Calcutta High Court

HON'BLE JUDGE(S): **SOUMEN SEN, UDAY KUMAR , JJ**

GURUPRASAD TAH V. ASHOKE KUMAR TAH

FA - 390 of 2009, decided on 26/04/2023

(A) Succession Act (39 of 1925) , S.63, S.276— Execution of Will - Suspicious circumstances - Testator had executed two Wills - First Will was revoked by second Will which was executed in favour of executor - At time of execution of second Will, testator was physically ill and mentally frail - No evidence that by time Will was registered, testator had recovered from it and could travel from his house to sub registry office - No evidence that Will was registered at house of testator on commission as it would be in normal course of action when non-generion having multiple ailments including physical disability was presumed to have executed a registered Will - Signature of testator appeared to be shaky and it represented frail health condition of testator - Signatures of testator were at right hand corner of Will instead of at bottom of each page and not immediately towards end where Will ends was unusual - No endorsement in registered Will that Sub-Registrar explained contents of Will to testator - All attesting witnesses and persons named in Will were men of executor - Executor had taken prominent role in execution of Will - Under said circumstances, evidence of scribe was essential, but executor refused to present scribe, although available - It can be said that suspicion was one inherent in transaction - Will was not a product of free and fair mind of testator - Probate proceedings liable to be dismissed.
AIR 2008 SC 300-Followed

(Para 20, 21, 33)

(B) Succession Act (39 of 1925) , S.276— Limitation Act (36 of 1963) , Art.137— Probate proceedings - Bar of limitation - Original application for grant of probate was filed on 12.02.1989 and was dismissed for default on 20.04.1995 - Second application for grant of probate was filed on 27.08.2005 without explaining delay - Executor cum beneficiary did not make any attempt to restore original proceeding - Subsequent application should have been filed within three years from date of withdrawal of first petitioner - No explanation offered for not restoring probate proceeding and for long delay - Probate proceedings liable to be dismissed.
AIR 2008 SC 2058-Followed

(Para 34, 39, 40, 41, 42)

Case Referred :	Chronological Paras
AIROnline 2022 Cal 12	Para No.(15)
AIR 2019 SC 4948 : AIR 2020 SC (Civ) 931 : AIROnline 2019 SC 1169	Para No.(36)
AIR 2019 SC 3318 : AIROnline 2019 SC 251	Para No.(36, 37)
AIR 2017 SC 5453 : AIR 2018 SC (Civ) 433	Para No.(36, 38)
(2009) EWHC 2029 (CH) (WLLR).	Para No.(23)

AIR 2009 SC 3247 : 2009 AIR SCW 3275	Para No.(38)
AIR 2008 SC 2058 : 2008 AIR SCW 2726 (Followed)	Para No.(10, 13, 14, 34, 36, 38, 39)
AIR 2008 SC 300 : 2007 AIR SCW 6787 (Followed)	Para No.(25)
AIR 2007 SC 614 : 2007 AIR SCW 203	Para No.(25)
(2003) EWHC 1885 (CH)	Para No.(23)
AIR 2002 SC 637 : 2002 AIR SCW 242	Para No.(25)
AIR 1990 SC 396	Para No.(7)
AIR 1985 Cal 275	Para No.(13)
AIR 1983 Bom 268	Para No.(14, 34)
1982 (1) All ER 882	Para No.(23)
AIR 1982 SC 133	Para No.(30)
AIR 1977 SC 282	Para No.(36)
AIROnline 1968 Mad 3	Para No.(27)
AIR 1968 SC 1332	Para No.(30)
AIR 1959 SC 443	Para No.(25, 28, 29)
AIR 1925 Nag 427	Para No.(31)
AIR 1922 PC 366	Para No.(31)
1894 (P) 151	Para No.(32)
(1841) 2 Court 91	Para No.(23)
AIR 2005 SC 780 : 2005 AIR SCW 605	Para No.(25)

Name of Advocates

Ms. Sohini Chakraborty, Falguni Majhi , for Petitioner; Rama Prasad Sarkar, Debasis Sur, Angsuman Patra , for Respondent.

1. **SOUMEN SEN, J. :-**The appellant is the elder son of the testator. The appeal is arising out of a judgment dated 30th May, 2009 passed by the 5th Court, Addl. District Judge, Burdwan in aprobate proceeding.

2. Briefly stated, Ashok Kumar Ta filed an application for grant of probate of a Will dated 4th July, 1983 executed by his father Gourpada Ta in respect of the property described in schedule A to the affidavit. Ashok is a named executor in the Will. Gourpada during his lifetime executed two wills. The first Will was executed on 3rd June, 1964. The said Will was revoked by the later Will dated 4th July, 1983. Ashok is claiming property of this Will.

3. The trial Court allowed the application for grant of probate. The trial Court was satisfied due execution and attestation of the Will by two attesting witnesses. The trial Court was of the view that the two attesting witnesses have proved due execution of the Will. There is no suspicious circumstances surrounding the execution of the Will. In this appeal the appellant has principally raised two issues

with regard to the grant of probate in favour of his brother Ashok. The first ground is that the application for grant of probate is barred by law of limitation and secondly, the execution of the will is surrounded by suspicious circumstances.

4. Ms. Sohini Chakraborty, learned Counsel representing the appellant submits that it is an admitted position that on 26th May, 1964 Gourpada executed a Will in which he made equal distribution of assets and properties in favour of his two sons. The said Will was registered on 3rd June, 1964. After almost 19 years on 4th July, 1983 Gourpada alleged to have executed the second Will in which he had bequeathed substantial property in favour of his younger son Ashok. The disposition in favour of Ashok is unnatural. The attesting witnesses are all close persons and known to Ashok. Gourpada at the time of execution of the Will was none- generion. He was suffering from diabetes and had suffered framour fracture in and around the time when the Will was executed. He was also having weak vision and was unable to read and write.

