SUPREME COURT OF INDIA

Anil Kak

Vs

Kumari Sharada Raje

Appeal (civil) 2965 of 2008 [Arising out of SLP (Civil) No. 2791 of 2006]

(S.B. Sinha and V.S. Sirpurkar)

24/04/2008

JUDGMENT

S.B. SINHA, J.

1. Leave granted.

2. These appeals are directed against a judgment and order dated 18.05.2001 passed by a learned Single Judge of the Madhya Pradesh High Court at Indore dismissing two applications for grant of probate/ letters of administration with the copy of the annexed Will in respect of the assets of Late Maharani Sharmishthabai Holkar (hereinafter called as "the testatrix"), the widow of Late Maharaja Tukoji Rao Holkar, former ruler of the erstwhile Holkar State.

3. Maharaja Tukoji Rao Holkar died on 21.05.1978 leaving behind four daughters, Sharada Raje Holkar, Sita Raje Ghatge, Sumitra Raje Dalvi and Sushila Raje Holkar. He had executed a Will on 27.11.1942 bequeathing all his properties in favour of the testatrix. Indisputably, a letter of administration had been granted in favour of the testatrix in respect of the Will dated 27.11.1942 made in her favour by her husband. Apart from the properties inherited by the testatrix from her husband, she had also her own Stridhan properties. She purported to have executed a Will on or about 23.08.1978 in favour of Kumari Sharada Raje. She, however, allegedly executed another Will on or about 4.11.1992, by reason whereof, she purported to have revoked the Will executed by her on 23.08.1978 and/ or the Codicil. She appointed one K.R.P. Singh and the appellant Anil Kak as joint executors. She also appointed Mr. T.N. Unni, her Chartered Accountant to assist the executors in administering and distributing the estate and executing the said Will. She categorized her properties in two parts, viz., Part A and Part B.

Part A consisted of those properties which were bequeathed in her favour by her husband and Part B consisted of properties other than those specified in Part A. By reason of the said Will, the said two sets of the properties were to be administered separately. Whereas Part A properties were bequeathed in favour of four daughters, Part B properties were sought to be bequeathed in favour of her four grand children.

4. Indisputably, the said Will was purported to have been attested by one Gita Sanghi, who examined herself as PW-5 and one Baljit Bawa, who was not examined. The Will contained a few appendices. Whereas the attesting witnesses purported to have put their signatures in each page of the Will, they did not put any signature on the appendices to the said Will.

5. With a view to appreciate the relationship of the parties, we may notice the family tree, which is as under:

Appellant Anil Kak is the husband of Gangesh Kumari and son-in-law of Sumitra Raje Dalvi. Appellant Arjun Kak is son of the appellant Anil Kak.

6. Before proceeding further, we may notice that whereas the application for grant of Letters of Administration with a copy of the Will dated 23.08.1978 annexed, filed by Kumari Sharada Raje was marked as Suit No. 2 of 1998; Anil Kak and Kumar Rampratap filed an application for grant of probate in their capacity as executors appointed under the said Will dated 4.11.1992, which was marked as Suit No. 3 of 1998. Both the suits were directed to be consolidated. The parties examined their witnesses in both the suits by adducing common evidence.

7. Whereas the Will dated 23.08.1978 was a very short document, the Will dated 4.11.1992 was a detailed one running into six typed pages besides three long appendices and two statements containing her investments in various shares within and outside the country.

8. A learned Single Judge of the High Court by reason of the impugned judgment refused to grant probate and/ or letters of administration in respect of both the Wills.

9. Whereas Civil Appeals arising out of SLP (C) Nos. 2791, 5831 and 9080 of 2006 have been filed against that part of the judgment whereby and whereunder grant of probate in respect of the Will dated 4.11.1992 has been rejected, Civil Appeal arising out of SLP (C) No. 13865 of 2006 was filed in respect of the Will dated 23.08.1978.

10. The Letters Patent Appeals were filed against the judgment of the learned Single Judge of the High Court by both the parties which have been dismissed by the Division Bench of the High Court as not maintainable.

11. The learned counsel appearing for both the parties, have addressed us on the merit of the matter. We are not considering the correctness or otherwise of the judgment of the Division Bench of the High Court holding the Letters Patent Appeals to be not maintainable, nor it is necessary for us so to do.

