APPELLATE CIVIL.

Before Sir John Wallis, Kt., Chief Justice, and Mr. Justice Phillips.

1916. April 16 and 17.

P. RADHAKRISHNA MUDALIAR (DEFENDANT), APPELLANT,

v.

P. SUBRAYA MUDALIAR (PLAINTIFF), RESPONDENT.*

Indian Succession Act (X of 1865), sec. 50—Will of a marksman—Mark not affixed by the testator himself but by another, not a due execution—Absence of two attesting witnesses besides the person affixing the mark, not a due attestation.

Where with a view to execute a will the testator, who was a marksman, touched the pen and gave it to another who affixed to the will a mark and wrote against it the testator's name and added beneath it his own name as the person who affixed the mark, and the will did not contain attestations of two *other* persons besides that of the person so affixing the mark:

Held that the will was invalid as not complying with the provisions of section 50 of the Indian Succession Act.

As a *marked* will it was invalid, as the mark was not affixed by the testator himself, as required by the section.

Considered as a *signed* will, as it might be, it was equally invalid as the testator's signature was put by another and there were not two *other* attestors besides the one so signing.

APPEAL from the judgment and Order of BAKEWELL, J., in the exercise of the Ordinary Original Testamentary Jurisdiction of the High Court, in Testamentary Original Suit No. 2 of 1915, in Original Petition No. 110 of 1914.

This was a suit to obtain letters of administration with the will annexed in respect of a will alleged to have been executed on 7th January 1914 by one Papathi Ammal, the mother of the plaintiff. The will, after the usual preliminary and disposing clauses, concluded as follows:—

"This × the mark of Papathi Ammal.
This mark was taken by D. V. Doraiswami Aiyangar.
Witnesses.—Janakirama Mudaliar.
This was written by D. V. Doraiswami Aiyangar.
7th January 1914."

Overruling the objection of another son of the testator, the caveator, that the alleged will did not in law amount to a will,

* Original Side Appeal No. 62 of 1915.

Mr. Justice BAKEWELL held it by the following judgment to be a duly executed and duly attested will satisfying the requirements of section 50 of the Indian Succession Act :—

"The evidence as to the execution of the will is that the testatrix touched the pen and gave it to Doraiswami Aiyangar, the second witness for the plaintiff who put the mark and wrote 'This is the mark of Papathi Ammal. This mark was taken by D. V. Doraiswami Aiyangar.' This witness and one Janakirama Mudaliar were both present at the time and Janakirama Mudaliar signed his name on the will under the word 'சாட்சிகள்' (witnesses). Doraiswami Aiyangar also wrote at the bottom of the will 'This was written by D. V. Doraiswami Aiyangar, 7th January 1914.' It has been argued that the will was not properly executed by reason of the fact that the person who put the mark is also one of the witnesses and also on the ground that this man Doraiswami Aiyangar did not sign the will as an attesting witness. I think the fact that the testatrix touched the pen and gave it to Doraiswami Aiyangar for the purpose of marking it amounts to an affixture of her mark to the will. The words of the first clause of section 50 of the Succession Act are '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.' I think that the placing of the mark upon the paper in her presence and by her direction is an affixture by her of her mark to the will within the meaning of section 50. The third clause of the same section provides that '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.' Those words show that if some person other than the testator signs the will on his behalf the execution by that person must be witnessed by two other witnesses, and it has been accordingly held in *In the matter of the petition of Hemlota Dabee*(1), that it is not sufficient if one of the attesting witnesses is the person who signed on behalf of the testator. The provision with regard to affixture of the mark is not the same as that with reference to the writing of the testator's *signature* by a third party. All that is necessary under section 50 is that the will should be attested by two witnesses each of whom must have seen the testator affix his mark to the will, or must have received from the testator a personal acknowledgment of his mark, and each of the

(1) (1882) I.L.R., 9 Calc., 226.

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witnesses must sign the will in the presence of the testator. I have already held that the testatrix did in fact affix her mark to the will. It is quite clear that each of the persons, Janakirama Mudaliar and Doraiswami Aiyangar, signed the will in her presence and the gesture of touching the pen and handing it to the witness is a sufficient acknowledgment by the testatrix of her mark. I think it is clear on the face of the will itself that both of these persons meant to sign as witnesses. In the first place the word 'witnesses' is in the plural, and secondly Doraiswami Aiyangar states specifically in the will that the mark of the testatrix was taken by him. I hold that the document propounded is the last will and testament of the testatrix and that she was of sound disposing mind at the time of its execution. Letters of administration will be directed to issue to the petitioner—plaintiff and the defendant will pay all costs of the suit."

