

IN THE HIGH COURT AT CALCUTTA
(Testamentary & Intestate Jurisdiction)

ORIGINAL SIDE

Present:

The Hon'ble Justice Krishna Rao

TS No. 30 of 2015
(PLA No. 189 of 2014)

IN THE GOODS OF :

SMT. KIRONBALA DEBI ALIAS KIRONBALA BANERJEE (DECEASED)

-AND-

INDRAJIT BANERJEE

-VS-

SAMIR KUMAR CHATTERJEE & ORS.

Mr. Suman Kr. Dutt, Sr. Adv.

Ms. Monica Jaiswal

Ms. Debjani Ghosh

Ms. Nasifa Yasmin

Ms. Deblina Banerjee

.....for the plaintiff

Mr. Kallol Basu, Sr. Adv.

Mr. Arif Ali

Mr. Gupta Nath Prasad

Mr. Samik Sarkar

.....for the defendants.

Hearing Concluded On : 20.06.2025

Judgment on : 28.07.2025

Krishna Rao, J.:

1. The plaintiff has initially filed an application being PLA No. 189 of 2014 for grant of Letters of Administration of the last Will and Testament of deceased, Smt. Kironbala Debi alias Kironbala Banerjee dated 18th July, 1986. On issuance of Special Citation out of total 17 legal heirs of the testatrix, only three legal heirs have filed caveats and affidavits in support of caveat. On receipt of caveats and affidavits in support of caveat, the application for grant of Letters of Administration is converted as Testamentary Suit No. 30 of 2015.

2. FACTS OF THE CASE:

a. The plaintiff, Indrajit Banerjee, son of late Dipti Lal Banerjee @ Dipak Banerjee is one of the grandsons of the testatrix. The testatrix died on 23rd January, 1993, leaving behind the following legal heirs:

i. Priya Lal Banerjee (since deceased) - Son :

Priya Lal Banerjee died leaving behind his wife Monika Banerjee (daughter in law of the testatrix) and Monika Banerjee died leaving behind (i) Partha Banerjee, Son and (ii) Krishna Das, daughter, (Grandson and granddaughter of the testatrix).

ii. Moni Lal Banerjee (since deceased) - Son :

Moni Lal Banerjee died leaving behind (i) Ila Banerjee, wife (Daughter in law of the testatrix) (ii) Abhijit Banerjee, Son, (iii) Chandana Sarkar, Daughter and (iv) Maitreyi Chatterjee, Daughter, (Grandson and granddaughters of the testatrix).

iii. Phani Lal Banerjee (since deceased) – Son :

Phani Lal Banerjee died leaving behind his wife Arati Banerjee (Since Deceased), (i) Subhajit Banerjee, Son, (ii) Surojit Banerjee, Son and (iii) Sangita Mukherjee, Daughter, (Grandsons and granddaughter of the testatrix).

iv. Dipti Lal Banerjee (since deceased) - Son :

Dipti Lal Banerjee died leaving behind his son, Indrajit Banerjee, grandson of the testatrix (Plaintiff herein).

v. Renuka Chatterjee (since deceased) - Daughter :

Renuka Chatterjee died leaving behind her sons, Samir Kumar Chatterjee and Sisir Kumar Chatterjee, (since deceased) (Grandsons of the testatrix).

vi. Bulu Mukherjee (since deceased) - Daughter :

Bulu Mukherjee died leaving behind her sons, Pradip Mukherjee and Prasanta Mukherjee (grandsons of the testatrix).

vii. Chhabi Chatterjee (since deceased) - Daughter :

Chhabi Chatterjee died leaving behind her son, Kalyan Chatterjee (grandson of the testatrix).

viii. Gita Mukherjee (since deceased) – Daughter :

Gita Mukherjee died leaving behind her husband, Sailendra Kumar Mukherjee (Son in law of the testatrix), Nabanita Mukherjee and Madhumita Jaiswal, daughters (grand-daughters of testatrix).

- b.** The testatrix executed her last Will and Testament on 18th July, 1986 by appointing her third son, namely, Phani Lal Banerjee as sole Executor of her last Will. The Executor died on 22nd June, 2003, without applying for grant of probate of the said Will. By the said Will, the testatrix bequeathed the land measuring an area of 30 Kattahs with all building and structures standing thereon at premises no. 2, Tangra 2nd Lane, comprised in Holding No. 171, Police Station, Tangra to her youngest son, Dipti Lal Banerjee alias Dipak Banerjee and after the death of Dipti Lal Banerjee, his son Indrajit Banerjee, the plaintiff shall get the said landed property.
- c.** Dipti Lal Banerjee died on 1st September, 2005. The wife of Dipti Lal Banerjee, namely, Ranu Banerjee died on 14th April, 2013. The plaintiff being one of the beneficiary of the Will has filed the present suit for grant of Letters of Administration.

