
(2006) 09 AHC CK 0266
In the Allahabad High Court

Estate of Late Smt. Sushila Devi and Ashok Dutt and Another	APPELLANT
Vs	
Yogendra Nath Dutt and Others	RESPONDENT

Date of Decision : 01-09-2006

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 145
Evidence Act, 1872 — Section 45, 47, 67, 68
Penal Code, 1860 (IPC) — Section 302
Succession Act, 1925 — Section 59, 63

Citation : (2006) 09 AHC CK 0266

Hon'ble Judges : Sunil Ambwani, J

Bench : Single Bench

Judgement

Sunil Ambwani, J.—Shri Ashok Dutt and Shri Satish Kumar Dutt sons of late Shri Dina Nath Dutt the named executors filed a Testamentary Case No. 17 of 1985 for grant of probate of the "holograph" will dated 20.5.1985 of their mother late Smt. Sushila Devi (the deceased) who died on 14.8.1985, residing at 7/83 Tilak Nagar Kanpur registered by Sub Registrar, Kanpur on 22.5.1985, along with an application to appoint them as interim administrators of her estate.

2. The deceased has left behind her, eight sons and one daughter. The eldest son Yogendra Nath Dutt is settled in Glasgow, U.K.; Shri Rajendra Nath Dutt, the second son is residing at 7/67 Tilak Nagar, Kanpur; Shri Satish Kumar Dutt, the third son is plaintiff No. 2. Km. Indu Mehta, the daughter residing at 7/83 Tilak Nagar Kanpur, is an advocate by profession and was counsel for State on criminal side in Kanpur Court. Shri Vinod Kumar Dutt, fourth son was residing at 7/83 Tilak Nagar Kanpur. He died during the pendency of the suit and was substituted by his widow Smt. Rewa Kiran Dutt, and two children Km. Nidhi and Amit Dutt, now major. It is alleged that Vinod Kumar Dutt was murdered and the trial, in which Shri Ashok Dutt, plaintiff-1 is one of the accused, is pending. Shri Kranti Kumar Dutt, the fifth son was residing at 222, Kangra Niketan, Vikaspuri, New Delhi, at the time of filing of the suit; Shri Ajai Dutt, sixth son was residing at Godhur Colliery, P.O Kusunda, District Dhanbad. Shri Ashok Dutt, plaintiff No. 1

has given his address in the plaint at 85/35 Kalpi Road, Kanpur and Shri Krishna Dutt, the last son is residing at 7/83 Tilak Nagar, Kanpur.

3. The citation was published vide orders of the Court. A caveat was filed by Shri Vinod Kumar Dutt stating that the will was not executed and signed by his mother Smt. Sushila Devi; at any rate the will was not executed by her free will and volition. In fact, it was the result of undue influence, pressure, coercion and fraud at the instance of the plaintiffs; Km. Indu Mehta and some other persons. In para 10 the caveator denied that Shri Rajendra Nath Dutt and Shri Vinod Kumar Dutt neglected their mother during her life time or had insulted, annoyed and injured her feelings.

4. The caveator insists in para 13 the plaintiffs to prove the will in solemn form of law, and alleged in para 14 that Smt. Sushila Devi was not sole owner of the properties (both immovable and movable), and that she could execute the will only in respect of her share of the properties. After setting out a pedigree in para 16, it is stated in para 17, and 18 that late Dina Nath Dutt-their father possessed several properties including premises 84/35 Kalpi Road, Kanpur; premises 123/355 situate at Factory area Fazalganj Kanpur and movable property in the shape of plant and machinery lying in these two premises. Late Shri Dina Nath Dutt purchased premises No. 7/83 Tilak Nagar Kanpur in an auction as highest bidder of Rs. 83, 000/-, through registered sale deed dated 24.5.1984 in the name of his wife Smt. Sushila Devi (the deceased). He was for all practical purposes owner and landlord of the premises. Smt. Sushila Devi had no source of earning or money to purchase the house. Shri Vinod Kumar was living at 7/83 Tilak Nagar, Kanpur as co-owner in his independent right.

5. In para 21 he stated that the entire sale consideration was paid from the account of Bharat Engineering Works, Kalpi Road, Kanpur of which Shri Dina Nath Dutt was sole proprietor. Shri Dina Nath Dutt expired on 19.8.1959 on which the properties devolved upon his wife and eight sons and one daughter in equal, shares. In para 25 he stated that Shri Rajendra Nath Dutt and Km. Indu Mehta separated from joint family in 1974 and 1977 respectively. The rest of the properties continued to be possessed by the remaining members jointly and remained under their co-ownership. In order to grab the benami property, the will was managed and is shown to be executed on 22.5.1985 by Smt. Sushila who was old and infirm and was never permitted to exercise her free will, in any manner. She could not relieve herself from the clutches of Shri Ashok Dutt and Ors. who had ill will and evil design to grab the joint family properties.

6. In the counter affidavit, Shri Ashok Dutt the plaintiff states that Sushila Devi was absolute owner of the properties of house No. 7/83 Tilak Nagar Kanpur. She was realizing rent and paying taxes. No undue pressure, coercion or fraud was brought upon or practiced on her either by the plaintiffs or Km. Indu Mehta. Shri Rajendra Nath Dutt and Shri Vinod Kumar Dutt never cared to look after their mother and always neglected, insulted and annoyed her on many occasions. Smt. Sushila Devi was in perfect state of health at the time of execution of the

will. Their late father had never objected to the ownership of their mother. She was assessed to income tax and wealth tax. The properties were distinct and separate from large number of other properties owned by H.U.F. of which Shri Dina Nath Dutt was the "Karta" during his life time as Smt. Sushila Devi was eldest daughter of Shri Rai Bahadur Bakshi Har Bans Lal Chhibbar, who was a Deputy Secretary in the Ministry of Commerce in the Government of India in 1930. She received generous gifts in cash and jewellery from him during his life time, and apart from that her husband late Dina Nath Dutt who was a flourishing businessman used to give her substantial amount for house keeping which they used to save. Sri Vinod Kumar Dutt is living in the accommodation at Kalpi Road as a licensee with the permission of the deceased only after his marriage in 1979 Prior to that he was living at P-22 Pratapganj Kanpur.

7. Shri Ashok Dutt further states in the replication that on the death of their father Shri Dina Nath Dutt, there was oral family partition 1.2.1974 after which all the heirs separated and joint Hindu family status was disrupted on which the members became owner of his/her properties which came to his/her share.

8. Further in the replication Shri Ashok Dutt stated the same facts as he had affirmed in his affidavit.

9. Shri Rajendra Nath Dutt filed a counter affidavit denying the execution of the will by his mother Smt. Sushila Devi, and supported the stand taken by Shri Vinod Kumar Dutt. Shri Ashok Dutt and Shri Satish Kumar Dutt filed a replication to this counter affidavit with the sale allegation as in their replication to counter affidavit of Shri Vinod Kumar Dutt.

