

PETITIONER:
MRS. JOYCE PRIMROSE PRESTOR(NEE VAS)

Vs.

RESPONDENT:
MISS VERA MARIE VAS & ORS.

DATE OF JUDGMENT: 12/04/1996

BENCH:
PARIPOORNAN, K.S.(J)
BENCH:
PARIPOORNAN, K.S.(J)
PUNCHHI, M.M.

CITATION:
JT 1996 (4) 333 1996 SCALE (3)596

ACT:

HEADNOTE:

JUDGMENT:

J U D G M E N T

PARIPOORNAN, J.

The plaintiff in O.S. No. 4/1970, IInd Additional District Judge's Court Bangalore, is the appellant herein. She filed an application under Section 276 of the Indian Succession Act, P&SC No.124/1969 for the grant of Letters of Administration of the estate of the deceased, Mrs. primrose Mary Vas (her mother). Mrs. Primrose Mary Vas had executed Ex. P-1, will Dated 19.6.1964. The first defendant in the suit (husband of the testatrix) and the second defendant are the executors of the said will. The plaintiff called upon the executors on 6.3.1969 to take out probate. She was not favoured with any reply. On 26.7.1969, M/S. D.A. Costa & D.A. Costa, Advocates informed the plaintiff that the second defendant was unwilling to act as the executor and that the first defendant was intending to contest the Will. It was in these circumstances the plaintiff as a legatee, prayed for the grant of letters of Administration of the estate of the deceased, Mrs. Primrose Mary Vas (her mother) with a copy of the will annexed as Annexure, Ex.P-1. The first defendant in the suit is Mr. Emmanuel Joseph Vas, husband of testatrix, the second defendant is one of the executors of the Will, plaintiff, defendants 3 and 4 are daughters of the testatrix and the 5th defendant is the testatrix's son. We will be referring to the parties in this appeal, as they were arrayed in the suit. The first defendant died pending the suit and defendants 3 to 5 were recorded as his legal heirs. In this appeal filled by the plaintiff, (one of the daughters and a legatee under the Will), the respondents are defendants 3, 4 and 5 in the suit. The trial court by judgment dated 29.1.1974, held that the Will of Mrs. Primrose Mary Vas dated 19.6.1964 is perfectly valid and genuine, and ordered thus:

"The suit is decreed. The plaintiff shall be granted letters of administration with a copy of the

Will (Ex.P.1) ennnexed, subject to the following conditions Viz., (1) that she executes the necessary administration bond under Section 291 of the Indian Succession Act to the extent of the value of the bequest made to deft. 3 & 4 (2) that she produces Estate Duty clearance certificate and (3) that she pays the necessary court fee for drawing up the letters of administration. The defendants. 3 and 4 will pay the costs of this to the plaintiff and bear their own."

In appeal, by defendants 3 and 4, a Division Bench of the Karnataka High Court, by judgment dated. 11.7.1978, reversed the said judgment and held that the Will is shrouded in suspicion and the propounder (the plaintiff) has failed to satisfy "the judicial conscience, dispelling all the doubts that arise in this case, that the Will, Ex.P-1 was legally and properly executed by Mrs. Vas with attestation by Mrs. Gadre and another."

2. The plaintiff filed S.S.P. (C) No. 991/79 and this Court granted leave to appal against the aforesaid judgment of the High Court of Karnataka by order dated 13.12.1979. and hence this appeal.

3 In this appeal the main question that falls for consideration is, the legality and validity of the Will dated 19.6.1964 executed by the testatrix, late Mrs. Primrose Mary Vas.

