

(1998) 05 DEL CK 0116
In the Delhi High Court
Case No : Probate Case No. 11/95

Sujan Singh Uban (Maj. Gen.)

APPELLANT

Vs

State

RESPONDENT

Date of Decision : 01-05-1998

Acts Referred:

Citation : (1998) 4 AD 575 : (1998) 73 DLT 636 : (1998) 45 DRJ 547

Hon'ble Judges : K. Ramamoorthy, J

Bench : Single Bench

Advocate : Mr. Arun Khosla and Mr. Kamal Nijhawan, for the Appellant; Mr. V.K. Makhija and Mr. S.K. Taneja Advocate for Objector Brig. Gurdip Singh Uban., for the Respondent

Judgement

K. Ramamoorthy, J.—The probate case has been instituted by the petitioner, the husband of the deceased Smt. Jaswant Kaur. Though in the Will dated 5.11.1991 propounded by the petitioner has not been specifically stated that the testatrix had appointed the petitioner as executor, the petitioner had claimed himself to be an executor and had filed this petition for the issuance of probate. Under the provisions of the Indian Succession Act, 1925 when there is no specific mention of the appointment of an executor only an application for Letters of Administration could be filed. The petitioner can pray for the issuance of Letters of Administration.

2. Smt. Jaswant Kaur died on 23.4.1994 leaving behind her husband Maj. Gen. Sujan Singh Uban, widow and the son of her pre-deceased son, two daughters and the son Brig. Gurdip Singh Uban. The following table will show relationship of the parties:-

TABLE Maj. Gen. Sujan Singh Uban = Jaswant Kaur Harsharan Gurdip Singh Har Kishan Jagdeep Singh Misra Uban Coomar Kanwardip Singh 3. The father Maj. Gen. Sujan Singh Uban had propounded the Will dated 5.11.1991. The son Brig. Gurdip Singh Uban had propounded the Will dated 23.4.1994. Maj. Gen. Sujan Singh Uban had filed Ex.P.1 to P.6 and the son had filed Ex. D.1 to D.14. The

father had examined himself as P.W.1 and other witnesses P.W.2 to P.W.7 and the son had examined himself as D.W.4 and examined D.W.1, D.W.2, D.W.3, D.W.5 to D.W.7.

4. Before I go to the analysis of the evidence, it is better to give the nature of the documents filed by the parties. The father had filed the following documents:-

1. Death Certificate (Ex. P.1)
2. Will dated 5.11.1991 (Ex. P.2)
3. Lease Agreement dated 18.3.1996 (Ex. P.3).
4. Photo copy of Petition before Tehsildar (Ex.P.3A)
5. Photo copy of Affidavit before Tehsildar of Gurdip Singh Uban.(Ex. P.4)
6. Judicial notice dated 30.5.1996 (Ex.P.5)
7. Medical Certificate dated 31.10.1995 (Ex. P.6)

5. The son had filed the following documents:-

1. Will dated 23.4.1994 (Ex. D.1).
2. Copy of Will dated 5.11.1991 (Ex.D.2)
3. Seven Photographs (Ex.D.3 to D.9)
4. Photo copy of lease agreement dated 15.10.1991 (Ex. D.10).
5. Copy of F.I.R. No. 252 (Ex. D.11)
6. Confidential details of deceased (Ex. D.12)
7. Photo copy of objection petition before the Tehsildar (Ex. D.13)
8. Certificate of Sena Aspatal dated 6.9.1996 (Ex. D.14).
9. Copy of letter dated 17.5.1994 (Ex. X-1)
-]10. Photo copy of receipt (Ex. X-2).

6. In the petition it is stated that the deceased executed the Will on 5.11.1991 and was attested by (1) Mr.S.Mr. Raj Kumar. The testatrix bequeathed all her properties and cash assets to the petitioner. The son filed the written statement on 13.9.1995. He disputes the Will propounded by the father. According to him, it had been fabricated, and that the mother did not execute any Will. The petitioner did not treat the wife properly. The petitioner was having extra marital relations. Having regard to the relationship between the petitioner and his wife the deceased did not want to give anything to the husband and she wanted to give the properties owned by her to the son because the other son had e-deceased her. According to the son, the deceased made her last Will on the night falling between 22nd and 23rd April 1994 in the Army Hospital, Delhi Cantonment. That

being the last Will, assuming there was any Will earlier that stood superseded and, Therefore, the petitioner cannot claim the relief prayed for in the petition. He would deny the execution and attestation of the Will propounded by the father. It is not necessary to relate other averments. In the written statement the son had also claimed for the issuance of probate on the strength of the Will now projected by him. The father had filed replication on the 6th day of February 1996, that it is only for the purpose of denying the case of the son with reference to the Will set up by him. The father had denied the execution and attestation of the Will set up by the son. It is not necessary to set out the averments in the replication.

7. On the pleadings, the following issues were framed for consideration on 10th of September 1996:-

ISSUES

1. Whether the deceased Mrs. Jaswant Kaur Uban executed her last valid Will dated 5.11.1991?

2. Whether the deceased executed a Will dated 22nd/23rd April 1994?

3. Whether the petitioner is entitled to probate of the Will dated 5.11.1991?

4. Whether the petitioner has violated the order dated 27.3.1996, if so, to what effect?

5. Relief.

8. Though the family has been rich and educated but does not appear to have been having love and affection which is necessary for a peaceful living and that had resulted in bitterness and estrangement which had culminated in the present proceedings. The father and the son are living in the same premises C-191, defense Colony, New Delhi. But they were not on talking terms for some time. The deceased apparently was not keeping good health and she became seriously ill in the night about 9 P.M, on the 22nd of April 1994. She was taken to the Military Hospital, Delhi Cantonment and unfortunately she never returned.

9. Thereafter, the parties had approached this Court for the reliefs claimed by them.

10. In the first instance, I have to consider whether the Will dated 5.11.1991, propounded by the father, has been proved in accordance with law. The parties have joined issues on material points relating to the preparation of the Will and the incidents which had happened on 22nd and 23rd April 1994. The father admits that he was present at the time of the execution of the Will. He also admits that the Will was typed out by Mr. Randhawa, a Typist who was working with him. Therefore, it is clear that it was the father who had prepared the Will. Under the circumstances, the onus is very heavy on the father to prove the execution and attestation of the Will.

11. Let me first consider the facts relating to the preparation of the Will. P.W.1 Maj. Gen. Sujan Singh Uban, as I have stated above, would admit that the Will was typed out 10-15 days before the execution thereof. According to him, the contents of the Will were dictated in English by the deceased. At the time of the dictation also, according to him, he was present and his wife had his assistance. P.W.1, the father does not say that his wife or himself informed the children about the intention of his wife to execute a Will. For 15 days, who had the custody of the Will he does not speak about. He would admit that Mr. Randhawa typed the Will in the Typewriter owned by him and it was typed at C-191, reference Colony, New Delhi. It may be noticed here that Mr. Randhawa has not been examined. The execution of the Will was kept in secrecy by the petitioner. The petitioner has also produced Ex. P.3 and lease deed which was typed by Mr. Randhawa. The following questions and answers will throw light on the point :-

"Q. According to you Will Ex. P.2 was dictated to N.S. Randhawa. Is he the same person who is a witness in the lease deed ex. P.3 dated 18.3.1996 on the ground floor?

