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

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Reserved on: 22.12.2022

Pronounced on: 29.03.2023

+ **RFA 50/2015**

OM PRAKASH POPLI AND ORS Appellants

Through: Mr. Ajay Kohli and
Ms. Dipika Prasad, Advocates.

versus

RAJ KUMARI BATRA AND ORS Respondents

Through: Mr. Sandeep Sharma, Mr.
Aman Dhyani, Ms. Bandana
Kaur Grover and Mr. Kunal
Aarora, Advocates for
respondent No. 1.

Mr. Shekhar Dasi and Mr. S.
K. Gupta, Advocate for
respondent No. 2.

CORAM:

HON'BLE MR. JUSTICE GAURANG KANTH

J U D G M E N T

GAURANG KANTH, J.

1. The case at hand is a first appeal which has been filed under Section 96 and Order XLI Rule 1 of The Code of Civil Procedure, 1908 against the Judgment and preliminary decree dated 11.12.2014, passed by the learned Additional District Judge-06, Central Delhi, wherein the learned Additional District Judge decided the Civil Suit No. 46/11/08 titled as *Raj Kumari Batra vs. Om Prakash Popli & Ors.* which was a suit for partition and permanent injunction (hereinafter referred to as the “impugned judgment”).

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2. The appeal arises from a suit brought by Respondent No. 1/Smt. Raj Kumari Batra in the Court of the learned Additional District Judge, Central Delhi, for partition and permanent injunction with respect to the property bearing No. C-II/ 55-56 situated at Lajpat Nagar, New Delhi (hereinafter, referred to as **“suit property”**) upon the death of the mother of the parties Smt. Laxmi Devi (hereinafter referred to as **“the deceased testatrix”**). Vide the impugned judgment, the learned Trial Court passed a Preliminary Decree of partition by metes and bounds in favour of Respondent No. 1 in respect of the suit property consisting of ground floor, first floor and second floor, except the basement floor to the effect that the parties were entitled to 1/5th share each in the suit property.

FACTS GERMANE FOR THE ADJUDICATION OF THE PRESENT APPEAL ARE AS FOLLOWS:

3. The factual matrix which emerges out of a perusal of the records is that Shri Om Prakash Popli, Shri Rajender Popli and Shri Subhash Chand Popli (hereinafter referred to as **“Appellant No. 1, Appellant No. 2 and Appellant No. 3”**, respectively) and Smt. Raj Kumari Batra and Shri Prem Nath Popli (hereinafter referred to as **“Respondent No. 1”** and **“Respondent No. 2”**, respectively) were all real siblings born to Late Shri Dayal Chand Ulfat and Late Smt. Laxmi Devi. As per the pleadings of the parties, Appellant Nos. 1, 2 and 3 had been residing in the suit property, whereas Respondent No. 1 was married and residing

with her husband in Agra and Respondent No. 2 was a resident of Canada.

4. Late Smt. Laxmi Devi, the mother of the parties, was the owner of the suit property. A perpetual lease deed dated 12.09.1968 had been executed in favour of Smt. Laxmi Devi which was registered with the office of Sub-Registrar, Delhi on 08.01.1969. A Conveyance Deed dated 28.06.2004 was executed in favour of Smt. Laxmi Devi making her the owner of the suit property and this was registered with the concerned sub-Registrar on 01.07.2004.
5. As per Respondent No. 1, her mother had sold the basement floor during her lifetime in pursuance of a Builder Collaboration Agreement and thereafter the entire property was constructed. Upon the death of her mother, Respondent No. 1 had initially filed a suit for partition and Permanent Injunction before the learned Trial Court submitting that Smt. Laxmi Devi had died intestate on 22.04.2008. Respondent No.1 claimed that upon the death of her mother, the suit property devolved upon the parties in equal share, i.e. 1/5th of the suit property apart from the basement floor which had already been sold.
6. The claims of Respondent No. 1 were refuted by the Appellants in their joint Written Statement where they claimed that the deceased Smt. Laxmi Devi had executed a duly registered Will dated 24.02.2005 during her lifetime whereby she had bequeathed the entire first floor portion of the suit property to Appellant No. 3 and the second floor of the suit property was

bequeathed in favour of Appellant Nos. 1 and 2 to the extent of the portions occupied by them.

7. It was the case of the Appellant Nos. 1 to 3 before the learned Trial Court that in the afore-stated Will (**Ex. PW-1/ D2**), Smt. Laxmi Devi had made a provision that she would be entitled to receive the rent of the ground floor so long as she was alive. The Will also contained a clause to the effect that after her demise and upon the payment of a sum of Rs. 10,00,000/- each to Respondent No. 1 and Respondent No. 2, the Appellant Nos. 1 to 3 would become the owners of the suit property to the extent of 1/4th share each to Appellant Nos. 1 and 2 and remaining half share to Appellant No. 3. The relevant portion of the Will is being reproduced below:

“NOW THIS WILL WITNESSTH AS UNDER

- 1. That so long the testatorix is alive she shall continue to be the absolute and exclusive owner of the property bearing No. C-II/55-56, Lajpat Nagar, New Delhi, except the basement portion which has already been sold AND on her death the TESTATORIX doth hereby bequeath, demise and give the entire First Floor to Subhash Chander, respective occupied portions of Second Floor to Om Parkash and Rajinder Kumar.*
- 2. So long the Testorix is alive, she shall be entitled to receive the rent of the Ground Floor Portion of the said property. Out of this rental income, the son Prem Nath and the Daughter Smt. Raj Batra shall be entitled to receive Rs. 10, 00, 000/- each and in each case, the said amount has been paid to during life time of the Testatorix, then none of them shall be entitled to receive any further amount nor thereafter. After the payment of Rs. 10, 00, 000/- each to Prem Nath and Smt. Raj Batra, as aforesaid, all the three sons shall become the owners to the extent of 1/4th share Om Parkash, Rajinder Kumar- 1/4th share, and Subhash Chander- 1/2 share of the Ground floor of the property and the rental income of the same in addition to*

portions referred to above. The Terrace of the said property shall remain under the use of all these three sons in equal shares.

3. *That the aforesaid beneficiaries shall be entitled to get their respective shares mutated in their own names with the authorities concerned and shall also be liable to pay all the taxes, fees, charges and or any other Govt dues in respect of their respective shares in the property.*
4. *That none of the legal heirs, shall have any right to interfere in this WILL.*
5. *That the two sons namely Subhash Chander and Om Parkash jointly and or severally shall act as EXECUTORS of this WILL besides being the beneficiary under this WILL. The previous will is, hereby cancelled.”*

8. Respondent No. 2 had expressed his inability to confirm the facts of the case before the learned Trial Court in view of the fact that he was a resident of Canada. He however asserted that the said Will appeared to be false and fabricated on the face of it. Respondent No. 2 further challenged the genuineness of the signatures on the Will.

9. Based upon the pleadings of the parties, the following issues were framed by the learned Trial Court on 29.03.2014:

“1. Whether the plaintiff alongwith co-defendants is owner of 1/5th undivided share in free hold property bearing no. IIC/55-56, Lajpat Nagar, New Delhi comprising of ground, first and second floor except the basement floor? OPP.

2. Whether the plaintiff's claim as aforesaid stands belied in view of duly registered will dated 24.2.2005 executed by their mother Smt. Lakshmi Devi whereby she bequeathed the entire first floor of the suit property to defendant no. 3 and second floor of the suit property to the extent of the portion occupied by them, in favour of defendants no. 1 & 2 ? OPD 1 to 3.

3. Whether Smt. Lakshmi Devi agreed that after her demise and upon payment of Rs. 10 lacs each to the petitioner and 4th defendant, the defendants no. 1, 2 & 3

were to become owners to the extent of 1/4th share each in favour of defendants no. 1 & 2 while the remaining half share in the ground floor portion would vest with defendant no. 3 and if so, whether the transaction was complete ? OPD 1 to 3.

4. Whether the plaintiff's suit has not been properly valued for the purposes of Court fee and jurisdiction being under value as alleged ? OPD 1, 2, 3, 4.

5. Whether the plaintiff is entitled to the preliminary decree of partition as prayed for? OPP.

6. Whether the plaintiff is entitled to the final decree of partition as prayed for ? OPP.

7. Whether the plaintiff is entitled to the decree of Permanent Injunction as prayed for? OPP.

8. Relief."

10. Further on 5.4.2014, an additional issue to the following effect was also framed and renumbered as issue no. 8, which reads as under:

"Whether the plaintiff would be entitled to withdraw the rent to the extent of 1/5th share as per order of the Court dt. 4.11.11 or whether in case of plaintiffs not succeeding, the defendants no. 1 to 3 are entitled to the same ? Onus on both parties?"

11. In support of their case, Appellant Nos. 1 to 3 had examined the following witnesses:

- i. **Appellant No. 3/Shri Subhash Chand Popli:** He was examined as **DW1 to 3/ W1** who tendered his evidence by way of affidavit **Ex. D1 to 3/ W1/ A**. He relied on, *inter alia*, the copy of Will (**Ex. PW1/D2**), copy of complaint dated 01.06.2008 to the S.H.O., Lajpat Nagar Police Station, written by Appellant No. 1 against Respondent No. 1 (**Ex. DW1/1**), and the various lease deeds in respect of lease of ground floor of the suit property. This witness was duly

cross-examined at length by the learned counsel for Respondent No.1 as well as the learned counsel for Respondent No. 2.

- ii. **Shri P.C. Gautam (D1 to 3/ W2):** He was one of the attesting witnesses. He tendered his evidence by way of affidavit **Ex. D1 to 3/ W2/A** and was duly cross-examined. No other witnesses were examined on behalf of the Appellants.

