

IN THE HIGH COURT AT CALCUTTA
CIVIL APPELLATE JURISDICTION
APPELLATE SIDE

BEFORE:

The Hon'ble Justice Soumen Sen

And

The Hon'ble Justice Siddhartha Roy Chowdhury

F.A. No.10 of 2015

Smt. Pranati Ghosh & Ors.

Vs.

Sri Anil Kumar Ghosh

For the Appellants	:Mr. Supratim Laha, Adv., Mr. Ashis Kumar Dutta, Adv.,
For the Respondent	:Mr. Aniruddha Chatterjee, Adv., Mr. Rahul Karmakar, Adv.,
Hearing Concluded On	: 06 th September, 2022
Judgment On	: 14 th September, 2022

Soumen Sen, J.: The facts of the case in brief are that the testator Bibhuti Bhushan Ghosh executed his last Will and testament on the 14th of October 1997. The Will was also registered on the said date. The testator had appointed his second son Anil Ghosh as executor. Bibhuti died on 31st of January 1998. The executor applied for grant of probate as propounder of the last Will and testament of Bibhuti and claimed that at time of execution, Bibhuti was mentally and physically alert enough to understand worldly affairs including that of disposition of properties, that attesting witnesses were present at the time of such execution who had seen the testator execute the same. However, Pranati Ghosh along

with others and including Ashima Ghosh one of the daughters of Bibhuti, an attesting witness claimed that the Will was executed by someone other than Bibhuti and the signature in the alleged Will was not that of the late Bibhuti Bhushan, he was not present during execution and registration and alleged impersonification and forgery.

It is trite law that the burden of proof is on the propounder to prove that the Will has been voluntarily executed, that the testator has signed the Will and put his signature on his own free Will having sound disposition of mind, understanding the nature and effect thereof and that the Will is a genuine document. The onus of the propounder may be discharged if he succeeds in bringing on record sufficient cogent evidence in this regard and removing all suspicions. However, the burden of proof shifts to the caveator if a defence of undue influence, fraud or coercion is raised.

As held in ***Barry v. Butlin*** reported in **(1838) 2 Moo PC. 480**, the law is well settled that the onus probandi lies on the person who propounds the Will, and this onus is in general discharged by proof of capacity, and the fact of execution, from which the knowledge and the assent to its contents by the testator will be assumed. But where a Will is prepared and executed under circumstances which excite the suspicion of the Court it is for those who propound the Will to remove such suspicion, and to prove affirmatively that the testator knew and approved of the contents of the document as opined in ***Tyrrell v. Painton*** reported in **L.R. 1894** Page 151. Where once it has been proved that a Will has been executed with due solemnities by a person of competent

understanding and apparently a free agent, that is, when the propounder of the Will has discharged the onus: the burden of proving that it was executed under undue influence is on the party who alleges it as observed in ***Boyse v. Rossborough*** reported in **(1857) 6 H.L.C. 2: 26 L.J. Ch. 256**. It was also held that influence in order to be undue within the meaning of any rule of law which would make it sufficient to vitiate a Will must be an influence exercised either by coercion or by fraud. To the same effect is the statement in **Barry** (*supra*) which held that the undue influence and the importunity must be of the nature of fraud or duress if they are to defeat a Will. As observed in ***Craig v. Lamoureux L.R.***, reported in **(1920) A.C. 349** the burden of proving undue influence is not discharged by merely establishing that a person has the power unduly to overbear the Will of the testator. It must be shown that in the particular case the power was exercised, and that it was by means of the exercise of that power that the Will was obtained.

In ***RM. Ak. P. Kannammal Achi & Ors., v A.N. Narayanan Chettiar*** reported in **(1970) 1 MLJ 252** it was held that “*While the burden on the propounder of the Will is to show that the testator executed the Will in his right mind and with disposing mental capacity, the caveator to succeed and have the Will thrown out should establish that the Will was executed under undue influence and the evidence in regard to this must be of the exercise of influence either by coercion or by fraud. Mere persuasion and importunity which do not unduly overbear the Will of the testator*

would not be undue influence that would vitiate the Will.” (emphasis supplied)

In ***Bur Singh v. Uttam Singh*** reported in (1911) I.L.R. 38 Cal. 355, where the question was as to the capacity of a testator and it was alleged that undue influence had been exercised over him in the matter of execution while he was admittedly seriously ill, though the evidence was to the effect that he was in possession of his senses and understood what he was doing when he signed the Will, the Judicial Committee remarked:

“The onus of proving the testamentary capacity of Shib Singh of course lies on those by whom the Will is propounded, and in their Lordships' opinion they have discharged that obligation by the evidence indicated above. Such evidence is not displaced by mere proof of serious illness and of general intemperance, and yet that is as far as the evidence of the respondents can fairly be said to go. So far as the charge of undue influence is concerned, all that is shown on the part of those attacking the Will is that there was motive and opportunity for the exercise of such influence by the defendants, and that some of them in fact benefited by the Will to the exclusion of other relatives of equal or nearer degree. Circumstances of that character may sometimes suggest suspicion, and would certainly lead the Court in the present case to scrutinise with special care the evidence of those who propound the Will; but in order to set it aside there must be clear evidence that the undue influence was in fact exercised, or that the illness of the testator so affected his mental faculties as to make them unequal to the task of disposing of his property.” (emphasis supplied)

Per contra Justice Maheshwari in ***Shivakumar & Ors., v. Sharanabasappa*** reported in **AIR 2020 SC 3102** it was observed that if a person challenging the Will alleges fabrication or fraud, undue influence, coercion etc. in regard to the execution of the Will, such pleas have to be proved by him. But even in the absence of such pleas, the very circumstances surrounding the execution of the Will may give rise to doubt or as to whether the Will had indeed been executed by the testator and/or as to whether the testator was acting on his own free Will and the suspicious features must be “real, germane and valid and not merely the fantasy of the doubting mind”.... “The Will being a rather solemn document that comes into operation after the death of the testator, special provisions are made in the statutes for making of a Will and for its proof in a Court of law.” (emphasis supplied)