4 A few facts, which are not in controversy should be borne in mind in adjudicating the case. The testatrix is one Mrs. Primrose Mary Vas. She was running a hotel, namely, "Terra Vera", at Bangalore. She was aged 63 at the time of execution of the Will, Ex.P-1 dated 19.6.1964. It has come out in evidence that she was admitted to Hospital on 21.6.1964 and was operated upon on 26.6.1964. She was discharged on 12.7.1964. The testatrix died in Bangalore on 23.6.1968, i.e., four years after the execution of the Will. The first defendant, Mr. Emmanuel Joseph Vas, an Advocate by profession, was 80 years old at the time of execution of the Will. He was chionic diabetic patient. His toes were amputated. He had his own properties. He had executed a Will regarding his properties wherein nothing was given to the plaintiff. The first defendant (husband) and second defendant, a retired District Judge are the executors of the Will. They failed to take steps to obtain probate of the Will. The 3rd defendant, sister of the plaintiff is unmarried. The 4th defendant, another sister, is married and is in Bombay with family. The 5th defendant is the son of testatrix. He is America since 1954. A citizen of U.S.A., he is admittedly well off, in that country. He is not a beneficiary under the Will, Ex.P-1. Though notice was personally served on him, he did not enter appearance either in the courts below or in this Court. He did not contest the Will. It is admitted by the 3rd defendant that the entire Will (Ex.P.1) is in the handwriting of the testatrix, her mother. It is a "holograph Will" The Will (Ex.P-1) was in the custody of the first defendant. There are two attesters to Ex.P-1. The first attester (PW-1) is Mrs. Gadre, admittedly, a frequent visitor to Bangalore and Hotel Terra Vera. The other attester is Mr. Fermie, a retired Post-Master General, and a permanent boarder in the hotel, Terra Vera. It has come out in evidence that Mr. Fermie, the other attester was no longer alive when the suit came up for trial

and so was not examined. Apart from one of the attesters to the Will (PW-1), the plaintiff, examined herself as PW-2. Under the Will, Ex.P-1, the testatrix had given equal shares to all the three daughters,. It is evident from the evidence of PW-1 that the plaintiff was not present when the Will was executed and signed by the testatrix and the attesters, The defendants did not in fact challenge that the Will was executed by the testatrix Mrs. Primrose Mary Vas. Their only attack was about the validity of the same as one tainted by undue influence of the plaintiff.

5 The trial court framed the following five issues:

- "1. Whether the plaintiff proves the due execution of the suit Will?
2. Whether plaintiff proves that the testator had the sound disposing state of mind to execute the said Will?
3. Whether the defendants prove the alleged undue influence and that the Will is tainted by such influence?
4. Whether the Will is valid?
5. What relief ?"

6. After discussion of the relevant evidence, the trial court entered the following findings:

- "Issue No.1: THE plaintiff has proved due execution of the Will,
Issue No2: The plaintiff has proved that the testator had the sound disposing state of mind to execute the said will;
Issue No3: The defendants have failed to prove the alleged undue influence nor have they proved that the will is tainted by such influence;
Issue No.4: The Will is perfectly valid;
Issue No.5: The plaintiff is entitled to the reliefs she has sought."

7. We will now extract the contents of Ex.P-1, original Will executed by Mrs. Primrose Mary Vas:

" This is the last Will and Testament of Mrs. Primrose Mary Vas, wife of Emmanuel Joseph Vas at present residing in "Terra Vera", St. Mark's Road, Bangalore, I hereby appoint my husband Emmanuel Joseph Vas and Mr. Joseph Richard Nazareth as joint and several executors of this my Will and Testament. Out of my money in the State Bank of Mysore, in the State Bank of India and the Post Office Savings Bank in the Shoolay Post Office, I bequeath Rupees Five Thousand to my daughter Dulcie Alice Vas and Rupees Five thousand to my daughter Joyce Primrose Preston. I hold shares in the new India Assurance Co., Ltd. These I give to my daughter Vera Marie Vas. The rest of my money in the State Bank of Mysore, the State Bank of

India and the Post Office Savings Bank I give to my daughter Vera Marie Vas. I bequeath my real property " Terra Vera" on St. Mark's road in Bangalore with all the furniture, crockery and cutlery it contains in equal shares to my three daughters Vera Marie Vas, Dulcie Alice Vas and Joyce primrose Preston. In witness whereof I Primrose Mary Vas have this nineteenth day of June 1964 set my hand.

Sd.Primrose Mary Vas
(Ex.P1(A))

Signed by Primrose Mary Vas in the presence of both of us present at the same time and in the presence of each other.

Sd.(Mrs.) Olive Gadre-Ex.P1(b)."

8 The main attack on the will was pleaded by the first defendant. Defendants 3 and 4 filed a joint written statement and took up the plea substantially in conformity with the one taken up by the first defendant. The gravamen of the charge against the validity of the Will runs as follows.

