A SAVITHRI AND ORS.

v.

KARTHYAYANI AMMA AND ORS.

OCTOBER 12, 2007

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[S.B. SINHA AND HARJIT SINGH BEDI, JJ.]

Succession Act, 1925—s. 63 - Will—Execution of—Allegation of suspicious circumstances - Execution of Will by testator in favour of C *his sister and her children with whom he had been living and who had been looking after him and his medical expenses during major portion of his life—Challenge to, by testator's son on the ground of suspicious circumstances—Held: Will was product of free will—Deprivation of due share by natural heirs would not amount to suspicious circumstance—* D *Moreso, testator left something for his son—Thus, execution of Will was genuine.*

ss. 63 and 61—Will—Validity of—Onus of proof, when there exist suspicious circumstances—Held: Lies on the propounder to explain E *them to the satisfaction of the court before it can be accepted as genuine—Evidence Act, 1872—s. 68.*

KN-brother and KK-sister purchased properties. KK had two children-SN (son) and NN (daughter). Appellants are wife, son and F **daughters of MN, son of SN. Respondent no. 1 and 2 are children and respondent no 3 and 8 are grandchildren of NN. SN and his wife had strained relations and SN was living with his sister and her children who were looking after him and bearing his medical expenses. Partition took place between the parties. SN executed a Will dated 07.08.1971 in** G **respect of the properties allotted to him. Value of properties allotted in favour of SN was Rs. 1000/- which would be in possession of and enjoyed by NA and her children and MN was to be paid Rs. 500/-. It was appellant's case that the Will was surrounded by suspicious circumstances as the Registrar was brought to the house of the**

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propounder which proved that the testator was not in good health and mental condition at the time of execution of the Will; that attesting witness to the Will stated that he had not seen the execution of the Will; that other witnesses to the execution of the Will were beneficiaries under the Will; that even when execution and registration of the Will had taken place at the house, no one from the locality had attested the Will as a witness. MN filed suit for partition and for cancellation of Will which was allowed. Respondent filed appeal challenging the order. High Court allowed the same. Hence the present appeal.

Dismissing the appeal, the Court

HELD: 1. The legal requirement in terms of section 63 of the Indian Succession Act, 1925 and section 68 of the Evidence Act, 1872 is that a Will like any other document is to be proved in terms of the provisions of the Act. The onus of proving the Will is on the propounder. The testamentary capacity of the testator must also be established. Execution of the Will by the testator has to be proved. At least one attesting witness is required to be examined for the purpose of proving the execution of the Will. It is required to be shown that the Will has been signed by the testator with his free will and that at the relevant time he was in sound disposing state of mind and understood the nature and effect of the disposition. It is also required to be established that he has signed the Will in the presence of two witnesses who attested his signature in his presence or in the presence of each other. Only when there exist suspicious circumstances, the onus would be on the applicant to explain them to the satisfaction of the court before it can be accepted as genuine. [Para 14] [415-A, B, C, D]

2.1. The submission that if both KN and SN were to bequeath their entire right, title and interest in the properties in favour of the respondents by way of family arrangement or otherwise, no deed of partition was required to be executed, cannot be accepted as thereby they would have lost their interest in the property during their life time. They evidently intended to have life interest in the property, bequeathing the same in favour of the respondents. The parties are governed by Marumakkattayam School of Hindu Law. The sisters in

A the family have a role to play. The fact that the testator was totally dependent on his nephew and nieces is beyond any dispute. He lost his employment in the year 1959. Apart from the properties which were subject-matter of the Will, he had no other independent source of income. Being totally dependent on the respondents and having been B suffering from cancer, he was bound to place implicit faith and confidence only upon those who had been looking after him. The Will was admittedly registered. The testator lived for seven years after execution of the Will. He could change his mind; he did not. The very fact that he did not take any step for cancellation of the Will is itself a factor which the Court C may take into consideration for the purpose of upholding the same. The question as to whether the Registrar was brought to the house of the propounder or he had gone to the Registrar's office is not a matter which requires serious consideration. But it may be noticed that the witness examined on behalf of the respondents, DW-2, categorically stated that D he had gone to the Registrar's office to get the same registered. Execution of the will might have taken place at the house of SN, but according to DW-2 he came to his office even after registration. Even the other Will was also scribed by him and he was an attesting witness therein also. [Para 12] [414-A, B, C, D, E, F]

