

(2001) 02 PAT CK 0059
In the Patna High Court
Case No : Test Suit No. 3 of 1996

In Re: Kamleshwari Devi (Deceased) and Vikas Singh and Others

Date of Decision : 05-02-2001

Acts Referred:

Citation : (2001) 02 PAT CK 0059

Final Decision : Allowed

Judgement

Sachchidanand Jha, J.—This is a petition u/s 278 of the Indian Succession Act (in short "the Act") for grant of Letters of Administration of the Will of Smt. Kamleshwari Devi, resident of Boring Canal Road, Patna. The petition was earlier registered as Testamentary Case No. 3 of 1991. After the Objector entered caveat it was converted into a suit and re-registered as Testamentary Suit No. 3 of 1996.

2. The case of the petitioners, who are the grand sons of Smt. Kamleshwari Devi (hereinafter called the testatrix) and beneficiaries of the disposition, is that the testatrix was the absolute owner of land bearing plot Nos. 172, 173, 174, 175 of khata Nos. 115/588 and 14 of village Dujra, Thana Digha (now known as Boring Canal Road within Budha Colony Police Station, Patna town), purchased by her from her streedhan on 3-6-53. After the purchase she got her name mutated in the revenue records. From her savings and streedhan she constructed a double storied house which was numbered as holding No. 494/414 B in the municipal records. She paid land revenue and municipal taxes to the State of Bihar and the Patna Municipal Corporation. On 22-8-86 she executed her last will at her aforesaid residence in the presence of her relatives and the at- testing witnesses, namely. Dr. Birendra Prasad Sinha and Dr. Vijayee Singh. The attesting witnesses are also close relatives being respectively the grand son-in-law and husband of the niece of the testatrix. The husband of the testatrix Bisheshwar Prasad Narin Singh died on 31-1-87. The testatrix also died soon after on 31-3-87. The petitioners along with their father performed the last rites and Shradh. After the death of the testatrix the petitioners came in possession of the house and the land, got their names mutated in the records of the State and the Patna Municipal Corporation and are paying land revenue and taxes to them.

3. Caveat was filed by Devesh Pratap Singh objecting to the grant of the letters of Administration. It is worth mentioning here that the testatrix had two sons, namely, Suresh Pratap Singh and Devesh Pratap Singh and a daughter, namely, Smt. Abha Singh. The petitioners herein are the sons of Suresh Pratap Singh. Considering that the objector being son was a direct heir and had heritable interest in the estate of the testator, his locus standi thus not being questioned, caveat was allowed and the proceeding was converted into suit, as indicated at the outset. At the stage of evidence he examined 7 witnesses including himself, and also produced some documents.

4. The case of the Objector is as follows. The petition is not maintainable as the Court has jurisdiction to grant probate or letters of administration of a will -- whereas the so called disposition is not a Will at all, nor a document of transfer or bequeath. It is merely a wish or desire of Smt. Kamleshwari Devi to give the property to the petitioners. It is said that Smt. Kamleshwari Devi was seriously ill since 1960. She was mentally and physically very weak and incapable of understanding, she was not in a sound state of mind to execute any type of document much less a will. It is also said, that the document in question, alleged to be Will is forged, fabricated and manufactured. The further case of the Objector is that the property did not exclusively belong to Smt. Kamleshwari Devi. She had, in fact, no property of her own. Whatever property she and/or the father has left behind is joint family property in which the Objector has share.

5. Before I enter upon the real Issues involved in the case I wish to dispose of the two objections relating to the exclusive ownership of the testatrix and the nature of the document, which is the subject matter of the proceeding. As regards the former, the scope of proceeding for grant of Probate or Letters of Administration stands well settled by judicial pronouncements. The jurisdiction of the Court is limited to finding out if the Will was duly executed, is the genuine and last Will of the testator/testatrix, executed by her in a sound state of mind and with full understanding. The question as to ownership of the property lies outside the scope of the proceeding. Counsel for the Objector referred to Section 59 of the Act. He submitted that the use of the words "his property" in that section indicates that the person can make a Will with respect to his own property and, therefore, whenever dispute is raised in that regard the Court has Jurisdiction to decide the same. The submission, in my opinion, is wholly misconceived and reference to Section 59 is totally misplaced. From perusal of the provisions of Section 59 and Explanations appended thereto it is clear that what the section deals with is the testamentary capability of the person to execute a Will. The main section lays down that every person of sound mind not being minor may dispose of his property by will. Explanation I clarifies that a married woman may also dispose of any property which she could alienate during her lifetime. As per Explanation II even a deaf or dumb or blind may also execute a Will if they are able to know what they are doing by it. According to Explanation III even an Insane person can make a Will at a time when he is not of unsound mind. Explanation IV prohibits a person who is not in a sound state of

