(1976) 06 CAL CK 0021

Calcutta High Court

Case No: A. F O. D. No. 293 of 1967

Susama Bala Devi and others		APPELLANT
	Vs	
Anath Nath Tarafdar and others		RESPONDENT

Date of Decision: June 25, 1976

Citation: AIR 1976 Cal 63

Hon'ble Judges: Sharma, J; Pradyot Kumar Banerjee, J

Bench: Division Bench

Advocate: Shyama Charan Mitter and Shyama Prasanna Roy Chowdhury, for the Appellant;B.C. Dutta, Ashutosh Ganguly and Rabindra Kr. Mukherjee, for the Respondent

Final Decision: Dismissed

Judgement

Sharma, J.
Sambhunath Tarafdar and his mother Sushamabala Devi applied for probate in respect of a will left by Nisi Kanta Tarafdar father of the first applicant and husband of the second. The grant of probate prayed for was opposed by Anathnath Tarafdar and Bhabanath Tarafdar, the first two of the three sons of Nisi Kanta Tarafdar and Sushamabala Devi, and this conflict gave rise to Original Suit No. 14 of 1961, in the Additional Court of District Judge, hence this appeal.

2. Stated in short plaintiff-appellants case reveals that Nishi Kanta Tarafdar on his death on August 8. 1945, left behind a number of properties which have been set out in 28 lots in the schedule of properties attached to the petition filed by the plaintiff-appellants. He also left behind him his a forenamed wife and three sons besides four daughters: Jayantibala Devi, wife of Bagalaprassanna Roy Choudhury, Prativasundari Devi, wife of Dr. Pragnath Banerjee, Banalata Devi and Shohalata Devi (the last two being unmarried at the time of his death). The appellants'' case is that sometime before his death Nisi Kanta Tarafdar had been ailing from various illnesses. Apprehending that his end was coming he made in his own hand writing a draft will of his own which he got approved by

a lawyer.

3. Later on, after incorporating some changes in the terms of the draft, he executed his last will and testament. Under the will he made provisions for the marriage of his unmarried daughters and also charged some immovable properties with the expenses of their marriage; but in case the properties were not required to be sold for defraying the expenses of their marriage, those properties were to go under the will to his youngest son Sambhunath Tarafdar who was staying at home and had no ostensible means of livelihood. Under the will nothing was left for other sons, the defendant-respondents, except the testator''s goodwill, because they were well settled in life. Nothing was also left to the two married daughters. The rest of the property was left to his widow Sushamabala Devi. Though the will was executed on November 12, 1944, and its existence was all along known, application for probate was filed only on March 11, 1961, that is, after fifteen years from the date of demise of the testator.

4. The suit was contested by the two elder sons on the ground inter alia that at the time of death Nisi Kanta Tarafdar had no mental and physical capacity to make the will and the alleged will was a forged one and the same was executed under undue influence and the same was not properly executed or legally attested. It was also contended that various circumstances surrounding the execution of the will and long disregard for it including the delay of fifteen years in applying for probate, were highly suspicious and so the plaintiffs were not entitled to a grant of probate prayed for.

5. On the basis of these pleadings the learned Additional District Judge, Nadia, raised issues and tried the suit. After considering various documentary evidence on record as well as oral testimony of the witnesses given in the suit, the learned Court below found that there were many suspicious circumstances surrounding the execution of the will and the circumstances seen and noticed were not removed from the mind of the Court by the propounders. Taking this view of the matter the learned court below dismissed the suit and refused the probate prayed for.

6. The suspicious circumstances which led the court below to doubt the genuineness of the will may now be noticed. The learned Judge was of the opinion that the circumstances which preceded and followed the alleged date of the execution of the will militated against the fact of such execution. He was of the opinion that the letters written by the testator to his sons Anath Nath Tarafdar and Bhabanath Tarafdar did not show any unfavorable disposition towards them and so the allegation contained in paragraph 1 of the alleged will could not have emanated from the testator. The learned Judge further found that reference to succession certificate made in the letter written by Bagala Prasanna Roy Choudhury, one of the attesting witnesses, to Anath Nath Tarafdar arouses suspicion because Bagala Prasanna having knowledge of the existence of the will could not have or would not have raised the question regarding succession certificate had the will been in existence. The learned Judge in the next place was of opinion that the inexplicable delay in bringing the Will to light following the death of the testator was a

factor which created a great suspicion about the existence of the will. The propounders having waited for 15 years before applying for probate contributed to the suspicion and having failed to give cogent reasons to explain the delay, strengthened the suspicion further. The learned Court below observed that two contemporaneous letters Exts. A/1 and A/1/1 have not been explained by the propounders. The learned Court further found that in Exts. A and A/2 the testator was accusing his youngest son Sambhu Nath Tarafdar, one of the propounders of the will, and also his own wife Sushamabala Devi, the other propounder, of indifference and callousness towards him. From the letters it appeared that the testator was, the learned Judge observed, despaired of his wife and his youngest son at a time when he was in ailing health and advancing slowly towards his death. The learned Judge held that the suspicions created by his letters render it highly improbable that the testator created a will of the type in question in favour of the persons against whom he had a number of grievances to ventilate. Therefore, the learned Judge held that in spite of the existence of the draft, even if it existed, the suspicious circumstances surrounding the execution of the will Ext. 1 remained unexplained. Consequently the learned Judge found that the propounders having failed to remove the suspicion from the mind of the Court, were not entitled to the grant of probate applied for.

