

OD-6

ORDER SHEET

IN THE HIGH COURT AT CALCUTTA
TESTAMENTARY & INTESTATE JURISDICTION

TS/16/2009

IN THE GOODS OF :
ARJUN KUMAR ROY, DECEASED
AND
AVIJIT DHAR

BEFORE:
The Hon'ble JUSTICE BIVAS PATTANAYAK
Date: 13th January, 2025.

Mr. Rahul Karmakar, Mr. Sounak Mukherjee, Advocates
for the petitioner/plaintiff.

The Court : This is an application for grant of probate of last Will and Testament dated 17th May, 2006 of the deceased Arjun Kumar Roy.

The plaintiff contends as follows :

Arjun Kumar Roy, the testator died on 21st November, 2008 at J.N. Roy Sishu Seva Bhavan, Raja Dharendra Street, Kolkatta-700006. During his lifetime, he executed his last Will and Testament on 17th May, 2006 and registered before the Registrar of Assurances, Kolkata. At the time of his death the testator was a Hindu governed by Dayabhaga School of Hindu Law. The said Will was executed in presence of Dr. Dilip Kumar Chandra and Shri Bhupati Dhar. The plaintiff/petitioner was appointed as the sole executor in the said Will. The deceased had only one legal heir, namely, his wife Smt. Phulrani Roy at the time of his death. In the event the deceased died intestate, his wife Smt. Phulrani Roy would have been his only legal

heir under Hindu Succession Act since the only child of the deceased predeceased the testator.

The wife of the deceased testator, who did not consent to the grant of probate, filed caveat and affidavit in support of the caveat on 6th April, 2009 contending that she never heard of any Will being executed by her late husband. Furthermore after the demise of their only son in the year 1994, the testator was not possessing sound mental faculties.

In view of the above, the probate application became contentious and was converted to a testamentary suit being TS 16 of 2009.

By order dated 3rd July, 2024 the name of the caveatrix Phulrani Roy was expunged for the reason of her death on 26th March, 2024.

Mr. Rahul Karmakar, learned Advocate appearing for the plaintiff/petitioner submits that the Will is a registered Will and the same has been proved by examination of one of the attesting witness Dr. Dilip Kumar Chandra as per requirement of Section 68 of the Indian Evidence Act, 1872 and Section 63(c) of the Indian Succession Act, 1925. The evidence of the witness would show that the testator was physically fit and mentally alert on the date of execution of the Will. There are no such suspicious circumstances to disbelieve the execution of the Will. The executor is the nephew of the testator and in order to protect the property, the Will has been executed appointing the plaintiff/petitioner as the executor. He also referring to pass Book of United Bank of India (Exhibit 'C'), the deposition of Arjun Kumar Roy in Case No. C/709 of 2005 (Exhibit 'I'), a written statement filed by Arjun Kumar Roy in Partition Suit No. 60 of 2005 (Exhibit 'K') and an affidavit-in-opposition in a GA 1851 of 2006

application (Exhibit 'M') submits that on the date of execution of the Will on 17th May, 2006, the testator was very much active and alert inasmuch as he has withdrawn money from the bank and has taken steps before the Court of Law. Relying on the decision of this Court passed in ***In the Goods of : Samir Kumar Biswas And Supriya Biswas versus Munmun Neogi*** reported in **2017 SCC OnLine Cal 17386**, he submits that since the requirement of Section 63 of the Indian Succession Act has been duly fulfilled and the provision of Section 68 of the Indian Evidence Act has also been satisfied for proving the Will by one attesting witness, the plaintiff/petitioner is entitled to grant of probate in his favour. He also submits that since the Will is a registered one, it carries with a presumptive value and weightage. To buttress his contention, he relies on the decision of this Court passed in ***Tapati Patra and Others versus Swarup Das and Another*** reported in **2023 SCC OnLine Cal 616**.

Before delving into the facts of the case, it would be profitable to reproduce the relevant provisions dealing with the validity and execution of the Will.

“Section 63 of the Indian Succession Act, 1925

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.

