07.10.2026
Ct. No. 7
SL No.10
pk/ap

CALCUTTA HIGH COURT
IN THE CIRCUIT BENCH AT JALPAIGURI

FAT 28 of 2025
CAN 2 of 2025

Nirendra Kishore Hore
Vs.
Ratna Sarkar and others

Mr. Suman Sehanabish,
Mr. Salok Sah,
Ms. Anwesha Chakraborty
... for the appellant.

Mr. Sourav Ganguly,
Ms. Rishita Chakraborty
... for the respondent nos. 1 (a) to (e),

1. Affidavit of service filed in Court today is taken on record.

2. This appeal is directed against a judgment and order dated **12.03.2025** passed by the learned **Additional District Judge, 1st Court, Cooch Behar** in **Title Suit (Probate) No. 1 of 2013**.

3. By the impugned judgment, the learned Trial Court dismissed the application for probate on contest.

4. The said beneficiaries under the Will, after the death of the appellant filed an application under Section 276 of the Indian Succession Act, 1925 ('the Act of 1905'), for grant of probate. The Will was, after the execution, registered with the Sub-Registrar, Cooch Behar on 17th February, 1989. The attesting witnesses to the Will were **Gautam**

Karmakar and **Nitai Chandra Dam**. Nitai Chandra Dam was also the scribe and a deed writer by profession.

5. The facts of this case are brief and fairly admitted.

6. The appellant herein, one of the sons of the late Dhirendra Kishore Hore, had applied for grant of probate of his father's last Will and testament dated February 17, 1989.

7. Dhirendra Kishore Hore had executed the Will on the aforesaid date and had also registered the Will on the same day.

8. Dhirendra Kishore Hore, a resident of Khagrabari, Vivekananda Street, Cooch Behar Town, P.S. Kotwali, District Cooch Behar, expired on March 2, 1996, while he was in his 80s.

9. The bequest in the Will was made in favour of the two sons of Dhirendra, namely, Nirendra Kishore Hore and Nitendra Kishore Hore. The said appeal has been preferred by one of the sons, Nirendra Kishore Hore.

10. The respondents before this Court are two sisters of the appellant, namely, Ratna Sarkar and Rina Bhadra. They filed objections to the application of the plaintiff/appellant under Section 276 of the Act of 1925. The application became

contentious. It was converted into a suit. The objectors filed formal written statement.

11. In the instant case, there were two attesting witnesses. One of such witnesses, Nitai Chandra Dam, had expired when the application for grant of probate was being heard, while the other, Goutam Karmakar, turned hostile.

12. On the hearing of the suit on behalf of the plaintiff Nirendra Kishore Hore deposed as PW-1. The Will was exhibited. The signature of the testator was identified as were the named attesting witnesses Nitai Chandra Dam and Gautam Karmakar. PW-1 admitted that until 1989, the relations between the two brothers and two sisters was cordial. The relations became strange thereafter.

13. PW-1 has deposed that the Will was executed in terms of the law in the presence of 2 attesting witnesses. The testator was in good health and of sound mind.

14. PW-2 was Pinaki Dam, son of deceased Nitai Chandra Dam, one of the attesting witnesses. He identified his father's signature. He deposed that his father was a deed writer by profession and he followed his father's profession at the place of work of his father.

15. There was no cross-examination of Pinaki by way of any suggestion or otherwise to bring forth the issue raised in argument by learned Counsel for the respondents, that Nitai had not seen the testator affix his signature or that Nitai was not an attesting witness. Clearly, the respondents did not envisage this issue.

16. PW-3 was Utpal De Bhowmick. He was an employee authorized by the District Sub-Registrar, Cooch Behar to depose in the suit. He produced the original Book No. 3, Volume- 1, Page- 125 of the year 1989 where the Will was recorded. He also produced the original registered Will executed by Dhirendra Kishore Hore, the testator. He deposed that the Will was in favour of his two sons, the appellants herein, namely, Nirendra Kishore Hore and Nitendra Kishore Hore. The original Book was scrutinized by the learned Trial Court and the certified copy retained in Court.

17. PW-4 was the second attesting witness to the Will Gautam Karmakar. He admitted his signature on the Will. He, however, denied that he had signed the same in the presence of the testator. He deposed that he was called by one of the appellants into the Cooch Bhear District Court and his signature was obtained on certain papers. He

was not aware of the contents of such papers. He denied that the testator ever executed the Will during his lifetime. He also deposed that the testator had not instructed any deed writer called Nolini Kanta Chakraborty to prepare the Will. PW-4 was declared hostile at the request of the plaintiff.

18. On behalf of the defence, Rina Bhadra deposed evidence as DW-1. She stated that the signature on the Will does not appear to that of her father. She could not recollect whether any written statement filed on behalf of her in the case or not. She was not aware of any legal steps taken by her father in respect of his property.

19. Based on the evidence before the learned Trial Court, the learned Trial Judge found that the appellant has not been able to prove due execution of the Will. He found that the executing witnesses ought to have stated that they had put their signatures on the Will in the presence of the testator and as per his instructions.

20. The learned Trial Judge also found that the appellant has not been able to demonstrate that the testator was physically and mentally fit executing the Will voluntarily and without influence, pressure or coercion. In addition

thereto, the learned Trial Judge found suspicious circumstances in execution of the Will.

21. This Court has carefully considered the evidence on record and has heard arguments of learned Counsel for the parties.

