

IN THE HIGH COURT AT CALCUTTA
CIVIL APPELLATE JURISDICTION
APPELLATE SIDE

Present:

Hon'ble Justice Soumen Sen

Hon'ble Justice Uday Kumar

FA 386 of 2008

with

I.A No. CAN 1 of 2008(Old CAN No. 6745 of 2008)

CAN 10 of 2019(Old CAN No. 9774 of 2019)

Smt. Tapati Patra & Ors.

Vs.

Swarup Das & Anr.

For the Appellants : Mr. Subir Sanyal, Sr. Adv
Mr. Sutirtha Das , Adv.

For the respondents : Ms. Soma Chakraborty, Adv.
Ms. Madhumita Patra, Adv.

Hearing Concluded on : 1st March, 2023

Judgment on : 15th March, 2023

Soumen Sen, J. : The Will of Sabitri Prabha Das is the subject matter of challenge in this probate proceeding. She bequeathed the property in favour of Mina Das and Swarup Das, wife and son of Dipak Kumar Das by a registered Will.

During the pendency of the appeal Mina Das died and she was substituted by her married daughter Mahua Dutta.

Aroti Das, Bidyut Das and Prasanta Das, wife and two sons of late Manoranjan Das filed an affidavit in support of the caveat upon being aware

of the pendency of the probate proceeding duly notified and published in the newspaper.

The probate case was accordingly, marked as a contentious cause.

During the Pendency of the appeal Aroti Das died and she was substituted by her married daughter Tapati Patra.

The beneficiaries of the Will and the caveators are all related to Sabitri from her husband's side.

Mr. Subir Sanyal learned Counsel representing on behalf of the respondents has submitted that the Will is not proved in accordance with law.

It is submitted that the alleged Will mentions the name of one Dipak Kumar Biswas as an attesting witness. Although Mr. Das has filed an affidavit-in-Chief but he did not appear during trial.

It is submitted that in absence of evidence of an attesting witness the Will is not proved in accordance with Law.

Mr. Sanyal has referred to Section 63(C) of the Succession Act, 1925 and Section 67 and 68 of the Indian Evidence Act and submits that one attesting witness atleast should be called for the purpose of proving the execution of the Will.

It is submitted that the caveator has raised suspicious circumstances surrounding the execution of the Will and the evidence on record would show that the persons involved in the execution of the Will are

known and close to the beneficiaries. The beneficiary has taken a very prominent role in the execution of the Will. The Will was brought into existence with a view to frustrate the suit filed by the caveators for partition of the suit property left by the deceased.

It is submitted that in absence of the Will the appellant would have succeeded the estate of the deceased along with respondents.

Ms. Soma Chakraborty learned Counsel representing on behalf of the respondent submits that basis of the challenge to the Will is that in the event the Will is given effect to it would result in disruption of possession of the caveators in the property in question and the caveators would be deprived of enjoying the said property as co-sharers.

It is submitted that there is no real challenge to the due execution of the Will.

Ms. Chakraborty has referred to the evidence of Bidyut Kanti Dey and Radha Gobinda Dey. Bidyut Kanti is the scribe and Radha Gobinda is the executor.

The learned Counsel has submitted that apart from the evidence of the aforesaid two witnesses it is important and crucial to note that it is a registered Will. The registration attaches solemnity to the due execution and attestation of the Will.

The learned Counsel has drawn our attention to Section 114(e) of the Evidence Act and submits that for a registered Will there is a presumption of valid execution and it ensures that anyone can rely with confidence on the

statements contained in the registrars maintained under the Registration Act, 1998. It ensures safety and transparency.

The learned Counsel submits that although the attesting witness did not appear and adduce evidence on behalf of the respondents it would not per se affect the due execution of the Will as it has been clearly stated by the scribe Bidyut Kanti that he has drafted and prepared the Will as per the instruction and direction of the testatrix Sabitri Prova Das and after the Will was drafted the contents of the Will was read over and explained to her.

It is submitted that Bidyut has also stated that Lakshmi Kanta Das was the typist and Sabitri signed on every page of the Will in his presence and in the presence of two witnesses one of whom was Radha Gobinda Dey and another witness was unknown to him and both the said witnesses signed the Will in presence of Sabitri.

