

IN THE HIGH COURT AT CALCUTTA
CIVIL APPELLATE JURISDICTION
Appellate Side

Present:

The Hon'ble Justice Rajasekhar Mantha

And

The Hon'ble Justice Ajay Kumar Gupta

F.A. No. 192 of 2012

With

I.A. No.: CAN 5 of 2024

Deb Prosanna Konar

Vs.

Sujata Konar & Ors.

(In place of Dilip Kumar Konar, since deceased)

For the Appellant : Mr. Probal Das, Adv.
Ms. Madhumita Patra, Adv.
Mr. S. Chakraborty, Adv.

For the Respondent : Mr. Sarajit Sen Adv.
Nos. 2(a), 2(b), 3 and 4 : Mr. Haradhan Ghosh, Adv.

Heard on : 01.10.2024

Judgment on : 22.11.2024

Ajay Kumar Gupta, J:

1. The instant First Appeal is directed against the judgment and order dated 12th March, 2012 passed by the Learned 5th Court, Additional District Judge, Burdwan in O.S. (Will) Case No. 7/2011. By the said judgment and order, the Learned Judge rejected the application for probate of a Will of Testator, Sudhir Chandra Konar, filed by the executor, Deb Prosanna Konar.

FACTS OF THE CASE:

2. The short facts, leading to filing of this present appeal, are summarised as under:

One Sudhir Chandra Konar, Son of Late Dibakar Konar was a Government Pleader practicing in the Burdwan Court from 1976 to 1996. He made and executed a Holograph Will ('the said Will') on 31.12.1986 appointing his younger son, Deb Prosanna Konar as an executor thereof. At the time of executing and attesting the said Will, the testator was residing permanently at Radhanagar South Road, Burdwan Town within the jurisdiction of the Learned Trial Court. He died on 13.12.2000 leaving behind him his widow and his two sons, namely, Dilip Kumar Konar and Deb Prosanna Konar and two daughters, namely, Chitralkha Ghosh and Rita Roy. By the said Will, he bequeathed his 'residential two storied' house situated at Burdwan including a vacant plot of land measuring more or less four Cottahs on the eastern side of his residential house

intervened by a lane, equity shares and debentures standing in the name of Testator in Public Limited Companies exclusively to his younger son, Deb Prosanna Konar. He bequeathed the rest of his properties equally to all his legal heirs. His wife, Sudhamoyee Konar died during the pendency of the suit.

3. The sole executor, Deb Prosanna Konar filed an application for probate under Section 276 of the Indian Succession Act, 1925 (hereinafter referred to as 'the said Act') before the Learned District Delegate, Burdwan on 04.05.2002. Which was registered as Will (P) Case No. 82/2002. It was converted to O.S. (Will) Case No. 7/2011 after it became contentious, when one of the testator's son, namely, Dilip Kumar Konar and daughter, Chitralkha Ghosh filed written objections. The younger daughter, Rita Roy did contest the claim for probate.

4. Dilip Kumar Konar has denied and disputed all the averments made in the said probate petition and further stated that the testator did not execute such Will and it was not his last will and testament.

5. It was further alleged that the Will was not duly executed and properly attested and the same is surrounded with suspicious circumstances. The testator had equal love and affection with all his children and could not have deprived his daughters and other son from

the residential and landed properties as well as shares and debentures of the testator. The propounder has failed to remove all such suspicious circumstances. The Learned Trial Court has rightly rejected the prayer for probate and prays for dismissal of the instant appeal.

6. The daughter Smt. Chitralekha Ghosh denied and disputed the contention of the appellant/executor and further stated that the testator neither executed nor attested the said Holograph Will. The testator did not have any reason to deprive her from the shares and other properties of the testator. The grounds urged by both objectors are more or less similar and identical.

7. On the basis of pleadings filed by the parties, the Learned Trial Judge framed the following issues:

- i. Whether the petitioner has valid right to file the present application for grant of probate?
- ii. Whether the citations have been to the next in kin of the testator?
- iii. Whether the Holograph Will filed for Probate has been executed by the testator Sudhir Chandra Konar and the same has duly been attested by the attesting witnesses?
- iv. Whether the petitioner is entitled to get grant of Probate of the Will left by the testator Sudhir Ch. Konar?

