
(1960) 12 MAD CK 0011

In the Madras High Court

Case No : O.S. Appeal No's. 65 and 70 to 74 of 1956

H. Venkata Sastri and Sons and Others

APPELLANT

Vs

Rahilna Bi and Others

RESPONDENT

Date of Decision : 05-12-1960

Acts Referred:

Registration Act, 1908 — Section 58, 59
Succession (Amendment) Act, 1926 — Section 3
Succession Act, 1925 — Section 63
Transfer of Property Act, 1882 — Section 100, 3

Citation : AIR 1962 Mad 111 : (1961) 74 LW 701

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

Bench : Full Bench

Judgement

Ramachandra Iyer, J.

(1) The following question has been referred for the opinion of the Full Bench :

Whether the decision in Veerappa Chettiar Vs. Subrahmania Aiyar and Others, , requires reconsideration.

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 Register

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 signature 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 Vs. Subrahmania Aiyar and Others*, , held that the signatures of the registering officer and the

identifying witnesses to the registration endorsement would be sufficient attestation within the meaning of S. 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 case 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 executing, the rule enunciated therein would apply. Vide *Kachi Kadambi*

Krishnamachariar Vs. T. Jagannadha Nayudu and Others, , *Ramanathan Chetti and Others Vs. Delhi Badaha Tevar and Others*, 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 and Others Vs. Surendra Bahadur Singha and Others* , by the Bombay High Court in *Thimmava*

Dundappa v. Channava Appaya AIR 1948 Bom 322, and by the Oudh Chief Court in *Chandrani v. Sheonath*, ILR 6 Luck 619 : IR 1931 Oudh

146.

The conflict of authority reflected in the decision of this court in *Veerappa Chettiar Vs. Subrahmania Aiyar and Others*, and of the Allahabad High

Court in *Lachman Singh and Others Vs. Surendra Bahadur Singha and Others* , was noticed by the Privy Council in AIR 1939 117 (Privy

Council) 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 the 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.

(2) The question whether the signatures of the registering officer and the identifying witnesses affixed to the document under the provisions of Ss.

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 S. 59 of the Transfer of Property Act which says,

Where the principal money secured is one hundred rupees 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.

(3) The work "'attested'" has been defined in S. 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.

The definition of the term "'attested'" which is almost identical with that contained in S. 63(c) of the Indian Succession Act, has been the result of an

amendment introduced by Act 27 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 Pattar v. Abdul Khadir*, ILR 35 Mad 607, 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 27 of 1926 modified the definition of the term in the Transfer of Property Act so as to make a person who merely obtains an acknowledgment of execution and affixed his signature to the document as a witness, an attestor. It will be noticed that although S. 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 of the purpose of the Act; of 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." In *Burdett v. Spilsbury*, (1842) 10 Cl&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.

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 27 of 1926. Before that amendment, admission of execution by the executant to a witness who thereupon puts his signature

cannot make him an attestor properly so called, as he not being present at the execution, cannot bear witness to it; a mere mental satisfaction that

the deed was executed cannot mean that he bore witness to execution.

(4) After the amendment of S. 3 by Act 27 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, (1) that the attestor should witness the execution, which implies his presence, then, and (2) 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 AIR 1927 248 (Privy Council) 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 has been subscribed by the husband of the executant in token of the fact that he approved of the transaction. The High Court of Patna (the High Court's judgment is reported in Bar Kuarin Alak Manjari Kuari and Another Vs. Sircar Barnard and Co., , 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 Aiyangar 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 AIR 1927 248 (Privy Council) 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 the existence of an animus is implicit in the word "attest" which occurs in the definition. In Lachman Singh and Others Vs. Surendra

Bahadur Singha and Others , 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.

(5) 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.

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 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, Ex. 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.

(6) Two matters then arise for consideration (1) 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 also *intuitu* in the performance of certain duties enjoined by the statute, and (2) 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.)

(7) Before considering the 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 Ss. 58 and 59 of the Transfer of Property Act. Support was sought for the contention in the judgment

of Gajendragadkar, J. In AIR 1948 Bom 322, 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.

