

**IN THE HIGH COURT AT CALCUTTA
(Civil Appellate Jurisdiction)
APPELLATE SIDE**

Present:

The Hon'ble Justice Madhuresh Prasad

And

The Hon'ble Justice Supratim Bhattacharya

F.A.T. 157 of 2021

In the matter of: Pradip Kumar Pyne

For the Appellant : Mr. Saurav Sen
 Mr. Triptimoy Talukder
 Mr. Diptomoy Talukder

Judgement Delivered On : 17.11.2025

Supratim Bhattacharya, J.:

1. This present First Appeal has been preferred by Pradip Kumar Pyne, the son of the testator of the Will namely Gopinath Pyne.
2. The Will in contention is said to have been executed on 25.02.1976.
3. The said Pradip Kumar Pyne sought for letter of administration in respect of the said Will before the learned Chief Judge, City Civil Court, Calcutta being Probate Case No. 50 of 2011.
4. On a written objection being filed on behalf of the opposite party namely Ruby Dutta the probate case became contentious and has been renumbered as Other Case being O.C. 33 of 2014 and was transferred to City Civil Court, Calcutta, Bench II for disposal.

5. During the proceedings as the opposite party defendant did not take any step so ultimately the case was fixed for ex parte hearing.
6. After taking both oral and documentary evidence and considering the same the O.C. 33 of 2014 has been dismissed ex parte without cost on 31.05.2017.
7. Being aggrieved by and dissatisfied with the judgment and order dated 31.05.2017 passed by the learned City Civil Court, II Bench Calcutta in OC no. 33 of 2014, the present appeal has been preferred.

Factual Matrix.

8. The lis involves a Will dated 25.02.1976 said to have been executed by the testator namely Gopinath Pyne who was the father of the present appellant/plaintiff. The said Gopinath Pyne was the sebait in respect of the deity namely Sri Sri Narugopal Jiu and one of the Sebait in respect of the deity namely Sri Sambhunath Jiu. The said testator through the impugned Will intended to nominate his wife namely Smt. Bina Pyne to be a sebait and joint trustee in respect of the aforementioned two deities on his death, with all the rights, duties which have vested in him as joint trustee. Through the impugned Will the testator also appointed Pradip Kumar Pyne the appellant/plaintiff as the executor of the said Will.

The plaintiff/appellant sought for letters of administration in respect of the said Will as because it has been stated that the two attesting witnesses of the said Will namely Kedarnath Pyne and Arunprakas Dhar have expired.

9. The said letters of administration was sought for by placing Smt. Rubi Dutta as an opposite party.

10. The said Rubi Dutta had filed written statement and had prayed for dismissal of the said case, but ultimately she did not contest the suit as such the said case was heard ex parte. In the present appeal also she has not appeared to contest the appeal

11. In the proceeding before the Trial Court Pradip Kumar Pyne the executor adduced evidence as PW1. One Chittapriya Raychowdhury a practicing advocate of City Civil Court, Calcutta adduced evidence as PW2. An Upper Division Clerk posted in the office of Registrar of Assurance Calcutta namely Pijush Kanti Das deposed as PW3.

The following documents have been marked as Exhibits:

Exhibit-1 - Death certificate of Gopinath Pyne

Exhibit-1/1 - Death Certificate of Anun Prakas Dhar

Exhibit-1/2 - Death certificate of Bina Pyne

Exhibit-1/3 - Death certificate of Kedarnath Pyne

Exhibit-2- Tax receipt of KMC

Exhibit-2/1 - Tax receipt of KMC

Exhibit-3 – Original Will

Exhibit-3/1- Signature of Kedarnath Pyne.

Exhibit-3/2- Signature of Gopinath Pyne.

Exhibit 4- Ration Card.

Exhibit-5 – Trust Deed.

Exhibit-6 - Power of attorney executed by Gopinath Pyne.

Exhibit-7 – Authorization letter.

Exhibit-8- Photo copy of the certified volume copy.

12. The Trial Court framed the following issues:

Issues

1. Is the suit maintainable in its present form and prayer?
2. Has the plaintiff been able to prove due execution and attestation of the Will?
3. Has the plaintiff been able to prove his case?
4. Is the plaintiff entitled to the relief as sought for?"

13. Before the Trial Court on behalf of the testator it was submitted that both the attesting witnesses namely Kedarnath Pyne and Arun Prakas Dhar have expired as such issuance of letters of administration has been sought for. It was submitted that the Will in question being a thirty years old document so genuineness of the said document under Section 90 of the Indian Evidence Act is to be presumed. It was also submitted on behalf of

the petitioner/plaintiff that letters of administration can be issued as there is no suspicious circumstance.

