

(1961) 02 MAD CK 0020

In the Madras High Court

Case No : Original Side Appeal No's. 65 and 70 to 74 of 1956

H. Venkata Sastri and Others

APPELLANT

Vs

Rahilna Bi and Others

RESPONDENT

Date of Decision : 01-02-1961

Acts Referred:

Registration Act, 1908 — Section 34(3), 35(2), 52, 58, 59

Succession (Amendment) Act, 1926 — Section 3, 63

Transfer of Property Act, 1882 — Section 3, 58, 59

Citation : (1961) 02 MAD CK 0020

Hon'ble Judges : Rajagopalan, O.C.J.; Veeraswami, J; Srinivasan, J; Ramachandra Ayyar, J; Kunhamed Kutti, J

Bench : Full Bench

Advocate : R. Visvanathan, M. Ramachandran and T.V. Balakrishnan, for the Appellant; K.S. Champakesa Ayyangar, C. Venugopalachari and M. Ramachandra Rao, for the Respondent

Judgement

Ramachandra Ayyar, J.—The following question has been referred for the opinion of the Full Bench:

Whether the decision in Veerappa Chettiar v. Subramania Ayyar ILR (1928) Mad. 123 (F.B.) requires reconsideration.

2. The appeals which have given occasion for the reference involve a question as to the validity of a security bond executed in favour of the Registrar of this Court creating a charge over certain immovable properties for payment of the amount due under a decree. The document was attested only by one witness at the time of execution. When the document was presented for registration, the admission of execution by the mortgagor was vouched by the signature of the Registrar. Two persons who identified the mortgagor before the Registrar also affixed their signatures in token of their identification. The Appellant, who impugned the validity of the security bond, contends that neither the Registrar nor the identifying witnesses could be deemed to be attesting witnesses, and those

signatures cannot have the effect of rendering the document as a duly executed mortgage. A Full Bench of this Court in *Veerappa Chettiar v. Subramania Ayyar* ILR (1928) Mad. 123 (F.B.), held that the signatures of the registering officer and the identifying witnesses to the registration endorsement would be sufficient attestation within the meaning of Section 3 of the Transfer of Property Act, the reason given being that the registering officer and the identifying witnesses performed the same duty under the Registration Act, as would be done by the attesting witnesses under the Transfer of Property Act. Although the decision in that case stated that the signatures on the registration endorsement made *alio intuitu* to satisfy the requirements of the registration could also be taken for the purpose of constituting thereby an attestation under the Transfer of Property Act, subsequent decisions of this Court have understood it to mean that it is only in cases where the evidence in a case establishes the fact that the Sub-Registrar and the identifying witnesses signed the documents in the presence of the executant, the rule enunciated therein would apply. Vide: *Nagamma v. Venkatramayya* ILR (1934) Mad. 220, *Ramanathan Chetti v. Delhi Batcha Tevar* (1930) 60 M.L.J. 302 and *A. Dhanapala Chetty Vs. D. Goverchand Sowcar and Another*, . Even so, that view has not been accepted in the Full Bench decision of the Allahabad High Court in *Lachman Singh, v. Surendra Bahadur Singh* ILR (1932) All. 1051 (F.B.), by the Bombay High Court in *Timmavva Dundappa v. Channava Appaya* AIR 1948 Bom. 322 and by the Oudh Chief Court in *Chandrani Kunwar v. Sheo Nath* ILR (1931) Luck. 619. The conflict of authority reflected in the decision of this Court in *Veerappa Chettiar v. Subramania Ayyar* ILR (1928) Mad. 123 (F.B.), and of the Allahabad High Court in *Lachman Singh v. Surendra Bahadur Singh* ILR (1932) All. 1051 (F.B.), was noticed by the Privy Council in *Surendra Bahadur Singh v. Thakur Behari Singh* (1939) 2 M.L.J. 762 (P.C.), but their Lordships did not consider it necessary in that case to settle that controversy, as in their view, even if it were legitimate to look at the proceedings relating to registration for the proof of due attestation of the mortgage deed, evidence in the case before them was insufficient to prove the necessary facts to constitute a valid attestation.

