

IN THE HIGH COURT AT CALCUTTA
CIVIL APPELLATE JURISDICTION
APPELLATE SIDE

BEFORE:

The Hon'ble Justice Soumen Sen

And

The Hon'ble Justice Siddhartha Roy Chowdhury

FA 42 of 2014

Smt. Moyna Bhattacharjee

Vs.

Sri Ashim Kumar Bhattacharjee & Ors.

For the Appellant : Mr. Milan Chandra Bhattacharjee, Sr.
Adv.,
Mr. Sanjay Mukherjee, Adv.,
Ms. Sulagna Bhattacharya, Adv.

For the Respondents : Mr. Dhruba Ghosh, Sr. Adv.,
Mr. Soumyajit Ghosh, Adv.,
Ms. Sananda Ganguli, Adv.,
Mr. Shubradip Roy, Adv.,
Ms. Ajeya Chowdhury, Adv.

Hearing concluded on : 17th August, 2022

Judgement on : 5th September, 2022

Siddhartha Roy Chowdhury, J.: Challenge in this appeal is to the judgement and decree passed by learned 4th Court, Additional District Judge, Alipore, granting probate of the Will of Dilip Kumar Bhattacharjee (since deceased) on 24th April, 2013 in O.S. No. 19 of 2009.

Ashim Kumar Bhattacharjee filed an application under Section 276 of Indian Succession Act for grant of probate of the last Will and testament of his father Dilip Kumar Bhattacharjee (herein after referred to

as the 'testator') contending, inter alia, that testator Dilip Kumar Bhattacharjee during his life time made a Will which was executed and registered on 20th November, 1992, whereby he bequeathed his properties upon his two sons Ashim Kumar Bhattacharjee, Biman Kumar Bhattacharjee and his daughter Soma Bhattacharjee, to the exclusion of his eldest son Deb Kumar Bhattacharjee, who died sometime in September, 2001. Smt. Moyna Bhattacharjee the widow of Deb Kumar Bhattacharjee, challenged the said testamentary disposition before the Court contending, inter alia, that the Will was not executed by Dilip Kumar Bhattacharjee on his free Will. Dilip Kumar Bhattacharjee during the life time of his first wife Krishna Bhattacharjee married Smt. Gouri Bhattacharjee. Ashim and Biman, two sons of Dilip Kumar Bhattacharjee used to put pressure upon him to make a Will in their favour otherwise they would boycott their father socially and would initiate criminal proceeding against him for bigamy. It is contended by the Caveator that Dilip Kumar Bhattacharjee was very affectionate towards her and she used to take care of her father-in-law whenever he stayed at 100 Rashbehari Avenue. Her father-in-law expressed her helpless condition before the Caveator after the death of her mother-in-law Krishna Bhattacharjee, who died on 9th April, 1990. After her death Dilip Kumar Bhattacharjee started residing at Subhasgram and occasionally he used to come and stay at 100 Rashbehari Avenue. Since 2001, he permanently started residing at Subhasgram and he breathed his last at Peerless Hospital on 19th November, 2006. It is contended further that husband of Caveator, Deb Kumar Bhattacharjee resisted the attempt of his brothers to let out ground and first floor of the house to Andhra Bank and earned

their displeasure. Deb Kumar Bhattacharjee became ill in 1998 and died in September, 2001. Dilip Kumar Bhattacharjee had a license to run a ration shop, after his demise the license got lapsed and could not be re-issued due to non-co-operation of the surviving sons of Dilip Kumar Bhattacharjee. It is asserted that the Will so propounded is not a genuine document. It is a fraudulent one. Signature on the Will of the alleged testator is also not genuine. Dilip Kumar Bhattacharjee did not execute the Will knowing about its content. The alleged Will is manufactured one. The Caveator prayed for dismissal of the suit.

Learned Trial Court after considering the pleadings of the parties framed five issues and after considering evidence-on-record was pleased to answer all the issues in favour of the Propounder of the Will and granted probate of the Will of Dilip Kumar Bhattacharjee executed on 20th November, 1992.

Being aggrieved by and dissatisfied with the said judgement the Caveator/defendant has preferred this appeal.

