

IN THE HIGH COURT AT CALCUTTA

Testamentary & Intestate Jurisdiction

Original Side

Present:

The Hon'ble Justice Arijit Banerjee

TS 6 of 2010

In the Goods of:

Smt. Belarani Ghosh (Deceased) & Smt. Ava Dutta

v.

Smt. Alo Dey

For the Propounder : Mr. Swarnendu Ghosh, Adv.
Mr. Amlan Jyoti Sengupta, Adv.
Mr. Rahul Sengupta, Adv.

For the Caveatrix : Mr. Dhruva Ghosh, Sr. Adv.
Ms. Pritha Bhaumik, Adv.

Heard on : 13.10.2015, 03.12.2015, 04.12.2015,
22.11.2016, 02.12.2016, 10.02.2017,
02.03.2017, 07.03.2017, 02.05.2017,
08.09.2017, 03.01.2020, 27.01.2020,
16.12.2020, 06.01.2021, 19.02.2021,
25.03.2021

CAV on : 09.04.2021

Further Hearing : 22.12.2022

Again CAV On : 22.12.2022

Date of Judgment : 15.03.2023

Arijit Banerjee, J.:

1. The plaintiff prays that Letters of Administration in respect of what she claims to be the last Will executed by Late Belarani Ghosh, on March

24, 2001, and credits of the deceased be granted in her favour throughout the State of West Bengal.

2. Belarani Ghosh died on July 17, 2004, living behind an immovable property situate at Premises no. 64/2/18 Biren Roy Road, Sukanta Nagar, Barisha, Kolkata-700 008. The plaintiff and the defendant are her two daughters and the only legal heirs.

3. The plaintiff claims that Belarani executed her last Will and Testament on March 24, 2001. The instrument is in Bengali Language. The plaintiff is the sole beneficiary under the Will. Nobody has been named as executor in the Will. The Will has been executed by way of a thumb impression. Three persons have been shown as attesting witnesses.

4. On or about November 30, 2007, the plaintiff filed PLA 362 of 2007 for grant of Letters of Administration in respect of the said Will. Special citation was issued upon the defendant pursuant to an order dated April 9, 2008, passed by a learned Judge of this Court. A caveat was filed by the defendant on April 29, 2008. An affidavit affirmed on May 5, 2008, in support of the caveat was filed by the defendant wherein, *inter alia*, the authenticity of the said Will was disputed. The proceedings therefore became contentious and were re-numbered as T.S. No. 6 of 2010.

5. In the affidavit in support of the caveat, the defendant's case is that Belarani was very ill and bed ridden for several years prior to her death. The defendant looked after her and nursed her. The plaintiff never came to see her. The plaintiff has fabricated the alleged Will to grab Belarani's properties. Belarani never executed any Will in favour of the plaintiff. Before her death, Belarani had disclosed to the defendant that she had made a Will in favour

of the defendant. Such Will was misplaced. Suddenly on April 20, 2008, the defendant found such Will made by Belarani under which the immovable Property in question was given to the defendant. She is taking steps for obtaining probate of the said Will.

6. The plaintiff's case on the other hand is that through her, Belarani was allotted the concerned plot of land by the Refugee Relief & Rehabilitation Department, Government of West Bengal by a registered deed dated July 13, 1989. The plaintiff constructed a house on such land at her own cost. She looked after Belarani who stayed with her. The defendant never cared about Belarani nor contributed any money towards construction of the house. That is the reason why Belarani executed the Will in question devising the immovable property in favour of the plaintiff. The Will is duly attested by three witnesses and has been executed in compliance with the requirements of law.

7. By an order dated June 6, 2013, a learned Judge of this Court framed the following issues:-

- “1. Is the document dated 24th March, 2001, the last Will and Testament of Smt. Belarani Ghosh, since deceased?
2. Is the plaintiff entitled to Letters of Administration in respect of the said Bengali Will dated 24th March, 2001?
3. Is the Will dated 24th March, 2001, a fabricated document as alleged in paragraphs 7 and 10 of the written statement?
4. To what other reliefs is the plaintiff entitled?”

