

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

Present:

The Hon'ble Justice Sugato Majumdar

**TS/26/2018
IA NO: GA/1/2018 (Old No: GA/558/2018)**

**IN THE GOODS OF:
GIRINDRA KISHORE PAL CHOUDHURY, DEC.
-AND-
RANJUSREE PAL
-VS-
SUPARNA PAL CHOWDHURY & ORS.**

For the Plaintiff : Mr. A.C. Kar, Sr. Adv.
Ms. Sarmila Das, Adv.

Hearing concluded on : 26/03/2025

Judgment on : 03/04/2025

Sugato Majumdar, J.:

This is an application for grant of letters of administration of the last will and testament of the deceased Girindra Kishore Pal Choudhury dated 30/11/2006.

The Testator Girindra Kishore Pal Choudhury breathed his last on 29/04/2015. His last abode was at 123, M.S. Mukherjee Road, P.O – B.D. Sopan, P.S: Khardah, District – 24 Parganas (N), Kolkata – 700116. Prior to his death, the Testator made his last will and testament on 30/11/2006 appointing his two sons, Subir Pal Chowdhury and Prabir Pal Choudhury as joint and several executors. One

of the executors, Subir Pal Chaudhury breathed his last prior to the death of the Testator. The said Subir Pal Chaudhury died intestate leaving behind him his widow and son.

There are two attesting witnesses of the will, namely, Swapan Debnath and Rathin Saha and the executant was identified by Sri Somnath Chakraborty, Advocate on the same day before the Notary Public Mr. Sita Ram Shaw.

One of the attesting witnesses, Swapan Debnath expired on 03/06/2015. A copy of death certificate is annexed to the instant application. Death certificates of the Testator as well as the deceased Executor are also annexed along with the instant application.

The sole surviving Executor of the will avoided to make application for grant of probate in spite of repeated persuasions by the present Petitioner who is the beneficiary of the will. On being constrained the Beneficiary filed the present application for grant of letter of administration of the last will and testament of the Testator dated 30/11/2006.

General and special citations were issued.

Caveats were filed on behalf of Smt. Suparna Pal Choudhury, wife of the deceased Executor Subir Pal Chaudhury. Prabir Pal Chaudhury who was appointed as the other executor, renounced his executorship by filling an affidavit in this Court, to that extent and lodged caveat. Both the Caveatrix and the Caveator filed affidavit supporting the caveats.

Contentions of Sri Prabir Pal Chaudhury are that the will is not a genuine will, it's rather an unnatural will. The Testator had no intention to execute any such will. Both the sons of the Testators were in his good book. The Executors, being the

sons of the Testators are the owners of the demised property located at Salt Lake, Kolkata. The Testator never expressed any willingness during his lifetime to execute any will in respect of the demised property. The instant will is a product of fraud and evil machination of the propounder who received substantial benefit under the will. The Testator was a man of weak intellect, too old and mentally retarded and devoid of understanding. The Testator must not have executed the will, as alleged. The beneficiary, being the present Petitioner is a stranger to the family. Testamentary disposition of property in her favour is unnatural raising serious cloud surrounding execution. All other contentions of the instant application are denied.

Similarly, the contentions of the Caveatrix Smt. Suparna Pal Choudhury, are that the instant will was never executed by the Testator. The Testator was a man of weak intellect, too old and mentally retarded and devoid of understanding. The instant will is product of fraud and evil machination of the propounder. All other contentions of the instant applications were refuted.

The probate proceeding became contentious on filing of the caveats. It was renumbered.

Following issues were framed:

- 1. Whether the instant will is the last will and testament of the deceased Girindra Kishore Pal Choudhury?*
- 2. Whether the Testator was physically fit and mentally alert at the time of execution of the will?*
- 3. Whether the will was properly executed in terms of law?*

4. Whether the execution of the will was tainted with suspicious circumstances?

5. Whether the will was got executed by practicing fraud and exercise of evil machination by the propounder of the will?

6. Whether letter of administration can be granted, as prayed for?

Oral as well as documentary evidences were adduced. Beneficiary of the will, one of the attesting witnesses Rathin Saha and one advocate in whose presence the instant will is said to be executed, were examined as witnesses on behalf of the Plaintiff. Although the Defendants contested the probate proceeding they did not produce any witness though P.W. 1 and P.W. 2 were cross-examined by the Defendants.

Issue No.1:

The Defendants, although refuted all the contentions made in the application, did not raise any defense that the Testator left behind him any subsequent will whereby the present will had been cancelled. It is the defense case that the present will was got executed by practicing fraud, not that any other subsequent will was there. Therefore, it is decided that the instant will is the last will and testament of the deceased Girindra Kishore Pal Choudhury.

This issue is decided in favour of the Plaintiff.

Issue No. 2,3,4,5:

All these issues are taken up together since these are co-related issues.

It is asserted and pleaded in the probate application that the instant will is the last will and testament of the Testator and it was executed in accordance with law.