Thus, however, is not the view taken by our court. In *Paramasiva Udayan Vs. Krishna Padayachi and Another*, , 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 Bhattacharjee Vs. Dasarath Malo and Others, , 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. This view is

accepted and followed in *Ralyaram Melaram, a Firm and Another Vs. Kaluram Agarwalla and Others*, . 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.

(8) 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.

(9) 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

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 where 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 terms

attest". As stated earlier Rankin, C. J. In *Abinash Chandra Bidyanidhi Bhattacharjee Vs. Dasarath Malo and Others*, , 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.

(10) 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-sec. (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-sec. (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 Ss. 71 to 77 which relate to the case where there has been a denial

of execution; where execution of the document has been admitted, S. 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 direct 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 under 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.

(11) It will be noticed that the signature of the registering officer to the endorsement made under 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 under S. 60 will necessarily have to be after an interval of time, namely that which would be necessary for copying the document and

completing the other formalities. Therefore, the mere fact that the registering officer the identifying witnesses append their signatures to the

endorsements made under S. 58 cannot prove that they are attesting witnesses.

In AIR 1939 117 (Privy Council) 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 under 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 and Others Vs. Surendra Bahadur Singha and Others and AIR 1948 Bom 222, 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 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.

(12) 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 Sec. 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

Ss. 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

under 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. Fazlunissa*, ILR 16 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 the 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 (1) presentation,

identification of executant, admission of execution, and the making of the endorsement under Ss. 58 and 59 and (2) the actual registration and

endorsing of the certificate under S. 60. The signatures of the registering officer and of identifying witnesses in the first stage that is under S. 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.

(13) We are therefore unable to share either of the two extreme views represented on the one hand by the decision in *Lachman Singh and Others*

Vs. Surendra Bahadur Singha and Others and on the other in *Veerappa Chettiar Vs. Subrahmania Aiyar and Others*, . 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

(1) the signatories are those who have seen the execution or received a personal acknowledgment from the executant of his having executed the

document, (2) they sign their names in the presence of the executant, and (3) 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 ILR 52 Mad 123 : AIR 1929 Mad , 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 extend 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 Ss. 58 and 59 of the Registration Act would amount to valid attesting signatures to the document, within the meaning of S. 59 of the Transfer of Property Act if the conditions necessary for a valid attestation under S. 3 of that Act have been satisfied and the persons affixing the signatures thereto had the animus to attest.

JUDGMENT OF THE DIVISION BENCH

(After the expression of the opinion of the Full Bench, these appeals coming on for hearing before the Court, Ramachandra Iyer, O. C. J, and

Kunhamed Kutti, J., the Court delivered the following judgment):

Ramachandra Iyer, O.C.J.:

(14) These appeals arise from the judgment of Balakrishna Aiyar, J. In certain proceedings relating to the rateable distribution of assets received in

execution of the decree in C. S. No. 56 of 1953. Hajee Ahmed Batcha, the defendant in that suit, was indebted to various persons. In respect of

one of those debts Venkata Sastri and Sons filed O. S. No. 13 of 1953 on the file of the Sub-Court, Vellore. Similarly, another creditor H. R.

Gowramma filed O. S. No. 14 of 1953 in the same court. The plaintiffs in the two suits filed interlocutory application praying for an attachment

before judgment of certain properties belonging to the debtor situate in the North Arcot district. On 28-1-1953 Hajee Ahmed Batcha filed a

counter-affidavit undertaking not to alienate his properties. That undertaking was recorded and no further orders were passed on the applications

for attachment before judgment. O. S. No. 13 of 1953 was compromised and a

decree in terms thereof was passed on 27-3-1953 for a sum of Rs. 5500. The other suit O. S. No. 14 of 1953 was tried and decree was passed for the full amount claimed on 14-4-1953. Soon thereafter the two decree-holders filed applications for execution of their respective decrees. One Rama Sastri another creditor of the same debtor who had obtained a decree against Hajee Ahmed Batcha in O. S. No. 364 of 1951-52 on the file of the District Munsif Court, Shimoga, had also obtained a transfer of that decree for execution through the District Munsif Court, Vellore, and an application for execution at his instance was pending in that court.