8. Both sides adduced evidences, both oral and documentary during trial.

9. After examining evidence, both oral and documentary, the Learned Trial Judge came to conclusion that the executor is unable to prove the Holograph Will which is claimed to have been executed and attested in good and sound mind of the testator and also failed to remove suspicious circumstances i.e. the reason for depriving other legal heirs from the properties like Equity shares, debentures and dwelling house. The Learned Trial Judge held that since the testator was an eminent lawyer, could have kept the Will in his own custody. Handing a copy of the Will over to his clerk, namely, Gouri Shankar Bhattacharya, one of the attesting witnesses for safe custody is highly suspicious.

10. The Learned Trial Judge also noticed the demeanour of the attesting witness, who was clerk of the testator. P.W. 3, Amiya Kumar Chowdhury while answering questions put to him during the cross-examination by the Opposite Parties. The Learned Trial Judge noticed that he was scared and fumbling while deposing his evidence. He stated that he was called by the Testator for attestation of the Will first at 9 am, then said at 10 am and then said at 11 am. P.W. 3 has stated that in the later part of December, 1996, when he was in chamber of senior, the

testator asked and approached him to attest the Will which was already prepared by him.

11. The Learned Trial Court also found P.W. 3 further had stated that when the Will was scribed by the testator, he was not present and he stated that on entering in the chamber of the testator, he found the testator with the Will at his hand. He was asked to sign on the Will. As such, he signed the Will without going through the contents thereof since the testator was senior most lawyer of Burdwan Court. This was very unusual according to the Learned Court below.

12. P.W. 3 also stated that Chitto Babu accompanied him to the said chamber. He further stated that both sides of the pages were written but he could not say as to whether the scribing of the Will was completed or not. He could not recollect except P.W. 2, testator himself, whether Chitto Babu and another person was ever present there or not. He could not say which sort of ailment the testator suffered at that point of time.

13. The Learned Trial Court found that the testator was very old and he has been suffering from “Senile Dementia” in the year 1995 which results in chronic and progressive deterioration of behaviour. There is lesser or higher intellectual function due to organic brain disease, memory disorder, most common cause is “Alzheimer’s disease, front

temporal dementia and dementia due to diffuse cortical Lewy body disease. Due to such illness of the testator, the Learned Trial Judge refused to believe the voluntary registration of the Holograph Will after 14 years of its execution. The Learned Trial Court relying on a judgment of **Raghu Kumar's case reported in 2011 (3) ICC 561** held merely because a Will is registered Will, the same by itself is not sufficient to dispel all the suspicions regarding it.

14. The Learned Trial Judge emphasised on in the Letters (Exbt. No. B-2) as admitted by the appellant when the testator stated that he had not done anything with regard to his property or transferred the same to anyone. No explanation was found by the appellant with regard to the interpolation made in the said registered Will.

15. The Learned Trial Judge finally observed that the appellant could not remove any of the suspicious circumstances as pointed out by the opposite parties while adducing evidence. According to the Learned Court below (i) testator's own version on 18.10.1990 admits that he has not done anything under Indian Succession Act, 1925 in respect of his property, (ii) deprivation of natural heirs, (iii) interpolation of some words in the Will, (iv) delay in registration of 12 years when admittedly testator had been suffering from 'Senile Dementia', (v) choice of totally outsiders for attestation of the Will, (vi) keeping the Will in the custody of P.W. 2,

(vii) contradictory statements of attesting witnesses, (viii) petitioner's own version that he knew the date of execution of Will yet his mentioning in the letter of 1995 that his father had not made any arrangement of the shares, (ix) although there is no limitation in filing probate suit but unexplained inordinate delay in filing the same particularly after filing of the suit for partition by O.P.W. 1 are suspicious circumstances.

16. Accordingly, the Learned Trial Judge rejected the probate application. Hence, the present appeal.

SUBMISSION ON BEHALF OF THE APPELLANT:

17. The learned counsel appearing on behalf of the appellant submitted that the Holograph Will had been written by the testator himself. He was well-educated and was a Government Pleader of Burdwan Court from 1976 to 1996. He had written such Holograph Will on 31.12.1986 by his own hand writing in his chamber in presence of the attesting witnesses and same was proved by the attesting witnesses, namely, Gouri Shankar Bhattacharya and Amiya Choudhury.

18. The P.W. 2, Gouri Shankar Bhattacharya was a staff of Collector Office. He was subsequently posted as clerk of Government Pleader. He worked with the testator from the very beginning till 1996. He always attended the chamber of the testator in the morning and evening. He

used to handle all his cases which the Testator represented the Government and he also maintained all communications with the Government. On the date of execution, he attended the chamber of the testator and found he was reading Gita. After completion of reading, the testator disclosed him that he is going to execute a Will. He asked him to call Amiya Babu and Chitto Babu to his chamber. When he returned to the chamber, he found the scribing of the said Will about to be completed and, thereafter, the testator put his signature in the said Will in his presence and then he put his signature on the Will. He also read it at that point of time.

