

**IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH**

RSA-1761-2023 (O&M)

Date of Decision : 11.12.2023

Smt. Satish Sharma

..... Appellant

Versus

Krishan Gopaul (Since Deceased) through his LRs and another

..... Respondents

CORAM : HON'BLE MR. JUSTICE VIKRAM AGGARWAL

Present : Mr. Kanwaljit Singh, Senior Advocate with
Ms. Gurmehr Kaur, Advocate, for the appellant.

Mr. Ashish Aggarwal, Senior Advocate with
Mr. Gaurav Arora, Advocate for the respondents/caveators.

VIKRAM AGGARWAL, J

1. Defendant Satish Sharma is in second appeal against the concurrent findings recorded by both the Courts below.

2. A suit for possession by way of partition with consequential relief of permanent injunction was filed by the plaintiffs-respondents which came to be decreed by the Court of Civil Judge (Junior Division), Karnal vide judgment and decree dated 17.11.2015. The appeal preferred by the defendant-appellant against the said decision was dismissed by the Court of Additional District Judge, Karnal vide judgment and decree dated 23.01.2023,

leading to the filing of the present second appeal. (For the sake of convenience, parties shall be referred to as per their original status).

3. One Pandit Desraj Mishra, who was a resident of Karnal, expired in 1974. He was survived by his wife Smt. Kailashwanti alias Kailashwati. The couple had three children namely Krishan Gopaul (son) & Dhiraj Bhanot and Satish Sharma (daughters). Smt. Kailashwanti was the owner of a house bearing No.559, situated in Model Town, Karnal (fully described in the plaint) (hereinafter referred to as 'the disputed house'). It is this house which is the bone of contention between the siblings.

4 (i). Plaintiffs Krishan Gopaul and Dhiraj Bhanot (both have expired and are now represented by their legal representatives) filed a suit for possession by way of partition with consequential relief of permanent injunction. The case set up was that Smt. Kailashwanti was the owner of the disputed house. Smt. Kailashwanti was stated to have expired intestate on 26.10.1980 after which the parties to the suit became owners in possession of the disputed house in equal shares. It was averred that the disputed house was a source of constant dispute between the parties and despite various efforts, no headway could be arrived at as the defendant, on account of her adamant stand did not want to part with the possession of the disputed house and wanted to usurp the share of the plaintiffs. It was averred that she intended to alienate the disputed house and since she did not agree to the proposal of dividing the disputed house in equal shares, the suit was instituted. A preliminary decree of possession by way of partition was prayed for. Consequential relief of permanent injunction restraining the defendant from

alienating any specific portion of the disputed house in excess of her share and also from changing the nature of the same was sought.

4(ii) The suit was opposed by the defendant. In the written statement, certain preliminary objections with regard to maintainability, locus standi, estoppel, the suit not being valued properly for the purposes of Court fee and jurisdiction etc. were raised. It was averred that a Will dated 31.12.1977 had been executed by Smt. Kailashwanti in favour of the defendant and that the defendant had been residing in the disputed house for the last 33 years. On merits, the relationship between the parties and the factum of Smt. Kailashwanti having expired on 26.10.1980 and she being the owner of the disputed house was admitted. It was averred that the defendant had served Smt. Kailashwanti in her old age and she had been residing with the defendant since 1977 whereas the plaintiffs had not served Smt. Kailashwanti in her old age. On account of the service rendered by the defendant to Smt. Kailashwanti, she executed a Will dated 31.12.1977 in favour of the defendant.

4(iii). It was also averred that the defendant had spent a huge amount to renovate the disputed house since it was in a dilapidated condition. All modern amenities had been provided. It was averred that the plaintiffs were fully aware about the execution of the Will dated 31.12.1977 and had never raised any objection to the ownership rights of the defendant over the disputed house. With the rise in prices, they had become dishonest and had started asserting their rights over the disputed house.