The learned Counsel has referred to the deposition of Radha Gobinda Dey and submits the he has corroborated the statements made in his affidavit-in-chief with regard to the due execution of the Will.

It is submitted that Radha Gobinda Dey in his evidence has clearly stated that at the time of execution and registration of the Will she was of sound mind and body and had the rational understanding and testamentary capacity. He has further stated that the Will was drafted and typed in his presence as per the instruction of Sabitri and he also claimed to be present at the time of execution and registration of the Will at Naihati Sub-registry office. He also duly identified the signature of Sabitri, Tarakeswar and

Dipen. He also stated that Tarakeswar and Dipen signed in their presence on the Will as witness.

Ms. Chakraborty has submitted that the Will was executed according to the provisions of Section 63(C) of the Indian Succession Act from the examination-in-Chief and cross-examination of the propounder. It has been proved that he was appointed by the testatrix as executor and in that capacity he filed the probate case. The executor has also filed the death certificate of the testatrix and has produced the original registered Will along with probate application. He has also filed an affidavit-in-Chief and was examined on permission. He has specifically stated that Sabitri was mentally and physically fit and who has the testamentary capacity when she signed the Will in his presence. He was also present at the time of execution in the registration of the will at the Sub Registrar Office and in his presence attesting witness, writer, scribe and the typist signed the Will.

It is submitted that one of the attesting witness Dipan Biswas filed his affidavit in chief on 8th June, 2005 but as he did not appear on the date of his examination and as such it was not possible to examine him. It is assumed as Dipan Biswas was intimated he filed his in chief but after filing the same he decided not to appear before the court by which it appears that he denied to prove the will and at that time the Deed writer who drafted the will Bidyut Kanti Dey was summoned and he filed his affidavit in chief on 16th June, 2006 he was examined on 16th June, 2006 without any objection and cross-examination on 15th July, 2006. It appears from examination in Chief and cross-examination of PW-2 that under instruction from testatrix

he drafted the Will, he signed the Will in presence of testatrix, testatrix signed every page of the Will in his presence, two attesting witnesses and typist, signed the Will in his presence at the time of registration before the A.D.S.R. Naihati.

It is strenuously argued that the Will was executed in terms of Section 63(C) of the Indian Succession Act the procedure was followed at the time of Registration of the said Will before the Sub-registrar, who was holding a public office had properly and validly carried out the registration after ascertaining that the Will was signed by the testatrix, attested by two witnesses, signed by the deed writer and the person who typed the will.

It is submitted that in the instant case Section 71 of the Indian Evidence Act would apply as the attesting witness did not appear. Even after filing the affidavit-in-Chief as an attesting witness on 8th June, 2005. Dipen one of the attesting witness did not appear for examination on 2nd July, 2005. His affidavit in Chief was filed by him and from the L.C.R. it appears that order was passed by the Ld. District Court below that as Dipen Kr. Biswas filed the Affidavit-in-Chief is not present Bidyut Kanti Dey filed Affidavit in Chief. Affidavit in Chief of Dipen Biswas is not proved and same is not admissible. From the LCR it appears learned Court below was pleased to fix the date for examination on 2nd July, 2005. And as he was not available for one year, Will, Scribe, writer Bidyut Kanti Dey was summoned and he was examined without any objection. From non-availability of attesting witness Dipen Biswas it is clear that he denied to appear before Court for proving the will.

It is submitted that the appellant did not raise any suspicious circumstances surrounding the execution of the Will. The genuinity of the Will was never urged and challenged. The signature of the testatrix has also not been challenged. The only ground of the appellants was that the testatrix was issueless and hence she could not make a Will. Out of the three objectors only D.W.1 appeared for examination. He was unable to prove that the testatrix was mentally or physically unfit at the time of execution of the Will.

It is submitted that during examination the Will was executed and registered and it will appear from the recitals in the Will the testatrix inherited the property of her husband which was purchased by her husband.

