

Har Narain Vs. Budh Ram

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Court : Delhi

Decided On : May-29-1991

Reported in : 1991(21)DRJ94

Judge : M.C. Jain, C.J. and; Arun Kumar, J.

Acts : [Succession Act, 1925](#) - Sections 278; [Code of Civil Procedure \(CPC\), 1908](#) - Sections 100

Appeal No. : Letter Patent Appeal No. 2 of 1976

Appellant : Har Narain

Respondent : Budh Ram

Advocate for Def. : Mr. Vohra

Advocate for Pet/Ap. : J.K. Seth,; Bhasker Tewari,; Poonam Chaudary and;

Judgement :

Aran Kumar, J.

(1) This is a Letters Patent Appeal against the judgment dated 30th October 1975 of a learned Single Judge of this Court in F.A.O.No.4 of 1969. By the impugned judgment, the learned Single Judge accepted the appeal of the respondent herein against the judgment of the trial court. The trial court had vide its judgment dated

4-11-1968 allowed the petition under Section 278 of the Indian Succession Act and granted Letters of administration in favor of the petitioner (appellant herein).

(2) The facts in the present appeal are that the appellant filed a petition for grant of letters of administration under Section 278 of the Indian Succession Act for grant of letters of administration with respect to the Will dated 15th May 1964, Ex. P-I. The Will was made by Mahant NarSingh Dass, Chela of Mahant Parshotam Dais, whereby the testator bequeathed all his movable and immovable property in favor of the appellant Har Narain and the respondent Budh Ram in the ratio of half and half each with a rider that if Budh Ram would sell his half share, it would be so only with the consent of Har Narain. It is a registered Will. The testator died on 19th May 1964, i.e. just four days after making and getting registered the said Will. The appellant Har Narain moved the petition under Section 278 of the Indian Succession Act with a copy of the Will attached on 12th March 1965. Caveat/objections were filed by Budhram, the other legatee under the Will who was also arrayed as respondent in the petition. The following objections were taken :-

(A) Execution and validity of the Will was denied ; (b) Mahant Nar Singh Dass's right or authority to execute the Will in respect of properties was disputed. It was stated that the properties belonged to the particular sect and therefore the testator had no right to make a Will qua the same ; (c) That the Will was a forged document ; and (d) That the alleged Will was the result of fraud, collusion and coercion.

(3) The learned District Judge who dealt with the matter, framed the following issues :-

'1. Whether the petitioner is entitled to letters of administration 2. Whether the Will has been duly and properly executed 3. Relief.'

(4) An order was also passed on 13th December 1965 by the trial court that no issue need be framed in these proceedings regarding the right or authority of the testator to make the Will.

(5) The District Judge trying the petition held vide order dated 4th November 1965 that the execution of the Will in the present case satisfied the tests laid down in various judgments of the Supreme Court and the Will being a registered document was held to be a genuine document. therefore, both the issues were decided in favor of the petitioner and the petitioner was granted letters of administration.

(6) Budh Ram being dissatisfied with the said decision filed an appeal in this court which was registered as F.A.O.No.4 of 1969. The learned Single Judge reversed the decision of the trial court and accepted the appeal holding that the Will had not been duly and properly executed. Thus both the issues were decided against the petitioner and the petition under Section 278 of the Indian Succession Act for grant of letters of administration was dismissed. It is against the said judgment of the learned Single Judge that the present appeal has been filed.

(7) At the outset a question was raised about the scope of the present appeal since the case really involves reappraisal of the evidence on record. It was submitted by the learned counsel for the appellant that the scope of a letters patent appeal is much wider as compared to that of a Second appeal under Section 100 of the Code of Civil Procedure wherein appeal lies only on a substantial question of law. It was submitted that there is no such limitation on the powers of the Court while dealing with a letters patent appeal, specially in a case of the present type which is one of reversal of the judgment of the first court. Reference was invited in this connection to a Division Bench decision of this Court reported as *Devi Charan v. Durga Pershad*, : AIR1967 Delhi128 wherein it has been held :-

'IT is now well settled that a Division Bench of a High Court, in hearing a Letters Patent Appeal from a First Appeal, which was heard by a Single Judge of the High Court, can review even findings of fact, particularly when the judgment of a learned Single Judge is not one of affirmance, but one which reverses the judgment of the trial Court. In an unreported decision of the Supreme Court of India, (C.A.No.232 of 1961, decided on 11-1-63) their Lordships of the Supreme Court observed as follows: - A Letters Patent Appeal from the judgment of a learned Single Judge in a first appeal to the High Court is not exactly equivalent to

a second appeal under Section 100 of the Civil Procedure Code, and, therefore, it cannot be held that a Letters Patent Appeal of this kind can only lie on a question of law and not otherwise. The matter would have been different if the Letters Patent Appeal was from a decision of a learned Single Judge in a second Appeal to the High Court. In these circumstances it will be open to the High Court to review even findings of fact in a Letters Patent Appeal from a first appeal heard by a learned Single Judge, though generally speaking the Letters Patent Bench would be slow to disturb concurrent findings of fact of the two courts below. But, there is no doubt that in the appropriate case a Letters Patent Bench hearing an appeal from a learned Single Judge of the High Court in a first appeal heard by him is entitled to review even findings of fact.'

(8) Reliance was also placed on a judgment of the Supreme Court in *Asha Devi v. Dukhi Sao* : [1975]1SCR611 in this connection.

