

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

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

**FAT 151 of 2016
IA No: CAN 3 of 2023
Sri Pradipta Kr. Sarkar
Vs.
Shefali Sarkar and others**

For the appellants	:	Mr. Partha Pratim Roy, Mr. Sarbananda Sanyal, Mr. Dyutiman Banerejee, Ms. Paulami Chakraborty....Advocates
For the respondent	:	Mr. Aniruddha Chatterjee, Ld. Sr. Adv., Mr. Abir Lal Chakraborty...Advocates
Heard on	:	19.06.2025
Hearing concluded on	:	26.06.2025
Judgment on	:	10.07.2025

Sabyasachi Bhattacharyya, J.:-

1. The present first appeal has been preferred against the dismissal of an application for probate of the last Will and testament of late Provat Kumar Sarkar. The primary premise on which the learned Testamentary Court dismissed the probate suit was that the date on which the scribe had signed the Will, that is, September 27, 2004, was subsequent to the date of alleged execution of the Will on September 10, 2004.
2. Learned counsel appearing for the executor/propounder/appellant contends that there was a second (subsequent) Will of the deceased

Testator produced by the defendants/respondents themselves. Although it was not marked as an exhibit, nor was any probate taken in respect thereof, since the defendants/respondents themselves produced the same in the Trial Court, the contents thereof can be looked into for collateral purposes. In the said Will itself, the Testator had referred to his first Will dated September 10, 2004, thus admitting the execution of the same.

3. Learned counsel for the appellant next argues that there was no date appearing under the signature of either the testator or the attesting witness in the Will-in-question. It is pointed out that the scribe of the Will was present at the time of subsequent notarization on September 27, 2004 and had signed as identifier during such notarization. Thus, it was patently a mistake on the part of the scribe to put the same date under his other signature which was already there on the Will.
4. It is submitted further that there is no pleading on record in the written objection/statement of the defendants-respondents challenging the date on which the scribe signed the Will or as regards any suspicious circumstance arising on such ground.
5. Moreover, no counter suggestion was put to P.W.2, one of the attesting witnesses, in his cross-examination regarding non-execution of the Will on the relevant date or regarding the testator or the attesting witnesses having not signed the Will on September 10, 2004. No argument has been advanced in that regard as well. Since the Will was duly proved under Section 63 of the Indian Succession Act as well as Section 68 of the Indian Evidence Act by both the attesting witnesses thereto, who

adduced evidence respectively as P.W.2 and P.W3, there cannot be any manner of doubt or suspicious circumstance surrounding the execution of the Will.

6. Learned counsel for the appellant argues that a third case was made out by the Testamentary Court, beyond the pleadings, arguments or contentions of either party, also traversing beyond the issues framed, by holding that the Will was shrouded by suspicious circumstances due to the date of signature of the scribe not tallying with the date of execution of the Will.
7. Hence, the Trial Court erred in law in raising such ground by itself in the impugned judgment for the first time, particularly without giving any opportunity to the propounder/appellant to rebut the same.
8. Learned counsel for the appellant submits that since the scribe has met his demise by now and there is no scope of further recall of the scribe as a witness, no useful purpose would be served by filing an application under Order XLI Rule 27 of the Code of Civil Procedure in that regard.
9. Learned counsel submits that the Will itself categorically explained the reasons for bequeathing the properties to the legatees therein. Furthermore, it is pointed out that the propounder/appellant was not the only legatee as per the Will. Half share of the dwelling house was given to the widow of the deceased. Regarding the rights to a petrol pump, which is also the subject-matter of the Will, the devolution was equal. Hence, it is contended that the learned Testamentary Court acted perversely in dismissing the probate proceeding by traversing beyond the pleadings of both parties.

