

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

Date of Reserve : 07.09.2009

Pronounced on : 14.09.2009

+ CS(OS) 273/1996

Sarvjit Singh Sareen

..... Plaintiff

Through : Mr. V.K. Makhija, Sr. Advocate
with Mr. Akshay Makhija, Advocate

Versus

Mrs. Ritu Menon & Ors

..... Defendant

Through : Mr. Y.P. Narula, Sr. Advocate with
Mr. Ashok Chhabra for Def. 1, 3 & 4.
Mr. S.K. Bahaduri, Advocate for D-2.

CORAM:

HON'BLE MR. JUSTICE S. RAVINDRA BHAT

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| 1. | Whether the Reporters of local papers may be allowed to see the judgment? | Yes |
| 2. | To be referred to Reporter or not? | Yes |
| 3. | Whether the judgment should be reported in the Digest? | Yes |

HON'BLE MR. JUSTICE S.RAVINDRA BHAT, J.

1. The plaintiff in this Suit seeks declaration as to Will dated 06.09.1995, which he disputes, as not legal and binding and that it contravenes Section-114 of the Indian Succession Act; he also claims that in the event of declaration not being granted, the Court should hold that the said Will is void and not binding on him. He further seeks a decree for partition in respect of the estate of Mrs. Lajja Sareen (hereafter called "the testatrix") regarding the property No.N-84, Panchsheel Park (hereafter referred to as "suit property"), movable/immovable assets fully described in the Suit, for the appointment of a Local Commissioner to suggest the mode of partition and take consequential steps towards drawing a final decree.

2. The undisputed facts that may be gathered from the pleadings are that the plaintiff (hereafter referred to as 'Sarvjeet'), Defendant No.1 (hereafter referred to as 'Ritu') and defendant No.2 (hereafter referred to as 'Beena') are brother and sisters respectively. They are the surviving children of the testatrix, who owned the suit property. The testatrix expired on 17.12.1995, leaving behind the suit property, cash and fixed deposits in the Central Bank of India and some units of the Unit Trust of India. The suit describes a Will dated 29.04.1986 in terms of which the testatrix provided that the suit properties were to vest in her children whereby Sarvjeet and Ritu were to jointly own the ground floor of the property; the first floor was to be inherited by Beena. The suit alleges that restrictions, on the disposition of the property or the shares of each heir were provided in this Will of 1986. According to such restrictions, no heir could sell or transfer his or her share without first offering it to the other two and that in the event of transfer of such share to one or the other heir, it was to be at half the fair market value.

3. The suit alleges that the testatrix had a history of medical problems which resulted in her physical and mental limitations. It is contended that her health started to deteriorate in 1988-89. She began to lose her balance and had an uneven gait difficulty in coordination and no control of her bodily functions. She suffered from short term memory loss and was diagnosed as having a blockage in the base of the neck. The Suit states that the testatrix underwent a surgery in 1989 at the All India Institute of Medical Sciences (AIIMS) where a shunt was installed to relieve pressure in the brain. It is alleged that the blockage in the shunt was diagnosed and corrected in early 1990 and later her physical and mental capabilities continued to deteriorate. The suit alleges that the testatrix's movements became restricted in December, 1993 – January, 1994 and she spent more time in bed and started to forget things and could not recognize people. The plaintiff also alleges that the testatrix fainted in April, 1995 resulting in her admission in the Sir Ganga Ram Hospital and blood transfusion to stabilize her condition. It is claimed that at that time doctors diagnosed that she had cancer in the stomach; the testatrix also suffered from depression. The suit states that by August, 1995, her condition seriously deteriorated and she underwent a second transfusion. It is stated that in October, 1995, the testatrix went through a dehydration shock and between October and December, 1995, she

went into semi-coma a number of times. Sarvjeet alleges in the suit that testatrix had become extremely weak at the time of her death and was incapable of doing anything and was totally dependant on Ritu and her husband (the third defendant – here after referred to as ‘Menon’). In the light of these allegations, the suit states that the testatrix was not of a sound disposing mind practically since April, 1995 when she had collapsed. It is contended that after death of the testatrix, Sarvjeet- who resides in United States of America (USA) came to Delhi to attend her last rites when he became aware of the Will propounded by Ritu and Menon, dated 6.9.1995. The suit alleges that the Will discloses that it was prepared by one Mr. Dinesh Behl, also nominated as an alternative executor; he provided professional services to Ritu and Menon and the institutions being managed by them. The attesting witnesses of the Will are the employees of Mr. Dinesh Behl, who are unknown to the testatrix and the family. It is alleged that the Will was signed by the Testatrix without her understanding its contents, as she was not of a sound disposing mind.

4. The suit further alleges that in December, 1995, the testatrix was not in a fit condition to read the Will or understand its contents. It is alleged that the attesting witnesses did not sign the documents on 6.9.1995 as stated in it. The Suit alleges that besides the testatrix not being possessed of a sound disposing mind, the circumstances show that it was executed on account of mis-representation and fraud played by Ritu and Menon, who led her to believe that they would be ousted from the property if Sarvjeet was given unrestricted right, along with his siblings. The suit alleges that the conditions imposed in the Will are absolutely illegal. They provide that during the life time of Ritu, Menon or their daughter Ratna Menon, i.e., the fourth defendant, (hereafter “Ratna”) they would have the right to live on the ground floor; Beena was to enjoy the life interest in respect of the first floor. The plaintiff submits that the first part of the Will, however, unambiguously bequeaths the suit property to the three heirs and the subsequent conditions have the effect of postponing the vesting by the heirs, contrary to Section-114 of the Indian Succession Act (hereafter referred to as Act).

5. The averments describe the conditions in the Will with some detail; it alleges that Sarvjeet was 55 years, Ritu, 48 years, Menon, 55 years and Ratna, 21 years at the time of filing of the Suit; Beena was 53 years at that stage. Sarvjeet contends that there is every possibility

that he would predecease Ratna Menon who is merely 21 years thereby postponing the vesting of property beyond his life time which renders the Will, void. The suit has described various movable assets in the form of fixed deposits, money multiplier receipts as well as details of the units issued by the Unit Trust of India. It is alleged that the testatrix had a saving bank account in which she left Rs.32,000/- The suit alleges that Sarvjeet is entitled to 1/3rd share and consequential partition of the suit property.

6. Ritu and Menon have filed a common written statement resisting the suit and submitting that with the execution of the Will, dated 6.9.1995, the previous Will dated 29.4.1986 stood superseded. They allege that the plaintiff has little or no personal knowledge of the state of health of the testatrix as he has been living in the USA, since 1964. It is further denied that the testatrix was labouring under mental or physical limitations or had lost control over her bodily functions and that she fell down from the stairs on several occasions or that she was suffering from short term memory loss. The defendants concede that testatrix underwent surgery in AIIMS and denied that her condition was diagnosed as blockage. They contend that the surgery was irrelevant for the present proceedings. They also deny that there was any relapse suffered by the testatrix in 1989 or that her physical or mental capabilities deteriorated. The first and second defendants allege that the testatrix's ailment was purely physiological and that she received appropriate treatment. They deny that she spent more time in bed and forgot things. It is contended that testatrix during her entire life time led a perfectly normal life, performing all day to day functions, on her own; she handled her investments and properties. They also say that the testatrix continued to entertain her friends, guests and relatives and took interest in the education of her granddaughter. She was also socialized and went to clubs etc. These defendants deny that testatrix fainted and collapsed in 1995. They, however, concede that she was diagnosed with cancer, but at the same time they deny that she was ever depressed. It is asserted that she was full of life till her death, on 17.12.1995. They also deny that her condition deteriorated in August, 1995. They specifically say that testatrix's mental abilities were intact and she kept close watch on investments and fixed deposits etc. even till just before her death; and that she used to keep a close watch on the kitchen. The defendants deny that the testatrix was under their control. These defendants also allege that

Sarvjeet had visited the testatrix towards the end of October, 1995 when he insisted on being given a copy of the Will, which was done.

7. The defendant Nos.1 and 2 contend that the Will referred to by Sarvjeet of 1986 was signed by Mr. Dinesh Behl and Mr. Pawan Sahni, his employee; they both knew the testatrix. They do not deny that Mr. Behl provided professional services to them but they say that he was known to the whole family including the plaintiff. Ritu and Menon state that Lajja Sareen was fully aware of everything around her and was of a perfectly sound mind while executing the Will which she did on her volition and while being fully conscious. They also deny that the two attesting witnesses did not visit the Suit property as alleged by the plaintiff. Ritu and Menon also allege that testatrix was aware that Sarvjeet was a non-resident with extensive property in the USA and had no intention of returning to India to live with her. They reiterate that the Will was executed volitionally and without exercise of any kind of control or undue influence by them. They also deny allegations of mis-representations and fraud. They assert that the Will is valid and can be enforced; according to them the Suit deserves to be dismissed and the plaintiff cannot seek the partition he claims.

8. The second defendant Beena in her written statement agrees with the suit allegations so far as they pertain to the surgery which took place in 1989 upon the testatrix. She, however, denies that the mental and physical capabilities of the deceased deteriorated in 1993-94. She also states that the testatrix was not dependent upon Ritu and Menon clarifying that when the testatrix was ailing, they looked after her, yet upon her return, she was looked after by her (Beena). It is submitted that in October, 1995, the testatrix was hospitalized and was taken care of by Beena; she remained unconscious for several days, but gained consciousness in the first week of November. Beena mentions that during her visit in October, 1995, she was not shown a copy of the Will but was informed that a new Will had been drawn up. Beena specifically states that whether the Will, dated 6.9.1995 is determined to be correct or wrong, as far as she is concerned, testatrix always wanted to protect her interests.

9. The earlier Will dated 29.04.1986 was exhibited as PW-1/1; the Will impugned by the Suit has been exhibited as DW-4/1A. The plaintiff has relied upon certain documents marked as Ex.PW-1/X1, PW-1/X3, PW-1/X4 PW-1/X5 and PW-1/X6 are day to day notes written by the

testatrix. Ex.PW-3/1 is an earlier Will said to have been made by the testatrix in May, 1995. The plaintiff relies heavily on PW-1/D1 the letter dated 12.11.1989 by Ritu to Beena; reliance is also placed on a letter dated 20.06.1995 marked as Ex.DW-1/PX1.

10. Sarvjeet, the plaintiff examined himself as PW-1; no other witness was examined in support of the Suit. Ritu examined herself as DW-1; Shri Dinesh Behl was examined as DW-2; Shri Sanjay Beri was examined as DW-3 and Shri Navneet Bansal deposed as DW-4.

11. In his deposition, PW-1 supported the averments in the suit, alleging that his mother had mental limitations, lack of comprehension, memory loss and disorientation. He stated that she had trouble with her speech and had an uneven gait. PW-1 talks of having spoken to the defendants about the testatrix's health and being informed that she was suffering and that according to the medical advice, there were neurological problems. He deposed having conversed with his mother in 1989 and forming an impression that she was very sick. He deposes that Ritu informed him that the testatrix suffered from fluid build-up in the brain which necessitated insertion of a shunt; he submits having purchased a shunt for her operation. According to him, the surgery resulted in improvement of gait, but other symptoms persisted. He learnt about relapse of his mother's symptoms later, after returning. He also deposes having visited India in October and December, 1995 when the testatrix's mind and health were very poor.

