

**IN THE HIGH COURT AT CALCUTTA
TESTAMENTARY AND INTESTATE JURISDICTION
ORIGINAL SIDE**

Present:

The Hon'ble Justice Sugato Majumdar

**TS/23/2018
IN THE GOODS OF:
RITA MUKHERJEE @
CHHANDA MUKHERJEE (DECED)
-AND-
SUDIPTA MUKHERJEE
-VS-
PARAMITA MUKHERJEE**

For the Plaintiff	:	Mr. Aniruddha Mitra, Sr. Adv. Mr. Lalratan Mandal, Adv.
For the Defendant	:	Mr. Shuvasish Sengupta, Adv. Mr. Soumyajit Mishra, Adv.
Hearing concluded on	:	01/09/2025
Judgment on	:	24/09/2025

Sugato Majumdar, J.:

This is an application for grant of probate of the last will and testament of the deceased Rita Mukherjee also known as Chhanda Mukherjee.

The deceased Rita Mukherjee was a Hindu governed by Dayabhaga School of Hindu Law. Her last place of abode was at Nandan Kanan, P.O: Ganga Nagar, P.S: Madhyam Gram, District North 24 Parganas. She breathed her last on 05/11/2016 at Narayana Multi Speciality Hospital, Barasat, District: North 24 Parganas. Prior to

her death she executed her last will and testament on 19/12/2009 in English language. The deceased left behind her one son, the present Petitioner and one daughter being the present Caveatrix. Her husband predeceased her.

The present Petitioner, being the Executor appointed under the will, filed the instant application for grant of probate of the aforesaid last will and testament of the Testatrix.

The Caveatrix lodged caveat supported by affidavit. The caveat was allowed for which the proceeding became a contentious one. The application was renumbered and converted into testamentary suit. The affidavit in support of the caveat was treated as the written statement. The Petitioner/Executor became Plaintiff and the Caveatrix became the Defendant.

Contentions of the Defendant, in nutshell may be summarized as follow:

- a. The father of the parties herein purchased a piece and parcel of land at Madhyamgram and constructed a two storied building. The brother of the Defendant, being the Plaintiff herein, is in the service of Kolkata Police. After death of the father, the Plaintiff did not allow the Defendant to meet with her mother, the Testatrix who had been living with the Plaintiff in the aforesaid house.
- b. The Defendant had turmoil in her matrimonial life which ultimately ended in mutual divorce. Thereafter, the Defendant has been residing in the present address, alone.
- c. The Testatrix had been suffering from various ailments. However, the Defendant used to talk to her over phone. The Plaintiff, although

lives in the same house with family, neglected to take care of the Testatrix. The Defendant was never allowed to visit her mother. Getting news of the death of the Testatrix, the Defendant attended the cremation and also went to the hospital. At that time, the Plaintiff handed over her a file containing the pension book for family pension. As the Defendant is a divorcee, she was entitled to family pension. At that time, she came to know of the will.

- d. It is contended in the written statement that the will is forged, fabricated and manufactured. The Plaintiff had detained the Testatrix wrongfully and illegally in the residence and did not allow any relative to meet her. The instant will could not have been made by the Testatrix out of her free consent.
- e. It was further contended in the written statement that the Testatrix had no testamentary capacity to execute any will, within one year of the death of her husband excluding her only daughter who had been deserted by her husband and staying alone in a rented accommodation, without having any means to survive.
- f. The instant Will had not been executed by the Testatrix; it is rather the Plaintiff who managed to get the signatures of the alleged attesting witnesses on the purported will. Being an employee of Kolkata Police, the Plaintiff exerted influence on all the family members and the relatives. The Plaintiff has also taken all the jewellerys of the Testatrix.
- g. According to the Defendant, probate should not be granted.

On the basis of the rival pleadings, the following issues were recast and framed:

1. *Whether this Court has jurisdiction to entertain the suit?*
2. *Whether the instant Will is the last Will and Testament of the Testatrix?*
3. *Whether the Testatrix had testamentary capacity at the time of execution of the last Will?*
4. *Whether the will was executed by the Testatrix out of her free will?*
5. *Whether there was any suspicious circumstance surrounding the execution of the Will and the Plaintiff is able to repel the doubts?*
6. *Whether the Will was a forged, fabricated and manufactured one?*
7. *Whether the instant Will was the last Will and Testament executed by the Testatrix or not?*
8. *Whether the Petitioner/Executor is entitled to grant of probate, as prayed for?*

Both the parties adduced evidence. The Will was exhibited and marked.