10. An application was filed by late Shri Vinod Kumar Dutt seeking amendment in para 27 and permission to add 27-A and 27- B after para 27. The application was allowed on 1.4.1987. By these amendments the defendants added in para 27 giving reference to Suit No. 821 of 1985 for permanent injunction filed by Shri Vinod Kumar against Sushila Devi and further stated in para 27-A and 27-B that Shri V.K. Dutt filed Suit No. 767 of 1986 against all other sons and a daughter of Smt. Sushila Devi and claimed his share in house No. 84/35 Kalpi Nagar; house No. 123/355 Factory area Fazalganj Kanpur and house No. 7/83 Tilak Nagar Kanpur and also for compensation for pendentelite and future expenses. Smt. Sushila Devi had no share in 83/35 Kalpi Road and House No. 123/355 Factory Area Fazalganj Kanpur. She also has no right to bequeath House No. 7/83 Tilak Nagar Kanpur. Shri Vinod Kumar Dutt filed Suit No. 821 of 1985, for permanent injunction against Sushila Devi and Indu Mehta restraining them from interfering with the enjoyment of plaintiff of house No. 7/83 Tilak Nagar Kanpur which he occupied in his own right and belong to his father and also benami in the name Mst. Sushila Devi.

11. An application was filed by Shri Rajendra Nath Dutt to stay the proceeding of this case on 22.4.1987 on the ground that suit No. 767/86 and suit No. 821/85 are pending at Kanpur. The application was rejected. The other application was

filed by Shri Vinod Kumar Dutt on 28.4.1987 to withdraw Suit No. 393 of 1985; 821 of 1985 and 767 of 1986 from Kanpur and to be tried along with this suit. The application was dismissed as not pressed on 12.8.1987.

12. Shri Krishna Dutt and Indu Mehta filed an application on 30.6.1987 to vacate the interim order and to grant interim injunction to protect their personal properties and not to eject them.

13. The will in question dated 20.5.1985 is allegedly executed by the deceased, was drafted by Shri V. B. Mathur, Advocate and is witnessed by Shri Ravikant and Smt. Kamlesh Nigam, Advocate. The holograph (in the hand writing of the testatrix) will of Sushila Devi is written by her on seven full scape pages and annexes a site plan of House No. 7/83 Tilak Nagar Kanpur. It was registered on 22.5.1985 at Bahi No. 3 Zild 598, page 147-151 at No. 63 on 30.5.1985 in the office of Sub-Registrar, Kanpur. The will starts with a recital that testatrix is 70 year"s old, is not sure of her life, and has decided to make arrangements of her movable and immovable properties to avoid any dispute between the legal heirs. She had purchased house No. 7/83 Tilak Nagar from her stridhan, in the life time of her husband Shri Dina Nath Dutt and is living in the house as owner thereof, and her name is entered in the government records. She has all the rights in the house. She has eight sons and one daughter who she named in the will and no one else has any right in the house. Other than this she has a property No. 84/35 Kalpi Road Kanpur, in a big hall shape room with an. area 215.3 square meter, which she has received in partition and is sole owner thereof. Apart from this she has 650 ordinary shares of M/s Hindustan Motors Limited; 100 shares of M/s Hindustan Motors Ltd; 100 ordinary shares of M/s Hindustan Commercial Bank Limited; 200 shares of M/s Shree Manufacturing Co. Ltd.; 117 shares of M/s Amrit Vanaspati Co. Ltd; which she gives to her son Satish Kumar Dutt. She has a bank account in Bank of India, Birhana Road, Kanpur in which some amount is deposited. Her eldest son Yogendra Nath Dutt has separated from her about 33 years ago. He had left for a foreign country for engineering degree, got married and is settled there. He has one daughter. He has not returned since 1982 and therefore, she is not giving any share to him, his wife, and daughter. The relations of her son Rajendra Nath Dutt with her and her other children are not cordial. Because of his bad behaviour she has decided to give nothing to him. He has also received sufficient properties in family partition. Her son Vinod Kumar Dutt is in the influence of his wife and has started misbehaving with her and is troubling his brothers and sister. He got sufficient properties in family partition and is earning and living separately. She has decided not to give anything from her property to him, though he is living in house 7/83 Tilak Nagar, Kanpur, with her consent and is under her orders to vacate the portion for which she has also filed the suit. Shri Vinod Kumar Dutt has two children namely Nidhi Dutt and Amit Dutt for whom the amounts of Rs. 10,000/- each in fixed deposit shall be given when they are 20 years old. Her fixed deposits shall be appropriated when the will is probated.

14. The will further recites that other than these children the testatrix has four sons and one daughters who are living in house 7/83 Tilak Nagar Kanpur and after her death, her properties will be given to them. Till then she will be the owner of the property. After her death the portion shown as "A" in site plan in green colour will be given to Satish Kumar Dutt; the portion shown in "B" in red colour will be given to her daughter Indu Mehta; the portion shown in "C" in yellow colour will be given to her son Kranti Kumar Dutt; the portion shown in "D" in white colour will be given to Shri Ajai Dutt; the portion shown in "E" in brown colour will be given to Krishna Dutt and the portion shown in "F" in blue colour will be given to Ashok Dutt. She gave the hall shape big room in House No". 84/35 to her youngest son Krishna Dutt; Rs. 5000/- was given to Arya Samaj Swaroop Nagar Kanpur, and further Rs. 5000/- to Hindu Anathalaya Latosh Road, Kanpur and after paying all these amounts whatever will be left in her saving bank account shall be given equally to her sons Satish Kumar Dutt; Ashok Dutt; Krishna Dutt and one daughter Anju Mehta and that nothing will be given to Shri Yogendra Nath Dutt; Shri Rajendra Nath Dutt and Vinod Kumar Dutt.

15. She further desired that none of her sons will have right to sell their portion in property No. 7/83 Tilak Nagar Kanpur and 84/35 Kalpi Road Kanpur, to any outsider. They will have to first offer the same to their brothers and sisters who have inherited the property at a reasonable price, i.e. 20% less of the market price, and that until her sons and daughter come in occupation of their respective shares, the income of rent will be distributed between Satish Kumar Dutt; Kranti Kumar Dutt; Shri Ajai Dutt; Shri Krishna Dutt and Km. Indu Mehta in equal shares. She further desired that all her jewellery gold, silver etc. shall be divided by the persons inheriting her property equally and that her previous registered will dated 25.2.1976 shall stand cancelled. She appointed Sri Satish Kumar Dutt and Ashok Dutt as executors of the will to divide the properties in accordance with her wishes. Lastly she stated that she is in good health and is able to clearly think and understand the contents of the will executed after deliberations and without any undue influence,

16. Out of eight brothers and one sister the will does not provide for Shri Yogendra Nath Dutt the first son; Shri Rajendra Nath Dutt. The children of Vinod Kumar Dutt receive a minor legatee of Rs. 10, 000/- each. Shri Ashok Dutt and Shri Satish Dutt, the executors are the plaintiffs. Shri Vinod Kumar Dutt, through her widow and children and Km. Indu Mehta who did not dispute the execution of will earlier and is a beneficiary under it, are the contesting defendants. Learned Counsel for Shri Kranti Kumar Dutt has made a statement in the court that he is not putting any contest to the will.

17. Following issues were framed by order dated 5.1.1987:

(i) Whether the Will dated 20th May, 1985 was executed by Late Smt. Sushila Devi of her own free will and whether the same was attested in accordance with law?

