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Rohtas Singh Vs. Jaswant Singh and ors.

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Court : Delhi

Decided On : Mar-03-2008

Reported in : 150(2008)DLT122

Judge : Pradeep Nandrajog, J.

Acts : Indian Succession Act, 1925 - Sections 63 and 276; Land Acquisition Act; Evidence Act, 1872 - Sections 68

Appeal No. : FAO No. 577/2002

Appellant : Rohtas Singh

Respondent : Jaswant Singh and ors.

Advocate for Def. : None

Advocate for Pet/Ap. : R.M. Aggarwal, Adv

Disposition : Appeal allowed

Judgement :

Pradeep Nandrajog, J.

1. The question involved in the present appeal is whether the will dated 6.10.1989 is the last legal and valid testament executed by late Sh. Than Singh.

2. Late Sh. Than Singh (hereinafter referred to as the testator) who died on 15.1.1991 was survived by his widow Smt. Birina Devi, 3 sons namely, Sh. Rohtas Singh, Sri Bhagwan and Jaswant Singh and 1 daughter Smt. Sham Devi.

3. On 19.4.19991 Rohtas Singh filed a petition under Section 276 of the Indian Succession Act 1925 seeking probate of the will purported to have been executed by Than Singh on 6.10.1989. He was the principal beneficiary under the will.

4. The will dated 6.10.1989, Ex. P-1, is a computer typed document and consists of 6 sheets. It has been typed in English language. It bears the thumb impression of the testator on each page. It is a registered document.

5. The will, Ex. P-1, has been witnessed by one Sh. Devender Kumar Sharma, Advocate and one Sh. Naresh Kumar Verma, Advocate.

6. In the will it has been stated that while executing the will the testator is revoking an earlier will executed by him on 21.8.1986, Ex.OW4/1. Reason given in Ex.P-1 for revoking the will dated 21.8.1986 and bequeathing major portion of his estate in favor of Rohtas Singh is the cruel behavior of his two sons Jaswant Singh and Sri Bhagwan and their families towards the testator and his wife. It is further recorded that the said two sons were dishonest and they were attempting to illegally grab the property owned by the testator. It is further recorded that in the month of September 1987 said two sons threatened the testator to hand over the property to them and also forcibly obtained his signatures on certain documents. It is further recorded that one Sh. Baljit Singh who is a relative of Sri Bhagwan, acting in connivance with the sons of the testator have filed a false case against the testator.

7. Widow of the testator supported the will dated 6.10.1989 purported to have been executed by the testator.

8. Remaining legal heirs of the testator i.e. his two sons Sri Bhagwan and Jaswant Singh and daughter Sham Devi had opposed the petition.

9. defense set up by the objectors was that on 6.10.1989 the testator was bed ridden and was not having required testamentary capacity to execute a will as he

was suffering from a paralytic attack. That the will was got executed from the testator by the propounder by playing fraud and coercion upon him. That the properties bequeathed under the will were ancestral properties and not self acquired properties of the testator. That the will dated 21.8.1986, Ex. OW-4/1, is the last legal and valid testament executed by the testator.

10. On behalf of the propounder following 5 witnesses were examined:

i. Devender Kumar Sharma, Advocate PW-1.... To establish the preparation, attestation and due execution of the will Ex. P-1 by the testator.

ii. Naresh Kumar Verma, Advocate PW-2.... To establish the preparation, attestation, registration and due execution of the will Ex. P-1 by the testator.

iii. Jitender Kumar Verma, PW-3.... To establish the registration of the will Ex. P-1.

iv Rohtas Singh, PW-4.... To establish the genuineness of the will Ex. P-1 and that the execution of the will is not surrounded by suspicious circumstances.

v Ravi Kumar Aggarwal, Advocate PW-5.... To establish that the testator was in a state of sound disposing mind around the time of the execution of the will Ex. P-1.

