(1999) 01 GAU CK 0017

Gauhati High Court

Case No: M.A. (F) No. 142 of 1993

Lamodhar Bordoloi		APPELLANT
	Vs	
Narendra Nath Bordoloi and Others		RESPONDENT

Date of Decision: Jan. 18, 1999

Acts Referred:

- Evidence Act, 1872 - Section 67, 68
- Registration Act, 1908 - Section 42, 43, 44, 45
- Succession Act, 1925 - Section 118, 2, 222, 222(2), 223
- Trusts Act, 1882 - Section 3, 5

Citation: (1999) 1 GLT 247

Hon'ble Judges: J.N. Sharma, J

Bench: Single Bench

Advocate: P.G. Baruah, N. Chakravorty, K.C. Mahanta, K. Sarma, R. Baruah and N. Chakravorty, for the Appellant; R.C. Deka, N.C. Phukan and R.K. Saikia, for the Respondent

Judgement

J.N. Sarma, J.

This is an appeal filed by the Objector Lombodhar Bordoloi against the decree in the suit for probate in respect of a Will left by one Mrinalini Devi by the learned Additional District Judge, Kamrup, Guwahati in P.T.S. No. 52 of 1990. An application for probate was filed u/s 276 of the Indian Succession Act for probate of the Will by five persons claiming themselves as the members of the Trust Board constituted by the Testator to properly manage her property described in the will.

2. The will is dated 26.6.80 and it is at page 18 of the paper book. Earlier to this will the Petitioner executed two wills, but both of them were annulled. The first will was executed on 24.9.S8 and it was annulled and the second will was executed on 18.11.66 and that was annulled by this will dated 26.6.80. The property in the will is the property given to Late Mrinalini Devi by her father and acquired by her. Mrinalini

Devi left the place of her husband long back as he married for the second time. The will was written by one Balo Ram Hazarika, who at that time was an employee in the Registrar in the Office of the Assam Co-operative Society, Guwhati-1 and the witnesses are (1) Shri Promode Chandra Bordoloi and Shri Ranendra Prasad Kakati, an advocate. The lady died on 23.6.89, that is, after 9 years of the execution of the will. An objection was filed by the step-son of the Testator. He is the son through the second wife of the husband of the lady. The plea taken up in the objection, inter-alia, are as follows:

(i) The will is a false one.

(ii) The will has been made by the Petitioners to deprive the legitimate claim of the objector.

3. Nowhere in the objection anything has been stated regarding the testamentary capacity of the testator to execute the will.

4. Three issues were framed. They are as follows:

1. Whether the Testator executed the will in favour of the Petitioners?

2. Whether it is a proper and valid will?

3. What reliefs are the parties entitled to?

5. PW-1 is Promode Chandra Bordoloi. He is a retired Deputy Labour Commissioner. He attested the will Exhibit-1. He deposed, inter-alia, as follows:

(1) That on 26.6.80 she has signed Exhibit-1 in my presence, after going through the same. Exbibits-1(1) to Exhibit-1(7) are the signatures of Mrinalini Devi which she had put in my presence. I as a witness had put my signature, Exhibit-1(8) after her. An advocate Kakati by name, who had been present there had put his signature as Exhibit-1(9).

(2) Exhibit-1 was registered on 26.7.80. That day I accompanied Mrinalini Devi to the registration office. Exhibit-1(10) and 1 (11) are my signatures.

(3) At the time of execution of Exhibit-1 the mental and physical state of Mrinalini Devi were sound. She had executed Exhibit-1 on her own volition. By Exhibit-1 she had authorised a Trust Board to manage her property. In the cross-examination of this witness nothing has been put to him mat Mrinalini Devi had no mental and physical capacity to execute the will. The only suggestion which was given was that Mrinalini had not signed Exhibit-1 in presence of Shri Ranendra Kakati and this witness.

