

# ALLAHABAD HIGH COURT

Kamla Kunwar

Vs.

Ratan Lal

Testamentary Suit No. 2 of 1968

(M.H. Beg, J.)

(17.12.1969)

## ORDER

### **M.H. Beg, J**

1. This is a petition under Section 270 of the Indian Succession Act, 1925, (hereinafter referred to as the Act), for the probate of the alleged will of the petitioner's mother-in-law, Smt. Jaggo Bai, who died at Banda, on 31st of October, 1961. The petitioner's case is that Smt. Jaggo Bai had duly executed her last will and testament on 26-10-1961 in triplicate at the same time and place. One of the alleged identically worded wills was deposited with the District Registrar on 28-10-1961, through a lawyer, Dwijendra Nigam. The second was said to have been deposited with Dwijendra Nigam, the lawyer who had drafted and attested the will. The third was alleged to have been found in the box of the deceased after her death. The applicant was to be, under the three identical wills, the executrix of the will and the administratrix of the property left by the testatrix.

2. A pedigree of the family is given in the petition. The petitioner, Smt. Kamla Kunwar, is shown there as the second wife of Beni Chand, the only son of Smt. Jaggo Bai. The first wife of Beni Chand, Smt. Chameli, died perhaps long ago. Her descendants are shown as a widowed daughter, Smt. Chandrakanta, who has two sons who are living, and a daughter, Smt. Chandrabhaga, who is dead but whose two sons are alive. The petitioner has impleaded, as opposite party No. 1, Ratan Lal, the only issue of Smt. Gopa Bai, one of the three daughters of Smt. Jaggo Bai. The other two daughters of Smt. Jaggo Bai had died issueless. The petitioner impleaded Beni Chand, her husband and only son of Smt. Jaggo Bai, as opposite party No. 2. The remaining eight opposite parties are descendants of Smt. Jaggo Bai through Beni Chand. The pedigree set up by the petitioner differs from that given by Beni Chand only in so far as it does not show Smt. Ved Kumari, the third wife of Beni Chand, through whom Beni Chand had five sons.

3. The will purports to deprive Beni Chand of all rights in the property except that of residence for his lifetime only in one house, on the grounds, that, he had squandered lakhs by indulging in immorality "(badchalni)"; that, he had neither resided with nor served the testatrix; that, he had filed civil and criminal cases against her; that, he would waste the property by giving it to his kept woman "(dashta)" and her children; that, he would make his wedded wife (i.e. the petitioner) a beggar. The principal object of the attack in the will seemed to be Beni Chand's third wife, Smt. Ved Kumari (described as 'dashta'), and the five sons of Beni Chand through her who get nothing under the will. The petitioner and opposite parties Nos. 3 to 10 are the apparent real beneficiaries in the will. Ratanlal, opposite party No. 1, was ostensibly deprived by the will of any right to the properties involved on the ground that he is well off. But, according to Beni Chand, the only contestant, the will is designed to conceal the fact that Ratanlal is a beneficiary as his right to a house, which is said to be disputed by Beni Chand, is acknowledged in the will.

4. The case taken up by Beni Chand reveals a long history of litigation going back to *Deo Kunwar v. Man Kunwar*<sup>1</sup>, which went up to the Privy Council (reported in (1895) ILR 17 All 1 (PC)), over the properties which had devolved on Smt. Jaggo Bai in 1890. Smt. Jaggo Bai had filed a Suit No. 481 of 1890 against her mother Smt. Deo Kunwar and her aunt Smt. Man Kunwar for a declaration of her interest as a life-estate holder. Beni Chand alleged, in his written-statement, that devolution of the deceased's property, originally consisting of several villages, including Bazar Kaithiganj, which is one of the properties covered by the above mentioned will, was governed, under the Crown Grants Act, 1895, by the terms of the grant. It is also alleged that, when Beni Chand married a lady of his own choice (called Ved Kumari) in 1928, his mother, Smt. Jaggo Bai, got annoyed and gifted all her properties in favor of the beneficiaries of the will now set up by the petitioner. Beni Chand's case is that he had to bring a suit for the cancellation of the giftdeed which was decreed in terms of a compromise so that the gifts made by Smt. Jaggo Bai were cancelled and the deceased accepted the position that she had only a life-interest in the properties in her possession. Beni Chand's written statement also mentions a suit brought in the year 1944 against his deceased mother to restrain waste as a result of which a family arrangement was said to have been arrived at wherein the deceased again admitted that she had only a life-interest and no power to alienate or transfer the property by a gift or will. Beni Chand also set up an estoppel against Kamla Kunwar's right to file an application for probate by reason of having signed some compromise in Suit No. 3 of 1939. According to the objector, the correct valuation of the property left by the deceased Smt. Jaggo Bai was Rs. 5,90,000/-. As regards the actual execution of the will, the case taken up by the objector is set out, in paragraph 13 of his written statement, as follows :-

"That the so-called will has been prepared in collusion with Sri Dwijendra Nigam at the time when Jaggo Bai became unconscious from 26th October, 1961, and they have managed to remove the valuables and left Smt. Jaggo Bai uncared for to die which is supported by medical certificate." The objector did not admit the correctness of the assertion made by the petitioner that the will was duly executed on 26-10-1961.

5. A number of issues were framed by the District Judge of Banda in whose court the petition was originally filed and where it was being heard before it was transferred to this Court. Learned counsel for the objector contended, before the evidence of the petitioner, which had already started in the court of the District Judge of Banda, could begin in this Court, that the petitioner was estopped from filing an application under Section 270 of the Act. All that he could indicate was evidence in the shape of admissions in the documents mentioned in the written statement of Beni Chand, It was pointed out to the learned counsel for the objector that mere admissions were not enough to operate as estoppels

<sup>1</sup> suit No. 237 of 1886

within the meaning of Section 115 of the Evidence Act and that the right to make an application under Section 270 of the Act was conferred by statute. It was also indicated to learned counsel that, in exercise of testamentary jurisdiction, this Court is not really concerned with questions of right or title to the property for which an ordinary title suit is the proper remedy. Thereafter, the two sides concentrated upon and led evidence in this Court on the first two issues only. These had been framed by the District Judge, Banda, as follows :-

- "1. Whether Smt. Jaggo Bai had executed any will on the 26th October, 1961, in favor of the petitioner in respect of the property specified in the petition as alleged ? If so, was she in a fit state of mind at the time when she executed the will ?
2. Whether Smt. Jaggo Bai was in unconscious slate at the time when the will in question is alleged to have been executed by her and whether the will was prepared in collusion with Sri Dwijendra Nigam ?"