Issue No.1:

The Learned Counsels did not argue on this issue. This Court has otherwise territorial jurisdiction to hear the suit.

Therefore, this issue is decided in favor of the Plaintiff.

Issue No.2:

The Defendant, in her averment in the written statement, did not specifically stated whether any other will was in existence or not. It is also not in evidence that another or other will was there or still is there, executed by the Testatrix, subsequent to execution of the instant Will. Evidence of the Plaintiff is cogent on the point that the instant will is the last will and testament executed by the Testatrix which was not rebutted by the Defendant by any convincing evidence. Pleadings and arguments of the Defendant are on genuineness of the will, which will be addressed later on. Therefore, it is established that no other will was executed by the Testatrix, subsequent to execution of the instant Will and this is the last Will and Testament of the Testatrix.

This issue is also decided in favor of the Plaintiff.

Issue No. 3,4,5,6 & 7:

For the sake of convenience all these issues are taken up together.

Argument on behalf of the Defendant:

Mr. Sengupta, the Learned Counsel for the Defendant principally argued that execution of the will was surrounded by suspicious circumstances. The witnesses failed to explain the circumstances which are alleged to be suspicious. As a result,

the Plaintiff failed to repel the clouds of doubts surrounding the execution of the will. In elaboration of his argument, Mr. Sengupta referred to particular statements of Mr. Sukumar Banerjee who deposed as attesting witness (P.W.1). The following excerpts was referred to:

Examination -in-Chief of Mr. Sukumar Banerjee (P.W.1)

Q.24. Did you recollect the time around which the execution of the Will took place?	Ans: At about 9 a.m., the execution of the Will took place.
Q.35. Kindly see page 10 of the probate application where it is written that the will was executed at 10.30 a.m. on 19 th December, 2009 – Am I right?	Ans: Yes that is so.
Q.36. In answer to question no.24, you have said that the execution of the Will took place at about 9.a.m. Are you in a position to clarify?	Ans: On that date, I was present there from about 9 a.m. The signature and execution of the Will were made at 10.30 a.m.

Cross Examination of Mr. Sukumar Banerjee (P.W.1)

44. As you deposed that you reached at premises 'Nandan Kanan', P.O. Ganganagar, P.S Madhyamgram,	Ans: Yes, that is so
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District North 24 Parganas at the residence of Rita Mukherjee at 9 a.m and execution were complete at 10.30 a.m. Am I correct?	
53. At what time did you leave the residence of Rita Mukherjee on that date?	Ans: At around 11.30 to 11.35 a.m. I left the residence of Rita Mukherjee.
55. I suggest it to you that the alleged Will of Rita Mukherjee was presented before the registration office at around 11.30 a.m on that date.	Ans: I do not know.

Examination-in-Chief of Lal Ratan Mondal, Advocate, (P.W.2)

6. Are you aware as to when execution of the Will took place?	Ans: I went to her residence on 19 th December, 2009 at around 9.00 a.m. and execution took place at about 10.20 – 10.25.
10. Do you remember the time of execution of the Will?	Ans: It started from 9.05 a.m. and process of execution finished at 10.25 a.m.
12. How did you have the knowledge?	Ans. After signing of the Will at the house of Rita Mukherjee@ Chhanda Mukherjee, I accompanied her in a car and went

	to the registration office and we reached there at 11 a.m. – Beforehand, my clerk had arranged all the necessary steps for the registration of the Will.
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Cross-Examination of Lal Ratan Mondal, Advocate, (P.W.2)

37. When did you meet Mrs. Rita Mukherjee for the first time?	Ans.: I do not remember the exact date. Almost 10 days before registration of the Will, I met Rita Mukherjee for the first time.
38. Is it correct that in the month of September, 2009 you met Rita Mukherjee?	Ans.: Yes.
42. What happened from 11 a.m. to 11.30 a.m. before presentation of the alleged Will before the Registrar?	Ans.: Within 11 a.m. to 11.30 a.m. signatures, photographs and thumb impressions were taken on the Will before presentation of the Will and also photographs at the registration office were taken.
51. As you have deposed that the alleged Will had been executed around 10.30 a.m. at the residence of Mrs. Rita Mukherjee - Am I correct?	Ans.: I said within 10.20 a.m. to 10.25 a.m.