mind -- whether unsound-ness of mind is result of intoxication or illness or any other cause -- if the person does not know what he is doing. The object of the provisions of Section 59 becomes further evident from the Illustration appended to it. 6. Whether a person was Incapable of executing a Will by reason of any physical and/or mental Incapacity is certainly a relevant point and, in fact, the most relevant point which is to be decided in Probate/Letters of Administration proceeding and in this case also I would deal with this aspect later in this Judgment. As regards the use of the words "his property", it is clear and. If I may say so, implicit that a person can execute a Will, like any transfer deed, only with respect to his own property and not someone else's property and therefore, nothing much turns on use of those words in Section 59 as to confer jurisdiction on the probate Court to decide any dispute relating to title, ownership etc. of the testator/testatrix in the property which is the subject-matter of the Will. It is settled legal position that it is not the duty of the probate Court to consider any issue as to title of the testator to the property with which the Will propounded purports to deal or to the disposing power the testator may have possessed over such property or as to the validity of the bequeaths made. See, for example, the case of Kashi Nath Singh Vs. Dulhin Gulzari Kuer, . Proceeding for grant of probate or letters of administration is not suit in the real sense it only takes the "form" of a regular suit according to the provisions of the Code of Civil Procedure, "as early as may be" -- vide Section 295 of the Act, Reference may be made to a Division Bench decision of this Court in Sidhnath Bharti (Objector) Vs. Jai Narayan Bharti a Full Bench decision of the Allahabad High Court in Mrs. Panzy Fernandas Vs. Mrs. M.F. Queoros and Others, , and a Division Bench decision of the Calcutta High Court in Balai Lall Banerjee and Others Vs. Debaki Kumar Ganguly and Others, . The grant of probate or letters of administration is decisive only of the Will propounded and not of the title etc. of the testator to the property. As the issues relating to title, ownership etc. are not to be gone into in such proceeding, it follows that even a favourable decision in favour of the petitioner/plaintiff granting probate or letters of administration in his favour does not operate as res judicata in any future suit which the Objector is at liberty to bring seeking declaration of his right, title, Interest etc. in the property. In the above premises the objection of the Objector as to disposing capacity i.e. ownership of the testatrix is rejected.

7. The objection that the document in question containing the Impugned disposition is not a Will but merely a wish or desire of the testatrix to give the property to the petitioners in future seems to have been taken, if I may say so, for the sake of objection. A bare perusal of the contents of the disposition, the original of which is on the record as Ext. 1 and photo copy is Annexure 1 to the petition, does not bear this out. The disposition is captioned in clear words as "Waslyatnama (Will)", and the recitals thereof also leave no room for doubt that testatrix Intended to give the property to the petitioners as a bequeath after her death. Translated into English (by me), the recitals are as under :--

Will dated 28-8-86

It is my desire that I give my house which is known as Kamla Niwas and which stands on Boring Canal Road, Patna, and along with house Kamla Niwas the land and the entire compound to my grandsons Vikas Singh and Vivek Singh, who are sons of my elder son Suresh Pratap Singh after my life, and the said grandsons will have the right. They will become its full owners and after my death they will get the house and the land recorded in their names in the Government offices and in the municipality and keep the same in their possession. Let it be understood that they will not sell the property.

8. Section 2(h) of the Act defines "Will" to mean "the legal declaration of the intention of a testator with respect to his property which he desires to be carried into effect after his death". As interpreted by Courts the characteristics of a Will are that (a) there should be a disposition of the property, (b) which takes effect after the death of the testator and (c) such disposition is irrevocable. There is nothing in the above recitals to suggest anything lacking so as to create doubt about its not being a will. In this connection reference may be made to Section 74 of the Act which says, "it is not necessary that any technical words or terms of art be used in a will, but only that wording be such that Intention of the testator can be known therefrom". I may also usefully refer to the following observations of the Supreme Court in *Veerattalingam and others Vs. Ramesh and others*, :--

