

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. 185 of 2015

With

I.A. No.: CAN 2 of 2018 (Old CAN No.: 3523 of 2018) & CAN 3 of 2024

Ramkrishna Saha & Ors.

Vs.

Rajkumar Saha

With

F.A.T. No. 302 of 2015

Kalpana Saha

Vs.

Rajkumar Saha & Ors.

For the Appellant(s) in FA 185 of 2015	: Mr. Gopal Chandra Ghosh, Adv.
and in FAT 302 of 2015	Mr. Tapash Bhattacharya, Adv.
	Mr. Aviroop Bhattacharya, Adv.

For the Respondent (s) in FA 185 of	: Mr. Haradhan Banerjee, Adv.
2015 and in FAT 302 of 2015	Mr. Prasanta Bishal, Adv.

Heard on : 06.09.2024

Judgment on : 24.09.2024

Ajay Kumar Gupta, J:

1. Two separate Probate Proceedings under Section 276 of the Indian Succession Act, 1925 were initiated by two separate executors seeking probate of two separate alleged Last Wills dated 11th June, 1993 and 3rd February, 1995 respectively of the testator, Monilal Saha before the Learned Trial Court. Both the Probate Proceedings have been decided by the Learned Trial Judge on 7th April, 2015 by two separate Judgments.

2. Feeling aggrieved and dissatisfied with the Judgment and Order dated 07.04.2015 passed by the Learned Additional District Judge, 5th Court at Malda in O.C. Suit No. 7/2010, the appellants/opposite parties, Ramkrishna Saha and others filed an appeal being F.A. No. 185 of 2015. At the same time, the appellant/petitioner, Kalpana Saha also filed another appeal being F.A.T. No. 302 of 2015 against another Judgment and Decree dated 07.04.2012 passed by the Learned Additional District Judge, 5th Court at Malda in O.C. Suit No. 4/2012.

3. By the said Judgment and Order dated 7th April, 2015, O.C. Suit No. 7/2010 was allowed on contest without any order as to costs in

favour of Rajkumar Saha in respect of the Will dated 11th June, 1993. A Probate Certificate was issued in his favour in respect of the estate left by Monilal Saha. On the other hand, O.C. Suit No. 4/2012 filed by Kalpana Saha, has been dismissed on contest without any order as to costs.

4. Both the aforesaid appeals have been taken up together for passing a common Judgment since the facts and law involved are similar and evidence relied by the Learned Court below are also found same and identical.

FACTS OF THE CASE:

5. The essential facts, relevant for the purpose of disposal of the instant appeals, are as under:

6. Monilal Saha, since deceased, during his lifetime used to reside at his residence at Silampur, P.S. – Kaliachak, District – Malda and also at Kalitala, P.S. – English Bazar within the jurisdiction of the Court. He had residential house, garden, agricultural land and business of a hotel named ‘ Monalisa’ situated at Baliadanga. He died on 04.01.1996 leaving behind his wife Saralabala Saha, three sons, namely, Ujjwal Saha, Rajkumar Saha and Ramkrishna Saha and three daughters, namely, Ranjana Saha, Bandana Chowdhury and Kalpana Saha at Malda Sadar Hospital due to his illness. The wife of Monilal Saha died after the death of Testator i.e. on 27.06.1994 at Silampur. Ujjwal Saha also died leaving behind his widow Dipti Saha. The claim of Rajkumar Saha is that

Monilal Saha, during his lifetime, executed his last Will on 11.06.1993, which was duly attested by Mriganka Kumar Dutta and Biswanath Roy as attesting witnesses. Rajkumar Saha and brother, namely, Ujjwal Saha was appointed as executors for obtaining probate from the competent Court. In pursuant to the contention of the petitioner, Monilal Saha was physically fit and mentally alert at the time of execution of the Will. Appellant found the Will in an old box of the deceased and, thereafter, filed a Probate Proceeding seeking probate of the said Last Will dated 11.06.1993. The Testator did not disclose about the Will to his sons and daughters during his lifetime.

