

Surender Kumar Vs. State

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Court : Delhi

Decided On : Jan-18-2010

Reported in : 166(2010)DLT760

Judge : Aruna Suresh, J.

Acts : Indian Succession Act - Sections 2, 59 and 63; Evidence Act - Sections 65, 67, 68 and 73

Appeal No. : Probate Case Nos. 5/1989 and 44/1990

Appellant : Surender Kumar;smt. Sudesh Kumari Mehdiratta and ors.

Respondent : State;state and ors.

Advocate for Def. : D.R. Singh, Adv. in Probate Case No. 5/1989, ; S.K. Sharma,
;

Advocate for Pet/Ap. : S.K. Sharma,; Anurag Mandla,; Vijender Katoch, Adv. in

Disposition : Petition dismissed

Judgement :

Aruna Suresh, J.

1. Probate case No. 5/1989 has been instituted by Surender Kumar son of Shri Tehl Ram Tuteja (since deceased) seeking probate in respect of Will dated

29.01.1988. Probate Case No. 44/1990 has been filed by Smt. Sudesh Kumari Mehdiratta daughter of deceased Tehl Ram seeking probate of Will dated 30.5.1985. Both these Wills are purported to have been executed by Tehl Ram Tuteja during his lifetime. Both the cases were consolidated vide order dated 29.01.1991 passed in Probate Case No. 5/1989 with further directions that proceedings would be recorded in Probate Case No. 5/1989.

2. In brief, the facts are that deceased Lala Tehl Ram Tuteja was the joint owner of house No. A-294, Derawal Nagar, Azadpur, Delhi with Surender Kumar (Petitioner) having equal share in the same. He expired on 8.03.1988 leaving behind three daughters, namely, Smt. Sita Rani, Smt. Raj Kumari and Smt. Sudesh Kumari. Sita Rani was married to one Thakkar Das, Raj Kumari was married to Jaman Lal Khurana and Smt. Sudesh Kumari was married to Gobind Lal Mendiratta. Sita Rani was the eldest daughter. She gave birth to two sons, one of them being Petitioner Surender Kumar. Since Tehl Ram had no son, Surender Kumar was adopted by him. Surender Kumar had been living with Tehl Ram since his childhood. He served Tehl Ram as his son and performed last rites of Tehl Ram and his wife as a son. As per Annexure =A' of the petition, Tehl Ram left behind following moveable and immoveable properties:

1. Cash in Bank:

(a) Three fixed deposit receipts of value of Rs. 30,000/- (including interest upto date) with Punjab National Bank Vijay Nagar in the joint name of the deceased and his daughter Smt. Sudesh Kumari - Rs. 34,500/-

(b) Cash in saving bank account in the joint name of the deceased and his daughter Smt. Sudesh Kumari with Punjab National Bank Vijay Nagar with estimated interest. - Rs. 1,500/-

(c) Ornaments (with Smt. Sudesh Kumar) - Rs. 1,00,000/-

2. Immoveable property consisting of one half share in House No. A-294, Derawal Nagar inclusion of rent upto date. - Rs. 2,00,000/-..

3. Tehl Ram also left behind debts consisting of house tax payable to Delhi Municipal Corporation of half share of the immovable property, funeral expenses of Rs. 29,000/- incurred by the Petitioner on his death. In all he left debt of Rs. 36,000/- as per Annexure =B' attached to the plaint.

4. Tehl Ram purported to have executed a Will dated 29.1.1988 bequeathing his immovable property to Surender Kumar and his moveable assets i.e. jewellery, cash etc. to his daughters to be shared equally.

5. Smt. Sudesh Kumari, Petitioner in Probate Case No. 44/1990 and one of the respondent/objector was the youngest daughter of Tehl Ram. Her husband was employed in Railways. Tehl Ram was allegedly taken to various religious places by Sudesh Kumari because of her husband being a railway employee. She claimed that Tehl Ram had executed a registered Will in her favour on 30.05.1985 to the exclusion of all his other children.

6. Both the parties have refuted the claims of each other and have filed their respective objections as well as cross objections. Since their objections are nothing but narration of their case in their respective petitions, I need not repeat the same.

7. On 29.01.1991, following issues were framed by this Court for adjudication:

1. Whether the deceased Tehl Ram Tuteja had executed a valid will dated January 29, 1988?

2. Whether deceased Tehl Ram Tuteja had executed a valid will dated May 30, 1985?

3. Relief....

8. Surender Kumar (Petitioner) has examined following witnesses to support his case:

(i) Surender Kumar (PW-1);

(ii) Phool Chand (PW-2), brother-in-law of Tehl Ram Tuteja;

- (iii) Thakkar Das Thakkar (PW-3), son-in-law of Tehl Ram Tuteja;
- (iv) Smt. Sita Rani (PW-4), sister;
- (v) Shri Jaman Lal Khurana (PW-5), son-in-law of Tehl Ram Tuteja;
- (vi) Smt. Raj Kumari (PW-6) sister;
- (vii) Dr. V.P. Soota (PW-7);
- (viii) Parveen Kumar Jain (PW-8), tenant;
- (ix) Shri Jagdish Chander (PW-9), attesting witness to the Will dated 29.1.1988;
- (x) Shri Surinder Kumar Arora (PW-10), attesting witness to the Will dated 29.1.1988;
- (xi) Shri Kamal Kant Khandelwal (PW-11), handwriting expert. His Affidavit is Ex.PW- 6/A.

9. There is an Affidavit of Vikas, son of the petitioner Surender Kumar. But this affidavit has not been tendered in evidence and therefore, is not being read for any purpose. Smt. Sita Rani, Jaman Lal Khurana, Smt. Raj Kumari, Parveen Kumar Jain and Jagdish Chander, though had tendered their Affidavits in evidence but were not produced by the Petitioner for their cross examination by the respondent. Since the abovesaid witnesses have not faced the cross examination by the respondent, their affidavit in evidence cannot be read in favour of the Petitioner.

10. Objector Smt. Sudesh Kumari, petitioner in Probate Case No. 44/1990 has examined following witnesses to support her case:

- (i) Sh. Shri Nivas (DW-1), attesting witness to the Will dated 30.5.1985;
- (ii) Mr. Deepak Mendiratta (DW-2)
- (iii) Shri Gobind Lal (DW-3) her husband;

11. There are Affidavits of Sudesh Kumari, Davinder Kumar Mendiratta dated 25th June, 1994, Dr. Rajeshwari Gupta dated 25th June, 1994 and of Dr. V.B. Dudeja, dated 25th June, 1994. However, they never appeared as witnesses for the respondent to face the cross examination. Hence, their Affidavits cannot be read in evidence.

