plaintiffs, Commodore T.S.Khurana, plaintiff No.1, Balbir Singh Ahuja PW-2, Dr.B.G.Kachru PW-3, Suresh Ram PW-4, Jaswant Singh PW-5 and Inderpal Singh PW-6 were examined as witnesses.

12. In his examination-in-chief Commodore T.S.Khurana PW-1, plaintiff No.1 reiterated the contents of the plaint filed by him.

13. On being cross-examined, Commodore T.S.Khurana PW-1, stated as under:-

“I received letter dated 24.2.1992 from my father and the contents of the same are correct. The letter is marked as Exhibit P-2.

It is not correct that Dr.Pooran Singh was not suffering from Senile Dementia on 24.2.1992. He was under treatment for this disease. It is correct that I have not produced or filed any document relating to medical treatment of my father for the disease Senile Dementia. I used to be in Bombay and my brothers and sisters used to tell me about his disease and treatment regularly.

....

Total of nine Wills have been filed by the parties in the case. I have gone through all the Wills. It is correct that in all the Wills defendant no. 3 has been given ground floor of the property. I am not aware if my father transferred any telephone in favour of defendant no.3 during his lifetime. I do not agree that suit property was the self acquired property of Dr.Pooran Singh. it is wrong to suggest that Dr.Pooran Singh executed Will dated 14.1.1992 while in sound disposing mind although it is in his own handwriting.”

14. Balbir Singh Ahuja PW-2, deposed that the deceased was the cousin of his mother. He used to visit the deceased regularly to pay him his respects and consult him regarding medical problems faced by him and his wife. During the end of 1991 and beginning of year 1992 the deceased was seriously ill and admitted in the hospital on numerous occasions. When he learnt that the deceased was not keeping good health he had gone to visit the deceased at his residence. The deceased was lying on a bed and one of his sons was present there. All of a sudden the deceased got up from the bed and tried to run away from the room. The son of the deceased caught hold of the deceased and he and the son of the deceased made the deceased to lie on the bed. The deceased was not in control of his faculties and mentally unstable at that time. He informed the plaintiff No.1 about the ill-health of the deceased. After sometime he learnt about the death of the deceased.

15. On being cross-examined, Balbir Singh Ahuja PW-2, stated as under:-

“It is incorrect to suggest that Dr.Pooran Singh had any grouse against me or for that reason he ran out of room when I visited him. I did not try to know the reason of the illness of Dr.Pooran Singh from anybody. In December, 1990 Dr.Pooran Singh was alright and he was a very intelligent doctor. In January, 1992 he was frail and in bed; suddenly he got up and started running out and I and his son got hold of him and put him back in bed. I have said that Dr.Pooran Singh was out of control of his faculties on the basis of my general observation as he got up from the bed and tried to run away from the room when he was in a very feeble physical condition. I have stated that he was not mentally stable on the basis of common sense. The word “faculties” stated by in para 3 of my affidavit I mean to say that abnormal behavior which I saw of Dr.Pooran Singh when he was very sick of getting up from the bed and running out from the room.”

16. Dr.B.G.Kachru PW-3, deposed that he is a practicing Psychiatrist. The deceased was his patient. The deceased was referred to him by his colleague Dr.Jasbir Kaur Khara, the daughter of the deceased. The deceased was mostly accompanied by his daughter Dr.Jasbir Kaur when he used to visit his clinic. It would be relevant to note the following portion of the examination-in-chief of the witness:-

“I had examined Dr.Pooran Singh for the first time in December 1991. He suffered from Senile Dementia. I would term his Non Compos Mentis. He had lost the powers & faculties of regulating his actions and conduct. He had become incapable of looking after himself & managing his own affairs – his memory was failing him – Power of self control was lost – power of reasoning stood interfered with, his judgment had become weak and faulty. He had not sufficient mental capacity to understand the nature & consequences of his acts. He was impulsive & forgetful. He appeared to be under acute mental

strain & stress for which he was prescribed appropriate treatment.”

17. On being cross-examined, Dr.B.G.Kachru PW-3, stated as under:-

“I did not know Dr.Pooran Singh prior to December, 1991. In December, 1991 I examined Dr.Pooran Singh for the first time and second time in middle of January, 1992 and so on till April, 1992. I examined him for half an hour on each occasion. I have said he was impulsive because he used to get away from the clinic. He was forgetful because he did not remember what he had in the breakfast and also he used to forget the names of his children. I attended number of cases of Dementia Senile. There is no instrument by which Dementia is found out. It is by examination only. Senile Dementia was diagnosed clinically by me about Dr.Pooran Singh. Senile Dementia and Alzheimer disease have similar symptoms. I enquired from his daughter about his treatment which were going on which were B. Complex and some tonics. She told me the illness of Dr.Pooran Singh as physically weak. Senile Dementia accrues gradually. I cannot say since how long he was suffering from Senile Dementia when he came to me. There is no specific test for ascertaining the degree of Dementia of any patient. I cannot say for how long Dr.Pooran Singh had been suffering nor I can make any guess. Dr.Pooran Singh never came to me alone and mostly accompanied Dr.Khera.

Rebuttal Evidence

A person suffering from Dementia can write coherently if asked to write on dotted lines or given a draft to copy but it depends upon the degree of Dementia.”

18. Suresh Ram PW-4, a LDC with L&DO produced the record relating to the suit property evidencing that perpetual lease-hold rights were conferred by L&DO in the name of the deceased.

19. Jaswant Singh PW-5, a Medical Record Technician with Ram Manohar Hospital produced the Original Admission Register of the hospital for the period from June 12, 1992 to June 29, 1992 and Original

Death Register of the hospital for the year 1992. The entry Ex.PW-5/1 made in the Admission Register records that the deceased was admitted in the hospital on June 18, 1992. The entry Ex.PW-5/2 made in the Death Register records that the deceased died in the hospital on June 28, 1992 and that cause of his death was '*Senile Dementia with Respiration*'.

20. Inderpal Singh PW-6, a LDC with L&DO deposed that a perusal of the record of L&DO relating to the suit property shows that the suit property was allotted to the deceased. The record contains an affidavit dated April 22, 1965 of Jaswant Kaur, the wife of the deceased, wherein it has been stated that Jaswant Kaur has been associated in the purchase of the suit property and that she would not claim any interest, share or title in the suit property.

21. In support of his case, Inderjeet Singh Khurana, defendant No.1, examined himself as DW-1.

22. Inderjeet Singh Khurana DW-1, defendant No.1, deposed that he is in possession of the first floor of the suit property. During his lifetime, the deceased had executed Will dated January 04, 1992 Ex.DW-1/1, which Will was in his possession. He deposed that he was also having a letter dated January 14, 1992, Ex.DW-1/2, written by the deceased to the Chief Engineer, DESU. During his lifetime, the deceased had executed three more Wills dated September 12, 1991 Ex.DW-1/3, June 10, 1991 Ex.DW-1/4 and September 2, 1988 Ex.DW-1/5. The deceased was mentally fit and agile at all times.

23. On being cross-examined, defendant No.1 stated as under:-

"It is true Ms.Lata Krishnamurthy, an Advocate who is the attesting witness of alleged Will dated 4.1.1992 had been

appearing as my Advocate in my case and was known to me. It is true that Dr.B.M.Singh Lamba, the other attesting witness on this Will is related to me. He is son of my wife's sister. It is true that there are nine Wills purported to have been executed by my father but I have filed four Wills as mentioned in my affidavit which only I was aware of. May be these nine Wills are in a sequence like one Will executed in 1982, three in 1988 and next three in 1991 and two in 1992. May be five Wills are handwritten and four are typed one. I am aware that a will to be a valid in law must bear attestation by two witnesses. It is true that I have not filed any list of witnesses and I do not propose to examine any other witness besides myself in this case. it is true that will dated 10.6.1991 filed by me in this case does not bear signature of any attesting witness on it.

Quest: You do not propose to examine the two attesting witnesses of the will dated 4.1.1992?

Ans: Not on my own but if the plaintiff wishes so they can be produced.

Quest: Is it a fact that defendants had been procuring writings from Dr.Pooran Singh not bearing attestation of any witness like the will dated 10.6.1991 and later on got signed from persons of their choice terming them as attesting witness?

Ans: I cannot speak of my father having given wills to his other children in what form. As far as I am concerned, he reposed confidence in me, me being the eldest son, and gave me those four wills which I have produced and if these were not attested, were not attested and I have nothing to say or add, but I did not add anything in the will.

I do not remember the dates when first three out of the four wills were given to me by my father but it were given in Delhi and as far the last fourth will is concerned which is dated 4.1.1992, my father had asked my describing his requirement which are mentioned in this will, and asked me to get it executed properly with the assistance of a Lawyer and a Doctor. This will was then prepared in the office of Advocate Sh.Ram Jeth Malani at House No.11 Harish Chandra Mathur Lane, where Sh.Ram Jeth Malani was residing as M.P. and

Ms.Lata Krishnamurthy was his associate Advocate and the moment this will was executed, it was delivered to me.

