

Chanchal Kumar Das and ors. Vs. Pasupati Nath Das and ors.

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Court : Kolkata

Decided On : Feb-04-2005

Reported in : AIR2005Cal212,2005(2)CHN289

Judge : D.K. Seth and ;R.N. Sinha, JJ.

Acts : [Indian Succession Act, 1925](#) - Sections 59, 61 and 63; ;[Evidence Act, 1872](#) - Sections 8, 11, 13, 40, 41, 42, 43, 44 and 54; ;Code of Civil Procedure (CPC) - Order 6, Rule 4; ;Code of Criminal Procedure (CrPC)

Appeal No. : Appeal No. 60 of 1984

Appellant : Chanchal Kumar Das and ors.

Respondent : Pasupati Nath Das and ors.

Advocate for Def. : Dipak Basu, ;Malay Ghosh, ;I.P. Mukherjee and ;Ranjana Guha, Advs.

Advocate for Pet/Ap. : Jayanta Kumar Mitra, ;Dhruba Ghosh and ;Satyabrata Chakrabarty, Advs.

Judgement :

D.K. Seth, J.

The Backdrop :

1. Out of four principal issues involved in the judgment under appeal, three were decided in favour of the propounder of the Will. The Will was found to be (1) duly executed and attested; (2) and genuine; (3) the caveators failed to substantiate that (b) the testatrix at the time of execution of the Will suffered from in senile dementia. So far issues No. 3(a) and 4 are concerned, it was found that the Will being the product of undue influence exercised by Harendra Nath Das and the execution of the Will being surrounded by suspicious circumstances, the propounder failed to satisfy the conscience of the Court that the Will was the produce of the testatrix's own will and volition and not made under the influence of the propounder.

1.1. Against this decision the propounder has preferred this present appeal. No cross-objection or cross-appeal has been filed by the caveator. In this context, the Court has to find out whether the learned Single Judge was right in holding that the Will was executed under undue influence exercised by Harendra Nath Das (Harendra Nath). It may be noted that the issue No. 3(a) was whether the testatrix Shyama Sundar Dassi had testamentary capacity to execute the Will. From the evidence it appears that she had full testamentary capacity to execute the Will. Therefore, this issue ought to have been held in favour of the propounder. The only question that stares on the face of the propounder is that whether such testamentary capacity was exercised under the undue influence of Harendra Nath. The scope of the appeal is confined only to that extent.

1.2. Both the learned Counsel had argued the case elaborately for days together and had drawn our attention to the various materials available on record to support their respective contention. We shall be dealing with the relevant materials as hereafter in the light of the discussion on the question and the principles since established.

The question :

2. The question that is involved is interesting in nature. Inasmuch as when all the issues were found in favour of the propounder, only the suspicious circumstances that surrounded the execution of the Will is required to be probed and found out as to what extent the same would invalidate the Will and defeat the case of the

propounder. In order to ascertain the same, before we look into the materials, we may discuss the settled principles of law operating in the field. The validity of the Will is to be tested on the anvil of the principles enunciated through different judgments rendered by the different Courts including the Privy Council and Supreme Court and the Courts in England and India. The principles followed both in England and India are almost identical.

Propounding a Will : The principle :

3. Under Section 59 of the [Indian Succession Act, 1925](#) Explanation 4 requires that the state of mind of the person making the Will shall be such that he must know what he is doing and shall be free from any intoxication, illness or such other cause that prevents him knowing what he is doing. Section 61 in Illustrations (vii) and (viii) explain the exceptions to the importunity, so far as relevant for our present purpose, as that takes away the free agency of the testator caused by fraud or coercion rendering the making of the Will void. This fraud, coercion or such importunities are grounds attracting Explanation 4 of Section 59 since elaborated in Section 61. Inducement or influence will not render the Will void when the Will is executed by the testator in the free exercise of his judgment and volition. Similarly, attention and flattery persuading the testator to make the Will will not invalidate the making of the Will if executed in free will and volition. These propositions have posed many a difficulties before the Courts by reason of different kind of facts coming before it. On this score the law as developed into the settled proposition, may be found to be followed in various decisions.

3.1. The rules governing the propounding of a Will are two. First, the onus probandi lies in every case upon the party propounding the Will and he must satisfy the conscience of the Court that the instrument so propounded is the last Will of the testator. Second, that if a party writes or prepares a Will, under which he takes a benefit, that is a circumstance that ought generally to excite the suspicion of the Court and calls upon it to be vigilant and zealous in examining any evidence in support of the instrument, in favour of which it ought not to pronounce, unless the suspicion is removed, and it is judicially satisfied that the paper propounded does express the true will of the deceased.