(9) In this case the Supreme Court had occasion to examine the power of a Division Bench while hearing a Letters Patent appeal. The Court observed as under : - 'The only question is whether the power of a Division Bench hearing a Letters Patent appeal under clause 10 of the Letters Patent of Patna High Court or its analogous provisions in the Letters Patent of other High Courts is limited only to a question of law under Section 100 of the Code of Civil Procedure or has it the same power which the Single Judge has as a first Appellate Court in respect of both questions of fact and of law. The limitations on the power of the Court imposed by Sections 100 and 101 of the Code of Civil Procedure cannot be made applicable to an Appellate Court hearing a Letters Patent appeal from the judgment of a single Judge of that High Court in a first appeal from the judgment and decree of the court subordinate to the High Court'

(10) It has been held in these cases that the scope of a letters patent appeal is much wider as compared to Second appeals under Section 100 of the Code of Civil Procedure Particularly in cases of reversal of judgment of a trial court, like the one in hand. the Division Bench is entitled to reappraise the evidence on record and come to its own findings. 97

(11) We are in respectful agreement with the view enunciated in these judgments. In fact this preposition of law has not even been challenged by the counsel for the respondents before us. thereforee, we proceed to examine the evidence on record. It may be worthwhile to notice the legal position in this behalf. This will enable us to decide about the due execution of the Will, Ex. P-1 in the light of the prevailing law. We may first notice the judgment of the Privy Council in *Mst. Gontibai v. Kanchhedilal and others* . It was laid down in that case that the onus probandi lies on the person who propounds the Will and this onus is in general discharged by proof of capacity, of the fact of execution, from which the knowledge and the assent to its contents by the testator will be assumed. But where a Will is prepared and executed under circumstances which excite the suspicion of the Court "it is for those who propound the will to remove such suspicion. and to prove affirmatively. that the testator knew and approved of the contents of the document". Where once it has been proved that a will has been executed with due solemnities by a person of competent understanding and apparently a free agent, that is, when the propounder of the will has discharged the onus; the burden of proving that it was executed under undue influence is on the party who alleges it. Undue influence in order to invalidate a Will, must amount to coercion or fraud. Its existence must be established as a fact and it must also appear that it was actually exercised on the testator. This burden is not discharged by merely establishing that the propounder had the power to unduly overbear the will of the testator. It must be shown that in the particular case the power was exercised, and that is as by means of the exercise of that power that the will was obtained. The discussion which follows about the facts of the case and the evidence and other material on record of this case will show that the propounder of the Will has duly discharged the onus which lay on him while the caveator alleging undue influence has failed to prove the same as a matter of fact. So far as reference has been made in the above observations regarding proof of capacity of the testator we may point out that in the present case it does not arise in view of the specific order of the trial court refusing to frame an issue on this question to which reference has already been made and which has remained unchallenged all along.

(12) Reference has been made to Naresh Charan v. Paresh Chanran. : [1955]1ITR1035(SC) . The Supreme Court has observed in this case that it is elementary law that it is not every influence which is brought to bear on a testator that can be characterized as 'undue', It is open to a person to plead his case before the testator and to persuade him to make a disposition in his favor. And if the testator retains his mental capacity, and there is no element of fraud, or coercion, the will cannot be attacked on the ground of undue influence. Carrying the same concept a little further and putting it in a different manner the Division Bench of the Calcutta High Court in Ajit Chondra v. Akhil Chandra, : AIR1960 Cal551 has observed that the testator may be led but not driven, while making a Will To our mind this expression beautifully sums up the whole concept regarding exercise of undue influence in the matter of making Wills The Calcutta High Court really followed the above referred decision of the Supreme Court.

(13) The land mark decision in (his connection is H. Venkatachala Ivenger v B.N.Thimmajamma & Others : AIR 1959 SC443 which has been quoted in extenso by the learned Single Judge in the impugned judgment and which has been relied upon by both the sides before us This decision lays down certain basic principles for examining due execution of a Will. However, ultimately it holds that it depends on facts of each case and the matter will rest with the Court which decides the issue about due execution of the Will as to how its conscience is satisfied on this question. We would like to refer to the following observations of the Supreme Court in the said decision :- 'It would prima facie be true to say that the will has to be proved like any other document except as to the special requirements of attestation prescribed by Section 68 of the Indian Succession Act. As in the case of proof of wills it would be idle to expect proof with mathematical certainty. The test to be applied would be the usual test of the satisfaction of the prudent mind in such matters. However, there is one important feature which distinguishes will from other documents. Unlike other documents the will speaks from the death of the testator, and so when it is propounded or produced before a Court, the testator Who has already departed the world cannot say whether it is his will or not ; and this aspect naturally introduces an element of solemnity in the decision of the question as to whether the document propounded is proved to be the last will and testament of the departed testator. Even go, in dealing with the proof of wills the

Court will start on the same enquiry as in the case of the proof of documents. The propounder would be called upon to show by satisfactory evidence that the will was signed by the testator, that the testator at the relevant time was in a sound and disposing state of mind, that he understood the nature and effect of the dispositions and put his signature to the document of his own free will. Ordinarily when the evidence adduced in support of the will is disinterested, satisfactory and sufficient to prove the sound and disposing state of the testator's mind and his signature as required by law, Courts would be justified in making a finding in favor of the propounder. In other words, the onus on the propounder can be taken to be discharged on proof of the essential facts just indicated. 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. It is obvious for deciding material questions of fact which arise in applications for probate or in actions on wills, no hard and fast or inflexible rules can be laid down for the appreciation of the evidence. It may,

however, be stated generally that a propounder of the will has to prove the due and valid execution of the will and that if there are any suspicious circumstances surrounding the execution of the will the proponnder must remove the said suspicions from the mind of the court by cogent and satisfactory evidence. It is hardly necessary to add that the result of the application of these two general and broad principles would always depend upon the facts and circumstances of each case and on the nature and quality of the evidence adduced by the parties.'

(14) Counsel for the parties have taken us through the judgment of the learned Single Judge. A special feature of the said judgment which one cannot help noticing is that the it proceeds totally on a one sided approach. Only the negative side of the evidence, i.e. points militating against the due execution of the Will have been noticed and considered, The positive side, i.e. the evidence led from the side of the petitioner appel- lant to support due execution of the Will has neither been noticed nor considered. This approach of the learned Single Judge naturally lead to the finding that the Will had not been duly executed by the testator while possessed of a sound disposing mind.

(15) The properties sought to be bequeathed under the Will consist of (a) a three storey building known as Chhota Ram Dwara which was stated to be worth Rs. 40,000.00 ; (b) Rs. 10,000.00 lying in fixed deposit in the Central Bank of India, Chandni Chowk. Delhi ; and (c) Agricultural land situated in village Kotbund, Tehsil Chhatta, District Mathura, stated to be worth Rs. 4,000.00 .