19. During cross-examination, he admitted that he could not relate the exact date of execution. He stated he accompanied the testator to the office of the District Sub-Registry, Burdwan on the date of registration of the Will. He identified the testator in the Registry Office before the Registrar.

20. He further stated that at the time of execution of the Will, the testator was in sound health and disposing state of mind.

21. P.W. 3, Amiya Choudhury is a practicing lawyer of the Burdwan Court. He deposed evidence and stated Sudhir Babu, during his lifetime, executed a Holograph Will on 31.12.1986. He put his signature in the

said Will in his presence and other witnesses, namely, Chitto Ranjan Konar and Gouri Shankar Bhattacharya. P.W. 3 also proved the said Will in the Court dock.

22. The propounder has able to prove the Holograph Will dated 31.12.1986 by adducing two attesting witnesses, which was subsequently registered before the DSR, Burdwan on 19.11.2001. However, the Learned Trial Judge did not consider the Will as genuine though the propounder has been able to prove the Will by the attesting witnesses in terms of Section 63 read with Section 68 of the Indian Succession Act, 1925. No suspicious circumstances left to disprove the Will.

23. It was further pointed out by the learned counsel that the Learned Trial Judge failed to appreciate the actual intention of the testator. He had a clear intention that the dwelling house would not be partitioned in any manner. He wanted to bequeath his two storied house including 4 Cottahs of land and Equity shares and debentures exclusively to his younger son, Deb Prosanna. He has mentioned in his Will that his elder son, Dilip resides in New Delhi in place of service. He had extended financial help to buy a flat at Delhi. Dilip Konar acquired one flat in Co-operative Housing Colony, where he was residing with his daughter and wife. Both the daughters of the testator are married and well settled, one

residing at London and another at Bangalore. Furthermore, the Testator has bequeathed his other remaining properties in equal share to all his legal heirs. So, question of deprivation to any of the legal heirs from the properties by the Testator is not at all correct averment. He had made provision for all legal heirs. He had not left any one from getting share from his other properties.

24. Learned counsel representing the appellant further submitted that the Testator was in sound health and disposing state of mind at the time of scribing, execution and attestation of the said Holograph Will and also at the time of registration. It is admitted fact that the Testator was a renowned advocate of the Burdwan Court. He was Government Pleader from 1976 to 1996. He was very much dealing with cases and represented the Government of the West Bengal. So, question of unsoundness of mind or not having disposition state of mind at that material point of time does not arise. It is true he had become rigid and stubborn subsequently but that does not mean he was unsound mind at the time of registration. He was fully aware about his last intention as such he bequeathed his 'residential two storied' house situated at Burdwan including a vacant plot of land on the eastern side of his residential house intervened by a lane, Equity shares and debenture standing in the name of Testator in Public Limited Companies exclusively to his younger son, Deba Prosana Konar.

25. Learned counsel further submitted that there was bona fide omission in the said Will regarding appointment of executor. The Testator, subsequently, realised and interpolated the Will by incorporating the sentence “appointing Doctor Deb Prasona Konar as executor of this Will” by putting his full signature beside such interpolation. Such interpolation would not in any manner affect the intention of the Testator and the contents of the Will. Finally, he prays for setting aside the impugned judgment and order dated 12th March, 2012 passed by the Learned Trial Judge and further prays for allowing the instant appeal on the aforesaid facts and circumstances.

Learned counsel representing the Appellant has also filed written notes of argument and placed reliance of a judgment passed in the case of ***Rabindra Nath Mukherjee and Another v. Panchanan Banerjee (dead) by LRS. And Others***¹ to bolster his contentions that Registered Will made by a 90 years old lady, who was identified by an advocate before the Sub-Registrar, is not suspicious circumstances and deprivation of natural heirs by testatrix is also not by itself a suspicious circumstance.

¹ (1995) 4 Supreme Court Cases 459

SUBMISSION ON BEHALF OF THE RESPONDENTS:

26. Per contra, learned counsel appearing on behalf of the respondents vehemently opposed the prayer of the appellant and further strenuously submitted that the propounder failed to prove the Will and its properly execution and attestation. The said Will was obtained by the propounder by way of undue influence, fraud or coercion. Appellant has failed to remove the suspicious circumstances leading to the execution of such Will. As per the Respondents, the Will is an unnatural, improbable and unjustified as the Testator had no justifiable reason to execute the said Will by depriving his elder son and two daughters though he had equal love and affection towards them.

