BENGA BEHERA AND ANR. A

v.

BRAJA KISHORE NANDA AND ORS.

MAY 15, 2007

[S.B. SINHA AND MARKANDEY KATJU, JJ.] B

WILL:

Testatrix executed Will in favour of respondent who was stranger to family—Genuineness of Will challenged by legal heirs—Held: No independent C *witness examined to show how testatrix came close to respondent—No explanation given as to why valuable agricultural land along with house had been gifted to respondent—Original Will has not been produced—Burden—on respondent was heavy, he being a stranger to the family which he failed to discharge—Trial Judge as also High Court did not take into* D *consideration effect of contradictions and inconsistencies in statement of witnesses and interpolation/variance in the Xerox copy of the Will* **vis-a-vis** *certified copy thereof—Non-production of original Will stating that Will got lost, gives rise to inference that Will did not contain thumb impression of testatrix—Testatrix was an old and ill lady and had no independent adviser in matter of execution of Will while respondent and his father being disciple* E *of her Guru were in a position to dominate her mental process—Existence of suspicious circumstances itself sufficient to arrive at a conclusion that genuineness of Will has not duly been proved—Succession Act, 1925—s.63.*

Will—Loss of—Proof of—Held: It is obligatory on part of beneficiary F *to establish loss of Will, beyond all reasonable doubt—Beneficiary did not say how the Will was lost—No FIR was lodged about missing of document before any authority—Even approximate point of time the Will was lost, was not stated—Loss of the original Will was, thus, not satisfactorily proved—Evidence Act, 1872—s. 65(c).*

G

Will—Attestation of—Requirement of—Held: Proof of execution of a Will has to be attested at least by two witnesses—At least one attesting witness has to be examined to prove execution and attestation of the Will—Further, it is to be proved that the executant had signed and/or given his

H

thumb impression in presence of at least two attesting witnesses and the attesting witnesses had put their signatures in presence of the executant.

Registration Act, 1908: s.52—Signature of every person presenting a document for registration is required to be endorsed on every such document at the time of presentation—If an authority in performance of a statutory duty signs a document, he does not become an attesting witness within the meaning of s.3 of Transfer of Property Act and s. 63 of Succession Act—"Animus attestandi" is a necessary ingredient for proving attestation.

One 'S' is the owner of the property in question. She was 70 years old and living in a math. She executed will in favour of respondent no. 1. The respondent no.1 was complete stranger to the family. On the same day, a sale deed was also executed by 'S' in favour of advocate PW-7. The will was scribed by PW-9, an advocate's clerk. PW-9 and one 'C' were the attesting witness 'S' expired in 1983. In 1986, first respondent applied for grant of letters of administration in respect of alleged will. Appellants are the heirs and legal representatives of the testatrix. They contested the said application, questioning execution of the Will alleging the same to be a forged and a sham document. Execution of the will was sought to be proved by producing a certified copy thereof. A purported xeroxed copy of the said will was also filed. Courts below held in favour of respondent no. 1. Hence the present appeal.

Allowing the appeal, the Court

HELD : 1. P.W. 9 did not, admittedly know the testatrix from before. He had seen her for the first time on the day when the Will was executed and because PW-7 had asked him to identify her, he did so. It was stated that the Will was scribed by him as per dictation of PW-7, but in the Will, it was stated that he himself did it. If he 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. [Paras 13 and 14] [861-F, G]

2.1. There is nothing on record to show that the testatrix understood the meaning, purport and contents of the Will. 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. [Para 14] [862-A-B] A

2.2. P.W.4 gave a completely different picture of the stay. According to him, on 15.1.1982 the testatrix expressed her desire to execute a Will as also a sale deed, whereupon he made a gist of the contents of the Will and then asked P.W.9 to scribe it. No draft of the Will was prepared although drafts of the sale deeds were prepared. Although in his depostion P.W.-4 contended that he had endorsed a certificate in the Will to the effect that the will was written by his clerk in his office on his direction, the certified copy of the Will did not show the same. A certificate to that effect appeared in the Xeroxed copy of the Will which was brought on record, but such a certificate did not find place in the certified copy of the Will, and thus, no reliance can be placed thereupon. [Para 15] [862-C, D] B C

2.3. So far as the deposition of P.W.7 is concerned, he contradicts P.W.-9 as according to him he was not present when the testatrix had put her thumb impression and he had attested her thumb impression before she gave her thumb impression. His evidence to the effect that the Will was read over and explained to the testatrix does not find mention in the Will and even a statement that three attesting witnesses signed the Will does not appear to be correct as only the name of PW-7 and PW-9 appeared as attesting witnesses in the Will. [Para 17] [862-E-F] D E

3. PW-4 cannot be considered to be a witness to execution of the will as he had nothing to do therewith. He comes into the picture only because an endorsement was found on the Xerox copy of the Will which, is of doubtful origin, keeping in view the fact that the same did not find a mention in the certified copy thereof. His evidence, would, thus, not be of much significance. This aspect of the matter was not considered by the High Court at all. [Para 20] [863-C, D] F

