

IN THE HIGH COURT AT CALCUTTA
(Testamentary & Intestate Jurisdiction)

ORIGINAL SIDE

Present:

The Hon'ble Justice Krishna Rao

TS 28 of 2016

(PLA 6 of 1989)

In the Goods Of:

Sri Krishna Koiri (Deceased)

And

Swapan Koery @ Swapan Koiri

Versus

Bimala Devi & Ors.

Mr. Ranjan Bachawat, Sr. Adv.

Mr. Debnath Ghosh

Mr. Sarosij Dasgupta

Mr. Chhandak Dutta

.....For the plaintiff

Mr. Sabyasachi Choudhury

Mr. Rajarshi Dutta

Mr. Indra Prasad Mullick

Mr. S. Bhattacharyya

.....For the defendants

Hearing Concluded On : 10.07.2024

Judgment on : 31.07.2024

Krishna Rao, J.:

1. The plaintiff has initially filed an application being PLA No. 6 of 1989 for grant of Letters of Administration of the last Will and Testament of the deceased, Krishna Koiri dated 4th April, 1966.
2. By an order dated 23rd July, 1990, this Court had granted Letters of Administration in favour of the plaintiff with respect to the Will and Testament dated 4th April, 1966. When the defendants came to know about the Letters of Administration granted by this Court, the defendants have filed an application under Section 263 of the Indian Succession Act, 1925 for revocation of Letters of Administration being G.A. No. 3181 of 2012 on the ground that no citation was served upon the daughters and other legal heirs and legal representatives of the deceased on whom the properties of the deceased would have devolved upon.
3. By an order dated 30th July, 2015, this Court allowed the application filed by the defendants and the Letters of Administration granted by this Court with respect to the Will was revoked and the plaintiff was directed to deposit the original Letters of Administration.
4. After revocation of Letters of Administration, the defendants have filed their caveat and in terms of the order dated 30th July, 2015, the

plaintiff has served the copy of the application to the defendants for grant of Letters of Administration.

5. On receipt of Caveat and affidavit in support of Caveat, this Court converted the application being PLA No. 6 of 1989 to Testamentary Suit No. 28 of 2016.

6. **CASE OF THE PLAINTIFF:**

- a. The deceased, Krishna Koiri died on 13th November, 1966, leaving behind his last Will and Testament dated 4th April, 1966 by appointing his wife Sonia Koiri as sole executrix. The Will was attested by three attesting witnesses. As per Will, the deceased granted his right in his immovable property to his wife Sonia Koiri and his only son Mahadeb Koiri, in equal shares. In the Will, it is also clarified that since both the daughters, namely, Kamala Koiri and Bimala Koiri were successfully married in affluent families and huge amount and ornaments were provided to them and none of them were in need of any further grant from the deceased, Krishna Koiri.
- b. By virtue of the Will, Sonia Koiri and Mahadev Koiri entitled to get the property in the District of 24 Parganas, Thana - Entally, under Sibadah Sub-Registry, included in Touzi No. 1298/2833, Dihi 55 Gram in Mouza Tangra Village, Holding No. 84, formerly 82, Division - 4, Sub Division N and under the corporation of Calcutta situated at premises No.11, Paymental Garden Lane,

Kolkata, total area of 2 Bighas, 7 Cottahs, 11 Chittaks, 10 sq.ft. of which 14 Cottahs of rent free land.

- c. The deceased at the time of death left behind four legal heirs namely:

(i). Sonia Koiri Wife

(ii). Mahadev Koiri Son

(iii). Kamala Bhagat nee Koiri Daughter

(iv). Bimala Prosad nee Koiri Daughter.

- d. Smt. Sonia Koiri has not taken any steps for grant of probate and died on 6th October, 1974. The legatee of the Will, namely, Mahadev Koiri has also not taken any steps for grant of Letters of Administration of the last Will and Testament and died on 15th July, 1971.
- e. Now the plaintiff being the grandson of Krishna Koiri and the son of Mahadev Koiri has filed the present suit for grant of Letters of Administration of the last Will and Testament dated 13th November, 1966.

7. SUBMISSIONS OF THE COUNSEL FOR THE PLAINTIFF:

- a. Mr. Ranjan Bachawat, Learned Sr. Advocate appearing for the plaintiff submits that P.W.1, the plaintiff herein and the grandson of the deceased has specifically deposed that he knew the attesting witnesses of the Will, one is the cousin brother of

the deceased and other two witnesses are the friends of his grandfather. He further submitted that P.W.1 also stated that he also used to go to the said persons with his grandfather and they also used to come to the house of grandfather. He further submitted that P.W.1 also stated that all three attesting witnesses of the Will are dead.

