



2026:AHC:186350

HIGH COURT OF JUDICATURE AT ALLAHABAD

SECOND APPEAL No. - 2785 of 1980

Bhanu Datta Pathak

.....Appellant(s)

Versus

Hardutta Pathak and others

.....Respondent(s)

Counsel for Appellant(s)	: Bipin Lal Srivastava, Pankaj Agarwal, Rahul Mishra, S.k. Verma, Santosh Kumar Singh, Sharad Kumar Pandey, Vinayak Varma
Counsel for Respondent(s)	: Anand Kr Srivastava, Avadhesh Singh, J.a. Azmi, J.p.mishra, M.p. Singh, Rahul Mishra

**Reserved
A.F.R.**

Court No. - 6

HON'BLE SIDDHARTH NANDAN, J.

1. Heard Shri Pankaj Agarwal, Advocate, appearing on behalf of the plaintiffs-appellant and Shri Rahul Mishra, Senior Counsel, assisted by Shri Avadhesh Singh, Advocate appearing on behalf of the defendant-opposite parties.

2. This is the plaintiff's second appeal which has been preferred against the judgment dated 28.08.1980 passed in Civil Appeal No. 357 of 1975, arising out of judgment dated 26.07.1979 passed in Suit No. 85 of 1973, by way of which a decree in favour of the plaintiff, was issued cancelling the disputed Will Deed dated 06.12.1971, executed by late Shri Shankar Dutt Pathak, in favour of defendant no. 1 Shri Hari Dutt Pathak; and further partly decreeing the suit for partition of half share in the property in dispute, in favour of the plaintiff.

3. This Court had admitted the aforesaid appeal by the order dated 10.11.1980 on the following substantial questions of law:-

(i) Whether after finding that the Civil Court had no jurisdiction to decide the dispute in regard to agricultural plots, the lower appellate court erred in law in not dismissing the first appeal in regard to the agricultural plots;

(ii) Whether the Will in regard to sirdhari plots was effective and valid;

(iii) Whether in absence of one of the alleged attesting witness to the Will, the compliance of Section 63 of the Indian Succession Act, was done;

(iv) Whether the Will was a conscious mental act of the alleged Testator-Shri Shankar Dutt Pathak, when there is absolutely no evidence on behalf of the defendant that he was physically and mentally alert and fit to execute the Will.

4. Shri Pankaj Agarwal, Advocate appearing on behalf of the appellant, had at the out set submitted that the question of law, at serial no.1 and 2, as framed on 10.11.1980, is not being pressed, as the plaintiff/appellant is not making claims with respect to the agricultural plots.

5. On 19.07.2022, Shri S.K. Verma, learned Senior Advocate, who was appearing for the appellant had submitted that, except defendant-respondent No. 2/2, all other defendants had amicably settled their dispute, outside the Court; and a written compromise has taken place between them and the second appeal may be dismissed in terms of the compromise Application No. 8 of 2021, which was filed with the signature of the appellant as well as of the said other respondents, except respondent No. 2/2.

6. This Court had sent the records along with compromise application to the lower appellate court, for verification of the signature of the parties; and parties were directed to appear before the court below on 22.12.2021 for verification.

7. As per the report of the I/C Additional District and Sessions Judge, Court No. 3, Azamgarh dated 22.12.2021, the parties had appeared before the Court below on 22.12.2021, who were duly identified by their respective counsels and they admitted their signatures on the compromise application and the compromise was duly verified by the learned Court below.

8. Shri Anand Kumar Srivastava, learned counsel appearing on behalf of respondent nos. 2/1/1, 2/1/2 and 3/1 to 3/5 had also not disputed the same, which fact was recorded by this Court in its order dated 19.07.2022.

9. However, Shri Rahul Mishra, learned Senior Counsel who had appeared on behalf of respondent no. 2/2, had submitted that his client had not signed the compromise and he wanted to contest the present second appeal on merits.

10. In view of the aforesaid, this Court vide its judgment dated 19.07.2022, had disposed of the second appeal on the basis of the compromise, in between appellant and respondent nos. 2/1/1, 2/1/2 and respondent nos. 3/1 to 3/5; and the compromise deed was made part of the decree. Thereafter, the Court in its order dated 29.07.2024 has recorded that prima faice it appears that the sole plaintiff was pressing his rights, and he has died pending appeal, and his heirs i.e. his widow and two sons have settled the dispute with the respondents; but for one i.e. respondent no.2/2.

Facts of the Case

11. The plaintiffs had filed the suit for cancellation of Will dated 06.12.1971, alleged to have been executed by Sri Shankar Dutt Pathak (herein after referred as “Testator”), in favour of defendant No.1; and he had further sought a relief for partition of his half share in the property in dispute and a declaration to the said effect.

12. It is an admitted position that Testator was survived by his two sons, namely, Keshav Dutt and Hari Dutt-defendant No.1; and defendant Nos.

2 and 3, i.e., Bal Dutt and Amba Dutt, both sons of Hari Dutt. Testator died on 06.05.1972, who is also grandfather of the plaintiff, i.e., Bhanu Datt, son of Keshav Datt-plaintiff.

Case of the plaintiff

13. The property in question is an ancestral property and the family was a Joint Hindu Family in which the plaintiff has got half share. The business was carried on in the name of Shankar Dutt Pathak-Testator and when he became old, the work was done by defendant No. 1 as Karta of the Joint Hindu Family. The mother of the plaintiff also died in the year 1961, in his village.

14. The plaintiff is a Government servant and at the time of filing of the suit he was Director, Central Ground Water Board, Lucknow; and was living outside, most of the time and came to his village on holidays.

15. The Will was executed on 06.12.1971 by Testator and within six months, he died on 06.05.1972; and when the plaintiff came to his village, he came to know that defendant No. 1 has moved an application for mutation on the basis of the Will and he was surprised to know that he has been excluded and the entire property has been given to defendant No. 1.

16. It is the case of the plaintiff that since 1949 till the date of his death, Shankar Dutt Pathak used to write to him regularly and he also sent money orders of small amounts, which were accepted by him and there was no bitterness in the relationship; and on the contrary Shankar Dutt Pathak loved his grandson, i.e. the plaintiff; and on account of his old age, he had become feeble and being completely dependent on the defendants, became of a feeble mind; and as such the circumstances surrounding the execution of the Will, was by way of exercising undue influence; and as such the same is liable to be vitiated on the said ground.

17. The second contention of the plaintiff/appellant is that no reasoning has been given in the Will, as to why he has been disinherited by the

Testator and further the narration in the Will that plaintiff did not take care of the Testator and the house, is indicative of the fact that the Testator was pressurized and coerced to write the Will, since the Testator loved the plaintiff, as he was his grandson.

18. It is also the case of the plaintiff that the narration in the Will, that in future the Testator has no hope from the plaintiff, is also indicative of undue influence, as there was never any hard feelings between the Testator and the plaintiff; and on the contrary, the Testator used to share all the details regarding his health and well-being with the plaintiff and at no point of time any apprehension or complaints, regarding the issue pertaining to the house or ignorance otherwise, was made by the testator. Plaintiff took care of his grandfather and the entire family and used to help the family in all possible manners; and also used to send money in the marriages and other works of the family; and as such his disinheritance from the normal line of succession is indicative of suspicious circumstances and the dominant status of defendant No. 1, coupled with the feeble health of the testator, clearly indicates that there was coercion and undue influence, which has resulted in the execution of the Will dated 06.12.1971.

19. Plaintiff has also alleged that the Will was executed by playing fraud and in collusion with witnesses, scribe and the Sub-Registrar and as such the Will dated 06.12.1971 is illegal and null and void and liable to be cancelled.

20. Though a dispute has also been raised in relation to the signature of the Testator but during the course of the argument, learned counsel for the appellant submitted that he is not pressing on the said ground and is confining his argument on the aforementioned issues, i.e., primarily that the Will was surrounded by suspicious circumstances and was an outcome of undue influence, which onus he had discharged, but the burden of proof which was on the defendants, has not been discharged and no evidence has been led to remove the suspicious circumstances, enveloping the execution of the Will.

Case of the defendant

21. The defendants had set up a case, that the Testator had borne the expenses of studies of the plaintiff and he was even sent for higher studies to America. Thereafter, the plaintiff got service in the year 1949 and was in a good position in his service; but he became separated from his family and even did not keep his mother, who lived with the defendants and even died in the village.

22. It was not denied by the defendants that the plaintiff used to send money to the Testator but it was a very nominal amount and Sri Shankar Dutt Pathak-Testator did not like to take that money and he was very much displeased with the plaintiff; since he never cared for his grandfather and even the plaintiff's wife never took care and as such he used to be very displeased.

23. It is also the case of the defendants that the plaintiff was fully aware of the Will and its execution; and the Will was never kept secret. The Will was executed with the free will and after fully understanding the import of the deed and further it was a registered Will.

24. It can also be ascertained from the record, i.e., from the cross examination of PW-2 (Bhanu Dutt), who stated that for the period from 1949 to 1961 (13 years), i.e., till the death of plaintiff's mother, she resided with him only for 7-8 months and she was seriously ill for 1-2 months prior to her death. She was being treated at Azamgarh, but plaintiff did not know the name of the doctor, or whether the treatment was Allopathic, Homeopathic or Ayurvedic. She was looked after by the testator.

25. The Will was read by the Testator and then he had put his signature on the same, in front of the two attesting witnesses and thereafter the same was registered in the office of the Sub-Registrar.

26. The perusal of the Will clearly indicates that the Testator had given reasons for disinheriting the plaintiff, since he did not take care either of the Testator or the ancestral house and the Testator did not have any hope

from the plaintiff in future also; and the Will not only gives the reason for disinheriting the plaintiff but also gives the reason for executing the same in favour of the defendant.