5. Ms. Chakraborty submits that one of the attesting witnesses namely, Subhas Chandra Samanta admitted that he was bed ridden at the time of execution of the Will and occasionally he would sit in chair if that were the physical condition of Gourpada then it is unbelievable that he visited the Registry Office and was present at the time of registration of the Will. It is submitted that the scribe of the Will had never come and deposed. The executor, in fact, had clearly stated in his evidence that he would not produce the scribe to prove the Will. The evidence of the attesting witnesses have been placed extensively to show that one of the attesting witnesses who claimed to be a law clerk, Sri Tinkari Gon was known to the executor. Mr. Gourpada claimed to have been present on 4th July, 1983 at Burdwan sub-registrar Office but in his affidavit he never mentioned the fact that the Will was registered on 4th July, 1983 at the said Registry Office. He was completely silent about the registration of the Will.

6. The learned Counsel submitted that considering the frail physical and mental health of the testator one would have expected the executor to produce evidence to show that at the time of execution of the Will his mental faculty was good and he was in a position to decide the disposition he intended to make. The Will would not show that attesting witnesses or the scribe had read over or explained the Will to the testator, instead of a self serving of endorsement of one of the attesting witnesses is appearing towards the middle of the second page of the Will. It is curious that one of the attesting witnesses have made an endorsement to the effect that the testator in the meeting was found to be of good health and with free mind

had executed the said Will in presence of the parties mentioned in the said Will. Having regard to the physical and mental condition of the testator it is for the executor to establish that the testator understood the contents of the Will before he put his signature. Moreover, the signature of the testator appeared on the right hand of the corner of each page but not in the portion where the contents of the Will end. Tinkari, one of the attesting witnesses during his cross-examination has admitted that on or about 1st or 2nd April, 1983 the testator informed him about his intention to execute the Will for the first time, however, in his chief he has said that two days earlier to the date when the testator executed the Will he expressed his desire to change the Will. Tinkari was the clerk of the Advocate of Ashok.

7. Ms. Chakraborty submits that both the attesting witnesses Tinkari and Subhas had deposed that when they respectively arrived at the testator's house on 4th July, 1983 all the other persons were present which is self contradictory, particularly when neither of them claimed that Tinkari and Subhas came together. It is submitted that Subhas during his cross has stated that the Will was registered on 8th July, 1983 between 11 and 11.30 p.m. in presence of Subhas, Gourpada and Santosh Mitra. He did not mention the name of Tinkari. However, Tinkari in his evidence has stated that he was present at the time of registration. Santosh who apparently played a very important role being the scribe was not produced and the executor in his cross-examination has stated that he would not bring the scribe to depose It is submitted that in view of the contradictory evidence of the attesting witnesses regarding the execution and registration of the Will the executor of the Will is required to remove such suspicious circumstances. The Hon'ble Apex Court in Kalyan Singh v. Chhoti reported in **AIR 1990 SC 396** has held that the factum of execution and validity of the Will cannot be determined merely by considering the evidence produced by the propounder In order to judge the credibility of the witnesses and disengage the truth from falsehood the Court is not confined only to their testimony and demeanour. It would be open to the Court to consider circumstances brought out in the evidence or which appear from the nature and contents of the documents itself. It would be also open to the Court to look into surrounding circumstances as well as inherent improbabilities of the case to reach a proper conclusion on the nature of evidence adduced by the party.

8. The learned Counsel submits that it is incumbent upon the executor to produce and adduce credible and reliable evidence to remove all possible doubts that are likely to linger in the mind of the court and pricks its conscience. The learned Counsel submitted that in the instant case, the executor has failed to explain the following suspicious circumstances.

i Why he intentionally allowed the first probate proceeding to be dismissed for default?

ii. What were the setbacks he experienced which led him to get the earlier probate application dismissed?

iii. What were the changed circumstances which led him to apply for probate afresh after 10 years?

iv Why was the scribe not examined particularly when the evidence of the attesting witnesses was contradictory?

v. Did the testator really understand the contents and purpose of the document which he signed?

vi. When was the will registered before the registry office- which date and what time?

9. It is submitted that the evidence of the witnesses for the propounder on above points are vague and contradictory. The suspicious circumstances were not at all explained.

10. Ms. Chakraborty submits that in any event and in any view of the matter the second application for grant of probate is barred by limitation. The second application for grant of probate was filed almost after 10 years without any explanations. It is ex facie barred by the law of limitation. It is submitted that the first probate proceeding was dismissed for default on 20th April, 1995 and the second application was filed on 27th September, 2005 without explaining the delay. In the affidavit in chief Ashok had failed to explain the reason for the delay. It is submitted that in view of the decision of the Hon'ble Supreme Court in Kunvarjeet Singh Khandpur v. Kirandeep Kaur reported in **2008 (8) SCC 463** : (**AIR 2008 SC 2058**), the said application is clearly barred. It is submitted that in paragraph 16 of the said report the Hon'ble Supreme Court has clearly stated that if the probate proceeding is not filed within the period of 3 years "when the right to sue accrue" which in the instant case has accrued on 12th February, 1989 the application of grant of probate would be barred by law of limitation in terms of the Article 137 of the Limitation Act, 1963. It is submitted that no explanation was offered for not taking any steps to recall the order of dismissal of the probate proceeding for default on 20th April, 1995 and by the time the second application for grant of probate was filed it was clearly barred by law of limitation. It is submitted that by reason of such delay one of the attesting witnesses namely Kamala Kanta Nandi could not be produced at the trial since he died before filing of the second application for grant of probate. It is submitted that allowing the grant of probate under such circumstances would be prejudicial and adversely affect the valuable right of the appellant in relation to the properties left behind by his deceased father.

