

**IN THE HIGH COURT AT CALCUTTA
CIVIL APPELLATE JURISDICTION
APPELLATE SIDE**

PRESENT:

**THE HON'BLE JUSTICE SOUMEN SEN
&
THE HON'BLE JUSTICE BISWAROOP CHOWDHURY**

**FAT 106 OF 2017
Shibasish Chatterjee
-vs.-
*Sri Debasish Chatterjee & Anr.***

For the Appellant : Mr. Sounak Bhattacharya
Mr. Sounak Mondal
Mr. Abhirup Halder
Mr. Anirban Saha Roy

For the Plaintiff/
Respondent No.1. : Mrs. Shohini Chakrabarty
Mr. Suprabhat Bhattacharyya
Ms. Prajaaini Das

Last Heard On: - January 31, 2025

Judgment on: - March 07, 2025

Biswaroop Chowdhury, J:-

1. The Appellant before this Court is a defendant in a suit for grant of Letter of Administration and is aggrieved by the Judgment dated 17.01.2017 passed by Learned Additional District Judge 16th Court at Alipore in O.S. 21 of 2012.

2. The case of the plaintiff/respondent no. 1 before the Learned Trial Court may be summed up thus:

A. One Balai Chandra Chatterjee since deceased son of Late Tulshi Charan Chatterjee was the permanent resident of Flat No. 2B

Ground Floor, premises no. 406, NSC Bose Road, P.S. Jadavpore now Patuli, Kolkata-700047 within the jurisdiction of this Court.

- B. That Balai Chandra Chatterjee since deceased executed a Will on 22.11.1995 and it was registered in the office of A.D.S.R. Alipore on 22.11.1995 and recorded in Book No. III Volume No. 13 pages 86 to 90 being no. 370 for the year 1995 of A.D.S.R. Alipore.
- C. That by the aforesaid Will the testator bequeathed the flat no. 2B of premises no. 406 NSC Bose Road in favour of the plaintiff subject to right of residence for life of his wife Anjali Chatterjee (defendant no. 1) and also directed that cash money if any lying will be divided amongst his wife and two sons disproportionately.
- D. That the testator named and appointed his youngest son Sri Shibasish Chatterjee (Defendant no. 2 as Sole Executor of the said Will and Testament to have the same probated from the competent Court of law without furnishing any security at the cost of his two sons.
- E. That the testator died on 19.04.2000 leaving behind his wife and two sons as his legal heirs. The plaintiff sometime after the death of his father Balai Chandra Chatterjee asked his younger brother the named executor (defendant no. 2) for obtaining

probate of the Will dated 22.11.1995 but he on one pretext or the other avoided the matter.

F. The plaintiff further by letter dated 26.11.2011, 27.12.2011 and 30.01.2012 asked his younger brother the named executor for obtaining probate with further intimation that in the event he is not interested in the matter in such event plaintiff will file Letters of Administration of the Will.

G. That the deceased testator was a Hindu governed by the Dayabhaga School of Hindu Law and also by the present Hindu Succession Act, i.e. the Act XXXIX of 1925.

H. That the deceased testator has left behind at the time of his death the following persons as his heirs and near relations:-

- i) Smt. Anjali Chatterjee – widow wife (defendant no. 1) of Late Balai Chandra Chatterjee of Flat No. 2 B, Ground Floor 40 C NSC Bose Road, P.S. – Jadavpur, Kolkata-700047.
- ii) Sri Debasish Chatterjee Elder son (plaintiff) of Late Balai Chandra Chatterjee of Flat No. 2 B, Ground Floor 406 NSC Bose Road, P.S. – Jadavpur, Kolkata-700047 and also of Kumrakhali South Sonarpur Station Road, Kolkata-700103.
- iii) Sri Shibasish Chatterjee younger son (defendant no. 2) of Late Netai Chandra Chaterjee of Saptanir Apartment Flat No. 6, 2 Kali Mandir Road, 2/29A Azadgarh, Kolkata-700040.

- I. That the amount of Assets which is likely to come to the plaintiff's hand as plaintiff/beneficiary of the Will is valued at Rs. 1,90,000/- which has been described in the Schedule hereunder and also in the affidavit of Assets.
 - J. That to the best of the plaintiff's knowledge, belief and information no application has been filed by anybody in the Learned Court or in any other Court for grant of probate or Letter of Administration in respect of the said Will of Late Balai Chandra Chatterjee.
 - K. That no Estate duty clearance is required as the testator died on 19.04.2000.
 - L. That according to law there is no impediment in granting Letter of Administration in respect of the Will annexed.
- 3.** Pursuant to the filing of the application for grant of Letter of Administration in respect of the Will of Balai Chandra Chatterjee notice was issued upon the defendants. The defendant no. 1 being the mother of the plaintiff and defendant no. 2 and the widow of testator filed one verified petition dated 27.03.2012 stating that she has given her consent for granting Letter of Administration from her part. The defendant no. 2/appellant has contested this suit by filing written statement denying all the averments made in the plaint.
- 4.** The written statement of the defendant no. 2/appellant may be summed up thus:

- A. The suit is not maintainable as no cause of action arose. The suit is immature and liable to be dismissed.
- B. The suit is mala fide one and filed with unclean hand covering the misdeeds of the plaintiff's ulterior motive. The mother of the defendant no. 2 and plaintiff had been taken by the plaintiff to his house where she is still living since after Puja in 2011 and thereafter he proceeded for preparation of the suit - an application for grant of letters of administration of the Will dated 22.11.1995.
- C. The testator was not in sound mind in the month of September, 1995, and was suffering from different ailments since early 1995. He had no capacity to disposition.
- D. The alleged Will dated 22.11.1995 is an outcome of fraud and the alleged Will was created by the plaintiff in connivance with the so called witnesses against the circumstances.
- E. The plaintiff created the Wills dated 05.06.1995 and then again on 22.11.1995 to add plaintiff's gain only and both were registered by practicing fraud.
- F. On the basis of the alleged Will this case is not tenable as per terms and conditions of the alleged Will.
- G. That the plaintiff is a greedy man and he managed to create this Will with the help of his henchman only to deprive the defendant no. 2 in getting his due share according to Hindu Succession Act.

- H. The mother of the plaintiff is an old lady and had no capacity to understand the consequences of whatever she does. So it is at the instigation and dictation of the plaintiff.
 - I. The value of the suit property is over 30 lakhs. Hence until proper Court fees are paid the instant case is not tenable.
 - J. The statement as made in the alleged Will is not the statement of Balai Chatterjee since deceased.
 - K. The entire statement in the alleged Will is the statement of the plaintiff who put the same in the mouth of the testator.
 - L. The alleged witnesses are the men of the plaintiff and the plaintiff in connivance with the alleged witnesses created the alleged Will to deprive the defendant no. 2 of his share according to Hindu Succession Act.
 - M. That as per alleged Will the entire estate have not been brought in the Hotchpotch of the Schedule.
 - N. The plaintiff is not entitled to get the probate of the alleged Will and/or the letter of administration.
 - O. That the suit is liable to be dismissed with costs.
- 5.** Upon framing of issues and holding regular Trial Learned Trial Court was pleased to allow the suit for grant of Letter of Administration on contest against defendant no-2/Appellant.
 - 6.** Plaintiff/respondent no-1 was granted the Letter of Administration of the last Will of Late Balai Chandra Chatterjee.