Section 63 of the Indian Succession Act, 1925 provides with mode of execution of unprivileged will.

“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.”

Section 68 of the Indian Evidence Act provides:

“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.”

Section 69 provides with mode of proof of a document where no attesting witness is found.

“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.”

In the instant case one of the attesting witnesses was examined since the other attesting witness is dead. Section 71 of the Indian Evidence Act, 1872 is relevant herein:

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

Mr. Kar, the Learned Senior Counsel appearing for the Plaintiff argued that the only attesting witness who was examined could not recollect the attestation of the will. In that circumstance the Plaintiff examined another witness in whose presence the attesting witness attested the will by putting his signature. Execution and attestation of the will has duly been proved under Section 71 of the Indian Evidence Act, 1872 according to Mr. Kar. It is further argued by Mr. Kar that the Petitioner was present at the time of execution of the will. The Petitioner identified the signatures of the Testator. The wife of the Testator was also present at the time of execution of the will. The whole array of evidence proves the execution of the will repelling any cloud of doubt surrounding execution and attestation of the will. The Learned Counsel relied on the decision of the Supreme Court of India **Janki**

Narayan Bhoir Vs. Narayan Namdeo Kadam [(2003) 2 SCC 91] to support his contention that due execution of the will may be proved with aid of Section 71 of the Indian Evidence Act, 1872 where the attesting witness fails to recollect execution of the document.

As stated above, execution and due attestation of a will is governed by Section 63 of the Indian Succession Act, 1925 whereas Section 68 of the Indian Evidence Act, 1872 provides mode of proof of a will. A person propounding the will must prove that it was duly and validly executed and shall also repel any clouds of suspicion surrounding the execution of the will. Although the will is required to be attested by two witnesses, for the purpose of proof of the will one attesting witness can be examined to prove the execution of the will. But the said single attesting witness must be in a position to prove the execution of the will. He must prove that the will was signed by the Testator and attested by two attesting witnesses in accordance with Section 63 (c) of the Indian Succession Act, 1925. Observations made by the Supreme Court of India in **Janki Narayan Bhoir's** case (supra) may be referred to:

“11. Section 71 of the Evidence Act is in the nature of a safeguard to the mandatory provisions of Section 68 of the Evidence Act, to meet a situation where it is not possible to prove the execution of the will by calling the attesting witnesses, though alive. This section provides that if an attesting witness denies or does not recollect the execution of the will, its execution may be proved by other evidence. Aid of Section 71 can be taken only when the attesting witnesses, who have been called, deny or fail to recollect the execution of the document to prove it by other evidence. Section 71 has no application to a case where one attesting witness, who alone had been summoned, has failed to prove the execution of the will and other attesting witnesses though are available to prove the execution of the same, for reasons

best known, have not been summoned before the court. It is clear from the language of Section 71 that if an attesting witness denies or does not recollect execution of the document, its execution may be proved by other evidence. However, in a case where an attesting witness examined fails to prove the due execution of will as required under clause (c) of Section 63 of the Succession Act, it cannot be said that the will is proved as per Section 68 of the Evidence Act.”

In **Jagdish Chand Sharma Vs. Narain Singh Saini [(2015) 8 SCC 615]** the scope of Section 63 (c) of the Indian succession Act, 1925 as well Section 68 and Section 71 of the Indian Evidence Act, 1872 was considered again referring to **Janki Narayan Bhoir’s** case:

“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. Any unwarranted indulgence, permitting extra liberal flexibility to these two stipulations, would render the predication of Section 63 of the Act and Section 68 of the 1872 Act, otiose. The propounder can be initiated to the benefit of Section 71 of the 1872 Act only if the attesting witness/witnesses, who is/are alive and is/are produced and in clear terms either denies/deny the execution of the document or cannot recollect the said incident. Not only, this witness/witnesses has/have to be credible and

impartial, the evidence adduced ought to demonstrate unhesitant denial of the execution of the document or authenticate real forgetfulness of such fact. If the testimony evinces a casual account of the execution and attestation of the document disregarding truth, and thereby fails to prove these two essentials as per law, the propounder cannot be permitted to adduce other evidence under cover of Section 71 of the 1872 Act. Such a sanction would not only be incompatible with the scheme of Section 63 of the Act read with Section 68 of the 1872 Act but also would be extinctive of the paramountcy and sacrosanctity thereof, a consequence, not legislatively intended. If the evidence of the witnesses produced by the propounder is inherently worthless and lacking in credibility, Section 71 of the 1872 Act cannot be invoked to bail him (the propounder) out of the situation to facilitate a roving pursuit. In absence of any touch of truthfulness and genuineness in the overall approach, this provision, which is not a substitute of Section 63(c) of the Act and Section 68 of the 1872 Act, cannot be invoked to supplement such failed speculative endeavour.”

