

30.07.2024.
Item No. 17.
Court No. 13
ap

F.A. No. 141 of 2014

**Smt. Manju Pathak
Versus
Sri Sakti Halder & Anr.**

Mr. Piyush Chaturvedi,
Ms. Soma Kar Ghosh,
Mr. Anujit Mukherjee,
Mr. Arabinda Pathak.

..For the appellant.

Mr. Partha Pratim Roy,
Mr. Prasanta Bishal.

...For the respondents.

1. This Bench and the earlier Bench have heard and considered the pleadings, evidence on record and the exhibits carefully.

2. The instant appeal is directed against the judgment and decree dated 27th August, 2013 passed by the learned Additional District Judge, 2nd Court, North 24 Parganas at Barasat in O.S. No. 87 of 2001.

FACTS OF THE CASE

3. The facts relevant to the case are that one Anil Kumar Halder died on 8th January, 2001 leaving behind a Will dated 23rd February, 1995. By the said Will, the testator bequeathed his house and the land appertaining thereto to his two grandsons, namely, Sakti Halder and Sanjoy Halder i.e. sons of his pre-deceased son, Swapan Halder.

4. The mother of the Sakti Halder and Sanjoy Halder, Sibani Halder originally filed Misc. Case No. 166 of 2001 for Probate under Section 276 of the Indian Succession Act, 1925 on 28th March, 2001.

Upon objection being filed by the appellant herein, Manju Pathak, the daughter of the testator, the application for Probate being Misc. Case No. 166 of 2001 was converted into O.S. No. 87 of 2001.

5. The principal objections urged against grant of Probate by the appellant were as follows:-

(a) The Will has been executed under suspicious circumstances, which are, inter alia, as follows:

(i) Sibani Halder had actively participated in the preparation of the Will;

(ii) The testator could not have excluded the appellant or her husband from the bequest;

(iii) There are hand written interpolations on the Will. The English and Bengali dates mentioned on the Will are at variance with one and another.

(iv) The testator had at all material times signed all the collateral documents including as a witness to a Sale Deed and rent receipts as Anil Halder and not as Anil Kumar Halder as signed in the Will;

(b) The testator was bed ridden and/or did not have the mental or physical capacity to execute the Will in question.

6. On behalf of the appellant/objector, three witnesses, namely, Manju Pathak was examined as OPW-1, Mr. Arjun Biswas, uncle of Manju pathak, who is stated to have sold certain properties to third parties

which was witnessed by the testator was examined as OPW-2 and Shyamal Sarkar, a tenant of the premises, who produced the rent receipts with the signature of the testator was examined as OPW-3.

7. On behalf of the Propounder, Sibani Halder was examined as PW-1, Mr. Subodh Basu, a neighbour and attesting witness to the Will, was examined as PW-2, one Dr. Sudhin Kumar Ghosal deposed as PW-3, who was a friend of the testator and also an attesting witness to the Will.

8. The oral evidence was concluded in the matter sometime on 23rd June, 2008.

9. Challenging an interim order dismissing an application of Sakti Halder and Sanjoy Halder, they moved this Court under Article 227 of the Constitution of India in C.O. No. 1889 of 2011.

10. The said revisional application was disposed of by an order dated 12th July, 2011 by a learned Single Judge of this Court granting liberty to the petitioner to file a fresh application for amendment of the plaint in the Court below.

11. Such application was filed before the Trial Court with twofold prayers. Sakti Halder and Sanjoy Halder stated that they were minors when the original application for Probate was filed by their mother. They have now attained majority. They wished to be substituted in place and stead of their mother as the legatees under the Testament.

12. They also applied for conversion of the application from one for Probate to that of the Letter of Administration. The said application was allowed on 18th March, 2013. On the basis of the evidence already led by the parties, the Court proceeded to hear the argument until 19th July, 2013 from both the sides and delivered the impugned judgment on 27th August, 2023.

13. The appellant produced an opinion of a hand-writing expert that was exhibited in the Court below. The expert has stated that the hand of the testator was troubling while he was putting his signature. The documents produced before the hand writing expert for opinion were the signatures on the Will of the Testator and his signatures as a witness in a sale deed dated 24th April, 1985 between Arjun Biswas and Kamala Biswas.

