

IN THE HIGH COURT AT CALCUTTA

Testamentary & Intestate Jurisdiction
Original Side

Present:

The Hon'ble Justice Arijit Banerjee

**TS 13 of 2006
IA No. GA/10/2017
(Old No. GA/363/2017)**

In the Goods of:

Kalap Nath Jaiswal (Deceased)

And

PRADIP KR. JAISWAL.

VS.

NIRMALA DEVI JAISWAL.

For the Plaintiffs : Mr. Dhruba Ghosh, Sr. Adv.
Mr. Soumyajit Ghosh, Adv.
Mr. Kaushik Mandal, Adv.
Ms. Pritha Bhowmik, Adv.
Mr. Altamash Alim, Adv.

For the Caveators : Mrs. Sumitra Mukherjee, Adv.
Mr. Jayanta Kumar Pain, Adv.

Date of Judgment : 14.12.2023

Arijit Banerjee, J.:

1. One Kalap Nath Jaiswal was a resident of Calcutta. He was a successful businessman and a wealthy person. He had two wives (This was when the Hindu Marriage Act, 1955, was not there). The first wife's name was Kamla Devi (in short 'Kamla'). The second wife was Shanti Devi (in short 'Shanti').

2. Kalap Nath had 4 sons and one daughter from his first marriage, namely, Ajay, Vinod, Manoj, Sanjay and Nirmala respectively. From his second marriage Kalap Nath had two sons and five daughters namely Vijay, Pradip, Pramila, Urmila, Meena, Beena and Shila respectively.

3. Kalap Nath died on June 16, 1996, having made and published, what the plaintiff says, was his last Will dated October 5, 1994. The plaintiff and Vijay (two sons from the second marriage) were named as executors in the Will. In the Will, the branch of Kalap Nath's first wife was by-passed and nothing was given to them. Kalap Nath devised and bequeathed all his properties, immovable and movable, to the branch of the second wife and in particular to Vijay and Pradip and their families. There was also a bequest in favour of his second wife Shanti.

4. Vijay and Pradip filed an application for probate of the aforesaid Will of Kalap Nath, being PLA no. 116 of 2003. The branch of the first wife of Kalap Nath filed caveat and affidavit in support thereof opposing the grant of probate of the said Will in favour of Vijay and Pradip. Accordingly, the matter became a contentious cause and was registered as TS 13/2006. It may be noted that during pendency of the suit, Vijay passed away and Pradip became the sole plaintiff.

5. No specific issues were framed by the learned Judge before whom hearing of the suit commenced. However, the only issue according to me is whether or not the Will in question is the last Will and testament of the testator and whether or not it should be admitted to probate.

6. From the affidavit dated July 30, 2004, filed in support of the Caveat and the supplementary affidavit dated January 14, 2010, it appears that the

defendants have opposed the plaintiff's prayer for the grant of probate on the following grounds:-

- (a) Kalap Nath did not have the capacity or power to make a Will relating to the assets which are the subject matter of the Will since such assets and/or properties belong to Kalap Nath Jaiswal HUF, and the same were not his personal properties.
- (b) Kalap Nath did not know English language. He could only put his signature in English. Hence the Will is highly suspicious.
- (c) The document described as a Will is a fabricated document manufactured long after Kalap Nath's death.
- (d) The propounders had failed to produce or file the original engrossed Will with the probate application.
- (e) Kalap Nath was not in a proper mental state to execute a Will. He was made to execute the Will under undue influence/coercion. The Will was not made on his own volition and does not reflect Kalap Nath's true will and intention.
- (f) The document alleged to be kalap Nath's Will, is unnatural, clothed with suspicion, reveals suspicious circumstances and is tainted with fraud.

7. On behalf of the propounders, three witnesses were examined. They were Dinabandhu Mandal, Kaushik Mandal and Pradip Kumar Jaiswal (propounder). Dinabandhu and Kaushik were witnesses to the said Will. On behalf of the Caveators only one witness was examined i.e, Ajay Jaiswal.

Evidence

8. I may briefly note the gist of the depositions of the witnesses.

9. Dinabandhu, Senior partner of Fox & Mandal, Solicitors, deposed that at the request of Kalap Nath, he had drafted the Will. The Will was signed in his office. Kalap Nath signed the Will first, thereafter on his request, Dinabandhu and then Kaushik signed the Will. Kalap Nath signed the Will after understanding the contents thereof. He was in good health on the date of the execution of the Will. The Will was executed in duplicate. The second copy may be called 'certified true copy'. This was done so that if the original was misplaced and/or not found, such certified true copy could be treated as original. The Witness identified the signatures on the Will as that of Kalap Nath, his own and of Kaushik Mandal.

10. The second attesting witness, Kaushik Mandal deposed that he was working with the Solicitors' firm M/s. Fox & Mandal at the time when the Will was executed by Kalap Nath in 1994. He identified the signature of kalap Nath, his own signature and that of Dinabandhu, the other attesting witness. He confirmed that the Will was signed in Dinabandhu's chamber, in his presence. The sequence of signature was the same as mentioned by Dinabandhu. He explained that Exhibit A is the original Will and Exhibit B is a certified copy of the Will. He confirmed that the contents of the said two Exhibits are the same. He further said that although Kalap Nath understood English language, the Will was also explained to him in Hindi by Dinabandhu in his presence. He also confirmed that the contents of the affidavit that he affirmed and filed as an attesting witness as part of the probate application, are true and correct. Witness also stated that the normal procedure followed by M/s. Fox & Mandal, was to execute two sets of the same Will by way of abundant caution.

