

**In the High Court at Calcutta
Civil Appellate Jurisdiction
Appellate Side**

**The Hon'ble Justice Sabyasachi Bhattacharyya
And
The Hon'ble Justice Uday Kumar**

**F.A. No.130 of 2016
With
CAN 2 of 2023**

**Smt. Manorama Sarkar and another
Vs
Sri Sibaram Pal and Others**

For the appellants	:	Mr. Arup Banerjee, Mr. Arun Kumar Saha
For the respondent no. 1	:	Mr. Aniruddha Chatterjee, Mr. S. S. Arefin
Hearing concluded on	:	07.11.2024
Judgment on	:	13.11.2024

Sabyasachi Bhattacharyya, J:-

1. The present appeal has been filed by two daughters of the testatrix challenging the grant of probate of the last Will and Testament of the said testatrix, namely Late Panchabala Pal, whereby she bequeathed her property to one of her daughters. Learned counsel for the appellant argues that the execution of the Will was shrouded by suspicious circumstances.
2. The Will was executed on June 29, 1995 and registered on September 15, 1995. The testatrix died on January 14, 2001 and the probate application was filed on May 16, 2001.

3. The proceeding became contentious on the appellants filing their objection. Accordingly, the probate application was returned on September 1, 2002 for being re-presented.
4. Accordingly, a plaint was filed by the propounder on April 11, 2007 which culminated in the impugned decree granting probate.
5. It is argued by the appellants that there was a delay of approximately five years in re-presenting the plaint after the proceeding turned contentious, which gives rise to doubt as to the veracity of the Will. Moreover, the signature of the testatrix, as on the earlier pages of the Will, also finds place on the top right-hand corner of the last page of the Will. It is argued that unless the signature is put at the bottom of the Will where the narrative of the Will ends, it cannot be said that there was due compliance of Section 63(b) of the Indian Succession Act, 1925, which mandates that the signature of the testator shall be so placed that it shall appear that it was intended thereby to give effect to the writing as a Will.
6. It is next argued that the son-in-law of the testatrix was made the Executor and was present at every stage of execution, whereas the beneficiary of the Will is his wife, one of the daughters of the testatrix. Such dominant role played by the son-in-law, whose wife is the sole beneficiary of the Will, itself can be treated to be a suspicious circumstance.
7. Moreover, it is found from the evidence of the scribe of the Will that the contents of the Will were “dictated” by the testatrix. However, the Will contains details of several pending cases and also includes some

English phrases. The testatrix, being an 80-year-old rural widow lady having no knowledge of English, could not have 'dictated' the Will. Also, P.W.4 (the scribe) stated in his evidence that the testatrix herself read the Will. However, it is an admitted position that she could not read or write but could barely scribble in Bengali.

8. Again, instead of the local sub-registration office near the house of the testatrix, the Will was registered in Burdwan Sadar Town. P.W.1, the Executor/propounder admitted in his evidence that he does not know the reason therefor. Thus, such conduct of the testatrix remains unexplained.
9. The testatrix signed on the Will but put her LTI (Left Thumb Impression) during registration, which is also a suspicious circumstance, it is argued.
10. If the Will was executed, learned counsel for the appellants argues, there was no reason why a subsequent giftdeed was executed in respect of the self-same property in favour of the sons of the beneficiary.
11. Previously on July 22, 1977, a gift deed was executed in favour of the appellants, challenging which a suit was filed and decreed. An appeal against the same was allowed and the matter was remanded to the Trial Court. Against the remand order, a First Miscellaneous Appeal is now pending in this Court. In view of the existence of such gift deed, a subsequent Will is automatically suspect and does not confer title.

