

Sudhir Kumar Sen and anr. Vs. Bijoy Kumar Sen and ors.

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Court : Kolkata

Decided On : Mar-18-2009

Judge : Ashim Kumar Banerjee and ;Prasenjit Mandal, JJ.

Acts : [Evidence Act, 1872](#) - Sections 67, 68 and 69; ;[Indian Succession Act, 1925](#) - Section 63

Appeal No. : F.A. No. 210 of 1996

Appellant : Sudhir Kumar Sen and anr.

Respondent : Bijoy Kumar Sen and ors.

Advocate for Def. : Amzad Ali, ;Kaberi Ghosh (Dey) and ;Sukla Basu, Advs.

Advocate for Pet/Ap. : S.P. Roy Chowdhury and ;Anit Kumar Rakshit, Advs.

Disposition : Appeal allowed

Judgement :

Ashim Kumar Banerjee, J.

1. I have read the well-versed judgement of my esteemed brother. With great humility, may I say, despite my best efforts I could not persuade myself to record my agreement with the finding of His Lordship.

2. It is the golden rule that Court of law must honour the last wish of the testator. Hence, in a probate proceeding the propounder is always one up in the game as whenever a Will is produced in Court of law Court proceeds on prima facie presumption that it is the last Will and testament of the deceased and issues notice to all the natural heirs on intestacy inviting their objection, if any. The propounder is only to discharge his onus by proving the execution of the Will. Under the Evidence Act a document can well be proved by bringing the author of the document to the witness box. Unfortunately in a probate case it is not possible to produce the author. Hence the execution must be proved by the propounder. Once the execution is proved probate is the resultant consequence unless the caviator or caviatrix rebuts such presumption by clouding the circumstance under which the Will was sought to have been executed. Such cloud is called as 'suspicious circumstance' in probate jurisprudence. Once the caviator or caviatrix is successful to cloud the onus shifts on the propounder to remove such cloud from the mind of the Court so that the Court can safely infer that the subject instrument was the last Will of the testator and it must be honoured.

3. The procedure for execution of a Will is prescribed under Section 63 of the [Indian Succession Act, 1925](#). Under the said provision any person can execute his Will by affixing his mark or signature to the Will or by getting it signed by some other person in his presence and by his direction and such signature and/or mark must appear to be intended to give effect to the writing as a Will. It is also provided that such Will shall be attested by two or more witnesses each of whom must be present at the time of execution of the Will by the author meaning thereby all three must be present at the time of signing the said document by each other. Under the Indian [Evidence Act, 1872](#) execution of a document is required to be proved through the procedure laid down in Section 67, 68 and 69 of the said Act of 1872. Section 67 inter alia provides that if a document is alleged to be signed by a person, the signature must be proved to be of the same person, in case it is handwritten the said document can also be proved by proving the handwriting of the author. The attestation of a document is also to be proved by producing any attesting witness alive at that time and such production is a must in case of a Will. Under Section 69 if the attesting witness could not be found the signature of the attesting witness must be proved through other means. Taking a sum total the

primary onus of the propounder is to produce the attesting witness and/or scribe of the Will if they are alive and prove that the execution was done following the mandate of Section 63 of the said Act of 1925. Once such onus is discharged it would be presumed that the subject instrument was the last Will and testament of the deceased. The onus, thus, shifts on the caviator to cloud the circumstance and if he is successful the onus then shifts to the propounder to remove such cloud.

4. Lot of arguments were made on unnaturality. In my humble view, every meaningful Will is unnatural as it purports to exclude any of the legal heirs as a whole or in part and to deprive him or them from enjoyment of the property left by deceased absolutely or in part or restricting their use and enjoyment.

