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IN THE HIGH COURT OF DELHI AT NEW DELHI

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***Reserved on: 06.10.2022
Pronounced on: 04.11.2022***

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FAO 126/2016

PROMILA KAPOOR

..... Appellant

Through: Mr. Vaibhav Gaggar, Ms. Sumedha
Dang and Mr. Ashit Kapoor,
Advocate

versus

STATE & ORS

..... Respondents

Through: Mr. V. D. Pahuja, Advocate for
respondent No. 2 alongwith
respondent No. 2 in person.

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RFA 733/2016

PROMILA KAPOOR

..... Appellant

Through: Mr. Vaibhav Gaggar, Ms. Sumedha
Dang and Mr. Ashit Kapoor,
Advocate

versus

INDER MOHAN NAGPAL & ORS.

..... Respondents

Through: Mr. V. D. Pahuja, Advocate for
respondent No. 1 alongwith
respondent No. 1 in person.

CORAM:

HON'BLE MR. JUSTICE GAURANG KANTH

J U D G M E N T

GAURANG KANTH, J.

1. The challenge in both these Appeals arises from the common Judgment & Decree dated 28.11.2005 passed by the learned ADJ-06, Central, Tis Hazari District Courts, New Delhi (hereinafter referred to

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as “**impugned judgment**”). Vide the said impugned Judgment, the learned Trial Court was pleased to allow the Probate case no. 124/06 titled as *Inder Mohan Nagpal & Ors. vs. State & Ors.* filed by Mr. Inder Mohan Nagpal (hereinafter referred to as “**Respondent No.1**”) and dismissed the Civil suit no. 158/06 titled as *Promila Kapoor Vs Inder Mohan Nagpal & Ors* filed by Ms.Promila Kapoor (hereinafter referred to as “**Appellant**”) for declaration, injunction and possession.

Facts relevant for the consideration of the present Appeals are as follows:

2. The factual matrix which emerges out of a perusal of the records is that Late Mr. Dina Nath Arora (“**the testator**”), who was the father of the Appellant, was born in Lahore on 24.12.1901 out of the wedlock of Late Sh.Charan Das Arora and Smt. Ganga Devi. The testator had a sister namely Smt. Jamuna Devi (grandmother of the Respondent No.1). The testator was working with Northwest Railway, Lahore. Post partition of India and Pakistan, he migrated to India and started working with Northern Railway and eventually retired from the Railway Board as a stenographer in the year 1963.
3. The testator married Smt. Malka Devi (the mother of the Appellant) in the year 1928. The couple had two issues out of the said wedlock, the first one being Late Shri Pran Nath Arora and the second one being the Appellant herself.
4. There was personality conflict between the testator and his wife (the mother of the Appellant). These conflicts led to marital discord between the testator and his wife. Hence, the Appellant was taken to her maternal home at Amritsar by her mother. However, the testator

continued to live in Delhi in the official accommodation provided to him by the Railway Board. It is the case of the Appellant that the estranged relations between her parents did not affect the relationship between the testator and his children.

5. In lieu of the properties left behind by the testator in West Pakistan, a property no. 2930, Hamilton Road, Delhi, admeasuring about 180-200 square yards with shops on ground floor and residence above was allotted to the testator. The said property was purchased by the testator partly out of his own funds and partly out of the funds of original Defendant No. 2 (father of Respondent No.1).
6. Around the year 1960, EPRRR Cooperative Housing Society Ltd. came up with a scheme, wherein they started allotting plots to the people who were displaced from Pakistan. In order to become the member of the said scheme, the testator was required to swear an Affidavit stating that he or his relatives or any HUF to which he is a member does not own any property in Delhi. Hence, the testator transferred his share in the property No.2939, Hamilton Road, Delhi in favour of Original Defendant No.2. The testator applied for a plot under EPRRR Cooperative Housing Society Ltd and since he fulfilled all the eligibility criteria, he was allotted a piece of land admeasuring approx. 623 Square yard bearing No. BB - 8, Greater Kailash - II, New Delhi (hereinafter referred to as **“Suit Property”**) in the year 1960. The testator named his children and grandchildren as the nominees for the suit property. Even in the revenue record of Railway Refugees Rehabilitation & House Building Co-operative Society Limited, the

testator had given the names of his wife, children and grandchildren as the nominees of his house at Greater Kailash.

7. The testator till his superannuation stayed at his official accommodation at Mir Dara Road and 9, School Lane, New Delhi. The testator retired in the year 1963 and he gave up his official accommodation. Nagpal Family (Family of his sister Late Smt. Jamuna Devi) offered him to stay with them at 2939, Hamilton Road, New Delhi. The testator accepted the said offer and started living with the Nagpal Family.
8. After the retirement, the testator got the building plan sanctioned and constructed a building at the suit property. It was rented out to one Mr. Harbans Singh in the year 1973 and to one Mr. Mohan Lal in the year 1974. The testator retained the possession of the garage where he used to keep some of his belongings. The testator continued to stay with the Nagpal Family.
9. In the meanwhile, testator's children got married and started residing with their respective spouses. Testator's son Late Sh. Pran Nath Arora joined Merchant Navy and settled in Calcutta. The Appellant (testator's daughter) married to Shri Prem Dayal Kapoor, who was then working with the Indian Army as a Captain. The Appellant used to stay at various places depending upon her husband's posting.
10. It is the case of the Appellant that the testator used to write letters to his children and meet them whenever he got a chance. It was further stated by the Appellant that the testator used to make telephonic conversation with his children and grandchildren whenever he missed them or wanted to talk to them. It is the case of the Appellant that

they frequently visited the testator during his stay with the Nagpal family.

