

NAFR

HIGH COURT OF CHHATTISGARH, BILASPUR

Second Appeal No.180 of 2003

1. Ujagar Died Through LRs

i. Sukhdev, S/o Ujagar, aged about 70 years, R/o Bade Baigindih, Post Risora, Thana Saria, Tahsil Baramkela, District Raigarh (C.G.)

ii. Pandaram, S/o Ujagar, aged about 60 years, R/o Bade Baigindih, Post Risora, Thana Saria, Tahsil Baramkela, District Raigarh (C.G.)

iii. Uma, D/o Ujagar, aged about 55 years, W/o Saukhilal, R/o Village Bara, Police Station Amlibhona, Tahsil Bhatli, District Bargard.

iv. Fakir Pradhan, S/o Ujagar, aged about 50 years, R/o Bade Baigindih, Post Risora, Thana Saria, Tahsil Baramkela, District Raigarh (C.G.)

v. Sobha, D/o Ujagar, aged about 48 years, R/o Village Kutrapali, Police Station Amlibhona, Tahsil Bhatli, District Bargard.

vi. Bilasani, D/o Ujagar, aged about 42 years, W/o Bharat, R/o Medhapali, Police Station Amlibhona, Tahsil Bhatli, District Bargard.

2. Trinath, S/o Ujagar Kolta, aged about 42 years, R/o Village Baigindih, Thana Baramkela, Tah. Sarangarh, District Raigarh (C.G.)

(Defendants)

---- Appellants

Versus

1. Must. Mahima, W/o Baladhar Kolta, D/o Late Shri Girdhari Kolta, aged about 46 years, Occupation Agriculturist, R/o Village Machhimuda, Post Negimuda, Tahsil Sohila, District Bargarh (Orissa)

(Plaintiff)

2. State of Chhattisgarh, Through Collector, Raigarh, District Raigarh (C.G.)

(Defendant)

---- Respondents

For Appellants: Mr. Awadh Tripathi & Mr. Vivek Tripathi, Advocates.

For Respondent No.1: Mr. Sourabh Sharma and Mr. Tarkeshwar Nande, Advocates.

For Respondent No.2 / State: -

Mr. Vimlesh Bajpai, Govt. Advocate.

Hon'ble Shri Justice Sanjay K. Agrawal

Judgment On Board

18/01/2019

1. In the instant appeal preferred by the appellants/defendants, the substantial questions of law found involved and formulated at the time of admission are as under: -

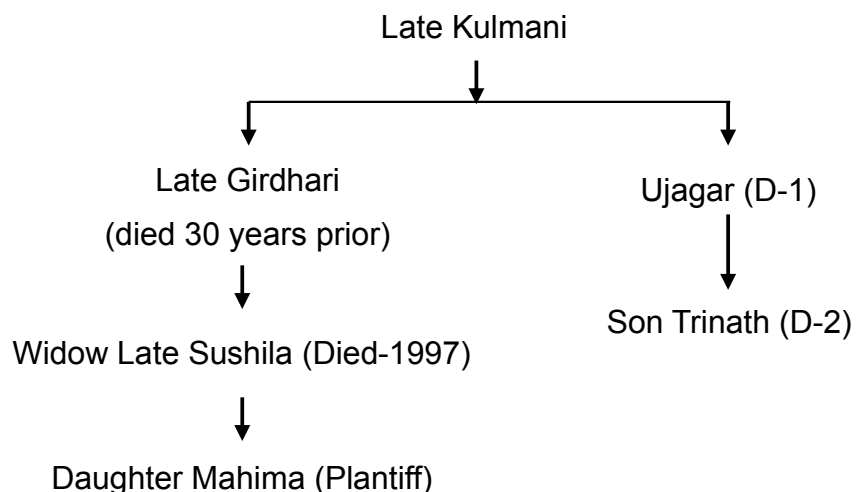
“1. Whether the lower appellate Court while reversing the findings of the trial Court was justified in holding that due execution, attestation and validity of the alleged registered deed of Will dated 15.05.1995 (Ex.D-1) could not be established in accordance with the provisions prescribed under Section 63 (c) of the Indian Succession Act, 1925?

2. Whether the lower appellate Court was justified in holding that the execution of entire Will (Ex.D-1) could be held to be invalid as the executor Sushila Bai was not entitled to execute with regard to the entire half share of the suit property?