7. In this Court on the one hand the appellants have tried to explain the circumstances surrounding the execution of that will, and on the other, the respondents (of whom only Anath Nath is contesting) have tried to highlight further the alleged suspicious circumstances surrounding the execution of the will. Now we shall proceed to consider those circumstances along with the explanations given by the appellants.

8. In order to buttress up their arguments the learned Advocates have drawn our attention to a number of decisions with a view to guide the Court in the matter of appraisement of evidence regarding the execution of the will and the alleged suspicious circumstances surrounding such execution. The first case that has been brought to our notice to provide us unnecessary guidance is reported in H. Venkatachala Iyengar Vs. B.N. Thimmajamma and Others, . In this case speaking for the Bench P. B. Gajendragadkar, J. (as he then was) elaborately discussed the relevant provisions of the Indian Evidence Act as to the manner of proving the will, as a document.

He also discussed the onus of removing the suspicious circumstances surrounding the execution of the will, and the fact that if propounders themselves take a prominent part in the execution of the will and take benefit under it that itself would constitute a suspicious circumstance. Paragraphs 19, 20, 21 and 22 of the judgment are very much instructive on this point. The views expressed therein (if we may respectfully say so, a legacy from the past) have been followed in cases after cases. To establish this, our attention has been drawn by the learned Advocates to cases reported in Rani Purnima Devi and Another Vs. Kumar Khagendra Narayan Dev and Another, , Shashi Kumar Banerjee and Others Vs. Subodh Kumar Banerjee since deceased and after him his legal representatives and Others, .

In the above two cases Wanchoo, J., speaking for the Bench has reiterated the views which had already been formulated in H. Venkatachala Iyengar Vs. B.N. Thimmajamma and Others, . From these decisions we find that the initial onus of proving the execution of the will rests upon the propounder and the will has to he proved like any other document under the provisions of the Indian Evidence Act besides proving the attestation of the execution by the witnesses. In the event there are suspicious circumstances surrounding the execution of the will, we find, the onus of explaining the circumstances which look suspicious and removing the suspicion from the mind of the Court rests squarely upon the propounder. If any fraud, undue influence and coercion is alleged by the caveator then it is for the caveator to prove the allegation of fraud, undue influence and coercion. If it is shown that the propounder has taken a prominent part in the execution of the will under which he has been conferred substantial benefit, that in itself is generally ireated as a suspicious circumstance surrounding the execution of the will and the prop sunder is required to remove the suspicion by clear and satisfactory evidence (vide also Gorantla Thataiah Vs. Thotakura Venkata Subbaiah and Others,). We also find from the decisions referred to above that in the matter of appreciation of evidence for deciding material questions of fact arising from the application for probate or in actions on will, hard, fast and inflexible rules cannot be laid down and proof depends upon facts and circumstances of each case. Therefore bearing in mind all these essential, albeit elementary considerations, we shall now proceed to examine the contentions raised by the rival sides before us.

9. The first contention regarding the suspicious circumstances surrounding the execution of the will raised before us relates to the place where the Will was executed. The evidence is that the Will Ext. 1 was executed in a house of the testator situate in Krishnanagar. Mr. Dut a appearing for the respondents Anath Nath Tarafdar contends that the will could not have been executed in Krishanagar because at the time the Will was allegedly executed that house was under the occupation of a tenant and the testator himself was not living there. It is not disputed that at about that time that house was under a tenant and the evidence does not show that there was any room kept apart from or outside of the tenancy for the use and occupation of the owner Nishikanta Tarafdar. Therefore, the question raised is a pertinent question as to exactly where the Will was executed in the house under somebody else"s possession and occupation. Mr. Mitter appearing for the appellants submits that there is no evidence to show that on the exact date when the Will was executed that house was under the occupation of a tenant. Therefore, he contends, the Will could well have been executed at Krishnanagar inside that house. From the evidence of P. W. 2. Gurudas Ganguli it appears that the Will was written in a ground floor room. Then again it is seen from his evidence that it was written in the corridor abutting a room in the ground floor. Why use a corridor if a room is available? If room is not available because of tenancy why go there at all to be placed in a corridor ? The evidence is halting and does not inspire confidence. Mr. Dutta raised a compention regarding the necessity of executing a Will at Krishnanagar at all instead of at the residential house of the testator. This necessity has not been fully explained. In our

