

**IN THE HIGH COURT AT CALCUTTA
TESTAMENTARY AND INTESTATE JURISDICTION
ORIGINAL SIDE**

Present:

The Hon'ble Justice Sugato Majumdar

TS/15/2015

IN THE GOODS OF: SITA DEVI BAZAZ (DEC)

For the Plaintiff	:	Mr. Rupak Ghosh, Adv. Mr. Ayan Datta, Adv. Mr. Pradip Kr. Sarawagi, Adv.
For the Defendant	:	Mr. Sarosij Dasgupta, Adv. Ms. Afreen Begum, Adv.
Hearing concluded on	:	26/08/2025
Judgment on	:	01/09/2025

Sugato Majumdar, J.:

The instant suit is for grant of probate of the last will and testament of the deceased Sita Devi Bazaz.

The deceased Sita Devi Bazaz was a Hindu who had her last abode at 378, Block-G, New Alipore, Kolkata-700053. She breathed her last on 20th January, 2013 at her place of residence. Prior to her death, she executed her last will and testament on 8th December, 2005 in English language. The will was duly registered. The Testatrix left behind her son and daughter. The present Petitioner being Executor, is the grandson of the Testatrix.

On death of the Testatrix, the instant application was filed, praying for grant of probate of the last will and testament of the Testatrix.

General and special citations were issued to the son and daughter of the Testatrix. The daughter of the Testatrix Smt. Rani Goenka lodged caveat as well as affidavit of support of caveat. The caveat was allowed and the affidavit was treated as written statement.

The contents of the written statement may be summarized as follow:

- a) It was contended that the will is unnatural, improbable and unfair, inasmuch as all the heirs and heiresses of the deceased are not included. The Defendant is the only daughter of the Testatrix and she had high respect for and faith on her mother. Relationship between herself and the Testatrix was very cordial. She used to visit her mother's home very frequently till death. At no point of time the Testatrix or the brother of the present Defendant or any of his family members informed or disclosed to the Defendant that the instant will had been executed by the Testatrix. The Defendant has no curiosity about the properties which had been acquired by the Testatrix during her life time. 10 to 12 years prior to her death, at the age of 82, the Testatrix had been suffering from amnesia. Before her death, she used to tell the Defendant that all her properties including jewelleris would be divided between the Defendant and her brother, being the son of the Testatrix. The ornaments of the Testatrix are not disclosed in the affidavit of assets.

- b) According to the Defendant, the Executor of the will is the grandson of the Testatrix. In the circumstances, it raises a reasonable doubt about genuineness of the will and gave rise to a suspicious circumstance surrounding execution of the will. The Executor is in ploy to grab the entire properties of the Testatrix, as alleged. The alleged will was prepared under suspicious circumstances.
- c) The alleged will was not properly executed, according to the Defendant. Bimal Kumar Bazaz who was the biological son of the Testatrix was subsequently adopted by the brother-in-law of the Testatrix. It is alleged that will was procured under coercion or undue influence and by exercise of force; all these were done by Rajkumar Bazaz, his son Atul Kumar Bazaz, Bimal Kumar Bazaz and other family members of Rajkumar Bazaz.
- d) Both the attesting witnesses are dead. Bimal Kumar Bazaz filed a declaration and affidavit before this Court. The propounder also admitted that he along with Bimal Kumar Bazaz were present at the time of execution of the will. It is contended in the written statement that the Testatrix was a house wife and *Pardanasin* lady who could not have made or executed any document including any will of her own. When the will was executed she was about 80 years. From the execution to attestation of the alleged will of the deceased, as pleaded, it is crystal clear that the will was never made and

executed under the instruction of the Testatrix. Brother Atul Bazaz, Rajkumar Bazaz and Bimal Kumar Bazaz had forced the deceased to execute the will. They had sole intention to deprive the Defendant from her mother's property. It was reiterated that will was got executed under undue influence and force; the Testatrix did not have any free mind; the propounder and other family members took advantage of the old age and physical ailment of the deceased and induced her to make the will.

- e) According to the Defendant, the will was unnatural and fictitious; probate should not be granted to the will.

On the basis of rival pleadings, following issues were recast:

1. *Whether the instant Will is the last Will and Testament of the Testatrix?*
2. *Whether the Testatrix was physically fit and mentally alert at the time of execution of the Will?*
3. *Whether the Will was duly executed by the Testatrix?*
4. *Whether the execution of the Will is surrounded by any suspicious circumstances?*
5. *Whether the Will was procured by coercion or undue influence or fraud or ingenuine?*
6. *Whether the instant Will was genuine or not?*

7. Whether the petitioner is entitled to probate of the Will as prayed for?

Both the parties adduced evidence.

