

First Appeal**Present:****The Hon'ble Justice Kalyan Jyoti Sengupta****And****The Hon'ble Justice Debasish Kar Gupta****Judgment on: 13.05.2010.****F.A. 194 of 2001****Smt. Shibani Sadhukhan & anr.****Vs.****Anil Sadhukhan****Points:**

PROBATE, SUSPICIOUS CIRCUMSTANCES: Testatrix was 90 years of age-. P.W.2 said she died at the age of 85 and if his evidence is taken then she executed the Will at the age of 82- Difference of age 82 and 90 Whether a great difference and very significant-Whether contradictory evidence with regard to the age can be overlooked-Signing of Bakalamdar whether can be said to be a signature of an attesting witness- When a person acts an agent whether he become a third party- In granting probate whether court is required to look into suspicious circumstances- Indian Succession Act, 1925 S 63 .

Facts:

The grandson and the granddaughter herein against the judgment and decree granting probate of the testamentary instrument said to be last Will of one Smt. Surobala Debi, since deceased (hereinafter referred to as testatrix). The respondent being the sole executor and legatee of the said testamentary document applied for grant and the appellant herein contested the same basically on the ground that the same was not the document executed by the said testatrix. The case of the appellants that the said testatrix has no reason to deprive the appellants who are also grandson and granddaughter of

the said lady. The said document was allegedly executed at a very old age when she was lost her power of vision and hearing. There was no reason to deprive the appellants as they were having normally good relationship with their deceased grandmother. Old age rendered the lady completely incapacitated to do anything else let alone to execute any document. The said document was a forged one and it was executed under suspicious circumstances.

Held:

The plaintiff was all along with the testatrix who was at that point of time 90 years of age. P.W.2 has acted as Bakalamdar who has said she died at the age of 85 so if his evidence is taken as regards age then she executed the Will at least 3 years before the age of 82. So difference of age 82 and 90 is a great difference and very significant. Age is a great factor and the contradictory evidence with regard to the age cannot be overlooked so easily, however the learned trial Judge overlooked it.

Para 24

The function of the Bakalamdar is to act for specific purpose to sign the document in case of illiterate person. Signing of the P.W.2 in the document cannot be said to be a signature of an attesting witness, as an agent of a particular person cannot be attesting witness who must be an independent third party. When a person acts an agent he is really doing the job of the principal so an agent cannot become a third party.

Para-24

The evidence of the P.W.2 cannot be accepted because his testimony in cross-examination that Surobala was not known while in examination-in-chief he has said that she was an old client. It is very curious when the law does not require engagement of any agent even in case of illiterate executant of a Will why he acted as a Bakalamdar. He never acted at the instruction of Surobala

rather he obeyed instruction of the lawyer. These serious contradiction by the witness himself does not inspire confidence of the Court to accept testimony of this person. **Para-25**

P.W.1 is sole legatee and beneficiary and he has taken all parts in preparation, execution of the Will while bringing the lady at the Sealdah Court and the Sheresta of the lawyer concerned and he was told about contents of the Will by the lawyer. Although, he has feigned ignorance at one portion in his testimony in the cross-examination that he did not know the contents of the Will but the other witnesses has said that the contents of the Will was read over to him. The plaintiff has made a false statement in his application for grant of probate that there is no other heirs. When a particular person makes a false statement on oath his testimony should not be believed as he is an interested person. At the age of 90 it is impossible for a lady to move around from her home to court and Chamber of the learned lawyer on different days. The suspicious circumstances is shrouded in the execution attestation of the Will as has been indicated in analysis of evidence as to why the Will was at all required to be executed when the respondents claims that he is the only heir and legal representative and none else. It was not explained why an unknown Mohorar or an unknown lawyer or other persons were made attesting witnesses. It was not explained why any relation on any other person was not brought as an attesting witness. It was not explained at all why one of the witnesses became agent and/or attorney of the said lady. This burden of plaintiff/respondent is extremely heavy as he is the sole beneficiary and took active part in preparation and execution of the Will in the manner as indicated above. He however failed to discharge this burden abysmally.

The execution or attestation has not been done lawfully.

