Shashi Kumar Banerjee & Ors vs Subodh Kumar Banerjee Since Deceased & ... on 13 September, 1963

Equivalent citations: AIR 1964 SUPREME COURT 529

Bench: P.B. Gajendragadkar, K.N. Wanchoo, N.R. Ayyangar

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           CASE NO.:
Appeal (civil)  295 of 1960

PETITIONER:
SHASHI KUMAR BANERJEE & ORS.

RESPONDENT:
SUBODH KUMAR BANERJEE SINCE DECEASED & AFTER HIM HIS L.RS. & ORS.

DATE OF JUDGMENT: 13/09/1963

BENCH:
P.B. GAJENDRAGADKAR & K. SUBBARAO & K.N. WANCHOO & N.R. AYYANGAR & J.R.
MUDHOLKAR

JUDGMENT:
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JUDGMENT 1964 AIR (SC) 529 The Judgment was delivered by : WANCHOO WANCHOO, J. : This is an appeal on a certificate granted by the Calcutta High Court. The appellants are the sons of Ramtaran Banerjee deceased (hereinafter referred to as the testator). They had been appointed executors under a will purported to have been executed by the testator on August 29, 1943. The testator was about 97 years old when he died on April 1, 1947. The appellants applied for probate of the will in the Court of the District Judge in June 1947. Their case was that the will in dispute was the last will and testament of the testator and had been duly executed. The petition was opposed by Subodh Kumar Banerjee and Sukumar Banerjee who are also sons of the testator as well as by the decendants of Sushil Kumar Banerjee and Sanat Kumar Banerjee, two other sons of the testator who had predeceased him. The main ground of opposition was that the will had not been properly executed and attested, though it was also contended that it was not genuine, and the testator did not have testamentary capacity at the time of signing the alleged will and that the execution of the will had been obtained by undue influence, fraudulent misrepresentation and coercion.

2. Four main issues arose on these pleadings, namely, -

(1) Is the will genuine?

(2) Has the will been properly executed and attested? (3) Had the testator testamentary capacity at the time of the signing of the alleged will?

(4) Was the execution of the will obtained by undue influence, fraudulent representation and coercion, as alleged?

The District Judge held on the evidence that though the testator might have been enfeebled in body, he retained a sound and disposing mind almost upto the last moment of his life, and one of the last documents executed by the testator which was attested by one of the caveators himself, was dated March 3, 1947. The issue as to undue influence, fraudulent misrepresentation and coercion was abandoned and was thus answered in favour of the appellants. The District Judge also held that due execution and attestation of the will had been proved and that the will was genuine. In consequence he granted probate with a copy of the will attached to the appellants.

3. The present respondents then went in appeal to the High Court, and the only issue that was urged before the High Court was with respect to the due execution and attestation of the will. The main contention in that behalf was that though the will appeared to be dated August 29, 1943, the signature of the testator appearing at the bottom of the will could not have been made in 1943, and reliance in this connection was placed on the evidence of a handwriting expert. The High Court first examined the evidence of the handwriting expert as to the date on which the signature appearing at the bottom of the will could have been made. The High Court differed from the trial court which had also considered the evidence of the expert and had refused to rely upon it in preference to the evidence of the attesting witnesses and came to the conclusion, relying on the evidence of the expert, that the signature could not have been put at the foot of the will in the year 1943 and similarly the names on the plan attached to the will could not have been written in 1943. Therefore having come to this conclusion, the High Court held that that was the end of the case of the propounders and the attesting witnesses must also be held to have deposed falsely. Having reached this conclusion, the High Court then went on to consider the evidence of the attesting witnesses and said that independently however of the view expressed by it as to the evidence of the expert it was not possible to rely on the evidence of the two attesting witnesses and consequently found that due execution and attestation of the will had not been proved. On this finding, the High Court reversed the judgment of the District Judge and rejected the petition for probate. As the High Court's judgment was one of reversal and the amount involved was over rupees twenty thousand, the High Court granted a certificate of fitness to enable the appellants to appeal to this Court; and that is how the matter has come up before us.

