Supreme Court of India
Supreme Court of India
Mahesh Kumar (D) By Lrs. vs Vinod Kumar & Ors. on 13 March, 2012
Bench: G.S. Singhvi, Sudhansu Jyoti Mukhopadhaya
NON-REPORTABLE

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NOS. 7587-7588 OF 2004

Mahesh Kumar (Dead) By L.Rs. ... Appellants versus

Vinod Kumar and others ... Respondents J U D G M E N T

G. S. Singhvi, J.

1. These appeals are directed against judgment dated 22.7.2004 of the learned Single Judge of the Madhya Pradesh High Court whereby he allowed the appeals filed by respondent No.1 - Vinod Kumar and respondent No.2 - Anand Kumar, set aside judgment and decree dated 21.11.2002 passed by II Additional District Judge (Fast Track), Harda (hereinafter described as the `trial Court') and decreed the suit filed by respondent No.1 for declaration, possession, permanent injunction and recovery of rent in respect of the share of Shri Harishankar (father of the appellant and respondent Nos.1 and 2) in the joint family property. The learned Single Judge also declared that respondent 2

No.2 shall be entitled to possession of his share in the suit property in terms of Will dated 9.6.1989 (Ex. P-1) executed by Shri Harishankar.

2. For the sake of convenience, the parties are being referred to as the appellant and the respondents.

3. Appellant Mahesh Kumar who is now represented by his legal representatives, respondent Nos. 1 and 2 and their father were members of the joint family. In 1965, respondent No.2 took his share and separated from the joint family. After 20 years, another partition took place among the remaining members of the joint family. In the second partition, respondent No.1 got 9.83 acres land of village Nimchakhurd and a house situated at Timarni Bazar. The appellant got the other house situated at Timarni and cash and Shri Harishankar got land comprised in Khasra No.92/1, 92/2 and 92/9 situated at Timarni along with the bungalow constructed over it.

4. In 1995, respondent No.1 filed Civil Suit No.20A of 1995 and prayed for grant of a declaration that by virtue of registered Will dated 9.6.1989 executed by Shri Harishankar, he had become sole owner of the property shown in red colour in the map annexed with the plaint and half portion in the shop situated 3

in the bungalow. He also prayed for grant of a decree of possession by alleging that after the death of father Shri Harishankar, he had asked the appellant to give shares to the brothers in terms of Will dated 9.6.1989 but latter declined to do so. The last prayer made by respondent No.1 was that the appellant may be directed to pay him share in the arrears of rent of the Bungalow which was leased out to Firm Ramesh Chand Dinesh Kumar Agarwal.

5. In his written statement the appellant claimed that after the 2nd partition, the parents started living with him and he and his family was looking after them. According to the appellant his mother died in January, 1992 and after her death, Shri Harishankar executed Will dated 10.2.1992 and bequeathed his share to him because he was looking after the parents and took care of the mother till her death on 23.1.1992 (Ex. D-2). He also

pleaded that respondent Nos.1 and 2 were not given anything because they had already got their respective shares in the joint family property.

6. In a separate written statement filed by him through his son Alok Kumar- cum-special power of attorney, respondent No.2 denied that he had separated from the joint family in 1965 and taken his share. Respondent No.2 pleaded that he is not bound by the partition which is said to have taken place in 1990 4

between the appellant, respondent No.1 and Shri Harishankar and that he is entitled to one-third share in the agricultural land and other properties of the joint family. However, he did not file counter claim in support of his plea that he was entitled to one-third share in what he described as the joint family property.

7. Respondent No.1 amended the plaint more than once but did not seek a declaration of invalidity qua Will dated 10.2.1992 on the ground that Shri Harishankar had executed the same under the influence of the appellant.

8. On the pleadings of the parties, the trial Court framed various issues including the following:

"(1) Whether respondent No.2 had separated from the joint family in 1965 by taking his share?

(2) Whether the second partition took place 10 years prior to the filing of suit by respondent No.1?

(3) Whether Shri Harishankar executed registered Will dated 9.6.1989 and bequeathed portion of his share to respondent No.1?

(4) Whether Shri Harishankar executed Will dated 10.2.1992?

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(5) Whether Will dated 10.2.1992 was valid and by virtue of that Will Shri Harishankar bequeathed his share to the appellant?