4. Execution of a Will is required to be proved in terms of s. 63 of the Succession Act, in terms whereof a Will must be attested by two or more witnesses. Execution of a Will, therefore, can only be proved in terms of clause (c) of s.63 when at least one of the two witnesses proves the attestation. A Will is required to be attested by two or more witnesses, each of whom has seen the testator sign or affix his mark to the Will. Section 68 of the Evidence Act provides for the requirements for proof of execution of the Will. In terms of said provision, at least one attesting witness has to be examined to prove execution of a Will. P.W.9, in his deposition, stated that 'S' did not put her G H

A thumb impression in his presence on the Will at the time of its execution. Whether the same would amount to denial of the execution of a Will even within the meaning of s.71 of the Indian Evidence Act is the question. He neither denies the execution nor has failed to recollect the execution of the Will. According to him, the testatrix had put her LTI only after he had put his signature.P.W.9 does not deny the execution. His statement, thus, does B not satisfy the requirements of s.63(c) of the Succession Act.

[Paras 21, 22 and 26] [863-F, G; 864-A, B, C, E]

4. By cross-examining one's own witness, the effect of his statement in examination-in-chief in a case of this nature cannot be ignored. Whether s.71 C of the Evidence Act was applicable in the facts of the present case must be found out upon reading his evidence in its entirety. [Para 26] [864-F]

Ittoop Varghese v. *Poulose and Ors.*, AIR (1975) Kerala 141 and *Janki Narayan Bhoir* v. *Narayan Namdeo Kadam*, [2003] 2 SCC 91, referred to.

D 5. Respondent No.1 in his evidence accepted that he had obtained the registered Will from the office of the Sub-Registrar upon presenting 'the ticket' on 30.1.1982. After receipt of the Will, he had shown it to 'S'. He did not say how the Will was lost, particularly when he had not only shown the original Will to the testatrix but also had consulted a lawyer in relation thereto. No information was lodged about the missing of the document before E any authority. Even approximate point of time the Will was lost, was not stated. Loss of the original Will was, thus, not satisfactorily proved.

[Paras 29 and 30] [866-C, D, E]

6. A document upon which a title is based is required to be proved by primary evidence, and secondary evidence may be given under Section 65(c) F of the Evidence Act. Loss of the original, therefore, was required to be proved. In a case of this nature, it was obligatory on the part of the first respondent to establish the loss of the original Will, beyond all reasonable doubt. His testimony in that behalf remained uncorroborated. Furthermore, secondary evidence, could be led by production of a certified copy given in terms of the G provisions of the Indian Registration Act. In support of the proof of the Will, purported Xerox copy and a certified copy thereof have been produced. In the Xerox copy, an endorsement has been made by an advocate that the executant was his client and it was written by his clerk in his office on his dictation, whereas in the certified copy there is no such endorsement of the advocate. A question has also been raised as to whether a certificate by Sub-Registrar at H the time of registration proves attestation. A Sub-Registrar in the matter of

registration of a document acts under the provisions of the Registration Act, 1908. S.52 of the 1908 Act prescribes the duty of Registering Officer when document is presented in terms thereof. The signature of every person presenting a document for registration is required to be endorsed on every such document at the time of presentation. If an authority in performance of a statutory duty signs a document, he does not become an attesting witness within the meaning of s.3 of the Transfer of Property Act and s.63 of the Succession Act. "Animus attestandi" is a necessary ingredient for proving the attestation. If a person puts his signature in a document only in discharge of his statutory duty, he may not be treated to be an attesting witness. [Para 31, 32, 33, 34, 35 and 36] [866-E-H; 867-A-C; F-H; 868-A]

Dharam Singh v. *Aso and Anr.*, [1990] Supp SCC 684, referred to.

7. It is now well settled that requirement of the proof of execution of a Will is the same as in case of certain other documents, for example Gift or Mortgage. The law requires that the proof of execution of a Will has to be attested at least by two witnesses. At least one attesting witness has to be examined to prove execution and attestation of the Will. Further, it is to be proved that the executant had signed and/or given his thumb impression in presence of at least two attesting witnesses and the attesting witnesses had put their signatures in presence of the executant. [Para 40] [868-H; 869-A]

Madhukar D. Shende v. *Tarabai Aba Shedage,* [2002] 2 SCC 85; *Janki Narayan Bhoir* v. *Narayan Namdeo Kadam,* [2003] 2 SCC 91 and *Bhagatram* v. *Suresh and Ors.*, [2003] 12 SCC 35, relied on.