"It is well settled that a Court while construing a Will should try to ascertain the intention of the testator to be gathered primarily from the language of the document; but while so doing the surrounding circumstances; the position of the testator, his family relationship and the probability that he used the words in a particular sense also must be taken into account. They lend a valuable aid in arriving at the correct construction of the Will. Since these considerations are changing from person to person, it is seldom profitable to compare the words of one Will with those of another or to try to discover which of the wills upon which the decisions have been given in reported cases, the disputed will approximates closely. Recourse to precedents, therefore, should be confined for the purpose of general principle of construction only, which by now, are well settled. There is still another reason as to why the construction put on certain expressions in a Will should not be applied to a similar expression in the Will under question for a will has to be considered and construed as a whole, and not piecemeal. It follows that a fair and reasonable construction of the same expression may vary from Will to Will. For these reasons it has been again and again held that in the matter of construction of a Will, authorities or precedents are of no help as each Will has to be construed in its own terms and in the setting in which the clauses occur (See *Ramachandra Shenoy and Another Vs. Mrs. Hilda Brite and Others*,)."

I have no doubt in my mind that the abovementioned recitals do convey clear intention of the testatrix to give property absolutely and finally to the petitioners effective after her death. I, therefore, hold that the Impugned document conforms to the description of Will and the proceeding is thus maintainable, the

objection of the Objector in this regard also is accordingly rejected.

9. Before moving to the issue Involved, I consider it appropriate to mention that though, as noted above, the Objector has characterised the impugned document as being "forged, fabricated and manufactured", he has not denied the genuineness of the signature of the testatrix on the impugned document. It may be stated here that in the light of the said objection of the Objector an application was filed by the petitioners for comparison of the signature of the testatrix on the will with her admitted signature. which was objected to by the Objector on the ground that no such plea had been taken by the defendant in the written statement. On behalf of the petitioners it was submitted that the averment occurring in paragraph 9 of the written statement that "a forged and fabricated document has been manufactured alleging to be will" is capable of two meanings. However, if the defendant takes a definite stand and does not deny the signature on the will it may not be necessary for the plaintiff to get the signature compared. In response to this Counsel for the Objector made a categorical statement that he does not deny the genuineness of the signature of the testatrix on the will. It would be appropriate to quote the relevant part of the order dated 3-10-97 in this connection as under :--

"In the present proceeding this Court is primarily concerned with the genuineness of the signature of the testatrix on the impugned will. I, therefore, also wanted to know whether the defendant denies the genuineness of the signature of the testatrix on the will. It hardly need be emphasised that in case of any controversy in that regard, genuineness of the signature on the will is to be compared with any admitted signature of the testatrix. Mr. Devendra Kumar Sinha counsel for the defendant stated that in the written statement no such stand has been taken by the defendant. Mr. Sinha counsel for the plaintiffs, referred to paragraph 9 of the written statement wherein it has been stated that "a forged and fabricated document has been manufactured alleging to be will." He submitted that the aforesaid statement is capable of two meanings. He stated that in case the defendant takes a definite stand and does not deny the signature on the will, it may not be necessary for the plaintiffs to get the signature on the aforesaid Power of Attorney to be compared by Handwriting Expert, but, in such a case the stand of the defendant may be recorded to avoid any complication in future.

The statement of Mr. Devendra Kumar Sinha that the defendant does not deny the genuineness of the signature of the testatrix on the impugned will is, accordingly, recorded."

The signature of the testatrix on the will not being in dispute the genuineness of the document, as such, cannot be disputed, more so when there is no challenge to the signatures of the attesting witnesses and or the handwriting of Visheshwar Pratap Narain Singh, the husband of the testatrix, who had scribed the will. The only thing thus to be seen is whether the will was duly executed in the prescribed manner, and secondly, whether the testatrix was in a sound state of mind and

voluntarily executed the will with due awareness and understanding.

10. The mode of execution of will has been laid down in Section 63 of the Act which may be quoted as under :

"Every testator, shall execute his will according to the following rules.

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

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

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

The ingredients of the Section, it would appear, are, firstly, that the testator should sign or put his mark on the will, or direct some other person to sign it in his presence, for example, in case of disability on his part to do so; secondly, such signature or mark must be so placed as to appear that thereby he intended by at least two witnesses, each of them having seen the testator sign or put his mark on the will or some other person sign the will, in presence of and on the direction of the testator. Such attestation by the witnesses must also be in presence of the testator.