3.2. The strict meaning of the term 'onus probandi' is this, that if no evidence is given by the party on whom the burden is cast, the issue must be found against him. In all cases the onus is imposed on the party propounding the Will. It is in general discharge by proof of capacity and the fact of execution from which the knowledge of and assent to the contents of the instrument are assumed. It cannot be that the simple fact that the party who prepared the Will being himself a legatee, is in every case under all circumstances, to create a contrary presumption, and to call upon the Court to pronounce against the Will, unless additional evidence is produced to prove the knowledge of its contents by the deceased. In a case where there appears to be some material to find out that the person who was a legatee to the Will had taken some part in the making of the Will, then the propounder as a legatee must prove that the testator had actual knowledge of the contents; and that the instructions flowed from him and that the instrument was read over to him are the most satisfactory evidence of such knowledge. In such a case, it is, at most a suspicious circumstance of more or less weight, according to the facts of each particular case, in some, of no weight at all, varying according to the circumstances, the quantum of the legacy and the proportion it bears to the property disposed of, and numerous other contingencies, but in no case amounting to more than a circumstance of suspicion, demanding vigilant care and circumspection of the Court investigation the case, calling upon it not to grant the probate without full and entire satisfaction that the instrument did express the real intentions of the deceased.

3.3. It may not be necessary, that in all cases, even if the testator's capacity is doubtful, the precise species of evidence of the deceased's knowledge of the Will is to be in the shape of instructions for, or reading over the instrument. They form, no doubt, the most satisfactory, but they are not the only satisfactory description of proof, by which the cognizance of the contents of the Will may be brought home to the deceased. The Court would naturally look for such evidence, in some cases it might be impossible to establish a Will without it, but it has no right in every case to require it.

3.4. The above principles emanate from *Pendock Barry v. James Butlin*, 1838 (2) Moore PC 480. This principle when followed in *Parker and Anr. v. Felgate*

& Tilly, 1883 (8) P&D; 171, it was elaborated as to whether the testatrix was capable of understanding what was going on and recollect all that she was doing. A person may not have the capacity to go over the whole transaction and take up thread of business from the beginning to the end and think it all over again, but if he is able to say to himself that he had settled the business with his solicitor would be sufficient. It is enough if he is capable of training his thought. The same principle was followed in *Tyrrell v. Panton and Anr.*, 1891 (4) All ER (Reprint) 1120, with the observation that the rule throwing the onus on the party propounding a Will to prove that it expresses the true will of the testator is not confined to cases where a Will is prepared by or on the instruction of the person taking a benefit under it, but extends to all cases in which circumstances exist that excite the suspicion of the Court. Wherever such circumstances exist, and whatever their nature may be, it is for those, who propound the Will to remove such suspicion or doubt, and to prove affirmatively that the testator knew and approved the contents of the documents. It is only when this is done that the onus is thrown on those who oppose the Will to prove fraud or undue influence, or whatever else they rely upon, to displace the case made for proving the Will.

Undue influence :

3.5. In *Craig v. Lamoureux*, 1920 AC 349 (PC) dealing with undue influence, it was held that when once it is proved that a Will has been executed with due solemnities by a person of competent understanding, and apparently a free agent, the burden of proving that it was executed under undue influence rests on the person who so alleges. The burden is not discharged by showing merely that the beneficiary had the power unduly to overbear the will of the testator, it must be shown that in that particular case the power has been exercised, and that execution of the Will was obtained thereby. The principle was followed in *Sarat Kumari Bibi v. Rai Sakhi Chand Bahadur and Ors.* AIR 1929 PC 45 where it was held that when the writer of a Will has taken a very active part in the preparation of the Will under which he gets a substantial advantage, the propounders of the Will must prove that the testator was aware of the contents of the Will. It is not correct to say that the benefit must be a pecuniary benefit, a legacy, for instance, more or less of a substantial nature. The same principle was reiterated in *Vellaswamy*

Servai and Ors. v. L. Sivaraman Serivai , wherein it was observed that: where the propounder of a Will is the principal beneficiary under it and has taken a leading part in giving instructions for the execution of the Will and procuring its registration and execution, the circumstances are such as would excite the suspicion of any probate Court and require it to examine the evidence in support of the Will with great vigilance and scrutiny. The propounder is not entitled to probate unless the evidence removes such suspicion and clearly proves that the testator approved of the Will. Laying down the same principle, the Apex Court in H. Venkatachala Iyengar v. B.N. Thimmajamma and Ors., : AIR 1959 SC443 held that there may be cases where the propounders themselves take a prominent part in the execution of the Will, which confer on them substantial benefits. In such case, it is itself generally treated as a suspicious circumstance attending the execution of the Will and the propounder is required to remove the said suspicion by clear and satisfactory evidence.