- 7.** The Appellant/defendant no-2 being aggrieved by the Judgment dated 17-01-2017 passed by Learned Additional District Judge 16th Court Alipore in O.S. No. 21 of 2012 has come up with the instant appeal.
- 8.** Pursuant to the filing of the Appeal notice was issued upon the Respondents. Respondent no-2 did not appear to contest the appeal but respondent no-1/plaintiff appeared and contested the appeal.
- 9.** Heard Learned Advocate for the Appellant and Learned Advocate for the Respondent no-1. Perused the grounds of Appeal and written notes of arguments.
- 10.** Learned Advocate for the Appellant submits that the alleged Will was allegedly executed by the testator at a point of time when he was suffering from Parkinson, Arthritis, and several other diseases. Usually the hands and limbs of a person suffering from Parkinson's disease shakes and trembles and consequently their hand-writing becomes very unstable and shaky. But in the instant Will the alleged signature of the testator was signed with precision and perfection.
- 11.** This is a clear case of suspicious circumstances, although the attesting witnesses may have in their evidences identified the alleged signature of the testator and they may have said in evidence that they have seen the testator signing the alleged Will.
- 12.** Learned Advocate further submits that the testator had allegedly executed the Will on 22nd November 1995 but on the same year he had also entered into an agreement for sale dated 05.03.1995 both

the said sale deed and agreement for sale was marked as exhibits in the suit. On comparison of the signatures of the testator in the agreement for sale and sale deed and Will it appears that the signatures are not matching with each other. Moreover, in the said agreement for sale dated 05-03-1995, the testator allegedly signed as "Balai Chatterjee" on all pages and more surprisingly, in the death certificate of the testator as produced by the respondents during the trial of the suit and marked as Exhibit the name of the testator is recorded as 'Balai Chandra Chattapadhyay'. This raises a suspicious circumstances regarding the alleged signature of the testator in the alleged Will and is certainly a suspicious circumstances. Moreover the alphabets in the alleged signature of the testator in the said will is much smaller in size than the alphabets of the signature of the testator in the said agreement for sale and sale deed, and the signature of the testator in the said Will runs in a straight line in, all pages, however the signature in the said agreement for sale and sale deed are not in a straight line but they are running downwards to upwards. Learned Advocate also submits that in the alleged Will the testator had stated that he had allegedly dictated a draft Will to his wife and subsequently Arun Sanyal, Advocate had prepared the final will in terms of the said draft Will. However neither the draft will was produced nor the wife of the testator was examined which raises suspicion.

13. Learned Advocate submits that the attesting witnesses deposed that the testator allegedly gave instructions to his Ld. Advocate at his sherista in Alipore Court then the Learned Advocate Arun Sanyal prepared the Will and the same was typed by a typist at Alipore Court, however, the testator in the Will had stated that he dictated the draft will to his wife, which gives rise to suspicious circumstances as to whether the testator had at all instructed his wife or the Learned Advocate to prepare the will. It is also not clear when the testator was suffering from, Arthritis and Parkinson's why he alone went to the registry office along with Mrs. Soma Chatterjee being one of the attesting witness at the time of alleged registration of the alleged Will and not accompanied by his wife.

14. It is submitted that P.W-1 in her cross-examination dated 03.12.2015 had clearly admitted that the wife of testator used to accompany the testator at the chamber of her senior ie. Arun Sanyal Advocate, since he was a patient of Parkinson's. It is quite surprising that although the testator heavily relied upon his wife regarding the execution of the Will but the wife did not accompany the testator either at the Alipore Court or at the registry office on the date of alleged execution and registration of the said Will. Only the advocates and the law clerk of the advocate are the attesting witnesses. However the respondents had not cleared the doubt and the suspicious circumstances in this regard. P.W.3 in cross-examination dated

24.04.2025 had stated that the testator had very good relationship with the elder and younger maternal uncles, the said maternal uncles were also not made attesting witnesses, and this raises suspicion which the respondents did not clear.

- 15.** Learned Advocate further submits that the testator in the alleged Will had stated that he had executed and registered another will on 5th June 1995 prior to execution of the present will but the said Will has not seen the light of the day and it is also stated that the earlier will was revoked. It is not known as to what the clauses of the said Will were or what the reason for revoking the earlier will was. This raises a suspicious circumstance which the respondents did not clear.
- 16.** Learned Advocate submits that the alleged Will in question does not contain any endorsement that the said Will was drafted by Advocate Arun Sanyal and the same was read over and explained to the testator before executing the same. It is quite surprising to find out that the agreement for sale dated 05.03.1995 and the sale deed dated 31-05-1995 contains an endorsement that the same has been drafted by Advocate Arun Sanyal. But surprisingly in the will in question which was allegedly drafted by Arun Sanyal on 22-11-1995 does not contain any such endorsement. Therefore the non-production of the alleged draft will prepared by Advocate Arun Sanyal or the draft of the will which was dictated by the testator to his wife is extremely fatal in the instant case and this creates a suspicious

circumstances around the Will. Learned Advocate submits that Will may be prepared and typed by the testator himself or may be prepared by an Advocate or an Attorney or a Solicitor under the instruction of the testator. In case of Wills prepared by an Advocate, or an Attorney or a Solicitor at the bottom of such Wills an endorsement is given 'Drafted by' and then the name of the Advocate and the office address or the chamber address of the said advocate is given. Here in the present case, Advocate Arun Sanyal did not give an endorsement that it was he who had drafted the will and also his office address or chamber address. However Advocate Arun Sanyal signed as an attesting witness in the Will and not as the draftsman. Therefore it is quite difficult to believe as to whether the said Advocate Arun Sanyal actually prepared the draft of the Will and the testator executed the same. These doubts were not cleared and the suspicious circumstances not dispelled.

- 17.** Learned Advocate further submits that the agreement for sale dated 05-03-1995 and the sale deed dated 31-05-1995 was signed by the witnesses Soma Chatterjee Advocate, Natabar Chowdhury, Law Clerk as attesting witnesses in English. It could not be understood why the attesting witnesses signed the Will in Bengali when the same witnesses signed the agreement for sale and sale deed in English. It is submitted that the attesting witnesses intentionally signed in Bengali, so that it is impossible to compare the signatures of the attesting

witnesses in the Will with those in the agreement for sale and sale deed. This raises a suspicious circumstances surrounding the Will.

- 18.** Learned Advocate submits that it has been stated by the PW-3, i.e. the respondent No. 1 in his affidavit-in-chief that he has got the original Will from the custody of his mother and then he filed the application for Letters of Administration. The same version of P.W.3 also appears in his cross-examination dated 29-06-2015. In the event the mother has knowledge of the execution of the Will in question by the testator why did she wait for 11 years after the death of testator to bring the Will to surface. It is also clear from the letters dated November 24, 2011 and December 27, 2011 written by the respondent no-1 to the appellant that the respondent no-1 also had knowledge about the execution of the Will since the date of death of their father. However the same was disclosed to the appellant only on November 24, 2011. The question arises why did respondents took 11 years to bring the will in question to surface and applied for Letters of Administration. Now it is a settled principle of Law that unnatural delay in filing an application for grant of Letters of Administration and probate is covered by Article 137 of the Limitation Act. It has been observed by the Hon'ble Supreme Court that the delay of 3 years after the Testator's death would arouse suspicion and greater the delay greater would be the suspicion and such delay has to be explained by the Executor or legatee of the Will in the application for Letters of

Administration but there is no such explanation of delay. This raises suspicious circumstances surrounding the Will.

