

**In The High Court at Calcutta
Civil Appellate Jurisdiction
Original Side**

A.P.D. No.7 of 2021

Arising out of

T.S. No.14 of 2006

**In The Goods of Saroj Kumar Chatterjee
- and- Kamalesh Bhattacharyya
Vs
Smt. Ratna Mitra and Ors.**

**The Hon'ble Justice Sabyasachi Bhattacharyya
And
The Hon'ble Justice Uday Kumar**

For the petitioner	:	Mr. Krishnendu Goopta, Bar at law, Mr. Prantik Gorai, Adv. Mr. Kanakendu Chatterjee, Adv. Mr. Partha Pratim Mukhopadhyay, Adv. Mr. Sudipta Mondal, Adv.
For the respondents	:	Mr. Dhrubo Ghosh, Sr. Adv. Mr. Soumojit Ghosh, Adv. Ms. Atreyee Senapati, Adv. Mr. Dipto Ghosh, Adv. Mr. Joydeep Dhar, Adv.
Hearing concluded on	:	12.02.2025
Judgment on	:	19.02.2025

Sabyasachi Bhattacharyya, J:-

1. The present intra-court appeal has been preferred against a judgment and deemed decree whereby the learned Single Judge dismissed the probate suit filed by the appellant.
2. The parties are at loggerheads over two Wills, both allegedly executed by Late Saroj Kumar Chatterjee, respectively dated August 30 and August 31 in the year 1988.

3. Saroj Kumar Chatterjee was the admitted owner of the subject-property, which is about the only fact which is admitted by both parties. The narrative bifurcates into two parallel storylines from there.
4. As per the respondents, Late Saroj Kumar Chatterjee executed a Will in favour of one Sabitri on August 30, 1988, which was probated on December 11, 1997.
5. The appellant filed an application for revocation of the said probate, which was disposed of by a learned Single Judge of this Court by an order dated July 27, 1998, without interfering with the grant of probate but observing that the said probate would be subject to the probate, if granted, in respect of the second Will executed by Late Saroj Kumar Chatterjee on August 31, 1988.
6. Sabitri subsequently executed a Will in favour of Gopal Mitra (whose heirs are the present respondents who have stepped into Gopal's shoes upon his demise) on February 6, 2004. Probate was granted in respect of the said Will on January 19, 2005.
7. The other branch of the story is that a second Will was executed by Late Saroj on August 31, 1988, a day after the previous Will, bequeathing his property in favour of the wife of the present appellant/propounder and an organisation by the name of Bharat Sevashram Sangha. The appellant was appointed as the executor of the said Will.
8. The appellant, in the capacity of executor of the said Will dated August 31, 1988, filed an application for probate thereof. Sabitri, the

beneficiary of the previous Will, initially lodged a caveat without filing any affidavit in support of it. Subsequently, Gopal Mitra lodged an independent caveat on the strength of the bequest by Sabitri, upon which the present probate proceeding was rendered contentious and registered as a suit. Gopal having met his demise subsequently, his heirs, the present respondents, were substituted and stepped into his shoes.

9. Learned senior counsel appearing for the appellant argues that Gopal had no caveatable interest in the subject-property, since he was neither an heir nor had any valid claim to the disputed property. It is contended that Sabitri, through whom Gopal claims, had lodged a caveat in 1993 but, in the absence of any affidavit in support thereof, which is mandatory under Rule 25, read with Rules 27 and 28 of Chapter XXXV of the Original Side Rules of this Court, such caveat was invalid in the eye of law. It is also insinuated that Sabitri deliberately did not file such affidavit since, in so filing, she would have to disclose the existence of the August 30, 1988 Will, which would have granted an opportunity to the appellant to contest the proceeding for grant of probate of the same. In any event, in view of the said caveat of Sabitri being invalid, it is to be deemed that Sabitri abandoned her right to lodge a caveat. Since Gopal claims through Sabitri, he stepped into the shoes of the latter, and accordingly, in view of abandonment of Sabitri's right to lodge a caveat, also derived no caveatable interest as such.

10. On the issue of caveatable interest, learned senior counsel for the appellant further argues that both Sabitri and Gopal sold parts the properties which are the subject-matter of Saroj's Will in favour of strangers, thus acting adverse to the interest of the testator's estate, which also denudes them of any caveatable interest.
11. Also, Gopal did not adduce any evidence despite contesting the probate proceeding, and as such, adverse inference should be drawn against him. Learned senior counsel for the appellant cites *Arjun Singh v. Virendra Nath and another*, reported at AIR 1971 Allahabad 29, in support of the argument that since Gopal, being the defendant, abstained from facing the witness box, adverse inference should be drawn against him.
12. The appellant also cites a Privy Council Judgement in the matter of *Sardar Gubakhsh Singh v. Gurdial Singh and another*, reported at AIR 1927 PC 230, where it was held that the practice of not calling the party as witness, with a view to force the other party to call him, and so suffer the discomfiture of having him treated as his own witness, is a bad and degrading practice.
13. The appellant further relies on *Vidhyadhar v. Manikrao and another*, reported at (1999) 3 SCC 573, for the same proposition.
14. The appellant's next contention is that only a contingent interest was derived by Gopal since the learned Single Judge, while refusing to revoke the probate in respect of the Will dated August 30, 1988, had observed that the revocation/annulment of the probate of the earlier Will dated August 30, 1988 would be dependent on the result of the

subsequent (present) probate proceedings. A contingent right, it is argued, cannot create any caveatable interest, in support of which proposition learned senior counsel for the appellant cites (1996) 5 SCC 201, as well as Black's Law Dictionary.

