

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

APPEAL NO.574 OF 2003

IN

TESTAMENTARY SUIT NO.33 OF 1999

IN

TESTAMENTARY PETITION NO.209 OF 1987

Myra Philomena Collaco. ...Appellant

vs.

1.Mrs.Lilian Coelho & others. ...Respondents

Mr.Ravi Kadam, Advocate General with Mr.E.Bharucha &
B.B.Saraf i/b. Ranjit & Co., for Appellant.

Mr.V.J.Makhija i/b. Denzil D'Mello, for Respondent
nos.1 to 3.

**CORAM: D.K.DESHMUKH &
A.A.SAYED, JJ.**

DATED: 22nd January, 2009.

P.C. :-

1. By this appeal, the appellant challenges the order dated 7.3.2003 passed by the learned Single Judge of this Court in Testamentary suit no.33 of 1999. The facts that are material and relevant are that the present appellant had filed a petition for grant of letters of administration with the Will annexed of the property and credits of her deceased mother Mrs.Maria Francisca Coelho who died on 24.11.1985. The Will that was propounded is dated 7.6.1982. By that Will, the property was bequeathed in favour of two sons viz. George and Reginald and the daughter-plaintiff in equal shares. A caveat was filed by the other Son Mr.Victor. He died during the pendency of the proceeding and therefore, the proceedings were continued by his widow. Because of the written statement filed by the original caveator, the Court framed following issues:-

"1. Does the plaintiff prove the due execution and attestation of the Will dated 7.7.1982 of the deceased Mrs.Maria Francesca Coelho?

2. Does the plaintiff prove that the said deceased was of sound and disposing state of mind and had testamentary capacity at the time of execution of the Will dated 7.7.1982 ?

2(a) Whether the defendants prove that deceased was not in a disposing state of mind and did not have testamentary capacity at the time of execution of the Will ?

3. Do the defendants prove that the signature of the deceased on the Will dated 7.7.1982 was forged ?

4. Do the defendants prove that the Will dated 7.7.1982 was executed by the deceased under undue influence, coercion and threats and fraud was played on the deceased by the plaintiff ?

5. Whether the plaintiff is entitled to letters of administration as prayed ?

6. What order and decree ?"

Parties thereafter led evidence both oral and documentary and the Court disposed of testamentary petition no.209 of 1987 which in view of the caveat was converted into testamentary suit no.33 of 1999 by order dated 7.3.2003. The learned Single Judge dismissed the petition. Perusal of the judgment of the learned Single Judge shows that the learned Single Judge has recorded findings in favour of plaintiff on issue nos.1 to 4. The findings against the plaintiff are recorded on the last two issues viz. Issue nos.5 and 6. In other words, the learned Single Judge has held that the plaintiff has succeeded in proving due execution and attestation of the Will dated 7.7.1982; the learned Single Judge has also held that the plaintiff has proved that the deceased was of sound and disposing state of mind and had testamentary capacity at the time of execution of

the Will. The learned Single Judge has also held that the plaintiff has succeeded in proving that the defendants have failed to prove that the deceased was not in a disposing state of mind and did not have testamentary capacity at the time of execution of the Will. The learned Single Judge has also held in favour of the plaintiff and against the defendants that the defendants have failed to prove that the signature of the deceased on the Will was forged. The learned Single Judge has also held in favour of the plaintiff and against the defendants that the defendants failed to prove that the Will dated 7.7.1982 was executed by the deceased under undue influence, coercion and threats and fraud was played by the plaintiff. The learned Single Judge has dismissed the suit only on one ground viz. That according to the learned Single Judge there were suspicious circumstances surrounding the execution of the Will. According to the learned Judge, there were three suspicious circumstances which surrounded the execution of the Will viz. (i) the Will is cryptic and it does not mention the property of the deceased, (ii) the plaintiff took prominent part in execution

of the Will, and (iii) the Will does not contain any explanation as to why the other two sons viz. Victor and Neveille have been excluded from any benefits. The learned Single Judge has also held that because of failure of the plaintiff to examine herself as witness an adverse inference has been drawn against her.

2. The learned Counsel appearing for appellant submits that after having recorded the finding in favour of the plaintiff that the plaintiff has proved the genuineness of the Will and after having held that the defendants have failed to prove that the testator was not in a disposing state of mind and did not have testamentary capacity at the time of execution of the Will and that the signature of the deceased on the Will was forged, should not have refused to grant letter of administration only on the basis of alleged suspicious circumstances. The learned Counsel relied on the judgment of the Supreme Court in the case "Madhukar D.Shende Vs. Tarabai Aba Shedage, (2002)2 Supreme Court Cases 85". The learned Counsel further submits that even assuming

that such suspicious circumstances, after having recorded the finding that Will is genuine, could have been taken into consideration, the alleged suspicious circumstances considered by the learned Judge were totally irrelevant.