3. Whether the mesne profits as awarded by the appellate Court to the tune of Rs.8,000/- per annum was justified in proper appreciation of evidence led by the parties?”

(Parties hereinafter will be referred as per their status shown and ranking given in the suit before the trial Court.)

2. The following genealogical tree would demonstrate the relationship amongst the parties: -



3. Kulmani had two sons namely Girdhari and Ujagar. The plaintiff is daughter of Girdhari out of his wedlock with Sushila whereas Ujagar,

S/o Kulmani, is defendant No.1 and his son is defendant No.2. Sushila had executed a Will dated 15-5-1995 (Ex.D-1) in favour of defendant No.2 bequeathing her exclusive property in favour of defendant No.2. Smt. Mahima – the sole plaintiff, filed suit that the Will executed by her mother in favour of defendant No.2 is illegal and void and sought declaration that she has half share in the suit property and also claimed ₹ 8,000/- per annum mesne profit from 1998-99.

4. Defendants No.1 and 2 filed their written statement denying the plaint averments stating inter alia that the Will has been executed by Late Smt. Sushila in favour of defendant No.2 out of free will, as they used to take care of the widow and the testator of the Will and as such, the plaintiff is not entitled for decree of partition ad possession.
5. The trial Court after appreciating oral and documentary evidence on record, dismissed the suit holding that the Will executed by the plaintiff's mother Sushila in favour of defendant No.2 is in accordance with law. On appeal being preferred by the plaintiff, the first appellate Court allowed the appeal and declared the Will deed Ex.D-1 as null and void and directed for half share in the suit property along with ₹ 8,000/- per annum mesne profit which has been questioned in second appeal in which substantial questions of law have been framed and which have been set-out in the opening paragraph of this judgment.
6. Mr. Tripathi, learned counsel appearing for the appellants herein / defendants No.1 and 2, would submit that the first appellate Court is absolutely unjustified in reversing the well reasoned judgment & decree of the trial Court and the conclusion reached is unsustainable and bad in law. The mesne profit awarded by the first appellate Court is also not justified, as there is no evidence on record that the plaintiff

is entitled for such mesne profit. Therefore, the judgment & decree passed by the first appellate Court are liable to be set aside.

7. Mr. Sharma, learned counsel appearing for the plaintiff / respondent No.1 herein, would support the impugned judgment & decree.
8. I have heard learned counsel for the parties and considered their rival submissions made herein-above and gone through the record with utmost circumspection.
9. The short question for consideration would be, whether execution and attestation of the Will Ex.D-1 has been proved and established by defendant No.2 in view of the provisions contained in Section 63 of the Succession Act, 1925 read with Section 68 of the Evidence Act, 1872?
10. It is trite law that a will as an instrument of testamentary disposition of property being a legally acknowledged mode of bequeathing a testator's acquisitions during his lifetime, to be acted upon only on his/her demise, it is no longer *res integra*, that it carries with it an overwhelming element of sanctity. [See Jagdish Chand Sharma v. Narain Singh Saini (Dead) through Legal Representatives and others¹]
11. In order to consider the plea raised at the bar, it would be appropriate to notice Section 63 of the Indian Succession Act, 1925 and Section 68 of the Evidence Act, 1872.
12. Section 63 of the Act of 1925 provides as under:-

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

1 (2015) 8 SCC 615

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

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

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

13. As per the provisions of Section 63 of the Succession Act, 1925 for due execution of a will (1) the testator should sign or affix his mark to the will; (2) the signature or the mark of the testator should be so placed that it should appear that it was intended thereby to give effect to the writing as a will; (3) the will should be attested by two or more witnesses; and (4) each of the said witnesses must have seen the testator signing or affixing his mark to the will and each of them should sign the will in the presence of the testator.

14. The above-stated provision of attestation of will under Section 63(c) of the Succession Act, 1925 by two or more witnesses has been held to be mandatory by Their Lordships of the Supreme Court in the matter of Janki Narayan Bhoir v. Narayan Namdeo Kadam².

15. Section 68 of the Evidence Act, 1872 provides as under:-

“68. Proof of execution of document required by law to be attested.—If a document is required by law to be attested, it shall not be used as evidence until one attesting witness at least has been called for the purpose of proving its execution, if there be an attesting witness alive, and subject to the process of the Court and capable of giving

² (2003) 2 SCC 91

evidence:

Provided that it shall be necessary to call an attesting witness in proof of the execution of any document, not being a Will, which has been registered in accordance with the provisions of the Indian Registration Act, 1908 (16 of 1908), unless its execution by the person by whom it purports to have been executed is specifically denied.”