5. PW-2 is Balo Hazarika, the scribe of the will who was the employee in the office of the Registrar at the time of writing will, but later-on he became an advocate. He deposed, inter-alia, as follows:

I had written the Exhibit-1, the will. It has been written as dictated by Smt. Mrinalini Devi. I had read it over to her and being satisfied she had signed the same. Exhibiti-1(1) to 1(7) are the signatures of Mrinalini Devi which she put in my presence. The other two witnesses put their signatures Exhibits-1(8) and 1(9) after Mrinalini Devi had put her signatures. Exhibits-1(12) to 1(18) are my signatures. Exhibit-1 had been written on 26.6.80 at the residence of Mrinalini Devi. In the cross-examination also the only suggestion which was given was that this will was written later-on in collusion with Harendra Nath Bordoloi. Regarding this the answer of the witness is as follows:- "It is not a fact that Exhibit-1 had been written in collusion with Harendra Nath Bordoloi. It is not a fact that Exhibit-1 had not been written as per statement of Mrinalini Devi.

6. RW.3 is Ranendra Prasad Kakati, an Advocate. He deposed as follows:

"Exhibit-1 is the will executed by Mrinalini Devi. It has been executed on 26.6.80 in my presence. I am an Attesting witness. Exhibit-1 had been executed in the residence of Mrinalini Devi. It had been written by advocate Balo Ram Hazarika. Advocate Hazarika read Exhibit-1 over to Mrinalini Devi, who after finding the same written according to her statement put signatures Exhibit-1(1) to Exhibit-1(7) in my presence. At that time Mrinalini Devi had been sound both mentally and physically. The other witness put his signature after Mrinalini Devi did, and after that I put my signature." A suggestion was given to this witness that Exhibit-1, the Will is a forged one. That was denied by him. It was further suggested that Exhibit-1 was not written as dictated by Mrinalini Devi. Nothing was put to this witness also regarding the physical and mental soundness of the testator to execute the Will.

7. PW-4 is Nishinath Changkakati. At that time he was the Chairman of the Assam Police Housing Corporation. Exhibit-1 Will was kept with him by Mrinalini Devi in an Envelope. He deposed that he knew the hand-writing of Mrinalini Devi and Exts. 1(1) to 1 (7) are the signatures of Mrinalini Devi. He also exhibited Exhibits-3 and 4, a rent note executed by the Objector with regard to one of the room''s which is a part of the property of the Will. In the cross-examination he states that he is an I.P.S. Officer and earlier he was the Director General of Police (Anti-Corruption and Vigilance). He deposed that the Sradhya Ceremony of Mrinalini Devi was done by Lombodhar Bordoloi, the objector. This Lombodhar Bordoloi got a job with the help of this witness and a suggestion was given that Exhibits-3 and 4 were obtained by this witness by threatening him regarding his job. This witness further deposed that Mrinalini Devi was aged about 85 years at the time of death. He admits that she was a heart patient and was under the treatment of Dr. Nalini Sarmaas well as occasionally under Dr. Prabir Bordoloi. The suggestion given to this witness was that Exhibit-1 was forged by taking advantage of the illness of Mrinalini Devi, was denied by this witness.

8. P.W.S is the valuer. There is no need to discuss his evidence for the determination of this case.

9. D.W. 1 is Lombodhar Bordoloi. He deposed that Mrinalini Devi was his stepmother. He also admitted that after completion of education he got a job in SSB with the help of Nishinath Changkakati, who was the Superintendent of Police at that time. He admits that there are two houses and a Mandir (Temple) on the land of the alleged Will. One of the houses is "Narayan Kutir" where he is living and another is "Cham Kutir" where there is a school since 1989 in the name of Satya Saibaba Shantiniketan. The Mandir is known as Lakshmi Narayan Mandir. He also admits that Mrinalini got this property from her father. He deposed that Mrinalini was a heart patient having High Pressure and was generally under treatment of Dr. Prabir Kumar Bordoloi and Dr. Nalini Sanria. He deposed that from May to July, 1980 Mrinalini Devi was bed-ridden and she was also not mentally steady at that time and she was treated by Dr. Bordoloi. He further deposed that she was not mentally and physically fit to execute any Will at that time and Exhibit-1 is a fake and forged Will. In the cross-examination he deposed, inter-alia, as follows:- "(i) I did not file prescription showing that my step-mother Was bed-ridden during May to July, 1980 and was under treatment of anybody. I did not say so in my Written Statement. Dr. Prabir Bordoloi married the sister of my wife." He denied the signatures in Exhibits-3 and 4.