- b. Mr. Bachawat submitted that P.W.1 has duly identified the Will and signatures of the testator in the Will and the Will is marked as Exhibit A and the signature of the deceased is marked as Exhibit A-1.
- c. Mr. Bachawat submits has relied upon Exhibits E, F and G-1 wherein the signatures of the deceased were exhibited on the identification of P.W.1 and submitted that there is no differences in signatures of the deceased appearing in the Will and other documents.
- d. Mr. Bachawat submitted that P.W.2 and P.W.3 are the sons of one of the attesting witness of the Will, namely, Balai Lal Dey. He submits that both witnesses have duly identified the signatures of their father appearing in the said Will. Mr. Bachawat refers to Exhibit H and submitted that the signature appearing in the affidavit submitted by the attesting witness, namely, Balai Lal Dey at the time of filing of application

for grant of Letters of Administration is duly identified by P.W.2 and P.W.3 and the same as marked as Exhibit-H.

- e. Mr. Bachawat relied upon the judgment in the case of ***Ashutosh Samanta vs. S.M. Ranjan Bala Dasi*** reported in **2023 SCC Online SC 255** and submitted that in case where the attesting witness is either dead or out of the jurisdiction of the Court or kept out of the way by the adverse party or cannot be traced despite diligent search, in that event, the Will may be proved in the manner indicated in Section 69 of the Evidence Act, 1872. He submits that by examining P.W.2 and P.W.3, the plaintiff has proved that Balai Lal Dey has signed in the last Will and testament of the deceased, Krishna Koiri as one of the attesting witness.
- f. Mr. Bachawat submitted that one affidavit in support of caveat has been filed by one Manoj Kumar Bhagat alleging that the registration of the Will has been obtained by fraud but no particulars of fraud have been pleaded. He submits that as on the date of affirmation of his affidavit i.e. on 25th August, 2015, his age was 49 and the Will was executed on 4th April, 1966 thus on the date of execution of Will he was not even a year old.
- g. Mr. Bachawat submitted that the second affidavit in support of caveat has been filed by one Shri Awanindra Kumar Bhagat and he has also made the same allegations but on the date of

execution of the Will, he was only 6 years old. He submits that only person who could have deposed regarding the veracity of the Will is Bimala Devi , the daughter of testator but she has not come forward to depose before the Ld. Commissioner.

- h. Mr. Bachawat submitted that the Will was duly registered before the Sub-Registrar, Behala on 4th April, 1966. The D.W.1 in his evidence categorically stated that he has no knowledge about the execution of the Will by the testator. He submits that D.W.1 has also admitted that he has no document to show that Bimala Devi, his mother authorized him to depose before the commissioner.
- i. Mr. Bachawat relied upon the judgment in the case of ***Bijon Behari Dhar vs. Dipti Pal and Another*** reported in **2023 SCC OnLine Cal 2223** and submitted that a registered document, therefore, prima facie would be valid in law. The onus of proof, thus, would be on a person who leads evidence to rebut the presumption.
- j. Mr. Bachawat submitted that long delay itself cannot be a ground for suspicious circumstances. He submits that probate application can be filed at any time after the death of the testator and cannot be a ground to refuse the probate for a Will which is a registered one. In support of his submission, Mr. Bachawat relied upon the judgment in the case of ***Goutam***

Bhowmick vs. Smt. Sabitri Bhuiya reported in **2012 SCC OnLine Cal 163**.

8. CASE OF THE DEFENDANTS:

- a. The application is not in the form as prescribed under the Indian Succession Act and does not conform with the requirement of Chapter XXXV of the Rules of Original Side of this Court.
- b. The application filed by the plaintiff does not comply with the requirement of Sections 278, 279, 280 or 281 of the Indian Succession Act, 1925.
- c. The physical condition of the deceased did not permit him to move and attend the office of the Registrar, Behala for registration of the alleged Will and the deceased was not in testamentary capacity.

9. SUBMISSIONS OF THE COUNSEL FOR THE DEFENDANTS:

- a. Mr. Sabyasachi Choudhury, Learned Advocate representing the defendants submits that from the language of the Will, the deceased was lying bedridden for the last one year prior to the alleged execution of the Will. The health condition of the deceased was extremely bad as recorded in the Will.

- b. He submits that Section 63 of the Indian Succession Act, 1925 required the Will to 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 presence and on 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 sign the Will in the presence of the testator, but it is not necessary that more than one witness be present at the same time and no particular form of attestation shall be necessary. He submits that the said requirement of law has not been complied in the present case.
- c. Mr. Choudhury submitted that P.W.1 admitted that he attained his majority in the year 1974 thus in the year 1966, he was about 9 years old so he cannot depose about the testamentary capacity of the testator. He submits that during cross examination of P.W.1, he stated that his grandmother told him that Sahadeb Koiri, Chandratara Dosad and Balai Lal Dey accompanied the testator to the Registrar office and he has not seen anybody sign on the alleged Will.
- d. Mr. Choudhury submitted that P.W.1 admitted that the testator was suffering from old age ailment since 1965. He submitted that as per evidence of P.W.1, he is not the direct witness of execution of the Will by the testator and he has also not seen

the attesting witness signing in the Will thus the evidence of P.W.1 is hearsay evidence which cannot be said to prove the execution of Will through the evidence of P.W.1.

