

IN THE HIGH COURT AT CALCUTTA
CIVIL APPELLATE JURISDICTION
APPELLATE SIDE

BEFORE:

The Hon'ble Justice Soumen Sen

And

The Hon'ble Justice Uday Kumar

F.A. No.78 of 2019

Kalyani Ghosh & Anr.

Vs.

Gayatri Ghosh & Ors.

For the Appellants	: Mr. Goutam Brahma, Adv. Mr. Tarapada Das, Adv. Ms. Pampa Saha, Adv. Mr. Arijit Dey, Adv.
For the Respondent	: Mr. Saptangshu Basu, Sr. Adv. Mr. Pratip Kr. Chatterjee, Adv. Mr. Ayan Banerjee, Adv.
Hearing Concluded On	: 15 th March, 2023
Judgment On	: 22 nd March, 2023

Soumen Sen, J.: The appeal is arising out of the judgment and order dated 13th March, 2015 passed by learned Additional District Judge, Fast Track Court, Sreerampur in probate Suit No. 15 of 2011.

The present appellants are the two daughters of the testator, namely, Bhanu Rani Ghosh and Kalyani Ghosh. Kalyani is the unmarried daughter and Bhanu is the widowed daughter at the time of execution of the alleged Will. They were residing with the testator at the relevant time under the Will. The wife of the testator Smt. Sarashi Dasi was given life interest in respect of all the properties left by the deceased and the widowed daughter was given the right of residence. She was allowed to stay in one room as

long as she would remain alive. The Will is silent on Kalyani, the unmarried daughter.

Kalyani and Bhanu contested the probate proceeding. They have alleged that the Will was not executed and attested in accordance with law under Section 63 of the Indian Succession Act, 1925. The propounder of the Will had failed to dispel/remove the reasonable suspicion, which surrounded the execution and attestation of the alleged Will. It was alleged that the testator was an alcoholic person and at the time of execution of the Will he was not in proper frame of mind.

The learned Trial Judge, however, rejected the said objections and granted probate in favour of the propounder of the Will. Hence this appeal.

Mr. Gautam Brahma, learned counsel appearing for the appellants submitted that the Will was not proved in accordance with law. The Will was alleged to have been executed on 25th February, 1969 and the application for grant of probate was filed by the executors, namely his two sons, on 27.5.1998. The testator died on 11th July, 1979. The appellants were unable to explain the delay in discovering the Will and the filing of application for grant of probate. It is submitted that the Will was brought into existence under suspicious circumstances in order to defeat the legal rights of his two daughters in the suit properties. Late Panchanan Ghosh always treated his wife and children equally and it is unbelievable that in the matter of dispossession of his assets he would deprive his daughters. It is submitted that the testator could barely sign in Bengali language or he could hardly read Bengali or English. The name of the father of the testator was Hari Charan Ghosh and he was always described

by the testator in that name. Therefore, the mentioning of the name of the father of the testator as Hari Charan Ghosh in the Will also raised suspicion. Moreover, Panchanan had special affection for her younger daughter, Kalyani and he was very anxious about her future. The deprivation of Kalyani, under such facts and circumstances, is highly improbable. The said Will was prepared by their brothers without the knowledge and consent of the testator and obtained signature of their father on the Will without understanding of the contents of the Will. The testator was a habitual drunker and it is inconceivable that in a proper frame of mind he would have executed a document of this nature, which is patently unconscionable. The execution of the Will was highly suspicious and improbable as few of the attesting witnesses were known to the executor and it is unbelievable that the execution of the Will was not disclosed to the executor earlier. The signature also differs in the Will from his actual signature. The application for probate was filed after a lapse of considerable time after the death of the testator. The delay has not been explained. Moreover, the original Will was not produced and the probate application was filed on the basis of the certified copy of the alleged Will without offering any satisfactory explanation for not being able to produce the original Will.

