

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 122 of 2022

with

CAN 2 of 2023

CAN 3 of 2023

CAN 4 of 2023

Rajiv Gogia

Vs.

Neena Puri

For the Appellant : Mr. Jishnu Saha, Sr. Adv.
Mr. Soumya Roy, Adv.,
Mr. Arindam Paul, Adv.,
Ms. Benazir Kazi, Adv.,
Ms. Debarati Das, Adv.,
Ms. Rudrani Saha, Adv.

For the Respondent : Mr. Pratyush Patwari, Adv.,
Mr. Shesh Nath Singh, Adv.,
Mrs. Anupama Sahay, Adv.

Hearing Concluded on : 2nd August, 2024

Judgment on : 14th August, 2024

Soumen Sen, J:

1. The application for grant of probate dismissed by the learned 8th City Civil Court, Calcutta in OC No. 17 of 2009 by a judgment and order dated 7th March, 2022 is the subject matter of challenge in the present appeal.

2. One of the beneficiaries is the appellant.

Prelude:

3. Briefly stated, Harish Chandra Gogia (in short 'Harish') owned several properties in Kolkata, Delhi and Dehradun at the time of his death. Although he had purchased a valuable property on S.N. Mukherjee Road being Premises No. 2, Surendra Nath Banerjee Road along with his brothers and at the time of death had 20% share in the said property, he never resided at the said premises and instead, he was living in a rented accommodation at Premises No. 9/3, Dacres Lane. Harish had a mysterious death at Rajgir, Bihar on 21st November, 1981 and was cremated on 23rd November, 1981 after his body was brought back to Calcutta. He died within six weeks from the date of execution of his alleged will. The death certificate records that "from the PM report it appears that no definite opinion could be ascertained with regard to the cause of death". The alleged will was executed by Harish on 10th June, 1981 with his two brothers namely, Arjan Dev Gogia (in short 'Arjan') the father of the appellant and Rattan Prakash Gogia (in short 'Rattan') as executors.

4. In or about 12 July, 1984 Kaushalya Devi Gogia, the wife of the testator filed an application under Section 372 of the Indian Succession Act, 1925 being Succession Case no. 237 of 1984 for obtaining succession certificate in respect of the property of the deceased husband. During the pendency of the said application Arjan filed an application on 21st June, 1986 registered as Probate Case no. 83 of 1986 for grant of probate of the said

alleged will. The wife and daughter of the deceased, however, contested the said proceeding and it was marked as a contentious cause.

5. On an application filed by Arjan in the aforesaid probate case the trial court stayed the proceeding of the succession case no. 237 of 1984.

6. Arjan died on 5th June, 1990.

7. Almost after four years in or about 28th February, 1994 the present appellant filed an application for grant of letters of administration with a copy of the will annexed under Section 276 of the Indian Succession Act, 1925 being LA case no. 22 of 1994. In the said proceeding an ad interim order was passed directing the parties to maintain status quo till disposal of the injunction application. Kaushalya Devi died on 20th December, 2000. The application for substitution was allowed by the learned Trial court on 26th April, 2001. Subsequently on 2nd December, 2005 the ad interim order of injunction was extended till disposal of the probate case. In view of the fact that the appellant was delaying in submitting the original Will as also the original death certificate of testator which was contended to be intentional, a peremptory direction was passed by the learned trial court on 15th July, 2006. A prayer for extension to file the aforesaid documents was rejected on 19th August, 2006 consequent whereupon the probate proceeding was dismissed for default. However, on 6th November, 2006 the LA Case No.22 of 1994 was restored and a fresh notice was served upon Neena Puri, the only issue and legal heir of the testator. Thereafter, the said proceeding was revived and renumbered as OC No.17 of 2009.

8. Neena, the respondent herein transferred her ownership in respect of the Dehradun property being Premises no. 2/2 Raipur Road, Dehradun on 24th May, 2007. This transfer was the subject matter of the challenge in suit no. 555 of 2008 filed by Mr. Suresh Dev Gogia, one of the beneficiaries before the learned Civil Judge (Sr. Div.) on 23rd October, 2008 on the ground that Neena had no interest over the said property in view of the disposition in his favour in the Will and had no right to execute a sale deed in respect of it. The aforesaid suit was dismissed by the learned Civil Judge (Sr. Div) at Dehradun on 5th October, 2021.

9. The probate proceeding was dismissed on 7th March, 2022. The learned trial Judge refused to grant probate of the alleged Will on the ground that the appellant had failed to remove the suspicious circumstances surrounding the execution of the Will in as much as the beneficiary had failed to prove due execution of the said Will.

10. This order is under challenge.

Submissions on behalf of the appellant:-

11. Mr. Jishnu Saha, learned Senior Counsel appearing on behalf of the appellant submits that the respondent has challenged the Will primarily on three grounds, namely-

- (i) Fraud, coercion and undue influence had been exerted on the testator by the appellant and his father Arjan.
- (ii) The testator was completely under the control of Arjan and his sons and

- (iii) The legal heirs of the testator had been and completely deprived of all rights in the moveable and immovable property of the testator which is unnatural and improbable.