Assailing the impugned judgement learned Senior Advocate for the appellant Mr. Milan Chandra Bhattacharjee submits that learned Trial Court did not consider the evidence of witnesses properly and passed erroneous judgement without considering the settled principle of law as pronounced by Hon'ble Supreme Court from time to time. The probate Court being a Court of conscience is under obligation to take into consideration the entire circumstances surrounding the execution of the Will instead of looking for mechanical compliance of Section 63 of the Indian Succession Act or Section 68 of the Evidence Act but learned

Trial Court made the voyage ignoring surrounding circumstances. Mr. Bhattacharjee makes us go through the content of the Will Exhibit-1 and submits that Dilip Kumar Bhattacharjee, the so called testator, was a Law Graduate, practicing Advocate of Calcutta High Court and junior to fabled Mr. Ashoke Kumar Sen. He was an alumni of Presidency College, Kolkata. Therefore, it is quite unnatural on his part to go to Alipore Court to get the Will prepared by an Advocate in the Court premises in Bengali and to execute the same on that very date. Dilip Kumar Bhattacharjee being Law Graduate could have prepared a Will on his own or could have requested his friends or juniors to prepare the same. The document is typed in Bengali which apparently does not match with his personality rather seems to be quite unnatural.

From the document Exhibit-1 it appears that Dilip Kumar Bhattacharjee, so-called testator bequeathed his property upon his two sons and daughter to the exclusion of eldest son Deb Kumar Bhattacharjee but without spending a single word giving reason as to why he took the said decision to execute the Will in deprivation of his first child. There is nothing to suggest any acrimony between the father and the son. Being a grandfather Dilip Kumar Bhattacharjee had no reason to forget the names of his grandchildren who used to live with him when the purported Will was executed. In the Will his grandsons are named as 'Siddhanta' and 'Arindam' while their names are 'Siddhartha' and 'Aritra'. An erudite person like Dilip Kumar Bhattacharjee had no reason to make such mistake. It shows that the Will was prepared not under the instruction of the testator, it was prepared under the instruction of some

other person. In the Will the grandfather appears to have given instruction to Ashim Kumar Bhattacharjee and Biman Kumar Bhattacharjee to pay a sum of Rs.1,00,000/- each to 'Siddhanta' and 'Arimdam' the two sons of Deb Kumar Bhattacharjee. But the grandfather did not give anything to the grandchildren. Highlighting the recital of the Will, Mr. Bhattacharjee further argued that the content of the instrument suggests that the will is unnatural.

Drawing our attention to the testimony of DW 2, nephew of Late Dilip Kumar Bhattacharjee, Mr. Bhattacharjee adverted that Deb Kumar Bhattacharjee was very amiable in nature and liked by his cousins. During cross-examination DW 2 stated that his uncle Dilip Kumar Bhattacharjee told him that he would give his properties to his two grandchildren, sons of Deb Kumar Bhattacharjee but he never told that he would deprive them. Dilip Kumar Bhattacharjee had no intention to deprive his sons or daughter-in-law.

Mr. Bhattacharjee, learned Senior Advocate in support of his submission relies upon decision of Hon'ble Supreme Court pronounced in the case of ***Bharpur Singh & Ors. vs. Shamsher Singh*** reported in **2009 (3) SCC 687** wherein it is held :

"23. Suspicious circumstances like the following may be found to be surrounded in the execution of the will:

- (i) The signature of the testator may be very shaky and doubtful or not appear to be his usual signature.*
- (ii) The condition of the testator's mind may be very feeble and debilitated at the relevant time.*
- (iii) The disposition may be unnatural, improbable or unfair in the light of relevant circumstances like exclusion of or*

absence of adequate provisions for the natural heirs without any reason.

- (iv) The dispositions may not appear to be the result of the testator's free will and mind.*
- (v) The propounder takes a prominent part in the execution of the will.*
- (vi) The testator used to sign blank papers.*
- (vii) The will did not see the light of the day for long.*
- (viii) Incorrect recitals of essential facts."*

Mr. Bhattacharjee strenuously argued that the evidence of PW 1 Amar Bhandari is not sufficient to prove the Will. Amar Bhandari claimed to have worked for Dilip Kumar Bhattacharjee as a Law Clerk but admittedly Dilip Kumar Bhattacharjee never practiced in Alipore Court. PW 1 Amar Bhandari stated that he was present when the registered Will was produced before Dilip Kumar Bhattacharjee, the alleged testator of the Will. The Will was drafted by Amit Chatterjee, Advocate at Alipore Court. In order to prove his previous acquaintance with Dilip Kumar Bhattacharjee said PW 1 stated that he was working as Law Clerk under Dilip Kumar Bhattacharjee and he had document to substantiate the fact. But no such document was produced. PW 2 the Executor, on the contrary, stated that his father was an advocate of High Court and not of Alipore Court. He never saw PW 1 in their house. Therefore, the evidence of PW 1 regarding his acquaintance with the so-called testator becomes doubtful.

