

OD-2

ORDER SHEET

TS/15/2022
(Old Case No.PLA/44/2012)
IN THE HIGH COURT AT CALCUTTA
TESTAMENTARY & INTESTATE JURISDICTION

IN THE GOODS OF :
KRISHNA KUMAR MITRA, DECEASED
AND
SOMNATH MITRA
VS.
ANANDA MITRA & ANR.

BEFORE:
The Hon'ble JUSTICE BIVAS PATTANAYAK
Date: 21st August, 2024.

Ms. Nilanjana Adhya, Mr. Anirban Pramanick, Ms.
Bhagyasree Dey, Advocates for the petitioner.

The Court : This matter is appearing in the list under the heading '*To Be Mentioned*'.

With the consent of the learned Advocate for the petitioner, the matter is treated as on the day's list and taken up for consideration.

Perused the report of Registrar-in-Insolvency dated 20th August, 2024 furnished in terms of order dated 16th August, 2024.

This is an application for grant of probate of last Will and Testament dated 15th February, 1989 of the testator Krishna Kumar Mitra.

The fact of the case is that the testator Krishna Kumar Mitra, son of Late Phanindranath Mitra died bachelor on 3rd September, 1989. The testator was governed by Dayabhaga School of Hindu Law. During his

lifetime and prior to his death, the deceased duly made and published his last Will and Testament in English language on 15th February, 1989. In the said Will, there persons were appointed as executors namely Dr. Deb Kumar Mitra, Dr. Kalyan Kumar Mitra and Dr. Somnath Mitra. Out of the three executors, Dr. Deb Kumar Mitra and Dr. Kalyan Kumar Mitra expired. The applicant being one of the executors has filed the present application for grant of probate.

Ms. Nilanjana Adhya, learned Advocate for the petitioner submits as follows. The plaintiff-applicant has complied with all the requirements in terms of Section 276 of the Indian Succession Act, 1925. The Will of the testator has been duly proved by the attesting witness Dr. Mihir Kumar Chowdhury. The attesting witness, who is also a doctor, deposed that the testator, at the time of execution of the Will, was mentally stable and sound. Therefore, the testator executed the Will out of his free will and was aware of its nature and effect. No suspicious circumstances come up regarding execution of the said Will. Although in the affidavits in support of the caveats, the caveators had tried to make out a case of fraud against the plaintiff, however, since the caveators failed to appear and adduce evidence, hence no material has come up before the Court in support of any fraud or forgery alleged to have committed by the plaintiff-applicant. The question of delay raised by the caveator has also been explained by the executor during his examination. Be that as it may, Indian Succession Act does not provide for any limitation for filing an application for grant of probate. It has also been asserted by the caveators that since there was a previous Will

executed by the testator on 24th August, 1988, there was no reason to execute the subsequent Will on 15th February, 1989. However, it is the settled position of law that the subsequent Will would prevail over the previous one if the execution complies and fulfils the provisions of law. In light of aforesaid submissions, she prays for grant of probate of the last Will and Testament of the testator dated 15th February, 1989 in favour of the petitioner.

Upon service of citation, Sankar Kumar Mitra, son of Late Dr. Sib Kr. Mitra and Ananda Mitra, son of Late Dr. Kalyan Kumar Mitra filed caveats as well as affidavits in support of caveat. The probate proceedings being PLA/44/2012 was converted to testamentary suit registered as TS/15/2022. Subsequent thereto the caveators did not appear to contest the suit. Accordingly, the caveats were discharged on 23rd August, 2023. One Mr. Sibaji Basu also filed caveat, however, since no affidavit in support of such caveat was filed, the caveat was discharged vide order dated 15th December, 2022.

Before delving into the facts of the case, it would be profitable to reproduce the relevant provisions dealing with the validity and execution of the Will.

“Section 63 of the Indian Succession Act, 1925

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.

Section 68 of Indian Evidence Act 1872

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

Thus, a bare reading of the aforementioned provisions would show that the requirements enshrined under Section 63 of the Indian Succession Act have to be categorially complied with for the execution of the Will to be proven in terms of Section 68 of the Evidence Act.

A Will is an instrument of testamentary disposition of property, which is a legally acknowledged mode of bequeathing a testator's property during his lifetime to be acted upon on his/her death and carries with it an element of sanctity. Since at the time of testing the document for its validity, the testator/testatrix would not be available for deposing as to the circumstances in which the Will came to

be executed, stringent statutory requisites for the proof thereof have been enjoined to rule out the possibility of any manipulation.

Now bearing in mind the aforesaid, it is to be seen whether the plaintiff-applicant has successfully established the validity and execution of the Will.

Apart from statutory compliance in order to establish the validity and execution of the Will, broadly following has to be proved (i) the testator signed the Will out of his own free Will, (ii) at the time of execution he had a sound state of mind, (iii) he was aware of the nature and effect thereof and (iv) the Will was not executed under any suspicious circumstances.

The applicant in order to prove the Will has examined Dr. Mihir Kumar Chowdhury, the attesting witness as PW1 who identified the signatures of the testator on the Will marked Exhibit 'A/1' to 'A/5' respectively and also proved the Will being marked Exhibit 'A/7'. He also deposed that all the attesting witnesses and the testator signed the Will in each others presence at the same time and place. The attesting witness, who is a doctor by profession, also deposed that at the time of execution of the Will the mental faculty of testator Justice Krishna Kumar Mitra was intact when he put his signature on the Will dated 15th February, 1989. The executor Somnath Mitra (PW2) also stated that the physical condition of the testator was okay but not in best of his health. But was managing well as expected of at that age. From the aforesaid evidence, it manifest that the testator was mentally stable and sound to execute the Will.

Although a case has been made out by the caveators of alleged fraud in execution of the Will but nothing has been proved since the caveators failed to appear and adduce evidence in the subsequent stage of the proceedings.

It has also been alleged in the affidavit in support of caveat that a previous Will was made by the testator on 24th August, 1988 in full senses and in sound mind and as such there was no reason to execute another Will subsequent thereto. Be that as it may, it is recorded in the Will that the previous Will dated 24th August, 1988 should be treated as null and void.

On careful perusal of the material on record and applying the provisions, it is evident that the Will was duly executed by the testator in the presence of witnesses out of his free Will in a sound disposing state of mind and the same stands proven through the testimony of one of the attesting witnesses, namely Dr. Mihir Kumar Chowdhury.

In view of the above, it is found that the petitioner has succeeded in establishing the proof of execution of the Will by the testator Justice Krishna Kumar Mitra. Accordingly, he is entitled to the grant of probate of the last Will and Testament dated 15th February, 1989.

Let there be an order in terms of prayer (c) of the petition.

The suit being TS/15/2022 stands disposed of.

Let the decree be drawn up expeditiously.

(BIVAS PATTANAYAK, J.)