

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ **FAO 36/2010**

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Date of Decision: June 27th, 2014

KAVITA KANWAR

..... Appellant

Through: Mr.Arun Khosla with Ms.Shreeanka
Kakkar, Advocates

versus

STATE (N.C.T.Delhi) & ORS

.... Respondents

Through: Mr.P.Banerjee with Ms.Nidhi
Parashar, Advs for respondent no.2.

Ms.Maninder Acharya, Sr.Adv. with Mr.Anuj
Aggarwal, Mr.Yatish Chandra & Mr.Gaurav
Khanna, Advocates for respondent no.3.

CORAM:

HON'BLE MS. JUSTICE VEENA BIRBAL

VEENA BIRBAL, J

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1. Present is an appeal under section 299 of the Indian Succession Act, 1925 (hereinafter referred to as 'the Act') wherein challenge has been made to the judgment dated 23.11.2009 passed by the Id.Addl. District Judge in Probate Case no.465/2006 whereby the probate petition filed by the appellant has been dismissed.

2. Briefly the facts relevant for disposal of the present appeal are as under:-

Appellant had filed a probate petition for the grant of probate of Will dated 20.5.2003 alleged to have been executed by her mother, Smt.Amarjeet Mamik w/o late Shri D.S.Mamik, in respect of property no.D-179, Defence

Colony, New Delhi excluding its ground floor. The mother of parties i.e. appellant and respondents No.2 and 3 had died on 21.5.2006. The appellant is the executor named and one of the beneficiaries in the said Will. It was alleged that the Will dated 20.5.2003 was executed by her mother in the presence of two witnesses, namely, Major General Manjit Ahluwalia r/o D-34, Defence Colony, New Delhi and Sh.Urvinder S Kohli r/o 227, Jor Bagh, New Delhi. It was further alleged that her father was the owner of the aforesaid property constructed on a plot of land measuring 325 Sq.yards comprising of a ground floor, first floor, terrace thereon and an annexe block of garage and servant quarter thereon. It was stated that the ground floor of the aforesaid property had already been gifted to the appellant by her father vide registered gift deed dated 25.1.2001. Her father had bequeathed to the testatrix i.e., Smt.Amarjeet Mamik the first floor, the terrace thereon and all other portion of the aforesaid property except the ground floor vide registered Will dated 14.2.2001. Her father predeceased her mother. The testatrix died on 21.5.2006 leaving behind two daughters, namely, Smt.Kavita Kanwar, Smt.Pamela Mehta i.e. appellant and respondent no.2 and one son Col.Prithvijit Mamik, respondent no.3. It was further alleged that by virtue of aforesaid Will the assets which were likely to come in the hands of the appellant were the first floor and other portions of the aforesaid property save and except the ground floor of the building and to carry out the two options of constructing either on the terrace of the first floor of the said building or to demolish the said building and to reconstruct and give the highest floor of the said building to respondent no.2 and retaining the terrace rights thereon. It was alleged that as per aforesaid Will, the balance in the saving bank account maintained with Central Bank

of India, Defence Colony as mentioned in Schedule-B annexed with Probate Petition would go to her brother Col.(Rtd.) Prithvijit Mamik i.e., respondent no.3. It was therefore prayed that probate in respect of aforesaid Will be granted in favour of the appellant.

3. Respondent no.2 initially did not file any objections to the petition or written statement before the Id.ADJ. Later on when the case was at the stage of evidence, respondent no.2 sought permission to file written statement which was dismissed vide order dated 3.7.2008 passed by the Id.ADJ. However, respondent no.2 continued to contest the matter.

4. Respondent no.3 had filed objections before the Id.ADJ by contending that the Will propounded by the petitioner was forged and fabricated one and the same was not executed by the deceased. It was alleged that no reason had been given in the Will in question as to why respondent no.3 had been excluded from the property by his mother i.e., testatrix. It was further alleged that there was no dispute between respondent no.3 and his mother and there was no reason why the deceased would exclude respondent No.3 from inheriting the property. Respondent no.3 had also disputed the signature of the deceased on the Will. It was further alleged that the Will dated 20.5.2003 on the face of it was a forged one. The respondent No.3 had further alleged that the property alleged to have bequeathed in favour of the petitioner is worth crores whereas respondent no.3 was the only son of deceased and he had good relations with his mother and it was not possible that his mother would bequeath only Rs.5,77,389/- in his favour. It was alleged that Will propounded was not a genuine Will.

5. On the basis of pleadings of the parties, the following issues were framed by Id.Addl. District Judge:-

- “1. Whether the Will dated 20-5-2003 of Smt.Amarjeet Mamik is proper and valid? OPP
2. Whether the Will dated 20-5-2003 of Smt.Amarjeet Mamik is forged and fabricated? OPR-3
3. Whether the petitioner is entitled to the grant of Probate/Letter of Administration in respect of Will dated 20-5-2003 of Smt.Amarjeet Mamik? OPP
4. Relief.”