In the meanwhile certain other things had happened. The fourth respondent in the first of the above appeals Abdul Jabbar Sahib, a brother of the son-in-law of Hajee Ahmed Batcha, alleging that the latter was indebted to him in respect of two promissory notes for Rs. 40556-1-2 & Rs.

8327-12-9 respectively, instituted a suit on the original side of this court for recovery of the amounts due to him under O. 7 of the original Side

Rules. That suit was registered as C. S. No. 56 of 1953. Hajee Ahmed Batcha applied for leave to defend on 19-2-1953 and leave was granted

to him on condition of his furnishing security to the satisfaction of the Registrar of this court in a sum of Rs. 50000 for any decree that might be

passed in the suit. The order granting the conditional leave is dated 9-3-1953.

On 26-3-1953 the defendant executed a security bond for the sum specified in favour of the Registrar of this court securing the very properties in

respect of which he undertook not to alienate in the Sub Court, Vellore. Those properties, as stated already, are situate wholly outside the limits of

the Madras city. The security bond was executed in the presence of the Second Assitant Registrar of this court, who signed the same as having

been executed before him. Apart from that officer, no other person has attested the document. The document was presented for registration in the

office of the Registrar of Madras, Chingleput District on 27-3-1953. The Sub-Registrar, who has been examined as P.W. 1, registered the

document after following the prescribed procedure and obtaining from the executant Hajee Ahmed Batcha an admission of execution. Before the

Sub-Registrar the executant was identified by Abdul Aziz and K. V. Renganathan, who have been examined as P. Ws 2 and 3. Hajee Ahmed

Batcha died on 14-2-1954. His legal representatives were then substituted in his place in C. S. No. 56 of 1953., which was taken up for trial on

19-3-1954. There was practically no contest to the suit. A decree was passed in the manner stated below:

1. That defendants 2 to 4 do pay to the plaintiff, from and out of the assets of defendant 1 deceased in their hands (a) a sum of Rs. 49891-13-0

with interest thereon at the rate of six per cent per annum from this day till the date of payment and (b) the proportionate costs of the plaintiff if this

suit when taxed and noted on the margin hereof with interest thereon at the rate of six per cent per annum from the date of taxation till the date of

payment.

2. That defendants 2 to 4 shall be at liberty to pay the amounts mentioned in clause 1 supra on or before the 20th April, 1954.

3. That the security bond executed in respect of their immovable properties by defendants 2 to 4 in pursuance of the order dated 9-3-1953 in

application No. 797 of 1953 shall stand enured to the benefit of the plaintiff as a charge for the amounts mentioned in clause 1 supra.

4. That in default of defendants 2 to 4 paying the amount mentioned in clause 1 supra on or before the date mentioned in clause 2 supra, the

plaintiff shall be at liberty to apply for the appointment of commissioners for sale of the aforesaid properties.

(15) Within a very short time the decree-holder in C.s. no. 56 of 1953 filed application No. 1823 of 1954 on 22-4-1954 for the appointment of a

commissioner to sell the properties covered by the security bond. Commissioners were appointed on the following day for the purpose. They sold

the properties on 29-5-1954 and 30-5-1954. The three decree-holders mentioned earlier, whose execution petitions were pending in the Vellore

court, appear to have got scent of the activities of Abdul Jabbar Sahib, and they filed applications in this court on 7-6-1954 for transfer of the

execution petitions pending in the Vellore courts to the file of this court. They also applied for rateable distribution of any assets that may be

received in this court in execution of the decree in C. S. No. 56 of 1953. On 15-6-1954, even before the full amount of the purchase money was

deposited in this court, the Commissioners appointed for the sale of the properties applied for directions as to the confirmation of the sale

conducted, by them. The sales were confirmed and the sale proceeds were deposited in court on 2-7-1954.

