

* **HIGH COURT OF DELHI AT NEW DELHI**

+ **F.A.O. No.279/2007 & C.M. Nos.9537/2007, 15901/2010,
22370/2011, 887/2012, 15378/2012, 17632/2012,
20036/2012, 1133/2013 & Crl. M.A. No.699/2013**

Decided on : 2nd July, 2014

SHRI NARAIN SINGH ETC. Appellants
Through: Mr. Daljit Singh, Senior Advocate with
Mr. D.K. Thakur & Mr. A.K. Saini,
Advocates.

Versus

THE STATE & ORS Respondents
Through: Mr. Dinesh Agnani, Senior Advocate
with Mr. Gurmehar Sistani, Mr. Vikas
Gautam, Mr. Arjun Syal & Ms. Kartika
Sharma, Advocates for R-2.

**CORAM:
HON'BLE MR. JUSTICE V.K. SHALI**

V.K. SHALI, J.

1. This is an appeal filed by the appellant against the judgment dated 15.5.2007 passed by the learned Additional District Judge, Delhi by virtue of which the letter of administration was granted in favour of respondent No.2, Jagdish Chand (hereinafter referred to as Jagdish Chand) in respect of Will dated 22.10.1973 exhibit A-1 purported to have been made by deceased Nathu Singh.

2. Briefly stated the facts as given in the impugned judgment of the learned Additional District Judge are as under :-

“The respondent No.2, Jagdish Chand Sharma, filed a petition under Section 276 of the Indian Succession Act, 1925 for grant of letter of administration with regard to the will of late Nathu Singh executed in his favour on 22.10.1973. Nathu Singh died at Delhi on 2.8.1980. After his death this case was filed on 30.10.1980. Nathu Singh was the owner of property number A-152 to A-162/1, situated in Sukhdev Nagar, Kotla Mubarakpur, New Delhi. He had allegedly great love and affection for the petitioner. He always treated him as his son during his lifetime. He bequeathed some part of his property in favour of the petitioner more specifically described in the will itself. The will was duly registered in the office of Sub Registrar, Delhi on 24.10.1973. The will was kept with Harswaroop Sharma for safe custody who, after the death of Nathu Singh delivered the will to the petitioner. He was survived by the sons, daughters and grand children who are made respondents in this petition. The petition was verified by G.C.Kumar, advocate.

Notice of the petition was issued to the respondents. The objections were filed by Jaswant Singh, son of the deceased. A preliminary objection was raised that :

i) The property was ancestral joint Hindu family property and Nathu Singh had no power to execute the will in favour of the petitioner. It was also denied that Nathu Singh had any love and affection for the petitioner. On the other hand it was submitted that Nathu Singh appointed the petitioner as his rent collector on 11.5.1973 and executed a Power of Attorney in his favour. The said Power of Attorney was duly registered. The

petitioner was authorised to collect rent from the tenants of Nathu Singh and to issue rent receipts. The petitioner failed to render his duties with due sincerity therefore the Power of Attorney was revoked on 2.2.1974. Petitioner created tenancy in favour of his wife Smt. Santosh Kumari Sharma in respect of shop number F-16 belonging to Nathu Singh without the knowledge of Nathu Singh. Nathu Singh filed a suit against the present petitioner in the year 1975 for recovery of damages for use and occupation.

ii) The deceased was not satisfied with the services of the petitioner and he also made complaints against the petitioner to his employer i.e. MCD. Execution of any will in favour of the petitioner is denied. Signature and thumb impression of Nathu Singh on the will dated 22.10.1973 is also denied. Further it was alleged that the contents of the will were never read over and explained to the testator who knew only Hindi language. Additional pleas were also taken that there were various civil and criminal cases pending between the petitioner and Nathu Singh and his family members. Petitioner misused his powers and created tenancy in favour of other persons without any knowledge of Nathu Singh. He misappropriated the rents realized by him. He also appeared as a witness in a criminal case against Nathu Singh on the complaint of Nathu Singh. Petitioner was also placed under suspension by the MCD where he was a teacher.

iii) An additional plea was taken that Nathu Singh sold one house area about 45 sq.yds, to one Kishan Lal and Bimla Devi. General Power of Attorney was executed by Nathu Singh in favour of Kishan Lal and Bimla Devi during his own

lifetime. Nathu Singh told the respondent Jaswant Singh and his brothers that he had executed two wills in favour of Kishan Lal and Bimla Devi as they wanted two separate wills in their individual names with respect to the property which was sold by him to them. The petitioner was present at the time of execution of the documents and the petitioner told the deceased that one Will was in favour of Kishan Lal and the other Will was in favour of Bimla Devi, wife of Jagdish. The deceased did not know at that time that the petitioner was playing a fraud and the second will which he was getting signed in the name of wife of Jagdish was actually in favour of the petitioner.

iv) If any Will was executed by the testator on that day it was under the bona fide belief that he was executing the Will in favor of Bimla Devi, wife of Jagdish, little knowing that actually the petitioner obtained his signature and thumb impression on a document which is now propounded as a Will of the deceased in favour of the petitioner. The marginal witnesses of both the wills are the same. Hence the Will propounded by the petitioner is a false document.”