9. D.W.2 is Dr. Prabir Kumar Bordoloi. This witness deposed as follows:- "Mrinalini Devi was a chronic heart patient suffered also from severe Anemia. As a result of which she lost her memory to recognise anybody particularly, during June and July, 1980. Her talk was quite irrelevant during that period, unable to move from her bed. She was under my treatment and I very frequently visited her." A suggestion was given to this witness that he has given false evidence because of his relationship with Lombodhar.

10. D.W.3 is Amal Chandra Barua. He deposed regarding the illness of Mrinalini Devi at the relevant time.

11. The followings are the relevant Exhibits in addition to the Will, Exhibit-1. Exhibit-3, the letter dated 19.7.89 written by Lombodhar Bordoloi, the Objector to the President of Mrinalini Devi Trust Board. In this letter he wrote as follows:

(i) I alongwith my family have acquired the right to live in her house without any rent as per her Will, executed in the year 1980 and as per her desire expressed verbally few days before her death. My step-mother had realised that fact and had before her death asked me to take another two rooms with the permission from the Board.

(ii) "I have informed the Board that I am ready to pay rent if required" Exhibit-4 is an agreement of tenancy dated 3.3.90 by Shri Lombodhar Bordoloi, the present Objector with the Trust Board, whereby he took two rooms at a rent of Rs. 500/- per month from the Board and in all he was given 4 rooms.

12. I have heard Shri P.G. Barua, learned Advocate General Assam for the Appellant and Shri C.C. Deka, learned Advocate for the Respondents. Shri P.G. Barua makes

the following submissions:

(i) That the bequest is void one being violative of Section 118 of the Indian Succession Act.

(ii) That the execution and attestation of the will was not proved.

(iii) That the Testatrix had no mental and physical capacity to execute the will at the relevant time.

13. Shri Deka, learned Advocate for the Respondents joins in issue on all the three grounds. He submits as follows:

(i) That Section 118 of the Indian Succession Act does not apply to the Will of Hindus, Buddhists, Sikhs or Jains. By Act 51 of 1991 a proviso was added to exclude Parsis also.

(ii) That the execution and attestation of the will was duly proved.

(iii) Regarding the mental and physical capacity Shri Deka submits that this question cannot be gone into inasmuch as there was not even a whimper regarding mis in the objection filed by the Objector. He further submits that when the PW-1 had deposed regarding the soundness of the physical and mental state of Mrinalini Devi there was no cross-examination on this point. Same is the case with P.W.3. It was further admitted by the Objector that he did not say anything regarding the state of health of Mrinalini Devi in the Written Statement. Even this Objector did not say that during the month of May to June, 1980 she was not in a position to talk as deposed by Dr Prabir Bordoloi and Amal Chandra Barua. He submits that Dr. Prabir Bordoloi, D. W.2 and Amal Barua, D.W.3 tried to improve and develop the case.

14. The learned Additional District Judge in paragraph 8 of the judgment found from the evidence as well as from the fact that Mrinalini Devi died about 9 years after the execution of the Will and that the Exhibit-1 was executed by Mrinalini Devi with sound mind in presence of the attesting witnesses P.Ws. 1 and 3.

15. Regarding testamentary capacity what is to be looked into is that the testamentary capacity is to be proved by the evidence of competent and dis-interested witnesses. The mere fact of saying that the testator was in a state of health which might have effected the memory of the testator is not sufficient. (See 52 C.W.N. 35 (P.C.) H. Venkatachala Iyengar Vs. B.N. Thimmajamma and Others, . In Seth Beni Chand (Since Dead) Now by L.Rs. Vs. Smt. Kamla Kunwar and Others, the testatrix was a woman aged about 80 years made a Will 5 days prior to her death bequething extensive properties in favour of her only son''s wife to the exclusion of others. It was held that the will was valid as the testatrix was in a sound and disposing state of mind and memory.