7. Appellants/Opposite Parties of F.A. No. 185 of 2015, had contested the case before the Trial Court by filing written objection denying and disputing all the contention of the petitioner, Rajkumar Saha. It is contended that the Will produced by the Raj Kumar Saha is manufactured one. They further stated that the testator actually executed his Last Will on 3rd February, 1995 after cancelling and revoking his earlier Will dated 11.06.1993. The said Will was torn by the testator because he realised that the Will was not properly executed due to some error traced out in the said Will.

8. Testator executed his Last Will on 03.02.1995 appointing daughters Ranjana Saha and Kalpana Saha as executors with a provision

that they jointly or singly can obtain probate from a competent Court. Accordingly, Kalpana Saha filed the Probate Proceeding seeking probate of Last Will dated 03.02.1995.

9. The Learned Trial judge after considering and appreciation of the Evidence on Record, both oral and documentary evidence adduced by the parties granted probate of the Last Will dated 11.06.1993 in favour of Rajkumar Saha and at the same time rejected the prayer for granting probate of Kalpana Saha, when the Learned Trial Judge found suspicious circumstances in the evidence adduced by the petitioner and attesting witnesses. Hence, Appellants have approached before this Hon'ble High Court by filing two separate appeals and as such both appeals came up before this Bench for disposal.

SUBMISSION ON THE BEHALF OF APPELLANTS:

10. The learned counsel representing the Appellants submitted that Will dated 11.06.1993 was subsequently manufactured by Rajkumar Saha to deprive the other legal heirs from the properties of the testator. Actually, the testator, Monilal Saha, himself cancelled and revoked the earlier Will dated 11.06.1993 on 03.02.1995 and a new Will was executed on the same date. The Last will dated 03.02.1995 was executed by Monilal Saha in presence of the attesting witnesses, Atul Kumar Saha and Niranjana Das.

11. Attesting witnesses proved that at the time of execution of the Will, Monilal Saha was mentally and physically fit and was in good health. All the necessary requirements for proving the Will in respect of its preparation, execution, attestation and genuineness under Section 68 of the Indian Evidence Act, 1872 have been fulfilled. The Will was also signed by the Scribe and the Licence Deed Writer, Haridas Biswas.

12. The attesting witnesses have duly proved that the Testator had put his signatures on the Will before the attesting witnesses. They also put their signatures in presence of Testator, Monilal Saha. The said Will was read over and explained to the Testator by the writer, Haridas Biswas.

13. It was further submitted that the Learned Trial Judge granted the probate in favour of Rajkumar Saha though he could not able to prove Will in question and several inconsistencies and contradictions appearing in the evidence of the attesting witnesses with regard to preparation, execution and attestation of the Will dated 11.06.1993. The said Will was not genuine because it was manufactured, subsequently by Rajkumar Saha in order to deprive the other legal heirs of the testator from the testator's property.

14. Finally, it was argued that the Learned Trial Court did not appreciate the error apparent on the face of the Will itself. The Will appears to be unusual as no provisions were made for his wife in the estate of Monilal Saha. It has also been mentioned in the Will that his Wife has died although she was alive at that relevant point of time. This creates serious suspicion about the genuineness of the Will. She has prayed that the probate granted by the Learned Trial Court in favour of Rajkumar Saha is required to be set aside only on the ground of 'serious suspicious circumstances' because a prudent man in a normal state of mind and health cannot say that his wife has died although she was in fact alive.

15. Monilal Saha also realised that he has not made any provisions for his wife. He cancelled and revoked his earlier Will dated 11.06.1993. The facts of cancellation and revocation of earlier Will dated 11.06.1993 has been clearly indicated in the Last Will dated 03.02.1995. The Learned Trial Court overlooked such serious issue regarding the actual intention of the testator as expressed in his latter Will dated 03.02.1995. The respondent, Rajkumar Saha failed to discharge his duty to prove the real intention of the Testator for depriving his wife from the residential house, garden and agricultural land as well as business of a hotel named "Monalisa" situated at Baliadanga with cogent, satisfactory and sufficient evidence. Banking upon the aforesaid submissions, the learned counsel

has prayed for granting of probate in respect of the said Will dated 3rd February, 1995 in favour of Kalpana Saha.