14. The handwriting expert did not state that the signatures on the sale deed and the Will did not belong to the same person. The appellant also produced rent receipts issued in favour of OPW-3, Shyamlal Sarkar where the testator had signed as Anil Halder and not as Anil Kumar Halder. Even in the sale deed in question, the testator had signed as Anil Halder and not as Anil Kumar Halder. The Court below, however, did not mark the rent receipts as exhibits as part of Exhibit-C which was the sale deed dated 24th April, 1985.

15. Also exhibited in the Court below was the Death Certificate of the testator where his name is mentioned as Anil Kumar Halder and the Voter's Identity Card where his name is also mentioned as Anil Kumar Halder.

FINDINGS OF THE TRIAL COURT

16. In a very sound and detailed analysis of the evidence both oral and documentary, the Court below found that there were no suspicious circumstances in execution of the Will for the following reasons:

(a) The appellant, Manju Pathak was given a sum of Rs.1,00,000/- and Rs.50,000/- each to the two daughters of Manju Pathak by the testator. The appellant admitted the same in course of cross-examination.

(b) The Court thereafter proceeded to rely upon a decision of the Supreme Court of India in the case of ***Gudev Kaur & Ors. Vs. Kaki*** reported in ***(2006) 3 SCC 114*** and found that it was not for a Court to sit in appeal over the propriety of a bequest under a Will.

(c) In so far as the physical and mental incapacity of the testator is concerned, the Court found that the appellant could not produce any shred of evidence demonstrating the same.

17. Admittedly, Manju Pathak, the appellant and her husband were residing with the testator even after

marriage. They still continue to reside in the same house.

18. The Court found that it is not unusual for a person named Anil Kumar Halder to sign both as Anil Halder as well as Anil Kumar Halder in West Bengal. The document produced i.e. the Sale Deed marked as Exhibit-A/1, ration card of the appellant containing the name of the testator as Anil Halder were not conclusive proof that the testator only signed as Anil Halder and not as Anil Kumar Halder.

19. It found that a man who may have been ill or bed-ridden cannot be understood of incapable of executing any document. The testator had sufficient mental and physical capacity to execute the Will.

20. The evidence of the handwriting expert was found to be of a no serious consequence upsetting the execution of the Will or questioning the genuineness of the same. The Court found favour with the evidence of PW-3, Dr. Sudhin Kumar Ghosal, who knew the testator Anil Kumar Halder very well. He has clearly deposed that he had seen the testator to sign and execute the Will.

21. The signature of Dr. Ghosal was compared with the signature on the Hazira filed in the Court below. This evidence read with the evidence of other attesting witness, namely, Subodh Basu, who clearly had proved the execution of the Will and had stated that he

had signed as an attesting witness weighed heavily with the Court below.

CONSIDERATION OF THE SUBMISSIONS OF THE APPELLANT AND ANALYSIS AND FINDINGS OF THIS COURT

22. Mr. Piyush Chaturvedi, learned Counsel appearing for the appellant has relied upon a number of decision to challenge the findings of the Court below. It is submitted by Mr. Chaturvedi that the scribe of the Will was not produced in evidence.

23. He submits that there is no evidence to indicate that the Will was prepared on the instructions of the testator. The technical recital and legal words and language of the Will would clearly indicate that the testator, who was a carpenter, could not have written such a Will himself. They must have been prepared by a third person. In the absence of any evidence that the Will was prepared on the instructions of the testator, the Court below erred in relying upon the same. Reference in this regard is made to paragraphs 24.1, 24.2, 24.8, 25.1, 25.4, 29.2, 29.3 and 29.5.3 of the decision of the Hon'ble Supreme Court of India in the case of ***Kavita Kanwar – Vs. – Pamela Mehta & Ors.*** reported in ***(2021) 11 Supreme Court Cases 209.***