Ms. Chakraborty has submitted that in ***Smt. Gunjari Das v. Sri Subal Chandra Das & Ors.***, reported in **2009(2) CalLJ 456: 2010(2) CalLT 157: 2009(3) WBLR 210 (Cal)** similar objection was raised and rejected by a Coordinate Bench on the ground that unless the objector is able to establish suspicious circumstances surrounding the execution of the Will and if it appears that the testatrix has testamentary capacity the requirement of Section 63 is adequately complied with.

The learned Counsel has also relied upon a decision of the Hon'ble Supreme Court in ***Raj Kumari & Ors. V. Suriner Pal Sharma*** reported in **2019 SCC Online SC 1747** for the proposition that the Will must be signed by the witness in the presence of the testator but it is not necessary that more than one witnesses should be present at the same time and there is no

prescription in the statute that the testator must necessarily sign the will in the presence of the attesting witnesses only or that attesting witnesses must put their signature on the Will simultaneously at the same time in the presence of each other and the testator.

The learned Counsel submits that since Dipen Kumar was not available his affidavit-in-Chief was not pressed and the Will was proved by the executor and the scribe of the Will.

Our attention is drawn to paragraph 18 of the judgment where an earlier decision of the Apex Court in ***Jagdish Chand Sharma v. Narain Singh Saini (Dead) Through Lrs.***, reported in **2015(8) SCC 615** has been referred and relied upon it is submitted that interplay of Sections 68 and 71 of the Evidence Act has been duly noticed in the aforesaid judgment and probate was granted, although attesting witness was not produced, after taking into consideration that the Will was proved in accordance with Section 63(C) and 68 of the Evidence Act.

In the aforesaid background we have to decide whether the Will was proved in accordance with Law.

Under Section 63(c) of the Succession Act, 1925 a Will has to be attested by two or more witnesses each of whom had seen the testator signed or affixed his mark to the Will and each of the attesting witnesses would be required to sign the Will in the presence of testator.

Section 68 of the Indian Evidence Act, 1872 refers to the mode of proving a Will. A Will is a document which is required under the Indian

Succession Act to be attested and by reason of Section 68 of the Indian Evidence Act the said document cannot be used as an evidence unless 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. Section 69 contemplates situation where no attesting witness could be found. Generally, we call such a witness to be an attesting witness for the purpose of proving a Will. We did not find any evidence on record that the attesting witness was unavailable or inspite of reasonable diligence and effort the presence of the attesting witness could not be secured.

The Code of Civil Procedure prescribes the manner and procedure for issuing summons to a witness. Unless the court is satisfied that inspite of best efforts an attesting witness could not be produced the court may take recourse to the evidence of an attesting witness to prove the will.

On a query raised by us as to the fate of the affidavit filed by the attesting witnesses our attention is drawn to an order dated 16th June, 2006 wherefrom it appears that affidavit-in-Chief of Sri Dipen Kumar Biswas affirmed on 8th June, 2005 was “not pressed as the said witness was not available and the affidavit-in-Chief of one Shri Bidyut Kanti Das affirmed on 16th June, 2006 instead was filed.

We however, could not find any satisfactory explanation for not producing any of the attesting witnesses to prove the Will.

In the instant case curiously the affidavit of the attesting witness was not pressed. It is not one of the cases where the attesting witness was not alive or could not be traced. The learned trial judge did not record any satisfaction as to the non availability of any of the attesting witnesses. The evidence of the propounder and the scribe cannot substitute the legal requirements for proving a Will. The court has to arrive at a positive finding that inspite of due diligence the attesting witness could not be produced. In fact in **Raj Kumari** (*supra*) the Hon'ble Supreme Court considered the interplay of Section 68 and 71 of the Evidence Act in paragraph 18 held:

*“18. In **Jagdish Chand Sharma** (*supra*) referring to Sections 68 and 71 of the Evidence Act, it was observed:*

“22.2. These statutory provisions, thus, make it incumbent for a document required by law to be attested to have its execution proved by at least one of the attesting witnesses, if alive, and is subject to the process of the court conducting the proceedings involved and is capable of giving evidence. This rigour is, however, eased in case of a document also required to be attested but not a will, if the same has been registered in accordance with the provisions of the Registration Act, 1908 unless the execution of this document by the person said to have executed it denies the same. In any view of the matter, however, the relaxation extended by the proviso is of no avail qua a will. The proof of a will to be admissible in evidence with probative potential, being a document required by law to be attested by two witnesses, would necessarily need proof of its execution through at least one of the attesting witnesses, if alive, and subject to the process of the court concerned and is capable of giving evidence.