4. The principles which govern the proving of a will are well settled; (see H. Venkatachala Iyengar v. B. N. Thimmajamma, 1959 (S1) SCR 426 : 1959 AIR(SC) 443) and Rani Purniama Devi v. Khagendra Narayan Dev, 1962 (3) SCR 195 : 1962 AIR(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 onus of proving the will is on the propounder and in 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 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 benefit on him, that is also a 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 relations. It is in the light of these settled principles that we have to consider whether the appellants have succeeded in establishing that the will was duly executed and attested.

5. Before we consider the evidence as to attestation, there are certain preliminary facts which are not in dispute and which may be set out. The testator was a man of great wealth and a well known lawyer of Calcutta. Though he retired from the Bar in 1935, he continued to be the elected President of the Alipore Bar Association till the end of 1946. He died at the very advanced age of 97 and was about 93 years old when the will in dispute is said to have been executed. He was the head of a large family, having seven sons, five daughters and numerous grand-children. His wife died on July 2, 1945. Two of his sons, Sushil and Sanat had predeceased him. Before his death the testator had already made provision for his heirs by executing a number of documents. The scheme he used was to grant a perpetual lease of the property in favour of the person whom he wanted to benefit; ultimately the reversionary interest in the leased property which the testator had was also conveyed to the same child. In this manner he had disposed of property worth about rupees sixty lacs, half to the pro- pounders, (namely, the appellants) and half to the caveators (namely, the respondents.) The will in dispute refers to the remaining property which is said to be valued at rupees three lacs only. It is witnessed by two persons, namely, Manmathanath Mookerjee and Sambhunath Munshi. The entire will is in the handwriting of the testator and has been corrected in various places and the correction have been initialled by the testator. It is not in dispute that the body of the will was written out by the testator between January and March 1943, leaving some blanks here and there, particularly in relation to the numbers of immovable properties disposed of and also in some cases the name of the particular legatee to whom the properties were to go. It also appears that the testator suffered from a severe illness in July 1943 and at one time his life was despaired of. It was after recovery from this serious illness that the will in dispute is alleged to have been signed by him on August 29, 1943. It is also not in dispute that the signature at the bottom of the will is the signature of the testator. Further though at one time there was dispute whether the date under the signature was written by the testator, the respondents have failed to prove that the date "29-8-1943" is not in the handwriting of testator. The dispositions in the will are in favour of the various sons and grandsons of the testator and also of his wife, and wherever the testator had deprived any of his descendants of benefit under the will he has given reasons for the same. Further the will recites at the end that the testator had signed it in the presence of the attesting witness and that the attesting witnesses had seen the testator signing it and that the attesting witnesses had attested it in the presence of the testator and of each other. In view of these facts the High Court had also to recognize that the will could by no. means be said to be an unnatural document. There is no. evidence to show

that the propounders (namely, the appellants) had taken any part in the execution of the will. We shall later refer to the evidence of the attesting witnesses which shows that the testator had cautioned them not to speak of the will and to keep the fact of their having attested it secret. The issue as to under influence, fraudulent misrepresentation and coercion was, according to the District Judge, "clearly, categorically and unconditionally abandoned" by the respondents. There can also be no. doubt that on the evidence, the testator was in a sound and disposing state of mind and had full testamentary capacity not only on August 29, 1943 when the will purports to have been executed but even almost upto the last day of his life, for he had executed many documents in 1944, 1945 and 1946 and the last of such document was executed on March 3, 1947 to which one of the caveators was an attesting witness. In the High Court no. argument appears to have been addressed against the finding of the District Judge that the testator had full testamentary capacity almost up to the last day of his death. Further the fact that the will is a holograph will and admittedly in the hand of testator and in the last paragraph of the will the testator had stated that he had signed the will in the presence of the witnesses and the witnesses 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 of 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 up to March 1947, even though he was an old man of about 97 when he died on April 1, 1947. The dispositions made in the will are by no. means unnatural and where the testator has deprived any of his descendants of any share of his remaining property he has given reasons for it. Besides he had already disposed of the large bulk of his property worth about rupees sixty lacs and the will only deals with a small residue worth about rupees three lacs. There is nothing to show that the dispositions were not the result of the free will and mind of 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 and of the handwriting expert on whose opinion alone practically the High Court has held that the will was not duly executed and attested.

