H. Venkatachala Iyengar

Vs

B. N. Thimmajamma & Others

Civil Appeal No. 18 of 1955

(T. L. Venkatarama Ayyar, P. B. Gajendragadkar, A. K. Sarkar JJ)

13.11.1958

JUDGMENT

GAJENDRAGADKAR, J. -

This appeal arises from a suit brought by the appellant in the court of the Subordinate Judge, Mysore, as the sole executor of the will alleged to have been executed by one Lakshmamma on August 22, 1945, (Ex. A). In this suit the appellant claimed a declaration that the said Lakshmamma was the owner of the properties mentioned in the schedule attached to the plaint and as such was entitled to dispose of them by a will; and he asked for consequential reliefs purporting to give effect to the bequests made by the said will. The schedule attached to the plaint describes the properties covered by the will under five items. First three items in the schedule refer respectively to 5, 4 and 4 agricultural lands at Hampapura village, whereas the fourth item includes 9 lands at Arjunahalli village and the last item is a vacant site in Hampapura village. According to the plaint, under the will respondent 1 was entitled only to a life interest in items 1 and 2 and that on her death the said items would vest in respondents 2 to 4 and respondent 5 respectively. Since respondent 1 was in possession of all the five items, the appellant claimed a decree for possession against respondent 1 in respect of items 3, 4 and 5 and a declaration that respondent 1 was to have only a life interest in items 1 and 2. By his plaint the appellant also claimed to recover Rs. 2,100 which had been collected by respondent 1 by way of income from the suit lands and a further prayer was made for the payment of current mesne profits by respondent 1.

Before referring to the pleadings of the parties it would be relevant to mention the material facts in regard to their relationship which are not in dispute. One Annaji Iyengar who died in July 1903 left behind him his adopted son, the appellant, and two daughters Gundamma alias Ranganayakamma who is still alive and Lakshmamma alias Achamma who is alleged to have executed the will in suit and died thereafter on September 26, 1945, at Mandya. Respondents 2 to 4 are the sons of the appellant. Lakshmamma was married to Sadagopalachar who died in December 1908. The couple had three children, a son named Narayana Iyengar who died on January 14, 1944, without any issue and left behind him his widow respondent 1; and the two remaining children of Lakshmamma were daughters Thirumalamma and Yadugiramma. Both of them are dead. Thirumalamma was married to one G. Parthasarathy Iyengar by whom she had a son of weak intellect, who died pending litigation, and three daughters Neelu, Jaya and Padmini. Yadugiramma was married to Kalbagal Garudachar and by him she had a son Narasimha Iyengar, respondent 5, and daughter Lilly. Kalbagal Garudachar had a son S. G. Kalbagal (hereinafter described as Junior Kalbagal) from his first wife. Jaya was married to Kalbagal Junior. The claim made by the appellant under the will is resisted by respondent 1. Respondents 2 to 5 have not appeared in the proceedings.

According to the case set out by the appellant in his plaint Annaji Iyengar had made a gift of properties, items 1 and 2, in favour jointly of Lakshmamma and Sadagopalachar under a registered deed of gift on February 16, 1902 (Ex. D). It was also alleged that the said Annaji Iyengar had executed a will on August 31, 1901, (Ex. B2(a)) under which he had bequeathed in favour of Lakshmamma and Sadagopalachar hypothecation bonds to the extent of Rs. 10,320 as gift with the express stipulation that the survivor of the legatees should take the whole of the bequest by survivorship. The appellant alleged that Sadagopalachar was a man of very moderate means and had given up his petty job in the registration means and had given up his petty job in the registration department in order to manage the properties received by him and his wife from Annaji Iyengar. During the course of the management Sadagopalachar used the cash of Rs. 10,320 received by bequest under the will of Annaji Iyengar to buy some immoveable properties including items 3 and 4. Since Sadagopalachar pre-deceased his wife Lakshmamma, all his rights in the properties acquired under the gift deed as well as those subsequently purchased devolved on Lakshmamma alone by survivorship. That is how she became the absolute owner of the said properties. Alternatively it was alleged by the appellant that even if survivorship did not apply and so her on Narayana Iyengar acquired interest to half the share in the properties covered by the gift deed, he had during his lifetime sold away considerable properties of his father and mother much above the value of his half share and in consequence the remaining properties which represent Lakshmamma's half share became her absolute properties. On this alternative ground the absolute title of Lakshmamma will regard to all the properties in suit was set up. The appellant thus claimed that Lakshmamma was entitled to make a will and asked for a declaration in that behalf and consequential reliefs so as to give effect to the terms and dispositions of the will. According to the appellant the will propounded by him was the last testament of Lakshmamma and it had been executed by her voluntarily and of her own free will while she was in a sound and disposing state of mind.

Respondent 1 disputed the appellant's claim. She denied that Annaji Iyengar had made a will on August 31, 1901, or that Lakshmamma and Sadagopalachar had received the moveables of the value of Rs. 10,320 under it. According to her, the gift deed (Ex. D) did not provide for devolution of interest by survivorship; she pleaded that Lakshmamma had transferred all her interests in the properties comprised in the gift deed in favour of her husband Sadagopalachar who then became their sole owner. Respondent 1 did not admit that the properties subsequently purchased by Sadagopalachar including items 3 to 5 were purchased with any monies bequeathed to him and his wife by Annaji Iyengar; according to her, Sadagopalachar had made these purchases with his own funds. Respondent 1's case was that, after the death of his father Sadagopalachar, her husband Narayana Iyengar became the absolute owner of all the properties and so Lakshmamma was not competent in law to make a will in respect of any of them. She further alleged that the will set up by the appellant was not genuine or valid and that at the material time Lakshmamma was not in a sound and disposing state of mind. She contended that the will had been brought into existence through the machinations of the appellant and she disputed the appellant's right to bring the present suit.

On these pleadings the learned trial judge framed fifteen issues. He found that the will executed by Annaji Iyengar on August 31, 1901, was genuine and valid; and that the rule of survivorship was applicable as between the legatees inter se in respect of the properties conveyed by the said will. It was, however, held that the rule of survivorship did not apply to the properties gifted to Sadagopalachar and Lakshmamma under Annaji's deed of gift (Ex. D) which was held to be genuine and valid. In regard to the properties subsequently purchased by Sadagopalachar the learned judge said that "in fairness to the parties he would like to hold that various survey numbers in items 3 and 4 had been purchased by Sadagopalachar out of the joint income from the properties bequeathed to

him and his wife by Annaji as also from the properties and through income which he got at a partition between himself and his coparceners" (Ex. F). The purchases made by Narayana Iyengar were held to have been made out of the income of the properties of his father and of his mother. The learned judge rejected the plaintiff's case that Narayana Iyengar had disposed of his properties equivalent to his right under the gift deed of Annaji (Ex. D) and held that he was the owner of the properties which had vested in his father. In the result, according to the learned judge, Lakshmamma had a half share in all the properties in suit and so she was competent to make the will in respect of the said share. The learned judge then considered the question as to the execution of the will set up by the appellant and came to the conclusion that the will (Ex. A) was genuine and valid to the extent of the share belonging to the testatrix. The learned judge also found that the suit was maintainable, was not barred by time and had been properly filed. As a result of these findings the learned judge declared that Lakshmamma was the full owner of half the share in the scheduled properties and that respondent 1 under the will had only a life interest in respect of the said half share in items 1 and 2. As a consequence of this declaration the decree passed by the learned judge directed respondent 1 to put the appellant in possession of Lakshmamma's half share in items 3, 4 and 5; it also ordered respondent 1 to pay to the appellant a sum of Rs. 1,050 out of the past mesne profits recovered by her. An enquiry into future mesne profits was also directed under O. XX, rule 12. In view of the fact that the appellant had succeeded only in regard to half the properties in suit the decree asked the parties to bear their own costs.

