

IN THE HIGH COURT AT CALCUTTA
Civil Appellate Jurisdiction
APPELLATE SIDE

Present:

The Hon'ble Justice Tapabrata Chakraborty
&
The Hon'ble Justice Raja Basu Chowdhury

F.A. 167 of 2017

Smt. Pushpa Kejriwal & Ors.
versus
Sri Om Prakash Kejriwal & Ors.

For the Appellants : *Mr. Ratul Das,*
Mr. Sarbojit Mukherjee

For the Respondents : *Mr. Pramod Kumar Drolia,*
Ms. Deblina Lahiri,
Mr. Mrinmoy Chatterjee,
Ms. Teresa Chetri

Hearing is concluded on : *8th December, 2022*

Judgment On : **24th February, 2023**

Raja Basu Chowdhury, J.:

1. The present appeal has been preferred challenging the judgment dated 31st January, 2017 passed by the Additional District Judge, FTC-IV, Alipore, South 24-Parganas, in O.S. No. 01 of 2017, granting probate of the Will made and published by Uma Sankar Kejriwal, in a contentious cause.

2. Shorn of unnecessary details the facts leading to filing of the instant appeal are set out hereunder:

- i) The Uma Sankar Kejriwal (hereinafter referred to as the deceased) during his life time made and published a Will and appointed Om Prakash Kejriwal, as the sole executor of the said Will.
- ii) The said Uma Sankar died on 5th July, 1999 leaving behind and surviving the following natural heirs and representatives:

Sl. No.	Name & Address	Relationship
01.	Bal Krishna Kejriwal, 485, Rabindra Sarani, Calcutta-34.	Son
02.	Om Prakash Kejriwal, 87/88, Jadu Colony, P.S. Behala, Calcutta-34.	Son
03.	Sushila Agarwal, W/o Sri Anand Swaroop Agarwal, C/o Capital Electronics P-161, VIP Road, Calcutta-54.	Daughter
04.	Smt. Sharda Kumar, W/o Sri Virendra Kumar 271, Asian Games Village, New Delhi-49.	Daughter

3. The said Om Prakash Kejriwal (hereinafter referred to as the propounder), having survived the deceased, filed an application for grant of probate of the aforesaid Will, claiming the same to be the last Will and testament of the deceased.
4. The said application was accompanied by an affidavit of assets affirmed by the propounder and an attesting witness's affidavit affirmed by Uchhal Kumar Bhadra, stating that the deceased, in the presence of Mr. B. L. Vyas, Barrister-at-law and in his presence had executed the Will and that the said deceased at the time of execution of the Will was "hale and hearty".
5. The aforesaid probate proceedings were contested by Bal Krishna Kejriwal by filing written statement. In the written statement filed by the Bal Krishna Kejriwal, the predecessor in interest of the appellants, (hereinafter referred to as the objector), claimed that the Will of which, the propounder was seeking probate, was a product of coercion, fraud and undue influence. There were suspicious circumstances surrounding the Will. Apart from the aforesaid, the following defences were also raised by the objector:
 - a) *the alleged Will is undated;*
 - b) *the signatures of the witnesses made in the will do not show that the alleged testator and the witnesses have signed at a time in presence of each other;*

- c) *the alleged Will is totally one sided in favour of propounder and is unnatural;*
- d) *no reason whatsoever has been assigned as to why the testator deprived his other legal heirs and legal representatives of their legitimate share in the assets and property of the deceased;*
- e) *the deceased wanted to make some alleged provisions for his two daughters also, i.e., defendant nos. 2 and 3 and in paragraph 10 of the alleged Will depicts a picture of getting sometime in the alleged Will, but it will appear that the propounder will also share equally with the sisters and the amount to be received by the defendants no. 2 and 3 is practically nil;*
- f) *all movable and immovable assets of the deceased have been bequeathed to the plaintiff and his son, depriving the other heirs absolutely;*
- g) *in normal circumstances, no father will deprive his other three children (all full-blooded to the plaintiff) and bequeath everything to one child, the plaintiff herein unless there are some threat or evil influence;*
- h) *the affidavit sworn by one of the alleged attesting witness Shri Uchhal Kumar Bhadra is false, and fabricated and the manner of signature on the last*

page of the Will by the said Uchhal Kumar Bhadra abundantly shows that the said signatures were put on the alleged Will subsequently. It is further significant that while the address of said Uchhal Kumar Bhadra appears in the Will annexed, there is no address on the Xerox copy;

