



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

% *Pronounced on: 22nd August, 2023*

+ **CS(OS) 345/2018 (Old Number CS(OS) 321/1999)**

1. **SHRI AJAY KUMAR KHURANIA**
SON OF LATE SHRI GULAB CHAND,
R/O 84-A, POCKET-F,
MAYUR VIHAR, PHASE-II,
DELHI-110091
2. **SHRI AVINASH KUMAR KHURANIA**
SON OF LATE SHRI GULAB CHAND,
R/O C-41, FIRST FLOOR,
EAST OF KAILASH,
NEW DELHI

..... Plaintiffs

Through: Ms. Zubeda Begum, Ms. Ishita
Mohanty, Ms. Sana Ansari & Mr.
Zubin Singh, Advocates.

versus

1. **SHRI MAHENDRA KUMAR KHURANIA**
SON OF LATE SHRI GULAB CHAND,
R/O C-41, FIRST FLOOR,
EAST OF KAILASH,
NEW DELHI
2. **SHRI CHANDRA PRAKASH KHURANIA**
SON OF LATE SHRI GULAB CHAND,
R/O 21771, RAILWAY COLONY,
KISHAN GANJ,
DELHI



3. MRS. ASHA VERMA

WIFE OF SHRI K.C. VERMA,
D/O LATE SHRI GULAB CHAND,
R/O 728, LAXMI NIKETAN,
MISHRA RAJA JI KA RASTA,
INDIRA BAZAR, JAIPUR,
RAJASTHAN

4. MRS. SHASHI NAGDEV

WIFE OF SHRI N.K. NAGDEV,
D/O LATE SHRI GULAB CHAND,
P.O. BOX NO. 21416,
SHARJAH, U.A.E.

..... Defendants

Through: Mr. Ravi Sikri, Sr. Advocate with Mr.
Sarvesh Bisariya, Mr. Ashish Azad,
Mr. Abhishek Sandillya & Mr.
Nishant Bharadwaj, Advocates.

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TEST.CAS.26/2000

MAHENDRA KUMAR KHURANIA

S/O LATE SHRI GULAB CHAND,
R/O C-41, EAST OF KAILASH,
NEW DELHI

..... Petitioner

Through: Mr. Ravi Sikri, Sr. Advocate with Mr.
Sarvesh Bisariya, Mr. Ashish Azad,
Mr. Abhishek Sandillya & Mr.
Nishant Bharadwaj, Advocates.

versus

**STATE**

THROUGH CHIEF SECRETARY,
GOVT. OF NCT OF DELHI,
SHAM NATH MARG,
DELHI-54

..... Respondent

Through: Ms. Zubeda Begum, Ms. Ishita
Mohanty, Ms. Sana Ansari & Mr.
Zubin Singh, Advocates for
Objector/R-3.

CORAM:

HON'BLE MS. JUSTICE NEENA BANSAL KRISHNA

J U D G M E N T**NEENA BANSAL KRISHNA, J.**

1. The plaintiff Sh. Ajay Khurania filed the suit for partition in the year 1999 in respect of property No.C-41, East of Kailash, New Delhi against his siblings being the lineal descendants of Smt. Gulab Devi. The eldest brother Sh. Mahendra Khurania, in return, filed a Probate case in the year 2000 in respect of Will dated 23.02.1994 of the mother Smt. Gulab Devi which was altered by the subsequent registered Will dated 14.05.1997. **The two suits are being decided together as they involve common issues.**

2. The **factual background of the present disputes** is that Late Smt. Gulab Devi mother of the parties to the suit, had purchased the property No.C-41, East of Kailash, New Delhi measuring 200 sq. yards (*hereinafter referred to as suit property*) from her own funds vide registered perpetual Lease Deed dated 27.01.1969. The two and half storey house was



constructed by Smt. Gulab Devi where she resided with all the family members till her death on 31.07.1997. The husband of Smt. Gulab Devi pre-deceased her on 20.08.1976. Smt. Gulab Devi was survived by four sons and three daughters.

3. **Civil Suit No. 345/2018** (*earlier CS (OS) No. 321/1999*) has been filed by the two sons Shri Ajay Kumar Khurania and Shri Avinash Kumar Khurania against the remaining legal heirs claiming *partition of the suit property* by asserting that the plaintiffs and defendant No.1 Shri Mahendra Khurania and defendant No. 2 Shri Chandra Prakash are in joint possession of the entire suit property and are in physical possession of the portions as specified in the Site Plan annexed with the plaint. The plaintiffs have let out their respective portions. Likewise, Second Floor, Barsati Floor which is in joint possession of plaintiffs and defendant No.1 and defendant No.2 has been let out to one tenant Mr. Trivedi, who is paying rent to defendant No.1 for and on behalf of all the legal heirs of Late Smt. Gulab Devi. It is claimed that there is a single electricity and water meter and the parties to the suit have installed their separate sub-meters for various parts of the property. The plaintiffs have asserted that they along with defendants Nos. 1 to 4, are co-owners to the extent of 1/6th undivided share and have sought partition accordingly. A decree of mandatory injunction is also sought to direct defendant No.1 to remove the unauthorized and illegal construction raised by him in the front courtyard of the ground floor of the suit property.

4. The **defendant No.1 Shri Mahendra Kumar Khurania and defendant No.2 Shri Chandra Prakash Khurania in their joint written**



statement have raised preliminary objections that the suit is not maintainable in its present form as the suit property has already been partitioned by their mother, late Smt. Gulab Devi, through a registered Will dated 23.02.1994. Also, the suit is bad for non-joinder of necessary parties as the legal heirs of deceased third sister. Smt. Parvati have not been impleaded.

5. **On merits**, while admitting that Smt. Gulab Devi was the exclusive owner of the property, it is explained that the construction of the property was done in two phases. Smt. Gulab Devi from her own funds had raised the construction on the ground floor in the year 1969, while the remaining construction was carried out in the year 1987 from the financial support given by Shri Mahendra Kumar Khurania. It is denied that Smt. Gulab Devi died intestate, but it is asserted that she had initially executed a registered Will dated 23.02.1994 which was altered by the subsequent registered Will dated 14.05.1997. It is admitted that the plaintiffs and defendant No. 1 and 2 are in possession of separate and independent portions of the property on the basis of Will dated 23.02.1994. Defendant No.1 had been receiving the rent from the tenant of the Barsati floor which had come to his share as per the Will though at present it is lying vacant. It is asserted that the parties have already installed their separate water and electricity connections. The defendant No.1 has denied that he has raised any unauthorized construction but it is explained that a temporary shed was installed during the lifetime and with the consent of Smt. Gulab Devi as is also mentioned by her.



6. It is further claimed that defendant Nos. 3 and 4, the daughters have already been dealt with in the Will dated 23.02.1994 and therefore, they have no legal right in the suit property. It is claimed that plaintiffs have deliberately concealed the fact of Late Smt. Parvati whose son Deepak has been mentioned as a beneficiary in the Will dated 23.02.1994 and not joined them as parties to the proceedings.

7. The defendant Nos. 1 & 2 have further asserted that plaintiff No.1 Ajay Khurania who had been allotted back portion of the suit property by virtue of registered Will dated 23.02.1994 has been debarred by the subsequent Will dated 14.05.1997 and has, therefore, become the unauthorized occupant of the portion which is in his possession. The plaintiff No. 2 is, however, admitted to be in possession of the front portion of the first floor on the basis of the Will.

8. **Defendant No. 3 Smt. Asha Verma and defendant No.4 Mrs. Shashi Nagdev**, the two daughters of Smt. Gulab Devi have however, produced a third Will dated 21.06.1997 which is claimed to have been executed by Smt. Gulab Devi at Jaipur, accordingly to which four different portions of the ground floor and first floor have been given to the plaintiffs and defendant Nos. 1 and 2, while the second floor (Barsati) along with the terrace rights had been bequeathed in favour of defendant Nos. 3 and 4. It is claimed that defendant Nos. 3 and 4 have become the absolute owners of the second floor along with the terrace rights in the property in question. The answering defendant Nos. 3 & 4 have been asking for the partition of suit property, but the same is being avoided by the plaintiffs and defendant Nos.



1 and 2 on one pretext or the other. It is, therefore, claimed that defendant Nos. 3 and 4 are also entitled to a share in the property and the property may be partitioned accordingly as per the last Will of Smt. Gulab Devi dated 21.06.1997.

9. **The plaintiffs by way of their replication to the Written Statements** have denied the execution of any of the Wills and have asserted that they are false and fabricated documents. They have further denied that the suit is bad for non-joinder of necessary parties. It is reiterated that since Smt. Gulab Devi died intestate, all her legal heirs are entitled to equal share in the property.

Probate Case No. 26/2000 filed by Sh Mahendra Khurania son of Smt. Gulab Devi:

10. Shri Mahendra Kumar Khurania, has filed the Probate petition seeking probate in respect of the registered Will dated 23.02.1994 and subsequent Will dated 14.05.1997 executed in his favour in respect of the suit property. The plaintiff has asserted that the Wills were executed by Smt. Gulab Devi in sound health and mind, voluntarily, and without any influence. They were signed in the presence of the attesting witnesses, PW-6 Shri Sunil Mehta and PW-7 Shri S.P. Jain respectively. Further, the Wills dated 23.02.1994 and 14.05.1997 have already been acted upon by the beneficiaries.

11. **Shri Chandra Prakash Khurania, Legal Heir No.2 in his Written Statement** has supported Sh. Mahinder Khurania and contended that the



Wills dated 23.02.1994 and 14.05.1997 are genuine and duly signed by Smt. Gulab Devi who was in sound health and mind at the time of execution. They were executed in the presence of the attesting witnesses and duly registered with the office of Sub-Registrar.

12. **Shri Ajay Kumar Khurania, Legal Heir No.3** (*plaintiff in partition suit*) in his objections to the Probate Petition has challenged the genuineness and validity of the Will claimed to be registered on 14.05.1997 by highlighting various suspicious circumstances; namely that the Will does not bear any date; that the signatures of Smt. Gulab Devi on the Will are claimed to be apparently forged; that the registration of the Will was just prior to the death of the deceased; the presentation of the Will by Shri Mahendra Kumar Khurania after three years of her death; and exclusion of Shri Ajay Kumar Khurania, the objector, from the Will even though he and his second wife Smt. Usha were having cordial relationship with the mother throughout her life. It was explained that after his first marriage had turned sour, he got married to Ms. Usha Singh with the consent of Smt. Gulab Devi who even attended the wedding. The surrounding circumstances around the Will dated 14.05.1997 create a doubt and raise suspicion about the genuineness of the Will.

13. **Shri Mahendra Khurania, in his rejoinder to the objections of Shri Ajay Khurania Legal heir No.3**, while denying the allegations of Shri Ajay Khurania, has asserted that the Wills were validly registered and were duly attested and signed in the presence of the deceased testatrix. He has claimed that it was due to the actions and bad behaviour of Shri Ajay



Khurania that he was excluded by Smt. Gulab Devi from the benefit of the suit property vide Will dated 14.05.1997. Smt. Gulab Devi was unhappy and had not consented to the second marriage of Shri Ajay Khurania with Smt. Usha Singh who was also previously married and had two children from her first marriage with Shri Arvind Singh.