11. In the present case the attesting witnesses are Dr. Virendra Prasad Sinha and Dr. Vijayee Singh. Dr. Vijayee Singh has sworn an affidavit enclosed as Annexure 3 to the petition stating as follows :

That I am one of the attesting witnesses to the will executed by late Kamleshwari Devi on twenty second day of August Nineteen eighty six (22-8-1986).

That late Kamleshwari Devi, testator, signed the will in my presence and also in presence of Dr. Birendra Prasad Sinha, residing (at present) at Kanpur Medical College, Kanpur.

That the deponent and Dr. Birendra Prasad Sinha also signed as witnesses to the will after the testator signed the will."

The above affirmation substantially satisfies the provisions of Section 281 of the Act which lays down the manner of verification of petition for Probate by "at least one of the witnesses to the will". For the sake of convenience the format of verification contained in the section may be quoted as under :--

"I (C.D.) one of the witnesses to the last will and the testament of the testator mentioned in the above petition, declare that 1 was present and saw the said testator fixed his signature (or mark) thereto (or that the said testator acknowledged the writing annexed to the above petition to be his last will and testament in my presence)."

12. Dr. Virendra Prasad Sinha, the other attesting witness has also made a similar affirmation, marked Annexure 2 in identical language. He has, in fact, further pledged his oath by deposing in Court as P.W. 2 to support the petitioners' case. He stated that at the time of the execution of the will he lived in the disputed house i.e. Kamla Niwas (He is, it may be recalled, grand son-in-law of the testatrix). On 22-8-86 his grand father-in-law V. P. N. Sinha i.e. testatrix's husband, called him downstairs and informed that his wife i.e. the testatrix wanted to execute a will. The will was scribed in his presence by said V.P.N. Sinha on the dictation of the testatrix. After the will was scribed the testatrix went through its contents and then put her signature making endorsement to the effect that she had read the contents. The signature was put by her in his presence. On her request he also put his signature with endorsement that she (testatrix) had signed in his presence in full sound mind. P.W. 2 Identified the will, which had already been proved by P.W. 1 earlier as Ext. 1, as the will which had been executed by the testatrix. He also proved his signature and endorsement. He further proved the signature and endorsement by Dr. Vijayee Singh. Nothing has been elicited from him in cross-examination to create doubt about the veracity of his evidence and the attestation of the will by him. It was submitted that P.W. 2 did not claim to have signed the attestation in the presence of the testatrix. The submission is contrary to the record. In his examination-in-chief he specifically stated that it was on request of the testatrix that he put his signature, and if anything was missing in his evidence it came in the cross-examination when in response to a question the witness stated that it was on being asked by the testatrix that he put his signature on the will. He also stated, In cross-examination, that everybody had put his signature in his presence. He further clarified, in cross-examination, that the testatrix stated that she wanted to execute a will and on her instruction and dictation V. P. N. Sinha i.e. her husband scribed the will. The evidence of P.W. 2 Dr. Virendra Prasad Sinha fully satisfies the Ingredients of Section 63 of the Act and 1 have no hesitation in holding that the petitioners have succeeded in proving the will and its due execution.

13. The will, in fact, has been proved not only by the attesting witness i.e. Dr. Virendra Prasad Sinha and the beneficiaries i.e. the petitioners as P.W. 1 and P.W. 4 but also by Smt. Abha Singh, the daughter of the testatrix and the sister of the petitioners' father and the Objector, as P.W. 3. Being equally related to them her evidence has great significance. In fact, in her cross-examination she stated that she has equal love and affection for both the brothers. Nonetheless, she in clear words identified the will, after looking into the same with the help of magnifying glass, as the will which her mother had executed in favour of her two nephews --

Vikas Singh and Vivek Singh. She further stated that at the time of the execution of the will she was in a sound state of mind and body; before she executed the will she had expressed her intention to execute will in favour of the grand sons with respect to her personal property. Such unequivocal affirmation of the petitioners' case by P.W. 3 goes a long way in proving the case propounded by them. Counsel for the petitioners, rightly, did not miss the opportunity to submit that P.W. 3 was a natural heir of the testatrix, and had the impugned will not been executed by her, she too would have had interest in the property. The fact that she had otherwise heritable interest in the property but still she came forward to prove the will demonstrates the veracity of the petitioners' case. I find substance in the submission.