27. Section 63 of the Act, 1925 only requires that the attestation shall be by two or more witnesses and it does not mandate that they must be from the testator's village, co-sharers or relatives; whereas the witnesses were known to the testator; while the trial court did not dispute the quality or credibility of the attesting witnesses and the scribe is competent and natural witness to a document which he has drafted. The allegations of undue influence was baseless and no evidence was led, except for a bald statement; and it is settled law that undue influence cannot be presumed but to be proved by the person who is alleging the same.

28. The perusal of the Will clearly indicates that defendant No.1 was the only surviving son of the Testator and he was living with him in his ancestral property and taking care of his father in the old age, including the agricultural property belonging to the testator.

29. The Will clearly stated that during the lifetime of the testator, he shall be owner of the property in question and thereafter defendant No.1 shall be the sole owner.

30. In view of the aforesaid, there are no suspicious circumstances and by examining one of the attesting witnesses of the Will, the requirement of law, both for discharging the onus to establish that there are no suspicious circumstances and also the execution of the Will as per law, has been discharged.

31. It is admitted between the parties that Sri Shankar Dutt Pathak-Testator was a teacher in Wesley High School, Azamgarh and used to get pay of Rs. 30/- to Rs. 60/- per month and his income being meager one, he had also undertaken other business and out of the income of the said business, the property in question was a self-acquired property and only a portion of the house marked as letter अ, ब, स, द in the plaint map, is ancestral.

Findings of the Trial Court-

32. The trial court had framed the following issues:-

1. Whether the will-deed, dated 6.12.1971 was duly executed by Shankar Dutt?
2. Whether on 6.12.71 Shankar Dutt was in a sound disposing capacity?
3. Whether the will-deed, dated 6.12.71 was executed under undue influence of the defendant no. 1?
4. Whether the property in dispute was acquired by Ishwar Dutt or was the exclusive property of Shankar Dutt?
5. Whether on 6.2.71 the plaintiff was the member of the joint Hindu family of Shankar Dutt or had separated, as alleged by the defendants?
6. Whether the will-deed, dated 6.2.71 is liable to be cancelled?
7. Whether the plaintiff is entitled to any share in the property in suit if so, what?
8. Whether the suit is barred by section 115 of the Evidence Act?
9. Whether the court-fee paid is insufficient?
10. Whether the plaintiff is right to sue?
11. Whether the suit is bad for misjoinder of the defendant 2 and 3?
12. To what relief, if any, is the plaintiff entitled?
13. Whether the Bhumidhari plots no. 89A, area 210 Kari and plot no. 86, area 300 Kari are also the subject matter in suit, as has been alleged by the defendant in W.S. para 7A2, If so, its effect?

33. The trial court decided the Issue Nos. 1, 2, 3 and 6 together and though considered the admitted position that Sri Shankar Dutt Pathak-

Testator bore all the expenses of studies of the plaintiff, including sending him abroad and the fact that the plaintiff was in Government service since 1949 and was well positioned in his service; but on account of the old age of the testator, the trial court proceeded to evaluate the evidence, which was led by the parties to examine the circumstances; and came to a conclusion and gave a finding that the defendants were unable to discharge their onus and the statement of DW-3 and DW-2 were not believable. The trial court also returned a finding that there is no witness of the village, in the Will and that the scribe who purchased the stamp on which the Will was written, he could not say whether any draft was prepared by the scribe, before writing the Will.

34. The witness only stated that Bhagwan Pandey, read over the deed to the Testator and thereafter the deed was taken to the registration office. However, the said Bhagwan Pandey was not examined, and he also did not go inside the registration office; therefore, it cannot be said that the Sub-Registrar read over and explained the deed to the executant.

35. While deciding the said issue, it was also the finding of the trial court that Sri Yogendra Nath Dixit-DW-2, who was scribe of the Will, had also signed the Will as the attesting witness, but he did not say that the other witness signed on the Will in his presence. He had also said that Bhagwan Pandey had not come with Shankar Datt Pathak-Testator but he came after half an hour of his arrival. DW-2 also stated that no paperwork was given by Shankar Datt Pathak-Testator to him in connection with the writing of the Will, and he had clearly stated that the Will was not read over to Shankar Datt Pathak-Testator but he himself had read the document.

36. Also, the statement of DW-3, i.e., Hari Datt Pathak, who is son of Shankar Datt Pathak-Testator and in whose favour the Will is written, was also not found satisfactory, as no evidence was led by the defendants that the Will deed was read over and explained to Testator and therefore the trial court gave a finding that under the circumstances of the case, it cannot be said that it was the mental act of Shankar Datt Pathak-Testator.

37. The trial court also gave a finding that the relationship is of father and son, therefore, there would be a presumption of fiduciary relationship and the deed does not appear to be a convincing deed; and defendants have not shown any valid reason to exclude the plaintiff from the succession.

38. The trial court on the aforesaid premise found it strange that no witness from the village was present and as such undue influence can be inferred; and on account of the old age, the Testator was not in a disposing capacity. The trial court also gave a finding that the execution of the Will was surrounded by suspicious circumstances and the condition of the testator's mind also appears to be feeble; and the onus was on the propounder of the Will to discharge any inference that there were suspicious circumstances in execution of the document, which has not been discharged by the defendants; and while on the other hand, the plaintiff's evidence in the form of various letters written by the Testator establishes that the relationship between the Testator and his grandson, i.e., the plaintiff, was good and accordingly his disinheritance from the line of succession, raises suspicious circumstances and the propounder of the Will has not been able to dislodge the said fact.

39. The trial court found that the statement of the plaintiff and the circumstances are sufficient to show that the Will was not genuine and the burden shifts on the defendants to prove that the Will is genuine and to remove all the suspicious circumstances which arose in the case; but the defendants had not been able to remove the said suspicious circumstances in this case by cogent and satisfactory evidence.

40. The trial court also relied heavily on the issue that neither the scribe or the Sub-Registrar read over the Will to the Testator and mere registration of the Will, may not prove that it is a genuine document.

41. In view of the aforesaid fact based findings, the trial court held that Shankar Datt Pathak-Testator was not in a sound disposing capacity on 06.12.1971 and the Will was executed under undue influence of defendant No.1.

42. The findings on the other issues are not contentious and parties have confined their argument to the issue of cancellation of the Will alone and as such, other issues are not being dealt with.

First Appellate Court

43. This Court finds that no separate issues were framed by the lower appellate court, and accordingly, as to whether the procedural irregularity of not framing the issue is fettered or not, shall be determined after examining the said judgment of the first appellate court; and it is also imperative to see that in case of failure on the part of the first appellate court in discharging its obligation of framing issues, whether it is prejudicial to either of the parties and wherein the parties have suffered on account of absence of knowledge that a particular question is in issue, resulting in failure to lead evidence on the point; or whether the parties were not only aware of the point in controversy but have also led evidence and advanced their submission; and in such cases, can the judgment of the first appellate court warrants interference on the issue of non-determination of some sufficient issue.

Discussion/Findings of The First Appellate Court

44. The first appellate court on the issue of cancellation of Will, which is only being pressed by the appellant herein, found that all the three defendants-appellants, had filed a joint written statement and pleaded that the allegations of the plaintiffs are wrong and that Shankar Dutt Pathak-Testator, had spent a lot of money on the higher education of plaintiff and also spent money, for sending him to America; and since 1949 when plaintiff became a government servant, he took his family and separated himself from the joint family, on account of which the Testator remained unhappy with the plaintiff and therefore he willingly executed the Will in favour of the defendants, with his full knowledge and consciousness.

45. Shankar Dutt Pathak was a teacher in a school and had a meager income, while he purchased the major portion of the property from his

business and as such the property was a self-acquired property. The defendants contested before the first appellate court on the premise that primarily the Will is a registered Will and has a presumption regarding its validity and also argued on the basis of the evidence, that the Will executed in their favour has been proved as per law, by examining one of the attesting witnesses, who had clearly stated regarding the execution of the Will, after the same being read by the Testator himself and that there did not appear to be any coercion or undue influence on the Testator at the time of execution of the said Will; and by doing so they have discharged their burden, as a propounder of the Will.

46. The court found that even after the execution of the Will, Sri Shankar Datt Pathak-Testator remained alive for six months and he wrote several letters, i.e., letter dated 16.12.1971 and 14.02.1972, etc., which demonstrated that he had full mental capacity, even after the execution of the Will dated 06.12.1971.

47. It also found that the defendants were the one who were taking care of the testator, i.e., their father, in the old age and therefore there is nothing in the circumstances that can be said to be suspicious; whereas the plaintiff was on government duties in different far away places like Jaipur, etc., being a Central Government servant and was posted throughout India.

48. It is also not the case of the plaintiff that he was taking care of his grandfather in times of his illness and on the other side he has taken away his wife and children with him; and it was the defendant who was taking care of his father, which only shows that there must have been great love and affection for the defendants; and since the plaintiff was given higher education by a petty teacher like Shankar Datt Pathak-Testator and money was also contributed by him in sending the plaintiff to America; therefore there is nothing suspicious in case, he has decided to not give his property to his grandson, who was otherwise well settled, but to his son who has taken care of him in the old age, while also

considering the money spent on the education of the plaintiff, which was instrumental in getting him a good government service, sufficient.

49. The reasoning given in the Will also indicates that it was the defendant who was taking care of the agricultural property, as well as Shankar Dutt Pathak-Testator, which reasoning does not appear to be very suspicious. The court also gave a considered finding that the registered Will cannot be cancelled on the basis of conjectures and surmises.

50. The first appellate court also found that no evidence was led by the plaintiff to demonstrate that the Testator was not well at the time of execution of the Will and the only evidence which was produced, i.e., of a neighbour Sri Shiv Dutt, who was found to be inimical to the defendants on the ground of several litigations.

