



IN THE HIGH COURT OF JUDICATURE AT BOMBAY  
TESTAMENTARY AND INTESTATE JURISDICTION

**TESTAMENTARY SUIT NO. 101 OF 2014**  
**IN**  
**TESTAMENTARY PETITION NO. 414 OF 2014**

Aruna Chhibber alias Aruna Nitin Chhibber, ]  
age about 54 years, Hindu Inhabitant of USA, ]  
Occu: Housewife residing at 2360, Ashleigh ]  
Drive, York, PA, USA 17402 and whilst in India ]  
residing at 2A, Zarna Enclave, Near Sai Dham ]  
Temple, W.E Highway, Kandivli (east) ]  
Mumbai-400 101 being the sole Executrix ]  
named under the Last Will and Testament of ]  
the deceased abovenamed ] **...Petitioner**

**Versus**

1) Rajnesh Pathak A-57, Sector 21, Noida, UP ]  
201 301 ] **...Respondent**

Mr. Amanjohat Anand a/w Mr. Puru Jain, Mr. Roshan Regi, Ms. Aditi Parekh i/b Jain Law Partners LLP, for the Plaintiff.  
Mr. Ravi Gadagkar i/b Ms. Usha Gadagkar, for the Defendant.

**CORAM : SHARMILA U. DESHMUKH**

**RESERVED ON : March 6<sup>th</sup>, 2026**

**PRONOUNCED ON : April 16<sup>th</sup>, 2026**

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**JUDGMENT:**

1. Testamentary Petition 414 of 2014 was filed seeking Probate of the last Will and testament dated 24<sup>st</sup> August, 2012 of Nirmala Pathak alias Nirmala Chamanlal Pathak, a resident of Delhi who expired on 25<sup>th</sup>



August, 2012. The Petitioner is the beneficiary and Executor under the Will dated 24<sup>th</sup> August, 2012 executed by the deceased and is daughter of the deceased. The grant is opposed by the son of the deceased by filing Caveat on the ground that Caveator was not aware of any Will executed by his mother and that he was informed by his father, who expired after the death of his mother that his mother had not executed any Will whatsoever. In the affidavit in support of Caveat, though a right was reserved to file an additional affidavit, there is no additional affidavit filed. The petition was converted into Testamentary Suit No. 101 of 2014. Issues were framed and evidence was led.

2. The Plaintiff examined the attesting witness and herself and the Defendant did not lead any evidence. After evidence was concluded and the Suit was listed to be heard finally, it was noticed that the original Will was not marked as an Exhibit. Mr. Gadagkar, learned counsel for the Defendant submitted that as the original Will was not marked as Exhibit, the Defendant did not have the opportunity of cross-examining the attesting witness on the Will. This Court by order of 16<sup>th</sup> January, 2016 recorded that it is the duty of the Court to mark the document in evidence and by order of 17<sup>th</sup> January, 2026, the Will came to be marked as **Exhibit PW-1/1** subject to objections and further cross-examination was permitted. Subsequently, the attesting witness was further cross examined and Court Commissioner's Report was submitted.



3. Mr. Anand, learned counsel for the Plaintiff would submit that the opposition to the grant is on the ground that the Defendant had no knowledge about the execution of the Will. He submits that Section 63(c) of Indian Succession Act, 1925 requires attestation and execution of the Will by two witnesses, which mandate is complied in the present case. He points out the evidence of PW-1 and in particular the response to the Question Nos 139, 145 , 146, 148, 150, 155 to 166, 168 in cross-examination and would submit that the testimony of the attesting witness has not been shaken in the cross examination. He submits that PW-2 has corroborated the evidence of PW-1 and points out the response to the Question nos. 82 to 84 in cross-examination. He submits that there is no suggestion by the Defendant that the Will is not genuine or that the signature on the Will is not that of the deceased. He would submit that the Defendant during the arguments for the first time has raised plea of inconsistency as to the place of execution and attestation taking advantage of a typographical error that exists in paragraph 4 of PW-1's affidavit of evidence which does not affect the validity and the attestation of the Will which has been proved in accordance with law.

4. He would submit that the husband of the deceased expired on 16<sup>th</sup> December, 2013 leaving behind a Will bequeathing his entire estate to the Caveator and hence, the deceased's bequest was natural and



equitable.

5. He would submit that in the testamentary petition, due to an inadvertent error by the erstwhile Advocate of the Plaintiff it is incorrectly pleaded that the Plaintiff and PW-1 are the only legal heirs of the testator. He would submit that subsequently by amendment in the year 2015, the Defendant was cited, and hence, the error is immaterial.