16. By the aforesaid provision, a document required by law to be attested to have its execution proved by at least one of the attesting witnesses if alive and it is subject to process of the court conducting the proceedings involved and is capable of giving evidence. However, proviso to Section 68 of the Evidence Act, 1872 is not available in case of will.

17. In the matter of Girja Datt Singh v. Gangotri Datt Singh³, Their Lordships of the Supreme Court have held that in order to prove the due attestation of will, the propounder of will has to prove that ‘A’ and ‘B’, the two witnesses saw the testator sign the will and they themselves signed the same in the presence of the testator. Their Lordships while considering Section 68 of the Evidence Act, 1872 further held that from the mere signature of two persons appearing at the foot of the endorsement of registration of will it cannot be presumed that they had appended their signature to the document as an attesting witness or can be construed to have done so in their capacity as attesting witness. It was pertinently observed as under:-

“In order to prove the due attestation of the will Ex. A-36 Gangotri would have to prove that Uma Dutt Singh and Badri Singh saw the deceased sign the will and they themselves signed the same in the presence of the deceased. The evidence of Uma Dutt Singh and Badri Singh is not such as to carry conviction in the mind of the Court that they saw the deceased sign the will and each of them appended his signature to the will in the presence of the deceased. They have been demonstrated to be

3 AIR 1955 SC 346

witnesses who had no regard for truth and were ready and willing to oblige Gur Charan Lal in transferring the venue of the execution and attestation of the documents Ex. A-23 and Ex. A-36 from Gonda to Tarabganj for reasons best known to themselves.”

“One could not presume from the mere signature of Mahadeo Pershad and Nageshur appearing at the foot of the endorsement of registration that they had appended their signatures to the document as attesting witnesses or can be construed to have done so in their capacity as attesting witnesses. Section 68, Indian Evidence Act requires an attesting witness to be called as a witness to prove the due execution and attestation of the will. This provision should have been complied with in order that Mahadeo Pershad and Nageshur be treated as attesting witnesses. This line of argument therefore cannot help Gangotri.”

18. In the matter of H. Venkatchala Iyengar v. B. N. Thimmajamma and others⁴ the Supreme Court speaking through Gajendragadkar, J., elaborately laid down the principles relating to the nature and standard of evidence required to prove a will. It was held as under:-

“(1) Stated generally, a will has to be proved like any other document, the test to be applied being the usual test of the satisfaction of the prudent mind in such matters. As in the case of proof of other documents, so in the case of proof of wills, one cannot insist on proof with mathematical certainty.

(2) Since [Section 63](#) of the Succession Act requires a will to be attested, it cannot be used as evidence until, as required by [Section 63](#) of the Evidence Act, one attesting witness at least has been called for the purpose of proving its execution, if there be an attesting witness alive, and subject to the process of the court and capable of giving evidence.

(3) Unlike other documents, the will speaks from the death of the testator and therefore the maker of the will is never available for deposing as to the circumstances in which the will came to be executed. This aspect introduces an element of solemnity in the decision of the question whether the document propounded is proved to be the last will and testament of the testator. Normally, the onus which lies on the propounder can be taken to be discharged on proof of the essential facts which go into the making of the

4 AIR 1959 SC 443

will.

(4) Cases in which the execution of the will is surrounded by suspicious circumstances stand on a different footing. A shaky signature, a feeble mind, an unfair and unjust disposition of property, the propounder himself taking a leading part in the making of the will under which he receives a substantial benefit and such other circumstances raise suspicion about the execution of the will. That suspicion cannot be removed by the mere assertion of the propounder that the will bears the signature of the testator or that the testator was in a sound and disposing state of mind and memory at the time when the will was made, or that those like the wife and children of the testator who would normally receive their due share in his estate were disinherited because the testator might have had his own reasons for excluding them. The presence of suspicious circumstances makes the initial onus heavier and therefore, in cases where the circumstances attendant upon the execution of the will excite the suspicion of the court, the propounder must remove all legitimate suspicions before the document can be accepted as the last will of the testator.

