IN THE HIGH COURT OF JUDICATURE AT CALCUTTA
CIVIL APPELLATE JURISDICTION
APPELLATE SIDE

RESERVED ON: 22.01.2026

DELIVERED ON: 17.02.2026

PRESENT:

THE HON'BLE MR. JUSTICE TAPABRATA CHAKRABORTY

AND

THE HON'BLE MR. JUSTICE REETOBROTO KUMAR MITRA

FA NO. 348 OF 2007

RAJA SHAH AND ORS.

- VERSUS -

KOWSHIK SHOW AND ORS.

Appearance:

Mr. Bhaskar Ghosh, Sr. Adv.

Ms. Shila Sarkar, Adv.

... For the Appellants

Mr. Saptangshu Basu, Sr. Adv.

Mr. Partha Pratim Roy, Adv.

Mr. Dyutiman Banerjee, Adv.

Ms. Paulumi Chakrabort, Adv.

... For the Respondents

Reetobroto Kumar Mitra, J.:

1. The appeal is from a judgment and decree dated 19th January, 2007 passed by the Additional District Judge, 2nd Court, Murshidabad. The impugned judgment and decree proceed to grant probate of a will of one Mahadeb Lal Show (hereinafter the testator).

2. The facts pertaining to the grant of probate in Title Suit No. 14 of 1991 are fairly simple, except for its rather long and unexplained pendency in Court.

3. Mahadeb Lal Show, a fairly wealthy resident of Khargra Dewanganj of Berhampore in the district of Murshidabad, passed away on 20th October, 1962, leaving behind him his two wives, Rajlakshmi Show and Dayamoyee Show. Mahadeb Lal Show had two sons and two daughters with Rajlakshmi and one son with Dayamoyee.

4. Mahadeb Lal Show had executed a will on 15th October, 1960, appointing Kalipada Show and Bishnupada Saha as the executors. Surprisingly, neither Kalipada Show nor Bishnupada Saha made any endeavor to file an application for grant of probate of Mahadeb's will even though they were the executors.

5. In the circumstances, Kartick, the elder son of Mahadeb from Rajlakshmi, filed a probate petition in 1975, which, however, due to efforts and endeavors

between the brothers and sisters to amicably resolve the disputes, did not see the light of a final adjudication and was indeed dismissed as withdrawn.

6. The second application for probate was instituted in 1989, once again by Kartick. Upon declaration of the said probate application as a contentious cause, the same was numbered as TS 14 of 1991 before the Court of the learned District Judge, Murshidabad and was thereafter transferred to the Additional District Judge, Murshidabad.

7. The reasons for the probate application becoming a contentious cause were that Santosh, Saraswati and Sadhana, the other three children of Mahadeb from Rajlakshmi and the siblings of Kartick, opposed the grant of probate.

8. Written statements were filed and the execution of the will by Mahadeb was challenged.

9. The usual grounds of challenging the execution of the will were duly raised, which may be summarised as under:-

a. The testator did not have the mental capacity to execute the will.

b. The will was manufactured and fabricated.

c. The will had been executed by the testator, not of his volition but upon domination by Kartick.

d. A further point had also been raised that the properties bequeathed by the will were not the properties of the testator but belonged to a coparcenary, since Mahadeb was governed by the Mitakshara School of law.

10. The defendants before the learned trial court raised certain issues other than the issues already mentioned, that is, the execution of the will was made in suspicious circumstances. Instances of such suspicious circumstances are as under:-

a. The signature of the testator appeared to be shaky.

b. Uneven distribution of properties amongst the children.

11. Having considered all of these arguments raised, the learned trial Court proceeded to pass a judgment and decree holding that the defendants had failed to prove their allegation that the will was forged and/or fabricated as there was no evidence in this regard led by the defendants.