22.3. Section 71 provides, however, that if the attesting witness denies or does not recollect the execution of the document, its execution may be proved by the other evidence. The interplay of the above statutory provisions and the underlying legislative objective would be of formidable relevance in evaluating the materials on record and recording the penultimate conclusions. With this backdrop, expedient it would be, to scrutinise the evidence adduced by the parties.

Xxx

xxx

xxx

57.1. Viewed in premise, Section 71 of the 1872 Act has to be necessarily accorded a strict interpretation. The two contingencies permitting the play of this provision, namely, denial or failure to recollect the execution by the attesting witness produced, thus a fortiori has to be extended a meaning to ensure that the limited liberty granted by Section 71 of the 1872 Act does not in any manner efface or emasculate the essence and efficacy of Section 63 of the Act and Section 68 of the 1872 Act. The distinction between failure on the part of an attesting witness to prove the execution and attestation of a will and his or her denial of the said event or failure to recollect the same, has to be essentially maintained. Any unwarranted indulgence, permitting extra liberal flexibility to these two stipulations, would render the predication of Section 63 of the Act and Section 68 of the 1872 Act, otiose. The propounder can be initiated to the benefit of Section 71 of the 1872 Act only if the attesting witness/witnesses, who is/are alive and is/are produced and in clear terms either denies/deny the execution of the document or cannot recollect the said incident. Not only, this witness/witnesses has/have to be credible and impartial, the evidence adduced ought to demonstrate unhesitant denial of the execution of the document or authenticate real forgetfulness of such fact. If the testimony evinces a casual account of the execution and attestation of the document disregardful of truth, and thereby fails

to prove these two essentials as per law, the propounder cannot be permitted to adduce other evidence under cover of Section 71 of the 1872 Act. Such a sanction would not only be incompatible with the scheme of Section 63 of the Act read with Section 68 of the 1872 Act but also would be extinctive of the paramountcy and sacrosanctity thereof, a consequence, not legislatively intended. If the evidence of the witnesses produced by the propounder is inherently worthless and lacking in credibility, Section 71 of the 1872 Act cannot be invoked to bail him (the propounder) out of the situation to facilitate a roving pursuit. In absence of any touch of truthfulness and genuineness in the overall approach, this provision, which is not a substitute of Section 63(c) of the Act and Section 68 of the 1872 Act, cannot be invoked to supplement such failed speculative endeavour.

57.2. Section 71 of the 1872 Act, even if assumed to be akin to a proviso to the mandate contained in Section 63 of the Act and Section 68 of the 1872 Act, it has to be assuredly construed harmoniously therewith and not divorced therefrom with a mutilative bearing. This underlying principle is inter alia embedded in the decision of this Court in CIT v. Ajax Products Ltd.”

It would be clear from the said decision that the propounder can take the benefit of Section 71 of 1872 Act only if the attesting witness/witnesses who is/are alive and his/her produce and in clear terms either denies/deny the execution of the document or cannot recollect the said incident. The witness has to be credible and impartial. The evidence adduced ought to demonstrate unhesitatingly denial of the execution of the document or real forgetfulness of such fact. In the instant case, none of the aforesaid things have happened.

It is clear from the evidence of the executor that Dipen signed the Will as scribe and not as an attesting witness. The signature of Biduyt, a scribe, could not be treated and/or equated with an attestation by an attesting witness.

