

was owned and possessed by Late Sh.R.C.Khanna, who died on 9th March, 1991. His wife had pre-deceased him. He left behind three sons namely Sh.K.L.Khanna, Sh.Jiya Lal Khanna and Sh. V.C Khanna and two daughters namely Usha Shah and Uma Dua. Sh.R.C.Khanna retired as the Deputy Director, Public Instructions, Department of Education Punjab and thereafter, he served as the Registrar of the Kurukshetra University, Kurukshetra. The bone of contention between the parties is a Will dated 22nd December, 1990, executed in favour of the defendant by late Sh.R.C.Khanna.

4. At this stage, a correct imprint of the Will is printed as under:-

Sh. R. C. Khanna
Sudharma 595,
Sector, 16-D,
Chandigarh, 160015.

Sibi left me lonely in this world. I have yet to take some very important decisions for the dear ones of our family for her wishes.

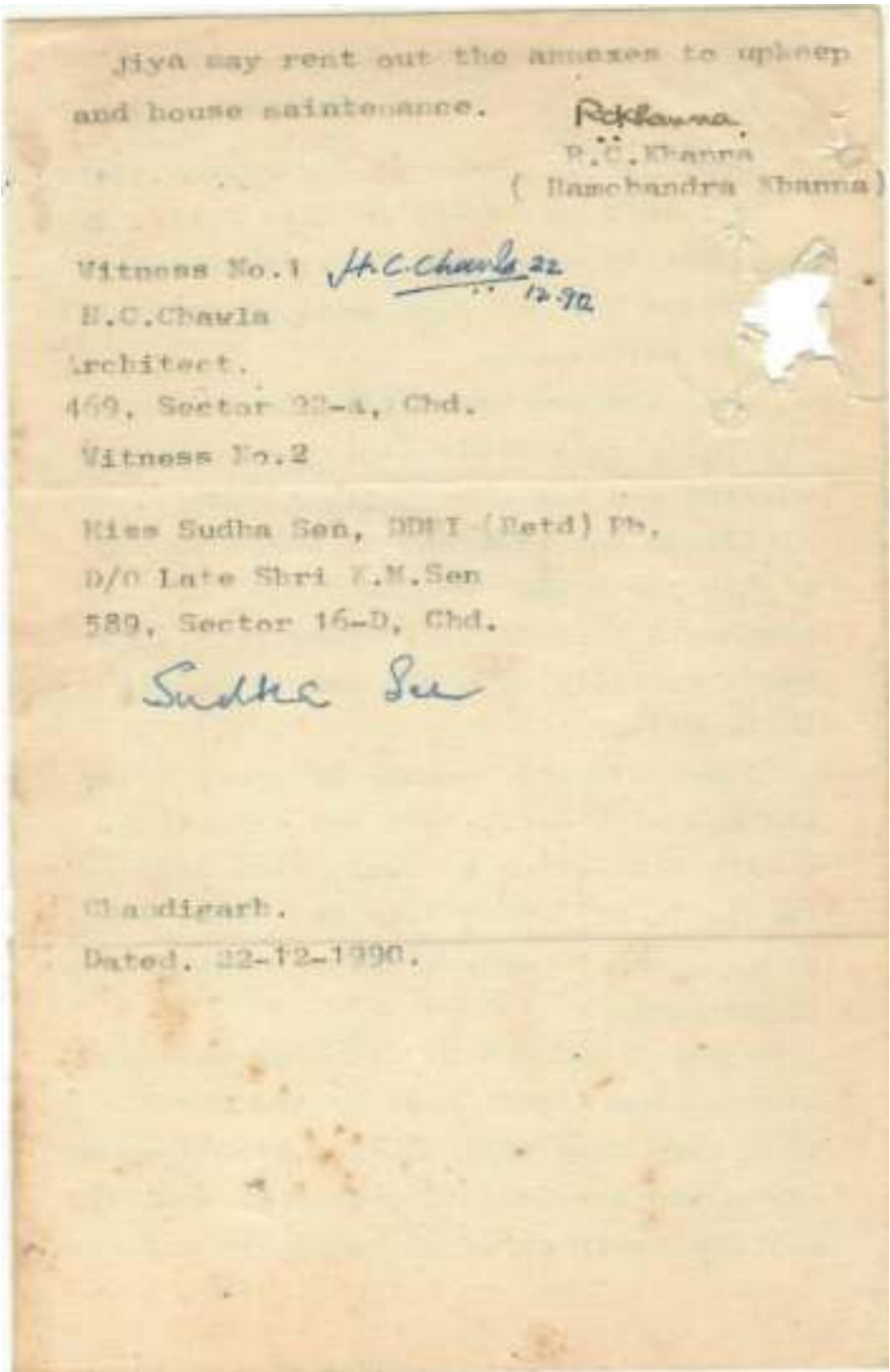
Vinod and Uma are settled abroad and are happy with their families. Usha is married and has a prosperous family.