4(iv) In the replication, the averments made in the written statement were denied and those made in the plaint were reiterated. With regard to the Will, it was averred that no such Will had been executed by Smt. Kailashwanti. It was averred that Smt. Kailashwanti had expired in 1980 and no mention of the Will had been made by the defendant till the filing of the written statement i.e. till 33 years. It was also averred that in the written statement, no details of the Will were given and even in the reply to the application moved by the plaintiffs under Order 8 Rule 1-A CPC, it was averred that the defendant had tried her best to locate the alleged Will but was not able to locate the same and that she would produce the Will before the Court as and when she located it. Subsequently, the written statement was amended and details of the Will were incorporated.

4(v) From the pleadings of the parties, the trial Court framed the following issues for adjudication:-

1. Whether the plaintiff is entitled to decree for possession by way of partition of the suit land detailed in para no.2 of the plaint ? OPP
2. Whether plaintiff is entitled to decree for permanent injunction for restraining the defendant from alienating any specific portion of the suit property, as prayed for ? OPP
- 2A Whether deceased Smt. Kailashwati had even executed any valid Will regarding suit property in favour of defendant, if so, to what effect ? OPD
3. Whether suit is not maintainable in the present form ? OPD
4. Whether plaintiff has no locus standi and cause of action to file the present suit ? OPD

5. Relief.

4(vi) Parties led their respective evidence. As has been noticed earlier, the suit was decreed by the trial Court and the appeal preferred by the defendant against the said decision was dismissed.

5. I have heard learned counsel for the parties.

6 (i). Learned Senior counsel represented the appellant/defendant submitted that both the Courts below have gravely erred in decreeing the suit filed by the plaintiffs. It was submitted that the execution of the Will duly stood proved and that there were no suspicious circumstances surrounding the Will. It was submitted that the execution of the Will was duly proved on record since one of the attesting witnesses and the scribe were duly examined. Reference was made to the oral and documentary evidence produced on the record of the case and it was submitted that the plaintiffs had never served Smt. Kailashwanti in her old age as a result of which she executed a Will in favour of the defendant.

6(ii). Learned Senior counsel assailed the findings of the Courts below stating that both the Courts had wrongly come to the conclusion that the Will was shrouded by suspicious circumstances. It was submitted that the Will was duly in the knowledge of the plaintiffs and the defendant had been residing in the disputed house for 33 years without any kind of objection from the plaintiffs. Learned Senior Counsel submitted that this in itself would show that Smt. Kailashwanti intended to grant the rights qua the disputed house in favour of the defendant who had served her in her old age. In support of his contentions, learned Senior counsel placed reliance upon the

judgments of Hon'ble Supreme Court of India in ***Maresh Kumar (Dead) by L.Rs. Versus Vinod Kumar & Ors. 2012 (2) Civil Court Cases 517 (S.C.), Leela Rajagopal & Ors. Vs. Kamala Menon Cocharan & Ors. 2014 (4) Civil Court Cases 758 (S.C.)***, judgment of Delhi High Court in ***Rajindra Motwani Versus State & Ors. 2014 (3) Civil Court Cases 077 (Delhi)*** as well as the judgments of Coordinate Benches of this Court in ***Ram Chand Versus Udai Singh alias Daya Ram & Ors. 2012 (3) Civil Court Cases 559 (P&H), Raj Kumar & Ors. Versus Hari Chand (dead) through his LRs. & Ors. 2014 (Suppl.) Civil Court Cases 799 (P&H), Pratibha and another versus Nandi Devi and others, in RSA No.1184 of 2016, decided on 27.11.2018.***

7. Learned Senior Counsel representing the respondents-caveators/plaintiffs was also heard to some extent. It was submitted that the concurrent findings recorded by the Courts below were well reasoned and do not call for any interference. Learned Senior counsel also referred to the oral and documentary evidence led on the record of the case and supported by the findings recorded by the Courts below.

