



AFR

Court No. - 36

1. Case :- SPECIAL APPEAL No. - 961 of 2004
Petitioner :- Dinesh Chandra Pandey
Respondent :- Brijesh Chandra Pandey & Others
Petitioner Counsel :- Ramesh Upadhyaya, Sunil Kumar Srivastava, V.C. Tripathi
Respondent Counsel :- Dhananjai Prasad, Dhru Prasad, Dhruv Narayan, S.C.

2. Case :- SPECIAL APPEAL No. - 79 of 2009
Petitioner :- Dinesh Chandra Pandey
Respondent :- Brijesh Chandra Pandey & Others
Petitioner Counsel :- Ramesh Upadhyaya
Respondent Counsel :- Dhananjay Prasad, Dhruva Narain

3. Case :- SPECIAL APPEAL No. - 80 of 2009
Petitioner :- Brijesh Chandra Pandey & Another
Respondent :- Dinesh Chandra & Another
Petitioner Counsel :- Dhananjay Prasad
Respondent Counsel :- Ramesh Upadhyaya

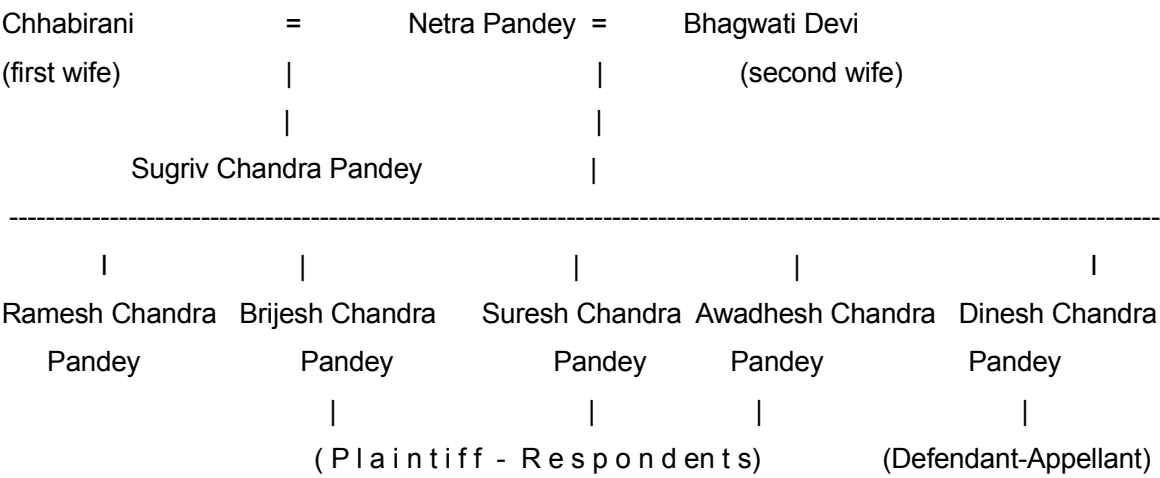
Hon'ble Yatindra Singh, J.
Hon'ble Mahendra Dayal, J.

1. Property often disrupts family peace and leads to feuds in a family: it creates differences that are difficult to bridge. This case is an example of the same, where brothers are fighting over a will for a residential house. And in resolving the dispute, we visit the principles applicable in determining the genuineness of the will.

THE FACTS

2. Sri Netra Pandey (Sri Pandey) was a teacher of history in Prayag Mahila Vidya Peeth, Allahabad. He was a writer and have written text books of history for school children. He married twice. By his first wife Smt Chhabirani, he had one son; by the second wife Smt Bhagwati Devi, (Smt Bhagwati), he had five sons and six daughters.

3. The relevant pedigree omitting the six daughters is as follows:



4. It is said that Sri Pandey and Smt Bhagwati jointly executed a registered will on 20.12.1988 (the 1988 will). It is said to be hand written by Smt Bhagwati. By this will, both of them gave their movable and immovable property to the surviving spouse and after death of the surviving spouse, to their youngest son, Sri Dinesh Chandra Pandey (the Defendant-Appellant).

5. Sri Pandey died on 10.1.1993. Smt Bhagwati fell ill and was diagnosed to be suffering from cancer of the stomach on 10.5.1993.

