

**IN THE HIGH COURT AT CALCUTTA**  
**(Testamentary & Intestate Jurisdiction)**

**ORIGINAL SIDE**

**Present:**

**The Hon'ble Justice Krishna Rao**

**TS No. 20 of 2016**

**IN THE GOODS OF :**

**MANTU DEBI BENIA (DECEASED)**

**-AND-**

**SRI PRADIP KUMAR BENIA**

**-VS-**

**SMT. SOVA GUPTA**

Mr. Meghnad Dutta, Adv.

Mr. Lalratan Mondal, Adv.

.....for the plaintiff

Mr. Aniruddha Mitra, Sr. Adv.

Mr. Sib Sankar Das, Adv.

.....for the defendant

Hearing Concluded On : 24.04.2025

Judgment on : 16.06.2025

**Krishna Rao, J.:**

1. The plaintiff had initially filed an application being PLA No. 31 of 2015 for grant of probate of the Last Will and Testament dated 30<sup>th</sup> May, 2000 of the testatrix Mantu Debi Benia.
2. Smt. Sova Gupta, W/o Late Sankar Gupta, daughter of Late Mantu Debi Benia has filed caveat and affidavit in support of caveat in PLA No. 31 of 2015 and on receipt of affidavit in support of caveat, the Probate Application was converted to a Testamentary Suit No. 20 of 2016.
3. The said Mantu Debi Benia (since deceased) was the widow of Late Mahavir Prasad Benia. The husband of the testatrix was predeceased to her who died on 23<sup>rd</sup> March, 1969. In the wedlock between Mantu Debi Benia and Mahabir Prasad Benia, two sons, namely, Pradip Kumar Benia, Sunil Kumar Benia and three daughters, namely, Sova Gupta, Tilotama Gupta and Susma Gupta were born.
4. Mantu Debi Benia died on 9<sup>th</sup> June, 2000. During her lifetime, she had executed her Last Will and Testament on 30<sup>th</sup> May, 2000 and appointed the plaintiff, her eldest son, namely, Pradip Kumar Benia, as sole executor of her Last Will and Testament.
5. The caveatrix submits that the last Will and Testament dated 30<sup>th</sup> May, 2000, is not genuine and the thumb impression of the deceased/ testatrix on the Will is also not genuine. It is also alleged by the

caveatrix that the deceased was not in sound mind and had no capacity to understand the implication for execution of her Will and Testament.

6. The caveatrix further alleged that the execution of the Will is surrounded by suspicious circumstances and is procured or manufactured by the son of the deceased under suspicious circumstances.
7. The caveatrix also alleged that the property which the testatrix has bequeathed in her alleged last Will and Testament, the testatrix is not the owner of the said property.
8. During pendency of the suit, one of the sons of the testatrix, namely, Sunil Kumar Benia died on 20<sup>th</sup> June, 2023 who is also one of the beneficiary of the last Will and Testament. After his death on an application of the plaintiff, this Court recorded the death of Sunil Kumar Benia and his legal heirs were brought on record. The legal heirs have filed their affidavit of consent stating that they have no objection for grant of probate to the plaintiff.
9. Considering the pleadings of both the parties, the following issues were framed:
  - (i) *Whether the Will dated 30<sup>th</sup> May, 2000, executed by Mantu Debi Benia, since deceased, is the last Will of the testator?*
  - (ii) *Whether the said Will is executed by Mantu Debi Benia, since deceased, or not?*

- (iii) *Whether Mantu Debi Benia, since deceased, had mental capacity and sound mind to understand the meaning and contents of the Will and Testament dated 30<sup>th</sup> May, 2000, before the execution thereof?*
- (iv) *Whether the Will and Testament dated 30<sup>th</sup> May, 2000, is genuine or has been executed to be practising fraud or is there any suspicious circumstances with regard to the genuineness while the Will was executed?*
- (v) *Whether the Executor is entitled to grant of Probate of the Will and Testament dated 30<sup>th</sup> May, 2000, executed by Mantu Devi Benia, since deceased, as prayed for?*

**10.** The plaintiff in order to prove his case, has examined 3 (three) witnesses, namely:

- i. *P.W.1 - Anand Kumar Lal, one of the attesting witnesses of the Will.*
- ii. *P.W.2 - Tilottama Gupta, one of the daughters of the deceased/testatrix.*
- iii. *P.W.3 - Pradip Kumar Benia, the executor of the Will and son of the deceased/testatrix.*

**11.** During evidence of the plaintiff's witnesses altogether 5 (Five) documents were marked as "Exhibit - A to Exhibit - E" which are as follows:

**Exhibit - A:** *Copy of the last Will and Testament dated 30<sup>th</sup> May, 2000 of Mantu Debi Benia, since deceased.*

**Exhibit - A/1:** *Left Thumb Impression of Mantu Debi Benia (since deceased), appearing on the first page bottom of the Will.*