(5) It is in connection with wills, the execution of which is surrounded by suspicious circumstances that the test of satisfaction of the judicial conscience has been evolved. That test emphasises that in determining the question as to whether an instrument produced before the court is the last will of the testator, the court is called upon to decide a solemn question and by reason of suspicious circumstances the court has to be satisfied fully that the will has been validly executed by the testator.

(6) If a caveator alleges fraud, undue influence, coercion, etc. in regard to the execution of the will, such pleas have to be proved by him, but even in the absence of such pleas, the very circumstances surrounding the execution of the will may raise a doubt as to whether the testator was acting of his own free will. And then it is a part of the initial onus of the propounder to remove all reasonable doubts in the matter.”

19. The principle laid down in the above-stated judgment has been followed with approval in Smt. Jaswant Kaur v. Smt Amrit Kaur and others⁵, Surendra Pal and others v. Dr. (Mrs.) Saraswati Arora and another⁶, Yumnam Ongbi Tampha Ibema Devi v. Yumnam

5 (1977) 1 SCC 369

6 (1974) 2 SCC 600

Joykumar Singh and others⁷ and Jagdish Chandra Sharma (supra).

20. In the matter of Ramesh Verma (dead) Through Legal Representatives v. Lajesh Saxena (dead) by Legal Representatives and another⁸, the Supreme Court has again reiterated the need of proving the attestation of will in accordance with Section 63(c) of the Succession Act, 1925 read with Section 68 of the Evidence Act, 1872.

21. In Surendra Pal (supra), the Supreme Court while re-stating the guidelines regarding the nature and extent of burden of proof on the propounder of a will held that propounder has to show that the will was signed by the testator; that he was at the relevant time in a sound disposing state of mind; that he understood the nature and effect of the dispositions; that he put his signature to the testament of his own free will; and that he has signed it in the presence of the two witnesses who attested it in his presence and in the presence of each other. Once these elements are established, the onus which rests on the propounder is discharged. It was further held that in cases where the propounder has himself taken a prominent part in execution of a will which confers on him substantial benefit that is itself one of the suspicious circumstances which he must remove by clear and satisfactory evidence.

22. The Supreme Court in Yumnam Ongbi Tampha Ibema Devi (supra) has clearly held that the attestation of will is not an empty formality. Highlighting the importance of attestation of Will it was held it means signing a document for the purpose of testifying of the signatures of

⁷ (2009) 4 SCC 780

⁸ (2017) 1 SCC 257

the executant. The attesting witness should put his signature on the will *animo attestandi* and it was held as under:-

“13. Therefore, having regard to the provisions of Section 68 of the Evidence Act and Section 63 of the Succession Act, a will to be valid should be attested by two or more witnesses in the manner provided therein and the propounder thereof should examine one attesting witness to prove the will. The attesting witness should speak not only about the testator’s signature or affixing his mark to the will but also that each of the witnesses had signed the will in the presence of the testator.”

23. In Janki Narayan Bhoir (supra), the Supreme Court while considering Section 63(c) of Succession Act, 1925 and Section 68 of the Evidence Act, 1872 held that mere proof of signature of the testator on the will was not sufficient, the attestation thereof is also to be proved as required by Section 63(c) of the Act Succession Act, 1925. It was observed as under: -

“10. Section 68 of the Evidence Act speaks of as to now a document required by law to be attested can be proved. According to the said Section, a document required by law to be attested shall not be used as evidence until one attesting witness at least has been called for the purpose of proving its execution, if there be an attesting witness alive, and subject to the process of the Court and capable of giving an evidence. It flows from this Section that if there be an attesting witness alive capable of giving evidence and subject to the process of the Court, has to be necessarily examined before the document required by law to be attested can be used in an evidence. On a combined reading of Section 63 of the Succession Act with Section 68 of the Evidence Act, it appears that a person propounding the will has got to prove that the will was duly and validly executed. That cannot be done by simply proving that the signature on the will was that of the testator but must also prove that attestations were also made properly as required by Clause (c) of Section 63 of the Succession Act. It is true that Section 68 of Evidence Act not say that both or all the attesting witnesses must be examined. But at least one attesting witness has to be called for proving due execution of the Will as envisaged in Section 63 although Section 63 of the Succession Act requires that a will has to be attested at least by two witnesses, Section 68 of the Evidence Act provides that a document, which is required by law to be attested, shall not be used as evidence until one attesting witness at least has been examined for the purpose of