It is submitted that the executors have relied upon the testimony of five witnesses. The Will is attempted to be proved by the two sons of the testator, who deposed as P.W. 1 and P.W. 4 and Shri Nikhilesh Bhattacharya, one of the attesting witnesses to the Will, as PW-2. Laxman Murmu, an UD clerk of the office of the District Registry, Hooghly had

produced the Will and he was PW-3. Mr. Sankar Dutta Roy, senior fingerprint expert, deposed as PW-5. It is submitted that the attesting witness has deposed that Panchanan was a chronic alcoholic and his evidence on this clearly contradicts the evidence of his two sons. The appellant could not produced any evidence to show the mental and physical health condition of the testator at the time of execution of the said Will.

Mr. Brahma submits that once it is established by evidence that the propounder was a habitual drinker and was under the influence of alcohol most of the time and also that he was not having good health, it was incumbent upon the propounder to lead cogent and credible evidence in order to prove due execution and attestation of the said Will. It is submitted that if Nikhilesh is believed to be an attesting witness of the alleged Will, Nikhilesh would have immediately informed the propounder about the existence of the alleged Will. It is submitted that it would appear from the evidence that Lalit Mohan Bhattacharya, under whom the testator and thereafter Biswanath worked, was one of the attesting witnesses and he was a frequent visitor to their place, then Lalit Mohan would have informed the existence of the said Will to the propounder immediately after the death of the testator or prior thereto. Mr. Brahma submits that at the relevant time, Biswanath was working under Lalit Mohan and Nikhilesh was one of his friends. It is highly unlikely that Nikhilesh could not disclose the existence of such Will to his friend Biswanath after it was executed or immediately after the death of their father. Both the sons have taken prominent part in the execution of the Will which could be discernable from

the involvement of Lalit and Nikhil if one assumes that the testator had, in fact, executed the said Will. Mr. Brahma submits that the propounder is required to remove all legitimate suspicions before the document can be accepted as the last Will of the testator as held in ***Rani Purnima Devi vs. Khagendra Narayan Deb***; reported in ***AIR 1962 Supreme Court 567***. It is submitted that on a holistic consideration of the aforesaid factors, it can be easily inferred that these are circumstances which raise reasonable suspicion and make it impossible for the Court to arrive at a finding that a Will of this nature could have been executed. The improbability with regard to due execution or attestation of the said Will is clear and cogent. The appellant could not dispel or remove any of the aforesaid suspicious circumstances. Mr. Bhramh submits that the principle laid down in ***Rani Purnima Devi*** (supra) has been reiterated in ***Vrindavanibai Sambhaji Mane vs. Ramchandra Vithal Ganeshkar & Ors.***; reported in ***AIR 1995 Supreme Court 2086***, ***N. Kamalam (dead) & Anr. vs. Ayyasamy & Ors.***; reported in ***AIR 2001 SC 2802*** and ***Janaki Narayan Bhoir vs. Narayan Namdeo Kadam***; reported in ***AIR 2003 SC 761*** and the propounder having failed to remove the suspicious circumstances is not entitled to the grant of probate. The probate court however has completely misdirected its mind in accepting the evidence of PW1, PW4 and Nikhilesh without taking into consideration of the aforesaid relevant factors and in failing to apply the tests laid down by several judgments of the Apex Court in deciding an application for grant of probate.

Per contra Mr. Saptangsu Basu, learned Senior Counsel appearing for the respondent has submitted that the Will is clearly proved by the two

sons of the testator, Nikhilesh Bhattacharya, the attesting witness, an UD Clerk of the office of the District Registry and the fingerprint expert. It is submitted that the attesting witness has categorically deposed that he was one of the attesting witnesses present during the execution of the Will. Panchanan Ghosh, put his signatures in the will in his presence and on his request, he also signed the Will in presence of the testator. He also deposed that Panchanan babu was physically fit and mentally alert at the time of executing the will. During cross examination he candidly submitted that he did not remember the name of the scribe and other minute details. The evidence of P.W. 2 is indeed trustworthy and cannot be brushed aside. It is clear from his testimony that he is not a tutored witness. It is to be kept in mind that he is giving evidence of an incident which took place in 1969, in May, 2005,i.e. after 36 years and at the age of 72 years. Naturally it is possible that he cannot remember every minute details of the incident but he remembers essential facts namely, the testator signed the Will in his presence and he signed as an attesting witness on his request. The allegation that the signature of the testator in the Will was not genuine could not be established by the defendants. The Will was duly registered and it carried a presumption that it was duly executed by the testator. A report of the Senior Fingerprint Expert was relied upon and marked as Exhibit 5. The fingerprint of Late Panchanan Ghosh was obtained from the Thumb Impression Register, Serampore and the same was compared with the fingerprint of Late Panchanan Ghosh in connection with another document which was admittedly executed by Panchanan Ghosh. The Fingerprint Expert opined that both the fingerprints were identical which