12. I have heard Mr. S.K. Sharma, Advocate for the petitioner and Mr. D.R. Singh learned Counsel for the respondents/objectors and have carefully perused the record. Since both the issues are inter related, they are taken up together.

ISSUE Nos. 1 & 2

13. Tehl Ram had earlier executed a registered Will dated 30.5.1985 Ex.R-1 whereby he bequeathed his half share in House No. A-294, admeasuring 268.22 sq. yds. Derawal Nagar, Azadpur, Delhi in favour of his daughter Smt. Sudesh Kumari and her two sons, the objectors. Surender Kumar, petitioner as PW-1 has not specifically disputed the signatures of Tehl Ram on the said Will. However, during the course of arguments, its genuineness and validity has been disputed. Respondents Sita Rani and Raj Kumari in their counter affidavits disclosed that Tehl Ram had informed them that he had executed a Will on 30.5.1985 in favour of Smt. Sudesh Kumari in a fit of anger. True, that the said two respondents have not appeared in the witness box to support their case. Though they had filed their Affidavits in evidence but did not step in the witness box to face cross examination and their testimony cannot be read in evidence. However, their counter affidavits supporting the case of the Petitioner can be looked into and considered for appreciation of the respective claim of the parties. Even, Sudesh Kumari, the beneficiary of the Will has not stepped in the witness box to prove that Will Ex.R-1 was executed by Tehl Ram during his lifetime voluntarily, in sound and disposing mind, in good health and sprit, without any pressure or coercion and that he also got the Will registered. The only witnesses examined by Sudesh Kumari are her son Deepak Mehdiratta and Gobind Lal, her husband. Both these witnesses during their cross examination admitted that Tehl Ram did not attend the marriage of daughter of Sudesh Kumari which took place before the execution of the Will. Will does not disclose any valid or genuine reason for ousting other two daughters

from inheritance by Tehl Ram. Will dated 30.5.1985 Ex.R-1 is signed by only one witness i.e. Srinivas and other signatory happened to be an Advocate who probably drafted and typed the Will.

14. Tehl Ram is purported to have executed another Will dated 29.01.1988 whereby he bequeathed his half share of the said property in favour of the Petitioner Surender Kumar and his moveable assets in the form of fixed deposits and bank account and jewellery to his three daughters namely, Raj Rani, Sita Rani and Sudesh Kumari respectively.

15. Section 59 and 63 of Indian Succession Act (hereinafter referred to as 'Act') lay down the principles which are mandatory to be followed by a Testator while executing an unprivileged Will. Whereas Will is defined in Section 2 (h) of the Act, as the legal declaration or an intention of the testator in respect of his property which he is desirous of being carried into effect after his death. Thus, firstly, the court has to see that the proof of execution of the Will is directly satisfied in terms of Section 63 of the Indian Succession Act and Section 65 and 68 of the Indian Evidence Act. Compliance of statutory requirements though itself may not be sufficient but they do postulate or propound in favour of the execution of a Will by the testator.

16. As per Section 59 of the Act, every person of sound mind not being a minor can dispose of his property by way of a Will.

17. Section 63 of the Act reads as follows:

63. Execution of unprivileged wills:

Every testator, not being a soldier employed in an expedition or engaged in actual warfare, or an airman so employed or engaged, or a mariner at sea, shall execute his will according to the following rules:

(a) The testator shall sign or shall affix his mark to the will, or it shall be signed by some other person in his presence and by his direction.

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

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

18. The rules which are required to be followed as per Section 63 of the act have been analysed by me in Vikram Chopra v. State and Ors. Test Case No. 13/1996 decided on 11th September, 2009 in the following manner:

36. From bare reading of Section 63 of the Indian Succession Act it is clear that the testator has to sign or affix his mark to the Will as it has to be signed by some other person in his presence and on his direction and that the signatures or mark are to be so made that it appears that it was intended thereby to give effect to the writing as a Will. It is further required that the Will is attested atleast by two witnesses or may be more. These attesting witnesses must see that the testator has signed or affixed his mark to the Will in their presence and each of the witnesses have signed the Will in the presence of the Testator. However, it is not necessary that more than one witness is present at the same time.

37. A Will like any other document has to be proved in evidence besides the requirements prescribed under Section 63 of the Indian Succession Act. The onus of proving the Will is on the propounder and in the absence of suspicious circumstances surrounding the execution of the Will, proof of testamentary capacity and signature of the testator as required by law are sufficient to discharge the onus. However, where there are suspicious circumstances, the onus would be on the propounder to explain them to the satisfaction of the court that the instrument so propounded is the last Will of a free and capable testator before the

Will could be accepted as genuine.

38. Will is a solemn document written by a person who is dead and who cannot be called in evidence to deny the execution or to explain the circumstances in which it was executed. It is the living who has to establish the Will. Therefore, it naturally puts heavy burden on the court to satisfy its judicial conscious that the burden of proof of due execution is fully discharged and every suspicious circumstance is explained. It is, therefore, essential that trustworthy and unimpeachable evidence should be produced before the court to establish the genuineness and authenticity of the Will. True that, no specific standard of proof can be enunciated which must be applicable to all the cases. Every case depends upon its own circumstances. Besides other proof, the conduct of the parties is very material as it has considerable bearing of evidence as to the genuineness of the Will which is propounded. The rules relating to proof of a Will are not rules of law. They are rules of prudence and therefore, the court vigilantly and jealously examines the evidence for proof of a Will. What can be suspicious circumstances to rebut the proof of the execution of the Will depends on facts of each case and they cannot be universally followed in every case where the Will is under challenge..

19. The party propounding the Will and seeking proof of the Will is required to keep in mind the abovesaid statutory provisions which are like a mandate to the proof of the Will/document.

20. Section 68 of the Indian Evidence Act makes it mandatory that at least one attesting witness is called for proving the execution of a document which is required in law to be attested, provided such an attesting witness is alive and is capable of giving evidence. It is noted that documents other than Will, if registered, are not required to be proved by calling upon an attesting witness.

21. In *H. Venkatachalah Iyengar v. Chimmajamma and Ors.* : AIR 1959 SC 443 the Supreme Court has laid down the necessary ingredients required to prove a Will where onus of proof is on the propounder, especially when propounder himself/herself takes a prominent part in execution of the Will which confer on them substantial benefits. Taking into consideration Section 59 and 63 of the Indian Succession Act as well as Sections 67 and 68 of the Indian Evidence Act,

the Supreme Court observed:

(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.

