

Nilendu Sen Vs. Pratip Kumar Sen

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Court : Kolkata

Decided On : Jun-18-1993

Reported in : (1993)2CALLT394(HC)

Judge : Prabir Kumar Majumdar and ;Rabin Bhattacharyya, JJ.

Acts : [Indian Succession Act, 1925](#) - Section 63; ;[Evidence Act, 1872](#) - Sections 60, 61 and 68

Appeal No. : Appeal No. 239 of 1984 and Testamentary Suit No. 20 of 1981

Appellant : Nilendu Sen

Respondent : Pratip Kumar Sen

Disposition : Appeal dismissed

Judgement :

Rabin Bhattacharyya, J.

1. This appeal is directed against the judgment and order dated 11th of August, 1983, passed by her Lordship, the Hon'ble Mrs. Justice Padma Khastgir in testamentary Suit No. 20 of 1981.

2. We shall now set out the backgorund in which the litigation was launched.

3. Bereft of unnecessary details, the facts of the case are that one Amiyabala executed a Will on 6.8.72, in favour of the propounder, Pratip Kr. Sen, one of the sons of the testatrix. It is needless to say that Amiyabala passed away a little over 5 years since the execution of the Will in English language. She was governed by the Hindu Succession Act and bequeathed all her properties both movable and immovable in an outside jurisdiction of this Court in favour of her relations as detailed in the Will.

4. It is conspicuous from the affidavit of assets, filed by the propounder under the Will that it did not exceed the sum of Rs. 62,000/-. The propounder has disclosed in his petition for probate about the heirs left behind her who would be entitled to the properties on intestacy. None but Nilendu Sen, the son of late Niladri Sen who is the eldest son in the line of issue of the testatrix filed the caveat in the proceedings. The caveator in support of his claim had filed an affidavit which bore allegations about the infirmity of Amiyabala to execute the Will as neither the brain nor the mind of Amiya-bala worked together. The recitals of the Will, according to the caveator, were far beyond the reach of naturalness. The execution of the Will was made in clouded atmosphere affecting not only its naturalness but also genuineness to the Core.

5. It was also pleaded that the Will was procured by the propounder or Dilip Kr. Sen of having recourse to undue influence.

6. On the above footings, the learned trial court framed as many as three issues to settle the controversy between the parties. The learned trial court on a careful examination of the evidence and conspectus of the documents including the attending circumstances, came to the conclusion about the legitimacy of the Will duly executed and attested, the learned trial court also disbelieved the evidence of the lone witness examined for the objector that Amiyabala had no capacity to execute the Will impugned., In the back ground of the above findings, the appellant objector has come up in Appeal.

The points for decision in the appeal, therefore, are :

1. Had the deceased testatrix the testamentary capacity for executing her last Will ?
2. Was the testatrix under any coercion, undue influence or duress at the time of execution of the Will ?
3. Is the appeal maintainable in the eye of law and fact ?

Decision :

Before embarking on an enquiry to decide the fate of the appeal that the Will complained against was, if the voluntary execution of the testatrix herself uninfluenced by any extraneous consideration. Before advertent to analyse the factual as well as legal premises of the case, it may be recalled since repeated by the law of precedents that 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 Succession Act. Undoubtedly, the onus of proving the Will is on the propounder and in absence of suspicious circumstances, the execution of the Will thereof, the testamentary capacity and the signature or the thumb impression of the testator or testatrix is required by law is sufficient to discharge the onus. Where, therefore, there has suspicious circumstances, the onus is on the propounder to explain them to the satisfaction of the Court before it accepts the Will as genuine. Where the caveator alleges undue influence, fraud or coercion, the onus is on him to prove the same. Even where there is no such pleas but the circumstances may raise 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 or thumb impression affixed on the Will, condition of the testatrix's mind, the disposition made in the Will being unnatural, improper and unfair or there might be other indications in the Will to show that the mind of the testatrix was not free in the light of the relevant circumstances. In such circumstances, before it is accepted as the last Will of the testatrix, court would expect that the legitimate suspicion be removed. If the propounder succeeds in removing suspicious circumstances, the court would grant probate even if the Will might be unnatural and might out or whole or in part near relation. This principle has been reviewed by the Supreme Court in a large number

of decisions which are numerical in strength.

7. Keeping in view the above principles, we are to consider the evidence adduced in this case to find out as to whether the propounder is entitled to probate of the Will. We do not prefer to burden our judgment by multiplying decisions about the proof of the Will as it is the settled law that the initial onus is upon the propounder to prove that the testatrix had the-testamentary capacity to execute the Will at the time when the Will was executed, that the Will was validly and properly executed by her, according to the law, and that the Will was the last Will of the testatrix.