(16) The claim of the three decree-holders was resisted by Abdul Jabbar Sahid on the ground that as the properties which were sold in execution

of the decree in C. S. No. 56 of 1953 had been secured to him for payment of the decree amount herein, the proceeds of the sale could not be

deemed to be assets of the judgment-debtor which could be made available for rateable distribution amongst the simple money creditors. It was

however contended on behalf of the decree-holders claiming rateable distribution that the security bond which Hajee Ahmad Batcha executed on

26-3-11953 was invalid as it had not been attested in the manner required by the provisions of the Transfer of Property Act and that the decree

passed in C. S. No. 56 of 1953 could not be read as itself creating a charge for the decree amount. Balakrishna Aiyar J. Rejected the claim of

Abdul Jabbar Sahib that the decree itself created a charge. The learned Judge held that the recitals in the decree only amounted to a declaration of

the existence of a charge in terms of the security bond D/- 26-3-1953. But on other question namely that concerning the validity of the security

bond the learned Judge following the decision of the Full Bench in Veerappa Chettiar Vs. Subrahmania Aiyar and Others, held that the signature of

the registering officer and of the identifying witnesses would be sufficient to constitute valid attestations of the bond. In that view, the learned Judge

rejected the claim of the other decree-holders for rateable distribution.

The aggrieved decree-holder have each filed two appeals against the judgment, one against the order in the execution petition and the other against

order on the petition praying for rateable distribution. O. S. A. Nos. 65 and 73 of 1956 are filed by the decree holder in O. S. No. 13 of 1953, O.

S. A. Nos. 71 and 74 of 1956 are filed by the decree-holder in O. S. No. 14 of 1953 and O. S. A. Nos. 70 and 72 of 1956 are filed by the

decree-holder in O. S. No. 364 of 1951-52 on the file of the District Munsif Court, Shimoga.

(17) The only question that arises for determination in these appeals is whether the assets realised by execution of the decree in C. S. No. 56 of

1953 represent the property secured for the benefit of the decree-holder therein, viz., Abdul Jabbar Sahib, or whether they belong to the

judgment-debtor Hajee Ahmad Batcha unencumbered in which case they should be reatably distributed between all the decree-holders.

(18) The case for Abdul Jabbar Sahib is put on an alternative basis: (i) that the security bond executed by Hajee Ahmad Batcha on 26-3-1953

was valid to create a charge in respect of the decree passed in his favour and (ii) that even otherwise as the decree passed by this court in C. S.

No 56 of 1953 created a charge over the very same properties, the proceeds of the sale would go only in discharge of his decree in preference to

the claims of the simple money decree-holders.

(19) The first of the two questions concerns the validity of the security bond. One ground on which the validity of the security bond was impugned

was that it had not been attested in accordance with the provisions of the Transfer of Property Act. Mr. Champakesa Aiyangar, learned counsel

for the respondent, put his case in two ways (1) that the security bond would be valid without there being any attesting witness thereto (2) the bond

should be held to be properly attested by reason of the fact the Sub-Registrar and the identifying witnesses have affixed their signatures to the

registration endorsements thereon.

(20) The latter contention formed the subject matter of reference to a Full Bench, whose opinion has been received. We shall consider presently

whether the signatures of the Sub-Registrar and /or the identifying witnesses appended to the document at the time of registration could be deemed

to be those of attestors in the light of that opinion. Before doing so, we will have to refer and deal with the two contentions raised on behalf of the

respondent. The first was that the security bond would not amount to a mortgage as defined in S. 58 of the Transfer of Property Act, as it was

intended to secure only a contingent liability and not any money advanced or to be advanced, and that therefore the rule as to attestation would not

apply. That however does not conclude the matter. Even so, the document would amount to a charge over immovable property. Sec. 100 of the

Transfer of Property Act states that all the provisions which apply to a simple mortgage under the Act shall, so far as may be apply to such a

charge. That would mean, that for the creation of a charge over Immovable property of the value of Rs. 100 and more, a document should be

executed duly signed, attested and registered.

In *Tenneti Viswanadham Vs. M.S. Menon, Official Liquidator of the Swarajya Printing and Publishing Company Limited and Another, and Pandit*

Shiva Rao and Another Vs. D.A. Shanmughasundaraswami (Official Liquidator) and Others, it was held the provisions as to attestation and

registration of simple mortgages would apply to the case of a charge. The contention that as the charge in the instant case was created in favour of

the High Court the provisions of the Transfer of Property Act would not apply and that unless the rules of court require attestation, there is no need

for that formality, cannot be accepted. The document purports to be executed by a party securing certain Immovable properties for the due

performance of a decree that may be passed in the suit. It is executed in favour of the Registrar personally (it would however make no difference

on this aspect of the matter even if it were executed in favour of the court as such a non-juristic entity). To such a document the provisions of S.