It is the requirement of law that the testator's signature must be made or acknowledged by him in the presence of two or more witnesses present at the same time. Each witness must then either attest and sign the will or acknowledge his signature, in testor's presence. The testator's complete signature must be made or acknowledged when both the attesting witnesses are actually present at the same time and each witness must attest and sign, or acknowledge his signature after the testator's signature has been so made or acknowledged. There is, however no sufficient acknowledgment unless the witnesses either saw or had the opportunity of seeing the signature, even though the testator expressly states that the paper to be attested is his Will or that his signature is inside the Will. Each witness should be able to say with truth that he knew that the testator had signed the document but it is not necessary that the witness should know that it is the testator's will. [**HALSBURY'S Laws of England, 4th Edn. vol.50, Para 312, as cited in *N. Kamalam v. Ayyasami*, AIR 2001 SC 2802: 2001(&) SCC 503, 51, para 22].**

Mr. Sanyal has argued that PW1 and PW2 are not attesting witnesses. Dipak Kumar Biswas was named one of the attesting witnesses did not appear at the trial. His affidavit was "not pressed". The other witnesses could not have proved due attestation.

Even if a person sees the testator sign and signs the will after seeing the testator sign and in the presence of the testator he would not be an attesting witness unless he puts his signature on the will *animo attestandi*. The distinction between the words “attest” and “sign” has been lucidly explained by Justice Sen in **Abinash Chandra Bidyanidhi Bhattacharya v. Dasarath Malo** reported in **ILR (1944) 2 Cal 388 at 394** in the following words:

“It should be noticed that in this section the words “attest” and “sign” are used. If Mr. Ghose’s argument were sound then it would not have been necessary to use these different words. The section would then have run as follows:- “the will shall be signed “by two or more witnesses each of whom has seen the “testator sign etc.....” The legislature makes a distinction between mere signing and attesting. Attesting is more than merely signing on the will. Attesting means signing a document for a particular purpose, the purpose being to testify to the signature of the executants. When a person puts his signature on a document as an attesting witness he virtually says:- “I put my signature on this document for the “purpose of testifying that the executants has signed “the document in my presence or has acknowledged “that he has done so”. Unless there is this intention in the mind of the person who puts his signature on the document, the placing of his signature would not amount to an attestation. The section does not say that it would be sufficient if two persons who saw the testator sign the will put their signature on it in the presence of the testator. It says that the will shall be attested by two persons who shall sign the will in the presence of the testator either after seeing the testator sign it or after receiving from the testator an acknowledgment of such signature. Apart from the case-law on the subject it seems

to me quite clear from the section itself that attestation implies something more than the mere putting down of a signature on a will in the presence of the testator by a person who has seen the testator sign.

A person who is present and sees what passes is a witness. Attestation means something done by such a witness to show that he has seen what has passed.”

Thus, if a person puts his name on the document *alio intuitu* he is not an attesting witness.

Attesting is more than merely signing on the will. It means signing a document for a particular purpose, the purpose being to testify to the signature of the executant. ***Durga Dutt v. Chandanu*, AIR 1956 HP 58, 59. [Indian Succession Act (39 of 1925), S. 63].**

Bidyut has clearly stated in his evidence that he is a scribe and not an attesting witness. If a person puts his signature on the document for some other purpose like certifying that he is a scribe, he is not an attesting witness [***See. M.L. Abdul Jabbar Sahib v. H. Venkata Sastri and Sons & Ors.*, reported in AIR 1969 SC 1147]**. Bidyut had never said that he was asked to sign as an attesting witness. It merely shows that he was involved in the preparation of the Will. He was never asked to put his signature as an attesting witness.

The signature of scribe of a Will cannot be raised to the status of a signature of an attesting witness and treated alike. Although the scribe's presence may not be doubted but the animus to attest is not available so far as the scribe is concerned. He is not a witness to the Will but a mere writer

of the Will. The statutory requirement cannot, thus, be transposed in favour of the writer, rather it goes against the propounder since both the witnesses are named in the Will and no attempt has been made to bring them and produce them before the court in order to satisfy the judicial conscience. The presence of the scribe and his signature appearing on the document cannot by itself be taken to be the proof of due attestation unless there is a clear direction to that effect in the document. Similar argument that the scribe also can discharge the function of an attesting witness was turned down in ***N. Kamalam (Dead) & Ors. v. Ayyasamy & Anr.***, reported in **2001(7) SCC 503** (paragraphs 1, 3, 20 and 27).