- 12.** In the disputed Will, it is contended, there is no endorsement as to the contents of the same having been read over and explained to the testatrix. Moreover, the 80-year-old rural widow lady allegedly travelled by bus to Burdwan Town and walked to the registration office, which is highly improbable.
- 13.** Also, the Will was registered three months after the execution of the same. The Will was admittedly dictated by the testatrix and states that she was over 80 years old at that point of time. However, the P.W.1-Executor admits in evidence that she was 75 years old at the time of her death, thereby putting the age of the testatrix at 70 years when the Will was executed. Such contradiction regarding the age of the testatrix ranging over a period of ten years casts ample doubt on the valid execution of the Will.
- 14.** Learned counsel for the contesting respondent no. 1 denies the allegations of the appellants and argues that in the written objection, the execution of the Will was not denied, nor was the signature of the testatrix on the Will challenged. The case of the appellants was false personification and/or undue influence, both of which the appellants failed to prove. Also, the written objection prefixes such allegation of false personification with the term “probably”, thereby taking the allegation to the realm of conjecture. It is argued that the provisions of Section 63 of the Indian Succession Act, 1925 were duly complied with and the appellants failed to adduce any evidence in support of their contention that the testatrix was not mentally or physically fit to execute the impugned Will at the relevant juncture.

15. Learned counsel for the respondent argues that the initial onus to prove allegations of suspicious circumstances is on the objectors. Having not raised any of the objections now raised in their written objection before the probate court, and having failed to proof any of the allegations even *prima facie*, there arose no question of the propounder dispelling any suspicious circumstance. The propounder did not get any opportunity to rebut the allegations being now levelled for the first time before the Appellate Court.
16. Importantly, the execution of the Will itself was not denied in the written objection, nor were the grounds of objection proved by the appellants. The grounds now raised in the appeal are new grounds, being raised for the first time before this Court.
17. Learned counsel argues that no medical document or other evidence was adduced by the appellants to prove the lack of physical or mental fitness of the testatrix to execute the Will. Mere old age or ailment did not automatically disqualify the testatrix from executing a Will of her own free volition. It is contended that, in fact, it is when a person becomes aged and suffers from ailments that she is all the more inclined to execute a Will.
18. Learned counsel for both the parties cite judgments in support of their respective cases which are dealt with below.
19. Upon hearing learned counsel for the parties, the court comes to the following conclusions:
20. The first ground raised by the appellants is the delay of about five years in re-presenting the plaint after the proceeding turned

contentious. However, such delay is not fatal by itself. The initial presentation of the probate application was after four months of the death of the testatrix. Thus, Article 137 of Schedule I of the Limitation Act, 1963 is not attracted in any event. In view of corroborative evidence of at least four witnesses, including two attesting witnesses to the Will, the execution of the Will was duly proved. Thus, the aspersion of suspicious circumstance caused merely by the delay is, in any event, sufficiently taken care of by the propounder.

- 21.** Regarding the signature of the testatrix on the last page of the Will not being at the bottom but at the right-hand top corner of the said page, there is no hard-and-fast legal requirement that the signature has to be at the bottom. Although ordinarily the testator puts his signature at the bottom of the Will, in the present case, the testatrix put her signature on the right-hand top corner of all the pages, including the last page. Mere placement of the signature, similar to the other pages of the Will, at the top of the last page does not itself vitiate the execution of the Will.
- 22.** Section 63(b) of the Indian Succession Act merely provides that the signature shall be so placed that it shall appear that it was intended thereby to give effect to the writing as a Will. A perusal of the Will reveals that the signature of the testatrix appears on every page of the Will and, like the other pages, on the top right-hand corner of the last page as well. Since the last page contain the culmination of the Will and, in any event, the important provisions of the Will are contained in other pages which were also duly signed by the testatrix, we are of

the opinion that the intent and purport of Section 63(b) has not been violated. Importantly, the signature of the testatrix itself has not been challenged at all at any point of time. The intention of the testatrix to execute the document-in-question as a Will is clear even otherwise from the materials and evidence on record and, as such, such argument of the appellants cannot be accepted.

23. Learned counsel for the appellants cites *Ramesh Nivrutti Bhagwat v. Dr. Surendra Manohar Parakhe*, reported at (2020) 17 SCC 284, where the Supreme Court observed *inter alia* that Article 137 of Schedule I of the Limitation Act, 1963 is applicable in case of an application for probate or grant Letters of Administration. However, a comprehensive reading of the judgment indicates that the ratio laid down ultimately was that although there is no absolute bar in filing an application for probate after three years, the delay thereafter would qualify as suspicious circumstance. In the present case, since the probate application was filed in time and the delay in re-presenting the same after turning contentious might be for a varied range of reasons, the bar of Article 137 cannot hinder the probate from being granted.
24. The appellants have also cited *Shashi Kumar Banerjee and others v. Subodh Kumar Banerjee since deceased and after him his legal representatives and others*, reported at AIR 1964 SC 529, in which case it was observed that it was not in dispute that the signature at the bottom of the Will was the signature of the testator. However, no proposition of law was laid down in the said case that the signature has to be at the bottom of the Will. The thrust of the above

observation was that the signature was that of the testator and not regarding the position of the same. Thus, the said judgment does not help the appellants in any manner whatsoever.