3. SUBMISSIONS OF THE PLAINTIFF:

- a.** Mr. Suman Dutt, Learned Senior Advocate representing the plaintiff submits that the Will has been executed by the testatrix in presence of two attesting witnesses. One of the attesting witnesses is Dr. Mihir Kumar Dutta, who was also the family physician and the other Mr. Sites Sinha who was the practicing Advocate of the High Court at Calcutta. The Will was drafted by Shri Samarjit Gupta, Advocate and he has also signed the said Will as a draftsman.
- b.** Mr. Dutt submits that in the Will, it is recorded that each and every word of this Will has been read out and translated and explained in Bengali to me by my Learned Advocate Shri Samarjit Gupta which proves that the Learned Advocate read over and explained the Will to the testatrix.
- c.** Mr. Dutt submits that the signature of the testatrix is not disputed by the defendants. The allegation of the defendants that the signature has not been made voluntarily. He submits that the defendants have not produced any evidence to prove the allegation of fraud. Mr. Dutt submits that on comparison of signature of Exhibit "H" i.e. letter to the Collector by the testatrix dated 21st March, 1983 and signatures appearing in the Will clearly shows that the testatrix has signed the Will.

- d.** Mr. Dutt submits that the Will is a registered document executed in the year 1986 which shows that the testatrix has presented the Will and the signatures of the testatrix before the Registrar was identified by an Advocate, the existence of Will cannot be disputed and the plaintiff is entitled to get benefit of presumption under Section 114 of the Indian Evidence Act.
- e.** Mr. Dutt submits that two attesting witnesses have signed the Will but both the attesting witnesses have passed away. He submits that Dr. Mihir Kumar Dutta died on 25th May, 2014 and Advocate Sites Sinha died on 27th January, 2009. He submits that Dr. Dutta was a family physician and well acquainted with all the family members, the same is not in dispute. He submits that Dr. Dutta had also certified the death of the testatrix and her cause of death on his letterhead dated 23rd January, 1993.
- f.** Mr. Dutt submits that in order to take recourse of Section 69 of the Indian Evidence Act, 1872, on the prayer of the plaintiff original records of the Pension Cell of Calcutta University containing signature and hand writing of Dr. Dutta was produced before the Registrar of this Court for the purpose of obtaining expert report and as per the hand writing expert report i.e. P.W.1, the signature appearing in the Will as attesting witness of Dr. Dutta is that of the signatures appearing in the pension papers. He submits that signature of one of the attesting witnesses was admitted in the cross-examination by the defendants.

- g. Mr. Dutt submits that the testatrix has specifically described the property as to the mode and manner to the disposition of her property, goes to show that she was mentally alert and could comprehend that the document, she had executed would be her last Will and Testament.
- h. Mr. Dutt relied upon the judgment in the case of **Sameer Kapoor Vs. State Through Sub-Division Magistrate South, New Delhi & Others** reported in **(2020) 12 SCC 480** and submitted that the proceedings filed for grant of probate or Letters of Administration is not an action in law. It is very difficult 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.
- i. Mr. Dutt relied upon the judgment in the case of **Satipada Chatterjee Vs. Annakali Debya** reported in **1953 SCC OnLine Cal 233** and submitted that where the evidence of the attesting witnesses is not specific but vague or doubtful or even where it is conflicting upon the same material facts, the Court may take into account the surrounding circumstances of the case and judge from the same, whether the requirements of the statute have been complied with.
- j. Mr. Dutt relied upon the judgment in the case **Kunwar Surendra Bahadur Singh and Others Vs. Thakur Behari Singh and**

Others reported in **AIR 1939 Privy Council 117** and submitted that the endorsement shows that on 18th July, 1986, the testatrix presented the Will at the Office of District Sub-Registrar, the endorsement signed by the Sub-Registrar and the testatrix. The endorsement records that one Samarjit Ghosh identified the testatrix. The registered Will also proved that the testatrix executed the Will in presence of two witnesses.