corroborates the case of the Executors that the Will was duly executed by Late Panchanan Ghosh. The said witness was cross-examined and he remained firm on his testimony even during cross-examination. It is submitted that the learned Trial Judge has taken into consideration the findings of the fingerprint expert with regard to thumb impression in Exhibit-2 i.e. on the Will and held it to be genuine. The Trial Court has also come to a specific finding that the Will has been proved in accordance with law under Sections 65 and 68 of the Indian Evidence Act, 1872, which was proved by one of the attesting witnesses.

The Trial Court came to the finding that since the original Will was missing and it was not clear as to who was in actual possession of the said Will, the Volume in question was summoned from the Registry Office in terms of Section 65 of the Evidence Act and the execution has been proved by one attesting witness. The Trial Court came to a specific finding that the defendants miserably failed to prove that the testator was not mentally and physically fit at the time of execution of the Will or that he executed the said Will under coercion or undue influence. They even failed to prove that the Late Panchanan Ghosh was under influence of liquor at the time when he executed the said Will. The Trial Court came to the finding that the defendants have failed to prove any suspicious circumstances from which it can be inferred that the Will is not genuine. It was also observed that the propounder did not take part in execution of the Will and there were no such suspicious circumstances. In fact, the propounder was not aware of the existence of the Will. The Court also came to the finding that the delay

in filing the probate case has been duly explained as the original Will was missing and the propounder was not aware of the existence of the said Will.

Mr. Basu submits that the delay may not stand in the way of the executors proving the Will in accordance with law. The delay cannot be a ground for refusal to grant probate, if there is a positive proof of execution of the Will by oral and documentary evidence and if examination of other evidence and the surrounding circumstances can satisfactorily explained the delay, such delay cannot be considered as fatal. In this regard, Mr. Basu has relied upon the decision of our court in ***Rajlakshmi Dassi Bechulal Das v. Krishna Chaitanya Das Mohant*** reported in **AIR 1972 Calcutta 210 : 1971 SCC Online Cal 5**. Mr. Basu submits that there is no suspicious circumstance surrounding the execution of the Will. The onus is on the respondent to establish that the execution of the Will is surrounded by suspicious circumstances and that the testator did not have the testamentary capacity. All the witnesses on behalf of the plaintiffs have given explanation for due execution and attestation of the said Will and unless it appears to be suspicious and highly improbable, the Court shall not decline to exercise its jurisdiction in refusing to grant probate. It is important that the attesting witness has proved due execution of the Will as well as testamentary capacity of the testator. Mr. Basu in this regard has drawn our attention to paragraphs 6 and 9 of **Rajlakshmi** (supra). It is submitted that minor contradiction in the deposition of the witnesses would not be fatal unless such contradictions are substantial. The Court shall not reject the positive evidence concerning the execution of the Will when the witness is giving evidence after 40 years then it is not possible for

such witness to remember every detail concerning the execution and attestation of the said Will. There is no discrepancy as fatal as would have disentitled the propounder to obtain a grant of Will. It is submitted that:

The onus on propounder to prove the Will shall stand discharged if the following elements are established:

- i. Testator was of sound disposing state of mind.
- ii. Understood the nature and effect of the disposition.
- iii. Signed on his own free will.
- iv. Signed in presence of two witnesses.

The propounder and the attesting witnesses have clearly discharged the aforesaid onus.