8. Although four issues have been framed, essentially, the issue is only one i.e. whether the Will dated March 24, 2001, is the last Will and

Testament of Belarani executed in accordance with the rules laid down in Section 63 of the Indian Succession Act, 1925.

9. The first witness examined by the plaintiff is one Biva Bose. She deposed inter alia to the following effect:-

(a) She lives about 3-4 houses away from the house where Belarani used to reside. She used to visit Belarani's house and called her 'Masima'. Belarani also used to visit her house.

(b) On March 24, 2001, at the request of Belarani she visited her house at about 1 p.m. She was asked to sign some papers. She found that Belarani's younger sister, Bijan Sarkar, and her son were present at Belarani's residence. Another gentleman was also present whose name she could not recall.

(c) Belarani wanted the persons present to sign a document. First her sister Bijan Sarkar signed. Then she signed and thereafter Bijan Sarkar's son signed the document. After that, Belarani put her thumb impression on the document. Belarani saw all the three persons signing the document.

(e) She identified the document as the Will. She said that she had written the Will as per the wishes of Belarani. She had read over the contents of the Will to Belarani. Belarani approved the Will. Belarani wanted the property to go to her younger daughter. (the plaintiff)

(f) Belarani was in a fit state of mind and body when she executed the Will which she did on her own volition without being influenced by anybody else.

(g) The Will that she had written was typed out by her husband on the same date and thereafter was executed by Belarani.

10. In cross-examination Biva Bose stated inter alia as follows:-

(a) In the Will the word 'Sri' has been used mistakenly as a prefix to the name of Bijan Sarkar. Bijan Sarkar is in fact a lady being the younger sister of Belarani.

(b) On March 24, 2001, Belarani visited her house to call her to Belarani's house.

(c) She had written down the Will by hand long time back but could not recall the exact date.

(d) Ava Dutta (plaintiff) was not present at the time of execution of the Will.

(e) Both Belarani and she had been residing in the locality since 1970. She has personal knowledge that Ava Dutta got the house constructed.

(f) She did not know Alo Dey till the death of Belarani. After Belarani's death Alo Dey came to reside in the house left behind by Belarani.

11. The plaintiff also got herself examined. She stated inter alia as follows:-

(a) The land was allotted by the Government as a part of Refugee Rehabilitation Scheme. Rupees fourteen hundred was also given. Using that fund and her own money, she constructed the house.

(b) Alo Dey use to reside elsewhere. After Belarani's death, Alo Dey (defendant) broke open the padlock on Belarani's room in 2007

and has been staying there since then. The other portion of the house is tenanted.

(c) She has lodged diary with the police station against Alo Dey for having forcibly taken possession of the room where Belarani used to reside.

(d) The Will was made over to her by Biva Bose after Belarani's death.

(e) In 2000-2001 Belarani was in good health and mentally alert.

(f) She had been maintaining Belarani who had no independent income, including taking care of her medical expenses.

(g) Apart from suffering from age related issues like hyper tension, acidity and knee problem, Belarani did not have any major ailment.

(h) Initially she had constructed two rooms on the land. This was before her marriage. After her marriage she construed 2 more rooms and later on constructed 4 rooms on the roof with asbestos shed, in the year 1995.

(i) Alo Dey visited Belarani only on 3/4 occasions in the last 40 years. She did not know anything about the Will till Biva Bose handed over to her the Will after Belarani's death.

11. The plaintiff then examined one Mridula Dhar who is the wife of one of the attesting witnesses, Subodh Dhar. She deposed that Smt. Bijan Sarkar was her husband's mother's younger sister. Bijan used to live with her. Bijan died in January, 2013. She had admitted Bijan Sarkar to a hospital

prior to her death. In the hospital records she had put her name as Bijan Das. She said that she cannot read English.