In the instant case, the evidence of Bidyut, the scribe shows that he had signed the document as a scribe and not as an attesting witness. In his evidence he has stated *“I signed the will as Deed writer”*.

The principle of “onus probandi” and “animo attestandi” in relation to execution of the Will was lucidly explained in **N. Kamalam** (*supra*) in the following words:

“1. The latin expressions 'onus probandi' and 'animo attestandi' are the two basic features in the matter of civil court's exercise of testamentary jurisdiction. Whereas 'onus probandi' lies in every case upon the party propounding a will, the expression 'animo attestandi' means and implies animus to attest to put it differently and in common parlance it means intent to attest. As regards the latter maxim, the attesting witness must subscribe with the intent that the subscription of the signature made stands by way of a complete attestation of the will and the evidence is admissible to show whether such was the intention

or not (see. in this context Theobald on Wills 12th Ed. Page 129). This Court in the case of Girja Datt v. Gangotri Datt Singh [AIR 1955 SC 346] held that two persons who had identified the testator at the time of registration of the will and had appended their signatures at the foot of the endorsement by the Sub-Registrar, were not attesting witnesses as their signatures were not put "animo attestandi". In an earlier decision of the Calcutta High Court in Abinash Chandra Bidvanidhi Bhattacharya v. Dasarath Malo; [I.L.R. 56 Cal. 598], it was held that a person who had put his name under the word "scribe" was not an attesting witness as he had put his signature only for the purpose of authenticating that he was a "scribe". In the similar vein, the Privy Council in Shiam Sunder Singh v. Jagannath Singh [54 M.L.J. 43] held that the legatees who had put their signatures on the will in token of their consent to its execution were not attesting witnesses and were not disqualified from taking as legatees. In this context, reference may be made to the decision of this Court in M.L. Abdul Jabbar Sahib v. H. V. Venkata Sastri & Sons & Ors. [1969(3) SCR 513] wherein this Court upon reference to Section 3 of the Transfer of Property Act has the following to state:

"It is to be noticed that the word "attested", the thing to be defined, occurs as part of the definition itself. To attest is to bear witness to a fact. Briefly put, the essential conditions of a valid attestation under s. 3 are: (1) two or more witnesses have seen the executant sign the instrument or have received from him a personal acknowledgement of his signature; (2) with a view to attest or to bear witness to this fact each of them has signed the instrument in the presence of the executant. It is essential that the witnesses should have put his signature animo

attestandi, that is, for the purpose of attesting that he has seen the executant sign or has received from him a personal acknowledgement of his signature. If a person puts his signature on the document for some other purpose, e.g., to certify that he is a scribe or an identifier or a registering officer, he is not an attesting witness."

3. Turning on to the former expression 'onus probandi', it is now a fairly well-settled principle that the same lies in every case upon the party propounding the will and may satisfy the court's conscious that the instrument as propounded is the last will of a free and capable testator, meaning thereby obviously, that the testator at the time when he subscribed his signature on to the will had a sound and disposing state of mind and memory and ordinarily, however, the onus is discharged as regards the due execution of the will if the propounder leads evidence to show that the will bears the signature and mark of the testator and that the will is duly attested. This attestation however, shall have to be in accordance with Section 68 of the Evidence Act which requires that if a document is required by law to be attested, it shall not be used as evidence until at least one attesting witness has been called for the purpose of proving its execution and the same is so however, in the event of there being an attesting witness alive and capable of giving the evidence. The law is also equally well-settled that in the event of there being circumstances surrounding the execution of the will, shrouded in suspicion, it is the duty paramount on the part of the propounder to remove that suspicion by leading satisfactory evidence." (emphasis supplied)

The situation would have been different if one attesting witness was also the scribe [See. **Mathew Oommen v. Suseela Mathew**, reported in **AIR 2006 SC 786** paragraph 8] or the signature of Bidyut is made below the

signature of the testatrix without describing him as an attesting witness in which case Bidyut could have been considered as an attesting witness. The latter situation would be governed by the ratio in **Beni Chand (since Dead) now by L.Rs v. Smt. Kamala Kunwar & Ors.** reported in **AIR 1977 SC 63: 1976(4) SCC 554**. It states:

“8. There is no substance in the grievance that the proof of the will in this case is incomplete for want of an attesting witness's evidence. Section 68 of the Evidence Act deals with proof of the execution of documents required by law to be attested. It provides that such documents shall not be used as evidence until at least one attesting witness has been called to prove the execution, if there be an attesting witness alive and subject to the process of the Court and capable of giving evidence. Since by Section 63 of the Succession Act, 1925 a will has to be attested by two or more witnesses, Section 68 of the Evidence Act would come into play and therefore it was incumbent on the propounder of the will to examine an attesting witness to prove due execution of the will. But this argument overlooks that Dwijendra Nigam is himself one of the three persons who made their signatures below the thumb impression of Jaggo Bai. None of the three is described in the will as an attesting witness but such labelling is by no statute necessary and the mere description of a signatory to a testamentary document as an attesting witness cannot take the place of evidence showing due execution of the document. By attestation is meant the signing of a document to signify that the attester is a witness to the execution of the document; and by Section 63(c) of the Succession Act, an attesting witness is one who signs the document in the presence of the executant after seeing the execution of the document or after receiving a personal acknowledgment from, the executant as regards the execution of the document. Nigam's evidence shows that he and the other two witnesses saw the testatrix putting her thumb-mark on the will by way of. execution and that they all signed the will in token of attestation in the presence of the testatrix, after she had affixed her thumb-mark: on the will.”

In the instant case there are two named attesting witness who put their signatures below the signature of the testatrix with such description.

The decision of the Coordinate Bench in **Smt. Gunjari Das** (*supra*) is clearly distinguishable as it appears from the said decision that one of the attesting witnesses appeared and gave evidence with regard to preparation, execution and registration of the Will. The learned Trial Judge did not find such evidence to be reliable. The learned trial judge was of the view that the propounder had failed to dispel the suspicious circumstances surrounding the Will. In the instant case, the attesting witness although filed an affidavit-in-Chief but did not appear at the trial. In fact, no summon was issued to the said witness for appearance. The situation would have been different if inspite of summons the said attesting witness has failed to appear. In such a situation the presumption under Section 71 of the Evidence Act could have been made applicable.

The argument that since the Will in question is a registered document it raises a presumption under Section 114(e) of the Evidence Act as to its valid execution is also not accepted.

The Will in question was registered before the insertion of Section 32A by Act 48 of 2005 on 24th September, 2001.

A registered document raises a presumption under Section 114 [Illustration (e)] of the Evidence Act to the effect that the events contained in the endorsement of registration duly performed and correctly recorded and being duly certified by Registrar of the document but it does not contemplate the factum of attestation within the meaning of Section 63 (c) of the Succession Act or Section 68 of the Evidence Act. In this regard, we can profitably place reliance on the decision of the Hon'ble Supreme Court in

Bhagat Ram & Anr. vs. Suresh & Ors., reported in **(2003) 12 SCC 35**,

where it is explained in the following words:-

“Question-3:

23. Registration of a document does not dispense with the need of proving the execution and attestation of a document which is required by law to be proved in one manner as provided in Section 68 of the Evidence Act. Under Section 58 of the Registration Act the Registrar shall endorse the following particulars on every document admitted to registration:

(1) the date, hour and place of presentation of the document for registration;

(2) the signature and addition of every person admitting the execution of the document, and, if such execution has been admitted by the representative, assign or agent of any person, the signature and addition of such representative, assign or agent;

(3) the signature and addition of every person examined in reference to such document under any of the provisions of this Act, and

(4) any payment of money or delivery of goods made in the presence of the registering officer in reference to the execution of the document, and any admission of receipt of consideration, in whole or in part, made in his presence in reference to such execution.