In ***H. Venkatachala Iyenger vs. B.N. Thimmajamma*** reported in **AIR 1959 SC 443** wherein the Court clearly distinguished the nature of proof required for a Will as opposed to any other document reads as under:-

“18. The party propounding a Will or otherwise making a claim under a Will is no doubt seeking to prove a document and, in deciding how it is to be proved, we must inevitably refer to the statutory provisions which govern the proof of documents. Sections 67 and 68, Evidence Act are relevant for this purpose. Under Section 67, if a document is alleged to be signed by any person, the signature of the said person must be proved to be in his handwriting, and for proving such a handwriting under Sections 45 and 47 of the Act the opinions of experts and of persons acquainted with the handwriting of the person concerned

are made relevant. Section 68 deals with the proof of the execution of the document required by law to be attested; and it provides that such a document shall not be used as evidence until one attesting witness at least has been called for the purpose of proving its execution. These provisions prescribe the requirements and the nature of proof which must be satisfied by the party who relies on a document in a court of law. Similarly, Sections 59 and 63 of the Indian Succession Act are also relevant. Section 59 provides that every person of sound mind, not being a minor, may dispose of his property by Will and the three illustrations to this section indicate what is meant by the expression “a person of sound mind” in the context. Section 63 requires that the testator shall sign or affix his mark to the Will or it shall be signed by some other person in his presence and by his direction and that the signature or mark shall be so made that it shall appear that it was intended thereby to give effect to the writing as a Will. This section also requires that the Will shall be attested by two or more witnesses as prescribed. Thus the question as to whether the Will set up by the propounder is proved to be the last Will of the testator has to be decided in the light of these provisions. Has the testator signed the Will? Did he understand the nature and effect of the dispositions in the Will? Did he put his signature to the Will knowing what it contained? Stated broadly it is the decision of these questions which determines the nature of the finding on the question of the proof of Wills. It would prima facie be true to say that the Will has to be proved like any other document except as to the special requirements of attestation prescribed by Section 63 of the Indian Succession Act. As in the case of proof of other documents so in the case of proof of Wills it would be idle to expect proof with mathematical certainty. The test to be applied would be the usual test of the satisfaction of the prudent mind in such matters.” (emphasis supplied)

In **S.R. Srinivasa v. S. Padmavathamma**, reported in **(2010) 5 SCC 274** the Hon'ble Supreme Court after taking into consideration the earlier decisions with regard to the mode, manner and the relevant legal provisions which govern the proof of Will has summarized the law with regard to the proof of Will in the manner following:

*“38. The aforesaid statement of law was further clarified by Chandrachud J. in the case of **Jaswant Kaur v. Amrit Kaur** reported in **(1977) 1 SCC 369** as follows:*

1. Stated generally, a Will has to be proved like any other document, the test to be applied being the usual test of the satisfaction of the prudent mind in such matters. As in the case of proof of other documents, so in the case of proof of Wills, one cannot insist on proof with mathematical certainty.

2. Since Section 63 of the Succession Act requires a Will to be attested, it cannot be used as evidence until, as required by Section 68 of the Evidence Act, one attesting witness at least has been called for the purpose of proving its execution, if there be an attesting witness alive, and subject to the process of the court and capable of giving evidence.

3. Unlike other documents, the Will speaks from the death of the testator and therefore the maker of the Will is never available for deposing as to the circumstances in which the Will came to be executed. This aspect introduces an element of solemnity in the decision of the question whether the document propounded is proved to be the last Will and testament of the testator. Normally, the onus which lies on the propounder can be taken to be discharged on proof of the essential facts which go into the making of the Will.

4. Cases in which the execution of the Will is surrounded by suspicious circumstances stand on a different footing. A shaky signature, a feeble mind, an unfair and unjust disposition of property, the propounder himself taking a leading part in the making of the Will under which he receives a substantial benefit and such other circumstances raise suspicion about the execution of the Will. That suspicion cannot be removed by the mere assertion of the propounder that the Will bears the signature of the testator or that the testator was in a sound and disposing state of mind and memory at the time when the Will was made, or that those like the wife and children of the testator who would normally receive their due share in his estate were disinherited because the testator might have had his own reasons for excluding them. The presence of suspicious circumstances makes the initial onus heavier and therefore, in cases where the circumstances attendant upon the execution of the Will excite the suspicion of the court, the propounder must remove all legitimate suspicions before the document can be accepted as the last Will of the testator.

5. It is in connection with Wills, the execution of which is surrounded by suspicious circumstances that the test of satisfaction of the judicial conscience has been evolved. That test emphasises that in determining the question as to whether an instrument produced before the court is the last Will of the testator, the court is called upon to decide a solemn question and by reason of suspicious circumstances the court has to be satisfied fully that the Will has been validly executed by the testator.

6. If a caveator alleges fraud, undue influence, coercion etc. in regard to the execution of the Will, such pleas have to be proved by him, but even in the absence of such pleas, the very circumstances surrounding the execution of the Will may raise a

doubt as to whether the testator was acting of his own free Will. And then it is a part of the initial onus of the propounder to remove all reasonable doubts in the matter.” (emphasis supplied)

In ***Bharpur Singh & Ors., v. Shamsher Singh***, reported in **2009 (3) SCC 687** at Paragraph 16 has stated the following three aspects that must be proved by a propounder:

“16..... (i) that the Will was signed by the testator in a sound and disposing state of mind duly understanding the nature and effect of disposition and he put his signature on the document of his own free Will, and (ii) when the evidence adduced in support of the Will is disinterested, satisfactory and sufficient to prove the sound and disposing state of testator's mind and his signature as required by law, Courts would be justified in making a finding in favour of propounder, and (iii) If a Will is challenged as surrounded by suspicious circumstances, all such legitimate doubts have to be removed by cogent, satisfactory and sufficient evidence to dispel suspicion.”