I cannot speak any reason or logic as to how and why in a Will dated 14.1.1992 plaintiff Sh. T.S.Khurana was excluded from any portion in the property C-511 Defence Colony New Delhi on the ground that he owned a house in Delhi but then in the Will ten days before dated 4.1.1992 he was bequeathed second floor in this house property C-511, Defence Colony, Delhi. I cannot speak for a reason or logic that plaintiff No.2, Dr.Mrs.Jasbir Kaur Khera was assigned a portion in the property C-511, Defence Colony, Delhi in the Will dated 12.09.1991. I cannot say any reason as to why my father executed as many Wills as are being pleaded in this case including five Wills executed between a short period of seven months i.e. 10.6.1991 till 4.1.1992?

Ques: Why do the Wills demonstrate a ding dong battle between you and defendant No.2 i.e. Col.Khurana i.e. if vide a particular Will you got the first floor then in the next Will Col.Khurana got the first floor and vice versa?

Ans. There was no ding-dong battle which is a surmise. I am not aware if in any of the Will defendant No.2 Col.Khurana has been given the first floor in the house property C-511, Defence Colony, Delhi.

I am claiming right in the first floor in the house property C-511, Defence Colony, Delhi on the basis of the Will dated 4.1.1992 even as well Will dated 14.1.1992.

Quest: When you did everything to help your father get prepared a Will, why do you want to take steps to get Will dated 4.1.1992 proved especially when the onus is upon you?

Ans: The will was signed by My father, a Doctor and two other witnesses and to the best of my knowledge that should have been adequate. He selected me to be the Karta of the will being eldest son and around in Delhi at that time.

Quest: What is the accommodation in 189, Golf Links, New Delhi?

Ans: Golf Link property has since been demolished.

Quest: Yesterday you said it is under construction. What have you to say?

Ans: Yes. It is under construction almost for the last four-five years.

Quest: Who is the owner of 189 Golf Links property and since when?

Ans: The owners are my wife Mrs.Govindera Khurana, my daughter Ms.Raveena Khurana, my son Mr.Amrinder Singh and the fourth share is the HUF share. They are the owners. I think, since 1991, most probably.

Quest: In 1992 it is fact that you had a noise in Noida and a bunglaw in Faridabad. What have you to say?

Ans: Yes.

Q. I put it to you that all along in the written statement you have stated and referred to the Will dated 14.1.1992 as the last valid Will. What have you to say?

Ans. It is true."

24. To prove the due execution of the Will Ex.T-D2/1 dated January 14, 1992 defendants Nos.2 and 3 examined defendant No.2 as DW-2.

25. In his examination in chief, Manjeet Singh Khurana DW-2, defendant No.2, reiterated the contents of the written statement filed by him. Additionally, he deposed that the deceased had invited him and his family to reside in the first floor of the suit property. The letter dated July 20, 1988 written by the deceased to him is a testament to said effect. Pursuant to the aforesaid invitation, he and his family started residing in the first floor of the suit property. This caused resentment in the family due to which reason the deceased suggested that he would raise construction in the second floor of the suit property and he i.e. defendant No.2 should move there. Thereafter the deceased raised construction over the second floor of the suit property. He contributed a sum of ₹80,000/-

for raising construction over second floor of the suit property. On January 14, 1992 the deceased had written letters to the civic authorities for providing water and electricity connections in the second floor of the suit property. Will Ex.DW-1/1 dated January 04, 1992 is a contrived document. On January 14, 1992 the deceased informed him that he had bequeathed the second floor of the suit property to him. Will Ex.T-D2/1 dated January 14, 1992 was executed by the deceased out of his own free will and accord. The deceased was in state of sound disposing mind at the time of execution of Will Ex.T-D2/1 dated January 14, 1992. Being relevant, we note the following portion of the examination in chief of the defendant No.2:-

“9. WILL DATED 14.1.1992 was found by me alongwith his pension file, income tax returns and pass books pertaining to his PPF/SAVINGS BANK ACCOUNT AFTER his demise on 28.6.1992 in late father’s cupboard. I took possession and filed all the above original documents in Delhi High Court (on record).

*20. That the contents of the letter dated 12/30th November, 1991 (Ex.P-3) are being misrepresented, distorted to mislead the Hon’ble Court. These contents were due to emotional outbursts arising out of my serious illness when there was initial resentment from all my brothers and sisters which were ultimately resolved amicably as such rumblings/differences do crop up in my family.....” **(Emphasis Supplied)***

26. On being cross-examined, defendant No.2 stated as under:-

“Quest: (Please see letter dated 12/30th November 1991 Ex P-3 addressed to plaintiff no.1). Is it in your handwriting?

Ans: Yes.

Quest: It was a very well thought and deliberate letter correctly described the scenario and clamor for property at the relevant time i.e. after you landed up at C-511 after your retirement. What have you to say?

Ans: I shared my pentup feelings ever since I landed up in my father's house. My aim of writing this letter was that plaintiff no.1 as an elder brother mediate over certain disputes among the brothers and sisters specially as envisaged in Para-4 and post script of my letter. But he did not had the decency to stay back and sort out the matter instead he vanished into thin air only to save this letter as and expedient to support his case because he anticipated that he would be dispossessed of my father's property for the reasons which are well known to him.

Quest: That the contents of your letter were correct and you never at any time denied the same in your pleadings, replies or affidavits. What have you to say?

Ans: I stand by what I wrote at Para-2 of this letter which depicts certain affairs at that point of time. But all these disputes and issues were resolved by my father amicably in a judicious wise manner and by constructing second floor for me to over come his dilemma and alarm for his fear to settle me in this house as per his commitments made in his letter dated 20.7.1988. This letter has no bearing on the will dated 14.1.1992.

Quest: In your letter Ex P-3 you have suggested that every one should be entitled to 1/5th legitimate share. How did you arrive at this conclusion?

Ans: As I suggested so because all brothers and sisters sit together to appeal to father to give 1/5th share to everybody irrespective of rank and other consideration but plaintiff no.1 found it convenient not to meet father to discuss this over the table.

Quest: What did you mean by saying that defendants were not and will not be successful and that you knew how to play your cards henceforth?

Ans: I said that my brothers will not be successful because I was very confident that my father with his intellect would discriminate between the right and wrong and had full confidence in his ability and playing cards I meant that I will also pay back my brothers and sisters in the same coin for ill-treating me. The word "Playing Cards" is not associated with any will or any co-relations. I am not stupid or foolish to write

a letter to plaintiff no.1 to say that I will play card against plaintiff no.1 himself. It defies no logic.

It is correct that my father made nine Wills (vol. He reviewed/updated Wills from time to time necessitated by changes in family circumstances arising out of demise of our mother on 15.2.1985, on set of my illness in 1984-85 and my impending retirement from the Army as well as addition of a second floor to the existing suit premises in the year 1991-92. All nine Wills except the last Will dated 14.1.1992 are non-est and gone by the wisdom of my father for whatever cogent reasons which cannot be called into question). I have produced three Wills in original in the sealed cover dated 12.8.1988, 15.9.1991 and the last Will dated 14.1.1992.

Quest: How did you come in possession of the Will dated 14.1.1992?

Ans. On 16.1.1992 my father showed me the Will dated 14.1.1992 in original and asked me to make photocopies of the same and returned the original to him, which I did and he placed the Will in the cupboard of his bedroom on the ground floor, on the top shelf under the newspaper and indicated its location to me which I recovered later after his death.

Quest: Can you tell me why your father executed five wills in seven months between 10.6.1991 till 14.1.1992, three wills in 1988 and three wills in 1991 and two wills in 1992. What have you to say?

Ans: I cannot speak of his mind and it was prerogative of my father.

Quest: Please see handwritten wills dated 15.9.1991, 2.9.1988, 10.6.1991 and 12.9.1991 therein the handwriting is even spaced while in will dated 14.1.1992 the later portion is cramped up. What have you to say?

Ans: The cramping of two-three lines in the end of the will dated 14.1.1992 is a manifestation of my father's alertness to leave some margin for the two attesting witnesses to sign on the will, avoiding use of next page, I cannot say definitely, he has written in the margin space also. It is also a tendency on the

part of any writer to be liberal in the beginning and later he may squeeze a bit to complete the space in the same page.

It is correct that as per Will dated 12.9.1991, first floor of property no. C-511, Defence Colony, New Delhi was bequeathed to defendant no.1 and second floor to Smt.Jasbeer Kaur Khera plaintiff no.2. Vol. It is a freak Will whereby second floor was bequeathed to my sister i.e. plaintiff no.2. Being a freak will in her favour which shows that she had no reckoning in any of the eight Wills which by itself excites a suspicion whether this freak will could have been a father's own volition and free disposition and the fact that this Will was revoked within three days, buttresses the arguments that there must be some cogent reasons to drop her out.