8. It is needless to repeat, that her eldest son and son-in-laws pre-deceased her. There could be no reflection on her as her daughter Radhika at the material point of time was alive who breathed her last in 1982.

9. The bone of controversy in the case between the parties is about the validity of the Will stated to have been executed by Amiyabala, widow of Narendra Nath Sen. It is admitted on all hands that Amiyabala passed away on 18.8.1977. Thereafter, the propounder sought for probate of the Will.

10. Mr. Mukherjee, the learned Counsel, appearing for the appellant has argued with such vehemence and industry that physical infirmity since crept in her for a variety of reasons among which the prematured death of the eldest son followed by the death of son-in-laws completely stole her physical and mental alacrity away to comprehend exactly her deeds and actions. In other words, he has developed his point that the deaths of near and dear relations snatched her power to comprehend and make an assessment of her acts and deeds. The testimonies, according to him, excite overwhelming suspicion, spreading over preparation and reading over of the Will. The attestation of the Will goes against all the canons of the Succession Act. The free Will of the testatrix was overpowered by undue influence, duress and coercion.

11. Mr. Basu, the learned Counsel, appearing for the respondent has seriously disputed the correctness of the argument of the appellant.

12. There is another salient feature of the Will is that the dispute is confined between Pratip, the executor on one hand and the objector on the other. It is trite saying that inaction in respect of the heirs or heiress of the testator or testatrix to resist the probate is no ground to hold that there was due execution of the Will. But the broad facts, as highlighted above, are essential to consider about the power of Amiyabala to execute the Will,

13. It stands out from the Will (Ext. A) dated 6.8.73 that there are three attesting witnesses-Prodyot Kr. Mallick, Abhijit Kumar Barat and Kamal Kumar Roy.

14. The genealogical history is catalogued below for the purpose of appreciation.

Amiyabala, the widow had four sons, viz. Niladri, Samarendra, Dilip and Pratip and three daughters viz. Manika, Dipika and Radhika. They were born of the loins of Narendra Nath Sen, late husband of Amiyabala. Of the four sons, Niladri, the eldest son in the line of the issue passed away leaving behind him his widow, two sons and two daughters among whom only Nilendu is contesting the probate. Of the three daughters of Amiyabala, Radhika passed away in the year 1982 i.e. long after the death of Amiyabala dated 18.8.77. The Will was executed on 6.8.72.

15. A further synopsis of the disposition of her property is essential to grasp the physical and mental power including the surrounding circumstances, in regard to the execution of the Will.

16. Amiyabala had two immovable properties which are known and numbered as 25 & 27 Chowdhury Lane, Shyambazar, Calcutta-700004. She bequeathed under the Will half of the premises No. 25 Chowdhury Lane, Calcutta to the heirs and heiress of Niladri, since deceased, absolutely and the other half of the said premises went in favour of Samarendra for life and on his death the said half will devolve upon the sons of her other three sons among whom Samarendra is bachelor. The premises No. 27 went to the shares of Dilip and Pratip in equal share absolutely and for ever. She bequeathed her immovable properties namely cash and ornaments besides other immovable properties to her sons Dilip and Pratip in equal share.

17. The cynosure of the case is as to whether Amiyabala had a sound disposing mind or in other words there was due execution of the Will.

18. To drive home the point, the pathology of the evidence on adduction by the parties should be looked into in order to appraise the worth behind the respective claims. Therefore, we should start from the premise of her health at the relevant time. The Will imprinted was executed on 6.8.72 at the residence of the testatrix. There are three attesting witnesses viz. P.W. 1 Prodyut Kr. Mallik, Abhijit Borat, son of late Amiya Borat and Kamal Kr. Roy. Of the three attesting witnesses, it is needless to repeat that P.W. 1 Prodyut Kr. Mallick and Abhijit Borat are closely related to the parties under the Us. Both the attesting witnesses are the grandsons of late Amiyabala.

19. The witnesses who have given an account of her health for the pro pounder at the time of execution of the Will during the trial are P.W. 1, Prodyut Kr. Mallik and P.W. 2 Pratip Sen, the propounder.

20. To dislodge the claim of the propounder, the objector Nilendu has examined three witnesses including himself. They are D.W. 1 Nilendu Sen, D.W. 2 Siba Prasad Dey and D.W. 3 Ganesh Ch. Pal. When we advert to the evidence of the parties, it is glaring from the evidence of P.W. 1 Mr. Mallik who has repeatedly canvassed in his evidence that the death of Prakash Ch. Mallik, the son-in-law and the premature death' of Niladri did not over power her mental faculties. He has cultivated in the bosom of his evidence. 'She was physically and mentally capable. She was quite fit. She could take firm decision at that stage.' About the physical competence of Amiyabala at the relevant time Mr. Mallik was subjected to gruelling cross-examination by the appellant but he never withered away at any stage of the cross-examination. When we go through the questions and answers of Mr. Mallik's evidence (vide questions and answer Nos 39 to 60), it is discernible from each of them that the health of Amiyabala was not impaired at the material point of time.