8(i). Before adverting to the merits of the appeal, it would be essential to observe that that the requirement of framing a substantial question of law in second appeal in terms of the provisions of Section 100 of the Code of Civil Procedure as had been laid down in various pronouncements by the Hon'ble Apex Court including ***Hero Vinoth (minor) versus Seshammal 2006 (5) SCC 545***, was subsequently held to be not there by the Hon'ble Apex Court. It was held that in the States of Punjab and Haryana, it is the provisions of the Punjab Courts Act, 1918 which would be applicable and, therefore, Section

100 CPC would not hold the field and, accordingly, there would be no requirement of framing substantial question of law in second appeal. With regard to the States of Punjab and Haryana, it was so held in ***Kirodi (Since Deceased) through his Lr. Versus Ram Parkash & Ors. 2019 (3) R.C.R. (Civil)*** and ***Satyender and Ors. Versus Saroj and Ors. 2022 (12) Scale 92*** respectively.

8(ii). It was further held in the judgment of ***Satyender and others Versus Saroj and others*** (supra) that though the requirement of formulation of a substantial question of law is not necessary, yet Section 41 of the Punjab Courts Act requires that only such decisions are to be considered in second appeal which are contrary to law or to some custom or usage having the force of law or the Courts below had failed to determine some material issue of law or custom or usage having the force of law. It was held that what was, therefore, important was still a “question of law”. It was also held that a second appeal was not a forum where the Court would re-examine or re-appreciate questions of fact settled by the trial Court and the Appellate Court. While holding so, the judgment in the case of ***Kirodi (Since Deceased) through his Lr. Versus Ram Parkash & Ors.*** (supra) was also considered.

8(iii) The legal position under subject is also required to be examined:-

8(iv) Section 63 of the Indian Succession Act, 1925 lays down as under:-

“63 Execution of unprivileged Wills. —Every testator, not being a soldier employed in an expedition or engaged

in actual warfare,¹² [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 acknowledgement of his signature or mark, or 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.”

8(v). Further, Section 68 of the Indian Evidence Act, 1872 lays down 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.)”

8(vi). In the case of *Shashi Kumar Banerjee and others Vs. Subodh Kumar Banerjee since deceased and after him his legal representatives and others, AIR 1964 SC 529*, a Constitution Bench of the Hon’ble Apex Court was dealing with the issue of genuineness of a Will. While referring to the judgment of the Hon’ble Apex Court in the case of *H. Venkata-Chala Iyengar Vs. B. N. Thimmajamma, AIR 1959 (SC) 443 and Rani Purnima Devi Vs. Khagendra Narayan Dev, AIR 1962 (SC) 567*, it was held that the principles governing the proving of a Will are well settled. It was held that 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 Section 63 of the Indian Succession Act. It was held that 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. It was held that 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. It was held that where the caveator alleges undue influence, fraud and coercion, the onus is on him to prove the same. It was held that the suspicious circumstances may be as to the 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 etc. These principles were reiterated recently by the Hon'ble Apex Court in the case of **Kavita Kanwar Vs. Pamela Mehta and others, (2021) 11 SCC 209**. It was held by the Hon'ble Apex Court as under:-

“24. We may now take note of the relevant principles settled by the consistent decisions in regard to the process of examination of a Will when propounded before a Court of law.

24.1. In the case of H. Venkatachala Iyengar (supra), a 3-Judge Bench of this Court traversed through the vistas of the issues related with execution and proof of Will and enunciated a few fundamental guiding principles that have consistently been followed and applied in almost all the cases involving such issues. The synthesis and exposition by this Court in paragraphs 18 to 22 of the said decision could be usefully reproduced as under:-

“18. What is the true legal position in the matter of proof of wills? It is well known that the proof of wills presents a recurring topic for decision in courts and there are a large number of judicial pronouncements on the subject. 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, Evidence Act are relevant for this purpose. Under Section 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 Sections 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, Sections 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 section 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 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.

