

## RAJASTHAN HIGH COURT

Surendra Bhatia

Vs.

Punam Bhatia

Civil Misc. Appeal No.245 of 2000 and Civil Misc. Appeal No. (Defect) 219 of 2000  
(J.C. Verma, J.)

26.04.2001

### JUDGEMENT

**J.C. Verma, J.**

1. S. B. Civil Misc. Appeal No.245/2000 has been filed against the judgment and decree dated 6-12-1999 passed by the District Judge, Jaipur city, Jaipur by Surendra Bhatia - defendant. In the suit filed by Smt. Poonam Bhatia by which decree he had allowed the application of the respondent plaintiff of grant of succession certificate; whereas Appeal No. (defect) 219/2000 is also directed against the same judgment and decree dated 6-12-1999 by Smt. Swarn Anand D/o Shri Chunni Lal Bhatia who was one of the defendant in the suit filed by Smt. Poonam.

2. The respondent-plaintiff Smt. Poonam Bhatia w/o Late Sudershan Bhatia and Kumari Smita Bhatia D/o Late Sudershan Bhatia R/o 7, Pradhan Marg, Malviya Nagar, Jaipur had filed a suit for succession certificate against Surendra Bhatia, Smt. Swam Anand sons and daughters of Shri Chunni Lal Bhatia and Kumari Smita Bhatia wife of Shri K.B. Bhatia.

3. Suit was filed under Section 372 of the Indian Succession Act, 1925 stating therein in the application that the deceased Sudershan Bhatia, husband of Smt. Poonam Bhatia and father of Kumari Smita Bhatia had property at Jaipur and Delhi. The deceased Sudershan Bhatia died on 21-4-1989 in Frankfurt, Germany and being sole heirs, they had claimed the succession certificate about the assets and liability of the deceased. The application was resisted by the defendants, now the appellant i.e. brother and sister of the deceased. The claim was being resisted on the basis of Will dated 17-4-1989 (Ex. A-1) purported to have been executed by Sudershan Bhatia, with

further submissions that the relations between the deceased and Smt. Poonam Bhatia were strained and, therefore, Sudershan Bhatia did not want to give any property to Smt. Poonam Bhatia. The Will is said to have been executed by the deceased Sudershan Bhatia in the hospital of Frankfurt in Germany. The following issues were framed;

(1) Whether the deceased had executed any Will and because of the Will the applicants are not entitled to succession certificate; (2) whether the will was legal and effective; (3) whether the probate is necessary and whether 'Will' was to be attested according to Germany law or it is otherwise illegal.

4. The trial Court had decided issue Nos.1 and 2 in favour of the applicant and against the defendant-appellants and the remaining issues against the defendants holding that Will was not validly executed and was written in the suspicious circumstance.

5. The appellant states that the order of the trial Court in not believing the 'Will' was erroneous. It is also submitted that the plaintiff Smt. Poonam Bhatia was, perhaps, not legally married to Sudershan Bhatia and reliance is placed for this purpose on Ex.15 i.e. the passport of the plaintiff where her name has been entered as Smt. Poonam Kapur wife of Priyaveer Kapur of New Delhi and also the ticket for journey from Delhi to Frankfurt on 2-11-1987 when she had accompanied late Sudershan Bhatia. In the statement given in the Court, plaintiff had stated that the marriage had taken place on 25-12-1985; it is contended that in case the marriage had taken place on 25-12-1985, then in such situation, the plaintiff could not have identified herself to be Mrs. Poonam Kapur in the passport.

6. The next submission made by the counsel is that the averments in the application under Section 372 had not been proved. It is also submitted that even though Will was produced by the present appellant; the onus should have been put on the plaintiff to prove that she was entitled to succession certificate. It is further submitted that the Will has been properly proved by the statement by DWs attesting witnesses with Mrs. Brigitti Rose Morsi Gorki and DW-3 Dr. Ure Faber and in such circumstances there was no reason for the trial Court for not believing the Will. It is stated that if the Will is believed, in that situation Late Sudershan Bhatia had expressly debarred the plaintiff to inherit any property and he had bestowed the property on the beneficiaries of the Will.

7. The trial Court had doubted the Will on number of counts; (1) how Surendra - . appellant was able to get the possession of the Will; (2) if Sudershan Bhatia was in the hospital at the time of writing of Will, it was dictated to whom and where was the original draft; (3) the Will written on the half page itself could have been written in hand or typing; (4) there is no attesting witnesses of the doctor or the Nurse of the hospital; (5) no record has been placed of physical or mental condition of the deceased; (6) there is no record about the presence of the attesting witnesses in the hospital ever produced; (7) despite the fact that the Will had mentioned maintenance of minor daughter Kumari Smita Bhatia of Sudershan Bhatia, but how no action was taken by the defendants to make arrangements for the education of such daughter; (8) who had got it laminated; (9) in the earlier suit filed between the parties on 17-7-1989, no mention had been made of any Will; (10) Ex.1/1 a document filled at the time of cremation in Germany, contains the entry that the deceased was unmarried; (11) Kapil Bhatia was not produced; (12) no details have been given about other properties; (13) the testator himself had written that he is going to die very soon but the attesting witnesses state that he was in healthy body and mind; (14) DW-2 Mrs. Goerke had declined to sign her statement; etc. etc.

8. Above are some of the suspicious circumstances of which the trial Court had made a mention.

9. Counsel for the appellant challenges the finding with the prayer that the judgment of the trial Court be set aside.

10. The other appeal CMA No.219/2000 (Defect) has been filed by Smt. Swarn Anand, sister of the deceased, on the ground that the property in question was ancestral and she as a sister was entitled for 1/4th share of the property under Indian Succession Act.