Thereafter, in paragraph 23, the Apex Court has narrated a few suspicious circumstance, as being illustrative but not exhaustive, in the following manner:-

“Suspicious circumstances like the following may be found to be surrounded in the execution of the Will: (i) The signature of the testator may be very shaky and doubtful or not appear to be his usual signature. (ii) The condition of the testator's mind may be very feeble and debilitated at the relevant time. (iii) The disposition may be unnatural, improbable or unfair in the light of relevant circumstances like exclusion of or absence of adequate provisions for the natural heirs without any reason. (iv) The dispositions may not appear to be the result of the testator's free Will and mind. (v) The propounder takes a prominent part in the execution of the

Will. (vi) The testator used to sign blank papers. (vii) The Will did not see the light of the day for long. (viii) Incorrect recitals of essential facts.” (emphasis supplied)

In **Niranjan Umeshchandra Joshi v. Mrudula Jyoti Rao & Ors.**, reported in **(2006) 13 SCC 433** at paragraphs 34, 35 & 36 the Hon’ble Supreme Court reiterated the circumstances that could be considered to be suspicious in the following words:-

“34. *There are several circumstances which would have been held to be described by this Court as suspicious circumstances: (i) when a doubt is created in regard to the condition of mind of the testator despite his signature on the Will; (ii) When the disposition appears to be unnatural or wholly unfair in the light of the relevant circumstances; (iii) where propounder himself takes prominent part in the execution of Will which confers on him substantial benefit.*

35. *We may not delve deep into the decisions cited at the Bar as the question has recently been considered by this Courts in **Venkatamuni v. C.J. Ayodhya Ram Singh** reported in (2006) 13 SCC 449 wherein this Court has held that the court must satisfy its conscience as regards due execution of the Will by the testator and the court would not refuse to probe deeper into the matter only because the signature of the propounder on the Will is otherwise proved. The proof of a Will is required not as a ground of reading the document but to afford the Judge reasonable assurance of it as being what it purports to be.*

36. *We may, however, hasten to add that there exists a distinction where suspicions are well founded and the cases where there are only suspicions alone.”*

In **Anil Kak v. Sharada Raje** reported in **(2008) 7 SCC 695** at paragraphs 52, 53, 54 & 55 the Apex Court opined that the court is

required to adopt a rational approach and is furthermore required to satisfy its conscience as existence of suspicious circumstances plays an important role, observing:

“52. Whereas execution of any other document can be proved by proving the writings of the document or the contents of it as also the execution thereof, in the event there exists suspicious circumstances the party seeking to obtain probate and/or letters of administration with a copy of the Will annexed must also adduce evidence to the satisfaction of the court before it can be accepted as genuine.

53. As an order granting probate is a judgment in rem, the court must also satisfy its conscience before it passes an order.

54. It may be true that deprivation of a due share by the natural heir by itself may not be held to be a suspicious circumstance but it is one of the factors which is taken into consideration by the courts before granting probate of a Will.

55. Unlike other documents, even animus attestandi is a necessary ingredient for proving the attestation.” (emphasis supplied)

Similarly, in **Leela Rajagopal and others v. Kamala Menon Cocharan and others**, reported in **(2014) 15 SCC 570**, at paragraph 13 the Hon’ble Supreme Court opined as under:-

“13. A Will may have certain features and may have been executed in certain circumstances which may appear to be somewhat unnatural. Such unusual features appearing in a Will or the unnatural circumstances surrounding its execution Will definitely justify a close scrutiny before the same can be accepted. It is the overall assessment of the court on the basis of such scrutiny; the cumulative effect of the unusual features and circumstances which would weigh with the court in the determination required to be made by it. The judicial verdict, in the last resort, will be on the basis of a consideration of all the unusual features and suspicious circumstances put together and

not on the impact of any single feature that may be found in a Will or a singular circumstance that may appear from the process leading to its execution or registration. This, is the essence of the repeated pronouncements made by this Court on the subject including the decisions referred to and relied upon before us.”

In the case of **RM. Ak. P. Kannammal Achi & Ors.**, (supra) it was observed-

“It is needless to state, as pointed out by the Supreme Court, that as in the case of proving all other documents so in the case of proving of Wills, it would be idle to expect proof with mathematical certainty. But if the judicial mind is not satisfied, and it is doubtful if the whole truth has come out, when it feels that there must be perjury on one side or the other and on which side the perjury is committed, and the competence of the testator is doubtful, it may hold that the Will has not been proved. The test to be applied is the usual test of satisfaction of the prudent mind in such matters. No doubt, as the testator is not there to affirm or deny whether he made the dispositions as presented in the Will, an element of solemnity is introduced, in the matter. Herein comes the phrase taken from Ecclesiastical Law 'satisfaction of the conscience of the Court.' But the very solemnity of the proceedings requires having regard to the fact that the enactment is no more there to state one way or the other, that the Court should not also lightly strike down a Will, fair and rational on its face and proved to have been duly signed by the testator in the presence of attesting witnesses, when apparently in sound disposing state of mind....Whether after the finding against undue influence there are left legitimate doubts which call upon the Court to be vigilant and zealous in the examination of the evidence in support of the Will and whether the conscience of the Court in this regard is satisfied are in the end questions of fact.” (emphasis supplied)

The effect of denial or failure to recollect due execution of the Will was elaborately discussed in **Janki Narayan Bhoir v. Narayan Namdeo Kadam** reported in **(2003) 2 SCC 91** at paragraph 11. While discussing section 71 of the Indian Evidence Act, it was held:

“11. Section 71 of the Evidence Act is in the nature of a safeguard to the mandatory provisions of Section 68 of the Evidence Act, to meet a situation where it is not possible to prove the execution of the Will by calling the attesting witnesses, though alive. This section provides that if an attesting witness denies or does not recollect the execution of the Will, its execution may be proved by other evidence. Aid of Section 71 can be taken only when the attesting witnesses, who have been called, deny or fail to recollect the execution of the document to prove it by other evidence. Section 71 has no application to a case where one attesting witness, who alone had been summoned, has failed to prove the execution of the Will and other attesting witnesses though are available to prove the execution of the same, for reasons best known, have not been summoned before the court. It is clear from the language of Section 71 that if an attesting witness denies or does not recollect execution of the document, its execution may be proved by other evidence. However, in a case where an attesting witness examined fails to prove the due execution of Will as required under clause (c) of Section 63 of the Succession Act, it cannot be said that the Will is proved as per Section 68 of the Evidence Act. It cannot be said that if one attesting witness denies or does not recollect the execution of the document, the execution of Will can be proved by other evidence dispensing with the evidence of other attesting witnesses though available to be examined to prove the execution of the Will. Yet another reason as to why other available attesting witnesses should be called when the one attesting witness examined fails to prove due execution of the Will is to avert the claim of drawing adverse inference under Section 114 Illustration (g) of the Evidence Act. Placing the best possible evidence, in the given circumstances,

before the Court for consideration, is one of the cardinal principles of the Indian Evidence Act. Section 71 is permissive and an enabling section permitting a party to lead other evidence in certain circumstances. But Section 68 is not merely an enabling section. It lays down the necessary requirements, which the court has to observe before holding that a document is proved. Section 71 is meant to lend assistance and come to the rescue of a party who had done his best, but driven to a state of helplessness and impossibility, cannot be let down without any other means of proving due execution by "other evidence" as well. At the same time Section 71 cannot be read so as to absolve a party of his obligation under Section 68 read with Section 63 of the Act and liberally allow him, at his Will or choice to make available or not a necessary witness otherwise available and amenable to the jurisdiction of the court concerned and confer a premium upon his omission or lapse, to enable him to give a go-by to the mandate of law relating to the proof of execution of a Will." (emphasis supplied)

This principle was reiterated in **M.B. Ramesh (D) by L.Rs. vs. K.M. Veeraje Urs (D) by L.Rs. and Ors.** reported in **(2013) 7 SCC 490** while upholding the validity of a Will with the aid of section 71 of IEA observed:

"The issue of validity of the Will in the present case Will have to be considered in the context of these facts. It is true that in the case at hand, there is no specific statement by PW2 that he had seen the other attesting witness sign the Will in the presence of the testator, but he has stated that the other witness had also signed the document. He has proved his signature, and on the top of it he has also stated in the Cross examination that the other witness (Mr. Mallaraje Urs), Smt. Nagammani, himself and one Sampat Iyanger and the writer of the Will were all present while writing the Will on 24.10.1943 which was registered on the very next day. This statement by implication and inference Will have to be held as proving

the required attestation by the other witness. This statement alongwith the attendant circumstances placed on record would certainly constitute proving of the Will by other evidence as permitted by Section 71 of the Evidence Act.” (emphasis supplied)

In **M.B. Ramesh (Dead) By LRs. (supra)** at paragraph 18 it was further observed:-

“18. That takes us to the crucial issue involved in the present case viz. with respect to the validity and proving of the concerned Will. A Will, has to be executed in the manner required by Section 63 of the Succession Act. Section 68 of the Evidence Act requires the Will to be proved by examining at least one attesting witness. Section 71 of the Evidence Act is another connected section "which is permissive and an enabling section permitting a party to lead other evidence in certain circumstances", as observed by this Court in paragraph 11 of Janki Narayan Bhoir v. Narayan Namdeo Kadam and in a way reduces the rigour of the mandatory provision of Section 68. As held in that judgment Section 71 is meant to lend assistance and come to the rescue of a party who had done his best, but would otherwise be let down if other means of proving due execution by other evidence are not permitted.” (emphasis supplied).

In **V. Kalyanaswamy (D) v. L. Bakthavatsalam (D)** reported in **2020 SCC OnLine SC 584** The Apex Court observed that Section 69 of the Evidence Act manifests a departure from the requirement embodied in Section 68 of the Evidence Act. In the case of a Will, which is required to be executed in the mode provided in Section 63 of the Indian Succession Act, when there is an attesting witness available, the Will is to be proved by examining him. He must not only prove that the attestation was done by him but he must also prove the attestation by

the other attesting witness. The consequence of denial of execution of the Will by the attesting witness and the burden of proof to establish due execution of Will has been considered and it is stated:

“83. We are of the view that Section 69 of the Evidence Act manifests a departure from the requirement embodied in Section 68 of the Evidence Act. In the case of a Will, which is required to be executed in the mode provided in Section 63 of the Indian Succession Act, when there is attesting available, the Will is to be proved by examining him. He must not only prove that the attestation was done by him but he must also prove the attestation by the other attesting witness. *This is, no doubt, subject to the situation which is contemplated in Section 71 of the Evidence Act which allows other evidence to be adduced in proof of the Will among other documents where the attesting witness denies or does not recollect the execution of the Will or the other document. In other words, the fate of the transferee or a legatee under a document, which is required by law to be attested, is not placed at the mercy of the attesting witness and the law enables proof to be effected of the document despite denial of the execution of the document by the attesting witness.*...” “While the burden to prove the Will and to satisfy the conscience of the court that there are no suspicious circumstances or if there are any to explain them is on the propounder of the Will, the burden to prove that the Will is procured by coercion, undue influence or fraud is on the respondents who have alleged the same.” (emphasis supplied)

While there can be no two opinion that in view of Section 68 of the Indian Evidence Act only one attesting witness, if alive and subject to the process of the Court and capable of giving evidence, has to be called to prove the execution of the document, however, it would be incumbent on

the propounder or the person claiming under the Will to prove that the said document was executed as required under Section 63(c) of the Indian Succession Act, 1925 and then only the document can be given effect to as a Will.

