

19.05.2026
Court No.13
Item No.27
AP

FA 70 of 2015

**Sima Halder & Ors.
(Tarun Halder since deceased)
Vs.
Smt. Dipa Roy (nee Sapui)**

Mr. Rajdeep Bhattacharya
Mr. Himadree Ghosh

... For the Appellants.

1. Despite service of notice, the respondent is not represented.

2. The appeal is directed against a judgement and decree dated 11th April, 2014 passed by the learned Additional District Judge, 13th Court at Alipore in O.S. No.6 of 2010. By the impugned judgement and decree, the Trial Judge dismissed the suit filed by the appellant/propounder of the last Will and testament dated 26th September, 2005. The said purported will is of one of the three wills executed by the testatrix Pari Devi.

3. The appellant/plaintiff, the propounder, is the one of the two brothers of the alleged testatrix. He had filed an application for grant of probate under Section 276 of the Indian Succession Act Of 1925 registered initially as Act XXXIX Case No.46/09 (P).

4. On the aforesaid application being cited, the first class of natural legal heirs of the deceased testatrix namely her husband Moni Mohan Sanpui and daughter Dipa Roy(nee Sanpui) entered appearance and denied the

claims of the applicant/appellant. Case no. 46 of 2009(P) having become contentious was converted into O.S. No.6 of 2010.

5. A formal plaint was filed by the applicant/appellant, in paragraph no. 10 whereof, he claimed to have deposited the original Will in Court. This was contrary to the averments made in the Application under 276 (supra), that the original Will was lost. The plaint was subsequently amended whereby the appellant reverted back to his original contention that the original Will was lost from his custody during a bus ride. A complaint was registered with the concerned police station, which was recorded in a General Diary.

6. The plaintiff/appellant's contended in the Trial Court, the Will was witnessed by P.W.-2 namely Arun Halder and the defendant No.1, Moni Mohan Sapui, husband of the testatrix.

7. The plaintiff/appellant examined himself and his brother Arun Halder as P.W.-1 and P.W.-2, respectively. The Defendant No.1, the alleged first attesting witness to the Will, examined himself as D.W.-1. The plaintiff, in addition to P.W.-1 and P.W.-2, examined P.W.-3 who was a clerk from the Registry Office, where the purported Will was registered. Admittedly, P.W.-3 was not posted at the said Registry Office when the Will was originally registered, and thumb impressions of the testatrix were taken in terms of the Rules prescribed under the Registration Act.

8. While P.W.-2 stated that the Will was signed in his presence and in the presence of D.W.-1, whereafter both of them put their signatures on the said Will, D.W.-1 clearly denied having signed on the original Will. He also denied that his wife at all executed any such Will.

9. It is also an admitted position that the scribe of the Will, who typed it in the Bengali vernacular, was not examined by the plaintiff. It is equally an admitted position that the said scribe was personally well-known to the defendant No.1.

10. The Trial Judge wholly disbelieved the plaintiff's case and found suspicious circumstances in execution of the Will in question. The Trial Judge found a flip-flop by the plaintiff/appellant.

11. Admittedly the certified copy of the will exhibited in the Court below did not contain the signature of the testatrix. The execution of the will by the testatrix was therefore required to be proved. PW 3 was not working in the registry office concerned on the date of the execution of the will. Even assuming that the records of the registry office can be relied upon, the same would not contain the signatures of the attesting witnesses as only the folio extract of the Will, which was produced in the trial Court.

12. It is now too well settled that Will is required to be proved by demonstrating compliance of Section 63 of the Indian Succession Act of 1925 and as per section 68 of the Evidence Act, 1872.

13. Section 63 of the Indian Succession Act, 1925, mandates that two or more witnesses shall sign on a will as attesting witnesses. Section 68 of the Evidence Act, states that the execution of a will shall be proved by examining '*at least*' any *one* of such attesting witnesses. The emphasis thereat is on the expression 'at least'. The said expression is inclusive but not restrictive.
14. A close reading of Section 68 of the Evidence Act indicates the said section *does not* limit the examination of attesting witnesses to one, since section 63 of the Indian Succession Act mandates that a will shall be attested by two or more witnesses. The said examination may include as many attesting witnesses as have signed on the will, provided that their examination is relevant to assess the authenticity of the will.
15. Therefore, the Court may call upon the second attesting witness to confirm the execution of a will, notwithstanding that the first attesting witness has deposed in favor of the will's execution. This is evident from the expression 'at least' employed in Section 68 of the Evidence Act. The clear denial of execution of a will by an attesting witness dents authenticity of a will.
16. The purpose and object of mandating two or more attesting witness to sign on the will is that if any one of such witnesses lies, the second may come up with the truth. Section 68 of the Evidence Act is set out below:-

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.]

