1885

BUSSUNTERAM MARWARY v. KAMALUDDIN AHMED.

Kamaluddin would not be entitled to demand contribution from them, in the event of the whole of the debt being realized from him or from his share. That being the case, it would not be just or equitable to hold the share of Kamaluddin answerable for the whole claim. If Kamaluddin had not helped the plaintiff in keeping alive his claim by payment of a certain sum of money, he (the plaintiff) would not be in a position to get any decree at all. And we think that it would be unjust to hold that Kamaluddin by his acts and conduct (which the first Court suspected to be the result of collusion between the plaintiff and Kamaluddin) not only kept the claim alive, but made his share answerable for the whole demand. If Kamaluddin was in a position to call upon the other heirs for contribution, there would be no difficulty in decreeing the whole claim as against his share. But, in the circumstances of this case, we are of opinion that the plaintiff is not entitled to charge the share of Kamaluddin with any more than a proportionate share of his dues.

We therefore see no ground for disturbing the judgment of the Court below, and dismiss this appeal with costs.

Appeal dismissed.

Before Mr. Justice Tottenham and Mr. Justice Ghose.

NITYE GOPAL SIRCAR (OBJECTOR) *v.* NAGENDRA NATH MITTER MOZUMDAR (PETITIONER).

1885
April 1.

Will, Attestation of—Witness—Signature—Mark—Indian Succession Act (X of 1865*), s.* 50.

The direction contained in s. 50, cl. 3, of the Indian Succession Act as to each of the witnesses signing the will is not satisfied by the witnesses affixing their marks, and it is necessary for the validity of a will that the signature, as distinguished from a mere mark of at least two witnesses, should appear on the will. *Fernandez* v. *Alves* (1) followed; *In the goods of Wynne* (2) dissented from.

If a testator on presenting his will for registration admits a signature on the will to be his before a Registrar, and is identified before him by a witness, and both the Registrar and the identifier sign their names on the will as witnesses to the admission of the testator, such attestation is sufficient

* Appeal from Original Decree No. 86 of 1884, against the decree of T. D. Beighton, Esq., Judge of Burdwan, dated the 20th of February 1884.

(1) I. L. R., 3 Bom., 382. (2) 13 B. L. R., 392.

1885

NITYE GOPAL SIRCAR v. NAGENDRA NATH MITTER MOZUMDAR.

to satisfy the requirements of cl. 3 of s. 50 of Act X of 1865. *In the matter of Hurro Sundari Dabia* (1) followed.

THIS appeal arose out of an application for letters of administration in respect of a will. The application had been granted by the Court below, and the objector now appealed.

The facts of the case appear sufficiently from the judgment of the High Court.

Baboo *Trailokya Nath Mitter* for the appellant.

Baboo *Sharoda Charan Mitter* for the respondent.

The judgment of the High Court (TOTTENHAM & GHOSE, JJ.) was as follows:—

This appeal arises out of an application made by one Nagendra Nath for letters of administration in respect of the will said to have been executed by one Madhusudan Sircar on the 16th of Srabun 1279. The application was opposed by one Nitye Gopal Sircar, who contended that the said will was not duly executed by the said Madhusudan. The Court below has held that the document is genuine, and that it was executed according to the formalities prescribed by law; and, being of that opinion, has granted letters of administration to Nagendra Nath.

The objector has appealed to this Court. There were two main questions raised by the learned vakeel who appeared for the appellant—first, that the will was not genuine; and, second, that none of the attesting witnesses having signed the document, but having simply put their marks against their names written by somebody else, there was no sufficient compliance with the rules prescribed by s. 50 of the Succession Act, and that the will was not therefore a valid document.

Upon the first question we agree with the lower Court in holding that the will is genuine; and that it was executed by the late Madhusudan. The second question raised by the appellant's vakeel is one which is not free from difficulty, and we may confess that it is with some hesitation that we pronounce our decision in the matter.

(1) I. L. R., 6 Calc., 17.

The rules laid down in s. 50 of the Succession Act as to the execution of a will are:—

1st.—"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."

2nd.—"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."

3rd.—"The will shall be attested by two or more witnesses, each of whom must have seen the testator sign or affix his mark to the will, or have seen some other person *sign* the will in the presence and by the direction of the testator, or have 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 must 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."

Now, it will be observed that, while speaking of the action of the testator, the Legislature uses the expressions, "shall sign *or* affix his mark," "signature *or* mark." But in speaking of the witnesses, the section does not use any alternative expressions, but simply says "the witnesses *must* sign." And this distinction, which we may state to be a marked distinction, occurs prominently in the third rule. That being the case, we cannot help thinking that the Legislature advisedly drew a distinction between the action of the testator and that of the witnesses as regards the mode of their respective signatures. This may certainly lead in certain cases in this country to a great deal of inconvenience, and in some instances the due execution of the will may be impracticable; for it may happen, as it does happen now and then, that the will is executed at a very critical moment, and witnesses, who are able to *sign* their names, are not available. But whatever the inconvenience or difficulty may be in the proper working of the said rules, we cannot ignore the distinction which the Legislature has drawn. Mr. Justice *Pontifex,*

1885

NITYE GOPAL SIRCAR v. NAGENDRA NATH MITTER MOZUMDAR.

in the case *In the goods of Wynne* (1), observed that he was "inclined to think that a signature by mark would be a sufficient "signature by a witness even under the Indian Act, as it would "undoubtedly be under the English Act." But it will be observed that the point was not actually decided by him, nor was it necessary for him to come to any decision upon the matter in that case. We have examined the English Wills Act, and some of the decisions in England bearing upon the matter, but we are unable to come to the same opinion which Mr. Justice *Pontifex* expressed. Section 9 of the said Act (1 Vic., c. 26) runs as follows:— "And be it further enacted that no will shall be valid unless "it shall be in writing and executed in manner hereinafter men-"tioned: that is to say, it shall be signed at the foot or end "thereof by the testator, or by some other person in his presence "and by his direction; and such signature shall be made or "acknowledged by the testator in the presence of two or more "witnesses present at the same time, and each witness shall attest "and subscribe the will in the presence of the testator, but no "form of attestation shall be necessary."