19. Learned Advocate submits that the Learned Trial Judge had wrongly decided the issue No-1 in the said suit. The issue no. 1 relates to application of Section 229, 230 and 231 of the Indian succession Act 1925 which deals with renunciation of the Executorships. It has been held by the Learned Trial Judge that the appellant herein was the named Executor of the said Will and since the Executor had not taken any steps for filing probate application in spite of having knowledge of the Will in question, the appellant had renounced his executorship by conduct. Learned Advocate further submits that when a person is appointed as Executor has not renounced the Executorship Letters of Administration shall not be granted to any other person until a citation has been issued calling upon the Executor to accept or renounce his Executorship. In this case no citation was issued to the Appellant as such the procedures laid down in Section 229, 230, and 231 of the Indian Succession Act 1925 was never complied before the Learned Trial Judge.

20. Learned Advocate also submits that the respondent no-2 being the mother and wife of the testator had filed a consent petition to the grant of Letters of Administration in favour of the respondent no.1 by way of a verified petition only and not by offering an affidavit of consent. In the event the said consent was given by way of affidavit it

would have fixed additional responsibility upon the deponent regarding the truthfulness or falsity of the consent given by the mother especially on the fact that it has come up on evidence that the mother was under total control of the respondent no. 1 i.e. the elder son since the death of testator.

21. Learned Advocate further submits that Will in question is shrouded by suspicious circumstances because of the unequal distribution of assets as allegedly bequeathed by the testator. In the said Will it has been clearly stated by the testator that he and his wife had bitter relationship with both sons and as such it is not possible for the testator or his wife to live with either of their sons. It cannot be ascertained what was, the actual intention of the testator since if the testator had bitter relationship with both of his sons then why he bequeathed the flat in question to respondent no-1 herein and depriving the appellant herein. If the testator was so much dissatisfied with his sons then he should not have bequeathed the said flat to either of the sons.

22. It is submitted that in the said alleged will it is stated that the younger son will get a sum of Rs. 3, 50,000/- from the estate of the testator after the death of the testator. It has also been stated in the said Will that the respondent No. 1 being the elder son of "the testator will receive a sum of Rs. 50,000/- from the estate of the testator after his death. However it cannot be understood why the testator had

made such a provision in the said Will when the younger son being the appellant herein got a sum of Rs. 3,50,000/- on 2.03.1995 2.05.1995, and 02.06.1995 much prior to the execution of the said Will i.e. 22-11-1995, and the appellant had executed money receipt in favour of testator which was marked as exhibit being No. 9 if the testator know about this fact, then there was no necessity of providing such a condition in the alleged Will because the appellant herein had received the aforesaid sum of Rs. 3, 50,000/- much prior to the execution of the alleged Will. This shows that the Will was prepared by someone else other than the testator who was completely unaware about the aforesaid fact. This gives rise to suspicious circumstances.

Learned Advocate has relied upon the following Judicial decisions.:-

a) Samir Chandra Das Vs Bibhas Chandra das and others

(2010) 6 SCC-P-432.

b) Delho Hembram Vs Barka Tudu @ Dhudu Tudu

(2015) SCC Online Cal-4454

c) Kunvarjeet Singh Khandpur Vs Kirandeep Kaur and Others

(2008) 8 SCC. 463.

d) Krishna Lal Ghosh Vs Ashoke Ranjan Dutta

FA.368 of 2013. P-12.

e) H.Venkatchala Iyengar Vs B.N.Thimmajamma

AIR-1959. S.C. 443-Para 36 and 37.

f) Bharpur Singh Vs Shamsheer Singh

(2009) 3 SCC. 687. Paragraphed 22 and 23.

g) Anil Kak Vs Kumara Sharada Raje

(2008) 7 SCC. 695.

h) H.Venkatchala Iyengar Vs B.N.Thimmajamma

AIR-1959. S.C. 443. Paragraphs 18, 19 and 20.

Arguments of Respondent no-1

23. Learned Advocate for the respondent no-1 submits at the outset that the Appellant who is the named Executor in the Will refused to take steps, hence application for grant of letter of administration was filed. Learned Advocate further submits that the Appellant in his cross-examination admitted that he received letters dated November 27, 2011 (Exhibit 7 at page 105) and January 30, 2012 a Photostat of the Will was also enclosed. It was mentioned in such letter that if the Appellant failed to apply for probate within 7 days, the Respondent no-1 would file an application for grant of Letters of Administration. Since the Appellant did not take any steps, the Respondent being empowered by Section 231 of the Indian Succession Act 1925 applied for letters of administration on March 28, 2012. Learned Advocate also submits that the Execution of the Will was duly proved as per Section 68 of the Indian Evidence Act.

24. It is submitted by the Learned Advocate that there were 3 attesting witnesses. In the said Will P.W. 1 Soma Chatterjee was an attesting witness of the said Will. She also deposed that the testator had

physical and mental capacity at the time of execution of the Will. She also deposed that she took the testator to the registration office for registration of the said Will. P.W. 2 (Natabar Chowdhury) the other attesting witness corroborated the fact of execution and the evidence of P.W. 1 Arun Sanyal Advocate was another attesting witness, however he died in 1999. Learned Advocate further submits that in an admitted agreement for sale (Exhibit-10) and Deed of Sale (Exhibit-11) where the testator was a party, both Arun Sanyal and Soma Chatterjee were attesting witnesses so it can be safely assumed that the testator relied upon Learned Advocate Arun Sanyal and Soma Chatterjee while executing deeds. Thus the execution of the Will was duly proved.

25. It is submitted by the Learned Advocate that the jurisdiction of a testamentary Court is limited only to consider the genuineness of execution of a Will, there is no place for the Court to see whether the distribution made by the testator was fair and equitable to all his children. However in the present case even if the distribution of the properties made in the Will is considered it will be seen that there was a fair and equal distribution of property in the Will.

26. It is further submitted that the Appellant in his cross-examination at pg-47 of the paper book admitted that from the Sale proceeds of the flat the testator gave the appellant a sum of Rs. 3,50,000/- in 1995. Such sum of money together with the sum of money bequeathed to

the Appellant during the date 2000 was more than enough to purchase a flat. Since the Appellant was given such sum of money, the flat was bequeathed to the Respondent no-1. Learned Advocate also submits that no suspicious circumstances thus arise even from the distribution of property in the Will.

27. Learned Advocate submits that execution of the Will was duly proved. No suspicious circumstance is seen even from the distribution of the assets of the testator. So non-production of mother as a witness in this case does not affect the grant of letters of administration. Thus the Trial Court was absolutely correct in granting letter of administration.

28. Learned Advocate for the Respondent No-1 relies upon the following Judicial decisions :

i. Vatsala Srinivasan. Vs Shyamala Raghunathan.

(Reported in (2016) 13 SCC-P-253.)

ii. Meena Pradhan and others.VS Kamla Pradhan and anr.

(Reported in (2023) 9 SCC-P-734.)

29. Before proceeding to decide the material in issue at the outset it is necessary to consider whether the Learned Trial Court rightly entertained the application for grant of Letters of Administration when an executor was named in the will and he did not make any express renunciation. In this regard it is necessary to consider the provisions

contained in Section 229, 230, 231 and 232 of The Indian Succession Act 1925 Section 229,230, 231 and 232 of the Indian Succession Act 1925 provides as follows:

S-229-Grant of administration where executor has not renounced :

When a person appointed as executor has not renounced the executorship, letters of administration shall not be granted to any other person until a citation has been issued calling upon the executor to accept or renounce his executorship.