view there was no necessity for Nishikanta to have gone all the way to Krishnanagar to have the Will executed there. The evidence given by the propounder shows that Nishikanta was already armed with a draft which was approved by a lawyer of Krishnanagar. If he was so armed there was no further need for him to go to Krishnanagar, as if surreptitiously, for executing the Will. Since none of the persons with whom Nishikanta was residing in his house were left without benefit under the Will Ex. 1, there was reason for him to fear that the execution of the Will as proposed by him would find interference at the hands of his family members if he tried to execute the Will at his residence. The persons who were disinherited by the Will Ext. 1 were persons who were then not living with Nishikanta Tarafdar in his residential house. All of them were far away elsewhere: they being two elder sons, Anath Nath Tarafdar and Bhabanath Tarafdar, and two married daughters, Jayantibala Devi and Prativasundari Devi. In the circumstances we do not see what was the necessity for Nishikanta to leave his hearth and home and go all the way to Krishnanagar house, which was then tenanted, and execute the Will there. The character of Nishikanta as revealed by his letters Exts. A and A/2 appears to be of sterner stuffs. In spite of opposition from his wife and younger son and younger daughters, be went with Nirapada to have Kaviraji treatment. This determination in the face of opposition shows that he was not a man who had to seek refuge away from his home to execute a Will. This was character which could face opposition, if any. So it is unlikely that he left his house to create a Will. Therefore, as satisfactory explanation is not to be had for all this suspicion lingers, but by itself alone this suspicion is not much because one cannot say that every act of a person can at all times be explained rationally and it should be capable of providing an explanation on consideration of the requirement of necessity alone. However some suspicion is aroused.

10. The next point that was raised by Mr. Dutta is regarding the witness. He submits that the witnesses are more or less chance witnesses and points to P. W. 2 Gurudas Ganguly a practising Advocate of Krishnanagar Court. According to the propounded Nishikanta Babu visited the house of Gurudas in order to call his father to be an attesting witness to the Will but as his father was not in the house Nishikanta requested him to act as an attesting witness and so he went to Nishikanta Babu''s house at Krishnanagar and in a room or in the corridor abutting a room in the ground floor the body of the Will was written and it was executed. Mr. Dutta contends that this witness is a chance witness because Nishikanta never wanted to call him as an attesting witness but he happened to go there in the place of his father. Mr. Mitter contends that Gurudas Ganguly was not a chance witness because he went there on the invitation of Nishikanta who had visited his house. He submits that Nishikanta might have visited the house of Gurudas to call Gurudas''s father but finding his father absent and thinking that the job could equally be performed by the son he called Gurudas to be an attesting witness, so there was hardly anything to treat this witness as a chance witness. In our opinion on this question the explanation given by Mr. Mitter is quite cogent. Mr. Mitter contends that the explanations given by the propounder should not be approached with the attitude of total disbelief but it should be approached with an open mind and if the explanation plausible there should be no reason

to hold it unacceptable. This proposition of law is no doubt indisuptable. In this case we find that Mr. Mitter has given cogent explanation. Therefore, in the circumstances alleged there is no reason to hold that Gurudas Ganguly can be dubbed a chance witness.

11. Mr. Dutta contends that the scribe who is one of the attesting witnesses gave out a wrong address and that is a circumstance which creates suspicion. Mr. Mitter submits that it was not a very solemn or serious act and as the witness was then there writing he might have given that as temporary address. From the evidence it is clear that the scribe did give a wrong address and there was no cogent reason for him to give a wrong address except for creating a false impression that he was a local man there; and this fact of giving a wrong address with some motive behind it also arouses some slight suspicion and this suspicion is not totally removed by the explanation given by the witness and by Mr. Mitter. However, on its own alone this suspicion is not strong enough to throw the Will into a cauldron of doubt entirely.

12. Next point urged before us by Mr. Dutta is that a son-in-law of the testator was a witness and that son-in-law was not a straightforward person because he was capable of managing things. In this connection he points out from the evidence Ext. A (1) (i) to show that this witness admittedly passed off a signature as that of Anath Nath knowing well that the signature was not of Anath and had been specifically procured for the purpose of deception by himself Mr. Mitter submits that that son-in-law Bagala Prasanna Roy Choudhury was not a man of the sort described as insinuated by Mr. Dutta, but he was a man who did not conceal anything and whatever he did, though out of the way and better not done, was done not in his own interest but in the interest of his in-laws. He submits that there is no reason not to rely upon the testimony of this witness. About this we shall have something to say later on. Suffice it to say here that his previous deed, though well meant may be, has shaken his credibility. Implicit trust cannot be put on his words alone. Another point urged before us is that there was no reason why Nishikanta should have requisitioned the services of Basanta Kr. Pramanick who was not a professional Muhuri for scribing the Will. According to this scribe witness Nishikanta Babu visited the District Court of Krishnanagar a day or two previous to the date of the execution of the Will and requested him to visit his house at 68; Mohitosh Biswas Street, Krishnanagar, for writing the Will Mr. Dutta contends that if Nishikanta in spite of ill health visited the District Court to procure a scribe for writing out the body of the Will, there was no reason for him to call of all persons Basanta Kr. Pramanick who was neither a professional deed-writer nor a Muhari. The person visiting court for the purpose of engaging a scribe to write a Will would naturally approach a Muhari or a professional deed-writer rather than approach a man who looks after the litigation of a Zamindari estate. Mr. Dutta contends that if Nishikanta visited the District Court itself then there was no reason for him not to have the Will written out and executed there in the court premises itself. There is some force in this argument. The Will itself is a small document and contains around 1000 words. This short Will with no schedule of properties demised could well have been executed in the court premises itself where lawyers would undoubtedly be available. Even if Nishikanta wanted

