

(1969) 06 CAL CK 0047

In the Calcutta High Court

Case No : Appeal from original decree No. 269 of 1959

Radhika Prosad Saha and Another

APPELLANT

Vs

Sm. Katyayani Dasi and Others

RESPONDENT

Date of Decision : 03-06-1969

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 18 Rule 12
Evidence Act, 1872 — Section 15
Registration Act, 1908 — Section 34(3), 51
Succession Act, 1925 — Section 63

Citation : 75 CWN 63

Hon'ble Judges : Salil Kumar Datta, J; Bijayesh Mukherji, J

Bench : Division Bench

Advocate : Apurba Dhan Mukherji, Samarendra Nath Banerji and Rebati Nath Sarkar, for the Appellant; Pramatha Nath Mitra and Bhabesh Chandra Mitter, for the Respondent

Final Decision : Dismissed

Judgement

Salil Kumar Datta, J.—This is an appeal by Radhika Prasad Saha and Jagat Bandhu Sarkar (Saha), father and son, and propounders both, from the judgment and decree dated April 9, 1959, of the learned District Judge, Birbhum, refusing to grant probate of a will alleged to have been executed by Bhujanga Bhusan Saha of Debagram, brother of Radhika and necessarily uncle of Jagat, on August 24, 1956, corresponding Bhadra 8, 1363 B.S. The will was registered only two days later, namely, on August 26, 1956, in the residence of the testator Bhujanga, the then Sub-Registrar of the area, Raghu-nandan Saha, having been pressed into service, on commission, for registration. The testator died some four months later, to be exact, on December 21, 1956. The case of the propounders is : the will was duly executed by the testator—a childless one, and was attested according to law. The testator had testamentary capacity at the time of execution of the will. He signed his name in the said will with his own hand and he himself put his initials at the "places in the will where the initials were required. The will

is the testator's last will by which he appointed them, father and son, executors. This is why they filed the will for being admitted to probate.

2. Katyayani, the wife of the testator, by her written objection against the grant of probate, raised various pleas.

(The judgment then lists the pleas *seriatim*, as also the evidence, oral and documentary, and proceeds:)

3. The learned Judge, on a consideration of the materials on record, has come to the conclusion that the will was not properly executed nor legally attested. It is further held that the document was vitiated by mis-presentation and undue influence of the propounders and as also by the absence of testamentary capacity of Bhujanga. The initials alleged to be of Bhujanga are forgeries and the document was an unnatural one, not a conscious act of the executant. Accordingly the prayer for admitting the will to probate has been rejected. Having been aggrieved by the aforesaid decision, the propounders have come up to this Court in appeal.

4. The principles governing the proof of a will have been enunciated by the Supreme Court in (1) *Rani Purnima Devi and Another Vs. Kumar Khagendra Narayan Dev and Another*, following the decision in (2) *H. Venkatachala Iyengar Vs. B.N. Thimmajamma and Others*, in the following manner: The mode of proving a will does not ordinarily differ from that of proving any other document except as to the special requirements of attestation prescribed by section 63 of the Succession Act, 39 of 1925. The onus of proving a will is on the propounder. And, in the absence of suspicious circumstances, surrounding the execution of a will, the proof of testamentary capacity and signature of the testator as required by law is sufficient to discharge the onus. Where, however, there are suspicious circumstances, the onus will be on the propounder to explain them to the satisfaction of the Court before the will can be accepted as genuine. If the caveator alleges undue influence, fraud or coercion, the onus will be on him to prove the same. Even where there are no such pleas, but the circumstances give rise to doubts, it is for the propounder to satisfy the conscience of the Court

5. What are suspicious circumstances was considered in the case of (2) *H. Venkatachala Iyengar v. B. N. Thimmajamma* (*supra*). The alleged signature of the testator may be very shaky and doubtful and the 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 and the evidence adduced may not succeed in removing the legitimate doubt as to the mental capacity of the testator. The disposition made in the will may appear to be unnatural, improbable and unfair in the light of the relevant circumstances, or the will may otherwise indicate that the said disposition may not be the result of the testator's free will and mind. In such cases, the Court naturally expects that all legitimate suspicions should be completely removed before the document is accepted as the last will of the testator. Further, a

propounder himself may have taken a prominent part in the execution of the will which conferred on him substantial benefits. If this is so, it is generally treated as a suspicious circumstance attending the execution of the will and the propounder is required to remove doubt by clear and satisfactory evidence. But even where there are suspicious circumstances and the propounder succeeds in removing them,, the Court will grant probate, though the will might be unnatural and might cut off wholly or in part near relations.

6. Turning now to the facts of the case on hand, it will appear as has rightly been found by the trial court, that there are suspicious circumstances attending the execution of the will and that it is an unnatural will. It is in evidence that the testator, as also his two brothers, separated since long by metes and bounds, had been in separate and exclusive possession of their respective properties. The testator lived in his separate residence with his wife Katyayani as the only inmate of the house, who, it is admitted, was a devoted wife and nursed the testator during his last ailment until his death, and her relation with the testator was intimate. It was, therefore, expected that such wife should have been properly provided for by the testator. In the will, however, a pittance out of the testator's vast properties has been given as bequest to the wife. In respect of schedule "ka" properties, she was given a life interest and on her death the properties are to vest absolutely and in equal shares on Jagatbandhu and his brothers, sons of Radhika. Even there, in respect of the residential house and lands appertaining thereto, she is given, in life interest, an undivided half share, while Jagatbandhu, one of the executors named in the will, is given the remaining half share in absolute interest. And Katyayani's life interest as aforesaid on her death is to vest on Jagatbandhu. Lands of ka-1 schedule measuring 1.81 acres in which she was given the right to alienate in ambiguous language were also to vest, on her death, on Jagatbandhu and his brothers. While the sons of Radhika were given together about 20 acres of land, Katyayani who would have otherwise succeeded to the estate of Bhujanga in its entirety, was given 2.22 acres of land in life interest and 1.81 acres of land in ambiguous language in absolute interest. The movable properties were bequeathed in equal shares to Katyayani and the said sons of Radhika. There is, therefore, no doubt that the will is most unnatural and this is a suspicious circumstance which has to be satisfactorily explained before the appellants can get letters of administration.

7. Another suspicious circumstance relates to the attestation of the will by the witnesses. There are seven attesting witnesses to the will. Of them, P.W. 2 Anadi, P.W. 3 Ramanath Saha, P.W. 4 Hirendra Nath Biswas, P.W. 5 Manindra Lal Saha have been examined by the propounders. None of the attesting witnesses speak of Naku Mistri and Hara Sankar Roy being present at the time of execution of the will, while Anadi stated further that Naku Mistri and Hara Sankar did not sign the will at the sitting and Jagatbandhu P.W. 6 says that none else was present at the Majlis, where the will is alleged to have been executed. The appearance of the names of Hara Sankar Roy and Naku Mistri on the alleged will as attesting witnesses, when there is no case or evidence of the testator having

acknowledged execution to them, is also a suspicious circumstance which has to be satisfactorily explained by the propounded before the grant is made in their favour.

8. The alleged will, exhibit 1, provides for meticulous bequests of properties to the beneficiaries under it, so improbable by a person who admittedly was passing his days in a serious ailment which confined him to bed. There is no dispute that Bhujanga was suffering from diabetes for 3/4 years at least before the execution of the will and there was medical treatment off and on by an attending physician. In addition, he had an ulcer on his leg caused by fall of hot water in or about Sravan 1363 B.S., the will having been executed, as alleged, on the eighth day of the next Bengali month, namely. Bhadra 8, 1363 B.S. The ulcer became septic and his entire leg was affected, as stated by Jagatbandhu even. In the state of continuous physical suffering in which Bhujanga was at the time of execution of the will, it seems highly improbable that he had the mental capacity to bequeath his properties in specific shares, with so much particularity, and even by metes and bounds, to the sons of Radhika, akin to what is done in a deed of partition. This is another suspicious circumstance relating to the testamentary capacity and the propounders have to remove the doubt before their application for grant may succeed.

9. Still another suspicious circumstance relates to the execution of the will by the testator and attestation by the witnesses. His signature at every page of the will appears shaky while his initials on interlineations at pages 10, 11 and 16 of the Will appear to be still more shaky and dissimilar and are in different ink, though " the evidence is that Bhujanga used one and the same fountain pen for the purpose. It also appears that Anadi and Ramanath, P.Ws. 2 and 3, do not speak of interlineations and of such interlineations having been initialled by Bhujanga, while Hirendra, Manindra and Jagatbandhu, P.Ws. 4, 5 and 6, speak about the interlineations and initials being made at the same majlis. It is also in evidence that except the fountain pen used by Bhujanga, there was only one inkpot and one pen at the majlis. The signatures of the witnesses, however, are in different ink, and it is also another suspicious circumstance which must be satisfactorily explained by the propounders before they can succeed.

10. It is undisputed that the will conferred substantial benefits to Jagatbandhu to which he would not be otherwise entitled. Jagatbandhu, it appears, took a prominent part in the execution of the will. He was himself present at the majlis, sitting by the side of Bhujanga, when he handed over to Bhujanga the fountain pen by which the will was executed by him. He again arranged for registration of the will and paid the fees for the commission. This is another suspicious circumstance attending the execution and registration of the will and the propounders must remove the doubt caused thereby to the genuineness of the will.