Mr. Bhattacharjee further contended that it was the specific case of the Caveator while opposing the probate proceeding that the Will does not contain the signature of Dilip Kumar Bhattacharjee. When PW 2 was

asked to produce document containing the admitted signature of his father, he stated that he did not have any document containing signature of his father excepting the Will. This answer of PW 2 is nothing but his ploy to keep the original admitted signature of his father away from the scrutiny of Court. It is impossible for any man of ordinary prudence to believe that Ashim Kumar Bhattacharjee, son of Dilip Kumar Bhattacharjee, does not have any paper containing the admitted signature of his father, though he is looking after the business of his father.

Drawing our attention to the death certificate, Mr. Bhattacharjee submits that Dilip Kumar Bhattacharjee died at the age of 82 on 19th November, 2006 at Peerless Hospital. The Will was prepared in the year 1992 precisely on 20th November, 1992, 14 years prior to the death of Dilip Kumar Bhattacharjee. Therefore, the age of Dilip Kumar Bhattacharjee should have been 68 years in the year 1992. An erudite person like Dilip Kumar Bhattacharjee had no reason to depict himself as man of 63 while his actual age was 68 years and that too for nothing.

It is further adverted by Mr. Milan Chandra Bhattacharjee, learned Senior Advocate for the appellant that the purported Will Exhibit-1 appears to have been registered on 20th November, 1992 and PW 1 Ashim Kumar Bhattacharjee stated that one year prior to the death of his father, his father told him and his other brother Biman Kumar Bhattacharjee about an envelope and instructed them to act accordingly "As per paper inside the envelope". Dilip Kumar Bhattacharjee owned three houses, one at 100 Rashbehari Avenue, second one at 98 Rashbehari and third one at Sonarpur. The testator did not disclose where he kept the envelope. The

propounder filed the application before the learned District Delegate seeking probate of Will on 8th December, 2006 within a month of death of his father. This is also a suspicious circumstance. There is no explanation wherefrom he found the envelope containing the paper particularly when it was not disclosed by his father.

It shows that the propounder took initiative to prepare the Will in question, with the help of his Advocate friend and his associates and produced the Will from his custody but did not produce any document containing the admitted signature of his father to show that the signature on the Will and admitted signature of his father are same and identical.

Cumulative effect of all these engulf the case with dense shadow of suspicion and the propounder though was under obligation to dispel such shadow of suspicion, failed to do so. Learned Trial Court failed to consider these surrounding circumstances concerning the execution of the Will. According to Mr. Bhattacharjee learned Trial Court acted mechanically without application of mind and as such made an erroneous judgement which should be set aside.

Refuting such contention Mr. Dhurba Ghosh, learned Senior Advocate argued that the Caveator Moyna Bhattacharjee challenged the Will on two specific grounds. According to Moyna Bhattacharjee, the Caveator, the Will is forged, fabricated and not executed by the testator in exercise of his free Will. And the other point is that the signature appearing in the Will Exhibit-1 is not genuine or in other words it is not the signature of Dilip Kumar Bhattacharjee. These two stands taken by the Caveator in the written statement are mutually contradictory and

sufficient to destroy the case of the Caveator. To buttress his point Mr. Ghosh relied upon the decision of this Hon'ble Court pronounced in the case of ***Nandadulal Dey & Ors. vs. Smt. Mira Das & Anr.*** reported in **AIR 1981 Cal 83** wherein Hon'ble Court held:

“16. The case of undue influence and forgery are rather self-destructive. If a case of undue influence is made, it cannot be forgery and vice versa. 20 Cal WN 310 : (AIR 1916 Cal 658). The conditions required under Section 63 of the Indian Succession Act have been fully fulfilled for the grant of a probate.”

