

**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**

FA 25 of 2011

**Smt. Mousumi Roy Chowdhury
Versus
Smt. Kanan Sarkar**

For the Appellant	: Mr. Shohini Chakrabarty, Adv. Mr. Intikhab Alam Mira, Adv.
For the Respondent	: Mr. Gopal Chandra Ghosh, Adv. Mr. Dhananjay Nayak, Adv.
For the Added Respondent	: Mr. Bhaskar Ghosh, Sr. Adv., Mr. Sanjay Mukherjee, Adv. Mr. Supratim Dhar, Adv. Ms. Madhu Priya, Adv.
Hearing concluded on	: 1 st February, 2023
Judgment Dated	: 9 th February, 2023

Soumen Sen, J: The appeal is directed against the judgment and order dated 22nd June, 2010 in revocation case no.1 of 2002 passed by the learned Addl. District Judge, Alipore, 24th Paraganas (South). The revocation application was allowed on the ground of non-citation of one Kanan Sarkar. The learned trial Court held that Kanan Sarkar is the “only legally married wife” of the deceased Anil Sarkar @ Anil Chandra Sarkar. The probate was revoked also on the ground that the appellant has failed to prove the “genuinity of the Will”.

This order is under challenged.

The identity of the testator as Anil Sarkar or Anil Chandra Sarkar, mis-description of some properties in the Will and the status of Kanan and Meena in relation to Anil Chandra Sarkar alias Anil Sarkar and the circumstances under which the Will was executed by Anil Sarkar in relation to properties which belonged to Anil Chandra Sarkar are the issues raised in connection with revocation of the Will alleged to have been executed by Anil Sarkar.

The trial court decided the issues in favour of Kanan and allowed the application for revocation of the grant of probate.

The essential dispute is whether Anil Sarkar and Anil Chandra Sarkar is one and the same person and consequent upon a finding to that effect the relationship of Kanan, Meena and Mousumi vis-à-vis the true identity of Anil need to be assessed to the extent necessary in determining the issues raised in the revocation application.

The trial court in holding that Kanan was entitled to citation has also arrived at a finding that the Will is not genuine.

Briefly stated, Mousumi Roy Chowdhury claiming herself, to be the daughter of one Anil Sarkar, has filed an application for grant of probate wherein she has stated that her father Anil Sarkar died leaving behind an alleged Will dated 23rd February, 1998 bequeathing his properties in favour of his wife Meena Sarkar. It is stated that the testator, at the time of his

death, was survived by his only daughter Mousumi and his wife Meena. On receiving the application the probate Court on 7th March, 2001 while accepting the highest stamp duty paid by the respondent executrix directed publication of the citation in the newspaper and fixed 12th April, 2001 for filing the newspaper publication. The prayer for publication was allowed on the basis of the petition filed by Mousumi. The citation was published in the Bengali Newspaper "Aajkal". On 12th April, 2001 the newspaper publication was taken on record and the trial Court fixed 30th April, 2001 for order. The matter was ultimately taken up for consideration on 22nd June, 2001. Mousumi and one of the attesting witnesses Pradip Kumar Mistri were examined. The original of the alleged Will was produced. The Will was proved by the attesting witnesses and thereafter probate was granted on that day i.e. 22nd June, 2001. The stamp duty was paid on 25th June, 2001 and the probate was signed by the learned District Deligate, Alipore on 25th June, 2001 requiring Mousumi to file inventory within six month of vendor account. Mousumi, however, did not file inventory.

In the meantime on or about 2nd January, 2002 Kanan Sarkar filed an application for revocation of the grant of probate.

The basis of the application was non-citation and forgery.

Kanan claimed herself to be the wife of one Anil Chandra Sarkar. In the application it is stated that Anil Chandra Sarkar died issueless on 14th March, 1998 leaving behind his wife Kanan. Anil Chandra Sarkar was always known and identified as Anil Chandra Sarkar and the description of

Anil Sarkar in the alleged Will is an incorrect misleading description of the identity of Anil Chandra Sarkar. Anil Sarkar and Anil Chandra Sarkar are not one and the same person. Anil Chandra Sarkar is one of the three sons of Haranath Sarkar who died intestate on 25th December, 1955 leaving behind three sons and two daughters. Gour Chandra Sarkar and Bholanath Sarkar are the other two sons of Haranath Sarkar. Both of them died intestate on 11th March, 1964 and 5th January, 1999 respectively leaving behind their legal heirs and representatives. The heirs of Haranath Sarkar in order to effect partition of the properties situated in Mouza Andharmanik and Mouza Ebrahimpur described in revocation application, divided and demarcated their respective portions by executing and registering two separate deeds of partition. On the basis of the said partition deeds Kanan had mutated her name in the record of rights and in possession of the properties in question as absolute owner. Kanan became aware of the claim made by Mousumi when a proceeding was initiated by Mousumi under Section 144(2) of Cr.P.C. against one Ratan Kumar Sarkar and Raman Kumar Sarkar near relations of Kanan in connection with the property in possession of Kanan. Kanan alleged that in the application filed under Section 144(2) Cr.P.C. Mousumi claiming herself to be the daughter of one Anil Sarkar made a claim in respect of the properties by virtue of a probate of an alleged Will executed by Anil Sarkar. Kanan claimed that Anil was suffering from protracted illness and he became completely disabled. He was completely bed ridden and was unable to move and write. Due to his protracted illness his mental faculty and capacity deteriorated Kanan

claimed to have a good relationship with his husband till his death. Kanan disputed the Will as genuine. Kanan claimed that the alleged Will might have been obtained fraudulently incorporating the properties of Anil Chandra Sarkar who was never known or identified at any point of time as Anil Sarkar.

The revocation proceeding was contested by Mousumi. Mousumi in denying the allegations made against her and her mother has stated that there are anomalies in describing the legal status of Kanan in relation to Anil Chandra Sarkar. Mousumi was not aware of any partition in respect of property left by Haranath or her father Anil Sarkar. Kanan wanted to grab the properties under the guise of legally married wife of Anil. She has no locus to mutate her name in the record of rights. Anil was physically fit and mentally alert at the time of execution of the Will. The Will was executed in presence of two witnesses. One of the attesting witnesses have duly proved the execution of the Will of Anil.

On the basis of the pleadings the learned trial court framed the five issues for consideration. The issues essentially are:

- i) *Whether non citation of the petitioner in the proceeding of probate case fatal since Kanon claims herself to be the only legal heir and inherited the property left by Anil Chandra Sarkar.*
- ii) *Whether the said Will was executed by Anil Chandra Sarkar or not or the said Anil Sarkar and Anil Chandra Sarkar is the same person?*

- iii) *Whether the probate was obtained by means of an untrue allegation of a fact or the Will of which probate was obtained was forged?*
- iv) *Whether the probate was obtained fraudulently by making a false suggestion or by concealing something material to the case?*
- v) *Whether the person to whom the grant was made has wilfully and without reasonable cause omitted to exhibit an inventory or account in accordance with the provisions of law?*

Before the learned trial court Kanan in order to prove that she is the real and only wife of Anil Chandra Sarkar has examined herself and three other witnesses one of whom claimed himself to be the priest who has performed their marriage rituals.