3. The question whether the signatures of the registering officer and the identifying witnesses affixed to the document under the provisions of Sections 58 and 59 of the Registration Act could be relied on as those of attesting witnesses to the document presented for registration, has primarily to be decided in the light of the relevant statutory provisions. As the case before us relates to the validity of a security bond, it will be useful first to refer to Section 58 of the Transfer of Property Act which says:

Where the principal money secured is one hundred rupee or upwards a mortgage other than a mortgage by deposit of title-deeds can be effected only by a registered instrument signed by the mortgagor and attested by at least two witnesses.

Where the principal money secured is less than one hundred rupees, a mortgage

may be effected either by a registered instrument signed and attested as aforesaid or (except in the case of a simple mortgage) by delivery of the property.

4. The word attested has been defined in Section 3 thus:

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 a 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.

5. The definition of the term attested which is almost identical with that contained in Section 63(c) of the Indian Succession Act has been result of an amendment, introduced by Act XXVII of 1926. Prior to that amendment, it was held by this Court that the word attested was used only in the narrow sense of the attesting witness being present at the time of execution. In *Shamu Patter v. Abdul Kadir Ravuthan* ILR (1912) Mad. 607 (P.C.), the Privy Council accepted the view of this Court that attestation of a mortgage deed must be made by the witnesses signing his name after seeing the actual execution of the deed and that a mere acknowledgment of his signature by the executant to the attesting witness would not be sufficient. The amending Act XXVII of 1926, modified the definition of the term in the Transfer of Property Act so as to make a person who merely obtained an acknowledgment of execution and affixed his signature to the document as a witness, an attester. It will be noticed that although Section 3 purports to define the word attested it has not really done so. The effect of the definition is only to give an extended meaning of the term for the purpose of the Act the word attest is used as a part of the definition itself. It is, therefore, necessary first to ascertain the meaning of the word attest independent of the statute, and adopt it in the light of the extended or qualified meaning given therein. The word attest means, according to the Shorter Oxford Dictionary, to bear witness to, to affirm the truth or genuineness of, testify, certify.

6. In *Burdett v. Spilsbury* (1843) 10 Cl. and F. 340, LORD CAMPBELL observed at page 417:

What is the meaning of an attesting witness to a deed? Why, it is a witness who has seen the deed executed, and who signs it as a witness.

The Lord Chancellor Stated:

The party who sees the Will executed is in fact a witness to it; if he subscribes as a witness, he is then an attesting witness.

7. The ordinary meaning of the word would show that an attesting witness should be present and see the document signed by the executant, as he could

then alone vouch for the execution of the document. In other words, the attesting witness must see the execution and sign. Further, attestation being an act of a witness, i.e., to testify to the genuineness of the signature of the executant, it is obvious that he should have the necessary intention to vouch it. The ordinary meaning of the word is thus in conformity with the definition thereof under the Transfer of Property Act before it was amended by Act XXVII of 1926. Before that amendment, admission of execution by the executant to a witness who thereupon puts his signature cannot make him an attester properly so called, as he, not being present at execution, cannot bear witness to it; a mere mental satisfaction that the deed was executed cannot mean that he bore witness to execution.