Krishan has promised to shift to one of his new houses in Chandigarh or Panchkula to make some space for Jiya-Fooja's family, who are yet to settle their kids.

Jiya-Fooja are looking after me in my old age with care, love and affection. I wish that after my death they will remain in full possession and owner ship of my house 'Sudharma' 595, Sector 16-D, Chandigarh.

My son Vinod and my daughter, Uma may stay on the first floor of the house when ever they visit India. Likewise, my other son and daughter, Krishan and Usha may use their parental house in need.

P.T.O.



5. The wife (Mrs Shakuntla Khanna) of late Sh.R.C.Khanna died in the year 1980. The pivotal dispute between the parties is with respect to the Will dated 22nd December, 1990, which has been proved by DW2, Sh.H.C.Chawla, one of the attesting witnesses. The second attesting witness Smt. Sudha Sen had died on 16th April, 1999. Hence, she could not appear in evidence.

6. The trial court dismissed the suit for partition filed by Sh. K.C Khanna and others while upholding the Will dated 22nd December,

1990. However, the First Appellate Court has held that though the execution of the Will has been proved in accordance with Section 68 of the Indian Evidence Act, 1872 (hereinafter referred to as '1872 Act') but still its execution is surrounded by various suspicious circumstances that remain unexplained. Thus, the suit filed against the appellant was decreed.

7. This appeal was filed by late Sh.J.L.Khanna, who died during the pendency of the appeal.

8. Heard the learned counsel representing the parties at length and with their able assistance perused the paper book alongwith the requisitioned record. On liberty being granted, the learned counsel representing the plaintiffs has also filed the synopsis alongwith the gist of his arguments.

9. In the considered view of the Court, the following questions arise for adjudication, in this appeal:-

i) If the propounder of the Will/testament leads evidence to prove its execution, is it appropriate to discard the same on the ground that it is surrounded by suspicious circumstances, in the absence of any pleading or evidence to that effect?

ii) If despite an opportunity, there is absence of cross examination of a witness on a particular issue or fact, then is it appropriate for the court to treat the unchallenged part as admitted?

10. Both the courts have currently held that DW2 Sh.H.C.Chawla, one of the attesting witnesses, has proved the Will in accordance with Section 68 of the 1872 Act. It has also come on record

that the executant late Sh.R.C.Khanna worked as the Deputy Director, Public Instructions and Registrar of the Kurukshetra University, Kurukshetra. He also used to write articles in the newspapers. The Will is stated to have been typed by Late Sh.R.C.Khanna himself on his own typewriter. The Will is typed on a small sized paper. The Will is recited on the front and back of the paper. The front page is not signed by anybody, but the back page is signed by late Sh.R.C.Khanna as well as the two attesting witnesses namely Sh.H.C.Chawla and Smt. Sudha Sen. It has come on record that Smt. Sudha Sen was a colleague of late Sh.R.C.Khanna in office.

11. The First Appellate Court has discarded the Will on the following suspicious circumstances:-

i)Sh. H.C.Chawla was a chance witness but his name has been typed as witness No. 1 and according to the evidence, Smt. Sudha Sen was already present with the testator.

ii) Only nicknames have been used in the Will but there was no impediment in writing the full names

iii) Front page of the Will is not signed by the testator. Hence, at the most the second page can be said to have been executed by the testator.

iv) Sh.H.C.Chawla and Sh. Sh.J.L.Khanna, the beneficiaries were Architects and hence, the chances of connivance with each other cannot be over looked.

v) No reason for disinheritance of other class 1 heirs has been disclosed in the Will.

vi) The Will is unregistered, although the executant was highly literate, who is not likely to take the risk of not registering the Will.

vii) The Will has been executed on a small piece of paper.