14. Having held that the petitioners have succeeded in proving due execution of the Will the issue which next arises for consideration is as to whether the Will was executed in sound state of mind. I have already referred to above, briefly, the evidence of no less than P.W. 3 Smt. Abha Singh in this regard. The petitioners as P.W. 1 and P.W. 4 unequivocally said so in their evidence. Equally significant is the evidence of P.W. 2 Dr. Vireridra Prasad Sinha who besides being attesting witness is also a doctor by profession. Another doctor, namely, Dr. Lalit Kumar, not related to the family, has also said so as P.W. 5. He has stated that he had occasions to meet and see Smt. Kamleshwari Devi during 1983-86 as he was in-laws of her grand son-in-law Dr. Sanjay Kumar Roy. During that period he saw the testatrix about 10-12 times. Her mental condition was sound. She always asked the servant to bring refreshment for him whenever he went there. Her physical condition was also fine except that she used to limp while walking. A question was put to him in cross-examination as to whether a neurologist can assess the mental condition of a person to which the answer was that on the basis of teaching imparted at the MBBS level every doctor can assess the mental condition of a person. Precious too little was elicited on behalf of the Objector in the cross-examination of these witnesses.

15. The thrust of the Objector's case, If I may say so, has been that the property did not exclusively belong to the testatrix. There is not much in the evidence led by him to create doubt about the soundness of mind of the testatrix. Out of seven witnesses examined by him including himself, namely, D.W. 1, D.W. 4, D.W. 5 and D.W. 6 spoke only about purchase of land and construction of the house "Kamla Niwas" i.e. regarding ownership. Even the Objector as D.W. 1 did not say a word in his examination-in-chief about the mental condition of the testatrix. D.Ws. 2, 3 and 7 spoke about illness, but the thrust of their evidence too is that the house did not belong to the testatrix. On the point of illness all that D.Ws. 2 and 3 said was that the testatrix had suffered paralytic stroke in 1980 whereafter she was bed-ridden. When they last met her in 1987, she was unable to recognise. They said nothing about the condition at or about the time when the Will was executed on 22-8-86. D.W. 7 stated that the testatrix had suffered the stroke in 1970 and thereafter she lived at Varanasi.

16. On the point of proof in testamentary cases I am tempted to refer to a passage from the decision in the case of Surendra Pal and Others Vs. Dr. (Mrs.) Saraswati Arora and Another, , relating to burden of proof in Probate proceeding. Thus said their Lordships, (at P. 2002 of AIR):--

"The propounder has to show that the Will was signed by the testator, that he was at the relevant time in sound disposing state of mind, that he had understood the nature of disposition, that he put his signature to the testament of his own free will and that he had signed It in the presence of the two witnesses who attested it in his presence and in the presence of each other. Once these elements are established, the onus which is placed on the propounder is discharged."

The Court clarified that if there are suspicious circumstances the onus may still be on the propounder to explain them to the satisfaction of the Court but if the caveator alleges Influence, fraud and coercion, the onus is on him to prove the same. Continuing, their Lordships observed (at P. 2003 of AIR):

"If the caveator does not discharge the burden which rests upon him in establishing the circumstances which show that the Will had been obtained by fraud or undue Influence, a probate of the Will must necessarily be granted if it is established that the testator had full testamentary capacity and had, in fact, executed it validly with a free will and mind."

17. On behalf of the Objector certain circumstances were cited which, according to him. create doubt about the genuineness of the will.

(i) The date "22-8-86" appears above the signature in the Will.

(ii) Though as per evidence of the petitioners" witnesses the testatrix used to sign in English, but the signature on the Will is in Hindi.

(iii) Neither Dr. Vijayee Singh nor father of the petitioners Suresh Prasad Singh was examined.

(iv) No provision was made by the testatrix for her second son i.e. Devesh Pratap Singh, the Objector, and/or his children.

(v) Above all, admittedly the testatrix was not keeping good health after 1980 and the couple started living at Varanasi.

(vi) Both the testatrix and her husband according to the petitioners" case lived at Varanasi -- how and why came to Patna on or about 22-8-86 to execute the Will.