(ii) Whether the Will dated 20th May, 1985 was executed as a result of undue influence, pressure, coercion and fraud laid upon her as alleged in the written statement filed by Sarvasri Vinod Kumar Dutt and Rajendra Kumar Dutt?

(iii) Whether the Testatrix was not in sound state of mental health at the time of execution of the said Will?

(iv) Whether the defendant-Caveators Sarvasri Vinod Kumar Dutt and Rajendra Kumar Dutt have any locus standi to oppose the grant of probate, they having set up title in the property bequeathed by late Smt. Sushila Devi in themselves?

(v) What relief if any, to be granted in this case.

18. The plaintiffs examined Shri Kamlesh Nigam as PW-1; and the propounder and executor of the will Shri Ashok Dutt as PW-2. Shri Kamlesh Nigam, Advocate PW-1 was examined and cross examined on 14.5.1987. Shri Ashok Dutt entered witness box on 13.11.1991. On 14.11.1991 the Court found certain documents filed on record were not available and were missing. The office reports were called and search continued upto 9.4.1992. The copies of these documents were placed on record. On 4.5.1992 Hon'ble Ravi H. Dhawan, J. (as he then was) allowed the documents to come on record and that on 14.9.1992 the Court recorded that there are about 12 cases pending in different courts between the parties at Kanpur. He observed that the matter was pending for seven years without evidence being recorded and that if the brothers and sisters do not rise above the action to solve their family matters during their life time, they may not see their rights and title on the properties left by their parent before the court below and that the court will mark down the case to appropriate civil court at their home ground at Kanpur. On the next day on 15.5.1992, the court made a solemn effort and requested the parties to come down to some settlement. The matter was pending since thereafter, for settlement, which eluded the parties upto year 2002 when it was recorded that since the statements have to be recorded, let the evidence proceed.

19. In the meantime Vinod Kumar Dutt died and was substituted by his widow and children on 28.11.1988. It is alleged by the defendants that he was murdered and that Shri Ashok Dutt is one of the accused in the case. Shri Ashok Dutt re-entered the witness box and was examined on 13.10.2003, 26.7.2004, 27.9.2004; 6.12.2004; 28.2.2005; and 22.8.2005. His cross examination was concluded on 23.8.2005. Shri Ashok Dutt ostensibly continued in the witness box from 13.11.1991 to 23.8.2005, for a period of about 14 years. He entered the witness box at the age of 42 and came out with grey hair at the age of 56 years. The case management in the high court needs to be given a fresh look. During all these years the parties were vigilant and were eager to get the matter decided. The record testifies that it was the court which took its time, in its slow moving circuitous passage of procedures; and legalese, travelling in time for 21 years to decide the case during which one of the son was murdered and that Km. Indu Mehta, the daughter has changed her stand. The dispute in the family still

unresolved without any effective mediation with the intervention of the court.

20. The defendants examined Shi i Rewa Kiran Dutt, widow of late Vinod Kumar Dutt as DW-1; Km. Indu Mehta as DW-2, KishanDuttasDW-3.

21. An affidavit of Amit Dutt, son of late Vinod Kumar Dutt was filed in evidence. The court found that he was 21 years old, and was making an attempt to depose about the relationship between her grand mother; uncles and their families. The court reminded the counsel for the defendants and the witness that the deposition would be meaningless as the witness was only about one year of age at the time when his grand mother died. The witness realized the consequence of his statement which could not be based even on his memory and withdrew from the witness stand.

22. A large number of documents was filed on record, some of which have not been proved. These shall be referred to while discussing the evidence.

23. In the order dated 14.5.1992 when the matter was listed for evidence, the court observed that eleven Suits and one Civil Appeal are pending between the parties, which have enveloped the brothers and sisters in litigation over the family properties. It was observed that even if the will is found worth of a probate or letters of administration, delivered or denied, the family will still be in litigation.

24. Some of the matters are still pending. Now since the matter has been heard, the Court, as testamentary court, is hopeful that the judgment delivered will benefit the subordinate court to end most of the litigation pending between members of the family. The relevant fact, however, to be noted here is that three days before the execution of the will, late Vinod Dutt had filed a suit against her mother Smt. Sushila Devi for declaration that the properties under the will were purchased benami by his father in her name. This fact has an important bearing of the need and due execution of the will.

Issue Nos. 1, 2 and 3

25. All the three issues namely whether the will was executed by the deceased of her own free will and whether the same was attested in accordance with the law; whether the will was executed as a result of undue influence, pressure, coercion and fraud laid upon her as alleged in the written statement filed by S/Shri Vinod Kumar Dutt and Rajendra Kumar Dutt; and whether the testatrix was not in sound state of mental health at the time of execution of the said will are interconnected and are decided together.

26. The law relating to the will is fairly well settled. In H. Venkatachala Iyengar Vs. B.N. Thimmajamma and Others, the Supreme Court laid down the principles of onus of proof of the will as follows:

The party propounding a will or otherwise asking a claim under a will is no doubt seeking to prove a document and, in deciding how it is to be proved, reference

must inevitably be made to the statutory provisions which 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 59 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 the usual test of the satisfaction of the prudent mind in such matters.

However, there is one important feature which distinguishes will from other documents. Unlike other documents 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 the world cannot say whether it is his will or not; and this aspect naturally introduces an element of solemnity in the decision of the question as to whether the document propounded is proved to be (the last will and testament of the departed testator. Even so, in dealing with the proof of wills the Court will start on the same enquiry as in the case of the proof of documents. The propounder would be called upon to show by satisfactory evidence that the will was signed by the testator, that the testator at the relevant time was in a sound and disposing state of mind, that he understood the nature and effect of the dispositions and put his signature to the document of his own free will. Ordinarily when the evidence adduced in support of the will is disinterested, satisfactory and sufficient to prove the sound and disposing state of the testator's mind and his signature as required by law.

Courts would be justified in making a finding in favour of the propounder. In other words the onus on the propounder can be taken to be discharged on proof of the essential facts just indicated.

There may, however, be cases in which the execution of the will may be surrounded by suspicious circumstances. The alleged signature of the testator may be very shaky and doubtful and evidence in support of the propounder's case that the signature in question is the signature of the testator may not remove the doubt created by the appearance of the signature; the condition of

the testator's mind may appear to be very feeble and debilitated; and evidence adduced may not succeed in removing the legitimate doubt as to the mental capacity of the testator; the dispositions made in the will may appear to be unnatural, improbable or unfair in the light of relevant circumstances, or, the will may otherwise indicate that the said dispositions may not be the result of the testator's free will and mind. In such cases the Court would naturally expect that all legitimate suspicions should be completely removed before the document is accepted as the last will of the testator. The presence of such suspicious circumstances naturally tends to make the initial onus very heavy; and unless it is satisfactorily discharged, Courts would be reluctant to treat the document as the last will of the testator. It is true that, if a caveat is filed alleging the exercise of undue influence, fraud or coercion in respect of the execution of the will propounded, such pleas may have to be proved by the caveators; but, even without such pleas circumstances may raise a doubt as to whether the testator was acting of his own free will in executing the will, and in such circumstances, it would be a part of the initial onus to remove any such legitifnate doubts in the matter.