11. In the plaint, it has been averred that the deceased Sudershan Bhatia was doing the business of export of Carpets in Jaipur in the name of the firm Jaipur in the matter of Oriental Tapis Pvt. Ltd., Amer Road. He and the plaintiff No.1 was the Director and was holding the majority shares. It was further mentioned that the deceased had self-acquired movable and immovable properties in Jaipur and Delhi for which succession certificate was being applied for. Defendant No.1 appellant had replied that the

plaintiff Smt. Poonam Bhatia was the Managing Director of the said company, but had resigned on 1-12-1988. It is stated in the written statement that Sudershan Bhatia was not well and he had gone to Frankfurt for check-up in March 1989. He died in the hospital and despite the fact that the plaintiff had come to know of, the death on 22-4-1989, she had not visited Germany. It was admitted that Kumari Samita was the daughter of the deceased and Poonam Bhatia. In the written statement filed, it was nowhere denied that the plaintiff was not the legally wedded wife, rather what was pleaded was that the plaintiff was having strained relations with her husband Sudershan. It was further pleaded in the written statement that a Will was executed on 17-4-1989 in the hospital itself and half of the property was given to defendant No.1, the present appellant and the remaining half to her minor daughter and the defendant No.1 was said to have been appointed as trustee of the minor daughter till she attained the age of 21 years. It was specifically admitted in the heading of additional details that Smt. Poonam Bhatia was a divorced lady married to Sudershan Bhatia on 25-12-1985. It was further pleaded that Smt. Poonam Bhatia had one daughter and one son from the wedlock of her earlier husband who are staying with Smt. Poonam Bhatia i.e. a specific admission had been made to the effect that the plaintiff Smt. Poonam Bhatia was a legally married wife after having been divorced from her earlier husband.

(Emphasis by Court)

12. The succession certificate was claimed in regard to the amount lying in the banks. State Bank of India, Jaipur, New Delhi, Bank of India, Hong Kong and Shanghai Banking Corporation, New Delhi. M/s. Jaipur Oriental Tapis Pvt. Ltd. equity shares, share certificates lying in the name of Sudershan Bhatia, details of which had been attached with the suit.

13. Smt. Poonam Bhatia, the plaintiff had appeared as PW-1. She had stated that she had married to Sudershan Bhatia on 25-12-1985 according to Hindu rites and one daughter Samita Bhatia was born out of the wedlock. She has stated that she and her husband had started a company named Jaipur Oriental Tapis Pvt. Ltd. and she was the Managing Director of the same and her husband was the Director. They were having the majority shares. Her husband was owning movable and immovable properties in Jaipur, Delhi and in Germany. She has stated that the property mentioned for the purpose of probate and succession certificate belonged to her husband and no one including Surendra Bhatia or Swarn Anand or Samita Bhatia had any share in the

property. Her husband had died on 21-4-1989 at Frankfurt. He was suffering from Endocarditis. She had even doubted the signatures on the alleged Will as produced by the defendant. She has stated that the defendant Surendra and her husband were not having any cordial relations as Surendra Bhatia was not happy of her marriage with his brother. She had visited Germany when her husband had gone there for operation in November 1987 and both had come back. Her husband had come back to India on 23-1-1988. He was again admitted at Escorts Hospital. He went to Germany for treatment. She could not accompany because of her infant daughter as was so desired by her husband. She has stated that she had been talking on telephone to her husband in Germany but she was not told of any Will having written by him. She specifically denied that the Will had been signed by her husband and signatures do not tally. She states that on getting the information of the death of her husband, the defendant Surendra Bhatia after consulting her immediately proceeded to Germany for bringing the dead-body, but without her permission he cremated him there in Germany. The ceremony of Uthawana was done at Jaipur at her residence on 29-4-1989. Even at that time she was Managing Director of the company. She had produced a voter's list showing her name and the name of her husband and one of his servant as resident of Jaipur. She has stated that her husband was divorcee of his earlier marriage vide Ex.9. She has also stated that the defendant Surendra Bhatia had forged signatures of her husband on certain document and a suit in this regard is also pending in Delhi in Tees Hazari Court. She has stated that she is in possession of the passport in the name of Smt. Poonam Kapur which was issued to her prior to the marriage to Sudershan Bhatia and when her earlier marriage with Shri Kapur was existing. She has not got the name changed in the pass-port. Even though her mother was Muslim in the year 1940, but after 1940 she had adopted Hinduism after her marriage. She has admitted that she had two children from her earlier husband Shri V.P. Kapur, who are now living with her. Even the expenses for education of these two children were being borne by her husband Sudershan Bhatia. He had no objection of staying of the children with them. After the marriage, her husband Sudershan Bhatia had purchased number of plots in her name in Durgapura. Mahar House Malviya Nagar and she was nominee in the insurance of her husband as well. She has even got the insurance money of her husband as nominee. She stated that earlier she was getting maintenance from her earlier husband. In the cross-examination, she says that Sudershan Bhatia, her husband, used to live in India for six months and for the remaining six months he used to live in Germany. She had visited Germany in 1986-87 with her husband and stayed with her husband. Sudershan Bhatia was owning his own house at Frankfurt. She had

become the Managing Director of the company on 4-9-1987 in the presence of her husband. She admits that she had lived with Swarn Anand immediately after marriage for about few days, but later on had shifted to their own house.

14. PW-2 K.P. Gupta, has been produced who is a Branch Manager of DAB, LIC, Jaipur and had depose about the insurance of Sudershan Bhatia. He stated that the insurance money of one policy has been already disbursed to the plaintiff Smt. Poonam Bhatia, but about the second policy the dispute has been raised.