11. Mastery again shrouds the draft" of the alleged will. P.W. 2 Anadi. the scribe, states in evidence that he wrote out the will (exhibit 1) from a draft, complete

even with schedules, given to him by Bhujanga. There is no evidence as to when and how the draft was prepared and by whom the draft was written, and it is improbable that Bhujanga in the plight he was, could or did, of his own, without legal advice and independent assistance, prepare a complete draft of the will, as appears from exhibit 1, the true transcript, if that, of the draft. Again, the draft, Anadi says, was never taken out of Bhujanga's house, and was copied by him for 3 days inside the said house. The draft, which could have spoken volumes, was however, never produced in Court and nobody "bothered" about the same. This is another suspicious circumstance which has to be explained by the propounders before they can ask the Court to grant the probate to them.

12. The alleged will, exhibit 1, it appears, was produced by the propounders along with their application for grant of probate. P.W. 6 Jagatbandhu says in evidence that he took the papers from the residence of Bhujanga when he had apprehended trouble over the will." There is, however, no evidence as to when and how the will was received back from the Registration Office and found its way to the residence of Bhujanga.

13. Before we examine the facts relating to the execution of the will, we shall consider the established principles relating thereto. It is for the propounders 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 his disposition and put his signature to the document of his own free will. In (3) *Barry v. Butlin*, 1838 2 Moo. PC 480, followed in (4) *Sarat Kumari v. Sakhi Chand*, 56 IA 62, it was held that the onus probandi lies 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. If the propounder writes and prepares a will under which he takes a benefit, that would excite the suspicion of the Court, and it should not pronounce in favour of the will unless it is judicially satisfied that the paper propounded expresses the true will of the deceased. In (5) *Tyrell v. Painton*, 1894 P. 151, it was held further that where circumstances exciting suspicion of the Court exist, it is for the propounder to remove such suspicion and to prove affirmatively that the testator knew and approved of the contents of the document.

14. There have been judicial pronouncements about the testamentary capacity and a sound disposing mind. In (6) *Burdett v. Thomson* quoted in (7) *Boughton & Marston v. Knight* (1373) LR 3 P. & D. 64 at 72, it was held that a high degree of soundness of mind is required to make a will. "From the character of the act it required the consideration of a larger variety of circumstances than is required in other acts, for it involves reflection upon the claims of several persons who, by nature or through other circumstances, may be supposed to have claims on the testator's bounty, and I power of considering these several claims and of determining in what proportion the property shall be divided amongst the claimants and, therefore, whatever degree there may be of soundness of mind,

the highest degree must be required for making a will".

15. This Court in (8) Surendra Sm. Ranee Dassi, 24 CWN 860, as in (9) Lila v. Bijoy Pratap (1925) CLJ 300, approved the test of testamentary capacity as laid down in (10) Har-wood v. Backer (1840) 3 Moo. PC 282 " in the following terms : "In order to constitute a sound disposing mind, a testator must not only be able to understand that he is by his will giving the whole of his property to one object of his regard, but that he must also have the capacity to comprehend the extent of his property and the nature of the claims of others, whom by his will he is excluding from all participation in that property." In (11) Shyam Sundar Debansi v. Sm, Kamal Kumari, "57 CLJ 246, it was held following (12) Bulli Kunwar v. Bhagirathi, 1905-9 CWN 649, that a Court of probate should first consider the question of execution of the will. If the Court is satisfied about the factum of execution, that in itself will amount to a finding that the testator with full knowledge of the claims of the relations upon his bounty, with full knowledge of the state of his properties and with full knowledge of every material circumstances, had executed the will. But it is not permissible for a Court of probate to consider aliunde the terms of the will, to consider whether the terms are generous or not, to consider whether the relations who had natural and legitimate claims on the testator's bounty, have been cut off altogether or not and then to consider the due execution" of the will with such preconceived ideas and to hold that the onus probandi had not been fully discharged by the propounder and to refuse to grant the probate of the will.

16. Turning now to the facts of the case, we find that Bhujanga had been ill with diabetes admittedly at least for 3/4 years prior to the execution of the will and was confined to bed. In addition he had an ulcer on his leg since Sravan 1363 B.S. which became septic and his entire leg was affected and his body was swollen. It can be safely presumed that he had a feeble and debilitated mind caused by his continued illness. In such state of affairs, it appears to us highly improbable that Bhujanga could, of his own, draft a will, complete in its entirety containing seventeen pages, with schedules marked as ka, ka/1, kha, ga, gha, uma, cha and chha. The said schedules comprise lands with full and complete description, meticulously bequeathed to different persons, by, amongst others, more or less even distribution to sons of Radhika akin to what is done in a deed of partition. Such a document complete in its provisions, possible by a person having the high faculties of mind required in a will, can hardly be expected from a person as Bhujanga, in the plight he was at the time. Further, the will has been alleged to have been prepared from a draft complete with schedules handed over by Bhujanga to Anadi shortly before its execution. The draft has not been produced nor there is anything to indicate that the draft was according to Bhujanga's instructions or that Bhujanga had anything to do with the drafting of the will. There is also no particular reason as to why Bhujanga should take Anadi in confidence and ask him to copy out the will. Though Bhujanga was under treatment, the attending physician was not examined. On the materials on record, it is impossible for us to hold that Bhujanga had testamentary capacity at

the time of execution of the will or that the impugned will was drafted according to his instructions or contained his desires about his properties.

17. There is no dispute that the will bears the signature of Bhujanga, though in a shaky manner, at the top of every page which is usually the practice. The will has to be proved like any other document except as to the special requirements of attestation prescribed in section 63 of the Indian Succession Act, 1925. As to execution and attestation, the propounders' case is that there was a majlis at the house of Bhujanga on the morning of August 24, 1956, when the attesting witnesses assembled at the call of Bhujanga. At his request, the will was read out by Anadi, P.W. 2, the scribe, and thereafter Bhujanga signed the will followed by the attesting witnesses who also signed in his presence. Anadi in his deposition states that apart from himself Manindra (P.W. 5), Ramanath (P.W. 3), Hirendra (P.W. 4- and Kumaris Mistri (O.F.W., 2) were present and signed as attesting witnesses and Hara Sankar and Naku Mistri did not sign at that sitting. Ramanath (P.W. 3), one of the attesting witnesses, does not speak of Kumarish, Hara Sankar and Naku Mistri being present at the sitting. P.W. 4 Hirendra states that, apart from himself, the attesting witnesses were Anadi, Ramanath, Kumaris and Manindra. P.W. 5 Manindra's evidence is that, apart from himself, Hirendra, Anadi, Ramanath and Kumaris were present at the meeting and signed as attesting witnesses. Jagatbandhu, P.W. 6, who was present at that sitting, states categorically that Manindra, Ramanath, Kumaris, Hirendra and Anadi signed and none else signed at that sitting. It is thus clear that, apart from discrepancies, the attesting witnesses to the will at the sitting were Anadi, Ramanath, Hirendra, Manindra and Kumarish and none else. It is, however, strange to find that names of Hara Sankar Roy and Naku Mistri as the remaining witnesses to the execution of the will. Hara Sankar, who was not examined, signed on every page of the will, while Naku and Kumaris denied having attested the will in the presence of the testator. Non-examination of Hara Sankar by itself may not be fatal as contended by Mr. Mukherjee relying on (13) Bankim Behari v. Sm. Matangini, 24 CWN 626. There is, however, no case by the propounder that the testator had any occasion to admit or acknowledge the execution of the will before the said witnesses. There is no explanation as to the appearance of the names of Ramanath and Naku Mistri as attesting witnesses in the will.

18. The attesting witnesses who deposed in the trial stated in one voice that they signed with pen, using the ink, while it is also admitted that Bhujanga signed with the fountain pen supplied to him by Jagatbandhu. Manindra stated that there were only one inkpot and one pen at the sitting. A glance at the will shows that the signatures of the witnesses are not in the same ink. As to interlineations at pages 10, 14 and 16 of the will, which are alleged by only P.W. 4, P.W. 5 and P.W. 6 to have been initialled by Bhujanga, it appears that the said initials are not at all similar to the signatures of Bhujanga appearing in the will and given at the same sitting and such initials are in an altogether different ink. These discrepancies, minor in character, assume high importance and dimension when there are suspicious circumstances surrounding the execution and attestation of

the will.

19. Anadi has stated in evidence that many educated and respectable persons live in the village and also close to Bhujanga's house. None of these persons are witnesses to the will or to the events surrounding the will, its preparation, drafting and execution. Neither any lawyer or any person assisting in the drafting of the will or the attending physician has been examined. Of the alleged attesting witnesses is P.W. 2 Anadi, a priest by profession, to whom Bhujanga is alleged to have entrusted the copying out of the will from the draft, though there is no reason as to why Bhujanga, of all persons, should take him in confidence. Nor is there evidence to show that his relationship with Bhujanga was intimate, while Anadi admits, he is on good terms with the propounders. The propounders are agnatic relations of Ramanath Shah P.W. 3 and they are on good terms with him. This witness was called by Nityananda, a son of Radhika and a legatee, to report to Bhujanga's house at the time of execution of the will. P.W. 4, Hirendra Nath Biswas, by occupation cultivator, without however having any land of his own, admitted that Jagatbandhu is his friend. P.W. 5 Manindra is related to the propounders, being a cousin of Radhika and it appears that his relationship was cordial with the propounders. P.W. 6 is Jagatbandhu, one of the propounders and a beneficiary under the will and, as already stated, at the time of the execution of the will, sat by the side of Bhujanga, as stated by Manindra, supplied him with the fountain pen with which he executed the will and he also applied for registration and paid the costs of commission. P.W. 7 Kumaris Banerjee, a Tahasildar, stated that though he had an ulcer, Bhujanga could move about and look after his own affairs, in direct contradiction with the evidence of other witnesses who stated that Bhujanga was ill and bedridden and his properties were looked after by Radhika and Jagatbandhu.

