

(2014) 02 DEL CK 0085

In the Delhi High Court

Case No : Regular First Appeal (OS) 13 of 2014

Sh. Prem Nath Chopra Deceased Thru Lrs.

APPELLANT

Vs

Sh. Arun Chopra and Others

RESPONDENT

Date of Decision : 26-02-2014

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 14 Rule 6, Order 15 Rule 1, Order 6 Rule 17 115 151

Evidence Act, 1872 — Section 58 68

Hindu Succession Act, 1956 — Section 14 15 15(2) 16

Limitation Act, 1963 — Section 17

Succession Act, 1925 — Section 2(h) 213 59 63 68

Citation : (2014) 209 DLT 144

Hon'ble Judges : Pradeep Nandrajog, J; Jayant Nath, J

Bench : Division Bench

Advocate : Y.P. Narula, instructed by Mr. Aniruddha Choudhary and Mr. Abhay Narula, for the Appellant; Harish Malhotra instructed by Ms. Shweta Bharti, Shantanu and Mr. Neelesh Sinha, Advocates for R-1 and R-3 to R-6, for the Respondent

Final Decision : Dismissed

Judgement

Pradeep Nandrajog, J.—The dispute in the present appeal is between a son of Late Sh. Chanan Das Chopra-Prem Nath who died during pendency of the suit and his wife Santosh and two daughters Vipula and Anuradha continuing with the litigation on being substituted as his legal heirs. On the other side pitched against Prem Nath were his nephews, Arun Chopra and Vivek Chopra sons of H.L. Chopra, the brother of Prem Nath. The fight is not on the estate of Late Chanan Das Chopra. It pertains to property bearing Municipal No. D-354, Defence Colony, New Delhi which was demised in perpetuity by the L & DO to Wing Commander Maharaj Kishan Chopra, the son of Late Sh. Chanan Das Chopra i.e. the brother of Prem Nath Chopra and H.L. Chopra. Prem Nath Chopra, Maharaj Kishan Chopra, Sham Lal Chopra and H.L. Chopra were brothers. Shanti Devi and Kamla Ahuja were their sisters. The genealogy tree of the family of Late Sh.

Chanan Das Chopra is as under:-

Prem Nath (Plaintiff): Santosh Chopra (wife) Vipula and Anuradha (daughters)

Maharaj Kishan: Har Kaur (wife)

Shyam Lal

Chanan Das Chopra: H.L. Chopra: Arun Chopra and Vivek Chopra (Sons)
(Defendants No. 1 and 2)

Shanti Devi: Virender and Rajan (Sons), Sudesh and Sunita (Daughters)
(Defendants No. 3 to 6)

Kamla Ahuja: Rosy (Son), Rita and Ruby (Daughters) (Defendants No. 7 to 9)

2. On November 16, 2006 Prem Nath Chopra instituted a suit seeking partition of property bearing Municipal No. D-354, Defence Colony, New Delhi (hereinafter referred to as the "Suit Property") and division of movable assets of Late Sham Lal Chopra as listed in Annexures A and B to the plaint. And we need to highlight that partition of the estate of neither Maharaj Kishan nor his wife Har Kaur was prayed for.

3. Prem Nath Chopra was the plaintiff. Arun Chopra and Vivek Chopra sons of Late H.L. Chopra were impleaded as defendants No. 1 and 2. Virender, Rajan, Sudesh and Sunita the children of Shanti Devi were impleaded as defendants No. 3 to 6. Rosy, Rita and Ruby, the children of Kamla Ahuja were impleaded as defendants No. 7 to 9. In our decision we shall be referring to the parties by their nomenclature in the suit.

4. It was pleaded in the plaint that Late Wing Commander Maharaj Kishan Chopra the brother of the plaintiff was the perpetual lessee of land bearing Municipal No. D-354, Defence Colony, New Delhi who constructed a building thereon in his lifetime and that he died intestate on November 30, 1984 leaving behind his wife Har Kaur Chopra as his sole Class-I legal heir who inherited the said property. He pleaded that Har Kaur Chopra died on June 07, 1988. He pleaded that by and under a conveyance deed dated February 03, 1997 executed by L & DO the lease-hold rights were mutated in the name of only Sham Lal Chopra. It was pleaded in the plaint that the plaintiff was not aware as to how the conveyance deed dated February 03, 1997 was executed by L & DO in favour of Sham Lal Chopra. He highlighted that he did not receive any information or notice from L & DO regarding execution of the said conveyance deed.

5. We need to highlight that it was categorically pleaded that Sham Lal Chopra inherited the suit property from his brother Maharaj Kishan Chopra and thus became the owner of the suit property. He pleaded that Sham Lal Chopra died intestate on October 04, 2006 leaving behind no class-I legal heir. Being class-II legal heirs of Sham Lal Chopra, he i.e. the plaintiff and the other siblings of Sham Lal Chopra viz. H.L. Chopra, Shanti Devi and Kamla Ahuja became entitled to 1/4th (25%) share each in the suit property and the movables owned by

Sham Lal Chopra. He pleaded that on the death of H.L. Chopra, Shanti Devi and Kamla Ahuja, their 1/4th (25%) share in the suit property was inherited by their children in equal proportion. He pleaded that partition had not taken place. So pleading, he prayed that the suit property be partitioned by metes and bounds as also the movable estate of Sham Lal Chopra. Since much would turn on the pleadings in the plaint, it would be useful if we note the contents of paras 1, 4, 7 and 9 of the plaint and while doing so to underline so as to highlight certain relevant pleadings. They read as under:-

1.....After the death of Mrs. Har Kaur Chopra on 7.6.1988, the plaintiffs are not aware as to how the Conveyance Deed in respect of the said property has been registered in the name of deceased Group Captain Mr. Sham Lal Chopra as the plaintiffs and other heirs of Wg. Cmr. Maharaj Kishan Chopra never received any information or notice from the authorities i.e. Land and Development Office.

x x x

4. That the deceased Shri Sham Lal Chopra died intestate on 4.10.2006. Death Certificate is enclosed as Annexure-P1. The deceased Shri Sham Lal Chopra was the owner of the property bearing No. D-354, Defence Colony, New Delhi and the Conveyance Deed in respect of the said property was registered in the name of the deceased on 3.2.1997. The deceased Gr. Capt. Sham Lal Chopra inherited this property from his elder brother Wg. Cmr Maharaj Kishan Chopra. Copy of Conveyance Deed is enclosed as Annexure P-2.

x xx

7. That the plaintiff has 25% share in the estate left behind by Shri Sham Lal Chopra, similarly, Defendants 1 & 2 being the heirs of Late Sh. H.L. Chopra have 12.5% share each. The Defendants 3, 4, 5 and 6 have 6.25% share each and defendants 7, 8 & 9 have 8.33% share each in the estate of Shri Sham Lal Chopra.

x x x

9. That the property is joint and plaintiff and the defendants have their shares in the movable and immovable properties as stated herein above, as such, no Defendants have any right whatsoever to sell or deal with the same. The said defendant No. 1 is also threatening to take possession of 1st floor of the suit property from the tenant M/s. ABP Private Limited who were to vacate the premises in October, 2006.

(Emphasis Supplied)

6. Whereas defendant No. 2, the brother of defendant No. 1, chose not to contest and preferred to be proceeded against ex-parte by not causing any appearance to be made when he was served with summons in the suit, defendant No. 1 opposed the claim by pleading that Maharaj Kishan Chopra was the absolute owner of the suit property. During his lifetime Maharaj Kishan

Chopra had executed a will dated February 25, 1956 bequeathing the suit property to his wife Har Kaur Chopra as a result whereof Har Kaur Chopra became the absolute owner of the suit property. During her lifetime, Har Kaur Chopra had executed a will dated January 18, 1985 bequeathing the suit property to Sham Lal Chopra as a result whereof on her death on June 07, 1988 Sham Lal Chopra became the absolute owner of the suit property. During his lifetime, Sham Lal Chopra had executed a will dated February 09, 2006 bequeathing the suit property to the defendant No. 1 and his wife Sarvjit Chopra, as a result whereof defendant No. 1 and his wife Sarvjit Chopra became the absolute owners of the suit property. It was pleaded that the plaintiff is fully aware about the execution of the will dated February 09, 2006 by Sham Lal Chopra. It was pleaded that since Sham Lal Chopra was issueless, he treated the defendant No. 1 as his own son and thus he had bequeathed the suit property to the defendant No. 1 and his wife. He pleaded that the relations between the plaintiff and Sham Lal Chopra were strained. He pleaded further that during his lifetime, Sham Lal Chopra had let out the first floor of the suit property to ABP Pvt. Ltd. under three lease-deeds dated October 12, 2001 and November 01, 2003/2005. In the said (three) lease-deeds, the defendant No. 1 and his wife Sarvjit Chopra has been referred to as the "legal heirs/successors" of Sham Lal Chopra, which fact clearly evidences that Sham Lal Chopra intended that the defendant No. 1 and his wife Sarvjit Chopra should succeed to the suit property.

7. In the written statements filed by defendants Nos. 3, 4, 5 and 6 they supported the case pleaded by defendant No. 1.

8. Whereas defendant No. 7 chose not to file a written statement, defendants Nos. 8 and 9 were not permitted by the learned Single Judge to file written statements because they did not do so within the period of 90 days prescribed under the CPC to do so.

9. On January 29, 2007 the plaintiff filed an application under Order VI Rule 17 of the CPC praying that he be permitted to amend the plaint. The amendment(s) sought was the deletion of paragraph 4 of the plaint (noted by us in the foregoing paragraphs) and adding pleadings to the effect that:- (i) Late Maharaj Kishan Chopra had acquired the suit property by using ancestral funds and thus the suit property, being an ancestral property, he i.e. Maharaj Kishan Chopra had no right to bequeath the suit property to his wife Late Har Kaur Chopra; (ii) the will dated January 18, 1985 purportedly executed by Late Har Kaur Chopra is forged; (iii) after receiving the written statements, the plaintiff went through various documents/records which were lying in the suit property at the time of the death of Sham Lal Chopra and discovered that Sham Lal Chopra and his wife Kamla Chopra had fraudulently got mutated the suit property in their names by falsely declaring to L & DO that they are the only legal heirs of Har Kaur Chopra as per her will dated January 18, 1985; (iv) the mutation and subsequent conversion of the suit property from lease-hold to free-hold in his favour has been obtained by Sham Lal Chopra by playing fraud upon L & DO and thus the

conveyance deed dated February 03, 1997 transferring lease-hold rights in the suit property in favour of Sham Lal Chopra is non-est in law; and (v) the will dated February 09, 2006 stated to have been executed by Sham Lal Chopra is a forged and fabricated document, who in any case, had no right to bequeath the suit property to the defendant No. 1 and his wife.

10. In essence, by way of amendment of the plaint, the plaintiff sought to lay a challenge to the title of Sham Lal Chopra to the suit property by questioning the will dated January 18, 1985 executed by Late Har Kaur Chopra.

