* IN THE HIGH COURT OF DELHI AT NEW DELHI

\+ FAO(OS) No.386/1996

HARI SINGH & ANR. .....Appellant through
Mr.A.B. Dial, Sr. Adv. with
Ms.Ananya Dutta Majumdar, Adv.

versus

THE STATE & ANR. .....Respondent through
Ms. Mala Goel with
Ms. Noopur Singhal, Advs.

WITH

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% Date of Hearing: November 26, 2010

Date of Decision: December 03, 2010

CORAM:
* HON'BLE MR. JUSTICE VIKRAMAJIT SEN
HON'BLE MR. JUSTICE MANMOHAN SINGH

1. Whether reporters of local papers may be allowed to see the Judgment? No
2. To be referred to the Reporter or not? Yes
3. Whether the Judgment should be reported in the Digest? Yes

VIKRAMAJIT SEN, J.

1. These Appeals assail the composite Judgment dated 6.8.1996 of the learned Single Judge deciding Probate Case Nos.24/1973 and 32/1978 refusing the prayer of the Petitioners to grant probate of the propounded Wills of Late Kundan Singh and Late Polo Singh respectively.

2. Probate Case No.24/1973 was filed for grant of probate of Will of Late Kundan Singh and Probate Case No.32/1978 was filed seeking probate of the Will of Late Polo Singh, who was the brother of Late Kundan Singh. The Petitioners in both the cases are common namely – S/Shri Hari Singh, Pritam Singh and Amar Singh, however, in Appeal only S/Shri Hari Singh and Pritam Singh are before us as Shri Amar Singh had died on 4.7.1995. An application under Order XXII Rule 2 of the Code of Civil Procedure, 1908 (CPC for short) was moved by the surviving Petitioners which was allowed without any opposition from the other side.

3. Objections were filed in Probate Case No.24/1973 by the daughter of Late Kundan Singh, namely, Smt. Gurbax Kaur and in Probate Case No.32/1978 by widow of Late Polo Singh and their daughter Smt. Gurinder Kaur.

4. We shall deal with both the Appeals separately to avoid overlapping and confusion.

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5. This Appeal impugns the refusal of grant of probate in Probate Case No.24/1973. The said Probate case was filed for the probation of the Will of Late Kundan Singh dated 2.12.1963. The Testator had died on 17.8.1971. The said Will is said to have been witnessed by Shri Mustaq Rai Khanna and Dr. Sohan Singh. The Probate Petition was accompanied by affidavits of these two attesting witnesses. By this Will, Late Kundan Singh had bequeathed his entire property and interest in the partnership business to his three nephews, S/Shri Hari Singh and Pritam Singh, who are the sons of his deceased brother Shri Ralia Ram, and Amar Singh who is the son of his other deceased brother Shri Paras Ram. The case of the Petitioners is that Late Kundan Singh and Late Polo Singh were jointly doing some business and the Petitioners who were their nephews were looked after by them as their own sons; and the petitioners respected their uncles just as their own fathers. It was because of the mutual affection between them that the Uncles executed the Wills in the favour of their nephews. The Will is in English and bequeaths the entire property of Late Kundan Singh to his nephews. The wife of the Testator had been appointed as the Executrix and nothing was given to her or her daughters. The Widow of Late Kundan Singh died in 1966. On 15.3.1976, their

daughter, Smt.Gurbaksh Kaur filed Objections against the grant of Probate sought by the Petitioners on the basis of the propounded Will.

6. In the Reply filed to the said Objections, the Petitioners have taken a plea that the deceased did not bequeath any property to his daughter because of the strained relations between the father and the daughter during the lifetime of the deceased. The same Reply also seeks to explain that the correct date of the Will is dated 18.11.1963 and the date mentioned as 8.1.1963 in the Petition was a mere typographical error.

7. The learned Single Judge, however, did not agree with the case of the Petitioners. After considering the evidence and statements of witnesses on record, he held that “the petitioners have not proved the due execution of the will and attestation of two attesting witnesses as required under Section 63 of Indian Succession Act, 1925 and they have not proved the same under Section 68 of Indian Evidence Act, 1872” and that he was “not able to accept the evidence of Mustaq Rai Khanna and Amar Singh on the aspect of due execution of the will having regard to the facts and circumstances of the case”. Shri Mushtaq Rai Khanna, the attesting witness to the propounded Will, was examined on commission. Shri Amar Singh was the only Petitioner who appeared in the Witness Box. The learned Single

Judge held that there were various suspicious circumstances surrounding the Will and the statements of witnesses that were sufficient to conclude that the propounded Will was not genuine.

8. Mr. A.B. Dial, learned Senior Counsel for the Appellants, states that the burden which the law lays on the Petitioner in a probate case had been duly discharged and that the learned Single Judge fell in error in opining that there were suspicious circumstances which the Appellant had not explained which were so material as to justify the rejection of the entire case of the Petitioner. It is argued on behalf of the Appellant that the learned Single Judge gravely erred in his approach to the effect that "I do not want to go into the question whether the signatures in the will of Kundan Singh or Polo Singh are the signatures of the brothers because, in my view, I would not be called upon to adjudicate on that question only if the surrounding circumstances are dispelled by the Petitioner". Learned Senior Counsel for the Appellant submits that such an approach is unknown in law, in that the Court is required to examine the genuineness of signatures of the Testator and the attesting witnesses as postulated in Indian Evidence Act and Indian Succession Act. It is only after the question of genuineness of signatures is duly answered, that the second question of existence of suspicious circumstance would arise.

Mr. Dial has further contended that the learned Single Judge has given too much weightage to circumstances which do not qualify as suspicious circumstances.

9. In order to prove the propounded Will, the Petitioner/Appellant had relied on the testimony of Shri Mushtaq Rai Khanna who testified that the Will was signed by Late Kundan Singh before him and Dr. Sohan Singh. He also affirmed that the signatures on the Will were that of Late Kundan Singh. Dr. Sohan Singh has not been examined; he had expired in 1983, that is, before the commencement of the Trial. The case of the Petitioner is that he had discharged the burden of proof in accordance with Section 68 of Indian Evidence Act, 1872 and Section 63 of Indian Succession Act, 1925 by producing one attesting witness to the Will. In addition thereto, the Affidavit of Shri Sohan Singh had been filed by the Petitioner; the Affidavit dated 6.5.1976 asseverates thus-

AFFIDAVIT

Affidavit of S.Sohan Singh son of late S.Sahib Singh aged about 66 years, resident of XV 8698 D.B.Gupta Road, New Delhi-55.

I, the above named deponent, do hereby state on solemn affirmation as under:-

1. That I knew Shri Kundan Singh son of Shri Chanda Singh resident of 16/26 WEA Karol Bagh, New Delhi.
2. That Shri Kundan Singh expired in the year 1971.

3. That the said Shri Kundan Singh executed a Will to which I am the attesting witness.
4. That I was then practising as Doctor at Desh Bandhu Gupta Road, Paharganj, New Delhi and my register number was 2213.
5. That at the time, I witnessed the said Will, Shri Kundan Singh was perfectly in good state of health and he signed the Will after fully understanding the same and when it was explained and read out to him.
6. That the said Shri Kundan Singh had specifically told that he is executing this Will in favour of S/Shri Hari Singh, Pritam Singh and Shri Amar Singh and by execution of this Will, he is disentitling the right of any property to his daughter Smt.Gur Bax Kaur.
7. That the said deceased Shri Kundan Singh has executed this Will with free will and he was fully conscious about the execution thereof.

DEPONENT

10. It is submitted that the Petitioner has also complied with the requirements of Delhi High Court Original Side Practice Directions No.7, Clause 2 of which provides as follows:-

> An application for probate shall be verified by at least one of the witnesses to the will (when procurable) in the form set forth in Section 281 of the Indian Succession Act, 1925, and the affidavit of such witness shall also be filed. If no affidavit by any of the attesting witnesses is procurable, evidence on affidavit must be produced of

that fact and of the handwriting and/or any circumstances which may raise a presumption in favour of due execution of the will.

11. Shri Daljit Singh testified that Late Kundan Singh used to take advice from him regarding the tax matters of his business. He proved the Partnership Deed, P-4 between Late Polo Singh and Late Kundan Singh and the three Petitioners; and stated that Late Kundan Singh and Late Polo Singh used to treat the Petitioners like their sons. He also identified the signatures of Late Kundan Singh on the propounded Will, and deposed that Late Kundan Singh used to sign in English.

12. Now coming to the document purporting to be the last Will of Late Kundan Singh, it may be noted that it is a two page document bearing seal of Delhi Administration at the top of both the sheets. The Testator declares the same to be his last Will and thereby revokes all the former Wills and codicils made by him. He bequeaths the movable and immovable assets delineated in the same instrument and his entire share in the partnership business to the three Petitioners. The Will further mentions the name of Late Kundan Singh's daughter, Smt. Gurbax Kaur as the Sole Successor, apart from Smt. Ratan Kaur, the wife of the Testator. The Testator makes a provision of a monthly maintenance of ₹ 150/- for his Widow, Smt. Ratan Kaur and records that "My said daughter is

not entitled to any share in my property". Smt. Ratan Kaur had been appointed as the Executrix.