11. Pradip Jaiswal, P.W-3, deposed that he is a son of Kalap Nath. He saw the Will for the first time on July 18, 2002, when he collected the same from the office of M/s. Fox & Mandal. His elder brother Vijay Jaiswal, the other executer named in the Will died on November 27, 2005. He identified his own signature and that of Vijay Jaiswal on the probate petition. He tendered Kalap Nath's death certificate. He deposed that Kalap Nath was healthy on the date the Will was executed. He narrated an incident of his step brothers physically assaulting Kalap Nath, causing his death, arrest of the assailants, murder trial and acquittal of the accused persons by way of benefit of doubt. Witness deposed that the relationship between Kalap Nath and his sons from his first marriage was bad. He tendered a complaint dated October 19, 1994, made by Kalap Nath against his sons from the first marriage. He deposed that three other complaints (Exhibits M, N and O) were also made by Kalap Nath to the police and other authorities. Such complaints were filed as Ajay and Vinod Jaiswal, being the step brothers of the witness, were assaulting Kalap Nath and trying to grab his properties. Witness tendered newspaper reports published in 'Bartaman' and 'Ajkal' regarding the aforesaid two step brothers assaulting Kalap Nath. He deposed that Kalap Nath did not deprive his children from the first marriage. During his life time he had given sufficient money, land and business to them. In answer to queries raised by the Court, witness deposed in details how badly the children from the second marriage treated Kalap Nath.

This witness was cross-examined extensively. He stood his ground and did not say anything contrary to what he had said in examination-in-chief.

12. The only witness who deposed for the Caveators was Ajay Jaiswal, one of Kalap Nath's children from the first marriage. He deposed that apart from him, the other Caveators are his sister Nirmala and younger brothers Vinod and Sanjay. He deposed that prior to the marriage of his step brother Pradip Jaiswal, his relationship with Kalap Nath was very cordial. Subsequent to the said marriage, the relationship became sour. On being shown the first and last pages of the Will, he said that his father's signature was forged. He said that the Will was not disclosed in the criminal proceedings nor in the Kanpur suit between the parties. He said a lot of things regarding the family business, his own business, Kalap Nath Jaiswal HUF, etc, which are not strictly relevant for the purpose of deciding the issue involved in this suit. He admitted that Kalap Nath had been residing with his second wife and the children from her since 1993. He also admitted that after 1993, the relationship between Kalap Nath and his first wife as also his relationship with Sanjay and Vinod, two sons from his first wife, was not cordial. He deposed that the properties mentioned in the Will were not Kalap Nath's personal properties. He said that the case of forgery has been made out since the Will was not executed in his presence. Further, the witnesses to the Will not being forensic experts, they could not confirm Kalap Nath's signature on the Will.

Arguments

13. Learned Advocate for the propounder submitted that the propounder has proved that the Will was executed and attested as per the provisions of Section 63 of the Indian Succession Act and in the manner contemplated under Section 68 of the Indian Evidence Act. This will appear from the

evidence of the two attesting witnesses who are well reputed solicitors of this Court. The Caveators have not been able to shake their testimony nor raise any doubt regarding the execution or attestation process.

14. Learned Advocate submitted that when the probate petition was first filed, the propounder had annexed the duplicate copy of the Will thereto with an undertaking to produce the original engrossed Will later. Subsequently, after the demise of the propounders' mother, they found the original engrossed Will amongst the belongings of their mother and filed the same in Court after obtaining the Court's leave. The attesting witnesses proved both the original and the duplicate copy of the Will. The depositions of the three witnesses from the side of the plaintiff, read together, leave no manner of doubt that the Will in question was executed and attested following the requirements of law and, should therefore be admitted to probate.

15. Learned Advocate further submitted that the fact that the first wife and her branch were not beneficiaries in the Will, per se does not make the Will unnatural. D.W. i.e. Ajay Jaiswal has admitted the acrimonious relationship between Kalap Nath and his first wife as well as the children from his first wife.

16. Learned Advocate then said that as regards lack of mental capacity of the testator or any undue influence having been exerted on him, no evidence has been tendered by the defendants excepting making a bald allegation.

17. As regards the defendants' case that Kalap Nath's signature on the Will is forged, learned Advocate said that again, no evidence has been adduced in support of such allegation. Neither have the Caveators led any

expert evidence on that score, nor have they produced any other signature of the testator with which comparison can be made.

18. It was then submitted that the pleas that the Will is a forgery and that the Will was procured by undue influence, are mutually destructive. Such inconsistent cases have been run by the defendants in desperation.

19. As regards the allegation that Kalap Nath was not the owner of the property as mentioned in the Will and as such could not have devised/bequeathed the same by way of the Will, learned advocate for the propounder said that the probate Court does not decide the title to the property mentioned in a Will. Further, in the Kanpur Suit, The Caveators have proceeded on the basis that some of such properties belong to Kalap Nath.