The will dated 12.9.1991 has been duly signed by my father and I identify his signatures as correct. I deny that my father could yield to any pressure because he was a strong resolute person and not timid to be moved or swayed by any member of the family. He was inviolable a character.

Q. Please see will dated 4.1.1992, under this will second floor was given to Sh.T.S.Khurana plaintiff no.1. What have you to say?

*Ans. The righteousness of transaction of will dated 4.1.1992 is in serious doubt in the glaring in the face of its record by own disclosure of defendant no.1 during his cross-examination on 10.5.2007 by plaintiff no.1 and subsequently on 17 and 18.12.2007. This will dated 4.1.1992 is surrounded by suspicious circumstances, numerous in number which shall be argued by me at appropriate stage” **(Emphasis Supplied)***

27. In his examination in chief, Kanwaljit Singh Khurana DW-3, wife of defendant No.3, reiterated the contents of the written statement filed by her husband i.e. Manmohan Singh Khurana, defendant No.3. Additionally, she deposed that her husband was the favourite son of the deceased evidenced from the facts that the deceased had bequeathed major portion of the ground floor of the suit property to her husband in all

the Wills executed by him and got transferred the telephone installed at the suit property in the name of her husband.

28. Pertinently, the witness had also sought to tender the affidavit Ex.DW3/I of Late Arjan Singh, the brother of the deceased, in her affidavit by way of evidence, which was objected to by the plaintiffs for the affidavit of a dead man cannot be tendered in evidence.

29. On being cross-examined, Kanwaljit Singh Khurana DW-3, stated as under:-

“Q: I put it to you that defendant No.1 had a house in Delhi also in Noida and a bungalow in Faridabad as also defendant No.2 in Faridabad and defendant No.3 in Green Field. (objected to by Counsel for the defendant No.3 on the ground that individual properties of the parties are not subject matter).

A: It is correct that the defendants were having the properties mentioned above.

Q: I put it to you that under will dated 4.1.92 second floor was given to Sh.T.S.Khurana while under will dated 14.1.92 second floor was given to defendant No.2 Col.Khurana within a gap of 10 days?

A: It is true that both the wills are on record but I can't say why my father-in-law why he did like this.

30. Commander (Retd.) Satbir Singh Butalia DW-D-2/A, deposed that he retired from Indian Navy and had known the deceased since the year 1952. He had witnessed the execution of Will Ex.T-D2/1 dated January 14, 1992 by the deceased at his residence. Lt.Col.(Retd.) Sukhbir Singh was also present in the residence of the deceased at the time of the execution of Will Ex.T-D2/1 dated January 14, 1992 by the deceased. The deceased seemed to be in good health and sound mind at the time of the execution of Will Ex.T-D2/1 dated January 14, 1992. The deceased

had executed Will Ex.T-D2/1 dated January 14, 1992 out of his own free will.

31. On being cross-examined, Satbir Singh Butalia DW-D-2/A stated as under:-

“Question: I put it to you that Dr.Pooran Singh had executed two different Wills in ten days i.e. 4.1.1992 and 14.1.1992? How you assess the state of mind of such a person?”

Ans. He was in full control of his mind and very clear in his thinking. As I have already stated that I have no knowledge about the Will dated 4.1.1992. I have seen Will dated 4.1.1992 which is Exhibit D-2/Z. It does bear signatures of Dr.Pooran Singh at point A.

Will dated 14.1.1992 was executed at C-511, Defence Colony between 9.00 A.M. and 10.00 A.M. I did not go through the same and I signed after Dr.Pooran Singh signed the same. I remember the dates because of the letter sent by Local Commissioner and I pressed my mind thereafter.

I did not write this date anywhere. Dr.Pooran Singh, Col.Sukhdev Singh and myself were present on 14.1.1992. There was nobody else present at the time of signing of the Will. No medical practitioner was present.

Dr.Pooran Singh rang me and called me to sign his Will on 14.1.992. First it was signed by Dr.Pooran Singh then thereafter by both the witnesses. I do not remember who signed first between us.

Dr.Pooran Singh wrote the Will in his own hand and himself drafted it.”

32. Lt.Col.(Retd.) Sukhbir Singh DW-D-2/B, deposed that he retired from Indian Navy and had known the deceased for the last 20 years. He had witnessed the execution of Will Ex.T-D2/1 dated January 14, 1992 by the deceased at his residence. Commander (Retd.) S.S.Butalia was also present in the residence of the deceased at the time of the execution of

Will Ex.T-D2/1 dated January 14, 1992 by the deceased. The deceased was in sound mind and health at the time of the execution of Will Ex.T-D2/1 dated January 14, 1992. The deceased had executed Will Ex.T-D2/1 dated January 14, 1992 out of his own free will.

33. On being cross-examined, Sukhdev Singh DW-D-2/B stated as under:-

“I have seen Will dated 15.9.1991 which bears my signatures. The same was attested by me. My signatures appear at Point A. The Will is Exhibit D-2/2.

With changing circumstances things keep on changing. So different Wills were executed by Dr.Pooran Singh. Even before his death he was at my house and he was absolutely normal human being. I say on my general observation that Dr.Pooran Singh was of sound mind and health and he was not perplexed.

At the age of 90 he called me and walked to my house so he was normal. He walked without a stick and told me to drop him back and thereafter I dropped him back. He expired next day.

I do not know where the Will dated 14.1.1992 was written. I signed the same in the drawing room of Dr.Pooran Singh. I signed the same at 11.00 A.M./12 Noon. There was another witness Commander S.S.Butalia. Nobody had called me and I dropped at his place and he showed me the Will and took my opinion I said it was correct so he requested me to sign. I did go through the same. It is difficult to say that how I remember date 14.1.1992 but under my signatures I had put the date as 14.1.1992.

I do not recall any other incident on 14.1.1992. I think I must have signed it first of all. About others I do not know. I do not know who signed after me.

I have seen my affidavit Ex.DW2/B/X which is dated 3.2.2006 and it bears my signatures at points “A” and “B”. I have not appeared before any other Local Commissioner. I signed my affidavit but I do not recollect where and at which place I

signed the same. I do not recollect who had brought the affidavit to me for my signatures.

The affidavit dated 3.2.2006 was not got typed by me. I do not remember if I got it attested before the Oath Commissioner or who got it attested. I do not think if I had ever gone to Oath Commissioner to get it attested.

I do not know who made the draft of the affidavit I do not know if he had any properties in Pakistan.

It is quite possible that affidavit dated 3.2.2006 might have been brought by Shri Lt.Col.Manjit Singh Khurana to me and I signed the same.”

34. The relevant documentary evidence adduced by the parties is as follows:-

A Plaintiffs

(i) Will Ex.TP-1/1 dated February 04, 1988 stated to have been executed by the deceased. (Will Ex.TP-1/1 was admitted by all the three defendants).

(ii) Letter Ex.P-3 dated November 12/30, 1991 stated to have been written by the defendant No.2 to the plaintiff No.1. (The letter Ex.P-3 has been admitted by the defendant No.2). The letter Ex.P-3 dated November 12/30, 1991 reads as under:-

“My dear Lochi,

1. I have been wanting to have a chat with you, but somehow you have not made it convenient to meet me; may be on a/c of circumstances beyond your control. I, therefore, take the liberty to put across to you my pent-up feelings over unpleasant/unsavory happenings in our family ever since I landed up at C/511, after my retirement.

2. That there is no affection anymore, no true delicacy of feelings, no harmony or coherence of behavior. This house is

now always in confusion. It is not only a place of vice, but a place of chaos reigning all over – no decency or decorum – mistrust flowing in the same blood – no sanity – only property, property, property !!! It's all poverty/bankruptcy of mind.

3. I vividly recollect (during my tenure in DGI at Delhi) your positive contribution towards construction of C/511, negated by Mohini who would send contractors away – to be chased up by you. How funny is it now to hear people say that Mohini has done lot of hard work & put lot of money in constructing this house to claim the biggest chunk.. no one says though everyone knows that I spared my car to Perfection House people to fund the house – sold it at a loss – What an irony!!! Mohini was unemployed till 1993 & later got in Border Roads at a salary of just ₹300/- p.m.

4. I have always maintained & reiterate the same that all of us deserve legitimate 1/5th share in whatever manner; w/out favour, discrimination on grounds of rank/efforts/money since all of us have put in our bit in some way or the other besides being legitimate children!!

5. I really wish to get lost from here but there is no safe haven for me at FBD for obvious reasons – since 1984 riots (anti-Sikh). You probably got lost as you had an alternative arrangement. I can claim my legitimate right even if I get lost & so I am not afraid.

6. That Mohini/Kanwal have both ill-behaved with us in a most perverted manner without regret, remorse or compassion. You probably do not know the other side of the story since you have kept distanced from me for reasons best known to you.

