into between the parties for payment in certain ways; and the order was, that it should be recorded. The learned Judges in that case considered that the order there might be regarded as one embodying the compromise, and that, the compromise being an actual undertaking to pay, the order was an order to pay. On the other hand in the case of *Bal Chand* v. *Raghunath Das* (1) the facts are precisely similar to those of the present case; and the learned Judges there took the same view as we have taken here. For these reasons we think that the view taken by the lower Appellate Court cannot be supported.

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The result is that the order of the lower Appellate Court must be set aside, and the order of the first Court, the Munsiff, affirmed, with costs.

J. V. W. *Appeal allowed.*

Before Mr. Justice Tottenham and Mr. Justice Ghose.

HORENDRANARAIN ACHARJI CHOWDHRY (PLAINTIFF) *v.* CHANDRAKANTA LAHIRI AND ANOTHER (DEFENDANTS).*

1888 *August* 10

Will—Attestation of will—Purda nashin lady—"In the presence of"—Succession Act (X of 1865), s. 50.

After execution of her will by a testatrix, a *purda nashin* lady, and its attestation in her presence by a witness who had seen her execute it, it was presented for registration, the testatrix sitting behind one fold of a door which was closed, the other fold being open, and the registrar and another person who identified the testatrix being in the verandah outside the room behind the door of which the testatrix sat, all that the registrar actually saw of her being her hand. The testatrix admitted her execution of the will, and her admission was endorsed on the will and witnessed by the registrar and the person who identified her at the same time. *Held*, that the witness was "in the presence of" the testatrix within the meaning of s. 50 of the Succession Act (X of 1865).

THIS appeal was brought in the matter of an application for probate of the will of one Rudramani Debya, a *purda nashin* lady, widow of one Kalichundra Lahiri. The will was executed on the 24th Kartick 1291 (8th November 1884), and the testatrix died on the 24th Aughran 1291 (8th December 1884).

* Appeal from Original Decree No. 67 of 1887, against the decree of J. R. Hallett, Esq., Judge of Rungpore, dated the 5th of February 1887.

(1) I. L. R., 4 All. 155.

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The only question material to this report was whether the attestation of the will was sufficient to satisfy the requirements of s. 50 of the Succession Act (X of 1865). The evidence showed that, though the will was executed in the presence of the witnesses, only one of the witnesses, *viz.*, Shurut Chunder Bandopadhya, who was also the writer of the will and had signed it for the testatrix in her presence and by her direction, signed it in the presence of the testatrix; the other witnesses having been told by the testatrix to go and sign it downstairs because she wanted to perform her *puja*. A commission was issued for the examination of other witnesses, one of whom stated that one of the other witnesses to the will also signed the will in the presence of the testatrix, but his evidence as to this was disbelieved by the Judge. It appeared, however, that, the Registrar of Calcutta having been sent for, the will was on the same day presented for registration, when execution was admitted to the Registrar by the testatrix, who was identified by her medical attendant Kedarnath Singha, both the Registrar and Kedarnath Singha signing their names as witnesses. At the time of the registration the testatrix was inside a room behind one fold of a door, the other fold of which was open, and the Registrar and the other witnesses were in the verandah into which the door opened.

The cases of *In the goods of Roymony Dossee* (1), *Hurro Sundari Dabya* v. *Chunder Kunt Bhuttacharjee* (2), and *Nitye Gopal Sircar* v. *Nagendra Nath Mitter* (3), have decided that if a signature on a will is admitted by the testator to be his, and he is identified before the Registrar by one of the witnesses to the signature, and both the Registrar and identifier sign their names as witnesses to the admission made, such an attestation is sufficient to satisfy s. 50 of the Succession Act. The only question in the present case was whether the signatures were affixed "in the presence of" the testatrix within the meaning of that section. The evidence of the Registrar was not before the lower Court, and that Court thought the evidence of the witness examined on the commission, who stated he had signed the will in the presence of the testatrix, unsatisfactory, and refused the application for probate.

(1) I. L. R., 1 Calc., 150. (2) I. L. R., 6 Calc., 17.
(3) I. L. R., 11 Calc., 429.

The applicant appealed to the High Court.

Mr. *Woodroffe*, Baboo *Grish Chunder Chowdhry*, and Baboo *Horendro Nath Mukerji*, for the appellant.

Baboo *Hem Chunder Banerjee*, and Baboo *Jadub Chunder Seal*, for the respondents.