Issue No. 1, 2, 3, 4, 5, 6 & 7:

All the issues are taken up together.

The Learned Counsel for the Plaintiff Mr. Ghosh firstly argued that the attesting witnesses are all dead. Death certificates of the attesting witnesses are Ext. C & H. Therefore, the execution of the will is proved by attending witness who was present at the time of execution of the will. The attending witness is none other than the wife of the present Executor. The attending witness stated that Advocate G.P. Sharma who had prepared the will under instructions of the deceased/Testatrix had also passed away. The attending was cross-examined extensively without any yielding any discrepancy. Therefore, according to Mr. Ghosh, due execution of the will is proved.

Secondly, it was argued by Mr. Ghosh that Ext. E is the affidavit of consent affirmed by the Caveatrix which was duly notarized on 08/09/2006. Ext. E contains statement of the Caveatrix that her mother, the Testatrix duly executed the will. There was no cross-examination challenging this Ext. E.

Thirdly, it was argued by Mr. Ghosh that affidavit of consents of Bimal Kumar Bazaz and Rajkumar Bazaz are on record. There was no cross-examination either to PW 1 or PW 2 on affidavit of consent. Relying upon **A.E. G. Carapiet Vs. A.Y. Derderian (AIR 1961 Cal 359)**, Mr. Ghosh

submitted that the consent of Bimal Kumar Bazaz and Rajkumar Bazaz as well as Rani Goyenka stood unchallenged and hence admitted.

Fourthly, Mr. Ghosh argued that although it is alleged that the Testatrix had been suffering from amnesia by the time she executed the will, no evidence was produced on behalf of Caveatrix to support the contention. In fact, PW 2 Miss. Archana Bazaz deposed that the Testatrix had been suffering from old age related issues and nothing more. Therefore, according to Mr. Ghosh, the allegation of amnesia is not proved.

Fifthly, it was argued that DW 1 had no personal knowledge and deposed on the strength of a power of attorney. Therefore, the evidence can be discarded.

Mr. Ghosh finally argued that burden of proof is of the Defendant to prove suspicious circumstances, once such burden is discharged then only it shifts to the Plaintiff. The Defendant failed to discharge this burden. Moreover, registration of the will created presumption of genuineness and due execution of the will which have not been rebutted or set at naught by the Defendant. It is further submitted that burden of proof of the allegations of undue influence, fraud and coercion are on the Caveatrix which they failed to discharge. Mr. Ghosh relied upon **H. Venkatachala Iyengar Vs. B.N. Thimmajamma & Ors. (AIR 1959 SC 443); Rani Purnima Debi & Anr. Vs. Kumar Khagendra Narayan Deb & Anr. (AIR 1962 SC 567); Madhukar D. Shende Vs. Tarabai Aba Shedage [(2002) 2 SCC 85]** in support of his contention.

Per contra, the Learned Counsel for the Caveatrix firstly submitted that it is settled position of law that a party has to prove his own case even in absence of any defence. In the present case, the Defendant, due to her medical condition could not adduce evidence. Medical condition is an admitted position and DW 1 proved the same in cross-examination. DW 1 further stated that he was personally aware of the contention of the Defendant. Therefore, according to him, evidence is reliable and should be treated as the evidence of the Defendant.

Secondly, it was argued that the Plaintiff's argument regarding discharge of onus of proof is misplaced. The Plaintiff has deliberately withheld the best evidence from the Hon'ble Court. Hence, adverse presumption is bound to follow.

Thirdly, it was argued that the physical and mental condition of the deceased/Testatrix is still a mystery. None of the witnesses claimed to have any knowledge in medicine and their evidence in this context is, therefore, unreliable. The onus of proof of medical condition of the deceased/Testatrix was on the Plaintiff who failed to discharge the same.

Fourthly, it was argued that the issue of exclusion of the Caveatrix from the alleged bequeath made in the will is not properly explained. Mere reference to a custom within a family of the deceased cannot assist the case of the Plaintiff. This created a very strong suspicious circumstance surrounding the execution of the will.

Fifthly, it was argued the entire case of the Plaintiff was based on oral evidence, namely, PW 2 whose name did not appear anywhere in the record.

