

**IN THE HIGH COURT AT CALCUTTA
CIVIL APPELLATE JURISDICTION
APPELLATE SIDE**

BEFORE:

The Hon'ble Justice Soumen Sen

and

The Hon'ble Justice Ajoy Kumar Mukherjee

FA 33 of 2021

Sabitri Das @ Ankun Das

Versus

Tapan Kumar Nandi & Ors.

For the Appellant : Mr. Probal Kumar Mukherjee, Sr. Adv
Mr. Subrata Mondal, Adv.
Mr. Sandipto Bose, Adv.
Mr. Sukanta Chakraborty, Adv.
Mr. Sujit Kumar Sharma, Adv.
Mr. Anindya Halder, Adv.

For the Respondents : Mr. Surya Prasad Chattopadhyay, Adv.
Mr. Arjun Samanta, Adv.

Hearing Concluded On : 22nd April, 2022

Judgment On : 18th May, 2022

Soumen Sen, J:- The appeal is arising out of an order dated 6th May, 2017 refusing to grant probate of a will executed by Mukta Nandi, wife of Late Bireshwar Nandi of Bidhan Nagar Municipality relating to her estate.

Sabitri is the executor of the Will. She is the appellant.

Sabitri Das filed an application for grant of probate of the last Will and testament of Mukta Nandi (hereinafter referred to as 'testatrix'). The testatrix is the elder sister of the executor. Prior to her death, testatrix made and published her last Will and testament on 14th November, 2007. She appointed her younger sister Sabitri Das as executor of the Will. The Will was executed by the deceased testatrix and registered in the office of the Addl. District Sub-Registrar at Bidhannagar and same was duly recorded in Volume No.3, C.D. Form -1, Page No. 837 to 855 being no.00129 for the year 2007.

Sabitri applied for the grant of probate by stating the aforesaid facts.

Four persons namely, Tapan Nandy, Renuka Das, Purnima Dutta and Jyotsna Das contested the proceeding by filing a joint written statement denying all material allegations made in the probate application. The caveators alleged that Sabitri has no locus standi to file the probate application. The alleged Will was never executed by Mukta Nandy. The said Will was obtained by fraud and misrepresentation. Under the Hindu Succession Act, 1956 neither the petitioner Sabitri nor Swapna are the legal heirs and successors of Mukta Nandy. The property mentioned in the schedule of the Will was originally belonged to Bireswar Nandy and after his death the said property was inherited by her wife Mukta Nandy. The testatrix was issueless and after her death the property should have devolved upon the legal heirs of her husband i.e. brother and sister of Bireswar, in

terms of the provisions of the Hindu Succession Act. Prior to her death the testatrix was suffering from incurable disease for a long time and which fact has been mentioned in the “so called Will”. At the time of execution of such alleged Will Mukta Nandy was suffering from many ailments and she became weak due to such prolonged illness.

The appellant/executor illegally made an attempt to obtain a probate of Will, which could not have been executed by Mukta Nandy due to her incurable disease. The executor in collusion with her sister Swapna and their husband most “illegally and motivatedly with the intention to grab the property” has filed the probate application.

On the basis of the pleadings the learned Trial Judge framed six issues, namely:

- i) Is the suit maintainable in its present form and law?*
- ii) Has the plaintiff any cause of action to file the instant suit?*
- iii) Whether the testatrix executed the purported Will in sound mind and health?*
- iv) Whether the purported Will has been executed by the testatrix out of undue influence or coercion by the plaintiff and procured by the plaintiff fraudulently?*
- v) Whether the plaintiff is entitled to get decree as prayed for?*
- vi) Whether the suit is liable to be dismissed under suspicious circumstances?*

The executor herself deposed as PW-1 and in continuation of her affidavit-in-chief. Biswanath Dutta, husband of Swapna Dutta deposed as PW-2. Renuka Das one of the sisters of Bireswar deposed as DW-1 and one Anima Mondal deposed as DW-2.

