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Court : Kolkata

Decided On : Aug-11-2017

Judge : Sahidullah Munshi

Appellant : ... Plaintiff

Respondent : Samarendra Kumar Bardhan

Judgement :

IN THE HIGH COURT AT CALCUTTA TESTAMENTARY & INTESTATE JURISDICTION ORIGINAL SIDE TESTAMENTARY SUIT NO.10 OF2014P.L.A. No.48 OF 2005 IN THE GOODS OF : DR. SUDHANYA KUMAR BARDHAN AND SACHINDRA KUMAR BARDHAN ... Plaintiff -Versus SAMARENDRA KUMAR BARDHAN ... Defendant BEFORE: THE HONBLE JUSTICE SAHIDULLAH MUNSHI August 11, 2017. Mr. Joyak Gupta, Mr. B. Mullick For the plaintiff Mr. Bimalendu Das For the defendant The Court : This P.L.A. No.48 of 2005 was filed by Sachindra Kumar Bardhan praying for grant of probate to the Will and Testament dated 7th September, 1997 of the deceased Dr. Sudhanya Kumar Bardhan. A caveat was lodged by Samarendra Kumar Bardhan, who, subsequently filed affidavit in support of the caveat and the P.L.A. was converted into a contentious cause and renumbered as T.S. No.10 of 2014. In the petition the propounder has made out a case that one Dr. Sudhanya Kumar Bardhan residing at 11/1A, Benoy Bose Road under Bhawanipore Police Station, Kolkata - 700025, executed his last Will and Testament on 7th September, 1997. By the said Will he appointed his eldest son Sachindra Kumar Bardhan, the propounder,

as executor of the last Will. The Will was written in English language and the original Will has been annexed to the probate petition. The Will was executed by the deceased-testator in presence of two attesting witnesses -

1) Prabhu Shaw of 1, Harish Mukherjee Street, Kolkata - 700025 and

2) Partha Sarathi Bardhan of 16N, Nandalal Jew Road, Kolkata - 700026. The signature of the deceased on the said Will was attested by the above-mentioned attesting witnesses. According to the propounder, the execution of the said Will is proved by the affidavit of Prabhu Shaw and also by his declaration. According to the plaintiff, the deceased left behind him surviving his heirs and legal representatives under the Hindu Law, who would have inherited the estate of the deceased had he died intestate. He has mentioned the names of such legal heirs and representatives in the probate petition. The plaintiff has set forth in the affidavit of assets, both movable and immovable which the deceased possessed at the time of his death and which has come to the possession of the heirs. The defendant, Samarendra Kumar Bardhan, one of the sons of the deceased-testator, has stated that his father died on 11th November, 1997 leaving behind him surviving his legal heirs. He is the second son of the testator. According to the defendant, his father was not in a position to sign any documents for last 15 years. According to him, the testator never made any Will, however, if at all made, the same has not been executed by his father in his free will and consent rather undue influence and fraud has been practiced to obtain his fathers signature on the alleged Will. It is the case of the defendant that since the testator of the alleged Will was blind and had no capacity to take any decision freely without being influenced by anybody and, accordingly, whatever is written in the alleged Will is not the true reflection and/or in conformity with the family settlement made by the testator that is, his father in his favour during his lifetime. It is specifically objected that Dr. Bardhan died on 11th November, 1997 and after expiry of long 8 years this probate application has been filed. The defendant filed a caveat upon receipt of citation from this Honble Court. The plaintiff has adduced as many as three witnesses. First of such witnesses, Sachindra Kumar Bardhan, deposed on 26th November, 2014. Cross-examination was concluded on 5th May, 2015. This witness is a Doctor by profession and was 70 years old on the day of deposition.

