

(2017) 03 AHC CK 0084
In the Allahabad High Court
Case No : Consolidation No. 728 of 2014

Mohammad Rashid

APPELLANT

Vs

Deputy Director of Consolidation Lucknow

RESPONDENT

Date of Decision : 22-03-2017

Acts Referred:

Constitution of India, 1950 — Article 226
Hindu Succession Act, 1956 — Section 63
Uttar Pradesh Consolidation of Holdings Act, 1953 — Section 9-A(2)

Citation : (2017) 4 ADJ 164

Hon'ble Judges : Rajan Roy, J.

Bench : Single Bench

Advocate : Mohd. Aslam Khan, Advocate, for the Petitioner; C.S.C, Ajmal Khan, Gopal Pandey, R.K. Srivastava, Advocates, for the Respondent

Final Decision : Dismissed

Judgement

Rajan Roy, J.—The proceedings before this court under Article 226 of the Constitution of India have arisen from the objections filed by the petitioner as also the contesting respondent under section 9-A(2), U.P. Consolidation of Holdings Act 1953 (hereinafter referred as "Act 1953") claiming title over the land in dispute. The petitioner herein filed objections claiming title based on a Will said to have been executed by the recorded tenure holder as also seeking correction in the area of the Gatas forming part of Khata No.321 in Village Kamlabad Madholi, Pargana Mahona, Tehsil Bakshi Ka Talab, District Lucknow. The private respondents, who are the sons of the recorded tenure holder, claimed title on the basis of succession. They also objected to the claim of the petitioner herein on the ground that the Will was fraudulent, illegal and unreliable, no such Will was executed by their father in favour of the petitioner.

2. All the three lower courts of the Consolidation Officer (C.O.), Settlement Officer Consolidation (S.O.C.) and Deputy Director Consolidation (D.D.C.) have adjudicated the dispute in favour of the private respondents and have rejected

the Will and the claim of the petitioner based thereon.

3. To encapsulate the facts of the case, a patta was granted by the Gaon Sabha in favour of Hasan (father of the contesting respondents) in respect of land forming part of Khata No.321 bearing Gata No.125/1 (0-2-5) and Gata No.1/9 (0-12-14) in the year 1976 (1383 F.). This is not in dispute. It is also not in dispute that Hasan was an employee of the petitioner and worked at his brick-kiln. Such lessees/patta holders as Hasan initially had only sirdari rights i.e. the property held by them was inheritable, except by testamentary succession in view of Section 170 U.P. Zamindari Abolition and Land Reforms Act 1950 (hereinafter referred as "Act 1950"), but, could not be transferred. Subsequently, on account of amendments in the Act 1950 they acquired the status of Bhumidhar with non-transferable rights. During subsistence of the aforesaid Patta Hasan is said to have executed a Will in favour of the petitioner which was registered on 4.7.1991. Thereafter, in view of the changes in the Act 1950 vide section 131-B which was inserted in the Act by U.P. Act No.19 of 1995 with effect from 14.1.1995 Hasan became a Bhumidhar with transferable rights. This happened on 31.5.1997. This fact is also not in dispute. It is also not in dispute that after the closure of the brick kiln of the petitioner Hasan left for his native place Azamgarh and died there on 17.3.1999. It is also not in dispute that Hasan left behind three sons and his wife.

4. Consolidation proceedings started in the concerned village at Lucknow in the year 1999. The petitioner filed an objection, as already referred earlier. The contesting respondents also filed objections as already referred herein above, albeit, with some delay. The delay was condoned.

5. Both the objections were considered and decided by the C.O. vide his order dated 25.4.2006. The consolidation officer rejected the objection of the petitioner and accepted the claim of the contesting respondents.

6. Being aggrieved, the petitioner herein filed an appeal under section 11(1) of the U.P. Consolidation of Holdings Act 1953 (hereinafter referred as "Act 1953") before the Settlement Officer, Consolidation. The appellate court also concurred with the findings and opinion expressed by the consolidation officer and rejected the appeal. Not being satisfied the petitioner herein took the matter further to the court of the Deputy Director of Consolidation under section 48 of the Act 1953 by filing a revision against the order of the courts below, however, it met the same fate. The Deputy Director of Consolidation also concurred with the findings and views expressed by the courts below.

