

(2007) 02 CAL CK 0027
In the Calcutta High Court
Case No : F.A. No. 411 of 2003

Smt. Krishna Bera and Others

APPELLANT

Vs

Sri Prabir Pramanik and Others

RESPONDENT

Date of Decision : 01-02-2007

Acts Referred:

Evidence Act, 1872 — Section 114, 68
Succession Act, 1925 — Section 63

Citation : (2007) 2 CALLT 484

Hon'ble Judges : Sanjib Banerjee, J; Kalyan Jyoti Sengupta, J

Bench : Division Bench

Advocate : Gopal Chandra Ghosh, Debapratim Banerjee and Om Narayan Rai, for the Appellant; Sadananda Ganguly, Aniket Mitra, Gurudas Mitra and Bhaskar Seth, for the Respondent

Judgement

Kalyan Jyoti Sengupta, J.—By this appeal the appellants above-named before us have impugned the Judgment and order passed by the learned Additional District Judge, 3rd Court at Barasat in O.S. No. 12 of 1995 whereby and whereunder the probate to the last Will and testament of late Binoy Krishna Pramanik has been granted. The short fact of the case which has given rise to this probate proceedings is stated hereunder.

2. The testator, one Binoy Krishna Pramanik, since deceased, before his death that took place on 12th November, 1988, is said to have executed his last Will and testament dated 13th July, 1988 and the same was registered on the same date. The applicant viz. the first respondent Prabir Pramanik was appointed as executor along with his mother Smt. Kamala Pramanik. It is alleged that because of inaction on the part of Kamala Pramanik, Prabir Pramanik applied for grant. It appears from the affidavit-of-assets that the testator has left a considerable properties which consists of house building and landed property. It is stated that the said Will was duly lawfully executed and attested and thereafter registered by the testator out of his own volition. Written statement was filed by one Smt. Prakriti Chatterjee, appellant No. 3 herein and the same was preceded by lodging

caveat. In the written statement validity and legality of the attestation, execution and registration of the same was challenged. It is alleged further that the said Will in question is a product of fraudulent, collusive act and the same was manufactured and procured upon coercion and threat. In substance, the Will is not a genuine document. According to them at that point of time the said testator was critically ill and his mind and body were not in functioning position to execute any document. It has also been alleged that the said testator was a patient of chronic diabetes and used to suffer from a trouble of prostate gland for a long time rendering him unfit completely before his death. As a matter of fact, Binoy Krishna Pramanik lost his power of vision, and hearing nor he could speak in communicable way. In other words, he failed to understand and interpret. Even assuming that the Will is otherwise executed properly the same is absolutely unnatural as far as disposition is concerned. Specific allegations have been made that the said Will was procured by the executor who is beneficiary under the Will.

3. On the aforesaid factual context the learned Trial Judge framed following issues:

1. Is the suit maintainable in its present form and law?
2. Was Benoy Krishna Pramanik physically fit and mentally alert at the time of execution of the Will? Was the Will done voluntarily by the deceased?
3. Was the Will legal and valid?
4. Is the plaintiff entitled to get a Probate as prayed for?
5. What relief, if any, is the plaintiff entitled to?

4. In order to prove the Will the applicant propounder examined himself first and then one Sri Shyamal Mukherjee, a practising advocate was examined who described himself to be the attesting witness. One Nemai Maity was examined as a witness. Another attesting witness, one Sri Lal Mohan Pramanick also testified as a witness regarding preparation and execution of the said Will. The contesting defendant, apart from examining herself to resist this application for grant, brought one Smt. Gita Rani Jana and one Dr. Siba Prasad Ghosh as witnesses to prove her case. Analyzing evidence of both the parties and after having examined the case as a whole the learned Trial Judge found that the defence put by the appellant No. 3 and the contesting defendant was not acceptable. He found that the Will was duly and validly executed by the said testator and the same was genuine. He had testamentary capacity and the registration was done validly.

5. In course of hearing of this appeal it was submitted though it was not divulged before the learned Court below that few days after execution and registration of the said testamentary document, during his lifetime he gifted a property being premises No. 177, Maharaja Nanda Kumar Road, Kolkata - 700 035 to her wife Kamala Devi. It was further alleged that Kamala Devi, in her turn, transferred the

said property to a third party. This revelation of fact in course of argument prompted us to examine Kamala Devi as a witness, though she was not called as witness by any of parties before the learned Court below. We felt that execution of any document by the testator, subsequent to the execution and registration of the Will is an important and very relevant fact to understand physical and mental capacity of the testator in a case where specific plea has been taken that the testator had been completely incapable of doing anything else as he turned to be a lump of flesh, and he was just keeping his biological existence, because of cancer in his prostate gland and he could not take any food by himself, lost his power of vision and hearing, not to speak of writing anything else. He was to be fed by someone else and even by artificial method.

6. Smt. Kamala Devi came before us and on examining her, we got two documents additional evidence and her oral testimony. She produced sale deed dated 7th November, 1988 not deed of gift as told in course of argument allegedly executed by her husband testator, which was exhibited as Exhibit "X" by us. She produced another sale deed dated 24th September, 1992 executed by her in favour of one Anwar Ali. Both the sale deeds concern transfer of the testator's property being 177, Maharaja Nanda Kumar Road (North) which is also part of the properties bequeathed by the said Will. From the oral testimony of the Kamala Devi it appears to us that she had no knowledge about the execution and registration of the said sale deeds. She even does not know the contents of the two exhibits being "X" and "Y" She could not explain how and why the testator executed the conveyance in her favour for a consideration. From the document being Exhibit "X" it appears to us that in contrast to the Will this document does not bear the signature of the testator Binoy Krishna Pramanik, rather everywhere he allegedly put his thumb impression. This was the document of November, 1988 being the month of his death whereas the Will is of July, 1988. It really creates a suspicion in the mind of the Court as to why a husband will sell a property to his wife or for that matter why wife should pay for the same. Nothing is explained or told. Story of execution of deed of gift is belied by production of document. This shows rather at least in the month of November, 1988 the gentleman was not in a position to sign whereas in the month of July, 1988, according to the version of the propounder, he was quite healthy and hearty and he signed it by himself. It was not clear to us whether in November the document was registered at the registration office or on commission. From the oral testimony of the Kamala Devi it appears to us that it was allegedly done at the registration office.

7. In view of the aforesaid factual aspect and pleadings the learned Counsel for the appellant, Mr. Gopal Chandra Ghosh, submits that the alleged Will was not the document of Binoy Krishna Pramanik and he had no testamentary capacity at all. This Will was got to be manufactured in collusion with all the attesting witnesses, and Shyamal Mukherjee, being P.W. 2, happens to be a friend and Advocate of the propounder. Surprisingly the application for probate was made after 7 or 8 years from the date of death of the said deceased. The learned Trial

Judge had totally ignored evidence adduced by the caveatrix as to the condition of health of the testator at that particular point of time. Even the evidence adduced by the propounder is examined and scrutinised carefully it would appear that the document was executed under suspicious circumstances. One of the attesting witnesses viz. Sri Biswanath Mukherjee, a retired Magistrate was not examined. The alleged draftsman of the Will Shri Kamal Baran Mukherjee, Advocate, was not examined. It was stated that the testator was not keeping sound or good health and he had been admitted to a nursing home for surgical operation. It is an admitted position further that three doctors used to attend him, and the testator was under the treatment, the doctors viz. Dr. Karuna Pal, Dr. P.P. Mitra who treated the testator for 6 to 8 years, and Dr. Jagadish Jana. They are not called as the witnesses. They could have said best, about the mental and physical condition of the testator. Mere proof of execution and attestation of a Will or for that matter registration of the same is not sufficient to accept the testamentary document as being a genuine one. If suspicious circumstances exist and unless it is dispelled and the burden of which lies upon the propounder to do so, a Will cannot be accepted for granting probate.

8. Mr. Sadananda Ganguly, learned Counsel for the respondent, submits that there is compact evidence of attestation, execution and testamentary capacity of the testator. Three attesting witnesses came to depose and all of them in chorus have said that the Will was prepared by the two lawyers and the same was gone through by the testator. The draft was prepared under his instruction. Thereafter he signed in presence of the two attesting witnesses. The Will was registered on a commission. Learned Trial Judge has meticulously appreciated and analyzed evidence and there is no absurdity in his analysis. Therefore, Appellate Court should not reappreciate or read again the evidence and further come to conclusion different from what a learned Trial Judge has done. He further submits that the act and conduct of a testator subsequent to the execution of the Will is of no value and relevance in deciding the question of the testamentary capacity. When lawful execution and attestation of the Will is proved, the Court without any ado accept the document for granting probate. He further submits that when large number of witnesses deposed before the Court on behalf of the propounder to prove the execution and attestation of the Will and further registration of the same the Court must conclude the document as being genuine and it is for the caveatrix to prove otherwise. In support of his submission he has relied on the following decisions viz. 74 CWN 290, AIR 2005 SC 780, AIR 1985 Cal 349, AIR 2005 SC 2333 and AIR 2004 Madras 403. He further contends that uneven distribution of the property by the Will is not a factor to hold that the same is in genuine. There is no unnaturalness in the disposition as the large area of vacant plot of land has been given to the daughter whereas the remaining properties with building and structures have been given to the son. In support of his submission he relied on the following decision reported in 2002 (1) CHN (supple.) 30.