12. The point of limitation was also raised, which did not find favour with the learned Judge.

13. Evidence was led by both parties in great detail and several documents were exhibited, including the will. As it appears from the documents other than the will of 15th October, 1960, (Exhibit 1) two other documents were exhibited

which are of great relevance. The first of such documents is a deed of gift executed by the testator in favour of his second wife Dayamoyee (Exhibit 3). The second document is a gift deed of 26th December, 1963 executed by the sons and daughters of Rajlakshmi, that is the propounder and the defendants in the suit as well as by Rajlakshmi herself, in favour of Dayamoyee (Exhibit 4).

14. During the pendency of the suit, Kartick, the original plaintiff, expired and had been substituted by his legal heirs, his two sons and two daughters.

15. Mr. Bhaskar Ghosh, learned senior advocate appearing for the appellants reiterated the arguments made by the defendants in the trial Court.

16. His submissions in a nutshell are as follows:-

a. The testator had lost his physical and mental capacity to execute a document such as the will.

b. The will was thus manufactured and fabricated.

c. The will was procured by Kartick through complete domination of the testator's volition.

d. The properties bequeathed in the will were coparcenary properties.

e. Suspicious circumstances in which the will was executed.

17. Other than these grounds as aforesaid, which relate to the execution of the will itself, Mr. Ghosh also tried to impress upon us that the very fact that the probate of the will was sought, only after the lapse of such long period of time (on both occasions) is reason enough to create suspicious circumstances and also that the probate application would be barred under the laws of limitation.

18. The appellants have relied upon the following decisions:

a. AIR 2008 SC 2058 (para 18);

b. AIR 2014 Calcutta 133;

c. AIR 2013 SC 2088;

d. AIR 1977 SC 1944;

e. AIR 2001 SC 3062;

f. AIR 1959 SC 443;

g. AIR 2006 SC 4362.

h. AIR 1961 Cal 461.

19. Mr. Saptangshu Basu learned Senior Advocate, appearing for the respondent made his submissions in support of the impugned judgment.

20. Mr. Basu argued that there was no evidence led by the defendants to show that the testator had lost his physical and mental capacity nor any evidence to show that the will was manufactured or fabricated. In fact, the lack of evidence was also apparent insofar as the question of domination of the testator's will by Kartick was concerned.

21. The nature of the property bequeathed by the will is of no relevance, since the will does not bestow title on the beneficiaries. Thus, if the will bequeathed coparcenary property, the same would not pass over to the beneficiaries.

22. Mr. Basu also argued that the factum of uneven distribution of property is not a suspicious circumstance.

23. Mr. Basu also argued that the question of limitation does not arise in the present case and limitation alone cannot be a ground for not granting probate.

24. Respondents have placed reliance on the following decisions:

a. 2020 (12) SCC 480 (Paragraph Nos. 15 to 18);

b. (2004) (2) SCC 747, paragraph 21;

c. C.O. 323 of 2015, Decided On: 14.05.2015, Arvind Garach V. Pragna Garach and Ors;

d. 2008 (8) SCC 463, Paragraph 16;

e. AIR 1953 Cal 471;

25. We have considered the arguments of the learned counsel for the parties and perused the documents and the evidence and the decisions relied upon.

26. The will is a registered document executed when both wives were alive. Rajlakshmi was given life interest in schedule "Ka" while schedule "Kha" was given to the propounder Kartick absolutely. The properties in schedule "Ga" were given to his second son Santosh Lal Show as a life estate. This is understandable, since Santosh was unmarried and obviously had no children. "Gha" was given to one of the daughters, Saraswati, as a life estate while properties in schedule "Unga" were given to the other daughter Sadhana and "Cha" were given to the son of Dayamoyee, Tulshi Lal absolutely. Since Dayamoyee had already been given properties by way of a gift deed she was not included in the will. It was also mentioned that after the death of Santosh, Kartick and Tulshi would get absolute right, title and interest over the property bequeathed to him.

27. The plaintiffs had examined Kalipada Show, the executor, who was PW1, Kartick Lal Show, the propounder, as PW2 and Koushik Kumar Show as PW3.

