

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

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

F.A.T. No. 448 of 2019

**Madhab Kumar Saha
Vs.
Tarun Kumar Saha and another**

For the appellant	:	Mr. Kushal Paul, Mr. Saptarshi Dutt
Hearing concluded on	:	21.11.2024
Judgment on	:	29.11.2024

Sabyasachi Bhattacharyya, J.:-

1. The propounder of the Will of one Renupada Saha (since deceased) has filed the present appeal against a judgment and decree of the court below dismissing the probate application on contest. Upon the probate application being filed, the same was objected to by the respondents, who filed separate written statements, upon which the same turned contentious and gave rise to Testamentary Suit No.9 of 2006.
2. Learned counsel for the appellant submits that the learned Trial Judge proceeded on an erroneous premise in observing that there were suspicious circumstances surrounding the execution of the Will, which were not dispelled by the propounder. The learned Trial Judge, it is argued, relied on extraneous factors and overlooked relevant evidence

on record which showed substantial satisfaction of the requirements of Section 63 of the Indian Succession Act, 1925 (hereinafter referred to as “the 1925 Act”) and Section 68 of the Indian Evidence Act, 1872.

3. The evidence of the plaintiff's witnesses was brushed aside as “nebulous, hazy and shaky”, which is contrary to the records and as such, the judgment is perverse.
4. The learned Trial Judge observed that no medical evidence was led by the propounder to throw light on the mental alertness of the testator; however, there was no suspicion cast on the mental condition of the testator at the relevant point of time, when he executed the Will, in any manner.
5. Learned counsel appearing for the appellant contends that the learned Trial Judge took the fact that the Will was executed in the shop-room of the testator with a pinch of salt, even without any question being put to the plaintiff's witnesses as to whether the location of the shop-room was far off from the residence of the testator.
6. In reality, it is contended, the shop-room is situated in the same building as the residence of the testator but no question was put to the plaintiff's witnesses regarding the location of the shop-room, nor was the said objection raised in the written statement by the objector/respondent no.2. As such, the propounder had no opportunity to adduce evidence to substantiate that the shop-room and the residence of the testator are housed in the same building. In fact, it is submitted that the propounder has sufficient evidence in hand to show the identity of location of the two.

7. D.W.2, the respondent no. 2, admitted in her cross-examination that she had heard of the execution of the Will from the testator himself, that is, her father, but denies the execution of the Will all the same. Such contradictory stand of D.W.2, the defendant/respondent no.2, itself vitiates the defence.
8. P.W.2 and P.W.3, both attesting witnesses to the Will, categorically led evidence to show that all the parameters of Section 63 of the 1925 Act were complied with, which is the only relevant parameter to substantiate a case of probate. In cross-examination, such stand could not be shaken by the defendants/respondents.
9. However, it is argued that the learned Trial Judge inflated a stray sentence in the cross-examination of P.W.2 beyond proportion. P.W.2, one of the attesting witnesses, stated in his cross-examination that prior to his signature, he saw the signature of the deed writer and the testator in the Will. It is argued that the said statement does not vitiate the fact that the testator signed in his presence. It is obvious that the testator put his signature on the Will prior to the signature of P.W.2, the attesting witness, and hence, P.W.2 would under normal circumstances see the signature of the testator on the Will prior to his signature.
10. The learned Trial Judge also found that the doctor treating the testator before his demise was not called as witness; however, such non-examination is not fatal, since the sickness of the testator was not pleaded or proved by any of the parties to be so serious so as to vitiate

the mental and physical capability of the testator to execute the Will of his own volition.