9. We have carefully read the pleadings and also read the evidence of both the

parties. We have heard the submissions of the respective learned Counsels. The issue before us is as to whether the learned Trial Judge has granted probate of the Will after having satisfied himself that the Will was lawfully and duly executed and free from any suspicious circumstances or not.

10. Suspicious circumstances cannot be illustrated as the same is of various nature and emanates from each and every individual fact. If the document is executed under suspicious circumstances the execution, attestation and registration are of no consequence. It is true that the registration at least gives some inference to the genuineness of the same but this statement of law is not always true particularly when the execution and registration are seriously challenged and Registrar himself is not examined. In this case the Registrar himself was not examined. The registration was done upon identification by the person or persons who were present there. In this case it is specifically pleaded with details that the testator had undergone a surgical operation for the problem in his prostate gland. He used to discharge blood with urine. Admittedly he was admitted to a nursing home where he had undergone operation. What was the result of the operation has got different version. The propounder and his all witnesses say that he was healthy and hearty at the time of execution and registration of the Will and his problem arising out of diabetes and prostate gland did not incapacitate him altogether to execute and register the said Will. On the other hand, in her testimony, daughter viz. D.W. 1. Smt. Sukriti Das, deposed in great details about how the testator had been suffering and what was the result of the operation. She said in her examination-in-chief that operation was totally unsuccessful. He was released from the hospital without any tangible result as the cancer was detected in completely incurable state. As such nothing could be done. She said in her testimony that the testator lost his visionary and listening power. He could not eat, nor could he speak, he was to be fed by other persons. He had no capacity to form any rational Judgment. Ultimately, he became a lump of flesh and was barely maintaining his biological existence.

11. Her evidence, if one reads, is natural. She was almost everyday attending his ailing father. Therefore, according to her, the health condition of the testator was not good but the question is what was the extent of his illness. In this context the evidences of both the sides are of lay persons. The testator was staying with his son, propounder. His testimony can not outweigh that of caveatrix, because of his large interest in the property. What was his exact condition could have been told by the doctors alone. Admittedly, three doctors examined him. The propounder chose not to call them as witnesses. He, at least, should have, on the face of the specific allegation of the total incapacity of the testator, brought the doctors who attended the testator for the last 6 years as witnesses. No such attempt was made. In our considered view non-examination of the doctor in this case is Suspicious Circumstances. Therefore, we think that the propounder has failed to dispel the suspicious circumstances. The learned Trial Judge, in our view, has not done justice having not read the evidence adduced by the caveatrix. He has merely picked up little and insignificant contradiction and left

relevant portion of her oral evidence. A document was exhibited to show that biopsy test was carried out and from this document it was shown that cancer had developed.

12. Regarding attestation and execution of the Will we are of the view that mere number of witnesses and their testimonies are not good enough to hold that the Will is genuine one. Normally the evidence is not reappreciated by the Appellate Court but done only when it calls for in case of apparently absurd reading and appreciation of the learned Trial Judge. We feel that this is one of such cases where we should read it and reappreciate. P.W. 1. at the time of examination-in-chief, has said though he claimed no to be present, that the testator was physically and mentally capable of executing the Will. He has said that three doctors examined him. He came to know about the Will only when one of his friends told his father. He has said that after releasing from nursing home his father, was fully cured and used to take part in the domestic work including going to market. He has not produced any document regarding prescription and prognosis report of the health condition after release from nursing home which he could have done. He has said that the Will was handed over to his mother after execution by one of the friends of the father. The said unnamed father's friend was not examined and called as a witness. His wife was one of the signatories to the document. So she was aware of the existence of the Will and to our mind it is impossible and abnormal that the husband will not know about the existence of the Will. In this "circumstance his testimony hardly inspire confidence of the Court.

13. Now we have to come to the preparation and execution portion of the said document. It is the story of the propounder that Shyamal Mukherjee and Kamal Baran Mukherjee, two brothers were responsible for the preparation and execution, and making arrangement for the registration of the Will. From the evidence it appears that Shyamal Mukherjee one of the Advocates was very well known to the propounder from his childhood. It was suggested by the caveatrix that Shyamal Mukherjee was the friend of the propounder. In his examination-in-chief he has said that Binoy Babu instructed and dictated the contents of the Will both to him and his elder brother, Kamal Baran Mukherjee and the Will was drafted by his elder brother. After the drafting was over, the same was gone through by Benoy Babu himself and he also read over the contents of the draft to Benoy Babu and being satisfied Benoy Babu asked them to prepare the final deed of Will. Subsequently, the said draft of the Will was type written by one private typist of Shyambazar in Bengali script and the name of the said typist is Sri Sudhir Saha who curiously was not examined though his name appeared in the document. Thereafter it is said that after the Will was prepared the same was taken to Benoy Babu who had gone through the contents of the same.

14. In the cross-examination the same witness says that the draft of the Will was also handed over to Benoy Babu and he did not know what he did with that draft. At every page of the said draft of the Will Benoy Babu endorsed with the word

"Manjur" and he signed every endorsement with the date. It is surprising that the said draft was not produced. He further said in his cross-examination that about two months prior to the date of execution of the said Will, both he and his elder brother were instructed to prepare the draft. Fifteen days thereafter, they prepared a preliminary draft of the Will and handed over the same to Benoy Babu who again handed over the same to them after some modifications and corrections thereon and thereafter the final draft was prepared on which Benoy Bahu put his signatures and endorsements of his approval. The said final draft will bearing endorsement of approval by Benoy Babu was returned to Benoy Babu along with the finally prepared typed deed. He further said that the said handing over might be about 10 days prior to the date of registration.

15. It is, thus, clear on the question of preparation of the draft of the Will that there is a glaring contradiction in the testimony of Shyamal Mukherjee as in his examination-in-chief of his evidence it shows that the draft was prepared instantaneously upon instruction and dictation of the testator by his elder brother, but in the cross-examination story is different, as it appears therefrom that both the brothers were summoned by the testator and thereafter the draft was prepared and they took about 15 days to present the draft for his approval. This contradiction, according to us, is very serious and can hardly be overlooked when the question of testamentary capacity is seriously doubted by the contestants. His elder brother Kamal Mukherjee could have been summoned as witness as it is alleged that he is a man behind preparation and finalization of the Will. Unfortunately he was not summoned as witness. He thereafter said that after registration and execution Kamala Devi, being wife of testator, called him. After registration the original Will was taken by the Registrar to his office and after voluminisation of the said Will, the original Will was taken by him from the registration office and then he handed over the said original Will to the wife of Benoy Babu. This piece of evidence is not corroborated when Kamala Devi was called by us. She said nothing about it. Moreover, the propounder himself has said that the Will was taken from one of the friends of his father. In view of the aforesaid serious contradiction we are not inclined to believe that the testimony of the Shyamal Mukherjee, regarding preparation of the draft as well as execution and attestation of original Will, should entirely be discredited, which we hereby do.

16. Next witness is Nemaï Maity, P.W. 3. His evidence does not inspire any confidence. He has not said who else was present when he put his signature. He has merely said that after the testator allegedly signed the document he put his signature. Therefore, his presence is very doubtful.

17. From the evidence of P.W. 4. Sri Lal Mohan Pramanick, it appears that at the time of preparation and execution of the Will he was present. This testimony is not corroborated by any other person, viz. by Shyamal Mukherjee who has stated two different versions. One is that the Will was drafted and prepared elsewhere and not at the same place. Another version is that the Will was

prepared and executed at the same time and same place. The Registrar was not examined. Therefore, it appears to us that there is a serious suspicious circumstances regarding preparation of the draft as well as the final Will. This has not been removed at all by cogent evidence.

18. It is, thus, evident that the learned Trial Judge has ignored the aforesaid situation. Mere registration in presence of the Registrar concerned is not sacrosanct to accept a document to be genuine. In the case of *H. Venkatachala v. B.N. Thimmqjamma* reported in AIR 1959 SC 444 it is ruled as the statement of law that even if there is no pleading as to the suspicious circumstances and if the Court finds from the evidence that there exists suspicious circumstances it is the propounder who has to dispel the same. According to us the propounder in this case has failed. There is no explanation as to why the document was filed for probate after 7 or 8 years.