Learned counsel also placed reliance of two judgments passed in the case ***Gopal Chandra Manna Vs. Arati Manna & Ors.***¹ And ***Meena Pradhan & Ors. Vs. Kamla Pradhan & Anr.***² to bolster his aforesaid Submissions.

SUBMISSION ON BEHALF OF THE RESPONDENT:

16. Per contra, learned counsel appearing on behalf of the Respondent/Petitioner, Rajkumar Saha vehemently argued and submitted that the Petitioner Rajkumar Saha has been able to prove the Last Will in accordance with law. Attesting witnesses i.e. P.W. 2 and P.W. 3 have been duly proved the preparation, execution and attestation of the Last Will dated 11.06.1993 rather the Appellants, Kalpana Saha and others admitted that the Last Will dated 11.06.1993 was executed by the deceased, Monilal Saha. The Learned Trial Judge rightly rejected their contention with regards to the cancellation and revocation of the Will dated 11.06.1993 as it was unable to prove the same with cogent and reliable evidence.

¹ 2024 (2) Indian Civil Cases 270 (Cal.)

² 2023 (4) Indian Civil Cases 801 (S.C.)

17. It was further submitted that it is unbelievable to accept that the Testator had appointed daughter Kalpana Saha as an executor even she was a married daughter. Testator had three sons. Testator was unhappy with Kalpana Saha because she married without consent of her parents with son of her mother's sister. No social function was held for her marriage. She never looked after her father while staying at Kalitala and died at Malda Sadar Hospital on 04.01.1996 as such appointing her as an executor raises serious suspicious circumstances. The petitioner with the help of her sister and sister's husband manufactured the Will dated 03.02.1995 to defeat the claim of the Respondent, Rajkumar Saha.

18. It is further submitted that Appellant/Petitioner, Kalpana Saha failed to prove the alleged Will before the Learned Trial Court. Signatures of the Testator in the Will dated 03.02.1995 appears very shaky and doubtful or not appearing to be his usual signature. Signature of the testator appearing in the last page is over written with two different inks or pens, therefore, the Learned Trial Judge rejected her application for probate on the ground that the Will was not proved as genuine. Consequently, her appeal is liable to be dismissed.

19. Learned counsel for the respondent/petitioner, Rajkumar Saha placed reliance of two judgments passed in the case of ***Kalyan Singh, London Trained, Cutter, Johri Bazar, Jaipur Vs. Smt. Chhoti and***

Ors.³ and **H. Venkatachala Iyengar Vs. B. N. Thimmajamma and Ors.**⁴ in support of his submissions.

DISCUSSION AND FINDINGS OF THIS COURT:

20. In order to prove the case of the respondent, Rajkumar Saha has examined himself as P.W. 1, Mriganka Kumar Dutta and Biswanath Roy have been examined as P.W.2 and 3 respectively as attesting witnesses and further exhibited number of documents such as Death Certificate of Monilal Saha marked as Exhibit 1. Will dated 11.06.1993 is marked as Exhibit 2 and Signatures of P.W. 2 and P.W. 3 are marked as Exhibit 2/1 and 2/2 on behalf of the petitioner in O.C. Suit No. 7 of 2010. At the same time, the opposite party, Kalpana Saha adduced evidence in order to prove her case. She has examined herself as P.W. 1, Atul Kumar Saha and Niranjana Das have been examined as P.W. 2 and 3 respectively as attesting witnesses. She further exhibited number of documents i.e. Death Certificate of Monilal Saha (Exhibit 1) and Will dated 3rd February, 1995 (Exhibit 2) in O.C. Suit No. 4 of 2012.

21. The Evidence on Record indicates that the deceased, Monilal Saha, had a residential house, garden and agricultural land at P.S. – Kaliachak and a Hotel, namely, ‘Monalisa’ at Mouza – Baliadanga. It is

³ 1990 AIR 396, 1990 SCC (1) 266

⁴ AIR 1959 Supreme Court 443

stated in the Will that due to his old age and uncertainty of his life, he decided to execute a Will to avoid any dispute amongst the legal heirs and representatives after his death. He appointed his sons Ujjwal and Rajkumar as the executors for obtaining probate of the said Will. In the said alleged Will dated 11.06.1993, he bequeathed his property to his legal heirs in the manner as stated hereunder:

“1) After my death my three daughters Bandana, Ranjana and Kalpana shall acquire the (Ka) schedule property in 16 as. share and they shall be entitled to make gift, sale and all kinds of transfers of the same.