20. The alleged attesting witnesses do not inspire confidence, interested as they were in the propounders. It is strange that though some of the witnesses P.Ws. 2, 3, 5 were conscious of the fact that the testator was unjustly depriving his faithful and devoted wife, no enquiries were made of him as to why he was depriving his wife. Further there are the other discrepancies, regarding the presence of Suchitra at the residence of Bhujanga at the time of execution of the will. P.W. 4 says that Katyayani was the only inmate of the house other than the servant and P.W. 3 stated that Suchitra was there while other witnesses excepting P.W. 2 are silent about her though according to P.W. 3 she was visible from the majlis. While P.W. 4 stated that there was no bedding on the Taktaposh, where Bhujanga was seated at the time of execution of the will, P.W. 5 stated that there were bedding and pillows on the said Taktaposh at the time. None of the witnesses could say which leg of Bhujanga, though the same was bandaged, was afflicted with the ulcer and even Anadi did not know that Bhujanga had diabetes. P.W. 2 in cross-examination stated that the witnesses signed all the pages at a time by turn, which however is not correct. Anadi stated in evidence that the will was written by him 2/3 days at the residence of Bhujanga prior to execution. Such event, if it took place at all, could not happen without the

knowledge of Katyayani. Strangely enough no question was put to her on cross-examination.

21. Mr. Mukherjee, the learned Counsel for the appellants, relying on the decision in (14) *Brahmadat Tewari v. Chaudan Bibi*, (20 CWN 192) contended that there is no conflict in the evidence of the witnesses on material points, namely, execution of the will by Bhujanga after it is read over by Anadi, and attestation thereof by other attesting witnesses. Even if two of the attesting witnesses repudiated their signature, it is obvious that they have given false testimony and in any event if their signatures may be ignored, the will was attested by more than two witnesses according to law. Mr. Mukherjee further contended that every presumption should be made in favour of the execution and attestation on the face of it and apparently duly executed.

22. We have already seen that the witnesses to the alleged execution do not inspire confidence interested as they are in the propounders, and there is no independent or reliable witness testifying to execution. The signatures of the alleged attesting witnesses, whose names appear in the will but who were admittedly not present in the majlis, have not been explained and it cannot also be said that the witnesses who repudiated their signature were giving false testimony. The trial court found them giving evidence in a straightforward manner. Further the shaky signatures of the testator in the will, the discrepancies about the ink of signatures of the witnesses, and the doubtful initials of the testator, coupled with the fact that the will patently was an unnatural will, along with the further fact that there was nothing in evidence to indicate that the impugned will was a conscious act of the testator or that the testator had testamentary capacity, and of the beneficiary sitting by the side of the testator seeing through the execution and his anxiety and steps for ensuring registration as discussed hereafter, lead us to suspect that there was no execution and attestation of the impugned will according to law. We have accordingly come to the conclusion that the evidence which has been produced in this case does not satisfy the conscience of the Court about the due execution and attestation of the impugned will. The appellants have, therefore, failed to dispel the suspicious circumstances stated above.

23. Mr. Apurbadhan Mukherjee contended that there is nothing unnatural about the will. In families having ancient notions such will is not uncommon as the intention is always to ensure that the properties do not go out of the family. Mr. Mukherjee also reminded the court that the Hindu Succession Act, 1956 (XXX of 1956) came in force with effect from June 17, 1956, and people in general then were not accustomed to absolute estates for widows. It must have been the intention of the testator to ensure that his properties do not go out of lineal descendants of his ancestors which event would otherwise happen accordingly to the law then in force. In any event, the widow is always assured of her maintenance out of the properties bequeathed to her and it has not been established by the respondent that the properties given to her by the will are

insufficient for her maintenance. Further, there is no reason to think that Jagat Bandhu and his brothers will not look after Katyayani as and when required. Mr. Mukherjee also relied on exhibits 14 series, the letters written by Bhujanga to Jagatbandhu, which clearly indicated his great affection for Jagatbandhu. Further, he contended, as Bhujanga had full testamentary capacity and he made dispositions according to his desire, it was not open to the court to substitute its own notions about fair and moral dispositions.

24. Mr. Mukherjee strongly relied on the decision in (15) Motibai Hormusjee Kanga v. Jamsetjee Hormusjee Kanga, 29 CWN 45 where the testator by his will, duly executed and attested as found and also registered, bequeathed his entire property to his second wife, without making any provision for the issues through his first wife including a minor son. It was held by the Privy Council that a man may act foolishly and even heartlessly: if he acts with full comprehension of what he is doing the court will not interfere with the exercise of his volition. Mr. Mukherjee also relied on the decision of (8) Surendra Krishna Mondal v. Ranee Dessi, 24 CWN 860, where the testator bequeathed the residue of his estate of over Rs. 3 lacs to his infant brother after payments of an annuity of Rs. 501/- per month for his wife and similar other two annuities of small amounts. It was held that the testator had the requisite testamentary capacity when the will was prepared and executed and that the provisions of the will were not unnatural and unreasonable. Reliance was also placed on the decision in (16) Ajit Chandra Majumdar Vs. Akhil Chandra Majumdar, , where the testator in his holograph will prefer one son exclusively to others. It was held that when the testator had full testamentary powers and a disposing mind, he could not be dictated by the Court as to what was a fair and an unjust disposition. Once it is established that the testator was free and had a sound disposing mind, then it is no longer the duty of the Court to go further to inject its own ethics of what is or is not a moral or a fair disposition according to the Court's own standards.

25. Upon the materials on record, we are unable to agree with Mr. Mukherjee that the will is not an unnatural and unfair disposition of the properties. Even Jagatbandhu in his evidence stated that Katyayani "was on best terms with Bhujanga". It is also in her evidence, which is uncontroverted, that she had nursed her husband as a devoted wife until the inevitable end took place. As Mr. Pramatha Nath Mitra, the learned Counsel for the respondent, has pointed out, the unnatural and unfair disposition of the property was a strong suspicious circumstance and it lay primarily on the propounders to dispel the suspicion in the mind of the Court. No attempt was even made by the appellants to dispel the suspicion or to satisfy the Court that the properties bequeathed to Katyayani were sufficient for her maintenance. The reasons for the unnatural and unfair disposition in the impugned will, as given out by Mr-. Mukherjee, are mere surmises without any legal testimony. In the case of (15) Motibai Hormusjee Kanga v. Jamsetjee Hormusjee Kanga (supra), the testator was pointedly asked by an attesting witness who felt that the will was unjust, as to why he was depriving his children, to which the reply given by the testator was that his wife,

the legatee, who was a good woman, would look after everything and the minor child. The Privy Council in allowing the appeal in favour of the propounder wife expressed their hope that she would faithfully carry out the wishes of her husband in respect of the minor child. In the case of (8) *Surendra v. Sm. Ranee Dassi* (supra), apart from the actual execution of will, there was evidence showing overt acts by the testator in the disposition of the properties. After the draft will was read, the testator altered the monthly maintenance of the wife from Rs. 401-to Rs. 50]-. It was further found that the testator had testamentary capacity at the time of execution of the will. In (16) *Ajit Chandra v. Akhil Chandra* (supra), the will was a holograph will where the mind of the testator clearly expressed itself in the physical act of writing out the will and the testator died 16 years after the execution of the will. In the instant case, apart from the execution of the will there is no overt act on the part of the testator to show that the dispositions in the will are the conscious act of the testator and it is still more surprising that none of the witnesses ever enquired of Bhujanga the reasons for his depriving a faithful and devoted wife.

26. In (17) *Vellaswamy Servai v. Sivaraman Servai*, 57 IA 96, it was held that where a beneficiary took leading part in giving instructions for the will and in procuring its execution and registration, such circumstances would excite the suspicion of any probate court which will examine the evidence in support of the will with great vigilance and scrutiny and the beneficiary will not be entitled to probate unless the evidence removes such suspicion and clearly proves that the testator approved of the will. Again the decision in (18) *Gorantla Thataiah Vs. Thotakura Venkata Subbaiah and Others*, , the Supreme Court reiterated the proposition that if the propounder takes a prominent part in the execution of the will which confers substantial benefits on him that itself is a suspicious circumstance attending the execution of the will and, in appreciating the evidence in such a case, the Court should proceed in a vigilant and cautious manner. It is undisputed that the will conferred substantial benefits on Jagatbandhu to which he would not be otherwise entitled. According to Jagatbandhu, he saw Bhujanga on the day before the execution of the will and was informed by him that the will was already prepared though he did not know nor enquired of the contents of the will. At the request of Bhujanga, he attended the execution of the will at the majlis and handed him over the pen with which he signed the will. Jagatbandhu sat by the side of Bhujanga as he executed the will. He again came at noon on that very day and on the following day, of his own, applied for registration of the will and paid the fees for commission. He did not return to his office to Krishnapore, till the will was registered. There is abundant testimony that Bhujanga was physically and mentally in a weak and debilitated condition and his properties were looked after by Radhika and Jagatbandhu. Jagatbandhu's continued presence at the time of execution of the will undoubtedly influenced Bhujanga in the exercise of his testamentary powers, if he had any, and the same together with Jagatbandhu's anxiety to see through the registration of the will excite in our mind a grave suspicion about the

genuineness of the will. The suspicion mounts up when we can find that the draft of the will is not produced nor there is any evidence as to when and how the draft was prepared or of the testator's taking any part in the drafting of the will. We are also not satisfied as to the custody of the registered will, as there is no evidence as to who took delivery of the same from the registration office and how it found its way to the residence of Bhujanga and our suspicion about the genuineness of the will is further deepened.