7. It is against this background that the present writ petition was filed in the year 2014 wherein an interim order was passed on 15.10.2014 that no third party rights will be created.

8. Contention of Mohd. Arif Khan, learned Senior Advocate assisted by Mohd. Aslam Khan, Advocate for the petitioner was that the Will dated 4.7.1991 executed by Hasan in favour of the petitioner and registered as per law was duly

proved by examination of one of the attesting witnesses, but, the same has been disbelieved by the courts below only on the ground it excluded the natural/legal heirs and also that there were certain discrepancies in the Will, such as, the last page appeared to have been added subsequently, containing the details of the holdings of Hasan, whereas, according to him, such details were mentioned on the first page of the Will itself. In support of his contention Sri Khan relied upon various decisions which shall be referred later while discussing the merits of the case. He contended that once the Will was proved the courts below had no option but to accept it as valid and grant the consequences based thereon to the petitioner. Hasan did not revoke the Will till his death, an aspect which has been ignored by the courts below. He also contended that one of the reasons which weighed heavily with the consolidation courts was that the Will was executed at a time when the testator did not have the right to transfer his holding whereas, according to him, firstly, Will is not a transfer, but a mode of succession; secondly, it is well settled that Will being effective on the death of the testator, if by then, he had acquired transferable rights over the land sought to be bequeathed, then the Will could not be held to be invalid merely because at the time of its execution the testator did not have such rights, as, his rights over the land in question as on the date of death had to be seen. In this regard he relied upon various decisions of this court which shall be referred in the later part of the judgment. Lastly, Sri Khan contended that the petitioner had filed an application for getting the signatures of Hasan as appearing on the Will examined by a Handwriting Expert, but, the said application was never decided and findings were recorded as to the validity of the Will ignoring the same, which, according to him, was an apparent error committed by the Courts below.

9. On the other hand Sri Azmal Khan, learned counsel appearing for the contesting private respondents, the sons of Hasan, contended that Section 170 of the U.P. Z.A. & L.R. Act barred the execution and registration of such a Will by a Sirdar or a Bhumidhar with nontransferable rights, therefore, in the face of such statutory bar the Will could not be read in evidence nor could the petitioner claim any title based thereon. According to him, execution of such a Will was also contrary to the object contained in sections 195 and 198 of U.P. Z.A. & L.R. Act which was to grant land to landless labourers for their sustenance and livelihood. Relying upon a decision of this court reported in 2006(1) JLR 789, Maan Singh v. Addl. Collector, Muzaffarnagar & ors., he contended that if transfer of land in such a way is permitted it Will defeat the very object for which the land has been granted to a landless labourer and will encourage their exploitation. According to him, the Will itself could not have been registered on 4.7.1991 as it was in clear contravention of section 170 of the Act 1950. Furthermore, learned counsel argued that apart from the Will having not been proved as per law it was also shrouded with suspicious circumstances, as, Hasan was an employee of the petitioner and worked at his brick-kiln when the Will is said to have been executed, the petitioner i.e. the employer was in a dominant position so as to influence Hasan, the relationship was also fiduciary. It is quite unnatural that an

employee would bequeath his holding in favour of the employer who owned a brick-kiln, that too, when his natural/legal heirs were alive, a circumstance which has not been explained by the petitioner nor has been justifiably explained in the Will. In this regard he placed reliance upon various decisions of the Supreme Court and this court some of which Will be referred in the later part of this judgment.

10. The moot point which falls for consideration in this case is as to whether the Will in question was proved as per law? Secondly, Whether the suspicious circumstances, if any, were satisfactorily explained and was the Will credible?