Mr. Basu submits that when the caveator alleges undue influence, fraud, coercion or suspicious circumstance (eg – genuineness of sign, condition of Testator's mind, disposition unfair/unnatural), it is for the caveator to prove. If the caveator does not discharge such burden probate must be granted.

Mr. Basu submits that a man's motivation is not for the Court to fathom, actions and reactions are unpredictable as they depend on several circumstances. At times psychological factors and frame of mind may determine his action and the intention of the testator can be ascertained only upon placing oneself in his shoes and his frame of mind as observed by the Hon'ble Supreme Court in ***Surendra Pal & Ors. V. Dr.(Mrs.) Saraswati Arora & Anr.*** reported at **AIR 1974 SC 1999: 1975(1) SCR 687: (1974) 2 SCC 600** (paragraphs 7, 9 and 10).

Mr. Basu submits that the onus lies on the caveator to prove undue influence, fraud and coercion. If the propounder removes doubt by clear and satisfactory evidence, even if Will seems unnatural and cuts off near relations, Court will not decline to grant probate as observed in ***Sashi Kumar Banerjee & Ors. V. Subodh Kumar Banerjee since deceased, AIR 1964 SC 529*** (paragraph 4) and ***Ramabai Padmakar Patil (dead) & Ors. V. Rukminibai Vishnu Vekhande & Ors., AIR 2003 SC 3109*** (paragraph 8). Mr. Basu submits that there was no cross-examination of the attesting witness that the signature of the testator was forged and the same cannot be raised in the appeal as held in ***Ranjan Kumar Mitra v. Swapanendra Krishri Deb*** (FA 47 of 2008) decided on 23rd December, 2011. There was no cross-examination of attesting witness and the expert in this regard. Mr. Basu submits that merely because the Will excludes to two daughters that by itself would not give rise to a presumption that there are suspicious circumstances behind the execution of the Will.

Mr. Basu thus, submits that under such circumstances, the finding of the Trial Judge is required to be upheld.

The execution of a will may be surrounded by suspicious circumstances which amongst others may include (i) the character or appearance of the signature of the testator raising doubt as to its genuineness (ii) feeble and debilitated condition of the testator's mind at the time of execution of the will raising doubt as to the mental capacity of the testator (iii) the unnatural, improbable or unfair dispositions in the will which in the light of relevant circumstances might indicate that the disposition might not be the result of the testator's free will, and mind (iv) a

prominent part taken by the propounder in the execution of a will under which the propounder received substantial benefits.

Even without presence of undue influence, fraud or coercion suspicious circumstances as aforesaid surrounding the execution of a will there may raise a doubt as to whether the testator was acting on his own free will in executing the document. [Per Dipak Kumar Sen, J. ***In the Goods of Tulsi Charan Law, deceased, Testamentary Suit no. 9 of 1963*** decided on 7th October, 1977.]

The will is a solemn document that comes into operation after the death of the testator and it was for this reason special provisions have been made in the Indian Succession Act for making of a Will and in the Indian Evidence Act for proving the Will in a court of law. The essential questions that would arise in a contentious probate proceeding are:

- i) Whether the testator signed the Will?
- ii) Did he understand the nature and effect of the disposition of the Will?
- iii) Did he put his signature to the Will knowing what it contained?

[See. ***H. Venkatachala Iyenger vs. B.N. Thimmajamma*** reported in **AIR 1959 SC 443**]

The 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. The

propounder is duty bound to demonstrate that the Will was signed by the testator in a sound and disposition state of mind after being fully aware of the nature and effect of the disposition he would presently make or he is about to make and thereafter he put his signatures on the document of his own free will. When a Will is challenged on the ground of suspicious circumstances surrounding the execution of the Will the propounder is obliged to remove all such legitimate doubts by cogent, satisfactory and sufficient evidence to displace such suspicion.

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 on 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.

