

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

Present:

The Hon'ble Justice Sugato Majumdar

TS/1/2007

IA NO: GA/8/2014 (Old No: GA/1514/2014),

GA/9/2014 (Old No: GA/2312/2014)

IN THE GOODS OF: GOUR LAL MITRA, (D)

-AND-

KAMAL KR. MITRA

VS

KUM KUM BISWAS & ORS.

With

CS/90/2008

IA NO: GA/10/2015(Old No: GA/2234/2015)

CHANDRA DAS & ORS.

VS

KAMAL MITRA

For the Plaintiff in TS/1/2007 &

for the Defendant in CS 90/2008

:

Mr. Dhruba Ghosh, Sr. Adv.

Mr. Debraj Sahu, Adv.

Ms. Debjani Ghosh, Adv.

Ms. Nafisa Yasmin, Adv.

For the Plaintiff in CS/90/2008 &

for the Defendant in TS/1/2007

:

Mr. Suman Dutt, Sr. Adv.

Mr. Sarosij Dasgupta, Adv.

Ms. Subhra Das, Adv.

Hearing concluded on

:

03/02/2026

Judgment on

:

24/02/2026

Sugato Majumdar, J.:

This is a contentious probate proceeding.

Deceased Gour Lal Mitra who was the Testator in the instant suit, was a Hindu and last resided at premises no. 5/1A, Raja Rajballav Street, Kolkata-700003. The said Gour Lal Mitra breathed his last on the 3rd day of June, 2005 in his residence. Prior to death, the Testator executed a will, said to be the last will and testament, dated 28th February, 2001 which was registered in Book No. III, Volume No. 3, Pages 292 to 302, Being No. 153 for the year 2001 at the office of the Registrar of Assurances, Kolkata. The Petitioner was appointed as the Executor.

On death of the Testator, the present application was filed by the Petitioner, praying for grant of probate of the said last will and testament dated 28/02/2001.

Citations were issued, following which several caveats were lodged, supported by respective affidavits in support of caveats. The Caveators and the Caveatrixes are one of the sons of the Testator and his daughters are the Caveatrixes. The present Petitioner is one of the sons of the Testator, the other being the Caveator.

Caveats were allowed and the affidavits in support of caveats were treated as written statement. The suit was renumbered and the Caveators as well as Caveatrixes became the Defendants.

The contention of the written statement filed by the original Defendant No. 1, Shyamal Kumar Mitra may be summarized as follow:

- a) The Testator, Gour Lal Mitra, at the time of his death, had only transferrable interests in respect of the premises no. 9, Nobin Chandra Boral Lane, Kolkata-700012.
- b) Adhar Kumar Mitra, since deceased, father of late Gour Lal Mitra was the absolute owner and was in possession of the following properties at the time of his death:-

- (i) 5/1A, Raja Rajballav Street, Kolkata – 700003.
 - (ii) 5/2A, Raja Rajballav Street, Kolkata – 700003.
 - (iii) 5/2B, Raja Rajballav Street, Kolkata – 700003.
 - (iv) 5/2C, Raja Rajballav Street, Kolkata – 700003.
 - (v) 5/2D, Raja Rajballav Street, Kolkata – 700003.
 - (vi) 5/2E, Raja Rajballav Street, Kolkata – 700003.
 - (vii) 5/2F, Raja Rajballav Street, Kolkata – 700003.
 - (viii) 6/1, Raja Rajballav Street, Kolkata – 700003.
 - (ix) 11C, Gokul Mitra Lane, Kolkata – 700005.
 - (x) 15, Gokul Mitra Lane, Kolkata – 700005.
 - (xi) 17, Gokul Mitra Lane, Kolkata – 700005.
 - (xii) 11A, Raja Dinendra Street, Kolkata – 700009.
 - (xiii) 11D, Gokul Mitra Lane, Kolkata – 700005.
 - (xiv) 11B, Raja Dinendra Street, Kolkata – 700009.
- c) Adhar Kumar Mitra, prior to his death, executed one of will on 21/04/1944 which had been registered on 28/04/1944 in the office of the Registrar of Calcutta. In terms of the will, the said Adhar Kumar Mitra, since deceased, bestowed life interests on his two sons, namely, Gour Lal Mitra and Netai Lal Mitra, Prativa Bala Mitra being widow of one pre-deceased son Bhupendra Lal Mitra and two daughters, namely, Sushama Bose and Rajlaxmi Dutta.