The aforesaid discussion on the law relating to the proof of the Will needs to be applied in the facts of the case and upon consideration of the argument advanced by the parties.

Mr. Supratim Laha, learned Counsel appearing on behalf of the appellant submits that the execution of the Will is surrounded by suspicious circumstances. Anil has taken prominent role in the execution of the Will. The Will has not been proved by any attesting witness. There are inconsistencies in the evidence of Anil with regard to the execution of the Will. Anil had made inconsistent statement with regard to the execution and registration of the Will. Our attention has drawn to the deposition of Anil where he stated that he was present during the execution of the Will and he had seen the other witnesses attesting the Will in presence of their father. However, during cross examination Anil has stated that he became aware of the Will only during registration at the registry office.

Mr. Laha submits that the appellant was suffering from various diseases and having regard to the cordial relationship of the testator is his daughter. There could not be any reason to exclude the daughters from the Will. It is submitted that Ashima in her deposition has clearly stated that she was made to sign on a blank paper and she had not accompanied to her father to the registry office. Mr. Laha submits that

the cumulative effect of the evidence would show that the Will was not executed by the testator and someone else had impersonated the testator in the registry office. Mr. Laha submits that the executor applied from the grant of probate after the partition suit was filed by the sisters. The reason for filing the probate proceeding is to deprive the sisters. Our attention is drawn to the cross examination of Anil where he has stated that the “probate suit” was filed when the sisters claimed their share. There is an inexplicable delay in applying for probate after 12 years from the death of the testator. Mr. Laha submits that once there are elements of suspicion it is duty of the propounder to remove all such suspicion circumstances as a probate takes effect after the death of the testator and it is absolutely necessary that the conscience of the Court is clear with regard to the due execution of the Will.

Mr. Anirudhha Chatterjee, learned senior counsel appearing on behalf of the respondents submits that there are no suspicious circumstances surrounding the execution of the contested Will dated 24th October 1997 as there is nothing unusual for a father to distribute his property among his sons after having given gifts to his daughters on their marriage and this was not a case where the natural heirs of the testator had been deprived. The major stand of the appellants had two legs. Firstly that the execution of the Will by the testator has not been proved and secondly, that the testator did not possess testamentary capacity. On the first point, the counsel for the respondent contended that the witnesses themselves in their deposition have admitted the execution of the purported Will by the testator. On the second point, he submitted

that no piece of document or evidence had been produced by the appellants to substantiate their claim that the testator was physically or mentally incapacitated to execute the said Will. The onus of proving the existence of suspicious circumstances is on the caveator and the appellants had primarily alleged impersonation of the alleged signature of the testator on the Will. As per the submission of Mr. Chatterjee, the compliance under Section 63 of the Indian Succession Act has been adhered to as the testator in the present case has 'signed' and/or 'affixed' his mark to the last Will. The mandate of Section 68 has also been complied with as is evident from the deposition of Ashima Ghosh, one attesting witness and affidavit filed by the other deceased attesting witness. The learned senior counsel points out that this is a peculiar case wherein one of the two attesting witnesses had demised and the other had turned hostile. However, he submits that in no contested probate case are all legal compliances met with absolute certainty and in this case too, substantial compliance has been met.

Mr. Chatterjee has submitted that the propounder Ashima and Pronati has proved due execution of Will. It is clear from the evidence of the aforesaid three persons that Ashima has the intention to attest the said Will and the extrinsic evidence on this point is receivable and can be looked into in deciding due execution of the Will. Mr. Chatterjee submits that if sufficient evidence available on record would show that the attestor has signed the Will and that he had put his signature out of his free Will having a sound disposition of mind and understood the nature and effect thereof the probate court can safely grant the probate of the

said Will. However, if a defence of fraud, coercion, undue influence is taken the burden would be on the caveator. Mr. Chatterjee submits that the only ground for challenge was impersonation which the caveators have failed to establish. No one have disputed the signature of their father on the Will. In this regard he has relied upon paragraph 32 and 33 of **Niranjan Umeshchandra Joshi** (supra) which reads:

“32. Section 63 of the Indian Succession Act lays down the mode and manner of execution of an unprivileged Will. Section 68 of the Indian Evidence Act postulates the mode and manner of proof of execution of document which is required by law to be attested. It in unequivocal terms states that execution of Will must be proved at least by one attesting witness, if an attesting witness is alive subject to the process of the court and capable of giving evidence. A Will is to prove what is loosely called as primary evidence, except where proof is permitted by leading secondary evidence. Unlike other documents, proof of execution of any other document under the Act would not be sufficient as in terms of Section 68 of the Indian Evidence Act, execution must be proved at least by one of the attesting witnesses. While making attestation, there must be an animus attestandi, on the part of the attesting witness, meaning thereby, he must intend to attest and extrinsic evidence on this point is receivable.

19. The burden of proof that the Will has been validly executed and is a genuine document is on the propounder. The propounder is also required to prove that the testator has signed the Will and that he had put his signature out of his own free Will having a sound disposition of mind and understood the nature and effect thereof. If sufficient evidence in this behalf is brought on record, the onus of the propounder may be held to have been discharged. But, the onus would be on the applicant to remove the suspicion by leading sufficient and cogent evidence if there exists any. In the case of proof of Will, a signature of a testator alone would not prove the execution thereof, if his mind may appear to be very feeble and debilitated. However, if a defence of fraud, coercion or undue influence is

raised, the burden would be on the caveator. [See Madhukar D. Shende v. Tarabai Shedage and Sridevi and Ors. v. Jayaraja Shetty and Ors.]. Subject to above, proof of a Will does not ordinarily differ from that of proving any other document.” (emphasis supplied)