Her name was also admittedly missed out by her husband, PW 1 in the original deposition. Such name was subsequently put into record. DW 1 did not include the name of PW 2 in his original answer since he knew the PW 2 was not present at the time of execution of the will. There is no proof that PW 1 was the attending witness. Therefore, due execution of the will is not proved in terms of the Indian Evidence Act, 1872.

Finally it was argued that so far as Ext. E is concerned, no reliance can be placed on that document, since the affidavit in support of caveat overrules that affidavit. The affidavit in support of caveat explained the circumstances and the contention of the Caveatrix. The contentions of the Caveatrix, contained in affidavit in support of Caveat, should be taken to be true.

It was then argued that ratio and observation in **H. Venkatachala Iyengar's** case is not applicable in the instance case. It was submitted that burden of proof of absence of suspicious circumstance always remained on the propounder of the will. Since that burden of proof was not discharged. Probate cannot be granted.

I have heard rival submissions.

The written statement that is the affidavit supporting the caveat contained pleading to the extent that will was unnatural, improbable and unfair; the genuineness of the will was challenged and among other it was pleaded that will was executed under suspicious circumstances. However, it is not challenged that the instant will is the last will and testament of the Testatrix. PW 1, the Executor deposed to this extent that the instant will is

the last will and testament. Therefore, it is established that this is the last will and the testament of the Testatrix.

Attesting witnesses are dead for which execution of the will could not be proved by any such witness. Instead of that PW 2 came to depose as attending witness. She stated in examination-in-chief and reiterated in course of cross-examination that she was present at the time of the execution of the instant will. PW 2 stated that the attesting witnesses as well as the Testatrix executed and signed the will in her presence and she identified the signatures of the attesting witnesses as well as signature of the Testatrix. Requirement of Section 68 is must in case of a will. A will is to be proved in compliance with Section 68 of the Indian Evidence Act, 1872. One of the attesting witnesses must come before the Court to prove due execution of the same by the testator or the testatrix. But there may be situations when the attesting witnesses are dead or not formed. Section 69 of the Indian Evidence Act, 1872 provides a gateway in that situation. Section 69 states:

“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 documents is in the handwriting of that person.”

In **Babu Singh v. Ram Sahai [(2008) 14 SCC 754]** scope of section 69 of the Indian Evidence Act was considered by the Supreme Court of India:

17. It would apply, inter alia, in a case where the attesting witness is either dead or out of the jurisdiction of the court or kept out of the way by the adverse party or cannot be traced despite diligent search. Only in that event, the will may be proved in the manner indicated in Section 69 i.e. by examining witnesses who were able to prove the handwriting of the testator or executant. The burden of proof then may be shifted to others.

In **V. Kalyanaswamy v. L. Bakthavatsalam** [**V. Kalyanaswamy v. L. Bakthavatsalam**, [(2021) 16 SCC 543] scope of section 68 and 69 of the Indian Evidence Act was again considered and explained by the Supreme Court of India :

“117. Reverting back to Section 69 of the Evidence Act, we are of the view that the requirement therein would be if the signature of the person executing the document is proved to be in his handwriting, then attestation of one attesting witness is to be proved to be in his handwriting. In other words, in a case covered under Section 69 of the Evidence Act, the requirement pertinent to Section 68 of the Evidence Act that the attestation by both the witnesses is to be proved by examining at least one attesting witness, is dispensed with. It may be that the proof given by the attesting witness, within the meaning of Section 69 of the Evidence Act, may contain evidence relating to the attestation by the other attesting witness but that is not the same thing as stating it to be the legal requirement under the Section to be that attestation by both the witnesses is to be proved in a case covered by Section 69 of the Evidence Act. In short, in a case covered under Section 69 of the Evidence Act, what is to be proved as far as the attesting witness is concerned, is, that the attestation of one of the attesting witness is in his handwriting. The language of the Section is clear and unambiguous. Section 68 of the Evidence Act, as interpreted by this Court, contemplates attestation of

both attesting witnesses to be proved. But that is not the requirement in Section 69 of the Evidence Act.”