11. Moreover, it is argued that since the respondents objected to the Will, it was their onus to call for medical evidence, if any, to disprove the factum of execution of the Will, since the propounder discharged his initial duty to prove valid execution of the Will otherwise.
12. The reason for the deviation from natural line of succession was explained in the Will and the propounder never took any active role in its execution. As such, there was no suspicious circumstance at all.
13. Learned counsel cites *Savithri and others v. Karthyayani Amma and others*, reported at (2007) 11 SCC 621, where it was held by the Supreme Court, by relying on previous judgments, that the burden of proof that the Will has been validly executed and is a genuine document is on the propounder. The propounder is required to prove that the testator signed the Will and had put his signature out of his own free will and had understood the nature and effect thereof. However, the Supreme Court held, if a defence of fraud, coercion or undue influence is raised, the burden would be on the caveator to prove the same. Only when a doubt is created in regard to the condition of the mind of the testator or the disposition appears to be unnatural or wholly unfair in the light of the relevant circumstances or where the propounder himself takes a prominent part in its execution, can a suspicious circumstance be said to have arisen.
14. In the absence of any such suspicious circumstance in the present case, it is argued that the obligation was never cast on the propounder,

apart from otherwise proving the execution of the Will in accordance with law, to dispel any such circumstance.

15. Learned counsel next cites *Smt. Indu Bala Bose and others v. Manindra Chandra Bose and another*, reported at (1982) 1 SCC 20, in support of his contention that the mode of proving a Will does not ordinarily differ from that of proving any other document except for the special requirement of attestation prescribed in case of a Will by Section 63 of the 1925 Act. The suspicious circumstances mentioned in the said judgment are not available in the present case. The Supreme Court observed in paragraph no. 8 of the report that any and every circumstance is not a “suspicious” circumstance. A circumstance would be “suspicious” when it is not normal or is not normally expected in a normal situation or is not expected of a normal person.
16. Learned counsel appearing for the appellant next places reliance on *H. Venkatachala Iyengar v. B.N. Thimmajamma and others*, reported at AIR 1959 SC 443, where the Supreme Court reiterated the above propositions and observed that in dealing with the proof of Wills, the court will start on the same enquiry as in the case of proof of documents. The Will has to be proved like any other document except the special requirements of attestation prescribed by Section 63 of the 1925 Act. However, it was held that 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. The onus on the propounder can be taken to be discharged on proof of the

essential facts indicated therein. In the absence of any legitimate suspicious circumstance, there arose no occasion for the propounder to remove the same in the present case.

17. Since the respondent chose to abstain from hearing despite the appeal appearing in the list for long and having been heard over several days, the hearing had to be concluded *ex parte* in the absence of the respondents.
18. In the impugned judgment, one of the suspicious circumstances indicated by the Learned Trial Judge was that the doctor treating the testator was not examined. However, we find from the statements of P.W.2, one of the attesting witnesses, who states in his evidence that the Will was written as per the instruction of the testator in the shop-room of the testator. It is stated in cross-examination by the P.W.2 that the testator was mentally fit and alert at the time of execution of the Will. The same narrative is repeated by P.W.3, one of the other attesting witnesses. D.W.2, the younger son of the testator who was deprived of the estate of the testator by virtue of the Will, adduced evidence against the probate case. He stated in his cross-examination that the testator, his father, was suffering from excess rate of White Blood Corpuscles and Septicemia and had passed away and that the disease was detected on examination of the testator's blood at Berhampur.
19. It is borne out by the evidence of D.W.2 that the papers relating to medical treatment of the testator were not with him and that the testator was admitted to the NRS Medical College and Hospital in

Kolkata. He was then shifted to the Shambhu Nath Hospital where he breathed his last.

20. As such, the evidence of both parties do not bear out any medical condition of the testator at the time of execution of the Will which would mentally or physically incapacitate him from executing the Will of his own free volition in sound mental health. Since there is not a single allegation as to any serious illness which could cause mental incapacity or any debilitating disease of such nature as to physically incapacitate the testator from executing such Will, there was no conceivable reason as to why the medical doctor treating the testator before his demise should be called as witness. In fact, the D.W.2 stated in his cross-examination that before his demise, the testator was physically unfit *to some extent*, but did not cite any mental ailment of the testator at all. D.W.2 went to the extent of stating that the testator was a radio mechanic of the District at that time, which obviously indicates that the normal brain functions of the testator were not hampered. Hence, there is nothing in his evidence to indicate any mental incapacity of the testator at the relevant point of time which would be germane in respect of execution of the Will.
21. Thus, the over-reliance placed by the learned Trial Judge on non-examination of the doctor treating the testator before his demise was irrelevant and besides the point.
22. Insofar as the execution of the Will is concerned, the plaintiffs' witnesses have unambiguously substantiated the compliance of the relevant yardsticks and parameters under Section 63 of the 1925 Act

