

**IN THE HIGH COURT OF PUNJAB AND HARYANA AT
CHANDIGARH**

RSA No.2907 of 1985

Date of Decision: 20.04.2017

Khubi Ram (deceased) through his legal representatives and others
...Appellants

Vs.

Mussadi (deceased) through his legal representatives
...Respondents

CORAM: HON'BLE MR. JUSTICE AMOL RATTAN SINGH

Present:- Mr. Pawan Kumar, Senior Advocate with
Mr. Rozer Kumar Aggarwal, Advocate,
for the appellants.

Mr. Ravinder Malik, Advocate,
for the respondent.

Amol Rattan Singh, J.

This appeal has been filed by the defendants in a suit filed by the respondent-plaintiff (now represented by his widow, son and daughter). The plaintiff, Mussadi, was the brother of appellants-defendants no.1 and 2, Khubi Ram and Tek Ram respectively and brother-in-law (husbands' brother) of defendant n.3, Champa Devi.

The 1st appellant-defendant, Khubi Ram, is also represented by his nine legal representatives, who are seen to be his widow, sons and daughters.

2. By his suit, the plaintiff had sought a decree of declaration with the consequential relief of possession of the suit property, to the extent of his share in the share of the late brother of the parties (brother-in-law of

appellant-defendant no.3), Phool Singh. The relationship between the parties, at the outset is shown by a pedigree table in the judgment of the learned Sub-Judge Ist Class, Jhajjar and is being reproduced hereinunder:-

Ram Nath= Shriyan				
I				
Phool Singh (died)	Chet Ram= Champa Devi (died) (widow of deft. no.3)	Khubi Ram (Defendant no.1)	Tek Ram (Defendant no.2)	Mussadi (Plaintiff)

As per the plaint, Phool Singh was a joint owner of property alongwith the husband of appellant-defendant no.3, namely Chet Ram, and appellant-defendant no.2 Tek Ram, i.e. he was a 1/3rd share holder in the total agricultural holding of 87 kanals and 1 marla, situated in village Jhajjar, then District Rohtak (now District Jhajjar). The suit land was fully described by way of rectangle, khewat, khatoni and khasra numbers in the plaint, which is not necessary to be gone into for the purpose of this appeal, such numbers of the suit land, or the total acreage thereof, not being in dispute.

3. As per the plaintiff, after the death of his brother, Phool Singh, his mother Shiriyan succeeded to the estate of Phool Singh and mutation no.5595 was accordingly entered in her favour in the revenue record. Shiriyan thereafter died on 08.08.1982, leaving behind the plaintiff and defendants as her legal representatives.

The defendants however produced a will dated 19.10.1981 allegedly executed by Shiriyan in their favour and accordingly, a mutation was entered in the revenue record though objected to by the plaintiff.

The plaintiff further contended that the will was bogus, forged, null and void and invalid, for the reason that his mother was 90 years of age,

suffering from rheumatism and was also deaf and dumb and was thus physically handicapped and not in a fit state of mind to execute any such will. Further, even if it was found to have been executed, it was not the result of her free volition and consequently would have been obtained by exercising undue influence over her. Yet further, it was contended that it was never read over to her and the procedure of its registration was also improper as documents are never read out or thumb marked before the Sub-Registrar.

Lastly, it was contended that the plaintiff had also given assistance to his mother in her old age and therefore, there would have been no reason for her to discriminate between her children, completely ousting one of them from inheritance of her estate.

Hence, as per the plaintiff, he had not been excluded from her inheritance of the estate of his late brother.

4. Consequently, the suit was instituted on 09.03.1983 and upon notice issued to them, the defendants appeared and filed their written statement on 03.06.1983, admitting to the relationship between the parties, as also to the date of death of Shiriyan, i.e. 08.08.1982.

However, the validity of the will was obviously supported by the defendants, contending that it was duly registered on 19.10.1981 and that Shiriyan was very much in a sound disposing mind at the time of its execution and there was no undue influence or pressure exerted upon her to execute it.

It was further contended that the will had been read over to her by the scribe and she, after admitting to the correctness of its contents, had affixed her thumb impressions over it in the presence of the attesting witnesses.

