Bench:
Mr. Justice Bhishmadev Chakrabortty
And
Mr. Justice Md. Ali Reza

First Appeal No. 151 of 2006
Alauddin and others .....appellants
-Versus-
Sree Narayan Chandra Shil being dead his heirs: 1(a) Keshob Chandra Shil and others .....respondents

Mr. ABM Siddiqur Rahman Khan with
Mr. Md. Rafiqul Islam Faruque,
Advocates
.....for the appellant

Mr. ABM Matiur Rahman with
Ms. Nahid Sultana, Advocates
.....for respondent No. 1

Judgment on 31.10.2022

Md. Ali Reza, J:

This appeal at the instance of defendants 6 and 7 is directed against the judgment and decree dated 02.05.2006 passed by the District Judge, Narayanganj in Title Suit No. 02 of 1988 arising out of Probate Case No. 12 of 1984.

Respondent No. 1 Sree Narayan Chandra Shil (since dead) as petitioner filed Probate Case No. 12 of 1984 in the Court of District Judge, Narayanganj on 25.11.1984 for

granting probate of the will dated 14.08.1943. The probate Case was subsequently transferred to the Court of Subordinate Judge, Narayanganj and renumbered as Probate Case No. 75 of 1985. The appellants namely Alauddin and Amina Begum being 3rd party to the will filed an application on 03.01.1987 for their addition as opposite party and they were added as opposite parties 6 and 7 on 08.02.1987. Opposite party 6 then filed written objection on 28.05.1988. Later on, the case was transmitted to the Court of District Judge who considering the written objection converted the probate case to Title Suit No. 02 of 1988 by order 41.

The case of the petitioner-plaintiff-respondent is that the suit land belonged to Shoshi Mohon Shil who had 05(five) sons named Jagadish, Robindra, Brindabon, Khetra Mohon and Shadhon. Jagadish, Robindra and Brindabon left this country for India in 1940 and lived there permanently. Khetra Mohon lived separately in Tongi. The youngest son Shadhon was taken in adoption in his childhood by his aunt through ritual participated by his brother Shoshi Mohon Shil and accordingly Shadhon was grown up there with and by his aunt. Subsequently, Shadhon being inspired to the ideals of

Islam embraced the same and changed his name to Mohammad Shahjahan and started living in the address in Dakshin Khan, Uttara. Thus, Shoshi Mohon Shil being abandoned by his family started living in the house of his eldest brother Nagorbashi. Nagorbashi at his own cost took proper care of Shoshi with maintenance and medication and Shoshi was satisfied with that. Shoshi desired to make a will in favour of Nagorbashi and expressed such intention to the local respectable persons and consequently executed the same on 14.08.1943 in presence of witnesses. Previously no will had been executed by Shoshi. Nagorbashi or his successors were empowered to take probate. Shoshi himself read the contents of the will and signed the same with full understanding in presence of the witnesses and scribe. The petitioner filed the case for granting probate with the original copy of the will.

The Court kept the will in the safe custody by order 2 dated 29.11.1984.

The case of opposite party-defendant-appellant No. 1 as made out in written objection is that the three sons

of Shoshi Mohon named Jagadish, Rabindra, Brindabon went to India permanently before 1947 and another son Khatro Mohon predeceased his father. Shashi Mohon died in 1959 leaving behind his youngest son Shadhon as his only successor. Shadhon became owner in possession. He was neither adopted to his aunt nor lost his title in his paternal property. Shoshi never executed the will and the same is forged, fraudulent, illegal and inoperative. Nagarbashi or his heirs did not acquire any right, title and interest in the suit property. Shadhon while maintaining title and possession in the suit land was inspired by the ideals of great Islamic religion and accepted the same on 17.07.1967 when he was about 22 years old. Subsequently, due to necessity of money he sold the suit land to Alauddin and his wife Amena on 03.10.1983 by 03(three) registered kabalas and delivered possession. Alauddin and Amena are opposite parties 6 and 7 respectively. Earlier the plaintiff-respondent filed Title Suit No. 194 of 1983 which was dismissed on 27.06.1985.

