

Vincent Britto Vs. Mrs. Eunice Britto

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Court : Karnataka

Decided On : Jan-25-2002

Reported in : AIR2002Kant179; ILR2002KAR2455; 2002(2)KarLJ600

Judge : V.G. Sabhahit, J.

Acts : [Indian Succession Act, 1925](#) - Sections 63 and 276

Appeal No. : Miscellaneous First Appeal No. 777 of 1995

Appellant : Vincent Britto

Respondent : Mrs. Eunice Britto

Advocate for Def. : Sanath Kumar Shetty and ;Rego and Rego, Adv.

Advocate for Pet/Ap. : Udaya Holla, Adv.

Disposition : Appeal allowed

Judgement :

V.G. Sabhahit, J.

1. This appeal under Section 299 of the [Indian Succession Act, 1925](#) is directed against the judgment and decree passed by the Additional District Judge, Dakshina Kannada, Mangalore in O.S. No. 1 of 1988, dated 12-12-1994.

2. The facts of the case in brief leading up to this appeal are as follows.-- The parties would be referred to with reference to their rank before the Probate Court.

Vincent Britto, S/o. Denis J. Britto filed an application for grant of probate under Section 276 of the Indian Succession Act before the District Judge, Dakshina Kannada on 7-3-1987 seeking for issue of probate annexed to the Will. It is averred in the application that Ms. Elizabeth Britto died on 17-9-1986 within the jurisdiction of District Court, Mangalore. She had executed last Will and testament in the presence of witnesses whose names appear on the foot thereof and the plaintiff is the Executor appointed under the Will since Mr. Ben Britto has declined to act as an executor by his letter dated 30-12-1986. It is averred that deceased Ms. Elizabeth Britto was the absolute owner of the immovable property described in the Schedule by virtue of inheriting 1/5th right in the said property and obtained release deed from other sharers in respect of the residue of the property. She bequeathed the schedule property in favour of her two nephews namely, Ivan J. Britto and Justice C. Britto. The amount of assets which are likely to come to the plaintiffs hand does not exceed Rs. 3,00,000/- and no other application has been made to any other Court for the grant of probate and the plaintiff undertakes to duly administer the property or credit of the said Ms. Elizabeth Britto and to make a full and true inventory thereof and exhibit the same in the Court within six months from the date of grant of probate to him and render to the Court a true account of the said properties and assets within one year from the said date and wherefore the application seeking for issue of probate.

3. The application was resisted by Vincent Britto and in view of the contest, the application was converted into suit O.S. No. 1 of 1988. The applicant filed a plaint reiterating the averments made in the application for grant of probate.

4. The defendant filed written statement averring that the plaintiff's suit is unsustainable both at law and on points of facts. The defendant denied that Ms. Elizabeth Britto was the absolute owner of immovable properties described in the Schedule attached to the plaint or that the alleged release deeds got executed in her favour in respect of residuary estate is valid, legal or binding on the defendant or other heirs. It was averred that alleged bequest of Schedule mentioned

properties is not legal nor is it valid and binding on the heirs who otherwise are entitled to inherit the property and the suit is also bad for non-furnishing of the required particulars of all the legal heirs left behind by late Ms. Elizabeth Britto. It was further denied that alleged Will dated 19-6-1983 is the last Will executed by Ms. Elizabeth Britto and that the plaintiff is the executor appointed under the alleged Will or that Mr. Ben Britto had declined to act as executor as averred in the plaint. It was further averred that Elizabeth Britto was not at all in a sound disposing state of mind during the fag end of her life so as to validly execute any Will. While the fact that the alleged Will directs that the deceased's own sister should go out of the house on the day of executant's death itself suggests that the alleged Will must have been got up under provocation or under external influence. The deceased Elizabeth Britto being an old lady she was suffering from high blood pressure and she was susceptible to sudden anger and rages, sudden likes and dislikes and was mentally not fit to execute any Will. It is further averred that without prejudice to the said contentions, the Will is not the outcome of a free mind of the executrix as the same appears to have been made under coercion and duress from Mrs. Winniefred Britto, widow of late Lawrence Britto as deceased was completely depending on her for food which she could not cook for herself. Even otherwise, she was aged 80 years and on account of her old age her mental equilibrium to a considerable extent had been affected. It is further averred that without prejudice to the foregoing contentions, Elizabeth Britto was acting as executrix of the Will of late P.L. Britto as well and the probate was issued by the competent Court in her favour and the said Elizabeth Britto was to hold the property bequeathed in favour of other heirs in trust until the estate of late P.L. Britto is divided in the manner indicated therein and Elizabeth Britto was acting as a trustee for the real beneficiaries and therefore the alleged release deeds even if any must have been done by her by utilising her capacity as executrix in which event the same is illegal, invalid and opposed to law and she did not get other sharers evicted through process of Court and by manipulations even if any release deeds are executed, the same are invalid. All the heirs who are entitled to claim/inherit the property are not made parties and the suit is bad for non-joinder of parties and wherefore the plaintiff is not entitled to any of the reliefs claimed in the suit.

