CASE NO.:
Appeal (civil) 6258 of 2000

PETITIONER:
Crystal Developers

RESPONDENT:
Smt. Asha Lata Ghosh (Dead)Thr.Lrs.Ors.

DATE OF JUDGMENT: 05/10/2004

BENCH:
ASHOK BHAN & S.H. KAPADIA

JUDGMENT:
J U D G M E N T

WITH

CIVIL APPEAL No.6259/2000

Archit Vanijya & Viniyog Pvt. Ltd. & Ors. \005Appellants

Versus

Smt. Asha Lata Ghosh (Dead)
Through LRs. & Others \005Respondents

AND

CIVIL APPEAL Nos.6871-6873/2003.

Archit Vanijya & Viniyog Pvt. Ltd. & Ors. \005Appellants

Versus

Arindam Ghosh & Others \005Respondents

KAPADIA, J.

CIVIL APPEALS NO.6258-6259 OF 2000

These civil appeals, by grant of special leave, are directed against the judgment and order dated 4.9.2000 passed by the High Court of Calcutta in First Appeal Nos.46 and 47 of 2000 confirming the judgment and decree passed by the Court of 9th Sub Judge, Alipore, Calcutta in Title Suit No.89 of 1981, whereby the suit for partition stood decreed. It may be clarified that Civil Appeal No.6258 of 2000 has been preferred by Crystal Developers who were original defendant no.14 in title suit no.89/81 whereas Civil Appeal No.6259 of 2000 has been filed by Archit Vanijya & Viniyog Pvt. Ltd. & others, original defendants no.15 to 20 in the said suit no.89/81.

Since common questions of law and fact arise in the said Civil Appeals, the same were heard together and are disposed of by this judgment.

The facts giving rise to these appeals are as follows:\027

One Balai Chand Ghosh (since deceased) had three wives. His first wife was Jamuna, from whom he had two sons, Naresh and Paresh. Nirmala was the second wife of Balai Chand Ghosh, from whom there were four sons and two daughters, namely, Jogesh, Ramesh, Bhabesh and Suresh. The names of the two daughters were Parul and Manju. Mamta was the third wife who had only one issue, Arindam.

On 21.9.1981, the above partition suit no.89/81 was filed in the Court of 9th Sub Judge, Alipore (hereinafter for the sake of brevity referred to as "the trial Court"). It was filed by Naresh, Jogesh, Ramesh, Bhabesh, Parul and Manju as legal heirs of Balai Chand, who had died on 16.8.1980. Balai Chand Ghosh left behind him considerable properties, one of which was the suit premises situate at 9/4, Middleton Row, Calcutta-16. Mamta, the third wife of Balai Chand was defendant no.1 and her son Arindam was defendant no.2 in the said suit. Nirmala, the second wife of Balai Chand was the third defendant. Paresh, the son from the first wife, was defendant no.4. Suresh, son of Balai Chand from the second wife, was the 5th defendant. Therefore, the parties to the suit claimed 1/11th undivided share each in the suit premises. The suit premises were wholly tenanted on 21st September, 1981 when the partition suit no.89 of 1981 was filed. In the said suit, a written statement was filed on 9.5.1983 by defendants no.1 and 2, namely, Mamta and her son Arindam. In the said written statement, Arindam set up the registered will made by Balai Chand on 25.12.1977. He relied on the probate dated 31.7.1981; consent decree dated 3.8.1981 in suit no.310 of 1981 as also the conveyance (Ex.A/8) dated 4.8.1981 in favour of Crystal Developers, defendant no.14. In the written statement, defendant no.2 also relied on the order dated 21.8.1982 passed by the Court of 5th Addl. District Judge, Alipore in Miscellaneous Case No.3/80 to show that Nirmala had knowledge of the registered will of Balai Chand and of the appointment of defendant no.2 as the executor under the said will. In 1993, the plaint was amended and defendant no.14 was brought on record. It is alleged that on inspection of assessment record of the municipality on 22.6.1993 and 22.8.1993, the plaintiffs came to know of the impugned transfer. According to the amended plaint, Mamta (defendant no.1) and Arindam (defendant no.2) had sold, in collusion with each other, the suit premises to defendant no.14 to prevent the plaintiffs from claiming the same; that prior to the transfer, defendants no.1 and 2 did not serve notice to the other heirs of Balai Chand; that the plaintiffs were not aware of the agreement for sale dated 12.3.1979 (Ex.A/1), the supplemental agreement for sale dated 21.7.1980 (Ex.A/2), the conveyance dated 4.8.1981 (Ex.A/8); that defendants no.1 and 2 never acquired any indefeasible title and consequently Ex.A/1, Ex.A/2 and Ex.A/8 were null and void and not binding on the other heirs of Balai Chand. The plaintiffs, accordingly, prayed for a preliminary decree for partition of the suit premises after declaring the plaintiffs 1/11th share in the suit premises.

In the written statement, defendant no.14 - Crystal Developers (the appellant in C.A. No.6258/2000) alleged

that the present partition suit was filed to circumvent Ex.A/1 and Ex.A/2, executed during the life time of Balai Chand; that pursuant to the consent decree dated 3.8.1981 in suit no.310/81, defendant no.2 had executed Ex.A/8 in favour of defendant no.14 on payment of full consideration; that pursuant to Ex.A/8, defendant no.14 got freed the suit premises from requisition, acquisition and other encumbrances (including tenants); that pursuant to Ex.A/8, defendant no.14 got the building plan sanctioned by Calcutta Municipal Corporation; that the old building was got demolished and new multi-storey building was constructed; that Ex.A/8 was executed only after defendant no.2 got the probate on 31.7.1981; that the aforestated developments were known to the heirs of Balai Chand who acquiesced to the development of the property between 21.9.1981 (when the partition suit was filed) and 22.6.1993 (when defendant no.14 was brought on record). It was submitted that probate dated 31.7.1981 was revoked on 9.7.1987 not on the ground of alleged fraud but for non service of citation on Parul and Manju, the daughters of Balai Chand and consequently Ex.A/1, Ex.A/2 and Ex.A/8 were binding on the estate of Balai Chand. In the written statement, defendant no.14 claimed that they were bona fide purchasers for value without notice of any defect in obtaining of probate by defendant no.2.

The written statement filed by defendants no.15 to 20, the vendees from defendant no.14, is on the same lines as that of defendant no.14 and therefore, it is not necessary to repeat the averments contained therein.

On the above pleadings, the trial Court framed 14 issues. However, we are concerned with issues no.8, 9, 11 and 12 as framed by the trial Court:\027

(i) Did defendants no.1 and 2 acquire indefeasible title and absolute right in the suit premises?

(ii) Whether Ex.A/8 executed by defendant no.2 in favour of defendant no.14 on the basis of probate dated 31.7.1981 was null and void in view of the subsequent revocation of the grant by the Probate Court vide order dated 9.7.1987?

(iii) Whether Ex.A/8 executed by defendants no.1 and 2 in favour of defendant no.14 was valid, legal and binding on the plaintiffs? and

(iv) Whether defendants no.15-20 were bona fide purchasers for value without notice?

Answering the above issues, the trial Court held that defendant no.14 was not a bona fide purchaser. In support of the said findings, the trial Court relied upon the following circumstances. Firstly, that Ex.A/1 and Ex.A/2 were executed by defendant no.2 as constituted attorney of Balai Chand. That no reason was given as to why Ex.A/1 and Ex.A/2 were got executed by defendant no.2 when Balai Chand was alive. Secondly, in the said suit no.310/81, defendant no.2 alone was the sole defendant even though on the date (21.4.1981) of filing

of the suit for specific performance, probate had not been granted. Thirdly, that the probate was obtained without service of the citation on Parul and Manju, the two daughters of Nirmala. Fourthly, according to the trial Court, the hastiness with which the said suit no.310/81 was settled indicated that consent decree was obtained without looking into the probate. According to the trial Court, defendant no.14 had knowledge of the grant of probate even before issuance of its certified copy by the Registry as defendant no.2 and defendant no.14 had common attorneys. Fifthly, the trial Court relied on the affidavit dated 25.9.1997 filed by defendant no.1 at the interim stage stating that Balai Chand had never entered into Ex.A/1 and that the power of attorney and the will were forged. Sixthly, the trial Court found that power of attorney was not proved and, therefore, Ex.A/1 and Ex.A/2 were executed by defendant no.2 to defeat the rights of the plaintiffs. Seventhly, under clause (2) of Ex.A/1, the purchase price was to be calculated @ Rs.55,000/- per kottah of land. On that basis, the total consideration receivable by defendant no.2 was Rs.15 lacs (approximately), whereas he has been paid Rs.9,54,632/-. Eighthly, in Ex.A/8 there was no reference to the consent decree dated 3.8.1981. Ninthly, the adhesive stamp was affixed on Ex.A/8 on 3.8.1981 i.e. one day prior to its execution. Lastly, that defendants no.15 to 20 had bought the suit premises after the revocation of the grant on 9.7.1987. In the aforesaid circumstances, the trial Court came to the conclusion that there was collusion between defendant no.2 and defendant no.14; that defendant no.14 was not a bona fide purchaser and that defendant no.2 had no authority to execute Ex.A/8 without the consent and knowledge of other heirs of Balai Chand. According to the trial Court, the probate was revoked by the High Court vide order dated 9.7.1987 for non-citation and forgery. The trial Court concluded that defendant no.2 had practised fraud upon the Probate Court in collusion with defendant no.14 and in the circumstances, Ex.A/1, Ex.A/2 and Ex.A/8 were not binding on the other heirs of Balai Chand. Consequently, the trial Court decreed the partition suit.