*22. It is obvious that for deciding material questions of fact which arise in applications for probate or in actions on wills, no hard and fast or inflexible rules can be laid down for the appreciation of the evidence. It may, however, be stated generally that a propounder of the will has to prove the due and valid 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. It is quite true that, as observed by Lord Du Parc in **Harmes v. Hinkson, 50 Cal W N 895 : (AIR 1946 Privy Council 156)**, "where a will is charged with suspicion, the rules enjoin a reasonable scepticism, not an obdurate persistence in disbelief. They do not demand from the Judge, even in circumstances of grave suspicion, a resolute and impenetrable incredulity. He is never required to close his mind to the truth". It would sound platitudinous to say so, but it is nevertheless true that in discovering truth even in such cases the judicial mind must always be open though vigilant, cautious and circumspect."*

24.2. In *Rani Purnima Debi (supra)*, this Court referred to the aforementioned decision in *H. Venkatachala Iyengar* and further explained the principles which govern the proving of a Will as follows:-

"5. Before we consider the facts of this case it is well to set out the principles which govern the proving of a will. This was considered by this Court in *H. Venkatachala Iyengar v. B. N. Thimmajamma, (1959) Supp (1) SCR 426: AIR 1959 Supreme Court 443*. It was observed in that case that the mode of proving a will did 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 section 63 of the Indian Succession Act. The onus of proving the will was on the propounder and in the absence of suspicious circumstances surrounding the execution of the will proof of testamentary capacity and signature of the testator as required by law was sufficient to discharge the onus. Where, however, there were suspicious circumstances, the onus would be on the propounder to explain them to the satisfaction of the Court before the will could be accepted as genuine. If the caveator alleged undue influence, fraud or coercion, the onus would be on him to prove the same. Even where there were no such pleas but the circumstances gave rise to doubts, it was for the propounder to satisfy the conscience of the Court. Further, what are suspicious circumstances was also considered in this case. The alleged signature of the testator might be very shaky and doubtful and evidence in support of the propounder's case that the signature in question was the signature of the testator might not remove the doubt created by the appearance of the signature. The condition of the testator's mind might appear to be very feeble and debilitated and evidence adduced might not succeed in removing the legitimate doubt as to the mental capacity of the testator; the dispositions made in the will might appear to be unnatural, improbable or unfair in the light of relevant circumstances; or the will might otherwise indicate that the said dispositions might not be the result of the testator's free will and mind. In such cases, the Court would naturally expect that all legitimate suspicions should be completely removed before the document was accepted as the last will of the testator. Further, a propounder himself might take a prominent part in the execution of the will which

conferred on him substantial benefits. If this was so it was generally treated as a suspicious circumstance attending the execution of the will and the propounder was required to remove the doubts by clear and satisfactory evidence. But even when where there suspicious circumstances and the propounder succeeded in removing them, the Court would grant probate, though the will might be unnatural and might cut off wholly or in part near relations." (emphasis supplied)

24.3. In the case of *Indu Bala Bose (supra)*, this Court again said,-

"7. This Court has held that the mode of proving a Will does not ordinarily differ from that of proving any other document except to the special requirement of attestation prescribed in the case of a Will by section 63 of the 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. Even where circumstances give rise to doubts, it is for the propounder to satisfy the conscience of the court. The suspicious circumstances may be as to the genuineness of the signatures 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 indications 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 suspicions should be completely removed before the document is accepted as the last Will of the testator. If the propounder himself takes a prominent 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.

8. *Needless to say that any and every circumstance is not a "suspicious" circumstance. A circumstance would be "suspicious" when it is not normal or is not normally expected in a normal situation or is not expected of a normal person."* (emphasis supplied)

24.4. *We may also usefully refer to the principles enunciated in the case of Jaswant Kaur (supra) for dealing with a Will shrouded in suspicion, as follows: -*

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

24.5. *In the case of Uma Devi Nambiar (supra), this Court extensively reviewed the case law dealing with a Will, including the Constitution Bench decision of this Court in the case of Shashi Kumar Banerjee and Ors. v. Subodh Kumar Banerjee and Ors.: AIR 1964 Supreme Court 529, and observed that mere exclusion of the natural heirs or giving of lesser share to them, by itself, will not be considered to be a suspicious circumstance. This Court observed, inter alia, as under:-*

"15. Section 63 of the Act deals with execution of unprivileged Wills. It lays down that 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. It further lays down that the Will shall be attested by two or more witnesses, each of whom has seen the testator signing or affixing his mark to the Will or has seen some other person sign the Will, in the presence and by the direction of the testator and each of the witnesses shall sign the Will in the presence of the testator. section 68 of the Indian Evidence Act, 1872 (in short the "Evidence Act")

mandates examination of one attesting witness in proof of a Will, whether registered or not. The law relating to the manner and onus of proof and also the duty cast upon the court while dealing with a case based upon a Will has been examined in considerable detail in several decisions of this Court A Constitution Bench of this Court in Shashi Kumar Banerjee's case succinctly indicated the focal position in law as follows: (AIR p. 531, para 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 section 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 the 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 indications 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."

