
(2016) 08 RAJ CK 0097

In the Rajasthan High Court

Case No : Civil Misc. Appeal No. 519 of 1994

LRs. of Bhinya Ram

APPELLANT

Vs

LRs. of Takhu Ram

RESPONDENT

Date of Decision : 22-08-2016

Acts Referred:

Succession Act, 1925 — Section 276

Citation : (2016) 3 DNJ 1330

Hon'ble Judges : Mr. Arun Bhansali, J.

Bench : Single Bench

Advocate : Mr. Suresh Shrimali and Mr. Rishab Shrimali, Advocates, for the Appellant; Mr. J.L. Purohit, Senior Advocate assisted by Mr. Rajeev Purohit, Advocate, for the Respondent

Final Decision : Partly Allowed

Judgement

Mr. Arun Bhansali, J.—This appeal under Section 299 of the Indian Succession Act, 1925 (the Act) has been filed by the appellant ? Bhinya Ram (since deceased) aggrieved against the judgment dated 21.09.1994 passed by the District Judge, Bikaner (the trial court?), whereby the application filed by the respondent ? Takhu Ram (since deceased) under Section 276 of the Act has been allowed and probate has been ordered to be issued in favour of respondent ? Takhu Ram in respect of Will dated 02.04.1979 executed by Smt. Ganga.

2. The respondent ? Takhu Ram filed application under Section 276 of the Act seeking probate of Will dated 02.04.1979 executed by Smt. Ganga wife of Late Kesara Ram, resident of ? Uchida, Tehsil ? Loonkaransar. It was averred in the application that executant Ganga expired on 01.05.1979 at Uchida and in respect of her properties situated at Village ? Netawas, she had executed a Will dated 02.04.1979 and placed her thumb impression, whereby she bequeathed her property including land admeasuring 151 Bigha, a house and five cows to the applicant; the Will was last will of the deceased; the Will was executed

voluntarily and the same is duly executed, the property is situated within the jurisdiction of the court and that Smt. Ganga was residing at and died at place within the jurisdiction of the court; the deceased was widow since childhood (cky fookg) and had no issue, the applicant is the nearest relation on her husband's side i.e. Smt. Ganga was applicant's Aunty (pkph). It was prayed that the application be allowed and probate be granted. The application was verified by the applicant Takhu Ram and one Hariram, attesting witness to the Will.

3. After notices were issued, a reply to the application was filed by Bhinya Ram, appellant, wherein the contents of the application were denied; the execution of the Will was disputed. It was claimed that the Will was forged and has been created to harm the applicant. It was also claimed that Smt. Ganga was Aunty (cqvk) of the non-applicant and used to live with him; the non-applicant was in possession of the properties of deceased Smt. Ganga and the agricultural land has been mutated in his name. It was disputed that the deceased Smt. Ganga was real Aunty of applicant. In the additional pleas, it was contended that the deceased had executed a Will in favour of the non-applicant and despite being aware about the same, the application has been filed; by way of counter claim, it was indicated that a Will dated 27.04.1979 was executed by the deceased Smt. Ganga in favour of the non-applicant and her two grand-daughters ? Dhapi and Chuki daughters of Jaisaram, wherein two agricultural fields admeasuring 16 Bigha 10 Biswa each were bequeathed to them and rest of the property was bequeathed to the non-applicant; the Will dated 27.04.1979 was the last Will of the deceased, which results in cancellation of the Will dated 02.04.1979 (which execution was not admitted). It was prayed that probate of Will dated 27.04.1979 be granted. It was further claimed in the additional pleas that the non-applicant is adopted son of Smt. Ganga and a registered adoption deed has been executed in his favour and, therefore, the property could not have been bequeathed by her; the application in absence of Dhapi and Chuki was not maintainable. Ultimately, it was prayed that the application filed by Takhu Ram be dismissed, the counter claim be allowed and probate be granted in favour of the non-applicant, Musamat Dhapi and Musamat Chuki daughters of Jaisaram.

4. Based on the pleadings of the parties, the trial court framed eight issues. On behalf of the applicant-Takhuram, three witnesses Lekh Ram ? his son (PW- 1), Hari Ram ? attesting witness (PW-2) and Khumana Ram ? scribe and son-in-law of the applicant (PW-3) were examined and two documents were produced. On behalf of the non-applicant, four witnesses DW-1 Bhinya Ram, DW-2 Kheta Ram and DW-3 Kana Ram were examined and by way of documentary evidence, four documents were exhibited, in rebuttal evidence DW-4 Rawat Ram was examined.

5. After hearing the parties, the trial court by the impugned judgment came to the conclusion that the Will dated 02.04.1979 (Ex.-2) stands proved by statement of PW-2 Hari Ram, the Will dated 27.04.1979 (Ex.-A/2) was not proved by Bhinya Ram; the adoption deed was not executed as per law and has not been proved before the court and, therefore, the non-applicant cannot be

declared as the owner of the property left by the deceased Smt. Ganga. Based on its findings, the proceedings were decided as noticed hereinbefore, whereby probate was ordered to be granted to applicant Takhu Ram qua Will dated 02.04.1979.