It was the first defendant who purchased "Terra Vera" buildings in 1941 jointly in his name and in the name of his wife. Later, he conveyed the property to his wife. He purchased necessary furniture, crockery etc. for the hotel. It was without his knowledge or consent that his wife (Mrs. Vas) made the Will. It was so made provisionally under peculiar circumstances. Just before the admission of Mrs. Vas to the hospital for operation, 3rd defendant who was at Bombay, was informed. The plaintiff and her husband were staying with the deceased. At that time, when the deceased was ailing, was about to be admitted to the hospital and was not in sound disposing state of mind, The plaintiff kept that Will with herself and she inserted it in the drawers of the first defendant's room sometime after the demise of Mrs. Vas. The Will was found by the 3rd defendant who showed it to the plaintiff and then, handed over the same to their lawyer, D.W. 3. Till then, the first defendant was not aware of the same. The Will appeared suddenly under peculiar circumstances in the first defendant's drawers. According to the first defendant, it should have been inserted in his drawer by the plaintiff herself. The plaintiff was well provided for and a separate house was purchased for her. The deceased completely forgot about the Will and subsequently expressed her intention contrary to the recitals in the Will. According to the deceased, it was understood that Terra Vera should become the property of the defendants. It is thereafter, the central front plot in the said property was given as a gift by the deceased to the plaintiff. In these circumstances, the plea was that the Will is not valid and cannot be considered to be the last Will and testament of the deceased because she had subsequently, departed substantially from the intended distribution of the property by that Will. In substance, the plea was that the plaintiff having got the will when the deceased was about to be admitted to hospital, kept it with her secretly and the Will came into existence under suspicious circumstances.

9 After referring to the legal requirements envisaged in Section 58 of the Indian Succession Act and Section 68 of the Indian Evidence Act and the background afforded by

various facts stated in paragraph 4 (supra), the trial court found the following:-

Ex.P-1, Will, is in the own handwriting of the testatrix. It was attested by PW-1, Mrs. Gadre and other attester, Mr. Fermie being dead, could not be examined. Both the attesters were permanent boarders in Terra Vera. The 3rd Defendant admitted in evidence that the Will is entirely in the handwriting of her mother and it bears her signature. It was she who handed over the Will to DW-3, Advocate, for safe custody. DW-3 stated that the deceased was one of his clients and had in fact, got three Gift Deeds drafted by him, relating to the front portions of Terra Vera. PW-1, stated that Mr. Fermie attested the will in her presence and in the presence of the testatrix and that Mrs. Vas was in a sound state of mind at the time of the execution of the Will. She was not cross-examined on that score. Indeed, it was the first defendant who called PW-1 for attestation and that statement was also not challenged in cross-examination. The above crucial aspects raise a strong presumption that Ex.P-1 is genuine document. Referring to the two statements pointed out by PW-1 in her statement that Mrs. Vas wrote the caption appearing above the signatures of the attesters, and that Mrs. Vas had written and signed the Will by the time they put their attestations, the trial court held that PW-1 has pointedly stated in chief-examination and also clarified in re-examination that they put their attestations only after Mrs. Vas. had signed the Will and the writing of the statement in the caption does not affect the execution of the Will, and is not serious discrepancy. The Court held that it was satisfied that the Will is duly executed and attested, and it was also established from the evidence that Mrs. Vas was in a sound state of mind when making out the Will the trial court also found that the attesters and the testator signed the Will in the presence of each other. Referring to the suspicious circumstances pointed out by the defence, namely, (1) the husband and son were not provided anything; (2) that the Will was attested by strangers and not by close friends; (3) that Mrs. Vas wrote the will on the eve of her operation, the trial court held. thus:

(1) The husband was aged 80 years and had his own properties. The son was well settled and was in U.S.A. ever since 1954. Mrs. Vas wanted to give her properties to her three daughters only.

(2) PW-1, Mrs. Gadre was frequently staying in Terra Vera and she was attached to Mrs. Vas, as is seen from her conduct before and subsequent to the execution of the Will and Mr. Fermie was also a permanent boarder in Terra Vera, and at the time of the execution of the Will, these two were the only permanent boarders in the Terre Vera Hotel.