20. Learned Advocate then submitted that a bald allegation has been made that there are suspicious circumstances surrounding the execution of the Will. Some of the contentions of the defendants do not even relate to the circumstances surrounding the execution of the Will. It was submitted that the alleged discrepancies in the evidence of the plaintiff's witnesses as to the custody of the original Will and the duplicate Will or the delay in filing the probate petition do not concern the execution of the Will. Similarly, the plaintiff never mentioned the Will in the criminal proceedings initiated against the defendants since it was not necessary to do so. In any event such proceedings were being prosecuted by the State and not by the plaintiff.

21. Finally, as regards the point of limitation, learned Advocate submitted that although in the cases relied upon by the Caveators, the Supreme Court

has observed that Article 137 of the Schedule to the Limitation Act would apply to all application including probate application, the Hon'ble Court also observed that the time from which limitation period commences is, "when the right to apply accrues." Article 137 does not read "when the right to sue *first* accrues". Therefore, the time did not start running from the date of the testator's death, but from the date when it became necessary for the executors to apply for probate. In this connection learned Counsel for the plaintiff relied on the decision of the Hon'ble Supreme Court in the case of ***Union of India & Ors. v. West Coast Paper Mills Limited & Anr., reported at (2004) 2 SCC 747 para 21.***

22. Learned Counsel submitted that the two decisions relied upon by the defendants on the point of limitation, i.e., ***Kunvarjeet Singh Khandpur v. Kirandeep Kaur & Ors., (2008) 8 SCC 463 para 14, Krishan Kumar Sharma v. Rajesh Kumar Sharma, reported at (2009) 11 SCC 537 para 14***, do not help the defendants. Learned Counsel relied on the decisions of the Bombay High Court and the Madras High Court in the cases of ***Vasudev Daulatram Sadaranganj v. Sajni Prem Lalwani, reported at AIR 1983 Bomb 268*** and ***E. Devaranjan & Ors. v. E. Ramiah, reported at AIR 1991 MAD 214.***

23. Learned Advocate for the Caveators argued that Kalap Nath died intestate in 1996. The alleged Will was manufactured after his death by the propounders to usurp the properties belonging to the HUF by the name of M/s Kalap Nath Jaiswal as well as the personal properties of Kalap Nath.

24. Learned Counsel tried to point out inconsistencies between the evidence of the witnesses examined by the propounders. For example, P.W. 2

(Kaushik Mandal) deposed (Q.56) that Ganga Prasad Jaiswal was present at the time of execution of the Will, but P.W. 3 (Pradip Jaiswal) deposed (Q 194) that Ganga Prasad was sitting outside. Again, with reference to Q 55 and 62 of P.W 2's deposition, it was submitted that P.W. 2 deposed that Kalap Nath went to the office of M/s. Fox & Mandal on the day of execution of the Will around mid day. It follows that the Will was prepared, explained to Kalap Nath and signed on the same day. No draft of the Will was prepared. This raises a strong suspicion.

25. Learned Advocate then argued that P.W. 1 gave contradictory answers regarding the alleged Will in response to Q 35 to 39. The said questions and answers read as follows:-

“35. You have also deposed before My Lord that you do not recollect if you had dealt with Kalap Nath Jaiswal before execution of this Will. Am I Correct?/ I have not said before execution. I do not recollect whether I had dealt with him in any other matter or not.

36. Therefore, do I take it that this was for the first time that you saw somebody who represented himself to be Kalap Nath Jaiswal? He was accompanied by our own client, Ganga Prasad Jaiswal who was very old. He was related to Kalap Nath Jaiswal. That is how he came to our office.

37. According to you, the identification of the testator was made by Ganga Prasad Jaiswal ?/ He never signed.

38. There was no means to ascertain whether the person who signed this document is actually Kalap Nath Jaiswal or anybody else?/ We do not do those things. We verify those.

39. Other than being assured by Ganga Prasad Jaiswal, you have no other means to verify or ascertain that the person signing the document was Kalap Nath Jaiswal himself. Do you follow my question?/ Yes, I follow. I myself have to verify or appoint the detective agency to verify whether that person is actually Kalap Nath Jaiswal as he representing.”

26. Learned Counsel then argued that Kalap Nath allegedly executed the Will on October 5, 1994, and passed away on June 16, 1996. However, the propounders allegedly collected the Will on July 18, 2002, i.e., more than 6 years after their father’s death from the office of M/s. Fox and Mandal. This also raises a suspicion as regards the genuineness of the alleged Will.

27. It was submitted that pursuant to a complaint lodged by the propounders, a criminal case was initiated in the year 1997 against Vinod Jaiswal, Sanjay Jaiswal and Ajay Jaiswal under Section 302/34 of IPC for the alleged murder of Kalap Nath. The 6th Additional District and Sessions Judge acquitted the accused persons by a judgment and order dated February 15, 1999. In the said criminal proceedings, the propounders never disclosed the existence of any Will of Kalap Nath.

28. Learned Counsel then argued that the original letters exchanged between Vijay Kumal Jaiswal and M/s. Fox & Mandal i.e., letter dated 09.05.2002 written by Vijay, letter dated May 10.05.2002 written by M/s. Fox & Mandal or letter dated 18.07.2002 written by Vijay and Pradip Jaiswal

to Fox & Mandal were not produced by PW 1 (Dinabandhu Mandal), Senior partner of M/s Fox & Mandal. Strong suspicion arises because of non production of such records.