8. After the amendment of Section 3 by Act XXVII of 1926, a person can be said to have validly attested an instrument, if he has actually seen the executant sign, and in a case where he had not personally witnessed execution, if he has received from the executant a personal acknowledgment of his signature, mark, etc. Thus, of the two significant requirements of the term attest, namely, (i) that the attester should witness the execution, which implies his presence then, and (ii) that he should certify or vouch for the execution by subscribing his name as a witness, which implies a consciousness and an intention to attest, the Amending Act modified only the first; the result is that a person can be an attesting witness, even if he had not witnessed the actual execution by merely receiving personal acknowledgment from the executant of having executed the document and putting his signature. But the amendment did not affect in any way the necessity for the latter requirement, namely, certifying execution which implies that the attesting witness had the animus to attest. The decision of the Privy Council in *Shiam Sundar Singh v. Jagannath Singh* ILR (1927) Luck. 640 (P.C.), establishes that a person can be an attesting witness only if, while putting his signature to the document, he had the animus to do so. In that case, the testator had devised his properties to his sons: with a view to secure the consent of all his sons to the disposition, he directed them to sign, and they, intending to sign for the purpose of expressing their consent to the dispositions, put their signatures as witnesses to the document. There was a recital in the Will itself that the signatures of the sons were obtained as evidence of their consent. It was contended that the bequest to the sons was void by reason of the fact that they were attesting witnesses. The signatures of the sons satisfied all the requirements of the definition of the term attest except for the fact that the disclosed purpose was only for showing their assent to the legacies and not to witness execution. In other words, the sons did not have the animus to attest. The Privy Council held that, as the signatures of the sons were taken for expressing their consent to the Will and for no other purpose, they could not be held to be attesting witnesses. In a still earlier case, AIR 1925 PC 89, a deed of mortgage executed by a lady was attested by one witness alone. But it had been subscribed by the husband of the executant in token of the fact that he approved of the transaction. The High Court of Patna in *Bar Kuarin Alak Manjari Kuari v.*

Sircar Barnard and Co. (1921) 62 I.C. 662, took the view that the husband of the executant, who signed the document only to signify his approval, could not be deemed to be an attesting witness, so as to validate the document. The Privy Council upheld that view, but without giving reasons. Mr. K.S. Champakesa Iyengar, who appeared on behalf of the Respondents, contended that once the requirements of the statute are satisfied, a person witnessing a deed by putting his signature therein would be an attesting witness and that it was not further necessary that he should have any animus. The learned Counsel sought to distinguish the decision in *Shiam Sundar Singh v. Jagannath Singh* ILR (1927) Luck. 640 (P.C.) as one where the document itself showed that the sons did not sign as a witness to execution, but as consenting parties to the Will. We are unable to agree with the contention. As we said earlier, the requirement as to the existence of an animus is implicit in the word attest which occurs in the definition. In *Lachman Singh v. Surendra Bahadur Singh* I.L.R (1932) All. 1051 (F.B.), it was held that if a person signed a document not with the idea of being an attesting witness, he could not be called an attesting witness.

9. This is in accord with principle and authority. But certain observations in that case went further than this. The learned Judges observed that a person in order to be an attesting witness must sign. with the idea of bearing testimony to the execution and with the further idea of permitting himself to be cited as a witness to prove execution.

10. With great respect, we can find no warrant for such a qualification. What an attester does is to witness execution of the deed or the acknowledgment of execution. This he does by putting his signature to the deed itself. It is for that purpose he should have the animus to attest. There is no need then to contemplate the possibilities of the matter coming up before Courts and the person making up his mind even then to attend Court to give evidence. For example, a foreigner who has come for a temporary stay in this country might validly attest a document, but yet, he may have all the time an intention of returning to his country with no idea of giving evidence in a Court. The intention required is only to attest the document and it is not further necessary that while so doing the witness should have the further object of bearing testimony to it in a Court. In *Girja Datt Singh Vs. Gangotri Datt Singh*, , a question arose whether the Sub-Registrar and identifying witnesses subscribing to the registration endorsements on a document could be held to be attesting witnesses. That the Supreme Court accepted the possibility of their being attesting witnesses as well is clear from the following passage in their judgment, page 351:

These signatures, it was contended, were enough to prove due attestation of the Will, exhibit A-36, This argument would have availed Gangotri, if Mahadeo Prasad and Nageshur had appended their signatures at the foot of the endorsement of registration animo attestandi.

It is, therefore, essential that before a witness to a document can be held to be an attesting witness to it, he should have had the animus to attest.