12. On behalf of Respondent No.1, the following witnesses were examined:

- i. **Court Witness: 1, Sh. Tejinder, UDC, SR-V, Mehrauli:**
This witness had been summoned at the instance of the Appellant Nos. 1 to 3 for proving the document **Ex. PW1/ D2**, i.e. the Will. The witness brought with himself register no. 1334, Vol. III at serial no. 7478 pertaining to the registration of the aforesaid Will. This witness stated that the Will was presented before the Sub-Registrar- V for registration on 24.02.2005 and it also had an endorsement of Sub-Registrar that the testatrix had appeared before him on the said date and her thumb impressions were taken by the Sub-Registrar. Upon being cross-examined, the said witness stated that he had recently joined the Registrar office and he could not identify any of the signatures on the Will. He further stated that he had simply brought the record upon receiving the summons.
- ii. **Smt. Raj Kumari Batra (PW-1):** She filed her affidavit in examination- in chief which was exhibited as **Ex. PW1/1**. She

stated that her deceased mother was the owner of the suit property by virtue of the perpetual lease deed dated 12.09.1968. She further stated that her mother had been made the exclusive owner of the suit property by virtue of the Conveyance Deed dated 28.06.2004. She was duly cross-examined by the learned counsel for the defendant nos. 1 to 3 (Appellant Nos. 1 to 3 herein) but was not cross-examined by defendant no. 4 (Respondent No. 2 herein).

- iii. **Shri Babu Lal Nirwan, UDC, Office of L & DO, Nirman Bhawan, New Delhi (PW-2):** This witness produced the complete file of the L& DO in respect of the suit property and stated in his cross-examination that the suit property was converted from lease hold to free hold in the name of Smt. Laxmi Devi on 28.06.2004 after which the same was sent to the office of the Sub-Registrar-V for registration.
- iv. **Shri Krishan Kaushik, Record Keeper, office of Building Department, SDMC, Lajpat Nagar, New Delhi (PW-3)-** This witness produced the sanctioned plan of the suit property and exhibited the same as **Ex. PW3/1** after comparing the same with the copy on the judicial record. This witness was not cross-examined by the defendants.
- v. **Shri Naveen Gandas, Record Lifter, Department of Delhi Archives (PW-4):** This witness brought the record pertaining to the registration of the lease deed **Ex. PW4/A** and stated that the document had been duly registered in the name of Smt. Laxmi Devi.

vi. **Shri Tejinder, UDC from the office of Sub-Registrar V, Mehrauli (PW-5):** This witness brought the record pertaining to the registration of the Conveyance Deed dated 28.06.2004 which was exhibited as **Ex. PW5/B**. He was duly cross-examined by counsel on behalf of Appellant Nos. 1 to 3.

13. It is pertinent to note that Respondent No. 2 did not lead any evidence before the learned Trial Court.

14. Upon perusing the records along with the evidence adduced, the learned Trial Court vide the impugned judgment decided Issue Nos. 2 and 3 against the Appellant Nos. 1 to 3 and in favour of Respondent No. 1. With respect to Issue No. 1, the learned Trial Court made the observation that in the absence of a Will, all the parties were entitled to 1/5th share each in the suit property by virtue of Section 15 of the Hindu Succession Act, 1956. The said issue was thus decided in favour of Respondent No. 1 and against the Appellant Nos. 1 to 3. Issue Nos. 4, 5 and 8 were also decided in favour of Respondent No. 1 and against Appellant Nos. 1 to 3. A preliminary decree was passed by the learned Trial Court by virtue of which the Appellant Nos. 1 to 3 were restrained by way of permanent injunction from creating any third party interest in respect of the title of the suit property till the passing of the final decree.

SUBMISSIONS ON BEHALF OF THE APPELLANTS

15. Mr. Ajay Kohli, learned counsel on behalf of the Appellants, submitted that the impugned judgment was totally perverse and was based on an erroneous appreciation of facts and law.

16.The learned counsel submitted that the learned Trial Court had erroneously proceeded to decide the case at hand on the basis of fictitious suspicious circumstances which had in fact been adequately explained by the Appellants in the course of the proceedings. Learned counsel fortified his submission by placing reliance on *Madhukar D. Shende v. Tarabai Aba Shedage* reported as (2002) 2 SCC 85 to argue that the totality of suspicious circumstances in a case had to be looked into and the validity of the Will should not be denied merely on the basis of mere conjectures which were not supported by any legal and convincing evidence.

17.The learned counsel further demolished the existence of suspicious circumstances shrouding the Will by making the following submissions:

- i. The deceased testatrix had appeared before the Sub-Registrar on numerous earlier occasions for the execution and registration of documents such as Conveyance Deed dated 28.06.2004 and Sale Deed for the sale of the Basement portion of the re-constructed suit property in favour of a third party purchaser in 2004 and had appended her signatures in front of the Sub-Registrar. It was further submitted by the learned counsel that while the earlier instances of execution were admitted by Respondent No. 1, this particular instance of executing a Will within a span of one year from the earlier execution had been baselessly denied by Respondent No. 1.

- ii. Placing reliance on *Uma Devi Nambiar & Ors. v. T.C. Sidhan* reported as (2004) 2 SCC 321, *Pentakota Satyanarayana & Ors. v. Pentakota Seetharatnam & Ors.* reported as (2005) SCC 67 and *Mahesh Kumar (Dead) by LRs. v. Vinod Kumar & Ors.* reported as (2012) 4 SCC 387, the learned counsel submitted that a Will was prepared to alter the natural course of succession and therefore the mere fact of exclusion of some of the natural heirs would not amount to a suspicious circumstance. The learned counsel furthered this limb of the argument by submitting that once the propounder succeeded in removing the suspicious circumstances, the Court had to give effect to the Will despite the fact that it was unnatural in the sense that it cut off wholly or in part the near relations.
- iii. The learned counsel relied on *Madhukar D. Shende (supra)* to submit that the mere fact that the attesting witnesses were known to the Appellants could not be held to be a suspicious circumstance, especially in view of the fact that the attesting witness, Shri P.C. Gautam had been duly cross-examined and the Respondents had not been able to impeach the credit and testimony of the said witness. The learned counsel concluded this limb of his argument by relying on the judgment of the Hon'ble Supreme Court in *Ramabai Padmakar Patil v. Rukminibai Vishnu Vekhande & Ors.* reported as (2003) 8 SCC 537 to submit that if one of the attesting witnesses was examined and no

infirmity was found in his testimony, non-examination of the person who typed the Will or the Advocate who was present at the time of preparation or registration of the Will could not be a ground to discard the Will.

- iv. It was further submitted by the learned counsel that the learned Trial Court had placed undue reliance on the typographical error pertaining to the date of the Will in clear disregard of the fact that Appellant No. 3 had consistently maintained in his cross-examination that the date on which the Will was typed was 17.02.2005 and it was thereafter registered on 24.02.2005. No objection had been received in the Sub-Registrar's Office with regard to such execution and registration and the Court Witness had also testified to this effect.
- v. The learned counsel placed reliance on ***Rabindra Nath Mukherjee & Ors. v. Panchanan Mukherjee & Ors.*** reported as ***(1995) 4 SCC 459*** to submit that where a Will was registered and it had been certified by the Sub-Registrar that the same had been read over to the executor who had thereafter appended her signature on the Will and admitted the contents thereof, the fact that the witnesses were interested would lose all significance.
- vi. Learned counsel further submitted that Respondent No.1 in her evidence had not said anything regarding the Will in question apart from denying the signatures of her deceased mother on the said Will despite herself having pleaded that

the Will was forged and fabricated. Learned counsel furthered his argument by highlighting the inconsistencies between the statements of Respondent No. 1 who, on the one hand doubted the existence of sound disposing state of the mind of her mother and on the other hand made a claim that her mother used to go to an STD Booth to call her a fact which necessitated the deceased to be in good health and a sound state of mind.

18. It was further submitted by the learned counsel for the Appellants that the impugned judgment had been rendered in ignorance of the fact that the requirements for due execution and registration of a Will as prescribed in Section 58 of the Indian Evidence Act, 1872 and Section 63 of the Indian Succession Act, 1925 had been duly complied with and the deceased had appended her signature on the Will followed by the attesting witnesses. The learned counsel further submitted that the said execution and registration of the Will had been proved by the Court Witness who had brought the record of the same to the Court.

19. The learned counsel concluded his arguments by relying on *Pentakota Satyanarayna & Ors. (supra)* to submit that each and every circumstance was not a suspicious circumstance and the same had to be established by cogent evidence. The learned counsel further submitted that in the facts and circumstances of the present case, the learned Trial Court had failed to appreciate in totality the evidence produced by the Appellants to dispel the suspicious circumstances.

20. In the light of the aforementioned submissions, the learned counsel for the Appellants prayed that the impugned judgment be set aside and the Will dated 24.02.2005 be upheld as the last Will of the deceased.

SUBMISSIONS ON BEHALF OF THE RESPONDENTS

Respondent No. 1

21. Mr. Sandeep Sharma, learned counsel on behalf of Respondent No. 1, questioned the validity of the aforementioned Will dated 24.02.2005 alleging it to be a forged and fabricated document.
22. Placing reliance on the judgment of the Hon'ble Supreme Court in *H. Venkatachala Iyengar v. B. N. Thimmajamma* reported as *AIR 1959 SC 443*, *Jaswant Kaur v. Amrit Kaur* reported as *(1977) 1 SCC 369* and *Raj Kumari v. Surinder Pal Sharma* reported as *2019 SCC Online SC 1747*, the learned counsel on behalf of Respondent No. 1 contended that the Wills which were surrounded by suspicious circumstances have been consistently held to be invalid by the Hon'ble Supreme Court. Learned counsel furthered his argument by highlighting the following circumstances as suspicious:
- i. The attesting witnesses to the said Will were the friends of Appellant No. 3.
 - ii. There was a vast and apparent difference between the signatures appended by the deceased on the conveyance deed and on the purported Will dated 24.02.2005.