29. It was then argued that there are inconsistencies as to when the alleged Will came to the knowledge of the propounders. P.W. 1 stated that the alleged Will was executed in duplicate and kept in the custody of Fox & Mandal (Q. 16,17,43). P.W. 1 also deposed that after execution of the alleged Will, the same was kept in safe custody of his office (Q. 43, 74, 86 and 87). A statement to the same effect was made by P.W. 2 (Q. 31). According to P.W. 2 the original Will and true copy thereof - Exhibits A and B - were kept in the office of M/s Fox & Mandal (Q 31 and 32). P.W. 2 deposed that initially one Will was misplaced but he did not say when it was found to be misplaced and how it was traced back. He also did not say whether the original Will or the true copy thereof was misplaced (Q 33). P.W. 3 deposed that he saw the Will for the first time 13 days after his father's death (Q 156, 366 to 372). In cross examination he gave contradictory answer (Q 488). P.W. 3 also deposed that the Will was retrieved from Fox & Mandal on 18.07.2002 and then only he saw the Will (Q 60, 158).

In the petition affirmed by P.W. 3 on March 30, 2009, he stated that his mother Shanti Devi died on 11.01.2009 and while going through her belongings, P.W. 3 discovered the original engrossed Will. In paragraph 8 of the application P.W. 3 stated that neither he nor his elder brother Vijay, since deceased, being the other executor named in the Will, were aware that the original engrossed Will was lying along with the belongings of Shanti Devi.

30. Learned Advocate argued that the aforesaid contradictions in the depositions of the three witnesses put forward by the propounder, regarding the existence of the alleged Will and the knowledge of the propounders about the same, raise serious suspicion about the genuineness of the Will.

31. It was then submitted that the Caveators had filed a suit for declaration challenging the genuineness of the alleged Will before the 2nd Civil Judge (Junior Division), Sealdah, being TS 416 of 2002. However, the propounders filed the probate application in the Calcutta High Court in February, 2003. When the said fact was brought to the notice of the learned Sealdah Court, an order dated January 12, 2004, was passed by the learned Court dismissing the suit, holding that it had no jurisdiction to entertain the suit.

32. It was then submitted that 6 years after filing of the probate application, the petition dated March 30, 2009, was filed before this Court praying for leave to file the purported original engrossed Will. An ex-parte order dated April 6, 2009, for disclosure of documents was obtained by the propounder.

33. Learned Advocate then submitted that it is the duty of the propounder of the Will to satisfy the conscience of the Court that the Will was duly executed by the testator. The Court will not refuse to probe deeper into the matter only because the signatures on the Will are otherwise proved. If the Will is surrounded by suspicious circumstances, it is the duty of the propounder to explain the same.

34. In connection with the delay in producing the original engrossed will, learned Advocate relied on the decision of the Privy Council in ***Mt. Biro v. Atma Ram AIR 1937 PC 101.***

35. Learned Counsel then made detailed submission on how Kalap Nath had come to reside in Calcutta from Village Bangaon, Azamgarh, Uttar Pradesh, some time before 1947 and how he built up a business along with his family members acting as a 'Hindu Undivided Family' (HUF). Essentially what learned Counsel tried to impress upon me is that the properties devised/bequeathed by Kalap Nath in the Will are HUF properties and as such, Kalap Nath had no right to deal with such properties in his Will. He was the Karta of M/s. Kalap Nath Jaiswal HUF governed by Hindu Mitakshara School. Any of the properties of such HUF could not be legally disposed of by Kalap Nath by the alleged Will or otherwise.

36. Learned Advocate for the Caveators submitted that the application for probate is barred by limitation. According to him the application for probate should have been filed within 3 years of Kalap Nath's death. Since the same was not done, the probate application became barred by law in terms of Article 137 of the Schedule to the Limitation Act, 1963. In this connection learned Advocate relied on the followed decisions ***(i) Krishan Kumar Sharma v. Rajesh Kumar Sharma (2009) 11 SCC 537, Para – 14. (ii) Kerala State Electricity Board Trivandrum v. T.P. Kunhaliumma (1976) 4 SCC 634.***

37. Learned Advocate also submitted that the delay in applying for probate of a will would result in suspicion. The greater the delay, greater would be the suspicion. In the present case, the Will surfaced in 2002, six

years after the death of Kalap Nath. The original engrossed Will was filed in Court in 2009, 13 years after Kalap Nath's death. These facts indubitably indicate suspicious circumstances and raise doubts about the genuineness of the Will.

38. On the point of suspicious circumstances, learned Advocate referred to the following decisions i.e.

(i) Bhagwan Kaur W/o Bachan Singh v. Kartar Kaur W/o Bachan Singh, reported at (1994) 5 SCC 135,

(ii) Bindeshri Prasad & Anr. v. Mst. Baisakha Bibi & Ors. reported at AIR 1920 PC 70,

(iii) Smt. Jaswant Kaur v. Smt. Amrit Kaur & Ors. reported at (1977) 1 SCC 369 Para 9.

39. As regards delay in producing the Will raising suspicion, reliance was placed on **Bharpur Singh & Ors. v. Shamsher Singh (2009) 3 SCC 687 (Para 23-25) and S. R. Srinivasa & Ors. v. S. Padmavathamma (2010) 5 SCC 274 (paragraph 38, 56, 65).**

Court's view

40. At the very outset it would be helpful to note the relevant contents of the Will of which probate is being sought. In paragraphs 4, 5 and 6 of the Will, Kalap Nath stated as follows:-

“4. I was living with my maternal uncle Shri Sumer Ram Shaw since deceased at Kanpur during my childhood for my education and thereafter I came to Calcutta with Shri Chandrabali Shaw, eldest son of my said uncle and also started living with him in

Calcutta. Gradually I learned business from my said maternal brother Shri Chandrabali Shaw and started my own business. All properties and business established by me are out of my self acquired property.