Yet further, it was contended by the defendants that they had

rendered services to Shirian in her old age and therefore, out of love and affection she had bequeathed her property to them and therefore, the plaintiff had no locus to file the suit, which they also contended to be time barred.

Lastly, as per the defendants, the suit property was self-acquired property in the hands of Shirian and therefore, she was fully competent to dispose of it in the manner she liked.

5. The respondent-plaintiff having filed a replication to the written statement, controverting the contents thereof, the following issues were framed by the learned Sub-Judge:-

- “1. Whether the will dated 19.10.81 alleged to have been executed by Smt. Siriya in fav our of the defendants is bogus, false frivolous, null and void on the grounds alleged in the plaint? OPP
2. Whether the plaintiff has got no locus standi to file the present suit? OPD
3. Whether the suit is not maintainable as alleged in the additional plea no.2 of the written statement? OPD
4. Whether the suit is barred by time if so to what effect? OPD
5. Whether the plaintiff is estopped from filing the present suit by his own act and conduct? OPD
6. Relief.”

6. Various documents having been tendered and witnesses examined by both parties by way of evidence, on the first and primary issue of the validity of the will, the learned Sub-Judge noticed that the plaintiff, as PW1, other than supporting his contentions in the plaint, had also testified to the effect that his mother had never come to the Tehsil on her own will and may have been forced to come there.

PW2, Ramphal, also supported the plaintiff, to the effect that he knew the family and Shiriyan had died at the age of 90-92 years and had also lost one son and further, that she never ever mentioned any will executed by her or that she ever went to the Tehsil.

PW3, Jangli Ram, the other witness for the plaintiff also deposed to the effect that she was between 80-90 years of age at the time of her death and recognised anybody only by their voice.

7. Conversely, defendant no.1 Khubi Ram appeared as DW1 and supported the written statement of the defendants, further stating that the death ceremony of his mother was also performed by the defendants and that one Chhote Lal, Numberdar, had informed them of the will of their mother, which was executed of her own free volition, on the basis of which a mutation had also been entered in the revenue record.

DW2 Chhelu Ram also testified to the effect that Shiriyan was known to him and used to live with Khubi Ram, who rendered services to her and consequently she had executed a will in favour of Khubi and the other two defendants of her free will.

Numberdar Chhote Lal testified to the effect that the will was executed in his presence, which was read over to him and the other witness, and that they both signed in it. He further stated that he had seen the original will and put his thumb impression over it, which he recognised.

8. Upon the aforesaid evidence, the learned Sub-Judge first recorded a finding (though there was no specific issue framed in that regard), to the effect that the property was not ancestral in nature and in fact, even the plaintiffs' own witness, i.e. PW2 Ramphal, had admitted in his cross-examination that it was purchased by all four brothers.

Therefore, going on to the issue of whether the document relied upon by the defendants was a genuine and valid will, the testimony of the attesting witness, Chhote Lal, DW4, was referred to, with the Court noticing that he had deposed that Shirian had executed it, who was known to him and that at the time of its execution she was of a sound disposing mind and the will was also read over “to them”.

The deed-writer/scribe, Om Parkash, also testified that the original will had been scribed by him at the instance of Shirian, which was read over to her and to the witnesses, who admitted the same to be true and affixed their thumb impressions and signatures.

On the basis of the aforesaid testimonies, the learned Sub-Judge held that the will stood duly proved in terms of Section 63 of the Indian Succession Act, 1925.

9. As regards the exclusion of the plaintiff from inheritance of his mothers' property, the learned trial Court first observed that special reasons had been given in the will for the same and thereafter stated that the reason described in it, was due to the service rendered by the defendants to the testatrix.

It was further recorded that the plaintiffs' own witnesses had also admitted that Shirian used to live with Khubi Ram, i.e. defendant no.1, though she used to go off and on to plaintiff Mussadi. Further holding that it had not been proved that Shirian was not of sound disposing mind, the will was held to be valid and believable.

10. The other issues, with regard to locus, maintainability and limitation not having been pressed, they were therefore decided in favour of the plaintiff.

11. On the aforesaid findings, the suit of the plaintiff was dismissed, leading to the filing of a first appeal by him before the learned first appellate Court.

12. That court (Additional District Judge, Rohtak), after noticing the pleadings, the issues framed and the evidence led by the parties, as also the arguments raised, first went on to look into the issue of whether the will stood proved even in terms of Section 63 of the Act of 1925.

