

**IN THE HIGH COURT AT CALCUTTA
TESTAMENTARY & INTESTATE JURISDICTION
ORIGINAL SIDE**

Present:

The Hon'ble Justice Sugato Majumdar

TS/6/2009

IN THE GOODS OF AKHILES KUMAR SINHA, DECEASED

-AND-

SANT AGARWAL

-VS-

RABI SINHA

For the Plaintiffs : Mr. Aniruddha Mitra, Adv.,
Ms. Somali Bhattacharyya, Adv.

For the Defendant : Mr. G. Chakraborty, Adv.

Hearing concluded on : 02.05.2023

Judgment on : 18.05.2023

Sugato Majumdar, J.:

The instant application is filed praying for grant of probate of the last will and testament dated 24th December 1987, of the testator Akhilesh Sinha, since deceased.

The testator, prior to his death, was resident of FD-347, Salt Lake City, Kolkata – 700091. He executed his last will and testament on 24th December, 1987 in English language and character limited to the property mentioned therein. The testator appointed Sri Sant Agarwal and failing him Sri Mahabir Prasad Agarwal as executor of the Will. The testator, at the time of death, left

behind his widow, two daughters and one son. The Will was attested by two witnesses. A declaration of one of the attesting witnesses is annexed to the present application for probate. Affidavit of assets is also filed along with the application.

After filing of the application, citations were issued to the near relatives of the testator. The answering Defendant being the son of the testator contested the probate application. In the affidavit in support of caveat, which is treated as a written statement, execution of the Will is seriously challenged. Contentions of the answering Defendant are that firstly, the purported Will is unnatural one as no prudent man would bequeath properties to the outsiders, more so when he had no transferable right title and interest in respect of the said property. Secondly, it is stated that signatures of the testator were obtained on a blank paper to create a Will. This is also manifest from the fact that signatures of the testator appearing on the bottom of the pages are unusual. Thirdly, it does not appear from the Will under whose instructions it was drafted or who actually drafted the Will. Fourthly, the signatures of the testator on the Will was obtained by practising fraud upon him by the present Executor of the Will. Fifthly, it is stated that the testator was not aware of the contents of the Will, for, there is no reason why the testator should bequeath his property or any right title interest in favour of outsiders of the family depriving his natural heirs and successors. Sixthly, it is contended that the Will contains unnatural disposition of property, vitiated with fraud. It is further evidenced by the fact that during lifetime of the wife of the testator, no application for probate was filed as the testator had no absolute right to dispose of property by the Will. In nutshell, the

written statement seriously challenged the Will and contended that probate should not be granted.

On the basis of the pleadings of the parties following issues were recast and framed:

1. Is the suit for probate maintainable in its present form and not?
2. Is the Will dated 24 December, 1987 is a valid Will of Akhilesh Kumar Sinha since deceased as alleged?
3. Whether the alleged signatures of Akhilesh Kumar Sinha were obtained on blank papers and converted into alleged Will dated 24th December, 1987?
4. Whether fraud was so practised upon Akhilesh Kumar Sinha for obtaining his signatures in the so called Will dated 24th December, 1987?
5. Is the executor of the Will entitled to probate on the Will annexed or not?

On behalf of the Plaintiffs, one Pranav Kumar Singh, Mr. Sant Agarwal, one of the attesting witnesses and Raj Kumar Todi were examined as P.W.1, 2 and 3.

On behalf of the Defendant, Mr. Ravi Singh, the Defendant himself was examined as D.W.1.

Both the parties adduced various documentary evidences which were exhibited and marked.

So far as the Issue No. 1, on maintainability of the instant application, is concerned, there is no irregularity or non-compliance of statutory provisions in filing of the instant application. Therefore, the application is maintainable in its form. This Issue No. 1 is decided in favour of the Plaintiffs.

Since the other issues are connected with each other, all the issues are taken up together for consideration.

Mr. Chakraborty, the Learned Counsel appearing for the Defendant argued on several points:

Firstly, it is argued by Mr. Chakraborty that the present Will was obtained by practice of fraud and the execution of the same is surrounded with suspicious circumstances. There is no mention of legal heirs and successors in the Will; there is no mention in the Will why the natural heirs and successors, namely, the wife, the son and the daughters are deprived of the demised property.

