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not be, impugned in the plaint when it was filed on the 22nd December, 1926, but it was clearly admitted that the prior mortgage was subsisting and was paramount. The case is similar to the cases decided by this Court in *Ajudhia Pande* v. *Inayat-ullah* (1) and *Collector of Moradabad* v. *Muhammed Hidayat Ali Khan* (2).

In our opinion the claim of the plaintiff that she has acquired rights by payment of the money due on the prior mortgage decree is not barred by the principle of *res judicata*.

The answers to both parts of the question referred to us are in the negative.

Before Mr. Justice Thom, Mr. Justice Niamat-ullah and Mr. Justice Rachhpal Singh

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MAIKOO LAL AND ANOTHER (APPLICANTS) *v.* SANTOO AND OTHERS (OPPOSITE-PARTIES)*

Succession Act (XXXIX *of* 1925), *section* 63—*Will—Attestation—Attesting witnesses not signing but affixing their marks—Validity—"Sign"—General Clauses Act* (X *of* 1897), *section* 3(52)—*Interpretation of statutes—Ambiguity.*

A will is validly attested, within the meaning of the provisions of section 63 of the Succession Act, if either of the two necessary attesting witnesses has merely affixed his mark to the will.

In view of the definition of "sign" as given in section 3(52) of the General Clauses Act the word "sign" in clause (*c*) of section 63 of the Succession Act should be interpreted to include affixing a mark, although the section is ambiguous inasmuch as a distinction has been drawn in clauses (*a*) and (*b*) of the section between signing and affixing a mark.

Where a section is ambiguous and two interpretations are possible, that interpretation should prevail which is most consistent with reason, common sense and convenience.

Mr. *Ram Nama Prasad*, for the appellants.

Messrs. *S. N. Seth* and *Brij Narain Mehrotra*, for the respondents.

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*First Appeal No. 54 of 1935, from an order of S. Iftikhar Husain, Additional District Judge of Cawnpore, dated the 19th of January, 1935.

(1) (1912) I.L.R., 35 All., 111. (2) (1926) I.L.R., 48 All., 554.

THOM, NIAMAT-ULLAH and RACHHPAL SINGH, JJ.:— The question referred to this Bench for decision is as follows: "Is a will validly attested within the meaning of the provisions of section 63 of the Indian Succession Act if either of the attesting witnesses has merely affixed his mark to the will?"

The material portions of section 63 of the Succession Act are as follows: "(*a*) 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. (*b*) 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. (*c*) The will shall be attested by two or more witnesses each of whom has seen the testator sign or affix his mark to the will or has seen some other person sign the will in the presence and by the direction of the testator, . . . and each of the witnesses shall sign the will in the presence of the testator . . . "

Learned counsel for the appellants contended that a will was validly attested if the witnesses simply affixed their mark to the document In support of his argument he referred to section 3, sub-section (52) of the General Clauses Act. Sub-section (52) is as follows: " '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." Learned counsel contended that in view of the aforementioned provision of the General Clauses Act the signature of a witness included his mark and that therefore a document was not invalid merely upon the ground that a witness had affixed his mark to the document instead of his signature.

Learned counsel for the respondents, upon the other hand, contended that in section 63 of the Indian Succession Act the legislature has drawn a clear distinction between signature and mark. In particular learned counsel referred to the fact that by sub-section (*a*) of

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section 63 it is open to the testator either to sign in the sense of actually writing his signature, or to affix his mark, but the person who may sign for him must affix his signature; it is not open to him merely to affix his mark. Similarly learned counsel contended that in sub-section (*c*) of section 63 there is the same clear distinction drawn between signature and mark. In this section, he contended, it is implied that the testator may sign in the sense of writing his signature or he might affix his mark, but it is enjoined that the witnesses must sign. The expression used is "and each of the witnesses shall sign", not that "each of the witnesses shall sign or affix his mark".

It is clear from a consideration of the terms of section 63 as a whole that the legislature intended that, where the testator was unable either to sign or to affix his mark the third person who signed for him had to sign by writing his signature and the name of the testator. It is not open to him merely to affix his mark.

It is further clear, in view of the provisions of sub-section (52) of section 3 of the General Clauses Act, that section 63 of the Indian Succession Act has been drafted in a careless and slovenly manner.

Two interpretations of the section are possible. It is possible to interpret the section as urged by learned counsel for the respondents and to hold that so far as the attestation of wills is concerned the legislature intended to draw a clear distinction between the signing of the will in the sense of writing the signature on the one hand and the affixation of the mark of a person on the other, and that so far as the person signing for the testator, and the witnesses, are concerned the legislature intended the signature, in the sense of writing the actual signature, to be essential.