Ans. Yes.

Q. Where the Will P.2 was typed?

Ans. It was typed in my house by Randhawa.

Q. The Typewriter that you have in the house if a portable one.

Ans. No. It is a normal office typewriter.

Q. Was Ex. P.3 lease deed typed on the same typewriter?

Ans. I do not remember on which typewriter Ex. P.3 was typed.

Q. Who typed out Ex. P.3?

Ans. Ex. P.3 was typed by Randhawa at my place.

Q. You are having only one typewriter.

Ans. Yes. I am having only one typewriter.

Q. Is the Will P.2 typed by Randhawa on the same typewriter?

Ans. I have only one typewriter. It may have been on the same typewriter."

12. At this stage, it may be noted that the two daughters examined by the father, don't speak anything about the reparation of the Will and they would admit that the parents did not inform them about the intention of the mother to execute a Will. The Will is in English language. Why was it typed in English, why was it prepared in English not in Hindi or any other language known to the testatrix has not been explained by the petitioner. But he would assert that his wife had good command over English language and she dictated the Will in English. That seems to be wholly unfounded. The testatrix, it could be seen from

the evidence, was not at all knowing English, leave alone, being proficient enough to have relevant knowledge and skill to dictate a testament. The following from the evidence of P.W.1 would show him how he could betray himself :-

"Q. I put it to you that Jaswant Kaur had no schooling.

Ans. I do not know. I did not see her certificates. But she used to read English newspapers daily.

Q. I put it to you that she had no educational qualification.

Ans. She spoke, she read English. She read guru granth sahib. She wrote the English, Hindi, Gurumukhi scripts.

Q. Can you tell to which standard she had read?

Ans. I do not know. I never saw her certificates.

Q. I tell you she neither understood English nor she could speak English.

Ans. No. She knew English very well.

Q. Have you any documents of Mrs. Jaswant Kaur in her own writing in English?

Ans. I do not remember. There may be one or two documents written by her in English.

Q. can you produce them?

Ans. If I find them I can certainly produce them.

Q. Can you produce any letter written by her in English?

Ans. I cannot produce any letter written by her in English script."

P.W.4 appears to be the eldest daughter and she also appears to be educated. She is the wife of Air Commander K.K. Mishra, Specialist in ENT Branch. She must be in a position to tell the Court about her mother having knowledge of english Her evidence is :-

"Q. Was your mother good in English?

Ans. Yes. She could read English newspaper, she could talk in English. But she did not have a degree.

Q. Could she dictate a letter in English?

Ans. Yes. She was in a position to dictate a letter in English.

Q. Were you getting letter in Hindi also?

Ans. Yes. Hindi as well as Gurmukhi mixed."

The other daughter appeared as P.W.5 Mrs. Harkiran Commar. Her husband is in

business. He has also been examined as P.W.7. She also appears to be well educated. Her son is in the United States of America. Both the daughters could speak fluent English and could understand the questions put to them clearly and they were able to give answers without any difficulty. P.W.5 had stated about her mother :-

"Q. What was your mother's education?

Ans. I do not know of her education. But we spoke Punjabi, Hindi and English at home. She would read English newspaper every day and could write in English.

Q. Have you got any letter in English from your mother?

Ans. I have no paper or letter which was written by my mother in English to me as I lived in the same city as her.

Q. Did she at any time write to anybody by her hand?

Ans. I do not remember."

13. When evidence is given by the members of family belonging to good position in life, one would expect them to tell us the truth but I am really a little perturbed to see the anxiety on the part of the petitioner and the daughters in trying to withhold material facts from Court. I could glean from the way in which they were answering questions and their reactions to the questions in the context of the circumstances of the case, , a lurking fear in their minds that they might divulge the correct facts to the Court. The petitioner and the two daughters were labouring hard in giving out the answers though they were very quick in giving out the answers. The mother was 70 years when she died. The father is a retired Maj. Gen. from the Indian Army. The daughters are quite cultured and educated but I am really surprised to see the father and the daughters stating that they were not aware the qualification of Smt. Jaswant Kaur. I am impelled to come to the conclusion that on this aspect of the case P.W.1, P.W.4 and P.W.5 have come forward with a false version. I do not want to refer to the evidence of D.W.4, the son Brig. Gurdip Singh. I am very clear in my mind that Smt.Jaswant Kaur had absolutely no knowledge about English and it was the petitioner P.W.1 Maj. Gen. Sujan Singh Uban who had prepared the Will and the testatrix had absolutely no knowledge about the contents of the Will.

14. I shall now take up the evidence relating to the execution of the Will. In this behalf, petitioner examined himself and examined P.W.2 Mr. H.S. Bedi and P.W.3 Mr. Raj Kumar. P.W.1 would state:-

"Q. Were you present when the Will was executed?

Ans. Yes.

Q. When Mrs. Jaswant Kaur made a Will, you were present?

Ans. Yes. I was present.

Q. Did she execute any Will before death?

Ans. She executed a Will before death?

Ans. She executed a Will on 5.11.1991. (document is shown to the witness i.e. the Will dated 5.11.1991). The Will is marked Ex. P.2. It was executed at my residence C-191, defense Colony, New Delhi.

Q. Who read out the Will to her?

Ans. At the time of the signing of the Will by the two witnesses, Raj Kumar read out the Will at her instance.

Q. You did not read out the Will.

Ans. I did not read out the Will.

15. According to P.W.1 he was present at the time of the execution of the Will and Smt. Jaswant Kaur, P.W.2 and P.W.3 were present. According to him, the Will was read out by Mr. Raj Kumar to Smt. Jaswant Kaur. The petitioner did not read out the Will. I pause have to mention one fact. If according to the petitioner Smt. Jaswant Kaur who was so well read in English why she should say that the Will should be read over to her by Mr. Raj Kumar when she is alleged to have had executed the Will on 5.11.1991. In the natural course of events Smt. Jaswant Kaur if she had dictated the contents of the Will, should have asked the Will to be brought from the place where she had kept and the Will should have been with her when the witnesses came for attestation or she should have asked the husband, the petitioner, to bring the Will which had already been typed out a few days before the alleged execution. It is not the case of the petitioner that on that date (5.11.1991) Smt. Jaswant Kaur was ill and the Will had to be read over to her in order to refresh her memory about what she had done 10-15 days before that date. It is somewhat very artificial though I can characterise it as unusual that the petitioner should have thought of a theory of P.W.3 reading over the Will to Smt. Jaswant Kaur. If all the loose parts are put together it will be clear that some vital components are missing. In the chief examination, the petitioner would not say anything about these matters. Mr. H.S. Bedi P.W.2 would state:-

"Q. Did Mrs. Uban call you in connection with the execution of the Will?

Ans. Yes.

Q. When was this?

Ans. It was on 4.11.1991.