proving its due execution if such witness is alive and capable of giving evidence and subject to the process of the Court. In a way, Section 68 gives a concession to those who want to prove and establish a will in a Court of law by examining at least one attesting witness even though will has to be attested at least by two witnesses mandatorily under Section 63 of the Succession Act. But what is significant and to be noted is that that one attesting witness examined should be in a position to prove the execution of a will. To put in other words, if one attesting witness can prove execution of the will in terms of Clause (c) of Section 63, viz., attestation by two attesting witnesses in the manner contemplated therein, the examination of other attesting witness can be dispensed with. The one attesting witness examined, in his evidence has to satisfy the attention of a will by him and the other attesting witness in order to prove there was due execution of the will. If the attesting witness examined besides his attestation does not, in his evidence, satisfy the requirements of attention of the will by other witness also it falls short of attestation of will at least by two witnesses for the simple reason that the *execution of the will* does not merely mean the signing of it by the testator but it means fulfilling and proof of all the formalities required under Section 63 of the Succession Act. Where one attesting witness examined to prove the will under Section 68 of the Evidence Act fails to prove the due execution of the will then the other available attesting witness has to be called to supplement his evidence to make it complete in all respects. Where one attesting witness is examined and he fails to prove the attestation of the will by the other witness there will be deficiency in meeting the mandatory requirements of Section 68 of the Evidence Act.”

24. The principle of law laid down in Janki Narayan Bhoir (supra) has been followed with approval in Jagdish Chandra Sharma (supra) by which it was held as under:-

“52. While dwelling on the respective prescripts of Section 63 of the Act and Sections 68 and 71 of Act 1872 vis-à-vis a document required by law to be compulsorily attested, it was held Janki Narayan Bhoir (supra) that if an attesting witness is alive and is capable of giving evidence and is subject to the process of the Court, he/she has to be necessarily examined before such document can be used in evidence. It was expounded that on a combined reading of Section 63 of the Act and Section 68 of the 1872 Act, it was apparent that mere proof of signature of the testator on the Will was not sufficient and that attestation thereof was also to be proved as required by Section 63 (c) of the Act. It was, however, emphasised that though Section 68 of the 1872 Act permits proof of a document compulsorily

required to be attested by one attesting witness, he/she should be in a position to prove the execution thereof and if it is a Will, in terms of Section 63 (c) of the Act, viz., attestation by two attesting witnesses in the manner as contemplated therein. It was expounded that if the attesting witness examined besides his attestation does not prove the requirement of the attestation of the Will by the other witness, his testimony would fall short of attestation of the Will by at least two witnesses for the simple reason that the execution of the Will does not merely mean signing of it by the testator but connotes fulfilling the proof of all formalities required Under Section 63 of the Act. It was held that where the attesting witness examined to prove the Will Under Section 68 of 1872 Act fails to prove the due execution of the Will, then the other available attesting witness has to be called to supplement his evidence to make it complete in all respects.”

25. In the matter of **Madhukar D. Shende v. Tarabai Aba Shedage**⁹, the Supreme Court has laid down that the propounder of the will has to establish the will in the manner contemplated by law and held as under: -

“9. It is well-settled that one who propounds a Will must establish the competence of the testator to make the Will at the time when it was executed. The onus is discharged by the propounder adducing prima facie evidence proving the competence of the testator and execution of the Will in the manner contemplated by law. The contestant opposing the Will may bring material on record meeting such prima facie case in which event the onus would shift back on the propounder to satisfy the Court affirmatively that the testator did know well the contents of the Will and in sound disposing capacity executed the same. The factors, such as the will being a natural one or being registered or executed in such circumstances and ambience, as would leave no room for suspicion, assume significance. If there is nothing unnatural about the transaction and the evidence adduced satisfies the requirement of proving a will, the court would not return a finding of 'not proved' merely on account of certain assumed suspicion or supposition. Who are the persons propounding and supporting a will as against the person disputing the will and the pleadings of the parties would be relevant and of significance.”

26. Similarly, in the matter of **Gopal Swaroop v. Krishna Murari Mangal and others**¹⁰ it has been held as under: -

9 2002 AIR SCW 242

10 (2010) 14 SCC 266

“21. That brings us to the third requirement, namely, that the will must be attested by two or more witnesses each of whom has seen the testator signing and affixing his mark to the will or has seen some other person signing in the presence and by the direction of the testator. ...”