The appellant during the course of trial exhibited the following documents:

Exbt. 1 - Death Certificate of Mukta Nandy;

Exbt. 1/1 – Death Certificate of Bireswar Nandy;

Exbt. 2 – Signature together with mutual fund collectively;

Exbt. 3 – Signature of Mukta Nandy;

Exbt. 4 to 4/2 – Cheque book containing signatures of Mukta Nandy;

Exbt. 5 – Signature of Mukta Nandy on deposit slip of U.B.I.;

Exbt. 6 – Will

Exbt. 6/1 – Signature of PW-2 over Will;

Exbt. 7/1 to 7/5 – Signature of Mukta Nandy over Will;

However, no document has been filed from the side of the contesting opposite party.

The learned trial Judge after recording the submission of the parties and relying upon the testimony of Anima returned a finding that in absence of evidence of any independent person in support of the fact that at the time

of the execution of the Will Mukta was physically fit and mentally alert, it cannot be said that Mukta was capable of executing the Will. The other reasons are: presence of husband of two beneficiaries as attesting witnesses, lack of property identification of Mukta before the sub registrar and deliberate omission of the names of the caveators in the application for grant of probate although they would have succeeded to the estate of their elder brother Bireswar in absence of any Will, identifier Goutam Dutta was not examined etc. Anima was considered to be an independent witness for the purpose of deciding the physical and mental capacity of Mukta Nandy to execute the alleged Will. All are considered to be interested witnesses excepting Anima.

Mr. Probal Mukherjee, the learned Senior Counsel appearing on behalf of the appellant submits that the learned Trial Judge has completely down played the solemnity attached to a registered Will and the fact that the Will was proved in accordance with Section 63 of the Indian Succession Act, 1925 read with Section 68 of the Indian Evidence Act, 1870. It is submitted that the executor in her affidavit-in-chief has identified the signature of Mukta Nandy and filed all the required documents to show that the dispossession in favour of the beneficiaries were not on account of any fraud or misrepresentation. In her cross examination she has proved the factum of death and denied the suggestion of fraud or undue influence. She has resolutely stood by her statement that Mukta did not lose her mental

capacity due to ailments. She also identified the attesting witnesses and has stated that the two sisters took the responsibility regarding preparation and execution of the Will at the instruction of Mukta Nandy. She has also stated that both the sisters used to look after Mukta Nandy during her illness. Mukta Nandy used to reside at Saltlake. The executor used to reside at Goalpark and another sister Swapna resides at Beliaghata. The executor and her sister used to stay at the house of Mukta alternatively and both had taken due care of Mukta. Anima and her two sons used to reside at the house of Mukta Nandy. She denied all the suggestions of any collusion or fraud of her sister or their husband, taking advantage to their close relation to Mukta.

Mr. Mukherjee has also taken us through the evidence of Biswanath Dutta, the husband of Swapna Dutta. Mr. Mukherjee submits that the evidence would show that at the request of Mukta the two husbands of her two sisters who are beneficiaries under the Will were present on 14th November, 2007 during execution and registration of the said Will. Mr. Mukherjee has relied upon paragraph 5 of the evidence in chief to show that the Will was prepared according to the instruction of Mukta Nandy and she after going through the contents of the Will and being satisfied with the narration of facts and contents of the Will, voluntarily put her signature on the said Will in presence of the attesting witnesses. She also put her LTI and signature on the reverse of the first page of the said Will, in presence of

sub registrar and the said LTI was duly identified by Gautam Dutta, Advocate. The attesting witness duly identified the signature of Mukta and duly proved the execution of the said Will in accordance with Section 63 of the Indian Succession Act. Biswanath also denied the suggestion that Mukta was not physically fit and mentally sound at the time of execution of the said Will or that she had executed the said Will under influence or pressure created by her sisters or husbands of the sisters. It is submitted that onus of the propounder is discharged when she proves the statutory requirements under Section 63 of the Indian Succession Act read with Section 68 of the Indian Evidence Act, 1872.

There are no suspicious circumstances at all surrounding the execution of the Will. Anima is an interested witness and she came to depose at the request of Renuka. She was not present at the time of death of Mukta. There are no corroborating material in support of her allegation of mental incapacity of Mukta to execute the Will. The illness of Mukta has been admitted in the Will by the sisters. The illness was not of such a nature which would incapacitate Mukta to act voluntarily or freely. Once the circumstances surrounding the execution of the Will and its genuineness have been duly established by the executor, the onus to prove fraud or misrepresentation is on the caveators which could not be established by the caveators. Moreover, the original Will would show that Mukta Nandy went to the office of the sub registrar to execute the Will and

had presented the Will which would go to show that she was physically fit and mentally alert and was aware about the purpose of her visit to the sub registrar's office. The testatrix survived thereafter for few years and she did not take any step for cancellation of the Will which would also be one of the factors to be taken into consideration in deciding the genuineness of the Will.