14. **Issues in Probate Case No.26/2000** were framed on **08.08.2003** as under: -

“(i) *Whether the Will dated 14.05.1997 is the last Will and testament of late Smt. Gulab Devi and is validly executed?*

(ii) *Relief.”*

15. **Issues in the Civil Suit No. 345/2018 Suit for partition** were framed on **18.11.2006** as under: -

“(i) *Whether the present suit is not maintainable in lieu of the preliminary objection No.1 as taken by defendant No.1 and 2? OPD*

(ii) *Whether the suit is barred for non-joinder of necessary parties? OPD*

(iii) *Whether Smt. Gulab Devi had executed the registered Will dated 23.02.1994 in favour of other legal heirs? OPD*

(iv) *Whether the suit property is liable to be partitioned? OPP*

(v) *Whether the plaintiff is entitled to relief of mandatory injunction, as prayed? OPP*

(vi) *Relief.”*

16. **Additional issues** were framed on **27.02.2007** as under :



“(i) Whether Smt. Gulab Devi has executed the registered Will dated 14.05.1997 modifying the earlier Will dated 23.02.1994?”

“(ii) Whether the Will dated 23.02.1994 has been acted upon by the parties in terms of the Will dated 23.02.1994?”

17. **I.A. No. 4468/2007** was filed by Shri Mahendra Kumar Khurania before this Court for consolidation of the partition suit and probate petition which was allowed vide Order dated 24.05.2007 and the *Suit No.345/2018 for partition* was withdrawn from the District Courts to be tried together with the probate petition in this Court.

18. This Court in its Order dated 01.03.2018 noting the submissions of the parties that no evidence had been recorded in the partition suit, but the evidence led in one suit was common in the other suit, liberty was given to the parties to the suit for partition to lead their evidence in respect of the issues framed therein. It was further directed that the suits shall be decided together as the decision in the partition suit will affect the decision in the probate case and vice versa.

Evidence in Civil Suit CS (OS) 345/2018 for Partition: -

19. **Shri Ajay Khurania, the plaintiff No.1** as **PW1** tendered his affidavit of evidence Ex.PW1/A and also proved the documents Ex.PW1/1 to Ex.PW1/20. He denied that any legal partition was ever done by Smt. Gulab Devi through documents or that any Will was executed indicating the manner in which the property was to be partitioned between the legal heirs



of Smt. Gulab Devi. The suit property is liable to be partitioned by metes and bounds whereby, he is entitled to 1/6th share in the same.

20. **PW2 Shri Kapur Chand Verma, (husband of Smt. Asha Verma, sister/ defendant No.3)** in his affidavit of evidence Ex.PW2/A supported the Plaintiff No.1 Shri Ajay Khurania and relied upon the evidence affidavit Ex. PW2/1 and the photographs and CDs filed on 31.05.2004 as Ex.PW2/2 (colly) tendered by him in the Probate case. He has further deposed that the partition was effectuated by *parchis* in 1992. He also deposed that inter se the family members shared cordial relationship.

21. **DW1 Sh. Mahendra Kumar** in his affidavit of evidence Ex. DW1/A deposed about the validity of the two Wills executed by Smt. Gulab Devi and proved the documents Ex.DW1/1 and Mark-A in support thereof.

Evidence in Probate Case No.26/2000

22. **PW1 Shri Mahendra Kumar Khurania** in his affidavit of evidence deposed about the execution of the Will dated 23.02.1994 Ex.PW1/1 and Will dated 14.05.1997 Ex.PW1/2 by Smt. Gulab Devi. He proved the death certificate of Smt. Gulab Devi as Ex. PW1/3 other documents as Ex.PW1/A to Ex.PW1/R.

23. **Ms. Prem Lata Head Clerk, Seelampur, Delhi appeared from the office of Sub-Registrar pursuant to the directions of the court** vide order dated 15.12.2003 and 08.01.2004. She had deposed that she was in the office of Seelampur since June, 2002 and was not aware of the procedure for maintenance of records in the office of Sub-Registrar. She explained that



she gets the record only after the number is assigned to the documents by the Delivery Room. The documents are kept loose as well as pasted on record and many a documents which are numbered are left loose in the record room. No Index Register is maintained and the Document Register is the same as the Peshi Register.

24. **Sh. B.S. Vashist from the office Sub-Registrar, Seelampur** who was examined as a *Court Witness*, explained that as per the records, the Will of Smt. Gulab Devi was presented for registration on 14.05.1997 and the number was provided on 03.06.1997. In cases where the formalities are not completed and the document is not registrable, the document is kept aside and is registered only after the completion of the formalities and the date of registration relates back to the initial date of presentation. In the present case, the endorsement had been made on 14.05.1997 and the registration is dated 03.06.1997. Alphabet “A” has been suffixed for the reason that two documents were given the same number and in order to distinguish, “A” was added in front of the registration number for the document.

25. **PW5 Shri Sarvanand LDC Sub-Registrar office, Seelampur**, deposed that the Will dated 14.05.1997 was registered in their office. He produced the copy of the registered Will and deposed on similar lines as Shri B.S. Vashist.

26. **PW6 Sh. Sunil Mehta** the attesting witness to the first Will dated 23.02.1994, has deposed that on the request of Smt. Gulab Devi, he had accompanied her along with Shri Mahendra Kumar to the office of the Sub-Registrar, Seelampur, New Delhi, where in his presence Smt. Gulab Devi



signed on the Will Ex.PW1/1. He as well as Shri Ramesh Vashist Advocate signed the Will on three places before the Sub-Registrar, where the Will was registered on 23.02.1994.

27. **PW7 Shri S.P. Jain** is the attesting witness to the second Will dated 14.05.1997. He has deposed that on 14.05.1997 he had accompanied Smt. Gulab Devi and Shri Mahendra Kumar to the Sub-Registrar's office, Seelampur where Smt. Gulab Devi had signed the Will in their presence while he and Sh. Ramesh Vashist Advocate had signed on the Will Ex.PW1/2 in the presence of each other.

28. **Advocate Ramesh Vashist** tendered his evidence by way of affidavit. *He was given up as a witness* by Mahendra Khurania on the ground that he was not traceable as he was not practicing in this court and his present address was not available.

29. **Shri Ajay Khurania, Objector/ Legal Heir No.3**, as DW-1 tendered his evidence by way of affidavit as Ex.D-1 bearing his signatures at points A and B. The documents relied upon by him are Ex.DW-1/1 to DW-1/16. He contested the validity of the execution of the Wills dated 23.02.1994 Ex.PW1/1 and Will dated 14.05.1997 Ex.PW1/2 and also claimed them to be forged and fabricated. He deposed that the execution of the Wills was surrounded by highly suspicious circumstances which raise a doubt regarding the ingenuity of the documents.

30. **DW2 Shri Kapur Chand Verma**, husband of Smt. Asha Verma, in his affidavit of evidence **Ex.D2** deposed that Smt. Gulab Devi, his mother-in-law, used to often discuss her problems, wishes and desires with him



freely with no reservations. Likewise, the sons of the deceased also discussed their personal matters freely with him and that he was on good terms with Shri Mahendra Khurania as well. He has further deposed that neither had the deceased Smt. Gulab Devi ever disclosed about having executed any Will nor had Shri Mahendra Khurania ever disclosed that he was in possession of any Will. Moreover, Smt. Gulab Devi had told him that she apprehended that Shri Mahendra Khurania may try to oust the brothers from the suit property.

31. **DW3 Shri Avinash Khurania** in his affidavit of evidence **Ex. DW3** deposed that as per his knowledge, their mother Smt. Gulab Devi used to get along well with his brother Ajay Khurania and his second wife Usha and that she often used to stay with them at their residence in Mayur Vihar, Phase-II, Delhi. Their mother used to treat all the children alike. However, at times she complained that Mahendra Khurania wanted the entire suit property. When Shri Mahendra Khurania started troubling them excessively and threatened to dispossess them, he made a complaint to the police Ex.D1/1 and his wife lodged the complaints Ex.D1/2 and D1/3. DW1/4 is the medical report of the injuries caused on his face by the wife of Shri Mahendra Khurania. Sh. N.L. Verma, his father-in-law also gave a complaint on behalf of Smt. Late which is Ex.D1/5.

32. **The Legal Heir No.3/ objector Shri Ajay Khurania had filed the affidavit of evidence of Shri Mukesh Kumar**, son of Sh. N.L. Verma, brother-in-law of Shri Avinash Khurania, **Sh. N.L. Sirohia**, the brother of deceased Smt. Gulab Devi, **Sh. N.L. Verma**, father-in-law of Sh. Avinash



Khurania, **Mr. Ashok Kumar Arora and Shri Chandra Chauhan**, family friends of Shri Ajay Khurania, **Mr Bhaskar Kumar Dhyani**, a neighbour of Sh. Ajay Khurania **and his sister Smt. Asha Verma** *but these witnesses were not produced for cross-examination and were dropped by Sh. Ajay Khurania vide Order Dated 11.12.2007 wherein he stated that only Shri Avinash Khurania is to be examined.*

Submissions of the Parties:

33. **Learned counsel on behalf of Shri Ajay Khurania** has argued that by virtue of the first Will dated 23.02.1994, Smt. Gulab Devi had given equal shares to all the four sons and the daughters were not aggrieved by the first Will. According to the first Will, the ground floor front portion was given to Shri Mahendra Khurania while Shri Avinash Khurania got the front portion of the first floor. The back portion of the ground floor went to Shri Ajay Khurania while Shri Chandra Khurania got the back portion of the first floor.

34. Learned counsel for Shri Ajay Khurania while challenging the genuineness of the second Will dated 14.05.1997, has argued that there are various suspicious circumstances surrounding the execution of the said Will. The delay in production of the Will by Shri Mahendra Khurania almost three years after the death of Smt. Gulab Devi raises doubts as to the validity of the Will. Shri Mahendra Khurania, the propounder, had taken an active part in the execution of the Will of 14.05.1997 wherein he is the major beneficiary. Though it is registered, but there is no date mentioned on the



document which suggests that blank papers were made to be signed by the testatrix. Though the Will dated 14.05.1997 is a typed one but the date has been inserted subsequently. The authenticity of the Will of 1997 has been challenged additionally on the ground that the date of purchase of stamp duty is 03.06.1997 for the Will dated 14.05.1997 clearly establishing that this Will had been created subsequently. The certified copies of this Will are different from the original Will. Also, there is no evidence to show that the contents of the Will were read over to Smt. Gulab Devi or that she understood the contents thereof before signing them. It has emerged in the evidence that she had no knowledge of the contents of the Will.

35. The attesting witnesses to the Will are unreliable. Shri S.P. Jain, the attesting witness is not trustworthy as he was not known to any other family member except Shri Mahendra Khurania despite him being a neighbour. The testimony of Sh. S.P. Jain therefore, cannot be relied upon.

36. **Shri Ajay Khurania in his written submissions** had further asserted that there is an inordinate delay in propounding the Wills which came to light for the first time three years after the demise of Smt. Gulab Devi. Shri Ramesh Vashist Advocate had acted in two capacities; one as the attesting witness and other as the drafter of the Will. However, Shri Ramesh Vashist has not been examined. The Bar Certificate issued by the Bar Association of Shahdara Court has no evidentiary value. No co-associate of Shri Ramesh Vashist has also been examined to prove his signatures on the Will. Any evidence that the Will had been scribed by Shri Ramesh Vashist on the instructions of Smt. Gulab Devi, cannot be held admissible.