3. In the rejoinder the averments made in the petition were reaffirmed and those in the written statement were denied. It was denied that the property bequeathed in favour of the petitioner was a joint Hindu family property because as per the statement of respondent Jaswant Singh deceased sold the properties in favour of

several persons and executed general power of attorneys and other relevant documents in favour of third parties while selling the properties. The properties were the self acquired properties of Nathu Singh. In the year 1950 Nathu Singh, out of his self acquired properties in Kotla Mubarakpur executed three gift deeds in favour of his sons. The gift was accepted by this respondent also admitting that his father was the absolute owner of the property. All the three sons were separately assessed to income tax. The properties were also gifted to his daughters by the deceased.

4. It was alleged that the respondent fraudulently got his name mutated in the revenue records in place of Nathu Singh and the litigation also started against him which was still pending. Even an injunction suit was filed by Nathu Singh for cancellation of Power of Attorney in favour of the petitioner by Nathu Singh which is admitted and explanation is given that as he was a teacher in one of the MCD schools, he was not entitled to act as an attorney. This respondent Jaswant Singh got a complaint lodged against him

through his father. Under these circumstances, Power of Attorney was revoked by the deceased. With regard to creation of tenancy in favour of Santosh Kumari Sharma, it was submitted that Nathu Singh himself created a tenancy in favour of Santosh Kumari Sharma. Whatever cases were filed by Nathu Singh against the petitioner were filed at the instance of this respondent only and ultimately those cases were got dismissed.

5. Joint objections were filed on behalf of Narain Singh, Rattan Singh, Dayawati, Sobhagyawati and Satyawati, sons and daughters of late Nathu Singh. They submitted that petitioner was collecting rent on behalf of the deceased but he made certain misrepresentations and engaged tenants without the consent of deceased. Hence he was displeased. Later on relations between the petitioner and the deceased were strained and under these circumstances it was not expected from him to execute a will in favour of the petitioner. It was also alleged that when the deceased/testator was having his own sons, daughters and grand children then why would he execute a Will in favour of the

petitioner? The Will is either fabricated or manipulated by the petitioner by misusing his authority and access. In fact deceased never intended to bequeath any property in favour of the petitioner. These respondents have also submitted that except for Jaswant Singh, deceased had full confidence in all his other sons and daughters. The deceased was annoyed with Jaswant Singh for the reasons that he had tried to deprive the deceased of a part of his property in connivance with the petitioner. Further they submitted that number of properties were transferred by the deceased in favour of other persons on the basis of Will and General Power of Attorney executed by the deceased in favour of the transferees. Most of these transfers were for consideration. The papers relating to such transfers were got prepared by the petitioner and on execution, they were handed over to the transferee. Petitioner got the thumb impressions/signatures of the deceased by misusing his position which he is now trying to misuse as his last will and testamentary disposition. Hence under these circumstances it was submitted by them that the will propounded by the petitioner was not a genuine document.

6. On the pleadings of the parties, following issues were framed on 23.3.1983:

1. *Whether Nathu Singh Saini deceased executed the will dated 22.10.1973 validly while possessed of a sound disposing mind?*
2. *Relief*

7. The petitioner examined six witnesses in support of his case and eight witnesses were produced by the respondents. AW-1, G.C. Kumar, is an advocate who drafted the will and signed as one of the attesting witness of the Will. AW-2, Harswaroop handed over the Will to the petitioner after the death of Nathu Singh as the Will was kept with him in his safe custody by the testator. AW-3, A.K. Jain was a Sub-Registrar, Asaf Ali Road at the relevant time who registered the Will propounded by the petitioner. AW-4, Ram Chand Sharma, proved the receipt showing that the wood at Nigam Bodh Ghat was purchased by the petitioner for cremating Nathu Singh. AW-5 Budh Ram is one of the attesting witness of the Will. AW-6, Jagdish Chand Sharma is the petitioner. Two more witnesses were examined by the petitioner, i.e., Santosh Goel and

Satish Kumar, LDC's from record room but their statements are not irrelevant.