22. In *Ramabai Padmakar Patil v. Rukminibai Vishnu Venkhande* : AIR 2003 SC 3109 the Apex Court considered as to what can be suspicious circumstance under the given set of facts in a case in para 8 of the judgment. It reads:

8. A Will is executed to alter the mode of succession and by the very nature of things it is bound to result in either reducing or depriving the share of a natural heir. 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. In *P.P.K. Gopalan Nambiar v. P.P.K. Balakrishnan Nambiar and Ors.* : AIR 1995 SC 1852 it has been held 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 features and not fantasy of the doubting mind. In this case, the fact that the whole estate was given to the son under the Will depriving two daughters was held to be not a suspicious circumstances and the finding to the contrary recorded by the District Court and the High Court was reversed. In *Pushpavati and Ors. v. Chandraja Kadamba and Ors.* : AIR 1972 SC 2492 it has been held that if the propounder succeeds in removing the suspicious circumstance, the Court would have 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. In *Rabindra Nath Mukherjee and Anr. Panchanan Banerjee (dead) by LRs. and Ors.* : (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. The concurrent finding recorded by the District Court and the High Court for doubting the genuineness of the Will on the aforesaid ground was reversed..

23. Reference is also made to *Madhukar D. Shende v. Tarabai Aba Shedage* : AIR 2002 SC 637; *Gorantla Thataiah v. Thotakura Venkata Subbaiah and Ors.* : AIR 1968 SC 1332; and *Rangaswami Naicker v. Rangammal (D) by Proposed LR K.R. Venkataswami Naidu* AIR 1969 Mad 271.

24. Where propounder of a Will takes active participation in the execution of the Will, it is the duty of the Court to scrutinize the documents carefully to know if it was a genuine document and validly executed by the executants because participation of a propounder in the execution of the Will in itself is a suspicious circumstance attending the execution of the Will.

25. In *H. Venkatachalah Iyengar v. Chimmajamma and Ors.* : AIR 1959 SC 443 It has been observed in para 21:

(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.

26. In *Raja Ram Singh v. Arjun Singh and Anr.* 2002 IV AD (Delhi) 558 it was held:

13. ...If, however, the propounder has taken a prominent part in the execution of the Will which confers substantial benefits on him that itself is a suspicious circumstance attending the execution of the Will and in appreciating the evidence the Court should proceed in a vigilant and cautious manner. Moreover, if the circumstance raises a suspicion of the Court that the Will does not express the mind of the testator then the Court would be right in rejecting the evidence of the attesting witnesses and scribe as well as of the propounder of the Will with regard to the execution of the Will by the testator. In order to appreciate the credibility of the witnesses, the Court can look into the surrounding circumstances. The mere fact that the Will was registered by itself is not a circumstance to show that the Will

is genuine. Nor this circumstance in itself is sufficient to dispel the suspicion regarding the validity of the Will where suspicion exists....

27. Keeping in mind the law as discussed above, it is to be seen if in the instant case requirement of Section 63 of the Act read with Section 68 of the Indian Evidence Act have been fully satisfied by the petitioner and the objector and the Will dated 31.05.1985 or the Will dated 29.01.1988 are shrouded by suspicious features. For that purpose, the first rule to appreciate the evidence is to peruse the Will. If the Will is rational, a presumption arises that it has been executed in a legal manner. However, this presumption is rebuttable. Will dated 03.05.1985 Ex.R-1 and Will dated 29.1.1988 Ex.PW1/1 read as follows:

WILL

This first and the last deed of Will is made at Delhi on 30th May 1985 by Shri Tehl Ram Tuteja son of Shri Chothe Ram Tuteja resident of House No. A-294, Derawala Nagar, Azadpur Delhi.

I am 83 years old. Life is but short and uncertain and God knows when it may come to an end. I with my free will, consent without coercion, or influence and making this Will, while keeping good health, sound mind in full conscious and in disposing mind, to avoid any litigation after my death. I am the absolute owner of House No. A-294, Derawal Nagar, P.O. Azadpur, Delhi, constructed on half portion on Eastern side i.e. touching Housing No. A-295, consisting of Ground floor, (G.C. consisting of one big room, one kitchen, two rooms, one latrine, bath room, boundary walls), (First floor consisting of one big room, one kitchen, two rooms, one latrine, one bath room), (second floor consisting of one small room, one verandah, one bath room and one room of latrine), and a common staircase, which serves all the three floors mentioned above, abounded as under:

North : Service Lane.

South : Road 15' wide.

East : House No. A-295. (Owners S/Shri Amar Singh narang, and Jagdish Chand Narang).

West : Plot No. A-293 - Lying vacant till dated (30-5-1985). by virtue of Sale Deed dated 11- 7-1978, registered in the office of the Sub-Registrar, Delhi, Sub. Distt. No. I, Delhi.

I hereby bequeath that so long as I am alive, I will remain absolute owner and in possession of aforesaid property and after my death, it shall go and devolve on Smt. Sudesh Kumari D/o Shri Tehl Ram Tuteja, w/o Shri Gobind Lal Mendiratta, and her two sons in equal shares. The Western portion of the said house is belonging to Shri Surender Kumar S/o Shri Thakur Dass, by virtue of the said Sale Deed and after the death of the Testator, the said Executors shall be the owners.

I have rented T-hree rooms, one kitchen, one Bath Room and one Latrine on the 1st floor to Shri Sarwan Kumar Jain s/o Shri Babul Lal Jain, from 16-7-1984 for a period of 3 years at a monthly rent of Rs. 1000/- (Rs. One thousand only). Smt. Sudesh Kumari W/o Shri Gobind lal Mendiratta will have the right to take the rent from Shri Sarwan Kumar Jain, in the event of my death. Complete portion on the Second floor is lying vacant as one date (12-4-1985).

The following daughters of the Testator shall have no right to interfere in this Will:

(1) Smt. Sita Rani W/o Shri Thakur Dass Thakkar, Resident of K- 206, Model T-own, Delhi.

(2) Smt. Raj Kuamri W/o Shri jaman Lal Khurana, Resident of 108-A. Kalal Khanna, Sadar Chowk, Meerut Cantt.

I am not giving any share to my daughters at (1) and (2) above, because they are well settled. Neither Smt. Sita Rani nor Raj Kumari and even their legal heirs shall have right or claim to my above said property. I hereby bequeath this in favour of my youngest daughter Smt. Sudesh Kumari W/o Shri Gobind lal Mendiratta, due to love and affection and as she and her family Members are looking after me during my old age. None of my other legal heirs will have any right or title or claim in the aforesaid property and if anybody raises any objections, they will be considered as NULL AND VOID in the court of Law. I have understood the contents of the will and I admit this to be correct. This is my FINAL WILL and I hereby revoke all my

previous Wills and Testaments.