and Section 68 of the Evidence Act. Both the attesting witnesses have adduced evidence as P.W.2 and P.W.3 respectively and have corroborated the proper execution and attestation of the disputed Will in accordance with law.

- 23.** D.W.2, in his cross-examination, stated that he did not know anything about the Will, which neither proves nor disproves the execution of the Will. Rather, the said witness admitted in his cross-examination that he was informed by the testator during his lifetime that he had executed a Will. Coming to the cross-examination of D.W.1, the defendant/respondent no.2, she also admitted that the testator was an electronic mechanic. She specifically admitted that on a specific date, that is, 30th of *Sravan*, 1403 BS, when she was in Kalighat, she received a phone call from her father, the testator, wherefrom for the first time she came to know about the Will. She also admitted in her cross-examination that she saw the alleged Will in court.
- 24.** Thus, despite denying the execution of the Will, both the defendants' witnesses categorically admitted that during his lifetime, the testator had stated about the execution of the Will to them. Thus, the evidence of the defendants' witnesses are contradictory to the stand taken in their pleadings.
- 25.** One sticking point which weighed with the learned Trial Judge in dismissing the probate case was an apparent discrepancy in the evidence of P.W.2, one of the attesting witnesses. The said discrepancy arises out of a statement in the cross-examination of P.W.2 to the effect that prior to his signature, he saw the signature of the deed writer as

well as the testator on the Will. He also stated that he finally saw the Will having the signature of the deed writer and the testator in the Will and remained present for about two hours at the time of execution of the Will. He also stated that the other attesting witnesses saw the Will after his seeing the Will and signed the Will after his signature.

- 26.** Let us now examine the requirements of Section 63 of the 1925 Act, which provision is quoted hereinbelow:

“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 acknowledgement of his signature or mark, or 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.”*

- 27.** The said Section mandates that the testator shall sign or affix his mark to the Will, which is applicable in the present case, and it must so appear that it was intended to give effect to the writing as a Will.
- 28.** Clause (c) of Section 63 requires that the Will shall be attested by two or more witnesses, each of whom has to see the testator sign or affix his

mark to the Will or has seen some other person sign the Will, in the presence or by direction of the testator, *or has received from the testator a personal acknowledgement of his signature or mark.* At the same time, 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.

29. Thus, what is required is that either the attesting witnesses have to see the testator signed the Will or to receive from the testator a personal acknowledgment of his signature. In the present case, both the attesting witnesses, including P.W.2, have repeatedly stated that they were present during the execution of the Will and that the testator had signed the Will. The mere statement that prior to the signature of P.W.2, he saw the “signature” of the testator on the Will does not vitiate his consistent stand in the examination-in-chief that the testator signed the Will in his presence and in presence of the other attesting witnesses.

30. The term “signature” might very well signify not merely the autograph of the testator but alternatively, the act of signing by the testator. We often find that there is a gap in conveying the exact nuances of the expressions used in a vernacular language when it is translated to some other foreign language. P.W.2 deposed in Bengali and while being transcribed, it was translated to English. The actual meaning of an expression might get lost in translation, some leeway for which has to be made while construing the evidence. The evidence of a witness has to be read as a whole, accommodating some reasonable margin of error in translation. Read as a whole, it is clear that P.W.2 categorically

testified that he had seen the testator sign the Will. Even if the testator's signature was on the Will prior to the signature of the attesting witnesses, it does not presuppose automatically that the signature was not done in presence of the said witnesses. Even if the testator signed in front of the attesting witnesses, it would be the testator's signature which would find place on the Will first, prior to the signature of the attesting witnesses. As such, we do not find any discrepancy in such statement so as to vitiate the very execution of the Will. P.W.3, the other attesting witness, also consistently corroborated the case of P.W.2 in respect of attestation and execution of the Will and on a cumulative reading of the two, there cannot be any doubt whatsoever as to due execution of the Will in terms of the provisions of Section 63 of the 1925 Act. The examination-in-chief of the attesting witnesses could not be shaken in cross-examination.