8. As against this evidence, respondents examined RW-1. Ramesh Kumar, clerk from record room (Civil), Tis Hazari Courts, Delhi who simply deposed that the summoned record cannot be produced in the court as the same was destroyed in a fire which took place in the record room. Similarly, RW-2, M.S. Rao, LDC from MCD, Vigilance Department deposed that he cannot produce the summoned record regarding the vigilance enquiry against the petitioner on the complaint of Nathu Singh. RW-3, Narain Singh is son of the deceased Nathu Singh, RW-4 is Ramesh Chandra Sharma and RW-5, Gulab Chand, is a clerk from the competent authority (slum) who produced some record regarding the litigation between Nathu Singh and Santosh Kumari. RW-6, Bhupesh Gupta, LDC from record room (Civil), Tis Hazari Court also produced the record of a civil suit between Nathu Singh and Santosh Kumari. RW-7, Ramesh Chand Saini is an advocate, who represented Nathu Singh in various courts in the cases filed by him

as well as against him. RW-8, Rajinder Singh Saini is son of respondent Jaswant Singh Saini. He appeared as a witness after the death of Jaswant Singh.

9. The AW-1, G.C. Kumar, in his testimony before the Court recorded on 27.9.1984, i.e., about 11 years after the execution of the alleged Will dated 22.10.1973 stated that he had scribed the Will Ex. A-1 but he was unable to recall if he had seen the testator signing/executing the document (Exhibit A-1). He further stated that he did not know the testator but had scribed the Will at the asking of his father, who was in those days working as a Deed Writer in Urdu and used to sit outside with the office of the Sub Registrar at Asaf Ali Road, New Delhi. The relevant portion of his testimony is as under:

“I did not know Ch. Nathu Singh Saini. I have seen Will Ex.A.1 it was drafted by me. Whenever someone came to my father for scribing of a document in English language, if I am present with my father at Asaf Ali Road he would instruct me to prepare the document in English language but if I was not present with my father would note down the instructions in Urdu language and would give me instructions to scribe the document in

English language when we met in our house in the evening. I do not remember if Ch. Nathu Singh who is the testator of Ex.A.1 had come to my father when I was by the side of my father at Asaf Ali Road or my father had given me the instructions to scribe the Will Ex.A.1 when he met me in the evening.

I do not now remember whether this will which is dated 22.10.1973 was given to me by my father at my house or to the testator at the Asaf Ali Road after I had scribed this document. I do not remember if I was present when the testator had signed Ex.A.1.”

10. The testimony of the other attesting witness Budh Ram who was examined as AW-5 was as under :

“I have seen document Ex.A-1. It bears my signatures at point encircled C on second page of this document as also at point sideline Y-2 on the backside of its first page. I had signed at the above said two places in presence of Ch. Nathu Singh.

I had however, not seen Ch. Nathu Singh signing this document at points B as also at points Y and Y-1. I had not appeared before the Sub Registrar and had not identified Ch. Nathu Singh before him. I had signed this document outside the office.

Q. I put it to you that on the day of execution of Ex.A.1. Ch. Nathu Singh had got registered five documents including Ex.A-1

and that out of the other four related to you and those documents were an Agreement to Sell and the Will executed by him in my (should be your) favour?

A. I do not remember how many documents were got registered by Ch. Nathu Singh on that date but the documents relating to me were executed about 8 or 10 days prior to Ex.A-1.”

During cross-examination, the said witness stated as under :

“Petitioner Jagdish Chand was also present on the date when I signed the document Ex.A.1 at the above said two places I did not know the contents of Ex.A-1 I had been taken to the office of the Sub-Registrar by Kishan Lal with a request that I should sign his power of attorney executed by Ch. Nathu Singh in favour of Krishan Lal who had purchased a house from Ch. Nathu Singh, Kishan Lal had paid the price of the said house to Ch. Nathu Singh, Smt Bimla is the wife of the elder brother of Krishan Lal. Shri Ram Niwas is the father of Shri Kishan Lal I knew S/Shri Ram Niwas is the father of Shri Kishan Lal. I knew S/Shri Ram Niwas and Kishan Lal earlier but I had known Ch. Nathu Singh because I had purchased the house 10 to 15 days prior to the date of my signing Ex.A-1 the name of the husband of Bimla Devi was Jagdish. Jagdish is not alive and had died before the date of execution of documents Ex.A-1. I do not know whether the property was purchased by Kishan Lal and Bimla Devi jointly from Nathu Singh or not. I was taken

to the office of the Sub-Registrar by Shri Kishan Lal and the only thing told to me was that I was to be an attesting witness of the Power of Attorney to be executed in his favour. I was not told that any will was executed by Ch. Nathu Singh in favour of the petitioner or that I was to attest it. I do not know if the petitioner had any relationship with Ch. Nathu Singh. Jagdish was present even at the time when Ch. Nathu Singh had executed documents in my favour as well as in favour of Kishan Lal and Bimla Devi.”

