

Pratap Bhattacharya Vs. Asoke Bhattacharya

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Court : Kolkata

Decided On : Sep-06-2006

Reported in : 2007(2)CHN243

Judge : Kalyan Jyoti Sengupta and ;Sanjib Banerjee, JJ.

Acts : [Indian Succession Act, 1925](#) - Section 63; ;[Evidence Act, 1872](#) - Sections 6, 18, 32, 33 and 68

Appeal No. : F.A. No. 297 of 2002

Appellant : Pratap Bhattacharya

Respondent : Asoke Bhattacharya

Advocate for Def. : Diptendu Majumder, Adv.

Advocate for Pet/Ap. : Anit Kumar Rakshit and ;Pasupati Sana, Adv.

Disposition : Appeal dismissed

Judgement :

Kalyan Jyoti Sengupta, J.

1. This was an appeal against the judgment and order dated 18th November, 2000 passed by the learned Trial Judge in Probate Suit No. 8 of 1989 whereby and whereunder letters of administration were granted with the Will annexed to the

probate application.

2. The facts of the case leading to filing of this appeal and briefly stated hereunder.

3. Asoke Bhattacharya, the sole respondent herein, on or about 19th May, 1988 applied for grant of letters of administration with the copy of the Will annexed, of his father late Purna Chandra Bhattacharya, Purna died on 28th September, 1979 leaving behind a document said to be last testamentary one dated 2nd August, 1974. The said testamentary instrument is described to be a holograph Will which was also registered in the office of the Sub-Registrar of Serampore on the same date. Purna had married twice. His first wife Chameli, pre-deceased him in 1930 and in 1932 he married Ashalata Debi. His first wife Chameli gave birth to three sons viz. Pratap who is the appellant before us, Kapil and one Chandra Bhusan, a predeceased son and a daughter Shefali. His second wife Ashalata gave birth to two sons viz. Asoke, being the respondent and Amiya who also died by this time leaving his surviving sole widow Jayanti and his son, Amitabha and five daughters viz. Dipali, Sadhana, Aruna, Ruby and Bandana.

4. By the said Will Purna had bequeathed all his properties left by him at the time of his death in favour of his second wife Ashalata Debi exclusively and he also appointed her as sole executrix for obtaining probate of the said Will. After her death, in terms of the Will, all his estate and properties if not disposed of by his second wife Ashalata during her life-time, were devolve upon the persons in accordance with the specification and stipulation made by the said testator in his Will. It appears from the text of the Will that Asoke and Amiya, being the two sons out of the second marriage, have been given their proprietary interest in the estate as specified in the Will. The testator Purna did not deprive Kapil being the son through his first wife. He has deprived the daughters of any proprietary right, title, interest in his estate. However, they have been given right to stay and use in the event new construction is made on the second floor of the main building by Amiya, the fourth son, in his allotment. Pratap, the appellant has been absolutely deprived for the reasons mentioned in his document. It further appears from the text of the document that the at the time of execution, attestation and registration of the same, the appellant was allowed to stay temporarily in a tile shed room situate

within the premises.

5. Admittedly there has been a delay in filing the application as the deceased died on 28th September, 1979 whereas the application was filed on 19th May, 1988. This delay is sought to be explained by the applicant/ respondent stating that existence of this instrument was not within his knowledge and it was discovered while searching his deceased mother's trunk. Actually, this search was necessitated to be made for finding a draft deed of gift required to adduce same in evidence in Title Appeal Nos. 112 and 113 of 1984 in the Court of Assistant District Judge. The testamentary document was found on 8th May, 1988.

6. Despite citations being issued upon all the heirs and legal representatives who could have inherited in case of death intestacy none contested the proceedings except the appellant. In fact, it appears from the records that some of the heirs or heiresses filed no objection in writing. We need not specifically mention who filed written consent and who did not as it is not much relevant in testamentary proceedings. The appellant alone contested taking various pleas, the substance of which is as follows:

(a) The said Will was not executed neither registered by his father Purna nor was there any attestation by any witness.

(b) Even if it is proved the document was executed by the testator it is nothing but a product of fraud, coercion, undue influence and further mental force exercised by the petitioner (respondent) and his step mother Ashalata, Amiya and Kapil in collusion and unholy assistance of the alleged scribe and alleged attesting witnesses who are all their henchmen and men under their control at a point of time when the testator was fully under their control and clutches and influence and acting confidence.