27. It is further submitted that the distribution of the properties of the testator to his legal heirs found unnatural, improbable and unjustified and no reason assigned for deprivation of the Equity shares, debentures, two storied houses and landed property to other legal heirs. It is true that the Holograph Will was registered but the same registration was made after 14 years of alleged execution and attestation of the Holograph Will after some interpolation and the said interpolation has been done after 14 years of attestation by the attesting witnesses. Therefore, the Holograph Will of the testator cannot be taken into account as a valid Will of the testator. The testator was not at all in sound and in disposition state of mind and health at the time of

execution and attestation of the Will or registration. He had been suffering from “Senile Dementia” which relates to a chronic and progressive deterioration of behaviour and higher intellectual function due to organic brain disease, memory disorder, most common cause is “Alzheimer’s disease, front temporal dementia and dementia due to diffuse cortical Lewy body disease since long time and it is admitted by the appellant himself on various occasions by writing letters to his sisters mentioning the disease of his father/testator, Sudhir Chandra Konar.

28. Apart from the above circumstances, there are several other contradictions and inconsistencies amongst the attesting witnesses with regard to the execution and attestation of the Will and regarding time and manner of scribe. Both the attesting witnesses are the interested witnesses. No independent witnesses were brought at the time of execution and attestation by the testator. It creates a serious doubt about the genuineness of the last Will of the Testator.

29. It was further submitted that the testator himself written a letter to his son admitting that he had not transferred his property to anyone under the Indian Succession Act, 1925. He had equal love and affection for all his children. He had no reason to exclude his son and daughters from his legacy.

30. The O.P. No. 1 instituted one suit for partition being Title Suit No. 70/2002 before the Learned Civil Judge (Senior Division), 1st Court, Chinsurah, Hooghly praying for a decree of partition. Thereafter, probate case had been filed by the propounder without explaining inordinate delay in filing the same is another suspicious circumstance shrouded the said Will. The Respondents finally pray for dismissal of the appeal with costs.

Learned counsel appearing on behalf of the Respondents has filed written notes of argument and also placed reliance of a judgment passed by the Hon'ble Supreme Court in the case of ***Shashi Kumar Banerjee & Ors. vs. Subodh Kumar Banerjee***² to support of his contention that when there are suspicious circumstances in the Will and when the caveator alleges undue influence, fraud and coercion, then the onus is on the propounder to explain and remove the same to satisfy the conscience of the Court.

DISCUSSION AND FINDINGS OF THIS COURT:

31. It is admitted fact that the Respondents/Opposite Parties have not denied the writings and signatures of the testator appearing in the Holograph Will dated 31.12.1986. However, they objected that the Will was not duly executed and properly attested and the same is surrounded

² **1964 AIR (SC) 529**

with suspicious circumstances. The other grounds of challenge are already set out above.

32. Now, the question before this Court is as to whether the Learned Trial Court was justified in rejecting the prayer of the Appellant for grant of Probate of the Holograph Will dated 31.12.1986 or not?

33. It is now well-settled that it is for the propounder to prove the Will, executed by the testator, that he was in sound mind to make the disposition. It is for the propounder to prove that the testator put his signature out of his own free will and that he signed it in the presence of witnesses, who attested it in his presence. The onus is totally on the propounder to dispel the allegations of undue influence, fraud or coercion is made by the caveator. Furthermore, the propounder must have to remove all legitimate suspicious circumstances to the entire satisfaction of the Court. It is well settled that any existence of suspicious circumstances itself would lead to a conclusion that the Will has not been duly executed by the Testator. All suspicious circumstances have to be removed as well by the Propounder.

34. In order to prove the case of the Appellant, the appellant/executor adduced himself as P.W. 1, one Gouri Shankar Bhattacharya as P.W. 2 and one Amiya Chowdhury as P.W. 3 as attesting witnesses respectively.

The appellant also tendered documents like Death Certificate of the testator marked as Ext. 1 and Original Holograph Will marked as Ext. 2.

35. During cross-examination of the P.W. 1, O.P. No. 1 produced some letters communicated between the testator and the son, marked as Exbts. A, A/1, A/2, B, B/1, B/2 and B/4 respectively on admission. P.W. 1 further admitted the letters marked as Exbts. A, A/1 and A/2 which were written by himself to O.P. No. 2, Smt. Chitralkha Ghosh and Exbts. B, B/1, B/2 and B/4 were written by the testator himself to the O.P. No. 1, Dilip Kumar Konar.