6. Before we come to the evidence of these three witness mentioned above we should like to refer to one other circumstance, which appears in this case. The evidence is that some time after the will had been executed it was handed over by the testator to his son Soshi. The will was in a closed envelope and on the top of that the testator had written "Soshi preserve this my will" and had signed that. It is not in dispute that the writing and the signature on this envelope are also in the hand of the testator. Soshi kept this envelope with him and after the death of the testator, he and his brother Sunil went with it to Birendra Nath Lahiri, an advocate. When the advocate saw the envelope it was closed. He did not open it. He advised them to give notice to all the heirs of the testator and fix a date and place for the opening of the envelope. They therefore asked him to issue the notice and gave him the names of all the heirs. He then issued a notice to all the heirs including the caveators respondents telling them that the last will and testament of the testator had been handed over to him, that he would open it on May 8, 1947 between 7 p.m. and 7-30 p.m. and requested them to be present at his

place either in person or through some agent in order to witness the opening of the envelope. In reply to this notice, two of the heirs, namely, Sukumar Banerjee and Provat Kumar sent replies; but they did not attend at the time and place fixed by Lahiri. The only persons to attend were the three appellants and one Kartick Mukherjee, who is a son-in-law of the testator and husband of one of the daughters named Nihar Bala. Thereafter the envelope was opened and it is no. one's case that at that time the will was not in the same condition in which it was when it was filed in court along with the probate application. Therefore when the will was opened on May 8, 1947, it bore the signature of the testator as well as the attestation of the attesting witnesses. This again is a very important circumstance in favour of the genuineness and due execution and attestation of the will and is perhaps the reason why the respondents did not come forward with a positive case as to the will having been attested after the death of the testator.

7. This brings us to the main question which has been debated before us, namely, the due execution and attestation of the will. The respondents' case in this connection appears to be that the date which appears on the will as the date of execution thereof is not the date on which the will was executed by the testator but that it was executed at a much later date and was thus not duly executed and attested. We have therefore to examine the evidence of the attesting witnesses in this connection and what the learned counsel for the appellants calls intrinsic evidence in the will itself to show that it must have been executed and attested on August 29, 1943 as it purports to be, for the fact that the will is in the handwriting of the testator and bears his signature is not in dispute. The respondents mainly relied on the evidence of the handwriting expert and their case as based on that evidence was that in 1943, 1944 and 1945 there was no. tremor in the handwriting of the testator and that tremor appeared in his handwriting from 1946 and went on increasing till his death in 1947. The expert's evidence further is that the writing the body of the will is without tremor while the signature at the bottom of it and initials in the margin on the corrections showed tremor and therefore the will must have been signed after 1945 and not in August 1943, as it purports to be. We shall deal with the evidence of the expert later; but it is pertinent to point out here that we cannot understand when the testator admittedly signed the will even according to the respondents, though sometime in 1946 why he should have antedated it to August 1943. It is in this connection that the finding of the District Judge that the testator was possessed of full testamentary capacity almost upto the moment of his death, certainly upto March 1947, which does not appear to have been challenged before the High Court, assumes great importance. If the testator had not signed this will in 1943 as it purports to be and if he was possessed of full testamentary capacity in 1946 as he must in our opinion be held to be and was in fact signing this will in 1946, we fail to see why he should not put on it the date in 1946, on which according to the respondents he actually signed the will and get it attested on that date. The whole argument therefore based on the theory of tremor put forward by the handwriting expert appears to us to be of no. help to the respondents; for the testator having retained full mental capacity and power of judgment till almost the last moment of his life, it does not stand to reason that he would antedate the will if he really signed it late in 1946. Once therefore it is admitted that the signature on the will is that of the testator, the theory that it is antedated by him can be accepted only if the expert's evidence is so convincing that the extreme improbability attaching to the said theory can be safely rejected.

8. Turning now to the intrinsic evidence in the will itself, to which reference has been made on behalf of the appellants, we find that there are as many as six circumstances which go to show that the date on which the will purports to have been executed, namely, August 29, 1943, must be the correct date and that a will containing the provisions which this will contains could not have been executed late in 1946. The first circumstance to which reference may be made is that it makes provision for the wife of the testator and provides for consultation with her in case there is any dispute between the three executors. Now it is not in dispute that the wife of the testator died in 1945; as such it would certainly be strange - if not impossible -to find a provision in the will for the wife and also a provision to the effect that the wife should be consulted whenever there was a dispute between the executors appointed under the will.