13. On making a careful comparison, we find that the signatures of the Testator are identical to those that appear on the Partnership Deed dated 1.10.1966 between Late Kundan Singh, Late Polo Singh, S/Shri Hari Singh, Amar Singh and Kirpal Singh. Signatures of Dr. Sohan Singh and Shri Mustaq Rai Khanna along with respective stamp marks appear below as attesting witness to the said Will. The date put down by Dr. Sohan Singh and Shri Mushtaq Rai Khanna below their signatures is 2.12.1963. In this context, the latter has deposed in these words:- "In fact myself, Dr. Sohan Singh and Sardar Kundan Singh signed in the presence of each other". In cross-examination, he has deposed that – "I had been called to that place by Polo Singh through Amar Singh. It was 2nd December, 1963 at about 4 P.M. to 5 P.M".

14. The learned Single Judge, despite noting all these evidence, holds that the purported Will of Late Kundan Singh is not a genuine Will. The reasons assigned by the learned Single Judge for disbelieving the case of the Petitioners are as follows:-

> 1. That the Will is made of sheets bearing the Seal of Delhi Administration and the paper is also of a distinct quality. The inference arrived at by the learned Single Judge is that such paper usually being in possession of

advocates, the purported Will may have been fraudulently got made from some advocate by the Petitioners.

2. That the Will does not contain a recital that the Testator has the power to revoke the Will and it shall come into force after the lifetime of the Testator. The inference drawn from absence of this recital is that the instrument purported is not a Will or testament but may well just be a draft.

3. That the purported Will disinherits the wife and daughter who were the natural successors of Shri Kundan Singh without assigning any reason. On this score, the learned Single Judge has found the Will to be unnatural.

4. That the preamble of the Will contains the date 18.11.1963, whereas the witness puts down the date to be 2.12.1963 and the other witness confirms that the date of execution to be 2.12.1963 and not 18.11.1963. Learned Single Judge notices this as a material infirmity and a strong suspicious circumstance against the genuineness of the Will.

5. Description of share in properties not being correct is also considered as a material suspicious circumstance.

6. No evidence adduced as to show who drafted the purported Will and at whose instance was it drafted.

7. The Petitioners had presented another Will before the Registrar to effectuate transfer of a property by means of a Sale Deed. The said Will is exhibited as Exhibit P-2. The recitals of the said Will are somewhat different to the one of which Probate is sought. The

> learned Single Judge infers from this that – "the petitioners have been producing one Will after the other to suit their convenience".
>
> 8. That the Petitioners had actively participated in the execution of the propounded Will and thus casts a doubt on the valid execution of the Will.

15. In our considered view, the learned Single Judge committed an error by not primarily dealing with the aspect of authenticity of signatures; and proceeding directly on the basis of the suspicious circumstances. In probate cases, the Courts have to first determine whether the propounder of the Will has discharged the burden placed on him by law under Section 68 of Indian Evidence Act and Section 63 of Indian Succession Act. This burden placed on the propounder would be discharged by proof of testamentary capacity and proof of the signatures of the testator. The burden then shifts on the contesting party to disclose *prima facie* existence of suspicious circumstances, after which the burden shifts back to the propounder to dispel the suspicion by leading appropriate evidence.

16. The law in this regard has been elaborated in *H. Venkatachala Iyenger –vs- B.N. Thimmajamma*, AIR 1959 SC 443, as follows:

> 18. What is the true legal position in the matter of proof of wills? It is well-known that the proof of wills

presents a recurring topic for decision in courts and there are a large number of judicial pronouncements on the subject. The party propounding a will or otherwise making a claim under a will is no doubt seeking to prove a document and, in deciding how it is to be proved, we must inevitably refer to the statutory provisions which govern the proof of documents. Sections 67 and 68 of the Evidence Act are relevant for this purpose. Under Section 67, if a document is alleged to be signed by any person, the signature of the said person must be proved to be in his handwriting, and for proving such a handwriting under Sections 45 and 47 of the Act the opinions of experts and of persons acquainted with the handwriting of the person concerned are made relevant. Section 68 deals with the proof of the execution of the document required by law to be attested; and it provides that such a document shall not be used as evidence until one attesting witness at least has been called for the purpose of proving its execution. These provisions prescribe the requirements and the nature of proof which must be satisfied by the party who relies on a document in a court of law. Similarly, Sections 59 and 63 of the Indian Succession Act are also relevant. Section 59 provides that every person of sound mind, not being a minor, may dispose of his property by will and the three illustrations to this section indicate what is meant by the expression “a person of sound mind” in the context. Section 63 requires that the testator shall sign or affix his mark to the will or it shall be signed by some other person in his presence and by his direction and that the

signature or mark shall be so made that it shall appear that it was intended thereby to give effect to the writing as a will. This section also requires that the will shall be attested by two or more witnesses as prescribed. Thus the question as to whether the will set up by the propounder is proved to be the last will of the testator has to be decided in the light of these provisions. Has the testator signed the will? Did he understand the nature and effect of the dispositions in the will? Did he put his signature to the will knowing what it contained? Stated broadly it is the decision of these questions which determines the nature of the finding on the question of the proof of wills. It would prima facie be true to say that the will has to be proved like any other document except as to the special requirements of attestation prescribed by Section 63 of the Indian Succession Act. As in the case of proof of other documents so in the case of proof of wills it would be idle to expect proof with mathematical certainty. The test to be applied would be the usual test of the satisfaction of the prudent mind in such matters.

19. However, there is one important feature which distinguishes wills from other documents. Unlike other documents the will speaks from the death of the testator, and so, when it is propounded or produced before a court, the testator who has already departed the world cannot say whether it is his will or not; and this aspect naturally introduces an element of solemnity in the decision of the question as to whether the document propounded is proved to be the last will and testament of the departed testator. Even so, in

dealing with the proof of wills the court will start on the same enquiry as in the case of the proof of documents. The propounder would be called upon to show by satisfactory evidence that the will was signed by the testator, that the testator at the relevant time was in a sound and disposing state of mind, that he understood the nature and effect of the dispositions and put his signature to the document of his own free will. Ordinarily when the evidence adduced in support of the will is disinterested, satisfactory and sufficient to prove the sound and disposing state of the testator's mind and his signature as required by law, courts would be justified in making a finding in favour of the propounder. In other words, the onus on the propounder can be taken to be discharged on proof of the essential facts just indicated.

20. There may, however, be cases in which the execution of the will may be surrounded by suspicious circumstances. The alleged signature of the testator may be very shaky and doubtful and evidence in support of the propounder's case that the signature, in question is the signature of the testator may not remove the doubt created by the appearance of the signature; the condition of the testator's mind may appear to be very feeble and debilitated; and evidence adduced may not succeed in removing the legitimate doubt as to the mental capacity of the testator; the dispositions made in the will may appear to be unnatural, improbable or unfair in the light of relevant circumstances; or, the will may otherwise indicate that the said dispositions may not be the result of the

testator’s free will and mind. In such cases the court would naturally expect that all legitimate suspicions should be completely removed before the document is accepted as the last will of the testator. The presence of such suspicious circumstances naturally tends to make the initial onus very heavy; and, unless it is satisfactorily discharged, courts would be reluctant to treat the document as the last will of the testator. It is true that, if a caveat is filed alleging the exercise of undue influence, fraud or coercion in respect of the execution of the will propounded, such pleas may have to be proved by the caveators; but, even without such pleas circumstances may raise a doubt as to whether the testator was acting of his own free will in executing the will, and in such circumstances, it would be a part of the initial onus to remove any such legitimate doubts in the matter.

21. Apart from the suspicious circumstances to which we have just referred, in some cases the wills propounded disclose another infirmity. Propounders themselves take a prominent part in the execution of the wills which confer on them substantial benefits. If it is shown that the propounder has taken a prominent part in the execution of the will and has received substantial benefit under it, that itself is generally treated as a suspicious circumstance attending the execution of the will and the propounder is required to remove the said suspicion by clear and satisfactory evidence. It is in connection with wills that present such suspicious circumstances that decisions of English courts often mention the test of the satisfaction of

judicial conscience. It may be that the reference to judicial conscience in this connection is a heritage from similar observations made by ecclesiastical courts in England when they exercised jurisdiction with reference to wills; but any objection to the use of the word “conscience” in this context would, in our opinion, be purely technical and academic, if not pedantic. The test merely emphasizes that, in determining the question as to whether an instrument produced before the court is the last will of the testator, the court is deciding a solemn question and it must be fully satisfied that it had been validly executed by the testator who is no longer alive.