15. PW-4 is Mrs. R.K. Vij, hand-writing expert who stated that she has compared the signature of the testator on the Will with the admitted signatures of the writer of the years 1986,1987 and 1988 and according to her conclusion, the signatures on the Will differ from the original/admitted signatures. She had given her report as Ex. PW-4/1.

16. Surendra Bhatia has appeared as DW-1. He had exhibited the Will and stated about the illness and death of his brother Sudershan Bhatia in Germany. He says that he was told on 21 -4-1989 itself by one Rahul Bhatia about the death of his brother and he left for Germany on the next day; he had cremated his brother in Germany and had brought the ashes in India and had gone to Hardwar. He had come back to India on 29-4-1989. 'Pagri ceremony' was done. He admits that the marriage with Smt. Poonam Bhatia was solemnized in December 1985. He further admits that Smt. Poonam Bhatia was divorced wife of V.P. Kapur. He states that he himself is unmarried, but Sudershan Bhatia used to live with him and that he was doing a Joint business with Sudershan Bhatia. Smt. Poonam Bhatia was told about the death on 22-4-1989. He admits that in the year 1987 Sudershan had gone to Frankfurt and was operated upon for by pass surgery. Smt. Poonam Bhatia had also accompanied him, but had come back after about two Weeks to look after the children. He has stated that the relations between Smt. Poonam Bhatia and Sudershan Bhatia were strained. He also admits that his brother Sudershan Bhatia was earlier married to one Anita and both were divorced by mutual consent. He also says that he does not know whether Sudershan was writing to Poonam Bhatia or not, but so far he is concerned, there was no much exchange of letters with his brother. Even though he says that he had about 40-50 letters with him, but he cannot produce even one. He also says that he cannot remember the address of Germany where he had been writing to his brother. He even does not know the house where his brother was living at Germany or that was itself acquired or on rent, nor he has even tried to know about it. He has not even tried to

know about some other business or property of his brother in Germany. He says that before proceeding to Germany on knowing of the death of his brother, he did not inform any person before leaving for Germany, nor he telephoned to any person including Smt. Poonam Bhatia. He says before coming to India, he had received the Will in Germany through Brigetti Goerke on 22-4-1989. He was introduced to such Goerke for the first time in the hospital. He even does not remember as to where and when he had opened the envelope containing the Will. He even does not remember that the envelope containing the Will which was given to him was open or sealed and who were present at the time when such will was given to him.

17. He admits that in his pass-port his permanent address has been shown as A-43, Kirti Nagar, New Delhi. He denies the suggestion that he had forged the signatures of his brother and has withdrawn certain valuables on the basis of the said Will. Of course, he admits that some criminal cases are pending against him filed by the plaintiff. He even does not remember the date, month or the year of the death of his mother or the father. He admits that in the month of March 1989 his brother Sudershan and Smt. Poonam Bhatia were living together in same house. He admits that he was arrested for the offence under Section 420 Indian Penal Code on 1-9-1990 and was released on bail on 4-9-1990. He admits that certain property had been purchased in the joint name of his brother and the plaintiff. He also admits that Sudershan had given the guarantee of Rs. 30 lacs for working capital of Smt. Poonam. He also admits that in 1987 one plot in Mahar House was purchased in the joint name with Poonam Bhatia. He admits that he was not the Director of the company in the lifetime of his brother and certain shares were got transferred by him on the basis of his Will.

18. DW-2/1 is Pradeep Bhatia who is a nephew of Sudershan Bhatia. He says that Sudershan Bhatia was married to Poonam Bhatia. He says that there were strained relations between Smt. Poonam Bhatia and Sudershan Bhatia, but he does not know any reason of such conflict. He does not know anything about his self-acquired property or ancestral property. He states that Sudershan Bhatia was attending to his work in Jaipur from 1986 right up to February 1989. He identified the signatures of Sudershan Bhatia on the Will on the ground that he had seen him signing. He was only a Supervisor/employee in the company of Sudershan Bhatia. He admits that he was a surety in a bail bond in favour of Surendra Bhatia, the defendant. He admits that at the time of surgery of Sudershan Bhatia in Germany, his wife had accompanied him. He admits the signatures on Exs.26, 27 and 28. Smt. Poonam Bhatia was the Managing

Director of the Company run by Sudershan Bhatia.

19. DW-2/2 is Alok Anand who is maternal grand father and states that he had property in Delhi and Punjab and after his death in the year 1978 the property was sold. He says that certain property was purchased by Sudershan in the year 1987 and also some property was purchased in Jaipur and the remaining property of Sudershan Bhatia was in Germany. The 'Uthawana' was done at the house of Sudershan at Jaipur. He says that he had no knowledge that Sudershan had filed any suit against his company Vandana International Firm in which he has a partner for liquidation and for recovery of amount in Delhi High Court. He also shows ignorance whether he was a party to such litigation in Delhi or not. However, he admits that he was living in the house of Sudershan in Delhi and that the house was sold by Sudershan Bhatia; he was evicted, his luggage was removed from the house. He is son of Smt. Swarn Anand. He says that he was told about the Will, but he had not cared to either read the Will or see the Will or even does not know as to in which language the will had been written.