Mr. Chatterjee has also relied upon paragraph 895 from **Halsbury’s Laws of England, Vol-103** to demonstrate the circumstances where the court can presume due execution of the Will. The said paragraph reads:

“895. Presumption of due execution. The principle omnia praesumuntur rite esse acta applies where the Will is regular on the face of it, with an attestation clause and the signatures of the testator and witnesses in their proper places. This presumption of due execution applies where there is a proper attestation clause, even though the witnesses have no recollection of having witnessed the Will, and even though the attestation clause appears only on the completed draft of a last Will. It applies where the testator’s name has been affixed by his direction just as where he has himself written his name. It may be rebutted by evidence of the attesting witnesses or otherwise, but the evidence as to some defect in execution must be clear, positive and reliable, since the court ought to have the strongest evidence before it believes that a Will with a perfect attestation clause and signed by the testator was not duly executed. Where there is only an incomplete clause it seems that the presumption applies, but with less force than where the attestation clause is in proper form. Where both the attesting witnesses are dead and the Will is in regular form the principle is applicable on proof of the handwriting.” (emphasis supplied)

He has reiterated in his submission that the appellants have failed to rebut due execution of the Will by a clear, positive and reliable evidence. Mr. Chatterjee has strenuously argued that having regard to the entire facts and circumstances surrounding the execution of the Will

it can be construed to be a fair disposition as the properties have been divided amongst his four sons and grandsons. The propounder is not the only beneficiary under Will. He has further submitted that in view of the nature and quality of evidence of Ashima for the purpose of proving the due execution of the Will, recourse can be taken to Section 71 of the Indian Evidence Act.

In the case at hand, it is observed that the draftsman of the Will, Rabindranath Ghosh and one of the attesting witnesses, Kanailal Ghosh were not available.

The propounder/respondent Anil Kumar Ghosh had filed original death certificate of the testator which had been duly issued by the Howrah Municipal Corporation under its seal and signature. He had deposed as PW1 and testified that the testator was mentally and physically fit to understand worldly affairs and execute the said Will, that he was personally present when it was prepared by Rabindra Nath Ghosh as per the testator's instructions, typed by Nityananda Guha and when it was executed in the presence of Kanailal Ghosh and Ashima Ghosh as attesting witnesses who also put their signatures. He also stated that the same was registered duly before the Additional Registrar of Assurance at Calcutta. Kanailal filed his affidavit-in-chief clearly stating that he was present at the time of execution of the Will dated October 24, 1997 and also had seen the testator and others attesting witnesses, lawyers and others putting their respective signatures on the said Will. Bibhuti was physically fit and mentally alert at the time of execution of the Will and he put his signatures on the Will in presence of

Kanailal. Kanailal is the uncle of the respondent. Rabindra was the cousin of the respondent and according to the respondent he was one of the witnesses who were present at the time of execution of the Will. The name of Rabindra nath Ghosh appeared in the Will as the scribe. He was an advocate. However, Kanailal died during the pendency of the proceeding and before the commencement of examination of witness, without being cross examined. Rabindra died on 13th January, 2003. It was in such circumstances Ashima was called as PW2 as an attesting witness to prove her signature on the Will.

PW2 Ashima Ghosh identified and deposed that she had put her signature on the Will. On cross examination, she stated that she was made to put her signature on a blank paper by her brother for a reason she does not know. Furthermore, she also stated that the document was not read over and explained to her. This clearly proves that she had signed on a written document. Notably, the question of reading over and examining a document only arises if the document is not blank. Significantly she admitted her signature in the Will.

The testimony of Ashima who turned hostile by filing written objection to the grant of probate is fraught with inconsistencies and unreliable hence strengthening the case for the respondents. The Will had been registered before the Additional Registrar of Assurance at Calcutta. An inspection of the original registered Will shows that all due procedures under the Registration Act have been complied with. The learned trial judge too on an examination of the documentary and oral evidence rendered, has observed that the Will has been duly executed

and registered. Hence, the burden of proof lies on the appellants to prove impersonation and undue influence.

The propounder PW1 has deposed that he was present during the execution, attestation and registration of the Will and hence becomes the attending witness proving the due execution and attestation of the Will dated 24th October 1997. Kanailal has said the same thing. The evidence of Kanailal as to the execution of the Will is corroborated by PW1, PW2 and DW1 with regard to signature of Bibhuti and due attestation. The statement made by Kanailal cannot be totally disregarded. The evidence is admissible but weight to be attached to such evidence should depend upon the facts and circumstances of the case. The testimony and evidence of PW1, PW2 and DW1 proves the fact of due execution, attestation and registration of the Will dated 24th October, 1997.

The testator admitted to being physically fit and mentally alert at the time of execution of the Will. He has candidly mentioned the reason for bequeathing the properties in favour of his four sons, grandsons and life estate for his wife. He was not keeping well and in contemplating of death the testator wished to distribute his assets. He could be of frail health due to old age but not a man with an impaired mind. In the absence of evidence to the contrary, it cannot be said that the illness if any plaguing the testator was of such a nature which would incapacitate him to act voluntarily or freely. Bibhuti had four sons and six daughters. Notably, in the alleged Will itself the testator stated that his six daughters were happily married and having given them sufficient dowry and ornaments and they being happily married and settled, he did not

wish to give them any share in the said ancestral property. Anil in his chief has categorically stated that Bibhuti during his lifetime made arrangement for the marriage of six daughters and all of them were “financially sound” at the relevant point of time. Pronati in her cross examination has admitted that Bibhuti arranged the marriage of all his daughters prior to the execution of the Will. In fact Bibhuti sold out many properties before the execution of the Will presumably for the purpose of marriage of his daughters. It is not unusual and unnatural that daughters who have been given stridhan during marriage to be excluded from inheritance. They are all settled and happily married. No evidence has come on record to show that they were dependent on their father or the statements made in the Will in respect of his daughters are untrue or incorrect. There is no misstatement in the Will with regard to any essential facts. Will executed to exclude other natural heirs by itself is not a suspicious circumstance as the whole idea behind the execution of the Will is to interfere with the normal line of succession. (See: ***Rabindra Nath Mukherjee & Ors., v. Panchanan Banerjee (Dead) by L.Rs. & Ors.***, reported in **1995(4) SCC 459** and ***Ved Mitra Verma v. Dharam Deo Verma*** reported in **2014(15) SCC 578**)