Being aggrieved, the matter was carried in appeal to the Division Bench of the High Court. By the impugned judgment, it has been held that defendant no.2 got himself substituted in the legal proceedings in 1982 without disclosing the grant of probate and Ex.A/8; that probate was revoked on account of non-citation; that defendant no.14 had colluded with defendant no.2 in filing of suit no.310/81 in which none of the other heirs were made party defendants; that no notice of purchase was given by defendant no.14 to the said other heirs before executing Ex.A/8; that in Ex.A/8, there was no reference to the consent decree; that in Ex.A/8, the date of grant of probate has been altered from 29.7.1981 to 31.7.1981 and Ex.A/8 was executed even before issuance of the certified copy of the probate by the Registry. In the circumstances, the High Court came to the conclusion that defendant no.14 was a privy to the fraudulent acts of defendant no.2 and was, therefore, not a bona fide purchaser. In the circumstances, the High Court dismissed the appeals. Hence, these appeals.

Mr. Shanti Bhushan, learned senior counsel for defendant no.14 submitted that although Ex.A/1 and

Ex.A/2 were executed by defendant no.2 as constituted attorney of Balai Chand, an advance of Rs.2.25 lacs was received by Balai Chand from defendant no.14 as evidenced by receipts Ex.A/3 and Ex.A/4. The receipt of payments by Balai Chand establishes that Balai Chand during his life time had intended to sell the suit premises. Hence, Ex.A/1 was binding on Balai Chand as also on his heirs. It was urged that Ex.A/8 was pursuant to Ex.A/1, Ex.A/2 and the probate, hence, it was binding on the estate of the deceased and therefore the other heirs could not have followed it into the hands of defendant no.14.

Learned counsel next submitted that it was not open to the plaintiffs to impugn Ex.A/8 as fictitious or fraudulent as the plaintiffs had acquiesced and allowed the suit property to be freed from encumbrances. In this connection it was pointed out that the partition suit was filed on 21.9.1981 whereas the plaint was amended in 1993 when defendant no.14 was brought on record. During this period the suit premises were freed by filing writ petition for revocation of requisition, acquisition and eviction of tenants. During this period the old structure was got demolished and a new multi-storey building was constructed. In the circumstances, it was highly improbable that none of the heirs had no knowledge of the aforestated developments. Hence, it was not open to the plaintiffs to sit on the fence for 13 years, allowing the property to be developed and then challenge Ex.A/8 as fictitious. It was submitted that both the Courts below have failed to notice the aforesaid circumstances.

Learned counsel for defendant no.14 next invited our attention to the evidence of DW5 on behalf of defendant no.14 and submitted that Ex.A/8 was entered into only after thorough search of the title deeds and the documents, including the probate dated 31.7.1981. It was submitted that defendant no.14 had paid the balance consideration to defendant no.2 who was the executor under the will. It was urged that the sale was duly completed only after defendant no.2 had obtained the probate. It was submitted that the heirs of Balai Chand were bound by the acts of the executor and the sale was binding on the estate of the deceased.

Learned counsel for defendant no.14 referred to the order passed by the civil Court in Misc. Case No.3/80 between Nirmala and Balai Chand by which on the demise of Balai Chand defendant no.2 was brought on record as the executor under the above will. According to the learned counsel the above order shows that Nirmala, the second wife of Balai Chand, was aware of the above will. She was aware of defendant no.2 being appointed an executor. Learned counsel therefore submitted that both the Courts below erred in holding that till 1986, the heirs were not aware of the will.

It was next submitted that the trial Court had erred in holding that the grant was revoked in 1987 on the ground of forgery. In this connection, it was pointed out that on 14.5.1986 Bhabesh applied for revocation of the grant on the ground that probate was obtained fraudulently. In the said application it was further

alleged that the will was forged. By order dated 18.9.1986, the Probate Court dismissed the application. Learned counsel further pointed out that Parul and Manju did not support Bhabesh in the above application. It is so recorded by the Probate Court in the order dated 18.9.1986, dismissing application of Bhabesh for revocation. Yet on 25.3.1987, Parul and Manju applied for revocation on the ground of fraud, forgery and non-citation. By an ex-parte order dated 9.7.1987, the probate Court has revoked the grant only on the ground of non-citation which is admitted by PW1 in his evidence. In the circumstances, learned counsel submitted that the revocation cannot annul the impugned disposition which was effected during the period when probate was in existence.

Lastly, it was submitted that in the absence of allegation of fraud or collusion against defendant no.14, both the Courts below erred in holding that defendant no.14 was not at arms length to defendant no.2. It was submitted that fraud and collusion have to be alleged and proved. It was urged that no particulars of fraud or collusion against defendant no.14 have been given in the plaint and yet both the Courts below have given a finding of collusion against defendant no.14 based on suspicion and misconception of facts without proof. Learned counsel invited our attention to the plaint in which the only allegation was that defendant no.1 and defendant no.2 had colluded with each other to defeat the claim of the other heirs of Balai Chand. Hence, there was no issue of fraud or collusion against defendant no.14. In the circumstances, learned counsel submitted that both the Courts below had erred in holding that defendant no.14 was not a bona fide purchaser.

Mr. Ranjit Kumar, learned senior counsel for defendants no.15 to 20 adopted the arguments advanced on behalf of defendant no.14 and submitted that under section 211 of Indian Succession Act, 1925, the estate of the deceased testator vests in the executor from the date the will becomes enforceable, i.e. from the date of death of the testator. Learned counsel submitted that the act of disposition performed by the executor is binding on the estate of the deceased under Section 307 as long as the said disposition is compatible with the administration of the estate. It was submitted that in the present case, Bhabesh had applied for revocation on the ground that the probate was obtained fraudulently, however, the Probate Court had rejected that application. It was submitted that defendant no.14 had completed the sale only after the probate and after going through it and therefore defendant no.14 was a bona fide purchaser and since defendants no.15 to 20 had derived title from defendant no.14, the said defendants no.15 to 20 were protected. In the circumstances, learned counsel submitted that revocation of grant will operate prospectively and such revocation will not annul the intermediate act of disposition by defendant no.2.

Mr. Mukul Rohtagi, learned senior counsel for plaintiffs no.1 & 4 and defendant no.4; Mr. Dhruv Mehta, learned counsel for plaintiffs no.5 and 6; and Mr. R.K. Shukla, learned senior counsel appearing on behalf of the heir of plaintiff no.2 submitted that defendants no.14 to 20 were not entitled to rely upon the probate or the will

in support of their case in view of the concession made by their counsel before the Division Bench of the High Court. In this connection, it may be mentioned that when the appeal came for final hearing before the High Court, the learned Judges enquired whether defendants no.14 to 20 would like to await the decision on the validity of the will from the Probate Court to which the defendants no.14 to 20 responded by stating that they would like to proceed with the matter as they were in possession having title to the suit premises. Learned counsel for the plaintiffs, therefore, submitted that defendants no.14 to 20 cannot rely on the probate or the will under the aforestated circumstances.

It was next contended on behalf of the plaintiffs that probate granted without will being proved in accordance with section 63 of Indian Succession Act and section 68 of the Evidence Act was void ab initio. Learned counsel submitted that aforestated question was a question of law and therefore the plaintiffs were entitled to raise it at any point of time before this Court, notwithstanding the fact that such a question was not raised by the plaintiffs before the lower Courts in this case. Learned counsel for the plaintiffs next contended that in this case the impugned will was surrounded by suspicious circumstances and that the initial onus was on defendant no.2 or defendant no.14 to remove or explain those circumstances. It was submitted in this connection that registration of the will was not conclusive. That on revocation of the probate on 9.7.1987 on the ground of non-citation, the onus to prove the will as genuine was on defendant no.2 or defendant no.14.

As regards the alleged suspicious circumstances surrounding the will, it was pointed out that Mamta, defendant no.1, had filed an affidavit dated 25.9.1997 at the interim stage in the present suit wherein she had stated that the impugned will was forged and that Balai Chand had made the will under undue influence of defendant no.2. It was further contended that the will was an unnatural disposition as Parul and Manju, the two daughters from Nirmala have not been named therein. That the will has been executed when Balai Chand was 90 years old. That the will was signed on 25.12.1977 but the same was registered on 4.1.1978; that the will was registered at the residence of Balai Chand in the presence of the Registrar, however, so far as the power of attorney is concerned, it was registered at the office of the Registrar on the same day i.e. 4.1.1978. That it is incomprehensible as to why none of the plaintiffs failed to respond to the notice issued by the Probate Court. In the circumstances, it was submitted that the will was surrounded by suspicious circumstances aforestated, apart from the circumstances mentioned in the impugned judgments and further that those circumstances indicated that even the probate was obtained fraudulently.