12. Mr. Saha has submitted that the Will itself has stated the reasons of deprivation of the wife and daughter in any of the properties and assets of the testator. The wife of the testator had been given a residential place at Delhi and she had her own source of income. His daughter had been happily married off. The learned Senior counsel also contended that there are no specific pleadings on record to show the nature of control allegedly exercised on the testator by Arjan and his son and how he had been dependent on them so as to put them in a position of reliance and resulting in a bequeath of his entire estate on their direction and in their favour. The Will had been prepared by a person not within the knowledge of the appellant or his father and since they were not present during the execution and attestation the question of coercion, undue influence or fraud did not arise.

13. The learned Senior counsel submitted that the exclusion of the natural heir from the bequest cannot by itself be a ground to hold that there are suspicious circumstances, especially when there are convincing reasons to show that the exclusion had happened in a natural way and the Court is not to apply equality clause of Article 14 of the Constitution of India to dispositions under a Will as observed in **Swarnalatha & Ors. v. Kalavathy & Ors**¹ and

¹ AIR 2022 SC 1585: 2022 SCC OnLine SC 381

Sashi Kumar Banerjee & Ors. v. Subodh Kumar Banerjee². Mr. Saha has also referred to the case of **Dhanpat v Sheo Ram (Deceased) through L.Rs. & Ors.**³ to contend that the exclusion of the testator's children and execution of will for the sole benefit of one of the sons was not held to be a suspicious circumstance. The delay on the part of Arjan to apply for probate and subsequently on his death by the present appellant for the letters of administration cannot give rise to any suspicious circumstance as clearly held in **Swarnalatha** (*supra*). The executor Arjan applying for probate without the support of the other named executor was also not under any dubious circumstance or with any mischief as it had been clearly stated in the Will that in case of any difference/disagreement between the executors, the opinion of Arjan would prevail.

14. Mr. Saha has submitted that the objector did not adduce any oral or documentary evidence to show that the brothers of the testator did not have a cordial relationship with him. Further, no evidence as to the feeble mental capacity or infirm mental condition of the testator had been led to suggest that he did not possess the required testamentary capacity to execute the said Will. There was also no proof as to the close relationship between the daughter, son-in-law and wife of the testator with the testator or their concern for the testator or that they ever attended to his medical needs. They were unable to show the alleged ill-health of the testator during or prior to the execution of the Will. Moreover, the respondent had failed to substantiate that one lady Smt. Shakti

² AIR 1964 SC 529

³ (2020) 16 SCC 209

Rani Devi had accompanied the testator to Rajgir and was living with the testator as his wife in a hotel there and had administered poison to him leading to his death. As regards the allegation of unnatural death of the testator, the post-mortem report was inconclusive and even if poisoning was contemplated, no steps were taken by the testator's wife and daughter, who stressed on their cordial loving relationship. They did not file a police complaint or any case seeking investigation into this matter or alleging police inaction.

15. Mr. Saha also contended that suspicious circumstances such as genuineness of testator's signature or condition of testator's mind have not been raised and as observed in ***Vrindavanibai Sambhaji Mane v Ramchandra Vithal Ganeshkar***⁴ in absence of such challenge and proof the probate cannot be denied. The disposition in the Will being unnatural in relevant circumstances was also not alleged in the pleading. Further that the suspicion alleged must be one inherent in the transaction itself and not the doubt that may arise from a conflict of testimony. It should be apparent on an investigation of the transaction as held in ***Meenakshiammal (Dead) through Lrs. v. Chandrasekharan & Ors.***⁵.

16. It was emphasized that when the three brothers were residing at different places in and around the time of execution of the will the allegation of undue influence by Arjan is absurd and unmeritorious. The widow and daughter of the testator never visited him in Kolkata before his death and as such could not have any knowledge of the health condition of the deceased.

⁴ (1995) 5 SCC 215 : AIR 1995 SC 2086

⁵ (2005) 1 SCC 280 : AIR 2005 SC 52

They had no contact with him since 1976. The wife and daughter lived separately in their respective residences in Delhi while the testator lived alone with his brother and looked for their assistance in times of emergency.

17. Mr. Saha has referred to the evidence of PW1 and has submitted that Md. Hafizulla PW1 has clearly stated in his evidence that the contents of the purported Will were explained over to the testator and that he had duly signed possessing testamentary capacity and after having understood the contents and scope of the said Will. There could be no suspicious circumstances regarding the preparation of the Will as the said will was drafted by an advocate who was engaged by the deceased. Both the attesting witnesses not being close friends of the beneficiaries and as such interested witnesses their statements as to due execution and attestation are to be accepted.

18. The objector did not appear to give evidence but sent her husband as her power of attorney to adduce evidence on her behalf and as such she did not face cross examination. Mr. Saha also pointed out the discrepancies and inconsistencies in the oral evidence of DW 1 Mahendra Puri, husband of the objector whose testimony he contended lacked any evidentiary value being a power of attorney holder and having no direct knowledge of the state of affairs and facts of the present case and whose deposition was riddled with statements based on convictions and beliefs. He had no personal knowledge of relevant facts before his marriage as to the relationship between the testator and his wife and daughter and/or his ailments. D.W.1 could not have deposed as to facts not within his personal knowledge merely on the basis of a POA

granted by his wife. Due to reluctance of the daughter to depose and prove the statements made through her husband by an affidavit in chief affirmed by Mahendra as a POA holder an adverse inference may be drawn against her for not entering the witness box and face cross-examination. In this regard Mr. Saha has relied upon the decisions of Hon'ble Supreme Court in ***Janki Vashdeo Bhojwani & Anr. v. Indusind Bank Ltd & ors.***⁶, and ***Vidhyadhar v Manikrao & Anr.***⁷ and contends that the entire evidence of Mahendra is to be discarded.

