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

DECIDED ON: 03.12.2010

+ **TESTAMENTARY CASE-6/1998**
I.A. No.10792/2009

SMT. VIMLA DEVI

..... Petitioner

Through: Mr. S.S. Gautam, Advocates.

versus

STATE

..... Respondent

Through: None.

CORAM:

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 |

MR. JUSTICE S.RAVINDRA BHAT (OPEN COURT)

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1. In the present proceedings, the petitioner seeks a probate of the Will of Late Shri Chander Bhan who died on 26.9.1991. The probate is in respect of two immovable properties i.e. 4315, Gali No.5, Tri Nagar, Delhi and also 4216, Gali No.5, Tri Nagar, Delhi.
2. The pleadings emerging from the case are that the Late Chander Bhan executed a Will on 21.1.1991 (Ex.PW-1/1) in terms of which he bequeathed the said first property to the first petitioner and the second property to the second petitioner. The first petitioner is the testator's daughter in law, (being the widow of his eldest pre-deceased son); the second petitioner is the testator's grandson being the son of the first petitioner. The Will is a registered one. The petitioners contend that the testator was in sound disposing mind and voluntarily bequeathed the properties by duly executing the Will on the date claimed by them in the presence of two attesting witnesses i.e. Mr. L.N. Babbar and Mr. Subhash Chander.

3. The testator had five sons and two daughters. The probate petition is contested by testator's surviving three sons and the legal representatives of the fourth pre-deceased son. His daughters, however, are not contesting the proceedings. The objectors contend that the probate cannot be granted as the Will was forged and that the testator had executed a subsequent Will on 25.8.1991. The testator died on 26.9.1991.

4. The petitioners in support of their case rely upon on the depositions of one of the attesting witnesses Shri L.N. Babbar who has deposed as PW-3. Besides they rely upon the evidence of PW-1, an employee from the Sub-Registrar's office, who produced the relevant registers and original Will, as well as the PW-2, who is the second petitioner in this case. The respondents in support of their case relied upon the deposition of Jai Kishan Dass, Respondent No.3, who deposed as RW-1 and that of Shri P.P. Gupta, who deposed as RW-2.

5. This Court on 14.5.2001, framed only one issue for consideration i.e. whether the Will propounded in this case dated 21.1.1991 is genuine and was validly executed by the testator. When the case was called out, the petitioner's counsel was present. Respondents were unrepresented. However, the petition is complete with all the records including the documents and the depositions of witnesses. In these circumstances, the Court is proceeding to pronounce judgment under the provisions of Order-XVII, Rule-2, CPC.

6. The attesting witness Shri L.N. Babbar deposed as PW-2 and stated that he drafted the Will and had been earlier working in the office of the Sub-Registrar. He identified the Will, which was exhibited as PW-1/1 and stated that it was drafted under the instructions of the testator, who signed the Will at point 'A' in his presence and that of the other attesting witness Shri Subhash Chandra. He identified his signature at point 'B' and that of Shri Subhash Chandra at point 'C', and again he identified another set of signatures of the testator, himself and of Shri Subhash Chandra at points 'E', 'F', 'G' & 'H'. He stated that attestation was in the presence of testator. He further added that the testator appeared to be of sound and disposing mind and was in his senses at the time of signing the Will. He was cross examined as to whether he maintained any records about the Wills drafted by him and who used to consult him in this regard. He also stated in cross examination that he faithfully recorded whatever was asked for by the testator Shri Chander Bhan. He clarified that no Will other than PW-1/1 was executed by the testator in his presence or was drafted by him.

7. Shri Jagdish Chander, Record Clerk from the office of Sub-Registrar was present in the

Court on 4.7.2005. He was discharged after the relevant document i.e. the Will is taken on the file. Shri Jagdish Chander was present in the Court on several dates. The second petitioner was examined as PW-2; he tendered his affidavit as Ex.PW-2/A.