10. Learned counsel for the appellant cites *Associated Cement Companies Ltd. v. G.S. Fertilisers Pvt. Ltd.*, reported at AIR 2015 Cal 106, and *Laxmibai (dead) through Lrs and Another v. Bhagwantbuva (dead) through Lrs and Others*, reported at (2013) 4 SCC 97, for the proposition that no third case can be made out by the court without framing an issue and giving an opportunity to the parties to lead evidence thereon. If doubt is raised in respect of correctness of a witness' statement, opportunity must be given to the witness to explain the same by drawing attention of the witness to that portion of the evidence. Otherwise, credibility of a witness cannot be impeached.
11. Learned counsel next relies on *B. Venkatamuni v. C.J. Ayodhya Ram Singh and Others*, reported at (2006) 13 SCC 449, for the proposition that the onus is on the propounder to remove suspicious circumstances, but the burden of proving undue influence, coercion, fraud, etc. is cast on the person who makes such allegations. Here, no such allegation was made at all by the objectors/respondents, let alone any such allegation being proved.
12. Learned senior counsel appearing for the respondent argues that the Testamentary Court is a court of judicial conscience and can itself look into suspicious circumstances, irrespective of the parties raising such objections.
13. Learned senior counsel cites *Indu Bala Bose and Another v. Manindra Chandra Bose and Another*, reported at (1982) 1 SCC 20, where it was held that all legitimate suspicions are to be removed by the propounder.

14. In *Kavita Kanwar v. Pamela Mehta and Others*, reported at (2021) 11 SCC 209, which is also cited by the respondents, it was held that even in the absence of pleas of fraud, etc., the very circumstances surrounding the execution of a Will may give rise to doubt as to whether the testator executed and acted of his own free will and volition in executing the Will.
15. Learned senior counsel cites *Gurdial Kaur and Others v. Kartar Kaur and Others*, reported at (1998) 4 SCC 384, for the proposition that if there is a suspicious circumstance, it is for the propounder to dispel the same.
16. Learned senior counsel argues that there appears no date in the disputed Will against the signatures of the attesting witnesses. Also, there is discrepancy in the evidence of the plaintiff's witnesses, including the attesting witnesses, who could not identify properly their own signatures. Learned senior counsel particularly places reliance on a portion of the cross-examination of P.W.2 in that regard.
17. It is argued that the propounder was the beneficiary of the Will and was an active participant in the execution of the same, which itself casts doubt on the validity of the Will. Thus, there was a heavy burden on the propounder to dispel such doubt.
18. It is argued next by the respondents that no explanation has been furnished as to how the attesting witnesses were related with the testator. One of the attesting witnesses was admittedly a law clerk and, thus, could very well be hand-in-glove with the propounder.

- 19.** Also, it is argued in continuation of the submission that a Testamentary Court is a court of conscience, that the scribe signed the Will later and the Testamentary Court correctly held that the same casts ample suspicion on the valid execution of the Will. P.W.2, one of the attesting witnesses, in his evidence, stated that the scribe drafted and then the testator signed the Will, which is the obvious chronology of events in the execution of a Will. Such statement, however, is contradicted by the scribe himself by signing on a later date. No application under Order XLI Rule 27 of the Code has been filed before this Court to adduce evidence on the part of the appellant to dispel such suspicious circumstance. It is argued that such avenue was open to the appellant even if it did not get any opportunity as such to rebut the said suspicious circumstances during trial before the Testamentary Court.
- 20.** Lastly, learned senior counsel appearing for the respondents argues that the second Will was marked as 'X' for identification and as such cannot be looked into as evidence. Even in the said document, the testator mentioned that the previous Will (the Will in contention herein) was executed under duress due to the volatile nature of the appellant and the trouble which the testator apprehended if the Will was not executed. Thus, it is insinuated by the respondents that the Will-in-question was not executed of the testator's own free volition. In that regard, learned senior counsel cites *Surendra Pal and Others v. Dr (Mrs) Saraswati Arora and Another*, reported at (1974) 2 SCC 600, where it was observed by the Supreme Court that if a testator is overawed by

powerful minds, free volition is affected and the and the same itself gives rise to suspicious circumstances.