3. The learned Counsel appearing for respondents, on the other hand, submits that though it is true that after having recorded the finding that the Will was genuine, the suspicious circumstances should not have been considered, really speaking this Court should consider what was recorded by the learned Single Judge while discussing issue no.5 and while considering the finding of the learned Single Judge on the other issues. The learned Counsel submits that the reasons given by the learned Single Judge for holding that execution of the Will is surrounded by suspicious circumstances are valid reasons. The learned Counsel relies on the judgment of the Supreme Court in the case "Rani Purnima Debi and another Vs. Kumar Khagendra Narayan Deb and another, AIR 1962 Supreme Court 567".

4. Now, in the light of these rival submissions, if the record is perused it becomes clear that the learned Single Judge has recorded a categorical finding after discussing the evidence on record that the plaintiff has proved due execution of the Will by the deceased. The plaintiff has also proved on the basis of the evidence on record that the deceased was of sound and disposing state of mind and she had testamentary capacity on the date on which the Will was executed. The learned Judge has recorded the finding against the defendants that the defendants have not been able to prove that the signature of the deceased is forged or that at the time when the Will was executed, the deceased was under undue influence, coercion and threats and fraud was played on the deceased by the plaintiff. The finding recorded by the learned Single Judge on these issues have not been challenged either by filing any cross objections or cross appeal or filing an affidavit putting the appellant on notice that the defendants propose to challenge the findings recorded on issue nos. 1 to 4 by the learned Single Judge. In our opinion, therefore, we will have to go by the

findings recorded by the learned Single Judge on issue nos. 1 to 4. In our opinion, once the learned Single Judge has recorded the findings that the Will is genuine and the signature on the Will of the testator is genuine and that testator was of sound and in disposing state of mind when the Will was executed and that the testator was not under any undue influence and coercion and that the signature on the Will is definitely of the testator, there was no question of considering any suspicious circumstances. The suspicious circumstances, if any, would have been relevant had there been any doubt about genuineness of the signature of the deceased on the Will, had there been any doubt about sound and disposing state of mind of the deceased when she executed the Will. When there is no doubt about sound and disposing state of mind of the deceased and when there is no doubt about the signature of the deceased on the Will, in our opinion, the surrounding suspicious circumstances are not relevant. In our opinion, what has been observed by the Supreme Court in paragraphs (8) and (9) of the Judgment in the case "Madhukar D.Shende Vs. Tarabai Aba Shedge, (2002)2

Supreme Court Cases 85" are relevant, it reads as under:-

"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* 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 whole, 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."

Once the propounder of the Will has established the competence of the testator to make the will then, in our opinion, the suspicious circumstances are not relevant. This position also becomes clear from the observations of the Supreme Court in paragraph (5) of the judgment in the case "Rani Purnima Debi and another Vs. Kumar Khagendra Narayan Deb and another, AIR 1962 Supreme Court 567" which reads as under:-

"5. Before we consider the facts of this case it is well to set out the principles which govern the proving of a will. This was considered by this Court in H.Venkatachala Iyengar V. B.N.Thimmajamma (1959) Supp(1) SCR 426: (AIR 1959 SC 443). It was observed in that case that the mode of proving a will did not ordinarily differ from

that of proving any other document except as to the special requirement of attestation prescribed in the case of a will by S.63 of the Indian Succession Act. The onus of proving the Will was on the propounder and in the absence of suspicious circumstances surrounding the execution of the Will proof of testamentary capacity and signature of the testator as required by law was sufficient to discharge the onus. Where, however, there were suspicious, circumstances the onus would be on the propounder to explain them to the satisfaction of the Court before the will could be accepted as genuine. If the caveator alleged undue influence, fraud or coercion, the onus would be on him to prove the same. Even where there were no such pleas but the circumstances gave rise to doubts, it was for the propounder to satisfy the conscience of the Court. Further, what are suspicious circumstances was also considered in this case. The alleged signature of the testator might be very shaky and doubtful and evidence in support of the propounder's case that the signature in question was the signature of the testator might not

remove the doubt created by the appearance of the signature. The condition of the testator's mind might appear to be very feeble and debilitated and evidence adduced might not succeed in removing the legitimate doubt as to the mental capacity of the testator; the dispositions made in the will might appear to be unnatural, improbable or unfair in the light of relevant circumstances; or the will might otherwise indicate that the said dispositions might not be the result of the testator's free will and mind. In such cases, the Court would naturally expect that all legitimate suspicions should be completely removed before the document was accepted as the last will of the testator. Further, a propounder himself might take a prominent part in the execution of the will which conferred on him substantial benefits. If this was so it was generally treated as a suspicious circumstance attending the execution of the will and the propounder was required to remove the doubts by clear and satisfactory evidence. But even where there were suspicious circumstances and the propounder succeeded in removing them,

the Court would grant probate, though the will might be unnatural and might cut off wholly or in part near relations."