12. We may also at the outset place on record that no argument has been advanced in regard to the findings of the learned Single Judge of the High Court refusing to grant letters of administration in respect of the Will dated 23.08.1978 of the testatrix.

13. The learned Single Judge framed the following issues:

"(1) Whether the alleged Will with its appendices dated 4.11.1992 was duly executed by late Maharani Sharmishthabai Holkar out of her free will, while she was in sound disposing state of mind;

(2) Whether the Will dated 4.11.1992 has been acted upon by the parties, if so, its effect;

(3) Whether late Maharani Sharmishthabai Holkar had executed only one will, i.e., dated 23.8.1978 out of her free will while she was in sound disposing state of mind;"

14. The learned Single Judge in its judgment inter alia held that the execution of the Will dated

4.11.1992 has not been proved as:

(i) Appendices were not signed by the attesting witnesses;

(ii) The Will remained in the custody of Anil Kak for a long time;

(iii) Anil Kak did not examine himself as a witness;

(iv) As an unequal division of the properties described in Part B of the Will effected, there existed suspicious circumstances.

(v) Anil Kak took part in preparation of the Will

15. Mr. Arun Jaitley and Mr. R.F. Nariman, learned senior counsel appearing on behalf of the appellants, in support of the appeal, submitted:

(i) The High Court committed a serious error in passing the impugned judgment insofar as it failed to take into consideration that the testatrix had divided her properties equally amongst her four daughters as also her grand children and, therefore, there did not exist any circumstance to suspect the genuineness of the Will.

(ii) The High Court committed a serious factual error insofar as it proceeded on the premise that Part B assets were divided only amongst three grand children; whereas in fact fourth grand child Vijayendra Ghatge was also a beneficiary under the Will.

(iii) Appendices were annexed with the Will for the purpose of bringing out clarities in regard to the division of the properties.

(iv) Medical certificates were annexed to the Will go to show that the testatrix had a sound disposing mind, and, thus, the burden of proof was on the caveators to prove contra.

(v) The High Court committed a serious error insofar as it failed to take into consideration the effect and purport of Sections 64, 87 and 103 of the Indian Succession Act (for short "the Act").

16. Mr. S.B. Upadhyay, learned senior counsel appearing on behalf of the respondents, on the other hand, urged:

(i) The Will dated 4.11.1992 was surrounded by suspicious circumstances as one of the executors was husband of one of the grand children and son-in-law of one of the daughters, whose family in turn was the beneficiary of the maximum number of properties, viz., 27 out of 35 items.

(ii) In view of a clear finding of fact arrived at by the High Court that the appellant Anil Kak had not only taken away the Will, he had also not disclose thereabout to the near relatives for a long time, is also a pointer to show that the execution of the Will by the testatrix was doubtful.

(iii) Appendices attached to the Will having been brought into existence at a later date, the provisions contained in Sections 64, 87 and 103 of the Act will have no application, in the instant case.

17. Testatrix at the time of execution of the Will was 85 years old. She was owner of substantial

properties.

18. Although all the four daughters of the testatrix were the beneficiaries of the properties described in Part A of the Will, detailed directions as to how the said estate is to be administered had been made therein. Even in relation to the criteria as regards distribution of assets including the manner in which the tax and other liabilities are to be made and how the investments with banks and others are to be encashed, if necessary to be encashed have been stated. More importantly, however, the shares in the companies were to be held in the joint names of the testatrix as also the joint executors. The executors were to hold the same in trust. Whether the said direction had been carried out and, if so, how and in what manner is not known. Executors had also been granted express power to recall and repossess the jewellery, money or money's wroth possessed by any beneficiary of the Will or legatee but ownership of which was not conferred on them for the purpose of meeting government dues, liabilities or expenses.

19. We may at this stage notice a few stipulations made in the said will dated 4.11.1992, which are as under:

"B-4. The Executors will distribute the shares in companies as detailed in Appendix 'B' together with the rights accruing thereto.

B-5. The jewellery belonging to me other than described in Part 'A' have been divided and earmarked in different names as per Appendix 'C'. I bequeath the items of my jewellery accordingly.