15. In another order dated September 26, 2006, passed in GA No. 3120 of 2006, a different learned Single Judge of this Court had held that although Gopal could go ahead with his transfers, the effect thereof would be subject to the outcome of the present probate proceeding in respect of validity of the August 31, 1988 Will, and that Gopal would have to disclose the pendency of the same in his transfer deeds, if executed.
16. Learned senior counsel for the appellant thirdly argues that the Will dated February 6, 2004, executed by Sabitri in favour of Gopal Mitra, reveals that there was a prior contract for sale by Sabitri to Gopal, for full consideration. The Will merely gave effect to such contractual agreement, in order to avoid stamp duty and registration costs, and thus cannot be construed as a valid Will in the eye of law. It is argued that the creation of a contractual right was adverse to the testator's estate and as such did not confer any caveatable interest on Sabitri or Gopal insofar as the present Will is concerned. Learned senior counsel cites *Suraj Lamp & Industries Private Limited (2) v. State of Haryana and another*, reported at (2012) 1 SCC 656 in support of such proposition.
17. Learned senior counsel appearing for the appellant further argues that the execution of the present Will dated August 31, 1988 was proved by

direct evidence. Both the attesting witnesses thereof filed affidavits in support of execution of the said Will. One of them, namely Sudhir Lal Roy, expired during pendency of the probate proceeding and, as such, could not be summoned as a witness. However, the other attesting witness, namely Purnendu Sarkar, adduced evidence to prove the due execution of the Will, which was unshaken in cross-examination.

18. The appellant next argues that the learned Single Judge relied on the opinion of two handwriting experts to disbelieve the due execution of the present Will. Learned senior counsel cites *Shashi Kumar Banerjee v. Subodh Kumar Banerjee, since deceased and after him his legal representatives and others*, reported at AIR 1964SC 529, a five-Judge Bench decision of the Supreme Court, for the proposition that the evidence of experts is not conclusive and cannot be relied on when due execution has been proved by direct evidence.
19. It is argued that the alleged shakiness in the signature of the Will dated August 31, 1988 was common for a 76-year old testator. In fact, since all the signatures of the August 30, 1988 Will (the first Will) were exactly in conformity with each other, it has to be assumed that it was not possible to have been executed by a 76-year old person, thus hitting at the root of the authenticity of the signatures in the first Will.
20. Biplab Majumdar, one of the expert witnesses, deposed that he needs sophisticated machine to examine thin and thick strokes, but admitted that no machine inspection was done. The answer of the said witness to Question no. 56 in his cross-examination is relied on for such purpose. Although the said witness opined that there was

“spuriousness” in the signature of the August 31, 1988 Will, he did not have any admitted signature to compare the signature with.

21. Purushottam Chatterjee, the other expert witness, also did not have any admitted signature with which to compare the signature on the second Will. Learned senior counsel points out to the answer of the witness to Question nos. 2, 25 and 35 in his evidence and contends that the said expert had no authority to state which document was genuine and which was forged. His statement that the questioned signatures cannot be taken as genuine is, thus, vitiated.
22. The August 30, 1988 Will was probated behind the back of the appellant and, as such, the signatures therein cannot be held to be sacrosanct or taken to be admitted signatures.
23. Learned senior counsel appearing for the respondent, on the other hand, relies on *Alamgir v. State (NCT, Delhi)*, reported at (2003) 1 SCC 21 to argue that it is not that expert opinion cannot be accepted in any case.
24. It is argued that Biplab Majumdar, one of the experts, was called by the propounder himself as his own witness. The propounder’s counsel cross-examined the said witness without declaring him to be hostile in accordance with Section 58 of the Evidence Act. Therefore, the suggestions put to the said witness on behalf of the propounder in his cross-examination cannot be relied on.
25. The report of the said expert, marked as Exhibit-C in the suit, spoke about tremors in the questioned document due to “spuriousness”. Since the appellant's own witness raised doubt about the authenticity

of the signature, the learned Single judge rightly relied on the same to disbelieve the signature.

- 26.** The other expert, namely Purushottam Chatterjee, also adduced evidence to state that the second Will was not genuine and that the signatures on the said Will and those on the first Will are of different persons. It is argued that such difference in signatures in Wills purportedly executed within a day of each other is not acceptable. Also, the said second expert witness deposed that the edges of the last page of the second Will were rougher than its first two pages, which also casts a doubt on the authenticity thereof.
- 27.** It is argued by the respondent that the first Will dated August 30, 1988 was duly proved so far as the signatures therein were concerned and probate was duly granted on contest on December 11, 1997, which has attained finality. Thus, the authenticity of the signatures on the first Will cannot be called into question. Since both experts opined that the signature on the second Will dated August 31, 1988 are not genuine compared to the first Will, it has to be construed that the signatures on the second Will were forged. Even a naked-eye comparison corroborates the same. The appellant sought appointment of a third expert, which was dismissed. An appeal preferred against the said order was also dismissed. Thus, the opinion of the experts was rightly relied on by the learned Single Judge.
- 28.** Learned senior counsel appearing for the respondents seeks to point out certain discrepancies in the evidence of the sole attesting witness

to the August 31, 1988 Will who adduced evidence, namely Purnendu Sarkar.