20. DW-2/3 is Sumendra Anand. He is also nephew of Sudershan. He admits the marriage with Poonam Bhatia. He says that Sudershan had acquired certain property, one farm house in Delhi, Mahar House in Jaipur in Malviya Nagar in the name of Poonam Bhatia, his wife. In addition he had certain other properties also. He says that after the "Pagri Rasm" Sumendra had told the people sitting in the Rasm about the Will and also had shown the Will. The Will was on a simple paper and was not laminated. He had identified the signatures of the testator. He admits that there were certain litigations between the parties through him against Sudershan. He also has no knowledge if any suit was filed by Sudershan against Vandana International in which he was Manager of such firm. He has no knowledge even that suit was decreed. He says that Surendra, the plaintiff, was living in Canada for 20-25 years, but he has no knowledge when he had come to India. He identifies Sudershan and Poonam Bhatia in photographs Ex.32.

21. DW-4 Ramesh Kumar Thakur is Hand-writing expert. He has compared the signatures of the testator on the Will with the passport and says that the Will had been signed by the person who had signed on the pass-port i.e. Sudershan. Certain variations and discrepancies had been pointed out to him on comparison of the two signatures, but states that these are the natural variations.

22. In addition to above, statement of Mrs. Brigitte Rosmorce Goerke, aged 59 years was recorded in Germany on Commission. She had declined to swear in the name of God. She says that she had seen Sudershan Bhatia on the day of death i.e. 21-4-1989. She says Mr. Bhatia had presented to her a document on 17-4- 1989 and to a question whether she remembers as to what was the document, she says that she can answer only after seeing the text of the document and it appeared that AW-1 was the same document. She says that Dr. Fehr was also present when she had signed the document. She says that Mr. Bhatia was normal in health on that day. The document was presented to her as it is and Dr. Fehr also signed before her. She says that the document was not handed over to her for safe custody nor she had taken this document. She says that she did not know Bhatia before signing this document nor did she know Surendra. In the cross-examination, she had stated that Sudershan had gone into Coma in the afternoon on 20-4-1989. She says that she was keeping the diary about the illness and death, but had not mentioned anything about coma, but no diary was produced. She says that Mr. Bhatia had become seriously ill on 20-4-1989, he was in the intensive care. She must have met Mr. Bhatia 12 times before his death. When on 17-4-1989 she had gone to Bhatia, no one else was present, not even the doctor or nurse. She says that the Will was already in his hand. She does not know to whom Mr. Bhatia had dictated the Will and who had typed the Will. She does not know as to what Dr. Fehr was doing for his living i.e. other witness, but she says that he was not a medical practitioner and that she had seen Dr. Fehr for the first time. She says that she was known to Sudershan since 1976 when they had met at a flight, but denies any other relations. She also had met the first wife Anita many times. She says that she had met plaintiff Surendra before 5-6-times.

23. Dr. Ury Fehr was also examined on Commission, who says that the document Ex. A-1 was signed in his presence in the hospital. He says that Sudershan was in good health at the time though he was ill. He says that he is having business relations with Rupil Bhatia and he had been visiting Sudershan Apartments several times with Rupil, which apartment was owned by Sudershan. He says that Sudershan was owning one or two cars. He does not know as to who had typed the Will or to whom it was dictated. He had gone only to sign the document. He says that Sudershan had underwent a surgery immediately after 17-4-1989. He says that on the next day of death of Sudershan, he had met Surendra, Rupil and his wife and he had picked them from airport.

24. Document A-1 /1 is the Will bearing the alleged signatures of Sudershan K. Bhatia, testator, Dr. Ury Fehr and Brigitte Goerke. Ex.1/1 is the death certificate about Sudershan. It is stated therein that he was not married. Ex.2/1 is the certificate by the Mayor stating that Sudershan was a Canadian citizen and had died on 21-4-1989 and family members were residing at D-129, Basant Marg, Bani Park Jaipur.

25. Ex. A is the reply filed on behalf of Surendra Bhatia, defendant appellant to the interim injunction application filed in another suit against Smt. Poonam Bhatia and others, copy of which application is exhibited as Ex.4, but in the reply filed by said Surendra Bhatia there was no mention of any Will even though reply was dated 7-7-1989. In Ex.5 in a criminal case No.313/ 1990, the appellant Surendra Bhatia was charged u/Sections 380, 467, 420 and 468 Indian Penal Code for discharging certain bonds.

26. The appellant had not mentioned about any Will in the defence taken against the charge. Ex.9 is a copy of the judgment of grant of divorce between Sudershan Bhatia deceased and Anita, his former wife. Ex.16 is the copy of the order in the case filed by Smt. Poonam Kapur (now the respondent) against her ex-husband Priyaveer Kapur. Ex.19 is the allotment letter dated 4-9-1986 of plot No. A-128 in the name of Sudershan Bhatia by New Pink City Grah Nirman Sahkari Samiti Ltd. in Mahaveer Nagar. Ex.26 is the affidavit of deceased Sudershan Bhatia about leaving of certain shares in his favour by her mother. Ex.5/29 is a Will of Lajwanti, mother of deceased Sudershan Bhatia stating therein that 20% share in the form of M/s. Vandana International Exports shall be transferred absolutely to Surendra Bhatia. It is further stated in the Will that Sudershan Bhatia had contributed all the capital required for the purchase of his 20% share in the firm of Vandana International Exports. Exs.34, 35, 37, 38 and 39 are the merit certificates of school of Samita Bhatia, the infant daughter of Smt. Poonam Bhatia and Sudershan Bhatia. Ex.44 is the payment of the amount to Smt. Poonam Bhatia as nominee of late Sudershan Bhatia, it is dated 5-10-1989.

27. AW 2/1 is the certified copy of the form No.32 under the Companies Act wherein there is endorsement against the name of Smt. Poonam Bhatia that she had resigned as Managing Director of the firm. Ex. AW 4/1 is the report of the expert of the signatures on the Will showing that the signatures do not tally when compared with the original.