9. After analysing the pleadings of the parties and evidence produced by them, the trial Court dismissed the suit vide judgment dated 21.11.2002. The following are salient features of the findings recorded by the trial Court: (1) Respondent No.2 had separated from the joint family in 1965 by taking his share.

(2) In the 2nd partition, which took place 10 years before the filing of suit, respondent No.1 got 9.63 acres land in village Nimchakhurd apart from the house situated at Timarni Bazar, the appellant got the house situated at Timarni (Ward No.7) apart from cash and Shri Harishankar got land comprising in Khasra No.92/1, 92/2 and 92/9 situated at Timarni apart from the bungalow constructed on the land.

(3) Shri Harishankar executed registered Will dated 9.6.1989 and bequeathed his share in the joint family property to his three sons.

(4) The second Will executed by Shri Harishankar on 10.2.1992 was valid and in terms of that Will, the appellant acquired the testator's share in the joint family property.

(5) In the absence of any challenge to the second Will, respondent Nos.1 and 2 were not entitled to anything from the share of Shri Harishankar.

(6) Respondent No.2 was not entitled to anything from the remaining joint family property because he had not filed counter claim.

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10. Respondent No.1 challenged the judgment and decree of the trial Court by filing an appeal under Section 96 C.P.C., which was registered as First Appeal No.118 of 2003. Respondent No.2 also filed separate appeal, which was registered as First Appeal No.133 of 2003. After hearing the counsel for the parties the learned Single Judge of the High Court framed the following questions:

(1) Whether in a partition which took place 30

years before the date of the filing of the suit, defendant Anand Kumar got his share in the joint

family property?

(2) Whether a partition took place among Harishanker, Vinod Kumar and Mahesh Kumar ten

years before the filing of the suit?

(3) Whether the deceased Hari Shanker

executed a will on 9.6.89 and bequeathed the property owned by him, to his three sons?

(4) Whether on 10.2.92 Hari

Shanker executed a Will superseding the earlier Will dated 9.6.89 and bequeathed his property only

to defendant Mahesh Kumar?

11. The learned Single Judge then considered the rival contentions, scrutinize the record of the trial Court and answered question nos. 1, 2 and 3 in affirmative and, thereby, confirmed the findings recorded 7

by the trial Court that respondent No.2 had separated from the family in 1965 and taken his share in the joint family property; that the second partition took place among Shri Harishankar, respondent No.1 and the appellant 10 years before filing of the suit and each one of them got their respective shares and that Will dated 9.6.1989 was duly executed by Shri Harishankar. The learned Single Judge then proceeded to consider the fourth question and held that even though respondent No.1 had admitted that Will dated 10.2.1992 (Exhibit D-2) bears the signatures of Shri Harishankar, the same cannot be treated to have been validly executed because the mandatory provision contained in Section 63(c) of the Indian Succession Act, 1925 (for short, `the 1925 Act') had not been complied with. The learned Single Judge referred to the statements of the attesting witnesses, viz., Sobhag Chand (DW-3) and Kailash Chand (DW-4) and observed: "30. However, for certain other reasons, I am of the opinion that the Will dated 10-2-92 is not a validly attested document. According to the case of propounder of the Will, the Will was attested by

Sobhag Chand (DW-3) and Kailash Chand (DW-4)

but from the evidence of Sobhag Chand (DW-3), it

is clear that when he signed the Will other attesting witness Kailash Chand was not present.

Sobhag Chand in his deposition has stated thus:

"Kailash Chand mere jaane ke kitne samay baad aaya iski mujhe jaankaari nahi hai."

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The witness also states that:

"Mere hastakshar karne ke eek do minat baad hi Harishankar ji ne hastakshar kiye the."

31. This clearly established that Hari Shankar signed the Will in presence of the witness and at that time Kailash was not present. Thus, Hari shankar did not put his signature on the Will in presence of Kailash Chand. Nor witness Kailash Chand states that he received from the testator a personal acknowledgement of his signature. Thus,

from the evidence of Sobhag Chand it is established beyond any shadow of doubt that one

of the attesting witnesses, Kailash did not see the

testator signing the Will nor did he receive from the testator a personal acknowledgement of signature. Even if both the witnesses signed the Will in the presence of the testator the Will cannot be said to be properly attested as both the witnesses did not see the testator signing the Will. In the absence of proof that the testator signed the Will in presence of both the attesting witnesses or

his acknowledgment was received, the Will cannot

be said to be duly attested as the imperative condition under Clause (c) of Section 63 of the Act

has not been satisfied. In order to prove the due attestation of the Will, the propounder of the Will

had to prove that Sobhag Chand and Kailash the two witnesses saw the testator signing the Will, but in the present case, the propounder has failed to prove attestation of the Will, the same cannot be said to be validly attested Will."