19. Mr. Saha has contended that the judicial verdict should be based on an overall assessment of the unusual features and 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 as opined in ***Leela Rajagopal & Ors. v Kamala Kanon Cocharan & Ors.***⁸

20. In conclusion, it was submitted that in absence of any pleading and proof of suspicious circumstances all the allegations made by the objector being bald, baseless and unsubstantiated and in contradistinction the due execution and attestation of the Will being proved by PW1, the learned trial Court should have granted the letter of Administration with the copy of the Will annexed.

⁶ (2005) 2 SCC 217

⁷ (1999) 3 SCC 573

⁸ (2014) 15 SCC 215

Submissions on behalf of the respondent:-

21. Per contra Mr. Pratyush Patwari learned Advocate appearing on behalf of the respondent has argued that due execution of the Will has not been proved by the beneficiary appellant. It is submitted that Mr. Narayan Sheshadri (in short 'Narayan') who is one of the attesting witnesses has not been examined. Md. Hafizullah was named as one of the other witnesses in the alleged Will. He filed an affidavit in evidence in which he has not stated that the Will was read over and explained to the testator and he had signed after seeing the testator going through the contents of the Will and thereafter putting his signature to the Will. Moreover, Hafizullah claimed that Narayan had introduced him in the year 1979 to the testator at M/s Harico Studio & Photo Stores and thereafter he did not meet him at all. It was only on the date of execution of the will that the testator came to his chamber with a prepared will and he signed the will as a witness along with Narayan. However, in his cross examination he has submitted that he took professional fees for 'creation' of the will, a fact not disclosed in his affidavit-in-evidence.

22. The present appellant in his cross-examination has stated that at the time of execution of the Will the testator was all alone at his rented accommodation at 9 Dacres Lane. There is no evidence suggesting that he was physically fit and mentally alert or had on his own volition executed the said Will. Regard being had to the facts and circumstances wherein the wife and the daughter of the testator have been practically deprived of the properties and the appellant is largely benefited by such disposition, it was argued that the

appellant is under an obligation to lead credible evidence and offer explanations to the circumstances under which the will was executed. The learned counsel cited the case of ***H. Venkatachala Lyengar v. B.N. Thimmajamma***⁹, ***Kalyan Singh v. Smt Chhoti & Ors.***¹⁰ and ***Veerappa (LR) v. Kalakappa & Anr.***¹¹ for the proposition that the propounder had to remove all suspicious circumstances surrounding the Will and place satisfactory evidence to prove that the Will had been signed by the testator by his own free will, possessing testamentary capacity and having understood the effect and nature of disposition therein.

23. The application of Arjan for probate of the alleged will has not been exhibited. It is not known how Arjan became the custodian of the said Will. Arjan filed the probate proceeding almost after six years from the date of the death of testator and only after Kaushalya filed an application for succession certificate. It is submitted that in a situation like this it was incumbent upon Arjan in the earlier probate proceeding and the present appellant Rajiv in the present proceeding to offer an explanation with regard to the custody of the Will.

24. It is submitted that the testator died under mysterious circumstances but the father of the appellant did not take any steps to proceed with further investigation of the case. Reliance was placed on ***Niranjan***

⁹ **AIR 1959 SC 443**

¹⁰ **AIR 1990 SC 396**

¹¹ **2021 (1) ICC 605**

Umeshchandra Joshi v. Mrudula Jyoto Rao & Ors.¹² to support the contention that even the manner in which the death certificate of the testator was issued raised suspicions. Although the death of the testator had occurred in Rajgir, Bihar his death certificate had been issued by the Calcutta Municipal Corporation with no certain cause of death being discernible.

25. One of the brothers Rattan admittedly did not join the other executor Arjan in the probate proceeding and there is nothing on record showing that a citation was issued to Rattan calling upon him to accept or renounce his executorship or that he had, in fact, renounced his role as executor.

26. It was submitted that the language in the Will is couched and manipulated in a manner to justify the said bequest. Rajiv during his cross examination has admitted that Rattan, the other executor wanted the Will to fail in order to deprive him and his brothers from getting the benefits of the Will. It was quite clear that all was not well for Arjan, as anticipating that this unusual disposition made secretly is likely to cause ripple in the family. Arjan purposely included in the recital that in the case of disagreement/difference of opinion regarding the interpretation of the Will or administration of estate his opinion shall be final. In order to show that Rattan's family was not deprived an insignificant portion of the property was allotted in favour of Pradip, son of Rattan. The learned Counsel has referred to the bequeath made in favour of all the three sons of Arjan to show that the said clause was purposely inserted by

¹² **AIR 2007 SC 614**

Arjan in this manufactured and fabricated Will and it can be safely assumed that he played a dominant role during execution of the alleged Will and he procured the presence of Narayan and Hafizullah to make it a believable story.