Section 68 of Indian Evidence Act 1872

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: xxx”*

Thus, a bare reading of the aforementioned provisions would show that the requirements enshrined under Section 63 of the Indian Succession Act have to be categorially complied with for the execution of the Will to be proven in terms of Section 68 of the Evidence Act.

A Will is an instrument of testamentary disposition of property, which is a legally acknowledged mode of bequeathing a testator's property during his lifetime to be acted upon on his/her death and carries with it an element of sanctity. Since at the time of testing the document for its validity, the testator/testatrix would not be available for deposing as to the circumstances in which the Will came to be executed, stringent statutory requisites for the proof thereof have been enjoined to rule out the possibility of any manipulation.

Now bearing in mind the aforesaid, it is to be seen whether the plaintiff-applicant has successfully established the validity and execution of the Will.

Apart from statutory compliance in order to establish the validity and execution of the Will, broadly following has to be proved (i) the testator signed the Will out of his own free Will, (ii) at the time of execution he had a sound state of mind, (iii) he was aware of the nature

and effect thereof and (iv) the Will was not executed under any suspicious circumstances.

In support the case, plaintiff/petitioner has examined the attesting witness Dr. Dilip Kumar Chandra. In his evidence the witness has categorically stated that the testator had a very good physic and his mental condition was normal. He further deposed that the testator was fit to understand everything always. Further he deposed that he came to the office of the learned Advocate Mr. Pulak Chandra Das to sign the Will. This witness further deposed that the testator Arjun Kumar Roy, the other attesting witness and the learned Advocate Pulak Chandra Das signed in his presence and he has also signed the original document in the office of Mr. Pulak Chandra Das, Advocate. After the testator and the other attesting witness put their signatures, he signed on the said document. He also deposed that Shri Arjun Kumar Roy presented the document in the registration office along with his pleader. This witness identified the signature of the testator on the Will dated 17th May, 2006 as well as his signature marked Exhibit 'A' and 'A2' respectively and the Will has been marked Exhibit 'A'. Further from the pass Book of United Bank of India (Exhibit 'C'), the deposition of Arjun Kumar Roy in Case No. C/709 of 2005 (Exhibit 'I'), a written statement filed by Arjun Kumar Roy in Partition Suit No. 60 of 2005 (Exhibit 'K') and an affidavit-in-opposition in a GA 1851 of 2006 application (Exhibit 'M') it is found that the testator has withdrawn money and also deposed before the Court, took steps in different proceedings which also shows that he was physically fit and mentally alert at the time of execution of the Will.

From the aforesaid, it is found that the plaintiff/petitioner has fulfilled the provision of Section 63(c) of the Indian Succession Act as well as the requirement under Section 68 of the Indian Evidence Act by proving the Will upon examination of one attesting witness who deposed that he has seen the testator sign the Will and the other attesting witness sign and thereafter he put his signature. Further it is relevant to note that there is no suspicious circumstances emanating from the evidence of the witness to disbelieve the contention of the plaintiff/petitioner even though the witness was subjected to cross-examination. Accordingly, the execution of the Will stands proved. This Court finds substance in the submission of Mr. Karmakar, learned advocate for the applicant referring to *Supriya Biswas (supra)* that since the requirement of Section 63 of the Indian Succession Act has been duly fulfilled and the provision of Section 68 of the Indian Evidence Act has also been satisfied for proving the Will by one attesting witness, the plaintiff/petitioner is entitled to grant of probate in his favour.

On behalf of the plaintiff/petitioner, reliance has been placed on the decision of *Tapati Patra (supra)* that a registered document carries weightage. Be that as it may, such contention of the plaintiff/petitioner cannot be accepted in view of the fact that the decision observes that though a registered document raises a presumption under Section 114 (Illustration e) of the Evidence Act but due attestation of the Will cannot be presumed merely because the Will was registered.

In view of the above discussions, let there be an order in terms of prayer (c) of the petition.

Caveat, accordingly, stands discharged.

The suit is decreed in terms of prayer (c) of the petition.

The department is directed to draw up and complete the decree as expeditiously as possible.

Urgent photostat certified copy of this judgment be supplied to the parties, if applied for, upon compliance of all requisite formalities.

(BIVAS PATTANAYAK, J.)

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