3.6. In Sarat Kumari Bibi, 56 Ind App 62 : AIR 1929 PC 45 (supra) relied upon in Venkatachala Iyengar, : AIR 1959 SC443 (supra), it was found that one Jamaluddin who took benefit under the Will, had taken an active part in the preparation of the Will, and, therefore, applied the rule made by Lindley and Davey L. JJ., in Tyrrell v. Painton, 1894 P. 151 at pp. 157, 159 that where circumstances exist which would excite the suspicion of the Court, the burden is upon the propounder of the Will to remove such suspicion and prove affirmatively that the testator knew and approved of the contents of the document.

The extent of proof :

3.7. The nature of proof required to prove a Will is not different from those required to prove other documents except the requirement of attestation prescribed under Section 63 of the Indian Succession Act. The proof is to be tested on the usual satisfaction of a prudent mind. What distinguishes a Will from other document is that the testator would not be available to testify the same as his last will. This introduces an element of solemnity in the decision. Even then the Court has to proceed with the enquiry in the same manner as is done in respect of any other document. The propounder is called upon to show by satisfactory evidence that (1)

the Will was signed by the testator in the presence of two attesting witnesses; (2) at the relevant time he was in sound and disposing state of mind; (3) he understood the nature and effect i.e., the content of the disposition; (4) he put the signature to the document of his own free will. The onus of the propounder can be said to be discharged on proof of the above essential facts.

3.8. However, in a case surrounded by suspicious circumstances viz.: the disposition may appear to be unnatural, improbable or unfair in the light of the relevant circumstances; or there may be indications that the disposition was not the result of the testator's free will and mind. Such suspicious circumstances make the initial onus very heavy; and unless satisfactorily discharged, the Court would be reluctant to treat the document as last Will of the testator. Where the propounder takes a prominent part in the execution of the Will conferring benefit upon him, that itself is a suspicious circumstance attending the execution of the Will; this the propounder is required to remove by clear and satisfactory evidence. In other words the propounder must satisfy the conscience of the Court that the document is the last Will and testament of the testator. Where the cavcator alleges undue influence, fraud and coercion, the onus is on him to prove the same. Even if there is no such plea but the circumstances give rise to doubts, it is for the propounder to satisfy the conscience of the Court. If the propounder is able to satisfy the conscience of the Court, the Court shall grant the probate, even if the Will might be unnatural, improbable and might cut off wholly or in part near relations. It is the will of the testator that is reflected in the Will. It is the testator's own property, which he has the liberty to deal with absolutely. It is not for the Court to find out justification or equity or otherwise in the action of the testator. It is not for the Court to make it fair or to sermonize. It is not for the Court to refuse the grant on account of the fact that the disposition is not just and fair or is unnatural or improbable when the conscience of the Court is clear about the proof of the execution of the Will on the face of the evidence satisfactorily sufficient to remove the suspicious circumstances.

3.9. The English Courts often mention the test of the satisfaction of judicial conscience. This is also followed by the Courts in India. The reference to judicial conscience in this context is a heritage from similar observation made by

ecclesiastical Courts in England when they exercised jurisdiction with regard to the Wills. Any objection to the use of the word 'conscience' in this context would be purely technical and academic, if not pedantic. The test merely emphasizes that in determining the question as to whether the instrument produced before the Courts is the last will of the testator, the Court is deciding a solemn question and it must be fully satisfied that it had been validly executed by the testator who is no longer alive. No hard and fast or inflexible rules can be laid down for the appreciation of the evidence adduced by the parties. Generally a propounder of the Will has to prove the due and valid execution of the Will. If there are any suspicious circumstances surrounding the execution of the Will, the propounder must remove the suspicion from the mind of the Court by cogent and satisfactory evidence. The result of the application of these two general and broad principles would always depend upon the facts and circumstances of each case and on the nature and proof of execution of the Will on the appreciation of the evidence. Relying on the decision in *Harmes v. Hinkson*, 50 CWN 895 : AIR 1946 PC 156, the Apex Court in *Venkatachala Iyengar* (supra) observed that 'where a Will is charged with suspicion, the rules enjoin a reasonable skepticism, not an obdurate persistence in disbelief. They do not demand from the Judge, even in circumstances of grave suspicion, a resolute and impenetrable incredulity. He is never required to close his mind to the truth'.