The issues, as framed above, dealt with the question of mental capacity of the deceased at the time of the alleged execution as a part of the first issue, framed on due execution of the will, although it was mentioned separately. But, it was repeated in the second issue where the alleged collusion of the lawyer, Dwijendra Nigam, has been, rather confusingly, lumped together with the very different question of the alleged mental incapacity of the deceased. The parties, however, seemed to be under no misapprehension as to what was really in issue. This could very well be re-stated as follows in a single issue :-

"Did Smt. Jaggo Bai duly execute the will in accordance with law on 26-10-1961 while she was in a fit state of mind to do so?"

6. The first issue, as refrained above, indicates the correct position emerging from the pleadings of the parties. The objector had put the applicant to strict proof of due execution of the will. The will could not be said to have been duly executed if the deceased was not shown to be in a fit state of mind at the time of the execution of the will or was not shown satisfactorily to have affixed her thumb impressions to the three identically worded wills said to have been executed at the same time and place one after the other. So far as any collusion of Dwijendra Nigam and any

other person is concerned, such a plea, implying fraud, has to be supported by sufficient particulars. As sufficient particulars of the alleged collusion or fraud are not given by the objector, upon whom the burden of proving such allegations lay, it is not possible to consider a case of collusion or fraud here. The law on this point is well settled (see; e. g. *Bishundeo Narain v. Seogeni Rai*<sup>2</sup>). The case, therefore, reduces itself into one in which all that need be determined is whether the applicant has proved due execution of the alleged will. In determining this question, special rules applicable to proof of due execution of wills have to be kept in view.

7. Apart from the specific statutory requirements for it, including attestation by two witnesses, found in Section 63 of the Act, proof of due execution of a will involves removal of reasonable doubt about its due execution which may arise from proved facts. The burden which Section 101 of the Evidence Act places upon the propounder of a will can, no doubt, be discharged by giving evidence which, as required by Section 3 of the Evidence Act, satisfies the hypothetical prudent man that the facts to be proved existed. Prudence, however, employs varying tests, depending partly upon the type of case to be

<sup>2</sup>AIR 1951 SC 280 at p. 283

decided and partly upon the whole set of facts and circumstances of the particular case under consideration, in order to reach satisfactory conclusions. The special rule that, so far as wills are concerned, the propounder must remove reasonable doubts, introduced by proved facts surrounding the execution of a will, just as a prosecution case in a criminal trial has to be proved beyond reasonable doubt, has been adopted in this country. It can be justified on grounds of prudence.

8. Unlike the ancient Romans, amongst whom will-making became a widely prevalent custom, so much so that it was considered practically a hall-mark of respectability, people of this country do not regard it as an obloquy or a departure from the norms of correct conduct for an owner of property to fail to make a will before dying. Testamentary disposition of property is still the exception and not the rule here. It is generally resorted to for exceptional reasons such as the ones sought to be made out in the will under consideration in the instant case. The usual and ordinary modes of thought and conduct of affairs by property owners at a particular time in a country are not irrelevant in considering the circumstances in which an alleged will is said to have been made. There is, of course, no prejudice against will-making in this country. But, the fact that it is generally made in unusual or exceptional circumstances here is worth remembering as it may place the burden of proving those circumstances upon the propounder or the will if its genuineness becomes doubtful. The social context and the possibilities of perpetrating fraud and of exploiting the infirmities of mind and body of the weak or the aged, which willmaking, offers to the unscrupulous, could also explain the meticulousness and rigour with which circumstances surrounding the alleged execution of a will are to be examined when suspicious features are present.

9. Even in England, where will making is more prevalent than in this country, the law, as set out by Gajendragadkar J. in *H. V. Iyengar v. B. N. Thimmajamma*<sup>3</sup>, is as follows :-

"Jarman on Wills' (Jarman on "Wills' - Vol. 1, 8th Edn. p. 50) says that the general rule is 'that the onus probandi lies in every case upon the party propounding a will and he must satisfy the conscience of the Court that the instrument so propounded is the last will of a free and capable testator'. He adds that, 'if a will is rational on the face of it, and appears to be duly executed, it is presumed, in the absence of evidence to the contrary, to be valid'. Similarly, Williams on 'Executors and Administrators' (Williams on 'Executors and Administrators' Vol. 1, 13th Edn. p. 92) has observed that, 'generally speaking, where there is proof of signature, everything else is implied till the contrary is proved; and, evidence of the will having been read over to the testator or of instructions having been given is not necessary'. On the other hand, Mr. Viswanatha Sastri, for respondent No. 1, contends that the statements on which the appellant has relied refer to wills which are free from any suspicion and they cannot be invoked where execution of the will is surrounded by suspicious circumstances. In this connection, it may be pertinent to point out that, in the same text books, we find another rule specifically mentioned. "Although the Rule of Roman Law," it is observed in Williams, "that 'Qui se cripsit haeredem' could take no benefit under a will does not prevail in the law of England, yet, where the person who prepares the instrument, or conducts its execution, is himself benefited by its dispositions, that is a circumstance which

<sup>3</sup>AIR 1959 SC 443 at p. 453

ought generally to excite the suspicion of the Court, and calls on it to be vigilant and zealous in examining the evidence in support of the instrument in favour of which it ought not to pronounce unless the suspicion is removed, and it is judicially satisfied that the paper does express the true will of the deceased (Williams on 'Executors and Administrators' Vol. 1, 13th Edn. p. 93)."

10. Learned counsel for the petitioner cited *Parker v. Felgate*<sup>4</sup>, where it was held, in the case of a testatrix who had given detailed instructions found entered in the books of her solicitor, that a will executed in accordance with these instructions and shown to her by her doctor, at a moment when she was aroused temporarily from her state of coma, so that she could signify her assent to the will, without its contents having been read out to her, was a valid will. In that case, the evidence of the doctor and of the lady who had actually signed on behalf of the testatrix after the testatrix had signified her assent, as well as the evidence of the solicitor, were there. The Court found nothing in this evidence to arouse any suspicion.

11. In *Battan Singh v. Amir Chand*<sup>5</sup>, the Privy Council observed :

"Their Lordships are further of opinion that the principle enunciated in (1883) 8 PD 171 should be applied with greatest caution and reserve when the testator does not himself give instructions to the Solicitor who drafts the will, but to a lay intermediary who repeats them to the Solicitor. The probabilities for error in transmission and the understanding and of description in such a situation are

obvious, and the Court ought to be strictly satisfied that there is no ground for suspicion, and the instructions given to the intermediary were unambiguous and clearly understood, faithfully reported by him and rightly apprehended by the Solicitor, before making any presumption in favor of validity."