100 would apply. Order 33 of the Original Side Rules, which provides for the taking of securities etc., does not however refer to the bond being

executed in accordance with the provisions of the Transfer of Property Act. But that cannot do away with the necessity of the execution of a

security bond in accordance with the provisions of the Transfer of Property Act. We are therefore of opinion that even construing the security

bond as creating a charge for a contingent liability it would be valid only if it had been attested by two witnesses as required by S. 59 of the

Transfer of Property Act.

(21) It was next contended on behalf of the respondent that the security bond executed by Hajee Ahmed Batcha should be deemed to be a charge

created by the act of court and that therefore the provisions of S. 100 of the Transfer of Property Act would not apply to the same. In support of

this contention the learned counsel referred to the decision in *Thangavelu Mudaliar v. Thirumalswami Mudaliar*, 1955 2 MLJ 618: ((S) AIR 1956

Mad 67) where it was held that a charge created by a decree of court could not be held to be one created by an act of the party or one under the

law so as to come within the terms of S. 100 of the Transfer of Property Act. We are, however, unable to see how a bond like the one before us

which was executed by a party voluntarily could be held to amount to a charge created by the court. The security was no doubt furnished in

pursuance of an order of court. But it would not for that reasons cease to be an act of the party executing it. It cannot even be said that the court

compelled him to execute a security bond. On the terms of the order, it was open to the party to execute it or not. The fact that the party would

obtain leave to defend the suit only on furnishing the security cannot make the execution of the bond an act of court. For one thing the execution of

a bond by creating a charge over Immovable properties is only one type of security that could be furnished. For example, the defendant can furnish

cash security or Government security, fixed deposit etc. But the debtor in the present case chose for the purpose of his convenience a type of

security which involved the creation of a charge over Immovable property. To render that security valid, he should comply with the requirements of

law. Even otherwise, that is, where a party furnishes a security bond charging Immovable property albeit without any option not to do the same, e.

G., in pursuance of a mandatory direction or decree of court, we are of the view that the formalities prescribed by the law should be observed. In

Nagaruru Sambayya v. T. Subbayya ILR 31 Mad. 330 it was held that a security bond executed in pursuance of an order of court did not derive

its validity from the order of court but was only the act of a party which would attract the provisions as to registration of the bond.

(22) It was next contended for the respondent that the purpose the effect of giving security as a condition for granting leave to defend the suit

would be to make the security available to the plaintiff subject to his proving the claim, that the other creditors of the judgment-debtor could have no

right to it. This no doubt so. But the question in the present case is not what would be the consequence of the security is found to be valid but

whether at all a valid security has been given. On that question the learned counsel for the respondent contended, as stated earlier, that a security

bond given in favour of the court should always be regarded as an act of the court. In support of that contention reference was to the decisions in

Tata Iron and Steel Co. Ltd. Vs. Charles Joseph Smith, and Lalita Prasad Chaudry v. Syed Mahammed Mansoor, ILR 18 Pat. 719. In those

cases a security bond was given in favour of the court for the due performance of a decree. It was held that the properties could be sold in

execution proceedings without the necessity of an attachment and in a case where security was given in favour of the court, execution could be

levied without a formal assignment of the bond. No question arose in those cases as to whether the security bond executed in favour of the court

should comply with the requirements of the Transfer of Property Act and of the Registration Act. The rule that the security could be enforced in the

suit itself without the necessity of a fresh suit in conformity with Order 34 of the CPC and in the case of a bond executed in favour of the court as

such (not in the name of the presiding or other officer) the bond could be enforced without an assignment in favour of the decree-holder, is a

consequence of the bond being given to a court and of court's inherent power. That rule has nothing to do with the creation of the charge, which is

essentially an act of the party.