12. The defendant examined only one witness, namely, Subodh Dhar. He deposed inter alia to the following effect:-

(a) Belarani had two sisters. The elder sister was Snehalata Dhar, Subodh's mother. The younger sister was Bijan Das.

(b) He had nothing to do with the execution of any Will of Belarani. He was made to sign on a blank sheet of paper by Ava Dutta (plaintiff). This was in the year 2008, at his residence, after the death of Belarani. When he signed the paper, there was no other signature thereon. He does not recognise the signatures on the document (Exhibit A). There was no thumb impression on the paper that he had signed.

(c) He did not know anybody called Bijan Sarkar. He knew someone called Bijan Das. She was his maternal aunt.

(d) He did not know anybody by the name of Biva Bose.

(e) Belarani did not sign any document in his presence. Belarani never asked him to sign any document.

(f) Apart from the blank paper, Ava Dutta did not ask him to sign any other document.

(g) On being shown his affidavit affirmed on December 10, 2007, which contains his signature, he said that he did not sign on any such affidavit. He had signed on a blank paper. He has never signed any legal document before any advocate or a notary public. He was never brought to court.

(h) Belarani used to love both her daughters.

(i) Bijan Das got married. He does not know the name of Bijan's husband. It is incorrect to say that Bijan Das's husband's name was Haren Sarkar.

(j) The signatures on all the pages of Exhibit 1 (his affidavit) are not his signature as he had put his signature on a blank paper.

13. The plaintiff also examined an officer of the bank wherein Bijan Bala Sarkar held an account. The bank officer attended the Court pursuant to a subpoena served on the bank manager for production of certain documents. The endeavour of the plaintiff was to show that Bijan Das and Bijan Bala Sarkar were the same person. In my opinion, the deposition of the bank officer is not of much relevance to the point in issue.

14. Learned Counsel for the plaintiff submitted that the plaintiff has successfully proved execution of the Will as required by Section 63 of the Indian Succession Act (in short the 'IS Act'). He submitted that out of two or more attesting witnesses, it is sufficient if one of the witnesses proves the Will. It is not necessary to call all the witnesses for proving execution of the Will. In the present case, Biva Bose, one of the attesting witnesses, has proved due execution of the Will. The other attesting witness, i.e., Subodh Dhar, denied that he had anything to do with the execution of the Will. He claimed to have signed on a blank sheet of paper sometime in the year 2008 at the request of the propounder. He denied having seen the testatrix put her thumb impression on the Will in question. However, Subodh cannot be believed. He has made several inconsistent statements in his deposition. At the time of taking oath for deposing, he had said he was unemployed.

However, on the next day, in cross-examination, he said that he runs a tea stall. Then again, when he was asked what was the name of Bijan Sarkar's husband, he had initially said that he does not know. At a subsequent stage, when it was suggested to him that the name of Bijan Sarkar's husband is Haren Sarkar, he said that it was incorrect. Subodh also tried to create an unnecessary confusion by saying that the name of one of the attesting witnesses is Bijan Das and not Bijan Sarkar. This has also been disproved by other evidence on record. Subodh claims that he was made to sign on a blank paper in 2008 and the Will in question has been fabricated by using such paper. The Will stood executed on March 24, 2001, and the application for grant of Letters of Administration was filed on November 30, 2007. Obviously the blank sheet of paper on which Subodh claims to have put his signature at the behest of the propounder, could not have been used to manufacture the Will. Subodh has not denied his signature on the Will in question being Exhibit A.

15. Learned Advocate then submitted that a Will need not be proved with mathematical precision. It was submitted that for proving a Will, the propounder would be called upon to show by satisfactory evidence that the Will was signed by the testator, that the testator at the relevant time was in a sound and disposing state of mind, that he understood the nature and effect of the dispositions and put his signature on the document of his own free will. On proof of these essential facts, the onus of the propounder can be taken to be discharged. In support of this proposition learned Counsel relied on the decision of ***Ramchandra Rambux v. Champabai & Ors. reported at AIR 1965 SC 354.***

16. Learned Counsel then submitted that the evidence on record would clearly show that Belarani was in a sound state of mind as on March 24, 2001 and there is nothing on record to show that she lacked testamentary capacity.