- i) the other attesting witness Shri B. L. Vyas who had been one of the closest friend and legal adviser of the deceased denies having known or ever seen Shri Uchhal Kumar Bhadra;*
- j) The statement made by Shri Uchhal Kumar Bhadra is false and fabricated;*
- k) The deceased has made corrections in the draft copy of the will in his own handwriting and that Mr Vyas by incorporating the corrections had prepared a draft will. Thus the will of which, the propounder was seeking probate had been revoked;*

6. Since the proceedings for grant of probate were contested, the same was converted to a contentious cause and tried as a suit. The learned Trial Judge on the basis of the pleadings of the parties framed 6 several issues. In course of the aforesaid proceedings, the propounder proved and exhibited the original Will executed by the deceased including other documents.
7. The propounder also examined himself in support of his case.

8. The objector on the other hand examined himself as defendant witness no. 1 as also the two daughters of the deceased and exhibited documents.
9. The objector also introduced a photocopy of a draft Will of Uma Shankar Kejriwal which, however, was not proved and was marked for identification. The learned judge after scanning each and every document including the affidavit of B. L. Vyas concluded that one of the attesting witness, namely, Uchhal Kumar Bhadra, who had been examined as attesting witness, PW-2, had been able to prove that the deceased had signed the Will in his presence and in presence of the other witness thereby raising a strong presumption of its regularity.
10. The learned judge by the judgment impugned in this appeal, held that there was a strong presumption of regularity and due execution of the Will, concluded that the propounder had been able to prove and explain due execution of the Will and that there was no suspicious circumstances surrounding the Will attached to the execution of the will, granted probate of the Will executed by the deceased.
11. Being aggrieved, the instant appeal has been filed.
12. Mr. Das learned advocate representing the appellants has strenuously argued that the propounder had failed to prove due execution of the Will. By relying on an affidavit sworn by B. L. Vyas, Barrister-at-law, it is contended that the deceased did not

execute the said Will in his presence and that when the said B. L. Vyas put his signature on the Will as witness, there was no signature of Uchhal Kumar Bhadra.

13. Mr. Das contends that the propounder had failed to present both the attesting witnesses. Having thus failed to produce both the attesting witnesses, the propounder had failed to explain the suspicious circumstances surrounding the Will. By referring to Exhibit-F, which is a deed of gift executed by the deceased, it was contended that the deceased having already gifted the third floor of his residential premises to the propounder, could not have again bequeathed the said third floor to the propounder. This according to him makes the Will unnatural. No reason had also been provided by the deceased as to why his elder son had been deprived. Ordinarily no man would deprive his own son and daughters. The propounder has failed to explain the aforesaid.
14. By referring to the examination of the propounder, he says that the Will had been produced by the propounder from the almirah of the deceased and the propounder was in control thereof. He then refers to the examination-in-chief of the attesting witness, Mr. Uchhal Kumar Bhadra, in particular, where the attesting witness had said that *“to the best of my recollection, it was sometime in the latter part of 1991.”* Referring to the cross-examination of the attesting witness, he submits that he had

contradicted himself and was not even certain as to when the Will was executed and as such no credence can be given to the deposition of the attesting witness.

15. He then refers to the affidavit of the other attesting witness, Mr. B. L. Vyas affirmed before a notary public on 9th June, 2000, in particular two paragraphs of the said affidavit wherein it is recorded as follows:

“That some times in the year 1991, Sri Uma Shaknar Kejriwal produced before me in my chamber at No.38, Baranasi Ghosh Street, Calcutta-7, a document purported to be his will and testament duly signed by him for my attestation to his signatures. At his request, I attested his signatures on the said document and signed my names as an attesting witness. At the time, I attested the signatures of Sri Uma Shaknar Kejriwal, there were no signatures of any other attesting witness on the said document at all. The said document was undated.”

16. By referring to the aforesaid affidavit, it is submitted that there had been no due attestation of the signature of the deceased. By further referring to the aforesaid affidavit, it is claimed that Mr. B. L. Vyas in paragraph 5 thereof has claimed that the deceased has expressed his desire to revoke his earlier Will. Mr. Das submits that since Mr. Vyas had a direct contact with the deceased, the existence of the subsequent Will cannot be doubted. He says that the deceased had a change of heart, since the relationship between the deceased and the propounder had

deteriorated, and it is for such reason the subsequent Will was executed. He then relies on the photocopy of the Will which had been introduced by the objector but the same had not been exhibited and only marked as X for identification. By relying on the aforesaid documents he submits that the propounder had failed to prove due execution of the Will and failed to remove the suspicious circumstances surrounding execution of the Will and the grant of probate should be revoked.