Niranjan Ch. Basak, Kuntal Show and Utpal Pal were all examined as PW4, 5 and 6 respectively. As none of the attesting witnesses were alive, the will was proved by way of secondary evidence.

28. The witnesses and more particularly PW1, who was the named executor under the will and a relative of the testator, deposed in no uncertain terms that the testator was in good health and was also mentally fit and that the will had been read over to him before he signed it in the presence of attesting witnesses who had seen him sign the will. This he had heard from the attesting witnesses themselves.

29. In fact, neither the attesting witnesses nor the scribes were alive. However, PW1 had identified the signature of the testator and those of the attesting witnesses including the scribes. These signatures were also exhibited and were tested in cross-examination.

30. PW2 Kartick Lal Show himself also deposed that his father was of sound mind, both physically and mentally, and had executed the will of his own volition without being under any coercion from any person whatsoever.

31. PW3 Kaushik Kumar Show, one of Kartick's sons, also deposed that the testator, his grandfather, was in good health both mentally and physically at the time of execution of the will. In fact he added that the belated filing for the

probate application on the second occasion in 1989 was precipitated by several rounds of settlement talks between the parties which ultimately did not succeed.

32. PW4, one Niranjan Ch. Basak, was a neighbour and a friend of the testator who deposed that the testator was in good health both physically and mentally and that the witness had access to the testator.

33. PW 5 Kuntal Show, the second son of Kartick, was the one who had produced the registered deed of gift dated 15th October, 1960 and that of 26th December, 1963 by which, as stated earlier, the donors had gifted the properties to the donee. The donee in both cases being Dayamoyee; the second gift deed involving both Dayamoyee and Tulshi Show.

34. The defendants had also deposed as witnesses. In fact, Saraswati was examined as OPW 1. She did not deny execution of the deed of gift on 26th December, 1963, in which she was one of the donors. This would subsequently be an extremely important issue.

35. One of the renowned local lawyers, Umapada Pal, was one of the attesting witnesses to the will. Since he was not alive at the time of hearing of the suit, his son Utpal Pal deposed as PW 6. Utpal is also a well known lawyer in the area. Utpal identified the signature of his father, one of the attesting witnesses, Umapada. In fact, he also went on to identify the signature of the other attesting

witness, Balaram Pal. Balaram was the grandfather of Utpal. Thus, Utpal successfully identified both the signatures.

36. In cross examination, Saraswati, one of the defendants, had admitted that Umapada and Balaram were both present at the time of execution of the will. This deposition also assumes great importance.

37. The basic issue, while dealing with the grant of a probate is to respect the last wishes of the testator, which are reflected in the document, termed as a will. However, one has to be absolutely sure that it is indeed the last wish of the testator and not a wish foisted on him by others nor a document which has been manufactured, forged or procured. The court literally assumes the role of a custodian and or the executor of the last wish of the testator.

38. In the present case we are unable to find any reason to believe, as there was no evidence to buttress the claim, that the testator was not of sound mind or physical capacity or that he was incapacitated for any other reason to execute the will. The evidence is clear and overwhelming that the testator was indeed in good health, with his cognitive abilities and decision making process in place to execute a will.

39. A mere allegation that the will was manufactured or fabricated, unsubstantiated and unsupported by any contemporaneous document or corroborative evidence is a mere ploy adopted by the appellants herein to stall the grant of probate.

40. Likewise, the properties bequeathed in the will, whether belonging to the coparcenary or not, is not the concern of the probate court, which is a court of conscience. If the property does not belong to the testator he cannot pass on the same to the person of his choice by or under the will.

41. The will has been proved by secondary evidence as there were no attesting witnesses alive to depose to the fact that it was indeed the testator who had executed the will by affixing his signature. Since no attesting witnesses were available, PW6 had, in no uncertain terms, proved and withstood cross-examination that the attestation of both attesting witnesses, who were his grandfather and father respectively, had affixed their signature in their own handwriting. PW1 and 2 had identified the signature of the testator, which were duly exhibited and withstood cross-examination in respect thereof. Execution of the will had been duly proved as not being one executed under coercion and that the same had been executed by the testator of his own free will and volition.