9. The next circumstance is that while providing for a monthly allowance for his daughter Sushila, the testator says that she was living with her sons in her house. It is admitted that Sushila came to live with her father in 1945, shortly before the death of her mother and stayed on till the testator died. In such circumstances it is extremely unlikely that the testator who had made corrections in the will before he signed it would not correct this part of it.

10. The third circumstance which is relied on is with respect to Nihar Bala, a daughter of the testator, to whom a bequest was made in the will and who is the wife of Kartick Mukherjee. The testator said in the will that her husband was a Senior Stock Varifier on a monthly pay of Rs. 300/-. Now it is in evidence that Kartick retired early in 1946 and his wife Nihar Bala asked in January 1947 for a monthly allowance which the testator provided for her. It is said that if this will was signed by the testator late in 1946 he would not say therein that his son- in - law was getting Rs. 300/- per mensem when in fact he had retired.

11. The fourth circumstance which is relied on is that the will says that Shivendra, a son of another daughter Rani Devi alias Renuke is preparing for his B. A. examination. Now it is not disputed that Shivendra had passed his B. A. Examination in 1944. Therefore it is said that if this will was signed in 1946 it could not have contained this recital about Shivendra and in consequence it must have been signed in 1943, which it purports to be.

12. The fifth circumstance which is relied on is that the will mentions that Sukumar's wife was alive for the testator when depriving Sukumar of any share in the property has said that he and his wife have no. children and Sukumar's income is more than sufficient to maintain him and his wife in ease and comfort. Now there is no. dispute that Sukumar's wife died in October 1943. It is therefore said that if this will was being signed in 1946, the testator cold not have used words in it to indicate that Sukumar's wife was alive; this could only happen if the will was really signed in August 1943.

13. Lastly, the will devised premises No. 76 Hazara Road in favour of Sashi, but on January 26, 1946, the testator had given away this property to Bimal. Consequently it is said that if the will was really signed in late 1946, such a bequest could not possibly appear there in.

14. These circumstances afford in our opinion intrinsic evidence of the fact that the will must have been signed in August 1943. On that basis all these recitals in the will would be correct and

appropriate. In reply however it is urged on behalf of the respondents that most of these circumstances do not go to the root of the matter inasmuch as they do not affect the dispositions made by the will. It is said that the will was undoubtedly written out between January and March 1943 at which time these recitals would be correct and that it may be that the testator did not worry to make any correction therein when he actually signed the will late in 1946. These explanations though technically possible are hardly satisfactory. We are of opinion that it is most unlikely that the testator would not correct these recitals in the will if he was really signing it in 1946 as he did make some corrections and the probabilities therefore indicate that the will was signed in 1943 as it purports to be. Further it was admitted in the High Court that it was not possible for the respondents to explain how all these recitals came to be in the will, they in our opinion clearly support the case of the appellants that the will was written out between January to March 1943 and signed in August 1943. In any case though some of the recitals are of a minor nature, there are two matters which in our opinion could not have appeared in a will signed late in 1946. These two matters are, namely, (1) provision for the wife when she undoubtedly died in 1945, and (2) the disposition of property No. 76 Hazara Road. We cannot accept the argument that these matters might have escaped the attention of the testator when he signed the will late in 1946 for there was nothing wrong with him till late 1946 which would allow such defects to creep into this will. We therefore agree with the contention on behalf of the appellants that these circumstances tend to show that the will must have been signed in August 1943 as it purports to be.

