

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

ORIGINAL SIDE

Present:

The Hon'ble Justice Krishna Rao

TS 14 of 2018

(PLA 270 of 2017)

With

IA No. GA 4 of 2022

With

GA 6 of 2023

In the Goods Of:

Jyoti Prakash Bhattacharjee (Deceased)

And

Kiran Chandra Barai & Anr.

Versus

Partha Sarathy Bhattacharya

Ms. Nilanjana Adhya

Mr. Rabi Ghosh

.....For the plaintiffs

Mr. Dhruba Ghosh, Sr. Adv.

Mr. Soumyajit Ghosh

Mr. Indranil Karfa

Mr. Sumit Dhar

.....For the defendant

Hearing Concluded On : 27.06.2024

Judgment on : 25.07.2024

Krishna Rao, J.:

1. The Plaintiffs have initially filed an application for grant of probate of the last Will and Testament dated 5th July, 2007 of Late Jyoti Prakash Bhattacharjee being PLA No. 270 of 2017.
2. By an order dated 1st February, 2018, this Court issued special citation and general citation. Upon issuance of citations, the defendant has entered appearance and filed caveat and affidavit in support of caveat. On receipt of caveat and affidavit in support of caveat, PLA No. 270 of 2017 is converted to Testamentary Suit No. 14 of 2018.
3. Jyoti Prakash Bhattacharjee died on 7th November, 2009, left behind his wife, namely, Chitralkha Bhattacharjee (since deceased), Partha Sarathy Bhattacharjee, his Son (the defendant herein), Smt. Chandana Sanyal and Ranjana Ghosal, his Daughters.
4. The plaintiffs say that on 5th July, 2007, Jyoti Prakash Bhattacharjee (since deceased) has executed his last Will and Testament by appointing the plaintiffs herein as joint executors with respect to his piece and parcel of land or ground measuring an area 10(Ten) Cottahs, 3 (Three) Chattaks, 30 (Thirty) Sq. Ft to be a little more or less being plot No. 35 of Sub-Block No. 9 of Block B in the town of Kalyani

developed by the Government of West Bengal in the Sub-Division of Kalyani in the District of Nadia, Thana Kalyani Sub Registrar Office at Kalyani of Krishnanagar Collectorate.

5. The plaintiffs say that the testator has executed his last Will and Testament in presence of his wife who is one of the attesting witnesses and another witness, namely, Khagendra Chandra Barai who is the father of executors. The attesting witness, Khagendra Chandra Barai has filed his affidavit on 18th May, 2017, supporting the Will executed by the testator in favour of the plaintiffs.
6. Ms. Nilanjana Adhya, Learned Advocate representing the plaintiffs submitted that the execution of the last Will and Testament dated 5th July, 2007, has been duly proved by the attesting witness Khagendra Chandra Barai and the defendant has not questioned the signatures of the Testator as well as the second witness of the Will, who is the wife of the Testator either in the affidavit in support of caveat or during cross examination of the witness.
7. Ms. Adhya submitted that the defendant has not been able to disprove the fact of execution of the last Will and Testament dated 5th July, 2007. She submits that the plaintiffs have adduced documentary evidence submitted by the Testator to the Estate Manager, Kalyani which shows the intention of the Testator that during his life time, he was intending to transfer the said land to the plaintiffs.

8. Ms. Adhya submits that the defendant during his cross-examination stated that he was aware of the intention of the testator and he or his family had no objection to the Kalyani property being given to someone outside their family. She submits that the defendant has not brought any evidence on record to prove that the plaintiffs have obtained Will from the deceased by coercion, misrepresentation, undue influence or by committing forgery.
9. Ms. Adhya submits that the defendants relies on a report prepared by the document examiner but this Hon'ble Court by an order dated 5th July, 2018, expressed that this Court does not require any expert opinion and the document examiner was only allowed to examine a coloured photocopy of the Will but during the cross examination, the Document Examiner confirmed that the photographs which he relied on were not the certified photographs supplied by the Registrar. She further submits that the document examiner has not submitted any report with respect to the age of documents.
10. Ms. Adhya submits that the defendant has provided the copy of death certificate only in the year 2016 and immediately the plaintiffs have filed an application for grant of probate of the last Will and Testament dated 5th July, 2007.
11. Learned advocate for the plaintiffs in support of her case relied upon the following judgments:
 - a. *Kristo Gopal Nath Vs. Baidya Nath Khan*
reported in AIR 1939 Cal 87.

b. Vrindavanibai Sambhaji Mane Vs. Ramchandra Vithal Ganeshkar and Others reported in (1955) 5 SCC 215.