11. Mr. Rama Prasad Sarkar, learned Counsel has submitted that the appellant has not taken the point of limitation before the learned trial Court and no issue was framed by the trial Court in this regard. The appellant after having lost the probate proceeding has taken up the issue of dismissal out of desperation. Since the executor was not called upon to adduce any evidence with regard to the reasons for not being able to file the application after it was dismissed for default, it would be unfair at this stage if this issue is allowed to be raised for the first time in the appeal. It is submitted that by not raising such issue before the trial court it has to be presumed that the appellant was not serious to challenge the probate proceeding on the ground of delay or dismissal of the earlierprobate proceeding.

12. Mr. Sarkar further submits that dismissal of an application for probate for default would not bar the executor, to file another application for grant of probate of the said Will. There is no limitation prescribed in the Act for making such application. Therefore there is no bar for the executor to file second application. As there is no cause of action for the proceeding, Section 137 of the Limitation Act for filing an application for probate does not apply.

13. The contention that after dismissal of the earlier proceeding without restoring the earlier proceeding, no fresh proceeding can continue is not also a correct position of law Reference has been made on the decision reported in **AIR 1985 Cal 275** in case of Bimala Kanta Sengupta v. Sarojini Koner. It is humbly submitted that in the case of Kunverjeet Singh Khandpur (supra) the Hon'ble Supreme Court has not considered the question as to "When the right to apply accrues". The Hon'ble Division Bench of this Hon'ble Court held that in an application for probate neither there is any cause of action as such for the proceeding nor any prescribed period of limitation. The propounder cannot be regarded as a plaintiff who brings a suit in respect of some cause of action.

14. The Hon'ble Supreme Court in Kunverjeet Singh Khandpur (**AIR 2008 SC 2058**)(supra) considered the Division Bench Judgment of Bombay High Court in **AIR 1983 Bom 268** and held that the conclusion made in paragraph 16(c) is the correct position of law:-

"16(c) such an application is for the court's permission to perform a legal duty created by a will or for recognition as a testamentary trustee and is a continuous right which can be exercised any time after the death of the deceased, as long as the right to do so survives and the object of the trust exists or any part of the trust, if created remains to be executed".

15. Mr. Sarkar submits that the plea of limitation has been raised with a view to

divert the attention of the court from the evidence adduced by the propounder and the attesting witnesses with regard to the due execution of the Will. It is submitted that two attesting witnesses have proved the Will in accordance with Section 63(c) of the Indian Succession Act. There is no requirement in law that the scribe has to be examined to prove the Will. Moreover, minor discrepancies and/or mathematical certainty in evidence cannot disprove the execution of the Will as held in Smt. Pranati Ghosh v. Sri Anil Kumar Ghosh reported at 2022 SCC Online Cal 2736 : (**AIROnline2022 Cal 122**) (paragraphs 7, 8, 14, 39 and 41).

16. The appellant in his evidence has specifically stated that he has not seen the earlier Will and therefore all his defence about the execution of the said Will were speculative. Mr. Sarkar has referred to pages 82 to 88 of the paper book to show that the appellant in his examination before the trial court had admitted that he is in possession of the property which was given to him by the Will. The testator signed various deeds and had taken into consideration the business being carried by him at the time of execution of the Will. The appellant being elder brother was not deprived of the property all together. It is submitted that if the executor had any ill motive and the Will is claimed to be a manufactured document then the deprivation of the appellant from all the properties would have been the natural consequence. The appellant admits the contents of the Will but he alleged only suspicious circumstances which are clearly removed in view of deposition of the attesting witnesses who have elaborately discussed the circumstances in which the said Will was executed. It is submitted that the allegations that by reason of the delay he could not produce one Kamala Kanta Nandi who would have deposed in his favour is irrelevant as the other person named in the affidavit filed by the appellant namely, Bidyut Tah was available and no explanation was offered for not producing Bidyut Tah as a witness for the appellant to support his case. The illness of the testator alleged is also of no consequence since the attesting witnesses have clearly stated that the testator was in a position to take a conscious decision and after the Will was drafted by the scribe in consultation with the testator the attesting witnesses have signed the Will in presence of the testator and they had also seen the testator putting their signatures in their presence. The appellant could not prove the illness of the testator at the time of execution of the Will by adducing any medical evidence.

17. In the backdrop of the aforesaid submission we are required to consider the judgment passed by the probate court in favour of propounder. The scribe and the other attesting witnesses are known to Ashok. The attesting witnesses have stated in their evidence that they used to know Ashok prior to execution of the Will.