- 29.** The first such discrepancy according to the respondent is that Purnendu did not depose as to the sequence in which the signatures were made in the second Will. Rather, his evidence suggests that they were not done in the correct sequence as per normal procedure.
- 30.** Secondly, no document was produced by the propounder to show that the said attesting witness was an employee of M/s Mitter & Co., in whose office the Will was allegedly prepared and the said attesting witness admittedly never saw the testator execute any document before or after the execution of the second Will. Also, the said attesting witness admitted that he was not aware of any litigation filed by the testator, nor knew any relative of Saroj. There is no record to show that the testator had authorised M/s Mitter & Co. to draft and prepare the Will, nor was any Day Book disclosed from the office of M/s Mitter & Co. regarding the second Will.
- 31.** Further, the said attesting witness did not know about the earlier Will and also did not know about Sabitri. He could not identify the testator's signature on the earlier Will. Furthermore, the attesting witness could not substantiate the testator's visits to Mr. Anil Mitra, Advocate (since deceased) of M/s Mitter & Co., in the teeth of the fact that the testator never availed of any legal services from the said advocate. Also, no explanation was offered as to why the testator required Purnendu Sarkar to sign as attesting witness.

- 32.** Learned senior counsel for the respondent next shifts his argument to alleged suspicious circumstances surrounding the alleged execution of the second Will. On such count, learned senior counsel argues that the first Will was proved and probate was duly granted, thereby establishing its authenticity beyond doubt. The second Will was prepared and executed allegedly within 24 hours of the same. Such abrupt change of mind of the testator is itself suspect and remains completely unexplained. Secondly, no evidence was adduced as to who drafted the second Will.
- 33.** The date written on the second Will was by hand, whereas the rest of the document was typewritten and no date was mentioned in the body of the second Will.
- 34.** Again, the construction of the two Wills are different, which is not in consonance with normal behaviour of a testator. Moreover, the propounder's own expert witness (Biplab) stated that the second Will was spurious, whereas the other expert said that the signatures on the two Wills do not match.
- 35.** As opposed to such clinching expert evidence, the attesting witness who sought to prove the second Will admitted that he did not know the testator personally and had not seen him sign any document before or after the Will dated August 31, 1988.
- 36.** Learned senior counsel cites *K. Laxmanan v. Thekkayil Padmini and others*, reported at (2009) 1 SCC 354, in support of the proposition that suspicious circumstances must be taken into account in respect

of execution of a Will in a probate proceeding, irrespective of any pleading with regard to the same.

37. Learned senior counsel for the respondents next argues on caveatable interest. It is submitted that the Will dated August 30, 1988, executed by Saroj in favour of Savitri, which was marked as Exhibit-2 in the suit, was probated on December 11, 1997, the probate being marked as Exhibit-1.
38. A revocation case was filed by the present propounder, but was disposed of by a learned Single Judge without interfering with the probate granted in respect of the first Will, thereby affirming the authenticity of the first Will. The observation that it will be subject to the probate of the second Will does not render the first probate “contingent” in any sense.
39. A certified copy of Sabitri's Will dated February 6, 2004, executed on the strength of Saroj's Will in her favour, was marked as Exhibit-C. It was probated on January 19, 2005, a certified copy of which has been marked as Exhibit-5 in the suit.
40. An objection was raised as to the *locus standi* of Gopal and his heirs to lodge caveat, which application was disposed of *vide* order dated September 6, 2017, leaving the issue open for trial.
41. Learned senior counsel for the respondent relies on *Jagdish Prasad Tulshan (D) by LR. v. Yasheel Jain*, reported at *AIR 2007Cal 218*, where it was held that an executor or beneficiary of a prior Will may contest a subsequent Will even without filing any probate or letters of administration application for such prior Will. The only requirement in

law is to prove the existence of the first Will. In the present case, it is argued, the first Will has been conclusively probated, which is itself proof of its existence.