6. In order to prove her case, appellant had examined herself as PW-1 and also examined both attesting witnesses of the Will, namely, Sh.Urvinder Singh Kohli, PW-2 and Major General Manjit Ahluwalia, PW-3, Sh.Nikhil Kanwar, son of the petitioner was also examined as PW-4. Respondent no.2 had examined herself as R2W-1. Respondent no.3 had examined himself as R3W-5 and also examined Sh.S.P.Khamra from Central Bank of India as R3W-5 and Sh.Ram Gopal Meena from Post Office Defence Colony as R3W-2, Shri S.P.Sharma from SBI as R3W-3 and Shri R.S.Negi from Defence Colony Association Club as R3W-4.

7. After hearing learned counsel for the parties and going through the material on record, the Id.ADJ held that the Will Ex.PW 1/H was surrounded by various suspicious circumstances, i.e. appellant was major beneficiary under the Will and had played active role in execution of Will; exclusion of respondent No.3 from the benefit of estate, respondent No.2 virtually did not get any share; manner of execution of Will, i.e. chances of testatrix executing the Will without understanding the contents are there; monetary

benefit was given to daughter of one of attesting witnesses; non-informing of execution of Will to legal heirs, etc. It was held that the appellant did not explain the aforesaid suspicious circumstances surrounding the Will in question. It was further held that in these circumstances the possibility of Will Ex.PW1/H being a forged and fabricated document and not duly executed by the deceased after understanding its contents and consequences could not be ruled out, as such, no relief had been given to the appellant. The issues framed were decided in favour of respondents and the petition for grant of probate was dismissed.

8. Aggrieved with the same, present appeal has been filed.

9. Learned counsel for the appellant has contended that there is no challenge by the respondents about the signatures and hand writing of the testatrix on the Will in question, as such there is admission about the validity of the Will Ex.PW1/H. It is submitted that when handwriting and signatures of the testatrix on the Will Ex.PW1/H are not forged and the same is attested in the manner prescribed under the law, in these circumstances, requirement of settled law to prove due execution of Will stands satisfied. It is further submitted that Will Ex.PW1/H is partly holographed and partly typed. It is submitted that holograph portion gives weightage to the Will Ex.PW1/H. It is submitted that when handwriting and signatures of testatrix are not questioned in the evidence and the learned ADJ has given a clear finding that the testatrix was of sound disposing mind and was having good health, in these circumstances, there was no need for learned ADJ to have gone deeper by probing further into the matter to satisfy its conscious about due execution of Will Ex.PW1/4. It is submitted that in any event no suspicious circumstances as noted by learned ADJ exist in the making of Will

Ex.PW1/H. It is submitted that reading the evidence on record the suspicious circumstances as noted by the learned ADJ in the impugned judgment are not made out. It is submitted that under the Will in question the respondent No.2 receives larger bequest than the appellant inasmuch as the appellant is required to incur expenditure towards constructing brand new storey over the terrace in order to provide residential flat of same size as that of the appellant to her. It is contended that the respondent No.3 was estranged from his parents and he was not concerned about the ailments of the testatrix. He neither performed her last rites and evidence led by the appellant establishes so. Despite that learned ADJ has noted that exclusion of son i.e. respondent No.3 as one of the suspicious circumstances in the execution of Will Ex.PW1/H. It is contended that there are contradictions in the evidence of respondent No.2 and 3 which makes their stand unbelievable. It is submitted that the respondent No.2 did not file any objections to the probate petition thereby admitted the validity of the Will. It is submitted that respondent no.2 had come up in the probate court seeking permission to further cross-examine the appellant with regard to holograph portion of the Will only when the appellant had filed a suit for injunction restraining the respondent No.2 from alienating the property in any manner in respect of which Will Ex.PW1/H has been executed. It is stated that aforesaid application for cross-examining the appellant was dismissed vide order dated 25.3.2008 by the learned trial court. It is submitted that subsequent challenge is afterthought and mala fide. It is further submitted that respondents No.2 and 3 have contended about the existence of third page to the Will in question. Rather, the respondent No.3 had moved an application before the Id.ADJ for bringing on record the third

page to the Will and the said application was dismissed on 23.8.2008. It is contended that the submission of respondents No.2 and 3 about the existence of third page to the Will Ex.PW1/H amounts to admission of the validity of Will in question. It is submitted that the parents of the appellant had special love and affection for her and due to that reason her father had gifted the ground floor of the building to her and mother had bequeathed the first floor and other portions as per Will Ex.PW1/H in her favour. It is submitted that gift deed of the father was never challenged by the respondents. It is submitted that Will dated 20.5.2003 is validly executed in accordance with law and is not stigmatised by any suspicious circumstances as has been held by Id.ADJ. It is submitted that none of the suspicious circumstances as observed by learned ADJ exist and the finding given is wrong.