(underlining is ours)

12. The learned Single Judge then also referred to some discrepancies in the statements of the appellant and the attesting witnesses and held that the 9

appellant failed to discharge the onus of proving that Will dated 10.2.1992 was duly executed by Shri Harishankar and was attested as per the mandate of Section 63(c) of the 1925 Act.

13. The learned Single Judge then enumerated the following reasons for coming to the conclusion that the execution of Will dated 10.2.1992 was suspicious and the testator had not acted of his own free will: (1) The Will was prepared by Shri S. K. Agrawal, Advocate in his office in the presence of Shri Harishankar and some witnesses including Bal Kishan (father in law of the appellant) and his son (brother in law of the appellant) and there was no reason for Shri Harishankar to have taken the document to the house of Bal Kishan.

(2) Both the attesting witnesses were chance witnesses. Sobhag Chand (DW-3) was not called by anybody and there was no reason for him to have gone to the house of Bal Kishan. Kailash Chand (DW-4) was called by Vishnu Prasad S/o Bal Kishan but the appellant gave out that both the witnesses came to meet his father.

(3) Kailash Chand (DW-4) lives at a distance of four furlong from the house of Bal Kishan and there was no reason why other persons of the 10

community who were living in the vicinity of Bal Kishan's house were not called to attest the Will.

(4) There were material contradictions in the statements of the appellant and the attesting witnesses.

(5) The Advocate, who drafted the Will was asked to sign the document after the executant (Shri Harishankar) and the two attesting witnesses had signed the same.

(6) The possibility that the signatures of Shri Harishankar and the attesting witnesses were obtained on blank paper and, thereafter, the draft was prepared by Shri S. K. Agrawal, Advocate cannot be ruled out because his signature appear on the left side at the bottom of the document in the margin.

(7) Will dated 10.2.1992 does not make a mention of the first Will and general statement made therein that the testator was cancelling the previously executed Will, if any, did not amount to revocation of Will dated 9.6.1989.

(8) While the first Will was registered, the executant did not bother to get the second Will registered.

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(9) There was no reason for Shri Harishankar to have given his entire share to the appellant only on the ground that he had served him and his wife during their old age.

(10) The appellant had himself taken active part in the execution of the second Will. The tenor of the statement of the appellant is indicative of the extra interest taken by him in the execution of the second Will. (11) Shri Harishankar had executed the second Will at the persuasion of the appellant and thus there was every reason to think that he had influenced the executant.

14. Shri S. B. Sanyal, learned senior counsel appearing for the appellant argued that the trial Court had correctly analysed the pleadings and evidence of the parties for coming to the conclusion that the appellant had succeeded in proving that Will dated 10.2.1992 was validly executed by Shri Harishankar and the learned Single Judge of the High Court committed grave error by setting aside the well reasoned findings recorded by the trial Court on this issue. Shri Sanyal emphasised that the learned Single Judge misread the statement of Sobhag Chand (DW-3) and erroneously observed that he had signed the Will as a witness even before the executant Shri Harishankar had signed the same and that the evidence of the other witness, 12

namely, Kailash Chand (DW-4) was liable to be discarded because he had not signed the Will in the presence of Sobhag Chand (DW-3). Shri Sanyal submitted that in terms of Section 63(c) of the 1925 Act, attestation of the Will by one witness is sufficient and Will dated 10.2.1992 cannot be treated invalid merely because the two attesting witnesses may not have simultaneously appended their signatures or that Kailash Chand (DW-4) was not present when Sobhag Chand (DW-3) had attested the Will. Learned senior counsel further argued that the exclusion of some of the heirs cannot be a ground for presuming that the Will dated 10.2.1992 was not genuine. He pointed out that in the first Will also Shri Harishankar had not given any share to his wife and the daughters but that was not taken as a ground for not treating the same to be genuine. Shri Sanyal submitted that non-registration of the second Will was not relevant because the law does not require registration of the Will. In support of his submissions, Shri Sanyal relied upon the judgments of this Court in Uma Devi Nambiar v. T. C. Sidhan (2004) 2 SCC 321, Sridevi v. Jayaraja Shetty (2005) 2 SCC 784, Pentakota Satyanarayana v. Pentakota Seetharatnam (2005) 8 SCC 67.