11. Two matters then arise for consideration: (i) conceding that they had the necessary animus, whether it would at all be competent for the Sub-Registrar and the witnesses identifying the executant at the time of registration to be attesting witnesses to the document, their signatures being made alio intuitu in the performance of certain duties enjoined by the statute; and (ii) even so, whether one can infer an animus to attest from the mere affixing of signatures by the registering officer and the identifying witnesses (the requirements as to the presence of the executant and acknowledgment being satisfied).

12. Before considering these questions, it is necessary to dispose of two subsidiary points. It is contended for the Appellant that as neither the registering officer nor the identifying witnesses purport to sign the registration endorsement as attesting witnesses, they should, as a matter of law, be held to sign only for the purpose enjoined by Sections 58 and 59 of the Registration Act. Support was sought for the contention in the judgment of Gajendragadkar, J. In *Timmava Dundappa v. Channava Appaya* AIR 1948 Bom. 322, 325, where the learned Judge relying on two earlier decisions of the Bombay High Court observed that an attesting witness must be a person who signs the document purporting to do so as an attesting witness. This, however, is not the view taken by our Court. In *Paramasiva Udayan v. Krishna Padayachi* ILR (1917) Mad. 535, it was held that a scribe who described himself only as a scribe, could be an attesting witness if he saw the signing of the document by the executant and that the Court could allow evidence to be let in for the purpose of showing that he was an attesting witness. Therefore, the decisive test for ascertaining whether a witness signing a document as attester, is not one of name or designation by which the person styles himself or to the phraseology used to describe him, but the character he fills and this can be ascertained by what he does with due regard to the intention accompanying his act. In *Abinash Chandra Bidyanidhi Bhattacharya v. Dasarath Malo* ILR (1928) Cal. 598, Rankin, C.J., observes that in order to constitute proper attestation, no formal attestation clause is necessary nor is it necessary that the signature of the attesting witness should appear in any particular place. We are of opinion that the view taken in this Court and by Rankin, C.J., is to be preferred to the one accepted by the Bombay High Court.

13. In *Girja Datt Singh Vs. Gangotri Datt Singh*, , the Supreme Court accepted the position that identifying witnesses appending their signatures to the registration endorsement (who did not describe themselves as attesting witnesses) could be attesting witnesses if they had the animus to attest. This would show that a person can be proved to be an attesting witness notwithstanding the fact that he did not describe himself as such.

14. Another contention was raised on behalf of the Appellant. Relying on the decision in *Ma Thein Shin v. Ma Ngwe Nu* AIR 1939 Rang. 211, that if an attestation is required for the instrument, it was said that the registering officer and identifying witnesses who did not sign the instrument properly so called, could never be attestors. We do not consider that the place where¹ the signature

of a person is put will always decide the character in which he put it. Further, that part of the document (generally the reverse side of the document) on which endorsements are made at the time of registration is also deemed to be part of it under the Registration Act. Sections 52 and 58 of the Registration Act state that endorsements should be made on the document; the signatures thereto would also be on the document. That would be sufficient to satisfy the definition of the term attest. As stated earlier Rankin, C.J., in *Abinash Chandra Bidyanidhi Bhattacharya v. Dasarath Malo* ILR (1928) Cal. 598, expressed the view that it was not necessary that an attesting signature should appear in any particular place in the document. We agree with the view taken by the learned Chief Justice.