37. **Ld. Counsel for Shri Ajay Khurania** has further claimed that the evidence that Smt. Gulab Devi had personally instructed Shri Ramesh Vashist is not brought out in the evidence as the advocate was not presented for cross-examination for the reason that he had stopped practising. Further, the alleged Will of 1997 stands vitiated as it was prepared under the undue influence of Shri Mahendra Khurania, the beneficiary under the Will dated 14.05.1997, who took active part in the execution and registration of the Wills and. He has admitted in his cross-examination that their mother had handed over the Will to him one month before her death, but he produced it before the family members after three years of her death which creates suspicion if in fact the Will was executed by Smt. Gulab Devi.

38. Ld. Counsel for Sh. Ajay Khurania has further argued that the only reason given in the Will dated 14.05.1997 for debarring Sh. Ajay Khurania is the alleged estranged relationship from 1994 to 1997 between the mother and Smt. Usha, the second wife of Shri Ajay Khurania of which there is no proof. On the contrary, the family photographs Ex.DW1/A to DW1/K reveal a totally different story. There is no cogent explanation as to why she would debar Shri Ajay Khurania in her subsequent Will dated 14.05.1997.

39. Learned counsel has placed reliance on the following judgments in support of his assertions:

- (i) Jaswant Kaur v. Amrit Kaur (1977) 1 SCC 369,
- ii) Kavita Kanwar vs. State (NCT Delhi) & Ors FAO 36/2010 decided on 27.06.2014,
- iii) Kavita Kanwar vs. Pamila Mehta & Ors. AIR 2020 SC 54.



40. **Ld. Counsel on behalf of Shri Mahendra Khurania** has countered these arguments and submitted that both the Wills dated 23.02.1994 and 14.05.1997 are registered and have been duly proved by the attesting witnesses in terms of Section 68 of the Indian Evidence Act. Moreover, the contents of the Will have also been proved by Shri Mahendra Khurania in his testimony. Smt. Gulab Devi had clearly stated the reason for excluding Shri Ajay Khurania in the Will dated 14.05.1997, which were as under: -

“(i) *He has made fool of his mother by not disclosing his illegal relationship with Usha Singh.*

(ii) *Shri Ajay Khurania had taken divorce from his first wife Neelu, which had caused Smt. Gulab Devi deep humiliation and she had been threatened and humiliated by Shri Ajay Khurania and Smt. Usha Singh”.*

41. It is further argued on behalf of Shri Mahendra Khurania that none of the objections taken apropos the genuineness of the subsequent Will could be proved by Shri Ajay Khurania. No evidence has been led to demonstrate that the signatures of Smt. Gulab Devi were forged or that the Wills were fabricated. The authenticity of the CDs or the photographs in accordance with Section 65B of the Indian Evidence Act has also not been proved by Shri Ajay Khurania and hence, they are liable to be rejected. No suspicious circumstances have been brought forth by Shri Ajay Khurania in respect of the both the Wills which stand duly proved, entitling the grant of probate in respect of the two Wills.

42. Lastly, it is argued that because the Will Dated 14.05.1997 has excluded Shri Ajay Khurania, he is not entitled to any share in the suit



property and the suit for partition filed by Shri Ajay Khurania is liable to be dismissed.

43. Shri Mahendra Khurania has relied upon the following cases in support of his contentions:

- (i) Dhanpat vs Sheo Ram & Ors. 2020 (16) SCC 209,
- (ii) Swarnakantha & Ors vs Kalavathy & Ors. Civil Appeal No. 1565 of 2022 decided on 30.03.2022,
- (iii) Kavita Kanwar vs. Pamila Mehta & Ors (Supra),
- (iv) Savita Dattatraye Karandikar vs Nishikant Sadashiv Karandikar & Ors. 2009 (6) Mh.L.J.

44. **Submissions heard from both the parties.** My issue-wise findings are as under: -

45. The following issues shall be considered together as they are inter-connected:

Issue No. (iii) in Civil Suit No. 345/2018 (framed on 18.11.2006).

(iii) Whether Smt. Gulab Devi had executed the registered Will dated 23.02.1994 in favour of other legal heirs? OPD

Additional Issue No. (ii) in Civil Suit No. 345/2018 (framed on 27.02.2007)

(ii) Whether the Will dated 23.02.1994 has been acted upon by the parties in terms of the Will dated 23.02.1994?



46. The two suits between the parties and their right to the suit property are hinging on the two Wills purportedly executed by Smt. Gulab Devi. An onerous duty is cast upon the court to unravel and decipher the true intent and import of the Wills since, *unlike other documents, the Will speaks from the death of the testator and the maker of the Will is never available for deposing as to the circumstances in which the Will came to be executed. This aspect introduces an element of solemnity in the decision of the question whether the document propounded is proved to be the last will and testament of the testator. Normally, the onus which lies on the propounder, can be taken to be discharged on proof of the essential facts which go into the making of the will as observed by the Apex Court in the decision of Jaswant Kaur (supra).*

47. With these introductory remarks, the facts of the present case may be analysed. It is an admitted case of the parties that Shri Gulab Chand and Smt. Gulab Devi were the parents of the parties to the present suit. The suit plot was purchased vide registered Perpetual Lease Deed dated 27.01.1969 in the name of Smt. Gulab Devi, their mother. Thereafter, initially the Ground Floor was constructed on the plot in the year 1969, while the First Floor and the Barsati Floor were constructed subsequently in the year 1987.

48. Though Shri Mahendra Khurania had asserted that he had extended financial help for construction of the First floor and Barsati floor, but he admitted in his cross-examination that he used to give money to his mother which was used by her for raising the construction.



49. Likewise, Shri Ajay Khurania in his affidavit of evidence had claimed that the contribution for construction of the above suit property was made by all the sons. He used to give his entire income to his mother and he had no separate account to prove his contribution for the construction of the upper part of the suit property. However, he admitted in his cross-examination that he was unable to tell the cost of construction as initially it was carried out by their mother. He also admitted that neither did he have any proof of contribution nor was it reflected in his Income Tax Returns that any amount was contributed towards construction as all the money was given to the mother and it was spent by her and not by him.

50. From the testimony of the parties, it emerges that the suit property was owned by Smt. Gulab Devi and the construction was raised in phases by her for which funds may have been contributed by the sons Ajay and Mahendra though admittedly there is no documentary proof of it. It is further not in dispute that she was survived by four sons namely; Shri Mahendra Khurania, Shri Chandra Prakash Khurania, Shri Ajay Kumar Khurania and Shri Avinash Kumar Khurania and three daughters namely; Smt. Asha Verma wife of Sh. K.C. Verma, Smt. Shashi Nagdev wife of Sh. N.K. Nagdev and deceased Smt. Parvati who is survived by her two sons namely Deepak and Pradeep and two daughters namely Rajni and Sajni.

51. Shri. Mahendra Khurania in support of his claim to suit property, has relied upon two Wills, the first being the registered Will dated 23.02.1994.

52. ***The mode for execution of Will is provided under Section 63 of Indian Succession Act, 1925*** which reads as follows:



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

*(a) - (b)****

*(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.”*

53. The conditions for execution of a Will, as per the mandate of Clause (c) of Section 63 Indian Succession Act, 1925 is that it must be attested by two or more witnesses, each of whom should have seen the testator sign or put his mark on the Will. The Will must be signed by the witnesses in the presence of the testator, but it is not necessary that more than one witness should be present at the same time.

54. In the case of H.Venkatachala Iyengar v. B.N. Thimmajamma and Others, AIR 1959 SC 443, the Apex Court emphasized that the Will is dissimilar from other documents of conveyance, as it is produced before the court after the testator has departed from the world, and the testator is not available to say that the Will is his own or it is not the same. This factum introduces an element of solemnity to the decision where the Will



propounded is proved to be the last will or testament of the departed testator. Therefore, the propounder to succeed and prove the Will, is required to prove by satisfactory evidence that:

- “(i) the Will was signed by the testator;*
- (ii) the testator at the time was in a sound and disposing state of mind;*
- (iii) the testator understood the nature and effect of the dispositions; and*
- (iv) that the testator had put his signature on the document of his own free will.”*

55. The Apex court in Jagdish Chandra Sharma vs Narain Singh Saini (Dead) Through LRs and Others (1995) 4 SCC 459, reiterated the requirements propounded by Section 63 of Indian Succession Act as mentioned in the case of H.Venkatachala Iyengar (supra).

56. Shri Mahendra Khurania has deposed about the due execution of the Will in terms of *Section 63 of the Indian Succession Act, 1925*. He deposed that Will dated 23.02.1994 is genuine and his mother Smt. Gulab Devi, who used to stay with him, had got the Will dated 23.02.1994 Ex. PW1/1 prepared from Shri Ramesh Vashist Advocate which was witnessed by Shri Ramesh Vashist and one Shri Sunil Mehta PW6 and was registered in the office of Sub-Registrar, Seelampur, Delhi. It is further deposed by him that at the time of preparation of the Will, their mother was in perfect physical and mental condition and was not suffering from any disease. He was extensively cross-examined by Shri Ajay Khurania and others, but there is no material cross-examination challenging the authenticity of the Will dated



23.02.1994 Ex. PW1/1. His testimony established the execution of the Will in terms of Section 63 of the Indian Succession Act.

57. The Will may have been validly executed in accordance with Section 63 of Indian Succession Act, but the bigger challenge arises with respect to proving the same once it is challenged by any party in the court of law. **Sections 68 and 71 of the Indian Evidence Act, 1872** outline the guidelines for the evidence required to be led in proof of the Will which is a *document required by law to be attested*.

“Section 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.]

Section 71- Proof when attesting witness denies the execution.—If the attesting witness denies or does not recollect the execution of the document, its execution may be proved by other evidence.”

58. In Jagdish Chand Sharma (supra) referring to Sections 68 and 71 of the Evidence Act, it was observed that for a Will to be proved so as to make it admissible in evidence, being a document required by law to be attested



by two witnesses, it would necessarily need proof of its execution through at least one of the attesting witnesses, if alive and capable of giving evidence.

59. The underlying principles were explained by the Apex Court in the decision of Jaswant Kaur (supra) as referred to in Raj Kumari v. Surinder Pal Sharma MANU/SC/1840/2019, wherein it was observed thus:

“(1) Stated generally, a Will has to be proved like any other document, the test to be applied being the usual test of the satisfaction of the prudent mind in such matters. As in the case of proof of other documents, so in the case of proof of Wills, one cannot insist on proof with mathematical certainty.

(2) Since Section 63 of the Succession Act requires a will to be attested, it cannot be used as evidence until, as required by Section 68 of the Evidence Act, 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.”

60. The issue was resolved beyond controversy in Janki Narayan Bhoir v. Narayan Namdeo Kadam (2003) 2 SCC 91 where it has been held that clause (c) of Section 63 of the Indian Succession Act requires and mandates attestation of a Will by two or more persons as witnesses, albeit Section 68 of the Indian Evidence Act, 1872 gives concession to those who want to prove and establish a Will in the court of law by examining at least one attesting witness who could prove the execution of the Will. However, where one attesting witness examined fails to prove due execution of the Will, then the other attesting witness must be called to supplement his



evidence to make it complete in all respects to comply with the requirement of proof as mandated by Section 68 of the Indian Evidence Act, 1872.

61. The requirements of law for proving of a Will were reiterated in the case of Dhanpat (supra) by the Supreme Court that in order to prove a will, at least one attesting person must be called as a witness and must prove its execution as provided under the law. If the attesting witness fails to prove execution of the Will, then the second witness must be called to supplement the evidence and show that the requirement of execution of Will as mandated by Section 63 of the Indian Succession Act was duly complied with.