11. The petitioner had also examined Shri A .K. Jain who was the Sub-Registrar at the relevant time. The following portion of his testimony is relevant :

“A. I used to receive hundreds of documents for registration and my duty was only to ensure that the persons presenting admitted the execution of these documents and I was not concerned with noting any peculiarities.”

In cross-examination the witness state as under :-

“I have seen the register brought by the Sub-Registrar’s clerk. It is correct that another document purported to be Will executed by Ch. Nathu Singh on 22.10.73 for registration and that document was registered at item no.1346 whereas Ex A-1 has been registered

at item no.1347 on the same day. It is correct that both the identifying witnesses of ExA-1 are also identifying witness at item No.1346 which had been shown to Kishan Lal etc. I did not know Shri Budh Ram the other identifying witness personally. I know Shri G C Kumar. During those days people used to dispose of their properties by executing Wills and as such people used to execute more than one Will in respect of different portions of their property.”

12. The aforesaid statement of attesting witnesses does not prove the execution of the Will dated 22.10.1973, Ex. A, as a valid Will in accordance with the mandatory provisions of law as there was no attestation by two or more witnesses within the meaning of section 63 (c) of the Indian Succession Act. The said section reads as under :

“63. Execution of unprivileged wills. –
Every testator, not being a soldier employed in an expedition or engaged in actual warfare [or an airman so employed or engaged] or a mariner at sea, shall execute his will according to the following rules:

(a) The testator shall sign or shall affix his mark to the will, or it shall be signed by

some other person in his presence and by his direction.

(b) The signature or mark of the testator, or the signature of the person signing for him, shall be so placed that it shall appear that it was intended thereby to give effect to the writing as a will.

(c) The will shall be attested by two or more witnesses, each of whom has seen the testator sign or affix his mark to the will or has seen some other person sign the will, in the presence and by the direction of the testator, or has received from the testator a personal acknowledgment of his signature or mark, or of the signature of such other person; and each of the witnesses shall sign the will in the presence of the testator, but it shall not be necessary that more than one witness be present at the same time, and no particular form of attestation shall be necessary.”

13. In *Lalitaben Jayantilal Popat vs. Pragnaben Jamunadas Kataria & Ors.*; AIR 2009 SC 1389, their Lordship of the Supreme Court have held that the said provision of Section 63 of the Indian Succession Act, 1925 indisputably is mandatory in nature. Their Lordships have further held as to what is meant by the word “attestation” as under :-

“What is meant by the word ‘attestation’ is defined in Section 3 of the Transfer of Property Act, which reads as under :

Section 3 – Interpretation clause in this act, unless there is something repugnant in the subject or context,

XXXX

XXXX

XXXX

“attested”, in relation to an instrument, means and shall be deemed always to have meant attested by two or more witnesses each of whom has seen the executant sign or affix his mark to the instrument, or has seen some other person sign the instrument in the presence and by the direction of the executant, or has received from the executant a personal acknowledgement of his signature or mark, or of the signature of such other person, and each of whom has signed the instrument in the presence of the executants, but it shall not be necessary that more than one of such witnesses shall have been present at the same time, and no particular form of attestation shall be necessary.”

14. The Supreme Court in the same year of 2009 as in *Lalitaben’s* case (*supra*) has also held in *Rur Singh & Ors. Vs. Bachan Kaur; (2009) 11 SCC 1* that the Will has to be attested by two or more witnesses and each of these witnesses must have seen the testator sign or affix his mark to the Will, or must have seen some other

person sign the Will in the presence and by the direction of the testator, or must have received from the testator a personal acknowledgement of signature or mark, or of the signature of such other person, and each of the witnesses has to sign the Will in the presence of the testator.