6. He would submit that in so far as Issue No (b) is concerned , the state of mind of the deceased and there is no case put up disputing the sound and disposing state of mind of the deceased and even in the Caveat there is no such ground raised. He submits that unfortunately, on the next day of execution of the Will, the deceased expired and it was a natural death. He submits that in the written submissions, the Defendant has duly asserted that the Testatrix was of sound mind and had the necessary disposition capacity at the time of execution of the Will.

7. He would further submit that PW-2 has specifically deposed as to the ill-treatment meted out by the Defendant and his wife to the deceased and her husband, which has remained un-impeached in cross-examination. He submits that even if no police complaint had been filed, the deposition remaining unshaken establishes the strained relationship between the deceased and the Caveator.



8. He submits that there are no suspicious circumstances surrounding the execution of the Will and, if any, have been duly removed by the Plaintiff. He submits that the cross examination of PW-1 establishes the exact sequence of events leading to the visit to the notary and due execution and attestation of the Will by the deceased. He submits that mere non examination of the notary/typist of the notary is not a ground to doubt the genuineness of the Will as the attesting witness has been examined to satisfy the mandate of Section 68 of the Evidence Act. He submits that the reason for exclusion of the Defendant from the Will has been explained satisfactorily by the Plaintiff as all other assets of the parents have been bequeathed in favour of the Defendant. In support he relies upon the following decisions :

***i) Mukesh Raishi Chheda vs Dhirajlal Rashi Chheda<sup>1</sup>***

***ii) Chanchalben Chimanlal Patel And Anr vs Ruxmani Ravindra Balotia<sup>2</sup>***

***iii) Sharifa Dost Mohammed (deleted) And Ors vs Ajit Developers Pvt. Ltd. And Ors.<sup>3</sup>***

9. *Per contra*, Mr. Gadagkar, learned counsel for the Defendant submits that the testamentary petition itself proceeded with a false statement that the Plaintiff and her sister are the only legal heirs of the

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1 2016 SCC Online Bom 8005

2 2025 SCC Online Bom 2569

3 2025 SCC Online Bom 1948



deceased. He submits that only after filing of Caveat, the Defendant's name was cited in the Petition. He points out the answer by PW-2 to Question No. 90 and 91 to contend that the exclusion of the Defendant is not satisfactorily explained as neither any police complaint has been filed nor any document has been produced to show bequest in favour of the Defendant. He submits that in any event, the bequest in favour of the Defendant would show cordial relationship and not strained relationship between the Defendant and his parents.

10. He submits that the PW-1 has filed her consent affidavit and is party to the design of the Plaintiff. He submits that the evidence does not establish the factum of due execution and attestation of the Will as per law. He submits that PW-1 has deposed that on 24<sup>th</sup> August, 2012 she along with the other attesting witness and the deceased were present at Tis Hazari Court, Delhi. He submits that, thereafter, the narrative has been changed in the cross-examination and the deposition is that the execution had taken place at Nehru place where they saw this board of notary from Tis Hazari Court, Delhi. He submits that the answer to Question Nos 154 to 65, 169 and 170 brings out the inconsistencies in the evidence of PW-1 and raises grave suspicion about the actual place of execution of the alleged Will. He points out the answers to Question Nos. 171 and 172 in cross-examination to submit that the response demolishes PW-1's claim that she was present



alongwith her father in Tis Hazari Court on 24<sup>th</sup> August, 2012. He would juxtapose the response to PW-2 to Question Nos. 83 and 84 with response of PW-1 to Question Nos. 155 to 159, 163 to 165 to bring out the discrepancy as regards time and place of execution and also time taken for preparation of the alleged Will.

11. He submits that uncertainty about the place of execution whether at Nehru Place or Tis Hazari Court Delhi raises suspicion about the execution of the Will especially when the deceased expired on the next day of the execution of the alleged Will. He submits that the Plaintiff has failed to lead evidence of the notary or the typist to remove the suspicious circumstance. He submits that the alleged Will is not registered. He would further submit that the wordings of the Will does not satisfy the requirement of it being a testamentary disposition. He submits that the manner in which the document is prepared does not indicate the presence of the Petitioner as the Will refers to testator and the wordings mention 'his/her' which would not have been the case if the Petitioner was present at the time of execution of the Will. He would further submit that the document also mentions that the bequeathed property can be transferred in the records of L&DO/MCD, whereas the property is in Mumbai.