24. This Court notes that the appellant had not urged this specific point in her objection or the written statement in the Court below. There was even not suggestion given to the witnesses for the

respondents in this regard. On the contrary the contents of the Will, the reason for exclusion of the appellant from immovable property and an implied recognition of the residence of the appellant in the estate are sufficient and convincing reasons for bequeathing his entire property to the two sons of his deceased son. The bequest is not unusual. The testator has not completely disinherited the appellant since she was given a sum of Rs.1,00,000/-, and Rs.50,000/- each was given to the two daughters of Manju Pathak. In this regard, the decision of the Supreme Court in **Raj Kumari v. Surinder Pal Sharma, (2021) 14 SCC 500** may be referred to:-

*12. In Jaswant Kaur v. Amrit Kaur [Jaswant Kaur v. Amrit Kaur, (1977) 1 SCC 369] , it was held that suspicion generated by disinheritance is not removed by mere assertion of the propounder that the will bears the signature of the testator or that the testator was in sound and disposing state of mind when the will disinherits those like the wife and children of the testator who would have normally received their due share in the estate. **At the same time, the testator may have his own reasons for excluding them.....**"*

25. Mr. Chaturvedi next relied upon a decision in the case of **Niranjan Umeshchandra Joshi – Vs. – Mrudula Jyoti Rao & Ors.** reported in **(2006) 13 Supreme Court Cases 433**, particularly paragraph 33 and 34 thereof that when there is a proof of a feeble and debilitated mind, the Will should not be treated as genuine and must be rejected by a Court.

26. As already stated earlier, one of the attesting witnesses, who was a Medical Doctor, has clearly stated that the testator has signed on the Will in his presence. He has not stated that the testator was mentally and physically incapable of putting his signature or making the bequest as contained in the Will. The presence of the doctor as an attesting witness to the Will dispels any doubts as regards the testator's mental and physical capacity.

27. The evidence of other attesting witnesses is equally convincing against the appellant. The appellant has not at all cross-examined the PW-2 and PW-3 on this score. The answers of PW-1, PW-2 and PW-3 to the halfhearted questions as regards the testator's mental and physical capacity have clearly brought on record that the testator was in sound mental capacity to make the bequest as he has done in the Will in question. The decision of **Niranjan Umeshchandra Joshi** (supra) cannot be applied to the facts of the present case.

28. There is no evidence brought by the appellant that the testator was illiterate. The Will is written in Bengali Vernacular. The language of the Will is not so intensely legalized for the testator or witnesses to understand the same. On the contrary, one of the witnesses, namely, Mr. Ghosal was a Medical Doctor and a friend of the testator. The other attesting witness was a neighbor and a retired Railway Employee. The

testator having friends like a retired Railway employee and a Doctor could be presumed to be extremely well versed in with the Bengali language. The dicta of **Kavita Kanwar** (supra) decision would have no manner of application in the facts of the present case.

29. Mr. Chaturvedi next argues that the propounder of the Will has not indicated as to how she came into possession of the documents. Reliance in this regard is placed on paragraphs 58, 60, 63 and 65 in the case of **S.R. Srinivasa & Ors. – Vs. – S. Padmavathamma** reported in **(2010) 5 Supreme Court Cases 274**.

30. This Court firstly notes that PW-1 was not cross-examined or questioned as regards how she came into possession of the Will. Such a case has not even made out in the written statement filed or objection filed by the appellant in the Court below. Admittedly, Sibani Halder was present when the Will was executed. The absence of evidence as regards how the propounder came to the custody of the Will assumes little or no importance in the facts of the instant case. It is but normal that since the mother of the two minor beneficiaries under the Will, would know about the existence of the will. She was present when the will was executed. The decision of **S.R. Srinivasa** (supra) can therefore have no manner of application in the facts of the present case.

31. On suspicious circumstances, the decision in the case of **H. Venkatachala Iyengar – Vs. – B. N.**

Thimmajamma & Ors. reported in **AIR 1959 Supreme Court 443** and the decision in the case of **Gorantla Thataiah – Vs. – Thotakura Venkata Subbaiah & Ors.** reported in **AIR 1968 Supreme Court 1332** lay down two general principles which indicate suspicious circumstances in execution of a Will. It is in the facts and circumstances of each case that one has to apply the aforesaid principles.