19. We, therefore, think that learned 1st Court has accepted without examining carefully evidence, the said document to be a genuine last testamentary document of Binoy Krishna Pramanik and granted probate without having the lawful requirement for such grant. The decisions cited by Mr. Ganguly are of no help on the facts and circumstances of the case. We are not taking note of the conduct of the testator after execution of the alleged Will. We are concerned whether the propounder has been able to prove that the testator was in a position, both mentally and physically, to execute and register the Will and further that the Will has been prepared and registered in such a manner which does not admit of any suspicion or doubt. We have narrated the evidence of each and every witness presented by both the parties. We have not been able to persuade ourselves in approving the findings of the learned Trial Judge particularly when Kamala Devi has deposed before us and gave her evidence about the Will. Moreover, two documents show that the signature of the testator does not appear there. We, certainly therefore entertain doubt reasonably that the testator was not fit to sign at least in November of the same year, as it was not explained why thumb impressions were put on pages of November document. What was his health condition in July, 1988 could have been told by the doctors concerned upon consideration of necessary medical documents and prognosis report as there is conflicting versions of both the sides. We, therefore, hold that the propounder has failed to prove the case with cogent evidence.

20. Hence, this appeal is allowed and the Judgment passed by the learned Court below is set aside.

Sanjib Banerjee, J.

21. While I respectfully concur with the above views of my learned Brother, I wish to pen my thoughts on the matter.

22. It is not everyday that the First Appellate Court feels it necessary to examine a party. The circumstances in which the widow of Benoy Krishna Pramanik came to testify before this Court need to be recounted.

23. In the closing stage of his reply to the appellants' submissions, learned Counsel for the propounder contended that the entire aura of suspicion relating to the making of the Will was unfounded. Not only did the alleged testator, we were told, have testamentary capacity, but he also executed an instrument subsequent to the execution of the alleged Will. By such subsequent instrument, it was submitted, Premises No. 177, Maharaj Nanda Kumar Road, Calcutta - 700 035 was gifted to the wife.

24. To our immediate question as to whether the relevant document had been exhibited, we were told that it had not been, though such document was available. It was also submitted on behalf of the propounder that his mother had sold such property subsequent to her husband's death. Again, we were assured that such further document could also be produced.

25. While the execution of a subsequent document by a testator can throw some light on his testamentary capacity at the time of making his Will, it struck us as unusual as to why Benoy Krishna would think it necessary to gift one of his properties to his wife after having given her life interest in his estate. We then enquired of learned Counsel for the appearing parties as to the state of health of the widow. Learned Counsel for the propounder, on instruction of his client present in Court, submitted that she was old and infirm but able to manage her affairs. On our further enquiry, we were told by learned counsel for the propounder, again on instructions, that the widow would be able to travel to Court and depose.

26. We, thus, directed the widow to come and testify before us after two days and also required the production of the two documents relating to the transactions referred to by learned Counsel on behalf of the propounder: the Deed of Gift and the subsequent Sale Deed.

27. The widow came to Court on the appointed day and the two documents, in original, were also produced.

28. The Deed of Gift turned out to be a sale deed said to have been executed by Benoy Krishna in favour of his wife on November 7, 1988, five days prior to his death. The other sale deed was one of September 24, 1992 by which the widow sold the said property to one Anwar Ali.

29. The widow had imprecise recollection of her husband's death. At first flush she claimed he had died some 30 years back. She was confident, however, that he was in good health immediately prior to his death; that he was up and about and even ventured out regularly. He had no cancer, she claimed. Though she could not initially recollect that her husband had been admitted to a nursing home a few months prior to his death, but she subsequently recalled his having spent a day at the nursing home, of her having visited such nursing home to accompany him back the day following his admission. To a question as to why her husband had not been operated upon, her response was that her husband did not require the operation that had been originally thought was necessary.

30. The lady, even making allowance for the failing memory of a geriatric and the discomfort of the alien and somewhat hostile surroundings in a Courtroom, completely disowned any participation in matters relating to the Will. She announced from her chair in the box that neither did her husband take her into confidence before the execution of the Will nor was she otherwise aware of the making of the Will prior to the execution thereof. She was in the thakurghar and came out and found some persons assembled and discovered the purpose of their intrusion.

31. She introduced the name of the person who is supposed to have made over the Will on the day of her husband's shradh. A Shyamal made over the Will, not to her but to her daughter-in-law on that day and she had no occasion to see the document or be shown the same at any subsequent stage. I shall not infer from her account that this Shyamal was the lawyer acquaintance of propounder Prabir. I merely notice her statement, emphatic in her indifference to such officious matters, that she was not given the alleged Will but it was the propounder's wife who received it.

32. She did not recognize the document of November 7, 1988 and had no recollection of having participated in the execution thereof. According to her, however, she remembered having sold the property at No. 177 and having made over the proceeds therefrom to two of her daughters in equal share. She executed the papers relating to the sale in Court, she said, and she received Rs. 20,000/- of which she retained no part. She was accompanied to the Court, for execution of the document by a person whose identity she could not recollect. But she was confident that her son did not go with her as he was out on work that day. His work, she said, took him to Tantipara every day.

33. I have recorded what transpired before us in Court. I shall refer to her testimony and on the two documents, on which neither side has advanced any argument despite our offer, in the sequence that they have been presented.

34. Benoy Krishna was a man of substantial means having properties in an around the Baranagar-Alambazar area on the northern fringes of the city and in Belgharia which is a little distance further out of the city. Son Prabir was the second of Benoy Krishna and Kamala's six children. The three youngest daughters are the appellants before us and they were among the contestants in the learned Court below to the grant of probate of the Will propounded by Prabir.

35. The execution of the Will was found to have been proved on the testimonies of lawyer Shyamal Mukherjee, Kamala's younger brother Nemai Maity, and Benoy Krishna's nephew Lal Mohan Pramanick, all claiming to be attesting witnesses to the Will. Their collective word was preferred to youngest daughter Sukriti Das's and the testimony of Benoy Krishna's cousin Gita Jana. A sentence, however, from Gita Jana's evidence was held to have corroborated the propounder's case. The third witness called by the contestants, a doctor from a pathology clinic was disregarded, as he could not confirm that Benoy Krishna

was, indeed, the B.K. Pramanik whose name appeared in the pathology report being exhibit "D-1".

36. In his application for grant, Prabir truthfully indicated all the intestate heirs and meticulously set out the details of the various Immovable properties possessed by the deceased. The application offers little interest save the reference to Kamala's disinterest or refusal to apply for the grant and save the exclusion of Premises No. 177 from the schedule of assets. In the words of the application, "Smt. Kamala Pramanik, widow of late Benoy Krishna Pramanik, who was appointed as one of the executors to the said Will, showed no interest and/or declined to join as an applicant of the above probate case alongwith Sri Prabir Pramanik, the present applicant, inspite of requests made by the present applicant Sri Prabir Pramanik".

37. The probate application was received by the learned Court below in March 1994 and special citations were issued by the first order in the matter of March 8, 1994. The order-sheet records that three of the heirs applied to be permitted to file objections to contest the grant. Prakriti Chatterjee, the second youngest of Prabir's siblings filed an objection contending, inter alia, as follows:

(i) The Will was fraudulent, collusive, manufactured, procured on coercion and threat and a product of undue influence.

(ii) The alleged testator did not have the mental alertness or physical fitness to execute any Will of any nature or prescribe the manner of devolution of his assets.

(iii) Benoy Krishna had been reduced to a lump of flesh, bereft of power of understanding. Long before the so-called execution of the so-called Will, his powers of hearing and vision had deserted him and he had lost his ability of speech because of "numbness of his tongue".

(iv) Prabir was in a position to dominate the alleged testator and brought about the execution of the Will "taking undue advantage of the physical unfitness and loss of mental alertness" of Benoy Krishna.

(v) Prabir "got the impugned Will executed, registered with the help of his yes-men...in collusion with the scribe and so called witnesses".

(vi) The alleged Will "was not a product of exercise of free Will of the deceased, nor the contents of the so called Will was read over and explained to him".

(vii) Benoy Krishna had been detected with cancer at the time of an attempted operation on his prostate gland, which led to his being incapacitated long before his death.

38. These were also the grounds that were urged before the learned Court below on behalf of the objectors and grounds which have been repeated before us. It was contended that the Will came to be in dubious and grotesquely suspicious circumstances and the learned Court below fell into serious error in finding in

favour of the propounder. The entire approach of the learned Court below was mistaken, it was contended, as it had taken the assertion of the propounder's supporters to be proof not only of the execution but of the testamentary capacity of the deceased. It was submitted that there was a thread of careful planning in the way the matter was presented on behalf of the propounder. In such meticulousness, even minor discrepancies ought to have been taken note of. The learned Court below proceeded on the premise that the contestants had to dislodge the Will rather than the propounder being required to establish it.