Against this decree respondent 1 preferred an appeal in the High Court of Mysore; and the appellant filed cross objections. The High Court held that the appellant had not established that when Lakshmamma was alleged to have executed the will she was in a sound and disposing state of mind or that it was her will in the sense that it represented her intentions. According to the High Court, in the light of this finding "it might be unnecessary to consider the other issues in the case." Even so the High Court proceeded to indicate its conclusions on two of such issues. It held that the appellant had entirely failed to prove that the money for the purchase of items 3, 4 and 5 came out of any bequest under Annaji's will (Ex. B2(a)) or the incomes from the properties covered by the gift deed (Ex. D) and so in its opinion Lakshmamma could not claim any share in the said properties. On the other hand, the High Court indicated that it was inclined to accept the plea raised by respondent 1 that Lakshmamma had transferred all her interest in the properties comprised in the said deed of gift in favour of her husband Sadagopalachar; and since in its opinion "Lakshmamma at no time appears to have claimed that she had any interest in those properties, there was considerable force in the argument urged by respondent 1 that Lakshmamma must have relinquished her interest in the said properties and waived her rights in favour of her husband". The High Court thought that the learned trial judge had not fully considered all the material bearing on this point and so was in error in holding that at the relevant date Lakshmamma had a subsisting interest in half the share even in the suit properties, items 1 and 2. Having thus indicated its decision on the two issues the High Court has observed that even if it had found in favour of the appellant on these two points it would not have been of any help to him because his case must inevitably fail when it is held that the will set up by him was not proved to be the last will and testament of Lakshmamma. In the result the appeal preferred by respondent 1 was allowed, the cross-objections filed by the appellant were rejected and his suit was dismissed. In the circumstances of the case the High Court made no orders as to costs.

The appellant then applied for and obtained a certificate from the High Court that the decision under appeal is one of reversal and it involves a claim respecting properties of the value of not less than Rs. 20,000. In pursuance of this certificate the High Court ordered that the appeal to this Court should be admitted; and so this appeal has come to this Court.

Since the main contention raised by the appellant is directed against the finding of the High Court that the will in question is not proved to be the last will and testament of Lakshmamma, it would be necessary to refer to the broad features, and dispositions, of the will and the evidence adduced by the appellant to prove its execution. At the material time Lakshmamma was about 64 years of age. She usually resided at Hampapur; but about a month before the execution of the will she had gone to Mandya to attend the marriage in the house of Junior Kalbagal. After the marriage was over she would normally have returned to Hampapur but she fell ill and had to extend her stay with Junior Kalbagal. The appellant's case is that she had told him that she wanted to execute a will and had given him instructions in that behalf. This talk had taken place between her and the appellant about a year before the execution of the will. The appellant, however, did not find time to get the will written. When Lakshmamma fell ill at Mandya the appellant had gone to visit her and she pressed the appellant to prepare the draft of her will in accordance with her instructions. So the appellant prepared a draft at Mysore a day prior to the execution of the will. He then went to Mandya by the morning train on August 22, 1945, and the will was got written about 11 or 11-30 a.m. The appellant had the draft in his hand from which he dictated to the scribe Chokkanna (P.W. 3) who wrote the will. After the will was written the scribe took it to the adjoining room where Lakshmamma was lying in bed. The will was then read out to her and was signed by her in five places (Exs. A-1 to A-5). Subsequently it was attested by two witnesses Krishnamurthy Rao (P.W. 1) and Narasimha Iyengar (P.W. 2). Some time later during the course of the day the Sub-Registrar came to the house of Junior Kalbagal and in his presence the will (Ex. A) was duly registered. On the same day at about the same time Lakshmamma executed a power of attorney in favour of the appellant (Ex. EE) and this document was also duly attested and registered. The appellant has examined himself (P.W. 7), the two attesting witnesses (P.W. 1 and P.W. 2), the scribe (P.W. 3) and Junior Kalbagal (P.W. 4) in support of his case that the will was duly and validly executed by Lakshmamma.

The will is a fairly long document and its English translation spreads over eight printed pages. Though the dispositions in the will have occupied a small portion of the document it contains elaborate arguments in support of the averment of the testatrix that she was entitled to make a will in respect of all the properties mentioned in the will. The will begins with the recital about the illness of the testatrix and says "as I have felt in my mind that it is necessary to mention here certain matters clearly so that there may not be any kind of obstacles and obstruction at the instance of any in respect of my purposes coming into effect after my death I have got them written in detail." Then, the will refers to the gift deed executed by Annaji jointly in favour of the testatrix and her husband Sadagopalachar as well as to Annaji's will under which hypothecation bonds of the value of Rs. 10,000 were bequeathed to both of them. The will then refers to the fact that Sadagopalachar was possessed of only a house and a carriage shed and owned no other ancestral property. Even the said house was of "very ancient times and was in a dilapidated condition". According to the will Sadagopalachar held a small government job which he resigned in order to live in Hampapur and to look after the property obtained by gift from Annaji. "It was my opinion", says the will, "that he was probably looking after my share of the property in addition to his own and was improving the same. It is but natural to think in this manner mutually in respect of husband and wife". Then the will refers to the subsequent purchase of certain lands and avers that the amounts received by the couple from Annaji were utilised for the said purchase. The will then refers to the death of Sadagopalachar in 1908 and describes the management of the properties during the lifetime of Narayana Iyengar the son of the testatrix. It says that during Narayanan's minority the testatrix sold some properties at the advice and with the help of her Brother-in-law Srinivasa Iyengar for debts "without considering whether it was my share or my husband's share"; she also sold gold and diamond ornaments to meet

the urgent needs of the family. After Narayanan became a major he began to manage the property in consultation with Srinivasa Iyengar. Narayanan wanted to build a house for residence in Mysore and so he sold some wet lands situated at Sarvamanya Gaudhanahalli village. Narayanan had no issue and so he spent generously at the time of the marriage of the three daughters of his younger sister Thirumalamma. Besides he got ornaments prepared moderately for all of them and purchased and gave them as pin money some wet lands situated at Arjunahalli village. Narayanan purchased and gave some wet lands at the same village to the son of his second younger sister Kalbagal Narasimha Iyengar and to Singamma and Lalithamma. Then the will refers to certain purchases made by Narayanan and adds that the purchase of the said lands nominally stands in his name though the right to the property vested in the testatrix. The will then states that Narayanan had no issue and so he treated his younger sister's children as his own, attended to their education, marriage and other auspicious functions with great zeal. Having disposed of his properties for the benefit of the said children Narayanan considered that since he was the only son of the testatrix her share of the property was sufficient for the maintenance of himself and his wife and so he had no worry on that account. In other words, the will alleges that as a result of the alienations made by Narayanan be ceased to have any share in the properties that remained and in consequence the said properties belonged exclusively and solely to the testatrix. Then the will refers to the insurance amount of Rs. 4,000 which was paid to respondent 1 on Narayanan's death; and in regard to Narayanan's illness which ultimately resulted in his death the will adds that the testatrix herself had provided separate money for his medicinal and family expenses and that she had given Narayanan Rs. 3,000 which had been deposited with her Brother-in-law and the Reserve Bank share of Rs. 500 to enable him to purchase a house at Mysore. The will then refers to respondent in terms of affection and states that the testatrix was making a bequest for life of items 1 and 2 in her favour in order that she may lead her life without any difficulty. "Except me", says the will, "no one has any right whatever to the scheduled properties. They should go only to those for whom it is intended here according to my desire after my death but there is no reason whatsoever for their going to my agnates or any others. I am at full liberty to make dispositions hereby according to my desire".

