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**(1953) 03 MAD CK 0020**  
**In the Madras High Court**  
**Case No : Second Appeal No. 1685 of 1949**

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|---------------------|----|------------|
| Gomathi Ammal       | Vs | APPELLANT  |
| V.S.M. Krishna Iyer |    | RESPONDENT |

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**Date of Decision :** 26-03-1953

**Acts Referred:**

Evidence Act, 1872 — Section 68  
Transfer of Property Act, 1882 — Section 3, 59

**Citation :** AIR 1954 Mad 126 : (1953) 66 LW 964 : (1953) 2 MLJ 303

**Hon'ble Judges :** Satyanarayana Rao, J

**Bench :** Single Bench

**Advocate :** A. Subramania Ayyar, for the Appellant; T.V. Balakrishnan, for the Respondent

**Final Decision :** Allowed

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## Judgement

Satyanarayana Rao, J.—This is an appeal by the plaintiff against the decree of the learned Subordinate Judge dismissing her suit, reversing the decree granted in her favour by the learned District Munsif. The suit was for a declaration that the othi deed Ex. A. 5 dated 10-2-1945 (of which Ex.B, 5 is the original) executed by the power-of-attorney agent of Sankararamier defendant 3 in favour of his brother defendant 1 does not affect the plaintiff's rights to the suit properties under the sale deed in her favour and for recovery of possession of the same with profits. The plaintiff schedule properties, it is not disputed, originally belonged to defendant 3. Under a sale deed dated 17-2-1945 Ex. A. 1 the property was conveyed by defendant 3 to the plaintiff for a sum of Rs. 1350 of which, the consideration was fully paid. In the document, defendant 3 assured the plaintiff that the property was free from encumbrances and that he held the property absolutely. As the plaintiff was obstructed, when she went to

take possession of the property by defendant 1 claiming rights under the othi deed of an earlier date, viz, 10-2-1945 she instituted the present suit

for the reliefs , stated above. Her case was that this document, the othi deed, was an ante-dated document brought into existence by the collusion

of defendants 1 and 3 and the power-of-attorney agent of the third defendant one Sivasubramania Aiyar. The stamps were purchased at Tinnevely

and though the document had to be registered at a nearer place, in fact it was presented for registration before the District Registrar of Tinnevely.

It was claimed that the recitals regarding the consideration in the othi deed were all false. There was an earlier criminal case against defendants 1

and 3 and also the power-of-attorney agent Sivasubram-ania Ayyar but that case was dismissed. The document was also attacked on the ground

that it was not validly attested.

2. Defendant 3 died during the pendency of the suit and defendant 1 was the sole contesting defendant. He claimed that the document in his favour,

the othi deed, was a valid document & was not antedated. In the trial court several issues were raised of which issues 1 & 3 are the most important

issues. Issue 1 covers the question that the deed was ante-dated and issue 3 concerns the question whether the othi deed was properly attested.

On the first point, the trial Court found in favour of the plaintiff but the third Issue was disposed of summarily and it was held that the deed was

validly attested. In the result, the suit was decreed in favour of the plaintiff. On appeal, this decision was reversed by the learned Subordinate

Judge, who held that the othi deed was not ante-dated and that it was valid. He did not, however, deal with the question of the validity of the

attestation of the document fully. He made a passing reference to it treating that question as one arising u/s 68, Evidence Act.

3. In this appeal by the plaintiff, the finding of fact could not be seriously challenged as there are no grounds for interfering with that finding though a

reversing one in second appeal. But the learned Advocate for the appellant pressed the issue relating to the validity of the attestation of the

document and that is the only question, which arises for consideration in this second appeal.

4. The document, the othi deed, Ex. B. 5, was executed in favour of defendant 1 by Sivasubramania Aiyar as the power-of-attorney, agent of

Sankararamier. It is so stated in the preamble to the document and in the body specific reference is made to the fact that he was executing the

document in his capacity as the general power-of-attorney agent of Sankararamier, defendant 3. It was signed also by the power-of-attorney agent

as Sivasubramania Aiyar, power agent of Sankararamier. The document purports to bear the attestation of Sankararamier, defendant 3 and A. S.

Subramania Aiyar a stranger. There is also the signature of the scribe S. Rangarajan Mudaliar. The scribe was not examined in the trial court and

no point was made of the existence of his signature on the document to make him a valid attesting witness if it is permissible to do so under law.

There are of course conflicting decisions on this point which, however, does not arise for consideration in this case.

5. The attestations, therefore, of two witnesses are alone left and if they are valid attesting witnesses, the document will be valid. The question

raised is that Sankararamier, who is one of the attesting witnesses, is the executant himself and he could not, therefore, be a valid attesting witness

to a document, which was executed by his power-of-attorney agent on his behalf and signed by him as such. The question is whether this

contention is well founded.