8. The Court granting Letters of Administration with a copy of the Will annexed, or probate must satisfy itself not only about the genuineness of the Will but also satisfy itself that it is not fraught with any suspicious circumstances. No independent witness has been examined to show how the testatrix came close to the respondent No.1. Why valuable agricultural land measuring Ac 4.187 and homestead land along with a house standing thereon had been gifted in favour of the first respondent, has not been explained. The original Will has not been produced. Why both the Will and the sale deed should have been executed on the same day, has not been explained. The burden on the first respondent was heavy, he being a stranger to the family. He failed to discharge the said burden. Variance, inconsistencies and contradictions have been brought on record, particularly in the statements of PW-4 and PW-9 and other witnesses *vis-a-vis* the contents of the document. Trial Judge as also the High Court did not take into consideration the effect of such

A **contradictions and inconsistencies, particularly the interpolation/variance in the Xerox copy of the Will vis-a-vis certified copy thereof. Serious consideration was required to be bestowed on the contention of the appellants that thumb impressions of the testatrix on different pages of the Xerox copy did not tally. No effort was made to compare the thumb impression appearing on the Xerox Copy with the thumb impression appearing on other admitted**
B **documents. Non-production of the original Will stating that the Will got lost, gives rise to an inference that it might have been that the Will did not contain the thumb impression of the testatrix. The testatrix was an old and ill lady. She had no independent adviser in the matter of the execution of the Will. On the other hand, the plaintiff/respondent No.1 and his father being disciple of**
C **her Guru were in a position to dominate her mental process. Existence of suspicious circumstances itself may be held to be sufficient to arrive at a conclusion that execution of the Will has not duly been proved.**

[Paras 41, 42, 43 and 46] [869-C-H; 870-A, B]

Niranjan Umeshchandra Joshi **v.** *Mrudula Jyoti Rao & Ors.*, **(2006) 14**
D **SCALE 186 and** *Joseph Antony Lazarus (Dead) By LRs.* **v.** *A.J. Francis*, **[2006] 9 SCC 515, relied on.**

Rabindra Nath Mukherjee and Anr. **v.** *Panchanan Banerjee (Dead) By LRs. and Ors.*, **[1995] 4 SCC 459 and** *B. Venkatamuni* **v.** *C.J. Ayodhya Ram Singh & Ors.*, **(2006) 11 SCALE 148, referred to.**

E

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 3467 of 2003.

From the Final Judgment and Order dated 21.11.2002 of the High Court of Orissa at Cuttack in First Appeal No. 397 of 1990.

F P.K. Mohanty, Raj Kumar Mehta and Sobhit Jain for the Appellants.

A.C. Pradhan, Rajib Sankar Roy, Pranab Kumar Mullick and H.A. Raichura for the Respondent.

The Judgment of the Court was delivered by

G

S.B. SINHA, J. 1. Interpretation and application of Section 63 of the Indian Succession Act, 1925 as well as Section 68 of the Indian Evidence Act, 1872 *vis-a-vis* the requirements of proof of execution of a document falls for consideration in this appeal which arises out of the judgment dated 21.11.2002 in First Appeal.No.397/1990 of the High Court of Orissa at Cuttack. However,
H before we embark upon the said question, we may notice the facts of the

matter in brief. A

2. Admittedly, one Sarajumani Dasi was the owner of the property in question. She was aged about 70 years when a Will was allegedly executed by her on or about 15.1.1982. She expired on 5.6.1983. The beneficiary of the Will was the first respondent herein. The testatrix was living in a math known as Bharati Math at Puri. In the Will, she disclosed her profession to be "Singer B of Bhajans and Kirtans". It is not in dispute that the first respondent was a complete stranger to the family. He is a businessman. His father was one of the disciples of late Taponidhi Ramakrushna Bharati Goswamy, who had founded the Math wherein the testatrix was living.

3. A deed of sale was also executed by the said Sarajumani Dasi in C favour of advocate Surendra Panda of Puri on the same day. The Will is said to have been scribed by one Banabehari Upadhyaya (PW-9), an advocate's clerk. He as well as one Chandramani Das Mohapatra who are said to be the attesting witnesses thereto also identified the testatrix before the Registering Officer. Respondent No.1 obtained the original Will from the Office of the D Registering Authority on 30.1.1982.

4. As noticed hereinbefore, Sarajumani Dasi expired on 5.6.1983. In 1986, an application was filed by the first respondent in the court of the learned District Judge, Puri for grant of Letters of Administration in respect of the alleged Will with a copy of the Will annexed, in terms of Section 278 of the E Indian Succession Act. Respondent No.1 claimed that he had also been residing in the said Math. She was assured of proper care by him and in consideration of the help and assistance rendered to her by respondent No.1, the said Will was executed in his favour.

5. Appellants herein are the heirs and legal representatives of the F testatrix. They contested the said application, *inter alia*, questioning execution of the Will alleging the same to be a forged and a sham document.

6. We may notice that the original Will was never produced by the appellant. G

7. Execution of the Will was sought to be proved by producing a certified copy thereof. A purported xeroxed copy of the said will was also filed. The registration of the said Will was sought to be proved by calling the document in question wherein the contents of the document registered were noted. H

A 8. To prove execution and attestation of the Will, the respondent No.1, *inter alia*, examined Banabehari Upadhyaya (P.W.9), Purnchandra Rath (P.W.4) and Surendra Panda (P.W.7).