11. The testator continued to stay with the Nagpal family till his death. The testator expired on 07.01.1989. His last rites were performed by his son Late Shri Pran Nath Arora. The Appellant and her family also attended the funeral whereas their mother due to her old age could not attend the funeral and the other rituals.
12. It is the case of the Appellant that even though she contacted the original Defendant No.2 and asked about the property papers of the testator, the original Defendant No.2 informed her that no such property paper was available as they had been disposed of. Hence, on 03.05.89, the Appellant along with her mother and brother filed a Petition for the grant of letter of administration of the estate of the testator on the basis that he died intestate and his wife and children are the beneficiaries of the estate of the testator.
13. At the time of testator's death, Sh. Mohan Lal, the tenant was in occupation of the suit property. In the month of January, 1990, Sh. Mohan Lal contacted the Appellant and informed her that the Respondent No.1 attempted twice to forcefully evict him from the suit property and an FIR had been lodged against Respondent No.1 in this regard. During the course of the discussions, Shri Mohan Lal revealed to the Appellant that Respondent No.1 was claiming himself to be owner of the suit property by virtue of a Will dated 29.11.1985. He further informed the Appellant that he was paying rent to the Respondent No.1 after the death of the testator. Shri Mohan Lal handed over a copy of the Will dated 29.11.1985 to the Appellant and

that was how the Appellant came to know about the alleged Will dated 29.11.1985 for the first time.

14. The Appellant thereafter informed the DDA, MCD and EPRRR Cooperative House Building Society that the alleged Will dated 29.11.1985 was a forged Will and the Appellant along with her mother and brother being the legal heirs of the testator were the co-owners of the suit property.
15. In pursuance of the public notice issued in the proceedings before the Learned District Judge for the grant of letter of administration, Respondent No.1 filed written statement on 07.02.1990 and set up the Will dated 29.11.1985 claiming that all properties of the testator were bequeathed in his favour.
16. In the meanwhile, Respondent No.1 forcefully evicted Shri Mohan Lal from the suit premises and took the possession of the suit premises.
17. On 22.09.1990, the Appellant issued a legal notice to Sh. Mohan Lal wherein he was informed that the Appellant, along with her mother and brother, are the owners of the suit property. Further, the Appellant challenged the genuineness of the Will dated 23.11.1985.
18. Thereafter, the Appellant along with her mother and brother filed a suit bearing Civil Suit No. 158/06/90 for declaration, injunction and possession for declaring the Will dated 29.11.1985 as null and void and also restraining the Defendants therefrom transferring the suit property in any manner.
19. During the pendency of the present suit, on 28.05.2003, Respondent No.1 filed a Petition being Probate Case No. 124/2006 under Section

275 of the Indian Succession Act for the grant of letter of administration qua the Will dated 29.11.1985.

20. As per the written statement filed by the Respondent No.1, the testator executed two wills dated 29.11.1985, bequeathing all his movable and immovable properties in favour of Respondent No.1. The First Will was executed on 29.11.1985. Having been registered on 02.12.1985, the first Will contains the testator's new style of signature (**"First Will"**). The second Will, being executed on 29.11.1985 and registered on 23.12.1985, contains the old signature of the testator (**"Second Will"**). Vide these Wills, the testator bequeathed the suit property to Respondent No.1. The second Will had the same contents as that of the first Will but the testator allegedly rectified his error by signing it in his old style of signature. In the second Will, the testator added an additional paragraph stating that the testator had executed his First Will earlier in the day and it was only to remove any ambiguity or objection that the second Will was being signed in the old style of signature so that the legatee might not have any difficulty in enforcing it. On the same day, the testator also visited Dr. Vijay Suri Clinic and got a medical fitness certificate dated 29.11.1985.

21. After getting the medical fitness certificate, the testator went further ahead and wrote a letter dated 29.11.1985 to the tenant of the suit property, Mr. Mohan Lal, informing him about the details of the Will executed by the testator. On the very same day, the testator also made an Affidavit stating that he had made a Will and bequeathed everything in the favour of Mr. Inder Mohan Nagpal.

22. On the pleadings of the parties, the following issues were framed by the learned ADJ in CS No. 158/06:

- i. *“Whether the document dated 29th November, 1985 is the last Will and testament of Shri Dina Nath Arora? If so, to what effect?”*
- ii. *“If issue no. 1 is proved against the defendants whether the plaintiffs are entitled to the declaration that they are the joint owners of the property No. BB-8, Greater Kailash-II, New Delhi? If so, to what effect?”*
- iii. *“Whether the plaintiffs are entitled to possession?”*
- iv. *“To what relief, if any, are the plaintiffs entitled?”*

23. In the probate case, the following issues were framed by the learned ADJ:

- i. *“Whether the Will dated 29.11.85 propounded by the petitioner in the present case is the last and genuine Will of late Shri Dina Nath Arora and if so, was it validly executed by him in sound disposing mind?”*
- ii. *Relief”*

24. Since the issue involved in Probate case No.124/2006 and Civil Suit No. 158/06/90 are identical, learned Trial Court vide order dated 12.07.2005 consolidated both the proceedings for the purpose of evidence. Hence, evidence was recorded in Civil Suit No. 158/06/90 and both the matters were taken up together.

25. In support of her case, the Appellant Smt. Promila Kapoor examined herself before the Trial Court as PW-1 and she was duly cross-examined. The next witness was Shri Jagdish Sethi whose affidavit in evidence was exhibited as **Ex.PW2/A**. He was also duly cross-examined. The third witness on behalf of them was Major General (Retd.) Sh. P.D. Kapoor whose affidavit in evidence was **Ex.PW3/A**. He was also discharged after being formally cross-examined. The next witness on their behalf was Shri Inder Lal Kapoor, brother in law of

the Appellant, whose affidavit in evidence was exhibit as **Ex.PW4/A**. No other witnesses were examined on behalf of the Appellant. The Appellants also relied upon the various letters written by the testator to his family members (**Annexure 'C' to 'I'**) to establish the cordial relationship between the testator and his children and grandchildren.