15. This brings us to the oral evidence of two attesting witnesses and the handwriting expert. We must, with respect, say that the High Court was not right in first considering the evidence of the expert and holding on its basis that the will could not have been signed in 1943, in a case of this kind where there were practically no. suspicious circumstances and where all the circumstances point to the due execution and attestation of the will. It is true that after having considered the evidence of the expert and having said that there was an end of the case of the propounders and the attesting witnesses must also be held to be untruthful once the evidence of the expert was believed, the High Court has gone on to consider the evidence of the attesting witnesses and has said that it was doing so independently of the view expressed by it as to the evidence of the expert. We propose therefore to take the evidence of the two attesting witnesses first to see whether in the circumstances of this case when we are dealing with a holograph will and when there are practically no. suspicious circumstances and the intrinsic evidence in the will itself points to its execution when it purports to have been executed we can rely on that evidence. The two attesting witnesses are Manmathanath Mookerjee and Sambhunath Munshi. Manmathanath Mookerjee is the father-in-law of Sunil, one of the propounders and to that extent he is certainly interested in supporting the propounders' case. It may also be conceded that in certain respects he has not been as straight forward as he should have been, particularly with respect to his dealings with his son-in-law. But he is a respectable man and his son-in-law was not in any way concerned with the execution of this will and did not get any great advantage out of it except that one of the sons Sukumar was disinherited by this will and this had increased his share a little; but that was also the case with the shares of the other descendants of the testator. Manmathanath Mookerjee was examined on commission and was cross-examined at inordinate length, sometimes on matters which were not very relevant to the point on which he was giving evidence, namely, the attestation of the will in dispute. But in spite of the interest he has in his son-in-law, Sunil and in spite of his unsatisfactory replies with respect to his dealings with Sunil,

it seems to us that there is really no. sufficient reason to disbelieve him when he says that he attested this will at the instance and in the presence of the testator and that the testator signed it in his presence and that of Sambhunath Munshi and that they signed it in his presence and in each other's presence.

16. Let us therefore examine the reasons which led the High Court to place no. reliance on the evidence of Manmathanath Mookerjee and Sambhunath Munshi. Manmathanath's statement is that he happened to go that day to inspect a house belonging to his father's debutter estate at Rustomjee Street which is near where the testator used to live. Therefore he went to see the testator because his usual practice was that whenever he was in the locality in which the testator lived and he had time at his disposal he always went round to see him. Similarly the evidence of Sambhunath Munshi was that he went to see the testator in order to hand over Glucose and Horlicks which he was asked to procure for the testator as in those days Glucose and Horlicks were difficult to get. Thus it was by chance that the two attesting witnesses happened to be there when the testator asked them to attest the will. The argument on behalf of the respondents is that if the testator wanted to execute the will he would have sent for these witnesses and it is too much to believe that they happened to be there and the testator took advantage of their presence. It may be that it is more usual for witnesses to be called when a person is intending to execute a will; even so there is nothing impossible in advantage being taken of the accidental presence of witnesses in this connection. Further if these two witnesses were not witnesses of truth they could easily have stated that they were called by the testator and in the circumstances of this case nobody would have been able to disprove that statement. It seems to us clear therefore that the testator took advantage of the accidental presence of these two witnesses whom he knew well from before and asked them to attest the will. Nor do we think there was any such relationship between Shambunath Munshi and Manmathanath Mookerjee or between Shambunath Munshi and Sunil and Sashi as to impel Shambunath to give false evidence as an attesting witness.

17. Stress however has been laid on a slight discrepancy in the evidence of the two attesting witnesses as to the time of the execution of the will. According to Sambhunath the will is said to have been executed at about 3-0 p.m. and it took about 45 minutes for the testator to complete the will by filling up the blank spaces therein and correcting it here and there. Sambhunath's statement also is that he arrived about noon at the house of the testator and shortly thereafter Manmathanath Mookerjee arrived. On the other hand, the evidence of Manmathanath is that he arrived about noon 3-30 p.m. and thereafter the testator brought the will, filled up the blanks and made corrections in it and then the execution and attestation took place. So according to this statement the will must have been executed and attested at about 4-30 p. m. Further, according to Sambhunath Munshi, he stayed at the place for 2 1/2 hours and Manmathanath Mookerjee came only a short time after he arrived. There is no. doubt that there are these discrepancies as to time. But we are of opinion that the discrepancies are not so serious as to make us distrust the evidence of the two attesting witnesses. That evidence in substance shows that the will was executed and attested sometime in the afternoon of August 29, 1943. Sambhunath would place it somewhere between 1 p.m. and 3-30 p.m. while Manmathanath places it somewhere between 3 p.m. and 5 p.m. Considering that these witnesses were giving evidence almost 8 or 9 years after the execution of the will, this discrepancy in time is not so serious as to destroy the value of their evidence. In substance, it shows that the

execution of the will took place in the afternoon according to both the witnesses; this is not a case where one witness says that execution took place in the morning while the other ways that it took place in the evening, which of course may introduce some infirmity in the evidence.