9. We will notice their statements before the learned District Judge for determining the question as to whether requirements of law had been complied B with.

10. P.W.9- Banabehari Upadhyaya who, as noticed hereinbefore, not only scribed the Will but also stated himself to be an attesting witness and identifier of the testatrix, in his deposition stated as under:

C "....On 15.1.82, Sarajumani Dasi executed a Will in favour of one Brajakishore Nanda and the same was scribed by me..

I do not remember anything that happened on 15.1.82 except what I have deposed with reference to the document.

D I first saw Sarajumani Dasi when she executed the sale deed. I did not know her before that.... Surendranath Panda brought Sarajumani Dasi to me with him. Sarajumani Dasi was with Surendranath Panda and I was called to scribe the Will to become an identifying witness and also an attesting witness. Surendra Panda identified Sarajumani Dasi to me and that is how I know her..... I did not make a draft of E the Will but scribed it as per dictation of Surendranath Panda. Sarajumani Dasi did not put her L.T.I. in my presence on the Will at the time of execution of it..... I attested her L.T.I. before she put her L.T.I. on the sale deed and the Will. Sarajumani Dasi was not present when I scribed the sale deed and will and made the endorsements F attesting her L.T.I. I do not know if any other person attested the Will and the sale deed.

....

...I scribed whatever was dictated by Sri Panda without understanding the meaning or purport. . I did not disclose before the G Sub-Registrar or before any body that I identified Sarjumani Dasi without knowing her or attested her L.T.I. even though her L.T.I. were not affixed in my presence....."

11. In his deposition, P.W.4-Purnachandra Rath (An Advocate) stated:

H "Thereafter on 15.1.82, Sarajumani again came to the Bar

Association and met me there. Brajakishore Nanda (P.W.1 - Plaintiff) and his father Sanmajaya Nanda (not examined) accompanied the Mata. She expressed before me that she would execute the Will and also the sale deed. On her instruction, I made a gist of the Will and asked Banabehari Upadhyaya to scribe the same..... The scribe read over and explained the contents of the Will to Sarajumani and she acknowledged the same to be true and correct. When Sarajumani affixed her L.T.I. on the Will, myself, Banabehari Upadhyaya, (P.W.9) advocate Sri Surendra Panda and Chandramani Das Mohapatra and Sanmajaya Nanda were present.....

I am attesting witness to the will. .. I endorsed a certificate in the Will to the effect that the executant was my client and the Will was written by my clerk in my office on my direction....."

12. In his deposition, P.W.7-Surendra Panda (An Advocate) stated thus:

"On 15.1.82, Sarajumani Dashi came to the Bar Association, Bhubaneswar. She was accompanied by Brajakishore Nanda and Jammajjaya Nanda at that time. That day i.e.15.1.82 Sarajumani Dashi expressed her desire before her lawyer Purnchandra Rath (P.W.4) to execute the Will in favour of Brajakishore Nanda..... Then the lawyer made a rough draft of the Will. Mr. Rath called Benabehari Upadhyaya to scribe the Will..... The contents of the document were read and explained to Sarajumani Dashi..... Sarajumani Dashi acknowledged the contents of the document to be true and correct and gave her L.T.I.. thereon. Attesting witness P.C. Rath, Chandramani and Banabehari Upadhaya were present when Sarajumani Dashi affixed her L.T.I. on the Will....."

13. P.W.9- Banabehari Upadhyaya did not, thus, admittedly know the testatrix from before. He had seen her for the first time on the day when the Will was executed and because Surendra Panda had asked him to identify her, he did so. It was stated that the same was scribed by him as per dictation of Surendra Panda, but in the Will, it was stated that he himself did it.

14. 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

A 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
B 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.

C 15. P.W.4-Purnachandra Rath, as noticed hereinbefore, gave a completely different picture of the stay. According to him on 15.1.1982 the testatrix expressed her desire to execute a Will as also a sale deed, whereupon he made a gist of the contents of the Will and then asked P.W.9 to scribe it. No draft of the Will was prepared although drafts of the sale deeds were prepared. Although in his deposition P.W.-4 contended that he had endorsed a certificate
D in the Will to the effect that the Will was written by his clerk in his office on his direction, the certified copy of the Will did not show the same. A certificate to that effect appeared in the Xeroxed copy of the Will which was brought on record and marked at Ext.-13/a, but such a certificate did not find place in the certified copy of the Will, and thus, no reliance can be placed thereupon.

E 16. The High Court in its judgment proceeded on the basis that P.W.-4 was also a witness to the execution of the Will by the testatrix and thus would come within purview of the definition of the term 'attesting witness'.

17. So far as the deposition of P.W.7-Surendra Panda is concerned, he
F contradicts P.W.-9 as according to him he was not present when the testatrix had put her thumb impression and he had attested her thumb impression before she gave her thumb impression. His evidence to the effect that the Will was read over and explained to the testatrix does not find mention in the Will and even a statement that three attesting witnesses signed the Will does not appear to be correct as only the name of P.W.-7 and P.W.-9 appeared as
G attesting witnesses in the Will.