On the point as to whether defendant no.14 and defendants no.15 to 20 were bona fide purchasers for value without notice, it was submitted that the consent decree dated 3.8.1981 in suit no.310/81 was a collusive decree entered into with the intention to defeat the rights of the plaintiffs in the partition suit. In this connection, reliance was placed on the following circumstances. That Balai Chand did not execute Ex.A/1 and Ex.A/2.

They were executed by defendant no.2 as constituted attorney for Balai Chand. The power of attorney has not been proved. That before the conveyance, Ex.A/8, Balai Chand expired and with the demise of Balai Chand, the power of attorney came to an end and, therefore, defendant no.2 had no power to transfer under such power of attorney. That after the demise of Balai Chand, balance consideration was received by defendant no.2 in his personal capacity from defendant no.14. That in suit no.310/81, the legal heirs of Balai Chand were not made party defendants. That Arindam was the only defendant. That the names of other heirs were known to defendant no.14 and yet they were not made parties in suit no.310/81. That the probate was obtained fraudulently without serving Parul & Manju. That provisions of Order 23 Rule 3B CPC were circumvented in obtaining the consent decree. According to the learned counsel, the probate in question was obtained fraudulently by non-citation on Parul and Manju. That although certified copy of the probate came to be issued on 31.7.1981, sale took place on 4.8.1981 which indicated that Ex.A/8 was entered into without going through the probate. That although defendant no.2 was aware of the names of other heirs, they were not made parties to suit for specific performance and that the consent decree was obtained by act of fraud on the Court. That all these circumstances were known to defendant no.14 and, therefore, defendant no.14 or defendants no.15 to 20 cannot claim protection for the transfer, which originated from fraud. That the said defendant no.14 and defendants no.15 to 20 have claimed interest in the suit premises on the basis of dishonest transaction, which originated from fraud committed on the parties to the suit and upon the Court. It was contended that suit no.310/81 was filed to complete the sale at the earliest. That there was total lack of bona fides on the part of defendant no.14 and defendants no.15 to 20. That in Ex.A/1, the total consideration was not mentioned and only the rate of Rs.55,000/- per kottah. At the above rate, the total price payable was Rs.15.04 lacs but defendant no.2 sold it for Rs.9.54 lacs. That defendant no.2 knew that transaction was a fraud and so he accepted the throw away price. That under clause 13.3 of Ex.A/1, the agreement was terminable in case the conveyance was not executed within one year of the date of the agreement. Therefore, it became necessary to extend the validity of the agreement which could be done by defendant no.2 only as constituted attorney and not as executor as extension could not be justified as a cause towards administering the estate of deceased and, therefore, by surreptitious method, defendant no.14 in connivance with defendant no.2 as constituted attorney executed Ex.A/2 after death of Balai Chand posing that instrument to be executed in July, 1980. In this connection, reliance was placed on the registration of Ex.A/2 on 2.12.1980 after the death of Balai Chand by defendant no.2 presenting it before the Registrar even though the power of attorney had come to an end. That in the above circumstances, it cannot be said that defendant no.14 and defendants no.15 to 20 took the property bona fide and in good faith.

In view of the above arguments, we have to examine the evidence on record.

On behalf of the plaintiffs, Bhabesh - plaintiff no.4

was examined as PW1. In his examination-in-chief, PW1 deposed that the plaintiffs learnt about the probate case in 1986. In 1986, plaintiffs became aware of Arindam getting the probate. However, PW1 deposed that plaintiffs were not aware of defendant no.2 being appointed executor under the will. He denied execution of the will by Balai Chand. PW1 further deposed that plaintiffs were not aware of Ex.A/8. He conceded that at the material time Balai Chand was not having good relations with Nirmala and her children and that at the material time, his relations with Balai Chand were not good. In his cross-examination, he deposed that there were several litigations between Balai Chand and Nirmala. Balai Chand had instituted title suit no.68 of 1962 in the Court of 8th Subordinate Judge, Alipore for a declaration that he was the real owner of eight properties and that defendant wives in whose name the properties stood were his benamidars. The suit was contested by Nirmala alleging that she was the real owner of the properties. By judgment dated 31.3.1962, the suit was decreed in favour of Balai Chand. Being aggrieved, First Appeal No.491 of 1962 was preferred by Nirmala, Suresh and Bhabesh against Balai Chand. The said appeal was compromised on 29.9.1977. In the said compromise, Balai Chand was declared to be the sole and absolute owner inter alia of the suit premises. The said settlement has been referred to by PW1 in his evidence. The said settlement was between Balai Chand and Nirmala. The compromise was objected to by Ramesh (one of the sons of Nirmala). Ultimately, there was one more compromise decree between Balai Chand and Ramesh, under which Ramesh was given premises bearing 74, Lansdown Road, Calcutta. PW1 in his evidence has also referred to the judgment of the Supreme Court in the case of Nirmala Bala Ghose and another v. Balai Chand Ghose reported in [AIR 1965 SC 1874] arising from suit no.67 of 1955 filed by Balai Chand against Nirmala seeking declaration that the deed of dedication was not an absolute dedication of properties to the deities. PW1 has further stated in his cross-examination that Balai Chand used to reside with his youngest wife Mamta and defendant no.2. PW1 in his cross-examination deposed that in 1986 he had applied for revocation of probate on the ground of fraud in obtaining the probate by defendant no.2 and forgery of the will, however, his application was rejected by the Probate Court. His two sisters, Parul and Manju had thereafter applied for revocation of probate on the ground of non-citation. PW1 admitted that Balai Chand had separated in mess since 1956-57. He was not aware of Ex.A/1. He was not aware of suit no.310/81. He was not aware of the consent decree in suit no.310 of 1981. He conceded that when Balai Chand died on 16.8.1980, litigations were pending between the deceased on one hand and Nirmala on the other hand. That when Balai Chand died, on 16.8.1980, he was living with his third wife Mamta and not with Nirmala. Balai Chand himself used to look after his properties. He has further deposed that he never enquired from Balai Chand about the transfer of properties. PW1 did not make any search in the Registrar’s office in the matter of title deeds concerning the suit premises on the demise of Balai Chand. PW1 admitted that the plaintiffs did not take steps to evict the tenants or to get the properties freed from requisition.

In the said suit, defendant no.2, Arindam, was examined as DW1. In his examination-in-chief, DW1 deposed that Jamuna died before the second marriage of Balai Chand leaving behind Paresh and Naresh, who never resided with Balai Chand. Balai Chand had married Nirmala, the second wife, who had four sons and two daughters, who never resided with Balai Chand. Balai Chand did not have good relations with Nirmala and her children. Balai Chand did not enjoy good relations with Paresh and Naresh. That there were suits between Balai Chand and Nirmala. Balai Chand had instituted suits against the sons of Nirmala for eviction from premises No.13, Beliaghata Road, Calcutta. That impugned will was probated. He was an executor and a legatee under the will. He had sold the suit premises to defendant no.14 after obtaining the probate. His step sisters, Parul and Manju, had applied for revocation of probate. That the probate was revoked for non-citation and not on the ground of fraud. DW1 in his cross-examination has stated that at one point of time, his mother Mamta, was under the impression that the will of Balai Chand was fake but later on she realized that the will was genuine and accordingly she had filed an affidavit dated 26.11.1997 in the present suit stating that the will was genuine and that the power of attorney was executed in favour of defendant no.2. DW1 deposed that Balai Chand during his life time agreed to sell the suit premises to defendant no.14 vide Ex.A/1. That the said agreement was subsequently modified by Ex.A/2. That Rs.1,25,000/- was received on 14.4.1979 (Ex.A/3). That at the time Ex.A/1 was executed, Balai Chand was hale and hearty. Balai Chand had agreed to sell the suit premises for consideration. DW1, however, denied that the will was forged. DW1 had very good relations with his mother Mamta and Balai Chand. He admitted his signatures on power of attorney. He denied that Balai Chand had not executed the power of attorney in his favour. He denied that Ex.A/1 had been entered into to defraud the other heirs of Balai Chand. He deposed that Ex.A/1 was entered into during the life time of Balai Chand. He denied that Ex.A/2 was collusive. According to DW1, Balai Chand was aware of Ex.A/1 and Ex.A/2. DW1 denied that he has no right to execute Ex.A/8. DW1 further asserted that he had signed Ex.A/8 in his capacity as a legatee as well as an executor of the estate of Balai Chand, after the probate dated 31.7.1981.