11. Devender Kumar Sharma, Advocate in his testimony as PW-1 deposed that he knew the testator since the year 1981 and that he and the other attesting witness had witnessed the due execution of the will Ex. P-1, by the testator. Regarding preparation of the will he deposed that the testator approached him and expressed his desire to execute a will. That after 2-3 sittings with the testator, on 6.10.1989, he prepared a draft of the will in accordance with the instructions of the testator. That the contents of the draft were read over to the testator by him in vernacular. That after the testator approved the draft it was got typed in his chamber. That the fair typed will, Ex. P-1, was also read over to the testator in vernacular and thereafter testator affixed his thumb impression on the will. That thereafter he and Naresh Kumar Verma, PW-2 signed the will as attesting witness. That at the time of the execution of the will Ex. P-1 the testator, Naresh Kumar Verma PW-2 and he were present. That thereafter they went to the office of Sub Registrar, Kashmiri Gate where he dropped the testator and Naresh Kumar Verma to get the will

registered. That the testator was in a state of the sound disposing mind at the time of the execution of the will Ex. P-1.

12. Naresh Kumar Verma, Advocate PW-2 deposed that he knew the testator as the testator used to visit the chambers of his associate Devender Kumar Sharma PW-1. Regarding preparation, attestation and due execution of the will Ex. P-1 he deposed on the same lines as PW-1. He however deposed that at the time of execution of the will Ex. P-1 the testator, his wife, Devender Kumar Sharma PW-1 and he were present. That after the execution of the will Ex. P-1 they went to the office of the Sub Registrar, Kashmiri Gate where Devender Kumar Sharma PW-1 dropped them. That at the time of the registration of the will Ex. P-1, the testator, one Sh. N.C.Bajaj, Advocate and he were present. That the testator was in a state of sound disposing mind at the time of the execution of the will Ex. P-1.

13. Sh. Jitender Kumar, LDC, Office of Sub Registrar, Kashmiri Gate, Delhi was examined as PW-3. He deposed that the will Ex. P-1 was registered on 6.10.1989. He also brought the necessary records to prove the same. He however deposed that the will Ex. P-1 was not registered in his presence.

14. Propounder Rohtas Singh in his testimony as PW-4 deposed that the testator had given him the will Ex. P-1 about 1' to 2 months before his death. That the testator was in a state of sound disposing mind around the time when the will Ex. P-1 was executed.

15. Ravi Kumar Aggarwal, Advocate in his testimony as PW-5 deposed that the testator had engaged him to prosecute the suit number 166/1988. That the testator was in a state of sound disposing mind around the time of execution of the will Ex. P-1 as evidenced from the fact that he could understand whatever was told to him and that from time to time he used to give instructions in connection with the conduct of the said suit. That on 27.10.1989 the testator visited him for the last time in his chambers at Tis Hazari Courts and on that date suit No. 166/1988 was dismissed.

16. On behalf of the propounder following documentary evidence was filed:

i) Ex. PW-1/4.... Death certificate of the testator.

ii) Ex. PW-5/RX1.... Photocopy of the plaint filed by Baljit Singh in suit No. 166/1988 which was a suit for mandatory injunction instituted by Baljit Singh against the testator.

iii) Ex. PW-5/RX2.... Photocopy of the written statement dated 8.5.1989 filed by the testator in suit No. 166/1988.

iv) Ex. PW-5/RX3.... Photocopy of the order dated 27.10.1989 passed by the Additional District Judge, Delhi. v) Ex. P-1.... Certified copy of the order dated 5.12.1988 passed by the Additional District Judge in LAC No. 49/1993. (Said document and the will dated 6.10.89 bear the same exhibit mark P-1)

vi) Ex. P-2.... Certified copy of the statement dated 5.12.88 made by the testator and Jai Dev OW-3 in LAC No. 49/93.

vii) Ex. P-4, Ex.P-5 and Ex.P-6.... Certified copies of the orders dated 18.4.1990, 4.5.1990 and 3.1.1991 respectively passed by the Additional District Judge in LAC No. 49/1993.

17. In the written statement Ex.PW5/RX2 it has been pleaded that on 30.9.1987 at about 3:00 PM some people along with Sri Bhagwan the son of the testator forcibly took the thumb impressions of the testator on some blank papers with mala fide intentions to use these papers later on for some ulterior purpose. That a police complaint was also made to this effect and the same is pending before the Metropolitan Magistrate Delhi. That a sum of Rs. 75,000/- was given by Rohtas Singh to the testator in order to enable the testator to purchase a property. That around 10.3.1988 the testator suffered a paralytic attack. That after sometime health of the testator improved.

