IN THE SUPREME COURT OF BANGLADESH
HIGH COURT DIVISION
(CIVIL APPELLATE JURISDICTION)

Present:

Mr. Justice Md. Badruzzaman.

And

Ms. Justice Aynun Nahar Siddiqua

FIRST APPEAL NO. 34 OF 2025

Sree Dipok Ranhjan Kar

.....Appellant.

-Versus-

Sree Babul Ranjan Kar

.....Respondent.

Mr. Swapan Kumar Dutta, Advocate

..... For the appellant

Mr. Bivash Chandra Biswas, Senior Advocate with
Ms. Purabi Saha, Advocate and
Ms. Dipali Rani Das, Advocate

..... For the respondent

Heard on: 09.02.2026, 10.02.2026, 15.02.2026, 19.02.2026and 22.02.2026.
Judgment on: 01.03.2026.

Md. Badruzzaman, J.

This appeal is directed against judgment and order dated 18.07.2023 passed by learned District Judge, Pirojpur in Miscellaneous Case No. 4 of 2022 (Probate) dismissing the case.

Facts, relevant for the purpose of disposal of this appeal, are that the appellant as petitioner filed Miscellaneous Case No. 37 of 2019 (Probate) before the learned Joint District Judge and Delegate Judge, 1st Court, Pirojpur for probate of the will dated 11.10.2010 claimed to be executed by Usha Rani Kar in respect of the suit property. Respondent-opposite property No. 1 filed written objection to contest the application and accordingly, the Delegate Judge

forwarded the case to the learned District Judge, Pirojpur for adjudication and the case was registered as Miscellaneous Case No. 4 of 2020 (Probate). The case of the appellant-propounder is that he is the son of Ramani Ranjan Kar and when he was 10 years of age, his mother died and after her death Ramani Ranjan Kar married Usha Rani Kar as second wife. Usha Rani Kar was the sole owner of the property by purchase described in the schedule of the will. Respondent-opposite party Babul Kar is his step brother and the son of Usha Rani Kar and Ramani Ranjan Kar. She loved and adored the petitioner as his own son and he also loved and respected her like his own mother. Consequently, at the fag end of her life, Usha Rani Kar executed a will on 11.10.2010 bequeathing her entire property in equal share to the petitioner and the opposite party. It was her last will and by that will the petitioner was appointed as the executor of the will. Usha Rani Kar died on 24.06.2017 and after her death, the petitioner requested the opposite party, on several occasions, to get probate of the will. But he expressed his inability on 17.05.2019 and as such, the petitioner being the legatee and the sole executor of the will filed the miscellaneous case for granting probate of the will.

The defendant-respondent in his written objection mainly contended that the petitioner has no *locus standi* to file the case and that it is not maintainable in its present form; that it is barred by limitation, estoppel, waiver and acquiescence and that the petitioner with a view to grabbing the suit property inherited by the opposite party from her mother filed the instant case by creating a false Will. This opposite party is the only son of Usha Rani Kar and he has two full sisters, Joshna Rani and Alo Rani and there was no reason on the part of Usha Rani Kar to bequeath her property in favour of the

petitioner by depriving her own son and daughters from the property and it was a suspicious will. The petitioner never loved Usha Rani Kar as his own mother but he was always cruel with her. The petitioner created the will in connivance with some interested quarters. Usha Rani Kar never executed any will and that the signatures appearing therein are forged and fabricated. On the death of Usha Rani Kar, the opposite party being her only son inherited her entire property including the suit property alone and after mutating his name in the B.R.S Khatian he has been owning and possessing the same without any interruption from any quarter. Ramani Ranjan Kar married Usha Rani Kar as his second wife after the death of the mother of the petitioner in 1966 and he died in 1973 when the petitioner had no income and accordingly, he remained in the same household till 1984-1985 and thereafter, he left that house with his family members and started to live in a different house separately and Usha Rani Kar was living with her own son and daughters in different house. The petitioner took away all documents in respect of their properties. A salish was held to resolve the dispute between the petitioner and the opposite party in respect of the enjoyment and occupation of their paternal property and in the pretext of resolving that dispute once for all by separating their share permanently, the petitioner with the help of his cohorts namely, Swapan Kumar Ghosh, Joharlal Ghosh and Ashoke Kumar took his signature on the bottom of a blank cartridge paper for preparation of an arbitration agreement (Achalnama). They also took signature Chinu Kar, the wife of the opposite party as witness on the self-same blank cartridge paper. Subsequently, the petitioner with the help of his cohorts converted the blank cartridge papers into will dated 11.10.2010 by

forging the signatures of his mother Usha Rani Kar and that is why the petitioner never brought the same in the light during the lifetime of Usha Rani Kar and after her death he filed the miscellaneous case disclosing about the will. It has further stated that the signature of Usha Rani Kar is available in her National Identity Card which is completely different from the signatures appearing in the will and the will is a product of forgery and as such, the petitioner is not entitled to get any probate of will and the case is liable to be dismissed.

Upon the pleadings of the parties, the learned District Judge framed as many as three issues as follows:

(i) Whether the will in the name of Usha Rani Kar dated 11.10.2010 as described in Schedule 'Ga' of the application is a genuine one.

(ii) Whether on the basis of said will a probate can be issued in favour of the petitioner in respect of 91.75 decimals of land as described in Schedule 'Kha' of the petition.

(iii) Whether the petitioner is entitled to any relief as prayed for.

During trial, four P.W.s and two D.W.s were adduced by the appellant and the respondent to prove their respective case. They also produced documentary evidence which were marked as Exhibits. Out of the documents produced by the propounder-appellant, the certified copies of S.A Khatian Nos. 11, 59 and 82 were marked as Exhibit 1 series, Death Certificate of Usha Rani Kar as Exhibit 2, the original will as Exhibit 3, rent receipt as Exhibit 4. Out of the documents produced by the opposite party-respondent, the certified

copies of S.A. Khatian Nos. 14, 15, 16, 682 and 815 were marked as Exhibits Nos. Ka, Ka(1)-Ka(4), B.S Khatian No. 1646 of 1997 as Exhibit Kha and Kha/1, Sale deed No. 2882 dated 07.06.1969 as Exhibit Ga, rent receipts as Exhibits Gha and Gha/1 and National Identity Card of Usha Rani Kar as Exhibit Cha.