5. Coming to the present case in hand, we find that the testator was 'Gharjamai'. He was maintained by his in-laws. His wife inherited substantial property from her parents being the only child. His wife predeceased him. He was a widower. His wife distributed equally her assets amongst three branches being two sons and the predeceased son's family. Had the Will not been there each one would get one third of the property left by the deceased testator whereas by the subject Will testator sought to give it to one of his son Bijoy to the exclusion of other two branches. He also excluded his grand daughters who however did not choose to contest the probate proceeding. The probate proceeding was contested only by his son Sudhir and his grandson Ashim. The others did not choose to contest the proceeding. If the Will is called unnatural such unnaturality should be weighed with the fact that despite being deprived by the testator through the purported Will the natural heirs did not come forward to challenge the probate proceeding except Sudhir and Ashim. Hence, in my view, the plea of unnaturality is not so germane in the facts and circumstances of this case so fully discussed by my esteemed brother which I need not repeat. I however wish to add that the testator gave reasons in his Will why he excluded others. One may not agree with his reasoning but at the end of the day it was his property and he must have the sole discretion to deal with the same.

6. It further appears that by the said Will one property situated in Labpur in the District of Birbhum was given to Sudhir. It was further provided in the said Will that

apart from the said Labpur property the other properties, if any, would devolve upon Bijoy to the exclusion of the others. Hence, in my view, the Will was not an unnatural one.

7. On the execution, it appears that the concerned Will was executed in 1978. It was registered with the Registrar of Assurance, Baharampur in 1981 when the testator was residing with Bijoy at Baharampur. The testator was alive for another two years and died in 1983. In a probate proceeding to cloud the circumstance the possession of the Will is a relevant factor. In the instant case the Will came out from the office of Registrar of Assurance, Baharampur, a Government Authority having no interest in the matter.

8. To prove execution, Bijoy examined himself as well as the attesting witness Biswanath Dhar. Bijoy claimed that he was not instrumental in execution and/or registration of the Will although he was an employee of the Settlement Office, Baharampur. He deposed that his father gave him the registration receipt which he produced before the Registrar after the death of his father and got the Will which was presented in Court for probate. In my view, evidence of Biswanath is more important than Bijoy. The deposition of Biswanath is appearing at page 45 - 49 of the Paper Book. He deposed that the Will was written by one Kamal Ranjan Paul at the direction of Rai Ranjan Sen, the testator. It was written in the balcony of the house where Bijoy used to reside. Biswanath also claimed that Bijoy was absent when the Will was written and executed. He also deposed that Kamal Babu wrote the Will and explained the contents to Rai Ranjan. Thereafter the Rai Ranjan signed the same in the presence of Umapada Pal, advocate, Samir Kr. Dhar, advocate, Dinsaran Majumder (since deceased), Asis Mazumder, Debika Prasad Chowdhury and himself. He identified the signature of the Rai Ranjan Sen. He also claimed that Rai Ranjan was physically fit and mentally alert at that time. It is significant that in cross-examination he could not be shaken. No suggestion was specifically put to him that he was an interested witness. In cross-examination he also denied having taken any loan for his daughter's marriage. No evidence was produced by the appellants to support such allegation.

9. The registration was proved through another witness Shri Nitta Gopal Chakraborty who identified the signature before the Sub Registrar, Berampur. He also deposed that in 1981 the testator was very much fit when he saw him in the residence of Bijoy. He also could not be shaken in the cross-examination. The Will was sent to the appropriate Government Department for expert opinion on the signature. On perusal of the report it appears that the expert opined that although there were dissimilarities, those dissimilarities occurred because of hurried signature. The report however opined that the signature appearing in the Will tallied with the signature of the testator appearing in the admitted documents. In this regard I may refer to the report of the handwriting expert appearing at page 13 of the Paper Book, Part - II. Hence, taking a sum total of the deposition of Rajanikanta, Nittagopal and Biswanath I am of the view that the propounder was successful in proving the execution of the Will.