51. The plaintiff had also not produced any Doctor or Vaidh who was treating Sri Shankar Dutt Pathak-Testator at the time of illness; and as such no evidence was produced to demonstrate that Sri Shankar Dutt Pathak-Testator, was unable to understand the contents of the Will and the documents.

52. The various money orders sent by the plaintiff, for an amount of Rs. 50/- or Rs. 200/-, cannot infer great love and affection of the Testator. Maybe the plaintiff was trying to repay the loan or money spent on him, for the purposes of sending him, for higher education to America. Similarly, if any money was sent to the family, during wedding etc. itself cannot be inferred to mean that the reasoning for his disinheritance from the normal line of succession, by way of Will in question, was suspicious.

53. The first appellate court, on the examination of the evidence of the defendants, has also given a finding that there is nothing material inconsistency in the statement of defense witnesses, which may go to the root of the matter. Statement has to be read as a whole and minor

contradictions are generally found in the illiterate villagers, i.e., witnesses like Bal Dutt.

54. The Plaintiffs herein have not pressed the issue of execution of the Will on the premise of forged signature etc., therefore this Court is not going into the said question.

55. The first appellate court, on examination of the evidence, also found that Shankar Dutt Pathak-Testator had included his self-acquired money and property in his ancestral property, and nothing to the contrary was even alleged in the plaint nor by any evidence. This factor has also not been pressed by the appellants, therefore nothing further is being reconsidered.

56. In consideration of the evidence and there being no material contradiction in the statement of the defendants, the first appellate court had set aside the judgment and decree of the trial court.

Issues:-

1. Whether, non framing of point of determination by the First Appellate Court, as provided under Order 14 Rule 1 of Civil Procedure Code (CPC), resulted in the prejudice to the plaintiff/appellant or not?
2. Whether in the absence of one of the alleged attesting witnesses to the Will, the compliance of Section 63 of the Indian Succession Act, 1925 was done?
3. Whether the Will was a conscious mental act of the alleged Testator, Shankar Dutta Pathak, when there is absolutely no evidence on behalf of the defendant that he was physically and mentally alert and fit to execute the Will?
4. Whether merely on account of the fact that the defendant was in a fiduciary capacity, over the assets and property of the Testator; and also the fact that the alleged Testator was an old man of 80 years, could it be held that suspicious circumstances existed as there was evidence to demonstrate, undue influence on the Testator, to nullify the Will?

Issue No.1

Whether, non framing of point of determination by the First Appellate Court, as provided under Order 14 Rule 1 of Civil Procedure Code (CPC), resulted in the prejudice to the plaintiff/appellant or not?

57. Learned Counsel for the appellant has submitted, that no point of determination was framed by the first appellate court, which resulted in prejudice to the appellant; and since Order XIV Rule (1) of Civil Procedure Code (CPC), provides for framing of issue, thereby non-framing of the issues, the judgment of the first appellate court stands vitiated.

58. For ready reference, Order XIV Rule 1 is reproduced below:-

***“ORDER XIV
SETTLEMENT OF ISSUES AND DETERMINATION OF SUIT
ON ISSUES OF LAW
OR ON ISSUES AGREED UPON***

1. Framing of issues. (1) Issues arise when a material proposition of fact or law is affirmed by the one party and denied by the other.

(2) Material propositions are those propositions of law or fact which a plaintiff must allege in order to show a right to sue or a defendant must allege in order to constitute his defence.

(3) Each material proposition affirmed by one party and denied by the other shall form the subject of distinct issue.

(4) Issues are of two kinds:

(a) issues of fact,

(b) issues of law.

(5) At the first hearing of the suit the Court shall, after reading the plaint and the written statements if any, and [after examination under rule 2 of Order X and after hearing the parties or their pleaders], ascertain upon what material propositions of fact or of law the parties are at variance, and shall thereupon proceed to frame and record the issues on which the right decision of the case appears to depend.

(6) Nothing in this rule requires the Court to frame and record issues where the defendant at the first hearing of the suit makes no defence.”

59. Before proceeding further, it is imperative to delve into the statutory provisions as well as the existing jurisprudence, which has been developed by this court as well as the Apex Court, while addressing the issue of importance of framing of issues.

60. Section 2 (ix) of CPC, 1908 (hereinafter referred to as CPC) provides that ‘judgment’ means the statement given by the Judge of the grounds of a decree or order.

61. Section 2(2) of the CPC, provides that ‘decree’ means the formal expression of an adjudication which, so far as regards the Court expressing it, conclusively determine the rights of the parties with regard to all or any of the matters in controversy in the suit and may be either preliminary or final.

62. In the case of **Makhan Lal Bangal v. Manas Bhunia & Ors**¹, the importance of framing of issues was considered and it was held that it is an imperative stage in any civil proceeding, as it narrows down the scope of trial, by separating wheat from chaff.

63. The issues framed indicate the real disputes between the parties which is to be determined.

64. In **Ramesh Chand Ardawatiya v. Anil Panjwani**², it was held that in a case where the Court is proceeding ex parte, the Court is not bound to frame issues under Order XIV and deliver the judgment on every issue, as required by Order XX Rule 5; yet the trial court should scrutinize the available pleadings and documents, consider the evidence adduced and would do well to frame the ‘points of determination’ and then only proceed to construct the ex parte judgment, dealing with the points at issue, one by one.

1 (2001) 2 SCC 652

2 (2003) 7 SCC 350

65. In the case of **Maya Devi v. Lalta Prasad**³, the Apex Court has held that in case the defendant has been proceeded against ex parte, it is a duty of the Court to pass to decree only after ascertaining the factual and legal veracity of the claim of plaintiff.

66. Therefore, what ensues from the aforesaid decision is that, it is imperative that issues must be framed in any civil proceedings, as it gives a clear indication to the parties, as to on what issues they are at loggerheads; and it is only after the knowledge of the issues, that the parties can lead evidence.

67. The Courts even examined that in case the proceedings are ex parte, then also it is well advised that the ‘point of determination’ must be framed and only after ascertaining the factual and legal veracity of the claim of the plaintiff, a judgment should be constructed.

68. In practice, the trial court first frames issue after examining the pleadings i.e. the focal point on which a trial is to proceed, while explicitly listing the ‘points of determination’.

69. Order XX Rule 5 CPC further reinforces this — if issues have been framed in the suit, the Court ‘shall state its finding or decision, with reasons, upon each separate issue’; and a judgment that omits discussion of the issues in dispute is defective, as the judgment must answer each such dispute (issues).

70. The points of determination in a judgment are essentially the legal and factual issues the Court must resolve.

71. The basic intent for providing this procedural aspect, is that the parties must know the issues, which shall be considered and form the basis of the decision, so that they can lead evidence; and in absence of such framing of issues and indication to the contesting parties, they may later on allege that no opportunity of adducing the evidence was given to them; but where the parties go to trial with knowledge that a particular question is in issue, though no specific issue has been framed thereon and adduce evidence relating thereto, later on merely on the aforesaid

3 (2015) 5 SCC 588

technicalities of the procedural requirement, one cannot argue that the entire trial, has vitiated. (**Ref: Nagubai Ammal & Ors. v. B. Shama Rao & Ors.**⁴)

72. In view of the aforesaid what can be culled out is that, the test for finding whether omission to frame issues cause prejudice to the parties or not, can be made on the touchstone, as to whether parties that go to trial had knowledge that-

(i) a particular question is in issue; and

(ii) parties had opportunity to lead evidence on that issue.

73. The Apex Court in the recent case of **Pramod Shroff v. Mohan Singh Chopra**⁵, reiterating the aforesaid test, considered the various judgments and laid down the ratio that omission to frame an important issue may sometimes cause prejudice to parties, resulting in failure to lead evidence on point; but where parties are not only aware of the point in controversy but also led evidence and advanced their submission, the courts are not justified in interfering with the findings of facts of the courts below. (**Ref: Sayeda Akhtar v. Abdul Ahad**⁶)

74. The Apex Court in the case of **Rishabh Chand Jain & Anr. v. Ginesh Chandra Jain**⁷, also held that procedural irregularities of not framing issues was inconsequential; what is to be seen is the effect and not the procedure.

75. The effect of Order XIV Rule 1 was considered and the following observations were made:-

“13. In terms of Section 2(2) of the Code, in case, the court adjudicating the case, conclusively determines the rights of the parties with regard to any one or more or all of the matters in controversy in the suit, the requirement of decree is satisfied. Such determination can be preliminary or final. Rejection of a plaint is deemed to be a decree under Section 2(2) of the Code. Only two orders are excluded - (i) any adjudication from which an appeal lies as an appeal from an

4 (1956) 1 SCC 698

5 2026 SCC OnLine SC 598

6 (2003) 7 SCC 52

7 (2016) 6 SCC 675

order, and (ti) any order of dismissal for default. Order 43 of the Code has provided for appeals from orders. The impugned order does not come under Order 43. The order has conclusively determined the rights of the parties with regard to one of the matters in controversy in the suit viz. res judicata. True, it is not an order passed on framing an issue. But at the same time, there is adjudication on the controversy as to whether the suit is barred by res judicata in the sense there is a judicial determination of the controversy after referring to the materials on record and after hearing both sides.

14. The impugned order dismissing the suit on the ground of res judicata does not cease to be a decree on account of a procedural irregularity of non-framing an issue. The court ought to treat the decree as if the same has been passed after framing the issue and on adjudication thereof, in such circumstances. What is to be seen is the effect and not the process. Even if there is a procedural irregularity in the process of passing such order, if the order passed is a decree under law, no revision lies under Section 115 of the Code in view of the specific bar under sub-section (2) thereof. It is only appealable under Section 96 read with Order 41 of the Code.”

76. In the present appeal, the appellants have confined their challenge to the registered Will, mainly on the ground that on account of old age of the Testator, i.e. being 81 years, itself is a sufficient fact, to indicate that the Will was executed under the suspicious circumstances, coupled with the fact that the fiduciary relationship of father and son, would suffice in the facts of the present case.