The said Adhar Kumar Mitra appointed his two surviving sons as the managers of his estate; it was provided that the daughter-in-law would get Rs.25/- per month from the estate of Adhar Kumar Mitra. The will further provided that, apart from payment of maintenance to the two daughters and widow daughter-in-law, the granddaughter shall be entitled to Rs.10/- per month till marriage. It was further provided in the will that on death of the two sons of Adhar Kumar Mitra, the estate would absolutely vest on the sons and daughters of Gour Lal Mitra and Nitai Lal Mitra whereby and whereunder the said sons and daughters would be the absolute owner of the estate in equal shares. Thus, it is pleaded in the written statement that Adhar Kumar Mitra specifically mentioned in his will that his sons Gour Lal Mitra and Nitai Lal Mitra would not be able to dispose of by way of mortgage, transfer or gift of any of the immovable properties and anything done contrary to this stipulation should be treated as void.

- d) The said Adhar Kumar Mitra, since deceased, appointed in his will, Gour Lal Mitra, Nitai Lal Mitra and one of the son-in-law Sekhar Kumar Basu as an Executor of the will but all of them expired. In terms of the will of the said Adhar Kumar Mitra, since deceased, the entire estate stood vested on the sons and daughters of Gour Lal Mitra in view of the fact that the other son Nitai Lal Mitra died on 29/05/1952 as bachelor.
- e) On death of Gour Lal Mitra, an enquiry was conducted by his heirs for a copy of the probate of the will of late Adhar Kumar Mitra which had been taken by Gour Lal Mitra during his life time. In

fact, Gour Lal Mitra informed his sons and daughters that probate of the will of the Adhar Kumar Mitra dated 21/04/1944 had already been granted. But on enquiry it was found out that probate of the will was not granted by this Court and the executors did not apply for grant of probate with *mala fide* intention.

- f) Certified copy of the registered will of the said Adhar Kumar Mitra, since deceased, was obtained by the Defendant No. 1 on 05/09/2005 and the same had been distributed among the daughters and the second son of Gour Lal Mitra, namely, Kamal Kumar Mitra who was the original Plaintiff/Applicant. In view of the fact that the Executors of the will of the said Adhar Kumar Mitra had died, the present Defendants were taking steps for grant of Letters of Administration in respect of the will of the said Adhar Kumar Mitra.
- g) It was further pleaded that the Testator Gour Lal Mitra had no transferable right, title or interests in respect of the estate of his father Adhar Kumar Mitra and any will executed by the Testator is of no consequence or effect so far as the estate of Adhar Kumar Mitra is concerned. The instant will may be effective in respect of the self-acquired properties of the Testator.
- h) It is denied that Gour Lal Mitra ever executed any will during his lifetime and the instant will was obtained by undue influence, suppression of fact and coercion.
- i) There was no special cordial relationship between Gour Lal Mitra and the Petitioner Kamal Kumar Mitra. The Testator herein, in

spite of full knowledge of will of his father late Adhar Kumar Mitra had not executed the will dated 08/02/2001 and the signature of Gour Lal Mitra was obtained by undue influence. There was no valid execution of the will dated 28/02/2001 as the Gour Lal Mitra had no right, title or interests of testamentary bequeath of the estate of Adhar Kumar Mitra, since deceased.

- j) It was further pleaded that Gour Lal Mitra had no transferable the right in the properties involved in the will dated 28/02/2001 except the premises no. 9, Nobin Chandra Boral Lane, Kolkata-700012 which was originally in the name of the wife of Gour Lal Mitra. The Testator owned the property on the strength of a will executed by his wife, namely, the mother of the Defendant no. 1. It was alleged that no notice of the probate proceeding was served on the Defendant.
- k) The Testator imparted sufficient education to both of his sons, namely, the Plaintiff and the Defendant no. 1. The Defendant no. 1 is in service of a bank whereas the Plaintiff is an engineer gainfully employed in NICCO wherefrom he retired voluntarily. There was no disharmony in the relationship between the Testator and his sons and daughters; as such, the will in question had projected a false reflection of relationship, professed to have existed between the Testator and his sons and daughters. This raises suspicion and apprehension of procurement of will of the Testator, exercising undue influence, coercion and fraud. It is further pleaded that the will is silent and did not speak out any reason for denial of properties to his daughters and the other son. It is reiterated that

the disposition of the property under the will is unnatural and his result of undue influence.