17. As regards attestation of the Will, learned Advocate submitted that it is true that Biva Bose in her deposition, at three places, has said that only after the three attesting witnesses signed on the Will, Belarani put her thumb impression thereon. However, Section 263 of the IS Act, does not specify any particular order or sequence in which signatures have to be put on the Will by the testatrix and the attesting witnesses. There will be sufficient compliance with the said provision of law, if the testatrix and the attesting witnesses signed the Will in the presence of each other.

18. Relying on P. Ramanatha Aiyar's Law Lexicon, 2nd Edition, Re-print 2002, learned Advocate submitted that to attest means only to witness the execution of a deed and there is nothing to preclude the signature of the witnesses from being under the heading of attestation. To attest is to bear witness to a fact and it is not necessary that the witness attesting a document should sign his name personally. Attestation in the English Wills Act, 1837, means to be present and see what passes, and, when required, bear witness to the fact. Attestation is the act of witnessing the actual execution of a paper and subscribing one's name as witness to that fact. As per Black's law Dictionary, 10th Edition, attestation means "to bear witness, testify to the defendant's innocence; to affirm to be true or genuine; to authenticate by signing as witness." In this connection, learned Advocate also relied on the decision in the case of **M. L. Abdul Jabbar Sahib v. M. V.**

Venkata Sastri & Sons and Ors., reported at (1969) 1 SCC 573 and on the decision in the case of ***Dinamoyee Debi v. Bon Behari Kapur, reported at (1902-03) 7 CWN 160.***

19. Learned Counsel then relied on the decision of the Hon'ble Supreme Court in the case of ***Bhagat Ram & Anr. v. Suresh & Ors. reported at (2003) 12 SCC 35.*** With great respect, I do not see how this decision advances the plaintiff's case. In that case what fell for determination by the Hon'ble Supreme Court is whether or not a Registering Officer can be an attesting witness of a document. The Hon'ble Court held that prima facie, a Registering Officer puts his signature on a document to discharge his duty as Registering Officer and not to attest the document. It was further held that depending on the facts and circumstance of a case, a Registering Officer can be an attesting witness of a document if in his testimony he can prove the execution of the document by deposing to have witnessed it.

20. Learned Counsel also cited the case of ***Benga Behera & Anr. v. Braja Kishore Nanada & Ors., reported at (2007) 9 SCC 728.*** With great respect, this case goes against the plaintiff. I will revert to this case later in this judgment.

21. Per contra, learned Advocate for the defendant submitted that the execution of the Will is shrouded with suspicious circumstances. None of the two attesting witnesses produced by the plaintiff has proved due execution of the Will. One of the attesting witnesses, Subodh, has categorically denied having to do anything with the execution of the Will. Even in cross examination he stood his ground to the effect that he was made to sign on a

blank sheet of paper by the plaintiff in the year 2008. Such evidence of Subodh alone is sufficient to destroy the sanctity of the Will.

22. Learned Counsel further submitted that Biva's deposition is riddled with inherent inconsistencies. It is not clear when and under what circumstances the Will was written. If Biva's answers to question nos. 23, 31, 46-53 of her deposition are read together, the same would seem to suggest that the alleged will was prepared on the date of its alleged execution i.e. March 24, 2001. She had been called by Belarani to sign on a document which she did along with two others and thereafter Belarani put her thumb impression on the document.

