

S. M. Mullick, N. C. Ghosh and S. N. Roy, for the respondents. 1928.

Order.

DAS AND JAMES, JJ.—This was a suit for produce rent and the learned Subordinate Judge has given the plaintiffs a decree on the admission of the defendants. It may be pointed out that the entire onus was on the defendants to satisfy the Court what was the produce during the years in suit and it may further be pointed out that the learned Subordinate Judge has disbelieved the evidence of the defendants. But disbelieving the evidence the learned Subordinate Judge has proceeded on the admission of the defendants and has given what I consider a very inadequate decree to the plaintiffs.

Mr. S. M. Mullick appearing on behalf of the tenants agrees that the road cess return should be taken as the basis of the decree. By consent of the parties the plaintiffs will have a decree at the rate of Rs. 262-2-9 per year besides cess. The plaintiffs are also entitled to damages at the rate of 25 per cent. There will be no order for costs in this Court. Interest at 6 per cent. per annum will run upon the decree from the date hereof until realisation.

APPELLATE CIVIL.

Before Kulwant Sahay and Macpherson, JJ.

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v.

BISWAMBHAR DAS MAHAPATRA.*

Succession Act, 1865 (Act X of 1865), section 50—pleader, signature of as identifier, on cover containing will, whether amounts to attestation—Registrar, endorsing but not signing

Circuit Court, Cuttack. Appeal from Original Decree no. 14 of 1927, from a decision of G. J. Monahan, Esq., I.C.S., District Judge of Cuttack, dated the 26th June, 1927.

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cover bearing testator's superscription, whether an attesting witness—Hindu will. whether requires attestation by two witnesses—Hindu Wills Act, 1870 (Act XXI of 1870).

A will by a Hindu, executed within the territories once subject to the Lieutenant-Governor of Bengal, requires attestation by two witnesses under section 50, Succession Act, 1865 (corresponding to section 63 of Act XXXIX of 1925), which was made applicable to Hindu Wills by the Hindu Wills Act, 1870.

Balmakund v. Ramendra Nath Ghose (1), distinguished.

Where, under section 42 of the Registration Act, 1908, a testator deposits his will, with the Registrar, in a sealed cover bearing a superscription that the cover contains the testator's last will, and the Registrar endorses the cover in the manner required by section 43, and copies the superscription and endorsement in his register, and signs the register, but not the cover. *Held*, that the Registrar is not in such circumstances an attesting witness to the will within the meaning of section 50 of the Succession Act, 1865.

Seemle that a person who signs the testator's superscription on the cover may in certain circumstances thereby become an attesting witness to the will, but a person who signs, as identifier, the Registrar's endorsement in the cover, is not an attesting witness to the will.

Hurro Sundari Dabia v. Chunder Kant Bhattacharjee (2), *Nitya Gopal Sircar v. Nagendra Nath Mitter Mozumdar* (3), *Horendranarain Acharji Chowdhury v. Chandrakanta Lahiri* (4), *Amarendra Nath Chattarji v. Kashi Nath Chattarji* (5), and *Sarada Prasad Tej v. Trigunacharan Ray* (6), followed.

Bond v. Seawell (7), distinguished.

Appeal by the plaintiff.

The facts of the case material to this report are stated in the judgment of Kulwant Sahay, J.

B. N. Das and *S. K. De*, for the appellant.

B. K. Ray, for the respondents.

(1) (1928) I. L. R. 50 All. 314. (4) (1889) I. L. R. 18 Cal. 19.

(2) (1881) I. L. R. 6 Cal. 17. (5) (1900) I. L. R. 27 Cal. 169.

(3) (1885) I. L. R. 11 Cal. 429. (6) (1922) I. L. R. 1 Pat. 300.

(7) (1765) 3 Burr. 1773; 97 E. R. 1091.

KULWANT SAHAY, J.—This appeal arises out of an application for grant of letters of administration with a copy of the will annexed. The learned District Judge of Cuttack has refused to make the grant and the applicant has preferred the present appeal.