**Exhibit – A/2:** *Left Thumb Impression of Mantu Debi Benia (since deceased), appearing on the first page bottom of the Will, identified by Anand Kumar Lal, one of the attesting witnesses of the Will.*

**Exhibit – A/3:** *Left Thumb Impression of Mantu Debi Benia (since deceased), appearing on the second page, top right of the Will.*

**Exhibit – A/4:** *Left Thumb Impression of Mantu Debi Benia (since deceased), appearing on the second page, bottom of the Will.*

**Exhibit – A/5:** *Signature of Anand Kumar Lal, appearing on the second page on the bottom of the Will.*

**Exhibit – A/6:** *Left Thumb Impression of Mantu Debi Benia (since deceased), appearing on the third page of the Will.*

**Exhibit – A/7:** *Signature of Anand Kumar Lal, identifying Left Thumb Impression of Mantu Debi Benia (since deceased).*

**Exhibit – A/8:** *Signature of Anand Kumar Lal as attesting witness.*

**Exhibit – A/9:** *Signature of Ashis Kumar Gupta, the other attesting witness.*

**Exhibit – A/10:** *Signature of M. Dasgupta, the Learned Advocate who read over and explained the contents of the Will to the Testatrix.*

**Exhibit – B:** *Copies of two rent receipts, one from the year 1996 and the other is from the year 1999.*

**Exhibit – C:** Copy of the death certificate of Mantu Debi Benia, dated 9<sup>th</sup> June, 2000.

**Exhibit – D:** Copy of the sanctioned plan issued by Howrah Municipality.

**Exhibit – E:** Copy of an agreement with the Contractor, namely, Rajkumar Jaiswal, dated 08.01.1985, regarding construction of a building on the premises, 17/4/1, Hat Lane, Howrah.

**12.** The defendant in order to prove her case, has examined 2 (two) witnesses, namely :

- i. D.W.1- Ms. Sova Gupta, (Caveatrix) one of the daughters of the deceased/testatrix.
- ii. D.W.2- Mr. Rajesh Gupta, son of Ms. Sova Gupta and grand-son of the deceased/testatrix.

**13.** During evidence of the defendant's witnesses, the defendant had also adduced altogether 7 (seven) documents and were marked as Exhibit – "1" to Exhibit – "7" which are as follows:

**Exhibit – 1:** Copy of a Title Suit being No. 25 of 2010 filed by Ms. Sova Gupta.

**Exhibit – 2:** Copies of application dated 20<sup>th</sup> August, 2015, under Right to Information Act and its reply dated 21<sup>st</sup> August, 2015 from Howrah Municipal Corporation along with the official translated copies of the report of the Howrah municipality are marked and exhibited collectively.

**Exhibit – 3:** Copy of a written statement filed by Pradip Kumar Benia and Sunil Kumar Benia, in the Title Suit No. 25 of 2010.

**Exhibit – 4:** Copies of Advocate's letter dated 26<sup>th</sup> August, 2017, which is sent by RTI to BSNL and another copy of a reply of the same sent by BSNL are marked and exhibited collectively.

**Exhibit – 5:** Certified copy of the Vakalatnama filed by Dilip Kr. Roy, advocated appearing on behalf of Pradip Kumar Benia and Sunil Kumar Benia dated 30.04.2010 along with the copy of a written statement filed on behalf of the said parties.

**Exhibit – 6:** Copy of a letter dated 25<sup>th</sup> April, 2019.

**Exhibit – 7:** Copy of a document dated 21<sup>st</sup> June, 2019, issued by Dr. Ratul Chatterjee, certifying that the testatrix was under his treatment for one year.

- 14.** P.W.1, Anand Kumar Lal is one of the attesting witnesses of the Last Will and Testament dated 30<sup>th</sup> May, 2000. In his evidence, the P.W.1 has stated that he knows the testatrix Mantu Debi Benia and in his presence and in presence of another attesting witness, namely, Ashis Kumar Gupta and the Advocate Mr. M. Dasgupta, the testatrix has executed her last Will and Testament in her house while she was mentally and physically fit. In his evidence, the P.W.1 has also stated that before execution of the Will by the testatrix, the Will was read over and explained to her by the Learned Advocate in Hindi language.

- 15.** P.W.1 has identified the Will and the same is marked as Exhibit – “A”. On his identification thumb impressions of testatrix in the Will are marked as Exhibit “A/1”, “A/3”, “A/4” and A/6. In the Will, P.W.1 through his pen at pages 1, 2 and 3 has made endorsement “*L.T.I. of Mantu Debi Benia identified by me*” and he has put his signatures in all pages and are marked as Exhibit- “A/2”, “A/5” and “A/7”. His signature as attesting witness is marked as Exhibit “A/8”. P.W.1 also identified the signature of another attesting witness, namely, Asis Kumar Gupta and the signature of Asis Kumar Gupta is marked as Exhibit “A/9”. P.W.1 also identified the signature of Advocate, M. Dasgupta and marked as Exhibit- “A/10”.
- 16.** P.W.2, Smt. Tilottama Gupta who is one of the daughters of the testatrix and also one of the beneficiaries of the Last Will and Testament, has stated regarding details of legal heirs of the testatrix and the property left behind by her mother. In her evidence, she has stated that her mother used to collect monthly rent from tenants of the building but her mother was not conversant in writing and reading and as per verbal instructions of her mother, P.W.2 used to write rent receipts and she also used to collect monthly rent on behalf of her mother. The rent receipt books were marked as Exhibit- “B” Collectively. The P.W.2 denied the suggestions made by the Learned Advocate for the defendant that the testatrix was admitted in the hospital because of cerebral attack.