Apart from the suspicious circumstances above referred to in some cases the wills propounded disclose another infirmity. Propounders themselves take a prominent part in the execution of the wills which confer on them substantial benefits. If it is shown that the propounder Has taken a prominent part in the execution of the will and has received substantial benefit under it, that itself is generally treated as a suspicious circumstance attending the execution of the will and the propounder is required to remove the said suspicion by clear and satisfactory evidence. It is in connection with wills that present such suspicious circumstances that decision of English Courts often mention the test of the satisfaction of judicial conscience. The lest merely emphasizes that, in determining the question as o whether an instrument produced before the Court is the last will of the testator, the Court is deciding a solemn question and it must be fully satisfied that it had been validly executed by the testator who is no longer alive.

It is obvious that for deciding material questions of fact which arise in applications for probate" or in actions on wills, no hard and fast or inflexible rules can be laid down for the appreciation of the evidence. It may, however, be stated generally that a propounder of the will has to prove the due and valid execution of the will and that if there are any suspicious circumstances surrounding the execution of the will the propounder must remove the said suspicions from the mind of the Court by cogent and satisfactory evidence. It is hardly necessary to add that the result of the application of these two general and broad principles would always depend upon the facts and circumstances of each case and on the nature and quality of the evidence adduced by the parties.

It is no doubt true that on the proof of the signature of the deceased or his acknowledgment that he has signed the will he willbe presumed to have known

the provisions of the instrument he has signed; but the said presumption is liable to be rebutted by proof of suspicious circumstances. What circumstances would be regarded as suspicious cannot be precisely defined or exhaustively enumerated. That inevitably would be a question of fact in each case.

27. These principles were reiterated 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, Ramchandra Rambux Vs. Champabai and Others, Pushpavathi and Others Vs. Chandraraja Kadamba and Others, Surendra Pal and Others Vs. Dr. (Mrs.) Saraswati Arora and Another, Smt. Jaswant Kaur Vs. Smt. Amrit Kaur and Others, S. Sundaresa Pai and Others Vs. Sumangala T. Pai and Another, Janki Narayan Bhoir Vs. Narayan Namdeo Kadam, Pentakota Satyanarayana and Others Vs. Pentakota Seetharatnam and Others, and Madhukar D. Shende Vs. Tarabai Aba Shedage,

28. In Joyce Primrose Prestor Vs. Vera Marie Vas and Others, , the Supreme Court while considering the presumption over the holograph will held;-

A "holograph Will" is one which is wholly in the handwriting of the testator. While there is a presumption of regularity and due execution of a Will, in the case of "holograph Wills", the presumption is all the more - a greater presumption. The case of a holograph Will is a special case which will require a different approach in considering the evidence in the case, to find whether the Will has been duly executed and attested. The approach to be made in such cases has been stated by the Constitution Bench in Shashi Kumar Banerjee case. In applying the principles laid down therein to particular cases, the nature of the Will, the pleadings of the parties in the case, facts admitted or proved and the presumptions available in law, will have to be carefully given effect to. It is in this background, the evidence in the case including that of the attesting witnesses should have been examined and what was required was only to formally prove the Will, and very little evidence to prove due execution and attestation of the Will, was alone called for.

29. In this case, the court has also to consider and decide whether any undue influence, pressure, coercion or fraud was played upon the testatrix as alleged in the written statement of Shri Vinod Kumar Dutt and Shri Rajendra Kumar Dutt.

30. The plaintiffs examined Smt. Kamlesh Nigam, a practicing lawyer at the District Court Kanpur, the attesting witness of the will as PW-1. She stated that she knew Smt. Sushila Devi and also met in the month of May 1985, when she has gone to her house. Smt. Sushila Devi asked the witness to meet her in the chamber of Shri V.B. Mathur in the court compound. It was either 18 or 19th May 1985. On the next day, she went to the chamber of Shri V.B. Mathur, Advocate where she met Smt. Sushila Devi who desired a practical document to be registered. She accompanied her to Sub Registrar's office, where they met one R.S. Agarwal (Ravi Shanker Agarwal). Smt. Sushila Devi took out a piece of

paper written by hand and signed it after correcting it and also signed on the contents and overwriting. She said that it was her will. Thereafter, Shri R.S. Agarwal signed the paper and the witness followed next. She was seen original will (Paper No. A-67) contained 7 pages. It was proved by her on her statement that it was signed by Smt. Sushila Devi and also by Shri R.S. Agarwal as attesting witness. She recognised the hand writing of Smt. Sushila Devi who had signed the documents in her presence and the presence of Shri R.S. Agarwal. She also proved the signatures of Shri R.S. Agarwal by stating that she recognised his signature. This was done on 20.5.1983. The document was presented for registration before the Sub Registrar. The Sub Registrar declined to entertain the document for registration on the ground that some objections were received by two sons of Smt. Sushila Devi i.e. V.K. Dutt and Rajendra Dutt. One of them Vinod Kumar Dutt is present in court. They left Sub Registrar's office. On 21.5.1985 Shri Ashok Dutt, one of the sons of Smt. Sushila Devi came to her and asked her to be present in the Registrar's office on 22.5.1985. She went there on 22.5.1985 at about 11.00 AM where Smt. Sushila Devi and Shri Ravi Shanker Agarwal were also present, the documents were presented before the Sub Registrar for registration. The entries were made on the reverse of the first page and Smt. Sushila Devi signed on the reverse of the first page. She was also asked to sign on the reverse near the signatures of Shri Ravi Shanker Agarwal who had just signed before her and she left for her chamber.

31. In the cross examination PW-1 stated that She had met Sushila Devi a "at home" given by her on the occasion of marriage of one son Vinod Dutt who had entered into court marriage and as an Advocate she had assisted him in the 5-6 years. She had visited Smt. Sushila Devi probably 10-15 times. She also met her during the period and the other members of the house. She was aware of number of children of Smt. Sushila Devi but was not very well acquainted with their names. She stated that Smt. Sushila Devi's daughter is practicing advocate and lives in Tilak Nagar. She does not know the door of the house and the direction to which it faces. She only knows that one of the doors opens towards east. She had seen Sushila Devi reading and writing. She had written out a "recipes of achar" which is still with her.

32. The witness was shown three group photographs and was asked to identify Smt. Sushila Devi, on which she stated that she had never seen her as unmarried woman and has always seen as widow and old age and therefore she cannot recognize her in the photograph (Paper No. A-66), in the other photographs (Paper A-67) she recognised Sushila Devi in extreme right. In the other photograph (Paper No. A-68) she could not recognize her and stated that Smt. Sushila Devi used spectacles. One of the ladies in the picture was putting on spectacles, but she was not able to recognize her.