The mere fact that the beneficiaries under the will had actively participated in execution or registration of the said Will or that natural heirs were excluded thereby would not by itself invalidate the genuineness of the Will and could not be considered to be suspicious circumstances. The presence of the attesting witnesses at the time of registration also by itself would not amount to taking a prominent part in execution of the Will. Before registration of the Will the registrar must satisfy himself that the testatrix had knowledge about the contents of the Will at the time of the execution and under such circumstances it cannot be contended that the execution of the Will is surrounded by suspicious circumstances. Mr. Mukherjee in this regard has relied upon the following decisions of the Hon'ble Supreme Court:-

i) ***Savithri and Ors. vs. Karthyayani Amma and Ors.*; 2007(11) SCC 621.**

ii) ***Pentakota Satyanarayana and Ors. vs. Pentakota Seetharatnam and Ors.*; 2005(8) SCC 67.**

iii) ***Goutam Bhowmick @ Bhuiya v. Shrimati Sabitri Bhuiya*; AIR 2012 Cal 57.**

iv) ***Bharpur Singh and Ors. v. Shamsher Singh*; 2009 (3) SCC 687.**

v) ***Dhanpat v. Sheo Ram (Deceased) through Legal Representatives and Ors.*; 2020 (16) SCC 209.**

Mr. Mukherjee has relied upon the decision of the Hon'ble Supreme Court in Bharpur (supra) paragraph 14 for the proposition that the Will must be proved having regard to the provision contained in Clause (C) of Section 63 of the Indian Succession Act, 1925.

Mr. Mukherjee submits that the application filed for additional evidence disclosing medical documents and medical reports would also establish that the testatrix was of sound mind and was attending the doctor's chambers, taking medicines and leading normal life with medicine and treatment. These evidence now brought on record would dispel any doubt about the mental incapacity of the testatrix. Mr. Mukherjee submits that the additional evidence is required to be taken on record and considered while disposing of the appeal as there is no objection per se by the respondents / caveators in admitting the said documents in evidence at the appellate stage as the said documents are likely to throw lights of the mental and physical condition of Mukta Nandy at the relevant time.

Per contra, Mr. Surya Prasad Chatterjee, the learned Counsel representing the respondent/caveators has supported the judgment. Mr. Chatterjee submits that the court is required to be extremely careful in granting probate to an executor only on recording a satisfaction that it is not a product of fraud, undue influence and misrepresentation as the Will becomes operative only upon the death of the testatrix. Irrespective of the fact that coercion, undue influence, fraud or mental incapacity being urged in the written statement, probate court, being a court of equity is required to be satisfied that the Will and the last testament is that of the testatrix executed voluntarily and with free mind. The mental incapacity of the testatrix is also a relevant consideration when the record reveals that she was suffering from cancer and may not have an independent mind and will to execute the Will.

Mr. Chatterjee has strongly relied upon the evidence of Anima who claim to have been with Mukta Nandy since 1992 as a full time maid servant. The learned Counsel has submitted that Anima in her deposition has clearly stated that in the year 2006 Mukta Nandy had been suffering from several ailments and she used to nurse her. Mukta had been suffering from cancer and she was operated by doctor and she was fully dependent upon Anima. Sabitri and Swapna used to come occasionally to meet Mukta but had never stayed in the house of Mukta Nandy. Swapna and Sabitri hatched conspiracy, which Anima could apprehend “as they used to

talk among themselves privately and did not allow any person to enter the room". The husband of the beneficiaries had also taken part in the discussion. Mukta Nandy had no knowledge at the fag end of life regarding wordly affairs. Occasionally Sabitri and Swapna and their husbands used to come along with some persons with the intention to transfer the property of Mukta which Anima could gather from their wishper. Anima tried to make Mukta aware of such conspiracy, but Mukta was not in a position to comprehend, as she lost all her mental faculties. Anima used to live in the house along with her two sons and they used to look after the property of Mukta. The sisters of Mukta used to take her out on the pretext of visiting doctors and request of Anima to accompany them was never allowed. She also had lost her eyesight and hearing at the "material period".