After making these elaborate averments the will proceeds to make dispositions of items 1 to 5. Items 1 and 2 are given to respondent for life. "She shall have no right such as hypothecation, sale, gift, exchange, etc., of the said properties nor has she any right whatever to create liability in any way in favour of others". After her death respondents 2 to 4 are given item 1 and item 2 is bequeathed to respondent 5. Respondent 5 is described as an heir by the testatrix after her death and has been authorised to perform all her ceremonies. Item 3 is bequeathed to respondent 5 and item 4 to respondents 2, 3 and 4. Out of the 15 acres of land included in item 4, the bequest in regard to 9 acres is burdened with a charge in favour of certain legacies and charities mentioned in the will. The recipients of the legacies who are the relatives of the testatrix are named, and the charities are also specifically mentioned. Rs. 500 each have to be paid to her eldest daughter's third daughter Padminiamma, to her eldest daughter's son Thirumalachar and to Sudhakalyani, the daughter of her eldest daughter's second daughter Jaya and to Nagendra, son of Neelamma, the eldest daughter of her eldest daughter. Besides, Rs. 1,000 had to be used for conducting service in the Sannadi of Lakshminarayanaswamy at Hampapur on the respective dates of death of her husband, her son and herself. A sum of Rs. 500 has to be endowed for the Nandadipa service in the name of Narayanan in the Sannadi of Thirupati Venkataramanaswami, and Rs. 500 for similar service in the name of Sadagopalachar in the Sannadi of Channakeshavaswami, Belur, the place of the family in Hassan District. An amount of Rs. 1,000 has to be utilised for scholarship to poor students. In all Rs. 5,000 have to be spent for these legacies and charities. The will directs that if respondents 2 to 4 fail to make these payments within three years after the death of the testatrix the appellant who is

appointed the executor under the will should, after the expiry of the said three years, sell for reasonable price the lands charged in that behalf and should pay the full amount realised by such sale to carry out the aforesaid charitable works and to give effect to the legacies mentioned in the will. The will then avers that after her death the document would remain with the appellant and it adds that the testatrix has not executed any prior will but that in case any such will has been executed by her the same stood cancelled by the execution of the present will. The will then repeats the averment about the title of the testatrix and states that when Narayana Iyengar was alive he had sold about 17 acres of land situate at Adagur and other places for purchasing lands at Arjunahalli village for his sisters' children and so the testatrix had fully liberty to make a disposition in respect of the scheduled properties which were her own. The will also adds that though the said properties stand in the name of her son and rent notes in respect of them are similarly executed in favour of her son that does not affect her title to the said properties in any way. These are the broad features, and dispositions, of the will in question.

We would now indicate briefly the evidence led by the appellant on the question about the valid execution of the will. We have already mentioned that the two attesting witnesses, the scribe and the appellant himself have given evidence in support of the will. Mr. Krishnamurthy Rao (P.W. 1) was a medical officer to the Mysore Sugar Company, Mandya, and he knew the Junior Kulbagal who was working as a Cane Superintendent in the said factory. This witness was called by Kalbagal to attest the will and so he went to his house and saw that Lakshmamma was lying in her bed since she had an attack of paralysis on her left side. According to the witness her mind was clear and he attested the will after ascertaining from her that the document had received her approval. The witness was cross-examined in regard to his statement that he had treated Lakshmamma and it was brought out in his answers that though she may have been under his treatment for about a week he could not say if her name found a place in the hospital register. He, however, added that even patients who are treated in their houses would be mentioned in the hospital register if they come and take medicine from the hospital. The witness admitted that the will was not written in his presence and that it was already written before he went to attest it. When the witness was asked about the details of his signature on the will he gave answers which showed that he did not have any clear recollection as to what happened on that date. First he stated that he had put one signature but ultimately admitted that he had signed twice, once while he attested the will and also when the Sub-Registrar registered it in his presence. It fact some of his answers suggest that the witness did not even remember that he was present when the Sub-Registrar arrived and registered the document. The witness stated that the will was read in his presence but he did not know if the whole was read or only a few portions of it.

The next attesting witness is Narasimha Iyengar (P.W. 2). He was employed in Mandya Sugar Company Distillery. According to him the will was written in his presence and Lakshmamma put her signature on it also in his presence. In cross-examination, however, it appeared that his statement that he was present when the will was written may not be accurate. He did not know whether there was any draft already prepared and he saw none. According to him, after the will was written the appellant read out the will to Lakshmamma but according to the appellant the will was read out by the scribe. He stated that after the will was attested both he and P.W. 1 left the place but it is clear that P.W. 1 was present at the time of registration. The witness even did not Know whether Lakshmamma had any attack of paralysis. The evidence of the scribe (P.W. 3) and of the appellant (P.W. 7) clearly negatived Mr. Iyengar's statement that he was present at the time the will was written. The evidence of both the scribe and the appellant unmistakably shows that Mr. Iyengar was not present when the will was written.

Chokkanna (P.W. 3) the scribe is a relative of Kulbagal. The mother of Chokkanna and Kulbagal's

mother are sisters. He has written the will. According to him Lakshmamma stated that she wanted to execute a will and that she would agree to what the appellant would get written. The witness stated that the will was written according to the dictation of the appellant in the presence of Lakshmamma. The appellant had a draft with him. Except the appellant, Lakshmamma and the scribe none else was present when the will was written. The attesting witnesses came after the will was written. The witness then read the will to Lakshmamma who consented to the recitals and signed it. It may be pointed out that the account given by the scribe in respect of the writing of the will is somewhat different from the account given by the appellant. The appellant has stated that the will was written in one room and Lakshmamma was lying in the adjoining room and it was after the will was written that the scribe went into the adjoining room and read the will to her so that the statement of the scribe that the will was written in the presence of Lakshmamma is not supported by the appellant. In fact the appellant's statement is corroborated by the evidence of Junior Kulbagal in this matter.

Mr. Kalbagal (P.W. 4) does not seem to know about the intention of the testatrix to execute the will. It was when plaintiff asked him to get some attesting witnesses that he came to know that a will was going to be executed. He then went and brought P.W. 1 and P.W. 2 for attestation. This witness admitted that Lakshmamma was ill and was unable to get up and leave her bed. He heard about her intention to execute the will about 9 a.m. in the morning. He was not present when the will was written. He was, however, present when the will was read out by the scribe to Lakshmamma. His father Kalbagal Garudachar and his wife Jaya were also present. The witness then stated that the appellant brought the Sub-Registrar at about 5-30 p.m. and the Sub-Registrar registered the will. It would, however, appear from the application (Ex. VI) made to the Sub-Registrar inviting him to come to Kalbagal's house to register the will that it was not the appellant but the witness himself who had brought the Sub-Registrar.