18. Order dated 27.10.89 Ex.PW-5/RX3 records that the counsel for the testator informs that the testator had executed a lease deed and thus the Suit No. 166/1988 filed by the plaintiff is being dismissed having been infructuous.

19. Exhibit P-1 records the presence of the testator and Jai Dev OW-3 in the court on 05.12.88.

20. Exhibits P-4, P-5 and P-6 record the presence of the testator in the court on 5.12.88, 18.4.90, 04.05.90 and 03.09.91 respectively.

21. On behalf of the objectors following 9 witnesses were examined:

i) Sham Devi OW-1, daughter of the testator.... To establish that the testator was not having required testamentary capacity at the time of the execution of the will Ex. P-1 and that the relations between the objectors and the testator were not strained.

ii) Jaswant Singh OW-2, son of the testator.... To establish that the testator was not having required testamentary capacity at the time of the execution of the will Ex. P-1 and that the relations between the objectors and the testator were not strained.

iii) Jai Dev OW-3, nephew of the testator.... To establish that the testator was not having required testamentary capacity at the time of the execution of the will dated Ex. P-1.

iv) G.V.Dass, Advocate OW-4.... To establish the attestation and due execution of the will dated 21.8.1986 Ex. OW-4/1 by the testator.

v) Karan Singh OW-5, neighbour of the testator.... To establish the attestation and due execution of the will dated 21.8.1986 Ex. OW-4/1 by the testator.

vi) Sri Bhagwan OW-6, son of the testator.... To establish that the testator was not having required testamentary capacity at the time of the execution of the will Ex. P-1 and that the relations between the objectors and the testator were not strained.

vii) Rakesh Kumar OW-7, Dealing Assisstant, DDA.... To establish the ownership of one of the properties bequeathed under the will Ex. P-1.

viii) Subhash Chand OW-8, Patwari, Village Sakurpur.... To establish the ownership of one of the properties bequeathed under the will Ex. P-1.

ix) Prehlad Singh, OW-9.... To establish that the DD entry No. 39 dated 30.9.1987 Ex. R-1 was not lodged by the testator.

22. Sham Devi in her testimony as OW-1 deposed that the testator suffered second paralytic attack in the year 1988. That from the time the testator suffered second paralytic attack till his death he remained bed ridden and was never in a state of sound disposing mind. That from the time the testator suffered second paralytic attack till his death he was residing with Rohtas Singh who did not allow Sri Bhagwan and Jaswant Singh the sons of the testator to meet the testator.

23. Jaswant Singh in his testimony as OW-2 deposed that the testator suffered second paralytic attack in the year 1987-88. That the testator never recovered after having suffered second paralytic attack. That in the year 1987-88 the testator was examined and treated by one Dr. Kothari. That Dr. Kothari is capable of giving evidence. That from the time the testator suffered second paralytic attack till his death he was residing with Rohtas Singh who did not allow him and Sri Bhagwan to meet the testator. That in the years 1988-89 certain litigations were pending by and against the testator. That the said litigations were being prosecuted by Rohtas Singh on behalf of the testator.

24. Jai Dev in his testimony as OW-3 deposed that the testator suffered a paralytic attack one year before his death. That after the attack mental condition of the testator was unstable and remained so till the time of his death. Relevant portion of his cross examination reads as under:

I was in regular contact with Mr. Than Singh even prior to his death. He was not in a position to attend the courts. However, I cannot tell the date or month and not even the year as to when he was not in a position to attend the courts. I cannot tell that year till when Sh. Than Singh used to attend the courts. However, he used to come to the courts.

25. G.V. Dass Advocate in his testimony as OW-4 deposed about the attestation and due execution of the will dated 21.8.86 Ex.OW-4/1 by the testator. Relevant portion of the cross examination reads as under:

I have no personal knowledge about the pendency of the LAC case regarding LAC case filed by the testator in his life time volunteered. Now I remember that I had filed a petition Under Section 18 of the Land Acquisition Act before the concerned LAC on the instructions of the testator. It is correct that I had moved an application on behalf of Than Singh and certified copy of the same is Ex. OW- 4/P1. Sh. Than Singh had not put his thumb mark at point X on Ex. OW-4/P1 in my presence. Volunteered I had prepared the document Ex. OW-4/P1 and had given it for signature/thumb mark on the testator Than Singh to Sh. Rohtas Singh.... Than Singh Used to contact me in connection with his LAC case but I do not remember about the frequency of his visits to me. I do not remember whether the testator Sh. Than Singh had contacted me on 5.12.1988, 10.7.1989, 12.7.1989, 18.4.1990, 4.5.1990 and 3.1.1991 immediately prior to the date of hearing as well as after the date of hearing.... Than Singh was coming to me only to receive the vouchers of the compensation in the company of Rohtas Singh applicant and all the three sons were coming to the court on his behalf intervally i.e. some time one son and sometime other son. Mr. Than Singh was of sound disposing mind at the time of his visits to me till 1980. (one thousand nine hundred and eighty only). I cannot give any reply to the question whether the testator had become a person of unsound mind after 1980. The testator was alright and was of sound mind whenever he came to me even after 1980.

26. Karan Singh in his testimony as OW-5 deposed about the attestation and due execution of the will dated 21.8.86 Ex.OW-4/1. Relevant portion of cross-examination of OW-5 reads as under:

I used to meet Than Singh even in the year 1990 and 1989. In 1989-90 and he was suffering from old age and cough etc. Otherwise he was alright.

27. Sri Bhagwan in his testimony as OW-6 deposed that the testator suffered second heart attack in the year 1987-88. That the testator never recovered after having suffered second paralytic attack. That from the time the testator suffered

second heart attack till his death he was residing with Rohtas Singh who did not allow him and Sri Bhagwan to meet the testator That certain litigations were pending by and against the testator. That the said litigations were being prosecuted by the propounder on behalf of the testator.

28. Prehlad Singh OW-9 deposed that he can neither admit nor deny the suggestion whether DD entry No. 39 dated 30.9.1987 was recorded at the instance of the testator.

29. On behalf of the objectors following documentary evidence was led:

i) Ex. R-1.... DD Entry No. 39 dated 30.9.1987.

ii) Application dated 9.10.1990 filed by the propounder in the High Court seeking his appointment as a guardian of the testator as he was suffering from mental infirmities (It is an un-exhibited document. However propounder admitted having filed said application)

iii) Ex. OW-4/P1.... Being an application for payment of compensation filed by the testator on 12.7.1989.

iv) Ex. OW-4/P2.... Certified copy of order dated 10.7.1989 passed by the learned Additional District Judge in LAC No. 49/1993.

30. After noting respective versions and evidence led by the parties, vide impugned order dated 24.8.2002 learned Trial Court has held that the propounder failed to prove the due execution of the will dated 6.10.1989 Ex. P-1 by the testator and thus dismissed the petition under Section 276 filed by the propounder.

31. Aggrieved by the impugned order dated 24.8.2002 passed by the learned Trial Court the propounder of the will Ex.P-1 has filed the present appeal.

32. Law relating to proof of the wills can be culled out as under:

I A will is a solemn document, being written by a person who is dead and who cannot be called in evidence to testify about the due execution of the will. It is the living who have to establish the will. It naturally throws a heavy burden on the

court to satisfy its judicial conscience that the burden of proof of due execution is fully discharged and every suspicious circumstance explained.

II 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 the last will of a free and capable testator.

III 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 : [2002]1SCR132)

IV The requirement of proof of a will is same as any other document excepting that the evidence tendered in proof of a will should additionally satisfy the requirement of Section 63 of the Indian Succession Act, 1925 and Section 68 of Indian Evidence Act, 1872. If after considering the matter before it, that is, the facts and circumstances as emanating from the material available on record of a given case the court either believes that the will was duly executed by the testator or considers the existence of such facts so probable that any prudent person ought under the circumstances of that particular case, to act upon the supposition that the will was duly executed by the testator, then the factum of execution of will shall be set to have been proved.

V. 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.

VI Circumstances can only raise a suspicion if they are circumstances attending, or at least relevant to the preparation and execution of the will itself.

VII 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.

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

IX If there is nothing un-natural about the transaction and the evidence adduced satisfies the requirement of proving a will the court would not return a finding of 'not proved' merely on account of certain assumed suspicion or supposition. Who are the persons propounding and supporting a will as against the person disputing the will and the pleadings of the parties would be relevant and of significance.