12. In his cross-examination, PW-1 mentions about having received a telephone call regarding the testatrix's illness in 1989 from Ritu. He states that she also spoke to him about the testatrix's lack of orientation, difficulty in speaking, lack of comprehension etc. PW-1 claims to have spent considerable time with the testatrix during 1990-93. He says that in early 1991 she was more communicative, when he spent lot of time chatting with her; thereafter in 1993, she became less mobile, shakier as well as distractive. Conversations with the testatrix were general in nature and mostly centered round the family. PW-1 stated that the testatrix was concerned about providing for Beena since she lived, unmarried in America. He concedes having talked to the testatrix's doctor in 1995. He states that the testatrix used to call him on a regular basis in the USA and that she used to do this till the end. The witnesses' knowledge was derived from information given by Ritu and Menon. When Lajja Sarin's condition was

stable, such communication was once in a month; but when the condition deteriorated, the communication was weekly or more frequent. PW-1 stated that Dr. Abby used to treat his mother; he states that the testatrix was member of Panchsheel Club, the Delhi Gymkhana Club, and was not totally bed ridden in 1993. He states that she was persuaded to get out of the bed and join others for lunch and dinner and she was fond of knitting. He re-collects that in 1991, she had knitted a blanket for his son. He also submits that the testatrix was aware of his fondness for pickles and sometimes she prepared it, which he used to take back with him to the U.S.A. PW-1 further states that the testatrix was an independent and self-respecting woman, who had her own resources.

13. PW-1 deposes that he heard from Ritu and Menon that the testatrix had been taken to Sir Ganga Ram Hospital sometime in end of March, 1995. He mentions about being unable to speak to the testatrix because she was mostly incoherent; was probably in May or June, 1995. The witness deposes having visited India in October, 1995; he states that the testatrix's condition kept on improving and then there was a setback. According to him, she had difficulty in eating though she did not have any pain as demonstrated by her physician Dr. Abbay, who used to visit her couple of times a week. The witness claims that the testatrix was unable to recognize people and she also went into coma; he clarifies, that she "passed out". He states that during his visit in October, 1995, she had lost her consciousness but when he left on 13.11.1995, she was not in a coma. He also states that the testatrix was not hospitalized during the period 26.10.1995 to 13.11.1995 and that during that time she was at home. PW-1 deposed having left for the USA in 1964; he conceded, while being questioned, in cross examination, that Ritu and Menon had been living in the suit property before 1979, during his father's lifetime; the father died that year. He also admitted that the testatrix had day to day interaction with Ritu, Menon and Ratna. He denied suggestions about not being involved in decisions pertaining to his mother's treatment, or that he did not give any financial contributions. He stated that all members of the family, including he, Ritu, Menon, Beena, and the testatrix's brothers, etc. were involved in such decisions. He states that though he offered to bear the medical expenses in 1993, it was declined.

14. Ritu, deposing as DW-1 spoke about the testatrix having been successfully operated for fluid buildup in her brain in August, 1989. According to her, the testatrix had prior to the execution of the Will dated 6.9.1995 made four other Wills to the best of her knowledge. The first was in 1980; the second was in 1986 and third was in 1989 or 1990 and the fourth Will was in 1995. She denied that in 1989 or any time thereafter the testatrix suffered from any mental or memory lapses, disorientation, or difficulty in speech. She also stated that the testatrix did not go into comma prior to her death and denied informing the plaintiff about Smt. Lajja Sareen's inability to speak or suggesting that there was no point in talking to her. According to DW-1, the plaintiff was given a copy of the Will in October, 1995. In the cross-examination, DW-1 conceded that the testatrix treated all her children with equal love and affection. She displayed awareness about the contents of the Will that had been executed in 1986. She denied the suggestion that the testatrix suffered from lack of co-ordination, disorientation and laps of memory and asserted that even prior to surgery, Smt. Lajja Sareen was absolutely normal. She clarified that prior to surgery she had minor symptoms like muscular pain in the legs. According to Ritu, the testatrix was admitted in March, 1995 in the Sir Ganga Ram Hospital because of low hemoglobin; and WAS diagnosed as a patient of anemia and stomach ulcer. She admitted to writing a letter Ex.PW-1/D1 and stated that she had written to Beena about their mother's health condition in 1985. DW-1 also admitted having written DW-1/PX1. Ritu stated that Dinesh Behl was a family Chartered Accountant; she denied that in May, 1995, the testatrix was completely under her control and could do anything as per her (Ritu's) commands. She states that at that time, the testatrix was not dependant on her and was not bed ridden and used to go out of the house. Ritu states that Navneet Bansal was an employee of the Dinesh Behl, that his employer provided services to the testatrix and, therefore, he used to attend to professional jobs. She states having no idea when the Will dated 6.9.1995 was signed. She denied any knowledge of Shri Rajeev Saxena or ever having met him.

15. DW-2 Dinesh Behl in his affidavit evidence deposes having been introduced to the testatrix by his previous partner Mr. Pawan Sahni, who left the firm in 1987. He also deposes becoming acquainted with the family of the testatrix and that his firm was preparing accounts, doing tax work and giving financial advice to the testatrix, Ritu and Menon. He states that even

the plaintiff sought his advice on financial matters on some occasions when he was in India. DW-2 deposes having been instructed to prepare the testatrix's Will in 1986, which was finalized and signed by her and witnessed by him (DW-2) and Pawan Sahni. Dinesh Behl deposes that in July, 1989, the plaintiff went to his office and informed him about his desire to give his share in the testatrix's Will to Menon, upon which, he, DW-2, informed the plaintiff that it was up to his mother to decide what she wanted to do. He also states that in September, 1989, the testatrix called him and informed that though the plaintiff wanted to give his share to Menon, she wanted to give something and requested that a fresh Will be drafted. DW-2 also states that a draft Will was prepared in 1989 and sent to the testatrix. He mentions that again in 1991, Smt. Lajja Sareen called him and handed over a copy of a codicil which was finalized and sent back to her. He states having been contacted by Smt. Lajja Sareen in February, 1995 and being told that she wanted to change her Will and have a new one drafted. According to the instructions, she wanted to give Beena life interest of the first floor and to give the younger daughter Ritu, Menon and Ratna, her son in law and granddaughter, life interest on the ground floor and that only after the life interest, the property was to be divided into 1/3rd share each in favour of all her three children. DW-2 deposes that sometime in 1995 on her instructions that the Will had to be attested, Mr. Sanjay Beri and Navneet Bansal and Rajeev Saxena working in the tax division of his office, went to the testatrix's house with a notary public. He states that Sanjay Beri gave him a copy of the notarized Will dated 6.9.1995 later.

16. In cross examination, he agreed doing professional work for Ritu and Menon; he also admitted that the testatrix's condition deteriorated from 1988-89. DW-2 says that whenever he interacted with the testatrix, she was coherent and in control of her senses. He disclaimed awareness about lack of her short term memory in 1989, and relapse due to some complications, in 1990; he was aware of the surgery performed on her in 1989. He was aware that the testatrix was treated in the Ganga Ram Hospital in 1995; he however, did not know the details, and was unable to answer why she needed blood transfusion, etc. Though he stated remembering meeting her during April, to August, 1995, he was unsure later, and was not able to remember whether she suffered from dehydration shock. He was cross examined about the deposition in the affidavit regarding drafting of the 1986, a codicil, the circumstances whereby

the plaintiff met him in 1989 and asked that his share should be given to Menon, and so on. He also stated that in February, 1995, the testatrix instructed him telephonically to draft a will. It was stated that though the will was dated February, 1995, when it was sent to the testatrix, she went to have it executed and registered before the Sub-Registrar, in May, 1995; she could not do so, since she did not carry any proof of identification. He denied having met the testatrix on 6-9-1995, or having any knowledge about her state of mind, at that time. He admitted that she was his client.

17. Shri Sanjay Beri deposed as DW-3; he spoke about a will dated 15-5-1995, signed by the testatrix at the Sub-registrar's office, that day and that he signed as an attesting witness. He said that Shri Rajat Chopra was the other attesting witness. According to DW-3, this will dated 15th May, 1995 could not be registered because the testatrix was unable to produce any identification letter or proof. He was ignorant of any other will, to which Navneet Bansal or Shri Dinesh Behl were attesting witnesses.

18. Shri Navneet Bansal deposed as DW-4. He said that the testatrix had signed in his presence, and in the presence of the other witness, Shri Rajeev Saxena. He mentions that Shri Sanjay Beri, a senior member of the firm where he worked, asked him to accompany Shri Rajeev Saxena and a notary public to the testatrix's house, for witnessing the execution of her will; he also states that he went there, and saw the testatrix sign on the will, which was signed by him and Rajeev Saxena, and also attested by the notary public. In cross examination, he stated having met the testatrix on two occasions; he could recollect that she was frail on the date when the will (marked by him as Ex. DW-4/1A) was executed by her. He mentioned that the date on the will had been changed; he denied the suggestion that Ritu and Menon, or either of them were present when the will was signed by the testatrix.

19. The Court had by its order had framed issues on 17.12.1998, on the basis of the pleadings; by subsequent order of 22.03.1999, an additional issue, [No. 1(a)] was framed. The issues on which the parties went to trial are as follows: -

1. Whether Smt. Lajja Sareen executed the Will dated 6.9.1995 as alleged in the written statement of defendant Nos.1-3; if so to what effect?

- 1 (a) Whether the conditions imposed in paragraph No.5 of the alleged Will dated 05.09.1995 are void in law and not binding on the plaintiff and whether the alleged Will is in contravention of Section-114 of the Indian Succession Act?
2. If Issue No.1 is proved against defendant No.1, whether the property is not liable to be partitioned?
3. Relief.

Issue No. 1

20. The plaintiff submits that the testatrix did not execute the Will; it is contended that her medical history for the period 1989-95 discloses deterioration in the general health; she underwent surgery in 1989 whereby a shunt was inserted near the base of her neck. Later there was a blockage and she suffered. The plaintiff points to instances where the testatrix fainted or fell down unconscious and had to be hospitalized.

21. The plaintiff argues that Will (DW-4/1A) was procured by undue influence. It is urged that the deceased testatrix was not of sound disposing mind and was unable to give knowledgeable consent to the contents and execution of the said Will. Here it is contended that the testatrix's health was feeble from the year 1989 onwards and it progressively declined. It is submitted that the testatrix suffered from short-term memory loss, became depressive, occasionally did not recognize people and was suffering from dementia. In fact, around the middle of 1995, she was diagnosed with cancer of her stomach and her condition seriously deteriorated. The plaintiff argues that even though no specific medical evidence, exists, two letters of Ritu, written to the plaintiff and Beena speak volumes of the physical and mental condition of the testatrix. The letter dated 12th November (PW1/D1) states that the testatrix was suffering from dementia brought on by degeneration. Though, no year is mentioned in the letter, it pertains to the year 1989 which may be gathered by the reference to a surgery to insert a shunt in the testatrix's brain, which took place in AIIMS that year; the year was admitted during arguments. The plaintiff refers to another letter dated 20th June (DW1/PX-1) confronted to DW-1, during cross- examination and she admitted that letter. The fact that this letter pertains to the year 1995 is evident as it discusses that the testatrix had been diagnosed with cancer of the stomach. It is submitted that the testatrix was diagnosed with cancer in

June 1995, as admitted in the written statement of Defendant Nos. 1, 2& 3. In fact the year when the letter was written has been admitted during the course of arguments.