6. Subsequently, a civil suit no. 345 of 1993 was filed on 25.5.1993. In this suit, the Defendant-Appellant, his wife, their son, and Smt Bhagwati are the plaintiffs. The relief sought is that the other brothers of the Defendant-Appellant be restrained from interfering with their possession from residential house at 21, Church Lane, Allahabad (the House).

7. Smt Bhagwati is said to have executed a second Will on 14.6.1993 (the 1993 will). The relevant facts in respect of this will are as follows:

- The 1993 will deals with only one property namely the House. By this will, the House was bequeathed to the five sons of Smt Bhagwati. However, it was also mentioned that the Defendant-Appellant would be entitled to live in the first floor and in case the House is sold then his two sons will be given ₹50,000/- each from the sale consideration;
- It was presented for registration by Sri Awadhesh Chandra Pandey, one of

the beneficiaries under the 1993 will. However, its registration was refused by Sub-Registrar on 20.7.1993;

- Sri Awadhesh Chandra Pandey filed an appeal against the same. It was allowed by the District Registrar on 21.5.1994 and Sub-Registrar was required to register it. Thereafter, the 1993 will was registered on 25.5.1994;
- During registration proceeding, the 1993 will was supported by four daughters of Smt. Bhagwati. However, one daughter had not expressed any opinion in these proceeding. Later on, she filed writ petition no. 19327 of 1994 against the order of the District Registrar. It was dismissed on 23.6.1994;
- The Defendant-Appellant also filed writ petition no. 27399 of 1994 against the order of the District Registrar. It was also dismissed on 27.11.1993.

8. After death of Smt Bhagwati, a family settlement was allegedly entered among her five sons on 27.6.1993. By the settlement, it was decided to sell the House and proceeds were to be distributed equally amongst them.

9. The Defendant-Appellant filed Testamentary case no. 38 of 1998 for grant of letters of administration in respect of the 1988 will. It was contested by Brijesh Chandra Pandey, Suresh Chandra Pandey, and Awadhesh Chandra Pandey (the Plaintiff-Respondents) and was converted into Testamentary suit (TS) no. 12 of 1999.

10. The plaintiff-respondents filed Testamentary case no. 16 of 1999 for grant of probate or letters of administration of the 1993 will. It was contested by Defendant-Appellant and was converted as Testamentary suit (TS) no. 13 of 1999.

11. The aforementioned two suits were consolidated. Out of these two, TS 13 of 1999 was treated to be leading case and evidence was led in this suit.

12. Among others, the Plaintiff-Respondents filed the following documents:

- (i) Original Will dated 14.6.1993 (Ex-1);
- (ii) Deed of agreement dated 27.6.1993 (Ex-2);
- (iii) Certificate of Dr. B Paul Thaliaech (Dr. Paul) dated 13.9.1993 (Ex-3);
- (iv) Certified copies of the statements of Sri Ram Ji Shukla, Sri Mahendra Singh, and Sri Madan Mohan Gupta before the District Registrar;
- (v) Certified copy of the order of the District Registrar dated 21.5.1994;
- (vi) Certified copies of the orders of the High court dated 23.6.1994 and 27.11.1998 in WP 19327 of 1994 and WP 27399 of 1994;
- (vii) Certified copy of the opinion of the hand writing expert dated 28.4.1994 filed before the District Registrar.

13. The position regarding the documents mentioned in the preceding paragraph is as follows:

- The documents mentioned at serial number (i) to (iii) are exhibited;
- The documents mentioned at serial number (iv) to (vi) are certified copies of the statements made before the District Registrar or the orders passed by the High Court. These documents are admissible in evidence. However, they are not exhibited. Both sides had no objection in case they were read in evidence and relied upon them;
- The last document at serial number (vii) is certified copy of the opinion of the expert for thumb impression. The hand writing expert, who gave the opinion, was not examined and it is not admissible.

14. The Plaintiff-Respondents also examined the following four witnesses:

- Sri Brijesh Chandra Pandey (DW-1, he is the first witness of the plaintiff-respondents and should be noted as PW-1. However, in the original record, he is referred to as DW-1. This is a clerical mistake): He is son of Smt Bhagwati and one of the Plaintiff-Respondents. He is beneficiary under the 1993 will. He has deposed about execution of the 1993 will as well as condition of Smt Bhagwati;
- Sri Madan Mohan Gupta, Advocate, (PW-2) (Sri Gupta): He is a family

lawyer. He is an attesting witness of the 1988 will and scribe of the 1993 will;

- Sri Mahendra Singh (PW-3) (Sri Singh): He is an attesting witness of 1993 will;
- Dr B Paul Thaliaech (PW-4) (Dr Paul): He is a doctor specialising in the field of cancer. He was treating Smt Bhagwati. He deposed about physical and mental condition of Smt Bhagwati.