27. Reverting to the facts of the present case in light of the principle of law rendered by Their Lordships of the Supreme Court in the above-noted judgments (*supra*) qua execution and attestation of will by a testator, the following factual position would emerge on the face of record: -

1. Testator Sushila is said to have executed registered will in respect of her properties in favour of defendant No.2 excluding her daughter namely, plaintiff Mahima on 15-5-1995 vide Ex.D-1.
2. The said will dated 15-5-1995 is said to be attested by two witnesses namely, Gajanand (DW-4) & Ramkrishna (DW-5) and it is said to be scribed by Advocate P. Dwivedi.
3. The said Will was registered at Raigarh, whereas the plaintiff's mother – testator was resident of Village Baigindih, Tahsil Sarangarh, District Raigarh.
4. P. Dwivedi, Advocate – scribe was not examined by the defendants.
5. Gajanand (DW-4), first attesting witness, has stated that the Will was executed by Sushila in favour of defendant No.2 in which Sushila has affixed her signature and he and Ramkrishna (DW-5) stood as witnesses. He did not state that he signed the Will in presence of testator Sushila and another witness Ramkrishna (DW-5) signed in presence of the testator. He has stated in paragraph 5 of his cross-examination that the Will was not fully read-over and he was asked to sign. He has further stated that testator Sushila was conversant with Oriya language and she does not know Hindi language. Similarly, Ramkrishna (DW-5) has stated that Sushila – testator of the Will, has executed Will in favour of defendant No.2 and in his presence, she has affixed her mark on the Will, but in contradiction, he has stated that the scribe of the Will has read-over the Will to the testator of the

Will. He has also admitted that the testator was conversant with Oriya language only and she does not know Hindi language.

6. The propounder of the Will – defendant No.2 has taken active participation in the execution of Will.

28. Reverting to the facts of the present case in light of the aforesaid narration of facts, it is quite vivid that compliance of Section 63(c) of the Succession Act, 1925 is absolutely missing in the present case though strict compliance of the said provision is imperative. Defendant No.2 being propounder of the Will must have proved that the testator has signed the will in presence of attesting witnesses and in his presence they have signed the Will. Section 63(c) of the Succession Act, 1925 clearly lays down the requirement of valid and enforceable will that it shall be attested by two or more witnesses, each of them has seen the testator signing or affixing his mark to the will and each of the witnesses has signed the will in presence of the testator as held by the Supreme Court in H. Venkatachala Iyengar (supra) that a will has to be proved like any other document except that evidence tendered in proof of will should additionally satisfy the requirement of Section 63 of the Succession Act, 1925 apart from under Section 68 of the Evidence Act, 1872.

29. Analysing the facts of the present case, it would appear that Gajanand (DW-4) – attesting witness examined before the Court merely stated before the Court that he signed the Will in presence of testator and another attesting witness Ramkrishna (DW-5) has signed the will and lastly the testator signed the will or marked her affix.

30. Mere signing of a Will as a witness would not per se amount to compliance of Section 63(c) of the Succession Act, 1925 as *animo*

attestandi is absolutely lacking. In the matter of **Bhagat Ram v. Suresh**¹¹, it has been held that to be an attesting witness it is essential that the witness should have put his signature *animo attestandi* for the purpose of attesting that he has seen the executant sign or has received from him a personal acknowledgement of his signature.

31. Therefore, both the attesting witnesses have failed to clearly state that they have signed the Will in presence of the testator and the testator has seen them signing the Will. Apart from this, both the attesting witnesses have clearly stated in their statements before the Court that the testator was only conversant with Oriya language and she did not know Hindi, as the Will has been executed in Hindi language, but there is nothing in the record to show that any translator was available and he translated the Will in Oriya language and it was read-over in Oriya language to the testator and she accepted the contents thereof and thereafter executed the Will in presence of two witnesses. This clearly raises a doubt that the Will was executed after understanding the contents of the Will bequeathing the property in favour of defendant No.2 and said defendant No.2, having active participation in execution of Will in his favour, failed to dispel the suspicious circumstances by clear and satisfactory evidence.