3.10. It would sound platitudinous to say so, but it is nevertheless true that in discovering truth even in such cases the judicial mind must always be open though vigilant cautious and circumspect. In laying down these principles, the Apex Court had thought it pertinent to rely on Williams on 'Executors and Administrations', Vol. I, 13th Edn., page 92 where it was observed in the text book that 'generally speaking, where there is proof of signature, everything else is implied till the contrary is proved; and evidence of the Will having been read over to the testator or of instructions having been given is not necessary..... Although the rule Roman Law that 'Qui se scripsit haeredem' can take no benefit under a will does not prevail in the law of England, yet, where the person who prepares the instrument, or conducts its execution, is himself benefited by its dispositions, that is a circumstances which ought generally to excite the suspicion of the Court, and calls on it to be vigilant and zealous in examining the evidence in support of the

instrument in favour of which it ought not to pronounce, unless the suspicion is removed, and it is judicially satisfied that the paper does express the true will of the deceased'.

3.11. The same principle was enunciated in *Ramchandra Rambux v. Champabai and Ors.*, : [1964]6SCR814 . While dealing with the nature of proof required in such a case, the Apex Court in this case relied on the observation made in *Venkatachala Iyengar (supra)* viz: 'As in the case of proof of other documents so in the case of proof of wills it would be idle to expect proof with mathematical certainty. The test to be applied would be the usual test of the satisfaction of the prudent mind in such matters.'

3.12. In case the bequest appears to be unnatural, then the Court has to scrutinize the evidence in support of execution of the Will with a greater degree of care than usual, because every person must be presumed to act in accordance with normal human behaviour but there is no gainsaying the fact that some individuals do behave in an abnormal manner. It was so observed in *Sushila Devi v. Pandit Krishna Kumar Missir and Ors.*, : AIR 1971 SC2236 .

3.13. If the various requirements of a valid Will are established, then as observed by the Privy Council in *Motibai Hormusjee Kanga v. Jamsedji Hormusjee Kanga*, 80 IC 777 : 26 BLR 579 : AIR 1924 PC 28 at p. 33 : 'It is quite clear that the onus of establishing capacity lay on the petitioner. It is also clear that if the caveator impugned the Will on the ground that it was obtained by the exercise of undue influence, excessive persuasion or moral coercion, it lay upon him to establish that case..... A man may act foolishly and even heartlessly; if he acts with full comprehension of what he is doing the Court will not interfere with the exercise of his volition.'

The citations : The principles repeated :

4. The essence of the principles discussed above has since been followed and repeated in various decisions. We may now discuss the same and then find out how far and to what extent these principles would apply in the presence case.

4.1. The decision in *H. Venkatachala Iyengar (supra)*, was referred to by the Apex Court in *Shashi Kumar Banerjee v. Subodh Kumar Banerjee*, : AIR 1964 SC529 viz : 'If the propounder succeeds in removing the suspicious circumstances the Court would grant probate, even if the will might be unnatural and might cut off wholly or in part near relations.'

4.2. The burden of proving undue influence is not discharge by merely establishing that the person had power unduly to overbear the will of the testator. It must be shown that in any particular case that power was, in fact, exercised and that it was by means of exercise of that power that the Will was obtained. This was observed by Hon'ble P. B. Mukharji, J., as his Lordship then was, in *Asit Chandra Majumdar v. Akhil Chandra Majumdar*, : AIR1960 Cal551 relying upon *Craig v. Lamoureux*, 1920 A.C. 349 : AIR 1919 PC 132 and *Mt. Gomtibai v. Kanchhedilal* AIR 1920 A.C. 272. Relying upon *Naresh Charan Das Gupta v. Paresh Charan Das Gupta and Anr.*, : [1955]1ITR1035(SC) , it was observed that it is elementary that law does not regard or characterize every interest which is brought to bear upon a testator as undue. It is open to a person to plead his case before the testator and to persuade him to make a disposition in his favour and if the testator retains his mental capacity and there is no element of fraud or coercion, the Will cannot be attacked on the ground of undue influence, Not all importunities are undue influence. While making such observation, the Apex Court at page 366 in *Naresh Charan Das Gupta (supra)* quoted the observation of Lord Penzance in *Hall v. Hall*, 1868 (1) P & D 481 'but all influences are not unlawful. Persuasion, appeals to the affections or ties of kindred, to a sentiment of gratitude for past services, or pity for future destitution, or the like - these are all legitimate and may be fairly pressed on a testator. On the other hand, pressure of whatever character, whether acting on the fears or the hopes, if so exerted as to overpower the volition without convincing the judgment, is a species of restraint under which no valid Will can be made. In a word, a testator may be led, but not driven; and his Will must be the offspring of his own volition, and not the record of some one else's'.