12. Mr. Dhruba Ghosh, Learned Senior Advocate representing the defendant submits that the purported document which is the last Will and Testament of Late Jyoti Prakash Bhattacharjee, dated 5th July, 2007, is forged and fabricated and is procured by manipulation and by tampering some other documents.
13. Mr. Ghosh submits that the plaintiffs have no connection whatsoever, neither with the deceased nor with the defendant or any of his family members. Mr. Ghosh submits that the father of the defendant, i.e. the deceased had originally obtained a lease of a property in Kalyani, West Bengal from the State Government, sometimes in or around the Seventies, but the said property was however never used by the deceased. Sometimes in the year 2000 or 2001, the defendant was informed by the deceased that some local person at Kalyani were interested in purchasing the said property and the deceased was being coerced to dispose of the same, to which subsequently, the deceased informed the defendant that the deceased had transferred his rights in respect to the property to one Khagendra Ch. Barai.
14. Mr. Ghosh submits that the name of the father of deceased is not “Nishikanta Bhattacharjee” as mentioned in the Will and Testament dated 5th July, 2007 but is “Jyotish Chandra Bhattacharjee”, therefore,

it is obvious that the said Will and Testament is an interpolated document presented by the plaintiffs.

- 15.** He submits that the father of the defendant, i.e. Late Jyoti Prakash Bhattacharjee was an eminent lawyer and was also the Advocate General of Nagaland and had practiced in various fields of law at the Supreme Court of India as well as in this Court so bare perusal of the document alleged to be the last Will and Testament of the deceased, will transpire that the deceased is not the draftsman of that alleged document and it will also transpire that some Advocate whose name is concealed had allegedly drafted the same.
- 16.** He submits that during the life time of the deceased has executed his last Will and Testament dated 24th April, 1995 which was drafted by the deceased himself. After his death on 7th November, 2009, the defendant's mother, namely, Chitralkha Bhattacharjee (now deceased) and the defendant himself applied for the grant of Letters of Administration of the said last Will and Testament of the deceased dated 24th April, 1995 and the same is pending before the Testamentary Court.
- 17.** In the meantime, on 29th January, 2010, the defendant's mother, Chitralkha Bhattacharjee, made and published her last Will and Testament and she expired on 17th October, 2011 and the last Will and Testament of Late Chitralkha Bhattacharjee was also put before this

Court for the grant of probate, and the same was granted by this Court by an order dated 3rd March, 2017.

- 18.** The defendant says that the defendant was shocked and suspicious as to the fact that after almost 9 years after the death of father, the plaintiffs were trying to obtain probate of the alleged last Will and Testament of the deceased dated 5th July, 2007 in respect of the property situated at B-9/35, Kalyani, P.O. & P.S. - Kalyani, District – Nadia, Pin Code: 741235.
- 19.** The defendant further says that his father during his lifetime never had spoken about the alleged Will and Testament dated 5th July, 2007 to any of his family members and neither the defendant's mother nor the defendant was aware of such Will and Testament. Moreover, the defendant's mother herself was a co-applicant along with the defendant for grant of Letters of Administration of the Will and Testament dated 24th April, 1995, being the PLA No. 45 of 2011. Therefore, the signatures of her was obtained without disclosing the fact that she is signing on the alleged Will and Testament dated 5th July, 2007. The defendant's mother's Will and Testament dated 29th January, 2010, only indicates about the Will and Testament of the deceased dated 24th April, 1995, which itself evidences that defendant's mother herself was not aware of the alleged Will and Testament.
- 20.** The defendant submits that his father never resided in CE/146, Salt Lake, Calcutta – 700064, therefore, the question of the said address to

be put in the Will as the deceased's residence in the year 2007 does not arise, rather the address mentioned is of the defendant's uncle and his aunt.

21. As per the submissions made by the defendant, the deceased was completely wheelchair bound on the date of the alleged Will and was assisted by his family or a chaperone, which was then affirmed by Dr. Debal Sen, who was doing treatment of the deceased.

22. Considering pleadings of both the parties, the following issues were framed:

“1. Whether the last Will and Testament dated July 5, 2007 has been made and executed in accordance with law?

2. Whether the last Will and Testament dated July 5, 2007 is forged, interpolated by the plaintiffs and procured by coercion, misrepresentation and undue influence of the Plaintiffs as alleged by the Defendant?

3. Whether the Plaintiffs are entitled to grant of Probate in respect of the last Will and Testament of Late Jyoti Prakash Bhattacharjee dated July 5, 2007?