Kanailal Chakraborty deposed as PW3 stated in his evidence that he was a priest for the bride and the marriage of Kanan was performed according to Hindu rites and rituals.

Bholanath Dhali was examined as PW4. He claimed to be the match maker of the marriage. In his evidence he has stated that Kanan married Anil in the year 1964.

Apart from such oral evidence Kanan in order to prove her legal relationship with Anil as wife has produced RS record of rights marked as Exbt.1 series, LR record of rights marked as Exbt.2 series, death certificate of Haranath Sarkar marked as Exbt.3, death certificate of Anil Chandra Sarkar marked as Exbt.3(a), death certificate of Bhola Nath Sarkar marked as Exbt. 3(b), death certificate of Gour Chandra Sarkar marked as Exbt.

3(c), the registered deed dated 25.09.1936 between Haranath Sarkar and Jadavpur Estate marked as Exbt. X for identification, deed of family settlement dated 04.11.1999 marked as Exbt.X(I) and deed of family settlement dated 17.05.2001 marked as Exbt.X(II). All these documents would disclose the identity of the person as “Anil Chandra Sarkar” with his residential address as Andhar Manik. Kanan in referring to the aforesaid documents has categorically stated that in all such public and private record and documents Anil Chandra Sarkar was described and identified as “Anil Chandra Sarkar”.

The specific case of Kanan before the trial court was that she was married in the year 1964 prior to any alleged marriage with Meena Sarkar, in the year 1972 and registered on 11th March, 1998 prior to three days before death of Anil Chandra Sarkar i.e. 14th March, 1998. Kanan has disputed the existence of any person by the name of Meena Sarkar. It was stated that one Mina Chatterjee has been wrongly stated to be Smt. Mina Sarkar. She was deserted by her husband. In or about 1977 Mina Chattterjee was brought to Andhar Manik by Bholanath Sarkar who happened to be Kanan’s “Mejo Bhasur” (second elder brother of Anil) in order to look after his ailing mother as a maid servant and since then she used to reside there in a thatched house situated at the corner of the premises until the death of her mother-in-law in 1985. After her death she was relieved of her duty.

Since the date of her marriage on 9th May, 1964 till closure of Bengal Lamp Company, 1976 she used to reside with her husband Anil Chandra

Sarkar at his Jadavpur residence at premises no.18, Central Road, Kolkata-700 002 (formerly known as 51/1 Central Road, Kolkata – 700 032). Thereafter, on and from 1976 and till the death of Anil Chandra Sarkar they used to reside together at village Andher Manik P.O. Andhar Manik, P.S. Bishnupur, District; 24-Parganas (South), as husband and wife.

Kanan became aware of the probate from a proceeding initiated by Mina Chatterjee under Section 144(2) Cr.P.C. as a concubine of Anil Chandra Sarkar. Mina Chatterjee who asserted to be Meena Sarkar does not reside in village Andher Manik at all. The elder brother of Anil died in the year 1975. The properties claimed by Mina Chatterjee as her own had never belonged to her and are the properties allotted to Kanan by virtue of the deed of partition dated 14th December, 1998. In the said partition deed the name of Anil Chandra Sarkar was mentioned as the husband of Kanan. There is misdescription in the properties in the Will. Out of 18 Dag numbers mentioned in the Will the lands appertaining to Dag number 3418, 3419 and 3240 belonged to one Nanilal Kayal and Others and Dag number 3759 has no existence. During her cross-examination she has specifically stated that Anil Sarkar was not related to her in any way. There is no proof that the testator of the Will, namely, Anil Sarkar had married Kanan. She had referred to the name of the persons who have witnessed her marriage to Anil Chandra Sarkar. She had also relied upon two deed of partition to establish her identity and relation with Anil Chandra Sarkar. She has specifically stated that her husband was admitted at the M.R. Bangur Hospital on 11th March, 1998 at 11p.m. in the night and died on 14th March, 1998.

Kanan denied that Tinkari Roychowdhury, husband of Mousumi admitted Anil to the hospital.

Smt. Chabi Sarkar, wife of Late. Gour Chandra Sarkar, brother of Anil Chandra Sarkar, has deposed as PW-2 she has stated in her evidence that Kanan Sarkar was the wife of Anil Chandra Sarkar. Anil Chandra Sarkar was issueless. Meena Sarkar is not the wife of Anil Chandra Sarkar and Mousumi Sarkar is also not the daughter of Anil Chandra Sarkar. Chabi Sarkar specifically stated that Kanan is the wife of Anil Chandra Sarkar. Anil Chandra Sarkar was the youngest of the three sons of Haranath Sarkar. She has stated that she was present at the said marriage and had witnessed the marriage. All the three sister-in-law used to stay together. Anil and Kanan stayed as husband and wife since their marriage at Andhar Manik. Before Anil Chandra Sarkar was admitted in the M.R. Bangur Hospital he was almost bed ridden. He was admitted to the nursing home by the local people along with Kanan on 14th March, 1998. He died due to cardiac failure. He was cremated at Kaoratola Mahasasan Crematorium and the last rite was performed by the eldest son of Chabi namely Ratan Kumar Sarkar. At that time Kanan was with Chabi at the village residential house. She denied existence of Mousumi or Meena Sarkar. It was stated that after the death of Anil Chandra Sarkar his wife Kanan had left for her paternal house in order to attend to her ailing none-generian mother. She used to come on and off to her matrimonial home and at the relevant time she was residing with Chabi as the house in which Kanan used to reside was in a dilapidated condition.

Before the learned trial court it was submitted that the sale deed registered on 8th September, 1985 before the Addl. District Sub-Registrar , Bishnupur, South 24 Paraganas during the lifetime of Anil Chandra Sarkar would show that Anil Chandra Sarkar is the son of late Haranath Sarkar and Anil Chandra Sarkar sold his property to one Subrata Mondal. Anil Chandra Sarkar himself signed his name in the document as Anil Chandra Sarkar. Both the witness to the marriage certificate and the alleged Will are same persons and apart from the said marriage certificate, no other documents were produced to show that Mina Sarkar is the wife of Anil Sarkar alias Anil Chandra Sarkar. In fact the marriage certificate mentions Anil Sarkar as the husband of Mina Sarkar. It would establish that the person named as a testator in the alleged Will as Anil Sarkar is not Anil Chandra Sarkar and the said document was forged, manufactured and fabricated to deprive Kanan the only married wife of Anil Chandra Sarkar from the enjoyment of the properties.

Before the trial court Mousumi did not adduce any evidence. It was argued on behalf of Mousumi that Mina Sarkar is the actual wife of Anil Chandra Sarkar. The probate was obtained following due procedure and there has been no suppression of fact. She denied the existence of Kanan Sarkar. It was argued that Mina Sarkar is the actual wife of Anil Sarkar alias Anil Chandra Sarkar and Mousuni is their only daughter.

On the basis of the evidence, pleadings and the arguments made on behalf of the parties the learned trial court accepted the version of Kanan on the basis of preponderance of probabilities. The learned trial court was of

the view that the oral and documentary evidence are greatly in favour of Kanan claiming her right as wife of Anil in contrast to the claim of Mousumi that her mother Meena is the legally married wife of Anil Chandra Sarkar.