In **Ashutosh Samanta v. Ranjan Bala Dasi [(2023) 19 SCC 448]**, both attesting witnesses had died. The two sons of the testator deposed about their presence when the will was signed by him. They also identified the signatures of Nivas Bhuiya, who drew and signed the will. In addition, one Phani Bhusan Bhuiya (PW 4), son of Nivas Bhuiya, deposed. In his evidence he deposed to having been present when the testator and the two attesting witnesses signed the will; he was able to identify their signatures. Referring to previous decisions, it was observed that in the event where attesting witnesses may have died, or cannot be found, the propounder is not helpless, as Section 69 of the Evidence Act, 1872 is applicable. In the instant case, P.W.2 being the attending witness and close relative of the deceased was present at the time of execution of the will and proved execution and attestation of the will. Her evidence withstood cross examination. Therefore, testimony of P.W.2 can be accepted and relied upon to consider due execution of the will.

It is alleged in the written statement that Testatrix have been suffering from amnesia at the time of execution of the will. Because of such amnesia, she was misguided and was influenced to execute this will. In examination-in-chief, both PW 1 and PW 2 stated that except issues related to old age, the Testatrix was physical fit and mentally alert at the time of execution of the will. This was confirmed in course of cross-examination by the witnesses. Thus, by adducing oral evidence, confirmed in cross-examination, burden of proof was discharged by the Plaintiff. Once they discharged their burden of proof, it was shifted to the Defendant to disprove the same.

DW 1 is the constituted attorney of the Caveatrix. He had never seen the Testatrix. He has no personal knowledge as to whether the Testatrix had been suffering from amnesia. No medical document was produced. In course of cross-examination, DW 1 admitted that he has no personal knowledge on his health condition of the Testatrix. The shifted burden of proof, thus, was not discharged by the Defendant. Therefore, it is established that the Testatrix had physical and mental capacity to execute the will.

The Caveatrix challenged the will on several grounds. Firstly it was alleged in the written statement that disposition by the will is unnatural, improbable and unfair for the reasons that all the heirs and heiresses of the Testatrix were not included. Testamentary disposition of property to the grandson he is not unnatural disposition; the grandson is very much closely related to a testator or a testatrix. No reason is needed, in fact, for depriving the sons and daughters. It is not necessary that the testator or the testatrix should compulsorily bestow his legal heirs and successors exclusively with his or her blessings. This argument cannot be accepted therefore.

Secondly, it was argued that the execution of the will was surrounded by the suspicious circumstances. Unnatural disposition was mentioned as one of the suspicious circumstances. As stated above, the disposition is no way unnatural. The execution of the will was attenuated in presence of a doctor and family members. The signature of the Testatrix was also identified by the witnesses. This apart the will is a registered one which though not conclusively yet raises a presumption of genuineness of the same. The Caveatrix did not examine herself because of her illness. The

constituted attorney had not enough personal knowledge as deposed. More so, Ext. E is the affidavit sworn by the Caveatrix before notary public where she stated that the will dated 8th December, 2005 executed by her mother Sita Devi Bazaz, was her last will and testament and the said will was validly executed. She also signified her consent in grant of probate in the will. This document is not challenged. She for this or that reason did not appear before this Court to depose, in which case, this Court could get clarification from her on this dichotomy and divergence. In absence, it may be considered that the Defendant, on two different occasions made two different and contradictory statements. Though it is in the form of affidavit there is no evidence challenging the contention of this document.

It is also alleged in the written statement that the will got executed by the Testatrix under force, coercion and undue influence. There is no cavil on the point of law that burden of proof is on the person who alleges that will was executed under coercion, undue influence or force. The principal of law had long been enunciated by the Supreme Court of India in **H. Venkatachala Iyengar Vs. B.N. Thimmajamma and Ors. (AIR 1959 SCC 443)** reiterated in **Rani Pnrnima Debi and Anr. Vs. Kumar Khagendra Narayan Deb and Anr. (AIR 1962 SCC 567)** and others subsequent judgments. In **Shivakumar v. Sharanabasappa [(2021) 11 SCC 277]**, three Judges' Bench of the Supreme Court of India, after considering the observations made in **H. Venkatachala Iyengar Vs. B.N. Thimmajamma and Ors. (supra)**, **Rani Pnrnima Debi and Anr. Vs. Kumar Khagendra Narayan Deb and Anr. (supra)** as well as other cases deduced the following principles:

“**12.** For what has been noticed hereinabove, the relevant principles governing the adjudicatory process concerning proof of a will could be broadly summarised as follows:

12.1. Ordinarily, a will has to be proved like any other document; the test to be applied being the usual test of the satisfaction of the prudent mind. Alike the principles governing the proof of other documents, in the case of will too, the proof with mathematical accuracy is not to be insisted upon.