Emphasis applied

17. Section 71 of the Evidence Act states that when attesting witnesses deny or fail to recollect the execution of a will, the same may be proved by other evidence. Sec.71 thus provides for a secondary mode of proof of execution of a will other than by attesting witnesses.

18. Section 71, however, may be invoked only when the attesting witnesses are not available to depose as opposed to when the attesting witnesses clearly deny the execution of the will. In ***Jagdish Chand Sharma v. Narain Singh Saini (Dead) Through LRs. and Others, reported in (2015) 8 SCC 615***, section 68 and 71 of the Evidence Act were examined in light of section 63 of the Indian Succession Act as follows:-

57.1. **Viewed in premise, Section 71 of the 1872 Act has to be necessarily accorded a strict interpretation. The two contingencies permitting the play of this provision, namely, denial or failure to recollect the execution by the attesting witness produced, thus a fortiori has to be extended a meaning to ensure that the limited liberty granted by Section 71 of the 1872 Act does not in any manner efface or emasculate the essence and efficacy of Section 63 of the Act and Section 68 of the 1872 Act. The distinction between**

failure on the part of an attesting witness to prove the execution and attestation of a will and his or her denial of the said event or failure to recollect the same, has to be essentially maintained.

Emphasis applied

19. The Court in ***Jagdish Chand Sharma (supra)*** thus has drawn a clear distinction between the failure to recollect the execution of the will and the clear denial of the attesting witness against the execution of the will. Section 71, however, contemplates both situations by employing the expression 'or'. A person may fail to recollect the execution of a will in the natural course of events. A clear denial therefrom however may run against the authenticity of a will. Section 71 of the Evidence Act is set out below:-

71. Proof when attesting witness denies the execution.—
If the attesting witness deniesor does not recollect the execution of the document, its execution may be proved by other evidence.

Emphasis applied

20. A harmonious reading of Sec. 68 read with Section 71 thus enables the Court to draw an inference against the execution of a will, when one of the attesting witnesses denies its execution and the propounder fails to rebut thereto.

21. An attesting witness must prove the signature of the testatrix. The attesting witness, if no other witness was examined by the propounder, is also required to prove the signature of the other attesting witnesses. If the attesting witnesses attested the will on different dates, the

acknowledgement of the attestation by the testator must be proved and brought on evidence.

22. In the instant case it is seen that the alleged second attesting witness has himself deposed in the Trial Court that he has not attested any such Will, propounded by the appellant. He has also denied that the testator has executed any such will. The execution and existence of the will is in doubt and remains un-proved.

23. The principle of approbate and reprobate as regards the loss of will read with the denial by DW 1 that he did not sign on the will and the will was never executed has completely rendered the will suspect. The appellant, therefore, was required to bring other evidence to rebut the denial by DW 1 against the execution of the will in terms of Section 71 of the Evidence Act. The said denial of the execution of the will in question was never overcome by the executor/appellant. PW 2 being a brother of the appellant could be considered an interested witness. The appellant has not brought any other cogent evidence oral or documentary to prove the will.

24. It is in this backdrop that the argument of the respondents that the original will was suppressed by the appellant because if disclosed would demonstrate the absence of the signature of DW 1, is germane,.

25. The requirement of proof and/or existence of two attesting witnesses to the Will in question have not been complied with by the applicant. In the present case, a clear doubt has arisen as to whether the will in question was the last will and

testament. Thus, DW 1's denial of the execution of the will has diluted the authenticity of the will in question.

26. Learned counsel for the appellant would firstly rely upon the decision of the Supreme Court in the case of ***Prem Singh and Ors. Vs. Birbal and Ors.*** reported in ***(2006) 5 SCC 353***. Paragraph 27 of the said judgement was relied upon to argue that there is a presumption that registered document is validly executed.

27. This Court firstly notes that the said decision was with regard to a registered agreement for sale. The said principles may not be strictly applicable in respect of a registered Will. The requirement of proving the said Will registered or otherwise by proving the signatures of the two attesting witnesses cannot be dispensed with. The ingredients of section 63 of the act of 1925 must be shown to have been complied with.