It is argued that he who asserts fraud or undue influence must plead and prove it. No evidence however is led by the Caveator or her witnesses to prove the element of fraud or undue influence.

Placing reliance upon the judgement of the Co-ordinate Bench of this Court presided over by one of us (Hon'ble Justice Soumen Sen) in FA 33 of 2021, *Sabitri Das @ Ankun Das vs. Tapan Kumar Nandi & Ors.*, Mr. Dhruba Ghosh, learned Counsel submits that if the Caveator alleges fraud or undue influence, coercion etc. in regard to the execution of the Will, such pleas have to be proved by the Caveator. The testator, since, has made his intention clear to bequeath the property in favour of his two sons and daughter which under no circumstances could be said to be unusual, irrational or abnormal or unfair or result of undue influence or coercion probate of the Will may not be denied.

Mr. Ghosh strenuously argued that a Will is executed to alter the normal mode of succession and by the very nature of things it is bound to result in either reducing or depriving the share of natural heir. Therefore,

because of the fact that one of the sons of the testator was excluded by the testator it cannot be considered to be a suspicious circumstance. According to Mr. Ghosh the propounder is obviously under obligation to remove all the suspected features provided, there must be real germane and valid suspicious features and not fantasy of the doubting mind.

Here in this case the Will was executed by the testator in the year 1992, 14 years prior to his death. In absence of any document to show that the mental faculty of the testator was impaired, there is no reason to hold that the execution of the Will was surrounded by suspicious circumstances.

In support of his contention Mr. Ghosh placed his reliance on a decision of the Hon'ble Apex Court pronounced in the case of ***Ramabai Padmakar Patil (D) through LRs. & Ors. vs. Rukminibai Vishnu Vekhande & Ors.*** reported in **(2003) 8 SCC 537** wherein it is held :

“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. In PPK Gopalan Nambiar v. PPK Balakrishnan Nambiar and Ors., it has been held that it is the duty of the propounder of the Will to remove all the suspected features, but there must be real, germane and valid suspicious features and not fantasy of the doubting mind. In this

case, the fact that the whole estate was given to the son under the Will depriving two daughters was held to be not a suspicious circumstances and the finding to the contrary recorded by the District Court and the High Court was reversed. In Pushpavati and Ors. v. Chandraja Kadamba and Ors., it has been held that if the propounder succeeds in removing the suspicious circumstance, the Court would have to give effect to the Will, even if the Will might be unnatural in the sense that it has cut off wholly or in part near relations. In Rabindra Nath Mukherjee and Anr. Panchanan Banerjee, it was observed that the circumstance of deprivation of natural heirs should not raise any suspicion because the whole idea behind execution of the Will is to interfere with the normal line of succession and so, natural heirs would be debarred in every case of Will. Of course, it may be that in some cases they are fully debarred and in some cases partly. The concurrent finding recorded by the District Court and the High Court for doubting the genuineness of the Will on the aforesaid ground was reversed."

Mr. Dhruba Ghosh, learned Senior Advocate for the respondent further submits that Will contains the decision of the testator and the Court while considering the application for probate does not sit in appeal over the decision made by the testator. The Court has very limited role to examine whether the instrument propounded is the last Will of the deceased or not and whether it is the product of the free and sound disposing state of mind. The testator executed the Will when all his three sons were alive. After the death of his eldest son Deb Kumar Bhattacharjee in the year 2001, he did not think it necessary to change his mind. In absence of any evidence to the effect that the testator did not execute the Will on his free will or that fraud was practiced upon the testator or that the Will is product of coercion, there is no reason for the Court to substitute its own opinion over and above the desire of the

testator. While making such argument Mr. Ghosh, learned Advocate for the respondent relied upon the decision of Hon'ble Apex Court pronounced in the case of **Gurdev Kaur & Ors. vs. Kaki & Ors.** (at paragraphs 77 and 78) reported in **(2007) 1 SCC 546**.

“77. The High Court has clearly deviated from the settled principle of interpretation of the will. The court does not sit in appeal over the right or wrong of the testator’s decision. The court’s role is limited to examining whether the instrument propounded as the last will of the deceased is or is not that by the testator and whether it is the product of the free and sound disposing mind. It is only for the purpose of examining the authenticity or otherwise of the instrument propounded as the last will, that the court looks into the nature of the bequest.