Q. What happened when you visited her and where?

Ans. I went to her place at C-191, defense Colony, New Delhi. Mr. Jaggi was present and Mrs. Uban and Mr. Uban was there. Mrs. Uban said that she had drawn a Will and after reading it asked Raj Kumar Jaggi also to read it aloud.

Q. Did you then see her signing the Will?

Ans. I saw Mrs. Uban signing the Will.

Q. Did you then sign as an attesting witness?

Ans. I signed the Will in her presence and in the presence of Raj Kumar Jaggi.

Q. Who asked her to sign the Will?

Ans. She signed the Will of her own. The Will was read over in English by Mr. Jaggi and some words she did not understand were translated to her.

Q. Who introduced you to Jaswant Kaur?

Ans. She was introduced by Mr. Uban in 1978.

Q. How much investment was made through you?

Ans. She never made any investment through me.

16. The witness would admit that Smt. Jaswant Kaur did not make any investment. It was only the petitioner, according to him, was having some dealing with him. Therefore, there is absolutely nothing on record to show that Smt. Jaswant Kaur had confidence in P.W.2 to call him to attest her Will. It is all the making of the petitioner. About the date being found in the Will, P.W.2 would say :-

"Q. Did you put the date on the Will?

Ans. No.

Q. Do you know when the Will was signed by you it did not bear the date?

Ans. It is correct that I did not see any date when I signed it.

P.W.3 Mr. Raj Kumar would contradict P.W.2 in this aspect and he would state :-

"Q. Do you know that at the time you signed, the date was not typed out at that time?

Ans. It is correct to suggest that at the time I signed, the Will did not bear any date.

17. According to P.W.1, P.W.2 and P.W.3 all were there along with Smt. Jaswant Kaur on 5.11.1991. Therefore, nobody could say that there was date put on the document on that date or if no date was mentioned why that was not done. In Ex. D.2 there is no date. The Explanation given by P.W.1 cannot at all be accepted. The evidence of P.W.1 in this behalf brings forth a very crucial aspect of the case to test his veracity.

Q. Please see the copy of the Will which was supplied along with the summons to Objector G.S. Uban. There is neither any correction nor it bears any date. Is it correct?

Ans. It is correct. It is exhibited as Ex. D.2.

Q. Mr. Jaggi attesting witness said yesterday there is yet another copy of the Will which is signed by him. Where is that Will?

Ans. The Will was typed and on the original Will the date 5.11.1991 was typed. It had a carbon copy and I noticed on the carbon copy that the date had not come out. So I wrote the date myself on the carbon copy and sent the carbon copy and the original for the photo copies and what you are showing the photo copy of the original and the carbon copy with and without the date on the carbon copy."

18. The story now related by the petitioner, it does not require any argument to say, not only falsifies the case of the petitioner but it also shows how the petitioner has been trying to be smart in his approach in attempting to prove the execution of the Will. P.W.2 was asked about as to how he could remember clearly the dates 4.11.1991 and 5.11.1991 he would come forward with an answer :-

"Q. Kindly tell the Court did you note down the date somewhere?

Ans. I have told the date 4.11.1991 because I have got certain papers of UTI with me for that day.

Q. What did you do with the papers which you had taken from Mr. Uban on 4.11.1991?

Ans. I deposited the same after 3 or 4 days with the UTI."

This would clearly show that the witness is not telling us the truth. One need not have any concrete evidence to show that he was on a particular date was asked to come by a particular person for the execution of the Will, especially the interval of time between the alleged execution of the Will and the date of evidence is not very long. The witness in his anxiety to show himself to be truthful has put forth a reason without any supportive document. This I am referring only to show that the petitioner has only procured P.W.2 for the purpose of his case.

19. P.W.3 is yet another witness of the petitioner for proving the execution of the Will. He unfolds himself as a person attracted to P.W.1 on reading his book :-

"Q. In what connection you know him?

Ans. I know him as an Author of the Book Gurus of India."

He would expect the Court to believe that on reading a book written by P.W.1 he was drawn to P.W.1 by a magnetic force, as it were, and visited P.W.1. According to him, the first contact was in 1986 but P.W.3 has not been able to tell us in which year the book was published and what is the subject matter of the book and when it was published and how he was able to get the address of P.W.1 and how he had been maintaining the relationship between P.W.1 and his wife and himself. He was forty five when he gave evidence on 23.9.1996. He must have

been 35 years in 1986. What is his station in life he has not been able to say and how he could maintain relationship with a Maj. Gen. he has not been able to mention. From the way he gave evidence I could see him a person who cannot speak the truth. He was not in a position to say as to why he had to read out the Will. He claims to have developed high regard for Smt. Jaswant Kaur. According to him, he used to go everyday to the residence of the petitioner. For what purpose, he would not say? According to this witness, Smt. Jaswant Kaur asked him to read the Will aloud to her. He would not give the reasons as to why Smt. Jaswant Kaur wanted him to read the Will when the husband was there. Regarding the magnetic power of the book written by the petitioner he would say :-

"Q. How are you connected with that book?

Ans. Since 1986.

Q. How are you connected with that book?

Ans. I am the reader of that book. Once I read his book, I started visiting his house."

20. According to this witness, it was Smt. Jaswant Kaur who called him. How many days prior to that he was called by Smt. Jaswant Kaur he has not been able to say.

21. Apart from the execution of the Will, about the custody of the Will with the petitioner, the theory trotted out by the petitioner appears to be wholly false. The petitioner would state that he knew where the Will was kept, a function was held on the 13th day after the death of Smt. Jaswant Kaur and on that date the Will was disclosed to the relatives. P.W.1 does not speak anything about these in his chief examination. In the cross-examination, he would state:

"How did you come into the custody of the Will Ex. P.2 after her death and when?

Ans. My wife kept the Will after its execution in the cover where we keep our documents and I took out the Will as per her wish on the 13th day after her demise from the same cover, on which she had said her assets were to be distributed. I knew the execution of the Will and I knew where the Will was kept.

Q. Did you announce about the existence of the Will on the 13th day, as stated in the Will?

Ans. Everybody in my family was told on the 13th day about the Will.

Q. Did you submit this Will before the date of the filing of the Probate case before any other authority?

Ans. I do not recollect.

Q. Was there any ceremony on the 13th day?

Ans. There was a pooja in the house and after the pooja this Will was opened by the family.

Q. How many attended the pooja?

Ans. Nobody else besides the immediate family was there. May be 10-12 more people besides family but I do not remember.

22. I want to refer to one aspect about the fulfilling the wish mentioned by Smt. Jaswant Kaur in her Will which was put in the cross-examination :-

"Q. You know that as per this Will Ex. P.2 she was to be cremated at the river Yamuna.

Ans. Yes.

Q. You did not fulfill her wish.

Ans. We could not do it.

Q. You did not disclose this thing to your sons and daughters at that time.

Ans. It is correct."

23. According to the petitioner, her wish was not fulfilled .He does not tell the Court about the reason. What I would infer from the overall evidence of P.W.1 that there was no wish expressed by Smt.Jaswant Kaur to be fulfilled by the petitioner and that was the reason why the petitioner had not even mentioned about the contents of the Will to her own children. If really the Will was true there is absolutely no reason as to why this had not been disclosed to the children.