Viii) The age of Smt. Sudha Sen was more than the executant and ordinarily the executant will not take this risk.

ix) The executant has failed to recite in the Will about its entrustment.

x) The will failed to satisfy the conscious of the court.

xi) The Will never saw the light of the day prior to the filing of the suit.

12. The court of first instance framed the following issues from the pleadings of the parties:-

“1. Whether the plaintiffs are co owners in the house no.595, Sector 16-D, Chandigarh? OPP.

2. If issue No.1 is proved in favour of the plaintiff whether they are also entitled to rendition of accounts in respect of the rent alongwith interest received by the defendant? OPP.

3. Whether the plaintiff is also entitled to injunction as sought? OPP.

4. Whether the defendant and his wife have become owners in possession of the said house no.595, by virtue of valid will executed by late Sh.R.C.Khanna? OPD.

5. Whether the plaintiffs have no locus standi to file the present suit? OPD.

5A. *Whether plaintiffs no.2 & 3 being the married daughters of late Sh.R.C.Khanna can seek the partition of the alleged joint property in view of Specific Bar under Section 23 of the Hindu Succession Act? OPD.*

5B. *Whether Mrs. Usha Shah and Mr.s Kusum Khanna have no legal authority to file the present suit on behalf of plaintiff No.3 & 4? OPD.*

6. *Whether the suit for partition is not maintainable being filed for partial partition? OPD.*

7. *Whether the suit has not been property valued for the purpose of court fee and jurisdiction? OPD.*

8. *Relief.”*

13. In order to prove their case, the plaintiffs examined PW1 Sh. KC Khanna and produced certain documents.

14. On the other hand, the defendant, in order to prove his case, examined himself as the DW1, Sh. H.C. Chawla as DW2, Sh. Arun Sikka as DW3 and Sh. Devendra Prasad, handwriting and fingerprint expert, as DW4.

15. The plaintiff in rebuttal evidence examined Sh. Dharmendra, Junior Assistant.

16. Now, this Court proceeds to analyse the reasons recorded by the First Appellate Court to discard the Will. The first reason is without any basis as when Sh.H.C.Chawla appeared in evidence as DW2, he categorically stated that in December, 1998, he went to the house of late Sh.R.C.Khanna to meet Sh.J.L.Khanna, who was not available. One old

lady Smt. Sudha Sen, who lived opposite to the house of late Sh.R.C.Khanna was present. Sh.R.C.Khanna requested him to sit for a while. Thereupon, he showed them a typed piece of paper and told them that he had prepared a Will and ask them to sign as witnesses. It has come on record that Sh.R.C.Khanna was highly literate and used to write articles in the newspapers. He had a personal typewriter with him on which the Will was typed. It is also evident that the Will is concise and precise and once Sh.R.C.Khanna had requested Sh.H.C.Chawla to wait for a while then the Will could have been typed within a short time. Moreover, the attention of Sh.H.C.Chawla was not drawn to the fact of him signing as witness No.1 when he appeared as DW2 in order to grant him an opportunity to explain this position. It was not appropriate for the trial court to discard the Will on the aforesaid basis without seeking explanation from Sh.H.C.Chawla.

17. The second reason given by the First Appellate Court is to the effect that nicknames have been used. It may be noted here that when a father is executing the Will, he is likely to use nicknames. In any case, full name of Sh.J.L.Khanna is Jiya Lal Khanna and the executant has specifically used the name Jiya. Hence, it was not appropriate for the First Appellate Court to discard the Will on this ground.

18. The next reason assigned by the First Appellate Court is erroneous as the recitals on the first page continued on the reverse side of the page. It is evident that the testator was man of a few words. It is apparent that the recital in the penultimate paragraph continued on the back side of the paper. Only Jiya had been authorised by late

Sh.R.C.Khanna to collect the rent of the annexe. In such circumstances, it was not appropriate for the First Appellate Court to discard the Will on this ground, particularly when neither Sh. Jiya Lal Khanna nor Sh.H.C.Chawla were cross-examined on this aspect of the matter.

19. The next reason assigned by the First Appellate Court is to the effect that Sh.H.C.Chawla and Sh.J.L Khanna were Architects and therefore, their connivance cannot be overlooked. It may be noted here that Sh.J.L.Khanna was in a private practice whereas Sh.H.C.Chawla was a government servant. Moreover, the learned counsel representing the defendant never solicited explanation either from Sh.H.C.Chawla or Sh.J.L.Khanna in this regard.