21. Time and again, when we read between the lines of the evidence of Mr. Mallick and with the aid of the learned counsel for the parties right from question Nos. 36, 39 and onwards and that of the deposition of P.W. 2 Pratip (vide

questions and answers No. 14, 15 & 34), it is notorious that they unreservedly prove that Amiyabala's health was not in a state of disrepair. The preparation of food by her, reading of newspaper and locking up in telephonic conversation with her daughters, as excavated during the cross-examination, lead to an unfailure assurance that her physical fitness and mental alertness were not at all crippled nor they kept any low profile. She was almost blind, quite deaf, under great emotionally distress, was subject to insance delusion and was suffering from melancholia and senile dimentia, as a result of several tragic events are mere allegations on paper without anything more which have been conjured up to stave off the probate.

22. D.W. 1 Nilendu could not furnish any satisfactory evidence of her physical draw backs. He has said glibly enough that he was residing at 27, Chowdhury Lane until they were thrown out of the premises. But no evidence both oral and documentary is forthcoming about their being in the premises till 29th of June, 1973. The contention of Mr. Mukherjee, therefore, is ill founded that she had no physical and mental alertness at the relevant time.

23. There is a good deal of reason to accept the contention of Mr. Bose, appearing for the propounder-respondent. He has taken us through the judgment, Will and the evidence which on close perusal prove that the boot is on the other leg.

24. The learned Judge rightly took into consideration about the physical fitness of Amiyabala to execute the Will and the conclusion thus arrived at does not require to be disturbed.

25. The next thing which states at our face is a very vital aspect of the matter pertaining to reading over of the contents of the Will and their translation to Amiyabala into Bengali for substantial understanding about the disposition of her property and their nature thereof.

26. P.W. 1, Mr. Prodyut Kr. Mallick has meticulously given times without number that he explained the impugned Will to her material grandmother in Bengali. He was not spared by the objector who subjected him to searching cross-examination on this court. The cross-examination of P.W. 1 about the reading over of the

contents of the Will and its translation to Amiyabala in Bengali did not suffer from any dent. On the contrary, it stands proved by the evidence of the objector D.W. 1, 'He is equally disinterested because he did not receive anything out of the Will. The answer to question No. 168 of the objector's evidence is that P.W. 1 was disinterested as he has nothing to gain from the transaction. In the perspective of the above, and that of the evidence of P.W. 1 and P.W. 2 when read in conjunction with the evidence of the parties, it becomes a faint attempt of the objector at the trial that reading over of the contents of the Will and its translation into Bengali with the object of explaining to her the disposition of her properties as recounted by P.W. 1 in his evidence excite any suspicion. D.W. 1, has admitted that Abhijit was disinterested as he had nothing to gain. A disinterested witness will never withhold the truth to serve the cause of the propounder and others who have laid no objection as to the grant of the probate. To the best of his ability, as stands out from the evidence, he explained the Will and the contents thereof to her in presence of Abhijit and Kamal which is not being shaken in the least. It has been extracted during the cross-examination that he explained the English version of the Will into Bengali to her. The mode and manner adopted by P.W. 1 in explaining the contents of the Will do not smack of any foul play nor any evidence has been elicited that he had any oblique motive behind the reading over and the translation of the English version into Bengali. P.W. 1 has given a very straight forward evidence who did not fumble for truth when he was cross-examined.

27. He was cross-examined regarding reading over of the English version of the Will followed by its translation in Bengali to her for her comprehension.

28. Reading over and translation of the English version of the Will in Bengali were mechanical and defective as contended by Mr. Mukherjee is absolutely illusory for the reason indicated above. Incidentally, he has argued that Amiyabala never knew what she was doing or what passed through her mind at the relevant time. We cannot help returning to the evidence of P.W. 1 and D.W. 1 where he has adhered to that P.W. 1, Prodyut Kr. Mallik, Abhijit and Kamal Kr. Roy were all disinterested. No motive was ascribed to them for their being witnesses to the Will in question in the evidence of Nilendu, the objector. It is, therefore, patent and proved that such disinterested attesting witnesses were not actuated by any

motive both overt and covert. The tall claim of the appellant that the circumstances in which the Will in question was executed was shrouded with mystery. It is an argument without any substance behind it. In the background of the unambiguous and unequivocal evidence of Nilendu, the reading over of the contents of the Will and its explanation to Amiyabala never projected any unnatural shadow on the case of the propounded Pratip. It also dismisses the claim of the appellant that there was any undue influence, misrepresentation, & coercion. The case built up by Nilendu in his affidavit that the endorsements 'reading over & explained' were incorporated in the absence of the deceased at the behest of the propounder is a figment of fancy. However, the appellant may say in his argument, the evidence is honest about the reading over and translation of the English version of the Will into Bengali to her. More so, the appellant could not extract any material from the record which could afford an irresistible conclusion that the reading over was mechanical and defective.