7. Your worthy Admiral brother has, of late, been malicious, vicious & vindictive – most unscrupulous like behavior for a wrong stand taken by him to demolish certain structures of C/511 to my detriments – placing his own selfish interests before those of mine, exploiting Papaji old age/simplicity to cause undue influence my image/sincerity which I dare say, are beyond reproach. Poor Papaji seems to be under some fear/apprehensions from Mohini/Kanwal & our Admiral brother. I do not know WHY He succumbs – I was stabbed Thrice at the behest of my own kith & kin living in

Delhi – but they were Not & will NOT be successful. I know how to play my cards henceforth. This is our ancestral property & rightly said so by Papaji on the basis of which he called me here with a long affectionate letter & I have done no crime.

8. *I do hope that you'll kindly make it convenient to give me a few minutes during your next visit.*

With regards to dear Bhabiji & love to children from both of us.

Yours affly

BHOLI

PS I have suggested a proposal to Papaji recently to sort out this property tangle & to give everyone due share regardless of any extraneous considerations. So let us all sit down & thrash it out once for all. If someone declines to take part in mutual discussion, he may not do so at his own risk & advantage."
(Emphasis Supplied)

(iii) Letter Ex.P-2 dated February 24, 1992 written by the deceased to the plaintiff No.1 (Letter Ex.P-2 is admitted by the defendant No.2 and denied by defendants Nos.1 and 3). Being relevant, we note the following portion of the letter dated February 24, 1992:-

"Many thanks for the birthday letter you sent me....On the 21st I will be in the 89th year of life. I am very grateful to Almighty God who have blessed with me sons like you – so dear and sincere. May He grant you and all my dear grand children & great grand children a long happy & prosperous life. Believe me I love you all so much. Last two months I have been ill with one thing and then another thing and have recovered from the third thing. Do not worry I am alright now – only praying not to fall victim to any more.

*Are you coming to Delhi in near future...." **(Emphasis Supplied)***

B. Defendant No.1

(i) Will Ex.DW-1/4 dated June 10, 1991 stated to have been executed by the deceased. (Will Ex.DW-1/4 has been admitted by the defendants Nos.2 and 3 and denied by the plaintiffs).

(ii) Will Ex.DW-1/5 dated September 2, 1988 stated to have been executed by the deceased. (Will Ex.DW-1/5 has been admitted by the defendants Nos.2 and 3 and denied by the plaintiffs).

(iii) Will Ex.DW-1/3 dated September 12, 1991 stated to have been executed by the deceased. (Will Ex.DW-1/3 has denied by the defendants Nos.2 and 3).

(iv) Will Ex.DW-1/1 dated January 04, 1992 stated to have been executed by the deceased. (Will Ex.DW-1/1 has denied by the defendants Nos.2 and 3).

(v) Letter Ex.DW-1/2 dated January 14, 1992 stated to have been written by the deceased to Chief Engineer, DESU. (Letter Ex.DW-1/2 has been admitted by the defendants Nos.2 and 3 and denied by the plaintiffs). Be it noted here that the letter Ex.DW-1/2 dated January 14, 1992 records that the deceased has constructed second floor in the suit property for his son Manjit Singh Khurana i.e. defendant No.2 and that an electricity connection be sanctioned for the said newly constructed floor.

C. Defendant No.2

(i) Will Ex.TD-2/1 dated January 14, 1992 stated to have been executed by the deceased. (Will Ex.TD-2/1 has been admitted by the defendants Nos.1 and 3 and denied by the plaintiffs).

- (ii) Will Ex.TD-2/2 dated September 15, 1991 stated to have been executed by the deceased. (Will Ex.TD-2/2 has been admitted by the defendants Nos.1 and 3 and denied by the plaintiffs).
- (iii) Will Ex.DW-2/10 dated August 12, 1988 stated to have been executed by the deceased. (Will Ex.DW-2/10 has been denied by the plaintiffs).
- (iv) Death report Ex.D-2/9 of the deceased issued by Dr.R.K.Gupta, RML Hospital. (Death report Ex.D-2/9 has been admitted by the plaintiffs and defendant No.1). The death report Ex.D-2/9 records that the cause of death of deceased was senile dementia with aspiration and duration of illness of the deceased was 2 ½ months.
- v) Letter Ex.D-2/8 dated July 20, 1988 stated to have been written by the deceased to defendant No.2. (Letter Ex.D-2/8 has been admitted by the plaintiffs and denied by defendant No.1). Being relevant, we note following portion of the letter Ex.D-2/8 dated July 20, 1988:-

“My dear Lal Bholi,

Received your affectionate letter. I am highly pleased that you are resigning.....

You are most welcome to immediately occupy the First Floor & I have already told dear Jit about my decision that you will settle here with me in our Defence Colony house. I will be glad with you and your family company. I will love to see you settle here with me. I love you very dearly. You will independently during my life time and after I am gone. I assure of you of this. Keep this letter safe as guarantee for what I say. I will discuss with you all about this when we meet. Why are you removing your tenant from Faridabad. Why lose the rent when your father guarantees you an independent accommodation in your ancestral house....

Come here immediately along with dear Bhajan & Gunny (of course your Doggi – I forget this fellow's name). I am not doing you any favour if I say "come and occupy first floor". It is your right. Have no tension whatsoever....Put a sign board outside the house "Lt. Col. M.S. Khurana Retd.". this will gladden your Father & it will be a name for him that one of sons is Lt. Col....You may send this letter to dear Bhajan so that she accepts your resignation with great joy after reading this. She must keep this letter safe. Now I close with loving regards to you & wanting to know when you are reaching Delhi.

....

Yours V. affectionately

Pooran Singh" (Emphasis Supplied)

(vi) Letter Ex.TD-2/6 dated January 14, 1992 stated to have been written by the deceased to Chief Engineer, MCD. (Letter Ex.TD-2/6 has been admitted by the defendant No.1). Be it noted here that the letter Ex.TD-2/6 dated January 14, 1992 records that the deceased has constructed second floor in the suit property for his son Manjit Singh Khurana i.e. defendant No.2 and that a water connection be sanctioned for the said newly constructed floor.

(vii) Letter Ex.D-2/6 dated January 31, 1992 stated to have been written by the plaintiff No.1 to the defendant No.2. (Letter Ex.D-2/6 has been admitted by the plaintiffs). Being relevant, we note the following portion of the letter dated January 31, 1992:-

"My dear Bholi,

Thank you for your letter dated 23 Jan 92 received yesterday, alongwith a letter from Bulbul. We are all relieved to learn that Dear Papa ji is alright & well cared for, with all of you in Delhi.

It was indeed nice visiting you and meeting both of you in Delhi recently.

....”

(viii) Letter Ex.TD2/20 dated February 25, 1992 stated to have been written by the deceased to the House Tax Department, MCD. The letter Ex.T-D2/20 records that the deceased had constructed second floor in the suit property; House Tax Department should reassess the suit property for purposes of House Tax on the basis of said newly raised construction and that he i.e. the deceased would sent documents for said purpose through his son Manjit Singh Khurana defendant No.2.

D. Defendant No.3

(i) Will dated May 18, 1982 stated to have been executed by the deceased. (Will dated May 18, 1982 has not been exhibited and denied by the defendants Nos.1 and 2).

(ii) Medical prescriptions Ex.TD-3/1 to Ex.TD-3/16 of the deceased for the period from January 31, 1992 to May 15, 1992. (Prescriptions Ex.TD-3/1 to Ex.TD-3/16 have been admitted by the defendants Nos.1 and 2).

(iii) Letter Ex.TD-3/8 written by the deceased to MTNL. (Letter Ex.TD-3/8 has been admitted by the defendants Nos.1 and 2). Letter Ex.TD-3/8 records that the deceased is desirous to transfer the telephone installed in the suit property in the name of defendant No.3.

35. A perusal of the afore-noted documentary evidence adduced by the parties brings out that as many as nine Wills are stated to have been executed by the deceased, the salient features whereof are as follows:-

S. No.	Particulars of Wills	Nature of Wills	Details regarding attestation of Will	Details regarding registration of Will
1.	Will dated May 18, 1982	Typed on plain paper	Attested by three persons.	Unregistered
2.	Will dated February 04, 1988 Ex.TP-1/1	Typed on letter head of deceased.	Attested by two persons.	Unregistered
3.	Will dated August 12, 1988 Ex.DW-2/10	Typed on plain paper	Attested by two persons.	Unregistered
4.	Will dated September 2, 1988 Ex.DW-1/5	Handwritten on letter head of deceased.	Attested by two persons.	Unregistered
5.	Will dated June 10, 1991 Ex.DW-1/4	Handwritten on letter head of deceased.	Not attested by any person.	Unregistered
6.	Will dated September 12, 1991 Ex.DW-1/3	Handwritten of letter of deceased.	Attested by two persons.	Unregistered
7.	Will dated September	Handwritten on letter	Attested by two	Unregistered.