Mr. Chatterjee relying upon evidence of Anima in an attempt to convince the appellate court that Mukta was not in a position to execute the Will. It is submitted that the scribe of the will was not examined. The caveators have been purposely left out, although they were the natural heirs who would have originally succeeded to the estate of Mukta in absence of any Will. This raises a strong presumption of suspicious circumstances surrounding the execution of the Will. The onus lies on the propounder to prove that the Will was executed and proved to be genuine. The learned Counsel relying upon the decision of the Hon'ble Supreme Court in ***S.R. Srinivasa and Ors. v. S. Padmavathamma reported at***

2010(5) SCC 274 paragraph 36 and H. Venkatachala Iyengar v. B.N. Thimmajamma and Ors. reported at AIR 1959 SC 443 submits that in absence of any evidence adduced in support of the Will to show disinterestedness of the parties surrounding the execution of the Will and the condition of the testatrix mind which was at the material time was feeble, disoriented and debilitated, the executor, having failed to remove the legitimate doubts with regard to the physical and mental capacity of the testatrix, is not entitled to the grant of probate.

A Will is a commitment, desire, inclination and intention to bequeath and dispose of properties in the future, in favour of the beneficiary. It is difficult at times to comprehend the rationality, nature and extent of disposition by Will to a stranger or persons remotely connected with the testator.

Dispositions of like nature at times raise issues like mental incapacity, feeble mind, undue influence, coercion and fraud on a perceived notion of it being unnatural and irrational. The legal heirs who would have ordinarily succeeded to the estate of the deceased but for the Will are generally the persons aggrieved and very often the Will is challenged on the ground of suspicious circumstances surrounding the execution of the Will. The propounder who also becomes the beneficiary under a will taking a prominent role in the execution of the Will, is one of the factors considered as suspicious circumstances in deciding a contentious probate proceeding.

It is, thus, necessary to establish that the testatrix at the time of execution of the Will was of sound disposing mind. When the Will is made, the law requires that there should be sound disposing mind both at the time when the instructions for the will is given and when the will is executed, but it would appear that if the will is shown to have been drawn in accordance with the instructions given while the testator was of sound disposing mind, it is sufficient that, when he executes it, he appreciates that he is being asked to execute a will, a document drawn in pursuance of those instructions shall remain valid. It is presumed that the testatrix was sane at the time when she made her will but if the question of her insanity or mental incapacity is contested, the initial onus is on the propounder to prove that the testatrix was of sound disposing mind and have the required mental capacity at the time when she made her will. While there must be a vigilant examination of all the evidence, if the court feels that there is no doubt substantial enough to defeat a grant of probate, then the grant must be made. The law does not require complete proof of mental capacity and sound disposing mind or even proof beyond reasonable doubt is not essential (***See. Wellesley v. Vere (1841) 2 Curt 917, Re Flynn, Flynn v Flynn 1982(1) All ER 882 at 890. (Clancy v. Clanc (2003) EWHC 1885 (CH), and Re: Perrins v Holland (2009) EWHC 2029 (CH) (WLLR).***

The law requires that at the time of bequeath the testatrix has a disposing mind so that she is able to make a disposition of her property

with understanding and reason. In the instant matter the caveators are the brothers and sisters of the husband of the testatrix. She became widow nineteen years prior to her death. She was suffering from various ailments. However, the medical evidence on record does not show that she was incapable of taking any conscious or independent decision or did not have the required mental capacity to execute any document. She used to visit bank and collect her pension. She was not immobile. In fact she was physically present before the Additional District Sub-Registry Bidhannagar (Salt Lake) and presented her last Will and testament for registration before the Additional District Sub-Registry and had put her signature in presence of the said officer after she read the Will in presence of the said officer and two attesting witnesses. In the Will, although as testatrix she was not required to give any reason as justification for her bequeath, she has clearly stated the reasons for bequeath of the property in favour of her two sisters. The testatrix was issueless. In the Will she has clearly stated that after the death of her husband, the said two sisters and their family members had taken due care of the testatrix and attended to her medical needs. The evidence on record would show that none of the family members from the side of her husband had ever enquired or visited her during this period of nineteen years and they did not even attended to the medical needs of the testatrix. In fact the caveators were unable to establish that after the death of the husband of the testatrix they had taken any care or interest towards the well being and comfort of the testatrix. On the contrary, the evidence would show that the caveators have admitted in their evidence that she was looked after by her three sisters who used to attend to all the medical needs of the testatrix.