(23) Reference was then made to the decision of the Allahabad High Court in *Ram Saran Das Vs. Yudhishtar Prasad and Others*, . In that case a

guardian appointed by court executed a security bond in the name of the court for the due performance of his duties. When the minors came of

age, the security bond was assigned by the court in their favour in order to enable them to realise the money from the surety. The order of

assignment was neither stamped nor registered. The learned Judges held that the assignment in favour of the quondam minors would not amount to

a sale as the court received no consideration for it, nor could it be regarded as a gift or exchange, and that therefore it was not necessary to effect

the assignment by a stamped and registered instrument. This decision related to an act of court, viz., the assignment of the security bond; we cannot

see how it can apply to a case where a party executes a bond in favour of the court. In our opinion, the security bond executed in the instant case

would not amount to a charge created by the court but on the contrary would be a charge created by a voluntary act of the party in favour of the

officer of the court. The provisions of S. 100 of the Transfer of Property Act would apply to it. It would therefore follow that in order to be valid

the document would have to be attested by two witnesses.

(24) In the present case, the document has been executed in the presence of the Second Assistant Registrar of this court, who has subscribed his

name at the end of the document. He would certainly be an attesting witness. The question then is, whether there is at least one other attesting

witness, to comply with the terms of S. 100 of the Transfer of Property Act. If the

signature of the registering officer or of the identifying witness

put in at the time of registration of the document could be regarded as complying with the definition of word "attested" contained in S. 3 of the

Transfer of Property Act, then the document could be held to be valid. The Full Bench has expressed the opinion that the signatures of the

registering officer and or of the identifying witnesses affixed to the registration Act would amount to valid attesting signatures to the document within

the meaning of S. 59 of the Transfer of Property Act, if the conditions, necessary for a valid attestation under S. 3 of that Act have been satisfied

and the persons affixing the signatures thereto had the animus to attest.

(25) The registering officer has been examined as P.W. 1. He frankly conceded that he had no personal recollection about the document. But he

would say that the registration proceedings were conducted in accordance with the rules and it must be that he signed immediately after the

executant signed his name. His evidence however is not very clear as to whether he signed his name in the presence of the executant. Having

regard to the fact that he registered on an average about 12 documents a day, it is hardly likely that he would have remembered as to whether he

put his signature in the presence of the executant or in the course of the day. Under S. 58 of the Registration Act it is permissible for the registering

officer to put his signature to the registration endorsement in the course of the day on which the document was presented for registration. P.W. 3,

Ranganathan, one of the identifying witnesses, no doubt stated that the registering officer put his signature to the registration endorsement when the

executant and the identifying witnesses were present. By we do not think that his evidence can be accepted in the circumstances of the case.

(26) Even assuming that the registering office put his signature in the presence, of the executant, there is nothing in his evidence to suggest that he

do so with the intention of attesting the document. He stated.

Once I am satisfied that the executant has signed and he has been properly identified and the two identifying witnesses are present and have

signed, the rest of the endorsements are merely formal and according to the rules. The rules are each document is finished before the other is taken.

I sign my name just after the witnesses have signed.

This evidence would show that the signature of the registering officer was made

only in the course of registration and for no other purpose. It

follows that the registering officer cannot be treated as an attesting witness to the security bond.

(27) The question then is whether the identifying witnesses can be regarded as attesting witnesses. It is stated by P. Ws. 2 and 3 that they along

with the executant went before the registering officer, who then asked Hajee Ahmed Batcha whether he executed the document and that the latter

answered the question in the affirmative. Their evidence, even if accepted, would only show that they were present when Hajee Ahmed Batcha

admitted execution before the registering officer. There is no evidence to show that Hajee Ahmed Batcha made any personal request to the

identifying witnesses to attest the document. It cannot be said on the evidence that they have received from the executant a personal

acknowledgment of his signature although it might be that they heard him acknowledge execution to the registering officer. The evidence of P.

Ws. 2 and 3 does not show that they had any animus to attest. P.W. 3 merely stated that the registering officer asked them (identifying witnesses)

to sign. That would indicate only that they affixed their signatures for the purpose of identification rather than with a view to attest. They cannot

therefore, be regarded as attesting witnesses to the document.

(28) Learned counsel for the respondent requested us that an opportunity might be given to the latter to re-examine the registering officer as well as

the identifying witnesses for finding out whether they had the intention to attest while affixing their signature to the registration endorsement. We

cannot accede to that request, in view of the categorical statements made in the evidence a remand at this stage would only tempt the parties to

procure if possible perjured evidence.