5. Having regard to the pleadings, the Probate Court framed appropriate issues.
6. On behalf of the plaintiff, the plaintiff examined himself as P.W. 1 and also examined the attesters to the Will, Ex. P. 2 as P.Ws. 2 and 3 and got marked the documents Exs. P. 1 to P. 10{a). On behalf of the defendant, the defendant was examined as D.W. 1 and D.Ws. 2 to 4 were also examined and Exs. D. 1 to D. 10 were got marked.
7. The Probate Court after considering the contentions of the learned Counsel appearing for the parties and the oral and documentary evidence on record by its judgment dated 12-12-1994 answered the issues against the plaintiff and held that the plaintiff had failed to prove that Ms. Elizabeth Britto executed the Will dated 19-6-1983 and that it was genuine and her last Will as pleaded and wherefore the plaintiff was not entitled to probate as sought for and accordingly dismissed the suit. Being aggrieved by the said dismissal of the suit, the plaintiff has preferred this appeal under Section 299 of the Indian Succession Act.
8. I have heard the learned Counsel appearing for the appellant and the learned Counsel appearing for the respondent.
9. The learned Counsel appearing for the appellant submitted that the Probate Court was only required to consider as to whether the applicant had proved that Elizabeth Britto had duly executed the Will dated 19-6-1983 while she was in sound disposing state of mind and the question about the capacity or the power of the testatrix over the property bequeathed under the Will and the title thereto could not be gone into by the Probate Court and the defendant has failed to substantiate the grounds urged in the written statement and has failed to show that the Will was not duly executed and that the Will was a result of coercion or undue influence or fraud and wherefore the Will dated 19-6-1983 which is in the handwriting of Elizabeth Britto had been duly proved to have been executed by the evidence of P.Ws. 2 and 3 and wherefore the judgment and decree passed by the Probate Court is liable to be set aside and the appellant is entitled to probate as sought for in the application.

10. The learned Counsel appearing for the respondent submitted that Elizabeth Britto herself was acting as an executrix in respect of the Will executed by P.L. Britto and had not discharged her duties as executrix under the said Will. She had no testamentary capacity to bequeath the schedule property. He further submitted that the evidence of P.Ws. 2 and 3 do not prove the due execution and attestation of the Will and the execution of the Will is surrounded by suspicious circumstances referred to by the Probate Court which has not been satisfactorily explained and wherefore the finding arrived at by the Probate Court does not call for interference in this appeal as the same is based upon the oral and documentary evidence on record and wherefore the appeal is devoid of any merits and is liable to be dismissed.

11. Having regard to the contentions urged the points that arise for determination in this appeal are:

1. Whether the Probate Court was justified in holding that the plaintiff was failed to prove the due execution and attestation of the Will dated 19-6-1983 and that it was the last Will of Elizabeth Britto executed by her while in sound disposing state of mind and wherefore the plaintiff was not entitled to the probate as sought for in the application?

2. Whether the impugned judgment passed by the Probate Court calls for interference in this appeal?

3. What order?

And I answer the above points for determination in this appeal as follows:

1. In the negative;

2. In the affirmative;

3. As per the final order for the following:

REASONS

12. Points 1 and 2. --It is the case of the plaintiff that Elizabeth Britto has duly executed the Will dated 19-6-1983 as per Ex. P. 2 and it is her last Will and testament and the same has been executed while she was in sound disposing state of mind. The scope of enquiry by the Probate Court while considering the application for issue of probate under the provisions of Section 276 of the Indian Succession Act is well-settled. Hon'ble Supreme Court in the case of Ishwardeo Narain Singh v. Smt. Kamta Devi and Ors., : AIR 1954 SC280 , has laid down as follows:

'The Court of Probate is only concerned with the question as to whether the document put forward as the last Will and testament of a deceased person was duly executed and attested in accordance with law and whether at the time of such execution the testator had sound disposing mind. The question whether a particular bequest is good or bad is not within the purview of the Probate Court. It is surprising how this elementary principle of law was overlooked by both the Courts below'.

13. The learned Counsel appearing for the respondent has relied upon a number of decisions of the Hon'ble Supreme Court namely, H. Venkatachala Iyengar v. B.N. Thimmajamma and Ors., : AIR 1959 SC443 , Rani Purnima Debi and Anr. v. Kumar Khagendra Narayan Deb and Anr., : [1962]3SCR195 , Shashi Kumar Banerjee and Ors. v. Subodh Kumar Banerjee (deceased) by L.Rs and Ors., : AIR 1964 SC529 , Surendra Pal and Ors. v. Dr. (Mrs.) Saraswati Arora and Anr., : [1975]1SCR687 , Smt. Jaswant Kaur v. Smt. Amrit Kaur and Ors. and Kalyan Singh v. Smt. Chhoti and Ors., : AIR 1990 SC396 , It is clear from these decisions that mode of proving the Will does not ordinarily differ from proving any other document except as to the special requirement of attestation prescribed by Section 63 of the Indian Succession Act. Proof in either case cannot be mathematically precise and certain and hence the test should be one of satisfaction of a prudent mind in such matters and under such circumstances.