32. There is no evidence on record that the plaintiff was not having cordial relations with her mother – testator of the Will. In this regard, the decision of the Supreme Court in the matter of **Jagdish Chand Sharma v. Narain Singh Saini (dead) Through Legal Representatives and others**¹² may be quoted profitably herein: -

11 (2003) 12 SCC 35

12 (2015) 8 SCC 615

“58. The materials on record, as a whole, also do not, in our comprehension, present a backdrop, in which, in normal circumstances, the testator would have preferred the appellant to be the legatee of his property as set out in the will, Ext. A-1, by denying his wife, children and grandchildren who were alive and with whom he did share a very warm affectionate and cordial relationship. Viewed in this context, the bequest is ex facie unnatural, unfair and improbable thus reflecting on the testator’s cognizant, free, objective and discerning state of mind at the time of the alleged dispensation. The suspicious circumstances attendant on the disposition, in our opinion, do militatively impact upon the inalienable imperatives of solemnity and authenticity of any bequest to be effected by a testamentary instrument.”

33. In the instant case, the plaintiff is daughter of Sushila – testator of the Will. She has been excluded from the ancestral property by way of Will. There is nothing on record to hold that she was not having cordial relation with her mother which compelled the testator – her mother, to deprive her from the property by executing Will in favour of defendant No.2.
34. Concludingly, this Court is fully satisfied that execution and attestation of Will is not found established in accordance with law and the propounder – defendant No.2 has failed to discharge his burden placed upon him by law to prove attestation of a Will.
35. Thus, substantial question of law No.1 is answered in favour of the plaintiff and against defendants No.1 and 2.
36. It is inexpedient to answer substantial question of law No.2.
37. Now, I have to consider substantial question of law No.3 by which ₹ 8,000/- per annum mesne profit has been granted by the appellate decree i.e. the decree of the first appellate Court. The submission of Mr. Tripathi, learned counsel for the appellants/ defendants No.1 and 2, is that it is on higher side and Rameshwar had also alleged that it is

on higher side. Enquiry with regard to entitlement of mesne profit has been made by the trial Court and the first appellate Court has reached to the conclusion that the plaintiff would be entitled for ₹ 16,000/- per annum as mesne profit and granted only ₹ 8,000/- which cannot be said to be on higher side. In the instant case, decree for mesne profit has been passed by the first appellate Court and the first appellate Court held that the plaintiff will be entitled for mesne profit from the date of institution of suit.

38. Clause (c) of sub-rule (1) of Rule 12 of Order 20 of the CPC reads thus: -

“12. Decree for possession and mesne profits.—(1)
Where a suit is for the recovery of possession of immovable property and for rent or mesne profits, the Court may pass a decree—

xxx xxx xxx

(c) directing an inquiry as to rent or mesne profits from the institution of the suit until—

(i) the delivery of possession to the decree-holder,

(ii) the relinquishment of possession by the judgment-debtor with notice to the decree-holder through the Court, or

(iii) the expiration of three years from the date of the decree, whichever event first occurs.”

39. The aforesaid provision would show that the period for which the rule permits a decree for mesne profits to be passed commences on the date the suit is instituted. The question which remains to be answered is as to when this period comes to an end, that is what is the meaning of the expression 'the date of the decree'. It is firmly established that a decree passed by the trial Court merges in the decree of the appellate Court it is only the decree of the appellate Court which is operative.

40. Hence, in the case at hand, the decree to be operative shall be the decree to be drawn-up in terms of the judgment in the second appeal. Thus, as provided under clause (c) of sub-rule (1) of Rule 12 of Order 20 of the CPC, the plaintiff would be entitled for mesne profits from the date of the institution of the suit and (i) till the delivery of possession to him or (ii) till the relinquishment of possession by the judgment-debtor with a notice to him through the Court or (iii) till the expiration of three years from the date of the appellate decree, i.e., the decree to be drawn-up in terms of the judgment in the instant appeal, whichever event out of the three occurs first. As the decree of the trial Court merges in the decree of the appellate Court, the meaning of the expression 'the date of the decree' would be 'the date of the decree of this Court'.
41. Therefore, the plaintiff should be entitled for mesne profits three years from the date of appellate decree. The third substantial question of law is answered accordingly.
42. Consequently, the appeal deserves to be and is hereby dismissed with the aforesaid modification leaving the parties to bear their own cost(s).
43. Decree be drawn-up accordingly.

Sd/-
(Sanjay K. Agrawal)
Judge