39. The Will has also been challenged in the manner of its uneven bequest. The more valuable properties, we were told, were shown to have been given to the son and useless, trespassed upon, marshy lands had been shown to have been left to the daughters. The appellants also questioned the values assigned, in the schedule of assets, to the various properties; that lucrative properties in Baranagar had been valued for a pittance while the low-lying Belgharia land had been shown to be of substantial worth. Such skewed valuations, the appellants suspected, were made to mislead Court and to underplay the apparent disparity in the bequests.

40. On behalf of the propounder-respondent, we were reminded of the fundamental inconsistency in the case run by the contestants. A charge of fabrication could not be run alongside a charge of undue influence. It was urged that the appellants were bound to fail as Prakriti, who filed the objection in the Court below, had not taken to the box and Sukriti, who had testified, had not filed any objection at all. It was argued that mere disparity in the manner of disposition of assets would not make a Will suspect. It was also contended that the contestants had failed to discharge the burden of showing that the Will had been brought about in suspicious circumstances and the appellants had failed to demonstrate that the testator lacked either physical or mental capacity to execute the Will.

41. It was further contended on behalf of the propounder-respondent that there was nothing perverse in the conclusions drawn by the learned Court below from the materials before it. It was said that when oral evidence was received, there had been considerable lapse of time from the date of execution of the Will and, as such, the attesting witnesses could not be expected to recount the scene with mathematical precision. It was but natural, it was submitted, that there would be some inconsistencies, but it was not for the Court to pounce upon minor discrepancies to find doubt in the overall testimony. The learned Court below had taken into consideration the evidence before it and was satisfied that due execution of the Will had been proved, and it was not for the Appellate Court to reappraise matters in the absence of any serious anomaly.

42. Learned Counsel for the propounder relied on several authorities in support of the contentions made. The case reported at *Sm. Labanya Ray Vs. Rai Saheb Phanindra Mohan Mukherjee and Others*, was relied on for the proposition that in the absence of the plaintiff taking the box to substantiate his claim, a negative

inference could be drawn u/s 114(g) of the Evidence Act and the case ought to be disbelieved. On the duty of Court and the burdens on the respective parties in cases relating to suspicious circumstances in connection with the execution of a Will, the decisions reported at Sridevi and Others Vs. Jayaraja Shetty and Others, AIR 2005 SC 233 (Daulat Ram and Ors. v. Sodha and Ors.), 2002 (1) CHN (SC) 30 (Sm. Chinmoyee Saha Vs. Debendra Lal Saha and Others, were placed. A Division Bench authority of the Madras High Court reported at Senthil Kumar, represented by guardian Chockalinga Mudaliar and Saraswathi Vs. Dhandapani, Senthilvel, represented by father and natural guardian and Vaidhiyalinga Mudalair, was cited for the proposition that it was natural for an attesting witness to have an inaccurate memory and inaccuracy would not by itself cast any serious aspersion on his testimony.

43. In addition, it was suggested that the propounder had discharged the burden in accordance with the requirements of both the Indian Succession Act and the Evidence Act. The propounder was not required to bring more than one attesting witness to prove due execution of the Will, but this propounder had got as many as three. The further submission was that upon the physical act of execution, attestation and registration having been proved, it was incumbent on the contestants to establish that the document could not have been, or was not intended by the testator to be, a Will.

44. Apart from the three sisters who opposed the grant, there appears to have been an attempt by the widow to also contest the same. Prabir had said in his application for grant that his mother was either not interested or declined to join in the application for grant of probate. She, thus came to be cited.

45. From the records that have been brought over from the learned Court below, it appears that Kamala executed Vakalatnama on three separate dates. Those appear from the file marked as "C-2". There is the first one executed by her on February 1, 1995 in favour of Mr. Samir Kumar Das, Advocate. There is a second which has been made by her in favour of Mr. Madan Mohan Kundu on April 9, 1997. The third appears to have been executed by Kamala in favour of Mr. Ajoy Mukhopadhyay and Mr. Madan Mohan Kundu on September 20, 1999. In the first and the last vakalatnamas Kamala has used her Bengali signature and in the other she has signed in English.

46. On the very three days that she had executed documents engaging lawyers, she filed three applications, two of which are contained in the file marked "C-1" and the last is contained in the file marked "C-2".

47. In the first application filed on behalf of Kamala and apparently signed by her Advocate, her averments have been as follows:

1) That after receiving Summons in respect of the above-mentioned Probate Case, issued by the learned Court, your Petitioner came to know that Prabir Pramanik filed an application for granting Probate of a false and fabricated "Will" executed by the deceased Binoy Krishna Pramanik.

2) That your petitioner (is) today appearing before the learned Court by filing the vakalatnama and desire(s) to contest the case by filing written objection/ statement against the said application and to take necessary steps....

48. In her next application of April 9, 1997, apparently signed by her in English, Kamala retracted from the position taken by her or on her behalf earlier in the proceedings. This time she had this to say:

1. That, Sri Prabir Paramanik instituted a Probate Case before the learned District Judge's Court at Barasat and the said case subsequently transferred to your Honour's Court and it is converted into an original suit being No. O.S. 12/95 and the said suit is pending trial.

2. That, it is fact Binoy Krishna Pramanik is the husband of the present applicant and father of the petitioner died on 12.11.1988. During his life time Binoy Krishna Paramanik executed and registered a Will wherein his wife Kamala Paramanik and his son were made executor of the said Will and the said Will was executed and registered on 13th day of July, 1988 in presence of some witnesses who put their signature (s) at the bottom of the Will and the said Will was drafted by Kamal Baran Mukherjee, Advocate.

It is also fact that Binoy Krishna Pramanik readover the Will and he was mentally and physically fit on that material time and the present petitioner Kamala Paramanik the wife of Binoy Krishna Pramanik used to look after her husband and she knows everything regarding the activities of her husband. Binoy Krishna Pramanik died leaving behind his only wife Kamala Pramanik, one son Prabir Pramanik and five daughters as his only legal heirs and successors in interest. During his life time all the daughters of Binoy Krishna Pramanik have been given in marriage and they are at present residing in their respective matrimonial home. Prabir Pramanik only son of Binoy Krishna Pramanik filed the above noted case as one of the executor (s) of the impugned Will. The contents of the Will is genuine and correct. This petitioner Kamala Pramanik might have/had file a written objection against the Probate Case and in the said written objection she might have/had put her signature but by this petition she is stating that she was misguided by misrepresentation and the contents of the said written objection was not read over and explained by any competent person if she could realise the contents of written objection she must not have put her signature on the said written objection. After knowing the contents of written objection this petitioner Kamala Pramanik clearly states that the statements or averments of the said W.O. are absolutely false, incorrect, wrongful and imaginary, as a result she prefers the instant petition stating that her husband Binoy Krishna Pramanik executed and registered a Will against which the present suit is pending. The Will in question executed by Binoy Krishna Pramanik is genuine one and on that material time her husband Binoy Krishna Pramanik was mentally and physically fit and he executed the said Will in his free mind and consent. The humble prayer of the present petitioner Kamala Pramanik is that the Will in question is genuine and the Probate may be granted as per terms and conditions of the Will and she

has/have no objection regarding the alleged Will and the case may be decreed in favour of the petitioner Prabir Pramanik.

49. Such statements as contained in the application styled as "a petition of consent" were verified by her before a notary in Barasat. The proceedings, of course, were before the Court in Barasat.

50. The third application by Kamala appears in the file marked as "C-2". This third application, apparently filed on her behalf by Mr. Kundu, one of the advocates who she authorized by the document of September 20, 1999, is ambiguous and somewhat inconsistent with the stand that she took in 1997. This, her last statement before the learned Court below, reads thus:

(1) That the opposite party No. 1 is the old widow wife of the deceased Binoy Krishna Pramanik who is contesting the suit by filing written objection.

(2) That the opposite party No. 1 intends to adduce evidence before this learned Court in the instant suit and for that it is necessary to allow an opportunity to the opposite party No. 1 to adduce evidence for the interest of natural justice & equity.

(3) That if the prayer of the opposite party No. 1 be not allowed her interest shall be seriously prejudiced and the complicity of the suit will arise.

(4) That the application is made bona fide and for the ends of justice.

51. Disregarding the apparent mis-statement in the third application by Kamala that she had filed a written objection in the probate proceedings, there is a sense of contest which it conveys. Despite this third application not having been signed by Kamala, the records show that on the day of the third application being made, she had executed an authority in favour of the two lawyers, one of whom had filed the application on her behalf.