27. Mr. Mukherjee has strongly contended that the will was duly registered in accordance with law and the registration conclusively established the genuineness of the will. In (19) *Ishwardeo Narain Singh Vs. Sm. Kamta Devi and Others*, , it was held that there is nothing in law which requires the registration of a will and to draw any inference against the genuineness of the will on ground of its non-registration is wholly unwarranted. But the mere fact that a will is registered will not by itself be sufficient to dispel all suspicion regarding it, where suspicion exists, without submitting the evidence of registration to a close examination, as was held in (1) *Purnima Debi v. Khagendra Narayan* (supra). It was further laid down in that case that if the evidence on a close examination reveals that the registration was made in such a manner that it was brought home to the testator that the document of which he was admitting execution was a will disposing of his property and thereafter he admitted its execution and signed it in token thereof, the registration would dispel the doubt as to the genuineness of the will. But if the evidence as to registration shows that it was done in a perfunctory manner, that the officer registering the will did not read it over to the testator or did not bring home to him that he was admitting the execution of a will or did not satisfy himself in some other way (as for example, by seeing the testator reading the will) that the testator knew that it was a will the execution of which he was admitting, the fact that the will was registered would not be of much value. The Supreme Court referred to cases where it was found that registration took place without the executant really knowing what he was registering.

28. The evidence of P.W. 1, Raghunandan Saha, who was the then Sub-Registrar of Nalhati, on seeing the will, was that the executant Bhujanga presented the document on August 26, 1956, for registration at his residence at Debagram and on the said date it was registered. He stated that on his enquiry Bhujanga admitted before him that it was a will and he also admitted his signature thereon. At the same time he stated that he had no independent recollection about the incident at the registration of the will but he remembered the same on seeing the will. The witness also stated that a will will not be registered if it appears to the Sub-Registrar that the testator has no testamentary capacity.

29. u/s 34(3) of the Indian Registration Act (XVI of 1908) on presentation of a document, the registering officer will enquire whether or no such document was executed by the persons by whom it purports to have been executed and satisfy himself about the identity of the executant. It is, therefore, obvious that the

registering officer is only to be satisfied about the identity of the person and ascertain as to whether the document has been executed by the executant. There is no other statutory obligation on the registering officer, as contended by Mr. Mukherjee, who submitted that the factum of registration conclusively established the testamentary capacity of the executant, as also unequivocal admission of the execution of the will on perfect realisation of its contents. As has been laid down by the Supreme Court, mere registration, without evidence of bringing home to the executant about the nature of the document including its contents, will not establish the conclusiveness of the will. In the instant case, barring an acknowledgment of the execution of the document, and of Bhujanga's admission of the document being a will, no further step was taken by the Sub-Registrar to bring home the document and its contents to the executant Bhujanga. The Sub-Registrar did not read over the will to Bhujanga nor did he see him reading the same. O.P.W. 2 Bholanath Saha who identified Bhujanga before the Sub-Registrar stated in his evidence that he was told by Jagatbandhu who called him there that the document was a power-of-attorney. He further stated that Bhujanga was lying in bed covered with cloth and did not answer to his call, and he was suffering from diabetes for last 4/5 years and had an ulcer on leg. No question was asked of Bhujanga by the Sub-Registrar after he had arrived at Bhujanga's place. It is obvious that there was no act on the part of the Sub-Registrar bringing home to Bhujanga the nature and contents of the document that was being registered before him. Nor there was any evidence disclosing that the testator realised that he was admitting execution of a will providing for bequests of his properties when he put his signature on the reverse of the will. We are not satisfied in the circumstances of the case that the testator knew or realised that the document he was admitting before the Sub-Registrar was a will and accordingly the registration must be held to be insufficient to dispel the suspicious circumstances relating the execution and attestation of the will referred to above.

30. Mr. Mukherjee has also relied Oil a registered Arpannama dated September 17, 1956, (exhibit 2); when dedicating the properties in schedules ka and kha thereof, to the deities, Bhujanga makes an admission about his having distributed earlier his properties by a registered will. Apart from the fact that the witnesses to this document are interested persons, and the document was prepared at the residence of Radhika, there is no evidence to prove that execution of the document was a conscious act of his. And after his return from hospital, his condition deteriorated and, as Katyayani says, he became unconscious and remained so till death. We are not prepared to attach any importance to the document and any admission made therein equally fails to dispel our suspicion about the will.

31. Mr. Mitra has drawn our attention to exhibit 12-a deed of gift dated May 19, 1956, executed by Bhujanga, which shows that the small quantum of property given to Jagatbandhu, so incompatible with the large bequests made in his favour by the impugned will. Mr. Mukherjee has also drawn our attention to

exhibit 11, a memo dated October 20, 1956, by Bhujanga nominating Jagatbandhu to receive the moneys under his insurance policy in lieu of his earlier nomination in favour of Katyayani. Possibly it is intended to explain away the unnatural bequests in effect depriving the wife. This document is in the English language which, it is admitted, Bhujanga did not know and there is no dependable evidence to indicate that the said memo was explained to him or that his signature thereon was a conscious act of his realising all implications. This document again does not help us to dispel our suspicions about the unnaturalness of the will.

32. In the view we have taken, we do not consider it necessary for us to probe into the allegations made by the respondent that the will was procured in place of a power-of-attorney by undue influence and misrepresentation on part of the propounders.

33. Upon an anxious and careful consideration of all the materials on record, we hold that the appellants have totally failed to dispel the suspicious circumstances relating to the execution and attestation of the alleged will of Bhujanga and accordingly they are not entitled to any relief in this appeal.

34. In the result the appeal fails and is dismissed with costs.

Bijayesh Mukherji, J.

35. Here is an unprivileged will of one Bhujanga Bhusan Saha who, it is said, executed it "at about 7-30 in the morning" on August 24, 1956, in his residence at Debagram, put it to registration at 7-30 a.m. too, two days later, to wit, on August 26, 1956, right in his residence again, the registrar having called on there on commission, got himself admitted in hospital on August 28 or 29, 1956, for having his old ailment of diabetes, followed by a septic ulcer, tended and treated, came back home after having stayed in the hospital for some 18 to 19 days that is to say, sometime between September 15 and September 21, 1956, and died childless, a little less than four months after execution by him of the will, to be exact, on December 21, 1956.

36. The genuineness of such a will is at issue in this probate litigation.

37. The propounders are Radhika Prasad Saha and Jagatbandhu Sarkar (Saha), father and son. Bhujanga, the testator, was Radhika Prasad's younger brother, and, therefore, Jagatbandhu's uncle.

38. The case, the propounders come to court with, as indeed they must, is that the will they set up is genuine, having had the knowledge and approval of the testator, endowed then with the complete capacity to do what he did.

39. The caveat is entered by Katyayani Dasi, the testator's widow, whom the will and her husband's will at that-leaves high-and-dry. It is hardly necessary to notice all she traverses in her written objection. Suffice it to note that her plea comes to this: the testamentary incapacity of her husband, fostered by old age

and illness, and the propounders, given to greed, preying upon it, have resulted in such an unnatural will, by which the propounder Radhika Prasad's sons, including Jagatbandhu, the other propounder, have been given the lion's share, and she has been given only a pittance, even though she was "the devoted wife" of the testator and "the object of his extreme affection."

40. The case is set down for trial on evidence and the will is pronounced against. Hence this appeal by the propounders, father and son, who are the named executors in the will.

41. The whole of the evidence completely satisfies us, as it has satisfied the learned trial judge, that the case bristles with circumstances which raise the suspicion of the court that the will does not express the mind of the testator—a suspicion which it is for the appellants qua propounders to remove but which they do not. Here are the more important of such circumstances, classified under suitable headings :

42. A. Old age and painful illness of the testator, evidencing a mind "very feeble and debilitated." How old was Bhujanga Bhusan, the testator, on August 24, 1956, corresponding to Bhadra 8, 1363 B.S., when he executed the will: The will itself recites that he will be some fifty years of age. Ordinarily, the evidence of the testator's own brother Radhika Prasad, the appellants' witness No. 8, should tell on a matter as this. Giving his testimony in the court of first instance on March 4, 1959, he put his own age as sixty-five and his brother Bhujanga Bhusan's as twelve to thirteen years junior to him. So, on August 24, 1956, Radhika Prasad was sixty-two years or thereabouts, and Bhujanga Bhusan some forty-nine or fifty years of age. If it is a matter of arithmetic only, such evidence is without flaw. But much more than mere arithmetic lies here. He cannot recall the year of his or Bhujanga Bhusan's birth. Nor can he say when his first child was born. Such a one does not, upon evidence, appear to be that type of an illiterate villager, so simple, that, asked about his age, he unhesitatingly puts it at twenty or forty, as if the difference is not much. On the contrary, he is apt to strike a prudent man as worldly-wise, having properties also at Parui—some fifteen to sixteen bighas of land— which he looks after, by "usually" staying there. "Parui is about 10 miles from Debagram," his own village. Such is the evidence between them-selves of Radhika Prasad and Jagatbandhu, father and son, themselves the two appellants, and their own witnesses too numbering 8 and 6 respectively. More, such a one Radhika Prasad places one event after another by years : e.g., (i) Bhujanga Bhusan separated from him in 1336 B.S.—some twenty-seven years ahead of the execution of the will in 1363 B.S.; (ii) in 1336 B.S. they gave the sons of Brajendra, another brother, their father's one-third share; (iii) for the first time in 1362 B.S. Bhujanga Bhusan performed the Lakshmi and the Saraswati pujahs; (iv) revenue survey operations took place in 1363 B.S., etc. It, therefore, looks a little odd that one like him fails to recollect, not the dates, but the years of birth of himself, Bhujanga Bhusan and his own first-born. Naturally it is suggested to him, on cross-examination, that he is seventy-five

years of age on the date of his evidence in court (March 4, 1959). He denies, that is so. But the trial judge records the following remark about him, while under examination, in the witness-box: "The witness is too old and decrepit and his age seems to be not less than 70 years." It appears to be open to the gravest doubt if the recording of such remark comes under the "demeanour" rule embodied in Order 18, Rule 12, of the Procedure Code, the plain meaning of "demeanour" being "behaviour" : "bearing towards another". How a witness looks, young or old, firm or infirm, has little to do with his behaviour or bearing to another. That apart, appearance is often deceptive, and it is so risky for any one, no less for a judicial personage, to jump to a witness's age from appearance only. So, we pass it by, but find, for the reasons that go before, that Radhika Prasad's evidence, about his own age and Bhujanga Bhusan's, appears to be none too happy. The least the court expects of such a one is the year of his birth and his brother's.