25. Learned counsel for the appellants also relies on a judgment of a learned Single Judge of this Court reported at *2021 SCC OnLine Cal 2364 [In the matter of: Saroj Kumar Chatterjee]*, where the Court observed that a certain degree of solemnity attaches to a Will by reason of the fact that it contains the last wish of the testator. 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 consciousness of mind and without undue influence and without being a victim of fraud, probate will be granted. In the present case, no particular of fraud or undue influence has been pleaded, nor is there an iota of evidence to substantiate such allegation. Hence, there is no reason as to why the said proposition should come in the way of grant of probate in the case at hand.
26. Again, in *H. Venkatachala Iyengar v. B.N. Thimmajamma and others*, reported at *AIR 1959 SC 443*, the Supreme Court highlighted that all legitimate suspicions should be completely removed before a document is accepted as the last Will of the testator. In the said case, the fact that the propounder had taken a prominent part in the execution of the Will and received substantial benefit under it was treated to be a suspicious circumstance.

- 27.** However, in the same breath, the Supreme Court observed that the satisfaction of judicial conscience in probate matters merely laid down the test emphasizing that in determining as to whether an instrument is the last Will of the testator, the court is deciding a solemn question and it must be fully satisfied that it had been validly executed by the testator who is no longer alive.
- 28.** In the present case there is ample corroborative evidence to substantiate due compliance of Section 63 of the Indian Succession Act and Section 68 of the Evidence Act, which are the guiding principles of law in probate cases with regard to proof of valid execution of a Will.
- 29.** One of the questions raised by the appellants is the prominent involvement of the propounder, a son-in-law of the testatrix, whose wife is the beneficiary of the Will, in the execution of the Will. However, mere presence or even active involvement of the Executor cannot *ipso facto* render the execution of the Will invalid or raise a suspicious circumstance. In the facts of the case, the Executor was admittedly present during execution and registration. However, the Will itself categorically explains why the other heirs were excluded and the demise was effected solely in favour of the beneficiary, who is one of the daughters of the testatrix and incidentally the wife of the propounder. In fact, the natural choice for a testatrix would be to appoint her son-in-law (and not a stranger) the Executor, if the Will bequeaths the property to his wife, a daughter of the testatrix. That

would, in fact, be the obvious course of action to facilitate smooth grant of probate.

30. In the present case, the appellants have alleged that the testatrix was not in a physical and mental condition to execute the Will. However, the medical conditions and ailments of the testatrix, as alleged, have not been proved by any iota of evidence, either documentary or oral. In the absence of any material to disprove the positive corroborative evidence of the propounder regarding the sound mental and physical capability of the testatrix to express her own free volition and will in execution of the Will, it cannot be said that mere involvement of the son-in-law as the Executor vitiates the Will.
31. The appellants have contended that the scribe drafted the Will as per “dictation” of the testatrix. Much argument has been advanced on the same, since the testatrix apparently could not have dictated the English phrases and details of cases mentioned in the Will. However, in the examination-in-chief of the scribe, being the P.W.4, which is in Bengali vernacular, it is clear that the scribe stated not that he had drafted the Will as per the “dictation” of the testatrix but that it was done in terms of the “instruction” of the testatrix. On the other hand, in the cross-examination, which was recorded in English, the term “dictation” was incorporated which, obviously, was erroneously translated in place of “instruction”. Often, if the evidence adduced in vernacular is transcribed in a foreign language, the true purport of the exact words used is lost in translation. A comprehensive perusal of the examination-in-chief and cross-examination of the scribe indicates

that what he meant was that the Will was drafted as per 'instruction', and not 'dictation', of the testatrix.

