
(1932) 06 AHC CK 0028
In the Allahabad High Court

Lachman Singh and Others	Vs	APPELLANT
Surendra Bahadur Singha and Others		RESPONDENT

Date of Decision : 21-06-1932

Acts Referred:

Citation : (1932) 06 AHC CK 0028

Hon'ble Judges : Mukerji, J

Bench : Single Bench

Judgement

Mukerji, J.—His Lordship after quoting the points referred proceeded.

2. The first point as framed above is. meant to decide whether, when a plaintiff sues on a mortgage deed and the mortgage deed not being admitted by the defendant or defendants, he has formally to prove it, it is necessary for him to give evidence of the fact that the deed had been attested by two witnesses; or whether it would be enough for him to comply with the provisions of Sections 68 to 71, Evidence Act. In other words, when. it is not specifically in dispute whether there were two or more attesting witnesses to the deed or less than two, whether it is enough for a party seeking to prove the document to call a marginal witness to prove the signature of the executant and the witness's own signature on the margin, the deed itself bearing on the face of it the attestation of more than one attesting witness. Again, in other words, the question is whether in the three cases decided in this Court : Ram Dei v. Munne Lal [1917] 1930 All. 669 Uttam Singh v. Huham Singh [1917] 39 All. 112 and Shib Dayal v. Sheo Ghulam [1917] 39 All. 241 have been correctly decided. The argument for the appellants as advanced by Dr. Katju was this. In order to make a mortgage deed admissible in evidence it may be enough for a party to examine only one attesting, witness and to prove that the attesting, ?witness attested the document and that the mortgagor signed it. To comply with the rules contained in Sections 68 and 69, Evidence Act, it may be enough for the party propounding the document not to adduce any further evidence. But, if he contented himself with a bare compliance with Sections 68 and 69, Evidence Act,, he may succeed

in making the document capable of being read by the Court, but the evidence would not be enough to prove that the document creates or created a valid mortgage, and therefore if a mortgage has to be enforced, it must be proved that it was duly attested by at least two witnesses according to law.

3. The argument on the other side is that in the absence of anything to show that a mortgage bond, which on the face of it is attested by two or more witnesses, was not actually so attested, it is enough to prove that one marginal witness attested the deed and the mortgagor executed it. It is urged in support of this argument that the presumption u/s 114, Evidence Act, would be that the mortgage deed had been executed in the manner required by law and that everything that was likely to have happened at the execution of a mortgage did happen. Certain English cases have been quoted in support of this contention, which rely on a presumption of the correctness of things, and these are *Wright v. Sanderson* [1884] 9 P.D. 149 relied on in *Uttam Singh v. Hukam Singh* [1917] 39 All. 112 and *Harris v. Knight* [1890] 15 P.D. 170 and an Indian Case *Jongendra Nath v. Nitai Gharan* 7 C.W.N. 384 has also been cited. The first two were cases of a will and the last one was a mortgage case. It was further argued on behalf of the respondents that the rules laid down in the three cases reported in ILR All. 39 have so long held good in this Court that it would be undesirable to pronounce them bad law after such a length of time. It becomes necessary to examine the three cases in Vol. 39 of the Allahabad series. In *Ram Dei v. Munna Lal* [1917] 39 All. 669 the pleadings of the parties do not appear from the report. We have sent for and examined the paper-book. We find that the suit was by the mortgagee on a simple mortgage alleged to have been executed by one Bachchu Lal, the late husband of the defendant. The defendant pleaded that so far as she was aware Bachchu Lal never executed any mortgage deed in favour of the plaintiff as alleged by him. On these pleadings it was held that the plaintiff "had done all that was needed of him by law if he examined one of the attesting witnesses who said that the mortgagor had signed in his presence and he (the witness) had signed the deed as an attesting witness. It was pointed out at p. 111 of the Report that:

It was not expressly proved that there was another attesting witness present who saw the mortgagor sign, but it was not proved to, the contrary that there was not another attesting witness.

