

OD-2

**IN THE HIGH COURT AT CALCUTTA
CIVIL APPELLATE JURISDICTION
AN APPEAL FROM ITS TESTAMENTARY AND INTESTATE JURISDICTION
ORIGINAL SIDE**

**APD/3/2024
With TS/6/2009**

**IN THE GOODS OF:
AKHILESH KUMAR SINHA (DEC)
-AND-
SANT AGARWAL
-VS-
RABI SINHA**

BEFORE:

The Hon'ble JUSTICE DEBANGSU BASAK

-AND-

The Hon'ble JUSTICE MD. SHABBAR RASHIDI

For the Appellant : Mr. Harpal Singh, Adv.
Mr. Shaunak Ghosh, Adv.
Mr. Sanjay Kumar Shaw, Adv.

For the Respondent : Mr. Debdut Mukherjee, Adv.
Mr. Kinjal Kumar Baral, Adv.

HEARD ON : 20.04.2026

DELIVERED ON : 20.04.2026

MD. SHABBAR RASHIDI, J.:-

1. The instant appeal is directed against the judgment and order passed on May 18, 2023 in TS/6/2009.

2. By the impugned judgment and order, the learned Trial Judge has dismissed an application for grant of probate filed on behalf of the plaintiffs therein. In the impugned judgment and order, learned Single Judge held that:

"In the case in hand, there are several circumstances which create suspicious circumstances surrounding the execution of the Will of the testator as stated above. Pleas of coercion and fraud must be proved by the caveator. But if any doubt is created regarding execution of the will then it is for the propounder of the will to clear such doubts. Before grant of probate, the conscience of the Court must be made clear, and the court must be satisfied that no suspicious circumstance existed at the time of execution of the will. It is rather a case which alleges that the testator did not intend to give effect to the writings contained in the will since his signatures were obtained in blank papers. It is also the case that the propounder of the will was present and took active role in preparation of the will and derived substantial benefit therefrom. In view of the observations of the Supreme Court of India, discussed above, burden of proof is on the propounder of the will to stir clear the clouds of suspicions surrounding execution of the will. The propounder of the Will failed to remove to suspicious circumstances surrounding the execution of the Will. Therefore, it is not a right case that the probate should be granted."

3. It is submitted by learned Senior Advocate appearing for the appellant that the learned Single Judge was not justified in holding that the impugned Will, probate against which was sought, to be clad in mystery. Learned Senior Advocate for the appellant also submitted that the learned Trial Court failed to take into account of provisions contained under Section 63 of the Indian Succession Act, 1925.
4. It was also contended that the learned Single Judge erred in holding that there was contradiction between the testimony of P.W.-1 and P.W.-2 so far as it relates to typing of the Will. Learned Senior Advocate also contended that the learned Single Judge erroneously held the purport of the impugned Will which contained a back sheet naming the advocate who presumably assisted the testator in executing the Will.
5. It was further contended that the learned Single Judge erred in holding that the testator did not intent to give effect to the writings contained in the Will in question.
6. Learned Senior Advocate for the appellant also submitted that the learned Single Judge erred in holding that there were contradictions in the statement of the attesting witnesses with respect to the place of execution of the Will in question. Learned Senior Advocate further

submitted that the learned Single Judge erred in holding that the Will in question was executed bequeathing all the properties of the testator in favour of outsiders. It is contended that a portion of the self same property was transferred through another Will in favour of the family members of the testator.

7. It has also been submitted on behalf of the appellant that the learned Single Judge did not take into consideration that although the propounder and beneficiary of the Will were mentioned as tenant in the subject matter of the Will but no such document was produced before the learned Trial Court.
8. It was the case of the appellant/plaintiff made out in the Trial Court that the testator before his death used to reside at FD-347, Salt Lake City, Kolkata-700091. The testator executed his last Will and Testament on December 24, 1987 in respect of the property mentioned therein. One Sri Sant Agarwal and failing him Sri Mahabir Prasad Agarwal was appointed as executor to such Will. The testator was survived by his widow, two daughters and a son. The aforesaid Will was duly attested by two witnesses. Declaration of one of the attesting witnesses was annexed to the application for grant of probate.