22. It is obvious that for deciding material questions of fact which arise in applications for probate or in actions on wills, no hard and fast or inflexible rules can be laid down for the appreciation of the evidence. It may, however, be stated generally that a propounder of the will has to prove the due and valid execution of the will and that if there are any suspicious circumstances surrounding the execution of the will the propounder must remove the said suspicions from the mind of the court by cogent and satisfactory evidence. It is hardly necessary to add that the result of the application of these two general and broad principles would always depend upon the facts and circumstances of each case and on the nature and quality of the evidence adduced by the parties. It is quite true that, as observed by Lord Du Parcq in Harmes v. Hinkson (1946) 50 CWN 895, “where a will is charged with suspicion, the rules enjoin a reasonable scepticism, not an obdurate

> persistence in disbelief. They do not demand from the Judge, even in circumstances of grave suspicion, a resolute and impenetrable incredulity. He is never required to close his mind to the truth". It would sound platitudinous to say so, but it is nevertheless true that in discovering truth even in such cases the judicial mind must always be open though vigilant, cautious and circumspect.

In *Inder Bala Bose –vs- Maninder Chandra Bose*, (1982) 1 SCC 20 : AIR 1982 SC 133, it was held that "any and every circumstance is not a suspicious circumstance. A circumstance would be suspicious when it is not normal or is not normally in a normal situation or is not expected of a normal person."

17. We shall now consider the contentions of the adversaries, keeping these principles in mind. The propounded Will of Late Kundan Singh, dated 18.11.1963, bears signatures of Late Kundan Singh at three places. The signatures are clear and in English language. The same are identical to the ones made on the Partnership Deed dated 1.10.1966 between Late Polo Singh, Late Kundan Singh, S/Shri Hari Singh, Amar Singh and Pritam Singh which is Exhibit P-8. The signatures on the Will have been identified by Shri Mushtaq Rai Khanna who is also the attesting witness to the propounded Will and Shri Amar Singh who is one of the Petitioners. The signatures on the Partnership Deed have been identified by Shri Daljeet Singh, Advocate who also

identifies the signatures on the purported Will to be of Late Kundan Singh. There is nothing forthcoming in their cross-examination which would cast a doubt on their statement to this effect. Moreover, the daughter and son-in-law, in their respective cross-examinations have admitted that Late Kundan Singh used to sign in English as well though they do not admit the signatures on the Will as genuine. From this, we conclude that the Will bears the signatures of Late Kundan Singh.

18. The second aspect in proving of Will is as regards the proof of execution by attesting witnesses. Section 68 of Indian Evidence Act makes it mandatory to prove a Will, registered or unregistered, by at least one of the attesting witnesses, if alive, and in compliance with Section 63 of Indian Succession Act. The propounded Will is attested by Shri Mushtaq Rai Khanna and Dr. Sohan Singh. Dr. Sohan Singh had expired in 1983 and thus did not enter the Witness Box though he had filed his affidavit dated 6.5.1976 which we have already noted.

19. It has been stated that Dr. Sohan Singh had deposed in context of the execution of the Will on 20.7.1977 in Suit No. E-162/75 before Shri M.A. Khan, HRC. The statement is Exhibit A-2 and the relevant portion reads as follows:-

> .... I know Kundan Singh. He had executed a Will. I had signed the same in the capacity of a marginal witness. At that time, Shri Mushtaq Rai Khanna, Member

Municipal Corporation was also present. He had also signed the Will in my presence. I do not remember as to I had signed the Will first or Shri Mushtaq Rail Khanna. Kundan Lal had also signed in my presence. He was quite well. This event relates to 1963. I identify the signatures of Shri Kundan Lal and myself on the original Will which is before me.

XXXX.

I do practice near the bridge at Original Road. I am M.B.B.S. I knew Kundan Singh since 1949 the day I had started Clinic. I was his family Doctor. He used to visit me a number of time for treatment. He was not suffering from any serious disease. I used to visit sometime on account of fever.

The Will was a typed one. The signatures were obtained at the Saw Mill Shop of Kundan Lal at Arakashan Road. It is near to my shop. …. Kundan Singh had called me that a Will is to be executed. He had told me that he has to execute a Will. The Will was signed in my presence. Shri Polo Singh and Shri Mushtaq Rai Khanna were present. Now I do not remember about other persons. It is wrong to suggest that my signatures were obtained at my shop. Some person on behalf of Kundan Lal had come to call me. Maybe his servant. I did not know him. He may be some other person. When I reached there, Shri Polo Singh was present there. Later on, Shri Khanna had also arrived over there. I had also gone through the Will. Kundan Singh had told that he has executed a Will.

20. However, since these proceedings were not before the same parties nor did the Objector have any chance to cross-examine the said witness in those proceedings, as the same were between the Petitioners and the tenant of one of the properties which are the subject matter of the probate, the statement made by Dr. Sohan Singh in those proceedings would normally be barred from consideration by virtue of Section 33 of Indian Evidence Act.

21. Coming to the second attesting witness, namely, Shri Mushtaq Rai Khanna, he was examined on commission, where he stated that he knew Late Kundan Singh since 1951; that he had seen the original Will dated 2.12.1963. He identified the signatures of Late Kundan Singh, Dr. Sohan Singh and his own and deposed that he signed in the presence of Late Kundan Singh, Dr. Sohan Singh, Late Polo Singh, Shri Darbar Singh and two other persons. He also says that Late Kundan Singh, Dr.Sohan Singh and himself signed in each other's presence. He confirmed that Late Kundan Singh was in good health and of sound mind at the time of the execution. Furthermore, that Dr.Sohan Singh read the Will to Late Kundan Singh since it was in English and explained it to him in Urdu, whereafter Late Kundan Singh had admitted the Will to be correct.

22. The statement of Shri Mushtaq Rai Khanna has not been believed by the learned Single Judge. The reasons stated by the learned Single Judge for this are that – (a) Affidavit of Shri Mushtaq Rai Khanna was filed only after the filing of Objections by the daughter of Late Kundan Singh (b) In his cross-examination, Shri Mushtaq Rai Khanna admitted that he had not made any mention of the wife and daughter of Late Kundan Singh or their presence at the time of execution of Will and that he did not remember the names of father of S/Shri Hari Singh, Amar Singh and Pritam Singh (c) because he admitted that two of the Petitioners were his supporters in the elections. Learned counsel for the Respondents supports the views of the learned Single Judge and states that the learned Judge did not commit any error in adjudging the witness to be unreliable in light of the unnatural testimony given by him in the court and his acquaintance with the Petitioners who are admittedly his supporters.

23. The learned Senior Counsel for the Appellants argues that the learned Single Judge erred in adjudging Shri Mushtaq Rai Khanna to be an unreliable witness. It is urged that the affidavits of the attesting witnesses were filed in compliance with the provisions of Delhi High Court (Original Side) Practice Directions. Thus, the filing of the affidavits had no relation to

the filing of the Objections by the other side. It is further stated that since the witness had deposed after about 20 years of the execution of the Will, he could not be expected to remember all the facts, including whether there was any mention of the wife and daughter of Late Kundan Singh at the time of execution or even the name of fathers of S/Shri Hari Singh, Amar Singh and Pritam Singh who had died long back. It is also argued that merely because two of the Petitioners were supporters of Shri Mushtaq Rai Khanna, it would not inexorably lead to the inference that Shri Mushtaq Rai Khanna would sign a forged Will and would enter the Witness Box to depose falsely. There is nothing forthcoming in his cross examination that proves that he did not know Kundan Singh or that Kundan Singh could not have asked him to be a witness to his Will. He was the Councilor of the area where Late Kundan Singh resided and knew the Testator since he along with Late Polo Singh were Government contractors. Being a person of political background and a respectable member of the society, he was a natural choice for being an attesting witness to the Will.

24. After considerable cogitation, we are of the view that there was no material irregularity or any unnatural circumstances for doubting the integrity or disbelieving the statement of Shri Mushtaq Rai Khanna. Having deposed after

the passage of two decades of the event, it is but natural that he may not remember all the exact details of the event. Law does not prescribe or expect that only very close family friends or associates should witness Wills. It is more important for the witnesses to command respect, and in this sphere, Shri Mushtaq Rai Khanna had the requisite credentials. There is nothing suspicious or unnatural in his not knowing the details of the daughter of Late Kundan Singh. In the affidavit he does mention that Late Kundan Singh did not leave anything for his daughter in the Will. The fact that two of the Petitioners were the supporters of the witness also does not impeach the credibility on the basis of which the entire testimony can be held unreliable. To the contrary, the admission that the Petitioners were supporters of the witness lends credibility to his presence.