12. He submits that question of Testator's signature or fraud, coercion or undue influence or being of unsound mind or incapable of



understanding the dispositions does not arise at all. He submits that the Testator may be of sound and disposing state of mind, memory and understanding, which by itself cannot establish that the alleged Will is free from doubt in view of the uncertainty of real and actual place of execution of the alleged Will and the time of execution. He submits that the residence of the deceased was at Greater Kailash and Nehru Place is at a distance of about 20-25 minutes by road. Tis Hazari Court takes about an hour by road and Saket Mall takes about 15-20 minutes by road. He submits that the alleged Will contains about 387 words and would take a typist minimum of 12 to 15 minutes to type and another 3-4 minutes to take print out and if dictated would take more time and therefore the timelines do not match. He submits that the suspicious circumstance not having been satisfactorily explained will not result in satisfying the conscience of the Court. In support he relies upon the following decisions :

***i) Gurdial Kaur And Ors. vs Kartar Kaur And Ors.***<sup>4</sup>

***ii) Smt. Indu Bala Bose And Ors. vs Manindra Chandra Bose And Anr.***<sup>5</sup>

***iii) H. Venkatachala Iyengar vs B.N. Thimmajamma And Ors.***<sup>6</sup>

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4 (1998) 4 SCC 384

5 (1982) 1 SCC 20

6 AIR 1959 SC 443



***iv) Ram Piari vs Bhagwant And Ors.*<sup>7</sup>**

***v) Rajammal vs Ramasami And Ors.*<sup>8</sup>**

***vi) Geeta Roy vs The State And Anr.*<sup>9</sup>**

***vii) Suresh Hemmady vs Dinesh Pandurang Bellare*<sup>10</sup>**

***viii) Jitendra Purushottamdas Gandhi And Anr. vs***

***Jayendra N. Zaveri*<sup>11</sup>**

***ix) Murthy And Ors. vs C. Saradambal And Ors.*<sup>12</sup>**

13. Vide order dated 2<sup>nd</sup> May, 2018, this Court framed the following issues for determination:

*(a) Whether the Plaintiff proves that the writing dated 24<sup>th</sup> August, 2012 was duly and validly executed and attested in accordance with law as the last Will and Testament of the deceased- Nirmala Pathak ?*

*(b) Whether the Plaintiff proves that at the time of the said alleged Will, the deceased was of sound and disposing state of mind, memory and understanding ?*

*(c) What relief and what order ?*

14. Before proceeding to analyze the evidence adduced by the parties, it would be appropriate to have a look at the relevant statutory provisions governing the validity and execution of the Will. Section 63

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7 (1990) 3 SCC 364

8 (1998) 2 MLJ 307

9 FAO No. 100 of 2013 decided by Delhi High Court on 20<sup>th</sup> March, 2014

10 [2013 (4) Mh.L.J.]

11 TS No. 83 of 2005 in TP No. 738 of 2005 decided December, 2010 by Bombay High Court.

12 (2022) 3 SCC 209



(c) of the Indian Succession Act, 1925 reads as under.

*"(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."*

15. Section 68 of the Indian Evidence Act, 1872 reads as under.

*"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.]"*

16. A Will is required to be proved as any other document except the additional proof of attestation as mandated by Section 68 of Evidence Act. The burden of removing all suspicious circumstances surrounding the execution of the Will is upon the propounder of the Will. The conscience of the Court must be satisfied that the Will constitutes the testamentary disposition of the deceased executed by the deceased voluntarily, out of her own free Will and free from all suspicious circumstances.

17. Now dealing with the issues arising for determination *ad-seriatim*.

**ISSUE NO (a):**

*(a) Whether the Plaintiff proves that the writing dated 24<sup>th</sup> August, 2012 was duly and validly executed and attested in accordance with law as the last Will and Testament of the deceased- Nirmala Pathak ?*

18. Section 68 of Evidence Act mandates the examination of at least one attesting witness for proving its execution. In any event, in present case, the admitted position is that the husband of the deceased who is the second attesting witness has expired. The Plaintiff has examined her sister, who is one of the attesting witness, as PW-1. PW-1 has filed her Affidavit in lieu of examination in chief and has deposed that on 24<sup>th</sup> August, 2012, PW-1 along with the other attesting witness and the deceased were present together at the Tis Hazari Court, Delhi where they had seen the testator affixing her signature at the foot of the Will. PW-1 has further deposed that the attesting witnesses in the presence of the deceased and of each other had set and subscribed their names and signatures at the foot of the testamentary paper. PW-1 has identified the signature of the deceased as well as the signature of the attesting witnesses on the Will.