12. A case relied upon strongly by the petitioner's counsel was: *I. N. Singh v. Smt. Kamta Devi*<sup>6</sup>, Here, the trial Court had entirely believed the testimony of one attesting witness, Sahdeo Singh, an Advocate and a zamindar, who used to pay Rs. 4,000/- per annum as land revenue. But, the High Court, on an appeal to it, had doubted the execution of the will due to a number of circumstances, such as the provision for marriage only of the sole heir, a minor daughter of testator, and the donation of the rest of the property to Thakurji, the fact that the will had not been either registered or deposited with the District Registrar, and the fact that Sahdeo Singh was a friend of Ishwardeo Narain Singh, a step brother of the testator, who had been appointed the executor of the will and the manager of the private charity which was the principal legatee under the will. Other witnesses were also produced by the applicant for probate. But, the Supreme Court, in agreement with the trial Court, which had the additional advantage of seeing witnesses depose, saw no reason to disbelieve Sahdeo Singh. This case certainly indicates that merely suspicious but explicable circumstances will not be sufficient to dispel the effect of the testimony of so completely reliable a witness as an Advocate of this Court is certainly expected to be. But, this case is not an authority for the proposition that the testimony of an Advocate, acting as an attesting witness, must be

<sup>4</sup>(1883) 8 PD 171    <sup>6</sup> AIR 1954 SC280

<sup>5</sup>1947 AC 161

accepted even when there is some evidence in the case which can only be explained on

the assumption that the version contained in his testimony about the execution of the will is not correct on a matter of crucial importance.

13. Subsequent decisions of the Supreme Court have left no doubt whatsoever that, although, it is enough ordinarily, for proving due execution of a will, that the requirements of Section 63 of the Act are satisfied prima facie, on credible evidence produced, yet, the position is altered and a rigorous scrutiny of all the facts and circumstances becomes obligatory when facts of a case reveal suspicious circumstances. Thus, in *H. V. Iyengar's case*, AIR 1959 Supreme Court 443 (*supra*), Gajendragadkar, J., said, at p. 452 :

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

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

It was also observed there (p. 452) :

"It is in connection with wills that present such suspicious circumstances that decisions of English Courts often mention the test of the satisfaction of judicial conscience. It may be that the reference to judicial conscience in this connection is a heritage from similar observations made by ecclesiastical Courts in England when they exercised jurisdiction with reference to wills; but any objection to the use of the word 'conscience' in this context would, in our opinion, be purely technical and academic, if not pedantic. The test merely emphasizes that, in determining the question as to whether an instrument produced before the Court is the last will of the testator, the Court is deciding a solemn question and it must be fully satisfied that it had been validly executed by the testator who is no longer alive."

14. In *Rani Purnima Debi v. K. K. Narayan Deb*<sup>7</sup>, the Supreme Court reiterated the principles laid down by it in *H. V. Iyengar's case*, AIR 1959 Supreme Court 443 (*supra*). It held that, among the circumstances creating doubts which the propounder of the will had to remove before succeeding, were the shaky and doubtful character of the signature of the testator in that case. It observed :

....."The condition of the testator's mind might appear to be very feeble and debilitated and evidence adduced might not succeed in removing the legitimate doubt as to the mental capacity of the testator; the dispositions made in the will might appear to be unnatural improbable or unfair in the light of relevant circumstances; or the will might otherwise indicate that the said disposition might not be the result of the testator's free will and mind. In such cases, the Court would naturally expect that all legitimate suspicions should be completely removed before the document was accepted as the last will of the testator."

15. In *Shashi Kumar Banerjee v. Subodh Kumar Banerjee*<sup>8</sup>, the Supreme Court followed its earlier decisions in Iyengar's, AIR 1959 Supreme Court 443 (supra) and Rani Purnima Debi's, AIR 1962 Supreme Court 567 (supra) cases. In *K. K. Subbaraju v. C. Subbaraju*<sup>9</sup>, the Supreme Court held, in conformity with its earlier decisions, that the onus of proving testamentary capacity of the testator, by showing that he was a major, rests on the person relying upon the will.

16. After this catena of consistent decisions of the Supreme Court, clearly indicating the mode of proving due execution of a will set up and the extent of the burden resting upon the propounder of the will, there is really no need to discuss other cases cited by learned counsel on this subject. Mention may, however, be made of three more cases especially cited by learned counsel to support their respective sides. On one side of the line separating cases of satisfactory proof from those of unsatisfactory proof fall *DeSouza v. DeSouza*, AIR 1956 Madhya Bharat 246 and *Januava Dasi Bairagin v. Hari Das*<sup>10</sup>, where the evidence of the lawyer who had drafted the disputed will was accepted as it could not be seriously questioned. In *DeSouza's case*, AIR 1956 Madhya Bharat 246, (supra), there was evidence of the Chaplain attending the testator in addition to the evidence of the vakil who had drafted and attested the will, and there was no conflict between this evidence and any other evidence relating to the execution of the will in the case. In *Januava Dasi's case*, 1957 All LJ 667 (supra), V. Bhargava, J., held the evidence of a single attesting witness, who had also drafted the will as a lawyer, to be sufficient to prove due execution, but, it was indicated there that non-production of other witnesses of the execution of the will could be taken into account with other suspicious circumstances if these had been considerable or weighty enough for discarding the will. In *V. Servai v. L. S. Servai*<sup>11</sup>, the disputed will was held to fall on the other side of the line and was rejected as a result of suspicious circumstances among which was the fact that the testator's signatures on the will looked like scrawls by a person unable to hold the pen properly.

<sup>7</sup>AIR 1962 SC 567

<sup>9</sup>AIR 1968 SC 947

<sup>11</sup>AIR 1930 PC 24

<sup>8</sup>AIR 1964 SC 529

<sup>10</sup>1957 All LJ 667

17. In the case before me, the facts and circumstances preceding the execution of the alleged will by the testatrix, depriving Beni Chand of his rights, show that the lady had made similar dispositions earlier in her lifetime. Beni Chand himself alleged that Smt. Jaggo Bai was displeased with him since his third marriage with Smt. Ved Kumari, said to be a Punjabi lady of another caste, so that Smt. Jaggo Bai had gifted away her properties to some of the legatees of the will under consideration. But, these donations were cancelled when Beni Chand litigated with his mother. Documentary evidence showing preceding events, read as a whole, indicate a weakness or fickleness or instability of the mind of Smt. Jaggo Bai which make the real meaning of any purported donation or disposition of property by Smt. Jaggo Bai highly problematical and uncertain.