The last witness in support of the will is the appellant himself, (P.W. 7). He has spoken to the instructions received by him from Lakshmamma a year before the date of the execution of the will and he has stated that he prepared a draft at Mysore a day before the will was executed and that the will was written by the scribe as he dictated the contents from the said draft. He had told Lakshmamma about what the draft contained but he admitted that the draft was not read out to her. The witness has then referred to the fact that the will was read out by the scribe to Lakshmamma and she consented to it, whereupon it was signed by her and subsequently attested by the two attesting witnesses. Then the witness refers to the registration of the document at about 5-30 p.m. On the morning of the day when the will was executed the witness was told by Lakshmamma that she would execute a power of attorney though the witness had not asked for it. A power of attorney was accordingly prepared and duly executed and registered. That in brief is the evidence on which the appellant relies.

It would be convenient at this stage to refer briefly to the reasons given by the courts below in support of their respective findings. The learned trial judge put the onus of proving the will on the appellant but he observed that "the proof that is necessary to establish a will is not an absolute or a conclusive one. What is required is only such proof as would satisfy a prudent man".

The learned judge then considered the evidence of the two attesting witnesses and the scribe and observed that "there can absolutely be no doubt that P.W. 3 wrote Ex. A at the time when it is said to have been written." He was of the opinion that the evidence of the scribe fully corroborates the evidence of P.W. 1 and P.W. 2. The learned judge then mentioned the fact that P.W. 4 who supported the appellant is no other than the husband of Lakshmamma's granddaughter. The evidence of the appellant himself was considered by the learned judge and his conclusion was that "it had to be

taken that Ex. A is a will executed by Lakshmamma and the signatures, Exs. A-1 to A-5 are those of Lakshmamma". The argument urged by respondent 1 that Lakshmamma could not have understood the contents of Ex. A was rejected by the learned judge and he observed that "when it is proved that Exs. A-1 to A-5 are signatures of Lakshmamma and that she executed Ex. A, it is to be presumed that the testatrix had the knowledge of the contents of the will". In the end the learned judge thus recorded his finding : "In view of the evidence and the presumption referred to above I think we deed not have any hesitation in holding that Lakshmamma executed Ex. A having fully understood the nature executed Ex. A and the recitals made therein".

The High Court, on the other hand, has taken a contrary view. The High Court thought that the evidence adduced by the appellant to prove the execution of the will was not satisfactory. It then examined the said evidence in some detail, criticised the discrepancies appearing in the said evidence, considered the probabilities and concluded that, on the whole, the said evidence would not justify the finding that the will had been duly executed by the testatrix. The High Court also thought that the appellant's version about the instructions given by Lakshmamma to him in the matter of the execution of the will was highly improbable; and, according to the High Court, the whole evidence of the appellant appeared to be unsatisfactory. The High Court then considered the question of onus and observed that since the appellant's sons had received a substantial benefit under the will and since he had taken a leading part in its execution, the onus was heavy on him to remove the suspicions attending the execution of the document and to establish that Lakshmamma had really understood its contents, had approved of them and had put her signatures on it when she was in a sound and disposing state of mind. It appears that the High Court also felt that the dispositions made by the will were unnatural and improbable; in particular it took the view that since the appellant had come into the family of Annaji by adoption it was very unlikely that his sons should have received such a substantial benefit under the will. In fact the judgment of the High Court appears to indicate that the High Court was inclined to hold that the testatrix may not have been in a sound and disposing state of mind at the material time. It is on these findings that the High Court reached its final conclusion that the appellant had failed to prove the due and valid execution of the will.

What is the true legal position in the matter of proof of wills ? It is well-known that the proof of wills presents a recurring topic for decision in courts and there are a large number of judicial pronouncements on the subject. The party propounding a will or otherwise making a claim under a will is no doubt seeking to prove a document and, in deciding how it is to be proved, we must inevitably refer to the statutory provisions which govern the proof of documents. Sections 67 and 68 of the Evidence Act are relevant for this purpose. Under section 67, if a document is alleged to be signed by any person, the signature of the said person must be proved to be in his handwriting, and for proving such a handwriting under sections 45 and 47 of the Act the opinions of experts and of persons acquainted with the handwriting of the person concerned are made relevant. Section 68 deals with the proof of the execution of the document required by law to be attested; and it provides that such a document shall not be used as evidence until one attesting witness at least has been called for the purpose of proving its execution. These provisions prescribe the requirements and the nature of proof which must be satisfied by the party who relies on a document in a court of law. Similarly, sections 59 and 63 of the Indian Succession Act are also relevant. Section 59 provides that every person of sound mind, not being a minor, may dispose of his property by will and the three illustrations to this section indicate what is meant by the expression "a person of sound mind" in the context. Section 63 requires that the testator shall sign or affix his mark to the will or it shall be signed by some other person in his presence and by his direction and that the signature or mark shall be so made that it shall appear that it was intended thereby to give effect to the writing as a will. This section also requires that the will shall be attested by two or more witnesses as prescribed.

Thus the question as to whether the will set up by the propounder is proved to be the last will of the testator has to be decided in the light of these provisions. Has the testator signed the will ? Did he understand the nature and effect of the dispositions in the will ? Did he put his signature to the will knowing what it contained ? Stated broadly it is the decision of these questions which determines the nature of the finding on the question of the proof of wills. It would prima facie be true to say that the will has to be proved like any other document except as to the special requirements of attestation prescribed by section 63 of the Indian Succession Act. As in the case of proof of other documents so in the case of proof of wills it would be idle to expect proof with mathematical certainty. The test to be applied would be the usual test of the satisfaction of the prudent mind in such matters.

However, there is one important feature which distinguishes wills from other documents. Unlike other documents the will speaks from the death of the testator, and so, when it is propounded or produced before a court, the testator who has already departed the world cannot say whether it is his will or not; and this aspect naturally introduces an element of solemnity in the decision of the question as to whether the document propounded is proved to be the last will and testament of the departed testator. Even so, in dealing with the proof of wills the court will start on the same enquiry as in the case of the proof of documents. The propounder would be called upon to show by satisfactory evidence that the will was signed by the testator, that the testator at the relevant time was in a sound and disposing state of mind, that he understood the nature and effect of the dispositions and put his signature to the document of his own free will. Ordinarily when the evidence adduced in support of the will is disinterested, satisfactory and sufficient to prove the sound and disposing state of the testator's mind and his signature as required by law, courts would be justified in making a finding in favour of the propounder. In other words, the onus on the propounder can be taken to be discharged on proof of the essential facts just indicated.

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

Apart from the suspicious circumstances to which we have just referred, in some cases the wills propounded disclose another infirmity. Propounders themselves take a prominent part in the execution of the wills which confer on them substantial benefits. If it is shown that the propounder has taken a prominent part in the execution of the will and has received substantial benefit under it, that itself is generally treated as a suspicious circumstance attending the execution of the will and

the propounder is required to remove the said suspicion by clear and satisfactory evidence. It is in connection with wills that present such suspicious circumstances that decisions of English courts often mention the test of the satisfaction of judicial conscience. It may be that the reference to judicial conscience in this connection is a heritage from similar observations made by ecclesiastical courts in England when they exercised jurisdiction with reference to wills; but any objection to the use of the word 'conscience' in this context would, in our opinion, be purely technical and academic, if not pedantic. The test merely emphasizes that, in determining the question as to whether an instrument produced before the court is the last will of the testator, the court is deciding a solemn question and it must be fully satisfied that it had been validly executed by the testator who is no longer alive.