4. The matter therefore stood thus : there was a denial on the part of the defendant of the execution of the mortgage deed by the mortgagor and there was no question" as to whether the deed was operative or not, assuming that the mortgage deed had been executed (signed by the mortgagor after it had been written out). It was held that there was no necessity for the plaintiff to prove affirmatively that the-execution had been witnessed by at least two of the attesting witnesses.

5. In the second case of *Uttam Singh v. Hukam Singh* [1917] 39 All. 112 the pleadings are not apparent on the face of the report. We have examined the

paper book in this case also and find that the plaintiff Hukam Singh sued on foot of a mortgage executed in favour of one Tulsi Singh by one Torhi Singh. Torhi Singh was dead and he was represented by his son and other members of the family. The defence of one set of defendants was that, the execution and receipt of the consideration money of the mortgage deed sued on by Torhi Singh were not admitted (by the contesting defendant). Another set said that Torhi Singh did not execute and complete the mortgage deed sued on. The issue framed in the Court of first instance was 1 : Did Torhi Singh execute the deed in suit for consideration? Does the deed in suit amount to a mortgage? Is the deed binding on the defendants.

6. The marginal witnesses who were three-in number were all dead and the signatures of two were identified by their relations. There was no question raised as to whether the requirements of Section 59, T.P. Act, had been complied with or not, in the sense that at least two witnesses-should have witnessed the execution of deed by the mortgagor. It was held by the High Court that if the provisions of Section 69 had been complied with, the document had been proved as a deed of mortgage, and it was not necessary to prove further that the mortgage had in fact been executed by the executant in the presence of the attesting witnesses. As we have said, in deciding this case the learned Judges namely Richards, C.J. and Rafique, J., relied on the case of Wright v. Sanderson [1884] 9 P.D. 149. In the third case of Shib Dayal v. Sheo Gulam [1917] 39 All. 241 the mortgage deed on the face of it appeared to have been attested by a large number of witnesses. The execution of the deed had been denied and one marginal witness was examined to prove the execution of the document by the mortgagor and the witness's own attestation. There was no proof that the mortgagor signed in the presence of two attesting witnesses; nor was there any proof to the contrary. It was held following the case of Uttam Singh v. Hukam Singh [1917] 39 All. 112 that the requirements of the law had been complied with.

7. The principle laid down in these cases which were decided by four Judges, was followed in this Court in Narain Das v. Dilawar [1919] 41 All. 250 by Richards, C.J., and Bannerji, J., the Judges who decided the case in Ram Dei v. Munna Lal [1917] 39 All. 109. Again, the principle laid down in the cases in ILR 39 All. was affirmed in Lalsa Rai and Others Vs. Udit Rai and Another, and in Pateshwari Prasad v. Shankar Dayal AIR 1924 All. 217. It was argued by Dr. Katju that the cases in Bam Dei v. Munna Lal [1917] 39 All. 109 Shib Dayal v. Sheo Ghulam [1917] 39 All. 241 and Uttam Singh v. Tlukum Singh [1917] 39 All. 112 have really been dissented from by a Division Bench in this Court in the case of Balbhadar Singh Vs. Lakshmi Bai . No doubt there are some dicta of Sen, J., which might be construed as going in favour of the appellants, but the learned Judge himself distinguished the case of Ram Dei v. Munna Lal [1917] 39 All. 109. Indeed no occasion for dissenting from the decision in ILR 39 All. arose, because in the case of Balbhadar Singh Vs. Lakshmi Bai it had been found as a fact that when the donor put his name on the deed of gift only one attesting witness was

present and the other two were not there. Thus it was clearly established on facts that the deed had never been completed as a deed of gift, as required by Section 123, T.P. Act. We are therefore not prepared to say that the cases *Ram Dei v. Munna Lal* [1917] 39 All. 109 *Shib Dayal v. Sheo Ghulam* [1917] 39 All. 241 and *Uttam Singh v. Hukam Singh* [1917] 39 All. 112 were dissented from in *Balbhadar Singh Vs. Lakshmi Bai* .