The learned Trial Judge has discarded the submission as regards to presumption of correctness of the impugned Will under Section 90 of the Evidence Act being a document of more than thirty years, on the ground that the aforesaid section does not apply to a Will. The Trial Court has held that neither the signature of the two attesting witnesses have been proved nor any person acquainted with the handwriting or signature of either of the two attesting witnesses has been examined. The learned Trial Judge, in the impugned judgment found that there is no explanation for non-examination of son, daughter, relative or any associate of any of the two attesting witnesses. This non-examination of any of the attesting witnesses or any person who is acquainted with the handwriting or the signature of either of the attesting witnesses is to be scrutinised. Considering the aforesaid facts and circumstance, the learned Trial Judge has not granted letters of administration in respect of the said Will.

- 14.** The Ld. Senior Counsel Mr. Sourav Sen being assisted by Triptimoy Talukder and Diptomoy Talukder representing the appellant/petitioner submitted during his exhaustive argument that there is no suspicious circumstance as regards to the impugned Will.

He has further submitted that both the attesting witnesses namely Kedarnath Pyne and Arun Prakas Dhar have expired.

He has further submitted that death certificates of the testator Gopinath Pyne and both the attesting witnesses have been proved and those have been marked as exhibits.

The learned counsel has also submitted that the Will in question has been executed on 25.02.1976 that is more than thirty years ago as such the Will in question being an old document so the correctness of the said document is to be presumed.

He has further submitted that a learned advocate has deposed being PW2. The said witness has proved the signature of the testator and one of the attesting witnesses namely Kedarnath Pyne.

The learned counsel has relied upon two judgments. One passed by the Hon'ble Apex Court in the case between *V. Kalyanaswamy (Dead) by legal representatives and another vs. L. Bakthavatsalam (Dead) by legal representatives and others*, reported in (2021) 16 SCC 543. He has also relied upon another judgment passed by a coordinate Bench of this Court passed in *FAT 304 of 2019 between Sujata Dhar vs. Ranjit Kumar Dhar and Ors.*

15. From the submission of the learned counsel and the documents on record it transpires that the appellant who is the executor appointed by the testator in the said Will in question has prayed for letters of administration.

16. Section 63 of the Indian Succession Act, 1925 lays down execution of unprivileged Wills. The said Section states as follows:

“63. Execution of unprivileged Wills.—

Every testator, not being a soldier employed in an expedition or engaged in actual warfare, or an airman so employed or engaged, or a mariner at sea, shall execute his Will according to the following rules:—

(a) The testator shall sign or shall affix his mark to the Will, or it shall be signed by some other person in his presence and by his direction.

(b) The signature or mark of the testator, or the signature of the person signing for him, shall be so placed that it shall appear that it was intended thereby to give effect to the writing as a Will.

(c) The Will shall be attested by two or more witnesses, each of whom has seen the testator sign or affix his mark to the Will or has seen some other person sign the Will, in the presence and by the direction of the testator, or has received from the testator a personal acknowledgement of his signature or mark, or the signature of such other person; and each of the witnesses shall sign the Will in the presence of the testator, but it shall not be necessary that more than one witness be present at the same time, and no particular form of attestation shall be necessary.”

The aforementioned section states explicitly that a will shall be attested by two or more witnesses.

Generally for proof of execution of a document which is required as per the provisions of law to be attested, Section 68 of the Indian Evidence Act corresponding to Section 67 of the Bharatiya Sakshya Adhiniyam comes into play.

In the present proceeding both the attesting witnesses have expired. When both the attesting witnesses have expired then to prove a Will Section 69 of the Indian Evidence Act, 1872 corresponding to Section 68 of the Bharatiya Sakshya Adhiniyam, 2023 comes in aid. The said section of the Bharatiya Sakshya Adhiniyam, 2023 lays down as follows:

“68. Proof where no attesting witness found.

If no such attesting witness can be found, it must be proved that the attestation of one attesting witness at least is in his handwriting, and that the signature of the person executing the document is in the handwriting of that person.”

The said section lays down that if no attesting witness can be found it must be proved that the attestation of one attesting witness at least is in his handwriting and the signature of the person executing the document is in the handwriting of that person. This proof can only be adduced by other person.

- 17.** In this present case a learned advocate namely Chittapriya Ray Chowdhury (PW2) has deposed claiming that he used to conduct cases on behalf of the testator namely Gopinath Pyne for twenty years. He has further deposed that a power of attorney

dated 12.07.1993 (exhibit-6) was executed by the testator Gopinath Pyne in favour of his wife namely Bina Pyne, bears his signature as a witness. He has further deposed that in his presence the said power of attorney was executed by Gopinath Pyne. From the said evidence it can be assumed that the said PW2 was acquainted with the testator namely Gopinath Pyne and his signature. The said witness has deposed that he knows the signature of Gopinath Pyne and also the signature of his brother Kedarnath Pyne, since both were his clients. This witness has thus proved the signatures of the testator Gopinath Pyne and that of one of the attesting witnesses namely Kedarnath Pyne. This aforementioned facts complies Section 68 of the Bharatiya Sakshya Adhiniyam. In such circumstance the said witness is competent and trustworthy.

