

Ajay P. Asher Vs. Kirit P. Asher and Another

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Court : Kerala

Decided On : Jul-06-2011

Reported in : 2011(3)ILR(Ker)510; 2011(3)KLT110(SN)(C.No.110);
2011(3)KLJ631; 2011(3)KHC288

Judge : Thottathil B. Radhakrishnan & S.S. Satheesachandran

Appeal No. : A.S.No.640 of 2000(C)

Appellant : Ajay P. Asher

Respondent : Kirit P. Asher and Another

Judgement :

S.S. Satheesachandran, J.

Plaintiff is the appellant. His claim for partition and separate possession of the suit properties was negated by the court below upholding the opposition of the 1st defendant that there was testamentary succession over the properties under Ext.B9 Will. Aggrieved by the dismissal of the suit, the plaintiff has come up with this appeal.

2. Plaintiff and the 1st defendant are the two sons, and the 2nd defendant, the only daughter of late P.L.Asher. Three schedules of properties as 'A', 'B' and 'C' were described under the plaint for partition and separate possession. Plaint 'A' schedule property belonged to the aforesaid P.L.Asher, the father of the parties

and, 'B' and 'C' schedule properties belonged to their grand father, the former of them is immovable property and the latter, movable properties, was the case of the plaintiff. Suit claim for partition and separate possession of 1/3rd share in the above three schedule properties was sought for by the plaintiff alleging that a request made by way of a letter and also by a reminder to supply a copy of the Will purported to have been executed by late P.L.Asher, as claimed by the 1st defendant, has not been complied with, and the plaintiff did not wish to continue joint possession of the properties. The 2nd defendant, daughter did not contest the claim. The 1st defendant, in his written statement, asserting that there was a testamentary succession over the properties of late P.L.Asher under Ext.B9 Will, contended that the aforesaid P.L.Asher had no proprietary title over 'A' schedule property. A partnership firm 'M/s P.L.Asher and Company', in which, late P.L.Asher was a partner, has tenancy rights over item Nos.2 and 3 in 'A' schedule and under the bequest made in Ext.B9 Will, after the death of the aforesaid partner, his rights thereof devolved upon the 1st defendant, was his case. 'B' schedule property under the Will had been bequeathed in favour of one Hrishi, his son, and item Nos.2 and 3 in 'C' schedule property are bequeathed to him under Ext.B9 Will, according to the 1st defendant. Some items in 'C' schedule as specified in the Will have been bequeathed to the plaintiff and he is in possession of those movable items, was the further case of the 1st defendant contending that the suit was bad for partial partition and also for non-joinder of necessary parties in as much as the other legatees under Ext.B9 Will, who included his wife, and also grand children of the testator have not been made parties to the suit.

3. Plaintiff amended the plaint impeaching Ext.B9 Will as created under the undue influence exerted over the testator late P.L.Asher by the 1st defendant, and, on that basis, he imputed the genuineness of that testament.

4. On the pleadings of the parties as aforesaid, the court below raised the issues thus: (i) Whether Ext.B1 Will is vitiated by undue influence (ii) Is the plaintiff entitled to seek partition of the plaint schedule properties and (iii) What, if any, are the properties available for partition ?

5. No evidence, oral or documentary, was adduced by the plaintiff. The defendants examined DWs.1 to 3 and exhibited Exts.B1 to B26.
6. The main issue, which was agitated upon by the parties, no doubt, was the validity of Ext.B9 Will propounded by the 1st defendant, which was impeached as not genuine by the plaintiff. The court below, after meticulous scrutiny of the materials placed, and also the pleadings and submissions made by both sides, concluded that Ext.B9 Will was duly executed by late P.L.Asher and there is no merit in the challenges raised by the plaintiff impeaching the genuineness of that testament. Upholding Ext.B9 Will and accepting the opposition raised to the claim for partition by the 1st defendant that over the properties of late P.L.Asher already there is a testamentary succession, the court below held that the plaintiff was not entitled to seek any partition, and, accordingly, the suit for partition was dismissed.
7. Noticing that the fulcrum of controversy involved in the appeal challenging the decree of the court below rested on the genuineness of Ext.B9 Will, in which, bequests have been made not only to the parties to the suit, but also to others, the wife of the 1st defendant, and that of the plaintiff, and also the grand children of the testator, we deemed it fit and appropriate to hear them also, and notices were ordered to those legatees to show cause why they should not be impleaded as parties in the appeal and the suit. Pursuant to steps taken with a copy of the order as aforesaid, one of the legatees, additional 8th respondent filed an affidavit stating that she is not interested in either supporting or opposing the appellant over the dispute relating to Ext.B9 Will and she does not wish to be a party to the proceedings. The other proposed additional respondents have entered appearance through counsel, but they did not file any affidavit or statement to the notice. Since the aforesaid legatees did not express their willingness to be made parties in the proceedings, and, having regard to the fact that in the suit they have not been made parties, and thus, not provided with opportunity to contest the claim, we closed the application for impleadment of additional respondents in the appeal. We make it clear that the notices issued to those legatees would have only the effect of posting them with notice of the litigation as between some of the legatees under the Will, parties to the suit, over its genuineness, but not on any other aspect touching upon the right or interest of those parties under the Will or

