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BEER-CHUNDER MANIKYA v. MAYMANA BIBEE.

We, therefore, set aside the order of the Judge, and restore that of the Munsif, and direct that execution do follow in accordance with the said order.

Appeal allowed.

Before Mr. Justice White and Mr. Justice Maclean.

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BISSONATH DINDA (OBJECTOR) *v.* DOYARAM JANA (PETITIONER).*

Will—Attestation of Will—Attesting Witness must sign after Testator—Indian Succession Act (X of 1865), s. 50.

The signatures of the two or more attesting witnesses to a will required by s. 50 of the Indian Succession Act (X of 1865), *must be attached to the* will after, and not before, the testator's signing or affixing his mark to it.

Quære.—Whether a will can be properly attested by a marksman?

Baboo *Bhowany Churn Dutt* for the appellant.

Mr. *H. E. Mendes* for the respondent.

THE facts of this case appear sufficiently from the judgment, which was delivered by

WHITE, J. (MACLEAN, J., concurring).—This is an appeal against an order of the Judge of Midnapore, granting letters of administration with the will annexed to Doyaram Jana. The will purports to be the will of one Soonder Jana, who died on the 29th of May 1878. It is dated and alleged to have been executed on the day previous to his death.

The grant was opposed by the present objector, who is the appellant before us.

Evidence has been given of the execution of the will by six witnesses, of whom five were attesting witnesses to, and one was the writer of, the will.

The objector, on the other hand, produced five witnesses; but their evidence, of course, is of a negative character.

The Judge considered that there was ample direct evidence of the execution of the will, and that the witnesses for the applicant were fairly trustworthy.

* Appeal from Original Decree, No. 51 of 1879, against the order of W. Cornell, Esq., Officiating Judge of Midnapore, dated the 11th December 1878.

The Judge adds—"There are some discrepancies as to the order *in which the signatures* (that is, the signatures of the attesting witnesses with *reference to* the execution of the will by the testator) were affixed, but these are not material."

The discrepancies to which the Judge alludes are looked at by him in the light of their effect upon the credibility of the witnesses; and if they had to be considered by the Court below only for that purpose, we should *not have* been disposed to interfere with the order of the Judge. But the existence of those discrepancies raises the question, whether the requirements of the Indian Succession Act as to the attestation of the testator's signature by two attesting witnesses have been complied with.

The Judge below is of opinion, that it is immaterial whether the attesting witnesses sign before or after the testator, provided they sign in his presence.

Now, s. 50 of the Indian Succession Act does not, in so many words, prescribe the order in which the signatures of the testator and attesting witnesses are to be affixed; but we think that it is to be implied from the language there used, and from the order in which the rules for execution are laid down, that the legislature intended that the two attesting witnesses should have seen the testator sign before they affixed their own signatures. The words in the English Wills Act, so far as they relate to the point we are now considering, are, in substance, the same as those used in the Indian Succession Act: and the English Courts of Probate, in dealing with those words, have held that the testator must sign before the attesting witnesses: *Cooper* v. *Bocket* (1). A case also has been cited to us—*Fernandez* v. *Alves* (2)—where the Bombay High Court has taken the same view of the law, and our opinion of the law is in accordance with these authorities. (The learned Judge then proceeded to examine the evidence of the attesting witnesses, and continued.) The witness Hurhu Adak is only a marksman. It is not necessary for us to determine, on the present occasion, whether the signature of a marksman would constitute the signature of an attesting witness within

(1) 3 Curt., 648. (2) I. L. R., 3 Bomb., 382.

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the meaning of the rules in the Indian Succession Act, because from his evidence one can draw no conclusion as to the order in which the signatures were affixed to the will. He merely says, "Soonder Jana signed it, I attested it. I put a mark as my signature."

The appeal is allowed, and the order of the lower Court reversed.

Appeal allowed.

Before Mr. Justice Jackson and Mr. Justice Tottenham.

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July 4.

THE SECRETARY OF STATE (DEFENDANT) *v.* PORAN SINGH (PLAINTIFF).*

Ghatwali Tenure — Misconduct of Ghatwal — Forfeiture of Tenure on dismissal.

The dismissal of a ghatwal will carry with it the forfeiture of his tenure.

IN this case the plaintiff, a sirdar ghatwal in the district of Bankura, was, owing to misconduct, dismissed on the 22nd February 1873. This dismissal was confirmed by the Magistrate, and finally upheld by the Commissioner on appeal. The plaintiff was deprived of the lands which he had held as such sirdar ghatwal, and these lands, on his dismissal, were handed over to his successor. The present suit was thereupon instituted by the plaintiff in the Court of the District Judge of Bankura (making the Secretary of State and the ghatwa appointed to succeed the plaintiff, co-defendants) to recover the lands thus taken from him. In his plaint the plaintiff claimed to hold the lands in suit by virtue of an ancient hereditary tenure held on payment of a certain punchakit† rent to the zemindar, and further contended that such lands were held by him irrespective of any service imposed upon him in his character of sirdar

* Regular Appeal, No. 215 of 1876, from a decision passed by the Officiating Judge of West Burdwan, dated the 17th April 1876.

† Cesses imposed in some of the Bengal districts, formerly, in addition to the revenue and other regular imposts. . . . . . . In some places the term appears to denote lands originally rent-free, but subject to a small quit-rent. — *Wilson's Glossary of Indian Terms.*