19. The requirement of Section 63 (c) is attestation of two or more witnesses in whose presence the testator has signed the Will and who have signed in presence of the testator. The intention of the testator to



execute the Will is established from the response to Question Nos. 145 to 147 by PW-1 as under:

*“Q. 145: Where, and when did the said deceased allegedly approach you?  
Ans: When I had gone to Delhi in August, my mother called me to her bedroom and informed me that she wanted to give this apartment to my sister Aruna.*

*Q.146: Did she say anything beyond what you have stated?  
Ans: Yes, she said that she wanted to be my witness as she trusted me to fulfil her wishes after she is not around.*

*Q. 147:” Can you tell exactly when and where did the said deceased allegedly approach ?  
Ans : 21st August, 2012.*

20. The cross-examination has been left at that and there is no further cross-examination to demolish the case set up as regards the intention expressed by the deceased. The presence of PW-1 around the time of execution of the Will has been established from the response to Question Nos. 108, 113 and 116, where she has deposed that she had travelled to Delhi on 18<sup>th</sup> August, 2013 and had stayed with her mother and was in Delhi till the final rites of the deceased were completed.

21. The Defendant has not disputed the signature of the deceased or of the attesting witness on the Will and the opposition in the Caveat is about lack of knowledge of execution of Will. Upon the petition being converted into suit, the Caveat is treated as written statement and there are no pleadings about suspicious circumstances surrounding the execution of Will. In any event, the burden is upon the propounder of Will to remove any suspicious circumstances surrounding the execution



of the Will so as to satisfy the conscience of the Court. In the present case, the suspicious circumstances according to the Defendant is the uncertainty about the place and time of execution of the Will and the exclusion of the Defendant from the Will. In so far as the place of execution of Will is concerned, PW-1 has deposed in response to Question No 155 as under:

*Q. No. 155 :- You have stated that on 24<sup>th</sup> August, 2012 "you alone with your late father was present together with the said deceased at Tis Hazari Court, Delhi. Who had plan the alleged visit to Tis Hazari Court, Delhi on 24<sup>th</sup> August, 2012 ?*

*Ans :- "My father, me and my mother all three of us decided that we will find a lawyer, a notary to make my mother's Will regarding this flat, so we took a taxi from home (i.e M-73, Greater Kailash -II and we went to Nehru Palace where we saw this board of notary from Tis Hazari Court and we just walked into the office of the notary lawyer."*

22. The response above is required to be read alongwith the response to Question No 91, where PW-1 has deposed that they never needed a lawyer before her brother started filing cases. She has further deposed that the deceased-mother had never consulted or engaged Advocate M.K.Jain for any legal opinion or matters and that she was not acquainted with Advocate M.K.Jain. In answer to question no. 98, she has deposed that her parents were not acquainted with any other lawyer and were acquainted with Advocate M.K.Jain after her mother's death. In response to Question Nos 171 and 172 she has deposed as under:

*"Q. 171: Have you visited any Courts in Delhi if so,when?*

*Ans: After my brother filed a case on me after my fathers death, in or about in the year 2014 that was the first time I visited Delhi, High Court to file my replies with the lawyer in Delhi.*



*Q. 172: Would it be correct to say that you have never visited any Courts in Delhi prior to the year 2014?*

*Ans. I have never visited any Courts in Delhi prior to the year 2014."*

23. This cross-examination assumes significance while appreciating the deposition of PW-1 that on 24<sup>th</sup> August, 2012, the deceased, the deponent as well as her father decided to find a lawyer or notary to make the mother's Will regarding the subject property and they took a taxi from home and went to Nehru Place where they saw the board of notary from Tis Hazari Court and walked into the office of the notary. Their conduct is in consonance with the conduct of a lay person who is not acquainted with any lawyer and has no knowledge concerning preparation of Will. In such case, it is normal course , in the absence of any legal advice, to approach a lawyer and in this case it was the notary lawyer who was approached for preparation of the Will.

24. Much emphasis has been laid by Mr. Gadagkar on the discrepancy in the deposition in the affidavit of evidence about the visit on 24<sup>th</sup> August, 2012 to Tis Hazari Court and the response in cross examination deposing that they had gone to Nehru Palace where they saw this board of notary from Tis Hazari Court. The evidence on record establishes that the PW-1 or her parents were not aware of location of the Courts and had never visited any Courts in Delhi. PW-1 has deposed that they had seen the board of Notary from Tis Hazari Court and had



walked in the office of the notary lawyer. It is not uncommon for the error to occur in describing the place where the execution of Will had taken place as the Court instead of the location of office of Notary especially when the board of Notary says Tiz Hazari Court. This is specially borne out from the stamp of the notary on the Will which bears the name of the notary as Sanyogita Tis Hazari Court, Delhi. Pertinently in the cross-examination, the attention of the witness was not specifically drawn to that part of the deposition in the affidavit of evidence to confront the witness, which would have led to a proper explanation by the witness.

25. During further cross examination of PW-1, the witness was confronted with the list of notaries appointed by the Government of India in respect of all States downloaded from official website of Ministry of Law and Justice and the suggestion was that there is no office of notary Advocate Sanyogita at Nehra Place, which suggestion has been denied by PW-1.