otherwise, as they are not parties to the appeal and the suit.

8. The counsel on both sides argued the matter rather elaborately touching upon various questions involved over the proof of a Will with reference to the facts of the case and the judicial pronouncements applicable thereto. The learned counsel for the appellant Sri.B.G.Bhaskar, fairly pointing out that the challenge against Ext.B9 Will, raised by way of the amendment to the plaint, was founded on the attack that such Will was vitiated by undue influence over the testator in its creation, contended that the omission or failure of the plaintiff to lead evidence and establish such challenge against the Will would no way affect his entitlement to assail Ext.B9 Will as not genuine by highlighting the suspicious circumstances presented in the case, more particularly, on the materials tendered by the 1st defendant indicating that it was not a genuine Will executed by late P.L.Asher on his free volition. The propounder of the Will has to remove each and every suspicious circumstance surrounding the execution of the Will is pressed upon by the learned counsel urging that the court below has failed to take note of the various suspicious circumstances connected with the execution of Ext.B9 Will and that has resulted in forming an erroneous conclusion by that court to hold that Ext.B9 Will is genuine, which, in fact, according to the counsel, is negated by the proved facts and circumstances involved in the case. Several suspicious circumstances are projected by the counsel to impeach the genuineness of Ext.B9 Will. Before instituting the suit, the plaintiff had made a demand to the 1st defendant, his elder brother, to give an authenticated copy of the Will, if any, executed by his father late P.L.Asher, but, that demand was not only not complied with, no reply was given informing him that late P.L.Asher had executed Ext.B9 Will and it has come into effect after his death. Though late P.L.Asher had passed away in 1996, Ext.B9 Will came into light only after the suit was filed and that too, with the written statement of the 1st defendant raising an opposition to the claim for partition on the basis of Ext.B9 Will. The 1st defendant, a legatee under the Will, who, according to the counsel, got a major share as bequest out of the assets of the testator was present at the time of making the testament. The testator and the 1st defendant lived together under a common roof, and his presence at the time when Ext.B9 Will was signed by the testator clearly demonstrated that the 1st defendant, a beneficiary under the Will had an active role in its making, and thus

casting a suspicion that it was not a voluntary making of the testator. The draft of Ext.B9 Will was not even produced nor any explanation given for its non-production. The materials produced by the 1st defendant, particularly, Ext.B6, indicated that the testator had association with legal experts, and he had consultation with them as well; and, when that be so, if he intended to make a Will then he would have got the draft of his testament prepared by a legal expert. That is not so with Ext.B9 Will. The attestors to Ext.B9 Will are shown to be close associates of the 1st defendant, a beneficiary under the Will, is yet another circumstance casting suspicion over the genuineness of the instrument, according to the counsel. In Ext.B9 Will, even the name of one of the grand sons of the testator, son of the 1st defendant, to whom some bequests are made, is wrongly stated as 'Rishi' instead of his correct name 'Hrishi', which, according to the counsel, is yet another circumstance to hold that the Will is not a voluntary making by the testator. Whereas, in Ext.B7 statement, prepared by the testator makes mention of 53 kgs. Of silver as part of his assets in Ext.B9 Will the quantity of such silver is stated to be less by 19 kgs., and in the Will there is also no mention or reference to the letters sent by Gandhiji, the Father of the Nation to the testator and also to his father in the Will, which, according to the counsel, are priceless and invaluable, are other suspicious circumstances surrounding the execution of Ext.B9 Will. Non-examination of the scribe to prove that the Will had been prepared under the instructions of the testator, Ext.B9 was only a typed instrument and there is no positive evidence as to who typed the Will other than that it was by a typist in the firm, 'M/s.P.L.Asher and Company', and, that no probate has been obtained over Ext.B9 Will though the testator had passed away prior to the suit are other circumstances canvassed by the counsel to contend that Ext.B9 Will is not a genuine Will of the testator.