77. The plaintiffs have also alleged that the narration in the Will, to the effect that the plaintiff was not taking care of the Testator and in future also he does not have any hope, is another factor to indicate that there was some undue influence on the Testator to execute the Will; since they had discharged their burden to indicate the suspicious circumstances or to create a cloud over the Will, while adducing evidence to the effect that since 1949 till the death of the Testator in the year 1972, there was regular communication by way of letters between the plaintiff and the Testator, and it can be seen that there was never any hard feelings or

complaints between the parties, or even after the execution of the Will, when communication was made by way of letters, the Testator never indicated that he has excluded the plaintiff from the natural line of succession, by way of execution of the Will in question.

78. This issue was broadly framed by the trial court as Issue Nos. 1, 2, 3 and 6 and dealt with together. The aforesaid fact itself establishes that the plaintiff and the defendant were very much aware of the issues which are being considered by the trial court, for the purposes of construction of the judgment; and accordingly the parties had led their evidence.

79. It is not the case of the plaintiff-appellants that they were taken by surprise, with respect to any issue or that they were prevented for want of knowledge with respect to any issue, to lead any evidence; and as such the twin test which has been considered by the court in the preceding paragraph are met.

80. The plaintiff-appellants cannot allege any kind of prejudice being caused to them for want of knowledge, by leading the evidence on the issues.

81. It is trite in law, that once the plaintiff and the defendant are aware of the issues and the grounds which are being sought to be raised, in relation to a relief being claimed, and they have led evidence on the said issue, the mere procedural irregularity of not following the mandate of Order XIV of CPC, itself cannot be a ground to vitiate the finding of fact and the decision on merit by the court. It is imperative that one of the parties will have to demonstrate that by non-framing of the issues, as per the procedure under CPC, a prejudice has been caused.

82. There cannot be any occasion to interfere in the judgment of the courts, which has dealt the factual as well as the legal issue and has given a finding with reasoning in the judgment.

83. Therefore, this Court has no hesitation in holding that by mere non-adherence of Order XIV of CPC, the first appellate court's judgment is liable to be vitiated or interfered with by this Court.

Issue No. 2

Whether in the absence of one of the alleged attesting witnesses to the Will, the compliance of Section 63 of the Indian Succession Act, 1925 was done.

84. The perusal of Section 63 of the Act, 1925 indicates that every Testator shall sign or affix his mark to the Will and shall be so placed that it shall appear that it was intended thereby to give effect to the writing as a Will.

85. The Will is required to be attested by two or more witnesses, each of whom must confirm that they have seen the Testator's sign or affix his mark to the Will and by the direction of the Testator, each of the witnesses shall sign the Will in the presence of the Testator; but it shall not be necessary that more than one witness be present at the same time, and no particular form of attestation shall be necessary.

86. For ready reference, Section 63 of the Act, 1925 is reproduced below: -

“63. Execution of unprivileged Wills.—

Every Testator, not being a soldier employed in an expedition or engaged in actual warfare, or an airman so employed or engaged, or a mariner at sea, shall execute his Will according to the following rules:—

(a) The Testator shall sign or shall affix his mark to the Will, or it shall be signed by some other person in his presence and by his direction.

(b) The signature or mark of the Testator, or the signature of the person signing for him, shall be so placed that it shall appear that it was intended thereby to give effect to the writing as a Will.

(c) The Will shall be attested by two or more witnesses, each of whom has seen the Testator sign or affix his mark to the Will or has seen some other person sign the Will, in the presence and by the direction of the Testator, or has received from the Testator a personal acknowledgement of his signature or mark, or the signature of such other person; and each of the witnesses shall sign the Will in the presence of

the Testator, but it shall not be necessary that more than one witness be present at the same time, and no particular form of attestation shall be necessary."

87. It is an admitted fact that DW-2 was the attesting witness to the Will and in his statement he has specifically stated that the Testator had read the Will on his own and thereafter had signed in front of him, and thereafter had asked DW-2 to sign as an attesting witness. The other witness had also signed in front of him. He had also stated that there was no coercion or influence on the Testator and he was of sound mind at the time of execution of the Will.

88. There was nothing in his cross-examination also which could have contradicted his statement, and merely because he was not able to give the details of the family members of the beneficiaries of the Will, could not be considered as a chink in his armor. He had given specific details regarding the execution and the registration of the Will and there is also an evidence that the Testator wanted execution of the Will, in favour of his only surviving son; which cannot be termed as suspicious circumstances.

89. He had given minute details, to the extent that when the Will was given to the Testator, he had removed his glasses as his distant vision was only impaired and he could read. He had also stated that he had accompanied the Testator before the Registrar and the registration took 10 to 12 minutes, where identification mark of Shankar Dutt and Bhagwan Dutt was taken and he had also signed, whereafter he received the receipt of the same and later on the Testator, i.e. Shankar Dutt, had come to take the registered copy of the Will which was obtained by him; and as such there was no coercion or pressure on the Testator of the Will. He had also stated that he knew Shankar Dutt as he was a student in the same school where Shankar Dutt was teaching and later on he had retired. He had also stated that he at times met Shankar Dutt in the market.

90. In the case of **Naresh Charan Das Gupta Vs. Paresh Charan Das Gupta**⁸, it was held that burden of proving undue influence rests squarely on the party who alleges it; and merely because a person may be in a position to influence the testator, itself cannot be perceived as the actual exercise of undue influence; but it must be proved that the said power was actually exercised.

91. A fiduciary relationship, such as a son caring for a father, does not automatically lead to a presumption of undue influence in testamentary cases; and accordingly the presumption by the Trial Court, merely on the basis of a relationship of a son and a father, was erroneous. There was no specific pleadings of act of coercion or fraud and the reversal of the burden by the Trial Court, was a fundamental error. For ready reference paragraphs 6a, 8, 10 to 12 in the case of **Naresh Charan Das Gupta** (supra) is reproduced below:-

“6a. We have been taken through the entire correspondence that passed between the testator and the appellant and the members of his family. It shows that the testator was solicitous about the welfare of the appellant, and was enquiring about his health and sending him on occasions medicines; that he was affectionately disposed towards his children and was sending them presents of cloth; that latterly he had so far modified his attitude towards the wife of the appellant as to invite her and her children to Calcutta; that he himself stayed with them for some time at Jamshedpur and was giving advice to the appellant on matters connected with his employment. It was argued that there was thus a gradual change of heart on the part of the father towards the appellant and the members of his family, that the recitals in the will could not be reconciled with this change of attitude, and that they must have been inspired by respondent 1.

We are unable to agree. It is one thing for a father who feels that he has been wronged by a disobedient son to wish him well in life, and quite another thing to give him any of his properties. In the whole of the correspondence which has been read to us, there is nothing to suggest that he wanted the appellant to share in the estate. On the other hand, there are indications that even when the appellant was in financial

8. (1955) AIR (SC) 363

difficulties, the testator considered that he was under no sort of obligation to come to his help. Vide Exs. 5(c) and C(1). It may be mentioned that after making the will on 28-11-1943 the testator continued to correspond with the appellant and the members of his family precisely in the same terms as before. Vide Exs. B(2), C(4) and A(10). That shows that the two currents of natural affection and settlement of properties flowed in distinct channels, and that the change in the course of the one had no effect on the direction of the other.

8. It was also argued that the dispositions in the will were unnatural in that the appellant had been practically disinherited and his children altogether ignored. This by itself cannot lead to any inference of undue influence on the part of the first respondent. Having regard to the character of the testator and his feelings in the matter it is not a matter for surprise that he should have cut off the appellant with a small legacy. It must also be mentioned that the net value of the assets as given in the probate petition is Rs. 23,865-10-9 and if the other legacies and charges are deducted, what was bequeathed to the first respondent cannot be said to be very considerable. It also appears that at that time his salary was Rs. 60/- per mensem and that he had a number of children, whereas the appellant is stated to have had a basic salary of Rs. 250/- per mensem then. Respondent 1, his wife and children have all along been dependants of the testator, whereas the appellant had lived apart from him from 1920. And it is not unnatural for the testator so to order the distribution of his estate as to secure the continuance of the existing state of affairs. The terms of the will, therefore, cannot be relied on as intrinsic evidence of undue influence, as contended for by the appellant.

10. It is elementary law that it is not every influence which is brought to bear on a testator that can be characterised as "undue". It is open to a person to plead his case before the testator and to persuade him to make a disposition in his favour. And if the testator retains his mental capacity, and there is no element of fraud or coercion - it has often been observed that undue influence may in the last analysis be brought under one or the other of these two categories - the will cannot be attacked on the ground of undue influence. The law was thus stated by Lord Penzance in - 'Hall v. Hall', (1868) 1 P& D 481 at p. 482 (C):

"But all influences are not unlawful. Persuasion, appeals to the affections or ties of kindred, to a sentiment of gratitude for past services, or pity for future destitution, or the like, - these are all legitimate and may be fairly pressed on a testator. On the other hand, pressure of whatever character, whether acting on the fears or the hopes, if so exerted as to overpower the volition without convincing the judgment, is a species of restraint under which no valid will can be made. Importunity or threats, such as the testator has the courage to resist, moral command asserted and yielded to for the sake of peace and quiet, or of escaping from distress of mind or social discomfort, - these, if carried to a degree in which the free play of the testator's judgment, discretion, or wishes is overborne, will constitute undue influence, though no force is either used or threatened. In a word, a testator may be led, but not driven; and his will must be the offspring of his own volition, and not the record of some one else's".