- 31.** With regard to the Will having been stated to be signed in the shop-room of the testator as opposed to his residence, we do not find any gross discrepancy in the propounder's case in that regard either.
- 32.** The propounder submits before us that the shop-room of the testator is situated in the same premises as his residence. The mere fact that the Will was executed in his residence whereas in evidence it was stated that it was executed in his shop-room does not *per se* create an anomaly. It might have been otherwise if a suggestion was put to any of the three plaintiff's witnesses as to whether the shop-room and the residence of the testator are housed in the same building and they answered in the negative. Since it is the defence case that there is a

discrepancy in that regard, it was the onus of the defence to put a question to the plaintiff's witnesses to such effect. In the absence of such a question, the propounder did not have any opportunity whatsoever to clarify that the shop-room and the residence of the testator are situated in the same building. In fact, the propounder claims that he is armed with evidence to that effect which he never got opportunity to adduce in the court below since the question was never raised by the defendants in the probate case.

- 33.** In fact, the said alleged discrepancy is a third case made out by the learned Trial Judge, and as such, we do not find it germane in the context.
- 34.** The learned Trial Judge relied on certain extraneous factors such as other persons having not been brought as plaintiff's witnesses. It was completely unnecessary to bring any other person to corroborate the execution of the Will, since the both the attesting witnesses have adduced evidence and corroborated due compliance with Section 63 of the 1925 Act and the provisions of Section 68 of the Evidence Act. Whereas only a single attesting witness might have adduced evidence to discharge the duty under Section 63 of the 1925 Act, in the present case, two attesting witnesses have done so and corroborated each other's case.
- 35.** As held above, the non-examination of the medical practitioner who treated the testator before his demise is utterly irrelevant in the absence of anything to indicate that the testator's illness might have

affected his mental or physical faculties so much so as to render the testator unable to execute the Will of his own free volition.

- 36.** The other suspicious circumstance which has been highlighted by the Supreme Court in all the reported judgments, being the active involvement of the propounder when he is a beneficiary of the Will, is also absent in the present case.
- 37.** Regarding the deviation from the line of succession in the Will and deprivation of the other son and daughter of the testator, the same has been sufficiently explained in the Will itself. The testator devotes several sentences in the Will to state that his younger son Tarun Kumar Saha (respondent no.1) was disobedient and had attempted to usurp the property of the testator at different points of time. It is stated further in the Will that there was a dispute going on between the testator and his said younger son, the latter having ill-behaved with the testator, for which the testator was heart-broken. The said younger son also physically tortured the testator as per the Will and the testator had lodged a General Diary Entry against him *vide* G.D. Entry No.1047 dated June 23, 1996, which particulars have been given in the Will itself. Further, the testator states in the Will that his only daughter has been given in marriage and she is living happily in her matrimonial home, for which reason there was no worry of the testator regarding his daughter.
- 38.** Under such circumstances, keeping in view the contribution of the propounder/elder son to the testator's well-being and upkeep, the

testator bequeathed the property in favour of his grandson, that is, the son of the propounder (elder son of the testator).