The cases bearing upon the said section show that in regard to the action of the testator a signature by mark is sufficient; and in the case of witnesses the subscription needs to be a subscription either of the name of the witness, or of some mark intended to represent it. But it will be observed, in the first place, that the said section of the English Wills Act does not lay down, as it is in the Indian Succession Act, the distinction between a signature and a mark; and, in the second place, the words used in the English Wills Act, with reference to witnesses, are "shall attest and subscribe," and not "must sign," as they are in the Indian Succession Act. That being the case, we are unable to follow the construction which has been put upon s. 9 of the English Wills Act in holding that the word "sign" in clause 3 of s. 50 of the Indian Succession Act includes a mark-signature.

In this view of the matter, we are of opinion that the second contention raised by the appellant against the will is correct; and we may observe that our view of the question is in accord with

(1) 13 B. L. R., 392.

that expressed by the Bombay High Court in *Fernandez* v. *Alves* (1).

1885

NITYE GOPAL SIRCAR v. NAGENDRA NATH MITTER MOZUMDAR.

But then we find that the will was presented by the testator for registration before the Sub-Registrar; and his signature was taken down before the said official on the back of the deed as admitting execution of it; and the writer of the deed, one Bepinbehari Bistu, who identified the testator before the Sub-Registrar, subscribed his name next to that of the testator, and that was followed by the signature of the Sub-Registrar himself. The said Bepinbehari in his evidence attests his own signature, and swears that he saw the testator sign his name to the will both before the Sub-Registrar, and also at the time of the execution of the deed, and we think that we may accept the certificate of the Sub-Registrar and the endorsements made by him, as also the evidence of Bepinbehari, as clearly showing that the document was presented to that authority by Madhusudan as his will; and that his signature having been taken, both Bepinbehari and the Sub-Registrar signed their respective names. We have, therefore, two persons who actually signed their names to the document after the testator had admitted it to be his will and put his signature on it. And we think that these persons may be properly taken to be witnesses within the meaning of s. 50, and that what was done before the Sub-Registrar would be a sufficient compliance with the requirements of the third clause of s. 50; and we should have been prepared to uphold the will as a valid document had it not been for this, that neither the evidence of the said Bepinbehari, nor the endorsements by the Sub-Registrar, shows that the said witnesses, *viz.*, Bepin and the Sub-Registrar, signed the will "in the presence of the testator." Although, perhaps, there can be little doubt in the matter, yet we think that the evidence ought to be clear upon the point; and we deem it right to take the same course which another Divisional Bench of this Court took—*In the matter of the petition of Hurro Sundari Dabia* (2)—in remanding the case to the lower Court, with directions that Bepinbehari may be recalled, and that the parties be allowed to adduce fresh evidence in this matter.

(1) I. L. R., 3 Bom., 382. (2) I. L. R., 6 Calc, 17.

1885

NITYE GOPAL SIRCAR v. NAGENDRA NATH MITTER MOZUMDAR.

If the District Judge be of opinion, after taking such fresh evidence that the said two witnesses signed their respective names in the presence of the testator, the order already passed by him will stand good, otherwise the application for letters of administration will have to be refused.

Costs will abide the ultimate result.

Case remanded.

FULL BENCH REFERENCE.

Before Sir Richard Garth, Knight, Chief Justice, Mr. Justice Mitter, Mr. Justice Prinsep, Mr. Justice Tottenham and Mr. Justice Pigot.

188[illegible]
April 10.

HORI DAS MAL (DEFENDANT) APPELLANT *v.* MAHOMED JAKI AND ANOTHER (PLAINTIFFS) RESPONDENTS.*

Julkur rights in tidal navigable rivers, Grant of, by the Crown—Grant, where there is no title by prescription, must be proved—Evidence as to nature and extent of grant.

The exclusive right of fishery in tidal navigable rivers may be granted by the Crown to private individuals. Such a right must ordinarily be proved either by proof of a direct grant from the Crown, or by prescription.

In the absence of title by grant or prescription in persons alleging themselves to be the holders of a *julkur* under an *ijara*, the mere payment of rent by fishermen to former *ijaradars* does not estop such fishermen from disputing the rights of the alleged holders; but such payment for the use of the *julkur* right is strong evidence of the rights of the alleged holders of the *ijara*, and of acquiescence in their title.

In the case of a grant of a *julkur*, in ascertaining what the boundaries of the *julkur* are, or what rights of fishery are contained within those boundaries, whether the subject of the grant be in tidal navigable rivers or not, the Courts should be guided by the same rules of evidence as would be applicable for the purpose of determining the nature and extent of any other grant.

Per PRINSEP and PIGOT, JJ.—Unless the boundaries given in a grant of a *julkur* clearly indicate to the contrary, a grant of a *julkur* would not ordinarily include the right of fishery in tidal navigable rivers.

THIS was one of five cases referred to a Full Bench by Mr.

* Full Bench References on Special Appeals Nos. 107 to 110 of 1883, against the decree of R. T. Rampini, Esq., Judge of Dacca, dated the 3rd October 1882, affirming the decree of Baboo Nilmani Nag, the Munsiff of Kaligunj, dated the 27th February 1882.