62. In the light of the afore discussed parameters to prove a Will, the evidence of the parties may now be considered.

63. To prove the execution of Will dated 23.02.1994 Ex. PW1/1, in accordance with Section 68 of Indian Evidence Act **PW-6** (in probate case) **Sh. Sunil Mehta** the attesting witness, was examined by Shri Mahendra Khurania. He deposed that in February, 1994, Smt. Gulab Devi had told her that she wanted to execute a Will and if he would be willing to be an attesting witness, to which he consented. Subsequently, he was called by her on 23.02.1994 and he accompanied her along with Shri Mahendra Khurania to the Office of Sub-Registrar, Seelampur, Delhi. When they reached the office, Smt. Gulab Devi signed the Will in his presence and he, as the attesting witness of the Will, had signed on the said Will at Point-A in Ex.PW1/1. Shri Ramesh Vashist, Advocate was also present and had signed the said Will in his presence and that there were three persons who had put



their signatures on the Will. He further deposed regarding her health and stated that Smt. Gulab Devi was not suffering from any physical or mental ailment then.

64. In his cross-examination, it has been explained by PW-6 Sh. Sunil Mehta that he knew Smt. Gulab Devi as she was staying in the neighbourhood of his office which is on Second Floor, C-41, East of Kailash. He further clarified that he also knew Shri Mahendra Kumar since 1991 as he used to come to his office daily. He narrated the events of the day the will was executed and recounted that he along with Shri Mahendra Kumar and Gulab Devi, went in a car to the Office of the Sub-Registrar at Seelampur, Delhi, though he was unable to tell whether it was a car or a taxi. He also stated that signatures in Hindi were put by Smt. Gulab Devi and thereafter, he signed as a witness. He affirmed that aside from him and Smt. Gulab Devi, the Advocate had also signed the Will. No material contradiction could be brought out in his evidence about his being the attesting witness.

65. Though the affidavit of evidence of Shri Ramesh Vashist was submitted, he could not be examined as he had left practice and was not found available at the given address.

66. A significant fact, though not mentioned in the pleadings, emerged in the testimony of the parties. Shri Ajay Khurania admitted the suggestion given to him in his cross examination on behalf of Shri Mahendra Khurania that in the year 1992, their mother in the presence of his Jijaji, Shri K.C. Verma, Shri Mahendra, Shri Chandra and their elder sister had divided the



suit property in four shares by putting chits and the four brothers were handed over the possession of their respective portion. He explained that he cannot confirm if the portion in his possession was bequeathed to him under the Will of 1994 since the same came to his knowledge only after the suit for partition was filed by him in 1999.

67. Admittedly, the Will dated 23.02.1994 divided the property into four equal portions and the four brothers got the possession of their respective shares though Smt. Gulab Devi continued to be its owner. Shri Ajay Khurania got the possession of the portion shown in green in the site plan annexed with the Will of which he continues to be in possession. The evidence and the admissions of the parties establish that even though Shri Ajay Khurania was not aware of this first Will (executed after the arrangement of physical division of the property amongst the four brothers in 1992), but it was in consonance and embodied the desire of Smt. Gulab Devi to give equal share to her sons which is a significant fact to corroborate its genuineness.

68. Further, the Will was duly registered which has the presumption of the genuineness and valid execution as has been expounded in the case of Prem Singh & Ors vs Birbal & Ors 2006 (5) SCC 353 by the Supreme Court.

69. Shri Ajay Khurania has challenged the authenticity of the Will dated 23.02.1994 Ex.PW1/1 on the ground that even though there were other Registrar offices at Aruna Asaf Ali Road, INA and Kashmere Gate where the Will could have been registered, Shri Mahendra Khurania chose to get it



registered at Seelampur which is known for not maintaining proper records and the registration of documents is done in violation of all settled principles of law as is reported in the Hindi newspaper '*Hindustan*' dated 07.11.2001 Ex.PW1/13 and in Hindi newspaper '*Hindustan*' Ex.PW1/14 dated 21.08.2001. Moreover, he on becoming aware of the alleged Wills, had moved applications for inspection of the Index Register, Document Register as well as Registration Form No.3, copies of which are Ex.PW1/20 (colly) despite which he has not been given inspection for the simple reason that these two Wills do not exist in the records of Seelampur Authority.

70. The simpliciter assertion of Shri Ajay Khurania that the documents were not registered in accordance with law at the Sub-Registrar Office, Seelampur, Delhi is not sufficient unless there is independent or cogent circumstance demonstrating that the Will dated 23.02.1994 was not registered in accordance with law or there was some manipulation at the Office of Sub-Registrar, Seelampur, Delhi at the time of registration of this Will.

71. The only support that Shri Ajay Khurania is drawing for challenging the authenticity of the Will is from the Newspaper reportings which *per se* cannot be treated as evidence. Even if it is shown that the records were not being maintained properly in the said Office and there was some irregularity in the functioning of the office of Sub-Registrar, Seelampur, Delhi, but that in itself is not sufficient to challenge the validity and authenticity of the Will dated 23.02.1994 Ex. PW1/1 which has been otherwise proved by Shri Mahendra Khurania by credible evidence. On the other hand Shri Ajay



Khurania has not been able to lead any evidence to demonstrate that the Will was not reflecting the true intent of the deceased or was a forged document. Merely because the Will was registered at Seelampur, cannot be a ground to disbelieve the authenticity or registration of the Will on this ground itself.

72. Shri Ajay Khurania has been unable to bring forth any material contradiction in the cross-examination of Shri Mahendra Khurania or PW6 Sunil Mehta, the attesting witness. From his own testimony as well, he has not been able to prove the Will to be a fabricated document. Shri Ajay Khurania has also not been able to bring in any circumstance which could create a doubt about the genuineness of the Will dated 23.02.1994 or that it was a fabricated document. Moreover, no serious challenge to the genuineness of the Will has been raised by Shri Ajay Khurania, which gave equal share in the suit property to all the four brothers in consonance with the understanding arrived at between the parties in 1992. The respective portions demarcated in the Will were the same of which the possession had already been handed over to the respective parties in the year 1992.

73. It is held that the testimony of Shri Mahendra Khurania which stands fully corroborated by the testimony of the attesting witness PW6 Sh. Sunil Mehta, has proved the execution and the authenticity of the contents of the Will 23.02.1994 Ex. PW1/1.

74. In so far as the question of whether the Will was acted upon by the parties is concerned, firstly, the Will could have been acted upon only after the demise of the testatrix. As has emerged in the evidence, the parties were not aware of the Will till after three years of demise of Smt. Gulab in 1997



when it was produced by Shri Mahendra Khurania in the Civil Suit; once the Will itself was not in the knowledge of the parties there is no question of it being acted upon by the parties. Secondly, the parties were in possession of their respective shares pursuant to an arrangement since 1992 i.e. even prior to the execution of the first Will in 1994. Therefore, it may be concluded that the Will was not acted upon by the parties.

75. *Issue No.(iii) and Additional Issue No. (ii) are decided in favour of Shri Mahendra Khurania.*

Additional Issue No.(i) in the Partition Suit No. 345/2018 (*framed on 27.02.2007*)

(i) Whether Smt. Gulab Devi has executed the registered Will dated 14.05.1997 modifying the earlier Will dated 23.02.1994?

AND

Issue No.1 in Probate Case No.26/2000 (*framed on 08.08.2003*)

(i) Whether the Will dated 14.05.1997 is the last Will and testament of late Smt. Gulab Devi and is validly executed?

76. A serious challenge has arisen in respect of the subsequent Will dated 14.05.1997 Ex. PW1/2 (in probate case) propounded by Shri Mahendra Khurania, which is in the nature of Codicil since it partially modifies the earlier registered Will dated 23.02.1994 Ex. PW1/1 to the extent of excluding Shri Ajay Khurania from any share in the suit property in lieu of which gold, ornaments and cash was given to him.



77. In the case of Madhukar D. Shende v. Tarabai Shedage: MANU/SC/0016/2002, the Supreme Court explained how a Will must be proved and on whom the onus lies to prove the same. It was observed thus:

*“5...It is well-settled that one who propounds a will must establish the competence of the testator to make the will at the time when it was executed. The **onus is discharged by the propounder** adducing prima facie evidence proving the competence of the testator and execution of the will in the manner contemplated by law. The **contestant opposing the will may bring material on record meeting such prima facie case in which event the onus would shift back on the propounder to satisfy the court affirmatively that the testator did know well the contents of the will and in sound disposing capacity executed the same. The factors, such as the will being a natural one or being registered or executed in such circumstances and ambience, as would leave no room for suspicion, assume significance. If there is nothing unnatural about the transaction and the evidence adduced satisfies the requirement of proving a will, the court would not return a finding of 'not proved' merely on account of certain assumed suspicion or supposition. Who are the persons propounding and supporting a will as against the person disputing the will and the pleadings of the parties would be relevant and of significance.***”

78. Similar observations were made by the Supreme Court in the case of Prem Singh & Ors. (supra) wherein it was observed that a registered



document has a presumption being prima facie valid in law and the onus of proof would be on a person who leads evidence to rebut the presumption.

79. Shri Mahendra Khurania, the propounder of the second Will deposited as PW1 (*in the probate case*), that the Will dated 14.05.1997 was the last Will executed by Smt. Gulab Devi as per her own volition, last wish and desire. It was drafted by Shri. Ramesh Vashist, and attested by both Shri Ramesh Vashist and Shri S.P. Jain in his presence as he was also present at the time of execution of the Will Ex.PW1/2. He has further deposed that at the time of execution of this Will, the testatorix/mother was in perfect physical and mental condition and she was not suffering from any disease whatsoever. The Will was presented for registration on 14.05.1997 *vide* Registration No. 26378-A bearing Book No. 3 Volume No. 1873 at Page 198 and he was also present at the time of registration of the Will. It is further deposed that the mother died a natural death on 31.07.1997 and her Death Certificate is Ex. PW1/3.

80. Shri Mahendra Khurania in order to prove the authenticity of the subsequent Will dated 14.05.1997 Ex. PW1/2, had examined PW7 Shri S.P. Jain (*in probate case*), the attesting witness to the second Will in terms of Section 68 of the Indian Evidence Act. Shri. S. P. Jain had deposed that he was called on 14.05.1997 by Smt. Gulab Devi to accompany her and Shri Mahendra Khurania to the Office of the Sub-Registrar, Seelampur, Delhi, where they met Shri Ramesh Vashist, Advocate, who had prepared the Will. Smt. Gulab Devi had signed in the presence of Shri Ramesh Vashist himself and the Registrar while he had signed the Will as an attesting witness.



81. PW7 Sh. S. P. Jain explained in his cross-examination, that he knew Gulab Devi as she was his neighbour. He also knew Shri Mahendra Khurania since 1976 when he was studying, though he never met the other children of Smt. Gulab Devi. He also explained that he used to pass daily in front of the house of Smt. Gulab Devi and she had told him that she would call him as and when required. Accordingly, on 14.05.1997 when he was passing through the house of Smt. Gulab Devi at around 08:00 A.M., she called him and requested him to accompany her which he agreed to do. He also explained that aside from Shri Mahendra and his mother, no other person was present in the house and that they all had travelled by taxi to the registrar's office. He confirmed that the Will was a typed document, though he did not read the contents of the same and explained that when they reached the Sub-Registrar Office the Will was in the hands of Shri Ramesh Vashist, Advocate. No material contradiction had emerged in the testimony of the attesting witness.

82. Shri Mahender Khurania thus proved that the Will had been executed in accordance with Section 63 of the Indian Succession Act, 1925 and has also examined the attesting witness to prove its execution.