B-6. I bequeath my shares in companies and deposit with the Seattle Bank in U.S.A. in favour of the respective nominees/ joint-holders as per Appendix. All expenses, liabilities, taxes, fees, etc. in realizing and distributing the said assets shall be borne proportionately by the nominees/ joint-holders."

20. The Will was purported to have been executed in presence of one Shanta Kumari Jain, a notary. Two medical certificates; one issued by Dr. S.K. Mukherjee and the other by Dr. Normal Sharma, were also annexed thereto.

21. It is not denied or disputed that the appellant Anil Kak took an active part in the matter of preparation and execution of the Will.

For proving the said Will, the appellants examined one of the executors, viz., Kumar Rampratap Singh as PW-1. He was not aware of the contents of the Will. It was handed over to him on 10.09.1993 by Shri T.N. Unni (PW-6), Chartered Accountant. It was in turn handed over to Anil Kak. The said Will was not executed in his presence. He was not even aware of the execution thereof.

22. Shanta Kumari Jain, Notary, Geeta Sanghi, one of the attesting witnesses and T.N. Unni examined themselves in support of the case of the appellants.

According to T.N. Unni, he had drafted only pages one to six of the Will. The said Will was purported to have been executed at his residence at Indore. Geeta Sanghi and Baljeet Bawa were the attesting witnesses. Baljit Bawa, as noticed hereinbefore, was not examined. Geeta Sanghi sought to prove the testatrix's signature as also her own signatures on the Will.

23. It is beyond any doubt or dispute that none of the attesting witnesses had put their signatures on appendices A to C. Appendices A to C contain the list of jewelleries in great details and which jewellery should be given to which grand daughter. The Wealth Tax assessment for the year 1992-93 was also annexed by way of a statement showing the market value of the shares of the companies registered in India. Another appendix specified that ACC and TISCO shares were to be equally divided amongst four daughters, viz., as per their average market value on the date of latest Wealth Tax assessment.

A statement showing the market value of the shares of the companies registered in U.K. as per the wealth tax assessment for the year 1992-93 was also annexed. In regard to the division thereof, it is stated that "each company's share is divided equally amongst my four daughters". Names of the daughters had again been mentioned therein. Statement showing the value of quoted shares as per wealth tax assessment for the year 1992-93 had also been appended, the division whereof were to be done in the following manner:

"The shares in each company will be divided into six equal divisions. My grand children Gangesh Kumari, Jagat Bingley and Ashish Dalvi will get one Division each and my great grand children are bequeathed three remaining shares as follows Children of Gangesh Kumari get one division, Children of Jagat Bingley get one division, children of Vijayendra Ghatge get one division. In case Ashish Dalvi is married and has children before my demise, the shares in each company will be divided into seven equal divisions and distribution remains the same with the additional division going to the children of Ashish Dalvi."

24. It also contained bequeaths of jewellery from the personal list of the testatrix as valued on 31st March, 1992 done by M/s. J.R.M. Bhandari. It again contained the statement showing the value of quoted shares in respect of certain companies and the mode and manner in which division thereof should be carried out.

25. It has furthermore been admitted that those appendices did not see the light of the day when the Will was executed by the testatrix and attested and notarised.

26. It has furthermore not been disputed that whereas Gangesh Kumari, Jagat Bingley and Ashish Dalvi are children of Sumitra Raje Dalvi, the only other grand child of testatrix Vijayender Ghatge is son of Sita Raje Ghatge. From the list containing the details of the jewellery, it appears that Vijendera Ghatge and family had been given one semi rectangle clip set with diamond and ruby cabochon and two buttons studded with diamonds and pearls set in gold. Umika Ghatge had also been given one square diamond ring and one bracelet watch set with diamonds ruby and emerald.

It furthermore appears that Arjun Kak is also a beneficiary under the Will.

27. The High Court made a distinction between the documents which are mere appendices to an otherwise complete Will and those which are part and parcel of the Will forming its integral part.

28. From what has been noticed hereinbefore it is clearly evident that division has not been made per stripe or per capita but by species. Each one of the jewelleries which was to be bequeathed to each of the beneficiary thereunder had specifically been specified. Moreover, from the valuation report, it would appear that the respective distribution purported to have been made in terms of the appendices would not make them of equal value or nearabout which was the desire of the testatrix.