Broadly these are the principles on which a probate court as a court of conscience must decide a probate proceeding. In the instant case, the probate case was filed almost after 20 years after the date of death of the testator. It was filed on 17th May, 1998. The two sons of the testator are the executors and beneficiaries of the will. They have stated that after they became aware of the existence of the Will in or about 2nd/3rd January, 1988 from Lalit Mohan they engaged one advocate Mr. Biswanath Ghosh, Serampore Court to make a search of the Will in the Office of the Registry concerned and thereafter they received a copy of the said Will and filed this probate proceeding on 27th May, 1998. The petitioner no.1 Biswanath

Ghosh in his evidence has stated the aforesaid facts. He has also stated that after he became aware of the existence of the said Will he enquired from his mother when his mother told him that “once my [his] father had given her ‘a paper’ but she would have to search the same”.

The wife of the testator survived till 20th October, 1998. During her lifetime their mother did not file any affidavit to that effect. The wife of the testator has referred to “a paper” which is not seen the light of the day. The affidavit of Lalit Mohan, however, was filed along with the application for grant of probate. Lalit Mohan in the said affidavit has stated as follows:

“I am one of the witness of the last will and the statements of the testator mentioned in the above petition and declare that I was present and to saw [sic] the testator by affix his signature thereto.”

The statement is not in accordance with Section 63(c) of the Indian Succession Act, 1925 apart from other glaring mistakes like “the statement of the ‘testator’ mentioned in the above petition”.

According to the executors apart from the Nikhilesh all the attesting witnesses were dead. The other attesting witnesses were Umapada Mukherjee, Subhas Chandra Bar, Nibaran Rakshit and Probash Sundar Ghosh were colleagues of Biswanath. The death certificates of the attesting witnesses were marked as Exbt.3 series with objection. The death certificates claimed to have been obtained before the filing of the probate case. Lalit Mohan was the employer of the testator and Biswanath. Biswanath in his evidence has admitted that during the lifetime of his

father the two brothers and their younger sister Kalyani used to reside with their parents in a common mess. That Kalyani is unmarried has been admitted by Biswanath. Biswanath also deposed that she has no source of income of her own.

Nikhilesh one of his friends who learnt driving from his father. The testator used to work under Durga Babu and later he started working under Lalit Babu. One Nibaran Rakshit is alleged to be the scribe of the said Will. According to Biswanath he knew Nibaran since 1980 and he used to visit him "on some occasions for purchasing stamp" but he could not recollect the exact number of stamp papers. He admitted that Umapada used to visit their house on few occasions during the lifetime of their father. Biswanath maintained good and cordial relationship with Umapada, Subhas and Nikhilesh. He, however, denied that his father was not in the habit of "excessive taking of liquor" and also denied that his mother and Kalyani used to "nurse my [his] father". He has stated that his grand-father was Haridas Ghosh @ Haricharan Ghosh. He admitted that he did not lodge any diary to the local Police Station to that effect that the original Will was found missing from their house. He also stated that Biswanath Ghosh, Advocate appointed by him to obtain the certified copy of the Will, was dead. But he could not produce any evidence to that effect. Krishna the other son of the testator and co-executor, in his evidence has stated that when there was a property dispute between the brothers and sisters Lalit Mohan visited their house and at that time he disclosed the existence of the Will. He did not specify the date. Biswanath did not say

anything about the dispute between brothers and sisters over property matters. According to Krishna, Lalit was the witness to the Will and Nibaran was the scribe-cum-attesting witness. If Nibaran is the scribe and attesting witness then the evidence of Biswanath that he knew Nibaran since 1980 is disproved. Krishna also had met Nibaran, a stamp vendor of Serampore Court many times but he could not recollect whether he visited Serampore Court in the year 1969/70. Biswanath in his evidence did not say that any of the attesting witnesses apart from Lalit had disclosed the existence of the Will after the death of their father. There is no evidence on record to show who had purchased the stamp paper for registration and who accompanied the testator to the registry office.