- 9.** On issuance of citation, the answering defendant i.e. the son of the testator, contested the probate proceeding. He challenged the Will against which the probate was sought.
- 10.** In the affidavit filed on behalf of the defendant, it was contended that the Will was unnatural one and that the testator had no transferable right and title in the property involved in such Will. It was also contended that the signature of the testator was obtained on a blank paper and such paper was converted into a Will. This was manifest from the fact that the signature of the testator appeared at the bottom of the pages much after the writings on the page ended.
- 11.** The defendant also made out a case that the Will was silent as to on whose instruction the Will was drafted. It was contended that the signature of the testator on the Will was obtained by practicing fraud upon him by the appellant/executor. The testator was not at all aware of the contents of the Will. The defendant also made out a case that the testator died leaving behind his widow and the instant application for grant of probate was filed belatedly much after the death of the wife of the testator.

- 12.** On the basis of the pleadings put in by the parties, the learned Trial Court framed as many as five issues, namely:

"1. Is the suit for probate maintainable in its present form and not?

2. Is the Will dated 24 December, 1987 is a valid Will of Akhilesh Kumar Sinha since deceased as alleged?

3. Whether the alleged signatures of Akhilesh Kumar Sinha were obtained on blank papers and converted into alleged Will dated 24th December, 1987?

4. Whether fraud was so practised upon Akhilesh Kumar Sinha for obtaining his signatures in the so called Will dated 24th December, 1987?

5. Is the executor of the Will entitled to probate on the Will annexed or not?"

- 13.** It appears from the materials placed before us that the first issue with regard to maintainability of the probate proceeding was decided by the learned Single Judge in favour of the petitioner/appellant. All other issues were taken up together for consideration.

- 14.** Upon hearing the parties and on consideration of the evidence produced on their behalf, the learned Single Judge observed in the

impugned judgment and order that there was a long gap between the typed portion and signature of the testator on the first page of the Will and signature of the testator was intervened by a long unusual gap. Learned Single Judge upon consideration of the provision of Section 63 of the Indian Succession Act, 1925 concluded that such gap appearing between the writings on the pages of the Will and signature of the testator thereon was in violation of Section 63(b) of the Act of 1925. Learned Single Judge was of the view that such unusual blank spaces between the writings of the Will and signature created reasonable suspicious circumstances. In deciding such question, learned Single Judge held that

"Signatures of the testator are there on each and every page of the Will, which is marked as Ext. A. There is a long gap between the typed portions and the signature of the testator on the first page of the Will, only intervened after a long gap below the typed words dots and '2' indicating the second page. The fourth page of the Will bears to signatures of the testator, one in the middle, the other at the bottom. The next page is a blank one containing signature of the testator which was penned through. Questions were put to the Executor of the Will, deposed as P.W.2 in course of cross-examination. When he was asked why the testator signed twice on the last page he could not explain the same. Rather answered that Mr. Soni was there. He was again asked in cross-

examination why there was a long gap after four lines on the first page and thereafter the numerical two was given followed by a long gap and then the signature of the testator. His answer was he could not tell anything but the testator signed that. It is in evidence of all the Plaintiff's witnesses that he was present at the time of execution of the Will. Testimony of P.W.2 did not explain these questions put to him. Although he deposed that he was present at the time of execution of the Will, he did not explain why a page is annexed to the Will bearing penned through signature of testator. He did not deny that the signature was that of the testator. He is supposed to explain why a blank sheet was signed by the testator but subsequently penned through; he failed to highlight anything on this point."

- 15.** Another suspicious circumstance which was circumscribed by the learned Single Judge in his impugned judgment is with regard to the contradictory statement of two attesting witnesses. Evidently, one of the attesting witnesses was examined in the probate proceeding as a witness on behalf of the plaintiffs and stated in his deposition that the Will in question was executed in presence of the wife of the testator whereas the declaration filed on behalf of the other attesting witness does not name the wife of the testator to be present at the time of execution of the Will. Learned Single Judge also noted serious contradiction in respect of the manner of preparation and execution of the Will and has noted:

"It is uniform statements of the Plaintiff's witnesses that at the time of execution of the Will the testator, Mr. Pranav Singh (P. W.1), one of the attesting witnesses; Mr. Soni, the other attesting witness; Mr. Agarwal, the Executor herein and one Mr. Raj Kumar Tody (P.W.3) were present. However, Mr. Pranav Singh stated in cross-examination that Mrs. Sinha was also present which was not corroborated by other witnesses. When the attesting witness P.W.1 was confronted with the question in course of cross-examination whether the testator signed blank documents he replied that the testator typed the Will and signed it in his presence. On the other hand, P.W.2, the Executor of the Will stated in course of his deposition that he did not know who prepared the Will. If testimony of the attesting witness is to be relied upon then P.W.2 was present at the time of execution and should have witnessed the typing of the Will by the testator. As such, it should be within his knowledge that the testator typed the Will. But his testimony is otherwise in this regard. Drafting and typing of the Will remains mysterious in view of contradictory statements of witnesses. This creates a suspicious circumstance."