29. In our view, it is a distant claim of the appellant that Amiyabala had no physical capacity to execute the Will. Necessarily, the evidence relating to reading over of the disputed Will to her followed by its translation into Bengali does not verse on suspicion, as the evidence is very much potent to dislodge such claim of the appellant.

30. Mr. Mukherjee has also put forth an argument that execution of the Will is beset with suspicion as the onus lies heavily on the appellant has not been adequately discharged. To deal with this vital aspect, of the matter dwelling on the question of the execution of the Will, the only answer that could be gathered in support of the respective claims of the parties is the evidence.

31. Elaborating the contention, he has canvassed about the absence of testamentary capacity of Amiyabala to which we have done away with the matter copiously.

Next a furore has been raised regarding the execution of the Will. According to him, the evidence is very weak that the execution of the Will is, therefore, not free from holes. On the other hand, the evidence adduced by the parties hovers suspicion as there was hush in the evidence of the propounder and P.W. 1. But

when we read through the evidence along with the learned Counsel for the parties, it stands out that P.W. 1 has stated in his deposition as reflected in the answer to question No. 70, 'first my mother signed, then I signed with my note and then I signed here, then Abhijit Borat signed and then Kamal Roy signed.' The answers following thereafter, in successive questions even do not remotely suggest or prove that there was no due execution of the Will or any suspicion crept in surrounding the execution of the Will. Besides, the evidence of D.W. 1 Nilendu is that he was not acquainted with the hand writing of his paternal grand mother.

32. Therefore, the authorship of the signature and the genuineness appearing in the several pages of the Will could never be disputed. We brush aside the contention of the appellant that the signatures were not of the testatrix. The authenticity about the genuineness of the signatures as found by the learned trial Judge appearing in the Will was not seriously challenged by the appellant before us and the arguments of the learned counsel for the appellant was mainly confined to the point that due execution of the Will not being proved by the propounder and the propounder not having been able to remove the suspicious circumstances in which the Will was sought to be executed, it is the conclusion of the appellant that in such a background probate in respect of the impugned Will ought not to have been granted by the court of probate.

33. Let us now examine the contention raised by the learned counsel appearing for the appellant in this context. The foundation of the first contention is that the age of the testatrix was not correctly stated by the propounder and P.W. 1 in their testimonies with the object of deliberately concealing the evidence about the physical and mental infirmity of the testatrix and her being a victim to undue influence.

34. The second point raised which proceeds from the first limb of submission in this regard is that D.W. 1 deposed, inter alia, to the effect that she had no mental capacity to execute the Will and signed the same. In refuting the claim of the propounder about due execution of the Will, it has been studiously canvassed that she was suffering from both physical as well as mental incapacity at the relevant time and hence, a Will practically depriving the number of heirs of Niladri in

respect of the unencumbered property was not only highly unnatural but also unbelievable. It is manifest from the disposition that the heirs of the eldest son Niladri were given such property which was saddled with tenants vis-a-vis the property that was given to the other heirs of Amiyabala was free from encumbrances. This point was further developed to the effect that since Amiyabala had no testamentary capacity because of her mental weakness, it is not possible as she could not move out of her house and also in view of the claim that she was a Pardanashin lady, got the Will prepared according to her own dictates or desires. Moreover, Amiyabala could neither sign nor exercise a free mind. The other contention is to the effect that the propounder was vitally interested like his surviving brothers and in view of the evidence forthcoming from the propounder himself that he took a leading part or role in the matter of preparation of the Will, this was sufficient suspicious circumstance for a court of probate to refrain from granting the probate thereof. In elaborating the point, it has been canvassed that the discrepancy in the evidence about the state of affairs preceding the execution of the Will as given by propounder and with held by P.W. 1, one of the attesting witnesses to the Will affects the credibility of the evidence.

35. The suspicion further densed for the contradictory evidence as to the discovery of the Will. Last but not the least, another contention has been urged that the death certificate divulges or discloses the infirmity of the testatrix to a higher degree for which support has been sought for from there by the learned counsel for the appellant that there was no due execution of the Will. Therefore, the account of the due execution of Will as rendered by P.W. 1 & 2 by the reason of falsity, embellishments and contradictions cannot be accepted. It generates further suspicion which the propounder could not remove.