11. Vide order dated March 01, 2007 the learned Single Judge dismissed the application seeking amendment of the plaint holding that the said application was not bona-fide and has been filed much beyond the period of limitation prescribed when cause of action accrued to seek cancellation of the mutation of the suit property recorded by L & DO in the name of Sham Lal Chopra. The reasoning of the learned Single Judge was that under the normal line of succession, the plaintiff along with other siblings of Maharaj Kishan Chopra would have inherited the suit property owned by him on the death of his wife Har Kaur Chopra on June 07, 1988. The plaintiff had not claimed any right in the suit property for eighteen long years, which conduct/acquiescence of the plaintiff evidence that the plaintiff had accepted that his brother Group Captain Sham Lal Chopra solely inherited the estate of Har Kaur Chopra, comprising the suit property, on account of a testamentary disposition made by Har Kaur Chopra in favour of Sham Lal Chopra. Such being the position, the plaintiff cannot be permitted to challenge the will dated January 18, 1985 executed by Har Kaur Chopra and the mutation of the suit property in favour of Sham Lal Chopra effected by L & DO in pursuance of the will dated January 18, 1985 or to claim that he i.e. the plaintiff was not aware as to how Sham Lal Chopra came to inherit the suit property; inasmuch as the plaintiff was residing in Delhi and was obviously aware of the inheritance.

12. The plaintiff filed an appeal before a Division Bench of this Court assailing the order dated March 01, 2007. Vide order dated March 23, 2007 the Division Bench dismissed the said appeal, reasoning as under:-

8. We have read the pleadings filed by the parties very carefully and also the statements made in the application seeking amendment. It is clearly established from the averments made in the plaint that at no stage the appellant contested the inheritance of the property by Group Captain Sham Lal Chopra and the appellant has accepted him as the owner of the property in fact he has categorically stated in paragraph 4 that the aforesaid Group Captain Sham Lal Chopra inherited the property from his elder brother Wg. Cmr. Maharaj Kishan Chopra. The aforesaid inheritance of the property by Group Captain Sham Lal Chopra took place some time in 1988 and consequent upon the inheritance, mutation was also done in favor of Group Captain Sham Lal Chopra on the basis of the Will which was executed by Mrs. Har Kaur Chopra. The contention that the appellant has come to know about the aforesaid will only upon going through

some of the documents lying in the house at the time of death of Shri S.L. Chopra cannot be accepted and is contrary to the averments made in the plaint. It is also apparent that the plea that is being taken is an after thought and if the same is allowed, the same will amount to allowing the appellant to take away admissions in the plaint. In the plaint there is no dispute that the estate left behind my late Mr. Sham Lal Chopra included B-354, Defence Colony, New Delhi. Inheritance of this property by Mr. Sham Lal Chopra, 18 years back is not questioned and challenged in a suit relating to partition of estate of late Mr. Sham Lal Chopra. There is also a delay of about 18 years during which period the appellant accepted the mutation done in favor of Group Captain Sham Lal Chopra and, therefore, it will not be appropriate to interfere with the findings recorded by the learned Single Judge.

(Emphasis Supplied)

13. Aggrieved, the plaintiff filed a Petition seeking Special Leave to Appeal before the Supreme Court which was dismissed vide order dated October 29, 2007, but with some observations. And since an argument was advanced before the learned Single Judge with respect to the effect of the observations made by the Supreme Court, it would be apposite to note the following portion of the order dated October 29, 2007:-

Having heard the learned counsel for the parties, we are of the opinion that in the facts and circumstances of this case, the plaintiff-petitioner shall not be prejudiced in any way, even if his application for amendment of the plaint is rejected although both the learned Single Judge as also the Division Bench of the High Court proceeded wrongly on the premise that non-questioning the inheritance of property by Mr. S.L. Chopra had conferred a title on him, no title can be conferred by admission; an inheritance of property is governed by the provisions of the Hindu Succession Act; but the question as to whether the respondents have obtained a title in the property by reason of execution of wills or otherwise is required to be gone into in terms of the provisions of the Hindu Succession Act coupled with the question of Indian Succession Act and Section 68 of the Indian Evidence Act.

Mr. Nayyar, learned counsel for the respondents submits that the learned Single Judge has fixed the matter for trial on day after tomorrow and in view of the fact that the respondents claim their exclusive title in the property by reason of the wills executed by Mrs. Har Kaur Chopra and Mr. S.L. Chopra, they have been directed to lead their evidence first.

The SLP is dismissed with the aforementioned observations.

(Emphasis Supplied)

14. Pertinently, the amendment(s) sought to be made by the plaintiff in the plaint were not allowed by the Supreme Court. But yet it was observed that title cannot be conferred by admission and inheritance is governed by law. It was

observed that no prejudice would be caused if the plaintiff was not permitted to amend the plaint. The Supreme Court observed that the question whether S.L. Chopra inherited the property as per law would have to be gone into.

15. Vide order dated July 25, 2007 following issues were settled by the learned Single Judge:-

1. Whether late Group Captain S.L. Chopra executed a legal and valid will dated 09.02.2006? OPD-1 & 3 to 6.

2. If Issue No. 1 is answered against defendants No. 1 & 3 to 6, to what share are the parties entitled to in the immovable property? OP Parties

3. Relief.

16. We need to highlight that the appellant was satisfied with the issues settled. He never sought an issue to be settled whether Har Kaur Chopra executed a will on January 18, 1985 bequeathing the suit property to Sham Lal Chopra. The plaintiff did not get any issue settled whether mutation in the record of L & DO obtained by S.L. Chopra was by playing fraud.

17. Thereafter the plaintiff filed an application under Order XIV Rule 6 of the CPC praying that additional issues be settled pertaining to the will dated January 18, 1985 allegedly executed by Late Har Kaur Chopra. Vide order dated February 15, 2008 the learned Single Judge disposed of aforesaid application in the following terms:-

In response to this application, the learned counsel appearing on behalf of the defendants 1, 3-6 states that the issues, as framed entirely cover the disputes in the suit. No further orders are necessary particularly in respect of the alleged will executed by Smt. Har Kaur Chopra.

This application stands disposed of in terms of this statement.

(Emphasis Supplied)

18. The plaintiff filed another application under Order VI Rule 17 CPC for amendment of the plaint filed by him. This time, the amendment(s) sought by the plaintiff was deletion of paragraph 7 of the plaint and adding pleadings to the effect that after the death of Har Kaur Chopra on June 07, 1988 the five living siblings of her husband Maharaj Kishan Chopra namely, Prem Nath Chopra (plaintiff), H.L. Chopra, S.L. Chopra, Shanti Devi, Kamla Ahuja, who were her legal heirs in terms of provisions of Section 15 of the Hindu Succession Act, 1956 became entitled to jointly succeed to her estate in terms of provisions of Section 16 of the Hindu Succession Act, 1956. In this manner, the plaintiff claimed 2/5th (40%) share (including the 1/5th (20%) share of S.L. Chopra) in the suit property. (Be it noted here that the plaintiff had also claimed inheritance to 1/5th (20%) share of S.L. Chopra in the suit property in view of his claim that he is entitled to succeed to 1/5th share of S.L. Chopra in the suit property as S.L. Chopra had died intestate and he was the sole surviving (class-II) heir of S.L.

Chopra). To put it simply, the plaintiff by claiming inheritance of the estate of Har Kaur Chopra under normal line of succession yet again, albeit indirectly, sought to challenge the will dated January 18, 1985 allegedly executed by Har Kaur Chopra in the (second) application for amendment of plaint filed by him. In addition thereto, the plaintiff sought to add in the amended plaint that "The Plaintiff is however, disputing the registration of the said conveyance deed in favor of Sh S.L. Chopra, as stated hereinbefore".

19. Vide order dated January 22, 2009 the Single Judge disposed of (second) application filed by the plaintiff for amendment of the plaint in the following terms:-

I consider that in view of the dismissal of the earlier application and in view of the observations made by the Supreme Court, the present application for amendment cannot be allowed. However, it need not be said that if this court comes to the conclusion that the will executed in favour of the defendants or the property being conveyed to the defendants as per the will was not lawful, the shares of different legal heirs will be in accordance with applicable laws and Hindu Succession Act.

20. Thereafter the plaintiff filed an appeal before a Division Bench of this Court assailing the legality of afore-noted order dated January 22, 2009 passed by the Single Judge, which appeal was dismissed as withdrawn vide order dated March 27, 2009. The relevant portion of the order dated March 27, 2009 reads as under:-

Though we have heard this Appeal in some more detail, it is not necessary to go into the merit thereof as we find that in the last Para of the impugned order, learned Single Judge has protected the interest of the appellants herein by observing that in case will executed in favor of the defendants or the property being conveyed to the defendants as per the will was not lawful, the shares of different legal heirs will be in accordance with applicable laws and Hindu Succession Act.

The only apprehension of learned counsel for the appellant is that this order has watered down the effect of the order of the Supreme Court in earlier round of litigation when first application of the appellant for amendment was dismissed.

Therefore, he submits that whereas the Supreme Court dealt with both wills, the learned Single Judge has now confined the discussion to one will only and in this way, the order of the Supreme Court is nullified. It hardly needs any clarification that the aforesaid observation of the Supreme Court cannot be nullified by the order passed by the learned Single Judge, which is not the intention of the order of the learned Single Judge either. The effect of the order of the Supreme Court can be argued by the appellant at which aspect naturally shall be considered at the appropriate stage.

In view of the aforesaid clarifications given, the appellant does not press this

appeal, which is accordingly dismissed as withdrawn.

21. During pendency of suit, the plaintiff expired on October 11, 2010 and his legal representatives viz. wife Santosh Chopra and two daughters Vipula Awasthy and Anuradha Antao were brought on record.

22. To prove the due execution of the wills Ex. DW-1/1 and Ex. DW-1/4 dated February 09, 2006 and January 18, 1985, defendant No. 1 Arun Chopra, the propounder of the wills examined himself as DW-1. R.K. Katyal, Uma Dhawan and Sudesh Prabhakar were examined as DW-2, DW-3 and DW-4 respectively.

23. Arun Chopra DW-1, deposed that the wills Ex. DW-1/1 and Ex. DW-1/4 are the last legal and valid testaments of Sham Lal Chopra and Har Kaur Chopra respectively. In essence, the defendant No. 1 in his examination-in-chief reiterated the contents of the written statement filed by him. In addition thereto, the defendant No. 1 deposed that during his lifetime Sham Lal Chopra had expressed to some of his close friends and relatives including his brother-in-law Rajesh Katiyal that he i.e. the defendant No. 1 was like a son to him and that he should inherit the suit property after his death and that Rajesh Katiyal had executed an affidavit Ex. DW-1/16 to said effect. The relations between him and Sham Lal Chopra were very close as evident from the fact that Sham Lal Chopra had got installed a telephone from MTNL at his i.e. defendant No. 1 residence at J-13A, Kailash Colony, New Delhi and produced a bill Ex. DW-1/17 relating to said telephone.

24. On being cross-examined, Arun Chopra DW-1, stated as under:-

I first went to Dubai in 1980 and returned in 1986 and thereafter in 2003 I again went to Dubai and staying there till date. I am doing business there. I am living in Delhi at J-13A, Kailash Colony since 1962-63.

Ques. Do you know what were the educational qualification of Smt. Har Kaur Chopra?

Ans. No.

Ques. Was she illiterate or literate?

Ans. She was literate, very much.

Ques. Have you ever seen her signing?

Ans. I do not remember.

Ques. Have you seen any document signed by her?

Ans. No.

Ques. I put it to you that you cannot say as to Smt. Har Kaur Chopra used to sign in Hindi or English?

Ans. I cannot say.

