

**In the High Court at Calcutta
Civil Appellate Jurisdiction
Appellate Side**

**The Hon'ble Justice Sabyasachi Bhattacharyya
And
The Hon'ble Justice Uday Kumar**

F.A. No. 133 of 2019

**Mita Rani Basak @ Mita Rani Basack and others
Vs.
Prabhat Kumar Basak**

For the appellants	:	Mrs. Sabita Mukherjee Roy Choudhury, Mr. Sanket Das, Ms. Sukriti Sengupta
For the respondent	:	Mr. Probal Mukherjee, Ld. Sr. Adv., Mr. Suhrid Sur
Heard on	:	03.04.2025
Hearing concluded on	:	10.04.2025
Judgment on	:	22.04.2025

Sabyasachi Bhattacharyya, J.:-

1. The present first appeal has been preferred against the grant of probate in respect of the last Will and Testament of Late Harendra Chandra Bysack.
2. Learned counsel for the appellant argues that the Will was executed on January 20, 1988 and the testator died on September 7, 1996. However, the probate application was filed only in the year 2015, that is, 19 years after the demise of the testator. It is argued that, as such, the probate application is barred by limitation. Moreover, the substantial delay in filing the same gives rise to grave suspicious

circumstances. The propounder, it is alleged, failed to dispel such suspicion and, as such, the learned Testamentary Court ought to have dismissed the probate suit.

3. Learned counsel next argues that there are several discrepancies surrounding the alleged execution of the Will. No evidence was led by the propounder as to who drafted and typed the Will, the place where the Will was executed, whether the contents of the Will were read over and explained to the testator and as to how the propounder came to possess the Will.
4. It is submitted that in the address of the first attesting witness Moloy Das, initially the term “Kol” (that is, the short form of “Kolkata”) was written. It is apparent from the Will that the same was subsequently interpolated, apparently by scratching off the said word and substituting it with the expression “Cal” (abbreviation of “Calcutta”). It is argued that in the year 1988, when the Will was executed, the City of Kolkata was still named as Calcutta and the renaming came much later. Thus, such interpolation is ample proof of the Will being manufactured subsequently, after the nomenclature of the city was changed, at a period much subsequent to the alleged date of execution of the Will.
5. The signature of the testator on the Will, it is argued, does not tally with the admitted signature of the testator on the gift deed dated January 17, 1990, marked as Exhibit-G in the suit. The flourish in the alleged signature of the testator in the Will is absent in his signature on the gift deed, which was executed only two years after

the Will. Such drastic change in signature does not happen in the normal course of business, it is contended.

6. It is further pointed out that there is large space between the typewritten matter in the Will and the signature of the testator. Section 63(b) of the Indian Succession Act, 1925 mandates that the signature of the testator shall be so placed that it shall appear that it was intended thereby to give effect to the writing as a Will. Such provision is contravened in the present case due to the huge gap between the content of the Will and the signature.
7. Further, the signature of the attesting witness Moloy Das appears above the testator's signature in the Will, which is also unexplained by the propounder.
8. Again, the Will was executed on January 20, 1988 whereas one of the beneficiaries thereof, namely Uma Kanto, a son of the testator, died in the month of May, 1988. The testator met his demise more than eight years thereafter on September 7, 1996. However, the testator did not alter his Will to incorporate the names of the heirs of Uma Kanto or to take into account the fact of demise of Uma Kanto and/or delete the name of the said beneficiary from the Will, which itself gives rise to suspicious circumstances as well.
9. The appellant contends that Section 105 of the Indian Succession Act provides that in the event the legatee does not survive the testator, the legacy cannot take effect but shall lapse and form a part of the residue of the testator's property, unless it appears by the Will that the testator intended that it should go to some other

person. Hence, the Testamentary Court erred in law in granting probate in respect of such lapsed legacy.

10. Learned counsel for the appellant next submits that P.W.2, one of the attesting witnesses, namely Mohan Dey, was admittedly a close associate of the executor/propounder. Thus, the propounder took a prominent part in execution of the Will, which also casts doubt on the valid execution of the same. No proof was adduced by the propounder that the said attesting witness was a neighbour of the testator. Rather, the documents produced by the propounder to prove the address of the wife and son of the said attesting witness show that they are residents of a different locality than that of the testator.
11. Moreover, it is argued that the chronology of the signatures in the Will differ from that suggested by the attesting witness in his deposition as P.W.2.
12. It is argued that no issue was framed by the learned Trial Judge on such objections of the appellant as to suspicious circumstances. Moreover, the learned Trial Judge did not even compare the signatures of the testator as appearing on the purported Will and the gift deed (Exhibit-G) under Section 73 of the Indian Evidence Act.
13. Learned counsel cites *Kavita Kanwar v. Pamela Mehta and others*, reported at *AIR 2020 SC 2614*, for the proposition that in the event of there being suspicious circumstances surrounding the execution of a Will, the propounder is to satisfy the court's conscience and

explain away such suspicious circumstances, which was not done in the present case.