4. Whether the execution of the last Will and Testament of Late Jyoti Prakash Bhattacharjee dated July 5, 2007 is shrouded with suspicious circumstances as alleged by the Defendant?

5. Whether the application for the Grant of Probate by the Plaintiffs in respect of the last Will and Testament of Late Jyoti Prakash Bhattacharjee dated July 5, 2007 barred by the Laws of Limitation?”

23. Plaintiffs in support of their case have examined two witnesses, namely:

- i) *Khagendra Chandra Barai who is one of the attesting witness of the Will.*
- ii) *Kanchan Barai, who is one of the executor of the Will.*

24. During evidence of the plaintiff's witnesses, altogether eight (8) documents were exhibited being **Exhibit A to Exhibit H** which are as follows:

Exhibit A : Copy of the Will and Testament dated 5th July, 2007.

A/1 : Signature of Late Jyoti Prakash Bhattacharjee.

A/2 : Signature of P.W.1, namely, Khagendra Chandra Barai.

A/3 : Signature of Late Chitralekha Bhattacharjee

Exhibit B : General Power of Attorney dated 5th July, 2002.

B/1 : Signature of Late Jyoti Prakash Bhattacharjee.

B/2 : Signature of Late Chitralekha Bhattacharjee.

B/3 : Signature of P.W.1, namely, Khagendra Chandra Barai.

Exhibit C : Application for transfer in respect of Plot No. B-9/35 dated 24th October, 2002.

Exhibit D : Money receipt for transfer of processing fees.

Exhibit E: Plan submitted before the Kalyani Municipal Authority.

Exhibit F : Copy of a letter dated 19th December, 2002.

Exhibit G : Site Plan (with objection).

Exhibit H: Copy of Death Certificate of Chitralkha Bhattacharjee.

25. Defendant has examined two witness namely:

- i. *Purushottam Chatterjee who is document examiner.*
- ii. *Partha Sarathy Bhattacharjee, who the caveator.*

26. During the evidence of defendant's witnesses, altogether 12 (twelve) documents, were marked as "**Exhibit 1 to Exhibit 12**":

Exhibit 1: Report of Document Examiner dated 11th August, 2018 along with documents.

Exhibit 2: Letter dated 10th December, 2002 from the Office of Estate Manager to Jyoti Prakash Bhattacharjee.

Exhibit 3: Agreement of Transfer dated 15th April, 2001 (with objection).

3/1 : Blank space in Exhibit 3 in the name of father of Jyoti Prakash Bhattacharjee.

3/2 & 3/3: Blank spaces in page 2, para 1 of Exhibit 3.

3/4 : Typed as SIGNED, SEALED AND DELIVERED by the Transferor.

3/5 : Typed as SIGNED AND DELIVERED by the Transferee.

3/6 : Blank space without signature of witness.

Exhibit 4: Copy of money receipt (with objection).

Exhibit 5: Copy of Supreme Court Bar Association Card of Late Jyoti Prakash Bhattacharjee.

Exhibit 6: Copy of Supreme Court Bar Association Card of Late Jyoti Prakash Bhattacharjee.

Exhibit 7: Property Tax Bill for the year 2007-2008 issued by the Kolkata Municipal Corporation.

Exhibit 8: Certified copy of Lease Deed.

8/1 : Signature of Jyoti Prakash Bhattacharjee appearing at the Lease Deed.

8/2 : Signature of Jyotish Chandra Bhattacharjee appearing at the Lease Deed.

Exhibit 9: Photocopy of the Will and Testament of Jyoti Prakash Bhattacharjee dated 24th April, 1995.

Exhibit 10 : Certified copy of the Will and Testament of Chitralekha Bhattacharjee dated 29th January, 2010.

Exhibit 11 : Certified copy of the Probate (PLA 98 of 2013).

Exhibit 12 : Encircled portions in the copy of Passport.

12/1 : Encircled portion dated 3rd January, 2008.