The will which is sought to be proved in the present case was executed by Balabhadra Prasad Bairiganjan Bhuyan Mahapatra on the 14th December, 1916. He died on the 8th January, 1922, leaving four sons, of whom the eldest Umakanta Bairiganjan Bhuyan Mahapatra was the applicant for the letters of administration and the other three sons opposed the grant. The learned District Judge has found that the document which was marked exhibit 4 by him purported to be the last will of the testator, that it was actually signed by him and that he was in a sound disposing state of mind at the time he executed it. He, however, found that it was not a valid will inasmuch as it had not been attested by two witnesses as required by law. The document (Exhibit 4) bears the signature of the testator on the top of the first page. There is no signature of any attesting witness and it is signed by Nilamber Patnaik at the end. Nilamber Patnaik was the writer of the will and he signed it as such. On the face of it therefore the will does not purport to bear the signature of any attesting witness. It is, however, contended that Nilamber Patnaik was not only the scribe of the document but was also an attesting witness. The testator after executing the will put it in a sealed cover and deposited it with the Registrar under section 42 of the Indian Registration Act. There is an endorsement in Oriya on the cover to the following effect :—

“ I, Sri Balabhadra Prasad Das Bairiganjan Bhuyan Mahapatra, of mauza Mangalpur samil mauza Gopinathpur, pargana Banchas, district Balasore, do execute this last will. Finis. The legatees are no. 1 Sri Tikayat Babu Umakanta Das Mahapatra, no. 2 Sri Babu Biswambhar Das Mahapatra, no. 3 Sri Babu Nityanand Das Mahapatra and no. 4 Sri Babu Sachidananda Das Mahapatra, who are my (Balbhadraprasad Das Bairiganjan Bhuyan Mahapatra's) sons. Dated 14-12-1916.”

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Below this endorsement in Oriya occurs the signature of Balbhadraprasad Das in Oriya. Below this is an endorsement in English made by the Sub-Registrar which runs thus :—

“ Presented this day the 14th December, 1916, at 1 P.M. by Balbhadraprasad Das Bairiganjan Bhuyan Mahapatra, son of Raghunath Das Rajkumar Bairiganjan Bhuyan Mahapatra of Mangalpur samil mauza Gopinathpur, pargana Banchas, thana Soro, by caste Karan, by profession zamindar, who is identified by Babu Hem Chandra De, Pleader, Balasore.”

The inscriptions on the seals that are legible are—

“ Sri Balbhadraprasad Das Bhuyan.”

This endorsement written by the Sub-Registrar does not bear any signature. There is, however, a signature, on the margin, of the testator Balbhadraprasad Das, and below it the signature of the pleader Babu Hem Chandra De. This superscription on the cover was copied by the Registrar in his Register no. 5 and this register was signed by him.

It is contended on behalf of the appellant that the scribe Nilamber Patnaik, the pleader Hem Chandra De and the Sub-Registrar were all attesting witnesses to the will. The learned District Judge has found that not one of them was an attesting witness. As regards the scribe Nilamber Patnaik, he does not purport to sign the will as a witness but as a scribe. The Oriya letters “ ni : ” with two dashes occur before his signature and it is contended that these letters “ ni : ” are a compound of two letters ‘ na ’ and ‘ i ’ and that “ na ” stands for nawisinda which means a scribe and that “ i ” stands for “ ishad ” which means a witness. This argument is ingenious but too far-fetched. Nawisinda and ishad or ishtishad are Persian words and it cannot be accepted that the Oriya letters “ ni : ” with the colon are a compound of these two words. The “ ni : ” on the document clearly stands for “ nikhitang ”, the Balasore form of “ likhitang ” (where n and l are often interchanged) and means “ written by ”. A scribe or any writer generally prefixes it to his signature. The

document, therefore, on the face of it, does not purport to have been attested by Nilamber as a witness. Evidence has, however, been given by the pleader Babu Hem Chandra De to the effect that the testator had told him that his confidential clerk Nilamber had written and attested the will. In cross-examination, however, he was forced to admit that all that the testator told him was that Nilamber wrote and signed it and even in re-examination he stated that what the testator told him might also mean that Nilamber 'had signed the will as a scribe' and not as a witness. This evidence therefore does not prove that Nilamber was an attesting witness.

Assuming that Nilamber signed the document not only as scribe but as a witness the law requires that the will must be attested by two or more witnesses, each of whom must have seen the testator sign or affix his mark to the will or must have received from the testator a personal acknowledgment of his signature or mark, and each of the witnesses must sign the will in the presence of the testator. These facts have not been proved in the present case. It has not been proved that Nilamber saw the testator sign the will or that he received from the testator a personal acknowledgment of his signature on the will and that he himself signed the will in the presence of the testator. It is thus clear that Nilamber cannot be treated as an attesting witness to the will.