8. The respondents relied upon the testimony of the third respondent - RW-1 and most crucially on the deposition of Shri P.P. Gupta - RW-2. Their case was that a later Will dated 25.8.1991 was executed which superseded the Will in question; it was sought to be substantiated by RW-2. The petitioners had, in their rejoinder to the respondents' objections contended that the issue as to whether there was a later Will had been gone into by the Civil Court in a previous proceeding i.e. Suit No.41/2003 which was originally filed in 1995 by them as CS (OS) 36/1995. In that suit, the first petitioner had sought for a decree of possession against Respondent Nos.2-8 on the ground that she was true and lawful owner of property being No.4315, Gali No.5, Tri Nagar, Delhi. The respondents - in this case rely upon the depositions in that case. Consequently, the petitioners brought on record certified copies of the judgment and decree in that case dated 15.7.2003.

9. RW-2 Shri P.P. Gupta deposed in this case that the Will said to have been executed on 25.8.1991 by the testator was in fact his last Will and testament and that it was drafted by a lawyer who sat in the Central Hall of Tis Hazari Courts on the said date i.e. 25.8.1991. The RW-2 in the cross examination, in this case, expressed ignorance as to whether he had deposed in any case as regards the due signing and execution of the Will by the late testator dated 25.8.1991.

10. The petitioners argue that having regard to the entire conspectus of circumstances and the respondents' case that the Will PW-1/1 is not the last one and not the last testament of the testator can no longer be urged in view of specific findings of the Civil Court in CS (OS) 41/2003 (Old No.36/03). In that case, the Court had pertinently framed the first issue as to whether the plaintiff, i.e., the first petitioner here - was owner of the suit property. The 4th issue cast in that case was in the following terms: -

"4. Whether the plaintiff is not the owner of the suit property as the Will dated 21.1.1991 is forged and the subsequent Will dated 25.8.1991 in favour of the defendant conferring the alleged ownership on the defendants has revoked all other earlier Wills of its effect? OPD

11. The relevant findings of the court, in the previous case, after considering rival depositions

including that of Shri P.P. Gupta and the attesting witness relied upon by the petitioner in this case i.e. Shri L.N. Babbar are as follows: -

“...In my opinion, by virtue of depositions made by PW 2, Sh. L.N. Babbar, the Will dated 21.1.1991 Ex. P-3 stands duly proved on the judicial file. PW-2, Shri L.N. Babbar has deposed as under: -

“Shri Chander Bhan came to me for the purpose of executing a Will and I drafted the Will according to his instruction. I explained the contents of the same in Hindi to Chander Bhan. After understanding the contents of the Will Sh. Chander Bhan signed the Will in my presence and in the presence of Sh. Subhash Gupta. Sh. Chander Bhan has signed on the same in my presence and I identify his signature. The sign of Chander Mal are at point A Ex. P 3. Firstly, Sh. Chander Mal signed thereafter Sh. Subhash Gupta as a witness and then I signed as a witness. I signed at point C and Sh. Subhash Gupta signed at point ‘B’. I and other marginal witnesses and the testator Sh. Chander Bhan signed on the Will, copy of which is Ex. P 3, in the presence of each other. The Will Ex. P3 also bears my signature at point ‘B’ which is regarding a drafting of the Will by me. Thereafter I presented the same before the SR on the same day. I and Shri Subhash Chand identified Shri Chander Bhan before the SR and the said Will was registered.”

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Thus in my opinion, in the facts and circumstances of the case, Will Ex. P3 stands duly proved as a Will executed by Shri Chander Bhan.”

12. It is pointed out further, in addition, that while returning the findings about the validity of Ex.P-3, i.e., (which is none other than the Will propounded in this case), the Civil Court had noticed no less than six contradictions between the witnesses who had deposed before it, i.e., the defendant in that case (i.e Respondents in this casse) as well as the depositions of Shri P.P. Gupta (RW-2) in the present petition. It is further argued that evidence led in this case conclusively establishes that the petitioners have been able to prove that the Will - PW-1/1 was the last and genuine Will and testament of the testator and the same was not superseded by any Will much less one dated 25.8.1991. It is also argued that the respondents have not sought to propound that

Will by any Counter Claim, even though, the same is required to be done for this purpose. The petitioners rely upon the judgment reported as *Rashmi Kapoor v. Raman Kapoor* 1988 Rajdhani Law Reports 232.