the Will to be executed in his house at Krishnanagar he could well have called upon the services of a deed-writer or a Muhari if not a lawyer. Therefore some suspicion is aroused as to why this Basanta Kumar Pramanick, an employee of a Zamindar, whose duty was to look after the litigation concerning the Zamindari estate should be called as a scribe. Mr. Mitter on the other hand sees nothing wrong in it. He submits that as Basanta Kumar Pramanick could do the job, there was no reason why he should not have been called. This is a suave explanation no doubt, but this explanation does not satisfy our mind deep down. It is not usual or natural for a person who visits a Court and wants to have a document scribed not to approach a professional man. Therefore the appearance of this non-professional scribe in the scene where a will was allegedly executed raises some suspicion because even by profession this man seems to be a tadbirkar for litigations not his own. Here is a man who although not a lawyer or a lawyer''s clerk thrives in the atmosphere of others'' litigation. His legal quackery allegedly fetched him some fees. He is a suspicious figure in the circumstances of the case. More so as he gave his address incorrectly. This suspicion by itself would not have amounted to much but when we consider the totality of the effect produced by the suspicious circumstances emerging here and there and not adequately explained, this circumstance would also add some volume to that totality.

13. Another contention raised by Mr. Dutta rests on the question whether the draft Will Ext. 2/1 Introduced at a late stage and proved by Bagala Prasanna Roy Choudhury is really in the handwriting of Nishikanta or not. Witness Bagala Prasanna Roy Choudhury, being the son-in-law of Nishikanta, is expected to know the handwriting of his father-in-law. Therefore his competency to prove the writing of Nishikanta cannot be doubted. The respondents before us also utilised the services of Bagala Prasanna Roy Choudhury in proving some of their documents written by Nishikanta through this witness. For example Exts. A and A/2 and A/3 were proved by him. This-shows that the respondents acknowledged the competency of Bagala Prasanna Roy Choudhury to recognise the handwriting of Nishikanta by sight. Therefore it cannot lie in the mouth of the respondents to say that Bagala Prasanna could not prove the handwriting of Nishikanta in the draft Will. No doubt, deposing as a witness, respondent Anath Nath Tarafdar, son of Nishikanta, has doubted the draft Will to be in the handwriting of Nishikanta wholly or partially. But he has not specified which portion, if any, is not in the handwriting of Nishikanta. Nor was the challenge from the side of the respondents so vehement as to call for the opinion of a handwriting expert in evidence. Therefore, taking all these into consideration we are of opinion that the respondents have not succeeded in creating a doubt on the score of the draft being in the handwriting of Nishikanta. The next attack launched upon this draft as a document of suspicious character relates to the state in which the draft exists today. When this draft will was produced in Court through a petition it was stated therein that the draft was in a mutilated stage and so it was not filed initially; but strangely enough no evidence was adduced by the propounders of the will to show how the mutilation of the draft came about. Nowhere, it is stated that when the draft came into the hands of the propounders it was found torn; nor has it been stated

anywhere that the draft got torn while it was in the custody of the propounders. The propounders are silent about it. This lack of explanation from the propounders on the point of mutilation of the draft will does raise some suspicion as contended by Mr. Dutta that it might have been torn deliberately so that the portion which does not harmonise with the terms of the Will Ext. 1 may not see the light of day. Mr. Mitter however seeks to explain this mutilation by saying that it might have been torn while being handled in the Serishta of the lawyer. If that were so, this explanation could have found expression in the petition through which Ext. 2/1 was introduced. Since this explanation did not find expression in the petition afore stated it is difficult for us to accept the explanation now given at the bar. Therefore in our opinion the suspicion that has been aroused by the production of the mutilated draft stands undispelled from our mind. Mutilation was accidental and not intentional, mutilation was not for the purpose of concealing some portions, are matters the propounders had to establish which they did not.