22. It is contended that the said facts establish that the testatrix's medical condition was frail and she did not possess the mental capacity to give knowledgeable consent for the execution of a Will. It is also evident from the said letters that the testatrix was completely dependent on Ritu and Menon, for all her needs and thus they were in a position to exercise undue influence and control over her. It is argued that the defendants No.1, 3&4 did not lead evidence to rebut the plaintiff's allegations, with regard to the testatrix's medical condition.

23. According to the plaintiff, the execution of the Will is surrounded by suspicious circumstances. It is submitted that the law here is well-settled; which is that those who propound the Will have to remove the suspicious circumstances and further that if the propounder plays a prominent part in execution of the Will which confer substantial benefits on him or her that in itself is a suspicious circumstance. In this regard, the plaintiff relies on the ruling of the Supreme Court reported as *Gorantla Thataiah v. Thotakura Venkata Subbaiah*, (1968) 3 SCR 473, where the following observations of the Privy Council in *Sarat Kumari Bibi v. Sakhi Chand* 56 IA 62, were quoted and applied:

"the principle which requires the propounder to remove suspicions from the mind of the Court is not confined only to cases where the propounder takes part in the execution of the will and receives benefit under it. There may be other suspicious circumstances attending on the execution of the will and even in such cases it is the duty of the propounder to remove all clouds and satisfy the conscience of the court that the instrument propounded is the last will of the testator."

The plaintiff also relies on the judgments reported as *Shashi Kumar Banerjee –vs- Subodh Kumar Banerjee* AIR 1964 SC 529 and *H. Venkatachala Iyengar v. B.N. Thimmajamma*, 1959 Supp (1) SCR 426. It is argued that fact that Ritu and her family members, the Menon and Ratna are given concurrent life interest in the property which virtually makes it impossible for the bequest in favour of the plaintiff to be enjoyed by him during his life time, points to their being instrumental in execution of such a will with such conditions. Further, the fact that the Will was been drafted by the Chartered Accountant of Ritu and Menon, and attested by his employees

(i.e of Shri Dinesh Bahl) establishes that the defendants No.1 &3 played a prominent part in preparation and execution of the said.

24. Relying on plaintiff's evidence, during his deposition and cross examination, it is contended by the first and third Defendants that the testatrix was in full control of her senses and was in a sound disposing mind, when she executed the will. It is urged that adverse inference has to be drawn against the plaintiff who was fully aware of the treatment of the mother by various doctors, but failed to summon any such witness to support his case that the deceased was not in a fit state of mind to execute the Will of 06.09.1995. It is submitted that Ritu, in her evidence explained about the testatrix's health and her mental capacity. She stated that her mother was in a fit state of mind and in October, 1995 her mother gave the copy of the Will (of 6.9.1995) to her brother (ie the plaintiff). The defendants say that Ritu was cross examined in regard to the Will of 1986 and also about the surgical shunt brought by the plaintiff from USA in August, 1989. Ritu was confronted with two letters Exhibit PW1/ D1 and Exhibit DW1/PX 1. The intrinsic evidence in the said letters is to the effect that the Defendant No.1 attended on her mother and was concerned with her health and therefore expressed her emotional feelings to her sibling. The letter of 1995 clearly establishes that the mother was fully conscious of the surrounding circumstances but the daughter (Defendant No.1) did not want to inform that she was diagnosed of cancer. It is contended that the two letters therefore do not prove that the mother was not in a sound disposing mind or that Ritu and her husband exercised any undue influence.

25. It is submitted that the Defendant Nos.1 and 3 have not played any role in the execution of the Will. The Defendant No.3 is constituted the executor of the Will and on his demise the financial advisor of the Testatrix has been made the executor of the Will. The Will was proved by one of the attesting witness, Mr. Navneet Bansal in terms of Section 63 of the Indian Succession Act, 1925 read with Section 68 of the Indian Evidence Act 1872. It is urged that the contents of the Will in fact would show the real intent of the Testatrix. The Will of 1986, (which has not been proved by the Plaintiff by producing the attesting witness as required under Section 63 (c) of the Indian Succession Act read with Section 68 of the Indian Evidence Act) also stipulated that all the three legal heirs would enjoy the property in the manner stated in the

said document. The intention of the testatrix in the Will of 06.09.1995 is to be gathered by reading the entire Will as *a whole and keeping in view the surrounding circumstances*.

26. The Defendant No.1 and 3 rely upon various judgments in support of their case with regard to proof of Will, its construction, intention of the Testator/ Testatrix etc. It is submitted that the correct principles of construing a will have been discussed in *Navneet Lal v. Gokul*, (1976) 1 SCC 630 where the court held that:

“8. From the earlier decisions of this Court the following principles, inter alia, are well established:

“(1) In construing a document whether in English or in vernacular the fundamental rule is to ascertain the intention from the words used; the surrounding circumstances are to be considered; but that is only for the purpose of finding out the intended meaning of the words which have actually been employed. (Ram Gopal v. Nand Lal¹)

(2) In construing the language of the will the court is entitled to put itself into the testator’s armchair (Venkata Narasimha v. Parthasarathy²) and is bound to bear in mind also other matters than merely the words used. It must consider the surrounding circumstances, the position of the testator, his family relationship, the probability that he would use words in a particular sense... But all this is solely as an aid to arriving at a right construction of the will, and to ascertain the meaning of its language when used by that particular testator in that document. (Venkata Narasimha case and Gnanambal Ammal v. T. Raju Ayyar³)

(3) The true intention of the testator has to be gathered not by attaching importance to isolated expressions but by reading the will as a whole with all its provisions and ignoring none of them as redundant or contradictory. (Raj Bajrang Bahadur Singh v. Thakurain Bakhtraj Kuer⁴)

(4) The court must accept, if possible, such construction as would give to every expression some effect rather than that which would render any of the expressions inoperative. The court will look at the circumstances under which the testator makes his will, such as the state of his property, of his family and the like. Where apparently conflicting dispositions can be reconciled by giving full effect to every word used in a document, such a construction should be accepted instead of a construction which would have the effect of cutting down the clear meaning of the words used by the testator. Further, where one of the two reasonable constructions would lead to intestacy, that should be discarded in favour of a construction which does not create any such hiatus. (Pearey Lal v. Rameshwar Das)

(5) It is one of the cardinal principles of construction of wills that to the extent that it is legally possible effect should be given to every disposition contained in the will unless the law prevents effect being given to it. Of course, if there are two repugnant provisions conferring successive interests, if the first interest created is valid the subsequent interest cannot take effect but a Court of construction will proceed to the farthest extent to avoid repugnancy, so that effect could be given as far as possible to every

testamentary intention contained in the will. (Ramachandra Shenoy v. Hilda Brite Mrs.).”

27. It is argued that the facts alleged to be suspicious circumstances, are not so; in this respect, the defendants emphasize that the plaintiff was living abroad ever since he left India, in 1964. Though he maintained contact with his family members, his settling abroad meant that the testatrix turned to her daughter, Ritu and her son-in law, Menon; they had shifted to the suit property, after the plaintiff's father's death. The evidence also suggests that these two persons (Ritu and Menon) were with her till the end. The defendants argue that the evidence shows that they did not participate in the preparation or execution of the testatrix's will, which was drafted under her instructions. It is argued that she was an independent person, and aware of her surroundings till the end. The attesting witness spoke and corroborated about due execution of the will. In the overall facts, the mere circumstance that the testatrix devised three life estates as intervening before the bequests in favour of her daughters, and son, did not mean that the will was either unnatural, or shrouded in suspicion.

28. Two things emerge from the above discussion. One, the execution of the will is contested; two, the plaintiff alleges that the testatrix was of not of sound and disposing mind, when the will was executed, and that she was “unduly influenced” by Ritu and Menon.

29. Section 63 of the Succession Act and Section 68 of the Evidence Act spell out the essential requirements of wills, and their proof, in a court of law. Section 63 states that:

“63. Execution of unprivileged wills.—Every testator, not being a soldier employed in an expedition nor engaged in actual warfare, or an airman so employed or engaged, or a mariner at sea, shall execute his will according to the following rules—

*(a)-(b) * * **

(c) The will shall be attested by two or more witnesses, each of whom has seen the testator sign or affix his mark to the will or has seen some other person sign the will, in the presence and by the direction of the testator, or has received from the testator a personal acknowledgement of his signature or mark, or of the signature of such other person; and each of the witnesses shall sign the will in the presence of the testator, but it shall not be necessary that more than one witness be present at the same time, and no particular form of attestation shall be necessary.”

Section 68 of the Evidence Act

“68. Proof of execution of document required by law to be attested.—If a document is required by law to be attested, it shall not be used as evidence until one attesting witness at

least has been called for the purpose of proving its execution, if there be an attesting witness alive, and subject to the process of the court and capable of giving evidence:

Provided....”

30. Section 68 of the Evidence Act provides the manner of proof of a document required by law to be attested. It states that such a document cannot be used as evidence till at least one attesting witness is called for the purpose of proving its execution, (if there such an attesting witness is alive), and subject to the process of the court and capable of giving evidence. Such witness has to be examined before the document can be used in an evidence. A combined reading of Section 63 of the Succession Act with Section 68 of the Evidence Act, reveals that the propounder of a will has to prove that the will was duly and validly executed. That can be done by not merely by proving the testator’s signature on the will, but also establishing that attestations were made properly as required by clause (c) of Section 63 of the Succession Act. Section 68 of the Evidence Act does not require the examination of both or all the attesting witnesses. Yet, at least one attesting witness should be examined to prove the due execution of a will as mandated by Section 63. Although Section 63 of the Succession Act requires that a will has to be attested at least by two witnesses, Section 68 of the Evidence Act provides that a document, which is required by law to be attested, shall not be used as evidence until one attesting witness at least has been examined for the purpose of proving its due execution if such witness is alive and capable of giving evidence and subject to the process of the court. Therefore, it is imperative that one attesting witness has to be examined and he (or she) should be in a position to prove the execution of a will. The sole attesting witness so examined, should be able to establish the attestation of a will by him and the other attesting witness for proving there was due execution of the will. (See *Janki Narayan Bhoir v. Narayan Namdeo Kadam*, (2003) 2 SCC 91; *Seth Beni Chand –vs- Kamla Kanwar* AIR 1977 SC 63; *H.Venkatachala Iyengar* (supra)). The first task of the court is to, therefore, see whether the plaintiff proves that the will was not executed in accordance with law.

31. The evidence here is in the form of deposition of one attesting witness, i.e of Navneet Bansal, DW-4. He proved that the will was executed by the testatrix on 6th September, 1995 and attested by another witness, i.e Rajeev Saxena, and also attested by a notary public. In cross

examination, he stated having met the testatrix on two occasions; he could recollect that she was frail on the date when the will (marked by him as Ex. DW-4/1A) was executed by her. He mentioned that the date on the will had been changed from 15-5-1995 to the date when it was executed, i.e 6-9-1995. He denied the suggestion that Ritu and Menon, or either of them were present when the will was signed by the testatrix. DW-4 stated that he was asked by DW-3 to visit the testatrix, for the purpose of attesting and witnessing the will. DW-3 spoke of the will having been attested by him, on 15-5-1995, in the presence of another person, before the Sub-registrar; the registration could not take place due to the testatrix's inability to provide proof of identity. DW-2 spoke about being instructed by the testatrix, on telephone, to prepare a will, in February, 1995, his sending it to her, and his being known to her, and having advised her previously. He conceded to being the adviser of Ritu and Menon, but also stated that the plaintiff too, had sought his advice on some occasion. These materials, in the opinion of the court, prove that Will Ex-DW4/1A was executed by the testatrix, on 6-9-1995, in the presence of two attesting witnesses, who saw her signing it, and also signed on it (attested it) in the presence of each other, and in the presence of the testatrix. This is sufficient proof, contemplated by Section 63 of the Succession Act and Section 68 of the Evidence Act.