42. The decisions relied upon by the appellants are distinguishable on facts, as set out herein.

43. The decisions in AIR 2008 SC 2058 and AIR 2014 Calcutta 133 deal with the implications of undue delay in filing an application for the grant of probate. These decisions have no application to the instant case and are distinguishable in view of the fact that the only implication of undue delay in filing a probate application is to create a suspicious circumstance, which is a rebuttable

presumption, in this particular case such presumption has been duly rebutted by the explanation for the delay.

44. The decision in AIR 2013 SC 2088 examines whether a will can attract the provision under Section 90 of the Evidence Act, 1872, and whether the presumption under that section can be applied to a will. This is an accepted proposition regarding the applicability of Section 90 of the Indian Evidence Act. However, in the case at hand, the signatures of the two attesting witnesses had already been proved beyond doubt by PW6, who was the son and grandson, respectively, of the two attesting witnesses.

45. The decisions in AIR 1977 SC 1944 and AIR 2001 SC 3062 dealt with the issue of whether a Hindu widow acquiring properties gets absolute rights under Section 14 of the Hindu Succession Act, 1956. This issue is not germane to the instant case, as the concerned will was executed after 1956 and the rights of the widows are not in contention before us in this matter.

46. The decisions in AIR 1959 SC 443 and AIR 2006 SC 4362 related to suspicious circumstances where the propounders themselves took a prominent part in the execution of a will, holding that such active participation may in itself create suspicious circumstances. This decision is distinguishable on facts, as in the present case none of the propounders took any part in the execution of the will. Thus, the question of any suspicious circumstances arising due to such participation by a propounder does not arise.

47. The decision in AIR 1961 Cal 461 relates to the proposition that a learned Judge's own assessment of a signature, without appointing an expert, cannot be permitted as a form of such self-assessment. This proposition has no applicability to the present case, as the evidence led by PW6 was clear and unequivocal in identifying the signatures of the two attesting witnesses his grandfather and father, respectively. Thus, there was no question of the learned Judge conducting a self-assessment of the signatures. Clearly, reliance on this decision is misplaced.

48. The applicability of the decisions relied upon by the respondents is discussed hereunder.

49. The decision in 2020 (12) SCC 480 deals with the principle that a testamentary application, either for probate or letters of administration, is for the court's permission to perform a legal duty created by a Will or for recognition as a testamentary trustee and is a continuous right which can be exercised any time after the death of the deceased, as long as the right to do so survives and the object of the trust exists or any part of the trust, if created, remains to be executed. The decision in 2008 (8) SCC 463 deals with the principle that such an application is for the Court's permission to perform a legal duty created by a Will or for recognition as a testamentary trustee and is a continuous right which can be exercised any time after the death of the deceased, as long as the right to do so survives and the object of the trust exists or any part of the trust, if created, remains to be executed. This, in fact, furthers the case of the respondents as the

legal duty cast upon the executor by the will has been held to be a continuous right which can be exercised at any time after the death of the deceased. In this particular case, since such right survived even on the date of filing the probate application, this authority supports the contention of the respondent.

50. The decision in (2004) (2) SCC 747 deals with the principle that time does not start running from the date of the testator's death, but from the date when it became necessary for the executors to apply for probate. This also supports the contention of the respondents clearly, as the time started running from the date when it became necessary for the executors to apply for probate. Thus, as per the explanation given by the respondents, such time arose only when the repeated attempts between the legatees of the late Mahadeb Lal Show failed. It is only then the application for probate was instituted.

51. The decision in C.O. 323 of 2015 deals with the principle that the right to apply for probate accrues when it becomes imperative for the executor to establish his right in such character and not from the date of the death of the testator. The right to apply would accrue when it becomes necessary to apply, and the application should be filed within three years from such date (Paragraph 25). As in the earlier matter, this also supports the contention of the respondents that the probate application was filed when all negotiations and deliberations failed and the right to apply accrued, making it necessary for the respondents to apply for probate. The application was made well within the period of three years (Second Instance) from such date.