6. It is submitted by learned counsel for the appellant that the trial court fell in error in holding that the Will dated 02.04.1979 was duly proved; Takhu Ram, the propounder of the Will despite grant of sufficient/repeated opportunities, did not enter the witness-box and in absence of the evidence of the propounder of Will, the propounder could not have been issued probate; with reference to the statement of three witnesses, it was submitted that there are material contradictions in the statement of the three witnesses, which clearly indicates that the Will dated 02.04.1979 was a forged document; the scribe of the Will is son-in-law of the applicant and the statements of the witnesses are not natural; it is an admitted fact that deceased, who was aged about 70 years at the time of her death, which happened within a short span of execution of the Will was a widow since childhood and ever since she was staying at Uchida, which place is about 17-18 kilometers away from Village ? Bhadera, the place of residence of the applicant and ever since her widowhood, the deceased Smt. Ganga was living at Uchida i.e. her matrimonial village and, therefore, there was no reason for her to execute Will in favour of the applicant, when non-applicant appellant is the adopted son of the deceased; the adopted son has been deprived for apparently no reason and further no reason is forthcoming from evidence of the parties for bequeathing the property to Takhu Ram.

7. With reference to the Will dated 27.04.1979, it was submitted that the Will was executed by the deceased and merely because one of the attesting witness Rawat Ram, turned hostile qua the appellant for reasons best known to him, the same cannot render the Will as ineffective; by Will dated 27.04.1979, the earlier Will was cancelled. The trial court has for no reason dwelt into the validity of the adoption deed in favour of the appellant, which was not the subject matter of the proceedings and the finding therein is ex facie baseless and against law. The adoption deed is not required to be attested under any provision of law and a valid adoption cannot be cancelled, therefore, the finding on the said issue also being baseless deserves to be set aside. It was submitted that the Will dated 02.04.1979 is surrounded by suspicious circumstances and, therefore, also the trial court was not justified in granting probate of such a Will.

8. Reliance was placed on Lalitaben Jayantilal Popat v. Pragnaben Jamnadas Kataria and ors.: 2009 DNJ (SC) 38; Iswar Bhai C. Patel @ Bachu Bhai Patel v. Harihar Behera and anr.: AIR 1999 SC 1341.

9. Vehemently opposing the submissions made by counsel for the appellant, learned counsel for the respondent submitted that due execution of the Will dated 02.04.1979 is proved from record by way of evidence led by the applicant, whereby the attesting witness of the Will Hari Ram and scribe Khumana Ram have been examined. It was submitted that despite cross-examination of the

said witnesses, nothing could be brought on record to dispute the due execution of the Will. The requirements of proving a Will in terms of Section 63 of the Act stands fulfilled and, therefore, the trial court was justified in granting the probate of the Will dated 02.04.1979. It was submitted that from the document claimed by the appellants as Will dated 27.04.1979 itself it is proved that Will dated 02.04.1979 was executed as the said document dated 27.04.1979 seeks to cancel the Will executed in favour of the respondent. It was submitted that from the statement of DW-4 Rawat Ram, it is proved that the alleged Will dated 27.04.1979 was not executed by the deceased Smt. Ganga and the document was got signed from Rawat Ram after death of Smt. Ganga and, therefore, the Will on its face is a forged document. The minor contradictions in the statements of the parties as pointed out, cannot invalidate the due execution of the Will. The plea of the Will being surrounded by suspicions circumstances has no basis. It was submitted that the adoption deed of the appellant though registered is not valid as the same does not confirm to the requirements of the Hindu Adoptions and Maintenance Act, 1956 ("the Adoption Act"). It was submitted that Takhu Ram is not a stranger as he is son of deceased Smt. Ganga's brother-in-law (tsB) and, therefore, the trial court was justified in granting probate of the Will in respondent's favour. An objection was raised that the appeal has abated as the appellant has failed to implead Jiya daughter of Takhu Ram after death of Takhu Ram while impleading other legal representatives as party. It was submitted that merely because Takhu Ram, who was not well and could not be examined cannot be a reason to question the validity of the Will as DW-1 Lekh Ram is his son and power of attorney holder has appeared in the witness-box.

10. Reliance was placed on Yumnam Ongbi Tampha Ibema Devi v. Yumnam Joykumar Singh and ors.: (2009) 4 SCC 780; Kailashi Devi v. Matadeen Agrawal and ors.: AIR 2001 Raj. 206; Apoline D'Souza v. John D'Souza : (2007) 7 SCC 225 and Daya Ram and others v. Shyam Sundari : AIR 1965 SC 1049.

11. I have considered the submissions made by learned counsel for the parties and have perused the material available on record.