15. The Defendant-Appellant has filed only one document namely the 1988 will (Ex A-1). He has also filed some documents along with rejoinder affidavit in TS 12 of 1999. Out of these, one is certified copy of plaint of OS 345 of 1993 mentioned in paragraph-6 of this judgment. It is not exhibited. A reference to it will be made later while discussing sub heading '*6th circumstance: Alleged suit by Smt Bhagwati*' under the third point.

16. The defendant-respondent examined the following two witnesses:

- Sri Dinesh Chandra Pandey (DW-1) (the Defendant-Appellant): He is sole beneficiary in the 1988 will and has deposed about the general condition of Smt Bhagwati in her last days.
- Sri Rajiv Ranjan Mishra (DW-2) (Sri Mishra): He is an attesting witness of the 1988 will.

POINTS FOR DETERMINATION

17. We have heard Sri Kesari Nath Tripathi and Sri Ramesh Upadhyaya counsel for Defendant-Appellant and Sri Dhruv Narain and Sri Dhananjay Prasad counsel for Plaintiff- Respondents. The following points arise for determination in this case:

- (i) What are the principles to prove an unprivileged will;
- (ii) Whether the 1988 will is valid;
- (iii) Whether the 1993 will is valid.

1st POINT: PRINCIPLES—UNPRIVILEGED WILL

18. Apart from other things, the Indian Succession Act, 1925 (the Succession Act)

deals with testamentary succession also. It talks about two kinds of wills: privileged and unprivileged.

19. A privileged will is defined under section 65 of the Succession act. It provides that a soldier or airman or a mariner, under conditions mentioned therein, may dispose of his property by a will made in a manner provided under section 66 of the Succession Act. They are called privileged wills: the rest of the wills are unprivileged wills.

20. An unprivileged will can be made as provided under section 63 of the Succession Act. In the present case, the wills were not made by the people covered under section 65 of the Succession Act and are unprivileged wills.

21. A will is like any other document and is to be proved in the same manner. However, unlike other documents, a will is always proved after the death of the testator: he is not there to say as to why and under what circumstances, the will was executed. It is for this reason that section 63 of the Succession Act lays down a special procedure for executing an unprivileged will.

22. An unprivileged will is required to be attested by two witnesses: who have seen the testator (or other person on his behalf) sign or affix his mark on the will (or received personal acknowledgement); and each of the attesting witnesses should have also signed the will in presence of the testator.

23. Section 68 of the Indian Evidence Act, 1872 (the Evidence Act) is titled 'Proof of execution of document required to be attested'. It provides that an attested document cannot be read in evidence unless it is proved by atleast one attesting witness if he is alive, provided he is subject to the process of the court, and capable of giving evidence. However, its proviso provides an exception.

24. The proviso to section 68 of the Evidence Act provides that it is not necessary to examine an attesting witness in case of a registered document, whose execution

is not specifically denied. But, this proviso does not apply to a will.

25. A will—even if it is registered and its execution is not specifically denied—cannot be read in evidence unless it is proved by at least one of the attesting witness as explained in the main part of section 68 of the Evidence Act.

26. The Courts have held (see below)¹ that:

- (a) The burden to prove fraud, or undue influence, or coercion, or forgery in making a will is upon the person alleging the same;
- (b) Even in absence of the aforesaid pleas, a propounder of a will has to satisfactorily explain the suspicious circumstances (if any) surrounding the will;
- (c) In absence of any suspicious circumstances, a propounder of a will has to prove due execution of the will by examining an attesting witness, if he is alive, subject to process of court, and capable of giving evidence as well as testamentary capacity of the testator.

With these principles in mind, let's consider the genuineness of the 1988 and 1993 wills.

2nd POINT: 1988 WILL IS VALID

27. The 1988 will is a joint will by Sri Pandey and Smt Bhagwati. It is said to be hand written by Smt Bhagwati. Sri Gupta and Sri Misra are the attesting witnesses of the same. Both attesting witnesses have been examined: Sri Gupta by the Plaintiff-Respondents and Sri Misra by the Defendant-Appellant.