16. In this particular case the testatrix died after 9 years from the date of execution of the Will. Further in Exhibits-3 and 4 (Exhibit-3 is in the own hand of the

Defendant), there is mention regarding the Will and these Exhibits-3 and 4 were admitted in evidence without objection and it does not lie in the mouth of the Objector to say that the testatrix had no testamentary capacity. Further I find that Dr Prabir Bordoloi and Amal Chandra Barua are not reliable witnesses inasmuch as Dr. Prabir Bordoloi is a close relative of D.W.I, Lombodhar Bordoloi and Amal Barua had dispute with the testatrix. So in view of the depositions of the PWs. I hold that the testatrix had the testamentary capacity to make the Will at the relevant time and I agree with the findings of the learned Additional District Judge.

17. Next let us take up the question of execution and attestation. Section 63 of the Indian Succession Act-lays-down the formalities required by law for the execution of a valid Will by every testator not being a soldier employed in an expedition or engaged in actual war-fare or a mariner at Sea. Such a will shall be duly executed by the testator as laid down in Clauses-(a) and (b) and must be attested by atleast 2 attesting witnesses as given in Clause-C. The law requites that the provision of this Section is to be complied with. The compliance can be a proved either by means of oral evidence or any other evidence. This section does not lay down how the fact of the compliance is to be proved. It cannot be laid down as a matter of law that because the witnesses did not state in examination-in-chief that they signed the Will in presence of the testator, there was no due attestation. It will depend on circumstances elucidated in evidence whether the attesting witnesses signed in presence of the testator. This is a pure question of fact depending on appreciation of evidence.

In Naresh Charan Das Gupta Vs. Paresh Charan Das Gupta, in Paragraph-12 that law has been laid down:

(12) It was also argued for the Appellant that there was no proof that the Will was duly attested as required by Section 63, Indian Succession Act, and that it should therefore be held to be void. P.Ws. 1 and 2 are the two attestors, and they stated in examination-in-chief that the testator signed the Will in their presence, and that they attested his signature. They did not add that they signed the Will in the presence of the testator. Now the contention is that in the absence of such evidence it must be held that there was no due attestation. Both the Courts below have held them against the Appellant on this contention.

The learned Judges of the High Court were of the opinion that as the execution and attestation took place at one sitting at the residence of P.W.I, where the testator and the witnesses has assembled by appointment, they must all of them have been present until the matter was finished, and as the witnesses were not cross-examined on the question of attestation, it could properly be inferred that mere was due attestation. It cannot be laid down as a matter of law that because the witnesses did not state in examination-in-chief that they signed the will in the presence of the testator, there was no due attestation. It will depend on the circumstances elicited in evidence whether the attesting witnesses signed in the

presence of the testator. This is a pure question of fact depending on appreciation of evidence. The finding of the Court below that the will was duly attested is based on a consideration of all the materials, and must be accepted. Indeed, it is stated in the judgment of the Additional District Judge that "the fact of due execution and attestation of the Will was not challenged on behalf of the Caveator at the time of the hearing of the suit." This contention of the Appellant must also be rejected.

18. Regarding onus of proving the execution in AIR 1976 Gau 94 (Chandra Kanta v. Lakheswar Nath) a Division Bench of this Court has pointed out as follows:

Once preponderance burden has been discharged by proper proof of execution etc. through Scribe, attesting witnesses, etc. the onus of the preponderance can be said to have been discharged. The question have to be decided with reference to Section 59 and Section 63. If circumstances are suspicious there legitimate suspicion have to be removed (See AIR 1975 Gau 50 (Kanthiram Bora v. Done Bora). The onus of proving a will is always on the propounder and in the absence of suspicious circumstances surrounding the execution of the Will, proof of testamentary capacity and of the signature of the testator as required by law is sufficient to discharge the onus (See Guro (Smt.) Vs. Atma Singh and Others, Smt. Indu Bala Bose and Others Vs. Manindra Chandra Bose and Another, the Supreme Court has enunciated the principle to be kept in view for granting probate. They are as follows:

"(1) Ordinarily, proving a will does not differ from any other document except in regard to the special requirement of attestation u/s 63 of the Succession Act.