18. Learned counsel appearing on behalf of the respondents, however, would submit that as the attesting witnesses were not willing to depose, it was not necessary to prove attestation in terms of Section 71 of the Indian Evidence Act. Summons were issued to the attesting witnesses by the Court.
H One of the attesting witnesses did not appear, P.W.9 appeared but he was

declared hostile. Our attention in this connection has also been drawn to a part of his statement in the cross-examination where he has deposed as under: A

> "....My Moharir licence might have been cancelled due to my misconduct and illegal activities."

19. It is not for this Court, as submitted by the learned counsel, to consider the integrity and honesty of the said witness. According to the learned counsel, not only P.W.4 should be treated to be an attesting witness, but must also be held to have proved due execution of the Will. B

20. We may deal with the contention of the learned counsel in respect of application of Section 71 of the Indian Evidence Act a little later. But, in our opinion, P.W.-4 cannot be considered to be a witness to execution of the will as he had nothing to do therewith. He comes into the picture only because an endorsement was found on the Xerox copy of the Will which, in our opinion, is of doubtful origin, keeping in view the fact that the same did not find a mention in the certified copy thereof. His evidence, in our opinion, would, thus, not be of much significance. This aspect of the matter was not considered by the High Court at all. We are, therefore, unable to agree with the following finding of the High Court: "The attesting witnesses Purna Chandra Rath(P.W.4) Chandramani Das Mohapatra and Banahihari Upadhay (P.W.9) were present when she affixed her LTI on the Will. All the three attesting witnesses signed the Will in presence of Sarajumani inasmuch as no reliance, whatsoever, can be placed on the testimony of P.W.-4, PW-4 is an advocate. He is supposed to know the importance of attestation. If he intended to be an attesting witness, he could have done so. C D E

21. It was also not necessary for the appellants to confront him with his signature in the Xeroxed copy of the Will, inasmuch as the same had not appeared in the certified copy. Execution of a Will is required to be proved in terms of Section 63 of the Succession Act, in terms whereof a Will must be attested by two or more witnesses. Execution of a Will, therefore, can only be proved in terms of clause (c) of Section 63 when at least one of the two witnesses proves the attestation. A Will is required to be attested by two or more witnesses, each of whom has seen the testator sign or affix his mark to the Will. Section 68 of the Evidence Act provides for the requirements for proof of execution of the Will. In terms of said provision, at least one attesting witness has to be examined to prove execution of a Will. F G

22. P.W.-9, as noticed hereinbefore in his deposition, stated that H

A Sarajumani Dasi did not put her thumb impression in his presence on the Will at the time of its execution. Whether the same would amount to denial of the execution of a Will even within the meaning of Section 71 of the Indian Evidence Act is the question.

23. Section 71 of the Evidence Act reads as under:

B

"71. *Proof when attesting witness denies the execution.*- If the attesting witness denies or does not recollect the execution of the document, its execution may be proved by other evidence."

24. He neither denies the execution nor has failed to recollect the C execution of the Will. According to him, the testatrix had put her LTI only after he had put his signature.

25. Section 71 of the Act provides for one of the exceptions where it is not possible to strictly comply with the requirements of Section 68. Sections 69, 70 and Section 71 are exceptions to Section 68. Section 69 provides for D proof of a document where no attesting witness is found. Section 70 provides for admission of execution by party to attested document. Section 71 deals with a situation where the attesting witness denies or does not recollect the execution of the document and only in that eventuality, the document's execution may be proved by other evidence.

E

26. As indicated hereinbefore, P.W.-9 does not deny the execution. His statement, thus, does not satisfy the requirements of Section 63(c) of the Succession Act. While appreciating evidence of a witness, we cannot go beyond the same and while doing so, we cannot raise a legal fiction that he must have done so only because the first respondent had cross-examined him F on certain issues. By cross-examining one's own witness, the effect of his statement in examination-in-chief in a case of this nature cannot be ignored. Whether Section 71 of the Evidence Act was applicable in the facts of the present case must be found out upon reading his evidence in its entirety.