83. Shri Ajay Khurania has questioned the Will by alleging fraud, misrepresentation or undue influence. The onus thus shifts on Shri Ajay Khurania to prove the suspicious circumstances with cogent and legally sustainable evidence.

84. PW1 Shri Ajay Khurania who has seriously contested the genuineness of the second Will, deposed (*in the suit for Partition*) that after the demise of



their mother, Shri Mahendra Khurania refused to partition the property by metes and bounds compelling him to file a partition suit in the year 1999 in which Shri Mahendra Khurania for the first time produced the Will dated 23.02.1994 Ex.PW1/1 and the second Will dated 14.05.1997 Ex.PW1/2 allegedly registered at Registrar's Office Seelampur, even though the property was located in East of Kailash. He deposed further that his mother Smt. Gulab Devi had never mentioned about any Will executed by her and that the Will dated 14.05.1997 Ex.PW1/2 is a fabricated document.

85. To corroborate his testimony he had also examined DW2 Shri Kapoor Chand Verma husband of their sister Asha Verma and DW3 Shri Avinash Khurania, the brother, who have both deposed on similar lines that Smt. Gulab Devi during her life time never mentioned about writing a Will but expressed an apprehension that Shri Mahender Khurania may try to oust the other brothers from the suit property. The authenticity of the Will dated 14.05.1997 Ex.PW1/2 needs to be tested **on the ground of various surrounding suspicious circumstances**, as claimed by Shri Ajay Khurania.

(i) Haphazard maintenance of Records at the Office of Sub-Registrar Seelampur:

86. The first suspicious circumstance surrounding the execution of the Will raised by Sh. Ajay Khurania is even though the property was located at East of Kailash, Mahendra Khurania purposely got the Will registered at the Seelampur office, which is known for mishandling documents, instead of offices at Aruna Asaf Ali Road, INA and Kashmere Gate which were nearer.



It was alleged that it in order to take the advantage of poor maintenance and haphazard manner of maintaining records in the Office of Sub-Registrar Seelampur that this Will was manipulated and registered at this Office instead of other offices.

87. *Shri B.S. Vashisht* from the office of Sub-Registrar-IV, Seelampur was examined on 09.12.2004 as the Court witness. He deposed on the basis of the records that the Will of Smt. Gulab Devi was presented in the office of Sub-Registrar-IV, Seelampur on 14.05.1997 however, the registration number was provided on 03.06.1997. He explained the delay in date of registration by contending that at times the document cannot be registered on the same day of presentation if all the formalities are not completed. It is kept aside and registered only after all the formalities are duly completed though the date of registration relates back to the date of initial presentation.

88. In the present case, endorsement was made on 14.05.1997 while the registration was effected on 03.06.1997. For this reason the two documents were given the same number but with suffix 'A' so as to distinguish the two documents. This witness also admitted that they do not have trained staff and mistakes do occur. Moreover, during that period in question the Contractor had not completed the entries and the complete record was not maintained in accordance with law. He was unable to say if there were other documents with identical number which may necessitate addition of suffix A to the number. He further stated that during the period in question, the Indexing was not carried out and the Pasting is also pending.



89. PW-5 Shri Sarvanand LDC, Sub-Registrar Office, Seelampur explained the procedure for registration of Will and stated that Registration Fee of Rs.21/- is required to be deposited for registration. Two witnesses are required to sign the Will at the time of registration and thereafter the document is registered, serial number is given and pasting is done thereafter. He further deposed that he had not brought the Index Register and the Document Register but had only produced the loose copy of the registered Will which was summoned by the Court. The witness admitted after going through the Peshi Register and Index Register that both were not same. He clarified that Index Register has not been ever prepared and the Record Clerk is the relevant person who can explain this. He was also shown Page No.2168/81 No.61 dated 06.05.1997 and also Entry 78 and thereafter 81. He could not explain why Entry No.79 and 80 were not mentioned even though they pertained to the year 1997. He was also unable to give any explanation as to why serial number 123 were shown after serial number 140 and 143.

90. **Record Keeper Ms. Prem Lata** appeared along with *PW5 Sarvanand, LDC* on 26.02.2004 and deposed that she was posted from the DC Office, Nand Nagri, Delhi to the office of Sub-Registrar, Seelampur in 2002. She stated that she was not familiar with the maintenance of the records in the Sub-Registrar and they get the record only after the number is assigned to the document by the delivery room. She was not aware of the procedure by which the numbering is given. She further deposed that while some documents are pasted, a number of documents are kept loose. They do not maintain any Index Register. She denied that the Index Register is



numbered serially. She was unable to explain how the loose documents are located.

91. Though the Will had been registered as per the testimony of PW5 Shri Sarvanand, serious incriminating facts have got revealed from the testimony of this witness and other witnesses who appeared from the office of Sub-Registrar's Office. It has emerged that no records are maintained in serialim, no proper registers are maintained in accordance with the defined procedure and it is a *free for all* mechanism operating in the Office. While some documents get pasted in the Register, many are left loose which can be traced only at the mercy of the officials. Such procedure makes it easy for manipulative registration of the documents as is established in this case.

92. As per Shri Mahendra Khurania and PW-7 Sh. S.P. Jain, the attesting witness Smt. Gulab Devi went to the Sub- Registrar's Office on 14.05.1997 on which date the Will was presented for registration. However, admittedly, the stamp paper on which the impugned Will was typed, has been purchased on 03.06.1997. The serial No. has been given as 26378-A on 03.06.1997. The explanation given by Shri B.S. Vashisht is that at times when there is some shortfall in the document on the date of its presentation for registration, it is registered on a subsequent date after completion of all the formalities though the registration relates back to the date of presentation. Interestingly, while the Will was typed, the date has been mentioned in pen which again reflects that the date has been inserted subsequently.

93. The Will was admittedly registered on 03.06.1997. If the only reason was that some formalities were to be completed, then as per the testimony of



Mr. B.S. Vashisht, it related back to 14.05.1997 and to the same serial number. Interestingly, suffix 'A' has been added to the serial number of the Will registered on 03.06.1997. It does not appeal to reason that if due to certain deficiencies, the registration was done on a subsequent date though it related back to the date of presentation, then what was the need to add 'A' in front of the serial number against which it had already been registered. It creates a doubt about the entire procedure of registration which seems to have been totally manipulated.

94. The intriguing factor that emerges is that the procedure and requisite documentation was known to Shri Mahendra Khurania as not only was the professional assistance taken from Shri Ramesh Vashist, Advocate for preparation and registration of Will, but the same people had got the earlier Will dated 23.02.1994 registered which did not suffer from any of these deficiencies. It was well within the knowledge of Sh. Mahendra Khurania that the Will has to be on stamp paper and if it was not so done in the first instance, the onus was on him to explain the circumstances and clear all the doubts.

95. **Learned Counsel on behalf of Shri Ajay Khurania has further has also pointed out certain discrepancies between the originals and the certified copies of documents** purportedly registered on 14.05.1997-03.06.1997 which are as follows:

- a) No date mentioned.
- b) Above the photograph of the deceased it is written DL/02/006/045131. On the bottom of the page below the name of witness S.P. Jain it is written



by hand DL/02/006/039062. Both have in common DL/02/006, however the numbers are different.

c) a number is written 101 by stamp on the front and back pages of the original Will which is not there in the certified copy.

e) The formation of “ ॐ ” in signatures of Gulab Devi be taken note of. They are above thumb impression in the original, while they are below the thumb impression in the certified copy.

f) In the original Will there is a sign of Gulab Devi on the front page, left side which is not there in the certified copy.

g) On the back page of the original Will, the signature of Smt Gulab Devi is above the thumb print, while in the certified copy, it is below the thumb print.

96. From a perusal of the original Will and the certified copy, the inconsistencies pointed out by Shri Ajay Khurania are evident. These inconsistencies have not been explained and raise suspicion regarding the authenticity of the Will.

97. All these discrepancies should have found explanation in the testimony of Shri Mahendra Khurania but conspicuously, his testimony is silent on all these aspects. No explanation is forthcoming as to who went on 03.06.1997 to clear the deficiencies and to get it registered. Also, as per Shri Mahendra Khurania, Smt. Gulab Devi and the attesting witness went to the Sub-Registrar's office only on 14.05.1997 and not on 03.06.1997. If so is the case, then the difference in the original and certified documents assumes greater significance. The only inevitable inference that can be



drawn in that this Will was got registered manipulatively raising a serious doubt about its genuineness being an embodiment of last wish of Smt. Gulab Devi.

(ii) Reliability and credibility of the attesting witness to the Will dated 14.05.1997:

98. Shri Ajay Khurania has alleged that the witness testimony of PW-7 Sh. S.P. Jain is an unreliable witness to the Will who was not known to anyone else in the family except Shri Mahendra as the two were colleagues and both had retired from the Delhi Administration.

99. Shri S.P. Jain in his evidence of affidavit Ex. PW7/A has stated that he knew Smt. Gulab Devi and her family since a long time by virtue of being their neighbour. Sh. S.P. Jain in his cross examination explained that on the day of execution of the Will he was called by Smt. Gulab Devi when he was passing by her house. It is highly improbable that she had called a stranger, who just happened to pass by her house to be an attesting witness to the Will. Further, upon being questioned on whether he knew the other sons of Smt. Gulab Devi, he admitted that only Shri Mahendra Khurania was known to him and he had never met the other siblings. Shri Ajay Khurania and Shri Avinash Khurania had also deposed that they do not know Sh. S.P. Jain and were not even aware that he was their neighbour. Strange it is indeed that a neighbour who is called by the testatrix to attest the Will, would not know the children and the family members of the testator. PW7 Sh. S.P. Jain was known only to Shri Mahendra Khurania,



which again reflects not only the intrinsic involvement of Sh. Mahendra in getting the Will executed but also establishes that the attesting witness was arranged by him, thus, casting a doubt about the credibility of the attesting witness.

100. The reliability of a witness who was a stranger to the testator was examined by the Supreme Court in the case of Smt. Jaswant Kaur (Supra) the facts of which are similar to the present case. It was observed that choosing two strangers to attest a document which is solemn and important in nature, is 'intriguing'. It was noticed that one of the attesting witnesses could not give details regarding the circumstances surrounding the registration of the Will and despite claiming to know the family members, he did not know the age of the children of the testator. Upon being cross-examined he finally admitted that he did not know the family of the testator. The second attesting witness was a total stranger to the testator who had claimed that the testator had called him from the business premises which was on the ground floor of the property where the testator resided. ***The court noted the improbability of the testator calling two strangers to attest the will, and the contradictions in the testimony as suspicious circumstances which shed doubt on the genuineness of the will.***

101. Hence, the random coincidence of calling Shri S.P. Jain to the house as he was passing by the house coupled with the fact that he did not know any of the other family members and was only known by Sh. Mahendra is a suspicious circumstance which raises doubts regarding the validity of the Will. Shri Mahendra Khurania has not been able to disperse the dark clouds



of suspicion around the evidence of Sh. S.P. Jain, the attesting witness making his testimony unreliable.

(iii) Demise of Smt. Gulab Devi soon after the execution of Will on 14.05.1997 and her physical and mental health:

102. Shri Ajay Khurania has claimed that the Will was registered on 14.05.1997 and soon thereafter his mother expired on 31.07.1997. **The connected circumstance that was obliquely referred was the age of Smt. Gulab Devi.** Shri Ajay Khurania has seriously contested the second Will dated 14.05.1997 Ex. PW1/2 by alleging that the mother was about 78 years of age at the time of execution of this alleged Will on 14.05.1997 and soon thereafter, she expired on 31.07.1997 at the age of 78 years.