It is obvious that for deciding material questions of fact which arise in applications for probate or in actions on wills, no hard and fast or inflexible rules can be laid down for the appreciation of the evidence. It may, however, be stated generally that a propounder of the will has to prove the due and valid execution of the will and that if there are any suspicious circumstances surrounding the execution of the will the propounder must remove the said suspicions from the mind of the court by cogent and satisfactory evidence. It is hardly necessary to add that the result of the application of these two general and broad principles would always depend upon the facts and circumstances of each case and on the nature and quality of the evidence adduced by the parties. It is quite true that, as observed by Lord Du Parcq in Harmes v. Hinkson ((1946) 50 C.W.N. 895) "where a will is charged with suspicion, the rules enjoin a reasonable scepticism, not an obdurate persistence in disbelief. They do not demand from the judge, even in circumstances of grave suspicion, a resolute and impenetrable incredulity. He is never required to close his mind to the truth". It would sound platitudinous to say so, but it is nevertheless true that in discovering truth even in such cases the judicial mind must always be open though vigilant, cautious and circumspect.

It is in the light of these general considerations that we must decide whether the appellant is justified in contending that the finding of the High Court against him on the question of the valid execution of the will is justified or not. It may be conceded in favour of the appellant that his allegation that Lakshmamma has put her signatures on the will at five places in proved; that no doubt is a point in his favour. It may also be taken as proved that respondent 1 has failed to prove that Lakshmamma was unconscious at the time when the will is alleged to have been executed. It is true she was an old woman of 64 years and had been ailing for some time before the will was executed. She was not able to get up and leave the bed. In fact she could sit up in bed with some difficulty and was so weak that she had to pass stools in bed. However, the appellant is entitled to argue that, on the evidence, the sound and disposing state of mind of Lakshmamma is proved. Mr. Iyengar, for the appellant, has strongly urged before us that, since these facts are established, the court must presume the valid execution of the will and in support of his contention he has invited our attention to the relevant statements on the point in the text books dealing with the subject. Jarman on "Wills" (Jarman on "Wills" - Vol. 1, 8th Ed., p. 50) says that "the general rule is 'that the onus probandi lies in every case upon the party propounding a will and he must satisfy the conscience of the court that the instrument so propounded is the last will of a free and capable testator'." He adds that, "if a will is rational on the face of it, and appears to be duly executed, it is presumed, in the absence of evidence to the contrary, to be valid." Similarly, Willims on "Executors and Administrators" (Williams on "Executors and Administrators" - Vol. 1, 13th Ed., p. 92) has observed that, "generally speaking, where there is proof of signature, everything else is implied till the contrary is proved; and evidence of the will having been read over to the testator or of instructions having been given is not necessary." On the other hand, Mr. Viswanatha Sastri, for respondent No. 1, contends that the statements on which the appellant has relied refer to wills which are free from any suspicions and

they cannot be invoked where the execution of the will is surrounded by suspicious circumstances. In this connection, it may be pertinent to point out that, in the same text books, we find another rule specifically mentioned. "Although the rule of Roman Law", it is observed in Williams, "that "Qui se scripsit haeredem" could take no benefit under a will does not prevail in the law of England, yet, where the person who prepares the instrument, or conducts its execution, is himself benefited by its dispositions, that is a circumstances which ought generally to excite the suspicion of the court, and calls on it to be vigilant and zealous in examining the evidence in support of the instrument in favour of which it ought not to pronounce, unless the suspicion is removed, and it is judicially that the paper does express the true will of the deceased" (Williams on "Executors and Administrators", Vol. 1, 13th Ed., p. 93).

It would, therefore, be necessary at this stage to decide whether an execution of the will in the present case is surrounded by any suspicious circumstances. Does the will appear to be on the whole an improbable, unnatural and unfair instrument as held by the High Court ? That is the first question which falls to be considered. We have already indicated that the preamble to the will contains many argumentative recitals. Indeed it would not be unjust to say that the preamble purports to meet by anticipation the main objections which were likely to be raised to the competence of Lakshmamma to make a will in regard to the properties covered by it. The preamble in great detail makes out a case that the properties received by the testatrix and her husband under the gift deed (Ex. D) devolved upon her by survivorship after her husband's death, a plea which has not been accepted even by the trail court. It also seeks to prove that the subsequent purchases made by her husband were in law the joint acquisitions of her husband and herself, a point on which the two courts below have differed. It sets out in detail the theory that the son of the testatrix has lost his right, title and interest in the properties which devolved on him after his father's death because he had alienated more than his share in the said properties during his lifetime; and it even suggests that during his illness and to help him to build a house in Mysore the testatrix had advanced him money from her separate funds, pleas which have not been accepted by either court below. It seems to us that the elaborate and well considered recitals which have been deliberately introduced in the preamble cannot possible be the result of corresponding instructions given by the testatrix to the appellant for preparing the draft of her will. In the context these recitals sound artificial and unnatural and some of them at any rate are untrue. The draftsman of the will has tried to be overwise and that itself is a very serious infirmity in the appellant's case that the instrument represents the last will and testament of the testatrix. Take for instance the statement in the will that the testatrix had advanced Rs. 3,000 to her son to enable him to purchase a house at Mysore. By itself this is not a matter of very great importance; but this detail has been introduced in the will in order to make out a strong case that all the properties mentioned in the will were the separate properties of the testatrix and so it would be relevant to consider what the appellant himself has to say about this recital. In regard to the Rs. 3,000 in cross-examination the appellant has stated that Mr. B. G. Ramakrishna Iyengar had sent this amount to the husband of respondent 1 in 1942 or so. It was sent by cheque on Mysore Bank. The appellant then added that the husband of respondent 1 had deposited this amount with B. G. Ramakrishna Iyengar's father-in-law after selling Goudanahalli lands with intent to purchase lands at Mysore; so that the claim made in the will that the testatrix had given this amount to her son out of her separate funds is inaccurate. The manner in which the several recitals have been made in the will amounts to a suspicious circumstance which must be satisfactorily explained by the appellant.

The next circumstance which calls for an explanation is the exclusion of the grand-children of the testatrix from any substantial legacies under the will. It is true that a bequest of Rs. 500 each is given to them but that can hardly be regarded as fair or just to these children. It was, however, urged

by Mr. Iyengar before us that Narayana Iyengar had, during his lifetime, given lands to his sister's daughters. He had also spent considerable amounts on the occasion of their marriages and had given them each valuable ornaments. In this connection, he referred us to certain documents exhibited under Ex. 'G' and attempted to show that the lands given to his sisters' daughters were of the value of Rs. 1,500 to Rs. 2,000 each. Apart from the fact that the value of these lands is not clearly proved nor are the circumstances under which they came to be gifted to the donees, we do not think it would be possible to accept the argument that even with these gifts the testatrix would not have thought of making more substantial bequests to her grand-children. It is not suggested that the relations between the testatrix and these grand-children were not cordial and affectionate and so it would be reasonable to assume that they would have been the objects of her bounties in a more liberal measure in ordinary circumstances.