As regards the Sub-Registrar, it is also clear that he cannot be treated as an attesting witness. It is contended that the endorsement on the cover containing the will must be taken to be a part of the will and further that the acknowledgment of the testator before the Sub-Registrar and the pleader Babu Hem Chandra De to the effect that the document contained in the cover was his will and that he had executed the same, and followed by the signature of the Registrar and of the pleader would be a sufficient compliance with the provisions of section 50 of the Indian

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1928. Succession Act of 1865, which corresponds to section 63 of the present Act (Act XXXIX of 1925), and that the Sub-Registrar and the pleader must be considered to be attesting witnesses. It is extremely doubtful whether the cover in which the will was placed and which was presented to the Sub-Registrar for deposit under section 42 of the Indian Registration Act can be treated as a part of the will. There is, however, an endorsement on the cover in Oriya where the testator says,

“ I do execute this last will,”

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and it bears the signature of the testator. Assuming that this endorsement on the cover containing the will was a sufficient acknowledgment of his signature upon the will it was not signed by the pleader as a witness. The signature of the pleader was taken to the endorsement of presentation made on the cover by the Sub-Registrar, and it is clear from the evidence of the Sub-Registrar that the pleader Babu Hem Chandra De signed this endorsement of presentation as an identifier as required by section 43 of the Indian Registration Act. It is contended that even under these circumstances the pleader should be taken to be an attesting witness, and reference is made to certain rulings of the Calcutta and Patna High Courts.

In *Hurro Sundari Dabia v. Chander Kant Bhattacharjee* ⁽¹⁾ where a testatrix admitted a signature on a will to be hers before a Registrar of Assurances and was identified before him by one of the witnesses to the signature and both the Registrar and the identifier signed their names as witnesses to the admission, it was held by Garth, C.J., and Mitter, J., that such an attestation was a sufficient compliance with the provisions of section 50 of the Indian Succession Act. The same view was taken by another Division Bench of the Calcutta High

Court in *Nitya Gopal Sircar v. Nagendra Nath Mitter Mazumdar* (1). In *Horendranarain Acharji Chowdhury v. Chandrakanta Lahiri* (2) admission of execution of a will before the Registrar and his signature on the endorsement of registration was held to be an attestation of the will. In *Amarendra Nath Chattarji v. Kashi Nath Chattarji* (3) it was held that the registration of his will by a testator and his signature to the certificate of admission of execution testified by the signatures of the Sub-Registrar and of a witness was sufficient attestation to satisfy the requirements of section 50 of the Indian Succession Act. In *Sarada Prasad Tej v. Trigunacharan Ray* (4) the cases cited above and some other cases were considered and it was held that the signature of the Registrar to the endorsement of admission of the will by the testator was a sufficient compliance in respect of attestation of a will as required by section 50 of the Act. There is, therefore, considerable force in the argument of the learned Advocate for the appellant in support of the view that the signature of the pleader on the cover containing the will should be regarded as the signature of an attesting witness although he signed the endorsement made by the Registrar as an identifier and not the endorsement in Oriya characters and the signature of the testator appearing on the cover. But the further argument of the learned Advocate that the signature of the Registrar should also be considered to be that of an attesting witness is one which cannot be accepted. His signature does not appear on the cover containing the will but in his own Register no. 5, in which under the rules he had to copy the endorsement as regards presentation which he had made on the cover. The Register no. 5 which bore the signature of the Registrar can in no sense be considered to be a part of the will. Reliance has been placed on *Bond v. Seawell* (5).

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(1) 1885) I. L. R. 11 Cal. 429.

(3) (1900) I. L. R. 27 Cal. 169.

(2) (1899) I. L. R. 16 Cal. 19.

(4) (1922) I. L. R. 1 Pat. 300.

(5) (1765) 3 Burr. 1778; 97 E. R. 1091.