8. Now let us consider the merits of the arguments. For the appellants it is urged that by compliance with the provisions of Sections 68, 69 and 71, Evidence Act, a party succeeds" only in making the mortgage-deed, or any other deed, like a deed of gift required to be attested by at least two witnesses, admissible in evidence but in order to be able to show that the document is a valid deed of mortgage or a valid deed of gift, he must also prove further that it was attested by two witnesses. It is conceded on behalf of the respondents and indeed the matter cannot be disputed that where the validity of the deed propounded either as a deed of mortgage or as a deed of gift is specifically in question, on the ground whether or not the requirements of Sections 59 and 123, T.P. Act, had been complied with, the party relying on the deed must prove that it had been attested by at least two attesting witnesses. But the question is where the mere execution of a document has to be proved either because of the case being *ex parte* or because of a mere denial of the execution, whether it would still be necessary to prove that the document was attested by two attesting witnesses.

9. The cases in *Ram Dei v. Munna Lal* [1917] 39 All. 109 *Shib Dayal v. Sheo Ghulam* [1917] 39 All. 241 and *Uttam Singh v. Ilukam Singh* [1917] 39 All. 112 lay down that it is not necessary. They relied on the express language of Sections 68 and 69, Evidence Act. Those sections make a document which is attested admissible in evidence if the requirements of those sections are complied with. If the documents become admissible in evidence they become admissible to prove what they contain, that is to say, they would become admissible to prove whether a mortgage had been executed or a gift had been made. There seems to be no warrant for an argument that a deed may be merely admissible and yet may be incapable of being read as a document of the kind which it professes to be. When the legislature enacted Sections 68 and 69, Evidence Act, they must have known that there might be titles for the creation of which attestation of the title-deed by at least two witnesses would be necessary. It is true that in 1872 when the Evidence Act was enacted the Transfer of Property Act had not come into force but the latter was enacted in 1882 and although 50 years have passed since it was enacted the legislature did not think it necessary to amend the Evidence Act, which had been enacted ten years earlier. This circumstance would go to show that in order to make a mortgage deed admissible in evidence as a mortgage deed or in order to make a deed of gift admissible in evidence as a deed of gift it is enough to comply with the provisions of Section 68 or Section 69, as the case may be, of the Evidence Act. But if the question be whether the document did create a mortgage or gift or not, it must be proved that the requirements of law as contained in Section 59 and Section 123, T.P. Act, have

been complied with. Thus on the merits and on the ground that long-established decisions of the Court should not be lightly interfered with we are of opinion that we should answer question No. 1 as follows:

Where a mortgagee sues to enforce his mortgage and the execution and attestation of the deed are not admitted, the mortgagee need prove only this much that the mortgagor signed the document in the presence of an attesting witness and one man attested the document provided the document on the face of it bears the attestation of more than one person; but if the validity of the mortgage be specifically denied, in the sense that the document did not effect a mortgage in law then it must be proved by the mortgagee that the mortgage deed was attested by at least two witnesses.