There is one more point which must be considered in this connection. As we have already mentioned the appellant's sons have received substantial bounties under the will. Are these bequests probable and natural ? It must be remembered that the appellant came into the family of Annaji by adoption long after the testatrix was married. The record does not show that the testatrix was on such affectionate terms with the appellant that she would have preferred to make a bequest to his sons rather than to her own grandchildren. Indeed the appellant admitted that, at the relevant time, he was in straightened circumstances and was indebted to the extent of nearly Rs. 30,000; and it does not appear that when he was faced with financial difficulties of this magnitude he asked for or obtained any assistance from his adoptive sister. That is why the bequests to the appellant's sons also amount to a suspicious circumstance which must be clearly explained by the appellant. We cannot easily reject the argument urged on behalf of respondent I that the bequests have been made in the names of the appellant's sons because, if they had been made in his own name, the properties bequeathed would have been attached and sold at the instance of his numerous creditors. We do not propose to measure precisely the value of the properties bequeathed to the appellant's sons. It would be enough to say that the said bequests are by no means insignificant or unsubstantial. Therefore, we are unable to see how the appellant can successfully challenge the finding of the High Court that some of the broad features of the will appear to be improbable and unfair; and if that be so, the appellant will have to remove the suspicions arising from these features before he can persuade the court to accept the instrument as the last will and testament of the testatrix.

In this connection it is necessary to bear in mind that the appellant whose sons have received the said bequests has admittedly taken a very prominent part in bringing about the execution of the will. He has prepared the draft and it was at his dictation that the scribe wrote the will. Indeed on the important question as to when and how instructions were given by the testatrix and whether or not in preparing the draft those instructions have been faithfully carried out, the only evidence adduced in the case is that of the appellant and no one else. Thus, the very important, if not the decisive, part played by the appellant in the execution of the will cannot at all be disputed in the present case.

Mr. Iyengar, for the appellant, strenuously contended that, in deciding whether the suspicions attending the execution of the will have been removed or not, it would be necessary to remember that the whole of the relevant evidence is all one way and there is no evidence in rebuttal led by respondent 1. His argument is that the evidence adduced by the appellant is satisfactory and the conclusion of the trial court which was well-founded need not have been reversed by the High Court. In support of this argument, Mr. Iyengar referred us to several judicial decisions and suggested that we should consider the evidence in the light of these decisions. According to him, these decisions would afford us considerable assistance and guidance in appreciating the evidence in the present case. That is why would now briefly refer to some of the decisions cited before us.

According to the decisions in Fulton v. Andrew ((1875) L.R. 7 H.L. 448), "those who take a benefit under a will, and have been instrumental in preparing or obtaining it, have thrown upon them the onus of showing the righteousness of the transaction". "There is however no unyielding rule of law (especially where the ingredient of fraud enters into the case) that, when it has been proved that a testator, competent in mind, has had a will read over to him, and has thereupon executed it, all further enquiry is shut out". In this case, the Lord Chancellor, Lord Cairns, has cited with approval the well-known observations of the Baron Parke in the case of Barry v. Butlin ([1838] 2 Moo. P.C. 480, 482). The two rules of law set out by Baron Parke are : "first, that the onus probandi lies in every case upon the party propounding a will; and he must satisfy the conscience of the court that the instrument so propounded is the last will of a free and capable testator"; "the second is, that, if a party writes or prepares a will under which he takes a benefit, that is a circumstance that ought generally to excite the suspicion of the court and calls upon it to be vigilant and zealous in examining the evidence in support of the instrument in favour of which it ought not to pronounce unless the suspicion is removed, and it is judicially satisfied that the paper propounded does express the true will of the deceased'. It is hardly necessary to add that the statement of these two rules has now attained the status of a classic on the subject and it is cited by all text books on wills. The will propounded in this case was directed to be tried at the Assizes by the Court of Probate. It was tried on six issues. The first four issues referred to the sound and disposing state of the testator's mind and the fifth to his knowledge and approval of the contents of the will. The sixth was whether the testator knew and approved of the residuary clause; and by this last clause the propounders of the will were made the residuary legatees and were appointed executors. Evidence was led at the trial and the judge asked the opinion of the jurors on every one of the issues. The jurors found in favour of the propounders on the first five issues and in favour of the opponents on the sixth. It appears that no leave to set aside the verdict and enter judgment for the propounders notwithstanding the verdict on the sixth issue was reserved; but when the case came before the Court of Probate a rule was obtained to set aside the verdict generally and have a new trial or to set aside the verdict on the sixth issue for misdirection. It was in dealing with the merits of the finding on the sixth issue that the true legal position came to be considered by the House of Lords. The result of the decision was that the rule obtained for a new trial was discharged, the order of the Court of Probate of the whole will was reversed and the matter was remitted to the Court of Probate to do what was right with regard to the qualified probate of the will.

The same principle was emphasized by the Privy Council in : Vellasawmy Servai v. Sivaraman Servai ((1929) L.R. 57 I.A. 96), where it was held that, where a will is propounded by the chief beneficiary under it, who has taken a leading part in giving instructions for its preparation and in procuring its execution, probate should not be granted unless the evidence removes suspicion and clearly proves that the testator approved the will.

In Sarat Kumari Bibi v. Sakhi Chand ((1928) L.R. 56 I.A. 62), the Privy Council made it clear that "the principle which requires the propounder to remove suspicions from the mind of the Court is not confined only to cases where the propounder takes part in the execution of the will and receives benefit under it. There may be other suspicious circumstances attending on the execution of the will and even in such cases it is the duty of the propounder to remove all clouds and satisfy the conscience of the court that the instrument propounded is the last will of the testator." This view is supported by the observations made by Lindley and Davey, L. JJ., in Tyrrell v. Painton ([1894] P. 151, 157, 159). "The rule in Barry v. Butlin ([1838] 2 Moo. P.C. 480, 482), Fulton v. Andrew ((1875) L.R. 7 H.L. 448) and Brown v. Fisher ((1890) 63 L.T. 465), said Lindley, L.J., "is not in my mind confined to the single case in which the will is prepared by or on the instructions of the person taking large benefits under it but extends to all cases in which circumstances exist which excite the

suspicions of the court."

In Rash Mohini Dasi v. Umesh Chunder Biswas ((1898) L.R. 25 I.A. 109) it appeared that though the will was fairly simple and not very long the making of it was from first to last the doing of Khetter, the manager and trusted adviser of the alleged testator. No previous or independent intention of making a will was shown and the evidence that the testator understood the business in which his adviser engaged him was not sufficient to justify the grant of probate. In this case the application for probate made by the widow of Mohim Chunder Biswas was opposed on the ground that the testator was not in a sound and disposing state of mind at the material time and he could not have understood the nature and effect of its contents. The will had been admitted to the probate by the District Judge but the High Court had reversed the said order. In confirming the view of the High Court the Privy Council made the observations to which we have just referred.