Renuka, one of the sisters of Bireswar during cross examination has stated:

“I have stated in my that I am deposing in this case on behalf of all the defendants. My eldest brother Bireswar Nandi died on 01.05.1999 leaving behind his wife Mukta Nandy. They had no issues. They used to live at Saltlake. My elder brother was an employee under Post and Telegraph. The wife of my elder brother got family pension till death. She died on 12.06.2010. I have no document to show that my Boudi was suffering from cancer since 2007. She was suffering from cancer in her Uterus. Previously she was treated at some Nursing Home at Salt Lake and ultimately she was treated at Thakur Pukur Cancer Hospital by herself. My Boudi were three sisters. One of them used to live at Golpark and I cannot say the residence of another sisters. My Boudi used to look after by her sisters. I have not seen the Will against which I have filed objection. I was informed by my advocate that the original will has been filed in the Court. I have filed an application to inspect the original Will but it was never inspected by me.

..... The Will if at all executed has been procured by force and that is why, I have used the term Manufactured in my examination in chief. The Registrar also conspired to the execution of the Will. I have stated this fact in my objection. I have not served any notice upon the Registrar nor I informed the matter to any superior. We were not informed about the death of my Boudi and her Shradha Ceremony was performed by her sisters. I came to know her death later on.

It is fact none of us were present at the time of death of my Boudi. Not a fact the sisters of Mukta did not know the address of myself and my brothers. It is fact there was an invitation through publication for the Shradha Ceremony. It is fact none of us were present in the Shradha Ceremony.
.....” (emphasis supplied)

The evidence of Renuka as extracted above would clearly establish that the brother and sisters of Renuka had shown no interest in Mukta after the death of their elder brother. They are only interested in the property after the death of their 'Bara Boudi' (elder brother's wife). They could not file medical document or any other document to show that they had ever accompanied Mukta to doctor or nursing home or had purchased medicines for Mukta. All the medical reports concerning Mukta had come from the custody of two sisters who are the beneficiaries under the Will.

In such circumstances, it is only natural that due to lack of empathy the testatrix would be more than willing and would be inclined to give preference to her sisters in acknowledgement of the care that she had received from her two sisters. In fact, the testatrix had excluded one of her sisters as she was well off. She bequeathed the property in favour of her other two sisters. The learned Counsel for the caveators made attempts to establish suspicious circumstances on the basis of the evidence of Anima who used to work as a maid servant when the testatrix was alive. The evidence of Anima was thought to be crucial for the caveators in absence of the caveators establishing any suspicious circumstances surrounding the execution of the Will. The evidence of the caveators are completely unworthy and fails to establish that the execution of the Will by the testatrix was under undue influence. The husbands of the two sisters, who are the beneficiaries, are the attesting witnesses. The beneficiaries of the Will have

taken a prominent role and hence one of the tests for refusal to grant based on suspicious circumstances as argued on behalf of the caveators at the first impression may seem to be attractive. However, merely because of the fact that the propounders have taken a prominent role in the execution of the Will cannot be the sole ground on which the probate can be refused. The caveators realizing their unworthy evidence frowned upon Anima to give them succor and to keep alive their hope in unsettling the Will. Anima has candidly admitted that she had come to depose on the request of Ranu, one of the caveators. Does this evidence worthy enough to dislodge the Will executed by Mukta at the sub-registry office? In fact, in the Will the testatrix had admitted to her illness. She also realized that she may not be live long. It may have been in contemplation of her death. She live almost three years after the execution of the Will. She as the owner of the property wanted to bequeath the property to her own sisters. She was not uneducated. A Registered Will stand on a different footing than an unregistered Will. The degree of proof of solemnity attached to any unregistered Will is much less in comparison to a registered Will. The reason being that the testatrix is expected to be present before the Registrar and there is a need to comply with the requirements of Section 29 and 32 of the Registration Act.