IN WITNESS WHEREOF, the Testator has signed this Will on the day, month and year first written above.

TESTATOR.

W I L L

I, Tehl Ram Tuteja son of Shri Chotu Ram Tuteja resident of House No. A- 294 Derawal Nagar, Delhi declare this to be my last Will which I make this 29th day of January, 1988 cancelling and revoking my previous will made in favour of my daughter Smt Sudesh Kumari wife of Shri Gobind Lal Mendiratta and her sons and all other previous Wills, if any, made heretofore.

2. Now I am about 85 years old but I am in a sound disposing state of mind.

3. It is well known to everybody that Shri Surender Kumar son of my daughter Smt Sita Rani wife of Shri Thakar Dass lived with me since his childhood and I brought him up as my son. He served me with devotion and looked after me well in my old age as a son.

4. Plot No. A-294 in Derawal Nagar, Delhi measuring 268.22 sq yds was conveyed to me and said Shri Surender Kumar jointly each having one half undefined share therein by the Dera Ismail Khan Co-operative House Building Society Limited by conveyance deed registered as Sl. No. 2520 in Addl Book No. 1, Volume No. 3607 pages 108-110 on 11.7.1978 with S.R. Distt. I and on this plot we jointly constructed the building each contributing equally towards the cost of its construction, House at Plot No. A- 294, Derawal Nagar is jointly owned by me and said Shri Surender Kumar each having one half undefined share therein. I hereby bequeath all my one half undefined share in the said plot No. A-294 Derawal Nagar and building constructed thereat to said Shri Surender Kumar absolutely. After my death my one half share in the said plot and the house constructed thereat shall go and devolve upon said Shri Surender Kumar absolutely to the exclusion of all my heirs.

5. I have kept my cash in three fixed deposit accounts of total value of Rs. 30,000/- and in saving bank account with Punjab National Bank, Vijay Nagar, in my name jointly with my daughter Smt. Sudesh Kumari wife of Shri Gobind Lal Mendiratta and kept with her some gold ornaments. I bequeath that after my death this cash and ornaments shall be distributed amongst my three daughters and said Shri Surender Kumar equally after meeting my funeral expenses. For this purpose I appoint said Shri Surender Kumar as the executor who shall collect the cash and ornaments and administer the same for the benefit of my aforesaid legatees after defraying funeral expenses.

IN WITNESSES WHEREOF I have signed this Will in the presence of the attesting witnesses and each of them signed in my presence and in the presence of each other on the date, month and year first above written.

Sd/-

(Tehl Ram in English & in Urdu)

TESTATOR.

28. It is a common case of the parties that Tehl Ram had half share in House No. A-294, Derawal Nagar, Azadpur, Delhi and other half share was owned by Surender Kumar petitioner. Tehl Ram and Surender Kumar were members of 'The Dera Ismail Khan Co- operative House Building Society Ltd.', Azadpur. The said society allotted Plot No. A-294, admeasuring 268.22 sq. yds. to Tehl Ram Tuteja and Surender Kumar jointly. Both the joint owners had paid for their respective share in the said land to the society. The Transfer Deed of the land was made in the joint name of Tehl Ram and Surender Kumar in respect of the said plot. Undisputedly, one site plan for the entire plot was got sanctioned and the house was build up as a single unit on the said plot. The entire plot was assessed to house tax as a single unit.

29. Gobind Lal (PW-3) husband of Sudesh Kumari in his cross examination admitted that there is only one entrance to the entire property and there is only one staircase in the property. It has come in the statement of Surender Kumar

(PW-1) that though he is the son of Sita Rani and Thakkar Das Thakkar, but he was adopted by Tehl Ram and since his childhood he was brought up and educated by Tehl Ram as his adopted son. He was married by Tehl Ram as his own son and he continued to serve Tehl Ram till his death. He and Tehl Ram lived in the same house throughout. His statement finds corroboration from the testimony of Phool Chand (PW-2), who happen to be brother-in-law (sala) of deceased Tehl Ram and Thakar Dass Thakkar (PW- 3), the natural father of Surender Kumar. From the examination and cross examination of the witnesses for the parties, it is clear that Tehl Ram Tuteja had no son and after the birth of Surender Kumar born to his eldest daughter Sita Rani, he adopted him as his son.

30. True, that there is no Adoption Deed and there is no evidence to indicate that any Adoption Ceremony was performed, the fact remains, Surender Kumar lived with Tehl Ram since his childhood and was looked after by Tehl Ram as a son. None of the daughters of Tehl Ram including Sudesh Kumari have stepped in the witness box to refute the claim of the petitioner that he was adopted by Tehl Ram and was brought up and educated by him as his son.

31. Petitioner has placed on record a photocopy of his school certificate Ex.PW1/2, issued by the Central Board of Secondary Education, photocopy of B.A. Degree, University of Delhi Ex.PW1/3, letter issued by Punjab National Bank dated 19.2.1970 informing him of his selection in service of the Bank as a Clerk/Cashier, to support that he was adopted by Tehl Ram in his childhood. In all these three documents, the name of the petitioner has come as .Surender Kumar Tuteja.. Thus, it is clear that petitioner was looked after by Tehl Ram Tuteja as his son.

32. The other admitted document is 'Sehra' Ex.PW-6/1 which was read and presented by Gobind Lal, husband of Sudesh Kumari and Jaman Lal Khurana on the occasion of marriage of the petitioner, which was solemnized on 28th September, 1968, as per the customs prevailing in the society of the parties. Names of Jaman lal and Gobind Lal find placed as Peshkarta on the left side of the Sehra. This fact is not disputed by Gobind Lal in his Affidavit or during his cross examination. The conduct of the parties, therefore, also indicate that

petitioner Surender Kumar was accepted and treated as brother by Sudesh Kumari and Raj Rani. It has come in evidence that Sehra is presented by the sisters in honour of their brother at the time of his marriage.