17. *Per contra*, Mr. Drolia, learned advocate appearing on behalf of the propounder submits that from the pleadings filed by the objector it would be apparent that only the following objections have been raised:

- a. Will is undated;*
- b. Signatures of the witnesses not made in presence of each other;*
- c. Will is one sided in favour of propounder and is unnatural;*
- d. No reason to deprive other heirs to share of the assets of the deceased;*
- e. Provision made for two daughters but practically nil in the assets of the testator;*
- f. All moveable and immoveable assets of deceased bequeathed to the respondent no.1 and his son;*
- g. Bequeath to the respondent no.1 is not natural;*
- h. Affidavit sworn by the attesting witness is false and fabricated;*
- i. Both the attesting witnesses were not present at the time of execution of Will;*

j. One Mr. B.L. Vyas, the other attesting witness has sworn an affidavit disclosing different fact.

18. He says despite the objector contending that the aforesaid Will had been revoked by a subsequent Will, no such Will had been produced. On the contrary, a xerox copy of a draft had been produced which had also not been exhibited but had only been marked 'X' for identification. The said document according to the learned advocate representing the propounder, is not even in the handwriting of the deceased. He says that the original Will had been marked as Exhibit-1, while several letters written by the deceased to the propounder had also been exhibited which are marked Exhibit 3 series. By relying on such letters, it is submitted that the aforesaid letters are proof of the fact that the Will is not unnatural and the same explains why the objector had been deprived by the deceased. He then submits that the affidavit of B. L. Vyas relied on by the objector has no evidentiary value as the said affidavit cannot be termed as evidence as per the Indian Evidence Act. B. L. Vyas has never come forward for being examined. No credence can be attached to the same.
19. By referring to the document which was marked for identification, it is submitted that as per such document, B. L. Vyas had been bequeathed a flat on the terrace by the deceased. By relying on such document, it is submitted that B. L. Vyas

had acted in collusion with the objector to affirm the affidavit on 9th June, 2000.

20. He says that the document marked for identification cannot be termed as either a Will or as a draft Will. By further referring to the cross-examination of the objector held on 2nd May, 2008, he says that the objector had admitted that he had not introduced any document to demonstrate that the Will in question had been revoked by the deceased. He says that the purported document which has been marked for identification has neither been proved nor has the same been marked as exhibit.
21. He says it is not mandatory that both the attesting witnesses should come forward to testify due execution of a Will. In support of his aforesaid contention he places reliance on a judgment delivered by the Hon'ble Supreme Court in the case of **Janaki Naraya Namdeo v. Narayan Namdeo**, reported in **(2003) 2 SCC 91**. He also places reliance on a judgment delivered by the Orissa High Court in the case of **Bishnupriya Mohapatra and Others v. Bata Krushna Mohapatra and Others**, reported in **AIR 1993 ORISSA 218**, in support of his contention that it is not necessary for the attesting witness to certify that he had attested the document in presence of the testator.
22. He says merely because the Will is undated, the same does not become invalid and that there is no requirement in law that a

Will should be dated. In support of the aforesaid proposition he places reliance on the judgment delivered in the case of ***Corbett v. Newey and Others***, reported in **3 W.L.R. 729 to 734(H)**.

23. He says that the propounder had discharged his onus and had proved due execution of the Will, *inter alia*, including the mental and physical capacity of the testator. By referring to the depositions, he submits that the propounder had categorically stated that the deceased had executed a deed of gift in favour of the propounder in respect of the first floor, prior to execution of the Will and in respect of the third floor, subsequent to execution of the Will and that the deceased at the time of execution of the Will was “hale and hearty” and was of sound mind.