28. Ex. D-4/1 is the report of the handwriting expert produced by the appellant defendant which shows that the signatures do tally.

29. The following points as argued arise for determination (1) whether Smt. Poonam Bhatia was married to the deceased and were living as husband and wife in India and Overseas. The appellant contests the very marriage on the ground that as per Ex.1, Ex.1/1, the death certificates got issued from Germany, Sudershan Bhatia is said to be unmarried at the time of death; (2) in the pass-port of Smt. Poonam Bhatia she has been shown as Smt. Poonam Kapur wife of Shri Priyaveer Kapur and she had been travelling on the said pass-port and had been making declaration that she is wife of Priyaveer Kapur for obtaining the documents for travelling; (3) Ex.16 is the order of the Court in the case of *Smt. Poonam Kapur v. Priya Veer Kapur*, an application filed by Smt. Poonam Bhatia against her ex-husband for maintenance on the basis of wife of Priya Veer Kapur; (4) the air tickets bear the name of Smt. Poonam Kapur.

30. It is argued that the abovesaid circumstances show that Smt. Poonam Bhatia, respondent was not legally married. No reason has been mentioned as to why Smt. Poonam Bhatia had not got her name changed from Smt. Poonam Kapur. It is further submitted that the statement of Poonam Bhatia should not be believed to the effect that her husband (Former) had got a divorce decree against her in London Court as he was living in London. It is submitted that in Ex.16 though it has been mentioned that her previous husband had gone to London, but that cannot be taken as a proof that he was domicile in London as he was only gone on pleasure trip. The counsel for the appellant wants to submit that for the reason that there is no cogent evidence to show that Smt. Poonam Bhatia was ever married legally to Sudershan Bhatia; therefore, she cannot be treated as a legally wedded wife even though it is admitted that a child was born out of the wedlock of Smt. Poonam Bhatia and Sudershan Bhatia. The appellant wants to substantiate this argument also on the ground that the pass-port of Sudershan who was a Canadian citizen, it was not known that he had visited India during the period when marriage is said to have taken place and, therefore, on 25-12-1985 it cannot be said that any marriage could have taken place. It is further stated that despite the admission made in the pleadings that Smt. Poonam Bhatia had married to deceased Sudershan Bhatia on 25-12-1985, the appellant is entitled to retract from such admission and even if admission has been made in regard to marriage of his brother and Poonam; and that can be disproved despite the admission if the

circumstances so prevail. He wants to submit that for the reason that mother of Smt. Poonam Bhatia was a 'Muslim' lady in the year 1940 and, therefore, the marriage of Smt. Poonam with Hindu was itself a void marriage.

31. Alternatively it is submitted that in any case even if Smt. Poonam Bhatia is held to be legally married, the alleged Will executed by Sudershan Bhatia which is duly attested by two witnesses is sufficient to dislodge Smt. Poonam Bhatia from the property and for the reason that the execution of the Will has been properly proved by both the witnesses, the trial Court ought to have believed the Will.

32. It is further submitted that the Will can also be believed for the reason that the relations between the husband and wife were strained from the fact that when Sudershan Bhatia had died on 21-4-1989, she had not immediately gone to Germany and it was the appellant who had gone to Germany to bring the dead body. It is further submitted that in the parallel proceedings filed earlier to this suit non-mention of the Will by the appellant was of no consequence at all because that suit was for management of the company Jaipur Oriental Tapich Pvt. Ltd. where she was claiming to be the Managing Director.

33. In the case of Oners and Parties interested in M.V. Vali Pero v, Fernandeo Lopez, AIR 1989 Supreme Court 2206, it was held that the deposition of the witness recorded on commission where correctness and authenticity of deposition was not disputed, the defect of not taking signature is not fatal to reception of deposition in evidence.

34. From the above narrated facts and law, the point to be determined on the evidence is as to whether Smt. Poonam Bhatia was legally married wife of Sudershan Bhatia deceased and whether after having been so admitted in the written statement, the appellant defendant can still dispute the factum of marriage.

35. In the written statement filed by the appellant defendant it is specifically admitted that the marriage between the parties had taken place. Not only it is admitted in the pleadings but it has also been stated in the evidence by the plaintiff and even by the defendant as well. The defendant and defendant's witnesses had categorically admitted and stated in the evidence that Sudershan Bhatia had married the plaintiff Poonam Bhatia on 25-12-1985. Even a girl child is also born out of wedlock. The appellant had tried to take a somersault by moving an amendment application to deny the aspect of

marriage itself which was not allowed by this Court in a Revision Petition No.343/1999 decided on 26-4-1999. It was held by this Court that the defendant once having admitted in the written statement cannot be allowed to take the inconsistent plea which plea is irretrievably prejudice the case of the plaintiff. The matter stood finally concluded by the observations of this Court in the abovesaid revision petition.

36. Counsel for the appellant wants to rely that he is entitled to withdraw the admission made in the pleadings and also in the evidence as per the judgment of *Muhammad Imam All Khan v. Husain Khan*,<sup>1</sup> where it was held that for the reason and in the absence of title, if any admission had been made, the party was entitled to withdraw from such gratuitous admission.

37. In the case of *Mam Chand v. Rupa*,<sup>2</sup> it was that the admission being based on erroneous state of affairs could not bind landlord or his successors.

38. In the case of *Banarsi Das v. Kanshi Ram*,<sup>3</sup> it was held that the admissions made so on the facts is binding but when it relates to the question of law, such admission cannot be made binding.