32. This Court finds that there are no suspicious circumstances established in so far as the Will in question is concerned by the appellant in the Court below. None have been found by the Court below, none have been found by us in the instant appeal.

33. The signature of the testator on the Will as Anil Kumar Halder instead of Anil Haldar as he witnessed the on a sale deed dated 29th April 1985, and in rent receipts, it may first be noted that the middle name 'Kumar' of the testator has not been used for the first time in the Will. The Voter ID card which is a document of significance has 'Kumar; as the testator's middle name. The death certificate of the testator also reflects 'Kumar' as his middle name. There is a huge difference between a will which is a testamentary document, and any other documents of transfer. Therefore, it is quite possible that the testator wanted his full name including his middle name to appear on the Will which is his last document as regards his properties.

34. While deciding on the validity of a Will, the conscience of the Court cannot be ruffled by technicalities. Reference in this regard, may be made to the decision of the Supreme Court in **Raj**

Kumari (Supra):-

11. “....In *H. Venkatachala Iyengar v. B.N. Thimmajamma* [H. Venkatachala Iyengar v. B.N. Thimmajamma, AIR 1959 SC 443] dilating on the statutory and mandatory requisites for validating the execution of the will, **this Court had highlighted the dissimilarities between the will which is a testamentary instrument vis-à-vis other documents of conveyancing, by emphasising that the will is produced before the court after the testator who has departed from the world, cannot say that the will is his own or it is not the same. This factum introduces an element of solemnity to the decision on the question where the will propounded is proved as the last will or testament of the departed testator....**”

17. In *M.B. Ramesh v. K.M. Veeraje*, (2013) 7 SCC 490 : (2013) 3 SCC (Civ) 576] reference was made to the view expressed by the Division Bench of the Bombay High Court in *Vishnu Ramkrishna v. Nathu Vithal* [Vishnu Ramkrishna v. Nathu Vithal, 1948 SCC OnLine Bom 97 : AIR 1949 Bom 266] wherein it was observed : (M.B. Ramesh case [M.B. Ramesh v. K.M. Veeraje, (2013) 7 SCC 490 : (2013) 3 SCC (Civ) 576] , SCC p. 505, para 27)

“27. [...] ‘15. ... We are dealing with the case of a will and we must approach the problem as a court of conscience. It is for us to be satisfied whether the document put forward is the last will and testament of Gangabai. If we find that the wishes of the testatrix are likely to be defeated or thwarted merely by reason of want of some technicality, we as a court of conscience would not permit such a thing to happen. We have not heard Mr Dharap on the other point; but assuming that Gangabai had a sound and disposing mind and that she wanted to dispose of her property as she in fact has done, the

mere fact that the propounders of the will were negligent—and grossly negligent—in not complying with the requirements of Section 63 and proving the will as they ought to have, should not deter us from calling for the necessary evidence in order to satisfy ourselves whether the will was duly executed or not.’ (Vishnu Ramkrishna case [Vishnu Ramkrishna v. Nathu Vithal, 1948 SCC OnLine Bom 97 : AIR 1949 Bom 266] , SCC OnLine Bom para 15)”
(emphasis in original)

35. The Will, therefore has been validly executed in terms of Section 63 of the Indian Succession Act and 68 of the Indian Evidence Act. The signature of the testator cannot be doubted in the facts of the case.

36. On the conversion of the application for Probate made initially to that of a Letter of Administration, the learned Counsel, Mr. Chaturvedi, has vehemently challenged the same. He argues that an interlocutory order can be challenged even at the final hearing. He relies upon three decisions of the Hon’ble Supreme Court of India in this regard. The first one is in the case of **Satyadhyan Ghosal & Ors. – Vs. – Deorajin Debi (Smt.) & Anr.** reported in **AIR 1960 Supreme Court 941** and another in the case of **Seth Nanak Chand Shadiram – Vs. – Amin Chand Pyarilal** reported in **AIR 1970 Calcutta 8** being a decision rendered by a Division Bench of this Court particularly paragraphs 10, 11, 18 and 19 thereof.

37. Reliance is also placed on the decision of **Achal Misra – Vs. – Rama Shanker Singh & Ors.** reported

in **(2005) 5 Supreme Court Cases 531** particularly paragraphs 11 to 13 thereof.