- k.** Mr. Dutt relied upon the judgment in the case of **Bharpur Singh and Others Vs. Shamsher Singh** reported in **(2009) 3 SCC 687** and submitted that a Will must be proved having regard to the provisions contained in clause (c) of Section 63 of the Succession Act, 1925 and Section 68 of the Evidence Act, 1872, in terms thereof the propounder of a Will must prove its execution by examining one or more attesting witnesses. If the validity of the Will is challenged on the ground of fraud, coercion or undue influence, the burden of proof would be on the caveator. He submits that the caveators have not proved their burden that the plaintiff has obtained the Will by way of fraud or coercion.

4. SUBMISSIONS OF THE DEFENDANTS:

- a.** Mr. Kallol Basu, Learned Senior Advocate representing the defendants submits that the plaintiff has filed the suit for grant of Letters of Administration after the period of 21 years from the date of death of the testatrix. By the time of filing of the suit, two

attesting witnesses, executor and first beneficiary of the Will passed away and due to which the execution of Will, mental stability of the testatrix and whether the Will is executed of own free will and volition is not proved.

- b.** Mr. Basu submits that the plaintiff deliberately delayed in filing of the proceeding. He submits that the plaintiff admits that he was present at the time of execution of the Will which proves that the plaintiff had the knowledge about the Will since the date of execution.
- c.** Mr. Basu submits that the Executor was the second son of the testatrix but during his life time, he choose not to propound the Will and the plaintiff has not explained the same as to why the Executor has not filed any case for grant of probate of the alleged Will. He submits that one of the attesting witnesses, namely, Dr. Mihir Kumar Dutta was a family physician and used to treat the family of the plaintiff and family of the Executor but no explanation is given why Dr. Dutta was silent for so many years and how it is possible that he has not disclosed the execution of Will by the testatrix in the year 1986 till his death.
- d.** Mr. Basu submits that the plaintiff tried to establish the signature of the testatrix by comparing it with a letter being Exhibit- "H". The letter dated 21st March, 1983 was signed as 'Kiron Bala Deby' but there is no signature of testatrix signing as 'Kiron Bala Deby alias

Banerjee' or 'Kiron Bala Deby (Banerjee)'. He submits that the signature is extremely shaky and is not usual signature of the testatrix.

- e. Mr. Basu submits that the plaintiff did not bring any witness of alleged execution of the Will. As per evidence of the plaintiff, one, Madhu Sudhan Parida was an attending witness who was allegedly present at the time of execution of the Will. There is no evidence to prove that the testatrix has executed her Will in presence of any of the witnesses. Mr. Basu relied upon the judgment in the case of ***Moturu Nalini Kanth Vs. Gainedi Kaliprasad (Dead, Through Lrs.)*** reported in **2023 SCC OnLine 1488** and submitted that a person propounding a Will has got to prove that it was duly and validly executed and that cannot be done by simply proving that the signature on the Will was that of the testator, as the propounder must also prove that the attestations were made properly.
- f. Mr. Basu submits that in the Will, the description of the ownership of the land in question is wrong. The testatrix has bequeathed the entire property in question, as if she is the full owner of the property in question. The testatrix as well as the entire family was fully aware that the property in question was owned by testatrix along with her step son, Priya Lal Banerjee.

- g.** Mr. Basu submits that the name of the testatrix has been wrongly written as 'Smt. Kironbala Debi alias Kironbala Banerjee' but the testatrix used to write her name as 'Deby' and not 'Debi'. Testatrix always used to writ 'Kiron Bala' and not 'Kironbala'. The testatrix never used the name 'Kironbala Banerjee' and always used and signed as 'Kiron Bala Deby'. Mr. Basu relied upon the judgment in the case of ***Bharpur Singh & Others Vs. Shamsher Singh*** reported in **(2009) 3 SCC 687** and submitted that the Will relied by the plaintiff is shroud by suspicious circumstances.
- h.** Mr. Basu relied upon the judgment in the case of ***Murthy & Others Vs. C. Saradambal and Others*** reported in **(2022) 3 SCC 209** and submitted that the propounder of the Will must examine one or more attesting witnesses and the onus is placed on the propounder to remove all suspicious circumstances with regard to the execution of the Will but in the present case, there is no evidence that the testatrix have signed her last Will in presence of any witness while possessing good health and fit state of mind.