The said Sections read:

“29. Place for registering other documents.—

(1) Every document [not being a document referred to in section 28 or a copy of a decree or order], may be presented for registration either in the office of the Sub-Registrar in whose sub-district the document was executed, or in the office of any other Sub-Registrar under the 2[State Government] at which all the persons executing and claiming under the document desire the same to be registered.

(2) A copy of a decree or order may be presented for registration in the office of the Sub-Registrar in whose sub-district the original decree or order was made, or, where the decree or order does not affect immovable property, in the office of any the Sub-Registrar under the ⁴¹ [State Government] at which all the persons claiming under the decree or order desire the copy to be registered.”

32. Persons to present documents for registration.—Except in the cases mentioned in [Sections 31, 88 and 89], every document to be registered under this Act, whether such registration be compulsory or optional, shall be presented at the proper registration-office,—

(a) by some person executing or claiming under the same, or, in the case of a copy of a decree or order, claiming under the decree or order, or

(b) by the representative or assign of such a person, or

(c) by the agent of such a person, representative or assign, duly authorised by power-of-attorney executed and authenticated in manner hereinafter mentioned.”

Registered document has a lot of sanctity attached to it and this sanctity cannot be allowed to be lost without following the proper procedure. Caveators did not file any complaint with the registering authority, alleging illegality or irregularity in execution of the registered document. Moreover, under Section 32A of the Registration Act, 1908 every person presenting any document at the proper registration office under Section 32 is required to compulsorily affix her passport size photograph

and finger print on the document as now required by reason of insertion of Section 32A by way of amendment in 2001. We have inspected the original registered Will. All the procedures required under Sections 29, 32 and 32A of the Registration Act, 1908 have been scrupulously followed.

We may proceed on the basis that at the time of the execution of the said will the testatrix was unwell. The enquiry that is required to be made is to find out whether the testatrix had the mental capacity to understand and comprehend the contents of the will and whether the same was executed freely and voluntary.

The deposition of the propounder and one of the attesting witnesses clearly establish beyond any reasonable doubt that testatrix was physically and mentally fit. The testamentary capacity of the testatrix was duly proved and at least one of the attesting witnesses was examined for the purpose of proving the execution of the Will. The evidence would show that the Will has been signed by the testatrix with her free will in presence of the sub registrar and at that time she was in sound disposing state of mind and understood the nature of the fact of her disposition. It is also established that the testatrix had signed in the Will in the presence of two attesting witnesses who attested her signature in her presence and in the presence of each other. The mode and manner of execute of a Will has been lucidly discussed in **Savitri** (supra) in paragraphs 19 to 21. The following paragraphs state:

“19. In Niranjana Umeshchandra Joshi v. Mrudula Jyoti Rao and Ors., this Court held:

32. Section 63 of the Indian Evidence Act lays down the mode and manner in which the execution of an unprivileged Will is to be proved. Section 68 postulates the mode and manner in which proof of execution of document is required by law to be attested. It in unequivocal terms states that execution of Will must be proved at least by one attesting witness, if an attesting witness is alive subject to the process of the court and capable of giving evidence. A Will is to prove what is loosely called as primary evidence, except where proof is permitted by leading secondary evidence. Unlike other documents, proof of execution of any other document under the Act would not be sufficient as in terms of Section 68 of the Indian Evidence Act, execution must be proved at least by one of the attesting witnesses. While making attestation, there must be an animus attestandi, on the part of the attesting witness, meaning thereby, he must intend to attest and extrinsic evidence on this point is receivable.

33. The burden of proof that the Will has been validly executed and is a genuine document is on the propounder. The propounder is also required to prove that the testator has signed the Will and that he had put his signature out of his own free will having a sound disposition of mind and understood the nature and effect thereof. If sufficient evidence in this behalf is brought on record, the onus of the propounder may be held to have been discharged. But, the onus would be on the applicant to remove the suspicion by leading sufficient and cogent evidence if there exists any. In the case of proof of Will, a signature of a testator alone would not prove the execution thereof, if his mind may appear to be very feeble and debilitated. However, if a defence of fraud, coercion or undue influence is raised, the burden would be on

the caveator. See Madhukar D. Shende v. Tarabai Shedage and Sridevi and Ors. v. Jayaraja Shetty and Ors. Subject to above, proof of a Will does not ordinarily differ from that of proving any other document.