(2) The onus of proving the Will is on the propounder and, in the absence of suspicious circumstances surrounding the execution of the Will, proof of testamentary capacity and of the signature of the testator as required by law, is sufficient to discharge the onus.

(3) However, where there are suspicious circumstances the onus is on the propounder to explain them to the satisfaction of the Court, before the Court accepts the Will as genuine.

Where the circumstances give rise to doubts, it is for the Probator to satisfy the conscience of the Court, by completely removing all legitimate suspicions.

(4) The suspicious circumstances may be as to the genuineness of the signature of the testator, the condition of the testator''s mind, the disposition made in the will being unnatural, improper or unfair in the light of the relevant circumstances or there might be other indications in the Will to show that the testator''s mind was not free. If the Probator himself takes a predominant part in the execution of the will which confers a substantial benefit on him, mat is also a circumstance to be taken into account.

(5) If the Probator succeeds in removing the doubts arising from the suspicious circumstances, the Court would grant Probate even if the will might be unnatural

and might have cut off (wholly or in part) near relations. Any and every circumstance is not a "suspicious" circumstances. The circumstances would be "suspicious" when it is not normal or is normally expected in a normal situation or is not expected of a normal person.

19. In Vrindavanibai Sambhaji Mane Vs. Ramachandra Vithal Ganeshkar and others, in paragraphs 14 and 15 it has laid down the laws as follows:

14. As far back as in 1894 the Privy Council in the case of Choteynarain Singh v. Mussamat Raton Koer (1895) LR 22 IA 12 observed mat 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 Vs. Baidya Nath Khan and Others, It said that where a Court is dealing with a testamentary case where there is large and consistent body of testamentary 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 mat 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 mem 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 has to be proved after the death of the testator. Hence the person execute 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 freeble mind which is likely to be influenced; (4) Unfair and unjust disposal of property. (See'' in this connection: H. Venkatachala Iyengar Vs. B.N. Thimmajamma and Others, Smt. Indu Bala Bose and Others Vs. Manindra Chandra Bose and Another, at p. 1192 : AIR 1982 SC 133 at p. 134-35) and Guro (Smt.) Vs. Atma Singh and Others, at p. 511. Suffice it to say that no such circumstances are present here.

20. In H. Venkatachala Iyengar Vs. B.N. Thimmajamma and Others, the Supreme Court has pointed out as follows:

18. The party propounding a Will or otherwise making a claim under a Will is no doubt seeking to prove a document, and in deciding now it is to he proved, reference must inevitably be made to the statutory provisions when govern the proof of documents. Sections 67 and 68 of the Evidence Act are relevant for this purpose. u/s 67 if a document is alleged to be signed by any person the signature of

the said person must be proved to be in his handwriting, and for proving such a handwriting under Sections 45 and 47 of the Act the opinions of experts and of persons acquainted with the handwriting of the person'' concerned are made relevant. Section 68 deals with the proof of the execution of the document required by law to be attested, and it provides that such a document shall not be used as evidence until one attesting witness at least has been called for the purpose of proving its execution. These provisions prescribe the requirements and the nature of proof which must be satisfied by the party who relies on a document in a Court of law. Similarly, Sections 89 and 63 of the Indian Succession Act are also relevant Thus the question as to whether the Will set up by the propounder is proved to be the last will of the testator has to be decided in the light of these provisions. It would prima facie be true to say that the Will has to be proved like any other, document except as to the special requirements of attestation prescribed by Section 63 of the Indian Succession Act As in the case of proof of other documents so in the case of proof of Wills it would be idle to expect proof with mathematical certainty. The test to be applied would be usual test of the satisfaction of the prudent mind in such matters.