- iii. Despite there being no Will made prior to the purported Will in question, a clause to the effect of the previous Will being cancelled has been included in the present Will.
 - iv. The typist of the Will as well as the Advocate at whose instance the Will had been drafted were not examined despite both of them being in the premises of the Tis Hazari Courts where the proceedings had taken place. In the absence of such examination, it was not possible to discern whether the contents of the Will in question, which were in English, had been read over and explained to the deceased testatrix, who was an illiterate woman and was well-versed only in the Hindi and Punjabi languages.
 - v. The alleged Will was dated 24.02.2005 whereas as per the statement of Appellant No. 3, the same had been prepared on 17.02.2005.
 - vi. There were contradictions in the testimonies of Appellant No. 3 and the attesting witness, Shri P.C. Gautam.
 - vii. The attesting witness, who claimed to have read over and explained the contents of the said Will, which was drafted in English, was not able to translate English terms into Hindi language in the Court. In view of this fact, it was doubtful whether the said witness was capable of explaining the essence of the Will to the deceased testatrix.
23. It was further submitted by the learned counsel for Respondent No. 1 that the onus to dispel the suspicious circumstances was on the propounder of the Will in question and in the present case the

Appellants had been unable to remove the dark clouds of suspicion hovering over the Will. The learned counsel placed reliance on the recent judgment of the Hon'ble Supreme Court in ***Kavita Kanwar v. Pamela Mehta*** reported as **(2021) 11 SCC 209** to bolster his submission.

24. Learned counsel for Respondent No.1 placed reliance on ***Pratap Singh v. State*** reported as **2010 SCC Online 2715** and submitted that where the language of the Will was in English which was not understandable to the Testatrix, it was mandatory that the testatrix shall know the contents of the Will. Drawing force from this submission, the learned counsel argued that in view of the circumstances cited above, it was clearly discernible that the contents of the aforesaid Will were not known to the Testatrix and therefore, the aforesaid Will could not have governed the division of the suit property.

Respondent No. 2

25. Mr. Shekhar Dasi, learned counsel on behalf of Respondent No.2 supported the case of Respondent No. 1 in sum and substance and made a few more submissions to attack the genuineness of the aforesaid Will.

26. Learned counsel for Respondent No. 2 submitted that the Appellants disclosed about the existence of the Will for the first time while filing their Written Statement in the suit for partition and permanent injunction brought forth by Respondent No. 1.

27. Learned counsel placed reliance on ***Joseph Antony Lazarus (Dead) By LRs. v. A.J Francis*** reported as **(2006) 9 SCC 515** to
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submit that the non-examination of the person who drafted the Will was a suspicious circumstance which affected the case of the Appellants herein.

28. It was further submitted by the learned counsel that there was no evidence on record to show that the aforesaid Will remained in the exclusive possession of the deceased testatrix from the duration of 17.2.2005 to 24.02.2005 and there was thus a possibility of the contents of the Will having been altered by the Appellant No.3.
29. Learned counsel further attacked the genuineness of the aforesaid Will by submitting that there is no recital in the said Will regarding the competence of the deceased testatrix with regards to her age and soundness of her mind. He relied upon the judgment of this Hon'ble Court in *Ragini Chopra v. Rajesh* reported as **2013 (1) RLR 586** in support of his argument.
30. Learned counsel further relied on the judgment of the Hon'ble Supreme Court in *Bharpur Singh v. Shamsher Singh* reported as **(2009) 3 SCC 687** to submit that mere registration of a Will was not a conclusive proof of its genuineness and the statutory requirements to establish the validity of the Will had to be complied with. It was further submitted by the learned counsel that in the present case, there was no evidence to show that the contents of the Will had been read over and explained to the deceased testatrix and the Officer who had registered the Will did not bring home to the deceased that he was executing a Will. The learned counsel furthered his argument by submitting that the

said perfunctory exercise of the power of registration of Will was in the teeth of the settled law on this subject-matter as laid down in a number of judgments pronounced by the Hon'ble Supreme Court.

31. In the light of the aforementioned submissions, learned counsel for the Respondents argued that the impugned judgment was sound and well-reasoned as the Appellants had been unable to dispel the suspicious circumstances shrouding the Will dated 24.02.2005. The learned counsel therefore prayed that the present Appeal be dismissed.

LEGAL ANALYSIS BASED ON THE FACTS OF THE CASE

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

33. Upon a perusal of the material on record, the sole issue which arises for consideration in the case at hand is: *Whether the Will dated 24.02.2005 is the last and genuine Will of the testatrix?*

34. Before entering into the thickets of the controversy before this Court, it would be appropriate to undertake a survey of the legal provisions and principles relating to the execution and proof of Wills. The relevant provisions in the Indian Evidence Act, 1872 and the Indian Succession Act, 1925 are being usefully extracted hereunder:

i. **Section 59** of the Indian Succession Act

“59. Person capable of making Wills.—Every person of sound mind not being a minor may dispose of his property by Will.

Explanation 1.—A married woman may dispose by Will of any property which she could alienate by her own act during her life.

Explanation 2.—Persons who are deaf or dumb or blind are not thereby incapacitated for making a Will if they are able to know what they do by it.

Explanation 3.—A person who is ordinarily insane may make a Will during interval in which he is of sound mind.

Explanation 4.—No person can make a Will while he, is in such a state of mind, whether arising from intoxication or from illness or from any other cause, that he does not know what he is doing.”

ii. **Section 61** of the Indian Succession Act

“61. Will obtained by fraud, coercion or importunity. –
A will or any part of a will, the making of which has been caused by fraud or coercion, or by such importunity as takes away the free agency of the testator, is void.”

iii. **Section 63** of the Indian Succession Act

“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.”

(emphasis supplied)

35. At this juncture, it will also be pertinent to refer to the succinct summarization of the provisions in Chapter VI of the Indian Succession Act, 1925 relating to construction of Wills as offered by the Hon'ble Supreme Court in a recent judgment in ***Kavita Kanwar (supra)***. The relevant portion is being reproduced below:

“23.2 Elaborate provisions have been made in Chapter VI of the Succession Act (Sections 74 to 111), for construction of Wills which, in their sum and substance, make the intention of legislature clear that any irrelevant misdescription or error is not to operate against the Will; and approach has to be to give effect to a Will once it is found to have been executed in the sound state of mind by the testator while exercising his own free will. However, as per Section 81 of the Succession Act, extrinsic evidence is inadmissible in case of patent ambiguity or deficiency in the Will; and as per Section 89 thereof, a Will or bequest not expressive of any definite intention is declared void for uncertainty. Sections 81 and 89 read as under:-

“81. Extrinsic evidence inadmissible in case of patent ambiguity or deficiency.- Where there is an ambiguity or deficiency on the face of a Will, no extrinsic evidence as to the intentions of the testator shall be admitted.

*** **

89. Will or bequest void for uncertainty.- A Will or bequest not expressive of any definite intention is void for uncertainty.”

Moreover, it is now well settled that when the Will is surrounded by suspicious circumstances, the Court would expect that the legitimate suspicion should be removed before the document in question is accepted as the last Will of the testator.”

23.3. As noticed, as per Section 63 of the Succession Act, the Will ought to be attested by two or more witnesses. Hence, any document propounded as a Will cannot be used as evidence unless at least one attesting witness has been examined for the purpose of proving its execution,

if such witness is available and is capable of giving evidence as per the requirements of Section 68 of the Evidence Act.”

(emphasis supplied)

36. **Section 68** of the Indian Evidence Act, 1872 relates to proof of documents required by law to be attested and reads 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.”

(emphasis supplied)

37. Therefore, as per Section 68 of the Indian Evidence Act, 1872, the examination of even one of the attesting witnesses is sufficient to prove the execution of a Will.

38. It will now be pertinent to refer to the relevant principles relating to examination of Wills as settled by judicial decisions.

- i. The celebrated judgment of the Hon’ble Supreme Court in the case of ***H. Venkatachala Iyengar (Supra)*** discusses at length the legal position in relation to proof of Wills where 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 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. ...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 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. ...”

(emphasis supplied)

- ii. The position of law on this point has further been explained by a Constitution Bench of the Hon'ble Supreme Court in ***Shashi Kumar Banerjee v. Subodh Kumar Banerjee*** reported as ***AIR 1964 SC 529*** in the following words:

*“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.**”*

(emphasis supplied)

- iii. In *Madhukar D. Shende (supra)*, the Hon'ble Supreme Court has made the following observations with reference to suspicious circumstances:

"8. The requirement of proof of a will is the same as any other document excepting that the evidence tendered in proof of a will should additionally satisfy the requirement of Section 63 of the Indian Succession Act, 1925 and Section 68 of the Indian Evidence Act, 1872. If after considering the matters before it, that is, the facts and circumstances as emanating from the material available on record of a given case, the court either believes that the will was duly executed by the testator or considers the existence of such fact so probable that any prudent person ought, under the circumstances of that particular case, to act upon the supposition that the will was duly executed by the testator, then the factum of execution of will shall be said to have been proved. The delicate structure of proof framed by a judicially trained mind cannot stand on weak foundation nor survive any inherent defects therein but at the same time ought not to be permitted to be demolished by wayward pelting of stones of suspicion and supposition by wayfarers and waylayers. What was told by Baron Alderson to the Jury in R v. Hodge 1838, 2 Lewis CC 227 may be apposite to some extent:

"The mind was apt to take a pleasure in adapting circumstances to one another and even in straining them a little, if need be, to force them to form parts of one connected hole; and the more ingenuous the mind of the individual, the more likely was it, considering such matters, to overreach and mislead itself, to supply some little link that is wanting, to take for granted some fact consistent with its previous theories and necessary to render them complete."

*The conscience of the court has to be satisfied by the propounder of will adducing evidence so as to dispel any suspicions or unnatural circumstances attaching to a will provided that there is something unnatural or suspicious about the will. **The law of evidence does not permit conjecture or suspicion having the place of legal proof nor permit them to demolish a fact otherwise proved by legal and convincing evidence. Well-founded suspicion may be a ground for closer scrutiny of evidence but***

suspicion alone cannot form the foundation of a judicial verdict – positive or negative.

9. It is well-settled that one who propounds a will must establish the competence of the testator to make the will at the time when it was executed. The onus is discharged by the propounder adducing prima facie evidence proving the competence of the testator and execution of the will in the manner contemplated by law. The contestant opposing the will may bring material on record meeting such prima facie case in which event the onus would shift back on the propounder to satisfy the court affirmatively that the testator did know well the contents of the will and in sound disposing capacity executed the same. The factors, such as the will being a natural one or being registered or executed in such circumstances and ambience, as would leave no room for suspicion, assume significance. If there is nothing unnatural about the transaction and the evidence adduced satisfies the requirement of proving a will, the court would not return a finding of 'not proved' merely on account of certain assumed suspicion or supposition. Who are the persons propounding and supporting a will as against the person disputing the will and the pleadings of the parties would be relevant and of significance.”

