

**IN THE HIGH COURT AT CALCUTTA
Civil Revisional Jurisdiction
Appellate Side**

Present:

The Hon'ble Justice Biswaroop Chowdhury

C.O. 2733 of 2024

Shri Kishore Kumar Khaitan.

VERSUS

Kishan Kumar Khaitan.

For the petitioner:

Mr. Partha Pratim Roy, Adv.
Mr. Kushal Chatterjee, Adv.
Mr. Mohan Lal Banerjee, Adv.
Mr. Oishik Chatterjee, Adv.

For the opposite party:

Mr. Vinay Kumar Purohit, Adv.

Last Heard on: May 16, 2025

Judgment on: May 23, 2025

Biswaroop Chowdhury, J:

The petitioner before this Court is an opposite party/defendant in a testamentary suit and is aggrieved by the Order dated 19th June 2024 passed by the Learned Judge 2nd Bench City Civil Court at Calcutta in O. C. case No. 06 of 2016 rejecting the application of the petitioner under section 63 of the Indian Evidence Act 1972 read with Section 151 CPC.

The case of the petitioner before the Learned Trial Court may be summed up thus:

1. That Mukhi Devi Khaitan was an Indian Citizen and Hindu governed by the Mitakshara School of Hindu Law who died on 27-03-2011 in Jaipur Rajasthan.
2. After the demise of the said Mukhi Devi Khaitan the only living heirs to her properties are namely Sri Basant Kumar Khaitan, Sri Mahendra Kumar Khaitan and Sri Kishore Kumar Khaitan and three married daughters namely, Smt Bimla Devi Goenka Smt Sarla Devi Bhartiya and Smt. Prabha Devi Bajoria as her heirs heiresses and legal representatives.
3. That in the year 2004, the said Mukhi Devi Khaitan was a senior citizen who suffered cardiac arrest and her health subsequently deteriorated with every passing day and again in the year 2007 she was hospitalized due to a paralytic attack at Bombay Hospital at Mumbai and thereafter she was under 24x7 medical supervision and was incapable of taking any decision of her own due to her precarious health condition.
4. The purported will allegedly appears to have been forged or manufactured by Mahendra Kumar Khaitan in collusion and connivance with the purported executor Kishan Kumar Khaitan in to deprive Kishore Kumar Khaitan from his rightful share in his mother's estate.

5. That Sri Kishan Kumar Khaitan is the executor of the purported will who was given in adoption by Late Mukhi Devi Khaitan and her husband Late Nathmal Khaitan to his brother Janghilal Khaitan and his wife Ganni Devi. Sri Kishan Kumar Khaitan stands ineligible to be legal heir of Late Mukhi Devi Khaitan's estate.
6. The witnesses to the said purported will are the henchman and employees of the said, Mahendra Kumar Khaitan who for his personal gains in collusion with the said Kishan Kumar Khaitan have forged and manufactured the purported Will. The purported will is nothing but a clear conspiracy of the said Mahendra Kumar Khaitan to deprive Kishore Kumar Khaitan from his legitimate share in the properties of the deceased.
7. It is evident from the alleged will that Late Mukhi Devi Khaitan was influenced manipulated and motivated to sign on a blank white paper by her son Mahendra Kumar Khaitan. The particulars of the alleged will was later squeered and finally printed by the help of electronic method in one page which no Lawyer shall prepare in this form on a scrap piece of paper.
8. It is important to produce, the medical records, hospital records as well as medical attendants records of late Mukti Devi Khaitan which are in the custody of plaintiffs.
9. It is submitted that Late Mukhi Devi Khaitan had never executed any will and said purported Will relied on in the probate application is a

forged and manufactured one and fabricated and afterthought document and produced in court after more than a year after her death.

The petitioner prayed that the plaintiffs be directed to produce the medical records, hospital records as well as medical attendants records of late Mukhi Devi Khaitan which are in the custody of defendants.

The said application was contested by the plaintiff/opposite party by filing written objection.

It is contended by the plaintiff opposite party in the objection that the petition is frivolous, malafide, malicious and harassing and only a plea to delay the hearing of the case. The plaintiff denied that after release from hospital in 2007 Late Mukhi Devi Khaitan was under 24x7 medical supervision or that she was incapable of taking any decision of her own due to her alleged precious health condition, as falsely alleged. It is contended that Late Mukhi Devi Khaitan had cardiac attack in 2004, and after administering medicines she was fully fit except some old age problems. It is specifically denied that after 2004 her health deteriorated with every passing day as falsely alleged. She suffered paralytic attack and was hospitalized in 2007 at Mumbai Hospital. Thereafter she recovered and was discharged from hospital being fit. The plaintiff opposite party further denied paragraph 4, 5, 6, 7, 8 and 9 of the petition. The plaintiff denied that the will executed by Late Mukhi Devi Khaitan is forged or manufactured by Mahendra Kumar Khaitan in collusion and connivance with

