

Form No.J(2)

IN THE HIGH COURT AT CALCUTTA
Civil Appellate Jurisdiction
Appellate Side

Present : The Hon'ble Mr. Justice Sabyasachi Bhattacharyya
&
The Hon'ble Mr. Justice Supratim Bhattacharya

FA 438 of 2025
with
CAN 1 of 2025
with
CAN 2 of 2025
with
CAN 3 of 2025
with
CAN 4 of 2025

Rajib Sardar and Anr.
Vs.
Banamali Sardar

For the appellants : Mr. Soujanya Bandyopadhyay, Adv.
Heard on : January 28, 2026.
Judgment on : January 28, 2026.

Sabyasachi Bhattacharyya, J.:

1. From the office report dated January 22, 2026, it transpires that insufficient postal costs have been put in by the appellants. Accordingly, the appellants are directed to put in the deficit postal costs of Rs.11/- by January 30, 2026.

2. Affidavit of service filed today be kept on record.
3. Despite service, none appears for the respondent.
4. In view of the probate suit from which the present appeal arises having been uncontested after filing of the written statement, we dispense with service of the notice of the appeal on the respondent, more so, in view of the innocuous nature of the judgment which we are about to pass.
5. The appellants took out an application for probate of the last Will and testament of one Nayan Sardar, since deceased, which turned contentious upon being contested by the respondent and was converted to a regular suit.
6. By the impugned judgment, the learned Testamentary Court dismissed the suit on several grounds.
7. One of such grounds was that the sole surviving attesting witness was not produced or examined to prove the Will.
8. That apart, it was observed by the learned Testamentary Court that although in the Will, only one of the appellants, namely, Rajib Sardar, was named as the sole executor, both Rajib Sardar and Surajit Sardar filed the probate application together.

9. That apart, some of the near relatives of the deceased were omitted from the array of parties.
10. Also, paper publication was not done by the appellants.
11. Although we do not find any apparent illegality in the said judgment, fact remains that the Testamentary Court is also a court of conscience and the endeavour of the probate court is to give effect to the last wishes of a deceased person. The judgment in a testamentary proceeding partakes of the character of a judgment *in rem* and ought not to be dismissed altogether for the technical laches of the propounder, at least without giving him an opportunity to rectify the technical defects in the proceeding, if those are curable in nature. Looked at from such perspective, an opportunity ought to have been given to the appellants to rectify such technical defects and to adduce evidence of the sole surviving attesting witness for the purpose of proving the Will.
12. At the end of the day, the impugned judgment pertains to technical laches on the part of the appellants which were curable in nature and could not be an absolute bar in preventing the executor of the Will of the deceased from taking out a fresh probate application.

13. Also, we are rather surprised to see that in the ordering portion of the impugned deemed decree, the learned Additional District Judge observed that the original Will be kept in safe custody in a sealed envelope in the office of the learned District Judge, Howrah “forever” and that “it will not be returned to the party”, although the District Courts are not courts of record. Such part of the deemed decree, in any event, is *de hors* the law and without jurisdiction and is required to be set aside.
14. The appellants, in order to rectify the defects for which the probate suit was dismissed, have preferred four applications in the present appeal.
15. CAN 1 of 2025 seeks an appropriate order for permitting the appellants to complete the procedure of paper publication. CAN 2 of 2025 seeks permission to produce the sole surviving attesting witness of the Will namely, Subodh Sardar as witness and thus, is in the nature of an application under Order XLI Rule 27 of the Code of Civil Procedure.
16. CAN 3 of 2025 is an application for amendment of the plaint of the probate suit by incorporating the names of the omitted near relatives of the deceased testator.

17. CAN 4 of 2025, on the other hand, seeks deletion of the name of Surajit Sardar as the propounder of the Will in the probate application.
18. This Court could very well have allowed those applications and permitted the defects to be cured. However, it would be an easier course of action in the event the appellant no. 1, Rajib Sardar, the sole executor named in the alleged Will, is permitted to file a fresh probate application, complying with the formalities as pointed out by the learned Testamentary Court, instead of creating a confusion by effecting so many changes and redirecting the Testamentary Court to hear the matter afresh. Moreover, since the probate application was not maintainable from the inception due to mis-joinder of a non-executor of the Will as propounder, it is somewhat doubtful as to whether such defect, although technical, could be cured at a subsequent stage of the proceeding.
19. On the basis of the above considerations, we are of the opinion that the probate suit was dismissed on technical grounds. Although it was held that the due execution of the Will could not be proved, the same was not on merits but on

the sole ground that the surviving attesting witness was not produced as witness by the propounder.

20. In view of the above, FA 438 of 2025 is disposed of by modifying the impugned deemed decree to the effect that the last portion of the impugned deemed decree, whereby the original Will was directed to be kept in the safe custody of the office of the learned District Judge, Howrah in a sealed envelope forever without returning the same to the party, is set aside. The original Will shall now be returned to the appellant no. 1, Rajib Sardar, who is the sole executor named in the Will, as and when so approached.
21. Moreover, it is hereby deemed to stand incorporated in the impugned judgment and deemed decree that the dismissal of Probate Suit No. 21 of 2023 on technical grounds shall not preclude the appellant no. 1, Rajib Sardar, the named executor in the Will, to file a fresh probate application for the grant of probate in respect of the last Will and testament of the deceased testator, Late Nayan Sardar.
22. CAN 1 of 2025, CAN 2 of 2025, CAN 3 of 2025 and CAN 4 of 2025 are disposed of in the light of the above observations.
23. There will be no order as to costs.

24. The parties shall act on the server copy of this order, duly downloaded from the official website of this court.

I agree.

(Sabyasachi Bhattacharyya, J.)

(Supratim Bhattacharya, J.)

AD-11
Ct No.16
28.01.2026
(SSS)