12. At the outset, the objection raised by counsel for the respondent regarding the appeal having abated needs to be dealt with. From the perusal of the record of the appeal, it is noticed that the appeal was filed against the sole respondent Takhu Ram. Where after, application under Order 22, Rule 4 CPC read with Section 151 CPC for taking on record legal representatives of deceased Takhu Ram was filed on 01.07.1996, inter alia, indicating that Takhu Ram expired on 14.04.1996. The list of sixteen legal representatives, which included Takhu Ram's wife, two sons, three daughters, legal representatives of predeceased sons Loona Ram and Himmata Ram was filed. On the application, by order dated 14.01.1998 in presence of counsel for the respondent, it was ordered that name of deceased respondent Takhu Ram be struck off from the array of respondents and in his place, heirs and legal representatives of deceased Takhu Ram as disclosed in paragraph 2 be substituted as respondents No. 1/1 to 1/16. Where

after on an application filed by the appellant under Section 151 CPC on 01.11.2006 for listing of the matter before the court, a response was filed by the respondents, inter alia, indicating that in fact Smt. Sugani wife of Takhu Ram has also died and that the appellant has not impleaded Mota Ram, Bhura Ram and Khayali Ram, sons of Himmata Ram as party respondents, Jiya daughter of Takhu Ram and Guddi daughter of Ladu Ram have not been added as legal representatives, Ram Narayan son of Himmata Ram had died in the year 1994 and he had left three legal representatives, who have not been added as legal representatives and now the appellant cannot be allowed to implead the left out legal representatives of Takhu Ram and the appeal be dismissed as abated. A rejoinder dated 13.07.2010 was filed by the appellant, inter alia, indicating that Mota Ram, Bhura Ram and Khayali Ram are not sons of Himmata Ram as claimed, but they are sons of Lekh Ram and Lekh Ram is already on record as legal representative of Takhu Ram, Guddi daughter of Ladu Ram is not a family member of the respondent and legal representatives of Ram Narayan are not heirs of Takhu Ram as Ram Narayan had died prior to Takhu Ram and they are grand-children of Himmata Ram. To the said rejoinder, no further response was filed.

13. The above sequence of events indicate that the application for bringing on record the legal representatives of deceased Takhu Ram indicating therein his sons, daughters and legal representatives of pre-deceased sons was filed in the year 1996, the same was allowed in the year 1998 and an objection regarding non-impleadment of all the legal representatives was raised as late as in the year 2007.

14. In the objection also, names of eight legal representatives, who were allegedly left out were indicated and when a rejoinder was filed pointing out that the objection qua seven legal representatives was baseless, no response was filed. Though, the objection raised was supported by affidavit of one Surja Ram, there is no explanation as to how an objection indicating incorrect facts about legal representatives could be filed before the court. The very fact that out of eight alleged left out legal representatives, seven have been shown to be not legal representatives of Takhu Ram, the veracity of Jiya being daughter of Takhu Ram and having been left out while impleadment also cannot be given any credence. The very fact that at the time when the application was decided in the year 1998, no objection was raised in this regard is also a pointer to be fact that legal representatives had already been impleaded.

15. Besides the above, in view of the fact that estate of deceased Takhu Ram is adequately represented on account of bringing on record his wife, two sons and, three daughters along with legal representatives of two deceased sons, it cannot be accepted that the appeal has abated on account of alleged not bringing on record one of several legal representatives of deceased Takhu Ram and that also in the circumstances noticed hereinbefore, wherein their existence on the basis of application containing incorrect facts is sought to be pressed after 18 years of

taking on record the legal representatives.

16. In view of the peculiar facts, the judgment in the case of Daya Ram (*supra*) has no application to the facts of the present case.

17. Coming to the merits of the appeal, the application seeking grant of probate was filed by Takhu Ram in relation to the Will dated 02.04.1979, a look at the Will (Ex.-2) indicates that the same has been inscribed by scribe Jeevan Ram, bears thumb impression of the executant and therein indicates that she is aged 70 years, Takhu Ram is her husband's nephew, looks after her and her house, she had executed an adoption deed in favour of Bhinya Ram, who has not looked after her and the house, which has collapsed for lack of repair and, therefore, she was cancelling the adoption deed, Bhinya Ram would not inherit her property and that Will was being executed in favour of Tukha Ram, who would inherit the properties in presence of the attesting witnesses. The Will also bears signatures of Chhog Singh, Hari Ram and Khumana Ram.

18. The requirements of proving a Will have been indicated by Hon"ble Supreme Court in *H. Venkatachala Iyengar v. B.N. Thimmajamma and ors.*: AIR 1959 SC 443 in the following manner:-

"19. However, there is one important feature which distinguishes wills 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 so, 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 favour 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.

20. There may, however, be cases in which the execution of the will may be surrounded by suspicious circumstances. The alleged signature of the testator may be very shaky and doubtful and evidence in support of the propounder's case that the signature in question is the signature of the testator may not remove the doubt created by the appearance of the signature; the condition of the testator's mind may appear to be very feeble and debilitated; and evidence adduced may not succeed in removing the legitimate doubt as to the mental

capacity of the testator; the dispositions made in the will may appear to be unnatural, improbable or unfair in the light of relevant circumstances; or, the will may otherwise indicate that the said dispositions may not be the result of the testator's free will and mind. In such cases the court would naturally expect that all legitimate suspicions should be completely removed before the document is accepted as the last will of the testator. The presence of such suspicious circumstances naturally tends to make the initial onus very heavy; and, unless it is satisfactorily discharged, courts would be reluctant to treat the document as the last will of the testator. It is true that, if a caveat is filed alleging the exercise of undue influence, fraud or coercion in respect of the execution of the will propounded, such pleas may have to be proved by the caveators; but, even without such pleas circumstances may raise a doubt as to whether the testator was acting of his own free will in executing the will, and in such circumstances, it would be a part of the initial onus to remove any such legitimate doubts in the matter."