Secondly, signatures of the testator at page 2, 4 and the scratched signature at the back cover page indicate that signatures were obtained on blank sheets. No explanation is there. When a copy of the Will was sent to the answering Defendant, copy of the back cover page of the Will was not sent. This itself creates a highly suspicious circumstance apart from others. With reference to Section 63 of the Indian Succession Act, 1925 Mr. Chakraborty argued that the Will was not at all executed in terms of or in accordance with the provision. Therefore, according to him, probate cannot be granted.

Thirdly, according to Mr. Chakraborty, execution of the Will is surrounded with suspicious circumstances. One of the attesting witnesses Satya Narain Soni stated in his declaration annexed to the application, that the present Will was executed at 48, Vivekananda Road, Kolkata-700006. Mr. Soni, although one of the attesting witnesses, did not appear in the court to prove the execution of the Will. Rather the other attesting witness came and deposed that the Will was executed by the testator at FD-347, Salt Lake City. P.W. 1 Pranav Kumar Singh, the other attesting witness was confronted with the statement of Mr. Soni that the present Will was executed at 48, Vivekananda Road, Kolkata-700006 but he did not complain that. These contradictory versions of the attesting witnesses create suspicious circumstances surrounding the execution of the Will.

Fourthly, it is argued by Mr. Chakraborty that the testator had only leasehold right in respect of the demised property. He had only half of the share therein. The testator and his wife had joint leasehold right in respect of the demised property. The testator signed blank papers and handed over those to the Executor for creation of documents related to tenancy. But, those signed blank papers were converted into a Will which is the present one, subject matter of the instant proceeding. D.W. 1 who is the son of the testator deposed and proved that blank papers were handed over to the Executor. It is further contended that signatures of the testator on the Will very clearly shows that blank papers were filled up. Therefore, according to him, there was no execution of the instant Will by the testator. Therefore, probate should not be granted. Mr. Chakraborty relied upon:

1. Janki Narayan Bhoir Vs. Narayan Namdeo Kadam (2003) 2 SCC 91
2. Bhagwan Kaur Vs. Kartar Kaur (1994) SCC 135
3. Yumnam Ongbi Tampha Ibema Devi Vs. Yumnam Joykumar Singh & Ors. (2009) 4 SCC 780
4. Lalitaben Jayantilal Popat Vs. Pragnaben Jamnadas Kataria & Ors. (2008) 15 SCC 365

Mr. Mitra, the Learned Counsel appearing for the Executor of the Will argued firstly that probate court has no jurisdiction to enquire into the title of the testator. How good was the title of the testator in respect of the demised property, cannot be questioned in a probate proceeding.

Secondly, it is argued by Mr. Mitra that Section 63 of the Indian Succession Act, 1925 makes specific provision as to how a will shall be executed. There is no hard and first rule that particular part of the Will shall be signed by the testator or that the testator must sign at a specific position in each page. According to him, the argument made by Mr. Chakraborty that signatures of the testator create suspicious circumstances is not tenable.

Thirdly, it is argued that witnesses on behalf of the Plaintiff, in particular one of the attesting witnesses, prove the execution of the Will. The other witnesses deposed to the same tune. It is clear and unambiguous from the testimony of the witnesses of the Plaintiff that the testator executed the Will in his own volition, in free mind without any influence or coercion from any quarter. According to him, the Will was properly executed and due execution is proved for which probate can be granted.

Fourthly, Mr. Mitra argued that the testator was a doctor by profession. He was a highly educated person. It is hardly believable that he would hand over some signed blank papers to any person. Each and every witness testified that the testator and roaring practice in homeopathy medicine. It is most unlikely that such a person would sign blank papers. The witnesses were cross-examined and questioned on creation of blank documents but their replies did not support the case of the answering Defendant. None of the witnesses even by hints stated that they did not see the testator signing the Will. It is rather the testimonies of all the witnesses that all the witnesses were present at the time of execution of the Will by the testator. In nutshell execution of the Will is duly proved by the witnesses, and probate should be granted.

Fifthly, Mr. Mitra argued that Mr. Soni's statement, filed along with the probate application containing averment that the Will was executed at 48, Vivekananda Road does not make a dent in the case of the propounder of the Will. One of the attesting witnesses namely Pranav Singh along with other witnesses stated that the Will was executed at FD-347, Salt Lake City, Kolkata - 700091, in the residence of the testator. Repeated cross examinations failed to contradict their statements. Therefore, on due importance should not be given to the statements of Mr. Soni. Consistent statement of the attesting witness as well as other witnesses proved attestation and due execution of the Will without having of any suspicious circumstance. Therefore, according to him probate granted. Mr. Mitra relied upon:

1. Hazara Bradri & Ors. Vs. Lokesh Datta Multani (2005) 13 SCC 278

2. H. Vendatachala Iyengar Vs. B. N. Thimmajamma & Ors. (1959) Supp (1) SCR 426: AIR 1959 SC 443
3. Bharpur Singh & Ors. Vs. Shamsher Singh (2009) 3 SCC 687
4. Mahesh Kumar (dead) by Lrs. Vs. Vinod Kumar & Ors. (2012) 4 SCC 387

I have heard the rival submissions.