24. P.W.4, the daughter Mrs. Harcharan Mishra would state :-

Q. Mrs. Mishra, when did you see the Will first time?

Ans. On 13th day o my mother's death. My father showed that this was the Will executed by my mother.

Q. During her life-time the mother did not show the Will to you?

Ans. No. She did not, but talked about it.

25. About the relations attending the funeral this witness would depose :-

"Q. Mrs. Mishra please tell to this Hon"ble Court did anybody of mother's relations attend the funeral?

Ans. She had a step-mother. So nobody had attended."

According to her, there was a ceremony on the 4th day and about 150 people attended and about the relations who attended the 4th day ceremony she would state:-

"Q. Anybody attended, the 4th ceremony or 13th ceremony of your mother's relations?

Ans. Her sister husband attended came after the 13th ceremony.

About the attendance on 13th day, she would state :-

"Q. On the 13th day, how many people came?

Ans. On the 13th day ceremony entire house was full. I do not exactly remember. It was over 150 people."

Again, she was asked about the ceremony she would state:-

"Q. Mrs. Mishra is it correct that all ceremonies were concluded on the 4th and there was no ceremony on the 13th day?

Ans. It is not correct."

About the attendance of relations on the date of funeral, P.W.1 would state :-

"Q. Did anyone of the said relations attend the funeral of Mrs. Jaswant Kaur?

Ans. None has attended the funeral."

About the attendance on the 13th day ceremony, P.W.1 would state :-

"Q. Who were the persons present there when you opened the Will on the 13th day?

Ans. My two daughters and son was present at that time.

Q. Was there any from outside the family present at that time?

Ans. I cannot recollect.

Q. Was there any ceremony on the 13th day?

Ans. There was a pooja in the house and after the pooja this Will was opened by the family."

P.W.1 would not speak about any function having been held on the 4th day. P.W.5 would state :-

"Q. When did you first see the Will?

Ans. On the 13th day.

Q. How many members attended the paath?

Ans. 7-8 members attended this paath.

Q. How many times the Will was shown to you?

Ans. Only when we sat on the 13th day of ceremony the Will was shown to me."

When P.W.4 would state that there were 150 people P.W.5 would say that 7 or 8

members attended and P.W.1 would say that only some relations attended the function.

26. Therefore, the petitioner had the Will with him and he did not disclose to the children is clear from the evidence and the case of the petitioner that it was disclosed on the 13th day is also not true.

27. The incidents relating to Smt. Jaswant Kaur being taken to the hospital on 22nd April 1994 and the death of that lady in that hospital have to be considered. They also go to show how the petitioner has also been trying to withhold the truth from Court. At about 9 P.M. on 22.4.1994 Smt. Jaswant Kaur complained of chest pain. Dr. V.K. Gujral, who appeared to have been summoned for examining Smt. Jaswant Kaur, had advised the patient being taken to the Military Hospital, Delhi Cantonment. Steps were taken to move her to the hospital. She was brought to the hospital at about 11.30 P.M. on 22.4.1994 and about 4.15 AM (23.4.1994) she died. The case of the petitioner is that the petitioner informed the younger daughter P.W.3 and she along with her husband P.W.7 came in their White Contessa Car and in that car Smt. Jaswant Kaur was taken to the Army Hospital, Delhi Cantonment. According to the petitioner, the son was not present at all and he came to the hospital only after having heard about the death of the mother. According to the son, Brig. Gurdip Singh, when the mother complained of chest pain he was informed and he came down to help the mother and he along with his wife and the father took the mother to the hospital and the driver of the son was also present. It was he who admitted the mother in the hospital and throughout he was present and on her death he received the body from the hospital. Normally, there cannot be any dispute of the deceased Smt. Jaswant Kaur being taken to the hospital and subsequent events which happened in the hospital but the father and the son were so inimically disposed of towards each other they had come forward with different theories just for the purpose of their own case. An analysis of the evidence would go to show that neither of them had come forward with truth and in the ultimate analysis one is left guessing. The documents summoned from the Military Hospital are also not very clear and the Doctors also had not been very definite about the particulars. Reading the evidence along with the other evidence relating to the preparation, execution and attestation of the Will, it pains me to note that for the purpose of clutching at the properties the persons belonging to a high strata of society had chosen to indulge in smoke screening. . About Smt. Jaswant Kaur being taken to the hospital, the evidence is conflicting. P.W.1 would state :-

"Q. Kindly tell us that in those days were you living on the first floor in defense Colony?

Ans. Yes, it is quite right.

Q. Whether she had to be carried down with support?

Ans. Yes.

Q. Did you take her to the hospital?

Ans. Yes, with the help of my daughter and her husband at that time.

Q. Kindly tell me that whether your wife was taken in your son's car?

Ans. No it is incorrect. It was my daughter's husband's car.

Q. I put it to you that you accompanied with your son from the Army Hospital to the defense Colony house.

Ans. No. I stayed there till she died."

P.W.4 would state :-

"Q. Where was your sister living at the date of death of your mother?

Ans. Vasant Vihar, New Delhi.

Q. Was your brother living on the second floor?

Ans. The brother was living in the defense Colony house in the second floor.

Q. Do you have any information who get your mother admitted in the hospital?

Ans. I have no information.

Q. Did your father talk to you on this aspect of the matter that who took your mother to the hospital?

Ans. No."

28. On an important matter like this in the lives of the sisters P.W.4 and P.W.5 one would expect them to talk about what happened to the mother on the last day of her life. It looks rather very strange that P.W.4 and P.W.5 had no discussion about it at all. P.W.4 is trying to project herself to be very innocent by saying that she was in Allahabad and she did not know anything what happened in Delhi. But when she had come for the funeral and according to her she had attended the ceremony on the 4th day and on the 13th day she must have ascertained about these facts from the father or P.W.5. She would even feign ignorance about having entered appearance in this case.

"Q. Have you engaged any counsel in this case?

Ans. I have not engaged any counsel in this case."

She would even go to the extent of saying that she was not aware of the litigation between the father and his daughter-in-law, widow of the pre-deceased son. The other sister P.W.5 would state :-

"Q. Do you remember the day when your Mummy died?

Ans. Yes.

Q. Did Daddy call you on that night when she was not well?

Ans. He called me and told me that Mummy was not feeling well and he had called a neighborhood Doctor who said she was to be removed to the hospital. When Daddy called me I rushed to his house Along with my husband.

Q. Who else did you find with Mummy there?

Ans. I found there Mummy and Daddy and no body else.

Q. Did Doctor examine her and if so, what did Doctor suggest?

Ans. The Doctor had examined her and told that she was to be removed to the hospital immediately.

Q. Who took her to the hospital?

Ans. My husband and myself.

Q. Who drove the car?

Ans. My husband drove the car and I was also sitting in the front seat. Mummi and Daddi were sitting in the back seat.

Q. When you reached the Army Hospital did you do any paper work?

Ans. No, we did not.

Q. What time did your father call you on the day when your mother was taken to hospital?

Ans. At 11.30 p.m.