The learned District Judge, upon consideration of the evidence and materials on record, dismissed the miscellaneous case vide judgment and order dated 18.07.2023 and being aggrieved by and dissatisfied with the said judgment, the legatee as appellant has preferred this appeal.

Mr. Swapan Kumar Datta, learned Advocate appearing for the appellant by taking as to the impugned judgment, the pleadings of the parties, the evidence adduce by them and other materials submits that the propounder by adducing and producing oral and documentary evidence could prove the sweet and congenial relationship between the testatrix and the legatee and proved the execution of the Will by the testatrix and that it was her last will but the trial Court illegally came to the conclusion that the plaintiff could not prove his case. Learned Advocate further submits that trial Court wrongly held that the will was not a genuine one or that the intention of the testatrix has not been reflected or that she did not make any expression in presence of any witness that she would make will depriving her real heirs. Learned Advocate finally submits that upon misreading and non-consideration of the evidence and materials on record the trial Court illegally dismissed the miscellaneous case and as such, interference is called for by this Court.

Mr. Bivash Chandra Biswas, learned Senior Advocate appearing with Ms. Purabi Saha, learned Advocate for the respondent submits this appeal is not maintainable because no decree was filed along with the Memorandum of Appeal inasmuch as the final order in the probate case by the learned District Judge refusing to grant probate was under the category of decree and in such situation the decree ought to have been drawn up according to the provisions of Rule 162 of the Civil Rules and Orders (Part-1) read with the provisions under Order XX rules 5A, 6 and 7 of the Code of Civil Procedure and as such, this first appeal is incompetent and the Memorandum of appeal is liable to be rejected. Learned Advocate further submits that as per section 19-I of the Court Fees Act the petitioner was required to make valuation statement in the application for probate but no statement was made therein and as such, the petition for probate of the will was not inform. Learned Advocate further submits that according to section 281 of the Succession Act the petition for probate of will must be verified by at least one of the attesting witnesses to the will but in the instant case the application was filed without any such verification of attesting witness and as such, the application was not maintainable. Learned Advocate finally submits the learned District Judge upon proper consideration of the evidence and materials on record came to its findings and decision and thereby dismissed the case and as such, interference is not called for by this Court.

In reply to the submissions, Mr. Swapan Kumar Dutta learned Advocate for the appellant submits that in a probate proceeding, contentious or not, does not require any decree to be drawn up because though the order passed in a probate proceeding may have

the force of a decree but strictly it is not a decree not having been passed in a suit; that in a probate proceeding, the valuation of property embodied therein in the application for probate and payment of court-fee on the said value, at the time of filing of said application is not at all necessary because in case of civil suits valuation of the property must be embodied in the plaint for invoking pecuniary jurisdiction of the Court but in case of filing an application for probate no such thing is required at all; that regarding verification of the application by attesting witness for probate under section 276 of the Succession Act as required under section 281 of the said Act is not mandatory rather directory because there is no consequence embodied therein or any other section of the said Act for non-compliance thereof and that requirement of law can be mitigated on any point of time during pendency of the proceeding in any logical way or manner and as such, the application for probate and this appeal is maintainable.

We have heard the learned Advocates, perused the impugned judgment, the pleadings of the parties, the evidence adduced by them and other materials available on record.

The learned District Judge while refusing to grant probate of the will by the impugned judgment mainly observed that the petitioner did not produce any witness to prove the sweet and congenial relationship between Usha Rani Kar and the petitioner Dipok Ranjan Kar; that although the petitioner was the competent witness to prove that will by citing himself as witness but he did not do so; the scribe Ashok Kumar Kar though was adduced as P.W.2 but in the will he being the licensed deed writer did not mention his license number; though the will is a computer composed document

but some parts of it were kept vacant and later filled up by handwriting but without any explanation; the will contains four signatures of Usha Rani Kar but all of those are different from each other; if the will be considered as the last testament of the testatrix Usha Rani Kar but later on she transferred some of her land which presupposes that the testatrix Usha Rani Kar subsequently might have revoked the same; as per the will, about 4.405 acre land was bequeathed by the testatrix but the petitioner claimed probate in respect of only 0.9175 acre land which is not only illegal but proves the falsity of that will and that the will was not a genuine document. The issues, which have been raised before us by the learned Advocate for the respondent in regards maintainability of the appeal, valuation of the application for probate and attestation of the application by attesting witness, involve only law points and as such, firstly, we would address those issues.

Maintainability of the Memorandum of Appeal:

Chapter IV of part IX of the Succession Act, 1925 deals with the practise in granting and revoking probates and letters of administration. Section 268 of the Act provides that the proceedings of the Court of the District Judge in relation to grant of probate and letters of administration shall, save as hereinafter otherwise provided, be regulated, so far as the circumstances of the case permit, by the Code of Civil Procedure, 1908. In other words, according to the said section, the procedural provisions of the Civil Procedure Code are applicable in relation to grant or revocation of probate and letters of administration, as the circumstances of the case permit. The proceeding for grant of probate is initiated by filing an application under section 276 of the Act. The details which are

required to be stated in the said application are mentioned in the said section. Similarly, the proceeding for letters of administration is initiated by filing an application under section 278 of the Act giving the details, as mentioned therein. Section 280 of the Act provides with regard to verification of petition for probate or letters of administration. Sub-Section (1)(c) of the section 283 empowers the District Judge to issue citations calling upon all persons claiming to have any interest in the estate of the deceased to come and see the proceedings before the grant of probate or letters of administration. Section 284 provides for lodging of caveats against the grant of probate or letters of administration by the persons who want to oppose the proceeding. After lodging of caveats the proceeding becomes contentious. Section 295 of the Act provides the procedure, to be followed in a contentious proceeding and section 299 provides for an appeal from orders passed by the District Judge in the proceeding. It would be beneficial to quite the provisions of sections 295 and 299 of the Act which runs as follows:-