The petitioner has no title and possession in the suit land. The suit is liable to be dismissed.

The Court of District Judge framed as many as 05(five) issues as to maintainability, limitation, whether the will filed by the plaintiff is genuine or not, whether the plaintiff has right and possession in the suit land and whether the plaintiff is entitled to decree as prayed for.

In course of trial plaintiff examined 03(three) witnesses and filed the will which was marked as Exhibit-1. On the other hand, the defendant 6 examined 03(three) witnesses but he did not file any document.

The Court of District Judge upon hearing the parties and perusal of evidence held that the plaintiff-petitioner has been able to prove the case and he is entitled to have the order of probate and accordingly the suit was decreed on 02.05.2006.

The defendant-opposite parties 6 and 7 being aggrieved by the impugned judgment preferred the instant appeal.

Mr. ABM Siddiqur Rahman Khan with Mr. Md. Rafiqul Islam Faruque, learned Advocates appearing on behalf of the appellants submitted that the impugned judgment is bad in law and liable to be set aside. Mr. Khan submitted that the lower Court erred in law in granting probate although according to section 63 of the Succession Act read with section 68 of the Evidence Act, two attesting witnesses are required to be examined but the plaintiff-petitioner did not take any such step in the instant case. The plaintiff also did not prove the testamentary capacity of Shoshi Mohon to the effect that at the time of execution he was in a sound and disposing state of mind and he understood the nature and effect of such disposition and put his signature on his own free will. He further submitted that the learned District Judge did not consider that the appellants being purchasers from Shadhon alias Shahjahan constructed house in the suit land thus respondent cannot claim on the basis of will which is forged and fraudulent. He laid much emphasis on suspicious circumstance and submitted that

the instant probate case was filed long after 40 years from the date of execution of the alleged will in 1943. The case of the plaintiff on the alleged adoption is also not proved in evidence and the will also does not have any such recital in its body. He further submitted that Title Suit No. 194 of 1983 filed at the instance of the plaintiff-respondent for declaration of title against the same party since was dismissed the petitioner is not entitled to any remedy. The will since being surrounded by suspicious circumstance the same cannot be considered the testamentary disposition of the testator. In support of his submission he has referred the case of Biswaswar Das Karmakar and others Vs. Sasanka Mohan Das and others reported in 35 DLR (AD) 315, Khitindra Chandra Vs. Jalada Devi 35 DLR (AD) 102, Paresh Chandra Vs. Hiralal Nath and others 36 DLR (AD) 156, Jogendra Nath Vs. Amulya Chandra and others 44 DLR (AD) 147, Narendra Nath Vs. Sunil Kumar 14 BLD (HCD) 10, Janki Narayan Vs. Narayan Namdeo (2003) 2 SCC 91, Rur Singh Vs. Bachan Kaur (2009) 11 SCC 1, Kanchan Bala Vs. Gita Rani 14 BLC

(HCD) 472, Bhagirat Barman Vs. Haricharan 4 BLC (AD) 234, Oom Prokash Vs. Shoroshoti Bai AIR 1998 MP 226 and Thirty Sam Shroff Vs. Shiraz Byramji AIR 2007 BOM 103. He finally submitted that the petitioner did not even mention the time of death and amount of asset of the testator and the case is also barred under Section 11 of the Code of Civil Procedure.