27. It is submitted that the alleged Will is unnatural and a product of fraud, coercion, importunity and undue influence. The testator could not have made this disposition which virtually excluded the wife and the daughter. All throughout the wife and the daughter of the testator maintained a cordial relationship with the testator. The testator used to take care of his wife and his daughter during his lifetime. The testator was incapable of preparing the Will by himself or could not have executed the said Will being fully aware of its contents. The alleged Will of the testator had surfaced almost five years after the death of the testator with the sole objective of depriving his wife and daughter and to frustrate the proceeding initiated for succession certificate. The counsel drew attention to the case of ***Surendra Bhatia v. Smt. Punam Bhatia & Ors.***,¹³ wherein the circumstance of a will bequeathing the testator's properties in favour of his brother in absence of any strained relationship between the testator and his wife/minor daughter, was deemed to be suspicious. The case of ***Rabindra Nath Hazarika v. Phulti Hazarika alias Phulti Bania***¹⁴ was cited to illustrate the case of a propounder who was held to be not entitled to letters of administration and the alleged will unnatural, as

¹³ AIR 2001 RAJ 338

¹⁴ AIR 2003 Gauhati 85

it bequeathed the properties to the nephew disinheriting the only daughter with no evidence to show the daughter was disliked by the testator.

28. The nephews of the testator have their own source of income. A perusal of the Will would show that an impression is sought to be given that Smt. Kaushalya Gogia lived separately from the testator had her own house and her own independent source of income. Smt. Neena Puri the sole daughter of the testator was married to Mahindra Puri. In the aforesaid facts it was contended that if both the wife and daughter of the testator were well settled and the nephews also had their independent source of income and properties no cogent reason was furnished as to why the natural heirs of the testator were completely deprived and the entire bequeath of the Will made in favour of the nephews of the testator.

29. The learned Counsel has referred to the evidence of the respondent to show that in or around 1975 the testator left for Delhi to stay with his wife and daughter and prior thereto the daughter was given in marriage in 1973 and the picture disclosed in the evidence would show that he was leading a happy married life. It is submitted that there is no evidence to show that the relationship between the testator and the other brothers was cordial. They had not participated in the marriage of the testator's daughter. The appellant has failed to show that the appellant or his father had taken good care of the testator which is sought to be projected as one of the grounds for such unusual and disproportionate bequeath in favour of the present appellant or the other sons of Arjan.

30. Mr. Patwari has further submitted that PW2 Rajiv Gogia the appellant herein has stated in his cross-examination that “after the 5th June, 1990 on death of my father, I have seen for the first time the Will”. However, the appellant had presented the petition in or around 19th August 2006 seeking time for taking steps for filing original Will and original death certificate of testator in LA Case No. 22 of 1994. The said petition and proceeding of LA case No.22 of 1994 was dismissed for default. The appellant did not adduce any cogent evidence as to the cause of delay of 16 years and did not give any explanation as to what prevented him from producing the original Will and for taking necessary steps to pursue the said proceeding and allowing it to get dismissed in 2006 even after having knowledge of the Will and seeing it in the year 1990.

31. The learned counsel placed reliance on the cases of ***Shiva Kumar & Ors. v. Sharanabasappa & Ors.***¹⁵ and ***Kavita Kanwar v. Mrs. Pamela Mehta & Ors.***¹⁶ to buttress his argument of the probate court being a court of conscience and the duty that lay on it to scrutinize and examine all other attending suspicious circumstances surrounding due execution and attestation of the Will, even in the absence of a plea of fraud or coercion.

32. The learned counsel placed reliance on ***Smith v. Anil Kuma & Ors.***¹⁷ to contend that Section 118 of the Evidence Act declares all persons as competent witnesses and Section 120 of the Act permits the husband to give

¹⁵ 2020 (3) ICC 366 (SC)

¹⁶ 2020 (3) ICC 590 (S.C.)

¹⁷ 2024 KER 43463

evidence in place of and instead of his wife and vice versa even in the absence of a written authority. On similar lines, he submitted that Mahendra Puri, DW1 was competent to depose on behalf of his wife the objector herein as her POA holder.

33. One of the properties as referred to in the said will of the testator is Premises No. 2/2/2 Raipur Road, Dehradun known as "Harish Niwas". The said premises originally belonged to Tulsi Devi, the mother of the testator. The testator had three brothers namely (a) Dhanpat Rai Gogia, since deceased (b) Arjan Dev Gogia, since deceased (c) Rattan Prakash Gogia, since deceased and three sisters namely Prem, Ved and Shanti. By registered gift deed dated 31.10.1957 executed by Tulsi Devi, as Donor, 4/5th part of the said property was gifted to her aforesaid four sons and 1/5th part of the said property was retained by Tulsi Devi. Such 1/5th part of the said property was gifted in favour of testator by Tulsi Devi by way of registered gift deed dated 15th April 1965. In such gift deed there is a stipulation that the testator shall not sell the said property unless the same is offered to Rattan, the brother of testator. Despite such stipulation in the gift deed dated 15th April 1965, the share of testator in the said property is shown to have been bequeathed in favour of the sons of Arjan, since deceased. However, the said registered gift deed dated 31.10.1957 has not been exhibited or brought on record.