Q. You and your husband took the mother to the Army Hospital, is it correct?

Ans. Yes.

Q. Who signed the admission form on reaching the hospital?

Ans. We did not sign the admission form at the time of admission of my mother.

Q. Did your father sign?

Ans. I do not remember.

Q. I put it to you that your brother was there and he signed the admission form.

Ans. It is not correct.

Q.61. It put it to you that it was your brother who took away your mother to the hospital?

Ans. No, it is incorrect.

The suggestion was made to her that she came only in the morning at 5 A.M. after the death of the mother. The evidence of P.W.5 if read along with the evidence of her husband P.W.7 I am not able to resist the feeling that they had

decided not to disclose the real facts. P.W.7 would state :-

"Q. Under what circumstances you visited your parents in law's place on that night?

Ans. On the night of 22nd April 1994, my mother-in-law was not well. We were also informed about her and she immediately need to be taken to the hospital. Myself and my wife immediately rushed to the hospital.

Q. Under what condition did you find your mother-in-law when you reached the house and at what time, you reached the defense Colony house?

Ans. It was around midnight. She was in a bad shape. She was having severe pain. She could not speak properly and complaining about the heavy chest pain. Then we took her to the hospital.

The answer given by the witness is very vague. I may also note on a fair sprinkling from his evidence :-

Q. Tell us who went to the hospital with Mrs. Jaswant Kaur?

Ans. Myself, my wife, her mother and her father.

Q. Around what time did you reach the hospital?

Ans. It was around 1.00 p.m. when we had reached the hospital.

Q. At what time did you reach your mother-in-law's house, and when you reached there, did you meet her?

Ans. We reached in the defense Colony's house in the midnight after getting the news of her serious illness and I did meet her, she was in a bad shape.

Q. In the year 1994, when your mother-in-law died at that time you were on talking terms with your mother-in-law?

Ans. No.

Q. And so with your wife?

Ans. No.

Q. When you found your mother-in-law seriously ill, did you go to meet her immediately?

Ans. No.

Q. Who was attending her in the MI room?

Ans. Dr. Bhardwaj was attending her in the MI Room.

Q. Who advised that she should be shifted/sent to ICU?

Ans. Well, I cannot say.

Q. Was your father-in-law was sitting outside the MI Room?

Ans. No, it is not correct.

Q. Where was your father-in-law when your mother-in-law was in the hospital. Was he in the MI Room?

Ans. Yes, he was.

Q .Did your father-in-law sign any papers?

Ans. Not to my knowledge.

Q. Did you sign any papers there?

Ans. No, I did not.

Q. did your wife sign any papers?

Ans. No, she did not."

29. A reading of evidence of P.W.7 would show that he had not played any part at all and he had come to give evidence under compulsive circumstances. There is absolutely no commitment on his part and he has been giving very evasive answers and it appears as if that he had made up his mind not to tell the Court what exactly happened. A reading of the answers would give anybody an impression that he was not present in the hospital when Smt. Jaswant Kaur was admitted. In other words, the son-in-law of Smt. Jaswant Kaur, a person in business, who had to go to the hospital in an hour of imminent calamity one would expect him to act with seriousness and circumspection and with certain amount of responsibility. I get the impression that he had not gone to the house in the night of 22nd of April 1994 and he had not gone to the hospital and he had come to give evidence at the instance of P.W.5 and P.W.1. His evidence sounds very self contradictory and unintelligible and unreasonable.

30. I now turn to what according to the petitioner happened on Smt. Jas-want Kaur reaching the hospital. I have to consider the evidence of the witnesses. P.W.1 would state:-

"Q. Who had signed while admitting her to the hospital?

Ans. The duty officer might have signed it. I have not signed it.

Q. Was your son around in the hospital at that night?

Ans. No, it is not correct.

Q. In the Army Hospital when a person is put on a dangerously illness the signatures of the next of kin is taken before the patient is removed to ICU.

Ans. I do not know.

Q. Did you sign any such forms?

Ans. I did not sign any such forms.

Q. Did your daughter or son in law sign any such form?

Ans. I do not know.

Q. I put it to you that this was signed by your son before she was moved to ICU.

Ans. it is incorrect because he was not there.

Q. When Jaswant Kaur was brought to the Army Hospital she was conscious?

Ans. Yes, she was conscious but she was in severe pain.

Q. When she was taken to the Medical Inspection Room she was still conscious?

Ans. Yes.

Q. When she was moved to ICU she was still conscious?

Ans. Yes.

P.W.1 would expect us to believe :-

Q. Who was the doctor who examined her?

Ans. I only know about the duty officer who examined her and her specialist who was called.

Q. Is it correct that Dr. Ghosh was the specialist who was called?

Ans. I cannot remember."

P.W.5 the daughter would state :-

"Q. Do you remember the Doctor who took charge?

Ans. I remember, Doctor Bhardwaj took charge and he took her to Intensive Care Unit (ICU).

Q. What did you do when she was in the ICU?

Ans. We (my Daddy, myself and my husband) sat outside the ICU.

Q. Did anybody visit the hospital (ICU) in this period?

Ans. No.

Q. Did any member of your family visit the ICU?

Ans. No."

31. If really P.W.5 had gone to the hospital she would have said that the mother was admitted at about 11.30 P.M., was kept in the M.I. Room for sometime, particular doctor came and examined her, was taken to Intensive Care Unit and she was there for a particular duration and she was given treatment and she died when she was in Intensive Care Unit. The following questions and answers would

show how the witness had taken things very lightly :-

"Q. When were you informed about her demise?

Ans. Between 3.30 - 4.00 a.m.

It sounds rather odd that P.W.5 should be informed by somebody about the death of her own mother when she was in the hospital. At this time when she gave evidence about this incident I carefully watched her reaction as a daughter when the mother was in the Intensive Care Unit and the mother was dying I would expect her to get the necessary reaction to the situation but she looked very unaffected and gave evidence as if some information she had received about death of her mother. This is sufficient to demonstrate that she was not present in the hospital at the time when her mother was in the Intensive Care Unit. About the information to the brother, she would state:-

"Q. Did you then inform other members of the family?

Ans. My brother was informed from the hospital."

Court would expect her to say that she was present along with the father and her husband in the hospital. The mother had died and she in-formed the brother about the death of the mother or she asked the father or husband to inform the brother. She would state :-

"Q. Did Daddy not care to inform him when she fell ill?

Ans. No. Because he was not on talking terms with my brother."

Further, she would state :-

"Q. At what time did your brother come to the hospital?

Ans. After Mummy"s death."

32. P.W.1, P.W.5 and P.W.7 would not tell the Court as to how the brother D.W.4 Brig. Gurdip Singh was informed. Whole thing is shrouded in what is called a closed secret. P.W.5 would further state:-

"Q. What time did your father call you on the day when your mother was taken to hospital?

Ans. At 11.30 p.m.

Q. You and your husband took the mother to the Army Hospital is it correct?

Ans. Yes.

Q. Who signed the admission form on reaching the hospital?

Ans. We did not sign the admission form at the time of admission of my mother.