However, from Biva's answers to question nos. 68-70, 96-103, it would appear that the alleged Will was first written by her in hand as per the wish of Belarani, much before March 24, 2001, and thereafter her husband got it typed on the same date. Learned Counsel submitted that it is not clear whether the Will was dictated by Belarani, on March 24, 2001 itself, then typed by Biva's husband and then executed. Biva has also deposed that on the date of the alleged execution of the Will apart from her and Belarani, only Subodh and Bijan were present. Biva's husband was not present. Therefore the question that arises is when was the alleged Will dictated and prepared. There is no answer to this. The plaintiff has made no attempt to dispel the doubts created by these contradictory versions. There is no clarity in the matter.

23. Learned Advocate further submitted that the medical evidence on record would show that Belarani had a bad fall on March 10, 2001. The X-Ray report on record, dated March 14, 2001, would show that she had

fractured her neck. However, Biva deposed that on March 24, 2001, Belarani walked to Biva's house which was 3/4 houses away, to call Biva to her house for signing a document. This is difficult to believe.

24. Finally, learned Counsel submitted that just as it has to be proved by the plaintiff that the testator had signed the Will, due attestation thereof also needs to be proved under Section 63(c) of the IS Act. In the present case, it is the consistent evidence of Biva that the three attesting witnesses first signed the Will and only then Belarani put her thumb impression thereon. This is not what the law contemplates. This is not due attestation. In this connection learned Counsel relied on the decision of the Hon'ble Supreme Court in the case of ***Sant Lal Mahton v. Kamla Prasad & Ors., reported at etc AIR 1951 SC 477*** and on a Division Bench decision of the Madhya Pradesh High Court in the case of ***Virendra Singh Pal v. Kashibai & Ors., reported in AIR 1998 Madhya Pradesh 324***.

Court's View

25. I could have disposed of this suit on a very short point of law juxtaposed with certain admitted facts. However, I have recorded the entire arguments of the respective parties as not doing so would be discourteous and impolite to learned Counsel for the parties who took great pains to argue such points.

26. A Will is a document which takes effect after the death of the author of the document. It is ambulatory in nature. A person is free to make as many Wills as he wishes. It is the last of such Wills which will be effective subject

to a competent Court of law admitting such Will to probate. Once a Court certifies a particular Will to be genuine and puts its seal of approval thereon, all previous Wills automatically stand nullified. A judgment granting probate in respect of a will is a judgment in rem and binds the whole world, subject to not being upset by a higher forum.

27. Since a Will becomes relevant only after the testator has passed away, when the executor named in a Will approaches a Court for probate or any other person having locus standi, including a beneficiary, approaches the Court for Letters of Administration where no executor is named in the Will, naturally the author of the Will is not available to assist the Court to decide about the authenticity or otherwise of the Will. This attaches a certain degree of solemnity to a testamentary document and puts great responsibility on a testamentary Court which is called upon to certify the genuineness of a Will by admitting it to probate. The Court must be very careful not to grant probate or Letters of Administration in respect of a Will which is not genuine. When the testator's signature on a Will does not appear to be genuine or where there may be suspicious circumstances surrounding the execution of a Will or there are other factors which indicate that the Will may not be true and genuine expression of the actual wish or intent of the testator, probate shall not be granted.

28. It is often said that a probate Court is a Court of conscience. Unless, on an overall assessment and appreciation of the entire gamut of facts and evidence on record, the Court is reasonably sure that the concerned Will is a genuine document, the same shall not be accepted by the Court. The Court's

conscience must not be troubled in any manner in admitting the Will to probate or in granting Letters of Administration in respect thereof.

29. In the present case, it appears to me that there are circumstances surrounding the execution of the Will, which are suspicious. As submitted on behalf of the defendant and recorded above, it is not clear at all when, where and how the Will was prepared. There are inherent inconsistencies in the deposition of Biva Bose, the only attesting witness who tried to prove the Will. The other attesting witness, Subodh Dhar, unequivocally denied having anything do with the execution of the Will. He stuck to his stand that he had, at the request of the plaintiff herein, signed on a blank sheet of paper in 2008. The third attesting witness did not depose as she had passed away before witness action started.