Suspicious Circumstances—1988 Will

28. The counsel for the Plaintiff-Respondents submits that the 1988 will should not be accepted as suspicious circumstances surrounding it have not been

¹ Kindly see: Vrindavanibai Sambhaji Mane vs. Ramchandra Vithal Ganeshkar: AIR 1995, SC 2086; Smt. Indu Bala Bose vs. Manindra Chandra Bose: 1982 (1) SCC 20; Jaswant Kaur vs. Amrit Kaur: AIR 1977 SC 74; Shashi Kumar Banerjee vs. Subodh Kumar Banerjee: AIR 1964 SC 529; Rani Purnima Devi vs. Khagendra Narayan Dev: 1962 (3) SCR 195; and H Venkatachala Iyengar vs BN Thimmajamma: AIR 1959 SC 443.

satisfactorily explained. According to him, suspicious circumstances are as follows:

- (i) Sri Pandey was a teacher of history and a writer; whereas, Smt Bhagwati was a semi-educated lady. It is strange that instead of Sri Pandey, Smt Bhagwati would scribe the 1988 will;
- (ii) A look at the 1988 will shows that it was written by some highly educated person. It cannot be written by Smt Bhagwati, a semi-literate lady;
- (iii) Sri Pandey had five sons and six daughters from Smt Bhagwati. One of the daughter had pre-deceased them but five sons and five daughters were alive. The 1988 will is in favour of only one son. There is inequitable distribution of the assets.

Suspicious Circumstances—1988 Will—Explained

29. Sri Gupta and Sri Misra are attesting witness of 1988 will. Sri Gupta (PW-2) is also scribe of the 1993 will and witness of the Plaintiff-Respondents themselves. He was cross-examined by the Defendant-Appellant. In the cross-examination, Sri Gupta proved the 1988 will. He deposed that:

- Sri Pandey and Smt Bhagwati did not sign before him but acknowledged their signatures on the 1988 will;
- He signed the 1980 will in front of them;
- He had accompanied them to the Registrar's office for registration of the 1988 will, where they put their thumb impression and signatures.

30. Sri Gupta (PW-2) was the witness of the Plaintiff-Respondents. He was not declared hostile. He was not cross-examined by the Plaintiff-Respondents. No suggestion was given to him about non-execution of the will. There is no reason to disbelieve his statement.

31. Sri Misra (DW-2) deposed that Sri Pandey and Smt Bhagwati signed in front of him and he signed in their presence. There is nothing in his cross-examination to falsify his statement.

32. There is unequal distribution of arrears in the 1988 will but reasons are provided in that will itself:

- The daughters were already married. They were also not given any share in the 1993 will;
- Sri Sugriv Chandra Pandey, the step son of Smt Bhagwati, was already given agricultural land;
- The other four sons of Smt Bhagwati had completed their education and were doing their own work or were in service. The Defendant-Appellant was the only person who was studying in LLB and was a student at that time.

33. The other sons were already established. The parents might be concerned about the future of their youngest son and bequeathed the properties to him. This circumstance is properly explained.

34. Sri Pandey and Smt Bhagwati were aged about 83 and 68 years respectively in 1988 but were not suffering from any ailment. There is nothing on record to suggest that they did not have testamentary capacity. According to the plaintiff-respondent, Smt Bhagwati had mental capacity to execute the 1993 will. To say that she did not have testamentary capacity in 1988, is beyond comprehension.

35. In our opinion, the 1988 will was duly executed by Sri Pandey and Smt Bhagwati; they had testamentary capacity to make the will: it is valid.

3rd POINT: 1993 WILL IS ALSO VALID

36. The 1988 will was in respect of entire movable and immovable properties of Sri Pandey and Smt Bhagwati. However, the 1993 will is only in respect of one property namely, the House. The rest of the properties, be they movable or immovable, are still governed by the 1988 will and have ultimately gone to the Defendant-Appellant.

37. The 1993 will is in favour of five sons of Smt Bhagwati but provides some extra

benefit to the Defendant-Appellant:

- It permits the Defendant-Appellant to live in the first floor of the House and the remaining four sons are to reside in the other portions of the house; and
- In case the five sons decide to sell the house then ₹50,000/- each is to be given to the two sons of the Defendant-Appellant from the sale consideration.