14. In the case of Shashi Kumar Banerjee, supra, Constitution Bench of the Hon'ble Supreme Court after referring to the earlier decisions of the same Court referred to by learned Counsel for respondent and has laid down the principles

governing the proving of Will and the same has been reiterated by the Hon'ble Supreme Court in the case of Mrs. Joyce Primrose Presto (Nec Vas) v. Miss Vera Marie Vas and Ors., : (1996)9SCC324 , as follows:

'The principles which govern the proving of a Will are well-settled (see H. Venkatachala Iyengar's case, supra and Rani Purnima Debi, supra). The mode of proving a Will does not ordinarily differ from that of proving any other document except as to the special requirement of attestation prescribed in the case of a Will by Section 63 of the Indian Succession Act. The onus of proving the Will is on the propounder and in the absence of suspicious circumstances surrounding the execution of the Will, proof of testamentary capacity and the signature of the testator as required by law is sufficient to discharge the onus. Where however there are suspicious circumstances, the onus is on the propounder to explain them to the satisfaction of the Court before the Court accepts the Will as genuine. Where the Caveator alleges undue influence, fraud and coercion, the onus is on him to prove the same. Even where there are no such pleas but the circumstances give rise to doubts, it is for the propounder to satisfy the conscience of the Court. The suspicious circumstances may be as to the genuineness of the signature of the testator, the condition of the testator's mind, the dispositions made in the Will being unnatural, improbable or unfair in the light of relevant circumstances or there might be other indications in the Will to show that the testator's mind was not free. In such a case the Court would naturally expect that all legitimate suspicion should be completely removed before the document is accepted as the last Will of the testator. If the pro-pounder himself takes part in the execution of the Will which confers a substantial benefit on him, that is also a circumstance to be taken into account, and the propounder is required to remove the doubts by clear and satisfactory evidence. If the propounder succeeds in removing the suspicious circumstances the Court would grant a probate, even if the Will might be unnatural and might cut off wholly or in part near relations...!'

15. The principle to be borne in mind while considering the sound disposing state of mind of the testator at the time of execution of the Will has been considered and succinctly laid down by the Calcutta High Court in the case of A.E.G. Carapit v. A.Z. Derderion, : AIR1961 Cal359 , as follows:

'The question of a sound mind is a dominant question in a Court of Probate. Numerous decisions of high authorities have laid down from time to time tests by which to judge a sound disposing mind. It is not an absurd test. Nor is it the test of a perfectly healthy and perfect mind. Indeed most of the Wills are not made by persons young and vigorous and glowing in health. The test of a sound disposing mind is in law a workable test. It means in plain language an appreciation of the fact that the man is making a Will, an appreciation of the contents of that Will and an appreciation of the nature of disposition that he is making having regard to the claims of affection and family relationship and claims of the society or community to which he belongs. It is not a hypothecated nor an impracticable test. It is not test of a psychologist or a psycho-analyst or a psychiatrist who in the modern age is prone to consider all human mind to be inherently unsound of nature and abnormal. Nor is it the too scientific test which would satisfy the highest technical medical examinations. Some idea of what this sound disposing mind in testamentary law is, can be gathered from Section 59 of the Succession Act and the statutory explanations thereunder. In Explanation 2 of Section 59 of the Succession Act it is expressly stated that persons who are deaf or dumb or blind are not thereby incapacitated for making a Will if they are able to know what they do by it. Similarly under Explanation 4 of Section 59 of the Succession Act no person can make a Will while he is in such a state of mind whether arising from intoxication or from illness or from any other cause that he does not know what he is doing. The illustrations make it clear that a mere perception of what is going on in the immediate neighbourhood and an ability to answer familiar questions but without competent understanding as to the nature of his property or the persons who are kindred to him or in whose favour it would be proper that he should make his Will, will not be enough proof of a sound mind within the meaning of Section 59 of the Succession Act. These statutory explanations are not intended to be exhaustive but they give practical illustrations to explain a sound disposing mind'.

16. I have gone through the oral and documentary evidence adduced by the parties before the Probate Court and also the judgment of the Probate Court impugned in this appeal and the same has to be appreciated and considered in the light of the principles laid down by the Hon'ble Supreme Court and Calcutta High Court in the above cited cases.

17. P.W. 1 is the plaintiff in this case. He is not an attesting witness to the Will and he was not present when the Will was executed and therefore his evidence would not be of much help to prove due execution and attestation of the Will.