27. Issue nos. 1, 2, 3 and 4 are interconnected and are taken together for consideration.

P.W.1, namely, Khagendra Chandra Barai, who is an attesting witness of the Will stated that the Testator, namely, Jyoti Prakash Bhattacharjee has executed a Will and Testament on 5th July, 2007 in a room in the first floor of the residence of the Testator and the wife of the Testator, namely, Mrs. Chitralekha Bhattacharjee was also present and she has also signed in the said Will and Testament as witness and after her signature, P.W.1 has signed in the said Will and Testament as witness as per request of the Testator. He has identified the Will and Testament and signature of testator, signature of the wife of testator and his signature. The Will is marked as Exhibit A, Signature of Testator is marked as Exhibit A/1, signature of the wife of Testator is marked as Exhibit A/3 and signature of P.W.1 is marked as Exhibit A/2. As per evidence of P.W-1, the Testator has initially executed an Agreement for Transfer of B-9/35, Kalyani, Nadia in favour of P.W.1 and the P.W.1 has also paid some money for the said land to the testator and the testator has taken steps for transfer of the said property but the transfer could not be effected. P.W.1 also stated that the testator has executed a Power of Attorney with respect to the said land in favour P.W.1 on 5th July, 2002. The Power of Attorney is also exhibited as Exhibit-B. Though the plaintiff has exhibited several documents but this Court has to see whether the plaintiffs have proved the execution of Will. The Agreement for Transfer which the P.W.1 has mentioned is exhibited during the cross-examination of P.W.1 as Exhibit-3 (with objection). In the cross-examination, P.W.1 has admitted that in Exhibit-3 at page nos. 1, 2 and page no. 3, there are

several blanks kept unfilled such as name of father of the testator, date of handing over the documents relating to the property and signature of witnesses.

It is the specific case of the defendant that the Will is forged and fabricated document. It is also the case of the defendant that the plaintiffs have suppressed the original agreement and have manipulated the original agreement by changing page no.5 of the agreement and pointing out following discrepancies:

- a. *In the 1st page of the WILL, name of father of Jyoti Prakash Bhattacharjee is mentioned as "Nishikanta Bhattacharjee" though the name of the father of the testator was "Jyotish Chandra Bhattacharjee".*
- b. *The first page of the Will 2/3rd of the space kept blank to adjust page no.5 of the agreement as part of the Will.*
- c. *At page no.2 in paragraph 1, 5th and 6th line inserting an big "fullstop" inserted date with one sentence which reads as follows "on this day of 5th July, 2007, I am executing this my Last Will and Testament." The space between 5th and 6th line is is are different from other spacing between two lines.*
- d. *In 3rd and 4th page of the Will, the name of the defendant is misspelt as "Sarathi" instead of Sarathy" as the father of the defendant never stated his name incorrectly in any document.*
- e. *At page "5" at the top is appearing in different type font from other page numbers.*
- f. *In the last page i.e. page no.5 of the agreement erased the word "Transferor" and "Transferee" and retyped words "Testator" and "Witnesses".*

- g. *In the bottom it is added as "Drafted by me strictly as per the Instructions of the Testator." And also added the word "ADVOCATE," but no signature of any advocate is appearing and no case is made out that the Will was drafter by any advocate.*
- h. *In the bottom of page 5 it is typed as "Contd.....6." but in other pages it was typed as "Contd.....P/2, P/3, P/4 and P/5".*
- i. *The back page of the Will also irregular as page 6 it is mentioned as:*

=6=

"DATED 5th DAY OF JULY, 2007

BETWEEN

*SHRI JYOTI PRAKASH BHATTACHARJEE
TESTATOR*

AND

SHRI KIRAN CHNADRA BARAI

&

SHRI KANCHAN BARAI

EXECUTORS

WILL

ADVOCATE

During cross examination of P.W.1 with respect to above discrepancies, following questions were put to him from question nos. 194 to 207 which reads as follows:

"194. (Shown first page of the document i.e. Ext. A) - do you find that the first 2/3rd of the page is blank?/ Yes.

195. So, I put it to you that this portion had been left blank for the purposes of stamp which is required in a Will?/ I have taken with me whatever document had been prepared.

196. Do you find that at the bottom right hand corner of the first page the succeeding page is mentioned as "Contd.....p2"?/ Yes.

197. And other similar words written under pages 2, 3 and 4 of the document ?/ Yes.

198. What is written at the bottom of page 5 of this document?/

199. (Shown page 5 of the alleged Will) - do you find the words "SIGNED SEALED & DELIVERED" appearing before the alleged signature of Jyotiprakash Bhattacharyya ?/ Yes.

200. Please encircle these three words in red ?/ Yes (witness encircles in red).

201. Do you find that there has been some overwriting and interpolation of the word "testator" just below that?/I cannot say.

202. I put it to you that it is evident from the document itself that there was another word written in place where the word "testator" has been typed and the same had been erased by whitener and the word "testator" has been typed on top of that ?/I cannot say how and in what way he had this document prepared.

203. But can you see for yourself today that there has been an overwriting or are you pretending that there is no such overwriting ?/I cannot understand.