He deposed in his examination-in-chief that his father, Dr. Sudhanya Kumar Bardhan, executed the Will on 7th September, 1997 and he died on 11th November, 1997. He deposed that at the time of death of late Dr. Bardhan, the Will was in his custody but a copy of the Will was circulated to him by the learned advocate who prepared the said Will and, ultimately, in December, 2004, he found the original Will which was kept in a drawer of the deceased-testator. The witness deposed that his father late Dr. Bardhan continued his medical practice till his death and he was physically and mentally alert at the time of execution of the Will. He deposed that he was residing in the same house where the testator used to reside and as a doctor he was of the opinion that his father was mentally and physically alert. The witness identified the Will executed by his father. He stated that there are four signatures on the said Will. He deposed that his fathers signature appears on the Will and he identified the same and encircled the same with red ink. He also identified the signature of one Arun Roy, another attesting witness, signed on the Will. The witness also identified the signature and encircled the signature of Arun Roy in red ink. The witness also identified the signature of another attesting witness, namely, Prabhu Shaw and encircled the signature of Prabhu Shaw in red ink. The witness identified the signature of one Partha Sarathi Bardhan, his brother and identified his signature by encircling the same in red ink. He, however, deposed that Mr. Partha Sarathi Bardhan is no more alive. The witness also identified the signature of Mr. Suranjit Ghosh who was an advocate and, according to the witness, he had drafted the Will. The witness encircled the signature of Sri Suranjit Ghosh in red ink. The witness deposed that at the time of execution of the Will he was present at the place where the Will was executed and he narrated the fact and time when the Will was executed. He confirmed that his father signed on the Will in his presence. He also deposed that apart from him, his younger brother, Mr. Partha Sarathi Bardhan and Mr. Prabhu Shaw, witnessed the execution of the Will. He also deposed that he saw the attesting witnesses putting their signature on the Will. In cross-examination, the said witness, Sachindra Kumar Bardhan deposed in answer to question no.57 that the testator informed the names of the persons whom he disclosed about the Will. In answer the witness deposed that Sachindra Kumar Bardhan, Samarendra Kumar Barthan, Partha Sarathi Bardhan, Subrata Kumar Bardhan and others that is, the sisters Mamata

Bardhan, Namita Bardhan, Sushama Bardhan and Pratima Bardhan. He further deposed that the testator informed all his sons and daughters. In answer to question no.63 whether all his sons and daughters except caveator are supporting the executor for obtaining the probate the witness deposed yes. In question no.68 in crossexamination the witness deposed that the testator was an M.B.B.S. and was a medical practitioner till his death and on the date of his death he was about 78 years of age. The above witness, Sachindra Kumar Bardhan is the eldest son of Dr. Sudhanya Kumar Bardhan who is also known as Gopal and the executor appointed by the testator in his Will dated 7th September, 1997. The next witness deposed for the plaintiff was Arun Kumar Roy. He is an attesting witness in the Will. In his examination -in-chief he deposed that Dr. Sudhanya Kumar Bardhan executed the Will and he identified the said Will in the box. He confirmed that the Will was executed on 7th September, 1997 by Dr. Sudhanya Kumar Bardhan and he identified his own signature on the Will which was encircled by him. He further deposed that Dr. Sudhanya Kumar Bardhan was physically fit and mentally alert at the time of execution of the Will. He further deposed that Dr. Bardhan signed the Will on his own wish and volition. In cross-examination Exhibit A (Will) was shown to him and he identified that the same was the Will for which probate has been sought for. He also deposed that apart from him there are two other attesting witnesses on the Will. This witness deposed that he saw the testator signing the Will. In question no.100 (cross-examination) a question was put to the witness I suggest it to you that the document dated 7th September, 1997 is not the Will and Testament of Dr. Sudhanya Kumar Bardhan as alleged by the propounder herein?.

. in answer, the witness deposed I do not agree.

. He also deposed that the contents of the alleged Will dated 7th September, 1997 were read out by the testator, since deceased. Therefore, from the above deposition it is clear that Arun Roy was an attesting witness to the execution of the Will of Dr. Sudhanya Kumar Bardhan. Dr. Sudhanya Kumar Bardhan singed on the Will in presence of Arun Kumar Roy and the testator read out the Will. Next witness for the plaintiff deposed in Court was Prabhu Shaw. He is also one of the attesting witnesses. He identified his signature on the Will (Exhibit A) which is