10. Now question comes, whether the caviator was able to cloud the circumstance. The written objection filed by Sudhir appears at page 18 - 23 of the Paper Book. Sudhir and Ashim filed the said written objection inter alia on the following grounds:

- i) The Will was a 'outcome of fraud and forgery'
- ii) Registry Office and Settlement Office were housed in the same building where Bijoy was working.
- iii) Rai Ranjan was resident of Lagosa in the District of Birbhum and could not have acquaintance with the witnesses residing in Mursidabad.
- iv) Mother distributed fourteen acres of land between the three branches equally. There was no cogent reason or justification to deprive other heirs.
- v) Sudhir was given only .23 acres of land.
- vi) Sudhir, being a successful doctor contributed for the benefit of the family and acquisition of property was done by him in Benami of his parents.

vii) In 1978 Rai Ranjan was absolutely deaf. His eyes were feeble. He lost his power of movement because of injury. He was under control of Bijoy.

11. On a composite reading it appears that the prime ground for challenge was two fold firstly, the Will was forged and secondly it was unnatural. The forgery was dispelled by the handwriting expert. Unnaturalness has already been dealt with by me hereinbefore.

12. Let us now find out whether there was any improvement on the part of the caviator during evidence. Few Bengali letters exchanged between father and son were disclosed. I have gone through those letters. It appears that the father had cordial relationship with the sons. It however appears that Sudhir miserably failed to prove that those properties were in fact acquired by him out of his own resource. Hence, such claim could not be proved. On a composite reading of the letters as well as the Will it appears that the testator discriminated the other son on the ground that the other son was better established and such fact was proved by Sudhir himself when he says that being a successful medical practitioner he contributed for the benefit of the family. Even as a result of the said Will Sudhir got .23 acres of land. I am unable to find out any circumstance which could conclusively guide us to refuse probate despite execution and registration of the Will having been proved by the propounder.

13. To sum up, the execution was proved through the attesting witness, registration was proved through the identifier. Will came out from a Governmental Authority. The testator assigned reasons why he was discriminating one son than the other. One may not agree with his reasoning. However, that has no consequence in the matter of probate once the Court is satisfied on the execution. The charge of forgery was negated by the expert opinion. It is true that the Court should not solely rely upon the opinion of the expert to come to a definite conclusion about the authenticity of a document. At the same time we cannot brush aside the opinion of an expert by looking at the document and framing a different opinion without having any expertise. That, in my view, would be a dangerous proposition.

14. Considering the evidence, I feel that the learned Judge of the Court below was right in granting probate and in my view the appeal should be dismissed.

Prasenjit Mandal, J.

15. This appeal is at the instance of the opposite parties and is directed against the judgment and decree dated July 20, 1995 passed by the learned Additional District Judge, Second Court, Birbhum at Suri in Probate Case No. 11 of 1986 whereby he granted probate in respect of a Will.

16. The fact of the case in short is that late Rairanjan Sen executed a deed of Will dated October 20, 1978 in respect of his immovable properties situated within the District of Birbhum. His youngest son, Bijoy Kumar Sen, was made the propounder of the Will. Thereafter the Will was registered with the Sub-Registrar, Berhampur, District-Murshidabad and the Will was kept with the Sub-Registrar. At that time, Bijoy Kumar Sen was posted as Compensation Officer at Berhampur, District-Murshidabad. But he was not aware of the Will at all. The testator died on April 28, 1983 as a widower. No other probate case was pending over the properties mentioned in the deed of Will and the Will in question was the last one of the testator. So the propounder prayed for grant of probate. The eldest son of the testator, namely Sudhir Kumar Sen and one grandson of the testator contested the petition for grant of probate contending, inter alia, that Rairanjan never executed the deed of Will as alleged. The impugned deed of Will was a forged document. The execution and attestation of the same were not properly done. The Will was registered at Berhampur, District-Murshidabad because at that time the propounder was working as Compensation Officer at Berhampur and the Office of the Compensation of the Settlement department and that of the Sub- Registrar were situated in the same building. So the propounder must have adopted malpractices in the matter of execution and registration of the deed of Will. The opposite party No. 1 is a doctor and he looked after his father at the last part of his life. The testator became deaf and he could not see properly. The propounder took such opportunities. So no probate should be granted in respect of the deed of Will impugned.

