

1879
KASTURBAI
v.
SHIVAJIRAM
DEVKURNA
AND
ANOTHER

defendants, any family property, and, if so, what amount (if any), having regard to the foregoing observations and to the circumstances of the parties, should be allotted to the plaintiff for her maintenance. Costs of this suit and both appeals should be in the discretion of the retrying Court. We should observe that the case of a wife is differed from that of a widow. The burden lie upon a wife to show such special circumstances as entitle her to a separate maintenance: *Sidlingapa v. Sidava*.(1)

Decrees reversed and case remanded.

(1) I. L. R. 2 Bom. 634.

APPELLATE CIVIL.

(74)

Before Mr. Justice M. Melvill and Mr. Justice F. D. Melvill.

June 17.

D. FERNANDEZ (OPPONENT, APPELLATE, v. R. ALVET (APPELLICANT),
RESPONDENT.*

The Indian Succession Act (X of 1865) Sec. 50—Will—Witness—Signature—Mark.

The direction contained in section 50, clause 3, of the Indian Succession Act (No. X of 1865) as to the signature of witnesses attesting an unprivileged will, is not satisfied by the witnesses affixing their marks. It is necessary for the validity of a will that the actual signature, as distinguished from a mere mark, of at least two witnesses should appear on the face of the will.

THIS was an appeal from the order of Rao Bahadur Gopalrao Hari Deshmukh, Joint Judge of Thana, whereby he directed that the will of Francis Fernandez, dated the 29th August 1875, and the will of Gatharina, his widow, dated 22nd January 1878, "should be acted upon".

The circumstances of the case are as follows:—

On the 3rd of January 1878, R. Alves applied for a probate of the will, dated 29th August 1875, of his deceased father-in-law, Francis Fernandez. This will was duly signed by the testator and by one of the attesting witnesses. The attestation of two other witnesses appears in the shape of a mark only.

On the 18th of January 1878, Daniel, the son of the deceased, applied for probate of his (the deceased's) will, dated 8th October 1875, the day of his death. The genuineness of this will was disputed by R. Alves, and the Joint Judge held that it was open to grave suspicion.

* Appeal No. 1 of 1879 under Act X of 1865.

In February 1878, Catharina, the testator's widow, died, and she left a will dated 22nd January 1878, reciting her husband's will of the 29th August 1875, and bequeathing one-half of her property to her daughter, the wife of R. Alves, and the other half to her son Daniel. R. Alves on the 23rd February 1878 applied for a probate of this will also.

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The Joint Judge held that the will of Francis Fernandez, dated 29th August 1875, and that of his widow Catharina, dated 22nd January 1878, were proved. No objection was, apparently, taken in his Court as to the informality of attestation in any of the wills.

Denkar Gangadhar Bhatt for the appellant.—The will of 29th August 1875 in favour of R. Alves is invalid. It is signed by one attesting witness only, the two others having merely made their mark: section 50 of the Indian Succession Act.

Shantaram Narayan for the respondent.—In England, 'signing' or 'subscribing' has been held to include a mark: Jarman on Wills, 76 Williams on Executors, 75. Mr. Justice Pontifex in the *Goods of Wynne* (1) says: "I am inclined to think that a signature by a witness would be a sufficient signature by a witness, even under the Indian Act, as it would undoubtedly be under the English Act." But no case can be found in India in which the point has been judicially decided. However, in the present case, one witness has signed his name; and as section 50 does not require more than two attesting witnesses, the writer of the will who has duly signed his name, may be looked upon as the other.

The judgment of the Court was delivered by

F. D. MELVILL, J.—The objections taken, on the hearing of the appeal, to the decision of the lower Court are, that the first will of Francis Fernandez, dated the 29th August 1878 (exhibit No. 3) is invalid, inasmuch as it has not been signed by the requisite number of attesting witnesses; and that the second will, dated 8th October 1875, is proved.

We consider that the first objection is valid. A marked distinction is drawn, in section 50 of the Act, between the required action of the testator and that of the attesting witnesses. The

(1) 13 Ben, L. R. 392.

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former may sign or affix his rank, and this referred to in each clause of the section. The attesting witnesses, however, must sign the will, and we must conclude that a signature is intended as opposed to a mere mark affixed. It was argued for the respondent that as one of the attesting witnesses has signed his name, the requisite number of two may be made up by looking upon the writer as an attesting witness. This argument, however, is invalid for this, if for no other, reason, that the writer signed his name before the testator affixed his mark.

In regarded to the second will, relied on by the appellant, we see no reason for mistrusting the correctness of the decision of the Joint Judge, that it is open to grave suspicion.

The genuineness of the third will is not disputed, and it is not open to the objection taken by the appellant against the first will. We, therefore, amend the order of the lower Court by declaring that the first will, dated the 29th August 1875, is invalid, and cannot, therefore, be acted upon. Each party to bear his own costs in this appeal.

Order accordingly.

APPELLATE CRIMINAL.

(75)

Before Mr. Justice Kemball and Mr. Justice F. D. Melvill.

IMPERTRIX v. KHIMCHAND NARYAAN.*

June 19.

Cotton Frauds Act (Bombay) No. VII of 1878, Secs. 6 & 14—Possession—Adulteration in Foreign Territory—Jurisdiction.

Cotton supposed to have been adulterated in foreign territory was seized in British territory.

Held that the Magistrate of the place, where the Cotton was seized, has jurisdiction to try the offender, as the effect of the new Cotton Frauds Act (Bombay) No. VII of 1878, Secs. 6 & 14, is to make the possession of "Cotton liable to confiscation" punishable with fine, and it is immaterial where the adulteration takes place.

THIS was a reference, under section 296 of the Code of Criminal Procedure, by A. A. Borradaile, Magistrate of the district of Ahmedabad.

*Criminal Reference, No. 63 of 1870.