Section 61 of the Indian Succession Act (39 of 1925) enacts that,

"A will or any part of a will, the making of which has been caused by fraud or coercion, or by such importunity as takes away the free agency of the testator, is void." Illustration (vii) to the section is very instructive, and is as follows :

"A, being in such a state of health as to be capable of exercising his own judgment and volition, B uses urgent intercession and persuasion with him to induce him to make a will of a certain purport. A, in consequence of the intercession and persuasion, but in the free exercise of his judgment and volition, makes his will in the manner recommended by B. The will is not rendered invalid by the intercession and persuasion of B."

11. Even if we accept the evidence of Indira, the case would, on the facts, fall within this Illustration. It is not disputed that the testator was in full possession of his mental faculties. There is no proof that the first respondent did or said anything which would have affected the free exercise by the testator of his volition. On the other hand, it is proved that the first respondent had no act or part in the preparation, execution, or registration of the will. It is a holograph will, and the evidence of P. Ws. 1 and 2 is that it was the testator himself who made all the arrangements for its execution, and that it was actually executed at the residence of P. W. 1. The

document was presented for registration by the testator, and he kept it with was presented for registration by the testator, and he kept it with himself, and it was taken out of his cash box after his death. He lived for nearly a year after the execution of the will, and even on the evidence of Indira, he was often thinking of it, and discussing it, but declared that it should stand. The cumulative effect of the evidence is clearly to establish that the will represents the free volition of the testator, and that it is not the result of undue influence by the first respondent or his relations. It should be mentioned that Indira herself sought to enforce her rights under the will shortly after the death of the testator, and that the appellant also obtained payment of legacy under the will for a period of 15 months. No ground has been established for our differing from the High Court in its appreciation of the evidence, and we agree with its conclusion that the will is not open to question on the ground of undue influence.

12. It was also argued for the appellant that there was no proof that the will was duly attested as required by S. 63, Indian Succession Act, and that it should therefore be held to be void. P. Ws. 1 and 2 are the two attestors, and they stated in examination-in-chief that the testator signed the will in their presence, and that they attested his signature. They did not add that they signed the will in the presence of the testator. Now, the contention is that in the absence of such evidence it must be held that there was no due attestation. Both the Courts below have held against the appellant on this contention.”

92. The first appellate court had found that, the perusal of Section 61 of the Act, 1925, and Section 104 to 114 of the Evidence Act and in consideration of the various case laws on the points, initially there was a heavy burden on the plaintiff and only thereafter the burden would shift onto the defendants, to remove any suspicious circumstances, with regard to the execution of the registered Will, as a propounder of the Will.

93. In view of the aforesaid, the defendant had clearly established by way of evidence of DW-2, who is admittedly the attesting witness, that in his presence the Testator had signed the Will and on his direction the

attesting witness put his signature; as such requirement of Section 63 of the Act, 1925 has been met.

94. Learned Counsel for the Appellant has relied upon a decision of the Apex Court in the case of **Rani Purnima Debi Vs. Kumar Khagendra Narayan Deb**⁹. Placing reliance on paragraph 5 and 7, the learned Counsel for the Appellant has submitted that the manner of proving of a Will does not differ from that of proving any other document, except as to the special requirement of attestation prescribed in the case of a Will by Section 63 of Act, 1925. Initially the onus is on the propounder of the Will and also to establish the absence of suspicious circumstances surrounding the execution of the Will. If there are allegations of undue influence, fraud or coercion, the onus would be on the person alleging the same.

95. Learned Counsel for the Appellant has submitted, that suspicious circumstances can be anything e.g. an alleged signature of the Testator in a shaky and doubtful manner, Testator's mind might appear very feeble and debilitated, the dispossessions made in the Will might appear to be unnatural, improbable or unfair or the dispossession may not be the result of the Testator's free Will and mind. He submits that the disposition in the Will with respect to the relation of the plaintiff and the Testator was absolutely improbable and unfair, keeping in view the evidence led by the plaintiff to the effect that the Testator was in continuous conversation with him and used to disclose every detail regarding his Will.

96. For ready reference paragraph 5 and 7 is reproduced below:

“5. Before we consider the facts of this case it is well to set out the principles which govern the proving of a Will. This was considered by this Court in H. Venkatachala yengar v. B. N. Thimmajamma, (1959) Supp (1) SCR 426. It was observed in that case that the mode of proving a Will did not ordinarily differ from that of proving any other document except as to the special requirement of attestation prescribed in the case of a Will by Section 63 of the Indian Succession

9 AIR 1962 Supreme Court 567

Act. The onus of proving the Will was on the propounder and in the absence of suspicious circumstances surrounding the execution of the Will proof of testamentary capacity and signature of the Testator as required by law was sufficient to discharge the onus. Where, however, there were suspicious circumstances, the onus would be on the propounder to explain them to the satisfaction of the Court before the Will could be accepted as genuine. If the caveator alleged undue influence, fraud or coercion, the onus would be on him to prove the same. Even where there were no such pleas but the circumstances gave rise to doubts, it was for the propounder to satisfy the conscience of the Court. Further, what are suspicious circumstances was also considered in this case. The alleged signature of the Testator might be very shaky and doubtful and evidence in support of the propounder's case that the signature in question was the signature of the Testator might not remove the doubt created by the appearance of the signature.

The condition of the Testator's mind might appear to be very feeble and debilitated and evidence adduced might not succeed in removing the legitimate doubt as to the mental capacity of the Testator; the dispositions made in the Will might appear to be unnatural, improbable or unfair in the light of relevant circumstances; or the Will might otherwise indicate that the said dispositions might 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 was accepted as the last Will of the Testator. Further, a propounder himself might take a prominent part in the execution of the Will which conferred on him substantial benefits. If this was so it was generally treated as a suspicious circumstance attending the execution of the Will and the propounder was required to remove the doubts by clear and satisfactory evidence. But even where there were suspicious circumstances and the propounder succeeded in removing them, the Court would grant probate, though the Will might be unnatural and might cut off wholly or in part near relations.

7. Let us now turn to the facts relating to the execution of this Will. We have already pointed out that the High Court was of the view that there were suspicious circumstances attending the execution of the Will and that it was an unnatural Will. The Testator left behind him his widow and his married

daughter (who are appellants before us) and an unmarried sister who was dependent upon him. Besides these, the Testator had a number of other relations who were much nearer to him than the respondent. Even if we leave out of account the married daughter and the other nearer relations, the widow and the sister were certainly expected to be properly provided for by the Testator. It is not in dispute that the relations between the Testator and his wife and sister were good. In these circumstances, we should have expected something better than what is provided in the Will for these two. All that the Will says is that the wife and the sister would be suitably maintained by the respondent during their life-time. No amount is specified which should be given to these two ladies as maintenance and no charge is created on the properties left by the Testator which were considerable. In effect, the two ladies were left to the tender mercies of the respondent in the matter of their maintenance. Further the result of this Will is that the daughter would be completely disinherited. The Testator had a number of children but all had died many years before and only one daughter was alive at the time of his death. She was married and on behalf of the propounder it is said that the relations between the Testator and her husband were not very happy. The evidence, however, does not show that the relations between the Testator and his son-in-law were particularly strained at the time of the execution of the Will. In any case there is no satisfactory evidence to show that relations between the Testator and his daughter were bad, even if the relations between him and his son-in-law were not of the best. In the circumstances we should have expected the Testator to make some provision for the daughter, particularly when it is said that she was not well-off. There is no doubt therefore that the Will is most unnatural and that is a suspicious circumstance which must be satisfactorily explained before the respondent can get letters of administration.”

97. The Court is in complete agreement with the ratio laid down by the **Rani Purnima Debi** (*supra*) but the dispossession in the Will, in the facts of the present case, under no circumstances can be said to be unnatural, improbable or unfair, as already discussed herein above.

98. In the case of **Savithri and others Vs. Karthyayani Amma and others**¹⁰, it was held that the execution of the will itself is for altering the natural mode of succession and as such the exclusion of the natural heirs or being given a lesser share, by itself and without anything more, cannot be held to be a suspicious circumstance. This is especially true when the bequest is made in favour of offspring who care for the testator.

99. For ready reference paragraphs 11, 15, 19 and 20 is reproduced below:-

“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.

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 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 Others, (2006) 11 SCALE 148].

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.

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

10. 2008 AIR (SC) 300

"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 suspicious circumstances. Suspicion means doubt, conjecture or mistrust. But the fact that natural heirs have either been excluded or a lesser share has been given to them, by itself without anything more, cannot be held to be a suspicious circumstance, especially in a case where the bequest has been made in favour of an offspring...."

100. In the case of **Mahesh Kumar (Dead) by L.Rs. Vs. Vinod Kumar and others**¹¹, it was held that a suspicion or a doubt about a Will's genuineness is more likely to arise, if the bequest is in favour of a third party, rather than a natural heir. For ready reference paragraphs 30 of the **Mahesh Kumar** (supra) is reproduced below:-

"30. The fact that the appellant was present at the time of execution of Will dated 10.2.1992 and that the testator did not give anything to respondent Nos. 1 and 2 from his share in the joint family property are not decisive of the issue relating to genuineness or validity of the Will. The evidence produced by the parties unmistakably show that respondent No. 2 had separated from the family in 1965 after taking his share and respondent No. 1 also got his share in the 2nd partition which took place in 1985. Neither of them bothered to look after the parents in their old age. The attitude of respondent Nos. 1 and 2 left Shri Harishankar and his wife with no choice but to live with the appellant, who along with his wife and children took care of the old parents and looked after them during their illness. Therefore, there was nothing unnatural or unusual in the decision of Shri Harishankar to give his share in the joint family property to the appellant. Any person of ordinary prudence would have adopted the same course and would not have given anything to the ungrateful children from his / her share in the property."

101. Similarly in the case of **Swarnalatha and others Vs. Kalavathy and others**¹², the Hon'ble Apex Court has held that the exclusion of a natural

11. 2012 (4) SCC 387

12. Civil Appeal No. 1565 of 2022 arising out of SLP (C) No. 13840 of 2019

heir from a bequest cannot, by itself, be a ground to hold that there are suspicious circumstances. The court cannot assess whether the distribution of property was fair and equitable to all children.