Provided that when one or more of several executors have proved a Will, the Court may on the death of the survivor of those who have proved grant letters of administration without citing those who have not proved

S-230- Form and effect of renunciation of executorship :

The renunciation may be made orally in the presence of the Judge or by a writing signed by the person renouncing, and when made shall preclude him from ever thereafter applying for probate of the Will appointing him executor.

S-231- : “Procedure when executor renounces or fails to accept within time limited – If an executor renounces or fails to accept an executorship within the time limited for the acceptance or refusal thereof, the Will may be proved and letters of administration, with a copy of the Will annexed, may be granted to the person who would be entitled to administration in case of intestacy.”

S-232- "Grant of administration of universal or residuary legatees.

-when-

a) the deceased has made a Will but has not appointed an executor, or

b) the deceased has appointed an executor who is legally incapable or refuses to act or who has died before the testator or before he has proved the Will or

c) the executor dies after having proved the will but before he has administered all the estate of the deceased.

A universal or a residuary legatee may be admitted to prove the Will and letters of administration with the Will annexed may be granted to him of the whole estate, or of so much thereof as may be unadministered."

30. In the instant case the Appellant/defendant no-2 was named as Executor of the Will. It is also an admitted position that the Will was not in his custody. The appellant who was appointed executor was apprised by the Respondent no-1 by his letter dated November 24, 2011 about execution of will by their father Balai Chandra Chatterjee since deceased. It was further intimated that original will shall be filed on the date of filing probate application. As the said letter could not be served upon the Appellant as he was out of Station another letter dated December 27, 2011 was issued enclosing a copy of Letter dated November 24, 2011. By Letter dated 5th January 2012, the Appellant

sought for the original will to take steps as per law, and he pleaded ignorance about execution of the will by the father the testator herein. The plaintiff/respondent no-1 upon receipt of the letter dated 30th January 2012 served upon the Appellant Xerox copy of the will of the testator with a request to intimate as to whether he is ready and willing to file the probate case as named Executor in the Will. As no reply was received from the Appellant the respondent no-1/plaintiff moved the Learned District Judge at Alipore under Section 270 read with Section 295 of the Indian Succession Act 1925 for grant of Letter of Administration.

- 31.** Learned Advocate for the appellant in this connection has relied upon the decision of Hon'ble Supreme Court in the case of **Samir Chandra Das** (supra).

The Hon'ble Supreme Court in the said decision observed as follows:

'28. We have already explained the factual situation and in our opinion, the High Court completely misguided itself in stretching the theory of renunciation to his illogical end. The provision of Section 230 lays down specifically as to how the executor renounces his character as an executor. That is certainly not to be found here and when the law requires a thing to be done in a particular manner, it cannot be done in any other manner. The concept of deemed renunciation, as found by the High Court, does not appeal

to us, much less on the factual background of the present case. There cannot be a deemed renunciation.

29. However, we must hasten to add that we do not even for a moment say that the court concerned has no power to deny the probate for good and valid reasons. However, in this case, we cannot subscribe to the opinion expressed by the High Court that there was a renunciation on the part of the appellant.

30. In a proper case, the court considering the probate application may, for good reasons, find it not possible to grant the probate to the executor, but in this case that has not happened. Instead, the High Court wrote a finding that the executor had renounced himself and he is deemed to have renounced on account of the so-called hostile stand taken by him. We do not agree that there was any hostile stand. We do not further agree that there was any such renunciation or deemed renunciation. We further do not agree that there can be any such renunciation or deemed renunciation. We further do not agree that there can be any concept of deemed renunciation.'

32. Upon perusing the above judgment it appears that the material in issue in the decision relied upon is not the same as in this case. In the case relied upon a challenge was thrown to the right of the named Executor who obtained probate of the will, but in this case the allegation was against the inaction of the named Executor in taking steps to obtain probate of the Will.

33. Upon harmonious construction of Section 229, Section 230, and Section 231 of the Indian Succession Act 1925 it will appear that upon issuance of citation upon the executor and considering his conduct regarding acceptance of executorship or renunciation of the same or his refusal to act or inaction without cause a decision can be taken by the Court regarding grant of administration to the person who could be entitled to administration in case of intestacy. In the instant matter it is in admitted position two notices were issued upon the executor/appellant who is also a legatee of the testator. Thus it cannot be said that the executor was in the dark regarding the Will. As no steps were taken by the Executor, application for grant of Letter of Administration was filed by the Respondent no-1 who is also a legatee of the testator. In matter where Executor is not a legatee special citation is required to be issued granting opportunity to accept or renounce the executorship. However when the executor is a successor in intestacy special citation may not be issued as upon issuance of general citation executor has an opportunity to take a stand whether he accepts or renounces his executorship and has further opportunity to admit or dispute the allegations made against him.

34. In the instant case the appellant who was appointed an executor to obtain probate of the will of the testator at the outset did not take any steps to obtain probate of the will. Upon receiving the citation pursuant to filing of the application for letters of Administration the Executor/Appellant did not express his willingness to obtain probate of the will neither did he deny the allegations made against him. On the other hand the Executor disputed the validity of the

will and contended that the testator was not in sound mind in the month of September, 1995, and was suffering from different ailments since early 1995 and had no capacity to dispose.

35. Now in order to discharge the function of an Executor, the person so named must accept the will executed by the Testator as valid and thereafter, proceed to obtain probate of the said will. The moment the Executor disputes the validity of the will and contends that the Testator was not in sound state of mind at the time of execution of will, it cannot be expected that he will take steps to prove the will of the testator. Thus, in such circumstance, the Court has power under Section 231 of the Indian Succession Act, 1925 to treat the conduct of the executor as renunciation and permit any successor in intestacy to prove the will in accordance with law and thereafter, grant letters of administration. Thus, in the facts and circumstances, the learned Trial Court rightly permitted the respondent no. 1/plaintiff who is a legatee of the testator to proceed with the application for grant of letters of administration.

36. With regard to the submission of the learned Advocate for the Appellant that the signature of the testator in an agreement for sale and sale deed as B. Chatterjee and in the alleged Will as Balai Chatterjee on all pages and the recording of name in the death certificate as Balai Chandra Chattopadhyay creates suspicion, this Court is of the view that it is the discretion of every person not to maintain uniformity of signature in all documents. The signatures of persons should be such which will enable others

to identify that it is made by the said persons, and also by himself. A person's official surname may be Chattopadhyay but he may choose to sign as Chatterjee.

37. Learned Advocate has also relied upon a decision of the Hon'ble Supreme Court in the case of **Kunvarjeet Singh Khandpur Vs. Kirandeep Kaur and others** reported in **(2008) 8 SCC P-463** and have submitted that long delay in filing the probate application is fatal.

38. The Hon'ble Supreme Court in the case **Kunvarjeet Singh** observed as follows:

'10. Two questions need to be addressed in this appeal. Firstly, about the applicability of Article 137 of the Limitation Act and secondly, even if it is applicable whether the petition was within time.

11. In *Kerala SEB v. T.P. Kunhaliumma* [(1976) 4 SCC 634] it was inter alia observed as follows : (SCC pp. 638 & 39, paras 18 & 22)

"18. The alteration of the division as well as the change in the collocation of words in Article 137 of the Limitation Act, 1963 compared with Article 181 of the 1908 Limitation Act shows that applications contemplated under Article 137 are not applications confined to the Code of Civil Procedure. In the 1908 Limitation Act there was no division between applications in specified cases and other applications as in the 1963 Limitation Act. The words 'any other application' under Article 137 cannot be said on the principle of *ejusdem generis* to be applications under the Civil Procedure

Code 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 the 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* [*Town Municipal Council, Athani v. Presiding Officer, Labour Court*, (1969) 1 SCC 873] and hold that Article 137 of the 1963 Limitation Act is not confined to applications contemplated by or under the Code of Civil Procedure. The petition in the present case was to the District Judge as a court. The petition was one contemplated by the Telegraph Act for judicial decision. The petition is an application falling within the scope of Article 137 of the 1963 Limitation Act.”