> "295. In any case before the District Judge in which there is contention, the proceeding shall take, as nearly as may be, the form of a regular suit, according to the provisions of the Code of Civil Procedure, 1908, in which the petitioner for probate or letters of administration, as the case may be, shall be the plaintiff, and the person who has appeared to oppose the grant shall be the defendant.
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> 299. Every order made by a District Judge by virtue of the powers hereby conferred upon him shall be subject to appeal to the High Court Division in accordance with

the provisions of the Code of Civil Procedure 1908, applicable to appeals.

From the aforesaid provisions, extracted above, it is clear that the proceedings for grant of probate or letters of administration is initiated by filing a petition/application and not by filing a plaint.

On the other hand, suit is not defined under the Code of Civil Procedure, but section 26 of the Code of Civil Procedure provides that every suit shall be instituted by the presentation of a plaint or in such other manner as prescribed. Order IV rule 1 of the Code provides that every suit shall be instituted by presenting a plaint to the Court or such officer as it appoints in this behalf. As such, it is clear that under the Code of Civil Procedure, presentation of a plaint is the institution of the suit; whereas, under the Succession Act the proceedings of probate or letters of administration is initiated by filing applications/petitions. Section 295 of the Act only says that after proceeding for grant of probate or letters of administration becomes contentious, the proceeding shall take, as nearly as may be, the form of a regular suit according to the provisions of the Civil Procedure Code, 1908, in which the petitioner for probate or letters of administration, as the case may be, shall be the plaintiff and the person who has appeared to oppose the grant shall be the defendant. Nowhere the aforesaid provision says that once the proceeding becomes contentious, the proceeding will be treated as a regular suit, it only says as nearly as may be the proceeding shall take the form of a regular suit. The proceeding becomes a suit in form only and not in substance. The use of words "as nearly as may be" in the section clearly shows that the legislature never intended that the contentious proceeding should exactly be the same as the suit. Thus,

the contentious proceeding is not a suit under the ordinary law. By virtue of section 295 of the Succession Act the said proceeding takes the form of a regular suit for the limited purpose of applying to it the provisions of the Code of Civil Procedure. The proceeding retains its character as proceeding and does not in point of fact becomes a regular suit.

So far as the suit is concerned, there is no dispute that it culminates into a judgement following by a decree as required by section 33 of the Code. The contentious proceeding under the Act is not a suit in point of fact and as such final orders passed in such proceeding is not a decree. Section 299 of the Succession Act provides an appeal from every order, which includes the order passed in contentious case also. Though meaning of a word 'order' is not decisive of the factor, it has to be considered as to whether an order in a contentious case is to be treated as a decree or not for the purpose of an appeal. Sub-section (2) of section 2 of the Civil Procedure Code defines 'decree' which means the formal expression of an adjudication which, so far as regards the Court expressing it, conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the suit and may be either preliminary or final. Under the definition of 'decree' under section 2(2) of the Civil Procedure Code, three essential conditions are necessary-(1) adjudication must be given in a suit; suit must start with a plaint and culminate in a decree and (3) the adjudication must be formal and final and must be given by a Court. Moreover, sub-section (14) of section 2 of the Civil Procedure Code defines 'order' which means the formal expression of any decision of a Civil Court which is not a decree.

The appeal under section 299 of the Succession Act is filed not only against the order passed in a contentious case but against other orders also and, as such, the word 'order' used in section 299 of the Act cannot be read as a decree. The question is as to whether the order passed in a contentious proceeding will be treated as decree by virtue of the provisions of section 295, which provides that as nearly as may be the proceeding takes the form of a suit. In this connection, it has to be seen as to whether the order passed in a contentious proceeding fulfils the ingredients of the decree. As stated above, the proceeding is not a suit and as such adjudication is not given in a suit. The proceeding culminates in an order and not in a decree and, as such, the two of the requirements of a decree are lacking and, in that view of the matter, an order passed in a contentious proceeding under the Act cannot be treated as a decree. There is no provision under the Act which requires for drawing up a decree after passing an order in a contentious proceeding.

Let us consider the precedents on the point in controversy. A Division Bench of the Calcutta High Court in *BalaiLall Banerjee v. Debaki Kumar Ganguly, AIR 1984 Cal 16* held as follows:-

> "Therefore, upon reading the relevant provisions of the Succession Act and the authorities referred to above, we are of the view that a proceeding for grant of probate or letters of administration is not strictly a suit though in some cases where the grant is opposed it is deemed as such. That, in our view, is only for the purpose of classification of the proceeding without changing its character. The order passed in such a proceeding may have the force of a decree but strictly it is not a decree not having been passed in a suit. Therefore, in our view a formal decree does not seem to be required to be drawn up following an order of grant,"

In the case of *Sundrabai Saheb v. The Collector of Belgaum, 1909 ILR (Vol. XXXIII) page 256* a Division Bench of the Bombay High Court considered the question of taxation of pleaders' fees in appeal from probate proceeding. While dealing with the said question section 83 of the Probate Act (V of 1881) which is equivalent to section 295 of the Indian Succession Act was considered and it was held therein that "the section does not say that proceedings for probate are "a regular suit" or that they shall be treated as such for all purposes. It provides that "they shall take as nearly as may be the form of a suit, according to the provisions of the Code of Civil Procedure. This would show that probate proceedings do not, under the ordinary law, fall within the description of a "regular suit" it is by virtue of section 83 that they are brought within that category; and they are so brought, not in point of fact but only in point of form, for the limited purpose of applying to them "as nearly as may be" the provisions of the Code of Civil Procedure. These restrictions leave still a difference between "a regular suit" and a "testamentary suit."