33. The witness stated that she knew Indu Mehta, Sushila Devi's daughter who is practicing advocate in Kanpur and was at the bar before her. Smt. Sushila Devi talked about her cases and litigation. and about quarrels with the wife of

Vinod Dutt. She knew Km Indu Mehta as she was a criminal lawyer and that in one of the cases she: was entrusted as there was dacoity in her house. In answer to one of the question, the witness stated it is also wrong to suggest that I had put my signatures on 20th May on the document. I have not filed any affidavit in the High Court". When the witness was shown her affidavit (A-4) filed with the case, the affidavit of attesting witness, she stated I had forgotten about this affidavit altogether. Smt. Sushila Devi had written the will at her house. It was not written by her in the court compound

34. In the re-examination by late Shri V.D. Singh, Advocate the witness stated saying intimation of Smt. Sushila Devi of having executed an earlier will was conveyed to me by her on 20.5.1985

35. Shri Ashok Dutt, the executer-plaintiff and propounder of the will was subjected to long deposition running into 30 pages on several dates between 13.11.1991 to 23.8.2005. Most of the part of her testimony relates to family matters which are not relevant for the purposes of this case. The relevant parts of the deposition and cross examination in brief is stated as follows; "Shri Ashok PW-2 stated that his mother expired on 4.8.1985, his father Shri Dina Nath Ji breathed his last in August 1958. The assets of her mother contains shares in companies, cash and jewellerys. These shares are mentioned in the petition and the "schedule of the properties" The immovable assets of her mother are properties bearing 7/83 Tilak Nagar Kanpur; and part of property 84/35 Kalpi Road, Kanpur. House No. 7/83 Tilak Nagar Kanpur was purchased by her in 1948. She was absolute owner thereof and that the property 84/35 Kalpi Road, Kanpur, 215 square meters of land, the houses and immovable assets devolved on her as one tenth of her share in family partition-cum-family arrangement between the legal heirs of late Shri Dina Nath in 1974. Her mother regularly paid taxes. The eldest brother settled in Glasgo (Scotland) since 1952. His mother was not satisfied with the conduct of Shri Rajendra Nath. She was not happy with the behaviour of Vinod Kumar Dutt and his wife Rewa Dutt, who were constantly harassing, humiliating and trying to insult her in all possible manner. Rajendra Nath and Shri Vinod Kumar did not care or bother about the welfare of their mother. Smt. Sushila Devi had filed a suit No. 393 of 1985 against Vinod Kumar for his dispossession from a portion of house. Shri Vinod Kumar Dutt had also filed a suit for injunction against her being suit No. 821 of 1985. The subsequent will was drafted by Shri Vijendra Bihari Mathur. The will is in hand writing of her mother which he recognises. He proved the original will, which was shown to him and identified the signatures of her mother and both the witnesses. He stated that she was enjoying absolute good health and was in full command of her senses. The will was executed on 20.5.1984 by her free will, without any undue influence, pressure, coercion or fraud. Shri Rajendra Nath Dutt and Vinod Kumar Dutt had filed objections against the registration of the will and as such it could not be registered on 20.5.1985. The registration was possible only on 22.5.1985 when the Registrar rejected their objections. Smt. Sushila Devi had earlier executed a registered will dated 25.2.1976 which was registered on 26.2.1976.

On a question whether his share of the property was enhanced in subject will as, compared to his share in the previous will, the witness stated "No, in fact, my share in the will dated 20.5.1985 has decreased." In his deposition on 13.12.2003, the witness stated that the will was written by Shri Sushila Devi. She had given instructions to Shri Y.B. Mathur, Advocate to prepare the draft of the will. She had gone with me to the residence of Shri V.B. Mathur and collected the draft of the will. After about a week, she again went to Mr. V.B. Mathur and asked to pick her up from them.

36. In his deposition on 26.7.2004 Shri Ashok Dutt PW-2 admitted that Bharat Engineering Works was in exclusive proprietorship by his father who was head of the family and that his mother acquired shares after the death of his father. There is a partition case pending in which an attempt is being made to grab the property of Shri Yogendra Nath by declaring him to be dead The suit is numbered 561 of 1981. The witness admitted that he has not filed documents of the ownership of the properties of his mother and has also not filed the shares certificates. In schedule 2 he has not mentioned about property No. 123/355. He denied that he has not given the measurements in the schedule of properties and submitted that the area of total properties is about one acre. They are situate in a good locality but denied with their value was Rupees one crore in 1985. The properties were valued at Rs. 5.7 lacs. There was no income from shares and that he received rent from the properties at the rate of Rs. 1200/- per month upto May, 1989 by giving receipts. The jewellery was kept by her mother in a locker jointly with his daughter Indu Mehta. The jewellery is still in possession of Indu Mehta.

37. On 27.9.2004 Shri Ashok Dutt stated that he had seen the jewellery but never tried to value it. The jewellery was distributed by her mother in her life time by writing on a "kacha" paper. He received the will from Shri Vijendra Bihari, who was her counsel in the pending cases. The witness was looking after the pending cases. The open space in the immovable properties were subjected to constructions by Shri Ajai Dutt without her consent. The witness had informed the court about the constructions which were about to be completed. He had not made any application to stop the constructions or to demolish them. About 4-5 rooms were constructed. On 6.12.2004 Shri Ashok Dutt admitted that the map annexed with the will was prepared by some draft man. It was not prepared in his supervision. He stated that in part-A there are five rooms; a small room; three varandah and open land in front, and in the back there were nine rooms, a varandah; latrine; bathroom and open space, in front and back in part B, C and D are in the shape of open land and there are three rooms; latrine bathroom; two varandah and open space in front and back in part. In part F there are four rooms; one varandah; one latrine and bathroom. The witness stated that his mother was educated upto 8th standard and she could read and write hindi very well. She could understand and read english but could not speak in english language. She could, however, right a few words in english.

38. On 28.2.2005 the witness was further cross examined with regard to the map appended to the will, and whether she had access to any colour box or stationery. He denied that the map was prepared under his instructions or that he had put the numbers A, B, C, D in the map. He was not aware of the draft will. His mother was not suffering from any illness or injected with drip or ego and there was no question of any nurse by the name of Mrs. Khan to attend her as she was lady of old values and could not have allowed any nurse of different religion to attend her. Her mother had written a letter in July 1985 to her eldest son Yogendra Nath. The witness denied that her mother was suffering from cancer and that her mother actually died on account of allegations made against her by Vinod Kumar and his wife before "Manila Morcha" for demanding dowry. Her mother was present at the time of marriage of Vinod Kumar. He, however, was not sure whether she had signed on the marriage certificate or not. Her mother had completed all formalities of the marriage and had never demanded dowry. The "Mundan" ceremony of all the children was performed by her in her house. The witness also denied that her mother was suffering from cancer.

39. The witness was then cross examined again on 22.8.2005 and 23.8.2005. He denied that his mother was ill for about 4-5 months before May 1995 and had lost her capacity to understand her affairs. She was never admitted to Maduraj Nursing Home. She was admitted only to R.K. Devi Memorial Hospital for one day. She was examined by Dr. N.C. Misra at Lucknow but he did not treat her. The witness denied that his mother was in the last stage of cancer and that he had not given any such statement in Suit No. 395 of 1985 that his mother was suffering from suspected liver cancer. She was always operated for cataract, and that she could see very well after the operations.