39. In the case of *Premchand Hira v. Bal Galal*,<sup>4</sup> in a divorce case under the Divorce Act, it was held that the marriage is to be strictly proved. The case has no bearing to the facts of the present case.

40. The Supreme Court in the case of *Modi Spinning and Weaving Mills Co. Ltd. v. Ladha Ram*,<sup>5</sup> had held that the parties cannot be allowed to change completely the case and substitute entirely different and new case and if such amendments are allowed the opposing party will be irretrievably prejudiced by being denied the opportunity of extracting the admission from the parties. It was held as under :-

"It is true that inconsistent pleas can be made in pleadings but the effect of substitution of paragraphs 25 and 26 is not making inconsistent and alternative pleadings but it is seeking to displace the plaintiff completely from the admissions made by the defendants in the written statement. If such amendments are allowed the plaintiff will be irretrievably prejudiced by being denied the opportunity of extracting the admission from the defendants. The High Court rightly rejected the application for amendment and agreed with the

trial Court."

41. In the case of *Heeralal v. Kalyan Mal*,<sup>6</sup> where the defendants had admitted 7 out of 10 properties as joint family property in written statement and contesting only three properties as exclusively belonging to them. Subsequently seeking amendment of written statement whereby withdrawing earlier admission made regarding 7 properties, it was held that such amendment would displace the plaintiffs case and his right to get preliminary partition. Amendment was not permissible.

42. Reliance is also placed on a *Surendra Bhatia v. Poonam Bhatia*<sup>7</sup> in this very suit where the amendment in the written statement made by the present appellant was disallowed of the fact that Poonam Bhatia was not legally divorced wife of P.V. Kapur. It was held that such an inconsistent plea which would displace the plaintiff completely from the admissions made by the defendants in the written statement cannot be allowed. If such amendments are allowed in the written statement plaintiff will be irretrievably prejudiced by being denied the opportunity of extracting the admissions from the defendants.

43. Yet in another *Swaran Anand v. Smt. Poonam Bhatia*<sup>8</sup> by the parties in this suit. It was held by this Court that efforts were being made to delay the decision of the present suit.

44. The contention of the counsel for the appellant cannot be accepted because it has been admitted in the pleadings; that because it has been admitted in the evidence led by the appellant defendant himself and as the defendant had also stated in the evidence that she was married to Sudershan Bhatia; and even a child was also born out of the wedlock, the appellant cannot retract his admission and take contradictory stand.

45. Not only there is clear admission, but it is also admitted fact that Poonam Bhatia plaintiff wife of Sudershan Bhatia was participating in the business at Jaipur. It is admitted by the appellant that Poonam Bhatia was Managing Director of the firm run by Sudreshan Bhatia. It is also admitted fact that Sudershan Bhatia had purchased number of properties in the name of his wife Poonam Bhatia at various places. The appellant goes on to state that he has been appointed as a trustee for the minor child born out of wedlock of Sudershan Bhatia and Poonam Bhatia, but still argues that there was no marriage between the parties, he contradicts himself: It does not lay in

the mouth of the appellant to say now that because of the reason that there was certain strained relations between Poonam Bhatia and her former husband or that Poonam Bhatia had not got her passport changed after marriage and was carrying the passport which was made earlier when she was married to her earlier husband and, therefore, expectation of the appellant from this Court to hold that there was no marriage at all is perhaps only a wish but not the fact and as such no argument of the appellant defendant in this respect is acceptable and is straightway rejected.

46. The only question which arises for determination is that in the facts of the case whether there are any shrouded circumstances in propounding the will by the appellant to say that the will is genuine or not.

47. The trial Court has narrated suspicious circumstances and in my opinion in the circumstances and the facts, the judgment of the trial Court in this respect cannot be doubted.

48. It is admitted in the evidence that the testator was doing business in Jaipur and also in Germany. He was treated in Germany one or two years earlier as well. His wife Poonam Bhatia had accompanied him in the year 1986-87. He was admitted in Escorts Hospital in India too. His wife was attending him. It is also admitted that the deceased Sudershan Bhatia was also a divorcee and so was the case of Poonam Bhatia as per the statement of Poonam Bhatia that they both were divorcees. It was also come on the evidence right up to end that Poonam Bhatia was the Managing Director of the firm run by Sudershan Bhatia at Jaipur. It has also come on record by way of evidence that Sudershan Bhatia had purchased number of properties in the name of Poonam Bhatia. It is also admitted fact that two children of Poonam Bhatia from her former husband were staying at Jaipur with Poonam Bhatia with the consent of Sudershan Bhatia and Sudershan Bhatia was looking after their interests as well.

49. The contention of the appellant that there were strained relations between Sudershan Bhatia deceased and Poonam Bhatia is not proved on record, rather what was has been proved and also admitted is that Sudershan Bhatia and Poonam Bhatia who were living like husband and wife were having normal relations. There is no evidence whatsoever brought by the appellant, even not a single instance of any strained relations between the parties has been stated and in such circumstances if both husband and wife were living normally and even a child is born, why should after

all the husband deprive the wife from inheritance; there is no explanation nor any evidence to warrant such action.

50. Another matter which shows doubt on the propounding of Will worth mentioning is that, even Surendra Bhatia, the appellant, the beneficiary of the Will was not having that brotherly relations with his brother. He cannot produce a single letter of having been exchanged between him and his brother. The appellant is also living mostly out of India. He does not even know the address of the deceased in Germany. He even does not know whether his brother had his own house at Germany or it was a rented house. He is a person who receives the information of the death of his brother from a third source and leaves immediately without telling it to the wife of his brother for bringing the dead-body to India, but does not bring the dead-body, rather cremates it in Germany. The existence of the Will is not immediately announced and in the previous litigation even there is no mention of the same. The conduct of the appellant does not repose any confidence.