Rajasthan High Court in the case of *Mst. Bhonri v. Suwalal, AIR 1956 Raj 119*, Orissa High Court in the case *Mst. Puinbasi Majhiani v. Shiba Bhue, AIR 1967 Orisssa 41* and Madras High Court in the case of *Philo Peter v. Divyanathan, AIR 1989 Mad 111* have taken a similar view that the contentions proceeding for grant of probate or letters of administration is not a regular suit and the order passed in the said proceedings is not a decree.

This question has been considered by Patna High Court in *Nand Kishore Singh v. Sri Ram Ahir, 1989 PLJR 256* and *Sidhnath Bharti vs. Jai Narayan Bharti, AIR 1994 Pat 144* who relying upon the judgement given in the case of Balai Lall Banerjee (*supra*) held that

the contentious proceeding for grant of probate and letters of administration is not a suit and a decree is not required to be drawn up following an order of grant of probate and a copy of decree is not required to be filed along with the memorandum of appeal.

Thus, after considering the question from different angles, we are of the view that the contentions proceeding for grant or refusal of probate or letters of administration is not a suit in substance and the order in the said proceeding is not a decree, as it does not fulfil the ingredients of decree as defined under the Code. There is no requirement in law that an order in a contentious proceeding should be followed by a decree. In that view of the matter, a decree is not required in law, to be filed along with the memorandum of appeal under section 299 of the Succession Act and as such, this appeal cannot be held to be incompetent due to non-filing of a copy of a decree along with the memorandum of appeal.

Valuation of the application for probate and letters of administration:

To resolve the issue of valuation of the application for probate or letters of administration we would first refer to section 19-I (1) of the Court Fees Act, 1870 which reads as follows:

> "19-I. Payment of court-fee in respect of probates and letters of administration-
>
> (1) No order entitling the petitioner to the grant of probate or letters of administration shall be made upon an application for such grant until the petitioner has filed in the Court a valuation of the property in the form set forth in the third schedule, and the Court is satisfied

that the fee mentioned in No. 11 of the First Schedule has been paid on such valuation."

Section 19-I (1) of the Court fees Act, 1870 says that the Court shall not grant probate until the fees are paid. It does not say that the Court shall not try an application for probate or letters of administration until the fees are paid or that the payment of the fees is a condition precedent to the making of the application.

When an application for probate or letters of administration is made to any Court, ad-valorem Court fees on the value of the assets of the estate of the testator be it according to the valuation put in the Affidavit of Assets or be it the valuation fixed by the Collector or finally decided by the Court under section 19-H of the Court Fees Act, is not payable until the Court has proceeded with the hearing of the application by taking evidence affording opportunity to the propounder to prove the Will and also his right to "an order entitling him to the grant of probate or letters of administration". Only when the Court has arrived at the decision that the propounder is entitled to the grant of probate of letters of administration, then only, but before the order entitling the petitioner to the grant of probate or letters of administration is made the court-fees mentioned in Article 11 of the First Schedule of the Court Fees Act need be paid upon the valuation found by the Court under section 19-H.

In section 19-C of the Court Fees Act which gives relief in case of several grants the language occurs "whenever a grant of probate or letters of administration has been or is made in respect of the whole of the property belonging to an estate and the full fee chargeable under this Act has been or is paid thereon." That language clearly shows that in a probate proceeding court-fees are

paid on the grant but not on the application. An unsuccessful propounder of a Will is not liable to pay court-fees mentioned in section 19-I of the Court Fees Act.

The provisions of sections 19-C, 19-H and 19-I of the Court Fees Act, 1870 clearly suggest that the court-fees according to the valuation fixed under section 19-H of the Act will be payable at a stage if and when an order entitling the grant of probate or letters of administration would be made and not any previous stage.

In view of the above, we are constrained to reject the submission of the learned Advocate for the respondent that the application for granting probate was not in form due to absence of valuation statement or non-payment of court-fees at the time of filing the application.

The verification of a petition required under section 281of the Succession Act, 1925

Verification of a petition required under section 281 of the Succession Act, 1925 is similar to the verification required of pleadings, including a plaint, under Order VI rule 15 of the Code of Civil Procedure, and has no greater effect or value. Omission to verify, or defective verification of, a pleading is a mere irregularity within section 99 C.P.C and is never fatal. The provision of section 281 of the Succession Act is less drastic than that of Order VI rule 15 C.P.C and an omission to verify, or a defective verification of, a petition for probate cannot have a more serious effect than that of a plaint. A pleading must be verified by the party or by some other person acquainted with the facts of the case; a petition for probate is, however, required to be verified by an attesting witness. A

petitioner for probate has no legal authority over an attesting witness and cannot compel him to verify their petition.

If a petition for probate or letters of administration is not verified by an attesting witness, the petitioner can always excuse himself on the ground that he could not procure any attesting witness to verify it. We, therefore, respectfully agree with the view expressed in *Rama Sinha vs. Murtibai 68 IC 940 (AIR 1923 Nag 41) that* the provision in section 281 of the Succession Act is merely directory and not mandatory i.e., non-compliance with it is not intended to lead to the rejection of the petition.

Now, we propose to consider the merits of the case. Before discussing the evidence regarding the genuineness of the will and also as to the fact whether the will has been executed complying with the due formalities required under law, we would like to refer to certain norms the Court should bear in mind in appreciating the evidence by the parties in applications for probate or letters of administration with the will annexed. One principle that has to be kept in mind is that for deciding the material questions of fact, which arise in applications for probate or action on will, no hard and fast inflexible rule can be laid down for the appreciation of evidence. The propounder of the will has to prove the due and valid execution of the will and that if there are many suspicious circumstances surrounding the execution of the will, the propounder must remove that suspicion from the mind of the Court by cogent and satisfactory evidence. It must also be remembered that the result of the application of the above two general and broad principles would always depend upon the facts and circumstances of each case and on the nature and quality of the evidence adduced by the parties. (*Ref:*

Harmese vs. Hinkson AIR 1946 PC 156 and H. Venkatachala vs. B.N. Thimmajamma, AIR 1959 SC 443).