15. Shri Sudhir Chandra, learned senior counsel appearing for respondent No.1 supported the impugned judgment and argued that learned Single 13

Judge rightly decreed the suit because the finding recorded by the trial Court on the issue of validity of Will dated 10.2.1992 was ex-facie erroneous. Learned senior counsel submitted that depositions of Sobhag Chand (DW-3) and Kailash Chand (DW-4) were full of contradictions and the learned Single Judge rightly took

cognizance of the same for coming to the conclusion that the Will was not attested as per the requirement of Section 63(c) of the 1925 Act. Shri Sudhir Chandra pointed out that while the first Will executed by Shri Harishankar on 9.6.1989 was signed him on each page and was duly registered at Harda, the second Will was signed only on the last page and was not registered. He then argued that even though respondent No. 1 admitted that signatures on Will dated 10.2.1992 were that of his father Shri Harishankar, this cannot by itself lead to an inference that the Will was duly executed and was genuine. Learned senior counsel emphasised that onus of proving due execution of the Will is always on the propounder and when there are suspicious circumstances, he is duty bound to remove the same. Shri Sudhir Chandra also pointed out that the attesting witnesses were not independent persons and this by itself was sufficient to give rise to a serious suspicion about the genuineness of the Will and the learned Single Judge rightly discarded their testimony because the same was contrary to the statement made by the appellant. He submitted that active 14

participation of the appellant, who was the sole beneficiary of the Will, was rightly relied upon the learned Single Judge for holding that the execution of Will dated 10.2.1992 was highly suspect. In support of his arguments, Shri Sudhir Chandra relied upon the judgments in H. Venkatachala Iyengar v. B. N. Thimmajamma (1959) Supp. 1 SCR 426, Rani Purnima Devi v. Kumar Khagendra Narayan Dev (1962) 3 SCR 195, Ramchandra Rambux v. Champabai (1964) 6 SCR 814, Moonga Devi v. Radha Ballabh (1973) 2 SCC 112, Surendra Pal v. Dr. (Mrs.) Saraswati Arora (1974) 2 SCC 600, Seth Beni Chand (since dead) now by Lrs. v. Kamla Kunwar (1976) 4 SCC 554, Niranjan Umeshchandra Joshi v. Mrudula Jyoti Rao (2006) 13 SCC 433, Lalitaben Jayantilal Popat v. Pragnaben Jamnadas Kataria (2008) 15 SCC 365, S. R. Srinivasa v. S. Padmavathamma (2010) 5 SCC 274 and Balathandayutham v. Ezhilarasan (2010) 5 SCC 770.

16. Before dealing with the respective arguments, we consider it necessary to mention that after the death of Shri Harishankar, the appellant and respondent No. 1 had filed separate applications for mutation of their name in respect of land bearing Khasra No.92/1 Raqba 1-63 acres and converted land bearing Khasra Nos. 92/2 and 92/9 Raqba 0-35 acres. In support of his claim respondent No. 1 produced Will dated 9.6.1989 and the appellant produced Will dated 10.2.1992. By an order dated 31.12.1996, the 15

Tehsildar sanctioned mutation in favour of respondent No. 1. That order was set aside by Sub-Divisional Officer, Harda, who remanded the case to the Tehsildar for reinvestigation. The appellate order was set aside by Additional Commissioner, Hoshangabad Division by observing that the Will produced by the appellant was suspicious. The revisional order was challenged by the appellant by filing a petition under Section 50 of the Madhya Pradesh Land Revenue Code, 1959. After examining the record and considering the arguments made before him, the Administrative Member of the Revenue Board, Madhya Pradesh vide his order dated 21.7.2000 allowed the petition and directed that the mutation be done in accordance with Will dated 10.2.1992. This is evinced from paragraph 5 of order dated 21.7.2000, the relevant portion of which is extracted below:

"The Will dated 9.6.1989 is the registered Will and its witnesses have also been examined. Therefore, there is no doubt in its validity. The statements were also taken of the two witnesses of the Will dated 10.2.1992. That although the same is not registered but there is no doubt in its existence. The signature done by Hari Shankar in the Will dated 10.2.1992 has been proved by the witness Salig Ram. That it has come in the evidence that Hari Shankar were 5 brothers and that he received 50 acres of and house in partition. That in between the three sons of Hari Shankar the partition had already taken place. It has been a long time since Anand Kumar had separated himself and Vinod Kumar separated himself in the year 1984-85. The said fact has also come in the evidence. That on the said fact no dispute has arisen by any party. The said fact has also been accepted by Vinod Kumar. The present dispute is only in 16

respect of the 1-98 acres of land in village Timarni and on which the house has also been built. That any person can execute the Will number of times during his life span and under these circumstances the Will which has been executed last would be taken into account. The suspicion or doubt can be raised if the Will is executed in favour of the third party from outside and not in favour of the natural legal heirs of the deceased.

But in case the priority is given only to some of the natural legal heirs in comparison to the other natural legal heirs then only on this very reason the Will cannot be held as been invalid. That when for once the Will date 10.2.1992 has been proved and there is no doubt on the part of the testator Hari Shankar in executing the same then under those circumstances there left no importance in the old Will and the proceeding would be initiated in accordance with the new Will. That the fact of the new Will been executed on account of bad behaviour on the part of Vinod Kumar and Anand Kumar or it has been executed on account of the death of the wife of Hari Shankar would not affect the existence of the Will. Accordingly, the order dated 31.12.1996 of the Trial Court and the order dated 30.5.1998 of the Additional Commissioner are set aside. The mutation proceedings would be done in accordance with the last Will dated 10.2.1992 of the deceased."

(underlining is ours)

The aforesaid order acquired finality because the same was not challenged by respondent No.1 by filing a petition under Article 226 or Article 227 of the Constitution.

17. The other important fact which needs to be noticed is that the suit fild by the appellant for eviction of the tenant, i.e., Firm Ramesh Chandra Dinesh Kumar Agrawal was decreed by the trial Court and possession of the suit premises was handed over to the appellant. In that suit, respondent No. 17

1 had sought his impleadment as party but his prayer was declined by the trial Court and the revision filed against the trial Court's order was dismissed by the High Court.

18. We shall now consider whether the appellant had succeeded in discharging the onus of proving that Will dated 10.2.1992 was validly executed. For deciding this question it will be useful to notice some of the precedents in which this Court had considered the mode and manner of proving a Will. In one of the earliest judgments in H. Venkatachala Iyengar v. B. N. Thimmajamma (supra), the three Judge Bench noticed the provisions of Sections 45, 47, 67 and 68 of the Indian Evidence Act, 1872 and Sections 59 and 63 of the 1925 Act and observed: "Section 63 requires that the testator shall sign or affix his mark to the will or it shall be signed by some other person in his presence and by his direction and that the signature or mark shall be so made that it shall appear that it was intended thereby to give effect to the writing as a will. This section also requires that the will shall be attested by two or more witnesses as prescribed. Thus the question as to whether the will set up by the propounder is proved to be the last will of the testator has to be decided in the light of these provisions. Has the testator signed the will? Did he understand the nature and effect of the dispositions in the will? Did he put his signature to the will knowing what it contained? Stated broadly it is the decision of these questions which determines the nature of the finding on the question of the proof of wills. It would prima facie be true to say that the will has to be proved like any other document except as to the special requirements of attestation prescribed by Section 63 of the Indian Succession Act. As in the case of 18

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.

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. 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 19

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.

Apart from the suspicious circumstances to which we have just referred, in some cases the wills propounded disclose another infirmity. Propounders themselves take a prominent part in the execution of the wills which confer on them substantial benefits. If it is shown that the propounder has taken a prominent part in the execution of the will and has received substantial benefit under it, that itself is generally treated as a suspicious circumstance attending the execution of the will and the propounder is required to remove the said suspicion by clear and satisfactory evidence. It is in connection with wills that present such suspicious circumstances that decisions of English courts often mention the test of the satisfaction of judicial conscience. It may be that the reference to judicial conscience in this connection is a heritage from similar observations made by ecclesiastical courts in England when they exercised jurisdiction with reference to wills; but any objection to the use of the word "conscience" in this context would, in our opinion, be purely technical and academic, if not pedantic. The test merely emphasizes that, in determining the question as to whether an instrument produced before the court is the last will of the testator, the court is deciding a solemn question and it must be fully satisfied that it had been validly executed by the testator who is no longer alive."