17. Upon consideration of the evidence on record, the learned Additional District Judge granted probate. Mr. Roy Chowdhury, learned Advocate for the appellants, contended that the Will impugned was not executed and properly attested as required under the law. At the time of alleged execution, the propounder stayed at Berhampur, District-Murshidabad as Compensation Officer of the Settlement Office in 1978 and the Office of the Compensation Officer and that of the Sub-Registrar at Berhampur were located in the same house in the upper floor and the ground floor respectively. The immovable properties of the testator were situated within the District of Birbhum and the attesting witnesses, scribe and lawyers were of the District of Murshidabad and the registration of the so-called deed of Will was made at Berhampur, District-Murshidabad. He also contended that due execution and attestation of deed of Will had not been done in accordance with Section 68 of the Evidence Act. He contended that the propounder was required to exclude all suspicious circumstances because the deed of Will was executed and registered outside the place where they would have been done and that at the relevant time the propounder was posted at Berhampur. Unless and until, the suspicious circumstances were removed, no probate could be granted by the learned Trial Court. The propounder was also required to prove that the testator was in full state of physical and mental fitness. The propounder having not been able to remove all such suspicious circumstances, was not entitled to get any probate in respect of the said Will. So the judgment and decree cannot be supported.

18. On the other hand, Mr. Ali, appearing on behalf of the propounder of the Will, submitted that suspicious circumstances did not exist at all. The Will was not executed depriving other heirs of the testator. The said deed of Will was executed and registered at Berhampur under Part IX of the Indian Registration Act and kept with the Sub-Registrar under a sealed cover. The propounder of the Will was not present at that time. So question of suspicious circumstances did not arise at all. He also contended that admittedly, the testator was a retired school teacher and he was a widower. Sometimes he lived at Jamna and sometime at Laghosa under P.S.-Labpur. He contended that the appellant Sudhir resided at Kirnahar, District - Birbhum for his medical profession. The testator was taken to Berhampur where the propounder had been residing with members of his family. He stayed there for two months and thereafter the daughter and son of the propounder took the

testator to his native village during the Durgapuja of that year. So there was good relation. In fact, the propounder had no sufficient money for holding transferable service. For that reason, certain immovable properties were given to the propounder by the deed of Will impugned. So there was no suspicious circumstance at all. The deed of Will had been executed, attested and registered properly. He supported the judgment.

19. Upon consideration of the rival submissions of the learned Advocates of both the sides and on perusal of the materials on record, we are to re-appraise the evidence on record on the following issues only in this appeal:

- i) Was the Will duly executed and attested by the testator?
- ii) Was the testator mentally alert and physically fit at the time of execution of the Will and
- iii) Was the Will obtained by practising fraud as alleged?

20. Admittedly, the testator resided as Gharjamai at Laghosa under P.S. Labpur and his wife was the only child of her father and she got some properties. Admittedly, she distributed her properties amongst the heirs including the son of a pre-deceased son namely, Ashim Sen equally. Admittedly, the testator had three sons and two daughters. The eldest son namely Basanta died long back leaving two daughters and a son namely Ashim. The daughters were married and other two sons of the testator namely Sudhir and Bijoy are the parties to the probate case amongst others. Admittedly, the testator suffered fracture injury on his waist and neck by fall on 13.07.1978 and he was being treated by his second son, Sudhir who was a practising doctor at Kirnagar. Thereafter, on getting information about the injury of the testator, the propounder brought him to Berhampur on 16.08.1978 for better treatment. The deed of Will impugned was executed on 20.10.1978, that is, about two months from the date of taking him to Berhampur by the propounder. Admittedly, thereafter the testator was again taken to his native village at Laghosa. The deed of Will impugned herein was marked exhibit 3B and one attesting witness was examined to prove the deed of Will. From such deed of Will and as per evidence on record, we find that though the Will was executed on