10. On the other hand, learned counsel for the respondent No.2 has submitted that the finding of the learned trial court that the Will in question is surrounded by various suspicious circumstances which has not been removed by appellant by leading cogent evidence and that the possibility of Will being forged and fabricated document require no interferences. It is submitted that there is no evidence that the testatrix understood the contents of the Will in question. It is submitted that Will contains legal jargon. No evidence has been led to show who had drafted the Will Ex.PW1/H. There is no evidence as to who had typed the typed portion of the Will in question. It is submitted that this itself is the suspicious circumstance and has been rightly held by the learned ADJ. Learned counsel for respondent No.2 has placed reliance on Jaswant Kaur v. Amrit Kaur & Ors.:1977 (1) SCC 369 in support of aforesaid contention.

11. It is submitted that testatrix was not even matriculate pass and she could not have used the legal language of her own as has been used in the Will Ex.PW1/H. It is submitted that the testimony of the attesting witnesses as well as the testimony of appellant is contradictory in material aspects as regards the handwritten portion on the Will Ex.PW1/H, discussion about the contents of Will at the time of its execution. It is submitted that the same creates doubt about the valid execution of Will Ex.PW1/H. It is further submitted that the Will Ex.PW1/H has been executed in secrecy which itself is a suspicious circumstance. During the life time of testatrix, respondent No.2 i.e., widow daughter of deceased was living on the first floor whereas the testatrix was residing on the ground floor of D-179, Defence Colony, New Delhi. The appellant was residing at Panchsheel Park. It has also come in the evidence that testatrix was having good terms with respondent No.2. There was no reason not to call respondent No.2 when the Will was being allegedly executed and only appellant was called. It is contended that the same shows that execution of the Will Ex.PW1/H was in suspicious circumstances. Learned counsel has placed reliance upon Rajesh Chand etc. v. Dayawati & Ors.: MANU/DE/0359/1980.

12. It is submitted that respondent No.2 was in fact taking care of the testatrix who was suffering from cancer. The husband of respondent No.2 had died in 1992 and it was respondent No.2 who was taking care of her mother i.e., testatrix. It is submitted that there is no time limit in the Will in question as to when the appellant would construct the floors. It is submitted that the respondent No.2 has been left at the mercy of the appellant about the nature and quality of construction. It is contended that the same could not have been the intention of the testatrix to leave her widow daughter at the

mercy of her younger sister i.e., appellant. There is no reason as to why the testatrix would exclude her son i.e., respondent no.3. It is submitted that unnatural nature of bequeath is also a suspicious circumstance and has been rightly observed by the learned trial court. It is contended that no evidence is led by appellant to dispel the suspicious circumstances to the satisfaction of the court.

13. Learned counsel for respondent no.3 has argued on the same lines as has been argued by learned counsel for respondent No.2. It is also submitted that no reason has been stated as to why respondent no.3 was excluded in the Will and as to why respondent no.2 was kept at the mercy of appellant. It is submitted that this itself is a suspicious circumstance. It is contended that disposition in the Will in question is unfair. It is contended that evidence on record shows that appellant has taken active part in execution of the Will Ex.PW1/H. It is further submitted that the suspicious circumstances, as noted by the Id.ADJ, have not been explained even before this court. It is contended that respondent No.3 was having cordial relations with his mother i.e. testatrix. It is submitted that respondent No.3 was living at Shimla due to which there was less interaction with the testatrix. It is submitted that evidence led by respondent No.3 shows that he was having cordial relations with the testatrix. It is contended that reading the entire evidence on record it cannot be said that testatrix was aware about the contents of the Will Ex.PW1/H.

14. I have heard learned counsel for parties and perused the material on record.

15. Section 63 of the Indian Succession Act lays down the mode and manner of execution of an unprivileged Will. Section 68 of the Indian

Evidence Act postulates the mode and manner of proof of execution of document which is required by law to be attested. It in unequivocal terms states that execution of Will must be proved at least by one attesting witness, if an attesting witness is alive subject to the process of the court and capable of giving evidence. A Will is to prove what is loosely called as primary evidence, except where proof is permitted by leading secondary evidence. Unlike other documents, proof of execution of any other document under the Act would not be sufficient as in terms of Section 68 of the Indian Evidence Act, execution must be proved at least by one of the attesting witnesses. While making attestation, there must be an animus attestandi, on the part of the attesting witness, meaning thereby, he must intend to attest and extrinsic evidence on this point is receivable.