18. We find force in reliance placed by the appellant on decision of the Apex Court in the case of **V. Kalyanaswamy** (Supra) as also decision of the co-ordinate Bench of this Court in FAT 304 of 2019. Insofar as the submissions advanced on behalf of the appellants that in the present case since no attesting witness could be found, deposition of the person acquainted with the handwriting of the testator and attesting witness is sufficient to prove execution of the Will by the testator. We also consider it apposite to refer to a judgment of the Hon'ble Apex Court passed

in the case between *Ashutosh Samanta (Dead) by legal representatives and Ors. Vs. Ranjan Bala Dasoi and Ors.* reported in (2023) 19 SCC 448. Paragraph 16 of the said judgment lays down the following:

“16. In Babu Singh v. Ram Sahai [Babu Singh v. Ram Sahai, (2008) 14 SCC 754], the Court held as follows with regard to Section 69: (SCC p. 759, paras 17-18)

“17. It would apply, inter alia, in a case where the attesting witness is either dead or out of the jurisdiction of the court or kept out of the way by the adverse party or cannot be traced despite diligent search. Only in that event, the will may be proved in the manner indicated in Section 69 i.e. by examining witnesses who were able to prove the handwriting of the testator or executants. The burden of proof then may be shifted to others.

18. Whereas, however, a will ordinarily must be proved keeping in view the provisions of Section 63 of the Succession Act and Section 68 of the Act, in the event the ingredients thereof, as noticed hereinbefore, are brought on record, strict proof of execution and attestation stands relaxed. However, signature and handwriting, as contemplated in Section 69, must be proved.”

From the aforementioned discussion it transpires that Section 69 of the Indian Evidence Act corresponding to Section 68 of the Bharatiya Sakshya Adhiniyam has been complied in the proceeding.

19. Insofar as submission of the learned Advocate for the appellant relying upon presumption regarding documents which are 30 years old, under Section 90 of the Evidence Act 1972, the law in this regard is clearly stated by the Apex Court in the above noted decision of the Apex Court in the case of *Ashutosh Samanta*

(Dead) by legal representatives and Ors. (Supra), wherein the Apex Court in paragraph 13 has stated:

“13. In view of the above decision, wills cannot be proved only on the basis of their age — the presumption under Section 90 as to the regularity of documents more than 30 years of age is inapplicable when it comes to proof of wills, which have to be proved in terms of Section 63(c) of the Succession Act, 1925, and Section 68 of the Evidence Act, 1872.”

20. Section 90 of the Indian Evidence Act has been relied by the appellant stating that the impugned Will is thirty years old as such correctness of the said document is to be presumed.

The proof of execution of the Will is governed by other sections of the Act, namely Section 67 and Section 68 of the Bharatiya Sakshya Adhiniyam, 2023 corresponding the Section 68 and Section 69 of the Indian Evidence Act, 1872. Therefore, the contention of the appellant as regards to Section 90 of the Indian Evidence Act , 1872 Corresponding to Section 92 of the Bharatiya Sakshya Adhiniyam, 2023 as regards to presumption as to documents thirty years old being duly executed and attested by the persons by whom it purports to be executed and attested is not at all acceptable. The rule laid down in Section 90 of the Indian Evidence Act , 1872 Corresponding to Section 92 of the Bharatiya Sakshya Adhiniyam, 2023 does not apply to proof of a

Will in a probate proceeding and such contention cannot be taken into consideration.

21. It is also fact that the said Smt. Rubi Dutta on the basis of whose written statement the case before the Trial Court had become contentious had not ultimately contested the suit as such the same was heard ex parte and in the present appeal also she has not entered appearance.
22. Thus from the aforementioned discussion it is apparent that the appellant has been able to prove the Will impugned.
23. In such circumstance this Court is of the view that the impugned judgment passed in the probate proceeding being OC No. 33 of 2014 is required to be interfered with and as such is set aside.
24. The prayer sought for by the appellant is **allowed**.
25. Letters of administration in respect of the Will dated 25.02.1976 executed by Gopinath Pyne is granted subject to the procedure laid down in law.
26. Office/department to take steps accordingly.
27. Parties shall be entitled to act on the basis of the server copy of the judgment and order placed on the official website of the Court.

28. Urgent certified photo copies of this judgment, if applied for, be given to the parties upon compliance of the requisite formalities.

I Agree,

(Madhuresh Prasad, J.)

(Supratim Bhattacharya, J.)