42. Learned senior counsel next cites *Swatantranandji v. Lunidaram Jangaldas*, reported at *AIR 1937 Bom 397*, where it was held that if grant of probate displaces any right to which the caveator is otherwise entitled, he has a caveatable interest.
43. Learned senior counsel appearing for the respondents also cites *NalinchandraGuha v. Nibaranchandra Biswas*, reported at *AIR 1932 Cal 734*, where it was held that a purchaser or assignee of an heir, after the heir's death, has the *locus standi* to file a revocation proceeding. By necessary implication, it is contended, such assignee shall also have a caveatable interest.
44. It is argued that the interest of Gopal in the property is not contingent in view of a valid Will having been executed by Sabitri in his favour, which was subsequently probated. Citing *Suraj Lamp (supra)*, the respondent argues that the transfer by virtue of a Will takes effect after death and is therefore not concluded or completed as a transfer prior to such demise. Thus, no question of any contingent right or contractual agreement arises with regard to the Will of Sabitri in favour of Gopal.
45. With regard to construction of a Will, learned Senior Counsel for the respondent relies on *Usha Subbarao v. B.N. Vishveswaraiah and others*, reported at *(1996) 5 SCC 201*, for the proposition that the intention of the testator is to be ascertained from the words used in

the Will, read as a whole, taking into account surrounding circumstances, the position of the testator, etc.

- 46.** Insofar as the appellant's argument of adverse inference to be drawn against Gopal for not adducing evidence himself is concerned, learned senior counsel for the respondents contends that Gopal got interest in the property long after the death of the first testator Saroj Kumar Chatterjee, on the strength of whose Will dated August 30, 1988 Sabitri executed a Will on February 6, 2004 in favour of Gopal. Thus, there was no scope for Gopal to have direct knowledge regarding the execution of the Will dated August 31, 1988 and as such, he could not be a necessary witness to disprove the purported execution of the second Will or to prove the execution of the first Will. Rather, the onus of proof of the execution and genuineness of signature of the second Will lay on the propounder, which was dispelled by the expert evidence.
- 47.** It is argued that no general proposition was laid down in *Shashi Kumar Banerjee(supra)* that expert evidence is to be ignored altogether if there is direct evidence by attesting witnesses. It was held in the said case that the suspicious circumstances raised therein did not go to the root of the matter. Further, the expert evidence there was not conclusive, since the mandatory chemical test was not done. It was further held that expert evidence as to handwriting is opinion evidence which is to be seen to have been corroborated by direct evidence or circumstantial evidence. Here, there is direct evidence of the signature of the testator on the August 30, 1988 Will, the authenticity of which

has not been challenged further upon the revocation case being dismissed.

48. In *Palchur Sankarareddi v. Palchur Mahalaksmama*, reported at 27 CWN 414, relied on by the appellant, what was decided was the credibility of the witness for which the demeanour of witness and argumentative inferences from facts were relevant. It was held there that shaky signature of the testator was due to his ill health, but the execution was otherwise perfect and there was nothing to rebut the evidence adduced by considerable witnesses on the said fact. The facts of the present case, it is submitted, are different from the said case.
49. Thus it is contended that the learned Single Judge was justified in dismissing the probate proceeding in respect of the purported Will dated August 31, 1988.
50. Upon hearing learned counsel for the parties, several issues have come up for consideration, which are discussed below:

Expert Evidence

51. The learned single judge relied on the evidence of two experts and his own reading of the signature of the testator on the Will dated August 31, 1988 (second Will) to come to the conclusion that the signature was not genuine.
52. *Sashi Kumar Banerjee (supra)* lays down the contours of assessment of expert evidence in probate cases. It was held by the Supreme Court there that opinion evidence, if not corroborated by direct or other

circumstantial evidence, does not dispel the direct evidence of the attesting witnesses. If the suspicious circumstances do not go to the root of the matter, the expert evidence cannot be looked into at the cost of the attesting witness's direct evidence on the execution of the Will.

- 53.** In such backdrop, a perusal of the evidence of Purnendu Sarkar, the sole surviving attesting witness at the juncture of adducing evidence, shows that he validly proved the due execution of the second Will, meeting the requirements of Section 63 of the Indian Succession Act as well as Section 68 of the Evidence Act.
- 54.** The respondents have argued that the correct sequence of signatures was not stated by the attesting witness. However, Section 63 of the Indian Succession Act does not necessitate such sequence to be stated separately. The attesting witness deposed to the effect that the testator signed the Will in his presence and in presence of the other attesting witness, who also signed in the presence of him and the testator. Nothing more is required to prove the due execution of a Will within the contemplation of Section 63 of the Indian Succession Act.
- 55.** In his affidavit evidence, the said attesting witness Purnendu stated that the Will was produced on the relevant date before the testator, who then went through the same, upon which the testator signed and executed his last Will and Testament dated August 31, 1988 in the presence of the said attesting witness and in the presence of Sudhir Lal Roy, the other attesting witness. It is stated that thereafter the testator requested the surviving attesting witness Purnendu and the

other attesting witness Sudhir Lal to sign as attesting witnesses in the said Will and both of them then signed in the Will in each other's presence and in the presence of the testator. The witness also stated that the testator was found by him to be physically fit and mentally sound.