78. The learned Single Judge of the High Court has not even properly appreciated the context of the circumstances. The contents of the will have to be appreciated in the context of the circumstances, and not vis-à-vis the rules for intestate succession. It is only for this limited purpose that the court examines the nature bequest. The court does not substitute its own opinion for what was the testator’s will or intention as manifested from a reading of the written instrument. After all, a will is meant to be an expression of his desire and therefore, may result in disinheritance of some and grant to another. In the instant case, wife of the testator Bhagwan Kaur alone had lived with the deceased and only she had looked after him throughout his life. The other daughters were all happily married a long time ago and in their weddings the testator had spent huge amount of money. In his own words, he had spent more than what they would have got in their respective shares out of testator’s property.”

Mr. Dhruba Ghosh, learned Counsel for the respondent prays for dismissal of appeal.

Will is a document that speaks after the death of the testator, to be proved by primary evidence, the legal principles regarding proof of a Will are no longer res-integra proceeding. It is required to be attested and proved as provided in Section 63 (c) of the Indian Succession Act, 1925 and Section 68 of the Indian Evidence Act, 1872. It cannot be used as evidence until one of the attesting witnesses is called for the purpose of proving its execution. In addition, it has to justify the requirements of Section 63 of the Indian Succession Act, 1925. In order to ascertain whether the Will has been validly executed and is a genuine document the propounder has to show that at the relevant point of time the testator was in sound and disposing state of mind and he signed the Will in presence of at least 2 witnesses who attested the Will in his presence and in presence of each other. Once these elements are established the onus of propounder is said to have been discharged.

We may in this regard rely with profit upon the celebrated decisions of Hon'ble Apex Court on proof of a will, reported in **AIR 1959 SC 443** is in the case of **H. Venkatachala Iyenger vs. B.N. Thimmajamma**. The relevant portion of the said judgement reads as under:-

"18. 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 Section 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 Sections 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, Sections 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 prescribed by Section 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."

In the above noted case, the Hon'ble Supreme stated that the following three aspects must be proved by a propounder:-

"(i) that the will was signed by the testator in a sound and disposing state of mind duly understanding the nature and effect of disposition and he put his signature on the document of his own free will, and

(ii) 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 propounder, and

(iii) if a will is challenged as surrounded by suspicious circumstances, all such legitimate doubts have to be removed by cogent, satisfactory and sufficient evidence to dispel suspicion. In other words, the onus on the propounder can be taken to be discharged on proof of the essential facts indicated therein."

In **Jaswant Kaur v. Amrit Kaur & others** reported in **(1977) 1 SCC 369**, Hon'ble Apex Court pointed out that when a will is allegedly shrouded in suspicion, its proof ceases to be a simple lis between the plaintiff and the defendant. What generally is an adversarial proceeding, becomes in such cases, a matter of the Court's conscience and then, the true question which arises for consideration is, whether, the evidence let in by the propounder of the will is such as would satisfy the conscience of the Court that the will was duly executed by the testator. It is impossible to reach such a satisfaction unless the party which sets up the will offers cogent and convincing explanation with regard to any suspicious circumstance surrounding the making of the will.

Hon'ble Apex Court in **Anil Kak v. Sharada Raje** reported in **(2008) 7 SCC 695** held as under:-

"52. Whereas execution of any other document can be proved by proving the writings of the document or the contents of it as also the

execution thereof, in the event there exists suspicious circumstances the party seeking to obtain probate and/or letters of administration with a copy of the will annexed must also adduce evidence to the satisfaction of the court before it can be accepted as genuine.

53. *As an order granting probate is a judgment in rem, the court must also satisfy its conscience before it passes an order.*

54. *It may be true that deprivation of a due share by (sic to) the natural heir by itself may not be held to be a suspicious circumstance but it is one of the factors which is taken into consideration by the courts before granting probate of a will.*

55. *Unlike other documents, even animus attestandi is a necessary ingredient for proving the attestation.”*

Similarly, in **Leela Rajagopal & others v. Kamala Menon Cocharan and others** reported in **(2014) 15 SCC 570**, Hon’ble Apex Court opined as under:-

“13. A will may have certain features and may have been executed in certain circumstances which may appear to be somewhat unnatural. Such unusual features appearing in a will or the unnatural circumstances surrounding its execution will definitely justify a close scrutiny before the same can be accepted. It is the overall assessment of the court on the basis of such scrutiny; the cumulative effect of the unusual features and circumstances which would weigh with the court in the determination required to be made by it. The judicial verdict, in the last resort, will be on the basis of a consideration of all the unusual features and suspicious circumstances put together and not on the impact of any single feature that may be found in a will or a singular circumstance that may appear from the process leading to its execution or registration. This, is the essence of the repeated pronouncements made by this Court on the subject including the decisions referred to and relied upon before us.”