29. We may now notice the provisions of Sections 64, 87 and 103 of the Act whereupon strong

reliance has been placed by the learned counsel appearing for the appellants.

Section 64 of the Act reads as under:

"64. Incorporation of papers by reference if a testator, in a will or codicil duly attested, refers to any other document then actually written as expressing any part of his intentions, such document shall be deemed to form a part of the will or codicil in which it is referred to."

30. The rule of incorporation by reference is well-known. One document is incorporated by reference in another when it is referred to, as if it would form an integral part thereof. [See Sarabjit Rick Singh v. Union of India 2007 (14) SCALE 263]

31. Principle of incorporation by reference was evolved so as to avoid unnecessary repetition of the same documents again and again in different parts of the original document. For invoking the said principle, a document must be in existence. It cannot be brought into existence later on. The executor of a document must know what the other document which he intends to incorporate in the Will contains.

This aspect of the matter has been considered by the House of Lords in William Henry Singleton v. Thomas Tomlinson and others [1878 (3) AC 404], wherein it was held:

"The question which arose in the Court below was whether in construing the will and in determining what the meaning of the testator was, this schedule could be looked at; and, my Lords, on that point it will be quite sufficient if I refer to the two propositions which were laid down, and which indeed were not challenged by any of the counsel at your Lordships' Bar. It was said that there are certain cases in which, although a document is not admitted to probate, still it may be referred to in a will in such a way as that you are entitled to look at the document, because it is virtually incorporated in that which is admitted to probate; and the two propositions which were laid down as the tests of the case in which a document under those circumstances could be looked at were these: first, that it must be clearly identified by the description given of it in the will; and secondly, that it must be shown to have been in existence at the time when the will was executed."

[See also Theobald on Wills, Sixteenth Edition, pages 59-61] In Halsbury's Laws of England, Fourth Edition, Paragraph 817 at pages 433-34, it is stated:

"Incorporation of documents: In certain cases documents referred to in a testator's will or codicil, though not themselves duly executed, may be incorporated in the will and included in the probate[Re Mardon [1944] P 109 at 112, [1944] 2 All ER 397 at 399.] Such a document must be strictly identified with the description contained in the will; but extrinsic evidence is admissible for the purpose of identification [See for instance, Allen v. Maddock (1858) I I Moo PCC 427; Re Almosnino (1859) I SW & TR 508]. The reference must be to a document as an existing document [Re Mordon] and not to one which is to come into existence at a future date[Re Sunderland (1866) LR I P & D 198; Re Reid (1868) 38 LJP & M I; Durham v. Northen [1895] P 66; Re Smart [1902] P 238. Certainty and identification is the very essence of incorporation: Croker v. Marquess of Hertford (1844) 4 Moo PCC 339 at 366, per Dr. Lushington.] The onus of proving the identity of the document and its existence at the date of the will lies upon the party seeking to establish it [Singleton v. Tomlinson], but the court will draw inferences from the circumstances surrounding the execution of the will.

If the will prima facie refers to the document as an existing document, then, even though it appears

from the surrounding circumstances, namely the date of the signing of the document, that it was not in existence at the date when the will was originally executed, the document may nevertheless be admitted to probate, since the will is treated as speaking from the date of its re- execution by the codicil; but if the will, treated as speaking at the date of the codicil, still in terms refers to a future document, the document cannot be admitted to probate even though it was in existence at the date of the codicil.[Re Smart [1902] P 238]."

32. Section 87 of the Act provides that testator's intention to be effectuated as far as possible, stating:

"87. Testator's intention to be effectuated as far as possible. The intention of the testator shall not be set aside because it cannot take effect to the full extent, but effect is to be given to it as far as possible."

33. In a case of this nature, however, in our opinion, Section 87 of the Act will have no application.

34. If the appendices formed an integral part of the Will and in their absence the Will was not complete, then the intention of the testator cannot be effectuated. A distinction must be made between an incomplete Will and a complete Will although intention of the testator cannot be effectuated.