27. Strong reliance has been placed by learned counsel on *Ittoop* G *Varghese* v. *Poulose and Ors.*, AIR (1975) Kerala 141. The High Court in that case proceeded on the basis that Section 71 of the Act would be attracted when a witness deliberately and falsely denies that he had attested the Will and in a situation of that nature, the Court would be entitled to look into the totality of the circumstances so as to enable it to arrive at a conclusion on H the question of attestation. In *Ittoop Varghese* case (supra), the witnesses

categorically stated that they had not seen the testator signing and did not gather any personal acknowledgement from the testator on his signature in the Will and further that they did not sign in the presence of the testator. It was a case where the statement of the witnesses was found to be wholly false. It was found having regard to the fact situation obtaining therein and in particular having been found that the testator knew about the formalities for the due execution of a valid Will which was also corroborated by the endorsement made therein. The Kerala High Court, furthermore, reassured itself from the other evidence that the testator had expressed his desire to execute the Will and in fact wanted to assure himself that no quarrel should arise between his sons after his death regarding the Will or his signature and only for that purpose he got it registered. It was furthermore noticed that the Sub-Registrar who had registered the document, on his examination, affirmed that the document was read over to the testator and the testator acknowledged his signature in the Will and also signed in token of presenting the Will before the Sub-Registrar. The Sub-Registrar had also signed it as one of the witnesses. When a Sub-Registrar had signed the document as a witness and after that D.W. -5 had signed as an attesting witness upon execution of the document by the testator, according to the High Court the circumstances of the case were sufficient to come to the conclusion that there was proof of the due compliance of the formalities required by Section 63 of the Succession Act in that case .

28. We may notice that this Court in *Janki Narayan Bhoir* v. *Narayan Namdeo Kadam*, [2003] 2 SCC 91 laid down the law on interpretation and application of Section 71 of the Act in the following terms:

> "11. Section 71 of the Evidence Act is in the nature of a safeguard to the mandatory provisions of Section 68 of the Evidence Act, to meet a situation where it is not possible to prove the execution of the will by calling the attesting witnesses, though alive. This section provides that if an attesting witness denies or does not recollect the execution of the will, its execution may be proved by other evidence. Aid of Section 71 can be taken only when the attesting witnesses, who have been called, deny or fail to recollect the execution of the document to prove it by other evidence. *Section 71 has no application to a case where one attesting witness, who alone had been summoned, has failed to prove the execution of the will and other attesting witnesses though are available to prove the execution of the same, for reasons best known, have not been summoned before the court.*

It is clear from the language of Section 71 that if an attesting witness denies or does not recollect execution of the document, its execution may be proved by other evidence. However, in a case where an attesting witness examined fails to prove the due execution of will as required under clause (c) of Section 63 of the Succession Act, it cannot be said that the will is proved as per Section 68 of the Evidence Act. It cannot be said that if one attesting witness denies or does not recollect the execution of the document, the execution of will can be proved by other evidence dispensing with the evidence of other attesting witnesses though available to be examined to prove the execution of the will"

(Emphasis supplied)

29. Another vital aspect of the matter cannot also be ignored. Respondent No.1 in his evidence accepted that he had obtained the registered Will from the office of the Sub-Registrar upon presenting 'the ticket' on 30.1.1982. After receipt of the Will, he had shown it to Sarajumani Dasi. He did not say how the Will was lost, particularly when he had not only shown the original Will to the testatrix but also had consulted a lawyer in relation thereto. No information was lodged about the missing of the document before any authority. Even approximate point of time the Will was lost, was not stated. In his cross-examination, he stated: "I cannot say where and how the original Will was lost."

30. Loss of the original Will was, thus, not satisfactorily proved.

31. A document upon which a title is based is required to be proved by primary evidence, and secondary evidence may be given under Section 65(c) of the Evidence Act. The said clause of Section 65 provides as under:

> "When the original has been destroyed or lost, or when the party offering evidence of its contents cannot, for any other reason not arising from his own default or neglect, produce it in reasonable time."

Loss of the original, therefore, was required to be proved.

32. In a case of this nature, it was obligatory on the part of the first respondent to establish the loss of the original Will, beyond all reasonable doubt. His testimony in that behalf remained uncorroborated.

33. Furthermore, secondary evidence, *inter alia*, could be led by

production of a certified copy given in terms of the provisions of the Indian Registration Act. In support of the proof of the Will, purported Xerox copy and a certified copy thereof have been produced. In the Xerox copy, an endorsement has been made by an advocate that the executant was his client and it was written by his clerk in his office on his dictation, whereas in the certified copy there is no such endorsement of the advocate.

34. A question has also been raised as to whether a certificate by Sub-Registrar at the time of registration proves attestation. A Sub-Registrar in the matter of registration of a document acts under the provisions of the Registration Act, 1908 (1908 Act). Section 52 of the 1908 Act prescribes the duty of Registering Officer when document is presented in terms thereof. The signature of every person presenting a document for registration is required to be endorsed on every such document at the time of presentation. Section 58 prescribes the particulars to be endorsed on documents admitted to registration, such as :

> "(a) Signature of the person admitting the execution of the document;
>
> (b) Any money or delivery of goods made in presence of Registering Officer in reference to the execution of the document shall be endorsed by the Registering Officer in the document presented for Registration.
>
> Therefore this is the only duty cast on the Registering authority to endorse on the will, i.e. to endorse only the admission or execution by the person who presented the document for registration. The compliance of this provision leads to the legal presumption that the document was registered and nothing else.."