- 17.** In cross examination, she has stated that when her mother used to come to the ground floor she used to tell P.W.2 that she would execute a Will. But P.W.2 had no knowledge as to when did she actually execute the Will. She further stated that she came to know about the Will from her brother Pradip Kumar Benia who informed her that her mother has executed a Will. At the time of cross-examination of P.W.2, copy of plaint of T.S. No. 25 of 2010 filed before the Learned First Civil Judge, Senior Division at Howrah was shown to her and she has admitted that the same is the copy of plaint filed by Pradip Kumar Benia. The copy of plaint is marked as Exhibit- "1".
- 18.** At the time of cross-examination of P.W.2, a reply received under Right to Information Act dated 21<sup>th</sup> August, 2015 was shown to the witness wherein the cause of death of the testatrix was recorded as Acute Palmona Edema in a case of Rheumatic Heart disease with C.V.A. (old) and the same is marked as Exhibit- "2" Collectively.
- 19.** P.W.3 is Pradip Kumar Benia, plaintiff (Executor) of the Will. He has produced death certificate of the testatrix which proves the death of the testatrix on 9<sup>th</sup> June, 2000 and the death certificate is marked as Exhibit - "C". In his evidence, the P.W.3 has stated that his two sisters, namely, Tilottoma Gupta and Sushma Gupta are residing in the ground floor of the property and the two brothers, namely, Pradip Kumar Benia and Sunil Kumar Benia are residing in the First Floor of the said building. He stated that the relationship of two sisters and their mother was good. P.W.3 has stated that the relationship between the mother

and Sovarani Gupta, the defendant herein was not very good. P.W.3 also stated that his sister Sovarani Gupta used to visit to see her mother rarely and she used to tell such things to the mother that hurt the feelings of mother.

**20.** P.W.3 has stated that physical condition of his mother in the months of April, May and June was good. He has stated that his mother had blood sugar, blood pressure and some breathing problem. He also stated that P.W.3 and his brother Sunil Kumar Benia used to look after their mother since their mother used to reside with them. Two daughters who reside in the ground floor also used to look after their mother. He stated that before four or five days of the death of his mother, her mother called him and handed over the Will to him. He has also produced Agreement entered between contractor and his mother in the said agreement also her mother had put her thumb impression and the said agreement is marked as Exhibit- "E".

**21.** D.W.1 is Smt. Sova Gupta who is one of the daughters of testatrix and defendant in the instant case. In her evidence, she has given description of the property in question. She has stated that prior to the death of her mother, her left side body became paralyzed and her mother was not in a position to talk, only she can utter few words. She has stated that in one day morning, she went to bathroom and she fell down and due to which she became paralyzed. It is the further evidence of D.W.1 that the testatrix could not able to move legs and hands. She used to look after her mother and she used to feed her mother. Her

main contention is that her mother has not executed any Will and the Will relied by the plaintiff is forged document. She has also stated that she has filed a suit against her brothers and sisters for partition of the property left behind by her mother.

- 22.** D.W.2 is the son of D.W.1 and the grandson of the testatrix. Exhibit "A" (Will) was shown to D.W.2 and after going through the said Will, he has referred the back page of the Will wherein file cover of the an Advocate and Notary Public, namely, Raghunath Chaterjee is enclosed in which two phone numbers have been mentioned and the witness stated that the BSNL No. 9432134378 is launched in the year 2006. He stated that his mother's Advocate has applied information from BSNL under RTI and the BSNL authorities have issued reply to the information stating that series of mobile no. 9432134378 was launched in the year 2006 and the RTI reply is marked as Exhibit- "4". In his evidence, the Vakalatnama filed by an Advocate Shri Dilip Kumar Roy on behalf of Pardip Kumar Benia and Sunil Kumar Benia in the suit filed by his mother before the Learned 1<sup>st</sup> Additional District Judge, Howrah in Misc Appeal No. 92 of 2017 is marked as Exhibit- "5". In his evidence, he has also identified the reply issued by the Learned Advocate, D.K. Roy to the advocate of the D.W.1 and the same is marked as Exhibit- "6". He has also produced one certificate issued by Dr. Rahul Chaterjee dated 5<sup>th</sup> August, 2015 stating that the testatrix was under his care for treatment about one year from 1999 to 2000. The certificate is marked as Exhibit - "7".