25. Now, we come to the third requirement, that is, to prove that the Testator was in possession of a sound disposing mind at the time of the making of the said Will. Dr.Sohan Singh has stated on affidavit filed in Court on 23.7.1976 that “the time I witnessed the said Will, Late Kundan Singh was perfectly in good state of health and he signed the Will after fully understanding the same and when it was explained and read out to him”. Shri Mushtaq Rai Khanna, in his Examination-in-Chief stated that “at the time of execution of Will, Sardar Kundan

Singh was of good health and sound mind"; the same is reiterated by Shri Amar Singh. No suggestion to the contrary was put to him in the cross-examination. Kundan Singh was about 50 years of age at the time of making of the Will in 1963. He died on 17.8.1971 which is 8 years after the propounded Will. There is no evidence on record to the contrary. Therefore, from the material on record, we are satisfied that the propounders of the Will have discharged the burden of proof laid on them by the statute.

26. We shall now deal with each of the circumstances which the learned Single Judge holds to be so suspicious as to disbelieve the case of the Petitioners and would warrant the grant of Probate of the alleged Will. In **FAO No. 874/2003** dated 21.11.2007 titled **Jagdish Lal Bhatia –vs- Madan Lal Bhatia**, the Court dealt with the legal burden of proof when a Will is propounded and also spelt as to what would constitute suspicious circumstances and what form of affirmative proof should be sought by the court to satisfy the judicial conscience that the document propounded is the last legal and valid custom of the testator. This reads as under:

> I. The legal burden to prove due execution always lies upon the person propounding a will. The propounder must satisfy the judicial conscience of the court that

the instrument so propounded is last will of a free and capable testator.

II. 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 the law. The contestant opposing the will may bring material on record meeting such prima facie 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. (see the decision of the Supreme Court in Madhukar D. Shende v Tarabai Aba Shedge, AIR 2002 SC 637).

III. No specific standard of proof can be enunciated which must be applicable to all the cases. Every case depends upon its circumstances. Apart from other proof, conduct of parties is very material and has considerable bearing on evidence as to the genuineness of will which is propounded. Courts have to be vigilant and zealous in examining evidence. Rules relating to proof of wills are not rules of laws but are rules of prudence.

IV. Expanding on the care and caution to be adopted by the courts, and presumptions to be raised, in the decision reported as (1864) 3 Sw & Tr. 431 In The Goods of Geale, it was opined that where a person is illiterate or semi literate or the will is in a language not spoken or understood by the executor, the court would require evidence to affirmatively establish that the testator understood and approved all the contents of the will.

V. One form of affirmative proof is to establish that the will was read over by, or to, the testator when he executed it. If a testator merely casts his eye over the will, this may not be sufficient.

VI. Courts have to evaluate evidence pertaining to the circumstances under which the will was prepared. If a will is prepared and executed under circumstances which raise a well grounded suspicion that the executor did not express his mind under the will, probate would not be granted unless that suspicion is removed.

VII. A word of caution. Circumstances can only raise a suspicion if they are circumstance attending, or at least relevant to the preparation and execution of the will itself.

VIII. Another point that has to be considered is about the improbability in the manner in which the instrument is scripted. Instance of suspicious circumstances would be alleged signatures of testator being shaky and doubtful, condition of the testator's mind being feeble and debilitated, bequest being unnatural, improbable and unfair.

IX. Suspicious circumstances are a presumption to hold against the will. Greater is the suspicion more heavy would be the onus to be discharged by he who propounds the will.

X. A will is normally executed by a person where he intends to alter the rule of succession or where he desires a particular form of inheritance and to that extent, nature of bequest is not of much substance to invalidate a will, but consistent view taken by the

courts is that this could be treated as a suspicious circumstance. What weightage has to be attached to this suspicion would depend upon case to case.

XI. Suspicion being a presumptive evidence, is a weak evidence and can be dispelled.

27. Firstly, the fact of the paper of the Will being of a distinct quality and bearing the Official Seal of the Delhi Administration does not evoke any doubt or suspicion. Late Kundan Singh and Late Polo Singh were government contractors; it was not unnatural for them to have paper bearing the Seal of Delhi Administration. Nothing suspicious arises from this fact.

28. Secondly, as regards the omission of a recital to the effect that "the testator has the power to revoke the Will" and that "it shall come into force after life-time of the testator" are concerned, the same neither impeaches the veracity of a testamentary instrument nor partake of suspicious character; both are legally axiomatic and their presence discloses bad drafting. These recitals, the absence of which the learned Single Judge has found to be so critical as to hold that the propounded Will was not a testamentary instrument at all, are mere formal expressions of the natural consequence of any testamentary instrument. It is commonplace that any testamentary instrument would take force only after the death of the testator and that during his lifetime a testator can make as many Will and each

subsequent Will would override the previous one. In the present case, the Objector has not produced any previous Will.

29. Thirdly, the learned Single Judge has held the Will to be unnatural on account of the fact that the entire property has been bequeathed to the nephews, disinheriting the Wife and the Daughter. The learned Counsel for the Respondent has vehemently supported the finding of the learned Judge on this score and has argued that the exclusion of the natural successors of the Testator was the most unnatural element about the propounded Will. The learned Senior Counsel for Appellants has urged that this is neither a suspicious circumstance nor a ground to hold the Will to be unnatural. Various Judgments have been cited which hold that disinheritance of natural heirs by a Will does not make the Will unnatural, rather Wills are made to alter the course of natural inheritance. It is further the case of the Appellants that the Testator loved his nephews like his own sons and they were brought up by their uncles Late Kundan Singh and Late Polo Singh. After the death of their brothers, it was Late Kundan Singh and Late Polo Singh who took care of the three Petitioners who only worked with them in their common business. It is also urged that the Uncles has great trust and

confidence in their nephews. This is evident from following facts:-

(a) There was a Partnership existing between S/Shri Kundan Singh and Polo Singh and the three Petitioners. Partnership Deed dated 30.10.1966 is exhibit P-7 on the record.

(b) Amar Singh in his Statement states that his marriage was got solemnized by his uncles and this fact is affirmed by the Objector, Gurbax Kaur, daughter of Kundan Singh in her Cross Examination.

(c) Justice Chadda (Retd.) in his Statement on commission also stated that uncles treated the nephews as his sons. The same fact was also affirmed by Mr. Daljit Singh, Senior Advocate.

30. It was also stated that there was some difference between the Daughter/Objector and the Father and that admittedly she did not even come for the cremation and final rites of her Father. It is argued that the Wife of Shri Kundan Singh was the Prosecutrix of the Will and a provision of maintenance of ₹ 150/- per month had been made which was not a substantial amount at that time. Learned counsel for the Respondent has emphasized that Shri Kundan Singh was residing with his Wife in 16/26, WEA, Karol Bagh, New Delhi until his sad demise and that the Petitioners were living separately. Ergo, if the Petitioners were as dear to him as his own sons, they ought have been living together with Shri Kundan Singh at his

residence. It is further stated that the Petitioners were merely fulfilling his moral obligation by bringing up, educating and marrying the Petitioners. Be that as it may, we do not think it unnatural for the Testator to have willed the entire property in the name of the nephews with a provision for a monthly maintenance for Wife. The Daughter was admittedly married and living in England and had not visited her parents for a long while. Mere disinheritance of natural heirs cannot be a suspicious circumstance in itself. In *Uma Devi Nambiar v. T.C. Sidhan*,(2004) 2 SCC 321, Hon'ble Supreme Court has held that:

> 16. A Will is executed to alter the ordinary mode of succession and by the very nature of things, it is bound to result in either reducing or depriving the share of natural heirs. If a person intends his property to pass to his natural heirs, there is no necessity at all of executing a Will. It is true that a propounder of the Will has to remove all suspicious circumstances. Suspicion means doubt, conjecture or mistrust. But the fact that natural heirs have either been excluded or a lesser share has been given to them, by itself without anything more, cannot be held to be a suspicious circumstance especially in a case where the bequest has been made in favour of an offspring. As held in P.P.K. Gopalan Nambiar v. P.P.K. Balakrishnan Nambiar, 1995 Supp (2) SCC 664 : AIR 1972 SC 2492, 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 features and not fantasy of the doubting mind. It has been held that if the propounder succeeds in removing the suspicious circumstance, the court has to give effect to the Will, even if the Will might be unnatural in the sense that it has cut off wholly or in part near relations. (See Pushpavathi v. Chandraraja Kadamba, (1973) 3 SCC 291.) In Rabindra Nath Mukherjee v. Panchanan Banerjee; (1995) 4 SCC 459, it was observed that the circumstance of deprivation of natural heirs should not raise any suspicion because the whole idea behind execution of the Will is to interfere with the normal line of succession and so, natural heirs would be debarred in every case of Will. Of course, it may be that in some cases they are fully debarred and in some cases partly.