X Well found suspicion may be a ground for closer scrutiny of evidence but suspicion alone cannot form the foundation of a judicial verdict- positive or negative.

33. With the afore-said understanding of law, I shall test the correctness of the impugned order dated 24.08.02.

34. A perusal of the impugned order shows that the learned Trial Court has held that the propounder has been able to establish that the testator had executed the will Ex.P-1 in presence of two attesting witnesses PW-1 and PW- 2 but that the execution of the will is surrounded by under-noted circumstances which cast a suspicion upon the fact that the testator was in a state of sound disposing mind at the time of the execution of the will:

a) Reasons given in the will Ex.P-1 for revoking will dated 21.8.86 Ex.OW-4/1 are the bad behavior of Sri Bhagwan and Jaswant Singh towards the testator and their attempt to grab the property of the testator. However from the documentary evidence led by the propounder neither the bad behavior of Jaswant Singh nor any attempt by him to grab the property of the testator is forthcoming.

b) In the will, Ex. OW4/1, the plot bearing Municipal No. WZ-60 is stated to be in the possession of Rohtas Singh and Sri Bhagwan while in the will Ex. P-1 the said plot is stated to be in the possession of Rohtas Singh and some tenants. It has

been opined that the fact that wrong particulars are mentioned in the will Ex. P-1 suggests that the testator was not aware of the contents of the will Ex.P-1.

c) In the will Ex. OW4/1 the plot bearing Municipal No. WZ-6 was bequeathed by the testator in favor of three sons. However under the will Ex. P-1 the said plot has been bequeathed in favor of Rohtas Singh and his wife i.e. bequest was disproportionate.

d) In the will, Ex. OW4/1, the properties bequeathed by the testator were stated to be the ancestral properties while in the will Ex. P-1 said properties are stated to be self acquired. It has been opined that the fact that wrong particulars are mentioned in the will Ex. P-1 suggests that the testator was not aware of the contents of the will Ex.P-1.

e) The fact that an application dated 9.1.90 was filed by Rohtas Singh in the High Court of Delhi seeking his appointment as a guardian of the testator for the reason the testator was mentally infirm goes to show that the testator was not having required testamentary capacity at the time of the execution of the will Ex. P-1.

f) That Naresh Kumar Verma PW-2 stated during his cross-examination that he did not know that the testator had given a copy of the will Ex.OW4/1 to his senior Sh Gehlot. It has been opined that this means that Sh. Gehlot was also associated in the preparation of the will but it is no where the case of the propounder that Sh. Gehlot was associated in the preparation of the will Ex.P-1.

g) Jaswant Singh OW-2 deposed that Rohtas Singh used to prosecute the Suit No. 166/88 and LAC case No. 49/93 on behalf of the testator and that no suggestion was given to OW-2 in his cross-examination that Rohtas Singh was not prosecuting said cases on behalf of the testator.

h) D.K. Sharma PW-1 deposed that the testator, Naresh Verma PW-2 and he were present at the time of the execution of the will Ex.P-1. While Naresh Kumar Verma PW-2 deposed that the testator, his wife, D.K. Sharma PW-1 and he were present at the time of the execution of the will Ex.P-1. It has been opined that there is contradiction in the testimony of the witnesses.

i) When questioned about the will Ex.OW4/1, Rohtas Singh pleaded ignorance. Will Ex.OW4/1 finds mention in the Will Ex.P-1. It has been opined that the fact that Rohtas Singh pleaded ignorance about the will Ex.OW4/1 suggests that he was trying to hide something.

j) In the Will Ex.P-1 it has been stated that the testator is bequeathing major portion of his estate in favor of Rohtas Singh because of his good behavior towards the testator. Rohtas Singh in his testimony as PW-4 denied the suggestion that will Ex.P-1 was executed by the testator in his favor because of his good behavior towards the testator. It has been opined that this is against the contents of the Will Ex.P-1 and thus raises doubts about its genuineness.

k) In the will Ex.P-1 it has been stated at the time of the execution of the will the testator is residing with Rohtas Singh. However Rohtas Singh in his testimony as PW-4 denied the suggestion that the testator was residing with him at the time of the execution of the Will Ex.P-1. It has been opined that this is also against the contents of the Will ex.P-1 and thus raises doubts about its genuineness.

l) Testator was around 80 years old at the time of the execution of the will Ex.P-1 and had suffered two paralytic strokes. This raises a presumption that the testator was not in such a physical condition to go to the chambers of D.K.Sharma, Advocate PW-1 for execution of the will Ex.P-1 or to the chambers of Ravi Kumar Aggarwal, Advocate PW-5 in connection with prosecution of suit No. 166/88.