14. Next contention raised by Mr. Dutta is regarding the necessity of the draft being approved by a lawyer of Krishnanagar Court. Mr. Dutta contends that there was no reason for Nishikanta to draft a Will himself and have it approved by a lawyer. He contends that Nishikanta could have as well asked the lawyer to draft a Will. Mr. Mitter submits that the explanation is simple here. Nishikanta being a layman drafted a Will in his own way and considered it advisable to have it approved, so there was nothing unusual in the step taken by Nishikanta. This is undoubtedly an explanation and tolerably a good explanation. We see no reason to discard this explanation altogether and hold it unreasonable. However, there is also some force in the contention of Mr Dutta that to cannot be denied. Anyway, the suspicion sought to be raised on this point by Mr. Dutta is not of any great significance. Mr. Dutta again contends that the word "approved" written by the lawyer on the margin of the draft Ext. 2/1 arouses some suspicions. The word "approved" has been misspelt there. Instead of using two "ps" only one "P" has been used in the word "approved". Mr. Dutta contends that a senior lawyer could not have made such a mistake. Mr. Mitter contends that probably the learned lawyer was in a hurry and unwittingly used one "P" where two "ps" were needed. He submits that it so happened due to oversight and hastiness on the part of the lawyer; therefore on the basis of this small evidence it cannot be said that the draft was not shown to a lawyer to get his approval. In this case the signature and writing of the lawyer has been proved by Jnan Chandra Mukherjee, a member of the Bar, who has been examined as P. W. 2. It appears that Mr. Mukherjee was 75 years old when his services were utilised to prove the signature and handwriting of Bakkeswar Bandyopadhyay. It is difficult to see why the service of an old lawyer whose sight may not have been of the best was utilised to prove the signature of Bakkeswar Babu and his handwriting as well. But since there was no challenge about the ability of P. W. 2 to prove the handwriting and signature of Bakkeswar Babu, there is no reason to doubt his veracity. It is true that a senior lawyer does not commonly make a mistake in writing the word approved, this being a word which frequently comes into use in legal circles; but then it is said that occasionally even Homer nods. Mr. Dutta contends that whenever Homer nods it is a suspicious circumstance by

itself. That may be so, but in this case as the ability of P. W. 2 to prove the handwriting and signature of Bakkeswar Babu was not seriously challenged it ceased to be a suspicious circumstance when some plausible explanation has been offered. But since the draft is mutilated it is difficult to say what was in the mutilated portion of the draft and whether the draft consisted of only one page and consequently it is difficult to say what exactly was approved by Bakkeswar Babu.

15. The next point raised before us by Mr. Dutta is that the Will sought to be probated does not conform to the draft. It is quite true that the draft being mutilated that part of the Will Ext. 1 which makes disposition of property is not to be found in the draft. In that view of the matter it can be said that the draft and the Will are at variance; but we have already stated that mutilation of the draft having not been properly explained that has given rise to an undispelled suspicious circumstance. From the draft one cannot say that the disposition of property made in the draft was just the same as is found in the Will. The Will confers substantial benefit upon the propounders and one cannot say whether the draft in its unmutilated state did so also. In this connection Mr. Dutta draws our attention to the case reported in Gorantla Thataiah Vs. Thotakura Venkata Subbaiah and Others, and submits that wherever the Will confers substantial benefit on the propounder that itself is a suspicious circumstance if the said propounder has taken a prominent part in execution of the Will. Mr. Dutta submits that in this case the draft of the will does not tally with the finished product, the propounders have taken benefit under the Will, and Sushamabala one of the propounders did take a prominent part, So the circumstances present here create a suspicion regarding the genuineness of the Will. There is no doubt that the propounders before us are substantially benefited by the Will. There is also evidence coming from Sushamabala herself which shows that she had taken some part in the execution of the Will inasmuch as she had advised Nishikanta Tarafdar to change some of the terms of the Will and which advice according to her had been accepted. Therefore in the circumstances it is for the propounders to remove all the suspicious circumstances. But the propounders in this case have not been able to explain properly why the draft was found in a mutilated condition, Therefore, the suspicion remains as to whether it would have harmonised with the terms of the Will had the draft remained in an unmutilated state.

16. But on the question of propounders taking prominent part, there is no evidence that Sushamabala did any canvassing for herself, indeed all canvassings do not amount to undue influence (vide Naresh Charan Das Gupta Vs. Paresh Charan Das Gupta, . Propounders taking part may arouse suspicion of undue influence only. Here undue influence is not pleaded nor proved. So in the result Sushmabala"s alleged advice to her husband in the matter of disposition of some property does not sprout any suspicion of noxious character.

17. Something is really missing or amiss is also brought home because in the draft there is mention of a "Schedule below". In the Will also the same thing is true. But not only in the mutilated draft but also in the Will Ex. 1, there is no schedule attached. There is no

cogent explanation forthcoming for this omission. If Bakkeswar Babu approved the draft, he cannot be expected to have approved an incomplete draft. Therefore, there must have been a schedule (sic) in the draft. The Will also speaks of (sic) but the schedule is simply not there. Therefore, this unexplained incongruity remains an unexplained suspicious circumstance intrinsically inscribed in the will itself. (In this connection, it is necessary to point out that the English renderings of the Bengali documents Exs. 1 and 2/1 have bypassed the word (sic)