The testator's intention is collected from a consideration of the whole Will and not from a part of it. If two parts of the same Will are wholly irreconcilable, the court of law would not be in a position to come to a finding that the Will dated 4.11.1992 could be given effect to irrespective of the appendices. In construing a Will, no doubt all possible contingencies are required to be taken into consideration. Even if a part is invalid, the entire document need not be invalidated, only if it forms a severable part. [See Bajrang Factory Ltd. and Another v. University of Calcutta and Others (2007) 7 SCC 183]

In Halsbury's Laws of England, Fourth edition, Volume 50, page 332-33, it is stated:

"462. Leading principle of construction: The leading principle of construction which is applicable to all wills without qualification and overrides every other rule of construction is that the testator's intention is collected from a consideration of the whole will taken in connection with any evidence properly admissible, and the meaning of the will and of every part of it is determined according to that intention."

In P. Manavala Chetty and five Ors. v. P. Ramanujam Chetty and Anr. [(1971)1MLJ127] , a single judge of the Madras High Court on the duty of the court of construction to give intention to the wishes of the testator opined:

"It is the obvious duty of the Court to ascertain and give effect to the true intentions of the testator and also avoid any construction of the will which will defeat or frustrate or bring about a situation which is directly contrary to the intentions of the testator. At the same time, it must be borne in mind that there are obvious limits to this doctrine that the Court should try to ascertain and give effect to the intentions of the testator. The law requires a will to be in writing and it cannot, consistently with this doctrine, permit parol evidence or evidence of collateral circumstances to be adduced to contradict or add to or vary the contents of such a will. No evidence, however powerful it may be, can be given in a Court of construction in order to complete an incomplete will, or project back a valid will, if the terms and conditions of the written will are useless and in-effective

to amount to a valid bequest, or to prove any intention or wish of the testator not found in the will. The testator's declarations or evidence of collateral circumstances cannot control the operation of the clear provisions of the will. The provisions of the Indian Succession Act referred to earlier indicate the limits of the Court's power to take note of the testator's declarations and the surroundings circumstances, i.e., evidence of collateral circumstances." [Emphasis Supplied]

As regards two inconsistent wills, with the latter being an incomplete one, the judgment of Bagnall, Re [[1948] W.N. 324] necessitates one discussions. In the said case, the testatrix had made two wills, one in 1936 and the other in 1943. In the first will, she gave certain legacies and disposed of the residue. In the second will, she provided legacies of the same amounts and in favour of the same persons but did not dispose of the residue. The second will was not described as a codicil to the first, nor did it expressly revoke it, but it was manifestly incomplete, ended without any stop and in the middle of a sentence and was signed by the testator at the bottom of the page leaving a large gap between the last words and the signature. Probate was granted of both wills. It was held:

(i) Though the second will was far removed in date from the first and was not called the "last will", it was intended, at any rate so far as it went, to take the place of the first will, and, therefore, the legacies given by the second will were in substitution so far as they went for those in the first;

(ii) An examination of the two documents, did not support the conclusion that the intention of the testatrix, when she executed the second will, was entirely to supersede the earlier instrument, and, consequently, the first will effectively disposed of the residue, and one legacy given in the first will but not repeated in the second will was not revoked by the latter.

In the judgment, the case of Kidd v. North [16 L.J. Ch. at p. 117] was referred to. There, an incomplete testamentary paper containing a legacy of 500 Pounds in favour of one Bridgett Bibby was admitted to probate with a will and three codicils of prior date and the question was whether this legacy was in substitution for a larger sum given by the first codicil. Lord Chancellor, held, thus:

"When the testamentary papers of which probate is granted appear to give several legacies to the same persons, it is often extremely difficult to ascertain what was the real intention of the testator,; and to attain that object as far as possible certain rules have been laid down and nice distinctions taken; but such rules and distinctions are applicable only to cases in which there is no internal evidence of intention; for where there that is to be found; it must prevail. Such is the present case; for I conceive it to be clear that the last testamentary paper was intended to be in substitution for all the others, and to supersede the provisions contained in them. It is indeed incomplete; but the ecclesiastical court having granted probate of it, no question can be made as to its being testamentary and operative as such so far as it goes. It is reasonable to give such effect to the incomplete instrument, if it contains within itself evidence of an intention to make an entirely new disposition; and for that purpose to undo all that had been done before; but if the new disposition applies only to part of the subject matter, the instrument being upon the face of it incomplete, and not applying to other parts, it is consistent with the principle to give effect to this intention, so far as it is expressed, but to consider the first disposition as operative, so far as no substituted disposition is provided in its place."