- e. Mr. Choudhury submitted that the date of alleged Will is 4th April, 1966 and the testator died on 13th November, 1966. The executor of the Will died on 6th October, 1974 and the legatee of the Will died on 15th July, 1971 and the application for grant of probate is filed in the month of September 1988 but the plaintiff has not provided any explanation why the executor or the legatee has not filed any case for grant of probate during their life time and why the plaintiff has filed the present case after the period of 14 years from the death of executor.

- f. Mr. Choudhury submitted that though P.W.1 has stated that all the attesting witnesses passed away and he identified their signature but the fact remains that he has not seen the attesting witnesses have signed the Will. Mr. Choudhury in support of his submissions relied upon the judgement in the case of ***H. Venkatachala Iyengar Vs. B.N. Thimmajamma and Others*** reported in ***AIR 1959 SC 443*** and submitted that it is the duty of the propounder to show satisfactory evidence that the Will was signed by the testator, that the testator at the relevant time was in a sound and disposing state of mind, that he understood the nature and effect of the dispositions and put his signature to the document of his own free will.

- g. Mr. Choudhury submitted that admittedly in the present case, none of the attesting witnesses of the Will come forward to prove the attestation of the Will. He submitted that the plaintiff has proved the death of one of the attesting witness but has not proved the death of other attesting witness. He submits that there was delay of 22 years in presenting the petition for grant of Letters of Administration. On the date of filing of the application, Balai Lal Dey was alive but the plaintiff has not taken any steps to ensure the presence of Balai Lal Dey to have his evidence recorded *de bene esse*. He further submits that the plaintiff has also not availed the provisions of Order XVI Rule 10 of the Code of Civil Procedure, 1908. Mr. Choudhury relied upon the judgment in the case of ***Babu Singh and Ors. vs. Ram Sahai @ Ram Singh*** reported in ***AIR 2008 SC 2485*** and submitted that mere fact the signature of the attesting witness is proved, is not sufficient to prove the due execution of the Will.
- h. Mr. Choudhury submitted that plaintiff has admitted that the executrix, Sonia Koiri died in the year 1974, the plaintiff has also admitted that Mahadev Koiri died on 15th July, 1971 and the plaintiff being the grandson of the testator was aware of the alleged Will in the year 1971 but the plaintiff has not explained the delay in the application for grant of Letters of Administration. He submits that it is admitted that the plaintiff attained majority in the year 1974 but has filed the application

only in the year 1988. In support of his submissions he has relied upon the judgment in the case of ***Kunvarjeet Singh Khandpur Vs. Kirandeep Kaur and Others*** reported in ***AIR 2008 SC 2058*** and submitted that delay beyond 3 years after the deceased's death would be aroused suspicion and greater the delay, greater would be the suspicion.

10. On the basis of pleadings of the parties, following issues were framed:

- i. Whether the testator had the testamentary capacity to execute the Will?*
- ii. Is the signature appearing in the Will the genuine signature of the testator?*
- iii. Whether the execution of the Will is shrouded by a suspicious circumstance as pleaded in paragraph 18 of the Affidavit in Support of the Caveat filed by the defendant no.1?*
- iv. What, if any, relief is the plaintiff entitled to?*

11. In order to prove his case, the plaintiff has examined 3 (three) witnesses, namely :

- (1) Swapan Koiri, the plaintiff himself as beneficiary under the Will and Testament dated 4th April, 1966,*
- (2) Sanjay Kumar Dey, the son of Late Bilailal Dey.*
- (3) Utpal Kumar Dey, being the other son of the son of Late Bilailal Dey.*

- 12.** During evidence of plaintiff's witness, all together 17 (seventeen) documents were exhibited, being 'Exhibit – A to Exhibit J & J/1" and one (1) document is marked as Exhibit "1" for identification, which are as follows:

Exhibit – A: Will and Testament of Sri Krishna Koiri (since deceased), dated 4th April, 1966.

Exhibit – A/1: Signature of Sri Krishna Koiri.

Exhibit – A/2: Seal of Registering Authority

Exhibit – A3: Schedule of property as mentioned in the Will and Testament (Ka and Kha).

Exhibit – B: Copy of the Death Certificate of Sri Krishna Koiri, dated 13th November, 1966.

Exhibit – C: Copy of the Death Certificate of Smt. Sonia Koiri, dated 6th October, 1974.

Exhibit – D: Copy of the Death Certificate of Mahadev Koiri, dated 15th July, 1971.

Exhibit – E: Signature of Sri Krishna Koiri, appearing at the first page of Ayurvedic Medicine Book.

Exhibit – F: Signature of Sri Krishna Koiri, appearing at the first page of Hindi Book.

Exhibit – G: Certified Copy of the Deed of Partition dated 21st January, 1966, between Sri Krishna Koiri and his cousin brothers.