On behalf of defendant no.14, one of its partners DW5 deposed that defendant no.14 had paid substantial amounts under Ex.A/1 and Ex.A/2. That initial amount of Rs.1,25,000/- was paid by cheque drawn in favour of Balai Chand (Ex.A3). That prior to Ex.A/8, the developer had instituted suit no.310 of 1981 for specific performance of Ex.A/1 and Ex.A/2 which suit was decreed on 3.8.1981, pursuant to which Ex.A/8 was executed on 4.8.1981 by defendant no.2 as the sole executor under the will of Balai Chand, which will was probated on 31.7.1981. He further deposed that defendant no.14 got possession of the suit premises after Ex.A/8. That before executing Ex.A/8, defendant no.14 had carried out the search of the title deeds and documents including the probate. That defendant no.14 was a bona fide purchaser. DW5 has deposed that he did not recollect the date on which the document Ex.A/8 was

submitted before the Collector for affixing the adhesive stamp. DW5 has denied that Ex.A/8 was prepared before the delivery of the judgment in the suit no.310/81. DW5 has deposed that defendant no.14 was aware of the probate case at the time when defendant no.14 alienated the suit premises in favour of defendants no.15 to 20. That defendant no.14 did not inform defendants no.15 to 20 regarding the pendency of the probate case as at the time of alienations in favour of defendants no.15 to 20, there was no probate case pending. DW5 has stated that Ex.A/8 was executed by defendant no.2 as sole executor of the will and as constituted attorney of Balai Chand. After seeing the document, DW5 has deposed that the adhesive stamp was engrossed on Ex.A/8 on 3.8.1981. DW5 has however further stated that he had no personal knowledge about the preparation of Ex.A/8. On being shown Ex.A/8, DW5 conceded that in Ex.A/8, there was no mention about suit no.310 of 1981. He however denied that Ex.A/8 was prepared much prior to 3.8.1981 when the said suit no.310/81 was decreed. He denied that the said suit no.310/81 was collusive, as between Balai Chand, defendant no.14 and defendant no.2. DW5 has further stated that suit no.310/81 was filed for specific performance against Balai Chand and defendant no.2 as executor of the will; that the testator was not alive when Ex.A/8 was executed; that Balai Chand had died leaving behind him nine children and two wives; that they were not made parties to the suit no.310/81; DW5 denied that he was aware of the revocation of the grant of probate in 1987. He denied that defendant no.14 was aware of the revocation of the probate in the year 1987.

On behalf of defendants no.15 to 20, DW6 deposed that the plaintiffs in the partition suit were never in possession of the suit premises. He denied that defendants no.15 to 20 were aware of revocation of probate at the time when they bought the suit premises from defendant no.14. DW6 stated that the work of construction of the new premises after demolition of the old building started in 1991, which work continued till 1996. That the construction of the new building got completed in 1996. DW6 further stated that 13 flats have been sold to various purchasers after receiving consideration.

On the above pleadings and the evidence, following points arise for determination:\027

(I) Effect of revocation of the probate on the disposition(s) during the pendency of the probate.

(II) Was the disposition during the pendency of the probate founded on fraud or collusion between the executor and the developers? and

(III) Was defendant no.14 bona fide purchaser for value without notice? If so, whether subsequent alienation by defendant no.14 in favour of defendants no.15 to 20 is valid and binding on the intestate heirs of Balai Chand?

I. EFFECT OF REVOCATION OF THE PROBATE ON THE DISPOSITION(S) DURING THE PENDENCY OF THE PROBATE.

The Indian Succession Act, 1925 is enacted to consolidate the law applicable to intestate and testamentary succession. Section 2(f) defines the word "probate" to mean the copy of a will certified under the seal of a Court of a competent jurisdiction with a grant of administration to the estate of the testator. Section 2(h) defines the word "will" to mean the legal declaration of the intention of a testator with respect to his property which he desires to be carried into effect after his death. Part VI deals with testamentary succession. Section 59 refers to persons capable of making wills. Section 61 inter alia states that a will obtained by fraud, coercion or undue influence which takes away the volition of a free and capable testator, is void. Under section 63, every will is required to be attested by two or more witnesses, each of whom has seen the testator sign or affix his mark to the will.

Section 211 falls in Part VIII which deals with representative title to the property of the deceased on succession. Section 211(1) declares that the executor or the administrator, as the case may be, of a deceased person is his legal representative for all purposes and that all the property of the deceased vests in him, as such. Under section 212, it is inter alia provided that no right to any property of a person who has died intestate can be established in any Court, unless letters of administration are granted by a probate Court. Under section 213, no right as an executor or a legatee can be established in any Court, unless probate of the will is granted, by the Probate Court, under which the right is claimed. Similarly, no right as executor or legatee can be established in any Court unless the competent Court grants letters of administration with the will annexed thereto. Sections 211, 212 and 213 brings out a dichotomy between an executor and an administrator. They indicate that the property shall vest in the executor by virtue of the will whereas the property will vest in the administrator by virtue of the grant of the letters of administration by the Court. These sections indicate that an executor is the creature of the will whereas an administrator derives all his rights from the grant of letters of administration by the Court. Section 214 states inter alia that no debt owing to a deceased testator can be recovered through the Court except by the holder of probate or letters of administration or succession certificate. Section 216 inter alia lays down that after any grant of probate or letters of administration, no person other than such grantee shall have power to sue or otherwise act as a representative of the deceased, until such probate or letters of administration is recalled or revoked. Part IX of the Act deals with probate, letters of administration and administration of assets of deceased. Under section 218(1), if the deceased is a Hindu, having died intestate, administration of his estate may be granted to any person who, according to the rules for the distribution of the estate applicable to such deceased, would be entitled to. Under section 218(2), when several such persons apply for letters of administration, it shall

be in the discretion of the Court to grant letters of administration to any one or more of such persons. Section 220 refers to effect of letters of administration. It inter alia states that letters of administration entitles the administrator to all rights belonging to the intestate. Section 221 inter alia states that letters of administration shall not render valid any intermediate acts of the administrator which acts diminish or damage the estate of the intestate. Sections 218, 219, 220 and 221 are relevant in the present case as they indicate that nothing prevented the intestate heirs of Balai Chand to apply for letters of administration, particularly when they alleged that Balai Chand died without making a will. Moreover, section 221 indicates that intermediate acts of the administrator which damage or diminish the estate are not validated. This section brings out the difference between letters of administration and probate. Section 221 expressly states that certain intermediate acts of the administrator are not protected as the authority of the administrator flows from the grant by the competent court unlike vesting of the property in the executor under the will (see: section 211). Section 222 states that probate shall be granted only to an executor appointed by the will. Section 227 deals with effect of probate. It lays down that probate of a will when granted establishes the will from the date of the death of the testator and renders valid all intermediate acts of the executor. Section 227 is, therefore, different from section 221. As stated above, in the case of letters of administration, intermediate acts of the grantee are not protected whereas in the case of probate, all such acts are treated as valid. Further, section 227 states that a probate proves the will right from the date of the death of the testator and consequently all intermediate acts are rendered valid. It indicates that probate operates prospectively. It protects all intermediate acts of the executor as long as they are compatible with the administration of the estate. Therefore, section 221 read with section 227 brings out the distinction between the executor and holder of letters of administration; that the executor is a creature of the will; that he derives his authority from the will whereas the administrator derives his authority only from the date of the grant in his favour by the Court. Section 235 inter alia states that letters of administration with the will annexed shall not be granted to any legatee, other than universal or residuary legatee, until a citation has been issued and published calling on the next-of-kin to accept or refuse letters of administration. Such provision is not there in respect of grant of probate. In the circumstances, the judgment in the case of Debendra Nath Dutt & another v. Administrator-General of Bengal reported in [ILR (1906) 33 Calcutta 713] will not apply to the present case.

Chapter III of Part IX deals with revocation of grants. Under section 263, the grant of probate or letters of administration may be revoked if the proceedings to obtain the grant were defective in substance; or the grant being obtained fraudulently by making a false suggestion or by suppressing from the Court something material to the case or if the grant was obtained by means of untrue allegation or if the grantee has wilfully and without reasonable cause omitted to exhibit an inventory or account in accordance with the provisions of Chapter VII of part IX. Before us, it has been vehemently urged on

behalf of the plaintiffs that the revocation of the grant of probate will make all intermediate acts ab initio void. Under section 263, as stated above, grant of probate or letters of administration is liable to be revoked on any of five grounds mentioned therein. One of the grounds as stated above is failure on the part of the grantee to exhibit/file an inventory or statement of account. Similarly, the probate or letter or administration is liable to be revoked if the grant is obtained fraudulently. Can it be said that revocation of the probate on the ground of non-exhibiting an inventory or statement of account will make the grant ab initio void so as to obliterate all intermediate acts of the executor? If it is not ab initio void in the case of non-filing of inventory or statement of account then equally it cannot be ab initio void in the case of a grant obtained fraudulently. In other words, what applies to clause (e) of the explanation equally applies to clause (b) of the explanation. At this stage, we clarify that if the intermediate act of the executor is not for the purpose of administration of the estate or if the act is performed in breach of trust then such act(s) is not protected. However, acts which are in consonance with the testator's intention and which are compatible with the administration of the estate are protected. Therefore, on reading sections 211, 227 along with section 263, it is clear that revocation of the grant shall operate prospectively and such revocation shall not invalidate the bona fide intermediate acts performed by the grantee during the pendency of the probate.