9. Per contra, the learned counsel for the 1st defendant urging that the circumstances which are canvassed to impeach Ext.B9 Will hardly merit any consideration as none of them, according to the counsel, throw any suspicion over its genuineness. Ext.B9 Will is a registered Will executed six years prior to the demise of the testator, who at the time of its registration and till his death, had retained full testamentary capacity and there is no case for the plaintiff that his mental faculties were in any way impaired during such period or that he was

susceptible to the influence from any external agency in view of his weak and infirm mind or body, according to the counsel. The relationship between the plaintiff, the youngest son, and the father, the testator, was far from cordial ever since disputes arose over the division of the assets of the testator's wife, the mother of the parties to the suit, situated in Bombay, as borne out by the correspondence between the father and the son (plaintiff) is also banked upon by the counsel to urge that if at all there was any disparity in the bequests made by the father to the plaintiff with those of the other legatees, there was justifiable cause for him to do so. Further more, even if it were a case of disinheritance of the plaintiff in toto by the testator, that by itself would not affect the validity or genuineness of the Will, according to the counsel, when the executant was shown to be having full testamentary capacity and was fully entitled to make disposition in the manner he wished in his Will. Referring to the bequests made under the Will to his sons, daughters-in-law and also grand children by the testator, it is argued by the counsel that if a valuation in terms of the money is made there is not much disparity in the bequests made in favour of the two sons - plaintiff and the 1st defendant. The circumstances projected by the appellant's counsel over the non-supply of copy of the Will, non-obtaining of the probate, non-examination of the scribe and non-production of draft of Ext.B9 Will etc., according to the counsel, can never be termed as suspicious circumstances over the making of the Will, and its validity and genuineness necessarily has to be examined with reference to the question whether it has been made on the free will and volition of the testator and whether it is free from any vitiating factor casting suspicion over the testamentary volition of the maker. The relationship between the plaintiff and his father, the testator, was strained and continued to be so ever since the death of the wife of the testator in 1986 owing to disputes over the division of the property comprising of buildings in the name of his wife in Juhu, Bombay, and the testator had taken serious exception to the unreasonable demands made by the plaintiff over the above property as could be seen from his correspondence and also the counter affidavit filed in proceedings relating to the issue of letters of administration, before the Bombay High Court, is also canvassed by the learned counsel to contend that Ext.B9 registered Will by the testator, where there is no challenge against his testamentary capacity or of the attestation over such testament, is a duly executed

testament of the maker, free from any suspicious circumstances whatsoever.

10. Ext.B9 Will is attacked on the ground that there are suspicious circumstances surrounding the making of the Will. We may, at the outset, point out that the only case projected by the plaintiff, that too, by way of an amendment to the plaint when Ext.B9 Will was pressed into service under the written statement of the 1st defendant to resist the claim of partition, was that such testament was vitiated by undue influence, however, without furnishing any specific particulars how it was vitiated. The fact that a challenge to the Will was made only on the aforesaid ground, no doubt, would not relieve the propounder from establishing the genuineness of the Will, and if, there is any circumstance arousing suspicion in its making, why it should not be taken as a suspicious circumstance affecting the validity of the Will. The propounder of the Will has to show that it was signed by the testator. He was at the relevant time having a sound disposing state of mind and he understood the nature and effect of the dispositions. He has put his signature to the testament of his own free will and he has signed it in the presence of two witnesses who attested it in his presence and in the presence of each other. The mandate under Section 63 of the Indian Succession Act as regards the due execution of a Will complying with the requirements as aforesaid are to be established by the propounder of the Will. How due attestation of the Will is to be proved is spelt out under Sections 68, 69 and 71 of the Indian Evidence Act, depending on the facts and circumstances indicated thereunder. Once the propounder establishes the elements indicated as above satisfying the statutory requirements referred to in the proof of a Will, the onus rests upon him is discharged. However, in cases where there are suspicious circumstances surrounding the execution of the Will, such as the testator, at the time of making of the testament, is shown to be weak and infirm or under severe stress and strain, or vested interests of third parties in the making of the testament and also the likelihood of such persons influencing him to get hold of his property is visible, or from such other circumstances indicating that the dispositions made by him under the testament are unnatural, improbable and unfair or there is disparity of his signature in the Will with his admitted signatures, the propounder has to explain and dispel them satisfactorily, to get the Will accepted as genuine and duly executed by the testator. In a case where the propounder had taken an active role