15. Keeping these judgments of the Supreme Court in view, it has to be held that the Will dated 22.10.1973 has not been proved and no probate or Letters of Administration can be granted under the law. This is on account of the fact that the first attesting witness AW-1, G.C. Kumar, has very clearly stated that he does not recollect the execution of the Will or that the testator had put his signatures to the Will in his presence. Section 63 requires that unless it is proved to the satisfaction of the Court that the testator had put his signatures in the presence of the attesting witnesses or such attesting witnesses had received a personal acknowledgement of these signatures from the testator, the Will cannot be held to have been proved as a valid Will. This shows that there has to be 'affirmative' evidence of the execution and attestation within the meaning of Section 63 and merely because the witness has forgotten or does not remember

having seen the testator signing the document because the testator's signature on the Will cannot be held having been proved. No presumption in this regard can be drawn.

16. The learned trial court has noted the fact that both the attesting witnesses, namely, AW-1, G.C. Kumar and AW-5, Budh Ram, have been examined by respondent No.2. They have identified their signatures as attesting witnesses but it has been observed by the trial court that the said attesting witnesses have testified without caring to state whether the deceased/testator had signed in their presence or not without reading and explaining the contents of the Will to the deceased/testator and without knowing anything. The learned Additional District Judge has observed that a perusal of the testimony of these witnesses leads her to draw only one conclusion that they have turned dishonest and have been won over by respondent No.2 and, therefore, they were turned hostile in court. It has also been observed by the learned trial court that the deceased/testator was dealing in the sale and purchase of the properties and on the same day, he had transacted a property in

favour of Kishan Lal and Bimla Devi and executed documents like Will, Power of Attorney, etc., which were also got registered. It has been stated that apart from Will in question, two other Wills were also executed and the objectors have not raised any objection with regard to the other two Wills and they have chosen to raise objection with regard to the Will in question and, therefore, the court of learned Additional District Judge has drawn an inference that all the three Wills were genuine and validly executed by the deceased/testator.

17. The second witness Budh Ram, AW-5, has stated that he was never asked by Ch. Nathu Singh the testator of the disputed Will to attest his Will and that he had gone to the office of the Sub Registrar, Delhi at the asking of Kishan Lal who had purchased a portion of the property from Ch. Nathu Singh by means of the prevalent method of execution of Power of Attorney, Agreement to Sell etc., and had gone to the Sub-Registrar's office for attesting the documents to be executed in favour of Kishan Lal and Bimla Devi and not in favour of the petitioner. In fact he does not even know

that any Will was to be executed in favour of the petitioner and he had not read the contents of the said Will. In view of this evidence of the second attesting witness, it certainly cannot be held that the requirements of Section 63(c) have been met and that the document Ex A-1 has been proved to be a validity executed Will. There is no proof of a valid “execution” and “attestation” by the two witnesses.

18. I am afraid that this reasoning given by the learned trial court does not inspire confidence and is not correct analysis of the evidence. While proving the Will, not only the signatures of the attesting witnesses have to be proved but it has also been shown by adducing positive evidence that the deceased/testator had an intention to bequeath the property and similarly, the witnesses had an intention to attest the document which was original and explained to the deceased/testator so that he knows what document he was executing. In the instant case, it is not in dispute that the beneficiary Jagdish Chand was helping the deceased/testator in transacting the property and collection of rent for a considerable period of time and therefore, enjoyed his confidence. On the date when the Will in

question is purported to have been executed, documents with regard to sale of a property were being executed by the deceased/testator, who did not know English. He only used to put his signatures in Urdu, therefore, the possibility of a document in the shape of the Will in question surreptitiously being inserted in other documents which were *bona fide* being signed by the deceased/testator as documents of transaction pertaining to the sale of the property, could not be ruled out. This suspicion had to be dispelled by the beneficiary by producing some evidence which has not been done. On the contrary, the trial court has drawn an unreasonable and unconvincing inference that merely because the other two Wills purported to have been executed by the deceased/testator have not been challenged by the objectors, therefore, necessarily, the third Will does not also become genuine. By virtue of the two Wills which have not been challenged, the objectors knew that their predecessor-in-interest had transacted a property. The deceased was in the habit of transacting properties in that mode while as the Will in question was a document by virtue of which the benefit was being sought to be conferred on the person who was enjoying the trust of

the deceased/testator, yet drawn a document in his favour, therefore, this is a vital suspicious circumstance which makes this appellate court disagree with the analysis of evidence of the trial court.

19. The learned senior counsel for the appellant has also referred to Section 71 of the Evidence Act and contended that in cases if the attesting witness denies or does not recollect the execution of a document, its execution may be proved by other evidence. This section was relied upon by the learned senior counsel for respondent No.2 only on account of purported statement having been made by AW-1, G.C. Kumar that he does not recollect as to whether the deceased/testator had put signatures in his presence or not.