18. P.Ws. 2 and 3 are attesting witnesses to the Will.

19. P.W. 2 has stated in his evidence that he knew Elizabeth Britto who was residing at Falnir. She was a teacher. The Will was executed on 19-6-1983 which was a Sunday. On the said day after attending the mass in the Church she asked him to be a witness and she came to his house at about 10 a.m. His house is at a distance of 1 1/2 to 2 furlongs from her house. Both of them went to the house of his neighbour Rodrigues, P.W. 3 and all the three of them walked to the house of Elizabeth and she executed the Will in her own house. Ex. P. 2 is the Will executed by Elizabeth Britto. Ex. P. 2(a) is the signature of Elizabeth Britto. Ex. P. 2(b) is his signature. Before he put his signature as a witness Rodrigues put his signature at Ex. P. 2(c). Elizabeth Britto was hale and healthy when she executed the Will, Ex. P. 2. He is not related to Elizabeth Britto. She put her signature before him and Rodrigues. It is elicited in the cross-examination of P.W. 2 that on the morning of 19-6-1983 Elizabeth Britto wanted him to attest the Will. She met him in the Church around 8 a.m. She wanted him to be a witness of her Will. She told him that she had already executed the Will. He did not question her as to what Will she had executed. After the mass he went to his house. He had told her that he was free in the morning and she came to his house at about 10 a.m. which is at a distance of 1 1/2 to 2 furlong from the house of Elizabeth Britto. He is not aware whether the beneficiary under the Will are the children of Winnifred Britto. Winnifred Britto is his mother's cousin. Justin Britto was present in the Court on the date of his evidence and he did not talk to him. On 19-6-1983 at about 10 a.m. Elizabeth Britto came to his house alone. He has no idea as to whether there was any special reason for Elizabeth Britto choosing him and the other attestor to attest the Will. It may be true that Mrs. Lozzie Rebello, wife of late Stany Rebello, cousin of Elizabeth Britto may be residing within 100 yards of her residence. It is true that within 100 yards of the house of Elizabeth Britto, Mrs. Dorthy D'Souza, sisber of Elizabeth Britto's brother's wife is residing and so also Mr. Ronald Menezes, brother of Dorthy D'Souza and Mr. Jorald D'Souza, son of Mrs. Dorthy D'Souza

are residing within 200 yards of Elizabeth Britto's house. He did not ask Elizabeth Britto as to why they should proceed to Rodrigues' house. After reaching Rodrigues' house there was no discussion between Elizabeth Britto and Rodrigues. He has not attested any other Will. No one was there in Elizabeth Britto's house when they reached there. Elizabeth Britto and Winnifred Britto and her children were staying in the same house. All Christians after attending the mass on Sunday will be at home generally. He did not question Elizabeth Britto about the absence of other members of her house. Elizabeth Britto did not tell him that she wanted to execute the Will secretly. The Will was not written in his presence. He did not feel it necessary to ask as to what had been written in the Will. He did not go through the Will when he signed it. He did not know when the Will was written and where it was written. He had not taken a pen with him. Elizabeth Britto supplied the pen to him. Elizabeth Britto went inside and came with the Will. He did not see the number of pages on which the Will was written and there were no signatures when it was brought to him for signature. He cannot estimate the age of Elizabeth Britto when she made the Will. It is true that he is a close friend of the family of Winnifred Britto. It is further elicited that it is not true to say that himself, Rodrigues and Winnifred Britto and her family have concocted the Will and it is not correct to say that on account of her old age Elizabeth Britto had no mental capacity to execute the Will and that she was ill. He is not aware whether Elizabeth Britto was suffering from high blood pressure and was susceptible to sudden anger and rages, sudden likes and dislikes and he is not aware whether on account of her high blood pressure it had affected her mental condition. He has no idea in whose pen Rodrigues attested the Will. He does not know whether prior to institution of the suit whether the plaintiff had filed a probate and succession petition and it is not true to say that he has not witnessed the due execution of the Will, Ex. P. 2 and that to support the case of Winnifred Britto and her family that he is giving false evidence.

20. P.W. 3-John Lawrence Rodrigues is another attesting witness to the Will, Ex. P. 2, dated 19-6-1983. He has stated in his evidence that on 19-6-1983 Elizabeth Britto and Collin J. Mathias came to his house and took him to Elizabeth Britto's house to attest a Will. All the three of them went to Elizabeth Britto's house. Elizabeth Britto executed the Will in their presence. Ex. P. 2 is the said Will. Ex. P.

2(a) is the signature of Elizabeth Britto, Ex. P. 2(c) is his signature and Ex. P. 2(b) is the signature of Collin Mathias. The Will was executed at about 11 a.m. Elizabeth Britto put her signature to the Will in their presence. After Elizabeth Britto put her signature to the Will he put his signature and then P.W. 2 put his signature. Elizabeth Britto told them that she had written the Will in her own handwriting. She was hale and healthy when she executed the Will. He is not related to Elizabeth Britto. It is elicited in the cross-examination of P.W. 3 that he does not know whether Julian Sequeira is the office colleague of Winnifred Britto. But she is working in Customs Office and Winnifred Britto also works in Customs Office. He knows Elizabeth Britto since 1974. He came to know of Elizabeth Britto since he was residing as a tenant close to her. Elizabeth Britto was calling on him and he used to go to her house sometimes. It is further elicited that he remembers the date and day of his attesting the Will, special reason being it was a Sunday. He has attested some other documents also. He has attested some more Wills. But he does not remember who executed those Wills and the dates and days of their execution. It is further elicited that Elizabeth Britto asked him to attest her Will and all of them left for her house. He did not take his fountain pen with him. It took about 10 minutes to walk to Elizabeth Britto's house. Elizabeth Britto asked them to sit in the veranda. He did not observe whether the main door of her house was open or closed when they went there. He does not know whether she was ailing. It is not true to say that on account of her old age her mental condition was weak. When they went to her house Winnifred Britto and her sons were not in the veranda. After they sat in the veranda Elizabeth Britto went inside the house and came back with the Will. He does not know what other papers she had when she came from inside the house. There was a table in the veranda. They sat near the table. Elizabeth Britto told them that she had written the Will in her own handwriting and that they should attest it. He does not know when that Will had been written and where. Elizabeth Britto first put her signature. She put only one signature. She also put the date. Thereafter he attested the Will. He did not do anything thereafter. He also wrote his address. Elizabeth Britto put the date on his signature also. After he attested the Will Collin Mathias attested it. He saw him putting the signature. He does not know whether he wrote anything else on the Will he did not read the Will. He did not ask Elizabeth Britto as to who were the