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In that case the will was written on two sheets of paper. Two attesting witnesses, who came in after the execution of the will, were shown the last sheet of the will and the testator sealed the will and a codicil which was written on another sheet of paper. The two witnesses attested the same in the testator's presence but they never saw the first sheet of the will nor was that sheet produced to them; nor was the same or any other paper upon the table. It was held that if the first sheet was in the room at the time when the latter sheet was executed and attested, there would remain no doubt of its being a good will and a good attestation of the whole will. This case does not help the appellant in the present case. It does not go to the length of making the Register no. 5 which contained the signature of the Registrar a part of the will. There the will itself was written on two sheets of paper and there was a codicil on the third sheet of paper. The first sheet of the will was not shown to the witnesses but it was in the room, and the witnesses who attested the signature of the testator on the second will were held to be the attesting witnesses of the whole will. It is thus clear that the Sub-Registrar cannot be treated as an attesting witness of the will, and at most it is the pleader Babu Hem Chandra De who alone can be treated as an attesting witness; but the law requires the attestation of the will by two witnesses and even if the pleader be considered to be an attesting witness the will has not been executed according to law.

It is next contended that a Hindu will does not require attestation at all and reference is made to *Balmakund v. Ramendra Nath Ghose* (1) where in the course of their judgment the learned Judges observed at page 317 of the report as follows: "Under section 3 of the Probate and Administration Act a will is defined as being the legal declaration of the intention of the testator with respect to his property

(1) (1928) I. L. R. 50 All. 814.

which he desires to be carried into effect after his death. It is not disputed that in the case of a Hindu, as Ram Rup Ghose was, the declaration may be legal although it is not signed by the testator, nor attested by witnesses, and it has been held in a number of cases that the draft instructions given by a testator to a lawyer, or a draft will prepared on such instructions can be treated as a will so as to allow grant of probate. We may refer in this connection to three cases, *Aulia Bibi v. Ala-ud-din* (1), *Janki v. Kaluu Mal* (2) and *Sarabai Amibi v. Mahomed Cassum*(3).

In this connection it has to be remembered that section 50 of the Indian Succession Act (Act X of 1865) which corresponds to section 63 of the present Act was made applicable to the wills of Hindus by the Hindu Wills Act (Act XXI of 1870). The provisions of the Hindu Wills Act were made applicable to all wills and codicils made by any Hindu on or after the 1st September, 1870, within the territories which were on the 1st September, 1870, subject to the Lieutenant-Governor of Bengal or within the local limits of the ordinary original civil jurisdiction of the Madras and Bombay High Courts and did not apply to the United Provinces to which the case of *Balmakund v. Ramendra Nath Ghose* (4) appertains; and therefore that case has no application to the facts of the present case which is governed by the Hindu Wills Act. The new Indian Succession Act of 1925 is made applicable to all Hindu wills from the 1st January, 1927. It is thus clear that attestation by two witnesses was necessary in order to validate the will now before us. The decision of the learned District Judge appears to be correct and this appeal is dismissed.

It is contended that the costs awarded by the District Judge are excessive as the hearing fee

(1) (1906) I. L. R. 28 All. 715.

(2) (1909) I. L. R. 31 All. 236.

(3) (1919) I. L. R. 48 Bom. 641.

(4) (1928) I. L. R. 50 All. 814.

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allowed by the District Judge was Rs. 1,236. This however, was in accordance with the General Rules and Circular Orders of the High Court. Having regard, however, to the fact that the will propounded was the genuine will of the testator and the application for letters of administration fails merely because the will was not properly attested, the costs in this Court as well as in the Court below should come out of the estate dealt with in the will. With this slight modification this appeal is dismissed.

MACPHERSON, J.—I agree. Indeed I go somewhat further and hold that the pleader was purely a witness to the deposit of the will, was not asked by the testator to attest his will and had no animus attestandi.

APPELLATE CRIMINAL.

Before Kulwant Sahay and Macpherson, JJ.

RAMCHANDRA PADHI

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KING-EMPEROR.*

Code of Criminal Procedure, 1898 (Act V of 1898), sections 195(3) and 476B—Munsif, whether subordinate to Subordinate Judge of Sambalpur within the meaning of the sections—Bengal, Agra and Assam Civil Courts Act, 1887 (Act XII of 1887), section 21, clauses (2) and (4)—notification—appeal, whether lies from an order of appellate court making complaint after subordinate court refuses to do so.

Section 21 of the Bengal, Agra and Assam Civil Courts Act, 1887, provides :

“(2).....an appeal from a decree or order of a Munsif shall lie to the District Judge; (4) The High Court may, with the previous sanction of the Local Government, direct, by

**Circuit Court, Cuttack. Criminal Appeal no. 2 of 1928, from a decision of Babu Sadhu Charan Mahanty, officiating Subordinate Judge, Sambalpur, dated the 7th July, 1928.*