Ques. When did you see the original will of Smt. Har Kaur Chopra for the first time?

Ans. In 2006 I saw the original will.

Ques. Who gave this document to you?

Ans. This document alongwith several other documents were given to me by S.L. Chopra.

Ques. When this will alongwith other documents were given to you by Mr. S.L. Chopra?

Ans. It was given to me in February, 2006 when I came from Dubai.

Ques. Have you ever met Mrs. Uma Dhawan?

Ans. Yes I have met her.

Ques. Do you know who is she?

Ans. She was an old friend of Sh. S.L. Chopra.

Ques. When you met her for the first time?

Ans. I met her for the first time at the Chotha Ceremony of Mr. S.L. Chopra.

Ques. Do you know who is Mr. T.L. Sood?

Ans. No. I have never met him.

Ques. Do you know whether Mr. T.L. Sood is dead or alive.

Ans. I do not know.

Ques. Do you know as to where Mr. T.L. Sood was residing in the year 2005-06?

Ans. I do not know Sh. T.L. Sood. I only know him through his signatures on the documents.

Ques. Is it correct that you made efforts to contact him?

Ans. We made efforts to contact him.

Ques. Were you able to contact him?

Ans. No.

Ques. When did you meet Ms. Uma Dhawan after meeting her in the Chautha Ceremony?

Ans. I met her only when she came to lead evidence in this Court.

Ques. Is it correct that Sh. S.L. Chopra was not keeping good health in the year 2006.

Ans. His health was not bad but it was indifferent.

Ques. How many times Mr. S.L. Chopra was admitted in the hospitals in the year 2005 and 2006 or you are not aware at all about this being out of India?

Ans. I do not exactly as to how many time Mr. S.L. Chopra was admitted in the hospitals in these two years but I personally taken him to hospital and clinic for check up at least four times.

Ques. When did Mr. S.L. Chopra died and at what time?

Ans. 04/10/06 approximately at 9.00 in the evening.

Ques. It is correct that your visit to the bank with the plaintiff or Smt. Subhag Grover after 10-15 days after death of Sh. S.L. Chopra?

Ans. I do not remember correctly but we went to bank after a week to 10 days.

Ques. Is it correct that when you alongwith plaintiff and Subhag Grover went to bank Smt. Subhag Grover opened a locker in the presence of plaintiff and yourself?

Ans. The locker was not opened in my presence as I was standing outside. The locker was opened in the presence of plaintiff and his wife, alongwith Subhag Grover.

Ques. Are you aware that Ms. Subhag Grover operated the locker on that day?

Ans. Yes.

Ques. I put it to you and the plaintiff accompanied Ms. Subhag Grover to the defence colony branch of Central Bank of India in order to get the locker opened and to see if Sh. S.L. Chopra had left behind any will or not?

Ans. Plaintiff and his wife went with Ms. Subhag Grover to see if Sh. S.L. Chopra had left any document in the locker or not. It was not specific to the will alone. I just accompanied them.

25. R.K. Katyal DW-2, deposed that Sham Lal Chopra was his brother-in-law and he was very close to him. He is a resident of Kolkata and he frequently keeps visiting Delhi. In the month of May, 2002 he had come to Delhi to attend the wedding of daughter of defendant No. 1 and was staying with Sham Lal Chopra at the suit property. On said occasion Sham Lal Chopra had told him that he is intending to bequeath the suit property to defendant No. 1 Arun Chopra and his movable assets equally to all the children of his brothers and he is proposing to make a will to said effect.

26. On being cross-examined, R.K. Katyal DW-2, stated as under:-

Originally this property was in the name of Sh. Maharaj Kishan Chopra. The family of Sh. Maharaj Kishan Chopra comprised him and his wife as they had no children. Sh. Maharaj Kishan Chopra died in 1984. After his death the property is in the name of his wife. The name of Sh. Maharaj Kishan Chopra's wife was Smt.

Har Kaur Chopra. I knew Smt. Har Kaur Chopra and I met her number of times. Smt. Har Kaur Chopra was knowing reading and writing Hindi but she was not knowing English. I never gave any affidavit regarding this property to L & DO. I never received any notice regarding this property from the office of L & DO. I do not know if my wife had received any notice from L & DO.

I do not know if the suit property was purchased from the amount of claim received by my father-in-law for the properties left by him in Pakistan. I do not know if Sh. S.L. Chopra was seriously ill too much before his death. It is wrong to suggest that I never visited Delhi after 2001 till October 2006. Volunteered I had come to Delhi in 2002 also for attending the wedding of Sh. Arun Chopra's daughter. It is correct that I come to the court on the asking of Sh. Arun Chopra.

27. Uma Dhawan DW-3, deposed that she has been a close friend of Sham Lal Chopra since last 40 years. She is a resident of Mumbai. She had once visited Delhi in the month of February, 2006, on which occasion she had met Sham Lal Chopra at his residence i.e. the suit property. One T.S. Sood, S/o. Late Sh. R.N. Sood, r/o 481, College Road, Civil Lines, Ludhiana was also present in the residence of Sham Lal Chopra at that time. On February 09, 2006 Sham Lal Chopra had executed a will in her presence. He had appended his signatures on a will in her presence. She and T.S. Sood had also signed said will as witnesses.

28. On being cross-examined, Uma Dhawan DW-3, stated as under:-

I came to know about the pendency of the present suit 10 to 15 days before the preparation of my affidavit Ex PW 3/A. I came to Delhi in October, 2007 for three times but I don't remember the dates. I read the contents of the suit 8 to 10 days before the preparation of my affidavit. I read the plaint as well as will. Sh. Arun Chopra had sent these papers to me at Bombay. My Advocate Ms. Bila Wala Associates at Bombay had drafted my affidavit EX PW 3/A. I do not know the name of the specific advocate who drafted my affidavit. The advocate had never come to Delhi with me. The said advocate is not an advocate for any of the party to the suit. The said advocate does not know about the present litigation but he drafted the affidavit after seeing the papers given to him by me. I signed the affidavit in the office of Ms. Bila Wala and thereafter Ms. Bila Wala sent it to Sh. Arun Chopra. In connection with my affidavit Ex PW 3/A I never visited either the Hon'ble Bombay High Court or the Bombay Civil Courts. I came to Delhi on 03/02/2006 in connection with a marriage. I came by flight but I don't remember the details of the flight. I don't exactly remember the time of flight but it was in the morning. I left Delhi on 09/02/2006 by evening flight.

I never received any call from Sh. S.L. Chopra's house at my aforesaid two mobile numbers between 01/02/2006 to 10/02/2006. I do not have any documentary evidence as on today to show that I was in Delhi in the first week of February, 2006 but I can make an endeavor to produce the same. It is wrong to suggest that I did not visit Delhi from 01/02/2006 to 10/02/2006. When I visited the house of Sh. S.L. Chopra on 09/02/2006 none else was present there.

I stayed there for 20-25 minutes. I do not have any knowledge as to who drafted the will. I do not know as to where the will was typed, when was it typed and who typed it. I know Mr. T.S. Sood, who is friend of mine and is still alive. It is wrong to suggest that Sh. S.L. Chopra did not execute any will. It is wrong to suggest that I did not put my signatures on the will of Sh. S.L. Chopra. It is wrong to suggest that I did not visit Delhi in February, 2006.

29. After the conclusion of recording of evidence of Uma Dhawan DW-3, the defendant No. 1 filed an application u/s 151 CPC to recall Ms. Uma Dhawan pleading therein that due to an inadvertent error the will Ex. DW-1/1 was not shown to witness Uma Dhawan at the time of preparation of affidavit Ex. DW-3/A relating to her examination-in-chief due to which reason the witness has not stated in her affidavit Ex. DW-3/A that Ex. DW-1/1 was the will executed by Sham Lal Chopra on February 09, 2006 in her presence.

30. Vide order dated October 03, 2011 the Single Judge allowed aforesaid application filed by the defendant No. 1 and permitted the defendant No. 1 to produce Uma Dhawan before the Joint Registrar and show her the will Ex. DW-1/1 and enquire from her whether the will Ex. DW-1/1 was the will which was executed by Sham Lal Chopra on February 09, 2006 in her presence and the plaintiff was also granted liberty to cross-examine the witness on said aspect of her deposition.

31. On November 01, 2011 witness Uma Dhawan DW-3, was shown the will Ex. DW-1/1 and she deposed that the will Ex. DW-1/1 was the will which was executed by Sham Lal Chopra on February 09, 2006 in her presence.

32. On the same day i.e. November 01, 2011 Uma Dhawan was (again) cross-examined by the plaintiff and she stated as under:-

The document which I have seen today runs into two pages.

(Witness is shown the document-Ex. DW 1/1).

I have seen the seal at Points B and BI on Ex. DW 1/1. I cannot say whether the same was affixed on the document before or after my signing the same. Again said, the same were not appended at the time when I had signed the document. I have never been a taxation advisor to the deceased-Group Capt. Sham Lal. (Vol. I know him for the last around 40 years approximate). It is incorrect to suggest that Ex. DW/1 is a forged and fabricated document or that the same was not signed by the deceased Group Capt. Sham Lal Chopra. It is also incorrect to suggest that the same does not bear the signatures of Group Capt. Sham Lal Chopra. It is also incorrect to suggest that I was not even present in Delhi on the said date.

Q. I put it to you that during your earlier cross examination you had stated that you would endeavor bringing the telephone/mobile bills pertaining to the period from 03.02.2006 to 11.02.2006. Have you brought them today?

Ans. I cannot bring such records as I have not been using any mobile phone. Again said, I rarely use mobile phone.

It is incorrect to suggest that I am deliberately not producing the same in as much as the same would reveal that I was not available at Delhi between 03.02.2006 to 11.02.2006.

33. In her examination-in-chief Sudesh Prabhakar DW-4, defendant No. 5, reiterated the contents of the written statement filed by the defendant No. 1.

34. On being cross-examined, Sudesh Prabhakar DW-5, stated as under:-

It is correct that I have not seen any document as to how this property was purchased. I cannot say if the claim received by Sh. Chanan Dass Chopra in respect of properties left behind by him in Pakistan were also used for purchasing this property and for raising construction thereon. It is correct that Sh. S.L. Chopra was admitted in the hospital before his death. It is correct that Sh. S.L. Chopra died in hospital. I have not seen any document of title in the name of Wing Commander Sh. M.K. Chopra. I have not seen any record of the L & DO, Delhi relating to the suit property. I have not seen any record as to how the suit property came in the name of Smt. Har Kaur Chopra as I am not concerned with that. I did not receive any notice from L & DO office after the death of Smt. Har Kaur Chopra. I do not know if any letter was received in the name of my father or mother. (Objected to). My mother did not sign any document regarding this property for L & DO as far as I know. I have not seen any document as to how the suit property came in the name of Group Captain Sh. S.L. Chopra after the death of Smt. Har Kaur Chopra as it is not my concern.