In terms of the aforesaid judgment any application to civil court under the Act is covered by Article 137. The application is made in terms of Section 264 of the Act to the District Judge. Section 2(*bb*) of the Act defines the District Judge to be the Judge of the Principal Civil Court.

12. Further in *S.S. Rathore v. State of M.P.* [(1989) 4 SCC 582 : 1990 SCC (L&S) 50 : (1989) 11 ATC 913] it was inter alia stated as follows : (SCC p. 585, para 5)

“5. Appellant's counsel placed before us the residuary Article 113 and had referred to a few decisions of some High Courts where in a situation as here reliance was placed on that article. It is unnecessary to refer to those decisions as on the authority of the judgment of this Court in *Pierce Leslie & Co. Ltd. v. Violet Ouchterlony Wapshare* [AIR 1969 SC 843] it must be held that Article 113 of the Act of 1963, corresponding to Article 120 of the old Act, is a general one and would apply to suits to which no other article in the Schedule applies.”

13. Article 137 of the Limitation Act reads as follows:

“Description of Period of limitation Time from which period begins to run suit

137. Any other application for which no period of limitation is provided	Three years	When the right to apply accrues.”
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elsewhere in

this Division.

The crucial expression in the petition (*sic* Article) 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 and because of the nature of the proceedings it is a continuing right. The Division Bench of the Delhi High Court referred to several decisions. One of them was *S. Krishnaswami v. E. Ramiah* [AIR 1991 Mad 214]. In para 17 of the said judgment it was noted as follows : (AIR p. 222)

“17. 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. An assessment of the relevant provisions of the Indian Succession Act, 1925 does not convey a meaning that by the proceedings filed for grant of probate or letters of administration, no rights of the applicant are settled or secured in the legal sense. The author of the testament has cast the duty with regard to the administration of his estate, and the applicant for probate or letters of administration only seeks the permission of the court to perform that duty. There is only a seeking of recognition from the court to perform the duty. That duty is only moral and it is not legal. There is no law which compels

the applicant to file the proceedings for probate or letters of administration. With a view to discharge the moral duty, the applicant seeks recognition from the court to perform the duty. It will be legitimate to conclude that the proceedings filed for grant of probate or letters of administration is not an action in law. Hence, it is very difficult to and it will not be in order to construe the proceedings for grant of probate or letters of administration as applications coming within the meaning of an 'application' under Article 137 of the Limitation Act, 1963."

14. Though the nature of the petition has been rightly described by the High Court, it was not correct in observing that the application for grant of probate or letters of administration is not covered by Article 137 of the Limitation Act. Same is not correct in view of what has been stated in *Kerala SEB case* [(1976) 4 SCC 634] .

15. Similarly reference was made to a decision of the Bombay High Court in *Vasudev Daulatram Sadarangani v. Sajni Prem Lalwani* [AIR 1983 Bom 268] . Para 16 reads as follows : (AIR p. 270)

"16. Rejecting Mr Dalpatrai'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 Conclusion (c) is the correct position of law.

16. In view of the factual scenario, the right to apply actually arose on 9-8-1999 when the proceedings were withdrawn by Smt Nirmal Jeet Kaur. Since the petition was filed within three years, the same was within time and therefore the appeal is without merit, deserves dismissal, which we direct but in the circumstances without any order as to costs.’

39. In the case of **Krishna Lal Ghosh (Supra)** FA 368 of 2013, this Hon'ble Court observed as follows:

The unnatural delay in filing the application for granting of letters of administration also appears to be one of the strongest suspicious circumstances shrouded with the Will.

The plaintiff/respondent had knowledge about such will even during the lifetime of Prafullabala Dutta, who died on 24.04.1973. The daughter of the testator died in the year 1983. The application for grant of letter of administration was filed in the year 1973 i.e. long 20 years after the alleged execution of such Will by Basanta Kumar Dutta.

Learned Advocated Mr. S. P. Roy Chowdhury appearing on behalf of the appellant candidly contended that there should not be any limitation in filing the application for grant of probate of letters of administration. Mr. Roy Chowdhury contended that long delay in filing such application for probate or letters of administration may be considered to be one of the suspicious circumstances. However, Mr. Roy Chowdhury has referred a decision reported in **2008(8) SCC 463 (Kunvarjeet Singh Khandpur v. Kirandeep Kaur and ors.)** to show that right to apply for such probate or letters of administration is governed by Limitation Act and the period of limitations is three years from the point of time of accrual of right to apply.

The Apex Court however has observed that the application for grant of probate or letters of administration is covered by Article 137 of the Limitation Act. The Apex

Court has further observed that the right to apply would accrue when it becomes necessary to apply which may not necessarily be within three years from the date of the deceased's death but the same has to be counted when the right to apply would accrue, 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 short, it may safely be stated that the Apex Court has duly recognised the application of the law of limitation in the application for grant of probate or letters of administration. The Apex Court further observed that the delay of three years after the deceased's death would arouse suspicion and greater the delay, greater would be the suspicion. Such delay has to be explained but cannot be equated with the absolute bar of limitation.'

40. It is true that delay in filing the probate application will cause suspicion, but if the delay is explained, the suspicion is removed.

41. In the instant matter, the respondent no. 1/plaintiff was not appointed as the executor and the will was not in his custody. Secondly, the Appellant who was appointed as Executor also did not have knowledge about the Will and the Will was not in his custody. From the plain reading of the will and from the evidence adduced nowhere it appears that either the Executor/Appellant or the plaintiff/respondent no. 1 had knowledge about execution of will. It appears from the will itself that the respondent no. 1 was not informed about execution of will. The only person who was informed about the will is the wife of the testator, the respondent no. 2 herein. There is also no evidence that the testator during his life time, intimated to any person except

the respondent no. 2 about execution of will or gave the custody of the will to any person. It is clear that the will was in the custody of the testator and after his death went to the custody of his wife, the respondent no. 2. Hence, if there was any delay or laches, it was on the part of respondent no. 2. This delay is explained by the plaintiff. The intention of the testator as reflected in Will cannot be frustrated for laches of the person in whose custody the will was lying or for laches of the executor. Moreover, during life time of the wife of the testator, the application for grant of administration of estate of testator was made by respondent no-1 and the wife of the testator was a party to the suit but did not contest the same. Thus, there is no existence of suspicion, with regard to delay.