33. Last rites of Tehl Ram were performed by Surender Kumar which fact is admitted by Gobind Lal DW-3 also. Though Gobind Lal testified that he and his wife Sudesh Kumari were not present at the time when the last rites of Tehl Ram were performed but, he admitted that he and Sudesh Kumari were present at the time of Uthala Ceremony of Tehl Ram as well as of his wife. He avoided a question when asked, as to who had asked Surender Kumar to wear the customary Pagri at the time of Uthawani of Tehl Ram and his wife. Sita Rani and Raj Kumari, the other daughters of Tehl Ram have not disputed the claim of Surender Kumar. Rather, in their counter affidavits to the petition, they have fully supported his claim. Though, they have not specifically disputed the execution of Will dated 30.5.1985 by Tehl Ram because both the daughters Sita Rani and Raj Kumari have stated in the counter affidavit that they were told by Tehl Ram that in a fit of anger, he had executed a Will in 1985 at the instance of Sudesh Kumari, who had taken him to Sub-Registrar officer at Kashmiri Gate, Delhi, where the Will was got registered and that the said Will was in favour of Sudesh Kumari and her two sons. They were also told that later on when he realized that he had executed a Will in a fit of anger, he repented and cancelled the Will executed in favour of Sudesh Kumari and he also executed a second Will on 29.1.1988. Both the sisters also testified that the said Will was the last Will executed by Tehl Ram during his lifetime voluntarily, in good health, spirit and in sound disposing mind.

34. From the entire evidence as discussed above, It is proved on record that Tehl Ram had love and affection for the petitioner to whom was a son and petitioner also rendered help and served and looked after Tehl Ram with full care during his lifetime as a son and performed all the duties of a son. In this background of the fact, now it is to be seen if Will dated 29.1.1988 is a valid Will executed by Tehl Ram Tuteja during his lifetime.

35. Mr. S.K. Sharma, learned Counsel for the petitioner has submitted that objector Smt. Sudesh Kumari has filed two sets of objections to the petition of

Surender Kumar. Both the objection petitions are identical. The first objection petition is dated 6.6.1989. Though it is signed by the objector but, does not bear the signature of the other two objectors, namely, Deepak Kumar and Devender Kumar. However, the verification of objection petition is signed by all the three objectors. This objection petition was got drafted, prepared and was signed by Smt. Sudesh Kumari and verification signed by all the objectors on 6.6.1989 at Lucknow. Similar is the position of second objection, petition which was signed and verified by all the objectors at Lucknow on 26.7.1989, though it is signed only by Smt. Sudesh Kumari. Therefore, according to him, there is no objection petition filed by Devender Kumar and Deepak Kumar and, the objection petitions placed on record can be considered as an objection petition filed by Smt. Sudesh Kumari only. He has further emphasized that Smt. Sudesh Kumari though filed her Affidavit, did not step in the witness box to face the cross examination, nor she tendered her Affidavit in evidence. Therefore, according to him, she has not substantiated and proved her objections by way of her oral testimony in evidence. Objector Devender Kumar though filed his Affidavit, did not appear for his cross examination. Only Deepak Kumar appeared as DW- 2 and tendered his Affidavit in evidence and faced the cross examination. He has argued that since objectors have not been able to prove their objections to the petition, the objections are liable to be dismissed for want of evidence.

36. It is highlighted by the counsel for the petitioner that petitioner does not dispute the registered Will dated 30.5.1985 but the said Will was superseded by the last Will dated 29.1.1988 executed by Tehl Ram. Therefore, Will dated 30.5.1985 having been superseded by the second Will; it is the Will dated 29.1.1988 which is the last valid Will of Tehl Ram and therefore, petitioner is entitled to obtain probate for the same.

37. He has argued that signature of Tehl Ram Tuteja on the Will dated 29.1.1988 are not specifically disputed by the objectors and also stand proved from the testimony of Kamal Kant Khandelwal PW-6, the handwriting expert.

38. Mr. D.R. Singh, learned Counsel for the objectors/respondents has refuted the submissions of the learned Counsel for the petitioner while referring to various

depositions made by the witnesses for the respondent at different places he has emphasize that evidence adduced on record by the petitioner is unworthy of reliance being full of contradictions and therefore, the petitioner who required to prove his own case that Will dated 29.1.1988 is a valid Will, has failed in his endeavor and the Will according to him, under the circumstances, cannot be considered as a valid and legal Will.

39. It is also argued by the counsel for the respondents that Will dated 29.1.1988 is forged Will and does not bear the signatures of Tehl Ram Tuteja, it is not a registered Will and was prepared by the petitioner after the death of Tehl Ram and forged his signatures on the same. It is emphasized that the statement and report of Shri Kamal Kant Khandelwal PW-6A is not worthy of reliance as he has given his opinion based on the photocopies without seeing the original documents.

40. True, that there are two objections filed by the objectors within a short span, refuting the legality and validity of the Will dated 29.1.1988, which are not signed by objectors Devender Kumar and Deepak Kumar. However, objectors have also filed a probate case claiming themselves to be legatees of Tehl Ram Tuteja by virtue of Will dated 30.5.1985. The said petition is signed by all the three objectors and duly verified by them. This petition was filed on 29.3.1989 i.e. before the objection petitions were filed. Therefore, under the circumstances, when both the probate petitions have been consolidated and are being decided by this common judgment, it would not be appropriate to say that there are no proper objections before this Court for consideration. In any case, I need not go into technicalities to deciding if the objection petitions are sustainable in view of the fact that probate petition filed by the objectors is also under consideration along with the probate petition of the petitioner.

41. Respondents/objectors have disputed the signatures of Tehl Ram on the impugned Will dated 29.1.1988. Surender Kumar PW-1, the petitioner has identified signature of Tehl Ram at Point A on the Will Ex.PW-1/1 and testified that the said Will was signed by Tehl Ram.

42. Ex. P-1 is an account opening form dated 1.7.1987 which was signed by Smt. Sudesh Kumari as well as deceased Tehl Ram, when a joint account was opened

by them in Punjab National Bank after the execution of the Will dated 30.5.1985. PW-6/A Kamal Kant Khandelwal examined the disputed signature of Tehl Ram on the Will dated 29.1.1988 and also examined whether the Testator Tehl Ram had put his signatures on the Will after or before the typed matter. He took photographs Ex.PW-6/1 and PW-6/2 for examination and the relevant part of the Will dated 29.1.1988 Ex./PW-6/1-A and submitted his report Ex.PW-6/5. After comparison of the disputed signatures with the admitted signatures appearing at Ex.P-1, he concluded:

In this case I examined the above mentioned Will with the help of magnifying lenses and with the help of other measuring devices. After careful and minute examination of the above mentioned Will, my opinion is that the Will is typed at first and the Testator Tehl Ram signed after typed matter and after examination I found that the curve of .R. is written after on the typed matter.