Exhibit – G/1: *Signature of Sri Krishna Koiri in the Photocopy of Deed of Partition.*

Exhibit – G/2: *Signature and seal of Registering Authority.*

Exhibit – H: *Signature of Balai Lal Dey, appearing in the Affidavit filed in the Probate Proceedings, filed by the plaintiff.*

Exhibit – I: *Signature of Balai Lal Dey in the Will and Testament of Sri Krishna Koiri, dated 4th April, 1966.*

Exhibit– J: *Signature of Balai Lal Dey in the “Personal Memoranda” of 1967 diary.*

Exhibit– J/1: *Signature of Balai Lal Dey in the “Personal Memoranda” of 1970 diary.*

Exhibit – 1 (Mark for Identification): *Copy of Deed of Conveyance dated 26th September, 2012 of Swapan Koiri.*

13. The defendants had examined 2 (two) witnesses, namely:

*(1) Mr. Gautam Kushwaha, son of Smt. Bimala Devi
and*

(2) Manoj Kumar Bhagat, son of Smt. Kamala Devi.

14. During examine of defendants’ witness, altogether 12 (twelve) documents were exhibited being ‘Exhibit – 1 to Exhibit 12’, which are as follows:

Exhibit 1: *Copy of Higher Secondary Pass Certificate of Swapan Koiri.*

Exhibit 2: *Copy of the Will of Balai Lal Dey.*

Exhibit 2/A: *Signature of Balai Lal Dey on the top right hand portion of his Will at page 4.*

Exhibit 2/B: Signature of Balai Lal Dey on the top right hand portion of his Will at pages 1, 2, 3 and on the center right portion of his Will.

Exhibit 3: Ceritifed Copy of the Sale Deed of Swapan Koery dated 26th September, 2012.

Exhibit 4: Two signatures of Bimala Devi collectively, on the original letter dated 1st November, 2023, made in Hindi language.

Exhibit 5: Signatures of Bimala Devi collectively, on original two documents of Income Tax Department.

Exhibit 6: Signature of Bimala Devi in the original PAN Card.

Exhibit 7: Bengali signature of Kamala Devi with picture, in the Concession Certificate dated 22nd March, 2001.

Exhibit 8: Original Death Certificate of Kamala Devi dated 13th August, 2011.

Exhibit 9: Original receipt of Crematorium issued by Halisahar Municipality upon the expenses towards Cremation of the dead body of Kamala Devi dated 13th August, 2011.

Exhibit 10: Bengali signature of Kamala Devi, in the original form of medical certificate for Orthopedically/Physically handicapped dated 25th February, 1990, issued by M. R. Bangur Hospital, 24 Parganas (S).

Exhibit 11: Original form of medical certificate for Orthopedically/Physically handicapped dated 25th February, 1990, issued by M. R. Bangur Hospital, 24, Parganas (S).

Exhibit 12: *Original Concession Certificate of Kamala Devi dated 22nd March, 2001 with picture, issued by one Naresh Prasad Sinha from Madhupur.*

15. DECISION WITH REASONS :

All issues are interconnected with each other, accordingly, are taken together for consideration.

16. The Will is dated 4th April, 1966 and is registered one. The testator Krishna Koiri has executed his last Will by appointing his wife Sonia Koiri as Executrix and his son Mahadeb Koiri as legatee of the said Will. Testator died on 13th November, 1966, executrix died on 6th October, 1974 and the legatee died on 15th July, 1971. Executrix during her life time has not filed any application for grant of probate of the Will. The plaintiff being the son of legatee and grandson of the testator as filed the present suit for grant of Letters of Administration.

17. Section 63 of the Succession Act, 1925 reads 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 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.

In the present case, there are three attesting witnesses in the Will but none of the witnesses have been examined as all of them passed away. At the time of filing of an application for grant of probate, one witness, namely, Balai Lal Dey was alive and he has filed his affidavit in support of his application for grant of Letters of Administration but he was not examined before this Court, he expired prior to examination of witness. The plaintiff who being the grandson of the testator has examined himself as P.W.1 in the instant case. The plaintiff, P.W.1 attained his majority in the year 1974 and the Will was executed in the year 1966 so at the time of execution of the Will he was 9 years old. He has stated that his grandmother i.e. Sonia Koiri, the executrix told to him that three persons accompanied the testator to the Registrar Office. P.W.1 also stated that he has not seen anybody sign on the Will. The plaintiff has relied upon answer to question nos. 20 to 22, 31, 148, 150, 161 and 162 of the P.W.1 and submitted that the registration of Will before the Registering Authority was duly proved by the P.W.1 in

his evidence. In question no. 163, the P.W.1 has admitted that he has not seen anybody sign on the Will dated 4th April, 1966 as he was not personally present. In question no.165, the P.W.1 has admitted that he is deposing with regard to the alleged Will dated 4th April, 1966 on the basis of whatever, his grandmother had told to him since he was not personally present. Considering the overall evidence of P.W.1 this Court finds that the evidence lead by P.W.1 is hearsay evidence and it cannot be said that the registration of Will is proved.