26. In the case of ***Geeta Marine Service Pvt Ltd., Vs. State of Maharashtra***<sup>13</sup>, Co-ordinate bench of this Court has held that merely because document referred to cross-examination is marked as Exhibit, the same does not dispense with the proof of documents in accordance with the law of evidence. It has observed that the marking of document as Exhibit by such process is based on consistent practice followed in

<sup>13</sup> 2008 SCC Online Bom. 924.



the Court of law and does not dispense with the requirement of proof of the execution, contents and genuineness of the documents in accordance with law of evidence unless the witness concerned admits the execution and genuineness of the document. In present case, no reliance can be placed on the contents of list of notaries without evidence being led to prove the contents of the list to establish the address of the notary Sanyogita. That apart, there is no evidence as to whether the address of the notary mentioned therein is the updated address or the home address or office address. It is possible that after shifting the premises, the notary has not updated her address as required. The list would in fact indicate that the notary, who had prepared the Will, is existing on the list of register of notaries.

27. As to the due execution and attestation of the Will, the sequence of events leading to the execution of the Will has been deposed in detail by PW-1 in response to question no. 164 and 198 as under.

*Q. 164: What happened during your purported visit to the said Advocate's office ?*

*Ans : "When we went there we spoke to the notary and told her the wishes of my mother that she wanted to make a Will and asked her if she could do it for us and she agreed for the same. Then we waited for her typist to come and after her typist came, notary stated dictating the wordings of the Will and kept on asking my mother is this what you want and what she was writing and after she finished typing the Will, she asked for the photographs of my mother and my sister, and my father had to go back home to get the photographs, and after that the notary asked my mother to sign and then I was asked to sign, and thereafter, my father was asked to sign.*

*Q. 198: Can you tell exactly what transpired on 24 August 2012 between 11:30 AM the time when you reach the alleged notary's office and 1:30 PM when you allegedly left notary's*



*office in terms of time (minutes/hours)*

*Ans: I do not remember the exact minute to minute transpired during the time 11:30 AM to 1:30 PM but I can tell what happened and how it happened. When we reach the notary's office, my father and mother spoke to the notary and asked her to make a Will of a property of my mother to be given to my sister and if she will do it and she said yes, and asked us to sit down till the typist comes and when the typist came the notary/Advocate asked my mother to sit next to her and tell the name and address of herself and name and address of the property and name and address of the person to whom it was given. So my mother answered her whatever she asked and the Notary dictated to the typist and repeated it back whatever was being typed so my mother could agree. After this was done, the notary asked for the photographs of my mother and my sister. As my father had not carried the photos, so he asked us to stay there and went back home to get the photos and after he returned, he gave the photos to the notary and she glued the photos on the Will and register and stamped it and took a copy asked my mother if that was correct after reading and then asked her to sign. My mother first signed on the Will, and then she signed on the register where the photo was glued, then the Will was given to me to say. I sent it and then my mother signed it. After that my father paid to the notary and took the Will and we left the notary office.*

28. There is no further cross examination of PW-1 on this aspect and the testimony remains unshaken. The evidence of PW-1 satisfies the proof required under Section 68 of Evidence Act. PW-1 has specifically deposed about the preparation and execution of the Will as per the wishes of the deceased and the attestation of the Will by two attesting witnesses. The deposition proves that the Will was prepared as per the instructions of the deceased and was executed by the deceased in the office of the notary in the presence of the attesting witnesses who had thereafter attested the Will in presence of the testator and in the presence of each other. The evidence of PW-1 when read cumulatively establishes the place of execution and attestation of the Will at the



notary's office at Nehru Place.

29. Coming to the aspect of time of execution of Will, the cross examination on the aspect of timing of the execution of the Will of PW-1 is as under.

*Ques. No. 157 :- What is the distance between M-73, Greater Kailash -II and Nehru place ?*

*Answer :- It's a 20 minutes drive from M-73, Greater Kailash-II to Nehru Place.*

*Ques. No. 158 :- What was the time of your alleged travel to Nehru Place from M-73, Greater Kailash -II as mentioned in answer to question no. 156 above ?*

*Answer :- Around 11:00 a.m.*

*Ques. No. 159 :- What conversation took place between you, your father and the said deceased during the alleged travel to Nehru place on 24<sup>th</sup> August, 2012 ?*

*Answer :- Nothing much, we were only looking for a Notary.*

*Ques. No. 160 :- When did you return home i.e. M-73, Greater Kailash -II after your alleged visit to Nehru place on 24<sup>th</sup> August, 2012 ?*