5. I have three other sons viz. Ajay Kumar Jaiswal, Vinod Kumar Jaiswal and Sanjay Kumar Jaiswal from my first wife. I have given them business and moneys and as such not making any provision for them under my Will. Specially for the last few months they are misbehaving with me and abusing me openly and publicly. It is my desire that they should vacate the Second Floor of my residential house where they are now staying.

6. I have one daughter from my first wife and five daughters from my second wife. They are all married and I have spent considerable amount at the time of their marriage and as such I am not providing anything to them in this my Will.”

41. By the subsequent paragraphs in the Will, Kalap Nath devised and bequeathed the residential house at Premises No. 3B Hazi Zakaria lane, Kolkata to Vijay and Pradip (the propounders). A property measuring about 4 bighas at Kanpur, was devised to Kalap Nath’s second wife Shanti Devi, Vijay and Pradip, their respective wives and kalap Nath’s grandson Vivek Jaiswal, in equal shares. Kalap Nath devised land at Transport Nagar measuring approximately 300 Square Yds. to Vijay and Pradip. The tenancy right in respect of the shop at 248C Acharya Prafulla Chandra Road, Kolkata- 7000 006, was given to Vijay and Pradip. Kalap Nath bequeathed his entire interest in the partnership carrying on business under the name

and style of 'Vijay Iron Trading Company', to his sons Vijay and Pradip. The rest and residue of his estate, Kalap Nath devised and bequeathed to Vijay and Pradip.

42. Kalap Nath therefore made it clear in the Will that he had given business and money to his sons from the first marriage and hence was not making any provision for them in the Will. An additional reason for not including the three sons from the first marriage, in the Will, is that they used to misbehave with Kalap Nath. As regards the daughter from the first marriage and the five daughters from the second marriage, Kalap Nath did not provide for them in the Will as he had married them off well spending substantial sums of money. To my mind, there is nothing unnatural about the disposition made in the Will in spite of Kalap Nath favouring the children from his second wife.

43. Just because the branch of the second wife are the beneficiaries under the Will to the exclusion of the branch of the first wife, the Will cannot be said to be unnatural. A will is generally made when the testator desires to alter the natural course of succession. As observed by the Hon'ble Apex Court in the case of ***Ramabai Padmakar Patil (Dead) through LRS. & Ors. v. Rukminibai Vishnu Vekhande & Ors., (2003) 8 SCC 537***, a Will is executed to alter the mode of succession and by the very nature of things it is bound to result in either reducing or depriving the share of a natural heir. If a person intends his property to pass equally to his natural heirs, there is no necessity at all of executing a Will. It is true that the propounder of a Will has to remove all suspicious circumstances. Suspicion means doubt, conjecture or mistrust. But the Fact that the natural heirs or some of them

have been excluded or a lesser share has been given to them, by itself without anything more cannot be held to be a suspicious circumstance.

44. Now I come to the question as to whether or not the execution of the Will has been duly proved. Sec. 63 of the Indian Succession Act, 1925 prescribes the manner of execution of an unprivileged Will. The requirements are as follows:-

“(a) The testator shall sign or shall affix his mark to the Will, or it shall be signed by some other person in his presence and by his direction.

(b) The 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.

(c) The Will shall be attested by two or more witnesses, each of whom has seen the testator sign or affix his mark to the Will or has seen some other person sign the 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 of the signature of such other person; and each of the witnesses shall sign the Will in the 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.”

45. The burden of proving valid execution of a Will and that it is a genuine document is squarely on the propounder. He must establish that the testator has signed the Will within his free will and having a sound disposition of mind and understood the nature and effect of the instrument

on which he was appending his signature. The testamentary capacity of the propounder must also be established. The propounder must explain to the satisfaction of the Court suspicious circumstances, if any, surrounding the execution of the Will.

46. A Will has to be proved like any other document. Sec. 68 of the Indian Evidence Act provides that if a document is required by law to be attested, it shall not be used as evidence until one attesting witness at least has been called for the purpose of proving its execution, if there be an attesting witness alive and capable of giving evidence. The proviso to Sec. 68 clarifies that it shall not be necessary to call an attesting witness in proof of the execution of any document, **not being a Will**, which has been registered in accordance with the provisions of the Indian Registration Act, 1908, unless its execution is specifically denied by the person by whom it purports to have been executed. Sec. 69 of the Evidence Act provides for the manner of proof of execution of a document which is required by law to be attested, when no attesting witness is found. We are not concerned with such a situation.

47. In the instant case, it appears from the evidence on record that the Will was signed by Kalap Nath in the presence of two witnesses (**Dinabandhu Mandal and Kaushik Mandal**) and the two witnesses then put their signatures on the Will in front of the testator. The Will was thus executed in accordance with law.

48. No argument has been advanced on behalf of the Caveators to the effect that Kalap Nath did not have the mental capacity to make the said Will.

49. As regards the legal capacity of the testator, it was argued on behalf of the Caveators that Kalap Nath was not the owner of the properties which are the subject matter of the Will. They are HUF properties. Therefore, Kalap Nath could not have devised such properties in the Will. This point cannot be considered in the present proceeding. The probate Court does not decide whether or not the testator had title to a property which is the subject matter of his Will.