18. In the Will dated 4th April, 1966, it is mentioned that *"I am lying bed ridden for the last one year. At present my health is in an extremely bad condition"* The plaintiff relied upon the question nos. 71, 72 and 81 of examination-in-chief and question nos. 231, 239 and 240 of cross examination and submitted that the plaintiff has proved that mental and physical condition of the testator was fit and the defendants have not produced any documents to rebut the said evidence or to prove that the testator was not in fit state of mind. In question nos. 71, 72 and 81 the P.W.1 stated that his grandfather signed the Will in full awareness and knowledge, he was mentally fit. In cross-examination, a specific question was put to P.W.1 about the express made in the Will with respect to his health condition and the P.W.1 stated that due to his old age ailment he must have stated but has not made any clarification why the testator mas made the said statement in the Will. The Will was executed on 4th April, 1966 and the testator died on 13th November, 1966 within seven months. It is the specific case of the plaintiff/P.W.1

that he has not seen anybody signing the Will and he deposed before this Court as an hearsay witness how his evidence can be believed that the testator has signed the Will while possessing good health and fit state of mind. In the Will itself it is mentioned that he is lying bed ridden for the last one year. Exhibit "B" is the death certificate of testator. In the death certificate, cause of death is recorded as "*chronic colitis circulatory failure*". This part of the evidence also proved that health condition of the testator was not good. Considering the evidence this Court finds that the plaintiff has not removed the suspicion whether the testator was in fit state of mind or physically fit.

19. P.W.2 and P.W.3 are the sons of one of the attesting witness namely Balai Lal Dey. Both witnesses have identified the signatures of their father appearing in the affidavit affirm by their father in support of the application for grant of Letters of Administration as Exhibit- H and Exhibit- I both witness have also identified the signatures of their father on the Will. Both witnesses though have identified the signatures of their father in the affidavit as well as in the Will but it is also admitted that the signature which they have identified as signatures of their father has not signed in front of them. P.W.2 has also produced two diaries of 1967 and 1970 of his father wherein he identifies the signatures of his father and marked as Exhibit-J and J-1. Neither P.W.2 nor P.W.3 have stated that either the signature appearing in the Will or signatures appearing in other documents were signed in their presence. The said witnesses have only identified the signatures of their

father. Mere identifying signatures of the attesting witness without any evidence that the said signatures were made in their presence, this Court is of the view that it cannot be said the testator has executed the Will in presence of the attesting witness.

Plaintiff has relied upon the judgment in the case of ***Pranti Ghosh and others Vs. Anil Kumar Ghosh*** reported in **2022 SCC Online Cal 2736** but the said case is distinguishable from the facts of this Case as in the said case, the Hon'ble Division Bench of this Court relied upon the judgement in the case of ***M.B. Ramesh (D) By L.Rs. Vs. K.M. Veeraje (D) by L.Rs.*** reported in **(2013) 7 SCC 490**, in the said case, the witness has not specifically stated that he had seen the other attesting witness sign the Will in the presence of the testator, but he has stated that other witnesses had also signed the document and during cross examination, the witness stated that other witness (Mr. Mallaraje Urs), Smt. Nagammani, himself and one Sampat Iyanger and the writer of the Will were present while writing the Will. In the present case, none of the witnesses were present at the time of execution of the Will nor have seen their father put his signature in the Will. Only the witnesses have identified the signatures of their father which did not full fill the provisions of Section 63 of the Successions Act or Sections 68 and 69 of the Indian Evidence Act.

- 20.** The Will is dated 4th April, 1966. As per Will the wife of the testator Sonia Koiri is the executrix of the said Will and the father the plaintiff, namely, Mahadev Koiri is the legatee. Testator died on 13th November,

1966. The executrix died on 6th October, 1974. Prior to death of executrix the legatee died on 15th July, 1971. The executrix was alive about eight years after the death of testator. Executrix has not taken any steps during her life time to get probate of the said Will. It is the evidence of P.W.1, the plaintiff herein that the executrix being the grandmother of the plaintiff, informed the plaintiff that the testator has executed the Will, admittedly, the grandmother had the knowledge of the Will and the plaintiff also came to know about the Will during the life time of his grandmother. The Plaintiff tried to explain the delay and during his examination in chief that he was only 10 years old and when he attained majority proceed with the matter. He also tried to explain that he has no money to initiate proceeding. What are the explanations the P.W.1 has given during his examination before commissioner, the plaintiff has not made any averments with regard to the explanation of delay caused in filing the application for grant of probate.