*Answer :- We returned by 01:30 p.m. to pick up my sister and to go for lunch outside.*

*Ques. No. 163 :- Can you tell us at what time did three of you purportedly reached the office of the said Advocate ?*

*Answer :- Around 11:30 a.m.*

*Ques. No. 164 :- What happened during your purported visit to the said Advocate's office ?*

*Answer :- When we went there we spoke to the Notary and told her the wishes of my mother that she wanted to make a Will and asked her if she could do it for us and she agreed for the same. Then we waited her typist to come and after her typist came, the Notary stated dictating the wordings of the Will and kept on asking my mother is this what you want and what she was typing and after she finished typing the Will, she asked for the photographs of my mother and my sister and my father had to go back home to get the photographs and after that the Notary asked my mother to sign and then I was asked to sign and thereafter my father was asked to sign.*

*Ques. No. 165 :- How long were three of you in the office of the said Advocate during your alleged visit on 24<sup>th</sup> August, 2012 ?*

*Answer :- Approximately, 2 hours.*

*Ques. No. 166 :- After returning home (M-73, Greater Kailash - II) on*



*24th August, 2012 at what time did you have lunch and where and with whom ?*

*Answer :- Around 02:00 p.m. at Saket Mall and with my mother and sister my dad did not accompany us as he wanted to rest and he ate at home.*

30. PW-2 in response to Question No 82 to 84 has stated as under:

*"Q. 82: Can you tell the proceedings of that day i.e. 24th August 2012 i.e. what time did you rise, have your breakfast, lunch, tea, and dinner and time of going to bed?*

*Ans: I woke up in the morning and the maid had not come so my mother made the breakfast and we had breakfast around 8:00 a.m. in the house and then I started washing clothes and then my sister, my father and my mother told me that they were going out for some work and since my Maasi (maternal aunt) was at home and not feeling well and hence stayed back at home and I cooked khichadi and then in between my father came back to the house and he went to his room and then I just went outside the balcony and I saw my father leaving immediately. Then around 1:00 p.m. -1.30 p.m. something like that my father, my mother and my sister came back. My mother kissed me and she gave me the Will and said this is for you. I was so touched with the gesture that I hugged my mother and then my sister said "this calls for celebration" and hence my mother, my sister and myself went out for lunch and my father and my maternal aunt stayed back home and ate my Khichdi. Then we came back around 4:00 -4:30 PM and we all had tea together at home. Then we watched television and had dinner and went to sleep.*

*Q.83: Can you tell the time when you saw your father coming back home and leaving immediately after going his room on 24th August 2012?*

*Ans: According to me approximately it was between 11:30 AM and 12:00 noon.*

*Q. 84: Can you tell when did your parents along with sister leave the house in the morning in the first time?*

*Ans: I am not sure but it was between 10:00 a.m. and 10:30 a.m.*

31. According to Mr. Gadagkar, given the distance between the residence of the deceased and Nehru Place which is 20 minutes, the parties must have reached Nehru Place on or about 11:30 a.m., and thereafter, almost 15 minutes time must have been consumed for dictation and typing of the Will, and thereafter, the father had to come back to the house for collecting photographs, which would be another



20 minutes. He would emphasise that the deposition of PW-2 does not corroborate the evidence of PW-1 as regards the timing, as PW-2 has stated that she had seen her father come home between 11:30 a.m. and 12 noon. He has further pointed out that PW-2 has stated that her parents and sister had left the house in the morning between 10:00 a.m. and 10:30 a.m., whereas, PW-1 has stated that they had left their residence at 11:00 a.m.

32. The Will has been executed on 24<sup>th</sup> August, 2012 and the cross-examination has been conducted in the year 2019 after a gap of almost 7 years. It cannot be expected that the witness would depose as to the timelines to the precise second. The evidence of PW-1 which is corroborated by PW-2 establishes that around 10:30 a.m.-11:00 a.m., the parties had left their residence and had gone to the office of the notary which was at the distance of 20 minutes, and thereafter, the Will was dictated and typed which must have taken about 15-20 minutes, considering that the document is a one page document, and thereafter, the father had come back to collect the photographs and had gone back which would have consumed another one hour. Pertinently, PW-1 has deposed that the entire process took about two hours and that they were back in the house at 2:00 p.m. from there they had gone for lunch.

33. The testimony of PW-1 and PW-2 matches in respect of the timelines barring a few minutes here and there and establishes with



sufficient precision the sequence of events leading to the execution of the Will. The testimony does not have to pin down the exact minute to minute sequence and it is sufficient if the evidence establishes the approximate timelines. The Plaintiff has established that the process of travelling to the notary, the preparation of Will, etc. has taken place within the time frame of two hours which has been corroborated by PW-2.