4.3. In this case the Will has also been challenged on the ground that it is an unnatural Will, because the testator preferred Harendra Nath who was otherwise unrelated to her than her natural heirs namely the only surviving son and the

grandchildren through him as well as the hapless and helpless widow of the predeceased son, though the widow had been very respectful and served her. On the question of unnatural and officious Will, a Court of Probate has to act with great caution. The testator who has full testamentary powers and disposing mind cannot be dictated by the Court as to what is a fair and just disposition. The Will is the will of the testator and he has, under the law, the freedom to give his property to whomsoever he likes. What strikes the Court is an eccentric or an unjust or an unnatural disposition can certainly be taken as a consideration of the main question of finding out whether the testator was acting as a free agent and had a sound disposing mind, then it is no longer the duty of the Court to go further to inject its own ethics or what is or is not a moral or a fair disposition according to the Court's own standards. Judged by that test many a Will by a father depriving his sons would be unjust and indeed many a Will exhibits man's inequity against his nearest and dearest relations and yet not on that ground alone have those Wills be declared by the Court invalid. Such wrongs, however, grievous, are not for the temporal Courts of Justice to correct and are better left to him who adjust all wrongs and non-justiciable inequities, and under whose munificence the testator and the disinherited alike live and die. This view was expressed by Hon'ble P.B. Mukharji, J. in *Asit Chandra Majumdar* (supra).

4.4. However, a strong warning was given by the Privy Council in *C. Harwood v. M. Baker*, 1840 (3) Moo PC 282 at pp. 290-291 on this subject of unjust exclusion : 'The question which their Lordships propose to decide in this case, is not whether Mr. Baker (testator) knew when he was giving all his property to his wife, and excluding all his other relations from any share in it, but whether he was at that time capable of recollecting who those relations were, of understanding their respective claims upon this regard and bounty, and of deliberately forming an intelligent purpose of excluding them from any share of his property. If he had not the capacity required, the property of the disposition made by the Will is a matter of no importance. If he had it, the injustice of the exclusion would not affect the validity of the disposition, though the justice or injustice might cast some light upon the question as to his capacity.'

4.5. In *Bishundeo Narain and Anr. v. Seogeni Rai and Ors.*, : [1951]2SCR548 , it was held by the Apex Court in paragraph 25 that : '.....if there is one rule which is better established than any other, it is that in cases of fraud, undue influence and coercion, the parties pleading it must set forth full particulars and the case can only be decided on the particulars as laid. There can be no departure from them in evidence. General allegations are insufficient even to amount to an averment of fraud of which any Court ought to take notice however strong the language in which they are couched may be, and the same applies to undue influence and coercion. See Order 6, Rule 4, Civil Procedure Code.'

4.6. In *AEG Carapiet v.. AY. Derderian*, : AIR1961 Cal359 , it was held that : '.....a propounder who is a legatee herself and who takes the biggest benefit of the estate, will have to remove the suspicion of the Court and the Court will be jealous in examining the circumstances and the facts.'

4.7. In *Annie M. Pichamuthu and Anr. v. Bessie Thangam Selvaraj and Anr.*, : AIR 1979 SC1431 , it was held in paragraph 4 viz: 'It is true that Dr. Arulmani was old and impecunious. Her niece, the first defendant, befriended her, visited her frequently, took care of her personal comforts and even gave her small amounts of money. There is no evidence to lead us to the conclusion that everything that was done by the first defendant was nothing but a pretence. For the purposes of this appeal we may even assume that the actions of first defendant were motivated and that the display of affection was a mere show. Even so it is difficult to conclude, in the absence of better or other evidence, that there was any undue influence or misrepresentation. It is clear from the evidence and it has been so found by the High Court that Arulmani was a woman of character and strong will. She was not likely to have been the victim of any undue influence or misrepresentation.....'

4.8. In *Surendra Pal and Ors. v. Saraswati Arora and Anr.*, : [1975]1SCR687 , the Apex Court, following *H. Venkatachala Iyengar (supra) & Rani Purnima Devi v. Kumar Khagendra Narayan Dev*, : [1962]3SCR195 , held that 'In the latter case this Court, after referring to the principles stated in the former case emphasized that where there are suspicious circumstances the onus will be on the propounder

to explain them to the satisfaction of the Court before the Will could be accepted as genuine; and where the caveator alleges undue influences, fraud and coercion the onus is on him to prove the same. It has been further pointed out that the suspicious circumstances may be as to the genuineness of the signature of the testator, the condition of the testator's mind, the disposition made in the Will which may be unnatural or unfair or improbable when considered in the light of the relevant circumstances. 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.'