(3) 3rd defendant herself admitted that Mrs. Vas was not having any serious ailment and the operation she underwent was a simple one, and the deceased was active till the very last. Coupled with the fact that it was the 3rd defendant who found the Will in the drawer of Mr. Vas, kept it with her, and later, handed over it to DW-3, the trial court pointed out that there is absolutely no suspicious circumstance surrounding the will. Proceeding further, the trial court also observed that the burden of proof is on the defence to show that the Will was got up by undue influence by the plaintiff and, it was not so shown. The plaintiff was not aware about the existence of the Will, nor was Mrs. Vas in position to be dominated by one of her daughters, the plaintiff. On the other hand, the fact that the

testatrix gave her property in equal shares to her daughters proved positively that she was not under any undue influence. The plaintiff was not even present when the Will was signed by Mrs. Vas and attested by two attesters and the entire Will was in the own handwriting of Mrs. Vas. These facts will show that no undue influence, as alleged, could be exercised. There was absolutely no material in the evidence of DW-1, DW-2, DW-4 and DW-5, which will affect the genuineness of the Will, Ex.P-1, executed by Mrs. Vas.

10. The High Court in the appeal filed by defendant 3 and 4, re-appreciating the evidence, the circumstances and the probabilities, formed "its own impression" about the evidence in the case, and "taking an over all picture of the entire case as revealed in the evidence" held that it was "constrained to observe that this case of the alleged Will is shrouded in suspicion".

11. We heard counsel. As stated in "The Law of Wills in India and Pakistan" by Mantha Ramamurthi, at page 81, the general principles governing the presumption of due execution and attestation, in the case of Wills are:-

"If a will appears on the face of it to have been duly executed and attested in accordance with the requirements of the Act, the maxim "omnia proe sumuntur rite esse acta," applies, unless it is clearly proved by the attesting witnesses that the will is not in fact duly executed. The Court of Probate has long been accustomed to give great weight to the presumption of due execution arising from the regularity ex facie of the testamentary paper produced where no suspicion of fraud has occurred.

The maxim "Omnia Proe sumuntur rite esse acta" is an expression in a short form, of a reasonable probability, and of the property in point of law on acting on such probability. The maxim expresses an inference which may reasonably be drawn when an intention to do some formal act is established. In *Blake v. Knight* Sir Herbert Jenner Fust observed "Is it absolutely necessary to have positive affirmative testimony by the subscribed witnesses that the will was actually signed in their presence. or actually acknowledged in their presence ? Is it absolutely necessary, under all circumstances that the witnesses should concur in stating that these acts took place ? or is it absolutely necessary, where the witnesses will not swear positively, that the Court should pronounce against the validity of the will. I think these are not absolute requisites to the validity of the will."

Consequently, "where the evidence of attesting witnesses is vague or doubtful or even conflicting the Court may take into consideration the circumstances of the case and judge from them collectively whether the requirements of the Statute were complied with; in other words the Court may, on consideration of other evidence or of the whole circumstances of the case, come to the conclusion that their recollection is at fault, that their evidence is of a suspicious character, of that they were willfully misleading the Court, and accordingly disregard their testimony and pronounce in favour of the will."

(pages 81-82)

(emphasis supplied)

The author has also categorized the various instances where the maxim has been applied in different cases (1) absence of evidence ; (2) some attesters speaking for and some against the will; (3) attesters honest but mistaken and (4) attesters giving false evidence.

12. while the presumption in the case of ordinary Wills is as stated above, in the case of "holograph Wills", the presumption is all the more - a greater presumption. Ex.P-1 is a "holograph will". It is one which is wholly in the handwriting of the testator. The Calcutta High Court in *Ajit Chandra Majumdar v. Akhil Chandra Majumdar* (AIR 1960 Cal. 551 at P. 552) stated about such a Will, thus:-

"The whole of this Will was written in the hand by the testator himself in English. The handwriting is clear and firm. The law makes a great presumption in favour of the genuineness of holograph will for the very good reason that the mind of the testator in physically writing out his own will is more apparent in holograph will than where his signature alone appears to either a typed script or to a script written by somebody else."