35. If an authority in performance of a statutory duty signs a document, he does not become an attesting witness within the meaning of Section 3 of the Transfer of Property Act and Section 63 of the Succession Act. The term 'attestation' means:

> "to 'attest' is to bear witness to a fact. The essential conditions of valid attestation are (i) two or more witnesses have seen the executant sign the instrument (ii) each of them has signed the instrument in presence of the executant.

36. "Animus attestandi" is a necessary ingredient for proving the

A attestation. If a person puts his signature in a document only in discharge of his statutory duty, he may not be treated to be an attesting witness.

37. The Registering Officer Rabindranath Mohanty was examined as P.W.8. He, in his deposition, stated:

B

> " .... I asked the executant her name, the name of the person in whose favour the Will was executed and the nature of the document..... She admitted before me that she has executed the Will after understanding the full import of the admission of execution of the Will."

While registering the Will, the Registering Officer has endorsed: "Execution C is admitted by the above Sarajumani Dasi who is identified by Sri Banabihari Upadhyay S/o Harihar Upadhyaya, Advocate's clerk of Bhubaneswar".

38. In *Dharam Singh* v. *Aso and Anr.*, [1990] Supp SCC 684, this Court held:

D

> "2. The two attesting witnesses did not support the execution of the will. The trial court relied upon the statement of the registering authority and on the basis of decisions of the Lahore and Punjab and Haryana High Courts found that the will had been proved. The lower appellate court reversed the decision by relying upon two decisions of this Court in *M.L. Abdul Jabhar Sahib* v. *H.V. Venkata Sastri & Sons and* E *Seth Beni Chand* v. *Kamla Kunwar.*
>
> 3. We have examined the record and are satisfied that the appellate court and the High Court were right in their conclusion that the Registrar could not be a statutory attesting witness. Therefore, the conclusion that the will had not been duly proved cannot be disturbed."

F

39. The said witness did not know the testatrix personally. Even her parentage was not asked for and inquired into. He was examined eight years after the registration. It is difficult for any ordinary person after a period of eight years, *inter alia*, on the basis of a certified copy to depose in regard G to evidence of such nature, particularly, in a case where a Will has been executed on the day on which she had executed a deed of sale in favour of a complete stranger. His evidence, therefore, does not inspire confidence. In any event he cannot be said to have proved due execution or attestation of the Will.

H 40. It is now well settled that requirement of the proof of execution of

a Will is the same as in case of certain other documents, for example Gift or Mortgage. The law requires that the proof of execution of a Will has to be attested at least by two witnesses. At least one attesting witness has to be examined to prove execution and attestation of the Will. Further, it is to be proved that the executant had signed and/or given his thumb impression in presence of at least two attesting witnesses and the attesting witnesses had put their signatures in presence of the executant. (See *Madhukar D. Shende* v. *Tarabai Aba Shedage,* [2002] 2 SCC 85; *Janki Narayan Bhoir* v. *Narayan Namdeo Kadam*, [2003] 2 SCC 91 and *Bhagatram* v. *Suresh and Ors.*, [2003] 12 SCC 35).

41. The Court granting Letters of Administration with a copy of the Will annexed, or probate must satisfy itself not only about the genuineness of the Will but also satisfy itself that it is not fraught with any suspicious circumstances.

42. No independent witness has been examined to show how the testatrix came close to the respondent No.1. Why valuable agricultural land measuring Ac 4.187 and homestead land along with a house standing thereon had been gifted in favour of the first respondent, has not been explained. The original Will has not been produced. Why both the Will and the sale deed should have been executed on the same day, has not been explained.

43. The burden on the first respondent was heavy, he being a stranger to the family. He failed to discharge the said burden. Variance, inconsistencies and contradictions have been brought on record, particularly in the statements of P.W.-4 and P.W.-9 and other witnesses *vis-a-vis* the contents of the document, which we have noticed hereinbefore.

44. Learned trial Judge as also the High Court did not take into consideration the effect of such contradictions and inconsistencies, particularly the interpolation/variance in the Xerox copy of the Will *vis-a-vis* certified copy thereof. Serious consideration was required to be bestowed on the contention of the appellants that thumb impressions of the testatrix on different pages of the Xerox copy did not tally. No effort was made to compare the thumb impression appearing on the Xerox Copy with the thumb impression appearing on other admitted documents. Non-production of the original Will stating that the Will got lost, gives rise to an inference that it might have been that the Will did not contain the thumb impression of the testatrix. The testatrix was an old and ill lady. She had no independent adviser in the matter of the execution of the Will. On the other hand, the plaintiff/respondent No.1

A and his father being disciple of her Guru were in a position to dominate her mental process.

45. Respondent No.1 was a student at the relevant time. His father had taken an active part in the entire process in registering and culmination of the Will in favour of his son. There are materials on record to show that although B sufficient time had been granted for examination of the other attesting witnesses, Chandramani Das Mohapatra was not summoned. No summon could be issued only because his correct address had not been furnished.

46. Existence of suspicious circumstances itself may be held to be sufficient to arrive at a conclusion that execution of the Will has not duly C been proved.