36. The Evidence on Record indicates that the deceased, Sudhir Chandra Konar had a two storied residential house at 3, Radhanagar South Road, Town Burdwan including 4 cottahs of vacant land just eastern side of his residential house, various Equity shares and debentures of the Public Limited companies as well as huge properties situated in and around Burdwan.

37. It is stated in the Will that testator was mentally and physically fit but he had to undergo an operation for Hernia within a few days and would be going to Kolkata for the said purpose. In those circumstances, he considers it would be proper to make provision for distributing assets that may be left by him amongst his heirs.

38. The Will also indicates about the legal heirs and their status. The Testator had mentioned in the Will that his two daughters are married and well settled. His elder daughter is living in England with her husband along with one son and one daughter. His eldest son Dilip Kumar Konar is serving in New Delhi and staying there with his family. He has only one daughter. His younger daughter, Smt. Rita Roy is staying at Bangalore with her one son and one daughter with her husband at his place of service. His younger son Sriman Deb Prasonna Konar is a Medical Practitioner and is now posted at Burdwan Medical College & Hospital and is staying with his wife and one daughter with him in his house at Burdwan.

39. In the said alleged Will, it is also mentioned that after considering all such aforesaid facts, the testator demised and bequeathed his properties to his legal heirs in the manner as stated hereunder:

“1) After his death, his younger son, Deb Prasonna Konar shall acquire a two storied residential house situated at 3 Radhanagar South Road, Town, Burdwan including 4 cottahs of vacant land just east side of his residential house, various Equity shares and debentures of the Public Limited companies

2) After his death, all other properties shall be distributed equally amongst the legal heirs”

40. Sri Gouri Shankar Bhattacharya (P.W. 2) and Sri Amiya Chaudhury (P.W. 3) deposed evidence as attesting witnesses and proved the signature of testator appearing in the said Will. P.W. 2 deposed that he used to act as clerk of the Ld. Govt. Pleader, Sudhir Babu. He executed a Holograph Will on 31.12.1986 in respect of his estate in presence of attesting witnesses. He further stated myself, Amiya Chaudhury, Ld. Advocate and one Chittaranjan Konar was the attesting witnesses. All the attesting witnesses signed in presence of Sudhir Babu. Sudhir Babu was in sound mind and health at the time of execution of the Will. Subsequently, the Will was registered in the Office of D.S.R. Burdwan. He identified the testator therein before the Registrar. The execution and registration of the Will were, therefore, validly proved.

41. P.W. 3 proved the Will as well as signature of the Testator and his own signature appearing in the said Will as attesting witness. He further deposed that Sudhir Babu was in sound mind and health at the time of execution of the Will. Both P.W. 2 and P.W. 3 proved the Will dated 31.12.1986 executed by Sudhir Chandra Konar. They proved preparation, execution and attestation of the Will in terms of Section 63 read with Section 68 of the said Act beyond any reasonable doubt.

42. However, it was pointed out by the Respondents that during cross- examination, both the attesting witnesses were unable to say exactly when the scribing of the Will completed although both attesting witnesses were present at the time of execution as such their evidence is not reliable. There are some minor contradictions or inconsistencies in the evidence of P.W. 2 and P.W. 3 but those can be ignored because they deposed more than two decades of the execution of the Will. Minor discrepancies and inconsistencies between witnesses suggest that they were not tutored. Here the witnesses were fully acquainted with the testator since long. Minor discrepancies and inconsistencies in their evidence would not defect the Will. Thus, the propounder has able to prove the Will by adducing two attesting witnesses in accordance with law.

43. Be that as it may, this Court is of the view that only proving of Will by the attesting witnesses is not sufficient. It is incumbent upon the Court to see all the surrounding suspicious circumstances while granting probate of a Will because Court has to see the intention of the testator and Last Will which may have been properly executed and his property would have been distributed amongst all the beneficiaries voluntarily or not, or free from undue influence, coercion, or duress and also its genuineness.

44. It would be essential here to consider the following judgments of the Hon'ble Supreme Court wherein the Hon'ble Supreme Court has settled the legal propositions for proving the Will in question on different situations.