5. EVIDENCES OF THE PARTIES:

- a.** The plaintiff is support of his case, has examined two (2) witnesses, namely:
1. Rajani Kanta Das P.W.1 (Hand writing expert)
 2. Indrajit Banerjee P.W.2 (Plaintiff)

- b.** During evidence of the plaintiff's witnesses altogether thirteen (13) documents were exhibited which are as follows:

- i. **Exhibit – A (Collectively)** : Copy of a report of the handwriting expert dated 10th November, 2017.
- ii. **Exhibit – B** : Original copy of the death certificate of Kiran Bala Banerjee dated 23rd January, 1993.
- iii. **Exhibit – C, C/1, C/2, C/3 & C/4 (Collectively)** : Original Will of Smt. Kiran Bala Banerjee along with signatures of the witnesses.
- iv. **Exhibit – D** : Original copy of the Death Certificate of Phani Lal Banerjee dated 22nd June, 2003.
- v. **Exhibit – E** : Copy of a family chart of Smt. Kiran Bala Debi @Kiran Bala Banerjee.
- vi. **Exhibit – F** : Original copy of the death certificate of Dipak Banerjee @ Dipti Lal Banerjee dated 1st September, 2005.
- vii. **Exhibit – G** : Original copy of the death certificate of Ranu Banerjee dated 14th April, 2013.
- viii. **Exhibit – H** : Copy of a letter dated 21st March, 1983 issued by the Collector, Corporation of Calcutta for payment of tax.
- ix. **Exhibit – I** : Copy of a document issued by the Collection Department, Kolkata Corporation on 4th April, 1983 acknowledging cheque issued by Smt. Kiran Bala Debi.

- x. **Exhibit – J** : *Original copy of the death certificate of Dr. Mihir Kumar Dutta dated 25th May, 2014.*
- xi. **Exhibit – K** : *Copy of a document issued by Government of West Bengal of Health & Family Welfare issued after the death of Sites Sinha on 27th January, 2009.*
- xii. **Exhibit – L** : *Copy of a prescription issued by Dr. Mihir Kumar Dutta certifying the cause of death of Smt. Kiran Bala Banerjee issued on 23rd January, 1993.*
- xiii. **Exhibit – M (Collectively)** : *Copies of documents for payment of pension of Dr. Mihir Kumar Dutta issued by the Accounts Officer of Calcutta University along with the application for pension of Dr. Mihir Kumar Dutta and his service book.*

During cross-examination of the P.W.2 from the side of defendants, one document is exhibited as:

- xiv. **Exhibit – N** : *Copy of a letter dated 6th April, 1979 issued by Mani Banerjee addressing the Director of Technical Education.*

c. The defendants have adduced one witness as D.W.1, namely:

- 1. Nabanita Mukherjee – D.W.1.

During examination of the defendant's witness, the defendants have exhibited one document marked as "Exhibit – 1".

i. **Exhibit 1:** Copy of a document dated 13th October, 2015 from Kolkata Municipal Corporation sent as a reply of the RTI seeking information by the defendants.

6. **DECISION WITH REASONS:**

- a. The plaintiff has filed the suit praying for a decree for grant of Letters of Administration of the last Will and Testament dated 18th July, 1986 of the testatrix, Kiron Bala Debi @ Kiron Bala Banerjee who died on 23rd January, 1993. As per the case of the plaintiff, the testatrix had bequeathed both movable and immovable properties to all her legal heirs as per the Will and as such the Will cannot be treated as unnatural Will. The description of the property bequeathed to all the legal heirs of the testatrix are as follows :

“(d). I give, devise and bequeath to my Grant son Partha Banerjee, son of Priyalal Banerjee, all that piece and parcel of land measuring about 9 Kattahs in area being C.S. Plot No.601. Khatian No. 602 of Mouza South Tangra, being a portion of premises No. 47, South Tangra Road, butted and bounded by on the North by Municipal Road, On the East by Prahlad Sarkar's land. On the South by tank of holding No.82, and on the West by Holding No. 84/85, and all structures standing thereon, which is now under the occupation and tenants.

“(e). I further give, devise and bequeath to my youngest son Dipti Lal Banerjee (Jhunu) all and my every household furniture, linen and wearing apparel, books etc. which are lying in premises No.2, Tangra, 2nd Lane, Calcutta.