18. As regards the first objection it is true that normally the maker of the document mentions the date below the signature. In the present case, as noted above, the will was scribed by the husband of the testatrix. Thereafter, as P.W. 2 stated, she went through the contents and made endorsement to the effect "isko pura parhkar da kiya". The date 22-8-86 has been mentioned in continuation in the same line. Below the said endorsement and the date the testatrix affixed her

signature. It is significant that the date 22-9-86 has been mentioned not only by the testatrix but also by the two attesting witnesses. In fact, the caption also mentions the same date while describing the document as "Will dated 22-8-86". Therefore, nothing turns on the fact that instead of below, the date appears above the signature.

19. As regards the second objection, power of attorney (Ext. 9) has been brought on record to show that sometimes the testatrix used to sign in Hindi also. That apart, to me It appears the fact that the language of the Will was Hindi, the testatrix might have considered it appropriate to affix her signature in the same language/script. In any view of the matter, the genuineness of the signature not being under challenge the question as to whether she should have affixed her signature in Hindi or English is of no consequence at all.

20. I do not also find any substance in the third objection. The case of *Roda Framroze Mody Vs. Kanta Varjivandas Saraiya*, . was cited in this connection. It was observed in that case that though one attesting witness is sufficient the words "at least" suggest that the evidence of more witnesses may be required. This undoubtedly is so depending on the facts of the case. If circumstances surrounding execution of the Will are not above board and the credentials of the sole attesting witness are doubtful, no doubt, the Probate Court is entitled to call upon and expect the pro-pounder of the Will to examine more witnesses to corroborate the evidence of the sole attesting witnesses. There, however, cannot be any hard and fast rule on the point. It would depend on the facts and circumstances of each case. In the matter of proof what is important is the quality of evidence and not its quantity. With the examination of Dr. Virendra Prasad Sinha the requirement of law stands satisfied, and there being no such suspicious circumstances creating doubt about the veracity of the will or the petitioners' case. I do not think any adverse inference should be drawn for not examining Dr. Vijayee Singh, the other attesting witness, who has affirmed the facts relating to attestation by swearing affidavit for which, if the evidence is found to be false, he may be prosecuted u/s 282 of the Act. As regards Suresh Pratap Singh, the petitioners' father, since he played no role in the execution of the will, his examination as a witness was hardly required.

21. The submission that no provision was made by the testatrix for the Objector and/or his children at the first instance looks attractive but has no substance. In some cases, in the facts and circumstances, the Courts have drawn adverse inference from omission to make provisions for particular members of the family, for example, where property is given to some relation or outsider without making provision for the wife or the children. Doubt may arise as to the or genuineness of the disposition, in cases where failure to make such provision makes a particular member of the family destitute or something of that kind. But where as between two sets of heirs, the testator prefers one of them, position will be different. After all, the very object of executing Will is to give the property to particular person/persons to the exclusion of or in preference to other heirs who

may but for the such disposition would have interest in. the property and in case of intestate death of the testator-testatrix, would have share in it. Counsel submitted that in such cases the Court should see if the reasons for excluding a natural heir have been assigned or not, and where they are not, adverse inference should be drawn. He relied on Smt. Rajeshwari Rani Pathak Vs. Smt. Nirja Guleri and Others, . That case was decided on its facts. As a matter of fact ratio of the decision so far as this point is concerned, is that if the Will contains reasons for depriving some heir, it is a material consideration to uphold genuineness and validity of the Will. In the present case, though it is not specifically said so, the will provides an inkling as to why the testatrix bequeathed the property to the petitioners. The reason seems to be that the Objector has only daughters. Though daughters have been brought at par with the sons in the matter of succession on the death of their father or mother, traditionally the sons have an edge over the daughters in the matter. Perhaps, the testatrix for this reason did not want her property to be shared by the Objector upon whose death, else, it would have been shared by his daughters. She wanted it to remain in her own family which could be possible only if sons of the other son had inherited it. The use of the words "apne pote Vikas Singh aur Vivek Singh unko apne zindagi ke bad de dun aur un poton ko hak hoga", signify the intention of the testatrix. In these premises the fact that the testatrix did not make any provision for the Objector or his daughters does not appear to be of much significance. It would not be out of place to mention that from the letters brought on record as Exts. 15 and 16 it appears that the relationship of the Objector with his mother i.e. testatrix was not very cordial. In one of the letters Ext. 16, in fact, he seems to have expressed his desire, out of anguish, to leave Kamla Niwas, if his stay in the house was not liked by her.