beneficiary under the Will. He does not know whether Elizabeth Britto was depending for her food and shelter on Winnifred Britto. He does not know whether Elizabeth Britto was being admitted to hospitals now and then for her ailments. He does not know whether Elizabeth Britto had high blood pressure. She was talking to him correctly. He does not know whether her B.P. had affected her mental condition and it is not true to say that himself, Collin Mathias and the family members of Winnifred Britto have concocted the Will. He does not know whether Elizabeth Britto had high blood pressure and she was susceptible to anger and sudden likes and dislikes. And it is not true to say that Elizabeth Britto did not execute the Will before him and that to help the beneficiaries, he is giving false evidence.

21. It is clear from the above said evidence of P.Ws. 2 and 3 that the evidence of these witnesses clearly proves the execution and attestation of the Will by Elizabeth Britto on 19-6-1983. Section 63(c) of the Indian Succession Act states that Will shall be attested by two or more witnesses, each of whom has seen the testator sign or affix his mark to the Will or has seen some other person sign the Will, in the presence and by the direction of the testator or has received from the testator a personal acknowledgment of his signature or mark, or of the signature of such other person and each of the witnesses shall sign the Will in the presence of the testator but it shall not be necessary that more than one witness be present at the same time, and no particular form of attestation shall be necessary. The evidence of P.Ws. 2 and 3 clearly shows that Elizabeth Britto put her signature on the Will, Ex. P. 2 in the presence of P.Ws. 2 and 3 and both P.Ws. 2 and 3 have attested the Will as witnesses in the presence of Elizabeth Britto. P.Ws. 2 and 3 have clearly stated that Elizabeth Britto told them that she had written the Will in her own handwriting and the evidence of the defendant, D.W. 1 shows that the defendant does not dispute that Ex. P. 2 is in the handwriting of Elizabeth Britto as it is elicited in the cross-examination of D.W. 1 that Elizabeth Britto was an educationist having B.A., B.T. Degrees. She was Headmistress of the school at the time of her retirement. Elizabeth Britto was Editor of a paper called Milagres Church Bulletin and she does not know for how many years she Edited the said paper. She does not know whether she was editor for the said paper from 1972 to 1984 and it is further elicited in her cross-examination that she cannot say who

has written Ex. P. 2, it looks like the handwriting of Elizabeth Britto and the finding of the Trial Court is also to the effect that having regard to the above said material on record the Will, Ex. P. 2 is in the handwriting of Elizabeth Britto and therefore it is a 'Holograph Will'. The burden of proof required to be discharged by the propounder of a Holograph Will has been laid down by the Hon'ble Supreme Court in the case of Joyce Primrose Presto, referred to above as follows:

'15. While the presumption in the case of ordinary Wills is as stated above, in the case of 'holograph Wills' the presumption is all the more a greater presumption. Ex. P. 1 is a 'holograph Will'. It is one which is wholly in the handwriting of the testator. The Calcutta High Court in *Ajit Chandra Majumdar v. Akhil Chandra Majumdar*, : AIR1960 Cal551 , stated about such a Will, thus:

The whole of this Will was written in the hand by the testator himself in English. The handwriting is clear and firm. The law makes a great presumption in favour of the genuineness of a holograph Will for the very good reason that the mind of the testator in physically writing out his own Will is more apparent in a holograph Will than where his signature alone appears to either a typed script or to a script written by somebody else'. The writing of the Will and signature of the testator are admitted. There is also due and proper attestation in accordance with the relevant statutory provisions. No suspicious circumstance appears on the face of the document, Ex. P. 1. The Will appears to be moderate and rational. Viewed from the above angle, there is a great presumption even bordering on actual proof of the due execution and attestation of the Will.

18. In applying the above general principles to particular cases, the nature of the Will, the pleadings of the parties in the case, facts admitted or proved and the presumptions available in law, Will have to be carefully given effect to. The case of a 'holograph Will' which is admittedly in the handwriting of the testator, is a special case which will require a different approach in considering the evidence in the case, to find whether the Will has been duly executed and attested. The approach to be made in such cases has been stated by the Constitution Bench in *Shashi Kumar Banerjee's case*, supra, at page 532 paragraph (5). In that case, the Court referred to certain undisputed preliminary facts as follows: The testator, a well-

known, wealthy lawyer, who died at the age of 97 had executed a Will when he was 93 years old. He had made provision for his heirs by executing a number of documents, and the Will referred to the remaining property. The Will was witnessed by two persons. The entire Will was in the handwriting of the testator, corrected in various places and the corrections were initialled by him. It was admitted that the signature at the bottom of the Will was of the testator. The dispositions were very clear and detailed and it could not be said to be an unnatural document. There was no evidence to show that the propounders took any part in the execution of the Will. After stating these preliminary facts, the Court stated the approach to be made in the case of a 'holograph Will', thus: 'Further the fact that the Will is a holograph Will and admittedly in the hand of the testator and in the last paragraph of the Will the testator had stated that he had signed the Will in the presence of the witnesses and the witnesses had signed it in his presence and in the presence of each other raise strong presumption of its regularity and of its being duly executed and attested. On these facts there is hardly any suspicious circumstance attached to this Will and it will in our opinion require very little evidence to prove due execution and attestation of the Will' .