(emphasis supplied)

- iv. In *K.C. Bajaj & Ors. v. Sudershan Kumari & Ors.* reported as *2008 SCC OnLine Del 477*, this Court has made the following observations at *para 48*:

“48. In deciding whether there is a will on the basis of the document, the probate Court certainly will not proceed to consider as to whether or not the disposition of the property was good or bad. The primary duty of the probate Court is to see firstly whether prima facie, the document constituted a will. If the propounder is able to satisfy the conscience of the Court, the Court shall grant the probate, even if the will cuts off, wholly or in part, near relations. It is the will of the testator that is reflected in the will. Being the testator's own property, he has the liberty to deal with it absolutely. It is not for the Court to find out justification or equity or otherwise in the action of the testator. It is not for the Court to make it fair or to sermonize. It is not for the Court to refuse the grant on

account of the fact that the disposition is not just and fair or is unnatural or improbable when the conscience of the Court is clear about the proof of the execution of the will on the face of the evidence, satisfactorily sufficient, to remove the suspicious circumstances.”

- v. In the case of ***Surender Kumar v. State*** reported as **2010 SCC OnLine Del 177**, this Hon’ble Court made the following observations 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)

39. At this juncture, it will be useful to cull out the essence of the survey of case laws undertaken hereinabove. The following points emerge from the above discussion:
- i. A Will has to be proved like any other document and its validity is to be established not by applying a test of

mathematical accuracy, but of satisfaction of judicial conscience.

- ii. The legal requirements pertaining to the proof of due execution of the Will have to be complied with. Since a Will is required to be attested as per Section 63 of the Indian Succession Act, 1925, it cannot be used in evidence until at least one attesting witness has stepped into the witness box and satisfied the Court as to due execution of the Will.
- iii. A Will speaks from the death of the testator and has an element of solemnity attached to it. This places the initial onus on the propounder but the same can be primarily discharged upon proof of the essential facts which go into the making of the Will.
- iv. In case a Will is surrounded by suspicious circumstances, the propounder has a heavier onus to discharge and he has to remove all the legitimate suspicions with the help of cogent and unimpeachable evidence.
- v. Although the initial onus to prove the Will is on the propounder, once that onus is discharged, mere suspicion cannot be the foundation of a judicial decision holding the Will as invalid. The Court has to be on guard against conjectures and “mere fantasy of a doubting mind.”
- vi. 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 the Hon’ble Supreme

Court, the suspicious features must be “real, germane and valid” and not merely the “fantasy of the doubting mind.”

vii. In the final analysis, the judicial decision in relation to a Will shall be on the basis of a holistic view arrived at after reviewing the totality of the facts and circumstances of the case at hand. All the unusual features and suspicious circumstances need to be put together and the impact of any single feature is not to be the deciding feature in cases where the validity of a Will is under challenge.

40. Based upon the above-mentioned legal principle, it is important to analyse the facts of the present case. In this case, deceased Smt. Laxmi Devi, the mother of the parties, executed a registered Will dated 24.02.2005. Respondent No.1 during her cross-examination identified the photographs appearing on the said Will as the photograph of her mother. Regarding the signature of the testatrix appearing on the said Will at point ‘A’, she stated that she is unable to say anything (*mujhe to samaj nahi aa raha hai*). The said Will was exhibited as **Ex. PW-1/D-2**. The onus to prove the said Will was on the Appellants. Hence in order to prove the said Will, the Appellants produced the following witnesses:

(i) **Court Witness: 1 – Sh. Tajinder, UDC, S.R-V, Mehrauli.**

This witness was examined as a Court witness and was summoned at the instance of Appellant Nos. 1 to 3 for proving the registration of the document Ex. PW1 /D-2. The witness brought the register no. 1334, Vol. III at serial no.

7478 which pertained to registration, of aforesaid Will which was registered against Registration no.2272. Book no. 3, Vol. no. 1334, pages 70 to 71 which is Ex PWI/D2. It bears endorsement of Sub Registrar V that the testatrix appeared before him and that her thumb impression was taken by the Sub Registrar. Hence the registration of the said Will was proved in accordance with law.

(ii) Witness-D1 to 3/W-1, Mr. Subhash Chand Popli (Appellant No.3 herein)

The said Witness is the beneficiary and propounder of the said Will. He appeared before the learned Trial Court and deposed that he took his mother to a computer typist sitting at Tis Hazari Court. The said typist typed the Will as per the instructions of his mother. She verified the contents of the Will in Hindi. As per the instructions of his late mother, he contacted his friends Mr. P.C Gautam & Mr. Raj Kamal and requested them to be the attesting witnesses to the Will. The date for the registration of the Will was fixed to 24.02.2005. On the said date, he along with his mother reached the Sub-Registrar office. There they met the attesting witnesses, Shri P.C. Gautam and Mr. Raj Kamal. Late Smt. Laxmi Devi asked Mr. P.C Gautam to read the Will and asked him to explain the contents of the said Will to her. Hence as per the direction of Late Smt. Laxmi Devi, he read the Will and explained the contents of the Will to her. After that he hired an agent at the Sub-Registrar office to help them with the

registration process. He further states that his mother had first appended her signature on the said Will followed by the attesting witnesses Sh. P.C Gautam and Sh. Raj Kamal. Thereafter the Will was presented for registration and the receipt of the same was kept by the agent. After two days, he and his mother went to the Sub-Registrar office and collected the Will from the said Agent.

D1 to 3/W-1 was subjected to rigorous cross-examination. During his cross-examination, he remained unshaken. He reiterated that he along with his mother went to the typist and got the Will typed. Thereafter, the Will was signed and registered on 24.02.2005 in presence of the attesting witness. He also explained the whole events which took place at the Sub-Registrar office with clarity. He identified the signature & thumb impression of his late mother appearing in the said Will dated 24.02.2005.

(iii) D1 to 3/W-2, Shri P.C. Gautam, one of the attesting witnesses of the Will dated 24.02.2005

This witness stated that he is a close friend of Appellant No.3. On 23.02.2005, he got a call from Appellant No.3. Appellant No.3 told him that his mother had got prepared her Will and she wanted him to be one of the attesting witnesses and asked him to come to Sub-Registrar Office, Mehrauli on 24.02.2005 at 10 am. As per the said instructions, he along with the other attesting witness, Mr. Raj Kamal reached the Sub-Registrar office at 10 am where he met Late Smt. Laxmi

Devi and Appellant No.3. Late Smt. Laxmi Devi asked him to read the Will and explain the contents of the same to her. As per her instructions, he read the Will and explained to her the contents of the said Will in Hindi. Thereafter, Late Smt. Laxmi Devi had put her signature on the said Will, followed by him and Mr. Raj Kamal. He identified his signature and the signatures of Late Smt. Laxmi Devi and Mr. Raj Kamal appearing on the said Will.

This Witness was also subjected to rigorous cross-examination. He reiterated his stand that he read the Will as per the instructions of Late Smt. Laxmi Devi and explained the contents of the said Will to her. In order to understand his capability to translate English to Hindi, he was asked to read Para 2 of the written statement from Mark X to Mark XI in the Court. In this regard, learned Trial Court, in the impugned Judgment, observed as follows:

'He also tried to translate from English to Hindi and read out portion Mark X to XI in para 2 of written statement of defendants no. 1 to 3 which he had read out loudly and unhesitatingly in the Court. He was then asked to explain and translate the meaning of same in Hindi. The Court had observed that the witness gave the crux of the part what he read but was unable to explain the meaning of the word 'prejudice'. He submitted to be knowing only Hindi and English language and admitted that he cannot do fluent Hindi to English or English to Hindi translation. He did not know the meaning of word 'testatrix', word 'executrix', word 'vernacular', word 'bequeath', word 'Conveyance Deed', word 'demise' of which he gave contextual meaning in the Court and also submitted that he cannot differentiate between 'Will' and 'Conveyance Deed'. He admitted that he could not explain as to what is meant by 'testatrix' or 'executrix'. He had not worked with any agency engaged in translation of Hindi/English

language. Having regard to the above, it can be observed that this witness may have a working knowledge of English language, but he is definitely not well conversed with most of the phrases and words used in Will Ex PW/D2 and thus his competence of having explained the entire contents of the Will in question from English to Hindi in its literal sense to the deceased testatrix is doubtful. It itself is therefore a suspicious circumstance coupled with the other factors.”

After recording the finding to the effect that the said witness was able to read and understand the English language and was also able to translate the documents from English to Hindi, the learned Trial Court observed that the witness could not explain the exact meaning of certain words but could explain the contextual meaning of those words. This Court is of the considered opinion that while explaining the contents of the Will to the testatrix, the witness is expected to explain the contents of the Will in a broader sense. It is not expected from a witness, who is not a lawyer or a translator, to explain the exact meaning of each and every word. The overall meaning of the document needs to be explained to the testatrix. Hence if the Witness is able to explain the contextual meaning of the words, that should be sufficient.

After examining the evidence of the attesting witness, this Court is of the considered view that he is a reliable witness and he had the ability to read and understand English language and also had the ability to translate the contents of the Will which was in English language to the testatrix in Hindi language.

41. According to the settled law on this point, 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 on the document of his **own free will**.

42. After examining the evidence of these Witnesses in its entirety, this Court is sufficiently satisfied that the four basic legal requirements which are required under law to prove the validity of a Will is met out in the present case. The Appellants successfully discharged the burden to prove that the Will dated 24.02.2005 is the last and genuine Will of the testatrix, Late Smt. Laxmi Devi.