It is highly unlikely that Umapada, Subhas and Probash all the attesting witnesses except Lalit were colleagues of Biswanath for the last several years and, in fact, Umapada worked with him for a long period would not disclose the existence of a vital and important document like the Will after death of the testator on 11th July, 1979. All of them died much after the death of the testator as would reveal from Exbt.3 series that were marked with objection. In fact, all the death certificates of the attesting witnesses were marked X, X2, X3 and X4 for identification. Even if it is assumed that the certificates of death are of the four attesting witnesses it reveals that Subodh Chandra Bhar died on 7th March, 1993, Lalit Mohan died on 21st February, 2001, Probhas died on 7th March, 1985 and Umapada died on 24th June, 1971 much after the execution of the alleged Will. It shows that at least three attesting witnesses were alive after the

death of the testator for quite sometime. The death certificates, however, have not been proved. It is highly unlikely that Biswanath who was working with Umapada would be unaware of the death of his colleagues in the year 1971 and it was only after filing of the probate proceeding and during trial that he became aware of the death of Umapada. There is more to this than meets of eye. Krishna denied that his father was illiterate or was a drunker. He, however, admitted that his younger sister is unmarried and Bhanumati another sister is widow. It appears from the evidence that Biswanath worked under Lalit Babu. It is extremely difficult to believe that Lalit Mohan did not disclose the existence of the Will until 2nd/3rd January, 1998 to settle a property dispute between the brothers and sisters. The Will raised its head only thereafter. Prior thereto there is not even a whisper of existence of any Will. The truth has the ugly habit of raising its head one day and this precisely what happened in this case. Apart from the fact that the affidavit of Lalit is not in conformity with the requirement of Section 63(c) of the Indian Succession Act, he did not file any affidavit of evidence nor he was cross examined. The probative and evidentiary value of that few lines declaration read with other evidence and circumstances cannot be accepted as due execution and attestation of the Will.

Contrary to the evidence of Biswanath, Krishna in his evidence has stated that Kalyani and Bhanumati, their sisters “used to nurse my [their] father”. Krishna also knew Nikhilesh for the last 16 years. He has also admitted that his father was under grief when Bhanumati became widow but he denied the suggestion that his father was anxious regarding

marriage of Kalyani since 1960. He, however, during his cross examination stated that his mother knew that their father was contemplating to make a Will but she did not know where the Will was kept. The brothers are also not aware of the existence of any such Will.

Nikhilesh in his evidence has stated that he was one of the attesting witnesses of the Will as per the request of Panchanan. Panchanan put his signature in the Will in his presence and thereafter he signed the Will in presence of Panchanan. The will was executed in his house Panchanan himself brought the Will to his place. Panchanan was physically fit and mentally alert at the time of execution of the will.

Lalit was his cousin. He could not recollect the exact time or date when he put his signatures on the so-called Will but this much he remembered he was alone in the drawing room prior to the arrival of Panchanan to his place. Panchanan did not disclose the name of the scribe. He could not recollect whether he wrote the contents of the Will prior to putting his signature or whether Panchanan had read over the Will to him. After he put his signature on the Will Panchanan left the place. He also could not say whether the Will was typed or holography Will. He seems to suffer from selective dementia and short time memory failure. He also could not recollect on which date the Will was registered. He did not accompany Panchanan to the Registry Office. However, he has specifically stated in his deposition that Panchanan was habitual drunker and his consumption of liquor was excessive. Due to his chronic drinking habits Nikhilesh's father Durga was extremely annoyed and sometimes he used to

beat Panchanan in order to rectify him. Panchanan stopped drinking 2/3 years prior to his death. He also admitted that Panchanan used to fell ill frequently due to excessive consumption of liquor.

It was on the background of this evidence the probate court as a court of conscience is to decide the validity of the Will. If Nikhilesh is considered to be disinterested witness as he has not beneficiary under the Will, it is quite clear that the testator was a chronic alcoholic and it is not improbable if not impossible that the document claimed to be his Will came into existence when he was completely out of his sense and mind. Although, exclusion of a legal heir at the time of bequest may not be the ground per se to deny grant of Will, it is quite difficult for a court of conscience to reconcile the fact that an unmarried daughter would be completely cut off and denied any share in the probate. The evidence on record shows that both the sisters used to take good care of their father and as Krishna admitted in cross examination that they used to nurse their father. The evidence clearly supports the view that even if it is assumed that the testator had put his LTI on the so-called Will there is a strong possibility of undue influence as having regard to the lifestyle of Panchanan and his chronic alcoholism it is not improbable that his faculties have been totally impaired and he was under control of the beneficiaries at the time of alleged execution of the Will. The onus probandi lies in every case upon the party propounding the Will. He must satisfy the conscience of the Court that the instrument so propounded is the last Will of a free capable testator. All the attesting witnesses are close to the executors. Under what