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

34. (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.

21. We do not find in the fact situation obtaining herein that any such suspicious circumstance was existing. We are not unmindful of the fact that the court must satisfy its conscience before its genuineness is accepted. But what is necessary therefor, is a rational approach.”

Deprivation of the share to the legal heirs of her husband itself is not a factor which would lead to the conclusion that there exists suspicious circumstances when admittedly she was left unattended and deserted by the caveators/respondents. They had shown no concern for their ‘Bara Boudi’ (elder brother’s wife).

One of the attesting witnesses has deposed that the testatrix signed the will in presence of the Sub-registrar in whose Sub-Division the

document was presented for registration and the endorsement on the reverse of the first page of the original Will would show that the testatrix presented the said will before the said sub-registrar for registration. One of the attesting witnesses have duly identified the signature of the testatrix and the other attesting witnesses at various pages of the said Will. The Registrar has also noted that the testatrix has been duly identified. The procedures that are required to be followed under the Registration Act, 1998 have been duly followed.

The emotional handholding of the sisters and their supportive role for almost nineteen years, after the testatrix became widow, justified the bequeath in favour of the two sisters and clearly demolish any insinuation of a disorderly mind to have poisoned her affections or prevent the exercise of her natural faculties. She knew whom she is excluding and she has given her reason in the Will for the bequest in favour of her two sisters. The testatrix was bound to place implicit faith and confidence upon them as they had looked after her and stood by her side for the last nineteen years.

During pendency of the appeal the appellants filed application under Order 41 Rule 27 of the Code of Civil Procedure for additional evidence. In the application the petitioners have disclosed medical prescriptions and reports from diagnostics centers, the originals of such prescriptions and certificates were offered for inspection. The respondents in fact relied upon those prescriptions in course of hearing of the appeal to show that the

nature of the ailment was not such that she could not have executed the will with free mind.

It is significant to mention that the respondents were unable to produce any evidence that they had offered any medical help or stood by the side of their elder brother's wife whenever she was in distress. It seems that they have completely abandoned her and became jealous and interested only when a general citation was issued inviting objections with regard to the grant of probate. They were not even aware of her death and her last rituals. This fact has been admitted by Renuka. An objection raised on behalf of the respondents that their names were deliberately not mentioned in the probate application, may not be of much significance as they appeared and contested the probate proceeding after they became aware of initiation of the said proceeding. They responded to the general citations.

In **S.R. Srinivasa & Ors. v. S. Padmavathamma**, reported in **2010(5) SCC 274** the Hon'ble Supreme Court after taking into consideration the earlier decisions with regard to the mode, manner and the relevant legal provisions which govern the proof of Will has summarized the law with regard to the proof of Will in the manner following:

38. In the case of H. Venkatachala Iyengar v. B.N. Thimmajamma 1959 Supp (1) SCR 426 Gajendragadkar J. stated the true legal position in the matter of proof of Wills. The aforesaid statement of law was further

clarified by Chandrachud J. in the case of *Jaswant Kaur v. Amrit Kaur* (1977) 1 SCC 369 as follows:

1. Stated generally, a will has to be proved like any other document, the test to be applied being the usual test of the satisfaction of the prudent mind in such matters. As in the case of proof of other documents, so in the case of proof of wills, one cannot insist on proof with mathematical certainty.
2. Since Section 63 of the Succession Act requires a will to be attested, it cannot be used as evidence until, as required by Section 68 of the Evidence Act, one attesting witness at least has been called for the purpose of proving its execution, if there be an attesting witness alive, and subject to the process of the court and capable of giving evidence.
3. Unlike other documents, the will speaks from the death of the testator and therefore the maker of the will is never available for deposing as to the circumstances in which the will came to be executed. This aspect introduces an element of solemnity in the decision of the question whether the document propounded is proved to be the last will and testament of the testator. Normally, the onus which lies on the propounder can be taken to be discharged on proof of the essential facts which go into the making of the will.
4. Cases in which the execution of the will is surrounded by suspicious circumstances stand on a different footing. A shaky signature, a feeble mind, an unfair and unjust disposition of property, the propounder himself taking a leading part in the making of the will under which he receives a substantial benefit and such other circumstances raise suspicion about the execution of the will. That suspicion cannot be removed by the mere assertion of the propounder that the will bears the signature of the testator or that the testator was in a sound and

disposing state of mind and memory at the time when the will was made, or that those like the wife and children of the testator who would normally receive their due share in his estate were disinherited because the testator might have had his own reasons for excluding them. The presence of suspicious circumstances makes the initial onus heavier and therefore, in cases where the circumstances attendant upon the execution of the will excite the suspicion of the court, the propounder must remove all legitimate suspicions before the document can be accepted as the last will of the testator.