The case of Shama Charn Kundu v. Khettromoni Dasi ((1899) I.L.R. 27 Cal. 522), on the other hand, was the case of a will the execution of which was held to be not surrounded by any suspicious circumstances. Shama Charn, the propounder of the will, claimed to be the adopted son of the testator. He and three others were appointed executors of the will. The testator left no natural son but two daughters and his widow. By his will the adopted son obtained substantial benefit. The probate of the will with the exception of the last paragraph was granted to Shama Charn by the trial judge; but, on appeal the application for probate was dismissed by the High Court on the ground that the suspicions attending on the execution of the will had not been satisfactorily removed by Shama Charn. The matter was then taken before the Privy Council; and their Lordships held that, since the adoption of Shama Charn was proved, the fact that the took part in the execution of the will and obtained benefit under it cannot be regarded as a suspicious circumstance so as to attract the rule laid down by Lindley, L.J., in Tyrrell v. Painton ([1894] p. 151, 157, 159). In Bai Gungabai v. Bhugwandas Valji ((1905) I.L.R. 29 Bom. 530), the Privy Council had to deal with a will which was admitted to probate by the first court, but on appeal the order was varied by excluding therefrom certain passages which referred to the deed-poll executed on the same day by the testator and to the remuneration of the solicitor who prepared the will and was appointed an executor and trustee thereof. The Privy Council held that "the onus was on the solicitor to satisfy the court that the passages omitted expressed the true will of the deceased and that the court should be diligent and zealous in examining the evidence in its support, but that on a consideration of the whole of the evidence (as to which no rule of law prescribed the particular kind required) and of the circumstances of the case the onus was discharged". In dealing with the question as to whether the testator was aware that the passages excluded by the appeal court from the probate formed part of the instrument, the Privy Council examined the evidence bearing on the point and probabilities. In conclusion their Lordships differed from the view of the appeal court that there had been a complete failure of the proof that the deed-poll correctly represented the intentions of the testator or that he understood or approved of its contents and so they thought that there were no grounds for excluding from the probate the passages in the will which referred to that deed. They, however, observed that it would no doubt have been more prudent and business-like to have obtained the services of some independent witnesses who might have been trusted to see that the testator fully understood what he was doing and to have secured independent evidence that clause 26 in particular was called to the testator's attention. Even so, their Lordships expressly added that in coming to the conclusion which they had done they must not be understood as throwing the slightest doubt on the principles laid down in Fulton v. Andrew ((1875) L.R. 7 H.L. 448) and other similar cases referred to in the argument.

In Perera v. Perera ([1901] A.C. 354) it was held that when the testator is of sound mind when he

gives instructions for a will but at the time of signature accepts the instrument drawn in pursuance thereof without being able to follow its provisions, he must be deemed to be of sound mind when it is executed. The will of Perera with which the court was concerned in this case was signed with a cross by the testator in the presence of five witnesses present at the same time who duly subscribed the will in the presence of the testator. The Notary Public was also among the persons present but he did not attest the will. No objection was taken in the court of first instance on this ground, but, in the court of appeal, the said objection was raised and it was held that the will was invalid on the ground that though the Notary Public was present he had not attested the instrument. The case was then taken to the Supreme Court in its collective capacity on review preparatory to an appeal to Her Majesty. The Supreme Court reversed the judgment under appeal and then proceeded to determine the case on the merits. The court held by a majority decision that the testator was of sound and disposing state of mind and restored the order of the primary judge. Against this decision there was an appeal. In this case, the evidence about the instructions given by the testator was very clear; and there was not the slightest reason for disbelieving the statement of Gooneratne that he had drawn the will faithfully in accordance with the details of instructions given to him. The will prepared from the said instructions seemed to be fair and just disposition of the testator's property. There was no concealment about the preparation of the will. The instructions were given on June 1 and it was in the evening of June 4 that the will was brought to the testator for execution. It is on these facts that it was held, following the observations of Sir James Hannen in Parker v. Felgate ([1883] 8 P.D. 171) that if a person has given instructions to a solicitor to make a will and the solicitor prepares it in accordance with those instructions, all that is necessary to make it a good will if executed by the testator is that he should be able to think thus far : "If I gave my solicitor instructions to prepare a will making certain dispositions about my property I have no doubt that he has given effect to intention and I accept the document which is put before me as carrying it out". We would again like to emphasize that the evidence about the instructions was very clear and definite in this case and it was also clearly established that the will which was just and fair was executed faithfully in accordance with the said instructions given by the testator. In such a case whether or not the will should be admitted to probate would depend upon the opinion which the court may form about the relevant evidence adduced in support of the will. It would be difficult to deduce any principle from this decision and to seek to apply it to other cases without reference to their facts.

The last case to which reference must be made is the decision of the Privy Council in Harmes v. Hinkson ((1946) 50 C.W.N. 895). It appears that, in this case, the testator George Harmes died in the city of Regina on April 4, 1941. Two days later Mr. Hinkson brought to the manager of the Canada Permanent Trust Company at its office in Regina a document which purported to be the will of the said Harmes. It was dated April 3, 1941, and named the Trust Company as executor. Under the will Mr. Hinkson by a devise and bequest of the residue was to benefit to a sum of more than Pounds 50,000. Mr. Hinkson was by profession a barrister and solicitor and had drawn the will with no witness present until after the body of the document was complete. Then two nurses were called in to witness its due execution. The learned judge of the Surrogate Court, after a lengthy trial affirmed the will and decreed probate in solemn form. On appeal by a majority decision the order of the trial court was reversed. Then there was a further appeal to the Supreme Court of Canada. It was heard by five learned judges. By a majority (Hudson, J., alone dissenting) the appeal was allowed and the decree of the Surrogate Court was restored. Against this decision the appellant obtained special leave to appeal to His Majesty-in-Council and it was urged on his behalf that, since the document was charged with suspicion from the outset, probate should not have been granted to the respondent Hinkson. The Privy Council did not accept this contention and dismissed the appeal. It was in dealing with the appellant's contention about the suspicions surrounding the execution of the

will that Lord Du Parcq made the observations which we have already quoted. Prima facie the facts on which the appellant relied were strong enough; but the question which according to their Lordships fell to be decided in the appeal was whether the learned trial judge's decision on the facts was erroneous and so manifestly erroneous that an appellate court ought to set it aside. Their Lordships then referred with approval to the principles which had been frequently enunciated as to the respect which the appellate court ought to pay to the opinion which a Judge who has watched and listened to the witness has formed as to their credibility (Powell v. Streatham Manor Nursing Home ([1935] A.C. 243). Their Lordships then briefly referred to the evidence led in the case and observed that it was impossible for them judging only from the printed page to decide between the various opinions of Mr. Hinkson's character which its perusal may leave open for acceptance by different minds. In the result they came to the conclusion in agreement with the Supreme Court that the trial court's decision on the facts must stand. It would thus be noticed that the decision of the Privy Council proceeded more on the basis that there was no justification for interfering with a finding of fact recorded by the trial judge particularly when the said finding rested on his appreciation of the evidence given by several witnesses before him. In this connection it is significant to note that the allegation of the appellant that Mr. Hinkson had exercised undue influence on the testator was repelled by the Privy Council with the observation that their acceptance of the judge's findings of fact leaves them no alternative but to reject it. Thus this decision merely serves to illustrate the importance which the Privy Council attached to the finding of fact recorded by the trail court in this case.