43. The only cross examination of Kamal Kant Khandelwal is to the fact that he had taken the photographs from the photocopy of the Will and not from the original Will, which he admitted. He was categorical when he said that the material was typed first and thereafter the Testator has put his signatures. There is no cross examination of the witness that the document was not signed by Tehl Ram Tuteja or that his signatures are forged on Ex.PW-1/1. Objectors have not examined any other handwriting expert to controvert the statement of Mr. Kamal Kant Khandelwal.

44. Signatures of Tehl Ram Tuteja appearing on the Will dated 30.5.1985 are stated to have been appended by him in the presence of witnesses. Respondents have claimed this Will to be the last and genuine Will executed by Tehl Ram during his lifetime. This Court in exercise of its power under Section 73 of the Evidence Act has every right to compare the admitted signatures of Tehl Ram appearing on the Will dated 30.5.1985 appended at different places on each page of the Will Ex.R-1 and also signatures appearing on the back of first page before the Registrar with the Will dated 29.01.1988. On comparison, it is obvious that both the documents are signed by Tehl Ram Tuteja. It is also clear that Will dated 29.1.1988 Ex.PW-1/1 was first typed and thereafter Tehl Ram appended his

signatures on the same. It is noted here that even in the will dated 30.5.85 Tehl Ram appended his signatures in such a manner that signature in Urdu are above word .Testator..

45. Tehl Ram opened a bank account in July, 1987 in the joint name of Sudesh Kumari and himself. This indicates that Tehl Ram was under the influence of Sudesh Kumari at the time when Will dated 30.5.1985 was executed.

46. Account opening form Ex.P-1 dated 1.7.1987 was summoned in evidence and the same was produced and filed on record by Mr. Nem Narain, Attorney of the Bank on 20.3.1997. Since on that day Smt. Sudesh Kumari was present, her statement was recorded by the Court for admission/denial of the said form. Smt. Sudesh Kumari identified her signatures at Point X-1 to X-5 on the form, whereas she identified the signatures of Tehl Ram at Point Y- 1 to Y-4. On perusal of the signatures of Tehl Ram appearing at four places in the form are all in variation to each other. None of these signatures can be said to have common features of writing. These signatures differ from the signatures of Tehl Ram appearing on the Will Ex.PW-1/1 and Ex.R-1. Whereas signatures appearing on both the Wills have similarities of writing and flow, which indicate that the signatory of both the documents was the same person. Be that as it may, it is not disputed that an account was opened in the joint name of Tehl Ram Tuteja and Smt. Sudesh Kumari on 1.7.1987.

47. As pointed out above, since Tehl Ram had improved in his health, he was physically fit and mentally alert on 13.7.1987 to go to the bank with his daughter and opened joint account in his name and in the name of Sudesh Kumari. Learned Counsel for the respondents has submitted that if Will dated 30.5.1985 was not executed by Tehl Ram in favour of Sudesh Kumari and Suredner Kumar was brought up and looked after by Tehl Ram as his son, then Tehl Ram had no reason to open an account in the joint name of himself and Smt. Sudesh Kumari.

48. An account opened after two years of the execution of the first Will Ex.R-1 in the joint name of Tehl Ram Tuteja and Sudesh Kumari in no manner can be considered as a suspicion of the execution of the Will dated 29.1.1988. It is relevant to state that in the will Ex.PW-1/1 Tehl Ram has narrated that he had kept

his cash in three fixed deposits accounts and also that he had a single bank account with Punjab National Bank, Vijay Nagar in his name jointly with his daughter Sudesh Kumari. It is of significance that Tehl Ram did not give any share in his moveable assets to Surender Kumar. His moveable assets have been bequeathed by him in equal share to his three daughters. This Will also indicates that the gold ornaments and bank documents were in the custody of Sudesh Kumari.

49. In the Will dated 29.1.1988 Tehl Ram has referred to his previous Will executed by him in favour of his daughter Sudesh Kumari, which he cancelled and revoked by way of this impugned dated 29.1.1988. As discussed above, petitioner has not disputed the execution of Will of 1985 by Tehl Ram in favour of Smt. Sudesh Kumari. Tehl Ram had every right to revoke and cancel his previous Will executed in favour of his daughter in 1985.

50. Surender Kumar Arora (PW-10) attesting witness to the Will has testified in his Affidavit that Will dated 29.1.1988 is attested by him which is the last Will of the deceased. On 29.1.1988 he had gone to see Tehl Ram who was sitting alone at that time he took out a typed sheet of paper and explained to him (the witness) that it was his last Will and testament and he acknowledged that it was drafted by his counsel on his instructions. In the meantime, PW-9 arrived who was also known to him. He has further testified that Tehl Ram Tuteja had explained the contents of the Will and acknowledged the same as his last Will and testament and also told him that by this Will he had bequeathed one half of house No. A-294, Derawal Nagar to his son Surender Kumar. Tehl Ram signed the Will in his presence and in the presence of Jagdish Chander and thereafter Jagdish Chander and he signed the Will at the same time in the presence of Executor. He identified his signatures as an attesting witness and also that of Jagdish Chander, another attesting witness and of Tehl Ram, the Executor on the Will Ex.PW-1/1.

51. In his cross examination, he has denied the suggestion that the paper was folded when it was taken out by Lalaji and Lalaji had already signed the same before he signed it. He also denied the suggestion that Lalaji had signed blank paper and the contents of the Will were typed later. He also denied the suggestion

that Will was signed after the death of Shri Tehl Ram Tuteja.

52. As regards the signatures appearing on Ex.PW-1/1 of Tehl Ram Tuteja and of the attesting witnesses in different pen and ink, to a question put to him, Surender Kumar Arora has replied that Lalaji had signed with one pen and he had signed with his own pen, which he was carrying with him. He had signed the Will after reading it. This witness stood the test of cross examination and his testimony could not be demolished by the objectors in his cross examination. Hence, I find no reason to disbelieve him.

53. Affidavit of Jagdish Chander was filed in evidence but, he could not be produced by the petitioner for his cross examination. It was not necessary for the petitioner to also examine Jagdish Chander to prove the execution of the Will Ex.PW-1/1. One attesting witness for the purposes of Section 68 of the Evidence Act is required to be examined and not both the attesting witnesses.

54. Petitioner therefore has proved in evidence that both the attesting witnesses and the executor of the Will had signed the Will in the presence of each other after the witnesses were explained the contents of the Will and the acknowledgment made by the executor that he had bequeathed his share in the No. A-294 in favour of Surender Kumar whom he brought up as his son.