	15, 1991 Ex.TD-2/2	head of deceased.	persons.	
8.	Will dated January 04, 1992 Ex.DW- 1/1.	Typed on plain paper.	Attested by two persons.	Unregistered.
9.	Will dated January 14, 1992 Ex.TD-2/1	Handwritten on letter head of the deceased.	Attested by two persons.	Registered after the death of deceased.

36. The details of bequest(s) made under the afore-noted nine Wills stated to have been executed by the deceased are as follows:-

S. No.	Particulars of Wills	Bequest of suit property (immovable asset of deceased)	Details of movable assets mentioned in Wills	Bequest of movable assets
1.	Will dated May 18, 1982	Bequeathed to wife Jaswant Kaur. If wife pre-deceases the deceased the house shall be exclusively owned by defendant No.3.	Cash, fixed deposits certificates, provident fund and gratuity.	Bequeathed to wife Jaswant Kaur. If wife pre-deceases the deceased the cash assets shall be distributed equally amongst all five children

		After the death of wife of deceased the house shall be exclusively owned by defendant No.3.		of deceased. After the death of wife of deceased the cash assets shall be equally distributed to all five children of deceased.
2.	Will dated February 04, 1988 Ex.TP-1/1	(i) Ground floor, garage, servant quarter and personal effects lying in ground floor shall belong to defendant No.3 (ii) First floor shall belong to defendant No.1. Defendant No.1 shall also get ₹1 Lakh from central pool for completion of construction of 1st floor. (iii) Defendant	Unit Trust of India, National Saving Certificates, Fixed Deposit Receipts, provident fund, Pfizer shares and State Bank of India and Hapur savings accounts.	A central pool of money shall be created from the money received from cash assets of the deceased. A sum of ₹Ten Thousand from central pool will be spent towards education etc of daughter of maid-servant of deceased. After giving money to defendants Nos.2 and 3 from central pool, the

		No.2 shall have right to construct second floor of the suit property. He shall also get ₹3 Lakhs from central pool.		remaining money in the central pool shall be shared equally between the plaintiffs.
3.	Will dated August 12, 1988 Ex.DW-2/10	(i) Ground floor and garage shall belong to defendant No.3. (ii) First floor shall belong to defendant No.2. (iii) Second floor which has a servant quarter only shall belong to defendant No.1. Defendant No.1 shall get a sum of Rupees 2 Lakhs from central pool for raising construction on second floor. Servant quarter on the second	Unit Trust of India, FDRs, Saving accounts, post office, provident fund scheme, Pfizer shares and national savings certificates.	A central pool of money shall be created from the money received from cash assets of the deceased. A sum of Rupees .Ten Thousand from central pool will be spent towards education etc of daughter of maid-servant of deceased. A sum of ₹5Lakhs shall be given to plaintiff No.1. Remaining money in the

		floor shall also belong to defendant No.1.		central pool shall belong to plaintiff No.2.
4.	Will dated September 2, 1988 Ex.DW-1/5	(i) Ground floor and garage shall belong to defendant No.3 (ii) First floor shall belong to defendant No.1. (iii) Second floor which has a servant quarter only shall belong to defendant No.2. Defendant No.2 shall get a sum of Rupees 2 Lakhs from central pool for raising construction on second floor. Servant quarter on the second floor shall also belong to defendant No.2.	Unit Trust of India shares, National Saving Certificates, FDRs, saving accounts Post Office, Provident Fund Scheme accounts and Pfizer shares.	A central pool of money shall be created from the money received from cash assets of the deceased. After giving money to defendants No.2 from central pool, the remaining money in the central pool shall be shared between the plaintiff No.1 and plaintiff No.2 in the proportion of 80% and 20% respectively.

		(iv) Driveway of suit property shall be used by all of his sons who reside in the suit property.		
5.	Will dated June 10, 1991 Ex.DW-1/4	(i) Ground floor shall belong to defendant No.1. Defendant No.1 shall pay a sum of Rupees One and half lakhs to defendant No.3 i.e. amount spend by defendant No.3 towards renovation of ground floor. All personal effects lying on ground floor belong to defendant No.3 and shall be returned to him. (ii) First floor which is partially built shall belong to	FDRs, National Savings Certificates, Unit Trust of India shares, Saving account, Provident Fund Scheme, Post Office, State Bank of India and Pfizer shares.	A central pool of money shall be created from the money received from cash assets of the deceased. After giving money to defendants No.2 from central pool, the remaining money in the central pool shall be shared equally between the plaintiffs.

		defendant No.3. (iii) Second floor which has one room shall belong to defendant No.2. Defendant No.2 shall also get a sum of Rupees One Lakh from central pool.		
6.	Will dated September 12, 1991 Ex.DW-1/3	(i) Ground floor, garage and furniture lying in ground floor shall belong to defendant No.3. (ii) First floor shall belong to defendant No.1. (iii) Second floor shall belong to plaintiff No.2. (iv) Driveway of suit property shall be used by	FDRs, saving accounts, Unit Trust of India shares, State Bank of India Provident Fund Scheme, Post Office National Savings Scheme, Pfizer shares and national saving certificates.	Cash assets of the deceased shall be shared equally by the plaintiff No.1 and defendant No.2.

		all residents thereof.		
7.	Will dated September 15, 1991 Ex.TD-2/2	(i) Ground floor, garage and furniture lying on ground floor shall belong to defendant No.3. (ii) First floor shall belong to defendant No.1. Defendant No.1 shall contribute a sum o Rupees Two Lakhs to central pool. (iii) Second floor and servant quarter constructed therein shall belong to defendant No.2. Defendant No.2 shall contribute a sum of ₹2 Lakhs to central pool. (iv) Driveway	Unit Trust of India shares, FDRs, State Bank of India Provident Fund Scheme, Post Office Saving Scheme, Saving Accounts, Pfizer shares and Saving Accounts in Post Office.	A central pool of money shall be created from the money received from cash assets of the deceased. The money in central pool as also the contributions made by defendants Nos.1 and 2 in central pool shall be shared equally by the plaintiffs.

		can be used by all residents of the suit property. Note: Defendant No.3 shall not contribute any sum to central pool as he had supervised construction of suit property and spent lot of money in construction.		
8.	Will dated January 04, 1992 Ex.DW-1/1.	(i) Ground floor shall belong to defendant No.3. (ii) First floor shall belong to defendant No.1 upon payment of Rupees Five Lakhs. (iii) Second Floor shall belong to plaintiff No.1 upon payment	FDRs, National Saving Certificates, Unit Trust of India shares, State Bank of India Provident Fund Scheme, Post Office National Savings Scheme, Saving Bank Accounts and Pfizer shares.	Cash assets and Rupees Five Lakhs paid by defendants Nos.2 and 3 shall be shared equally by the plaintiffs.

		of Rupees Five Lakhs.		
9.	Will dated January 14, 1992 Ex.TD-2/1	(i) Ground floor, garage and personal effects lying on ground floor shall belong to defendant No.3. (ii) First floor shall be owned by defendant No.1. Defendant No.1 shall contribute a sum of ₹Three Lakhs towards Central Pool. (iii) Second floor and servant quarter constructed therein shall belong to defendant No.2. Defendant No.2 shall contribute a sum of ₹Three Lakhs towards Central Pool.	Unit Trust of India, FDRs, Post Office National Scheme, Post Office Saving Bank, Provident Scheme and Pfizer shares.	A central pool of money shall be created from the cash assets of the deceased. The money in central pool as also the contributions made by defendants Nos.1 and 2 in central pool shall be shared equally by the plaintiffs.

37. At the outset it needs to be highlighted that save and except the Will dated January 14, 1992 Ex.TD-2/1, no other Will contains any reasons for the bequests made in said Wills. The reason contained in the Will Ex.TD-2/1 dated January 14, 1992 for the bequest made under said Will is that the deceased is desirous that all his five children should settle in Delhi and since they own houses in Delhi the plaintiffs would not be bequeathed any portion of the suit property.

38. Vide impugned judgment and decree dated November 18, 2010 the Single Judge has dismissed the suit filed by the plaintiffs and held that Will Ex.TD-2/1 dated January 14, 1992 is the last legal valid testament of the deceased.

39. With respect to issue No. (i) it has been held by the learned Single Judge that:-

(i) Burden to prove that the suit property was ancestral in nature was upon the plaintiffs which burden has been failed to be discharged;

(ii) Plaintiffs have led no cogent evidence to establish that the status of the suit property was ancestral;

(iii) Merely because there is a passing reference to the suit property as an ancestral property in the letters Ex.D-2/8 and Ex.P-3 dated July 20, 1988 (written by the deceased to defendant No.2) and November 12/30 November, 1991 (written by the defendant No.2 to plaintiff No.1) respectively the suit property would not automatically become ancestral property, for in a suit for partition, the reference to the suit property as ancestral in some correspondences exchanged between the parties to the suit would not by itself be sufficient to effectively conclude that the status of the suit property is ancestral;

(iv) Best evidence to prove nature of the suit property was the lease-deed dated March 22, 1963 (an undisputed document) regarding allotment of the suit property by L&DO wherein the deceased has been shown as the recorded owner of the suit property. Had the allotment been made to the deceased in lieu of the ancestral properties left behind by him in Pakistan then said fact would have certainly found a mention in the lease-deed dated March 22, 1963 or the documents accompanying said lease-deed; and

(v) The inescapable conclusion which emerges from the lease-deed dated March 22, 1963 is that the suit property is the self-acquired property of the deceased.