A registered Will carries a higher degree of solemnity attached to it than an unregistered one. In deciding the genuineness of a Will the primary duty of the court to ascertain the intention of the testator while looking at the surrounding circumstances and by putting itself in the armchair of the testator. The propounder is not the sole beneficiary. All the sons and grandsons are the beneficiaries under the Will. It is not an

unnatural disposition. There are sufficient reasons as pointed out hereinabove, which suggest that the testator had full capacity to execute the said Will and the Will is the off-spring of his own volition and not the record of someone else's.

The fate of the purported Will dated 24th October 1997 is not necessarily at the mercy of the attesting witnesses.

One of the attesting witnesses, namely Ashima Ghosh having turned hostile, Kanailal Ghosh the other attesting witness would have been the suitable and best person to testify regarding the execution of the purported Will by the testator. However, Kanailal Ghosh signed his affidavit on the 15th of May 2010 stating therein that he had seen the testator and other attesting witnesses putting their signatures on the Will. Kanailal passed away on the 16th of April 2011. Rabindranath could have been an attending witness. PW1 had filed his affidavit his chief on 14th February 2011 and was cross examined on 9th June 2011. As observed, Kanailal passed away before he could be called as a witness. The evidentiary value of the affidavit signed by him would have to be examined in the light of the present facts and circumstances.

Such a situation warrants the applicability of Section 71 of the Evidence Act. The said section can only be requisitioned when the attesting witnesses, who having being called fail to prove the execution of the document by reason of either denying their own signatures, or denying the signature of the testator or having no recollection as to the execution of the document. Application of this section would depend on exhausting examination of all attesting witnesses. The principle is well

settled that when the evidence of the attesting witness is vague, doubtful or even conflicting upon some material point, 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. The Court may on consideration of the other evidence or whole circumstances of the case come to the conclusion that their evidence is of a suspicious character or that they are wilfully misleading the court and accordingly disregard their testimony and pronounce in favour of the document. Thus, Section 71 is a safeguard to the mandatory provisions of Section 68 to meet a situation where it is not possible to prove the execution of the Will by calling attesting witnesses, though alive. In the present case, the testimony of Ashima would prove that her evidence was doubtful as she turned hostile and the other attesting witness was dead.

DW1 Pronati Ghosh deposed that her father had lost the power of writing and at that point in time could not sign his name on any paper. She also stated that at that relevant time, he did not possess the required mental capacity to understand matters relating to his properties and that a false person was presented at the registration office impersonating her father and that her father could not have put his signature on the alleged Will. On cross examination, she stated that she had not gone to the Registry Office and consequently also admitted that her father put his signature on the Will. She could not adduce any evidence to prove that her father was physically unfit and mentally ill at the relevant time. She named her uncle Sripati Ghosh to be the person

who would prove physical and mental illness of her father. She however, did not summon Sripati Ghosh as defence witness. Though Anil has clearly corroborated the statement made in his chief with regard to physical and mental health condition of his father to the effect that his father was physically fit and mentally alert at the time of preparation and execution of the Will, the appellants have failed in this regard to provide any proof regarding the ill health of their late father or that some other person had impersonated the testator. All other evidence have supported the case of the respondent. The agreement that the learned Trial Judge had committed grave error in disregarding and ignoring the evidence of Ashima and Pranati and their evidence would prove that the Will was executed falsely by impersonation falls to ground.

On an applicability of the principle of this Section and taking into consideration all the facts and circumstances of the present case at hand, the Will should be taken to be genuine and duly executed and registered by the testator. Exclusion of contested siblings would not by itself create suspicion unless it is surrounded by other circumstances creating an inference. As discussed I am unable to find any other circumstances creating an inference of suspicious circumstances. Ashima appears to have changed her mind after she signed the Will.

To summarise it could be said that at the end of the day the court must satisfy its conscience as regards due to execution of the Will by the testator and the court would not refused to probe deeper into the matter only because the signature of the propounder on the Will is otherwise proved. The reading of the Will as a proof of its execution must afford

the judge reasonable assurance of it as being what it purports to be. However, a resolute and impenetrable incredulity is not demanded from the judge even if there exists a circumstance of grave suspicion. The cautious approach is required as an order for granting probate is a judgment in rem the Will takes affect after the death of the testator which makes the task of the court difficult in deciding an issue with regard to the suspicion circumstances surrounding the execution of the Will. It was for these reasons attestation assumes a greater importance unlike other documents, even animus attestandi is a necessary ingredient for proving the attestation. **[See. *Murthi v. C. Saradambal* reported in 2022(3) SCC 209.**

However, a concerning issue that remains is that the respondent has in his cross-examination stated that “My father never disclosed regarding execution of the Will and I came to know for the first time in the Registry Office” on which much emphasis has been laid by Mr. Laha. This would imply that prior to the visit at the registration office, he had no knowledge of the preparation of the Will, which would be contrary to his stance in the affidavit-in-chief and deposition. However, he has also stated that his father had gone to the Registry Office for execution of the Will, that he remained present during execution and that his father had got the Will registered at Calcutta upon the advice of Rabindra Nath Ghosh, advocate, cousin brother of Anil, who had prepared it. Rabindranath died before the commencement of trial. This statement of Anil cannot by itself term the entire case as being one shrouded in suspicious circumstances in the absence of other evidence to refute the

case of the respondents. Deposition of witnesses, being common men, and not proficient in legal niceties and accuracies, must not be critically evaluated and with such mathematical precision such as to disregard and be disillusioned as to the true facts of the case at hand.