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2.2. It is not correct to contend that DW-2 could not have been the attesting witness. He in his deposition categorically stated that he had seen the Will being read over to the propounder. The witnesses and he had seen SN putting his signature on the Will. SN had also seen the F witnesses putting their signatures. This satisfies the requirements of the provisions of section 63 of the Indian Succession Act, 1925 and section 68 of the Evidence Act, 1872. [Para 13] [414-F, G]

Apoline D'Souza v. *John D'Souza* (2007) 7 SCALE 766, relied on.

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2.3. It was appellant's case that the signature of the testator on the Will was obtained under undue influence or coercion. The onus to prove the same was on them. They have failed to do so. If the propounder proves that the Will was signed by the testator and he at the relevant time was in sound disposing state of mind and understood

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the nature and effect of disposition, the onus stands discharged. For this purpose the background fact of the attending circumstances may also be taken into consideration. [Para 15] [415-D, E] A

B. Venkatamuni **v.** *C.J. Ayodhya Ram Singh and Ors.,* **[2006] 1 SCALE 148 and** *Niranjan Umeshchandra Joshi* **v.** *Mrudula Jyoti Rao and Ors.,* **(2006) 14 SCALE 186, referred to.** B

3.1. The circumstances relevant for determining the existence of the suspicious circumstances are (i) when a doubt is created in regard to the condition of mind of the testator despite his signature on the Will; (ii) when the disposition appears to be unnatural or wholly unfair in the light of the relevant circumstances; (iii) where propounder himself takes prominent part in the execution of Will which confers on him substantial benefit. In the fact situation obtaining herein no such suspicious circumstance was existing. The court must satisfy its conscience before its genuineness is accepted. Therefore, a rational approach is necessary. C D

[Paras 17 and 18] [416-G, H; 417-A, B]

3.2. 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. 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. E F

[Para 19] [417-B, C, D]

3.3. The conscience of the court must be satisfied. In the instant case, the High Court has considered the relevant factors. It has been found that the Will was the product of the free will. He had executed the Will after knowing and understanding the contents thereof. G

[Para 22] [418-E]

Joseph Antony Lazarus (Dead) By L.Rs. **v.** *A.J. Francis,* **[2006] 9 SCC** H

A **515, distinguished.**

H. Venkatachala Iyengar **v.** *B.N. Thimmajamma and Ors.*, **AIR (1959) SC 443, relied on.**

Ramabai Padmakar Patil (Dead) though L.Rs. and Ors. **v.** B *Rukminibai Vishnu Vekhande and Ors.*, **[2003] 8 SCC 537;** *S. Sundaresa Pai and Ors.* **v.** *Sumangala T. Pai (Mrs.) and Anr.*, **[2002] 1 SCC 630 and** *Gurdial Kaur and Ors.* **v.** *Kartar Kaur and Ors.*, **[1998] 4 SCC 384, referred to.**

C CIVIL APPELLATE JURISDICTION : Civil Appeal No. 4882 of 2007.

From the Judgment and final Order dated 17.8.2004 of the High Court of Kerala at Ernakulam in A.S. No. 617 of 1992(B).

D Nishe Rajen Shonker (for T.T.K. Deepak & Co.) for the Appellants.