102. The said judgment reinforces the principle that the testator has absolute freedom of disposition and the courts cannot engage in any kind of analysis of the fairness of the Will, which is beyond its jurisdiction; and the role is limited to determining due execution and testamentary capacity, not to applying a standard of fairness or questioning the testator's reasons for excluding, is well settled.

103. For ready reference paragraph 25 of **Swarnalatha** (supra) is reproduced below.

“25. The law relating to suspicious circumstances surrounding the execution of a Will is already well-settled and it needs no reiteration. It is enough if we make a reference to one of the recent decisions of this Court in Kavita Kanwar vs. Mrs. Pamela Mehta and Ors.¹ where this Court referred to almost all previous decisions right from H. Venkatachala Iyengar vs. B.N. Thimmajamma². But cases in which a suspicion is created are essentially those where either the signature of the testator is disputed or the mental capacity of the testator is questioned. This can be seen from the fact that almost all previous decisions of this Court referred to in Kavita Kanwar (supra) list out circumstances, which in the context of the lack of sound and disposing state of mind of the testator, became suspicious circumstances. In the matter of appreciating the genuineness of execution of a Will, there is no place for the Court to see whether the distribution made by the testator was fair and equitable to all of his children. The Court does not apply Article 14 to dispositions under a Will.”

104. In the case of **H. Venkatachala Iyengar Vs. B.N. Thimmajamma and others**¹³, it was held that it is the propounder's duty to prove due execution and dispel any legitimate suspicion; and a Will is not rendered invalid merely because it alters the normal line of succession in favour of one heir.

13. 1959 AIR (SC) 443

105. It is no doubt that the registered Will was in favour of the defendants/opposite party and the law requires that the execution of the Will has to be duly proved as per Section 63 of the Act, 1925; but once having done so, the trial court erred in completely relying upon the evidence of the plaintiff, by way of various letters being exchanged between the plaintiff and his grandfather, to judge the exclusion of the plaintiff from the normal line of succession; and as indicated herein above, that it is not merely on ground of a fiduciary relationship that the exclusion can be looked as a suspicious circumstance; especially when the testator bequeaths property to one of his sons, who cared for him in his old age.

106. For ready reference paragraphs 18 to 20 is reproduced below:-

18. What is the true legal position in the matter of proof of wills ? It is well known that the proof of wills presents a recurring topic for decision in Courts and there are a large number of judicial pronouncements on the subject. The party propounding a will or otherwise making a claim under a will is no doubt seeking to prove a document and, in deciding how it is to be proved, we must inevitably refer to the statutory provisions which govern the proof of documents. Sections 67 and 68, Evidence Act are relevant for this purpose. Under S. 67, if a document is alleged to be signed by any person, the signature of the said person must be proved to be in his handwriting, and for proving such a handwriting under Ss. 45 and 47 of the Act the opinions of experts and of persons acquainted with the handwriting of the person concerned are made relevant. Section 68 deals with the proof of the execution of the document required by law to be attested; and it provides that such a document shall not be used as evidence until one attesting witness at least has been called for the purpose of proving its execution. These provisions prescribe the requirements and the nature of proof which must be satisfied by the party who relies on a document in a Court of law. Similarly, Ss. 59 and 63 of the Indian Succession Act are also relevant. Section 59 provides that every person of sound mind, not being a minor, may dispose of his property by will and the three illustrations to this section indicate what is meant by the expression "a person of sound mind" in the context. Section 63 requires

that the testator shall sign or affix his mark to the will or it shall be signed by some other person in his presence and by his direction and that the signature or mark shall be so made that it shall appear that it was intended thereby to give effect to the writing as a will. This section also requires that the will shall be attested by two or more witnesses as prescribed. Thus the question as to whether the will set up by the propounder is proved to be the last will of the testator has to be decided in the light of these provisions. Has the testator signed the will ? Did he understand the nature and effect of the dispositions in the will ? Did he put his signature to the will knowing what it contained ? Stated broadly it is the decision of these questions which determines the nature of the finding on the question of the proof of wills. It would prima facie be true to say that the will has to be proved like any other document except as to the special requirements of attestation prescribe by S. 63 of the Indian Succession Act. As in the case of proof of other documents so in the case of proof of wills it would be idle to expect proof with mathematical certainty. The test to be applied would be the usual test of the satisfaction of the prudent mind in such matters.

19. However, there is one important feature which distinguishes wills from other documents. Unlike other documents the will speak from the death of the testator, and so, when it is propounded or produced before a Court, the testator who has already departed the world cannot say whether it is his will or not; and this aspect naturally introduces an element of solemnity in the decision of the question as to whether the document propounded is proved to be the last will and testament of the departed testator. Even so, in dealing with the proof of wills the Court will start on the same enquiry as in the case of the proof of documents. The propounder would be called upon to show by satisfactory evidence that the will was signed by the testator, that the testator at the relevant time was in a sound and disposing state of mind, that he understood the nature and effect of the dispositions and put his signature to the document of his own free will. Ordinarily when the evidence adduced in support of the will is disinterested, satisfactory and sufficient to prove the sound and disposing state of the testator's mind and his signature as required by law, Courts would be justified in making a finding in favour of the

propounder. In other words, the onus on the propounder can be taken to be discharged on proof of the essential facts just indicated.

20. There may, however, be cases in which the execution of the will may be surrounded by suspicious circumstances. The alleged signature of the testator may be very shaky and doubtful and evidence in support of the propounder's case that the signature in question is the signature of the testator may not remove the doubt created by the appearance of the signature; the condition of the testator's mind may appear to be very feeble and debilitated; and evidence adduced may not succeed in removing the legitimate doubt as to the mental capacity of the testator; the dispositions made in the will may appear to be unnatural, improbable or unfair in the light of relevant circumstances; or, the will may otherwise indicate that the said dispositions may not be the result of the testator's free will and mind. In such cases the Court would naturally expect that all legitimate suspicions should be completely removed before the document is accepted as the last will of the testator. The presence of such suspicious circumstances naturally tends to make the initial onus very heavy; and, unless it is satisfactorily discharged, Courts would be reluctant to treat the document as the last will of the testator. It is true that, if a caveat is filed alleging the exercise of undue influence, fraud or coercion in respect of the execution of the will propounded, such pleas may have to be proved by the caveators; but, even without such pleas circumstances may raise a doubt as to whether the testator was acting of his own free will in executing the will, and in such circumstances, it would be a part of the initial onus to remove any such legitimate doubts in the matter.

107. The suspicious circumstances can be brought home by the person who alleges, in case the testator's signature was disputed or his mental capacity being questioned, is also settled.

108. The appellant having abandoned the ground pertaining to the testator's signature and though questioned the mental capacity of the testator, but however, did not lead any evidence to the said effect and on the contrary his ignorance about the treatment also, did not inspire much confidence about his allegations regarding the mental capacity of the testator; and on the contrary the respondent/opposite party led specific

evidence by way of statement of DW-2, to establish the mental capacity of the testator and his consciousness about the execution of the Will; and as such in consideration to the principle, that the testator has absolute freedom of disposition, this Court does not find the reversal of the finding of the trial court by the first appellate court, erroneous.

109. The Counsel for the Appellant has also relied upon a decision of a Coordinate Bench of this Court in **Hardwar Vs. Smt. Kulwanta in Second Appeal No. 3080 of 1981**¹⁴, to submit that the burden of proof clearly rested upon defendants, as they were propounder of the Will. He has placed reliance on Paragraph nos. 12, 23, 24 and 38.

110. For ready reference the same are quoted herein below:

“12. In my view, learned counsel for the appellant is misconstruing the concept of term "burden of proof" and "onus" by identifying the two as synonymous. The onus probandi i.e. "Burden of proof" lies upon a person who is bound to prove the fact and it never shifts.

23. In other words, undue influence means domination of a weak mind by strong mind to an extent which causes the behaviour of the weaker person to assume an unnatural character. Undue influence is any influence brought to bear upon a person entering into an agreement or consenting to a disposal of property which in normal circumstances one would not have done or agreed to do. The essence of "undue influence" is that a person is constrained to do against his Will, but for the influence he would have refused to do it left to exercise his own judgment. It is an influence which acts to the injury of a person who is swayed by it and which compels that person to do something which he would not have done, if he had been a free person.

24. Undue influence does not connote excessive, inordinate or disproportionate influence but something wrongful. Acts of undue influence sometime range themselves under either coercion or fraud. Person having influence over another and by that influence induces the Will of the other to his subjection, then it is such coercion as is sufficient to constitute undue influence. It is an influence whereby control is obtained over the mind of the victim by insidious

¹⁴ 2013 AIR Allahabad 129

approaches and seductive artifices. It may arise where parties stand to one another in a relation of confidence which puts one of them in a position to exercise over the other, an influence, which may be perfectly natural and proper in itself, but, is capable of being unfairly used. The question whether a party is in a position to dominate other is broadly a question of fact. No general law can be laid down as to when one would be in a position to dominate over the Will of the other owing to complexities of human nature and relations. It may arise due to personal relationship or as a result of circumstances, in which the contract was entered into. In (Inchenoriah Binte Mohamed Tahir Vs. Shaik Allie bin Omar bin Abdullah Bahashuan) AIR 1929 Privy Council 3, it was held, where the donor is not only an old lady of feeble health but is also entirely dependant upon the donee, her nephew, even for food and clothes, there is sufficient relation between them to presume undue influence being responsible for bringing about the gift.