“(f). I was required to make payment of Rs.50,000/- (Rupees fifty thousand only) to my oldest non Priyalal Banerjee and since I had no

sufficient fund my youngest son Diptilal Banerjee made of arrangement for the fund and paid the said sum of Rs. 50,000/- (Rupees fifty thousand) on my behalf and I have not been able to repay the said amount to said Sri Diptilal Banerjee. I have a mind to dispose of 17 ½ Kathas of land of my Deoghar Property, the details of which are given hereunder and out of the sale proceed of the same I shall repay the said sum of Rs. 50,000/- to my youngest son Diptilal Banerjee as well as Rs.5000/- (Rupees five thousand only) to my third son Phanilal Banerjee which I took from him for my personal use/ as a loan and which I could not repay him upto now.

If it is not possible for me for any reason whatsoever to dispose of the said property finally during my life time and to repay the said sum of Rs.50,000/- and Rs. 5000/- to my aforesaid two sons in that event the said property vis., all that piece and parcel of the land measuring 17 ½ Kathas of land being Plot No. 13 of Kasturipur town of Deoghar, within Rohini Estate P.S. Deoghar, District Dumka of Bihar butted and bounded by on the North by Land of K. J. K. Dey, On the East by Road, On the South the land Kalicharan Bar and on the West by Rami Bar. Should be sold out to the highest buyer by my executor Sri Phanilal Banerjee and out of the said sale proceeds the aforesaid sums of Rs. 50,000/- and Rs. 5,000/- should be paid to my said sons Diptilal Banerjee and Phanilal Banerjee respectively and the balance sale proceeds if any should be considered as my moveable asset and the same to be distributed along with my other monies lying with the Banks as per my instructions given hereunder.

A sum of Rs. 500/- (Rupees five hundred) should be paid to Rama Krishna Mission from my account.

(f). All my monies are lying in the following accounts and certificates :-

(1). Savings Bank Account No. 11/3305, Bank of Baroda, Park Circus Branch.

(2). Savings Bank Account No. 859756, Grindlays Bank Ltd. Entally Branch,

(3). *The following Cash Certificates of West Bengal State Co-Operative Bank Ltd.*

(a). *Certificate No. CC-09153 for Rs.5000/- to mature on 3. 10. 87.*

(b). *Certificate No. CC-09152 for Rs. 5000/- to mature on 3. 10. 87.*

(c). *Certificate No. CC-09171 for Rs. 2000/- to mature on 30. 12. 87.*

I give, devise and bequeath the aforesaid certificate No. CC-09153 or the amount receivable from the said Certificate Jointly to my two daughters Tulu Chatterjee wife of Sri Shib Chatterjee and Bulu Mukherjee wife of Prafulla Mukherjee to have and hold the same in equal share.

I give, devise and bequeath the aforesaid certificate No. CC-09152 or the amount receivable, to my other two daughters Jointly Smt. Chabi Chatterjee wife of Abani Chatterjee and Smt. Gita Mukherjee wife of Soilen Mukherjee to have and to hold the same in equal share.

I give, devise and bequeath the aforesaid certificate No. CC-09171 or the amount receivable from the same jointly to my two daughter in laws Smt. Ila Banerjee wife of Manilal Banerjee and Smt. Arati Banerjee wife of Phanilal Banerjee to have and to hold the same in equal share.

I give, devise and bequeath, out of the said Savings Bank Account a sum of Rupees Five Hundred (Rs. 500/-) to my servants Bonamali who has been discharging his duties to my satisfaction for a pretty long time.

I give, devise and bequeath, the balance sum of money lying in my aforesaid two Saving Bank Accounts and from my other available money as far as possible equally to my following grand sons and grand-daughters

- 1). *Mana Banerjee Son of Manilal
Banerjee*

2).	Raju Banerjee		Sons of Phanilal Banerjee
3).	Bhaju Banerjee		
4).	Indrajit Banerjee		Son of Diptilal Banerjee
5).	Badal Chatterjee		Sons of Shiv Chatterjee
6).	Madal Chatterjee		
7).	Smt. Mukherjee	Tanu	Daughter of Soilen Mukherjee
8).	Smt. Mukherjee	Kiku	
9).	Partha Banerjee		Son of Priyalal Banerjee
10).	Rana Mukherjee		Sons of Prafulla Mukherjee
11).	Tatu Mukherjee		
12).	Kalyan Chatterjee		Son of Abani Chatterjee

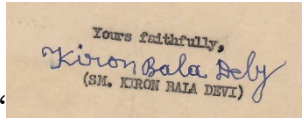
h). Subject to above specific devise and bequeath the rest and residue of my estate, moveable and immovable, including future assets if any acquired by me absolutely and favour unto the use of my daughter-in-law. Smt. Arati Banerjee wife of Sri Phanital Banerjee.