24. He says that once the propounder had discharged his onus as aforesaid, it is for the objector to dislodge the presumption which is raised, and it is for him to establish the circumstances, to show suspicious circumstances surrounds the Will. In support of the aforesaid contention, he places reliance on a judgment delivered by the Hon’ble Supreme Court in the case of ***Surendra Pal & Ors. v. Dr (MRS) Saraswati Arora & Anr.***, reported in **AIR 1974 SC 1999**. He then says that merely because Mr. Das has submitted that natural heirs did not get shares, the same does not necessarily mean that there is suspicious circumstances surround the Will. In support of the

aforesaid proposition, he places reliance on the judgment delivered by the Hon'ble Supreme Court in the case of ***Uma Devi Nambiar & Ors. v. T.C. Sidhan (Died)***, reported in **(2004)2 SCC 321**.

25. He submits that mere intention to revoke the Will does not tantamount to revocation of a Will, unless carried into effect in a manner required by law. He says that the testator had never executed any document so as to revoke his previous Will and as such the Will has not been revoked. In support of the aforesaid proposition, he place reliance on a judgment delivered by the Hon'ble Supreme Court in the case of ***Anil Behari Ghosh v. Smt. Latika Bala Dassi & Ors.***, reported in **AIR 1955 S.C. 566**. He has also places reliance on a judgment delivered by the Hon'ble Supreme Court in the case of ***MRS HEM NOLINI JUDAH (SINCE DECEASED) AND AFTER HER LEGAL REPRESENTATIVE MRS MARLEAN WILKINSON -VERSUS- MRS ISOLYNE SAROJBASHINI BOSE AND OTHERS***, reported in **AIR 1962 SC 1471**, *inter alia*, to contend that the Court exercising testamentary jurisdiction is not concerned about the title of the property bequeathed but only concerned with the genuineness and due execution of the Will.
26. On the issue of execution of the deed of gift, it is submitted that simply because the deceased had executed a Will, same does not bar the deceased to deal with his property during his life time,

which forms subject matter of the Will. Dealing with the property during the life time of the deceased, does not have the effect of revoking the Will. In support of the aforesaid contention he has placed reliance on a judgment delivered by the Hon'ble Kerala High Court in the case of **Sridevi Amma & Ors. v. Venkitaparasurama Ayyan & Ors.**, reported in **AIR 1960 Ker 1**.

27. He submits that no case has been made out by the appellants/objector warranting interference and the instant appeal deserves to be dismissed with costs.

28. We have heard the learned advocates appearing for the respective parties and have considered the pleadings, the exhibits and all documents forming part of the record.

29. We find that the learned Judge on the basis of the pleadings of the parties had framed the following issues :

"Issue:-

On the basis of the averments of both Sides following issues are framed namely:-

a) Is the suit maintainable in its present form and prayer?

b) Had the testator any Testamentary capacity to execute this Will?

c) Is the WILL genuine?

d) Was the WILL procured under suspicious circumstances?

e) Is the plaintiff entitled to get the probate of the Will?

f) To what relief, if any, is the plaintiff entitled?"

30. We also notice that propounder had examined himself and one attesting witness and had exhibited the following documents in support of his case:

- a) Exhibit 1 (Original WILL).*
- b) Exhibit 2 (the original school leaving certificate of Uma Shankar Kejriwal).*
- c) Exhibit 3, 3/1 to 3/15 (letter written by Uma Shankar Kejriwal to the plaintiff).*
- d) Exhibit 4 (death certificate of Uma Shankar Kejriwal).*

31. We also notice that the original defendants, including the objector had examined themselves and had exhibited the following documents:

- a) Exhibit A one photograph*
- b) Exhibit B & B/1 two photographs*
- c) Exhibit C & C/1 two letters,*
- d) Exhibit D handing/taking over certificate of United India Suppliers Limited,*
- e) Exhibit E certified copy of Form no. 32*

- f) Exhibit F certified copy of deed of gift.*
- g) Exhibit G photograph*

And another Xerox copy of a will allegedly executed by Uma Shankar Kejriwal has been produced by the Defendants which has been marked as X for identification.

32. We find from the Exhibit 1 that the Will is in fact undated. We find that the learned judge had considered the effect of an undated Will by referring to the treaties and has concluded that an undated Will does not affect genuineness of such Will, when such imperfection is explained by way of evidence. We find that the propounder had produced the original school leaving certificate of the deceased, which has been marked as Exhibit 2. The date of birth of the deceased is mentioned as 2nd May, 1920. From the oral testimony of the attesting witness, it appears that the Will was executed sometimes in the year 1991, although Mr. Das had attempted to impeach such testimony by, *inter alia*, contending that the attesting witness could not identify the exact date on which he had attested the Will, however, the entire testimony of the attesting witness clearly indicates due execution of the Will by the deceased. The contention of Mr. Das that the undated Will had raised a suspicion, which has not been removed is, thus, rejected.