40. On the last date of his cross examination Shri Ashok Dutt explained the contents of the will and the map. He admitted that her mother could not have written such a long draft in the same way of writing. He, however, denied that he or Satish Kumar, had persuaded their mother to write the will or that they used to, threaten her or physically abused her for writing the will. He got married after one year of the will, according to wishes of her mother who had settled his marriage.

41. In defence the defendants examined Smt. Rewa Dutt, widow of late Shri Vinod Kumar Dutt as DW-1, Smt Indu Mehta as DW-2 and Shri Krishna Dutt as DW-3. All these witnesses deposed about the illness of Smt. Sushila Devi; her relations with their children and the undue influence exercised by Ashok Dutt and Satish Kumar Dutt on Smt. Sushila Devi for writing the will.

42. Smt. Rewa Dutt DW-1 stated that she married to Vinod Kumar Dutt on 16.11.1979. Since Shri Vinod Kumar was the man of modern thinking, he was not ready to accept the dowry. He had called her parents at Kanpur and entered into a registered marriage (Paper No. A-177). The marriage was settled by the Bhabhi of the deceased Smt. Krishna, who was bua of the witness. Smt. Sushila Devi had signed the marriage certificate. She was happy with her. He lived life as

Arya Samaji believed in a reformed way of conducting marriage. The deceased used to love her children and had given a "pritibhoj" on the birth of the first child and also Mundan Sanskar.

43. The witness stated that Ashok Dutt and Shri Satish Dutt were not keeping good relations with her husband, as he was carrying out his own business. The deceased wanted Shri Satish Kumar; Ashok Dutt and Indu Mehta to marry. Shri Satish Kumar and Ashok Dutt agreed to marry only if she transfers the house 7/83 Tilak Nagar Kanpur to them as Vinod Kumar was occupying two rooms and there was no other place in the house for their families. When Dr. R.K.. Lumba opined in April 1995 that Smt. Sushila Devi is suffering from liver cancer, Shri Ashok Dutt and Satish Kumar Dutt started exercising undue pressure from her for writing the will and told her to evict Vinod Kumar, Rajendra Nath and Yogendra Nath otherwise they will not live the house. The mother was disturbed and had lost mental capacity to understand her affairs. She was 75 years old and was very weak. Shri Ashok Dutt and Shri Satish Kumar abused late Vinod Kumar; Indu Mehta and Krishna Dutt, and on several occasions matters worsened to the extent of beating Krishna Dutt. When she tried to intervene she was also slapped by Shri Satish Kumar. Smt. Sushila Devi was very disturbed and sad on these occasions and agreed to write whatever they desired.

44. In July 1985 Smt. Sahjaha Begam, a nurse was called to attend Smt. Sushila Devi for her care. Dr. Pandey, who was no longer alive, used to be called to look after her. The papers were sent to Dr. M.C. Misra at Lucknow regarding her illness and that she had gone to ultra sound to R.K. Devi Medical Centre and Madhuraj Nursing Homes (vide papers No. 664-668.)

45. The witness further stated in her examination in chief that the executrix pressurized her to write in her own hand writing, as such a will had greater value. They had fabricated her signatures in filing Suit No. 393 of 1985 between Sushila Devi v. Vinod Kumar. In this case Shri Vijendra Behari Mathur was their advocate. Before this suit Vinod Kumar Dutt had filed a Suit No. 831 of 1985 against her mother for staying his dispossession. The stay is still operative. Her husband was fatally attacked by Ashok Dutt and his servant Hira Lal; Lal Babu; Vijai Shanker and Raj Kishore. He was admitted to King George Medical College, Lucknow where he died on 3.11.1988. A case u/s 302 is pending in the court of 4th Additional District Judge against Shri Ashok Dutt who is in occupation of house Nos. 84/35 Kalpi Road and 123/355 Fazalganj and also one tenth share of her husband and is receiving rent. A suit No. 767 of 1986 filed by her late husband and another suit No. 561 of 1989 filed by Kranti Kumar against Krishna Dutt, is also pending for partition of these properties. The will was written by exercising undue influence and coercion on a paper with penciled lines.

46. In her cross examination the witness stated that the deceased used to live with her husband; Indu Mehla; Krishna Dutt; Ashok Dutt and Satish Kumar Dutt. During her illness she was confined to her room and was looked after for treatment by Shri Krishna Dutt. She has lost interest in food and could not even

eat sabudana. Dr Lumba referred her to Maduraj Nursing Homes and on further examination she was found to be suffering from cancer which were detected by her elder son. She does not remember whether CT scan was done or that her blood was tested. She does not know whether Alfa Fito protein test is made for detecting lever cancer and was never tested by putting her needle in her liver. She proved the prescriptions (Paper A-165 and A-166) but could not inform whether the word "cancer" was written in the prescription (paper A-167) which does not contain the name of the patient. She also could not say as to why the prescriptions and bills of medicines did not bear her name and stated that novalgin and multineta were given to her for reducing pain and a glucose drip was given to her and stated that she was mentally deranged.

47. The witness could not explain as to why her husband had never disclosed the fact that his mother was suffering from cancer in any of the suits or in the written statement. She, however, stated that the will was written in 1985 in about 10-12 days during which there was lot of quarrel in the house. The will, however, was not written in her presence as she was busy with her children. However, she also subjected to beating of Satish Dutt and Krishna Dutt along with Indu Mehta and her husband.

48. The witness further stated that Ashok Dutt had told his mother that if she does not right the will, he will leave the house and if she did not give him the whole house, she will not marry but Smt. Sushila Devi did not come under the pressure. Shri Krishna Dutt got the will executed to dispossess them from the house. He is an accused in the murder case of her husband. Shri Rajendra Nath has not been given any share in the will and she further stated that she will depose in the criminal case.

49. Smt. Indu Mehta DW-2 stated that his mother was ill; was suffering from cancer and died in first week of May 1985. She had not concealed any facts in her affidavit. She could confirm the illness of her mother from the advise given by Dr. A.K. Lumba. She does not have all the medical prescriptions as these were taken, away by Shri Ashok Dutt for ultra sound report which states that she was suffering from liver cancer. She also deposed about the quarrel in the family at the time of writing of the will in which Satish Kumar had beaten Shri Krishna Dutt and she along with Rewa Dutt were pushed out from the room. Shri Krishna Dutt had also beaten Smt. Rewa Dutt and at that time she was ADC (Criminal). She had taken legal steps on this subject and had reported to the police station. The police, however, did not register the report.

50. Indu Mehta further stated that her mother had earlier prepared a will. She did not find it necessary to file a caveat. However, she had filed an interim application for her share and had made an application for giving possession of her share as she was in financial hardship. The witness was shown objections (Paper-A 160) and admitted that she had not written about the fact that her mother was suffering from cancer. She had told everything to her counsel. He has understood the matter. She has also received a share in the will.

51. Indu Mehta in her cross examination on 8.1.2006 agreed that in Suit No. 821 of 1995, Vinod Kumar Dutt did not level any allegation against her. The plaint was signed by Shri Vinod Dutt on 20.5.1985. On same the day when the will was executed, a Suit No. 1103 of 1987 filed by her along with Krishna Dutt, Ajai Kumar and Kranti Kumar, and a prayer was made restraining Satish Kumar and Ashok Kumar from evicting them from the house. She also proved the certified copy of the judgment in case No. 15/89 and 40/89 u/s 145 Cr.P.C.