51. Even though the Will is said to have been attested by the two witnesses, the German nationals in Germany who had been examined on Commission, but the circumstances do depict that the Will is a creation of suspicious circumstances. This very witness does say that the testator was in hale and healthy condition on 17-4-1989 when the Will was signed; but the testator died within three days of the Will. Any person who is said to be normal and healthy on 17-4-1989 and was admitted in the hospital and dies on 21 -4-1989, a doubt is definitely caused of the fact whether the testator was healthy and in sound mind; if the Will was signed in the hospital itself, why the certificate from the doctor or any medical attendant in the hospital when the testator was admittedly admitted in the hospital was not taken; the Will ex. A/ 1 /1 is either computer type or electronic type; on 17-4-1989 when he was in the hospital, how could the testator got the computer or electronic draft is still shrouded with suspicious circumstances.

52. Smt. Poonam Bhatia had stated that Mahar House was purchased in her name, so were the other plots in Durgapura and Malviya Nagar etc. If the plot was in the name of Poonam Bhatia, the testator Sudershan Bhatia could not have Willed these plots to his brother in the Will. As regard to the Will, the attesting witness Mrs. Brigitte states that the testator was only acquaintance of her but the document of the Will was not handed over to her for safe custody. She says that she was not knowing the testator

prior to signing this document nor did she know the appellant Surendra Bhatia prior to death of Sudershan; but goes on to say that the testator had gone in Coma on 20-4-1989. She says that 24 hours before the death, the testator was in the intensive care of the hospital. She does not remember the room where Sri Bhatia was admitted but states that at the time of signing of the Will, no doctor or nurse was ever present and the Will was already ready when she reached there but she cannot say as to who might have drafted the Will. She did not know as to whom the Will was dictated or who had typed it. The second attesting witness had come after her arrival i.e. within one hour. She says that she had met Surendra Bhatia appellant on 22-4-1989 at Frankfurt and that he was not known to her earlier. To a question in the cross-examination she says that Ex.A/1 is not the original Will, but it is only a photostat copy.

53. The other witness Dr. Uri Fehr says that he has signed the Will in the presence of Ms. Brigitte Goerke. He says that Shri Bhatia was in good health. He was also not known to the appellant Surendra Bhatia until after the death of Sudershan Bhatia. He even does not know as to who had typed the Will or to whom the Will was dictated. He says that the testator had underwent the surgery after 17-4-1989. He says that he had picked up the appellant from airport. He says that Surendra Bhatia had told him that Sudershan Bhatia had a wife and a child.

54. Surendra Bhatia states that the Will in question was given to him by Brigitte Goerke in the sealed cover whereas the witness Brigitte Goerke states that she was not keeping this Will for safe custody. He admits that the plots situated in Durgapura were purchased in the Joint name of Poonam Bhatia and Sudershan Bhatia. He also admits that in the year 1987 a plot was purchased near Mahar house in the joint name of Poonam Bhatia and Sudershan Bhatia. He also admits that he was never the Director of the company of his brother during the lifetime of his brother.

55. The statement of Brigitte Goerke does not repose any confidence. She does not know the appellant Surendra Bhatia. She was also not knowing Dr. Yuri, but still when Surendra Bhatia reaches the hospital on 22-4-1989, she is already present in the hospital along with other persons to receive him. If none of the parties i.e. appellant and Brigitte was knowing each other before the death of the deceased; it is unimaginable that this lady would be waiting for Surendra Bhatia on the next date of death along with other persons. The conduct of attesting witness is definitely suspicious and doubtful. Apart from the fact that in the Will it is mentioned that

Surendra Bhatia would start looking the interest of minor children of the deceased, but the appellant Surendra Bhatia did not take single step to take care of the daughter of deceased in any manner.

56. In the case of *Rajmata Smt. Sushila Kum. v. Maharaj Sri A. Singh*<sup>9</sup> it was held that the registration of the will by the testator cannot be held to be suspicious circumstance. It is held that nothing damaging could be elicited out in the lengthy cross-examination of these two attesting witnesses. If the Will is type written, it is a suspicious circumstance. It was held that if the propounder succeeds in resolving the suspicious circumstances the Court was bound to grant the probate.

57. A Division Bench of this Court in the case of *Smt. Suraj Devi v. Smt. Sita Devi*<sup>10</sup> had held that the question of probate is only restricted to proof of legal and valid execution of the Will and the question of marriage and divorce are irrelevant and that if the Will is duly signed by the testator and attested by the witness, in that situation, the will is to be acted upon unless there are suspicious circumstances to ignore the same.

58. In the case of *Vrindavanibai Sambhaji Mane v. Ramchandra Vithal Ganeshkar*<sup>11</sup> it was held that the propounder taking prominent part in execution of Will which confers substantial benefits on him, shaky signature, feeble mind which is likely to be influenced, unfair and unjust disposal of property, were not present in the Will and, therefore, it could not be considered that the will was involving any suspicious circumstance.

59. Delhi High Court in the case of *Mathew Jacob v. Ms. Salestine Jacob*<sup>12</sup> had held that the production of one attesting witness is sufficient to inherit the property and whole of the property was given to one only. It was held that the Will becomes suspicious.