204. Please come to the portion just below that where words "SIGNED AND DELIVERED BY the witnesses" are typed do you find that// Yes.

205. Please encircle that portion that you have just identified?/ Yes. (Witness encircles in red).

206. Do you find that there has been an interpolation where the word "witnesses" is typed ?/I cannot understand.

207. I put it to you that it is evident from the face of the record that the word "witnesses" has been typed on top of an earlier word which was erased by whitener and is an interpolation?/I cannot say anything, he knew what he did."

By an order dated 5th July, 2018, this Court allowed the defendant to appoint a document examiner of its choice to have the Will and Testament dated 5th July, 2007, examined. In the said order, this Court also made it clear that the Court has not decided regarding the requirement to appointment of any document examiner for any expert opinion and the appointment is made only at the instance of the party for the limited purpose and establishing its defence at the trial.

In terms of the said order, the defendant has appointed one Purushottam Chatterjee as document examiner. At the time of evidence, the defendant has examined the document examiner as D.W.1. He has stated that he has examined the disputed Will and Testament in the office of the Registrar, Original Side of this Court with proper scientific instrument and camera. He has further stated that during examining, the Will and Testament he has used different types of magnifying glass, including Mag Torch, Magnifying glass torch attached with torch. He also clarified that the magnifying glass with torch and scientifically it is called as illuminating magnifying. The report prepared by D.W.1 is marked as Exhibit- 1.

Question and answer of question No.23 of D.W.1 reads as follows:

“23. In course of your examination did you inspect the quality of the pages of the document ? / Yes, I find that out of five pages in this Will the last page i.e. page no. 5 of different quality than the first four pages of this disputed Will.”

During cross examination of D.W.1 though the plaintiffs have put several questions to said witness but the plaintiffs have neither put any question to the answer to the question No.23 nor given any suggestion with respect to the said answer. In cross examination of D.W.1 at question No. 137, the plaintiff has made specific suggestion that the Will and Testament dated 5th July, 2007, is genuine but the document examiner has denied the suggestion of the plaintiffs.

Report of document examiner is as follows:

“1. The disputed Will is an unregistered Will containing six sheets including cover page being No.6.

2. At page-2, line-5, there is big full-stop and the word "on" started after the word "life" which is not normal and usual in my opinion.

3. The entire sentence started with small letter/word "on" and ended with "Testament" was added fraudulently.

4. The big full-stop was not possible to erase and as such, it remains in original position and no way than to continue and to add the next sentence with small letter, just to show continuation of the previous sentence.

5 The marginal position of the 6th line, the word "am" is not similar with other lines (i.e. 5th line "health" and 7th line "I"). Line 6th is more right than the rest of the writings.

6. At page-2, the spacing between 5th & 6th line may be compared with 4th & 7th line which will prove that spacing is less than the rest of the writings. It will also prove that taking the advantage of the spacing between 1st & 2nd para (as we also find spacing between 2nd and 3rd para), the fraudulent interpolation occurred.

7. There are clear sign of erasures at two places now reading as "Testator & Witnesses" at

page-5 and line 18 & 20 and which is palpable even to a naked eye observation on Xerox copy and which are not normal and suspicious too, in my opinion.

8. The page marking at top of figure "5", the size of the said figure "5" is more big than the rest of the figures "5" (even on same page). I also find sign of erasure and fibre condition of the paper is disturbed at the page where present figure "5" is occupied. In my opinion, there was a previous figure which was erased and re-typed as figure "5" to serve the purpose.

9. There are five written pages of the said disputed Will. The paper used of page No.5 shows not similar with other four pages of the said Will. This can be observed by examination of transmitted light examination.

10. The edge condition of the top portion of page-5 shows more old than rest of the four pages in relative position. This strongly suggest that page No.5 was added and used old paper than other four pages of the said Will, Le. all papers are not of same period.

11. I find one vertical folding at back of the page No.5 which are absent on other pages. This also suggest that the present page No.5 is more old than the rest four pages of the Will.

12. At the bottom of the 5th page, writings "Contd...6." can be found. In other pages in relative position, it is "Contd.....P/2" etc. were written. This also strongly suggest that all pages were prepared in different sittings.

13. In my opinion, if the said addition at page-2, line 5th & 6th were genuine addition, then there should be signature of the Testator.

14. Similarly, if the erasure at page No.5, line No.18 & 20 were genuine erasures, there should be signatures of the Testator also.

