

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

Present:

The Hon'ble Justice Sugato Majumdar

PLA/63/2019

**IN THE GOODS OF-
SHRIMATI RAMA DATTA GUPTA (DEC)**

For the Plaintiff : Mr. K. N. Jana, Adv.

Hearing concluded on : 11/04/2025

Judgment on : 23/04/2025

Sugato Majumdar, J.:

This is an application for grant of probate of the last will and testament of late Rama Dutta Gupta.

Rama Dutta Gupta, since deceased, the Testatrix herein, was a Hindu governed by Dayabhaga School of Law. Her last abode was at Cluster IX, E/8, Sector-III, Purbachal, Salt Lake City, Kolkata-700091. She expired on 03/07/2008. Prior to her death, the Testatrix herein, executed her last will and testament on 02/06/1995, in respect of property, mentioned in the will namely a piece and parcel of land measuring about 8.290 katha in No. N/2, Sector of Digha Development Scheme, Post office & Police Station-Digha, District- Midnapore. This property has been devised and bequeathed to the Petitioners, being the Executors of the will. The will was registered in the office of the District Registrar, Barasat for the District of

North 24 Parganas. The will and the death certificate were annexed to the instant application.

The present Petitioners were appointed as Joint Executors of the will.

The husband of the Testatrix predeceased her. At the time of her death, she had two sons and two daughters as legal heirs and successors.

After filing of the instant application citations were issued. No caveat was lodged on behalf of any person. Therefore, the probate proceeding remained uncontentious.

The will was to be proved in solemn form, that is why this Court allowed the Petitioner to produce witnesses.

One of the propounders of the will Sri Abhijit Das examined himself as P.W.1 and another person named Tarak Nath Dutta examined himself as P.W.2 who is the attending witness. When the application was filed it was accompanied by an affidavit sworn in by one of the attesting witnesses, Atanu Battacharjee.

On behalf of the Petitioners, the original death certificate as well as the original will itself were adduced in evidence, exhibited and marked accordingly.

Section 63 of the Indian Succession Act, 1925 provides execution of the unprivileged will. It goes as follow:

“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 Section provides manner of execution of a will. So far as, proof of a will is concerned the same is contained in Section 68 of the Indian Evidence Act, 1872:

“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 (XVI of 1908), unless its execution by the person by whom it purports to have been executed is specifically denied.

Section 69 contemplates a situation where attesting witness is not found. It goes as follow:

“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 handwriting of that person.”

On appreciation, evidence of the propounder of the will sounds contradictory. He testified that before death, the Testatrix told him about execution of the will. This

implies that he had no knowledge of execution of the will. Again, he stated that he made the Testatrix last in the year 1996/1997. He further stated that he had no interaction with the Testatrix after the year 1996/1997 but his elder brother had interacted with her after execution of the will. He also testified that the will was in the custody of his elder brother. The elder brother, namely, the other Joint Executor did not appear before this Court to examine himself and to apprise this Court circumstances surrounding the execution and the subsequent chain of events. From the evidence of the propounder, it appears that after 1996/1997, he did not interact with the Testatrix till her death in the year 2008. Furthermore, P.W.1 could not clearly state when the Testatrix died; he said possibly it was in the year 2004. Actually, death took place in the year 2008. Beneficiaries under the will are the Executors who are not related to the Testatrix but rather strangers. The bequest is an unnatural one depriving the sons and daughters. They were also not present at the time of the execution; at least none of the witnesses speak out that. Since P.W.1 last met with the Testatrix, as appears from his testimony, in the year 1996/1997 and about 8 years intervened from the date of execution of the will to the date of death of the Testatrix, there remains a doubt whether this is the last will and testament of the Testatrix. It might be or might not be that the Testatrix changed her mind and made another will. As P.W.1 stated, his elder brother had interaction with the Testatrix even after execution of the will, he could have come forward to say whether there was any change in mind of the Testatrix and whether there was any subsequent will or not.

P.W.2 is the attending witness. He stated in evidence that one of the attesting witnesses, Atanu Bhattacharjee expired in the year 2022. He further stated that he did not know and has no idea of what abouts of Subrata Sengupta, the other attesting

witness. No attempt was made by the propounder of the will to search out the said attesting witness.