The learned trial court has relied upon various documents exhibited by Kanan to arrive at a finding that the real identity of the person is Anil Chandra Sarkar and not Anil Sarkar. It was on the basis of the oral and documentary evidence of strongly suggesting that Anil Chandra Sarkar is the real person and Kanan is married to him it was held that Kanan was entitled to citation. As a corollary the trial court held that the Will is forged. The trial court on the basis of evidence overwhelmingly pointing out to suspicious circumstances surrounding the making and execution of the Will held the Will to be forged and not genuine.

Mousumi is aggrieved by the said judgment.

Miss Sohini Chakraborty, learned Counsel appearing on behalf of the appellant has submitted that the trial court in a probate proceeding could not have decided the marital status of her mother. In probate proceeding the marital status of Kanan and Mina could not have been decided and settled. The trial court disregarded the evidence of the probate proceeding where the Will was proved in accordance with the provisions of the Indian Succession Act, 1925.

Mrs. Chakraborty submits that in her cross-examination on 20th February, 2006 Kanan has specifically stated that Anil Sarkar was not related to her in any way. The death certificate marked as Exbt. 3(a) issued

on 11th April, 2002 has described the deceased as Anil Chandra Sarkar although the date of death was 14th March, 1998 and the date of registration of such death was also dated 14th March, 1998 which would show that the said death certificate [Exbt. 3(a)] was not original.

Mrs. Chakraborty has referred to the ration card of Kanan to show that after the death of Anil his name was inserted in the said document as the husband of Kanan. Previously it refers the name of the father of Kanan and the address mentioned in the said document would still show the home address of her father. The insertion of the name of Anil after his death clearly proves that the same was done intentionally to procure a document to establish that Kanan was related to Anil.

It is submitted that the duplicate 'stay in' certificate issued by Bangur Hospital would show that Anil Sarkar was admitted in the said Nursing Home under the care of Shri Tinkari Roychowdhury with the address of Tinkori where Anil was residing last. It proves that Anil was under the care and supervision of Mousumi and her family contrary to the claim that Anil was all along with Kanan till his death. The documents produced by Kanan would further show that Anil Chandra Sarkar was also described as Anil Sarkar in official document also and not always as Anil Chandra Sarkar as claimed by Kanan. The fact that Kanan produced duplicate documents instead of any original document regarding hospitalisation of Anil in M.R. Bangur Hospital would further prove that Kanan was not present at the time of death of Anil.

Mrs. Chakraborty has submitted that the identity of Anil Sarkar is clearly established from the “stay in” certificate produced by Bangur Hospital, Marriage Certificate of Anil with Mina, Votar Card of Kanan and Information Slips as to pendency of legal proceedings. These evidence could not be dislodged by Kanan in her evidence.

It is submitted that the Trial Court has decided the forgery of the Will without any material produced before the learned Trial Judge as foundational facts and evidence in arriving at the said conclusion were absent.

In fact the Trial Court failed to appreciate the materials which are on record in connection with the probate case which would clearly prove that the appellant/executrix obtained probate after duly proving the Will in terms of Section 63 of the Indian Succession Act.

Mrs. Chakraborty has submitted that the evidence of Kanailal and Bholanath are hearsay. It is submitted that the evidence of Chabi that since marriage of Kanan and Anil used to reside at Andhar Manik is in clear contradiction to the statement made by Kanan in paragraph 89 and 90 of her affidavit in chief where she has clearly stated that from her date of marriage till closure of Bengal Lamp Company in 1976 she had stayed with her husband at Jadavpur and on and from 1976 till the death of her husband she stayed at Andhar Manik. The oral evidence of Kanan and other witnesses do not conclusively establish her marriage with Anil. The oral evidence are contradictory.

In fact such evidence were not relevant under Section 50 of the Indian Evidence Act for the Court to form an opinion regarding relationship between Anil and Kanan. The documentary evidences like Ration Card produced by Kanan to prove her marriage shows that the same was all obtained after death of Anil. In some documents like death certificate of Anil, his name was subsequently changed as Anil Chandra by Kanan. The deed of partition executed among the family members and Kanan after the death of Anil, cannot be a proof of her marriage with Anil. On the other hand Kanan produced an extract of the Hindu Marriage Register (Exhibit 7) which shows that marriage between Mina and Anil dated 22nd April, 1972 which took place at Santoshpur and was duly registered on 11th March, 1998. All these facts and circumstances, in fact prove that Anil Babu before his death, to protect the interest of Mina, his wife, got their marriage registered and executed the Will in favour of Mina to save her from the greed of his brothers and their family, who left no stones unturned to deny the Mina's right, marital status and even damaged her reputation by calling her maid servant of the house and setting up a stranger as his wife and even denied the legitimacy of Mousumi.

Mrs. Chakraborty has submitted that the probate court in a revocation application cannot decide the genuineness of the Will. Once a probate court has come to a finding that the grant was made without citing parties who ought to have been cited, the probate court is required to give an opportunity to the executrix to prove the Will in accordance with law.

The executrix cannot be denied the opportunity to prove the Will afresh. The denial of any such right would be contrary to law and denial of justice to the executrix. In any event the trial court was required to consider the evidence before the probate was granted. The trial court having failed to consider such evidence has clearly erred in law in deciding the genuineness of the Will as the Will was already proved in accordance with law under Section 63(c) of the Indian Succession Act, 1925. It is submitted that defect in the procedure even if accepted cannot invalidate a grant obtained in accordance with Section 63(c) of the said Act.

Per contra Mr. Gopal Chandra Ghosh learned Counsel appearing on behalf of Kanan has submitted that although Mousumi claimed to be the daughter of Anil Chandra Sarkar and Meena Sarkar as her mother, curiously neither Mousumi nor Meena had come forward and deposed in support of their legal status and to prove the Will afresh. It is submitted that it is a cardinal rule of evidence that the best evidence available should be brought before the court to prove a fact or points in issue as held in ***Mohanlal Shamji Soni v. Union of India, 1991 Supp (1) SCC 271***. Mr. Ghosh submits that under the facts and circumstances of the case the obvious question that would arise in the mind of the court is “why would the defence not lead the best evidence available to establish its case?”

Mr. Ghosh has referred to Section 114 illustration (g) of the Indian Evidence Act to argue that in absence of any evidence being adduced by Mousumi or Meena in support of their legal status and reluctance to give evidence to prove the solemnity attached to the execution of the Will an

adverse inference is required be drawn against them. It is submitted that death certificate furnished in the Probate proceeding by the appellant does not reflect the name of the father of Anil Sarkar whereas the death certificate (Exbt. 3(a) and R.S. Porcha (Exbt. 1) exhibited by the respondent would clearly show the name of the father of Anil Chandra Sarkar. It is submitted that there are various discrepancies in the documents produced by the appellant with regard to the identity and residential address of Anil Chandra Sarkar. The learned Counsel has referred to “stay in” certificate of M.R. Bangur Hospital which showed Anil Sarkar’s address as 347 B Baishnabghata (Exbt. 4) whereas the sale deed (Exbt.20) executed by Anil Chandra Sarkar during his lifetime and his death certificate would show that Anil Chandra Sarkar was the resident of Andhar Manik, South 24 Paraganas. It is argued that no one had come forward to depose that Anil Sarkar was also known as Anil Chandra Sarkar and he had a daughter by the name of Mousumi Roy Chowdhury. Mousumi did not produce either birth certificate or school certificate showing Anil Sarkar @ Anil Chandra Sarkar as her father.