Tinkori in his evidence has stated that Santosh Kumar Mitra was the scribe and duly identified the signature of Santosh Kumar Mitra in the Will. Santosh Kumar Mitra, scribe of the Will was present at the residence of Gourpada in the evening of 4th July, 1983. Tinkori was requested by Gourpada two days prior to the execution of the Will that he wanted to change the earlier Will and expressed his desire to execute a fresh Will for which he had intimated Santosh Kumar Mitra. Santosh and Tinkori were known to each other professionally. Tinkori had prior acquaintance with Gourpada as he and his son Ashok used to visit the chamber of the advocate in which he used to work. Tinkori has specifically stated at the time of preparation of the Will Gourpada had shown some record of rights and other documents of some properties and on consideration of these documents and at his instruction Santosh Kumar Mitra prepared the Will in presence of Subhas and Dipak Singh and Tinkori. After the Will was written by Gourpada it was not signed immediately. Gourpada read the Will and thereafter he took back the previous Will and the documents of which reference were made in the will. It was only thereafter the testator put his signatures after being fully satisfied with contents of the Will. Tinkori has stated that Gourpada had also signed in all pages in the right hand side top corner of the Will and after it was written he made an endorsement in Bengali to the effect that all the attesting witnesses have seen the testator putting his signature on the Will in gathering on his free will and volition and both the witnesses seen each other putting their signature in presence of the testator. Tinkori had also stated that Dipak put his signature as a third witness. After all the attesting witnesses had put their signature the original Will was handed over to Gourpada and kept in his custody. In his cross examination he has clarified the reasons for endorsement he made in Bengali stating that testator had signed the Will of his own volition as all the attesting witnesses wanted such endorsement to be made in the Will. He stated that Gurupada and Ashok both sons of testator are businessman. Gurupada has engaged his transport business whereas Ashok deals in tyre business. The Will was drafted in his presence. When he arrived at the house of the testator he found the other persons named in the Will were all presence. The Will was dictated to the scribe and on the basis of such dictation the deed writer read the Will. The deed writer took about two hours to complete the Will. He had seen the earlier Will that was executed by the testator sometimes in 1964. Subhas the second attesting witness also signed the Will in his presence. Gourpada was wearing a spectacle and used it for reading purpose at the time of going through the contents of the Will he was wearing spectacle. He denied that Gourpada lost his vision and was unable to move. He admits that he used to know Ashok for five years.

18. Subhas the second attesting witness corroborated the statement of Tinkori with regard to the preparation and execution of the Will. He also stated that testator informed him that he had executed the earlier Will in 1964. Santosh was known to him as he used to give coaching to the sons of Gourpada namely Gurupada and Ashok. At the request of Gourpada he reached the house of Gourpada in the evening of 4th July, 1983 and found Tinkori, Santosh and Dipak in his house. He also stated that before the preparation of the Will some records and documents of some properties were consulted. Those documents were given to Santosh at the time of preparation of the Will. The previous Will was produced in the said gathering in presence of all the persons named in the Will prior to the writing of the Will Gourpada handed over the previous Will to Santosh and Santosh on the basis of the advice from Gourpada and as per his direction scribe the Will and while preparing the Will he consulted the previous Will and thereafter noted down the reference of properties in respect of some documents produced before Santosh, the scribe. After the Will was prepared it was handed over to Gourpada who read it and thereafter took back the previous Will and the documents reference to which was made in the Will and thereafter he put his signature after going through the contents of the said Will. Subhas, the other attesting witness, has stated that he was a frequent visitor to the residential house of the parties and knew the appellant as well. He also corroborated the signatures of Gourpada on different pages. He also corroborated the evidence of Tinkori with regard to due execution of the Will and the signature of the testator. In his cross examination he has stated that he received a phone call from the testator and after he arrived he was told about the purpose for his presence. He also stated that it took almost two hours to prepare the Will.After the Will was prepared Gourpada did not immediately put his signature. He read the contents of the Will and thereafter only put his signature. At first Gourpada put his signature in all pages of the Will. After his signature was over Tinkori put his signature as the first attesting witness and thereafter the other witnesses put their signatures. On the date of registration he was present with Gourpada. He knew Tinkori. However, he had admitted that Gourpada was a patient of diabetes. He was around 91 years at the time of execution of the Will, he was completely bed ridden but sometimes he used to sit on the chair. His legs were fractured. However, he did not lose his locomotion. He has stated that Dipak was the private tutor known to Ashok. He also in the capacity of private tutor used to visit the house of the attesting witnesses. He stated that Ashok and Gurupada residing separately but he could not recollect when Ashok started to reside separately from Guruprasad.

19. Gurupada in his evidence has stated that at the time of his death the testator was aged 91 years. Since 1970 he was suffering from diabetes and other ailments for which his physical condition deteriorated. He had problem in his eyes and kidney and subsequently suffered femur fracture. He lost his vision. Gurupada used to take care of his father and attend to his medical needs. He used to love him and out of natural love and affection previously he bequeathed the dwelling house in favour of his two sons. The attesting witnesses are all known to his brother Ashok and with their connivance this Will has been manufactured. At the relevant time his father Gourpada did not have the physical and mental ability and capacity to execute the Will of this nature. The said will cannot be the product of his free Will and volition. The earlier proceeding was abandoned as his brother realized that he would not able to prove the said will Kamala Kanta and Bidyut would have deposed against the existence of the Will and in favour of Gourpada. In his cross -examination he has stated that he did not file any medical documents to show that his father suffering from ailments to 1970 to 84. He started his transport business since 1971. In 1970 his father would be about 64 to 65 years. He admits that his father executed the will sometimes in 1964 and it was executed out of his own volition. He is in position of land measuring about 1.61 acres situated in Mouza Chagram. He had filed the suit against his brother in 2004 challenging the gift alleged to have been made by his father in favour of his brother Ashok. He could not say whether the probate suit land in Chagram has been allotted to him by his father and on that basis he is in position of the said property.

20. In view of the admitted position that at the time of execution of the 2 Will the testator was physically ill and mentally frail it was incumbent upon the executor and the attesting witnesses to establish the mental ability and physical fitness of the executor to execute the Will. It is possible that a person may be physically unfit but mentally alert.