10. On the second point also there appears to be a conflict of decisions among the different High Courts. In *Veerappa Chettiar v. Subramania Ayyar* AIR 1929 Mad. 1 it was held that where it was proved that the mortgagor admitted execution of the document before the Sub-Registrar and the two identifying witnesses who appeared at the registration" the requirements of Section 59, T.P. Act, had been complied with. In *Bunkates Sewak Singh v. Iana Das* [1909] 3 I.C. 905 a more or less similar view was taken by a Bench of two Judges of this Court. In *Ram Charan Vs. Bhairon and Others* the views taken in *Veerappa Chettiar Vs. Subrahmaniam Aiyar and Others*, and *Veerappa Chettiar v. Subramania Ayyar* AIR 1929 Mad. 1 were accepted without any examination. In Oudh a Division Bench has expressly dissented from the view taken in the cases quoted above : see AIR 1931 146 (Oudh) There being no question of upholding a current of decisions we must decide the question on principle alone. Section 59, T.P. Act, requires that for the creation of a mortgage other than a possessory mortgage of a small value (with which we are not concerned here) there should be a registered instrument "signed by the mortgagor and attested by at least two witnesses." The safeguards therefore that are needed are : (1) the signature of the mortgagor on the instrument, (2) attestation by at least two witnesses and (3) registration of the document. The object of having a document attested by two or more witnesses is to provide contemporaneous evidence and to safeguard against the admission of perjured and false evidence. With respect to a document which need not be attested for its validity any man can come forward and say that he saw it being executed. There is no guarantee that the witness was present at the, execution of the document. On the other hand, if a document is required by law to be attested, there is this safeguard against the fabrication of false evidence, that there would be at least two persons in whose presence the document would be signed or before whom the mortgagor would admit the execution of the document, either, at the date of the execution of the document or immediately afterwards. Under the definition of the word "attested" as it now stands, it is not necessary that the executant should sign the document in the presence of the attesting witnesses, but all that is necessary is that the executant should personally acknowledge his signature or mark on the document and the attesting witnesses should sign the instrument in the presence of the

executant. Thus the executant will see before a document has the validity or force of a mortgage that his signature is there and at least there are two persons who have signed before him, the persons being such as have received a personal acknowledgment of the execution of the bond from him (the mortgagor).

11. After the deed has been signed and attested, it is to be taken to the registration office for registration. If we dispense with the previous signing of the document by the mortgagor and the previous attestation by the two marginal witnesses, we reduce the guarantee of genuineness required by Section 59, T.P. Act, Further, if we permit the registration and what may happen at the time, to take the place of execution and attestation which, according to the plain language of the section must precede registration, we break the entire spirit of the enactment. The duty of a registering officer is contained in several sections of the Registration Act (1908). When the document is presented to him, he is to inquire of the person making the presentation, if he happens to be the person executing the document, whether the presenter executed the document or, where the presenter is not the executant, whether the person who professes to have executed the document really executed the same. Then he has to satisfy himself as to the identity of the person or persons appearing before him and alleging that they have executed the document : see Section 34, Sub-section (3), Clauses (a) and (b). Then Section 52 requires that the day, hour and place of presentation shall be endorsed on every document at the time of presentation. Then Section 58 requires that the signature and addition of every person examined in reference to a document as also the signature and addition of every person admitting the execution of the document shall be obtained. Where therefore the registering officer does not know the executant of the document personally and has to ask certain persons as to whether they know the executant, the signatures of these persons, ordinarily known as the identifying witnesses, have to be taken down. Section 59 requires that the registering officer shall affix the date and his signature to all endorsements made under Sections 52 and 58. Thus, we find that, although the registering officer receives a personal acknowledgment from the executant of the fact of his executing a document and although he puts down his signatures under a statement recorded by himself or his clerk that the executant admitted the execution, he does not sign as an attesting witness. Section 59 requires that the registering officer shall affix the date and his signature on the same day on which the endorsements were made. Thus he will do his duty according to law, if all the endorsements are prepared in his presence and all signatures are taken in his presence and, he at the end of the day's work, sits down and signs all the endorsements made in the course of the day. At that time neither the executants nor the identifying witnesses need be present.

12. An attesting witness is one who signs the document in the presence of the executant after seeing the execution of the document or after receiving a personal acknowledgment of the execution of the document by the executant. Thus, there is no guarantee that a registering officer shall sign the document in

the presence of the executant and will thus fulfil the requirements of an attesting witness. Then again, the identifying witnesses may be present when the executant admits the execution of the document in the presence of the Sub-Registrar, or they may not be so present. They may be sent for after the executant has made his admission. They sign the endorsement on the document only in token of the fact that they have identified the executant before the Sub-Registrar. Thus they do not sign as attesting witnesses, and they never profess to be attesting witnesses.