- 21.** Upon taking note of the contentions of the parties and going through the materials on record, we propose to render our findings on the various questions raised under the following broad heads:

Alleged discrepancy regarding the date of signature of the scribe

- 22.** A plausible explanation has been offered by the appellant during arguments regarding the apparent discrepancy in the date of signature given by the scribe in the Will, being September 29, 2004, which is subsequent to the execution of the Will on September 10, 2004.
- 23.** We find from the Will itself that the scribe signed as an identifier as well at the time of notarization of the disputed Will. When the Will was notarized, the undisputed date of which is September 27, 2004, it is the same learned advocate who acted as scribe who signed the Will at the relevant place where the seal of the notary was put, as the identifier of the signature of the executor. The date of notarization is evident from the seals of the notary on each page of the Will, which was September 27, 2004.
- 24.** The advocate, who acted as scribe as well as identifier, put the date of notarization as September 27, 2004 beneath his signature in the capacity of identifier at the time of such notarization. His signature appears as well in the capacity of scribe above the signature as identifier on the last page of the Will, under the inscription in Bengali vernacular that the Will was read over and explained to the testator. It

is clear therefrom that the scribe, who also acted in the capacity of identifier, had initially not signed under his signature as scribe, but while putting a date to his signature as identifier at the time of notarization, also wrote the same date erroneously under his signature as scribe.

- 25.** We find such explanation quite plausible because no date appears against the signatures of either the testator or the attesting witnesses in the Will. Thus, an obvious presumption is raised that at the time of execution of the Will, none concerned, including the testator, the attesting witnesses or the scribe, put any date against their respective signatures. The scribe, also acting as identifier at the time of notarization, put the same date (the date of notarization) beneath both his signatures – as scribe as well as identifier – erroneously at the time of notarization.
- 26.** Also, nothing hinges upon such alleged discrepancy, since it is nobody's case that the testator was illiterate. In fact, the testator has signed the Will all through. Hence, the signature of the scribe under the inscription that the Will was read over and explained to the testator was merely a surplusage, since such inscription itself is redundant in case of a literate person who signed the Will.
- 27.** We cannot overlook another aspect of the matter. Section 63 of the Indian Succession Act does not require the signature of the scribe to be proved at all. It is only the validity of the signatures of the testator and the attesting witnesses and the chronology of their signatures and their presence before each other which are relevant for the purpose of

Section 63. Hence, the scribe is not even required to sign the Will under law and his signature or the date underneath the same are utterly immaterial. Just because the date of notarization was erroneously put under the signature of the scribe as well, beneath the inscription that the Will was read over and explained to the testator, simultaneously with his signature as identifier, does not necessarily mean that the Will was not executed and signed by the testator as well as the attesting witnesses on September 10, 2004, which date, in any event, appears in the body of the Will.

- 28.** We cannot also be oblivious of the fact that there is no pleading in the written objection/statement of the defendants/respondents as regards such alleged discrepancy in the date of signature of the scribe. There is no argument advanced by either of the parties, not even any issue framed specifically thereon. Also, no cross-suggestion was put specifically to the plaintiff's witnesses on such count that the signature of the scribe was of a later date. Hence, there could not have been an occasion for the appellant to anticipate and dispel the doubt in the mind of the Testamentary Court in that regard, if any. As evident from the decisions cited by both the parties, there is no doubt that if there is any suspicious circumstance, it is the propounder's duty to dispel the same. However, in case of allegations of fraud/misrepresentation, which is the premise of the present argument of the respondents, the same has to be specifically pleaded by the person making such

allegation. Such burden has been recognised in *B. Venkatamuni (supra)*¹ by the Supreme Court.

29. Again, in *Laxmibai's case (supra)*², the Supreme Court held that if a doubt is raised regarding the correctness of the statement of a witness, opportunity must be given to him by drawing his attention to the specific portion of the incriminating evidence, without which the credibility of the witness cannot be impeached, on a conjoint reading of Sections 138 and 146 of the Evidence Act.
30. Again, it has been reiterated repeatedly by the Supreme Court that a Will has to be proved like any other document, in terms of Section 68 of the Indian Evidence Act, subject to the satisfaction of Section 63 of the Indian Succession Act. In the present case, both the attesting witnesses have proved the Will. Their examination-in-chief, satisfying all the parameters of Section 63, have not been demolished in cross-examination. The said attesting witnesses adduced evidence as P.W.2 and P.W.3 respectively, and their deposition stands unimpeached.
31. Hence, the mere allegation that the signature of the scribe was put on a subsequent date does not vitiate the execution of the Will otherwise.
32. Another aspect of the case is that the Testamentary Court, for the first time in its impugned judgment, cited the reason as discussed above as a suspicious circumstance, without granting any opportunity to the propounder to deal with the same. There is no scope of filing an