16. A Will is executed to alter the ordinary mode of succession and by the very nature of things it is bound to result in earlier reducing or depriving the share of natural heirs. If a person intends his property to pass to his natural heirs, there is no necessity at all of

executing a Will. It is true that a propounder of the Will has to remove all suspicious circumstances. Suspicion means doubt, conjecture or mistrust. But the fact that natural heirs have either been excluded or a lesser share has been given to them, by itself without anything more, cannot be held to be a suspicious circumstance specially in a case where the bequest has been made in favour of an offspring. As held in P.P.K. Gopalan Nambiar v. P.P.K. Balakrishnan Nambiar and Ors.: [1995] 2 SCR 585, it is the duty of the propounder of the Will to remove all the suspected features, but there must be real, germane and valid suspicious features and not fantasy of the doubting mind. It has been held that if the propounder succeeds in removing the suspicious circumstances, the court has to give effect to the Will, even if the Will might be unnatural in the sense that it has cut off wholly or in part near relations.In Rabindra Nath Mukherjee and Anr. v. Panchanan Banerjee (dead) by LRs. and Ors.: AIR 1995 Supreme Court 1684, it was observed that the circumstance of deprivation of natural heirs should not raise any suspicion because the whole idea behind execution of the Will is to interfere with the normal line of succession and so, natural heirs would be debarred in every case of Will. Of course, it may be that in some cases they are fully debarred and in some cases partly."

24.6. In the case of Mahesh Kumar (supra), this Court indicated the error of approach on the part of the High Court while appreciating the evidence relating to the Will as follows:-

"44. The issue which remains to be examined is whether the High Court was justified in coming to the conclusion that the execution of the will dated 10-2-1992 was shrouded with suspicion and the appellant failed to dispel the suspicion? At the outset, we deem it necessary to observe that the learned Single Judge misread the statement of Sobhag Chand (DW3) and recorded something which does not appear in his statement. While Sobhag Chand categorically stated that he had signed as the witness after Shri Harishankar had signed the will, the portion of his statement extracted in the impugned judgment gives an impression that the witnesses had signed even before the executant had signed the will.

45. Another patent error committed by the learned Single Judge is that he decided the issue relating to validity of the will by assuming that both the attesting witnesses were required to append their signatures simultaneously. Section 63(c) of the 1925 Act does not contain any such requirement and it is settled law that examination of one of the attesting witnesses is sufficient. Not only this, while recording an adverse finding on this issue, the learned Single Judge omitted to consider the categorical statements made by DW 3 and DW 4 that the testator had read out and signed the will in their presence and thereafter they had appended their signatures.

46. The other reasons enumerated by the learned Single Judge for holding that the execution of will was highly suspicious are based on mere surmises/conjectures. The observation of the learned Single Judge that the possibility of obtaining signatures of Shri Harishankar and attesting witnesses on blank paper and preparation of the draft by Shri S.K. Agarwal, Advocate on pre-signed papers does not find even a semblance of support from the pleadings and evidence of the parties. If Respondent 1 wanted to show that the will was drafted by the advocate after Shri Harishankar and attesting witnesses had signed blank papers, he could have examined or at least summoned Shri S.K. Agarwal, Advocate, who had represented him before the Board of Revenue."