The Plaintiff-Respondents have accepted the 1993 will with these extra benefits to the Defendant-Appellant, who is disputing it.

Suspicious Circumstances—1993 Will

38. The counsel for the defendant-appellant submits that the 1993 will is surrounded by suspicious circumstances and as they are not properly explained, it cannot be accepted. According to him, suspicious circumstances are as follows:

- (i) The 1993 will is said to be executed by Smt. Bhagwati. However, instead of her photograph, the photograph of one of the beneficiary namely, Sri Awadhesh Chandra Pandey is affixed;
- (ii) There is contradiction in the statement of Sri Gupta (PW-2) regarding purchase of the stamp paper for the 1993 will in the testamentary suit and his statement before the District Registrar. His testimony about the 1993 will cannot be relied;
- (iii) The signature on the will are shaky and not clear. No expert was examined to prove the signature or thumb impression of Smt Bhagwati;
- (iv) There was no change in circumstances to modify the 1988 will;
- (v) The 1993 will does not refer to the earlier 1988 will;
- (vi) Smt Bhagwati had filed OS 345 of 1993 for injunction against her step son and the remaining four sons. There is no reason why would she bequeath a share in the House to the remaining four sons within a month;
- (vii) In the family agreement dated 26.6.1993, there is no mention about 1993 will. It shows that the will was written after 26.6.1993;

- (viii) Smt Bhagwati was suffering from cancer. She was terminally ill. She did not have testamentary capacity to execute the will.

Suspicious Circumstances—1993 Will—Explained

1st Circumstance: Photograph of Awadhesh

39. The photograph on a document to be registered is of the person presenting the document for registration. In 1988 will, the photographs of Sri Pandey and Smt Bhagwati were affixed, as they had presented that will for registration.

40. The 1993 will was presented for registration after death of Smt Bhagwati by Sri Awadhesh Chandra Pandey. It is for this reason that it had the photograph of Sri Awadhesh Chandra Pandey and not of Smt Bhagwati. Had the 1993 will contained the photograph of Smt Bhagwati then that would have been suspicious circumstance.

2nd Circumstance: Alleged Contradiction in Sri Gupta's Statement

41. The certified copy of statement of Sri Gupta before the District Registrar was filed in the testamentary suit but was not exhibited. The District Registrar is a public officer before whom the statements are officially recorded. It is record of an act of a public officer and is a public document. Its certified copy is admissible and it can be considered though not formally exhibited. The counsel for the parties also had no objection for the same.

42. Sri Gupta, in his statement, before the District Registrar stated that he had purchased the stamp for the 1993 will. However, in the testamentary suit, he stated that he does not know who had purchased the stamps.

43. The statement of Sri Gupta in the testamentary suit was recorded seven years after the incident; it was six years after the earlier statement. Often lawyers in the district courts accompany the person concerned to purchase the stamps; sometime their clerks accompany them; sometimes the person directly purchases the stamp. It is just possible that Sri Gupta might not have remembered the exact position

after seven years. There is no contradiction between the two statements.

44. Apart from above, Sri Gupta is not a party in the proceeding. He is merely a witness in the proceeding, whose testimony is sought to be discredited on the basis of the previous statement. There is another aspect of the matter.

45. The certified copy of Sri Gupta's statement may be admissible but in case credibility of Sri Gupta is to be impeached on the basis of the earlier supposed contradiction then it should have pointed out to him as mentioned in section 145 of the Evidence Act. This has not been done. Had it been pointed out, Sri Gupta could have explained or corrected himself. It can not be so relied (See below for rulings on the point)².

46. In our opinion, testimony of Sri Gupta can not be held to be unreliable merely on this alleged contradiction that in fact is no contradiction.

3rd Circumstance: The Shaky Signature

47. In 1988 will, the age of Smt Bhagwati has been mentioned as 68. The Defendant-Appellant is propounder of this will. We have also accepted it as genuine. In case she was aged about 68 years in 1988 then in 1993, she would be 73 years of age.

48. It is admitted case that Smt. Bhagwati was suffering from cancer of the stomach with Ascitis. Her cancer was at terminal stage. She was old, suffering, and in pain. In such a situation, it is natural that her signature would be shaky. In case it was not so, then it would have been suspicious.