Paras- 25, 26,27,29 & 30

The duty of the Court while appreciating the evidence of the witnesses is to carefully analyse and scan reading answer to the examination-in-chief and cross-examination and to evaluate the same in its entirety. At the time of examination-in-chief the witness concerned is told before hand what is to be said in the court but what is to be told in the cross-examination cannot be foreseen and answer to the cross-examination in relation to the issues relevant, is more important than the answer given in examination-in-chief. It is true, there must be a contradiction after lapse of considerable time, and contradiction in the testimony of the witnesses is quite natural and if there is no contradiction then the court reasonably presume the evidence is tutored. But this does not mean that contradiction which are serious in nature and goes to a situation of belief and disbelieve on the fact in issue has to be considered and regarded. The learned trial Judge, however, could not notice the said vital contradiction with regard to attestation execution of the Will.

Para-34

Cases Cited:

AIR 1959 SC 443 (H. Venkatachala Iyengar v. B.N. Thimmajamma and others)

Smt. Jaswant Kaur v. Smt. Amrit Kaur and others reported in AIR 1977 SC

Ramchandra Rambux v. Champabai and others reported in AIR 1965 SC 354

Ram Datta v. Atanu Datta reported in 1999 (1) CHN at page 35

Rambhai Padmakar Pati v. Rukminibai Bishnu Vekhandi reported in AIR 2003 SC 3109

Prabal Kumar Chakraborty v. Arijit Chakraborty reported in 2003 (4) CHN 10

Gunjarani Das v. Sunil Chandra Das reported in 2003 (2) CLJ Cal

Indubala Bose v. Manichandra Das reported in AIR 1982 SC 133

**For the Appellants: Mr. Sabyasachi Bhattacharya,
Ms. Sahini Bhattacharya.**

For the Respondent: Mr. Ram Krishna Ray.

The Court:

This was an appeal at the instance of the caveator/defendant against the judgment and decree granting probate of the testamentary instrument said to be last Will of one Smt. Surobala Debi, since deceased (hereinafter referred to as testatrix). The respondent being the sole executor and legatee of the said testamentary document applied for grant and the appellant herein contested the same basically on the ground that the same was not the document executed by the said testatrix. The said document was executed under the suspicious circumstances apart from same being illegal on account of unusual and unnatural method of the disposition.

2. It was alleged in the written statement by the appellants that the said testatrix has no reason to deprive the appellants who are also grandson and granddaughter of the said lady. The said document was allegedly executed at a very old age when she was lost her power of vision and hearing. There was no reason to deprive the appellants as they were having normally good relationship with their deceased grandmother.

3. Learned Trial Judge having read the pleadings of both the sides framed the following issues:-

- (i) Is the suit maintainable?
- (ii) Did Smt Surobala Debi execute any will on 2nd October 1986, if so was it her last will and testament?
- (iii) Was the instrument duly executed and attested?

- (iv) Is the plaintiff entitled to grant of probate as applied for?
- (v) What relief, if any, is the plaintiff entitled?

In order to prove the case the executor propounder/respondent examined three witnesses including himself, out of them two were said to be attesting witnesses. Similarly the defendants in order to demolish the case of the propounder/respondent examined three witnesses including appellant No.2, out of them two are third party witnesses. The learned trial Judge after having read the evidence of both the sides has come to conclusion that the said Will has been lawfully executed and attested and the learned Judge also found the testatrix was having physical and mental ability to execute the same document. As such overruling objection made by the appellants herein learned trial Judge granted probate of the Will.

4. Mr. Sabyasachi Bhattacharjee, learned counsel appearing with Ms. Bhattacharjee while highlighting the grounds made in the memorandum of appeal submits that the Will has not been factually and lawfully executed by the said lady. Old age rendered the lady completely incapacitated to do anything else let alone to execute any document.

5. He submits that it will appear from the evidence of the witnesses of the plaintiff/respondent that the said document was a forged one and it was executed under suspicious circumstances. It was not the document executed by the lady and this will appear from the serious contradiction as to the date and timing of the execution of the Will. The story made out for drafting and preparation of the alleged document and also the presence of the said lady was completely improbable if not impossible having regard to her physical incapacity. Each and every witness has contradicted among themselves in their evidences, if the evidence of each and every witnesses is read juxtaposition carefully, with regard to the date of execution of the Will, as well as preparation of the document.