(Emphasis Supplied)

19. The requirement indicated in the above law laid down by Hon"ble Supreme Court has been that the propounder of the Will is required 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. The onus on the propounder can be taken to be discharged on proof of the essential facts just indicated. However, in cases, where the execution of the Will is surrounded by suspicious circumstances, the Court would require that the suspicions should be completely removed before the document is accepted as the last Will of the testator and unless it is satisfactorily discharged, courts would be reluctant to treat the document as the last will of the testator, the initial onus to remove any such legitimate doubts in the matter lies on the propounder. One of the suspicious circumstance indicated is that the disposition made in the Will appear to be unnatural, improbable or unfair in the light of relevant circumstances.

20. In the present case, the Will has been propounded by Takhu Ram, the sole beneficiary of the Will. The application was filed by him regarding which appellant Bhinya Ram had filed caveat and where after filed objections along with counter-claim and rejoinder to the reply/reply to the counter-claim was filed and the issues were framed by the trial court. Thereafter the matter was posted on 16.01.1993, for evidence on behalf of the applicant, the same was adjourned on 26.02.1993, 27.03.1993, 19.05.1993, 05.06.1993, 23.07.1993, 27.08.1993, 17.09.1993, 06.10.1993; where after on 19.11.1993, an application was filed on behalf of applicant Takhu Ram seeking recording of the statement through Commissioner, which application was allowed on 19.11.1993 itself and the Commissioner was directed to record the statements on 19.12.1993. Where after, it was noticed on 21.12.1993, 07.01.1994, 06.02.1994, 16.03.1994,

13.04.1994 and 23.04.1994 that the statements were not recorded by the Commissioner. On 23.04.1994, an application was filed by the applicant Takhu Ram seeking permission from the court to examine the scribe and attesting witness of the Will before the statements of the applicant, in terms of provisions of Order 18, Rule 3A CPC, which application was rejected by the trial court on 23.04.1994 itself and it was directed that all the witnesses be presented on the next date; on 29.04.1994, statements of PW-1 Lekh Ram, PW-2 Hari Ram and PW-3 Khumana Ram were recorded and after reserving right of rebuttal, the evidence was closed.

21. From the above sequence of events, it is clear that despite grant of sufficient opportunity rather excessive opportunities and providing for examination of the propounder through Commissioner, he did not enter the witness-box/got himself examined, application was filed seeking permission under Order 18, Rule 3A CPC, which was rejected and applicant was directed to produce the entire evidence and on the next date, three witnesses other than the propounder was produced. The burden of proving the Will and the role of the propounder of the Will, as already noticed hereinbefore and as laid down by Hon"ble Supreme Court in the case of H. Venkatachala Iyengar (supra) is of extreme importance. Further the appearance of the propounder of the Will in probate proceedings cannot be equated with any other litigation, wherein the power of attorney holder can appear on behalf of the plaintiff under well defined circumstances. The requirement of appearance and consequence of nonappearance of a plaintiff himself has been noticed by Hon"ble Supreme Court in the case of Iswar Bhai C. Patel (supra) as under:-

"18. As early as in 1927, the Privy Council in *Sardar Gurbaksh Singh v. Gurdial Singh*, Air 1927 PC 230, took note of a practise prevalent in those days of not examining the parties as a witness in the case and leaving it to the other party to call that party so that the other party may be treated as the witness of the first party. Their Lordships of the Privy Council observed as under :-

"Notice has frequently been taken by this Board of this style of procedure. It sometimes takes the form of a manoeuvre under which counsel does not call his own client, who is an essential witness, but endeavours to force the other party to call him, and so suffer the discomfiture of having him treated as his, the other party"s, own witness.

This is thought to be clever, but it is a bad and degrading practise. Lord Atkinson dealt with the subject in *Lal Kunwar v. Chiranji Lal* (1910) ILR 32 All 104, calling it "a vicious practise, unworthy of a high-toned or reputable system of advocacy."

19. They further observed as under :-

"But in any view her non-appearance as a witness, she being present in Court, would be the strongest possible circumstance going to discredit the truth of her case."

20. Their Lordships also took note of the High Court finding which was to the following effect :-

"It is true that she has not gone into the witness box, but she made a full statement before Chaudhri Kesar Ram, and it does not seem likely that her evidence before the Subordinate Judge would have added materially to what she had said in the statement.

21. They observed :-

"Their Lordships disapprove of such reasoning. The true object to be achieved by a Court of justice can only be furthered with propriety by the testimony of the party who personally knowing the whole circumstances of the case can dispel the suspicions attaching to it. The story can then be subjected in all its particulars to cross-examination."

22. This decision has since been relied upon practically by all the High Courts. The Lahore High Court in *Kripa Singh v. Ajaipal Singh*, AIR 1930 Lahore 1, observed as under :-

"It is significant that while the plaintiffs put the defendant in the witness-box they themselves had not the courage to go into the witness-box. Plaintiffs were the best persons to give evidence as to the "interest" possessed by them in the institution and their failure to go into the witness-box must in the circumstances go strongly against them."