35. Before examining the afore-noted circumstances enumerated by the learned Trial Court I note that the learned Trial Court had not appreciated the evidence led by the parties in its correct perspective.

36. A closer scrutiny of the evidence led by the objectors shows that the version of the objectors that the testator was phyisically infirm and was not in state of sound disposing mind at the time of the execution of the Will. Ex-P1 as he was suffering from a paralytic attack has no legs to stand for the reason evidence led by the objectors suffers from the following defects:

I. OW-1, OW-2 and OW-6 deposed that the testator suffered in a paralytic attack in the year 1987-88 while OW-3 deposed that the testator suffered paralytic attack one year before his death i.e. in the year 1990.

II. From the testimonies of OW-2 and OW-6 it is forthcoming that the testator was being treated by one Dr. Kothari and Dr. Sehra. It is further forthcoming from the testimony of OW-2 that Dr. Kothari was capable of giving evidence. Had the doctors who were treating the testators were examined by the objectors the correct medical condition of the testator would have come to the knowledge of the court. The non examination of the doctors of the testator by the objectors leads to an adverse inference to be drawn against the objectors.

III. The orders dated 5.12.1988 Ex. P-1 and P-2 passed by the learned Additional District Judge in LAC No. 49/1993 shows that on 5.12.1988 the testator along with Jai Dev OW-3 were present in court. However Jai Dev in his cross examination deposed that the testator was in not in a position to attend the court. When questioned as to when the testator was not in a position to attend the court he pleaded ignorance. Evidence of Jai Dev, OW-3 is thus ipxi dixit in nature and in no way helps the case set up by the objectors. Ex.P-1 and Ex.P-2 evidence that on 5.12.1988 the testator was physically fit and was present in court.

IV. Exhibits P-1, P-4 and P-5 show that the testator was present in the court on 5.12.1988, 18.4.1990, 4.5.1990 and 3.1.1991. G.V.Dass OW-4 in his cross examination stated that he do not remember whether the testator contacted him around the time of aforenoted dates. Ex.OW4/P2 shows that on 10.07.89 G.V. Dass informed the court that his client i.e. the testator made a statement in the court on 5.12.1988. Ex. P-2 shows that G.V. Dass was not present in the court when the testator made a statement on 5.12.1988. How did G.V.Dass OW-4 became aware that the testator made a statement in court on 5.12.1988 remains a mystery

V. G.V. Dass OW-4 in his cross examination further deposed that all 3 sons of the testator used to come to the court in connection with conduct of LAC No. 49/1993. This testimony is contrary to the stand taken by the objectors that LAC No. 49/1993 was prosecuted by Rohtas Singh on behalf of the testator. VI. G.V. Dass

OW-4 during his cross examination also deposed that the testator was in a state of sound disposing mind during the time of his visits to him till the year 1980. When questioned about the condition of the testator after 1980 he first pleaded ignorance and later replied the testator was alright and in a state of sound disposing mind during the time of his visits to him even after 1980. Evidence of G.V.Dass OW-4 is thus ipxi dixit in nature and in no way helps the case set up by the objectors.

VII. Karan Singh OW-5 in his cross examination has categorically deposed that he used to meet the testator in the years 1989-90 and that in the years 1989-90 the testator was only suffering from old age and cough but was otherwise alright. In view of said testimony case set up by the objectors that the testator never recovered after having suffered second paralytic attack suffers a serious set back.

37. Evidence led by the propounder and the attendant facts and circumstances of the case strenghtens the case of the propounder. My reasons for so holding are as under:

I. In the will Ex.P-1 one of the reasons for revoking the will Ex.OW-4/1 is stated to be the cruel behavior of Sri Bhagwan and Jaswant Singh towards the testator and his wife. The fact that widow of the testator supported the will Ex.P-1 lends credence to the contents of the will Ex.P-1.