the plaintiff to deprive the defendant from his rightful share in his mother's estate as falsely alleged. It is contended by the plaintiff that he is the biological son of Late Mukhi Devi Khaitan and her husband Late Nathmal Khaitan. It is admitted that he was given in adoption by his biological parents to Late Janki Lal Khaitan and his wife Gonni Devi. The plaintiff has specifically denied that the witness of the purported Will is henchman of Mahendra Kumar Khaitan who for his personal gains with the plaintiff forged or manufactured the purported will. It is also denied that the particulars of Will was later squeezed and finally printed by the help of electronic method in one page. It is contended that the medical records or hospital records if any are not available with Sri Basant Kumar Khaitan son of Late Mukhi Devi Khaitan with whom she used to reside. It is further contended that the testatrix had no medical attendant at any point of time and as such question of producing records of medical attendants does not and cannot arise at all. It is also denied that the will is forged, manufactured or fabricated.

The Learned Trial Judge upon considering the petition and upon hearing the parties was pleased to reject the application made by the petitioner by observing and directing as follows:

Perused the said application, whereby the defendant/objector has prayed for passing necessary order to direct the plaintiff/petitioner to produce the medical records, hospital records and records of medical attendants of Lt. Mukhi Devi Khaitan on the ground that those are in the custody of the

plaintiff/petitioner and are very much relevant to ascertain as to whether the said Mukhi Devi Khaitan, as the testator, had the requisite physical and mental capacity to execute the disputed will in question which according to the defendant/objector is manufactured and vitiated by forgery and fabrication.

The plaintiff/petitioner has resisted and contested the said application by filing his WO denying all the material allegations contained in the said application and has prayed for rejection of the same mainly on the ground that the alleged documents in question are not in the custody of the plaintiff/petitioner or with Basant Kumar Khaitan, son of the said deceased testator, with whom she used to reside during the last part of her life.

The instant probate proceeding was filed by the plaintiff/petitioner as the executor to the disputed last will and testament of the said deceased testator and on being contentions the said proceeding is being contested by the defendants mainly on the ground that at the time of execution of the disputed will the testator was physically and mentally unfit to execute the same as she had suffered cardiac arrest in the year 2004 as well as with paralysis for which she had to be admitted in hospital in the year 2007 and since then she had been constantly under medical supervision for which she was incapable for taking any decision. After closure of recording of evidence of both the parties, the instant suit was fixed for hearing argument and thereafter the defendant/objector has come up with the instant application.

It is obvious that the onus to prove the alleged physical and/or mental incapacity of the deceased testator lies upon the defendant/objector. In the sense it was upon him to establish his allegations raised against the question of genuineness of the disputed will. Once it has been categorically stated on behalf of the plaintiff/petitioner that the records in question are not in his possession or in the possession of son of the deceased testator, no useful purpose will be served in issuing any direction upon the plaintiff/petitioner as prayed for in view of the fact that the provision of section 101 of the Indian Evidence Act never casts the duty upon a party, who asserts the negative of a fact. The defendant/objector could have easily resorted to taking necessary steps by calling for the requisite records from the concerned hospital but he has not done so for reasons best known to himself but unknown to this court.

Whatever the case may be, when the statement of the plaintiff/petitioner about absence of any such record has been made by way of affirmation, question of issuing any direction as prayed for by the defendant/objector cannot arise and as such the application under consideration is not entitled to succeed.

Hence it is

Ordered

That the application of the defendant/objector u/s 151 CPC dtd 10.4.24 stands rejected on contest.

The petitioner being aggrieved by the order passed by the Learned Trial Judge has come up with this application under Article 227 of the constitution of India.

It is contended that the Learned Trial Judge had erred in law and in fact in failing to appreciate that the documents pertain to the medical records of the mother of the petitioner and vital for proper adjudication of the case. It is further contended that the Learned Judge failed to appreciate the fact that the said Smt. Mukhi Devi during her last days was staying with the opposite party as such it is pertinent to mention that the said medical documents at present is with the custody of the opposite party/plaintiff. It is also contended that the Learned Trial Judge erred in law and in fact in not appreciating that the documents sought for production are vital to establish the case of the petitioner.

Heard Learned Advocate for the petitioner and Learned Advocate for the opposite party, perused the petition filed and materials on record.

Learned Advocate for the petitioner submits that the Learned Judge erred in dismissing the application of the petitioner for production of medical records by the opposite party. Learned Advocate further submits that the production of medical records is necessary to get the picture of physical and mental condition of the testatrix in executing the Will. Learned Advocate relies upon the following judicial decisions:

Murthy and others VS C. Saradambal and others.

Reported in (2022) 3 SCC. P-209.