35. But, the aforementioned principle cannot be applied in the instant case inasmuch as appendices appended to the Will clearly specify as to how and in what manner the intention of the testatrix to divide her properties equally amongst her daughters and/ or her grand children was to be

implemented.

It is not a case where a general division was to be made leaving the manner of application to the executors. The Will refers to appendices. Once it refers to the appendices indicating that the distribution shall be in terms thereof, it is difficult to comprehend as to how without the same, the Will can be said to be a complete one so as to effectuate the intention of the testator. The intention of the testator in other words must be found out from the entire Will. It has to be read as a whole. An endeavour should be made to give effect to each part of it. Only when one part cannot be given effect to, having regard to another part, the doctrine of purposive construction as also the general principles of construction of deed may be given effect to. In the instant case, the document is one. It is inseparable. Whereas the principal document provides for the broad division, the principles of division laid down therein would be followed if the appendices are to be taken recourse to. If the principles of equality as has been suggested by the learned counsel is to be given effect to, it was expected that the testatrix intended to confer the same benefit or the benefit having same value or nearabout to be conferred on each of the legatees.

In effect and substance, the purported directions contained in the appendices which did not see the light of the day on the date of execution of the Will, make the application of the directions of the testatrix wholly impossible to be carried out. It is in that sense the provisions of Section 87 of the Act are applicable.

36. The High Court has assigned good and cogent reasons in support of its judgment for not accepting the evidence of Mr. Unni. Mr. Unni admitted that the appendices were to be brought by Anil Kak. If the same had not been brought to her on the day the Will was executed, we wonder how the testatrix had knowledge thereabout. It now almost stands admitted that the appendices did not form part of the Will at the time of its purported execution. If the Will was incomplete the question of its proving the execution does not arise. An integral part of the document for the purpose of satisfying the tests laid down under Section 63(1)(c) of the Act and Section 68 of the Evidence Act must mean a complete document.

37. In "Jarman on Wills", Volume 1, Eight Edition (Sweet & Maxwell) at Pages 145-46 on Incomplete Wills, it is stated:

"XII.- Incomplete Wills: Cases sometimes occurred under the old law, and may possibly arise under the present, in which something more than mere compliance with legal requirements was made necessary to the efficacy of the will by the testator himself, he having chose to prescribe to himself a special mode of execution; for in such case, if the testator afterwards neglects to comply with the prescribed formalities, the inference to be drawn from these circumstances is, that he had not fully and definitely resolved on adopting the paper as his will [Accordingly, under the old law, which did not require wills of personalty to be authenticated by the testator's signature or by attestation, the Prerogative court in several instances refused to probate of wills, concluding with the words "In Witness", etc , but not signed: Abbot v. Peters, 4 Hagg. 380. Questions as to the testamentary validity of incomplete papers rarely occur in practice, now that authentication of signature and attestation are essential to such validity.] The presumption is slight where the instrument is duly signed and attested, and perfect in all other respects, but must apparently be rebutted by some evidence before it can be admitted to probate.[Per Sir J. Nicholl in Beaty v. Beaty. See also 1 Wms. Exors., Pt. 1., Bk. II , Ch. II, s.2.].

But this doctrine in favour of imperfect papers obtains only where the defect is in regard to some

formal act, which the testator has prescribed as necessary for the authentication of his will, and not where it applies to the contents of the instrument; for, if in its actual state the paper contains only a partial disclosure if the testamentary scheme of the deceased, it necessarily fails of effect, even though its completion was prevented by circumstances beyond his control [Montefiore v. Montefiore, 23 Ad. 354; see also Griffin v. Griffin, 4 Ves. 197, n. This case afforded two sufficient grounds for the rejection of the paper; first, that it was not the whole will; and secondly, that its completion was not prevented by inevitable circumstances].

