



Proving Wills under Suspicious Circumstances

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Proving Wills under Suspicious Circumstances

The Supreme Court has recently exhaustively dealt with the issue of proving of wills, and when a will may be considered to be invalid and executed under suspicious circumstances.

Wills are amongst the simplest of legal documents to draft. They can be written in the own language of the will writer (testator), on any kind of paper. They don't need to be registered or stamped under law, and can be valid so long as the testator (i) ensures a signed and clear statement of who inherits what *i.e.*, testamentary intent; (ii) has two witnesses, who are recommended to both be present when the will is signed, although they don't need to be aware of its contents; and (iii) has adequate medical and legal capacity to execute.

What makes wills tricky, from a practical perspective, is that the testator will not be around to ensure that the will is given due effect to. This makes it critical to draft wills carefully and to adopt best practices while putting a will in place.

Facts of the Case

The brief facts of the case of *Kavita Kanwar v. Mrs Pamela Mehta & Others*¹ are that the testatrix, late Smt. Amarjeet Mamik had two daughters and a son.

One daughter, Kavita Kanwar was the executor and substantial beneficiary of the will even though she had not stayed with the testatrix for over 20 years. The other daughter, Pamela Mehta was widowed with a child, lived in the same building and acted as a caregiver for the testatrix who had cancer. She did not receive material bequests, aside from an unclear direction that Ms. Kanwar should provide her with a place of residence in the bequeathed property. The son, Prithviraj Mamik also claimed to have good relations with the testatrix but only received some nominal bank balances.

The primary asset consisted of a land and building in Defence Colony, New Delhi, of which Ms. Kanwar owned the ground floor, while the remaining was owned by the testatrix. Ms. Kanwar filed an application for the will to be probated *i.e.*, declared valid by the Court.

The probate application was refused by the Trial Court, which found several unexplained circumstances surrounding the will (further detailed below). Ms. Kanwar then appealed, unsuccessfully before the Delhi High Court and then filed a Special Leave Petition before the Supreme Court, which agreed that the circumstances did not justify granting of a probate.

Issue Discussed by the Supreme Court

Some of the issues highlighted by the Supreme Court, which relied on guiding principles set out in a previous ruling of *H. Venkatachala Iyengar v. B.N. Thimmajamma*², are as follows:

- i. **Form of the Will:** The Supreme Court found it suspicious that parts of the will, which were handwritten, had traces of pencil lines beneath it and pointed to the testatrix having written as per dictation. Other parts were typed out in spite of the testatrix not being computer literate. Further, certain portions of the will contained technical and legal words which suggested that the will had been drafted by a lawyer. However, the lawyer was not to be found, which created a suspicion that the testatrix, who had not completed her education, may not have completely understood the contents of the will. Another issue that came up was in relation to a missing page in the will, in relation to which Ms. Kanwar made inconsistent claims at different points in the proceedings.
- ii. **Unreliable Witnesses:** The Supreme Court found the attesting witnesses to be unreliable. One of the witnesses admitted that he hardly knew the testatrix and was called to the residence of the testatrix by Ms. Kanwar solely to witness the execution of the will while the other witness's daughter had received a payment of ₹ 25,000 from Ms. Kanwar. There were also inconsistencies in the statements made by various parties, including the witnesses, in relation to the signing of the will.
- iii. **Role Played by Executor/Beneficiary in Signing of the Will:** Ms. Kanwar played an active role in the signing of the will, to the exclusion of the other children. She also received a substantial benefit under it, which has been held in previous Supreme Court rulings³ to create a presumption in favour of suspicious circumstances. This involvement was considered particularly strange, because the other daughter lived in the same building and was a caregiver for the testatrix, whereas

¹ Civil appeal no. 3688 of 2017

² *H. Venkatachala Iyengar v. B.N. Thimmajamma*, 1959 AIR 443 (SC)

³ The Trial Court relied on the law laid down by previous cases relating to determination of suspicious circumstances surrounding the execution of a will especially when the propounder is involved in the process of execution of the will and stands to benefit the most, namely *H. Venkatachala Iyengar v. B.N. Thimmajamma*, 1959 AIR 443 (SC); *Indu Bala Bose v. Manindra Chandra Bose*, 1982 (1) SCC 20 SC; and *Surendra Pal v. Dr. Saraswati Arora*, 1974 (2) SCC 600 (SC)



Ms. Kanwar had not lived with her for several years. There were also inconsistencies in the testimony of Ms. Kanwar, who claimed that she was not aware that the will was being signed on the given day, although the witnesses claimed otherwise.

- iv. **Exclusion of Beneficiaries:** Finally, there was concern around the unnatural and unfair distribution of assets under the will, such as the widowed daughter having received nearly nothing in spite of being a caregiver for the testatrix and in difficult circumstances. There were no clear instructions regarding the residence to be provided to her by Ms. Kanwar. The Court was also not satisfied with the treatment of the son. Therefore, while testators in Hindu law do have testamentary freedom in respect of self-acquired assets *i.e.*, the right to bequeath (or not bequeath) property to anyone of their choosing, the Supreme Court held that if after taking all the factors together, the conscience of the Court is not satisfied regarding the will representing the last wishes of the testator, then the will cannot be given the approval of the Court.

Best Practices for Testators

In the present case, we will never know if the will was indeed genuine. But how could the conclusion have been different, and what must a testator do to ensure that her wishes are given effect to in light of the above? Some best practices that may be followed by testators include:

- i. **Form of the Will & Legal Capacity:** Firstly, regarding the form of the will, it is helpful to be able to prove that the wishes contained in the document are indeed the wishes of the testator, and that the testator is fully aware of the bequests being made. One way to do this is to ensure that the will is written in clear language in the testator's own words, or if professional assistance has been obtained, that the lawyer's details are available to confirm that the testator understood the contents of the will. A doctor's certificate may also be attached, testifying to the mental ability of the testator to make the bequests.
- ii. **Registration of Wills:** Regarding the issue of missing pages, one way to address this is to have the will registered, after which it is kept in the custody of the Registrar. Registration is not compulsory under law. However, it does minimize the possibility of pages being swapped or removed, and acts as an additional piece of evidence in relation to the validity of the will. If a will is registered and subsequently revoked, the most recent will would continue to be the one that takes effect, irrespective of whether it is registered.
- iii. **Importance of Reliable Witnesses:** The role of witnesses cannot be over emphasized, and it is important to have trustworthy witnesses who can testify as to the circumstances of execution. Ideally, they should be younger and likely to survive the testator, as well as be traceable and reliable when the will is sought to be proven. These days, it is also common practice for testators to record/ videotape the process of signing of the will in case a challenge is raised.
- iv. **Disinheriting of Family Members:** The above best practices become all the more important if the will involves a disinheriting or exclusion of family members. Mere proof of signatures on a will is not sufficient to prove its validity, and the party seeking probate needs to satisfy the conscience of the Court. One way to do this is also for the testator to explain why certain family members have been disinherited in favour of others.

Finally, if testators anticipate a contest, they should evaluate other options for transferring wealth to the next generation. For example, real estate may be transferred by way of a lifetime gift from a testator to a child, subject to a life interest in favour of the testator. This would allow the testator enjoyment of the property during her lifetime, as well as smooth transition to the child, while also enabling the testator to step in, in case of challenges from other heirs. Trusts are also useful in enabling a seamless transition to the next generation while still allowing testators control during their lifetimes.

A will may still have relevance irrespective of such lifetime bequests, for example, if minor children are involved, a testamentary guardian is generally appointed under a will. However, if testators think proactively about future contingencies and family dynamics while putting in place a plan, it can go a long way towards preserving harmony.



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