20.10.1978, the same was registered with the office of the Sub-Registrar at Berhampur on 18.05.1981 and the same was kept with the Sub-Registrar under Chapter IX of the Indian Registration Act. Admittedly, the testator died in April, 1983 at the age of 95 years. Amongst others, propounder examined himself, one attesting witness namely Biswanath Dhar and the expert who gave opinion as to the handwriting of the executant of the deed of Will and thus upon consideration of the evidence on record on behalf of both the parties, the learned Trial Judge opined that the deed of Will impugned was executed.

21. From the above facts and circumstances, it is evident that while the executant was in the nineties, the deed of Will had been executed. The Court is, therefore, required to consider whether the disposition made in the deed of Will was natural, probable and fair in the prevalent circumstances. Alternatively, we can say that the Court is required to see first, whether the disposition of the property by the deed of Will had been done by the testator at his free will and mind. If the suspicious circumstances existed, the burden of proof in dispelling the suspicious circumstances certainly was upon the propounder of the Will because the testator stayed at the house of the propounder at the time of execution of the deed of Will.

22. In the instant case, we find from the admission of the propounder himself duly corroborated by his witnesses that the propounder himself was not present at all at the time of preparation and execution of the deed of Will. Admittedly, at that time the propounder resided at Saidabad, Berhampur in a rented house and according to evidence of the attesting witness, P.W.2, the said deed of Will was written in the varandah of the rented house of the propounder. The P.W.2 is the next door neighbour of the propounder. According to him, the testator was known to him as he visited the house of the propounder at Saidabad. So from the evidence of the attesting witness, it is clear that the testator became acquainted to him through the propounder. This attesting witness is unable to read the Will and he admitted that he had defects in his eyes.

23. P.W.3, Nitya Gopal Chakraborty, is the identifier of the testator before the Sub-Registrar, Berhampur. He described himself as a resident of Kasimbazar under P.S. Berhampur, District-Murshidabad. Though at one place in the deed of Will

there is a note that he was a resident of Jamna under P.S. Labpur, District-Murshidabad, his statement that Jamna is within the district of Murshidabad cannot be accepted because at the time of deposition the P.W.3 clearly stated on oath that his paternal house was situated at village Rasara under P.S. Kandi, District- Murshidabad. But he constructed a house at Kasimbazar. Thus, we find that the identifier of the testator hailed from Kasimbazar, District-Murshidabad. He stated clearly that he was an employee of the Compensation Office at Berhampur where the propounder of the Will was also posted. In other way, we can say that this P.W.3 was an employee of the office of the propounder of the deed of the Will. According to him, he saw the testator on three occasions, one in 1978, second time in 1979 and last time in 1981. The propounder claimed that he was totally dark about the execution of the Will and he came to know the fact only when his father handed over the receipt of registration of the deed of Will for taking the Will from the office of the Sub-Registrar at Berhampur. He claimed that he knew the contents of the deed of Will when he got delivery of the deed of Will in 1985. The P.W.3 was not previously known to the testator and he became acquainted with him certainly through the propounder of the Will. The scribe cum attesting witness Kamala Ranjan Paul was a resident of Chunapur, Berhampur, District-Murshidabad. The two lawyers who prepared the draft, were from Berhampur Bar Association. Thus, we find that the propounder of the Will examined some persons as P.Ws. and they all hailed from the district of Murshidabad. But he had not been able to examine any person from village Laghosa where the testator resided. The impugned Will had been prepared in the house of the propounder at Saidabad, Berhampur in the absence of the members of the testator's family and close relations like the D.W.1 who visited the house of the testator. Keeping in view all such facts and also the claim of the propounder that he was not at all present at the time of execution of the deed of Will at his house, we are of the view that the statement of the propounder that he was in dark quietly about execution and registration of the deed of Will and that the witnesses to the deed who were none but the neighbours and employee of the office of the propounder would become the witness to the deed, could not be believed at all. Therefore, we hold that the presumption that the deed of Will (exhibit 3B) had been properly executed by the testator, is rebutted by the proof of suspicious circumstances. Our such