42. Learned Advocate for the Appellant submits that draft copy of the Will was not produced by the plaintiffs and thus it is fatal in this case. Learned Advocate for the Appellant relies upon the decision of the Hon'ble Supreme Court in the case of **H. Venkatachala Iyengar (supra)**

43. The Hon'ble Supreme Court in the case of **H. Venkatachala (supra)** observed as follows:

'36.It is in the light of these decisions that the appellant wants us to consider the evidence which he has adduced in the present case. It would be convenient to begin with the appellant's story about the instructions given by the testatrix for preparing the will. In the plaint the appellant has referred to the sudden illness of the testatrix at Mandya and it is alleged that when she

took ill the testatrix sent for him with the obvious intention of making arrangements regarding her properties. Accordingly when he met her at Mandya she explained all her intentions to him in the matter of disposing all her properties and her rights thereto. In other words, the case made out in the plaint clearly and specifically is that when the testatrix was ill at Mandya she sent for the appellant and gave him instructions for preparing a draft of her will. However, when the appellant gave evidence he made a material improvement in his story. According to his evidence, the appellant had received instructions from the testatrix a year before the will was actually drafted. It was then that the testatrix had given him the gift deed (Ex. D) and asked him to prepare the draft. Consistently with this new version the appellant has added in his evidence that when he met her at Mandya during her illness she reminded him that she had asked him to make a will for quite some time and she insisted that the draft should be prepared without any delay. In our opinion, the evidence given by the appellant on this point is clearly an after-thought and his story that he had received previous instructions cannot be accepted as true. Besides, it is somewhat remarkable that, on both the occasions when the testatrix talked to the appellant and gave instructions to him no one else was present; and so the proof of this part of the appellant's case rests solely on his own testimony. If the testatrix had really thought of making a will for over a year before it was actually executed, it is unlikely that she would not have talked about it to other relatives including Kalbagal with whom she was actually staying at the material time.

37. Then it would be necessary to enquire whether the draft which the appellant prepared was consistent with the instructions alleged to have been given by the testatrix. The draft, however, has not been produced in the case on the plea that it had been destroyed; nor is it specifically stated by the appellant that this draft was read out fully to the testatrix before he dictated the contents of the will to the scribe. Thus even the interested testimony of the appellant does not show that he obtained approval of the draft from the testatrix after reading it out fully to her clause by clause. It is common ground that Mandya where the testatrix was lying ill is a place where the assistance of local lawyers would have been easily available; and in ordinary course the testatrix would have talked to Kalbagal and the appellant and they would have secured the assistance of the lawyers for drafting the will; but that is not what the appellant did. He went to Mysore and if his evidence is to be believed he prepared the draft without any legal assistance. Having regard to the nature of the recitals contained in the will it is not easy to accept this part of the appellant's case. Besides, as we have already indicated, we find great difficulty in believing that the elaborate recitals could have been the result of the instructions given by the testatrix herself.'

44. With regard to the submission of the learned Advocate for the petitioner that the testator dictated the draft will to his wife and subsequently, Arun Sanyal, Advocate had prepared the final will in terms of the said draft will but neither the draft will was produced nor the wife of the testator was examined as a witness during trial which raises suspicion as to whether the

will, was same as that of draft will approved, it is to be remembered that a will when drafted by an Advocate as per instruction of the testator is submitted before the testator for approval. Upon obtaining the approval, the Advocate of the testator prepares final will to be executed by the testator. After execution of the will, the testator collects the same and keeps it in his custody or in the custody of any person whom he trusts but the draft of the will on which approval is obtained is kept by the Advocate of the testator in case of future dispute or future reference. Thus, apart from the advocate of the testator, no person will have the draft will which was approved by the testator. It is the said advocate who can adduce evidence with regard to the draft will, being approved by the testator. In the instant case the Learned Advocate who drafted the will of the testator died when the case was taken up for evidence thus there was no scope for the draft will being produced and evidence in that regard being adduced as to whether the Will filed in Court is the same of the draft will approved. Hence the wife of the testator will not be in a position to state as to whether the will executed by the testator was the same as that of the draft will. The decision of H. Venkatachala (Supra) is not applicable to the facts of the case. Thus non production of draft will on account of death of the Learned Advocate who drafted it is not fatal in this case.

45. Learned Advocate for the appellant has relied upon the following decisions to support his case with regard to suspicious circumstances.

Bharpur Singh and other Vs Shamsher Singh.

(Reported in (2009) 3 SCC. P-687.)

Anil Kak Vs Kumari sharada Raje and others

(Reported in (2008) 7 SCC-P-695.)

H. Venkatachata Iyengar Vs B N Themmaj amma and ors.

(Reported in AIR-1959. S.C. 443.)

In the case of Bharpur Singh and others (supra) the Hon'ble Supreme Court observed as follows:

'22. We may notice that in Jaswant Kaur vs. Amrit Kaur & ors. [(1977) 1 SCC 369] this Court pointed out that when the Will is allegedly shrouded in suspicion, its proof ceases to be a simple lis between the plaintiff and defendant. An adversarial proceeding in such cases becomes a matter of Court's conscience and propounder of the Will has to remove all suspicious circumstances to satisfy that Will was duly executed by testator wherefor cogent and convincing explanation of suspicious circumstances shrouding the making of Will must be offered.

23. Suspicious circumstances like the following may be found to be surrounded in the execution of the Will:

i. The signature of the testator may be very shaky and doubtful or not appear to be his usual signature.

- ii. The condition of the testator's mind may be very feeble and debilitated at the relevant time.
- iii. The disposition may be unnatural, improbable or unfair in the light of relevant circumstances like exclusion of or absence of adequate provisions for the natural heirs without any reason.
- iv. The dispositions may not appear to be the result of the testator's free will and mind.
- v. The propounder takes a prominent part in the execution of the Will.
- vi. The testator used to sign blank papers.
- vii. The Will did not see the light of the day for long.
- viii. Incorrect recitals of essential facts.

24. The circumstances narrated hereinbefore are not exhaustive. Subject to offer of reasonable explanation, existence thereof must be taken into consideration for the purpose of arriving at a finding as to whether the execution of the Will had duly been proved or not. It may be true that the Will was a registered one, but the same by itself would not mean that the statutory requirements of proving the Will need not be complied with.'

46. In the case of **ANIL KAK** (supra) the Hon'ble Supreme Court observed as follows:

‘52 Whereas execution of any other document can be proved by proving writings of the document or the contents of it as also the execution thereof, in the event there exists suspicious circumstances the party seeking to obtain probate and/or letters of administration with a copy of the Will annexed must also adduce evidence to the satisfaction of the Court before it can be accepted as genuine.

53. As an order granting probate is a judgment *in rem*, the court must also satisfy its conscience before it passes an order.

54. It may be true that deprivation of a due share by (sic to) the natural heir by itself may not be held to be suspicious circumstances but it is one of the factors which is taken into consideration by the Courts before granting probate of a will.

47. In the case of H. Venkatachala (supra) the Hon’ble Supreme Court observed as follows:

‘18.What is the true legal position in the matter of proof of wills ? It is well-known that the proof of wills presents a recurring topic for decision in courts and there are a large number of judicial pronouncements on the subject. 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 s. 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 handwriting under ss. 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, ss. 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 s. 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.

19. However, there is one important feature which distinguishes wills from other documents. Unlike other documents the will speaks from the death of the testator, and so, when it is propounded or produced before a court, the testator who has already departed the world cannot say whether it is his will or not ; and this aspect naturally introduces an element of solemnity in the decision of the question as to whether the document-propounded is proved to be the last will and testament of the departed testator. Even so, in dealing with the proof of wills the court will start on the same enquiry as in the case of the proof of documents. The propounder would be called upon to show by 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. Ordinarily 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 the

propounder. In other words, the onus on the propounder can be taken to be discharged on proof of the essential facts just indicated.