It was first noticed that vide an order dated 05.03.1985 (passed by the first appellate Court itself), the second attesting witness to the will, Suresh Chand, had been called as a Court witness and had testified to the effect that the original will, a copy of which was exhibited as Ex.P1 before the trial Court, bears his signatures and that an old lady whose name he does not know had got the will executed. He had seen the lady sitting with the deed-writer and at the time when he (PW1) had reached the seat of the scribe, the will had already been written out. The Court witness further testified that it was not read over to the lady in his presence and as far as he could remember, one Chhote Lal, Numberdar, was also present who had also appeared before the Sub-Registrar and had “perhaps signed the will in his presence”.

The first appellate Court also recorded a finding that in cross-examination, this witness stated that he had signed the will at the instance of Chhote Lal and the petition writer and also on their “good faith, that the lady had thumb marked it in his presence” but he does not remember whether Chhote Lal had signed in his presence.

On noticing the aforesaid testimony, the learned lower appellate Court recorded a finding that as per this witness, obviously he did not even know the testatrix.

13. The testimony of the scribe, i.e. DW3 Om Parkash, was noticed by the learned court to the effect that though he had deposed that he had seen the original will, and had also admitted to having written it out at the instance of Shiriyan, he had not stated that Shiriyan had first thumb marked it and that the other witnesses had seen her thumb marking it, after which they had signed/thumb marked it.

It is to be noticed at this stage itself that as reproduced by the learned first appellate, this witness had testified as follows:-

“I have seen the original will which is my hand and which was scribed by me at the asking of Smt. Shiriyan widow of Ram Nath; that after writing it, it was read over to Shriyan and witnesses and Shriyan and witnesses had signed/thumb marked the same after admitting it correct.”

Similarly, the statement of the other attesting witness, Chhote Lal, DW4, has been reproduced by the learned first appellate Court as follows:-

“The will which was got by Smt. Shiryen bears my signatures. I have seen its original. It bears my thumb impressions. Before obtaining their thumb impressions, the petition writer had read it over.”

The aforesaid statement was interpreted by that Court to the effect that the witness had not stated anywhere that Shiriyan had thumb marked the will in his presence, nor had he stated that there was any other attesting witness to the will and whether that witness had seen her thumb marking it and had thereafter attested it in her presence.

14. On the basis of the aforesaid testimonies, it was held by the first appellate Court that the will had factually not been proved (even in terms of Section 63 of the Act of 1925).

Other than the above, that Court held that the will would be seen to be shrouded in suspicious circumstances in view of the fact that there would be no reason for a mother to dis-inherent one of her sons, with not even an allegation by the defendants that relations between that son (the plaintiff) and their mother were strained or that she was annoyed with him.

On the other hand, the plaintiffs' witnesses had stated that she also came to reside with the plaintiff.

Hence, holding the will to be not free of suspicion, on that ground also, it was held to be not a valid will.

15. The decision on the other issues by the trial Court in favour of the plaintiff not having been challenged by the defendants, the appeal of the plaintiff was therefore allowed and the suit decreed in his favour, to the effect that the will of the mother of the parties (mother-in-law of appellant-defendant no.2) was null, void and not binding upon the plaintiff and therefore, he was entitled to possession of a 1/4th share of the suit land.

16. Consequently, this regular second appeal has been filed by the defendants in the suit, which was admitted to regular hearing by an order of a co-ordinate Bench, dated 11.02.1986.

Thereafter, upon a statement made by counsel for the appellants on 23.09.2011, that after the death of the first appellant and respondent-defendant Mussadi, none had contacted him despite best efforts, the appeal was dismissed for want of prosecution but upon an application thereafter filed for restoration, it was duly restored vide an order dated 07.10.2013.

17. Though no question of law has actually been framed in the grounds of appeal, however, obviously the question of law that arises is as to whether the will of the late Shirian was duly proved in terms of Section 63 of the Indian Succession Act, 1925 and if that is so, can it be still held to be a valid will, not shrouded by any suspicious circumstances, contrary to what has been held by the first appellate Court?