It is no longer *res integra* that probate court cannot enquire into the title of the testator. That is beyond the ambit of probate proceeding. Therefore, whether the testator, Akhilesh Kumar Sinha had title over the property, so demised by the instant Will, cannot be looked into in the present proceeding. I agree with the submission of Mr. Mitra in this respect. This Court cannot consider whether the testator had title in respect of the property in question.

Section 63 of the Indian Succession Act, 1925 provides for execution of unprivileged Will. Section 63 (a) provides that the testator shall sign or shall affix his marks on the Will, or shall be signed by some other person in his presence or by his direction. Sub-section (b) provides that signature or mark of the testator, or the signature of the person signing for him, shall be so placed that it shall appear that it was intended thereby to give effect to the writing as a will. Sub-section (c) states that a will shall be attested by two or more witnesses, each of whom has seen the testator sign or affix his mark to a will or has seen some other person sign a will, in the presence and by the direction of the testator, or has received from the testator a personal acknowledgement of his signature or mark, or the signature of such other person; and each of the

witnesses shall sign a will in presence of the testator, but it shall not be necessary that more than one witness be present at the same time and no particular form of attestation shall be necessary. Section 63 does not specify how the testator shall sign a will or specify that the testator shall sign a particular part, either at top or bottom or at the sides of a will. But what is necessary is that it shall be placed in such a way that the intention of the testator to give effect to the writings contained in each of the pages is clearly conveyed. Signature of the testator, in instant case, is important in view of allegations and disputes raised in this proceeding. If the execution of a will is challenged on the ground that it was typed on a signed blank paper then the execution of a will remains questioned. By such challenge, clouds of suspicious circumstances surround execution of a will. In that case, it is for the propounder of a will and burden of proof lies on him to clear all the doubts and repel all the clouds surrounding execution. In catena of decisions the Supreme Court of India as propounded this principle of law.

Signatures of the testator are there on each and every page of the Will, which is marked as Ext. A. There is a long gap between the typed portions and the signature of the testator on the first page of the Will, only intervened after a long gap below the typed words dots and '2' indicating the second page. The fourth page of the Will bears to signatures of the testator, one in the middle, the other at the bottom. The next page is a blank one containing signature of the testator which was penned through. Questions were put to the Executor of the Will, deposed as P.W.2 in course of cross-examination. When he was asked why the testator signed twice on the last page he could not explain the same. Rather

answered that Mr. Soni was there. He was again asked in cross-examination why there was a long gap after four lines on the first page and thereafter the numerical two was given followed by a long gap and then the signature of the testator. His answer was he could not tell anything but the testator signed that. It is in evidence of all the Plaintiff's witnesses that he was present at the time of execution of the Will. Testimony of P.W.2 did not explain these questions put to him. Although he deposed that he was present at the time of execution of the Will, he did not explain why a page is annexed to the Will bearing penned through signature of testator. He did not deny that the signature was that of the testator. He is supposed to explain why a blank sheet was signed by the testator but subsequently penned through; he failed to highlight anything on this point.

It is uniform statements of the Plaintiff's witnesses that at the time of execution of the Will the testator, Mr. Pranav Singh (P.W.1), one of the attesting witnesses; Mr. Soni, the other attesting witness; Mr. Agarwal, the Executor herein and one Mr. Raj Kumar Tody (P.W.3) were present. However, Mr. Pranav Singh stated in cross-examination that Mrs. Sinha was also present which was not corroborated by other witnesses. When the attesting witness P.W.1 was confronted with the question in course of cross-examination whether the testator signed blank documents he replied that the testator typed the Will and signed it in his presence. On the other hand, P.W.2, the Executor of the Will stated in course of his deposition that he did not know who prepared the Will. If testimony of the attesting witness is to be relied upon then P.W.2 was present at the time of execution and should have witnessed the typing of the Will by the testator. As such, it should be within his knowledge that the testator typed the Will. But his

testimony is otherwise in this regard. Drafting and typing of the Will remains mysterious in view of contradictory statements of witnesses. This creates a suspicious circumstance.