11. On a perusal of the order passed by the consolidation officer the court finds that he has dealt with the controversy at hand threadbare. He has appropriately scrutinized the evidence on record and thereafter has recorded his findings based thereon. He has noticed that Hasan was an employee of the petitioner at his brick-kiln, as admitted by the petitioner herein in his statement. The fact that the contesting respondents were sons of Hasan was also admitted as also the fact that he had left behind a wife also. While considering the testimony of one of the two attesting witnesses Ehtisham who alone was produced to prove the Will the consolidation officer has noticed his statement that the Will was in four pages, but he had signed only on one page and had not signed on the last page. This witness had also admitted to the fact that Hasan was working at the brick-kiln of the petitioner. The consolidation officer has specifically mentioned in his order that the witness had not stated that Hasan had made his signatures on the Will in his presence or he had seen him signing the Will (see section 63 of Indian Succession Act). The consolidation court noticed that neither in the statement of Mohd. Rashid (petitioner herein) nor the attesting witness of the Will Ehtisham any explanation was offered as to why Hasan intended to bequeath his holding in favour of the petitioner instead of his sons and wife. The consolidation officer also noticed that the Will allegedly executed by Hasan did not bear any mention whatsoever of his children and wife, an aspect which was not explained by the petitioner nor any explanation was offered in this regard in the Will. Furthermore, the consolidation court on a scrutiny of the original Will found that normally the testator and the witnesses sign on the last page of the Will, but, in this case the last page (page no.4) appeared to have been added subsequently containing the details of the holdings. It found that there was no similarity and uniformity in the signatures of the testator on each of the pages. The consolidation officer considered the authority reported in 2001 (92) RD 29, Robert Prabhakar v. David Ebenezer, wherein, it was opined that omission of any reference to the natural heir in the Will is a factor which creates doubt and goes against its veracity and also that mere registration of a Will was not proof enough to remove the suspicious circumstances. The court below also considered that though there were two attesting witnesses, only one namely Ehtisham was produced. Even though the other witness was also alive, no steps were taken for summoning him. Considering the doubt raised as regards the veracity of the Will the second witness should also have been produced. He found that the last page of the Will

did not bear the signature of the witness. He opined that the last page had been subsequently added with some ulterior motive, even though, the details of the holdings were mentioned at page No.1 of the Will. Most importantly, the consolidation court noticed that at page 3 of the Will the date "4.7.1991" had been written, but there was some over-writing on the figure "4" which was indicative that the Will was prepared on some other date which was changed to "4 July 1991". Furthermore, in the lines preceding this i.e. last three lines of the Will the words "Aaj Morkha July 1991" are mentioned, but the date has not been mentioned which, according to him, raised serious doubts about its genuineness.

12. The court also noticed that even though the Patta was granted to Hasan in 1383 F. i.e. 1976 Anglican year, at the end of 2nd line at page 2 of the Will the figure "1976" was typed, but, by hand "/79" had been added which created a doubt as to its genuineness. The court has also taken note of the statement of Ekhlakh Ahmad that his father used to sign as "Mohd. Hasan" and in support whereof he had produced an election notice bearing such signature of his father, whereas, in the Will the signatures were as "Hasan Khan". It also noticed that the signatures of the testator Hasan on different pages of the Will did not match and in this context referred to section 72 of the Indian Evidence Act (as relied upon by the private respondents herein) to contend that the court was competent enough to compare the signatures and see any discrepancy by its naked eyes also.

13. Thereafter, the consolidation court considered the factual scenario involving the employment of Hasan at the brick-kiln of the petitioner and the recital in the Will that the petitioner had taken care of him as also the fact that after closure of the brick-kiln Hasan had gone back to his native village and died there. The court opined that one could understand the sons and wife of the testator taking care of him, but, it was quite improbable that the employer, that too, owner of a brick kiln had taken care of him. It has also taken note of certain decisions of the Board of Revenue wherein it was held that if the relations of the testator with his son and wife were cordial, then it would be unnatural for him to bequeath his property to someone else other than his natural heirs. The Consolidation Court also considered the bar of section 170 which prohibited bequest of holding by an Aasami or Bhumidhar with non-transferable rights and held that the Will itself could not have been executed nor registered.