6. He also submits that the respondent/plaintiff being the sole legatee of the Will had taken active role and part for procuring this document. It has not been explained with the cogent evidence why he was involved in alleged preparation and execution of the Will.

7. It will appear from the document that P.W.2 namely one Kishori Mohan Saha has acted as Bakalamdar (authorized agent to sign). A Bakalamdar cannot act as an attesting witness under the law. As such, his evidence cannot be accepted as that of attesting witness even if it is accepted. It is not understood as to why he was required to act as a Bakalamdar when law does not require for appointment for execution of the Will and particularly when the lady herself admittedly is alleged to have put her thumb impression on the document. Actually, the said Kishori was the man of the plaintiff and his evidence should be disbelieved together. Learned trial Judge has failed to notice the serious contradiction with regard to the evidence amongst the witnesses of the plaintiff themselves. This contradiction led to only conclusion of impossibility of happening of anything else.

8. He further submits that it is surprising without mentioning the name of the appellants as heirs and legal representatives in case of death intestacy in the application for grant of probate the plaintiff/respondent surreptitiously applied for grant. He has drawn support of the following decisions for his argument:-

(i) The decision of the Supreme Court reported in AIR 1959 SC 443 (H. Venkatachala Iyengar v. B.N. Thimmajamma and others) wherein it has been ruled amongst other that the burden of proof for removal of suspicious circumstances lies on the propounder. It is also the duty of the court to see the propounder has discharged the duty even if such a plea is not taken by the defendant/the contestant.

(ii) The decision of the Supreme Court in case of Smt. Jaswant Kaur v. Smt. Amrit Kaur and others reported in AIR 1977 SC wherein the principle laid down in the case of H. Venkatachala case (Supra) has been followed and reiterated to the effect that it is the duty of the court to see that the propounder has removed all the suspicious circumstances.

(iii) In the case of Ramchandra Rambux v. Champabai and others reported in AIR 1965 SC 354 on the plea that it is open to look into surrounding circumstances as well as the probabilities so that it may be able to form a correct idea of the trustworthiness of the witness.

(iv) The Division Bench of this Court in Ram Datta v. Atanu Datta reported in 1999 (1) CHN at page 35 it is held that in case of exclusion of natural heirs a propounder has to explain as to why such exclusion took place and particularly when the testatrix was in care and custody of the propounder.

9. Mr. Ramkrishna Roy appearing for the respondent submits while supporting the judgment of the learned trial Judge that the learned court below having appreciated the evidence and believing the same come to the conclusion that the Will has duly been executed and attested.

10. He submits that there are three witnesses who have proved not only the execution attestation of the Will but also preparation of the same. The evidences given in support of the plaintiff was clear and cogent that the lady duly executed the Will and it was attested by as many as three attesting witnesses.

11. He further submits that each and every circumstances cannot be said to be suspicious one. Even if the evidence of P.W.1 as attesting witness is discarded still then his evidence being Bakalamdar has corroborative value of the execution and attestation of the Will. Another attesting witness namely P.W.3, Sunil Kumar Kundu has proved the attestation and execution of the Will.

There has been no concrete prove to establish that the said lady was unwell and having incapacity to execute the document. The appellants/defendants have failed to prove with a cogent evidence that they were the sons and daughters of one Bedanabala Sadhukhan @ Kalidasi Sadhukhan. To support his submission he has brought for the assistance of this Court following decisions:-

- (i) The decision of the Supreme Court in case of Rambhai Padmakar Pati v. Rukminibai Bishnu Vekhandi reported in AIR 2003 SC 3109 on the proposition that exclusion of heirs would not cast any doubt as to authenticity of the Will.
- (ii) The decision of this Court in case of Prabal Kumar Chakraborty v. Arijit Chakraborty reported in 2003 (4) CHN at page 10 on the principle that when there is no evidence of coercion or undue influence nor any suspicious circumstances having been proved and further at the time of execution the testatrix were physically and mentally fit the Court cannot refuse to grant probate of the Will.
- (iii) The Division Bench of this Court in case of Gunjarani Das v. Sunil Chandra Das reported in 2003 (2) CLJ Cal is placed on the principle that in absence of any proof as to physical unfitness or inability or further lack of mental alertness the age of the person is no bar to execute a Will or the Court will disbelieve automatically because of the age.
- (iv) The decision of the Supreme Court in case of Indubala Bose v. Manichandra Das reported in AIR 1982 SC 133 is cited on the principle that any and every circumstances is not a suspicious circumstances and circumstances would be suspicious when it is not normally expected in a normal situation or nor accepted by a normal person.