With regard to the proof of will it is beneficial to quote the observations made in *AIR 1959 SC 443 (supra):*

> "The party propounding a will or otherwise making a claim under a will is no doubt seeking to prove a document and, in deciding how it is to be proved, reference must inevitably be made to the statutory provisions which govern the proof of documents. Sections 67 and 68 of the Evidence Act are relevant for this purpose. Under Section 67, if a document is alleged to be signed by any person, the signature of the said person must be proved to be is his handwriting, and for proving such a handwriting under sections 45 and 47 of the Act, the opinion of experts and of persons acquainted with the handwriting of the person concerned are made relevant. Section 68 deals with the proof of the execution of the document required by law to be attested; and it provides that such a document shall not be used as evidence until one attesting witness at least has been called for the purpose of proving its execution. These provisions prescribe the requirements and the nature of proof which must be satisfied by the party who relies on a document in a court of law. Similarly, Sections 59 and 63 of the Indian Succession Act are also relevant. Thus, the question as to whether the will set up by the propounder is proved to be the last will of the testator has to be decided in the light of these provisions. It would prima facie be true to say that the will has to be proved like any other document except as to the special requirements of attestation prescribed by S.63 of the Indian Succession Act. As in the case of proof of other documents in the case of proof of wills it would be ideal to expect proof with mathematical certainty. The rest to be applied would be the usual test of the satisfaction of the prudent mind in such matters."

In *Paresh Chandra Bhowmik vs. Hiralal Nath and another, (1984) 6 BLD (AD)199* our Apex Court held as follows:

> "Appellant, propounder, set up the will seeking its probate, and as such, it is he on whom lies the entire responsibility for proving that the will was duly executed by the testator as his last will. Due execution of a will means not only that the testator executed it by putting his signature or affixing his mark that is thumb impression, but also it requires that the testator executed it in sound disposing mind, fully knowing the nature and effect of his action. In other words, it must be proved that the testator had 'testamentary capacity' at the time he put his signature or thumb impression on the will. When a written will is sought to be proved, it must be proved by fulfilling the statutory provisions namely, provisions of sections 67 and 68 of the Evidence Act governing proof of a document. In addition, the special requirements of section 63 of the Succession Act shall also have to be fulfilled."

The above views of our jurisdiction and Indian Jurisdiction clearly suggests that in order to get an order granting probate or letters of administration, the propounder is under an obligation to prove by satisfactory evidence that the will was signed by the testator, that the testator at the relevant time was in a sound and disposing state of mind and that he understood the will and put his signature on the document of his own free will. Ordinarily, when the evidence adduced in support of the will is disinterested, satisfactory and sufficient to prove the sound and disposing state of the testator's mind and his signature as required by law, Courts are justified in making a finding in favour of the propounder. In other words, the onus on the propounder can be taken to be discharged on proof of the essential facts indicated.

Now we may refer to the important aspect, which always received serious consideration by Courts in adjudicating the validity of a will. This is what is known as the suspicious circumstances surrounding the execution of the will.

In *H. VentaKachala Iyengar vs. BN Thimmajama, AIR 1959, 443* the Supreme Court of India observed as follows:

> "……and evidence adduced may not succeed in removing the legitimate doubt as to the mental capacity of the testator; the dispositions made in the will may appear to be unnatural, improbable or unfair in the light of the relevant circumstances, or, the will may otherwise indicate that the said dispositions may not be the result of the testator's free will and mind. In such cases, the Court would naturally expect that all legitimate suspicions should be completely removed before the document is accepted as the last will of the testator. The presence of such suspicious circumstances naturally tends to make the initial onus very heavy; and unless it is satisfactorily discharged, courts would be reluctant to treat the document as the last will of the testator. It is true that if a caveat is filed alleging the exercise of undue influence, fraud or coercion, in respect of the execution of the will propounded, such pleas may have to be proved by the caveators, but even without such plea circumstances may arise a doubt as to whether the testator was acting of his own free will in executing the will, and in such circumstances, it would be a part of the initial onus to remove any such legitimate doubts in the matter.

In regards suspicious circumstances surrounding the execution of the will our Appellate Division in *6 BLD (AD) 199*(*supra*) observed as follows:

> "Mere putting signature or fingerprint on a document does not mean that the document has been executed by the person putting the signature or placing the thumb impression; the signature or thumb impression of the testator shall be so placed, as specifically prescribed in section 63 of the Evidence Act, that it shall appear that it was intended thereby to give effect to the writing of the will. This raises the question of testamentary capacity of the testator that is, the testator had full sense, he was in sound mind and he understood the nature and effect of his action in putting his signature or placing his mark on

> the document. Of course, when it is found that the purported testator put his signature or mark on the will, then it shall be presumed that he knew the nature and effect of his action. But this presumption is liable to be rebutted by proof of suspicious circumstances surrounding the will. …….Even if the caveator did not raise the question of testamentary capacity, yet the propounder is not exonerated from the incumbent duty to prove that the testator had sound and disposing mind and that he fully understood the nature and effect of his action in executing the will."

Above citations clearly suggest that if the evidence adduced is not succeeded in removing the legitimate doubt as to the mental capacity of the testator; if the dispositions made in the will appears to be unnatural, improbable or unfair in the light of the relevant circumstances, or, if the will otherwise indicate that the said dispositions is not the result of the testator's free will and mind, such legitimate suspicions should be completely removed before the document is accepted as the last will of the testator. Moreover, even if the caveator does not raise the question of testamentary capacity i.e the testator had full sense, he was in sound mind and he understood the nature and effect of his action in putting his signature or placing his mark on the document, yet the propounder is not exonerated from the incumbent duty to prove that the testator had sound and disposing mind and that he fully understood the nature and effect of his action in executing the will. Moreover, all legitimate suspicions should be completely removed before the document is accepted as the last will of the testator.