- 14.** As such, the appellant contends that the impugned grant of probate be set aside.
- 15.** Learned senior counsel appearing for the propounder/respondent argues that Article 137 of the Schedule to the Limitation Act is not applicable in terms to a probate application. At best, long delay in filing such an application may give rise to suspicious circumstances. In support of such contention, learned senior counsel cites an unreported judgment of a Division Bench of this Court in *F.A. No.15 of 2019 [Achin Ghose and others v. Debasish Sengupta and another]*. It is argued that the propounder, in the probate application as well as his evidence, sufficiently explained the delay to the effect that the parties all along acted in terms of the Will and the reciprocal gift deeds to the appellant and the other daughters of the testator. No dispute was ever raised regarding the bequest until the appellant filed a partition suit in the year 2015 incorporating the subject-matter of the Will. The cause of action for filing the probate application was the filing of such suit, whereby the legacy was challenged for the first time. As such, the delay *per se* could not have operated as the bar to the grant of probate in the circumstances of the case.
- 16.** Learned senior counsel next argues that the due execution and attestation of the Will has been duly proved in terms of Section 63 of the Indian Succession Act, read with Section 68 of the Indian

Evidence Act. The reasons for the distribution of assets in the Will were sufficiently given in the Will itself and the bequest was not unconscionable. It is pointed out that in the Will itself, the testator expressed his intention to subsequently execute gift deeds in respect of the rest of his property in favour of his daughters, including the appellant. Later on, such gift deed was actually executed by the testator in favour of the appellant and his other daughters in the year 1990, thereby acting in terms of the intention of the testator as expressed in the Will. Thus, the subsequent execution of the gift deed-in-question further proves the veracity of the Will.

- 17.** It is argued that no suspicious circumstances were made out in the present case. The written objection/written statement of the appellant did not point out specifically the objections argued before this court, which are now sought to be taken before the Appellate Court for the first time. There is no pleading in the written statement as to the alleged interpolation regarding the address of the first attesting witness. Moreover, on a perusal of the original Will, it is found that there is no interpolation as such.
- 18.** Learned senior counsel argues that the defendant/appellant did not apply for appointment of any expert to compare the signatures of the testator on the Will with that on the gift deed. Moreover, minor differences in signature do not vitiate the due execution of the Will.

19. Learned senior counsel submits that the flourish in the signature on the Will does not, by itself, invalidate the same and the signature of a person may vary over the passage of time.
20. It is argued that P.W.2 adduced evidence after about thirty years from the execution of the Will, and was aged about 73 years at the time of deposition and, as such, minor discrepancies in his deposition, even if there be any, is but natural.
21. Learned senior counsel further argues that the applicability of Section 105 of the Indian Succession Act cannot be a subject-matter of consideration in a probate proceeding but can be raised only in a suit for title. Mere non-execution of a revised Will due to the demise of one of the legatees does not vitiate the Will itself.
22. Learned senior counsel appearing for the propounder/respondent points out that the oral evidence of the attesting witness Mohan Dey itself indicates that he was a neighbour of the testator and, as such, it was only natural for him to be nominated as one of the attesting witnesses by the testator.
23. Thus, it is contended that the learned Testamentary Court was justified in granting probate in respect of the disputed Will.
24. While meeting the objection taken by the appellant that the form of verification of the probate application did not comply with Section 281 of the Indian Succession Act, learned senior counsel for the respondent cites a Division Bench judgment of the Bombay High Court in *Pralhad Ganpat Salgar v. Sunil Dilip Kakod*, reported at

2019 SCC OnLine Bom 66, for the proposition that the said format is not mandatory.

- 25.** Upon hearing learned counsel for the parties, the court comes to the following conclusions:

Delay in filing the probate application

- 26.** It is an admitted position that the Will was executed on January 20, 1988 and the testator died on September 7, 1996, whereas the probate application was filed on November 14, 2015. The same turned contentious upon the appellant filing a written objection and was registered as Original Suit No.01 of 2016.
- 27.** In paragraph no.5 of the probate application, it was stated by the propounder that the original Will as also a photocopy of the same was lying all along in the custody of the propounder/executor. In paragraph no.6, it has been stated that the executor and the legatees of the Will continued to enjoy the property jointly in an uninterrupted manner on payment of taxes, repairing the subject-property as well as asserting their rights in terms of the Will. Subsequently, upon getting a notice of partition from the married daughters of the testator, including the appellant, the executor was prompted to file the probate application.
- 28.** The order sheet of Title Suit No. 94 of 2015 filed in the Court of the learned Civil Judge (Senior Division) at Jhargram has also been brought on record, which indicates that a partition suit, incorporating the subject-matter of the Will as well, was filed by the

married daughters of the testator on October 8, 2015 whereas the probate application was filed in the very next month, on November 14, 2015. Such position is not denied by the appellant. Article 137 of the Schedule to the Limitation Act provides that the limitation for filing any application where no limitation is provided elsewhere in the Act commences from when the right to apply accrues. In the present case, the right to apply accrued only upon the bequest under the Will being challenged by way of a partition suit being filed by the married daughters of the testator.

29. In *Achin Ghosh (supra)*, the Division Bench of this Court followed the proposition as laid down in *Sameer Kapoor v. State, through Sub-Division Magistrate, South, New Delhi and others*, reported at (2020) 12 SCC 480, where it was held that a testamentary application, either for probate or letters of administration, is for the court's permission to perform a legal duty created by a Will or for recognition as a testamentary trustee and is a continuous right which can be exercised any time after the death of the deceased, as long as the right to do so survives and the object of the trust exists or any part of the trust, if created, remains to be executed. It was further held by the Supreme Court 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 death of the testator.

30. The Supreme Court, in the said judgment, proceeded on the premise that Article 137 of the Limitation Act would not operate as a

bar *per se* but a prolonged delay in filing the probate application would at best give rise to suspicious circumstances, to be explained away by the propounder.

31. Following such principle, we find from the records of the instant case that admittedly the partition suit, including the subject-property of the Will, was filed only in the year 2015 and the probate application was taken out within a month thereafter. Taking into account the proposition laid down in the Supreme Court in *Samir Kapoor (supra)* and by the Division Bench of this Court in *Achin Ghosh (supra)*, the cause of action for filing the probate application only arose when the bequest under the same was threatened by the institution of the partition suit by the daughters of the testator, including the present appellant.
32. The application for probate is not for assertion of a legal right as such, but for the court's permission to perform a legal duty created by a Will and for recognition as a testamentary trustee. The right to obtain a probate is otherwise continuous and can be exercised at any time after the death of the deceased so long as it survives and the object of the trust exists or any part of the trust remains to be executed. The rights of the legatees flow from the Will itself and, as held in *Achin Ghose (supra)* the right is not conferred merely by the grant of probate. The grant of probate is required by law only in certain parts of India, including West Bengal, and is merely a sanction by the court for the exercise of the legacy rights emanating from the Will itself. In fact, in a bid to draw parity between the law

regarding the rights conferred by a Will throughout India, since a probate is not mandatorily required to assert the rights on the basis of a Will in all parts of India, it was reiterated in *Achin Ghose (supra)* that the strict rigours of Article 137 are not applicable to the rights flowing from the Will when the testamentary trust continues in the applicants.

- 33.** Suspicion if, any, due to the delay has been amply explained away by the propounder in the light of the above discussions and as such, the delay of about nineteen years in filing the probate application could not be a deterrent in grant of probate.

Proof of due execution and attestation of the Will

- 34.** The Will has been duly proved by P.W.2, one of the attesting witnesses, in terms of Section 63 of the Indian Succession Act, read with Section 68 of the Indian Evidence Act. P.W.2 was the sole surviving attesting witness at the juncture when the Will was proved and, in his examination-in-chief (which was unshaken in cross-examination), he duly proved the testator having signed the Will in presence of the attesting witnesses and the attesting witnesses, in turn, having signed the Will in the presence of the testator after seeing him sign the Will and in presence of each other. As per Section 68 of the Evidence Act, no further proof of due and valid execution and attestation of the Will was required. All necessary ingredients of Section 63 having thus been satisfied, the due execution and attestation of the Will was proved.

- 35.** D.W.1, the appellant herself, in her evidence admitted that the testator was in sound mental and physical condition till 1990, whereas the Will was executed in the year 1988. Such admission of D.W.1 in her cross-examination dated September 13, 2018 leaves no manner of doubt that the testator was in sound mental and physical condition to execute the Will.
- 36.** Insofar as the deviation from the normal line of succession in the Will is concerned, the very purpose of a Will is to deviate from the normal line of intestate succession and a Will cannot be vitiated merely on such ground.
- 37.** As rightly argued by the respondent, the Will was not unconscionable. The reasons for the bequest were clearly enumerated in the short but succinct Will. The testator clearly stated in the Will that the subject thereof was being given unto his five sons equally/jointly and the rest of the land, which was situated at the north of the self-same property, would be given by him to his three married daughters in equal manner as his wife pre-deceased him. The registered gift deed dated January 17, 1990, executed only two years after the Will, gave effect to such intention of the testator, which itself bears out the veracity of the Will. Thus, not only was sufficient justification for depriving the daughters of the subject-property of the Will given in the Will itself, the testator acted in terms of the Will and executed a registered gift deed in favour of his daughters two years thereafter.