45. One of the celebrated decisions relied by this Court on proof of a Will, passed in the case of **H. Venkatachala Iyenger vs. B. N. Thimmajamma**³ wherein the Hon'ble Supreme Court has clearly distinguished the nature of proof required for a testament as opposed to any other document. The relevant portion of the said judgment reads as under: -

"18. The party propounding a will or otherwise making a claim under a will is no doubt seeking to prove a document and, in deciding how it is to be proved, we must inevitably refer to the statutory provisions which govern the proof of documents. Sections 67 and 68, Evidence Act are relevant for this purpose. Under Section 67, if a document is alleged to be signed by any person, the signature of the said person must be proved to be in his handwriting, and for proving such a handwriting under Sections 45 and 47 of the Act the opinions of experts and of persons acquainted with the handwriting of the person concerned are made relevant. Section 68 deals with the proof of the execution of the document required by law to be attested; and it provides that such a document shall not be used as

³ **AIR 1959 SC 443**

evidence until one attesting witness at least has been called for the purpose of proving its execution. These provisions prescribe the requirements and the nature of proof which must be satisfied by the party who relies on a document in a court of law. Similarly, Sections 59 and 63 of the Indian Succession Act are also relevant. Section 59 provides that every person of sound mind, not being a minor, may dispose of his property by will and the three illustrations to this section indicate what is meant by the expression "a person of sound mind" in the context. Section 63 requires that the testator shall sign or affix his mark to the will or it shall be signed by some other person in his presence and by his direction and that the signature or mark shall be so made that it shall appear that it was intended thereby to give effect to the writing as a will. This section also requires that the will shall be attested by two or more witnesses as prescribed. Thus, the question as to whether the will set up by the propounder is proved to be the last will of the testator has to be decided in the light of these provisions. Has the testator signed the will? Did he understand the nature and effect of the dispositions in the will? Did he put his signature to the will knowing what it contained? Stated broadly it is the decision of these questions which determines the nature of the finding on the question of the proof of wills. It would prima facie be true to say that the will has to be proved like any other document except as to the special requirements of attestation prescribed by Section 63 of the Indian Succession Act. As in the case of proof of other documents so in the case of proof of wills it would be idle to expect

proof with mathematical certainty. The test to be applied would be the usual test of the satisfaction of the prudent mind in such matters."

In fact, the legal principles with regard to the proof of a will are no longer res integra. Section 63 of the Indian Succession Act, 1925 and Section 68 of the Evidence Act, 1872, are relevant in this regard. The propounder of the will must examine one or more attesting witnesses and the onus is placed on the propounder to remove all suspicious circumstances with regard to the execution of the will. In the above noted case, the Court has stated that the following three aspects must be proved by a propounder:-

- "(i) that the will was signed by the testator in a sound and disposing state of mind duly understanding the nature and effect of disposition and he put his signature on the document of his own free will, and*
- (ii) when the evidence adduced in support of the will is disinterested, satisfactory and sufficient to prove the sound and disposing state of the testator's mind and his signature as required by law, courts would be justified in making a finding in favour of propounder, and*
- (iii) if a will is challenged as surrounded by suspicious circumstances, all such legitimate doubts have to be removed by cogent, satisfactory and sufficient evidence to dispel suspicion. In other words, the onus on the propounded can be taken to*

be discharged on proof of the essential facts indicated therein."

46. Similarly, in the case of ***Jaswant Kaur v. Amrit Kaur and others***⁴, the Hon'ble Supreme Court pointed out that when a Will is allegedly shrouded in suspicion, its proof ceases to be a simple lis between the plaintiff and the defendant. What generally is an adversarial proceeding, becomes in such cases, a matter of the Court's conscience and then, the true question which arises for consideration is, whether, the evidence let in by the propounder of the Will is such as would satisfy the conscience of the Court that the Will was duly executed by the testator. It is impossible to reach such a satisfaction unless the party which sets up the Will offers cogent and convincing explanation with regard to any suspicious circumstance surrounding the making of the Will.

47. Similarly, the Hon'ble Supreme Court in the case of ***Anil Kak v. Sharada Raje***⁵, held and opined that the Court is required to adopt a rational approach and is furthermore required to satisfy its conscience as existence of suspicious circumstances plays an important role, holding:

"52. Whereas execution of any other document can be proved by proving the writings of the document or the

⁴ **(1977) 1 SCC 369;**

⁵ **(2008) 7 SCC 695.**

contents of it as also the execution thereof, in the event there exists suspicious circumstances the party seeking to obtain probate and/or letters of administration with a copy of the will annexed must also adduce evidence to the satisfaction of the court before it can be accepted as genuine.

53. As an order granting probate is a judgment in rem, the court must also satisfy its conscience before it passes an order.

54. It may be true that deprivation of a due share by (sic to) the natural heir by itself may not be held to be a suspicious circumstance but it is one of the factors which is taken into consideration by the courts before granting probate of a will.