For the appellant it was contended that the attestation was sufficient. The test is whether the testatrix could have seen the witnesses had she chosen to look—Williams on Executors, 8th Ed., p. 93; *In the goods of Piercy* (1); *Newton* v. *Clarke* (2); *Casson* v. *Dade* (3); *In the goods of Trimmel* (4); *Shires* v. *Glascock* (5); *Day* v. *Smith* (6); *Todd* v. *Winchelsea* (7); *Norton* v. *Basset* (8). The cases on this point where the attestation was held to be insufficient are cases where, under the circumstances, the testator could not have seen the witnesses even had he desired to do so.

It was only absolutely necessary at the registration of the will that there should be *one* witness, as the execution had already been attested by one witness, and it is not necessary that both the witnesses should sign at the same time.

For the respondents on this point the following cases were cited: *Doe* v. *Manifold* (9); *Winchelsea* v. *Wauchope* (10); *In the goods of Killick* (11); *In the goods of Newman* (12); *In the goods of Ellis* (13); *In the goods of Colman* (14); *Tribe* v. *Tribe* (15).

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

This is an appeal against a decree of the District Judge of Rungpore, refusing probate of a will alleged to have been executed by Rudramani Debya. The judgment of the Court below is very short; and it is not quite clear from that judgment whether

(1) 1 Robert, 278.
(2) 2 Curt., 320.
(3) 1 Bro. C. C., 99.
(4) 11 Jur. N. S., 248.
(5) 2 Salk., 688.
(6) 3 Salk., 395.
(7) M. and Malk., 12; S. C. 1 C. & P., 488.
(8) Dea. and Sw., 259.
(9) 1 M. and S., 249.
(10) 3 Russ., 441.
(11) 10 Jur. N. S., 1083.
(12) 1 Curt., 914.
(13) 2 Curt., 395.
(14) 3 Curt., 118.
(15) 1 Robert, 775.

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the Court below disbelieved the *factum* of the will or refused probate merely because the requirements of the law, as stated in s. 50 of the Indian Succession Act, made applicable to Hindus by the Hindu Wills Act, had not been fulfilled in the matter of attestation.

The learned counsel, who argued the appeal on behalf of the appellant-petitioner for probate, assumed in opening that the *factum* of the will was undisputed, and that it was left to him to argue only the point as to due attestation.

The learned vakil, however, who appeared for the respondents, strenuously contended that the will was not genuine, in addition to the defect in attestation. Section 50 of the Indian Succession Act requires, for the due execution of a will, that it shall be signed or marked by the testator, or, at his request, by somebody on his behalf, in the presence of two witnesses, and that the witnesses who attest it must sign the will in the presence of the testator. In the present case it appeared at the trial that only one of the attesting witnesses had signed the will in the actual presence of the testatrix. The first witness examined stated that, when the testatrix had signed the will, she desired the rest of the persons present to go downstairs, as she wished to perform her *puja*, and that the other witnesses signed in a room below, where the testatrix could not see them. This being the state of things shown in the District Court at the first hearing, a commission was issued to examine certain witnesses in Calcutta. One of these witnesses supplemented the case of the petitioner, so far as he said that one of the witnesses signed in the presence of the testatrix; but the District Judge disbelieved his evidence on this point, and possibly disbelieved the whole evidence in support of the will. But in the result he held that probate should not be granted, and dismissed the application.

At the close of the learned Counsel's address for the appellant we were prepared to call for further evidence as to the attestation because it appeared that the will itself had been registered, and the endorsements on the back purported to show that the will having been acknowledged by the testatrix in the presence of the Registrar and other persons, the Registrar and another witness signed the endorsement showing that she had admitted the

execution. And previous cases, decided in this Court, have held that such attestation by the Registrar would be sufficient. We have been referred to the case of *Hurro Sundari Dabya* v. *Chunder Kant Bhuttacharjee* (1), and to another case, *Nitye Gopal Sircar* v. *Nagendra Nath Mitter* (2), in which we ourselves were Judges, and in which we followed the law as laid down in the previous case. But upon hearing the respondents' pleader we found that he disputed the *factum* of the will itself. Therefore, before making up our mind to have further evidence, we thought it proper to hear him out. He urged many points against the will being accepted as a genuine document. He pointed out that the applicant for probate himself did not come forward to depose, nor did any other member of the family. He also pointed out discrepancies in the evidence, and he relied upon the state of the record, as it stood, as fully supporting the judgment of the lower Court. Assuming that judgment to be one against the *factum* of the will itself, he of course also relied upon the defect in the attestation which the learned counsel for the appellant had been compelled to admit. But upon a full consideration of the evidence we came to the conclusion that the document was unquestionably genuine, that is, the testatrix had really and intentionally signed it herself, fully knowing what its purport was. That being so, we considered it necessary, in order to come to a proper judgment in the case, to obtain the evidence of the Registrar of Calcutta and the other witness whose name appears on the endorsement. It seemed to us that, if the Registrar was in a position to prove beyond doubt that he had actually signed this endorsement in the presence of the testatrix, his evidence would be sufficient to complete the case of the petitioner. We accordingly adjourned the hearing to this day. And to-day we have examined the Registrar and Baboo Kedarnath Singha, the other witness.