(emphasis supplied)

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19. The ratio of H. Venkatachala Iyengar's case was relied upon or referred to in Rani Purnima Devi v. Kumar Khagendra Narayan Dev (supra), Shashi Kumar Banerjee v. Subodh Kumar Banerjee AIR 1964 SC 529, Surendra Pal v. Dr. (Mrs.) Saraswati Arora (supra), Seth Beni Chand (since dead) now by Lrs. v. Kamla Kunwar (supra), Uma Devi Nambiar v. T.C. Sidhan (supra), Sridevi v. Jayaraja Shetty (supra), Niranjan Umeshchandra Joshi v. Mrudula Jyoti Rao (supra) and S. R. Srinivasa v. S. Padmavathamma (supra). In Jaswant Kaur v. Amrit Kaur, (1977) 1 SCC 369 the Court analysed the ratio in H. Venkatachala Iyengar's case and culled out the following propositions: - "1. Stated generally, a will has to be proved like any other document, the test to be applied being the usual test of the satisfaction of the prudent mind in such matters. As in the case of proof of other documents, so in the case of proof of wills, one cannot insist on proof with mathematical certainty.

2. Since Section 63 of the Succession Act requires a will to be attested, it cannot be used as evidence until, as required by Section 68 of the Evidence Act, 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.

3. Unlike other documents, the will speaks from the death of the testator and therefore the maker of the will is never available for deposing as to the circumstances in which the will came to be executed. This aspect introduces an element of solemnity in the decision of the question whether the document propounded 21

is proved to be the last will and testament of the testator. Normally, the onus which lies on the propounder can be taken to be discharged on proof of the essential facts which go into the making of the will.

4. Cases in which the execution of the will is surrounded by suspicious circumstances stand on a different footing. A shaky signature, a feeble mind, an unfair and unjust disposition of property, the propounder himself taking a leading part in the making of the will under which he receives a substantial benefit and such other circumstances raise suspicion about the execution of the will. That suspicion cannot be removed by the mere assertion of the propounder that the will bears the signature of the testator or that the testator was in a sound and disposing state of mind and memory at the time when the will was made, or that those like the wife and children of the testator who would normally receive their due share in his estate were disinherited because the testator might have had his own reasons for excluding them. The presence of suspicious circumstances makes the initial onus heavier and therefore, in cases where the circumstances attendant upon the execution of the will excite the suspicion of the court, the propounder must remove all legitimate suspicions before the document can be accepted as the last will of the testator.

5. It is in connection with wills, the execution of which is surrounded by suspicious circumstances that the test of satisfaction of the judicial conscience has been evolved. That test emphasises that in determining the question as to whether an instrument produced before the court is the last will of the testator, the court is called upon to decide a solemn question and by reason of suspicious circumstances the court has to be satisfied fully that the will has been validly executed by the testator.

6. If a caveator alleges fraud, undue influence, coercion etc. in regard to the execution of the will, such pleas have to be proved by him, but even in the absence of such pleas, the very circumstances surrounding the execution of the will may raise a doubt as to whether the testator was acting of his own free will. 22

And then it is a part of the initial onus of the propounder to remove all reasonable doubts in the matter."

20. In Uma Devi Nambiar v. T.C. Sidhan (supra), the Court held that active participation of the propounder / beneficiary in the execution of the Will or exclusion of the natural heirs cannot lead to an inference that the Will was not genuine. Some of the observations made in that case are extracted below: "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 heirs. If a person intends his property to pass to his natural heirs, there is no necessity at all of executing a Will. It is true that a propounder of the Will has to remove all suspicious circumstances. Suspicion means doubt, conjecture or mistrust. But the fact that natural heirs have either been excluded or a lesser share has been given to them, by itself without anything more, cannot be held to be a suspicious circumstance especially in a case where the bequest has been made in favour of an offspring. As held in P.P.K. Gopalan Nambiar v. P.P.K. Balakrishnan Nambiar 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 Pushpavathi v. Chandraraja Kadamba.) In Rabindra Nath Mukherjee v. Panchanan Banerjee 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."