32. The next question is whether the will was executed under suspicious circumstances, or whether the plaintiff has established that the testatrix was not of sound mind, or was under the "undue influence" of Ritu and Menon.

33. Apart from the *legal requirements* spelt out by Section 63 (of the Succession Act) and Section 68 (of the Evidence Act) discussed previously, the court which considers a plea about validity (or otherwise) of a will has to see other significant facets. The court has to be satisfied generally that the testator (or testatrix) was of a sound and disposing mind, in possession of his or her senses, with the ability to perceive that the document executed was indeed a will which she or he desired, and was also aware of its contents, which accorded with her (or his) wishes. These essentials were clarified by the Supreme Court, in *H. Venkatachala Iyengar v. B.N. Thimmajamma*, 1959 Supp (1) SCR 426, in the following terms:

"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.

21. Apart from the suspicious circumstances to which we have just referred, in some cases the wills propounded disclose another infirmity. Propounders themselves take a prominent part in the execution of the wills which confer on them substantial benefits. If it is shown that the propounder has taken a prominent part in the execution of the will and has received substantial benefit under it, that itself is generally treated as a suspicious circumstance attending the execution of the will and the propounder is required to remove the said suspicion by clear and satisfactory evidence. 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."

The reasoning in this decision has been applied subsequently in several judgments: *Rani Purnima Debi –vs- Khagendra Narayan Deb* AIR 1962 SC 567; *Surendra Pal –vs- Dr. Saraswati Arora* 1974 (2) SCC 600; *Gurdial Kaur –vs- Kartar Kaur* 1998 (4) SCC 384, etc. Courts have emphasized that usually it is the cumulative effect, rather than a stray circumstance, which would weigh in concluding that a will is shrouded in suspicion. Ultimately, it is the conscience of the court, which should be satisfied that the will is a genuine document, and expresses what is intended by the testatrix or testator, apart from being satisfied that the technical legal requirements mandated by the joint operation of Section 63 of the Succession Act, and Section 68 of the Evidence Act, are fulfilled.

34. In his evidence, the Plaintiff stated that

'the Will of 1995 bears my mother's signature. I am not aware of the fact that whether my mother made and signed another will in May 1995. I identify the signatures of my mother on the aforesaid Will'

The Will was later exhibited as Exhibit DW 4/1 by Mr. Navneet Bansal in his statement recorded on 21.07.2003. The Plaintiff also deposed that his my mother was *"very fond of playing cards"* and that after 1989 she *"did not go to the club on a regular basis as after her operation she was fairly incapacitated."* He further deposed that in 1993 his *"mother was not totally bed ridden"* He submitted that she was found of knitting and she knitted a lot; that she had knitted a blanket for his son. This was in the year 1993 -94, as is apparent from his statement that at that time *"we told her how good the blanket knitted by her was"*. He was cross examined at length regarding his interaction with the mother; the plaintiff admitted that:

- (a) he was been living abroad since 1964.
- (b) he spoke to Dr. Ravi Bhatia to ascertain the medical condition of his mother in the year 1990.
- (c) He spoke to his mother's doctor in 1995, and that he had no contact with *"my mother's doctor between the year 1991 and 1995. My mother used to call me in the United States of America. She used to call me on a regular basis and this continued till the end."*
- (d) The conversation with his mother used to be general about his family; she spoke to his son once or twice.
- (e) Ritu and Menon used to be in touch with him periodically about the testatrix's medical condition, normally once a month, and, later, once a week.
- (f) He visited India in October, 1995; he states that the testatrix's condition kept on improving and then there was a setback.
- (g) Ritu and Menon had been living in the suit property before 1979, during his father's lifetime; the father died that year.
- (h) The testatrix had day to day interaction with Ritu, Menon and Ratna.
- (i) Dr. Abby used to treat his mother;

- (j) the testatrix was member of Panchsheel Club, the Delhi Gymkhana Club, and was not totally bed ridden in 1993.
- (k) His mother was “an independent and self respecting person” having her own resources.
- (l) The testatrix was not hospitalized during the period of his visit in 1995, till 13-11-1995; she was not in a coma, but had “passed out”.

35. The evidence of DW-2 establishes that the testatrix wanted her will to be changed; he drafted it according to her wishes, and sent it to her. An attempt to get one such will registered was made, in May, 1995, but without any success, as the testatrix did not possess any identification proof (evident from the deposition of DW-3). The circumstances whereby the will was executed has been discussed by the court, in the previous part of its findings. No medical evidence has been led about the state of the testatrix’s mind or her condition, either during September, 1989 or before her death. The plaintiff admits knowing who was the testatrix’s physician, and that he used to visit her weekly for checking up her condition; yet he does not attempt to secure his deposition, or present him as a witness. The plaintiff could, if he so wished, have secured evidence from the hospitals where the testatrix had been admitted, to throw more light on these aspects; he did not choose to do so. It is in this context that the court would have to see the two documents, Exhibit PW1/ D1 and Exhibit DW1/PX 1, relied upon heavily by the plaintiff. Extracts of those letters are reproduced below:

Extracts of D.W./ PX-1

*“Dated : 20th June
Dearest Bina,*

It is so sad that a letter to you, after so long, should be one with such unhappy news, but I did not think I could speak on the ‘phone about something that has upset me so much. When you called on Sunday, the doctors had already told me to be prepared for the worst, and even though one may be mentally prepared, that small ray of hope is always there. I kept hoping it would be like the last time – a warning, but a clear biopsy. Well, it almost was. Of the four tissue samples they took, three tested negative one positive. The diagnosis is adenocarcinoma of the stomach. It is a rather virulent form of cancer, but so far, localized to the stomach.

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We have decided not to tell her what she has. It would just break her spirit and destroy her peace of mind, something that will be impossible to recover. Of Course, she will know eventually, when she experiences the changes in her body, but till then, all the doctors, and we too, feel there is just no point in alarming her.

XXXX

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X

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This whole week I have lain awake at night, wondering how it is that one single individual can have three life threatening diseases in her last 25 years. How can it be ? Surely, she has had more than her share of suffering, paid her dues, squared her accounts, I just do not know how I am going to face it, face telling her, whenever, see the paid and fear in her eyes.... I seem to have run out of strength, feel quite alone. Feel unbearably sad. How to be 'normal' with her when my heart is sinking ? And these last few years, she has been so peaceful, so calm with herself and her life. Why did she have to be tested for forbearance once more ? I just wish there was a brief and quick way of dealing with this, but there is not of course.

We have cancelled our trip – neither the heart nor the mind to go. I had to make a feeble excuse for Mummy, but she is so 'detached' in a way that nothing comes as a surprise to her in the way that one anticipates. She is happy of course that we are around but as she says 'only because you worry about me. I am not worried. I only worry 'only because you worry about me. I am not worried. I only worry that your plane wont crash, that you will come back safe'.

Extracts of PW/DW 1

"November 12

My dear Bina and Pappal.

Xxx

xxxxx

xxxx

As I told Bina over the phone, Mummy is no better today than she was when she went in for the shunt correction. To the extent that the scan I am sending you shows that there is no fluid build up and the ventricles are normal ('beautiful' as Bhatia put it), it is an indication that the shunt is functioning well and there is no problem with that. But there has been no improvement in the other symptoms – disorientation, difficulty in speaking, trouble chewing and swallowing, etc. – except that she has bladder control now, and so obviously that activity of the

brain has not been impaired. After fairly detailed discussion with Dr. Bhatia, Sneh Bhargava and Kanta this is what we have been able to come up with.

What Mummy is suffering from is a fairly common complication of TB Meningitis, whereby there is an increasing and progressive calcification of brain tissue. (in fact, there is marked increase in the calcification between August, when the shunt was put in, and now).

XXXX

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XXX

She has, for example, been complaining of double vision, memory lapses and so on for a while. The really dramatic difference now is the speech and even that is more noticeable only because she speaks very little, not because she is indistinct or incoherent. On the contrary, she can follow all commands, all conversations and also talks sensibly when she wants to. It is just that she has some trouble articulating and actually talks very little. If she were to talk normally then the decline may not seem so dramatic. Added to all this is the fact that hers is now abnormal brain, she is also suffering some from dementia and ataxia, and atrophy. So the question is – can she be helped with medication? Well, they are reluctant to give her strong drugs because they may trigger off renewal of TBM and the benefit may not be worth the risk. In fact, she has been on medication for a week but it has not helped at all.

Xxx

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xxx

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The major problem now is her complete dependency for everything. She has to be fed, cannot manage to eat solid or soup, sometimes even chokes on semi-solids or soup, and of course, has to be helped to the bathroom etc. She can walk though with help, so she is sort of mobile. She normally prefers to eat with us at the table unless she is tired or has eaten earlier. We have an attendant for the night – the same woman who helped out for a couple of days when she first had the shunt inserted – and I am trying to organize another person to help out during the day, because it really is a more or less full time job. But it is not easy to get any one- arduous and boring work, long hours, and so on....”

36. PW-1/DW 1, as is evident facially, appears to have been written soon after the surgery, in 1989, when the shut was inserted; Ex. DW-1/PX-1 was written in 1995. Both letters were written by Ritu, to her sister, Beena. They reflect the daughter’s anguish at her mother’s condition, and her sharing this with a sister. They undoubtedly contain general references to the poor health condition of the testatrix, her constant suffering, temporary respite after the surgery, and so on. The earlier letter, PW/DW1 mentioned that the testatrix suffered from

dementia; in her examination, DW-1 stated that these symptoms existed for a few months. She was cross examined in detail, about the testatrix's medical condition. She denied ever telling the plaintiff that their mother was unable to speak; she deposed that when the plaintiff went visiting his mother in October, 1995, he was given a copy of the will. She identified PW-1/X5 and PW-1/X6, which were written by the mother in the normal course. She stated that prior to her surgery (in 1989) the testatrix had minor symptoms like muscular weakness in the legs and that in March, 1995 she was hospitalized due to low haemoglobin. She denied that the testatrix was under her (Ritu's) control, or that she was bed-ridden at the time when the Will was executed.