in the execution of the Will and under the Will, substantial benefit is shown to be conferred on him, it may amount to a suspicious circumstance, and he must remove the suspicion, if any, surrounding the execution of the Will. In examining whether there are suspicious circumstances and also the evidence required from the propounder to dispel any doubt over the genuineness of the Will, it cannot be determined under a strait - jacket formula or by yardsticks uniformly applicable, but only with reference to the totality of the circumstances surrounding the making of the Will and also the testamentary capacity of the maker. What is required to be established by the propounder to dispel circumstances which are indicative of arousing suspicion, is only satisfaction of the conscience of the court for removal of such suspicion, which a reasonable man may entertain in the facts and circumstances of the case. In the context it is apt to take note of the observations of the Apex Court in the matter, which spell out thus: " it is the conscience of the Court that has to be satisfied, as such the nature and quality of proof must be commensurate with the need to satisfy that conscience and remove any suspicion which a reasonable man may, in the relevant circumstances of the case, entertain (See H.Venkatachala Iyengar v. B.N.Thimmajamma and Others (AIR 1959 SC 443), Rani Purnima Devi and Another v. Kumar Khagendra Narayan Dev and Another (AIR 1962 SC 56) and Surendra Pal v. Dr.Saraswati Arora and Another ((1975) 1 SCWR 488)).

11. Late P.L.Asher is the testator in Ext.B9 Will. His father L.P.Asher with his family, hailing from erstwhile Bombay, had settled down in Calicut in connection with his business. Both L.P.Asher and his son P.L.Asher, the testator, had participated in the freedom struggle and were inmates in Sabarmathi Ashramam. Both of them had close association with Gandhiji. After independence, L.P.Asher with his family initially lived for some time in Bombay and later settled in Calicut. However, the family continued to shuttle down in both places, Bombay and Calicut. The children of late P.L.Asher, the testator, had their higher education in Bombay. The testator's mother had registered her name in a Co-operative Society and had obtained five shares to get land allotment for construction of a house, which, later on was transferred in favour of the wife of the testator, namely, Urmila P. Asher. Pursuant to allotment of land made over twenty cents of land, a three storied construction was completed in that plot. Though the Society had entered

into a lease only with Urmila P. Asher, later on the names of her two sons, the plaintiff and the 1st defendant, were added to the share certificate. After the death of the testator's wife, disputes arose between the plaintiff and 1st defendant over the division of rights in the building covered by the lease, and the 1st defendant applied for letters of administration before the High Court of Bombay. The testator late P.L.Asher filed a counter affidavit in that proceeding supporting the claim of the 1st defendant. He had also taken exception to the claims of the plaintiff over the property as excessive and unreasonable and, in fact, pleaded with him to have a flexible stand to settle the disputes over the property. While such proceedings were pending in respect of the aforesaid property situated in Juhu, Bombay, Ext.B9 Will in respect of his assets was made by the testator late P.L.Asher. Ext.B9, a registered Will, is signed by the testator and it has been properly attested, is not a matter under challenge; but, that testament is impeached by the plaintiff, the younger son of the testator, P.L.Asher, challenging that its making is surrounded by suspicious circumstances, and the propounder of the Will, the 1st defendant, elder son of the testator, has not dispelled such suspicious circumstance satisfactorily proving that it is a genuine Will executed on free volition of the testator.