16. For proving the Will, the propounder has to show that the Will was signed by the testator; that he was at the relevant time in a sound disposing state of mind, that he understood the nature and effect of the dispositions, that he put his signature to the testament of his own free will and that he has signed it in the presence of the two witnesses who attested it in his presence and in the presence of each other. Once these elements are established, the onus which rests on the propounder is discharged. But there may be cases in which the execution of the will itself is surrounded by suspicious circumstances, such as, where the signature is doubtful, the testator is of feeble mind or is overawed by powerful minds interested in getting his property, or where in the light of the relevant circumstances the dispositions appear to be unnatural, improbable and unfair, or where there are other reasons for doubting that the dispositions of the Will are not the result of the testator's free will and mind. In all such cases where there may be legitimate

suspicious circumstances those must be reviewed and satisfactorily explained before the Will is accepted. Again in cases where the propounder has himself taken a prominent part in the execution of the Will which confers on him substantial benefit that is itself one of the suspicious circumstances which he must remove by clear and satisfactory evidence. After all, ultimately it is the conscience of the Court that has to be satisfied, as such the nature and quality of proof must be commensurate with the need to satisfy that conscience and remove any suspicion which a reasonable man may, in the relevant circumstances of the case, entertain. Reliance is placed on H. Venkatachala Iyengar v. B. N. Thimmajamma: (1959) Supp.1 SCR 426 and Rani Purnima Devi v. Kumar Khagendra Narayan Dev: (1962) 3 SCR 195.

17. The law is well settled that the conscience of the court must be satisfied that the Will in question was not only executed and attested in the manner required under the Indian Succession Act, 1925 but it should also be found that the said Will was the product of free volition of the executants who had voluntarily executed the same after noting and accepting the contents of the Will. Execution of Will is a solemn act of the executants who must own up the recitals in the instrument and there must be clear evidence that he puts his signature in a document after knowing fully its contents. The executant of a document must, after fully understanding the contents and tenor of the document put his signature or affix his thumb impression. In other words, the execution of the document does not mean merely signing but signing by way of assent to the terms of contract of alienation embodied in the document.

18. It has been observed in Jaswant Kaur v. Amrit Kaur and Others: (1977) 1 SCC 369 that:-

“9. In cases where the execution of a will is shrouded in suspicion, its proof ceases to be a simple lis between the plaintiff and the defendant. What, generally, is an adversary proceeding becomes in such cases a matter of the court's conscience and then the true question which arises for consideration is whether the evidence led by the propounder of the will is such as to satisfy the conscience of the court that the will was duly executed by the testator. It is impossible to reach such satisfaction unless the party which sets up the will offers a cogent and convincing explanation of the suspicious circumstances surrounding the making of the will.” (Emphasis supplied)

19. It is well settled that when genuineness of the Will is in question, apart from execution and attestation, it is also the duty of the person seeking declaration about the validity of the Will to dispel suspicious circumstances existing, if any. Reference is made to the judgment of Supreme Court in Babu Singh and others V. Ram Sahai @ Ram Singh: AIR 2008 SC 2485.

20. It has been held by the Supreme Court in Gurdial Kaur & Ors. vs. Kartar Kaur & Ors.: 1998 SCR (2) 486 and number of other judgments that the propounder of the Will has to show that the Will was the product of free volition of executant who had voluntarily executed the same after knowing and understanding the contents of the Will.

21. In P.P.K. Gopalan Nambiar v. P.P.K. Balakrishnan Nambiar and Ors.: AIR 1995 SC 1852, the Supreme Court has held as under:-

“It is trite that it is the duty of the propounder of the Will to prove the Will and to remove all suspected features. But there must be real,

germane and valid suspicious features and not fantasy of the doubting mind”.

22. In Benga Behera and Anr. v. Braja Kisore Nanda and Ors.: MANU/SC/7673/2007, the Supreme Court has held that “existence of suspicious circumstances itself may be held to be sufficient to arrive at a conclusion that execution of the Will has not duly been proved.”

23. In B. Venkatamuni v. C.J. Ayodhya Ram Singh and Ors.: AIR 2007 SC 311 the Supreme Court has held that the Court must satisfy its conscience as regards due execution of the Will by the testator and the court would not refuse to probe deeper into the matter only because the signature of propounder on the Will is otherwise proved. The proof of Will is required not as a ground of reading the document but to afford the judge reasonable assurance of it as being what it purports to be.

24. The mere fact that signature of a person is proved on a document does not necessarily mean that the person who has signed the document has done so after understanding the contents of the document. The expression “execution” does not merely means the signature, but means that the executant or the person who puts the signature has done so after understanding the contents of the document. In other words, it has to be proved that the hand which had signed the document was with the mind. Reference is made to the Division Bench judgment of Madras High Court titled J. Mathew (died) and Others v. Leela Joseph: MANU/TN/1475/2007.