- 38.** Hence, there cannot be any manner of doubt regarding the genuineness of the Will.

Suspicious circumstances

- 39.** With regard to the alleged interpolation regarding the address of one of the attesting witnesses, namely Mohan Dey, on a plain glance of the original Will, which forms a part of the record, we could not find any palpable interpolation beyond doubt. Although there is some overwriting/smudging on the word “Cal”, it is not evident *ex facie* that the same was interpolated in place of “Kol”. More importantly, such objection was not taken specifically by the appellant before the Testamentary Court, nor was any expert witness sought to be appointed by the appellant. Since it is the appellant who is now taking the point, it was her incumbent duty and onus to disprove the authenticity of the said word on the Will. In the absence of any endeavour on the part of the appellant to seek appointment of expert witness, adverse inference ought to be drawn against the appellant on such count.
- 40.** The other alleged discrepancies in the Will sought to be projected by the appellant are minor in nature. It is rightly contended by the respondent that the Will was executed in the year 1988, whereas the deposition of P.W.2 was taken in 2018, that is, three decades thereafter, when P.W.2 was aged about 73 years. It is a trite proposition of law that some amount of minor discrepancies in

evidence is but natural and only strengthens the veracity of the same rather than cast doubt on the deposition on such count.

- 41.** P.W.2, the sole surviving attesting witness who adduced evidence to prove the Will, has stated in his evidence that he was a neighbour of the testator and not a stranger, which fact has not been disproved by the appellant. The minor change in the signature of the testator between the execution of the Will and the gift deed is also within reasonable limits. Mere flourish under a signature does not vitiate the signature otherwise, particularly in the absence of any expert evidence being sought in that regard by the appellant, who challenges the same.
- 42.** The argument regarding chronology of the signature is not substantially borne out by the evidence of P.W.2. Under Section 63 of the Succession Act, no particular chronology is required to be proved for the valid execution of a Will to be established. The necessary ingredients of Section 63 have been proved by P.W.2. The mere order in which the signatures were mentioned in his examination-in-chief need not be correlated with the chronology of such signatures on the Will.
- 43.** In any event, the endeavour of the Testamentary Court, which is also a 'court of conscience', is not to start with a fault-finding exercise but to give effect to the last wishes of the deceased testator as much as possible.
- 44.** The reliance of the appellant on *Kavita Kanwar (supra)* is misplaced. In the said judgment, the Supreme Court *inter alia* held that

ordinarily a Will has to be proved like any other document and the test to be applied is the usual test of satisfaction of the prudent man and proof of mathematical accuracy is not to be insisted upon. The unique feature of a Will, it was held, is that it speaks from the death of the testator and therefore, the maker thereof is not available for deposing about the circumstances in which the same was executed, which introduces an element of solemnity in the decision of the question as to whether the document propounded is the last Will of the testator.

- 45.** The initial onus, naturally, lies on the propounder but the same can be taken to have been primarily discharged on proof of the essential facts which go into the making of a Will. It was further held that if a person challenging the Will alleges fabrication, fraud, undue influence, coercion, etc., such pleas have to be proved. A circumstance is “suspicious” when it is not normal or is not normally expected in a normal situation or is not expected of a normal person. The Supreme Court highlighted that the suspicious features must be real, germane and valid and not merely the “fantasy of the doubting mind”.
- 46.** The test of satisfaction of judicial conscience only arises when the execution of the Will is surrounded by suspicious circumstances. In the absence of any such circumstance having been proved in the present case, we do not find that the onus ever shifted to the executor to dispel such non-existent suspicious circumstances.