The probate application is filed along with a statement of Mr. Soni, one of the attesting witnesses. This statement is relied upon in the probate application. Affidavit is also filed along with a probate application, solemnly affirmed by Mr. Soni. Mr. Soni stated that Will was executed at 48, Vivekananda Road, Kolkata - 700006. Subsequently, Mr. Soni was not produced before this Court. This statement of Mr. Soni cannot be taken as gospel truth to prove that Will was executed at that place because he was not neither deposed before this Court nor subjected himself to cross-examination. The witnesses, who gave testimony in the suit stated that the Will was executed at FD-347, Salt Lake City, Kolkata - 700091 which was the residence of the testator. They deposed that Mr. Soni was present. No explanation is given why Mr. Soni did not come to this Court to depose. It is true that any one of the attesting witnesses may depose before the Court to prove execution of the Will but Mr. Soni's testimony became important in view of the fact that he made a statement that Will was executed at a different place and the same was relied upon in the probate application. Since the execution of Will is challenged on the ground that some signatures of the testators was obtained in a blank papers the testimony of Mr. Soni becomes important and assumed significance substantially when his statement on place of execution is contradictory to the other attesting witness. This creates suspicious circumstances surrounding the execution of the Will.

It is in statements of all the witnesses that the executor was present at the time of the execution of the Will. Substantial benefit is derived by the wife of the executor from the Will. Benefit under the Will is given to the outsiders depriving the family members. That is an unnatural bequest, in which the propounder of the Will has a substantial benefit through his wife and he was present at the time of execution of the Will. This is one of the suspicious circumstances surrounding the execution of the Will. In member of decisions the Supreme Court of India held that this kind of circumstance raise suspicious surrounding execution of the Will.

“It is no longer *res integra* and well-settled by catena of decisions that proving a will does not differ from that of any other documents except that a will must be attested in terms of Section 63 of the Indian Successions Act, 1925. It is also necessary under Section 68 of the Indian Evidence Act, 1872 that one of the attesting witnesses must prove the will before the Court. If the attesting witnesses are not found, then Section 69 provides for how will is to be proved. The onus of proving the Will is on the propounder and in the absence of suspicious circumstances surrounding the execution of the will, prove of testamentary capacity and the signature of the testator as required by law, is sufficient to discharge the onus. Where, however, there are suspicious circumstances, the onus is on the propounder to explain them to the satisfaction of the Court before the Court accepts will as genuine. Even where

circumstances give rise to doubts, it is for the propounder to satisfy the conscience of the Court. “The presence of such suspicious circumstances naturally tends to make the initial onus very heavy; and, unless it is satisfactorily discharged, courts would be reluctant to treat the document as the last will of the testator.” [*H. Venkatachala Iyengar v. B.N. Thimmajamma*, AIR 1959 SC 443].

In this case, the Supreme Court of India mentioned various suspicious circumstances surrounding execution of the will:

“20. There may, however, be cases in which the execution of the will may be surrounded by suspicious circumstances. The alleged signature of the testator may be very shaky and doubtful and evidence in support of the propounder's case that the signature, in question is the signature of the testator may not remove the doubt created by the appearance of the signature; the condition of the testator's mind may appear to be very feeble and debilitated; and evidence adduced may not succeed in removing the legitimate doubt as to the mental capacity of the testator; the dispositions made in the will may appear to be unnatural, improbable or unfair in the light of relevant circumstances; or, the will may otherwise indicate that the said dispositions may not be the result of the testator's free will and mind. In such cases the court would

naturally expect that all legitimate suspicions should be completely removed before the document is accepted as the last will of the testator.”

21. Apart from the suspicious circumstances to which we have just referred, in some cases the wills propounded disclose another infirmity. Propounders themselves take a prominent part in the execution of the wills which confer on them substantial benefits. If it is shown that the propounder has taken a prominent part in the execution of the will and has received substantial benefit under it, that itself is generally treated as a suspicious circumstance attending the execution of the will and the propounder is required to remove the said suspicion by clear and satisfactory evidence.”