T. R. Venkatarama Sastriyar with *V. Raghunatha Sastriyar* for the appellant.

The question in this case is whether the will in question is duly executed. Under section 50 of the Indian Succession Act when the will purports to bear a mark instead of a signature of the testator, the marking must be by the testator himself and not by any one else on his behalf. In this case somebody else has affixed the mark for the testator in the presence of the testator putting the name of the testator against the mark and signing his own name thereunder in token of his having affixed the mark. This is a case of signing a will by another and not of marking. If it is a case of signing by another then the will is invalid under section 50 of the Act as there are not two "other" persons who have seen the testator sign the will. The word "other" has been held to mean one other than the testator or the person who signs for the testator: see *Avabai* v. *Pestonji Nanabhai*(1) and *In the matter of the petition of Hemlota Dabee*(2).

C. V. Anantakrishna Ayyar with *V. Sivaprakasa Mudaliar* for respondent. The word "sign" in the last part of section 50 of the Indian Succession Act means something other than marking. If a third person signs for the testator then the two attesting witnesses must be different from the person who signs for the testator. But if a mark alone is put by

(1) (1874) 11 Bom. H.C.R., 87. (2) (1882) I.L.R., 9 Calc., 226.

another for the testator, then the person who put the mark can be an attesting witness. I submit this case can be construed as one of marking by the testator. A man who used to sign every document by getting his servant to put his rubber stamp was held to have signed his testament himself, when his servant put his rubber stamp to the same: see *Nirmal Chunder Bandopadhya* v. *Saratmoni Debya*(1). Similarly the mark is the testator's even if it is put by another: *Wilson* v. *Beddard*(2) a case of marking by the testator aided by another.

[WALLIS, C.J.—That is not disputed; but there there was a marking by the testator though with another's assistance.]

This is the practice in India.

[WALLIS, C.J.—We can't construe a section wrongly to suit a practice.]

Handing the pen is equal to marking. See Jarman on Wills, Volume I, page 114, and *Fernandez* v. *Alveo*(3).

[WALLIS, C.J., referred to *Shamu Patter* v. *Abdul Kadir Ravuthan*(4). *Shamu Patter* v. *Abdul Kadir Ravuthan*(5) for the meaning of the word "attest."]

The cases under the English Wills Act (1 Vict., cap. 26, section 9) are collected in Chitty's Statutes, Vol. 15, under the heading of "Signature to wills." They show that an attesting witness in England can sign for the testator. See also *Krishnachar* v. *Vadichi Gounden*(6) which shows that handing over a pen to another to put a mark is execution. An attesting witness can mark: see *In the Goods of Wynne*(7). An initial amounts to signature—*Ammayee* v. *Yelumalai*(8).

[WALLIS, C.J.—There it was held that marking by an attestor will not do.] I refer to *Mukta Nath* v. *Jitendra Nath*(9).

[WALLIS, C.J.—That is against you as in that case there was a contact of the testator's hand with the paper.]

Moreover there is an acknowledgment by the testatrix of her mark to the attestors.

[PHILLIPS, J.—No, that is not your case; the marking and attestation were all at the same time.]

(1) (1898) I.L.R., 25 Calc., 911. (2) (1841) 59 E.R., 1041; s.c., 12 Sim., 28.
(3) (1879) I.L.R., 3 Bom., 382. (4) (1912) I.L.R., 35 Mad., 607 (P.C.).
(5) (1908) I.L.R., 31 Mad., 215. (6) (1896) 6 M.L.J., 209.
(7) (1874) 13 B.L.R., 392. (8) (1892) I.L.R., 15 Mad., 261.
(9) (1916) 22 C.L.J., 262.

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The following judgment of the Court was delivered by

WALLIS, C.J.—This is an appeal from a judgment of BAKEWELL, J., and raises a question of some importance as to whether under section 50 of the Indian Succession Act, when the testator is a marksman or unable to sign his name, his mark as distinct from his signature may be affixed by any one but himself. The Wills Act XXV of 1838, which in this respect reproduced the provisions of the English Wills Act of 1 Vict., did not contain any express provision as to signature by means of affixing a mark where the testator was unable to write but merely required the will to be signed "by the testator or by some other person in his presence and by his direction." It was, however, well settled that under these provisions a testator unable to write might sign by affixing his mark. In section 50 of the Indian Succession Act, probably on account of the great number of illiterate people India, it was thought desirable to provide expressly for execution by affixing a mark, and in that section three ways of execution are provided. "The testator shall (1) sign or (2) shall affix his mark to the will or (3) it shall be signed by some person in his presence and by his direction." And it is next provided "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." It is expressly provided that it is the testator who is to affix his mark, and while the section goes on to provide for the will being signed by some other person in his presence and by his direction, there is no corresponding provision about the testator's mark being affixed by some other person in his presence and by his direction. Further the language of the following rule as to "the signature or mark of the testator, or the signature of the person signing for him" clearly shows that what was contemplated was that the mark should be affixed by the testator himself. As already mentioned this section for the first time contained a separate provision for execution by affixing a mark, and the decisions on the Statute of Frauds and the Wills Act, according to which affixing a mark was a mode of signature, are therefore inapplicable. It was, in our opinion, clearly the intention of the Legislature that to satisfy the provisions of the section as to execution by affixing a mark the mark must be affixed by the testator himself. We are therefore with great respect unable to