43. Katyayani, herself the principal respondent to this appeal and her own witness No. 4, puts her age to be fifty-five or fifty-six on the date of her evidence (March 5, 1959), her husband, the testator, having been, she says, nine or ten years older than she. That would make the testator some sixty-two or sixty-three years of age in August 1956, the date of execution of the will. True it is that she too cannot speak of the year of her birth; nor can she say how old was she when her husband died. But she is illiterate, as stated by Jagatbandhu and Anadi, the propounders' witnesses numbering 6 and 2 respectively, on cross-examination. And that is just the sort of answer expected of one like her. To equate Katyayani with Radhika Prasad, the worldly-wise, will be to equate the two unequals. All the same, Katyayani's is not very firm evidence either.

44. Upon such evidence of the testator's brother, on one hand, and his wife, on the other, appearances are in favour of his having been not that young: about fifty years of age, on the date of execution of the will. More than this cannot be found, Radhika Prasad's evidence tending to minimise his brother's age so as to fit the age stated in the will, and Katyayani's being not that high which can be relied upon in safety in its entirety.

45. No matter whether the testator was in his early fifties or sixties on August 24, 1956, the date when he executed the will, one thing appears to be clear and certain, upon evidence : that he was then suffering from a very painful disease to which he succumbed on December 21, 1956. Diabetes he had. Both the appellants, as also others, admit it in their evidence. Radhika Prasad, the father, saying" on cross-examination, that the testator, his brother, had it two to three years before his death, and Jagatbandhu, the son, of twenty-six years of age, saying, on cross-examination again, that the testator, his uncle, had it one or two years before his death. So, upon the evidence of the propounders themselves, the testator had diabetes right from 1954's end or thereabouts, he having died on December 21, 1956. Ramanath, the appellants' witness No. 3, ascribes diabetes to the testator some three to four years before his death. He had then

diabetes right from 1952 or 1953.

46. Diabetes in itself is neither to be made light of, as is done before us on behalf of the appellants, nor to be made much of, without more. It all depends upon how much excess of sugar in the blood and urine one down with the disease has and what precautions he is taking in drug and diet alike : matters on which we have no medical evidence. But the evidence we have is that the testator was injured with hot water one or two months before the execution of the will. So, such scalding he had between June 24 and July 24 of 1956. It was followed by the onset of an ulcer which turned septic, as was only to be feared about a diabetic patient. And his entire leg was affected.

47. Such is the evidence, on cross-examination, of none else than the appellant Jagatbandhu. His father Radhika Prasad admits the testator having had an ulcer late in Asarh or early in Sravan 1363 B.S., the will, he it recalled, having been executed on the eighth day of Bhadra following. And Bhadra is just the month after Sravan. But he denies, the ulcer became gangrenous and his brother Bhujanga Bhusan's body became swollen. He denies too, his brother was completely bedridden and invalid.

48. Evidence as this of the father cannot be preferred to that of the son who appears to have suppressed much less than what his father does. Indeed, the father's evidence is such that it falsifies itself on this point. He confesses, on cross-examination, he does not remember whether he had talks or not with his brother, the testator, after the onset of the ulcer and before execution of the will, when, to show his utter disinterestedness, he says, he was at Parui from where he returned home at Debagram one or two days after registration of the will, that is, on or about August 28, 1956, to be told by his wife about the will. If that is so, if he does not remember his having any talks with the testator, after he, a diabetic, goes down with ulcer and before execution by him of the will, how does he remember that the ulcer did not turn into a gangrene, the testator's body having not swollen, or that the testator was not completely bed-ridden and invalid? A most improbable evidence on the face of it and on his own showing.

49. That apart, the son Jagatbandhu's evidence is that "the entire leg" of his uncle, the testator, "was affected". With "the entire leg" affected, the testator was not expected to move about. He was expected to be completely bedridden-a fact which Radhika Prasad denies, admitting at the same time that he "attended the fields", i.e., the lands, for survey operations : Bhujanga Bhusan did not, after the onset of the ulcer.

50. Even what the propounders' witnesses say go to show that the testator was sick, very sick. Anadi, their witness No. 2, the scribe of the controversial will and an attesting witness too, says in chief that the testator was bedridden at the time of execution of the will due to an ulcer on his leg and could sit up. On cross-examination, he cannot say whether the ulcer was very painful or not. What complicated diseases the testator was suffering from, Anadi did not ask him,

even though the will, he was amanuensis of, -and this was the first-ever will he was writing, on instructions from the testator-, as he says once; "I wrote Ex. 1 (the will) as instructed by him (the testator)" : opens with the words: "I have been suffering from very various complicated diseases." -as I translate the excerpt from the will in Bengali. Now, that one will be bedridden with his "entire leg" affected, as Jagatbandhu says, appears to be plain common sense too.

51. The remaining witnesses of the propounders, save the registrar, speak of the testator having an ulcer followed by diabetes. Such witnesses are Ramanath, No. 3, who says of the ulcer caused by scalding, having turned septic, which however did not stand in the way of his moving about in the house, though he had not seen him do so ever, Hirendra Nath, No. 4 and a bookbinder by profession, as also the friend of the propounder Jagatbandhu, Manindra Lal, No. 5, who says, the testator, because of the ulcer, "could not go out", and Kumaris Banerjee, No. 7. who shows himself in an odious light, in that he speaks of the testator having been in "good health" in Bhadra 1363 B.S. (on the eighth day of which month the will was executed), though he admits, the testator had "an ulcer on his leg", which however, according to him, did not prevent the testator from moving about and looking after his own affairs, In saying so, Kumaris Banerjee says much more than even what Radhika Prasad says : Bhujanga Bhusan, the testator, did not "attend the fields", i.e., his land, and did not, therefore, necessarily look after his affairs, after he had gone down with the ulcer.

52. Thus, even on the basis of evidence, led on behalf of the propounded, we can, in safety, find as a fact, as indeed we do, that the testator, it diabetic from 1952 or 1953, had the misfortune to be scalded in June or July 1956 and that such scalding did develop into a septic ulcer. Now, it is common learning that diabetes and ulcer go very ill together and forebode the worst about the unfortunate victim And that is exactly what had happened here too. Only four or five days after execution of the will on August 24, 1956, that is to say on August 28 or 29, he was admitted in the Berhampore hospital for treatment, as Jagatbandhu, one of the two appellants and witness No. 6, says in chief. Such is the evidence too of, amongst others, Kumaris Banerjee, the appellants witness No. 7, who says of the testator's removal to the hospital at Berhampore, his diabetes and ulcer having aggravated. Such is the evidence again of the scribe Anadi who deposes to the testator's admission, a few days after execution of the will, in the Berhampore hospital. None from the hospital is examined.

53. Jagatbandhu speaks of his uncle, the testator, having been treated by a Kaviraj (Vaid), and also by one Dr. Biren Chatteraj of Bhadrapur, five or six months before his uncle's death, which takes one to June or July 1956. And the will was executed on August 24, 1956. So, Dr. Chatteraj's would have been excellent evidence to show whether or no the testator could understand

(i) The nature of his act, evidenced by the will, and its effect.

(ii) the extent of the property which he was disposing of,

(iii) the claims to which he ought to give effect, Katyayani's being one such paramount claim, and

(iv) the disposal he was making, he would have made, if his mind had been sound-

in sum, whether or no the testator had testamentary capacity : (20) Banks v. Goodfellow, (1870) LR 5 QB, 565, (10) Harwood v. Baker, (1840) 3 Moo. PC 282 at p. 290, and other cases collected in Tristram and Coote's Probate Practice, 22nd. Edn., p. 895. Realizing that he has spoken much too much, in placing his uncle's treatment by a named doctor, 5 or six months before his death, Jagatbandhu resiles from the evidence just noticed and says instead, Dr. Chatteraj treated his uncle only five or six days before his death, not five or six months before. Such retraction is not apt to carry conviction.

54. It is, therefore, plain, even on the foot of evidence led on behalf of the propounders, that here was a diabetic testator executing his will, when he was down with a painful ulcer developed into septicaemia. More, the prognosis was so bad that such a one had to be removed to the hospital in four or five days' time, by none else than the propounder Jagatbandhu himself. It appears, therefore, to be equally plain that the testator's was then in all likelihood a mind, "very feeble and debilitated." The mind of a diabetic, writhing, for days on end, running into a month or more, under an ulcer caused by scalding, with his "entire leg" affected and swollen, could not have been very probably otherwise. And the court sees in this a highly suspicious circumstance in the timing of the impugned will. The onus is, therefore, cast upon the appellants, propounding such will, to remove the suspicion from the mind of the court. That onus remains undischarged. The best evidence to discharge such onus would have been the records of the hospital at Berhampore testified to by medical men, who treated him there, and also the evidence of Dr. Chatteraj under whose treatment the testator was from June or July 1956, as admitted by Jagatbandhu once, though he runs away from such admission, realizing that he should not have said so much. In any event. Dr. Chatteraj's would have been the best evidence as to exactly when he had treated the testator. The withholding of this sort of evidence-the best in the circumstances- entitles us to presume, as we do, that were it forthcoming, it would not have supported the propounders' case on the testamentary capacity of the testator.

