APPELLATE CIVIL.

Before Sir Owen Beasley, Kt., *Chief Justice, and Mr. Justice King.*

1934, August 30.

ALAPATI NAGAMMA (RESPONDENT, PLAINTIFF), APPELLANT,

v.

ALAPATI VENKATRAMAYYA AND TWO OTHERS (APPELLANTS, DEFENDANTS), RESPONDENTS.*

Transfer of Property (Amendment) Act (XXVII of 1926), sec. 3 —"Sign"—Meaning of—Attesting witness unable to write his name—"Sign" if includes "mark" in case of—Sub-Registrar—Valid attestor if and when.

The word "sign" used in section 3 of the Transfer of Property Act (XXVII of 1926) with reference to an attesting witness must be taken to be governed by the definition of that word in section 3 (52) of the General Clauses Act of 1897 and to include, with reference to a person who is unable to write his name, "mark". A marksman can therefore validly attest a gift deed. The Sub-Registrar who registered the deed cannot be held to be a valid attestor in the absence of evidence to show that he signed the document in the presence of the executant.

Ram Charan v. *Bhairon*, (1930) I.L.R. 53 All. 1, referred to.

APPEAL under Clause 15 of the Letters Patent against the judgment of CURGENVEN J., dated 28th of August 1931 and passed in Second Appeal No. 773 of 1930, preferred to the High Court against the decree of the District Court of Guntur in Appeal Suit No. 265 of 1928 preferred against the decree of the Court of the District Munsif of Guntur in Original Suit No. 364 of 1924.

* Letters Patent Appeal No. 98 of 1931.

P. Satyanarayana Rao for *V. Pattabirama Sastri* for appellant.

B. T. M. Raghavachari for respondents.

Cur. adv. vult.

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The JUDGMENT of the Court was delivered by BEASLEY C.J.—The plaintiff filed the suit under appeal to recover possession of a house to which she claimed to be entitled under a gift deed executed by the second defendant, the mother of the plaintiff's late husband Subbayya, in favour of Subbayya and the plaintiff jointly. The suit was contested upon various grounds, the only one with which we are here concerned being that the gift deed was not validly attested. The gift deed purports to have been attested by five persons, two of whom have signed their names and three have made their marks. On behalf of the plaintiff it was contended that the writer of the document and the Sub-Registrar who registered it were attestors also. Only one of the two signatories could be traced and he was P.W. 7. The District Judge found that he attested the document and it must therefore be accepted that the gift deed was attested by at least one attestor. The District Judge has further found that one of the marksmen (P.W. 8) did attest as a marksman but it was contended in the District Court that a marksman cannot in law validly attest a document of this kind. The learned District Judge ruled against that contention but CURGENVEN J. in second appeal took the contrary view and held therefore that P.W. 8 did not validly attest the gift deed. It was conceded in argument here and by CURGENVEN J. that, before the Transfer of Property Act (XXVII of 1926)

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definition clause 3, it was beyond doubt that a marksman could be accepted as an attestor but it was argued by the respondents that the Act of 1926 in introducing a definition has altered the law in this respect. Section 3 of the Transfer of Property (Amendment) Act defines "attested" as follows:

> "'Attested', in relation to an instrument, means (and shall be deemed always to have meant) attested by two or more witnesses each of whom has seen the executant sign or affix his mark to the instrument, or has seen some other person sign the instrument in the presence and by the direction of the executant, or has received from the executant a personal acknowledgment of his signature or mark, or of the signature of such other person, and each of whom has signed the instrument in the presence of the executant . . . ."

On behalf of the respondents it is contended that the word "sign" which is the act to be performed by the attesting witness means "actually sign", that is to say, by the writing of the attestor's signature. Stress is laid upon the acts to be done by the executant which are stated in the earlier portion of this definition. The executant may sign the instrument or affix his mark to it or may direct some other person to sign the instrument in his presence or may give a personal acknowledgment of his signature or mark or the signature of the person who has signed at his direction to the attestors. It is argued that none of the before-mentioned alternatives are given to the attesting witness whose only act is to affix his signature to the instrument in the presence of the executant and that the distinction between the acts of the executant and the attesting witness is clearly shown by the use of the one word "sign" in relation to the act of the latter. It is conceded that the Act of 1926 is retrospective;

and if the respondents' contention is sound, the result is that all such instruments as have been previously attested by marksmen have become invalidly attested although clearly they were validly attested previous to the Act of 1926—a very startling result which the appellant argues cannot have been intended by the Legislature. As CURGENVEN J. points out in his judgment there is no case law directly in point although a decision cited to us, namely, *Ram Charan* v. *Bhairon*(1) which is the only reported decision since the passing of the Act of 1926 on the point of attestation, does bear upon this question because it was there held that a signature made by some other person at the request of an attesting witness and on his behalf is a valid attestation by the attesting witness. This case was not, however, referred to in the second appellate Court. The definition of attestation in section 3 of the Transfer of Property Act of 1926 is the same as that in the Indian Succession Act (X of 1865) and it has been held in *Fernandez* v. *Alves*(2) and *Nitye Gopal Sircar* v. *Nagendra Nath Mitter Mozumdar*(3) that a marksman cannot validly attest a will. In both these cases rule 3 in section 50 of the Indian Succession Act (X of 1865) was considered although in the latter case it was conceded in the judgment that this view may certainly lead in some cases in India to a good deal of inconvenience and in some instances the due execution of a will may be impracticable. From these decisions it is contended by the respondents that by taking rule 3 in section 50 of the Succession

(1) (1930) I.L.R. 53 All. 1. (2) (1879) I.L.R. 3 Bom. 382.
(3) (1885) I.L.R. 11 Calc. 429, 431.