The Will is shrouded in suspicious circumstances, as certain properties are included in the Will which never belonged to Anil Chandra Sarkar as also certain Dag Nos. are mentioned which are not even in existence.

The judgment of the Trial court covers all the issues framed. The learned Trial Judge has held with reasons that the (i) Will is not genuine; (ii)

Testator is not genuine; (iii) non-citation of the interested parties and thus there is no scope for reopening of the case.

It is submitted that the probate was obtained by practicing fraud on the basis of manufactured and fabricated documents. In fact, there is a clear and deliberate statement that the testator had no other relations or heirs other than Mousumi and Meena whereas the evidence on record would reveal that Kanan Sarkar was the wife of Anil Chandra Sarkar and there are other co-sharers of Anil Chandra Sarkar which appears even in the body of the Will and they should have been cited. It is submitted that the funeral rites performed by the nephew of Anil also could not be rebutted.

Mr. Ghosh further submitted that it is interesting to note that although Meena claimed to have married Anil in the year 1972, the said alleged marriage was registered only on 11th March, 1988 only three days prior to the death of Anil on 14th March, 1988. Apart from the fact that there is a serious dispute with regard to the identity of Anil Sarkar with Anil Chandra Sarkar, Mousumi was expected and obliged to lead evidence in the revocation proceedings with regard to the validity and execution of the Will by removing all suspicious circumstances.

It is submitted that PW-1 in her cross-examination could not be unbuckled from her position that she is the only married wife of Anil Chandra Sarkar. Mere incorporation of the first name "Anil" in the Ration card or voter ID in itself does not in any manner dilute her claim of being the wife of Anil Chandra Sarkar. Marriage of Kanan Sarkar with Anil

Chandra Sarkar stands proved. Therefore the claim of executrix that her mother Mina Sarkar married some Anil Sarkar @ Anil Chandra Sarkar and her claim that Mina Sarkar is the only legally married wife cannot be sustained. In any event, since the marriage of Kanan has been proved in prior point in time (1964) to the alleged claim of marriage by Mina (1972) in such circumstances, the entire edifice of claim of executrix falls flat.

During her cross-examination, PW-1 categorically proved the registered deed of partition wherein she had been shown to be the wife of Anil Chandra Sarkar. PW-1 further stated that her elder Chabbi Jaa would depose and she would bring witnesses to prove her marriage which she had done and in absence of documentary evidence to substantiate her marriage, the oral evidences of PW2, PW3 and PW4 become very vital and relevant under Section 50 of the Indian Evidence Act. All these witnesses faced cross examination and their deposition goes on to prove that Kanan is the wife of Anil Chandra Sarkar. All the said witnesses are now dead.

It is highly suspicious that Anil Chandra Sarkar would sign a document as vital as a Will as “Anil Sarkar” and not “Anil Chandra Sarkar,” which was his full name. Mere glance at the signatures appended in the WILL having signature of “Anil Sarkar” and the Exhibit 20 bearing signature of “Anil Chandra Sarkar” would reveal that the signatures are of different persons and an attempt to make it look similar.

The Probate application contains several misstatements based upon WILL like being the “*son of second wife of Haranath*” – which is not correct

and Anil Chandra Sarkar could not have claimed that in his proper frame of mind, if he himself made the WILL. Misstatements are galore as the properties of third parties having no connection with Anil Chandra Sarkar were included. If real Anil Chandra Sarkar made the Will, he would not have committed such serious mistakes.

In the face of such overwhelming evidence on record corroborating and uncontroverted in nature, the Learned Trial Court rightly held that Kanan Sarkar is the wife of Anil Chandra Sarkar and Mina Sarkar cannot be considered to be the wife of Anil Chandra Sarkar. The conclusion of the trial court is in view of the specific claim of executrix that the Will executed by Anil Chandra Sarkar is perfect and in order since it was benefitting wife and daughter of Anil Sarkar. Therefore, the argument made on behalf of the Appellant that the learned Trial Court could not have given a declaration as to the marriage of Anil Chandra Sarkar is not correct. It is submitted that the learned trial Court has only declared that the probate granted by the district delegate is not in order and the same is required to be revoked. The observation of learned trial court as regards the status of Kanan and Mina is in the course of arriving at the conclusion about the revocability of the probate granted to the alleged Will. The said observation cannot prevent Mousumi or Meena to claim a proper declaration through a different proceeding like paternity suit.

Mr. Ghosh has also submitted that it is important to take into consideration that the relatives of Anil Chandra Sarkar would not unnecessarily give recognition to Kanan as the legally married wife of Anil

Chandra Sarkar and would agree to partition the property, giving thereby Kanan her share which ultimately Kanan could sell accordingly to her wish. Mr. Ghosh submits that judicial notice of this fact is required to be taken into consideration as the family of Anil Chandra Sarkar namely his sister-in-law, nephew and niece all have recognised Kanan as the wife of Anil Chandra Sarkar and even ensure that Kanan gets her due share in the property.

It is submitted that the appellant had claimed Anil Sarkar and Anil Chandra Sarkar are one and the same person. The burden of proof lies on the appellant to establish such identity. However, neither any question was put to any of the petitioner witnesses nor any evidence was adduced by the appellant to establish her contention.

Since all the original documents have come from PW1, in the form of death certificates, deeds of conveyance and all these documents remain uncontroverted throughout till now, the evidence adduced by PW1 is of much higher and greater significance. Even if for a moment, it is accepted that Kanan is not the wife of Anil Chandra Sarkar, and hence not cited, still there is no reason for not citing the brothers of Anil Chandra Sarkar.

Mr. Ghosh submits that there are three important factors that the probate court is required to consider in the matter of grant. They are:

(a) 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

(b) 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 the propounder, and

(c) 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 herein. **[1999(1) CHN 35 Rama Dutta & Ors. Vs. Atanu Dutta Para-43, 46 and 47; FA 42 of 2014 Smt. Moyna Bhattacharjee vs. Sri Ashim Kumar Bhattacharjee & Ors. on 5th September 2022].**

It is submitted 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 the true question which arises for consideration is, whether, the evidence led in by the propounder of the Will is such as would satisfy the conscience of the Court and the Will was duly executed by the testator. **1977(1) SCC 369 (Jaswant Kaur Vs. Amrit Kaur & Ors.)** paragraph 9; **2008(7) SCC 695 (Anil Kak Vs. Sharada Raje)**

Mr. Bhaskar Ghosh, the learned Senior Advocate representing the transferees from Kanan has supplemented the argument of Mr. Gopal Chandra Ghosh, Advocate by emphasising that the appellant has not put her case in cross-examination to any of the witnesses of the original

respondent Kanan nor in respect of clear assertions made by Kanan with regard to non-citation, relationship between Kanan and Anil and genuineness of the alleged Will.