59. You are a busy lawyer. You did not attend High Court on 19th December, 2009?	Ans.: After the registration of the Will, I came to the High Court.
60. Is it your evidence that you attended the high court proceedings on 19th December, 2009?	Ans.: I cannot say as it is an old incident.
61. 19th December, 2009 was a Saturday and the High Court was closed?	Ans.: I cannot say.
65. Who accompanied Sukumar Banerjee when he came to your chamber for sign on the declaration?	Ans.: Sudipta Mukherjee accompanied him.
77. You prepared the alleged Will of Mrs. Rita Mukherjee in the month of September, 2009 - Am I correct?	Ans.: I cannot recollect.

3. Evidence of Sudipta Mukherjee:-

Examination-in-Chief

9. When did you come to know that your mother left behind the Will?	Ans.: My mother was suffering frequently and 2/3 months before her death, she said me about the said Will.
10. What did she say?	Ans.: While taking her to the hospital, she said that she might not come back. She said that there is a Will

	in her almirah and other things like money, jewellery etc. The address of the Advocate was also there, which I can find there. I told my mother that she would come back in good health.
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Cross-Examination

33. Am I correct in saying that you had no knowledge regarding the signing of the Will by anyone?	Ans: I have no knowledge.
34. You have no knowledge regarding the registration of any document by Smt. Rita Mukherjee?	Ans.: Yes, I have no knowledge.
40. After you found the Will from your mother's almirah, you have ever contacted Mr. Sukumar Banerjee and Ranjit Banik?	Ans.: No.
41. Who had handed over the copy of the Will to Mr. Lal Ratan Mondal?	Ans.: I myself had handed over the copy of the Will to Mr. Lal Ratan Mondal at his chamber.
42. Had you ever requested Lal Ratan Mondal to call Sukumar Banerjee and Ranjit Banik?	Ans.: I had told Mr. Lal Ratan Mondal to do all the necessary things in which are legally required in this matter.

E. EVIDENCE OF SUDIPTA CONTRADICTION IN THE MUKHERJEE AND LAL RATAN MONDAL:

Evidence of Sudipta Mukherjee	Evidence of Lal Ratan Mondal
40. After you found the Will from your mother's almirah, you have ever contacted Mr. Sukumar Banerjee and Ranjit Banik? Ans.: No.	65. Who accompanied Sukumar Banerjee when he came to your chamber for sign on the declaration? Ans.: Sudipta Mukherjee accompanied him.
41. Who had handed over the copy of the Will to Mr. Lal Ratan Mondal? Ans.: I myself had handed over the copy of the Will to Mr. Lal Ratan Mondal at his chamber.	
42. Had you ever requested Lal Ratan Mondal to call Sukumar Banerjee and Ranjit Banik? Ans.: I had told Mr. Lal Ratan Mondal to do all the necessary things in which are legally required in this matter.	

F. EVIDENCE OF THE DEFENDANT:**Examination-in-Chief**

92. What do you want to say about the alleged Will of your mother which has been filed before this Hon'ble Court?	Ans.: The said Will is not genuine. My mother was forced to execute this Will.
94. Can you tell what is the distance between Madhyamgram to Calcutta High Court?	Ans.: 28 kilometers approximately and it take 2 hours to reach this Hon'ble High Court.
97. Is it possible for your mother to travel with one unknown person alone from Barasat to Registry Office, Kolkata and Registry Office, Kolkata to Barasat.	Ans.: Impossible

Cross-Examination

117. [Shown the Will at page 15] - Do you find the signature of your mother as appearing at page 3 of the document?	Ans.: My mother never used to sign as Rita Mukherjee. I know, she used to sign as Chhandha Mukherjee.
118. So, I take it that the signature of Chhandha Mukherjee which is appearing at page 3 of the instrument is that of your mother?	Ans.: It appears to be so.

124. I suggest it to you that you allegation that your mother did not have testamentary capacity to execute the Will, is incorrect?	Ans.: I do not agree.
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G. ANALYSIS OF EVIDENCE OF THE PLAINTIFF:

1. Sukumar Banerjee deposed that the execution of the Will had allegedly been done at 10.30 on 19th December, 2009 and he left the house of the testatrix at 11.30-11.35. He further deposed that he was not aware that the Will was presented for the registration on the same day at 11.30 at the office of Registrar of Assurance, Kolkata.
2. Mr. Lal Ratan Mondal, Advocate adduced evidence before this Hon'ble Court and confirmed that the Will had been allegedly executed on 10.30 a.m. and he reached the office of the Registrar of Assurance at Kolkata at 11.00 a.m. The distance between Madhyamgram to the office of the Registrar of Assurance, Kolkata is around 28 kilometers. Therefore, by any stretch of imagination, no one can reach from Madhyamgram to the said office within 30 minutes on a Saturday at 10.30 a.m. after crossing the Jessore Road. In question nos. 37 and 38, Mr. Mondal has taken the contrary stand regarding the time of meeting with the executrix.
3. The propounder was not aware of the execution of the Will and he deposed that he never contacted Sukumar Banerjee and Ranjit Banik. However, from the deposition of Lal Ratan Mondal, it is

clear that Sukumar Banerjee was accompanied by Sudipta Mukherjee.