55. Unlike other documents, even animus attestandi is a necessary ingredient for proving the attestation.”

48. In the case of ***Leela Rajagopal and others v. Kamala Menon Cocharan and others***⁶, the Hon’ble Supreme Court opined as under:-

“13. A will may have certain features and may have been executed in certain circumstances which may appear to be somewhat unnatural. Such unusual features appearing in a will or the unnatural circumstances surrounding its execution will definitely justify a close scrutiny before the same can be accepted. It is the overall assessment of the

⁶ (2014) 15 SCC 570

court on the basis of such scrutiny; the cumulative effect of the unusual features and circumstances which would weigh with the court in the determination required to be made by it. The judicial verdict, in the last resort, will be on the basis of a consideration of all the unusual features and suspicious circumstances put together and not on the impact of any single feature that may be found in a will or a singular circumstance that may appear from the process leading to its execution or registration. These are the essence of the repeated pronouncements made by the Hon'ble Supreme Court on the subject."

49. Considering the aforesaid decisions, in the present case in hand, it is admitted facts that the testator excluded his married daughters and elder son in the executed Will from the residential house situated in Burdwan including 4 cottahs of the land and Equity shares and debentures. However, the Testator bequeathed his other properties to all his legal heirs. Out of two daughters, younger daughter, Smt. Rita Roy did not contest the suit and thereby she accepted the last desire of her father. Only one son and one daughter contested the suit and raised doubt about the Last Will of the testator though they did not deny the handwritings and signature of the testator. The said Will was subsequently registered before the Office of District Sub-Registrar Burdwan. Suspicious circumstances apparent on the said Will as raised by the Respondents must have to remove by the Appellant herein. Now, this Court examines the same one by one herein below:-

50. Firstly, The Will was meticulously examined and this Court finds sufficient evidence to confirm its genuineness. The testator herein was an educated and accomplished Government Pleader, drafted the Holograph Will in his own handwriting, indicating his clear intention to leave the primary portion of his estate to the propounder, his son. This choice aligns with his right to bequeath his property to his son. No evidence suggested strained relationships among family members and letters between the testator and his son demonstrate affection and a clear intent that he did not want to partition with his residential house property within his legal heirs.

The testator clearly did not want his house at Burdwan to be sold out. The elder son and daughter Chitralekha were not residing in Burdwan. The younger son propounder was working in Burdwan and was living in the same house. He was settled in Burdwan. He was unlikely to sell out the house. The testator's logic in giving the house of Burdwan to the propounder is, therefore, logical and justified.

51. Secondly, the testator wrote a letter to his son Dilip on 18.10.1990 (Exbt. B/4) stating he had not yet made arrangements under the Indian Succession Act, 1925 despite executing a Will in 1986. Dilip had been living away from his father since 1959, first in Meerut and then in Delhi and their relationship was strained, partly for some times due to Dilip's

inter-caste marriage which was opposed by the family. Subsequently, the testator had tried to reconcile with Dilip through letters but Dilip never responded keeping their distant relationship. It is understandable that the testator did not disclose his intention regarding the Will to Dilip. The letter of the year 1990 does not affect the validity of the Will which was executed properly in the presence of witnesses long before the letter was written. It is quite natural that testator would not have intention to disclose to any legal heirs prior to his death regarding his last Will.

52. Thirdly, regarding the interpolation in the said Will, it is acknowledged that a sentence was added later, appointing Dr. Deb Prosanna Konar as the executor of the Will. The testator himself signed next to this addition. The Will was registered with the District Sub-Registrar, Burdwan and the same is confirmed by the Registrar as such, registration is presumed to have been properly done. At the time of registration, the attesting witness, Gouri Shankar Bhattacharya identified the testator before the Registering Officer. The failure to appoint an executor in the original Holograph Will was a bona fide mistake and the subsequent addition does not affect the Will's validity or the testator's intention. The exact timing of this addition is unclear but it is presumed to have been made before execution and/or registration. Therefore, this interpolation is not a suspicious circumstance and does not provide grounds or reasons to reject the prayer for probate of a Will.

53. Fourthly, the allegation of depriving the son and daughters of the testator's property is not substantiated as the testator did not entirely exclude them. The Will provides for a fair distribution of the remaining properties with the intention that other properties be divided equally among his children. The testator had substantial landed properties in the Burdwan district. The other children were well-settled by the time when the Will was executed. The younger son, who lived with the parents, cared for them and arranged medical treatment, was likely to be the primary beneficiary of the Burdwan property. The testator had also supported Dilip financially for purchasing a flat in Delhi. Given these circumstances, the testator's decision to leave the Burdwan property to his younger son, was natural and not an unjust deprivation of the other children. From the letters, exhibited during cross-examination, also show the clear intention of the testator that the residential house should not be partitioned. Based on the evidence, there are no suspicious circumstances surrounding the execution of the Will.