Mr. Ghosh submits that a party is obliged to put her case in cross-examination to the witness of the opposite party and is an essential requirement and not an empty formality or a matter of procedure. In absence of any cross-examination on the aforesaid issues the statement of Kanan and other witnesses on behalf of the original respondent has to be accepted, in view of the decision of the Hon'ble Supreme Court in ***Muddasani Venkata Narsaiah (D) Th. Lrs. Vs. Muddasani Sarojana*** reported at **2016(12) SCC 288** (paragraph 15).

Mr. Ghosh has argued that the contention raised on behalf of the appellant that an opportunity is required to be given to the appellant to prove the Will afresh is untenable. It is submitted that in the revocation proceeding the court can always consider the genuineness and proper execution of the alleged Will. In fact, our attention is drawn to the issues settled by the learned trial Judge in the revocation application where the validity of the Will was put in question. It is submitted that once the parties are aware of the nature of the disputes and the issues involved in a lis have with their eyes wide open have participated in the trial and adduced evidence in this regard, it would no more be opened for a party to raise an issue of jurisdiction unless there is an inherent lack of jurisdiction. The probate court in fact has the jurisdiction to decide the said issue and the said issue has been decided on evidence. Kanan in her application for

revocation has specifically raised the issue of genuineness and validity of the Will and she along with the other witnesses were able to establish that the Will is forged, fabricated and manufactured. On such circumstances there is no requirement to remand the matter for proving the Will as argued on behalf of the appellant.

Mr. Ghosh has submitted that by reason of long passage of time most of the witnesses are dead and unavailable and it would not be in the interest of justice to remand the matter for retrial to decide the probate proceeding afresh. Mr. Ghosh submits that in a similar situation the Division Bench of this Court in ***Rama Dutta & Ors. v. Atanu Dutta*** reported at **1999(1) CHN 35; 1998 SCC Online Cal 253** had declined to remand the matter for fresh consideration and decided the genuineness of the Will on the basis of the evidence on record. Mr. Ghosh has further submitted that remanding the matter at this stage to the trial Court would result in another round of litigation that needs to be avoided in view of the decision of the Hon'ble Supreme Court in ***K. Krishna Reddy v. Special Deputy Collector*** reported in **AIR 1988 SC 163** (paragraph 12). In a situation like this where the appellant did not avail the opportunity to lead evidence remanding the matter would give an undeserving lease of life of the lis in a situation as observed by the Hon'ble Supreme Court in ***P. Purushottam Reddy & Anr. v. Pratap Steels Ltd.*** reported in **2002(2) SCC 686** (paragraph 10).

Mr. Ghosh submits that in a revocation application where there is a serious doubt with regard to the execution of the Will and where there is "a mystery or a puzzle, the probate court can ask for clarification from the

propounder” per **Rama Dutta** (supra) and in such a situation the probate court will be required to consider the matter afresh which would require the propounder to lead fresh evidence to remove such suspicion mystery. Mr. Ghosh has relied upon the paragraph 25 and 26 of the said report which read:

“25. In a situation like this, where there is a mystery or a puzzle, the probate court asks for the clarification from the propounder. There are three important points for the probate court to consider in the matter of a grant. The first is the due execution and attestation of the Will. The second is the testamentary capacity and mental health of the testator at the time of execution. The third is the free agency of the testator, i.e. whether the Will was truly the testator’s Will and testament or was it somebody else’s Will which the testator was making out as his own.

26. Where there is mystery or suspicion pointing towards the absence of any of these factors, viz. Execution capacity or own volition, the probate court asks for a clearing up of the mystery and a removal of suspicion. In our case the execution and attestation are beyond suspicion. Indeed Rabindra Nath Dutt tried to throw doubts on the signature of his father from the box but those doubts are in no way reasonable one. The probate court is not concerned with any and every doubt which might be thrown by the caveator, but only with reasonable ones.”

Mr. Bhaskar Ghosh, Senior Advocate has strongly objected to any remand and submitted that the appeal should be dismissed.

The issues raised has reminded me of the opening paragraph of the judgment of Mr. Panna Lal Basu, First Addl. Judge, Dacca in Title Suit no. 38 of 1935 [Kumar Ramendra Narayan Roy v. Sreemati Bibhabati Devi, by Rai Sahib Upendra Nath Ghosh, Manager, Court of Wards and Others] decided on 24th August, 1936 which had beautifully and succinctly captured the issues that had some relevance in this appeal as it concerns establishing the identity of few persons. Although the facts are dissimilar but the

poignance attached to the relationship we need to decide I am inclined to rely on the observation made by the learned Judge. It states:

“The principal question raised in the suit is a question of fact. It respects the identity of an individual. It is not outside judicial experience, nor is the suit unprecedented, but it is very extraordinary and its gravity arises from the magnitude of the property at stake and certain personal relations it affects.”

It is true that the nature of the instant proceeding is different from above and the facts are not identical but to the extent of the true identity of Anil and his relationship with Kanan, Meena and Mousumi are concerned such observations are relevant. It is also relevant having regard to the nature and extent of property and personal relationship of Anil with Kanan, Meena and Mousumi it would likely to affect.

The principal issue raised in this appeal is the declaration of status of Kanan in the revocation proceeding as the only married wife of Anil Sarkar @ Anil Chandra Sarkar.

The other issue was with regard to declaration that the Will was forged as a consequence whereof the probate was revoked. The probate court is a court of conscience. The executor is required to remove all doubts that are likely to arise in a probate proceeding where the execution of the Will is shrouded by suspicious circumstances. The evidence on record strongly suggests that Kanan is the wife of Anil Chandra Sarkar. The oral and documentary evidence clearly suggest that Anil Chandra Sarkar and not

Anil Sarkar is a co-sharer of a large number of properties along with his step brothers.

Both Kanan and Chabi could recollect that one lady by the name of Meena used to look after their ailing mother in law since 1977 till 1985 and after her death she was relieved. It was, thus, not unnatural that Meena would have required information of Anil which is capable of being used for financial benefits. Curiously Meena did not come and depose in the revocation proceeding although she could have done so in order to demolish the evidence of Kanan and Chabi and she could have established her right as wife of Anil Sarkar @ Anil Chandra Sarkar and could have given credence to her marriage certificate. It was also essential to give legitimacy to Mousumi. Kanan was not expected or required to lead any better or further evidence to establish her legal status as wife of Anil Chandra Sarkar. Kanan had never accepted that Anil Sarkar and Anil Chandra Sarkar could be or is one and the same person. No suggestion was put to any of the witnesses in the revocation application in this regard. In any event, when the respondent was able to establish her legal relationship with Anil Chandra Sarkar the onus is on Mousumi to establish her relationship with Anil Sarkar @ Anil Chandra Sarkar. It is not a case where Kanan had failed to discharge her burden of proof at least to claim citation and then put an assault on the alleged Will. In a revocation application while deciding the legal requirement of citation upon heirs who are likely to succeed in absence of the Will the court is required to form an opinion as to whether the applicant seeking revocation was able to make out a case for citation.

A Will is a commitment, desire, inclination and intention to bequeath and dispose of properties in the future, in favour of the beneficiary.

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.

The law requires that at the time of bequeath the testator has a disposing mind so that he is able to make a disposition of his property with understanding and reason.