- 21.** A will is a commitment, desire, inclination and intention to bequeath and dispose of properties in the future, in favour of the beneficiary.
- 22.** When the will is made, the law requires that there should be sound disposing mind both at the time when the instructions for preparation of the will is given and when the will is executed, but it would appear that if the will is shown to have been drawn in accordance with the instructions given while the testator was of sound disposing mind, it is sufficient that, when he executes it, he appreciates that he is being asked to execute a will, a document drawn in pursuance of those

instructions shall remain valid. It is presumed that the testator was sane at the time when he made his will but if the question of his insanity or mental incapacity is contested, the initial onus is on the propounder to prove that the testator was of sound disposing mind and have the required mental capacity at the time when he made his will. While there must be a vigilant examination of all the evidence, if the court feels that there is no doubt substantial enough to defeat a grant of probate, then the grant must be made. The law does not require complete proof of mental capacity and sound disposing mind or even proof beyond reasonable doubt is not essential.

- 23.** The law requires that at the time of bequeath the testator has a disposing mind so that he is able to make a disposition of his property with understanding and reason.
- 24.** The mode and manner of execution of a will has been lucidly discussed in **Savithri & Ors. vs. Karthyayani Amma & Ors.** reported in **(2007) 11 SCC 621: (AIR 2008 SC 300)** in paragraphs 19 to 20. The said paragraphs are reproduced below:

“19. In **Niranjan Umeshchandra Joshi v. Mrudula Jyoti Rao**, **(AIR 2007 SC 614)**, this Court held:

32. Section 63 of the Evidence Act lays down the mode and manner in which the execution of an unprivileged will is to be proved. Section 68 postulates the mode and manner in which proof of execution of document is required by law to be attested. It in unequivocal terms states that execution of will must be proved at least by one attesting witness, if an attesting witness is alive subject

to the process of the court and capable of giving evidence. A will is to prove what is loosely called as primary evidence, except where proof is permitted by leading secondary evidence. Unlike other documents, proof of execution of any other document under the Act would not be sufficient as in terms of Section 68 of the Evidence Act, execution must be proved at least by one of the attesting witnesses. While making attestation, there must be an *animus attestandi*, on the part of the attesting witness, meaning thereby, he must intend to attest and extrinsic evidence on this point is receivable.

33. The burden of proof that the will has been validly executed and is a genuine document is on the propounder. The propounder is also required to prove that the testator has signed the will and that he had put his signature out of his own free will having a sound disposition of mind and understood the nature and effect thereof. If sufficient evidence in this behalf is brought on record, the onus of the propounder may be held to have been discharged. But, the onus would be on the applicant to remove the suspicion by leading sufficient and cogent evidence if there exists any. In the case of proof of will, a signature of a testator alone would not prove the execution thereof, if his mind may appear to be very feeble and debilitated.

20. Therein, this Court also took into consideration the decision of this Court in **H. Venkatachala Iyengar (supra)**, AIR 1959 SC 443, wherein the following circumstances were held to be relevant for determination of the existence of the suspicious circumstances:

34. ... (i) when a doubt is created in regard to the condition of mind of the testator despite his signature on the will;

(ii) when the disposition appears to be unnatural or wholly unfair in the light of the relevant circumstances; and

(iii) where propounder himself takes prominent part in the execution of will which confers on him substantial benefit.”

25. It is trite law that the burden of proof is on the propounder to prove that the will has been voluntarily executed, that the testator has signed the will and put his signature on his own free will having sound disposition of mind, understanding the nature and effect thereof and that the will is a genuine document. The onus of the propounder may be discharged if he succeeds in bringing on record sufficient cogent evidence in this regard and removing all suspicions.

26. In ***RM. Ak. P. Kannammal Achi & Ors. v. A.N. Narayanan Chettiar*** reported in ***(1970) 1 Mad LJ 252 : (AIR Online 1968 Mad 3)***, it was held that “while the burden on the propounder of the will is to show that the testator executed the will *in his right mind and with disposing mental capacity*, the caveator to succeed and have the will throw out should establish that the will was executed under undue influence and the evidence in regard to this must be of the exercise of influence either by coercion or by fraud. *Mere persuasion and importunity which do not unduly overbear the will of the testator would not be undue influence that would vitiate the will*”.

27. It is paramount duty of the propounder to explain away the suspicious circumstances attending the execution of the will. This burden gets heightened when a caveat is entered challenging the will as forged or vitiated by undue influence, etc. These principles are elaborately stated

by the Supreme Court in **H. Venkatachala Iyengar vs. B.N. Thimmajamma** reported in **AIR 1959 SC 443**.

28. In **H. Venkatachala Iyengar (supra)**, the court clearly distinguished the nature of proof required for a will as opposed to any other document 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 of the 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 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 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.”