- 39.** D.W.1/respondent no.2 is the daughter of the testator, who was also excluded in the bequest. She admitted in her cross-examination that she was married on November 28, 1981, that is, long before the Will was executed. Since prior to the demise of her father, D.W.1 admits that she and her brothers had strained relations with each other. She admitted that once the police had taken her younger brother although her father went to the Police Station and got him released. All of these corroborate the narrative in the Will.
- 40.** D.W.1 also admits that she had good relations with her younger brother Tarun, who deposed in her favour.
- 41.** There is nothing on record to dispute the statement of the testator in the Will, which has otherwise been proved to be executed in accordance with law, which statement should be taken as sacrosanct in the absence of any cogent rebuttal, being the expression of the will of the deceased.
- 42.** The sanctity attached to the desire of the deceased is the nucleus of the probate jurisdiction and the same has to be honoured, however much the objectors might have qualms in that regard.
- 43.** In the present case, the reasons for the exclusion of the other heirs from the bequest have been clearly explained in the Will itself. The propounder (himself the elder son of the testator and not a stranger to the family), whose son is the beneficiary of the Will, has not been proved to have an active role in the preparation and/or execution of the

Will, nor is there anything on record to show that the execution of the Will was tainted by any illegality or irregularity. There is not an iota of evidence that the propounder had an overbearing influence on the testator to influence the latter's decision unduly. Both attesting witnesses have proved the execution of the Will in accordance with law. Both D.W.1 and D.W.2 have admitted that the testator, their father, informed them about the Will during his lifetime and in a specific query put to the D.W.2 in his cross-examination as to whether his father had executed the Will according to his choice and intention and free will, the said witness answered that he could not state/depose categorically under which circumstances the Will under consideration was executed by his father.

- 44.** In the teeth of such admission, the denial of the proper execution of the Will can only be hearsay insofar as the said witness is concerned.
- 45.** Applying the law as laid down by the Supreme Court in the context of the facts of the present case, we find that the stand of the propounder and the evidence of the plaintiff's witnesses passed muster. In the present case, apart from no particulars of fraud, coercion or undue influence having been made out in the pleadings or evidence, the intimation by the testator of the execution of the Will has been admitted by both the defendants' witnesses. That apart, no debilitating physical or mental incapacity to prevent the testator from executing the Will of his own free volition has been substantiated by the defendants/respondents.

- 46.** Moreover, as discussed above, the execution and attestation of the Will is attended by no “legitimate” suspicious circumstance which might have required the propounder to dispel the same. As succinctly put by the Supreme Court in *Smt. Indu Bala Bose (supra)*, any and every circumstance is not a “suspicious” circumstance. A circumstance would be “suspicious” when it is not normal or is not normally expected in a normal situation or is not expected of a normal person.
- 47.** Even otherwise, as reiterated by the Supreme Court in *H. Venkatachala Iyengar (supra)*, the Will has to be proved like any other document, apart from the special requirements of Section 63 of the 1925 Act. As in the case of other documents, in case of proof of Wills, it would be idle to expect proof with mathematical precision. The usual tests of satisfaction of the prudent mind are sufficient while dealing with the proof of a Will and the onus on the propounder can be taken to be discharged on proof of the essential facts in parity with Section 68 of the Evidence Act and Section 63 of the Indian Succession Act. The present Will having met the said tests with flying colours, the impugned judgment of the learned Trial Judge was perverse inasmuch as it overlooked vital evidence substantiating the valid execution of the Will and placed reliance on extraneous circumstances and/or irrelevant materials having no bearing on suspicious circumstances regarding the execution of the Will.
- 48.** Thus, the appeal succeeds.
- 49.** Accordingly, F.A.T. No. 448 of 2019 is allowed on contest, thereby setting aside the impugned judgment and decree dated August 20,

2019, passed by the learned Additional District Judge, Third Court at Berhampur, District: Murshidabad in Testamentary Suit No. 9 of 2006, granting probate of the Will to the plaintiff/propounder/appellant Madhab Kumar Saha.

- 50.** Interim orders, if any, stand vacated.
- 51.** The appellant will be at liberty to ensure that ministerial acts in consonance with the present probate decree are completed expeditiously.
- 52.** A formal decree be drawn up accordingly.

(Sabyasachi Bhattacharyya, J.)

I agree.

(Uday Kumar, J.)