23. This decision was also relied upon by the Bombay High Court in *Martand Pandharinath Chaudhari v. Radhabai Krishnarao Deshmukh*, AIR 1931 Bombay 97, which observed as under :-

"It is bounden duty of a party personally knowing the facts and circumstances, to give evidence on his own behalf and to submit to cross-examination and his non-appearance as a witness would be the strongest possible circumstance which will go to discredit the truth of his case."

24. The Lahore High Court in two other cases in 1934, namely, *Bishan Das v. Gurbakhsh Singh*, AIR 1934 Lahore 63 (2) and *Puran Das Chela v. Kartar Singh*, AIR 1934 Lahore 398 took the same view.

25. A Division Bench of the Patna High Court in *Devji Shivji v. Karsandas Ramji*, AIR 1954 Patna 280, relying upon the decision of the Privy Council in *Sardar Gurbakhsh Singh v. Gurdial Singh* (AIR 1927 PC 230) (supra) and the Madhya Pradesh High Court in *Gulla Kharagjit Carpenter v. Narsingh Nandkishore Rawat*, AIR 1970 Madh Pra 225 have also taken the same view. The Madhya Pradesh High Court also relied upon the following observation of the Calcutta High Court in *Pranballav Saha v. Sm. Tulsibala Dassi*, AIR 1958 Cal 713 :-

"The very fact that the defendant neither came to the box herself nor called any witness to contradict evidence given on oath against her shows that these facts cannot be denied. What was prima facie against her became conclusive proof by

her failure to deny."

26. The Allahabad High Court in *Arjun Singh v. Virender Nath*, AIR 1971 All 29, held that :-

"the explanation of any admission or conduct on the part of a party must, if the party is alive and capable of giving evidence, come from him and the Court would not imagine an explanation which a party himself has not chosen to give."

27. It was further observed that :-

"If such a party abstains from entering the witness box it must give rise to an interference adverse against him."

28. A Division Bench of the Punjab & Haryana High Court also in *Bhagwan Dass v. Bhishan Chand*, Air 1974 Punj & Har 7, drew a presumption under Section 114 of the Evidence Act that if a party does not enter into the witness box, an adverse presumption has to be drawn against that party.

29. Applying the principles stated above to the instant case, it would be found that in the instant case also the appellant has abstained from the witness box and had not made any statement on oath in support of his pleading set out in the written statement. An adverse inference has, therefore, to be drawn against him. Since it was specifically stated by respondent No. 2 in his statement on oath that it was at the instance of the appellant that he has issued the cheque on the account of respondent No.1 in the Central Bank of India Ltd., Sambalpur Branch, and the appellant, admittedly, had encashed that cheque, an inference has to be drawn against the appellant that what he stated in the written statement was not correct. In these circumstances, the High Court was fully justified in decreeing the suit of respondent No. 1 in its entirety and passing a decree against the appellant also."

22. The applicant-respondent Takhu Ram was required to appear before the court to explain the circumstances and it was not expected of the court to imagine an explanation, which the applicant himself has not chosen to give. The propounder of the Will was required to enter the witness-box to explain all the suspicious circumstances surrounding the execution of the Will. Being applicant for grant of probate, it was incumbent upon him to explain the circumstances, under which, the properties were bequeathed to him. Applying the principles laid down by Hon"ble Supreme Court in the case of *Iswar Bhai C. Patel* (supra), the propounder of the Will i.e. Takhu Ram having not enter the witness-box and having not made any statement on oath in respect of his pleadings, an adverse inference is to be drawn against him as it is a case of utter failure of the propounder of the Will to prove the averments made in the probate proceedings.

23. So far as the reliance placed by learned counsel for the respondent on judgment in the case of *Kailashi Devi* (supra) is concerned, the same pertained to a suit for dissolution of partnership firm and therein the power of attorney holder appeared in the witness-box and in those circumstances, it was held that

the evidence of said power of attorney holder can be led, however as noticed hereinbefore, the role of a propounder of the Will is quite different and significant from plaintiffs in other suits and, therefore, the judgment has no application to the facts of the present case.

24. The analysis of the statements of the three plaintiff witnesses indicates that it is an admitted case that the deceased Smt. Ganga, had her matrimonial home at Uchida, which was 17-18 kilometers away from Bhadera, the place, where the Will is claimed to have been executed; she was living at Uchida for over 50 years since her childhood, which fact was indicated by PW-1 Lekh Ram and PW-2 Hari Ram. It was specific case of the applicant that the testatrix was aged 70 years and visited Bhadera for attending marriage of grand-daughter of Takhu Ram and after about 20 days of the marriage, the Will was executed and, thereafter she went back to Uchida, her home and died on 01.05.1979 at Uchida.