- 56.** In answer to Question No.25 of his cross-examination, Purnendu's, testimony remained unshaken and he said when confronted with the signatures of the testator and the two attesting witnesses including himself, that he knew those signatures. In answer to Question No.26 in his cross-examination, he also stated that the testator was in sound mind and normal.
- 57.** In answer to Question No.29, he answered in the positive to the question whether the testator signed the Will of his own free will.
- 58.** In answer to Question No.13 in his cross-examination, the said witness corroborated that the signature of the testator appears in the Will along with his signature and the signature of the attesting witness. In answer to Question No.14, he states that the signature of Saroj Kumar Chatterjee was executed in his presence. Even in his cross-examination, the said attesting witness remains firm and stands by his original testimony-in-chief which clearly shows that the requirements of Section 63 of the Indian Succession Act were duly complied with. Even if no particular sequence of signatures was mentioned in his evidence, the attesting witness stated the relevant details of the testator having signed in his presence and in the presence of the other attesting witness and both the attesting

witnesses having signed in the presence of the testator and of each other. Thus, the Will was validly proved by one of the attesting witnesses as required under Section 68 of the Evidence Act, in due compliance of the ingredients of Section 63 of the Indian Succession Act.

59. In the teeth of such strong direct evidence, we are now to examine the allegations of suspicious circumstances as argued by the respondent, in order to ascertain whether such alleged suspicious circumstances go to the root of the matter so as to necessitate the court to go into the experts' opinion, which approach is in consonance with the proposition laid down in *Sashi Banerjee (supra)*.
60. The first point taken by the respondent in that regard is that the second Will was executed within 24 hours of the first Will, which however, by itself, cannot be deemed to be a suspicious circumstance. A septuagenarian in the last phase of his life might very well alter his intention of bequest the day after having executed a Will. A person ought to be allowed this much latitude in the twilight years of his life which, by itself, need not be viewed as a suspicious circumstance of such magnitude that it displaces his last Will and Testament.
61. The judicial conscience of the probate court, even without any allegation of suspicious circumstance, has undoubtedly to be satisfied on the due execution of the Will. Here, we have direct evidence of one of the attesting witnesses which could not be shaken in his cross-examination.

- 62.** The court need not, therefore, go behind the will and read into the mind of the testator as to the reason for altering his Will. Conspicuously, whereas the first alleged Will dated August 30, 1988 purported to bequeath the entire property solely to Sabitri, the second Will distributed the property not only to the wife of the executor but also to the Bharat Sevashram Sangha, a non-profit organization doing public and charitable work. This, perhaps, would not be the case if the executor was a scheming person manipulating unduly the volition of the testator.
- 63.** The other questions put to the attesting witness in cross-examination and the answers elicited in respect thereof, harped upon strongly by the respondent as suspicious circumstances, are entirely irrelevant. Whether there was no evidence as to who drafted the second Will dated August 31, 1988 or whether the date thereof was inserted by hand and not typed and no date being mentioned in the body of the Will have no bearing on the authenticity of the Will.
- 64.** The construction of the two Wills being different does not cut ice in that regard as well, since it largely depends on the scribe. There being no case made out that the scribes of both the Wills were the same person, such difference in construction is obvious and on the whole immaterial.
- 65.** Also, whether the attesting witness knew the testator previously or saw him sign before or after the Will-in-question are also utterly immaterial parameters, since he was only to prove that he had seen the testator sign the disputed Will.

- 66.** Thus, we are of the opinion that no suspicious circumstance going to the root of the matter finds place in the present case for the court to disbelieve the unshaken direct evidence of the attesting witnesses as to due execution of the Will dated August 31, 1988 and to look further into the expert opinion, which is merely opinion evidence and, thus, not conclusive.
- 67.** We cannot lose sight of certain other aspects of the matter either. The evidence of the experts was not on the basis of any “admitted” signature. To understand this, we have to consider that the signature in the first Will dated August 30, 1988 was not admitted at any point of time either by the propounder of the second Will or by any of its legatees. In fact, neither the propounder/executor nor the beneficiaries of the present Will dated August 31, 1988 were even aware of the probate proceeding in respect of the purported Will dated August 30, 1988 since no citation had been issued on them, nor did they have any opportunity to challenge the signature. It would be absurd to hold that in the absence of even any opportunity to the appellant to challenge the signature, it should be construed that the signature was ‘admitted’ merely because a probate was granted in respect of the Will containing it.
- 68.** Exploring the topic a step further, we are to consider whether mere grant of probate of a Will is conclusive proof of signature of the testator thereon. For such purpose, we resort to Section 41 of the Evidence Act, 1872, which Act was in force at the relevant point of time and as such, is applicable to the present case.

- 69.** As per Section 41, a final judgment, order or decree of a competent court in the exercise of probate jurisdiction, which confers upon or takes away from any person any legal character or declares any person to be entitled to such character or any specific thing, not against any specified person but absolutely, is relevant *when the existence of any such legal character, or the title of any such person to any such thing, is relevant*. The Section proceeds further to say that such judgment, order or decree is conclusive proof that any legal character which it confers accrued at the time when the decree came into operation, that any legal character to which it declares any person to be entitled accrued to that person at the said point of time, that any legal character which it takes away from any such person ceased at the time of such judgment and that anything to which it declares any person to be so entitled was the property of that person at the time from which such judgment was passed.
- 70.** Thus, the grant of probate is not conclusive proof of anything apart from the legal characters as indicated above, let alone the signature on the purported Will which was granted probate of.
- 71.** Hence, we can safely come to the conclusion that the signature of the testator on the Will dated August 30, 1988 was neither conclusively proved by grant of probate thereof, nor was it a signature admitted by the propounder of the second Will dated August 31, 1988.
- 72.** It is well-settled that comparison for the purpose of genuineness has to be on the premise of one of the signatures being admitted and the other disputed. If both the signatures are either proved inconclusively

or are not admitted, there cannot arise any question of comparison for the purpose of ascertaining genuineness. In such a case, even if it was proved that the signatures did not tally, it would not be sufficient to prove which one is genuine and which fake.