20. The fifth reason assigned by the First Appellate Court that no reason has been assigned to disinherit the other class I heirs is factually incorrect and result of failure of the court to read it carefully. The testator has clearly explained that Vinod and Uma are settled abroad and Sh. Kishan Chand (KC Khanna) has promised to shift to one of his new houses in Chandigarh or Panchkula. The other daughter Usha is already married in a prosperous family. It has been specifically stated that Jiya and Pooja (husband and wife) are looking after him in his old age with love, care and affection. Moreover, the testator like a true father has wished that his other children, including daughters, whenever they visit India, shall have a place to stay in the house in question. He has even wished that Kishan and Usha who are settled in India may use their parental house in need. Thus, sufficient reasons have been explained clearly in the Will. The testator is not required to give

elaborate reasons for bequeathing the property in favour of a particular heir. The courts are not expected to sit in appeal to nullify the wishes of the testator.

21. The sixth reason assigned by the First Appellate Court is also unsustainable. The Court, after noticing that the Will is not compulsorily registered, held it to be one of the suspicious circumstances surrounding its execution. It has come in evidence that late Sh.R.C.Kapoor had fallen and suffered a fracture. He remained in the hospital and thereafter, recuperated at his house. As Sh.R.C.Khanna's movement was restricted due to a fracture, it was not expected of him to visit the office of the Sub-Registrar to get the Will registered despite the suffering.

22. The next reason assigned by the court that the Will has been scribed on a small piece of paper, which is equivalent to one fourth of the legal size paper, is also erroneous. Late Sh.R.C.Khanna has used a piece of paper which appears to be a part of the letter head. It is for this reason on the top he has written the address of the house. It is also not in dispute that the Will was scribed in accordance with Section 63 of the Indian Succession Act, 1925. Hence, it was not appropriate for the court to hold that the Will is surrounded by suspicious circumstances just because it was scribed on a small piece of paper.

23. The seventh reason assigned by the First Appellate Court is also erroneous as it was not necessary for the testator to request only those attesting witnesses, who are younger than him. In fact, the testator has requested his colleague to be one of the witnesses whereas the

second attesting witness Sh. H.C.Chawla is of the age of his son. In such circumstances, it was not sufficient to discard the duly executed Will on insubstantial grounds.

24. The eight reason assigned by the court is also incorrect as it was not necessary that in the Will, there should be recital with regard to the entrustment of the Will.

25. The ninth reason assigned by the court is required to be appreciated in the facts of the case. In fact, the court has held that the Will has failed to satisfy the conscious of the court. It may be noted here that the First Appellate Court has overlooked the following evidence, which satisfies the conscious of the court:-

a) DW1, Sh.J.L.Khanna has stated that during his lifetime, late Sh.R.C.Khanna, transferred the landline telephone connection to his name. He produced two applications submitted by Sh. RC Khanna. This telephone connection was installed in the house in question. There was no cross examination of Sh.J.L.Khanna on this aspect of the matter. Thus, it is safe to assume that this part of the evidence was unchallenged.

b) On 15 July, 1986, Late Sh. R.C. Khanna give him a cheque of Rs.25,000/- to purchase a car. Even this part of the statement was not challenged in the cross-examination of late Sh.J.L.Khanna.

c) On 11th July, 1990, Sh.J.L.Khanna signed the rent note Ex. PA as special attorney of late Sh.R.C.Khanna. This document has been produced by the plaintiffs themselves

d) On 4th December, 1991, Uma, one of the daughters Sh.R.C.Khanna, in her letter, admitted that Jiya Lal Khanna has invested a lot of money in the construction of the house.

e) Vinod, one of the sons of late Sh.R.C.Khanna in his letter Ex.D1, written on 30th August, 1991 has requested Sh.J.L.Khanna to produce the Will.

26. In this case, it has come in evidence that initially the Will remained in possession of late Sh.R.C.Khanna, who has subsequently handed over the same to Smt. Sudha Sen. Once this suit was filed on 17th July, 1997, Sh.J.L.Khanna went to Smt. Sudha Sen and during discussion, she stated that late Sh.R.C.Khanna has left a Will, which is available with her and she will trace the same and hand it over to him. In October, 1997, for the first time, she handed over the Will to Sh.J.L.Khanna that is the reason why the Will was produced for the first time in the suit. The Will has been executed by a highly educated testator. His signatures have been proved, not only by Sh.H.C.Chawla but even by the handwriting and fingerprint expert. The plaintiffs have not made any effort to prove that Sh.R.C.Khanna never signed the Will. In such circumstances, there was no reason to discard the Will on the alleged suspicious circumstances.