In **Babu Singh v. Ram Sahai**, [(2008) 14 SCC 754], referring to section 69 of the Act, it was observed by another Bench of the Supreme Court India:

“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 executant. The burden of proof then may be shifted to others.”

In **Kalyanaswamy v. Bakthavatsalam**, [(2021) 16 SCC 543], it was observed, referring to section 69 of the Indian Evidence Act, 1872:

“107. Though the expression used is “if no such attesting witness can be found”, inter alia, it bears the following interpretation. The word “such” before “attesting witness” is intended to refer to the attesting witness mentioned in Section 68 of the Evidence Act. As far as the expression “found” is concerned, it would cover a wide variety of circumstances. It would cover a case of an incapacity to tender evidence on account of any physical illness. It would certainly embrace a situation where the attesting witnesses are dead. Should the attesting witness be insane, the word “found” is capable of comprehending such a situation as one where the attesting witness, though physically available, is incapable of performing the task of proving the attestation under Section 68 of the Evidence Act, and therefore, it becomes a situation where he is not found.”

Moturu Nalini Kanth vs Gainedi Kaliprasad (Dead, Through Lrs.) [2023 SCC OnLine SC 1488] the principle of law for proof of a will was reiterated:

“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*¹, 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*².”

It was observed also that mere marking of Exs. C1 & C 2 affidavits was not sufficient to satisfy the requirement of Section 69 of the Evidence Act. It was further observed:

“**32.** For the purposes of Section 69 of the Evidence Act, it is not enough to merely examine a random witness who asserts that he saw the attesting witness affix his signature in the Will. The very purpose and objective of insisting upon examination of at least one attesting witness to the Will would be entirely lost if such requirement is whittled down to just having a stray witness depose that he saw the attesting witness sign the Will.”

Reference may be made to **Surendra Pal v. Saraswati Arora (Dr) [(1974) 2 SCC 600]** where principle was succinctly laid down:

“**7.** The propounder has to show that the Will was signed by the testator; that he was at the relevant time in a sound disposing state of mind, that he understood the nature and effect of the dispositions, that he put his signature to the testament of his own free will and that he has signed it in the presence of the two witnesses who attested it in his presence and in the presence of each other. Once these elements are established, the onus which rests on the propounder is discharged.”

In **K. Laxmanan v. Thekkayil Padmini, [(2009) 1 SCC 354]**, referring to section 68 of the Indian Evidence Act, 1872, it was observed by the Supreme Court of India that a bare reading of the aforesaid provision will make it crystal clear that so far as a deed of will is concerned, the position in law is no longer in doubt for the onus of proving the will is on the propounder. The propounder has to prove the legality of the execution and genuineness of the said will by proving absence of suspicious circumstances surrounding the said will and also by proving the testamentary capacity and the signature of the testator. Once the same is proved, it could be said that the propounder has discharged the onus.

Conspectus of facts invite certain conclusions. Firstly, there is an unnatural bequest to the stranger by the instant will. Secondly, the will was not executed in presence of the relatives, sons and daughters of the Testatrix. Thirdly, it is not clear and a doubt remains as to whether this is the last will and testament of the Testatrix. Fourthly, execution of the will is sought to be proved by attending witness.

Execution of the will is to be in conformity with Section 63 of the Indian Succession Act, 1925. The will is to be proved in accordance with provision of Section 68/69/71 of the Indian Evidence Act, 1872. No case is made out or no evidence is furnished as to why Section 69 should be applicable. The propounder of the will said nothing on the attesting witnesses. No explanation is there why the other living attesting witness had not been examined. Established and proved facts do not warrant that the execution of the will should be proved dispensing with the evidence of attesting witnesses. In such circumstances and for the reasons stated above execution of the will as contemplated in section 63 of the Indian Succession Act, 1925 cannot be said to be proved, in the manner contemplated in Section 68 of the Indian Evidence Act, 1872. For reasons stated above, it is concluded and decided that the will is not proved.

Hence, grant of probate is refused.

The instant probate application stands disposed of accordingly.

(Sugato Majumdar, J.)