20. There may, however, be cases in which the execution of the will may be surrounded by suspicious circumstances. The alleged signature of the testator may be very shaky and doubtful and evidence in support of the propounder's case that the signature, in question is the signature of the testator may not remove the doubt created by the appearance of the signature; the condition of the testator's mind may appear to be very feeble and debilitated; and evidence adduced may not succeed in removing the legitimate doubt as to the mental capacity of the testator; the dispositions made in the will may appear to be unnatural, improbable or unfair in the light of relevant circumstances; or, the will may otherwise indicate that the said dispositions may not be the result of the testator's free will and mind. In such cases the court would naturally expect that all legitimate suspicions should be completely removed before the document is accepted as the last will of the testator. The presence of such suspicious circumstances naturally tends to make the initial onus very heavy; and, unless it is satisfactorily discharged, courts would be reluctant to treat the document as the last will of the testator. It is true that, if a caveat is filed alleging the exercise of undue influence, fraud or coercion in respect of the execution of the will propounded, such pleas may have to be proved by the caveators; but, even without such pleas circumstances may raise a doubt as to whether the testator was acting of his

own free will in executing the will, and in such circumstances, it would be a part of the initial onus to remove any such legitimate doubts in the matter.'

48. Learned Advocate for the respondent no-1 submits that as the Executor refused to take steps hence application for grant of letter of administration was filed.

49. Learned Advocate further submits that the Execution of Will was proved as per Section 68 of the Indian Evidence Act. Learned Advocate also submits that there were three attesting witnesses. P.W.1 Soma Chatterjee proved the execution of Will she further deposed that the testator had physical and mental capacity at the time of execution of the Will. She further stated that she took the testator to the registration officer. P.W.2 Natabor Chowdhury corroborated the fact of execution. It is submitted by the Learned Advocate that in an admitted agreement for sale and Deed of Sale where the testator was a party both Arun Sanyal and Soma Chatterjee were attesting witnesses. So it can safely be assumed that the testator relied upon Learned Advocates Arun Sanyal and Soma Chatterjee while executing deeds. Learned Advocate also submits that there was fair and equal distribution of property in the Will, hence no suspicious circumstances.

50. Learned Advocate also submits that execution of Will was duly proved and nonproduction of mother as a witness does not affect grant of Letters of Administration.

The following decisions are relied upon:

Meena Proadhan and others Vs Kamala Pradhan and anr.

Reported in (2023) 9 SCC. P-734.

Vatsaha Srinivasan Vs Shyamala Radhunathan.

(Reported in (2016) 13 SCC-253.)

51. In the case of **Vatsala Srinivasan (supra)** the Hon'ble Supreme Court observed as follows:

'8. We are also in agreement with the view expressed in the impugned judgment, which has also relied upon law laid down in the case of **Jadeja Pravinsinhji Anandsinhji (supra)**, in which it has been held:-

"6.An executor, in the capacity of an executor, has no personal interest in the estate of the deceased.
The object of the executor in these proceedings is to get an adjudication not of any dispute in which he is personally interested but the object is to propound the will of the deceased for the benefit of those who take an interest in the will.

9. It is, therefore, clear that an executor in applying for probate is not fighting a personal action but fighting for the interests of all the beneficiaries under the will. Therefore the action of an executor in applying for a probate is not in substance a personal action and as observed earlier by me the maxim *actio personalis moritur cum persona* could not apply to such a case. If the executor fails in his duty, any of those whom he represents are entitled to intervene and

carry on the proceedings with a 'formal modification' that the prayer must then be for letters of administration with the will annexed".

52. In the case of Meena Pradhan and others (supra) the Hon'ble Court observed as follows:

'10. Relying on H. Venkatachala Iyengar v. B.N. Thimmajamma, 1959 Supp (1) SCR 426 (3Judge Bench), Bhagwan Kaur v. Kartar Kaur, (1994) 5 SCC 135 (3-Judge Bench), Janki Narayan Bhoir v. Narayan Namdeo Kadam, (2003) 2 SCC 91(2Judge Bench) Yumnam Ongbi Tampha Ibema Devi v. Yumnam Joykumar Singh, (2009) 4 SCC 780 (3Judge Bench) and Shivakumar v. Sharanabasappa, (2021) 11 SCC 277 (3Judge Bench), we can deduce/infer the following principles required for proving the validity and execution of the Will:

10.1 The court has to consider two aspects: firstly, that the Will is executed by the testator, and secondly, that it was the last Will executed by him;

10.2 It is not required to be proved with mathematical accuracy, but the test of satisfaction of the prudent mind has to be applied.

10.3 A Will is required to fulfil all the formalities required under Section 63 of the Succession Act, that is to say:

(a) 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 the said signature

or affixation shall show that it was intended to give effect to the writing as a Will;

(b) It is mandatory to get it attested by two or more witnesses, though no particular form of attestation is necessary;

(c) Each of the attesting witnesses must have 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 acknowledgment of such signatures;

(d) Each of the attesting witnesses shall sign the Will in the presence of the testator, however, the presence of all witnesses at the same time is not required;

10.4 For the purpose of proving the execution of the Will, at least one of the attesting witnesses, who is alive, subject to the process of court, and capable of giving evidence, shall be examined;

10.5 The attesting witness should speak not only about the testator's signatures but also that each of the witnesses had signed the will in the presence of the testator;

10.6 If one attesting witness can prove the execution of the Will, the examination of other attesting witnesses can be dispensed with;

10.7 Where one attesting witness examined to prove the Will fails to prove its due execution, then the other available attesting witness has to be called to supplement his evidence;

10.8 Whenever there exists any suspicion as to the execution of the Will, it is the responsibility of the propounder to remove all legitimate suspicions before it can be accepted as the testator's last Will. In such cases, the initial onus on the propounder becomes heavier.

10.9 The test of judicial conscience has been evolved for dealing with those cases where the execution of the Will is surrounded by suspicious circumstances. It requires to consider factors such as awareness of the testator as to the content as well as the consequences, nature and effect of the dispositions in the Will; sound, certain and disposing state of mind and memory of the testator at the time of execution; testator executed the Will while acting on his own free Will;

10.10 One who alleges fraud, fabrication, undue influence et cetera has to prove the same. However, even in the absence of such allegations, if there are circumstances giving rise to doubt, then it becomes the duty of the propounder to dispel such suspicious circumstances by giving a cogent and convincing explanation.

10.11 Suspicious circumstances must be 'real, germane and valid' and not merely 'the fantasy of the doubting mind' 1. Whether a particular feature would

qualify as 'suspicious' would depend on the facts and circumstances of each case. Any circumstance raising suspicion legitimate in nature would qualify as a suspicious circumstance for example, a shaky signature, a feeble mind, an unfair and unjust disposition of property, the propounder himself taking a leading part in the making of the Will under which he receives a substantial benefit, etc.'

53. Now before proceeding to adjudicate the matter in issue it is necessary to consider the provisions contained in Section 59, Section 63 of the Indian Succession Act 1925 and Section 68 of the Evidence Act.

Section 59 of the Indian Succession Act 1925 provides as follows:

Section 59 Person Capable of making Wills – Every person of Sound mind not being a minor may dispose his property by Will.

Explanation-1. A married woman may dispose by Will of any property which she could alienate by her own act during her life.

Explanation 2. Persons who are deaf or dumb or blind are not thereby incapacitated for making a Will if they are able to know what they do by it.

Explanation 3. A person who is ordinarily insane may make a Will during interval in which he is of sound mind.

Explanation-4. No person can make a Will while he is in such a state of mind, whether arising from intoxication or from illness or from any other cause that he does not know what he is doing.

Section-63 of the Indian Succession Act 1925 provides as follows;

Section 63- Execution of unprivileged Will.- Every testator, not being a soldier employed in an expedition or engaged in actual warforce [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 Evidence Act deals with proof of execution of document required by Law to be attested.

As per section 68 of the Evidence Act 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

Provided that it shall not be necessary to call an attesting witness in proof of the execution of any document, not being a will, which has been registered in accordance with the provisions of the Indian Registration Act 1908 (16 of 1908) unless its execution by the person by whom it purports to have been executed is specifically denied.