21. In Rani Purnima Devi and Another Vs. Kumar Khagendra Narayan Dev and Another, wherein in paragraph-23 the Supreme Court has laid down the law as. follows:

(a) There is no doubt that if a will has been registered, that is a circumstance which may, having regard to the circumstances, prove its genuineness. But the mere fact that a will is registered will not by itself be sufficient to dispel all suspicion regarding it, where suspicion exists, without submitting the evidence of registration to a close examination. If the evidence as to registration on a close examination reveals that the registration was made in such a manner that it was brought home to the testator that the document of which he was admitting execution was a will disposing of his property and thereafter he admitted its execution and signed it in token thereof, the registration will dispel the doubt as to the genuineness of the will.

(b) But if the evidence as to registration shows that it was done in a perfunctory manner, that the officer registering the will did not read it over to the testator or did not bring home to him that he was admitting the execution of a will or did not satisfy himself in some other way (as, for example, by seeing the testator reading the will) that the testator knew that it was a will the execution of which he was admitting, the fact mat the will was registered would not be of much value.

22. Kalyan Singh Vs. Smt. Chhoti and Others, wherein in paragraph-20 the Supreme Court has laid down the law as follows:

20. A will is one of the most solemn documents known to law. The executant of the Will can not be called to deny the execution or to explain the circumstances in which it was executed. It is, therefore, essential that trustworthy and unimpeachable evidence should be produced before the Court to establish genuineness and

authenticity of the Will. It must be stated that the factum of execution and validity of the Will can not be determined merely by considering the evidence produced by the propounder. In order to judge the credibility of witnesses and disengage the truth from falsehood the Court is not confined only to their testimony and demeanour. It would be open to the Court to consider circumstances brought out in the evidence or which appear from the nature and contents of the documents itself. It would be also open to the Court to look into surrounding circumstances as well as inherent improbabilities of the case to reach a proper conclusion on the nature of the evidence adduced by the party.

23. Gurdial Kaur and others Vs. Kartar Kaur and Others, , the Supreme Court has laid down the law as follows:

3. The law is well settled that if there is a suspicious circumstances about the execution of the will, it is the duty of the person seeking declaration about the validity of the will to dispel such suspicious circumstances. In this connection, reference may be made to the decision of this Court in Rani Purnima Devi v. Kumar Khagendra Narayan Deb. It has been held in the said decision that if a will being registered and having regard to the other circumstances, is accepted to be genuine the mere fact that the will is a registered will will not by itself be sufficient to dispel all suspicions regarding the validity of the will where suspicions exists. It has been held that the broad statement by the witness that he had witnessed the testator admitting execution of the will was not sufficient to dispel suspicions regarding due execution and attestation of the will. It has been specifically held that registration of the will by itself was not sufficient to remove the suspicion Relying on an earlier decision of this Court reported in H. Venkatachala Iyengar v. B.N. Thimmajamma it has been held in the said decision that where the propounder was unable to dispel the auspicious circumstances which surrounded the question of valid execution and attestation of the will, no letters of administration in favour of the propounder could be granted.
4. The law is well settled that the conscience of the Court must be satisfied that the will in question was not only executed and attested in the manner required under the Indian Succession Act, 1925 but it should also be found that the said will was the product of the free volition of the executant who had voluntarily executed the same after knowing and understanding the contents of the will. Therefore, whenever there is any suspicious circumstance, obligation is the cast on the propounder of the will to dispel the suspicious circumstance.

24. In AIR 1962 GAU 106 (Tajo Ram Nath and Anr. Appellants v. Baneswar Nath, Respondent). There was a contention that whether the document in question was a Will as defined u/s 2 (h) of the Indian Succession Act. After quoting the Will in paragraph-3 a Division Bench of this Court in Paragraph-4, the law has been laid down as follows:

4. It will appear that by the first part of the above document, the property was put in possession and under the management of the Plaintiff during the life time of the deceased. In the second part it was directed that the Plaintiff would get the properties as an owner on the death of the testator. We do not think that there can be any objection in law if one part of an instrument is operative as will and another part of the same instrument operates as a document giving possession and management. The desire of the testator to give up the ownership of the property to the Plaintiff-Respondent only on his (testator''s) death is quite clear and in such circumstances exhibit 1 falls within the statutory definition of a will.