Q. Did you father sign?

Ans. I do not remember.

Q. I put it to you that your brother was there and he signed the admission form?

Ans. It is not correct.

Q. I put it to you that it was your brother who took away your mother to the hospital.

Ans. No, it is incorrect."

33. About her knowledge as to what happened immediately after the mother was put in the M.I. Room and subsequent events, the following would show that she was not at all present in the hospital :-

"Q. Which place/room your mother was first taken to the Army Hospital?

Ans. To MI Room.

Q. Till what time she remained in MI Room?

Ans. She was immediately removed to the Intensive Care Unit.

Q. Please tell to this Hon''ble Court at what time she was admit- ted?

Ans. I do not remember the exact time. It was around 12.15 a.m. when I reached and she was immediately removed to the ICU.

Q. When your mother was removed to the ICU was the hospital authority took any signatures of the kin of your mother?

Ans. I do not remember.

Q. I put it to you she was removed to the ICU at 3.00 a.m. in the night and your brother has signed the paper.

Ans. It is incorrect.

Q. Before she was taken to the ICU who was the Doctor who examined her?

Ans. Dr. Bhardwaj.

Q. I put it to you that Dr. Bhardwaj is an ENT specialist and he re questioned the services of cardiologist?

Ans. I do not know whether Dr. Bhardwaj requisitioned the service of a cardiologist.

Q. Who was the officer in charge on duty?

Ans. Dr. Bhardwaj.

Q. Did you know that Dr. Ghosh was summoned and he examined your mother?

Ans. I do not know whether Dr. Ghosh examined her before she was removed to ICU at 1.30 in the night.

Q. I put it to you that Dr. Ghosh was contacted when he was in the dinner party and he was in jean and shirt.

Ans. I do not remember.

Q. Is your husband in town today?

Ans. Yes.

Q. I put it to you that after she was admitted to the ICU after sometime Doctor told your father and brother that she was in safe hands and they can go home now and accordingly they returned home?

Ans. No my father, husband and myself sat outside the Intensive Care Unit.

Q. I put it to you that it was only the hospital authority who informed on telephone that your mother was serious and reach immediately?

Ans. It is incorrect.

It was suggested to her that it was only hospital authorities who informed on telephone that the mother was serious and thereupon all of them reached. I consider her evidence to be very incredible.

34. Maj. (Dr.) R.K. Bhardwaj was examined as P.W.6 about these aspects. He is a person known to Air Commandant Mr. K.K. Mishra and Mrs. Mishra (P.W.4). He would admit that he has got friendly relationship with them. He would also admit that Air Commandant K.K. Mishra is a Senior ENT Specialist. P.W.6 is the person who had issued the certificate which is marked as Ex. P.6. Ex. P.6 reads as under :-

"1. Certified that I was Duty Medical Officer at Army Hospital, Delhi Cantt, on 22 Apr 94 and morning of 23 Apr 94.

2. At about 0130 hrs on 23 Apr 94, Mrs. Jaswant, wife of Maj Gen SS Uban (Retd) was brought to the Hospital with signs and symptoms of acute Myocardial Infarction by her husband. Due to her critical condition, she was immediately admitted to Intensive Care Unit and treatment in the form of Intravenous Sedation, Oxygen Mask Therapy and other supportive treatment were started. Unfortunately, she again had a massive heart attack from which she could not be revived in spite of best efforts. She was declared "Dead" at 0415 hrs on 23 Apr 94.

3. Throughout her stay in the Hospital, she was in critical state and under sedation."

It is dated 31st October 1995. The petition for probate was instituted in this Court on 6.3.1995. Therefore, after the institution P.W.1 had managed to get a certificate from P.W.6 who is friendly with P.W.4 and her husband. It is in this context, his evidence has to be considered. He would state :-

"Q. By whom she was brought?

Ans. She was brought by her husband.

Q. Can you name him?

Ans. Yes, Maj. General S.S. Uban.

Q. You have issued a certificate which I am going to show you dated 31.10.1995, is this the certificate issued by you. Do you recognise the counter signatures of the Dy. Commandant?

Ans. Yes. It has been exhibited as P.6."

His narration of events would expose him to be a person not telling the truth :-

"What was the condition of the patient when you saw her and where did you see her?

Ans. She was complaining of chest pain and she was brought to the MI Room in the Army Hospital.

Q. Is it correct that the pain and the symptoms that she was manifesting, were related to a Myocardial infraction. What kind of pain that she was complaining?

Ans. It was due to heart problem.

Q. You have certified that she was under sedation throughout her stay in the hospital?

Ans. There were other cardiologists in the hospital who were looking after her.

Q. Who treated her during her stay in the MI Room?

Ans. One physician doctor was treating her.

Q. Can you name him?

Ans. Dr. Vikram.

Q. Was the Cardiologist also in the MI Room?

Ans. I do not remember.

Q. Do you remember having seen anyone other than Maj. Gen. Uban accompanying the patient?

Ans. I do not remember.

Q. Did you identify Shri Uban by his face or by presentation of any document by him?

Ans. I do not remember. He must have produced some documents to prove that he was Major General Uban and Mrs. Jaswant Kaur's husband.

Q. Is it on the basis that you prepared all the necessary papers pertaining to the

patient's as the next of kin?

Ans. She was being treated as wife of Maj. General Uban who entered the hospital and talked to the Doctors, as the next of kin."

These answers would go to show that the witness was trying to hide his closeness with P.W.4 and her husband. He has not been able to say who applied for the certificate. He does not know anything about Ex. D.14. He would state :-

"Q. For how much time she was there?

Ans. She was there for about half an hour.

Q. Now, Dr. Ghosh, a Cardiologist was summoned by you because it was a heart problem case?

Ans. I do not remember.

Q. Do you remember that Dr. Ghosh came to the hospital at 12.15 that is at midnight?

Ans. I do not remember.

Q. Do you know Dr. Ghosh treated her?

Ans. Yes, as per the records yes.

Q. When she was in the MI Room she was talking and telling some- thing. What was the complaint with her?

Ans. I do not recollect.

Q. Is it correct that Dr. Ghosh recommended for her removal to ICU at about 12.30 midnight?

Ans. I do not know.

Q. Then she was shifted to the ICU at about 12.30 midnight, is it correct or not?

Ans. As per the records, she reached the ICU at 12.30."

These answers would reveal that he did not know what was happening in the hospital. He would admit that Smt. Jaswant Kaur having been subject to ECG. He would admit that Brig. Gurdip Singh Uban was the person who took charge of the body.

35. P.W.7, husband of P.W.5, would give a very interesting version as to what happened after reaching the hospital:-

"Q. Who went into the MI Room with the patient?

Ans. Her husband, my wife and myself went into the MI Room.

Q. Did any other member of the Uban family visit the hospital before her death on that night.

Ans. No, none at all.

Q. Did you stay in the hospital throughout her stay in the hospital or did you go back home?

Ans. I stayed in the hospital throughout."