- 73.** In the present case, an additional factor is that the learned Single Judge, apparently taking resort to Section 73 of the Evidence Act, compared the signatures of the two Wills himself. The said Section requires that in order to ascertain whether a signature is that of a person by whom it purports to have been made, any signature *proved to the satisfaction of the court* to have been written or made by that person may be compared with the one which is *to be proved*, although the signature has not been produced or proved for any other purpose. It is relevant to note that the signature of the earlier Will was not proved to the satisfaction of the present probate court at any point of time.
- 74.** A further indicator is in the second paragraph of Section 73 which specifies that the court may direct any person present in court to write any words or figures for the purpose of enabling it to compare the words or figures so written with the disputed signature.
- 75.** Here, there was obviously no scope of obtaining the signature of the deceased testator.
- 76.** As such, there was nothing before the court to be used as an admitted signature or a signature which was proved to have been executed before the said court, to be used as the touchstone on which the authenticity of the disputed signature could be compared.

- 77.** The same logic applies to the experts as well.
- 78.** Furthermore, it is well-settled that experts' evidence is only opinion evidence. Section 45 of the Evidence Act provides that when the court has to form an *opinion*, inter alia as to identity of handwriting, the *opinions* upon that point of persons specially skilled in such field are *relevant facts*.
- 79.** The said Section is included under Part-I of the Evidence Act which deals with relevancy of facts. Thus, an expert's opinion is only opinion evidence, which might at best be another piece of evidence which forms a relevant fact for adjudication of the suit but under no circumstances is conclusive proof of the genuineness or otherwise of the questioned handwriting or signature.
- 80.** Section 47 of the Evidence Act provides as to when opinion as to handwriting is relevant. On a similar footing as Section 45, the Section begins with the expression "when the court has to form an opinion as to the person by whom any document was written or signed...."
- 81.** The opinion of any person "acquainted with the handwriting" of the person by whom it is supposed to be written or signed is a relevant fact under the said Section.
- 82.** The Explanation to the said Section is crucial in the present context. Among the persons who are said to be "acquainted with the handwriting" of another person, first comes a person who has *seen that person write*. Thus, in the present case, the attesting witness Purnendu Sarkar was a person who had seen the testator sign the

second Will dated August 31, 1988 and hence, his opinion is also a relevant fact, on an equal, if not better, footing than an expert's opinion under Section 45 of the Evidence Act.

- 83.** Pitted against each other, the direct evidence of the attesting witness, who was an eye witness of the signature being executed by the testator on the disputed Will, must prevail over the indirect and opinion evidence of the two experts who were not present at the relevant juncture and only relied on certain inconclusive yardsticks to arrive at the opinion that the signature on the second Will is not genuine. More importantly, the comparisons by the experts were between signatures in two different documents, none of which was admitted. Hence, at best, the experts could have proved that the signatures in the two documents vary but not that one of them was genuine and other one was not. The expression "spurious" used by Biplab Majumdar, one of the experts, is to be read in the context of the rest of his evidence, which makes it clear that such finding is based on the signatures on the two Wills not tallying. Thus, there is no independent proof by the witnesses that the signature of the testator on the second Will was not genuine.
- 84.** Learned senior counsel for the respondent also argues that the rough edge of the last page as compared to less rough edges of the first two pages of the second Will also prove that the second Will is not genuine. Such argument is neither here nor there, since the concerned expert, Purushottam Chatterjee, was called upon not to examine the authenticity of the document itself but the signature put

by the testator thereon and any other statement of the said witness than on the signature is irrelevant and superfluous. Moreover, the roughness of one of the pages as opposed to the others, by itself, is not at all a salient indicator of the document not being authentic.

85. If we consider the ratio of *Alamgir(supra)*, the Supreme Court held that although there is no rule that expert evidence must never be acted upon, in the same breath, it was held that human judgment is not totally infallible, for which due caution is to be exercised and the approach is to be of due care and caution. Acceptability and creditworthiness of expert evidence, as per the said decision, depends only upon probe and examination.
86. In the present case, there was no independent corroborative evidence adduced by the respondent in support of the experts' evidence. In the absence of any suspicious circumstance worth the name or going to the root of the matter and/or any evidence of spuriousness of the signature of the testator on the second Will independent of the two experts, the learned Single Judge had only one course open before him, in consonance with the proposition laid down in *Sashi Banerjee (supra)*, that is, to rely on the direct evidence of the attesting witness in terms of Section 63 of the Indian Succession Act and declare the Will to be genuine. There arose no occasion, in the absence of any suspicious circumstances or evidence in corroboration of the expert witnesses, to go beyond the deposition of the surviving attesting witness and look further into the mere opinion evidence of the experts.