55. Worse still, the evidence led instead has been the worst instead of the best. Indeed, the propounders' witnesses are apt to strike one as so very partisan and interested nothing to say of the fact that they are not fit enough to speak about the effect of a painful, septic ulcer upon the mind of an aged diabetic testator, as a medical man would. Theirs is "opinion evidence of non-experts", as aptly put by Mr. Mukherji appearing for the appellants, when addressing us though on such evidence led on behalf of the respondent Katyayani. Anadi has the candour to admit that the testator was bedridden, though he makes the testator "sit up". Ramanath has married the cousin of the propounder Jagatbandhu. He is a tutor

too to the son of Kumaris Banerjee, witness No. 7 of the propounders. No doubt, he is a relation of the testator as well. But his evidence reveals that he throws all his weight in favour of the propounders, not "bothering" about what befalls Katyayani who, he admits, was "on the best of terms" with her husband, the testator. Hirendra Nath, that bookbinder, a landless one, admits, Jagatbandhu is his friend; but Jagatbandhu disowns such friendship, confessing at the same time that he is "used to move about with him", much too thin a disguise for friendship. Manindra Lal is one whom Radhika calls "Dada". He admits, the testator "could not go out, because of his ulcer. Result: Radhika Prasad and Jagatbandhu looked after his properties. But Jagatbandhu does not say so. And Radhika Prasad in chief says just the opposite : "I was not in charge of looking after Bhujanga"s properties during the Revisional Settlement."-relaxing a little on cross-examination : "I cannot say who looked after his affairs (the testator"s) thereafter (i.e., after he was down with ulcer.) I looked after (his affairs) occasionally on being requested by him." The type Kumaris is has been noticed. He outdoes even Radhika Prasad. See paragraph 55 ante.

56. The oral evidence of so many poor specimens does not remove the legitimate suspicion from the mind of the court about the testamentary capacity of the testator, an old diabetic, having fallen a victim to scalding, followed by ulcer and septicaemia, for a month and more. If to such poor evidence be added that of Katyayani, leaving aside that of two witnesses of hers, Kumarish Mistri (No. 2) and Bholanath (No. 3), the suspicion in the mind of the court becomes all the greater. Towards the end of Sravan 1303 B.S.,-only a few days ahead of Bhadra 8 following, when the will is said to have been executed-, the testator lost his senses. So says Katyayani. Say, she exaggerates a little. But, it is clear, she does not exaggerate much. Two considerations lead to such a conclusion. One, only four or five day.-; after execution of the will, the testator was removed by Jagatbandhu to hospital at Berhampore via Loharpore railway station where he was taken by cart. It may therefore be taken for granted that his condition was grave and causing alarm. Now, this did not develop all at once. The testator was, sickening for such an alarming condition all these days. Two, diabetes, scalding, a resultant ulcer and septicaemia are bound to make a serious inroad into the mind of the subject, making him so "feeble and debilitated", though senseless he may not be : and therein lies Katyayani"s exaggeration, strengthened so much the more by her own evidence that the testator used to take a parota (puri) or two. before he was taken to hospital. Sure enough, a senseless person does not take such stuff. Such exaggeration notwithstanding, the core of her evidence remains : that a feeble and debilitated one like the testator could not make or cause to be made the controversial will running into seventeen pages and providing for dispositions in so many detail. That this is so is confirmed all the more by what follows in the next paragraph : another suspicions circumstance.

57. B. Signatures of the testator "very shaky" and doubtful, his initials being still more doubtful. The testator"s seventeen signatures, one each, on each of the seventeen pages, into which the will runs, at the top right-hand corner of each

page, have only to be seen in order to be convinced how very shaky they are. Yet Anadi, the scribe of the will, the first-ever for him, not a professional one. but a priest doing a labour of love, says glibly enough that. the testator "signed freely and easily" and took ten to fifteen minutes to subscribe his seventeen signatures. So, one signature a minute, even though the signer signs "freely and easily"! But the signatures speak for themselves; they are neither free nor easy. Shaky to a degree, they show symptoms of a good deal of effort and tremor as well. And that must be so when the signer was signing so, down with a septic ulcer superadded to the old ailment of diabetes, the two combined making a dreadful complication.

58. Signatures apart, there are initials of the testator, the initials reading "Bhujanga", at pages 10, 14 and 16 of the original will. On such initial, the pleading of the propounders bears : "He (the testator) signed his name on the said will with his own hand and he himself put his initials at the places where his initials were required." Add to this the evidence of Manindra and Jagatbandhu, the appellants' witnesses numbering 5 and 6, that Bhujanga Bhusan, the testator, did put his initials on the interlineations in the will, and with the same fountain pen of his, which Jagatbandhu brought for his uncle, the testator, from his room. Now, look at the signatures and initials of the testator, and it appears to be clear to the naked eye even today, after so many years, that the ink pressed into service for the testator's signatures is not the same as the ink pressed into service for his initials. So, this is another highly suspicious circumstance which the propounded, by evidence, must dispel, to the satisfaction of the court's conscience but which they do not.

59. The learned trial judge has proceeded on another basis which, if it does not come on the edge of the law, becomes all the more damaging to the propounders. The Register of Wills, that is, the relevant book containing this will, maintained in the registry, is brought in court. A certified copy of the will" taken out by Katyayani, from the registry, on the basis of the copy recorded in the relevant registerbook, u/s 51 of the Registration Act 16 of 1908, gets into evidence and is marked exhibit A, overruling the propounders' objection. The judge then compares the copy in the register-book of the registry and the copy, exhibit A, with the original will, exhibit 1, only to discover that the testator's initials on three pages are in the original, and not in the two copies. Ergo, he concludes, the initials are subsequent forgeries.

60. The learned judge should have gone a little more before having come to such conclusion. He is using the copies-whether the one in the register-book of the registry or the one granted to Katyayani-as primary evidence, not as secondary evidence, the original will having been on record already. So, the clerk who recorded the copy in the register-book from the original will should have been examined as a court witness, if not by any one of the parties. Were that done, the propounders would have had an opportunity, which is their minimal due, to cross-examine the maker of the copy in the register-book, with a view to

establishing that the initials, already there, were overlooked by him. Whether they would have succeeded or not, in establishing so, is another matter. The point is that, without having afforded them an opportunity to that end. it is neither right nor fair to draw an inference adverse to them.

61. Be that as it may, the patent disparity of the ink, with which the initials and signatures of the testator have been put in the body of the will, in spite of one fountain pen having been used, is there to be seen and has to be weighed as a highly suspicious circumstance against the propounders who do little or nothing to disabuse the mind of the court of such suspicion.

62. C. Preparation and execution of the will. A topic as this reveals a gravely suspicious circumstance. Anadi, a priest by profession, just what Jagatbandhu describes him to be, wrote this will, as instructed by the testator, when Katyayani, the testator's wife, and Suchitra, his sister, were in the house. Not that the testator had given certain instructions and he made the draft, though the manner in which he broaches the matter : "I wrote Ex. 1 (the will) as instructed by him (the testator) """, seems to suggest so. An ignoramus, he had never drafted a will before, and does not know how to draft one. There are more competent scribes at Debagram than he. Yet, sent for by the testator through his servant Nathoo, he did not come on the first day. But the testator would not let such a one slip, no matter that he knew not how to draft a will. Then, he was sent for again. And he had to come. More, he had stayed with the testator for an hour and a half, when the testator made over to him a draft will. Whom the draft was by he did not ask the testator. Nor can he say if the name of the drafter was noted in the draft. The propounders were not there. But Kumaris Banerjee, the propounders' witness No. 7, was. He did not take the draft will home, but told the testator, then on a Taktaposh in the verandah, with an ulcer on his leg, that he would write out the will in" his idle moments. Then, he called on the testator again, without having been sent for, and started writing the will, at 3 or 3/30 p.m., on Bhadra 5, 1363 B.S; corresponding to August 21, 1956. On the first day, he wrote only "the body of the will", without the schedules, which he completed writing "on the two following days", that is to say, on Bhadra 6 and 7. Writing over, on Bhadra 7, corresponding to August 23, the testator asked him to read the will, which he did. Manindra, Ramanath, Hirendra and Kumaris Mistri were present there. They all, including himself, saw the testator sign the will. They all, including himself, signed as attesting witnesses too. Was the will then executed on August 23, 1956, and not on August 24, 1956, the date it bears ? Anadi, the priest turned into a scribe, does not know what he is speaking about. If such evidence stands, here is an end of execution of the will on August 24, 1956; here is an end too of the propounders' case.

63. Where is the draft by an unknown drafter ? That is a very material document, absence of which,-and for that no explanation whatever is forthcoming from the side of the propounders, bound in duty and law to offer an explanation to our satisfaction does raise another suspicious circumstance. The testator, a diabetic

patient, then going through the agony of scalding the resultant ulcer and septicaemia, could not have ordinarily fended for himself with a view to providing for so many dispositions, and in such a meticulous manner, in a will running into seventeen sheets of paper.

64. Again, as Manindra, the propounders" witness No. 7, who was one of those who attested the will, says : "There was only one inkpot and pen in the Majlis,- where the will was executed by the testator with a fountain pen, which he alone had used. If that is so, how is it that on page after page in these seventeen pages, the signatures of Hirendra Nath Biswas appear in one ink, and those of others, who took the trouble of signing on each page, such as Anadi, Ramanath, Hara Shankar, and Manindra Lal, appear in quite a different ink ? This is not all. Leaving aside the discrepancies as to who the attesting witnesses were,-a matter which has been dealt with by my learned brother-, let a review be made, one by one, of (1) Hara Shankar Roy Chowdhury who signed as an attesting witness on each of the first sixteen pages on the left-hand margin in a slanting manner and on the seventeenth page at the bottom, (2) Kumaris Chandra Mistri who signed as an attesting witness on the seventeenth page only, on the left-hand margin, and in a slanting manner too, and (3) Naku Mistri who signed as such at the foot of the last page, just above Hara Shankar"s.