52. In the context, of the propounder's assertion in his application for grant and the revelation in the closing stages of submission in this appeal that Kamala was the beneficiary of a gift by Benoy Krishna subsequent to the execution of the Will, such bits of mundane trivia evidencing Kamala's wavering stands assume significance. While it is understandable why neither the propounder nor the contestants mustered the courage to call Kamala to the box in the learned Court below, we could not let such opportunity pass. But more of Kamala later, as there were seven before her who testified in the proceedings.

53. Before the learned Court below, it, was the propounder who took the oath first. He was not present when the Will was supposed to have been executed nor involved in its preparation or registration, he claimed. The Will did not come out of his custody, he asserted, it was given to him by his mother upon it being given to her by an acquaintance of his father before the day of the shradh. He would have us believe that he was not aware of the making of the contents of the Will prior to getting the registered Will in his hands. Lest I be unkind to the

propounder, his own words should speak:

...I was not present in my home at the time of preparation and execution of the Will and as I was not aware of the same.... I came to know about the Will when one of the friends of my father handed over the said Will to my mother after the death of my father. My father's said friend was not a witness in the said Will. The said handing over of the Will by my father's friend was done within a few days from the death of my father but before his shrad ceremony.

54. It matters little as to whether the Will was made over by Benoy Krishna's friend on the day of the shradh or a few days before that. What is significant is that, according to Prabir, he was so far removed from the preparation and the execution of the Will that he "was not aware of the same" and "came to know about the Will when one of the friends of my father handed over the said Will to my mother after the death of my father." But Prabir's wife Amita had signed the document and had identified the alleged maker thereof. Prabir admitted that he had a normal relationship with his wife. But his wife had not remembered to mention the small matter of execution of the Will to Prabir. Again, in Prabir's words:

...My wife was present in home on the day of execution and registration of the Will on commission and the Will bears her signature. I came to know from the Will itself that my wife Smt. Amita Pramanik was the identifier of my father in the said Will. My wife resides with me and I am having good and cordial relation with her.

55. Next, it was the turn of the Advocate-draftsman and a boyhood acquaintance of Prabir to support the alleged Will as an attesting witness. Advocate Shyamal Mukherjee claimed that Benoy Krishna had instructed him and his elder brother (also a lawyer) to prepare a draft Will. According to him, "the draft of the Will was gone through by Benoy Babu himself and I also read over the contents of the draft to him and being satisfied Benoy Babu asked us to prepare the final Deed of Will." After the Will was gone through by the testator, and for good measure, also read over to Benoy Krishna, the learned Lawyer claimed to have arranged the final typing thereof and organised the registration of the document on commission.

56. The commission was necessary, he said, as Benoy Krishna "was temporarily sick and it was not possible for him to go to the registration office." As to the persons present at the time of execution, the learned Lawyer named Benoy's nephew Lal Mohan Pramanick, brother-in-law Nema Maity, Kamala and Amita among relatives. There were four others who were present according to him. Kamala's presence accidentally happened as she appeared at the place where the Will was being executed."

57. The learned lawyer went on further to say:

I do not know who called the other three attesting witnesses besides me and I

found them already present at that place when I appeared there along with the Registrar. I advised Benoy Babu that presence of witnesses were required during execution of the Will.... The said instruction for collecting witnesses were given to Benoy Babu by me about 10 days prior to the date of execution of the Will.

The application to the Registrar for registration on commission was made on the very morning on the date of execution of the Will.

I mentioned the date of execution and registration of the Will to Benoy Babu at the time of advising him for collecting the witnesses.

The draft of the Will was also handed over to Benoy Babu and I do not know what he did with that draft. On every page of the said draft of the Will Benoy Babu endorsed with the word "Manjur" and he signed under every endorsement with the date.

58. On the other aspects as to suspicious circumstances, the learned Lawyer repelled all suggestions put forward on behalf of the contestants. In substance, he corroborated the propounder's testimony as to the sound and disposing state of testator's mind and also as to the physical capacity of Benoy Krishna. He also added that as far as he recollected, Benoy Krishna had favoured the daughters in having allotted 1/4th share out of 88 bighas of wetland or jheel to his daughters.

59. Kamala's younger brother then came to testify in support of the Will as another attesting witness thereto. Apart from repeating that "the mental and physical condition of Benoy Babu was sound at the time of creation and execution of the said Will", his testimony, in its relevant part, is as follows:

The present Will was also registered in the house of Benoy Babu immediately after execution of the same and at that time, besides Benoy Babu, five persons including me, were present. I was called there by my elder sister who is the wife of Benoy Babu on the very noon on the date of execution of the Will. I went to the house of Benoy Babu on that occasion at about 6.30/7 p.m., and on reaching there I found five persons were already present there...on reaching there I found four persons already present and they were Sri Biswanath Mukherjee, a retired Magistrate, Sri Lal Mohan Pramanick and two learned Lawyers namely, Sri Kamal Baran Mukherjee and his brother Sri Shyamal Mukherjee.

60. Nephew Lal Mohan Pramanick was the last to come in support of his uncle's alleged Will. After asserting that the testator was in good mental and physical condition, Lal Mohan Pramanick's narration went thus:

The Will was registered in the house of Binoy Babu on commission. I reside in an adjacent house of Binoy Babu. My aunt Kamala Devi called me to their house before the registration. I went to the house of my uncle at about 3/4 p.m. and by that time the Registrar was already present there. Besides the Registrar, I found his Assistant, my uncle, Benoy Babu, my aunt Kamala Devi, the learned lawyer of Benoy Babu and his assistant and witnesses namely, Nemai Maity, Shyamal Mukherjee and one Smt. Amita Pramanik were present in that room. I do not

recollect whether any other person besides them were present there. I found the Will ready in Bengali type-writing. Benoy Babu put his signature in my presence in all the pages of the deed of Will.... I recollect that another person by the name of Biswanath Mukherjee was also present there. After the signature of Benoy Babu I and other witnesses present put our respective signatures on the deed of Will. The entire process of putting signatures starting from Benoy Babu to the last man who put his signature on the deed of Will, took about 1 hour time. Benoy Babu started to put his signature on the deed of Will at about 15/20 minutes after my arrival there.

61. There is another part of Lal Mohan's testimony that needs to be noted:

I myself did not go through the deed of Will before putting my signature thereon since Benoy Babu himself read out the contents therein to all the persons present there.

Not a fact that Benoy Babu was severely sick or ill at the time of execution of the said Will, not that he became a bundle of flesh at that time having no reasoning power.

Not a fact that at the time Benoy Babu had no capacity to himself go through any writing or to understand anything read out to him.

Not a fact that Prabir himself has colluded with his lawyer to get it drafted according to his desire nor that thereafter (Prabir) got it executed and registered.

I did not find Prabir in the room where the work of execution and registration of the Will was being done during the period of my presence there. Before arrival there, I was not aware that a deed of Will was going to (be) executed and registered. When my aunt Kamala Devi went to my house for calling me, I inquired from her why I was being called.

No curiosity arose in my mind as to why the only male child of the house namely, Prabir was absent from that place though his father was going to execute and register a Will of his property....

62. The second appellant examined herself as the first witness in support of the contestants. In her examination-in-chief she dwelled on the prolonged illness of her father and on his having been detected with cancer. The relevant portion of her testimony relating to her father's health and her conviction of his unsound mental state, needs to be reproduced:

...My father died after a prolonged illness for 3/4 years. On 17th day of May, 1988 my father was admitted at Mayfair Nursing Home at Baranagar for a surgical operation on his Prostrate Gland and on 18th May, 1988, during surgical operation upon him, it was detected by the surgeon that he has developed a cancer in his Prostrate gland and naturally the surgical operation could not be done besides opening the abdomen. Before closing the abdomen the surgeon collected the sample from his prostrate gland for biopsy and the biopsy was done

in a laboratory near Hind Cinema in Central Calcutta. The biopsy report was positive for a cancer as growth. Thereafter, our father was brought back to his house from the nursing home. During his prolonged illness for 3/4 years my father used to pass blood with urine and after return from the nursing home the bleeding increased and my father was completely bed ridden and failed to take any food and also failed to talk properly. The physical condition of my father deteriorated day by day and his voice became choked and as he could not take food himself we used to make paste the boil rice and to feed him with spoon. He failed to move his tongue properly and it became numb. He had hazy vision and his audition power became weak and we had to speak near his ear. At that time he could not speak clearly and we could anyhow understand what he wanted to state. My father had no capacity to give any advice to any body during his stay in his house, or during the period from his return from the nursing home on 18th May, 1988 and the date of his death. As his memory was not working properly, he had no capacity to understand if anyone make any talk to him or read over anything to him. At that time my father was lying on his bed like lump of flesh. My father was a patient of Diabetes for 30 to 35 years till his death.