12. The 1st defendant was examined as DW1 and the two attestators to the Will as DWs.2 and 3. Exts.B1 to B6 were tendered to show that the testator had made drafts, or scribbled down some notes, how the disposition of his assets was to be made much before the making of Ext.B9 Will. Ext.B7 is stated to be a description statement of the movable and immovable assets of the testator kept in his personal file. Exts.B10 and B11 are two power of attorneys executed by the testator P.L.Asher appointing the 1st defendant as his attorney to do the acts authorized under those instruments. Ext.B11 was executed in March, 1987 and Ext.B10 in July, 1994. Exts.B15, B16 and B18 to B26 are correspondence between the plaintiff and the testator, some of which are copies and the others original, mainly centering around the disputes connected over the division of the land and buildings in Juhu, Bombay, in respect of which, proceedings then continued before the High Court of Bombay. Ext.B17 is the copy of the affidavit filed by the testator P.L.Asher in the aforesaid proceedings over the letters of administration applied for by the 1st defendant in respect of the above mentioned

property, supporting the case of the claimant (1st defendant) and repudiating the opposition thereto by the plaintiff, who was the respondent in that proceedings. The learned Sub Judge, after appreciating the oral and documentary evidence let in by the 1st defendant, the propounder of the Will, has reached the conclusion that late P.L.Asher, the executant of Ext.B9 Will, had full testamentary capacity, which, in fact, was not challenged, and his Will (Ext.B9) making disposition of his assets, was duly executed and properly attested, and no circumstances existed casting any suspicion to indicate that it was not made on the free volition of the testator. Ext.B9 Will was signed by the testator and its attestation was properly made as required by law, is not under challenge. Further more, no material was produced or circumstance shown to indicate that the registration of that Will suffered from any infirmity whatsoever. Though some circumstances were pointed out to impeach the genuineness of the testament as not duly executed by the testator, we may, at the threshold, point out that no circumstance was presented nor any argument was advanced before us impeaching the registration of the Will as having been carried out practicing any fraud or deception on the testator and not in compliance with the legal requirements to be satisfied for its registration under the provisions of the Registration Act. So much so, the challenge raised over the execution of Ext.B9 Will, necessarily, has to be looked into taking into account that the signing of that instrument by the testator and its proper attestation and registration are not matters under challenge in the case.

13. We have carefully scanned through the evidence of the 1st defendant as DW1 and the attestators to Ext.B9 Will, DWs.2 and 3. Though these witnesses have been subjected to searching cross examination, as rightly taken note of by the court below, we do not find any worth mentioning circumstance culled out from any of those witnesses to sustain the challenge canvassed to impeach the genuineness of Ext.B9 Will on the premise that its making was under suspicious circumstances. The fact that the 1st defendant (DW1) was a legatee under Ext.B9 Will and he was present when that testament was got attested by DWs.2 and 3 cannot at all be viewed as a suspicious circumstance where there is nothing more to indicate that the free will of the testator to make the disposition had been influenced by the conduct or act of the 1st defendant and, further, the testator was susceptible to such influence on account of his weak or infirm mind and body or

such other cause affecting his decision making, more particularly, the making of his testament. DW2, one of the attestators to Ext.B9 Will is a chartered accountant and he has asserted that late P.L.Asher, testator was a client of his firm, which is not disputed. Other than questioning him with reference to Ext.B1 draft and the contents thereof when compared with Ext.B9 Will have some disparity, we do not find anything being asked to the witnesses touching upon the circumstances surrounding the attestation of Ext.B9 Will. Presence of DW1 at the time of attestation deposed to by the attestator DW2, that too, in his examination in chief, in isolation without any other material is incapable of showing that it is a suspicious circumstance surrounding the execution of the testament by the maker. Similar is the case of DW3, the other attestor. He was a schoolmate of the 1st defendant and, according to him, he knew P.L.Asher, the testator, for about forty years prior to attesting Ext.B9 Will. His evidence would show that the attestation in the Will was made at the residence and, later, he was also a witness to the registration of that testament at the Registry. The registration took place a few days after the attestation is also spoken to by this witness. Not only that the attestation to the instrument was not challenged on any ground whatsoever, we find that to this witness (DW3) also, other than putting forth some suggestive questions he had some interests in favour of the 1st defendant, all of which had been refuted in unequivocal terms, his attention was not invited to nor any question put to him with regard to any suspicious circumstance surrounding the making of the Will if at all the plaintiff had any such challenge to impeach validity of Ext.B9 Will. Evidently, so far as the attestation of Ext.B9 Will, to prove that alone, DWs.2 and 3 were examined, there was no challenge from the plaintiff, and the attempt made to bolster up a case that the execution of the Will is surrounded by suspicious circumstances on the basis of the statement made by those witnesses, that too, in their examination in chief, as to the presence of the 1st defendant when attestation of the instrument was made which, in fact, had been candidly admitted by the 1st defendant as DW1 as well, association of DW3 with the 1st defendant as the schoolmate, etc. suffice to say, without any other connecting material to arouse suspicion to doubt the genuineness of the Will, is a futile exercise having no value or merit at all. At any rate, the circumstances so projected are not at all suspicious circumstances and they do not affect nor even cast any doubt over the