In ***Bharpur Singh &Ors., v. Shamsher Singh***, reported in **2009 (3) SCC 687** at Paragraph 16 has stated the following three aspects that must be proved by a propounder:

“16..... (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 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.” (emphasis supplied)

Thereafter, in paragraph 23, the Apex Court has narrated a few suspicious circumstance, as being illustrative but not exhaustive, in the following manner:-

“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.” (emphasis supplied)

In **Niranjan Umeshchandra Joshi v. Mrudula Jyoti Rao & Ors.**, reported in **(2006) 13 SCC 433** at paragraphs 34, 35 & 36 the Hon'ble Supreme Court reiterated the circumstances that could be considered to be suspicious in the following words:-

“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 Venkatamuni v. C.J. Ayodhya Ram Singh reported in (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. 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.

It is trite law that the burden of proof is on the propounder to prove that the Will has been voluntarily executed, that the testator has signed the Will and put his signature on his own free will having sound disposition of mind, understanding the nature and effect thereof and that the Will is a genuine document. The onus of the propounder may be discharged if he succeeds in bringing on record sufficient cogent evidence in this regard and removing all suspicions. However, the burden of proof shifts to the caveator if a defence of undue influence, fraud or coercion is raised.

As held in **Barry v. Butlin** reported in **(1838) 2 Moo PC. 480**, the law is well settled that the onus probandi lies on the person who propounds the Will, and this onus is in general discharged by proof of capacity, and the fact of execution, from which the knowledge and the assent to its contents by the testator will be assumed. But where a Will is prepared and executed under circumstances which excite the suspicion of the Court it is for those who propound the Will to remove such suspicion, and to prove affirmatively that the testator knew and approved of the contents of the document as opined in **Tyrrell v. Painton** reported in **L.R. 1894** Page 151.

It is paramount duty of the propounder to explain away the suspicious circumstances attending the execution of the Will. This burden gets

heightened when a caveat is entered challenging the Will as forged or vitiated by undue influence etc. These principles are elaborately stated by the Hon'ble Supreme Court in ***H. Venkatachala Iyengar v. B.N. Thimmajamma***, reported in **1959 (Supp) 1 SCR 426: AIR 1959 SC 443**.

In ***H. Venkatachala Iyengar*** (*supra*) the Court clearly distinguished the nature of proof required for a Will as opposed to any other document 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 of the Evidence Act are relevant for this purpose. *Under s. 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 ss. 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.*" (emphasis supplied)

The Privy Council in discussing the onus to prove the Will by the propounder in **Gomtibai v. Kanchhedilal & Ors.**, reported in **AIR 1949 PC 272** has stated:

"The onus probandi to establish a Will lies on the person who propounds it. This onus is in general discharged by proof of capacity, and the fact of execution, from which the knowledge and the assent to its contents by the testator will be assumed. But where a Will is prepared and executed under circumstances which excite the suspicion of the court, it is for those who propound the Will to remove such suspicion and to prove affirmatively that the testator knew and approved of the contents of the Will. Where once it is proved that a Will has been executed with due solemnities by a person of competent understanding and apparently a free agent, that is when the propounder of the Will has discharged the onus, the burden of proving that it was executed under undue influence is on the party who alleges it." (emphasis supplied)

It is well-established that in a case in which a Will is prepared under circumstances which raise the suspicion of the court that it does not express the mind of the testator, it is for those who propound the Will to remove that suspicion. [See. **Gorantla Thataiah v. Venkatasubbaiya,**

reported in **AIR 1968 SC 1332: Indu Bala Bose v. Manindra Chandra Bose**, reported in **AIR 1982 SC 133.**]

A Will is one of the most solemn documents known to law. By it a dead man entrusts to the living, the carrying out of his wishes, and as it is impossible that he can be called either to deny his signature or to explain the circumstances in which it was executed it is essential that *trustworthy and effective evidence* should be given to establish compliance with the necessary forms of law [**Ram Gopal Lal v. Aipna Kunwar**, reported in **AIR 1922 PC 366**]. It seems impossible to enunciate any specific standard of proof which will be required to establish the authenticity of a Will in any given case. Everything depends upon the circumstances of the particular case under consideration. (**Keshev v. Vithal; AIR 1925 Nag 427, Per Findley O.C.J.**).

In **S.R. Srinivasa 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. The aforesaid statement of law was further clarified by Chandrachud J. in the case of **Jaswant Kaur v. Amrit Kaur** reported in **(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.” (emphasis supplied)

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. The court observed:

“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)

In the instant case, it can be unhesitatingly concluded on the basis of the preponderance of evidence that Kanan was entitled to a citation. It is unbelievable that Meena would not be aware of the existence of Kanan or her sister in laws or the other brothers of Anil Chandra Sarkar. Mousumi and Mina possibly could not comprehend that there could be a challenge to the probate by Kanan and have for reasons best known to them abstained from giving any evidence which has proved fatal from them.

In fact, Mousumi in the probate application at paragraph 6 has spelt her mother as “Smt. Meena Sarkar (Wife) P.O. and Vill.- Andhar Manik, P.S. Bishnupur, Dist- 24 Parganas (South), whereas in the objection to the revocation application she has described her mother as Mina”. (emphasis supplied). She also could not explain the difference in the spelling of the name of her mother. In fact, she did not prove that Anil and Meena @ Mina are her parents.

It is quite clear from the conduct of Meena and Mousumi that they did not want to face cross-examination.

The probate Court in deciding a revocation application which is, *inter alia*, based on non-citation is required to form an opinion on the status of the applicant vis-à-vis the testator and in the instant case, the trial court has precisely made the said exercise only for the purpose of ascertaining whether Kanan ought to have been cited. The observation of the learned

Trial Judge that Kanan was the only legal married wife has to be read and understood in the aforesaid context.

In any event, if we assume that Anil Sarkar and Anil Chandra Sarkar are the same person then Anil could not have married Mina during the subsistence of his earlier marriage. When there is a requirement of an opinion as to the relationship of one person to another the evidence of person who was the member of the family or otherwise has special means of knowledge on the particular subject of relationship is relevant and admissible evidence Per A.K. Sarkar, J., ***Dolgobinda Paricha Vs. Nimai Charan Misra & Ors.***, reported in **AIR 1959 SC 914**.

Although both Mousumi and Mina had the opportunity to adduce evidence in rebuttal they kept quiet and did not file any affidavit of evidence. Moreover, it is established that some of the properties mentioned in the alleged Will belonged to Anil Chandra Sarkar and not Anil Sarkar and in respect of few Anil was not the owner.

This clearly raised a doubt with regard to the genuinity of the Will. The conduct of Mousumi is not as innocent as it is tried to be projected and/or portrayed in the appeal. If Mousumi was absolutely confident about the authenticity and genuinity of the said Will and its due execution she could have in the revocation proceeding prove the Will afresh in accordance with Section 63 of the Indian Succession Act, 1925 and produce all relevant documents and evidence to dispel the serious doubt and suspicious circumstances raised by Kanan with regard to the genuineness of the Will.

There are misstatements in the Will with regard to relationship and description of properties. Misstatement in the recitals in a Will is one of the grounds on which probate can be revoked. [See. **Bharpur Singh & Ors.** (supra)]

Interestingly, all the documents produced by Kanan to prove her relationship with Anil Chandra Sarkar are much prior in point of time in relation to the application for grant of probate and the dispute arose between the parties.