35. On behalf of plaintiff, Santosh Chopra, the wife of the plaintiff, was examined as PW-1. She deposed that the plaintiff had died on February 11, 2010. The suit property was acquired by Maharaj Kishan Chopra by using ancestral funds. Maharaj Kishan Chopra died intestate leaving behind his wife Har Kaur Chopra as his sole legal heir. Upon death of Har Kaur Chopra all five siblings of Maharaj Kishan Chopra viz. plaintiff, S.L. Chopra, H.L. Chopra, Kamla Ahuja and Shanti Devi, became entitled to inherit 1/5th share in the suit property. S.L. Chopra played fraud upon L & DO and other legal heirs of Maharaj Kishan Chopra and got mutated the suit property in his and his wife's name by falsely declaring to L & DO that he and his wife are the only legal heirs of Har Kaur Chopra and that Har Kaur Chopra had executed a will bequeathing the suit property to them. Few days after the death of S.L. Chopra, her husband (plaintiff), Arun Chopra (defendant No. 1) and Subhag Grover, sister-in-law of S.L. Chopra visited Central Bank of India, Defence Colony for opening a locker which was jointly in name of S.L. Chopra and Subhag Grover. The locker was opened at the instance of defendant No. 1 who was insisting that S.L. Chopra had executed a will in his lifetime and same has been kept by him in the locker. On opening the locker, no will was found therein. The will Ex. DW-1/1 dated February 09, 2006 is a forged and fabricated document which has been manufactured by the defendant No. 1

by using old letter heads of S.L. Chopra. S.L. Chopra was not keeping good health and the plaintiff, Vipula Awasthy, the daughter of the plaintiff and Subhag Grover, sister-in-law of S.L. Chopra used to look after him. The plaintiff and his daughter Vipula Awasthy had borne the medical expenses of S.L. Chopra on many occasions. Defendant No. 1 who mostly resided in Dubai has never looked after S.L. Chopra and borne his medical expenses.

36. On being cross-examined, Santosh Chopra PW-1, stated as under:-

My relations with Shri S.L. Chopra were cordial.

Witness is put to document purporting to be the will of Sh. Maharaj Kishan Chopra from amongst the records of L & DO. Question is objected to by the learned counsel for plaintiff on the grounds that the document cannot be put to the witness as the same is neither original nor the witness is connected with the execution of the document, alleged to be the will nor is the document otherwise admissible. Heard. Witness is directed to answer. Objections are kept open for consideration at the appropriate stage). I have seen document Mark A. The same is mere attested photocopy. I do not have knowledge or any information about the same.

It is incorrect to suggest that Mrs. Har Kaur Chopra had left any will. (Witness is put to document purporting to be the will dated 18.01.1985 of Mrs. Har Kaur Chopra, from amongst the documents on record of L & DO. Question is objected to by the learned counsel for plaintiff on the grounds that the document cannot be put to the witness as the same is nether original nor the witness is connected with the execution of the document, alleged to be the will nor is the document otherwise admissible. Heard. Witness is directed to answer. Objections are kept open for consideration at the appropriate stage).

I have seen Mark B. The same does not bear the signatures of Smt. Har Kaur Chopra at Points A and B. (Vol. I have not seen her signing, as well).

I was never informed about any will left by Smt. Har Kaur Chopra. (Vol. as there was none executed by her).

Mr. S.L. Chopra had been staying in the property in question for around 30-35 years before his death. (Vol. he was occupying the first floor of the suit property and the ground floor was occupied by Wing Commander Shri M.K. Chopra).

Q. I put it to you that after the death of Mrs. Har Kaur Chopra, Sh. S.L. Chopra and his family continued to live in the property. Did you object to the same?

Ans. I did not object. (Vol. as SL Chopra and his wife shifted to the ground floor).

(Witness is put to Para 9 of her affidavit).

Q. You have claimed that Sh SL Chopra had played a fraud as well as misrepresentation for getting the property mutated/substituted in his as well as his wife"s name. When did you come to know about such fraud/

misrepresentation for the first time/

Ans. We came to know about the fraud only after my husband's filing the present suit for partition.

As far as I recollect, the same came to our knowledge after some months of filing the present suit and that was upon the disclosures by L & DO.

Q. You have stated in your affidavit that the will dated 09.02.2006 appears to have been made on a blank paper signed by Sh. SL Chopra. Are you in possession of any such document or have you seen any such blank document signed by Sh. SL Chopra?

Ans. I have not personally seen the documents. (Vol. the documents were removed by defendant no. 1's wife after the death of Shri S.L. Chopra).

37. Additionally, Raghubir Singh, an official of L & DO, was summoned as a witness in the suit. The witness brought the record of L & DO relating to the suit property. (We shall be noting the record of L & DO relating to the suit property while analyzing the impugned judgment passed by the Single Judge).

38. Before proceeding further, we note the relevant documentary evidence led by the parties.

39. The first relevant document is the will Ex. DW-1/1 dated February 09, 2006 stated to have been executed by Sham Lal Chopra. The will Ex. DW-1/1 is an unregistered and notarized document. The will is typed with a manual typewriter, consists of two sheets and has been scribed in English. It bears the signatures of Sham Lal Chopra on both the pages. Whereas the signatures of Sham Lal Chopra are contained towards left side margin on the first page of the will the signatures are towards the bottom on the second page. The will has been typed on a letter head of "Group Captain S.L. Chopra (Retd.)". The will has been witnessed by Uma Dhawan (a resident of Mumbai) and T.S. Sood (a resident of Ludhiana). The will records that Sham Lal Chopra is the owner of the suit property and is bequeathing the same to the defendant No. 1 and his wife Sarvjit Chopra. It further records that all the movable assets i.e. shares and other similar investments in instruments/securities, bank balance and fixed deposits etc. of Sham Lal Chopra be divided equally among all the children of his brothers and sisters.

40. The next relevant document is the will Ex. DW-1/4 dated January 18, 1985 stated to have been executed by Har Kaur Chopra. The will Ex. DW-1/4 is a registered document. It consists of two pages and has been scribed in English. It bears the signatures of Har Kaur Chopra in Hindi on both the pages. The will records that Har Kaur Chopra is the owner of the suit property and she is bequeathing the same to Sham Lal Chopra and his wife Kamla Chopra.

41. The next three documents which need to be noted are the lease deeds dated November 11, 2003 Ex. DW-1/5, October 12, 2001 Ex. DW-1/6 and November

01, 2004 Ex. DW-1/7 whereby Sham Lal Chopra had let out the first floor of the suit property to ABP Pvt. Ltd. Company.

42. It would be apposite to note the following portion of the lease deed dated November 11, 2003 Ex. DW-1/5:-

This Lease Deed is made at Delhi on this day of 1st November 2003 by and between Group Captain S.L. Chopra Retd. S/o. Late Shri Chanan Dass Chopra owner and R/o D-354, Defence Colony, New Delhi-110024 hereinafter called "LESSOR" which expression shall includes his heirs, Shri Arun Chopra & Mrs. Sarvjit Chopra R/o J-13A Kailash Colony, New Delhi-48 assigns and legal representatives of the ONE PART

43. It would also be apposite to note the following portion of the lease deed dated November 01, 2004 Ex. DW-1/7:-

this Lease Agreement made this day of 1st November 2004 between Group Captain S.L. Chopra Retd. S/o. Late Shri Chanan Dass Chopra owner and R/o D-354, Defence Colony, New Delhi-110024, hereinafter called "LESSOR" which expression or terms includes his heirs, Shri Arun Chopra & Mrs. Sarvjit Chopra R/o J-13A kailash Colony, New Delhi-48 assigns and legal representatives of the ONE PART

44. Vide impugned judgment and decree dated January 08, 2014 the Single Judge has dismissed the suit filed by the plaintiff.

45. A perusal of the impugned judgment shows that while adjudicating the suit the Single Judge has examined following three questions:-

A Whether it was open to the plaintiff to question the mutation of the suit property and subsequent conversion of the suit property from leasehold to freehold in favor of S.L. Chopra carried out by L & DO on the basis of the will Ex. DW-1/4 stated to have been executed by Har Kaur Chopra?

B. Whether the mutation of suit property and conversion of the suit property in his favor was obtained by S.L. Chopra by playing fraud upon L & DO?

C. Whether the will Ex. DW-1/1 dated February 09, 2006 has been executed by Sham Lal Chopra?

46. With respect to question A noted above, the Single Judge held as follows:-

(i) In view of dictum of law laid down by the Supreme Court in the decisions reported as Kunhayammed and Others Vs. State of Kerala and Another, and Gangadhara Palo Vs. The Revenue Divisional Officer and Another, that where some reasons, however meager, are given by the Supreme Court while dismissing a Special Leave Petition, then by virtue of "doctrine of merger" the judgment of High Court merges into the order of the Supreme Court and after merger there is no judgment of the High Court, the orders dated March 01, 2007 passed by the Single Judge dismissing the (first) application for amendment of

plaint filed by the plaintiff and March 23, 2007 passed by the Division Bench affirming the order dated March 01, 2007 have merged into the order dated October 29, 2007 passed by the Supreme Court.

(ii) A careful reading of the order dated March 29, 2007 passed by the Supreme Court brings out that vide said order i.e. March 29, 2007 the Supreme Court has held that:- (a) Single Judge and Division Bench had "proceeded wrongly" on the basis that the plaintiff has failed to question the inheritance of the suit property by S.L. Chopra; (b) mere admission by S.L. Chopra would not confer title to the suit property on S.L. Chopra; (c) the inheritance of the suit property was governed by the provisions of Hindu Succession Act, 1956; (d) the question as to whether the defendants had title to the suit property by virtue of the wills Ex. DW-1/1 and DW-1/4 requires to be examined and (e) genuineness of the wills Ex. DW-1/1 and DW-1/4 would have to be examined with reference to Section 63 of the Indian Succession Act and Section 68 of the Indian Evidence Act, 1872.

(iii) When the plaintiff sought to add issues relating to the genuineness of the will Ex. DW-1/4 stated to have been executed by Har Kaur Chopra in the suit a statement was given by the counsel for the defendant No. 1 that the issues already framed in the suit covered all the disputes between the parties as recorded in the order dated February 15, 2008 passed by the Single Judge.

(iv) A conjunctive reading of the orders dated October 29, 2007 and February 15, 2008 passed by the Supreme Court and Single Judge brings out that the parties to the suit clearly understood that the question of genuineness of both the wills including the will Ex. DW-1/4 stated to have been executed by Har Kaur Chopra had to be adjudicated upon in the suit.

(v) In view of reasons (i), (ii), (iii) and (iv), it has to be held that it was open to the plaintiff to question the mutation and conversion of the suit property from leasehold to freehold in favor of S.L. Chopra carried out by L & DO on the basis of the will Ex. DW-1/4 stated to have been executed by Har Kaur Chopra. In other words, it was open to the plaintiff to question the genuineness of the will Ex. DW-1/4 stated to have been executed by Har Kaur Chopra.

47. The question (B) has been answered in negative by the Single Judge. The reasoning of the Single Judge in said regards is as follows:-

(i) The sequence of events as emerging from the record of L & DO relating to the suit property brings out that even if it is held that the will Ex. DW-1/4 stated to have been executed by Har Kaur Chopra has not been proved by the defendant No. 1 in accordance with law, it cannot be said that the conveyance deed dated February 03, 1997 whereby the suit property was converted from lease-hold to free-hold and mutation of the suit property in his favor was obtained by S.L. Chopra by playing fraud upon L & DO. As a necessary corollary thereof, the challenge laid by the plaintiff to the Conveyance Deed dated February 03, 1997 which confers title to the suit property upon S.L. Chopra after three years of execution of said deed is barred by limitation in terms of Article 59 of the

Schedule to the Limitation Act, 1963 and therefore the said challenge fails.