Keeping in mind the aforesaid settled principles of law let us consider the case at hand.

From the attending facts of the case it is admitted that Dilip Kumar Bhattacharjee was an alumni of Presidency College, Calcutta, a law graduate and a junior to Mr. Ashoke Kumar Sen, an eminent lawyer of the country in his time.

Mr. Milan Chandra Bhattacharjee, learned Senior Counsel for the appellant raised a question as to the necessity of the testator Dilip Kumar Bhattacharjee to go to Alipore Court, which was not his place of practice, to prepare a Will in Bengali and to get it registered on that very day; instead of preparing any document by himself or by any of his colleague practitioner, which would have been natural for Mr. Bhattacharjee, particularly when there is no evidence regarding his prior acquaintance with Mr. Amit Chatterjee, who drafted the Will. Dilip Kumar Bhattacharjee went to Alipore Court got the Will prepared by Mr. Amit Chatterjee practicing Advocate of Alipore Court. Draft was prepared on instruction and settled.

The Will was typed at Judges' Court premises, Alipore by one Arabindo Ghosh. The draft of the Will, prepared in the Court premises, however, was not produced before the Court. Dilip Kumar Bhattacharjee took the Will to the Office of the Registrar for the purpose of registration and from the Will we find that it was presented for the purpose of registration at 11.30 a.m. of 20th November, 1992. Entire procedure was completed at a jet speed.

Going through the content of the Will we find that the names of the grandsons - two sons of the first child of the testator, were written incorrectly as 'Siddhanta' and 'Arindam' instead of 'Siddhartha' and 'Aritra'. The grandfather consciously would put incorrect names of his grandsons is extremely difficult to accept. Even the disposition in their favour is unnatural and unfair having regard to the entire facts relating to the execution of the Will. This erroneous description in the recital of Will undoubtedly creates suspicion; speed associated with the preparation of Will gives an impression that it was not prepared on 20th November, 1992 and possibly not under the instruction of Dilip Kumar Bhattacharjee. Ashim Kumar Bhattacharjee the propounder as PW 2 stated during cross-examination that he was acquainted with Amar Bhandari who happens to be Clerk of a lawyer Swapan Kumar Chakraborty, he had intimacy with Swapan Babu since last 10-11 years.

Amar Bhandari as PW 1 proved the Will as one of the attesting witnesses and stated that he was a registered Clerk at the time of execution of the Will, he worked under Amit Chatterjee as well.

On perusal of the Will and taking into consideration the oral testimony of PW 1 we find that the Will was prepared and registered on the same day i.e. 20th November, 1992. On that very day the draft was prepared by Amit Chatterjee, Advocate of Alipore Judges Court. It was typed and placed for registration at about 11.30 a.m. This proximity of time between the instructions given by the testator to the lawyer, thereafter preparation of the draft it's settlement followed by typing of the document makes the preparation and execution of the Will doubtful and

such doubt gets intensified when the names of the grandchildren are found to have been written incorrectly.

The Caveator challenged the Will not only on the ground of fraud, coercion, undue influence etc. but also by making specific averment that it was not signed by testator. PW 2 the propounder of the Will, is earning his bread by running the business owned by his father Dilip Kumar Bhattacharjee. When PW 2 was asked to produce the admitted signature of his father during cross-examination, he replied that he did not have any document containing his father's signature, other than the Will in question. All documents were given by his father to his second brother and those documents were kept in the locker of his second brother. However, he stated that he mentioned the list of properties in the affidavit of assets appended to his petition for grant of probate, as disclosed by his second brother. This explanation of PW 2 regarding his inability to produce any document containing the admitted signature of his father is not at all convincing; rather it appears to be an improbable narrative of the propounder to avoid the obligation of proving the signature of his father on the Will or to put it differently, it is a very conscious attempt on the part of the propounder of the Will to withhold documents containing the admitted signature of the testator. In such circumstances, we are inclined to draw adverse presumption by holding that had the admitted signature of the testator been produced by PW 2, it would have proved that the Will executed and registered in the year 1992, actually does not contain the signature of the testator.