Now, we turn to the present case. Exhibit 3 is the will. It is dated 11.10.2020 and it is an unregistered will. The will is purportedly executed by the stepmother of the propounder

appellant. Before considering whether the will has been executed after satisfying all the requirements under the statute, for a moment, we assume that all the statutory formalities have been complied with for the purpose of examining whether the will is otherwise bad; say that it is not genuine, whether it is surrounded by suspicious circumstances, whether it is a result of undue influence and coercion and also the question whether at the time when the will was executed the testatrix Usha Rani Kar had sound and disposing state of mind, whether the will has been executed with a free mind of the executrix.

First, we will consider the question of genuineness of the will. When we say that we are examining the genuineness of the will, we only mean that whether the will has been signed by the testatrix knowing that she was executing a will. Of course, this question has got real significance as to the other aspects we have to consider like suspicious circumstances and the sound disposing state of mind of the testatrix.

P.W.1, Debakar Kar is the son of the propounder-petitioner, Sree Dipok Ranjan Kar, claimed to be the constituted attorney of his father, deposed on behalf of his father but he could not produce any power of attorney to depose on his behalf. He was not an attesting witness of the will. In examination-in-chief he deposed, "নালিশী জমাজমির মালিক ছিলো উষা রানী কর। তিনি প্রার্থীর সৎ মাতা ও ১ নং প্রতিপক্ষের গর্ভধারনী মাতা। উষা রানী রমনী রঞ্জনের ২য় স্ত্রী তার প্রথম স্ত্রী মারা গেলে তিনি ২য় স্ত্রী গ্রহণ করেন। উষারানীকে দিপক রঞ্জন নিজ মাতার মত দেখতেন। উষা রানীও দিপক রঞ্জন কে নিজ গর্ভজাত পুত্রের ন্যায় দেখতেন। উষারানী তার সম্পত্তি (৯১.৭৫ শতক) প্রার্থী দিপক রঞ্জন নিজ পুত্র বাবুল রঞ্জন কে সমান অংশে উইল করেন ১১-১০-২০১০ তারিখে। তারা দুই জনে তা আনন্দ চিত্তে মেনে নেয়। উষারানী ২৪-৬-২০১৭ তারিখে মারা গেছে।..... এই উইলটা উষারানীর একমাত্র ও শেষ উইল। এই কেস ছাড়া অন্য কোন কেস করা হয়নি। আমি উইলটি প্রবেটের আবেদন করছি।" In

cross-examination he stated, “এই উইলে মোট ৩টি খতিয়ানের সম্পত্তি আছে। তার নম্বর ১৫, ১৬, ৬৮২। উইলে এস,এ ৮১৫, ১৭, ৬৭৪, ১৪ নং খতিয়ানের জমির উল্লেখ আছে। এই সব খতিয়ানের জমা জমি কেন দাবী করি না সে বিষয়ে দরখাস্তে উল্লেখ করিনাই। .....দিপক রঞ্জন করের বয়স যখন ১০ বছর তখন তার মাতা মারা যায়। দিপক রঞ্জন কর একান্নবর্তী পরিবার থেকে ১৯৮৪/১৯৮৫ সালে পরিবার পরিজন নিয়ে পৃথক হয়ে যায়। উষারানী করের গর্ভজাত একমাত্র পুত্র বাবুল কর। বি,এস ১৬৫১ নং খতিয়ানে সমান অংশে প্রার্থী ও ১ নং প্রতিপক্ষের নামে রেকর্ড হয়েছে। এস,এ ১৪ নং খতিয়ানের মালিক উষা রাণী না। উইলে এই জমি হস্তান্তরের ক্ষমতা তার ছিলো না।.....উষারাণী নিজের নাম লিখতে পারেন। জাতীয় পরিচয় পত্রে তার স্বাক্ষর আছে। আমার ঠাকুর দাদার জমির সীমানা নিয়ে গন্ডেগোল নেই। সীমানা বিরোধ মিমাংসার জন্য কোন শালিস বৈঠক হয়নি। উইলের কথাবার্ত াহয়েছে ১০/১০/২০১০ তারিখে উইলটা স্বাক্ষর হয়েছে ১১/১০/২০১০ তারিখে। কথাবার্তা সকাল ৯/১০ টার সময় হয়। সেখানে কাকা, কাকী, অশোক কুমার ঘোষ, স্বপন কুমার ঘোষ, জহর লাল ঘোষ, উপস্থিত ছিলো। উইলটা আামদের ঘরের সামনের বারান্দায় বসে লেখা হয়। লেখা লেখির পর উইলটা নিয়ে যায় অশোক কুমার কর। উইলের ব্যবহৃত কার্টিজ পেপার ও সাক্ষীর সংখ্যা কোন হাতে লেখা বলতে পারবো না। উইল প্রথমে অশোক কুমার কর পরে দাতা উষারানী কর, তারপর দীপক রঞ্জন কর, এর পর বাবুল কর, চিনু কর এরপর স্বপন কুমার ঘোষ এর পর জহর লাল ঘোষ স্বাক্ষর করে। এই স্বাক্ষর গ্রহনের সময় আমি উপস্থিত ছিলাম। আমরা সবাই ছিলাম। আমাদের ঘরে বসে হয়। কি বার ছিলো মনে নেই। .....জমির কাগজপত্র বাবার কাছে ছিলো। উইলনামায় উষারানীর ৪টি সহি আছে। সত্য নয় যে এসব স্বাক্ষরের সাথে মিল নেই। সত্য নয় যে উইলনামা জাল। সত্য নয় যে উষারানী কোন সম্পত্তি উইলে ঘোষনা করেন নাই। সত্য নয় যে আমার পিতা উষারানীর সম্পত্তি আত্মাসতের জন্য এই উইলনামা করেছে।”