- 32.** The appellants argue that as per P.W.4, the testatrix herself read the Will, whereas she could not read or write but barely scribble in Bengali. However, P.W.3 Asit Kumar Saha, one of the attesting witnesses, deposed that the testatrix "went through the recitals of the Will with the help of the deed writer" and was satisfied with the contents of the Will. The said evidence, read in conjunction with the statement of the P.W.4 that the testatrix saw, read and signed the Will after being satisfied, coupled with the further statement of P.W.4 and the attesting witnesses that the Will was read over and explained to her, belies the allegation that the testatrix herself purported to read the document. Whether the testatrix went through the document or whether she had minimal knowledge of Bengali and sought to satisfy herself by once perusing the Will herself is immaterial, since the consistent evidence of all the plaintiffs' witnesses was that the Will was read over and explained to her.
- 33.** The appellants contends that there is no endorsement in the Will itself regarding the document being read over and explained to the testatrix. However, such statement, even if incorporated in English, in a Will which is drawn up in the English language, which is foreign to the testatrix, would mean precious nothing. Even if the Will was not actually read over and explained but a statement to that effect was incorporated in English in the Will, there would be no way to discover whether it was actually so read over and explained to the testatrix.

The act of reading over and explained has to be, thus, independently corroborated even apart from the statements contained in the Will itself.

- 34.** The evidence of the plaintiffs' witnesses, including the attesting witnesses and the scribe, clearly goes on to show that the contents of the Will were read over and explained to the testatrix and she was satisfied with the same. Thus, the omission of such endorsement in the Will itself is utterly irrelevant.
- 35.** The testatrix was about 80 years old and travelled by bus and walked a little for executing the Will/having it registered. However, the said fact itself does not cast any doubt on the execution of the Will, since a lady of advanced years in a rural area ought not to be automatically deemed to be so physically unfit as to be unable to undertake the short journey. The plaintiffs' witnesses consistently deposed that the testatrix was physically fit and mentally alert. Such corroborative evidence remained unshaken in cross-examination and cannot be brushed aside, particularly since the objectors/appellants utterly failed to substantiate their case of her physical unfitness at the relevant point of time.
- 36.** Explanation has been given by the scribe/deed writer in his cross-examination as to why he drafted the Will even during a strike of the deed writers. He did so, according to his evidence, out of sympathy because the elderly lady approached him herself, which is perfectly plausible. The registration was effected three months after due to the strike, which is also equally probable.

- 37.** The minor discrepancy in age, since the testatrix was mentioned to be an octogenarian in the Will but as per the deposition of her son-in-law (P.W.1), was around 70 years at the relevant juncture, is more easily explained away. Elderly people even in cities, let alone rural areas, are often seen not to be sure about their exact age. There are very few elderly ladies of the age of the testatrix at the time of execution of the Will who would be remembering vividly their dates of birth. In fact, the alleged discrepancy arose in the version of the son-in-law/executor in his evidence. The son-in-law might very well have been unaware of the exact age of his mother-in-law, which is not so serious an issue as to cast suspicion on the execution of the Will itself.
- 38.** The appellant cites *Gurdial Kaur and others v. Kartar Kaur and others*, reported at (1998) 4 SCC 384 to argue that the law is well-settled that the conscience of the court must be satisfied that the Will-in-question was not only executed and attested in the manner required under the Indian Succession Act, 1925 but was the product of the free volition of the executant.
- 39.** Again, in *Smt. Jaswant Kaur v. Smt. Amrit Kaur and others*, reported at (1977) 1 SCC 369, also cited by the appellants, it was held that cases in which execution of the Will is surrounded by suspicious circumstances like a shaky signature, a feeble mind, an unfair and unjust disposition of the property or the propounder taking a leading part in making the Will, the suspicion has to be removed, for which a heavy onus lies on the propounder. Satisfaction of judicial conscience

was considered in the context of allegations of fraud, undue influence, coercion, etc.