(ii) The sequence of events relating to the ownership of the suit property noted by the Single Judge is as under:- Maharaj Kishan Chopra was the recorded owner of the suit property by virtue of Perpetual Lease Deed dated executed by L & DO in his favor. After the death of Maharaj Kishan Chopra, his wife Har Kaur Chopra submitted an affidavit April 29, 1984 to the effect that she i.e. Har Kaur Chopra is the sole (class-I) legal heir of Maharaj Kishan Chopra and that Maharaj Kishan Chopra had left behind a will bequeathing the suit property to her. A letter April 10, 1984 is written by the Air Headquarters to L & DO to the effect that Maharaj Kishan Chopra had left behind a will bequeathing all his movable and immovable assets to his wife Har Kaur Chopra. On the basis of the aforesaid letter dated April 10, 1984 and the fact that will of Maharaj Kishan Chopra was not required to be probated in terms of provisions of Section 213 of the Indian Succession Act L & DO mutated the suit property in favor of Har Kaur Chopra. (The Single Judge has noted that no challenge has been laid by the plaintiff to the will executed by Maharaj Kishan Chopra or to the mutation of the suit property in favor of Har Kaur Chopra). Har Kaur Chopra died issueless on June 07, 1988. On July 21, 1988 S.L. Chopra wrote a letter to the L & DO stating therein that Har Kaur Chopra had left behind a will bequeathing the suit property to him and his wife Kamla Chopra. Thereafter S.L. Chopra and his wife Kamla Chopra submitted affidavits dated June 28, 1988 and January 19, 1989 to the similar effect and sought mutation of the suit property in their names. On June 21, 1989 a noting has been made by an official of L & DO in the file of the suit property to the effect that "Party met me today. He has been asked to furnish no objection affidavit from all his brothers and sisters in case the lessee has died issueless and get the will mutated by competent court of law". Thereafter, S.L. Chopra and Kamla Chopra wrote a letter dated May 14, 1990 to L & DO stating therein that they are not required to furnish no-objection certificates from siblings of Maharaj Kishan Chopra for the reason Har Kaur Chopra who was the absolute owner of the suit property in terms of provisions of Section 14 of the Hindu Succession Act, 1956 had not died intestate and left behind a registered will; they i.e. S.L. Chopra and Kamla Chopra are the beneficiaries under the said will and the will of Har Kaur Chopra is not required to be probated in view of prevalent government policy. (The Single Judge notes that the stand taken by S.L. Chopra and Kamla Chopra was legally correct for the reasons that by virtue of Maharaj Kishan Chopra bequeathing the suit property to her Har Kaur Chopra became a full owner of the suit property and could deal with it any manner she wished in view of prescription in Section 14 of the Hindu Succession Act, 1956 that any property possessed by a female Hindu whether acquired before or after the commencement of the Act shall be held by her as full owner thereof and the will of Har Kaur Chopra was not required to be probated in terms of provisions of Section 213 of the Indian Succession Act). The aforesaid stand taken by S.L. Chopra and Kamla Chopra was accepted by a Law Officer of L & DO on March 20, 1999 and he opined that in view of the fact that S.L. Chopra and Kamla Chopra

are the "beneficiaries" under the will of Har Kaur Chopra the suit property be mutated in their names. On the basis of aforesaid opinion of Law Officer, the suit property was mutated in the names of S.L. Chopra and Kamla Chopra.

48. The question (C) has been answered in affirmative by the Single Judge. In said regards, the reasoning given by the Single Judge that Ms. Uma Dhawan DW-3, the attesting witness to the will Ex. DW-1/1, is a reliable and independent witness. The testimony of Uma Dhawan DW-1, that S.L. Chopra had executed the will Ex. DW-1/1 in her presence inspires confidence. The fact that Uma Dhawan DW-3, has no knowledge about the preparation of the will Ex. DW-1/1 does not dent the credibility of said witness. The non-production of notary who notarized the will Ex. DW-1/1 or the other attesting witness T.S. Sood does not affect the genuineness or validity of the will Ex. DW-1/1.

49. Aggrieved by the impugned judgment and decree dated January 08, 2014 the plaintiff has filed the above captioned appeal.

50. The submissions advanced by the learned senior counsel appearing for the plaintiff/appellant can be broadly classified into two categories:-

(a) The learned Single Judge committed an error in holding that the challenge laid by the plaintiff to the mutation and execution of conveyance deed dated February 03, of the suit property by the L & DO in favor of Sham Lal Chopra was barred by limitation.

(b) The learned Single Judge committed an error in holding that the will Ex. DW-1/1 dated February 09, 2006 executed by Sham Lal Chopra is a genuine document, in that it was executed by Sham Lal Chopra in a state of sound disposing mind.

51. Under category (a), the submissions advanced by the learned senior counsel of the appellant were as follows:-

I Vide order dated October 29, 2007 it was held by the Supreme Court that "no title can be conferred by admission....but the question as to whether the respondents have obtained a title in the property by reason of execution of wills or otherwise is required to be gone into in terms of the provisions of the Hindu Succession Act coupled with the question of Indian Succession Act and Section 68 of the Indian Evidence Act". In view of aforesaid categorical direction given by the Supreme Court it was imperative upon the defendant No. 1 to prove the execution of the will Ex. DW-1/4 dated January 18, 1985 by Har Kaur Chopra, particularly when the orders dated March 01, 2007 and March 23, 2007 passed by the Single Judge and Division Bench respectively dismissing the application for amendment of plaint filed by the plaintiff merged into the order dated October 29, 2007 passed by the Supreme Court in view of the settled legal position that where some reasons, however meager, are given by the Supreme Court while dismissing a Special Leave Petition, then by virtue of "doctrine of merger" the judgment of High Court merges into the order of the Supreme Court

and after merger there is no judgment of the High Court. It was further argued that even the defendant No. 1 was well aware of the fact that he is required to prove the execution of the will Ex. DW-1/4 by Har Kaur Chopra evidenced from the fact that on February 15, 2008 counsel appearing for the defendant No. 1 had made a statement to the effect that "the issues, as framed entirely cover the disputes in the suit" when the plaintiff sought to add issue (s) relating to validity of will Ex. DW-1/4 dated January 18, 1985 stated to have been executed by Har Kaur Chopra in the suit.

II Assuming that the order dated October 29, 2007 was not passed by the Supreme Court, even then it was incumbent upon the defendant No. 1 to have proved the execution of the will Ex. DW-1/4 dated January 18, 1985 by Har Kaur Chopra for the reason the plaintiff had not admitted the title of S.L. Chopra to the suit property in the plaint filed by him. All that was stated by the plaintiff in his plaint was that "after the death of Mrs. Har Kaur Chopra on 7.6.1988, the plaintiffs are not aware as to how the Conveyance Deed in respect of the said property has been registered in the name of deceased Group Captain Mr. Sham Lal Chopra", which sentence cannot be construed to mean that the plaintiff had admitted the title of S.L. Chopra to the suit property.

III A fraud is an act of deliberate deception with the design of securing something by taking unfair advantage of another. It is a deception in order to gain another's loss. It is a cheating intended to get an advantage. It is settled legal position that fraud vitiates everything. Article 59 of the Limitation Act, 1963 prescribes that limitation period for getting an instrument cancelled or set aside would be three years from the date when the facts entitling the plaintiff to have the instrument cancelled or set aside first become known to him. It was argued that the factum of fraud played by S.L. Chopra in getting the mutation and execution of conveyance deed of the suit property in his favor became known to him only when the defendant No. 1 filed his written statement in the suit. The fact that the plaintiff had no knowledge of aforesaid fraud played by S.L. Chopra prior to filing of written statement by the defendant No. 1 is further reinforced by the fact that the plaintiff had specifically averred in his plaint that the plaintiff is not aware as to how the Conveyance Deed of the suit property got executed in favor of S.L. Chopra. In that view of the matter, it cannot be held that the challenge laid by the plaintiff to the mutation and execution of conveyance deed dated February 03, 1997 of the suit property by the L & DO in favor of Sham Lal Chopra was barred by limitation.

IV Alternatively to submission (III) noted above, it was argued by the plaintiff that since the mutation and execution of conveyance deed dated February 03, 1997 of the suit property in his favor was obtained by S.L. Chopra by playing fraud the same were nullity and void documents and thus the plaintiff was not required to seek cancellation of said documents and he could file a suit claiming substantive relief of partition and other ancillary reliefs flowing from the same. No limitation period is prescribed for a suit for partition in the Schedule to the

Limitation Act, 1963. Article 113 of the Schedule prescribes that the limitation period for any suit for which no period of limitation is provided elsewhere in the Schedule is three years from the date the right to sue accrues. Therefore, the limitation period for filing a suit for partition is three years to be reckoned from the date when the right to sue accrues. In a suit for partition, the right to sue would accrue when the said right is threatened. In the instant case, the right to sue accrued to the plaintiff only when the defendant No. 1 and his wife threatened the plaintiff they would forcibly dispossess him from the ground floor of the suit property and tried to take possession of the first floor of the suit property from the tenant therein in the year 2006. The suit in question was filed by the plaintiff on November 16, 2006. Such being the factual position, the plaintiff could not have been ousted on the ground of bar of limitation.

52. Under category (b), the submissions advanced by the learned senior counsel appearing for the appellant were as follows:-

I. Ms. Uma Dhawan DW-3, the (stated) attesting witness to the will Ex. DW-1/1, miserably failed to prove that she had attested the execution of the will Ex. DW-1/1 dated February 09, 2006 by S.L. Chopra. Counsel highlighted that there are material omissions in the affidavit by way of evidence (examination-in-chief) of Uma Dhawan which are as follows:- (i) Uma Dhawan did not state that she had attested the execution of the will Ex. DW-1/1 by S.L. Chopra; (ii) no details have been given by Uma Dhawan that as to how and in what circumstances she was called by S.L. Chopra to witness the execution of the will Ex. DW-1/1; (iii) Uma Dhawan did not state that she, S.L. Chopra and T.S. Sood (other attesting witness to the will) had appended signatures on the will Ex. DW-1/1 in the presence of each other; (iv) Uma Dhawan did not state that S.L. Chopra was in a state of sound disposing mind at the time of execution of the will Ex. DW-1/1 and (v) Uma Dhawan did not mention any details about T.S. Sood, the other attesting witness to the will Ex. DW-1/1. It was further highlighted by the counsel that Uma Dhawan was repeatedly called upon to produce records of her mobile phone for the month of February, 2006 but she failed to do so. Counsel argued that an adverse inference should be drawn against Uma Dhawan for her failure to produce records of her mobile phone for had said records been produced it would have come to light that Uma Dhawan who was a resident of Mumbai was not present in Delhi on February 09, 2006 i.e. the date on which Uma Dhawan claimed to have attested the execution of the will Ex. DW-1/1. Counsel then argued that falsity of evidence of Uma Dhawan is evident from the statement made by her in her cross-examination that no one was present at the residence of S.L. Chopra when she had gone there on February 09, 2006 i.e. the date of execution of the will Ex. DW-1/1. If no one was present at the residence of S.L. Chopra on February 09, 2006 then how come T.S. Sood, the other attesting witness to the will Ex. DW-1/1, happen to attest the execution of the will Ex. DW-1/1 by S.L. Chopra. Lastly, counsel pointed out that Uma Dhawan DW-3, had deposed at the behest of the defendant No. 1 evidenced from the admission made by her in cross-examination that the defendant No. 1 had got prepared her

affidavit by way of evidence after having received a copy of the plaint and the will Ex. DW-1/1 from the defendant No. 1.