24.7. Another decision cited on behalf of the appellant in the case of Leela Rajagopal may also be referred where this Court summarised the principles that ultimately, the judicial verdict in relation to a Will and suspicious circumstances shall be on the basis of holistic view of the matter with consideration of all the unusual features and suspicious circumstances put together and not on the impact of any single feature. This Court said,-

"13. A will may have certain features and may have been executed in certain circumstances which may appear to be somewhat unnatural. Such unusual features appearing in a will or the unnatural circumstances surrounding its execution will definitely justify a close scrutiny before the same can be accepted. It is the overall assessment of the court on the basis of such scrutiny; the cumulative effect of the

unusual features and circumstances which would weigh with the court in the determination required to be made by it. The judicial verdict, in the last resort, will be on the basis of a consideration of all the unusual features and suspicious circumstances put together and not on the impact of any single feature that may be found in a will or a singular circumstance that may appear from the process leading to its execution or registration. This, is the essence of the repeated pronouncements made by this Court on the subject including the decisions referred to and relied upon before us."

24.8. We need not multiply the references to all and other decisions cited at the Bar, which essentially proceed on the aforesaid principles while applying the same in the given set of facts and circumstances. Suffice would be to point out that in a recent decision in Civil Appeal No. 6076 of 2009: Shivakumar & Ors. v. Sharanabasppa & Ors., decided on 24.04.2020, this Court, after traversing through the relevant decisions, has summarised the principles governing the adjudicatory process concerning proof of a Will as follows:-

"1. Ordinarily, a Will has to be proved like any other document; the test to be applied being the usual test of the satisfaction of the prudent mind. Alike the principles governing the proof of other documents, in the case of Will too, the proof with mathematical accuracy is not to be insisted upon.

2. Since as per section 63 of the Succession Act, a Will is required to be attested, it cannot be used as evidence until at least one attesting witness has been called for the purpose of proving its execution, if there be an attesting witness alive and capable of giving evidence.

3. The unique feature of a Will is that it speaks from the death of the testator and, therefore, the maker thereof is not available for deposing about the circumstances in which the same was executed. This introduces an element of solemnity in the decision of the question as to whether the document propounded is the last Will of the testator. The initial onus, naturally, lies on the propounder but the same can be

taken to have been primarily discharged on proof of the essential facts which go into the making of a Will.

4. The case in which the execution of the Will is surrounded by suspicious circumstances stands on a different footing. The presence of suspicious circumstances makes the onus heavier on the propounder and, therefore, in cases where the circumstances attendant upon the execution of the document give rise to suspicion, the propounder must remove all legitimate suspicions before the document can be accepted as the last Will of the testator.

5. If a person challenging the Will alleges fabrication or alleges fraud, undue influence, coercion et cetera in regard to the execution of the Will, such pleas have to be proved by him, but even in the absence of such pleas, the very circumstances surrounding the execution of the Will may give rise to the doubt or as to whether the Will had indeed been executed by the testator and/or as to whether the testator was acting of his own free will. In such eventuality, it is again a part of the initial onus of the propounder to remove all reasonable doubts in the matter.

6. A circumstance is "suspicious" when it is not normal or is 'not normally expected in a normal situation or is not expected of a normal person'. As put by this Court, the suspicious features must be 'real, germane and valid' and not merely the 'fantasy of the doubting mind.'

7. As to whether any particular feature or a set of features qualify as "suspicious" would depend on the facts and circumstances of each case. A shaky or doubtful signature; a feeble or uncertain mind of the testator; an unfair disposition of property; an unjust exclusion of the legal heirs and particularly the dependants; an active or leading part in making of the Will by the beneficiary thereunder et cetera are some of the circumstances which may give rise to suspicion. The circumstances above-noted are only illustrative and by no means exhaustive because there could be any circumstance or set of circumstances which may give rise to legitimate suspicion about the execution of the Will. On the other hand, any of the circumstance qualifying as being suspicious could be legitimately explained by the propounder. However, such suspicion or suspicions cannot be removed by mere proof of sound and disposing state of mind of the testator and his signature coupled with the proof of attestation.

8. The test of satisfaction of the judicial conscience comes into operation when a document propounded as the Will of the testator is surrounded by suspicious circumstance/s. While applying such test, the Court would address itself to the solemn questions as to whether the testator had signed the Will while being aware of its contents and after understanding the nature and effect of the dispositions in the Will?