(16) Notice of the petition was issued to the general public through citation in the press as well as to Budh Ram respondent the other benefi- ciary under the Will. Two persons filed objections in response to the said notice. One was Hari Dass, Chela of Mahant Kewal Ram, according to whom the entire properties subject matter of the Will belonged to the sect and the testator had no right or power to bequeath them through a Will. He stated that Budh Ram was the only Chela of the testator and he became a Mahant after the death of the testator, thereforee, he was entitled to manage the properties It was further stated that the properties passed from Guru to Chela and, thereforee, the Guru or the Mahant had no right to treat them as his personal properties and make a Will regarding the same. The

Will was further stated to be a forged document. The Mahant had only a right to nominate a Chela as the successor otherwise the Chela had to be elected by the brotherhood. The propounder of the Will neither belonged to the sect nor was he the Chela of the deceased testator. It was also stated that according to the custom of the sect, in case the succession fails, the properties revert to the principal gaddi at Kherapa in Jodhpur of which the objector claimed to be the Mahant. No appeal was filed by the said objector Hari Dass against the judgment of the trial court nor did he appear before the learned Single Judge or in the preseat proceedings. thereforee, the objections of Hari Dass need not detain us any further.

(17) This leads us to the objections of respondent Budh Ram. The objections of Budh Ram have already noticed by us herein before, Much stress was laid by Budh Ram on the plea that the properties under the Will belonged to the sect bhek and could not be bequeathed by way of a Will. He further claimed to be a disciple and chela of the deceased. It was also stated that after the death of Mahant Nar Singh Dass, the objector was elected as the Mahant, according to the custom and practice of the sect to which the deceased belonged while the propounder/appellant neither belonged to the sect nor was he a disciple of the deceased.

(18) In view of the order of the trial court dated 13-12-1965 which was never challenged by either side and which thus became final and binding on the parties, we need not go into the question of the right, authority or power of the deceased testator to make a Will regarding the properties subject matter of the Will. The present proceedings are confined to the question of dluc execution of the Will alone. We have been informed by counsel for the parties that separate proceedings are already pending between them on this question. This leaves us only to consider the issues framed in the present case,

(19) The principles of law regarding testing the due execution of a Will have been well defined and laid down in various judgments of the Supreme Court as well as of the High Courts. In fact the counsel for the parties rely on the same judgment in support of the stand taken by them reapectively. In this connection the land mark decision of the Supreme Court reported in : AIR 1959 SC443 (which has already

been referred to) has been heavily relied upon by counsel for both the sides.

(20) In the background of this law, we have to consider the question as to whether the Will has been duly and properly executed and if the Will is proved to be duly and properly executed, the answer to the first issue, i.e. Whether the petitioner is entitled to Letters of Administration, only follows and there is hardly any ground to refuse the same when the Will is to be held to be duly executed.

(21) The learned Single Judge held the above issue against the pro- pounder of the Will, i.e. the appellant before us mainly on account of following reasons which according to him gave rise to suspicions about to the due execution of the Will :- 1. The testator was seriously ill for more than a week before his death and could not go to the registration office personally to get the Will registered nor to the bank in connection with his fixed deposit receipt of Rs. 10,000.00 . He was aged more than 87 years and actually died within four days of the alleged execution of the Will. According to the learned Single Judge 'this circumstance will Indicate a great feebleness of the body and mind of the deceased and it is an important circumstance to cast suspicion. of his testamentary capacity'. In support of this, the learned Single Judge has relied upon the evidence of Public Witness -2 Dr. Vasudev Gupta, who was stated to have visited the deceased on 12th and 13th May 1964 to treat him and who found the deceased to be unconscious with Oedema of the whole body and dilation of the heart. RW-5 Mahant Prem Dass stated that the deceased was unconscious for about a week before his death and that the deceased was a literate man and could sign his name. RW-6 Abhe Dass and RW-7 Mahant Sewa Ram also made statements saying that the deceased was unconscious for about a week before his death. From this the learned Single Judge concluded that the deceased being over 87 years of age and being so sick for about a week before his death showed that his mental faculties would be damaged and as such the deceased could not have a sound disposing mind at the time of making of the alleged Will. 2. The testator was the Mahant and, therefore, head of the religious institution and admittedly a literate person. therefore, affixation of the thumb impression by him on the Will in question was a highly suspicious circumstance. The veracity of the statement of Public Witness -2, who was the Sub Registrar who registered the Will at the residence of the testator was

doubted. This is what the learned Single Judge had to say in this connection :- 'It is understandable if the testator had both signed and thumb marked the will but it is impossible to conceive that an educated man like the testator who was the head of the religious institution and had been signing documents, would reconcile himself to merely putting his thumb impression on an important document like will in case he had the mind and will to execute it. Thumb impressions can easily be obtained by another person even when the executant be lying unconscious to be not in possession of sound disposing mind. The absence of signatures on the will in the circumstances of the case throws a great doubt on the testamentary capacity of the deceased. 3. Mahant Har Narain. the propounder of the Will was a convict for murder for which he had undergone sentence. therefore it was felt by the learned Single Judge that in his view 'such a person' would scarcely be object of bounty by a pious person by in respect of religious properties. 4. Harnarain exercised a dominant influence in preparation of the Will, which according to the learned Single Judge, was obvious. It was further felt by the learned Single Judge that the provisions of the Will were most unnatural, improper and unfair and did not reflect the mind of the deceased. 5. Ram Dwara was a religious institution which the deceased had inherited from his guru. It was felt to be highly improper for the deceased to make a bequest of the Ram Dwara treating the propounder of the Will and the objector like his sons. It is further observed by the learned Single Judge that if the deceased testator wanted to put some check or provide for supervision over his disciple/chela in the matter of administration of the properties of the sect, he could have appointed a Committee of management rather than appointing a murderer and life convict to control his successor. Normally the religious properties ought to have been allowed to be succeeded to by the succeeding Mahant. 6. The execution of the special power of attorney. Ex. P-2 on 16th May 1964, i.e. the day next to the date of the execution of the Will was felt to be a part of a scheme of Harnarain to get hold of the entire properties of the testator. therefore, it was felt that the Will was of Harnarain and not that of the testator. In view of the above observations the learned Single Judge felt no doubt in his mind that the Will had not been executed by the deceased and that the Will did not reflect his mind.