18. Mr. Pawan Kumar, learned Senior counsel appearing for the appellants-defendants, after referring to the facts, including the relationship of the parties *inter se*, first referred to the testimonies of DWs3 and 4 and CW1, to submit that nothing could be discerned from those testimonies to hold that the will was not validly executed in terms of Section 63 of the Act of 1925, as has been held by the lower appellate Court.

Learned senior counsel then referred to paragraph 6 of the judgment of the learned Sub-Judge, to submit that it was very obvious that it was due to the reason that Smt. Shirian lived with the late appellant-defendant no.1, Khubi Ram, that she exercised her discretion to bequeath her property to the appellants-defendants and not to the plaintiff.

Mr. Pawan Kumar next submitted that though the witnesses for the plaintiff had stated that the testatrix was blind, deaf and dumb and not in a fit state of mind, no medical evidence whatsoever was led to that effect and hence, the testimonies of those witnesses cannot be believed.

Learned senior counsel next submitted that the lower appellate Court actually reversed the judgment of the learned Sub-Judge primarily on the ground that the Court witness, Suresh Chand, had testified that the will was not read over to the testatrix in his presence and that he also did not actually know her.

He further submitted that as per the Sub-Registrars' endorsement of the will, it was registered in the presence of the testatrix, and therefore no evidence would be required to prove the validity of the will, even in terms of Section 114 of the Indian Evidence Act, 1872.

Mr. Kumar next referred to the cross-examination of DW3, Om Parkash, wherein, after his examination-in-chief to the effect that the will was scribed at the instance of the testatrix and was thereafter read over to her and she, having admitted to its correctness, thumb marked it, he again reiterated that though he did not know whether the testatrix was literate or not, however, the will was duly read over to her, which she had understood.

To similar effect, learned senior counsel referred to the testimony of DW4, Chhote Lal, from the trial Court record.

19. In support of his arguments, Mr. Pawan Kumar first referred to a judgment of the Supreme Court in **Lalitaben Jayantilal Popat v. Pragnaben Jamnadas Kataria & Ors.** 2009 (1) RCR (Civil) 715, to submit that though the will needs to be attested by two witnesses, both need not be examined.

Mr. Kumar next referred to the judgment in **Savithri & Ors. v. Karthyayani Amma & Ors.** 2007(4) RCR (Civil) 749, to submit that simply because a natural heir has been excluded, that by itself is not a factor to conclude that the will could not be believed.

He next referred to the judgment in **Pentakota Satyanarayana & Ors. v. Pentakota Seetharatnam & Ors.** 2005 (4) RCR (Civil) 615, to submit that where the testator was in a healthy and state of mind and the will was duly registered and otherwise proved by an attesting witness, there would be no reason to disbelieve it.

Learned senior counsel in this context further submitted that once

the Registrars' endorsement on the will was never dislodged by the plaintiff, by leading any evidence to the contrary, the will would stand duly proved.

20. In response thereto, Mr. Ravinder Malik, learned counsel appearing for the respondent-plaintiff (now his LRs), first submitted that the will, Ex.P4, not being the original will and only a photostat copy thereof, it in any case could not be held to be proved.

He next referred to the judgment of the learned lower appellate Court to reiterate the reasoning given therein for disbelieving the will, to the extent that DW4 Chhote Lal had nowhere stated that the testatrix had thumb marked the will in his presence.

In fact, as per learned counsel, the scribe, DW3, contradicted DW4 to that extent by stating that she signed in the presence of both the witnesses.

CW1 in any case, learned counsel further pointed out, specifically stated that the will was not read over in his presence and he had only signed it in good faith because of Chhote Lal and the scribe.

Learned counsel next submitted that the contention of the plaintiffs' witnesses as to the physical condition of the testatrix was never shaken even in their cross-examination, and her state of mind could further be seen from the fact that the will nowhere gives any reason for specifically excluding the plaintiff therefrom, whose name also, very strangely, does not find mention in the will, despite there being no evidence led to the effect that she had any animosity towards him.

21. Mr. Malik next referred to a judgment of the Supreme Court in **Kaliya v. State of Madhya Pradesh** (2013) 10 SCC 758 to submit that mere exhibition of a document is not enough to prove it.

Lastly, learned counsel for the respondent-plaintiff submitted that PW3, Jangli Ram, had specifically stated that the property had been purchased by four brothers, and therefore, in any case, upon the death of one of the brothers it had to be equally divided amongst the remaining three.