31. Courts are not expected to be satisfied that a bequeathal is rational or not; what has to be considered is whether the bequest was so unnatural that the Testator could not have made it. It is the admitted position that the nephews were working together with their uncles and that they had been looked after by the uncles only. Indian society has traditionally been a patriarchal, where the succession to property by males had been in vogue to the detriment of females. It is only recently that legislative reforms, together with a social paradigm, shift in favour of the right of women has gained recognition. However, we have to be mindful of the fact that the Courts have to uphold

the wishes expressed and not the wisdom behind the same. The Court cannot infuse its own value system on the testator. The Privy Council in *Motibai Harmusjee Kanga –vs- Jamsetjee Harmoonji Kanga*, AIR 1924 PC 28 observed that "a man may act foolishly and even heartlessly; if he acts with full comprehension of what he is doing, the Court will not interfere with the exercise of his volition". For these reasons, we do not find the disinheritance of the Daughter/Objector as a suspicious circumstance.

32. Fourthly, the learned Single Judge has held that the two dates appearing on the Will shroud its execution with suspicion. It is stated that the typed portion in the Preamble of the Will contains the date 18.11.1963, whereas the witnesses have inscribed 2.12.1963 under their respective signatures. Shri Mushtaq Rai Khanna, in his cross-examination, stated that the Will was executed on 2.12.1963; he did not proffer any explanation why the date on the Will was 18.11.1963. There can scarcely be any cavil that a document can bear two dates. The Appellant's case is that the Will was got prepared on 18.11.1963 but it was executed on 2.12.1963 and that is why the witnesses put down the date as 2.12.1963. At first blush, this circumstance does look a trifle suspicious but the explanation given by the learned Senior Counsel for the Appellant is both cogent and

likely. The two dates appearing on the propounded Will are also not separated by a long period. It seems quite probable to us as explained by the Appellant that the date on the Preamble might be the date of preparation of Will and the other date, separated by only 14 days, viz. 2.12.1963 may be the date of execution. There is nothing in law that prescribes that the testamentary document has to be made and executed on the same day. Law does not mandate that each of the witnesses must be aware of the contents of the Will and the nature of the bequests. The rigours of attestation endeavour to eradicate manipulation and fabrication of such a testament by mandating that the testator as well as the witnesses should be simultaneously present at the time of its execution; nothing more and nothing less. Though there is no categorical evidence coming forth on the record, we do not find this fact to be legally anomalous or suspicious as to impeach the entire case of the Appellant/Petitioner.

33. Fifthly, the description of share of the property in Kundan Singh's Will is said to be incorrect in the context of the actual share that he held in the subject property he held at the time of his death. As per the Respondents, the comparison of the assets described in the Will and actually held by the Testator is shown in the Table below:-

Will	List of properties given in Annexure 'C' Probate Petition of Kundan Singh Pg.5 of Vol.1	Affidavit of Valuation of properties Annexure 'C' of probate Petition of Kundan Singh
Para 2 (1) -2 ½ storeyed 16/26, WEA, Karol Bagh, New Delhi	½ share in 2 ½ storeyed Building 16/26, WEA, Karol Bagh, New Delhi	½ share in 2 ½ storeyed Building 16/26, WEA, Karol Bagh, New Delhi
Para 3(1) 1/5 share in the Firm Polo Singh & Co.		

34. It seems to us that this is not a fatal inconsistency for the reason that the parties concerned were transacting business jointly and therefore they could have considered there to be a commonality of ownership. In the event, both the deceased brothers have made identical dispositions of their properties and businesses, that is, in favour of their nephews who are in business along with them. With due deference to the learned Single Judge, unjustified weightage has been given to this aspect of the objection or demur to the execution of the Will.

35. Sixthly, the fact that there is no evidence adduced on behalf of the Petitioners as regards the drafting and typing of the Will is looked at as a suspicious circumstance by the learned Single Judge. *Ramabai Padamkar Patil –vs- Rukminibai Vishnu Vekhande*, (2003) 8 SCC 537 clarifies that the propounder is not required to prove the details pertaining to the preparation of the Will once he successfully proves its execution. The Hon'ble Supreme Court in the above stated case held that "the mere non-examination of the advocate who was present at the time of the preparation or registration of the Will cannot, by itself be a ground to discard the same". We find that Section 63 of Indian Succession Act and Section 68 of Indian Evidence Act have been complied with. Absence of proof of preparation of the draft of the Will as to who prepared it, who typed it and on whose instruction, becomes wholly irrelevant, especially when the case of the Appellants is that they did not participate in the preparation.

36. Seventhly, another Will exhibited as X1 was produced by the Petitioners before the Registering Authority relating to the sale of property which belonged to Shri Kundan Singh. Paragraph 4 of that Will stated that – "my said daughter is not entitled to any share in my property which I am possessed of or I may acquire". These recitals are facially missing in the Will

propounded before us. Both the Wills bear the same date, that is, 18.11.1963. This fact, however, is not relevant for the purpose of probation of the Will propounded in this Court. If the Petitioners had committed an interpolation in the Will presented before another authority, a separate course has to be pursued to prosecute them for that. That cannot be a suspicious circumstance for the purpose of the Will propounded in this Court.

37. Eighthly, the learned Single Judge has also held that the Petitioners participated in the execution of the said Will and that is a good ground to doubt the genuineness of the Will. The learned Single Judge relies on the statement of Shri Mushtaq Rai Khanna where he says that besides Shri Kundan Singh, Dr. Sohan Singh and one Shri Darbar Singh, there were two-three other persons present at the time of the execution of the Will. The learned Single Judge has drawn a presumption that these other unnamed persons were the Petitioners. Learned Senior Counsel for the Appellants has correctly pointed out that such a presumption is wholly erroneous in absence of any cogent evidence as regards the presence of the Petitioners at the time of the execution. Shri Amar Singh has deposed that he received the Will from Late Polo Singh only in 1973, and that he was not aware of the existence or whereabouts of the Will

during the lifetime of Late Kundan Singh. No suggestion or question has been put to him by the Objectioner as regards the role played by the Petitioners in the preparation of the Will. The Respondent has relied upon ***Bharpur Singh*** *–vs- Shamsher Singh*, (2009) 3 SCC 687 to argue the fact that participation in execution of Will by the beneficiary is a suspicious circumstance. In the said Judgment, their Lordships have given an inclusive list of circumstances which may be termed as suspicious circumstance. Propounder taking prominent part in the execution of Will is also listed amongst other suspicious circumstances. The Appellant, however, has drawn our attention to ***Pentakota*** *Satyanarayana –vs- Pentakota Seetharatnam,* (2005) 8 SCC 67. Paragraph 25 of the ***Pentakota*** reads as follows:-

> 25. It is settled by a catena of decisions that any and every circumstance is not a suspicious circumstance. Even in a case where active participation and execution of the Will by the propounders/beneficiaries was there, it has been held that that by itself is not sufficient to create any doubt either about the testamentary capacity or the genuineness of the Will. It has been held that the mere presence of the beneficiary at the time of execution would not prove that the beneficiary had taken prominent part in the execution of the Will. This is the view taken by this Court in *Sridevi* v. *Jayaraja Shetty, (2005) 2 SCC 784*. In the said case, it

has been held that the onus to prove the Will is on the propounder and in the absence of suspicious circumstances surrounding the execution of the Will, proof of testamentary capacity and the proof of signature of the testator as required by law would not be sufficient to discharge the onus. In case, the person attesting the Will alleges undue influence, fraud or coercion, the onus will be on him to prove the same and that as to what suspicious circumstances which have to be judged in the facts and circumstances of each particular case.

38. In *Sridevi –vs- Jayaraja Shetty,* (2005) 2 SCC 784 relied in **Pantakota** it was observed thus:-

16**.** Counsel for the appellants argued that Respondent 13 had taken prominent part in the execution of the Will as he was present in the house at the time of the alleged execution of the Will. We do not find any merit in this submission. Apart from establishing his presence in the house, no other part is attributed to Respondent 13 regarding the execution of the Will. Mere presence in the house would not prove that he had taken prominent part in the execution of the Will. Moreover, both the attesting witnesses have also stated that the daughters were also present in the house at the time of execution of the Will. The attesting witnesses were not questioned regarding the presence of the daughters at the time of the execution of the Will in the cross-examination. The presence of the daughters in the house at the time of execution of the Will itself dispels any doubt about the so-called role

which Respondent 13 had played in the execution of the Will. They have not even stepped into the witness box to say as to what sort of role was played by Respondent 13 in the execution of the Will.

39. Thus, the observations in ***Bharpur Singh*** has to be read in accordance with the previous pronouncements in Pantakota and ***Sri Devi***. Unless there is an element of undue influence, coercion or fraud, mere presence or participation by a beneficiary is not a suspicious circumstance.

40. In the absence of any firm evidence and the pronouncements made by the Hon'ble Supreme Court, it is wholly erroneous to conjucturise that the Petitioners actively participated in the preparation of the Will.

41. From this detailed analysis of the evidence in support of the execution of Will and the suspicious circumstances pleaded by the Respondent and noted in the impugned Judgment, we are of the view that the Appellants have proved the valid execution of the propounded Will as required by law. The Judgment of the learned Single Judge is, therefore, set aside and probate of the Will dated 2.12.1963 of Late Kundan Singh is granted.