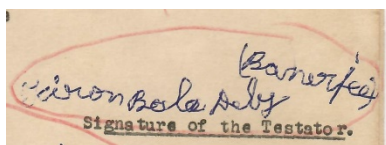
i). I appoint my third son Sri Phanilal Banerjee son of late Jogendra Kumar Banerjee to be the sole executor of my this Will.”

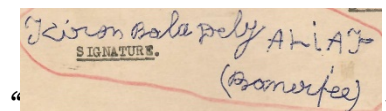
- b.** It is admitted that both the attesting witnesses of the Will, namely, Dr. Mihir Kumar Dutta and Advocate, Sites Sinha are no more and thus, there is no chance of the plaintiff to examine any attesting

witnesses. To prove the signature of the testatrix, the plaintiff has relied upon Exhibit “H” which is the letter submitted by the testatrix during her lifetime on 21st March, 1983 to the Collector, Corporation of Calcutta with regard to payment of tax. By referring the signature of the testatrix appearing in Exhibit “H” and the signatures appearing in the Will, Exhibit “C”, it was argued that on comparing of signatures appearing in Exhibit “H” and Exhibit “C”, it is proved that the signatures appearing in the Will is of the testatrix.

- c. This Court has considered the signatures appearing in Exhibit “H” and Exhibit “C” and found that in Exhibit “H”, the testatrix has

signed the said document as “” and in Exhibit “C”, the signature of the testatrix is appearing in two places at page no. 7 and one signature reads as follows : “

” and another signature appearing as

”. Considering the three signatures, this

Court finds that the signatures appearing in the Will are shaky. In one signature, the title “Banerjee” is written in the bracket and in another signature, title “Banerjee” is written in bracket with the word ‘alias’ but in Exhibit “H”, the signature is not shaky and

properly signed as “Kiran Bala Deby” and title “Banerjee” is not written.

- d. The plaintiff has also argued that the Will i.e. Exhibit “C” is a registered Will and executed in the 1986 and as per the seal appearing in the said Will proves that the testatrix has presented the Will for registration on 18th July, 1986 and thus it cannot be disputed that the testatrix has not executed the Will. The plaintiff has relied upon Section 114 of the Indian Evidence Act, 1872. Section 114 of the Indian Evidence Act, 1872, reads as follows:

“114. Court may presume existence of certain facts.— *The Court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business, in their relation to the facts of the particular case.”*

The plaintiff has prayed for decree for grant of Letters of Administration of the Will dated 18th July, 1986, admittedly the said document is registered one. The Will is to be proved as per Section 63 of the Indian Succession Act, 1925 and Section 68 and Section 69 of the Indian Evidence Act, 1872 by examining one of the attesting witnesses of the Will and in case, the attesting witness is not available, attending witness is to be examined to prove that the testatrix has executed her Will in their presence. But in the present case, neither the attesting witnesses nor the attending witnesses were examined to prove that the Will was executed by the testatrix while possessing good health and fit state

of mind. The plaintiff has relied upon the registration of the Will but the plaintiff has not examined either the Sub-Registrar or any of the employees of the Office of the Sub-Registrar to prove that the testatrix was present in the Office of the Sub-Registrar and has executed her Will in their presence. Thus mere registration of the Will without examination of any attesting witness or the attending witness to prove the Will was executed by the testatrix in their presence, or any other circumstances to prove that Will was executed by the testatrix, presumption cannot be drawn.

- e. Proof of execution of the Will as mandated under Section 63 of the Indian Succession Act, 1925 requires execution by the testatrix of the Will in presence of two attesting witnesses who have seen the testatrix signed in their presence and has signed the Will in presence of the testatrix and in presence of each other. In the present case, both the attesting witnesses are no more and as such there is no evidence on record that the testatrix has signed the Will in presence of two attesting witnesses or the two attesting witnesses have signed the Will in presence of testatrix. The plaintiff to prove the signature of one of the attesting witness, namely, Dr. Mihir Kumar Dutta has called for the service record of the said witness to compare the signature of the said witness through expert and accordingly P.W.1 was engaged as expert to compare the signature of Dr. Mihir Kumar Dutta from the signatures appearing in the service record of the said witness, the

plaintiff has proved that the signature of Dr. Mihir Kumar Dutta appearing in the Will is of the signature appearing in the service record of the said witness. The plaintiff has to prove that the testatrix has signed the Will in presence of two attesting witnesses, the plaintiff need not to prove the signature of the attesting witnesses. The attesting witness has to be examined before the Court to say that the testatrix has signed the Will in their presence. It is not required that the signature of the attesting witnesses is to be proved. Thus, mere obtaining expert report with regard to the signature of the attesting witnesses will not serve purpose for proving the Will.