52. Shri Krishna Dutt (DW 3), the last witness stated that his mother was suffering from cancer. Dr. R.K. Lumba at Madhuraj Nursing 1 Ionic had advised for ultra sound in 1985. Dr. Lumba had told him in confidence that her mother is suffering from liver cancer and will survive only for a few days and that she is in a last stage of cancer. When the cancer was detected, Ashok Dutt and Satish Kumar told her that it is necessary to execute the will and remove the name of Vinod Kumar from the previous will. He proved (Paper No. A-167/A-164-168) which are papers for treatment of Sushila Devi and prescription of Dr. N.C. Misra and the report of Maduraj Nursing Home; and R.K. Devi Medical Centre. He further deposed that Ashok Dutt and Satish Kumar pressurized their mother to write the will in hand. They used to dictate and their mother used to write by hand. Whenever the mother objected on the ground of ill health, they used to, speak loudly and threatened her that in case she does not write, they will leave the house. In para 15 of his deposition the witness stated that his mother was given multibioneta through glucose on which she would regain the health and again start writing the will on the dictation by Satish Kumar and Ashok Dutt. This process continued for a week. She could not write the letters in english language, which were written by Shri Satish Kumar and were explain to her. These places in the will were left blank.

53. In his cross examination Shri Krishna Dutt stated that their mother had settled the marriage of Ashok Dutt in around January 1985 in Delhi where she had gone with her. The witness stated that she had a stone in gallbladder, which converted itself into liver cancer. The fact, that Smt. Sushila Devi was suffering from liver cancer, was known to him in May 1985. He informed this fact to their counsel who had forgotten to write it in the written statement. The witness relied upon the medical prescription of Dr. Lumba and the report of "Singhal Ultra Sound", film. The report was removed by Shri Satish Dutt. No such objection or application was given by them about the loss of the film. In his cross examination the witness stated that he was working in Bharat Engineering Works, which is their family concern, but has no knowledge about the income tax paid by the firm, as he was not holding any post in the firm. He was only assisting the family business which was closed since 31.3.1974. In reply to the further questions, the witness stated that the will was written by Smt. Sushila Devi on her bed. Some of the pages were written before him. The will was written in about 10 days during which the executor had stopped her from meeting any person. There was some "marpeet" between him and Ashok Dutt and Satish Dutt in this regard. Their mother did not sign the will in his presence,

He was not present in the office of the Registrar at the time of the registration of the will. The witness did not admit that all the persons in the will are given equal shares. There are no measurements in the plan appended to the will, and that he can only say about unequal shares by the looking at the map. He could not, however, say as to which portion is bigger than the other. In reply to the question to point out the portion in which he is living, the witness stated that he is living in the entire portion of 7/83. They however do not meet each other and do not visit the other's room occupied by the brothers and sisters. The witness could not explain as to why he had stated that Vinod Kumar is not beneficiary under the will. The portion given to him is in his occupation and that he was in possession of the full house except two rooms in possession of Ashok Dutt and Satish Dutt. The witness stated that he was not advised to write about the threats extended by his brothers on their mother in his caveat as he did not think it proper to write these facts.

54. The will is written on seven pages, on penciled lines by the testatrix in her own clear and legible hand writing. She has signed each page of the will. It is not denied by the defendants that the will is in the hand writing of their mother and that she had signed the will. The will was registered by the Sub Registrar, Kanpur on 22.5.1985 and was witnessed by Shri Ravi Kant and Smt. Kamlesh Nigam, Advocate. It has been proved by Smt. Kamlesh Nigam, Advocate, who appeared in the witness box and verified that the testatrix had signed the will in her presence and that both the witnesses had signed in her presence and thereafter they had gone to Sub Registrar's office on 20.5.1985. The Sub Registrar did not accept the document, as some objections were raised made by Shri Vinod Kumar Dutt. These objections, however, were not with regard to due execution of the will but regarding the title of the property. The testatrix along with attesting witnesses again went to the Sub Registrar's office on 22.5.1985 and the document was registered. The execution of the document, its attestation and registration is as such not denied.

55. It is submitted on behalf of caveator-objectors that the testatrix was an old lady suffering from terminal stage of cancer. She has lost her mental capacity and was unable to understand her affairs. Shri Ashok Dutt and Shri Satish Kumar Dutt had threatened her and prevailed upon her to get the will written from her on several dates. They used to speak in loud and threatening voice to their mother. Shri Ashok Dutt threatened that he will not marry, if she does not give him the property and to turn out Shri Vinod Kumar Dutt from the house. It is alleged that when Shri Vinod Kumar Dutt filed a suit for declaring the properties were purchased from joint family business, the will was got executed in a hurry. It is also alleged that she was suffering from terminal liver cancer and that the Doctors had warned that she will not live for long. The caveators have thus challenged the will on the ground that it was executed as a result of undue influence, pressure, coercion and fraud played upon her and that she was not in a sound mental health at the time of execution of the will. They also allege that she did not exercise her free and disposing mind in execution of the will.

56. The defendants have not pleaded in the caveat applications, or counter affidavits that the testatrix was suffering from cancer. The fact about her terminal illness from cancer was stated and sought to be proved at the time of filing of documents and adducing oral evidence. The witnesses could not explain as to why they did not state the fact of the illness of their mother in their pleadings. Smt. Rewa Dutt could not explain as to why her husband did not state this fact in his objections. Km. Indu Mehta a seasoned and experienced lawyer also could not explain this fact. She could give no reason as to why she did not mention these facts in her objections, which were filed three years after the death of her mother and as to why her advocate has not taken this plea. In her cross examination she has stated that she had told this fact to her counsel and that he wrote whatever he thought proper. She admitted that she is beneficiary under the will. In fact she had not opposed the will and had not taken any such plea that the will was a result of coercion and undue influence in her affidavit. She has changed her stand during the course of the trial.

57. The court does not ordinarily allow and rely upon the evidence beyond the pleadings. The fact, that the testatrix was suffering from cancer, was never pleaded, and has also not been proved on record. There is no medical certificate on record to establish that the testatrix was diagnosed to be suffering from cancer, and about her medical condition in the month of May 1985 or on the date of execution of the will. The defendants stated in their oral evidence that the cancer was detected by the help of ultra sound. They could not state whether any further tests or examinations were carried out. The ultra sound reports have not been produced. There is no evidence that biopsy was conducted on her. Mrs. Rewa Dutt DW-1 and Km. Indu Mehta DW-2 have stated that when she was taken to the doctor, and that Dr. A.K. Lumba had told Indu Mehta in confidence that she was suffering from cancer. When she was asked questions about the medical certificates, Km. Indu Mehta cleverly stated that these documents are with Ashok Dutt.