12. We have heard the learned counsel for the parties and we have gone through the pleadings and evidence both oral and documentary. It is well settled position of law when any challenge is thrown as regard appreciation of evidence by the litigant on the ground of the same being wrong

and absurd, the Appellate Court will certainly examine however bearing in mind that the Appellate Court will not endeavour to upset appreciation easily. In rare case it is done and one of such rare cases in our view is that when a reading of the evidence by the learned Appellate Court reveals that the learned First Court has not taken into consideration of the impact of the cross-examination of testimony of any witness.

13. It appears as appropriately submitted by Mr. Bhattacharjee learned Advocate we find following flaws in the judgment in the matter of appreciation of evidence:

- (i) While appreciating the evidence adduced by the plaintiff the learned Judge has picked up selectively sum and substance of the examination-in-chief and basing thereon recorded evidentiary value. The learned trial Judge did not consider impact of the cross-examination of the witnesses.
- (ii) The learned trial Judge did not even discuss the implication of the evidence of the defendants in order to examine the core issue whether at the old age the testatrix was in a position to do anything else or to execute any document.
- (iii) The learned Judge did not think to decide whether there exists suspicious circumstances, or there was any necessity to remove the same.

Thus we feel it necessary to analyse the evidence of each and every witnesses.

14. P.W.1 the respondent himself has said in his examination-in-chief that the testatrix met the learned lawyer at Sealdah Civil Court namely one Debendranath Dey who drafted the Will on her instruction. He has said that he has been residing from his boy-hood in the suit property with the testatrix. He was present when the Will was drafted at the Sealdah Court and he was also present when Surobala executed the Will in the house of the learned lawyer Debenbabu in presence of the witnesses. He has testified that before execution, the lawyer read over and explained the contents

of the Will. After having known and understood the contents of the Will Surobala put L.T.I. The other persons namely Kishori Mohan Saha, Ganesh Ghosh signed the Will as attesting witnesses. He has admitted that one Bedanabala Dasi was one of the heirs and she was his aunt. He denied that the appellants are the sons and daughters of Bedanabala. He has denied that Bedanabala married second time and the present defendants/appellants are the sons and daughters of the second marriage. His version in his examination-in-chief is that the defendants are not heirs and legal representatives of Bedana.

15. In the cross-examination he has admitted that at the time of execution of the Will the testatrix was 92 years old and three years thereafter she died. He has also admitted in the cross-examination that Surobala could not read papers and documents as she was illiterate. She has died of old age ailments and Asthma. He has also admitted that he accompanied Surobala to reach the residence of lawyer who drafted the Will. He accompanied his learned lawyer with the draft of the Will to reach Sealdah Court to get it typed there. He further admitted that he met the lawyer in his residence for the purpose of getting the draft typed. In his cross-examination he has said that after the draft was typed, the typed Will was taken away by his lawyer to his residence. The said lawyer never visited the house of Surobala in connection with the Will. He has also said that after lapse of one week from the date of drafting the Will was typed and on one occasion he accompanied Sorobala to go to the house of lawyer. He cannot recollect the date when Surobala executed the Will in the residence of the lawyer. He said that even after execution of the Will Surobala did not tell him that she gave the property to him. In his evidence, in cross-examination, according to him he was ignorant of the contents of the disposition, Surobala took the Will after execution and kept in her box. In the first

day of examination-in-chief it was said by him that the Will in question was not the last Will of Surobala Dasi which was sought to be explained away by him in re-examination.

16. One Kishori Mohan Saha in his examination-in-chief has said that Debenbabu drafted the Will as per instruction of Surobala Dasi and it was finally typed at Sealdah Civil Court. The typing of the Will was done under supervision of the Surobala Dasi and thereafter, the said typed Will was taken by Deben Babu.