22. In rebuttal, Mr. Kumar, learned senior counsel, stated that the physical condition of the testatrix could be seen from the fact that though she died on 08.08.1982, the will was executed well before that date, i.e. on 19.10.1981, which is about 10 months before her death.

Learned senior counsel submitted that even as per Section 68 of the Indian Evidence Act, only one of the attesting witnesses to the will is required to testify to its veracity before the Court.

In the present case, CW1 and DW4, both having specifically stated that they had signed on the will, there was no reason to hold that it was not proved in terms of Section 63 of the Indian Succession Act.

23. Having considered the aforesaid arguments as also the judgments of the Courts below and that part of the record of the lower Courts, which learned counsel have both referred to, it needs to be noticed that though in second appeal this Court is not required to go into the factual aspects, including verifying the testimonies of the witnesses, but in the circumstances that the suit of the plaintiff was dismissed by the Sub-Judge, relying upon the will set up by the defendants and that judgment was reversed, with the learned first appellate Court holding that the will was not a valid one, this Court is to satisfy its conscious with regard to the manner of execution of the will and whether it actually stood proved by the testimonies of the attesting witnesses as had testified before the Courts below, in addition to seeing whether the will was actually shrouded by any suspicious circumstances so as to disbelieve it.

24. Before going on to appraising as to whether the learned lower appellate Court has correctly disbelieved the will even in terms of Section 63 of the Act of 1925, the said provision is reproduced hereinunder:-

Indian Succession Act, 1925

“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 acknowledgement of his signature or mark, or 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.”

Similarly, Section 68 of the Indian Evidence Act, 1872, is reproduced as follows:-

Indian Evidence Act, 1872

“68. Proof of execution of document required by law to be attested.- If a document is required by law to be attested, it shall not be used as evidence until one attesting witness at

least has been called for the purpose of proving its execution, if there be an attesting witness alive, and subject to the process of the Court and capable of giving evidence:

[Provided that it shall not be necessary to call an attesting witness in proof of the execution of any document, not being a Will, which has been registered in accordance with the provisions of the Indian Registration Act, 1908 (16 of 1908), unless its execution by the person by whom it purports to have been executed is specifically denied.]”

25. Thus, as regards Section 63 (a) of the Act of 1925, the testator is required to sign or affix his mark on the will or direct some other person to do so on his behalf.

In the present case, the thumb impression of the testatrix being genuine or not being a separate issue, at least what is purported to be her thumb impression, is not denied to be present on the will. Thus, the said provision would stand complied with, if the thumb impression is genuine.

As regards Section 63(b), it requires that the signature or mark of the testator, or of such other person who has signed/affixed his mark on his direction, shall be so affixed at such a place on the will, so as to appear that the testator actually was giving effect to the recital in the will.

In this context, it needs to be said that nothing has been pointed to from the record to show that the will was not thumb marked at the appropriate place, though the copy of the will that is present in the record is not a photocopy of the original will.

Coming then to clause (c) of Section 63 of the Act, the will in question is stated to be attested by two witnesses, i.e. Chhote Lal and Suresh

Chand.

It may be stated here that clause (c) does not actually require that the testator must sign in the presence of witnesses, or that the witnesses must sign in each others' presence. What is required is that even if the testator has not signed in their presence, he must acknowledge to each of them that he has signed the will, or has authorised some other person to sign it on his behalf and that such person has signed it (or has affixed his mark thereto).

Thus, a will is compulsorily required to be attested by at least two witnesses, each of whom has seen the testator sign or affix his mark on it, or to whom the testator acknowledged having signed it/affixed his mark on it, or that under his direction, somebody else had affixed his signatures/mark.

In the present case of course, the contention being that the testatrix herself had affixed her thumb impression, the requirement is as to whether either she affixed her thumb impression before both the attesting witnesses, i.e. CW1 and DW4, or she acknowledged to each of them that she had so affixed her thumb impression on her will.

It is, therefore, considered necessary to actually reproduce the testimonies of both the attesting witness, i.e. DW4 Chhote Lal and CW1, Suresh Chand.