(c) Such fact of coercion and fraud will also appear from the fact that a deed of gift dated 25th September, 1978 was caused to be executed and registered fraudulently and collusively and on perpetration of fraud, undue influence, force and coercion and it was declared to be as such by a competent Civil Court, viz. learned Munsif, Second Court in Title Suit Nos.285/1980 and 15/1980.

(d) Moreover, the disposition of the Will is wholly unnatural and contains all falsehood about him and his conduct.

(e) The testator had no mental capacity to execute his Will due to acute suffering from high diabetes and high blood pressure, severe trouble in the one eye (the other eye having gone blind before 1960) and various other diseases.

(f) The alleged story intending to set up for explanation of delay is unbelievable, false and concocted. Delay in filing of the application for grant itself suggests ingenuineness of the document.

7. In view of the aforesaid serious challenges the testamentary suit was contested and heard. Considering the respective pleading of the documents the learned Trial Judge framed following issues:

(a) Is the suit maintainable in its present form?

(b) Is the alleged Will dated 2.8.1974 fraudulent one?

(c) Has the Will been duly executed and attested?

(d) Is the plaintiff entitled to get a decree as prayed for?

(e) To what relief, if any, is the plaintiff entitled?

8. Before the learned Court below apart from examining himself the petitioner/respondent has examined one Binapani Sinha, P.W. 2, and one Ajit Kumar Bandopadhyay, P.W. 3. The second witness was an assistant of the Additional Sub-Registrar at Serampore and the third witness was described as the attesting witness. On the other hand, the appellant has no other witness except himself.

9. On appreciation of evidence and examining the documents the learned Court below was satisfied that the said document which was a holograph one, is the last Will and testament of Purna. According to him, his conscience was clear about the lawful and valid execution, attestation and valid registration of the same. He disbelieved the case made out by the appellant as to testamentary incapacity,

fraud, coercion, collusion and he thereafter granted the relief prayed for. However, we find that the learned Trial Judge has granted probate instead of granting letters of administration with the copy of Will annexed, contrary to the prayer. At the every outset we are constrained to comment that this ordering portion of the judgment of the learned Trial Judge is the result of total non-application of mind.

10. Assailing the aforesaid Judgment and order Mr. Anit Kumar Rakshit, learned Advocate appearing for the appellant, while pressing the grounds mentioned in the memorandum of appeal, contends that from the evidence adduced by the respondent it will appear that there has been no lawful valid execution of the Will. He submits that a Will is required to be executed by the testator with at least two attesting witnesses in accordance with the provision of Section 63(c) of the [Indian Succession Act, 1925](#) (hereinafter referred to as the said Act).

11. Respondent Asoke could not prove anything else apart from proving the signature of his father going by his own testimony. He was not present at the time of execution and attestation of the Will. The sole attesting witness who came to prove attestation and execution of the Will admittedly was not present at the time when another attesting witness viz. Monmotha Bhattacharya is alleged to have put his signature on the document. So his testimony regarding attestation and execution is of no value at all. He contends further that it is true under the provision of Section 68 of the Evidence Act one of two or more attesting witnesses is just enough to prove lawful execution and attestation of the testamentary instrument but he must prove that the Will was executed in accordance with the provision of Section 63 of the said Act. The sole witness has candidly said that he has not seen Monmotha to sign as an attesting witness or the testator had signed in presence of Monmotha. His testimony that testator is alleged to have told him that Monmotha had put his signature already, rather he acknowledged the signature of Monmotha as one of the witnesses is not admissible nor relevant as a piece of evidence.

12. According to Mr. Rakshit, it is thus clear that the document was not proved all as regards attestation and execution. The learned Trial Judge has ignored this aspect erroneously.

13. He says that the attestation and execution of the Will was shrouded with suspicious circumstances as firstly there was a delay of more than 9 years in making this application. Had there been a genuine Will there was no need of a deed of gift which was declared to be a void, and invalid document by the competent Court of Law. In support of his submission he has produced a certified copy of the Judgment of the said two title suits which we have permitted as it is mentioned in the pleading, to be produced. This statement of fact clearly suggests the intention of the testator was not to execute any testamentary instrument.