14. For the reasons aforesaid, the consolidation officer found the Will to be dehors the law and doubtful in credibility, especially as, the Will did not even mention the natural heirs of the testator. The court also recorded a finding in favour of the private respondents that they were sons of Hasan based on the evidence adduced and entitled to the land in question and also to be recorded as its tenure holder. The Settlement Officer Consolidation it is revealed that he concurred with the findings of the consolidation officer. Likewise, the court of the Deputy Director, Consolidation.

Section 170 of the Act 1950 reads as under:

"Section 170. No bhumidhar with non-transferable rights or asami shall have the right to bequeath by Will his holding or part thereof."

Earlier this provision was applicable only to Sirdars or Aasamis, but by U.P. Act No.8 of 1977 it was also made applicable to Bhumidhar with non-transferable rights, such as the testator, with effect from 28.1.1977 i.e. prior to the alleged execution of the Will in question on 4.7.1991.

15. Based on the aforesaid provision Sri Azmal Khan, learned counsel appearing for the contesting respondents emphasized that the execution of the Will and its registration itself was de hors the said provisions, therefore, no claim of the petitioner to title could be entertained. In this regard, this court finds merit in the submission of Sri M.A. Khan, learned Senior Advocate that even though a Will may have been executed on a date when the testator did not have the Right to Bequeath the land in question, but, if he acquired such rights before his death, then, such Will would be valid on the date of death and would not be held to be unenforceable merely because on the date of its execution the testator did not have the right to bequeath the property in question, unless of course, the testator intended otherwise, though, it cannot be said that it could be registered on the said date of execution, as it would be in contravention of a statutory bar. A Single Judge Bench of this court while rendering its judgment in the case of Babu Lal v. Ram Harakh reported in 1968 ALJ 774 considered the question as to whether an undivided coparcener can execute a Will regarding his undivided interest and whether such a Will would be valid or not ?, even though it was a case of bequest of an undivided interest by an undivided coparcener, it was in respect of agricultural land. Considering the facts before it, where one Beni executed a Will on 16 July, 1946, bequeathing his undivided ?th share in favour of the first plaintiff, but, died on 21 December, 1954 i.e. after he had become the owner of his ?th share of the Bhumidhari holding, relying upon a Division Bench judgment of this court in Mahendra Singh v. Atar Singh, 1967 ALJ 8, the court opined "In my opinion, the learned counsel for the appellant is right in his submission that since the Will operates only at the moment of death of the executant, the Will would be enforceable and recognisable as a valid instrument, if the property was capable of being bequeathed on the date of his death." Furthermore, relying upon a judgment of the Supreme Court reported in AIR 1964 SC 136, Addagada. Raghawamma & anr. v. Addagada Chenchamma & anr., it further observed that "The Supreme Court held that a member of an undivided coparcenary has the legal capacity to execute a Will, though he can not validly bequeath his undivided interest in the joint family properties. So, an undivided coparcener is competent to execute a Will, but, his undivided interest is incapable of being bequeathed. A Will speaks only from the date of death of testator. If the property bequeathed by a Will has, on the date of death of the testator, become capable of being bequeathed, the Will would become operative in respect of it. Here, Beni died on 21st December, 1954, when his share had become defined and capable of being bequeathed. The Will though executed on 16th July 1946, became operative on his share on the date of Beni's death,

because by then his share was capable of being bequeathed. The plaintiff validly acquired Beni's share in virtue of the Will. In the result, the appeal is allowed."

16. Reference may also be made in this context to another decision of a Division Bench of this court reported in 1973 RD 444, *Roop Narain v. Ram Chandra*, wherein one of the questions which fell for consideration was as to whether occupancy/tenancy could be transferred under a Will and whether the Will to that extent was valid ? The second question was as to whether the Will was invalid on the ground that the course of inheritance provided by it militated against the rules of Hindu Law. The Single Judge Bench had opined that the Will was valid. Considering the two questions a Division Bench of this court held as under:

"6. We have critically examined the will. It gives a clear intention of the testator to transfer all the properties that he owned. It does not seek, to transfer the occupancy tenancy as such. It is not disputed that before his death the testator had obtained Bhumidhari rights in respect of the occupancy holdings and that right could be legally transferred under a will. Since the will takes effect after the testator's death, it cannot be successfully contended that the occupancy tenancy was sought to be transferred under the will and to that extent it was invalid. All the properties held by the testator at the time of his death were legally bequeathed under the will and in this respect the will in question must be held to be valid."