Written statement filed by the other Defendants, namely, Kum Kum Biswas, Jhum Jhum Sen and Chandra Das contained same pleading which need not be reiterated for the sake of brevity.

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

1. Whether the instant will was the last will and Testament of the Testator, namely, Gour Lal Mitra?
2. Whether the Testator had mental capacity and physical ability to execute the will?
3. Whether the will was executed out of volition, free will of the Testator?
4. Whether the Testator had testamentary capacity to execute the will?
5. Whether the will got executed by practicing fraud, undue influence and coercion on the Testator ?
6. Whether the execution of the will was surrounded by suspicious circumstances and whether the Plaintiff is able to dispel such suspicion?
7. Whether the will was executed in terms of Section 63 of the Indian Succession Act, 1925?
8. Whether the Plaintiff is entitled to grant of probate?
9. What are relief or reliefs the Plaintiff is entitled to?

Issue No. 1

It is not the case of the Defendants that the instant will was not the last will and testament of the Testator; it is not in the pleading that there was another will of the Testator subsequent to execution of the instant will. Therefore, it is concluded that this is the last will and testament of the Testator, subject to prove of due execution.

Issue No. 2

Testamentary capacity of the Testator is in challenge.

Mr. Ghosh, the Learned Senior Counsel for the Plaintiff argued that the Testator, at the time of the execution of the will was in perfect sound state of mind and good physical health; he had physical ability and mental stability to execute the will. The Learned Senior Counsel invited attention of this Court to the testimony of PW-1 who stated in course of examination in chief that the Testator was physically fit and mentally alert at the time of execution of the will. The Learned Senior Counsel also referred to the deposition of PW-3 who answered affirmative as to the physical and mental condition of the Testator at the time of execution of the will. Physical and mental stability was also admitted by the DW-1 in course of cross-examination. Then the Learned Senior Counsel referred to the deposition of PW-2 who stated that he accompanied the Testator for registration at the office of the Registrar of Assurance, Kolkata on the very same day of execution of the instant will. They covered the distance from the office of the solicitor to the office of the Registrar of Assurance by walk. They discussed on various issues which shows that the Testator was physically fit and mentally alert at the time of execution of the will.

Challenging the testamentary capacity of the Testator, Mr. Dutta, the Learned Senior Counsel for the Defendants argued that the assets covered under the instant will belonged to the estate of late Adhar Kumar Mitra. The will dated 21/04/1944, executed by the late Adhar Kumar Mitra bequeathed only life interest to his son late Gour Lal Mitra, since deceased, who did not have any right to further bequeath the properties. The Defendants produced documentary evidences to establish that probate of the will of late Adhar Kumar Mitra, had been duly granted by the Additional District Judge at Alipore. Referring to the testimony of the witnesses and documentary evidences, the Learned Senior Counsel submitted that the Testator had not mental capacity at the time of execution of the instant will, otherwise knowing fully well that he had only life interest and no capacity to dispose of the properties he could not have bequeathed these properties by testamentary device. These establish that the Testator had no proper mental capacity to execute the will.

I have heard rival submissions on this point.

Testimony of the witnesses deposed that the Testator was mentally alert and physically fit at the time of execution of the will. DW-1 was asked in course of cross-examination as to whether the Testator was a weak willed person. She denied the same and answered that though in the later part of life when he became unwell, he was dependent a little but he was in full position of strength and he was a very strong person. The other Plaintiff's witnesses also testified that the Testator was physically fit and mentally alert.

The argument of Mr. Dutta, though sounds novel is unacceptable. Merely because, as alleged, the properties bequeathed did not belong to the Testator does not prove or indicate that he had no mental capacity at the time of execution of the

will. Therefore, this Court accepts that the Testator was physically fit and mentally alert at the time of execution of the will. This issue is decided in favour of the Plaintiff.

Issue No. 3 to 7:

The discussions on these issues are clubbed together in view of the fact that they are related to each other.

Issue Nos. 3 & 5 are related belonging to cognate allegations.

It is settled law that when allegations are made by the Caveators or Caveatrix that the Testator was forced to execute the will or that coercion or undue influence had been exercised on the Testator or that a particular will was a product of misrepresentation, burden of proof lies on them to prove that. Law is being so propounded by the Supreme Court of India since **H. Venkatachala Iyengar Vs. B.N. Thimmajamma [AIR 1959 SC 443]** till now, reiterated in plethora of decisions.