60. In the case of *Smt. Jaswant Kaur v. Smt. Amrit Kaur*<sup>13</sup> it was held that in a case where the will is shrouded in suspicion, its proof ceases to be a simple lis between the plaintiff and the defendant and the true question which arises for consideration is whether the evidence led by the propounder of the Will is such as to satisfy the conscience of the Court that the Will was duly executed by the testator. It was impossible to reach such satisfaction unless the party which sets up the Will offers a

cogent and convincing explanation of the suspicious circumstances surrounding the making of the Will.

61. In the case of *Kalyan Singh v. Smt. Chhoti*<sup>14</sup> it was held that in order to judge the credibility of witnesses and disengage the truth from falsehood the Court is not confined only to their testimony and demeanour. It would be open to the Court to consider circumstances brought out in the evidence or which appear from the nature and contents of the documents itself. It was observed as under (at pp.402 - 403 of AIR):-

"A Will is one of the most solemn documents known to law. The executants of the Will cannot be called to deny the execution or to explain the circumstances in which it was executed. It is, therefore, essential that trustworthy and unimpeachable evidence should be produced before the Court to establish genuineness and authenticity of the Will. It must be stated that the factum of execution and validity of the Will cannot be determined merely by considering the evidence produced by the propounder. In order to judge the credibility of witnesses and disengage the truth from falsehood the Court is not confined only to their testimony and demeanor. It would be open to the Court to consider circumstances brought out in the evidence or which appear from the nature and contents of the documents itself. It would be also open to the Court to look into surrounding circumstances as well as inherent improbabilities of the case to reach a proper conclusion on the nature of the evidence adduced by the party."

62. In the case of *H. Venkatachala Iyengar v. B.N. Thimmajamma*,<sup>15</sup> it was held that the party propounding a Will or otherwise making a claim under a Will is no doubt seeking to prove a document. If the document is alleged to be signed by any person, the signature of the said person must be proved to be in his handwriting. The opinion of the experts and of persons acquainted with the handwriting of the person concerned are made relevant. It was held that the propounder is to 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. Onus is on the propounder if he discharges the above said proof of essential facts. There can be cases where the execution of the Will can 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 mental capacity of the testator; the dispositions made in the Will may appear to be unnatural. Improbable or unfair in the light of relevant circumstances, or the Will may otherwise indicate that the said dispositions may not be the result of the testator's free will and mind. In such cases the Court would naturally expect that all legitimate suspicions should be completely removed before the document is accepted as the last Will of the testator. It was further observed in the above said case that for deciding material question of fact which arise in applications for probate or in actions on Wills, no hard and fast or inflexible rules can be laid down for the appreciation of the evidence. What circumstances would be regarded as suspicious cannot be precisely defined or exhaustively enumerated. That inevitably would be a question of fact in each case.

63. The Supreme Court in the above said case had held that even though the scribe had been proved by two attesting witnesses and after going through the evidence had confirmed the finding of the High Court to the effect that the Will was not a valid Will.

64. In view of the settled law that it is up to the propounder of the Will to clear all the doubts and disputes of the Will; in the present case, the defense of the appellant stands falsified on every material aspect i.e. on the factum of marriage of his brother with the plaintiff; the so-called strained relations between the two; his own relation were strained with Sudershan Bhatia, the testator; he is not even knowing any details or particulars or even not corresponding with his brother and producing nothing on record that he was remaining in touch with his brother during his lifetime; he having no interest or concern with the firm at Jaipur owned by his brother and Poonam Bhatia, but all of a sudden he was made all and all in the Will about this firm; house which was not exclusively owned by the testator could not be willed to the beneficiary; non-mentioning of the details of the properties are certain circumstances on which the defense stands falsified apart from the fact that even the health condition of the testator on 17-4-1989 is doubtful of the fact whether he was in senses or not or in sound mental condition specially when as per admission of the attesting witness Sudershan Bhatia had gone into coma on 20th even though the suggestion was denied

that he was in coma from 15th. If a person is unconscious and goes in coma on 20th, it is assumed that such a patient must be in a very serious condition and still in such a serious condition a computer or electronic typed Will is produced which is again a photo-stat copy of the original as per the statement of the attesting witness i.e. A/1. All these circumstances do cast a shadow on the genuineness of the Will and in my opinion, the trial Court had rightly rejected the existence of the Will holding that it is not above suspicion. The medical treatment record could have depicted the condition of the testator which has been not got produced by the propounder.

65. In view of the above-said reasons and discussions, I do not find any merit in the misc. appeal and the same deserves to be dismissed and is dismissed with a cost of Rs. 5,000/-.

66. The connected appeal No.219/2000 (defect) has also no merit. Nothing has been brought to the notice of the Court that the property in question for which the succession certificate was being sought under Section 372 of the Succession Act was of ancestral nature. Onus was on the appellant. No such onus has been discharged. Rather, it has come in the evidence that the property in question was owned by Sudershan Bhatia either in his name or in the joint name with his wife Poonam Bhatia. The misc. appeal No.219/2000 (defect) is also dismissed with a cost of Rs. 5000/-.

67. Both the misc. appeals are dismissed.

Appeals dismissed.

Cases Referred.

1. (1898) 25 Ind App 161
2. AIR 1932 Lah 651
3. AIR 1963 SC 1165
4. AIR 1927 Bom 594
5. (1977) 1 SCR 72
6. AIR 1998 SC 618
7. revision petition No.343/1999 decided on 26-4-1999
8. revision petition No.1225/1999 decided on 3-11-1999
9. (1993) 2 WLC (Raj.) 325

10. (1995) 1 WLN 480
11. AIR 1995 SC 2086
12. AIR 1998 Del 390
13. AIR 1977 SC 74
14. AIR 1990 SC 396
15. AIR 1959 SC 443