

(1918) 02 PRI CK 0006

In the Privy Council

Case No : Privy Council Appeal No. 61 of 1913

Rai Ganga Pershad Singh and others

APPELLANT

Vs

Ishri Pershad Singh and others

RESPONDENT

Date of Decision : 01-02-1918

Acts Referred:

Citation : (1918) AIR(PC) 3

Hon'ble Judges : Bart, Walter Phillimore, Ameer Ali, John Edge, Viscount Haldane, JJ.

Advocate : Chester, Ranken Ford, T.L. Wilson and Co., H.N. Sen, A.M. Dunne, B. Dube, De Gruyther, for the Appearing Parties.

Judgement

Viscount Haldane, J.

This appeal arises out of a suit which was brought by one Ishri Pershad and others to enforce an instrument of mortgage, dated in 1893, against the present appellants and others.

The whole question before their Lordships turns, in the first instance, upon the validity of the instrument of mortgage which is sought to be enforced. It is argued on behalf of the appellants that the mortgage was invalid because it was not executed in the manner rendered necessary by section 59 of the Transfer of Property Act, 1882. Section 59 enacts that :-

"Where the principal money sum secured is 100 rupees or upwards, a mortgage can be effected only by a registered instrument signed by the mortgagor, and attested by at least two witnesses."

Now the question is : What is meant by the word "attested"? In the present case, all that is proved is that the mortgage was executed under circumstances which their Lordships will state very shortly. It was granted by a lady called Mussummat Sharbat Koer, who was the guardian of her son Balmukund Das, and she executed the mortgage on his behalf. She was a pardanashin lady, and the account given by the respondents' own witnesses of what happened was this :

She was behind the pardah when the document was taken to her for signature; none of the witnesses saw her sign it; her son came from behind the pardah and said that it had been signed by her. That was all.

The question is whether the witnesses who appended their names under these circumstances attested the document in accordance with the provisions of section 59. Now at one time there seems to have been a good deal of difference of opinion as to what "attested" meant. It will be observed that the words are not "attested and acknowledged," as is the case in some statutes, but "attested" only. At the time this appeal was decided by the High Court, this Board had not decided the case of *Shamu Patter v. Abdul Kadir Ravuthan*, 1912 35 Mad. 607 = 16 I.C. 250 = 39 I.A. 218 (P.C.).

In that case it was held, settling the law as to the interpretation of the words to which their Lordships have referred in section 59 that the section is not complied with if the witnesses have not been present at the execution of the instrument and have only attested on the subsequent acknowledgment of the signature. After that there was another case brought before this Board, which was relied on by the respondents as bringing the point in the present case, at any rate, much nearer. It was a case of *Padarath Haluvai v. Ram Nain Upadhia*, 1915 37 All. 474 = 30 I.C. 366 = 42 I.A. 163 (P.C.). The headnote is as follows :-

"A mortgage deed purported to be executed by two pardanashin ladies. It appeared from the evidence of two of the attesting witnesses that they saw the hand of each executant when she signed the deed, and that although they could not see the faces of the executants, they heard them speak and recognized their voices."

That is a very different case from a case of attesting on mere subsequent acknowledgment. It is a case in which the witnesses actually saw the hand of each lady, and in which they recognised her voice, and it is plain that, in the case of witnesses who were acquainted with the individuality of the lady concerned, they might very well recognise the hand which guided the pen and the voice sufficiently to be able to swear to the identity of the person who was performing the act. But that is a very different case from the one before their Lordships upon the present occasion, where, not only was the actual attestation not witnessed by a hand put out from behind the curtain, but the voice was not heard, and what the witnesses went on was, in the main, the fact that the son came to them and said:

"Here is the deed which my mother has executed". That, in their Lordships' opinion, is not enough to satisfy the terms of the statute. The mortgage is therefore void, and the appeal must succeed.

It has been suggested that the appeal should be referred back to the Court below, on the view which their Lordships take of the law (and it is a view which may be said to have been a somewhat novel one at the time of the decision of the High Court in Calcutta, given in 1909, three years before the first decision of

the Judicial Committee, to which their Lordships have referred), for the purpose of framing an issue to see whether it could be brought within the later decision about pardanashin ladies.

But it is obvious that the facts, as proved here, fall far short and very remote from, what was under consideration in the case to which reference has been made, and their Lordships see no justification for taking the unusual course of referring back an appeal which has been argued, and which ought prima facie to be decided upon the materials which were before the Courts below.

Their Lordships will, therefore, humbly advise His Majesty that the appeal should be allowed, and that the respondents should pay to the appellants their costs here and in the Courts below.