55. Learned Counsel for the respondents has argued that Tehl Ram was suffering from bleeding piles and paralysis and therefore, he was not mentally and physically fit to execute the Will dated 29.1.1988. These submissions are devoid of any merits. Petitioner has examined Dr. V.P. Soota to prove that Tehl Ram was of sound and disposing mind at the time of execution of the impugned Will. Dr. V.P. Soota (PW-7) in his Affidavit disclosed that Tehl Ram Tuteja was well known to his family as he lived near his clinic in Katra Nanak Chand, Subzi Mandi for a very long time, and was their family doctor. He also testified that to his knowledge Tehl Ram never went to any other doctor for treatment. He admitted that deceased was suffering from bleeding piles but, has stated that he was physically fit and normal till his death and had been reading and writing till his death. He was mobile and used to attend social functions and was never bed-ridden.

56. In his cross examination, he deposed that except bleeding piles, Tehl Ram was not suffering from any other kind of chronic disease and he used to come to him accompanied by his son Surender Kumar for treatment of his bleeding piles. He never saw him taking help of stick for walking. Deceased had visited his clinic about 1/11/2 months before his death. He denied the suggestion that Tehl Ram had stopped visiting his clinic as he had suffered paralytic attack and was unable to walk and was under the treatment of Dr. S.K.Gupta and Dr. Rajeshwari Gupta.

57. Respondent Sudesh Kumari has not been able to demolish the case of the petitioner that Tehl Ram was physically fit and mentally alert when he executed the Will dated 29.1.1988. There is no evidence on record to indicate that Tehl Ram was suffering from paralysis at the time of execution of the impugned Will and could not have signed the same. In the absence of any evidence to the contrary, it can be safely concluded that Tehl Ram Tuteja was of sound and disposing mind, mentally alert and physically fit at the time of execution of the Will Ex.PW-1/1.

58. Petitioner has placed on record two photographs Ex.PW-5/1 and PW-5/2 to emphasize that Tehl Ram was physically fit in the year 1986 when he attended the engagement ceremony of Raju son of his daughter Raj Kumari at Jwala Nagar. Gobind Lal (PW-3) did admit in his cross examination that Lala Tehl Ram had attended the function (engagement ceremony) of Raju at Jawala Nagar, Meerut.

59. A person suffering from bleeding piles is not mentally impaired to lose his senses of discretion. This type of disease in no manner affects the mental capabilities of any person. As regards paralysis, I have already stated above the respondents have failed to prove that Tehl Ram Tuteja was paralytic at the time of execution of the Will on 29.1.1988.

60. According to his own statement Tehl Ram had suffered a paralytic attack on his right side of body, face, arm and leg in June, 1985 i.e. soon after the execution of the Will dated 30.5.1985 in favour of his wife. He did admit that Tehl Ram had improved in his health and had started moving with the help of a stick. Though, he tried to state that in the year 1986 Lala Tehl Ram was not in a position to sit crossed legs on the floor, but the photographs depict otherwise.

61. Learned Counsel for the respondents has submitted that mannerism in which the signatures were appended by Tehl Ram Tuteja on Ex.P-1 on 1.7.1987 indicate that he had suffered a paralytic attack.

62. Even if, the submission of the learned Counsel for the respondents for the sake of argument is accepted that Tehl Ram had suffered paralytic attack, as is evident to from Ex.P-1 as admitted by Gobind Lal he had improved in his health over the period. The impugned Will was executed after about 11/2 years of Tehl Ram signing the account opening form Ex.P-1. As already discussed above, his signatures appearing on the Will Ex.R-1 and the impugned Will dated 29.1.1988 Ex.PW-1/1 have strong similarities which demolishes the case of the respondents that Ex.PW-1/1 is a forged document.

63. There is no other evidence on record to indicate that because of paralysis Tehl Ram had lost his mental balance, sense of discretion and comprehension and was not mentally fit to understand as to what was being signed by him.

64. If the submissions of learned Counsel for the respondents is accepted that Tehl Ram had suffered paralytic attach on his right side in June, 1985, that explains dissimilarities appearing on the account opening form Ex.P-1 of the Punjab National Bank at different places. As discussed above, Surender Kumar Arora, attesting witness of the Will has categorically stated that Tehl Ram Tuteja was in full senses, with normal physical condition and he had executed a Will voluntarily without any pressure or coercion or influence of any kind.

65. It is pertinent that objectors in the objection petition did not raise any objection to the validity of the Will on the ground that Tehl Ram Tuteja was not in sound and disposing mind at the time of execution of the Will dated 29.1.1988. This objection has been raised in the cross probate case filed by Smt. Sudesh Kumari.

66. Another submission of the leaned counsel for the respondents is that Tehl Ram did not open account in the joint name with Surender Kumar and himself is a factor which explains that he had no faith in the petitioner. It is proved on record that when the account was opened in July, 1987, Tehl Ram was under the influence of Smt. Sudesh Kumari because, he had been travelling with her to

different religious places, her husband being in the railways. There is no evidence on record to indicate that Tehl Ram ever disclosed or conveyed displeasure or lack of faith in Surender kumar.

67. Smt. Sudesh Kumari, beneficiary of the Will dated 30.5.1985 has not stepped in the witness box to explain the circumstances in which the said Will was executed and why Tehl Ram ousted all his legal heirs i.e. Sita Rani and Raj Kumari and bequeathed the house in question in her and her sons favour, even Devender Kumar son of Sudesh Kumari has not stepped in the witness box to support the case of his mother. It was Sudesh Kumari who had gone to the Sub Registrar Office with Tehl Ram Tuteja for execution and registration of the Will dated 30.5.1985. This Will was alleged to have been handed over to Gobind Lal, husband of Sudesh Kumari when he visited Delhi, but the date of handing over the Will has not been disclosed by Gobind Lal in his testimony.

68. It is highlighted by the learned Counsel for the respondents that Will dated 29.1.1988 is an unregistered will. This fact also clearly indicate that the said will is a forged document. However, I find no force in the submission of the learned Counsel for the respondents for the simple reason that a Will is not required to be registered. Though, registration of a Will may be a strong factor for proving its genuineness, then a registered Will can also be shrouded with suspicion if it fails the test laid down in Sections 59 and 63 of the Act.