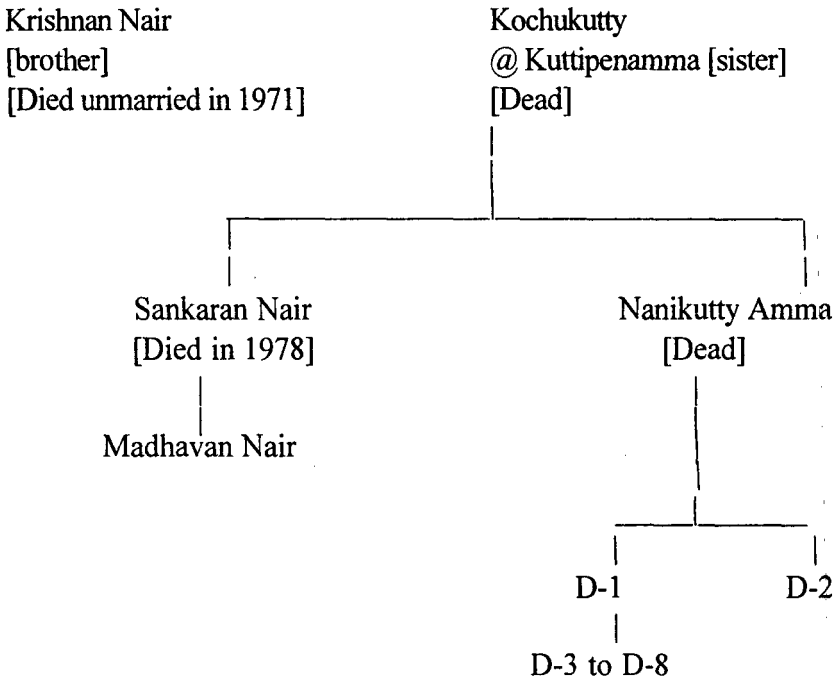
T.L.V. Iyer, S. Prasad, Jay Kishor Singh and Subramonium Prasad for the Respondents.

The Judgment of the Court was delivered by

E **S.B. SINHA, J.** 1. Leave granted.

2. The question involved in this appeal is the validity of a Will dated 07.08.1971 executed by one Sankaran Nair.

3. For the sake of convenience, the genealogical table may be noticed F at the outset :



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4. The properties in suit were purchased by Krishanan Nair and Kochukutty @ Kuttipennamma, mother of Respondent Nos. 1 and 2 and grandmother of Respondent Nos. 3 to 8 herein. Krishnan Nair was a bachelor. Kochukutty had two children, Sankaran Nair and Nanikutty Amma. They were governed by Marumakkattayam School of Law. Appellants herein are wife, son and daughters of Madhavan Nair son of Sankaran Nair (Plaintiff). Respondent Nos. 1 and 2 herein (Original Defendant Nos. 1 and 2) and Respondent Nos. 3 to 8 herein (Original Defendant Nos. 3 to 8) are children and grandchildren respectively of Nanikutty Amma (sister of Sankaran Nair). Sankaran Nair died in 1978. Indisputably, the relationship between Sankaran Nair and his wife was strained. They were living separately. Sankaran Nair had been living with his sister and her children. They were looking after him. He was suffering from cancer. Respondents herein were bearing all costs for his treatment.

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Execution of the said will is not in dispute. What is contended is that the same was surrounded by suspicious circumstances which, according to the appellants, were :

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A 1. Registrar was brought to the house of the propounder which proves that the testator was not in good health and mental condition at the time of execution of the Will.

2. DW-2, who was an attesting witness to the Will, in his deposition stated that he had not seen the execution of the Will. He had also no previous acquaintance with the parties.

3. Other witnesses to the execution of the Will were beneficiaries under the Will.

4. Even when execution and registration of the Will had taken place at the house, there was no reason as to why anybody from the locality had not attested the Will as a witness.

5. In the year 1986, Plaintiff having come to know that Respondent No. 3 was going to construct a house on the said land, filed a suit for partition as also for cancellation of the said Will. The said suit was decreed by the learned Subordinate Judge by a judgment and order dated 18.01.1992, holding, *inter alia*, :

"...The plaintiff had stated that at the time of execution of the will the testator was not in a sound disposing state of mind and he did not sign the document after knowing the contents of the same. In such circumstances, the propounder has to prove that the testator signed the document in the presence of two attesting witnesses who signed it in the presence of each other. The important aspect is that Sankaran Nair was not having testamentary capacity at the time of execution of Ext. A1 is more or less admitted by the defendants. In chief examination of PW-4 he has stated that the Sankaran Nair was not able to execute Ext. A4 and he was not in such a mental condition to execute such a document. That statement in chief examination is not cross-examined..."