15. The page No.6 is a cover page and cannot be treated as continuation writing sheet of the said Will.

16. The Witness No.2 at page-5 of the said Will is one Mr. Khagandra Ch. Barui who is the father of the two Executors.

17. I find no signature and address of the Advocate at page No.5 & 6 in the said Will which is not normal in my opinion.

18. I find similar common words in 4th and 5th pages of the Will, which are land markings and identification/description. It is practically repetition of same land markings/description. In my opinion, there was no other alternative to discard/delete the same writings as there was only one signature available at page-5 of the Testator.

19. All the said facts and conditions strongly suggest that page No.5 was added fraudulently to show a continuation of the 4th page of the Will which was practically an old page of some other document containing a signature of the Testator.

After considering all the above facts, I am of opinion that the page No.5 of the said Will was fraudulent added and as such, this Will cannot be and should not be treated as a genuine document.”

The celebrated decision of the Hon’ble Supreme Court on proof of a Will, in the case of **H. Venkatachala Iyenger Vs. B.N. Thimmajamma** reported in **AIR 1959 SC 443**, the Hon’ble Supreme Court held that:

“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 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.

28. In the above case, the Hon'ble Supreme stated that the following three aspects must be proved by a propounder:-

"i) that the will 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 propounder can be taken to be discharged on proof of the essential facts indicated therein."

29. In the present case, the suspicious circumstances appearing in the Will was duly put to the notice of P.W.1 and P.W.2 by the Learned Counsel for the defendant during their cross-examination but neither P.W.1 nor P.W.2 has provided any sufficient and satisfactory evidence to dispel the said suspicion. P.W.1 is the attesting witness of the Will but during his evidence though he has stated about the execution of the Will by the Testator in his presence and in presence of the wife of the Testator but failed to explain about the discrepancies brought to the notice of P.W.1.

30. As per the evidence of P.W.1, the testator has executed the Will and Testament in his presence and in the presence of the wife of the testator and the wife of the testator has also signed in the said Will as

witness. Though the wife of the testator died and she could not be examined as witness in the present case but the documents produced by the defendants is contrary to the evidence of the plaintiffs. The defendant has exhibited one Will and Testament dated 29th January, 2010, (Exhibit-10) executed by Chitralkha Bhattacharjee, W/o Late Jyoti Prakash Bhattacharjee wherein she has declared her son, the defendant herein as the sole beneficiary and universal legatee of her last Will and Testament. In the said Will and Testament, the mother of the defendant has also disclosed that her husband, Jyoti Prakash Bhattacharjee made his last Will and Testament on 24th April, 1995 by which she has received 50% undivided share in the residential property at 527, Jodhpur Park, Kolkata but she has not disclosed about any Will executed by her husband in the year 2007 with respect to Kalyani Property in favour of plaintiffs. The said Will and Testament dated 29th January, 2010, is duly probated by this Court dated 3rd March, 2017, which is marked as Exhibit-11. Considering the above, it is impossible for this Court to believe the evidence of P.W.1 that the Will date 5th July, 2007, was executed by the deceased in presence of his wife and she has signed in the Will as attesting witness.

- 31.** P.W.2, Kanchan Barai who is the son of P.W.1, is one of the executor of the Will and Testament along with plaintiff no.2. In his examination-in-chief in question nos. 22 to 27, he has stated as follows:

“22. Did your father ever explain to you?/ My father said that this Will was prepared by my 'Dadu' and told us to keep the Will.

23. *Who are you referring to as "Dadu"?/ Mr. Jyoti Prakash Bhattacharjee.*
24. *Did you ever have the occasion to meet your 'Dadu' or the person you called 'Dadu'?/ I went once at their house and met him. At that time I called him 'Dadu'.*
25. *Can you recollect when you had met him?/ I cannot recollect the exact date but it may be in the year 2001.*
26. *Did you ever have the occasion to meet the children of Mr. Jyoti Prakash Bhattacharjee?/ No.*
27. *Where did you meet Late Jyoti Prakash Bhattacharjee? / I have met Jyoti Prakash Bhattacharjee in his house at Jodhpur Park."*

32. In cross examination, P.W.2, he has admitted that only one occasion, he has met with the testator and he is not the family member of the testator. He also admitted that he do not know the name of father of Jyoti Prakash Bhattacharjee. He also admitted that in the document which he has filed in the present suit, the name of the father of the testator is Jyoti Prakash Bhattacharjee. Considering the statement of P.W.1, P.W.2 and the documents, it is proved that the father's name of the testator is Jyotish Chandra Bhattacharjee and not Nishikanta Bhattacharjee.