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42. This Appeal impugns the refusal to grant probate for the Will of Late Polo Singh's Will dated 27.12.1971 propounded in

Probate Case No.32/78. The Testator is said to have expired on 4.11.1977. The Probate Petition under Section 276 of the Indian Succession Act states that by virtue of the said Will, the Testator has bequeathed his entire property to the Petitioners in equal share. It is also stated in the said Will that the Daughter, Smt. Gurdev Kaur, had been suitably compensated in the lifetime of the deceased and as such, she shall not be entitled to any property left by the Testator. As regards the Wife, Smt. Gurbachan Kaur, the Will provides for monthly maintenance of ₹ 300/- be paid by the Petitioners in equal share. It also alleged that the said Will was duly executed in the presence of Dr. Sohan Singh and witnessed by Shri Madan Lal Maggon.

43. The Probate Petition was contested by Smt. Gurbachan Kaur, wife of Late Polo Singh and Smt. Gurdev Kaur, the daughter. It was stated in the Reply to the Petition that Late Polo Singh had not executed any Will; that the relations between the two Respondents were not estranged in any manner with the deceased, therefore, there was no reason whatsoever for the deceased to disinherit his widow and daughter and make his nephews the absolute owners of his property. It is also alleged that the signatures of the deceased, if found genuine, must have been made on some blank papers

which the Petitioners must have got hold of, and on which they fabricated a bogus Will.

44. An affidavit, dated 14.8.1978, of Shri Madan Lal Maggon was filed wherein he stated "That Shri Polo Singh had executed a Will on 27.12.1971 which was signed in my presence by him in perfectly sound mind and good health. That I witnessed on the same date of 27.12.1971 after the executant Shri Polo Singh had put in signatures thereon when it was also read out to him and this Will stands signed by me on all pages".

45. The Petitioners have relied on the testimony of Shri Madan Lal Maggon as an attesting witness, the statement of Shri Daljeet Singh, Advocate who verified the signatures of Late Polo Singh on the Will and also the fact that the nephews were working along with the uncles and that uncles used to treat them as their sons; and the testimony of Shri Amar Singh who was the only Petitioner who appeared as a witness in the Trial. They have also placed reliance on certain documents which are alleged to be bearing signatures of Late Polo Singh.

46. The learned Single Judge held that there were sufficient suspicious circumstances to cast a cloud on the genuineness of the Will and, therefore, declined to grant probate for the same.

47. Suspicious circumstances which the learned Single Judge ruled were regarding the valid execution of Will were:-

1. There being no affidavit by Shri Polo Singh who is said to be an attesting witness to the Will.
2. The recitals in the purported Will stating it to be only a document to be used at a future time and not a testamentary declaration.
3. There being no love for the wife of Shri Polo Singh from the side of nephews.
4. Shri Daljit Singh not being consulted as regards the preparation and execution of Will.
5. Will being unnatural on the ground of a casual reference being made to the Wife and Daughter in the Will and totally disinheriting them.
6. An adverse inference drawn from the fact that some of the witnesses who would have been very material to the case, including the other two Petitioners and relatives of Dr. Sohan Singh having been kept away to prevent best evidence from coming to the Court.
7. Unnatural and improbable account of discovery of Will and disclosure of this fact to the wife and daughter in the testimony of Amar Singh.

48. We shall adopt the same course that we did for the previous Appeal. We shall first deal with the evidence as regards the attestation of the Will and then proceed to the circumstances perceived as suspicious circumstances by the learned Single Judge.

49. The propounded Will of Late Polo Singh dated 27.12.1971 is a four page document written in Hindi. The Will notes the fact that the Testator's brother, Late Kundan Singh had died the

same year and in his Will has left his entire share to the nephews. It also narrates that the three nephews treated him as their father and, therefore, he also bequeathed his estate to them in equal shares. The reason for making no provision for his widow and daughter mentioned in the Will is that the Tesator had already given in his lifetime what he wished to give to his daughter. The Will is signed on each page by Late Polo Singh and Shri Madan Lal Maggon; Dr. Sohan Singh affixed his signatures on the bottom of the last page and has ascribed that "I have examined S. Polo Singh. He is in full possession of his senses to understand and execute the Will. He has signed in my presence".

50. We have perused the signatures of Late Polo Singh on all the pages of Will and also on the Partnership Deed dated 30.4.1968. On a careful inspection, the signatures appear to be similar and made by the same hand. Shri Daljeet Singh, Senior Advocate who appeared as PW2, stated - "I have seen the original partnership deed dated 17th April 1968. It was drafted by me and it was entered into between the five persons who are the executants of this partnership deed. I am its attesting witness. Probably all the five executants of this partnership deed had put their signatures on the deed in my presence. However, I cannot say definitely as long time elapsed since

then. .... Polo Singh and Kundan Singh signed many papers in my presence such as balance-sheets, profit and loss account statements and certain other documents and I am fully conversant with their signatures and can identify them". He also stated that "Polo Singh used to sign in English".

51. Justice S.S. Chadha (Retd.) was also examined as a witness for Petitioner and deposed that he used to handle Late Polo Singh's litigation when he was an Advocate. He also testified as regards the execution of a General Power of Attorney dated 1.10.1963 executed by Late Polo Singh in favour of Shri Hari Singh. The same is Exhibit P-7 on the record. Justice Chadha also stated that "I have seen the original Power of Attorney dated 1.10.1963. It is executed by Polo Singh". We have perused the signatures on the said General Power of Attorney. They are similar and appear to have been made by the same hand that signed on the Will.

52. There is nothing suspicious or contradictory forthcoming in the cross-examination of these two Witnesses who have testified as regards the veracity of the Partnership Deed and the General Power of Attorney respectively, both bearing signatures of Late Polo Singh that are identical to those made on the Will. We, therefore, hold that the signatures on the purported Will are of Late Polo Singh.

53. We shall now deal with the other essential requirement of proof of execution of the Will by at least one attesting Witness, namely, Shri Madan Lal Maggon. The other attesting Witness, Dr.Sohan Singh, had already died before the commencement of the Trial. Shri Madan Lal Maggon stepped in the Witness Box on 24.3.1986. In his Examination-in-Chief, he stated that he knew both Late Kundan Singh and Late Polo Singh; that his previous residence in Pahar Ganj was just 50 yards apart from the workshop of Late Polo Singh and Late Kundan Singh; that he used to supply building material to Polo Singh & Co. In the context of the Will, he deposed thus –"I have seen the original Will dated 27.12.1971 of Late S. Polo Singh. It bears my signatures on each page of this Will. I have seen the last page of the Will and the writing encircled red and marked 'A' thereon. It was made by Dr. Sohan Singh who put his signature below it in my presence. I had read out the contents of this Will to S. Polo Singh. S. Polo Singh had signed on all the four pages of this Will in my presence. Therefore I signed on all the four pages of this Will after admitting its contents as correct. Dr. Sohan Singh had also medically examined S. Polo Singh before S. Polo Singh signed on all the four pages of the Will. Dr. Sohan Singh signed on all the four pages of this Will. Dr. Sohan Singh also signed the Will in my presence as also in the presence of S. Polo Singh.

…. Polo Singh was in a fit state of health when he executed the Will Ex.Ph ….."

54. In the cross-examination held on the same day, the Witness stated as follows –"Polo Singh used to live with him in that house besides the three petitioners and the family of Kundan Singh. I do not know the name of the daughter of Polo Singh. I do not know as to when she was married. Polo Singh died in November, 1977. Polo Singh continued to live in the same house behind Imperial Cinema, Pahar Ganj, New Delhi till his death and his wife Smt. Gurbachan Kaur had also been living with him in that very house. …. When I was summoned at the workshop-cum-office of Polo Singh, Kundan Singh and the Petitioners the Will Ex.P4 was already lying with the deceased Polo Singh when I reached there. I have been seeing the signatures of Polo Singh done only in English script. He used to sign on cheques in English script. He also used to sometimes write in Punjabi. …. I never saw Polo Singh writing or signing in Hindi script. Polo Singh could read Gurmukhi script. He could not read Hindi script. …. I reached at the office-cum-workshop of Polo Singh at 5:00 p.m. on the relevant date. Polo Singh now deceased, and Dr. Sohan Singh were already present there when I reached there. Besides them some workers of Polo Singh were present in the workshop-cum-office but they were not

present at the place where Polo Singh executed the Will. A worker of Polo Singh had summoned me from my residence. I knew him by face but not by name. .... I did not ask Polo Singh as to from whom he got the subject-matter of the Will prepared or from whom he got the same typed out. Dr. Sohan Singh also did not ask Polo Singh as to from whom he has got the Will typed out. I also did not ask as to when he had got the Will typed out. .... He had told me that he was giving his property by Will to the three nephews i.e. the petitioners. I did not ask Polo Singh as to why he was not given his property to his daughter or his wife nor he told anything about this to me. .... The wife of Polo Singh used to be present at the house on those occasions. I did not talk anything to her about Polo Singh having executed the Will. Polo Singh also never talked to his wife about the Will in my presence. The wife of Polo Singh never talked about any will in my presence. I do not know the daughter of Polo Singh named Gurdev Kaur. I do not know when she was married. I never saw her at the house of Polo Singh whenever I visited his house. I never talked about this Will to anyone either during the life-time of Polo Singh or after his death. I learnt that I have to be examined as a witness in this case only 3-4 days ago. Amar Singh and Hari Singh, two of the petitioners, conveyed a message to me through my brother

Shri Radha Kishan Maggon that I should see them. I then met Amar Singh and Hari Singh about five days back at their worship at Ara Kashan Road. I shifted from Ara Kashan Road in the year 1980".