36. According to him, he was present right from 1 P.M. when he reached the hospital and he was there until Smt. Jaswant Kaur died. But his evidence would not show him to be telling the truth of what happened in the hospital. The hospital records are not giving the correct account of what happened to the patient on her being taken into the hospital. She was put in the M.I. Room at about 11.30 P.M. but the hospital record shows that she was admitted in the hospital at 1.15 P.M. In the hospital about 11.30 P.M. ECG had been taken and, Therefore, Smt. Jaswant Kaur must have been present in the hospital at 11.30 P.M. D.W.4, the son, would state that it was he who took the mother to the hospital and admitted her into the hospital and sometime later the hospital authorities had told him that the patient was feeling comfortable and all of them could go back home and authorities would inform them in the morning about further treatment to be given to the patient. Even though I am not able to place complete trust on the evidence of D.W.4 on other aspects it appears to me to be probable that it was D.W.4 who had taken along with the father Smt. Jaswant Kaur to the hospital. There is a letter by D.W.4 on 27.8.1996 and the hospital authorities had sent reply on 6.9.1996 and the reply reads as under :-

"1. Please refer to your letter No. Nil dated 27 Aug 96, added to Comdt this hospital.

2. As per existing provision on the subject, it is submitted that the information required by you in connection with hosp admission and treatment in respect of your late mother cannot be furnished. These requisite information can only be furnished to the Court on receipt of orders from them. Lt Col PK Ghosh, the Cardiologist who had attended your mother has also left the hospital and services."

D.W.4 had made an attempt to get records from the hospital.

37. On 17.5.1994 D.W.4 had written to the Adjutant General, Army Headquarters about the way in which his mother was treated in the hospital and that is marked as Ex. X-1. The register maintained to show the receipt of the complaint. An extract from the register maintained for this purpose is marked as X-2. These two documents are spoken to by D.W.1 and D.W.2 who produced them. The authenticity of these documents cannot be challenged. In X-1 on 17.5.1994 D.W.4 wrote:-

"1. I am writing to you in connection with an aspect of administration at the Army Hospital, Delhi Cantt, which in my considered view is in need of corrective measures.

2. On night 22/23 Apr 94, my mother suffered a mild heart attack which was attended to by a civilian Cardiologist, who advised us to get her admitted in a hospital. She was taken by me to the MI room of Army hospital. She was taken by me to the MI room of Army Hospital, Delhi Cantt at approximately 2330 hours on 22 Apr 94, where she was detained for approximately 45 minutes by the doctors on duty, who went about their work in a leisurely detached manner. Her ECG was recorded on a machine which was not functioning properly. The Cardiologist who came later confirmed to me that it was not a heart problem, but an infection of the lungs; however, as a precautionary measure he was putting her in the ICU. She was admitted into the ICU at approximately 0030 hours on 23 Apr 94, and we were advised to go home as all was under control. At about 0400 hours, we were informed on the telephone that she had collapsed and by the time we reached the hospital she was no more. Whether it was a case of a recurrence or neglect, I am unable to say.

3. You would recollect, Sir, that I spoke to you at about 0500 hours on 23 Apr 94, that the Army Hospital had refused to provide transport to take the mortal remains home. You would also recollect, Sir, that you had instructed the Duty Medical Officer to convey to the Commandant of the Army Hospital to provide transport, even if it was to be on payment. Initially the Commandant agreed to do so but within minutes he spoke to me on the telephone, saying that there were clear instructions, that no transport could be provided for such a job, and that I should hire some civilian transport, or alternatively I, who would be having a large number of friends, could speak to any one of them for the same. It was at this stage that I spoke to Col B Shekhawat MA to COAS, who immediately had the necessary transport sent across. Thereafter the body was not released for another two hours or so because Hospital Stoppage Charges of Rs. 4.75 (Rupees four and paise seventy five) had to be cleared, and finally there was no sheet to wrap the body in. One NCO, who was persuaded to give a sheet did so, with the fervent plea that it should be returned to him, otherwise it would be cut from his pay. The sheet has since been returned.

4. That my father, a retired Maj Gen, who has served the Indian Army for over three decades starting from the North-West Frontier Province, through the Burma Campaign, three Indo-Pak wars and had finally earned the status of a Minister of State, and myself, a serving Brig should be required to undergo this type of ignominy and harassment at the time of a personal bereavement is sad.

5. I would request that necessary action be initiated on these points, to ensure that others do not have to suffer in the manner that I have."

38. Some credence is to be given to this document because it was almost within 21 days from the date of the death of Smt. Jaswant Kaur. Though there was no love lost between the father and the son, the son instinctively had some affection for the mother and that had moved him to write the letter. Therefore, the reading the evidence of the witnesses in the context of this letter, I am very clear in my mind that P.W.5 and her husband had not gone to the hospital on the 22nd of

April 1994 and it was the son and the father, who were living in the same premises, who had acted swiftly in taking Smt. Jaswant Kaur to the hospital.

39. After considering the materials placed by the petitioner, I have no hesitation for giving the finding that the execution and attestation of the Will dated 5.11.1991 Ex. P.2 is not at all proved by the petitioner.

40. From a reading of the evidence of P.W.1, P.W.2 and P.W.3 I am of the view that the evidence has been not consistent, has been incoherent and not trustworthy and I am not able to believe the witnesses relating to the execution and attestation of the Will.

41. I have to now consider the Will propounded by the son, which is stated to have been executed by Smt. Jaswant Kaur on 22/23.4.94. The Will is in a white paper. The Will must have been written by D.W.4. It is stated to have been attested by D.W.6 Mr. Suresh Shivaji Hasli, the driver of the son and D.W.7, wife of D.W.4. I had narrated the circumstances under which Smt. Jaswant Kaur was taken to the hospital and taken to the Intensive Care Unit and it is incredible that Smt. Jaswant Kaur would have been in a position, possessed of sound and disposing state of mind to execute a Will. The evidence of D.W.4, D.W.6 and D.W.7 is absolutely unworthy of any belief. It is wholly unnatural and I have no hesitation in rejecting the case of D.W.4 with reference to the execution and attestation of the Will.

42. The deceased Smt. Jaswant Kaur was not in a sound and disposing mind. Admittedly, she was suffering from serious illness from 9 P.M. and while she was in the hospital she had developed cardiac problems and, Therefore, her mind could not have been in a position to think about disposition. The Hon"ble Calcutta High Court in (47) Cal 1043 had put the position in a very lucid fashion :

"Mere ability to sign one"s name does not necessarily imply the possession of the full mental powers requisite for a valid disposition of property. Nor is it sufficient to show that the testator was conscious when he executed the instrument. As Creswell J. said in Earl of Sefton v. Hopwood (1855) 1 f. amp F 578, "it is not sufficient in order to make a will that a man should be able to maintain an ordinary conversation and to answer familiar and easy questions. He must have more mind than suffices for that.

