

OD-26

ORDER SHEET

PLA/127/2022
IN THE HIGH COURT AT CALCUTTA
TESTAMENTARY & INTESTATE JURISDICTION

IN THE GOODS OF :
ASHIT KUMAR DUTT, DECEASED

BEFORE:

The Hon'ble JUSTICE BIVAS PATTANAYAK

Date: 30th August, 2024.

Mr. Debmalya Ghosal, Mr. Arnab Dutt, Mr. S.
Dutt, Mr. Arnab Sen, Ms. Labani Dey, Advocates for the petitioner.

The Court : This is an application for grant of letters of administration in respect of the registered Will and Testament dated 7th December, 2009 and Codicil dated 26th February, 2013 of the deceased Ashit Kumar Dutt.

The deceased Ashit Kumar Dutt was governed by Dayabhaga School of Hindu Law and he died on 5th April, 2020 at his residence at 19, Mahanirban Road, P. S. Rabindra Sarobar, Kolkata – 700 029, District – 24 Parganas (South). During his lifetime the deceased executed and published his last Will and Testament dated 7th December, 2009 which was registered with Additional District Sub-Registrar at Alipore, District – 24 Parganas (South) followed by a Codicil dated 26th February, 2013. The deceased died as a bachelor. The mother of the deceased, namely, Radharani Dutt predeceased the deceased long ago in the year 1949. Under the said last Will and testament the deceased appointed Mrs. Debjani Mitra as the executrix. The said executrix applied for grant of probate of the said last Will

and testament and the Codicil being PLA No.170 of 2020. However, pending such application and prior to such grant, she died on 5th May, 2021 leaving behind her husband Sourendra Nath Mitra and her only son Sandip Mitra, the petitioner herein. An application being GA 1 of 2021 was filed by petitioner herein for withdrawal of the petition for grant of probate filed by his mother. By order dated 18th November, 2024 passed in GA/1/2021, such petition for grant of probate was allowed to be withdrawn with liberty to file an application for grant of letters of administration. Hence, this application for grant of letters of administration.

Upon filing of the application, citations were issued in terms of order of this Court dated 8th June, 2023. However, neither any caveat was filed nor any of the cited party appeared to oppose the prayer of the petitioner. During the course of the proceedings, the propounder was unable to give the address of one of the two attesting witnesses. In such circumstances, on 19th January, 2023 gist of General citation along with the names and particulars of the attesting witnesses were directed to be published once in '*The Telegraph*', an English daily and once in '*Anandabazar Patrika*', a Bengali daily having wide circulation on any Sunday. Since despite publication of notice none of the attesting witnesses appeared to depose in support of the Will, the propounder intended to prove the Will through attending witness who is also an attesting witness to the Codicil and the Will was directed to be proved in solemn form. In compliance thereof, the witness Avijit Guha was examined to prove the execution of the Will.

Mr. Debmalya Ghoshal, learned Advocate appearing for the petitioner submits that in the case at hand since none of the attesting witnesses were

found, the Will had to be proved in terms of Section 69 of the Evidence Act as in such a situation, Section 63 of the Indian Succession Act and Section 68 of the Evidence Act will not be applicable so far as proving of the execution of Will by one of the attesting witness is concerned. Referring to the decision of the Hon'ble Supreme Court passed in the case of **V. Kalyanaswamy (Dead) by Legal Representatives And Another versus L. Bakthavatsalam (Dead) By Legal Representatives And Others** reported in **(2021) 16 SCC 543** he submits that the expression 'not found' in Section 69 of the Indian Evidence Act covers a wide variety of circumstances. In the present case at hand, since after publication of notice none of the attesting witnesses appeared, the same construes as 'not found' in terms of Section 69 of the Evidence Act. Section 69 of Evidence Act requires it to be proved by the witness that the attestation of one attesting witness at least is in his hand writing and the signature of the person executing the document is in the hand writing of that person is. The witness, who is an attesting witness of the Codicil, has categorically deposed that he has seen the attesting witness signing the Will as a witness and he has also seen the testator putting his mark to the Will. Thus from the evidence adduced on behalf of the petitioner the requirement under Section 69 of the Evidence Act is complied with. Referring to the decision of this Court passed in **Anath Nath Das and others versus Sm. Bijali Bala Mondal** reported in **AIR 1982 Cal 236** he submits that onus lies on the propounder of the Will to prove the due and valid execution of the Will and if there are any suspicious circumstances surrounding the execution of the Will, propounder must remove the said suspicion from the mind of the Court by cogent and

satisfactory evidence. Since no suspicious circumstances has come up before the Court, hence nothing remains to be discharged in such regard. He prays for orders in terms of prayer (e) of the petition.

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.

At the outset, let it be examined whether Section 69 of the Evidence Act “*Proof where no attesting witness found*” applies in the facts and circumstances of this case. In order to examine the aforesaid, it would be apposite to reproduce the relevant provisions of Section 69 of the Evidence Act as hereunder:

“69. Proof where no attesting witness found – *If no such attesting witness can be found, or if the document purports to have been executed in the United Kingdom, it must be proved that the attestation of one attesting witness at least is in his handwriting, and that the signature of the person executing the document is in the handwriting of that person”.*

Bearing in mind the aforesaid provisions, on going through the order dated 19th January, 2023, it is found that the propounder was unable to provide the address of one of the two attesting witnesses. Taking into consideration such circumstances, this Court directed for publication of gist of General citation along with the names and particulars of the attesting witnesses in one English and one Bengali daily. Since no attesting witnesses filed their affidavit to prove the Will in common form nor they appeared to

depose in support of the Will despite publication of notice, the Will was directed to be proved in solemn form by attending witness.