2) After my death my three sons and three daughters Ujjal, Rajkumar, Ramkrishna, Bandana, Ranjana and Kalpana shall acquire the (Kha) schedule property in 16 as. share and they shall be entitled to make gift, sale and all kinds of transfers of the same.

3) After my death my three sons Ujjal, Rajkumar and Ramkrishna shall acquire the (Ga) schedule property in 16 as. share and they shall be entitled to make gift, sale and all kinds of transfers of the same.

4) After my death my second son Raj Kumar Saha shall acquire the (Gha) schedule property in 16 as. share and he shall be entitled to make gift, sale and all kinds of transfers of the same.

5) *(Una) schedule property is situated in Mouza Baliadanga within P.S. Kaliachak and Hotel “Monalisa” is situated within the said property. I and my three sons – Ujjal, Rajkumar and Ramkrishna Saha run the said Hotel in partnership. In the said Hotel “Monalisa” I have 30% share and Ramkrishna Saha has 30% share. Ujjal and Rajkumar Saha have 20% share each. My 30% share in the said Hotel “Monalisa” shall be acquired by Rajkumar Saha after my death. Rajkumar Saha has 20% share. Hence, Rajkumar Saha shall acquire 50% share after my death.*

6) *If my 1st son Ujjal does not sell or transfer the property during his life-time which he is going to acquire by this Will then after his death his wife shall acquire the property in life interest and she shall not be entitled to sell or transfer the said property and after her death my sons or sons’ heirs shall acquire the same.”*

22. Mriganka Kumar Dutta (P.W. 2) and Biswanath Roy (P.W. 3) deposed evidence and proved the signatures of testator. They further deposed that the testator executed the Will in their presence. Will was written and drafted by Mr. Santi Kumar Das according to the instruction of deceased Monilal Saha and contents of the said Will were read over and explained to Monilal Saha and after being satisfied with the contents of the Will, the testator put his signature in the Will in their presence. Both the witnesses and writer of the Will, Santi Kumar Das saw him

signing the Will. They further stated that at the time of execution of the Will, Monilal Saha was physically fit and mentally alert. P.W. 2 and P.W. 3 proved the Will as well as signatures of the Testator and their own signatures appearing in the said Will as attesting witnesses. They also proved preparation, execution and attestation of the Will.

23. Before entering into the merits of the case, the relevant provisions for proving the will are required to be reproduced herein below for ready reference and better understanding. Section 68 of the Indian Evidence Act, 1872 reads as follows:

“68. Proof of execution of document required by law to be attested. — *If a document is required by law to be attested, it shall not be used as evidence until one attesting witness at least has been called for the purpose of proving its execution, if there be an attesting witness alive, and subject to the process of the Court and capable of giving evidence:*

[Provided that it shall not be necessary to call an attesting witness in proof of the execution of any document, not being a will, which has been registered in accordance with the provisions of the Indian Registration Act, 1908 (16 of 1908), unless its execution by the person by whom it purports to have been executed is specifically denied.]”

24. In addition, Section 63 of the Indian Succession Act, 1925 provides the manner of execution of unprivileged Will as follows:

“63. Execution of unprivileged wills. —*Every testator, not being a soldier employed in an expedition or engaged in actual warfare, or an airman so employed or engaged or a mariner at sea, shall execute his will according to the following rules: —*

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

(b) The signature or mark of the testator, or the signature of the person signing for him, shall be so placed that it shall appear that it was intended thereby to give effect to the writing as a will.

(c) The will shall be attested by two or more witnesses, each of whom has seen the testator sign or affix his mark to the will or has seen some other person sign the will, in the presence and by the direction of the testator, or has received from the testator a personal acknowledgment of his signature or mark, or of the signature of such other person; and each of the witnesses shall sign the will in the presence of the testator, but it shall not be necessary that more than one witness be present at the same time, and no particular form of attestation shall be necessary.”

