

APPELLATE CIVIL.

Before Sir Richard Garth, Kt., Chief Justice, and Mr. Justice Mitter.

IN THE MATTER OF THE PETITION OF HURRO SUNDARI DABIA AND
OTHERS.*

1880
May 14.

HURRO SUNDARI DABIA v. CHUNDER KANT BHUTTACHARJEE.

Will, Attestation of—Succession Act (X of 1865), s. 50—Hindu Wills Act (XXI of 1870), s. 2.

Section 50 of the Succession Act (X of 1865) clearly intends that the two attesting witnesses to a will shall sign their names *after* the testator or testatrix shall have executed the will.

Bissonath Dinda v. Doyaram Jana (1) and *Fernandez v. Alves* (2) followed.

If a testatrix admits a signature on a will to be hers before a Registrar of Assurances, and is identified before him by one of the witnesses to the signature, and both the Registrar and the identifier sign their names as witnesses to the admission made,—

Hell, that such an attestation would be sufficient to satisfy s. 50 of Act X of 1865.

In the goods of Roymoney Dossee (3) followed.

THIS was an application made by Hurro Sundari Dabia and others, under Act XXI of 1870, to obtain probate of the will of one Tara Sundari Dabia, who had died on the 16th Choitro 1284 (28th March 1878), leaving her property to the petitioners.

One Chunder Kant Bhuttacharjee objected to probate being granted, on the ground that the attesting witnesses had put their signatures to the will before the testatrix had herself signed it. Chunder Kant also himself applied to the Court for a certificate to collect the debts of the deceased.

On the face of the will it appeared that the testatrix had, at the time when the will was presented for registration, admitted before the Registrar the signature on the will to be hers; that

* Appeal from Original Decree, No. 5 of 1879, against the order of H. Beveridge, Esq., the Officiating Judge of Rungpore, dated the 18th September 1878.

(1) I. L. R., 5 Calc., 738.

(2) I. L. R., 3 Bomb., 382.

(3) I. L. R., 1 Calc., 150.

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one of the attesting witnesses to the will had identified the testatrix to the Registrar; and that both the Registrar and the attesting witness who had so identified the testatrix, had placed their signatures at the bottom of the memorandum made on the will, setting forth the admission by the testatrix of her signature at the Registration office.

The Court of first instance held, that the provisions of s. 50 of the Succession Act had not been complied with, inasmuch as the attesting witnesses had signed the will before the testatrix had done so, and therefore he dismissed the petition for probate, and directed that a certificate under Act XXVII of 1860 should be granted to Chunder Kant.

From this order Hurro Sundari Dabia appealed to the High Court.

Baboo *Ishur Chunder Chuckerbutty* for the appellants.

Baboo *Grija Sunker Mozumdar* for the respondent.

The judgment of the Court (GARTH, C. J., and MITTER, J.) was delivered by

GARTH, C. J.—We think that, in this case, the Judge was quite right in holding that the attestation at the foot of the will was insufficient, because it is proved that both the witnesses signed their names before the will was signed by the testatrix. We agree with the learned Judges who decided the case of *Bissonath Dinda v. Doyaram Jana* (1), and also with the Bombay case of *Fernandez v. Alves* (2), which was cited to show that s. 50, Act X of 1865, clearly intends that the two witnesses shall sign their names *after* the testator or testatrix shall have signed his or hers.

But then there is the further point, which has been argued here, and to which the attention of the Judge does not appear to have been directed,—namely, that when the testatrix admitted before the Registrar her execution of the will, she was identified on that occasion by one of the same persons who profess to have witnessed her signature to the will. Upon her admit-

(1) I. L. R., 5 Calc., 738.

(2) I. L. R., 3 Bomb., 382.

ting before the Registrar that the signature to the will was hers, the Registrar signed his name as attesting her admission, and apparently the other witness did the same. Now, if these persons signed their names in the presence of the testatrix as attesting her own admission that she had signed the will, we think that would be sufficient, as an attestation, to satisfy the requirements of the 50th section.

We have decided, therefore, to remand the case, in order that the Judge, by recalling the witness who has already been examined, Chunder Kishore, and also any other witnesses who were present, may* satisfy himself upon this point, and determine the case accordingly.

We find that the view we now take was adopted by Mr. Justice Phear in *In the goods of Roymoney Dossee* (1).

As the appellant did not raise this contention in the Court below, and as upon the materials now before us she would not be entitled to succeed, we think that the objector should have his costs in this Court.

Both parties will be at liberty to adduce fresh evidence bearing upon the question which we direct to be tried.

Case remanded.

Before Mr. Justice Pontifex and Mr. Justice McDonell.

IN THE MATTER OF THE PETITION OF NAZIRUN.

MUHAMDEE v. NAZIRUN.*

1880
March 17.

*Guardian and Minor—Application for Certificate—Grounds for Refusal—
Right of Appeal—Act XL of 1858, s. 28.*

An application for a certificate under Act XL of 1858 (which, if successful, would, in effect, prolong the minority of an infant from eighteen to twenty-one), should not be granted when the alleged minor is admittedly on the point of attaining the age of eighteen, unless under particular circumstances, as where very great weakness of mind is proved, or where it is shown that there is some absolute necessity for making such order.

* Appeal from Order, No. 258 of 1879, against the order of J. F. Brown, Esq., Judge of Patna, dated the 15th August 1879.

(1) I. L. R., 1 Calc., 150.

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