II. Another reason stated in the will Ex.P-1 for revoking the will Ex.OW-4/1 is the attempt by Sri Bhagwan and Jaswant Singh in the month of September, 1987 to illegally grab the properties of the testator. The fact that DD entry dated 30.9.1987 Ex.R-1 was recorded in respect of the said incident lends credence to the contents of the will Ex.P-1. The objectors have contended that DD entry Ex.R-1 was recorded at the instance of the propounder and not the testator. However, the fact that the incident of 30.9.1987 finds mention in the written statement dated 8.5.1989, Ex.PW5/RX2, filed by the testator in Suit No. 166/1988 strongly suggests that the DD entry was recorded at the instance of the testator.

III. The pleading in the written statement dated 8.5.1989 Ex. PW5/RX2 that the propounder gave a sum of Rs. 75,000/- to the testator so as to enable him to purchase a property goes to show that the relations between the testator and the

propounder were very cordial.

IV. The fact that the testator filed written statement Ex.PW5/RX2 on 8.5.1989 strongly suggests that the testator recovered after having suffered a paralytic attack and that he was having required testamentary capacity around the time of execution of the will dated 6.10.1989 Ex.P-1.

V. The testimony of PW-5 that on 10.7.1989 testator visited him in his chambers is strengthened by the fact that on said date PW-5 made a statement in court on basis of which Suit No. 166/1988 was dismissed as being infructous. There is a strong presumption that PW-5 made said statement only after being instructed by the testator. This establishes that the testator was in a state of sound disposing on 10.07.89 as also around the time of the execution of the will dated 6.10.89 Ex.P-1.

VI To counter Exhibits PW5/RX2, PW5/RX3, P-1, P-2, P-4, P-5 and P-6 objectors pleaded that the suit No. 166/88 and LAC No. 49/93 were being prosecuted by the propounder on behalf of the testator. No suggestion was given either to Ravi Kumar Aggarwal, Advocate PW- 5 or to GV Dass Advocate OW-4 that the said cases were being prosecuted by the propounder on behalf of the testator. This leads to an inference that the testator was prosecuting said two cases himself.

VII. Exhibits P-1, P-2, P-4, P-5 and P-6 records the presence of the testator in the court on 5.12.88, 18.04.90, 04.05.90 and 03.09.91 respectively clearly leads to an inference that testator was in a state of sound disposing mind around the time of the execution of the Will Ex-P1.

38. I may now deal with the circumstances enumerated by the learned trial court as suspicious.

39. As regards circumstance (a) suffice would it be to note that when a person makes a statement that two persons were involved in an incident and there is independent evidence that one of the said two persons was involved in the said incident, the presumption of truthfulness of the statement gets reinforced. The case projected by the objectors was that they were having cordial relations with the testator but Rohtas Singh with whom the testator was residing prevented them

from meeting the testator. In this regards, the testimony of two witnesses of the objectors OW- 3 and OW- 5 is important. OW- 3 Jaidev was the nephew of the testator and OW- 5 Karan Singh was the neighbour of the testator. Both the witnesses deposed that they were in regular contact with the testator till his death. However, none of the said witnesses deposed that objectors were having cordial relations with the testator and that the propounder prevented the objectors from meeting the testator.

40. Circumstance (b) is not suspicious for the reason there is a time gap of nearly 3 years between the executions of the two wills. The possibility that in the said period of 3 years the persons who were in the possession of the plot could have been changed cannot be ruled out. No evidence has been led by the objectors to establish that Sri Bhagwan was in possession of the said plot at the time of the execution of the will Ex. P-1.

41. Circumstance (c) is not suspicious for the reason the very reason for the execution of the will Ex.P-1 by the testator was to change the bequest made in the will Ex.OW4/1. Furthermore the reasons as to why testator changed the bequest are clearly stated in the will Ex.P-1.

42. Circumstance (d) is not suspicious for the reason a perusal of the wills shows that the testator in both the wills stated that he had rebuilt and renovated the said properties by his own funds and that he is the absolute owner of the said properties. The trial Judge has placed undue importance on the fact that in the will Ex. OW4/1 testator has stated that he got the properties in succession from his ancestors but has overlooked the fact the in the very next sentence the testator has stated that he had rebuilt and renovated the said properties from his own funds.