The English translation of the testimony of DW4 would be to the following effect:-

“My signatures are existent on the will executed by Smt. Shiryan. I have seen the original, it is my thumb impression. I have recognized it. The will was read over to us by the deed-writer prior to affixing our thumb impressions on it.

xxxx examination.

I knew Shiryan Devi. I know Mussadi, Khubi and Tek Ram. All three are brothers. At the time when the will was got executed,

her age would be 80 to 85 years. Spectacles were also worn (by her). She could see. She could also hear properly. It is incorrect that she was picked up and brought whereas in fact she had come herself on foot. I do not know whether she had rheumatism (“*Baoo*”) or not. Smt. Shiryan had both, ancestral and purchased property. It is incorrect that this will was written out before Shiryan reached and that she affixed her thumb impressions. It is incorrect that the will was not read over to her. It is also incorrect that the thumb impressions of the witnesses were obtained earlier. I do not know whether she treated her three sons alike or not. I do not also know whether she used to have any 'ceremonies' or used to give and take any money from them and whether they equally respected her or not”.

26. Hence, a perusal of the aforesaid testimony reveals that specifically this witness, i.e. one of the attesting witnesses to the will, has not stated that he saw Shiryan actually affixing her thumb impression on the will, though what is contained in the examination-in-chief would suggest so, as he has stated that the deed-writer had read over the will “to us” before the thumb impressions were affixed.

Yet, whether “us” included Shiryan who thereafter affixed her thumb impression, or whether it refers to the second attesting witness, is not wholly clear.

27. Coming next to the second attesting witness to the will, Suresh Chand, who was summoned as a Court witness by the first appellate Court. His testimony is available in English, on the file of that Court, seemingly translated by the Presiding Officer at the time of the deposition of the witness. It reads as follows:-

“I have studied upto Matric. I have seen will dated 19.10.1981, copy of which is Ex.P1. It bears my signature. (Original has been

shown to the witness by the counsel for the respondents). One old lady, whose name I do not know, had got this will executed. I had seen her sitting with the petition writer. Her health was normal at that time. When I reached the seat of the petition writer, this will was already lying scribed. It was not read over to that lady in my presence. So far as I remember, one Chhote Lal Lambardar was also present there. Perhaps, Chhote Lal had signed the will in my presence. I had also appeared before the Sub Registrar and had also signed the will in his presence.

xxxxx by Sh. Balwan Singh Suhag, Adv.

I did not know that lady earlier. I had signed the will at the instance of Chhote Lal and the petition writer and also on their good faith. I had gone there on that day because my wife had purchased a house. Petition writer had told me that I should sign this will as a witness and he will get the sale deed executed in favour of my wife attested from some person (perhaps from Khubi Ram), as both the parties belonged to same city. That lady had thumb marked the will in my presence. Perhaps Chhotu Lal signed this will but he had definitely signed my wife's sale deed. ..again said I do not remember whether Chhotu Lal had signed the will in my presence.”

Thus, a perusal of the testimony of CW1, i.e. the second attesting witness to the will, Suresh Chand, reveals that the testatrix, i.e. Smt. Shiryan did thumb mark the will in his presence. However, whether she understood the will or not was not known to this witness, as he stated that he did not know whether it had been read over to her earlier because it was not read over to her in his presence. Very obviously, he also did not know the testatrix.

Though, as per clause (c) of Section 63, the testator of the will is not specifically required to inform the attesting witness that he understands the contents of the will and the only requirement is that the will must be either

signed by the testator in the presence of the witnesses or that the testator had acknowledged his signature or mark thereupon, yet in order to determine the validity of a will, it would be essential for the witness to at least know that the person affixing his mark on the will or acknowledging that his signature or mark is on the will, is actually the person who has executed the will and not an impostor.

In the present case, Suresh Chand having specifically deposed that he did not know if the lady sitting with the other attesting witness (Chhote Lal), was actually Smt. Shiriyan or not, the mandatory requirement of Section 63 (c) cannot be stated to have been fulfilled qua this witness.

Thus, as already observed hereinabove, though an inference may possibly be drawn that the testatrix also affixed her thumb mark on the will in the presence of the other witness, i.e. Chhote Lal, there is no specific acknowledgement even in his testimony, that she signed in his presence or had acknowledged her thumb impression on it, or that it was just the witnesses as had affixed their thumb marks in each others' presence. And though, as regards this witness, the import of his testimony would be that Shiriyan had affixed her thumb impression on it, however, in the absence of a specific statement to that effect, in the totality of circumstances, this Court would not hold that even Chhote Lal can be said to have seen the testatrix affix her thumb impression on the will.