It is in the light of these decisions that the appellant wants us to consider the evidence which he has adduced in the present case. It would be convenient to begin with the appellant's story about the instructions given by the testatrix for preparing the will. In the plaint the appellant has referred to the sudden illness of the testatrix at Mandya and it is alleged that when she took ill the testatrix sent for him with the obvious intention of making arrangements regarding her properties. Accordingly when he met her at Mandya she explained all her intentions to him in the matter of disposing all her properties and her rights thereto. In other words, the case made out in the plaint clearly and specifically is that when the testatrix was ill at Mandya she sent for the appellant and gave him instructions for preparing a draft of her will. However, when the appellant gave evidence he made a material improvement in his story. According to his evidence, the appellant had received instructions from the testatrix a year before the will was actually drafted. It was then that the testatrix had given him the gift deed (Ex. D) and asked him to prepare the draft. Consistently with this new version the appellant has added in his evidence that when he met her at Mandya during her illness she reminded him that she had asked him to make a will for quite some time and she insisted that the draft should be prepared without any delay. In our opinion, the evidence given by the appellant on this point is clearly an after-thought and his story that he had received previous instructions cannot be accepted as true. Besides, it is somewhat remarkable that, on both the occasions when the testatrix talked to the appellant and gave instructions to him, no one else was present; and so the proof of this part of the appellant's case rests solely on his own testimony. If the testatrix had really thought of making a will for over a year before it was actually executed, it is unlikely that she would not have talked about it to other relatives including Kalbagal with whom she was actually staying at the material time.

Then it would be necessary to enquiry whether the draft which the appellant prepared was consistent with the instructions alleged to have been given by the testatrix. The draft, however, has not been produced in the case on the plea that it had been destroyed; nor is it specifically stated by the appellant that this draft was read out fully to the testatrix before he dictated the contents of the will to the scribe. Thus even the interested testimony of the appellant does not show that he obtained

approval of the draft from the testatrix after reading it out fully to her clause by clause. It is common ground that Mandya where the testatrix was lying ill is a place where the assistance of local lawyers would have been easily available; and in ordinary course the testatrix would have talked to Kalbagal and the appellant they would have secured the assistance of the lawyers for drafting the will; but that is not what the appellant did. He went to Mysore and if his evidence is to be believed he prepared the draft without any legal assistance. Having regard to the nature of the recitals contained in the will it is not easy to accept this part of the appellants' case. Besides, as we have already indicated, we find great difficulty in believing that the elaborate recitals could have been the result of the instructions given by the testatrix herself.

It is in the light of these circumstances that the direct evidence about the execution of the will has to be considered. The evidence of P.W. 1 is really inconclusive on the point about the execution of the will. Apart from the fact that he had no clear recollection as to what happened on the day when he attested the will, this witness has frankly stated that he could not state definitely whether the whole of the document was read over to the testatrix before he put the attesting signature; and it was naturally of very great importance in this case to produce satisfactory evidence that the will was read out to the testatrix and she understood the nature and effect of its content. On this point even if P.W. 1 is believed it does not help the appellant's case. The evidence of P.W. 2 cannot carry much weight because his main story that he was present at the time when the will was written is wholly inconsistent with the evidence of P.Ws. 3, 4 and 7. That leaves the evidence of the scribe and the appellant himself. The scribe (P.W. 3) is a near relation of Kalbagal and even he does not at all support the appellant's case about previous instruction because, according to him, the testatrix said that she would agree to whatever the appellant would get written. The relevant evidence of this witness is clearly inconsistent with the appellant's case about previous instructions and so it would be difficult to treat the evidence of this witness as sufficient to prove that the testatrix fully understood the nature of the recitals in the preamble and the effect of the dispositions before she put her signature to the will. The evidence of the appellant (P.W. 7) cannot obviously be useful because it is the evidence of an interested witness and is besides not very satisfactory. On behalf of the appellant it was urged before us by Mr. Iyengar that the evidence of Kalbagal (P.W. 4) is disinterested and so it should be believed. That also appears to be the view taken by the trial court. In our opinion, however, it would not be right or correct to describe Kalbagal as wholly disinterested. Respondent No. 5 who is the step-brother of Kalbagal and who stays with him in the same house along with their father has admittedly received substantial benefit under the will. If an undivided brother of P.W. 4 has received this benefit it would not be accurate to say that the witness is wholly disinterested. Besides, it appears from the evidence of Kalbagal that he knew nothing about the execution of the will until the appellant asked him to get some attesting witnesses for the will. This evidence does not strike us as natural or probable; but apart from it, even Kalbagal's evidence does not show satisfactorily that the will was read out to the testatrix so as to enable her to understand its full effect before it was signed by her. That is the whole of the evidence led by the appellant on the question of the execution of the will. On this evidence we are not prepared to hold that the High Court was in error in coming to the conclusion that it was not shown that the testatrix fully understood the contents of the will and put her signature on the instrument intending that the recitals and the dispositions in the will should be her recitals and dispositions.

In this connection we would like to add that the learned trial judge appears to have misdirected himself in law inasmuch as he thought that the proof of the signature of the testatrix on the will raised a presumption that the will had been executed by her. In support of this view the learned judge has referred to the decision of the Calcutta High Court in Surendra Nath Chatterji v. Jahnavi Charn Mukerji ((1928) I.L.R. 56 Cal. 390). In this case no doubt the Calcutta High Court has held

that on the proof of the signature of the deceased or his acknowledgment that he has signed the will he will be presumed to have known the provisions of the instrument he has signed; but Mr. Justice B. B. Ghose, in his judgment, has also added that the said presumption is liable to be rebutted by proof of suspicious circumstances and that undoubtedly is the true legal position. What circumstances would be regarded as suspicious cannot be precisely defined or exhaustively enumerated. That inevitably would be a question of fact in each case. Unfortunately the learned trial judge did not properly asses the effect of suspicious circumstances in the present case to which we have already referred and that has introduced a serious infirmity in his final conclusion. Incidentally we may also refer to the fact that the appellant obtained a power of attorney from the testatrix on the same day; and that has given rise to the argument that the appellant was keen on taking possession and management of the properties under his control even before the death of the testatrix. There is also another circumstance which may be mentioned and that is that the Sub-Registrar, in whose presence the document was registered on the same day, has not been examined though he was alive at the date of the trial. On these facts then we are inclined to hold that the High Court was justified in reversing the finding of the trial court on the question of the due and valid execution of the will.

Before we part with this case, however, we would like to add that the High Court was not justified in recording its findings on two other issues in the present appeal. As we have already indicated, the High Court itself has observed that, once it was held that the will had not been proved by the appellant, no other issue survived for decision. Even so, the High Court has expressed its conclusions in favour of respondent 1 on the question about the character of the subsequent acquisitions of items 3, 4 and 5 and about the subsisting title of the testatrix in respect of all the properties covered by the will. Having regard to the relationship between the parties it is difficult to understand how mere entire in the revenue record made in the name of Sadagopalachar or the long possession of Sadagopalachar and, after his death, of Narayana Iyengar can prove the transfer of Lakshmamma's title or its extinction by adverse possession respectively. It is apparent that, in recording these conclusions, the High Court has not fully or properly considered all the relevant evidence; and consequently, the reasons given by it are open to serious challenge on the merits. Indeed Mr. Viswanatha Sastri did not appear to be inclined to support the said findings. We do not, however, propose to decide these questions on the merits because in view of our conclusion on the principal issue it is unnecessary to consider any other points. We would, therefore, like to make it clear that the said two issues are not decided in the present proceedings and may have to be considered afresh between the parties if and when they arise.

The result is the appeal fails and must be dismissed but there will be no order as to costs in this Court.

Appeal dismissed.

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