It is clear from the reading of the above quoted paragraph (5) that the suspicious circumstances, if any, are to be removed before the document can be accepted as last will of the testator. Therefore, the suspicious circumstances, if any, have to be taken into consideration by the Court before recording the finding that the Will is genuine and not after recording the finding that the Will is genuine.

5. Even assuming that the learned Single Judge could have taken into consideration the alleged suspicious circumstances after recording the finding that the Will is genuine, in our opinion, the circumstances which have been considered by the learned Single Judge as suspicious circumstances can hardly be termed as suspicious circumstances. In the Will, the testator clearly states that whatever may be the property left behind by her and owned by her

at the time of her death will be shared in equal proportion by her children named in the Will. Merely because she does not mention names of her other children and does not specify the property, in our opinion, cannot make the Will, which is otherwise genuine, a doubtful document. The property which is left behind by the deceased is never the subject matter before the testamentary Court. It is settled law that a person who may not own any property can also make Will. Therefore, existence of property is not necessary for making a valid Will. In our opinion, the learned Judge has committed an error in taking into consideration the issue of property while considering genuineness of the Will. So far as the second circumstance is concerned, in our opinion, even assuming that the plaintiff has taken prominent part in execution of the Will, it will not create doubt about genuineness of the Will because the learned Judge after discussing the evidence on record has recorded a categorical finding against issue no.4 that the testator was not under undue influence of the plaintiff. If the plaintiff was not in a position to influence the testator, mere presence of

the plaintiff at the time of execution of the Will will not create doubt about genuineness of the Will. So far as the third reason given by the learned Judge is concerned, many a times the purpose of Will is basically to exclude the person who otherwise inherits the property left behind by the testator. There is no duty on the testator to explain in the Will itself as to why the testator is excluding other heirs. In our opinion, once genuineness of the Will is accepted, merely because in the Will there is no explanation as to why the other heirs have been excluded, it cannot make the Will a doubtful document. So far as the observations of the learned Judge that failure of the plaintiff to examine herself as witness when it was possible for her to examine herself as witness, makes her liable to draw adverse inference against her is concerned, in our opinion, the entire aspect has been taken wrongly into consideration by the learned Judge. Perusal of the petition shows that the petitioner does not claim that the Will has come from her custody, she does not claim that she was present at the time of execution of the Will, and therefore, examination of the

plaintiff-petitioner as witness to prove either the Will or the probate petition was not necessary. Merely because one of the witnesses examined by the plaintiff says that she was present at the time of execution of the Will, does not oblige the plaintiff to examine herself as witness. If the plaintiff has been able discharged onus placed on her to prove the execution of Will by the testator in sound and disposing state of mind, in our opinion, merely because the plaintiff who could have examined herself as witness did not examine herself as witness, does not make her liable for drawing adverse inference against her. In our opinion, the entire approach adopted by the learned Judge in this regard is erroneous.

6. Taking overall view of the matter therefore, the finding that has been recorded by the learned Judge against issue nos. 5 and 6 is liable to be set aside. It is accordingly set aside. Finding on issue nos.5 and 6 is recorded, for the above mentioned reasons, in favour of the plaintiff i.e. in the affirmative, and it is held that in view of the

finding on issue nos.1 to 4 recorded by the learned Single Judge, the plaintiff is entitled to grant of letters of administration.

7. In the result, therefore, appeal succeeds and is allowed. The order passed by the learned Single Judge and the finding recorded by the learned Single Judge against issue nos.5 and 6 is set aside. Instead, against issue no.5 the finding is recorded in favour of the plaintiff and it is held that the plaintiff is entitled to grant of letters of administration as prayed for by the plaintiff. The suit filed by the plaintiff being Testamentary Suit no.33 of 1999 is allowed. The suit is decreed in terms of prayer clause of the suit. Appeal is disposed of.

(D.K.DESHMUKH, J.)

(A.A.SAYED, J.)