Chapter IV of part IX deals with practice in the matter of granting and revoking probates and letters of administration. Section 273 inter alia states that a probate or letters of administration shall have effect over all the properties and estate of the deceased and shall be conclusive as to the representative title against all debtors of the deceased and against all persons holding the property of the deceased and shall afford full indemnity to all debtors discharging their debts and to persons delivering up such property to the grantee. Section 278 states that every application for letters of administration shall be made by a petition in the prescribed form. Section 297 inter alia states that when a grant of probate is revoked, all payments bona fide made to an executor under such grant before revocation shall be a legal discharge to the person making payment. Under section 307, an executor or an administrator has the power to dispose of the property of the deceased, vested in him under section 211, either wholly or in part, in such manner as he may think fit. This section brings out the distinction between vesting of the estate in the executor under section 211 and his power of disposition. Section 317 refers to duties of an executor or an administrator to file statement of account and inventory periodically. To complete the title in favour of the legatee, under section 332, an assent of the executor is contemplated. This section shows that the revocation of the grant operates prospectively. It completes acts of disposition on the assent being granted. Section 332 further indicates that the property vests in the executor under the will from the date of demise of the testator; that the executor can dispose of the property and that on the assent of the executor, the title of the legatee under the will is completed. Therefore, section 332 makes it clear that revocation of the grant of the probate shall

operate prospectively and not retrospectively.

As stated above, it is submitted on behalf of the plaintiffs that probate dated 31.7.1981 was void as the will of Balai Chand was not proved in accordance with section 63 of Indian Succession Act read with section 68 of the Indian Evidence Act. Learned counsel for the plaintiffs further submitted that on revocation of the probate the grant becomes void ab initio and would obliterate all previous dealings by the executor performed during the continuance of the probate.

We do not find merit in the above arguments. As stated above, section 273 refers to conclusiveness of the probate as to the representative title. It establishes the factum of the will and the legal character of the executor and all the property of the deceased testator from the date of the death of the testator, as long as the grant stands. Under section 41 of the Evidence Act, the grant operates as judgment in rem and can be set aside on the ground of fraud or collusion provided it is pleaded and proved by the party so alleging. [See: Lady Dinbai Dinshaw Petit & others v. The Dominion of India & another reported in AIR 1951 Bombay 72]. It is, therefore, not a pure question of law. As stated above, revocation will not operate retrospectively so as to obliterate all intermediate acts of the executor performed during the existence of the probate, however, if the intermediate acts are incompatible with the administration of the estate, they will not be protected. That the conclusiveness under section 273 is of validity and contents of the will.

In S. Parthasarathy Aiyar v. M. Subbaraya Gramany & another, reported in [AIR 1924 Madras 67] it has been held:\027

"\005 It is not right, as has been suggested in some cases, to treat a will of which probate has not been granted as non-existent and the property passing by intestacy. On the contrary, the will is a perfectly valid document. The executor under it can deal with the property and give a perfectly good title though it may be that to complete that title it requires probate to be taken out at a later date\005."

In the case of Mt. Azimunnisa Begum v. Sirdar Ali Khan & others [AIR 1927 Bombay 387], the facts were as follows. The plaintiff was a minor. When her father died, she was the youngest child. No citation was served on her nor any guardian ad litem appointed in the probate proceedings instituted by the executors. She applied for revocation of the probate on the ground that it was not the last will. That the grant of the probate was against the interest of the infant. It was held that want of citation by itself will not vitiate the probate, but in the absence of a citation duly served upon guardian ad litem, it would be open to the infant on attaining majority to institute proceedings within the period prescribed by the Limitation Act for the revocation of the grant of probate. In that matter, the plaintiff alleged that probate was obtained from the probate court under cover of secrecy. The plaintiff did not lead evidence to substantiate the allegation of secrecy in obtaining the probate. She contended that the will was ab initio void. It was held

that the property had vested in the executor by virtue of the will and even if it is afterwards detected that the will was forged, all acts of the executor in respect of the suit premises, where bona fide purchasers are concerned, must be regarded as valid.

In Cherichi v.Ittianam & others [AIR 2001 Kerala 184], it has been held that the prohibition under section 213 of Indian Succession Act is regarding establishing any right under the will without probate and that section cannot be understood as one by which the vesting of right as per the provisions of the will is postponed until the obtaining of probate or letters of administration. The will takes effect on the death of the testator and what section 213 says is that the right as executor or legatee can be established in any Court only if probate is obtained. Therefore, section 213(1) does not prohibit the use of will which is unprobated as evidence for purposes other than establishment of right as executor or legatee. Therefore, the requirement of obtaining probate becomes relevant at the time when the establishment of right as executor or legatee is sought to be made on the basis of a will in a court of justice.

In Sheonath Singh v. Madanlal reported in [AIR 1959 Raj. 243], it was held that Section 213 does not vest any right. It only regulates the procedure of proving a will. It is distinct from section 211. It lays down a rule of procedure and not of any substantive right.

In Mrs. Hem Nolini Judah v. Mrs. Isolyne Sarojbashini Bose & others reported in [AIR 1962 SC 1471], it has been held that section 213 does not say that no person can claim as a legatee or executor unless he obtains a probate of the will. It only says that no right as an executor or legatee can be established in any Court without probate.

In Komollochun Dutt & others v. Nilruttun Mundle, reported in [4 ILR Cal. 360] it has been held that the property of the testator vests in the executor by virtue of the will and not by virtue of the probate. The will gives the property to the executor. The grant of probate is only a method by which a will can be proved. When the probate is granted, it operates on the whole estate and it establishes will from the date of death of the testator. The probate can be revoked upon any of the grounds mentioned in section 234 of the Indian Succession Act, 1865 (Section 263 of Indian Succession Act, 1925]. In the said judgment, it has been observed that in cases where the probate has been given in the common form, and not in the solemn form, the Probate Court may call upon the propounder to prove the will in the presence of the objector afresh so as to give the objector an opportunity of testing the evidence in support of the will. This judgment, therefore, lays down that even when the probate issued in the common form is revoked under section 263 the revocation operates prospectively; that on revocation parties are given an opportunity to prove the will afresh. To the same effect is the ratio of the judgment in the case of Mt. Ramanandi Kuer v. Mt. Kalawati Kuer reported in [AIR 1928 PC 2].

In the case of Akshay Kumar Pal v. Nandalal Das reported in [ILR (1946) 1 Cal. 432] it has been held that where the grant of probate is revoked, the grant does not become void ab initio and the revocation will not invalidate any previous dealing of the executor as long as they are done in due course of administration of the estate or they are with persons acting in good faith. That an administrator derives his authority from his appointment by the Court whereas an executor derives his authority from the will. That the letters of administration confer rights on the administrator but the probate is an evidence of the pre-existing rights of the executor appointed by the will and the probate does not confer any new right on such executor. That the vesting of the property of the deceased in the executor under section 211 is independent of the grant of probate. That section 211 does not say, with reference to an executor, that he becomes the legal representative only on obtaining probate. On the other hand, section 307 indicates that an executor can exercise the power of disposition without obtaining the probate. However, the executor must administer the estate in accordance with the will. His acts must not be incompatible with the administration of the estate. That under section 211, the estate of the testator vests in the executor even before the grant of probate, but by virtue of section 213, the executor can establish his right in a Court on production of the probate. When a competent Court grants probate or letters of administration, it can never be absolutely sure that the deceased left no subsequent will. There is always a possibility of subsequent will being discovered later on. There is always a risk of fraud on the Court. However, such possibility of risk cannot indefinitely hold up the administration of the estate. Therefore, section 273 makes the grant conclusive. As soon as the grant is made, section 273 comes into play. However, the law takes note of the possibility of error, irregularity or fraud and accordingly makes provisions for revocation of grant for just cause. (section 263). If a grant is made in any of the circumstances falling in the explanation to section 263, the Court can revoke the grant. However, such revocation can only be prospective and not retrospective. In this connection, section 297 of the Act is important. That section provides that when grant of probate is revoked, all payments made bona fide to any executor under such grant before revocation shall constitute a legal discharge to the person making such payment. The object of the aforestated Scheme of the Act is to make it safe for the public to freely deal with the grantee. The theory of vesting of the estate in the executor at the moment of death of the testator, even before the will is probated, is true enough for the administration of estate but it is subject to the qualification that the grant even if erroneously made is revocable if the circumstances in the explanation to section 263 exist. However, till the grant is revoked, the grantee is the only legal representative of the deceased and people may safely deal with such representative in good faith in due course of administration and such dealings will be protected even if the grant is subsequently revoked. Accordingly, it was held that revocation of the grant does not make the grant void ab initio and will not invalidate any intermediate acts done in good faith in due course of administration of estate.

In the case of Valerine Basil Pais (dead) by LRs v. Gilbert William James Pais & another reported in [1993 (2) Kar. LJ 301] it has been observed that even in cases where grant has been obtained by fraud, so long as the grant remains unrevoked, the grantee represents the estate of the deceased.