We should not be oblivious to the fact that the genuineness of the signature of the testator is under challenge. The onus lies upon the

propounder to meet the challenge and dispel the suspicion raised by the Caveator regarding execution of the Will. Particularly when the Will is claimed to have been prepared and executed at Alipore Court on the same sitting and within a short span of time presented for registration.

The testator was not accustomed to visit Alipore Court as an Advocate. We find the propounder saying that his father never practiced at Alipore Court, he was an Advocate at High Court. We cannot shut our eyes from the fact that Amar Bhandari though claimed to have worked with the testator Dilip Kumar Bhattacharjee as his Clerk, the propounder PW 2 stated that he never saw Amar Bhandari in their house rather he was acquainted with Amar Bhandari a Clerk of one Swapan Kumar Chakraborty, an Advocate, practicing at Alipore Court.

It is rightly argued by Mr. Dhruba Ghosh, learned Senior Advocate for the respondent that the Court does not sit in appeal over a decision of the testator but at the same time we should not be unmindful of the fact that being a Court of conscience, while considering the appeal Court has the obligation under law to probe deep into the matter because of the fact that proof of a Will is required not as ground of reading the document but to afford a judge reasonable assurance of it as being what it purports to be.

We may in this regard rely upon the judgement of Hon'ble Supreme Court in ***Naranjan Umeshchandra Joshi v. Mrudula Jyoti Rao***, reported in **(2006) 13 SCC 433:-**

“34. There are several circumstances which would have been held to be described by this Court as suspicious circumstances:

- (i) when a doubt is created in regard to the condition of mind of the testator despite his signature on the will;*
- (ii) When the disposition appears to be unnatural or wholly unfair in the light of the relevant circumstances;*
- (iii) where propounder himself takes prominent part in the execution of will which confers on him substantial benefit.*

35. We may not delve deep into the decisions cited at the Bar as the question has recently been considered by this Courts in B.Venkatamuni v. C.J. Ayodhya Ram Singh [(2006) 13 SCC 449], wherein this Court has held that the court must satisfy its conscience as regards due execution of the will by the testator and the court would not refuse to probe deeper into the matter only because the signature of the propounder on the will is otherwise proved.

36. The proof of a will is required not as a ground of reading the document but to afford the Judge reasonable assurance of it as being what it purports to be.

37. We may, however, hasten to add that there exists a distinction where suspicions are well founded and the cases where there are only suspicions alone. Existence of suspicious circumstances alone may not be sufficient. The court may not start with a suspicion and it should not close its mind to find the truth. A resolute and impenetrable incredulity is not demanded from the Judge even if there exist circumstances of grave suspicion.”

It goes without saying that the Will in question is a registered document and registration took place before the insertion of Section 32A by Act 48 of 2005 on 24th September, 2001.

A registered document raises a presumption under Section 114 [Illustration (e)] of the Evidence Act to the effect that the events contained in the endorsement of registration duly performed and correctly recorded

but it does not contemplate the factum of attestation within the meaning of Section 63 (c) of the Succession Act or Section 68 of the Evidence Act being certified by Registrar of the document. In this regard, we can place our reliance with profit in decision pronounced in **Bhagat Ram & Anr. vs. Suresh & Ors.** reported in **(2003) 12 SCC 35** wherein the Hon'ble Supreme Court held:-

“Question-3:

23. Registration of a document does not dispense with the need of proving the execution and attestation of a document which is required by law to be proved in one manner as provided in Section 68 of the Evidence Act. Under Section 58 of the Registration Act the Registrar shall endorse the following particulars on every document admitted to registration:

(1) the date, hour and place of presentation of the document for registration;

(2) the signature and addition of every person admitting the execution of the document, and, if such execution has been admitted by the representative, assign or agent of any person, the signature and addition of such representative, assign or agent;

(3) the signature and addition of every person examined in reference to such document under any of the provisions of this Act, and

(4) any payment of money or delivery of goods made in the presence of the registering officer in reference to the execution of the document, and any admission of receipt of consideration, in whole or in part, made in his presence in reference to such execution.