18. It was also urged that it was most unlikely that Manmathanath Mookerjee would go to inspect his house in Rustomjee Street on an afternoon in the month of August, as it would be a most inconvenient time for a person of his status. But if the time would be inconvenient to a person of status, we fail to see why we should not believe such a person when he says that he actually did go for a particular purpose to a particular place at a particular time. Some criticism was also made about Manmathanath's statement that he did not know in which room his daughter used to live in the testator's house. We fail to see how this statement affects the credibility of the witness, for it is not disputed that the witness being the father-in-law of the testator's son used to go to the testator's house as and when occasions arose. Some criticism was also made as to whether Manmathanath wrote the word "witness" on the plan attached to the will. When asked about it he stated that he did not remember, which seems to us to be a perfectly understandable answer in connection with a matter about which evidence was being given after 8 or 9 years. Stress was also laid on some discrepancies between the evidence of Manmathanath and Sambhunath Munshi as to whether some children had come during in the time they were there and if so when. These are however matters of such minor detail that they cannot affect the main evidence of these two witnesses.

19. Further so far as Sambhunath Munshi is concerned, he was obviously on good terms with the testator who he had known for some years. All that has been said against him is that he was a tenant of Manmathanath. But he was a tax collector of the Calcutta Corporation and as such we do not think that he would be under the thumb of Manmathanath or his son-in-law simply because he was a tenant in Manmathanath's house. Otherwise there is no. reason except for the discrepancies to which we have already referred and which in our opinion do not detract from the substantial truth of his statement, why his evidence should be disregarded. Taking therefore a broad view of the evidence of these two witnesses in the circumstances of this case to which we have already referred, we are of opinion that the evidence is reliable and does prove execution and attestation of the will in dispute.

20. This brings us to the evidence of the handwriting expert. In his report, the expert said that the testator's pen control in spite of his advanced years was well maintained in 1943 and the specimen of the testator's writing in that year showed strength and ease and perfect control over the pen which was scarcely seen in the hand of an oldman of about 92 years. Further the report said that the change in the testator's pen control between the years 1943 and 1945 was so slight as to be scarcely noticeable. But in 1946 all of a sudden the pen control gave way and the hand shook and this resulted in deviations in the natural path of the strokes. The report further said that the main body of the will which is said to have been written in 1943 showed strength in pen control and pressure which is found in the specimens of 1943 but the additions and the signature at the bottom of the will as well as in the margin showed that they must have been written late in 1946 after the testator had lost pen control. In his evidence the expert made some changes in his opinion. He said that deterioration in the signature of the testator began from March 1946 and this he said because he had to admit that many signatures of January 1946 did not disclose any tremor. Further though in the

report he had said that tremors began suddenly in 1946, in his evidence he admitted that in oldage tremors appeared gradually and increased with passage of time. Further he was cross-examined with respect to certain signatures of the testator of the period before 1946 which showed tremors and also with respect to certain signatures after 1946 which did not show tremors. He had to admit that some of these signatures shown to him did not conform to the pattern, namely, that there was pen control upto March 1946 and thereafter pen control was lost. He however explained these deviations from the pattern by reference to what he called "pen pressure" and "angularities" which according to him were different from loss of pen control. There is however no. doubt that there are some signatures of the period upto March 1946 which show tremors and there are some signatures of the period after March 1946 which do not show much tremor. We may in this connection refer to Ex. E-36 and Ex. 23/1 of 1943, Ex. C/21 and Ex. E.53 of 1944 and Ex. E-75 of 1945 which clearly show tremors. Further Ex. C-38 of January 30, 1946 also clearly shows tremor and these are all before March 1946 from which time according to the expert tremor started. On the other hand Ex. E-100 of June 1946 is admitted by the expert himself as showing not much tremor. We must not also forget that the testator was an oldman of about 93 even in 1943 and therefore if sometimes his signatures were not as set as usual, that may be explained partly by his extreme oldage. We agree with the District Judge that no. two signatures written by a person in the ordinary course of writing are precisely alike and differences may arise from various factors such as diversity in the makes of the pen, the level of the signatures the space it occupies etc. and therefore it is difficult to generalise and it will indeed be dangerous to base a decision upon such inconclusive data. All that can be said after a review of all the signatures from 1943 is that as the testator's age increased his writing became more shaky, though as we have said before, there are examples of shaky signatures before 1946 and also examples of not so shaky signatures after 1945.