(emphasis supplied)

The writing of the Will and signature of the testator are admitted. There is also due and proper attestation in accordance with the relevant statutory provisions. No suspicious circumstance appears on the face of the document, Ex.P-1. The Will appears to be moderate and rational. Viewed from the above angle, there is a great presumption - even bordering on actual proof of the due execution and attestation of the Will.

13. Defendants have urged a few suspicious circumstances and have alleged that the Will was executed by the undue influence exercised by the plaintiff. Notwithstanding the high degree of presumption available in the case of a holograph Will, which on the face of it appears to be properly and duly executed and attested, have the defendants let in cogent evidence to offset the said presumption and/or have succeeded in proving the special plea set up by them, falls for our consideration. In our

considered view, the answer can be only in the negative.

14. We were taken through the judgments of the Courts below and also the evidence of witness. We should say that the entire approach made by the high Court, the way it scanned the evidence with minute particulars, reappreciated the evidence, and substituted its "own impressions" were misconceived and misplaced. The High Court referred to the decisions of this Court laying down the principles to be borne in mind as to how a Will should be proved in Court of law, especially when there are suspicious circumstances surrounding the facts of the execution of the Will. Reference was made to the decisions in H. Venkatachala Iyengar v. B.N. Thimmajamma, (AIR 1959 SC 443), Rani Purnima Debi and another v. Kumar Khagendra Narayan Dev and another (AIR 1962 SC 567), Shashikumar Banerjee and others v. Subodh kumar Banerjee and others (AIR 1964 SC 529), Ramchandra Rambux v. Champabai and others (AIR 1965 SC 354). Surendra Pal and others v. Dr. (Mrs.) Saraswati Arora and another (AIR 1974 SC 1999) and Smt. Jaswant Kaur v. Smt Amrit Kaur and others (AIR 1977 SC 74). The general principles which govern the proving of a Will are stated in the aforesaid decisions. Of the above, the decisions reported in Shashikumar Banerjee's case (AIR 1964 SC 529) is by the Constitution Bench. Therein, paragraph (4), the law has been succinctly stated thus at page 531:

"The principles which governed the proving of a will are well settled; (see H. Venkatachala Iyengar v. B.N. Thimmajamma, 1959 Supp (1) SCR 426 : (AIR 1959 SC 443) and Rani Purnima Devi v. Khagendra Narayan Dev, (1962) 3 SCR 195. (AIR 1962 SC 567). the mode of proving a will does not ordinarily differ from that of proving any other document except as to the special requirement of attestation prescribed in the case of a will by S. 63 of the Indian succession Act. The mode of proving the absence of suspicious circumstances surrounding the execution of the will, proof of testamentary capacity and the signature of the testator as required by law is sufficient to discharge the onus. Where however there are suspicious circumstances, the onus is on the propounder to explain them to the satisfaction of the court before the court accepts the will as genuine. Where the caveator alleges undue influence, fraud and coercion, the onus is on him to prove the same. Even where there are no such pleas but the circumstances give rise to doubts, it is for the propounder to satisfy the conscience of the court. The suspicious circumstances may be as to the genuineness of the signature of the testator, the condition of the testator's mind, the dispositions made in the will being unnatural improbable or unfair in

the light of relevant circumstances or there might be other indication, in the will to show that the testator's mind was not free. In such a case the court would naturally expect that all legitimate suspicion should be completely removed before the document is accepted as the last will of the testator. If the propounder himself takes part in the execution of the will which confers a substantial circumstance to be taken into account, and the propounder is required to remove the doubts by clear and satisfactory evidence. If the propounder succeeds in removing the suspicious circumstances the court would grant probate, even if the will might be unnatural and might cut off wholly or in part near relation.

(emphasis supplied)

15. In applying the above general principles to particular cases the nature of the will, the pleadings of the parties in the case, facts admitted or proved and the presumptions available in law, will have to be carefully given effect to. The case of a "holograph will" which is admittedly in the handwriting of the testator, is a special case which will require a different approach in considering the evidence in the case, to find whether the will has been duly executed and attested. The approach to be made in such cases has been stated by the Constitution Bench in Shashikumar Banerjee's case, (supra) at page 532 paragraph (5). In that case, the court referred to certain undisputed preliminary facts as follows: The testator, a well-known wealthy lawyer, who died at the age of 97, had executed a will when he was 93 years old. He had made provision for his heirs by executing a number of documents, and the will referred to the remaining property. The will was witnessed by two persons. The entire will was in the handwriting of the testator, corrected in various places and corrections were initialled by him. It was in the handwriting of the testator, corrected in various places and corrections were initialled by him. It was admitted that the signature at the bottom of the will was of the testator. The dispositions were very clear and detailed and it could not be said to be an unnatural document. There was no evidence to show that the propounders took any part in the execution of the will. After stating these preliminary facts, the court stated the approach to be made in the case of a 'holograph will', thus :