25. The circumstances, in which, the Will is claimed to have been executed and the events, which have been recounted by the three witnesses qua the proceedings on the day of execution of the Will indicate material contradiction regarding the presence of the two attesting witnesses and the scribe Khumana Ram as claimed by the applicant. While Lekh Ram (PW-1) son of the applicant indicated that Chhog Singh and Hari Ram were called through a boy, whose name, he did not remember and, thereafter, first Hari Ram came and then Chhog Singh came. Whereas, Hari Ram (PW-2) indicated that when he reached at the place of Takhu Ram, Chhog Singh was already there and that Brijlal son of Takhu Ram had come to call him. Both the witnesses PW-1 and PW-2 indicated that the document was executed around 9-10-11-12 AM, Khumana Ram, the scribe in his statement, stated that he had reached place of Takhu Ram at 7.00-8.00 AM and that Hari Ram and Chhog Singh were already there and they had reached before his arrival at the place of Takhu Ram.

26. The above contradictions in the statement of the three witnesses are quite material, inasmuch as, the plea and the evidence, which has been led indicates that the Will was scribed by Khumana Ram and was signed by Hari Ram and Chhog Singh as attesting witnesses, however, the fact that while Lekh Ram indicates that Hari Ram came earlier and thereafter Chhog Singh was called while Hari Ram indicates that Chhog Singh was already there when he reached and Khumana Ram indicates a third story, wherein both Hari Ram and Chhog Singh were present before he reached at the place of Takhu Ram at 7.00-8.00 AM in the morning.

27. Lekh Ram indicated in his statement that Chhog Singh was called through some boy and he doesn't known the name of the boy. If, Chhog Singh and Hari Ram were already present at the place of Takhu Ram before Khumana Ram arrived at the placed of Takhu Ram i.e. at 7.00-8.00AM would mean that Chhog Singh was called before 7.00 AM through a boy, admittedly Chhog Singh is not resident of the same village and it is claimed that Chhog Singh was in the village for some Panchayat related work, as to when Chhog Singh was not having his

place of residence in the same village from where and how a child before 7.00 AM went and called Chhog Singh is wholly unexplained. Chhog Singh, the other attesting witness has not been examined. The above contradictory and improbable circumstances regarding the presence of two attesting witnesses, the scribe, the beneficiary of the Will Takhu Ram and his son PW-1 Lekh Ram together at about 7.00 AM in the morning, raises doubts about the fact that the witnesses were telling the truth.

28. Further while Hari Ram indicated Brijlal son of Takhu Ram came to call him, Lekh Ram indicated that he did not remember the name of boy, who was sent for calling Hari Singh, whereas Brijlal is his real brother. Such contradictions in the statement raises doubts regarding the due execution of the document as to whether the execution at all happened as claimed by the applicant and/or his witnesses.

29. If the statements are taken on the face value, the same would indicate that the two attesting witnesses, scribe, beneficiary and his son, all collected from before 7.00 AM in the morning for the purpose of executing the Will, which aspect in the circumstances that the Will pertained to a 70 years old widow and was being executed at a small village creates suspicion.

30. Hon''ble Supreme Court in the case of H. Venkatachala Iyengar (supra) pointed out that if the disposition made in the Will appears to be unnatural, improbable or unfair in the light of relevant circumstance, the same would make a Will surrounded by suspicious circumstance and the court would expect that all such suspicion should be completely removed before the document is accepted as the last Will of the testator.

31. As noticed hereinbefore, the testator Smt. Ganga was a child widow and since here widowhood, was staying at Uchida, the period, she spent at Uchida since the time of death of her husband was about 50 long years, admittedly Bhinya Ram is a resident of Uchida and was related to Smt. Ganga and was in fact adopted by her by a registered adoption deed dated 13.03.1978 (Ex.-A1A). Further, the claim is that Smt. Ganga visited village ? Bhadera to attend marriage at Takhu Ram''s place and after 20 days of the marriage, she executed the Will in favour of Takhu Ram. Interestingly, after executing the Will on 02.04.1979, she left Bhadera and went back to Uchida, where she ultimately died on 01.05.1979. The Will indicates that Bhinya Ram did not look after Smt. Ganga and did not repair the house, which led to its falling down. The document further indicates that Takhu Ram looks after her and her house. A further reference has been made to the adoption deed and it has been indicated that she cancels the adoption deed. There are obvious contradictions in the Will itself, wherein on the one hand it has been indicated that Takhu Ram looks after Smt. Ganga and her house and in the same document, it has been indicated that as Bhinya Ram did not look after the house, the same fell down. If Takhu Ram was looking after Smt. Ganga and her house, how can the house fall down because of the same being ignored by Bhinya Ram is unexplained. Further, if Smt. Ganga was being

looked after by Takhu Ram and because of that she executed Will in his favour bequeathing everything to him and was in the last stage of her life, what prompted her to go back to Uchida, where she ultimately died after few days, the contents of the Will if had some substance, the natural course would have been that after executing the Will, she would have stayed with the beneficiary and would not have left village ? Bhadera.

32. As already noticed hereinbefore, the propounder of the Will chose not to appear in the witness-box despite sufficient opportunity, the three witnesses, which appeared in the witness-box concentrated merely on proving the execution of the Will, however, the burden of the propounder to remove the suspicious circumstances, has remain totally undischarged, there is not an iota of evidence to indicate as to what prompted Smt. Ganga to disturb the natural line of succession i.e. succession in favour of her adopted son Bhinya Ram and to bequeath her estate to Takhu Ram. In view of the fact that adverse inference has already been drawn on account of non-appearance of the propounder of the Will despite sufficient opportunity, the lurking doubt/suspicion remains unanswered/unexplained.