agree with the learned Judge that the placing of the mark upon the paper in the presence of the testatrix and by her direction is an affixture by her of her mark to the will within the meaning of section 50. In *Nirmal Chunder Bandopadhya* v. *Saratmoni Debya*(1) all that was decided was that the affixing by a servant of the testator under his direction of the name stamp of the testator was a signature by some other person in the testator's presence and by his direction, and not the affixing of a mark, and there is nothing in the case to suggest that the learned Judges considered that the affixture of a mark at the direction of the testator would be sufficient. In *Mukta Nath* v. *Jitendra Nath*(2), it was held that the section was sufficiently complied with where the mark was actually affixed by the testator though with the assistance of another person, but there the testator took an active part in affixing the mark. In this case according to the finding of the learned Judge the testatrix touched the pen and gave it to Doraiswami Aiyangar who wrote in Tamil ;

This mark × Papathiammal.

This mark taken.

D. V. Doraiswami Aiyangar.

This may amount to a signature by some other person in her presence and by her direction within the meaning of the section, and if attested by two witnesses other than the signatory would be sufficient, but the mere handing the pen to Doraiswami Aiyangar who affixed the mark in her presence is not, in our opinion, an affixture of her mark by the testatrix such as is required by the section. It is said truly that touching the pen and handing it to some one to sign for one is a very common form of signature in this Presidency, but this cannot affect the construction of the section, and in the recent attestation case *Shamu Patter* v. *Abdul Kadir Ravuthan*(3), with reference to this and similar sections their Lordships of the Judicial Committee observed that they could not agree with what had been said by the learned Judges of another High Court regarding the policy of placing a larger construction on the word "attest" in consequence of the social institutions of the country. This observation appears to apply equally to the present case.

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(1) (1898) I.L.R., 25 Calc., 911.

(2) (1916) 22 C.L.J., 262.

(3) (1912) I.L.R., 35 Mad., 607 (P.C.).

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If the signature, as distinct from the mark of the testatrix, is taken to have been affixed by Doraiswami Aiyangar in her presence and by her direction, the will fails for want of due attestation, as the section requires that the will should be attested by two or more witnesses each of whom must have seen the testator sign or affix his mark, or have seen some *other* person sign the will in the presence and by direction of the testator. The language of the section is perfectly plain, and it is unnecessary to refer to decided cases to show that the person who signed by direction of the testator cannot be one of the two attesting witnesses required by the section. The appeal is allowed and the suit and the petition dismissed with costs throughout.

N.R.

APPELLATE CRIMINAL.

Before Mr. Justice Oldfield and Mr. Justice Sadasiva Ayyar.

1916. July 14.

THE KING-EMPEROR, APPELLANT,

v.

MUSA AND ANOTHER, ACCUSED.*

Madras Towns Nuisance Act (III of 1889), sec. 3 (10)—"Gaming" and "public place," meaning of.

The accused in this case held for stakes a game called "Ring" in an open space in the compound of a Hindu temple. In convicting the accused under section 3 (10) of the Madras Towns Nuisance Act (III of 1889) on the grounds that the place was a public place and the game was a game within the meaning of the above section as it was played for stakes,

Held: (*a*) "Gaming," generally and in section 3 (10) means "playing for stakes;"

(*b*) a public place is one where the public go whether they have a right to or not; it is sufficient to constitute a place a public one even if only a section of the general public such as Hindus have a right to go to it;

and (*c*) The character of the game as one of skill or chance is not material under the section

Hari Singh v. *Jadu Nandan Singh* (1904) I.L.R., 31 Calc., 542, followed.

APPEALS under section 417 of the Code of Criminal Procedure (Act V of 1898) against the acquittal of the abovenamed accused

* Criminal Appeals Nos. 658 and 659 of 1915.