(22) Coming to the evidence led by the propounder of the Will in support of his case we find that Public Witness -1 Lal Chand is a Clerk from the office of Sub

Regittrar, Delhi which has been produced to prove the due registration of the Will dated 15th May 1964. He has given particulars of the registration No., date etc. on the basis of the original register brought to the court by him which has been stated to have been signed by the then Sub Registrar at the relevant portions. Public Witness -2, S.P. Suri was the Sub Registrar who registered the Will. He has slated that the Will bad been presented before him at the residence of the testator at 2/32, Bagh Diwar, Delhi. According to the witness the deceased was sick at that time and there is an endorsement on the Will that on account of his illness the Will was produced by the testator at his residence before the Sub Registrar The witness has also stated that the testator was in his senses at that time. The contents of the Will were read over to the testator who accepted them to be correct and he thumb marked at places *C' and 'D' when the Will was produced for registration. The Sub Registrar was assertive while saying that he felt satisfied that the testator was in sound disposing mind at that time. He has also stated that the witness attested the endorsement in, his presence and in the presence of the testator. Also that the testator had affixed his thumb mark in the presence of the attesting witnesses.

(23) The witness has withstood lhe cross examination there is no reason to doubt the veracity of the statement of this official witness who had la discharge of his official duties registered the Will. The address where the witness stated have gone for this purpose is the correct address where she deceased was admittedly residing during his last days and in fact where he always used to reside.

(24) Public Witness -4 in Gauri Shankar who is an attesting witness of the Will, ExP-1 This witness claimed to be knowing the. testator for over 40 years before his death and was a frequent visitor to the deceased. He stated that :he deceased had Intended to make a Will and he often talked to this witness about the same. The witness has also started that the testator wanted to give his entire property to Har Narain but she latter persuded him to give some property to Budh Ram. On his persuation the testator consented to divide the property in two parts and to give half and half to both of them. The Will was made on 15th May 964 ExP-I was the said Will The Will was written in the preseace of the witness by Nand Lal Grover at the instance of the testator. The testator was in sound disposing maid and good

health at time of execution of the Will. The contents of the Will were read out to him and after admitting the same to be correct the testator affixed his thumb impression. He has given the names of certain other persons at the time of execution of the Will which included Ram Kumar the other attesting witness. He has identified his signatures on the Will, Ex P-i. According to the witness he and Ram Kumar attested the Will in the presence of the testator. The Will was got registered by the testator on the same day before the Sub Registrar Delhi. It was in the evening. The witness has stated that he was present when the Will was got registered. The Sub Registrar came to the residence of the testator. The Will was presented to the Sub-Registrar by the testator himself, The contents of the Will were read out to the testator who admitted the same to be correct and thereafter he thumb marked, the Will in the presence of the witness. The witness stated that one Ram Gopal Advocate was also present at that time who had identified the testator before the Sub Registrar.

(25) In cross examination the witness has stated that he knew even Mahant Purshotam Dass who was the guru of the testator Mahant Nar Singh Dass. The witness has stated in cross examination that the testator was ill for about one month before his death. The witness has further stated that he never had any talk about the contents of the Will with the testator before he attested the Will. He had gone to the residence of the testator when he received a message to reach that place, on 15th May 1964. In fact according to the witness Budh Ram the objector had gone to call him for purposes of attestation of the Will. The witness has repeated that the Will was written in his presence and that the other attesting witnesses were also present in the Ram Dwara when he reached there. According to this witness the testator was in a lit condition when the Will was executed and thumb marked by the testator. These lines are significant in his statement : 'He could use his hands though these were shaking at that time. I did not see his hands shaking on any earlier occasion I did not notice whether his hands were shaking previously or not'.

(26) The testimony of this witness is quite clear, positive and assertive. There is no reason to doubt the veracity of the statement of this witness who was an old acquaintance of the testator and who in fact knew the guru of the testator. Another

significant point 211 his statement is that Budh Ram. the objector had himself gone to call him for purposes of attestation the Will on the fateful day of 15th May 1964 Then this witness has stated the hands of the deceased were shaking at the time of the execution of the Will, it supports the Explanationn of the appellant, the propounder of the Will that the Will could not be signed by the testator for this reason and it had to be thumb marked. Merely because a testator is unable to put his signatures on the Will does not mean that the execution of the Will has to be doubted. What is important is that the intention of the testator to make a Will should be clear and unequivocal and a factor to impress this can be signstures, thumb impression or even some mark as held in some of the old cases.

(27) Then we come to Public Witness -, Ram Swamp who stated that he was present when the testator executed the Will in question. According to the wilness the scribe read over the Will to the testator who admitted the contents there of to be correct. The will was thumb marked by the testator in the presence of Gauri Shankar and Ram kumar, the attesting witnesses who attested the same by signing the Will in the presence of the testator. The witnesses have further stated that Shri Ram Gopal, Advocate who identified. the testator before the Snb Registrar had come to the house of testator along with Sub Registrar who had come for the purpose of registering the Will. The testator was in his senses and admitted the making of the Will before the Sub Registrar. The Will was also thumb marked by the testator in the presence of the Sub Registrar and the registration endorsement was signed by PW-4 Gauri Shankar and the advocate Ram Gopal. Ram Gopal was already dead. In cross examination the witness stated that be knew the testator for 10 years and he used to visit him 3/4 times a month. The testator was a literate person and could write and sign. He is also stated to have lived in Ram Dwara and continued to live as a tenant there. According to the witness shortly before his death the testator had fever and loose motions but he was able to move about. He knew Ram Gopal, advocate even before. The Will Ex.P-1 was written in his presence and Gauri Shankar, Hari Shankar, Ram Kumar and Jagdish were ptesent at the time when the Will was executed. Har Narain used to reside with the testator It is further stated by the witness that the testator was telling the scribe about what was to be written in the Will.