genuineness of Ext.B9 Will tend to indicate even remotely that the testament was not made under the free volition of the testator.

14. Ext.B9 Will was a registered Will and the testator had passed away six years after the making and registration of the Will. What was the frame of mind of the testator at the relevant point of time when Ext.B9 Will was executed, and was it so weak and infirm to be susceptible to the influence of any other person vitiating his capacity to make dispositions of his estate under a testament, has to be examined to consider whether any of the circumstances canvassed could be taken as suspicious circumstances impairing his Will, to hold that it is not a testament reflecting voluntary dispositions of his property on his free will. Late P.L.Asher, the testator, is stated to be one among those handpicked by Gandhiji for Dandi March, in the freedom struggle. At the age of sixteen, participating in the freedom struggle, he was detained in Yerwada prison, and in view of his young age, he was soon released from the prison. However, within a few years, he again joined the freedom struggle, and suffered imprisonment for more than one year. He, and also his father, had correspondence with Gandhiji, which it is stated, was preserved by late P.L.Asher as a treasure. No material, leave alone, any circumstance was presented nor pointed out that the testator late P.L.Asher at the time when Ext.B9 Will was executed, suffered from any infirmity affecting his testamentary capacity. He was a freedom fighter, who had undergone imprisonment and even from childhood he was one who prepared to undergo sacrifices and also face ordeals for the cause he cherished 'Freedom of the Nation' is a telltale mark over his character indicating that, normally, he would not be susceptible to the influence of others in effecting dispositions over his property by way of a testament. It has also come out from the evidence tendered in the case that his relationship with the plaintiff, the younger son, after the death of his wife, was painful and agonized, and in fact, he had filed a counter affidavit before the High Court of Bombay supporting the claim raised by the 1st defendant, his eldest son, in the property of his wife in Juhu, Bombay. The correspondence, which he had with the plaintiff, as evidenced by Exts.B18 to B26, would indicate that he wanted the plaintiff to be reasonable in the division of all the assets, left behind by his wife, the buildings comprised in the property in the aforesaid place. The tone of bitterness and pain over the conduct of the plaintiff is borne out in his correspondence. He entertained,

rather, believed that the claim raised by the plaintiff over the property of his wife was excessive, unreasonable and, further, prejudicial to the claims of the others including him. When such be the fact situation prevailing at the time he executed Ext.B9 Will, even if he had made a testament not providing anything to the plaintiff over his assets, still that would not generate any suspicion to doubt his testament unless there are vitiating circumstances to show that his testamentary capacity was impaired, and the dispositions were not made on his free will. We may also point out that the reference made with respect to the money value of the properties under the disposition made under the bequests to the legatees, to consider whether there is any disparity thereunder, would not cut much ice nor influence the court in evaluating the genuineness of a Will. What the court is expected to look into is whether the requirements of proof over the Will is established, and if so, whether it is free from any suspicious circumstances surrounding its execution; if that be so, then, it is not the outlook of the court to sit over the judgment on the dispositions made by the testator over his properties. We may take note of the observations of the Privy Council in *Motibai Hormusjee Kanga v. Jametjee Hormusjee Kanga* (AIR (1924) PC 28) in this regard, which reads thus:

"A man may act foolishly and even heartlessly; if he acts with full comprehension of what he is doing, the Court will not interfere with the exercise of his volition".