P.W.2 Ashok Kumar Karclaimed was the scribe of the will in his examination-in-chief deposed, “১। দিপক রঞ্জন কর ২। বাবুল রঞ্জন কর নামীয় ১১/১০/২০১০ তারিখের উইলটি আমার লেখা। উইলদাতা উষারানী আমার সামনে সহি করে। স্বাক্ষীরাও আমার সামনে সহি করে। এই সেই উইল ও আমার সহি প্রদ:-৩, ৩/১, আমি উষারানী করের কথা মত তার ছেলেদের অনুকূলে উইলটি লিখি। দিপক ও বাবুল উইলটি লিখতে সম্মতি দেয়।” In his cross examination he stated, “আমি একজন দলিল লেখক কিন্তু উইলে আমার লাইসেন্স নম্বর দেইনি। উইলনামা স্বাক্ষরের ২/১ দিন আগে উইল করার কথাবার্তা হয়। উইলনামায় তারিখ ও কার্টিজের সংখ্যা স্বাক্ষীর সংখ্যা হাতে লেখা। এর ব্যাখ্যা উইলনামায় দিই নাই। কথাবার্তার সময় ওরা দুই ভাই, তাদের মাতা আর আমি উপস্থিত ছিলাম। তখন সময়

সকাল ৯/১০ টারদিকে। সত্য নয় যে উষারানী আমার সামনে উইলনামায় সহি করে নাই। সত্য নয় যে উইলনামার জন্য কোন বৈঠক হয়নি। সত্য নয় যে দিপকের দ্বারা প্রভাবিত হয়ে এই উইলনামা তৈরী। সত্য নয় যে মিথ্যা সাক্ষ্য দিলাম।"

P.W.3 Swapan Kumar Ghosh in his examination-in-chief stated, "উষারানী দাতা আর দিপক রঞ্জন ও বাবুল গ্রহীতা নামীয় এই উইলের আমি সাক্ষী। অন্য সাক্ষী হলেন জহর লাল ঘোষ, দীপক, বাবুল, আর চিনু সাক্ষী। লেখক হলেন অশোক কুমার কর। আমার সামনে অশোক কুমার কর উইলটি লেখে। সাক্ষীরা আমার সম্মুখে সহি করে। উষারানীর কথামত অশোক কুমার কর উইলটি লেখে।" In cross- examination he stated, "সার্টিফিকেটে আমার নাম জহুর লাল ঘোষ। আর ভোটার আইডি কার্ডে আমার নাম স্বপন কুমার ঘোষ। আমি বি, এ পাশ। উইলনামা লেখার সময় আমি উপস্থিত ছিলাম। কথাবার্তা সময় আমি ছিলাম। ১০/১১ তারিখে ফাইনাল কথাবার্তা হয়। উইল হয় ১১/১০ তারিখে। স্বাক্ষরের সময় ছিলাম। কথাবার্তার সময় আমি, অশোক কর, আঃ হান্নান ছিলো। ঐ তারিখের বাংলা তারিখ কত ছিলো বলতে পারবো না। আজকের বাংলা তারিখ বলতে পারবো না।"

P. W.4 Jahar Lal Ghosh in his examination-in-chief stated, উষারানী দাতা দিপক ও বাবুল গ্রহিতা নামীয় এই উইলের সাক্ষী হিসাবে আমার সহি আছে। উষারানীর সহি চিনি আমার সামনে দলিলের সাক্ষীরা দাতা, গ্রহিতারা সহি করে। উষারানর কথামত উইল লেখা, গ্রহিতাদের সম্মতি ছিলো।" In cross-examination he stated, "উইলের কথাবার্তার সময় ছিলাম। অশোক কর, স্বপন ঘোষ ছিলো। এই কথাবার্তার বাংলা তারিখ বলতে পারবো না। কথাবার্তা হয় ১১/১০/২০১০ তারিখ যে দিন কথাবার্তা হয় ঐ দিন সকালে উইলটা টাইপ করা হয়। কথা আগে হয়। স্বাক্ষর পরে হয়। আমার আর উষারানীর বাড়ীর মধ্যবর্তী দুরত্ব ৬/৭ মিঃ। উইলে কোন কোন সম্পত্তি হস্তান্তরিত হয় বলতে পারবো না। সত্য নয় যে উইলের কথাবার্তা ও স্বাক্ষরের দিন উপস্থিত ছিলাম না। সত্য নয় যে দিপকের দ্বারা প্রভাবিত হয়ে মিথ্যা সাক্ষ্য দিলাম।"

On the other hand, Babul Ranjan Kar O.P.W.1 in his examination-in-chief deposed that Profullah Chandra transferred 2.4950 acre land in favour of his mother Usha Rani Kar vide registered deed of gift No. 2882 dated 1979 and after transfer of 0.85 acre land, she was owning and possessing the rest 1.6450 acre land which was recorded in her name in B.S Khatian No. 1646 and after

her death he inherited said property and mutated his name and got B.S Khatian No. 1997. Dipok Ranjan Kar has no title to this land. Usha Rani Kar has one son and two daughters namely Joshna and Malarani. Dipok Ranjan Kar was a cunning person from his childhood and he knew that Usha Rani Kar was his stepmother and he used to misbehave with her. His father died in 1970 when Dipok was minor and after death of his father, he had been living with them and after his marriage he was separated in 1984-85. OPW1 further deposed that documents in regards the properties of their father were under the custody of Dipok. While he understood that after death of Usha Rani Kar the opposite party would inherit her entire property, he availed various plans to misappropriate the property which OPW1 did not know as he was serving in an NGO and he was busy with his official works and taking that opportunity the petitioner with the help of his party men, Sapan Kumar Ghosh (P.W.3), Ashok Kumar Kar (P.W.2) called a Salish and he took his and his wife's signatures on blank cartridge papers for the purpose of making Achalnama and thereafter, by using that cartridge papers the petitioner (Dipok) created the will dated 11.10.2010. He forged the signature of his mother and during life time of Usha Rani Kar, the petitioner did not disclose about the will and after her death he filed this case disclosing about the will. His mother never transferred any property by will and she did not sign the will. In cross-examination he deposed that he did not sign on the will. His signature has been taken for the purpose of preparing Achalnama which the petitioner took on cartridge paper. It is not true that the petitioner did not take his signature on a cartridge paper or that after reading about the will he

signed it or that his mother Usha Rani Kar signed the will at her free will and without any coercion.