18. The next point urged by Mr. Dutta is on the question of delay in applying for probate. Mr. Mitter draws our attention to a judgment delivered by Masud, J., and reported in Rajlakshmi Dassi Bechulal Das Vs. Krishna Chaitanya Das Mohanta, , and submits that delay by itself cannot be a ground for refusing grant of probate. He also relies upon this decision and submits that if suspicious circumstances be given a possible explanation the Court should not refuse grant of probate, when the attesting witnesses have otherwise proved voluntary execution of the Will and testamentary capacity of the testators. In this case there has been a delay of about fifteen years in applying for probate. This delay has not been, we think, properly explained. Mr. Mitter however submits that as there was no call to probate the Will the propounders did not probate it, and when it was found that the Will was required to be probated to protect the interest of the legatees the propounders came forward with their application. This explanation however does not appear to be quite satisfactory. We find from the evidence on record that some difficulty was faced by Bagala Prasanna Roy Choudhury when he had to dispose of the Government Promissory Notes left behind by Nishikanta that was a time when a probate would have been of use. This is also seen from the letter of Bagala Prasanna Roy Choudhury written to Anath Nath (vide Ex. A (4)) where he speaks of Succession Certificate which Anath Nath seems to have promised to send him to facilitate the disposal of G. P. Notes. The need for probate had also been felt it appears when a Power of Attorney to manage the property was sought for by Sambhunalh Tarafdar one of the propounders from his brother Anath Nath Tarafdar. Therefore it cannot be said that previously there was no necessity for probate and so the Will was not probated. Furthermore, it is seen from the Khatians Ext. D series that properties bequeathed under the Will to Sushamabala were being recorded in the names of her three sons as well. This also shows that necessity for probate had arisen before but no Will was sought to be probated then. It is true that delay by itself cannot be a ground for refusing grant of probate as has been observed in Rajlakshmi Dassi Bechulal Das Vs. Krishna Chaitanya Das Mohanta, but "delay by itself" is a term pregnant with meaning. It shows that there should not be anything else to obstruct the grant of probate except an objection on the score of delay. In that case when attesting witnesses prove voluntary execution of the Will and testamentary capacity of the testator, a probate can be granted. The law as laid down in the decision referred to above is, if we may respectfully say so, correct; but in this case suspicious circumstances are being pointed out one after another and the propounders are required to explain them to the satisfaction of the Court. Coupled with these comes in to mingle the factor of unexplained delay.

19. One factor which weighs much in our mind is this; why Sushamabala should have observed silence for long fifteen years and not even whispered about the Will, We have already shown some instances where a probate would have facilitated some transactions and would have facilitated protection of her interest but when she did not apply for probate. Why should she have remained silent all along with the Will in her possession is not easily explained. One thing is however certain that Sushamabala was not averse to the terms of the Will or to the Will as a whole. Had she been averse to the terms of the Will or allergic, so to speak, to the Will executed by her husband then we could have understood why she dilly-dallied in the matter of applying for probate.

But she was not averse because, according to her, when Nishikanta read out the Will in draft to her she proposed some changes in it and the changes proposed by her were accepted by Nishikanta and they were incorporated in the Will. If this be true then we can only say that Sushamabala had from the very beginning accepted the Will and was happy with its terms. She being the major beneficiary indeed there was no reason for her to be unhappy with the terms of the Will. Since she was not unhappy with the terms of the Will or averse to it (because she never tried to dissuade Nishikanta from making the Will) there was no reason for her not to probate the Will.

Therefore the delay of fifteen years in not probating the will coupled with equally long silence, in the circumstances of the instant case, creates a good deal of suspicion in our mind and unfortunately for the propounders of the Will this suspicion has not been fully removed.

20. Another contention raised by Mr. Datta while showing suspicious circumstances surrounding the execution of the Will in question rests on the ground of disinheritance of Anath Nath Tarafdar and Bhabanath Tarafdar, the respondents. Mr. Dutta pointing to the letters Exts. A and A/2 addressed by Nishikanta to his sons Anath Nath and Bhabanath on 16-5-1945 submits that the relationship between the father and the aforesaid sons were of the best. He submits that while Nishikanta complained of the behaviour of his wife, youngest son and daughters living with him, he turned for financial assistance and solace towards his elder sons. Exts. A and A/2 showed that Nishikanta was asking for money from Anath Nath and Bhabanath to meet the expenses of his Kaviraji treatment. In those letters he was complaining that others had become apathetic in the matter of treatment of his ailments. In his letter to Bhabanath, Nishikanta wrote that disregarding the obstructions raised by the members of the family with whom he was living, he would go to Bhabanath and stay with him. Mr. Dutta contends that these letters clearly show that Nishikanta was in the best of terms with Anath Nath and Bhabanath and had no complaints against them. He further submits that the letters written by Anath Nath and Bhabanath to the mother after the death of Nishikanta show that the two elder sons were not disrespectful towards their mother Sushamabala. He also refers to the letters written by Sushamabala (Ex. A/6) to Anath Nath and submits that when in trouble Sushamabala used to look to Anath Nath for sympathy. Taking all these letters into consideration Mr. Dutta contends, it can be seen that Nishikanta had no reason to complain against the