27. The learned counsel representing the respondents has highlighted the following submissions, in the written synopsis, in support of the judgment passed by the First Appellate Court, which are extracted as under:-

“i. The document (writing dated 22.12.1990) on the face of it is totally unreliable, self-contradictory and invalid :-

a. Not scribed on full page (either A 4 or Legal size) despite the fact that the testator was highly educated (retd. as Deputy Director Education and also Registrar of the Kurukshetra University). The said writing dated 22.12.1990 (alleged WILL) does not bear the title of WILL or LAST WISH or VASIYATNAMA. The said document is un-registered, not scribed by any regular deed writer, despite the fact that all such facilities were available within a stone's throw to the Testator in a city like Chandigarh.

b. It is in comprehensible that such a person will casually draft his own WILL in such as causal and perfunctory manner on a small piece of paper. He has just mentioned nick names of his kids in a very casual manner. He has also mentioned in the first para of the will that he has divided the property on his wife's wishes but nowhere has the appellant ever proven his mother's wishes. The testator was stated to have typewriter and library at his home as per the statement of Defendant himself, therefore had stationery available at his place. The main body of the WILL i.e. page no.1 is neither signed by the testator nor by any of the attesting witnesses. The page no.2 is stated to be on the back of first page rather than using the second page.

c. The only line on page no.2 of the alleged WILL, which alone is signed by the testator as well as the two attesting witnesses (Sh. H.C. Chawla-DW 2 & Miss Sudha Sen- Deceased), defy the contents of page no.1.

It needs highlighting here that had the testator actually declared "Jiya-Pooja" (Defendant and his wife) as the "...full possession and ownership of my house 'Sudharma' 595, Sector 16-D Chandigarh, a well read and experienced Administrator like Sh. R.C. Khanna would not have given a totally redundant power to Jiya (Defendant) to rent out annexes for he upkeep of the same house.

d. In the humble submission of the Plaintiff/ Respondents, the said writing dated 22.12.1990 (alleged WILL) has been manufactured and fabricated on the Authority Letter which Late Sh. R.C. Khanna must have signed on or before 11.07.1990 (ie, the date when Rent Agreement Ex. P-A at page no.315 and 317 of the LCR was executed/ signed by the Defendant on behalf of his father, while renting out the annexe-portion of the house in dispute). Furthermore, a perusal of cross-examination of DW-1 at page no. 255 reads as under:-

"I have seen the photocopy of the rent agreement dt. 11.07.1990 it bears my signatures and I identify the same the

same is Ex. PA. I was the special attorney of my father as referred in Ex PA but I cannot produce the same. It is incorrect that Sh. R.C. Khanna never appointed me as special attorney. It is wrong that I mention this wrong at in Ed. PA. I do not have any such POA with me."

This is the reason that signatures of the Testator on page no.2 alone are existing and there is no signature of the Testator on the main body ie. the first page of the alleged WILL. It is quite obvious that signatures of his close friend and classmate H.C. Chawla (DW 2) had been typed first and signatures against Witness No.1', though the date has been mentioned in a totally unnatural manner. Again the second attesting witness has not signed in the same manner as Witness No.1 has signed but below the name and address of Witness No.2.

Had the Defendant Jiya and his wife declared full owner of the entire house, then there would have been no need to recite again that Defendant may rent out annexes of that very house. In this regard, the respondent rely upon decision of the Hon'ble Supreme Court reported as AIR 2004 SC page no.1772 titled as "Uma Devi Nambia and Anr. Vs. T.C Sidhan, wherein in Para 10 (3) it has been categorically held by the Apex Court that none of the expression are to be ignored and none of them are redundant and contradictory. In fact

entire Para 10 of the said decision requires kind consideration for the present case.

e. The alleged WILL is further unnatural inasmuch as the Testator has not bequeathed his other properties and bank accounts/ deposits etc. Had Late Sh. R.C. Khanna decided to execute his testamentary document, as alleged by the Defendant/ Appellant, the Testator would have declared about his other assets and in whose favour the same are to go.