(28) This brings us to the statement of the petitioner Har Narain as PW-1 in support of his case. He has stated that he knew the deceased testator for the last 50 years. According to him the testator died at the Bagh Diwar house (Ram Dwara) in May 1964 at the age of about 90 years. He has referred to the Will, Ex P-1 made by the testator. He says that he was present at the time of execution of the Will as well as the time of its registration. The deceased was in his full senses and when he made the Will. He and the attesting witnesses signed the Will in the presence of one and the others at the same sitting. He has stated that Ram Gopal, advocate who had identified the deceased before the Sub Registrar had died. Then he refers to the power of attorney executed by the deceased on the day next to the execution of the Will. The power of attorney is Ex P-2 and is also thumb marked by Mahant Nar Singh Dass. This document is stated to have been drafted by one Hari Chand, Advocate who had also died in the meanwhile. The witness has further stated about the agreement between him and Budh Ram, respondent/objector which is ExP-3. The scribe of Ex. P-3 and the attesting witnesses were produced as Public Witnesses. In cross examination the witness has stated that Mahant Nar Singh Dass, the testator was his guru and the relations between them were that of guru and chela. He admitted that there was no ceremony about his appointment as chela nor there was any writing about it. According to this witness the testator was on sick bed about 15 days before his death. The deceased was suffering from dysentery and also had fever. The deceased had expressed his intention to make the Will a day before the execution of the Will. He has denied the suggestion that during the last few weeks the testator had lost consciousness and was not in his senses. He has not denied that Mool Chand was real brother's son. However, the suggestion that Mool Chand had forced the deceased to make the Will was denied. The witness goes on to say that the scribe was present when the deceased thumb marked the Will. The name of the scribe is given as Nand Lal. The witness claims to have drafted the Will during his illness. The suggestion has been thrown to the witness that the agreement Ex.P-3 was got executed by fraud or that the testator was made to sign a blank piece of paper. He admits having been convicted for murder and having served the sentence.

(29) ' Certain things clearly emerge from this statement. There is no suggestion of fraud, coercion or undue influence having been exercised by the witness in execution of the Will by the deceased. The witness is quite positive in his assertion that the deceased was in sound disposing mind the Will was executed by the testator. He was present throughout the execution and registration of the Will. In fact the witness was looking after the deceased during his last days and even much prior to that. The witness has not been asked any questions as to why the Will was thumb marked by the testator and not signed by him.

(30) The other evidence which we will discuss herein after shows that the statement of this witness is worthy of credence. It will be seen from the evidence which follows that the deceased testator had since long strained relations with Budh Ram who claims to be his duly appointed chela. Budh Ram was not even allowed to enter the Ram Dwara. As against Budh Ram, the petitioner appellant was the only person who looked after the deceased for a long time and till his death. It is but natural that in the condition in which the testator was, any person would like to give his property to one who serves him during his last stage.

(31) So far as the oral evidence led on behalf of Budh Ram objector is concerned, RW-2, Dr. Vasudev Gupta has stated that he had visited the testator at Ram Dwara, Bagh Dewar to treat him. He found oedema of the whole body and dilation of the heart of the patient. The witness has further stated that he found the patient unconscious when he went on his first visit on 12th May 1964, On the next day also when he visited the deceased, he found him in the same condition and advised his removal to the hospital.

(32) Then RW-5, RW 6 and RW-7, who claim to be the Mahants, have been examined by the objector mainly to show that the deceased was not in a fit mental condition at that time when the Will is alleged to have been executed. A reference to the statements of these witnesses will show that they have contradicted each other on the state of consciousness of the deceased during a week before his death which fact demolishes the entire evidence of these witnesses regarding the mental condition of the deceased during the last week before his death. Of course RW-2, i.e. Dr. Vasudev had no reason to tell a lie nor do we disbelieve his

statement but his statement alone cannot lead to the conclusion that on the date when the Will was made, the deceased was unconscious. Rather it helps to show that the deceased was in such a condition of health that he was unable to move about and that is why the entire execution and registration of the Will took place at his residence itself.

(33) The respondent has also produced RW-3 Ram Kumar who is the other attesting witness to the Will and RW-4, Nand Lal, the scribe of the Will. The fact that these important witnesses have been produced by the respondent obviously shows that they have been won over by him. Experience has shown that the scribes generally and the attesting witnesses sometime can play havoc with a Will and can stand in the way of the solemn wish of the deceased as expressed in his testament being fulfilled. This is what RW-3, the attesting witness and RW-4, the scribe have tried to do in, the present case. RW-3 Ram Kumar admits that he had attested the Will ExP-1 and he has identified his signatures thereon. However, he goes on to say that Har Narain, the petitioner and his nephew Mool Chand had brought the Will to him at his shop at Nai Sarak and Mahant Nar Singh Dass, i.e. the testator was not present when he put his signatures on the Will. According to the witness the Will had neither been thumb marked nor executed in his presence and when it was brought to him it did not bear any thumb mark of the testator or the signatures of any other witness.

(34) In cross examination he admits that when he signed the Will he knew that the document which he was signing was the Will of Mahant Nar Singh Dass. Strangely he never bothered to enquire from Mahant Nar Singh Dass even later as to whether he had sent the Will for his signatures, which fact stands admitted during the cross examination. He admits having signed the Will on 15th May 1964 at about noon time. 15th May is the date on which the Will was made. According to all the witnesses the Will was executed at about 9 or 10 am. therefore, it is impossible to believe the statement of this witness that the Will was not signed or thumb marked by the testator when it had been brought to him for his signatures as an attesting witness. This witness further proved so to be a liar when he denies having had any correspondence with Bodh Ram objector. Ex.P-5 to P-10 are the letters placed on record written by this witness to Budh Ram. Denial by this

witness of the said documents is obviously a lie because the letters of Budh Ram which are Ex.P-11 to P17 are admittedly written by Budh Ram to Ram Kumar and the address on those letters is the same as that of this witness.