O.P.W.2 Shahin Sarwar in his examination-in-chief stated that he saw the mother of Babul Kar namely Usha Rani Kar. He did not hear whether Usha Rani Kar gave her property to Babul and others and he heard about boundary dispute in regards their paternal property and that Usha Rani Kar did not transfer any property by will. In cross-examination he stated that he did not know whether Usha Rani Kar transferred her property. After filing the case opposite party told that no will was executed. He did not know whether Usha Rani gave her property by will to her two sons.

On perusal of Exhibit 3, the will it appears that it was written on three Cartridge papers. As per its recital, it was executed by Usha Rani Kar. Nothing has mentioned therein that the recital of the will was read over to Usha Rani Kar or that she signed the will after it was read over and explained to her. P.W.S 2, 3 and 4 though deposed that the executrix signed the will in their presence but they did not say a single word that the will was read over and explained to the testatrix before she signed it and that she understood the contents of the document and thereafter, she put her signature thereon. Moreover, as per Exhibit Cha (National Identity Card of Usha Rani Kar), her date of birth is 21.06.1937 which means she was an old lady aged about 73 years at the time of execution of the will. She lived after the execution of the will for about 7 (seven) years because she died on 24.06.2017.

The burden was upon the petitioner-appellant to prove that the testatrix at her free will and volition and upon understanding its contents, sheput her signature on it or signed it. On a careful perusal

of the oral evidence of the witnesses adduced by the petitioner it appears that they made contradictory statements in regards the date of discussion about execution of the will. Further, Pt.W.1 in his cross-examination stated that Ashok Kumar take away the will after it was written but when it was returned by him and signed by the testatrix was not disclosed by Pt.W.1. Exhibit 3 is a computer composed document but P.W.3 Swapan Kumar Ghosh stated that he was present when it was written. On the other hand, after the death of the executrix her only son, the opposite party mutated his name in the concerned Revenue Office in respect of 1.64 acre land including the suit land vide Mutation Case Nos. 719 of 2019 and 2020 and got separate mutation Khatian No. 1997(Exhibit Ka/1).

There is other aspect of the matter. Admittedly, Usha Rani Kar had one son, the opposite party, and two daughters namely, Joshna Rani and Mala Rani but the propounder was the stepson of the Usha Rani Kar who was separated with his family members from Usha Rani Kar in 1984-1985 and he never looked-after her and then the testatrix lived with her own son Babul Ranjan Kar separately. By the will (Exhibit 3), 50% of the entire property of Usha Rani Kar was bequeathed to her stepson Dipok Ranjan Kar depriving her son and two daughters from that property. It has been contended by the respondent that the propounder took his signature on cartridge papers in the name of salish and by forging the signature of the testatrix he created the will. The learned District Judge after examining the signature of the testatrix appearing in the will observed that those are different from each other and accordingly, disbelieved the execution of the will by Usha Rani Kar. We have also examined the signatures appearing in the will carefully from which it

appears that there are significant differences in the manner of writing those signatures. The propounder-appellant did not take any steps to examine those signatures with any of the admitted signatures of Usha Rani Kar by way of hand writing expert to prove the genuineness of the signatures of the testatrix appearing in the will. When the respondent specifically contended that the signatures of the testatrix were forged, the burden was upon the appellant to prove that those are genuine one. Even if the respondent did not rise the question of testamentary capacity, yet the propounder was not exonerated from the incumbent duty to prove that the testatrix had sound and disposing mind and that she fully understood the nature and effect of her action in executing the will but the appellant miserably failed to discharge his duty. Accordingly, we are of the view that the petitioner could not prove the execution of the will by Usha Rani Kar and as such, endorse the view of learned District Judge that the petitioner could not prove the genuineness of the will.

Moreover, if we consider that the will was a genuine document but admittedly, the testatrix deprived her own son and two daughters from 50% of her property by executing the will in favour of her step-son (the petitioner). So, the testatrix's action in this respect is unfair and this fact raises another suspicion. But the propounder could not remove such suspicion by adducing any evidence.

On a careful scrutiny of the oral and documentary evidence adduced and produced by the propounder-appellant, we are constrained to hold that he failed to succeed in proving the execution of the will by Usha Rani Kar. He also failed to remove the legitimate doubt as to the mental capacity of the testator in executing the will. The will appears to us to be unnatural, improbable and unfair in the

light of the relevant circumstances and it is not the result of the testator's free will and mind and that the appellant failed to explain or mitigate such legitimate suspicious circumstances by adducing any evidence. Accordingly, he is not entitled to get any order of probate of the will.

A perusal of the impugned judgment, it appears that the learned District Judge on proper consideration of the evidence and materials on record, arrived at a correct decision and there is no illegality or infirmity in the above decision so as to call for any interference.

In that view of the matter, we find no merit in this appeal.

In the result, the appeal is dismissed with cost.

Send down the Lower Court Records (LCR) along with a copy of this judgment to the Court below at once.

(Justice Md. Badruzzaman)

I agree.

(Ms. Justice Aynun Nahar Siddiqua)