40. With respect to issues Nos. (ii) and (iii) it has been held by the learned Single Judge that:-

(i) It is not necessary to examine the validity of Will Ex.DW-1/1 dated January 04, 1992 for it is neither admissible in evidence nor an admitted document inasmuch as attesting witnesses to said Will have not been examined by the defendant No.1 who produced said Will or by any other party to the suit;

(ii) The testimony of the attesting witnesses to the Will Ex.TD-2/1 dated January 14, 1992 viz. S.S.Butalia and Sukhbir Singh inspires confidence when seen in light of the fact that it is an undisputed fact that the Will Ex.TD-2/1 has been handwritten by the deceased and bears his signatures; the legal position being that holograph Wills i.e. handwritten Wills carry a greater presumption in favour of its genuineness, for the reason, the mind of testator in physically writing out his own Will is more

apparent in holograph Will than where his signatures alone appear to be appended either on a typed script or on a script written by somebody else;

(iii) The testimony of Dr.B.G.Kachru PW-3, that the deceased was suffering from senile dementia and was forgetful and could not understand nature and consequences of his acts during last days of his life does not inspire confidence for the reasons:-

(a) The symptoms mentioned by witness i.e. B.G.Kachru to conclude that the deceased was suffering from senile dementia are general symptoms of dementia;

(b) B.G.Kachru had medically examined the deceased on three occasions only;

(c) The testimony of B.G.Kachru was not based on any record;

(d) B.G.Kachru claimed in his testimony that he can recall the treatment given by him to his patients even after thirteen years but he could not give the names of even ten patients examined by him in December, 1991, which would evidence his contrived testimony;

(e) B.G.Kachru had stated in his testimony that a person suffering from senile dementia cannot always write coherently whereas in rebuttal evidence the witness contradicts himself by stating that a person suffering from senile dementia can write coherently if asked to write on dotted lines or given a draft to copy it but it depends upon the degree of dementia;

(f) B.G.Kachru has nowhere stated in his testimony that what was the degree of senile dementia which the deceased was suffering;

(g) Despite the fact that she is a doctor and used to medically attend the deceased the plaintiff No.2 has neither stepped into the witness box to corroborate the testimony of Dr.B.G.Kachru nor produced any medical record pertaining to the illness/treatment of the deceased; and

(h) No suggestion has been given to the attesting witnesses to Will Ex.TD-2/1 to the effect that the deceased was made to write on dotted lines or was given a draft to copy at the time of execution of Will Ex.TD-2/1;

(iv) The entry Ex.PW5/2 made in Death Register of RML Hospital to the effect that cause of death of deceased was senile dementia with aspiration is suspicious for the reason Senile Dementia by itself cannot possibly be a cause of death whereas aspiration can be. Aforesaid entry in Death Register is superfluous because senile dementia with aspiration can never be the cause of death. In fact, aspiration alone can be the cause of death. This renders entry Ex.PW-5/2 made in Death Register of RML Hospital quite doubtful, more so in the absence of any record regarding illness/treatment of the deceased;

(v) Two prominent symptoms of senile dementia are forgetfulness and state of frequent or regular confusion in carrying out routine activities or decision making, which state of mind is not depicted in the letter Ex.P-2 dated February 24, 1992 written by the deceased to plaintiff No.1;

(vi) There are three broad degrees of a disease viz. mild, moderate or severe. The testimony of Dr.B.G.Kachru PW-3, does not establish the degree of senile dementia suffered by the deceased;

(vii) The fact that the deceased had not bequeathed any portion of the suit property to the plaintiffs would not make Will Ex.T-D2/1 invalid;

(viii) The circumstance that multiple Wills have been executed by the deceased during his lifetime by itself cannot be a ground to discard Will Ex.T-D2/1 for the reason except Will Ex.T-D2/1 no other Will is proved or admitted to have been executed by the deceased. Furthermore, the letter Ex.P-3 dated November 12.30, 1991 written by the defendant No.2 to plaintiff No.1 reveals that during the lifetime of deceased there had been inter-se fights and discord amongst the children of the deceased regarding division of the suit property. This could be the reason for execution of Wills prior to the execution of Will Ex.T-D2/1;

(ix) It is meaningless that the defendant No.1 owned a house in Delhi yet the deceased had bequeathed a portion of the suit property to him for it has not been stated in Will Ex.T-D2/1 that the deceased is bequeathing the suit property to the defendants for they do not own any house in Delhi;

(x) The burden was upon the plaintiffs to establish that execution of Will Ex.T-D2/1 by the deceased is a result of undue influence exercised upon him by the defendants in view of the facts that it has been established from evidence on record that Will Ex.T-D2/1 has been handwritten and signed by the deceased in the presence of attesting witnesses to said Will, which burden has not been discharged by the plaintiffs for they have led no worthwhile evidence to establish that execution of Will Ex.T-D2/1 by the deceased is a result of undue influence exercised upon him by the defendants; and

(xi) Evidence on record makes it crystal clear that Will Ex.T-D2/1 has been executed by the deceased out of his own free will and in a state of sound disposing mind in the presence of two attesting witnesses viz.

S.S.Butalia and Sukhbir Singh whose evidence is unimpeachable and completely reliable.

41. Aggrieved by the afore-noted impugned judgment and decree dated November 18, 2009 passed by the Single Judge the plaintiffs have filed the present appeal.

42. During the hearing of the appeal, following submissions were advanced by the counsel appearing for the plaintiffs:-

A It is settled law that in order to execute a Will the testator must have a sound disposing mind and memory. In the instant case, the deceased was not having sound disposing mind at the time of execution of Will Ex.T-D2/1 dated January 14, 1992 as he was suffering from senile dementia around and on the date of the execution of Will Ex.TD-2/1. Such being the position, Will Ex.T-D2/D1 is invalid.

B The evidence of Dr.B.G.Kachru PW-3, clearly established that the deceased was suffering from senile dementia during the last days of his life. The testimony of Dr.B.G.Kachru established that the '*deceased had lost the powers & faculties of regulating his actions and conduct. Deceased had become incapable of looking after himself & managing his own affairs – his memory was failing him – Power of self control was lost – power of reasoning stood interfered with, his judgment had become weak and faulty. Deceased had not sufficient mental capacity to understand the nature & consequences of his acts. Deceased was impulsive & forgetful. He appeared to be under acute mental strain & stress*'. Dr.B.G.Kachru PW-3, was cross-examined at length by the defendants but nothing was elicited therefrom which could discredit his testimony. Furthermore, the entry Ex.PW-5/2 made in the Original Death

Register of RML Hospital that the cause of death of deceased was '*Senile Dementia with Aspiration*' corroborates the testimony of Dr.B.G.Kachru that the deceased was suffering from senile dementia during last day of his life. Not only this, the recordings contained in the letter Ex.P-2 dated February 24, 1992 written by the deceased to the plaintiff No.1 to the effect that *since last two months the deceased has been ill and with one thing and then another thing* leaves no manner of doubt that the deceased was not enjoying good health in the last days of his life, more particularly around the time of execution of Will Ex.T-D2/1 dated January 14, 1992. Such being the position, the Single Judge committed an error in terming Dr.B.G.Kachru PW-3, as an unreliable witness.

C It is well settled that the propounder of the Will should prove the execution of the same in accordance with Section 63 of the Indian Succession Act, 1925 and prove the same in accordance with Section 68 of the Indian Evidence Act, 1872. If there are suspicious circumstances surrounding the execution of the Will, the onus becomes greater on the part of the propounder and they must lead evidence to clear those suspicions and satisfy the Court that the Will propounded was the last testament of the testator. A circumstance would be suspicious when it is not normal or is not normally expected in a normal situation or is not expected of a normal person. In the instant case, as many nine 'inconsistent' Wills have been executed by the deceased during his lifetime. Surely, it is not normal for a person to execute not one or two but as many as nine inconsistent Wills in his lifetime. The circumstance that the deceased had executed nine inconsistent Wills during his lifetime is itself sufficient to establish a non-testamentary state of mind. It was incumbent upon the defendants to have led the evidence to clear the

suspicious circumstance of the deceased having executed nine inconsistent Wills in his lifetime. However, the defendants have neither led any evidence nor offered any reasonable explanation, much less satisfactory, as to why the deceased had executed nine inconsistent Wills in his lifetime. The learned Single Judge has failed to deal with the aspect of execution of multiple inconsistent Wills by the deceased in his lifetime. In view of failure of the defendants to explain the execution of multiple inconsistent by the deceased in his lifetime Will Ex.T-D2/1 deserves to be discarded and cannot be held as last legal valid testament of the deceased, more particularly when it is seen that the last two-three lines in Will Ex.T-D2/D1 are cramped up.