(29) Mr. Champakesa Aiyangar, learned counsel for the respondent, then contended that even if the security bond is held to be invalid for want of

proper attestation, the decree in the suit should be held to create a charge over the properties which were ultimately brought to sale. It must be

remembered that C. S. No. 56 of 1953 was a suit for recovery of a sum of money. No relief by way of enforcing a charge or mortgage was

prayed for in the suit. Indeed Abdul Jabbar Sahib had no charge over the properties securing the amount due to him before instituting the suit.

Secondly, the properties covered by the security bond, which are referred to in the decree, are all situate outside the original jurisdiction of this

court and it would not be competent for the plaintiff to institute a suit claiming relief against those properties in this court. It is apparent from the

judgment in the an aside in the (?Sic) as it were. The learned Judge Ramaswami J. Who disposed of the suit added at the end of his judgment the

following words:

It is stated that the defendants have executed a security bond in respect of their immovable properties when they obtained leave to defend and this

will stand enured to the benefit of the decree holder as a charge for the decree amount.

The matter was posted to be spoken to again on 25-3-1954; the learned Judge stated,

Time for payment till 20th April 1954 with liberty to apply for the appointment of Commissioners for sale of property if payment is not made.

Balakrishna Aiyar J. Held that in making this order the learned Judge could not have intended to grant a relief which was not even asked for in the

plaint and that his intention must have been only to declare the existence of the charge created by the security bond and that therefore if the security

bond was invalid for any reason the plaintiff would have no higher right by virtue of the decree which did not itself create the charge We agree with

the view of the learned Judge. Our reasons are: clause (3) of the decree is not happily worded. It is more consistent with the view that it was the

bond that was to operate for the benefit of the plaintiff than with a charge being created by the decree. In our opinion, the ambiguity in clause (3)

can be resolved by a reference to the judgment in the context of the admitted fact that no relief was prayed for in the plaint in respect of the

properties given as security, and no relief by way of creating a charge can be given by this Court over immovable properties which are not the

subject matter of the suit and which are situate outside the City of Madras.

Learned counsel for the respondent placed considerable reliance upon clause (4) of the decree which gave the plaintiff liberty to apply for sale of

the properties specified in clause (3) Clause (4) is only consequential upon clause (3). If under c. (3) of the decree, there is no charge created by

court over the properties, clause (4) cannot be construed as giving one.

In our opinion, the decree should be construed as containing nothing more than a recital of the fact of there having been a security bond executed in

favour of the plaintiff by the defendant, which was to enure for the benefit of the former in case there was default in the payment of the decree

amount. Therefore if the security bond fails for any reason, clauses (3) and (4) of the decree cannot by their own force amount to the creation of a

charge over the properties so as to enable the respondent to claim priority in respect of the proceeds of the sale realised in execution of his decree.

Learned counsel for the appellants contended that even if the decree were to be construed as creating a charge, it would be void having regard to

the fact that this court would have no jurisdiction over properties situate in the mofussil; vide clause 12 of the Letters Patent. In the view we are

taking in regard to the construction of the decree, it is not necessary to determine the question whether it is not necessary to determine the question

whether if the decree were construed to be one creating a charge over Immovable properties it would be valid. Even if the decree were held to be

invalid, a further question would arise whether it would be competent for this court, which is now concerned with the appeals from a judgment in

execution proceedings, to hold that the decree is void.

(30) For the reasons already given by us, we are of opinion that the security bond executed on 26-3-1953 by Hajee Ahmed Batcha in favour of

the Registrar of this court was not validly executed, in that it failed to conform to the provisions of the Transfer of Property Act and that the sale in

execution of the decree in C. S. No. 56 of 1953 can be regarded only as a sale in execution of a money decree and that the decree holder Abdul

Jaffar Sahif would be bound to share the proceeds of the sale along with the other decree holders who had obtained decrees against the same

judgment debtor and whose execution petitions have been pending in this court before the receipt of the assets.

(31) The appeals succeed and are allowed with costs in O. S. A. Nos. 65, 70 and 71 1956, here and before the learned Judge (Advocate's fee one set).

(32) Appeals allowed.