"Further the fact that the will is holograph will and admittedly in the hand of the testator and in the last paragraph of the will the testator had stated that he and signed the will in the presence of the witnesses and the witnesses had and had signed it in his presence and in the presence of each other raise strong presumption of its regularity and of its being duly executed and attested. On these facts there is hardly any

suspicious circumstance attached to this will and it will in our opinion require very little evidence to prove due execution and attestation of the will. There is no doubt about the genuineness or the signature of the testator, for it is admitted that the signature at the foot of the will is his. The condition of the testator's mind is also not in doubt and he apparently had full testamentary capacity right upto March 1947, even though he was an old man of about 97 when he died on April 1, 1947.....There is nothing to show that the dispositions were not the result of the free will and mind of the testator. Further, the propounders (namely, the appellants) had nothing to do with the execution of the will and thus there are really no suspicious circumstances at all in this case. All that was required was to formally prove it, though the signature of the testator was admitted and it was also admitted that the whole will was in his handwriting. It is in the background of these circumstances that we have to consider the evidence of the two attesting witnesses....."

(emphasis supplied)

16. In the judgment under appeal, the High Court notice the aforesaid decision of this Court in Shashikumar Banerjee's case (supra) and has quoted the following passages in the said case :

"In the case of SHASHI KUMAR BANERJEE AND OTHERS -VS- SUBODH KUMAR BANERJEE (AIR 1964 S.C. 529). His Lordship Justice Wanchoo, has laid down:.....Where however there are suspicious circumstances the onus is on the propounder to explain them to the satisfaction of the court before the court accepts the Will as the Will as genuine....."

"..... in the case of SHASHIKUMAR BANERJEE AND OTHERS VS. SUBODH KUMAR BANERJEE AND OTHERS- (A.I.R. 1964 S.C. 529). Therein, His Lordship, Justice Wanchoo, J., has observed in para 5 of the judgment this :

"The entire Will is in the handwriting of the testator and has been corrected in various places and the corrections have been initialled by the testatorOn these facts these is hardly any

suspicious circumstances attached to this Will and it will in our opinion require very little evidence to prove due execution and attestation of the will." "

After quoting the above truncated passages and without advertent at all to the crucial passages, indicating as how the evidence of the attesting witnesses should be evaluated, in the case of 'holograph wills' (extracted hereinabove), the learned judges of the High court stated in our opinion, wrongly, that the facts of this case are entirely different and so, the appreciation of the evidence of the case is to be done on the "unique features" of each case.

17. We are afraid that the High Court failed to give effect to the strong presumption of regularity and due execution and attestation of the holograph will, in the instant case. Admittedly, the Will, Ex.p-1, is in the handwriting of the testator as spoken to by the 3rd defendant herself. The facts in this case in great measure conform to the broad facts and circumstances detailed in the case of "holograph will" in Shashikumar Banerjee's (supra) In this case the 3rd defendant admitted in cross-examination that her mother, Mrs. Vas "was active till the last" and that "she used to go to mass every morning." She further stated that the Will is in the handwriting of the testator. She stated. "I see Ext.p-1. This is the will. It is entirely in my mother's handwriting. I am fully acquainted with her handwriting. Ext.P-1(a) is the signature of my mother." The evidence of PW-1, one of the attesters, is categorical that the Will was attested by her and a co-attester in the presence of the testatrix and that the testatrix was in a sound state of mind at the time of execution of the Will. dw-3, Advocate by profession, stated -" I am acquainted with the signature and writing of Mrs. Vas (Testator). I see the Will Ext.P-1. the will, was signed and executed. By ex. P-1, all daughters have been given equal shares and the document cannot be said to be unnatural. In these circumstances, a strong or high degree of presumption of the regularity and of due execution and attestation of the Will, arose. As stated by this court in Shashi Kumar Banerjee's case (supra), it is in this background, the evidence in the case including that of the attesting witnesses should have been examined and what was required was only to formally prove the Will, and very little evidence to prove due execution and attestation of the will, was alone called for. The High Court totally ignored the above vital aspects. On the other hand, the High Court opined that the facts of this case are entirely different from those of Shashikumar Banerjee's case (supra), and the unique features should be scanned, in great detail. In the process, the High Court re-appreciated the entire evidence, through a microscope, as it were, and indulged in surmises and conjectures,