Coming to the case in hand, the petitioner was examined as PW 1, she testified that the will was signed by Girindra Kishore Pal Choudhury, the Testator in his presence. The petitioner proponent of the will deposed in this case. She identified the signatures of the Testator. He stated that he signed the document in front of his Advocate Birendra Chandra Chakraborty. She was not cross-examined.

Mr. Birendra Chandra Chakraborty stated in examination-in-chief that he was well-acquainted with the signature of the Testator. Mr. Rathin Saha deposed as attesting witness. In examination-in-chief, he was asked whether he did know Girindra Kishore Pal Choudhury who signed the will; he answered:

“I do not know him”.

In examination-in-chief, he also stated that he could not remember the exact time of signing of the document. Suggestion was given to him that signature in the will was that of Girindra Kishore Pal Choudhury being the Testator and he signed the same in his presence of this witness to which he replied that he did not agree. He stated that he signed the will as per dictate of Somnath Chakraborty, Advocate; after advocate Somnath Chakraborty signed the will he asked the witness to put signature on the will. Suggestion was also given in Question no.36 that signature of Girindra Kishore Pal Choudhury was put in presence of Somnath Chakraborty while the witness was present to which he answered:

“When learned advocate Somnath Chakraborty and I signed on the Will, Mr. Girindra Kishore Pal Chowdhury was not present.”

In answer to Question no. 37 he stated:

“Learned advocate Somnath Chakraborty after putting his signature on the will had asked me to sign on the will and I do not know whether the signature of Girindra Kishore Pal Choudhury was there or not. I did not see because in our shersta many a times it happens he signed a document without going through the particulars.”

Once again, he was asked in Question no. 41 that Girindra Kishore Pal Choudhury had signed the will in his presence he disagreed and stated that Testator was not present. Again, suggestion was given to him in Question no. 47 that all the attesting witnesses and Mr. Somnath Chakraborty were present when this will was executed by the Testator in the chamber of Mr. Somnath Chakraborty. His answer was:

“I do not agree. Only the learned advocate Mr. Somnath Chakraborty was present at the sheresta at that point of time.”

In answer to Question no. 61 he reiterated that no one was present except himself and Mr. Somnath Chakraborty. In answer to Question no. 63 he stated that Mr. Somnath Chakraborty gave him a will and said that the former signed the will and asked the witness to put signature of that. In answer to Question no. 71 he reiterated that when the document was signed by the witness and Mr. Somnath Chakraborty only two persons, namely, the witness and advocate Somnath Chakraborty was present. Again, he answered in reply to the Question no. 74 that he did not know the Testator and there was no third person of the room at the point of time. Question no. 75 as well as Question no. 79 with their answer can be quoted here:

Question No.75: - “I am suggested it to you that Girindra Kishore Pal Choudhury was personally present when this document was signed in the serestha? / No.”

Question No.79: - “All the signatures appearing in the Will of Girindra Kishore Pal Choudhury is that of the testator himself? / I cannot say that. I do not know him and I do not know his signature also.”

In answer to Question no. 80 he reiterated that he neither knew Girindra Kishore Pal Choudhury nor his signature.

Evidence of the attesting witness Mr. Rathin Saha is clear and unambiguous. Repeated questions were put to him and his repeated answer is - he did not see the Testator to put signature in the will in his presence. He was not acquainted with the signature of the Testator. There is no ambiguity in evidence. In very clear terms it was stated when he put signature in the will as an attesting witness, only himself and

Somnath Chakraborty was present. Testimony of the attesting witness Mr. Rathin Saha is very clearly proved that neither it's a case of oblivion nor denial of execution. He did not say that Girindra Kishore Pal Choudhury was not signatory to the document. In other words, he never said that Girindra Kishore Pal Choudhury did not sign the document. On the other hand, there is no denial of his attestation of the document. This is a case with neither comes within the ambit of Section 71 of the Indian Evidence Act, 1872.

Attesting witness, namely, Mr. Rathin Saha was not present when the Testator was not signed the document. When this attesting witness put his signature on the will, neither the Testator was present, nor his signatures were there on the will. The attesting witness put his signature not in presence of the Testator. Somanth Chakraborty was not examined in this case. Moreover, since this is neither a case of oblivion or denial Section 71 cannot be resorted to. The will was to be proved in terms of Section 68 of the Indian Evidence Act, 1872. Therefore, it is inevitable conclusion that the execution and the attestation of the will are not proved in accordance with the mandatory provisions of Section 63(c) of the Indian Succession Act, 1925 read with section 68 of the Indian Evidence Act, 1872. In nutshell, the execution of the will is not proved as a result of which letter of administration, as prayed for, is hereby refused and the will is not eligible for probate. All these issues are decided accordingly.

Issue no. 6 & Additional Issue:

Since it is concluded that execution and attestation of the will is not proved. Considerations of these issues are redundant.

In nutshell, the instant application stands dismissed. The instant application stands disposed of accordingly with pending applications, if any.

(Sugato Majumdar, J.)