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(emphasis supplied)

The same view was reiterated in Pentakota Satyanarayana v. Pentakota Seetharatnam (supra).

21. In the light of the above, it is to be seen whether the appellant succeeded in proving that Shri Harishankar had executed Will dated 10.2.1992 and the same was duly attested as per the mandate of Section 63(c) of the 1925 Act.

22. In his statement filed in the form of affidavit under Order XVIII Rule 4 Code of Civil Procedure the appellant categorically stated that respondent No. 1 separated from the joint family in 1985 and got a house at Timarni apart from 10 acres land situated at Village Nimacha. The appellant further stated that his father and respondent No. 1 were running Anand Medical stores as a partnership which was dissolved and the medical store was handed over to respondent No. 1; that after dissolution of the partnership, he started a shop of seeds, fertilizer and pesticides and he and his wife and daughter served the parents till their death. According to the appellant, after the death of the mother, his father-in-law had invited his family members including the father for "dehli chudane" ceremony and at that time his father got prepared Will and signed the same in the presence of witnesses, who also appended their signatures. The appellant also stated that he was paying nazul tax, house tax, rent, etc., in 24

respect of 2 acres land and the bungalow. He also stated that the Revenue Board had passed order for mutation of his name and that in furtherance of the decree passed in the eviction suit, he obtained possession of the bungalow from the tenant. Along with the affidavit, the appellant produced several documents including the receipts showing payment of the rent and various taxes and conversion of a portion of the agricultural land. He also produced copies of the judgment and order passed by the Civil Court and the Revenue Board.

23. The appellant was subjected to lengthy cross-examination by the counsel for respondent Nos. 1 and 2. In reply to one of the questions put by the counsel for respondent No. 1, the appellant stated that there was a partition in 1985 in which respondent No. 1 was given 10 acres land at Nimacha and house situated at Gandhi Chowk, Timarni. In response to another question, the appellant stated that his father had put signatures on Exhibit D-2 in his presence and that his father and others did not sign on the first page because the writing was not complete. The appellant also stated that Kailash Chand (DW-4) had signed before Sobhag Chand and Sh. S.K. Agarwal had signed after his father and two witnesses had signed the Will. In reply to the question put by the counsel for respondent No. 2, the appellant stated that till 1965 all the brothers and parents lived together and, thereafter, respondent No. 2 separated from the joint family. In reply to another question, the appellant gave out that Sobhag Chand and 25

Kailash Chand are neither related to his father nor are they his friends but knew him and they used to visit his in-laws. The appellant also stated that his father had told the witnesses that he had executed Will because he was happy with the services rendered by the appellant and his wife. The appellant gave out that the two attesting witnesses do not belong to his caste and the houses of the persons belonging to his caste are at a distance from his in-laws house.

24. The evidence of Sobhag Chand (DW-3) and Kailash Chand (DW-4) was also filed in the form of affidavits. They categorically stated that Shri Harishankar had read out the Will in their presence and they appended signatures after Shri Harishankar had signed the same. The attesting witnesses were cross-examined at length about the time of their attesting the Will. Sobhag Chand denied the suggestion that he had signed the Will before Shri Harishankar had signed the same. He expresses his ignorance about the time when Kailash Chand had come. He also expressed his ignorance as to after how much time Kailash Chand came to the house of Bal Kishan. Although, there is some difference about the point of time when the two attesting witnesses appended their signatures on the Will but both have stood gruelling cross- examination on the

factum of their having signed as witnesses after the executant, viz., Shri Harishankar had signed the Will in their presence and that too after reading out the same.

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25. From what we have noted above, it is clear that the appellant succeeded in discharging the onus of proving that the Will dated 10.2.1992 had in fact been executed by Shri Harishankar and he had signed the same in the presence of the attesting witnesses who also appended their signatures in his presence. The fact that Shri Harishankar was in a sound state of health (physically and mentally) is established from the statement of respondent No.2 who categorically denied the suggestion that the mental and physical condition of his father deteriorated 5-6 months prior to his death or that he had lost his mental balance. In his statement, respondent No.1 did not suggest that the physical and mental health of his father was not good at the time of execution of Will dated 10.2.1992. Not only this, he made the following important admissions: i) The parents were living with the appellant and during the illness of mother the appellant's wife used to look after her.

ii) The expenses incurred in the funeral of the mother were paid by the appellant.

iii) The Board of Revenue decided the case of mutation in favour of the appellant and he did not challenge the order of the Board of Revenue. iv) Shri S.K. Agarwal is related to him and he was his counsel before the Board of Revenue.