D Letter Ex.P-2 dated February 24, 1992 written by the deceased to the plaintiff No.1 nearly a month after the execution of Will Ex.T-D2/1 dated January 14, 1992 brings out that the deceased was very fond of the plaintiff No.1. In view of deep affection between the plaintiff No.1 and deceased, it does not lie to reason and logic that the deceased would bequeath suit property all his sons except the plaintiff No.1. In said regards, it was further highlighted that the reason given in Will Ex.T-D2/1 dated January 14, 1992 for not bequeathing a portion of the suit property to the plaintiff No.1 that the deceased is desirous that all his five children should settle in Delhi and plaintiff No.1 owns a house in Delhi is palpably false inasmuch as even defendant No.2 owned a house in Golf Links, Delhi as admitted by him in his testimony.

43. Per contra, the counsel appearing for the defendants supported the impugned judgment and decree dated November 18, 2010. The arguments advanced by the defendants can be summarized as follows:-

A It is settled law that where testamentary capacity of a testator is proved by the evidence of competent and disinterested witnesses, the fact that the testator was admittedly in a state of health which affected his memory and rendered him incapable of managing his affairs falls far short of establishing that he was incapable of considering what dispositions of his property he should make in favour of members of his family or that he did not understand the dispositions which in fact he did make. In the instant case, the evidence of attesting witnesses to Will Ex.T-D2/1 dated January 14, 1992 viz. S.S.Butalia and Sukhbir Singh establishes that the deceased was in a state of sound disposing mind at the time of execution of Will Ex.T-D2/1 dated January 14, 1992. The evidence of B.G.Kachru PW-3, who is stated to have examined the deceased on mere three occasions cannot be accepted against the positive testimonies of competent and disinterested attesting witnesses to Will Ex.T-D2/1 dated January 14, 1992 who prove testamentary capacity of the deceased at the time of execution of Will Ex.T-D2/1 dated January 14, 1992.

B A perusal of all the nine Wills executed by the deceased shows that the said nine Wills are fairly consistent with each other. Save and except Wills Ex.DW-1/3 and Ex.DW-1/1 dated September 12, 1991 and January 04, 1992 respectively the deceased has not bequeathed any portion of the suit property to the plaintiffs in any of the Wills.

C Letter Ex.D-2/8 dated July 20, 1988 written by the deceased to the defendant No.2 that the deceased was very fond of defendant No.2 and had invited him i.e. defendant No.2 to reside in the suit property. Furthermore, vide letter dated July 20, 1988 the deceased had assured the defendant No.2 that he would get to reside in the suit property even after

his death. Will Ex.T-D2/1 dated January 14, 1992 is in harmony with the aforesaid assurance given by the deceased in the letter dated July 20, 1988 inasmuch as the deceased had bequeathed second floor of the suit property to the defendant No.2 vide said Will.

D The law raises a great presumption in favour of the genuineness of a holographic Will. There is strong presumption of regularity of holographic Will and of its being duly executed and attested. In the decision reported as AIR 1964 SC 529 Shashi Kumar Banerjee & Ors. Vs. Subodh Kumar Banerjee it was held by the Supreme Court that the propounder of a holographic Will is only required to formally prove the Will and very little evidence is required to prove due execution and attestation of the Will. In the instant case, Will Ex.T-D2/1 dated January 14, 1992 was a holographic Will i.e. written by the deceased himself. In view of categorical and unimpeachable evidence of attesting witnesses S.S.Butalia and Sukhbir Singh the inescapable conclusion which emerges is that Will Ex.T-D2/D1 was executed by the deceased out of his own free will and in a state of sound disposing mind.

E A perusal of the letters Ex.DW-1/2 and Ex.T-D2/6 dated January 14, 1992 written by the deceased to DESU/MCD, letter Ex.T-D2/20 dated February 25, 1992 written by the deceased to House Tax Department and letter Ex.P-2 written by the deceased to the plaintiff NO.1 (relevant contents whereof have been noted by us in the foregoing paras) leaves no manner of doubt that the deceased was very much in control of his affairs and enjoying good mental health around the time of execution of Will Ex.T-D2/1 dated January 14, 1992.

44. From the afore-noted conspectus of facts, it is apparent that the core issue which has arisen for consideration in the present appeal is : Whether Will Ex.T-D2/1 dated January 14, 1992 is the last legal and valid testament of the deceased. (Be it noted here that the plaintiffs that the finding returned by the Single Judge that the suit property was the self-acquired property of the deceased has not been challenged by the plaintiffs in the present appeal).

45. '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.

46. 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.

47. 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.

48. 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.

49. 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 (i) the will was signed by the testator in the presence of two attesting witnesses; (ii) at the relevant time he was in sound and disposing state of mind; (iii) he understood the nature and effect i.e., the content of the disposition; (iv) 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.

50. The testamentary capacity of the testator is required to be proved under Section 59 of the Indian Succession Act, 1925. As to the testator's capacity, he must, in the language of the law, have a sound and disposing mind and memory. In other words, he ought to be capable of making his

will with an understanding of the nature of the business in which he is engaged, a recollection of the property he means to bequeath, of the persons who are the objects of his bounty and the manner in which it is to be distributed between them.

51. Sound testamentary capacity means that these conditions must exist at one and same time: (i) the testator must understand that he is giving his property to one or more persons; (ii) he must also understand and recollect the extent of his property and (iii) he must also understand the nature and extent of claims upon him both of those whom he is including in his will and those whom he is excluding from the will. The testator must realize that he is seizing a will and his mind and will must accompany his physical act of execution.

52. The testator's age, illness and mental weakness are all important considerations in determining if the will had been got executed as a result of importunity or undue influence. Illness of the testator, mental or physical, militates against the voluntary character of the will.

53. The question of sound mind is a dominant question in a court of probate. The test of sound disposing mind is in law a workable test. It means in plain language an appreciation of the fact that the man is making a will, an appreciation of the contents of that will and an appreciation of the nature of the disposition that he is making having regard to the claims of his family members.

54. What is required is for the validity of the will is that the testator should have been able at the time of making it, to comprehend the nature and effect of disposition, and should have sufficient memory and

intelligence to form a proper judgment regarding it and should have freely decided to make it.

55. Section 12 of the Indian Contract Act, 1872 prescribes that a person is said to be of sound mind, if at the time he makes a contract, he is capable of understanding it and forming a rational judgment to this effect. Mere ability to sign one's name, nor mere consciousness, nor the fact that the testator was able to maintain ordinary conversation and answer familiar and easy questions does not necessarily constitute a sound and disposing mind. The testator must be capable of disposing of his property with understanding and reason. He must be able to appreciate his property and form a judgment with respect to the parties whom he chooses to benefit by it after his death. The question of sound and disposing mind is a question of fact and of degree of mental capacity in each case.

56. 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 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.

57. Any and every circumstance is not a suspicious circumstance. A circumstance would be suspicious when it is not normal or is not

normally expected in a normal situation or is not expected of a normal person.

58. Where the caveator alleges undue influence, fraud and coercion, the onus is on him to prove the same. Even if there is no such plea but the circumstances give rise to doubts, it is for the propounder to satisfy the conscience of the Court.

59. Keeping afore-noted legal principles in mind, we proceed to determine whether Will Ex.T-D2/1 dated January 14, 1992 is the last legal and valid testament of the deceased.

60. In order to find out answer to the above question, let us note the basic facts of the case.

61. It is not seriously disputed by the parties to the suit that the deceased had executed as many as nine Wills in his lifetime. First one being; Will dated May 18, 1982 and last one being; Will Ex.T-D2/1 dated January 14, 1992.

62. Out of nine Wills executed by the deceased, one Will viz. Will Ex.T-P1/1 dated February 04, 1988 has been produced by the plaintiffs; four Wills viz. Will Ex.DW-1/5 dated September 02, 1988, Will Ex.DW-1/4 June 10, 1991, Will Ex.DW-1/3 dated September 12, 1991 and Will Ex.DW-1/1 dated January 04, 1992 have been produced by the defendant No.1; three Wills viz. Will Ex.TP-1/1 dated August 12, 1988, Will Ex.T-D2/2 dated September 15, 1991 and Will Ex.TD-2/1 dated January 14, 1992 have been produced by the defendant No.2 and one Will dated May 18, 1982 has been produced by the defendant No.3.

63. The plaintiffs admit that Will Ex.T-D2/1 dated January 14, 1992 is in the handwriting of the deceased and contains his signatures. They assail the validity of Will Ex.T-D2/1 on the ground that the deceased was not in a state of sound disposing mind at the time of execution of said Will. The case set up by the plaintiffs is that after the death of his wife (mother of parties in the present case) on February 15, 1985 the deceased was a shattered man and completely lost his bearings. During the last days of his life the deceased was suffering from senile dementia as a result whereof the deceased was a bundle of nerves, totally incoherent and confused and dependent on others for his daily needs. Taking advantage of ill-health of the deceased, particularly his poor mental health, the defendants made the deceased to write on dotted lines and subsequently gave the shape of 'Wills' to the aforesaid writings of the deceased by getting them attested from their known persons.