14. Learned Trial Judge did not consider this aspect of the matter. He contends further that registration of the document is of no value when there exists suspicious circumstances attended to the execution and attestation of the Will. The onus is very heavy on the part of the propounder and such a burden of proof should have been discharged satisfactorily. Unfortunately he has failed to do so. In spite of all this the learned Trial Judge has wrongly granted relief. In support of all the aforesaid contentions he has relied on the following decisions before us viz. AIR 2003 SC 761, head note 'C' AIR 1963 SC 567, AIR 1965 SC 354 AIR. 1959 SC 443 AIR 1977 SC 74 AIR 1988 Delhi 273 AIR 1980 P & H 83 and AIR 1991 Karnataka 86.

15. learned Counsel for the respondent, on the other hand, contends that the learned Trial Judge has rightly granted relief. He submits that there was no illegality or infirmity in execution or attestation of the Will. Registration of the Will proves prime facie genuineness of the document particularly when the document itself is a holograph one. He submits further that it will appear from the evidence that the testator himself was the scribe. He came to the attesting witness P.W. 1 and in his presence he put his signature and added kaifiat on the document. Thereafter, he himself went to the registration office for registration. P.W. 2 has proved the factum of registration. When the Will was executed the testator was advanced in age, The testator himself said that another attesting witness viz. Monmotha had already signed on the Will. Thus, all these facts or series of facts bring out naturalness and genuineness of the document. The case of mental and physical incapacity, fraud, coercion, undue influence were not proved by the defendant with cogent evidence apart from making oral statement before the Court

in his evidence. No document has been brought to show that the handwriting of the last document and the signature thereof were not of the testator. In fact, the appellant for a long time leaving his father had been residing elsewhere. He married twice. Testator himself has explained as to why he had been deprived. If the disposition of the document is read carefully it will appear that there is no unnaturalness. He has given reason as to why he had not given any proprietary right or interest in favour of any of his daughters.

16. As far as delay is concerned he submits that it has been sufficiently explained with cogent evidence that the existence of the document was not within the knowledge of the propounder and it was discovered under the facts and circumstances stated in the petition as well as in his evidence in 1989. The applicant/respondent was under belief that there had been no Will and there was only a deed of gift which, however, was not accepted by the competent Court of Law by pronouncing judgment. This judgment has been accepted by the applicant and an appeal filed against the judgment was withdrawn discovery of the last Will and testament upon searches as being carried out from the trunk of his mother.

17. The mother was the sole executrix and legatee in terms of the Will. It was the duty of his mother to apply for probate during her lifetime but she did not do so. As such, there was no fault on the part of the applicant for delayed action. There is no suspicious circumstance either pleaded or proved. There cannot be any suspicious circumstances having regard to the facts and circumstances of this case. He contends further that it is true that another attesting witness Monmotha was not cited as a witness. It is also true that his signature could not be proved by any one but these factors hardly stand in the way of accepting the Will as being last one as Monmotha's signature can be said to have been proved by virtue of the statement made by the testator himself before another attesting witness. Statement made by the deceased has been proved and this statement constitutes a part of the series of the same transactions and it is relevant and admissible under Section 6 of the Evidence Act. Therefore, the attestation and execution has been proved and the petitioner has been able to discharge his onus.

18. In support of his submission he has relied on the following decisions viz. AIR 2003 SC 761, AIR 2005 Karnataka 136 AIR 1960 Cal 551, 2002(1) CLJ 459 22 CWN 315 and AIR 2005 SC 52.

19. We have carefully read the respective pleadings and gone through the judgment and order passed by the learned Trial Judge. We have considered the submissions of learned Counsel for the parties. The question in this appeal is as to whether the learned Trial Judge has on the facts and circumstances of this case correctly accepted that the said Will was the valid and lawful last instrument of Purna or not. In other words, whether there has been proof of lawful execution and attestation of the last Will of Purna. No pleading by the appellant of suspicious circumstances in execution, attestation and registration of the document, can be found. We shall consider the first contention as to whether there has been proof of valid and lawful execution and attestation or not.

20. In order to accept a Will to be valid and lawful the document must be prepared and executed in accordance with the provision of Section 63 of the [Indian Succession Act, 1925](#) (hereinafter referred to as the said Act).