25. What can be culled out and gathered from the decision quoted above is as follows:

(1) Unlike other document the will speaks from the death of the testator and so when it is propounded or produced before a Court the testator who has already departed from the world, can not say whether it is a will or not and this aspect naturally introduces an element of solemnity in the decision of the question as to whether a document propounded is proved to be the last will and testament of the departed testator. Even so, in dealing with the provisions of the wills, the Court will start on the same enquiry as in the case of other documents.

(2) The initial burden is always on the propounder to prove due execution, attestation and a sound disposing state of mind of the testator. So in matters of wills or settlement any plea of undue influence and/or falsity, forgery has to be sustained by the person who takes up the pleas.

(3) Regarding suspicious circumstances one should bear in mind that the Court should approach the matter as in a normal situation. The Supreme Court up-held the will despite a number of suspicious circumstances in Brij Mohan Lal Arora and Others Vs. Girdhari Lal Manocha, The suspicious circumstances were:

(i) That the testatrix was a sort of prisoner under the control of the Respondent.

(ii) She died on the same date of the execution of the will.

(iii) Though literate she fixed only her thumb mark.

(iv) The will was registered not on the same day, but three weeks later.

(v) The terms are general sans all details as to property. The Court referred to the point by discussing a letter of the lady to the Appellant who had long neglected her. It was the Respondents that looked after her. As to other matters the finding was that the lady was 70 years old chronically ill and so had a trembling hand. So the naturality will be to take her thumb impression. The witness stated as to her sound state of mind. The Court, therefore, held the Will as valid.

(4) A Will is one of the most solemn document known to law by it a dead man intends to the living the carrying out of wishes and as it is impossible that he can be

called either to deny her signature or to explain the circumstances in which it was executed, it is essential that trustworthy and an effective evidence should be given in compliance with the necessary formalities of law.

(5) It can not be laid down as a matter of law that because the witness did not state in Court that they signed the Will in presence of the testator, there was no due attestation. Thus, if a witness owing to inadvertance fails to say that he had attested the document in the presence of the testator and narrates the consequence which leads to no other inference but one that he had put his signature in the presence of the testator then this omission on the part of the witness would not invalidate the Will and it shall not preclude the Court to in far this fact from other evidence on record that the witnesses had signed the document in the presence of the testator. The law does not emphasise that the witness must use the language of the Section 63 to prove the requisite matters thereof. (6) In a case where attesting witnesses are produced and they give clear and cogent testimony regarding execution, one should require very strong ground to repeal the effect of such testimony. It will not do to talk airily about circumstance suspicion. Testimony not seriously impaired in cross-examination, something more than suspicion is necessary to discredit the testimony of attesting witnesses who may be of inferior status to make a convincing argument based on the social status of such person (see Genda Kumar v. Harnandan AIR 1916 P.C. 166). In this particular case as stated above there was no effective cross-examination of the attesting witnesses as well as of the Scribe. There was no plea regarding lack of testamentary capacity in the objection. The learned Judge found that the Will was properly executed, attested and there was no suspicious circumstances. On an overall view of the matter and on consideration of the evidence on record as indicated above, I agree with the findings of the learned Judge.

26. Another limb of argument was that the Petitioners have not been named as the executor of the Will, as such, in view of Section 222 of the Indian Succession Act and Section 223 no Probate can be granted. Section 222 provides that "Probate is to be granted only to an Executor appointed by the Will. Section 222(2) provides that "The appointment may be expressed or by necessary implication" In Section 223 it is the person to whom the Probate can not be granted. It is provided that Probate can not be granted to any association of individuals."

27. An Executor has been defined u/s 2(c) of the Indian Succession Act. An Executor is a person bound to carry the Will into effect or Execution after the death of the Testator and to dispose of state according to his wish. He is the person appointed to the general office of executing a Will or last testament, A person nominated in the Will and appointed to administer the state is an Executor.