18. There is a document in Urdu signed by Smt. Jaggo Bai, in Hindi, and signed in English by Ratanlal, opposite party No. 1, as a witness, which was executed as long as 29th May, 1933, (Ex. D. 37). It was evidently given by Smt. Jaggo Bai to Beni Chand. Ratanlal wrote there over his signature in English : "signed before me." I have compared Smt. Jaggo Bai's signature, in Hindi, and Ratan Lai's signature, in English, with other signatures of theirs on documents on record. There can be no mistake or doubt about the genuineness of these signatures. This document and a number of other documents filed by Beni Chand could not be proved by the evidence of Beni Chand himself. He is said to be lying ill at Delhi. But, it was apparently in the custody of Beni Chand who filed it, and, it purports to have been scribed by the Mukhtar-i-am of Smt. Jaggo Bai more than twenty years ago, the period given in Section 90 of the Evidence Act as amended in its application to Uttar Pradesh. Ratanlal himself, it was suggested, was her mukhtar-i-am and paiokar. Learned Counsel for the petitioner could not contend that this document was not admissible under Section 90 of the Evidence Act. He confined his objections to admissibility of other documents which do not purport to be more than twenty years old. In this document, purporting to be the last will of Smt. Jaggo Bai, she stated that, by executing a will on 28-10-1931, ostensibly depriving Beni Chand of all his rights in property, as a result of consultations with some lawyers, it was never the intention of Jaggo Bai to really deprive her son Beni Chand of any rights. She stated there that the will executed by her on 28-10-1931 was "utterly fictitious and artificial" (bilkul 'Farzi' aur 'Masnooi') intended only to teach her son a lesson as he had shown some disobedience to her, but, as he had mended his ways, she was declaring her will of 28-10-1931 as cancelled and void. This document gives rights in all her belongings to Beni Chand after her death. It is significant that it is witnessed by Ratanlal who is also the mukhtar-i-am and paiokar of the petitioner. A letter written on 30-5-1931 by Smt. Jaggo Bai to Beni Chand indicates that Smt. Jaggo Bai was not wanting in love and affection towards her only son and was displeased with him only because of his third marriage with Smt. Ved Kumari described by her to him as "your Arya Samaji wife". She pleads with her son, in this letter, not to be angry with her.

19. There is also, on record, a certified copy of a compromise decree of the Court of the Civil Judge of Banda in a Suit No. 3 of 1939 (marked Ex. A-4) filed by Beni Chand against Smt. Jaggo Bai, the petitioner Smt. Kamla Kunwar, Smt. Chandrabhaga, Smt. Chandrakanta, and two others. It shows that Smt. Jaggo Bai had again made dispositions of property in favor of Smt. Kamla Kunwar, and Smt. Chandrabhaga and Smt. Chandrakanta, the two daughters of Beni Chand, on 3-5-1937 and 26-4-1939. These dispositions were also declared to be fictitious and illegal and void by Smt. Jaggo Bai herself in the compromise which was signed also by the petitioner Smt. Kamla Kunwar and other defendants in that case. After that, Suit No. 6 of 1944 was brought by Beni Chand against Smt. Jaggo Bai to restrain waste. Again, a compromise decree was passed in this suit (Ex. A-7). Its terms show that Smt. Jaggo Bai not only acknowledged once more that she had only a life-interest in the properties in suit but she appointed Beni Chand to manage the properties. Past litigation and relations between the mother and son are relevant here only in order to judge how far the disputed will could be a genuine and

seriously intended disposition or either a spurious document or a part of make-believe. The question whether Smt. Jaggo Bai had the legal right to make a testamentary disposition of any of the properties covered by the will is not, as already indicated, to be decided here. What does this background reveal?

20. Firstly, we find that, whenever Smt. Jaggo Bai had purported to make any disposition of property which seemed to deprive her son of his rights, she had gone back on her action and declared it to be fictitious and void. Her rather whimsical actions revealed a mind, such as she possessed, torn between a mother's love for her only son and the influences to which it was likely to have been subjected by interested persons in order to induce her to punish her son, apparently for no greater sin than that of having married a lady outside the 'biradari' through whom Beni Chand had five sons, by making dispositions in favor of those of her own 'biradari.' If her past course of conduct disclosed a purpose in her mind, it was a spasmodic one of punishment of her son from time to time. She used to declare whenever, according to her own notions, the purpose was served, that the purported disposition was unintended, fictitious, and void. In these circumstances, stronger evidence than that which could otherwise suffice would be required to establish a genuine will making which was not meant to be a mere make-believe, even if Smt. Jaggo Bai's thumb impressions on the alleged will in triplicate had been indisputably proved.

21. Secondly, it is significant that, although the mother and son had been litigating for years in the past, Smt. Jaggo Bai had never, in the course of that litigation, accused her son of any immorality or extravagance. Hence, bald allegations of loose living and extravagance against Beni Chand, made for the first time in the disputed will, which have not been supported by any other evidence whatsoever, could not be meant to be taken at all seriously and could very well be the out come of inventive minds other than that of Smt. Jaggo Bai.

22. It is true that Smt. Jaggo Bai seemed to have abused Smt. Ved Kumari, the third wife of Beni Chand, so that Beni Chand filed a criminal complaint under Section 500, I. P. C. against his mother for calling his third wife, who is said to be educated and to have served as a Municipal Commissioner, a 'dashta' or a kept woman. The record of that case was summoned and is before me. It shows that, on 30th August, 1961, Shrimati Jaggo Bai filed an application, through her counsel, Sri Dwijendra Nigam, withdrawing the words used by her so that it was to be deemed that they were never uttered. The case between mother and son was compromised. In these circumstances, the language used by Smt. Jaggo Bai to abuse Smt. Ved Kumari, which was soon withdrawn, could not amount to any allegation of immorality or of loose living against Beni Chand.

23. The criminal case also evidenced the rather curious mentality of Smt. Jaggo Bai. She invariably withdrew, after some time, whatever she had done to injure or punish her son or his educated third wife when she either believed that the purpose of the act had been served or when her son took some legal action about it. The aged lady's periodic actions against her son were like

performances in a Gilbert and Sullivan comic opera. This background made it certainly difficult to know what the lady really meant when she either took or proposed some action purporting to disinherit her son or to deprive Smt. Ved Kumari or her children of their expectations. Such a lady could be easily instigated by interested persons into taking some action purporting to disinherit her son if she was, at any time, displeased with him because, according to her way of thinking, such action was a form of punishment which could reform her son.

