

P. Radhakrishna Mudaliar Vs. P. Subraya Mudaliar

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SooperKanoon Citation : sooperkanoon.com/786523

Court : Chennai

Decided On : Apr-07-1916

Reported in : 34Ind.Cas.849; (1916)31MLJ357

Appellant : P. Radhakrishna Mudaliar

Respondent : P. Subraya Mudaliar

Judgement :

1. This is an appeal from a judgment of Baker, J. and raises a question of some importance as to whether under Section 50 of the Indian Succession Act, when the testator is a marksman or unable to sign his name, his mark as distinct from his signature may be affixed by any one but himself. The Wills Act XXV of 1838 which in this respect reproduced the provisions of the English Wills Act of 1 Vic. did not contain any express provision as to signature by means of affixing a mark where the testator was unable to write but merely required the will to be signed ' by the testator or by some other person in his presence and by his direction'. It was however well settled that under these provisions a testator unable to write might sign by affixing his mark. In Section 50 of the Indian Succession Act, probably on account of the great number of illiterate people in India, it was thought desirable to provide expressly for execution by affixing a mark and in that section three ways of execution are provided. ' The testator shall

(1) sign or

(2) shall affix his mark to the will or

(3) it shall be signed by some person in his presence and by his direction,' And it is next provided ' 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.' It is expressly provided that it is the testator who is to affix his mark and while the section goes on to provide for the will being signed by some other person in his presence and by his direction, there is no corresponding provision about the testator's mark being affixed by some other person in his presence and by his direction. Further the language of the following rule as to. ' the signature or mark of the testator, or the signature of the person signing for him' clearly shows that what was contemplated was that the mark should be affixed by the testator himself. As already mentioned this section for the first time contained a separate provision for execution by affixing a mark and the decisions on the Statute of Frauds and the Wills Act according to which affixing a mark was a mode of signature are therefore inapplicable. It was, in our opinion, clearly the intention of the legislature that to satisfy the provisions of the section as to execution by affixing a mark, the mark must be affixed by the testator himself. We are therefore with great respect unable to agree with the learned Judge that the placing of the mark upon the paper in the presence of the testatrix and by her direction is an affixture by her of her mark to the will within the meaning of Section

50. In *Nirmal Chunder Bandopadhyaya v. Saratmoni Debya* I.L.R. (1898) Cal. 911 : L.R. 25 IndAp 225 all that was decided was that the affixing by a servant of the testator, under his direction of the name stamp of the testator was a signature by some other person in the testator's presence and by his direction and not the affixing of a mark and there is nothing in the case to suggest that the learned Judges considered that the affixture of a mark under the direction of the testator would be sufficient. In *Mukta Nath v. Jitendra Nath* (1916) 22 C.L.J. 262, it was held that the section was sufficiently complied with where the mark was actually affixed by the testator though with the assistance of another person, but there the testator took an active part in affixing the mark. In this case according to the finding of the learned Judge the testatrix touched the pen and gave it to Doraisami Iyengar who wrote in Tamil.

This mark x--Papathiammal.

This mark taken

D.V. Doraisami Iyengar.

3. This may amount to a signature by some other person in her presence and by her direction within the meaning of the section and if attested by two witnesses other than the signatory would be sufficient, but the mere handing the pen to Doraisami Iyengar who affixed the mark in her presence is not, in our opinion, an affixture of her mark by the testatrix such as is required by the section. It is said truly that touching the pen and handing it to some one to sign for one is a very common form of signature in this Presidency, but this cannot affect the construction of the section and in the recent attestation case *Shamu Pattar v. Abdul Kadir Ravuthan* I.L.R. (1912) Mad. 607 : 23 M.L.J. 321, with reference to this and similar sections their Lordships of the Judicial Committee observed that they could not agree with what had been said by the learned Judges of another High Court regarding the policy of placing a larger construction on the word 'attest' in consequence of the social institutions of the country. This observation appears to apply equally to the present case.

4. If the signature as distinct from the mark of the testatrix is taken to have been affixed by Doraisami Aiyangar in her presence and by her direction, the will fails for want of due attestation, as the section requires that the will should be attested by two or more witnesses each of whom must have seen the testator sign or affix his mark, or have seen some other person sign the will in the presence and by direction of the testator. The language of the section is perfectly plain and it is unnecessary to refer to decided cases to show that the person who signed by direction of the testator cannot be one of the two attesting witnesses required by the section. The appeal is allowed and the suit and the petition dismissed with costs throughout.