21. In the instant case the evidence of Subhas Samanta one of the attesting witnesses clearly shows that he was completely bed ridden and used to sit sometimes. He suffered fracture on his legs. The caveator is the son of the testator. He has also stated that at the time of execution of the alleged Will his father suffered femur fracture. It is considered to be a serious injury that requires immediate medical care and it can take month for broken femur to heal. There is no evidence that by the time the Will was registered the testator had recovered from it and could travel from his house to the sub registry office. There is no evidence of the Will was registered at the house of the testator on commission it would have been the normal coures of action when a none-generion having multiple ailments including physical disability is presumed to have executed a registered Will.

There is no endorsement in the registered Will that the sub registrar has explained the contents of the Will to the testator. It is true that the Will contains a recital that the testator with sound mind had executed the Will and an attempt is made in justification thereof by Tinkori by making an endorsement to that effect in the last page of the Will. The attempt and jealousness with which the will is projected to be a product of sound disposition has raised more questions about its fairness. Notwithstanding allotment of one of the properties to the appellant where the appellant is residing separately and also notwithstanding the fact that the executor was residing with his father and may have taken due care of him. A person with fractured leg or femur as the case may be could not have travelled to the registry office for the registration of the said Will. It is impossible if not unbelievable that the testator could travel to the sub registry office with such health condition for the registration. In fact, Subhas Samanta has stated that he had not seen Tinkori at the registry office. On the basis of the aforesaid evidence it was incumbent upon the executor to produce some medical evidence or other reliable evidence to show that at the time of execution of the Will his father was physically fit and mentally alert and was capable of taking an independent decision without being influenced by the executor. It is for the executor to establish that the testator had the physical ability to move and present himself before the registry office. All the attesting witnesses and the persons named in the Will are the men of the executor. It is true that one of the attesting witnesses Subhas was known to both brothers. Undoubtedly, the executor has taken a prominent role in the execution of the Will. It was under such circumstances the evidence of the scribe was essential. The executor refused to present the scribe, although available, at the trial. In the evidence it has also come to light that the executor had problem with his eyes. The signature of the testator appears to be shaky and it represents the frail health condition of the testator. The testator did not put his signature at the end of the Will before the signature of other persons alleged to be present at the time of execution of the Will. The signatures are at the right hand corner of the Will instead of at the bottom of each page and not immediately towards the end where the Will ends is unusual as normally signatures at the corner of a page is made when it is intended to be used in a court proceeding. Apart from it that the testator was capable of signing the Will and with full knowledge of the contents thereof and thereafter proceeded to the registry office are to be established at the trial. The appellant had cataract and was wearing glasses. At the age of 91 what was the condition of the eyes of the testator ought to have been assessed considering his overall health condition. A person completely bed ridden in all likelihood would lost all his instinct and impulses.

22. A Will is a commitment, desire, inclination and intention to bequeath and dispose of propertiesin the future, in favour of the beneficiary.

23. When the Will is made, the law requires that there should be sound disposing mind both at the time when the instructions for preparation of the will is given and when the will is executed, but it would appear that if the will is shown to have been drawn in accordance with the instructions given while the testator was of sound disposing mind, it is sufficient that, when he executes it, he appreciates that he is being asked to execute a will, a document drawn in pursuance of those instructions shall remain valid. It is presumed that the testator was sane at the time when he made his Will but if the question of his insanity or mental incapacity is contested, the initial onus is on the propounder to prove that the testator was of sound disposing mind and have the required mental capacity at the time when he made his Will. While there must be a vigilant examination of all the evidence, if the court feels that there is no doubt substantial enough to defeat a grant of probate, then the grant must be made. The law does not require complete proof of mental capacity and sound disposing mind or even proof beyond reasonable doubt is not essential (See. Wellesley v. Vere (1841) 2 Court 917, Re Flynn, Flynn v Flynn 1982 (1) All ER 882 at 890. (Clancy v. Clanc (2003) EWHC 1885 (CH), and Re: Perrins v Holland (2009) EWHC 2029 (CH) (WLLR).

24. The law requires that at the time of bequeath the testator has a disposing mind so that he is able to make a disposition of his property with understanding and reason.

25. The mode and manner of execution of a Will has been lucidly discussed in Savithri and Ors., v. Karthyayani Amma and Ors., reported in 2007(11) SCC 621 : (**AIR 2008 SC 300**) in paragraphs 19 to 20. The said paragraphs are reproduced below:

"19. In Niranjan Umeshchandra Joshi v. Mrudula Jyoti Rao and Ors. (**AIR 2007 SC 614**), thisCourt held:

32. Section 63 of the Indian Evidence Act lays down the mode and manner in which the execution of an unprivileged Will is to be proved. Section 68 postulates the mode and manner in which proof of execution of document is required by law to be attested. It in unequivocal terms states that execution of Will must be proved at least by one attesting witness, if an attesting witness is alive subject to the process of the court and capable of giving evidence. A Will is to prove what is loosely called as primary evidence, except where proof is permitted by leading secondary evidence. Unlike other documents, proof of execution of any other document

under the Act would not be sufficient as in terms of Section 68 of the Indian Evidence Act, execution must be proved at least by one of the attesting witnesses. While making attestation, there must be an animus attestandi, on the part of the attesting witness, meaning thereby, he must intend to attest and extrinsic evidence on this point is receivable.

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 Shedage (**AIR 2002 SC 637**) and Sridevi and Ors. v. Jayaraja Shetty and Ors. (**AIR 2005 SC 780**) Subject to above, proof of a Will does not ordinarily differ from that of proving any other document.