In the present suit, the trial Court has recorded the finding that the probate was revoked on the ground of non-citation, fraud in procuring the probate and forgery of the will. This finding of the trial Court is perverse. On 14.5.1986, Bhabesh applied for revocation on two grounds, namely, that the will was forged and that the probate was obtained fraudulently by defendant no.2. Vide order dated 18.9.1986, the Probate Court dismissed the application of Bhabesh. On 25.3.1987, an identical application was made by Parul and Manju for revocation of the grant alleging fraud, forgery and non-citation. By order dated 9.7.1987, the Probate Court revoked the grant. PW1 in his evidence has deposed that the probate was revoked on account of non-citation. Therefore, reading the aforestated orders and the evidence of PW1, it is clear that the probate was revoked only on account of non-citation. Despite this evidence, the trial Court holds that the probate was revoked on the ground of forgery and fraud apart from non-citation. In our view, this finding is unsustainable for want of evidence.

Learned counsel for the plaintiffs, however, submitted that the initial onus was on defendant no.2 or defendant no.14 to prove the genuineness of the will. It was submitted that the will of Balai Chand was surrounded by numerous suspicious circumstances which have been taken into account by both the Courts below. In this connection, reliance was placed on the following factors:\027

(i) Execution of Ex.A/1 and Ex.A/2 by defendant no.2 as constituted attorney of Balai Chand even when Balai Chand was alive;

(ii) Affidavit of Mamta dated 25.9.1997 stating that Balai Chand was unduly influenced by defendant no.2. That the will was forged;

(iii) That the power of attorney was never produced by defendant no.2 in evidence and, therefore, the act on the part of defendant no.2 in entering into the Ex.A/1 with defendant no.14 was with the intention of defrauding Balai Chand and his intestate heirs;

(iv) That defendant no.2 in his evidence has deposed that Balai Chand though old was hale and hearty and, therefore, there was no reason for execution of Ex.A/1 and Ex.A/2 through the constituted attorney;

(v) That under clause (2) of Ex.A/1, the rate at which the suit premises were agreed to be sold was Rs.55,000/- per kottah of land and at that rate the total consideration receivable by Balai Chand was Rs.15 lacs, whereas in

fact the amount received by defendant no.2 under Ex.A/8 was Rs.9,54,632/-;

(vi) That in the case of Naresh Chandra Ghosh v. Archit Vanijya & Viniyog Pvt. Ltd. reported in [1998) 2 Cal. L. J. 344], the will was found to be forged by the High Court;

(vii) That revocation was on account of forgery and fraud;

(viii) That defendants no.15 to 20 purchased the suit premises after revocation.

Before dealing with each of the aforestated circumstances, we may examine the legal position.

In the case of Surendra Nath Chatterji v. Jahnavi Charan Mukherji reported in [AIR 1929 Cal. 484] the facts were as follows: The will was alleged to have been executed by one Ram Lal Mukherji, dated 6th September, 1914 and the Codicil was executed by the same gentleman dated 11th September, 1920. Ram Lal died on 9th April, 1923. He was a gentleman of considerable properties and died at a good old age. It is said that he was 85 years of age at the time of his death. It is unnecessary to state in detail the members of his family at the time of his death and shortly before that as the facts have been fully set out in the judgment of the District Judge. It is sufficient to say that he was survived by four sons, Mritunjoy, Ganga Charan, Jahnavi Charan and Jahnavi Prosad and two daughters and a large number of grandchildren. He became a widower in the year 1890, and after that he went to live more or less as a recluse in a house built on a rock near the town of Monghyr in the province of Bihar. Previously he was a permanent resident of Boinchee in the district of Hoogly. The house in which he lived at the time of his death was described as Pirpahar. None of his sons lived there and it appears from the evidence that if any of them ever visited him it must have been on rare occasions. The most curious thing is that one of the sons, Ganga Charan, practiced as pleader at Monghyr and lived about 2 miles from the house of his father, but even he seems to have seldom visited his father. It was held that the propounder of a will has to remove only such suspicious circumstances as are suggested by the objectors. In that case it was found that facts alleged by the objectors were not supported by evidence. There was no evidence of undue influence. That the evidence was that the testator had sound disposing mind. He was ill treated by his sons. The Court found that all the alleged suspicious circumstances were removed by the evidence. The Court observed that no questions were put by the objectors to the propounder of the will regarding such circumstances. The Court found from the evidence that the testator was a strong willed person and the manner in which he was treated by his sons one cannot assume that the will made by him was without knowing the contents.

Similarly, in the case of Smt. Indu Bala Bose & Ors. v. Manindra Chandra Bose & Anr. reported in [AIR 1982 SC 133], it has been held that a circumstance

would be "suspicious" when it is abnormal or is not normally expected in a normal situation or is not expected of a normal person.

In the light of the aforestated judgments we may now examine the evidence in this case. Balai Chand had married thrice. Jamuna pre-deceased him. When he made the will Balai Chand had two wives and nine children. He was strong willed. He was conscious of his legal rights. He had considerable properties. During his life time, he asserted his legal rights qua the tenants. He used to litigate on every issue. He collected rent from the tenants. He filed eviction and rent collection suits against the tenants. He sued Nirmala. He had numerous cases filed against Nirmala the particulars of which are as under:\027

Sl. No.	Suit No. of Trial Court	Case No. in High Court	Case No. in Supreme Court	NAME OF PARTIES	In Appeal	REMARKS
01	79-80 of 1954	268 & 270 of 1957	966 & 968 of 1964	Nirmala Bala Ghose v. Balai Chand Ghose		Suits were filed by Balai Chand
02	67 of 1955	269 of 1957	967 of 1964	Nirmala Bala Ghose v. Balai Chand Ghose		Suit was filed by Balai Chand
03	67 of 1976					

Nirmala Bala Ghosh v. Balai Chand Ghosh Suit was filed by Balai Chand	04	
M.C. 3 of 1980 in Misc Appeal No.309 of 1978 Balai Chand Ghosh v. Nirmala Ghosh Arindom Ghosh was substituted in place of Balai Chand.	05	2/1961 [Earlier Nos.68/56, 13/59]
FA 492/62 Ramesh Ghosh v. Balai Chand Ghosh Compromised matter.	06	2/1961
FA 491/62 Nirmala Ghosh etc. v. Balai Chand Ghosh Compromised matter.	07	111/66
		180/73

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Iswar Satyanarayan v. Balai Chand Ghosh (D) through LRs Nirmala Ghosh & others	The LRs of Balai Chand were restrained from alienating property no. 13 & 13/1 Beliaghata Road	08 4/1968
Mamta Ghosh v. Nirmala Bala Ghosh	Suit for declaration that 5 Hindustan Park is not attachable in execution.	

Between September, 1977 and July, 1978, settlements between Balai Chand and Nirmala, Suresh & Bhabesh had taken place concerning the properties; that suit premises came to Balai Chand; that this settlement was also challenged by Ramesh which was followed by another settlement under which Ramesh got property at Lansdown Road, Calcutta. That this is not the case where one of the sons have got all the properties of the testator.

Apart from the aforestated facts, the will of Balai Chand recites specifically that Balai Chand had two sons Paresh & Naresh from his first wife Jamuna; that he had five sons from his second wife; that he was at one point of time living with Nirmala and her sons in house No.13, Beliaghata Road, Calcutta; that soon thereafter Nirmala and her sons started disobeying him; that they were ungrateful to him; that he was ill-treated by them and that thereafter he has been living with Mamta and her son Arindam. In his will, the deceased has further stated that he had number of businesses; that he had various house properties in his own name and in the benami names of the sons of Nirmala; that the said sons of Nirmala had falsely claimed the properties and consequently, Balai Chand had to institute suits, in which he was declared to be the owner of the properties. In his will, he has referred to the above settlement of September, 1977. In the circumstances, there was no question of Arindam influencing his father Balai Chand in the making of the will bequeathing the suit premises to him.

The evidence further shows that during the life time of Balai Chand, Ex.A/1 and Ex.A/2 came to be

executed. That although Ex.A/1 and Ex.A/2 were executed by defendant no.2 as the constituted attorney of Balai Chand, an amount of Rs.1.25 lacs was received by Balai Chand from defendant no.14, which is uncontroverted evidence of DW5, and which indicates that Balai Chand was aware of Ex.A/1 and that he intended to sell the suit premises to defendant no.14. Further, Ex.A/3 shows that the cheque for Rs.1.25 lacs was drawn in favour of Balai Chand. Further, Balai Chand lived for almost three years after making the will on 25.12.1977. He found Arindam to be obedient. He loved Arindam and Mamta. These basic tell-tale circumstances have not been considered by the Courts below. Both the Courts below have drawn inferences from circumstances with dead uniformity and without realistic diversity. The factors taken into account by the Courts below have been broadly indicated. However, it is important to note that in this case we are concerned with the intention of the testator. The basic error committed by the Courts below is that it has examined the alleged suspicious circumstances de hors the above tell-tale circumstances duly established by evidence and the contents of the will viz. the strained relationship between the testator and Nirmala, Jamuna and their children, the love and affection of Balai Chand for Mamta and Arindam and lastly the strong personality of the deceased. In the light of the above circumstances, the factors relied upon by the Courts below are not relevant particularly in the context of deciding the question whether Balai Chand had approved the impugned disposition in favour of Arindam. With these findings, we may examine each of the factors taken into account by the trial Court. The trial Court has placed reliance on the affidavit of Mamta dated 25.9.1997 in which, as stated above, Mamta has alleged that the will was forged; and that it was outcome of undue influence exercised by defendant no.2 on Balai Chand. However, the said affidavit has been filed by Mamta at an interim stage and it is not put in evidence. On 26.11.1997, Mamta files another affidavit, in which she states that she has gone through Ex.A/1, Ex.A/2, Ex.A/8 as well as the will and the power of attorney executed by Balai Chand in favour of Arindam. By the said affidavit, she confirms the signature of Balai Chand on the power of attorney in favour of Arindam. She also confirms the sale by Arindam in favour of defendant no.14. DW1 in his evidence has explained that the first affidavit was filed by his mother under misconception and subsequently on going through the papers she had rectified her earlier position. This evidence has not been shaken. Therefore, the said alleged suspicious circumstance stood cleared. The next circumstance which the trial Court found to be abnormal is execution of power of attorney by Balai Chand during his life time. Balai Chand was 90 years of age. Negotiation of sale is a tedious and laborious task. He was hale and hearty but to negotiate and sell the property was difficult for an old man. Hence, we do not find any abnormality in the son being appointed as constituted attorney, particularly when under the will Arindam was the legatee. The trial Court has come to the conclusion that the power of attorney was not produced in evidence by Arindam and consequently execution of Ex.A/1 by constituted attorney of Balai Chand was to defraud Balai Chand and his heirs. However, the trial Court has failed to consider the evidence of DW5 stating