103. The age of a person is not determinative of her mental incapacity. Merely because Smt. Gulab Devi was old and aged this in itself cannot be a circumstance to conclude her mental incapacity as was observed in the case of *Benedicta Monterio and others Vs. Thomas Monteiro and Others* 2015 SCC OnLine Kar 9451. A similar situation came up for the consideration of the court when the will of a 90-year-old testator who was hospitalized on account of paralysis at the time of the execution of the Will was contested. The court pointed out that the capacity to make a Will which is a mental exercise, is quite different from physical state of health. It was observed that the mental incapacity is required to be proved by positive evidence.

104. It was stated by the Supreme Court in the case of *Sridevi and Others vs Jayaraja Shetty and Others* (2005) 2 SCC 784 that the death of a testator



soon after execution of a Will could not in itself be a suspicious circumstance particularly when the sound state of the health of the testator and his physical and mental capability stand proved.

105. The argument raised by Shri Ajay Kurania may look attractive, but he has not challenged the physical health and the mental faculties of his mother. Neither any medical documents nor any evidence has been led by him to establish that she was not mentally sound or was incapable to understand the contents of the Will Ex.PW1/2.

(iv) Involvement of Shri Mahendra Khurania in registration of Will:

106. Shri Ajay Khurania has raised a contention that the propounder, Shri Mahendra Khurania took an active part in the making of the Will under which he received a substantial benefit, which again raises a doubt about the Will being a voluntary expression of the wishes of Late Smt. Gulab Devi. He played an active and prominent role in not only the making of the documents but also its execution and registration.

107. Admittedly, Shri Mahendra Khurania and his family all throughout had been residing with Smt. Gulab Devi in the suit property. He was even taking care of the property and even dealt with the tenants inducted in some part of the suit property. It can be easily inferred that Shri Mahendra Khurania was occupying a dominant position vis a viz. their mother.

108. It is evident from the evidence led by Shri Mahendra Khurania himself that he took active part in the preparation of the Will under which he



received a share which was earlier given to Shri Ajay Khurania in the Will dated 23.02.1994.

109. From the testimony of Shri Mahinder Khurania as well as the attesting witness PW7 Sh. Shri S.P. Jain, it emerges that he had accompanied the attesting witnesses and late Gulab Devi to the office of the Sub-registrar. Further, Shri S.P. Jain the attesting witness, was an acquaintance of Shri Mahendra Khurania and was not known to any other person in the family. Shri S.P. Jain was the colleague of Shri Mahendra Khurania, both having retired from Delhi Administration. Moreover, the Will after its registration was in his possession.

110. Shri Mahendra Khurania has mentioned in his cross-examination that he called his advocate to prepare the Will as per his mother's wishes hence, implying that he had a key role in getting the Will drafted. It is also admitted by him in his testimony that he had accompanied Smt. Gulab Devi to the office of Sub-Registrar. In H. Venkatachala Iyenger (supra) it was observed that where the propounder himself takes a prominent part in the execution of the Will which conferred on him the substantial benefit is generally treated as a suspicious circumstance attending the execution of the Will and the propounder is required to remove the doubt by clear and satisfactory evidence.

111. Similar were the observations made by the Apex Court in the case of Surinder Pal vs. Saraswati Arora 1974 (2) SCC 600, and Indu Bala Bose (supra).



112. In the case of Pamela Mehta and Ors (supra) the Apex court examined the factor of unequal distribution of property by the testator and observed that where a propounder himself takes a prominent part in the execution of the Will which conferred on him substantial benefits, is generally treated as a suspicious circumstance. The active participation in the execution of the Will cannot be brushed aside as an inconsequential factor while attempting to project innocence in regard to the registration process by the propounder, who was required to remove the doubts by clear and satisfactory evidence and.

113. Pertinently, in the case of Kavita Kanwar (supra) the Apex Court observed that the nature and quality of proof must be commensurate with the need to satisfy the conscience of court and remove any suspicion which a reasonable person may entertain.

114. The mental faculty of Smt. Gulab Devi and her sense of comprehension may not have been impaired despite her age, yet it cannot be overlooked that she was about 78 years old at the time of execution of the second Will and the likelihood of Shri Mahendra Khurania who she was residing with, to exert his influence on her free Will is a circumstance of relevance to be considered along with other factors.

(v) Relationship of trust between the Testator and Beneficiary:

115. The Will dated 14.05.1997 while disinheriting Shri Ajay Khurania, conferred on Shri Mahendra Khurania a substantial benefit. To understand



this change of heart of Smt. Gulab Devi to disinherit one son from the property in her subsequent Will, it would be pertinent to analyse the nature of relationship between Shri Mahendra Khurania and Smt Gulab Devi to ascertain whether Shri Mahendra Khurania was in a position of trust and confidence and has abused the same to obtain an unfair advantage under the Will.

116. The Advanced Law Lexicon, 3rd Edition, 2005, defines “*fiduciary relationship*” as “*a relationship in which one person is under a duty to act for the benefit of the other on the matters within the scope of the fiduciary relationship.*”

117. The term “*Fiduciary Relationship*” has been well discussed by the Apex Court in the case of Central Board of Secondary Education and Ors vs Aditya Bandopadhyay (2011) 8 SCC 497, wherein it was observed as under:-

“Fiduciary relationship usually arises in one of the four situations: (1) when one person places trust in the faithful integrity of another, who as a result gains superiority or influence over the first, (2) when one person assumes control and responsibility over another, (3) when one person has a duty to act or give advice to another on matters falling within the scope of the relationship, or (4) when there is specific relationship that has traditionally be recognized as involving fiduciary duties, as with a lawyer and a client, or a stockbroker and a customer.”

118. Their Lordships referred to various authorities to ascertain the meaning of the term *fiduciary relationship* and observed that generally, the



term ‘*fiduciary*’ applies to any person who occupies a position of peculiar confidence towards another. It refers to *integrity and fidelity*. It contemplates *fair dealing and good faith*, rather than legal obligation, as the basis of the transaction. The term includes those informal relations which exist whenever one party trusts and relies upon another, as well as technical fiduciary relations.

119. In Wolf vs. Superior Court [2003 (107) California Appeals, 4th 25] the California Court of Appeals defined fiduciary relationship as under :

“any relationship existing between the parties to the transaction where one of the parties is duty bound to act with utmost good faith for the benefit of the other party. Such a relationship ordinarily arises where confidence is reposed by one person in the integrity of another, and in such a relation the party in whom the confidence is reposed, if he voluntarily accepts or assumes to accept the confidence, can take no advantage from his acts relating to the interests of the other party without the latter’s knowledge and consent.”

120. Further, in the case of Central Board of Secondary Education and Ors. (supra) it was observed that:

"The term ‘fiduciary’ refers to a person having a duty to act for the benefit of another, showing good faith and candour, where such other person reposes trust and special confidence in the person owing or discharging the duty. It is used to describe a situation or transaction where one person (beneficiary) places complete confidence in another person (fiduciary) in regard to his affairs, business or transaction/s. The term also refers to a person who holds a thing in trust for another (beneficiary). The fiduciary is expected to act in



confidence and for the benefit and advantage of the beneficiary, and use good faith and fairness in dealing with the beneficiary or the things belonging to the beneficiary. If the beneficiary has entrusted anything to the fiduciary, to hold the thing in trust or to execute certain acts in regard to or with reference to the entrusted thing, the fiduciary has to act in confidence and expected not to disclose the thing or information to any third party."

121. These judgements explaining the concept of fiduciary relationship were also referred in the cases of RBI Vs. Jayantilal N. Mistry (supra), Marcel Martins Vs. M. Printer & Ors. (2012) 5 SCC 342, Pawan Kumar Vs. Babulal since deceased through LRs and Ors. (2019) 4 SCC 367.

122. Hence, what emerges from the above discussion is that where a person reposes trust and special confidence in the person owing or discharging the duty and places complete confidence in another person (fiduciary) in regard to his affairs, business or transaction/s, a fiduciary relationship is established between them. In determining whether there existed a fiduciary relationship in the nature of trust and confidence between Shri Mahendra Khurania and Smt. Gulab Devi in the present case, the facts of the case may be examined.

123. Shri Mahendra Khurania in his cross-examination has stated that the mother Smt. Gulab Devi had personally handed over the alleged Wills to him before her death. It is also mentioned in the Will Dated 23.02.1994 Ex.PW1/1 that "*Mahendra Khuraniya has fully cooperated in constructing one and half story over the house and he has helped in taking care of the*



whole family. The repayment of the loan taken twice by me for construction of the house is also is still being made by Mahendra”. “Further, the income received from rent shall be spent on the general maintenance of the house and its account will be kept by shri Mahendra Khuraniya.”.

124. It is further stated that *“All the four sons shall have the right to use their own portion for his own use but for giving on mortgage or sale or to give as gift or on rent, the consent of their eldest brother Mahendra shall have to be obtained because after my death all the rights in respect of the above house shall vest in him and for all kinds of legal proceedings in government or semi-government departments the full rights shall completely vest in Mahendra only and all my heirs shall remain bound with these terms and conditions, and legal agents (Representatives) will maintain the same.”*

125. It is clear from the above contents of the Will that Smt. Gulab Devi trusted Shri Mahendra Khurania and he also collected and managed the rental income derived from the suit property and received the same. It is clear that she trusted him more than her other children as Shri Mahendra Khurania has been given complete rights for sale, gift, or rent of the other portions in the suit property. All these factors lead to an inevitable conclusion that there existed a relationship of trust and confidence between the testator and Shri Mahendra Khurania which amounted to a fiduciary relationship.

126. Having so concluded, what remains to be considered now is whether Shri Mahendra Khurania has used the position of trust to obtain an unfair advantage.



127. In Subhas Chandra Das Mushib Vs. Ganga Prasad Das Mushib and Ors (1967) 1 SCR 331, the Apex court observed that while making out a case of undue influence, two things have to be considered: (1) *whether the relationship between the donor and the donee is such that the donee is in a position to dominate the will of the donor*, and (2) *whether the donee used that position to obtain an unfair advantage over the donor*. On determination of these two issues, the third point that emerges that is of *onus probandi*. If the transaction appears to be unconscionable, then the burden of proving that the contract was not induced by undue influence lies upon the person who is in a position to dominate the will of the other. But it may be further qualified that merely because the parties were nearly related to each other or merely because the donor was old and weak character, no presumption of undue influence can be raised. The presumption of undue influence solely on the basis of close relationship is not warranted by law.

128. In the case of M. Rangasamy (supra), similar proposition was reiterated that where it was alleged that the defendant exercising dominating influence over his grandmother in a fiduciary relationship, got the two settlement deeds executed from her by exploiting her old age, dim eye-sight and mental condition. It would normally be the rule that a person who pleads undue influence has to lead evidence to establish that fact but in view of the fiduciary relationship of the defendant, the proof that the gift deeds were the result of the free exercise of independent will by the executants, was to be supplied by the defendant.



129. In Krishna Mohan (Supra), it was explained that Section 111 of the Indian Evidence Act, 1872 engrains the rule that where the party complaining shows a fiduciary relationship or dominant position, the law presumes everything against the transaction and the onus is passed on the person who is holding the possession of confidence of trust to show that the transaction was fair and reasonable and had taken no advantage of his position. This principle that he who bargains in a matter of advantage with a person, who places confidence in him, is bound to show that a proper and reasonable use has been made of that confidence. Such transaction does not necessarily become void ipso facto nor is it necessary for those who impeach it to establish that there was a fraud or imposition, but the burden of establishing its perfect fairness, adequacy and equity is caused upon the person in whom the confidence has been reposed.