It held the Will to be valid.

17. Reference may also be made to another precedent of this court rendered on 6 July, 1970 in Writ Petition No.3074 of 1964, *Jasran v. Board of Revenue, U.P.*, reported in 1970 RD 313, by Justice R.S. Pathak (as he then was), wherein, this court specifically considered the disposing power of a testator and the date on which it is to be judged. The Court observed as under :

"The Board has proceeded on the view that on the date when the will was executed Jugadi had no transferable rights in the property and, therefore, the will conferred no rights on the petitioner. The petitioner now prays for certiorari.

It seems to me that the petition must succeed. The will was executed by Jugadi on July 15, 1948. Admittedly, on that date Jugadi did not possess the right to transfer his interest in the land. Subsequently, he obtained Praman Patra on June 16, 1950 which, the Board has found, had the effect of conferring Bhumidhari rights on the date when the estate vested under the U.P.Z.A. and L.R. Act. According to the Board, Jugadi became a Bhumidhar of the land on July 1, 1952. He continued as Bhumidhar until 1958 when he died.

Now, the principle is well settled that a will takes effect upon the death of the testator and before that event it has no legal operation. It passes no interest or title to the legatee during the lifetime of the testator. In that sense, it is distinguishable from a gift. On the death of the testator, the property which passes under the will must be ascertained with reference to the date of the

testator's death. Section 90, Indian succession act, which applies to Hindus, specifically provides that the description contained in a will of property shall, unless a contrary intention appears from the will, be deemed to refer to and comprise the property answering that description at the death of the testator. A will must be construed with reference to the property of the deceased comprised in it to speak and take effect as if it had been executed immediately before the death of testator as if the conditions of things to which it refers are those existing immediately before the death of the testator. *Bodi v. Venkataswami* (ILR 38 Mad. 369). It was laid down by the Chancery Division in *Re. Russe*, (L.R. 19 Ch.D. 432) that where a thing bequeathed may increase, diminish or otherwise change during the testator's life so that the description may from time to time apply to different amounts of property of like nature or to different subject, then the effect is that the property answering the description at the death of the testator passes under the gift."

18. When the provisions of section 170 of the Act 1950 are read and understood in the light of the legal principles enunciated as aforesaid to the validity of a Will executed on a date when the testator did not have the right to bequeath it, though, he acquired the same before his death, this court is of the view that the prohibition contained in section 170 has to be understood in consonance with such enunciation in the aforesaid precedents and not otherwise. Execution of a Will passes no interest or title to the legatee. What is barred by section 170 is bequest by a Sirdar or Bhumidhar with nontransferable rights. Bequest by Will takes place after death of the testator. The rights of a testator in respect of the property in question as existing immediately before his death have to be taken into consideration and not those existing at the time of execution, therefore, if the Will executed by Hasan would have been otherwise proved and found to be credible, then, it would not be invalidated merely because it had been executed on a date when he did not have the right to bequeath by Will, as, before his death he had acquired such rights, however, it is highly doubtful if it could have been registered on 4.7.1991, as, it would be against section 170 as applicable at that time.

19. This issue has been discussed only for its legal significance, otherwise for the reasons discussed in this judgment, as, the Will itself has not been found to be proved nor credible, no benefit of this enunciation can be given to the petitioner herein.

20. In this context as regards the validity of the Will the first and foremost feature which strikes the court is the finding of the consolidation officer that Ehtisham, one of the two attesting witnesses, did not depose that he had seen Hasan signing the Will or that Hasan had signed in his presence. The legal position in this regard is now so well settled that it hardly requires any elaborate discussion. In view of the provisions of section 63 of the Indian Succession Act 1925 and section 68 of the Indian Evidence Act 1872 the Will has to be proved by the production of at least one of the attesting witnesses who could necessarily

depose in terms of the aforesaid provisions which requires that the testator and the witnesses signed in the presence of each other. In the absence of any such deposition the Will cannot be said to be proved. On a careful perusal of the writ petition the court does not find any such assertion that the findings of the consolidation court in this regard was erroneous. The testimony of Ehtisham has also not been annexed to establish that it was so. Mohd. Arif Khan, learned Senior Counsel did not even address this issue during his arguments.

