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**IN THE HIGH COURT AT CALCUTTA
CIVIL APPELLATE JURISDICTION
ORIGINAL SIDE**

**APOT/154/2025
IA No. GA/3/2026**

**IN THE GOODS OF:
SHRIMATI RAMA DATTA GUPTA, DECEASED
-AND-
GOPAL DAS AND ANR**

BEFORE:

The Hon'ble JUSTICE DEBANGSU BASAK

-AND-

The Hon'ble JUSTICE MD. SHABBAR RASHIDI

For the Appellant : Mr. Rudradeb Choudhury, Adv.
Mr. Shaswat Nayak, Adv.
Mr. Shoham Sanyal, Adv.
Mr. K. N. Jana, Adv.

HEARD ON : 24.06.2026

DELIVERED ON : 24.06.2026

MD. SHABBAR RASHIDI, J.:-

1. The appeal is directed against the judgment and order dated April 23, 2025 passed in PLA/63/2019.
2. By the impugned judgment and order, the learned Single Judge refused to grant probate to the last Will and Testament of late Rama Datta Gupta.

- 3.** It is submitted by learned advocate appearing for the appellant that the grant of probate was wrongfully refused by the learned Single Judge. It was further submitted that one of the attesting witnesses affirmed affidavit in support of the case of the petitioner, which was on record. The attesting witness having expired prior to the institution of the proceeding and could not be produced before the learned Trial Court.
- 4.** It was further submitted that the Will in question was proved in accordance with law by an attending witness in terms of Section 63 of the Indian Succession Act, 1925 as well as Section 68 of the Indian Evidence Act, 1872.
- 5.** It was further contended by the learned advocate for the petitioner that the learned Trial Judge erred in holding that the Will in question could not be proved in accordance with law and was executed under suspicious circumstances and thereby refusing grant of probate to such Will. It was further contended by learned Advocate for the petitioner that the learned Trial Court attributed suspicious circumstances to the Will in question only on the ground that it was not a natural Will and no interest was proposed to be conveyed on the natural legal heirs of the petitioner of the Will.
- 6.** It appears that Rama Datta Gupta was a Hindu governed by Dayabhaga School of Jurisprudence. He last resided at Cluster IX, E/8, Sector-III, Purbachal, Salt Lake City, Kolkata-700091. She

expired on July 3, 2008. Prior to her death, said Rama Datta Gupta had executed a last Will and Testament on June 2, 1995 in respect of the properties mentioned in the said Will. The said Will was registered in the Office of District Registrar, Barasat.

7. One of the propounders of the Will was examined as P.W.-1. One Tarak Nath Dutta, the attending witness, was examined as P.W.-2. The application for grant of probate was filed supported by an affidavit affirmed by one of the attesting witnesses, namely, Atanu Bhattacharjee.
8. Petitioners were appointed as joint executors of the Will. The husband of the testatrix died prior to her death. At the time of her death, the testatrix was survived by two sons and two daughters as legal heirs and successors. The Will was proved in solemn form.
9. It is well settled that a Will has to be proved in accordance with Section 63 of the Indian Succession Act which reads as follows:

“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.”

10. It further transpires from the judgment and order that learned Single Judge noted that Will has to be proved in accordance with Section 68 of the Indian Evidence Act. If the attending witnesses are not available or cannot be produced to prove the Will, the Will is required to be proved in accordance with Section 69 of the Act of 1872. It would be apposite to set out the provisions of Sections 68 and 69 of the Indian Evidence Act.

“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.]”

“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.”*

11. As noted above, one of the petitioners deposed as P.W.-1 whereas the attending witness was examined as P.W.-2. We have gone through the evidence so recorded before the learned Trial Court. From the affidavit of evidence of P.W.-2 it transpires that although P.W.-2 was not an attesting witness but he testified that the Will was executed in his presence. The executrix as well as two attesting witnesses signed on the Will in his presence. Not only that, P.W.-2 has also in his deposition established that the testatrix had an intention and was in a mental condition sufficient to execute the Will.

- 12.** In the impugned judgment and order, the learned Trial Court has come to the following conclusion :-

“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.”

- 13.** As noted above, the Court has been informed that both the attesting witnesses are no more alive and are not available to prove the

execution of the Will in question in accordance with the provisions of Section 68 of Evidence Act. An attending witness has been examined as P.W.-2. We have already noted that P.W.-2 in his deposition categorically stated that he was present when the Will in question was executed by the testatrix. He has also proved that, both the testatrix and the two attesting witnesses signed on the Will after its execution in her presence. Not only that, she has gone further to prove that at the time of execution of the last Will, the testatrix was physically fit and mentally alert to make a Will.

- 14.** One of the attesting witnesses, namely, Atanu Bhattacharya swears an affidavit which is accompanied with the application for probate. In such affidavit, the attesting witness has stated to the effect that on June 2, 1995 he was present and saw the testatrix Smt. Rama Datta Gupta putting her signature at the foot of the subject Will in his presence as well as in the presence of other attesting witness, i.e. Sri Subrata Sengupta. He further stated that at the request of the testatrix, Atanu Bhattacharya signed on the Will in presence of the testatrix and Subrata Sengupta. The other attesting witness also signed in the similar way. Not only that, Atanu Bhattacharya further stated in his affidavit that testatrix was in a sound state of mind at the time of execution of the Will and had full testamentary capacity.

- 15.** Likewise, the attending witness, i.e. Tarak Nath Dutta who deposed as P.W.-2 stated in his deposition that he was present on June 2, 1995 when the testatrix Smt. Rama Datta Gupta executed the Will. He also stated that he saw the testatrix signing on the Will and the two attesting witnesses putting their signature on the Will.
- 16.** Such evidence of P.W.-2 apparently overlooked by the learned Trial Court. To our opinion, the petitioner has been able to prove the Will legally in accordance with provisions of Sections 69 and 71 of the Indian Evidence Act, 1872. We therefore, set aside the impugned judgment and order.
- 17.** PLA/63/2019 stands allowed.
- 18.** There will be an order in terms of prayer (d) of the application for probate.
- 19.** Accordingly, APOT/154/2025 along with the connected application is disposed of, without any order as to costs.

(MD. SHABBAR RASHIDI, J.)

- 20.** I agree.

(DEBANGSU BASAK, J.)