4.9. In *Satya Pal Gopal Das v. Panchubala Dasi and Ors.*, : AIR 1985 SC500 , it was held in paragraph 3 thus:

'3. As we said there are certain outstanding features of the case which should dispel all suspicion that may possibly otherwise attach itself to the Will. The Will was registered on June 30, 1946 and the testator died on March 12, 1950. That is to say, the testator lived for nearly four years after the execution and registration of the Will and yet he took no steps to have the Will cancelled or to revoke it. It could not be that the Will was somehow brought into existence and the signatures of Nrisingha Prosad were obtained in the Will by practising some fraud. The endorsements on the Will show that Nrisingha Prosad Das himself had presented the Will for registration to the Sub-Registrar and that the Sub-Registrar had been called to the residence of Nrisingha Prosad Das for the purpose of registering the Will. Nrisingha Prosad Das affixed his signature twice again in the presence of the Sub-Registrar, as shown by the endorsements. The endorsements also show that execution was admitted by Nrisingha Prosad Das. As earlier mentioned by us, every page of the Will has been signed by Nrisingha Prosad Das and at the Foot of the Will, a note listing the various corrections made has also been signed by Nrisingha Prosad Das. Therefore, there cannot even be the slightest doubt that the document was executed by Nrisingha Prosad Das, that its execution was admitted by Nrisingha Prosad Das before the Sub-Registrar and that Nrisingha Prosad Das himself presented it to the Sub-Registrar having called him to his own residence

for that purpose.....'

The present case : The principles applied :

5. Tested on the above principles in the present case, it appears that Harendra Nath might have some influence over the testatrix because of the dependence of the testatrix upon Harendra Nath. The overall fact that has been brought before us shows that the testatrix had a very bad relation with her only surviving son, with whom she had both civil and criminal legal battles. The son had never cared for the mother. The mother had been leaving independently and looking after the properties with the help of manager Harendra Nath. The various letters, which are part of the exhibits, clearly indicate that the testatrix had trust and confidence on Harendra Nath and that Harendra Nath had looked after and managed her properties. Harendra Nath was the trusted lieutenant of the testatrix. This trust and confidence could be very well be construed as dependence. This dependence may be exploited to influence the will of the testatrix. It is exactly what Mr. Bose has intended us to believe and drew our attention to various materials to bring home his contentions. True it is, that she had reposed trust and confidence and was dependent on Harendra Nath. This dependence may be characterized either as an influence undue or a persuasion, appeals to the affection or ties of kindred afflicting the sentiment of gratitude or the pity for future destitution. The helplessness of the person, upon whom the testatrix had reposed trust and confidence and depended, and who stood by her all along, might have kindred her pity that persuaded her to provide for him. This has to be judged on the basis of the disposing state of mind of the testatrix whether there are sufficient evidence to hold that the testatrix had acted in fears or hopes or on any kind of pressure exerted by Harendra Nath to overpower the volition without convincing the judgment; and that the will of the testatrix was overborne or overpowered so as to render it ineffective; and that the action of the testatrix was that of a dependent agency and not of an independent agency. The materials before us clearly establish that the testatrix was a woman of strong mind and will. She could manage things all alone at a distant place pursuing her spiritual life and Dev seba. From the correspondences and the materials on record it does not appear that the lady was seeking any advice or was dependent in respect of decisions she used to

take in relation to the management of her affairs at the distant place where she was staying all alone and looking after the Debuttar Estate therein and managing the Dev seba and other affairs. There is nothing to indicate that the lady was dependent on Harendra Nath for taking any decision in respect of her affairs. The dependence was with regard to the management of her properties including realization of rent etc. and payment of funds out of such collection to enable the lady to meet her necessities. The letters indicate a sweet relation of mother and son in between the lady and Harendra Nath, who was addressed affectionately and called as son. Our attention has not been drawn to any material on which it can be concluded that the lady had no independent will and that her will was overpowered and overborne. Neither there is any material to show that the lady was either under fear or had any hope or that she was supposed to purchase peace. The caveator has not been able to establish, as it appears from the material disclosed, any of the ingredients mentioned above viz: that the testatrix had acted in fears or hopes on any kind of pressure exerted by Harendra Nath to overpower the volition without convincing the judgment; and that the will of the testatrix was overborne or overpowered; and that the action of the testatrix was that of a dependent agency and not of an independent agency; or that she was driven but not persuaded to execute the Will.