- f.** The plaintiff at the time of filing of an application for grant of Letters of Administration being PLA No. 189 of 2014 has also filed an affidavit of one Shri Madhu Sudan Parida, son of Late Sudarshan Parida as an attending witness of the Will. In paragraph 8 of the plaint also it is mentioned that the Will is proved by the affidavit of Shri Madhu Sudan Parida but the said Madhu Sudan Parida was not examined before the Court as an attending witness. There is no evidence on record to prove that the testatrix has executed her last Will and Testament on 18th July, 1986, either in presence of attesting witness or in presence of attending witness.

- g.** Section 63 of the Indian Succession Act, 1925, reads 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.”

- h.** In the case of **Moturu Nalini Kanth vs. Gainedi Kaliprasad (Dead, Through Lrs.)** reported in **2023 SCC OnLine SC 1488**, the Hon’ble Supreme Court held that :

“20. *Trite to state, mere registration of a Will does not attach to it a stamp of validity and it must still be proved in terms of the above legal mandate. In Janki Narayan Bhoir v. Narayan Namdeo Kadam, this Court held that the requirements in clauses (a), (b) and (c) of Section 63 of the Succession Act have to be complied with to prove a Will and the most important point is that the Will has to be attested by two or more witnesses and*

each of these witnesses must have seen the testator sign or affix his mark to the Will or must have seen some other person sign the Will in the presence of and by the direction of the testator or must have received from the testator a personal acknowledgment of his signature or mark or of the signature or mark of such other person and each of the witnesses has to sign the Will in the presence of the testator. It was further held that, a person propounding a Will has got to prove that it was duly and validly executed and that cannot be done by simply proving that the signature on the Will was that of the testator, as the propounder must also prove that the attestations were made properly, as required by Section 63(c) of the Succession Act. These principles were affirmed in Lalitaben Jayantilal Popat v. Pragnaben Jamnadas Kataria.”

- i. Sections 68 & 69 of the Indian Evidence Act, 1872, reads as follows:

“68. Proof of execution of document required by law to be attested.— *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.]

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

executing the document is in the hand writing of that person.”

- j.** In the case of ***Murthy & Ors. vs. C. Saradambal & Ors.*** reported in **(2022) 3 SCC 209** , the Hon’ble Supreme Court held that:

“32. In fact, the legal principles with regard to the proof of a will are no longer res integra. Section 63 of the Succession Act, 1925 and Section 68 of the Evidence Act, 1872, are relevant in this regard. The propounder of the will must examine one or more attesting witnesses and the onus is placed on the propounder to remove all suspicious circumstances with regard to the execution of the will.”

- k.** In the present case, though it is the case of the plaintiff that the testatrix has executed her last Will and Testament dated 18th July, 1986 in presence of two attesting witnesses and in paragraph 8 of the plaint, the plaintiff has named one attending witness, namely, Madhu Sudan Parida and the said attending witness has also filed an affidavit at the time of filing of an application for grant of Letters of Administration being PLA No. 189 of 2014. Due to the death of the attesting witnesses, it was not possible for the plaintiff to examine the attesting witnesses to prove the Will in terms of Section 63 of the Indian Succession Act, 1925 but the plaintiff ought to have examined the attending witness, namely, Madhu Sudan Parida but the plaintiff has neither examined the said attending witness nor has explained why the plaintiff has not examined the said attending witness. It is also the case of the plaintiff that the Will was drafted by one Samarjit Gupta, Advocate

and he has signed the Will as a draftsman but the plaintiff has not examined the said Advocate to prove that the testatrix has given instruction to the Advocate to draft the Will and as per instruction, the Learned Advocate drafted the Will.

In the instant case, there is no evidence as to whom the testatrix has given instructions to write the Will. The subscriber has also not examined. It is also not known as to whether the assistance of an Advocate or any other trustworthy person was taken by the testatrix in order to make the testament and bequeath the property. Taking into consideration, the overall evidence of the plaintiff, this Court finds that the plaintiff failed to prove the execution of the Will by the testatrix.