On 13.7.88 my father had no capacity at all to advise anyone for preparation of any deed or to understand any contents of any deed or to put his signature on any deed. My father had no independent thinking or willing on 13.7.08.

63. In her cross-examination, she was asked as to whether she possessed any documents in support of her father's prostrate gland ailment and whether she could support her statement that her father had developed cancer in the last stage of his life. She did not have any papers, she said, to prove his prostrate gland problem, but she possessed records to substantiate her claim that Benoy Krishna had developed cancer. She recalled that her father had spent about seven days in the nursing home beginning May 17, 1988. She refuted suggestions that she had falsely testified that her father was completely bedridden and had lost his power of speech. She also denied the further suggestion that her father was mentally alert and physically fit till the date of his death.

64. According to her, Benoy Krishna had not divulged to her that he would make or had made a Will. That apart, the only other point of note was her statement in cross-examination that the two other appellants before us had accompanied her to Court on that day.

65. Gita Jana, who claimed to be a cousin of the deceased and to whom it was suggested on behalf of the propounder that she was merely a maid servant in the Pramanik household, also asserted that Benoy Krishna was a patient of cancer. She corroborated Sukriti's account as to the physical health and mental state of Benoy Krishna in the following words:

He was admitted in nursing home namely, Mayfair when blood came out from of his (penis), and operation was done to detect the disease he was suffering from.

After operation it was detected that he was attacked with cancer but the operation was not completed. Thereafter he was taken to his residence from the said nursing home. At that time he was bed ridden and the state of his health was very bad. He was short of vision and hard of hear (ing). He used to communicate his desire by showing various signs, as his voice was chocked. His tongue became numb. He also lost his normal sense. He had no capacity to execute any instrument in favour of any person at that time nor he had capacity to give instructions or advice to anybody. Myself and my boudi (deceased's wife) and the younger daughter...used to look after and nurse my said elder brother (testator).

66. In course of the cross-examination, she does not appear to have otherwise said anything that detracted from her evidence-in-chief. There, however, appears the following sentence, obviously in response to a suggestion:

Not a fact that Benoy Krishna could not talk freely prior to his death.

67. A medical practitioner was last called by the contestants who proved a pathology report exhibit D/1, Dr. Siba Prasad Ghosh was the owner of the laboratory that prepared the report on May 18, 1988. Exhibit D/1 was only a copy from the records of the original report that the medical practitioner produced and proved. The original report was not tendered in the proceedings. The doctor also produced an extract from a register maintained by his predecessor in the clinic whose signature and handwriting he proved. Such extract, marked as exhibit D, bears the date "18/5/88" on the top-left. The writing "B.K. Pramanic:/m/79 yrs." also appears in the extract. There is a reference to a biopsy of the growth in the anterior bladder wall also appearing in the extract. There is also what seems to be a recording of how the patient came to be referred. That would be evident from the following scribbling immediately below and to the right of the patient's name:

C/o MFNH Dr. A. Nan MS

68. Two other documents were relied upon on behalf of the appellants in the learned Court below, both said to be letters written by the widow to one of her daughters. It was claimed that it would be apparent from such letters that the widow was aware that the Will was not genuine but that the propounder had arranged the entire matter in such manner that it would be both expensive and time consuming to dislodge the Will. In the first of the two letters, there is the Bengali expression "aat ghat bendhe" used by the mother while referring to Prabir having prepared the Will. This expression has been noticed by the learned Judge in his Judgment. Though the translation of the letter has captured the sense of the expression in the context, the literal translation of that expression is absent. The translated portion reads: "Your brother has taken all precautions and measures while preparing the Will. You all cannot do anything." Literally, however, the expression "aat ghat bendhe" means "without leaving any loose ends".

69. But such document should not have been looked into for the purpose that it has been. Even though the existence of the document remained unchallenged, the author of the letter was neither brought to prove it nor were the contents thereof admitted by the person against whom the document was proposed to be used. The daughters relied on the letter, and, it does not appear from the records, that the propounder accepted the contents of the letter to be correct.

70. The appellants could have availed of the opportunity afforded to them by us in having the contents of the letters proved by Kamala. They only chose to put the solitary question to her, as to whether her husband had been suffering from cancer. She answered that question in the negative. Thus, went abegging, the appellants' chance to buttress their challenge to the Will.

71. The challenge has to be seen on the basis of the other evidence in support thereof without delving into the contents and purport of the two letters being exhibits A and A/1. This has to be so as, in the absence of proof of the contents of the first letter, the expression "aat ghat bendhe" (without leaving loose ends) cannot be taken to be a charge of fabrication of the Will. It could just as easily be understood to imply that the Will was prepared after taking due care and caution such that it would be immune to any challenge.

72. We have been constrained to look into such material, both the oral and documentary evidence, as the appellants have urged that the learned Court below erred both in its approach to decide the matters in issue and in the assessment of the evidence before it. The appellants have attacked every bit of the Judgment and have assailed the conclusions drawn as being perverse on the basis of the materials before the Court.

73. The learned Court below held that the appellants had failed to demonstrate that the Registrar had failed to perform the duty of satisfying himself that the Will was duly executed at the time he received the same for registration. It was also held that the appellants had failed to impress with cogent evidence that the testator really became a lump of flesh and lost his power to speech because of numbness of his tongue. Mere averment to such effect, the learned Court below felt, would not stand in the way of granting probate, and, consequently, "there cannot be any question relating to physical fitness and mental alertness of Benoy Krishna Pramanik before and at the material time of the alleged Will dated 13.7.88". In the discussion under the relevant issues as to the legality and validity of the Will, the Judgment impugned has referred to the oral evidence of Prabir and his lawyer acquaintance in over seven printed pages, followed by a little over a page to the other two alleged attesting witnesses. The oral evidence on behalf of the contestants is discussed in less than a page, the prominent part of which is that one sentence from Gita Jana's cross-examination and the finding on such basis that it supported the propounder's case. The doctor is referred to and the two documents that he exhibited are found not to be relevant as there was nothing in such documents which could show that Benoy Krishna had no capacity to exercise free Will in executing the testamentary document.

74. Even though not all challenges to a Will raise the question "why?" and not "why not?" as to the grant, it is undoubtedly for the propounder to establish due execution. Due execution encompasses the physical act of execution and attestation and, the more abstract, requirement of the sound disposing state of the testator. It is not as if the propounder has a grant for the asking and it is for the caveator to dislodge the Will.

75. There are certain aspects which call for proof on the part of the caveators. But, the overall burden of proving due execution always remains on the propounder. In the state of the evidence, the opponents may be required to establish material in support of suspicious circumstances, but only upon apparent execution having been demonstrated to be valid by the propounder.

76. The learned Court below, however, proceeded to decide the matter more on the contestants' failure to establish suspicion and the attendant circumstances rather than the propounder being required to dispel the doubts raised.

77. But before the Judgment of the learned Court below is weighed in the context of the evidence before it, there remains the contesting respondent's challenge to the admissibility of Sukriti's testimony and the consideration of the grounds urged in Prakriti's written statement. This basic attack has to be overcome by the appellants, or else the matter would, effectively, go uncontested.

78. Prakriti's was the only written statement filed in the matter and, according to learned Counsel for the propounder, Prakriti did not testify in support of her grounds of challenge to the grant.

79. It appears from the records of the learned Court below that both Krishna Bera and Sukriti Das had filed a petition in the original proceedings, the text of which is as follows:

Defendant No. 6 & 7 begs to submit as follows:

1) That in the above noted suit, these defendants figure as defendant No. VI and VII.

2) That defendant No. V, who happens to be this defendant's sister, has already preferred a suitable written statement incorporating therein the actual state of affairs basing upon which the validity and legality of the so called Will has been challenged.

3) That these defendants accept the contention raised in the W.S. as preferred by defendant No. V in consequence of which these defendants beg to adopt the said W.S. as of their own and want to contest the suit basing upon the said W.S.

Under the above mentioned facts and circumstances these defendants pray for passing necessary order or orders allowing them to contest the suit by way of adopting the W.S. as preferred by the defendant No. V.

80. The signatures of the two sisters making such application appeared thereon. The application was made on January 29, 1999. On such date, as it appears from the order-sheet included in the paper book, the matter had been taken upon for hearing. The order recorded on that day, in its material portion, as is follows:

Both the parties file hazira. The O.P. 6 & 7 appear by filing power and file a petition praying for filing the W.S. which was already filed by the O.P. No. 5. Copy served and objected to. Hd. (Heard) the prayer of O.P. 6 & 7 is allowed. The case is taken up for further evidence. O.P. No. 1 Sukriti Das is...allowed....