49. Sri Gupta (PW-2) is an advocate and scribe of the 1993 will. He was also attesting witness of the 1988 will and got it registered. Sri Singh (PW-3) and Sri Ramji Shukla are the attesting witnesses of the 1993 will. Sri Gupta and one of the

² See: Gangadhar Tilak Vs. Srinivas Pandit: AIR 1915 PC 75; Karan Singh Vs. State of MP: 2003 (12) SCC 587; Biswanath Prasad V. Dwarka Prasad: AIR 1974 SC 117; Halsbury's Law of England 4th Edition Volume 17 para 284;

attesting witness Sri Singh (PW-3) were examined.

50. Sri Gupta deposed that:

- Smt Bhagwati had summoned him to the House and requested him to prepare the will;
- He prepared the will according to the instructions given by Smt Bhagwati and contents were read out to her. After she was satisfied, he got it typed in the district court;
- After getting it typed, he took it back to the House and read it out to Smt Bhagwati;
- Smt Bhagwati signed the will after being satisfied.
- He got thumb impression of Smt Bhagwati also affixed on the 1993 will as her signatures were not clear:

51. Sri Singh (PW-3) is an attesting witness of the 1993 will. He also deposed that Smt Bhagwati had signed and affixed her thumb impression in front him and he had signed in front of her.

52. There is no reason for Sri Gupta and Sri Singh to depose falsely. There is also nothing in their cross-examination to suggest that they are falsely deposing regarding signature and thumb impression of Smt Bhagwati.

53. In view of above, there was no necessity for the Plaintiff-Respondents to examine any expert. In case, the signature or thumb impressions were being disputed by the Defendant-Appellant then he should have examined the hand writing expert.

4th Circumstance: Reason to Modify the 1988 Will

54. By the 1988 will, all properties (movable or immovable) were ultimately given to the Defendant-Appellant. The 1993 will does not cancel the 1988 will but merely modifies it in respect of the House.

55. The 1988 will provides unequal distribution of the properties and the reason for it was that at that time the Defendant-Appellant was unsettled in life and others were settled. The 1993 will was written five years after the 1988 will. The Defendant-Appellant must have passed LLB by that time and settled in life. This is sufficient reason to change the will.

56. Apart from above, it is admitted by the Defendant-Appellant (DW-1) in his statement that he along with his two brothers (namely Sri Brijesh Chandra Pandey and Sri Awadhesh Chandra Pandey) was living in the House. They were living in the portion different than the portion, where the defendant appellant was living. In case, no share was given to them, they would have had to leave the House.

57. Smt. Bhagwati was suffering from cancer. Her three sons including the Defendant-Appellant were living in the same House. All children were settled in 1993. Every mother loves her children equally. The 1993 will restores equity among them in respect of the House only though it provides some additional benefit to the Defendant-Appellant.

58. In our opinion, there was justification for modifying the 1988 will so far as the House was concerned.

5th Circumstance: No Reference to 1988 Will

59. The fact that there is no reference of the 1988 will in the 1993 will is not a suspicious circumstance. The 1988 will was not being cancelled by the 1993 will; it was merely being modified in respect of the House to adjust the equities.

60. Sri Gupta (PW-2) knew about the earlier will: he was an attesting witness thereto. In case 1993 will, was prepared after death of Smt Bhagwati or was forged at leisure then it was easy for Sri Gupta to incorporate this fact also.

61. Sri Gupta (PW-2) stated that he prepared the will as he was instructed. Smt Bhagwati, being ill and in pain, might have forgotten or might have thought it

unimportant to mention about the earlier will. She might not have instructed Sri Gupta. In any case, this question should have been put to Sri Gupta in the cross-examination. Nothing turns upon the same.

6th Circumstance: Alleged Suit By Smt. Bhagwati

62. The photostat certified copy of the plaint in OS no. 345 of 1993 was filed along with the rejoinder affidavit by the Defendant-Appellant in TS no. 12 of 1999. It was not filed with the list of documents in TS 13 of 1999, where evidence was led. It should have been filed alongwith list of documents in the leading TS no. 13 of 1999. However, it is a certified copy of the plaint and we are considering the same.

63. In OS 345 of 1993, the Defendant-Respondent, his wife, and their son are plaintiffs alongwith Smt Bhagwati. It has been filed against step son and the remaining four sons of Smt Bhagwati with the allegation that they are illegally evicting them. The relief sought in the suit is for permanent injunction restraining the defendants of that suit from evicting them.