43. Now the burden shifts to the Respondents to explain whether there exists any suspicious circumstance which creates genuine doubts regarding the validity of the said Will dated 24.02.2005. The suspicious features must be “real, germane and valid” and not merely the “fantasy of a doubting mind. Learned Trial Court enumerated the following suspicious circumstances in the impugned judgment:

- i. The propounder (Appellant No. 3) played an active part in the execution and registration of the Will.
- ii. The alleged typographical error in the affidavit of Appellant No. 3 as the date of the Will being 17.05.2005 and not 17.02.2005 coupled with the use of the phrase “on and around the 17th of May 2005” has not been adequately explained by Appellant No.3.
- iii. The typist had not been examined before the Court although the peculiar facts of the case necessitated the same as the testatrix was not able to read and did not have any knowledge of English language.
- iv. Nothing has emerged out of the examination of the witnesses to establish that the Will had been read over and explained to the deceased testatrix by either the typist or Shri P.C. Gautam or even the Sub-Registrar. In view of this fact, it cannot be said as to whether the deceased had been made aware of the contents of the Will which she had executed.
- v. The attesting witnesses were the colleagues of Appellant No.3 and no reason had been given as to why these two people were chosen in spite of the availability of the immediate relatives and neighbours of the deceased testatrix.
- vi. There were a number of inconsistencies in the evidence of the attesting witness, Shri P.C. Gautam and the Appellants

had not been able to establish that he was close with the deceased as stated by them.

- vii. In view of the inability of Shri P.C. Gautam to explain the meaning of English terms such as “bequeath”, “demise” and “testatrix” occurring in the Will, it could not be said with certainty whether he had been able to correctly explain the afore-stated Will to the testatrix as claimed by the Appellants.
 - viii. There was a possibility of Appellant No. 3 replacing the typed Will of his mother as the date column had been left blank and the Will remained unsigned between 17.02.2005 to 24.02.2005.
 - ix. It was unclear as to why the sentence “The previous Will is hereby cancelled” had been incorporated in the said Will considering the fact that no other will had been executed by the testatrix.
 - x. There were contradictory testimonies in relation to the sequence of events pertaining to registration of the Will.
44. This Court shall now deal with the aforementioned suspicious circumstances to discern whether the findings of the learned Trial Court were based on cogent and unimpeachable evidence.

i. Typographical error pertaining to date

Appellant No. 3 has mentioned in his affidavit verified on 12.08.2014 and filed on 17.09.2014 that his mother had expressed a desire to make her Will in respect of the suit property “on and around the 17th of May 2005” although the

said Will had been executed on 24.02.2005. The learned counsel for Respondents had portrayed this as an inconsistency and the learned Trial Court had held the same to be a suspicious circumstance. The relevant portion of the impugned judgment is being reproduced hereunder:

“21.1. An analysis of testimony of third defendant, particularly para 3 of his affidavit is necessary. Not only this affidavit verified on 12.8.14 and filed on 17.9.14 but also his earlier affidavit sworn on 31.7.14 and filed on 1.8.14 makes mention on oath that his mother expressed her desire to make her Will with respect to property in question on 17.5.2005. The Will is said to be dated 24.2.2005. If the said testimony is accepted, then a doubt is created as to which of the two dates is correct. It would be quite obvious that if the mother of defendants no. 1 to 3 was expressing her desire to make her Will on 17.5.2005, which can not be correct but if it is taken to be correct, then it would not stand to reason as to why she would not disclose to have already executed and registered a Will dated 24.2.2005. It becomes more difficult to comprehend the above as the third defendant, a beneficiary, himself is said to have taken active participation in execution as well as registration of Will. Thus, there can be a typographical error in the aforesaid date i.e. 17.5.2005 but even if so, the Court can not loose sight of the fact that this point was duly urged and argued by the plaintiff's counsel but not responded to in rebuttal by the counsel for defendants no. 1 to 3. Even if there was no occasion for such rebuttal then also the third defendant was suggested during his cross examination by the plaintiff that the Will in question had been back dated. In the cross examination of defendant no. 3 by the forth defendant, the execution of Will is said to be dated 17 . 2 .2005. Even if 17.5.2005 is read by this Court as 17.2.2005 then also it can not loose sight of the fact that the witness used phrase, "on and around the 17th May 2005" in para 3 of his affidavit. It nowhere clarifies whether the witness took his mother to Tis Hazari Court on the I same date i.e 17.2.2005 or not. This aspect should have been clarified but left unattended and is found to be one of the suspicious circumstance which has not been clarified.”

A close scrutiny of the evidence on record reveals that the aforesaid suspicious circumstance as noted by the learned Trial Court in view of the inconsistency between the dates mentioned in the affidavit of Appellant No. 3 has been removed while he was cross-examined. It is pertinent to note that Appellant No. 3 had consistently maintained in his cross-examination that the Will was typed on 17.02.2005. The relevant portion of the cross-examination of Appellant No. 3 is extracted hereunder:

“...It is wrong to suggest that till the death of my mother the plaintiff and his family had very cordial relations with my mother. I came to the court on 17-02-2005 at about 2/2:30 PM. The Will was got typed on 17-02-2005 itself. I do not know if the typist put the date 17-02-2005 on the Will or not as I did not check the same. I had not told the typist about the name and address of the person who would become the witnesses to the said Will. The typist had explained the contents of the will to my mother after typing it. However, I do not remember that the fact of typist explaining the contents of the Will to the mother has been mentioned or not in the Will. It is wrong to suggest that my mother had not come to the court on 17-02-2005 or that there was no occasion for the typist to explain the contents of the Will by the typist to her. My mother had not told the reason of not giving share, in the property to the plaintiff or defendant No. 4. It is wrong to suggest that I got the Will typed in collusion with defendant no. 1 & 2 in order to deprive the plaintiff and defendant No. 4 in the share of the property in question...”

A bare perusal of the above paragraph leads to an obvious inference that the said mention of the month of May in the affidavit submitted by Appellant No. 3 had been a typographical error and was therefore not a suspicious circumstance affecting the validity of the said Will. Further no

suggestions whatsoever has been put to the Witness regarding this typographical mistake. The finding of the learned Trial Court in this respect is therefore erroneous.

ii. Attesting Witnesses were colleagues of Appellant No. 3

Learned Trial Court has considered the absence of any person directly known to the testatrix as attesting witness to the Will as a suspicious circumstance affecting the validity of the Will. A perusal of the relevant portion of the impugned judgment reveals that the learned Trial Court has considered the inability of the witness Shri P.C. Gautam to state the correct age of the deceased and to recall the various dates when he visited Appellant No. 3 on different occasions as instrumental in coming to its conclusion.

It will be pertinent here to note the observations of the Hon'ble Supreme Court in *Madhukar D. Shende (supra)*. The relevant portion of the judgment has been usefully extracted below:

“10. ...The two attesting witnesses on account of being known to Chingubai's son, being his classmates, were known to the family, and therefore, were natural witness to be called to attest the execution of will. On account of their acquaintance with the family, they could have naturally known and identified the executant. Merely because of being classmates they would be interested in obliging their classmates' mother so as to benefits her and go to the extent of falsely deposing is too far-fetched an inference to draw. The contents of the will, coupled with oral evidence, show that for last 25/30 years, Chingubai had taken care of Bhagubai and it was due to love and affection of Bhagubai for Chingubai that the former was bequeathing her properties in favour of Chingubai. Chingubai is none else than Bhagubai's

sister's daughter and probably the only heir. There is nothing to suggest that Bhagubai had anyone else than Chingubai, who could be a closer heir or relation of Bhagubai and with whom Bhagubai could have spent her last days. No other relation of Bhagubai, who would have succeeded to the estate of Bhagubai if the will would not have been there, has come forward to dispute or to object to the will. The challenge is thrown by a stranger to the family and one who has trespassed upon the property."

(emphasis supplied)

A careful scrutiny of the reasons given by the learned Trial Court to treat the abovementioned circumstance as a suspicious circumstance reveals the inherent fallacy in the reasoning. It will be pertinent to note that it has nowhere been mandated that the attesting witnesses have to be the immediate family members or neighbors of the executant or that they should be very close to the executant. The two attesting witnesses, being the colleagues of Appellant No. 3 who used to reside with the executant (deceased testatrix), were known to her and could be considered to be able to identify the deceased testatrix. As to the inability of Shri P.C. Gautam to recall the various dates when he met with Appellant No. 3 or to state the exact age of the deceased testatrix, this Court is of the considered opinion that these are minor discrepancies which cannot be held as impeaching the credit of Shri P.C. Gautam as an attesting witness, who has otherwise been consistent in his testimony. One cannot lose sight of the fact that the said witness was giving evidence approximately 10 years after the execution of the Will dated 24.02.2005. It is natural for a person to forget minute details,

10 years after the incident. This Court, therefore, finds itself unable to agree with the findings of the learned Trial Court on this point.

iii. Inconsistencies in examination of Shri P.C. Gautam

In the impugned judgment, the learned Trial Court has pointed out several discrepancies in the statements of Appellant No. 3 and Shri P.C. Gautam as to the sequence of events in the process of registration of the Will in question. The learned Trial Court has taken the same to be suspicious circumstances. The relevant paragraph of the judgment is reproduced below:

"27. According to defendant no. 3, he and his mother reached at 10 a.m at the office of Sub Registrar, Mehrauli where both the attesting witnesses were present. However, attesting witness Sh P. C. Gautam in his cross examination dated 26.9.14 has submitted that, "Sh Subhash and his mother arrived after we had reached the Sub Registrar office". This in itself is a major contradiction between the testimony of the propounder of the Will and its attesting witness.

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28. The testimony of defendant no. 3 further reveals that it was he who hired an agent who helped in registration process. The affidavit of Sh P.C. Gautam also states so. However, in his cross examination dated 17.9.14, he submitted that, "number of agents were roaming in the office of Sub Registrar at Mehrauli on 24.2.2005. When my mother was signing the Will the agent came at his own. Nobody had called the said agent. The said agent asked me if any documents is to be got registered in the office of Sub Registrar and told him that the Will is to be got registered. I do not know the name or address of said agent, who approached me, for getting the Will registered. He was not having any office."

28.1. On the contrary, the attesting witness Sh Gautam has maintained his stand. His cross examination reasserts

that defendant no. 3 called an agent and that he is not aware whether he was advocate or deed writer or that he was having a seat in the office complex. He again re-asserted in his cross examination dated 17.9.14 that it was defendant no. 3 who had gone to call the agent. The above aspect is again a major contradiction between the testimony of propounder of the Will and its attesting witness. The entire consequences of events as narrated by the witness therefore, becomes doubtful in the absence of other corroboration. I have already said that the Court has not been disclosed whether defendants no. 1 & 2 knew about these developments between 17.2.2005 to 24.2.2005 and even thereafter till the death of their mother or not....”