21. This apart, another striking feature in the Will is the absence of a mention by the testator Hasan about his children and wives, which appears to be quite unnatural. Not only there is no mention of them, there is also no justifiable explanation as to why ignoring the natural heirs, he intended to bequeath, if at all, the holdings acquired by him through a patta, on account of his status as a landless labourer, in favour of a third person, that too, his employer who was already well off. It is true that exclusion of the natural/legal heirs by itself does not invalidate a Will, but it does give rise to suspicion as observed by the Supreme Court in the case of *Ram Piari v. Bhagwant & ors.*, AIR 1990 SC 1742, relevant extracts of which are extracted herein below:

"2. Although freedom to bequeath one's own property amongst Hindus is absolute both in extent and person, including rank stranger, yet to have testamentary capacity or a disposable mind what is required of propounder to establish is that the testator at time of disposition knew and understood the property he was disposing and persons who were to be beneficiaries of his disposition. Prudence, however, requires reason for denying benefit to those who too were entitled to bounty of testator as they had similar claims on him. Absence of it may not invalidate a Will but it shrouds the disposition with suspicion as it does not give any inkling to the mind of testator to enable the Court to judge if the disposition was voluntary act...."

22. Even though in the aforesaid case the property had been bequeathed to some of the natural heirs while excluding others the observations of the Supreme Court that such deviation may not invalidate a Will but it does shroud the disposition with suspicion as it does not give an inkling to the mind of the testator to enable the court to judge if the disposition was voluntary act, are relevant and the principle contained therein is applicable to the facts of the present case also.

23. In *H. Venkatachalliah v. B.N. Themmajamma*, AIR 1989 SC 443, it was held to render the Will infirm unless the propounder cleared the suspicion with clear and satisfactory evidence. Mere execution of Will, thus, by producing scribe or attesting witness or proving genuineness of testator's thumb impressions by themselves was not sufficient to establish validity of Will unless suspicious circumstances, usual or special, are ruled out and the courts' conscience is satisfied not only on execution but about its authenticity. See *Kalyan Singh v. Smt. Chhoti and Ors.*, (1989) 4 JT 439 (AIR 1990 SC 396)."

24. Reference may also been made in this regard to another decision of the Supreme Court in the case of Kalyan Singh v. Smt. Chhoti, AIR 1990 SC 396.

25. Reference may also be made to the decision of the Supreme Court reported in (2008) 15 SCC 365, Lalitaben Jayantilal Popat v. Pragnaben Jamnadas Kataria & ors., wherein it has been categorically held that a Will has to be proved not only by proving the signature of the executor, but it should be found to be free from any suspicious circumstances. It was further held that whether a Will is surrounded by suspicious circumstances or not, is essentially a question of fact. The Supreme Court further observed "It is a trite law that execution of a Will must be held to have been proved not only when the statutory requirements for proving the Will are satisfied, but the Will is also found to be ordinarily free from suspicious circumstances. When such evidences are brought on record, the court may take aid of the presumptive evidences also."

26. Reference may also be made to the decision of the Supreme Court reported in AIR 1968 SC 1332, Gorantla Thataiah v. Thotakura Venkata Subbaiah & ors., paragraph 6, which reads as under:

"8. According to the decision in *Fulton v. Andrew* (1875) L.R. 7 H.L. 448, "those who take a benefit under a will, and have been instrumental in preparing or obtaining it, have thrown upon them the onus of showing the righteousness of the transaction". "There is however no unyielding rule of law (especially where the ingredient of fraud enters into the case) that, when it has been proved that a testator, competent in mind, has had a will read over to him, and has thereupon executed it, all further enquiry is shut out". In this case, the Lord Chancellor, Lord Cairns, has cited with approval the well-known observations of Baron Parke in the case of *Barry v. Butlin* (1838) 2 Moo. P.C. 480 at p.482. The two rules of law set out by Baron Parke are :