In short, the presumption is always against a paper which bears self-evident marks of being unfinished; and it behoves those who assert its testamentary character distinctly to show, either that the deceased intended the paper in its actual condition to operate as his will, or that he was prevented by involuntary accident from completing it [Reay v. Cowcher, 1 hagg. 75, 2 ib. 249; Wood v. medley, 1 ib. 661; In b. Robinson, ib. 643; Bragge v. Dyer, 3 hag. 207; Gillow v. Bourne, 4 Hagg. 192. And to the contrary presumption in favour of a regularly executed and apparently completed will, vide Shadbolt v. Wagh. 570; Blewitt v. Blewitt, 4 Hagg. 410.]"

To the same effect is Alexander on "Commentaries on Wills" Vol. I, Exceution at page 193-94 which states:

"prior to the Statute of Wills of 1 Vict., ch. 26, and the American statutes, which require the same formalities in the execution and attestation of wills of personalty as in devises of realty, the courts allowed imperfectly executed testamentary writings to take effect as nuncupative dispositions of personalty, where it appeared that the testators intended them to operate in the form in which they were found, and that the failure to completely execute them arose for some reason other than a purpose to abandon."

It was further stated:

"But the courts always viewed such instruments with suspicion and, in proportion to the incompleteness of the document, demanded a higher degree of evidenceBut the more modern day doctrine is that a nuncupative will can be made only by spoken words or by signs and that, if the words be reduced to writing by the testator or by someone else at his request, they lose their nuncupative character. And it seems that under the modern statutes and rulings, even verbal instructions for drawing up a written will, although spoken in the presence of the proper number of witnesses, can not be admitted to probate as a nuncupative will."

38. Section 103 of the Act speaks of a residuary bequest but the same evidently has no application in this case.

The execution of the Will becomes impossible both in respect of the properties described in Part A and Part B.

39. Furthermore, the Will is surrounded by suspicious circumstances. The execution of a Will does not only mean proving of the signatures of the executors and the attesting witnesses. It means something more. A Will is not an ordinary document. It although requires to be proved like any other documents but the statutory conditions imposed by reason of Section 63(c) of the Act and Section 68 of the Indian Evidence Act cannot be ignored.

In B. Venkatamuni v. C.J. Ayodhya Ram Singh & Ors. [2006 (11) SCALE 148], this Court held:

"It is, however, well settled that compliance of statutory requirements itself is not sufficient as would appear from the discussions hereinafter made."

It was observed:

"Yet again Section 68 of the Indian Evidence Act postulates the mode and manner in which proof of execution of document which is required by law to be attested stating that the execution must be proved by at least one attesting witness, if an attesting witness is alive and subject to the process of the Court and capable of giving evidence."

Yet again in Niranjan Umeshchandra Joshi v. Mrudula Jyoti Rao & Ors. [2006 (14) SCALE 186], this Court held:

"Section 63 of the Indian Succession Act lays down the mode and manner of execution of an unprivileged Will. Section 68 of the Indian Evidence Act postulates the mode and manner of execution of document which is required by law to be attested. It in unequivocal terms states that execution of Will must be proved at least by one attesting witness, if an attesting witness is alive subject to the process of the court and capable of giving evidence. A Will is to prove what is loosely called as primary evidence, except where proof is permitted by leading secondary evidence. Unlike other documents, proof of execution of any other document under the Act would not be sufficient as in terms of Section 68 of the Indian Evidence Act, execution must be proved at least by one of the attesting witnesses. While making attestation, there must be an animus attestandi, on the part of the attesting witness, meaning thereby, he must intend to attest and extrinsic evidence on this point is receivable.

The burden of proof that the Will has been validly executed and is a genuine document is on the propounder. The propound is also required to prove that the testator has signed the Will and that he had put his signature out of his own free will having a sound disposition of mind and understood the nature and effect thereof. If sufficient evidence in this behalf is brought on record, the onus of the propounder may be held to have been discharged. But, the onus would be on the applicant to remove the suspicion by leading sufficient and cogent evidence if there exists any. In the case of proof of Will, a signature of a testator alone would not prove the execution thereof, if his mind may appear to be very feeble and debilitated. However, if a defence of fraud, coercion or undue influence is raised, the burden would be on the caveator. [See Madhukar D. Shende v. Tarabai Shedage (2002) 2 SCC 85 and Sridevi & Ors. v. Jayaraja Shetty & Ors. (2005) 8 SCC 784]. Subject to above, proof of a Will does not ordinarily differ from that of proving any other document."