34. Despite request being made by the Respondent, neither Arjan Dev Gogia nor R.P. Gogia, both deceased, had disclosed the value of shares of the testator in partnership firm M/s. Harico Studio & Photo Stores at Premises No.

3B Jawaharlal Nehru Road, Kolkata wherein testator is the sole tenant and such tenancy is now being transferred in favour of Respondent, who is paying rent to the landlord.

Our Views:

35. A Will is a commitment, desire, inclination and intention to bequeath and dispose of properties in the future, in favour of the beneficiary. It is 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 [see **Ram Gopal Lal v. Aipna Kunwar**¹⁸]. 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. (see **Keshev v. Vithal**)¹⁹

36. In the case of **Kalyan Singh v. Smt. Chhoti & Ors.**²⁰ it was noted in paragraph 20 as under:

“It has been said almost too frequently to require repetition that a will is one of the most solemn documents known to law. The executant of the will cannot be called to deny the execution or to explain the circumstances in which it was executed. It is, therefore, essential that trustworthy and unimpeachable evidence should be produced before the court to establish genuineness and authenticity

¹⁸ AIR 1922 PC 366

¹⁹ AIR 1925 Nag 427

²⁰ AIR 1990 SC 396

of the will. It must be stated that the factum of execution and validity of the will cannot be determined merely by considering the evidence produced by the propounder. In order to judge the credibility of witnesses and disengage the truth from falsehood the court is not confined only to their testimony and demeanour. It would be open to the court to consider circumstances brought out in the evidence or which appear from the nature and contents of the documents itself. It would be also open to the court to look into surrounding circumstances as well as inherent improbabilities of the case to reach a proper conclusion on the nature of the evidence adduced by the party.” (emphasis supplied)

37. In **H. Venkatachala Lyengar v. B.N. Thimmajamma**²¹ the solemnity attached to a Will was enunciated in paragraph 19 as:

“Unlike other documents the will speaks from the death of the testator, and so, when it is propounded or produced before a Court, the testator who has already departed the world cannot say whether it is his will or not; and this aspect naturally introduces an element of solemnity in the decision of the question as to whether the document propounded is proved to be the last will and testament of the departed testator.”

38. 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

²¹ AIR 1959 SC 443

remove that suspicion. [See ***Gorantla Thataiah v. Venkatasubbaiya***,²²: ***Indu Bala Bose & Ors. v. Manindra Chandra Bose & Ors.***²³.]

39. In the present case, the signature of the testator and the attesting witnesses has not been challenged by the respondent herein. The court is required to consider the circumstances brought out in the evidence and what appears from the nature and contents of the alleged Will in order to ensure that the said document is the last Will upon removing all suspicious circumstances surrounding the execution of the said Will. 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 is “to put itself into the testator’s arm-chair to look to the surrounding circumstances.”

40. Certain issues remain unanswered by the present appellants and are essential for considering the alleged suspicious circumstances in the present case.

41. In ***Niranjan Umeshchandra Joshi v. Mrudula Jyoti Rao & Ors.***²⁴ at paragraphs 34, 35 & 36 the Hon’ble Supreme Court reiterated the

²² AIR 1968 SC 1332

²³ AIR 1982 SC 133

²⁴ (2006) 13 SCC 433

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. (emphasis supplied)

42. In **Shiva Kumar & Ors. v. Sharanabasappa & Ors.**²⁵; in paragraph 11(5) and 11(6) the court observed:

“If a person challenging the Will alleges fabrication or alleges fraud, undue influence, coercion et cetera 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 give rise to the doubt or as to whether the Will had indeed

²⁵ 2020 (3) ICC 366 (SC)

been executed by the testator and/or as to whether the testator was acting of his own free will. In such eventuality, it is again a part of the initial onus of the propounder to remove all reasonable doubts in the matter.

A circumstance is “suspicious” when it is not normal or is “not normally expected in a normal situation or is not expected of a normal person”. As put by this Court, the suspicious features must be “real, germane and valid” and not merely the “fantasy of the doubting mind.” (emphasis supplied)

43. It is trite law that 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. 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. It is the paramount duty of the propounder to explain away, the suspicious circumstances attending the execution of Will. This burden gets heightened when a caveat is entered challenging the Will as forged or vitiated by undue influence etc. (see **Guruprasad Tah v. Ashoke Kumar Tah & Ors.**,²⁶)

44. In **H. Venkatachala Iyengar** (supra),²⁷ the Hon’ble Supreme Court clearly distinguished the nature of proof required for a Will as opposed to any other document noting that Section 68 of the Evidence Act deals with the

²⁶ AIR 2023 Cal 267

²⁷ AIR 1959 SC 443

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. 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 of the Will.

45. The death certificate of the testator issued by the Calcutta Municipal Corporation shows that no definite opinion of death could be ascertained. Even when postmortem was done, the report was not disclosed/exhibited but reference was made to it by his son-in-law (DW1) in his affidavit in chief. Considering that Arjan the brother of the testator had an extremely cordial and affectionate relationship with him, it seems surprising that he did not take any necessary steps to lodge police complaint and investigate the true cause of his unusual death when he had died in Rajgir all alone, allegedly accompanied by only one maid servant, Shakti Rani Devi. Even when DW1, Mahendra Puri, had stated in his deposition that the death of the testator was allegedly caused by the poisoning no measures were taken by the appellant herein to refute the said claim by any evidence to the contrary.