12.2. Since as per Section 63 of the Succession Act, a will is required to be attested, it cannot be used as evidence until at least one attesting witness has been called for the purpose of proving its execution, if there be an attesting witness alive and capable of giving evidence.

12.3. The unique feature of a will is that it speaks from the death of the testator and, therefore, the maker thereof is not available for deposing about the circumstances in which the same was executed. This introduces an element of solemnity in the decision of the question as to whether the document propounded is the last will of the testator. The initial onus, naturally, lies on the propounder but the same can be taken to have been primarily discharged on proof of the essential facts which go into the making of a will.

12.4. The case in which the execution of the will is surrounded by suspicious circumstances stands on a different footing. The presence of suspicious circumstances makes the onus heavier on the propounder and, therefore, in cases where the circumstances attendant upon the execution of the document give rise to suspicion, the propounder must remove all legitimate suspicions before the document can be accepted as the last will of the testator.

12.5. If a person challenging the will alleges fabrication or alleges fraud, undue influence, coercion et cetera in regard to the execution of the will, such pleas have to be proved by him, but even in the absence of such pleas, the very circumstances surrounding the execution of the will may give rise to the doubt or as to whether the will had indeed been executed by the testator and/or as to whether the testator was acting of his own free will. In such eventuality, it is again a part of the initial onus of the propounder to remove all reasonable doubts in the matter.

12.6. A circumstance is “suspicious” when it is not normal or is “not normally expected in a normal situation or is not expected of a normal person”. As put by this Court, the suspicious features must be “real, germane and valid” and not merely the “fantasy of the doubting mind”.

12.7. As to whether any particular feature or a set of features qualify as “suspicious” would depend on the facts and circumstances of each case. A shaky or doubtful signature; a feeble or uncertain mind of the testator; an unfair disposition of property; an unjust exclusion of the legal heirs and particularly the dependants; an active or leading part in making of the will by the beneficiary thereunder et cetera are some of the circumstances which may give rise to suspicion. The circumstances abovenoted are only illustrative and by no means exhaustive because there could be any circumstance or set of circumstances which may give rise to legitimate suspicion about the execution of the will. On the other hand, any of the circumstances qualifying as being suspicious could be legitimately explained by the propounder. However, such suspicion or suspicions cannot be removed by mere proof of sound and disposing state of mind of the testator and his signature coupled with the proof of attestation.

12.8. The test of satisfaction of the judicial conscience comes into operation when a document propounded as the will of the testator is surrounded by suspicious circumstance(s). While applying such test, the court would address itself to the solemn questions as to whether the testator had signed the will while being aware of its contents and after understanding the nature and effect of the dispositions in the will?

12.9. In the ultimate analysis, where the execution of a will is shrouded in suspicion, it is a matter essentially of the judicial conscience of the court and the party which sets up the will has to offer cogent and convincing explanation of the suspicious circumstances surrounding the will.”

Coming to the case in hand, P.W.1 and P.W.2 deposed and extensively cross examined. Physical and the mental capacity of the testatrix was normal, as discussed above. Disposition of property was to the grandson of the testatrix, which though alleged to be unnatural, is not so, being confined within filial relationship. The testatrix stated in the will that since her daughter and son are well settled, she did not make any provision for them. These reasons are enough to justify the bequest. Probate court is not a court of appeal over the will; it rather sits in the armchair of the testator or testatrix to make the will efficacious. In other words, the propounder of the will proved and established due execution of the will and stirred clear all the clouds of suspicions.

Caveatrix/Defendant failed to discharge this burden of proof cast on her. She failed to establish any undue influence, coercion or force, as alleged to be exerted on the testatrix. D.W.1 had no personal knowledge either of the testatrix or on the attenuating circumstances. More so, on previous

occasion she stated in Ext.E that the will was duly executed. There is no reason or explanation as to why suddenly the issues of undue influence, coercion or force cropped up. She did not come before this Court for illness. No iota of evidence was adduced to establish the alleged facts of undue influence, force or coercion. Therefore, the allegation of undue influence, force or coercion is not proved.

In conclusion, this Court is of opinion that the last will and testament of the Testatrix dated 8th December, 2005 was duly executed in accordance with Section 63 of the Indian Succession Act, 1925.

All these issues are decided in favour of Plaintiff.

In nutshell, the instant suit succeeds.

Let the probate be granted to the last will and testament dated 8th December, 2005 of the Testatrix Sita Devi Bazaz.

The instant suit is disposed of.

Inventory and accounts shall be filed within the six months.

(Sugato Majumdar, J.)