20. Therein, this Court also took into consideration the decision of this Court in H. Venkatachala Iyengar (**AIR 1959 SC 443**) (supra), wherein the following circumstances were held to be relevant for determination of the existence of the suspicious circumstances:

34. (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 relevantcircumstances;

(iii) Where propounder himself takes prominent part in the execution of Will which confers on him substantial benefit.(emphasis supplied)

26. It is trite law that the burden of proof is on the propounder to prove that the Will has been voluntarily executed, that the testator has signed the Will and put his signature on his own free will having sound disposition of mind, understanding the nature and effect thereof and that the Will is a genuine document. The onus of the propounder may be discharged if he succeeds in bringing on record sufficient cogent evidence in this regard and removing all suspicions.

27. In RM. Ak. P. Kannammal Achi and Ors., v. A.N. Narayanan Chettiar reported in

(1970) 1 MLJ 252 : (AIROnline 1968 Mad 3) it was held that "While the burden on the propounder of the Will is to show that the testator executed the Will in his right mind and with disposing mental capacity, the caveator to succeed and have the Will thrown out should establish that the Will was executed under undue influence and the evidence in regard to this must be of the exercise of influence either by coercion or by fraud. Mere persuasion and importunity which do not unduly overbear the will of the testator would not be undue influence that would vitiate the Will." (emphasis supplied)

28. It is paramount duty of the propounder to explain away the suspicious circumstances attending the execution of the Will. This burden gets heightened when a caveat is entered challenging the Will as forged or vitiated by undue influence etc. These principles are elaborately stated by the Hon'ble Supreme Court in H. Venkatachala Iyengar v. B.N. Thimmajamma, reported in 1959 (Supp) 1 SCR 426: **AIR 1959 SC 443**.

29. In H. Venkatachala Iyenger (supra) the Court clearly distinguished the nature of proof requiredfor a Will as opposed to any other document reads as under:-

"18. 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, we must inevitably refer to the statutory provisions which govern the proof of documents. Sections 67 and 68 of the Evidence Act are relevant for this purpose. Under s. 67, if a document is alleged to be signed by any person, the signature of the said person must be proved to be in his handwriting, and for proving such a handwriting under ss. 45 and 47 of the Act the opinions 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. Section 59 provides that every person of sound mind, not being a minor, may dispose of his property by will and the three illustrations to this section indicate what is meant by the expression "a person of sound mind " in the context. Section 63 requires that the testator shall sign or affix his mark to the will or it shall be signed by some other person in his presence and by his direction and that the signature or mark shall be so made that it shall appear that it was intended thereby to give effect to the writing as a will. This section also requires that the will shall be attested by two or more witnesses as prescribed. 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. Has the testator signed the will? Did he understand the nature and effect of the dispositions in the will? Did he put his signature to the will knowing what it contained? Stated broadly it is the decision of these questions which determines the nature of the finding on the question of the proof of wills. 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 Section 63 of the Indian Succession Act. As in the case of proof of other documents so in the case of proof of Wills it would be idle to expect proof with mathematical certainty. The test to be applied would be the usual test of the satisfaction of the, prudent mind insuch matters." (emphasis supplied)

30. It is well-established that in a case in which a Will is prepared under circumstances which raise the suspicion of the court that it does not express the mind of the testator, it is for those who propound the Will to remove that suspicion. [See. Gorantla Thataiah v. Venkatasubbaiya, reported in **AIR 1968 SC 1332**: Indu Bala Bose v. Manindra Chandra Bose, reported in **AIR 1982 SC 133**.]

31. A Will is one of the most solemn documents known to law. By it a dead man entrusts to the living, the carrying out of his wishes, and as it is impossible that he can be called either to deny his signature or to explain the circumstances in which it was executed it is essential that trustworthy and effective evidence should be given to establish compliance with the necessary forms of law [Ram Gopal Lal v. Aipna Kunwar, reported in **AIR 1922 PC 366**]. It seems impossible to enunciate any specific standard of proof which will be required to establish the authenticity of a Will in any given case. Everything depends upon the circumstances of the particular case under consideration. (Keshev v. Vithal; AIR 1925 Nag 427, Per Findley O.C.J).

32. Whenever a Will is prepared under circumstances which raised a reasonable suspicion that it does not express the mind of the testator, the court ought not to pronounce in favour of it unless the suspicion is removed Tyrrel v.. Painton 1894 (P) 151 at 159.

33. On the basis of the evidence it can be safely said that the suspicion is one inherent in the transaction itself. On the basis of the evidence it is difficult to arrive at a conclusion that the Will isa product of free and fair mind of the testator.

34. Apart from the aforesaid the application for grant of probate is also barred by the laws of limitation in view of the decision of the Hon'ble Supreme Court in Kunverjit Singh (**AIR 2008 SC 2058**) (supra). The original application for grant of probate was filed on 12 February, 1989 and it was dismissed for default on 20th April,

1985 after the appellant filed his affidavit in respect of the caveat opposing the grant of probate. Thereafter on 27th September, 2005 the second application for grant of probate was filed by the respondent No.1. In Kunverjeet Singh (**AIR 2008 SC 2058**) (supra) the Hon'ble Supreme Court explained the concept of right to apply for probate in the context of article 137 of the Limitation Act, 1963. It was held that an application for grant of probate and letters of administration is in effect seeking permission of the court by the executor to perform the legal duty and discharge the instruction of the testator as mentioned in the Will and is a continuous right which can be exercised at any time after the death of the testator as long as the right to do so survives and the object of the trust exists or any part of the trust if created remains to be executed. In paragraph 15 of the report, the Apex Court summarized its conclusions in the following manner:

"15. Similarly reference was made to a decision of the Bombay High Court's case in Vasudev Daulatram Sadarangani v. Sajni Prem Lalwani **AIR 1983 Bom 268** . Para 16 reads as follows:

16. Rejecting Mr. Dalapatrai's contention, I summarise my conclusions thus:

(a) under the Limitation Act no period is advisedly prescribed within which an application for probate, letters of administration or succession certificate must be made;

(b) the assumption that under Article 137 the right to apply necessarily accrues on the date of the death of the deceased, is unwarranted;

(c) such an application is for the Court's permission to perform a legal duty created by a Will or for recognition as a testamentary trustee and is a continuous right which can be exercised any time after the death of the deceased, as long as the right to do so survives and the object of the trust exists or any part of the trust, if created, remains to be executed;

(d) the right to apply would accrue when it becomes necessary to apply which may not necessarilybe within 3 years from the date of the deceased's death.

(e) delay beyond 3 years after the deceased's death would arouse suspicion and greater the delay, greater would be the suspicion;

(f) such delay must be explained, but cannot be equated with the absolute bar of limitation; and

(g) once execution and attestation are proved, suspicion of delay no longer operates.

Conclusion (b) is not correct while the conclusion (c) is the correct position of law."

35. It would thus appear that sub-paragraph (d) makes it clear that the right to apply

is dictated by necessity which however, significantly and importantly may not arise within three years from the death of the testator. The application for grant of probate or letter of administration is not governed by any article of the Limitation Act.

36. In Ramesh Nivrutti Bhagwat v. Surendra Manahor Parakhe, reported at 2020 (17) SCC 284 : (**AIR 2019 SC 4948**), the Supreme Court reiterated that the Succession Act does not prescribe any specific period of limitation for the grant of probate, or for making an application for revocation or cancellation of probate or letters of administration. The residuary Article 137 of the Limitation Act which covers proceeding for which no period of limitation is stipulated in the Act, provider for a three year period of limitation would govern such proceedings. In affirming the views expressed in Kunverjeet Singh (supra) the Apex court observed:

"13. This issue was considered in Kunvarjeet Singh Khandpur v. Kirandeep Kaur and Ors., (2008) 8 SCC 463 : (**AIR 2008 SC 2058**). This Court negatived the plea that since the Act prescribes no period of limitation in regard to matters concerning grant of probate or letters of administration, there is no time limit. The court followed the decision in the Kerala State Electricity Board, Trivandrum v. T.P. Kunhaliumma, (1977) 1 SCR 996 : (**AIR 1977 SC 282**) which took note of the change in the collocation of words in Article 137 of the Limitation Act, 1963 compared with Article 181 of the Limitation Act, 1908, and held that applications contemplated Under Article 137 are not applications confined to the Code of Civil Procedure, 1908. In the older Limitation Act of 1908, there was no division between applications in specified cases and other applications, as in the Limitation Act, 1963. The court held in Kerala State Electricity Board (supra) that:

"18.....The words "any other application" Under Article 137 cannot be said on the principle of ejusdem generis to be applications under the Code of Civil Procedure other than those mentioned in Part I of the third division. Any other application Under Article 137 would be petition or any application under any Act. But it has to be an application to a court for the reason that Sections 4 and 5 of the 1963 Limitation Act speak of expiry of prescribed period when court is closed and extension of prescribed period if Applicant or the Appellant satisfies the court that he had sufficient cause for not preferring the appeal or making the application during such period.

22. The conclusion we reach is that Article 137 of the 1963 Limitation Act will apply to any petition or application filed under any Act to a civil court. With respect we differ from the view taken by the two-judge bench of this Court in

Athani Municipal Council case and hold that Article 137 of the 1963 Limitation Act is not confined to applications contemplated by or under the Code of Civil Procedure.

14. Applying the ratio in Kerala Electricity Board (supra), the court, in Kunvarjeet Singh Khandpur (supra) observed that:

"13. The crucial expression in the petition is "right to apply". In view of what has been stated by

this Court, Article 137 is clearly applicable to the petition for grant of letters of administration. As rightly observed by the High Court in such proceedings the application merely seeks recognition from the Court to perform a duty because of the nature of the proceedings it is a continuing right. The court then concluded that the right to apply for probate accrues on the date of death of the testator.

15. Recently, in Sameer Kapoor and Another v. State through Sub-Divisional Magistrate South, New Delhi and Ors. (**AIR 2019 SC 3318**), the context was slightly different; the probate was issued by a foreign court. The executor sought letters of administration in an Indian court (like in the present case), Under Section 228. The court dealt with the objection of limitation, and noticed, firstly, that Kunvarjeet Singh Khadapur (supra) had ruled about applicability of Article 137 for grant of probate in the first instance. Drawing a distinction from the grant of probate (or letters of administration) and the recognition of that, Under Section 228, the court (in Sameer Kapoor (supra)) held as follows:

"17. it can be said that in a proceeding, or in other words, in an application filed for grant of probate or letters of administration, no right is asserted or claimed by the applicant. The Applicant only seeks recognition of the court to perform a duty. Probate or letters of administration issued by a competent court is conclusive proof of the legal character throughout the world. That the proceedings filed for grant of probate or letters of administration is not an action in law but it is an action in rem. As held by this Court in the case of Kunvarjeet Singh Khandpur (**AIR 2008 SC2058**) (supra),

15....."16.....(c) an application for grant of probate or letters of administration is for the court's permission to perform a legal duty created by a will or for recognition as a testamentary trustee and is a continuous right which can be exercised any time after the death of the deceased, as long as the right to do so survives and the object of the trust exists or any part of the trust, if created, remains to be executed."