observations get support from the decisions reported in : AIR 1959 SC443 and : [1977]1SCR578 . Mr. Ali contended that when the question of circumstantial circumstances arose and doubt was raised whether the Will could have been executed, the correct procedure would be to see the improbability of the evidence adduced by the propounder of the Will. In support of his contention, Mr. Ali referred to the decision reported in : AIR 1995 SC2086 and he referred to the paragraphs 14 and 15 of the same which are quoted below:

14. As far back as in 1894 the Privy Council in the case of Choteynarain Singh v. Mussamat Ratan Koer observed that in the case of execution of a Will, an improbability must be clear and cogent. It must approach very nearly to, if it does not altogether constitute, an impossibility. This was reiterated by the Calcutta High Court in the case of Kristo Gopal Nath v. Baidya Nath Khan. It said that when a court is dealing with a testamentary case where there is a large and consistent body of testimony evidencing the signing and attestation of the Will, but where it is suggested that there are circumstances which raise a suspicion and make it impossible that the Will could have been executed, the correct line of approach is to see that the improbability in order to prevail against such evidence must be clear and cogent and must approach very nearly to, if it does not altogether constitute, an impossibility. There is no such improbability about the Will in the present case.

15. There is also a large body of case law about what are suspicious circumstances surrounding the execution of a Will which require the propounder to explain them to the satisfaction of the court before the Will can be accepted as genuine. A Will has to be proved like any other document except for the fact that it has to be proved after the death of the testator. Hence, the person executing the document is not there to give testimony. The propounder, in the absence of any suspicious circumstances surrounding the execution of the Will, is required to prove the testamentary capacity and the signature of the testator. Some of the suspicious circumstances of which the court has taken note are: (1) The propounder taking a prominent part in the execution of a Will which confers substantial benefits on him; (2) Shaky signature; (3) A feeble mind which is likely to be influenced; (4) Unfair and unjust disposal of property. (See in this connection

: H. Venkatachala Iyengar v. B. N. Thimmajamma, Indu Bala Bose v. Manindra Chandra Bose and Guro v. Atma Singh. Suffice it to say that no such circumstances are present here.

24. He also submitted that if the Will appeared to be unnatural one, in that case, the evidence in support of the execution of the Will should be scrutinised with a greater degree of care than usual. He referred to the decision reported in : AIR 1971 SC2236 . In the instant case, the plea of complete ignorance by the propounder about the execution and registration of the deed casts doubt about execution of the deed and also on placing proper person before the Sub-Registrar for registration of the deed of Will subsequently. As per evidence on record, after suffering injury in 1978, the testator was unable to move alone at the relevant time. Unless, the propounder did something for the execution of the Will it was difficult to believe the witnesses of Berhampur would take necessary steps for execution and registration of the deed of Will. The draft copy of the deed is not forthcoming before us to ascertain who prepared the draft copy and who were present at the time of preparation of the draft. Above all, Court is to consider how disposition of the property had been made in a testamentary case. The decision reported in : AIR 1995 SC2086 also lays down certain matters which are to be considered as suspicious circumstances. One of such factor is unfair and unjust disposal of the property of the testator. In the instant case as observed earlier, the testator had three sons and two daughters of whom two sons and two daughters are now alive and the heirs of the deceased son, Basanta Sen, including his widow wife are also alive. But it is curious to note that except giving 23 decimals of land to Sudhir, all the properties of the testator including his properties which he was to get before his death, would devolve upon the propounder. The propounder himself admitted that his father had total landed properties measuring about 20 bighas. So save and except 23 decimals of land, all the landed properties say admittedly measuring 20 bighas of land and other properties either in his own name or in the benam of the testator, would devolve upon the propounder as per the deed of Will depriving Sudhir and the heirs of the deceased son, Basanta and also daughters. The contention in the deed of Will that the propounder had meagre income for his service and that he had to move from one place to another for his services, we hold, are not at all a justified ground to dispose of almost all the properties in