II There are many unusual features of the will Ex. DW-1/1 dated February 09, 2006 which are highly suggestive of the fact that the will Ex. DW-1/1 is a forged document. The first unusual feature of the will Ex. DW-1/1 pointed out by the counsel was that the will Ex. DW-1/1 has been typed not on the letter head which was being used by S.L. Chopra on the date of the execution of the will Ex. DW-1/1 but on a letter head which was being used by S.L. Chopra many years prior to the execution of the will Ex. DW-1/1. The other unusual features of the will Ex. DW-1/1 pointed out by the counsel were as follows:- (i) S.L. Chopra had appended his signatures below the word "testator" whereas normally a testator signs above the word "testator"; (ii) the space between the last line of the will Ex. DW-1/1 and the signatures of S.L. Chopra contained in the last page of the will Ex. DW-1/1 is unusually large; (iii) the spacing between the word "testator" and the point where S.L. Chopra had appended his signatures is unusually large; (iv) the word "Chopra" has been typed as "Chopta" in the last line of the will Ex. DW-1/1 but said mistake has not been corrected; (v) word "Chopra" has been first typed as "Chopra" at one place in the will and subsequently alphabet "C" has been super imposed on alphabet "G" but said correction has not been signed either by testator S.L. Chopra or by any of the attesting witnesses.

III The preparation of the will Ex. DW-1/1 dated February 09, 2006 is shrouded in great mystery. No evidence has come on record regarding the preparation of the will Ex. DW-1/1 by S.L. Chopra. The questions such as, who has drafted the will Ex. DW-1/1? Who has typed the will Ex. DW-1/1? Who has notarized the will Ex. DW-1/1? have remained unanswered in the instant case. Counsel further argued that S.L. Chopra was fairly old and frail on the date of execution of the will Ex. DW-1/1 and thus it could reasonably be assumed that S.L. Chopra would not have gotten prepared the will Ex. DW-1/1 by himself but would have taken help from someone. In these circumstances, the absence of evidence relating to preparation of the will Ex. DW-1/1 raises a doubt on the genuineness of the will Ex. DW-1/1.

IV The origin of the will Ex. DW-1/1 dated February 09, 2006 is shrouded in great mystery. No evidence has come on record as to how the defendant No. 1 came into the possession of the will Ex. DW-1/1. No word has been spoken by the defendant No. 1 in his examination-in-chief as to how he came to possess the will Ex. DW-1/1. The defendant No. 1 who mostly resided in Dubai stated in his cross-examination that the will Ex. DW-1/1 came into his hands in the month of February, 2006 in Delhi however he failed to produce his passport to show that he was present in Delhi in the month of February, 2006. The failure of the defendant No. 1 to produce his passport is indicative of the fact that the defendant No. 1 was not present in Delhi in the month of February, 2006 and thus he could not have gotten his hands on the will Ex. DW-1/1 in Delhi in the month of February, 2006 as claimed by him.

VI The failure of the defendant No. 1 to prove T.S. Sood, second attesting witness of the will Ex. DW-1/1, and the fact that S.L. Chopra was not in a state of sound disposing mind at the time of the execution of the will Ex. DW-1/1 are also suggestive of the will Ex. DW-1/1 being a forged document.

53. Having noted the submissions advanced by the plaintiff, we now proceed to deal with the same.

54. Late Chanan Das Chopra had six children namely, Maharaj Kishan Chopra, Sham Lal Chopra, Prem Nath Chopra (plaintiff), H.L. Chopra, Shanti Devi and Kamla Ahuja.

55. Vide an indenture dated October 28, 1971, L & DO executed a perpetual lease in favour of Wing Commander Maharaj Kishan Chopra under which the plot of land over which the suit property was constructed was leased in perpetuity in favour of the lessee Maharaj Kishan Chopra.

56. Maharaj Kishan Chopra died issueless on November 30, 1984. During his lifetime, Maharaj Kishan Chopra had executed a will bequeathing the suit property to his wife Har Kaur Chopra.

57. On account of aforesaid testamentary disposition, the suit property was mutated in the name of Har Kaur Chopra. (Though the plaintiff did try to set up a case while cross-examining the witnesses examined by the defendant No. 1 that Maharaj Kishan Chopra could not have bequeathed the suit property to his wife Har Kishan Chopra for the suit property was not his self-acquired property but ancestral as it was acquired by him by using ancestral funds the plaintiff has not seriously challenged the ownership of Har Kaur Chopra of the suit property).

58. Har Kaur Chopra died on June 07, 1988. After the death of Har Kaur Chopra, the suit property stood mutated in the names of S.L. Chopra and his wife Kamla Chopra in the year 1992.

59. Thereafter vide conveyance deed dated February 03, 1997 the lease-hold rights in the suit property were converted into free-hold in the favour of S.L. Chopra.

60. S.L. Chopra died issueless on October 04, 2006. His wife Kamla Chopra had pre-deceased him.

61. Nine years later on November 16, 2006 the plaintiff filed the present suit for partition of the suit property and division of the movable assets of S.L. Chopra.

62. Most significantly, the suit in question was filed by the plaintiff seeking partition of estate of S.L. Chopra comprising of the suit property. (See paragraph 7 of the plaint noted by us in the foregoing paras). In other words, the suit in question was filed by the plaintiff on the premise that S.L. Chopra was the owner of the suit property.

63. Thereafter a written statement came to be filed by the defendant No. 1

pleading therein that the suit property cannot be partitioned between the class-II legal heirs of S.L. Chopra inasmuch as S.L. Chopra had left behind a will dated February 09, 2006 bequeathing the suit property to him and his wife Sarvjit Chopra.

64. Now, came to be filed by the plaintiff, the application seeking amendment of his plaint. In the said application the plaintiff tried to amend the very premise on which the plaintiff had filed the suit in question i.e. S.L. Chopra was not the owner of the suit property. The amendment sought by the plaintiff was to the effect that Har Kaur Chopra who was issueless had died intestate. After her death, the suit property devolved upon the legal heirs of her husband Maharaj Kishan Chopra i.e. siblings of Maharaj Kishan Chopra in terms of provisions of Section 15(2) of the Hindu Succession Act, 1956. It was further alleged that the will Ex. DW-1/4 dated January 18, 1985 stated to have been executed by Late Har Kaur Chopra is a forged document. In essence, the plaintiff sought to withdraw the admission made by him in the plaint that S.L. Chopra was the owner of the suit property by seeking amendment of the plaint.

65. Vide order dated March 01, 2007 the Single Judge dismissed the application for amendment of plaint filed by the plaintiff, which order was affirmed by the Division Bench vide order dated March 23, 2007.

66. The SLP filed by the plaintiff against the order dated March 23, 2007 passed by the Division Bench came to be dismissed by the Supreme Court vide order dated October 29, 2007 with the observations that "both the learned Single Judge as also the Division Bench of the High Court proceeded wrongly on the premise that non-questioning the inheritance of property by Mr. S.L. Chopra had conferred a title on him, no title can be conferred by admission".

67. Significantly, the plaintiff did not succeed in his attempt to withdraw the admission made by him in the plaint that S.L. Chopra was the owner of the suit property by amending the plaint.

68. In the decision reported as AIR 1988 SC 618 Heeralal vs. Kalyan Mal a suit for partition of several properties was filed by the plaintiff. The defendants in their written statement took a definite stand with respect to only some of the properties, claiming exclusive title thereto and meaning thereby that other properties were admitted to be joint. Thereafter amendment of written statement was sought by the defendants claiming some other properties also to be exclusive properties. The Supreme Court held that the defendants cannot be allowed to amend their written statement. It was held that the defendants having taken a plea of only some of the properties being their exclusive property were deemed to have admitted the other properties to be joint and could not thereafter be allowed to plead that the properties earlier so admitted to be joint to be also their exclusive property. It was held that on the basis of the said admission a preliminary decree could have been passed and if the amendment is granted, the whole case of the plaintiff qua admitted joint properties would get

displaced. It was further held that a right to decree which had accrued to the plaintiff by such admission could not be irretrievably deprived by allowing the amendment. It would be relevant to note the following observations made by the Supreme Court:-

6. In our view, the order passed by the High Court u/s 115, CPC, allowing withdrawal of earlier admissions of defendant nos. 1 and 2 in their original written statement about 5 out of 7 items of Schedule-A properties cannot be sustained. The reason is obvious. So far as Schedule-A properties were concerned, a clear admission was made by defendant nos. 1 and 2 in their joint written Statement in 1993 that 7 properties out of 10 were joint family properties wherein the plaintiff had 1/3rd share and they had 2/3rd undivided share. Once such a stand was taken, naturally it must be held that there was no contest between the parties regarding 7 items of suit properties in Schedule-A. The learned Trial judge, therefore, was perfectly justified in framing Issue No. 2 concerning only remaining three items for which there was dispute between the parties. In such a situation under Order XV Rule 1 of CPC the plaintiff even would have been justified in requesting the court to pass a preliminary decree forthwith qua these 7 properties. The said provision lays down that, "where at the first hearing of a suit it appears that the parties are not at issue on any question of law or of fact, the Court may at once pronounce the judgment". Even that apart, the defendants-respondent did not think it fit to move any amendment application for getting out of such admission till the plaintiff moved an application for appointment of receiver regarding admitted items of properties. It is only thereafter that the application for amendment was moved. Learned Trial judge was right when he observed that even the ground made out in the application were not justified. Consequently, there is no question of taking inconsistent stand which would not have affected prejudicially the plaintiff as wrongly assumed by the High Court. We also fail to appreciate how the decisions on which strong reliance was placed by the learned counsel for the respondent can be of any assistance to him. We may briefly refer to them.

69. In the decision reported as Avtar Singh and Others Vs. Gurdial Singh and Others, both the appellants and respondents had filed a suit in respect of a piece of land situated at village Nardu, Tehsil Rajpura. The question which arose for consideration in the said suits was whether the appellants had encroached upon a public street. The Trial and Appellate Court held that the land in question was part of a public street and encroached upon by the appellants. The aforesaid finding was approved by the Supreme Court on the ground that the appellants have themselves admitted that a part of the land in question was included in a public street. It would be relevant to note the following observations made by the Supreme Court:-

Admission, it is well known, forms the best evidence, it may be that admission does not create any title, but the nature of the kind can form subject matter of admission. Section 58 of the Evidence Act postulates that things admitted need

not be proved. It may be that in their Suit the respondents herein did not call for the records from the State or the local authorities to show that the land in question was a public street but keeping in view the fact that the appellants "witnesses have admitted the said fact" in their own Suit, we are of the opinion, the findings of fact arrived at by the First Appellate Court and affirmed by the High Court, need not be interfered with.

(Emphasis Supplied)

70. In both the afore-noted decisions of the Supreme Court, the title to a property/land has been conferred by admission. As already noted hereinabove, in the instant case, a categorical admission was made by the plaintiff in the plaint filed by him that S.L. Chopra was the owner of the suit property, which admission was not allowed to be withdrawn. But, in the instant case, in view of the order dated October 29, 2007 it has to be held that the plaintiff could challenge the title of Sh. S.L. Chopra. The learned Single Judge has also held so. We also proceed on the basis that the title of Sh. S.L. Chopra could be questioned.