- 23.** Mr. Meghnad Dutta, Learned Advocate representing the plaintiff submits that in order to prove the Will, the plaintiff has examined one of the attesting witnesses, namely, Anand Kumar Lal being P.W.1 and during his examination, he has proved the will executed by the testatrix on 30<sup>th</sup> May, 2000. He submits that P.W.1 has categorically stated that the executrix has executed her last Will and Testament in his presence and in presence of another attesting witness and one Advocate, namely, M. Dasgupta. He submits that P.W.1 has stated that the testatrix has put her thumb impression in all pages of the Will and he has identified her thumb impression by writing "*L.T.I. of Mantu Debi Benia identified by me*". He submits that the Will and signature of P.W.1 and signature of another attesting witness, signature of an advocate and the thumb impression of the testatrix are marked without any objection from the defendant.
- 24.** Mr. Dutta submits that with regard to the physical fitness and mental alertness of the testatrix, the P.W.1 has stated that at the time of execution of the Will, the testatrix was in fit state of mind. He submits that from the evidence of P.W.2 and P.W.3, it is proved that the testatrix was performing her all ordinary works.
- 25.** Mr. Dutta submits that the attesting witness has identified the thumb impression of the testatrix and to corroborate the thumb impression, a certified copy of the agreement entered between testatrix and developer on 8<sup>th</sup> January, 1985, was produced being Exhibit-"D" which proves

that testatrix was illiterate and used to put her thumb impression in all documents whenever it required.

- 26.** Mr. Dutta submits that the defendant has stated that the Will is not a genuine document and the thumb impression is not of the testatrix but the defendant has not adduced any contrary evidence to say that the thumb impression is not of the testatrix. He submits that the document relied by the defendant being Exhibit – “2” does not speak about that the testatrix was suffering from paralysis or was in unsound mind. He submits that the document records that the cause of death was due to acute pulmonary edema in case of rheumatic heart disease with CVA (old) which means that at the time of death, the testatrix had respiratory problem and heart disease only. He submits that the defendant has produced the document but has not adduced the evidence of the doctor to prove the said document.
- 27.** Mr. Dutta submits that the defendant has not adduced any evidence to prove that the allegation of suspicious circumstances. He submits that the defendant failed to prove that the Will is not genuine and was executed under any suspicious circumstances.
- 28.** Mr. Dutta submits that during evidence of D.W.2, the D.W.2 has produced one document alleged to have received through Right to Information Act from the BSNL authorities with regard to the phone number of the Notary Public Advocate but the defendant has not taken such plea in her caveat or in her affidavit-in-support of caveat. He

submits that in the absence of pleadings, any evidence produced by the parties cannot be considered. In support of his submissions, he has relied upon the judgment in the case of ***Ram Sarup Gupta (Dead) by LRs. vs. Bishun Narain Inter College and Ors.*** reported in ***(1987) 2 SCC 555***. He also relied upon the judgment in the case of ***Srinivas Raghavendrarao Desai (Dead) by LRs. vs. V. Kumar Vamanrao@Alok & Ors.*** passed in ***Civil Appel No (s). 7293-7294 of 2010 dated 4<sup>th</sup> March, 2024.***

- 29.** Mr. Dutta submits that to prove the Will, the plaintiff has examined one of the attesting witnesses of the Will and the attesting witness has proved the will and there is no reasons to disbelieve the evidence of the attesting witness. In support of his submission, has relied upon the judgment in the case of ***Shivakumar & Ors. vs. Sharanabasappa & Ors.*** reported in ***(2021) 11 SCC 277.***
- 30.** Mr. Dutta submits that the defendant in her affidavit-in-support of caveat in paragraph 10 has stated that the testatrix is not at all owner of the property but no issue with regard to the same is framed during evidence, the defendant has not denied with regrd to ownership of the property. He submits that the probate cannot determine the title of the property. The probate Court are to see that the Will executed by the testatrix was actually executed by her in a sound disposing of mind without coercion or undue influence and the same was duly attested. In support of his submissions, he has relied upon the judgments in the case of ***Ishwardeo Narain Singh vs. Kamta Devi and Ors.*** reported

in *(1953) 1 SCC 295* and *Kanwarjit Singh Dhillon Vs. Hardyal Singh Dhillon* reported in *(2007) 11 SCC 357*.

- 31.** Mr. Anirudhha Mitra, Lerved Senior Advocate representing the defendant submits that the deceased died on 9<sup>th</sup> June, 2000 and the alleged Will is dated 30<sup>th</sup> May, 2000 i.e. just 9 days before her death, thus this create suspicion about the execution of the alleged Will. He submits that the testatrix was an illiterate lady but the Will is in English language and as per the case of the plaintiff, the Will was read over and explained to her by the Advocate in Hindi Language but the plaintiff failed to examine the Learned Advocate to prove that he has read over and explained the Will to the testatrix. He further submits that the plaintiff has not adduced any evidence to prove the thumb impression of the deceased.
- 32.** Mr. Mitra, submits that one of the attesting witnesses of the Will, the brothers-in-law of the executor Pradip Kumar Benia and another attesting witness is brother-in-law of the Sunil Kumar Benia who is one of the beneficiary of the Will. He submits that there is no independent attesting witness in the Will which also create suspicion of execution of the Will by the testatrix. He submits that as per the evidence of P.W.1 the Will was executed at 12:00 Noon but at that time neither the sons nor their family members were present in the house, is not believable story made out by the plaintiff and his witness.