The second limb of argument of Mr. Sengupta was that an appearing Advocate should not adduce evidence for his client. Lal Ratan Mondal, the Learned Advocate deposed as a witness in an attempt to cover up the inherent discrepancies of the evidence of the attesting witness. On the one hand, rules of Bar Council of India is prohibitory and the whole evidence should be expunged. In support of contention, Mr. Sengupta relied upon **In the matter of: A Pleader, Madhura [(1947) SCC OnLine Mad 296]; R.K. Agarwal Vs. Rana Harishchandra Ranjit Singh [(1994) Mh. LJ 186]**.

Argument on behalf of the Plaintiff:

Per contra, Mr. Mitra, the Learned Counsel for the Plaintiff submitted: Firstly, a will is to be executed in terms of Section 63 of the Indian Succession Act, 1925 and the proof of the execution of a testamentary document is required to be done in terms of Section 68 of the Indian Evidence Act, 1872. PW 1 duly proved the execution of the will. He had deposed that he was present with the deceased Testatrix along with another attesting witness at the residence of the Testatrix at the time of execution of the will. It was categorically stated by the attesting witness PW 1 that the will was executed by the Testatrix in presence of the attesting witnesses and in presence of another gentleman who helped him to sign the will. All the persons signed the will in presence of each other. PW 1 had also deposed that he had a discussion with the deceased about the nature of bequeath under the will. PW 1 also stated that execution of the will took place at around 10:30 in the morning. PW 1 further stated in the evidence that the Testatrix asked PW 1 to put signature in

the will. The will was marked as Ext. A. No question was put to PW 1 in course of cross-examination on testamentary capacity of the Testatrix or about forging or manufacturing the will. According to Mr. Mitra, this is sufficient to establish due execution of the will.

Secondly, it was argued that PW 2 is a practicing advocate of this Court who was present at the time of execution of the will and arranged for the same. Mr. Mondal, the Learned Advocate deposed as PW 2 who stated that the execution took place at around 10:30 a.m. on 19th December, 2009 in his presence. PW 2 further deposed that contents of the will were read over to the Testatrix in presence of all the attesting witnesses prior to execution. PW 2 accompanied the Testatrix from her residence at Madhyagram to the office of Registrar of Assurance, Kolkata and it is he who arranged for registration of the will and was present thereat. In course of cross-examination, he further elaborated the process of registration of the will which took place at 11:00 a.m. No question was put to PW 1 asking for testamentary capacity of the deceased for forging or manufacturing the will. In nutshell, Mr. Mitra argued that due execution of the will was proved by the Plaintiff's witnesses.

Thirdly, it was argued that the Defendant's counsel did not put any question in course of cross-examination on testamentary capacity of the Testatrix thereby accepting the testamentary capacity of the Testatrix. Although a defense was taken that the will was forged and manufactured, burden of proof of the same was on the Defendant which she failed to discharge. Therefore, according to Mr. Mitra allegations of forgery, undue influence, coercion, and fabrication of will are not proved by the Defendant. On the other hand, testimony of Plaintiff's witnesses, which are cleared and cogent were able to establish due execution of the will removing any doubt on existence of suspicious circumstances. According to Mr.

Mitra probate should be granted, therefore. In support of the contention, Mr. Mitra relied upon **H. Venkatachala Iyengar Vs. B.N. Thimmajamma (AIR 1959 SC 443)**; **Rani Purnima Debi Vs. Kumar Khagendra N. Deb (AIR 1962 SC 567)**; **Sashi Kumar Banerjee Vs. Subodh Kumar Banerjee (AIR 1964 SC 529)**; **Indubala Bose Vs. Manindra Chandra Bose [1982 (1) SCC 20]**; **Mahesh Kumar Vs. Vinod Kumar [2012 (4) SCC 387]**; **Leela Rajagopal Vs. Kamala Menon Cocharan [2014 (15) SCC 570]**; **Meena Pradhan Vs. Kamla Pradhan [2023 (9) SCC 734]**.