15. Now, so far as the circumstances presented as suspicious circumstances by the learned counsel for the appellant to impeach Ext.B9 Will, we may state that most of them cannot be treated as suspicious circumstances surrounding the execution of that testament. No copy of the Will was given even when demand was made by the appellant; no probate over the Will was applied for, which, in the given facts of the case, was not warranted by the provisions of Section 57 of the Indian Succession Act; the scribe who prepared the Will was not examined; the draft of the Will was not produced; the name of the grand son of the testator was shown as 'Rishi' instead of 'Hrishi'; Ext.B9 was not in consonance with Ext.B1 draft; there is disparity over the quantity of silver in Ext.B1 draft and Ext.B9 Will; and, the Will does not contain any disposition over the letters and correspondence that the testator had with Gandhiji, and the like circumstances canvassed, can never be considered as suspicious circumstances surrounding the execution of

Ext.B9 Will especially where his testamentary capacity to make a disposition of his properties remain unimpeached. Any fact situation can be deciphered several ways depending upon the flight of imagination of a person, and be capable of drawing innumerable hypothesis having no nexus with the reality involved. But in considering the validity of a Will and more so, where the legal requirements as to its proof is established by cogent and convincing materials, to satisfy the conscience of the court as to whether its execution is free from suspicious circumstances, any challenge on that ground to impeach the genuineness of that testament must be something which would, in the normal course, cause a suspicion in the mind of an ordinary prudent man may entertain under such circumstance. The fact that a copy of the Will was not given when a demand was made and the similar circumstances canvassed by the counsel including the discrepancy in the name of the grand son of the testator, the quantity of the silver etc. with Ext.B1 draft, that too, when none including the plaintiff has any case that Ext.B9 Will was based on Ext.B1 draft and its production by the 1st defendant was only to show that the testator, before making Ext.B9, contemplated of making the testament for disposition of his property, are hardly circumstances to be taken as suspicious circumstances, that too, surrounding the execution of Ext.B9 Will. Similarly, the circumstances projected that Ext.B9 Will was produced only with the written statement of the 1st defendant; the draft of that Will was not produced; the testator had association with legal experts and their assistance was not taken in making Ext.B9 Will; the name of one of the grand sons of the testator was incorrectly stated as 'Rishi' instead of 'Hrishi' in Ext.B9 Will; there is no reference nor of any bequest made of the correspondence of the testator, which, he is stated to have preserved as priceless treasure etc. do not by themselves indicate in any way that the execution of Ext.B9 Will is surrounded by any suspicious circumstance, more so, where there is nothing on evidence to indicate that the testator was weak, infirm and susceptible to the influence of any persons in the making of his Will. Concededly, the relationship between the plaintiff and his father, the testator was strained. The testator was cared and looked after by the 1st defendant, his eldest son and they lived under the common roof at the time of making of the Will and till his death, six years later. The presence of the 1st defendant when Ext.B9 Will was made and the attestors to such Will have some

acquaintance with him, with nothing more giving rise to any suspicion in the making of the Will as not out of the free will and volition of the testator, are totally irrelevant circumstances incapable of casting any shadow or even the semblance of shadow over Ext.B9 Will as not duly executed by the testator out of his free will. There is discrepancy in the quantity of silver stated in Ext.B9 Will when compared with Ext.B1 draft in as much as there is a reduction of 19 kgs. of that precious metal under the Will, which is mooted as a suspicious circumstance to impeach the testament, has got innocuous value when none including the plaintiff had any case that Ext.B9 Will was based on Ext.B1 draft, and further, the production of the draft by the 1st defendant seems to be only to show that much before the making of Ext.B9 Will, the testator contemplated of making dispositions of his properties under a Will. We do not find any merit in the circumstances canvassed by the appellant projecting them as suspicious circumstances impairing the genuineness of Ext.B9 Will. We find that without even mounting the box, nor producing any materials whatsoever, the appellant after having practically conceded the testamentary capacity of his father as and when Ext.B9 Will was made, and also due attestation of that testament, has attempted to assail the validity and genuineness of that testament highlighting some circumstances, all of which taken separately or together, on critical analysis, are found to be incapable of casting any suspicion over the genuineness of Ext.B9 Will nor its due execution by the testator on his own free will. The dismissal of the suit by the court below, in the proved facts and circumstances of the case, upholding Ext.B9 Will as genuine, is unassailable, and the challenge thereto must fail. In the result, the appeal is dismissed directing both sides to suffer their costs.

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