33. The judgments cited by learned counsel for the respondents are not of much assistance to the respondents. The case of Yumnam Ongbi Tampha Ibema Devi (supra) only pertained to the requirement of Section 63 of the Act. Further, in the said case also, the Hon''ble Supreme Court noticed the fact that in the case of *Benga Behera v. Braja Kishore Nanda* : (2007) 9 SCC 728, no independent witness was examined to show how the testatrix came close to the propounder and why valuable agricultural land and homestead land along with a house standing thereon has been gifted in his favour was not explained and the existence of suspicious circumstance itself was held to be sufficient to arrive at a conclusion that of the Will has not been duly proved.

34. Similarly, in the case of *Apoline D'Souza* (supra), the fact of execution of the Will in favour of a person, who was not staying with the testatrix by ignoring her relative, was not approved by Hon''ble Supreme Court. In the case of *Lalitaben Jayantilal Popat* (supra), cited by learned counsel for the appellants, similar views were expressed and it was laid down that law in regard to a proof of a valid Will is now well settled, wherein it has to be proved not only by proving the signature of the executor, but it should be found to be free from any suspicious circumstances and that as an order granting probate is a judgment in rem, the court must also satisfy its conscience before it passes an order.

35. In view of the above discussion, the contradictions in the statements of witnesses, the improbability of the circumstances, in which, it is claimed that the Will was executed and on account of failure on part of the propounder of the Will to remove suspicious circumstances, the finding on issue No. 1, recorded by the trial court cannot be sustained and the same is, therefore, reversed.

36. The other aspect, which arose in the present case, pertains to the adoption

of Bhinya Ram. The issue No. 6 framed by the trial court reads as under:-

(6- vk;k izfroknH Hkha;kjke jftLVMZ [kksykukek ds vk/kkj ij xaxk dk nRrd iq= gS vkSj bl otg ls eq0 xaxk dks tk;nkn egruktk ds ckr dksbZ olh;r djus dk vf/kdkj ugha Fkk\\)

The said issue was framed based on the additional plea raised by Bhinya Ram in his reply, wherein it was claimed that as Bhinya Ram is adopted son of Smt. Ganga, she had no right to execute the Will.

37. As already noticed hereinbefore, the applicant did not file any replication to the reply questioning the validity of the adoption deed and, therefore, the issue only pertained to the right of Smt. Ganga to execute the Will. The trial court, however, while dealing with the issue No. 6, came to the conclusion that though the adoption deed was registered, the scribe and the attesting witnesses were necessary to be examined for proving the said Will in view of the provisions of Section 3 of the Transfer of Property Act, 1882 ("the T.P. Act"). The trial court then went on to hold that as Bhinya Ram was married and had six children and was aged 40 years, the adoption was contrary to the provisions of Section 10 of the Adoption Act and as Bhinya Ram has not indicated in written statement and has not produced any evidence that a married 40 years old person can be adopted in the community, based on the document, Bhinya Ram cannot be treated as adopted son of Smt. Ganga and that in the Will dated 02.04.1979, the adoption deed has been cancelled by Smt. Ganga. The trial court after accepting the submission on behalf of Bhinya Ram that adoption cannot be cancelled, reiterated that the adoption deed has not been proved and the same is in violation of provisions of the Adoption Act.

38. The trial court though recorded a finding that Bhinya Ram was looking after Smt. Ganga and he might have done the funeral obsequies and that land has been mutated in his name and he is in possession of the house belonging to Smt. Ganga, held that the same cannot prove his adoption and decided the issue against Bhinya Ram.

39. The finding of the trial court regarding necessity of an attesting witness for an adoption deed, based on provision of Section 3 of the T.P. Act, is baseless as Section 3 of the T.P. Act pertains to interpretation, wherein term "attested" though has been defined, the same does not indicate the necessity.

40. The provision pertaining to a registered adoption deed is contained in Section 16 of the Adoption Act, which reads as under:-

"16. Presumption as to registered documents relating to adoption.- Whenever any document registered under any law for the time being in force is produced before any court purporting to record an adoption made and is signed by the person giving and the person taking the child in adoption, the court shall presume that the adoption has been made in compliance with the provisions of this Act unless and until it is disproved."

41. The above provision only requires the document purporting to record an adoption to be signed by the person giving and the person taking the child in adoption and does not require any attesting witness to such document.

Section 68 of the Evidence Act, 1872 reads as under:-

"68. Proof of execution of document required by law to be attested. - If a document is required by law to be attested, it shall not be used as evidence until one attesting witness at least has been called for the purpose of proving its execution, if there be an attesting witness alive, and subject to the process of the Court and capable of giving evidence:

[Provided that it shall not be necessary to call an attesting witness in proof of the execution of any document, not being a Will, which has been registered in accordance with the provisions of the Indian Registration Act, 1908 (16 of 1908), unless its execution by the person by whom it purports to have been executed is specifically denied.]"