26. On behalf of the Defendants, Shri Sudershan Lal, attesting witness to the Will was examined as **RW-1** who was cross-examined and discharged. They also examined Shri Bal Kishan who was also an attesting witness, as **RW-2**. Respondent No.1 Sh. Inder Mohan Nagpal had examined himself as **RW-3** whose affidavit in evidence was **Ex.RW3A**. He was extensively cross-examined before being discharged. Dr. Vijay Suri was also examined as **RW-4**. He was a medical Practitioner and was summoned to prove the originals of certificates dated 29.11.1985 (**Ex.RW3/1**) and dated 03.01.1987 (**Ex.RW3/21**). Another witness was summoned from A & C department, SDMC, R.K Puram (**RW-5**, Shri Ishwar Chand Sharma), with respect to mutation of the suit property. The last witness of the Respondents was **RW-6**, Sh S.P. Mehra who was also summoned in the capacity of Ex-President of EPRR Co-operative House Building Society and was summoned to prove the records of the society. No further witnesses were examined by the parties.

27. Upon perusing the records along with the evidence adduced, the learned Trial Court vide impugned judgment dated 28.11.2015 decided all of the four issues in favour of the Respondent No.1 and against the Appellants, thereby granting relief to the Respondent No.1. Consequently, Respondent No.1 was held entitled to grant of Letters

of Administration with Will annexed in respect of the properties described in the Will **Ex. PW-1/DX-4** and more particularly described in para 6 (i) & (ii) of the petition.

SUBMISSIONS ON BEHALF OF THE APPELLANT

28.Mr. Vaibhav Gaggar, the learned counsel on behalf of the Appellant submitted that the impugned judgment was totally perverse and was based on an erroneous appreciation of facts and law. The learned counsel further went on to submit that the case at hand was a classic case of a party trying to usurp the property of a deceased person away from the Class I heirs of the deceased by concocting a false story and placing on record fabricated documents.

29. It was further submitted that the testator had good relationship with his children and was in regular touch with them and even though the testator was living away from his family, the family ties were well-maintained.

30.Placing reliance on the celebrated case of *H. Venkatachala Iyengar v. B.N. Thimmajamma & Ors.* reported as *AIR 1959 SC 443*, the learned counsel argued that the impugned judgment was in the teeth of the abovementioned case as the learned Additional District Judge failed to appreciate the settled law that the propounder of the Will was legally obligated to prove the Will and the burden never shifted.

31.It was further pointed out by the learned counsel for the Appellant that the learned Additional District Judge erroneously decided the issue of genuineness of the alleged Will. The learned counsel further went on

to highlight the suspicious circumstances which raised reasonable doubts on the genuineness of the Will. The following suspicious circumstances were enumerated by him:

- i. The natural heirs of the testator were excluded;
- ii. The propounder of the Will was the named Legatee and he had total access and control over the accounts and affairs of the testator;
- iii. The registration of the Will(s) itself was suspect considering the gross delay in registering the Will(s) since the two Wills were allegedly created on the same date with different signatures but were registered on two different dates;
- iv. The Will had been *ante-dated* considering the contents of the second Will which mentioned certain facts about the registration of the first Will which had not happened by the said date;
- v. The person who drew up the Will(s) himself was never examined;
- vi. The witnesses attesting to the execution of the Will were all interested parties;
- vii. No reason was mentioned for signing the first Will in the new style of signature which has not been used by the testator in any other document whatsoever;

32. The learned counsel further submitted that a number of events, including the cancellation of names in the EPRRR form, execution of two Wills, writing a letter to the tenant and procuring medical fitness certificate by the doctor, happened on the same crucial date, i.e. 29.11.1985. The learned counsel submitted that it was humanely impossible for an eighty-four year old man to travel to all these different places and get all these things done on the same date.
33. It was further submitted by the learned counsel for the Appellant that the evidence on record suffered from serious infirmities as revealed in the cross-examination of the witnesses.
34. The final submission made by the Appellant concerned the fact of the probate of the Will being hopelessly time-barred as the petition for carrying out the Probate of the Will was instituted by the Respondent in 2006, while the suit for possession was filed by the Appellant much earlier in time, i.e. in 1990.
35. In the light of the abovementioned submissions, the learned counsel prayed that the impugned order be set aside and a decree of permanent injunction be granted restraining the Respondent No. 1 from creating any third party right in any manner with the suit property.

SUBMISSIONS ON BEHALF OF THE RESPONDENT

36. Mr. V.D. Pahuja, learned counsel on behalf of the Respondent No.1 submitted that the objections of the Appellant were barred under Section 11 of The Code of Civil Procedure, 1908 as the Appellants had not challenged the validity of the registered Wills during the trial

of their petition under Section 278 of The Indian Succession Act, 1925.

37. The learned counsel further cited Section 2 (12) of the Indian Stamp Act, 1899 to define the term “execution” as meaning “signature” and submitted that the onus to prove that the Will was not genuine would shift on the Appellant once the execution of the Will had been proved. He submitted that the execution of the Will had not been disputed in view of the fact that the Appellants had filed a suit to declare the Will as invalid merely on the grounds of unsoundness of mind and suspicious circumstances and had not in fact challenged the execution of the Will. It was further submitted by him that the Appellant had not disputed the signatures of the testator on the registered Will either during her evidence or during the cross-examination of the witnesses of the Respondent.

38. Placing reliance on ***Daulat Ram v. Sodha*** reported as ***AIR 2005 SC 233***, the learned counsel submitted that the burden to prove that the Will was forged or under coercion was on the person who alleged it. He submitted that the Appellant had failed to discharge this burden.