20. I do not think that in the instant case, Section 71 of the Evidence Act is of any help to the respondent.

21. The object of Section 71 is in the nature of a safeguard to mandatory provisions of Section 68 of the Evidence Act to meet the situation where it is not possible to prove the execution of a Will by calling attesting witnesses though alive. It has also been held in *Janki Narayan Bhoir vs. Narayan Namdeo Kadam*; AIR 2003 SC

761 that the aid of Section 71 of the Evidence Act can be taken help of only when attesting witnesses, who have been called, deny or fail to recollect the execution of the document to prove it by other evidence. In the instant case, the witnesses are not only denying their signatures or execution of the document but also their testimony shows lack of intention to attest the document as a Will. Further, there are attendant circumstances which raise doubt with regard to that intention and, therefore, I feel that Section 71 does not help the appellant in any manner.

22. Further there has to be what is known as *animus attestandi*, i.e, the witness must have intended to attest the Will. In *Anil Kak vs. Kumari Sarda Raje*; AIR 2008 SC 2195, their Lordship of the Hon'ble Supreme Court of India have held "while making attestation there must be a *animus attestandi* on the part of the attesting witnesses meaning thereby he must intend to attest and extrinsic evidence on this point is receivable".

23. Even in *Rur Singh (deceased through LRs) & Ors. vs. Bachan Kaur*; (2009) 11 SCC 1 also, their Lordships of the Hon'ble

Supreme Court of India held that “unlike other documents, even animus attestandi is a necessary ingredient for proving attestation”.

24. For the foregoing reasons, the petitioner had miserably failed to prove the validity of the Will in accordance with Section 63 of the Indian Succession Act and Section 68 of the Indian Evidence Act and is therefore not entitled to Letters of Administration. The learned trial Judge in the Court below has failed to apply her mind and has fallen into a grave error in granting the Letters of Administration in favour of the petitioner in respect of the Will Ex A-1 which has not been proved to have been executed and attested in accordance with Section 63 (c) of the Indian Succession Act.

25. The next submission of the learned senior counsel or the appellants had been that the Will (Exhibit A-1) is shrouded by grave suspicion. This was disputed by the learned counsel for the respondent No.2 Jagdish Chand. It was contended by him that Jagdish Chand had a long drawn association with the deceased-testator. He had been practically acting as his estate manager and there was nothing unnatural in execution of the Will in his favour.

26. I have considered the rival contentions. In my view, the following points are important to note if a Will can be said to be natural or not. This is *de hors* the point as to whether the Will has been proved or not according to Section 63 (c) of the Indian Succession Act.

- i. The Will (Exhibit A-1) is an unnatural and unfair Will as there was no reason whatsoever why would the testator Ch. Nathu Singh would have altogether excluded members of his family in particular his wife Smt. Chandrawati who has been left absolutely unprovided for. During the life time of his wife, no reasonable person is expected to prefer a total stranger to succeed to his property. Even assuming that he had any love and affection for such a stranger unless and until it is shown that relations of the husband wife were strained. Such love or affection for a stranger cannot override love and affection as well as duty towards one's wife and children. The Appellants have vehemently denied the testator had any love and affection for the petitioner.

On the other hand, it has been alleged by the objectors that the deceased/testator had strong aversion for him as he had found him to be a clever person of a doubtful integrity. In this behalf some of the events listed herein below show that the testator could possibly not have any love and affection for the petitioner. “Nemo praesumitur alienam posteritatem suae praetulisse” [Trayner's Latin Maxims, 4th edition, 2005 reprint, p. 382]: No one is presumed to have preferred another's offspring to his own. This is

a legal presumption which holds with regard to testamentary writings.

- ii. The testator on 18.12.1975 had filed a suit for recovery of Rs.1200/- against the petitioner Jagdish Chand, his wife Santosh Kumari and his son Anil, which was registered as Suit No.412/75. The suit for recovery of damages for unauthorized use and occupation, which the petitioner and his wife (defendants in that case) had failed to pay and the testator had to take resort to legal proceedings certainly does not show that the testator had any love and affection for the petitioner. It is pertinent to note that the testator in his plaint filed in suit No.412/75 stated that the petitioner/defendant in that case is a clever person and was commanding confidence of the plaintiff (testator herein) and used to obtain signatures of the testator who was illiterate and can hardly sign his name on several papers which he might misuse.
- iii. In the Written Statement filed by Jagdish Chand (beneficiary) in that case he stated that the testator who was the plaintiff in that case had made false allegations against him (against Jagdish Chand) and he should therefore be prosecuted for defaming him. A person who can ask the Court to prosecute the testator certainly cannot claim to be a person for whom the testator had love or affection. In the replication filed by the testator in S.No.412/75 it was stated that Jagdish Chand was appointed as a rent collector only to realize the rent and render account to the testator which he did not do and his services therefore were terminated.
- iv. Jagdish Chand's allegation that the said suit was filed by the testator against him at the instance of his sons who were inimical towards him (Jagdish Chand) and