placed at no.2 and he has identified the signature of other persons. He has also identified the signature of the testator, who he used to call Baba, late Sudhanya Kumar Bardhan. He deposed that apart from him, there were signatures of Arun Kumar Roy, an advocate and Dr. Partha Sarathi Bardhan, the third son of the testator. This witness deposed that he was a pharmacist and was an Assistant of Doctor Sudhanya Kumar Bardhan since 1973. He worked with doctor Bardhan for about 27 years. He worked with doctor Bardhan till his death. He further deposed that although, doctor Bardhan died in 1997 but he worked in the chamber till 2008. He deposed that Dr. Sudhanya Kumar Bardhan practiced right up to the time of his death and Dr. Bardhan was physically fit and mentally alert at the time of execution of the Will. He also deposed that Dr. Bardhan signed on the Will at his own wish and volition and he signed the Will in presence of all the witnesses including him. In cross-examination the witness deposed that by the Will flats were given to each of the sons and they all are residing in their respective flats. He deposed that until death of the testator he regularly used to practice as a medical practitioner, see patients, diagnose and give medicines to the patients. In crossexamination he deposed that even after death of Dr. Sudhanya Kumar Bardhan he continued to work in his medical shop till 2008 and he had regular connection with the sons of the deceased. He deposed that the Will was executed in his presence. Negating the question raised in cross-examination that there are suspicious circumstances shrouded in the alleged execution of the Will the witness deposed that he did not agree to any suspicious circumstances and rather he further deposed that the sons have shifted in their respective flats and have been residing there what has been allotted by Dr. Bardhan to his sons in the Will. One Mr. Suranjit Ghosh was also called as a witness as he drafted the Will. He was shown Exhibit A and he identified that this was the Will he drafted. He deposed that this Will was executed on 7th September, 1997. He deposed that apart from him there were other witnesses, namely, Mr. A.K. Roy, Mr. Prabhu Shaw and Mr. Partha Sarathi Bardhan when Dr. Sudhanya Bardhan singed the Will and he further deposed that under instruction of Dr. Bardhan, since deceased, he drafted the Will. His signature was tendered and it was marked as Exhibit B. in cross-examination he answered that in or about 1995-96 he was instructed by Dr. Bardhan, since deceased, to draft the Will and the deceased went through the Will

after it was drafted. This witness also deposed that apart from him other witnesses singed on the Will in question. In cross-examination, the witness disagreed to the suggestion given to him that the deceased could not have read the alleged Will as he had a very feeble eye sight because of the glaucoma which he was suffering at the time when the Will was executed and that the deceased did not have the testamentary capacity to execute the alleged Will and that the contents of the alleged Will was never read over or explained to the deceased prior to the execution of the alleged Will. One, Subrata Chowdhury was also called in Court to serve with a subpoena to produce certain documents regarding one savings account no.5050 of Dr. Sudhanya Kumar Bardhan. He was asked to produce specimen signature card and other related documents in respect of the said account of Dr. Sudhanya Kumar Bardhan. Witness produced the originals along with photo copies thereof. The specimen signatures of Dr. Sudhanya Kumar Bardhan were tendered and marked as Exhibits 5 and 6 respectively. In support of the caveat an affidavit was filed by Samarendra Kumar Bardhan. The said Samarendra Kumar Bardhan, in his examination-in-chief, deposed that testator was his father and Sachindra Kumar Bardhan is his elder brother. He deposed that relationship with all the sons and daughters with the father was cordial prior to his death. He deposed that before death his father was blind. He could not walk properly and he was suffering from arthritis. In order to explain the word blind he deposed that mainly because of sugar his father became blind and suffered from glaucoma. He disputed the Will when it was shown to him in the box. He deposed that his father was blind and he could not sign and execute the document. When he was shown page 8 of the document (Will dated 7th September, 1997) he deposed that his father was blind. Question of signing does not arise and he disputed the signature to be his fathers signature on the Will. He deposed that his fathers signature was embodied in Punjab National Bank. He, however, identified the signature of Prabhu Shaw on the Will. Significantly, this caveator, in question no.22, when he was asked What was the mental condition of your father Dr. Sudhanya Kumar Bardhan before his death?.

. He replied He was fine. He used to speak to us.

. He also deposed that there was no occasion that his father deprived any of his heirs and legal representatives from his estate. Question nos.35 and 36 are of some importance which were asked by the Court. The question and answer is quoted below :

35. Can you not recollect the name of another sister?. (Witness looked at his wife inside the Court room and then said) Pratima.