130. The Will dated 14.05.1997 while disinheriting Shri Ajay Khurania, conferred on Shri Mahendra Khurania a substantial benefit and bestowed upon him Ajay's erstwhile share in the suit property. Hence, it is evident that an unfair advantage has been given to him under the second Will. It would be also pertinent to mention here that though the Will was in the custody of Sh. Mahendra Khurania but it did not see the light of the day for three years till Sh. Ajay Khurania filed a suit for partition. If indeed the Will was genuine, there is no explanation forthcoming from Sh. Mahendra Khurania for having kept quiet for three long years and not disclosed the two Wills immediately on the demise of their mother.



131. There is no evidence that has been led by Shri Mahendra Khurania to dispel the suspicion cast in the eyes of the court. He has not been able to prove that there was no unfair advantage and that the act of execution of the Will was an independent act of the testator which was made with a free and voluntary exercise of will.

(vi) Reasons for disinheriting Sh. Ajay Khurania in the second Will dated 14.05.1997:

132. In conjunction with the circumstances as discussed above, the question that arises and demands consideration is the reasons for exclusion of Sh. Ajay Khurania in the second Will even though he had been given an equal share along with his three brothers in the first Will.

133. In P.P.K Gopalan Nambiar vs. P.P.K Balkrishan Nambiar & Ors. (1995) 2 SCR 585 the Apex Court observed that it is the duty of the propounder of the Will to remove all the suspected features, but there must be real, germane and valid suspicious circumstances and not the fantasy of a doubting mind. If the propounder succeeds in removing the suspicious circumstances, the Court has to give effect to the Will *even if the Will might be unnatural in the sense that it cuts of wholly or in part near relations.*

134. In Rabindernath Mukherjee & Anr. vs. Panchanan Banerjee (dead) by LRs and Ors. AIR 1995, SC 1684 it was observed that the circumstance of deprivation of natural heir should not raise any suspicion because the whole idea behind execution of Will is to interfere with the normal line of succession and so natural heirs would be debar in every case of Will. Of



course it may be that in some cases they are fully debarred and in some cases partly.

135. In the case of Uma Devi Nambiar & Ors vs T.C. Sidhan (Dead) (2004) 2 SCC 321 extensively reviewed the case law dealing with a Will and opined that mere exclusion of the natural heir of giving of lesser share by itself cannot be considered as a suspicious circumstance. The Court observed that a Will is exhibited to alter the ordinary mode of succession and by its very nature, it is bound to result in either refusing or depriving the share of natural heirs. If a person intends his property to pass to his natural heirs, there is no necessity of executing a Will. It is true that the propounder of Will has to remove all suspicious circumstances. Suspicion means doubt, conjecture or mistrust. But the fact that natural heir has been excluded or lesser share has been given to them by itself without anything more, cannot be held to be suspicious circumstance especially in a case where the bequest has been made in favour of an off spring.

136. While considering several suspicious circumstances such as old age of the testator and his death 15 days after the execution of the Will in the case of Sridevi and Others (Supra), the Supreme Court observed that when reasons for unequal distribution have given in the Will itself, the same cannot be treated as a suspicious circumstance when the testamentary capacity of the testator has been established. Similar observations were made by the Apex Court in the case of Swarnlatha & Ors. (supra) wherein it was observed that exclusion of one of the natural heirs from the bequest for the reasons given in the Will which are more than convincing to show that



the exclusion of the daughter happened in a natural way, it cannot by itself be a ground to hold that there are suspicious circumstances.

137. In Kavita Kanwar (supra) it was observed that while appreciating the genuineness of execution of a Will, there is no place for the Court to see whether the distribution made by the testator was fair and equitable to all the children. The Court does not apply Article 14 to dispositions under a Will.

138. Therefore, simplicitor exclusion of some legal heir from the Will may not raise question about its genuineness, but the attending circumstances like exclusion of name in the **subsequent** Will, definitely merits consideration.

139. The Will dated 14.05.1997 Ex. PW1/2 gave the reasons for exclusion which read as under:

“WILL

I, smt Gulab Devi w/o late shri Gulab chand aged 75 yrs am resident of C-41 East of kailash ,New delhi-65.

That a house under my ownership and possession is situated at C-41,East of kailash. New delhi-65. The area of that house is 200 Sq. yards for which a will regarding above mentioned house prior to present will, has been got registered on 23rd of feb of the year 1994 after a deep thought and consideration for the peace and security of my family members, through this will by making a change in the prior will do hereby withdraw completely all the rights bestowed to my third son Ajay for the portion of the house mentioned therein do hereby authorize my eldest son Mahendra Khuraniya. To have all the rights of sole ownership of the said portion of the house, because Ajay has not maintained his behavior and character morally good he has maintained illegal relation with an already married woman Usha Singh with two children and who



has been of criminal nature and characterless women. Thus for the years together he has been making me fool, whereas due to these illegal relations ,he took divorce from his lawfully married wife Neelu. As a result of which I and my family members have sustained a deep humiliation before our SAMAJ. This characterless women had been of making intention to usurp my house for the last 16 years when she lived in my above house with her husband Arvind Singh as a tenant as she after having passed a married life of 15 years with her husband Arvind Singh and having two issues has abandoned her husband and has trapped my son Ajay. Now she in the presence of my son Ajay passes comments that why this 80 year old woman does not die., and like a serpent is keeping possession of the house. And further she threatens that she would get my eldest son beaten with shoes in the mid of the road (Chauraha) as she belongs to Etah district and her father and brothers are having relations with dacoits etc.

That during my presence and repeatedly explaining my son Ajay he has not only dishonoured me but also humiliated me and getting us threatened . So after my death for the security and safety of my family members I, by way of giving Ajay one and half kg of gold and other ornaments as well as cash out of my movable properties, have given complete share of his due rights and thus and now Ajay will have no share or right on my above house C-41,East of kailash,Nd-6.

Thus this second and last will is written on a pie paper with my full free consent without fear or force after considerable thought in the presence of two witnesses. The above will has read over and has been signed by me so as to remain as a document of proof, which may be used at the time of, needed. This will may be considered as a part of my prior registered will.



Gulab Devi
Signatures of the will doer,

Signatures of the witnesses,

- 1. S.P. Jain s/o shri D.C. Jain,
C-103, East of Kailash,
New Delhi-65.
DL/02/006/039062*
- 2. Ramesh Vashist (Advocate).”*

140. Purportedly the explanation given in the Will was that “*her son, Shri Ajay Khurania has not only repeatedly dishonoured her but also humiliated and threatened her. In order to ensure safety and security of all the family members, while she gave a complete share of her rights in the suit property, and Shri Ajay Khurania being given his shares was held to be no longer entitled to any share or right in the suit property*”. It was further stated that this subsequent Will may be considered as part of an earlier registered Will.

141. This explanation given in the Will is explained by Shri Mahendra Khurania as PW1 (in the probate case) who has deposed that on account of bad behaviour of Shri Ajay Khurania, the Will dated 23.02.1994 was modified/amended by subsequent Will dated 14.05.1997 as has been mentioned in the Will. Shri Mahendra Khurania was cross-examined in extenso on behalf of Shri Ajay Khurania about the relationship between Smt. Usha, second wife of Shri Ajay Khurania and the mother, the testatorix. He denied having any knowledge of marriage of Shri Ajay Khurania with Smt. Usha Khurania. However, his evasiveness gave way when confronted with various photographs Ex.PW1/A to K and he admitted the presence of Smt. Usha Khurania and her daughter in various family



functions. In response to a specific query about the cordiality of relationship between Shri Ajay Khurania and his wife Smt. Usha Khurania after 1992, Shri Mahendra Khurania clarified that they used to meet in friends circle and on some other occasions but only in functions.

142. **Sh. Ajay Khurania in his cross examination** by Shri Mahendra Khurania deposed that he got divorced from his first wife Neelu in the year 1985. Likewise, Smt. Usha, his present wife, took divorce from her first husband Shri Arvind Singh. It was further deposed that the marriage between him and Smt. Usha Singh was decided after his elder brother and mother had a discussion and thereafter they talked to him. He admitted that his elder sister Smt. Asha had proposed a girl for marriage after his divorce, though the same did not materialize. He further explained that he started living in a flat in Mayur Vihar in the year 1992 after his marriage with Smt. Usha Singh, though he also continued to be in possession of the premises in the suit property and he was living in both the properties. He also explained that his mother had good relations with him and she used to live with him in his Mayur Vihar house for 15 out of 30 days in a month.

143. Shri Ajay Khurania further explained that his mother was residing with him where she fell sick and he got her admitted in Max Hospital and then she was shifted to National Heart Institute where she died on 31.07.1997. A suggestion was given to him that Shri Mahendra Khurania had informed him about the death of mother to which he explained that there was no question of conveying the information as he himself was present in National Heart Institute. It was also suggested that on 02.08.1997 Shri



Mahendra Khurania with his wife Saroj and Shri Chandra had gone to Haridwar for immersion of ashes of the mother, to which he claimed that all the four brothers had gone to Haridwar with the ashes.

144. Shri Mahendra Khurania has not been able to prove that there was any ill will between the mother and Smt. Usha Khurania. Rather the cross-examination of Shri Ajay Khurania establishes that that though after the marriage with Smt. Usha in 1992 he had shifted to his house in Mayur Vihar, they continued to interact as a family in the social and family functions. Not only this, the mother used to visit him and his wife at their house and stay with them occasionally and in her last days it was at their house that she had taken ill. She was shifted from Shri Ajay's house to Spring Meadows Hospital. No evidence has been led by Shri Mahendra Khurania to show any strained relationship between the mother and Smt. Usha Khurania.

145. Pertinently, Sh. Ajay Khurania got remarried in the year 1992 while the first Will was executed in 1994. Generally, new relationships take time to be accepted and get settled with passage of time, it is the initial years which see more friction. If there was such acrimony and discord between Smt. Gulab Devi and daughter-in-law Usha as is claimed by Shri Mahendra Khurania, it would have definitely found mention in the first Will itself which was penned in 1994 i.e. two years after the marriage. Rather, the 1994 Will (which is subsequent to the second marriage of Sh. Ajay Khurania) is in consonance with the family decision that all four brothers



must have equal share, thereby reflecting that Smt. did not have any inclination to disinherit Sh. Ajay Khurania from the suit property.

146. Another significant aspect in the second Will Ex. PW1/2 is that Sh. Ajay Khurania has not been completely disinherited. While the share in the suit property has been allegedly denied, he has been given “*one and half kilogram of gold and other ornaments as well as cash out of my moveable properties*” in and hence, been given “*given complete share of his due rights*”. Now this apparent giving of money and jewellery in lieu of his share in the suit property, does not in any manner reflect that she had any intent of depriving Shri Ajay Khurania from his share in her assets. Apposite would it be to observe that the tone and tenor of the Will was not to disinherit Shri Ajay Khurania as has been projected by Shri Mahendra Khurania.

147. It would be appropriate to note at this juncture that there is an apparent dissonance in the various recitals of the Will. The best evidence to countenance the assertions was to atleast produce some evidence that the money and jewellery as mentioned, was actually given to Shri Ajay Khurania. The entire evidence is conspicuously silent in this regard.