50. It was argued on behalf of the Caveators that there were suspicious circumstances surrounding the execution of the Will which have not been explained by the propounder. However, the instances of suspicious circumstances given by learned Advocate and recorded above, do not pertain to execution of the Will. All such instances relate to circumstances post execution of the Will, even assuming that they can be described as suspicious circumstances.

51. As regards the decision of the Hon'ble Supreme Court in ***Bhagwan Kaur v. Kartar Kaur, (supra)***, on facts, the Hon'ble Supreme Court found that there were suspicious circumstances surrounding execution of the Will. The legatee took active part in the execution of the Will. No provision was made in the Will for the two widows. Only a pious wish was recorded in the Will that the legatee would look after the testator's widows. The Hon'ble Supreme Court held that because of the suspicious circumstances, the Will should not be admitted to probate. In ***Bindeshri Prasad v. Baisakha Bibi, (Supra)***, the Privy Council set aside the decree of the High Court granting probate of a Will. The *ratio decidendi* of that decision is that in a suit by heirs of a deceased person for declaration that the alleged Will of the

deceased whereby they were deprived of the succession to his estate, is a forgery, the burden of establishing without reasonable doubt that the Will propounded is of the deceased, is upon those propounding the Will. There is no quarrel with this proposition of law. In the facts of this case, that decision has no manner of application.

52. Although one of the points taken in the affidavit in support of the caveat is that the signature on the Will is not that of Kalap Nath, the point has not been seriously pressed. The Caveators did not produce any admitted signature of kalap Nath for comparison with the signature on the Will. They did not also adduce evidence of any hand writing expert.

53. In ***Smt. Jaswant Kaur v. Amrit Kaur, Supra***, (another case relied upon by the Caveators), it was held that in cases where the execution of a Will is shrouded in suspicion, its proof ceases to be a simple lis between the plaintiff and the defendant. What comes up initially as an adversarial proceeding, becomes in such cases, a matter of the court's conscience and the true question that then arises is whether the evidence led by the propounder of the Will is such as to satisfy the conscience of the Court that the Will was duly executed by the testator. It is impossible to reach such satisfaction unless the party which sets up the Will offers a cogent and convincing explanation of the suspicious circumstances surrounding the making of the Will.

I respectfully agree with the aforesaid observation as I must and I am bound by the same. However, in the facts of this case, I have not found any suspicious circumstance surrounding the execution of the Will.

54. Another decision relied upon by the Caveators is that of the Hon'ble Supreme Court in ***Bharpur Singh v. Shamsher Singh, (Supra)***. At paragraph 23 of the reported judgment examples of suspicious circumstances surrounding the execution of a Will are indicated as follows:-

- “ 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.”

55. However, in paragraph 24 of the judgment the Hon'ble Court added that the circumstances narrated are not exhaustive.

56. The Caveators also relied upon the decision of the Hon'ble Supreme Court in the case of ***SR Srinivasa v. S. Padmavathamma, (supra)***. In paragraphs 38, 56 and 65 of the reported judgment, which were relied upon by learned Counsel, the Hon'ble Court discussed how a Will ought to be proved; what could be suspicious circumstances surrounding the execution

of a will; the onus of proving a Will; and the obligation of the propounder to explain the suspicious circumstances, if any. These are general principles of law. I reiterate, that I have not found any suspicious circumstance surrounding the execution of the Will, in the present case.

57. It has also been argued on behalf of the Caveators that although the Will is dated October 5, 1994, it surfaced for the first time in 2002 i.e., after 8 years and the original thereof was filed in Court only in 2009 i.e., 13 years after the testator's death, This would also indicate that the Will is a manufactured one.

I am unable to accept the aforesaid argument. While it is true that delay in propounding a Will would create some suspicion, but such delay has to be an inordinate and un-explained one. Generally speaking the longer the delay, the stronger the suspicion. However, in the present case, the propounder has offered satisfactory explanation. He has said that in the criminal proceedings initiated against the three sons of the testator from the first marriage of the testator, there could be no question of disclosing the Will as the same was irrelevant for those proceedings. In any event the State was prosecuting that matter. It was only when the propounders found that the Caveators were disposing of and/or otherwise dealing with properties belonging to the estate of Kalap Nath, that they found it necessary to apply for probate of the Will. Initially the true copy of the Will which was kept in the safe custody of Fox & Mandal, Solicitors, was filled with the probate application since the original was not traceable at that time. Subsequently, when the plaintiff found the original Will while going through the belongings

of his mother after her demise, the original Will was also filed in the present proceedings. I find the explanation of the plaintiff to be quite acceptable.

58. Learned Advocate for the Caveators also argued that there are inherent inconsistencies and contradictions in the evidence adduced by the witnesses for the plaintiff. I have indicated some such alleged inconsistencies above. I do not find the same to be of any appreciable significance or such as would detract from the credibility of the concerned witnesses.