36. Can you recollect the surname of your sister, Pratima?./ Halder.

. The caveator also deposed in cross-examination that the testator was not attending his chamber but when patients used to go to him he used to attend them at his residence. In answer to the question whether other brothers were residing at his place apart from residence, he answered, they used to reside at 11/1A, Benoy Bose Road, Kolkata - 700025 and thereafter he deposed that all these arrangements as per present situation were settled by his father. The witness also deposed that he was happy with the settlement made by his father in 1983 because the whole property was in his custody at that time. He deposed further that he and other heirs of the testator took possession of the building at Manohar Pukur Road as per instruction of the testator. He confirmed in question no.95 that all arrangements for their stay were settled by his father. This witness was shown Annexure 3 to the application for grant of probate being Exhibit A and it was suggested to him that at the top it was written the last Will and Testament of Dr. Sudhanya Kumar Bardhan.

. In answer, he says yes but he disagreed to the suggestion as to whether the signature was the signature of his father. He, however, said that he was familiar with his fathers signature and when he was asked to produce any document where his father signed he said he had a photocopy of Ration Card of his father which carries his fathers signature and also a bank document of Punjab National Bank which carries the specimen signature of his father. He, ultimately, said that since his fathers property has not been properly divided amongst the brothers and sisters, he is opposing the application for grant of probate. On the prayer of the defendant for appointment of handwriting expert for comparison of signature of the testator, Dr. Sudhanya Kumar Bardhan, appearing on the last Will and Testament

dated 7th September, 1997 with the signature of Dr. Sudhanya Kumar Bardhan appearing on the specimen signature card kept in the custody of Punjab National Bank, Bhawanipore Branch in connection with Savings Bank Account No.5050, this Court passed an order on 7th December, 2016, inclined to allow the prayer of the defendant for sending the documents to the handwriting expert for opinion. The document was sent to the expert and the report dated 28th April, 2017 was filed by the Registrar, Original Side, before this Court wherefrom it appeared that reports from C.F.L. (Central Forensic Laboratory) has been received by the Registrar and in turn, he was directed to circulate copies of the said report to the parties. The said report was taken on record. From the report it appears that the expert could not express any opinion regarding the authorship of the red enclosed signatures stamped and marked Q1 to Q9 in comparison with the blue enclosed signatures stamped and marked A1 to A6. The expert suggested that for a thorough and scientific study of the handwriting characteristic of the documents involved, some more admittedly genuine signatures which may be available on official documents preferably of the year 1990-95 are required for further examination. Record does not reveal that the defendants have taken any steps in pursuance of the said opinion of the Central Forensic Laboratory. The report has not been challenged either. In order to justify the period of delay as raised by the defendant in their affidavit that there has been a delay of long 8 years in filing the application for probate, Mr. Gupta relied on a judgment in the Case of Moti Lal Shaw - Vs. - Mandadari Devi & Ors., reported in AIR 2005 CAL10 wherein a Division Bench of this Honble Court held , we cannot treat the delay of 18 years as a matter of suspicion only because 18 years is a long period of time. There is no rule that a long period of time creates a suspicion in the air. Suspicion, even suspicion, must be given some specific shape. In an equity Court, matters never go by such rules of thumb, that a long gap of time creates suspicion, in some sort of specific way, only when the explanations fail.

. In the present case, sufficient explanation has been given by the witnesses in the box to the effect that the Will was kept in the drawer of late Dr. Sudhanya Kumar Bardhan, who was a doctor by profession and it was found long after his death from a place where he used to keep his own documents. Therefore, the question of delay as has been pointed out in the affidavit filed by the defendant is not