Sri Devi and others VS Jayaraja Shethy.

Reported in AIR-2005.S.C. P-780.

Learned Advocate for the opposite party submits that the application taken out by the petitioner is merely with the intention to delay the proceedings and the Learned Trial Judge rightly rejected the petition of the petitioner.

Learned Advocate for the apposite party also relies upon the decision of Sri Devi and Ors. (supra).

Before proceeding to decide the material in issue it is necessary to consider Section 63 of the Indian Evidence Act 1972.

Section 63 of the Evidence Act deals with secondary evidence means and includes:-

- 1) Certified copies given under the provisions hereinafter contained.
- 2) Copies made from the original by mechanical process which in themselves ensures the accuracy of the copy and copies compared with such copies.
- 3) Copies made from as compared with the original.
- 4) Counterparts of documents as against the parties who did not execute them.
- 5) Oral accounts of the contents of a document given by some person who has himself seen it.

Upon perusing the order of the Learned Trial Judge it will appear that the Learned Judge while dismissing the application, went on to observe that the onus to prove the alleged physical and/or mental incapacity of the deceased testator is upon the defendant/objector. Once it has been categorically stated on behalf of the plaintiff/petitioner that the records in question are not in his possession or in possession of son of the deceased testator no useful purpose will be served in issuing any direction upon the plaintiff/petitioner as prayed for in view of the fact that the provision of section 101 of the Indian Evidence Act never caste the duty upon a party who asserts the negative of a fact.

In the case of Murthy (supra) the Hon'ble Supreme Court observed as follows:

“55. On the other hand, the evidence of DW1 in relation to the fact that the testator was not in a good health and he was suffering from a paralytic attack and was not in a position to write, is in corroboration with what PW2 has also admitted in his evidence, that the testator could not be taken to the sub- Registrar's office for the registration of the will as he was suffering from a paralytic stroke.

56. It has also come in evidence that there was no cordial relationship between the first plaintiff and her husband S. Damodaran and in fact proceedings for dissolution of marriage were initiated which became infructuous on his demise.

57. For the aforesaid reasons, we hold that the respondents-plaintiffs have not been successful in proving the validity of the will in accordance with law inasmuch as the suspicious circumstances surrounding the very execution of the will have not been cleared by any cogent evidence, rather, the genuineness of Ex-P1 remains in doubt. It is observed that the will (Ex-P1) did not come into existence at the instance of the testator but it is a concocted document and has been got up after the demise of S. Damodaran.

58. In view of the aforesaid discussion, we hold that the respondents-plaintiffs have failed to prove the will (Ex-P1) in accordance with law inasmuch as they have not removed the suspicious circumstances, surrounding the execution of the will. Hence, Ex-P1, not being a valid document in the eye of law, no Letters of Administration can be granted to the respondents-plaintiffs.

59. In the circumstances, we hold that the learned Trial Judge was right in dismissing the suit. However, the Appellate Court being the Division Bench has reversed the judgment and decree passed by the Trial Court and has decreed the suit. On extracting the relevant portions of the judgment of the Appellate Court, which consists of eleven paragraphs, it is found that the same has been written in a cryptic manner. It is observed that the judgment could be brief and succinct if the Appellate Court is to dismiss an appeal and affirm the judgment and decree of the Trial Court. But when the judgment and decree of the Trial court is

to be reversed then it is incumbent upon the Appellate Court to dwell into the matter in detail and to give reasons for reversing the same. Assigning reasons not only makes the judgment wholesome, but is also necessary in order to deduce and lead to just conclusions.”

In the case of Sri Devi (supra) it was observed as follows:

“14. The propounder of the will has to show that the will was signed by the testator; that he was at the relevant time in sound disposing state of mind; that he understood the nature and effect of dispositions and had put his signatures to the testament of his own free will and that he had signed it in the presence of the two witnesses who attested in his presence and in the presence of each other. Once these elements are established, the onus which rests on the propounder is discharged. DW-2, the scribe, in his testimony has categorically stated that the will was scribed by him at the dictation of the testator. The two attesting witnesses have deposed that the testator had signed the will in their presence while in sound disposing state of mind after understanding the nature and effect of dispositions made by him. That he signed the will in their presence and they had signed the will in his presence and in the presence of each other. In cross-examination, the appellants failed to elicit anything which could persuade us to disbelieve their testimony. It has not been show that they were in any way interested in the propounders of the will or that on their asking they could have deposed falsely in court. Their testimony inspires

confidence. The testimony of the Scribe (DW-2) and the two attesting witnesses (DWs. 3 & 4) is fully corroborated by the statement of hand-writing expert (DW-5). The will runs into 6 pages. The testator had signed each of the 6 pages. Hand-writing expert compared the signatures of the testator with his admitted signatures. He has opined that the signatures on the will are that of the testator. In our view, the will had been duly executed.