64. Relevant would it be to note that the suit property comprises of ground, first and second floors.

65. The first in the series of Wills executed by the deceased is the Will dated May 18, 1982. As per said Will, the suit property has been bequeathed to Jaswant Kaur, the wife of the deceased. After the death of Jaswant Kaur, the suit property was to be exclusively owned by the defendant No.3. The movable assets of the deceased were to be equally divided between all five children of the deceased.

66. Nearly three years thereafter, the deceased executed Will Ex.T-P1/1 dated February 04, 1988 whereby the deceased had bequeathed ground, first and second floors of the suit property to the defendants

Nos.3, 1 and 2 respectively. Central pool of money was to be created which was to be shared equally by the plaintiffs.

67. Nearly four months thereafter, the deceased executed Will Ex.DW-2/10 dated August 12, 1988 whereby the deceased had bequeathed ground, first and second floors of the suit property to the defendants Nos.3, 2 and 1 respectively. Central pool of money was to be created. A sum of Rupees Five Lakhs from central pool was to be paid to the plaintiff No.1. Remaining money in the central pool was to belong to the plaintiff No.2.

68. Nearly twenty one days thereafter, the deceased executed Will Ex.DW-1/5 dated September 02, 1988 whereby the deceased had bequeathed ground, first and second floors of the suit property to the defendants Nos.3, 1 and 2 respectively. Central pool of money was to be created which was to be shared by the plaintiffs in the proportion of 80-20.

69. Nearly three years thereafter, the deceased executed Will Ex.DW-1/4 dated June 10, 1991 whereby the deceased had bequeathed ground, first and second floors of the suit property to the defendants Nos.1, 3 and 2 respectively. Central pool of money was to be created which was to be shared equally by the plaintiffs.

70. Three months thereafter, the deceased executed Will Ex.DW-1/3 dated September 12, 1991 whereby the deceased had bequeathed ground, first and second floors of the suit property to the defendants Nos.3 and 2 and plaintiff No.2 respectively. No central pool of money was created. Cash assets of the deceased were to be shared equally by the plaintiff No.1 and defendant No.1.

71. Three days later, the deceased executed Will Ex.T-D2/2 dated September 15, 1991 whereby the deceased had bequeathed ground, first and second floors of the suit property to the defendants Nos.3, 1 and 2 respectively. Central pool of money was created which was to be shared equally by the plaintiffs.

72. Three and half months later, the deceased executed Will Ex.DW-1/1 dated January 04, 1992 whereby the deceased had bequeathed ground, first and second floors of the suit property to the defendants Nos.3 and 1 and plaintiff No.1 respectively. Central pool of money was created which was to be shared equally by the plaintiff No.2 and defendant No.2.

73. Ten days later, the deceased executed Will Ex.T-D2/1 dated January 14, 1992 whereby the deceased had bequeathed ground, first and second floors of the suit property to the defendants Nos.3, 1 and 2 respectively. Central pool of money was created which was to be shared equally by the plaintiffs.

74. An analysis of the afore-noted facts and in particular that nine Wills were executed by the deceased brings out the possibility of two facts. The first being the result of the deceased suffering from senile dementia that he was fixed in his mind with the idea looming large of he being required to execute a Will and forgetting that he had already executed one. After having executed a Will, he forgot a few days after or perhaps a few months after that he had executed a Will and thus he executed another Will. Interlinked with this is the possibility that the deceased would not recollect whom he had to bequeath what. The second being the mind of the testator being so weak and wavering that suddenly he would pick up a pen and write something on a piece of paper. This

penning of thought cannot be equated as a conscious decision which is the hallmark of a sound and a stable mind.

75. The evidence of Dr.B.G.Kachru PW-3 and entry Ex.PW-5/2 made in the original Death Register of RML Hospital is to the effect that the deceased was suffering from senile dementia. Senile dementia is the disease of brain caused loss of cognitive functions (reasoning, memory and other mental abilities) due to trauma and normal ageing. Senile dementia impairs the capacity of person to carry out everyday acts such as driving, household chores and personal care etc. In addition thereto, persons suffering from senile dementia experience decline in intellectual functions like use of language and numbers, awareness of what is going on around them, judgment and ability to reason and solving problems etc. Perhaps, the confusion in the mind of the deceased regarding manner of distribution between his children was caused due to senile dementia. (Be it noted here that it has also been observed by the Single Judge two prominent symptoms of senile dementia are forgetfulness and state of frequent or regular confusion in carrying out routine activities or decision making). Be that as it may. The fact of the matter is that the deceased had no clear understanding about the manner in which he distributed his assets between his children.

76. As already noted by us, in order to execute a valid Will the testator must be having sound testamentary capacity at the time of execution of Will. Meaning thereby, the testator ought to be capable of making his will with an understanding of the nature of the business in which he is engaged, a recollection of the property he means to bequeath, of the persons who are the objects of his bounty and the manner in which it is to be distributed between them.

77. In view of the fact that the deceased had no understanding about the manner in which he distributed his assets of his children at the time of making of Will Ex.T-D2/1 dated January 14, 1992 it has to be held that the deceased was not having sound testamentary capacity at the time of execution of Will Ex.T-D2/1 dated January 14, 1992. As a necessary corollary thereof, it has to be held that Will Ex.T-D2/1 dated January 14, 1992 is not last legal and valid testament of the deceased.

78. There is another aspect of the present case.

79. The propounder of Will Ex.T-D2/1 dated January 14, 1992 is defendant No.2.

80. In his examination-in-chief defendant No.2 deposed that he found Will Ex.T-D2/1 dated January 14, 1992 in the cupboard of the deceased along with his pension, provident fund papers etc after the death of the deceased. The defendant No.2 gave a completely different version in his cross-examination with respect to his possession of Will Ex.T-D2/1 dated January 14, 1992. In his cross-examination, the defendant No.2 stated that on January 16, 1992 the deceased showed him Will Ex.T-D2/1 dated January 14, 1992 and asked him to make photocopies of the same. After making photocopies he returned (original) Will Ex.T-D2/1 dated January 14, 1992 to the deceased. The deceased kept Will Ex.T-D2/1 dated January 14, 1992 under a newspaper in the top shelf of his cupboard. After the death of deceased he i.e. defendant No.2 retrieved Will Ex.T-D2/1 dated January 14, 1992 from aforesaid cupboard.

81. The letter Ex.P-3 dated November 12/30, 1991 written by the defendant No.2 to the plaintiff No.1 brings out that the children of the deceased were embroiled in a bitter fight over the distribution of suit

property. The letter further brings out that the defendant No.2 was very angry with his siblings regarding distribution of the suit property and highly apprehensive that his siblings would try that he i.e. defendant No.2 does not get his share in the suit property. Most significantly, it was stated by the defendant No.2 in the letter dated November 12/30, 1991 that his siblings would not succeed in their attempt to disinherit him from the suit property as *'he knows how to play his cards'*. It also needs to be noted that defendant No.2 has not been given a portion of the suit property in Will Ex.DW-1/1 dated January 04, 1992 which was executed immediately prior to Will Ex.T-D2/1 dated January 14, 1992. In these circumstances, the possibility that the defendant No.2 *'played his cards'* and took advantage of poor mental health of deceased and him write on dotted lines cannot be ruled out, more so when we find that there is glaring contradiction in the version of defendant No.2 regarding his possession of Will Ex.T-D2/1 dated January 14, 1992.

82. In view of above discussion, it has to be held that Will Ex.T-D2/1 dated January 14, 1992 is not the last legal and valid testament of the deceased.

83. The evidence on records suggests that Will dated May 18, 1982 was clearly revoked by the deceased. But, by which Will? We do not know. Certainly not by Will Ex.T-D2/1 dated January 14, 1992. From the wavering and confused nature of bequests made by the deceased it is most difficult for us to determine that which of the Wills executed by the deceased is the correct manifestation of the intention of the deceased regarding distribution of the suit property. In any case, none of the other eight Wills executed by the deceased have been propounded by any of the parties to the suit. In that view of the matter, it has to be held that the

deceased had died intestate. As a result thereof, the suit for partition of the suit property filed by the plaintiffs had to succeed.

84. We allow the appeal and set aside the impugned judgment and decree dated November 18, 2010 and pass a preliminary decree declaring share of each sibling i.e. the plaintiffs and the defendants to be $1/5^{\text{th}}$ i.e. 20%.

85. The suit is revived for further proceedings and parties shall appear before the learned Single Judge when the suit would be listed for directions on March 25, 2014.

(PRADEEP NANDRAJOG)
JUDGE

(JAYANT NATH)
JUDGE

MARCH 19, 2014
mamta