33. Learned Counsel for the plaintiff submits that the defendant has not questioned the signature of the testator appearing in the Will and the signature of the attesting witness who is the wife of the testator either in the affidavit in support of caveat or during examination of witnesses. In support of her case, Learned Advocate has relied upon the judgment

in the case of **Kristo Gopal Nath Vs. Baidya Nath Khan** reported in **AIR 1939 Cal 87** and submitted that the right way of dealing with a testamentary case in order to find the positive evidence the Learned Judge ought to apply his dispassionate consideration of the evidence and avoid all kinds of speculations called 'circumstances of suspicion'. The correct line of approach is to see that the improbability in order to prevail against the positive evidence must be clear and cogent and must approach very nearly to, if it does not altogether constitute, an impossibility.

34. Plaintiff has also relied upon the judgment in the case of **Vrindavanibai Sambhaji Mane Vs. Ramchandra Vithal Ganeshkar and Others** reported in **(1995) 5 SCC 215** wherein the Hon'ble Supreme Court relying upon the judgment of **Kristo Gopal Nath (Supra)** and held that :

“14. As far back as in 1894 the Privy Council in the case of Choteynarain Singh v. Mussamat Ratan Koer observed that in the case of execution of a Will, an improbability must be clear and cogent. It must approach very nearly to, if it does not altogether constitute, an impossibility. This was reiterated by the Calcutta High Court in the case of Kristo Gopal Nath v. Baidya Nath Khan. It said that when a court is dealing with a testamentary case where there is a large and consistent body of testimony evidencing the signing and attestation of the Will, but where it is suggested that there are circumstances which raise a suspicion and make it impossible that the Will could have been executed, the correct line of approach is to see that the improbability in order to prevail against such evidence must be clear and cogent and must approach very nearly to, if it does not altogether

constitute, an impossibility. There is no such improbability about the Will in the present case.”

35. It is correct that there is no challenge of signature of the Testator and his wife in the Will and Testament but it is the specific case of the defendant that the father has not executed any Will and Testament in favour of the plaintiff and mother of the defendant has not signed as witness in the Will and Testament. In support of the defence, the defendant has exhibited the Will and Testament of his mother being Exhibit-10 and in the said Will and Testament, mother has categorically mentioned that her husband has made his last Will and Testament on 24th April, 1995 but she has not disclosed anything about the present Will and Testament dated 5th July, 2007. The defendant has made out a specific case that the P.W.1 and the plaintiffs have suppressed the original Agreement of Transfer dated 15th April, 2001 (Exhibit-3) and have manipulated page No. 5 of original Agreement and used as in the alleged Will.

36. Leaned Counsel for the defendant relied upon the judgment in the case of **Kartar Kaur and Another vs. Milkho and Others** reported in **(1996) 11 SCC 626** and submitted the Hon’ble Supreme Court relying upon the judgment in the case of **H. Venkatachala Iyengar (supra)** and held that :

“Where, however, there are suspicious circumstances, the onus would be on the propounder to explain them to the satisfaction of the Court before the Will can be accepted as genuine. If the caveator alleges undue influence,

fraud or coercion the onus will be on him to prove the same. Where there are no such pleas but the circumstances give rise to such doubts, it is for the propounder to satisfy the conscience of the Court.”

- 37.** In the case in hand, it is the specific case of the defendant that the name of the father of the testator is Jyotish Chandra Bhattacharjee but in the Will and Testament, it is recorded as Nishikanta Bhattacharjee and it proved that the name of the father of the testator is Jyotish Chandra Bhattacharjee. Simultaneously in the Will and Testament, the address of the testator is mentioned as C/o. S. Bhattacharjee, CE/146, Salt Lake, Calcutta 64 and *nest* at 527, Jodhpur Park Kolkata but in question no.17, P.W.1 stated that “*it was executed in a room in the first floor of the residence of Jyoti Prakash Bhattacharjee.*” But admittedly the testator was not residing at Salt Lake, Kolkata.
- 38.** P.W.1 stated that the testator has executed a Will and Testament by bequeathing the property to the plaintiffs but the plaintiff during his cross examination admitted that he is not related to the family of the testator and only met once with the testator. This circumstances is unnatural that a person unknown to the testator and had met with the testator only once, how the testator has executed Will in his favour. It is also pertinent to mention here that plaintiff no. 2 has not deposed before this Court and thus, the defendant could not get chance to cross-examine the other plaintiff.