25. Upon perusal of the abovementioned provisions, it would show that the requirements provided under Section 63 of the Indian Succession Act, 1925 have to be categorically complied with for the

execution of the Will to be proven in terms of Section 68 of the Indian Evidence Act, 1872.

26. It would be useful to refer the following judgments of the Hon'ble Supreme Court on proof of Wills.

27. One of the celebrated decisions relied by this Court on proof of a Will, reported in **AIR 1959 SC 443** is in the case of **H. Venkatachala Iyenger vs. B. N. Thimmajamma**, 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 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."

28. Similarly, in ***Jaswant Kaur v. Amrit Kaur and others* [1977 1 SCC 369]**, 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.

29. Similarly, the Hon'ble Supreme Court in ***Anil Kak v. Sharada Raje*, [(2008) 7 SCC 695]**, 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

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.”

30. And in ***Leela Rajagopal and others v. Kamala Menon Cocharan and others***, [(2014) 15 SCC 570], 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 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".

Emphasis supplied.

31. Accordingly, to prove the Will, the propounder has to prove the following requirements for satisfaction of the Court while granting a probate.

- i) Last Will of the Testator;
- ii) True and clear intention of the Testator;
- iii) Preparation, proper execution and attestation;
- iv) Appointment of executors either from outsiders or from the beneficiaries to manage the properties and liabilities;
- v) Bequeathing his property to his legal heirs, representatives or even outsider with valid reasons thereof;

vi) The testator must have the mental and physical capacity to understand the nature and consequences of making a Will, including knowledge of his property and beneficiaries thereof;

vii) The Will must be made voluntarily, free from undue influence, coercion, or duress. Furthermore, there should be demonstrated that the decision to create the Will was made on his/her own free will.

viii) There must not be any suspicious circumstances in the Will itself.

If aforesaid circumstances are proved by the propounder, the Court can grant Probate or Letter of Administration without hesitation in favour of the executor/petitioner.

32. Let us see how far, the petitioner proved the Will as per the legal provisions and opinions as laid down by the Hon'ble Supreme Court as mentioned hereinabove.

33. It is admitted fact that the Appellant, Kalpana Saha admitted that the testator, Monilal Saha had earlier executed a Will dated 11.06.1993. However, it is contended that the said Will was cancelled and revoked during his lifetime by tearing it by the testator himself as such alleged last Will as claimed by Rajkumar Saha is not valid, lawful and same is subsequently manufactured. On such manufactured Will, a Probate cannot be granted. However, the Learned Trial Judge did not accept her version on the following reasons:

a) Attesting witnesses (P.W. 2 and P.W. 3) have been duly proved the Will dated 11.06.1993 by their oral evidence that Monilal Saha was in sound health and mind while executing the Will. The Testator signed the Will after being satisfied with the contents of the Will. He himself read over and understanding its contents. Santi Kumar Das, writer of the Will also read over and explained the contents of the Will to the deceased, Monilal Saha. Testator signed the Will and, thereafter, attesting witnesses put their signatures.

b) The Appellants/Opposite parties in F.A. No. 185 of 2015 cannot hold contradictory statements at a time because once they are alleging the Will, had been procured by the petitioner through undue influence upon the deceased, Monilal Saha and on the other hand, they are also admitting that the Will was executed by Monilal Saha on 11.06.1993.

c) The evidence adduced by Appellants/Opposite parties contains inconsistencies and contradictions with regard to manner of cancellation and revocation of Will. Once it is being pleaded that the Will dated 11.06.1993 was torn by the Testator himself on 03.02.1995 and made a new Will but during cross-examination of attesting witness (P.W. 2), he stated the said Will was revoked and cancelled by executing a 'Batilnama'. But neither Torn Will nor Batilnama was produced before the Learned Court below to substantiate their contention. Therefore, the

Learned Court did not rely on their contention of cancellation and revocation of Will.