5.1. The fact remains that the solicitor was called at the residence and the doctor was present. There is no allegation of threat being given to the lady. There is no material to show that there was any occasion for the testatrix to execute the Will in favour of Harendra Nath to purchase peace. There is no material to show that Harendra Nath had exploited the sentiment of the lady or otherwise or had exerted any force or fear or had given any hopes. Even if Harendra Nath took part in the execution and registration of the Will and he did everything therefor, but it does not appear that the attesting witnesses, the doctor, the solicitor had overborne and overpowered the will of the testatrix. May be the solicitor had been working for the testatrix, may be the doctor had been treating the testatrix, may be they are very close to Harendra Nath, but these are not materials sufficient to hold that the will of the testatrix was overborne or overpowered. The learned Single Judge had found that the testatrix had the mental capacity to execute the Will and the Will was duly executed. As soon the propounder had shown all these materials and the situation

is such that it is very difficult to hold that the influence exercised by Harendra Nath was undue and not persuasion, particularly, when the testatrix had no one to depend upon at the hour of her need, even at a point of time the widow daughter-in-law had also deserted her; the older ladies are of great sentiment and may be too sentimental.

5.2. May be the Will is unnatural and unjust, may be that the only surviving son and the grandchildren had been deprived, but it is not for the Court to justify the action taken by the testatrix. It is her property and she was free to give the property to whom she may like; whether that giving is unfair or unjust, it is not for the Court to see. It is only a suspicion, which is to be carefully scrutinized. The Court's duty is to find out as to whether the suspicion has been removed. All influence may be undue, but whether this undue influence is the result of persuasion or a drive. The entire evidence, as we see, does not indicate that the lady was driven to execute the Will in favour of Harendra Nath. The inclusion of various other properties is not a ground to hold that the lady was not acting on her own but was influenced. The supplying of the particulars of the properties by Harendra Nath would not also be sufficient to hold against the Will. It is to be seen whether the lady had executed the Will on her own volition with the mental capacity and state of mind of disposing independent of any one else's will and that she knew the contents of the Will. The signature in each page and the signature of all corrections are also indicative of the fact that she knew the contents of the Will. The Will was read over and explained to her and she had signed in the presence of the attesting witnesses, which have since been so found by the learned Single Judge and, therefore, having regard to the facts and circumstances of the case, it is clear that the influence that might have been exercised by Harendra Nath was of the second category, namely, a persuasion and not a drive.

5.3. Mr. Bose has relied on the judgment on the revocation of the Will executed by the husband of the testatrix and relied heavily on the finding thereof in order to establish that the lady under the undue influence of Harendra Nath had sought to concoct a deed of revocation, which was so found. But this judgment relates to act which took place before the testatrix executed the present Will. The judgment may be of relevance in respect of state of things surrounding the revocation of the Will

of the testatrix's husband. This is an act, which was anterior to the execution of the Will by the testatrix. Therefore, the finding of that judgment would not be of any relevance for our present purpose in view of the provisions contained in Sections 40, 41, 42, 43 and 44 of the Evidence Act dealing with the relevance of the judgment between the parties, for the reasons following.

5.4. Section 40 of the Evidence Act enacts that the existence of any judgment, order or decree which by the law, that is, by the provisions of the Civil Procedure Code or Criminal Procedure Code i.e. judgments in support of a plea of res judicata, in civil case or of autre fois acquit or autre fois convict, in criminal cases, constitutes res judicata, that is, bars a second suit or trial, is a relevant fact; and to have the effect, the judgment must be inter parties. Section 40 has nothing to do beyond admissibility of the judgment. The question of res judicata is to be determined under the separate adjective law. Section 40 simply renders admissible judgments which operate as pleas in bar of the action of the kind as plea of res judicata or otherwise, under some other rule of law. That section has nothing to do with questions of evidence beyond the admissibility of the judgments, because a plea of res judicata is not a plea as a matter of evidence, but only a plea barring the action as a matter of procedure as distinguished from the rules of evidence, *Collector of Gorakhpur v. Palakdhari*, 12 A 1 FB per Mahmood, J., p. 44. Section 40 does not lay down that the judgment must prevent the Court from taking cognizance of the entire suit as against all the parties. If the judgment prevents the Court from taking cognizance of the suit so far as it relates to some of the parties thereto, then also Section 40 would apply, *Bholanath v. Manmatha*, 45 CWN 420. This Mr. Bose has not pleaded.