- 16.** It further transpires from the materials on record that there are serious contradictions with regard to the place where the alleged Will was actually executed. We have noted that the executor was a resident of FD-347, Salt Lake City, Kolkata-700091. According to declaration filed on behalf of the one of the attesting witnesses, it

was stated that the Will was executed at 48, Vivekananda Road, Kolkata-700006 whereas the other attesting witness who has deposed in this case has stated that the Will was executed at FD-347, Salt Lake City, Kolkata-700091. On such score also, in the impugned order, learned Single Judge held that the Will was executed under suspicious circumstances. The learned Single Judge held as follows:

"The probate application is filed along with a statement of Mr. Soni, one of the attesting witnesses. This statement is relied upon in the probate application. Affidavit is also filed along with a probate application, solemnly affirmed by Mr. Soni. Mr. Soni stated that Will was executed at 48, Vivekananda Road, Kolkata - 700006. Subsequently, Mr. Soni was not produced before this Court. This statement of Mr. Soni cannot be taken as gospel truth to prove that Will was executed at that place because he was not neither deposed before this Court nor subjected himself to cross-examination. The witnesses, who gave testimony in the suit stated that the Will was executed at FD-347, Salt Lake City, Kolkata - 700091 which was the residence of the testator. They deposed that Mr. Soni was present. No explanation is given why Mr. Soni did not come to this Court to depose. It is true that any one of the attesting witnesses may depose before the Court to prove execution of the Will but Mr. Soni's testimony became important in view of the fact that he made a statement that Will was executed at a different place and the same was relied

upon in the probate application. Since the execution of Will is challenged on the ground that some signatures of the testators was obtained in a blank papers the testimony of Mr. Soni becomes important and assumed significance substantially when his statement on place of execution is contradictory to the other attesting witness. This creates suspicious circumstances surrounding the execution of the Will."

17. Upon consideration of the entire evidence as well as in consideration of the aforementioned suspicious circumstances attending to the alleged Will executed by late Akhilesh Kumar Sinha, learned Trial Judge refused to grant probate to such Will which resulted in the impugned judgment and order.
18. Section 63 of the Indian Succession Act, 1925 provides for the manner in which a non-privileged Will is required to be executed. Section 63 of the Act of 1925 reads as follows:-

"63. Execution of unprivileged wills.- *Every testator, not being a soldier employed in an expedition or engaged in actual warfare, 1*[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 acknowledgment of his signature or mark, or of 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."

- 19.** In the case at hand, it appears that there are legitimate disputes with regard to execution of the impugned Will by the testator in the light of the provisions contained in Section 63 of the Act of 1925. There are allegations that the signature of the testator was obtained by practicing fraud or otherwise on blank papers which were subsequently converted into Will. There are apparently material contradictions in the statement of the two attesting witnesses, one of whom was examined as a witness in the probate proceeding and declaration in the form of affidavit on behalf of the other attesting witness was annexed to the application. The place of execution of the alleged Will mentioned in the aforesaid testimonies of the attesting witnesses are contradictory. Besides that, there are contradictory statements with regard to the manner in which the

alleged Will was executed. On one hand, it was alleged that the Will in question was typed by the testator himself and, thereafter, executed whereas, the other proposition shows it probable that the signature of the testator was obtained and, thereafter, a document in the nature of Will was prepared.

- 20.** Section 63(b) requires the signature or mark of the testator or the person signing for the testator to be so placed that it appears that it was intended thereby to give effect to the writing as a Will. Apparently, the writings on the impugned Will show an unusual gap between the writings and the signatures of the testators. Not only that, the last page of the Will, though contains signature of the testator but does not contain in writing. Such facts give rise to reasonable suspicion as to the execution of the Will in terms of the provisions of Section 63 of the Act of 1925.
- 21.** In the facts of the case at hand, the appellant/petitioner has not been able to adduce evidence to overcome the said suspicion in respect of the place of execution of the Will, the manner in which the alleged Will was executed and that the testator actually intended to execute a Will and give effect to the writings contained in the impugned Will.
- 22.** In the facts and circumstances of the case, we find no reason to interfere with the impugned judgment and order. The same is hereby affirmed.

23. Accordingly, APD/3/2024 is dismissed, without any order as to costs.

(MD. SHABBAR RASHIDI, J.)

24. I agree

(DEBANGSU BASAK, J.)

sp3