30. In her evidence, the plaintiff has stated that she became aware of the Will in question only after the death of Belarani. She has said that after the rites and rituals following her mother's death were done with, Biva Bose handed over to her the Will. Biva Bose has deposed that Belarani had entrusted safe custody of the Will with her with instruction not to divulge the factum of execution of such Will to Ava. I find this to be rather strange. Why would Belarani want to keep the Will concealed from Ava when Ava is the sole beneficiary named in the document? I can understand Belarani asking Biva not to divulge the making of such Will to Alo who got nothing under the Will. But keeping execution of the Will a secret in so far as the sole beneficiary under the Will is concerned – well, I find the same to be indicative of suspicious circumstances.

31. A Will is executed by a person to alter the natural course of succession. Hence, dis-inheriting one legal heir and making another legal heir the exclusive beneficiary under a Will, does not per se indicate suspicious circumstances. Of course, it would be a different thing if the legal heir (s) is / are altogether excluded and a complete stranger is named as the sole beneficiary under the Will. That would surely raise the eye-brows of the Court and make it very cautious. But when there are other suspicious circumstances and the court's conscience is troubled, it would be better to allow the natural course of succession to operate rather than deprive a legal heir of a share in the estate of the deceased on the basis of a purported Will about the authenticity of which the Court has doubts.

32. However, even if I were wrong in holding that there are suspicious circumstances surrounding the execution of the Will in question, there is yet another reason why this suit must fail.

33. Section 63 of the IS Act lays down the procedure for execution of unprivileged Wills. The Section reads thus:-

“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:—

(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 acknowledgment 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.”

34. It is clear from the section that at least two persons as witnesses must attest the Will. The witnesses shall attest the Will by putting their signatures thereon after having seen the testator putting his signature or mark on the Will.

35. Hence, if the witnesses sign the Will prior to the testator putting his/her signature on the Will, the same shall not amount to valid attestation as contemplated by Section 63 of the IS Act.

36. In the facts of this case, Biva Bose, the plaintiff's witness and one of the attesting witnesses, has repeatedly said in her deposition, in no uncertain terms, that the three attesting witnesses put their signatures on the Will first and finally Belarani put her thumb impression thereon. Although Biva Bose has made inconsistent statements as regards the order or sequence in which the attesting witnesses signed the Will, the same is

really not of much importance, except detracting from the credibility of Biva Bose as witness. What is significant is that when the attesting witnesses signed the Will, that document did not bear Belarani's signature on thumb impression. At best, what the witnesses sought to attest was a draft document which Belarani proposed to execute as her Will. The witnesses did not attest the Will. The document could have matured into a Will only after Belarani put her thumb impression thereon.

37. In the case of ***Sant Lal Mahton v. Kamla Prasad (supra)***, a suit was filed for enforcement of a simple mortgage bond by sale of the mortgaged property. The Trial Judge, while deciding the other issues in favour of the plaintiffs, held that the bond sued upon was not legally attested since the attesting witnesses had put their signatures on the bond prior to the executants of the bond signing it. Holding that such bond could not rank as a mortgage bond, the Trial Judge refused to make a decree for sale of the mortgaged property and instead passed a money decree for the amount due on the bond, personally against the defendants. A Division Bench of the Patna High Court allowed the appeal from such decree. The matter being carried to the Supreme Court, the judgment and order of the High Court was set aside and the Trial Judge's judgment and decree was restored. The Supreme Court accepted the finding of the Trial Judge that there was no legally attested mortgage bond.

38. In the case of ***Virendra Singh Pal v. Kashibai & Ors., (supra)*** on facts which were very similar to the facts of the present case, a Division Bench of the Madhya Pradesh High Court held as follows:-

“19. A perusal of Section 63 of the Indian Succession Act makes it apparent that the Legislature’s intent underlying therein is to maintain a distinction between mere signing and attesting. It refers to the signing of a document for a particular purpose, that being to testify to the signature of the executant.