15. Once it is accepted that a person (other than the party) purporting to affix his signature to a document in one capacity can be shown to have done so in another capacity as well, there can be no objection in principle for the persons signing the registration endorsements from being attesting witnesses unless the statute itself prohibits it. Section 34 prescribes the duties to be performed by the registering officer when a document, is presented for registration and Sub-Section 3 thereto states that the officer shall enquire whether the document was executed by the person by whom it purports to have been executed and satisfy himself as to the identity of the persons who appear before him, claiming to have executed the document. Section 35 prescribes the procedure to be followed where there has been either an admission or denial of execution and Sub-Section 2 thereto enables the officer to examine any one present in his office in regard to the persons appearing before him. It is unnecessary for the present purpose to refer to the provisions contained in Sections 71 to 77 which relate to the case where there has been a denial of execution; where execution of the document has been admitted, Section 52 enjoins the registering officer to endorse on every document presented, the day, hour and place of presentation and obtain the signature of the person presenting it and directs that every document admitted for registration shall without unnecessary delay be copied in the appropriate book according to the order of its admission. Section 58 sets out the particulars to be endorsed on the document by the registering officer. This is to be done on the date of presentation and is distinct from the certificate of registration which is to be endorsed on the same document u/s 60 after the completion of registration. Section 58 requires the signatures of the person admitting execution and of every person examined with reference to the document (e.g., the identifying witnesses), being taken on the document. Section 59 directs the registering officer to affix his signature to the endorsement on the same day as that of the presentation. Section 60 provides for the endorsements of a certificate and the signing of the same by the officer on the document containing the word registered together with the other particulars regarding the book in which it is copied.

16. It will be noticed that the signature of the registering officer to the endorsement made u/s 58 need not be made in the presence of the executant or even made at the same time as when the latter puts his signature. That can be

affixed at any time in the course of the day. Nor does the statute contemplate that the executant should admit execution to or in the presence of the identifying witness. The signature of the registering officer u/s 60 will necessarily have to be after an interval time, namely, that which would be necessary for copying the document and completing the other formalities. Therefore, the mere fact that the registering officer and identifying witnesses append their signatures to the endorsements made u/s 58 cannot prove that they are attesting witnesses. In *Surendra Bahadur Singh v. Thakur Behari Singh* (1939) 2 M.L.J. 762 (P.C.), the Privy Council observed that in the case before them, where there was no evidence that the Sub-Registrar and the identifying witnesses affixed their respective signatures in the presence of the executant, the endorsements made at the time of registration as a whole, giving them their natural meaning, would be relevant only to the matter of registration; similarly the signatures of the identifying witnesses would only vouch the identification. This would indicate that the mere existence of a registration endorsement containing the particulars u/s 58 and being signed by the registering officer and the identifying witnesses cannot be availed of as proving an attestation. But that is not the same thing as saying that in no circumstances can their signature be taken as those of attesting witnesses. In *Lachman Singh v. Surendra Bahadur Singh* ILR (1932) All. 1051 (F.B.) and *Timmava Dundappa v. Channava Appaya* AIR 1948 Bom. 322, it was held that the Registrar and the identifying witnesses who performed certain functions prescribed by the Registration Act cannot be attesting witnesses. With great respect to the learned Judges, we are unable to share that view. There is nothing in the various provisions of the Registration Act to which we have made reference, to preclude either the registering officer or the identifying witness from being attesting witnesses. Cases may arise where the admission of execution is made to the Registering Officer and to the identifying witnesses and they or any of them put their signatures in the presence of the executant with the idea of also attesting the document. We have earlier held that a witness to a document can occupy a dual role. The statutory definition of the word attest includes a case where there has been an acknowledgment of execution by the executant to the witnesses and this condition will be satisfied when such acknowledgment is made to the registering officer; so also in a case where it is made to the witness who attends the Registrar's office for identification. There is, therefore, nothing in principle which would preclude either the registering officer or the identifying witnesses who subscribe only to the registration endorsement from being attesting witnesses to the document. This is, of course, subject to the other requirements of the qualification of an attesting witness being satisfied.