that Rs.1.25 lacs was received by Balai Chand. In this connection, Ex.A/3 is important. It indicates payment by cheque in favour of Balai Chand of Rs.1.25 lacs which has not been considered by the trial Court. It indicates that Balai Chand had knowledge of Ex.A/1 and that he had approved the agreement of sale. In the cross-examination Arindam has deposed that Balai Chand had signed the power of attorney. Arindam has denied the suggestion of Balai Chand not executing the power of attorney. Lastly, the evidence of Arindam has not been shaken on this point. The next circumstance which the trial Court takes into account is that Arindam has received payments of Rs.9.54 lacs whereas under Ex.A/1 he was entitled to receive Rs.15 lacs. As stated above, no suggestion was put to DW1 (Arindam) in cross-examination on this point. In the case of Surendra Nath Chatterji (supra), it has been held that the propounder must explain those circumstances which are put to him in cross-examination. In the present case, for example, there could be number of explanations. Was the price reduced to meet the cost of evicting tenants and free the suit premises from encumbrances? In the absence of allegations the trial Court could not have proceeded on the above circumstance to hold that property was sold at a lesser price. In fact there was no such plea taken by the plaintiffs. The next circumstance on which the trial Court placed reliance was revocation of probate. According to the trial Court Arindam had obtained the probate fraudulently. According to the trial Court the will was forged. As stated above, this finding was without evidence. As stated above, the application dated 14.5.1986 by Bhabesh on the aforesaid grounds was dismissed. PW1 has stated that probate was revoked for non-citation pursuant to application by his sisters. Hence, the trial Court had given the finding without evidence. In this connection the trial Court relied upon the interim order passed by the Division Bench of the High Court in the case of Naresh Chandra Ghosh & others v. Archit Vanijya and Viniyog Ltd. & others reported in [(1998) 2 Cal. L.J. 344]. The only question before the Division Bench of the High Court was whether defendants no.15 to 20 should be restrained from raising construction and whether receiver should be appointed. In the said order, there is no finding of forgery. On the contrary, in the said order, it has been clarified that admittedly a multi-storey building has been constructed and that the plaintiffs in the partition suit in normal circumstances must be held to have knowledge of ongoing construction. That the plea of ignorance raised by the plaintiffs cannot be accepted. Under the aforestated circumstances, the inferences drawn by the trial Court are from circumstances which have not been alleged and proved. The findings are not based on evidence. The trial Court has failed to take into account the proved preponderatory circumstances and it was influenced by inconsequential matters in holding that the will was not genuine. Before concluding, we reiterate that revocation of the probate operates prospectively; that such revocation does not obliterate bona fide transactions entered into by the executor during the pendency of the probate; that we have gone into the circumstances surrounding the will as they were pressed into service during the course of the argument.

According to the impugned judgment, in addition

to the above alleged suspicious circumstances taken into by the trial Court, it has been held by the High Court that Arindam got impleaded in 1982 without disclosing the probate and the conveyance; and that Arindam had fraudulently obtained the probate without serving citation on his two step-sisters. According to the High Court no steps have been taken to prove the will even after it has been revoked as far back as 9.7.1987.

At the outset, we may point out the basic fallacy committed by both the Courts below. They have read the record of the case without the same being tendered in evidence. Further the findings are perfunctory. In the present case the High Court, as stated above, has given a finding that in 1982 Arindam got impleaded in the suit without disclosing the conveyance. No particulars of the order of impleadment have been given. However, on our going through the records of the case paper we found the order passed by Additional District Judge, Alipore dated 21.8.1982 in Miscellaneous Case No.3/80 in which Balai Chand was a party as a shebait. The subject matter of Miscellaneous Case No.3/80 was quite different. In that suit, on the demise of Balai Chand, defendant no.2 was substituted. In the said order the civil Court has observed that Nirmala did not dispute the existence of the will; that she was aware that Arindam was the executor under the will. This order is partly quoted in the written statement filed by Arindam in the partition suit in support of his contention that as far back as 21.8.1982, Nirmala was aware that Balai Chand had died making a will and yet no steps were taken to amend the plaint to that effect till 1993. Further, Ex.A/8 in the present suit concerning the suit premises was not relevant in Misc. Case No.3/80 as the subject matter of the two cases was different. That in any event the said order dated 21.8.1982 was not put to Arindam in cross-examination. In the circumstances, the High Court erred in holding that Arindam had deliberately withheld the disclosure of the conveyance and the probate. In fact the order of additional District Judge shows that Nirmala had made it clear that she did not accept the validity of the will. Similarly, in the present case, the High Court has given a finding that Arindam had obtained the probate fraudulently without service of citation on Mamta and Parul the two daughters of Nirmala. There is no evidence. On the contrary, as stated above, vide order dated 18.9.1986 the Probate Court had rejected the application for revocation made by Bhabesh on the ground of forgery and fraud. That in his evidence Bhabesh has conceded that probate stood revoked by order dated 9.7.1987 on the ground of non-citation. That the history of the litigation, as reflected in the evidence, shows that Nirmala and her sons had fought for various properties, every inch of the way. One can understand the sons of Nirmala not being served. Here Nirmala and her sons and the sons of Jamuna were served. That the High Court erred in disbelieving Arindam when he deposed that Manju and Parul were not cited as they were not the legatees. This was due to misconception and not on account of fraud. Lastly, the High Court has observed that the will is lying in the state of derelict without being probated. Here also one finds that after revocation, Arindam applied for revival of proceedings; that order of revival was passed and it was challenged by one of the other sons of Balai Chand. Therefore, these circumstances which indicate the

strained relationship between the parties, their propensity to litigate at every stage have not been considered by the Courts below. In these circumstances, we have no hesitation in saying that the findings are based on conjectures and suspicion and that relevant circumstances have not been taken into account.

(II) WAS THE DISPOSITION, DURING THE PENDENCY OF THE PROBATE FOUNDED ON FRAUD OR COLLUSION BETWEEN THE EXECUTOR AND THE DEVELOPERS?

AND

(III) WAS DEFENDANT NO.14 BONAFIDE PURCHASER FOR VALUE WITHOUT NOTICE? IF SO, WHETHER SUBSEQUENT ALIENATION BY DEFENDANT No.14 IN FAVOUR OF DEFENDANTS No.15 TO 20 IS VALID AND BINDING ON THE INTESTATE HEIRS OF BALAI CHAND?

As the above two points are interconnected, we propose to deal with them jointly.

As stated earlier, the grant of probate establishes the genuineness of the will and the person in whose favour the probate is granted is entitled to convey the title arising out of the will probated by the Court. It may happen that the propounder did not take appropriate steps, by mistake, to notify the other heirs before obtaining probate. But the third party who acts bona fide and deals with the grantee cannot be made answerable to the fraud or mistakes committed by the propounder [See: Valerine Basil Pais (dead) by LRs. v. Gilbert William James Pais & another reported in 1993 (2) Kar. L. J. 301].