24. Such particulars as are referred to in Sections 52 and 58 of the Registration Act are required to be endorsed by Registrar alongwith his signature and date on document under Section 59 and then certified under Section 60. A presumption by reference to Section 114 (Illustration (e)) of the Evidence Act shall arise to the effect that

the events containing in the endorsement of registration, were regularly and duly performed and are correctly recorded. None of the endorsements, require to be made by the Registrar of Deeds under the Registration Act, contemplates the factum of attestation within the meaning of Section 63(c) of the Succession Act or Section 68 of the Evidence Act being endorsed or certified by the Registrar of Deeds. The endorsements made at the time of registration are relevant to the matters of the registration only (See: Kunwar Surendra Bhadur Singh and Ors. v. Thakur Behari Singh and Ors. reported in AIR 1939 PC 117). On account of registration of a document, including a will or codicil, a presumption as to correctness or regularity of attestation cannot be drawn. Where in the facts and circumstances of a given case the Registrar of Deeds satisfies the requirement of an attesting witness, he must be called in the witness box to depose to the attestation. His evidence would be liable to be appreciated and evaluated like the testimony of any other attesting witness.”

We consider it apposite to point out certain factual aspects which inspire us to arrive at just decision:-

(i) The disposition appears to be unnatural as we find exclusion of Deb Kumar Bhattacharjee, the eldest son of the testator, sans explanation.

(ii) Incorrectly written names of the grandchildren of the testator in the recital of the Will also appear to be unnatural.

Disposition appears to be unnatural when the content of the Will is examined in contradistinction with the deposition of DW 2 who withstood the test of cross-examination.

Prasanta Ranjan Mukherjee, the nephew of the testator as DW 2 in his evidence stated that Deb Kumar Bhattacharjee was loved by his father for his innocence, honesty, good and liberal nature. Dilip Kumar

Bhattacharjee had profound love and affection towards his grandsons i.e. sons of Deb Kumar and Moyna and was very proud of them because of their educational achievement. His uncle (Dilip Kumar Bhattacharjee) during his life time expressed his desire to settle his property in favour of his two grandsons.

DW 2 stated further that the content of the Will appears to be contrary to such wishes and desires of Dilip Kumar Bhattacharjee.

(iii) The conduct of the propounder to avoid his obligation to dispel the cloud of suspicion by not producing before the Court the admitted signature of Dilip Kumar Bhattacharjee, the testator when the Caveator challenged the very signature on the Will.

(iv) Production of Will within one month death of the testator by PW 2 without indicating the place, where it was kept and how did the Propounder come to know about such place, particularly when it was not disclosed by the testator to him, having purportedly executed the document 14 years before his death.

(v) Acquaintance of PW 2 with the attesting witness PW 1, a Clerk of Sri Swapan Kumar Chakraborty, Advocate, with whom PW 2 had 'intimacy' for more than a decade. Amar Bhandari PW 1 also worked with Sri Amit Chatterjee, the scribe of the Will. In absence of evidence indicating their prior acquaintance with the testator, who never practiced in Alipore Court, the role played by PW 1 and Sri Amit Chatterjee obviously ignites a sense of doubt.

(vi) Unusual pace with which the Will was prepared, executed and submitted for registration on 20th November, 1992 cannot be overlooked. All these aspects cumulatively excite suspicion surrounding the preparation and execution of Will.

It is trite to say that an order of granting probate is judgement in rem and the Court must satisfy its conscience before passing an order granting probate of the Will.

The circumstances as indicated hereinabove unerringly suggest that the entire case is shrouded with shadow of suspicion which the propounder has failed to remove in order to satisfy the conscience of the Court. Therefore, we express our inability to uphold the impugned judgement and decree.

We allow the appeal and set aside the impugned judgement and decree.

Consequently the appeal succeeds.

Department is directed to send down the Lower Court Records immediately.

Urgent Photostat certified copy of this judgement, if applied for, should be made available to the parties upon compliance with the requisite formalities.

I agree

(Siddhartha Roy Chowdhury, J.)

(Soumen Sen, J.)

Later

Learned Advocate for the respondents prays for an order of stay which is considered and rejected.

(Soumen Sen, J.)

(Siddhartha Roy Chowdhury, J.)