It was further observed :

"...The definite case of the plaintiff is that all the documents were executed at the instance of Narayanan Nair. On cardinal scrutiny of the entire evidence as a whole it can be seen that Narayanan

Nair is the actual person behind the execution of all the documents..." A

The learned Trial Judge also observed :

"...It is also not proved whether the testator signed the document after knowing the contents of the documents. If the relationship of the testator with the son was so strange, there was no necessity for him to reserve Rs.500/- to his son in Ext.A4. If he reserves Rs. 500/- to his son in Ext. A4 that means he has an affection towards his son during his life time. Therefore, he might have intended to give the property to his son after his death. There was no necessity for him to bequeath his property to the defendants who are living along with him and taking the income from the property. That income is sufficient for his maintenance and there is no necessity for bequeathing the entire property to the defendants as Ext. A4..." B C D

6. An appeal preferred thereagainst, however, has been allowed by reason of the impugned judgment dated 17.08.2004, holding :

"...The plaintiff who could claim as legal heir of Sankaran Nair has no right to challenge the partition deed executed by Sankaran Nair and others except on establishment of the fact that Sankaran Nair was not in a position to understand the contents of the partition deed or that fraud was played on him while effecting partition which he did not find out during his life time..." E

The High Court further observed : F

"...In the will it is stated that the property bequeathed under the will was obtained by his uncle and his mother and there was a partition between himself, uncle and others and the property allotted to him in the partition was being bequeathed under the will. In the will Sankaran Nair has also directed an amount of Rs. 500/- to be given to the plaintiff. Therefore, there is nothing unnatural in Sankaran Nair directing the property obtained by him to be enjoyed by his nephew and niece and their children as they were looking after him during the major portion of his life time. In such G H

A circumstances I do not think that it can be said that mere disinheritance of the legal heir by itself in the peculiar facts of this case will amount to a suspicious circumstance..."

7. Appellants are, thus, before us.

B 8. Mr. Nishe Rajen Shonker, learned counsel appearing on behalf of the appellants, in support of the appeal, would submit that the High Court committed a serious error in passing the impugned judgment insofar as it failed to take into consideration the suspicious circumstances surrounding the Will which have been noticed by the learned Trial Judge.

C It was contended that as the beneficiaries under the said Will took an active role in the matter of execution thereof, the same by itself would be sufficient to hold that the execution thereof had not been proved. Strong reliance, in this behalf, has been placed on *H. Venkatachala Iyengar* v. *B.N. Thimmajamma and Ors.*, AIR (1959) SC 443.

D 9. Mr. T.L.V. Iyer, learned Senior Counsel appearing on behalf of the respondents, on the other hand, would submit that the findings of the learned Trial Judge are perverse being beyond the pleadings in the suit.

The learned counsel would contend that the learned Trial Judge failed E to notice that although two Wills had been executed – one by Krishnan Nair on 06.08.1971 and another by Sankaran Nair on 07.08.1971, only the latter one was in question. The learned Counsel urged that although the partition had taken place on 27.07.1971, as the testators intended to keep life interest for themselves, the said Wills were executed soon after F the partition.

10. We may notice certain peculiar features of this case. The value of the joint family properties was assessed at Rs. 4,000/-. The share of Sankaran Nair being 1/4th therein, the value of the properties allotted in his favour was only Rs. 1,000/-. Out of the said properties, in terms of G the said Will, a sum of Rs.500/- was to be paid to the plaintiff.

In the said Will it was stated :

"My day-to-day affairs well as treatment are being looked after and is rendered in a sincere manner and according to my wishes

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by Sankunny Menon & Karthiyani Amma who are (the children of my late sister Nani Kutty Amma) and her children.