(The judgment then deals with such evidence and proceeds :)

On top of all, the learned trial judge who has had the advantage of having seen "the open, oral examination" of these two witnesses, Kumaris Mistri and Naku Mistri, considers that they "deposed in a very straightforward manner," in spite of, may be, an infirmity here or an infirmity there. Dealing as we are with "the dead body of the evidence, without its spirit, which is supplied, when given openly and orally", we should necessarily be slow to take a view different from that taken by him, in absence of perversity or any other compelling necessity, which we miss here.

* * *

65. D. Propounder Jagatbandhu taking a prominent part in the execution and registration of the will which does confer on him substantial benefits. Jagatbandhu, as he admits on cross-examination, works, at the relevant time, in the project office at Krishnapore. From execution of the will down to its registration-a period of three days: August 24 to August 26 -he does not return to his office. He sits by the testator when the will is executed, as is the evidence, on cross-examination, of Manindra Lal. What is more, execution over, indeed, on the day following the execution, he himself applies to the registry at Nalhati, six to seven miles from his village Debagram, for registration on commission. So he does, as the testator, his uncle, cannot "be taken to Nalhati either on foot or by cart". Incidentally, in saying so, he virtually admits the grave illness of his uncle, the testator: just what has been found above as a fact: paragraphs 46-61. He pays the fees for the commission too. So, the prominent part he takes in the

whole business is plain to be seen.

66. That such a one gets substantial benefits is writ large on the will. Here is an analysis of the will's dispositions :

(Setting out such analysis, the judgment proceeds:)

67. The dispositions in the will are not over yet. The movable properties the testator's wife and nephews: Jagatbandhu and brothers: get in equal shares, and after the wife's death, those nephews again-Jagatbandhu being one of them-get in equal shares too : a case of an absolute gift followed by a gift over. So also in the case of the testator's dwelling-house, but with this difference that Jagatbandhu alone gets the moiety Katyayani leaves behind on her death.

68. Therefore, Jagatbandhu, a propounder, taking a prominent part in the execution and registration of the will, which does confer on him substantial benefits, looks patent. Not that it constitutes a total disqualification for such a one for being the object of the testator's bounty. It does not. But that the court must be vigilant and jealous, because such benefit does create a suspicion that must be removed by Jagatbandhu propounding the will. That has not been removed.

69. E. A most unnatural, improbable, and unfair will in the light of all relevant circumstances here. What the dispositions are like has been noticed. Katyayani gets so little and Jagatbandhu with his brothers gets so much, Jagatbandhu, a propounder, getting much the most. Why ? What has Katyayani done to merit only a pittance as this ? She has really been a devoted wife throughout, as she claims, and as even the propounders' witnesses testify to. Anadi says, on cross-examination : "Bhujanga (the testator) had no relation in his house except his wife who used to do all nursing for him." Ramanath pledges his oath to say, and on cross-examination again, that Katyayani (referred to in the recorded evidence as "O.P." : opposite party, that is, the defendant in the probate suit) "lived all along with him (the testator) on the best of terms." Manindra Lal says almost as much too, on cross-examination : "He (the testator) was on good terms with Katyayani." Even Jagatbandhu does not lag behind. Cross-examined, he admits: "Katyayani is illiterate. She was on (the) best terms with Bhujanga (the testator)."

70. Thus, the evidence is over-whelming that the relationship between the testator and his wife was the very best. Add to this the wife's evidence: that the testator used to pass urine and stool in bed during his illness, as was only to be expected. Who could have nursed him then but she ? Certainly, Jagatbandhu, the recipient of the largest bounty, did not nurse him. Prima facie, it, therefore, looks such an unnatural, improbable and unfair will is not the result of the testator's free will and mind, even though the unknown drafter has spared no efforts to indulge in window-dressing in trying to show how careful the testator has been in having distributed his considerable properties amongst the objects of his bounty. The doubt, about the unnaturalness of the will, raised in our mind has

not been removed by clear and satisfactory evidence, and truth to tell, by any manner of evidence.

71. The Hindu Succession Act, 30 of 1956, come into force on June 17, 1956, is said to be at the root of such a will. The testator, one of the old school, could not reconcile himself to a drastic law as this, making a woman the owner of property in an absolute right, and hence provided for dispositions in the manner he did. On behalf of the appellants we have been pressed to hold so. But we miss any evidence to that end. On the contrary, Ramanath, who did not "bother" about Katyayani and her welfare, rejects the suggestion put to him that the will in controversy was "cooked" to foil the new legislation, namely, the Hindu Succession Act.

72. To sum up, the testator with a mind, very feeble and debilitated, because of a painful illness beyond treatment, as indeed proved to demonstration by his death not even in four months' time, his signatures in the will being very shaky and his initials therein being open to the gravest doubt, preparation and execution of the will in circumstances so doubtful, a propounder taking a prominent part in execution and registration of the will by which he is immensely benefited, the stamp of unnaturalness, unfairness and improbability upon the whole of the will itself, - all these have created in our mind a grave suspicion, which it is for the appellants qua propounders to remove, but which they do not.

73. It is, however, said: "Why? The will has been put to registration. And that is enough to dispel all suspicion." The answer to such a contention is: registration simpliciter cannot be regarded as a talisman casting away all suspicion all at once. The manner of registration has got to be looked into. If the manner is good and shows the testator having admitted execution of the will and sighed in token thereof, sure enough, registration goes a long way to dispel suspicion. If, however, the manner shows scamping, and worse still, raises suspicion on its own, then, far from removing suspicion, it only adds suspicion upon suspicion. And that is what we see here upon evidence.

74. Let the type of serious illness, we have found, the testator is down with, even on the day of execution of the will, (August 24), be recalled. Two days later (August 26), what turn does such illness take? Less serious it cannot be. More serious it turns very probably. Two considerations, gleaned from the evidence led even on behalf of the propounders, lend assurance to a conclusion as this. One, as Jagatbandhu, a propounder, says, on cross-examination, the registrar is brought to the testator instead of the testator being taken to the registrar in the registry at Nalhati, six or seven miles from Debagram, because the testator is then incapable of "doing" this distance "either on foot or by car." Two, only two or three days later (August 28 or 29), the testator is removed to the Berhampore hospital, braving the journey by cart to Loharpore railway station and the journey by train thereafter to Berhampore, as indeed it has to be braved due to compelling necessity, nothing like which is, to be seen, in so far as his calling on the registry is concerned. Why is the testator removed so? The answer is that

given by the propounders" witness No. 7, Kumaris Banerjee : "He (the testator) went to Berhampore hospital as the ulcer and his diabetes had aggravated." And that is plain common sense too. People like the testator do not remove themselves, or are not removed, to the hospital unless something very grave and disturbing comes to light.

75. Such is the man, ailing and ailing for days on end from a very painful malady : an ulcer turned septic because of old diabetes: whose will Registrar Raghunandan Saha, the propounders" witness No. 1, comes to register on August 26. Giving evidence in court a little less than two years after his visit to the testator's house, followed by registration, (August 26, 1956-the date of registration-and July 1, 1958-the date of his evidence in court), and that too on the foot of Jagatbandhu's application for registration on commission, on the ground that the testator is incapable of "doing" the journey to the registry "either on foot or by cart", so ill is he, the registrar says, on cross-examination, that he does not remember anything about the physical appearance or health of the testator at the time of registration of the will. This appears to be somewhat strange in that it is registration on commission which brings the registrar "at 7-30 a.m." on August 26 to the "private residence of Bhujanga Bhusan Saha, Testator," as the endorsement over his signature on the back of the first page of the will bears. It is not a case of registration right in the registry where a crowd engaged the attention of the registrar day in day out, making it impossible for him to observe the physical appearance or health of any one of them. But here the out-look is completely otherwise. The very fact that he is doing registration on commission,-and such commissions, we take it, are not very frequent, even though amnesia gets the better of the registrar who cannot remember how many registrations he had gone in for, on commission-, is apt to remind him, at the least, of the outward health of the man whose will he is registering so. Stranger still is what he says further down: "I do not remember in which posture the testator was at that time." Whereas much "smaller" men than he : the propounders" witnesses : can recall that the testator was lying on a taktaposh (bedstead), two days earlier, he, a registrar and "Block Development Officer," cannot recall this little even.

76. If that is so, if his power of recollection is so poor at that, how does he say in chief: "I found that he (the testator) had testamentary capacity." He makes it clear, on cross-examination, that he remembers "the incidents" touching registration, On having seen the will, independent of which he has no recollection. He is entitled to refresh his memory by referring to the will and the endorsements made by him thereon, but within the limits set by sections 15" and 160 of the Evidence Act 1 of 1872.

77. Now, his evidence: how he found that the testator had testamentary capacity, calls attention. He asked the testator whether or no "the signatures on the will were his." The testator, asked so, answered the question in the affirmative. Then, the registrar had asked him again whether or no he knew the

nature of the document. The testator answered, it was a will. But the registrar had already told him that it was a will. Because the first question was whether or no "the signatures on the will were his". Be that as it may, answers as these satisfied him that the testator had testamentary capacity.