5.5. Section 41 deals with what is usually called judgments in rem, that is, judgments which are conclusive not only against parties to them, but against all the world. The section does not however, give any definition of the term judgment in rem, but only enumerates four classes of judgments. The judgment in the present case may be in rem but it relates only to the revocation of or validity of the Will of the husband of the testatrix and not the subsequent Will by the testatrix.

5.6. Section 42 deals with the admissibility of judgments relating to matters of public nature, though not between the parties or privies, without making any distinction between the words 'public' and 'general', which is sometimes made in England. But such judgments, orders or decrees are not conclusive proof of that which they state. This, however, Mr. Bose did not urge.

5.7. Section 43 says that judgments other than those mentioned in Sections 40-42 are irrelevant unless the existence of such judgments is a fact in issue or is relevant under some other provisions of the Act, e.g., under Sections 8, 11, 13, 54 Explanations (2) & c. Section 44 says that when any judgment, order or decree has been received under Sections 40-42, the adverse party may show that it was obtained by fraud or was delivered by a Court without jurisdiction. Judgments vitiated by fraud can therefore be challenged under Section 44 without bringing a suit to set them aside. This also is not the case here.

5.8. Mr. Basu, relying on this judgment, sought to contend that it was found on the earlier occasion that Harendra Nath could exert undue influence on the testatrix to bring about the deed of revocation of the Will of the testatrix's husband. In the said judgment, it was found that the testatrix in collusion with Harendra Nath had forged the signature of her husband to bring in existence the revocation of the Will executed by her husband. Even if it was found that the testatrix was influenced unduly by Harendra Nath, but the same would not be a fact relevant for the purpose of holding that the Will executed by the testatrix was also a result of undue influence of Harendra Nath over the testatrix. The execution of the Will by the testatrix being a subsequent event cannot be judged by the finding in the earlier judgment. Admittedly, the finding in the judgment may be one of the factors to be taken into consideration and weighed with in the light of the materials placed before the Court in support or against the Will executed by the testatrix and sought to be probated. It has to be judged on the basis of the appreciation of the evidence placed before the Court. Independent of the evidence placed before the Court, the finding of the said judgment would not clinch the issues. The present facts and circumstances of the case are to be appreciated on the principles enunciated hereinbefore independent of the earlier finding in the said judgment, which can be considered as a factor but not as a matter having bearing conclusive for the

purpose in which the evidence is to be appreciated and tested. We do not find that this finding of this judgment would be sufficient to discharge the onus that was cast upon the caveator to establish the undue influence to the extent of driving the testatrix to execute the Will. On the other hand, it appears that the testatrix had participated in the probate case relating to her husband's Will and had given evidence which clearly shows that she is a lady of independent will and intelligent mind and had stood by her own action. The relation between Harendra Nath and the testatrix in the said case might be as parties to collusion but that does not prove for our present purpose that Harendra Nath had exerted undue influence to drive her to execute the Will in his favour, even though the testatrix had executed the Will before the said judgment. Having regard to the principles of the Evidence Act, we do not find that the finding of the said judgment would conclusive prove exertion of influence by Harendra Nath to drive the testatrix to execute the Will.

CONCLUSION

6. As discussed above, it appears that the testatrix, a lady of strong independent will, as has been found by the learned Single Judge, since not challenged, to have the mental capacity, and that the Will was duly executed. The dependence of the testatrix upon Harendra Nath kindred her affection, pity, sentiment and a sense of gratitude to provide for him, who stood by her during her hours of need, in view of the helplessness that, she perceived, would befall Harendra Nath after her demise. The presentation and registration of the Will, the signature at the bottom of all the pages, the initials of each corrections, the attestation by the attesting witnesses, the evidence of the doctor, the solicitor etc. supported by the evidence adduced on behalf of the propounder, the exhibits, all clearly establish that the propounder was able to discharge the burden to establish the execution of the Will and remove the suspicious circumstances surrounding the execution thereof. The testatrix was persuaded but not driven to execute the Will in favour of Harendra Nath. At the same time, the evidence adduced on behalf of the caveators does not seem to establish fraud, coercion or undue influence to overbear or overpower the will of the testatrix and to establish that the testatrix was driven and not persuaded to execute the Will.

6.1. In the facts and circumstances of the case, the Court could not have refused the grant of probate because the Will was unnatural or improbable.

ORDER

7. Therefore, the appeal succeeds. The judgment and decree appealed against is hereby set aside only to the extent it had refused the grant. Let there be a grant of probate in terms of prayer (b) of the petition and leave in terms of prayer (c) of the petition.

7.1. There will, however, be no order as to costs.

7.2. Urgent xerox certified copy of the judgment be given to the parties on usual terms, if applied for.

R.N. Sinha, J.

I agree.