Applying the above tests to the evidence on record we find that Balai Chand had strained relationship with his first two wives; that he had differences with his sons from the first two wives; that there were litigations writ galore between them; that Balai Chand loved Arindam and that he had bequeathed the suit premises to Arindam under the above will. Further, the sons of Nirmala have fought legal battles on every issue both during the life time of Balai Chand and even after his demise. Even after revocation, Ramesh had objected to revival of probate proceedings. These circumstances are relevant because the main ground on which the Courts below have proceeded to declare Ex.A/8 as fictitious, although there is no plea, was the speed with which Ex.A/8 came about. According to the impugned judgments the manner in which suit no.310/81 was filed without impleading the other heirs and the manner in which Ex.A/8 came to be executed on 4.8.1981 after the grant on 31.7.1981, without reference to the consent decree dated 3.8.1981 in suit no.310/81, proved that Ex.A/8 was collusive and fictitious having being entered into to defeat the claims of the intestate heirs. These findings of the Courts below are without consideration of the relevant circumstances. After the will dated 25.12.1977, Ex.A/1 was executed on 12.3.1979 followed by supplemental agreement dated 21.7.1980 (Ex.A/2) under which Balai Chand agreed to sell the suit premises to defendant no.14. It is true that

Ex.A/1 and Ex.A/2 have been signed by Arindam as constituted attorney of Balai Chand. However, it would not be correct to say that Balai Chand was not aware of Ex.A/1 and Ex.A/2. In this connection, DW1 has deposed that Rs.1.25 lacs was received by him under the said agreement, Ex.A/1. That as can be seen from Ex.A/3, the cheque for Rs.1.25 lacs was drawn in favour of Balai Chand. The said amount was credited to his account. This evidence is not considered by the Courts below. This evidence was clinching as Ex.A/8 has been executed pursuant to Ex.A/1 and Ex.A/2 which were entered into during the life time of Balai Chand. That Ex.A/1 and Ex.A/2 were, therefore, binding on the estate of Balai Chand and his other heirs. Under the will the suit premises have been bequeathed to Arindam. Hence, both the Courts erred in holding that Ex.A/8 was fictitious having been entered into to defeat the claim of other heirs.

Now coming to the finding of the Courts below that the haste with which Ex.A/8 was entered into indicated collusion between Arindam and the Developers and consequently both the Courts below have held that the impugned Ex.A/8 was fraudulent and not binding on the other heirs. In the circumstances both the Courts below have held that defendant no.14 was a privy to the fraud in execution of Ex.A/8. These findings are given without any plea of fraud or collusion against defendant no.14. There is no issue framed by the trial Court. The trial Court has framed the issue of collusion against defendants no.15 to 20. In the plaint, collusion is alleged between defendants no.1 and 2. In the impugned judgment of the Division Bench of the High Court, great stress is laid on suit no.310/81 being filed without impleading the other heirs in coming to the conclusion that the developers were not bona fide purchasers and that they had knowledge of the alleged fraud by Arindam in obtaining the probate without service of citation on Manju and Parul. However, while returning the above findings, both the Courts below have failed to notice the evidence on record. Suit no.310/81 was filed on 21.4.1981 prior to the partition suit. It was filed to enforce Ex.A/1 dated 12.3.1979. Suit No.310/81 was filed after the will and before Arindam could obtain the probate. As stated above, Arindam was the executor under the will. He was a legatee under the will. At the time of the filing of the suit the will was in existence. At the time of the suit, Ex.A/1 and Ex.A/2 were there. As held, the executor has authority under the will to alienate. That he need not wait till the probate. For filing the said suit no.310/81, probate was not required. However, before the decree, probate had been obtained. In the circumstances, without allegation of collusion against developers, both the Courts erred in holding, without evidence, that Ex.A/8 was collusive as it was got executed expeditiously. Here also, we find that relevant evidence has not been taken into account. The evidence shows the propensity of the family to litigate on every issue. The developers had invested huge amount not only in the payment of consideration but also by way of costs incurred to free the suit premises from requisition, acquisition and other encumbrances including eviction of tenants. Under the above circumstances, after the probate, the developers were bound to expedite the sale. Even according to the Division Bench of the High Court,

Arindam was not reliable. In the circumstances, without evidence, the Courts below erred on the basis of expedition of sale that Ex.A/8 was fictitious and based on collusion between Arindam and defendant no.14. Similarly, for the aforestated reasons, both the Courts below erred in holding that probate was obtained fraudulently without effecting service on Parul and Manju.

Lastly, both the Courts below have failed to notice the provisions of section 41 of Transfer of Property Act.

In the case of Gurbaksh Singh v. Nikka Singh & another reported in [AIR 1963 SC 1917] it has been held that section 41 is an exception to the general rule that a person cannot confer a better title than what he has. Being an exception the onus is on the transferee to show that the transferor was the ostensible owner of the property and that the transferee had after taking reasonable care to ascertain that the transferor had power to transfer, acted in good faith.

In the case of Seshumull M. Shah v. Sayed Abdul Rashid & others reported in [AIR 1991 Karnataka 273], it has been held that in every case, where a transferee for valuable consideration seeks protection under section 41 of the Transfer of Property Act, the transferee must show that the real owner had permitted the apparent owner either by express words, consent or conduct to transfer the property in favour of the transferee. In other words, it must be shown that with the consent of the true owner, the ostensible owner was able to represent himself as the owner of the property to the purchaser for value without notice.

Applying the above tests to the facts and circumstances of the present case, we find, on the basis of the evidence on record, that the suit for partition was filed on 21.9.1981. Nirmala was aware of the will as early as 21.8.1982. She did not apply for letters of administration. She did not challenge the will. Between 21.9.1981 to 22.6.1993 (when the plaint was amended) the developers demolished the old building. They constructed a multi-storey building. They got freed the property from all encumbrances stated herein above. In the circumstances, it cannot be said that the other heirs of Balai Chand had no knowledge of the aforestated events. [See: Order of the Division Bench in Naresh Chandra Ghosh & others v. Archit Vanijya and Viniyog Ltd. & others reported in (1998) 2 Cal. L.J. 344]. In our view, the test laid down in the matter of applicability of section 41 of the Transfer of Property Act is squarely applicable to the facts of the present case. The intestate heirs of Balai Chand allowed Arindam to represent to the developers that he was the owner of the suit premises. It is established by the conduct of the inaction on the part of the intestate heirs of Balai Chand. Hence, we hold that defendant no.14 was bona fide purchaser for value.

Before concluding, we may refer to the judgment of the Madras High Court in the case of G.F.F. Foulkes & others v. A.S. Suppan Chettiar and another reported in [AIR 1951 Madras 296] in which it has been held that if the nature of the transaction gives notice to the

purchaser that the executor was disposing of the assets contrary to the will then the purchaser is said to have participated with the executor in an improper conversion of the estate of the deceased and in such a case the sale would be invalid. In the present case, under the will, the suit premises have been bequeathed to Arindam who is also appointed as an executor. Therefore, there is nothing to suggest that Ex.A/8 was incompatible with the administration of the estate of Balai Chand. In the circumstances, we hold that defendant no.14 was a bona fide purchaser for value and the alienation effected by defendant no.14 in favour of defendants no.15 to 20 was valid.

Lastly, we may refer to the preliminary objection advanced on behalf of the plaintiffs. When the matter came up for final hearing before the Division Bench of the High Court, an enquiry was made by the learned Judges from the subsequent purchasers whether they would like to prove the will or await the decision in the probate case before proceeding with the appeals arising out of the judgment of the trial Court granting a preliminary decree for partition. At that stage, defendants no.14 to 20 stated that they wanted to proceed with the matter and that they did not want to await the decision of the Probate Court. The learned counsel appearing on behalf of the plaintiffs submitted that in view of the aforestated statement made on behalf of the defendants no.14 to 20, it was not open to the said defendants to rely upon the probate or the will for the purposes of showing that they were bonafide purchasers for value without notice and that their purchase was good and valid as defendant no.2 had a good title to convey on the basis of the will and the probate. Before us, it has been submitted on behalf of the plaintiffs that if a particular concession is recorded in the judgment of the High Court, the party aggrieved can not thereafter assail the same. We do not find any merit in this argument. Firstly, before the trial Court, defendant no.14 and defendants no.15 to 20 had asked for stay of the partition suit pending decision by the Probate Court. It was objected to by the plaintiffs. The objection of the plaintiffs was upheld and the matter was decided against the defendants. Secondly, before the trial Court, it was the plaintiffs who had relied upon the alleged suspicious circumstances surrounding the will. In the circumstances, defendants no.14 to 20 cannot be prevented from relying on the probate and the will.

We are mindful of the fact that generally this Court does not interfere with the concurrent findings recorded by the Courts below in civil appeals by way of special leave under Article 136 of the Constitution of India. However, in cases where the Courts below have given findings on documents and on the basis of assumption and inferences founded on facts and circumstances, which in themselves offer no direct or positive support for the conclusion reached, it is our incumbent duty to review such inferential process. In such cases, the right of this Court to review such inferential process cannot be denied. It is well settled that inferences have to be drawn from a given set of facts and circumstances with realistic diversity and

not with dead uniformity. We have, therefore, interfered with the concurrent findings recorded by the Courts below as we find that in the present case, findings have been recorded on fraud and collusion in favour of the plaintiffs, who have not alleged fraud or collusion supported by the particulars.

For the reasons stated above, the appeals succeed and are allowed. The judgment and decree of both the Courts below are set aside and the suit for partition stands dismissed. Interim order, if any, against the appellants stands vacated.

CIVIL APPEAL Nos.6871-6873 OF 2003.

For reasons given in our judgment allowing Civil Appeals No.6258 and 6259 of 2000 and in view of our finding that the conveyance dated 4.8.1981 executed by Arindam in favour of Crystal Developers was valid and in view of our finding that the Crystal Developers were bona fide purchasers for value, these appeals have become infructuous and the same are disposed of accordingly.

There shall be no order as to costs in all the appeals.