sufficient to destroy the case of the plaintiff for grant of probate. Mr. Gupta has also relied upon the following judgments : Rammol (Das) Koch - Vs. - Hakol Koli Kochini, reported in XXII CWN315 Madhukar D. Shende - Vs. - Tarabai Aba Shedage, reported in (2002) 2 SCC85 Krishan Kumar & Ors. - Vs. - Daryao Singh (deceased by LRs) & Ors., reported in AIR2005 Punjab & Haryana 52. Smt. Sulka Devi & Anr. - Vs. - Hriday Narayan Singh, reported in AIR2010(NOC) 913 (CAL). Sridevi & Ors. - Vs. - Jayaraja Shetty & Ors., reported in AIR 2005 SC780 Yumnam Ongbi Tampha Ibema Devi - Vs. - Yumnam Joykumar Singh & Ors., reported in (2009) 4 SCC780 Drawing the Courts attention to the provisions of Indian Succession Act as regards the minimum requirement for proving a Will Mr. Gupta has cited the decisions in Rammol (Das) (supra) where it has been held under the old Section 50 of Indian Succession Act of 1865 that Will can be proved by one attesting witness as required under Section 68 of the Evidence Act. In Madhukar D. Shende (supra) the Honble Apex Court has held that the requirement of proof of a Will is the same as that of any other document save and except that the evidence tendered in proof of a Will should additionally satisfy the requirement of Section 63 of the Indian Succession Act, 1925 and Section 68 of Evidence Act, 1872. It has been further held that the conscience of the Court has to be satisfied by the propounder of Will adducing evidence so as to dispel any suspicious or unnatural circumstances attaching to a Will provided that there is something unnatural or suspicious about the Will. The law of evidence does not permit conjecture or suspicion having the place of legal proof nor permit them to demolish a fact otherwise proved by legal and convincing evidence. Well-founded suspicion may be a ground for closer scrutiny of evidence but the suspicion alone cannot form the foundation of a judicial verdict - positive or negative. Paragraphs 8 and 9 of the said judgment are profitable in the present case and those are reproduced below :

8. The requirement of proof of a will is the same as any other document excepting that the evidence tendered in proof of a will should additionally satisfy the requirement of Section 63 of the Indian Succession Act, 1925 and Section 68 of the Indian Evidence Act, 1872. If after considering the matters before it, that is, the facts and circumstances as emanating from the material available on record of a given case, the court either believes that the will was duly executed by the testator

or considers the existence of such fact so probable that any prudent person ought, under the circumstances of that particular case, to act upon the supposition that the will was duly executed by the testator, then the factum of execution of will shall be said to have been proved. The delicate structure of proof framed by a judicially trained mind cannot stand on weak foundation nor survive any inherent defects therein but at the same time ought not to be permitted to be demolished by wayward pelting of stones of suspicion and supposition by wayfarers and waylayers. What was told by Baron Alderson to the jury in R. v. Hodge may be apposite to some extent: The mind was apt to take a pleasure in adapting circumstances to one another and even in straining them a little, if need be, to force them to form parts of one connected whole, and the more ingenuous the mind of the individual, the more likely was it, considering such matters, to overreach and mislead itself, to supply some little link that is wanting, to take for granted some fact consistent with its previous theories and necessary to render them complete.

. The conscience of the court has to be satisfied by the propounder of will adducing evidence so as to dispel any suspicions or unnatural circumstances attaching to a will provided that there is something unnatural or suspicious about the will. The law of evidence does not permit conjecture or suspicion having the place of legal proof nor permit them to demolish a fact otherwise proved by legal and convincing evidence. Well-founded suspicion may be a ground for closer scrutiny of evidence but suspicion alone cannot form the foundation of a judicial verdict - positive or negative.

9. It is well settled that one who propounds a will must establish the competence of the testator to make the will at the time when it was executed. The onus is discharged by the propounder adducing prima facie evidence proving the competence of the testator and execution of the will in the manner contemplated by law. The contestant opposing the will may bring material on record meeting such prima facie case in which event the onus would shift back on the propounder to satisfy the court affirmatively that the testator did know well the contents of the will and in sound disposing capacity executed the same. The factors, such as the will being a natural one or being registered or executed in such circumstances and

ambience, as would leave no room for suspicion, assume significance. If there is nothing unnatural about the transaction and the evidence adduced satisfies the requirement of proving a will, the court would not return a finding of not proved. merely on account of certain assumed suspicion or supposition. Who are the persons propounding and supporting a will as against the person disputing the will and the pleadings of the parties would be relevant and of significance.