The Hon'ble Supreme Court in *V. Kalyanaswamy (supra)* observed as follows:-

“107. Though the expression used is “if no such attesting witness can be found”, inter alia, it bears the following interpretation. The word “such” before “attesting witness” is intended to refer to the attesting witness mentioned in Section 68 of the Evidence Act. As far as the expression “found” is concerned, it would cover a wide variety of circumstances. It would cover a case of an incapacity to tender evidence on account of any physical illness. It would certainly embrace a situation where the attesting witnesses are dead. Should the attesting witness be insane, the word “found” is capable of comprehending such a situation as one where the attesting witness, though physically available, is incapable of performing the task of proving the attestation under Section 68 of the Evidence Act, and therefore, it becomes a situation where he is not found.”

Bearing in mind the aforesaid proposition, as from the materials on record, it is found that endeavours were made to examine the attesting witness in order to prove the Will, however, none of the attesting witnesses appeared to depose in support of the Will, hence circumstances falls within the category *“if no attesting witness can be found”* as provided under Section 69 of the Evidence Act. Accordingly, it led to issuance of direction for proving the Will by attending witness in solemn form. Therefore, Section 69 of the Evidence Act applies to the facts of the case for proving the due and valid execution of the Will. At the same time, for the reasons as above, since no attesting witness could be found to depose in support of the Will, Section 63 of the Indian Succession Act and Section 68 of the Indian Evidence Act does not apply to the facts of the case.

In *V. Kalyanaswamy (supra)*, the Hon'ble Supreme Court observed as follows:-

“117. Reverting back to Section 69 of the Evidence Act, we are of the view that the requirement therein would be if the signature of the person executing the document is proved to be in his handwriting, then attestation of one attesting witness is to be proved to be in his handwriting. In other words, in a case covered under Section 69 of the Evidence Act, the requirement pertinent to Section 68 of the Evidence Act that the attestation by both the witnesses is to be proved by examining at least one attesting witness, is dispensed with. It may be that the proof given by the attesting witness, within the meaning of Section 69 of the Evidence Act, may contain evidence relating to the attestation by the other attesting witness but that is not the same thing as stating it to be the legal requirement under the Section to be that attestation by both the witnesses is to be proved in a case covered by Section 69 of the Evidence Act. In short, in a case covered under Section 69 of the Evidence Act, what is to be proved as far as the attesting witness is concerned, is, that the attestation of one of the attesting witness is in his handwriting. The language of the section is clear and unambiguous. Section 68 of the Evidence Act, as interpreted by this Court, contemplates attestation of both attesting witnesses to be proved. But that is not the requirement in Section 69 of the Evidence Act.”

Keeping in mind the aforesaid observation of Hon'ble Supreme Court and the express provision of Section 69 of the Evidence Act, following are to be proved:

- [i] The attestation of one attesting witness at least in his handwriting.
- [ii] The signature of the person executing the document is in handwriting of that person.

Mr. Avijit Guha the attending witness deposed that at the time when the testator executed the Will he was present in the room. He also deposed that after the document was read over to the testator by Antara Dutt, one of the attesting witnesses, the testator put his thumb impression on the document since he was unable to put his signature. He also deposed that

the testator put his left thumb impression on the document in his presence. He identified the thumb impression of the testator. This witness further deposed that on the request of the testator the attesting witness Antara Dutt put her signature. Further the second attesting witness Maloy Sengupta also put his signature in the Will. Both the attesting witnesses has put their signatures when the attending witness was present in the room. Thus, from the aforesaid evidence of the attending witness, it manifest that the above requirement under Section 69 of the Evidence Act is satisfied. He was also deposed that the testator had breathing problem and he was not able to move and sometimes his hands and legs used to tremble. However, he deposed that the testator was mentally fit and sound. Further no suspicious circumstances divulge from the evidence on record. Had there been presence of such suspicious circumstances naturally there would have been heavy onus on the propounder to discharge. In the absence of the same, this Court is in consonance with the submission advanced by Mr. Ghosal, learned advocate for the petitioner that since there was no suspicious circumstances, nothing remains to be discharged relying on *Anath Nath Das (supra)*.

Further this witness is an attesting witness to the Codicil dated 26th February, 2013. He deposed that the said Codicil was executed by the testator in his presence and he identified the same. He also identified the thumb impression of the testator and the signature of other attesting witness. Further that at the time of execution of Codicil, he was present in the room when the other attesting witness signed in the Codicil.

In view of the above evidence on record, it is found that the execution of the last Will and Testament dated 7th December, 2009 and Codicil dated 26th February, 2013 of the deceased Ashit Kumar Dutt has been validly proved.

Accordingly, let there be order in terms of prayer [e] of the petition.

The petitioner is directed to furnish personal bond of Rs.15,00,000/- with one surety.

The petition stands disposed of.

(BIVAS PATTANAYAK, J.)

pa/snn