Fourthly, it was argued by Mr. Mitra that there is no bar on advocates to testify. Mr. Mitra referred to Section 118 and 126 of the Indian Evidence Act, 1872 to reinforce the argument that advocates are not debarred from testifying on behalf of their client; they are guided, however, by professional conduct and etiquette as contemplated in the Advocates Act, 1961. It is further stated that Section 6 of the Advocates Act, 1961 lays down functions of the State Bar Council which includes power to entertain and determine cases of misconduct. It is argued by Mr. Mitra that there is neither any legal basis nor any justification to expunge the evidence of PW 2; neither Indian Evidence Act, 1872 nor Advocates Act, 1961 permits such expunging. In this case, Mr. Mondal, PW 2 was cross-examined in full; not a single question of suggestion was given with reference to Rule 13. This issue was agitated for the first time at the time of final argument. Referring to **A.E.G. Carapiet Vs. A.Y. Derdrian (AIR 1961 Cal 359)**, Mr. Mitra argued that abstaining from cross-examining PW 2 on applicability or reference to Rule 13 is tantamount to accepting his evidence. Mr. Mitra further submitted that it is a settled principal of law that evidence of witness who has been cross-examined and cannot be expunged. Mr. Mitra referred to **Chinna Bayyannagari Munirami Reddy Vs. Chinna**

Bayyannagari Shankar Reddy and Ors. (2016 SCC OnLine Hyd. 672) on this point Mr. Mitra further referred to **S. Nirmala & Ors. Vs. Shanthi Harisrishnan & Ors. (OSA. Nos. 187 of 2024)**. Mr. Mitra also referred to **Seth Biradh Mal & Ors. Vs. Sethani Prabhabhati Kunwar & Ors. (AIR 1939 PC 152)** to submit that a Three Judges Bench allowed a Barrister who was present at the time of registration of the adoption deeds and also appearing for one of the parties to depose as witness. In nutshell, Mr. Mitra concluded that the whole conspectus of facts no way demand expunging the evidence of PW 2.

Decisions with reason:

Starting from **H. Venkatachala Iyengar Vs. B.N. Thimmajamma (AIR 1959 SC 443)**, spates of judgments were passed by the Supreme Court of India, laying down the principles of law governing grant of probate, some of which were relied upon by Mr. Mitra, the Learned Counsel for the Plaintiff. In **Shivakumar v. Sharanabasappa [(2021) 11 SCC 277]**, three Judges' Bench of the Supreme Court of India, after considering the observations made in **H. Venkatachala Iyengar Vs. B.N. Thimmajamma and Ors. (supra)**, **Rani Pnrnima Debi and Anr. Vs. Kumar Khagendra Narayan Deb and Anr. (supra)** as well as other cases deduced the following principles:

“**12.** For what has been noticed hereinabove, the relevant principles governing the adjudicatory process concerning proof of a will could be broadly summarised as follows:

12.1. Ordinarily, a will has to be proved like any other document; the test to be applied being the usual test of the satisfaction of the prudent mind. Alike the principles governing the proof of other documents, in

the case of will too, the proof with mathematical accuracy is not to be insisted upon.

12.2. Since as per Section 63 of the Succession Act, a will is required to be attested, it cannot be used as evidence until at least one attesting witness has been called for the purpose of proving its execution, if there be an attesting witness alive and capable of giving evidence.

12.3. The unique feature of a will 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. This introduces an element of solemnity in the decision of the question as to whether the document propounded is the last will of the testator. 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.

12.4. The case in which the execution of the will is surrounded by suspicious circumstances stands on a different footing. The presence of suspicious circumstances makes the onus heavier on the propounder and, therefore, in cases where the circumstances attendant upon the execution of the document give rise to suspicion, the propounder must remove all legitimate suspicions before the document can be accepted as the last will of the testator.

12.5. If a person challenging the will alleges fabrication or alleges fraud, undue influence, coercion et cetera in regard to the execution of the will, such pleas have to be proved by him, but even in the absence of such pleas, the very circumstances surrounding the execution of the will may give rise to the doubt or as to whether the will had indeed been executed

by the testator and/or as to whether the testator was acting of his own free will. In such eventuality, it is again a part of the initial onus of the propounder to remove all reasonable doubts in the matter.

12.6. 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”. As put by this Court, the suspicious features must be “real, germane and valid” and not merely the “fantasy of the doubting mind”.