38. This Court is of the view that the decision and proposition of law urged by Mr. Chaturvedi cannot be disputed. Interlocutory orders or any error committed at the interlocutory stage that would have a vital bearing on the final decision of a case can always be raised at the time of final hearing.

39. This Court, however, does not find any serious error in an application for Probate being converted into one for Letter of Administration. In the case of **Vatsala Srinivasan – Vs. – Shyamala Raghunathan** reported in **(2016) 13 Supreme Court Cases 253** the conversion of an application for Probate to that of a Letter of Administration is vice versa and has been upheld. Paragraphs 8 and 18 of the said judgment are set out hereinbelow:

8. Section 213 of the Indian Succession Act, 1925 provides that no right as executor or legatee can be established in any Court of Justice unless a Court of competent jurisdiction in India has granted probate of the Will under which the right is claimed or has granted letters of administration with the Will or an authenticated copy annexed. Section 220 provides that letters of administration entitle the Administrator to all rights belonging to the intestate as effectually as if the administration had been granted at the moment after his death. The effect of a probate under section 227 is that probate when granted establishes a Will from the death of the testator and renders valid all intermediate acts of the executor as such. Under section 222 a probate can be granted only to an executor appointed by the Will. When probate has been granted to several executors and one of them dies, section 226 stipulates that the entire representation of the testator accrues to the surviving executor or executors. Section 232 then provides as follows:—

“232. Grant of administration to universal or residuary legatees.— When (a) the deceased

has made a Will, but has not appointed an executor, or

(b) the deceased has appointed an executor who is legally incapable or refuses to act, or who has died before the testator or before he has proved the Will, or

(c) the executor dies after having proved the Will, but before he has administered all the estate of the deceased, an universal or a residuary legatee may be admitted to prove the Will, and letters of administration with the Will annexed may be granted to him of the whole estate, or of so much thereof as may be unadministered.”

Section 232 deals with three identified situations. The first is where no executor has been named in the Will executed by the deceased. The second is where though an executor has been appointed by the deceased in the Will the executor (i) is legally incapable; or (ii) refuses to act; or (iii) has died before the testator; or (iv) had died before he has proved the Will. The third situation deals with a case where the executor after having proved the Will has died but before the estate of the deceased has been administered. In either of these situations section 232 provides that (i) a universal or a residuary legatee may be admitted to prove the Will; and (ii) letters of administration with the Will annexed may be granted to him of the whole estate or of such part of the estate as remains to be administered. The law does not postulate a vacuum in the administration of the estate of a deceased testator. Hence in the several situations to which a reference has been made in section 232, the Act contemplates that the universal or a residuary legatee may be admitted to prove the Will with a consequential issuance of letters of administration with the Will annexed. The second set of eventualities to which a reference has been made earlier contemplates a situation where the executor under a Will of the deceased has died before the Will was proved. The death of the testator before the Will is proved may occur either before the presentation of a Petition for probate or, for that matter, even after the presentation of a Petition but before probate has actually been granted upon the Will being proved. Whether as a matter of fact the death of the executor takes place before or after the institution of a Petition for probate, the death in such a case is prior to the Will being proved. Hence in both the situations, a residuary legatee is entitled in law to be admitted to prove the Will and to the issuance of letters of administration.

18. *Both a proceeding for the grant of probate as well as a proceeding for the grant of letters of administration with the Will annexed is initiated for protecting the interest of the legatees under the Will. The essence of the enquiry in both the proceedings is the same and relates to the genuineness and authenticity of the Will. Having*