favour of the propounder. Admittedly, the propounder constructed a two-storied building at Berhampur town subsequently. He was the Deputy Magistrate and Collector at Berhampur subsequently and at that time he got a salary of Rs. 3200/- p.m. His salary could not be said at all meagre at that point of time. We do not find any justification in depriving the wife of the eldest son of the testator at all. The contention of the propounder that Ashim, son of the pre-deceased son, got some property from the wife of the testator, we hold, is not a ground at all because as per admission of the propounder the other heirs of the wife of the testator got equal share of her properties. So this contention of the propounder cannot be accepted at all. In other words, we hold that as there was an attempt to grab all the properties left by the testator save 23 decimals of land, this Court cannot ignore such suspicious circumstances. At the time of execution of the deed of Will, the testator was under medical treatment and the propounder was taking necessary steps for his treatment at Berhampur. Naturally, the testator had feeble mind at his old age at that time and he depended fully on the propounder at that time. So his mind was such as was likely to be influenced by the propounder, whether directly or indirectly.

25. As regards the report of the handwriting expert, Mr. Roy Chowdhury did not argue much. He submitted that the opinion of the handwriting expert as appearing in the evidence on record shall be considered along with other evidence already on record and then the Court should come to a conclusion. In support of his contention Mr. Roy Chowdhury referred to the decision reported in AIR 1967 SC 778 and AIR 1980 SC 531. As regards the decision referred to in AIR 1967 SC 778, we find that the matter relates to a trial on criminal matter and the Apex Court observed that when the evidence of the complainant about handwriting of an accused was sufficient to establish evidence against the accused, it was not necessary to examine the handwriting expert in support of the evidence of the complainant. This decision is altogether on a different point. The other decision referred to above refers to the opinion of a handwriting expert observing that the reasons for opinion must be carefully proved and examined and all relevant evidence must be considered. Upon hearing both the sides on this matter, we are of the considered opinion that the report of the handwriting expert is not a conclusive proof over the matter in dispute. Rather the opinion of the handwriting

expert shall also be considered along with other evidence to arrive at a conclusion. In the instant case, the handwriting expert opined that signature appearing on the deed of Will impugned was the signatures of the person appearing in the deed under reference, that is, the testator. Though Mr. Roy Chowdhury did not argue much on the opinion of the handwriting expert, yet we are of the view that one factor might not be lost sight of. At a glance we find that the signatures appearing on the deed of Will impugned have no similarities. It is true, if a person makes several signatures, each signature may differ from the other; but yet there must be some similarities. But in the instant case, we find that the signatures appearing on the Will at a glance have no symmetry at all. The handwriting expert described such desymmetry as modifications and simplifications stating that such incident happened when the testator signed the Will speedily. This is, we hold, another suspicious circumstance. Another factor is that the handwriting expert did not consider the signature of the testator appearing on the reverse of the first page of the Will which was very much important in deciding actually who signed on the reverse of the first page. Defence version is that after 1978, the testator did not go to Berhampur at all and so a doubt casts whey such signature appearing on the reverse of the first page was not examined by the handwriting expert. Above all, as per admission of the propounder, he himself was not present at the time of execution of the Will though it had been done at his rented house at Saidabad.

26. The lawyers of Berhampur Court who prepared the draft of the Will had not been examined. The draft copy had not also been produced. Neither sons, daughters nor other relations of the testator were present at the time of preparation and execution of the deed of Will. This casts a doubt what was the reason for making signatures by the testator on the deed of Will hurriedly making different types of signatures at different places of the Will. The propounder himself stated even he was not informed of the execution of the Will though he was to function as the executor of the Will. All these factors are the suspicious circumstances surrounding the execution of the Will and the propounder was not at all able to remove such surrounding suspicious circumstances.