24. At the time when the will was said to have been executed, there was a dispute pending, before the District Judge of Banda, between Smt. Jaggo Bai and Beni Chand, which certainly provided a good cause for Smt. Jaggo Bai to indulge in another act of intended punishment which may not, as in the past, be really intended, if the lady's own declarations in the past are to serve as guides, to have any legal effect. The dispute, in what has been referred to by counsel, and also in evidence given, as the "bond case," arose out of the terms of the compromise decree in Suit No. 6 of 1944 mentioned above. The record of the "bond case" was also summoned and it is before me. It shows that Smt. Jaggo Bai wanted delivery of zamindari abolition compensation bonds to her personally and not to her son, but Beni Chand, who purported to act under a power of attorney, said to have been executed by Smt. Jaggo Bai, wanted the delivery of the bonds to be made to him. After the objection of Smt. Jaggo Bai on 6-5-1961, Beni Chand had prayed, on 27-5-1961, that the bonds may not be handed over to Smt. Jaggo Bai but be deposited in a bank as provided in the decree dated 10-11-1949 in Suit No. 6 of 1944. By an order passed on 25-11-1961, the District Judge held that the application of Smt. Jaggo Bai to deliver bonds to her had abated due to the death of Smt. Jaggo Bai. Thus, the dispute between the mother and son was unresolved at the time when the questioned will was alleged to have been executed.

25. In the situation disclosed above, there was nothing unnatural or improbable if, as Sri Dwijendra Nigam (P. W. 2), deposed, Smt. Jaggo Bai had told him, as her lawyer, when she came to the court of the District Judge on 21-10-1961, in connection with the bonds' case, that she wanted to execute her will. Sri Dwijendra Nigam stated that Smt. Jaggo Bai then visited him at his house on 22-10-1961 at about 4 or 5 p. m. with Ratan Lal, and that some facts were noted by him in order to draft a will. He said that, on 24-10-1961, Smt. Jaggo Bai sent him a list of her properties. He stated that he sent word to her that he would come to her house on 26-10-1961 with the will duly drafted. So far, I can find no reason to discard the testimony of Dwijendra Nigam (P. W. 2).

26. Dwijendra Nigam (P. W. 2) went on to assert : that, he visited Smt. Jaggo Bai on 26-10-1961, at about 12 noon, with the typed will in triplicate, an original and two typed carbon copies of its three pages; that, after reading the will out to Smt. Jaggo Bai, according to whose instructions slight alterations were made in it, he took the impressions of a thumb of Smt. Jaggo Bai on each page of each of the three typed wills, one after the other; that, he obtained the signatures of attesting witnesses, Ratanlal and Mool Chand Bajpai, another lawyer, and that, he signed the wills himself as an attesting witness then and there and gave one of these in a sealed cover to the

lady. It is this part of the evidence of Dwijendra Nigam which, unfortunately, has revealed cracks, in the light of a close scrutiny of the thumb impressions on the three wills, a fingerprint expert's evidence, and facts and circumstances mentioned below. The more these cracks were probed and examined, the wider and more irreparable they appeared to become so that it is not prudent, in my opinion, to believe that this part of the evidence in the case is also correct. On the other hand, all proved facts and circumstances of the case fit in with each other only on the assumption that this part of Dwijendra Nigam's version is not really correct.

27. The original typed will on which an attempt could have been made to take the impressions of Smt. Jaggo Bai contains at least two blotches on the first page and one on the second suggesting that the first attempt to take thumb impressions on the document had to be abandoned. Each of these three blotches were crossed out with a pen. Dwijendra Nigam admitted, under cross-examination, that the first attempt to take Smt. Jaggo Bai's thumb impressions With ink from the pad he had brought with him had failed. He explained that this was due to his defective inkpad so that a fresh inkpad had to be purchased from the market and brought before the interrupted proceeding could be resumed after a few minutes only. But, if Dwijendra Nigam's version was correct, the twelve alleged thumb impressions of Smt. Jaggo Bai, one on each of the two pages and two on the third and last page of each of the three identically worded wills, had been taken one after another from the same digit or thumb at the resumed proceeding so that there could not be a marked difference either in the creases or in the formation of ridges registered by the thumb used.

28. When the learned counsel for the caveator cross-examined Sri Dwijendra Nigam about the marked differences between the size and creases of thumb impressions on the original and the two carbon copies of the will, he avoided the subject on the plea that he was not an expert. Thus, according to the petitioner's pivotal witness, on whose solitary testimony the whole case of execution of the will rests, the crucial issue in the case could only be resolved by an expert's evidence. But, the petitioner had not even attempted to support the case by either an expert's evidence or even by submitting any previous or proved other thumb impressions of the testatrix for comparison. The testatrix could sign and had signed as well as thumb impressed documents such as a mukhtarnama (Ex. D-2) proved by the caveator. But Dwijendra Nigam said that she had given up signing due to tremor in her hand and that he knew this for a period given by him as two to five years. It was, however, not proved that Smt. Jaggo Bai, who had signed the purported will of 29-5-1933, was incapable of signing her allegedly more solemn and serious and last and genuine will of 26-10-1961. Be that as it may, the petitioner's case rests on the allegation that Smt. Jaggo Bai did execute the will of 26-10-1961 by putting altogether twelve impressions of the same thumb on the original typed will and two carbon copies of it.

29. As the petitioner had not submitted any previous thumb impression of Smt. Jaggo Bai for comparison, although the question of genuineness of thumb impressions on the three identical wills was seriously disputed, I looked into the records of the bond case and the criminal case for

other thumb impressions of Smt. Jaggo Bai. There I find nothing more helpful than blotches with faint suggestions of ridges and creases sometimes which cannot, in so far as anything can be made out of them, be found to tally with the relatively clear impressions on the will on the two carbon copies. We have, therefore, to turn to the evidence of the caveator about the thumb impressions of Smt. Jaggo Bai supported by an expert's evidence.