43. While holding circumstance (e) as suspicious the learned trial court ignored the record of suit no 166/88 and LAC no 49/93. As already noted the record of suit No. 166/88 and LAC no 49/93 suggests that the testator was in a state of sound disposing mind around the time of the execution of the will Ex.P-1. Trial Court ignored the fact that suit No. 166/88 and LAC case No. 49/93 were more proximate in time to execution of the will Ex.P-1 as compared to application dated

9.10.90 filed by Rohtas Singh. Testator died on 15.1.91. Thus application dated 9.10.90 was more proximate in time to the death of the testator. The probability is that the testator was having required testamentary capacity at the time of the execution of the will Ex.P-1 as evident from the record of suit No. 166/88 and LAC case No. 49/93. That the health of the testator failed 4-5 months before his death and that is why propounder moved application dated 9.10.90 in the High Court of Delhi.

44. Pertaining to circumstance (f) suffice would it be to note a question was put to PW-2 in cross-examination whether the copy of the Will Ex.P- 1 was handed over by the testator to Sh. Gehlot. PW-2 pleaded ignorance about the said fact. This cannot be a suspicious circumstance in as much as PW-2 merely answered a question put to him.

45. Pertaining to circumstance (g) learned Trial Judge overlooked the fact that objectors did not give any suggestion to PW-5 and OW-4 advocates engaged by the testator that Rohtas Singh used to prosecute the said two cases on behalf of the testator.

46. As regards circumstance (h) the said contradiction between the testimonies of PW-1 and PW-2 is not so major so as to be fatal to the genuineness of the will Ex.P-1. Will Ex.P-1 was executed on 6.10.89. Examination-in-chief of PW-1 was conducted on 4.5.94. While appreciating oral evidence it needs to be remembered that witnesses forget minute details pertaining to a fact/incident for the reason there is quite often a considerable time interval between the happening of the fact/incident and recording of evidence.

47. As regards circumstance (i) i.e. Rohtas Singh by pleading ignorance about the will Ex.OW4/1 meant that he had no personal knowledge about the execution of the said will by his father. The fact that the will Ex.OW4/1 finds a mention in the will Ex.P-1 does not mean that Rohtas Singh was having personal knowledge about the execution of the will Ex.OW4/1.

48. As regards circumstance (j) suffice would it be to note that a witness cannot be asked questions which are in the nature of an opinion.

49. As regards circumstance (k) suffice would it be to note that scenario of parties trying to overstate or hide their cases is not uncommon. It is quite possible that Rohtas Singh picked up a rumor/gossip that a will is held to be not genuine if testator was residing with the beneficiary at the time of the execution of the will and thus deposed that the testator was not residing with him at the time of the execution of the will dated 6.10.89 Ex.P-1.While appreciating testimony of Rohtas Singh it is to be noted that he is a villager and thus could have easily been influenced/misled by rumors/gossip etc.

50. As regards circumstance (l) suffice would it be to note that the said presumption drawn by the learned trial court is contrary to Exhibits PW5/RX2, PW5/RX3. P-1, P-2, P-4, P-5 and P-6 which show that the testator used to appear in the court around the time of the will Ex.P-1 and the testimony of OW-5 that the testator was in an alright condition even in the years 1989-90.

51. Objectors have miserably failed to prove that the testator never recover after having suffered second paralytic attack and the testator was not having required testamentary capacity at the time of the execution of the will dated 6.10.1989 Ex. P-1. The objectors have tried to hoodwink the court by taking advantage of the fact that the testator suffered a paralytic attack sometime prior to the execution of the will dated 6.10.89 Ex.P-1.

52. On the other hand propounder by leading positive evidence successfully established that the testator recovered after having suffered second paralytic attack and that he was having required testamentary capacity at the time of the execution of the will Ex. P-1.

53. In view of above discussion I hold that the will dated 6.10.1989 Ex.P-1 was duly executed by the testator and thus grant letters of administration in respect of will dated 6.10.1989 Ex. P-1 in favor of the propounder/appellant.

54. The appeal is allowed. Petition filed by the appellant is allowed.

55. Impugned order dated 24.8.2002 is set aside.

56. No costs.

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