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Act and introducing that rule word for word into section 3 of the Transfer of Property Act of 1926 non-testamentary documents have now been put on the same footing as wills. There is no doubt much force in this contention but a good deal of its force is lost because the two before-mentioned decisions have not been followed by the Madras High Court and on the contrary their correctness is doubted in *Ammayee* v. *Yalumalai*(1) where it was held that, if the attesting witnesses affix their initials at the time of witnessing the execution of a will, it is sufficient compliance with the terms of section 50 of the Indian Succession Act. *Fernandez* v. *Alves*(2) and *Nitye Gopal Sircar* v. *Nagendra Nath Mitter Mozumdar*(3) are dealt with in the judgment at page 263 where it is stated :

"According to the English law, it is sufficient if the attesting witnesses affix either their marks or their initials . . . . . But it is contended that the Indian Succession Act, section 50, by providing that the testator 'shall sign or shall affix his mark to the will' and that the attesting witnesses 'must sign the will' makes a distinction between the testator and attesting witnesses and precludes the latter from merely putting marks or initials in attesting the will. In support of this contention, *Fernandez* v. *Alves*(2) and *Nitye Gopal Sircar* v. *Nagendra Nath Mitter Mozumdar*(3) are quoted. In these cases it was held that it was not sufficient for the attesting witnesses to put their marks to the will. We wish not to be understood as agreeing with these decisions. It seems to us open to argument that the principle of the English decisions as to what is a sufficient 'subscribing' within the meaning of the English Act applies equally as to what is a sufficient 'signing' by an attesting witness within the meaning of the Indian Act."

This of course was not a decision upon the point, the observations being merely *obiter*, but nevertheless it cannot be said that the Madras view is in

(1) (1892) I.L.R. 15 Mad. 261. (2) (1879) I.L.R. 3 Bom. 382.
(3) (1885) I.L.R. 11 Calc. 429, 431.

agreement with that of Bombay and Calcutta. The English law is quite clear upon this point. In Halsbury's Laws of England, Vol. 28, page 553, article 1098, it is stated :

"To make a valid subscription a witness must either write his name or make some mark intended to represent his name. A will may be subscribed by marks even though the witnesses are capable of writing";

and *Harrison* v. *Harrison*(1) is referred to as an authority for this statement. In Jarman on Wills (7th Edition), Vol. 1, at page 103, it is stated that

"a mark has been decided to be a sufficient subscription but it is never advisable, where it can be avoided (and, now that the art of writing is so common, seldom necessary) to employ marksmen as witnesses."

In England, therefore, where people are far more literate than in India, the mark of a marksman is a sufficient attestation to a will. It is difficult to see any sufficient reason for the application of a stricter rule in India where the large majority of people are illiterate. It has further to be observed that both *Fernandez* v. *Alves*(2) and *Nitye Gopal Sircar* v. *Nagendra Nath Mitter Mozumdar*(3) were decided before the General Clauses Act of 1897 was enacted. That provides in section 3 (52) that

"'sign' with its grammatical variations and cognate expressions shall, with reference to a person who is unable to write his name, include 'mark' with its grammatical variations and cognate expressions."

and section 4 (2) makes the definition applicable to all Acts passed after the 14th January 1887 unless there is anything repugnant in the subject or context. Section 3 (52) could not apply to the Succession Act of 1865 which was of very restricted

(1) (1803) 8 Ves. Jun. 184; 32 E.R. 324. (2) (1879) I.L.R. 3 Bom. 382.
(3) (1885) I.L.R. 11 Calc. 429.

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applicability but does in our view apply to the Transfer of Property Act of 1926. What we have now to consider, therefore, is whether there is anything repugnant in the context of the Transfer of Property Act of 1926 to the definition in section 3 (52) of the General Clauses Act of 1897. At first sight it might appear that such repugnancy exists as it might well be argued that, if the Legislature had in view the definition of "sign" in the General Clauses Act, it was unnecessary to mention any affixing of his mark by the executant. But in our view the act of execution by the executant is so important and the physical acts to which the attestors may have to testify are so important that the Legislature deemed it necessary to set out all the four alternatives in precise language. On the other hand, no such importance appears to us to be attached to the act of the attestors provided only it is done in the presence of the executant. Whether they sign the document themselves or affix their mark to it the mere presence of their names on the document will be sufficient *prima facie* evidence to show who the attestors are. The really essential part of the definition is that the attestors should be present and be assured by what they themselves see or by what the executant acknowledges before them that the executant has actually executed the document. On a careful analysis we accordingly see nothing in the context which would prevent the words "signed the instrument" being taken to be governed by the definition of "sign" in the General Clauses Act. As we have stated earlier, the construction put upon section 3 of the Transfer of Property Act of 1926, if correct, makes all

instruments which it is beyond question were validly attested by marksmen now invalid and, unless it is certain that the section intended to draw this marked distinction and bring about such an unfortunate result, it seems to us that it would be unreasonable to place that construction upon it.

The second point raised in the appeal is concerned with the signature of the Sub-Registrar on the back of the document. In view of the conclusion which we have just stated which establishes the validity of the gift deed, it is unnecessary to consider this at any length. We need only say that we agree with CURGENVEN J. when he says that evidence is certainly necessary to establish the fact that the Sub-Registrar signed the document in the presence of the executant. It is impossible to presume that he did this as he is under no legal obligation to do it. All he has to do is to certify that the executant was properly identified and acknowledged execution before him and this he may quite properly do at a time when the executant has left his office. In the present case admittedly there is no evidence that the Sub-Registrar signed in the presence of the executant. He therefore cannot be held to be a valid attestor. But as we have now found that both P.W. 7 and P.W. 8 are valid attestors this appeal must be allowed with costs here and in second appeal and the decree of the District Judge restored.

A.S.V.