17. He said in examination-in-chief that Surobala namely testatrix was old client of the Sheresta of another lawyer under whom he was working. He acted as Bakalamdar. He signed the Will in the capacity of the Bakalamdar of the said testatrix as well as attesting witness. He has said that Deben Babu who drafted the Will read over the content of the Will to the said lady. He was present at the time of execution of the Will. He has also said that the lady put her thumb impression first, thereafter, he signed and then one Ganesh Ghosh and Sunil Kumar Kundu successively signed as attesting witnesses.

18. In cross-examination, he has admitted that Surobala never came to their Sheresta in connection with any suit. In his cross-examination, it appears that he was not having any personal terms or acquaintance with the said testatrix. He admitted that the propounder accompanied Surobala to the residence of Deben Babu and Sealdah Civil Court. He has admitted that whatever he has done he has done acting as Bakalamdar and an attesting witness as per instruction of the learned lawyer. He came to know Surobala in the Chamber of Daben Babu and before that he was not acquainted with the lady. He has admitted in his cross-examination that all the other attesting witnesses signed as per instruction of Debenbabu, the learned lawyer. He admitted that Surobala never talked to him in connection with the Will. He has said in the cross-examination that on the date of typing the Will

was executed in the residence cum chamber of Deben Babu at night. At that night at about 8/8.30 p.m. the Will was executed. He said that the age of the Surobala was 85 and 86 at the time of her death. He had admitted in cross-examination that on the date of execution of the Will Surobala for the first time saw those attesting witnesses in the residence cum Chamber of Deben Babu.

19. P.W.3, Sunil Kumar Kundu has said in examination-in-chief that he had no personal knowledge if Surobala died. He has said that he executed the Will on one holiday as per instruction of Deben Babu, and her grandson was present in the Chamber at the time of execution of Will. Accordingly, they came to his Chamber at night. Deben Babu finally read over the contents of the typed Will to Surobala and her grand son. Thereafter Surobala put her L.T.I. on the Will in execution of the same.

20. P.W.2, Kishori Mohan Saha acted as Bakalamdar as Surobala did not sign the Will, she put L.T.I. He signed the Will as an attesting witness. In his presence Surobala put her L.T.I. In cross-examination, he has admitted that he had no acquaintance with Surobala independently. He had no direct knowledge as to the descendent of Surobala. He did everything in connection with the Will as per direction of his senior Daben Babu and he did not receive any remuneration from Daben Babu. Surobala did not give any instruction to him. He and Surobala reached there at 10 a.m. on the date of typing of the Sealdah Court. He did not see either Daben Babu or Surobala talking each other. He has said that Daben babu drafted the Will on the date of typing of the Will at Sealdah Court. In his cross-examination he has said that after two or three days of typing the Will was executed. In the cross-examination he has said that he and Kishori Mohan Saha signed as a witness at the time of execution. Other witnesses did not sign in his presence nor he can say at whose instruction they signed the Will.

21. The D.W.1 has testified that he had good relation with grandmother/testatrix and the plaintiff is his cousin being the son of his uncle, whose younger brother married his mother Bedana who became widow at the young age. Bedana was seriously ill before her death. The testatrix herself used to come to their house and used to nurse his mother. After death and even on the date of Sradh ceremony testatrix and the plaintiff came. He has said also that the testatrix due to her old age could not hear nor could see anything or was not in position to move around at the time of execution of the Will. Of course, she could not produce any document supporting the case of illness of his grandmother.

22. D.W.2, one Sobharani Chowdhury has said in her testimony that she was a tenant of the said testatrix. She has corroborated the version of the D.W.1 that Kalidasi @ Bedana was the mother of the appellants and her husband was one Ratan Sadhukhan who married the said Kali Dasi @ Bedana. She had seen testatrix to come to the house of mother of the defendants at the time of her illness. She used to nurse. She also had seen Surobala coming at the time of death and also Sradh ceremony. She has also said that Surobala was not keeping good health at that point of time.