42. A bare look at the above provision reveals that it is only in a case where a document is required by law to be attested, for the said document to be used as evidence, one attesting witness at least must be called for the purpose of proving its execution and the proviso indicates exception even in the said requirement, wherein except in a case of Will, it is not necessary to call an attesting witness in proof of the execution of any document, which has been registered in accordance with the provisions of the Registration Act.

43. In view of the fact that the adoption deed is not required to be attested and the fact that the adoption deed in the present case (Ex.-A1A) is a registered instrument, execution whereof was not denied by Takhu Ram, there was no requirement of production of any of the attesting witness to the said document for proving the said adoption deed and, therefore, the finding of the trial court in this regard cannot be sustained.

44. So far as the non-fulfilment of the requirements of the provision of Section 10 of the Adoption Act is concerned, as already noticed hereinbefore, there was neither any challenge to the adoption nor the same was the issue before the court so as to require Bhinya Ram to produce witnesses to support the custom of married persons and persons above the age of 15 years being adopted in the community and, therefore, there was no occasion for the trial court to determine the validity of the adoption deed.

45. Interestingly, in fact not only there was no dispute about Bhinya Ram being adopted son of Smt. Ganga in the pleadings, in fact there was admission on behalf of the applicant Takhu Ram that Bhinya Ram was adopted son of Smt. Ganga, inasmuch as, Lekh Ram (PW-1) son of Takhu Ram specifically stated in his cross-examination that it was true that Bhinya Ram was adopted by Smt. Ganga, however, he claimed that the adoption deed was cancelled by Will dated 02.04.1979. Both the other two attesting witnesses i.e. Hari Ram and Khumana

Ram specifically indicated that Smt. Ganga told them that Bhinya Ram was her adopted son.

46. Besides the above, even in the Will dated 02.04.1979 relied on by Takhu Ram, there is an specific reference that Bhinya Ram was adopted by Smt. Ganga, which adoption was sought to be cancelled by way of the said Will only.

47. In view of the above state of the pleadings and evidence, it was not in issue at all as to whether Bhinya Ram was adopted son of Smt. Ganga and, therefore, there was no occasion for the trial court to adjudicate the validity of the deed of adoption. The trial court went beyond its jurisdiction in determining the validity of the adoption deed, which was neither the issue nor the contest between the parties.

48. Provision of Section 15 of the Adoption Act reads as under:-

"15. Valid adoption not to be cancelled.

- No adoption which has been validly made can be cancelled by the adoptive father or mother or any other person, nor can be adopted child renounce his or her status as such and return to the family of his or her birth."

The above provision clearly provides that no adoption, which has been validly made can be cancelled by the adoptive father or mother or any other person, nor can the adopted child renounce his or her status as such and return to the family of his or her birth.

49. In view thereof, the stipulation in the Will dated 02.04.1979, even if the same was valid by itself would have no implication in so far as adoption of Bhinya Ram was concerned.

50. In view of the above discussion, the finding recorded by the trial court pertaining to the validity of the adoption of Bhinya Ram, cannot be sustained and the same is, therefore, reversed.

51. However, from the record, it cannot be deciphered and nor it is the case of Binya Ram that the property sought to be bequeathed by Smt. Ganga was inherited by her from her husband and, therefore, adoption of Bhinya Ram, by itself could not have divested Smt. Ganga from dealing with the said property, however, in the present case, the finding on issue No. 1 regarding the execution of the Will dated 02.04.1979 having been reversed, in absence of a Will, the property of Smt. Ganga would be inherited by way of intestate succession.

52. So far as the Will sought to be propounded by Bhinya Ram is concerned, the said Will cannot be given much credence, inasmuch as, Bhinya Ram was well aware of the execution of the Will, despite that after death of Smt. Ganga, he got the entire agricultural land mutated in his favour vide resolution dated 13.08.1979 passed by Gram Panchayar Hasera based on the adoption deed only and neither made any reference to the Will dated 27.04.1979 nor got the land mutated in favour of two other beneficiaries under the Will i.e. Ms. Chuki and Ms.

Dhapi to whom purportedly two agricultural fields admeasuring 16 Bigha 10 Biswa each were bequeathed by Smt. Ganga by Will dated 27.04.1979. The said conduct of Bhinya Ram, is writ large on record, wherein he has chosen not to disclose the said Will in the first instance and has not given any explanation for the said omission on his part, which renders the very execution of the Will dated 27.04.1979 as suspicious. Further, the statement of one of the attesting witness Rawat Ram (DW-4) lends further credence to the above suspicious circumstance and, therefore, qua the said Will dated 27.04.1979, even the appellant is not entitled to grant of probate.

53. In view thereof, the finding on issue No. 7 of the trial court pertaining to the counter claim made by Bhinya Ram does not call for any interference.

54. In view of the above discussion, the appeal is partly allowed. The judgment and decree dated 21.09.1994 passed by the trial court is set aside to the extent that the decree has been granted in favour of Takhu Ram for grant of probate pertaining to the Will dated 02.04.1979; the finding pertaining to the validity of adoption deed dated 13.03.1978 is also set aside. However, the decree pertaining to the Will dated 27.04.1979 is upheld.