12.7. As to whether any particular feature or a set of features qualify as “suspicious” would depend on the facts and circumstances of each case. A shaky or doubtful signature; a feeble or uncertain mind of the testator; an unfair disposition of property; an unjust exclusion of the legal heirs and particularly the dependants; an active or leading part in making of the will by the beneficiary thereunder et cetera are some of the circumstances which may give rise to suspicion. The circumstances abovenoted are only illustrative and by no means exhaustive because there could be any circumstance or set of circumstances which may give rise to legitimate suspicion about the execution of the will. On the other hand, any of the circumstances qualifying as being suspicious could be legitimately explained by the propounder. However, such suspicion or suspicions cannot be removed by mere proof of sound and disposing state of mind of the testator and his signature coupled with the proof of attestation.

12.8. The test of satisfaction of the judicial conscience comes into operation when a document propounded as the will of the testator is surrounded by suspicious circumstance(s). While applying such test, the court would address itself to the solemn questions as to whether the

testator had signed the will while being aware of its contents and after understanding the nature and effect of the dispositions in the will?

12.9. In the ultimate analysis, where the execution of a will is shrouded in suspicion, it is a matter essentially of the judicial conscience of the court and the party which sets up the will has to offer cogent and convincing explanation of the suspicious circumstances surrounding the will.”

Coming to the case in hand, it is found that one of the grounds of opposition to the grant of probate was that the Testatrix had no testamentary capacity to execute the instant will. This is Issue No. 3.

PW-1, the attesting witness stated in this examination-in-chief that the Testatrix was completely healthy, both physically and mentally (Q.29). In cross-examination, he reiterated that the Testatrix was quite healthy and fit (Q.48). PW-3, the Executor being the son of the Testatrix stated, in course of examination-in-chief, that she was completely alright and mentally sound (Q.20) though he stated earlier that the Testatrix expired due to oldage issues like blood sugar, blood pressure etc. (Q.6).

Evidence of the aforesaid witnesses did not disclose anything or reveal anything to show that at the time of execution of the will the Testatrix had been suffering from any such illness which would have affected her testamentary capacity. The will was executed on 19/12/2009 and the Testatrix expired on 05/11/2016. At the time of death she was ill because of oldage issues, as deposed by the Executor, being PW-3. Thus, the burden of proof had been discharged by the Executor to establish that the Testatrix had testamentary capacity and she was physically fit and mentally alert to execute the instant will. Once the burden of proof is discharged, it

was on the Defendant to disprove and rebut the evidence. DW-1, being the Defendant, stated in evidence that she used to converse with her mother over telephone as the Executor threatened her to throw out of the house if she met her mother. She further stated in her deposition (Q.14) that her brother once allowed her to meet the Testatrix in the year 2010. She stated also in course of examination-in-Chief that health condition of the Testatrix was bad prior to death of her father and got deteriorated even more after death of her father. She further stated that the Testatrix was diabetic and later pace-maker was installed in her heart. (Q.42, 43). In course of cross-examination DW-1 stated that pace-maker was installed in sometime after 2010. (Q.114).

Evidence of DW-1 partly corroborated the evidence of PW-3 that the Testatrix was diabetic. Additionally, DW-1 stated that pace-maker was installed after the year 2010; the will was executed in the year 2009. Nothing came out of the evidence of the DW-1 to disprove the evidence adduced by the Plaintiff that the Testatrix was physically fit and mentally alert at the time of execution of the instant will. Nothing came out from the evidence of DW-1 that when she met with her mother in the year 2010, she had been suffering from any serious ailment. In other word, the Defendant failed to disprove the evidences adduced by the Plaintiff. Therefore, it is established and proved that the Testatrix had testamentary capacity and she was physically fit and mentally alert to execute the instant will.

Issue No. 3 is decided in favour fo the Plaintiff.

Before considering other issues, Issue No. 6 & 7 should be addressed a priori.

As discussed above, the allegations or plea of forging, manufacturing or fabricating the will must be proved by the Defendant/Caveatrix. Burden of proof lies

on the person who asserts that same. Once, the burden of proof is discharged, it is for the propounder of the will to disprove the same. This view had been consistently taken by the Supreme Court of India since the decision of H. Venkatachala Iyengar (supra), discussed above.

DW-1 was shown the signature of the Testatrix appearing on the will (Q.118). She was asked whether the signature was that of her mother. This was in course of cross-examination. She answered “It appears to be so”. She was again asked in course of cross-examination (Q.120) on her allegation that the will was forged, or manufactured or fabricated and untrue and what she was to say. Her answer was it was not fact. Her allegation was that the mother was misguided and her mind was misdirected in execution of the will.