In **Shashi Kumar Banerjee & Ors. Vs . Subodh Kumar Banerjee (AIR 1964 SC 529)**, five Judges’ Bench of the Supreme Court of India reiterated these principles again, relying upon *H. Venkatachala Iyengar’s* case (supra):

“4. The principles which govern the proving of a will are well settled; (see [H. Venkatachala Iyengar v. B. N. Thimmajamma](#), 1959 (S1) SCR 426 : 1959 AIR(SC) 443) and [Rani Purniama Devi Vs. Khagendra Narayan Dev](#), 1962 (3) SCR 195 : 1962 AIR(SC) 567). The mode of proving a will does not ordinarily differ from that of proving any other

document except as to the special requirement of attestation prescribed in the case of a will by [S. 63](#) of the Indian Succession Act. The onus of proving the will is on the propounder and in the absence of suspicious circumstances surrounding the execution of the will, proof of testamentary capacity and the signature of the testator as required by law is sufficient to discharge the onus. Where however there are suspicious circumstances, the onus is on the propounder to explain them to the satisfaction of the Court before the Court accepts the will as genuine. Where the caveator alleges undue influence, fraud and coercion, the onus is on him to prove the same. Even where there are no such pleas but the circumstances give rise to doubts, it is for the propounder to satisfy the conscience of the Court. The suspicious circumstances may be as to genuineness of the signature of the testator, the condition of the testator's mind, the dispositions made in the will being unnatural improbable or unfair in the light of relevant circumstances or there might be other indication in the will to show that the testator's mind was not free. In such a case the Court would naturally expect that all legitimate suspicion should be completely removed before the document is accepted as the last will of the testator. If the propounder himself takes part in the execution of the will which confers a substantial benefit on

him, that is also a circumstance to be taken into account, and the propounder is required to remove the doubts by clear and satisfactory evidence. If the propounder succeeds in removing the suspicious circumstances the Court would grant probate, even if the will might be unnatural and might cut off wholly or in part near relations. It is in the light of these settled principles that we have to consider whether the appellants have succeeded in establishing that the will was duly executed and attested.”

In *Indu Bala Bose v. Manindra Chandra Bose*, (1982) 1 SCC 20 a similar observation was made by the Supreme Court of India:

“7. This Court has held that the mode of proving a Will does not ordinarily differ from that of proving any other document except to the special requirement of attestation prescribed in the case of a Will by Section 63 of the Succession Act. The onus of proving the Will is on the propounder and in the absence of suspicious circumstances surrounding the execution of the Will, proof of testamentary capacity and the signature of the testator as required by law is sufficient to discharge the onus. Where however there are suspicious circumstances, the onus is on the propounder to explain them to the satisfaction of the court before the court accepts the Will as genuine. Even where circumstances give rise to

doubts, it is for the propounder to satisfy the conscience of the court. The suspicious circumstances may be as to the genuineness of the signatures of the testator, the condition of the testator's mind, the dispositions made in the Will being unnatural, improbable or unfair in the light of relevant circumstances, or there might be other indications in the Will to show that the testator's mind was not free. In such a case the court would naturally expect that all legitimate suspicions should be completely removed before the document is accepted as the last Will of the testator. If the propounder himself takes a prominent part in the execution of the Will which confers a substantial benefit on him, that is also a circumstance to be taken into account, and the propounder is required to remove the doubts by clear and satisfactory evidence. If the propounder succeeds in removing the suspicious circumstances the court would grant probate, even if the Will might be unnatural and might cut off wholly or in part near relations.”

Catena of decisions of the Supreme Court of India reiterated and confirmed the same principles.

In the case in hand, there are several circumstances which create suspicious circumstances surrounding the execution of the Will of the testator as stated above. Pleas of coercion and fraud must be proved by the caveator. But if

any doubt is created regarding execution of the will then it is for the propounder of the will to clear such doubts. Before grant of probate, the conscience of the Court must be made clear, and the court must be satisfied that no suspicious circumstance existed at the time of execution of the will. It is rather a case which alleges that the testator did not intend to give effect to the writings contained in the will since his signatures were obtained in blank papers. It is also the case that the propounder of the will was present and took active role in preparation of the will and derived substantial benefit therefrom. In view of the observations of the Supreme Court of India, discussed above, burden of proof is on the propounder of the will to stir clear the clouds of suspicions surrounding execution of the will. The propounder of the Will failed to remove to suspicious circumstances surrounding the execution of the Will. Therefore, it is not a right case that the probate should be granted.

Issue No. 2, 3, 4 and 5 are, therefore, decided against the Plaintiff.

In nutshell, for reasons discussed above, grant of probate, as prayed for, is refused.

The instant suit is accordingly dismissed without cost.

(Sugato Majumdar, J.)