

(1918) 08 MAD CK 0032
In the Madras High Court

Muniappa Chettiar (dead) and Others	APPELLANT
Vs	
Su. Ma. Vellachamy Mannadi and Others	RESPONDENT

Date of Decision : 16-08-1918

Acts Referred:

Citation : 49 Ind. Cas. 278 : (1919) 19 LW 95

Hon'ble Judges : Oldfield, J;Abdur Rahim, J

Bench : Division Bench

Judgement

Abdur Rahim, J.—In this case a mortgage bond was executed by two persons. One of them executed it in his own house in* the presence

of two attesting witnesses. Afterwards the document was taken to the jail, when the other executant executed it. The attesting witnesses who had

already attested the document went to the jail and saw the execution of it by the other executant, but they did not subscribe their names again as

attesting witnesses after the document was executed by the 2nd executant in jail. It is the question of the Validity of the mortgage so far as this

executant, the 1st defendant, is concerned, that has been argued before us in the appeal.

2. I have, not the least doubt that an attestation of a document before its execution cannot be called proper attestation within the meaning of

Section 59 of the Transfer of Property Act. Attestation does not consist merely in seeing the execution of a document. It requires a further act, that

is, subscribing the name of the witness on the document as having seen the execution. I think this is involved in the very definition of the word

"attest," and that is also in accordance with what is laid down by their Lordships of" ""the Privy Council in Shamu Patter v. Abdul Kadir Rowthan

16 Ind. Cas. 250: (1912) M.W.N. 935 : 39 I.A. 218 and Maharaja Bum Narayan Singh v. Adhindra Nath Mukhurji (1916) 1 M.W.N. 428 : 20

C.W.N. 989 : 31 M.L.J. 251 :20 M.L.T. 216 : 25 C.L.J. 115, This is again how it was understood by a Division Bench of this Court in the case

of Kotamreddi Seetamrta v. Vannelakanti Krishnaswamy Row 35 Ind. Cas. 18 It seems to me something like contradiction in" term"s to speak of

attestation of a document before its execution. Mr. A. Krishnaswami Aiyar argued that, if the so-called witnesses put" down their names to a

document intending to see its execution afterwards and then actually saw its execution, such a continuity of intention and action would constitute the

act a sufficient attestation within the, meaning of the law. But I fail to see what the intention of the witnesses has got to do with it. The document

must be signed by the executant, and that fact must be testified on the document itself by the witnesses who saw its execution.

3. Then it was argued on behalf of the appellants that, in this case, it was not open to the trial Judge to go into this question at all, because the 1st

defendant in his written statement admitted that the mortgage bond had been executed. It was argued that this amounts to an admission that the

document was validly executed, that is to say, it was not only executed by the 1st defendant but that the requirements of law regarding attestation

by two witnesses had been complied with. In the first place, I cannot read the statement as necessarily implying that the requirements of law with

respect to attestation had been conformed to. I think all that was meant to be admitted was that the 1st defendant had signed the document. No

doubt, no legal objection to the validity of the document was taken in the written statement" by the defendant on the ground that it was not

properly attested as required by the law. It was not until the examination of one of the witnesses for the plaintiff that the Subordinate Judge,

thinking that the question of due attestation ought to be enquired into, framed the additional issue with respect to this point. It is argued that it was

not open to the Subordinate Judge to do this. I do not, however, see any force in this contention Both Section 58 of the Evidence Act and Order-

VIIr, Rule 5, of the CPC give a discretion to the trial Judge to require a fact that has been admitted by one of the parties to be proved otherwise

than by the admission. And taking this to be merely a case of proof, I think it was within the competence of the trial Judge to require proof of the

due attestation of the bond in question. The Legislature in giving discretion to the Court in this connection does not in any way attempt to define"

under what circumstances the discretion is to be exercised. But I am inclined to hold that in a case where a Court finds that a certain document

would not be valid in law unless certain facts were proved, and it doubtful whether those facts existed, it is competent for it to embark on an

enquiry on the subject. I think in the Privy Council case of *Shamu Patter v. Abdul Radir Rew-tha* 16 Ind. Cas. 250 this very point was raised and

their Lordships thought that, under such circumstances, the Court had ample power to frame an additional issue. Mr. De Gruyther, the learned

Counsel for the appellant, relied upon an admission by the respondent of the execution of the bond, but their Lordships held that it was competent

to the Court to enquire into the matter.

4. There is also another answer to this argument of the appellants based upon the so-called admission of the 1st defendant. Section 59 of the

Transfer of Property Act requires attestation by two witnesses for the validity of the document itself. It says that a mortgage can be effected only

by a registered instrument signed by the mortgagor and attested by at least" two witnesses. All the rulings on the subject have interpreted these

words as importing that, without such attestation, a document would be ineffectual to create any mortgage. This is in effect the ruling of the Privy

Council in *Maharaja Ram Narayan Singh v. Adhindra Nath Mukhurji* 34 Ind. Cas. 900: 4 L.W. 15 It is not merely a question of proving a

document. Section 68 of the Evidence Act requires that one of the attesting witnesses shall be examined in order to prove a document of this

character. That is undoubtedly a question of proof. But even if a mortgage bond is proved in that way, the bond would not be valid if the

requirements of section 59 of the Transfer of Property Act regarding attestation by two witnesses had not been complied with. If, as I think, the

provisions of Section 59 of the Transfer of Property Act relate to the question of the legal operation of the document itself apart from the mode of

proving it, then, there can be no force in the argument based on the so-called admission, the effect "of which would only be to dispense with the

proof of the document. On these grounds, I think the appeal must fail and be dismissed with costs of the respondent.

Oldfield, J.

5. I am not prepared to dissent from my learned brother's references to the lower Court's view of its discretion u/s 58 of. the Evidence Act and

Order VIII, Rule 5 of the Civil Procedure Code, but I think that that part of the case can be put on a firmer foundation because the 4th and 5th

defendants were ex parte and, as in *Shamu Patter v. Abdul Kadir Rowthan* 16 Ind. Cas. 250 : (1912) M.W.N. 935 : 16 C.L.J. 596, it was the

duty of the trial Judge to satisfy himself that the claim was formally proved against them. As regards the remainder of my learned brother's

judgment, I respectfully concur.