38. Here, I may also observe that law does not require plaintiff to establish positively, that, in fact, the deed had been obtained by exercising undue influence. The plaintiff cannot be expected to set out in detail the element of undue influence in the plaint and to bring forth documentary or oral evidence to prove each and every aspect, much of which depends and originated from human behaviour, relation, etc.. It was enough to point out that defendant was in a position to dominate the Will of vendor and he obtained an unfair advantage by using that position. I am fortified in expressing above view, by judgment of this Court in Sher Singh and Ors. Vs. Pirthi Singh and Ors. 1975 Allahabad 259.”

111. It is no doubt that the “burden of proof” lies upon the person who is bound to prove the fact and it never shifts; but a person who asserts a particular fact, has to prove the same and it is only after that the burden is discharged; and in the present case, this Court has already held that there has been compliance of Section 63 of the Act, 1925 by producing the attesting witness DW-2 and also there being no contradiction in his cross-examination; and such the burden dispelling suspicious circumstances, has been discharged.

112. Learned Counsel for the appellant has lastly relied upon a decision in the case of **Chinu Rani Ghosh Vs. Subhash Ghosh and Ors.**¹⁵ (SLP (C) No. 23721 of 2022) dated 11.12.2024, to submit that the statement of the scribe, who is also an attesting witness, cannot be considered as a compliance to Section 63 of the Act, 1925. For ready reference paragraph 16 is reproduced below:

“16. On a perusal of Will (Ext.C), which is a testament of Smt. Kanaki Bala Ghosh dated 15.05.1995, it is no doubt clear that in the insofar as the witnesses columns are concerned, the names of the Shri Gopal Devnath, Shri Nilmohan Sarkar and Shri Maran Dev Nath have been noted. As far as the scribe of the said testament is concerned, the name of Shri Subajit Roy has been noted. We may at this stage itself state that the object and purpose by which a Will is attested by a witness is quite distinct from the object and purpose by which a scribe would attest a Will; an attesting witness would attest a Will on the request made by the Testator for the purpose of due execution of the Will and in accordance with section 63 of the Succession Act. But the object and purpose with which a scribe or for that matter, a draftsman of the Will would attest the Will is not the same. Therefore, in the instant case, the evidence of Shri Subajit Roy (DW-2) cannot be construed as that of an attesting witness.”

113. The facts of the case in **Chinu Rani Ghosh** (*supra*) is distinguishable. In the said case, there were three names in the column of the witness and the fourth person was scribe; and the Apex Court in consideration of the object and purpose of attestation by witness, and the object and purpose by which scribe would attest the Will, being different in the facts of the said case, found that the scribe did not conform with the requirement of Section 63 of the Act, 1925, as a witness would only sign in the presence of the Testator and on his request, whereas the scribe and for that matter a draftsman of the Will, who attest the Will, would sign in a different capacity.

114. Since, there were 3 attesting witnesses to the Will deed and one of them was produced to prove the Will, whose evidence was found

¹⁵ 2024 Supreme (SC) 1370

untrustworthy and therefore a reliance was placed upon the testimony of the scribe to prove the Will; the Apex Court in the said factual background held that, the scribe not being one of the attesting witnesses, his evidence cannot be that of attesting witness.

115. In the case of **Mathew Oommen Vs. Suseela Mathew**¹⁶, and in the case of **Seth Beni Chand Vs. Kamla Kunwar**¹⁷, it was held that scribe of the Will deed is a competent attesting witness and once his name or signature appears in the column of the attesting witness, his evidence as attesting witness is proper.

116. For ready reference para-8 of **Mathew Oommen** (supra) and paras-8 and 9 of **Seth Beni Chand** (supra) is reproduced below:-

“8. Another circumstance mentioned by the learned counsel for the respondent for challenging the Will is that the beneficiary never applied for probate or for mutation of the property in his name soon after the death of the father. This again is no reason to dislodge the Will. The learned counsel for the respondent also argued that the Will had not been attested by two attesting witnesses as required under the law. In support of this argument it was submitted that one of the alleged attesting witness is only scribe of the Will and is not attesting witness. Regarding this objection we may note that there is no requirement in law that a scribe cannot be an attesting witness. The person concerned has appeared in the witness box as PW 1 and has clearly stated that he is a scribe of the Will as well as he is an attesting witness of the Will. For attestation what is required is an intention to attest which is clear from the statement of PW 1. He categorically stated that he has signed as an attestor and scribe. In our view, the requirement of attestation of the Will by two witnesses is fully met in the present case.....”

“8. There is no substance in the grievance that the proof of the will in this case is incomplete for want of an attesting witness's evidence. Section 68 of the Evidence Act deals with proof of the execution of documents required by law to be attested. It provides that such documents shall not be used as

16. 2006 AIR (SC) 786

17. 1977 AIR (SC) 63

evidence until at least one attesting witness has been called to prove the execution, if there be an attesting witness alive and subject to the process of the Court and capable of giving evidence. Since by Section 63 of the Succession Act, 1925 a will has to be attested by two or more witnesses, Section 68 of the Evidence Act would come into play and therefore it was incumbent on the propounder of the will to examine an attesting witness to prove due execution of the will. But this argument overlooks that Dwijendra Nigam in himself one of the three persons who made their signatures below the thumb impression of Jaggo Bai. None of the three is described in the will as an attesting witness but such labelling is by no statute necessary and the mere description of a signatory to a testamentary document as an attesting witness cannot take the place of evidence showing due execution of the document. By attestation is meant the signing of a document to signify that the attestor is a witness to the execution of the document; and by Section 63 (c) of the Succession Act, an attesting witness is one who signs the document in the presence of the executant after seeing the execution of the document or after receiving a personal acknowledgment from the executant as regards the execution of the document....

9. The question which now arises for consideration, on which the Letters Patent Court differed from the learned Single Judge of the High Court, is whether the execution of the will by Jaggo Bai is proved satisfactorily. It is well-settled that the onus probandi lies in every case upon the party propounding a will, and he must satisfy the conscience of the Court that the instrument so propounded is the last will of a free and capable testator. See Jarman on Wills (8th Ed., p. 50) and H. Venkatachala Iyengar v. B. N. Thimmajamma, (1959) Supp 1 SCR 426 = (AIR 1959 SC 443). By "free and capable testator" is generally meant that the testator at the time when he made the will had a sound and disposing state of mind and memory. Ordinarily, the burden of proving the due execution of the will is discharged if the propounder leads evidence to show that the will bears the signature or mark of the testator and that the will is duly attested. For proving attestation, the best evidence would naturally be of an attesting witness and indeed the will cannot be used as evidence unless at least one attesting witness depending on availability, has been called for proving its execution as required by Sec. 68 of the Evidence Act. But where, as in the instant case, the

*circumstances surrounding the execution of the will are shrouded in suspicion, it is the duty of the propounder to remove that suspicion by leading satisfactory evidence. The testatrix was advanced in age being past eighty years of age, the will contains provisions which are prima facie unnatural since the only son is disinherited under it and the testatrix died five days after making the will. There can be no dispute that these are gravely suspicious circumstances. But the propounder has, in our opinion, offered an explanation of these circumstances which ought to satisfy a prudent mind. Ultimately, that is the test to adopt for one cannot insist on mathematical proof even where the circumstances attendant on the execution of the will raise a suspicion as regards its due execution. The burden in testamentary cases is of a different order than in other cases in the sense that an attesting witness must be called, wherever possible, to prove execution, the propounder must remove the suspicion, if any, attaching to the execution of the will and if there be any doubt regarding the due execution, he must satisfy the conscience of the court that the testator had a sound and disposing state of mind and memory when he made the will. "Reasonable scepticism, not an obdurate persistence in disbelief nor a resolute and impenetrable incredulity" is demanded of the testamentary judge. "He is never required to close his mind to the truth." See *Harmes v. Hinkson*, (1946) 50 Cal WN 895 = (AIR 1946 PC 156) Per Lord Du Parcq. Gajendragadkar J. who spoke for the Court in *Iyengar's case* (1959) Supp (1) SCR 426 at page 446 = (AIR 1959 SC 443 at p. 432) noticed these observations of Lord Du Parcq with approval and said : "It would sound platitudinous to say so, but it is nevertheless true that in discovering truth even in such cases the judicial mind must always be open though vigilant, cautious and circumspect."*

117. However, in the present case, the scribe has also signed in the column of an attesting witness and has given a specific evidence that the Testator has put his signature in front of him after reading the Will, whereafter he had asked him to sign as an attesting witness, which he did; whereafter he accompanied the Testator to the office of the Sub-Registrar and there also the signatures were put; and as such the conditions enumerated under Section 63 of the Act, 1925 is met.

Issue no.3

Whether the Will was a conscious mental act of the alleged Testator, Shankar Dutta Pathak, when there is absolutely no evidence on behalf of the defendant that he was physically and mentally alert and fit to execute the Will.

118. It is trite in law, that the propounder of the Will has to establish that there was no suspicious circumstances and the Will was executed as per the provisions of Section 63 of the Act, 1925.

119. The Plaintiff/Appellant has asserted that he had led evidence in support that there was cordial relationship between the Testator and the Plaintiff; and also that the narration in the Will, to the effect that Plaintiff was not taking care of the Testator and that he had no hope from him in the future to take care of him or his property, therefore he is executing the Will in favour of his only surviving son, gives rise to a suspicious circumstances.

120. The Plaintiff had further submitted that the Testator was of 81 years of age and in a feeble state, coupled with the fact that the Testator died within six months from the date of execution of the Will, itself demonstrates that the Testator was not in a good physical or mental condition to execute the Will.

121. However, the Plaintiff has not led any evidence to show that the Testator was under any medical treatment at the time of execution of the Will nor any witness who could justify that the Testator was not in a sound mind or physically in a condition to execute the Will. On the contrary, evidence has been led by the defendants by way of statement of DW-2 and DW-3, who have categorically stated that the Testator had gone to the court for the purposes of preparation of the Will and he had gone alone; and only after some time another person had come. DW-2 has categorically stated that the Will was read by the Testator and signed in front of him. DW-2 has also stated that there was no element of coercion or pressure on the Testator at the time of execution of the Will; and as such, in view of the evidence led by the defendants, the burden of

proof was discharged to establish that the Testator was also physically and mentally fit to execute the Will.