f. The alleged WILL recites that Jiya-Pooja' are looking after the Testator in his old age. The said point has been conceded to be factually incorrect by the Defendant while appearing as DW-1. At page no.237 read with page no.241 of the LCR the Defendant has conceded that he being in private practice as an Architect, having office in Sector-18 away from the residence of the Testator was working from 9:00 AM to 9:00 PM and that his wife Pooja was also working from 9 to 5. He has further conceded that he was having his bed-room at the ground-floor whereas, the Plaintiff/Respondent was residing in the first floor in the adjoining bed-room with the Testator (page no. 245). It has further been conceded that the Testator Sh. R.C. Khanna remained ill, admitted to PGI for period of 40 days prior to his death and that he was looked-after and expenditure borne by the Plaintiff/ Respondents and not by him. It is further admitted in cross-examination that when the

Testator had broken his hip-joint, he had to sleep in the drawing room at ground-floor and the defendant and his wife failed to vacate any of the bed-room for the Testator. All this clearly shows that the propounded WILL is totally untrustworthy.

C. The major factor which the Ld. Lower Appellate Court had rightly rejected the WILL as per findings recorded in Para 18 (X) needs further elaboration as under:-

a. It is come on record that there was lot of ill-will and litigation between the brothers after the death of the Testator in March 1991. It is the case of Defendant that both attesting witnesses of the alleged WILL i.e. Sh. H.C. Chawla Miss Sudha Sen had attended the last rites ceremonies of the Testator-Late Sh. R.C. Khanna. It has further been the case of Defendant that H.C. Chawla had come on 22.12.1990 to see him at their house being very close friend (i.e. chance witness to the WILL). It is totally unbelievable that for good seven years the WILL has not seen at the light of the day till filing of his evidentiary affidavit in the Court.

b. It has come on record that as back as year 1993 letters/ notice was issued by the Estate Officer (page no.329) to the defendant for mutation of the property in dispute through natural succession and that thereafter the house in dispute was mutated in favour of all

the five legal heirs of late Sh. R.C. Khanna (page no.371). To be read with Testimony of PW-2 (Jr. Assistant/ Estate Office, Chandigarh) and admission in the cross-examination of DW-1.

c. Plaintiffs have highlighted that after demise of Sh. R.C. Khanna in year 1992 dispute started between parties, especially in respect of tenant in the annexe-portion i.e. Sh. Chamn Lal Nagrath, whose son was got married with the D/o Plaintiff No. 1. The matter had gone to the Police Authorities, apart from Civil Suit wherein an Injunction Suit was instituted by the Defendant on 22.12.1990 (Replication page no.95). Ex. P-B is the apology tendered by the Defendant before the Police whereas in the Civil Suit instituted by him, a finding was returned that the house in dispute has not been partitioned amongst the legal heirs of Late Sh. R.C. Khanna. Furthermore, the appellant filed appeal which was dismissed on 23.01.1995 and a finding was also recorded in that judgment that appellant had equal share in the property with plaintiff No.1 Sh. K.C Khanna. The appellant never ever challenged that finding. The DW-1 conceded at page no.247 to the effect that in the suit filed by him against Mr. Nagrath and the Plaintiffs, there was no mention of the alleged WILL dated 22.12.1990.

d. It can also be seen that the Defendant has failed to plead the date of alleged WILL and the name of the close associate from whom the

same has been received/ traced by the Defendant (page no.81). The written-statement has been filed on 28.10.1997, however in his evidentiary affidavit at page no. 227, the DW-1 states that he had received the alleged WILL from Miss Sen in end of Oct. 1997.

If it was so, why said writing dated 22.12.1990 not appended with the written statement filed by Defendant? And why the same was not produced either with the written-statement or later despite filing of various applications for production of documents (page no.113) by the Plaintiffs?