- 33.** Mr. Mitra submits that P.W.1 stated that he had no knowledge in whose custody the Will was kept after execution of the same. The Will bears seal and stamp of Notary Public with date of 30<sup>th</sup> May, 2000 but P.W.1 stated that he has no knowledge about the notarization of the Will, thus the notary of the Will is not proved. He submits that on the reverse page of the Notarial Certificate of the Will, name, address and mobile phone number of the Notary Public have been provided in which one mobile number is 9432134378 but as per the report of the BSNL authorities, series 94321 was launched only in the year 2006, thus it is proved that the Notarial Certificate in the Will is false and fabricated.
- 34.** Mr. Mitra submits that the defendant has issued notice to the plaintiff for partition of the property left behind by her mother and on receipt of the notice, the plaintiff has sent a reply being Exhibit- "6" through his Advocate stating that the plaintiff has no intention to deprive the defendant from the property left behind by their mother but in the reply, the plaintiff has not informed the defendant that the mother has left behind any Will. He submits that in the partition suit filed by the defendant, the plaintiff has filed written statement but in the written statement the plaintiff has not disclosed about the alleged Will.
- 35.** Mr. Mitra submits that the plaintiff has filed an application for grant of probate on 11<sup>th</sup> February, 2015 that is after the period of 15 years from the date of death of the testatrix though the plaintiff had the knowledge of the Will. As per the case of the plaintiff, the testatrix has handed over the Will to the plaintiff before 4 or 5 days of her death. He submits that

the plaintiff has not provided any explanation why the plaintiff has filed an application for grant of probate after the period of 15 years.

**36.** Mr. Mitra submits that since filing of caveat by the defendant, the defendant has categorically stated that the testatrix was not in a fit state of mind and had no capacity to understand the implication of the Will. He submits that the plaintiff has not examined any doctor to prove that the testatrix was in a fit state of mind at the time of execution of the alleged Will. He submits that on the contrary, the defendant has produced documents obtained under the Right to Information Act from the Howrah Municipal Corporation being Exhibit-“2” wherein it is mentioned that the cause of death was “Accute Palmona Edema” in a case of Rheumatic Heart Disease with C.V.A. (old). He submits that the defendant during evidence of D.W.2 produced a certificate issued by Dr. Rahul Chaterjee being Exhibit-“7” wherein it is certified by the doctor that she was under his care since 1999 to 2000 for multiple problems including left hemiparesis, which is partial paralysis on the left side of the body and was also suffering from “Motor Apraxia”. He submits that the plaintiff in his evidence admitted that Dr. Rahul Chaterjee used to treat the testatrix.

**37.** Mr. Mitra in support of his submissions, relied upon the following judgments:

- i. ***H. Venkatachala Iyengar vs. B.N. Thimmajamma and Others reported in AIR 1959 SC 443.***

- ii. ***Bharpur Singh and Others Vs. Shamsher Singh*** reported in (2009) 3 SCC 687.
- iii. ***Mahesh Kumar (Dead) By Lrs. Vs. Vinod Kumar & Ors.*** reported in (2012) 4 SCC 387.
- iv. ***Meena Pradhan and Others Vs. Kamla Pradhan and Another*** reported in (2023) 9 SCC 734.

38. Section 63 of the Indian Succession Act, 1925 reads as follows:

**“63. Execution of unprivileged Wills.—**  
*Every testator, not being a soldier employed in an expedition or engaged in actual warfare, [or an airman so employed or engaged,] or a mariner at sea, shall execute his Will according to the following rules:—*

(a) *The testator shall sign or shall affix his mark to the Will, or it shall be signed by some other person in his presence and by his direction.*

(b) *The signature or mark of the testator, or the signature of the person signing for him, shall be so placed that it shall appear that it was intended thereby to give effect to the writing as a Will.*

(c) *The Will shall be attested by two or more witnesses, each of whom has seen the testator sign or affix his mark to the Will or has seen some other person sign the Will, in the presence and by the direction of the testator, or has received from the testator a personal acknowledgement of his signature or mark, or the signature of such other person; and each of the witnesses shall sign the Will in the presence of the testator, but it shall not be necessary that more than one witness be present at the same time, and no particular form of attestation shall be necessary.”*