47. In *Rabindra Nath Mukherjee and Anr* v. *Panchanan Banerjee (Dead) By LRs. And Ors.*, [1995] 4 SCC 459, this Court opined:

> "8. If a total view is taken of the aforesaid circumstances, which has D to be the approach, we are of the opinion that the courts below overplayed some circumstances which they regarded as suspicious and somehow missed some circumstances which bolstered the case of the propounders."

48. We may, however, notice that in *B. Venkatamuni* v. *C.J. Ayodhya* E *Ram Singh & Ors.*, [2006] 11 SCALE 148, this Court upon considering a large number of decisions opined that proof of execution of Will must strictly satisfy the terms of Section 63 of the Indian Succession Act. It was furthermore held:

> "It is, however, well settled that compliance of statutory F requirements itself is not sufficient as would appear from the discussions hereinafter made."

It was observed:

> "Yet again Section 68 of the Indian Evidence Act postulates the mode and manner in which proof of execution of document required by law G to be attested stating that the execution must be proved by at least one attesting witness, if an attesting witness is alive and subject to the process of the Court and capable of giving evidence."

It was emphasised that where there are suspicious circumstances, the onus would be on the propounder to remove the suspicion by leading H appropriate evidence stating:

"However, having regard to the fact that the Will was registered one and the propounder had discharged the onus, it was held that in such circumstances, the onus shifts to the contestant opposing the Will to bring material on record meeting such *prima facie* case in which event the onus shifts back on the propounder to satisfy the court affirmatively that the testator did not know well the contents of the Will and in sound disposing capacity executed the same.

Each case, however, must be determined in the fact situation obtaining therein.

The Division Bench of the High Court was, with respect, thus, entirely wrong in proceeding on the premise that compliance of legal formalities as regards proof of the Will would sub-serve the purpose and the suspicious circumstances surrounding the execution thereof is not of much significance.

The suspicious circumstances pointed out by the learned District Judge and the learned Single Judge of the High Court, were glaring on the face of the records. They could not have been ignored by the Division Bench and in any event, the Division Bench should have been slow in interfering with the findings of fact arrived at by the said court. It applied a wrong legal test and thus, came to an erroneous decision."

49. Yet again in *Niranjan Umeshchandra Joshi* v. *Mrudula Jyoti Rao & Ors.*, [2006] 14 SCALE 186, this Court held:

"Section 63 of the Indian Evidence Act lays down the mode and manner in which the execution of an unprivileged Will is to be proved. Section 68 postulates the mode and manner in which proof of execution of document is required by law to be attested. It in unequivocal terms states that execution of Will must be proved at least by one attesting witness, if an attesting witness is alive subject to the process of the court and capable of giving evidence. A Will is to prove what is loosely called as primary evidence, except where proof is permitted by leading secondary evidence. Unlike other documents, proof of execution of any other document under the Act would not be sufficient as in terms of Section 68 of the Indian Evidence Act, execution must be proved at least by one of the attesting witnesses. While making attestation, there must be an *animus attestandi*, on the part of the attesting witness, meaning thereby, he must intend to attest and extrinsic evidence on this point is receivable.

A The burden of proof that the Will has been validly executed and is a genuine document is on the propounder. The propounder is also required to prove that the testator has signed the Will and that he had put his signature out of his own free will having a sound disposition of mind and understood the nature and effect thereof. If sufficient evidence in this behalf is brought on record, the onus of the B propounder may be held to have been discharged. But, the onus would be on the applicant to remove the suspicion by leading sufficient and cogent evidence if there exists any. In the case of proof of Will, a signature of a testator alone would not prove the execution thereof, if his mind may appear to be very feeble and debilitated. However, if a defence of fraud, coercion or undue influence is raised, the burden C would be on the caveator. [See *Madhukar D. Shende* v. *Tarabai Shedage,* [2002] 2 SCC 85 and *Sridevi & Ors.* v. *Jayaraja Shetty & Ors.,* [2005] 8 SCC 784]. Subject to above, proof of a Will does not ordinarily differ from that of proving any other document."

Noticing *B. Venkatamuni* (supra), it was observed:

D

"The proof a Will is required not as a ground of reading the document but to afford the judge reasonable assurance of it as being what it purports to be.

We may, however, hasten to add that there exists a distinction E where suspicions are well founded and the cases where there are only suspicions alone. Existence of suspicious circumstances alone may not be sufficient. The court may not start with a suspicion and it should not close its mind to find the truth. A resolute and impenetrable incredulity is demanded from the judge even there exist circumstances of grave suspicion. [See *Venkatachala Iyengar* (supra)]"

F

[See also *Joseph Antony Lazarus (Dead) By LRs.* v. *A.J. Francis*, [2006] 9 SCC 515]

50. For the reasons aforementioned, the impugned judgment cannot be sustained which is set aside. Accordingly, the appeal is allowed with costs. G Counsel's fee assessed at Rs.5,000/-.

D.G. Appeal allowed.