46. As per the recitals in the last Will and testament of Harish Gogia, (1) Suresh and Ashok Gogia sons of Arjan have been given all right, title and interest in premises No.2/2/2 Raipur Road, Dehradun (2) Rajiv Gogia son of Arjan has been given all right, title and interest in the undivided 1/5th share in

premises 3, Surendra Nath Banerjee Road, Calcutta 700 013 and (3) Pradip Gogia son of Rattan has been given all right, title and interest in a small house at Dehradun. (4) Ashok Gogia has also been given all right, title interest in 30 percent share in the co-partnership business M/S Harico Studio & Photo Stores in Calcutta and the residue of whatever the testator possessed was bequeathed unto Arjan and Rattan. From a bare perusal of the above mentioned contents of the Will it appears that Arjan's sons, Suresh, Ashok and Rajiv were the primary beneficiaries of the testator's estate. Notably, for such unusual disposition by the testator in his last Will and Testament, no special relationship between them and specifically the sons of Arjan has been substantiated either by documentary or oral evidence. There are also no record to show that the said appellant who was one of the principal beneficiaries of the Will had in any way taken care of Harish Gogia during his lifetime for any such special treatment to be meted out to them or any such favour to be endowed upon them, excluding the natural heirs or all other heirs and/or nephews and nieces.

47. It has also been specifically stated in the recitals of the Will that in case of any difference and/or disagreement between the two executors, Arjan and Rattan in any matter concerning the administration or interpretation of the Will the opinion of Arjan would be final and binding on all others which goes to show that primacy had been given to Arjan even in the case of any possible dispute that the maker of the Will had anticipated. The said recital is reproduced below:

“In case of any difference and/or disagreement between my said two Executors in any matter or thing relating to and/or concerning the administration of my estate and/or interpretation of this my Will and Testament the opinion of my said Executor SHRI ARJAN DEV GOGIA shall be final and all concerned shall be bound by such opinion of the said SHRI ARJAN DEV GOGIA.”

48. This fact feeds the suspicion that Arjan had unduly influenced the testator's mind or contents of the purported Will. The aforesaid clause is unusual and as we proceed to read the other paragraphs of the Will it clearly, unmistakably and gradually slants towards the legal heirs of Arjan with Arjan behind the curtain, operating and maneuvering silently to fulfill his desire. The overwhelming presence of Arjan is discernible from the document. Arjan possibly had anticipated that having regard to the disposition there might arise a conflict with his brother Rattan and such clause was inserted with an insignificant bequeath in favour of one of the legal heirs of Rattan which was ostensibly made to show that legal heirs of both the brothers have been benefitted. The wife was excluded from all properties and daughter of the testator, Smt. Neena Puri has only been given a mere pittance of Rs.40,000/-. PW2 has stated in his cross-examination that “I do not have any document to prove that the relationship in between Kaushalya Gogia and Harish Gogia was not cordial. I also have no document to show that she refused to stay along with joint family of their brother H.C. Gogia.” Even, on the consideration that the wife and daughter of the testator did not possess a cordial relationship with the testator and had their own source of income, it is rather unusual in the

present facts and circumstances for the testator to have bequeathed almost his entire estate only to one brother and his successors, in the absence of any significant affinity being shown in that regard. This mere amount of Rs.40,000/- has been inserted in the Will in a feeble attempt to project a fiction that the only legal heir of the testator had not been completely excluded from his last Will. However, in the absence of any record of the brothers and/or the nephews of Harish having attended Neena Puri's marriage, any evidence as to any special relationship existing among them, and even the testator living separately and all alone in a rented accommodation at premises no.9/3 Dacres Lane despite having 20 per cent share in premises no. 2 Surendra Nath Banerjee Road without any aid or support of his brothers with whom he had a so called loving, cordial and close relationship, shatters the make-believe story sought to be projected by the appellant herein.

49. PW2 has stated in his cross-examination that "on the date of the execution of the alleged Will, Harish Chandra Gogia used to reside at 9, Dacres Lane. At the time of execution of the alleged Will he was alone in the said premises". He has also stated that he has not filed any document showing the normal physical and mental condition of Harish at the time of execution of the alleged Will. However, PW1, M. Hafizulla had stated in his affidavit of evidence that on 10th June, 1981 the testator was present at No.10, Old Post Office Street, Calcutta and had executed the alleged Will by signing his name at the foot of the Will in his presence as well as that of another attesting witness Narayan since deceased. Hence, it is explicit that there are contradictions in

the testimonies of PW1 and PW2 as to the place of execution of the Will by the deceased testator. PW1 could not have been present at both the places on the same date and time. PW1 has never deposed that he ever visited the residence of the testator.