37. The complete picture which emerges from the oral and documentary evidence is that the testatrix had a medical history; she underwent surgery in 1989. She appears to have been suffering from some ailment or the other; she had to be admitted to the Ganga Ram Hospital in early 1995. She was "frail" when the will was signed by her in September, 1995. However, the plaintiff admits that though she had difficulty in speech, when he visited her in October, 1995, she started improving; he also states that she was not in coma, as was alleged earlier, but that she had passed out. Her slowness, difficulty in speech, etc may have been symptoms – though the court cannot conclude that she suffered from dementia, yet even if that condition were to be assumed, the deposition of disinterested testimony of DW-2, DW-3 and DW-4 establish that she was in her full senses during the period February to September, 1995. The plaintiff candidly stated that she was a self respecting and independent individual. The evidence of DW-2 establishes that the testatrix had no less than four wills prepared; though suggestions were made that Ritu and Menon were involved in the making and execution of the will, there was no proof for those allegations. On the other hand, the defendants' witnesses consistently deny that the said two persons were involved in the execution of the will, or were present at the time. Though the plaintiff knew which doctor treated his mother, and also had talked to her specialist earlier, he did not produce either of them in support of his allegations about her mental (in)capabilities.

38. It is well established that the intention of a testator, in executing a will, is to disturb or interfere with the normal line of succession. Therefore, unless something unusual and grossly

unfair is shown in the disposition, the mere fact that some heirs are excluded is not a ground to conclude that it was executed under suspicious circumstances. (See *Rabindra Nath Mukherjee – vs- Panchanan Banerjee* 1995 (4) SCC 459; *Sadasivam-vs- K. Doraiswamy* 1996 (8) SCC 624; *P.P.K. Gopalan Nambiar –vs- P.P.K. Balakrishnan Nambiar* 1995 Supp (2) SCC 664). In *Vrindavanibai Sambhaji Mane v. Ramchandra Vithal Ganeshkar*, (1995) 5 SCC 215 the Supreme Court listed out what are the “usual suspects” in terms of unnatural circumstances which would make courts pause, and consider whether such features are “suspicious circumstances”:

“(1) The propounder taking a prominent part in the execution of a Will which confers substantial benefits on him; (2) Shaky signature; (3) A feeble mind which is likely to be influenced; (4) Unfair and unjust disposal of property..”

39. In this case, as noticed earlier, Ritu was caring for the testatrix on a day to day basis, providing for emotional, moral and physical support. The plaintiff no doubt, used to visit his mother. Her association was, however more immediate; the materials on record show that she lived with the testatrix for about 16 years, after her father’s death. In all probability, Ratna was a young child when Ritu’s family shifted to the suit property. The plaintiff had lived away from his mother – indeed immediate family, for more than 30 years, till the time of his mother’s death. The testatrix probably knew that he owned properties, and other assets, in the United States of America. She also was concerned for Beena, who had not been married; she was living in the United States. This anxiety is reflected in the previous will, of 1986, where equal rights were given to all heirs. Like in the case of Ritu and Menon, she also provided for a life estate for Beena, in respect of the first floor of the suit property, in the will in this case. The evidence also suggests that she had prepared three other wills; she instructed DW-2 to prepare another one, which he did in February. The evidence of DW-2, DW-3 and DW-4 establish that the testatrix was in a mentally sound condition to execute the will. The plaintiff acknowledges that she was an independent and self respecting person. In these overall circumstances, a parent’s desire to make provision for the child who was immediately with her – in this case, for over 15 years, and undeniably ministered her needs for what were the most difficult years of her life, is not “unnatural” – it is perhaps to the contrary. This natural desire is underlined by her provisioning for her unmarried daughter, who lived – at that time, abroad. Yet, she did not forget her son,

nor does the will show any negative emotion; the Will perhaps recognizes that he was unlikely to return and settle in India. Therefore, she provided an absolute interest, equal to his siblings, to be enjoyed by all of them, after the interests of Ritu, Menon, and Ratna, in relation to the ground floor, and after the life interest of Beena, in respect of the first floor.

40. The lack of any corroborative evidence in the form of deposition of the testatrix's doctor, or indeed any medical records, is also significant. The diary maintained by her containing entries for the months of September and October, 1995 (Ex. PW-1/X4 to Ex. PW-1/X6) show that the testatrix used to take interest in her affairs, and enter the monthly expenses. Ex. PW-1/X1 is apparently a letter written by the plaintiff's wife to the testatrix on 31-1-1994; this reveals the plaintiff's awareness that his mother could read letters, at least at that time. He concedes that she was not in a coma, during his visit in October and November, 1995; he does not say that she was suffering from dementia.

41. Other letters and correspondence on the record establish the existence of a filial bond between the plaintiff and his mother; it was also apparently shared by his son, and his wife, Terry. The evidence and some of the materials no doubt show that despite two of her children (the plaintiff and Beena) living abroad, family ties were strong – the letters relied on by the plaintiff to show the medical condition of his mother, written by Ritu – also reveal her concern for the mother, and her desire to share it with both the siblings. The profile which emerges from all these documents, and materials (about the testatrix) is that of an independent and self respecting individual, determined to live her life despite the many medical setbacks she was subjected to, with dignity, mindful of her surroundings. Her love and affection, enveloped her children as to be able to overcome barriers of distance and time; at the same time she was concerned that those who had shared their lives and cared for her in the most difficult part of her life, should be given some recognition. All these, in this court's opinion, do not point to a "feeble mind" capable of being influenced, or someone who could be cajoled or coerced to do another's bidding. The plaintiff relies on a will of 1986; even its term grants all the children rights; Ritu and the plaintiff share equal rights for the ground floor, and Beena, for the first floor. All are subjected to a kind of pre-emptive condition, in the event of their deciding to sell their individual shares. The will of 1995, undoubtedly alters the disposition; yet the court

cannot be unmindful that the testatrix lived and experienced perhaps the most painful part of her life, for the intervening 9 years; surely she was entitled to take that into consideration. In judging what is fair, the court, in such cases, never should adopt any “objective” standard – there can be none, since each individual is coloured by his or her life’s experiences. A parent’s notion of what is fair is exclusively his or her’s; the court has to see the overall circumstances, and satisfy its conscience that the document presented is indeed a will, duly executed in accordance with law, and truly reflects the choice of a free mind, uninfluenced by any vitiating circumstances.

42. In the overall facts of this case, this court concludes that the Will Ex. DW-4/1A was validly executed by the testatrix, Lajja Sarin, who was of sound and disposing mind, and was not prepared or executed under suspicious circumstances. This issue is accordingly answered.

Issue No. 1(a) and 2

43. These issues are to be taken together, since a finding on one will impact on the potential relief that can be granted in the other. The plaintiff argues that a bare reading of Section 114 of the Succession Act clarifies that no bequest is valid whereby the vesting of the thing bequeathed may be delayed beyond the life time of one or more person living at the testator’s death. It is argued that in this case, the plaintiff is the eldest of the three children of the testatrix. At the time of filing of the suit in 1996 he was 55 years, Ritu was 48, Beena was 53, Menon was 55 years and Ratna was 21 years. If the life interest of the defendants, are to be upheld, says the plaintiff, he would most certainly be unable to avail of the bequest in his favour, during his life time.

44. The plaintiff relies on the ruling of the Supreme Court in *Mauleshwar Mani & Ors. Vs. Jagdish Prasad & Ors* (2002) 2 SCC 468 where it was held that if, in a Will a testator bequeats his absolute interest in favour of a person then the subsequent bequest which is repugnant to the first bequest would be invalid. It was also held that if some property is given absolutely to one person but later on other directions about the same property are given which conflict with and take away from the absolute title given in the earlier portion, in such a conflict, the earlier

disposition of absolute title shall prevail and later directions should be disregarded. Applying the above principle to the Will of 1995, the plaintiff argues, it is evident that once an absolute bequest has been made by the testatrix in favour of her three children – the plaintiff, Ritu and Beena, the subsequent conditions imposed in Para 5 of the Will are bad in law and cannot be given effect to. It is contended that the defendants' position that the life interest so created is valid by reason of Sections 115 and 119 of the Act, is incorrect.

45. It is urged that firstly, Section 115 has no application as it comes into play where the bequest is made to a class of persons, with regard to some of whom it is inoperative by reason of Sections 113 and 114. However with regard to the Will in question there is no "class" to whom the bequest has been made. In this context, argues the plaintiff, a "class" has been defined (in *Sanjiva Row's – Indian Succession Act* (7th Edition)) as

"A number of persons are popularly said to form a class when they can be designated by some general name as children, grandchildren, nephews."

About applicability of Section 119, the plaintiff says that the provision states that whereby the terms of the bequest the legatee is not entitled to immediate possession of the thing bequeathed, a right to receive it at the proper time shall unless a contrary intention appears by the Will, become vested in the legatee on the testators' death. The plaintiff argues that in the will in question, a contrary intention has clearly been expressed. The Will states that

"The right to these portions of the house specified hereinabove shall vest in my heirs either on the cessation of the life interest as mentioned above or upon the above named beneficiaries agreeing to give up their interest during their lifetime"

The plaintiff points out that the Will was not drafted by a layman; but by Mr. Dinesh Bahl, a Chartered Accountant (of defendant No.1 & 2).

46. It is also argued that Sections 112 to Sec 118 are under Chapter VII of the Act – "*Of Void Bequests*", whereas Section 119 occurs under Chapter VIII – "*Of The vesting of Legacies*". Therefore it is urged that Chapter VII would not be controlled by Chapter VIII as it (Chapter VII) deals with void bequests. Once a bequest is void, says the plaintiff, there is no question of its further interpretation. Further the exceptions to Sections 113 and Sec 114 are enumerated in

Chapter VII itself by virtue of Sections 115 and 116. Thus there is no question of reading provisions of Chapter VIII as carving out a new exception to the provisions of Chapter VII.

47. The plaintiff lastly, submits that Section 138 provides that where a fund is bequeathed absolutely to or for the benefit of any person, but the Will contains a direction that it shall be applied or enjoyed in a particular manner, the legatee shall be entitled to receive the fund as if the Will contains no such directions. Reliance is placed on the decision in *Umrao Singh –vs- Baldev Singh* AIR 1933 Lahore 201. It is contended therefore that on an application of Section 138 to the Will in question, the life interests given in para 5 of the Will should be ignored and the absolute bequest in the initial portion of para 5 should be treated as valid bequests.

48. As observed earlier, the defendants rely on the ruling in *Navneet Lal alias Rangi Vs. Gokul & Ors.* (1976) 1 SCC 630; they also rely upon a Full Bench ruling of this Court in *Maj. Gen. Rajinder Singh Chowdhary Vs. S. Manjit Singh Chowdhary & Ors.* 88 (2000) DLT 173 (FB). The defendants also rely upon *Raj Bajrang Bahadur Singh –vs- Thakurain Bakhtraj Kuer* AIR 1953 SC 7, to say how a will should be construed. It is argued that the will gives life interest in respect of the ground floor to Defendant No.1, 3 and 4 and the Defendant No.2 is given life interest in the first floor of the suit property. The interest devolves upon all the testatrix's three legal heirs subject to such life interests (mentioned in para 5 of the Will). The Defendant No.1 3 and 4 submit that the vesting of the property took place in favour of all the three legal heirs on the date of the demise of the testatrix, and not after the extinction of the life interests.

49. It is argued that the daughters are given life interest in the portions of the property and the plaintiff is excluded from taking possession of any portion of the property, during such time. The postponement of possession of the property, in favour of the plaintiff, say the defendants, is not postponement of vesting of the property. It is submitted that the testatrix's intention appears to be to secure her two daughters with regard to their residence while ensuring that the property remained in the family. She also knew that her son who lived in USA with his family was unlikely to live in India. The defendants urge that the testatrix also intended that all her children should get equal share in case they decide to sell the property. In view of this knowledge and intention, the provisions of Section 114 of the Indian Succession Act are not

applicable as there is no postponement of vesting of the property. In fact the provisions of Section 119 are directly applicable to the present case.