9. In the ultimate analysis, where the execution of a Will is shrouded in suspicion, it is a matter essentially of the judicial conscience of the Court and the party which sets up the Will has to offer cogent and convincing explanation of the suspicious circumstances surrounding the Will."

9 (i). Reverting to the case in hand, It is unfortunate that real brothers and sisters are fighting a legal battle over a house owned by their mother Smt. Kailashwanti. Their father Pandit Desraj Mishra expired in the year 1974 and Smt. Kailashwanti expired on 26.10.1980. Admittedly, the defendant has been residing in the disputed house since 1977. The suit was filed in the year 2013. Whether the plaintiffs had consented to the defendant residing in the disputed house and whether Smt. Kailashwanti had executed a Will in favour of the defendant are issues which need to be addressed. It is a bit strange that the defendant kept on residing in the disputed house till the filing of the suit without any objection from any quarter. At the same time, it is equally strange that the alleged Will dated 31.12.1977 never saw the light of the day till the filing of the suit.

9(ii) Certain facts are admitted. The relationship between the parties is admitted. Smt. Kailashwanti being the owner of the disputed house is admitted. The question which needs to be addressed is as to whether the property of Smt. Kailashwanti i.e. the disputed house would devolve upon the legal heirs of Smt. Kailashwanti by way of succession or in accordance with

the Will dated 31.12.1977. As per the plaintiffs, the same will devolve as per succession whereas, as per the defendant, she would be the sole and exclusive owner of the disputed house in view of the Will dated 31.12.1977 executed in her favour by her mother Smt. Kailashwanti. We shall straightway refer to the Will Ex.D1. It is an unregistered document. Further, it has been thumb marked by Smt. Kailashwanti. There were two attesting witnesses namely Mukhtiar Singh and Sh. Mehar Chand. The scribe was Sh. R.L.Dhammi. Considering the fact that the Will was drafted by a scribe, its format and its placement is somewhat strange. One witness namely Mukhtiar Singh had signed on the first page on the side margin of the Will and there is also thumb impression of Kailashwanti on the side margin of the said page. The second witness Mehar Chand signed on the second page on the side margin and the thumb impression of Smt. Kailashwanti are at the bottom of the said page. This is not the normal format of a Will and once the scribe was there, the placement of the signatures of both the witnesses would be expected to be at the bottom as also on the side margins.

9(iii) Ex.P-4 and Ex.P-7 were two documents produced on record which were the conveyance deed of the disputed house and a money-order form on which there were signatures of Smt. Kailashwanti. The conveyance deed was executed in November, 1963 and it bears the signatures (though in Hindi) of Smt. Kailashwanti. The money-order receipt also bears the signatures of Smt. Kailashwanti in Hindi. This receipt was of May 1980. It, therefore, means that prior to the execution of the alleged Will and also after that i.e. in the year 1963 and 1980 Smt. Kailashwanti appended her signatures on two documents vis. a conveyance deed and a money-order receipt. These

documents were duly exhibited during the course of evidence and were not objected to. It had also come on record that Sh. Desraj Mishra was an advocate. It is, therefore, quite unnatural that Smt. Kailashwanti put her thumb impressions on the alleged Will instead of appending her signatures. The onus to prove that the Will had been executed was upon the defendant and the defendant did not examine any expert to prove that the thumb impressions were of Smt. Kailashwanti.

9(iv). In so far as the attesting witnesses and the scribe are concerned, one attesting witness Mukhtiar Singh stepped into the witness box as DW2. The scribe also appeared as DW3. However, the other attesting witness namely Sh. Mehar Chand was not examined and no reason was given for his non-examination. The testimony of both DW2 Mukhtiar Singh and DW3 Sh. R.L.Dhammi was not found to be trustworthy by the Courts below. I have also perused their statements. It is quite strange that Smt. Kailashwanti decided to execute her Will on a cold day of December i.e. 31.12.1977 and allegedly went to the Tehsil premises to get the Will scribed when the Courts were closed. Mukhtiar Singh, while appearing as DW2 stated, in his cross-examination that his father had sent him for being a witness to the Will as Smt. Kailashwanti had asked his father to come as a witness but he was busy in some work. He stated that the defendant was also accompanying Smt. Kailashwanti when she went for execution of the Will. He stated that he was illiterate. It is quite strange that an illiterate person was called as a witness to the Will. Normally a person would call some literate person as a witness so that in case of any dispute, he would at least be in a position to support the Will. DW2 Mukhtiar Singh stated that he did not know the other witness