22. In view of the above principles laid down by the Hon'ble Supreme Court it is clear that the evidence of the above said witnesses, P.Ws. 2 and 3 would clearly prove due execution and attestation of the Will. The finding of the Probate Court that evidence of P.Ws. 2 and 3 does not prove due execution and attestation of the Will cannot be sustained in view of the above evidence of P.Ws. 2 and 3. The Probate Court failed to note that mere fact that it is elicited in the evidence of P.Ws. 2 and 3 that they do not know the contents of the Will and as to who the beneficiaries were would not by itself discredit the evidence of P.Ws. 2 and 3 as what is required to be proved is the execution and attestation of the Will by the testatrix which is required for the purpose of issuing probate as sought for in the application. The finding of the Probate Court that there is no averment in the application that Elizabeth Britto was of sound mind and therefore the evidence of P.Ws. 2 and 3 cannot be attached any importance is also unsustainable in view of the fact that what is required to be contained in the application for grant of probate has been mentioned in Section 276 of the Indian Succession Act and all the contents required to be stated in the said section have been stated by the

applicant and it is clearly stated that writing annexed to the application is the last Will and testament of Ms. Elizabeth Britto and was duly executed by her in the presence of witnesses whose names appear on the foot thereof and wherefore when it is clearly averred that it was duly executed by Elizabeth Britto in the presence of witnesses the mere fact that there is no specific averment that Elizabeth Britto was of sound disposing state of mind for stating which is not specifically required to be stated as per the description given in Section 276 of the Indian Succession Act. Hence, it is clear that the said finding of the Probate Court cannot be sustained.

23. The next question is as to whether the testatrix Elizabeth Britto was in a sound disposing state of mind when she executed the Will, Ex. P. 2 on 19-6-1983. It is clear from the facts averred in the written statement as also the suggestions made to P.Ws. 2 and 3 that what is suggested to P.Ws. 2 and 3 in their cross-examination is that Elizabeth Britto was old, she was suffering from high blood pressure and she was susceptible to sudden anger, sudden likes and dislikes and was not in sound disposing state of mind. It is true that P.Ws. 2 and 3 have feigned their ignorance about the said facts. However, the very fact that the Will was written and executed by Elizabeth Britto by reducing her intentions into writing about the disposition of the property after her demise and her educational qualification and status in life would clearly show that she was in sound disposing state of mind. Though the defendants have tried to make out a case that she was suffering from high blood pressure and due to her old age she was susceptible to sudden likes and dislikes the same has not at all been substantiated. The evidence of D.Ws. 1 to 4 is not helpful to show that there is material to disbelieve the evidence of P.Ws. 2 and 3 that she was in sound disposing state of mind at the time of execution of the Will. D.W. 1 is the defendant who is an interested witness. D.W. 2 is Dr. K.K. Verghese who treated the testatrix as in-patient in Unity Health Complex from 14-9-1985 to 21-9-1985 i.e., subsequent to the execution of the Will. The facts elicited in his evidence show that he was not the Doctor who treated Elizabeth Britto and she was treated by Dr. Amarnath Hegde who has been examined as D.W. 4.

24. D.W. 4 has stated in his evidence that Elizabeth Britto was treated by him in Unity Health Complex, Mangalore on 16-9-1985. She was referred to him by Dr. Suresh Mankar of Mangalore. She was admitted with clinical evidence of pulmonary tuberculosis of the right lung. She was admitted in the Unity Health Complex as an in-patient and advised to take treatment for nine months. It is elicited in his cross-examination that he examined the said patient only once and he has not treated the patient personally. The tuberculosis disease the said patient was suffering was well-advanced at the time of his examination. The symptoms noted in Ex. D. 8 are the normal symptoms of the patient who gets cold or running nose.

25. D.W. 3 is the Medical Officer in charge of records in Fr. Muller's Hospital at Mangalore and he has produced in-patient register maintained in the hospital from 1-8-1979 to 12-2-1980 and has stated that the name of L. Britto, care of E. Britto is mentioned in the said in-patient register at Sl. No. 1469, dated 1-2-1980 at page 235 and Ex. D. 7 has been issued by Fr. Muller's Hospital on 27-8-1990. It bears the signature of Dr. Denzil Pinto who is studying Post-graduation course in Mangalore in the said hospital and there is no other records available in the hospital regarding in-patients from 1-8-1979 to 12-2-1980. It is elicited in his cross-examination that L. Britto was admitted as an in-patient in the hospital. The patient's address is given as care of E. Britto as per Ex. D. 10. The patient L. Britto was admitted for the treatment of Ischaemic Heart disease. Ex. D. 10 pertains to one L. Britto, care of E. Britto and there is no material to show that the said entry pertains to Elizabeth Britto and not L. Britto. The other documents produced by the defendant is also not helpful to show that she was not in a sound disposing state of mind and when the evidence on record is considered in the light of the principle laid down by the High Court of Calcutta in the above cited decision it is clear that the evidence of P.Ws. 2 and 3 and also the evidence of P.W. 1 that Elizabeth Britto was in sound disposing state of mind on the date of execution of the Will 19-6-1983 is proved.