circumstances the Will was registered is not explained. Nikhilesh has clearly stated that he did not go to the registry office. Lalit Mohan did not file any affidavit to that effect. There is a serious doubt whether the document on which Nikhilesh alleged to have put his signature is the same document that was registered. The wife of the testator refers to 'a paper' and it is not proved that the said 'a paper' is the registered Will. The involvement of the friends and colleagues of Biswanath one of the executors in the due execution and attestation of the Will and the very fact that Biswanath and his brother are the beneficiaries, it is sufficient to excite the suspicion of the Court and requires the court to be zealous and vigilant in examining the evidence in support of the instrument in favour of which probate is claimed and it is duty of the court in such circumstances not to pronounce the judgment in favour of the propounder unless suspicion is removed. The court has to be satisfied that the testator may be led but not driven and his Will must be the offspring of his own volition and not the record of someone else's.

In proving a will, the initial onus is on the propounder who has to prove by disinterested, satisfactory and sufficient evidence the signature of the testator, the sound and disposing state of his mind, his understanding of the nature and effect of his dispositions and finally the free and voluntary nature of his act in executing such a document.

In the instant case, there are circumstances which raise a strong suspicion. When we consider the circumstances which raise a suspicion and make it improbable that the Will could not have been executed in

contrast to the evidence in favour of the execution and attestation of the Will we find that it is almost impossible for a normal person to make such an unconscionable and unjust disposition with free will and volition. In a situation like this what the Court has to do “to put itself into the testator’s arm-chain to look to the surrounding circumstances.

In **Anil Kak v. Sharada Raje** reported in **(2008) 7 SCC 695** at paragraphs 52, 53, 54 & 55 the Apex Court opined that the court is required to adopt a rational approach and is furthermore required to satisfy its conscience as existence of suspicious circumstances plays an important role, observing:

“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 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.” (emphasis supplied)

Similarly, in **Leela Rajagopal and others v. Kamala Menon Cocharan and others**, reported in **(2014) 15 SCC 570**, at paragraph 13 the Hon’ble Supreme 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.” (emphasis supplied)

It is inconceivable that the unmarried daughter would be made homeless or would be left to the mercy of their brothers. There is no evidence on record suggesting that the relationship between the father and two deprived daughters was so arid or frictional. The evidence on record suggest otherwise.

Mr. Basu has submitted that delay would not be fatal as there is positive proof of execution of the Will by oral and documentary evidence. We are unable to accept the said submission. The evidence on record gives us the impression that the Will was brought into existence only after Lalit Babu visited the premises of the testator to resolve the property dispute between the brothers and sisters. The knowledge and existence of the Will if it were at all existed on the date mentioned in the certified copy of the alleged Will it is unimaginable and unbelievable that none of the attesting

witnesses would disclose the existence of the Will. In fact, the evidence strongly suggests that no Will was ever executed in the year 1969.

The learned trial Judge has not taken into consideration the aforesaid factors in deciding the probate case. The judgment was passed on misappreciation of fact and law. On the basis of the evidence it was not possible for a probate court to arrive at a finding that the Will is genuine or executed with free mind and free will. It is not possible on the basis of the evidence to arrive at a finding that the appellant was conscious of the disposition he had made or that he was physically fit and mentally alert at the time of execution of such alleged Will or it is the outcome of a free will and mind.

The evidence clearly suggests that the Will was never executed by the testator at all.

Under such circumstances the appeal succeeds. The judgment of the trial court is set aside. There shall be no order as to costs.

I agree

(Soumen Sen, J.)

(Uday Kumar, J.)