64. OS 345 of 1999 does not appear to be filed by Smt. Bhagwati and might have been filed only by the Defendant-Appellant, his wife, and son. It also appears to be filed for oblique motives. Our reasons for the same are as follows:

- (i) In the suit, Sri Sugriv Chandra Pandey, the step son of Smt. Bhagwati, is defendant-1. It is admitted case that he had nothing to do with the family and lived in the village, where agricultural property was given to him.
- (ii) Smt Bhagwati was the mother. She was owner of the House. She was seriously ill and was at the last stage of cancer. It is inconceivable that sons would try to throw her out from her House at that stage.
- (iii) The plaint in OS 345 of 1993 also contains signature of Smt Bhagwati. This suit was filed on 25.5.1993, when the suit was filed, she was aged about 73 years. Sri Pandey had already expired on 10.1.1993. She was at the terminal stage of cancer of stomach. She was also in great pain at that time. Yet, signatures of Smt Bhagwati are very steady on every page. This creates a doubt in our mind if she actually signed the plaint.

65. In our opinion, OS 345 of 1993 does not create any doubt regarding authenticity of the 1993 will. At this stage, we would like to clarify that OS 345 of 1993 is still pending, it may be decided without being influenced by any observations made in this judgement.

7th Circumstances: No Reference of Will in the Family Settlement

66. A family settlement was also entered among the sons of Smt Bhagwati on 27.6.1993. It is in English and states that:

- There have been many wills and in order to end the dispute, it was decided to sell the House;
- The amount fetched be distributed equally to the extent of $1/5^{th}$ amongst the five brothers.

67. This family settlement is signed by all five sons of Smt. Bhagwati. The Defendant-Appellant has admitted his signature on the same. He has also admitted in his cross-examination that he is BA LLB and knows English. It shows that the Defendant-Appellant had some inkling that Smt. Bhagwati has given share to everyone in the residential house.

68. The fact that the 1993 will is not mentioned in the settlement deed is immaterial. It states that many wills have been executed, which is a fact. Had the other wills specifically mentioned in the family settlement and there was no mention of the 1993 will, then the matter would have been different. This is not the case and no suspicion arises on this account.

8th Circumstance: Testamentary Capacity

69. Dr. Paul (PW-4) gave a certificate on 13.9.1993 that Smt Bhagwati was under his treatment; she had cancer of stomach with malignant Ascitis and was given palliative chemotherapy; she was in the terminal stage of the disease, when seen last by him on 15.6.1993 but she was fully conscious and mentally alert.

70. Dr Paul was examined by the Plaintiff-Respondents as PW-4. He proved his certificate and stated that:

- Smt Bhagwati was his patient since 26.5.1993 and she was suffering from cancer of stomach with Ascitis. Her cancer was at the terminal stage;
- She was examined by him on 5.6.1993 and lastly on 15.6.1993;
- She was in acute pain and her condition was low but she was mentally alert;
- She was in a position to understand the things as her cancer had nothing to do with the brain.

71. With due respect to George Orwell, all organs in a human body are important but some are more important than others. If human body is a computer then the brain is its chipset and the operating system. In case brain is affected then some organ would be affected but its reverse is not true. In case brain is not effected then the person is mentally alert and can execute a will or any other document: he can dispose off the property.

72. Primary cancer could be in different parts of the body. It could be in stomach, brain, mouth etc. It can and normally leads to the secondary cancer (secondaries) in the other parts of the body. Nevertheless, stomach cancer normally does not metastasis the brain cancer. Even if the secondaries are in the Brain, a patient losses consciousness gradually and slowly in matter of time. A patient having brain cancer cannot be mentally unfit on a day and become mentally fit on the next day.

73. The Will was written on 14.6.1993. Dr Paul stated that he examined Smt Bhagwati on 15.6. 1993 and on that day, she was mentally fit. If Smt Bhagwati was mentally fit on 15.6.1993 then there was no reason as to why she would not be mentally fit on 14.6.1993.

74. Dr. Paul stated that Smt Bhagwati was mentally alert and in a position to understand the things as her cancer had nothing to do with brain. No suggestion has been put to Dr Paul that cancer had spread to her brain. In absence of any

suggestion or cross-examination, it cannot be held that Smt. Bhagwati was not mentally fit to make the will on 14.6.1993.