. Drawing an analogy to the present case made out by the caveator-defendant that his father became blind towards the last part of his life and, therefore, he had lost all capacity to take an independent decision and to sign the document, Mr. Gupta has cited the decision in the case of Krishan Kumar & Ors. (supra) to submit that it cannot be held that merely because a person became blind or hard of hearing, that his mental faculties were also affected in any manner. Unless a positive evidence is forwarded to prove that any undue influence was made upon the testator it cannot be concluded that the Will is not genuine. Mr. Gupta has relied on paragraph 18 of the said decision which is quoted below :

18. Although an argument has been raised by the plaintiffs that Prabhu was under the undue influence of the defendants, who had also participated in execution of the Will, but nothing has been brought on the record by the plaintiffs to show as to how and in what manner Prabhu was under any undue influence of the defendants. The mere fact that defendant Jagdish had admitted in his statement that he had also accompanied Prabhu when he went to execute the Will would not lead to any inference that Jagdish had also actively participated in execution of the Will. Prabhu was an old man who was also blind and hard of hearing. He needed somebody to accompany him when he wanted to execute the Will. In these circumstances, if defendant Jagdish had accompanied him for the execution of the aforesaid Will, that fact itself cannot be used against the defendants to conclude that there was any active participation of the defendants in execution of the Will. Similarly, it cannot be held that merely because Prabhu was blind or hard of hearing, that his mental faculties were also affected in any manner. DW - 3 Bhim Sain, Deed Writer, had scribed the Will Ex. D1. The said witness has categorically stated that the Will in question was written by him on the asking of Prabhu who had thumb marked it after the contents thereof were read to him. A similar

statement has been made by DW - 2 Sultan Singh who is one of the attesting witnesses of the said Will. Nothing meaningful has come on record in the cross-examination of the aforesaid witnesses to show that Prabhu was in any manner influenced by the defendants or that he did not understand the factum of execution of the Will. Merely because Prabhu was disabled in hearing and vision, would not lead to any inference that his mental faculties were also affected in any manner.

. To contend the similar argument Mr. Gupta has drawn the attention of this Court to the decision of Smt. Sulka Devi & Anr. (supra) which gives an indication that in absence of non-production of any cogent evidence to prove ill-health of the testator and in absence of doctor treating the testatrix to testify testamentary incapacity the argument that the testator had no capacity to make the Will should not be believed. The decision in the case of Sridevi & Ors. (supra) has been cited by Mr. Gupta to show that only because an allegation is made that an unequal distribution has happened by virtue of the Will left by the testator, the same cannot be a ground to hold that the Will was not genuine or that the Will was not the reflection of the true mind of the testator. He has relied upon paragraphs 14, 15, 16and 17 of the said judgment and those are set out below :

14. The propounder of the will has to show that the will was signed by the testator; that he was at the relevant time in sound disposing state of mind; that he understood the nature and effect of dispositions and had put his signatures to the testament of his own free will and that he had signed it in the presence of the two witnesses who attested in his presence and in the presence of each other. Once these elements are established, the onus which rests on the propounder is discharged. DW-2, the scribe, in his testimony has categorically stated that the will was scribed by him at the dictation of the testator. The two attesting witnesses have deposed that the testator had signed the will in their presence while in sound disposing state of mind after understanding the nature and effect of dispositions made by him. That he signed the will in their presence and they had signed the will in his presence and in the presence of each other. In cross-examination, the appellants failed to elicit anything which could persuade us to disbelieve their testimony. It has not been show that they were in any way interested in the propounders of the will or that on their asking they could have deposed falsely in

court. Their testimony inspires confidence. The testimony of the Scribe (DW-2) and the two attesting witnesses (DWs. - 3 &

4) is fully corroborated by the statement of hand-writing expert (DW-5). The will runs into 6 pages. The testator had signed each of the 6 pages. Hand-writing expert compared the signatures of the testator with his admitted signatures. He has opined that the signatures on the will are that of the testator. In our view, the will had been duly executed.