50. The defendants urge that succession is never kept in abeyance. In the present case the succession took place immediately on the demise of the testatrix. The postponement of possession would not mean that succession was postponed. The residual vesting of the property took place and the plaintiff's contention that the three persons mentioned in the Will who had life interest would live beyond his lifetime, would not make the will void. As per Section 119 of the Indian Succession Act the legal heirs of the plaintiff would be entitled to his share in case he pre deceases defendant No.1, 3 and 4. It is submitted that as by virtue of Section 57 read with Schedule III of the Indian Succession Act, some its provisions are applicable to Hindu Wills. Section 114, 115 and 119 of the said Act, would be applicable in the given facts of the case. Section 87 is relevant as it stipulates that the Testator's intention should be effectuated as far as possible. The defendants therefore contend that the Will in question cannot be declared void. In support of the above contention the Defendants rely upon *Dr. Mahesh Chand Sharma Vs. Raj Kumari Sharma* (1996) 8 SCC; *Aniruddha Mitra –vs- Administrator General* AIR 1949 PC 244. It is submitted that the suit for partition is liable to be dismissed keeping in view the fact that the Will of the Testatrix is binding on the parties concerned and is to be given effect to. The Defendants rely upon *Muniananjappa & Ors. Vs. R.Manual & Another* 2001 (5) SCC 363.

51. From the above discussion, it is evident that the parties have conflicting claims as to the validity of the Will, since it contains certain conditions. Before analysizing them or semantically typecasting those directions, it is necessary to extract the relevant part of the Will, Ex. DW4/1A. The testatrix, after the introductory part, and making the bequests in respect of movables and investments, says that:

“ 5. I own the house No. N-84, Panchshila Park, New Delhi 110017. I bequeath the above house equally to my children Ritu Menon, Bina Sareen and Sarvajit Sareen, subject to the following stipulations:

- During the lifetime of my daughter Ritu or her husband Mr. A.G.K.Menon or her daughter Ratna, they will together or separately have the right to*

live in the ground floor of the house. My other daughter Bina during her lifetime shall enjoy similar rights over the first floor of the house. Between the above beneficiaries, they will have undivided right to use the common facilities of the house, say terrace, garden, garage and/or servant quarters.

- *My daughter Ritu or her husband, Mr. A.G.K. Menon or her daughter, Ratna will have the right to construct any superstructures over the garage and the servant quarters.*

The right to these portions of the house specified hereabove shall vest in my heirs either on cessation of the life interest as mentioned above or upon the above named beneficiaries agreeing to give up their life interest during their lifetime.

6. In the event of the sale of the house by all co-owners the sale proceeds will be divided equally between them, i.e one-third each..."

52. The relevant provisions of the Succession Act, relied upon by the parties in this case, are set out below:

"Section 87. *The intention of the testator shall not be set aside because it cannot take effect to the full extent, but effect is to be given to it as far as possible.*

Section 111. *Where a bequest is made simply to a described class of persons, the thing bequeathed shall go only to such as are alive at the testator's death-*

Exception :-If property is bequeathed to a class of persons described as standing in a particular degree of kindred to a specified individual, but their possession of it is deferred until a time later than the death of the testator by reason of a prior bequest or otherwise, the property shall at that time go to such of them as are alive, and to the representatives of any of them who have died since the death of the testator.

Section 112, *Where a bequest is made to a person by a particular description, and there is no person in existence at the testator's death who answers the description, the bequest is void.*

Exception.-If property is bequeathed to a person described as standing in a particular degree of kindred to a specified individual, but his possession of it is deferred until a time later than the death of the testator, by reason of a prior bequest or otherwise; and if a person answering the description is alive at the death of the testator, or comes into existence between that event and such later time, the property shall, at such later time, go to that person, or, if he is dead, to his representatives.

Section 113. *Where a bequest is made to a person not in existence at the time of the testator's death, subject to a prior bequest contained in the will, the later bequest shall*

be void, unless it comprises the whole of the remaining interest of the testator in the thing bequeathed.

Section 114. No bequest is valid whereby the vesting of the thing bequeathed may be delayed beyond the lifetime of one or more persons living at the testator's death and the minority of some person who shall be in existence at the expiration of that period and to whom, if he attains full age, the thing bequeathed is to belong.

Illustrations

(i) A fund is bequeathed to A for his life and after his death to B for his life; and after B's death to such of the sons of B as shall first attain the age of 25. A and B survive the testator. Here the son of B who shall first attain the age of 25 may be a son born after the death of the testator; such son may not attain 25 until more than 18 years have elapsed from the death of the longer liver of A and B; and the vesting of the fund may thus be delayed beyond the lifetime of A and B and the minority of the sons of B. The bequest after B's death is void.

(ii) A fund is bequeathed to A for his life, and after his death to B for his life, and after B's death to such of B's sons as shall first attain the age of 25. B dies in the lifetime of the testator, leaving one or more sons. In this case the sons of B are persons living at the time of the testator's decease, and the time when either of them will attain the age of 25 necessarily falls within own lifetime. The bequest is valid.

(iii) A fund is bequeathed to A for his life, and after his death to B for his life, with a direction that after B's death it shall be divided amongst such of B's children as shall attain the age of 18, but that, if no child of B shall attain that age, the fund shall go to C. Here the time for the division of the fund must arrive at the latest at the expiration of 18 years from the death of B, a person living at the testator's decease. All the bequests are valid.

(iv) A fund is bequeathed to trustees for the benefit of the testator's daughters, with a direction that, if any of them marry under age, her share of the fund shall be settled so as to devolve after her death upon such of her children as shall attain the age of 18. Any daughter of the testator to whom the direction applies must be in existence at his decease, and any portion of the fund which may eventually be settled as directed must vest not later than 18 years from the death of the daughters whose share it was. All these provisions are valid.

Section 115. If a bequest is made to a class of persons with regard to some of whom it is inoperative by reason of the provisions of Section 113 and Section 114, such bequest shall be (void in regard to those persons only and not in regard to the whole class).

Illustrations

(i) A fund is bequeathed to A for life, and after his death to all his children who shall attain the age of 25. A survives the testator, and has some children living at the testator's death. Each child of A living at the testator's death must attain the age of 25 (if at all) within the limits allowed for a bequest. But A may have children after the testator's decease, some of whom may not attain the age of 25 until more than 18 years have elapsed after the decease of A. The bequest to A's children, therefore, is operative as to any child born after the testator's death, [and in regard to those who do not attain the age of 25 within 18 years after A's death, but is inoperative in regard to the other children of A].

(ii) A fund is bequeathed to A for his life, and after his death to B, C, D and all other children of A who shall attain the age of 25. B, C, D are children of A living at the testator's decease. In all other respects the case is the same as that supposed in Illustration (i). Although the mention of B, C and D does not prevent the bequest from being regarded as a bequest to a class, it is not wholly void. It is operative as regards any of the children B, C or D, who attains the age of 25 within 18 years after A's death.

Section 116. *Where by reason of any rules contained in Sections 113 and 114, any bequest in favour of a person or of a class of persons is void in regard to such person or the whole of such class, any bequest contained in the same will and intended to take effect after or upon failure of such prior bequest is also void.*

Section 119. *Where by the terms of a bequest the legatee is not entitled to immediate possession of the thing bequeathed, a right to receive it at the proper time shall, unless a contrary intention appears by the will, become vested in the legatee on the testator's death, and shall pass to the legatee's representatives if he dies before that time and without having received the legacy, and in such cases the legacy is from the testator's death said to be vested in interest.*

Explanation.—An intention that a legacy to any person shall not become vested in interest in him is not to be inferred merely from a provision whereby the payment or possession of the thing bequeathed is postponed, or whereby a prior interest therein is bequeathed to some other person, or whereby the income arising from the fund bequeathed is directed to be accumulated until the time of payment arrives, or from a provision that, if a particular event shall happen, the legacy shall go over to another person.

Illustrations

- (i) A bequeaths to B 100 rupees, to be paid to him at the death of C. On A's death the legacy becomes vested in interest in B, and if he dies before C, his representatives are entitled to the legacy.
- (ii) A bequeaths to B 100 rupees, to be paid to him upon his attaining the age of 18. On A's death the legacy becomes vested in interest in B.
- (iii) A fund is bequeathed to A for life, and after his death to B. On the testator's death the legacy to B becomes vested in interest in B.
- (iv) A fund is bequeathed to A until B attains the age of 18 and then to B. The legacy to B is vested in interest from the testator's death.
- (v) A bequeaths the whole of his property to B upon trust to pay certain debts out of the income, and then to make over the fund to C. At A's death the gift to C becomes vested in interest in him.
- (vi) A fund is bequeathed to A, B and C in equal shares to be paid to them on their attaining the age of 18, respectively, with a proviso that, if all of them die under the age of 18, the legacy shall devolve upon D. On the death of the testator, the shares vested in interest in A, B, and C, subject to be divested in case A, B and C shall all die under 18, and upon the death of any of them (except the last survivor) under the age of 18, his vested interest passes so subject, to his representatives.

53. As to the manner of construing a will, the decision of the Supreme Court in *Navneet Lal alias Rangji* (supra) had crisply distilled the various principles, gleaned from earlier decisions (*Ram Gopal –vs- Nandlal* AIR 1951 SC 139; *Venkatanarasimha –vs- Parthasarathy* 15 Bom LR 1010; *Gnanambal Ammal –vs- T. Raju Ayyar and Ors.* AIR 1951SC 103; *Raja Bajrang Bahadur Singh* (supra) AIR 1953 SC 7; *Peary Lal –vs- Rameshwar Dass* AIR 1963 SC 1703 and *Ramachandra Shenoy –vs- Hilda Brite* AIR 1964 SC 1323). Thus, firstly the fundamental rule is to ascertain the intention from the words used; yet that is only for the purpose of finding out the

intended meaning of the words which have actually been employed. Secondly, while interpreting the language of a will the court is entitled to put itself into the testator's armchair and is bound to bear in mind also other matters than merely the words used. It must consider the surrounding circumstances, the position of the testator, his family relationship, the probability that he would use words in a particular sense; all this is to aid the correct construction of the will, and to ascertain the meaning of its language when used by that particular testator in that document. Thirdly, the intention of the testator is to be gathered not by attaching importance to isolated expressions but by reading the will as a whole with all its provisions and ignoring none of them as redundant or contradictory. Lastly the court has to, so far as possible, accept, a construction that would give to every expression some effect rather than that which would render any of the expressions inoperative. The court will look at the circumstances under which the testator makes his will, such as the state of his property, of his family and the like. Where apparently conflicting dispositions can be reconciled by giving full effect to every word used in a document, such a construction should be accepted instead of a construction which would have the effect of cutting down the clear meaning of the words used by the testator. Also, where one of the two reasonable constructions would lead to intestacy, that interpretation should be discarded in favour of a construction which does not create any such hiatus.