36. The above contentions canvassed by the learned counsel for the appellant do not hold any water as they are mere contentions without any material behind them. The variation of age does not indicate any suspicious circumstances nor such innocuous statement has cast any reflection on the Will and her capacity to execute. The death certificate of Amiyabala is sought to have been made as capital to forestall due execution of the Will. But, it is needless to repeat that the Will was executed on 6.8.72 and she passed away on 18.8.1977. There is no

evidence on record that she was within the grip of general debility at the relevant time which arrested her power of comprehension. Cause of death as reflected in the death certificate does not lead to an inevitable conclusion of her suffering from general debility at the relevant time. We are of the view, in view of the evidence of D.W. 1, that the attesting witnesses were disinterested and, therefore, there could be no reason to conceal the truth by the disinterested attesting witnesses. Besides, the cause of death as disclosed in the said certificate has no proximate relation with the execution of the Will,

37. Mr. Shiba Prasad Dey, D.W. 2, is a procured witness who has not disputed that in course of his visit to that house in connection with repairing. His evidence neither suggests that Amiyabala was stricken with illness or mental infirmity. On the other hand, his evidence is, 'but before I went there Dilip used to go and talked to his mother that Shiba has come.' Thereafter, I used to go there.' This evidence of Shiba Prasad is a last nail to the coffin of the case of the appellant. In our view, this witness has been introduced in evidence about whom a single question was not asked during the examination of Mr. Mallick and the propounder about his visit to the premises of Amiyabala. This evidence in our view instead of helping the appellant, helps the respondent.

38. Much has been said that the disposition of the property by Amiya bala was discriminatory as the recitals in the Will are suggestive of the fact that the property both movable and immovable were not evenly distributed amongst the sons and the heirs of the pre-deceased son amongst which non-consideration of provision for the unmarried grand daughter is of great significance. But, we should not be oblivious of the facts that it is most natural for a testatrix to bequeath all her properties to the heirs with whom the testatrix had been residing rather than to those with whom there is no evidence of any association. We have rummaged the entire evidence of the parties. There is no shred of obscurity that the eldest son along with his family members ever resided with the mother. It is pre-eminently seen from the evidence that the eldest son used to put up at railway quarter in New Alipur until his retirement and, thereafter, he shifted to a flat at Gariahat on account of his superannuation. However, considering the state of affairs, it is seen that the recitals in the Will about the disposition of the property cannot be

adjudged obliquely. As herein before mentioned, she bequeathed half of the premises No. 25 Chowdhury Lane to the heirs of Niladri, since deceased, absolutely but she was not unconscious of the other half for which she made a further disposition in favour of Samarendra, a bachelor for life and on his death the said half Will devolve upon the sons of her other three sons viz. Niladri, Dilip & Pratip in equal shares absolutely and for ever. Therefore, the disposition of immovable property in the manner, as rectified in the Will, itself could never countenance any unnaturalness overt or covert.

39. In the background of the above, it cannot be said that the testatrix was enfeebled by infirmities or disease that she had lost memory in making disposition of the property.

40. Mr. Mukherjee has seriously disputed in his argument that the role played by the propounder Pratip, is really suspicious as he failed to furnish a satisfactory explanation about the preparation of the Will and the execution thereof. Therefore, the next question which survives for further consideration with circumspect eyes is with regard to the part played by the propounder in the matter of testatrix's making out a Will and the presence of Pratip in the premises at the time of execution of the Will by which according to Mr. Mukherjee, he derived adequate benefit to the detriment of others.

41. It is no doubt true that there is rule that where a Will is prepared by a party who takes a benefit under it, that is a circumstance which forms a just ground of suspicion and requires clear and satisfactory proof that the instrument contains the real intention, of the testatrix. The principle for this rule is that when the person who can prove a fact has a strong motive for asserting it, his evidence must be received with greater caution than that of a disinterested witness, and, therefore, every circumstance of legitimate suspicion which is found to exist must make any reasonable man less ready to accept his testimony.

42. Explaining this rule in *Harnes and Anr. v. Hinkson* AIR 1946 PC 146, their lordships of the Privy Council observed that this rule warns the Judge that in such circumstances the evidence of the witness who drew the Will, must be received with caution ; but this does not mean that it must be rejected altogether. The

burden of proof may be discharged. The adverse presumption may be rebutted. Such rules in fact only enjoin reasonable scepticism, not an obdurate persistence in disbelief. These rules do not demand from the Judge, even in circumstances to grave suspicion, a resolute and impenetrable incredulity. In short, a Judge is never required to close his mind to truth.

