

**(1939) 08 MAD CK 0022**  
**In the Madras High Court**

Kesavamattam Koda Nayakamma

APPELLANT

Vs

Edara Venkayya and Another

RESPONDENT

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**Date of Decision :** 08-08-1939

**Acts Referred:**

Transfer of Property Act, 1882 — Section 59

**Citation :** (1939) 2 MLJ 664

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

**Bench :** Division Bench

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**Judgement**

Venkataramana Rao, J.—This is an appeal from the decree of the learned District Judge of West Godavari in a suit instituted on a mortgage

executed by defendants 1 and 2 in favour of the plaintiff. The second defendant is the son-in-law of the first defendant. The property mortgaged is

a house in Ellore. It is the case of the plaintiff that the property solely belongs to the first defendant. It is the case of the first defendant that the

property belonged to her husband. It is not necessary to determine that question. The second defendant admitted the claim. The main defence of

the first defendant was that the mortgage was not executed by her, that she was an ignorant and illiterate woman and the second defendant was in

a position to dominate her and the suit document was vitiated by fraud and undue influence. The learned Judge on a consideration of the evidence

came to the conclusion that the first defendant had not made out the case of fraud and undue influence. He found in favour of the plaintiff in regard

to the execution of the mortgage and gave a decree for the amount claimed. This appeal is by the first defendant.

2. In appeal the main point urged before us is that the mortgage is unenforceable because the plaintiff failed to prove due execution of the suit

document. The contention is that u/s 59 of the Transfer of Property Act a mortgage of the description sued on must be signed not only by the mortgagor but must be attested by two attesting witnesses in the presence of the executant and there is no proof of such a valid attestation. When a defendant denies execution of the mortgage alleged to have been executed by him, it is incumbent on the mortgagee, to prove due execution of the same, that is, execution in accordance with law. He must prove that the mortgagor signed the document in the presence of two attesting witnesses who must have seen the executant sign the document or received an acknowledgment from him of his having signed the document and each one of the attestors must have signed the document in the presence of the executant. The mortgage-deed in this case purports to be attested by two witnesses, P.W. 1 and one Perimella Venkatasubba Rao. Only one attesting witness has been called, that is, P.W. 1. He has deposed that he saw the first defendant put her thumb impression on the document but he does not depose that he signed it in her presence. He did not say anything about the other attesting witness signing it. In order to supply this lacuna Mr. Ramachandra Rao on behalf of the mortgagee sought in aid the deposition of P.W. 2, the writer of the document, one Turimella Suryanarayana. He contends that a writer can be an attesting witness. Whether a writer can be an attesting witness depends on the circumstances of each, case. Assuming the writer can be treated as an attesting witness, the one essential element of attestation is wanting in this case. The writer does not depose that he signed the document in the presence of the executant. Mr. Ramachandra Rao submits that, having regard to the circumstances of this case, it is open to USL to presume that P.W. 1 and the writer must have affixed their signatures in the presence of the executant. So far as P.W. 1 is concerned it seems to us to be very doubtful whether he was actually present at the time when the first defendant put her thumb impression. A suggestion was made in the cross-examination of P.W. 1 that he did not attest the document in the residence of the plaintiff but elsewhere. In the cross-examination of P.W. 2 it was elicited that when the document was being written P.W. 1 was not there but the second defendant brought P.W. 1 as he was going along the road to attest the document. The evidence as to the presence of P.W. 1 at the time of execution is unsatisfactory. With regard to P.W. 2, on an examination of the

document it will be seen that he does not sign the document as a writer but there is a statement that the writing of the document is of Turimella

Suryanarayana. It cannot be said that that statement amounts to attestation within the meaning of the law. The statement indicates that it was not

intended that he should sign as an attesting witness. But even assuming as we have said that he intended to sign that document as an attesting

witness, he does not, depose-that he Wrote the said statement in the presence of the first defendant and all that he says is that the first defendant

was present when he was writing Ex. A. On the evidence we are not inclined to presume that all the attesting witnesses including the writer were

present at the time when the first defendant put her thumb impression and that all persons being at the same place it would have been possible for

the first defendant to witness the signature by the attesting witnesses and the writer. We are therefore reluctantly forced to come to the conclusion

that the mortgage-deed has not been duly proved to be executed by the first defendant and a decree on the mortgage cannot be sustained and

must be set aside. But Mr. Ramachandra Rao contends that there is a personal covenant in the document and on the strength of that personal

covenant it is open to us to pass a money decree in favour of the plaintiff for the amount claimed. This can be done. Vide Kunku Moidin v.

Madhava Menon (1908) 19 M.L.J. 584 : ILR 32 Mad. 410 . Therefore, while we set aside the mortgage decree as passed by the lower Court,

we pass a decree against the defendants for the amount claimed in the plaint with interest at the contract rate up to date of plaint and at 6 per cent,

from date of plaint.

3. As far as costs are concerned as this point was not specifically raised in the Court below the proper order we should pass is to direct the parties

to bear their costs in this appeal but the plaintiff will have his costs in the Court below as decreed.

4. Both the defendants claim they are agriculturists and they are entitled to get relief under the Agriculturists Relief Act. The petitions filed by them

will be sent down to the lower Court for an enquiry into the question whether the defendants are agriculturists; and if they are found to be

agriculturists, the lower Court will give them relief under the Act and the decree we have passed against them will be subject to the relief they will

get on the said petitions. It is open to the plaintiff to oppose the said petitions and raise all objections which are open to him.