54. In *Usha Subbarao –vs- B.E. Vishveshwaraiah* AIR 1996 SC 2260, the Supreme Court had to decide whether an intervening life estate (in a slightly involved and complex will) favouring the testator's wife, postponed vesting of the properties to his sons; one of them predeceasing the widow. The trial court decreed the pre-deceased son's suit, for his share, after the widow's death; however, the High Court set aside the decree, holding that the vesting took place later, and was therefore, void. The Supreme Court restored the trial court's decree, holding that the bequest did not create a contingent interest, but that property vested upon the testator's death, enjoyment being postponed. It was observed that:

"17. Does the said bequest cease to be a bequest for a vested interest for the reason that the right to separate enjoyment in respect of his share in the properties mentioned at items Nos. 2, 3 and 4 in Schedule "A" and the properties specified in Schedules "C" and "D" is not available till the legatee obtains majority and the right to separate enjoyment

of his share in the property mentioned at item No. 1 in Schedule "A" and the properties specified in Schedule "B" is not available during the life time of Smt. Nadiga Nanjamma ? In our opinion, this question must be answered in the negative. Under the English law where a condition can be family read as postponing merely the right of possession or of obtaining payment, transfer or conveyance, so that there is an express or implied distinction between the time of **vesting** and time of enjoyment, the gift is held to be vested at the earlier date if the rest of the context allows. But where the **postponement** of the gift is on account of some qualification attached to the donee, the gift is prima facie contingent on his qualification being acquired. A gift to a person "at", "if", "as soon as", "when" or "provided" he attains a certain age, without further context to govern the meaning of the words, is contingent and vests only on the attainment of the required age, this being a quality or description which the donee must in general possess in order to claim under the gift. But if the words of a gift express a distinction between the gift itself and the event denoting the time of payment, division or transfer, and this time is the attainment by the donee of the age of twenty-one years or other age or is any other event which, assuming the requisite duration of life, must necessarily happen at a determinable time, then prima facie the gift is not contingent in respect of that event. (See : Halsbury's Laws of England, 4th Edn., Vol. 50, paras 591, 592 and 604, at pp. 396, 397, 405. The same is the position in India and it has been succinctly brought out in illustration (ii) to Section [119](#) and illustration (ii) to Section [120](#) of the Indian **Succession** Act. The said illustrations are as under :

Illustration (ii) to Section [119](#)

(ii) A bequeaths to B 100 rupees, to be paid to him upon his attaining the age of 18. On A's death the legacy becomes vested in interest in B.

Illustration (ii) to Section [120](#)

(ii) A sum of money is bequeathed to A "in case he shall attain the age of 18," or "when he shall attain the age of 18." A's interest in the legacy is contingent until the condition is fulfilled by his attaining that age.

18. In the present case, the testator in the **Will** has not used words similar to those contained in illustration (ii) to Section [120](#). The testator after making the bequest in favour of the legatees has given the direction that a son on attaining majority could demand partition according to the prevailing Hindu law in force at that time to get his portion in items Nos. 2, 3 and 4 in Schedule "A" and the thrift deposit standing in his name as mentioned in Schedule "C" as well as his portion in the properties specified in Schedule "D". This is a case where the testator has made a distinction between the gift itself and the event denoting the time of payment, division or transfer, viz., attaining the age of majority. It falls in the same category as illustration (ii) to Section [119](#) of The Indian **Succession** Act and must be held to be a bequest of vested interest in respect of these properties.

19. Similarly, the direction in the **Will** excluding the property at item No. 1 of Schedule "A" and the properties mentioned in Schedule "B" for partition during the life time of Smt. Nadiga Nanjamma and that Smt. Nadiga Nanjamma would be entitled to reside in the house at item No. 1 of Schedule "A" and to use the income from the properties mentioned in Schedule "B" for her own maintenance if she lives separate from any of the major sons, only creates a limited life interest in the said properties in favour of Smt. Nadiga Nanjamma and it does not have the effect of rendering the bequest in respect of those properties as a contingent bequest and it continues to be a bequest of a vested interest in those properties. Reference in this Context may be made to the decision of the Privy council in *Rewun persad v. Jiadha Beeby* (1846) 4 M.I. A. 137, where the testator gave his wife a life estate and after her death one moiety of the estate to his brother and the other moiety to his two sons. The brother and one of the sons died during the life time of the widow. It was held that as the share of the sons were vested the widow of the pre-deceased son was entitled to succeed to her husband's share. Similarly, in *Bhagabati v. Kalicharan* (1911) 38 I.A. 54, the bequest was to the mother for life, then to the wife for her life and then to the nephews. The Privy Council rejected the contention that there was no vesting in the nephews until the death of the survivor of the mother and the widow and held that the nephews were intended to take a vested and transmissible interest on the death of the testator though their possession and enjoyment were postponed. The same position is reiterated in illustration (iii) to Section [119](#) which reads as under:

Illustration (iii) to Section [119](#)

(iii) A fund is bequeathed to A for life, and after his death to B. On the testator's death the legacy to B becomes vested in interest in B."

55. Earlier, in the Privy Council decision, *Rewun Persad v. Jiadha Beeby* (1846) 4 M.I. A. 137, the testator gave his wife a life estate and after her death one moiety of the estate to his brother and the other moiety to his two sons. The brother and one of the sons died during the life time of the widow. It was held that as the share of the sons were vested the widow of the pre-deceased son who was entitled to succeed to her husband's share. Likewise, in *Bhagabati v. Kalicharan* (1911) 38 I.A. 54, the bequest was to the mother for life, then to the wife for her life and then to the nephews. The contention that there was no vesting in the nephews until the death of the survivor of the mother and the widow was rejected by the Privy Council which held that the nephews were intended to take a vested and transmissible interest on the death of the testator though their possession and enjoyment were postponed.

56. The following extract in *Aniruddha Mitra* (supra) reveal what were the facts that the Privy Council had to deal with, as well as its conclusions:

"The material clauses of the will may now be summarized. By Clause 5 the testator has given the right of residence in the family house and the use of the furniture therein to his wife, his son (the appellant) and his wife (unnamed) for their respective lives. By Clause 7 he has allowed maintenance of Rs. 700 per mensem for his wife, to his son and his son's wife Nivanani during their lives. The clause also provides how the allowance is to be distributed in the event of the death of one or other of them. By Clause 8 an annuity of Rs. 4,000 per mensem is granted to the Calcutta University. By Clause 11 if a son is not born to, or adopted by, the appellant during the testator's lifetime the income of the estate after meeting the "expenses aforesaid" was directed to be paid to the Calcutta University until such time as a son shall be born or shall be adopted by the appellant or his wife (not named). By Clause 9 the testator proceeds to make the bequest in favour of person or persons unborn, these persons being a class designated as "the legitimate son or sons " of the appellant "whether natural born or validly adopted." The clause says they shall become entitled to all the rest and residue of my property" (the italics are by their Lordships), i.e., the residuary estate. Then it says that if there is only one son the residue "shall be made over" to him on his completing the age of twenty-one years; if there are more sons than one the residue is to be made over to them in equal shares, on the youngest son attaining the age of twenty-one years. The clause ends with the statement that until the youngest son of such son or sons attains the age of twenty-one years the executor shall pay Rs. 700 to each son for maintenance and expenses.

8. The first question arising on the construction of this clause is, when does the residuary estate mentioned in the clause vest in the legatee? Does it vest the moment a son is born to or adopted by the testator's son (Aniruddha), or does the fact that the estate is to be "made over" on the completion of twenty-one years by the only or youngest son make the vesting contingent, i.e., in other words, does the postponement delay or affect the vesting of the residuary estate? All the judges who have considered this question have come to the conclusion that the residuary estate in Clause 9 became vested the moment a son was born to or adopted by the testator's son, and the completion of twenty-one years by the only or youngest son is not a contingency, but is only a postponement of possession. The arguments advanced by Mr. Khambatta, learned Counsel for the appellant, have not convinced their Lordships that the view taken by the courts in India is wrong. The words "shall become entitled to " used in the first sentence in Clause 9 show that there is a transfer of ownership with a vesting as soon as a testator's son (or sons) is born or adopted, i.e., at the date of the birth or adoption. The expression that the residue shall be "made over" to the person concerned supports the above view. Further, that the legatee when he comes into existence becomes immediately entitled to the estate appears to be clear from Clause 11 of the will. On the death of the testator, unless there is a legatee in existence entitled to the estate, the Calcutta University is entitled to the surplus; but the University's interest immediately comes to an end on the birth of a

son to the appellant or the adoption of a son by him or by his wife. This view is borne out also by Clause 10 of the will. The completion of twenty-one years by the only son or the youngest son before the estate is handed over, relied on by Mr. Khambatta to show there is a contingency, is in their Lordships' opinion not a contingency but amounts only to a postponement of possession and does not affect the actual vesting of the estate."

57. In *Dr. Mahesh Chand Sharma* (supra) the testator created life interest in favour of his wife, of the property, which she could enjoy. After her death, it was to vest in his legal heirs. The court held that the vesting took place immediately, and that enjoyment was postponed:

*"Let us first analyse Section [119](#) from the point of view of the facts of this case and see what does it say. According to it, unless a contrary intention appears from the Will, a bequest made to a legatee, who is not entitled to immediate possession of bequest, gets vested in such legatee on the date of death of the testator. The Explanation appended to the section elucidates the words "unless a contrary intention appears by the Will" occurring in the main limb of the section. The Explanation says inter alia that merely because a prior interest in the bequest is given to some other person, it does not mean that a contrary intention is indicated in the Will. Illustration (iii) is of crucial relevance. It says that where a fund is bequeathed to A for life and after A's death to B, the legacy to B becomes vested in interest in B on the testator's death. If we read the principle underlying the main limb of Section [119](#) along with the Explanation and Illustration (iii), it becomes abundantly clear that the present case squarely falls within the four corners of this section. It fits in neatly into Illustration (iii) to Section [119](#). Here, the Doctor's Lane house is bequeathed to Satyawati for life and after her death to the legal heirs of the testator. Once this is so, the legacy to the legal heirs of the testator became vested in such legal heir(s) on the date of death of the testator - and admittedly on that death, first defendant was the only legal heir of the testator. We may mention that merely because a prior interest in the bequest is given to Satyawati, it cannot be said that the Will indicates a contrary intention within the meaning of the main limb of Section 119. See *Chilanakuri Pullappa v. Gunika Bayanna*, [MANU/AP/0090/1962](#) : AIR1962AP54 and *P. Somasundaram v. K. Rajammal*, A.I.R. (1976) Mad. 295 in this behalf. Now, once the bequest to "the legal heirs of the testator" provided by the Will got vested in the first defendant on the date of the death of the testator, there is no question of the first defendant being divested there from. On the death of Satyawati, the first defendant became entitled to possession of the Doctor's Lane house which had already vested in him....*

...23. We are, therefore, of the opinion that by operation of law, i.e., by virtue of Section [119](#) of the Indian Succession Act, the bequest to "the legal heirs of the testator" vested in the first defendant - he alone being the legal heir of the testator on that date - on the date of death of Ram Nath (testator). The vesting of bequest to "the legal heirs of the

testator" was not postponed till the death of interposer, Satyawati. The language of Clause (i) of the Will cannot be construed otherwise..."