**39.** P.W.1, Anand Kumar Lal is the one of the attesting witnesses of the Will and in his evidence, has stated that the testatrix Mantu Debi Benia has executed her Last Will and Testament in her house on 30<sup>th</sup> May, 2000 at 12:00 noon and at the time of execution of the Will Mantu Debi Benia, Testatrix; P.W.1, namely, Anand Kumar Lal; Asis Kumar Gupta and M. Dasgupta, Advocate were present. In his evidence, he has stated that before the testatrix put her signature in the Will, the Advocate translated the entire contents of the Will in Hindi and explained to the testatrix. He has also stated that he along with Asis Kumar Gupta and Advocate, M. Dasgupta has seen Mantu Debi Benia putting her thumb impression on the Will. He has also stated in his examination that the testatrix was mentally and physically fit at the time of execution of Will. He has identified the Will and marked as Exhibit- "A" and thumb impressions of the testatrix are marked as Exhibits - "A/1", "A/3", "A/4" and "A/6". P.W.1 has also made endorsement in the Will below the thumb impression of the testatrix "*LTI of Mantu Debi Benia identified by me*" and his signature were marked as Exhibit - "A/2", "A/5", "A/7" and "A/8". The P.W.1 has also identified signatures of another attesting witness, namely, Asis Kumar Gupta and his signature is marked as Exhibit "A/9". P.W.1 also identified the signature of the Advocate, M. Dasgupta in the Will who has made endorsement as "*Read over and explained in Hindi to the testatrix and Identified by me*" and the signature of Advocate is marked as Exhibit- "A/10".

- 40.** P.W.1 admitted in the cross-examination that he is the brother-in-law of the plaintiff and another attesting witness is the brother-in-law of the Sunil Kumar Benia who is also the beneficiary of the Will. In the cross examination also the P.W.1 has stated that the testatrix was not ill and she was mentally and physically fine. From the trend of cross-examination of P.W.1, it is found that the defendant made out a case that both the attesting witnesses are the interested witnesses. In cross-examination, the defendant has put the question about the relationship between the attesting witnesses, executor and beneficiary but neither in the affidavit in support of caveat nor in the cross-examination, the defendant has put any suggestion to P.W.1 that he being the relative of the executor has made false statement before the Court and no Will was executed by the Testatrix in his presence.
- 41.** The defendant has relied upon two documents with regard to the physical and mental condition of the testatrix i.e. Exhibit- "2" and Exhibit - "7". Exhibit - "2" is the information received under the Right to Information Act wherein it is recorded that the cause of death of the testatrix was "Acute Palmona Edema" in a case of Rheumatic Heart disease with C.V.A (old)". Acute Palmona Edema in the case of Rheumatic Heart Disease (RHD) with C.V.A (Cerebrovascular Accident) indicates a sudden build-up of fluid in the lungs due to heart failure, often caused by valve problems like mitral stenosis, which is common in Rheumatic Heart Disease. Exhibit- "2" does not reflect whether the testatrix was suffering from paralysis or she was not capable to execute

Will. Exhibit – “7” is Certificate issued by Dr. Rahul Chatterjee wherein he has certified that the testatrix was under his care for Mitral Stenosis with Regurgitation due to Rheumatic Heart Disease and he has attended the testatrix about one year in 1999 to 2000.

- 42.** The Testatrix died on 9<sup>th</sup> June, 2000 and the doctor has issued certificate on 5<sup>th</sup> August, 2015 i.e. after the period of 15 years from the death of the testatrix. The defendant has not brought the doctor as witness to prove the certificate. It is not proved that how the said certificate is issued by the doctor. The defendant has not filed any document in support of the certificate issued by the doctor. Mere exhibited document, it cannot be said that the document is proved. The Testatrix might be under treatment with the said doctor but this Court only on the basis of the certificate issued after 15 years from the death of the testatrix and without any corroborative documents and evidence cannot hold that the physical and mental condition of the testatrix was not good. In contrary, the P.W.1 who is the attesting witness in his examination-in-chief as well as in the cross-examination has stated that the physical and mental condition of the testatrix was good.

In the case of ***Shivakumar & Ors. (supra)***, the Hon’ble Supreme Court held that :

**“12.1.** *Ordinarily, a will has to be proved like any other document; the test to be applied being the usual test of the satisfaction of the prudent mind. Alike the principles governing the proof of other documents, in the case of will too, the proof*

*with mathematical accuracy is not to be insisted upon.*

**12.2.** *Since as per Section 63 of the Succession Act, a will is required to be attested, it cannot be used as evidence until at least one attesting witness has been called for the purpose of proving its execution, if there be an attesting witness alive and capable of giving evidence.*

**12.3.** *The unique feature of a will is that it speaks from the death of the testator and, therefore, the maker thereof is not available for deposing about the circumstances in which the same was executed. This introduces an element of solemnity in the decision of the question as to whether the document propounded is the last will of the testator. The initial onus, naturally, lies on the propounder but the same can be taken to have been primarily discharged on proof of the essential facts which go into the making of a will.*

**12.5.** *If a person challenging the will alleges fabrication or alleges fraud, undue influence, coercion et cetera in regard to the execution of the will, such pleas have to be proved by him, but even in the absence of such pleas, the very circumstances surrounding the execution of the will may give rise to the doubt or as to whether the will had indeed been executed by the testator and/or as to whether the testator was acting of his own free will. In such eventuality, it is again a part of the initial onus of the propounder to remove all reasonable doubts in the matter.*