6. In -- "Shamu Patter v. Abdul Kadir", 33 Mad 847 (PC) (A), before the amendment of the Transfer of Property Act, it was held by the Privy

Council that the attestation of a mortgage deed within the meaning of Section 59, T. P. Act, must be by persons who signed their names as

witnesses after seeing the actual execution of the deed. Mere acknowledgment of the signature by the executant, it was held, was not sufficient.

The Privy Council, therefore, by this decision resolved the conflict, which then existed in the Indian courts. In the Transfer of Property Act as it

stood before the amendment, there was no definition of the word "attestation". A definition of the word "attested" was for the first time introduced

by the Transfer of Property Amending Act (Act 27 of 1926) and as some doubt was felt under that Amending Act whether the Act could be

retrospective or not, a further amendment was made by the Repealing and Amending Act of 1927 which inserted the words "and shall be deemed

always to have meant" to clearly indicate that the definition in the Amending Act of 1926 was retrospective in operation. The definition as it now

stands in these words :

Attested"" in relation to an instrument, means and shall be deemed always to have meant attested by two or more witnesses each of whom has

seen the executant sign or affix his mark to the instrument or has seen some other person sign the instrument in the presence and by the direction of

the executant, or has received from the executant personal acknowledgment of his signature or mark, or of the signature of such other person and

each of whom has signed the instrument in the presence of the executant; but it shall not be necessary that more than one of such witnesses shall

have been present at the same time and no particular form of attestation shall be necessary.

The definition includes the acknowledgment of signature by the executant as sufficient in cases where the person who signed as an attesting witness

did not see the actual execution of the deed. The requirement of attestation to a document was stated by the Privy Council in Shamu Patter's case

(A) referred to above to be that ""the barriers against perjury and fraud"" to use the language of the Master of the Rolls in --""Ellis v. Smith". (1754)

1 Ves. Jun 11 (B), ""should not be removed upon speculative considerations."" The attestation therefore, of persons to a document is to ensure that

there is no fraud or other vitiating circumstance in the execution of the document.

7. "Seal v. Claridge", (1881) 7 QBD 516 (C), a decision under the Bills of Sale Act, 1878, construing Section 8 and Section 10 of the Act, it was

laid down by Lord Selborne Lord Chancellor, that ""the com-monsense of mankind has always rejected the notion that the party to a deed could

also attest it."" Tfte Act under consideration required that the execution of every bill of sale should be attest- ed by a Solicitor of the Supreme

Court. The grantee in that case under the Bill of Sale was a solicitor and the signature of the grantor was attested by the grantee and the point for

consideration was whether the bill could be treated as . having been validly attested. It was held that the solicitor was a grantee under the bill, he

could not be a valid attesting witness as he was a party to the document, though not the executant. The word ""attestation"" implies said the Lord

Chancellor,

the presence of some person, who stands by but is not a party to the transaction. The view which I take seems to be confirmed by the

circumstance that attestation is unnecessary, unless it is required by an instrument creating a power or by some statute. If the argument of Mr.

Dugdale is correct, the attestation required by the Bills Of Sale Act, 1878, would be satisfied by the mere repetition of the signature of a party to

the deed; can this be regarded as a useful provision. I do not place much reliance upon what was said by Lord Eldon, L. C. in -- "Coles v.

Traeothick", (1804) 9 Ves. 234 (D), but I do rely upon --"Freshfield v. Reed, (1842) 9 M & W 404 (E)". It follows from that case that the party

to an instrument cannot "attest" it. When I pass to the provisions of the Bills of Sale Act, 1878, I find that it is necessary that the execution of a bill

of sale shall be attested by a solicitor. This means that a solicitor shall be an independent witness. It has been admitted that if the grantor were a

solicitor he could not attest his own signature; but it is contended that it is different in the present case where the grantee is a solicitor. It was the

intention of the Legislature that the nature of the bill of sale should be explained to the grantor; one object, no doubt, was that he should be

adequately protected; can it be said that an attestation by a grantee is sufficient, when he has the greatest possible interest to deceive the grantor, if

he is inclined to be fraudulent or to be guilty of malpractice? He is not to attest an instrument which is to operate chiefly for his own benefit.