55. The learned Single Judge discounted his Testimony and held that evidence given by Shri Madan Lal Maggon "does not at all inspire confidence in me and I am not able to say that he is speaking the truth. He does not appear to be a person in whom Polo Singh would have reposed trust and asked him to attest his Will". The reasons for the learned Single Judge disbelieving the said Witness and holding his testimony to unnatural are – (a) because he has not been able to say in the chief examination as to who sent for him and who all were present at the time of execution of the Will (b) he failed to explain why the statement of Dr. Sohan Singh is mentioned in the Will itself which is marked as 'A' in Exhibit P4 (Will of Polo Singh) (c) because he did not know the name of the daughter of Shri Polo Singh and when she got married though he was a neighbor (d) because he stated that he came to know that he was to appear as a Witness only a few days before his disposition and prior to that he had not been told that he had to appear as a Witness in this case and (e) he did not state as to how he had informed the Petitioners about his whereabouts after shifting from Arakashan Road.

The learned Senior Counsel for the Appellant submits that there was no reason for discrediting the testimony of Shri Madan Lal Maggon and it was not essential for him to remember who had sent for him and each and every person. He had stated in the Cross-examination that he was called from his residence by a worker of Late Polo Singh who he knew him by face and not by name. As regards the people present at the time of the execution of Will, he said that Late Polo Singh and Dr. Sohan Singh were already present there when he reached there. He deposed that some other workers were also present at the work-cum-office of Late Polo Singh but were not present at the particular place where the Will was actually executed. The statement written at the end by Dr. Sohan Singh as regards the fitness of the Testator was also not required to be explained by Shri Maggon. No question was put to him in the cross-examination, thus the learned Single Judge could not have drawn an adverse inference on this score. It is not unusual for a neighbor not to know the name of the daughter of his neighbor. We think it relevant that the witness was a neighbor at the work-cum-office of Late Polo Singh and not to his residence, thus the question that he ought to have known the name of daughter of Late Polo Singh is ruled out. The portion of the Cross-examination where the Witness states that he only

recently got to know that he would be required to appear as a witness is said to be not of much consequence, nor is the fact as to how he informed the Petitioners of his new address after shifting from Pahar Ganj. Witness stating that he learnt that he had to be examined as a witness only 3-4 days ago cannot be construed to mean that he did not know of this case or that he had not filed affidavit in the case as attesting witness himself. Moreover, it is not too difficult to locate a person living in the same city. We are also of the view that the Respondents have failed to elicit any statement in the Cross-examination which impeaches the credibility of the witness or damages the case of the Appellants. In our opinion, there was no ground to hold that the witness did not inspire confidence or that Late Polo Singh could not have chosen him for being one of the attesting Witnesses for his Will.

56. The other attesting witness, Dr. Sohan Singh, could not appear before the Court as witness since he had expired in 1983. There is no affidavit from him supporting the Petition like the one filed by Shri Madan Lal Maggon. Learned Senior Counsel for Appellant explains that the Rules set out in Practice Directory make it obligatory for the Petitioners to support his application for probate with an affidavit of at least one attesting witness and, therefore, it was not required to file

affidavits of both the attesting witnesses. Smt. Gurbax Kaur, the daughter of Late Polo Singh, conceded that there was one Dr. Sohan Singh near the factory of Late Polo Singh and Late Kundan Singh but she refuted the fact that he had signed on the Will as an attesting witness. She deposed that Dr. Sohan Singh was not the family doctor of the Testator and that Dr. Kundra was the family doctor. After adverting to these statements, the learned Single Judge observed that in the absence of the connecting link, it was difficult to infer that Dr. Sohan Singh, who practiced in Pahar Ganj, had attested the Wills. It appears to us that the learned Judge reached the wrong conclusion. It was not even the case of the Respondents that there was no Dr. Sohan Singh in existence. Shri Madan Lal Maggon in his Statement verified that Dr. Sohan Singh was his neighbor at Pahar Ganj. The daughter of Late Polo Singh agreed that there was one Dr. Sohan Singh close to their house but she only refuted the fact that he was the family doctor. She even said that she knew Dr. Sohan Singh as they used to take medicine from him sometimes. Though the evidence given by Dr. Sohan Singh before the learned ACR to support the Will may not be read in evidence in these proceedings, the fact that he did appear as an attesting witness to support the Will before a Court is a relevant fact that cannot be overlooked. Just because

there is no direct evidence coming from Dr. Sohan Singh, it cannot be said that he would not have attested or affirmed the Will in the probate proceedings also. The other attesting witness has stated that he knew Dr.Sohan Singh and he signed the Will in his presence. The signatures on this Will are also identical to those on Exhibit P-2 for which we have probated. In light of these facts, we hold that there is a connecting link to indicate that Dr. Sohan Singh living in Pahar Ganj was the one who attested the Will.

57. Coming to the question of the Testator possessing sound disposing state of mind, there is a statement of Dr. Sohan Singh at the end of the Will itself stating that he had examined the Testator and he was found to be in possession of his senses to understand and execute the Will. The other attesting Witness, Shri Madan Lal Maggon, has also testified that the Testator was in a fit state of health when he executed the Will. Late Polo Singh had died on 4.11.1977 and the purported Will is dated 27.12.1971, about 6 years before his demise. Though the Testator had suffered from a paralytic attack just 4-5 months before his death, there is no evidence adduced from the Respondents that the Testator had suffered from any serious medical ailment at the purported time of the Will that would have impaired the mental capacity of the Testator to understand

and execute the present Will at the relevant time. Therefore, in light of the evidence on record we hold that the Petitioners have discharged the burden of proof that the Testator was in possession of sound disposing mind at the time of the execution of Will.

58. We shall now deal with the question of whether there exist such unexplained suspicious circumstances as would cloud the veracity of the propounded Will. Firstly, it has been stated that Dr. Sohan Singh was not prepared to file his affidavit and that he was not prepared to state that he was a witness to the said Will. The Practice Directions provide that an affidavit from only one of the attesting witnesses is sufficient to support the Probate Petition. The act of attesting the Petition is, in itself, evidence of the fact that the witness is signing as an attesting witness. This Petition is verified by both Shri Madan Lal Maggon and Dr. Sohan Singh, whilst Shri Madan Lal Maggon has inscribed that –"I, Madan Lal Maggon, the witness to the aforesaid will and testament of the Testator mentioned in the above mention declare that I was present and saw the Testator fixing his signatures thereto". The said Testator acknowledges the writing enclosed to the above petition to be the last Will and testamount in my presence and Dr. Sohan Singh's statement reads thus - "I, Dr. Sohan Singh, M.B.B.S. Regd. No.2213

Deshbandhu Gupta Road, Paharganj, New Delhi had examined Sr. Polo Singh on 27.12.71 and he was completely fit and in full senses to understand and execute the Will dated 27.12.71. He also signed the said Will in my presence".

59. There is no prescribed format that an attesting witness has to conform to. The statement has to be read as a whole and the context in which it is made. Even though the statement made by Dr. Sohan Singh does not contain a recital that he was a witness to the Will, as found in Shri Madan Lal Maggon's statement but since he has deposed that the Will was executed by the Testator in his full senses and his presence, the requirement of his stating that he was an attesting witness is met by the witness. Ergo, it cannot be assumed that Dr. Sohan Singh was not prepared to state that he was an attesting witness.

60. Secondly, the learned Single Judge, after going through the contents of the Will, holds that the document purported as a Will is in fact only a document to be used for reference at a future time and not a Testamentary Document. The reasons given in the impugned Judgment are that there are no useful recitals that 'the Testator has got the power to revoke the said Will' and that the 'Testament would come into effect after the lifetime of the Testator'. It is also noted that the concluding

recital of the purported Will is that “This Will I have executed to maintain a document and it could be used at the proper time”. We have already dealt with the question of effect of omission of some formal recitals to the sanctity of a Will in the connected Appeal and for brevity would merely reiterate the absence of some non essential and mere formal recitals would not invalidate a Will. On the contrary, such recitals are legal platitudes. What may be construed from the final recital of the Will is that the Testator wanted the Will to be a documentation of his wishes that would become effective on the right time, that is, his demise. The interpretation made by the learned Single Judge that the recital means that the Testator merely wanted the same to be a non-effectual document for his own future reference is not logical. A document has to be read as a whole and one line cannot be read out of context to predicate that the document or an instrument is not what the title and the content asserts it to be.