regard to these fundamental similarities in both the proceedings there is no conceivable reason as to why the law must be regarded as prohibiting a beneficiary from seeking to continue the proceedings upon the death of the sole executor and as incidental thereto for seeking formal conversion of the proceeding from one for the grant of a probate to one for the issuance of letters of administration. If there were to be a specific prohibition in law enacted by the legislature the position may have well been different. In the absence of a legal prohibition to the contrary the Court would not readily accept a submission, the effect of which would be to result in delaying the proceedings for the administration of the estate and a resultant multiplicity of proceedings. This is amplified in the present case where the recording of evidence is complete. Nearly eight years have elapsed since the institution of the suit. Evidence of seven witnesses has been recorded and the suit is ripe for final hearing. There is no dispute about the position that in any event the beneficiary would have been entitled to institute separate proceedings independently for the grant of letters of administration. That right can well be espoused by the beneficiary by seeking a continuation of the existing proceedings. It must be noted, that this right which is available is recognized with reference to a beneficiary under the Will. A fundamental difference has to be made between a situation where the legal heirs of a sole executor seek impleadment in the proceedings on the death of the executor. The legal heirs of the sole executor cannot be brought on record since the right to seek probate of the Will subsists in the executor alone. But that is not to say that a beneficiary under the Will is prohibited from continuing the existing proceedings. The proceedings enure to the benefit of the legatee. The appointment of the administrator is but a step in aid of the proper administration of the estate of the deceased. Section 273 provides that probate or letters of administration shall have effect over all the properties and estate of the deceased through the State in which the same is or are granted and shall be conclusive as to the representative title against all debtors of the deceased and all persons holding property which belongs to him. Parties, documents and facts are similar in both sets of proceedings. In this view of the matter and particularly having regard to the judgment of the Supreme Court to which we have made a reference earlier we are of the considered view that the learned Single Judge was not in error in allowing the Chamber Summons."

40. In **Shambhu Prasad Agarwal & Ors. – Vs. – Bhola Ram Agarwal** reported in **(2000) 9 SCC 714** it was held in paragraphs 2, 3, 5 and 6 as follows:

2. One Maina Devi, wife of late Baidyanath Agrawal executed a will on 14-6-1976 nominating her nephew Matadin Agarwal to be the owner of her house, landed properties and other immovable properties. On 23-9-1981, Maina Devi died. In the year 1982, Matadin Agarwal filed a probate petition (Probate Case No. 1 of 1982) which was converted into Title Suit No. 1 of 1985. In the probate petition, Matadin Agarwal claimed grant of probate in his favour. On 13-7-1987, Matadin Agarwal died. On the death of Matadin Agarwal, his heirs who are appellants before us, filed an application in Title Suit No. 1 of 1985 for their substitution in place of Matadin Agarwal. They also filed another application for amendment of the petition. In the amendment application, it was prayed that instead of grant of probate the legal heirs may be granted letters of administration. These applications filed by the appellants herein were rejected by the court. The revision filed by them was also dismissed by the High Court. It is against these orders, the appellants are before us.

3. Learned counsel appearing for the appellants urged that the view taken by both the courts below is erroneous inasmuch as the appellants being the heirs of the legatee were entitled to be substituted and to pray for issue of letters of administration. However, this is contested by the learned counsel for the respondent.

5. We find that it is not disputed that Matadin Agarwal was a legatee under the will. It is true that Matadin Agarwal ought to have applied for issue of letters of administration and not for probate. However, this did not debar his heirs to get the probate petition amended. The trial court rejected both the applications of the appellants on the ground that since the probate petition filed by the legatee related to his personal right, therefore no right accrued to the appellants for their substitution in his place. This view, according to us, is not correct. Matadin Agarwal, as stated above, was a legatee and not an executor under the will. It is true that where an executor dies, his heirs cannot be substituted because the executor possessed personal right, but this is not applicable where the heirs of a legatee apply for issue of letters of administration. It is not disputed that today the appellants can file a petition for issue of letter of administration. Since considerable time has elapsed, we feel that the interest of justice demands that the proceedings should come to an end as early as possible and we should not dismiss this appeal merely on highly technical ground.

6. For the aforesaid reason, we set aside the orders under challenge and send the case back to the trial court. We permit the appellants to be substituted in the proceedings and also permit them to amend the petition. It goes without saying that after the remand, it will be open to the parties to take such plea as may be available to them under the law. Since the matter is pending for a considerable time, we direct the lower court to decide the matter expeditiously. The appeal is allowed. There shall be no order as to costs.

41. The upshot of the aforesaid decisions is that the grant of Probate and Letter of Administration are covered under the same Chapter of the Indian Succession Act, they are meant to give legal efficacy to a testamentary document with or without any executor.