24. Such particulars as are referred to in Sections 52 and 58 of the Registration Act are required to be endorsed by Registrar alongwith his signature and date on document under Section 59 and then certified under Section 60. A presumption by reference to Section 114 (Illustration (e)) of the Evidence Act shall arise to the effect that the events containing in the

endorsement of registration, were regularly and duly performed and are correctly recorded. None of the endorsements, require to be made by the Registrar of Deeds under the Registration Act, contemplates the factum of attestation within the meaning of Section 63(c) of the Succession Act or Section 68 of the Evidence Act being endorsed or certified by the Registrar of Deeds. The endorsements made at the time of registration are relevant to the matters of the registration only (See: Kunwar Surendra Bhadur Singh and Ors. v. Thakur Behari Singh and Ors. reported in AIR 1939 PC 117). On account of registration of a document, including a will or codicil, a presumption as to correctness or regularity of attestation cannot be drawn. Where in the facts and circumstances of a given case the Registrar of Deeds satisfies the requirement of an attesting witness, he must be called in the witness box to depose to the attestation. His evidence would be liable to be appreciated and evaluated like the testimony of any other attesting witness.” (emphasis supplied)

In view of the aforesaid due attestation of the Will cannot be presumed merely because the Will was registered.

Mrs. Chakraborty, learned Advocate representing the respondent has submitted that the absence of the attesting witnesses would not invalidate proof of the Will by other means as contemplated under Sections 69 and 71 of the Evidence Act, 1872 and in this regard she has relied upon a decision of our court in **Smt. Panati Ghosh & Ors. v. Sri Anil Kumar Ghosh, FA No. 10 of 2015** reported at **2022 SCC Online Cal 2736: (2022) 4 ICC 554: 2022(4) CCC 122** authored by one of us (**Soumen Sen, J.**). In **Pranati Ghosh** (supra) the draftsman of the Will and one of the attesting witnesses were not available. The other attesting witnesses turned hostile. Kanailal

after he filed his affidavit in chief expired for which he could not be cross-examined. It was in such a situation Section 71 of the Evidence Act was applied. The relevant observations in this regard is:

“36. The said section can only be requisitioned when the attesting witnesses, who having being called fail to prove the execution of the document by reason of either denying their own signatures, or denying the signature of the testator or having no recollection as to the execution of the document. Application of this section would depend on exhausting examination of all attesting witnesses. The principle is well settled that when the evidence of the attesting witness is vague, doubtful or even conflicting upon some material point, the Court may take into consideration the circumstances of the case and judge from them collectively whether the requirements of the statute were complied with. The Court may on consideration of the other evidence or whole circumstances of the case come to the conclusion that their evidence is of a suspicious character or that they are wilfully misleading the court and accordingly disregard their testimony and pronounce in favour of the document. Thus, Section 71 is a safeguard to the mandatory provisions of Section 68 to meet a situation where it is not possible to prove the execution of the Will by calling attesting witnesses, though alive. In the present case, the testimony of Ashima would prove that her evidence was doubtful as she turned hostile and the other attesting witness was dead.” (emphasis supplied)

In the instant case, none of the attesting witnesses were examined. Unlike other documents, proof of execution of any other documents under the Indian Succession Act would not be sufficient as in terms of Section 68 of the Evidence Act, execution must be proved at least by one of the attesting witnesses. While making attestation, there must be animus attestandi on the part of the attesting witnesses, meaning thereby he must intend to attest and extrinsic evidence on this point is receivable. (See. **Niranjan Umeshchandra Joshi v. Mrudula Jyoti Rao & Ors.**, reported in **2006(13) SCC 433** paragraph 32). The trial court has not arrived at a

finding that the propounder in spite of best efforts could not produce any of the attesting witnesses. Significantly, propounder claimed to have been present at the sub-Registry office and it can be presumed that he had all the required information and details of the attesting witnesses. In fact, the affidavit of one of the attesting witnesses although filed but not pressed.

In view thereof the analogy of Section 69 or 71 of the Evidence Act, 1872 cannot be applied.

In such circumstances we are of the view that the Will has not been proved in accordance with law.

The judgment and order of the Trial court dated 9th April, 2008 is hereby set aside. The interim order passed on 24th September, 2008 stands vacated.

The appeal succeeds. The application being CAN 6745 of 2008 is dismissed and CAN 9774 of 2019 stands disposed of.

However, there shall be no order as to costs.

I agree

(Soumen Sen, J.)

(Uday Kumar J.)