40. In *Guro (Smt) v. Atma Singh and others*, reported at (1992) 2 SCC 507, the Supreme Court again highlighted that the presence of suspicious circumstances makes the initial onus heavier and the propounder has to remove all legitimate suspicion.
41. As discussed above, the objectors/Appellants have miserably failed to prove their pleaded case of impersonation of the testatrix at the registration and undue influence. In fact, even if it were to be assumed that the registration was suspect, the same would not retrospectively vitiate the execution of the Will itself, in view of Wills not being compulsorily registrable.
42. In a judgment reported at 1944 ILR 388[*In the goods of Gokul Chand, deceased*], it was observed that the Legislature makes a distinction between mere signing and attesting, the latter being more than merely signing of a Will.
43. In the present case, the attesting witnesses have both come before the court and adduced evidence which could not be impeached in cross-examination. There was no suspicious circumstance proved by the appellants at all. Rather, due compliance of Section 63 of the Indian Succession Act and Section 68 of the Evidence Act is found in the present case. Corroborative evidence of physical fitness and mental alertness of the testatrix apart, all other allegations of suspicious circumstances have been fully dispelled.

- 44.** Another factor cannot be overlooked in the present case. The arguments made before this Court are largely being made for the first time by the appellants. The execution of the Will itself and/or the validity of the signature of the testatrix on the Will were not disputed in the court below. In the written objection, the plinth of the objection was the delay in registration of the document, which has been explained away by the then prevailing strike of the deed writers, as borne out by the evidence of the scribe.
- 45.** The other grounds were that the testatrix was unfit and ailing and was bed-ridden at the relevant juncture and that she did not have any mental lucidity sufficient to voluntarily execute a Will. Not a single scrap of medical paper and/or oral evidence of any neighbour or anyone else has been brought before the court by the appellants to substantiate such allegation.
- 46.** The allegation of undue influence has also not been substantiated at all. In paragraph 13 of the written objection, which is in Bengali vernacular, the objectors/appellants admit that the signature of the testatrix was taken on the Will but alleged that “probably” a third person impersonated the testatrix before the registration office.
- 47.** First, the expression “probably” takes the allegation into the realm of conjecture. Secondly, even if there was to be some discrepancy in the registration, such *post facto* discrepancy could not vitiate the prior execution of the Will three months back. In any event, the impersonation alleged is a figment of the appellants’ imagination and could not be substantiated at all by evidence.

- 48.** In *Meena Pradhan and others v. Kamla Pradhan and another*, reported at (2023) 9 SCC 734, cited by the respondents, the Supreme Court reiterated that the requirement of Section 63 of the Indian Succession Act and Section 68 of the Evidence Act are to be fulfilled for grant of probate, which has been duly done in the present case. There is nothing to alert the judicial conscience of the court in any manner, nor did the appellants succeed in substantiating their bald allegations.
- 49.** In *Pranati Ghosh and others v. Anil Kumar Ghosh*, reported at 2022 SCC OnLine Cal 2736, a Division Bench of this Court rightly observed that the onus of the propounder may be discharged if he succeeds in bringing on record sufficient cogent evidence removing all suspicions; however, the burden of proof shifts to the caveator if a defence of undue influence, fraud or coercion is raised. Several English judgments were considered by the Division Bench in coming to such finding. The present case precisely fits the said observations. Since the objectors/appellants took the plea of undue influence/coercion, it was their initial onus and burden to substantiate such allegations. Having failed to do so, there is no reason why the grant of probate by the learned Trial Judge ought to be faulted.
- 50.** It may be mentioned here that even if there were two views possible on the same set of facts, since the Trial Court has accepted one of the plausible views, this Court, sitting in First Appeal, cannot or ought not to substitute its own views for that of the learned Trial Judge. It is a

well-settled and time-honoured principle of law and there is no reason why we should deviate from the same.

51. In view of the above discussions, we are of the opinion that the appellants have failed to make out any case for setting aside the impugned judgment and decree granting probate of the last Will and Testament of Late Panchabala Pal.
52. Accordingly, the appeal fails. Thus, F.A. No. 130 of 2016 is dismissed on contest, thereby affirming the judgment and decree dated February 24, 2012 passed by the learned Additional District Judge, Fifth Court at Burdwan in O.S.(Will) Case No. 26 of 2007.
53. There will be no orders as to costs.
54. CAN 2 of 2023 is also disposed of accordingly.
55. Interim orders, if any, stand vacated.
56. A formal decree be drawn up accordingly.

(Sabyasachi Bhattacharyya, J.)

I agree.

(Uday Kumar, J.)