39. The learned counsel further cited the case of ***Indu Bala v. Mahendra Chandra Bose*** reported as ***AIR 1982 SC 133*** to clarify the meaning of the term “suspicious circumstances” as something which is not normal or not normally expected in a normal situation or of a normal person. He refuted the existence of suspicious circumstances by submitting that the Appellant has failed to point out any suspicious circumstances to invalidate the Wills. He further submitted that the legatee in both

the Wills was the same and he himself gave a justification in the second Will as to the reason for executing two Wills. He went on to submit that executing two Wills on the same date bequeathing properties to the same person/ legatee and to get them registered on two different dates did not constitute suspicious circumstances. He buttressed his argument further by placing reliance on *Sushila Devi v. Pt. Krishan Kumar* reported as *AIR 1971 SC 2236* to submit that the non-bequest of property to the children of testator would not make the Will invalid.

40.To dismantle the contention of unsoundness of mind of the testator, the learned counsel submitted that the Appellants failed to give any suggestion as to the same to the Respondent's witnesses during cross-examination. On the other hand, the contents of the Will went on to prove that the testator was of sound mind when he executed the said Wills. He further placed reliance on the doctor's certificate dated 29.11.1985 (**Ex. RW 3/1**) to submit that the said certificate confirmed the sound state of mind of the testator. He buttressed his argument by relying on Section 59 of The Indian Succession Act, 1925 to submit that a Will executed even by a feeble-minded or disabled person is valid.

41.The learned counsel further relied on Sections 15, 16 and 17 of the Indian Contract Act, 1872 to submit that the Appellant did not place any material on record or plead any relevant facts to constitute coercion, undue influence or fraud on part of the Respondent. He

submitted that the same was mandatory to be done under Rule 4 of Order VI of The Code of Civil Procedure, 1908.

42. The learned counsel further submitted that the Appellant had herself admitted during her cross-examination that her father had got their names cancelled as nominees in the EPRRR Form and got the name of the legatee substituted in their place. He further submitted that the Appellant did not object to the payment of rent by the tenant to the legatee or file any case to restrain him from handing over the possession of the property to the Respondent.

43. In the light of the aforementioned submissions, the learned counsel for the Respondent argued that the impugned judgment was sound and well-reasoned in all respects and prayed that the present Appeals be dismissed with costs.

LEGAL ANALYSIS BASED ON THE FACTS OF THE CASE

44. This Court heard the arguments advanced by the learned Counsel for the parties and also examined the evidence placed on record and the judgments relied upon by the parties.

45. The issue which arises for consideration in this case is - *Whether the Will dated 29.11.1985 is the last and genuine Will of the testator?*

46. In order to decide this issue, it is essential to examine the law relating to Wills. It is important to first expound the law relating to the execution and proof of Wills under the Indian Succession Act and the Evidence Act.

(i) **Section 63** of the Indian Succession Act reads as follows:

“63. Execution of unprivileged wills. Every testator, not being a soldier employed in an expedition or 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) The testator shall sign or shall affix his mark to the Will, or it shall be signed by some other person in his presence and by his direction.

(b) The signature or mark of the testator, or the signature of the person signing for him, shall be so placed that it shall appear that it was intended thereby to give effect to the writing as a Will.

(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 acknowledgment 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.”

47. Hence, as per the mandate of clause (c) of Section 63, a Will is required to be attested by two or more witnesses each of whom should have seen the testator sign or put his mark on the Will.

(ii) **Sections 68** of the Evidence Act, which relates to proof of documents required by law to be attested, read as under:

“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 that it shall not be necessary to call an attesting witness in proof of the execution of any document, not being a will, which

has been registered in accordance with the provisions of the Indian Registration Act, 1908 (16 of 1908), unless its execution by the person by whom it purports to have been executed is specifically denied."

48.Hence, as per section 68 of the Evidence Act, at least one of the attesting witnesses needs to be examined to prove the execution of a Will.

49.The legal position in relation to proof of Wills has been discussed at length in the celebrated judgment of the Hon'ble Supreme Court in the case of ***H. Venkatachala Iyengar (Supra)***. The 3-judge bench has made the following observations on this point:

"18. ..The party propounding a will or otherwise making a claim under a will is no doubt seeking to prove a document and, in deciding how it is to be proved, we must inevitably refer to the statutory provisions which govern the proof of documents. Sections 67 and 68 of the Evidence Act are relevant for this purpose. Under s. 67, if a document is alleged to be signed by any person, the signature of the said person must be proved to be in his handwriting, and for proving such a handwriting under ss. 45 and 47 of the Act the opinions of experts and of persons acquainted with the handwriting of the person concerned are made relevant. Section 68 deals with the proof of the execution of the document required by law to be attested; and it provides that such a document shall not be used as evidence until one attesting witness at least has been called for the purpose of proving its execution. These provisions prescribe the requirements and the nature of proof which must be satisfied by the party who relies on a document in a court of law. Similarly, ss.59 and 63 of the Indian Succession Act are also relevant. Section 59 provides that every person of sound mind, not being a minor, may dispose of his property by will and the three illustrations to this section indicate what is meant by the expression "a person of sound mind" in the context. Section 63 requires that the testator shall sign or affix his mark to the will or it shall be signed by some other person in his presence and by his direction and that the signature or mark shall be so made that it shall appear that it was intended thereby to give effect to the writing as a will. This

*section also requires that the will shall be attested by two or more witnesses as prescribed. Thus, the question as to whether the will set up by the propounder is proved to be the last will of the testator has to be decided in the light of these provisions. **Has the testator signed the will? Did he understand the nature and effect of the dispositions in the will? Did he put his signature to the will knowing what it contained?** Stated broadly it is the decision of these questions which determines the nature of the finding on the question of the proof of wills. It would prima facie be true to say that the will has to be proved like any other document except as to the special requirements of attestation prescribed by s.63 of the Indian Succession Act. As in the case of proof of other documents so in the case of proof of wills, it would be idle to expect proof with mathematical certainty. The test to be applied would be the usual test of the satisfaction of the prudent mind in such matters.*