25. The burden of proof that the Will has been validly executed and is a genuine document is on the propounder. The propounder is also required to prove that the testator has signed the Will and that he had put his signature

out of his own free will having a sound disposition of mind and understood the nature and effect thereof. If sufficient evidence in this behalf is brought on record, the onus of the propounder may be held to have been discharged. But, the onus would be on the applicant to remove the suspicion by leading sufficient and cogent evidence if there exists any. In the case of proof of Will, a signature of a testator alone would not prove the execution thereof, if his mind may appear to be very feeble and debilitated. However, if a defence of fraud, coercion or undue influence is raised, the burden would be on the caveator. Reference is made to Benga Behera and Anr. v. Braja Kisore Nanda and Ors.: MANU/SC/7673/2007, Madhukar D. Shende v. Tarabai Shedage: MANU/SC/0016/2002: and Sridevi and Ors. v. Jayaraja Shetty and Ors. (2005) 8 SCC 784.

26. In view of above legal position, the contention of learned counsel for appellant that if handwriting and signatures of testatrix are not challenged in cross-examination and it has come in the evidence that the testatrix was of sound disposing mind, the validity of Will stands proved, has no force. As per settled law discussed above the propounder has to satisfy the conscience of the court as regards due execution of the Will by the testator and for that the court can probe deeper into the matter to satisfy its conscience that the testator/testatrix had duly executed the will after understanding its contents.

27. The suspicious circumstances surrounding the Will Ex.PW1/H as noted by learned ADJ has already been noted above.

28. The question for consideration is whether the evidence led by the appellant i.e., propounder satisfies the conscience of the court that the Will in question was duly executed.

29. The Will Ex.PW1/H is alleged to have been executed on 20.5.2003 at the residence of testatrix i.e. D-179, Defence Colony, New Delhi. It is alleged to have been attested by two witnesses i.e., Sh.Urvinder S Kohli, PW-2 and Major General Manjit Ahluwalia, PW-3. The Id.trial court has observed that though the signatures on the Will Ex.PW1/H are that of the testatrix and the attesting witnesses have also signed on it but the evidence on record does not establish that the testatrix at the time of signing of the Will Ex.PW1/H understood the contents of the same.

30. The evidence on record in this regard is examined. The appellant has nowhere stated in her evidence by way of affidavit Ex.P1 that testatrix was aware of the contents of the Will Ex.PW1/H. In her cross-examination, she has stated that her mother i.e. testatrix did not discuss the contents of the Will Ex.PW1/H with her before drawing it nor her mother told her as to who had drawn and typed the said Will. The appellant has further stated in cross-examination that she does not know when Will Ex.PW1/H was got typed. She has further stated that she had come to know about the said Will Ex.PW1/H only on 20-21 May, 2003. The appellant has also deposed that she does not know whether her mother i.e., testatrix had discussed the Will Ex.PW 1/H with respondent no.2 or respondent no.3. Her mother did not ask her to call respondent nos.2 and 3 on that day. In cross-examination, she has further stated that her mother had discussed the contents of the Will with the witnesses i.e. PW2 and PW3 whereas PW2 and PW3 in their evidence have denied the same. The appellant has further deposed that she does not know if any professional or any deed writer was engaged for drafting/typing of the Will Ex.PW 1/H. The appellant has also deposed that on that day her mother had written something but she does not know whether it was on the

Will or something else. From her evidence, it cannot be said that testatrix was aware about the contents of the Will Ex.PW1/H.

31. The witness Sh.Urvinder S Kohli, PW-2 in cross-examination has deposed that the testatrix did not discuss the contents of the Will Ex.PW1/4 with him nor he had questioned about the same. He has further deposed that when he reached at the house of testatrix, appellant was already present there. The Will Ex.PW1/4 was not produced before him when they three were present in the house. He has further deposed that Major General Manjit Ahluwalia, PW-3 came to the house of testatrix after about 10-15 minutes of his reaching there. The Will Ex.PW1/H was already ready with the testatrix, however, she wrote something more on it. The said witness has further deposed that the testatrix did not tell as to who had typed the typed portion of the Will Ex.PW1/H. He did not read the Will Ex.PW1/H but had a glance of it. He has denied that handwritten portion was inserted after signing of the same by all. On reading his evidence also, it cannot be said that testatrix was aware or had understood the contents of the Will Ex.PW1/H before putting her signatures on it.