¹ *B. Venkatamuni v. C.J. Ayodhya Ram Singh and Others* reported at (2006) 13 SCC 449

² *Laxmibai (dead) through Lrs and Another v. Bhagwantbuva (dead) through Lrs and Others* reported at (2013) 4 SCC 97

application under Order XLI Rule 27 of the Code of Civil Procedure at this juncture, since it is submitted that the scribe is by now deceased. Even otherwise, we are of the opinion, in view of the above discussion, that the apparent discrepancy in the date of signature of the scribe has been sufficiently explained and, in any event, the signature of the scribe is a surplusage when seen in the context of Section 63 of the Indian Succession Act. The Will has been proved satisfactorily by both the attesting witnesses, whereas Section 68 of the Evidence Act requires only one of the attesting witnesses to do so. Thus, this issue is held in the negative and in favour of the propounder / appellant.

Alleged discrepancy in the evidence of the P.Ws.

- 33.** We find from a careful scrutiny of the evidence of both the attesting witnesses, P.W.2 and P.W.3, that they comprehensively proved the due execution of the Will in terms of the yardsticks of Section 63 of the Indian Succession Act.
- 34.** Learned senior counsel for the respondents argues that one of the attesting witnesses stated in his cross-examination that he could not recollect whether he had signed on the Will.
- 35.** A perusal of the said portion of the cross-examination of P.W.3, dated July 26, 2012, merely shows that the witness could not recollect from his memory and say whether he had signed on “the Will” executed by the deceased testator as an attesting witness. However, in the same sentence, P.W.3 refers to the date of the said Will being March 23, 2006. The said date is not of the impugned Will but of the subsequent

purported Will which was produced by the respondents but not marked as exhibit. Thus, the entire statement, as to P.W.3 not remembering having signed and whether the signature on the document-in-question was his or not, relates to the subsequent Will dated March 23, 2006 and not to the Will-in-question. Hence, the argument of discrepancy in the deposition of the attesting witnesses is utterly baseless.

Whether the Will is vitiated otherwise.

- 36.** Active participation of the propounder, who is a beneficiary, has been cited by the respondents as a vitiating factor in respect of the Will.
- 37.** Even otherwise, such active participation, in the absence of other incriminating evidence, would not *per se* vitiate the valid execution of a Will. However, in the present case, we find that the bequest was not even made solely to the propounder. Rather, half of the dwelling house was given to the propounder whereas the widow of the deceased testator was also given half share. Regarding a petrol pump, which is also a part of the subject-property of the Will, half of the same was given to the widow of the testator and only on her demise, to the propounder and thereafter to the propounder's son.
- 38.** Furthermore, in the Will itself, sufficient explanation has been given for the manner of bequest, including that the daughters of the testator were happily married, the expenses of which marriages were borne by the testator himself.
- 39.** In the subject Will, the testator clearly stated that he was being looked after by the propounder and that the propounder had undertaken that

he or his family would not neglect or inflict any mental torture on the testator or his wife.

40. Read in the context of the subsequent Will, which has been vociferously cited by the respondents to contend that the testator referred to the first Will having been executed under duress due to apprehended troublemaking by the propounder, it is evident that even if there was some previous trouble between the testator and his son, the propounder, the same was resolved, which is reflected in the Will-in-question. The reference in the disputed first Will to the assurance by the propounder not to inflict any mental torture provided sufficient justification for execution of the same, particularly in the context that the testator wrote in the Will that the propounder was looking after the testator and his wife then, for execution of the disputed Will.
41. Moreover, as stated earlier, the Will justly distributes the property between his son and his widow in equal proportion, if not with a bias towards the widow, since the petrol pump was given first to the widow and thereafter to the propounder and subsequently to the propounder's son. The daughters of the testator having been given in marriage previously by the testator and their leading satisfactory matrimonial lives, as cited in the Will itself, also afforded sufficient justification for depriving them in the disputed Will.
42. It is also well-settled that mere deprivation of a particular section of the heirs of the testator itself does not vitiate the Will, since a Will is meant for the very purpose of deviating from the normal line of succession.