71. The suit property was mutated in the names of S.L. Chopra in the year 1992. On February 03, 1997, a conveyance deed was executed converting lease-hold rights in the suit property into freehold in favour of S.L. Chopra. Nine years later on November 16, 2006 the plaintiff filed the suit in question seeking partition of the suit property.

72. The mutation and conveyance deed dated February 03, 1997 confer title of the suit property upon S.L. Chopra. The plaintiff has claimed that aforesaid mutation and conveyance deed dated February 03, 1997 were obtained by S.L. Chopra by playing fraud upon L & DO and other (class-II) legal heirs of Maharaj Kishan Chopra. Such being the case, the plaintiff was required to get cancelled the mutation and conveyance deed dated February 03, 1997 which confer title of the suit property upon S.L. Chopra; howsoever faulty the mutation was

73. Article 59 of the Limitation Act, 1963 prescribes that limitation period for getting an instrument cancelled or set aside would be three years from the date when the facts entitling the plaintiff to have the instrument cancelled or set aside first become known to him.

74. The question which arises for consideration is that when did the plaintiff come to know that S.L. Chopra had obtained mutation and conveyance deed in respect of the suit property in his favour by playing fraud upon L & DO and other (class-II) legal heirs of Maharaj Kishan Chopra, as claimed by the plaintiff.

75. In the plaint filed by him, the plaintiff has averred about the execution of the conveyance deed dated February 03, 1997, but it is not discernible from the plaint as to when did the plaintiff get the knowledge about the execution of the said conveyance deed.

76. To find an answer to the aforesaid question, we need to go deeper into the facts and circumstances of the case and evidence led by the parties.

77. One such document which throws light on the aforesaid aspect of the matter is the lease-deed dated October 12, 2001 Ex. DW-1/6 whereby S.L. Chopra had let out the first floor of the suit property to M/s. ABP Pvt. Ltd. (Be it noted here that the plaintiff had not seriously disputed the genuineness of the lease deed dated October 12, 2001 Ex. DW-1/6 for he has not put any question to any of the witnesses of the defendant No. 1 regarding said lease deed. Furthermore, the plaintiff has himself stated in his plaint that M/s. ABP was a tenant in the first floor of the suit property).

78. The act of S.L. Chopra of letting the first floor of the suit property in the year 2001 is of importance for the said act was hostile to the title of the plaintiff and other siblings of Maharaj Kishan Chopra to the suit property for the plaintiff was claiming that the suit property; had devolved upon the siblings of Maharaj Kishan Chopra including himself on the death of Har Kaur Chopra. The said act of S.L. Chopra would have surely rung a bell in the mind of the plaintiff that as to how S.L. Chopra got the right to deal with the suit property for the suit property was in the name of Late Har Kaur Chopra and had as per the plaintiff had devolved upon the siblings of Maharaj Kishan Chopra including himself on the death of Har Kaur Chopra. The act of S.L. Chopra of letting the first floor of the suit property in the year 2001 was hostile to the title of the plaintiff and other siblings of Maharaj Kishan Chopra to the suit property. In these circumstances, it can reasonably be assumed that the plaintiff would have made enquiries regarding the title to the suit property soon after October 12, 2001 and learnt about the mutation and execution of the conveyance deed dated February 03, 1997 in the favor of S.L. Chopra as also the (alleged) fraud played by S.L. Chopra somewhere in the year 2001, if not earlier.

79. The plaintiff could have filed a suit seeking cancellation of the mutation of the suit property in favor of S.L. Chopra and the conveyance deed dated February 03, 1997 conferring title to the suit property upon S.L. Chopra within three years of the date he came to know the facts which entitled him to get the said documents cancelled.

80. As already held by us, the plaintiff came to know of the fact which entitled him to get cancelled the mutation of the suit property in favor of S.L. Chopra and conveyance deed dated February 03, 1997 in the year 2001, if not earlier, and thus could have filed the suit seeking cancellation of said documents in the year 2004.

81. It may be true that, as observed by us in paragraph 71 above, that in the instant case in view of the order dated October 29, 2007 passed by the Supreme Court title of Sh. S.L. Chopra was required to be established. Concededly in the record of L & DO title of Sh. S.L. Chopra has been recorded. The same is on the basis of a conveyance deed dated February 03, 1997. It may be true that the foundation of the said conveyance deed was the stated will executed by Har Kaur Chopra, which has not been proved, but the fact of the matter would remain that a registered title document exists and unless the same is got cancelled to the

world at large S.L. Chopra would be required to be treated as the owner of the property. It is on this reasoning it has to be held that ownership of Sh. S.L. Chopra has been established notwithstanding the will executed by Har Kaur Chopra not being proved. The appellants may plead a fraud but that would not relieve them of the obligation to seek cancellation of the conveyance deed in question when fraud came to their knowledge. As we have already reasoned hereinabove in paragraphs 72 to 81 knowledge of the fraud if any played would be with the appellants when Sh. S.L. Chopra let out the first floor of the property to a tenant under the lease-deed Ex. DW-1/6 dated October 12, 2001. 3 years' limitation reckoned therefrom would expire on October 12, 2004. Granting benefit to the appellants to have taken some time to gain knowledge of the manner in which the fraud was played so that while instituting the plaint they could plead material particulars of the fraud, by accessing the record of L & DO, limitation to question the conveyance deed in question would commence if not later, within reasonable period of October 12, 2001, which at best would be 2 to 3 months and thus as per Section 17 of the Limitation Act, 1963 the period of limitation would be required to be treated as having commenced by December, 2001. We highlight that as per sub-Section 1 of Section 17 of the Limitation Act, 1963 the period of limitation commences when the plaintiff discovered the fraud or with reasonable diligence could have discovered it.

82. In this view of the matter, the Single Judge has rightly come to the conclusion that the plaintiff is precluded from questioning the title of S.L. Chopra to the suit property on the ground of bar of limitation.

83. We next need to examine whether the will Ex. DW-1/1 dated February 09, 2006 is the last legal and valid testament of S.L. Chopra.

84. "Will" as defined u/s 2(h) of the Indian Succession Act means "the legal declaration of the testator with respect to his property which he desires to be carried into effect after his death". The essential characteristic of a will, as is well known, is that it is a mere declaration of an intention so long as the testator is alive, a declaration which may be revoked or varied by the testator during his lifetime; it is a disposition that requires the testator's death for its consummation and is but ambulatory or without fixed effect until the happening of this event. The document is a will if it contains specific words of bequest to come into effect after the death of the testator.

85. A will is a solemn document. By it, a dead man entrusts to the living to carry out his wishes and since it is impossible that he can be called either to admit or deny his signatures or to explain the circumstances in which it was executed, duty of care is cast on the shoulders of the court while considering a probate case.

86. The rules governing the propounding of a will are two. First, the onus probandi lies in every case upon the party propounding the will and he must satisfy the conscience of the Court that the instrument so propounded is the last

will of the testator. Second, if a party actively participates in the execution of a will under which he takes a benefit, it is a circumstance to excite the suspicion of the Court and calls upon the court to be vigilant and zealous in examining the evidence on record.

87. The strict meaning of the term "onus probandi" is this, that if no evidence is given by the party on whom the burden is cast, the issue must be found against him. In all cases the onus is imposed on the party propounding the will. It is in general discharge by proof of capacity and the fact of execution from which the knowledge of and assent to the contents of the instrument are assumed.

88. The nature of proof required to prove a will is not different from those required to prove other documents except the requirement of attestation prescribed u/s 63 of the Indian Succession Act. The proof is to be tested on the usual satisfaction of a prudent mind. What distinguishes a will from other document is that the testator would not be available to testify the same as his last will. This introduces an element of solemnity in the decision. Even then the Court has to proceed with the enquiry in the same manner as is done in respect of any other document. The propounder is called upon to show by satisfactory evidence that (i) the will was signed by the testator in the presence of two attesting witnesses; (ii) at the relevant time he was in sound and disposing state of mind; (iii) he understood the nature and effect i.e., the content of the disposition; (iv) he put the signature to the document of his own free will. The onus of the propounder can be said to be discharged on proof of the above essential facts.

89. However, in a case surrounded by suspicious circumstances viz.: the disposition may appear to be unnatural, improbable or unfair in the light of the relevant circumstances; or there may be indications that the disposition was not the result of the testator's free will and mind, such suspicious circumstances make the initial onus very heavy; and unless satisfactorily discharged, the Court would be reluctant to treat the document as the last will of the testator. Where the propounder takes a prominent part in the execution of the will conferring benefit upon him, that is a suspicious circumstance attending the execution of the will; the propounder is required to remove the doubt by clear and satisfactory evidence. In other words the propounder must satisfy the conscience of the Court that the document is the last will and testament of the testator.

90. Where the caveator alleges undue influence, fraud and coercion, the onus is on him to prove the same. Even if there is no such plea but the circumstances give rise to doubts, it is for the propounder to satisfy the conscience of the Court. If the propounder is able to satisfy the conscience of the Court, the Court shall grant the probate, even if the will cuts off, wholly or in part, near relations. It is the will of the testator that is reflected in the will. Being the testator's own property, he has the liberty to deal with it absolutely. It is not for the Court to find out justification or equity or otherwise in the action of the testator. It is not for the Court to make it fair or to sermonize. It is not for the Court to refuse the

grant on account of the fact that the disposition is not just and fair or is unnatural or improbable when the conscience of the Court is clear about the proof of the execution of the will on the face of the evidence, satisfactorily sufficient, to remove the suspicious circumstances.

91. As the wills are too frequently made by the sick and dying, the degree of understanding and memory which the law requires is such as may be reasonably expected from persons in that condition. Therefore, it is wrong to suppose that those qualities of mind should be possessed by the testator in the highest degree, position or to the same extent as before the illness in order to enable him to validly make his will. Section 59 of the Indian Succession Act requires that the testator should have a sound mind. The sound mind referred to does not mean that the testator should have his mental faculty in their fullest vigour, but means that he should have the capacity to understand the nature of his property; memory to remember the relations and persons normally having claims on his bounty and has also a judgment. As observed by their Lordships of Privy Council in the decision reported as AIR 1945 174 (Privy Council) ., the fact that the testator was unwell when he executed the will is a long way from saying that he had no testamentary capacity. The testator does not have to be found in perfect state of health to have his will declared valid. It is sufficient to prove that he was able to outline the manner in which his estate was to be disposed of.

92. The general principles governing the presumption of due execution and attestation are, if a will appears on the face of it to have been duly executed and attested in accordance with the requirements of the Act, the maxim "*omnia presumuntur rite esse acta*" applies, unless it is clearly proved that the will in fact, was not duly executed. The Court of probate has long being accustomed to give great weight to the presumption of due execution arising from the regularity *ex facie* of the testamentary paper produced where no suspicion of fraud has occurred.

93. Where once it has been proved that a will has been executed by a person of competent understanding, the burden of proving that it was executed under undue influence is on the party who alleges it. The Bombay High Court laid it down in the decision reported as *Gomtibai Vs. Kanchhedilal*, that undue influence in order to invalidate a will must amount to coercion or fraud. Its extents must be established and it must also appear that it was actually exercised on the testator.