5. It is in connection with wills, the execution of which is surrounded by suspicious circumstances that the test of satisfaction of the judicial conscience has been evolved. That test emphasises that in determining the question as to whether an instrument produced before the court is the last will of the testator, the court is called upon to decide a solemn question and by reason of suspicious circumstances the court has to be satisfied fully that the will has been validly executed by the testator.

6. If a caveator alleges fraud, undue influence, coercion etc. in regard to the execution of the will, such pleas have to be proved by him, but even in the absence of such pleas, the very circumstances surrounding the execution of the will may raise a doubt as to whether the testator was acting of his own free will. And then it is a part of the initial onus of the propounder to remove all reasonable doubts in the matter.

In the instant case, the attestation is established. One of attesting witnesses has proved the Will as required under Section 63 of the Indian Succession Act, 1925 read with Section 68 of the Indian Evidence Act, 1872.

The onus probandi lies upon the party propounding a Will and he is required to satisfy that the instrument so propounded is the last Will of a free and capable testatrix. The proof of testamentary capacity and due execution of the Will and that the Will truly represent the testatrix's intention having been established, on a balance of probability, it can be safely concluded that the extent of evidential burden has been successfully discharged by the executors in the teeth of the nature of suspicion attempted to be raised by the caveators surrounding the executor of the Will.

There is no evidence to suggest that the testatrix was incapacitated to execute the said Will and the Will is not the off-spring of her own volition and the record of someone else's. The respondents tried to project certain circumstances as suspicious. If the testatrix has clearly intended to bequeath her property in favour of two sisters with reasons, which under the circumstances could not be said to be unusual, irrational, abnormal or unfair or result of an undue influence or coercion, the probate of the Will cannot be denied.

We agree that in deciding the genuineness of a Will the primary duty of the court is to ascertain the intention of the testatrix while looking at the surrounding circumstances and by doing itself in the armchair of the testatrix. We do not find by applying the armchair principle that the execution of the Will was surrounded by suspicious circumstances. The

clarity in the mind of the testatrix with regard to the nature of the document she was executing and intent of the testatrix to dispose of her assets after her death in the manner provided in the Will has been sufficiently established by the appellants at the trial. The affections and cordiality shared by the testatrix with her sisters clearly justified the exclusion of the legal heirs of the side of her deceased husband.

Thus there is a strong presumption of validity of disposition in favour of the beneficiaries under the Will and this presumption could not be dislodged by the caveators.

Before registration of the Will the registrar must have satisfied himself that a testatrix had knowledge of the contents of the Will at the time of its execution. Moreover, the registered will itself record that the testatrix signed the Will after going through the contents of the said Will. The fact that the attesting witnesses to the registered Will are closely related to the beneficiaries being their husband is not of any relevance. As observed in *Pentakota* (supra) the mere fact that the beneficiaries under the Will had actively participated in the execution of the Will, would by itself shall not be considered to be a suspicious circumstance.

The medical evidence on record read with the other evidence does not establish that the mental faculties of Mukta was so impaired that she was not in a position to take an independent and impartial decision and had

abdicated her free Will in favour of someone else. Mukta's will is the offspring of her own volition and not the record of someone else's.

On the basis of the evidence on record we are clear in our conscience that the Will of which probate has been prayed for is the last Will and testament of Mukta.

The appeal succeeds. The impugned judgment is set aside. The application for grant of probate of Mukta Nandy is allowed. The learned trial Court is directed to issue probate certificate on compliance of all other formalities.

The department is directed to send down LCR and the Original Will at the earliest.

There shall be no order as to costs.

I agree,

(Soumen Sen, J.)

(Ajoy Kumar Mukherjee, J.)