A perusal of the impugned judgment on this ground reveals that the said inconsistencies were mere minor contradictions in the testimonies of the two witnesses and did not materially affect the case of the Appellants. A careful reading of the above-cited paragraphs would suggest that the versions of the two witnesses are not inconsistent as to the time of arrival of Appellant No. 3 and his deceased mother or the hiring of an agent to help in the process of registration. The learned Trial Court's reasoning as to the existence of this suspicious circumstance also appears to be flawed.

iv. Non-examination of the typist

Learned counsel for the Respondents have contended that in the absence of examination of the typist who prepared the Will, it was not possible to discern whether the contents of the Will in question, which were in English, had been read over and explained to the deceased testatrix, who was an illiterate woman and was well-versed only in the Hindi and Punjabi

languages. This contention has found favour with the learned Trial Court which has recorded the following finding:

“21.3. The deposition of defendant no. 3 further discloses that he took the testatrix to Tis Hazari Court since his father was also a practicing lawyer. I have already pointed out that it is not known whether he had taken his mother to the typist on the same date when she expressed her intention or not. The testimony further reveals that the typist prepared the Will as per the instructions conveyed by her to him. It is not provided as to whether said typist was well acquainted with the knowledge of Hindi as well as English language and if he was aware, he was competent enough to make true translation of the wishes of the testatrix from Hindi to English. The affidavit is silent as to in which language the testatrix conveyed her instructions to the typist, however, it is clear from the testimony of witnesses available on record that she was illiterate and spoke only Hindi and Punjabi languages. The said typist has not been examined in the Court which the defendants should have having regard to the above peculiar facts pointed out above. In this context, it is in the cross examination of defendant no. 3 that he never tried to contact the said typist after the date of execution of the will although he has been coming to this Court in connection with this case regularly. It is also in the cross examination that the defendant no. 3 remembered the name of said typist which has been given by him as Monu @ Montu. The said typist is said to be sitting behind the office of one Mr. Narula, Advocate. It is in the cross examination of defendant no. 3 that it was Mr. Narula, Advocate who had told him to get the Will prepared from any typist in the Court complex and then show it to him. Even Mr. Narula, Advocate has not been examined in support of the confirmation to the above fact. These aspects are missing in the pleadings. The fact remains that said Montu played role of a scribe. Mere non examination of Montu is not be viewed as a suspicious circumstance. However, when the evidence establishes that the testatrix was illiterate and could have not read the Will at all for the lack of education and even otherwise if she had the requisite education, then also she could not have read the contents of the Will in any language, as clear from the fact that the testatrix at the time of execution of Will was 85 years old and has had three operations during her life

time and was hard of hearing and was using hearing aid and that admittedly, she was not in a position to read. The defendant no. 3 categorically admits in his cross-examination dated 17.9.14 that, "It is correct that she was not in a position to read. My mother was aged about 85 years in the year 2005." Even Sh P.C Gautam/attesting witness has said in his cross examination that Smt Lakshmi Devi did not use eye glasses. In his cross examination dated 26.9.14, defendant no. 3 has admitted that she used hearing aid although volunteered by saying that only seldom. Thus, the non examination of scribe/typist of the Will in this case despite his probable availability is suspicious circumstance in the facts of this case."

The above findings have been challenged by the learned counsel for the Appellants who has argued that if one of the attesting witnesses was examined and no infirmity was found in his testimony, non-examination of the person who typed the Will or the Advocate who was present at the time of preparation or registration of the Will could not be a ground to discard the Will.

In this respect, it will be pertinent to note that in the above paragraphs, this Court has opined that the attesting witness Shri P.C. Gautam was a credible witness and no such infirmity had been found in his examination which would be fatal to the case of the Appellants. The said examination had been in compliance of the legal stipulations and this Court is inclined to believe the version put forth by the attesting witness.

In this regard, it will be pertinent to note the observations of the Hon'ble Supreme Court in ***Ramabai Padmakar Patil***

(*supra*). The relevant portion of the said judgment has been extracted hereunder:

“9. The learned District Judge has observed that Smt. Yamunabai was very old when she executed the Will and she was hard of hearing and was unable to walk. He further observed that Chhaya Dighe who typed the Will and one Shri Tiwari, Advocate, who was present at the time of preparation and execution of the Will, were not examined and these facts together created a doubt regarding the authenticity of the Will. As discussed earlier, in view of Section 63 of Indian Succession Act the proviso to Section 68 of the Evidence Act, the requirement of law would be fully satisfied if only one of the attesting witness is examined to prove the Will. That this had been done in the present case by examining PW2 Raghunath Govind Sogale cannot be disputed. No infirmity of any kind had been found in the testimony of this witness. Chhaya Dighe merely typed the Will and she is not an attesting witness nor it is anybody's case that Smt. Yamunabai had put her thumb impression on the Will in her presence, therefore, her examination as a witness was wholly redundant. The mere non examination of the Advocate who was present at the time of preparation or registration of the Will cannot, by itself, be a ground to discard the same....We are, therefore, clearly of the opinion that the finding recorded by the learned District Judge, which has been affirmed by the High Court in second appeal, is not based upon a correct application of legal principles governing the proof and acceptance of Will and the same is completely perverse. The aforesaid finding is accordingly set aside. The finding recorded by the trial Court that Will is genuine is hereby restored.”

(emphasis supplied)

A perusal of the above paragraph reveals that the observation recorded above applies with full force to the case at hand considering its factual matrix. This Court is therefore unable to accept the finding of the learned Trial Court that the non-

examination of the typist of the Will is a suspicious circumstance.

v. **Propounder playing an active role in execution and registration of the Will**

The fact that the propounder of the Will, i.e. Appellant No. 3 has played an active role in the registration and execution and has also been granted half the share in the suit property by virtue of the aforesaid Will has weighed with the learned Trial Court as a suspicious circumstance while deciding upon the validity of the Will.

At this juncture, it will be apposite to first deal with the submissions of the learned Counsel of Respondent No. 1 that Appellant No. 3 had not made Appellant Nos. 1 and 2 aware of the existence of the Will in question. The finding of the learned Trial Court in this regard is being reproduced hereinbelow:

*“21.2. The testimony of defendant no. 3 is silent as to whom she had expressed her desire to make her Will. It is not I clarified that if the said desire was expressed by her in the presence of defendants no. 1, 2 & 3 or to which of the individual defendant. **What can be comprehended from the testimony is that the desire must have been expressed by her to the third defendant and that is why he alone took her to Tis Hazari Court. Here the knowledge of aforesaid aspect by defendants no. 1 & 2 is silent. It is thus not known whether the information was disclosed to them or not.** This factor becomes important and worth consideration as not only defendant no. 3, but also defendants no. 1 & 2 are the beneficiaries under the Will, the defendant no. 3 being the major beneficiary. The entire evidence is clear that it was the third defendant who had the Will in his control during the execution as well as registration of Will EXPW1/D2. Thus, these facts makes this case distinguishable from the facts of the cases cited*

above for and against the impact of propounder of the Will taking active part in its execution and registration.”
(emphasis supplied)

A perusal of the records reveals that the aforesaid finding rendered by the learned Trial Court was erroneous in view of the fact that a joint Written Statement was filed by all the three Appellants (defendants before the learned Trial Court) and an affidavit to this effect was also filed which bears the signature of all the three Appellants. It cannot, therefore, be said that the other two Appellants did not have knowledge of the Will in question.

Moving further, it will also be pertinent to note the observations of the Hon’ble Supreme Court in ***Rabindra Nath Mukherjee & Ors. (supra)***. In this case, one of the suspicious circumstances to challenge the validity of the Will in question was the active part played by one Subodh, a close relation of Rabindra, one of the executors, in getting execution of the Will. Dismissing the challenge to the validity of the Will on this count, the Hon’ble Court made the following observation:

“As to "ubiquitous" Subodh, it may be said that somebody has to take necessary steps in such matters; but if he happens to be one close to the executor, some eye-brow is bound to arise. Even so, if there be other circumstances on record to show the voluntary character of the document, the eye-brows should get dropped down. And such circumstances were present in the case, which somehow missed the two courts below.”

It is therefore possible to disregard the active role played by the propounder in execution and registration of the Will if there is a plausible explanation for the same. In

the case at hand, the learned Trial Court overlooked the fact that the deceased testatrix was a woman in her eighties who had been living on the first floor of the suit property along with Appellant No. 3 who was her son. It was therefore natural for her to express her desire to prepare a Will to her son who had been living with him. In view of this explanation, this Court does not find strength in the challenge mounted on the validity of the Will on the ground of active participation of the propounder in execution and registration of the said Will.

vi. **Respondent Nos. 1 and 2 deprived of share in the suit property.**

Another ground of challenge raised by the learned counsel for the Respondent was the deprivation of Respondent Nos. 1 and 2 of any share in the suit property despite there being no evidence of their relationship with their mother going sour.

In this regard, it will be pertinent to note the observations of the Hon'ble Supreme Court in *Uma Devi Nambiar (supra)*.

The relevant portion of the judgment is being extracted below:

“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 either reducing or depriving the share of natural heir. 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 especially in a case where the bequest has been made in favour of an offspring. As held in PPK Gopalan Nambiar v. PPK Balakrishnan Nambiar and Ors. (AIR 1995 SC 1852), 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 circumstance, 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 (See, Puspavati and Ors. v. Chandraja Kadamba and Ors. (AIR 1972 SC 2492). In Rabindra Nath Mukherjee and Anr. v. Panchanan Banerjee (dead) by LRs. and Ors. (1995 (4) SCC 459), 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.”
(emphasis supplied)

On similar lines, this Court has made the following observations in **K.C. Bajaj & Ors. (supra)**:

“In deciding whether there is a will on the basis of the document, the probate Court certainly will not proceed to consider as to whether or not the disposition of the property was good or bad. The primary duty of the probate Court is to see firstly whether prima facie, the document constituted a will. If the propounder is able to satisfy the conscience of the Court, the Court shall grant the probate, even if the will cuts off, wholly or in part, near relations. It is the will of the testator that is reflected in the will. Being the testator's own property, he has the liberty to deal with it absolutely. It is not for the Court to find out justification or equity or otherwise in the action of the testator. It is not for the Court to make it fair or to sermonize. It is not for the Court to refuse the grant on account of the fact that the disposition is not just and fair or is unnatural or improbable when the conscience of the Court is clear about the proof of the execution of the will

on the face of the evidence, satisfactorily sufficient, to remove the suspicious circumstances.”