28. The proviso to section 68 of the Evidence Act clarifies that when a document is *not* a will, its execution may be proved on the ground that the document is registered. A will being a registered one therefore does not exempt it from being proved by examining the attesting witnesses. In ***Raj Kumari v. Surinder Pal Sharma, reported in (2021) 14 SCC 500***, it was held that registration of a will removes a tint of doubt and no more as follows:-

12.....In RabindraNath Mukherjee v. Panchanan Banerjee [RabindraNath Mukherjee v. Panchanan Banerjee, (1995) 4 SCC 459] , **this Court had observed that the doubt would be less significant if the will is registered** and the Sub-Registrar certifies that the same was read over

to the executor who, on doing so, had admitted the contents.
**In each case, the court must be satisfied as to the
 mandate and requirements of clause (c) to Section 63 of
 the Succession Act.**

Emphasis applied

29. Indeed, it is true that a registered instrument carries with it a presumption of a valid execution and existence. This is rebuttable by cogent and effect evidence. Hence, mere proof of registration of a document would not be fatal to a defence that the document is not validly executed.
30. The GD entry and complaint also revealed that a sale deed was stated as missing and not the original will. This therefore is a suspicious circumstance as regards loss of the original will.
31. A further suspicious circumstance was found by the trial Court in the bequest under the purported will. The defendant no. 2 was found to be happily married and was yet given a portion of the two houses by a separate will. The husband has been totally excluded because he has inherited some properties from his paternal side. This Court is in agreement with the trial Court that these are suspicious circumstances.
32. This Court notices that before the trial Court, PW 1 has stated that the testatrix signed on all pages of the will in the Bengali. The signature extract from the office of Registrar of Assurances however indicates that the signature is in English. This Court also finds that the appellant played an active part in execution of the will. Both PW 1 and PW 2 are beneficiaries under the will. These are suspicious circumstances.

33. Learned counsel for the appellant next relied upon a decision in the case of ***Hemalatha (D) by LRs. Vs. Tukaram (D) by LRs.& Ors.*** reported in **2026 SCC OnLine SC 106** particularly paragraph 30 of the said decision is placed. This Court, however, notes that the said decision was in the context of a registered sale deed. As already stated hereinabove, the requirement of proof of a Will even if registered under the provisions of the Indian Succession Act cannot be ignored by reference to a registered document and the provisions of the Registration Act.

34. Learned counsel for the appellants next relied upon a decision of the Supreme Court in the case of ***Metpalli Lasum Bai (Since Dead) & Ors. Vs. Metapalli Muthaih (D) by Lrs.*** reported in **2025 SCC OnLine SC 1488**. Paragraph no 9 of the said decision is specifically placed before this Court.

35. Indeed, it was a case dealing with a registered Will. In the said case the defendant opposing grant of probate had, however, admitted the signatures of the testator as well as the attesting witnesses. The facts of the instant case are completely different from the said case of ***Metpalli Lasum Bai*** (supra). In fact, the findings of this Court of the requirement of proof of the registered Will appears to find support from the aforesaid ***Metpalli Lasum Bai*** (supra) decision.

36. Learned counsel for the appellant lastly relied upon a decision of a coordinate Bench of this Court in the case of ***Sujata Dhar Vs. Ranjit Kumar Dhar & Ors.*** reported in

2023 SCC OnLine Cal 618. Even in the facts of the said case at paragraph 11, it transpires that the caveator therein admitted the signature of the testatrix therein and also admitted the registration of the Will in question before the Registrar of Assurance therein. The facts of the ***Sujata Dhar***(supra) decision is, therefore, different from the facts of the instant case. The ratio of the said decision cannot be applied in the instant case.

37. As already stated hereinabove, the appellant has not been able to prove the execution of the Will. Several suspicious circumstances have been noticed by this Court and the trial Court in respect of the execution of the Will in question.
38. Having regard to the aforesaid discussion, this Court is of the view that the impugned judgement and decree dated 11th April, 2014 passed by the Additional District Judge, 13th Court at Alipore in O.S. No.6 of 2010 calls for no interference.
39. Hence, FA 70 of 2015 is dismissed. Consequently, all connected pending applications, if any, are also disposed of.
40. Interim orders, if any, shall stand vacated.
41. There shall be no order as to costs.
42. All parties shall act on the server copy of this order duly downloaded from the official website of this Court.

(RajasekharMantha, J.)

(Rai Chattopadhyay, J.)