Mehar Chand previously. He denied many questions and feigned ignorance about many facts. Similarly the scribe Sh. R.L.Dhammi stated that he did not remember as to whether the defendant was accompanying Smt. Kailashwanti or not. However, her signatures/thumb impressions were not there in his register. He did not retain a copy of the Will in his register. He also did not make an entry with regard to the execution of the Will in his register. His register which was brought in the Court during the evidence contained blank pages. He stated that he had not seen the identification proof of Smt. Kailashwanti. He further stated that he had never had a permanent seat in the Karnal Tehsil but used to go there for work.

9(v). The analysis of the oral and documentary evidence clearly shows that the execution of the Will does not stand fully proved and that there are a number of questions which were left unanswered. The Will Ex.D1 does not qualify the test laid down in the judgments referred to in the preceding paragraphs. Another thing which has not been explained by the defendant is as to why the Will dated 31.12.1977 did not see the light of the day till the suit was filed and why no effort was made by the defendant to get the disputed house mutated in her favour on the basis of the Will. It cannot be ruled out that the defendant had been residing in the disputed house with the consent of the plaintiffs but once the plaintiffs felt that she was not getting the house transferred in the names of all of them, the suit was filed. Had the Will been executed, there was no reason why no efforts were made to get the disputed house transferred in the name of the defendant.

9(vi). Still further, it also came in the evidence that the plaintiffs had participated in the last rites of Smt. Kailashwanti and there is no concrete evidence on the record that the plaintiffs had not served Smt. Kailashwanti in her old age as a result of which she executed the Will in favour of the defendant.

9(vii). It is, therefore, abundantly clear that the execution of the Will was not proved by the defendant and further, the Will was also shrouded by suspicious circumstances. Both the Courts below, therefore, did not commit any illegality in decreeing the suit and rejecting the stand of the defendant.

9(viii) I have gone through the judgments relied upon by learned Senior counsel representing the appellant/defendant. In the case of **Mahesh Kumar (Dead) by L.Rs. Versus Vinod Kumar & Ors.** (supra) the Hon'ble Apex Court held that the mere fact that the propounder was present at the time of the execution of the Will would not affect the genuineness or validity of the Will. This judgment will not come to the aid of the appellant as she has not been non-suited only on the ground of having been present at the time of execution of the Will but on the contrary she has been non-suited on account of many other circumstances which have been discussed in the preceding paragraphs. For the same reason, the judgment in the case of **Leela Rajagopal & Ors. Vs. Kamala Menon Cocharan & Ors.** (supra) will not come to the aid of the appellant.

9(ix). The judgment in the case of **Ram Chand Versus Udai Singh alias Daya Ram & Ors.** (supra) was given in the peculiar facts of that case and would not apply to the facts of the present case. In the case of **Raj**

Kumar & Ors. Versus Hari Chand (dead) through his LRs. & Ors., a

Coordinate Bench of this Court held that merely because there were thumb impressions on the Will instead of signatures, it would not amount to suspicious circumstances and that the thumb impressions are rather more authentic and difficult to tamper with. This judgment would also not come to the aid of appellant/defendant since no efforts were made to prove that thumb impressions were actually of Smt. Kailashwanti and further as to under what circumstances before and after execution of the Will, Smt. Kailashwanti had been appending her signatures instead of thumb impressions. It has to be borne in mind that the onus to prove the Will was upon the defendant which she did not successfully discharge.

In view of the aforementioned facts and circumstances, I do not find any ground to interfere in the well reasoned judgments passed by both the Courts below. Accordingly, finding no merit in the present appeal, the same is dismissed.

(**VIKRAM AGGARWAL**)
JUDGE

11.12.2023

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Whether speaking/reasoned	Yes/No
Whether Reportable	Yes/No