43. It goes without saying as it is well settled that once it has been proved that a Will has been accepted by a person of competent understanding, the burden of proving that it was executed under strain circumstances is on the party who alleges it. Such instances are patently absent in the case of the objector which was adequately taken note of by the learned trial Judge. The case of undue influence and coercion is foreign to the case of the objector. The case of the objector falls on a different premises i.e. the due execution of the Will.

44. Mr. Mukherjee has next contended that the impugned Will docs not make any provision for the marriage of the grand daughter born of the loins of Niladri. It is suggestive of the fact that the mind of the testatrix about the even disposition of her properties both movable and immovable was not at all reflected. Therefore, the naturalness is in dispute. It was the recitals of somebody who has keen interest in disposition. To trace the truth or otherwise of the submissions made by Mr. Mukherjee, if we hark back, the recitals in the Will unerringly point out the mind of the testatrix. The naturalness of the Will is above board. To gather the naturalness about the disposition of the Will, the intention of the testatrix could be gathered from the totality of the circumstances towering from the recitals thereof. It transpires from the recitals that she wanted to keep the immovable properties confined amongst the male descendants. It shows meticulously how active was the mind of the testatrix at the material point of time. She never wanted that the immovable properties should be the subject-matter of devolution of interest, so far as the female members of the same families are concerned. That is why, 'site made the provision in the Will that the immovable properties after the death of Samarendra would devolve upon the sons of her other three sons viz. the sons of Niladri, Dilip & Pratip in equal share and for ever. It exposes the high degree of comprehension which Amiyabaia had at the material point of time. The conscious disposition of the immovable properties amongst the male descendants, in our

view descends as a boomerang on the case of the objector Nilendu.

45. It is needless to say that the court is obliged to make an endeavour in order to ascertain the intention of the testatrix. This intention primarily could be gathered from the language employed in the document which is to be read as a whole but not in isolation. It is also the duty of the court to make an assessment of the surrounding circumstances viz. the position of the testatrix, her family relationship the probability that she would use words in a particular sense and many other things which are often summed up in the somewhat picturesque figure. 'The court is entitled to put itself into the testatrix's arm chair.' It is nothing but an aid to arrive at a right conclusion while interpreting the Will. Nevertheless, it is a solemn duty of the court to carry out the intention as manifest or expressed in the Will and none other.

46. It should not also slip away from our mind that the case does not represent non-inclusion of the heirs of Niladri intestamentary disposition.

47. In the background of the above, the disposition of the immovable properties cannot be viewed with suspicion and inequalities,. It repels the contention of Mr. Mukherjee that she was in failing health. There is no material on record which could be taken note of by us that the propounder took a lion share by the disposition of the immovable properties so made by Amiyabala. True it is, if the propounder takes a benefit under the Will, that itself would be a circumstance exciting the suspicion of the court *Surya Narayan Murti v. Surama and Anr.* AIR 1947 PC 169. On analysis of the evidence we find that there is no satisfactory material to establish that Pratip who is deriving benefit under the Will really took no vital role in the act of execution of the Will under challenge. It has been elicited by the objector during the cross-examination of Pratip in answer to 89, 'She had many persons who were lawyers. Her grandson, Pradyut Ch. Mallick is a lawyer. Bikash Chandra Mallik is a lawyer.' It fosters belief when considered with the evidence of D.W. 3 that avenues were explored by her for preparation of the Will. The name of Pradyut in answer to question No. 89 of Pratip's evidence in an accidental-slip or mistake or may be the result of typographical devil. To petter all doubt we read through the evidence of the parties and they lend considerable assurance that it

would be Prodosh Kr. Mallik. The evidence of G, C. Pal may very well provide us with a clue that Mr. P. K. Mallick, Barrister-at-Law, who had his Chamber in the office of Mr. G. C. Pal who might have given him the Will to type out. Besides, the answer of Mr. G. C. Pal in relation to question No. 18 of his deposition where he could not definitely say if Mr. Mallick gave it to him for typing or he gave it to the typist. He has highly claimed in his evidence in answer to question No. 18 of his deposition, 'this is my faint recollection. It was about 10 years old.' Therefore, Mr. G. C. Pal did not deny his liability affirmatively so far as the typing out of the contents of the Will is concerned. Thus, preparation of the Will verges on darkness is not true.

48. The first case relied on by him is *Sarad Kumari Bibi v. Sakhichand and Ors.*, 56 Indian Appeal 62 : AIR 29 PC 45. There, the lordships held that onus is on the propounder that the person executing the Will knew and approved the contents of the Will. In our view, there is overwhelming material that the propounder substantially discharged the onus through him and his witnesses. The evidence as to surrounding circumstances unwittingly add flavour to the case of the propounder that Amiyabala knew about the contents of the Will and duly approved of the same before the executed the deed.