32. Major General Manjit Ahluwalia, PW-3, the other attesting witness to the Will Ex.PW1/H has stated in his evidence by way of affidavit Ex.P3 that on 20.5.2003 he was called by testatrix at her house to attest Will Ex.PW1/H and accordingly he had gone there. When he reached there, the testatrix took out a partly typed Will and thereafter wrote something on the Will in her own handwriting in opening and closing paras of the Will and signed it. Thereafter, in the presence of testatrix, he and Sh.Urvinder S Kohli, PW-2 attested the said Will. In his cross-examination, he has stated that he is having good relations with the appellant and respondent nos. 2 and 3. He

has further deposed that the testatrix did not explain the contents of the Will Ex.PW1/H to them when they were signing it. He has further deposed that no discussion took place at the time of execution of the Will Ex.PW1/H. He has further deposed that the will Ex.PW1/H was in the folder which testatrix had already taken out before he reached her house. The testatrix was also having a draft out of which she copied something in her own hand writing on Will Ex.PW1/H. He does not know whether the other attesting witness i.e. Sh. Urvinder S. Kohli PW2 who was present had read and gone through the Will Ex.PW1/H.

33. Even from the evidence of attesting witnesses i.e. PW2 and PW3 it can't be said that testatrix had put her signatures on the Will Ex.PW1/H after understanding its contents or that while signing she was aware of its contents.

34. It is not the case of the appellant that the testatrix had given instruction to some advocate or had consulted him and got the Will Ex.PW1/H prepared from an advocate. The bequest in the Will Ex.PW1/H is contained in type written portion and language used shows that the same is drafted by a lawyer. The testatrix was not computer literate and had no legal knowledge. No evidence is led as to who drafted and typed the Will Ex.PW1/H. The non-explanation of above amounts to a suspicious circumstance as has been held by Supreme Court in Smt. Jaswant Kaur vs. Amrit Kaur & Ors.: 1977 (1) SCC 369.

35. Respondent no.2 is the widow daughter of testatrix. She has stated in her evidence that her mother was not even 10th pass. The appellant has stated in evidence that she does not know educational qualification of her mother but she could read and write English. During arguments, learned

counsel for appellant has submitted that testatrix was matriculation pass. The Will Ex.PW1/H is partly typed and partly hand written i.e. opening and closing para of the Will Ex.PW1/H. The evidence shows that the Will Ex.PW1/H was also not prepared in one sitting. The first and last para of Will Ex.PW1/H is in the handwriting of testatrix. The rest of the Will Ex.PW1/H is typed one. No explanation has been given in evidence as to why the Will is partly handwritten and partly typed. During arguments, learned counsel for appellant has submitted that first and last para are handwritten so as to give more weightage to the Will in question. However, the reasoning given is not understandable. Further, no evidence is led by the appellant to show from where the Will in question was got typed. The first para of Will in question gives the name and other details of testatrix and last para is the closing para of the Will in question. The typed portion gives the details of alleged bequeath in the Will Ex.PW1/H whereby major portion has been given to the appellant and one floor as per choice of the appellant is alleged to have been bequeathed in favour of respondent No.2. Reading the evidence led by the appellant it can't be said that the testatrix had understood the typed portion or same was read over to her before she had put her signatures on the Will Ex.PW1/H. The learned ADJ has rightly held the above as the suspicious circumstance surrounding the execution of Will Ex.PW1/4.

36. The alleged bequeath of the immovable property in will Ex.PW1/4 is as under:-

“1. I hereby give, devise and bequeath to my youngest daughter the said Mrs. Kavita Kanwar my entire share in the aforementioned immovable

property, namely the first floor and the terrace including all other portions, save and except the ground floor with specific directions that my said daughter Mrs. Kavita Kanwar will carry out either of the 2 options as deemed proper by her, namely

(a) construct on the terrace of the said building such residential facility of such covered area as is permissible under the Municipal Building Bye-laws at the time of my demise and hand over possession of the same construction to my elder daughter, namely Mrs. Pamela Mehta, who shall thereafter acquire sole exclusive title to the said portion with the terrace rights thereon continuing to vest in favour of the said Mrs. Kavita Kanwar,

OR

(b) demolish the said building and carry out such new construction as is permissible under the Municipal Building Bye-laws and be the sole exclusive owner of the entire building thus constructed, save and except such constructed residential portion on the highest floor of such building, which portion shall vest solely and exclusively in favour of my said elder daughter Mrs. Pamela Mehta, while the terrace rights thereon shall continue to vest in favour of my said daughter Mrs. Kavita Kanwar.”

37. Nothing is stated in the petition or in the evidence led by appellant as to why the major portion of the immovable property is being given to her. It is not her case that she was looking after her mother. As per her evidence, appellant is living at Vasant Vihar for the last about 20-22 years whereas

testatrix was living at Defence Colony house on the ground floor. It has also come in the evidence that respondent no.2, the widow daughter of testatrix at the relevant time was living on the first floor of the aforesaid house. She is stated to be still being there. It has also come in the evidence that the testatrix had suffered cancer and was looked after by respondent no.2. Respondent no.2 in cross-examination has stated that her mother was suffering from cancer and she was looking after her mother and she used to take her to Army Hospital. No suggestion was given to her that she was not taking care of her mother. It has also come on record that the testatrix died after two years of detection of cancer and she had undergone all the tests and was getting treatment for cancer.