On the other hand, it is possible to interpret the section in the light of sub-section (52) of section 3 of the General Clauses Act, and to construe the expression "and each of the witnesses shall sign" with particular reference to that sub-section.

The question which we have to decide is as to which interpretation should in the circumstances be adopted. In other words, what interpretation is consistent with the intention of the legislature so far as that intention is to be gathered from the language of the Act.

Section 3 of the Transfer of Property Act defines the word "attested" and in the definition the same distinction is drawn between the executant and the witnesses. The executant may sign or affix his mark, but the witnesses must sign.

The definition of "attested" in section 3 of the Transfer of Property Act was considered by a Bench of the Madras Court in the case of *Nagamma* v. *Venkatramayya* (1). In that case it was held that a document was validly attested even though one of the witnesses had merely affixed his mark to the document as a witness. In the course of his judgment the learned CHIEF JUSTICE refers to the English law upon this point. He quotes from Halsbury's Laws of England the following passage: "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." This principle is supported by the author of Jarman on Wills, volume I, 7th edition, page 103. The learned CHIEF JUSTICE then proceeds: "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." We find ourselves in complete agreement with the view which has been expressed in that case upon this point.

Learned counsel for the respondents referred to two earlier cases, *Fernandez* v. *Alves* (2) and *Nitye Gopal Sircar* v. *Nagendra Nath Mitter* (3). In both these cases the decision was that a will was not validly attested if

(1) (1934) I.L.R., 58 Mad., 220. (2) (1879) I.L.R., 3 Bom., 382.
(3) 1885 I.L.R., 11 Cal., 429.

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the witnesses had not actually signed the document. As was observed, however, in the Madras case referred to above, these cases were decided before the General Clauses Act of 1897. Prior to this Act there was no statutory definition of the word "sign".

As we have already observed there are two possible interpretations of section 63 of the Indian Succession Act. The interpretation for which learned counsel for the respondents contended would undoubtedly lead to most untoward results in these provinces. In the large majority of cases, for example, mortgages are attested by illiterate witnesses who merely affix their marks to the documents. The same is true of testamentary deeds. If we are to hold that the legislature intended that witnesses must sign the documents which they attest and not merely affix their marks thereon, it will follow that all these deeds will be invalid. We should be reluctant to interpret the section in such a way that such consequences would ensue. Undoubtedly the section is ambiguous. Its ambiguity arises from careless draftsmanship. Two interpretations are possible, and apart from authoritative decision, in our view the court should be guided by the general principle that that interpretation should prevail which is most consistent with reason, common sense and convenience. That principle has been enunciated in Maxwell on Statutes, 7th edition, at page 166. In section 1 dealing with presumption against intending what is inconvenient or unreasonable, the learned author states: "In determining either the general object of the legislature, or the meaning of its language in any particular passage, it is obvious that the intention which appears to be most in accord with convenience, reason, justice and legal principles should, in all cases of doubtful significance, be presumed to be the true one."

Undoubtedly the interpretation which is most in accord with convenience, reason, justice and legal principles is the interpretation for which the appellants contend. Furthermore we would observe that we can

see no reason whatever why the legislature should have deliberately excluded illiterate persons as witnesses to testamentary dispositions in a country where the large majority of the people are illiterate.

For the above reasons we are of opinion that a will is validly attested within the meaning of the provisions of section 63 of the Indian Succession Act if either of the two necessary attesting witnesses has merely affixed his mark to the will. We answer the question referred to this Bench accordingly.

APPELLATE CIVIL

Before Mr. Justice Bennet and Mr. Justice Smith
And on a reference
Before Sir Shah Muhammad Sulaiman, Chief Justice

MUNICIPAL BOARD, AGRA (DEFENDANT) *v.* RAM LAL (PLAINTIFF)*

1936
March, 19
April, 22

Municipalities Act (Local Act II of 1916), section 97—Written contract between Municipal Board and a contractor to execute unspecified repairs and constructions as might be ordered by municipal engineer during one year—Validity—Whether a separate written contract for each item of work necessary.

A written contract, signed by a contractor as well as by the chairman and the executive officer of a Municipal Board, was entered into, by which the contractor undertook to execute such repairs and constructions as might be ordered by the municipal engineer from time to time during the period of one year; he was to be paid at the rates enumerated in the schedule of rates sanctioned by the Municipal Board; and on failure to carry out any such order he would forfeit the security deposit and the contract would be annulled. Details or specifications of the items of works that might be ordered by the municipal engineer during the said period were not given in the contract:

Held, (SMITH, J., *contra*) that the contract fulfilled the requirements of section 97 of the Municipalities Act and was valid, although it did not specify and detail the various items

*First Appeal No. 419 of 1932, from a decree of M. A. Nomani, Subordinate Judge of Agra, dated the 24th of June, 1932.