122. Another aspect of the matter is that, after the execution of the Will, for another six months the Testator was alive and had admittedly communicating with the plaintiff by way of various letters, which the plaintiff himself had brought on record as proof. From the said letters also, the plaintiff could not establish that either the Testator was not in a good physical condition to execute the Will or was mentally not alert to execute the Will. In view of the same, it cannot be of much consequence, especially when the Will was proved, as per the requirement of Section 63 of the Act, that no evidence was further led by defendant, that the Testator was physically and mentally alert to execute the Will.

123. In view of the aforesaid finding of the first appellate court, there is no requirement of any interference, with the finding, that the Will was executed with full mental consciousness and consent of the Testator. Merely because an individual is more than 80 of age, it cannot be presumed that he is so feeble as to not get a Will executed or that his mental capacity has diminished. The letters written by the Testator to the plaintiff, itself shows that he was aware with respect to various domestic matters and was even discussing his health with the plaintiff; as such the mental condition cannot be said to be affected, so much as to not get a Will executed.

124. It is also an admitted fact, that the Testator was a teacher in a school and as such was capable of understanding the contents of the Will, which he read himself as per the evidence of DW-2, and only after understanding the same he has appended his signature on it. The plaintiff's witness, that is Shiv Dutt, was found to be involved in litigation with the defendant; and as such was in inimical relationship with the defendant. A categorical finding has been returned by the first appellate court, that there is no reason to disbelieve the statement of the attesting witness, and thereafter has concluded that the trial court has wrongly said it on facts that the witnesses have not proved the Will.

Issue No. 4 -

Whether merely on account of the fact that the defendant was in a fiduciary capacity, over the assets and property of the Testator; and also the fact that the alleged Testator was an old man of 80 years, could it be held that suspicious circumstances existed, as there was evidence to demonstrate, undue influence on the Testator, to nullify the Will.

125. First of all we have to examine, as to what meaning is to be given to the term “Fiduciary Capacity”. A fiduciary capacity is a legal and ethical role where one person or group holds, manages, or control assets and property, for the benefit of someone else.

126. It is an admitted fact that the defendant was the son of the Testator and the plaintiff was the grandson. It is also admitted that the plaintiff was not residing with the Testator and only occasionally visited him on his holidays. He had even taken away his wife and children with him and was enjoying a good position in government service. It is also admitted that the education of the plaintiff was taken care of by the Testator and he had also sponsored his education abroad, i.e. in America. The contents of the Will clearly states as follows:

"तभी से अपने बाल बच्चों को साथ रख कर अपना जीवन आराम से बिता रहा है। हमारा तथा घर का कुछ भी ख्याल नहीं करता है, उससे भविष्य में भी कोई अच्छी आशा नहीं दिखाई पड़ती है तथा हमारा दूसरा लड़का हर दत्त पाठक हमारे साथ रह कर हर प्रकार से हमारी सेवा सुसूखा करता है व हमारी खेती बारी का भी इन्तजाम भली भाँति करता है। उस श्री हर दत्त पाठक की सेवा बर्दास्त व कर्मावरदारी से हम प्रतिज्ञ बहुत ही प्रसन्न हैं। इस वास्ते हम चाहते हैं कि जब तक हम जिन्दा हैं तब तक हम अपनी सारी संपत्ति के मालिक व काबिज रहेंगे बाद हमारे मरने पर हमारी सारी संपत्ति के मालिक व काबिज श्री हर दत्त पाठक पुत्र श्री शंकर दत्त पाठक हम मुन्कीर सा. मौजा पठकोली परगना निजामाबाद तहसील सदर जिला आजमगढ़ होंगे।"

127. The Will itself speaks about the relationship, as such, between the parties, i.e. the Testator, his son and his grandson. Merely because the Testator had excluded the plaintiff from his inheritance, for the reasons which he states in the Will, does not mean that he had ill- feelings for his grandson. He merely states the factual circumstances, that on account of the Government job, the grandson being posted all over the country and naturally he has taken his wife and children with him; and as such he

does not take care of the Testator and in future also the Testator does not think that the plaintiff will take care of his property in question, which is in the village and the agricultural land; and on the contrary his son, i.e. Har Datt Pathak is taking care of his father and also looking after the agricultural property.

128. It is not the case of the Plaintiff, that the defendant had ever breached his duties, as a son or has not taken care of his grandfather; or has ever misappropriated the property of his grandfather, during his life time.

129. The said reasoning of the Will, cannot be said to be alien to the human nature and in the given admitted family setup of the Testator, it can very easily be inferred as a natural consequence to give the property to his son, with whom the Testator is living; and had never raised any grievance regarding his care or his property.

130. The plaintiff had not led any evidence to the effect that his grandfather was not very happy with his son or that his son was not taking good care of him. In fact, it has also come in the evidence that the grandfather also had taken care of the mother of the plaintiff, who died in the village itself; while the plaintiff was posted elsewhere.

131. The question of a dominating position or fiduciary relationship, depends upon the facts of each case and merely because there was relationship of a father and son, while the father being of old age, cannot itself automatically be inferred that the son was in a dominating position.

132. In the society in which we all are living, there is still a hope in the form of a joint family and parents take care of their children, till the fag end of their life and in reciprocation, the parents are given equal respect and due care by the younger ones in the family; and as such an ipso facto conclusion cannot be reached by merely considering the relationship of father and son, where the father is of old age. The physical and mental capacity of the Testator could not be demonstrated by the plaintiff to be as such, that he is unable to execute the Will.

133. The plaintiff has failed to establish that the beneficiary of the Will, was in a dominating position or that he has misused his fiduciary capacity; and a registered Will which has a presumption of its validity, cannot be cancelled merely on the said ground and the first appellate court has rightly reversed the finding of the trial court on the said issue.

134. Shri Pankaj Agrawal, Advocate, who appears on behalf of appellant, argued with great vehemence, that the moment a person is in a dominant position and he uses that position to obtain unfair advantage for himself, at the cost of a person relying upon his authority or aid or position, the “influence” Will become “undue”.

135. In view of the aforesaid, he submits that since the plaintiff's grandfather was living with the defendant, he used his dominant position to disinherit the plaintiff; and accordingly, the “influence” has become “undue”.

136. However, the plaintiff has failed to prove that the mental capability of the Testator was weak at the time of execution of the Will and on the contrary, the defendants led evidence that the Testator had gone to the court for the purpose of registration alone and it is later on that he was joined by another person, and as such it cannot be said that the Testator was constrained to do anything, against his Will; and but for the influence, he would have refused to do it.

137. In case the Testator was coerced to execute the Will and he was communicating for the next six months, post execution of the Will, in a mode by which he could have easily avoided the interference of the defendant, i.e. by way of writing various letters, he would have definitely stated in one of the letters that he has been coerced to execute the Will. The mental faculty of the Testator being weak or feeble also could not be demonstrated by the plaintiff, as the letters which were produced by none other than the plaintiff himself, itself indicated that he was in a fit mind, to make communication with the plaintiff.

138. Shri Pankaj Agrawal, Advocate, had also stressed on the point that plaintiff was not required to set out in detail the elements of undue

influence in the plaint, but however, this Court finds that since it was the plaintiff who was alleging undue influence, he ought to have brought home the charges by way of leading cogent evidence, which was not led by him.

139. The appellant has also relied upon a decision of this Court in the case of **Rameshwari Devi Vs. Dr. R.D. Sharma and Others in Second Appeal No. 705 of 2003**¹⁸ and placing reliance on Paragraph 21 and 23, he had submitted that Section 16 of the Indian Contract Act, which defines “undue influence” provides that where a person who is in a position to dominate the will of another, and enters into a contract with him, which appears to be unconscionable, the burden of proving that such contract was not tainted by undue influence, shall be upon the person dominating the will of the other. For ready reference, Paragraph Nos. 21 and 23 of the **Rameshwari Devi** (*supra*) is reproduced below:

“21. The learned Counsel for appellant has relied upon Section-16 of the Indian Contract Act, which defines undue influence. In Section 16(3) of the Act aforesaid, it has been provided that where a person who is in a position to dominate the will of another, and enters into a contract with him, which appears to be unconscionable, the burden of proving that such contract was not tainted by undue influence shall be upon the person dominating the will of the other.

23. The Apex Court in the case of Ladly Prasad Jaiswal v. Karnal Distillery Company Ltd., AIR 1963 Supreme Court 1279 held that Sub Section 3 of Section 16 of the India Contract Act has limited application. The presumption will arise only if it is established by the evidence that the party who obtained the benefit of a transaction was in a position to dominate the will of the other and the transaction is shown to be unconscionable. If either of these 2 conditions is not fulfilled, the presumption of undue influence will not arise and the burden will not shift on the beneficiary of the transaction.

140. The Court may not be detained by the said judgment, as it *per se* relates to a contract between two persons, when the person is in a position to dominate the will of another. In view of the aforesaid and

¹⁸ 2018 (7) ADJ 607

also for the reasons stated herein above, this Court does not find any ground for interference with the judgment and decree passed in Civil Appeal No. 357/1975 dated 28.08.1980, and accordingly the present second appeal is hereby dismissed, as against Respondent No.2/2; while the other respondents having entered into a compromise; and this Court, vide its judgment dated 19.07.2022, has already disposed off the present second appeal, to the extent of the remaining respondents, in pursuance of the Compromise Application No.08/2021, after it's due verification; and accordingly the same shall be made part of the Decree.

(Siddharth Nandan,J.)

September 8, 2026

S.Prakash/Sumit