15. Coming to the suspicious circumstances surrounding the will, it may be stated that although the testator was 80 years of age at the time of the execution of the will and he died after 15 days of the execution of the will, the two attesting witnesses and the scribe have categorically stated that the testator was in sound state of health and possessed his full physical and mental faculties. Except that the deceased is 80 years of age and that he died within 15 days of the execution of the will, nothing has been brought on record to show that the testator was not in good health or possessed of his physical or mental faculties. From the cross-examination of the scribe and the two attesting witnesses, the appellants have failed to bring out anything which could have put a doubt regarding the physical or mental incapacity of the testator to execute the will. Submission of the learned counsel for the appellants that the testator had deprived the other heirs of his property is not true. The family properties had been partitioned in the year 1961. The shares which were given to Dharmaraja Kadamba and Raviraja Kadamba were in possession of tenants and vested in the State Government after coming into force of Karnataka Land Reforms (Amendment) Act, 1973 whereas the properties which had been given to the daughters were in the personal cultivation of the family. The testator while executing the will bequeathed the properties which had fallen to his share in the partition and which he had inherited from his brother which were in his personal cultivation in favour of his two sons Dharmaraja Kadamba and Raviraja Kadamba and gave the right to receive compensation to other heirs of the properties which were under the tenants and had vested in the State Government. It is not a case where the father had deprived his other children totally from inheritance. Reasons for unequal distribution have been given in the will itself. This had been done by him to balance the equitable distribution of the

properties in favour of all his children.

16. Counsel for the appellants argued that Respondent No.13 had taken prominent part in the execution of the will as he was present in the house at the time of the alleged execution of the will. We do not find any merit in this submission. Apart from establishing his presence in the house, no regarding the execution of the will. Mere presence in the house would not prove that he had taken prominent part in the execution of the will. Moreover, both the attesting witnesses have also stated that the daughters were also present in the house at the time of execution of the will. The attesting witnesses were not questioned regarding the presence of the daughters at the time of the execution of the will in the cross-examination. The presence of the daughters in the house at the time of execution of the will itself dispels any doubt about the socalled role which Respondent No.13 had played in the execution of the will. They have not even stepped into the witness box to say as to what sort of role was played by Respondent No.13 in the execution of the will.

17. Another suspicious circumstance which was highlighted at great length by the learned counsel for the appellant is that the Respondent Nos. 8-13 had failed to disclose the will for a period of 4 years in any of the earlier proceedings before the revenue authorities and the forest authorities. That the will was got registered after a lapse of 4 years and did not see the light of the day till the initiation of proceedings in the present suit. We do not find any substance in this submission as well. Respondent No.13 in his testimony has stated that the contents of the will were disclosed in the year 1976 at the time of final obeisance ceremony of the testator. There is not much of cross- examination of this witness on this point. None of the appellants have stepped in the witness box. Sukirthi Hegde (PW-1), husband of Appellant No.3 i.e. grand-daughter of the testator, denies knowledge about the disclosure of the contents of the will at the time of final obeisance ceremony of the testator. He has not even stated in his testimony as to whether he was married to Appellant No.3 at the time of the death of the testator or that he was present at the time of final obeisance ceremony of the testator. There is nothing on the record which could persuade us to disbelieve the testimony of Raviraja Kadamba (DW-1). The case of the respondents is that the will was

disclosed in the year 1978 as well during the proceedings pending before the forest authorities. Respondent No.13 had moved an application before the forest authorities for permission to cut the trees standing on the land which had come to his share under the will. It was contested by the appellants. A settlement was arrived at and the three daughters viz. Padmaraja Kadamba, Sridevi and Muttu @ Dejamma (out of whom two are the appellants and 3rd died and is now represented through her daughter) in a joint statement filed before the authorities, categorically stated that "we do not have any right over the said land". It was also stated that after the death of their father, they did not have any objection for the grant of general certificate authorizing Respondent No.13 to cut the trees in Survey No.189. In view of this statement, it does not lie in the mouth of the appellants to contend that they had any right over the property. From this it can be safely presumed that the statement that they did not have any right in the land was made by them only after knowing the contents of the will. Both the attesting witnesses have stated that the daughters were present at the time of the execution of the will. This assertion of the two attesting witnesses has not been controverted by either of the daughters by appearing in the witness box. From their presence in the house at the time of the execution of the will, it can reasonably be inferred that they had knowledge about the execution of the will. Under these circumstances, it cannot be held that the execution of the will had not been brought to the notice of the appellants.