behavior of his aforesaid sons. He submits that it is strange that a father who looked for assistance towards his elder sons would make unfounded allegation in the Will stating that the two sons were disrespectful towards their mother. He submits that since the will contains false allegations it cannot be considered to be a genuine will. Further he contends that since the will makes unnatural disposition disinheriting the elder sons who were all along in amity with his father and helping the father, the will cannot be a genuine will. To counteract this argument Mr. Mitter submits that it is one thing to wish well of children and it is another thing to give them property. To support this he draws our attention to the case reported in Naresh Charan Das Gupta Vs. Paresh Charan Das Gupta, and reads out, the portion approvingly quoted therein from Hall v. Hall (LR 1 P & D 481, 482) and submits that some persuasions are legitimate. He also contends that when direct evidence of execution of Will is there inequity of disposition cannot outweigh the evidence supplied by witnesses regarding the execution of Will by a testator having testamentary capacity to do so. The evidence does show that Nishikanta had hardly any reason to incorporate in the Will a statement that his elder sons were disrespectful towards their mother. Sushamabala''s evidence does not contain anything which can lead us to the conclusion that Anath Nath Tarafdar and Bhabanath Tarafdar were disrespectful towards her. Instances of disrespect exhibited by Anath Nath and Bhabanath towards Sushamabala prior to the execution of the Will are not to be found, in the circumstances, it must be said that the will contains a statement which does not appear to be true. From what we learn of Nishikanta''s character on reading the letters written by him, we find that Nishikanta was not a man who would unnecessarily cast a stigma on the character or conduct of any one, much less his elder sons without reason. Therefore the statement of the nature and character found in the Will raises suspicion about its genuineness. But the observation contained in Mrs. S. Misra @ S. Lazarus Vs. Sm. Mangala Kumari Devi, , has to be borne in mind. It is stated therein: "Even if the recital contains in the Will is incorrect, or even untrue the Will nevertheless a valid Will....

Therefore, untrue statement contained in the Will by itself constitutes no ground to hold the Will invalid or unreal if its due execution is otherwise proved and there be no other unexplained suspicious circumstances. It is also true that inequity of disposition by itself is no ground to hold the Will invalid. If it is permissible to say so, we might say that most Wills contain some elements of inequitous disposition, if intestacy is considered to be the valid and normal disposition of a deadman''s property. But all these things will have to be considered along with other suspicious circumstances surrounding the execution of the Will. If other suspicious circumstances are there which are unexplained then iniquitous disposition and untrue statements contained in the will would go to add further volume to the suspicious circumstances that the will is not a genuine document

21. The next point canvassed before us by Mr. Dutta is that had there been a will Sushamabala and Sambhu Nath could not have approached Anath Nath for a General Power of Attorney (Ammoktarnama) to manage the property. Mr. Mitter contends that in the first place the draft General Power of Attorney is a document not prepared by

Sambhu Nath and in the second place, he contends, that in any event Sushamabala did not approach Anath Nath for his signature on the General Power of Attorney and the learned Court below was wrong in holding that Sushamabala had joined.Sambhu Nath in requesting Anath Nath for his signature. In this connection Mr. Mitter draws our attention to the written statement filed by the respondents and submits that in the written statement para 11 there is no mention that Sushamabala approached Anath Nath for a General Power of Attorney so that Sambhu Nath be able to manage the property on legal footing. It appears that in the written statement there was no allegation against Sushamabala that she approached Anath Nath to get an ammoktarnama but in his deposition on cross-examination Ananth Nath introduced the story that Sushamabala had accompanied Sambhunath when the latter approached him for a signature on the ammoktarnama. Therefore it can be said that the learned Judge below was wrong in coming to the conclusion that Sushamabala had also requested Anath Nath for a signature on the ammoktarnama. Be that as it may, there is no doubt, as has been found by the court below, that Sambhunath tried to get the signature of Anath Nath on the ammoktarnama. Had there been a will in existence, the necessity of getting an ammoktarnama could not be there. Sambhunath being a propounder, it was his duty to explain why in spite of the existence of the will he wanted to get an ammoktarnama executed by Anath Nath, his brother. Since Sambhunath has not come forward to explain his conduct in spite of his being a propounder, this conduct of his tells heavily upon the case of the propounders and puts in jeopardy the genuineness of the will.

22. Another matter which draws our attention is the letter written by Sushamabala to Anath Nath Ext. A/6. This letter was written by Sushamabala complaining to Anath Nath about the desire of Bhabanath to sell the Goaribari at Krishnanagar. This seems to be the valuable property of the family and a precious possession. From the letter of Sushamabala it appears that in her opinion the prestige of the family was to a certain extent attached to the possession and retention of this property which the family had earned with, it appears, good deal of hard Labour. When Bhabanath proposed to sell this property away that proved to be the last straw on the camel''s back and Sushamabala became seriously aggrieved. In the proposed sale of the said Goaribari she saw not only passing away from the family''s possession a valued property but also the passing away of the prestige that her husband and his predecessor had earned. Hence this letter Ext A/6. But at the end of this letter referring to Bhabanath she wrote" (sic)

(Bengali portion in Devnagri.)

This shows that Sushamabala was showing helplessness. Had she had the will In her custody and power there was no need for her to be afraid of Bhabanath''s proposal or his (what she calls) selfishness. She could at once throw him out of her house declaring that she would probate the will which her husband had left. Since she turned for sympathy towards Anath Nath she could also have told Ananth Nath that time had come for her to probate the will in order to protect the family possession as well as the family prestige. Want of this bold assertion anywhere at a time when such boldness was required badly

creates an impression in our mind of suspicion and doubt about the existence of the will itself. This suspicion, has not been removed from our mind by cogent explanation.