15. Coming to the suspicious circumstances surrounding the will, it may be stated that although the testator was 80 years of age at the time of the execution of the will and he died after 15 days of the execution of the will, the two attesting witnesses and the scribe have categorically stated that the testator was in sound state of health and possessed his full physical and mental faculties. Except that the deceased is 80 years of age and that he died within 15 days of the execution of the will, nothing has been brought on record to show that the testator was not in good health or possessed of his physical or mental faculties. From the cross-examination of the scribe and the two attesting witnesses, the appellants have failed to bring out anything which could have put a doubt regarding the physical or mental incapacity of the testator to execute the will. Submission of the learned counsel for the appellants that the testator had deprived the other heirs of his property is not true. The family properties had been partitioned in the year 1961. The shares which were given to Dharmaraja Kadamba and Raviraja Kadamba were in possession of tenants and vested in the

State Government after coming into force of Karnataka Land Reforms (Amendment) Act, 1973 whereas the properties which had been given to the daughters were in the personal cultivation of the family. The testator while executing the will bequeathed the properties which had fallen to his share in the partition and which he had inherited from his brother which were in his personal cultivation in favour of his two sons Dharmaraja Kadamba and Raviraja Kadamba and gave the right to receive compensation to other heirs of the properties which were under the tenants and had vested in the State Government. It is not a case where the father had deprived his other children totally from inheritance. Reasons for unequal distribution have been given in the will itself. This had been done by him to balance the equitable distribution of the properties in favour of all his children.

16. Counsel for the appellants argued that Respondent No. 13 had taken prominent part in the execution of the will as he was present in the house at the time of the alleged execution of the will. We do not find any merit in this submission. Apart from establishing his presence in the house, no other part is attributed to respondent no-13 regarding the execution of the will. Mere presence in the house would not prove that he had taken prominent part in the execution of the will. Moreover, both the attesting witnesses have also stated that the daughters were also present in the house at the time of execution of the will. The attesting witnesses were not questioned regarding the presence of the daughters at the time of

the execution of the will in the cross-examination. The presence of the daughters in the house at the time of execution of the will itself dispels any doubt about the so-called role which Respondent No. 13 had played in the execution of the will. They have not even stepped into the witness box to say as to what sort of role was played by Respondent No. 13 in the execution of the will.”

With regard to the judicial decisions relied upon by the Learned Advocates which deals with the issues of suspicious circumstances and mental condition of the testator the same can be taken into consideration on conclusion of argument and before deciding the suit but not at the time of considering application for adducing evidence.

Now the point for consideration is whether the Learned Trial Judge was justified in dismissing the application of the petitioner.

At the very outset it is clear that such application was filed at the belated stage, when the matter was fixed for arguments without any special reasons. Further upon perusing the written statement/ written objection of the petitioner/defendant it will appear that the bone of contention of the petitioner/defendant is that the will is forged and manufactured. It is the contention of the defendant/petitioner that the testatrix being incapable of taking decision out of her free will, never executed such will, and the said Will has been forged and manufactured by Mahendra Kumar Khaitan in collusion with his associates. Thus it is necessary for the defendant/petitioner prove that

the will is forged or manufactured by adducing evidence. It is not the case of the petitioner/defendant that the executor or Mahendra Kumar Khaitan by taking advantage of ill health and mental condition of the testator got the Will executed by undue influence. Thus medical documents are not vital piece of evidence. Even if it is assumed that medical documents are vital to show suspicious circumstance in connection with the execution of Will it was open for the petitioner/defendant to examine the hospital authorities with regard to the ailments of the testatrix. It is a common practice that after death of a member in a family the death certificate is only preserved and other documents with regard to ailments and treatment of the person deceased the said documents are destroyed after certain period unless they are specifically required for any mediclaim or insurance claim. It cannot be disputed also that perusal of the medical prescription of the person deceased invites sadness in the mind of his near relation. Thus these documents are destroyed after a certain period pursuant to death. Thus the person under whose care the deceased was residing at the time of death cannot be held liable for destroying the documents unless the said documents were called for under law after death. Thus in the facts and circumstances this Court does not find any error in the order passed by the Learned Trial Judge.

Hence this revisional application stands dismissed. Order dated 19th June 2024 passed by Learned Judge Bench II City Civil Court Calcutta in O.C. 06/16 is affirmed. However as the case involves proof of a Will which is different from proof of other documents or proof of other property rights, the

parties may if there is any special circumstance apply before the Learned Trial Court for adducing evidence, which may be considered in accordance with law.

It is made clear that this Court has not gone into the merits of the case and the Learned Trial Court will be free to decide the case in accordance with Law.

Urgent photostat certified copy of this order, if applied for, should be made available to the parties upon compliance with the requisite formalities.

(Biswaroop Chowdhury, J.)