148. The entire compendium of evidence leads to only one conclusion that the second Will Ex. PW1/2 is a manipulated document and is not the embodiment of last desire of Late Smt. Gulab Devi.

149. It is thus, held that Shri Mahendra Khurania has not been able to prove the genuineness of Will dated 14.05.1007 which is shrouded with various suspicious circumstances, namely, Haphazard maintenance of



records at the Office of Sub-Registrar, Seelampur, Reliability and credibility of the attesting witness, Involvement of Shri Mahendra Khurania in registration of the Will, Relationship of trust between the Testator and the Beneficiary and reasons for disinheriting Shri Ajay Khurania in the second Will.

150. It is held that Will dated 14.05.1007 Ex. PW1/2 is a fabricated document.

(vii) Will propounded by Smt Asha Verma:

151. It may also be pertinent to refer to the claim of Smt. Asha Verma who while approbating and reprobating about the Will Ex.PW1/2 had in the alternative, alleged that a Will dated 21.06.1997 was executed by Smt. Gulab Devi at Jaipur, accordingly to which four different portions of the ground floor and first floor have been given to the plaintiffs and defendants Nos. 1 and 2, while the second floor (Barsati) along with the terrace rights had been bequeathed in favour of defendant No. 3 and 4. It is claimed that defendant Nos. 3 and 4 have become the absolute owners of the second floor along with the terrace rights in the property in question.

152. Shri K.C. Verma has also deposed that he had attested the said Will dated 21.06.1997 as per the desire of Smt. Gulab Devi which was in custody of Smt. Asha Verma, Defendant No.3. He has also explained that the same was handed over to Shri Mahendra Khurania upon the demise of Smt. Gulab Devi.



153. However, it may be noted that there is no evidence, apart from bald averments that have been made by Defendant No.3 in this regard. The Will dated 21.06.1997 has not been produced and proved by the Defendant No.3. Hence, the only conclusion that can be drawn is that the alleged Will is non-existent.

154. Additional Issue No.(i) in **CS (OS) 345/2018** and Issue No. (i) in **Probate Case No. 26/2000** are decided against Sh. Mahendra Khurania.

Preliminary Objections:

Issue No.(i) in Civil Suit No. 345/2018 (*framed on 18.11.2006*):

**(i) Whether the present suit is not maintainable in lieu of the preliminary objection No.1 as taken by defendant No.1 and 2?
OPD**

155. Shri Mahendra Khurania and Shri Chandra Prakash Khurania raised an objection that the present suit is not maintainable in its present form as the property in dispute had already been partitioned amongst plaintiffs and the defendants Nos. 1 and 2 by their mother late Smt. Gulab Devi by way of a Will, which is a duly registered document. Hence, the present suit is liable to be dismissed on this short ground.

156. Shri Ajay Khurania, being the legal heir of Smt. Gulab Devi has filed the suit for partition claiming his 1/6th share in the suit property by contending that Smt. Gulab Devi died intestate on 31st July, 1997 leaving behind the Plaintiffs and the Defendants No. 1 to 4 as her sole legal heirs. However, subsequent to filing of the partition suit, Shri Mahendra Khurania



propounded the two Wills dated 23.02.1994 and 14.05.1997. Thereafter, Shri Mahendra Khurania filed a Probate suit before the court for giving effect to the Wills of Smt. Gulab Devi. Shri Ajay Khurania in the present suit has questioned the validity of the two Wills and has alleged that they are forged.

157. First and foremost, indisputably Smt. Gulab Devi was the exclusive owner of the suit property. There could not have been a partition amongst the parties to the present suit during the lifetime of Smt. Gulab Devi since the progeny of Smt. Gulab Devi had no right whatsoever during her lifetime. There was no bar against Smt. Gulab Devi in dividing her property amongst her children in the manner she desired but the right could have been created by a written document which was registered. Smt. Gulab Devi merely handed over the possession of specific portions of the suit property by way of an arrangement, but it was definitely not a partition having the effect of barring the present suit. Merely taking possession of the property as divided by Smt. Gulab Devi does not amount to a legal partition of the suit property as the heirs/beneficiaries are merely joint owners until such division has been made in accordance with law. In fact, the parties have set up their respective claims to the suit property sans this Family Arrangement, on the demise of sole owner of the suit property on the basis of Will or on the assertion that she died intestate. Admittedly, no registered document dividing the property was executed in 1992.



158. Further, Shri Ajay Khurania has sought partition by asserting that Smt. Gulab Devi died intestate while Shri Mahendra Khurania is claiming Probate of the Wills.

159. In Sameer Kapoor vs State, (2020) 12 SCC 480, it was observed that a Probate Court can only determine the legal character of a Will. Further, the Apex Court in Shamita Singh vs Rashmi Alhuwalia, (2020) 7 SCC 152, found that the outcome of a Probate Petition has an impact on the judgement of a partition suit and thus, when the two proceedings are filed parallelly, they are consolidated in order to have a harmonious finding.

160. In a similar vein, in Binapani Kar Chowdhury vs Sri Satyabrata Basu and Anr Civil Appeal 5784 of 2002, decided on 16th May, 2006, it was observed that *Section 213 of the Indian Succession Act, 1925 does not come in the way of a suit or action being instituted or presented by the executor or the legatee claiming under a Will.*

161. Ergo, a partition suit is not barred until a probate has been granted by a court and thus, the validity of a Will can be questioned by legal heirs of the deceased. Hence, it is observed that the partition suit will not be barred merely because there is a Will in respect of the suit property, which is a duly registered document.

162. In light of the above discussion, issue No. (i) in the Suit for Partition is decided in favour of the Plaintiffs Shri Ajay and Shri Avinsash Khurania.

Issue No. (ii) in Civil Suit No. 345/2018 (framed on 18.11.2006):



“(ii) Whether the suit is barred for non-joinder of necessary parties? OPD”

163. Defendant No. 1 and 2 took a preliminary objection that the suit is barred for non-joinder of necessary parties.

164. It is an admitted fact that Smt. Gulab Devi had seven children. Late Smt. Parvati, the eldest sister of the plaintiff expired in 1968. Shri Ajay Khurania in his prayer has sought 1/6th share in the suit property through partition by virtue of being a legal heir of the deceased, Smt. Gulab Devi and has not included Late Smt. Parvati Devi, the eldest daughter who had pre deceased her.

165. This objection loses all merit, in light of the fact that the Probate petition was ordered to be tried together with the suit for partition by the Order dated 24.05.2007 of this Court. Notice was directed to be issued to all the Legal Heirs of Smt. Gulab Devi as mentioned in Paragraph 6 of the Probate petition, vide Order dated 24.05.2000. Further, vide Order dated 19.07.2001, the remaining L.R Nos. 1, 6 and 7, were directed to be served way of publication and since none appeared, they were proceeded ex-parte as per subsequent Order dated 19.10.2001. Consequently, it is established that all the LRs were duly served and Late Smt. Parvati through her legal heirs was proceeded ex-parte in accordance with law. All the legal heirs were put to notice about these suits. Thus, to hold the suit of partition as not maintainable as the Legal Heirs of Smt. Parvati were not impleaded in the partition suit, is to take a hyper technical approach which does not have any merit as they were served by way of publication and had notice despite



which they chose not to put any appearance in this litigation. It cannot be held that the legal heirs of Smt. Parvati were au courant with the filing of the partition suit.

166. Pertinently, no share of the suit property has been given to the LRs of Smt. Parvati in the impugned Will dated 23.02.1994 and 14.05.1997. Therefore, by virtue of the findings of this court on the validity of the Will dated 23.02.1994, and the scope of partition of the suit property being restricted to the shares as defined in the Will, this court is of the opinion that it is not sagacious to dismiss the partition suit on such a hyper technicality of non-joinder of LRs' of Smt. Parvati in the partition suit, especially after twenty five years of institution of the suit.

167. Thus, the issue is decided in favour of Shri Ajay Khurania and Shri Avinash Khurania.

Issue No. (iv) in Civil Suit No. 345/2018 (*framed on 18.11.2006*):

(iv) Whether the suit property is liable to be partitioned?

168. On merits, this court has found the Wills dated 23.02.1994 Ex.PW1/1 of Smt. Gulab Devi as propounded by Shri Mahendra Khurania, is the last Will valid in law and hence, the suit property is liable to be partitioned in its accordance with the same.

Issue No. (v) in the Civil Suit No. 345/2018 (*framed on 18.11.2006*):

(v) Whether the plaintiff is entitled to relief of mandatory injunction, as prayed? OPP



169. The Plaintiff, Shri Ajay Khurania had sought to direct Shri Mahendra Khurania to remove the unauthorized and illegal construction raised by him in the front courtyard of the ground floor of the suit property. Though the plea had been taken about unauthorized and illegal construction but the plaintiff failed to adduce any evidence in support thereof.

170. **The issue is decided against Sh. Ajay Khurania.**

Issue No. (ii) in Probate Case No. No.26/2000 (*framed on 08.08.2003*)

(ii) Relief:

171. In view of the findings in the issues as discussed above, it is held that the Will dated 14.05.1997 Ex. PW1/2 is not the genuine Will of the deceased Smt. Gulab Devi and the Will dated 23.02.1994 Ex. PW1/1 is the last genuine Will as executed by Smt. Gulab Devi, in regard to which probate is granted.

172. The present petition is allowed. Letter of Administration with Will annexed is hereby granted to the Petitioner, subject to payment of requisite court fees. Petitioner shall furnish Administrative Bond with one surety to the satisfaction of the learned Registrar General of this Court.

173. The Valuation Report shall be filed by the SDM concerned and brought on record before the learned Joint Registrar.

174. On payment of the requisite court fee and other formalities noted above, the Letter of Administration annexed with the Will shall be issued by the Registry.

175. The petition stands disposed of in the above terms.



176. List before the Joint Registrar (Judl.) on 04.09.2023 for depositing of the bond.

Issue No. (vi) in the Civil Suit No. 345/2018 (*framed on 18.11.2006*)

(vi) Relief:

177. Shri Ajay Khurania, Shri Avinash Khurania, who are the two plaintiffs in the partition suit along with Defendant No.1 Shri Mahendra Khurania and defendant No.2 Shri Chandra Khurania, are held entitled to their specified share each in the suit property as per the Will dated 23.02.1994 Ex.PW1/1 of Smt. Gulab Devi and **a preliminary decree of partition is according made.** However, considering that the suit property had already been demarcated and all were in possession of their respective shares as mentioned in the site plan annexed with the Will Ex. PW1/1, the parties/Legal Representatives of Smt. Gulab Devi are entitled to the following share in the suit property based on the Will executed by her:

S.no	Legal heir of Gulab Devi	Receivables
1.	Shri Mahendra Khurania	Front portion of the ground floor which is shown in red colour in the map.
2.	Shri Chandra Khurania	The back portion of the first floor shown in saffron colour in the map
3.	Shri Avinash Khurania	Front portion of the first floor shown in khaki colour in the map



4.	Shri Ajay Khurania	The back portion of the ground floor shown in the green colour in the map
5.	Smt. Saroj Khurania, wife of Shri Mahendra Khurania	One shop built in Shri Mahendra Khurania's portion marked in red colour in the map.

178. The final decree is also passed in accordance with the site plan. **The suit for partition is accordingly decreed.** Decree Sheet be drawn accordingly. The parties shall pay the requisite Stamp Duty/Court Fees. The Decree be registered in accordance with Law.

(NEENA BANSAL KRISHNA)
JUDGE

AUGUST 22, 2023
Va/NK