26. The next question is as to whether there are any suspicious circumstances surrounding the execution of the Will as contended by the defendant. It is clear from the averment made in the written statement that apart from averring that

Elizabeth Britto was an old lady suffering from high blood pressure and susceptible to sudden anger, sudden likes and dislikes and was not mentally fit to execute the Will there is no other suspicious circumstance specifically averred and what is averred is not substantiated and is belied by the above evidence on record. The further averment in the written statement is to the effect that it is not of a free mind of the executrix as the same appears to have been made under coercion and duress from Mrs. Winnifred Britto as the deceased was completely depending on her for food as she could not cook for herself. The said contention that the Will is not executed out of free mind and appears to have been made under coercion and duress from Mrs. Winnifred Britto is also not substantiated as the burden of proving that the Will was not out of free mind of Elizabeth Britto and it was a result of coercion and duress was upon the defendant and defendant has not at all produced any material in that behalf to substantiate the contention that the Will was result of coercion and duress of Winnifred Britto over Elizabeth Britto, the testatrix who was completely depending upon her. In the case of Surendra Pal, supra, Hon'ble Supreme Court has held that where the Caveator alleges undue influence, fraud and coercion the onus is on him to prove the same and if the Caveator does not discharge the burden which rests upon him in establishing the circumstances which show that the Will had been obtained by fraud or undue influence, a probate of the Will must necessarily be granted if it is established that the testator had full testamentary capacity and had in fact executed it validly with a free will and mind. In the present case it is clear that the finding of the Trial Court that Winnifred Britto was in a dominant position and the Will has been executed not out of free mind but due to coercion and duress from Mrs. Winnifred Britto is clearly unsustainable as it is not based upon material on record. It is true that Elizabeth Britto was staying with Winnifred Britto and her sons are beneficiaries under the Will. That would not by itself lead to the presumption that she has prevailed upon the pressurised Elizabeth Britto to execute the Will bequeathing the properties in favour of her children. Testatrix was an educated lady who had retired as Headmistress of School and was Editor of Church Bulletin as admitted by D.W. 1 in her cross-examination. Mere fact that Elizabeth Britto having become old was living with Winnifred Britto and that Winnifred Britto was looking after her, in the absence of any material to show that she had dominated and pressurised

and influenced Elizabeth Britto to execute the Will in favour of her children, cannot be presumed or inferred from the material in the present case. Elizabeth Britto was not married and disposition of property in favour of sister's children with whom she was living and looked after by her sister cannot be said to be unnatural and would not at any rate give rise to presumption of domination or undue influence. The defendant has miserably failed to substantiate the same. In the above cited case of Surendra Pal, supra, it has been held as follows:

'Apart from general consideration emerging from the nature of a Will and the circumstances which not infrequently surrounded the execution of it, there are other matters which are peculiar to the time and the society and perhaps even to the person making the Will and his or her family. Inferences arising from relationships between a testator and a legatee are certainly so dependent upon the peculiarities of the society or community to which the testator and the legatee belong, their habits and customs, their values, their mores, their ways of thinking and feeling, their susceptibilities to particular kinds of pressures, influences, or in documents that it seems very difficult to reduce them to a general rule applicable at all times and everywhere so as to raise a presumption of undue influence from a particular type of relationship. The only kinds of relationship giving rise to such presumptions are those contemplated in Section 111 of the Indian Evidence Act. Any other presumption from a relationship must, to be acceptable, be capable of being raised only under Section 114 of the Indian Evidence Act. Such presumptions of fact are really optional inferences from proof of a frequently recurring set of facts which make a particular inference from such facts reasonable and natural. If a particular situation arising from a set of facts, which may raise a presumption elsewhere, is exceptional or unusual here, there could be no question here of applying a presumption arising from a common or natural course of events. A suggested inference of undue influence would then be a matter of proof on the particular facts of the case before the Court. This, we think is the correct legal position here'.

Therefore, in the light of the above said principles laid down by the Hon'ble Supreme Court and the material on record it is clear that the finding of the Probate Court that Winnifred Britto dominated and influenced Elizabeth Britto to execute

the Will cannot at all be sustained. Further, it is also clear from the oral and documentary evidence on record that the finding of the Probate Court that there are suspicious circumstances surrounding the execution of the Will which has not been satisfactorily explained by the propounder of the Will cannot also be sustained.

27. Further, it is clear from the perusal of the judgment of the Probate Court that the Probate Court failed to note that in view of the decision of the Hon'ble Supreme Court in the above cited decision of Ishwardeo Narain Singh case, the Court of Probate is only concerned with the question as to whether the document put forward as the last Will and testament of a deceased person was duly executed and attested in accordance with law and whether at the time of such execution the testator had sound disposing mind and the question whether a particular bequest is good or bad is not within the purview of the Probate Court and wherefore the finding of the Probate Court that Elizabeth Britto was appointed as executor in the Will executed by her father and she had obtained probate in respect of the Will executed by her father on 12-3-1946 who died on 3-10-1947 in O.P. No. 78 of 1957 and she has not executed the Will in terms of the intentions expressed by her father as per the terms of the said Will would not in any way affect the proof of execution and attestation of the Will executed by Elizabeth Britto in respect of which the probate is sought for in the present case.