59. Coming to the question of limitation, the Caveators relied on the decision in the case of **Kerala SEB v. T.P. Kunhaliumma, (supra)**. That case concerned the provisions of the Indian Telegraph Act, 1885 and the Indian Electricity Act, 1910. In that case the respondent before the Supreme Court had filed a petition under Sections 10 and 16 (5) of the Indian Telegraph Act, 1885 read with Section 51 of the Indian Electricity Act, 1910, claiming compensation against the appellant Electricity Board for having cut and removed some trees standing on the respondent's property for the purpose of laying electric line. The Board assessed the compensation at Rs. 1619.90/-. The respondent filed a petition before the District Judge, Tellicherry, under Section 16(3) of the Indian Telegraph Act, 1885, claiming enhanced compensation. One of the issues that arose was whether or not the petition was barred by time under Article 137 of the Schedule to the Limitation Act, 1963. The District Judge held that the application was governed by Article 137 and the petition having been filed beyond 3 years, was barred by time. The respondent filed a revisional petition before the Kerala High Court. The High Court set aside the order of the District Judge

and remanded the matter for fresh consideration. The matter having ultimately reached the Supreme Court, it was held that Article 137 of the 1963 Limitation Act will apply to any petition or application filed under any Act in a Civil Court. Article 137 is not confined to applications contemplated by or under the Code of Civil Procedure.

60. The Caveators also referred to the decision of the Hon'ble Supreme Court in the case of **Krishan Kumar Sharma v. Rajesh Kumar Sharma, (supra)**,. In that case the Delhi High Court held that Article 137 of the Limitation Act, 1963 does not apply to probate proceedings. The matter being carried to the Hon'ble Supreme Court, it was held that Article 137 is applicable to applications for grant of probate or letters of administration.

61. Article 137 of the Schedule to the Limitation Act reads as follows:-

Description of suit	Period of limitation	Time from which period begins to run
137. Any other application for which no period of limitation is provided elsewhere in this division.	Three Years	When the right to apply accrues.'

62. The Bombay High Court in the case of **Vasudev Daulatram Sadaranganj v. Sajni Prem Lalwani, reported at AIR 1983 BOM 268 (Supra)**, held that under Article 137, the right to apply necessarily need not accrue on the date of the death of the deceased in case of an application for probate or letters of administration. Such an application is for the Court's

permission to perform a legal duty created by a Will or for recognition as a testamentary trustee and is a continuous right which can be exercised at any time after the death of the deceased, as long as the right to do so survives and the object of the trust exists or any part of the trust, if created, remains to be executed. The right to apply would accrue when it becomes necessary to apply which may not necessarily be within 3 years from the date of the death of the testator. The paragraphs of the judgment of the Bombay High Court in which the aforesaid observations were made, were extracted by the Hon'ble Supreme Court in its judgment in the case of ***Krishan Kumar Sharma v. Rajesh Kumar Sharma, (supra)*** .

63. In the case of ***S. Krishnaswami, E. Devaranjan & Ors. v. E. Ramiah, Re, AIR 1991 MAD 214 (supra)***, at paragraph 24 of the reported judgment, the Madras High Court noted as follows:-

“24. In a proceeding, or in other words, in an application filed for grant of probate or letters of administration, no right is asserted or claimed by the applicant. The applicant only seeks recognition of the Court to perform a duty. Probate or letters of Administration issued by a competent Court is conclusive proof of the legal character throughout the world. An assessment of the relevant provisions of the Indian Succession Act, 1925 does not convey a meaning that by the proceedings filed for grant of probate or letters of administration, no rights of the applicant are settled or secured in the legal sense. The author of the testament has cast the duty with regard to the administration of his estate, and the applicant for probate or letters of administration only

seeks the permission of the Court to perform that duty. There is only a seeking of recognition from the Court to perform the duty. That duty is only moral and it is not legal. There is no law which compels the applicant to file the proceedings for probate or letters of administration. With a view to discharge the moral duty, the applicant seeks recognition from the Court to perform the duty. It will be legitimate to conclude that the proceedings filed for grant of probate or letters of administration is not an action in law. Hence, it is very difficult to and it will not be in order to construe the proceedings for grant of probate or letters of administration as applications coming within the meaning of an 'application' under Art. 137 of the Limitation Act, 1963.”

64. In **Krishan Kumar Sharma, Supra**, Hon’ble Supreme Court observed that the nature of a petition for grant of probate or letters of administration has been rightly described by the Madras High Court in **E. Devaranjan & Ors. v. E. Ramiah, Supra**. However, the Madras High Court was not corrected in observing that such an application is not covered by Article 137 of the Schedule to the Limitation Act, in view of the decision of the decision of the Supreme Court in the case of **Kerala SEB (supra)**.

65. What emerges from the aforesaid discussion is that an application for probate or letters of administration has to be made within three years from the date on which the right to apply accrues. It may be noted that the phrase is “right to apply accrues” and not “right to apply first accrues”. In my view, the right to apply for probate is a continuous right. If it could be termed as a cause of action (which probably it cannot be), then I would say

that such cause of action arises afresh every moment. It is the executor's right to seek court's permission to perform a duty cast on him by the testator. It is the pious obligation of the executor to carry out the wishes of the testator as reflected in his last Will. For this purpose the executor needs the courts certificate that the Will is a valid and genuine one. The executor need not rush to the Court and apply for probate immediately upon the death of the testator. He may do so when the need to apply for probate arises which may be beyond three years from the date of demise of the testator.