The judgment of a court of probate is a judgment in rem and it binds the world. A judgment in rem cannot be revoked or set aside by a judgment which is only conclusive inter-parties therefore, even when there is allegation of forgery, the proper remedy of party who wants revocation of a grant of probate, is to apply to the probate court under Section 263 and not by way of a civil suit.

In a revocation proceeding the genuinity of the Will can be questioned.

In **Promode Kumar Roy v. Sephalika Dutta** reported in **AIR 1957 Cal 631** while dealing with the rights of persons who can apply for revocation of the grant of probate on 'just cause' in paragraphs 14 and 24 it is stated:

"14. The net position then is that an applicant for revocation must, in order to succeed, establish just cause within the meaning of Section 263 that is, as laid down in clauses (a) to (e) thereof, but even if just cause be established revocation may still be refused by the Court in the exercise of its discretion under that section, if the facts and circumstances of the particular case would warrant such refusal. In this view we shall consider first whether the appellant

has succeeded in proving any just cause for revocation in the present case and if we hold in the affirmative on that question we shall consider next whether, in the circumstances of the present case, an order for revocation should be made in the exercise of our discretion under the Section.

24. In the above view of the matter we are not prepared to hold that the absence of a specific challenge to the genuineness or validity of the Will or its existence would not by itself be fatal to the revocator's case and, in our opinion, an implied challenge would be quite sufficient from this point of view.....”

The court also discussed the order that could be passed upon revocation in paragraphs 26 and 27 which read:

“26. Prima facie the appellant is entitled to an order of revocation but the position will entirely change if the respondent succeeds in proving the Will according to law. This she may be allowed to do in the present proceedings and the revocation order may be deferred until the Court considers the entire matter and decides whether the Will has been proved or not, or an order of revocation may be made forthwith and the Letters of Administration proceeding revived and restored to file or a fresh proceeding started therefore and the question of genuineness or validity of the Will or its existence, so far as it is relevant in the Probate Court, reconsidered in that proceeding in accordance with law. Either course has the sanction and support of precedent and authority and the Court is entitled to adopt the one or the other according to the circumstances before it. The Supreme Court in Anil Behari's case (J), did certainly lay down that the question of genuineness or validity of the Will or its existence is not outside the scope of revocation proceedings and may be considered by the revocation court in deciding whether the grant should be revoked or not in the exercise of its judicial discretion but, at the same time, it cannot be seriously argued -- at any rate, we are not convinced -- that their Lordships ever intended to rule that no order for revocation can be made under, the first three Clauses of Section 263 of the Indian Succession Act unless and until the question of genuineness and validity of the Will or its existence is decided against the grantee of the probate or letters of administration. Such a view would be productive of very serious inconvenience and grave complications and we do not find anything in the statute or in the pronouncement of their Lordships or in any principle, precedent or authority to compel its acceptance. In our view the law is this : (i) Where the attack on the Will forms the only ground or just cause for revocation, that must be considered by the revocation court, the onus being on the applicant for revocation to prove his case, (ii) Where the attack on the Will forms only one of the several grounds of just causes for revocation under Clauses (a) to (c) of the section, the other grounds should be considered first and if they or any of them be established and the Court finds no reason to refuse revocation in the exercise of its discretion, the propounder should be called upon to prove the Will, the onus of proof being cast upon him, and if he succeeds, the grant would stand;

otherwise it would be revoked. If the other grounds fail, the court should consider the ground of attack on the Will, placing the onus on the revocator. (iii) Where the just causes, pleaded in a particular case, under Clauses (a) to (c) do not comprise any attack on the Will, --and this is quite possible as we have already seen, -- the court may, in a proper case, consider the Question of genuineness or the validity of the Will or its existence for proper exercise of its discretion under the section but it is not obliged to do so in every case. Such consideration may be appropriate where the parties have adduced evidence on the point or where there are before the Court all relevant details of the necessary averments or where the question admits of decision on proved or admitted facts; otherwise, ordinarily, at least, the grant should be revoked in the absence of circumstances compelling refusal of revocation in the exercise of the court's judicial discretion, and the original proceeding for the grant should be revived and reopened or a fresh proceeding for the grant should be initiated and the will proved over again and the question of grant considered afresh in that proceeding.

27. Generally speaking, this will be a very convenient course having the undoubted support of plain commonsense and to the adoption of such a course in such cases law seems to present no obstacle. We do not, however propose to lay down any absolute rule in this matter and the court should be free to decide what course should be followed in a particular case. It should be guided by the facts and circumstances before it and should have power to make necessary adjustments to shorten litigation and avoid unnecessary delays.” (emphasis supplied)

In **Anil Bihari Ghosh v. Smt. Latika Bala Dassi & Ors.**, reported in **AIR 1955 SC 566** the Hon’ble Supreme Court in paragraph 15 discussed the issue whether question of genuineness of Will can be raised in a proceeding for revocation of grant of probate. It reads:

“14. It was vehemently argued at all stages of the case including the appeal before us that admittedly no citation was issued against Girish Chandra Ghosh aforesaid and as he was the person most interested in the testator's estate besides the legatees named in the will, the case came directly within the purview of clause (a) of the Explanation and Illustration (ii) quoted above. Girish Chandra Ghosh has been found by the Judge in the first instance to have been the person most vitally interested in the estate of the testator, whether he died intestate or leaving a will, in the events which had happened. The learned counsel for the contesting respondent suggested that it had not been found by the lower Appellate Court as a fact upon the evidence adduced in this case, that Girish was the nearest agnate of the testator or that Charu

had murdered his adoptive father, though these matters had been assumed as facts. The courts below have referred to good and reliable evidence in support of the finding that Girish was the nearest reversioner to the estate of the testator. If the will is a valid and genuine will, there is intestacy in respect of the interest created in favour of Charu, if he was the murderer of the testator. On this question the courts below have assumed on the basis of the judgment of conviction and sentence passed by the High Court in the sessions trial that Charu was the murderer. Though that judgment is relevant only to show that there was such a trial resulting in the conviction and sentence of Charu to transportation for life, it is not evidence of the fact that Charu was the murderer. That question has to be decided on evidence. However, for purposes of this case we shall assume in favour of the appellant that Charu was the murderer. The result of such an assumption is that Girish being the nearest reversioner to the estate of the testator, in case of intestacy after the death of the testator's widow in 1921; or in case of testamentary succession after the death of the two legatees, the testator's daughter-in-law and the nephew's wife aforesaid, and the failure of the legacy in favour of Charu on account of the murder would, in either event, have sufficient interest in the estate of the testator to entitle him to challenge the grant and to obtain revocation. But it is noteworthy that Girish who died in 1940, lived for about 19 years after the grant and took no steps in that direction. There may be some doubt as to Girish's knowledge of the probate proceedings and of the grant until 1933; but, in our opinion, there is ample evidence in support of the finding arrived at by the Court of Appeal below that Girish was aware of the grant at the latest in 1933 when Debi Prosad Mitter took proceedings to obtain a grant in his own favour also. In his application, as indicated above, he clearly stated that Charu was the murderer of his adoptive father and that Girish would succeed to his estate, which otherwise would have gone to Charu. If Girish had initiated proceedings for revocation of the grant and had insisted on the will being proved in his presence, the courts would have had no difficulty in having all the necessary evidence before it because the chief person who had played the most leading part in the execution of the will, in its registration and in its being admitted to probate, viz., Anil Nath Basu, was then alive and could have been examined. But for reasons not made clear in these proceedings Girish did not think it worth his while to take any steps in court to challenge the will or the grant. The estate was worth anything between five to forty lakhs, perhaps nearer five lakhs than forty lakhs. Girish was a mere pensioner belonging to a middle class family. Either he did not think it worth his while to embark on a litigation with all its uncertainties or he had not the wherewithal to do so. The record as it stands does not satisfactorily explain the reasons why Girish refrained from making any attempts to get this large estate. If the will was not genuine or valid, Girish would take the reversionary estate at once