21. Since it is an unprivileged Will we feel it is appropriate to quote Section 63 of the said Act:

63. Execution of unprivileged Wills.--Every testator, not being a soldier employed in an expedition or engaged in actual warfare, or an airman so employed or engaged, or a mariner at sea, shall execute his Will according to the following rules:

(a) The testator shall sign or shall affix his mark to the Will, or it shall be signed by some other person in his presence and by his direction.

(b) The signature or mark of the testator, or the signature of the person signing for him, shall be so placed that it shall appear that it was intended to give effect to the writing as a Will.

(c) The Will shall be attested by two or more witnesses, each of whom has seen the testator sign or affix his mark to the Will or has been some other person sign

the Will, in the presence and by the direction of the testator, or has received from the testator a personal acknowledgement of his signature or mark, or the signature of such other person; and each of the witnesses shall sign the Will in the presence of the testator, but it shall not be necessary that more than one witness be present at the same time and no particular form of attestation shall be necessary.

(emphasis supplied)

22. In this case, the Will is a holograph and registered one. In our opinion holograph Will coupled with registration though prima facie carries presumption of genuineness but, unless such a document is executed and attested in accordance with the provision of Section 63(c) of the said Act, it cannot be accepted to be a testamentary instrument. The provision of law has to be followed irrespective of act and conduct of the testator. Ordinarily the property of a person is to go down after his death to the heirs and legal representatives in normal course. However, the right of execution of testamentary document is a legal privilege to alter the course of ordinary succession. Such privilege cannot be absolute and without any checks and balance. If this legal safeguard is not strictly followed then any weak and incompetent person can be forced or persuaded with fraudulent representation to execute such document in order to deprive the heirs and legal representatives of their legitimate right of succession. Provision for attestation by two or more witnesses in the Act has been made in order to eliminate such eventualities. As such, the compliance of this provision cannot, under any circumstances, be ignored or dispensed with.

23. In the context of the aforesaid discussion we have to examine whether the instant document has been executed by Purna or attested by the witness. Only one attesting witness, viz, P.W. 3, was examined. He has said in his evidence that Purna had written the said Will in his own handwriting. Purna put his signature in that Will in his seresta. He instructed the witness to sign as an attesting witness. The testator told him that Monmotha, another attesting witness, had already signed and he also identified the signature of Monmotha. Some additions in writing in the Will were made and it was done by Purna himself in his presence. This witness is candid enough to say that he did not see Monmotha signing the Will.

Thereafter the testator went to Registration Office for registration. The testator signed the Will at the time of the registration in the presence of the Registrar and also in his presence. In the cross-examination of this witness the testimony of this witness cannot be disturbed. The witness is a deed writer of the office of Additional District Sub-Registrar at Serampore. From the evidence of this witness as well as the evidence of the propounder it does not appear that there was any relationship or past acquaintance with each other. One Binapani Sinha, P.W. 2 came to depose in support of the propounder. From his evidence it appears that he merely proves that the Will was registered in the Volume II, page Nos. 12 to 15 of Deed No. 13 of the year 1974. In the cross-examination he (?) categorically stated that he had no part in comparing the text of the Will with the Register. However, his testimony was not cross-examined in the deed. In any event, there is no suggestion or whisper regarding the invalidity and illegality of registration in this way. From this testimony it is thus clear that Purna himself signed the Will and got the same registered. Only question which has been raised is whether signature of another attesting witness Monmotha is proved or not. It is known to us whether Monmotha is alive. There has been no submission as to whether Monmotha is alive or dead. In our view it hardly matters. One attesting witness is enough to prove a Will. Under Section 68 of the Evidence Act one attesting witness is competent to prove the Will. It is not necessary that all the attesting witnesses have to be summoned to prove all things legally required.

24. If one witness proves attestation and execution of the Will and his testimony is believable and acceptable then the evidence of other witnesses is not warranted at all.

25. In this case, the attesting witness P.W. 3 is very truthful and he has said that he has not seen. Monmotha, being another attesting witness, signing in his presence but testator told him that this was signed by Monmotha before he put his signature. Now the question is how far the statement of testator is admissible and/or relevant under the provisions of the law as the requirement of Section 63 Clause (c) is that the signature of both the attesting witnesses have to be proved. This piece of evidence to prove the signature of Monmotha is undoubtedly hearsay. Ordinarily hearsay evidence is not admissible. But there are exceptions.