81. On facts and on the basis of the records, it cannot be said that Sukriti's evidence could not be looked into as she had not objected to the grant in a formal manner. True, Sukriti had said in her cross objection that she had "not submitted (her) own written objection or statement in the present suit". It is easy to be misled by such statement and without paying too much attention to the word "own" contained therein. She had not filed any formal written statement but upon her application and the order of January 29, 1999, the solitary written statement in the learned Court below should be taken to have been filed on behalf of all the three appellants before us.

82. This answers the other ground of challenge to the points urged in the written statement being considered. It is not necessary that all the persons filing a joint written statement need to testify in support of the case run therein.

83. The decision that was relied upon by the contesting respondent in such context is one reported at 68 CWN 611. The passage that was placed before us appears at pages 627.-628 of that report:

The effect of a party not giving evidence in support of the case made by him in the pleadings may be fatal as was pointed out by the Privy Council more than once. Reference was not made to these cases at the Bar. But it seems to me that a reference to these cases is very useful in finding out the effect of a party not giving evidence. In AIR 1927 230 (Privy Council) Lord Shaw after referring to the fact that a material witness who was present in Court did not go to the witness box pointed out at page 233 of the report as follows:

Notice has frequently been taken by this Board of this style of procedure. It sometimes takes the form of a manoeuvre under which counsel does not call his own client, who is an essential witness, but endeavours to force the other party to call him, and so suffer the discomfiture of having him treated as his, the other party's own witness.

This is thought to be clever, but it is a bad and degrading practice. Lord Atkinson dealt with the subject in *Lal Kunwar v. Chiranjilal* (2) calling it "a vicious practice, unworthy of a hightoned or reputable system of advocacy.

The present case, however, is a pointed instance of the evils which flow from such a practice. Bhagwan's case had been the subject of prolonged investigation in the Revenue Courts and had been pronounced by them a bogus case. She had

appeared and told the story there and it had not been believed. She was, however, also present in this Civil Suit, the issue in which was the legitimacy of the boy that she was putting forward as a jaagir of the estate. Her non-appearance in answer to the challenge, that is to say, to disclose the actual fact as to her condition, shortly after her husband Jawala's death, her disappearance into a foreign state, and all the other circumstances mentioned had been established. If her story were, notwithstanding all this, a true story, it was her bounden duty to give evidence in the suit telling the whole facts in support of her and her alleged son's case; but she did not. If under advice she did not do so, that advice was of the worst description, and worthy of the animadversion above made. But in my view her non-appearance as a witness, she being present in Court, would be the strongest possible circumstance going to discredit the truth of her case". Similar observations were made by the Privy Council in the case of *Durga Kumwar v. Mathura Kunwar* (3) 15 CWN 721, 722. Besides the Court is entitled to draw the inference as provided in illustration (g) to Section 114 of the Evidence Act and come to the conclusion that the evidence of the defendant No. 1 has been deliberately withheld because, if produced it would have been wholly unfavourable to him. In this view of the matter I accept the plaintiffs case regarding the agreement and all its terms. I reject the case sought to be made out by the defendants in their written statement that no agreement was arrived at between the parties and that all that had taken place was mere negotiation for the purchase of the premises.

84. The conclusion in that case has to be seen in the light of the facts involved therein. The plaintiff in that case had claimed a decree for specific Performance of an oral agreement for purchase of a property. The oral agreement, according to the plaintiffs allegation in the plaint, was recorded and/or confirmed by three letters from the plaintiffs solicitor and two letters from the vendor-defendant. It was claimed that pursuant to such agreement, the plaintiff's solicitor sent to the vendor-defendant's solicitor a draft agreement for sale. The defence of the vendor-defendant was primarily that there was no agreement for sale. The first defendant claimed that the letters referred to in the plaint did not record or confirm any agreement and they were exchanged in course of negotiation. It was claimed in the written statement that there was no concluded contract and, in any event, there was no agreement to deliver vacant possession. The plaintiff and her husband testified in the proceedings. The plaintiff also examined the broker who corroborated the plaintiff's testimony. The first defendant chose not to be examined. The Court construed the documents before it to hold that an agreement had, indeed, been concluded between the plaintiff and the first defendant. What remained to be examined was whether the first defendant had agreed to make over vacant possession to the plaintiff. In the absence of the first defendant coming to support his case made out in the written statement, the Court inferred against him.

85. Clearly, on facts, that decision has no relevance in the present context. Prakriti had filed a written statement, the contents whereof had been adopted by

Sukriti and Krishna. By passing the order of January 29, 1999, the Court accepted the solitary written statement before is to be one filed on behalf of all the appellants before us. None of the three sisters abandoned the contest. I have noticed Sukriti's statement that she had been accompanied to Court on the day of her cross-examination by Prakriti and Krishna. These three sisters have continued their contest in preferring the appeal.

86. With the appellants' right to contest having been established, the grounds for challenging the Will call for examination. There are two aspects that fan the smoke of suspicion in this case; the apparently perfect execution of the alleged Will and the state of health or condition of the alleged testator.

87. Despite Prabir's absence from the scene of the execution, his shadow looms large. The alleged attesting witnesses parroted the same version except that Nemai and Lal Mohan claimed that Kamala had required them to be present at the time of execution. Kamala has refused any kind of association with the making of the Will and the lawyer-witness has said that Kamala's presence at the scene of the alleged execution was purely accidental. It is neither Nemai nor Lal Mohan's case that the alleged testator, who according to them, was hale and hearty, approached them to be present. The lawyer-witness and team did not obtain their presence.

88. Nemai and Lal Mohan also contradict themselves as to the time of the day. There is considerable difference, particularly in the context of the meticulousness in which the matter is presented, between 4 p.m. 6.30 p.m. in mid-July. In noticing such times, I have taken the later time suggested by Lal Mohan and the earlier time suggested by Nemai. If Lal Mohan is to be believed, the entire process was completed by 5.30 p.m. at the latest. Again, both Nemai and Lal Mahan claimed that the other was already present at the scene. The lawyer's assertion that there was a draft Will and that the alleged testator had approved each page and had endorsed "Manjur", was not supported by the production of such document.

89. Prabir's denial of his association with the execution was carried to the extreme by his denying knowledge of the execution despite his wife having been present at the time of execution. It is not normal for the only active male member of such a household as the Pramanik's to be either absent at such a momentous time or be unaware of the same. It is also unusual that given the background, Prabir's wife would fail to even mention the matter to her husband. Prabir's attempt to show no involvement in the execution of the Will appears laboured and unreal. Not only did Prabir try and demonstrate that he played no prominent part in the execution of the Will, he carried it to the further step of trying to demonstrate that he had no part in it at all.

90. In any event, Prabir's claim of total lack of involvement arouses suspicion.

91. It is the same thread that runs through Prabir's offer of trying to establish the sound disposing state of his father at the time of execution of the alleged

Will. In his examination-in-chief, Prabir fairly stated that at the time of Benoy Krishna's admission to the nursing home, the surgeon had suspected that the patient had cancer. He went on to assert that his father was neither mentally nor physically handicapped by the malaise. It is not necessary that a person suspected of cancer or diagnosed as suffering from cancer immediately loses physical or mental capacity. To this extent, Prabir's testimony is believable. But, it is what he went on to add, that again excites suspicion. After his father returned from the nursing home, according to Prabir, he was fully cured and used to take part in all domestic work, go to the market and manage the properties.

92. In cross-examination, he claimed that his father had last been to the nursing home "about 11 months or one year" before he died. His father died of cardiac failure, he said, and had only old-age ailments and no other. Both in his testimony and in the suggestion put on his behalf to Sukriti, Gita Jana and the doctor, there is an attempt to deny the more serious ailment that his father seems to have been afflicted with. It is such denial that gives rise to further suspicion.

93. Prabir's assertion that his father died of cardiac failure was again, as I see it, but to divert attention from the killer disease that he carried. Ultimately, most deaths are caused by cardiac failure. But there are ailments that prompt cardiac failure.

94. The propounder supplied the name of the nursing home, "May Fair Nursing Home" (MFNH by its initials). Why his memory lapsed while he recalled the time of his father's admission, is not known. It is equally unlikely that the operation on the prostate gland would have been performed despite the surgeon's admitted suspicion of it being affected by cancer. Ordinarily, an investigation is called for upon such suspicion. Sukriti's and Gita's versions appeared to be the more credible. The period of admission, mid-May 1988, remains uncontroverted despite Prabir's attempt to push the date back by a few months. Exhibits D and D/1 both bear the date of May 18, 1988. Both the exhibits referred to B.K. Pramanik, a doctor A. Nan, MS and the initials MFNH. Pramanik is not as common a surname that two persons of nearly the same age and bearing the same initials would appear on the same day with the same ailment. It is the attempt on behalf of the propounder in the suggestion put to the doctor, that again rings a discordant note. There was little reason for the propounder to detract from those two exhibits, unless there was something he wanted to hide.