because the testator's widow died in 1921 and there was no other impediment in his way, except to get rid of the will. If, on the other hand, the will was genuine and valid, even then he would stand to gain all the interest which had been bequeathed in favour of Charu. The fact that Girish did not take advantage of his position as the nearest reversioner as on partial intestacy goes a long way to support the great probability of the will being valid and genuine, especially as it had been probated and because the appellant in his long petition for revoking the grant has not made the least suggestion casting any doubt on the genuineness and validity of the will. But it was argued on behalf of the appellant that that stage had not yet arrived and that it would be open to the appellant after obtaining an order of revocation of the grant to show that the will was either not genuine or had not been validity executed. Great reliance was placed in this connection on the judgment of a Division Bench of the Calcutta High Court in Mokshadayini Dasi v. Karnadhar Mandal (19 C.W.N. 1108) where the following observations have been made :-

"No question of the genuineness of the will arises for consideration till the Court has decided that the probate must be revoked on one or more of the grounds specified in section 50 of the Probate and Administration Act. The only matter for consideration at this stage is, whether the appellants have made out a just cause for revocation of the probate which was granted without notice to them : Brindaban v. Sureshwar 10 C.L.J. 263. The question of genuineness cannot be considered till a case for revocation is made out: Durgavati v. Sourabini I.L.R. 33 Cal. 1001."

The observations relied upon by the appellant were made with reference to the facts of that case and were not intended to be of universal application. As pointed at above, section 263 of the Act also contemplates a case for revocation based on the single ground that the will in respect of which the grant in question was obtained was as forged one. In such a case, whether or not the will was a forged one would be the only question to be canvassed before the court before the order of revocation could be made." (emphasis supplied)

The aforesaid authorities clearly show that in a revocation proceeding the genuinity of the Will can be considered and adjudicated upon by the probate court. In fact, in the revocation proceeding issues were framed regarding the genuinity of the Will in question. Pleadings were filed to that effect. There were evasive denials in the objection filed by Mousumi. In the

instant case the pleadings are not at variance with the proof. The parties were aware of the nature of the dispute and the evidence that the parties are expected to lead in support of their respective claim. The plaintiffs have led evidence to establish that the Will is required to be revoked for just cause. In fact, “just cause” would also include the Will of which probate was obtained was forged. We are in agreement with the submission made by Mr. Bhaskar Ghosh, Senior Advocate that the reluctance of Mousumi or her mother to give evidence on the relationship as well as valid execution of the Will and failure to put their essential and material case in cross-examination proved abortive and fatal. It affirms that all is not well with the execution of the Will. The failure to put essential question in cross examination has been succinctly stated in **A.E.G. Carapiet v. A. Y. Derderian** reported in **AIR 1961 Cal 359** in paragraph 10 of the said judgment. Chief Justice Mukherjee as His Lordship then was, in His Lordship’s inimitable style had summarised the principle in paragraph 10 it reads thus:

“10. The law is clear on the subject. Wherever the opponent has declined to avail himself of the opportunity to put his essential and material case in cross examination, it must follow that he believed that the testimony given could not be disputed at all. It is wrong to think that this is merely a technical rule of evidence. It is a rule of essential justice. It serves to prevent surprise at trial and miscarriage of justice, because it gives notice to the other side of the actual case that is going to be made when the turn of the party on whose behalf the cross examination is being made comes to give and lead evidence by producing witnesses. It has been stated on his authority of the House of Lords that this much a counsel is bound to do when cross examining that he must put to each of his opponent’s witnesses in turn, so much of his own case as concerns that particular witness or in which that witness had any share. If he asks no question with regard to this, then he must be taken to accept the plaintiff’s account in its entirety. Such failure leads to miscarriage of justice, first by springing surprise upon the party when he has finished the evidence of his witnesses and when he has no further chance to meet the new case”

made which was never put and secondly, because such subsequent testimony has no chance of being tested and corroborated.” (emphasis supplied)

The said judgment has also addressed the importance of sound mind if it is raised as one of the issues in challenging the validity of the Will. The test of a sound disposing mind would mean an appreciation of the fact that the man is making a Will on appreciation of the contents of the Will and on appreciation of the nature of the disposition that he is making having regard to the claims of affection and family relationship and claims of the society or community to which he belongs. It may not be a perfectly healthy and perfect mind but the testator should have the mental capability and faculty to appreciate the aforesaid fact. In the instant case, the testator died within three days from the date of his admission and he was suffering from severe respiratory problem. The marriage with Mina was registered on 11th March, 1988 only three days prior to the death of Anil. On the very same date, i.e. 11th March, 1988, Anil was admitted at M.R. Bangur at 11 p.m. The alleged Will was dated 23rd February, 1998. The evidence of Kanan and Chabi was that at the relevant time Anil was completely bed ridden. The law is well settled that the burden of proof is on the propounder to prove that: i) the Will has been voluntarily executed, ii) the testator had signed the Will and put his signature on his free will having sound disposition of mind and iii) upon understanding the nature and effect thereof.

Mousumi filed an objection in the revocation proceeding. However, she did not give any evidence in support of her objection. It has proved fatal for her. It discredits her case. On the basis of the evidence overwhelmingly

against Mousumi, the reluctance of Mousumi not to give evidence makes the improbability of the Will and its genuinity more stronger.

On the basis of the evidence it can be safely concluded that Kanan was able to raise suspicious circumstances surrounding the execution of the Will. Kanan was able to discharge her burden of proof in establishing that the identity of Anil as testator is doubtful if not an imposter and that it contains incorrect recitals with regard to relation and properties of Anil Chandra Sarkar and is a forged Will. We have noticed that Mousumi and Meena had remained inexplicably silent and abstinence to lead evidence in the said proceeding to disprove Kanan and establish the genuinity of Will. There are sufficient material on record to excite the suspicion of the court with regard to preparation and execution of the alleged Will.

In view of the fact that the issue of genuinity of the Will can be decided in the revocation proceeding and has been decided in the said proceeding and as the first appellate court we can decide the said issue on the basis of the materials on record we find no reason to remand the matter for a fresh adjudication on the “genuinity of the Will”.

The appeal stands dismissed, however, there shall be no order as to costs.

I agree

(Soumen Sen, J.)

(Uday Kumar, J.)