30. There is no doubt that the evidence of an expert is not conclusive (See : *Ishwari Prasad v. Mohd. Isa*<sup>12</sup>). I have indicated, in *Devi Prasad v. State*<sup>13</sup>, how expert evidence is to be used to assist the Court in forming its own opinions on disputed questions. In the case before me, the evidence of the expert, Sri Mohini Mohan Sen Gupta, only brings out clearly and helps one to appreciate the inescapable significance of what is there on record in the form of the twelve alleged thumb impressions of Smt. Jaggo Bai on the three wills and the proved thumb impressions of Smt. Jaggo Bai which include one found in the record maintained at the District Registration Office. Sri Ram Asrey Nigam (D. W. 1), the Chief Registration Clerk, was summoned with what was called 'Register No. 8' on which the left thumb impression of Smt. Jaggo Bai was taken when she executed a mukhtarnama (Ex. D-2) in favor of four persons. The particulars given of the lady tally with Smt. Jaggo Bai and the contents of the mukhtarnama, entered in a register known as 'Register No. 4', were shown to be those of the original mukhtarnama proved to have been executed by Smt. Jaggo Bai and produced (Ex. D-2) by the caveator. The expert photographed and magnified the thumb impression there and two Other proved thumb impressions of Smt. Jaggo Bai and compared them with the disputed ones. The proved thumb impressions are of the "whorl" type and bear no resemblance to the "loop" types found on the three wills (Court Ex. 1 and Court Ex. 2 and Ext. 4). It was after this evidence that the petitioner's side alleged that the proved thumb impressions were of the left thumb and the disputed ones were of the right thumb. Sri Dwijendra Nigam then made a further and subsequent statement, before the Commissioner appointed by this Court, that all the thumb impressions on the disputed wills were of the right thumb.

31. There were, however, such marked differences between the thumb impressions on the original will and the two carbon copies, as regards formation of ridges and the creases found in the impressions, that the matter was put to Sri Sen Gupta, the finger-print expert, so as to elicit his opinion on the question whether they could be of the same thumb or digit. He was quite definite that they could not be of the same digit. The reason given by him, that the loop type on the original is very markedly different from the loop type on the two carbon copies, is obviously correct. The loop type on the originally typed will is like an erect bulb with ridges on the two sides converging sharply towards each other and then narrowing into a neck. The loop on the carbon copies is stublike and drooping on one side with ridges of the two sides running at first almost parallel and then moving away from each other. It is not possible for the two kinds of loops to have been made by the same digit or at least not by the same surface of the same digit. Neither Dwijendra Nigam nor the learned counsel for the petitioner could say anything which may explain these very obvious divergencies. Indeed, Dwijendra Nigam had stated that he had

himself held Smt. Jaggo Bai's thumb when taking the impressions so that the possibility of such marked differences due to mere clumsiness or very different parts of the same digit touching the paper could hardly be there if his version was correct. And, the very authority cited by learned counsel for the petitioner only helped to bring out and confirm the correctness of the opinion that the impressions on the originally typed will and the

<sup>12</sup>AIR 1963 SC 1728

<sup>13</sup>AIR 1967 All 64 at p. 7

will on each of the two carbon copies could not be of the same digit or at least not of the same surface of a digit.

32. Mr. Radha Krishna, learned counsel for the petitioner, relied on a short book by Mr. M. K. Mehta on "The Identification of Thumb Impressions and Cross-Examination of Finger Print Experts" (2nd Edition 1963) where we find (at page 20);

"In the microscopic sense, no two impressions of the same digit or thumb of the same individual are ever identically similar, even though they may have been obtained at the same time and under the same set of conditions".

After observing that these differences may be due to variations in the pressure of the thumb, in the area or surface which contacts the paper, and in the position in which the contact is made, it is stated there (p. 24) :

"No matter what may be the cause of superficial difference, the fact will always remain that the pattern and the sequence of the ridge characteristics will always be the same."

And, we also find there (page 26)

"To begin with, the patterns should be examined first. If the patterns are different, it is a conclusive proof that the impressions are of different persons. If the patterns are the same, the core and the delta should be located."

Then, it is stated there (page 26) :

"If the various ridge characteristics are all found in the same order in the impressions under comparison, it can be safely stated that the impressions are from the same finger or thumb of the same individual. Likewise, the ridge characteristics are also determined from the delta as a starting point, and the ridges intervening between the core and the delta may also be counted."

33. Now, applying the tests given in the book mentioned above, I find that the opinions of Sri M. M. Sen Gupta (D. W. 3) are faultless. The proved thumb impressions of Smt. Jaggo Bai are of the

whorl type and the disputed ones are all of the loop type. But, the loops in the originally typed will (Court Ex. 1) are of the variety found in illustration 38 (at p. 27), and the loops made on the carbon copies (Court Ex. 2 and Ext. 4) are of the variety found in Illustrations 39 and 40 (pages 36 and 37) given in the book cited. After counting the ridges between the core and the delta in the two types on Court Ex. 1, on the one hand, and on Court Ex. 2 and Ex. 4 on the other, it will be found that they could not possibly be of the same surface of a digit. Therefore, the digits must be at least presumed to be different. There is no evidence that Dwijendra Nigam so took the thumb impression from the same digit, although he held it with his hand, as to deliberately bring different parts of the digit into contact with the paper in order to give the impression that they were taken from different digits. The chances of such marked differences as we actually find creeping in due to mere accident seem so remote that they were not even put in cross-examination to Sri Sen Gupta whose definite and unequivocal opinion, that the digits used in making the thumb impressions on the originally typed and carbon copies of the will were different, remained absolutely unshaken.

34. Another matter on which the version of Sri Dwijendra Nigam exposed itself to a serious attack was that he deposed that, after the execution of the will, one copy was sealed and given to Smt. Jaggo Bai, another was taken by him to be presented to the District Registrar, and a third was kept by him in a sealed cover for his record. At first, the original typed copy, said to have been found in a box of Smt. Jaggo Bai, was not produced in Court. It was only produced after an application made by Beni Chand for its production. It was marked as Court Exhibit 1. The will produced from the custody of Sri Dwijendra Nigam was marked Court Ext, 2. Both these wills were produced under the orders of the District Judge, and, therefore, they were, after correction of marks, marked as Court Exhibits. The will on the carbon copy which was deposited with the District Judge was marked Ext. 4, and its sealed cover was marked Ex. 5 and is found indorsed by Sri Dwijendra Nigam as follows :

"This cover contains the 'will' of Smt. Jaggo Bai daughter of Seth Uttam Ram Gujarati, Vaish r/o Seth Ji Ka Bara, Gulamaka, Banda. Submitted by Dwijendra Nigam Vakil her counsel (duly authorised agent of Smt. Jaggo Bai), Dwijendra Nigam 28-10-1961".