50. A perusal of the said Will, will make it evidently clear that the same had been prepared by a legal professional and could not have been drafted by a common man devoid of any substantial legal knowledge. Even if the version of PW1, Md. Hafizulla is taken to be true of the testator executing his last Will at no.10 Old Post Office Street, it does not seem plausible for the testator to have engaged an advocate and to have paid him professional fees merely for attesting the said Will instead of actually having engaged him for creation/drafting his last Will and Testament. The said PW1 in his cross-examination has also notably stated that he was paid “professional fees for creation of the said Will”, a fact which had not been previously disclosed in his affidavit in evidence. Even, if it is considered that such fees was taken by PW1 for attestation, his subsequent statement in the cross-examination cannot be construed to be a minor inconsistency in deposition which can be easily disregarded as he is a lawyer by profession and had deposed on oath having known the legal significance and ramifications of the same.

51. PW1 has also in his cross-examination deposed that he had met the testator for the first time in the year 1979 in his photography shop M/S. Harico Studio and Photo Stores. He had neither ever acted as an advocate on behalf of the testator nor visited his place of residence. Normally persons well

acquainted with the testator and who are known to him and in whom he reposes his trust are generally called to be the attesting witnesses for execution of Will. The Will was prepared by a legal professional and not by a common man. It seems unusual why the testator being a businessman and a prudent person would have engaged PW1, to act only as an attesting witness and not engaged him to draft his last will being an advocate when he could have engaged any other person who were more closely acquainted with him in the course of business.

52. Mr. Saha has submitted that the probate application was filed by Arjan accompanied by an affidavit from Narayan Sesadri. The said affidavit of Narayan cannot be looked into and considered since Narayan has not proved the said affidavit. Curiously, Arjan did not file the application of grant of probate within a reasonable time. Arjan had waited for five years to file the probate case only after Kaushalya, the wife of the testator filed an application for grant of succession certificate in or about 12th July, 1984. Such was opposed by Arjan and two years later, he filed an application for grant of probate on 21st June, 1986. Till his death in 1990, for almost four years, Arjan did not diligently pursue the probate proceeding. The question obviously arises as to why Arjan had delayed the filing of the probate proceeding or why he did not take expeditious steps for early disposal of the proceeding if he were so certain about the genuity of the Will.

53. After four years from the death of Arjan, the present appellant, Rajiv filed an application for grant of letters of administration with the copy of the will annexed on 28th February, 1994.

54. PW2, Rajiv Gogia has stated that he was aware of the fact that his father Arjan had taken steps during his life time to obtain probate of the Will and that he had seen the said Will after 5th June 1990 on the date of his father's demise. Though a peremptory direction was passed by the learned Trial Court on 15th July, 2006 granting last opportunity to the appellant to file the original will and death certificate but on 19th August, 2006 a prayer for extension to file the abovementioned documents was rejected and the probate proceeding was dismissed for default. Hence, as rightly pointed out by the learned Counsel for the respondent it is manifestly clear that the appellant had knowledge of the earlier probate proceeding and had also seen the purported Will of the testator, but neither did he take any steps in pursuing the said case diligently by filing the required documents nor did he furnish a suitable explanation for the delay of 16 years in producing the purported Will. Although a peremptory direction was given to file the original Will, Rajiv did not do so even till 19th August, 2006 consequent whereupon the probate case was dismissed for default and non-compliance of the said order. This clearly shows that the appellant had not actively pursued the probate matter and it raises a suspicion with regard to the authenticity of the Will or disposition made thereunder by the testator.

55. Rajiv could not prove the due execution and attestation of the Will. He has stated in his affidavit of evidence that Narayan one of the attesting witnesses who had signed at the foot of the Will had died in Madras and by the reason of his demise, the other attesting witness, Md. Hafizullah PW1 had been called to prove the execution of the Will. For the reasons recorded above, the evidence of PW1 cannot be accepted. No documentary evidence has been brought on record to show the date of Narayan's alleged demise although it is alleged from the affidavit claimed to have been filed by Narayan that he was residing at 9, Dacres Lane. His death certificate was never produced. No attempt was made by Rajiv for recording his statement prior to his alleged death. He did not furnish any reason as to why he was not called as a witness even in the prior probate proceeding or in these 16 years. In view of the fact that PW1 failed to prove the Will in accordance with the law, the only alternative remaining with Rajiv was to prove the Will by Narayan or by any attesting witness. PW1 had claimed to be introduced to the testator by Narayan. It is natural that in such circumstances Narayan should have been examined and given preference to PW1. Moreover, Hafizulla in his affidavit filed along with the application for letters of administration did not state that the Will was read over and explained to the testator or that the testator put his signature only after going through the contents of the Will. Indeed subsequently he tried to improve upon it. As it now appears that he had prepared the Will on receiving professional fees his evidence that he was merely an attesting witness cannot be accepted. The evidence of PW1 is

untrustworthy. In the light of the evidence of Rajiv where he has clearly stated that the testator was alone at the time of execution of the will in his rented apartment at 9 Dacres Lane and the evidence of PW1 as to the place of execution and attestation of the alleged Will, the ratio in **Brojendra Nath Roy Chowdhury v. Chittaranjan Ghosh & Ors.**,²⁸ has become relevant when in a similar situation, a Division Bench of this Court observed that *“the original plaintiff could have filed the probate case soon after the revocation application was allowed and could have made a fresh attempt to prove the Will with the scribe-cum-attesting witness who was alive till 1990. It raises a serious doubt as to whether the scribe-cum-attesting witness was at all present at the time of execution of the said Will or that the said Will was executed voluntarily”*. A serious doubt is also raised in view of the evidence of Rajiv as to whether Narayan was indeed present during the execution of the alleged Will by the testator.