- 87.** Hence, the learned Single Judge, with due respect, acted contrary to law and to the irrefutable factual pointers embedded in the body of evidence in disbelieving the authenticity of the Will dated August 31, 1988.

Caveatable Interest

- 88.** We are, however, are unable to agree with the appellant insofar as the alleged lack of caveatable interest of Gopal is concerned.
- 89.** As held by the Supreme Court in *Krishna Kumar Birla v. Rajendra Singh Lodha*, reported at (2008) 4 SCC 300, caveatable interest accrues if somebody succeeds to the estate of the deceased by way of inheritance; if not, a special interest is to be established which has to be a real and not a contingent interest. Even a creditor of the deceased was held to have such special interest. It was also held that the interest can be wide but must be one which would not have the effect of destroying the estate of the testator itself.
- 90.** In *Jagdish Prasad Tulshan (D) by LR. (supra)*, the beneficiary of a prior Will, even without probate, was held to have a caveatable interest. In the present case, the prior Wills of Saroj to Sabitri and Sabitri to Gopal have both been probated. Therefore, sufficient caveatable interest was created in favour of Gopal and on his demise, his heirs, the present respondents.
- 91.** In *Swatantranandji (supra)*, the court held that if grant of probate displaces any right, a person has a caveatable interest, which testis also satisfied by Gopal in the present case.

92. The crux of the principles governing caveatable interest, as laid down in the cited judgments, can be summarised as follows:

- (i) Heirs of the testator by virtue of normal line of succession have a caveatable interest;
- (ii) If not by inheritance/succession, anybody having a special interest, including a creditor or a purchaser/assignee from an heir of the deceased has a caveatable interest, subject to such interest being a present interest and a real interest and not a contingent interest;
- (iii) If the legal heirs of the deceased testator are contesting the probate, a person claiming through such legal heirs has no caveatable interest;
- (iv) A person does not have a caveatable interest if the interest claimed by him is contrary to or destroys the interest of the testator in the subject-matter of the Will.
- (v) Anybody whose rights will be displaced by virtue of grant of probate has a caveatable interest.

93. All the above tests are satisfied in favour of Gopal.

94. The appellant has argued that Sabitri and Gopal sold parts of the subject-properties. However, such sales, even if any, were not adverse to the interest of the testator in the estate. Rather, both Sabitri and Gopal acted in terms of the Will executed by the original owner/testator Saroj and asserted their rights through such Will while purporting to transfer such properties. Hence, both Sabitri and Gopal, instead of acting adverse to the estate of the testator, asserted

and relied on such right and only on the strength of the testator's title, derived by them through Wills, purported to effect transfers. Hence, it cannot be said that they acted adverse to the interest of the testator.

- 95.** As to Sabitri having abandoned her right to lodge caveat, such argument of the appellant is not tenable in the eye of law. Sabitri clearly expressed her intention to contest of the present probate proceeding by lodging a caveat which, however, was not valid in the eye of law in view of the non-filing of affidavit in support of the caveat in violation of the relevant Rules of the Original Side Rules framed by this Court. Thus, the caveat was rendered invalid due to technicalities, which does not tantamount to Sabitri ever abandoning her right to lodge a caveat, which would have required a conscious relinquishment of such right and positive assertion by Sabitri of such relinquishment, which are utterly absent here.
- 96.** Thus Gopal, stepping into the shoes of Sabitri, continued to have a caveatable interest which was rightly asserted in the present proceeding.

Contingent Interest

- 97.** The appellant's argument of Gopal's interest being contingent is also not sustainable. A learned Single Judge of this Court, while dismissing the present appellant's revocation case on July 27, 1998, merely observed that the revocation would be subject to the probate being granted in respect of the second Will dated August 31, 1988. However, fact remains that the revocation was refused, thereby sustaining the earlier probate which had attained finality. The

observation that such probate of the first Will would be “subject to” the outcome of the probate proceeding in respect of the second Will does not *per se* nullify the probate of the first Will.

98. Such observation only recognizes the automatic consequence of grant of probate in respect of the second and last Will, which would not invalidate the first probate as such but merely denude the probate in respect of the first Will dated August 30, 1988 of its efficacy, since it is the last Will and Testament of the testator which prevails over all previous Wills.
99. The effect of grant of probate in respect of the second Will would only be that both the probates would remain valid in the eye of law but the first probate would lose its legal strength to confer legal character as contemplated in Section 41 of the Evidence Act and would be rendered toothless and denuded of its efficacy. It would be the probate of the last Will, that is, the second Will dated August 31, 1988, which would then prevail.

Adverse Inference

100. The appellant has argued that adverse inference should be drawn against Gopal, being the caveator, for not having faced the witness box himself. The cited judgments of Allahabad High Court in the case of *Arjun Singh (supra)*, the Privy Council in the case of *Sardar Gubakhsh Singh (supra)* and the Supreme Court in *Vidhyadhar (supra)*, merely

hold that adverse inference can be drawn if a party to the suit does not himself/herself adduce evidence.