The question whether the Testatrix was misdirected and misguided to execute the instant will, will be addressed later on. But evidence of the DW-1 went against the allegation of fabrication, forging or manufacturing the instant will. She did not deny the signatures of her mother, the Testatrix. Therefore, the Defendant, failed to discharge the burden of proof that the will is forged, manufactured or fabricated, thereby failed to prove the allegations.

The Issue No. 6 is, therefore, decided against the Defendant.

So far as the Issue No. 7 is concerned, no evidence is there that another or subsequent will was executed by the Testatrix and the instant will is not the last will and Testament of the Testatrix. It is, therefore, decided that the instant will is the last will and Testament of the Testatrix.

Issue No. 7 is also decided in favour of the Plaintiff.

Issue No. 4 is whether the instant will was executed by the Testatrix out of her free will.

The Defendant in course of her cross-examination stated that her allegation was that her mother had been misguided and her mind had been misdirected in execution of the instant will. She further deposed that it is unusual that immediately five months after death of the husband, a lady would execute a will depriving her daughter who used to take utmost care of her. She used to take her mother for medical treatment to doctor as long as she had been living with her mother. She further stated that the Testatrix devised and bequeathed property to a person who was well-placed in service at Calcutta Police depriving her daughter who is a destitute. The Defendant further stated that she was living in a hostel at that time.

DW-1 stated in course of examination-in-Chief that she left her husband's house only once in the year 2010, after death of her father. The father expired on 13/01/2009. This shows that at the time of execution of the will she was in her matrimonial home. So her statement is contradictory that at that time she was living in a hostel. The instant will was not written in any cryptic manner. The will is elaborate one with reasoning why the Defendant was not given any thing under the will. The Testatrix explained in the will why she had not bestowed her daughter with anything under the will; the daughter, namely, the Defendant had already been paid a sum of Rs.3,00,000/- out of the asset of the husband of the Testatrix. The Testatrix was mindful of the fact that the daughter, namely, the Defendant was not totally deprived of the parental assets.

The Defendant did not adduce any concrete evidence. Rather a presumption was raised that the mind of the Testatrix was misdirected and misguided because she

was not given anything under a will. Evidence of DW-1 did not reveal anything to the extent that she visited her mother anytime in the year 2009. A presumption is not substitute of proof. A will contains the desire of a testator or a testatrix. If the Testatrix desired not to bequeath anything to the Defendant that cannot be said to be something unusual. It is not a case of unnatural disposition. The Testatrix lived with her son, the Plaintiff herein. She might have given her properties to the son. Reason for depriving the daughter is there in the will.

In the circumstances, and for reasons, as stated above, it cannot be said that the will was not executed out of the free will of the Testatrix.

The Issue No. 4 is decided in favour of the Plaintiff against the Defendant.

Argument regarding suspicious circumstances, which is Issue No. 5, mostly centered on discrepancy of time. Detailed argument, made by Mr. Sengupta, has already been noted above.

Firstly, let us examine the evidential issue of PW-2, Mr. Lal Ratan Mondal, who is a practicing advocate. Section 126 of the Indian Evidence Act, 1872 provides for this.

“126. Professional communications. — No barrister, attorney, pleader or vakil, shall at any time be permitted, unless with his client’s express consent, to disclose any communication made to him in the course and for the purpose of his employment as such barrister, pleader, attorney or vakil, by or on behalf of his client, or to state the contents or condition of any document with which he has become acquainted in the course and for the purpose of his professional employment, or to disclose any advice

given by him to his client in the course and for the purpose of such employment:

Provided that nothing in this section shall protect from disclosure –

- (1) any such communication made in furtherance of any ²[illegal] purpose,
- (2) any fact observed by any barrister, pleader, attorney or vakil, in the course of his employment as such, showing that any crime or fraud has been committed since the commencement of his employment.

It is immaterial whether the attention of such barrister, [pleader], attorney or vakil was or was not directed to such fact by or on behalf of his client.

Explanation. – The obligation stated in this section continues after the employment has ceased.

The provision does not place embargo on any lawyer to depose as a witness in respect of documents with which he has been acquainted with in course of professional employment; but the gateway is the consent of the client. After, PW-2 was examined, the Plaintiff himself deposed as PW-3. Not a single question was asked to PW-3 in course of cross-examination, as to whether any consent was given or not. Of course, such consent was implied when PW-3, the Plaintiff did not allege that consent was not taken. Therefore, impliedly there was consent. Rules, referred to by Mr. Sengupta, framed under the Advocate's Act have nothing to say on the evidentiary value of any witness. Mr. Mondal was the person who accompanied the Testatrix to the office of the Registrar of Assurance and was present at the time of registration of the will. Therefore, his evidence is relevant and is acceptable. The question whether such evidence is able to repel any doubt of suspicion will be

discussed next. The decision relied on by Mr. Sengupta was made in specific facts and circumstances and has no relevance here.