It is more apt to consider due execution of the will in accordance with Section 63 of the Indian Succession Act, 1925 since this is the principal challenge by the Defendants. The other issues like allegations of undue influence, misrepresentation shall be taken up thereafter. A close examination is needed as to whether the will had been duly executed in accordance with the provisions of Section 63 of the Indian Succession Act, 1925, an issue so vehemently pressed by Mr. Dutta, the Learned Senior Counsel.

Mr. Dutta, the Learned Senior Counsel appearing for the Defendant argued, firstly that the will bears a date of 28/02/2001. One of the attesting witnesses Mr. Ashok Kumar Ghosh deposed that the will was executed on 28th February, 2001.

Mr. Ashok Kumar Ghosh also stated that the will was executed and subsequently registered on the same date, namely, 28th February, 2001. The other attesting witness Gobinda Lal Mitra submitted his affidavit, verifying petition along with the present probate application wherein he stated that the will was executed on 28th February, 2001. But the will was registered on 27/02/2001 on the day it had been executed by the Testator. To clear the suspicion, the attesting witness Ashok Kumar Ghosh was examined thrice but the witness failed to remove the suspicion on surrounding the execution of the will. The Executor stated that he came to know of the will only after death of his father. Therefore, he could not clarify the discrepant dates of execution of the will. Gabinda Lal Mitra was not examined. Therefore, according to Mr. Mitra, execution of the will is not proved and probate should not be granted.

Secondly, it was argued that both the Testator as well as Ashok Kumar Ghosh, since deceased, a noted Advocate and Attorney at Law who prepared the will, were aware of lack of testamentary capacity of the Testator. He deposed that the Testator had provided him with list of properties in his own handwriting. This apart the draft will was allegedly approved by the Testator in his own handwriting. According to Mr. Dutta suspiciously neither Mr. Ashok Kumar Ghosh had enquired about the source of right of Gour Lal Mitra. The Will is also silent on how the Testator got testamentary right to bequeath the properties. This, according to Mr. Dutta, proves existence of suspicious circumstance which, the Plaintiff failed to explain.

Thirdly, as argued by Mr. Dutta that the Executor deposed that the Testator had basic education and was not very conversant with English language. Executor further stated that he was not aware as to whether the will was read over or explained to the Testator. The will does not show that it had been read over and

explained to the Testator. According to Mr. Dutta, the Testator was not aware of what he had signed which does not prove due execution of the will.

Fourthly, it was argued that the eldest son of the Testator has been deprived of completely in the instant will for the purported reason that he did not raise his children properly or gave them proper education. The Executor deposed that the Testator was not happy with the marriage of the daughter of the eldest son but evidence shows that the Testator's eldest son had cordial relationship with the family, he had attended the family functions and actively participated in the family ceremonies. Even though the eldest son left the house, he maintained cordial relationship with the family which has been suppressed by the Executor. The Executor in course of examination deposed that the properties of the Testator had been handed down from the Executor's grand-father to the Testator except for two properties. This shows that both the Testator and the Executor was aware of the will of late Adhar Lal Mitra.

Fifthly, it was argued that when the Executor is the beneficiary, probate Court should observe extra caution in granting the probate.

In nutshell, it was argued that the execution of the will was surrounded by suspicious circumstances which the Plaintiff failed to dispel.

Mr. Ghosh, the Learned Senior Counsel appearing for the Plaintiff, in reply firstly submitted that the plea of suspicious circumstance is absent in the written statement that cannot be argued, therefore, *de hors* pleading.

Secondly, replying the argument of discrepancy in date of execution, Mr. Ghosh submitted that the will bears the date 28/02/2001 though it was registered on 27th February, 2001 and an authorized person on behalf of the Registrar of

Assurance, Kolkata appeared before this Court to produce the original register/ volume book and thumb impression register. He was called to give evidence by the Plaintiff; his evidence established that the will was registered on 27th February, 2001. PW-1, namely, late Ashok Kumar Ghosh was recalled and reexamined when he stated that the will was executed as well as registered on the same date, namely, 27th February, 2001. He was cross-examined and in course of cross-examination he stated that on 27th February, 2001, the will was executed in his office after which Gour Lal Mitra along with his representative went to the Registrar of Assurance, Kolkata for registration of the will. Mr. Ghosh argued that dated 28th February, 2001 was mentioned by Mr. Gobinda Lal Mitra in his affidavit as a mistake.