58. In the circumstances, I find that the plea, that the testatrix was suffering from terminal stage of cancer, is beyond the pleading and in any case the fact has not been proved on record. Two of the brothers namely Shri Ashok Dutt and Shri Krishna Dutt PW-2 and PW-3, daughter-in-law Smt. Rewa Dutt DW-1 and daughter Km. Indu Mehta, DW-2 appeared as witnesses to support their case. None of these witnesses, however, have stated anything about the medical condition of the testatrix before or after the date of execution of the will, and the circumstances in which she died about three months thereafter. In case she was suffering from terminal stage of cancer, they were the best persons to have deposed about her medical condition and cause of death.

59. Though it is duty of the propounder of the will to prove the will and to remove all these suspected features, but there must be clear germane and valid suspicious features and not fantasy of the doubting mind.

60. The presumption in the case of "Holograph Wills" is of the more-the greater

presumption. In *Ajit Chandra Majumdar Vs. Akhil Chandra Majumdar*, it was stated about such a will thus: The whole of this will was written in the hand by (he testator himself in english. The hand writing is clear and Jinn. The law makes a greater presumption in favour of the genuineness of a holograph will for the very good reason that the mind of the testator in physical writing out his own Will is more apparent, in a holograph will, than were his signature alone appears to either a typed script or to a script written by somebody else.

61. It is come in the evidence of PW-2, DW-2, and DW-2; that the will was written by the testatrix on many dates. The objection of Smt. Rewa Dutt, the daughter-in-law-DW-1 and Km. Indu Mehta, the daughter DW-2 that the testatrix was subjected to coercion and undue influence by Ashok Dutt and Satish Dutt, on all these dates is difficult to believe. Km. Indu Mehta is a lawyer by profession. She was Additional District Government Counsel (Criminal) at the time when the will was written. She could have easily reported this matter to the police or atleast raised some objections. It is hard to believe that the only daughter of the deceased, a practicing lawyer did not raise any objection or made any protest to the exercise of undue influence by her brothers on her mother. Smt. Rewa Dutt DW-1 has gone to the extent of saying that her brothers used to beat her as well as Indu Mehta DW-2 and her husband. This statement is not supported by the deposition of Km. Indu Mehta. She has nowhere stated in her examination-in-chief that she was subjected to beating or even subjected to rough treatment from her brothers.

62. It is not denied by the defendants that the deceased had earlier executed a will in which she had given shares to all the sons. Shri Ashok Dutt stated that he was given a larger share in the earlier will. There was no reason for him to have exercised undue influence on her mother, for executing another will in which he was given a lesser share. In the will the testatrix has given properties only to her children. She has not given anything to any outsider to make the bequest doubtful.

63. Shri Rajendra Nath Dutt and late Shri Vinod Kumar Dutt have, in fact, admitted in their written statement that the disputed will was executed by their mother. Their objections to the Registrar were not with regard to due execution of the will but were taken on the ground that she was not the owner of the properties and that the properties were actually purchased from the business of the joint family funds of which they were also owners. There has been a spate of litigation between the parties before or after writing of the will. In all these pleadings, the objectors nowhere alleged that the will was written under coercion or that the testatrix was not in a sound and disposing state of mind when she had written the will.

64. Learned Counsel for objector submitted that there is no evidence about the preparation of the sketch map of the house in which different portions have been shown to be given to the sons in different colours and that the testatrix did not have access to the stationery to prepare the map and to mark the portions in

colour. It is true that the propounder of the will has not explained these facts. They have rather pleaded ignorance to the preparation of this sketch map. They have not even offered a suggestion about its preparation and the help which their mother had taken in getting the areas demarcated with colours. This, however, does not put the execution of the will in doubt. The will was drafted by her counsel and that she had taken the same to the court for registration. Further, I find that the testatrix was an educated lady. She could read and write Hindi and understand English very well. For such a person, it is not difficult to put the alphabets in English in the will. Smt. Rewa Dutt DW-1 and Indu Mehta-DW-2 have not stated that she had no knowledge of English at all and that she could not even write the alphabets in English.

65. The minor discrepancies in the statement of the attesting witness Smt. Kamlesh Nigam do not affect her testimony. She has explained about the execution and registration of the will. There is a mistake about the year in her examination-in-chief. In her re-examination permitted by the court she has clarified and explained the date of execution and registration of the will.

66. With regard to the identification of photograph of the deceased by Smt. Kamlesh Nigam, by the attesting witness, I find that there is no proven photograph of the deceased on record. The defendants have not filed the photographs of the deceased and have not got her identified in her photograph from any of their witnesses. In the circumstances, it cannot be said that the person identified by the attesting witnesses is not the deceased or is not so dissimilar to the deceased that no person who had met her, would have made a mistake. Smt. Kamlesh Nigam has not clearly stated that she had met the deceased several times, she had also attended the marriage reception of her son late Shri Vinod Kumar Dutt.

67. With regard to the Fazalganj property, Shri Ashok Dutt in his cross examination, has explained that the deceased got constructed the area coloured as "A" property in view of one tenth share in Fazalganj property and this fact clearly demonstrates that she was the owner and was in a position to execute the will in respect of this property also. The question of title however need not be considered in the probate proceedings.

68. In the facts and circumstances, I find that the execution and attestation of the will, with the free will and in sound and disposing mind of the deceased has been proved. The propounders have explained all the suspicious circumstances surrounding the will. There was no undue influence, pressure, coercion and fraud played upon the testatrix in writing and executing the holograph will. The threat and the coercion alleged to be exercised on her has not been proved. The deceased has written the will in several sittings during which many family members were present in the house. No one made any complaint or protest on her writing and the circumstances in which she had written the will. The attesting witness has proved that the deceased brought the will to her in the court premises which could not be registered on some date on account of objections

raised by Vinod Kumar Dutt and Rajendra Kumar Dutt on the question of ownership to the bequeathed properties. The will was, however, again brought by her and was registered on 22.5.1985.

69. Issue Nos. 1 and 3, as such, are decided in favour of the plaintiffs and issue No. 2 is decided against the defendants.

Issue No. 4

70. The question of title of the bequeathed properties cannot be considered and decided by the Testamentary Court. Any one objects to the grant of probate by setting up title in himself has no locus standi to oppose the grant of probate. Shri Vinod Kumar Dutt and Shri Rajendra Kumar Dutt have challenged the title of their mother and have stated that the properties were purchased from the funds of joint family business. They have as such denied the title of the executor of the will. Late Shri Vinod Kumar Dutt and now his widow Smt. Rewa Dutt and Shri Rajendra Kumar Dutt, are thus found to be incompetent to challenge the grant of probate.

Issue No. 5

71. On the findings on Issue Nos. 1 to 4 returned in favour of the plaintiffs, they are entitled to grant of probate as named executors, of will dated 20.5.85, registered on 22.5.85.

72. The testamentary suit is accordingly decreed. The plaintiffs as named executors of the will dated 20.5.1985, registered on 22.5.85 with Sub Registrar, Kanpur, are entitled to the probate of the will, with will attached, for its execution in accordance with the wishes of the deceased. The office shall work out the court fees payable by them and that probate shall be issued after payment of court fees to the satisfaction of the Registrar General of the Court and after execution of the Administration Bond. The executors will comply with the rules of the court with regard to submissions of the periodical accounts for due execution of the will. Costs are quantified at Rs. 25, 000/- to be paid by the defendants to the plaintiffs.