He must have what the old lawyers called a "disposing mind"; he must be able to dispose of his property with understanding and reason. That does not mean that he should make what other people may think a sensible will, or a reasonable will, or a kind will.....But he must be able to understand his position; he must be able to appreciate his property, to form a judgment with respect to the parties whom he chose to benefit by it after death; and if he has capacity for that, it suffices." Sir John Nicholl observed in Marsh Vs.Tyrrell (1828) 2 Hagg. 84: "it is a great but not uncommon error to suppose, that because a person can understand a question put to him, and can give a rational answer to such question, he is of perfect, sound mind, and is capable of making a will for any purpose whatever;

whereas the rule of law, and it is the rule of common sense, is far other- wise." As Redfield J. said in *Converse Vs. Converse* (1849) 21 Ver. 168,"in order to execute a valid will, one must have sufficient active memory to recall his family and his property and to form a rational judgment in regard to the deserts of the one, and the disposition of the other with reference to such deserts." This was emphasised by Hannen J. in *Burdett Vs. Thompson* (1873) 3 P amp D.72 where he modified his previous observations in *Bough- ton Vs. Knight* (1873) P amp; D. 64:

Whatever is the highest degree of soundness of mind is required to make a will. From the character of the act, it requires the consideration of a larger variety of circumstances than is required in other acts, for it involves reflection upon the claims of the several persons who, by nature or through other circumstances, may be supposed to have claims on the testator's bounty, and the power of considering these several claims and of determining in what proportion the property shall be divided amongst the claimants." To the same effect are the observations of Erskine J. in *Harwood Vs. Baker* (1840) 3 Moo.P.C. 282: "a testator must not only be able to understand that he is by his will giving the whole of his property to one object of his regard: but he must also have capacity to comprehend the extent of his property, and the nature of the claims of others, whom, by his will, he is excluding from all participation in that property; and that the protection of the law is in no case more needed, than it is in those where the mind has been too much enfeebled to comprehend more objects than one:" *Woomesh Chunder bids was Vs. Rashmohini Dassi* ILR (1893) Cal 279, affirmed by the Judicial Committee in *Rashmohini Dasi Vs. Umesh Chander bids was* ILR (1898) 25 Cal 824 , *Susil, Kumar Banerjee Vs. Apsari Debi and Others* . This is not a novel rule but is dictated by plain common sense and has been recognised for over three centuries: *Marquis of Winchester's Case* (1599) 6 Coke 23, *Combe's case* (1606) Moo K.B. 759. This does not imply however, that the testator must possess these qualities of the mind in the highest degree possible, or that he must possess them in as large a measure as he may formerly have done; though the mind may have been in some degree debilitated and the memory may have become in some degree enfeebled, it is sufficient that there is enough left to enable the testator clearly to discern and discreetly to judge of all those things and all those circumstances which enter into the nature of a rational, fair and just testament (per Cockburn C.J. in *Banks v. Good fellow* (1870) L.R. 5 Q.B. 549 citing with approval *Den v. Vancleve* (1819) 2 S N.J.L 660."

43. The evidence of D.W.4, D.w.6 and D.W.7 is not at all reliable and in the light of the admitted facts their evidence is not at all helpful.

44. While considering the evidence of all the witnesses in the case, I had to remind myself of the important principles laid down by the Supreme Court in *Ramchandra Rambux Vs. Champabai and Others*, the Supreme Court observed :-

"the Court is not confined only to the way in which the witnesses have deposed

or to the demeanour of witnesses, but it is open to it to look into the surrounding circumstances as well as the probabilities, so that it may be able to form a correct idea of the trustworthiness of the witnesses."

In *Chaturbhuj Pande and Others Vs. Collector, Raigarh*, speaking about the duty of the Judges in estimating the quality of the oral evidence adduced before them observed :-

"In assessing the value to be attached to the oral evidence they are bound to call in aid their experience of life."

In *Tej Bahadur Singh Vs. State of U.P.*, while dealing with a criminal case referring to the duty of the Court, the Supreme Court observed:-

"Rather the foolproof narration given by the prosecution witnesses has left us with the impression that the story put forward is lifeless and mechanical and does not stand scrutiny when tested on the preponderance of probabilities, having regard to human behavior in the day-to-day happenings when moving on the road of life."

45. In the light of the circumstances adverted to by me above, I find it absolutely unnecessary to embark upon analysing the evidence of the alleged attesting witnesses for considering the proof of the Will dated 22/23.4.1994. The Will set up by D.W.4 is not at all proved and the case of D.W.4 stands rejected.

46. I thought of referring to the principles applicable in considering the proof of Wills. I had dealt with the principles applicable in *Hari Singh Vs. State*, 1996 (3) A.D. 877 in great detail and I do not want to enter into an exercise over again. I am able to come to the conclusion without any hesitation whatsoever that the father and the son have not proved the Wills propounded by them in accordance with law. The effect of it is that Smt. Jaswant Kaur had died intestate and the distribution of her estate shall have to be made in accordance with law. Though the parties had prayed for issuance of probate and when the Wills have not been proved, some arrangement has to be made for the administration of the estate of the deceased. The heirs of the deceased Smt. Jaswant Kaur are :-

1. P.W.1 Maj. Sujan Singh Uban
2. P.W.4 Maj. Mrs. Harcharan Mishra
3. P.W.5 Mrs. Harkiran Commar
4. D.W.4 Brig. Gurdip Singh
5. Mrs. Amarjeet Uban alias Shammi, widow of the pre-deceased son and Sh. Kanwardip Singh Uban son of the pre-deceased son.

There are five sharers. The parties shall be entitled to the shares as mentioned below :-

1. P.W.1 Maj. Sujan Singh Uban - 1/5th

2. P.W.4 Maj. Mrs. Harcharan Mishra-1/5th

3. P.W.5 Mrs. Harkiran Commar - 1/5th

4. D.W.4 Brig. Gurdip Singh - 1/5th

5. Mrs. Amarjeet Uban alias Shammi, widow of the pre-deceased son - 1/10th and son of the pre-deceased son - 1/10th.

47. Having regard to the strained relationship between the parties, in the interests of justice, I feel it is a fit case where Letters of Administration with reference to the estate of the deceased Smt. Jaswant Kaur should be granted. I hereby appoint Shri V.K. Sharma Advocate, practicing in this Court, as an Administrator for the distribution of the estate of the deceased Smt. Jaswant Kaur to her heirs. He shall take over the charge of the estate of the late Smt. Jaswant Kaur and take an inventory of the properties, both movable and immovable, and file a report in this Court on or before the 30th of September 1998 and shall apply for appropriate directions for distribution amongst the heirs of the deceased. P.W.1 Maj. Gen. Sujan Singh Uban shall pay Rs. 5,000/- to the Administrator. P.W.4 Major Mrs. Harcharan Mishra shall pay Rs. 5,000/- to the Administrator. P.W.5 Mrs. Harkiran Commar shall pay Rs. 5,000/- to the Administrator and D.W.4 Brig. Gurdip Singh Uban shall pay Rs. 5,000/- to the Administration. The widow and the son of the pre-deceased son should not be, at this stage, burdened with any payment. At the time of the final orders, when they receive their due shares, they can be directed to pay whatever the costs that this Court may ultimately decide, to be shared by them. The payment shall be made to the Administrator on or before the 15th of July 1998.

Probate case 11/95 stands disposed of. There shall be no order as to costs._