13. It follows that the guarantee as to the genuineness of the transaction, expected to be furnished by attesting witnesses, disappears. There is no guarantee that the Registrar signed the document in the presence of the executant. There is no guarantee that the identifying witnesses signed the document in the presence of the executant. Again, there is no guarantee that the identifying witnesses heard the executant admitting the execution of the document. It would then remain for the mortgagee to try to persuade the Sub-Registrar and the identifying witnesses to appear in Court and to state that, as a matter of fact, they heard the executant admitting execution and that they signed the registration endorsement in the presence of the executant, although they may have no re-collection as to what had happened. In the case of an attesting witness, even if he does not remember what happened when he signed, if he is really an attesting witness, he can, on looking at his own signature at the margin of the deed, safely swear that, although he has no clear recollection of what had happened, he could say from his own signature that he was an attesting witness to the deed and that the mortgagor had either executed the document in his presence or had at least acknowledged the execution in his presence and that he (the attesting witness) had signed the document in the presence of the mortgagor. Thus we see that the spirit of the enactment that a mortgage deed to be valid must be signed and attested by at least two witnesses is broken, if we accept the possibility of the Sub-Registrar or identifying witnesses "coming forward as so many attesting witnesses.

14. There are again some other difficulties in the way of accepting the correctness of the decisions like *Veerappa Chettiar v. Siibramania Ayyar* AIR 1929 Mad. 1. Section 47, Registration Act, lays down that a registered document shall operate from the time from which it would have commenced to operate if no registration thereof had been required or made, and not from the time of its registration. Thus, the law understands that a document is presented for registration after it has been completed as if there had been no law of registration in existence. Again, a similar deduction can be made from the language of other sections of the Registration Act; for example, u/s 34 the registering officer is required to inquire whether the document presented before him has been executed or not. This contemplates that the document is ready there and requires registration. The registration is a guarantee against fabrication. The document is operative by its own force, but registration gives a guarantee that it is not a fabricated document. The Sub-Registrar is required to

make his "endorsements" on the document: see Sections 52, 58 and 59. A document therefore must be a document which existed before the "endorsement" was made on it. The same conclusion may be drawn from the language of Section 59, T.P. Act. There must be u/s 59 an "instrument" signed by the mortgagor and attested by at least two witnesses before it can be registered. If signature and attestation be permissible at the registration, why should not a further attestation be possible after the registration? Suppose a person whom a Sub-Registrar knows presents before a Sub-Registrar a document professed to be a mortgage deed but bearing no attestation: the Sub-registrar accepts the admission and signs the endorsement in the presence of the executant and thus, let us take it for granted, becomes an attesting witness. Then if the mortgagor takes the document to another man and asks him to sign on the margin as an attesting witness, the deed should be treated as a valid mortgage u/s 59, for, are there not two attesting witnesses according to the contention of the respondents? In our opinion therefore the document must be completed by the signature of the mortgagor and by the signature of the attesting witnesses before it is presented for registration.

15. In the case of *Samu Patter v. Abdul Kadir Ravuthan* [1912] 35 Mad. 607 their Lordships of the Privy Council quoted certain English decisions with approval. These decisions define an attesting witness as follows:

In *Bryan v. White* [1850] 2 Rob. 315 Dr. Lushington in 1850 laid down that "attest" means the persons shall be present and see what passes, and shall, when required, bear witness to the fact.

16. Again, the Lord Chancellor summed up the conclusion in these words:

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.

17. Thus an attesting witness must sign a document as an attesting witness. If a man signs a document not with the idea of being an attesting witness, he cannot be called an attesting witness. Thus, we find that in the case of AIR 1927 248 (Privy Council) certain sons of a testator had been made to sign a will of a talukdar ostensibly as marginal witnesses. The testator said in the will:

I have executed this will with the consent of all my sons and have got them to sign it as witnesses with this very purpose so that this will might be acted upon fully etc.