34. There is no cross examination on the date of execution of the Will. PW-1 and PW-2 maintain that the Will was executed on 24<sup>th</sup> August, 2012 in the notary's office. PW-2 has further deposed that after returning from the notary's office, the deceased had handed over the Will to the Plaintiff. There is no cross examination on the said aspect. The Defendant has failed to elicit any admission to raise a doubt about the due execution and attestation of the Will by the deceased. The Plaintiff has thus proved the fact of execution of the document and due attestation by the attesting witnesses and there are no suspicious circumstances as regards uncertainty of the time and place of execution of the Will and in any event the deposition of PW-1 duly corroborated by PW-2 removes any suspicion about the due execution and attestation of the Will.

35. The non reference in the Will to the specific gender of the testatrix or the mention about transfer of the property in records of



Delhi authorities when the property is located in Mumbai, does not constitute a suspicious circumstance. The wordings of the Will cannot be a ground to dispute that the document is not the Will of the deceased. The deceased was unacquainted with legal language and the Will was prepared by a notary on the instructions of the deceased. It is not the actual wordings of the Will which are material but whether the Will makes a testamentary disposition of the property. Perusal of the Will sufficiently indicates that the document is a testamentary disposition of the property contained therein in favour of the Plaintiff and has been duly attested in accordance with the mandate of law.

36. The other suspicious circumstance raised is about the exclusion of the Defendant from the Will. PW-2 has deposed that the Defendant and his wife were ill-treating the deceased and her father - Chamanlal Devraj Pathak. She has deposed that the Defendant was never inclined to keep the parents with him, and therefore, the parents were residing with the younger daughter at her residence in Mumbai and used to shuttle between Mumbai and Delhi. She has further deposed that even in Delhi, the deceased and her husband stayed alone at their Greater Kailash residence, whereas, the Defendant and his family resided at Noida.

37. In response to the Question No. 74 in cross-examination, PW-2 has voluntarily deposed that the Defendant did not come to visit the



father when he was hospitalized for knee surgery nor did he call him on telephone to enquire about his well being. The specific deposition about the ill treatment remained uncontroverted in the absence of any further cross examination. The only question put to PW-2 was as to filing of a police complaint, and PW-2 has admitted that there was no police complaint filed against the Defendant and his wife. PW-2 has voluntarily deposed about the misbehaviour of the Defendant with the parents. She has deposed that even when the mother was unwell, the Defendant did not visit the mother in the hospital and that the Defendant pushed the father on the entrance door of his house, when the father went to Defendant's house to request him to accompany him to Amsterdam to sell the property. There is no further cross examination and the voluntary deposition has remained uncontroverted. The admission about non filing of police complaint is not a reason to disbelieve the testimony of PW-2 about misbehaviour of the Defendant with his parents.

38. PW-2 has further deposed in her Affidavit of Evidence that the Defendant had received maximum funds and asset from the parents in the earlier years. The contention that the receipt of assets indicates cordial relationship cannot be accepted as the reference to the transfer of properties is in the earlier years. Even if the Plaintiff has not produced any document to support her case of transfer/bequest of



properties in favour of Defendant, there is not even a suggestion in the cross examination of PW-2 that the Defendant has not received any property from his parents.

39. In ***Swarnalatha & Ors. vs. Kalavathy & Ors.***<sup>14</sup>, the Hon'ble Apex Court has held as under:

*"The law relating to suspicious circumstances surrounding the execution of a Will is already well-settled and it needs no reiteration. It is enough if we make a reference to one of the recent decisions of this Court in [Kavita Kanwar vs. Mrs. Pamela Mehta and Ors. - AIR 2020 SC 2614](#) where this Court referred to almost all previous decisions right from [H. Venkatachala Iyengar vs. B.N. Thimmajamma \(supra\)](#). But cases in which a suspicion is created are essentially those where either the signature of the testator is disputed or the mental capacity of the testator is questioned. This can be seen from the fact that almost all previous decisions of this Court referred to in [Kavita Kanwar \(supra\)](#) list out circumstances, which in the context of the lack of sound and disposing state of mind of the testator, became suspicious circumstances. In the matter of appreciating the genuineness of execution of a Will, there is no place for the Court to see whether the distribution made by the testator was fair and equitable to all of his children. The Court does not apply [Article 14](#) to dispositions under a Will."*

40. The exclusion of the Defendant from the Will cannot constitute suspicious circumstance when considered in light of evidence which has come on record and especially when considered that even the younger daughter who is the attesting witness has been excluded from the Will. It needs to be noted that there was no role played by Plaintiff in the execution of the Will by the deceased. The non examination of the notary or the typist is immaterial as the attestation and due execution of the Will has been proved as mandated by Section 68 of Evidence Act by examining the attesting witness.