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v) The application for impleadment filed by him in the suit instituted by the appellant against the tenant was dismissed by the trial Court and the order of the trial Court was upheld by the High Court.

vi) That the appellant was paying municipal tax / nazul tax and rent in respect of the property which fell to the share of Shri Harishankar.

26. Thus, even from the statement of respondent No.1 it is established that the Will (Exhibit D-2) was signed by his father Shri Harishankar and on the strength of Exhibit D-2 the appellant had succeeded before the Board of Revenue and the Civil Court.

27. The issue which remains to be examined is whether the High Court was justified in coming to the conclusion that the execution of Will dated 10.2.1992 was shrouded with suspicion and the appellant failed to dispel the suspicion. At the outset, we deem it necessary to observe that the learned Single Judge misread the statement of Sobhag Chand (DW-3) and recorded something which does not appear in his statement. While Sobhag Chand categorically stated that he had signed as the witness after Shri Harishankar had signed the Will, the portion of his statement extracted in the impugned judgment gives an impression that the witnesses had signed even before the executant had signed the Will. Another patent error committed by the learned Single Judge is that he 28

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

28. The other reasons enumerated by the learned Single Judge for holding that the execution of Will was highly suspicious are based on mere surmises/conjectures. The observation of the learned Single Judge that the possibility of obtaining signatures of Shri Harishankar and attesting witnesses on blank paper and

preparation of the draft by Shri S. K. Agarwal, Advocate on pre-signed papers does not find even a semblance of support from the pleadings and evidence of the parties. If respondent No.1 wanted to show that the Will was drafted by the advocate after Shri Harishankar and attesting witnesses had signed blank papers, he could have examined or at least summoned Shri S. K. Agarwal, Advocate, who had represented him before the Board of Revenue. On being examined before or by the Court, Shri S. K. Agarwal could have testified whether he had prepared the Will on 29

pre-signed papers. However, the fact of the matter is that it was neither the pleaded case of respondent No. 1 nor any evidence was produced by him to prove that Shri Harishankar and the attesting witnesses had signed the blank papers and, thereafter, Shri S.K. Agarwal prepared the Will.

29. The mere fact that Kailash Chand lives at a distance of about four furlong from the house of Bal Kishan (father in law of the appellant) has no bearing on the issue relating to validity of the Will nor the non-examination of the persons belonging to the same community has got any relevance. The absence of a categorical recital in Will dated 10.2.1992 that the earlier Will was cancelled is also not relevant because once the execution of the second Will is held as duly proved, the earlier Will automatically becomes redundant because the second Will represents the last wish of the testator.

30. The fact that the appellant was present at the time of execution of Will dated 10.2.1992 and that the testator did not give anything to respondent Nos. 1 and 2 from his share in the joint family property are not decisive of the issue relating to genuineness or validity of the Will. The evidence produced by the parties unmistakably show that respondent No. 2 had separated from the family in 1965 after taking his share and respondent No. 1 also got his share in the 2nd partition which took place in 1985. Neither of them bothered to look after the 30

parents in their old age. The attitude of respondent Nos. 1 and 2 left Shri Harishankar and his wife with no choice but to live with the appellant, who along with his wife and children took care of the old parents and looked after them during their illness. Therefore, there was nothing unnatural or unusual in the decision of Shri Harishankar to give his share in the joint family property to the appellant. Any person of ordinary prudence would have adopted the same course and would not have given anything to the ungrateful children from his / her share in the property.

31. In view of the above discussion, we hold that the learned Single Judge was clearly in error in reversing the well-reasoned finding recorded by the trial Court on the issues of execution of Will dated 10.2.1992 by Shri Harishankar and its genuineness and validity. Consequently, the appeals are allowed, the impugned judgement is set aside and the one passed by the trial Court is restored. The parties are left to bear their own costs.
.....J. [G.S. SINGHVI]

.....J. [SUDHANSU JYOTI MUKHOPADHAYA]

New Delhi,

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March 13, 2012.