"first that the onus probandi lies in every case upon the party propounding a will; and he must satisfy the conscience of the court that the instrument so propounded is the last will of a free and capable testator" "the second is, that, if a party writes or prepares a will under which he takes a benefit, that is a circumstance that ought generally to excite the suspicion of the court and calls upon it to be vigilant and zealous in examining the evidence in support of the instrument in favour of which it ought not to pronounce unless the suspicion is removed, and it is judicially satisfied that the paper propounded does express the true will of the deceased." In *Sarat Kumari Bibi v. Sakhi Chand & Ors.*, 56 Ind 62=(AIR 1929 PC 45). the Judicial Committee made it clear that "the principle which requires the propounder to remove suspicions from the mind of the Court is not confined only to cases where the propounder takes part in the execution of the will and receives benefit under it. There may be other suspicious circumstances attending on the execution of the will and even in such cases it is the duty of the propounder to remove all clouds and satisfy the conscience of the court that the instrument propounded is the last will of testator."

This view is supported by the following observations made by Lindley and Davey, L. JJ., in *Tyrrell v. Painton* (1894) P. 151 AT pp. 157, 159.

"The rule in (1838) 2 Moo. P.C. 480; (1875) 7 HL 448; and *Brown v. Fisher* (1890) 63 L.T. 465 is not, in my opinion, confined to the single case in which a will is prepared by or on the instructions of the person taking large benefits under it, but extends to all cases in which circumstances exist which excite the suspicion of the Court; and wherever such circumstances exist, and whatever their nature may be, it is for those who propound the will to remove such suspicion and to prove affirmatively that the testator knew and approved of the contents of the document, and it is only where this is done that the onus is thrown on those who oppose the will to prove fraud or undue influence, or whatever else they rely on to displace the case made for proving the will." (Lindley, L.J.).

"It must not be supposed the principle in (1938) Moo. P.C. 480 is confined to cases where the person who prepares the will is the person who takes the benefit under it - that is one state of things which raises a suspicion; but the principle is that wherever a will is prepared under circumstances which raise a well-grounded suspicion that it does not express the mind of the testator the Court ought not to pronounce in favour of it unless that suspicion is removed." (Davey, L.J.)."

27. The satisfaction of statutory requirements as contained in section 63 of the Indian Succession Act 1956 and section 68 of the Evidence Act 1872 by themselves are not sufficient nor complete for proving the Will and making it credible to the conscience of the court, unless the suspicious circumstances surrounding a Will are removed and the conscience of the Court is satisfied in this regard. In this regard reference may again be made to the landmark judgment on the subject of veracity and validity of Wills rendered by the Supreme Court in the case of *H. Venkatchala Iyengar v. B.N. Thimmajamma*, 1959 AIR (SC) 443, where in it was held as under:

"20. 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 legitimate doubts in the matter.

21. Apart from the suspicious circumstances to which we have just referred, 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 decisions of English courts often mention the test of the satisfaction of judicial conscience. It may be that the reference to judicial conscience in this connection is a heritage from similar observations made by ecclesiastical courts in England when they exercised jurisdiction with reference to wills; but any objection to the use of the word "conscience" in this context would, in our opinion, be purely technical and academic, if not pedantic. The test merely emphasizes that, in determining the question as to 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. 22. 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 quite true that, as observed by Lord Du Parc in *Harmes v. Hinkson*, 50 Cal.W.N. 895 (AIR 1946 PC 156), "where a will is charged with suspicion, the rules enjoin a reasonable scepticism, not an obdurate persistence in disbelief. They do not demand from the judge, even in circumstances of grave suspicion, a resolute and impenetrable incredulity. He is never required to close his mind to the truth". It would sound platitudinous to say so, but it is nevertheless true that in discovering truth even in such cases the judicial mind must always be open though vigilant, cautious and circumspect."