95. Finally there was the widow who dispelled suggestion of her husband having had cancer. Kamala's conduct has to be viewed in the context of her shifting stands in the learned Court below and her present position. She is with her son, who secured her presence in Court. She was ready to assert in favour of the Will, never mind if the questions put to her did not merit such answer. On our query as to whether she was aware of her husband's Will, she replied that he had made his Will during his last days and added that he was quite fine at that point of time. To our further question as to whether she knew what had been left to

her under the Will, she responded by saying that whatever her husband did, he did rightly. Add to this, her being unaware of the alleged sale effected in her favour by her husband five days before his death and her confident recollection of her execution of the subsequent sale for the same property unaccompanied by her son-the inference is obvious. Whether she was pained by this unsavoury matter dragging for such a long time or had been won over by her son or overcome by her present helplessness - her testimony does not inspire confidence.

96. The propounder, and his two relatives who took the stand in his support, made a conscious effort to underplay the ailment that Benoy Krishna suffered from. By the time the doctor climbed out of the box, not only was cancer established, the aborted attempt to operate on the prostate gland had also been proven. Not only was Benoy Krishna not "fully cured" as Prabir proclaimed, it was a downhill journey for him after his return from the nursing home. It is unlikely that the cancer of the prostate of an 80 year old that ultimately resulted in his cardiac failure would have left him in the physical or mental state to consciously execute papers relating to a property transaction five days before his death. Apart from the fact that such transaction was completely unnecessary, one cannot lose sight of the fact that such transaction was relied upon to dispel doubts as to the alleged testator's physical and mental capacity at the time of execution of the alleged Will. It is also of some significance that the subsequent sale of premises No. 177 was said to have been completed before the application for grant of probate was filed.

97. More than the appellants, it is the propounder who presented circumstances that aroused suspicion. A gaffe followed every cover up in Prabir's attempt to establish the Will. Advisedly, the propounder took a stand of being uninvolved in the execution of the Will. His presence and his having intimated Namai and Lal Mohan would have been more credible than the version that we have been presented. A bolder admission of cancer and execution of the Will notwithstanding such affliction would have been easier to digest than the attempt to disown exhibits D and D/1. The appellants' charge of lack of sound disposing state of testator found strength in the propounder's failed attempt in denying cancer. In his apparent absence, I find Prabir's overwhelming presence in the matter relating to the alleged execution of the Will. There were substantial grounds of suspicion raised that were not removed.

98. Suspicious circumstance, like fraud, is not always capable of direct proof. It may be inferred. As in this case, it is not as if each incidence of suspicion is an independent ground for dislodging the Will, it is the cumulative effect of the circumstances that leads to the inevitable perception of something being amiss.

99. As in the case of any other plaintiff, the burden of proving his case is cast on the propounder. Upon the propounder giving such evidence as will support the case he has run, the onus shifts on the contestants to adduce rebutting evidence. The onus may shift back again to the propounder, as it has in this case

on Sukriti rebutting the propounder's evidence on the state of the health of the alleged testator.

100. If Prabir had not attempted to push back the date of his father's admission to the nursing home for the prostate gland problem and had not played down and virtually denied his father having been impaired by terminal cancer, there would have been less doubt in the matter. It would have been more probable for a person having been diagnosed with cancer, but who was otherwise alert, to immediately provide for his assets upon his death. If Prabir had not tried to discredit the pathology report, the other grounds of challenge may not have stood out. If Prabir had been present at the time of execution of the alleged Will or had claimed to have taken part in it, it would have been more credible.

101. It is undoubtedly for the propounder to dispel all doubts relating to the execution of a Will. The nature of the doubts, as high authorities tell us, depends on the facts of each case. On the reading of the evidence before the learned Court below, it is our belief that there were serious questions that remained unanswered. It is the propounder who has to bear the consequences of the questions remaining unanswered.

102. The factual doubts that persist cannot be cleared by the authority of precedents. The Judgments relied upon on behalf of the propounder, despite the unquestionable value of the propositions laid down therein, do not persuade me to gloss over the contradictions, discrepancies and doubts that the matter at hand throws up.

103. There is no denying that attesting witnesses would have imperfect recollection particularly if the date of execution is long prior to the evidence of the attesting witnesses being received. The case reported at AIR 2004 Mad 403 (Arulmigu Adhisakthi Siva Bala Subramanya Temple v. The Executive Officer, Arulmigu Vamana-pureswarar Temple) on this aspect is, doubtless, authority for such proposition. But the inaccuracy in the testimonies of the attesting witnesses examined this case have weighed much less than the other aspects of suspicion. Similarly, the proposition as reiterated in the Supreme Court decision reported at S. Sundaresa Pai and Others Vs. Sumangala T. Pai and Another, that uneven bequest is not always suspicious, does not dispel the other doubts that remain as to execution and the testamentary capacity, in particular, of the alleged testator.

104. In the decision rendered in the Judgment reported at Sm. Chinmoyee Saha Vs. Debendra Lal Saha and Others, the principal challenge was the delay in applying for probate. On facts it was held in that case that the propounder had satisfactorily explained the reasons for delay. It was her credible evidence in that case that her delay in coming to Court for probate was due to the fact that her husband's brothers tried to prevent her from taking any step in the matter. Again, on facts, the Division Bench dispelled the suggestion made by the contestants to the Will that the signature of the testatrix had been obtained on a blank paper. In the Supreme Court Judgment reported at AIR 2005 SC 233

(Daulat Ram and Ors. v. Sodha and Ors.), the only ground urged by the contestants was that the Will was forged. However, no issue was framed on this point and no evidence was led by the contestants to prove the forgery. It was in that context that the Supreme Court held as follows (at paragraph-10):

10. Will being a document has to be proved by primary evidence except where the Court permits a document to be proved by leading secondary evidence. Since it is required to be attested, as provided in Section 68 of the Indian Evidence Act, 1872, it cannot be used as evidence until one of the attesting witnesses at least has been called for the purpose of proving its execution, if there be an attesting witness alive, and subject to the process of the Court and capable of giving evidence. In addition, it has to satisfy the requirements of Section 63 of the Indian Succession Act, 1925. In order to assess as to whether the Will has been validly executed and is a genuine document, the propounder has to show that the Will was signed by the testator and that he had put his signatures to the testament of his own free will; that he was at the relevant time in a sound disposing state of mind and understood the nature and effect of the dispositions and that the testator had signed it in the presence of two witnesses who attested it in his presence and in the presence of each other. Once these elements are established, the onus which rests on the propounder is discharged. But where there are suspicious circumstances, the onus is on the propounder to remove the suspicion by leading appropriate evidence. The burden to prove that the Will was forged or that it was obtained under undue influence or coercion or by playing a fraud is on the person who alleges it to be so.

105. In the present case the grounds of suspicion are manifold. It does not appear from the evidence that the propounder has been able to satisfactorily demonstrate that Benoy Krishna was physically or mentally as sound as being able to execute his Will. In that regard the propounder has even sought to deny that his father having been diagnosed with cancer. There is also the mystery as to how the presence of Lal Mohan and Nemai Maity were arranged at the time of the execution of the alleged Will when their assertion that it was Kamala who ensured their presence, has been completely denied by the widow. There is also suspicion, not so much in the unevenness of the bequest under the alleged Will, but in the propounder's attempt to try and underplay the obvious unevenness in ascribing unrealistic values to the properties in the affidavit of assets.

106. Prabir has also floundered having once pitched his case as high as to suggest that his "father returned home fully cured and used to take part in...domestic works including going to market, and he used to manage the...entire ejmali properties at that time." If such was the state of health, it is inconceivable that registration would be caused on commission. If he was temporarily ill, as attesting witness and lawyer Shyamal Mukherjee claimed, the registration could have been done when his health improved.

107. The learned Court below erred in failing to see on the basis of the material before it that there were serious doubts as to the execution of the alleged Will. It

was not prudent to disbelieve the testimony of Sukriti on the basis of the lone, and somewhat incongruent, sentence from Gita Jana's evidence.

108. The learned Trial Judge did not wonder how the alleged execution came to be planned, performed and perfected unbeknown to Prabir. He erred in not doubting Prabir's assertion that Prabir got to know of the alleged Will, not from wife Amita who had identified the alleged testator at the registration or from mother Kamala who had accidentally stumbled upon the execution party, but only after the registered document came ultimately to be in his possession after the death of the alleged testator.

I agree with His Lordship that the propounder has failed to prove due execution of the alleged Will and has altogether failed to remove the doubts relating to the testamentary capacity of the alleged testator.