*19. However, there is one important feature which distinguishes wills from other documents. Unlike other documents the will speaks from the death of the testator, and so, when it is propounded or produced before a court, the testator who has already departed the world cannot say whether it is his will or not; and this aspect naturally introduces an element of solemnity in the decision of the question as to whether the document propounded is proved to be the last will and testament of the departed testator. Even so, in dealing with the proof of wills the court will start on the same enquiry as in the case of the proof of documents. **The propounder would be called upon to show by satisfactory evidence that the will was signed by the testator, that the testator at the relevant time was in a sound and disposing state of mind, that he understood the nature and effect of the dispositions and put his signature to the document of his own free will. Ordinarily when the evidence adduced in support of the will is disinterested, satisfactory and sufficient to prove the sound and disposing state of the testator's mind and his signature as required by law, courts would be justified in making a finding in favour of the propounder. In other words, the onus on the propounder can be taken to be discharged on proof of the essential facts just indicated.***

20. 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 alllegitimate suspicions should be completely removed before the document is accepted as the last willof 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. ...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.

22. It is obvious that for deciding material questions of fact which arise in applications for probate or inactions on wills, no hard and fast or inflexible rules can be laid down for the appreciation of theevidence. It may, however, be stated generally that a propounder of the will has to prove the due andvalid execution of the will and that if there are any suspicious circumstances surrounding the execution of the will the propounder must remove the said suspicions from the mind of the court by cogent and satisfactory evidence. It is hardly necessary to add that the result of the application of these two

general and broad principles would always depend upon the facts and circumstances of each case and on the nature and quality of the evidence adduced by the parties. ...”
(emphasis supplied)

50. The position of law on this point has further been succinctly indicated by a Constitution Bench of the Hon’ble Supreme Court in ***Shashi Kumar Banerjee v. Subodh Kumar Banerjee*** reported as ***AIR 1964 SC 529***, wherein the Court made the following observations:

“4. The mode of proving a will does not ordinarily differ from that of proving any other document except as to the special requirement of attestation prescribed in the case of a will by S. 63 of the Indian Succession Act. The onus of proving the will is on the propounder and in the absence of suspicious circumstances surrounding the execution of the will, proof of testamentary capacity and the signature of the testator as required by law is sufficient to discharge the onus. Where however there are suspicious circumstances, the onus is on the propounder to explain them to the satisfaction of the Court before the Court accepts the will as genuine. Where the caveator alleges undue influence, fraud and coercion, the onus is on him to prove the same. Even where there are no such pleas but the circumstances give rise to doubts, it is for the propounder to satisfy the conscience of the Court. The suspicious circumstances may be as to genuineness of the signature of the testator, the condition of the testator's mind, the dispositions made in the will being unnatural improbable or unfair in the light of relevant circumstances or there might be other indication in the will to show that the testator's mind was not free. In such a case the Court would naturally expect that all legitimate suspicion should be completely removed before the document is accepted as the last will of the testator. If the propounder himself takes part in the execution of the will which confers a substantial benefit on him, that is also a circumstance to be taken into account, and the propounder is required to remove the doubts by clear and satisfactory evidence. If the propounder succeeds in removing the suspicious circumstances the Court would grant probate, even if the will might be unnatural and might cut off wholly or in part near relations.”

51. In this regard, it will also be apt to quote the following observation of the Hon'ble Supreme Court in the case of ***Rani Purnima Debi And Another v. Kumar Khagendra Narayan Dev*** reported as ***AIR 1962 SC 567***:

“23. There is no doubt that if a will has been registered, that is a circumstance which may, having regard to the circumstances, prove its genuineness. But the mere fact that a will is registered will not by itself be sufficient to dispel all suspicion regarding it where suspicion exists, without submitting the evidence of registration to a close examination.”

52. On this point, it will also be pertinent to quote the following observation of this Hon'ble Court cited in the case of ***Surender Kumar v. State*** reported as ***2010 SCC OnLine Del 177*** at ***para 18***:

“Will is a solemn document written by a person who is dead and who cannot be called in evidence to deny the execution or to explain the circumstances in which it was executed. It is the living who has to establish the Will. Therefore, it naturally puts heavy burden on the court to satisfy its judicial conscious that the burden of proof of due execution is fully discharged and every suspicious circumstance is explained. It is, therefore, essential that trustworthy and unimpeachable evidence should be produced before the court to establish the genuineness and authenticity of the Will. True that, no specific standard of proof can be enunciated which must be applicable to all the cases. Every case depends upon its own circumstances. Besides other proof, the conduct of the parties is very material as it has considerable bearing of evidence as to the genuineness of the Will which is propounded. The rules relating to proof of a Will are not rules of law. They are rules of prudence and therefore, the court vigilantly and jealously examines the evidence for proof of a Will. What can be suspicious circumstances to rebut the proof of the execution of the Will depends on facts of each case and they cannot be universally followed in every case where the Will is under challenge.”

(emphasis supplied)

53.Hence, as per the law settled in this regard, the burden of proof is on the propounder of the Will to prove the execution of the same and he needs to prove four basic facts:

- i. The will was signed by the testator in the presence of two attesting witnesses;
- ii. At the relevant time he was in sound and disposing state of mind;
- iii. He understood the nature and effect i.e., the content of the disposition;
- iv. He put the signature to the document of his own free will.

54.In the light of the principles discussed above, this Court shall now proceed to examine the evidence on record to ascertain whether the execution of the Will in question is surrounded by any suspicious circumstances which render the Will on the whole to be an improbable, unnatural and unfair instrument.