Mr. ABM Motiar Rahman, learned Advocate appearing for the plaintiff-respondent submitted that the appellant cannot challenge the grant of probate under Section 283(1)(c) of the Succession Act. The appeal is not maintainable because the appellants are not aggrieved as defined under the law and the revocation case is not maintainable and they have no locus standi to challenge the probate Case. The three kabalas dated 03.10.1983 include fictitious land and those are invalid documents under Section 28 of the Registration Act. Moreover, the appellant did not even file and prove those documents in evidence. He finally submitted that the respondent is entitled to get the aid of Section 90 of the Evidence Act in

the given facts and circumstances of the present case and the impugned judgment calls for no interference by this Court being passed upon proper appreciation of evidence. He has referred the case of Sree Moti Charu Bala Sen Vs. Abul Hashem and others reported in 33 DLR (AD) 254 and ADC (Revenue) Vs. Orun Kumar, 6 BLC 354.

We have heard the learned Advocates for both sides and perused the evidence on record and gone through the impugned judgment and the grounds taken in appeal.

It is admitted that Shoshi Mohon had 05(five) sons named Jagadish, Rabindra, Brindabon, Kethromohon and shadhon alias Shahjahan . Jagadish, Rabindra, Brindabon permanently left this country for India before 1947. Khetro Mohon lived separately in Tongi and died during the life time of his father. The plaintiff-respondent claims that Shadhon was adopted to his maternal aunt. Subsequently, he embraced Islam on 17.07.1967 and named himself as Shajahan through affidavit dated 27.07.1967 in which he asserted that he was about 22 years old at that time. Thus it appears that admittedly he

was born in 1945 after two years of the execution of will dated 14.08.1943 (Exhibit-1). So, it can be safely held that he had no personal knowledge about the will or its execution. Defendant 6 now appellant denied the case of adoption raised by respondent. Respondent Narayan is the son of propounder Nagarbashi who is the brother of testator Shoshi. The son of Shoshi named Shadhon alias Shahjahan is said to have sold the suit land to the appellant by 03(three) documents dated 03.10.1983. Appellant 2 is the wife of appellant 1 but she did not file any caveat or contest the suit. Defendant 6 did not even file their documents. Defendants 6-7 in order to contest the probate case filed application for their addition on 03.01.1987. The then Subordinate Judge allowed the application on 08.02.1987 only on the finding that they had good reason to be added as party to the litigation. It is absolutely surprising how the Subordinate Judge found good reason without any document and beyond the settled law. However, the respondent did not go to the Higher Court against such order. But in the instant appeal

this Court is not fettered to examine whether the order dated 08.02.1987 was rightly passed or not. The main question is whether the appellant got any interest in the estate of the testator so as to be called upon to come and see the proceeding before the grant of probate as provided under Section 283 of the Succession Act. In order to entitle a person to come and see the proceeding before the grant of probate he must show that he is interested in the estate of the deceased. Here the purchaser-appellant did not even produce their documents in evidence. Moreover, in the evidence it appears that both D.W. 1 and D.W. 2 claimed to be transferee and transferor respectively to those documents clearly admitted that those documents were registered in Tongi Sub-registry office instead Rupganj and the vendor had no paper to show any land belonging to him in Tongi. Law is settled that document holding fictitious property is invalid under Section 28 of the Registration Act. So the appellant have simply failed to

show that they have any interest in the estate of the testator.

The interest in the estate of the testator within the words of Section 283 of Succession Act means an interest through the testator. A person who claims outside or independently of the will or claims adversely to the testator and disputes his right to deal with the property cannot be deemed to claim any interest in the estate of the deceased. The crucial point in this case is whether the appellant claimed any interest in the estate through the testator and since they do not and cannot do so they had no *locus standi* to be added as a party or question the execution or attestation of the will in this probate proceeding. This aspect of the case has long ago been settled in Charu Bala case reported in 33 DLR (AD) 254. This Charu Bala case was affirmed in the case of Shubra Nandi Mojumder Vs. Begum Mahmuda Khatun reported in 42 DLR (AD) 133. In Shubra Nandi's case, caveator Mahmuda claimed interest through an agreement executed by the testator Sharat Kumar himself and filed

application for her addition in the probate proceeding. Consequently, Leave was granted and our Honorable Appellate Division referring to Charubala case held that the point has been settled and there is no scope for taking different view. A Division Bench of this Court also relied upon the same principle in the case reported in 6 BLC(DB) 354.