The principal limb of argument of Mr. Sengupta was that the execution of the will was surrounded with suspicious circumstances. The structured argument of Mr. Sengupta has given above. The first issue was timing of execution and the registration of the will. The attesting witness stated that at about 09:00 a.m. execution of the will took place. He said yes to the question that will was executed at 10:30 a.m. on 19th December, 2009. A clarificatory answer of the attesting witness was that he was present from 09:00 a.m. and the will was executed at 10:30 a.m. PW-2, on the other hand, deposed that the execution of the will started at 09:05 a.m. and was finished at 10:25 a.m. Registration of will began at 11:00 a.m. to 11:30 a.m. According to Mr. Sengupta time of travel from Madhyam Gram to the office of the Registrar of Assurance takes more than one hour; going with the testimony of the witnesses, it took only half an hour to travel from Madhyam Gram to the office of the Registrar of Assurance. This discrepancy of timing itself created a suspicious circumstance surrounding the execution of the will.

One thing must be kept in mind - witnesses cannot recapitulate in a machine perfect manner of timing after lapse of several years; minute by minute recapitulation is not possible. What appears from the testimony of the witnesses is that execution of the will took place between 09:00 a.m. to 10:30 a.m. There is no glaring discrepancy in the testimony of the witnesses; it is not that one of the witnesses stated that the execution took place in morning or late morning and the other said that execution took place in the evening. It is on evidence that registration process began at 11:30 a.m. so execution of the will may be at any time between 09:00 a.m. to 10:30 a.m. Some discrepancies do not vitiate the whole gamut of

evidence of the witnesses specially when the discrepancies are not glaring and very material. Observations of the Supreme Court of India in **Rammi v. State of M.P. [(1999) 8 SCC 649]** may be reminisced:

“**24.** When an eyewitness is examined at length it is quite possible for him to make some discrepancies. No true witness can possibly escape from making some discrepant details. Perhaps an untrue witness who is well tutored can successfully make his testimony totally non-discrepant. But courts should bear in mind that it is only when discrepancies in the evidence of a witness are so incompatible with the credibility of his version that the court is justified in jettisoning his evidence. But too serious a view to be adopted on mere variations falling in the narration of an incident (either as between the evidence of two witnesses or as between two statements of the same witness) is an unrealistic approach for judicial scrutiny.

25. It is a common practice in trial courts to make out contradictions from the previous statement of a witness for confronting him during cross-examination. Merely because there is inconsistency in evidence it is not sufficient to impair the credit of the witness.”

Although observed in respect of criminal trial, principles are applicable to any testimony of witness, be the same a civil trial. Testimony of the one of the witnesses, if accepted, does not render the other testimony absurd or impossible or improbable. It is true that mere registration of the will does not sanctify its execution. It is for the propounder to steer clear any cloud of doubt but this discrepancy of time does not create any suspicious circumstance in the execution of the will. Secondly, the propounded of the will was not present as appears from the evidence; there is no unnatural disposition of property. The Testatrix travelled from Madhyam Gram to

Kolkata for the purpose of registration which indicates that she was not feeble or physically unfit or mentally inert. As stated earlier, DW-1 stated in course of cross-examination that her objection to grand of will was that the mother, namely, the Testatrix very soon after expiry of her father executed a will in favour of the son, depriving the daughter. This evidence has already been dealt with above; this itself does not caste any doubt or create any suspicious circumstance.

In effect, the Plaintiff's evidence is adequate and sufficient to negate existence of any suspicious circumstance.

In nutshell, Issue No. 5 is decided in favour of the Plaintiff.

Issue No. 3 to 7 are decided in favour of the Plaintiff.

Issue No. 8

As discussed above, Issue No. 3 to 7 are decided in favour of the Plaintiff. Consequential inference is that the Plaintiff is entitled to get probate of the last will and testament of the Testatrix dated 19/12/2009. This issue is decided accordingly.

The instant suit is allowed.

Let probate be granted.

Inventory and accounts shall be filed within six month from the date of grant of probate.

The instant suit stands disposed of accordingly.

(Sugato Majumdar, J.)