(35) RW-4 is Nand Lal who is the scribe of the Will Ex P-1. In spite of his effort to support the objector, this witness has made certain admissions which go to establish the case of the petitioner regarding the due execution of the Will. This witness has stated that Mahant Nar Singh Dass gave him instructions for scribing this Will and the Will was thumb marked by the said Mahant Nar Singh Dass. Thereafter in order to demolish the Will the witness goes on to say that no signatures of the witnesses were obtained on the document. From this statement the case of the objector that the testator was unconscious or did not have a sound disposing mind while executing the Will is totally demolished. His own witness is saying that he scribed the Will according to the instructions of the testator and that the testator thumb marked the document in his presence. Further a significant admission made by this witness in favor of the petitioner appellant as 'the testator described himself as literate but insisted on thumb marking Ex. P-1 as he said that his hand was trembling'. The much needed Explanation as to why the Will was thumb marked by a literate person comes through the statement of objector's own witness. The Explanation about the thumb marking of the Will coming from objector's witness fully justifies the thumb marking of the Will in spite of the fact that the deceased was a literate person and totally removes any doubts or suspicion or the allegation of unnaturalness in the Will being thumb marked instead of being signed. This witness has also totally demolished the case of the objector regarding the Will being procured by the propounder petitioner or having been the result of exercise of coercion or undue influence. Since the witness has stated in clear terms that he drafted the Will according to the instructions of the testator, the transaction is duly recorded in the register of scribe. This witness has clearly admitted in his cross examination that 'the person who described himself as Mahant Nar Singh Dass was in his senses. The evidence of this witness leaves no doubt in our mind about the due execution of the Will and the Will being the result of free and sound disposing mind of the testator,

(36) The objector has appeared as his own witness as RW-8. He claims to be duly appointed chela of Mahant Nar Singh Dass. According to him Ram Dwara had been in existence for more than 100 years. The witness has repeated the same story about the testator being unconscious for about 8/10 days before his death. He denies the execution of any Will by Mahant Nar Singh Dass. In order to create confusion about the execution of the Will at Ram Dwara by the testator, this witness has stated that no deed or petition writer or Sub Registrar came to the Ram Dwara during the last days of Mahant Nar Singh Dass. According to him the testator never thumb marked any document. About his signatures on Ex. P-3, i.e. the compromise between him and Har Narain the propounder of the Will, his explanation is that he signed the same on false representation. He also says that contents of Ex. P-3 were not read over to him though he admits that the document was scribed in his presence. He alleges that the petitioner leads a secular life and resides with his family in another house in Kucha Ghazi Ram. However, when cross examined on this point, he admits that the petitioner is not married. This witness admits that the testator was about 85 years of age at the relevant time. He admits that letters P-11 to P-17 were written by him to Ram Kumar but says that Ram Kumar to whom these letters were written is different from Ram Kumar who is the attesting witness of the Will. We have already commented on this statement and held that this is totally unbelievable. This is the same Ram Kumar.

(37) A reference to letters Ex. P-11 to P-17, admittedly written by the objector to Ram Kumar, clearly shows that the objector had since long stained relations with the testator Mahant Nar Singh Dass, so much so that the Mahant was not even prepared to allow his own chela, i.e. objector Budh Ram, to enter the Ram Dwara where Mahant Nar Singh Dass used to reside. Budh Ram was virtually begging of Ram Kumar through these letters to at least ensure by using his good offices with the Mahant to allow entry of Budh Ram in the Ram Dwara so that some patch up with the guru could be worked out by Budh Ram.

(38) Replies to these letters which are Ex. P-5 to P-10 from Ram Kumar are equally significant in which Ram Kumar has shown his efforts to arrange a patch up between the Mahant and his chela Budh Ram and his failure to do so. These letters clearly show that the Mahant who was the guru of Budh Ram was

extremely annoyed with Budh Ram and was not prepared even to see his face. In these circumstances it is quite reasonable to expect from Mahant that he would not like to leave anything to Budb Ram. This also shows that the statement of Mahant Nar Singh Dass to the effect that it was on account of his persuasion that the testator agreed to give half of his properties to Budh Ram becomes credible. This also justified the clause in the Will that Budh Ram with whom guru. It was already so much annoyed could not have a free hand with respect to dealings qua his half share of the properties. It appears that the testator felt that Budh Ram may sqander away his half share and though he was persuaded to give haf share to Budb Ram he did not want to give opportunity to Budh Ram to dispose of the same and he wanted it to be preserved.

(39) While dealing with the documents on record. Ex P-3 dated 11th August 1964 is also very significant and important. This document is an agreement Budh Ram has admitted the genuineness and validity of the Will It was further agreed by both the parties that they will share the properties half and half. The document has been scribed by Wasna Ram, Public Witness -6. Both the attesting witnesses to this documents have also been produced, (they are PW- 10 and Public Witness - 11 Stamp paper for the agreement was purchased by Budh Ram himself Public Witness -3 is the Stamp Vendor who sold that stamp for execution of this document to Budh Ram. This witness has stated with reference to his relevant stamp vendor's register, that entry at Sr. No 7034 is regarding sale of stamp paper worth rupees 1.50 to Budh Ram for purpose of this agreement in favor of Har Narain. The witness has also referred to the signatures of Budh Ram against the said entry in his register and a copy of the entry has been produced as Public Witness 3/1. Budh Ram has himself admitted the fact that this document was executed in his presence by a scribe. The only thing he says that the documents is in Urdu and he can not read or write urdu. In the face of the overwhelming evidence about this document its validity cannot be disputed. We find that Budb Ram executed this agreement with his free will and he accepted in this document the validity and execution of the Will, Ex. P-1.

(40) EX. P-2 is the special power of attorney executed by the deceased testator in favor of Har Narain, the petitioner, i.e. the propounder of the Will. Public Witness -

5 and Public Witness -8, S/Shri Jagdish Prasad and Pt. Megh Raj are the attesting witnesses of the said document. This document is also thumb marked by the deceased and the Explanationn regarding thumb marking of the Will holds good for thumb marking of tbil document also by the deceased.

(41) In view of the aforesaid oral and documentary evidence on record and in view of the further fact that the Will in question is a duly registered Will, we have no doubt about the due execution of the Will while the testator was possessed of a sound disposing mind.