28. Section 3 of the Indian Trust Act enacts that a Trust is an obligation and next to the ownership of property and arising out of a confidence repose in and accepted by the owner or declare and accepted by him for the benefit of another or of another

and the owner, the person who reposes or declares the confidence is called Author of the Trust. The person who accepts the confidence is called Trustee. The person for whose benefits the confidence is accepted is called Beneficiary. A Trust relating to immovable property must be in writing, signed and registered or by Will vide Section 5 of the Indian Trust Act.

29. In this particular case in the Will Exhibit-1 the following declarations are there:

"(a) Through this Will, I have appointed a Trust Board constituted with the following members to operate, as per my wish, all my immovable and movable properties after my death and have made them joint Trustees of my entire property as per conditions mentioned in this Will.

These members are (1) Shri Narendra Nath Bordoloi, Father late Prannath Bordoloi of Uzanbazar, Guwahati. (2) Shri Sachindra Barua, Father Late Saradananda Barua of Durgabari Road, Tinsukia. (3) Shri Nishinath Changkakati, Father Late Keshabnath Changkakati, Chenikuthi, Guwahati. (4) Shri Arun Ch. Changkakati, father late Keshab Nath Changkakati of Chenikuthi, Guwahati(5) Shri Sachindra Bordoloi, Father Late Gargaram Bordoloi of North Guwahati.

(b) In my absence (death), a list of all my immovable and movable properties should be prepared and kept in a almirah and it should be ensured mat no one other than the members of the Board get it.

30. So this application for Probate was filed by Mrinalini Devi Trust Board and they must be deemed to be Executor even by implication. Even individually they may be deemed to be Executor.

31. The last ground urged by Shri Barua is mat Will is void bequest u/s 118 of the Indian Succession Act. Section 118 of the Indian Succession Act is quoted below:

Bequest to religious or charitable uses. - No man having a nephew or niece or any nearer relative shall have power to bequeath any property to religious or charitable uses, except by a will executed not less than twelve months before his death, and deposited within six months from its execution in some place provided by law for the safe custody of the wills of living persons provided that nothing in this Section shall apply to a Parsi.

32. Shri Barua strenuously urged that as the bequest was to religious or charitable uses and Will was not deposited within 6 months from its execution in some places provided by law for the safe custody of the Wills of living persons, it is a void bequest as provided in the Chapter-VII of the Indian Succession Act and in this connection he refers to Sections - 42, 43, 44 and 45 of the Indian Registration Act.

33. Section-42 of the Registration Act provides for deposit of the will. Section -43 provides for procedure on deposit of will. Section 44 provides for withdrawal of sealed cover deposited u/s 42. Section 45 provides for Proceedings on death of

depositor.

34. Shri Barua, the learned advocate in advancing his argument failed to consider and take note of the fact that this Section 118 does not apply to the Wills of the Hindus, Budhists, Sikhs or Jains. By Act 51 of the 1991 the proviso mentioned above was added to exclude Parsis also. That this does not apply to a Will of Hindu, for that let us have a look at Section 57 of the Indian Succession Act. Section 118 quoted above appears in Part-VI of the Indian Succession Act. Section 57 provides, inter-alia, as follows:

Application of certain provisions of Part to a class of wills made by Hindus, etc.- The Provisions of this part which are set out in Schedule III shall, subject to the restrictions and modifications specified therein, apply - (c) to all wills and codicils made by any Hindu, Buddhist, Sikh or Jain, on or after the first day of January, 1929, to which those provisions are not applied by Clauses (a) and (b).

35. A look at Schedule III will show that Section 118 is excluded from this application. Further as this Section is not applicable to the Hindus, as such a bequest made by Hindu for charitable and religious purposes is not governed by this Section Such a bequest may be void u/s 89 of the Indian Succession Act, but can not be void under this Section. This contention of Shri Barua absolutely has no force. In the Notes appended to Section 118 in all the standard commentary of Indian Succession Act, it has been specifically stated that Section-118 is not applicable to the Wills made by the Hindus, that is, because of mandate of Section 57.

36. Accordingly there is no merit in this appeal and the same is dismissed. However, I leave the parties to bear their own costs.