[See also Adivekka and Others v. Hanamavva Kom Venkatesh (Dead) By LRs. and Another (2007) 7 SCC 91]

40. Whereas execution of any other document can be proved by proving the writings of the document or the contents of it as also the execution thereof, in the event there exists suspicious circumstances the party seeking to obtain probate and/ or letters of administration with a copy of the Will annexed must also adduce evidence to the satisfaction of the court before it can be accepted as genuine.

41. As an order granting probate is a judgment in rem, the court must also satisfy its conscience before it passes an order.

It may be true that deprivation of a due share by the natural heir by itself may not be held to be a

suspicious circumstance but it is one of the factors which is taken into consideration by the courts before granting probate of a Will.

Unlike other documents, even animus attestandi is a necessary ingredient for proving the attestation.

In Benga Behera & Anr. v. Braja Kishore Nanda & Ors. [2007 (7) SCALE 228], this Court held:

"46. Existence of suspicious circumstances itself may be held to be sufficient to arrive at a conclusion that execution of the Will has not duly been proved."

In B. Venkatamuni v. C.J. Ayodhya Ram Singh & Ors. [2006 (11) SCALE 148], it was stated:

"However, having regard to the fact that the Will was registered one and the propounder had discharged the onus, it was held that in such circumstances, the onus shifts to the contestant opposing the Will to bring material on record meeting such prima facie case in which event the onus shifts back on the propounder to satisfy the court affirmatively that the testator did not know well the contents of the Will and in sound disposing capacity executed the same.

Each case, however, must be determined in the fact situation obtaining therein.

The Division Bench of the High Court was, with respect, thus, entirely wrong in proceeding on the premise that compliance of legal formalities as regards proof of the Will would sub-serve the purpose and the suspicious circumstances surrounding the execution thereof is not of much significance.

The suspicious circumstances pointed out by the learned District Judge and the learned Single Judge of the High Court, were glaring on the face of the records. They could not have been ignored by the Division Bench and in any event, the Division Bench should have been slow in interfering with the findings of fact arrived at by the said court. It applied a wrong legal test and thus, came to an erroneous decision."

Yet again in Savithri & Ors. v. Karthyayani Amma & Ors. [JT 2007 (12) SC 248], this Court held:

"18. We do not find in the fact situation obtaining herein that any such suspicious circumstance was existing. We are not unmindful of the fact that the court must satisfy its conscience before its genuineness is accepted. But what is necessary therefor, is a rational approach.

19. Deprivation of a due share by the natural heirs itself is not a factor which would lead to the conclusion that there exist suspicious circumstances. For the said purpose, as noticed hereinbefore, the background facts should also be taken into consideration. The son was not meeting his father. He had not been attending to him. He was not even meeting the expenses for his treatment from 1959, when he lost his job till his death in 1978. The testator was living with his sister and her children. If in that situation, if he executed a Will in their favour, no exception thereto can be taken. Even then, something was left for the appellant."

42. The court is, thus, required to adopt a rational approach in a situation of this nature. Once the court is required to satisfy its conscience, existence of suspicious circumstances play a prominent role. The Will, as noticed hereinbefore, is in two parts. Whereas the first part deals with the property belonging to the husband of the testatrix, the second part deals with the properties which

purportedly belongs to her. Distribution of assets, however, was not specifically stated in the Will. They were to be made as per the appendices annexed thereto. The appendices which were required to be read as a part of the main Will so as to effectuate the intention of the testatrix have not been proved. The Will by its own cannot be given effect to. The Will must be read along with the appendices. No doubt in construing a Will arm chair rule is to be adopted. The Will was, therefore, not complete. It is not correct to contend that the appendices were very much in existence at the time when the Will was executed. Existence of a document must mean the actual existence.

We are, therefore, of the opinion that no case has been made out for interference with the impugned judgment.

43. For the reasons aforementioned, the appeals are dismissed with costs. Counsel's fee assessed at Rs. 50,000/-.