27. The deed of Will lays down that the heirs of the eldest son of the testator got sufficient properties but such statement in the Will became untrue by the evidence

of the D.W.2, Sudhir and D.W.3, Ashim. Admittedly, the testator was a well-to-do man but his grandson, Ashim stated on oath that his mother had no property nor any gold ornament. He has been working in the colliery since 1971 and he is getting a meagre remuneration for his service. He clearly stated that his mother, eldest sisters and he himself resided at Laghosa, that is, in the house of the testator and they were maintained by his grandfather, (testator) and uncle, Sudhir/P.W.2. Sudhir bore expenses for their education and sisters' marriage. It is his clear statement that they lived together up to 1978 and thereafter he managed his family including his mother with a nominal sum of Rs. 400/- only in 1978 and that the testator loved them. We do not find anything to discredit his statement. The fact that they were poor reveals from his further statement that the propounder did not bear their education and other expenses save and except he paid Rs. 100/- only on one occasion on being requested by the D.W.3 by a letter. He admitted that he got some properties equally with other heirs of his grand mother and this statement is corroborated by the evidence of the propounder and Sudhir also. So we find that if the deed of Will is to be considered as genuine, then the heirs of the eldest son of the testator were totally deprived of the properties left by the testator without any justified reason. From the evidence on record, it had been established that the mother of the D.W.3 served the testator also. But neither she nor the D.W.3 was blessed by any property of the testator by his Will. The propounder was not at all able to remove all such suspicious circumstances.

28. If we carefully consider the above facts and circumstances, it would be crystal clear that the deed of Will was executed at Berhampur by some men of the propounder. This could happen when the testator himself took initiative for execution of the deed of Will depriving legitimate claims of other heirs of the testator. So we are of the view that the propounder himself was the instrumental of the deed of Will and none else. The propounder himself might not be present as per his statement at the time of preparation and execution of the Will to show that of the view that it was difficult for the testator alone to contact the lawyers and the men of the propounder to become attesting witnesses to the deed, while he was in the nineties and suffering from injuries on his waist and neck. Even after execution of the Will, we do not find any justification why the same was kept concealed as per the case of the propounder totally from other heirs of the testator including the

propounder of the Will. Therefore, the contention of the propounder that he knew everything on taking delivery of the deed of Will from the office of the Registrar, we hold, is not trustworthy at all. We are of the view that the propounder had taken such a stand in order to show that he was not at all the instrumental of the Will. For the reasons discussed above, we are of the view that the propounder was not able to remove all the suspicious circumstances surrounding the execution and registration of the deed of Will. Therefore, we are of the view that the deed of Will (Exhibit 3B) could not be considered as validly executed by the testator. Consequently, it could not be said that the deed of Will impugned as the last Will of the testator. There is no medical paper to conclude that the testator was physically fit and mentally alert at the relevant time. Had the testator been physically fit and mentally alert, he would not have made testamentary disposition in the manner as mentioned in the Will. The impugned Will had been created under the undue influence of the propounder and none else. Thus, the fiduciary relation had been abused by the propounder. Accordingly, we are of the view that the learned Trial Judge did not decide the issues properly. The issue Nos. 1 and 2 are decided against the propounder and that the will was obtained by practising fraud upon the testator. The issue No. 3 is also decided against the propounder. So the judgment and decree passed by the learned Trial Judge cannot be supported. The same is set aside.

29. The appeal succeeds and it is allowed.

30. The probate case stands dismissed. Considering the circumstances, there will be no order as to costs.

31. Urgent xerox certified copy of this order, if applied for, be made available to the learned Advocate for the parties on their usual undertakings.

32. Since we could not be ad idem on the issue let this appeal be referred to a third Judge to be nominated by the Hon'ble Chief Justice, for His Lordship's ultimate decision on the issue.