20. In the aforesaid view of the matter execution of the Will must be attested as required under Section 63 of the Indian Succession Act. Further, in the absence of the signature of the testator on the Will no question of attestation of the signatures of the executant of the Will can arise.

21. In its decision in the case of Santilal v. Kamla Prasad, reported in AIR 1951 SC 477, the Apex Court had observed that as in that case the attesting witnesses had signed the deed before it was executed such an attestation was no attestation in the eye of law.

22. In the present case the attesting witness, Satya Narain Sharma, who had been examined as a witness by Kashibai, in his cross-examination had admitted that it was subsequent to the attestation by Bharatkishore and Satya Narain Sharma that the executant, Narainsingh Pal, had affixed his thumb mark on the Will. In other words, he had admitted that he as well as the other attesting witness had signed as attesting witnesses on the "Will" in question before the executant had put his thumb mark thereon. It is, therefore, apparent from a perusal of the statement of Satya Narain Sharma, one of the attesting witnesses, who alone had been examined in support of the Will set up by Kashibai that attestation

had preceded the execution of the Will. Even in her statement, Kashibai, herself had admitted that attestation by Bharatkishore and Satya Narain Sharma had preceded the execution of the Will.

23. In the aforesaid circumstances the "Will" claimed to have been executed by Narayansingh Pal could not come to her rescue as the attestation of the said Will being no attestation in the eye of law, the said Will was liable to be ignored. The finding to the contrary returned against the present appellant, therefore, is not at all sustainable in law and is accordingly reversed."

39. Further, in view of the observations of the Hon'ble Supreme Court in the case of ***Benga Behera & Anr. v. Braja Kishore Nanda & Ors., (supra)*** there is no further scope for doubt that a person putting his signature on a document as attesting witness prior to the executant of that document signing it, cannot be said to be attesting witness and cannot be said to have attested the document lawfully. In that case P.W. 9, purporting to act as attesting witness, signed a Will prior to the testatrix signing the same. At paragraph 14 of the reported judgment, the Supreme Court held as follows:-

"If he had put his signature before the testatrix had put her thumb impression on the sale deed and the Will, he does not answer the requirement of attesting witness. He was not aware of any other person attesting the Will and the sale deed. P.W.9, therefore, failed to prove execution or attestation of the Will. Not only he did not take any instruction from the testatrix before the Will was scribed, but the same was done on the dictation of P.W.7. There is nothing on record to show that the testatrix understood the meaning,

purport and contents of the Will. She had put her thumb impression in his presence. There is nothing on record to show that the Will was read over and explained to the testatrix and she had put her thumb impression upon understanding the contents and purport of the Will and put her thumb impression as admission thereof. A certificate to that effect was in ordinary course required to be given by the scribe of the Will, particularly when the same had been found to be given by him in the sale deed executed by her on the same day which was marked as Ext.16.”

40. Section 63 of the IS Act mandatorily requires attestation of a Will by at least two witnesses. In view of the discussion above, in the present case, in the eye of law, there was no attestation of the Will in question. The requirements of Section 63 are not satisfied. One may recall the age hold principle laid down in the case of ***Taylor v. Taylor (1875) 1 Ch.D. 426*** and in the case of ***Nazir Ahamad v. The King-Emperor, reported at AIR 1936 PC 253*** and subsequently by the Hon’ble Supreme Court and the High Courts that when a statute prescribes a procedure for doing something, that thing must be done either following that procedure or not at all. All other modes of doing that thing are necessarily forbidden.

41. In the result, I hold that Exhibit A is not a validly executed Will and no Letters of Administration can be granted in respect thereof. Accordingly, the suit fails and is dismissed with costs assessed at Rs. 30,000/-.

42. Urgent certified copy of the judgment and order, if applied for be given to the parties upon compliance of necessary formalities.

(Arijit Banerjee, J.)