8. This principle was considered in some of the decisions of the Indian Courts. In -- AIR 1931 285 (Oudh) , before a Full Bench of the Lucknow

High Court the question of the valid attestation of a mortgage executed benami but attested by a person who actually advanced the money was

raised. It was held that though the person, who advanced the, money, was interested in the transaction as he is to get the ultimate benefit of the

mortgage, he was not a party to the document and therefore the principle that a party to a document cannot be a valid attesting witness did not

apply. A benamidar, it was pointed out, was the legal mortgagee and he was the person who was in the legal sense a party to the deed. Merely

because a person is interested in a transaction, he is not on that ground disentitled to be a valid attesting witness. In -- "Peary Mohan v. Sreenath

Chandra", 7 Ind Cas 735 (Cal) (G), the Calcutta High Court ruled that the co-executant of a mortgage was not a valid attesting witness and this

principle was followed in that Court in -- "Sarurjigar Begum v. Baroda Kanta", 37 Cal 526 (H) and other cases. In -- Rajani Kanta Bhadra Vs.

Panchananda, , a mortgage bond was executed by an illiterate person and there was no seal or thumb impression of the mortgagor on the deed. It

was held that the scribe, who executed the document for and on behalf of the mortgagor, was not competent to attest his own signature as an

attesting witness, even assuming that the subscription of the name as a scribe amounted to attestation within the meaning of Section 59, T. P. Act.

In -- "Sristidhar Ghose v. Rakhyakali Dasi", AIR 1922 Cal 168 (J), the writer of the mortgage bond wrote out the name of the executant who was

illiterate and then signed his own name by way of attestation. It was held that the document was not properly attested within the meaning of Section

59, T. P. Act. All the decisions on the point were fully considered by Mookerjee J. At page 169, that learned Judge observed :

We are unable to accept the contention of the respondent that the scribe who wrote out the name of the executant may be taken to have at the

same time witnessed that fact, in other words to have simultaneously performed a double function. It might have been maintained with equal

plausibility that where a deed has to be executed by "A" and "B" under authority conferred by a "power of attorney, executes it on his behalf

writing thereon "A by his duly constituted attorney "B" "B" is competent to become an attesting witness, to witness the endorsement made by

himself. Dr. Kanjilal frankly conceded that such a position was manifestly incongruous and untenable. But, plainly, no real distinction in principle

can be found between the hypothetical case mentioned and the concrete instance before us. In our opinion, there is no escape from the position

that a scribe cannot be an attesting witness of what he has himself written. If in the case of execution of a document by a literate man, who can

write his own name, it is deemed necessary by the Legislature to have two other persons as attesting witnesses, it is at least equally essential to

have two independent attesting witnesses when the man is illiterate and cannot write his name which is written for him by another.

9. These decisions illustrate the necessity for the attestation of a person as a witness, who had actually seen the executant sign the document or as

now allowed by the amended definition received an acknowledgment from the executant. But there is no decision which has gone to the length of

upholding that the executant himself could be a valid attesting witness. The principle laid down by Lord Selborne in -- "(1881) 7 QBD 516 (C)",

has never been dissented from. On the other hand it has been applied in other cases.

10. In the present case, though the power-of-attorney agent of Sankaramier, defendant 3, is a different person, the act he did was an act on behalf

of Sankaramier and in law, Sankaramier is the executant of the document. Sankaramier, being a party to the document, could not be a valid

attesting witness for the very good reasons given by Lord Selborne, Lord Chancellor in the case already cited. The argument strongly pressed on

behalf of the respondent, however, is that as physically the two persons are distinct, it should be treated that the power-of-attorney agent, was in

fact the person who actually signed the document and therefore there is no objection for Sankaramier, on whose behalf the document was

executed to be a valid attesting witness. It is rather difficult to accept this argument for it is impossible to hold that Sivasubramania Aiyar, the

power-of-attorney agent, was in any sense of the term the executant of the document. The person entitled to sue for redemption and liable to be

sued for enforcing the mortgage is not Sivasubramania Aiyar but Sankaramier, the executant. Therefore in law Sankaramier is treated as the

executant of the document though the act was done by somebody on his behalf. The analogy of cases where the scribe puts the mark of an illiterate

executant and also signs as attesting witness could equally apply in the present case. If in the one case he could not be a valid attesting witness,

there is no reason why in the present case Sankaramier should be treated as a valid attesting witness. If any, the reason for holding that he

could not be a valid attesting witness is stronger than in the other case. I am, therefore, unable to accept the argument of "the learned counsel for

the respondent so strongly pressed by him and applying, the well-established principle that a party to a document cannot be valid attesting witness,

I must hold that the document, the othi deed was not validly attested and, therefore, ineffective to create a valid mortgage. The plaintiff, therefore,

though not entitled to succeed on the question of fact, is entitled to succeed on the question of law.

11. The appeal must, therefore, be allowed and the decree of the lower Court must be vacated and that of the District Munsif restored with costs

here and in the court below. No leave.