17. One contention which was accepted in the Allahabad and Bombay decisions referred to earlier and which was pressed before us on behalf of the Appellant is, that as it is clear from Section 59 of the Transfer of Property Act, that execution and attestation must precede registration, a completed document alone could be presented for registration and, therefore, the statute does not contemplate an

unattested document being attested in the process of registration. We would, however, point out that an unattested document cannot always be held to be an incomplete document. For example, a document which purports to effect a mortgage containing a personal covenant if unattested can still operate as a bond. An unattested or imperfectly attested document cannot be said to be an incomplete document when the executant has signed it, though it may not operate to create that interest which under the law only a duly attested deed could create. Such a document can be presented for registration. If in the illustration given above the unattested mortgage bond is registered, the creditor can enforce the personal covenant within the period of limitation prescribed for registered documents. Therefore, if under the law, a valid attestation could take place simultaneously with the endorsements under Sections 58 and 59, the document which was valid as a personal bond will become a mortgage according to its tenor. It is, however, contended that registration is a single process starting from the presentation of the document to the affixing of the certificate thereon u/s 60, and no other act except registration can be done during that process. It can be conceded that there can be no attestation of the document after registration; nor even one during the time when the document is being copied in the books. But what is registration? Actually it is the recording of a copy of the document in the Office of the Registrar (see) *Majid Hossain v. Fazl un Nissa* ILR (1888) Cal. 468. Strictly speaking, presentation of the document is only an essential preliminary step thereto, though it might be said to be integrally connected with it. It may be that a party to the document, once admitted to registration, may have no power to add to it even by way of attestation; but that does not mean that one of the integral steps connected with registration cannot under the law operate as attestation of the document. Under the statute there are two distinct stages in a registration, separated at any rate in point of time. In certain cases presentation of document may even happen at the residence of the executant, while registration can only be in the Registrar's office. The two stages are: (i) presentation, identification of executant, admission of execution, and the making of the endorsements under Sections 58 and 59; and (ii) the actual registration and endorsing of the certificate u/s 60. The signatures of the registering officer and of identifying witnesses in the first stage, that is, under Sections 58 and 59, do precede registration de facto. There can be no bar to the attestation being simultaneous with the making of those endorsements. The judgment of the Supreme Court in *Girja Datt Singh Vs. Gangotri Datt Singh*, , does contemplate an imperfect document becoming perfect during the course of registration. It is contended for the Appellant that the observations of the Supreme Court in that case should be restricted to the case of a Will. There is, however, no intelligible reason behind any such distinction.

18. We are, therefore, unable to share either of the two extreme views represented on the one hand by the decision in *Lachman Singh v. Surendra Bahadur Singh* ILR (1932) All. 1051 (F.B.), and on the other in *Veerappa Chettiar v. Subramania Ayyar* ILR (1928) Mad. 123 (F.B.). In our opinion, such signatures

of the registering officer and the identifying witnesses endorsed on a mortgage document can be treated as those of attesting witnesses, if (i) the signatories are those who have seen the execution or received a personal acknowledgment from the executant of his having executed the document; (ii) they sign their names in the presence of the executant; and (iii) while so doing they had the animus to attest. The mere presence of the signatures of the registering officer or the identifying witnesses on the registration endorsements would not by themselves be sufficient to satisfy the requirements of a valid attestation; but it would be competent for the parties to show by evidence that any or all of these persons did in fact intend to and did sign as attesting witnesses as well. The decision of this Court in *Veerappa Chettiar v. Subramania Ayyar* ILR (1928) Mad. 123 (F.B.), can be held to be correct only to this limited extent, namely, that the signatures of the registering officer and of the identifying witness can, if the requisites of a valid attestation are proved, be treated as those of attesting witnesses; with great respect to the learned Judges who decided that case, we are unable to accept the statement of the rule in the unqualified form in which it has been enunciated, namely, that the signatures of the registering officer and identifying witnesses affixed to the registration endorsement would be sufficient attestation. For this reason and to the extent indicated above, that decision has to be overruled. We would, therefore, answer the question referred to us in the affirmative and further state as our opinion that the signatures of the registering officer and/or of the identifying witnesses affixed to the registration endorsement under Sections 58 and 59 of the Registration Act, would amount to valid attesting signatures to the document, within the meaning of Section 59 of the Transfer of Property Act, if the conditions necessary for a valid attestation u/s 3 of that Act, have been satisfied and the persons affixing the signatures thereto had the animus to attest.