38. As per evidence on record, the testatrix was financially well off. She had sufficient bank balance in her account. She was also getting family pension and had employed her own servants. In these circumstances, it can't be said that the testatrix was financially dependent upon the appellant and due to that reason major portion is bequeathed in her favour. Even that is not the stand of appellant also.

39. As per the Will Ex.PW1/H, respondent no.2 has been left at the mercy of the appellant and there is no time limit in the Will in question as to when the appellant would construct the floors and the nature and quality of construction for giving her alleged share, the respondent no.2 would be first dispossessed in order to enable the appellant to reconstruct the building.

40. Reading the Will in question, it is the appellant who is the major beneficiary of the Will. The evidence on record shows that she has also played an active role in the preparation of the alleged Will. She was present when the Will in question was allegedly executed. The attesting witness

Urvinder S Kohli, PW-2 is very well known to the appellant being her friend for the past 30 years. He has deposed that he had known deceased through appellant and later the appellant's cousin's son got married to his daughter in the year 1994 and since 1994 he had visited testatrix only twice or thrice on social occasions. Reading his evidence it can't be said that he was close to the testatrix. In these circumstances, testatrix could not have called him of her own for attesting the Will Ex.PW1/H. Though in the evidence, appellant has deposed that her mother i.e., testatrix had called the said witness whereas the witness PW2 has deposed that on 18.5.2003, he was called by the appellant who told him to come to her mother's house on 20.5.2003 as her mother wanted to execute the Will.

41. The evidence on record shows that appellant has taken a prominent part in execution of Will Ex.PW1/H which confers on her a substantial benefit worth crores of rupees. This itself is a big suspicious circumstance as has been held by Supreme Court in Niranjan Umesh Chandra Joshi vs. Mridula Jyoti Rao: 2007 (1) AD SC 477. It has also been held by Supreme Court in Surinder Pal vs. Saraswati Arora: (1974) 2 SCC 600 that where propounder takes prominent part in the execution of Will which confers on him a substantial benefit that is itself one of the suspicious circumstance which he must remove by clear evidence. In the present case no evidence is led by appellant to satisfy the conscience of the court to clear the aforesaid suspicious circumstance existing at the time of making of Will Ex.PW1/H. The propounder was required to remove the doubts by clear and satisfactory evidence.

42. As per the Will Ex.PW1/H, no immovable property has been bequeathed in favour of respondent no.3. He is only given balance in the

saving bank account of testatrix maintained with Central Bank of India. It is also not mentioned in the Will as to why respondent no.3 who was the only son of testatrix would not get share in her immovable property. The appellant in her cross-examination has deposed that respondent no.3 was having strained relations with her mother i.e. testatrix whereas Major General Manjit Ahluwalia, PW-3 who was close relative of the parties i.e. son of sister of testatrix has deposed that that relations between testatrix and respondent no.3 were satisfactory.

43. The appellant in her evidence has further deposed that respondent no.3 had not looked after the testatrix. On the other hand, respondent no.2 who is the sister of appellant and respondent no.3 has stated in her evidence that respondent no.3 was having good relations with his mother i.e., testatrix. As respondent no.3 who was serving in Indian Army was posted at Simla, the testatrix used to speak to him over phone and used to call him by his nick name 'Pom Pom'. His mother had sent a birthday card on his birthday and also wished him all the happiness by writing the same inside the card. There is no reason as to why testatrix would not bequeath part of immovable property in favour of his only son i.e., respondent no.3.

44. Respondent no.3 has also deposed that he had joined Indian Army following the foot steps of his father who was also in Indian Army. There are also letters of appellant and respondent no.2 to their brother i.e. respondent no.3. There are also family photographs showing family members together including respondent no.3. The photograph on record showing deceased celebrated the second marriage anniversary of respondent no.3. It has also come in the evidence that deceased had given a sum of Rs.5 lakh lying in her account to respondent no.3 vide Will Ex.PW1/H. Had

there been any strained relations, the testatrix would not have bequeathed any amount to respondent no.3 as is mentioned in alleged Will Ex.PW1/H.

45. The stand of appellant is that the respondent no.3 had not looked after the deceased in the hospital when the testatrix was ill. Her further stand is that last rites of deceased were already performed before he could reach Delhi. The reasoning given by appellant is not convincing. Reading the overall evidence on record there is no sufficient evidence of strained relations between deceased and respondent No.3 to such an extent that deceased could have excluded him from the bequeath of immovable property of deceased in Will Ex.PW1/H.