54. Now with regard to the capability of the testator in the evidence of P.W. 1 Soma Chatterjee it is clearly stated that Balai Babu the testator executed the will at the sherista of Advocate Arun Babu in the presence of the witnesses and Balai Babu was physically fit and mentally alert at the time of execution of will. She further clarified that she brought Balai Babu to ADSR Alipore for registration of the Will and she identified Balai Babu at the Registry Office. She also stated that the Will was drafted by Arun Babu. Although P.W. 1 was cross-examined but nothing could be shaken as to the testator being physically and mentally fit, at the time of execution of will and that the Will was executed by the testator at the chamber of Arun Babu who drafted the Will

and the same being executed in the presence of P.W.1 and other witnesses. P.W. 1 reiterated that she only brought the testator at the registry office and that the testator used to visit chamber of Arun Babu with his wife thus it was not the first time testator came to Arun Babu's chamber or that he came with some other person. In fact the testator earlier also engaged Arun Babu to draft sale deed and agreement for sale as will appear from the documents exhibited. As the testator was the client of Arun Babu it should be presumed that Arun Babu and his junior P.W. 1 was acting under the instruction of his client and not any other person unless the contrary is proved. With regard to the submission of Learned Advocate for the Appellant that it was not endorsed in the will that it was drafted by Advocate Arun Babu this Court is of the view that is not material in this case due to the fact that the Learned Advocate himself was an attesting witness and there was scope to obtain evidence regarding drafting of the will had he been alive at the time of evidence of the case. Thus this issue is not at all fatal due to the fact that the junior of the Learned Advocate has stated in evidence that the Will was drafted by her Senior Arun Babu. The evidence of P.W.1 cannot be disbelieved by any stretch of imagination and under Section 68 of Evidence is sufficient to prove the will. However as an abundant precaution the evidence of other witnesses of the plaintiff is also taken into consideration.

55. P.W. 2 Natabar Chowdhury also corroborated the evidence of P.W. 1 by specifically stating that the testator Balai Babu signed the Will at the Sharista of Advocate Arun Babu in his presence and in presence of two other

witnesses namely Advocate Arun Sanyal and Advocate Soma Chatterjee, and that the testator was physically and mentally fit. He further stated that the will was typed by typist Sanjit Mazumder and he identified the signature of Sanjit Mazumder. The evidence stood the test of cross examination and nothing could be shaken as to the physical and mental fitness of the testator. P.W.2, in cross examination stated that on the instruction of testator Arun Babu drafted the Will, which strengthens further the probate case that the testator voluntarily instructed his Learned Advocate and the instruction was not given by any other person. The evidence of two attesting witnesses P.W.-1 and P.W. 2 goes to establish that the testator was capable of making wills as per Section 59 of the Indian Succession Act 1925, the same was executed in accordance with the provisions contained in Section 63 of the said Act and the proof of the Execution of the Will was in accordance with Section 68 of the Evidence Act. Although the will is proved as per Section 68 of the Evidence Act but as the issue of suspicious circumstances is raised it would be reasonable to consider and deal with the same.

56. The Appellant although has alleged that the testator was not in sound state of mind at the time of execution of Will but he did not furnish any medical documents with regard to the mental ailment of the testator nor did he state any name of doctor who treated the testator. The evidence of P.W.1 and P.W.2 and the evidence of execution of sale Deed and Agreement for sale by testator prior to execution of will, is sufficient to draw the inference that allegation of mental ailments of testator have no legs to stand upon. Secondly

the allegation of undue influence upon testator is made against the respondent no-1/plaintiff has no basis.

57. Upon considering the contents of the Will and the evidence nowhere it appears that respondent no-1 was involved in the preparation of the Will or Execution of the will or had custody of the Will or knowledge of its execution. It is clear from the deposition that the respondent no-1 was not residing with his parents after 1989, but only was in touch with them. Unless somebody resides with the testator regularly it is not possible to exert pressure or undue influence upon him. Moreover if any legal heir of a testator manages to get a Will executed by a testator he shall mention his name as executor and keep the Will in his custody and apply for probate within a very short period from date of death of testator. In the instant case the Appellant who is making allegation of undue influence is named as executor in the Will and respondent no-1 after coming to know about the execution of will and obtaining the same from the mother on 2011 the respondent no-1 applied for grant of letters of administration when the appellant/executor failed and neglected to apply for probate. Hence this allegation of undue influence by appellant cannot be sustained

58. Now the only point for consideration is the difference of signature of Testator in executing sale deed and agreement for sale and execution of Will. In executing sale deed and agreement for sale the signature of testator is shown to be not done with precision and perfection, and signature was not in one line

but in will it is done with precision and perfection and in straight line. It is the contention of the Appellant that usually the hands and limbs of a person suffering from Parkinson's disease shakes and trembles and consequently their handwriting becomes very unstable and shaky As attention is drawn by the Learned Advocate of Appellant to the signature of the testator in agreement for sale and sale deed marked exhibits 10 and exhibit 11 which is admitted and signature of the testator in the Will is disputed by the appellant it is necessary to compare the said signature by invoking Section 73 of the Evidence Act.

59. Section 73 of the Evidence Act provides as follows:

“73. Comparison of signature writing or seal with others admitted or proved-In order to ascertain whether a signature writing or seal is that of the person by written or made, any signature writing or seal admitted or proved to the satisfaction of the Court to have been written or made by that person may be compared with the one which is to be proved although that signature writing or seal has not been produced or proved for any other purpose.

The Court may direct any person present in Court to write any words or figures for the purpose of enabling the Court to compare the words or figures so written with any words or figures alleged to have been written by such person.

This section applies also with any necessary modifications to finger – impressions.”

60. In the instant matter the signature of testator as appearing in deed of sale and agreement for sale which is admitted by the appellant are alleged by the defendant to be different to that appearing in the will. Now whether it can be inferred that Will was not signed by the testator whereas from the evidence of P.W-1 and P.W.2 it appears the testator signed the will in their presence. It is well settled that he who asserts a fact must prove the same. As the defendant/appellant asserted that the Will was not signed by the testator the onus is upon him to prove the same by adducing evidence but no evidence is adduced by the defendant appellant in this regard.

61. Upon considering the signature made in the will and that in the agreement for sale and sale deed this Court does not find any ground to hold that signature made in the will is not that of the testator when no specific evidence is adduced by the defendant including evidence of expert. The evidence of P.W. 1 and P.W. 2 have reposed confidence in the minds of this Court that the Will was signed by the testator.

62. Thus upon considering the facts of the case and the judicial decisions relied upon this Court is of the view that the propounder of the will has been able to establish that the testator had physical and mental capability of executing a will, secondly the propounder has been able to satisfy that the testator has executed the will in accordance with the rules as provided under Section 63 of the Indian Succession Act, thirdly the execution of will is proved in accordance with the provisions of Section 68 of The Indian Evidence Act.

Hence we do not find any error in the Judgment dated 17-01-2017 passed by the Learned Trial Court.

63. Hence this Appeal fails and the same is dismissed. Judgment dated 17-01-2017 passed by Learned Additional District Judge 16th Court Alipore in O.S. 21 of 2012 is affirmed. However in the facts and circumstances of the case there shall be no order as to costs.

Urgent Xerox certified copy of this judgment, if applied for, be given to the parties on usual undertaking.

I agree

(Biswaroop Chowdhury, J.)

(Soumen Sen, J.)