And I do believe that they will continue to behave in the same was (sic) future also. And I, hereby declare that after my death, all the assets in my name as well as the property in the B Schedule which has devolved upon me by the above mentioned deed, shall vest in and be taken possession of and enjoyed by my late sister Nanikutty Amma's children, Sankunni Menon and Karthyayani and her children and nobody else will have any right whatsoever over my assets or property. Within an year of my death, a sum of rupees five hundred shall be given to my son Madhavan and a receipt for the same shall be obtained by Karthyayani Amma. If the above mentioned sum is not given to Madhavan within 1 year and for that a receipt is not obtained, he is entitled to get an interest of ½% per hundred rupees, until he receives the money. If the amount is not accepted even after knowing about the above amount he shall not have any right to claim any interest as stated above. Item No. 2 of the schedule which I have received as may lawful share, is hereby charged for the realization of the above said amount. If my uncle, Krishnan Nair, expires after my death, then for his funeral and other related rituals an amount which may extend upto Rs. 250/-, shall be borne by Karthyayani Amma, This Will shall come into force only in the event of and on my death. I hereby retain and have all rights and authority to cancel this will or redraft the same or dispose of my properties as per my wish. I also hereby state that, in the event of any such act, the same shall be done only through a document made to that end. After deciding and agreeing as above the witnesses signs below. I have signed in this will only in Pullapra Village and is being numbered after producing it in the Trichur Registrar Office."

11. We would proceed on the basis that at the time of execution of the said Will, the testator was unwell. The test, however, is as to whether he possessed mental capacity to understand the contents of the Will and whether the same was free and/or voluntary.

A 12. Submission of the learned counsel that if both Krishnan Nair and Sankaran Nair were to bequeath their entire right, title and interest in the properties in favour of the respondents herein, by way of family arrangement or otherwise, no deed of partition was required to be executed, cannot be accepted as thereby they would have lost their interest B in the property during their life time. They evidently intended to have life interest in the property, bequeathing the same in favour of the respondents. It must also be borne in mind that the parties are governed by Marumakkattayam School of Hindu Law. The sisters in the family have a role to play. The fact that the testator was totally dependent on his nephew C and nieces is beyond any dispute. He lost his employment in the year 1959. Apart from the properties which were subject-matter of the Will, he had no other independent source of income. Being totally dependent on the respondents having been suffering from cancer, he was bound to place implicit faith and confidence only upon those who had been looking after D him. The Will was admittedly registered. The testator lived for seven years after execution of the Will. He could change his mind; he did not. The very fact that he did not take any step for cancellation of the Will is itself a factor which the Court may take into consideration for the purpose of upholding the same. The question as to whether the Registerer was brought E to the house of the propounder or he had gone to the Registrar's office is not a matter which requires serious consideration. But we may notice that the witness examined on behalf of the respondents, Raveendran (DW-2), categorically stated that he had gone to the Registrar's office to get the same registered. Execution of the will might have taken place at the F house of Nanikutty Amma, but according to DW-2 he came to his office even after registration. Even the other Will was also scribed by him and he was an attesting witness therein also.

13. It is not correct to contend that DW-2 could not have been the attesting witness. He in his deposition categorically stated that he had seen G the Will being read over to the propounder. The witnesses and he had seen Sankaran Nair putting his signature on the Will. Sankaran Nair had also seen the witnesses putting their signatures. This satisfies the requirements of the provisions of the Section 63 of the Indian Succession Act, 1925 and Section 68 of the Indian Evidence Act, 1872. [See *Apoline* H

D' Souza v. *John D' Souza* (2007) 7 SCALE 766]. A

14. The legal requirements in terms of the said provisions are now well-settled. A Will like any other document is to be proved in terms of the provisions of the Indian Succession Act and the Indian Evidence Act. The onus of proving the Will is on the propounder. The testamentary capacity of the testator must also be established. Execution of the Will B by the testator has to be proved. At least one attesting witness is required to be examined for the purpose of proving the execution of the Will. It is required to be shown that the Will has been signed by the testator with his free will and that at the relevant time he was in sound disposing state of mind and understood the nature and effect of the disposition. It is also C required to be established that he has signed the Will in the presence of two witnesses who attested his signature in his presence or in the presence of each other. Only when there exist suspicious circumstances, the onus would be on the propounder to explain them to the satisfaction of the court before it can be accepted as genuine. D

15. We may, however, notice that according to the appellants themselves, the signature of the testator on the Will was obtained under undue influence or coercion. The onus to prove the same was on them. They have failed to do so If the propounder proves that the Will was signed E by the testator and he at the relevant time was in sound disposing state of mind and understood the nature and effect of disposition, the onus stands discharged. For the aforementioned purpose the background fact of the attending circumstances may also be taken into consideration. [See *B. Venkatamuni* v. *C.J. Ayodhya Ram Singh and Ors.,* (2006) 11 F SCALE 148].