39. In the case of *Kishan Singh Ahluwalia -vs- Sheela Saxena & Ors.*

reported in **2001 (2) M.P.L.J 117**, the Madhya Pradesh High Court held that :

“24. In the present case, the Will in question contained three incorrect recitals of a grave nature. Firstly, it had been recited therein that Smt. Sheela Saxena, the propounder of the Will was like a daughter to the testatrix who had treated her like her mother. It is nobody's case that the testatrix was not the real mother of Smt. Sheela Saxena. That being so, there could be no occasion for the testatrix to say that Sheela Saxena was just like a daughter to her. The recital contained in paragraph 1 of the Will suggests as if Sheela Saxena was not the real daughter of the testatrix. The testatrix could never be a party to such an inaccurate recital in the Will.”

40. Considering the above facts and circumstances of the case, this Court finds that the plaintiffs failed to remove the suspicious circumstances as available on the face of the Will and Testament. The document examiner i.e. D.W.1 has identified his report wherein all together 19 points has noted with respect to the discrepancies. If the report is not taken into consideration and any person sees the Will carefully, the discrepancies are appearing on the face of record which will corroborate the report of the document examiner. Not only that, the discrepancies were brought to the notice of P.W.1 as well as P.W.2 during cross examination but none of the witnesses explained about the discrepancies. This Court perused the original Will and Testament and the report of the document examiner as well as the evidence of witnesses, on perusal of original Will, this Court finds that there are

several discrepancies in the Will which corroborate the report of document examiner. This Court specifically observed that the Will consist of six pages including back page of the Will and Testament but except in page no. 5 in none of the pages, there is any signature of testator in other pages. This Court also finds that page no.5 of the Will and Testament is manipulated and fabricated document by incorporating certain words and the page is different from other pages.

In view of the above, this Court decided the issue nos. 1, 2, 3 and 4 against the plaintiff and in favour of defendant.

41. ISSUE No. 5:

The plaintiff has initially filed an application for grant of probate of the last Will and Testament dated 5th July, 2007 on 23rd August, 2017 and on filing of caveat and affidavit in support of caveat, the suit is converted as Testamentary Suit. The defendant says that the suit filed by the plaintiff is barred by limitation as the testator died on 7th November, 2009 and after the period of 8 years, the plaintiff has filed an application for grant of probate. Counsel for the defendant relied upon the statement of P.W.1 wherein he has stated that he came to know about the death of the testator in the year 2010 and thereafter also P.W.1 continued to meet the wife of testator but has not filed the application for grant of probate within the stipulated period of three years from the date of knowledge of the death of the testator. As per the case of the plaintiff though the plaintiff had the knowledge of death of the testator in the year 2010 but death certificate of the testator was

not available with the plaintiff and without death certificate, application for grant of probate will not be accepted and immediately after getting the copy of death certificate from the defendant, the plaintiff has filed an application for grant of probate.

In the case of ***Sameer Kapoor –vs- State through Sub-Division Magistrate South, New Delhi*** reported in **2020 (12) SCC 480**, the similar question was arose whether Article 137 of the Limitation Act, 1963, shall be applicable for application for grant of probate or letters of administration?

Article 137 of the Limitation Act, 1963, reads as follows:

<i>Description of suit</i>	<i>Period of limitation</i>	<i>Time from which period begins to run</i>
137. Any other application for which no period of limitation is provided elsewhere in this Division.	Three years	When the right to apply accrues

The Hon'ble Supreme Court relying upon the judgment passed in the case of ***Kunvarjeet Singh Khandpur*** reported in ***AIR 2008 SC 2058 (supra)*** and in the case of ***Krishan Kumar Sharma –vs- Rajesh Kumar Sharma*** reported in ***(2009) 11 SCC 357***, held that so far as the question is concerned, the same is now not res integra and answer the said question in affirmative by holding that Article 137 of the Limitation Act, 1963, shall be applicable to the applications for grant of probate or letters of administration.

In the present case, the testator died on 7th November, 2009 and admittedly the plaintiffs and the P.W.1 came to know about the death of the testator in the year 2010 but the application for grant of probate was filed only on 23rd August, 2017 i.e. after the period of 8 years from the death of the Testator. Accordingly, the suit filed by the plaintiffs for grant of probate is barred by limitation.

In view of the above, Issue No. 5 decided against the plaintiffs.

42. Conclusion:

Considering the above issues decided by this Court, the plaintiffs are not entitled to get probate of the last Will and Testament date 5th July, 2007. **T.S. No. 14 of 2018 (PLA No. 270 of 2017) is dismissed.** Decree be drawn accordingly. **GA No. 4 of 2022** with **GA No. 6 of 2023** are accordingly **disposed of**.

(Krishna Rao, J.)