As regards Baboo Kedarnath Singha, we are not able to place any great reliance upon his statement. But as regards the evidence of Baboo Pertap Chunder Ghose, the Registrar of Calcutta, we think it unexceptionable, excepting so far as his

(1) I. L. R., 6 Calc., 17. (2) I. L. R., 11 Calc., 429.

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memory, after the lapse of four years, has deceived him. There is a discrepancy between his evidence and that of Kedarnath Singha as to the particular place in which the registration was effected, that is to say, whether it took place upstairs or down-stairs, and whether the Registrar was in the verandah outside the room in which the testatrix sat, or in the same room. Speaking for myself, what weighs with me most in the Registrar's evidence is his positive assurance that in such a case as this he never omits to make the endorsements and sign them then and there in the presence of the executant. He was asked if he had ever postponed making the endorsements until he returned to his office, then filling up the endorsements at his leisure; and he said that he never did so: and he also stated that he was especially careful in the case of a will to satisfy himself that the executant knew what the contents of the document were. He tells us that the testatrix in this case was decidedly an intelligent lady, and she repeated the substance of the contents of the will. From his evidence it would appear that he and the other witness were in the verandah outside the room, behind the door of which the lady sat. He remembers that she sat behind one fold of the door which was closed, and the other fold open, she being seated behind the fold closed; he also stated that all he saw of her was her hand. The question is therefore whether he was in her presence within the meaning of s. 50. It seems to have been held in English cases that "in the presence of the testator" would include his being in such a position that he could, if he chose, see the witnesses. We think that the testatrix in this case, if she sat behind one fold of the door, the Registrar being admittedly outside in the verandah, might, if she chose, without leaving her seat, have seen him by putting her head forward. It is obvious that it is not absolutely necessary that the testator should actually see the witnesses who attest the will, because a blind person may execute a will. It has been held in England that if a blind person is so placed as, if he had not been blind, he could have seen the witnesses, these witnesses were in his presence within the meaning of the law. That is the case of *In the goods of Piercy* (1). There is another case—*Newton* v. *Clarke* (2)—

(1) 1 Robert, 278. (2) 2 Curt., 320.

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in which the testator signed his will while lying in his bed. There were two attesting witnesses, one of whom the testator could see and could be seen by him, and the other witness was so placed behind a curtain that neither could he see, nor could be seen by, the testator; it was held, however, that both witnesses were sufficiently in the presence of the testator to make their attestation valid. That we think is a very fair case to follow in the case of a *purda nashin* lady. It is unquestionable that had the fold of the door been removed the testatrix in this case would have been able to see the witnesses who signed and attested her will. It also appears to our mind that the testatrix could have seen them by putting her head forward.

That being so, we think probate of the will should be granted.

We accordingly set aside the decree of the lower Court and decree the appeal. But under the circumstances we do not think we ought to make the respondent pay the costs, for upon the evidence before the District Judge he was right in refusing probate

J. V. W. *Appeal allowed.*

Before Mr. Justice Wilson and Mr. Justice O'Kinealy

ISHUR CHUNDER BHADURI (PLAINTIFF) *v.* JIBUN KUMARI BIBI (DEFENDANT).*

1888 *July* 27.

Limitation Act, 1877, *Arts.* 59 *and* 60—*Money deposited—Banker and Customer—Money lent—"Deposit"—"Trust"—Cause of action—Demand.*

The plaintiff deposited from time to time with the firm of the defendant, who carried on a banking business, various sums of money, the amounts deposited bearing interest, and at times certain sums being withdrawn by the plaintiff, and an account of the balance of principal and interest being struck at the end of each year and presented to the plaintiff. The date of the first deposit was not known, but it was some time previous to 1282 (1875). A demand was made for the whole amount of the principal and interest in Bhadro 1292 (August—September 1885), and the demand not having been complied with, a suit to recover the money was brought on the 8th March 1886. *Held*, that s. 60 and not s. 59 of the Limitation Act was applicable to the case; the cause of action therefore arose at the date of the demand and the suit was not barred.

* Appeal from Appellate Decree No. 1933 of 1887, against the decree of G. G. Dey, Esq., Judge of Pubna and Bogra, dated the 29th of June 1887, reversing the decree of Baboo Bulloram Mullick, Subordinate Judge of that district, dated the 29th of December 1886