1. The defendants have contended that the plaintiff has filed the suit for grant of Letters of Administration after the period of 21 years from the death of the testatrix. As per the evidence of the plaintiff, after the death of his mother sometimes in the month of May, 2014, when he opened the almirah of his mother, he found the original Will along with some original documents in her locker. During the cross-examination of the plaintiff being P.W.2, the question nos. 192 to 194 reads as follows:

“Q. 192. *When did your parents receive the Will from your “sejo jethu”?/ I would not be exactly aware of the dates.*

Q. 193. *Since your father died on 1.9.2005 – would you agree it must be before that date?/ Yes.*

Q. 194. *Was the original Will given to your parents or the photocopy?/As my mother mentioned it was original Will."*

7. In the case of **H. Venkatachala Iyengar Vs. B.N. Thimmajamma & Ors.** reported in **AIR 1959 SC 443**, the Hon'ble Supreme Court held that the propounder of the Will must prove:

- (i) That the Will was signed by the testator in a sound and disposing state of mind duly understanding the nature and effect of dispositions and he put his signature on the document of his own free will, and
- (ii) When the evidence adduced in support of the Will is disinterested, satisfactory and sufficient to prove the sound and disposing state of testator's mind and his signature as required by law, courts would be justified in making a finding in favour of propounder, and
- (iii) If the Will is challenged as surrounded by suspicious circumstances, all such legitimate doubts have to be removed by cogent, satisfactory and sufficient evidence to dispel suspicion. In other words, the onus on the propounder can be taken to be discharged on the proof, the essential facts indicated therein.

In paragraph 20 of the said judgment, the Hon'ble Supreme Court held that:

“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.”

- a. The plaintiff being P.W.2, in his examination-in-chief stated that he got the Will from the almirah of his mother sometimes in the month of May, 2014 but during the cross-examination, he has admitted that his parents received original Will from his “sejo jethu” i.e. the third elder parental uncle and he has also agreed that it must be before the death of his father i.e. on 1st September,

2005 and he has also admitted that his mother had the knowledge about the Will. There is no explanation, as to why the executor during his lifetime has not filed any application for grant of probate. As per the answer given by the plaintiff during his cross-examination, the father of the plaintiff died on 1st September, 2005 and mother of the plaintiff died on 14th April, 2013. The plaintiff in his answer at Question No. 193, admitted that his parents received the Will from “sejo jethu” prior to 1st September, 2005 but the plaintiff has failed to explain why the father has not initiated any proceeding for grant of probate of the Will, though the father of the plaintiff, namely, Dipti Lal Banerjee was also one of the beneficiary of the Will.

- b.** It is the case of the plaintiff that one of the attesting witness namely, Dr. Mihir Kumar Dutta died on 25th May, 2014 and was the family doctor but it is impossible to believe that the said attesting witness even after the death of the testatrix on 23rd January, 1993, has not disclosed about the execution of the Will by the testatrix on 18th July, 1986 to any of the family members.
- c.** In the case of ***Bharpur Singh & Ors. vs. Shamsheer Singh*** reported in ***(2009) 3 SCC 687***, the Hon’ble Supreme Court held that :

“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.”

- 8.** In the present case, the testatrix died on 23rd January, 1993 and the Executor of the Will, namely, Phani Lal Banerjee died on 22nd June, 2003 i.e. after the period of more than 10 years but during the life time, the Executor has not filed any application for grant of probate. The father of the plaintiff also one of the beneficiary of the Will and died on 1st September, 2005 and as per evidence of the plaintiff, the parents of the plaintiff had the knowledge of the Will but the father of the plaintiff has also not filed any application for grant of Letters of Administration. This Court already held that the signature of the testatrix is shaky and the signature appearing on the Will contains the title “Banerjee” but

there is no evidence brought on record that the testatrix used to sign by mentioning the title “Banerjee”.

9. CONCLUSION:

The burden of proof that the Will has been validly executed and a genuine document is on the propounder. The propounder is also required to prove that the testatrix has signed the Will and she put her signature out of her own free will having a sound disposition of mind and understood the nature and effect thereof.

In the present case, this Court finds that the plaintiff has failed to prove that the testatrix has executed her last Will and Testament in presence of two attesting witnesses while possession good health and fit state of mind.

In view of the above, **T.S. No. 30 of 2015 (PLA No. 189 of 2014)** is **dismissed**. All connected applications, if any, are also disposed of.

Decree be drawn accordingly.

(Krishna Rao, J.)