. Lastly, Mr. Gupta has drawn the attention of this Court to paragraphs 11 and 12 in the decision of Yumnam Ongbi Tampha Ibema Devi (supra) to submit that as per the provisions of Section 63 of Indian Succession Act, a propounder is required to prove that Will has been duly executed and in order to show due execution of the Will the following requirements are to be fulfilled by the propounder - (i) That the testator has signed or affixed his mark to the Will; (ii) That the signature or the mark of the testator has been so placed that it should appear that it was intended thereby to give effect to the writing as a Will; (iii) That the Will has been attested by two or more witnesses and lastly, (iv) That each of the said witnesses has seen the testator signing or affixing his mark to the Will and each of them has signed the Will in the presence of the testator. In the present case, the evidence adduced by the plaintiff supports the execution of the Will by

the testator and it suggests the fulfillment of all the requirements laid down under Section 63 of the Indian Succession Act. The attesting witnesses have identified the signature of the testator in the Will. They have also identified each others signature in the Will, although, one attesting witness is sufficient but, in the present case, more than one witness has come up to prove the Will. The attesting witness has said not only about the testators signature or affixing his mark to the Will but has also said that each of the witnesses signed the Will in the presence of the testator. Therefore, there is no room for suspecting the Will that it was not the genuine Will of the testator, nor anything comes out from the evidence or the materials placed before this Court that the Will has been executed under any suspicious circumstances, nor is there any evidence led on behalf of the defendant suggesting for such a suspicious circumstance save and except that the distribution of the assets under the Will has not been proportionately made to the natural heirs of the deceased. This cannot be any ground that the Will is not genuine simply because some of the natural heirs has got larger share under the Will and some has got lesser. When such distribution of assets has been fully justified and explained by the testator himself in his Will there can be no occasion to demand that the Will is under any suspicion. Therefore, there is no reason to hold that the Will is not a genuine one. Even evidence of the defendants says that his father was able to attend patients throughout his life, although, he was not able to attend the chamber but if patients would come at his residence he would prescribe for them. Such an evidence of the caveator-defendant obviously suggests that the testator, who was a practicing doctor, had the mental capacity to execute the Will. The evidence that has been led by the defendant does not, in any manner, reflect that the Will was executed not by way of a free consent of the testator. The evidence and other materials on record does not, in any way, justify to hold that the testator of the alleged Will had no capacity to take any decision freely without being influenced by anybody as alleged by the defendant. The allegation of undue influence and/or practice of fraud upon the testator also could not be established by the defendant. The burden of proof that the Will has been procured by undue influence or by causing fraud, is upon the person who alleges it to be so and, in my view, the evidence on record led by the defendant is insufficient to substantiate the allegation of fraud. It is always improper to presume

a Will to be a product of fraud primarily from a consideration of its contents. It is not permissible for the Courts to do what Courts are often invited to do on behalf of objectors, namely, to make up their minds about the iniquitous character of the contents of the Will and then to look at the positive or direct evidence in favour of the execution of the Will from that standpoint. It is also improper for a Court to start making all kinds of speculation as to the circumstances and suspicions which make it impossible that the Will could have been executed. It is bound to consider the evidence regarding the execution and attestation and if satisfied with that evidence it must pronounce in favour of that Will. Finally, there is no presumption either in fact or in law as seems to be commonly supposed that a Will if propounded must be out of fraud. The allegation leveled against by the defendant appears to be without any basis and corroborated by any other fact on record and, thus, is disbelieved by this Court. This Court holds that the Will is genuine and the last Testament of the testator. For the reason assigned hereinbefore, I allow the instant suit and order that probate of the original last Will executed by the deceased testator, Dr. Sudhanya Kumar Bardhan on 7th September, 1997, shall be granted to the propounder and costs and incidental to the probate application shall be paid out of the funds from the estate of the deceased. Urgent Photostat certified copy of this judgment, if applied for, be delivered to the learned counsel for the parties, upon compliance of all usual formalities. (Sahidullah Munshi, J.)

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