The exceptions have been provided on the facts and circumstances as mentioned in Sections 32, 33 and also Section 6 of Indian Evidence Act. Though it is argued by learned Counsel for the respondents that the provisions of Sections 32 and 33 of the said Act are applicable but we are of the view that those are applicable in a limited situation as mentioned in the sections. However, we find relevancy in the submission of learned Counsel for the respondent that the statement made by Purna regarding proof of signature of Monmotha to Ajit is admissible. Provision of Section 6 of the Evidence Act is set out hereunder:

6. Relevancy of facts forming part of same transaction. Facts which, though not in issue, are so connected with a fact-in-issue as to form part of the same transaction, are relevant, whether they occurred at the same time and place or at different times and places.

26. In a decision of the Supreme Court reported in : 2000 CriLJ29 (Sukhar v. State of Uttar Pradesh) it has been explained what are the conditions when Section 6 can be pressed into operation. It is said in paragraph 6 of the said judgment as follows:

Section 6 of the Evidence Act is an exception to the general Rule whereunder the hearsay evidence becomes admissible. But for proving such hearsay evidence within the provisions of Section 6 what is required to establish is that it must be almost contemporaneous with the acts and there should not be interval which will allow fabrication. This statement sought to be admitted, therefore, as forming part of *res geatae*, must have been made contemporaneously with the acts or immediate thereafter.

27. The Supreme Court while rendering the aforesaid decision has taken note of other previous judgments of the Supreme Court wherein provision of Section 6 has been made applicable on the same line and condition.

28. According to us, when provision of Section 6 is applied to accept hearsay evidence in a criminal trial where standard of proof is beyond reasonable doubt, this provision can safely be applied in case of civil proceedings requiring standard of proof as preponderance of probability.

29. In this case, the testator who is dead, immediately after having got the signature of Monmotha said before Ajit that Monmotha had signed already, meaning thereby that he acknowledged the signature of Monmotha. The language of Section 63(c) is very clear that it is not necessary that signatures by the attesting witnesses have to be made simultaneously in the presence of each other. Requirement of the law is that one attesting witness has already signed or accepted and acknowledged the signature of other person by the testator and thereafter another attesting witness has signed and seen the testator to sign and/or heard to have acknowledged the signature of other person.

30. The evidence of Ajit is very natural and forms course of events in normal way and depicts formation of chain of same series of transactions. Therefore, this statement of testator forms part of *res gestae*.

31. Moreover, the statement of Purna made before Ajit is also one piece of admission under the provision of Section 18 Clause (2) of the Evidence Act, since both the parties herein are deriving their interests in the subject-matter of the proceedings from the said deceased testator. We, therefore, for convenience sake, set out Section 18 of the Indian [Evidence Act, 1872](#):

18. Admission by party to proceeding or his agent.-- Statements made by a party to the proceeding, or by an agent to any such party, whom the Court regards, under the circumstances of the case, as expressly or impliedly authorized by him to make them, are admissions.

By suitor in representative character. -- Statements made by parties to suits, suing or sued in a representative character, are not admissions, unless they were made while the party making them held that character.

Statements made by

(1) party interested in subject-matter.-- persons who have any proprietary or pecuniary interest in the subject-matter of the proceeding, and who make the statement in their character of persons so interested.

(2) person from whom interest derived-persons from whom the parties for to the suit have derived their interest in the subject-matter of the suit,

(emphasis supplied)

are admissions, if they are made during the continuance of the interest of the persons making the statement.

32. Hence, the signature of another attesting witness has been proved as the testator himself personally acknowledged the signature of another attesting witness.

33. In the Court below we do not find any plea of suspicious circumstances having been taken either in course of cross-examination or in the argument. However, before us plea of suspicious circumstances has been raised. It is true that suspicious circumstances, if any, relating to attestation and execution of the Will is to be examined by the Court even where no such plea in the pleading is taken. The position of the law has been settled in the case of *H. Venkatachala Iyengar v. B.N. Thimmajama* reported in : AIR 1959 SC443 that when there were suspicious circumstances the onus would be on the propounder to explain them to the satisfaction of the Court before the Will could be accepted as genuine, even where there was no such plea but the circumstances gave rise to doubts, it is for the propounder to satisfy the conscience of the Court.