21. This conclusion is in our opinion borne out by the various signatures on the will and the various writings therein which were made to fill in the blanks after the main body of the will had been written in January to March 1943. The full signature at the foot of the will does show some tremor but there are a number of signatures on the margin of the will which are not full and some of them do not show much tremor though some do. Further according to the evidence of the attesting witnesses, the plan attached to the will was also signed at the same time as the will and the expert admitted in his evidence that the signature of the testator on the plan showed superior control and was not like the signature at the bottom of the will which according to the expert showed failing pen control. If both these signatures were made on the same day-and there is no. reason why they should not have been, whether in 1943 or late in 1946-, it is remarkable that the one on the will, according to the expert, shows failing pen control while the one on the plan does not disclose any tremor. The evidence of the expert therefore in these circumstances is not conclusive and can not prove that the signature at the bottom of the will could not possibly have been made on August 29, 1943 on which date it purports to have been made. Besides it must not be forgotten that the will was executed in August 1943 soon after the testator had recovered from a serious illness and if there is some tremor here and there in his writing on that day, his illness may partly explain it. In this connection however our attention was drawn to some signatures made on September 1, 1943 only three days later which do not show much tremor : (see Ex. C/15). As we see the signature of September 1, 1943, we find that it is not quite so firm as some other signatures made later in the month of September. On the whole therefore we are not prepared to accept that the signature at the bottom of the will

could not possibly have been made in August 1943 and must have been made late in 1946. We do not consider in the circumstances of this case that the evidence of the expert is conclusive and can falsify the evidence of the attesting witnesses and also the circumstances which go to show that this will must have been signed in 1943 as it purports to be. Besides it is necessary to observe that expert's evidence as to handwriting is opinion evidence and it can rarely, if ever, take the place of substantive evidence. Before acting on such evidence it is usual to see if it is corroborated either by clear direct evidence or by circumstantial evidence. In the present case all the probabilities are against the expert's opinion and the direct testimony of the two attesting witnesses which we accept is wholly in consistent with it.

22. Again it is not in dispute that the envelope containing the will bears the signature of the testator and the endorsement on it to the effect "Soshi, preserve this my will." According to Soshi, this closed envelope was given to him towards the end of December 1945 or beginning of January 1946. It would be safe to presume that both the signature and the endorsement on it were made at the same time. But if one looks at the endorsement one finds some tremor or deviation in the words "Soshi" and "preserve" while there is very little tremor or deviation in the signature of the testator. This shows that sometime even in the writing written at the same time tremor appeared in some words, even though other words did not have tremor. It may be that towards the latter part of 1946 and in 1947 the tremor became rather pronounced and was usually present all the time.

23. Finally we may point out that the expert admitted in his evidence that it was only by a chemical test that it could be definitely stated whether a particular writing was of a particular year or period. He also admitted that he applied no. chemical tests in this case. So his opinion cannot on his own showing have that value which it might have had if he had applied a chemical test. Besides we may add that Osborn on "Questioned Documents" at p. 464 says even with respect to chemical tests that "the chemical tests to determine age also, as a rule, are a mere excuse to make a guess and furnish no. reliable data upon which a definite opinion can be based"

> . In these circumstances the mere opinion of the expert cannot override the positive evidence of the attesting witnesses in a case like this where there are no. suspicious circumstances.

24. On the whole therefore it seems to us that it has not been established by the evidence of the expert that the signature at the bottom of the will could not be made on August 29, 1943 as deposed to by the attesting witnesses. In the circumstances of this case, the view taken by the District Judge of the evidence of the expert, namely, "it would be indeed dangerous to base a decision upon such inconclusive data" appears to us to be correct. We hold therefore on a review of the entire evidence that due execution and attestation of the will in dispute has been proved as alleged by the propounders and so the appellants are entitled to probate with a copy of the will attached. We therefore allow the appeal, set aside the order of the High Court and restore that of the District Judge. The appellants will get their costs throughout.