- 101.** However, the very premise of such proposition is that the party to a proceeding has direct knowledge of the material facts of the case.
- 102.** The facts of such cases are distinguishable from the present case.
- 103.** In the present case, there is an inherent peculiarity insofar as Gopal had a caveatable interest through the Will of Sabitri, who in turn derived title from the original testator Saroj, whose second Will is in contention in the present proceeding; whereas Gopal could not have any direct knowledge of the execution of either the first Will dated August 30, 1988 or the second Will dated August 31, 1988 executed by the original testator Saroj, since Gopal came into the picture much later through the Will of Sabitri, executed only on February 6, 2004.
- 104.** Even the appellant has argued that Gopal, having no knowledge of the Will, could not have a caveatable interest, thus admitting that Gopal could not have direct knowledge of the execution of either of the Wills dated August 30 or August 31, 1988 respectively. In the absence of any direct knowledge, even if a party to the proceeding, Gopal could not be the best witness or even be in a position to adduce direct evidence on the relevant facts of the case, that is, valid execution of the Will dated August 31, 1988 or otherwise. Hence, nothing would hinge on the evidence of Gopal in the present case and, as such, his non-examination as a witness cannot give rise to an adverse inference against him.

Whether the Will in favour of Sabitri is a contract

- 105.** First, the authenticity as a whole of the Will in favour of Sabitri, executed by Saroj on August 30, 1988, cannot be reopened since the probate granted in respect of the said Will has attained finality and the present appellant was unsuccessful in his revocation case.
- 106.** Secondly, a Will transfers property posthumously, there being no transfer *in praesenti* and *inter vivos*. There is no bar to the purpose of a Will being to honour an earlier commitment to sell a property to the beneficiary by the testator.
- 107.** Even if there was an agreement for sale between Sabitri and Gopal, the same did not create any right *in praesenti* as per Section 54 of the Transfer of Property Act. Thus, there could not arise any adverse interest being created in respect of the testator's estate. Rather, Sabitri would have relied on the interest of the testator Saroj in the subject-property if she had executed an agreement for sale on the strength of Saroj's Will in her favour.

Discrepancies in Attesting Witnesses' Evidence

- 108.** The respondent has stressed much on the alleged discrepancies in the attesting witnesses' evidence. However, as discussed above, all the said alleged discrepancies are inconsequential for the purpose of

ascertaining suspicious circumstances. Whether the attesting witness Purnendu was an employee of M/s Mitter and Co., whether there was a Day Book or any explanation as to why he was called as witness or whether he saw the testator sign before or after the Will dated August 31, 1988 and/or whether there was any litigation to justify the testator's visit to the office of M/s Mitter and Co., do not affect the authenticity of the Will in any manner.

- 109.** Even if the attesting witness did not know of the earlier Will in favour of Sabitri or could not identify the testator's signature on the first Will, it is unfathomable as to how the same could have any effect on the authenticity of his evidence. Rather, it is the respondents' case that the signature on the two Wills do not tally. In the teeth of such submission, it defies logic as to how the inability of the attesting witness of the second Will to identify the signature on the first Will which the respondents admits to vary, could have any effect or shake the sound evidence of execution of the second Will adduced by the attesting witness.

Whether the propounder/appellant could cross-examine Biplab Majumder, one of the expert witnesses

- 110.** Lastly, it falls for consideration whether the propounder/appellant could cross-examine Biplab Majumder, one of the expert witnesses, having himself called the said expert as witness.

- 111.** Contrary to the argument of the respondents, Biplab Majumder was called not as the plaintiff's witness but as an independent expert witness. By the very nature of their capacity as witnesses, experts are independent witnesses, whether called by either of the parties or appointed by the court independently.
- 112.** Hence, there was no necessity under Section 58 of the Evidence Act to first have Biplab declared as hostile witness before the plaintiff/propounder could cross-examine him.
- 113.** Thus, the said argument of the respondent is also turned down.
- 114.** In fine, we are not unaware of the constricted scope of interference in an intra-court appeal. However, this is not a case where this Court is merely substituting its views for that of the learned Single Judge just because another view is possible or that the impugned judgement was "not right" and not "wrong".
- 115.** Rather, in view of our conclusion on the first issue, the reliance placed on the experts' witnesses by the learned Single Judge in the teeth of the unshaken direct evidence of the attesting witness (who was an eye-witness to the testator having signed the Will dated August 31, 1988) in consonance with Section 63 of the Indian Succession Act, in the absence of any suspicious circumstances worth the name or going to the root of the matter, was contrary to settled principles of law and as such, vitiates the impugned judgment.
- 116.** Accordingly, the appeal succeeds.
- 117.** A.P.D. No.7 of 2021 is allowed on contest without any order as to costs, thereby setting aside the judgment and deemed decree dated

August 21, 2021 passed by the learned Single Judge in Testamentary Suit No.14 of 2006.

- 118.** Probate is hereby granted to the Executor/Appellant in respect of the last Will and Testament dated August 31, 1988 executed by the testator Saroj Kumar Chatterjee (since deceased) in respect of the estate of the said deceased.
- 119.** Ministerial steps in pursuance of the present decree be taken accordingly.

(Sabyasachi Bhattacharyya, J.)

I agree.

(Uday Kumar, J.)