34. The suspicious circumstance cannot be illustrated exhaustively nor can it be defined. It depends upon various factors and facts and circumstances of the case. Primarily the caveator in the suit should point out the suspicious circumstances to the Court. In course of the cross-examination suggestions may be given with particulars, Caveator should indicate the suspicious circumstances so that the propounder can get chance to explain. If this task at least is not taken by the caveator how the propounder will explain it. Of course it does not debar the Court of its own motion if caveator fails or omits to do so, to examine the entire evidence relating to attestation and execution and registration where registered Will is produced to clear its mind. We find various instances under which the Court held that there exists suspicious circumstances in the case of *Rani Purnima Debi* and

Anr. v. Kumar Khagendra Narayan Deb and Anr. reported in : [1962]3SCR195 . Extremely unnatural bequest is one of the instance (ii). the signatures of the testator appear to be shaky and have been put on the document in unusual places, testator is in habit of signing blank papers and keeping them with the lawyers. Propounder who has got entire benefit of the Will had taken active part in preparation, execution and registration of the Will. These are some of the illustrations where a Will can be said to have been executed and attested under suspicious circumstances. If these are apparent from the evidence and documents, irrespective of the stand of the Caveator, the Court must call upon the propounder to clear suspicion from the mind of the Court.

35. Keeping in view of the Supreme Court pronouncement as above we have examined the evidence thoroughly and also the document. We do not find any unusualness in the document. The evidence is the testator himself had written the document and signed it. He personally came to the attesting witness, who is a third party for attestation and registration. From the Will we do not find any unusualness or unnaturalness of the bequest of the property. Purna has given explanation as to why the appellant has been deprived totally. He had given his second wife the property absolutely and on her death if she did not dispose of the property during her lifetime it will go to the sons from both the wives as per specification contained in the Will. Even the daughters have not been deprived absolutely. Provision has been made for their stay if they want to do so occasionally. All the daughters have been married off and they are well placed. As such, none of the daughters has come forward to challenge the Will. Moreover, we find from the affidavit of assets that the property and estate are not vast or huge and if any share was given to any of the daughters, then the sons would not have got anything. The appellant's full blooded brother has been given the largest share whereas the respondent propounder had received relatively lesser legacy.

36. Under such circumstances, it cannot be said that the propounder has got substantial interest and benefit of the Will. Ordinarily, the mother would have got all the properties, not the propounder here. Fortunately or unfortunately the mother died before the application for probate could be made. Under the provision of law and having regard to the disposition made in the Will it is not clear how large share

would be inherited by the propounder.

37. In view of the aforesaid findings, it is clear from the evidence and the facts that the appellant himself has admitted that he had been away from the family for a long time and was not in the mainstream of the family and never looked after his father. As such there were reasons to deprive him. Even in the pleading, one of the daughters who at one stage wanted to contest the grant, stated that the appellant was driven away and in fact was not liked by the testator. So exclusion of the appellant is not unnatural having regard to the mind of the testator.

38. Therefore, the above decisions of the Supreme Court cited by Mr. Rakshit on the facts and circumstances have no application and another decision of the learned Single Judge on the same proposition of law reported in AIR 1988 Delhi 273 is also not applicable.

39. Another point has been taken that a deed of gift was set up and the same was declared null and void by the competent Court of Law. Therefore, if the deed of gift was there what was the necessity of executing another Will. This factor according to Mr. Rakshit, is one of the instances of suspicious circumstances. A suit was filed relying on the deed of gift unknowingly that there was a Will as it was discovered from the mother's trunk later on. This has been sufficiently explained in the evidence in a believable way. Of course, the learned Trial Judge did not discuss all these details. When the deed of gift has been cancelled by a competent Court of Law and such Judgment has been accepted there is no point of taking this factor as being a suspicious circumstances as we do not find any substance in this argument.

40. We, therefore, hold that the learned Trial Judge has come to the correct decision. However, the order was not passed properly as letters of administration should have been granted instead of probate. We, therefore, dismiss the appeal. We uphold the Judgment and findings of the learned Trial Judge. We grant letters of administration with the copy of the Will annexed modifying the order.

41. Let this grant be made by the learned Court below. All the lower Court records of this case be sent down forthwith.

Sanjib Banerjee, J.

42. I agree.

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