55.In the present case, it is the case of the Respondent No.1 that the testator executed two registered Wills dated 29.11.1985. **Ex. PW1/DX2** (first Will) was a registered Will executed on 29.11.1985 and registered on 02.12.1985. **Ex. PW1/DX4** was a registered Will dated 29.11.1985 and registered on 23.12.1985 (second Will). In **Ex. PW1/DX4**, the testator himself explains the reasons for executing the second Will. The relevant extract of the second Will, reads, inter alia, as follows:

“I got my WILL dated 29 November 1985 registered earlier with the Sub Registrar New Delhi, which I signed in my new style of signatures. However, in order to remove any ambiguity or confusion or doubt or

objection, I have signed this WILL again in my old style of signatures which will be found on old documents for comparison, if necessary. I again get this Will registered with the Sub Registrar, New Delhi, so that my abovenamed legatee may not face any problem or difficulty in enforcing it.”

56. This Court carefully examined both the Wills and noted the following points:

- (1) Both the Wills reveal the same intention of the testator, i.e, intention to oust the natural heirs from inheriting his estate and bequeath it to Respondent No.1.
- (2) Both the Wills were executed on the same date, i.e, 29.11.1985. As per the testator, he signed the first Will with his new signature. However, in order to avoid any controversy, he executed the second Will with his old signature.
- (3) First Will was registered on 02.12.1985 and the second Will was registered on 23.12.1985. Hence, as on 29.11.1985, first Will was not registered. However, the testator in his second Will executed on the same date, i.e, 29.11.1985, states that ‘*I got my WILL dated 29 November 1985 registered earlier with the Sub Registrar New Delhi, which I signed in my new style of signatures.*’

57. Respondent No.1 relied upon the following documents to prove the authenticity of the Will dated 29.11.1985:

- (i) **Ex.RW3/1-** This is a Medical Certificate dated 29.11.1985 issued by Dr. Vijay Suri (Ex.RW3/1) certifying that the testator is in a ‘*sound state of mind & health to make a statement of Will*’ as on 29.11.1985. Dr. Vijay Suri stepped

into the witness box as RW-4 and admitted that he had issued the said certificate in his own handwriting. He also admitted that the testator himself came to his clinic to collect the said certificate and the testator countersigned the said certificate in front of him. Interestingly, the signature of the testator that appears in the said Exhibit RW3/1 is his 'old signature'.

- (ii) **Ex.PW1/DX5-** This is a letter dated 29.11.1985 issued by the testator to Mr. Mohan Lal, his tenant informing the factum of the execution of the Will and making it known to him that after his demise the rent was to be paid to Respondent No.1. In the said document, the testator put his both signatures, the old one and the new one. It seems unusual and unbelievable as a person puts two different signatures in a casual letter written by him to his tenant. This generally happens when a person is extra-cautious and acts in a manner to cover up the lacunae in his behavior.
- (iii) **Ex.PW1/DX3-** This is an Affidavit executed by the testator on 10.12.1985. This Affidavit bears the stamp of the Oath Commissioner, Mr. Narinder Singh. In this Affidavit, the testator stated that he had executed the Will dated 29.11.1985 and the said Will was his last Will. He also stated that his wife and children deserted him 30 years back and hence he has with his free will bequeathed his properties to Respondent No.1. This document bears 2 sets of signatures of the testator. **X-11, X-12** and **X-13** are the old signature of

the testator and **X-14, X-15** and **X-16** are the new signature of the testator. It appears that the new signatures X-15 and X-16 are appearing just above the word 'Deponent' and the old signatures X-12 and X-13 are appearing on the left side of the word 'Deponent'. In an attested Affidavit, it is not possible to have two different signatures of the deponent. No oath Commissioner will attest such a document. Prima facie, it appears that X-11, X-12 and X-13 are affixed after the attestation of the said document by the oath Commissioner. The concerned oath Commissioner was not summoned by Respondent No.1 to dispel the doubt created on the veracity of this document.

- (iv) **Ex.PW1/DX6-** This is another Affidavit executed by the testator and it is exactly identically worded as that of PW1/DX5. This Affidavit was attested on 03.01.1986 by another oath Commissioner Mr. O.P Chaudhary. This document bears the old signature of the testator at **X-27** and **X-28**.
- (v) **Ex.PW1/DX1-** This is a registered General Power of Attorney executed by the testator in favour of Respondent No.1. This document was executed on 03.01.1987 and registered on 05.01.1987. The said document was executed after the execution and registration of the Will dated 25.11.1985. This document contains 4 old signatures of the testator at points **X-1, X-2, X-3** and **X-4**. However, in the entire document, there was no mention about the Will dated

25.11.1985. There are two witnesses to the said document, Mr. Subhash Sharma & Mr. Laxman Das Chawla. However, both these witnesses were not summoned to prove the execution and registration of the said document.

58. After examining both the Wills dated 29.11.1985 (**Ex. PW1/DX2** and **Ex. PW1/DX4**), and all the other documents produced to prove the veracity of the Will, this Court is of the considered opinion that the Will dated 25.11.1985 (**Ex. PW1/DX4**) was prepared and executed under suspicious circumstances. It raises well-grounded suspicion regarding the fact that whether the Will dated 29.11.1985 (**Ex. PW1/DX4**) expresses the mind of the testator or not. Hence, it is very much essential to examine the evidence of the attesting witnesses.

59. **Ex. PW1/DW2** and **Ex. PW1/DW4** have same set of attesting witnesses: (i) Mr. Sudharshan Lal (ii) Mr. Bal Kishan and (iii) Mr. Virenderjit. Mr. Sudharshan Lal (RW-1) and Mr. Bal Kishan (RW1/2) entered into the witness box to prove the execution and registration of the said documents.