75. The counsel for the Defendant-Appellant brought to our notice that part of the statement of the Defendant-Respondent (DW-1), where he stated that Smt Bhagwati was being given pain killer and after taking it, she used to become unconscious. On this basis, the counsel submits that Smt Bhagwati did not have testamentary capacity to make the will.

76. No prescription of the pain killer has been filed. It is not clear how a person would become unconscious after taking it. There is nothing on record to show that Smt Bhagwati was unconscious at the time when the 1993 will was executed.

77. Dr Paul (PW-4) stated that Smt Bhagwati was mentally alert. He was not cross-examined on the question whether Smt Bhagwati could become unconscious after taking any pain killer.

78. In any case, Dr Paul stated that she was mentally fit. In view of the same, no reliance can be placed on this part of the testimony of the Defendant-Appellant that Smt. Bhagwati used to become unconscious after taking the pain killer.

79. Apart from above, there are other reasons for holding that Smt Bhagwati had testamentary capacity and was of sound mind to execute the will.

80. Sri Gupta was a family lawyer. He had attested the 1988 Will and then got it registered. He also stated that he was summoned on 14.6.1993, thereafter was instructed to prepare a will, and at that time mental condition of Smt Bhagwati was sound.

81. A lawyer is capable of understanding, if a person is in a fit mind to understand a thing or not. There is no reason for Mr Gupta to make a false statement. In fact

there is no suggestion that he was making a wrong statement.

82. In our opinion, Smt Bhagwati was mentally sound and in a fit condition to understand and make the 1993 will: she had the testamentary capacity.

Other Circumstances in Favour of 1993 Will

83. It is relevant to point out that out of six real sisters of the parties, five of them are alive. None of them have contested either of the wills.

84. At the time of registration of the 1993 will, four sisters had given their consent for registering the will. This fact is recorded in the order of the District Registrar dated 21.5.1994. The fifth one had neither supported nor opposed the registration but had later filed a writ petition, which was dismissed.

85. Four out of five sisters also support the 1993 will. At present, all of them are supporting it by not contesting it. There is no reason for them to do so, unless the 1993 will was executed by their mother.

86. In our opinion:

- Smt Bhagwati had executed the 1993 will;
- She had testamentary capacity to do so;
- All suspicious circumstances have been satisfactorily explained;
- It is genuine.

A CORRECTION

87. We have come to the same conclusion as the single Judge: we have also upheld both the wills. However, the single Judge has granted probate in respect of them. This seems to be a clerical error.

88. Section 222 of the Succession Act explains that probate can be granted only if

the executor was appointed in a will. In the wills, no executor was appointed and as such probate could not be granted.

89. Nevertheless, letters of administration along with the copies of the wills annexed can be granted. This in fact was prayer in the suits. We order accordingly.

CONCLUSIONS

90. Our conclusions are as follows:

- (a) The burden to prove fraud, or undue influence, or coercion, or forgery in making a will is upon the person alleging the same;
- (b) Even in absence of the aforesaid pleas, a propounder of a will has to satisfactorily explain the suspicious circumstances (if any) surrounding the will;
- (c) In absence of any suspicious circumstances, a propounder of a will has to prove due execution of the will by examining an attesting witness if he is alive, subject to process of court, and capable of giving evidence as well as testamentary capacity of the testator;
- (d) In case credibility of a witness (not a party to a proceedings) is to be impeached on the basis of any contradiction in his previous statement then his attention must be drawn to it. He should have opportunity to explain it;
- (e) The will dated 20.12.1988 is a valid will;
- (f) The will dated 14.6.1993 is also a valid will and modifies the earlier will in respect of house no. 21, Church Lane, Allahabad.

91. In view of our conclusions, Special Appeal no. 79 of 2009 is dismissed. Special Appeal numbers 961 of 2004 and 80 of 2009 are disposed off with the observations that:

- (i) Letters of administration along with the copy of will dated 20.12.1988 annexed be granted in favour of Sri Dinesh Chandra Pandey in respect of all movable and immovable properties except the house number 21, Church Lane, Allahabad;

- (ii) Letters of administration along with the copy of will dated 14.6.1993 annexed be granted in favour of Plaintiff-Respondents namely Sri Brijesh Chandra Pandey, Sri Suresh Chandra Pandey, and Sri Awadhesh Chandra Pandey in respect of house number 21, Church Lane, Allahabad.

This may be done after provision of chapter 30 rule 9 of the High Court Rules are complied with.

Order Date :- 23.7.2012

BBL