46. There is no evidence coming forth to explain the suspicious circumstance of excluding respondent no.3 from bequeath of the immovable property. As noted above, there is no evidence that deceased had understood the contents of the Will Ex.PW1/H before signing it. In this background, exclusion of respondent no.3 is also a grave suspicious circumstance which has also remained unexplained. The same cast doubt as to the genuineness of Will Ex.PW1/H.

47. Further the respondent no.2 is the widow daughter of the testatrix who was residing on the first floor of the property and the testatrix was residing on the ground floor of same building when the Will in question was executed. She was also having good relations with the testatrix. There is no reason as to why the testatrix would not have called respondent no.2 and only called the appellant at the time of execution of the Will. The execution of the Will in secrecy surrounds the same by suspicious circumstance which is unexplained. Further the execution of Will in question is also not disclosed to respondent No.2 for 3 years when as per Will Ex.PW1/H,

respondent No.2 is also given one floor which itself is a suspicious circumstance. No explanation is given by the appellant for the same.

48. Further, there are serious contradictions in the testimony of attesting witnesses i.e. PW2 and PW3 and that of appellant on material aspects pertaining to the execution of the Will. In affidavit Ex.P1 the appellant has stated that the testatrix had brought out a partly typed Will and further wrote in her own hand the opening and closing paragraphs of the Will Ex.PW1/H. In cross-examination, she has stated that she does not know whether she had written on the Will or something else. Sh. Urvinder S. Kohli PW2 has stated that the handwritten portion on the Will Ex.PW1/H was written by the testatrix of her own. Sh. Manjit Ahluwalia PW3 has stated in cross-examination that the testatrix was having one draft out of which she copied something in her own handwriting on Will Ex.PW1/H. All the three witnesses have deposed differently as to how handwritten portion was written on Will Ex.PW1/H. There is also contradiction as regards discussion about the contents of Will Ex.PW1/H by testatrix with the attesting witnesses. The appellant has stated in her cross-examination that her mother had discussed the contents of Will with the witnesses whereas both the attesting witnesses have denied that the contents of Will were discussed by the testatrix. PW2 has also stated in the cross-examination that he even did not question the testatrix on the same. There is also contradiction about the manner of taking out of Will at the time the witnesses had reached the house of testatrix. The attesting witness PW2 has deposed that the Will was not produced before him when he was present with the testatrix and appellant. According to him, when PW3 had come, only then the Will was produced. On the other hand, Sh. Manjit Ahluwalia PW3 has deposed that when he had

reached the house of testatrix Will Ex.PW1/H had already been taken out by the testatrix before he reached her house. The above contradictions are serious in nature and create a doubt about the execution of Will Ex.PW1/H in accordance with law.

49. It has also come in the evidence that Rs.25000/- was paid by the appellant to the daughter of the attesting witness Major General Manjit Ahluwalia PW3 through cheque Ex.R3W1-C from account jointly in the name of testatrix and the appellant after the death of testatrix. The stand of respondent No.2 and 3 is that the aforesaid payment was made in order to get favour from the attesting witness PW3 as such his evidence is not reliable. On the other hand, the stand of the appellant is that the said amount was not only paid to the daughter of PW3 but was also paid to the daughter of respondent No.2 and to the son of appellant as the deceased/testatrix wanted to gift the said amount to them. In support of the stand, learned counsel for appellant has referred to the alleged third page of Will in question. It may be mentioned that the alleged third page of the Will Ex.PW1/H is never produced by the appellant. Rather, when the respondent No.3 had moved an application for production of the alleged third page of the Will, appellant had denied the existence of said page. The third page of the Will is never proved before the learned ADJ. Even assuming the alleged third page exists, the same does not dispel the suspicious circumstances as have been noted above. In these circumstances, the contention of the appellant that the alleged third page of Will Ex.PW1/H proves its validity has no force.

50. No fault is also seen in accepting the reasoning by the learned ADJ given by the respondent No.2 in not contesting the probate petition earlier.

Reading the evidence on record, it cannot be said that the contest to the probate by respondent No.2 at subsequent stage was afterthought and mala fide as is alleged by learned counsel for appellant.

51. In view of above discussion, the findings of learned ADJ that Will Ex.PW1/H is surrounded by various suspicious circumstances which has remained unexplained and the possibility of aforesaid Will not duly executed by the deceased after understanding its contents are confirmed. No illegality or perversity is seen in the findings given by the learned ADJ. No case is made out for interference with the impugned judgment.

Accordingly, the appeal is dismissed. There is no order as to costs.

VEENA BIRBAL, J.

June 27th, 2014
ssb/kks