18. The testator himself believed that he had obtained the signature of his sons as witnesses. Now a legatee by attesting a will forfeits the gift made by the document. Their Lordships of the Privy Council held that the sons did not lose the gifts because they could not be legally regarded as attesting witnesses. It is clear therefore that the mere fact that a man sees the execution of a document and signs it does not make him an attesting witness, unless he signs with the idea of bearing testimony to the execution and with the idea further of permitting

himself to be cited as a witness, to prove the execution. This point was very clearly discussed in a Patna case in the judgment of the Patna High Court and the judgment was upheld by the Privy Council, the appeal being characterized as "hopeless" : see AIR 1925 PC 89 Here was a deed of mortgage which was actually attested by only one witness, but it had been subscribed to by the husband of the executant in token of the fact that he approved of the transaction. The Patna High Court dismissed the suit on the ground that there were no two attesting witnesses to the deed. The Judge delivering the judgment of the Patna High Court said:

I hold that the Maharaj Kumar (the husband) not having subscribed as witness is not a witness. It follows that the mortgage bond was not attested by at least two witnesses and it cannot be enforced against the mortgagors.

19. On the authority of these two cases it must be held that neither the registering officer nor the identifying witnesses signed as attesting witnesses, and therefore they cannot be treated as such for the purpose of the validity of the mortgage.

20. On behalf of the respondents Mr. Piare Lal Banerji has relied on certain decisions in Calcutta where it has been held that the requirements of a valid will, namely, its execution before two attesting witnesses, is sufficiently complied with if an otherwise defective will is taken for registration purposes before a Registrar and if the testator admits execution before the Registrar and the identifying witnesses. We need not quote these cases, but we can take it as an established rule of law in the Calcutta High Court and also in the Patna High Court which follows usually the decisions of the Calcutta High Court. Mr. Piare Lal Banerji's argument is that the rule of attestation of a will is similar to the rule of attestation of a mortgage deed (since the word "attested" was defined in the Transfer of Property Act) and that therefore the same rule should apply to a mortgage-deed.

21. We are of opinion that the argument is fallacious and should not be accepted. A will is not required by law to be registered. Thus, it might be enough for the compliance of the rule of execution and attestation if the testator actually admits execution before the Sub-Registrar and the identifying witnesses. Like a mortgage deed a will need not be executed and attested first before it is presented for registration. Only two safeguards are needed for a will, namely, execution and attestation. If these are supplied at the registration, the requirements are fulfilled. The case of a will therefore is entirely different from a case of a mortgage and cannot be relied upon as a clear guide.

22. Then it was argued by Mr. Piare Lal Banerji that the cases relating to a will decided by the Calcutta and Patna High Courts have been known to the legislature, and in amending the rule as to wills by Act 39 of 1925 the legislature has not touched the rulings, and therefore it must be taken to have approved of them. It was further argued that as, after the introduction of the definition of the

word "attested" in its final shape, the execution of a will and the execution of a mortgage deed are similar in nature and as the legislature in amending the Transfer of Property Act in 1929 did not alter the law, it must be taken that it approved of the Calcutta decisions in respect of wills, as equally applicable to a case of mortgages. This argument, in our opinion, is fallacious and makes too many assumptions which are not warranted by facts. To start with, the Succession Act of 1865 was not amended by Act 39 of 1925. The Act of 1925 is only a consolidating Act putting together all the law that was to be found on similar subjects in many enactments. Thus it cannot be said that the legislature had an opportunity to change the law as to wills and let it stand where it stood before. Secondly, the law as to wills as laid down in the Calcutta High Court was not applied except perhaps with one or two exceptions to the cases under mortgages. It cannot be said that the legislature in the year 1929 was aware that it had been held that a mortgage could be validly executed by admission before the Sub-Registrar and the identifying witnesses. The Madras Full Bench ruling was delivered on 4-9-1928 and in all probability did not appear in the Law Reports till the end of 1929.

23. On a careful consideration of the entire arguments, we are of opinion that the answer to the second question must be in the negative, and we decide so. Let these our answers be sent to the Division Bench which made the reference.