52. The decision in AIR 1953 Cal 471 deals with the civil presumption under Section 90 of the Evidence Act, 1872 specifically, whether the Court is entitled to presume due execution and attestation of a Will under Section 90 where the evidence of witnesses deposing to attestation did not definitively state that they signed in the presence of the testator. The Court may presume that the document was duly signed and attested under Section 90 where it is purported to have been signed and attested. The execution and attestation of the will had been duly proved by way of oral evidence, on account of which this particular decision may not be wholly applicable.

53. The only issues which remain and warrant serious consideration are the issues of limitation and suspicious circumstances.

54. In so far as the suspicious circumstances are concerned, the alleged fact that the handwriting of the testator was shaky or that the bequest was uneven as argued by Mr. Ghosh is not a matter of concern, since these allegations were unsubstantiated and uncorroborated and remained mere allegations.

55. The witnesses produced by the plaintiff, the predecessor in interest of the respondent herein, had unequivocally deposed that there were persons in attendance when the will was executed and the signatures of both the attesting witnesses, who had expired, were duly identified.

56. It is of some importance to note here that the deed of gift of 26th December, 1963 to which all children of Mahadeb and Rajlakshmi were parties mentioned in no uncertain terms that the gift was being made pursuant to the will of Mahadeb on 15th October, 1960. The deed of gift had been signed by all the predecessors of the appellants herein and thus they were aware and had specific knowledge that there was a will executed by their father (of the original appellants) on 15th October, 1960. None of these persons, the predecessors of appellants herein, had challenged this portion of the deed of gift either at the time of execution or even thereafter. Clearly they had knowledge and acquiesced to the will which had been executed by their father.

57. In so far as the suspicious circumstances emanating from unequal distribution of assets and properties are concerned, it was argued by the appellants that it was an unnatural bequest. The will provided for all of the children of Mahadeb, in varying degrees. It was not an unnatural bequest merely due to unequal distribution. Unequal distribution or uneven distribution does not under any stretch of imagination qualify, by itself, as a suspicious circumstance. The natural heirs of Late Mahadeb Lal Show had been beneficiaries, if not by the will, by deeds of gift. Thus, all natural heirs of the testator had been sufficiently endowed with bequests.

58. This leaves us with the final issue of limitation. The testator having expired in October, 1962, the first probate petition was filed sometime in 1975, which was

however withdrawn as the parties were seeking to make an amicable settlement amongst themselves.

59. The second probate application was filed in 1989 after almost 14 years since the first application was withdrawn. This was explained by the respondents herein and or their predecessors in interest that there were indeed settlement talks which were going on between the parties, which only culminated when they failed, and only thereafter in 1989 the second round of proceeding for grant of probate of the testator's will was initiated.

60. Delay in approaching the court for grant of probate may arouse the suspicion of the court and may raise a presumption of suspicious circumstances. However, this is a rebuttable presumption, rebuttable by proving due execution and attestation. Thus, once the delay has been explained and attestation and execution proved, the question of suspicion lingering on the ground of delay is unwarranted. Delay in a probate application cannot be construed as an absolute bar but as a suspicious circumstance which can be explained. In the present case, the delay in filing the probate application has been well and sufficiently explained, that the parties were exploring the possibility of an amicable settlement. Thus efforts having failed, the propounder had filed the application.

61. In view of the aforestated, we find that the judgment and decree by the learned Additional District Judge, 2nd Court does not warrant any interference.

62. The appeal and the connected applications are dismissed without any order as to costs.

63. Let this judgment, along with the lower court records, be sent to the learned Court below forthwith.

64. An urgent photostat-certified copy of this order, if applied for, should be made available to the parties upon compliance with the requisite formalities.

(Reetobroto Kumar Mitra, J.) (Tapabrata Chakraborty, J.)