- (i) **Mr. Sudharshan Lal (RW-1)** - RW-1 in his cross examination stated that he did not understand English or Hindi. However, he later said that he understood Urdu and 'little English' and had studied up to 6th standard. He further stated that Mr. Inder Mohan Nagpal (Respondent No.1, i.e. the beneficiary of the Will) was his son-in-law. He again stated that the testator had called him one day before the execution of the Will and requested him to be a witness to his Will. As per his instruction, RW-1 had reached the sub-registrar's office and the testator who

was available there showed him the typed copy of the Will. He further stated that he did not go through the said Will. He admitted that the testator signed the Will in his presence, and he signed the Will immediately after the testator. RW-1 further stated that the sub-registrar asked the testator in English whether he was executing the Will voluntarily or not. The testator answered in English in the affirmative. The Witness further stated that later he asked the testator about the sub registrar's question and the testator explained to him the meaning. He further stated that he had signed the Will in Urdu Language. He also submitted that he had attended the sub registrar office twice, one in November and another in December.

- (ii) **Mr. Bal Kishan Narula (RW-2)** - RW-2 stated that Respondent No.1 (Mr. Inder Mohan Narula, i.e. beneficiary of the Will) was his brother-in-law. He also stated that when he went to the testator, the Will was typed. He did not know who typed the Will. He further stated that he had not gone through the Will as he did not know English. He admitted that the testator and other witness signed the Will in his presence. He also stated that the testator stated about 'the execution of the Will to the sub-registrar' and they signed the Will.

60. The signature of the testator appearing in a Will is very vital part of the Will. In the present case, the testator was an educated person, and it can safely be presumed that he also knows about this basic fact. No prudent person will ever try to execute two different Wills with two different signatures. Such a scenario is possible only when the testator

noticed the difference in signature only after the first Will was executed and registered. Hence, in order to avoid any ambiguity, second Will was executed with the same content and with a rider explaining the reason for the execution of the second Will. Had the testator realised the issue of difference in signature on the same day itself, he would never have got the first Will registered at all. In the present case, the date of execution of both the Wills is 29.11.1985. It means the testator noticed the difference in signature on the same day itself. If that were the case, the first Will would never have been registered at all. In addition, the second Will states that ‘*I got my WILL dated 29 November 1985 registered earlier with the Sub Registrar New Delhi, which I signed in my new style of signatures.*’ This itself shows that on the date of the execution of the second Will, the first Will had already been registered. Hence, this Court is of the considered view that the second Will was *ante-dated*, meaning, the second Will was executed on a date after the registration of the first Will.

61. From the statement of both the attesting witnesses, it is evident that the Will was signed by the testator before the Sub registrar office in their presence. However, both the witnesses categorically stated that by the time they reached the sub registrar’s office, the testator had a typed copy of the ‘Will’ in his hand. They had not read the Will as they did not know English. There is no evidence to the effect that the testator signed the typed ‘Will’ knowing the contents of the same.

62. At the cost of repetition, it is reiterated that the propounder of the Will needs to prove 4 basic facts:

- i. The will was signed by the testator in the presence of two attesting witnesses;
- ii. At the relevant time he was in sound and disposing state of mind;
- iii. He understood the nature and effect i.e., the content of the disposition;
- iv. He put the signature to the document of his own free will.

63. In the present case, there is no evidence to show that the Will had been drafted as per the instruction of the testator. There is no evidence to show that the testator even read and understood the contents of the Will.

64. The Respondent No.1 could have dispelled this doubt by summoning the draftsman of the said Will. However, the draftsman of Will was not summoned to prove this crucial fact. The above inference is further fortified by the observation of the Hon'ble Supreme Court in the case of ***Joseph Antony Lazarus (Dead) by LRs v. A.J. Francis*** reported as ***(2006) 9 SCC 515***, wherein the Hon'ble Court made the following observations at ***Para 21***:

“The last and perhaps the most significant aspect of this matter is the failure of the appellant to examine the learned advocate who is said to have drafted the Will on the instructions of the testatrix and the non-examination of the Sub-Registrar before whom the Will is said to have been presented for registration. Both the said witnesses could have conclusively proved the facts relating to the preparation, execution and registration of the Will. In the absence of any evidence, we are unable to ascertain as to whether the Will was ever read over and explained to the testatrix before she is said to have executed and presented the same for registration.”

65. Both the attesting witnesses are closely related to Respondent No.1 who is the beneficiary of the Will. One Witness is his brother in-law

and other witness is his father in-law. Both of them stated categorically that the testator was known to them through the Nagpal family. Both of them did not know anything about the family background of the testator. It is very evident that both these attesting witnesses were not independent witnesses, and they were arranged either by the Respondent No.1 or the Nagpal Family. The active involvement of the propounder of the Will in the execution of the Will itself is a suspicious circumstance. This was observed as early as 1930 in the celebrated case of ***Vellasawmy Servai v. L. Sivaraman Servai*** reported as ***AIR 1930 PC 24***. The relevant part of the judgment is being reproduced below:

“The respondent, the propounder of the will, is the principal beneficiary under it, Even according to the evidence of Taugasawmy, which the High Court accepted, but which the trial Judge wholly disbelieved, the respondent took a leading part in giving instructions for the will and in procuring its execution and registration. Circumstances exist in this case that would excite the suspicion of any Probate Court and require it to examine the evidence in support of the will with great vigilance and scrutiny, and the respondent is not entitled to probate unless the evidence removes such suspicion and clearly proves that the testator approved of the will. In their Lordships' opinion, the respondent has wholly failed to do so.”

66. At this juncture, it will be pertinent to note the decision of the Hon'ble Supreme Court in the case of ***H. Venkatachala Iyengar (supra)***, wherein it has observed that a heavy burden is placed on the propounder of the Will to dispel the suspicious circumstances surrounding the Will. After analyzing the evidence on record, this Court is of the considered view that the Respondent No.1, who was the propounder of the Will, miserably failed to dispel the suspicious circumstances surrounding the execution of the Will dated 29.11.1985

Ex.PW1/DX4. Respondent No.1 also miserably failed to establish on record that the testator signed the Will after knowing the contents of the same.