To similar effect is the observation of the Hon’ble Supreme Court in ***S. Sundaresa Pai & Ors v. Mrs.Sumangala T.Pai & Anr.*** reported as ***AIR 2002 SC 317***. The relevant portion of the judgment is being reproduced hereunder:

“5. The main reason which weighed with the High Court for its conclusion that the will was unnatural was uneven distribution of the assets by Indira Bai and also that the will did not give anything to the widowed daughter. According to the High Court this daughter was 'perhaps more deserving'. It also noticed that the will gave bulk of immovable properties to only one son. Another son was not given any immovable property. The third son was given one half share in only one immovable property and the other half of it was given to respondent no.1. Indira Bai in the will also did not give anything to her husband. All movables as per the will were given to the three sons equally.

6. It is significant to note that only the plaintiff has questioned the will. All the defendants were supporting the will. The High Court also found that in view of the testimony of the attesting witness, the will had been formally proved. Under these circumstances, we fail to understand how the conclusion about the will being unnatural on the basis of uneven distribution of the assets by Indira Bai could be reached. The widowed daughter had not questioned the will. She rather supported it. Therefore, it could not be taken as a circumstance to show that the will was unnatural by observing that she was more deserving. It is a question which lies squarely within the pure discretion of the executant of the will. The finding that the "will is most unnatural" cannot be sustained.

7. Learned counsel for plaintiff/respondent no.1, supporting the impugned judgment also laid strong emphasis on uneven distribution of the assets which, according to him, shows the suspicious circumstances in respect of the execution of the will. The uneven

distribution of assets amongst children, by itself, cannot be taken as a circumstance causing suspicion surrounding the execution of the will. One son was given bulk of immovable properties; another none; another half share in one immovable property; other half being given to the plaintiff and another daughter and husband were given nothing. It is also not in dispute that some properties were given in gift to the plaintiff by her mother during her life time. There was nothing unnatural.”

(emphasis supplied)

The law is settled on the point that mere exclusion of natural heirs or uneven distribution of property among heirs does not in itself amount to a suspicious circumstance if it has been adequately explained. At this point, it will be pertinent to reproduce the relevant clause of the Will which dealt with the distribution of the suit property. The same can be usefully extracted as under:

“1. That so long the testatorix is alive she shall continue to be the absolute and exclusive owner of the property bearing No. C-II/55-56, Lajpat Nagar, New Delhi, except the basement portion which has already been sold AND on her death the TESTATORIX doth hereby bequeath, demise and give the entire First Floor to Subhash Chander, respective occupied portions of Second floor to Om Parkash and Rajinder Kumar.

2. So long the Testorix is alive, she shall be entitled to receive the rent of the Ground Floor Portion of the said property. Out of this rental income, the son Prem Nath and the Daughter Smt. Raj Batra shall be entitled to receive Rs. 10, 00, 000/- each and in case, the said amount has been paid to during life time of the Testatorix, then none of them shall be entitled to receive any further amount nor thereafter. After the payment of Rs. 10, 00, 000/- each to Prem Nath and Smt. Raj Batra, as aforesaid, all the three sons shall become the owners to the extent of 1/4th share Om Parkash, Rajinder Kumar- 1/4th share, and Subhash Chander- 1/2 share of the Ground floor of the property and the rental income

of the same in addition to portions referred to above. The Terrace of the said property shall remain under the use of all these three sons in equal shares.”

(emphasis supplied)

A perusal of the above-cited clause reveals that after the death of the deceased testatrix, Appellant No. 3 was to be entitled to half share of the ground floor of the property and Appellant Nos. 1 and 2 were to be entitled to 1/4th share each. Out of the rental income of the ground floor, Respondent Nos. 1 and 2 were to receive Rs. 10,00,000/- each and in case, the said amount had been paid to them during the life time of the testatrix, then none of them were to be entitled to receive any further amount thereafter. It is pertinent to note that the deceased testatrix had not cut off both the Respondents completely from the inheritance and had made provision for the payment of Rs.10,00,000/- to each of them. The Respondents herein were only deprived of any share in the suit property situated in Delhi, which is not a suspicious circumstance in itself considering the fact that Respondent No. 1 had been living in Agra with her husband, while Respondent No. 2 had been living in Canada for a very long time, while all the three Appellants had been residing in the suit property. In the light of these facts and the judicial principles evolved in the above-discussed judgments, this Court is not inclined to consider the uneven distribution of property among the children of the testatrix as a suspicious circumstance.

vii. 'Will' not read over and explained to the deceased

In the impugned judgment, the learned Trial Court has highlighted several points indicating that the said Will was not read over and explained to the testatrix and she was not aware as to what she was signing. The learned Trial Court has taken the same to be a suspicious circumstance affecting the validity of the said Will. The relevant portion of the impugned judgment reads as follows:

"21.4 It is further in the testimony of defendant no. 3 that the testatrix verified the contents in Hindi once the Will was typed. The affidavit is silent as to how such verification was made. It has come in his cross examination only that he had come to the Court on 17.2.2005 at about 2/2.30 p.m and the Will was got typed on the said date itself. It has also come only in the cross examination of third defendant that it was typist who had explained the contents of the Will to his mother, after typing it. This fact is not mentioned in the Will itself. In what language the typist explained the contents of the Will to his mother after typing it, is not clarified in the cross examination. Thus, as to under what circumstances, the contents of the Will were verified by the deceased testatrix on 17.2.2005 has not seen the light of the day.

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25. In the cross examination of defendant no. 3 dated 17.9.14 it has come that the typed will remained in possession of his mother and that he had asked her if she wanted to have any change incorporated therein. Further, as against his stand that the Will was read over to her by the typist, he submits in his cross examination dated 26.9.14 that it was he who read over the contents of the Will to his mother after it was typed. Said stand is contrary to what was deposed earlier...

27.2. Further, it is a stand of this witness that he had read out the Will to the testatrix and explained its contents to her in Hindi. On this aspect also, he was cross examined. This witness has done M.A in Hindi Literature and has

through out remained in Hindi medium institutions. He was comfortable for his cross examination to be carried out in Hindi language. He asserted to have signed his affidavit after having read and understood its contents. He also tried to translate from English to Hindi and read out portion Mark X to XI in para 2 of written statement of defendants no. 1 to 3 which he had read out loudly and unhesitatingly in the Court. He was then asked to explain and translate the meaning of same in Hindi. **The Court had observed that the witness gave the crux of the part what he read** but was unable to explain the meaning of the word 'prejudice'. He submitted to be knowing only Hindi and English language and admitted that he can not do fluent I Hindi to English or English to Hindi translation. He did not know the meaning of word 'testatrix', word 'executrix', word 'vernacular', word 'bequeath', word 'Conveyance Deed', word 'demise' of which he gave contextual meaning in the Court and also submitted that he can not differentiate between 'Will' and 'Conveyance Deed'. He admitted that he could not explain as to what is meant by 'testatrix' or 'executrix'. He had not worked with any agency engaged in translation of Hindi/English language. Having regard to the above, it can be observed that this witness may have a working knowledge of English language but he is definitely not well conversed with most of the phrases and words used in Will EXPW1/D2 and thus his competence of having explained the entire contents of the Will in question from English to Hindi in its literal sense to the deceased testatrix is doubtful. It itself is therefore a suspicious circumstance coupled with the other factors.

30. The witness volunteered to be not aware as to whether Sub Registrar himself was sitting behind the window or his staff. He further submits that the official concerned had asked only one question from Smt. Lakshmi Devi as to whether she knew the contents of the Will to which she had replied in positive. He states under oath that the contents of the Will were not explained by the said official to Smt Lakshmi Devi in his presence. This becomes more important in view of the fact that witness thereafter admits the correctness of the suggestion that they had left the window only after completion of formalities.

31.1 The attesting witness has admitted that Sub Registrar concerned neither knew him or Sh. Raj Kamal personally and therefore, the endorsement on the Will made by Sub Registrar V that 'witness no. 2 namely Raj Kamal is known to him personally' is of no relevance and it appears to be mere user of a printed format. Similar is the position with respect to endorsement that the 'contents of the documents were explained to the parties who understood the same and admitted as correct'. This fact specifically stands belied in the testimony of attesting witness who states that no inquiry was made from him and only one question was asked from the testatrix and that nobody had explained the contents of the Will to her. Thus, none of the case law on the subject cited by the respective parties on the above aspect has factual bearing in the distinct facts of this case. Merely because PW 5 has stated about the usual procedure followed during registration of documents would not imply that the same was followed in this case also. This creates strong possibility that the contents of Will after being typed on 17.2.2005 could have been easily substituted, the document being unsigned between the intervening period, and also leads to the conclusion regarding incompetency of attesting witness to have translated its true and complete contents to the testatrix. It definitely leads to the conclusion that the official concerned at the Sub Registrar office had not explained or read over the contents of the Will to the testatrix in her language which is definitely not English. This leads to a final conclusion that the testatrix may not be even aware as to what was being signed by her before the Sub Registrar concerned."

At this juncture, it will be pertinent to consider the finding of the learned Trial Court that it had not been established that the contents of the Will in question were read over and explained to the deceased testatrix and that there was a possibility of the typed Will having been replaced by Appellant No. 3. It will be pertinent to note that despite the non-examination of the typist of the Will and the Sub-Registrar, the evidence of Shri P.C. Gautam to the effect that he read over and explained the

contents of the Will to the testatrix on her asking have not been contradicted. The mere fact that Shri Gautam was unable to explain the meaning of a few technical terms occurring in the Will is not sufficient to infer that he was not competent to explain the essence of the Will to the testatrix. The learned Trial Court appears to have been caught up in legalese and ignored the fact that Shri Gautam was able to give contextual meaning of the terms and could also satisfactorily translate the paragraphs written in English into Hindi language.