34. This Court also does not repose confidence on the evidence adduced by the attesting witnesses or accept the contention of the Petitioner, Kalpana Saha regarding revocation and cancellation of the Will dated 11.06.1993 either by way of tearing it or by executing a 'Batilnama' on 3rd February, 1995. However, at the same time, learned counsel for the Respondent, Rajkumar Saha also fails to convince this Court about the suspicious circumstances as pointed out by the learned counsel for the Appellants with regard to the contents of the Will, which are highly unusual. The alleged Last Will dated 11.06.1993 of deceased, Monilal Saha as claimed by Rajkumar Saha indicates that his 'wife is dead' though she was very much alive on the date of alleged execution of Will i.e. on 11.06.1993. It is an admitted fact that the wife of the Testator originally died on 27.06.1994.

35. After going through the pleadings and evidence on record, both oral and documentary, it is admitted fact that Monilal Saha executed the Will dated 11.06.1993 but, in the said Will, it was mentioned that the wife of the testator has died though she was alive on 11.06.1993. Therefore, validity and execution of the Will dated 11.06.1993 creates a serious doubt.

36. It is proved by the attesting witnesses that the Will dated 11.06.1993 was written by Santi Kumar Das according to the instruction of the deceased Monilal Saha and contents of the Will were read over and explained to Monilal Saha. He also read over the contents of the Will himself. Thereafter, Monilal Saha, being satisfied with the contents of the Will, put his signatures in the copy of Will in presence of attesting witnesses, Mriganka Kumar Dutta and Biswanath Roy and Dulal Chandra Saha and the writer of the Will, Santi Kumar Das. They also witnessed the signing of the Testator's signature, then how the Testator would say that his wife was dead. It is unacceptable and unbelievable statement of the Testator.

37. The Learned Trial Judge overlooked the contents of the Will which itself creates a doubt in the mind of the Court. Even for the sake of argument if such statement would have been written mistakenly then why Monilal Saha while bequeathing his property to his legal heirs omitted his wife. No provisions were made in favour of his wife in the estate of testator though she was alive. This creates another serious doubt and suspicion circumstances over the execution of Last Will dated 11.06.1993 of deceased, Monilal Saha. No explanation has been assigned by the learned counsel appearing on behalf of Rajkumar Saha with

regard to suspicious circumstances. He simply submitted it was a bona fide mistake that can be ignored.

38. Rajkumar Saha denied about the cancellation and revocation of the Will dated 11.06.1993. The Will was not cancelled by the deceased Monilal Saha. The Will dated 03.02.1995 was manufactured by the petitioner, Kalpana Saha with the help of her sister and sister's husband. Actually, Monilal Saha was suffering from heart disease since 1994. He came to Malda Town in his own residence at Kalitala firstly with him and his wife. Rajkumar Saha took his father at CMC Hospital, Vellore, where the doctor advised him to take rest. None of his sons and daughters except Rajkumar Saha looked after his father and finally he died at Malda Sadar Hospital.

39. He further alleged that the Will dated 3rd February, 1995 is a Forged Will and was manufactured with the help of Deed Writer and witnesses because Monilal Saha could not appoint Kalpana Saha as an executor because the deceased Monilal Saha was not happy with Kalpana Saha. She had married with the son of her mother's sister and no social function was held for her marriage and also she married without the consent of her parents.

40. There was a strained relationship between the parents and Kalpana Saha. So, question of appointing her as an executor does not arise at all. Whereas, she denied the fact that she married her cousin brother. Accordingly, the evidence of P.W. 1, Kalpana Saha is not reliable. When the Will was executed on 3rd February, 1995, no one present, only brother-in-law could say the details of the execution of the Will dated 3rd February, 1995 whereas P.W. 2, in his evidence, narrated that on 3rd February, 1995, he was informed by deceased Monilal Saha with regard to the cancellation and revocation of the Will dated 11.06.1993 and also about the deed of cancellation.

41. Nothing has been produced in support of their contention. The youngest son of Monilal Saha suddenly traced out the Will in a wall shed abandoned almirah lying in the wall of the said hotel situated at village Bailiadanga and handed over to the Petitioner, Kalpana Saha. Although Ramkrishna Saha, was a party to the case, he did not appear or state anything in support of the petitioner, Kalpana Saha.