61. Thirdly, the learned Single Judge discounts the claim of the Petitioners on the ground that widow of Late Polo Singh did not share his love for the Petitioners. It is not essential that the widow should also have harboured the same sentiments as her husband or his nephews. We do not see it as a suspicious circumstance at all. The learned Single Judge, however, did not

agree with this statement and proceeded on the hypothesis that if the nephews were treated by Late Kundan Singh as his sons and nephews used to treat him as their father, then they must also treat the Wife of Late Kundan Singh as their Mother and in that eventuality, such a confrontation would not have arisen. This assumption is assailed by the Appellants as being wholly misconceived. It is argued on their behalf that the Petitioners used to treat Late Kundan Singh's Wife as their Mother. Moreover, the daughter/Objector had been married a long time before the Will was executed, and was residing in the United Kingdom.

62. Fourthly, the learned Single Judge has observed that since the Petitioners and the Testator knew Shri Daljit Singh, Advocate, yet his services were not taken for the preparation of Will. We do not find this as a suspicious circumstance. We have already held that the Petitioner is not required in a probate case to lead evidence as regards preparation of Will. The factum of valid attestation is alone to be proved. The fact that Shri Daljit Singh was not consulted for preparation of the Will cannot be a ground for suspicion. Shri Daljit Singh may have been instrumental in executing the Partnership Deed between the Petitioners and their uncles and may have advised Late Polo Singh on taxation matters, this fact cannot be overstated to say

that he should have been consulted for preparation of the Will and not consulting him in execution of Will by any stretch of imagination would be a suspicious circumstance.

63. Fifthly, like in case of Late Kundan Singh's Will, the fact that the Wife and the Daughter are disinherited is seen as a suspicious circumstance. We have already discussed this fact in context of Late Kundan Singh's Will. In the case of Late Polo Singh, the circumstances are almost identical, except for the fact that the Testator in his Will mentions that his brother has bequeathed his entire property to the nephews and he would like to do the same, and that the nephews take care of him as if they were his own sons. This recital in the present Will is an important fact as it shows that the uncles who had brought up the nephews as their own sons also made similar bequests in their respective Wills, and that Late Polo Singh has recorded this fact in the Will itself. In view of our discussion earlier, we hold in favour of the Appellants that the bequeathal in favour of nephews is not a suspicious circumstance.

64. Sixthly, the learned Single Judge has drawn an adverse inference against the Petitioners that they have deliberately concealed best evidence from coming on the record. The reasons stated for drawing the adverse inference are that out of the three Petitioners, only one appeared in the Witness Box;

when Late Polo Singh was alive, he was not called as a witness to support Late Kundan Singh's Will as he is stated to have the knowledge of the same, and lastly, it is stated that the Petitioners could have produced relatives of Dr. Sohan Singh to bring some evidence of his participating in both the Wills as an attesting witness on record. It is beyond cavil that a party is obliged to present the best evidence in its possession before the Court. Where a party omits to produce a material document or tender a material witness, an adverse presumption may be raised by the Court. This, however, does not mean that a party is supposed to bring before the Court every possible witness or piece of evidence which may be relevant in a case. Such an adverse presumption would only arise where the Court comes to a conclusion that the party has prevented a material witness or a material piece of evidence from coming on record essential for deciding the case and thereby prevented the truth from coming to light. Courts cannot, however, determine how a party has to prove its case and through what evidence. In the present case, all the three Petitioners stood in the same capacity and equal footing with a common case and examination of each Petitioner would have resulted in nothing but duplication of the evidence. Besides, it is not required in law for each petitioner to come individually and depose unless there is special knowledge of

some relevant facts attributable to him in his individual capacity. Further, it may also be noted that in case of probation of a Will, the essential requirement of proving the same are statutorily defined under Indian Evidence Act and Indian Succession Act. No doubt, the entire burden of proof is on the Petitioner who propounds the Will, however, it does not mandate that each Petitioner is to depose individually in the case.

65. In a probate case, the attesting witness remains the material witness and therefore it is not required for every person having knowledge of the attestation of the Will to come and depose. Late Polo Singh may have had the knowledge of the attestation of Will but this would not make him a material witness. As regards the proof of attestation by Dr. Sohan Singh is concerned, it can only be proved by the persons present at the time of the attestation who saw him attesting the Will; the relatives of Dr. Sohan Singh could not have shed any light on this fact. Moreover, his affidavits are already on record to this effect. Significantly, Dr. Sohan Singh had deposed before the learned Additional Rent Controller in the context of Shri Kundan Singh's Will. We are informed that on the basis of the statement of Dr. Sohan Singh, the learned ARC substituted the Petitioners as the Legal Representatives of Shri Kundan Singh vide Order

dated 31.1.1973. We, thus, are unable to draw any adverse inference.

66. Lastly, the testimony of Shri Amar Singh and the narration as regards the discovery of Will of Late Polo Singh is stated to be completely unnatural and untrustworthy. The witness who was also one of the petitioners had deposed as regards the discovery of Will as follows:-

> We found the Will Ex. P.4 of Polo Singh lying in the steel almirah of our Ara Kashan Office one week after the death of Polo Singh. We got the knowledge about the existence of this Will only at that time for the first time. This Will was lying in a bundle of documents. After the death of Polo Singh, Hari Singh and myself both used to deal with those documents. This Will came to my hand for the first and then I showed it to Hari Singh. The wife of Polo Singh used to reside with him till his death. They had good relations with each other as husband and wife. Polo Singh used to pay income tax till his death.

67. In the cross-examination, Witness was shown the Will and asked some questions relating to the contents, to which the witness replied that he did not understand Hindi script very well and, therefore, he was unable to read the same. On being asked how he became aware of the contents of the Will, the witness replied as follows:-

> I have gone through the English transliterated copy of the Will Ex.P.4. This transliterated copy was prepared by our lawyer. I had come to know about the contents of the Will when I found the Will. I got the Will read out from a person at This Hazari Courts for the first time. I do not remember his name. He was a passerby.

From this statement, the learned Single Judge concludes that "This is quite unnatural. Therefore, Amar Singh is trying to withhold the material facts from the Court".

68. On the question as to how the fact of existence of Late Polo Singh's Will was made known to the Wife and the Daughter, it was said thus:-

> We had shown a copy of the Will to the widow as also the daughter of Polo Singh when the Will came to our hands. This was shown on the date of Kirya of Polo Singh. That copy of the Will was shown to them in the presence of our entire biradri. Amongst others Thakur Singh of Pahar Ganj, Sampuran Singh of Karol Bagh, D.D. Singh of Marinda, my father-in-law Shri Biru Ram from Mani Majra and Dhani Ram from Kharar were present. About 200-300 persons were present at the time of Kirya when the copy of the Will was shown to the widow and daughter of Polo Singh. The widow of Polo Singh did not say anything showing her surprise at the Will of Polo Singh as in the Will she was given only a monthly maintenance in the lifetime of Polo Singh.

On this Reply, the learned Single Judge observed that – "It cannot at all be believed that the Will was shown to the widow and the daughter in the presence of 200-300 persons at the time of Kirya ceremony. Amar Singh is prepared to speak anything for the sake of his case".

69. With respect, we find no reason for the learned Single Judge to disbelieve the entire testimony of Shri Amar Singh on this score. The testimony, which was disbelieved by the learned Single Judge, does not have any appreciable bearing on the execution, veracity and legality of the said Will. It is not the case of the Respondent that they were kept in dark about the Will. The statement of a witness is required to be read holistically and even if a portion thereof is false, it cannot be discounted altogether and in its entirety. Slight irregularity, inconsistency or exaggeration should ordinarily not be a ground to disbelieve the entire evidence of the witness. Even if the narration or discovery of Will, as stated by Shri Amar Singh, is not believed, it will not result in the Will becoming irregular or illegal. Besides some improbable statements, there is nothing elicited from the witness that either supports the case of the Respondent or strikes at the claim of Appellants.

70. In our considered opinion, the learned Single Judge did not correctly appreciate the evidence that had been brought on record and misapplied the law as regards probation of Will. The Appellants have succeeded in proving the valid execution of Will of Late Polo Singh dated 27.12.1971 as his last Will and testament. The impugned Judgment of learned Single Judge is set aside and probate is granted to the Will dated 27.12.1971 of Late Polo Singh.

71. There shall be no order as to Costs.

(VIKRAMAJIT SEN)
JUDGE

(MANMOHAN SINGH)
JUDGE

December 03, 2010