It appears that in all cases referred to by the appellant the caveator happens to be claiming through testator as heir or reversioner but in the instant case the appellants claimed independently. So the main submission of the appellant on technicality of suspicious circumstance relying upon those referred cases bears no value and falls through. In the event of contesting the case by Shahjahan himself may arise the question of suspicious circumstance or whether Shoshi was competent or in a sound and disposing state of mind or possessed testamentary capacity at the time of execution of Exhibit-1 dated 14.08.1943. In fact, admittedly Shahjahan was born in 1945 and he had no knowledge whether

Nagarbashi resorted to any fraud, undue influence and coercion in course of execution by testator Shoshi. Moreover, paragraph 15 (xiv) of T. Romesh case (online version) referred to by the appellants shows that such allegations on fraud etcetera brought about by the caveator with regard to execution have to be proved by him.

Shadhon alias Shahjahan is sealed with a case of adoption. PW-1 Narayan is the paternal cousin of Shahjahan and PW-2 Rabindra is the brother of Shahjahan. They deposed on adoption. PW 2 is the significant witness because as an heir he was entitled to the property left by his deceased father if he would have opposed the will. He is the disinterested witness. He supported the case of adoption. On the other hand, DW-1 Alauddin admitted in evidence that Shadhon lived in the disputed house with his father but Shadhon alias Shahjahan as DW-2 himself admitted that his uncle Banabashi maintained him and in 1967 he lived in Manikdi Tejgaon and his present address is Dakshin

Khan, Uttara. D.W. 3 also supported that Banabashi maintained Shadhon. The possession of Shadhon alias Shahjahan is material in the instant case in order to defeat the case of adoption. Shahjahan as well as the appellant has to make out a definite case that before sale to the appellants in 1983 Shahjahan lived in his paternal house. But admittedly things are different here. Even the affidavit dated 27.07.1967 shows his address was Balughat, Cantonment, Tejgaon in 1967. Therefore it is held that the earlier possession of vendor Shahjahan in the suit land is not proved in evidence.

The will was executed in 1943. The appellant claimed to have purchased the land in 1983 from Shajahan. PW 3 stated in evidence that the appellant tried to enter into the suit land after purchase from Shajahan for which criminal case was started and he was convicted. He further stated that he has home in a portion of the land. There is no specific evidence on the entry of the appellant in the suit land. As discussed above, Shajahan's possession was not proved. In this context it is

understood that after purchase in 1983 appellant forcibly had entered into a portion of the suit land. Since Shajahan had no possession, the appellant's possession, if any, claiming under Shajahan is not believable. But it transpires that he is a trespasser and law is settled that a trespasser cannot maintain his illegal possession against the real owner.

Learned Advocate for the respondent submitted that the will was executed in 1943 and it was a very old event so it was not possible to prove it by direct evidence. The will was produced from the proper custody without objection. So there is a presumption under section 90 of the Evidence Act that the will was duly executed and attested. Learned Advocate for the appellant strongly opposed this argument. He drived our attention to paragraph 14(b)(i), 14(e)(ix) of T Romesh Case and submitted that presumption under section 90 does not apply to will because wills have to be proved in terms of section 63(c) of the Succession Act read with section 68 of the Evidence Act.

To understand the intention and purpose of a law all the relevant sections of that particular law must be read together. From a combined reading of sections 283(1)(c) and 63(c) of the Succession Act, it appears that the party who wants to assail a will relying on section 63(c) must at first satisfy the requirement of section 283(1)(c) that the attacking party-caveator coming under section 284 must be a party claiming interest in the estate through testator and if such party claims independently of the will can not be said to have interest in the probate case. In the instant case the appellant claims independently and he even did not produce his documents before the Court and the documents also are said to have been tainted with fictitious property. In such a situation the appellant-caveator cannot get the benefit and question the validity of the will under section 63 where he has no legal right or interest under section 283 of the Succession Act. The *ratio* of the case of Kanchan Bala reported in 14 BLC 472 as referred to is similarly not applicable in the present case because in that case Kanchan Bala was claiming not

independently but through testator according to section 283 of the Succession Act.