(42) Public Witness -4, Gauri Shankar is one of the attesting witness to the Will Ex.P-1. He has stated that in fact Budh Ram objector bad called him for purposes of being an attesting witness to the Will and he bad accompanied Budb Ram to the Ram Dwara where the Will was executed. No suggestion has been put to the said witness in his cross examination that the testator was not of sound disposing mind at the time of the execution of the Will or that be was unconscious at that time. Similarly no such suggestions have been made to the Sub Registrar Public Witness -2 who registered the Will. Public Witness -5 Jagdish Parsad who is really anattesting witness to the power of attorney, Ex. P-2 has in his cross examination proved the execution of the Will also. No suggestion has been put to him on coercion or undue influence or unconscious state of mind of the testator. Similarly Public Witness -9 Ram Sarup has stated that be was present at the time of execution of the Will but there is no suggestion to him about the testator being unconscious at that time or not possessing a free disposing mind.

(43) On the contrary RW-3 Ram Kumar who is the most important witness of the objector has been proved to be a liar. Ex P-11 to P-17, the letters admittedly written by objector Budb Ram to Ram Kumar bear the address of this very witness and in spite of this be has denied having received those letters and has tried to create a confusion that the addressee of these letters may be a different Ram Kumar. He has denied letters Ex. P-5to P-10 written by him to Budh Ram. A reading of these letters together connects them with each other and, therefore, obviously this witness is telling lies. The other star witness of the objector, i.e. RW-4 Nand Lal, the scribe of the Will has in fact proved the case of the petitioner in his

effort to disprove the Will. The witness little realised that the points on which the petitioner was needing support to prove his case, were really proved by him, i.e. the possession of sound disposing mind by the testator at the time of execution of the Will and the Will having been scribed by him on the instructions of the testator and the Explanation why the Will was thumb marked by the testator. In fact the execution of the special power of attorney. Ex. P-2 by Mahant Nar Singh Dass in favor of Har Narain shows that he wanted to give effect to the Will in his life time itself by permitting Har Narain to start the management of the properties by virtue of special power of attorney.

(44) Mr. O.N Vohra, learned counsel for the objector has laid much stress on the fact that Har Narain was an ex-convict for murder having served a sentence for this and, therefore, was not a person deserving to be appointed to manage the properties of a religious sect or to inherit the same. The learned Single Judge has also felt that such a person could not be entrusted with these responsibilities and if there was no trustworthy disciple to succeed, a Managing Committee ought to have been appointed for the properties of the sect. However, this argument does not impress us in view of the fact that Har Narain had faithfully served the testator for 40 years-as against the objector on whom the testator had not trust and in fact who had been turned out by the testator and the testator was not even prepared to allow him to enter the Ram Dwara. So far as the question of light or authority of the testator to make a Will regarding the properties subject matter of the Will is concerned, the game is not before us and, therefore, we need not go into it. In the proceedings under Section 278 of the Indian Succession Act, the Court is only concerned with the due execution of The Will. The question to title has to be settled in independent proceedings and it was rightly decided by the trial court at the threshold that this question could not be the subject matter of the present proceedings and no issue was allowed to be framed on this question.

(45) The learned counsel for the objector has tried to build an argument that the Will pertains to properties for which no Will could be made. therefore, according to him the Will has been procured by Har Narain to suit his own interest devouring religious properties. This argument is not tenable in the face of the evidence on record which we have accepted and which shows that the Will is the result of free

and sound disposing mind of the testator. It has further been urged on behalf of the respondent that the statement of the respondent to the effect that the testator could not make a Will regarding the properties subject matter of the Will is against his own interest because by virtue of the Will at least he gets half of the properties. Again this argument is not tenable in view of the fact that a closer look at the disposition under the Will shows that what Budh Ram has got is also hedged and he is not free to deal with the same the way he may like to. For disposing of his half share of the properties he has to again fall back upon Har Narain. This position is actually admitted by the respondent when he seeks to argue that he is really not getting anything under the Will. It has further been argued that in the Will the testator has described himself 'gaddi nasbin' while he goes on to say that the properties mentioned in the Will are his absolute properties -According to the submission on behalf of the respondent this is an inconsistent stand which militates against the genuineness of the Will. We do not agree. Recital in the opening part of the Will about the testator being gaddi nashin is in the context of establishing his identity. The language of the Will clearly shows that it is not that of a common man. The language is stock language of the scribes and, therefore, the inconsistency sought to be made out, cannot be attributed to the testator. Then the counsel for the respondent urges that the Will is a most unnatural document as no sadhu would think of giving away religious properties like this. The answer to this is the due execution of the Will as per instructions and desire of the testator. Probably the testator thought that he could make a Will regarding the properties in question. Moreover, as we have already stated, this argument really relates to the power of authority of the testator to make the Will which we need not go into. We have been told that the litigation about the right to make a Will is already pending in the Civil Court and this question will be decided more appropriately there,

(46) Mr. Vohra, learned counsel for the respondent has further argued that the show of something being given to Budh Ram in the Will is part of a sinister design of Har Narain to give him nothing as well as to keep him on his side by showing that he is getting half of the property, Budh Ram being a simpleton. Sinister design attributed to Har Narain is that by virtue of the Will he was taking away the property which really belonged to Ram Dwara, i.e. the religious sect for which he would have to face the entire sect. The sect would have opposed such a move

and, therefore, he wanted to keep Budh Ram, officially appointed chela of the testator Mahant Nar Singh Dass, on his side. According to Mr. Vohra, Har Narain felt that if Budh Ram was on his side, he will be able to face the members of the sect and this will help in siphoning away the sect properties for his personal ends, Budh Ram did not fall in the trap and stood up against Har Narain. This argument seems to be too far fetched and, therefore, does not impress us at all. The real question about the right of the testator to make a Will, will be decided in the appropriate civil forum. The other members of the sect and some of them claiming to be Mahants have already initiated litigation in this behalf and mere Budh Ram being on the side of Har Narain would not have made any difference. Here we may mention that Budh Ram has in any case burnt his boats while entering into the agreement/compromise. Ex P3. His Explanationn about the agreement that it was under undue influence or coercion or that he did not know about the contents thereof, is wholly untrust worthy and false.