42. The change of an application from Probate to that of Letter of Administration can cause no serious prejudice to any party. In fact, the facts of the instant case bear substantial similarity with the facts of the recent decision of the Bombay High Court in the case of **Shirin Boman Faramarzi v. Zubin Boman Faramarzi** reported in **2013 SCC OnLine (Bom) 1267** particularly paragraphs 18 thereof.

18. On perusal of the record produced by parties, in my view both the executors who were alleged to have been appointed by the said deceased in the Will in question have not come forward to act as an executors. Though this Court had passed an order impleading the executors with a view to ascertain whether any of those executors who would act as executor or would renounce the executorship, as far as Mr. Himanshu Kode is concerned, he neither appeared before this Court nor filed any affidavit in reply. There was no response given by Mr. Himanshu Kode to any of the letters addressed by the petitioner. As far as Mr. Diniar Mehta is concerned, he made a statement through his counsel that he did not want to act as an executor in respect of the Will in the form as annexed or produced with the petition by the petitioner. Since Mr. Himanshu Kode has

not come forward to act as an executor though served with notice and proceedings and since Mr. Diniar Mehta has refused to act as an executor in respect of the Will in the form in which it is produced by the petitioner, in my view in this situation, the beneficiary would have been entitled to file a petition for Letters of Administration with Will annexed. It is the case of the petitioner that since none of the executors had come forward to act as executors and in view of the erstwhile advocate filing a petition for probate instead of filing petition for Letters of Administration, petitioner had filed such proceedings. In my view, no prejudice would be caused to the caveator if the petition filed for probate is allowed to be converted into the petition for Letters of Administration in the circumstances referred to above.

43. It is seen that at the time when the application for Probate was made by Sibani Halder, mother of Sakti Halder and Sanjoy Halder, they were minors. Upon their attaining majority, their substitution in the capacity as legatees as petitioners is normal. Both the probate and letter of administration proceedings is to test the validity of the will; the former is the procedure devised for proving the valid execution of the latter.

44. In view of the dicta mentioned in the cases referred to hereinabove, the conversion of the application for Probate to that of a Letter of Administration by the Court below cannot be faulted. On the last argument of Mr. Chaturvedi that Sibani Halder's presence during the execution of the Will should and must be understood as an active participation in preparation of the Will, this Court finds no clear evidence in this regard.

45. In this country it is not unusual for a grandfather to pass on his estate to the male lineage in

his family. The testator had already protected the residence of and had taken care of his daughter, son-in-law and her children, since after her marriage till his death.

46. Sibani Halder did not derive any specific or special benefit at all from the Will. It is only her sons that have been given the house property of the testator.

47. In the facts and circumstances of the case, this Court does not see any evidence of active participation of Sibani Halder in preparation of the Will of the testator. Even assuming for the sake of argument that the same could be inferred, that by itself will not constitute a suspicious circumstance so suspicious that would throw out the Will in question.

48. Furthermore, the active partition as alleged gets negated by the deposition of the attesting witnesses, and in law, such an active participation by a person must be of an overawing nature so as to dominate the Will of the testator if not replace his Will with that of the other person. In this regard, reference may be made to **Raj Kumari (Supra)**

12.. However, suspicion may arise where the signature is doubtful or when the testator is of feeble mind or is overawed by powerful minds interested in getting his property or where the disposition appears to be unnatural, improbable and unfair or where there are other reasons to doubt the testator's free will and mind. The nature and quality of proof must commensurate with such essentiality so as to remove any suspicion which a reasonable or prudent man may, in the prevailing circumstances, entertain.

49. For the reasons stated hereinabove, F.A. No. 141 of 2014 must fail and is hereby dismissed.

50. There will be no order as to costs.

51. L.C.R. be returned to the Court below as expeditiously as possible.

52. The Registry of this Court shall communicate a copy of this order to the Court below for necessary information.

53. All parties are directed to act on a server copy of this order duly downloaded from the official website of this Court.

(Rajasekhar Mantha, J.)

(Apurba Sinha Ray, J.)