56. Rajiv has also stated that in spite of repeated requests, Rattan had at no point of time showed any eagerness or willingness to act as executor and by his sheer indifference he had renounced his role of executorship. In this regard no letters of such repeated requests being made either by Arjan in his prior probate case or even Rajiv Gogia in his grant for letters of administration has been brought on record. There is no evidence to show Rattan was aware of the Will or declined to act as an executor. In 1994 Rattan was alive. No citation was issued to Rattan in any of the proceeding to accept or renounce his

²⁸ AIR 2023 Cal 183

executorship. Although it was alleged that Rattan did not take any interest and would allow the said Will to fail the procedure under Section 229 of the Indian Succession Act, 1925 was not followed. The conduct of Rattan is also an important factor touching upon the nature and contents of the document.

57. In **Kavita Kanwar v. Mrs. Pamela Mehta & Ors.**²⁹ the satisfaction of the conscience of the Court in probate matter was emphasized in paragraphs 25.1 and 25.4 is as follows:

“it has also been held that this Court has consistently held that the probate proceeding is ultimately a matter of conscience of the Court: and irrespective of whether any plea in opposition is taken or not, a propounder of Will is required to satisfy the conscience of the Court with removal of all the suspicious circumstances. By the very nature and consequence of this proceeding, filing or non-filing of written statement or objections by any party pales into insignificance and is of no effect. The probate proceeding is not merely inter partes proceeding but leads to judgment in rem and, therefore, even when no one contests, it does not ipso facto lead to grant of probate. The probate is granted only on proof of Will as also on removal of suspicious circumstances, if there be any, to the final satisfaction of the conscience of the Court.

25.4. When the proceeding is solemn in nature like that for probate, which leads to judgment in rem, it is beyond the cavil that mere non-filing of caveat or opposition is not decisive of the matter. The propounder, in every matter for grant of probate, irrespective of opposition or even admission by any party, is required to satisfy the conscience of the Court, with removal of suspicious circumstances, if any.” (emphasis supplied)

²⁹ 2020 (3) ICC 590 (S.C.)

58. In **Anil Kak v. Sharada Raje**,³⁰ 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)

59. Similarly, in **Leela Rajagopal and others v. Kamala Menon Cocharan and others**,³¹ 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

³⁰ 2008) 7 SCC 695

³¹ (2014) 15 SCC 570

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)

60. In the facts of the instant case merely because of the fact that the signature of the testator on the alleged Will is apparently proved and uncontested, the Will cannot be said to be duly proved with regard to Section 63 of the Indian Succession Act and Section 68 of the Indian Evidence Act. As has been illustrated above through a plethora of landmark judgments, there can be varied situations which can be termed as suspicious circumstances surrounding the due execution and attestation of a Will ranging from the propounder taking a dominant role in execution, the natural heirs of the testator being excluded, the Will not seeing the light of day for long period of time, to the beneficiaries exerting undue influence or coercion on the testator. However, even in the absence of the caveator failing to establish with the aid of cogent evidence any such suspicious circumstance or in the event of an

inadequate defence being presented on the behalf of a caveator, the court is not precluded from examining the other surrounding circumstances attending the execution and attestation of the Will.

61. As discussed hereinabove, there are several other suspicious circumstances which give rise to doubt whether the testator possessing due testamentary capacity and having understood the true scope and extent of the bequeath of the Will had signed at the foot thereof. It does not seem plausible on any account for the testator to have made such an unequal distribution of assets and to have endowed the appellant and his brothers herein with the majority of his estate. Such disposition is exceedingly unnatural, improbable and unreasonable in the light of relevant circumstances being the exclusion of the wife and sole issue of the testator without any convincing and acceptable reason. It is unconceivable that the sole issue of the testator would only be left and unusual pittance of Rs.40,000/- in the absence of any evidence suggesting that the relationship between the testator and his daughter was sour or frictional. Specifically in such an instance where the testimony adduced by one of the attesting witnesses does not inspire any confidence and is fraught with inconsistency, a significant onus lay on the appellant to prove the due execution and attestation by leading evidence either in the nature of an affidavit by Narayan or calling upon him at a prior point of time to give testimony and be subjected to cross examination, which he failed to do. Further the appellant choosing to let a long time elapse before filing the original

death certificate and will of the testator 16 years after his father's death he should not be entitled to any indulgence at the hands of the court.

62. On an objective assessment of the circumstances surrounding the preparation, execution and attestation of the Will we are of the view that the appellant has failed to remove the suspicious circumstances surrounding the execution of the Will. The exclusion of the natural heirs appears to be improbable in the facts and circumstances of the case. In consonance with the impugned judgment of the trial court, it is impossible for a probate court to arrive at a finding that the will was a product and/or outcome of a free will and mind.

63. Under such circumstances the appeal fails.

64. There will be no order as to costs.

65. Urgent Photostat certified copy of this order, if applied for, be supplied to the parties upon compliance of all requisite formalities.

I agree

(Soumen Sen, J.)

(Uday Kumar, J.)