(47) According to Mr. Vohra, the most important suspicious circumstance about the Will is that a Mahant who dedicated a lifetime in pursuit of religious order would never give away the religious properties in favor of a secular man, and was an ex convict who had suffered a life sentence. Such a saintly man could not make such a Will. Counsel goes on to argue that Budh Ram was not present at the time of execution of the alleged Will, otherwise he would not have let this happen. While arguing this the learned counsel forgets that if Budh Ram was so concerned about his guru, i. e. the Mahant. why was he not with his guru during his last days? Secondly, there is nothing wrong in an ex convict sincerely serving a religious head. May be this was his penance and he served the Mahant selflessly which resulted in the Mahant developing a special affection for him Infact the argument of Mr. Vohra, if accepted, would mean that a convict should be condemned for all times to come and should never have a chance to rehabilitate himself in the society. Such a negative approach does not impress us.

(48) The above discussion completely answers the various suspicious circumstances found by the learned Single Judge about the due execution of the Will and for which he held that the Will was not a result of sound disposing mind of the testator and had not been duly executed. With respect, we feel that the learned

Single Judge has tried to see more than what meets the eye. The approach of the learned Single Judge was totally directed towards negative side which led to the positive side being completely ignored. We do not find any suspicious circumstances about the execution of the Will.

(49) On the aspect that the testator died within four days of the execution of the Will in the present case and would this become such a circumstance as to render the due execution of the Will suspicious, Mr. Seth relies on *Beni Chand v. Kamla Kunwar* : [1977]1SCR578, wherein the testatrix an old woman of 80 years made a Will 5 days prior to her death bequeathing her extensive properties in favor of her only son's wife and children to the exclusion of her another son and their progeny. Like in the present case the objection to the due execution of the Will was that the lady was in an unconscious state of mind at the time the Will was said to have been executed. The Supreme Court turned down the objection and found nothing wrong in the Will having been executed 5 days prior to the death of the testatrix. The Will was otherwise found to have been executed while the testatrix was possessed of a sound disposing mind.

(50) In the present case great stress has been led from the objector's side on the fact that the Will is thumb marked while the testator was a literate person who could sign the document. As to why the Will was thumb marked, has been explained in evidence and the Explanation is that the hands of the witness were shaking at the relevant time. In this context reliance has been placed on *Brij Mohan Lal v. Girdhari Lal*, : AIR 1978 SC1202 wherein the testatrix was a woman of 70 years of age but was proved to be having a sound disposing mind though she was incapable of signing her name at the time of execution of the Will. The Court found nothing wrong with the execution of the Will. In the said case the testatrix was even able to sign the same. The expression of free Will regarding disposing of the assets is the most important factor and if the Court is satisfied about this, mere failure to sign will be immaterial.

(51) Mr. Seth then relied on *Indu Bala v. Munindra Chandra* : [1982]1SCR1188. This judgment reiterates the same legal principles as laid down in the authorities referred to hereinbefore.

(52) Reliance has also been placed on *Kishan Singh v. Nichhattar Singh*, wherein the testator was a deaf and dumb person and had cancer of the back and head. It was held that there is no legal bar to will away the property by a person who is deaf and dumb. The testator who was dumb and deaf made a registered will in favor of the defendant who was mentioned as his sister's son therein and the will was scribed by an Advocate and the same was written on the basis of the questions and answers, which were put to the Principal of the School for the Deaf and Dumb who answered the same, in writing, after getting the answers from deceased testator by putting the necessary signs to him in view of the question asked by him, and even after writing the will, a certificate was obtained from the Principal who certified that the contents of the will had been explained by him to the testator by signs and gestures, and the testator had thumb marked the same in token of its correctness and the Registrar who registered the Will was also produced and he had registered the will after being satisfied from the expert, viz. Principal of the School for the Deaf and Dumb, and after getting the necessary certificate. It could not be said that the Will was not a valid document. It follows that a testator of a will does not have to be found to be in perfect state of health to have his will declared valid. The only criteria is that the testator was capable of understanding the nature of his act, which was fully proved in this case. Further, the mere fact that the propounder of the will was present at the time of the execution of the will alone is not sufficient to doubt the genuineness of the will.

(53) Another point raised on behalf of the objector to suggest presence of suspicious circumstances and in order to destroy the Will is that the propounder was present throughout execution and registration of the Will. Apart from referring to the facts of the case in order to show that mere presence of the propounder at the time of execution of the will would not make any difference, Mr. Seth, learned counsel for the appellant has relied on *Malkani v. Jamadar*: AIR 1987 SC 767. It was held in that case that the genuineness of the Will cannot be doubted only on account of presence of the beneficiaries under the Will and even if they are taking active part in the execution of the Will. If the facts and circumstances of the case were sufficient to satisfy the conscience of the Court otherwise, the mere presence of the beneficiaries will not make any difference.

(54) The crux of the entire law on the subject is that the court has to be satisfied as to whether the testator was possessed of a sound disposing mind while making the Will and thereafter the question of due execution including the attestation of the Will follows. We find in the facts and circumstances of the case that the deceased had a sound disposing mind and he was quite conscious of what he was doing when he executed the Will and that the Will was prepared according to his instructions. We also hold that the execution of the Will has been duly proved. The fact that the deceased was a literate person and in spite of this the Will is thumb marked does not demoralize the Will since we find the Explanation for thumb marking as good and sufficient to justify the same. The Will has been executed at the place of normal abode of the testator in the presence of various persons including an advocate who identified the testator and in the presence of the attesting witnesses before whom the testator thumb marked the Will and who attested the same is the presence of the testator after the testator had been read out the contents of the Will and he had accepted the same to be correct according to his instructions which were given to the scribe of the Will in the presence of these persons. All these persons have appeared as witnesses. Further the Will has been registered and the Sub Registrar who has appeared in this connection is a totally disinterested witness. We have no reason to disbelieve him. We are thus fully satisfied about the due execution of the Will.

(55) Accordingly we allow this appeal and set aside the judgment of the learned Single Judge dated 30th October 1975 thereby restoring the judgment dated 17th October 1968 passed by the District Judge, Delhi allowing the petition of the appellant under Section 278 of the Indian Succession Act. Both the issues framed in this case are decided, in favor of the petitioner/appellant and he is held to be entitled to have the Letters of Administration of the estate of Mahant Nar Singh Dass, deceased with a copy of the Will annexed, subject to his complying with the conditions imposed in the judgment of the District Judge dated 4-11-1968.

(56) In the circumstances of the case we leave the parties to bear their own respective costs.