Thirdly, Mr. Ghosh argued that question of title of the Testator is beyond the scope of adjudication in the testamentary jurisdiction. It is trite law that probate Court cannot go into the question of title in a probate proceeding. According to Mr. Ghosh challenge to the title of Testator is fatal for the Caveators and Caveat should be discharged. The Learned Counsel referred to **Krishna Kumar Birla Vs. Rajendra Singh Lodha & Ors. [(2008) 4 SCC 300]**.

Fourthly, Mr. Ghosh submitted that when the Defendant alleged fraud and/or coercion and/or undue influence, burden of proof always lies heavily on them. Once the burden of proof is discharged, it shifts on the Plaintiff to disprove. One of the Defendant's witness Mrs. Jhum Jhum Sen admitted that the Testator was a strong willed person. No other evidence had been adduced on behalf of the Defendants to establish practice of fraud, coercion or undue influence. Therefore, according to Mr. Ghosh, these allegations are turned out to few times and not proved. Mr. Ghosh also relied upon **Pentakota Satyanarayana & Ors. Vs. Pentakota Seetharatnam & Ors. [(2005) 8 SCC 67]**, **Daulat Ram & Ors.**

Vs. Sodha & Ors. [(2005) 1 SCC 40] and Savithri & Ors. Vs. Karthyayani Amma & Ors. [(2007) 11 SCC 621].

Fifthly, it was argued that the Testator had during his life time proceeded with and was involved into litigations where he signed pleadings in English language. He was also able to read and write English and this was admitted by the Defendant's witness Mrs. Jhum Jhum Sen. This evidence rules out the allegations that the Testator was not able to read the will for lack of knowledge in English language and it had been signed without knowing the contents.

Sixthly, it was argued that the will is a reasoned will and explained the reasons for bequeathing and deprivation. The testimony of Defendant's witnesses rather confirms the case of the Plaintiff than that of the Defendants themselves. He further argued that the very nature of execution of a will is always to defeat the natural course and consequences of succession. The contents and explanation provided in a will do not call for scrutiny in a proceeding for grant of probate of a will. Furthermore, deprivation of a legal heir under the will has no bearing on the genuineness of the will. Mr. Ghosh referred to the observation of the Supreme Court of India in **Savithri & Ors. Vs. Karthyayani Amma & Ors. [(2007) 11 SCC 621]** where the Supreme Court of India referred to an earlier decision in **Ramabai Padmakar Patil Vs. Rukminibai Vishnu Vekhande & Ors. [(2003) 8 SCC 537]** where it was observed that a will is executed to alter the mode of succession and by the very nature of things, it is bound to result in either reducing or depriving the share of a natural heir.

Mr. Ghosh distinguished the judgments referred to by the Learned Counsel for the Defendant.

I have heard rival submissions.

Before further discussion, it is made clear that in view of the settled principle of law that the probate court cannot decide on the title of the property, this Court is refrained from considering the question as to whether the will of the late Adhar Lal Mitra was granted probate or not. That might be relevant for deciding on the right, title and interest of the present Testator which would be irrelevant as of now.

Before advertng to the rival pleas, it is necessary to consider certain statutory provisions. Section 63 of the Indian Succession Act, 1925 provides mode of execution of will :

“Section 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.”

Section 68 of the Indian Evidence Act, 1872 provides mode of proof of will when attesting witness is available :

“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.]”

Law on the subject was expounded by the Supreme Court of India in **H. Venkatachala Iyengar Vs. B.N. Thimmajamma [AIR 1959 SC 443]**. The propounder of a will must show by satisfactory evidence that the will was signed by the Testator, that the Testator at the relevant time was in sound and disposing state of mind, that he understood the nature and effect of the dispositions and put his signature to the document out of his own free will, ordinarily when evidence adduced in support of the will is this interested, satisfactory and sufficient to prove the sound and disposing state of the Testator’s mind and the signature as required by law, Court would be justified in making a finding in favour of the propounder. In other words, the owners of the propounder can be taken to be discharged on proof of these essential facts. It was further laid down that there may be cases in which the execution of the will may be surrounded by suspicious circumstances. In such cases, the Court would naturally expect that all legitimate suspicion should be completely removed before the document is accepted as the last will of the Testator. Presence of such suspicious circumstances naturally tended to make the initial onus very heavy; and unless it is satisfactorily discharged, the Court would be reluctant to treat the document as the last will of the Testator. In continuation, it was further observed that satisfaction of judicial consigns is a test, in case of such suspicious circumstances. In fact, in this case, the Court emphasized that any suspicious circumstances surrounding the execution of the will must be removed by the