58. *Raja Bajrang Bahadur Singh* (supra) was a case where the testator provided for succession of the properties in favour of one Dhuj Singh, and later his heirs, who were given a specific property or share, without the right of alienation. After extinction of Dhuj Singh's line, the assets were to revert to the testator's estate. The Supreme Court held that:

"the beneficiaries under the will are Dhuj Singh himself and his heirs in succession and to each such heir or set of heirs the rights of malik are given but without any power of alienation. On the total extinction of this line of heirs the properties affected by the will are to revert to the estate. As it was the intention of the testator that the properties should remain intact till the line of Dhuj Singh was exhausted and each successor was to enjoy and hold the properties without any power of alienation, obviously what the testator wanted was to create a series of life estates one after another, the ultimate reversion being given to the parent estate when there was a complete failure of heirs. To what extent such intention could be given effect to by law is another matter and that we shall consider presently. But it can be said without hesitation that it was not the intention of the testator to confer anything but a life estate upon Dhuj Singh in respect of the properties covered by the will. The clause in the will imposing total restraint on alienation is also a pointer in the same direction. In cases where the intention of the testator is to grant an absolute estate, an attempt to reduce the powers of the owner by imposing restraint on alienation would certainly be repelled on the ground of repugnancy; but where the restrictions are the primary things which the testator desires and they are consistent with the whole tenor of the will, it is a material circumstance to be relied upon for displacing the presumption of absolute ownership implied in the use of the word "malik". We hold, therefore, that the courts below were right in holding that Dhuj Singh had only a life interest in the properties under the terms of his father's will."

59. The decision in *Mauleshwar Mani* (supra) concerned facts where a second wife, Smt Sona Devi was given an absolute estate by the testator, followed by subsequent bequests in favour of the testator's daughters' sons. The later bequest was impugned by a subsequent purchaser, as repugnant to the absolute interest created in favour of Smt Sona Devi and, therefore, invalid. It was argued on behalf of the daughter's sons that the will has to be read as a whole and an effort should be made to give effect to the wishes of the testator and, in that view of the matter, all his sons of the daughters inherited the property left behind by him. The Supreme Court held that:

"In Ramkishorelal v. Kamalnarayan AIR 1963 SC 890 it was held that in a disposition of properties, if there is a clear conflict between what is said in one part of the document and in another where in an earlier part of the document some property is given absolutely to one person but later on, other directions about the same property are given which conflict with and take away from the absolute title given in the earlier portion, in such a conflict the earlier disposition of absolute title should prevail and the later directions of disposition should be disregarded. In Radha Sundar Dutta v. Mohd. Jahadur Rahim¹ it was held where there is conflict between the earlier clause and the later clauses and it is not possible to give effect to all of them, then the rule of construction is well established that it is the earlier clause that must override the later clauses and not vice versa. In Rameshwar Bakhsh Singh v. Balraj Kuar² it was laid down that where an absolute estate is created by a will in favour of devisee, the clauses in the will which are repugnant to such absolute estate cannot cut down the estate; but they must be held to be invalid.

11. From the decisions referred to above, the legal principle that emerges, inter alia, are:

(1) where under a will, a testator has bequeathed his absolute interest in the property in favour of his wife, any subsequent bequest which is repugnant to the first bequest would be invalid; and

(2) where a testator has given a restricted or limited right in his property to his widow, it is open to the testator to bequeath the property after the death of his wife in the same will.

12. In view of the aforesaid principles that once the testator has given an absolute right and interest in his entire property to a devisee it is not open to the testator to further bequeath the same property in favour of the second set of persons in the same will, a testator cannot create successive legatees in his will. The object behind is that once an absolute right is vested in the first devisee the testator cannot change the line of succession of the first devisee. Where a testator having conferred an absolute right on anyone, the subsequent bequest for the same property in favour of other persons would be repugnant to the first bequest in the will and has to be held invalid. In the present case the testator Jamuna Prasad under the will had bequest his entire estate, movable and immovable property including the land under self-cultivation, house and groves etc. to his wife Smt Sona Devi and thereafter by subsequent bequest the testator gave the very same properties to nine sons of his daughters, which was not permissible. We have already recorded a finding that under the will Smt Sona Devi had got an absolute estate and, therefore, subsequent bequest in the will by Jamuna Prasad in favour of the nine daughters' sons was repugnant to the first bequest and, therefore, invalid. We are, therefore, of the view that once the testator has given an absolute estate in favour of the first devisee it is not open to him to further bequeath the very same property in favour of the second set of persons."

57. The plaintiff's reliance on the above decision, to this court's mind, is not apt. No doubt, *Ramkishorelal*, relied on by *Mauleshwar Mani* clarifies how a will should be construed, i.e to

give effect to clear bequests and dispositions, wherever they occur. Yet, the Supreme Court also cautioned in *Ramkishorelal*, that all parts of the will should be given effect to and read harmoniously. All these principles were enumerated in *Rangi* (supra), and applied consistently by later decisions, which also rested their conclusions on normative guidance discernable from provisions of the Succession Act. *Mauleshwar Mani* does not notice any of those later decisions, or cite any statutory provision; the court, moreover, was guided by the impact of Section 169 of the UP Zamindari Abolition Act. In these circumstances, the court is of opinion that *Mauleshwar Mani* is not of any assistance for deciding this case.

60. In the will DW-4/1A the testatrix very significantly says that “*I bequeath the above house equally to my children*” and, in the same sentence, states that it (the bequest) is “*subject to the following stipulations:...*” She no doubt uses the term “vest” later on, after talking of the life interests (of Ritu, Menon and Ratna for the ground floor, and of Bina, for the first floor):

“The right to these portions of the house specified hereabove shall vest in my heirs either on cessation of the life interest as mentioned above or upon the above named beneficiaries agreeing to give up their life interest during their lifetime.”

61. The debate here, about date of “vesting” in this court’s opinion, on a proper application of legal principles, can never be guided by the use of one or other term. The entire will has to be seen to gather the true intention of the testatrix, in the present case. The plaintiff argues that DW-2 who drafted the will was no novice, and must have known the difference between an absolute estate and a contingent one, as the different expressions occurring in the instrument (“bequeath” and “vest”) testify. The court, even while considering this aspect, cannot be unmindful of the circumstance that there was no cross examination on that score, or that the said witness, a Chartered Accountant was conversant about the technicalities of the Succession Act. As observed in *Usha Subbarao*, an interest is “vested” when there is immediate right of present enjoyment or a present right for future enjoyment. An interest is said to be contingent if the right of enjoyment is made dependent upon some event or condition which may or may not happen. On the happening of the event or condition a contingent interest becomes a vested interest. The court noticed that the Transfer of Property Act, 1882 as well as the Indian Succession Act, 1925 recognise this difference (between “vested” interest and a

“contingent” interest). “Vested” interest is defined in Section 19 of the Transfer of Property Act, 1882, in the following terms:

“19. Where, on a transfer of property, an interest therein is created in favour of a person without specifying the time when it is to take effect, or in terms specifying that it is to take effect forthwith or on the happening of an event which must happen, such interest is vested, unless a contrary intention appears from the terms of the transfer.

A vested interest is not defeated by the death of the transferee before he obtains possession.

Explanation.—An intention that an interest shall not be vested is not to be inferred from a provision whereby the enjoyment thereof is postponed, or whereby a prior interest in the same property is given or reserved to some other person, or whereby income arising from the property is directed to be accumulated until the time of enjoyment arrives, or from a provision that if a particular event shall happen the interest shall pass to another person.”

Section 21 of the same Act defines a “contingent” interest, as follows:

“21. Where, on a transfer of property, an interest therein is created in favour of a person to take effect only on the happening of a specified uncertain event, or if a specified uncertain event shall not happen, such person thereby acquires a contingent interest in the property. Such interest becomes a vested interest in the former case, on the happening of the event, in the latter, when the happening of the event becomes impossible.

Exception.—Where under a transfer of property, a person becomes entitled to an interest therein upon attaining a particular age, and the transferor also gives to him absolutely the income to arise from such interest before he reaches that age, or directs the income or so much thereof as may be necessary to be applied for his benefit, such interest is not contingent.”

The court said that although the settled principles for construing a will have to be applied, in case of dispute whether an interest is vested or contingent, there should be *“bias in favour of vested interest unless the intention to the contrary is definite and clear”*. Here, the use of one or the other expression cannot be determinative, as it would be tearing a word or phrase out of the overall context of the will. The testatrix was an educated lady, who knew the meaning of a will; she had previously prepared – or instructed the preparation of – three other wills. The 1986 will also places restrictions on disposal of interests – in case the owner of one share or the other desired to transfer it, he or she had to offer it first to the others, and for half the market value. The restriction in this will is in the nature of life interests; in that sense, the character of encumbrance differs. Nevertheless the intention to ensure that the property is kept within the family, by and large, predominates. Clause 6 in the 1995 Will enables all the children of Lajja Sareen, in case they consent to that course, to dispose of the property. This condition, read

together with the opening “bequest” clarify, in this court’s view the intention of the testatrix, that property was to vest in all the heirs immediately; what was postponed, was its enjoyment.

62. The court is unpersuaded by the plaintiff’s submission that Section 114 and 115 occur in another chapter, of the Act, and are to be read apart from the provisions of Chapter VIII – particularly Sections 119 and 120. Firstly, it is a sound rule of statutory interpretation that a statute has to be read as a whole, and all its parts construed harmoniously. Secondly, no one part of the statute can – unless there are clear and unambiguous words indicating the contrary, such as a *non-obstante* clause or a like devise – prevail over another. Thirdly schematic arrangement of provisions may be according to some design by the law-maker, whereby distinct subject matters are dealt with in a pre-arranged manner; this should not cloud the task of interpretation of the terms (even though it may, in some cases, be an internal guide for construction) which is to be done on the basis of the clear terms of the expressions used in the provisions. Lastly, the argument urged by the plaintiff conflicts with his reliance of Section 138, which, concededly occurs in a later part of the Act.

63. As far as Section 138 is concerned, facially, it deals with “fund”. This court notices that the provision had been discussed in *Maj. Gen. Rajinder Singh Chowdhary v. Sardar Manjit Singh Chowdhary*, ILR (2001) 2 Del 249. The court took note of *Shantilal Babubhai & Ors. V. Bai Chhani & Ors.* AIR 1973 Guj 146, a full Bench decision of Gujarat High Court, as well as *Lalit Mohan Mondal Vs. Profulla Kumar Mondal (deceased through his LRs.)* AIR 1982 Cal. 52. *Maj. Gen. Rajinder Singh Chowdhary* was decided after the Full Bench remand in *Maj. Gen. Rajinder Singh Chowdhary Vs. S. Manjit Singh Chowdhary & Ors.* 88 (2000) DLT 173 (FB) (supra). After remand, the court held that the interest of the widow – though expressed in “absolute” terms, in that case, in the will – had to be read along with the bequest made in favour of the other sons; it therefore, overruled applicability of Section 138. This court is in agreement with that approach – in fact the expression “bequest” in this case – strong in itself, to indicate immediately, occurs in the same sentence which qualifies the use and enjoyment as subject to the life interests. Therefore, the court is unable to agree that by applying Section 138, the life interests are to be ignored, and the plaintiff given his interest absolutely.

64. In view of the above discussion, Issue Nos. 1(a) and 2 are found against the plaintiff, and in favour of the defendants.

65. Since all the findings in all the issues have been returned against the plaintiff, the court holds that no relief can be granted. The suit is accordingly dismissed. In the peculiar circumstances, the court does not make any order on costs.

DATED: 14th September, 2009

(S. RAVINDRA BHAT)
JUDGE