22. PW-2 and PW-4 deposed as and/or on behalf of the attesting witnesses. One of the attesting witnesses Nitai Chandra Dam had died. PW-2 was Pinaki Dam, son of Nitai Chandra Dam. He proved the signature of his father, the attesting witness Nitai Chandra Dam. PW-4 who himself was an attesting witness identified his signature on the Will. He, however, deposed that he had not signed in the presence of the testator or on his instructions. He was passing by Cooch Behar District Court. He was called by one of the beneficiaries Nirendra Hore and was made to sign on certain documents, contents whereof, he was not aware.

23. What is clear and explicit therefore, is one of the attesting witnesses Gautam Karmakar, could not identify the Will and his deposition clearly goes against the plaintiff/appellant. What remains therefore is the signature of the other attesting witness Nitai Chandra Dam. Such signature has been duly proved by his son, Pinaki Dam, PW-2.

This evidence of PW-2 must be read in conjunction with the evidence of PW-1 that the Will was executed in accordance with law, i.e., that Nitai Chandra Dam had duly signed the Will in presence of the testator. This is a presumption that would lawfully follow when one reads the evidence of PW-1 in conjunction with that of PW-2.

24. The aforesaid is further bolstered by the fact that the original Will that was registered, was produced before the learned Trial Court by an employee of the Sub-Registry of Cooch Behar, PW-3.

25. For the defendants/respondents to rebut this presumption, positive evidence ought to have been led.

26. Effective cross-examination of the plaintiff witnesses suggesting that the attesting witness Nitai Chandra Dam had not put his signature in presence of the testator, must be confronted to the plaintiff witnesses.

27. The evidence of PW – 3 is suspicious. In addition to denying that he put his signature on the Will in the presence of the testator, he went on to depose that the testator had never executed any Will or summoned any one to scribe any Will. This could not have been to his knowledge. He was

therefore tutored to depose against the appellants to somehow damage their case.

28. The method of execution of an unprivileged Will has been specifically provided in Section 63 of the Indian Succession Act, 1925.

29. It provides that the testator shall sign or affix his mark. It also provides that there should at least be two 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. It also specifies that 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. This is the mode of execution of an unprivileged Will.

30. The Indian Evidence Act, 1872, provides as to how a will is to be proved.

31. Section 68 thereof provides such particular process and procedure, which covers not just a Will but any other document as well, which is required by law to be attested.

32. Thus, if there is no attesting witness available, the alternative mode of proving the will is not completely barred, as provided in Section 69 of the Evidence Act.

33. However, Section 69 of the Evidence Act, 1872 deals with a situation where the attesting witnesses cannot be found or in other circumstances as provided therein.

34. Section 71 of the Evidence Act, 1872 provides for a situation where the attesting witness denies or does not recollect the execution of the document. This section specifies that the execution of such a document may be proved by other evidence.

35. The plaintiffs in the suit, appellant herein, has clearly proved that the will was executed by his father who was in good physical and mental condition, without any coercion or fraud or importunity. There is no cross-examination by the respondents to suggest a case otherwise.

36. The appellant, through the son of the attesting witness and the authorized representative of the District Sub-Registrar, has been able to establish that the Will had indeed been executed by his father of his own volition and that the Will was duly registered by the District Sub-Registrar, Cooch Behar.

37. In the light of the aforesaid discussions, the decision in the case of Pazhanathal (Dead) through Lrs. & Ors. – Vs. – Alamathal (Dead) through Lrs.

& Ors. reported in 2026 SCC OnLine SC 1575, could have no manner of application. The law laid down in the said decision is duly fulfilled and the appellant/plaintiff has been able to prove the Will in question even otherwise, as per Section 71 of the Act of 1925.

38. This Court finds that at no place was there effective and pointed cross-examination done by the defendants/respondents' sisters, Rina Bhadra and Ratna Sarkar. The respondents have therefore not been able to rebut the factum of the Nitai Chandara Dam having signed the Will in the presence of the testator. No contrary evidence has been led by them in this regard.

39. The two sisters had no doubt with regard to the signature of the attesting witness, Netai Chandra Dam or that he had not signed in the presence of the testator.

40. This Court, therefore, finds that in addition to proving the original Will through the evidence of PW-3, an employee of the Office of the Sub-Registrar at Cooch Behar, the appellants/plaintiffs have in substance, proved the requirement of Section 63 of the Act of 1925.

41. Coming to the suspicious circumstance surrounding the Will, this Court notices that the

Trial Judge has been rather casual in using the expression "suspicious circumstance" without discussing the same in the light of the evidence led by the parties.

42. This Court notices that bequest under the Will was not out of the ordinary. It is common place in this country for a testator to say that he does not bequeath any property to his daughters since he had given them in marriage, borne expenditures for the same and that they are well-settled.

43. It is equally common place for a father to pass on his properties to his two biological sons. Such bequest is done normally to ensure that the properties of a testator pass on to the male lineage of the family, who will carry the family name.

44. This Court, therefore, does not notice any suspicious circumstance in the subject Will, of the daughters being disinherited by a testamentary document by the father.

45. In the light of the above discussions, this Court is of the view that a decree for Probate must be granted to the Will and to the last Will and Testament of Sri Dhirendra Kishore Hore dated 17th February, 1989. There shall be a decree to that effect.

46. Let the Trial Court therefore issue Probate as directed herein.

47. F.A.T. 28 of 2025 is allowed and disposed of.

48. In view of disposal of the appeal itself, the connected application being CAN 2 of 2025 shall also stand disposed of.

49. There will be no order as to costs.

50. All parties shall act on the server copy of this order duly downloaded from the official website of this Court.

(Rajasekhar Mantha, J.)

(Reetobroto Kumar Mitra, J.)