42. Ramkrishna Saha was not called upon as witness by the petitioner to prove the fact of tracing out the Will dated 3rd February, 1995. Non-calling him as a witness gives a presumption under Section 114 (g) of the Indian Evidence Act, 1872. The section itself provides that *“evidence which could be and is not produced would, if produced, be*

unfavourable to the person who withholds it". The petitioner failed to produce Ramkrishna Saha as witness which could not be presumed that the Will was traced out by Ramkrishna Saha. Accordingly, it would not support the petitioner's case. Rather this gives rise about the doubt in the mind of the Court regarding the actual fact. Petitioner Kalpana Saha failed to say who used to look after their father and how he was brought to Malda when it was admitted fact that the testator was residing at Malda since 1994 and while staying there, he died in Malda Sadar Hospital on 4th January, 1996.

43. It was further admitted by the petitioner, Kalpana Saha that their father was taken to Vellore twice but she denied the fact that Rajkumar Saha accompanied their father to Vellore whereas she also denied they did not accompany her father at Vellore for his treatment. She did not state anything with respect to the treatment of her father in Vellore. Whereas, she admitted that her father was sick at that point of time. On the other hand, she stated that her father was physically fit before his death. Such suppression of facts also creates doubt in the mind of the Court.

44. It appears that the testator had three sons and three daughters, for arguments sake, if the O.P. Rajkumar and Ujjawal were not favourite to the testator, he had another son left to be appointed as executor. If at

all he did not want his sons to be executors, he could have appointed his sons-in-laws as executors or any other independent reliable person. There is no explanation given anywhere as to why sons were not appointed as executors. Kalpana Saha is the youngest daughter and she had married without the consent of her parents and also no social ceremony was held in her marriage.

45. Further, the reason of marrying without the consent of her parents without any social ceremony is very clear. She married her cousin brother so it is quite natural that the family members especially her parents will not support it. Such being the situation, it is quite unnatural for the deceased to appoint the petitioner, Kalpana Saha as one of the executors in his Will.

46. From the above, it is clear that the circumstances which are arising are not trustworthy and there are improbabilities to reach to a proper conclusion on the basis of such evidence. Again, as per P.W. 2, the copy of Draft, Cancellation Deed and the Last Will were all kept by Monilal Saha himself. But except the alleged Last Will, nothing was produced by the petitioner. It has been admitted by P.W. 2 that all his children used to look after Monilal Saha. Then why there was no one present or why the sons were excluded from being appointed as executors is not clear to this Court. All these factors cast clouds over the

execution of the Will dated 03.02.1995. Therefore, Learned Court below rightly rejected the application filed by Kalpana Saha.

47. This Court also perused the Will dated 03.02.1995 on naked eyes and found the signatures of the Testator appearing very shaky, doubtful or not appear to be his usual signature. Furthermore, signature appearing in the last page of the alleged Will dated 03.02.1995 is over written by two different inks or pens. All these suspicious surrounding circumstances create doubt about the preparation, execution and attestation of the Will. Finding of the Learned Court below appears to be correct, legal and justified as such requires no interference.

48. Now, the question arises about the proof of preparation, execution and attestation of the Will by the attesting witnesses according to the provision of Section 68 of the Indian Evidence Act, 1872 and Section 63 of the Indian Succession Act, 1925 is sufficient to allow the application for probate?

49. 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 may be properly executed and his property would have been distributed

amongst all the beneficiaries voluntarily, free from undue influence, coercion, or duress and also its genuineness.

50. The serious issue raised by the appellants, Ramkrishna Saha and others with regard to mistake committed by the Testator in a Will dated 11.06.1993 is strong and genuine. It would never happen that the testator would mention about the death of his wife in his Last Will although she was alive on the date of alleged execution of the Will. It is an admitted fact that the Wife of Testator died 27.06.1994 after the death of Testator.

51. No provisions were made in favour of his wife in the said will in the estate of Testator though she was alive at the time of execution of the Will, creates another serious doubt in the mind of this Court. This Court tried to convince from different angles about such mistake as pointed out by the learned counsel but unable to convince that such mistake appears as bona fide and can be ignored.