It will not be out of place here to deal with the submission of the learned counsel for Respondent No. 1 that the Will was in the hands of Appellant No. 3 in the office of the Sub-Registrar and he could have very well replaced the Will during the interval between the date of typing of Will and the date of registration. This contention does not hold water in view of the fact that Appellant No. 3 was accompanied by his mother (deceased testatrix) in the office of the Sub-Registrar. Merely carrying the Will in his hands could not point to the reference that he had replaced the Will. It will also be pertinent to note the contents of the Will had been explained to the deceased on the date of registration of the Will after the same had been handed over to Shri Gautam from Appellant No. 3. The “possibility” of the Will having been replaced in the interregnum is therefore ruled out.

45. After careful examination of the evidence adduced by the parties, this Court is of the considered view that the execution and

registration of the Will in question is not surrounded by any suspicious circumstances in respect of the registration of the Will which render it on the whole to be an improbable, unnatural and unfair instrument.

46. In this context, it will be relevant to cite the observations of the Hon'ble Supreme Court in the case of ***Rabindra Nath Mukherjee & Ors. (supra)***, wherein the Hon'ble Court had made the following observations:

“6. In case where a will is registered and the Sub-registrar certifies that the same had been read over to the executor who, on doing so, admitted the contents, the fact that the witnesses to the document are interested loses significance. The documents at hand were registered and it is on record that the Sub- registrar had explained the contents to the old lady. So, we do not find the third circumstance as suspicious on the facts of the present case.”

47. It is pertinent to note that apart from a bare denial of the signature of the testatrix on the Will and her being in a sound state of mind to execute a Will, no evidence has been produced on record to challenge the competence of the testatrix to execute the same. What is more surprising to note is that Respondent No. 1 in her cross-examination has altogether denied to speak any further about the Will in question, the validity of which she has challenged. In this regard, the observations of the Hon'ble Supreme Court in ***Ramabai Padmakar Patil (supra)*** assume importance. The same have been reproduced below:

“9. The fact that Smt. Yamunabai was hard of hearing or that she was unable to walk does not lead to an inference that her mental faculties had been impaired

or that she did not understand the contents of the document which she was executing. It is important to note that Smt. Yamunabai personally came to the office of the Sub-Registrar and her death took place after a considerable period i.e. 3 years and 9 months after the execution of the Will. No evidence has been adduced by the defendants to show that at the time of the execution of the Will she had been suffering from any such ailment which had impaired her mental faculties to such an extent that she was unable to understand the real nature of the document which she was executing. We are, therefore, clearly of the opinion that the finding recorded by the learned District Judge, which has been affirmed by the High Court in second appeal, is not based upon a correct application of legal principles governing the proof and acceptance of Will and the same is completely perverse. The aforesaid finding is accordingly set aside. The finding recorded by the trial Court that Will is genuine is hereby restored.”

(emphasis supplied)

48. The observations of this Hon'ble Court in *K.C. Bajaj & Ors.* (*supra*) are also instructive. The relevant portion of the judgment is being reproduced below:

*“32. As the wills are too frequently made by the sick and dying, the degree of understanding and memory which the law requires is such as may be reasonably expected from persons in that condition. Therefore, it is wrong to suppose that those qualities of mind should be possessed by the testator in the highest degree, position or to the same extent as before the illness in order to enable him to validly make his will. Section 59 of the Indian Succession Act requires that the testator should have a sound mind. The sound mind referred to does not mean that the testator should have his mental faculty in their fullest vigour, but means that he should have the capacity to understand the nature of his property; memory to remember the relations and persons normally having claims on his bounty and has also a judgment. As observed by their Lordships of Privy Council in the decision reported as *Judah v. Isolyne*, the fact that the*

testator was unwell when he executed the will is a long way from saying that he had no testamentary capacity. The testator does not have to be found in perfect state of health to have his will declared valid. It is sufficient to prove that he was able to outline the manner in which his estate was to be disposed of.

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*56. The next suspicious circumstance namely the feeble mind, frail health and weak eye sight of the testatrix, to my mind needs to be considered with reference to the law relating to a will. As noted in para 25 above, (refer para 32 quoted therein from the decision dated 1.04.2008 in FAO No. 289/1998 Shri K.L. Malhotra v. Sudershan Kumari). As the wills are too frequently made by the sick and dying, the degree of understanding and memory which the law requires is such as may be reasonably expected from persons in that condition. Therefore, it is wrong to suppose that those qualities of mind should be possessed by the testator in the highest degree, position or to the same extent as before the illness in order to enable him to validly make his will. Section 59 of the Indian Succession Act requires that the testator should have a sound mind. The sound mind referred to does not mean that the testator should have his mental faculty in their fullest vigour, but means that he should have the capacity to understand the nature of his property; memory to remember the relations and persons normally having claims on his bounty and has also a judgment. As observed by their Lordships of Privy Council in the decision reported as **Judah v. Isolyne**, the fact that the testator was unwell when he executed the will is a long way from saying that he had no testamentary capacity. The testator does not have to be found in perfect state of health to have his will declared valid. It is sufficient to prove that he was able to outline the manner in which his estate was to be disposed of.*

57. There is no evidence which suggests that the testatrix was a lady of feeble mind. On the contrary, there is evidence to show that the testatrix had her mental faculties intact. There is deposition of the son of the testatrix Krishan Kumar Ahuja, RW-1 that the testatrix herself used to decide as to how much amount she wanted to withdraw from her bank account, whom she wanted to give the amount withdrawn by her and for what purpose.

It would not be out of place to mention that the sons of the testatrix tried to project a case that their mother had turned nearly blind in the year 1960, evidenced by the deposition of Ashok Kumar Ahuja, RW-3 that when his mother went to Srinagar with her husband she was nearly blind. But under sustained cross-examination he admitted that his mother used to cook the food for his father. Obviously, the mother was not blind. Further, the alleged will propounded by the objector being Ex. RW-1/1 though not proved as duly executed in as much as the same has not been witnessed by a witness, as per the claim of the objector was signed by his mother in the year 1968. The objector has himself brought on record evidence that his mother was absolutely fit if not later at least in the year 1968. I am conscious of the fact that the instant will has been executed in the year 1977 but the fact remains that the objector did not take a stand that his mother's eye sight started deteriorating after 1968. His case was that his mother had turned nearly blind in the year 1960, a fact belied by the admissions and evidence led by the objector. In the absence of any evidence that the mother became nearly blind after 1968, the whole version of the objector has to be put in the dustbin.

58. In the decision reported as *Ramabai Padmakar Patil v. Rukminibai Vishnu Vekhande*, the testatrix was hard of hearing and could not walk properly. Objectors to the will sought to contend that the testatrix was not in a state of sound disposing mind at the time of the execution of the will. Negating the contention of the objectors the Hon'ble Supreme Court observed that the fact the testatrix was hard of hearing or that she was unable to walk does not lead to an inference that her mental faculties had been impaired or that she did not understand the contents of the document she was executing. The Hon'ble Supreme Court further held that evidence should have been adduced by the objectors to show that at the time of the execution of the will she had been suffering from any such ailment which had impaired her mental faculties to such an extent that she was unable to understand the real nature of the document which was executing."

(emphasis supplied)

49.To similar effect are the observations of the Hon'ble Supreme Court in ***Leela Rajagopal & Ors vs Kamala Menon Cochran & Ors.*** reported as ***(2014) 15 SCC 570***, which are being reproduced below:

“12. The lack of knowledge of English even if can be attributed to the testator would not fundamentally alter the situation inasmuch as before registration of the Will the contents thereof can be understood to have been explained to the testator or ascertained from her by the Sub Registrar, PW-4, who had deposed that such a practice is normally adhered to.”

50.A survey of the afore-cited observations reveals that it is a settled judicial principle that once the Will had been read over and explained to the testator and there are no objections raised to the competence of the testator to understand the same, it is taken to bear testimony to the fact that the testator is aware about the contents of the Will and is taken to execute the same being fully cognizant of its effect on the distribution of his assets. A careful scrutiny of the evidence on record reveals that the Appellants have been successful in establishing that the Will in question dated 24.02.2005 had in fact been executed by Smt. Laxmi Devi and she had signed the same in the presence of the attesting witnesses who also appended the signatures in her presence. The fact that Smt. Laxmi Devi was in a sound and disposing state of mind is established from the fact that she had gone herself to get her Will typed on 17.02.2005 and thereafter, to get it registered on 24.02.2005. There is not a single shred of evidence on record to suggest otherwise or to impeach the credit of the witnesses

deposing to this effect. In light of the same, it cannot be said that the faculties of the testatrix were impaired merely because she was 85 years of age while executing the Will. It will also be pertinent to mention here that the deceased testatrix had died after almost three years of executing the Will and she had not made any other Will in the intervening period. This Court is therefore not inclined to accept the finding of the learned Trial Court that the Will in question had not been read over and explained to the testatrix and she was unaware as to what she was signing.

CONCLUSION

51. Upon perusal of the records, it becomes evident that the Appellants have been able to dispel the clouds of suspicious circumstances hovering over the validity of the Will in question by tendering adequate explanation for the same. The Appellants have thus been able to cross the hurdle of satisfying the test of judicial conscience as stated in *H. Venkatachala Iyengar (supra)*.

52. In view of the above discussion and appreciation of the evidence placed on record, this Court is of the considered opinion 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. This Court is of the view that the learned Trial Court has not appreciated the evidence relating to genuineness of the Will in its totality and has attached undue importance to certain circumstances, dubbing the same as

“suspicious”. In its zeal to find “suspicious circumstances”, the learned Trial Court has overlooked the plausible explanations rendered by the Appellants and given a go-by to the well-settled principle of the satisfaction of judicial conscience with the help of cogent and unimpeachable evidence.

53. Accordingly, the present appeal is allowed. The impugned judgment is set aside. The suit filed by Respondent No.1 for the partition of the suit property is dismissed. Parties are entitled for their respective shares in the suit property as per the last Will dated 24.02.2005 executed by Late Smt. Laxmi Devi, the mother of the parties. The parties are left to bear their own cost.

MARCH 29, 2023
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GAURANG KANTH, J.