78. But how does he remember having asked these two questions to the testator—certainly part of "the incidents" touching registration, of which, on his own admission, he has no recollection independent of the will? Nowhere in the will it is recorded that such questions were put to the testator. Necessarily, therefore, he has no writing over there to refresh his memory from. It then comes to this: after having seen the will and the endorsement by him on the reverse, he remembers having asked those two questions, of which there is no record but which are generally asked with a view to testing whether the testator has testamentary capacity or not. So, on having seen the will and his endorsement thereon, he concludes that these two routine questions he had put to the testator. And he says so on oath, admission of the will to registration reminding him too that the testator must have answered the two questions in the manner he says he did. But on how the testator looked like then—normal and healthy or abnormal and ailing—on the posture he was in—standing, sitting or lying—the registrar's mind is blank. Not a very creditable evidence coming from such a one; and all the less creditable because of saying to a very sick testator in advance whether the signatures on the will were his or not, and then asking him about the nature of the document.

(The judgment then deals with further evidence on registration and proceeds:)

79. This is when all the evidence about registration of the will, vindicated by the appellants and impugned by the respondent, before us. Does such registration dispel the type of suspicion—and they are so many—which force themselves on us? It does not, on the basis of the law laid down by the Supreme Court in (1) *Rani Purnima Debi v. Kumar Khagendra Narayan Deb*, AIR 1962 SC 567, 574: a case I am governing myself by throughout— "if the evidence as to registration shows that it was done in a perfunctory manner, that the officer registering the will did not read it over to the testator or did not bring home to him that he was admitting the execution of a will or did not satisfy himself in some other way (as, for example, by seeing the testator reading the will) that the testator knew that it was a will the execution of which he was admitting, the fact that the will was registered would not be of much value." Just so here. The registrar does not read the will over to the testator. In having asked the testator, then a much ailing man, in great pain and physical discomfort, as we are satisfied upon evidence, no matter that the registrar's mind is blank upon that, those two routine questions, the first of which is leading and assumes the existence of a will, and the second of which is thereby rendered useless, the registrar does not bring home to the very sick testator that it is a will he is admitting execution of. Having seen such a one: the testator, so sick and ailing, why does the registrar not ask him to read the will himself, and he being unable to do so in that state of his health, why

does not the registrar get the will read over to him-a most elementary thing to do ? There is no better way of satisfying oneself that it is a will such an ailing man, in great physical pain and discomfort, has gone in for. As the registrar himself says, on cross-examination : "A will is not registered if it appears to the Sub-Registrar that the testator has no testamentary capacity." It is a very right thing to say. But it is a very wrong thing to be satisfied at one jump about the testamentary capacity of so sick a man on the basis of the two routine questions "generally" asked, as the registrar says, and to one in that precarious condition, established by evidence reviewed above, and the two very shaky signatures-shakier than those had two days earlier-of the testator in token of registration being a pointer too. The signer, the testator, read up to Class V-VI, as is the evidence of Ramanath. And how bad the questions are has been noticed. It is, therefore, not possible to regard such perfunctory manner of registration as the cure-all of all suspicion here, there and almost everywhere touching the impugned will.

80. On top of all this, here is a will with no residuary bequest. Not that the will fails, because it is so. But that the will goes all out to deprive the testator's wife of every bit of property which would have been here as a matter of course by way of inheritance, though, as a devoted wife, she has tended and nursed the testator, her beloved husband, over the years. Gift of only fifty-eight cents of land by the testator to his nephew Jagatbandhu on May 14, 1956, exhibit 12, a little more than three months ahead of execution of the impugned will, has nothing in it to shed it (the impugned will) of its suspicion or unnaturalness. If anything, it brings into bold relief the inherent unnaturalness all the more. Gift of a little, out of the vast land, the testator has, to his nephew, and that too nearly three months and a half before the will, is quite understandable. What defies understanding is almost total deprivation of the wife, who loves the testator and is loved by him too as a devoted and dutiful partner.

81. The less said about the arpannama, exhibit 2, executed by the testator on September 17, 1956, some three months before his death, on his return home from the hospital,-a document which was written in house of Radhika, a propounder, as his witness No. 7 Kumaris Banerjee admits-, in support of an unsupportable will, the better. The property covered by the arpannama is not in the impugned will. Jagatbandhu again is made the first sebaite. though the testator told Ramanath Saha, the propounders' witness No. 3, he himself would be the first sebaite. Are the propounders then aided by their allies-and the witnesses named in the arpannama are either their allies or relations-out to "grab" the little left out from the will ? The line of succession of sebaite is settled too : Jagatbandhu, after him his named brothers, and the eldest son of such sebaite. Really it looks like Radhika speaking through Bhujanga in Radhika's house where the document is admittedly written, setting apart even the property here for his sons and sons' sons, behind the cloak of named deities, whose very existence is open to the gravest doubt in view of Ramanath's evidence, on cross-examination : No deity installed : No image or idol or Shila: Pujah only once in

1362 B.S. Upon the whole, it only appears to be a smokescreen for one more acquisition for Radhika's children and children's children, no less for Katyayani's deprivation of this little too : 126 cents of land only. So, I say at the risk of repetition, the less said about such an oblique deed of endowment, in favour of nonexistent deities, wherein the testator admits the impugned will,-and for that the appellants rely upon it-, the better.

82. Indeed, it appears to be clear, upon all I see here, that the same power which produces the highly suspicious will produces this equally suspicious arpannama too. Therefore, instead of removing the suspicion, it becomes rather an additional evidence of it. And one more additional evidence of this sort is the nomination made by the testator on October 20, 1956, at death's door then, by which he cancelled his earlier nomination in favour of Katyayani, made Jagatbandhu his nominee for the money (Rs. 2,000) secured by a life insurance policy, exhibit 13, and handed over the policy to his new nominee Jagatbandhu. The endorsement making the nomination so, exhibit 11, is in English which, Ramanath says towards the close of his cross-examination, the testator did not know. But Jagatbandhu fills up this lacuna by saying that Manmatha, since dead, had written the endorsement in English and explained it to the testator who signed it thereafter. So, the same power is seen again: the power which produces the impugned will and what looks like a sham arpannama, each steeped in a grave suspicion, produces such nomination too, depriving Katyayani of this little money as well. In sum, upon the whole of the evidence, what is seen is a horrid commerce as the result of which Katyayani gets poorer and poorer, reduced to beggary, so to say, for her maintenance; and Jagatbandhu gets richer and richer, swollen to affluence, not his due and not expected either, in the normal course.

83. In view of all that goes before, it is hardly necessary to refer to other material which, in no way, negates the conclusion come to. Only the correspondence, exhibits 14 series and the like, may just be touched. Certainly, the letters written by the testator to Jagatbandhu radiate love and affection for his nephew. That does not mean however he had no love and affection for his life's partner Katyayani who stood by her husband all along, tending and nursing him over the years, just as a dutiful and devoted wife does. So, such correspondence hardly explains the inexplicable : profusion for Jagatbandhu and sacrifice of Katyayani.

84. What the appellants are sore about, as contended for on their behalf, is: "here is a will of an adult, and a male too, put to registration. And still it will not be admitted to probate! What counts is the will of the testator, and not a fancied will of the court's ideas of the testator's duty to his wife." A proposition as thus appears to be sound as far as it goes. But, in the circumstances this litigation reveals, it does not go far enough. Where (as here) the whole business about the will is surcharged with suspicious circumstances, which the pro-pounders fail to remove, to the satisfaction of the trial judge and of ours too, the proposition is not attracted. Such is the law again laid down by the Supreme Court in the (1)

Purnima Debi case supra, reiterating its earlier decision in (2) H. Venkatachala Iyengar Vs. B.N. Thimmajamma and Others, . The law laid down so may be formulated as under : In cases, where the condition of the testator's mind appears to be very feeble and debilitated, the signatures of the testator appear to be very shaky and doubtful, the dispositions made in the will appear to be unnatural, improbable or unfair in the light of relevant circumstances, or not the result of the testator's free will or mind, and a propounder himself appears to have taken a prominent part in the execution of the will which confers on him substantial benefits, all such legitimate suspicions are to be completely removed by clear and satisfactory evidence before the document can be accepted as the last will of the testator. I have governed myself accordingly. None of the suspicious circumstances referred to in the foregoing lines have been removed. Again, to quote the exact words of Wanchoo C.J. (then Wanchoo J.) from the (1) Purnima Debi case : "... even where there were suspicious circumstances and the propounder succeeded in removing them, the Court would grant probate, though the will might be unnatural and might cut off wholly or in part near relations." We would have done the same, that is, granted the probate, in spite of the will having been so unnatural, unfair and all that, had the appellants qua-propounders succeeded in removing the suspicious circumstances pointed out above. But they have not succeeded so. Such is the answer to the contention this paragraph opens with.

85. Indeed, propriety or impropriety, without more, of the disposition, is not the test. The governing test is the existence of so many suspicious circumstances, not removed nor capable of being removed, by the evidence led on behalf of the propounders. Result: the very capacity of the testator has to be found against. In the words of Erskine J. in (10) Harwood v. Baker, (1840) 3 Moo. PC 282 : "If he (the testator) had not the capacity required, the propriety of the disposition made by the will is a matter of no importance. If he had it, the injustice of the exclusion would not affect the validity of the disposition, though the justice or injustice might cast some light upon the question as to his capacity." With respect, I have proceeded just so, the injustice of the exclusion of Katyayani from the dispositions, in the manner indicated above, having only cast some light upon the question as to her husband's capacity. Not that it is held : exclusion of Katyayani so, and, therefore, no testamentary capacity of Bhujanga. It only casts some light. Taken with all other suspicious circumstances recorded above, still further light is available, and there can be one and only one conclusion: that the impugned will cannot be admitted to probate, as found by the trial judge.

86. The appeal, therefore, fails. Accordingly, I agree with my learned brother that the appeal be dismissed and in the manner proposed by him.