13. This Court has carefully considered the submissions. In order to prove the Will, it is incumbent upon the propounder to lead evidence before the Court conforming to the requirement of Section-63 of the Indian Succession Act, 1925 read with Section-68 of the Evidence. The petitioners rely upon the deposition of Shri L.N. Babbar - PW-3. In his depositions - both chief examination as well as cross examination, what emerges is that the testator signed in his presence and that of the other witness Shri Subhash Chandra. PW-3 identifies his signatures as well as that of the testator and other attesting witnesses and further deposed that this was done in the presence of the testator. To a specific question about the health and mental frame of the testator, he replied that the latter was of sound mind and appeared to be healthy. He was extensively cross examined as to the status of the records maintained by him in view of his statement that he used to draft the Wills and such other documents. No serious fact discrediting the witness or casting any doubt about his statement could be elicited by the respondents. In these circumstances, this Court is of the opinion that PW-3 proved due execution of PW-1/1. The Court also notices that the said document i.e. the Will was actually summoned and produced by the concerned employee from the Sub-Registrar's office.

14. So far as the respondents' defense is concerned, it is primarily based upon the later Will dated 25.8.1991. The Civil Court in its previous judgment and decree dated 15.7.2003 had noted that P.P. Gupta's statement (who claimed that he was an attesting witness of the Will propounded by the respondents in that suit) contains several contradictions i.e. (1) no awareness of what the testator was doing for a living, in spite of his claim that he was a friend of a long standing, (2) the petitioners'/plaintiff's having established that 25.8.1991 was a Sunday when the Central Hall in Tis Hazari Courts used to be closed, (3) no awareness as to who was the lawyer said to have been drafted the said Will dated 25.8.1991, (4) having contradicted the other witness i.e. one of the respondents in this case by saying that the testator used to own vehicles whereas they had on the other hand stated that he did not, (5) lack of awareness as to whether the Will had been corrected and if so by whom - the said document/Will dated 25.8.1991 contains some corrections.

15. This Court notices that in the present case, depositions of the very same Shri P.P. Gupta -

RW-2 crucially contradicts the previous statement made by him in the other suit. He expresses ignorance or lack of re-collection of having deposed in any other legal proceeding or suit in respect of the said Will. The Court notices that RW-2 is not an aged person; he claims to have been born in 1953 which means that when he deposed before this Court, he was not very old. Furthermore, in the present case, RW-2, nowhere indicates where the Will is said to have been drawn and signed by the testator, in contradiction to what had been deposed in the previous suit, i.e., that it was signed in the Central Hall of Tis Hazari Courts. For these reasons, this Court is of the view that the respondents' objections as to the existence of the later Will and testament which superseded the Will dated 21.1.91 is unfounded and they have not been able to establish the allegations made by them in this case.

16. It has been repeatedly held by the Supreme Court that apart from the legal requirements spelt out by Section 63 (of the Succession Act) and Section 68 (of the Evidence Act), 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 & Ors.* AIR 1959 SC 443, 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 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."*

17. The above reasoning in this decision has been applied subsequently in several judgments: *Rani Purnima Debi v. Khagendra Narayan Deb* : AIR 1962 SC 567; *Surendra Pal v. Dr. Saraswati Arora* 1974 (2) SCC 600; *Gurdial Kaur v. Kartar Kaur* 1998 (4) SCC 384, etc. Courts have emphasized that usually it is the cumulative effect, rather than a solitary 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. 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 v. Panchanan Banerjee* 1995 (4) SCC 459; *Sadasivam v. K. Doraiswamy* 1996 (8) SCC 624; *P.P.K. Gopalan Nambiar v. 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 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.

18. Having regard to the entire conspectus of the circumstances, this Court is satisfied that the petitioners have been able to prove due signing of the Will PW-1/1 by the testator; his bequeathing the suit properties to them being the eldest daughter-in-law and grandson of a pre-deceased son, appears to be out of natural love and affection and the respondents have not been able to establish or point to any suspicious circumstance that should displace this Court's findings in this regard. This Court notes that the Will does not nominate or appoint an Executor. In the circumstances, by virtue of Section-235 of the Indian Succession Act, the Court has to appoint Administrator to carry out the wishes under the Will - PW-1/1. Accordingly, second petitioner Shri Ajit Kumar is hereby appointed as Administrator. Let letters of administration with the registered Will attached be issued in his favour subject to his furnishing administrative and surety bond to the satisfaction of the Registrar of this Court.

19. Test. Case No.6/1998 is allowed in the above terms.

**S. RAVINDRA BHAT
(JUDGE)**

DECEMBER 03, 2010

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