54. Lastly, the respondents raised question about the testator's mental state, suggesting that he was not in sound mind while executing and registering the Will due to his suffering from 'Senile Dementia'. While it is acknowledged that the testator had this conciliation, it was not evident in 1986, when the Will was executed. The propounder's letter

mentioned symptoms of dementia in 1995, not at the time of the Will's creation. Senile Dementia, common in elderly persons includes memory loss and difficulty with daily tasks, but it does not necessarily impair one's ability to make decision. The testator was actively practicing as Government Pleader until 1996, which requires mental sharpness suggesting he was mentally fit when he executed the Will. The attesting witnesses confirmed that the testator was in good health and in a sound state of mind during the execution. Therefore, despite his dementia, there is no evidence that he lacked the mental capacity to understand the Will as he had sufficient mental clarity at that time.

55. There is no doubt about the holograph Will was written by Testator himself and same was registered after 14 years before the Office of District Sub-Registrar, Burdwan in presence of attesting witness, Gauri Shankar Bhattacharya. He identified the Testator before the Registrar and, thereafter, it was registered. Such registration cannot be questioned because the Court can presume the same was properly registered as it was certified by the Registrar.

56. Not single document has emerged from the record that he was suffering from 'Senile Dementia' in the year 1986, when the Will was executed and attested. From the letter of propounder, it reveals the testator was suffering from 'Senile Dementia' in the year 1995. Therefore,

it can be accepted that the Testator was in a good mental health and in disposing state of mind and capacity to understand the implication of registration of the Will.

57. In the light of above discussion and propositions of law as laid down by the Hon'ble Supreme Court in the aforesaid judgments, we are of the view that the propounder has able to remove and prove the following requirements for satisfaction of this Court for granting a probate of a Holograph Will dated 31.12.1986 of Late Sudhir Chandra Konar as under:

- i) Last Will of the Testator;
- ii) True and clear intention of the Testator;
- iii) Preparation, proper execution and attestation;
- iv) Appointment of executor;
- v) Bequeathing his properties to his legal heirs with valid reasons thereof;
- vi) The testator had the mental and physical capacity to understand the nature and consequences of making a Will, including knowledge of his properties and beneficiaries thereof;
- vii) The Will made voluntarily, free from undue influence, coercion, or duress. Furthermore, the testator decision to create the Will on his own free will.
- viii) He also removed all suspicious circumstances shrouded in the Will, which was raised by the Respondents.

58. In the aforesaid premises, we have no hesitation to say that the Learned Trial Judge has misdirected himself in interpreting the circumstances by injecting his own findings and has thereby erroneously rejected the prayer of the Appellant/Plaintiff. Therefore, the impugned judgment and order dated 12th March, 2012 passed by the Learned 5th Court, Additional District Judge, Burdwan in O.S. (Will) Case No. 7/2011 is hereby set aside.

59. Consequentially, we are fully satisfied that the Appellant has proved the Will in accordance with law.

60. Accordingly, **F.A. No. 192 of 2012** stands **allowed** on contest without order as to costs. The Impugned Judgment and Order dated 12th March, 2012 shall stand set aside. Petitioner, Deb Prosanna Konar is entitled to get probate of the Will and Testament of the deceased Sudhir Chandra Konar dated 31.12.1986.

61. I.A. No.: CAN 5 of 2024 and connected application, if any, is also, thus, disposed of. The name of Sujata Konar, Respondent No. 2 (a), since deceased be expunged from the cause title of Memo of Appeal. Her only daughter Shemanti Banerjee is already on record of the Appeal.

62. Registry is directed to send down a copy of this Judgment as well as Trial Court Records at once to the Learned Trial Court for information and necessary action to grant probate in favour of the Appellant/Plaintiff on usual terms and conditions within fortnight from the date of communication of the Judgment.

63. Urgent photostat certified copy of this Judgment, if applied for, is to be given to the parties on priority basis on compliance of all legal formalities.

I Agree.

(Rajasekhar Mantha, J.)

(Ajay Kumar Gupta, J.)

Later:

After pronouncement of the Judgment, the learned advocate for the respondent prays for stay of the operation of the Judgment and Order.

Such prayer is considered and rejected.

(Rajasekhar Mantha, J.)

(Ajay Kumar Gupta, J.)