- 43.** Thus, we do not find anything to establish that the Will-in-question is otherwise vitiated or shrouded by suspicious circumstances.

Relation between attesting witnesses and testator

- 44.** P.W.3, one of the attesting witnesses, has clearly stated in his deposition that he was a neighbour of the testator. The other attesting witness, P.W.2, also in his examination-in-chief, stated that he knew the testator as well as his son, the propounder, very well. Thus, it is borne out by their own evidence that both the attesting witnesses were known to the testator prior to the execution of the Will, which denudes the very premise of such objection of the respondents.
- 45.** Nothing in law disqualifies a law clerk, merely by dint of his profession, from being an attesting witness in a Will. Unnecessary doubt cannot, thus, be cast on the said attesting witness or collusion assumed between the propounder and the attesting witness (P.W.2), merely because the latter was a law clerk. Thus, such objection is also frivolous and is hereby turned down.

Whether due execution of the Will has been proved.

- 46.** We find from the evidence of P.W.2 and P.W.3, both attesting witnesses to the disputed Will, that they spotlessly proved the execution of the Will in terms of the parameters of Section 63 of the Indian Succession Act. Although Section 68 of the Evidence Act requires only one attesting witness to adduce evidence, here both the attesting witnesses came

forward and their evidence on such count remains unimpeached on the relevant and salient yardsticks of Section 63.

- 47.** As discussed earlier, sufficient justification has been given in the Will itself for the manner in which the testator's estate has been distributed. The mere reference in the subsequent Will to apprehended trouble cannot by itself be equated with the testator having not signed the disputed Will of his own free volition.
- 48.** The principle of the testator being overawed by powerful minds, as held in *Surendra Pal*³ (*supra*), is not applicable, since mere apprehended trouble is not equivalent to undue influence or coercion by a powerful mind. The alleged overbearing "power" of the mind of the propounder otherwise has not been proved at all. Rather, the disputed Will records the statement of the testator that he was satisfied with the care taken of him by the propounder as well as his family and the propounder had assured that he and his family would not cause any mental torture to the testator. Thus, the Will itself contains the answers to the objections raised by the respondents.

CONCLUSION

- 49.** In fine, in view of the above discussions, we arrive at the conclusion that the valid execution of the Will was duly proved by the propounder and there was no "legitimate" suspicious circumstance [as held in *Indu*

³ *Surendra Pal and Others v. Dr (Mrs) Saraswati Arora and Another* reported at (1974) 2 SCC 600

*Bala (supra)*⁴, cited by the respondents themselves] was made out at any point of time, which could hit the validity of the execution of the Will at its roots. Hence, the learned Testamentary Court erred in law and in fact in refusing to grant probate of the last Will and testament of late Provat Kumar Sarkar in favour of the propounder/appellant.

50. Accordingly, F.A.T No. 151 of 2016 is allowed on contest, thereby setting aside the impugned judgment and decree dated September 29, 2015 passed by the learned Additional District Judge, Fourth Court at Krishnanagar, District-Nadia in Original Suit No. 10 of 2008. We hereby allow the probate application of the appellant, thereby granting probate in favour of the propounder/appellant in respect of the last Will and Testament of late Provat Kumar Sarkar, dated September 10, 2004. The consequential ministerial acts shall be performed in the Testamentary Court for grant of such probate to the appellant at the earliest.

51. There will be no order as to costs.

52. Interim orders, if any, stand vacated.

(Sabyasachi Bhattacharyya, J.)

I agree.

(Uday Kumar, J.)

⁴ *Indu Bala Bose and Another v. Manindra Chandra Bose and Another reported at (1982) 1 SCC 20*