23. D.W.3 namely one Hari Sadhan Saha is another tenant of said Surobala (testatrix). He has said that the plaintiff/respondent is the relation of the defendants namely cousin. The defendants/appellants are the daughter and son of Bedana out of the marriage with Ratan. She has said Surobala generally could not go out of her house during 4 or 5 years before her death and at that time she used to behave unusually. Bedanabala, mother of the appellant died in November 1982 as she had been suffering from Tuberculosis before her death. During her sufferings Surobala used to come and nurse her. She has denied the suggestion that Bedanabala was always seen as

widow. She has also said that Bedanabala has one husband previously and died at her early age thereafter Bedanabala married said Ratan Sadhukhan.

24. From aforesaid analysis of evidence it emerges the plaintiff was all along with the testatrix who was at that point of time 90 years of age. P.W.2 has acted as Bakalamdar who has said she died at the age of 85 so if his evidence is taken as regards age then she executed the Will at least 3 years before the age of 82. So difference of age 82 and 90 is a great difference and very significant. Age is a great factor and the contradictory evidence with regard to the age cannot be overlooked so easily, however the learned trial Judge overlooked it. P.W.2 has admitted he acted as Bakalamdar. According to us the function of the Bakalamdar is to act for specific purpose to sign the document in case of illiterate person. According to us, signing of the P.W.2 in the document cannot be said to be a signature of an attesting witness, as an agent of a particular person cannot be attesting witness who must be an independent third party. When a person acts an agent he is really doing the job of the principal so an agent cannot become a third party.

25. It appears to us that evidence of the P.W.2 cannot be accepted because of apparently serious contradiction as we read his testimony in cross-examination that Surobala was not known while in examination-in-chief he has said that she was an old client. It is very curious when the law does not require engagement of any agent even in case of illiterate executant of a Will why he acted as a Bakalamdar. From his own evidence we find that he never acted at the instruction of Surobala rather he obeyed instruction of the lawyer. These serious contradiction by the witness himself does not inspire confidence of the Court to accept testimony of this person. We accordingly discard his evidence. As far as the testimony of P.W.1 is concerned he is sole legatee and beneficiary and he

has taken all parts in preparation, execution of the Will while bringing the lady at the Sealdah Court and the Sheresta of the lawyer concerned and he was told about contents of the Will by the lawyer. Although, he has feigned ignorance at one portion in his testimony in the cross-examination that he did not know the contents of the Will but the other witnesses has said that the contents of the Will was read over to him.

26. It is surprising P.W.1 in his application has said that there is no other heirs except himself. If it is his case that the defendants are not the heirs of Surobala in case of death intestacy, as they are not the children of Bedana, the daughter of Surobala then why the Will was at all required to be executed he could have inherited as a matter of course being sole heir. Therefore what prompted to bring about a Will to be executed is not explained. Actually, it appears from the intrinsic evidence called out from the testimony of the independent witnesses viz. D.W.2 and D.W.3 that the defendants/appellants are also the heirs and legal representatives of Surobala in case of death intestacy and in order to exclude them the said Will was got to be executed. When a letter was written to the learned lawyers by the appellant to the plaintiff who replying through his learned lawyer, did not deny that the defendants /appellants are the heirs and legal representatives of the Surobala rather insisted that Will has been executed by the said lady. Had it been the case what has been stated in the probate proceeding by the plaintiff then his first reaction would have been denial of claim of being heirs and legal representatives of the Surobala. In view of the aforesaid documentary evidence as well as independent testimony of the D.W.2 and D.W.3 we are of the view that the plaintiff has made a false statement in his application for grant of probate that there is no other heirs.

27. When a particular person makes a false statement on oath his testimony should not be believed as he is an interested person so, we totally discard the testimony of the P.W.1.

28. We now examine whether P.W.3 has been able to lend any assistance to lawful execution attestation of the Will. He has said in cross-examination he did not know Surobala at all. He had acted on the instruction of learned lawyer Daben Babu. He has said that this document was executed 3 or 4 days after the preparation of the final document whereas P.W.2 said that it was done on the date of typing of the Will. P.W.3 has said further that he has not seen other witnesses to sign when Surobala and he were there. Other attesting witnesses have not come forward to say as to when they signed it. It has been specifically stated by P.W.3 that Daben Babu merely read over the contents of the documents to Surobala and propounder. We fail to understand why it was at all necessary to read over the contents of the documents to propounder plaintiff unless he was eager to know whether the Will has been prepared making him legatee. Nowhere it has been said either by P.W.3 that the contents of the Will was explained to the lady who was admittedly illiterate and ignorant, about the legal niceties. It is said that there has been a draft but the draft has not been produced.