The question that arose for consideration in this case, is largely one of fact. the decision of which depended upon the appreciation of the oral evidence adduced in the case. The weight of importance that should be given to the finding of the trial judge who had occasion to watch the demeanor of the witnesses and assess their credibility and the restraints that should be observed by the Appellate Court in such Cases, have been stated by this Court in more cases than one, vide Sarju Prasad Ramdoe Saha V. Jwaleshwari Pratap Narain Singh and Others (AIR 1951 SC 120), Madhusudan Das v. Smt. Narayani Bai and Others (AIR 1983 SC 114), etc. It need hardly be stated that the onus is on the appellant,

to show that the judgment appealed against is wrong. It is for the appellant to show where the assessment of the court below has gone wrong and not merely seek a reassessment of the evidence. We regret to note that the High court in the instant case, has not at all borne in mind the above salient principles of law in re-appreciating the entire evidence in this case through a microscope, as it were, and drawing its own "inferences" and "impressions".

18. We shall only quote a few passages from the judgment of the High Court to show how the approach of the High Court was palpably wrong, which vitiated the ultimate conclusion reached by it.

"Admittedly, Mrs. Vas was in her 63rd years of age at the time she wrote out Exhibit P-1. It was on the eve of her operation. She was suffering from high blood pressure and hospital records would show that she was suffering from uterus complaint for 4-5 years. It is probable, therefore, that she was in nervous tension on the date when the Will was written out by her and obviously, Mrs. Preston was in a similar operation, to successfully dominate over Mrs Vas and prevail upon her to write out the Will. This circumstance cannot be viewed in its isolation. It is to be viewed with the other circumstances arising in this case."

"That being so, it is normally not expected of Mrs. Vas to execute a Will, if at all, without the knowledge and consent of Mr. Vas in this connection, the trial Court has rightly observed that the form of the will and the language used would clearly indicate that the draft was prepared by a lawyer. The trial Court however, has further stated, that in all probability, Mr. Vas, husband of the testatrix, must have helped her in getting the draft prepared and that he must have known about the execution of the Will by his wife Mrs. Vas. Though at the first blush it looks probable the evidence on record does not support such an inference."

"The defendants have examined D.W.1 Mrs. Susala Heredia, D.W.2 Mr. M.A.J. Vs. Niyak, D.W.3 Mr. George D'Costa and D.W. 4 Mr. F.J. Heredia, in addition to the evidence of Miss Vera Vas. All of them have specifically stated that Mr. Vas told them that he was unaware of the alleged Will executed by his wife and that it is his daughter Mrs. Joyce Preston who had managed to get such Will attested and planted in his chest drawer."

"If really Mrs. Vas executed a Will and got it attested as if made out by the propounder, it is probable to expect that she would have kept the Will with her husband Mr. Vas who was named as one of the executors in the Will."

"In the circumstances the sworn statement of Vera Vas that she did not know anything about the Will till Mrs. Preston told her about the Will after the death of her mother is probable and believable."

".....the surrounding circumstances discussed by us above render it probable that the incomplete Will was in her possession and subsequently, after getting the attestation done, she induced Vera Vas to search for it and after some days, she placed it in her father's chest drawer and subsequently, when it was found by Vera Vas, she rushed with the Will and showed it to Mrs. Preston and subsequently, told it to D.W.3, her mother's lawyer, to probate the Will."

"It is in this context that we have to appreciate the evidence of Mrs. Gadre, the alleged attester of the will."

"The submission of the learned Counsel for the appellants that it was Mrs. Preston who got the Will written by her mother as per the draft got prepared by her, took custody of it and got subsequently the attestation of Mrs. Gadre and one other witness, cannot be brushed aside as groundless. The strong and reasonable suspicion arising in this context is not cleared by the propounder so as to satisfy the Court has entirely missed to appreciate this aspect."