23. The last contention of Mr. Dutta is based on subsequent events, events subsequent to the decree passed by the court below and pending the hearing of appeal. Mr. Dutta submits that one of the propounders, namely, Sambhunath, sold away a number of properties some singly and some jointly with his brother Bhabanath. He submits that this shows that Sambhunath himself does not regard the will as genuine, sacred, and binding. Mr. Mitter admits the sales but submits that he does not represent Sambhunath and the act and conduct of Sambhunath do not affect the genuineness and character of the will. We think that the alleged conduct of Sambhunath does not have a bearing on the genuineness of the will one way or other. Sambhunath might have taken that desperate step in the belief and calculation that intestacy would have benefited him more. The conduct of Sambhunath only affects him to the extent that he is not a suitable person to administer the estate as an executor. That being the position we think the subsequent events do not affect in any way our present consideration of the case, as this post decretal act is not a suspicious circumstance surrounding the execution of the will.

24. Now we shall turn to the execution of the will. Nishi Kanta had mental and physical capacity to execute the will is not in doubt. Had he been so minded he was in a position to create a will from the view point of soundness of mind and body. This is obvious from the contemporaneous letters we have already referred to above. If the witnesses are believed the execution is proved.

25. We have already stated that the scribe appears to have acted in a surreptitious manner because he did not give his correct address. Bagala Prasanna Roy Choudhury does not inspire very great confidence because of his admitted conduct which we have already briefly noticed. After the death of Nishi Kanta when G. P, notes were required to be sold he was entrusted with the task of selling them. He did manage to dispose them of but not before creating a forged signature of Anath Nath Tarafdar. This act of forging signature did not redound to his credit. It showed that he was a man who could manage things for the party he was with. In this case he is with the propounders. Therefore naturally a suspicion arises whether he has not been able to manage matters again by some deft handling. The next point to be considered is that it appears from his letters to Anath Nath (Ext. A(4)) that Anath Nath had promised to send a succession certificate to facilitate the disposal of the G. P. notes. In this letter he inquired about the succession certificate. He knew that the will existed so he could have told ''Anath Nath that succession certificate was not needed but a probate would be in order (or at least could have remained indifferent). He did not do so. His explanation is that Nishi Kanta and Sushamabala had forbidden him to disclose the existence of the will. Whether Nishi Kanta did forbid or did not cannot be verified. But Sushamabala does not appear to have said anywhere that she had forbidden Bagala Prasanna Roy Chowdhury from disclosing the existence of the will. Therefore his explanation remains uncorroborated and his conduct in inquiring about the succession certificate remains a suspicious circumstance.

Hence it is not possible to rely upon this witness and it is not unlikely that he managed things again. The evidence of another witness Gurudas Ganguly is not of such weight as to sweep aside all the suspicious circumstances noticed and recorded above. Therefore, all in all, the evidence given by the attesting witnesses do not create such impression as to sweep aside all other considerations. But the evidence offered by the attesting witnesses will have to be considered simultaneously along with the suspicious circumstances and not separately in watertight compartment before or after taking a look at the suspicious circumstances. Otherwise some strange result may follow. If evidence regarding due execution and attestation is taken up first for consideration in isolation of suspicious circumstances and a finding is made positive or negative and execution is held proved or not proved, then there would really be no need to look at and consider the effect of suspicious circumstances. In case due execution and attestation is held proved, the suspicious circumstances will at once be silenced and routed. If due execution and attestation is held not proved further support of suspicious circumstances to defeat the will would be superfluous. Therefore, to avoid the horns of this dilemma, it is necessary to consider the evidence regarding due execution and attestation of a will along with the suspicious circumstances. While writing out, this may not be achieved; because, in writing, something must be written first and something after that and so on; but while considering the matter and weighing the pros and cons of a case, the unique mental faculty of carrying on simultaneous consideration of various factors must be utilised to come to a finding whether probate can be given or not. With this observation in passing we shall now proceed further.

26. By now we have covered all the points that have been raised before us by the parties. We have found many a suspicious circumstance not properly explained and a few suspicious circumstances explained more or less satisfactorily. Weighing the unexplained suspicious circumstances along with the explained suspicious circumstance and the evidence of execution of the will we come to the conclusion that in this case the unexplained suspicious circumstances are too many in number and too weighty in character. Hence we find that the learned court below was justified in refusing the grant of probate applied for by the propounders. It is true that at her old age Sushamabala seems to have been undeservingly deeply wounded in her sentiment by the uncharitable proposal made by Bhabanath. But unfortunately a Court of law has to decide matters on the basis of facts and law and not on the basis of injury to sentiment howsoever grievously inflicted.

27. Hence this appeal has to be and is hereby dismissed; but, m the facts and circumstances of the case, we make no order as to costs.

P.K. Banerjee, J.

27. I agree.