Now, Dwijendra Nigam deposed, under cross-examination, that the cover in which he had sealed his copy of the will was not preserved or was lost. So, we do not know what was written on it. It is, however, deposed by him that the cover in which the will said to have been handed over to Smt. Jaggo Bai immediately after the execution of the will and then found in her box was contained is Court Exhibit No 3, marked on 11-1-1967. This cover also bears the following indorsement in Sri Dwijendra Nigam's writing in English :

"This cover contains the "Will' of Smt. Jaggo Bai daughter of Seth Uttam Ram resident of Seth Ji Ka Bara, Gulamaka, Banda, Dwijendra Nigam 28-10-1961"

Dwijendra Nigam admitted having made the indorsement and having put this date there. It is evident that, on 26-10-1961, there was no point in putting down "28-10-1961" on the cover. This was the date on which the will was deposited in Court. Nobody knew, on 26-10-1961, when it would be deposited. The indorsement of a different date on 26-10-1961 would be false and meaningless. The particular date indorsed is tell-tale. It is also perhaps not without some significance that the sealed cover bore the seal of Smt. Sarup Rani Nigam, the wife of Sri Dwijendra Nigam, which was likely to be kept at his residence by Mr. Dwijendra N. Nigam and not taken around. Therefore, the suggestion could be made on behalf of the caveator, on very substantial and otherwise inexplicable grounds, that the will was not actually executed on 26-10-1961, but it must have been kept in readiness to get it thumb marked by Smt. Jaggo Bai if she was well enough to execute it. As Smt. Jaggo's Bai's condition worsened, it was perhaps not thought safe to wait any longer. The three identical wills were probably sent to Dwijendra Nigam on 28-10-1961 with the assurance that they were thumb marked by Smt. Jaggo Bai. A copy must have been deposited on 28-10-1961 with the District Registrar in hot haste with thumb impressions on it believed by Dwijendra Nigam to be those of Smt. Jaggo Bai, but which, most probably, were not hers at all or else they could have been shown to tally with at least one previous thumb impression of the testatrix. Mool Chand Bajpai, like Dwijendra Nigam, may have signed on mere assurance. None of the attesting witnesses had written, as Ratanlal wrote on the purported previous will of 29-5-1933. "Signed before me." Attestations on mere assurance are, of course quite illegal and contrary to section 63 of the Act, but they are neither so uncommon nor so rare as to be ruled out.

35. Proved facts and circumstances of this case can be satisfactorily explained only on a hypothesis or conjecture of the kind set out above. Otherwise, how could 28-10-1961 appear on Court Ex. No. 3 in Dwijendra Nigam's own writing, if he did not, as he could not on his own version, see Court Ex. No. 3 between 26-10-1961 and its production in Court? He was specifically asked, in cross-examination, whether he handed over the will immediately after execution to Smt. Jaggo Bai or sent it to her afterwards. His answer was that one will was sealed and given to Smt. Jaggo Bai and one was taken by him to be presented to the District Registrar and a third was kept by him for his own record. In the examination-in-chief, the witness had stated that the sealing was done in the presence of Smt. Jaggo Bai after the execution of will, and he had also admitted making the indorsement of the date on the sealed cover court Ex. 3 given to Smt. Jaggo Bai. In paragraph 3 of the petition, it is stated that one will (produced later from sealed cover Court Ex. 3) was found in Smt. Jaggo Bai's box. There is no suggestion anywhere that this will was taken by Dwijendra Nigam and then sent back on 28-10-1961 or that Dwijendra Nigam met Smt. Jaggo Bai after 28-10-1961. Thus Dwijendra Nigam's version does not explain the date on the telltale Court Ex. 3, but the hypothesis or conjecture made above could explain it as 28-10-1961 was probably the date on which three wills were brought to Dwijendra Nigam and one was returned in a sealed cover after the illegal attestations made on assurance. I do not put this inference at a higher level than a conjecture or reasonable doubt that it may be true because, although Dwijendra Nigam was questioned about the time when the will was given to Smt. Jaggo

Bai, he was not specifically questioned about the date given on Court Ex. 3, and, therefore, no opportunity was given to him, as it should have been, to explain what the date on Court Exhibit No. 3 meant. As I have already explained above, the law, in such cases, is that the propounder of the will must remove such reasonable doubts before succeeding.

36. What I have described as a hypothesis or conjecture can, no doubt, be supported further by the direct evidence of some facts submitted by Beni Chand. The caveator actually produced two businessmen, Kashi Prasad (D. W. 4) and Bhaggu Teli (D. W. 5), and a doctor-cum-insurance-agent, Dr. Ramesh Gupta (D. W. 6), to prove that Smt. Jaggo Bai was in a state of coma on 26-10-1961 and was very ill when they saw her few days earlier on a customary visit at a festival. The suggested inference was that she did not regain consciousness after she had gone into coma so that execution of a will by her on or after 26-10-1961 was not possible. It is not necessary to discuss either the evidence submitted by the caveator about the condition of Smt. Jaggo Bai on and after 26-10-1961 or the evidence, also given by the caveator's witnesses, that she had no right thumb at all, as it had been amputated due to gangrene, but only a left thumb to be able to make an impression with. There is material in the evidence of the three witnesses mentioned above to cast doubts on their complete veracity. They may have tried to prove, by alleging meeting or seeing Smt. Jaggo Bai, as though they were intimate friends of hers, what they may have only heard. Their evidence is mentioned only to show that even a conjecture or an assumption which could explain otherwise inexplicable facts is not without some basis in direct evidence. This direct evidence could and would have been discarded entirely as unreliable if there had been better evidence to support the petitioner's case. Even unsatisfactory evidence can be made use of in the manner indicated by me in Devi Prasad's case (supra). In the instant case, the version of the otherwise unreliable witnesses fits circumstantial evidence, which not infrequently indicates the truth more unerringly than direct testimony, better than the version of a witness which would have been preferred if the thumb impressions and the date on Court Ex. 3 had not damaged it so much.

37. Unfortunately, witnesses, even of the respectable class and the honourable profession to which Mr. Dwijendra Nigam no doubt belongs, are not free from the proclivity to so state facts that their statements suit what they believe to be just rather than represent what has actually taken place. Scruples tend to vanish even in such a witness, if the witness believes that his evidence, though untruthful in some respects, serves what he regards as a justifiable end. Even if this is not the real explanation of the obvious conflict between the version of Dwijendra Nigam and the proved facts and circumstances of the case discussed above, the testimony of the lawyer cannot in the particular circumstances disclosed above, be enough to prove due execution of the disputed will. As there are substantial grounds to doubt its correctness, other facts and circumstances, which may have been otherwise explicable and insufficient to reject the evidence of Dwijendra Nigam, cannot be ignored and may also be mentioned here.