69. In Smt. Indu Bala Bose and Ors. v. Manindra Chandra Bose and Ors. : AIR 1982 SC 133 what can be suspicious circumstances surrounding the Will have been laid down for consideration which are as follows:

7. This Court has held that the mode of proving a will does not ordinarily differ from that of proving any other document except to the special requirement of attestation prescribed in the case of a will by Section 63 of the Succession Act. The onus of proving 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 signature of the testator as required by law is sufficient to discharge the onus. Where however there are suspicious circumstances, the onus is on the propounder to explain them to the satisfaction of the court before the court accepts

the will as genuine. Even where circumstances give rise to doubts, it is for the propounder to satisfy the conscience of the court. The suspicious circumstances may be as to the genuineness of the signatures of the testator, the condition of the testator's mind, the disposition made in the will being unnatural, improbable or unfair in the light of relevant circumstances, or there might be other indications in the will to show that the testator's mind was not free. In such a case 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. If the propounder himself takes a prominent part in the execution of the will which confers a substantial benefit on him, that is also a circumstance to be taken into account, and the propounder is required to remove the doubts by clear and satisfactory evidence. If the propounder succeeds in removing the suspicious circumstances the court would grant probate, even if the will might be unnatural and might cut off wholly or in part near relations.

70. In *Niranjan Umeshchandra Joshi v. Mridula Jyoti Rao and Ors.* I (2007) CLT 159 (SC) what can be the suspicious circumstances for consideration of a Will in question have been dealt with. Para 33 of this judgment reads as follows:

33. There are several circumstances which would have been held to be described by this Court as suspicious circumstances:

(i) When a doubt is created in regard to the condition of mind of the testator despite his signature on the Will;

(ii) When the disposition appears to be unnatural or wholly unfair in the light of the relevant circumstances;

(iii) The propounder himself takes prominent part in the execution of Will which confers on him substantial benefit.

71. Suspicious circumstances, which can refute the execution of a Will depends on the facts of each case and they cannot be universally followed in every case where the Will is under challenge.

72. In my view, no suspicious circumstances shrouding the Will have been proved on record. Therefore, genuineness of the Will, under the circumstances, becomes undoubtful.

73. To sum up, the facts and circumstances which prove the genuineness of the Will dated 29.1.1988 Ex.PW-1/1 are:

(i) The Will was executed by Lala Tehl Ram Tuteja in his sound disposing mind, voluntarily in the presence of two attesting witnesses Jagdish Chander and Surender Kumar Arora. Surender Kumar Arora has identified his signatures as well of Jagdish Chander and of the Testator on the Will Ex.PW-1/1.

(2) The Will was got drafted by Lala Tehl Ram Tuteja from an Advocate and at the time when he executed this Will, besides him and the attesting witnesses, no other person was present.

(3) The Will was read over and explained to the witnesses and the Testator as well as attesting witnesses signed the Will in the presence of each other.

(4) The testator vide impugned Will Ex.PW-1/1 cancelled and revoked his previous Will made in favour of his daughter Sudesh Kumari in the following manner:

I, Tehl Ram Tuteja son of Shri Chotu Ram Tuteja resident of House No. A-294 Derawal Nagar, Delhi declare this to be my last Will which I make this 29th day of January, 1988 cancelling and revoking my previous will made in favour of my daughter Smt Sudesh Kumari wife of Shri Gobind Lal Mendiratta and her sons and all other previous Wills, if any, made heretofore..

The Will was cancelled and revoked by Tehl Ram Tuteja by his second and last Will dated 29.1.1988. Therefore, Will dated 30.05.1985 Ex.R-1 lost its existence after the execution of the Will dated 29.1.1988.

(5) Surender Kumar since his childhood was brought up, educated and married by Tehl Ram Tuteja as his son and he was living with the deceased till his death, looked after him, served him and also performed his and his wife's last rites as a son.

(6) Will Ex.PW-1/1 is a balanced Will in which Testator has bequeathed his half share in Plot No. A- 294, Derawal Nagar, Azadpur, Delhi, admeasuring 268.22 sq. yds. in favour of Suredner Kumar which he owned jointly with him and he bequeathed three fixed deposits, amounting to Rs. 30,000/- and in saving bank account in his name jointly with Sudesh Kumari and gold ornaments which were in the custody of Sudesh Kumari to all his three daughters in equal share. The moveable assets were to be distributed after meeting his funeral expenses.

74. Whereas, Will dated 30.5.1985 is shrouded by following suspicious circumstances:

(i) The propounder of the Will Smt. Sudesh Kumari actively participated in the execution of the Will, which is not signed by two independent witnesses. Srinivas was known to Gobind Lal, husband of Smt. Sudesh Kumari as they were working in the same department and Srinivas had met Tehl Ram only 4/5 times before execution of the Will, but did not meet him thereafter.

(ii) Ouster of Sita Rani and Raj Kumari from inheritance of the property of the deceased goes unexplained in the Will or even in evidence. Ouster of natural legal heirs i.e. his two other daughters completely from inheritance besides the Petitioner, who was looking after the deceased and served him as his son.

(iii) In the Will Tehl Ram is silent about his moveable assets, bank account, etc.

(iv) The Will is silent as to why entire immoveable property was bequeathed by Tehl Ram in favour of his one daughter and her two sons only.

(v) Neither Sudesh Kumari nor Gobind Lal or her other family members attended the funeral ceremony and other customary rites on the death of Tehl Ram.

75. Respondent Sudesh Kumari has made every endeavour to prove that her son Devender Kumar used to live with Tehl Ram in his house. However, neither Sudesh Kumari nor Devender Kumar have stepped in the witness box to prove that Devender Kumar had been living with Tehl Ram in his house. Even if, it is assumed that Devender Kumar was residing with Tehl Ram as it has come in evidence that he was residing with Tehl Ram Tuteja for quite some time before his

death, there is no evidence to indicate that he was looking after and serving him during his lifetime.

76. Under the proven circumstances, it can be safely concluded that Tehl Ram had revoked his earlier Will dated 30.05.1985 and had executed a legal and valid Will dated 29.1.1988 Ex.PW-1/1. Therefore, claim of Surender Kumar in respect of House No. A- 294, admeasuring 268.22 sq. yds. Derawal Nagar, Azadpur, Delhi by virtue of this Will is proved. Thus, it is concluded that the Will dated 30.05.1985 Ex.R- 1 though bears the signatures of Tehl Ram, is shrouded by strong suspicious circumstances which invalidate the Will Ex.R-1. These issues have been proved in favour of the Petitioner and against the respondent.

Issue No. 3 : (Relief)

77. In view of my discussion on the issues as above, it is concluded that Tehl Ram Tuteja executed a valid and legally enforceable Will dated 29.1.1988 Ex.PW- 1/1. Hence, Probate Petition No. 5/1989 filed by petitioner Surender Kumar is allowed and the probate as prayed for in respect of Will dated 29.01.1988 Ex.PW-1/1 is granted. Probate petition filed by Smt. Sudesh Kumari being Probate Petition No. 44/1990 is hereby dismissed.

78. Under the circumstances, parties are left to bear their own costs.

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