that the testator had got the suit dismissed in default for this reason is false. The fact however is that the testator had filed a suit against Jagdish Chand for having created tenancy in favour of his wife without the testator's knowledge or consent and he was annoyed for this reason, as well as for not paying his dues. As far as getting the suit dismissed in default is concerned, it is pertinent to note that the suit was dismissed in default on 11.8.1980 after the death of the testator as nobody pursued the same. The evidence on record does not show that the testator had any affection for or could possibly have any affection for a person like the petitioner. If at all the record shows that the testator had a strong aversion for the petitioner in particular as he had to issue public notice in Veer Arjun informing the general public about the petitioner's dishonesty.

- v. In Suit No.412/75 the testator had claimed damages for use and occupation against the petitioner for the period October/November 1973, January/February 1974 and from 1.4.1974 to 30.11.1975 at the rate of Rs.50/- p.m. when the testator claimed damages for the month of October 1973 he could not have possibly had made any Will in October 1973 in favour of petitioner against whom he had to litigate for paltry sum of Rs.1200/-. The two facts seem to be totally in incongruent and cannot be reconciled.

27. All these five facts clearly show that it was highly improbable for the deceased/testator, who was availing of the services of the beneficiary for his professional purposes, had over a period of time ceased to have full cognizance in his integrity and allegiance qua him and, therefore, he

would execute a Will in favour of a person in whom he had lost the trust or whom he saw with a sense of distrust.

28. There is another aspect of the matter which raises a serious suspicion regarding the genuineness of the Will. This is the past conduct of the beneficiary Jagdish Chand. These factors are :

a) The petitioner Jagdish Chand is alleged to be a person of doubtful integrity as described by the testator himself in the Plaint in Suit No.412/75 and it is on record of the case that he is a clever person who tries to take undue advantage of anybody who comes in his contact. The two instances which have been brought to the notice of the Court are that one Shri Ramesh Chand Sharma who had purchased a portion of the property of the testator on 1st October, 1973 had after the death of the testator filed a petition for grant of probate or Letters of Administration. He has stated as he had appeared as a witness as RW4. According to his deposition, the Petitioner had got the sale documents, namely, Agreement of Sale, Power of Attorney and Will and also got the Petition drafted and presented in Court through a Counsel of the petitioner's choice Shri T.C.Sharma, Advocate. The Petitioner got some unauthorized and false averments made in the Petition through the counsel of his choice and the witness during the course of the trial in his case had to amend the Petition because the Petitioner Jagdish Chand had got inserted certain facts which he had never instructed to be averred. In particular it may be stated that in the Petition the Petitioner Jagdish Chand got inserted paragraph 12 of the Petition in which he stated that the Will executed in favour of Ramesh Chand Sharma was kept in safe

custody of Jagdish Chand Petitioner herein whereas the actual fact was that the Will was all along in possession of the purchaser Ramesh Chand Sharma himself. He had therefore to amend the Petition and set the record straight and thereafter relieved the said counsel Mr. T.C.Sharma who had been appointed for him by the Petitioner Jagdish Chand and the witness stated in court that he had to amend the Petition because the Petitioner Jagdish Chand had defrauded him.

b) Another instance of the respondent No.2's dishonesty is in a case filed by Rattan Singh, son of the testator, against his tenant Om Prakash for recovery of rent when the said Defendant Om Prakash had produced certain receipts which had been provided by Jagdish Chand but were not the correct documents. Rattan Singh, the Plaintiff in that case had not received the amount shown to have been received in the false receipts provided by Jagdish Chand and the Defendant Om Prakash in that case realized this fact during the course of trial of that case and stated in court that a fraud had been played on him by the respondent No.2 Jagdish Chand and therefore he was ready to pay the amount of the suit and compromise the case. These two instances show that Jagdish Chand tried to take advantage of anybody who comes across him and is always prepared to manipulate things in his own favour.

c) It is also pertinent to note that a portion of the property bearing No.A-162/1 is also the subject matter of a dispute in 3 suits pending in Tis Hazari Courts, Delhi against the respondent No.2's wife Smt. Santosh Kumari. The said property is also the subject matter of the disputed Will Ex A-1. The testator would not have allegedly sold a portion of the said property if he had purportedly made a Will in respect

of the said property bearing No.A-162/1. Even if it assumed that that a Will was made in respect of the property then the same stood revoked on sale of a portion of the said property mentioned in the Will.