- 29.** It is well established that in a case in which a will is prepared under circumstances which raise the suspicion of the court that it does not express the mind of the testator, it is for those who propound the will to remove that suspicion. [See *Gorantla Thataiah vs. Venkata subbaiya* reported in **AIR 1968 SC 1332**, *Indu Bala Bose vs. Manindra Chandra Bose* reported in **AIR 1982 SC 133**].
- 30.** A will is one of the most solemn documents known to law. By it a dead man entrusts to the living, the carrying out of his wishes, and as it is impossible that he can be called either to deny his signature or to explain the circumstances in which it was executed it is essential that trustworthy and effective evidence should be given to establish compliance with the necessary forms of law (**Ram Gopal Lal v. Aipna Kunwar**, reported in **AIR 1922 PC 366**). It seems impossible to enunciate any specific standard of proof which will be required to establish the authenticity of a will in any given case. Everything

depends upon the circumstances of the particular case under consideration. (**Kesheo v. Vitkal, AIR 1925 Nag 427, Per Findley O.C.J.**)

31. On the basis of the evidence it can be safely said that the suspicion is one inherent in the transaction itself. On the basis of the evidence it is difficult to arrive at a conclusion that the will is a product of free and fair mind of the testator.

32. In **Kunvarjeet Singh (AIR 2008 SC 2058) (supra)**, the Hon'ble Supreme Court explained the concept of right to apply for probate in the context of Article 137 of the Limitation Act, 1963. It was held that an application for grant of probate and letters of administration is in effect seeking permission of the court by the executor to perform the legal duty and discharge the instruction of the testator as mentioned in the will and is a continuous right which can be exercised at any time after the death of the testator as long as the right to do so survives and the object of the trust exists or any part of the trust if created remains to be executed. In para 15 of the report, the Supreme Court summarised its conclusions in the following manner:

*"15. Similarly reference was made to a decision of the Bombay High Court's case in **Vasudev Daulatram Sadarangani v. Sajni Prem Lalwani** reported in **AIR 1983 Bom 268**. Para 16 reads as follows:*

16. Rejecting Mr Dalapatrai's contention, I summarise my conclusions thus:

(a) under the Limitation Act no period is advisedly prescribed within which an

application for probate, letters of administration or succession certificate must be made;

(b) the assumption that under Article 137 the right to apply necessarily accrues on the date of the death of the deceased, is unwarranted;

(c) such an application is for the court's permission to perform a legal duty created by a will or for recognition as a testamentary trustee and is a continuous right which can be exercised any time after the death of the deceased, as long as the right to do so survives and the object of the trust exists or any part of the trust, if created, remains to be executed;

(d) the right to apply would accrue when it becomes necessary to apply which may not necessarily be within 3 years from the date of the deceased's death;

(e) delay beyond 3 years after the deceased's death would arouse suspicion and greater the delay, greater would be the suspicion;

(f) such delay must be explained, but cannot be equated with the absolute bar of limitation; and

(g) once execution and attestation are proved, suspicion of delay no longer operates.

Conclusion (b) is not correct while the conclusion (c) is the correct position of law."

- 33.** It would thus appear that sub-para (d) makes it clear that the right to apply is dictated by necessity which however, significantly and importantly may not arise within three years from the death of the

testator. The application for grant of probate or letter of administration is not governed by any article of the Limitation Act.

- 34.** In *Ramesh Nivrutti Bhagwat v. Surendra Manohar Parakhe* reported in **(2020) 17 SCC 284 : (AIR 2019 SC 4948)**, the Supreme Court reiterated that the Succession Act does not prescribe any specific period of limitation for the grant of probate, or for making an application for revocation or cancellation of probate or letters of administration. The residuary Article 137 of the Limitation Act which covers proceeding for which no period of limitation is stipulated in the Act, provides for a three year period of limitation would govern such proceedings. In affirming the views expressed in ***Kunvarjeet Singh (supra)***, the Supreme Court observed:

“13. This issue was considered in Kunvarjeet Singh Khandpur v. Kirandeep Kaur, (2008) 8 SCC 463 : (AIR 2008 SC 2058). This Court negated the plea that since the Act prescribes no period of limitation in regard to matters concerning grant of probate or letters of administration, there is no time-limit. The court followed the decision in Kerala SEB v. T.P. Kunhaliumma (1977) 1 SCR 996: (AIR 1977 SC 282) which took note of the change in the collocation of words in Article 137 of the Limitation Act, 1963 compared with Article 181 of the Limitation Act, 1908, and held that applications contemplated under Article 137 are not applications confined to the Civil Procedure Code, 1908. In the older Limitation Act of 1908, there was no division between applications in specified cases and other applications, as in the Limitation Act, 1963. The court held in Kerala State Electricity Board (supra) that :

‘18. ... The words “any other application” under Article 137 cannot be said on the principle of ejusdem generis to be applications under the Code of Civil Procedure other than those mentioned in

Part I of the third division. Any other application under Article 137 would be petition or any application under any Act. But it has to be an application to a court for the reason that Sections 4 and 5 of the 1963 Limitation Act speak of expiry of prescribed period when court is closed and extension of prescribed period if applicant or the appellant satisfies the court that he had sufficient cause for not preferring the appeal or making the application during such period.

22. The conclusion we reach is that Article 137 of the 1963 Limitation Act will apply to any petition or application filed under any Act to a civil court. With respect we differ from the view taken by the two-Judge Bench of this Court in Athani Municipal Council case and hold that Article 137 of the 1963 Limitation Act is not confined to applications contemplated by or under the Code of Civil Procedure.'