28. Similarly, the suspicious circumstances referred to by the Probate Court do not pertain to the suspicious circumstances surrounding the execution of the Will by Elizabeth Britto in respect of which probate is sought for in the present case. The fact that as per the Will executed by the father of Elizabeth Britto an amount of Rs. 1,500/- was to be paid to Ms. Marry within five years from the date of death of her father and also the other circumstances stated by the Probate Court that the schedule property should not be alienated and auctioned and should be in occupation of one of the legal heirs of the deceased and the fact that Winnifred Britto, the mother of beneficiaries was staying with Elizabeth Britto and Elizabeth Britto was depending upon Winnifred Britto for her food are not the suspicious circumstances surrounding the execution of the Will in the present case. The finding of the Probate Court that since Elizabeth Britto was aged and was staying

with Winnifred Britto, mother of beneficiaries and the fact that she applied for death certificate of Elizabeth Britto even before the dead body of Elizabeth Britto was removed and also the fact that she handed over the release deed produced in the case to the Advocate and the defendant came to know of the same only when the same were handed over to her and her Advocate would not be suspicious circumstances surrounding the execution of the Will. It is not the case of the defendant that Winnifred Britto was also present when Will was executed. It is not proved that Winnifred Britto was present and has taken dominant part in execution and attestation of the Will.

The finding of the Probate Court is that she has taken active part in the litigation which could never be a suspicious circumstance surrounding the execution of the Will and wherefore the said circumstances referred to by the Probate Court which according to it are suspicious circumstances surrounding the execution of the Will cannot at all be said to be the circumstances surrounding the execution of the Will which was required to be explained by the plaintiff as they do not in any manner affect the validity of execution and attestation of the Will that too when the Will was in the handwriting of Elizabeth Britto and has been proved to have been duly executed and attested by the evidence of P.Ws. 2 and 3.

29. Further, the Probate Court also failed to note that Ms. Marry, sister of Elizabeth Britto was staying with Elizabeth Britto and as per the contents of the Will itself it is clear that since she was staying with Elizabeth Britto and she was looked after by Elizabeth Britto the amount was not paid and in the Will there is a provision made for payment of Rs. 8,000/- to the sister of the testatrix Marry Britto and Marry herself has not filed any Caveat nor objected to grant of probate.

30. Further, the fact that another executor Ben Britto who had been named in the Will has declined to act as executor and wherefore the plaintiff has filed the application as executor would not also be a suspicious circumstance surrounding the execution of the Will. Ben Britto has given letter dated 21-9-1986 and the same has not been disputed by Ben Britto and mere fact that there is delay in taking the said letter and renouncing of executorships after the death of Ben Britto and there is delay in filing the application which was filed on 7-3-1987 after obtaining the

letter from Ben Britto on 30-12-1986 would also not constitute any suspicious circumstance surrounding the execution of the Will as they are circumstances which have arisen subsequent to the execution of the Will and death of Elizabeth Britto.

31. Further, the finding of the Probate Court that the writing of the Will and attestation by the witnesses is in the same ink would also raise suspicious circumstance cannot also be sustained as P.Ws. 2 and 3 have clearly stated that they had not taken pen and pen was given by Elizabeth Britto and they have signed by the pen given by Elizabeth Britto and wherefore the said fact cannot also be said to be suspicious circumstance surrounding the execution of the Will and wherefore it is clear that the finding given by the Probate Court that there are suspicious circumstances surrounding the execution of the Will and the same have not been satisfactorily explained is outcome of mere conjecture and surmises and cannot at all be sustained in the eye of law. Further, it is also clear that there is no evidence to show that Will was obtained by fraud or under duress as pleaded in the written statement as already held above and so far as the non-imp leading of the proper and necessary parties are concerned, the finding of the Probate Court cannot at all be sustained as it is clear that the application has been filed by the executor for issue of probate and all the legal heirs of Elizabeth Britto were not required to be brought on record. Further, when all the legal heirs have not chosen to file any Caveat or objections to the application it is clear that the finding of the Probate Court that suit is bad for non-joinder of necessary parties cannot also be sustained for non-imp leading of the legal heirs of deceased testatrix as they are not necessary parties to be impleaded in the case and wherefore the said finding of the Probate Court on Issue No. 6 cannot also be sustained and accordingly I answer the points for determination and pass the following order;

This appeal is allowed. The judgment and decree passed by the I Additional District Judge, Dakshina Kannada, Mangalore in O.S. No. 1 of 1988, dated 12-12-1994 dismissing the suit of the plaintiff is set aside and the suit of the plaintiff is decreed as prayed for and the plaintiff shall be entitled to issue of probate annexed to the Will, Ex. P. 2, dated 19-6-1983 executed by Elizabeth Britto. No order as to costs in this appeal.