38. Firstly, there is an entry, in the counterfoil of the receipt for money paid at the time of the

deposit of the will with the District Registrar showing that only Rs. 10/-was charged. But, in every case in which an application for deposit of a will is made Rs. 10.50 is the proper charge according to the Registration Clerk. The prescribed charge of 50 nP. for the application was, therefore, not shown to be made at the time of the deposit of the will. According to Dwijendra Nigam's version, there was both an application and his vakalatnama attached to it bearing a thumb impression of Smt. Jaggo Bai. Learned counsel for the caveator, on the other hand, suggested that these were not there at all and that Sri Nigam had no authority to deposit the will but had managed to get it done due to his influence and importance in the District. The statement of the Registration Clerk, Ram Asrey Nigam (D. W. 2), shows that, even if there was an application and vakalatnama it must have been weeded out although no entry could be shown disclosing that they were there and were then weeded out. Neither the Registration clerk nor learned counsel for the petitioner could explain how no receipt for 50 nP. to be charged for the application is to be found. In most other cases of deposit of documents, the total charge shown is Rs. 10.50 nP. This is only a suspicious feature suggesting that the deposit may have been managed, in great haste, without even complying with all the formalities. But, on the other hand, there is a presumption of regularity of proceedings for the deposit of the will which the caveator did not entirely rebut. This presumption, however, does not dispense with the need to prove due execution of the will deposited which is a different matter.

39. Secondly, although beneath each of the twelve alleged thumb impressions of Smt. Jaggo Bai there is an indorsement in Hindi showing that it was her thumb impression, it is not indicated there whether it is the left or right thumb impression. This could be a circumstance suggesting that Sri Dwijendra Nigam was not there at all when somebody put down the thumb impressions. Otherwise, as a presumably careful lawyer, who had gone to get the solemn act of execution of a will performed, he would have noted it. Dwijendra Nigam's explanation that this was due to inadvertence is certainly unsatisfactory. In the bond case, where two thumb impressions, which are also little more than mere blotches, were taken on the last page of an affidavit on which Dwijendra Nigam is shown as the identifier of Smt. Jaggo Bai, one of these is indicated as "R. T. I.". Dwijendra Nigam asserted that he had a 'conviction' that right thumb impressions only of females were to be taken in accordance with the practice in Banda. This statement did not improve matters. The left thumb impressions of Smt. Jaggo Bai on the three proved documents, including one on an official record kept in the Registration Office at Banda, repelled the unsubstantiated allegation of any general practice at Banda at variance with the following instructions contained in Rule 308 of the Registration Manual :

"The impressions taken shall be of the left thumb. If the left thumb be defective or injured, the right thumb, or any other digit may be used, and a note made in the register and on the document of the particular digit employed."

It is true that this rule was not binding on Sri Dwijendra Nigam. But, if a lawyer by profession takes it upon himself to conduct a proceeding which is to serve as a substitute for registration, for

which he is paid a fee, he could be expected, to protect himself, to be not less cautious and prudent than the Registrar. If he had a peculiar "conviction" about the thumb impressions of females taken in Banda, he would have provided evidence of such a notion by at least indicating in the document itself which digit he had utilised. The omission to show this on the alleged wills is highly suspicious in the context of other facts discussed above. It suggests that Sri Dwijendra Nigam was not there when somebody's thumb impressions were taken on the wills.

40. Thirdly, the alleged attesting witnesses have only signed the wills. There is nothing to show, apart from the statement of Dwijendra Nigam, that Smt. Jaggo Bai had put her thumb impressions before the alleged attesting witnesses. Even the word "witness" or the word "attested" is not found anywhere on the will. Slight omissions of this kind are not quite insignificant in the context of facts discussed earlier.

41. Fourthly, if Smt. Jaggo Bai was "hale and hearty" (words used by Dwijendra Nigam) and strong and healthy enough to attend the Court of the District Judge on 21-10-1961 and to visit Sri Dwijendra Nigam's house on 22-10-61 to instruct him it is difficult to understand why Sri Dwijendra Nigam, who was, apparently, not very familiar with requirements of prudence or with precautions to be taken for showing due execution of wills, did not advise Smt. Jaggo Bai to either get the will registered, or, at least to go personally with him to the District Registrar to get her will deposited. On 22-10-1961, there was no reason, according to Sri Nigam's version, to anticipate either any incapacitating illness, much less the sudden subsequent demise, of Smt. Jaggo Bai. His statement that he took upon himself to visit her house at about 12 noon on 26-10-1961, without even having been asked to do so, to get the will executed, because he respected her, seems unconvincing although it may be true.

42. Fifthly, although Dwijendra Nigam stated that he had noted the instructions of Smt. Jaggo Bai, no note showing that this was done was produced. Indeed, if Smt. Jaggo Bai had taken back the abusive term 'dashta', used for Smt. Ved Kumari, and had to face criminal prosecution for it, she was not likely to instruct her lawyer to use such a term again so soon for Smt. Ved Kumari. She and her lawyer, Dwijendra Nigam, could expect a fresh criminal prosecution against her if she had used such a language in a will in case its contents leaked out. Such language could very well be used in an attempt to artificially simulate the language of the testatrix at a time when it was known that her life was drawing to a close.

43. Lastly, there is an omission on the petitioner's side which has, as a matter of law, more serious consequences in a case like this than the merely suspicious circumstances mentioned above. The caveator had denied both the capacity of Smt. Jaggo Bai, a lady of over eighty years in age, who had evidently been ailing and was treated by doctors round about 26-10-1961, to execute a will on that date, as well as due execution of the will. Nevertheless, the petitioner produced neither any doctor who may have treated her and could depose about her physical and mental condition at the relevant time nor any alleged attesting witness other than Shri Dwijendra

Nigam. Indeed, Ratanlal, impleaded as opposite party No. 1, an alleged attesting witness and pairakar of the petitioner, was present in this court throughout the proceedings until comments had been made that it was surprising that even Sri Ratanlal had not stepped into the witness box. Ratanlal was not seen in court during the latter part of the lengthy arguments. If the version of Shri Dwijendra Nigam about the execution of the will had been entirely satisfactory and sufficient, the presumption from non-production of material witnesses, that their testimony would have damaged the petitioner's case, may not have arisen. But, in the circumstances discussed above, that presumption can also be and should be, in my opinion, raised here.

44. It may not be out of place to mention here that, as the caveator and the petitioner are related to each other as husband and wife, and Smt. Ved Kumari is now said to be dead, it may be possible for the parties to make up and to arrive at some settlement in their old age for the benefit of all concerned rather than to indulge in litigation of which members of the family concerned seem, from the background discussed above, much too fond. This petition is, for the reasons given above, dismissed. But, in view of the relationship between the parties. I make no order as to costs.

45. There are two applications pending against the Administrator appointed by the District Judge in 1963. In view of the order passed above, the Administrator is discharged. The applications against the Administrator will be sent to the District Judge, who appointed him, and to whom the Administrator must submit accounts.

Petition dismissed.