The doubt is further perpetuated by the testimony of CW1 Suresh Kumar, because both, in his examination-in-chief, as also in his cross-examination, he did not make any firm statement that Chhote Lal had signed in his presence and instead stated that “perhaps” he had done so.

28. It needs to be noticed here that the learned first appellate Court

had also disbelieved the will because of the testimony of CW1 Suresh Chand, on the ground that the will was already scribed before he came there and was not read over to the lady sitting there in his presence and because he also did not know the lady herself.

In this regard, it needs to be stated that even reading over of the will to the testator in the presence of the witnesses is not an essential ingredient of Section 63(c) but the fact that he did not even know the lady, though she thumb marked the will in his presence, would again, even in the opinion of this Court, lend a doubt to the authenticity of the will and the fact that Smt. Shriyan understood the contents thereof.

Thus, in view of the aforesaid discussion, this Court would also not hold that the will was duly proved even in terms of Section 63 (c) of the Act of 1925.

29. This, of course, is other than the fact that this Court also does not differ with the finding of the first appellate Court that with no animosity or ill will or strained relations shown between the testatrix and her 3rd living son, i.e. respondent-plaintiff Mussadi, it is wholly unnatural that she would wholly and completely disinherit him in her will. Of course, had she given any reason to that effect, the will may not have been disbelievable, but with Mussadis' name not even finding a mention in the will, simply because it reads to say that the beneficiaries thereof served the testatrix, in the opinion of this Court, that would not lift the veil of suspicion from the authenticity of the will, also given the age of Shriyan at that time.

30. It may be observed here that the Supreme Court in its judgment in **Jaswant Kaur v. Amrit Kaur and others AIR 1977 SC 74**, has laid down the parameters on which a Court would accept a will to be genuine, even

though it disinherits a natural successor. In fact, the purpose of a will is to try and ensure that the person(s) whom the testator wishes to benefit, so benefit from it, to the exclusion of all other natural heirs. Hence, simply exclusion of a natural heir would not *per se* make a will unbelievable, provided of course that the beneficiaries thereof prove the validity of it, both, in terms of Section 63 (c) of the Act of 1925, and Section 68 of the Evidence Act.

31. In that context, it needs to be stated that both the attesting witnesses having testified before the Courts below, with only one witness actually required to testify as per Section 68, the essential requirement of that provision, would otherwise stand fulfilled.

However, with one of the witnesses not clearly stating that the testatrix had affixed her thumb impression to the will in front of him or had acknowledged the thumb impression on the document to be hers and the other witness not knowing the testatrix at all but stating that the lady present affixed her signatures in his presence, the will cannot be held to be proved in terms of Section 63(c) of the Indian Succession Act, 1925.

Further, with a son who was otherwise not estranged from the testatrix, wholly and completely excluded from her estate, with his name not even finding a mention in the will even to give a reason for disinheriting him, the document has to be held to be wholly surrounded in suspicious circumstances, especially in view of the very advanced age of the testatrix.

Therefore, I see no reason to hold that the will in question is a believable one and that the first appellate court erred in discarding it.

32. Though it is not necessary actually to go into that question now, yet, as regards the contention of learned counsel for the respondent-plaintiff that the original will not being present on the file of this Court, it cannot be

said that the will was proved, that is a contention obviously raised only for the sake of arguments before this Court, as it has come even in the testimony of CW1, as also DW4, that the original will was produced in Court before these witnesses and further, no objection was taken even before the first appellate Court on behalf of the respondent-plaintiff, that the original will had not been produced. Hence, that contention by learned counsel for the respondent-plaintiff is rejected.

33. Yet, having agreed with the findings of the 1st appellate Court that the will has not been proved to be a valid will, the judgment and decree passed by that Court is upheld and this appeal is dismissed, but with no order as to costs.

April 20, 2017
dinesh

(AMOL RATTAN SINGH)
JUDGE

1. Whether speaking/reasoned?	Yes/No
2. Whether reportable?	Yes/No