propounder with cogent and satisfactory evidence. This principle of law was followed through the decades by the Supreme Court of India. Another aspect was considered by the Supreme Court of India in **Rani Purnim Debi & Anr. Vs. Kumar Khagendra Narayan Deb & Anr. [AIR 1962 SCC 567]** where the Supreme Court of India observed that the mere fact that the will is registered, will not by itself be sufficient to dispel all suspicion regarding it where suspicion exists without submitting the evidence of registration to a close examination. Three Judges Bench of the Supreme Court of India in **Shivakumar & Ors. Vs. Sharanabasappa & Ors. [(2021) 11 SCC 277]** considered all the authorities on due execution and proof of a will including **H. Venkatachala Iyengar Vs. B.N. Thimmajamma [AIR 1959 SC 443]** and reiterated the law in this regard. It is reiterated that a case in which the execution of the will is surrounded by suspicious circumstances, stands on a different footing. Presence of suspicious circumstances makes the onus heavier on the propounder and, therefore, in cases where the circumstances attendant upon the execution of a document give rise to suspicion, the propounder must remove all legitimate suspicions before the document can be accepted as a last will. It was further observed that “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. The suspicious features must be “real, german and valid” and not merely the “fantasy of the doubting mind.” It was further explained that whether any particular feature or a set of features “qualify as suspicious” would depend on the facts and circumstances of this case. In the ultimate analysis where the execution of a will is shrouded in suspicion. It was observed:

“**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?”

Reference may be made to the decisions of Supreme Court of India in **B. Venkatamuni Vs. C. J. Ayodhya Ram Singh [(2006) 13 SCC 449]**. The Supreme Court of India observed in this case that it is well-settled that compliance with statutory requirements is itself not sufficient. In **Ramesh Chand (D) Vs. Suresh Chand & Anr. [(2025) SCC OnLine SC 1879]**, the Supreme Court of India observed that where one attesting witnesses examined to prove the will fails to prove its due execution then the other available attesting witness has to be called to supplement his evidence. Whenever there exists any suspicion as to the execution of the will it is the responsibility of the propounder to remove all legitimate suspicions before it can be accepted as the Testator's last will. In such case, onus is heavy on the propounder of the will. Observations of the Supreme Court of India in **Meena Pradhan v. Kamla Pradhan, [(2023) 9 SCC 734]** may be quoted:

“**10.1.** The court has to consider two aspects : firstly, that the will is executed by the testator, and secondly, that it was the last will executed by him;

10.2. It is not required to be proved with mathematical accuracy, but the test of satisfaction of the prudent mind has to be applied.

10.3. A will is required to fulfil all the formalities required under Section 63 of the Succession Act, that is to say:

(a) The testator shall sign or affix his mark to the will or it shall be signed by some other person in his presence and by his direction and the said signature or affixation shall show that it was intended to give effect to the writing as a will;

(b) It is mandatory to get it attested by two or more witnesses, though no particular form of attestation is necessary;

(c) Each of the attesting witnesses must have 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 such signatures;

(d) Each of the attesting witnesses shall sign the will in the presence of the testator, however, the presence of all witnesses at the same time is not required;

10.4. For the purpose of proving the execution of the will, at least one of the attesting witnesses, who is alive, subject to the process of court, and capable of giving evidence, shall be examined;

10.5. The attesting witness should speak not only about the testator's signatures but also that each of the witnesses had signed the will in the presence of the testator;

10.6. If one attesting witness can prove the execution of the will, the examination of other attesting witnesses can be dispensed with;

10.7. Where one attesting witness examined to prove the will fails to prove its due execution, then the other available attesting witness has to be called to supplement his evidence;

10.8. Whenever there exists any suspicion as to the execution of the will, it is the responsibility of the propounder to remove all legitimate suspicions before it can be accepted as the testator's last will. In such cases, the initial onus on the propounder becomes heavier.”