28. Some of the suspicious circumstances referred in the above quoted judgment were when the depositions made in the Will may appear to be unnatural, improbable or unfair in the light of the relevant circumstances or the Will may otherwise indicate that the said deposition 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. As stated by the Supreme Court, the presence of such suspicious circumstances naturally tends to make the initial onus very heavy and unless it is satisfactorily discharged, the courts would be reluctant to treat the document as the last Will of the testator. The burden of explaining the suspicious circumstances is upon the propounder of the Will i.e. the petitioner herein.

29. The Supreme Court in the case of H. Venkatachala Iyengar (supra) has also held that even without any plea of exercise of undue influence, fraud or coercion in respect of the execution of the Will propounded it would be part of the initial onus to remove any such legitimate doubts in the manner, which of course is on the one seeking its benefit. If such pleas are raised, then of course the one raising it will have to prove it. Therefore, in the facts of the present case not only the plea of fraud was very much there, but even otherwise the same could be seen by the courts below as has been done by them.

30. One of the feature which makes the Will in question highly suspicious is the factum of the holding of a landless labourer, who had initially been granted patta in respect thereof by the Gaon Sabha on account of his state of penury, being bequeathed by him through a Will to a third person, i.e. a brick kiln owner and a wealthy person. It is somehow too unnatural to be accepted, especially as, the propounder of the Will has not offered any satisfactory explanation in this regard. An employee bequeathing his property to his employer (a private businessman), rather a landless labourer within the meaning of the provisions of section 198 of the Act 1950 intending to bequeath his land to his employer when there is nothing on record to show that his relations with his three sons and wife were strained, ignoring their legal claim as natural heirs, is highly improbable and it is in this context that the courts below have considered the exclusion of the natural heirs. The contention of Sri Khan that exclusion of natural heirs by itself cannot invalidate the Will cannot be disputed but it does create suspicion. The courts below have not held the Will to be invalid on the ground of exclusion of natural heirs, but have doubted its credibility and while doing so one of the factors considered is the aforesaid.

31. The only justification offered in the Will in this regard is that the petitioner Mohd. Rashid was the testator's "humraah" since childhood and was taking care of him, therefore, being happy with his service and care he wanted to respond in lieu thereof by way of making him his legal heir and putting him in his shoes. As already noticed by the courts below the Will does not indicate that the testator's relations with his sons or wife were strained nor was it the case of the petitioner

herein, nor there was any evidence in support thereof. As already noticed, there is not even a mention of the testator's natural heirs in the Will. As already held by the consolidation court it appears to be highly improbable that instead of the sons and wife the owner of the brick kiln i.e. the employer would take care of the employee to an extent so as to persuade him to Will his property to him. The entire transaction appears to be quite unnatural.

32. In the present case, apart from the fact that the Will has not been proved as per statutory requirements, as already discussed herein above, the petitioner has also failed to remove the suspicions in the minds of the courts below, as also, this court.

33. Even though some of the observations of the consolidation authorities, especially those based on section 170 may not be correct *stricto sensu* in view of the reasons given in the earlier part of this judgment, as the suspicious circumstances referred above remain unexplained the courts below can not be said to have erred in discarding the Will as not credible. The dominant position of Mohd. Rashid over his employee, the testator, at the time of execution of the Will, from which he could influence him, makes it all the more suspicious. Reference may be made in this regard to the decision of the Supreme Court reported in AIR 2003 SC 4351, Krishna Mohan Kul v. Pratima Maity, wherein the burden of proving the fairness and genuineness of a transaction has been held to be upon the person who is in a dominant position or a position of active confidence. Proof of a Will is complete only when the suspicious circumstances are explained and suspicions in the mind of the court are removed.

34. The petitioner who is the propounder of the Will has failed to discharge his onus with regard to the suspicious circumstances surrounding the Will.

35. In view of the above discussion the fact that the Will had been registered does not make it any more acceptable in law.

36. For the aforesaid reasons and subject thereto this court does not find any reason to interfere with the findings of fact recorded by the courts below as regards the unexplained suspicious circumstances surrounding the will and it not being proved nor with the conclusions arrived at. The writ petition is accordingly dismissed.