22. The objection as to the testatrix keeping indifferent health does not also have much substance in the facts and circumstances. I have already dealt with this aspect earlier. I may add, in fairness to the petitioners, that heavy reliance was placed by them on the fact that the testatrix used to operate bank accounts herself. A bunch of Pass Books and counterfoils of cheques have been brought on record as Ext. 5 series. It was pointed out that one such withdrawal was as late as on 19-3-86 (Ext. 5/5). It was submitted that as against the evidence adduced by the petitioners, no positive evidence has been adduced by the Objector regarding mental condition, or lack of disposing capacity, of the testatrix at the time of execution of the will.

23. In this connection I would like to mention that as per Section 59 which has already been referred to above, even a person who is ordinarily insane is competent to execute a Will at a time when he is of sound mind. What is important is not the Illness of the testator or testatrix but her power of understanding. A person may be physically ill but he may be mentally sound. Nothing has come in evidence -- either in the cross-examination of the petitioners' witnesses at the instance of the Objector or in the evidence of the Objector witnesses --to suggest" that the testatrix suffered from any

unsoundness of mind, muchless on or about 22-8-86 when she executed the Will. She might have been living at Varanasi for sometime in the past but, as stated by P.Ws., she often came to Patna, the place of her permanent residents. If she decided to execute the will during one such stay it cannot be said to be a circumstance creating suspicion about its genuineness.

24. One of the most important features of the present case is that the Objector does not dispute the genuineness of the signature of the testatrix on the will. His objection as to ownership of the property, as noted hereinabove, being only peripheral, having admitted the genuineness of the signature of the testatrix on the will, the Objector can resist the grant of Letters of Administration only if he was able to show that the execution was not voluntary -- that it was the result of fraud, coercion, undue influence or the like. No such case has been pleaded by the Objector. As laid down in the case of *Surendra Pal v. Dr. (Mrs.) Saraswati Arora* (AIR 1974 SC 1999) (*supra*), even if such case had been pleaded by him, the burden of proof would have been upon him to establish that the Will had been obtained by fraud, undue influence or coercions etc. It is significant to point out that the propounders of the Will i.e. the petitioners did not apparently play any role in the execution of the Will. They came to know about it later from their grandmother i.e. testatrix during Dussehra i.e. sometime in the month of October in 1986. His grandfather had the custody of the Will in the meantime. These replies came in cross-examination of P.W. 1.

25. Before I close the discussion, I must refer to few other decisions cited on behalf of the Objector. *Addagada Raghavamma and Another Vs. Addagada Chenchamma and Another*, was cited on the point that the will could not be executed with respect to undivided share of the joint family property. Though, as observed above, in the present proceeding this Court is not called upon to go into and decide the question of ownership of the property, the decision has no relevance in the present case for the reason that the case related to a will executed by member of undivided co-parcener, whereas in the present case the testatrix being a female was not member of the eo-parcenary. Besides the suit itself was for possession and not one for grant of Probate/Letters of Administration. *Yelamanchilisa Panchakshamma Godavaru Vs. Yalamanchili Cheva Abhayi and Others*, was relied upon on the point of the nature of the document. In that case the plaintiff had instituted a suit both as adopted son and as persona designata on the basis of a will. The trial Court dismissed the suit on both the grounds. The lower appellate Court and, later, the High Court rejected his case based on adoption but held the plaintiff entitled to the reliefs on the basis of will. The Supreme Court held on construction of the will that it was merely a direction to the defendant to adopt the plaintiff and did not amount to any disposition of the property. As a matter of fact, in *Ram Nath Das Vs. Ram Nagina Choubey and Others*, another decision relied upon on behalf of the Objector, a Division Bench of this Court laid down that the document to be called Will must be with respect to disposition of the property i.e. the declaration of the testator must be with respect to some property, In that case the Court held on

construction of the document that by it the maker had merely appointed his successor, he did not make any disposition of the property.

26. The objections of the Objector having thus been considered and the petitioners having been held to have proved the will. its due execution, in a sound state of mind by the testatrix, in the absence of any suspicious circumstance surrounding the execution, the petitioner is must be held entitled to grant of Letters of Administration.

27. In the result, the petition is allowed, Let Letters of Administration of the will of Smt. Kamleshwari Devi dated 22-8-86 be granted In favour of the petitioners on payment of due Court-fee, if not already paid, and on their furnishing Inventory and accounts within stipulated period u/s 319 of the Act. The parties will bear the costs of the proceeding.