The reasons is quite obvious as the Defendant was in Oct. 1997 fabricating/ manufacturing the said document as WILL and therefore the name of Miss. Sen was not disclosed in the written statement.

e. DW-2 H.C. Chawla in his evidentiary affidavit has categorically stated that he had reached the residence on 22.12.1990 by chance. He however in his cross-examination failed to disclose as to whether the WILL was typed in his presence or it was already typed. This question assumes lots of significance, keeping in view the stereotype language used by him at page no.261 (as dictated by his Lawyer which fact was conceded by him in is cross-examination at page no.265-267). Though, it was stated by DW-2, the so-called attesting witness that an old lady purported to

be Miss. Sen was already present on the fateful day i.e. 22.12.1990 along with the Testator. It is highly suspicious in such circumstances as to why the name of H.C. Chawla was typed as witness no.1, whereas Miss. Sen had arrived at the house of Testator prior to him. DW-2 further failed to explain as to why he had not disclosed the contents of the WILL to his friend and Colleague i.e Defendant regarding the bequeath of the house in dispute for number of years i.e.. from 09.03.1991 till the filing of suit in year 1997. Both DW-1 and DW-2 concedes that both of them were living in the same city for all these years and they have been frequently meeting each other for the last so many years prior to the death of Testator and later till the completion of suit/ appeal.

This clearly demonstrate that the said documents is a fabricated and therefore highly suspicious.

f. The Respondents are relying upon various decisions, especially 2019(3) RCR (Civil) 968 titled as "Sona Singh us. Kaka Singh and Anr." wherein in Paras 18 to 20 it has been held that if a WILL is not produced immediately and there is unexplained delay, such is a suspicious circumstance.

***D. LIMITED SCOPE OF SECOND APPEAL
U/S 41 OF THE PUNJAB COURTS ACT TO
INTERFERE IN THE FINDINGS OF FACTS
RECORDED BY THE COURT BELOW.***

It is submitted that the scope of Regular Second Appeal is very limited and the Hon'ble High Court cannot intervene merely on the ground that another view is possible.

In the humble submissions of the Respondents, in the facts and circumstances and evidence on record, the view taken by the Ld. Lower Appellate Court is most probable and acceptable view. The same cannot be interfered in the limited jurisdiction of Regular Second Appeal.”

28. In fact, most of the submissions made by the learned counsel representing the appellant have already been examined by this Court while analysing the reasons given by the First Appellate Court, however, there are certain additional submissions, which are required to be analysed. As regards argument under clause (1a), the same has already been examined. Submission made under clause (1b), it may be noted that Smt. Shakuntala Khanna died in the year 1980. Late Sh.R.C.Khanna knew about the wishes of his wife. These wishes could not be proved by the plaintiffs. The plaintiffs have not led any evidence to prove that Smt. Shakuntala Khanna had wished that the property should be equally divided.

29. Submission (1e) is without any substance. The Will operates after the death of the testator. In this case, the testator during his lifetime enabled his son Jiya to rent out the annexe to upkeep and maintain the house. Hence, the last sentence in the Will is not at all contradictory.

30. The argument under (1d) is also not relevant as Sh. Jiya Lal Khanna has specifically stated that he cannot produce the special power of attorney, as the said argument is not sufficient to hold that Sh.R.C.Khanna did not give attorney to Sh.J.L.Khanna. It may be noted here that Ex.PA has been produced by the plaintiffs. In such circumstances, there is no substance in this argument. The learned counsel representing the appellant also relies upon judgment in **Uma Devi Nambia and Anr. Vs. T.C Sidhan AIR 2004 SC 1772**. This Court has studied the said judgment. In this case, the Supreme Court interpreted two inconsistent clauses of the Will and in that context, the Supreme Court held that the last clause of the testament will prevail and none of the expressions are to be ignored. It may be noted here that the Will operates after the death of the testator and by incorporating the last sentence, the testator Late Sh.R.C.Khanna has permitted to give on lease a part of the property so that the amount can be spent on house maintenance. In fact, the Supreme Court in **PPK Gopalan Nambiar vs PPK Balakrishnan Nambiar And Ors 1995 (Suppl) 2 SCC 664** held that suspicious circumstances must be real, germane and valid and they should not be the fantasy of a doubtful mind. In this case, the observations made by the Supreme Court are aptly applicable as the First Appellate Court has decided the case with a doubtful mind, without there being any substantial suspicious circumstances, which may give rise to issues, which are germane to the main case.

31. As regards argument under (1e), it may be noted here that the plaintiffs have not proved that late Sh.R.C.Khanna was owner of any

other substantial movable or immovable property. It is not necessary that the testator must execute the Will with respect to his entire property.