33. Relying on an affidavit sworn by B. L. Vyas, Mr. Das has strenuously argued that the propounder had failed to establish that there had been due execution of the Will. Although the affidavit of the other attesting witness had been produced, the said witness had not come forward to prove his affidavit or to dispute his signature in the Will.
34. Admittedly, none of the parties have produced any other Will made and published by the deceased. Only a photocopy of a document has been produced which has been marked 'X' for identification. We find that it has been rightly contended by the respondent that mere intention to execute a Will does not have the effect of revoking the previous Will.
35. We also find that the Mr. Drolia has relied on a judgment delivered by the Hon'ble Supreme Court reported in **AIR 1955 SC 566** in the case of **Anil Behari Ghosh** (*Supra*) and another judgment delivered by the Hon'ble Bombay High Court in the case of **Kaikhushru Jehangir v. Bai Bachubai Jehangir & Others**, reported in **AIR 1951 Bom 339**, *inter alia*, to contend, mere intention to revoke does not have the effect of revoking the Will.
36. We, thus, find that the aforesaid contention raised by the appellants is not sustainable and is accordingly rejected.
37. We find that Mr. Das by relying on Exhibit F which is a certified copy of Deed of gift has attempted to make out a case that the

deceased having gifted a part of the immovable property in favour of the propounder had no occasion to execute a Will and the same is unnatural and creates suspicion. We find that in this context, the learned advocate representing the propounder has rightly contended that in a probate proceedings the Court is not concerned with the title of the property and in support thereof he has relied on the judgment delivered by the Hon'ble Supreme Court in the case of ***Mrs. Hem Nolini Judah (Since Deceased) and after her legal representative Mr. Marlean Wilkinson*** (*Supra*). The jurisdiction of the testamentary Court does not concern the title to the property is no longer *res integra*. We also find that the affidavit of B. L. Vyas could not have been used as an evidence to either discredit the attesting witness or to question due execution of the Will. The appellants did not choose to produce B. L. Vyas for being examined. We find that the learned Judge after discussing about the affidavit sworn by B. L. Vyas has categorically concluded that such document cannot be used to contradict the other attesting witness. He has also concluded that the other attesting witness despite lengthy cross-examination did not yield and make his testamentary doubtful. We find that the learned judge has also rightly held that it is not mandatory for propounder to call both the attesting witnesses to prove the Will. In this context, it would be profitable to refer to the judgment delivered by the Hon'ble Supreme Court

in the case of ***Janaki Narayan Nemdeo Kadam v. Narayan Namdeo***, reported in **(2003) 2 SCC 91**.

38. It is, therefore, clear that there is no requirement in law to produce both the attesting witnesses. As such the propounder cannot be faulted for having proved due execution of the Will by producing only one attesting witness.
39. Although, it has been argued that no person would deprive his sons and daughters and the very fact of depriving the objector by the deceased makes the Will unnatural, we are not in agreement of the same. We find that the testator in this last Will has provided reasons why he had deprived the predecessor of the appellants. We find that the objections raised by the learned advocate have all been considered by the learned Trial Judge. The exclusion of natural heir by the testator does not make the Will unnatural nor does the same gives rise to suspicious circumstances. The judgment delivered by the Hon'ble Supreme Court in the case of ***Uma Devi Nambiar & Ors. v. T. C. Sidhan (dead)***, reported in **(2004) 2 SCC 321** as relied on by the advocate representing the propounder, supports the above view.
40. As such we do not find the Will to be unnatural. We have also independently considered the objections raised by the learned advocate representing the appellants both on the aspect of due execution of the Will as also on the question of suspicious circumstances surrounding the Will. We must say that not only

the propounder had been able to prove due execution of the Will but also had been able to remove the suspicious circumstances surrounding a Will. As such the learned Court below had rightly granted probate in favour of the propounder. We, thus, do not find any reason to interfere with the grant of probate.

41. The appeal fails, the same is accordingly, dismissed.

42. Department is directed to send down the records at once.

43. There shall, however, be no order as to costs.

44. Urgent certified copy of the aforesaid order if applied for be made available to the parties on urgent basis upon compliance of necessary formalities.

(Raja Basu Chowdhury, J.)

(Tapabrata Chakraborty, J.)