14. Applying the ratio in Kerala SEB case (supra), the court, in Kunvarjeet Singh Khandpur (supra) observed that :

'13. ... The crucial expression in the petition is "right to apply". In view of what has been stated by this Court, Article 137 is clearly applicable to the petition for grant of letters of administration. As rightly observed by the High Court in such proceedings the application merely seeks recognition from the court to perform a duty because of the nature of the proceedings it is a continuing right.'

The court then concluded that the right to apply for probate accrues on the date of death of the testator.

15. in Sameer Kapoor v. State through Sub-Divisional Magistrate South, New Delhi & Ors. reported in AIR 2019 SC 3318), the context was slightly different; the probate was issued by a foreign court. The executor sought letters of administration in an Indian court (like in the present case), under Section 228. The court dealt with the objection of limitation, and noticed, firstly, that Kunvarjeet Singh Khandpur case (supra) had ruled about applicability of Article 137 for grant of probate in the first instance. Drawing a distinction

from the grant of probate (or letters of administration) and the recognition of that, under Section 228, the court in Sameer Kapoor case (*supra*) held as follows:

‘17. ... It can be said that in a proceeding, or in other words, in an application filed for grant of probate or letters of administration, no right is asserted or claimed by the applicant. The applicant only seeks recognition of the court to perform a duty. Probate or letters of administration issued by a competent court is conclusive proof of the legal character throughout the world. That the proceedings filed for grant of probate or letters of administration is not an action in law but it is an action in rem. As held by this Court in Kunvarjeet Singh Khandpur (AIR 2008 SC 2058) (*supra*).

15. ... “16. ... (c) ... an application for grant of probate or letters of administration is for the court's permission to perform a legal duty created by a will or for recognition as a testamentary trustee and is a continuous right which can be exercised any time after the death of the deceased, as long as the right to do so survives and the object of the trust exists or any part of the trust, if created, remains to be executed.””

16. The decision in *Lynette Fernandes v. Gertie Mathias* [*Lynette Fernandes v. Gertie Mathias*, (2018) 1 SCC 271], dealt with the precise issue of the period of limitation applicable for an application for cancellation of a probate or letters of administration. This Court held as follows:

‘19. One must keep in mind that the grant of probate by a competent court operates as a judgment in rem and once the probate to the will is granted, then such probate is good not only in respect of the parties to the proceedings, but against the world. If the probate is granted, the same operates from the date of the grant of the probate for the purpose of limitation under Article 137 of the Limitation Act in proceedings for revocation of probate. In this matter, as mentioned *supra*, the appellant was a minor at the time of grant of probate. She attained majority on 9-9-1965. She got married on 27-10-1965. In our

considered opinion, three years limitation as prescribed under Article 137 runs from the date of the appellant attaining the age of majority i.e. three years from 9-9-1965. The appellant did not choose to initiate any proceedings till the year 25-1-1996 i.e. a good 31 years after she attained majority. No explanation worthy of acceptance has been offered by the appellant to show as to why she did not approach the court of law within the period of limitation. At the cost of repetition, we observe that the appellant failed to produce any evidence to prove that the will was a result of fraud or undue influence. The same will has remained unchallenged until the date of filing of application for revocation. No acceptable explanation is offered for such a huge delay of 31 years in approaching the court for cancellation or revocation of grant of probate'."

- 35.** The Supreme Court in ***Sameer Kapoor v. State, (2020) 12 SCC 480***, observed that in an application for grant of probate or letters of administration no right or claim of the applicant is ascertained as the applicant only seeks recognition of the court to perform a duty. If allowed it becomes a conclusive proof of the legal character of the will. It is an action in rem.
- 36.** In the instant case, the executrix has not made any attempt to initiate proceeding for grant of probate though she died on 6th October, 1974. The plaintiff has filed the present application in the month of August 1988 i.e. after 14 years of the death of the executrix and after 22 years from the date of death of the testator. In the application, the plaintiff has not explained about the delay of either 14 years or 22 years. Only during his evidence, the plaintiff tried to explain the delay but it is

established norms, no amount of evidence beyond pleadings can be accepted by the Court.

37. CONCLUSION:

Considering the submissions of the parties, materials on record and the evidences lead by the parties. The burden of proof that the Will has been validly executed and is genuine document is on the propounder. The propounder is also required to prove that the testator has signed the Will and he had put his signature out of his own free Will having sound disposition of mind and understood the nature of effect thereof. Onus is on the propounder to remove the suspicion by leading sufficient and cogent evidence. In the case of Will, a signature of a testator alone would not prove the execution of Will. This Court finds that there is no evidence that the testator has given any instruction while the testator was of sound disposing mind to draft Will and the same was executed in presence of the attesting witnesses while possession good health.

In view of the above, **T.S. No. 28 of 2016 (PLA 6 of 1989)** is **dismissed**. Decree be drawn accordingly.

(Krishna Rao, J.)