As succinctly stated by Lord Du Parcq in ***Harmes v. Hinkson*** reported in **(1946) 50 CWN 895** "*where a Will is charged with suspicion, the rules enjoy a reasonable scepticism, not an obdurate persistence in disbelief. They do not demand from the Judge, even in circumstances of grave suspicion, a resolute and impenetrable incredulity. He is never required to close his mind to the truth*". (emphasis supplied)

In such cases, proof with mathematical certainty cannot be insisted upon. On a holistic assessment and consideration of the entire matter, the cumulative effect of apparent unusual features seems to have been tempered and the judicial conscience can also be said to be satisfied with regard to the facts and evidence on record. Being duly signed by the testator in a sound state of mind the Court must be vigilant and not lightly strike down a Will fair and rational on its face. The Will being registered with the Registrar the shroud of suspicion is also less significant.

The proof of testamentary capacity and due execution of the Will and that the Will truly represents the testator's intention having been established, it can be safely concluded that the extent of evidential burden has been successfully discharged by the executor in the nature of suspicion raised by the caveator surrounding the execution of the Will. Testing the case of both the parties on the anvil of balance of

probabilities as is applicable in civil cases, with special reference to the legal requirements to prove a Will it must be held that the propounder has successfully stood on its legs and discharged the burden of proof that the Will has been validly executed and is a genuine document. Consequently, the executor/propounder is entitled to the grant of probate on the ground that the execution of the alleged Will is not shrouded in suspicion.

In view of the facts and circumstances of the present case, the appeal stands dismissed.

(Soumen Sen, J)

Siddhartha Roy Chowdhury, J.: I have the advantage of reading the draft judgement of Hon'ble Justice Soumen Sen. While concurring with the view expressed by Hon'ble Justice Sen, I would like to add some words to convey my view in justifying our decision to maintain the judgement of learned Trial Court.

The Will reflects the last desire of the testator or the testatrix. Therefore, the Court should normally act in accordance with the wishes of the maker of the Will, unless of course there is any doubt about the genuineness or voluntariness of the maker of the Will. If we consider the attending facts of the case from the point of view human probability it is quite natural that PW 2 Anima Ghosh being the only surviving attesting witness would not and could not have supported the propounder for the simple reason that she along with her sisters filed

suit for partition against their brothers including the propounder. No wonder she expressed her ignorance about the execution of the Will by her father. Under such circumstances, the provision of Section 71 of the Evidence Act becomes relevant and an effective statutory provision to prove the Will in a situation where attesting witness denies the execution. Section 71 of the Evidence Act envisages:

“71. Proof when attesting witness denies the execution.—If the attesting witness denies or does not recollect the execution of the document, its execution may be proved by other evidence.”

Hon’ble Supreme Court in **Janki Narayan Bhoir vs. Narayan Namdeo Kadam** reported in **(2003) 2 SCC 91** held:

“On a combined reading of Section 63 of the Succession Act with Section 68 of the Evidence Act, it appears that a person propounding the Will has got to prove that the Will was duly and validly executed. That cannot be done by simply proving that the signature on the Will was that of the testator but must also prove that attestations were also made properly as required by Clause (c) of Section 63 of the Succession Act.

11. Section 71 of the Evidence Act is in the nature of a safeguard to the mandatory provisions of Section 68, Evidence Act, to meet a situation where it is not possible to prove the execution of the Will by calling attesting witnesses, though alive. This section provides that if an attesting witness denies or does not recollect the execution of the Will, its execution may be proved by other evidence. Aid of Section 71 can be taken only when the attesting witnesses, who have been called, deny or fail to recollect the execution of the document to prove it by other evidence.”

In this case at hand learned Trial court did not follow strictly the provision of Section 71 of the Evidence Act knowingly or unknowingly;

the propounder was allowed to prove the Will while adducing evidence as PW1, before the attesting witness demonstrated her intention to deny the execution which should not have been done. But what would have happened, had the propounder been examined on recall as PW 1 to make necessary statement required to prove the execution and attestation of a Will after the only available attesting witness PW 2 Anima Ghosh expressed her ignorance about execution of Will by her father. In such circumstances, we would have banked upon the provision of Section 71 of the Evidence Act and would have acted upon the evidence of the attending witness, the propounder.

Thus, I am of the view that in the given facts and circumstances we should not take any pedantic view and in our opinion without being hyper technical in absence of the evidence of attesting witness, Will should be considered to have been proved by the testimony of the propounder, and attending witness PW 1, more so when it is found that PW 2 Anima Ghosh proved her signature on the Will and Pranati Ghosh admitted the signature of her father on the Will.

Bibhuti Bhusan Ghosh undoubtedly died within three months from the date of execution of Will and recital of the document shows that Bibhuti Bhusan Ghosh admitted his poor health condition to justify the preparation and execution of Will to settle his properties among his sons and he had given reasonable explanation to exclude his daughters. It is true that the propounder was present when the Will was executed he accompanied his father to Calcutta. From his evidence we find his father followed the advice or suggestion of his cousin brother Rabindra Nath, an

advocate by profession and who drafted the Will, to come over to Calcutta for its execution and registration.

Thus, we do not find any reason to imbibe with the argument advanced by learned Advocate for the appellant Mr. Supratim Laha to hold that the execution of Will is surrounded by suspicious circumstances and not proved in terms of the provision of law. Delay of 13 years in filing the petition for grant of probate or exclusion of the daughters by the testator really do not engulf the execution of Will duly registered, with suspicion per se, so as to deny probate of the Will.

Appeal cannot be accepted. Impugned judgement and decree passed by learned Trial Court is affirmed.

Consequently the appeal fails.

(Siddhartha Roy Chowdhury, J.)