".....if really Mrs. Vas had made a Will as per exhibit p-1, nothing could prevent her from changing the Will on revoking it. She kept quiet obviously because there was no completed will. There cannot be any other plausible reason of it."

"The learned Counsel rightly pointed out that when she wanted to execute a gift deed in favour of her daughters, she approached D.W.3 M.D'Costa, an Advocate and got the gift deeds written and registered with his assistance. Besides, she also told D.W.3 that she wanted to make a Will. Hence, the fact that she herself wrote out the draft of

the will and signed it would further show that it was at the importunity and pressure of her daughter who, perhaps brought the draft to her and that Mrs. Vas copied it out though she was cautious enough not to get it attested."

"Thus, taking an over all picture of the entire case as revealed in the evidence, we are constrained to observe that this case of the alleged Will is shrouded in suspicion.

(emphasis supplied)

19. We have already held that Ex.p-1 " holograph Will" and the facts of the resent case are substantially similar to the one in Shashikumar Banerjee's case (supra). All that was required was to formally prove Ex.P-1 (Will). The evidence of PW-1, the attester, which has been accepted by the trial court, is categorize and she stated in chief examination thus:

"I know the petitioner. I had seen her mother. I know her form 1958. The mother of the petitioner was running boarding & lodging house in St. Marks Road. The name was "Terra Vera" hotel. I stayed in her hotel on many occasions approximately 2-1/2 months each time, when I came to Bangalore on holiday - During June 1964. I was staying in that hotel with my husband. At that time I was asked to attest a Will executed by the mother of the petitioner. Miss Preimrose Mary Vas executed that Will. her husband E.J. Vas asked me to be present and sign the Will. Mr. Vas, Mrs. Primrose Vas myself and the other attesting witness are Mr. Firmie were present."

"I see Ex.P.1. It is the last Will Mrs. Primrose Mary Vas the testator has put her signature at Ex.P-1.(a) in my presence. I have attested Ex.P-1, Will, at Ex.P-1(b) the other attester D.P. Fermie put his attestation after my attestation in my presence and in the presence of the testator. The deceased testator was perfectly fit mentally and physically when she executed Ex.P-1, Will. The entire Will Ex.P-1 is in the handwriting of the testator herself. The husband of the testator herself. The husband of the testator was also present when the deceased executed of Ex.P-1. The husband of the testator called me to be present at the time of the execution of Ex.P-1."

(emphasis supplied)

Nothing was brought out in cross examination to discredit this witness. The attesting witnesses were frequent visitors

to Bangalore and permanent boarders in hotel "Terra Vera" There was absolutely no cross examination on the various aspects stated by the witness regarding the due execution and attestation of the Will, as extracted hereinabove. The trial Court adverted to the above crucial aspects arising in this case as also the admission by the 3rd defendant that the Will is entirely in the handwriting of her mother, that it bears her signature and she found the will in her father's drawer and handed over Ex.P-2, Will to D.W. 3, Advocate. This fact is also corroborated by D.W.3, advocate. The trial Court laid emphasis on such crucial aspects and held that the Will a holograph Will herein - was duly executed and attested and Mrs. Vas was in a sound state of mind when Ex.P-1, Will, was executed. The said finding is based on a proper application of the law and the unassailable evidence available in this case. So also, trial Court, after adverting to the pleas urged by the defence, held that there are no suspicious circumstances surrounding the Will and that there is no evidence to show that the plaintiff exercised undue influence over Mrs. Vas. Such finding based on proper application of the law and the evidence available in the case was reversed by the High Court by a totally wrong approach to the question and without giving effect to the "strong presumption" available in the case regarding the presumption of regularity and due execution and attestation of the will Ex.p-1.

20. We are, therefore, constrained to hold that the judgment rendered by the High Court under appeal, is totally erroneous and deserves to be set aside, We hereby do so. The judgment of the High Court of Karnataka dated 11.7.1978 is hereby set aside and the appeal is allowed. The judgment of the trial court is restored. Since this litigation is between near relations, in the peculiar circumstances of this case, we pass no order as to costs.