49. We have dealt with the matter copiously and in view of the clear and unambiguous evidence and circumstances surrounding the execution of the Will, the propounded has left no stone unturned to prove such knowledge and approval of the contents of the Will by her which she executed.

50. The next case relied on by him is the case *Venkatachalcty Ayenger v. B. N. Thimtnaiamma and Ors.*, : AIR 1959 SC443 where it was held that it was the obligation of the propounder to remove suspicion of the pro-pounder took a prominent part in the execution of the Will and has received substantial benefit under it, that itself is generally treated as suspicious circumstances attaining the execution of the Will. There is no slender material on record that the propounder took the lion share under the disposition or he was instrumental in making preparation of the Will followed by its execution. Nilendu has admitted on all hands that Mr. Mallick and Mr. Barat were disinterested who had nothing to gain from the

Will itself by disposition. The submission in the background of the aforesaid evidence although repeated proves the submission is abortive. It may be legitimately inferred, that she might have prepared the Will through her grandson dwelling on the legal profession and the contribution of Mr. G. C. Pal, P.W. 3 could hardly be repelled and expelled from our consideration. Mr. Pal has not refuted clearly that his name was used behind the episode. On the other hand, the evidence of Mr. Pal is suggestive that his action had some nexus with the preparation of the Will spoken of. The next case cited by Mr. Mukherjee is *Nittle v. Nye* (1959) 1 Ail England Reporter 552, and *Rampiyari v. Bhagwant*, AIR 1990 1742. In the case of *Nittle v. Nye* (supra), it was the knowledge of the act and the approval is absolutely essential behind the execution of the Will. But this case in our view, is not of any assistance as the facts emerged from the evidence satisfactorily proved that she was in a state of health which did not render her incapable of understanding of her act and disposing of her property and she was not also deprived of her power of reasoning. The case of *Rampiyari v. Bhagwant* (supra) in the background of the facts does not come to the help of the appellant.

51. The fact of the case of *Rampiyari*, in short, is that the father who executed the Will without any rhyme or reason disinherited the daughter with whom he had no estrangement of feeling the genuineness of the Will was affected when the Will was executed, while he was under the guilt and the witness had no talk, with the testator. Therefore, he had no scope to examine the physical fitness of the testator to execute the Will. Happy marriage or financially well settlement of appellant could not add to genuineness of the Will.

52. The case of *Pratip Sen* is altogether different. None of the surviving daughter-in-laws or their progenies raised any voice of protest nor the daughter of the eldest son of *Amiyabala* was vocal about the genuineness of the Will. Therefore, the case of *Rampiyari* is appropriately inapplicable to the facts and circumstances of the case.

53. The case of *Batten Singh v. Amirchand* 1948 (AC) 161 : 52 CWN 51.1 has been relied on by Mr. Mukherjee. It has been held that a Will prepared under instruction of the testator, such instructions cannot be viewed with distrust. Though

at the time of execution, the person executed the Will that only the Will has been prepared in accordance with the instructions. But here there is no case made out during the trial that instruction of the Will was given to a solicitor but only through an intermediary. Even, the highest premium is paid to the submission made by the learned Advocate for the appellant still then by the clarity and plain languages employed in the Will and also by the reason of its translation into bengali by a person with whom neither the propounder nor the objector was at daggers drawn could something import of his own extraneous to the instruction and, therefore, the disposition cannot be viewed with suspicion. Abundant caution flows from the disposition. The claim of highest degree of comprehension by the nature of disposition earlier discussed would suggest that her degree of comprehension neither kept any low profile nor any low key. The female members of the family when kept out of the benefit of the disposition, it is glaring that she never wanted to pass her property on to the female members. It suggests, therefore, her ample awareness of the disposition and power of foreseeability. After marriage of the granddaughter it would be legitimate to infer that stranger should not be introduced who could become a problem in the family in near future. Simply because the provision for marriage of the granddaughter has not been made, it does not evoke suspicion and for that reason alone the Will should fail. It is nothing but a cry indespair.

54. The case of *Garnett Botfield v. Garnett Botfield and Ors.* 1901 (Probate 335) has been relied on by Mr. Mukherjee. The facts as disclosed in the ruling under reference have no bearing on the present case as there is no evidence on record that the contents of the Will were not read over and the testatrix did not know about the contents of the Will. Therefore, the ratio decidendi of the above case could not be made applicable to the facts of this case. The next case relied on by Mr. Mukherjee is *Hormasji Kharsetji Sethna v. Dhanjishaw Ratanji Lalcaca*, the Bombay Law Reporter 569 = 7 IC 657. The court held there that mere knowledge was not sufficient, there must be approval of the disposition under the Will by the person executing it. We have given our anxious consideration to the submission more often than one send we do not like to keep ourselves detained over the subject.