Coming to the case in hand, the date appears on the body of the will was 28/02/2001. PW-1 who was a noted Solicitor and Advocate of this Court stated in his examination in chief that the will was executed on 28th February, 2001. The Testator executed the will in his chamber in his presence as well as in presence of Gobinda Lal Mitra, the other attesting witness. Gobinda Lal Mitra filed an affidavit along with the probate application where he stated that the will was executed on 28th February, 2001. This attesting witness was present at the time of execution of the will and saw that the Testator had fixed his signature at the end of the will. The

will was executed at 6, old Post Office Street, Kolkata which is the address of the office of attorney being the PW-1. In the said affidavit, it was also stated by Gabinda Lal Mitra being the other attesting witness that will was executed by the Testator and attested by him in presence of PW-1. PW-1 affirmed the date of execution as 28th February, 2001 in answer to several questions in course of examination in chief. Both the attesting witnesses' statements reveal that the will was executed on 28th February, 2001. It was admitted by PW-1 the will was registered at his instance and PW-2 accompanied the Testator for registration of the will.

The will was registered on 27th February, 2001. PW-1 stated in evidence that the date 28th February, 2001 was inserted by him. In answer to question no. 65, he stated that Gobinda Lal Mitra visited his office on 28th February, 2001. In answer to question no. 74, in course of cross-examination, he stated that the will was executed in office of PW-1 on 28th February, 2001 and was registered on the same day. This is reiterated in answer to several questions. Then in re-examination, he stated that the will was registered on 27th February, 2001 yet it was executed on 28th February, 2001 and the date was written by him. Obviously, the will could not have been executed after registration. Although in answer to question no. 33, PW-1 stated that immediately after execution it was registered and the date of execution was repeatedly stated as 28th February, 2001, it could not have been done so, since the will was registered on 27th February, 2001. In answer to question no. 73, PW-1 stated that he could not remember presence of Gobinda Lal Mitra in his office on 27th February, 2001.

Repeated insistence of PW-1 that the will was executed on 28th February, 2001 is not true, since it was registered on the day before and it was recurrently deposed by PW-1 that will was executed and registered on the same day. In course of re-examination, he stated that the will was executed on 27th February, 2001 and

he could not remember when Gobinda Lal Mitra was present. Testator did not put the date in his own hand in the body of the will. If it is true, as appears to be, that the will was executed on 27th February, 2001 then presence of Gobinda Lal Mitra, the other attesting witness in the chamber of PW-1 is not proved, as PW-1 could not remember the presence of Gobinda Lal Mitra in his chamber on 27/02/2001. Effect of contradictory statements of PW-1 is that his evidence cannot be regarded as trustworthy and reliable. Secondly, the day on which the will was executed namely 27/02/2001, presence of the other attesting witness is not established. Now, the will was registered on 27th February, 2001, so it can be assumed that it was executed on that date. But presence of Gobinda Lal Mitra at the time of execution of the will is not proved. Apart from creating suspicious circumstances surrounding execution of the will, due execution of the will on a specific date is doubtful. In such case, it is duty of the propounder of the will to clear stir all doubts surrounding execution of the will. Mere producing one attesting witness to establish the due execution of the will is not enough specially when the statements of one of the attesting witness were contradictory and not trustworthy. In these circumstances, the propounder of the will should call for the other attesting witness who could have stated and could have clarified on the circumstances, surrounding the execution and attestation of the will. PW-1 stated that the other witness was alive by then. It is not also clear whether this Gobinda Lal Mitra signed as attesting witness, if any, at the time when the Testator executed the will, as because presence of Gobinda Lal Mitra at the time of execution of the will is not proved. The propounder of the will withheld the best evidence or withheld evidence which could have clarified the matter. In absence, due execution of the will in accordance with Section 63 of the Indian Succession Act, 1925 is not proved. It is not proved whether the other attesting witness put his signature at the time of execution of the will in presence of the Testator negating the statutory requirement that “each of whom has seen the testator sign or affix his mark to the

will.” This is fatal for the propounder of the will. Evidences adduced is not and failed to establish due execution of the will in accordance with Section 63 of the Indian Succession Act, 1925.

For reasons discussed above, this Court is of view that due execution of the will, in accordance with Section 63 of the Indian Succession Act, 1925 is not established.

Since due execution is not established, other issues as to coercion, undue influence and others need not be considered contextually.

Accordingly the Issue No. 7 is decided against the Plaintiff.

For reasons discussed above, this Court is of view that the Plaintiff is not entitled to grand of probate and accordingly the probate is refused.

The suit is accordingly disposed of.

CS No.90 of 2008 is released from this Court to be placed before Bench having determination.

(Sugato Majumdar, J.)