29. Moreover, we think that at the age of 90 it is impossible for a lady to move around from her home to court and Chamber of the learned lawyer on different days. The aforesaid aspect of the matter was not at all dealt with by the learned trial Judge as correctly pointed out by the learned counsel Mr. Bhattacharjee. In the Supreme Court decisions reported in AIR 1959 SC 443 it has been said it is the duty of the court to see whether there exists suspicious circumstances, even if it is true whether it has been explained away by the propounder satisfactorily.

30. The suspicious circumstances is shrouded in the execution attestation of the Will as has been indicated in our analysis of evidence as to why the Will was at all required to be executed when the respondents claims that he is the only heir and legal representative and none else. It was not explained why an unknown Mohorar or an unknown lawyer or other persons were made attesting witnesses. It was not explained why any relation on any other person was not brought as an attesting witness. It was not explained at all why one of the witnesses became agent and/or attorney of the said lady. This burden of plaintiff/respondent is extremely heavy as he is the sole beneficiary and took active part in preparation and execution of the Will in the manner as indicated above. He however failed to discharge this burden abysmally.

In our view, the execution or attestation has not been done lawfully.

In the case of Rampada v. Rukmini Bishnu Vekhanda reported in AIR 2003 SC 3109 the Supreme Court has explained the position of law with regard to the mode of execution and attestation of a Will. In paragraph 5 it is reiterated the proposition of law as follows:-

“Section 63 of Indian Succession Act deals with execution of unprivileged wills. It lays down that the testator shall sign or shall affix his mark on the Will or it shall be signed by some other person in his presence and by his direction. It further lays down that the Will shall be *(emphasis supplied)*

attested by 2 or more witnesses, each of whom has seen the testator signing affixing his mark to the Will or has seen some other persons signed the Will, in the presence and by the direction of the testator and each of the witnesses, shall sign the Will in presence of the testator.”

31. In the case here we have already noted that all the attesting witnesses have signed at the instance and direction of the learned draftsman lawyer not by the testatrix. P.W.3 has categorically stated in the cross-examination that other witnesses did not sign in my presence nor he could say at whose instruction they signed the Will. None of the witnesses of the P.W.1 has said when other

witnesses signed or whether in presence of the testator they have signed or not. 32. The evidence of this learned lawyer appears to be independent. Thus, the legal requirement of execution attestation has not been fulfilled. Hence, we hold that there has been no lawful execution or attestation of the Will.

33. When we hold there is no lawful execution attestation of Will or at least there is no proof to this effect the decisions cited by the learned counsel for the respondent are not at all applicable nor do we consider to deal with the same. Learned trial Judge, in our view, has not examined this aspect of the matter and he has picked up the evidence of the P.W.s perfunctorily and has accepted the evidence mechanically.

34. The duty of the Court while appreciating the evidence of the witnesses is to carefully analyse and scan reading answer to the examination-in-chief and cross-examination and to evaluate the same in its entirety. At the time of examination-in-chief the witness concerned is told before hand what is to be said in the court but what is to be told in the cross-examination cannot be foreseen and answer to the cross-examination in relation to the issues relevant, is more important than the answer given in examination-in-chief. It is true, there must be a contradiction after lapse of considerable time, and contradiction in the testimony of the witnesses is quite natural and if there is no contradiction then the court reasonably presume the evidence is tutored. But this does not mean that contradiction which are serious in nature and goes to a situation of belief and disbelieve on the fact in issue has to be considered and regarded. The learned trial Judge, however, could not notice the said vital contradiction with regard to attestation execution of the Will.

Thus, this appeal succeeds.

Hence, we set aside the decree granting probate of the Will.

There will be no order as to costs.

(K.J. Sengupta, J.)

I agree.

(Debasish Kar Gupta, J.)