In the case of Md. Abdul Motin Kazi Vs. Govt. of Bangladesh reported in 11 ADC 133 interpretation of law on section 90 of the Evidence Act has been laid down. In the instant case there is no evidence to show that Nagarbashi ever played any unscrupulous role in course of execution of the will (Exhibit-1). Rather the appellant-caveator being a third party to the will did not even bother to produce their documents challenging the will. His conduct appears to be unscrupulous. Exhibit-1 came from proper custody and was more than 30(thirty) years old and on its face it is presumed that the same was executed by Shashi Mohon in a sound disposing state of mind. Relaying on the authority of the decision of their Lordships of the Privy Council in Munna Lal Vs. Mst. Kashi Bai AIR (34) 1947 PC 15 the presumption in cases of execution and attestation of will under section 90 of the Evidence Act was drawn by a Division Bench in the case of Mst. Saran Vs. Abdul Rashid reported in PLD 1950 Sind

131. In the case of Swarna Kottoyya Vs. Karancheti Vardhamma reported in AIR 1930 Mad 744, the similiar view was taken long ago.

Considering the fact and circumstance of the present case it appears that a presumption, therefore, arises under section 90 of the Evidence Act that Exhibit-1 evidencing the will is a genuine document and validity executed.

It has been stated in paragraph 3 of the application (now plaint) of the probate case that the plaintiff-respondent is empowered to take the probate after the death of propounder Nagarbashi. Clause 5 of the will (Exhibit-1) also shows the same and as such the respondent has become the propounder under section 146 of the Code of Civil Procedure read with Sections 268 and 295 of the Succession Act. Respondent as PW 1 stated in evidence that his father could not file the probate case during his life time for his illness. Learned Advocate for the appellant strongly submitted that this long delay in filing the probate case would raise suspicion and he

referred the judgment of Patna High Court passed in the online case of Hari Nath Thakur Vs. Sri Bhagwan Thakur. In the referred case the objection was also filed by the persons claiming through testator. The fact of the case is also different from the instant case. It transpires that after purchase in 1983 this appellant has been causing disturbance in the peaceful possession of the respondent who was at peace before such transfer. But according to the line of events he was forced to file this case because his back was against the wall. Minorities are under pressure in every country's social system. Many times they are deprived of basic rights and legal facilities. Respondent did not file this case until he was compelled to do the same after being threatened and subsequent illegal trespass of the appellant in around 1987. Without the guarantee of fundamental human rights and the rule of law no nation can attain perfection. Justice is established when the idea that what is injurious to others is injurious to oneself comes to the mind of the people of the society. When there is inequality in the society, people

move away from the concept of morality and treat the weak with injustice. It disrupts social behavior and state principles. This kind of injustice can be removed from the society through well thought out and specific application of law. The technicalities of the law should be used sparingly with caution keeping in mind that justice shall not come undone. In the instant case, it is sad to experience that appellant pleads with the technicality of suspicious circumstance without producing any document. This Court is reluctant to accept such submission.

Appellant did not file and prove any paper of Title Suit No. 194 of 1983 and the matter in issue of that suit as alleged is apparently not the same. Question of *res judicata* does not arise at all. As discussed above appellants have no interest in the estate through testator under Section 283 of the Succession Act and their access to this proceeding is shut down. For the reasons stated above we are not inclined to interfere with the judgment

and decree passed by the District Judge and accordingly this appeal having no merit is dismissed.

Communicate this judgment to the concerned Court. Send down the lower Court's record.

Bhishmadev Chakrabortty, J:

I agree.

B.O. Naher.