32. As regards argument number (1f), it may be noted that the appellant was in private practice as an Architect, however, that itself would not be sufficient to hold that he was not taking care of Sh.R.C.Khanna. Late Sh. R.C.Khanna, has specifically stated in the Will that Jiya and Pooja are looking after him with love, care and affection. Moreover, Jiya Lal Khanna while appearing as DW1 has specifically stated that after Sh.R.C.Khanna had fallen and suffered fracture so he started staying on the ground floor and sleeping in the drawing room, and that itself proves that late Sh.R.C.Khanna was not comfortable in staying with Sh.K.C.Khanna, who was residing on the first floor.

33. The next argument under clause (1e) is with regard to the previous litigation. The plaintiff has not produced and proved this document. In any case the defendant (appellant) has specifically stated that he had some inkling of the Will as disclosed to him by Sh. H.C.Chawla, however, he was not in possession of the Will that is why he could not disclose its date. While replying to para 1 of the plaint, the appellant has specifically stated that Sh.RC Khanna did not die intestate and he had bequeathed the property in favour of defendant and his wife. He stated that a plaintiffs were aware of the said Will. He even referred to the letter Ex. D1, written by plaintiff no. 4 to the defendant. The plaintiffs have not produced the judgment wherein it was found that the property has been inherited in equal shares. Moreover, this was only an inter se dispute between a tenant and the landlord in an

injunction suit. The findings of the court in the previous judgment can only be res judicata if the issue in question was directly and substantially an issue in the previous litigation.

34. With regard to argument under clause (1d), it may be noted that Sh.J.L.Khanna has disclosed that he was given the Will in October 1997 and in one of the written statements, he had stated that he had recently traced the Will at the instance of a close associate of the father of the parties and as such it could not be produced previously. That itself is sufficient to explain that the defendant had just come to know of the Will.

35. Argument under clause (c) had already been analyzed. However, it may be noticed that Sh. H.C.Chawla was never questioned in the cross-examination about the procedure adopted by Sh.R.C.Khanna, the testator. Sh. H.C Chawla has specifically stated that when he visited the house of late Sh.R.C.Khanna, he asked him to wait although Sh.J.L.Khanna had gone out of station. Once he was asked to wait, Sh.R.C.Khanna, who was well acquainted with typing and was having his own typewriter at home, could have typed the Will. The failure of the plaintiffs to cross examine the witness Sh.H.C Chawla enables the court to draw an inference that the plaintiffs are not questioning the veracity of the aforesaid statement.

36. The next argument of the learned counsel is based on the judgment passed in **Sona Singh versus Kaka Singh and another 2019 (3) RCR (Civil) 968**. In the facts of that case, the Supreme Court held that the propounder of the Will has failed to dispel a number of

suspicious circumstances, which have been pointed out by the other party. The aforesaid position is in the facts of that case. Hence, the judgment is not applicable to the facts of the present case. Moreover, in this case the Will remained in possession of Smt. Sudha Sen.

37. The last argument of the learned counsel is based on Section 41 of the Punjab Courts Act, 1918. It may be noted here that in this case the judgment of the First Appellate Court is perverse. Not only the five factors which have been noticed by this Court have been overlooked but even the First Appellate Court has failed to examine the facts. There was absence of cross examination by the plaintiffs on certain important facts stated by Sh.J.L.Khanna. In fact, the Supreme Court has held that failure to cross examine a witness on a particular issue/aspect justifies the court to draw an inference that this unchallenged part is admitted. Reliance in this regard can be placed on **Rajendra Prasad (dead) through his LRs versus Darshana Devi, AIR 2001 SC 3207**. In order to dispute the correctness of the statement of a witness, the opportunity must be given to him in cross examination to explain his statement by drawing his attention to the said statement. It has always been understood that if a party intends to impeach a witness, they are bound, while the witness is in witness box, to give the witness an opportunity to make an explanation. Reliance in this regard can also be placed on **Brownie vs Doun (1893) R67 (HL)**.

38. Section 41 does not debar the High Court from re-appreciating the evidence once it is found that the First Appellate Court has overlooked the material evidence, which has already been noticed.

39. Keeping in view the aforesaid facts and discussion, the Regular Second Appeal is allowed. The judgment of the First Appellate is set aside and that of the learned trial court is restored.
40. All the pending miscellaneous applications, if any, are also disposed of.

20.09.2023
rekha
Whether speaking/reasoned : Yes/No
Whether reportable : Yes/No

(ANIL KSHETARPAL)
JUDGE