94. The burden of proving undue influence is not discharge by merely establishing that the person had power unduly to overbear the will of the testator. It must be shown that in any particular case that power was, in fact, exercised and that it was by means of exercise of that power that the will was obtained. This was observed by the Calcutta High Court in the decision reported as *Ajit Chandra Majumdar Vs. Akhil Chandra Majumdar*, Relying upon the decision of the Supreme Court in the decision reported as *Naresh Charan Das Gupta Vs. Paresh Charan Das Gupta*, . it was observed that it is elementary that

law does not regard or characterize every interest which is brought to bear upon a testator as undue. It is open to a person to plead his case before the testator and to persuade him to make a disposition in his favour and if the testator retains his mental capacity and there is no element of fraud or coercion, the will cannot be attacked on the ground of undue influence. Not all importunities are undue influence. While making said observation, the Supreme Court in Naresh Charan Das Gupta's case (supra) quoted the observation of Lord Penzance in the decision reported as 1868 (1) P&D 481 *Hall v. Hall* but all influences are not unlawful. Persuasion, appeals to the affections or ties of kindred, to a sentiment of gratitude for past services, or pity for future destitution, or the like-these are all legitimate and may be fairly pressed on a testator. On the other hand, pressure of whatever character, whether acting on the fears or the hopes, if so exerted as to overpower the volition without convincing the judgment, is a species of restraint under which no valid will can be made. In a word, a testator may be led, but not driven; and his will must be the offspring of his own volition, and not the record of someone else's.

95. The golden rule in interpreting a will is to give effect to the testator's intention as ascertained from the language, which he has used. The overriding duty of a Court is to construe the language which the testator has in fact employed giving due weight to all the words and rejecting none to which a meaning can reasonably be assigned. The Court is entitled to put itself into the testator's arm chair to construe a will and to form an opinion apart from the decided cases and then, to see whether those decisions require any modification of that opinion and not to be guided by considering as to how far the will in question resemble other will upon which the decisions have been given. The proposition that the will has to be read as a whole cannot be disputed. Whether there is a will on the basis of the document, the probate Court certainly will not proceed to consider as to whether or not the disposition of the property was good or bad. The primary duty of the probate Court is to see first whether prima facie, the document constituted a will.

96. Any and every circumstance is not a suspicious circumstance. A circumstance would be suspicious when it is not normal or is not normally expected in a normal situation or is not expected of a normal person.

97. If evidence adduced by the propounder is legal and convincing and satisfies the conscience of the court, mere conjecture or unfounded suspicion should not be permitted to sway the verdict that the will has not been proved. The law of evidence does not permit conjecture or suspicion having the place of legal proof nor permit them to demolish a fact otherwise proved by legal and convincing evidence. Well founded suspicion may be a ground for closer scrutiny of the evidence but suspicion alone cannot form the foundation of a judicial verdict-positive or negative.

98. Keeping the afore-noted legal principles in mind, we proceed to determine whether the defendant No. 1 has been able to establish that the will Ex. DW-1/1

dated February 09, 2006 was the last legal and valid testament of S.L. Chopra.

99. S.L. Chopra was issueless. His wife Kamla Chopra had predeceased him. He died on October 04, 2006. Defendant No. 1 Arun Chopra is the nephew of S.L. Chopra i.e. the son of his brother H.L. Chopra.

100. As per the will Ex. DW-1/1, S.L. Chopra had bequeathed the suit property to the defendant No. 1 and his wife Sarvjit Chopra and his movable assets have been equally divided by him between all the children of his brothers and sisters.

101. We have carefully looked into the evidence led by the defendant No. 1, propounder of the will Ex. DW-1/1, and find that evidence(s) has surfaced on record which strongly suggests that S.L. Chopra intended to bequeath the suit property to the defendant No. 1 and his wife Sarvjit Chopra.

102. The aforesaid evidence(s) are the three lease-deed(s) dated November 11, 2003 Ex. DW-1/5, October 12, 2001 Ex. DW-1/6 and November 01, 2004 Ex. DW-1/7 whereby Sham Lal Chopra had let out the first floor of the suit property to ABP Pvt. Ltd. Company.

103. Most significantly, the afore-noted three lease-deeds record that the expression "heir" of S.L. Chopra includes Arun Chopra (defendant No. 1) and his wife Sarvjit Chopra. The said three lease-deeds bring out the clear intention of S.L. Chopra that he wanted the defendant No. 1 and his wife Sarvjit Chopra to succeed to the suit property inasmuch as in all the afore-noted three lease deeds which have executed by S.L. Chopra in the span of four years the defendant No. 1 and his wife Sarvjit Chopra has been named/referred to as the "heirs" of S.L. Chopra. Thus, the three lease-deeds dated November 11, 2003 Ex. DW-1/5, October 12, 2001 Ex. DW-1/6 and November 01, 2004 Ex. DW-1/7 go a long way in establishing the genuineness of the will Ex. DW-1/1 dated February 09, 2006 whereby S.L. Chopra had bequeathed the suit property to the defendant No. 1 and his wife Sarvjit Chopra. More so, when the plaintiff have not seriously disputed the genuineness of said three lease deeds dated November 11, 2003 Ex. DW-1/5, October 12, 2001 Ex. DW-1/6 inasmuch as no question has put by the plaintiff to any of the witnesses of the defendant No. 1 during their cross-examination regarding the genuineness/execution of the said three lease-deeds.

104. Ms. Uma Dhawan DW-3, an attesting witness to the will Ex. DW-1/1, has deposed that the will Ex. DW-1/1 was executed by S.L. Chopra in her presence on February 09, 2006.

105. To discredit the testimony of Uma Dhawan DW-3, it has been argued by the counsel that Uma Dhawan did not state in her evidence by way of affidavit that it was the will Ex. DW-1/1 which was executed by S.L. Chopra in her presence. In this regard, we note that the evidence by way of affidavit of Uma Dhawan was prepared in Mumbai as she was the resident of Mumbai. On the date when the evidence by way of affidavit was prepared in Mumbai the will Ex. DW-1/1 was lying sealed in this Court. Since the will Ex. DW-1/1 was lying in this Court on

the date of preparation of her affidavit by way of evidence obviously Uma Dhawan DW-1, could not have seen the will Ex. DW-1/1 while sitting in Mumbai and state in her affidavit that it was the will Ex. DW-1/1 which was executed by S.L. Chopra in her presence on February 09, 2006. When the will Ex. DW-1/1 was shown to her on November 01, 2011 Uma Dhawan DW-3, clearly stated it was the will Ex. DW-1/1 which was executed by S.L. Chopra in her presence on February 09, 2006.

106. Regarding non-mentioning of certain details by Uma Dhawan in her examination-in-chief (evidence by way of affidavit) suffice would it be to note that Uma Dhawan DW-3, had stated all vital details relating to execution/attestation of the will Ex. DW-1/1 dated February 09, 2006 in her examination-in-chief. Nothing turns on the fact that Uma Dhawan DW-3, had stated anything about the preparation of the will Ex. DW-1/1. Uma Dhawan DW-3, was associated only with the execution/attestation of the will Ex. DW-1/1 and not the preparation of said will.

107. Uma Dhawan DW-3, has been cross-examined at length by the plaintiff but nothing has been elicited therefrom which dents the veracity of her evidence. Uma Dhawan DW-3, is a credible witness particularly when we find that the contents of the will Ex. DW-1/1 stated to have been attested by her receive corroboration from the three lease-deeds dated November 11, 2003 Ex. DW-1/5, October 12, 2001 Ex. DW-1/6 and November 01, 2004 Ex. DW-1/7.

108. Let us now deal with the circumstances pointed by the learned senior counsel for the plaintiff which according to him shrouds the will Ex. DW-1/1 dated February 09, 2006 with suspicion.

109. It is no doubt true that the will Ex. DW-1/1 has been typed on an old letter head of S.L. Chopra and it has not emerged as to how the will Ex. W-1/1 saw the light of day. But, this would be a circumstance only to raise the eyebrows and if otherwise evidence on record establishes due execution of a will, the raised eyebrows should fall. In the instant case, the raised eye-brows fall in view of the facts that the evidence of Uma Dhawan DW-3, that S.L. Chopra had executed the will Ex. W-1/1 in her presence on February 09, 2006 inspire confidence and the contents of the will Ex. W-1/1 receive corroboration from the three lease-deeds dated November 11, 2003 Ex. DW-1/5, October 12, 2001 Ex. W-1/6 and November 01, 2004 Ex. DW-1/7.

110. Regarding absence of evidence regarding the preparation of the will Ex. W-1/1 is concerned, suffice would it be to note the following observations made by the Supreme Court in the decision reported as Ramabai Padmakar Patil (D) through LR's. and Others Vs. Rukminibai Vishnu Vekhande and Others,

...The learned District Judge has observed that Smt. Yamunabai was very old when she executed the will and she was hard of hearing and was unable to walk. He further observed that Chhaya Dighe who typed the will and one Shri Tiwari, Advocate, who was present at the time of preparation and execution of the will,

were not examined and these facts together created a doubt regarding the authenticity of the will. As discussed earlier, in view of Section 63 of Indian Succession Act and the proviso to Section 68 of the Evidence Act, the requirement of law would be fully satisfied if only one of the attesting witness is examined to prove the will. That this had been done in the present case by examining PW 2 Raghunath Govind Sogale cannot be disputed. No infirmity of any kind had been found in the testimony of this witness. Chhaya Dighe merely typed the will and she is not an attesting witness nor it is anybody's case that Smt. Yamunabai had put her thumb impression on the will in her presence, Therefore, her examination as a witness was wholly redundant. The mere non examination of the Advocate who was present at the time of preparation or registration of the will cannot, by itself, be a ground to discard the same....

111. Noting the law laid down by the Supreme Court in the Ramabai's case (supra), we can safely conclude that the absence of the evidence regarding the preparation of the will Ex. DW-1/1 is not fatal to the genuineness of the will Ex. DW-1/1.

112. It is no doubt true that the defendant No. 1, the propounder of the will Ex. DW-1/1, has led no evidence to show that S.L. Chopra was in a state of sound disposing mind at the time when he executed the will Ex. DW-1/1. Ideally, the defendant No. 1 ought to have led evidence to the effect that S.L. Chopra was in a state of sound disposing mind at the time when he executed the will Ex. DW-1/1. But, the aforesaid omission is not fatal to the genuineness of the will Ex. DW-1/1 for it was not even the case of the plaintiff that S.L. Chopra was not in a state of sound disposing mind around the time of the execution of the will Ex. DW-1/1.

113. One of the circumstances pointed out by the counsel to hold against the genuineness of the will Ex. DW-1/1 is that the defendant No. 1, the propounder of the will Ex. DW-1/1, did not examine the second attesting witness. Section 68 of the Indian Evidence Act, 1872 provides that a document required by law to be attested can be proved by the evidence of one attesting witness to the document. Therefore non-examination of the second attesting witness is of no relevance.

114. The other circumstances pointed out by the learned counsel for the plaintiff are trivial in nature and in no manner raise a serious doubt on the genuineness of the will Ex. DW-1/1.

115. To conclude, we hold that the defendant No. 1 has been able to establish that the will Ex. DW-1/1 dated February 09, 2006 is the last and legal valid testament of S.L. Chopra.

116. The net result of the above discussion is that the present appeal fails and is hereby dismissed. No costs.