67.The Learned Trial Court has discussed in detail the position of law as emerges from various judicial pronouncements. However, it appears that the learned Trial Court was swayed by the family background of the testator and failed to examine the circumstances surrounding the execution of the Will. Learned Trial Court erroneously opined that the onus lies on the Appellant to establish their case regarding the fabrication of the Will. This finding has played an instrumental role in the decision rendered in the impugned judgment. In this connection, it will be pertinent to note the findings of the Learned Trial Court on this issue. The relevant paragraphs are being reproduced below:

“25. Having settled the same, I revert to the aspect qua further consideration on the issues above. There is no direct evidence on record that the defendants had indeed exercised undue influence over the testator. There is also no direct evidence to substantiate that the testator was kept in confinement. It is nobody's case that the testator was unable to ambulate at the time of execution/registration of Wills till his death. No clear ailment of the testator has been proved on record despite plea to that effect. It would be evident from the evidence on record that the testator was in need of residential accommodation after his retirement. It is not disputed that he had chosen to stay with the Nagpal family. Conversely, there is no documentary evidence to the effect that either plaintiff no. 3 or her husband had made a request in writing for the testator to stay with them alongwith plaintiff no. 1 who was alive at that time nor there is any supporting evidence to that effect.

26. Conversely, there is no conclusive evidence on record to indicate that the testator came from a conservative family, the values of which would not even allow them to provide regular outdoor education to the girl child, in this case, the third plaintiff. If she was 13 years old in 1950, then no proof of her indoor education is produced by plaintiffs. There is no clear evidence on

record also even to indicate that the first plaintiff had shifted to Delhi in the residential accommodation of the testator after partition in the year 1947. Conversely, there is over whelming evidence to indicate that the first plaintiff moved away to Amritsar and did not join the house of the testator. Although, the plaintiffs set up a case that she stayed with him till 1950, however, there is no supporting evidence produced by them in the above context. Further, admittedly, the first plaintiff had taken the third plaintiff alongwith her to Amritsar to stay at the residence of Shri Rai Bahadur G.R Sethi in the year 1950. That she has not returned again to stay with the deceased testator is an established fact. It is also established fact that there were no marital relations left between the testator and the first plaintiff. To add to it, there is over whelming evidence to the effect and also admitted that the testator did not attend the marriage of either the plaintiff no. 2 or for that matter, the plaintiff no. 3. RW 3 is very vocal in re-asserting again and again on oath that plaintiffs no. 1, 2 & 3 had deserted the testator. No comprehensive and consistent line of cross-examination has been adopted for the said witness despite his sustainable stand.

“28 ... There is no such letter in which the testator has revealed anything about his health prospects to Sh Sethi as no evidence has been led on record which would necessarily point out that the testator was sick to such extent that his mental faculties had been affected or that he had become unfit for execution of Will.”

28.1. The above letters clearly indicate that there was no love lost between the testator and the plaintiffs.”

“30.3. So far as the aspect of illness of testator is concerned, the defendants have been able to produce and prove the medical certificates issued by Dr. Vijay Suri in respect of sound state of mind which have been duly proved on record. Merely because of the averment that they were not required to be arranged in due course of proceedings is itself is not a suspicious circumstance.

30.4. Moreover, the terminology and the language used in the Will in question points out to the fact that the deceased could not have been unstable or not in such health to have not gone to the Sub Registrar for registration of the Wills Ex PW-1/DX-3 and Ex PW-1/DX-4. There is a categorical statement in the Wills that the testator is in sound state of mind and health which fact is supported by both the attesting witnesses.

30.6. Merely because the attesting witnesses are known to defendant no. 1, it can not be itself a suspicious circumstance.

The witnesses on both the Will are same. I find no reason to disbelieve their testimonies.

*30.11. Conversely, after having analysed the above suspicious circumstances that have been dealt with in this judgment in the light of the case laws that I have cited above, particularly **Shashi Kumar Banerjee's case (Supra)** and **Jaswant Kaur's case (Supra)**, I am to hold that the defendants have not raised any such grave suspicious circumstance that would cast doubt on the registration and execution of Will Ex PW-1/DX-4.*

30.12. I may also state that merely because the bequeath in the said Will is excluding the natural heirs, is not in itself a suspicious circumstance rendering the Will as invalid in view of the law earlier relied on and proposition that a Will is intended to alter the general course of succession.”

68.A perusal of the impugned judgment reveals that the abovementioned circumstances were not taken into consideration by the learned Trial Court while granting the relief to the Respondent No.1 under the impugned judgment. In the considered opinion of this Court, the learned Trial Court erred in not attaching adequate weight to the aforementioned circumstances which posed a grave challenge to the authenticity of the Will in question.

69.The cumulative effect of all the aforementioned circumstances taken together gives rise to a genuine doubt regarding the authenticity of the Will and as to whether the same had, in fact, been executed by the testator with his own free volition. Upon perusal of the records, it becomes evident that the Respondent, being the propounder of the Will, has failed to remove the clouds of suspicion created by the existence of the abovementioned circumstances. He has thus not discharged the heavy onus placed on him in order to be able to cross

the hurdle of satisfying the test of judicial conscience as stated in ***H. Venkatachala Iyengar (supra)***.

70. In view of the above discussion and appreciation of the evidence placed on record, this Court is of the view that the conclusions drawn by the learned Trial Court are based on an erroneous appreciation of evidence pertaining to the genuineness of the Will in question.

71. Accordingly, the present appeals are allowed and the impugned judgment is set aside. The Appellant herein is held entitled to the recovery of possession in her favour in respect of the property bearing number BB - 8, Greater Kailash - II, New Delhi. The parties are left to bear their own cost.

72. Decree sheet be prepared accordingly.

GAURANG KANTH, J.

NOVEMBER 04, 2022

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