52. The suspicious circumstances surrounding the execution of the Will dated 11.06.1993 are as follows:

a) Wife has been declared dead on the date of execution of the Will although she was alive;

- b) It is an admitted fact that the Wife of Monilal Saha died on 27.06.1994;
- c) The deposition may be unnatural, improbable or unfair in the light of relevant circumstances like exclusion of his wife from the property belongs to the Testator or absence of adequate provisions for the other natural heirs without any reasons;
- d) The depositions may not appear to be the result of the testator's free will and intention.

53. When a serious doubt is pointed out by the Appellants, Court must be careful and must satisfy its conscience as regards due execution of the Will by the Testator and the Court would not refuse to probe deeper into the matter only because the signature of the Testator on the Will is otherwise proved. The maker of the Will would not leave such ambiguity in expression of his intention as would arise by indicating that his wife is dead. For what has been notice hereinabove, the document in question carries unusual features, which travel into the realm of abnormalities.

54. When all the aforesaid abnormalities, curious and rather strong circumstances are put together, the inescapable conclusion is that the Will in question cannot be accepted as the Last Will of the Testator. The unexplained, unusual and abnormal features pertaining to the Will in

question only lead to the logical deduction that Will dated 11.06.1993 was not prepared and executed by the testator.

55. It is noticed that all the aforesaid features and factors indicated hereinabove are very much available on the face of record. However, the Learned Trial Judge even while dealing with the several contentions in excessive details, failed to notice some of the features indicated above or simply brushed aside the particular feature carrying abnormality. The Learned Trial Court obviously misdirected itself on several of the key and pivotal factors and decided in favour of the Respondent/Petitioner, Rajkumar Saha and granted probate, its decision could not have been approved by this Bench.

56. It was emphasised by the learned counsel appearing on behalf of Rajkumar Saha that the execution of the Will proved in accordance with the requirements of Section 63 of the Indian Succession Act, 1925 and Section 68 of the Indian Evidence Act, 1872 has been duly established on record with the testimony of the attesting witnesses. The submissions, so made on behalf of Rajkumar Saha, cannot be accepted for the reason that mere proof of the document in accordance with the requirements of Section 68 of the Indian Evidence Act, 1872 is not final and conclusive for acceptance of a document as a Will.

57. When suspicious circumstances exist and the suspicions have not been removed, the document in question cannot be accepted as a Last Will of the Testator and the Will dated 11.06.1993 appears not a genuine one on the basis of aforesaid abnormalities. Accordingly, the grant of probate in favour of Rajkumar Saha with regard to the alleged Will dated 11.06.1993 is required interference by this Court.

58. The Appellants of F.A. No. 185 of 2015 filed an application under Order 41 Rule 27 of the Code of Civil Procedure, 1908 during pendency of the appeals enclosing xerox copies of the death certificate of Saralabala Saha and Sale Deed dated 04.10.1955 executed by Monilal Saha during his life time in order to prove actual date of death of Saralabala Saha and signature of Monilal Saha. However, this Court does not find any reason to allow such prayer at this stage on the ground that actual date of death of Saralabala Saha has not been denied by the other side. Furthermore, when both the alleged Wills dated 11.06.1993 and 03.02.1995 appear not genuine in view of the above discussions and findings of this court, so, question of proving or tallying or verifying the signatures of the Testator appearing in the said Will does not arise. Consequentially, the application stands rejected.

59. Accordingly, **F.A. No. 185 of 2015** stands **allowed** after setting aside the Judgment and Order dated 7th April, 2015, passed by the

Learned Trial Court in O.C. Suit No. 7 of 2010 and **F.A.T. 302 of 2015** stands **dismissed** after affirming the Judgment and Order dated 7th April, 2015, passed by the Learned Trial Court in O.C. Suit No. 4 of 2012.

60. Consequentially, **I.A. No.: CAN 2 of 2018 (Old CAN No.: 3523 of 2018)** and **CAN 3 of 2024** are also, thus, disposed of.

61. Department 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 taking necessary steps.

62. 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.)