55. Mr. Mukherjee has next contended that no instructions were given to anybody nor the draft produced. He relied on the case of *Kuppayammal v. Ammal Animal*, ILR 22 Madras 345. Their Lordships in the said case held that it is the obligation of the propounder to disclose in the petition, the assets which are likely to come in the hand of the propounder and the propounder was not relieved and obligation to prove the execution of the Will and the contents understood by the testator. The propounder has proved all to the best of his ability. Therefore, the ruling under reference helps the respondent to a great extent.

56. It is next contended that non-production of the draft does not lead to an inevitable conclusion that the disposition was contrary to the impugned Will. It does not suffer from any tilted ambiguities which a man of ordinary prudence could gather its meaning. It bore a standard form bereft of complexities. The disinterested evidence of Mr. Mallick, the dis-interested attesting witnesses and the nature of disposition when combined into one, there could be no reason to hold that there is manifest illegality in the Will itself. He tried to borrow information from Samarendra who has not been examined in this case for him. The next case relied on by both the parties is *Chinmoyee Saha v. Debendralal Sahu and Ors.*, : AIR1985 Cal349 .

57. In the background of the factual exposure as set out in paragraph 3 at page 351 of the ruling under reference that this is not a case crowded with suspicious circumstances multiplied by one after another as strewn in several paragraphs of it. Their lordships in consideration of all the circumstances as agitated and after close analysis of the judgment of the Additional District Judge who dismissed the suit on the ground that the suspicions surrounding the Will had not been removed by the propounder granted probate. An exhaustive list of facts of the ruling under reference may occupy -a few pages more but some of such facts are given which are not exhaustive but merely illustrative. As for example non-inclusion of sons and daughters of Jagai, absence of registration, testamentary capacity, undue delay in presentation, of the probate. Even in the background of the overwhelming facts and circumstances, their lordships made a due consideration of them and by judicial pronouncement allowed the appeal and granted the probate. But, there is one important observation of their lordships which could hardly go unnoticed. Their

lordships while disposing the appeal held in support of non-inclusions of the heirs of Gagai from the Will that the Will is the Will of the testator and he has under the law, the freedom to give property to whomsoever he likes.

58. What strikes the court as an eccentric or an unjust or an unnatural disposition can certainly be taken as a consideration on the main question of finding out whether the testator was acting as a free agent and with a sound disposing an understanding mind. But once it is establish that the testator was free and had a sound disposing mind, as in the instant case the testatrix, it is no longer the duty of the court to go further to inject its own ethics of what is or is not a moral or a fair disposition according to the Court's own standard.

59. The facts of the case at hand do not answer that the disposition was eccentric, unjust and unnatural. In our view, the ruling under reference cannot animate the claim of the appellant.

60. The next case relied on by Mr. Mukherjee is Kalyan Singh v. Smt. Chhoti and Ors., : AIR 1990 SC396 . The case under reference constitutes a case of absolute suspicion as the Will was not produced for a long time although the party got the opportunity to produce the same for ascertaining the title of the plaintiff to the property. The plaintiff however, could not remove the suspicion and court came to the conclusion that the plaintiff failed to discharge his onus. Therefore, no new question of law has been decided in the case as it is the requirement of law to prove the due execution of the Will.

61. In the background of the case at hand we could only say that the execution never fail foul of Section 61 of the Succession Act, 1925.

62. According to the Privy Council dictum as laid down in the case of Harmess and Anr. v. Hinkson (supra), that the first rule about the conscience of the court has to be satisfied despite assessing the evidence of the witnesses from the propounder's side about the Will. The evidence of P.W. 1, Prodyut Mallick, P.W. 2 Pratip Sen and D.W. 3 G. C. Pal is convincing enough and we do not find anything to reject the same.

63. We are satisfied that initial suspicions were unfounded and the propounder has been successful in discharging his burden of proving the Will which expressed really the free and capable mind of Amiyabala in this regard. In our view, there is no misappreciation of every evidence by the court below which has drawn correct inference from the fact found that are reasonably justified.

64. We may add that due execution of the Will by Amiyabala and attestation of her signature by requisite number of witnesses having been proved, it is not necessary to speculate the reasons for execution of the Will by her. It is natural disposition as found from the facts and circumstances of the case. The points raised are, thus, disposed of.

65. In this view we uphold the judgement and decree of the learned trial Judge and dismiss the appeal, without any order as to costs.

66. The Counsel for the appellant prays for stay of operation of this judgment and order, such prayer is refused.

P.K. Majumdar, J.

67. I agree.