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41. The Plaintiff while filing the testamentary petition had not cited the Defendant, and upon Caveat being filed, the Petition came to be amended citing the Defendant as one of the legal heirs. This Court is concerned with the issue as regards the genuineness and authenticity of the Will. The argument about non citing the Defendant is immaterial for deciding the issues in question.

42. There is no quarrel with the proposition laid down in ***Gurdial Kaur And Ors. vs Kartar Kaur And Ors. (supra)***, that the burden is upon the propounder to remove the suspicious circumstances, which has been discharged in the present case.

43. In ***Smt. Indu Bala Bose And Ors. vs Manindra Chandra Bose And Anr. (supra)***, there were eleven suspicious circumstances enumerated by the Defendant therein including the fact that the scribe and one of the attesting witness were employees and other attesting witness was a relative. The Hon'ble Apex Court observed that nobody will invite a stranger or a foe to be a scribe or witness of a document executed by or in his favour and on overall consideration did not find any suspicious circumstances. The decision is not an authority for the proposition that scribe has to be necessarily examined for proving the Will.

44. The decision of ***H. Venkatachala Iyengar vs B.N. Thimmajamma And Ors. (supra)*** is a landmark decision which has been consistently followed. Applying the principles laid down in the said decision to the



facts of the case, upon cumulative appreciation of the evidence on record, the execution of the Will has been duly proved and there are no suspicious circumstances surrounding the execution of the Will.

45. In ***Rajammal vs Ramasami And Ors. (supra)***, the decision turned on the facts of that case where the testatrix at the time of alleged execution of the Will was bedridden. The evidence showed that the testatrix did not go to the place where the Will was allegedly executed. The facts are clearly distinguishable.

46. The decision of ***Geeta Roy vs The State And Anr. (supra)***, ***Suresh Hemmady vs Dinesh Pandurang Bellare (supra)*** and ***Jitendra Purushottamdas Gandhi And Anr. vs Jayendra N. Zaveri (supra)*** were rendered in facts of that case and has no applicability where the factual scenario is different. The Courts in the said decisions applied the well settled principles to the evidence on record while deciding the issue as to the genuineness of the Will. In the present case, the evidence on record establishes the intention of the testatrix to bequeath the property to the Plaintiff and the due execution and attestation of the Will by the deceased.

47. The decision of ***Murthy And Ors. vs C. Saradambal And Ors. (supra)***, reiterates the well settled legal principles with regard to proof of Will and in facts of that case held that the Plaintiff therein had failed to prove the Will in accordance with law as they had not removed the



suspicious circumstances surrounding the execution of the Will.

48. Upon cumulative appreciation of the evidence on record, the due execution and attestation of the Will by the deceased has been proved free from any suspicious circumstances. Issue No (a) is accordingly answered in the affirmative.

**ISSUE NO (b):**

*(b) Whether the Plaintiff proves that at the time of the said alleged Will, the deceased was of sound and disposing state of mind, memory and understanding ?*

49. PW-1 has specifically deposed that the deceased was of sound and disposing state of mind at the time of execution and attestation of the Will. In response to Question No 56 and 57 in cross-examination, PW-1 has deposed that the deceased was hale and hearty till time of her death and did not suffer from any ailment. PW-1 has further deposed in answer to Question No 146 and 150 about the intention and desire of the deceased to bequeath the property to the Plaintiff, which indicated that the deceased was aware of the implications of her actions. PW-2 has also deposed as to the sound and disposing state of mind of the deceased.

50. What assumes significance is that there is no suggestion about the deceased not being in a position of making testamentary disposition of her property. On the contrary, it is the Defendant's own submission



that there is no question of the testator's signature, or of fraud, coercion or undue influence or being of unsound mind or incapable of understanding the dispositions. In this background, the death of the deceased on the next day of execution of the Will is matter of mere coincidence. There is no evidence that the deceased was incapable of traveling to the notary's office on the earlier day and the evidence shows that after the execution of the Will, the deceased alongwith the PW-1 and PW-2 went out for lunch. The deceased was a home science graduate and was therefore aware of the nature of disposition and had instructed the notary which is evident from the response to question no. 164 where the deceased had reiterated her desire to bequeath a property as set out in the Will. The evidence proves that the deceased was healthy and of sound and disposing state of mind at the time of execution of the Will. Issue No (b) is answered in favour of the Plaintiff.

51. In light of the above findings on Issue Nos (a) and (b) , the following order is passed:

The suit is decreed. No order as to costs.

**(SHARMILA U. DESHMUKH, J.)**