16. The decision in Lynette Fernandes v. Gertie Mathias, (2018) 1 SCC 271 : (**AIR 2017 SC 5453**), dealt with the precise issue of the period of limitation applicable for an application for cancellation of a probate or letters of administration.

This Court held as follows:

"19. One must keep in mind that the grant of probate by a Competent Court operates as a judgment in rem and once the probate to the Will is granted, then such probate is good not only in respect of the parties to the proceedings, but against the world. If the probate is granted, the same operates from the date of the grant of the probate for the purpose of limitation Under Article 137 of the Limitation Act in proceedings for revocation of probate. In this matter, as mentioned supra, the Appellant was a minor at the time of grant of probate. She attained majority on 09.09.1965. She got married on 27.10.1965. In our considered opinion, three years limitation as prescribed Under Article 137 runs from the date of the Appellant attaining the age of majority i.e. three years from 09.09.1965. The Appellant did not choose to initiate any proceedings till the year 25.01.1996 i.e., a good 31 years after she attained majority. No explanation worthy of acceptance has been offered by the Appellant to show as to why she did not approach the Court of law within the period of limitation. At the cost of repetition, we observe that the Appellant failed to produce any evidence to prove that the Will was a result of fraud or undue influence. The same Will has remained unchallenged until the date of filing of application for revocation. No acceptable explanation is offered for such a huge delay of 31 years in approaching the Court for cancellation or revocation of grant of probate."

37. The Supreme Court in Sameer Kapoor v. State, **2020 (12) SCC 480** : (**AIR 2019 SC 3318**) observed that in an application for grant of probate or Letters of Administration no right or claimof the applicant is ascertained as the applicant only seeks recognition of the Court to perform a duty. If allowed it becomes a conclusive proof of the legal character of the Will. It is an action in rem.

38. The question of limitation arises only when there is any threat or challenge to the Will. The grant of probate by a competent court operates as a judgment in rem and once probate is granted it binds the whole world and it operates from the date of the grant. In a proceeding for revocation the limitation period would commence from the date of grant of probate and shall be governed by Article 137 of the Limitation Act (See. Lynette Fernandes (**AIR 2017 SC 5453**), (supra). The right to apply under Article 137 of the Limitation Act in the context of a probate would be the date on which the dispute arises or when it becomes necessary for grant of probate. A party may also apply when a challenge is made to a Will as manufactured, forged, non- existent, fabricated or any dispute arises in relation thereto where the genuineness of the Will is required to be established. There is no outer limit for filing of application for probate and the time would commence from the date

when the right to apply accrues. The right to apply under Article 137 of the Limitation Act for the purpose of limitation has to be contextual and it would apply from the date on which the right to apply accrues which is variable and would depend upon the facts of the case. It would vary from case to case. It is possible that the executor may not be aware of the death of the testator in every case. The date of death of the testator is not crucial or determative of the right to apply for probate for the purpose of limitation. In any event under Section 293 of the Indian Succession Act probate or letters of administration with the Will annexed may be granted after the expiration of seven days in case of probate and fourteen days in case of letters of administration from the death of the testator. In Kulverjit Singh (**AIR 2008 SC 2058**) (supra) it appears that there was a probate petition filed within three years from the date of death which saved the petitioner as the right to apply for administration was taken to commence when the previous petition for grant filed by another person was withdrawn more than three years from the death and a fresh petition was also consequently filed more than three years from the date of death. The date of death was not reckoned to be the date when the right to apply "accrues". The said principles was reiterated in Krishna Kumar Sharma v. Rajesh Kumar Sharma reported in **AIR 2009 SC 3247** : 2009(11) SCC 537. In Krishna Kumar Sharma (supra) it was held that any application to civil court under the Act of 1925 is covered by Article 137 of the Limitation Act and that would include the application under Section 276 of the Act.

39. In the instant case, the executor cum beneficiary did not make any attempt to restore the original proceeding. If we applied the principle laid down in Kunverjee Singh (**AIR 2008 SC 2058**) (supra) the subsequent application should have been filed within three years from the date of withdrawal of the first petitioner. We have referred earlier that in Kunverjeet Singh (**AIR 2008 SC 2058**) (supra) the Hon'ble Supreme Court was dealing with a situation when the application for probate has been originally filed within three years from the death of the testator but it was subsequently withdrawn on 9 August, 1999. The subsequent application was filed within three years from the date of withdrawal of the first petition but it was more than three years from the death when the will took effect. The apex court found that the said application was in time as observed in paragraph 16 of the said report which reads:

"16. In view of the factual scenario, the right to apply actually arose on 9.8.1999 when the proceedings were withdrawn by Smt. Nirmal Jeet Kaur. Since the petition was filed within three years, the same was within time and therefore the appeal is without merit, deserves dismissal, which we direct but in the circumstances

without any order as to costs."

40. In the instant case we do not find any explanation offered for not restoring the probate proceeding and this long delay has not been explained. By reason of the judgment of the Hon'ble Supreme Court the second application could have been maintained if it were filed on or before 20 April, 1998.

41. In any event no explanation was offered for not restoring the probate proceeding and within the period of limitation.

42. On this ground also the application for grant of probate is liable to be dismissed.

43. The probate proceeding thus fails on both score, namely, failure to remove suspiciouscircumstances and limitation.

44. The appeal succeeds, however, there shall be no order as to costs.

45. The LCR along with original Will may be sent down to the trial Court.

46. UDAY KUMAR, J. :- I agree.

Appeal Allowed