16. In *Niranjan Umeshchandra Joshi* v. *Mrudula Jyoti Rao & Ors.,* (2006) 14 SCALE 186, this Court held :

> "Section 63 of the Indian Evidence Act lays down the mode G and manner in which the execution of an unprivileged Will is to be proved. Section 68 postulates the mode and manner in which proof of execution of document 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 H

A 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
B 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.

C The burden of proof that the Will has been validly executed and is a genuine document is on the propounder. The propounder 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.
D 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
E 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
F 784]. Subject to above, proof of a Will does not ordinarily differ from that of proving any other document."

17. Therein, this court also took into consideration the decision of this Court in *H. Venkatachala Iyengar* (supra), wherein the following
G circumstances were held to be relevant for determination of the existence of the suspicious circumstances :

"(i) When a doubt is created in regard to the condition of mind of the testator despite his signature on the Will;

H (ii) When the disposition appears to be unnatural or wholly unfair

in the light of the relevant circumstances; A

(iii) Where propounder himself takes prominent part in the execution of Will which confers on him substantial benefit."

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 B 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 C 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 D can be taken. Even then, something was left for the appellant.

20. In *Ramabai Padmakar Patil (Dead) though L.Rs. and Ors.* v. *Rukminibai Vishnu Vekhande and Ors.*, [2003] 8 SCC 537, this Court held :

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"8. A Will is executed to alter the mode of succession and by the very nature of things it is bound to result in either reducing or depriving the share of a natural heir. If a person intends his property to pass to his natural heirs, there is no necessity at all of executing a Will. It is true that a propounder of the Will has to remove all F suspicious circumstances. Suspicion means doubt, conjecture or mistrust. But the fact that natural heirs have either been excluded or a lesser share has been given to them, by itself without anything more, cannot be held to be a suspicious circumstance, especially in a case where the bequest has been made in favour of an G offspring...."

[See also *S. Sundaresa Pai and Ors.* v. *Sumangala T. Pai (Mrs.) and Anr.*, [2002] 1 SCC 630].

21. Strong reliance has been placed by the learned counsel on H

A *Gurdial Kaur and Ors.* v. *Kartar Kaur and Ors.*, [1998] 4 SCC 384, wherein it was held :

> "4. The law is well settled that the conscience of the court must be satisfied that the Will in question was not only executed and attested in the manner required under the Indian Succession Act, 1925 but it should also be found that the said Will was the product of the free volition of the executant who had voluntarily executed the same after knowing and understanding the contents of the Will. Therefore, whenever there is any suspicious circumstance, the obligation is cast on the propounder of the Will to dispel the suspicious circumstance. As in the facts and circumstances of the case, the court of appeal below did not accept the valid execution of the Will by indicating reasons and coming to a specific finding that suspicion had not been dispelled to the satisfaction of the Court and such finding of the court of appeal below has also been upheld by the High Court by the impugned judgment, we do not find any reason to interfere with such decision. This appeal, therefore, fails and is dismissed without any order as to costs. "

22. There is no dispute in regard to the proposition that the conscience of the court must be satisfied. In the instant case, the High Court has considered the relevant factors. It has been found that the Will was the product of the free will. He had executed the Will after knowing and understanding the contents thereof.

23. *Joseph Antony Lazarus (Dead) By L.Rs.* v. *A.J. Francis,* [2006] 9 SCC 515, whereupon again reliance was placed, one of the circumstances was that the names of the two sons of the testator had not been mentioned therein. The said decision cannot be said to have any application to the instant case.

24. For the reasons aforementioned, we do not find any legal infirmity in the judgment of the High Court. The appeal is dismissed. However, in the facts and circumstances of the case, there shall be no order as to costs.

N.J. Appeal dismissed.