66. Furthermore, in ***Kunvarjeet Singh Khandpur v. Kirandeep Kaur & Ors., (Supra)***, at paragraph 15 of the reported judgment, the Hon'ble Supreme Court held that conclusion (b) of the Bombay High Court in paragraph 16 of the judgment in the case of ***Vasudev Daulatram Sadaranganj (supra)***, is not correct but conclusion (c) is the correct position of law. Paragraph 15 reads as follows:-

"15. Similarly reference was made to a decision of the Bombay High Court's case in Vasudev Daulatram Sadarangani v Sajni Prem Lalwani (AIR 1983 Bom.268). Para 16 reads as follows:

"16. Rejecting Mr. Dalapatrai's contention, I summarise my conclusions thus:--

(a) under the Limitation Act no period is advisedly prescribed within which an application for probate, letters of administration or succession certificate must be made;

- (b) the assumption that under Article 137 the right to apply necessarily accrues on the date of the death of the deceased, is unwarranted;
- (c) such an application is for the Court's permission to perform a legal duty created by a Will or for recognition as a testamentary trustee and is a continuous right which can be exercised any time after the death of the deceased, as long as the right to do so survives and the object of the trust exists or any part of the trust, if created, remains to be executed;
- (d) the right to apply would accrue when it becomes necessary to apply which may not necessarily be within 3 years from the date of the deceased's death.
- (e) delay beyond 3 years after the deceased's death would arouse suspicion and greater the delay, greater would be the suspicion;
- (f) such delay must be explained, but cannot be equated with the absolute bar of limitation; and
- (g) once execution and attestation are proved, suspicion of delay no longer operates".

The conclusion 'b' is not correct while the conclusion 'c' is the correct position of law."

67. Therefore, even as per the above decision of the Hon'ble Supreme Court, the right to apply for probate accrues on the date of death of the testator and is a continuous right which can be exercised at any time after the death of the deceased.

68. In view of the aforesaid, I reject the contention of the Caveators that the present probate proceedings are barred by limitation.

69. I have considered the evidence adduced by the parties as a whole. It is trite law that the totality of the evidence on record will have to be looked into in coming to a conclusion as to whether or not a Will has been duly proved and the requirements of Section 61 and 63 of the Indian Succession Act have been complied with. I am more than satisfied that the Will in question is the last Will and testament of late Kalap Nath Jaiswal which he executed voluntarily and in sound state of mind and health. It is a rational Will and makes complete sense. The testator's relationship with the branch of his first wife was admittedly acrimonious as his clear from the evidence on record.

70. In ***H. Venkatachala Iyengar v. B. N. Thimmajamma & Ors., AIR 1959 SC 443***, which both the sides relied on, the Apex Court observed, inter alia, as follows:-

“22. It is obvious that for deciding material questions of fact which arise in applications for probate or in actions on wills, no hard and fast or inflexible rules can be laid down for the appreciation of the evidence. It may, however, be stated generally that a propounder of the Will has to prove the due and valid execution of the will and that if there are any suspicious circumstances surrounding the execution of the will the propounder must remove the said suspicions from the mind of the Court by cogent and satisfactory evidence. It is hardly necessary to add that the result of the application of these two general and broad principles would always

depend upon the facts and circumstances of each case and on the nature and quality of the evidence adduced by the parties. It is quite true that, as observed by Lord Du Parcq in *Harmes v. Hinkinson*, (AIR 1946 PC 156) “where a will is charged with suspicion, the rules enjoin 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.” It would sound platitudinous to say so, but it is nevertheless true that in covering truth even in such cases the judicial mind must always be open though vigilant, cautious and circumspect.”

71. A certain degree of solemnity attaches to a Will by reason of the fact that it contains the last wish of the testator as to how his properties will devolve upon his departure from this world and also because by the very nature of the document, the testator cannot be called as a witness to prove the Will. In my opinion, it is the solemn duty of the Probate Court to try and give effect to the last desire of the testator unless the same becomes impossible for the reasons discussed above. Of course, the Probate Court is a Court of conscience and unless its conscience is satisfied that a Will has been executed voluntarily by the testator following the requirements of law with full alertness of mind, without undue influence and without being a victim of fraud, probate will not be granted. Such satisfaction will have to come from the entire conspectus of a particular case as is revealed by the

pleadings and evidence on record. The law is not, as I understand, that a Will has to be proved with mathematical precision.

72. I am satisfied that the Will in question was validly executed in accordance with law by Kalap Nath and it is his last Will. Whether by their pleadings or by their evidence, the defendants have not been able to establish that Kalap Nath lacked the mental capacity to execute the Will. On the contrary I am satisfied that Kalap Nath knew exactly what he was doing by executing the Will. The Will was executed without any fraud or undue influence being exercised on him. There were no suspicious circumstances surrounding the execution of the Will.

1. In view of the aforesaid and taking a careful but realistic view of the facts of the case and the evidence on record, I am satisfied that the Will in question should be admitted to probate. Accordingly, there will be an order in terms of prayer (c) of the probate petition, i.e., probate of the last Will and testament dated October 5, 1994, executed by late Kalap Nath Jaiswal, lately residing at no. 3B Hazi Zakaria Lane, 700 006, be granted to the petitioner/plaintiff as the executor thereof. Costs of this suit incurred by the plaintiff shall come out of the estate of the deceased. TS 13 of 2013 is accordingly disposed of and the connected application if any, is also disposed of.

73. Urgent certified copy of the judgment and order, if applied for be given to the parties upon compliance of necessary formalities.

(Arijit Banerjee, J.)