29. The above-mentioned facts reinforce the view that it cannot be said by any certainty that the Will is proved by any preponderance of probability. On the contrary, there are serious doubts about the Will which has been proved by the witnesses and it will not be safe to grant a probate on the basis of this Will.

30. Before concluding, it may be worthwhile to refer to some of the applications which are pending before this court though no arguments have been advanced on the same. Two of the applications are filed under Section 340 Cr.P.C. being C.M. Nos.15378/2012 and 699/2013 by both the sides. I have gone through the contents of both these applications. The contents of both these applications are in the nature of an attempt to pin the other side with a threatened criminal action so that each of the side is able to steal a march over the other. Since the case has been considered on merits, I am not inclined to entertain any of these

applications and accordingly, both these applications are treated as dismissed.

31. The other applications being C.M. Nos.22370/2011, 17632/2012 and 20036/2012 have been filed by the appellant under Order 41 Rule 27 CPC for adducing of additional evidence during the pendency of the first appeal as well as for taking on record the certified copies of the pleadings of the previous litigation purported to have arisen between the deceased/testator and respondent No.2, Jagdish Chand, the beneficiary. I have gone through the contents of the application as well as the reply. So far as taking of cognizance of the certified copies of the pleadings of the previous litigation between the deceased/testator and respondent No.2 is concerned, that cannot be ignored and the court is bound to take it into consideration the same while deciding the appeal. I have taken into consideration the certified copies of the pleadings which have been filed by the appellant along with the application. To that extent, the application is allowed. So far as the prayer in the other applications for taking on record the photocopies of the documents are concerned, that

cannot be entertained as a document has to be proved in accordance with law and the photocopies cannot be taken cognizance of.

32. Having regard to the aforesaid discussion, I am of the following considered opinion :-

(i) That the Will exhibit A-1 is not proved in accordance with law under Section 63 sub-Section (c) of the Indian Succession Act, 1925 inasmuch as the testimony of both the attesting witnesses AW-1, G.C. Kumar and AW-5, Budh Ram, is not reliable. G.C. Kumar is an advocate, who has waived while testifying in court and does not show that he had an intention along with the deceased/testator and AW-5, Budh Ram regarding the execution of the Will. AW-5, Budh Ram, is more in the nature of a tout and was known to G.C. Kumar and was also known to the deceased/testator as well as Jagdish Chand, the beneficiary. Therefore, the possibility of Budh Ram having obtained the signatures of G.C. Kumar on the document could not be ruled out though all the three of them may not have signed at the same time.

(ii) There are number of suspicious circumstances as have been envisaged in paragraph Nos.26 and 28 hereinabove. The sum and

substance of these suspicious circumstances is that the deceased/testator was illiterate knowing only Urdu. The Will is drafted in English and the day the Will has been drafted and got signed, the deceased/testator had executed two other Wills and the other property documents regarding the sale of some of his property in favour of Kishan Lal and Bimla Devi and the possibility of his signing this particular document, that is, Will in question, as a document of a part of sale transaction in favour of Kishan Lal or Bimla Devi, could not be rule out. Simultaneously, the possibility of the document having been surreptitiously inserted in the said set of documents by Jagdish Chand, who was the confidant of the deceased/testator, with the help of Budh Ram, AW-5, cannot also be ruled out. There was past history of litigation initiated by deceased/testator against the wife of Jagdish Chand, who had unauthorizedly done something not specifically instructed by the deceased/testator in which damages were claimed from his wife. In such a circumstance, it could not be said that the document which is purported to have been executed by the deceased/testator in favour of the beneficiary, Jagdish Chand, out of the so-called natural love and affection

was actually enjoying the natural love and affection of the deceased/testator.

33. For the above mentioned broad reasons, I feel that the finding returned by the trial court is not correct appreciation of the evidence adduced by the parties especially respondent No.2 and, accordingly, the judgment dated 15.5.2007 is set aside and the Will is held to have not been proved.

V.K. SHALI, J.

JULY 02, 2014
‘AA’