- 47.** Insofar as the appellant's argument that the strict format of Section 281 of the Indian Succession Act was not followed is concerned, we respectfully agree with the proposition laid down in *Pralhad Ganpat Salgar (supra)*, a judgment passed by a Division Bench of the Bombay High Court, to the extent that the format given therein is not mandatory. The same is merely a rule of technicality and non-adherence to the exact format given in the statute does not vitiate the grant of probate as such. The format can only act as a guideline and not be a mandate set in stone.
- 48.** The appellant has argued that there is a large space between the typed matter and the signature in the Will. However, we are unable to convince ourselves on such count upon a perusal of the original Will, which is a part of the records.
- 49.** The depiction of the signature of the first attesting witness above that of the testator is also within the zone of normalcy. A perusal of the Will reveals that the heading "Witness:" was printed on the left-hand side beneath the text of the Will, under which Serial Nos.1 and 2 were also typed. The attesting witnesses signed against the said numbers. It may very well be that the testator signed the Will before the attesting witnesses signed and thereafter, for the sake of adhering to the respective serial numbers, the witnesses signed against their allotted numbers. Moreover, the Will was executed on a small piece of letterhead of the testator and as such, the signatures had to be accommodated accordingly. Hence, the placement of the respective signatures of the testator and the

attesting witnesses does not create any manner of doubt whatsoever regarding the valid execution of the Will.

- 50.** We also find Section 63(b) of the Indian Succession Act to be squarely complied with, since the location of the signature of the testator beneath the body of the Will clearly denotes the intention of the testator for the document to be treated as a Will.
- 51.** The arguments as to the propounder having not proved as to who drafted or typed the Will or where it was made, etc., are entirely irrelevant in the context.
- 52.** The testator signed in English in a clear manner and there is no reason why the tests applicable to an illiterate person are to be applied and it should be held that reading over and explaining the Will to the testator was mandatorily to be proved.
- 53.** The sole surviving attesting witness having duly proved the Will, we do not find any reason to interfere with the grant of probate, since the due execution and attestation of the Will was substantially proved.
- 54.** As regards the death of one of the legatees between the execution of the Will and the demise of the testator not being reflected by any change in the Will, it is obvious that a *post facto* event cannot retrospectively vitiate the prior execution of the Will. The tests which are to be applied to ascertain the valid execution of the Will pertain to the date when it was actually executed, that is, on January 20, 1988. The subsequent demise of a son of the testator, who was one of the legatees in the Will, could not have been

contemplated by the testator on the date of execution of the Will. Thus, merely because a revised will was not executed, no aspersion can be cast on the valid execution of the Will prior to the said demise.

- 55.** Moreover, such fact all the more raises the Will above suspicion, since in the event someone wanted to manufacture a Will subsequent to the death of the testator, he or she would definitely have reflected the demise of one of the legatees in the interregnum in the contents of the manufactured Will and would not have left it as it is.
- 56.** As regards the arguments on Section 105 of the Indian Succession Act, the respondent is justified in contending that the same does not affect the valid execution of the Will and could only affect the effect on the title which passed through the Will, which again would be a question of title, not to be gone into by the Testamentary Court. The charter of the Testamentary Court is merely to ascertain the due and valid execution and attestation of the Will, which conditions having been satisfied in the present case, Section 105 cannot be invoked at all.
- 57.** Again, as held earlier, P.W.2, the surviving attesting witness proved in his oral evidence that he was a neighbour of the testator and, as such, his being an associate of the executor *per se* does not cast any suspicion on the Will.
- 58.** The appellant has argued that no issue was framed by the Trial Court on suspicious circumstances. However, such argument is

contrary to the records. Issue Nos.3, 4 and 5 framed by the learned Testamentary Court are as follows:

- “3. Whether the Will is duly executed by the Testator or it is forged and fabricated one?*
- 4. Whether the Plaintiff exerted any undue influence to execute the will?*
- 5. Whether the Testator was physically fit and mentally alert at the time of execution of the will?”*

- 59.** The said issues sufficiently covered the question of suspicious circumstances, if any. In any event, the parties led evidence on all the issues raised in objection by the appellant and went to trial fully knowing each other's case. Arguments were advanced extensively. Thus, no further issue was required to be framed exclusively on the question of suspicious circumstances.
- 60.** In view of the above discussions, we are of the considered opinion that the learned Testamentary Court was justified in granting probate in respect of the last Will and Testament of Late Harendra Chandra Bysack and we do not find any reason or ground to interfere with the impugned judgment and deemed decree.
- 61.** Accordingly, F.A. No.133 of 2019 is dismissed on contest, thereby affirming the judgment and deemed decree dated June 22, 2019 passed by the learned Additional District Judge, First Court at Sealdah, District: South 24 Parganas in Original Suit No.01 of 2016, thereby granting probate in respect of the last Will and Testament of Late Harendra Chandra Bysack.

- 62.** There will be no order as to costs.
- 63.** A formal decree be drawn up accordingly.
- 64.** Pending interim applications, if any, stand disposed of accordingly.

(Sabyasachi Bhattacharyya, J.)

I agree.

(Uday Kumar, J.)