**12.6.** *A circumstance is “suspicious” when it is not normal or is “not normally expected in a normal situation or is not expected of a normal person”. As put by this Court, the suspicious features must be “real, germane and valid” and not merely the “fantasy of the doubting mind”.*

**12.7.** *As to whether any particular feature or a set of features qualify as “suspicious” would depend on the facts and circumstances of each case. A shaky or doubtful signature; a feeble or uncertain mind of the testator; an unfair disposition of property; an unjust exclusion of the legal heirs*

*and particularly the dependants; an active or leading part in making of the will by the beneficiary thereunder et cetera are some of the circumstances which may give rise to suspicion. The circumstances abovenoted are only illustrative and by no means exhaustive because there could be any circumstance or set of circumstances which may give rise to legitimate suspicion about the execution of the will. On the other hand, any of the circumstances qualifying as being suspicious could be legitimately explained by the propounder. However, such suspicion or suspicions cannot be removed by mere proof of sound and disposing state of mind of the testator and his signature coupled with the proof of attestation.*

**12.8.** *The test of satisfaction of the judicial conscience comes into operation when a document propounded as the will of the testator is surrounded by suspicious circumstance(s). While applying such test, the court would address itself to the solemn questions as to whether the testator had signed the will while being aware of its contents and after understanding the nature and effect of the dispositions in the will?*

**12.9.** *In the ultimate analysis, where the execution of a will is shrouded in suspicion, it is a matter essentially of the judicial conscience of the court and the party which sets up the will has to offer cogent and convincing explanation of the suspicious circumstances surrounding the will.*

**43.** In the case of ***Bharpur Singh (supra)***, the Hon'ble Supreme Court held that:

**“14.** *The legal principles in regard to proof of a will are no longer res integra. A will must be proved having regard to the provisions contained in clause (c) of Section 63 of the Succession Act, 1925 and Section 68 of the Evidence Act, 1872, in terms whereof the propounder of a will must prove its execution by examining one or more attesting witnesses. Where, however, the validity of the will is challenged on the ground of fraud, coercion or undue influence, the burden of proof would be on*

*the caveator. In a case where the will is surrounded by suspicious circumstances, it would not be treated as the last testamentary disposition of the testator.*

**17.** *This Court in Niranjan Umeshchandra Joshi v. Mrudula Jyoti Rao [(2006) 13 SCC 433 : (2006) 14 Scale 186] held: (SCC pp. 447-48, paras 33-34)*

*“33. The burden of proof that the will has been validly executed and is a genuine document is on the propounder. The propounder is also required to prove that the testator has signed the will and that he had put his signature out of his own free will having a sound disposition of mind and understood the nature and effect thereof. If sufficient evidence in this behalf is brought on record, the onus of the propounder may be held to have been discharged. But, the onus would be on the applicant to remove the suspicion by leading sufficient and cogent evidence if there exists any. In the case of proof of will, a signature of a testator alone would not prove the execution thereof, if his mind may appear to be very feeble and debilitated. However, if a defence of fraud, coercion or undue influence is raised, the burden would be on the caveator. (See Madhukar D. Shende v. Tarabai Aba Shedage [(2002) 2 SCC 85] and Sridevi v. Jayaraja Shetty [(2005) 2 SCC 784] .) Subject to above, proof of a will does not ordinarily differ from that of proving any other document.*

*34. There are several circumstances which would have been held to be described (sic) by this Court as suspicious circumstances:*

*(i) when a doubt is created in regard to the condition of mind of the testator despite his signature on the will;*

*(ii) when the disposition appears to be unnatural or wholly unfair in the light of the relevant circumstances;*

*(iii) where propounder himself takes prominent part in the execution of will which confers on him substantial benefit.*

*(See H. Venkatachala Iyengar v. B.N. Thimmajamma [AIR 1959 SC 443] and T.K. Ghosh's Academy v. T.C. Palit [(1974) 2 SCC 354 : AIR 1974 SC 1495] .)*

**23.** *Suspicious circumstances like the following may be found to be surrounded in the execution of the will:*

*(i) The signature of the testator may be very shaky and doubtful or not appear to be his usual signature.*

*(ii) The condition of the testator's mind may be very feeble and debilitated at the relevant time.*

*(iii) The disposition may be unnatural, improbable or unfair in the light of relevant circumstances like exclusion of or absence of adequate provisions for the natural heirs without any reason.*

*(iv) The dispositions may not appear to be the result of the testator's free will and mind.*

*(v) The propounder takes a prominent part in the execution of the will.*

*(vi) The testator used to sign blank papers.*

*(vii) The will did not see the light of the day for long.*

*(viii) Incorrect recitals of essential facts.”*

**44.** Affidavit-in-support of caveat, the defendant has nowhere alleged that the Will was manufactured after the death of the testatrix. In the affidavit, the defendant has stated that:

**“9.e)** *The deponent herein apprehends and have reasons to believe that the so called Will said to be the last Will of the said deceased was procured and obtained by the son of the said deceased living along with said deceased and the same was alleged to be executed by fraudulent*

*deceptive and dishonest and accordingly the so called Will cannot or under any circumstances be said to have been executed voluntarily by the said deceased. It is also denied that the deceased knew or approved all the contents of the said documents.*

**12.** *As regards the Left Thumb impression as was put in all the pages of the said Will is not authentic and correct. On the said Will the Left Thum impression as has been put by the Testatrix who did not understand the true meaning and scope of the said writing in the Will and it appears to have been read out translated and explained in Hindi by an Advocate to here but it does not appear therein that she the Testatrix understood the true meaning of it and did not admit the said translation, as such it is without any ray of imagination that the said Will was executed by the said Testatrix in presence of the two witnesses as appeared therein. Further it is evident that the Left Thumb impression of the Testatrix was not her."*

- 45.** In the present case though the defendant has taken the stand that the Will is not genuine and surrounded by suspicious circumstances but taking into consideration of the evidence of P.W.1 who is one of the attesting witness of the Will and the documents i.e. Exhibit – “2” and Exhibit- “7” relied by the defendant, this Court finds that from the examination and cross-examination of P.W.1, the plaintiff has proved with regard to the execution of the Will on 30<sup>th</sup> May, 2000 in his presence and in presence of another attesting witness and the Advocate. The defendant tried to prove that the testatrix was not in sound mind and physically fit but the said document does not prove that the testatrix was not in sound mind and physically fit. The defendant relied upon the information received through RTI and on perusing the said document, this Court finds that only the cause of death is explained and not with regard to the condition of the testatrix

on the date of execution of the Will. The certificate issued by the doctor only reveals that she is under his treatment but the said certificate does not prove that the testatrix was not mentally and physically fit at the time of execution of Will.

**46.** D.W.2 during his examination has brought the copy of plaint, written statement, reply to the notice issued by the advocate of the plaintiff to the Advocate of the defendant in connection with T.S. No. 25 of 2010 with respect to the suit property. It is the contention of the defendant that after the death of testatrix on 9<sup>th</sup> June, 2000, the defendant has issued notice to the plaintiff for partition of the property left behind by the testatrix and in reply, the plaintiff has informed the defendant that the plaintiff has no intention to deprive the defendant from her claim. The defendant tried to make out a case during cross-examination and during argument that the plaintiff had the knowledge about the Will since before the death of the testatrix but has filed an application for grant of probate after the period of 15 years from the date of death of the testatrix. The defendant has filed caveat and affidavit in support of caveat but the defendant has not taken any stand with regard to delay in filing of the probate case. The defendant has not raised any issue of limitation in the affidavit in support of caveat and thus the plaintiff could not get an opportunity to deal with the issue raised by the defendant during argument.

**47.** The defendant tried to make out the case that the Advocate and Notary Public who has provided his BSNL mobile number in the back sheet of

the Will the said series number was released by the BSNL in the year 2006. The defendant has not made out such case in the affidavit in support of caveat. The defendant has also not adduced any evidence to prove the same by examining the BSNL authorities. The defendant only on the basis of the RTI information tried to make out the case which is not the stand in the affidavit in support of caveat. The defendant has also not put any question to that effect at the time of cross examination of the plaintiff witnesses.

**48.** This Court also finds that the defence taken by the defendant during the evidence of the defendants witness, other than the stand that the Will is not genuine, testatrix was not fit state of mind and the Will is alleged to have executed under the suspicious circumstances, the defendant has not made out any case either in the affidavit in support of caveat or has also not put any questions during the cross-examination of the plaintiff witnesses.

**49.** This Court has to consider whether the document put forward as the last Will and Testament of the testatrix was duly executed and attested in accordance with law and whether at the time of such execution, the testatrix had sound disposing mind. In the present case from the evidence of P.W.1, it is clear that the testatrix has executed her last Will and testament while possessing good health and fit state of mind in presence of attesting witness.

- 50.** In the case of ***Kanwarjit Singh Dhillon (supra)***, the Hon'ble Supreme Court held that it is well settled law that the functions of a probate Court are to see that the Will executed by the testator/testatrix was actually executed by him in a sound disposing state of mind without coercion or undue influence and the same was duly attested.
- 51.** Considering the total facts and circumstances, evidence led by the parties and the documents relied by the parties, this Court finds that the plaintiff has proved the Last Will and Testament of the testatrix Mantu Debi Benia and this Court did not find any suspicious circumstances to deny for grant of probate of the Will.
- 52.** Department is directed to issue probate of the last Will and Testament dated 30<sup>th</sup> May, 2000 to the plaintiff on compliance of all formalities. At the time of grant of probate, the copy of Will be made part of probate.
- 53. T.S. No. 20 of 2016 is disposed of.** Decree be drawn accordingly.

**(Krishna Rao, J.)**