

(1912) 07 PRI CK 0003

In the Privy Council

Shamu Patter

APPELLANT

Vs

Abdul Kadir Ravuthan and others and Abdul Rajak Sahib and others

RESPONDENT

Date of Decision : 30-07-1912

Acts Referred:

Citation : (1912) 35 ILRPC 607 : (1912) 39 IndApp 218

Hon'ble Judges : Shaw, Johan Edge, Ameer Ali, JJ.

Judgement

Ameer Ali, J. 1. These are two consolidated appeals from certain judgments and decrees of the High Court of Madras, dated January 28, 1908, affirming the decisions of the Subordinate Judge of South Malabar at Palghat; and the sole question for determination in both cases turns upon the meaning to be attached to the word "attested" in Section 59 of the Indian Transfer of Property Act (IV. of 1882), the first clause of which provides that, where the principal money secured is one hundred rupees or upwards, a mortgage can be effected only by a registered instrument signed by the mortgagor and attested by at least two witnesses. 2. The appellant Shamu Patter, as the representative of one Appu, deceased, brought a suit on July 18, 1902, in the Court of the Subordinate Judge of South Malabar, to enforce a mortgage alleged to have been executed in favour of Appu by the Ravuthan defendants. The other defendants to Patter's action were certain attaching creditors of the Ravuthans, who are respondents in the present appeals, and who challenge the mortgage on the ground, inter alia, that it was in fraud of creditors and without consideration. Their attachment on the mortgaged properties appears to have been partially removed at the instance of Patter, and they accordingly brought a suit some time in 1903 in the Court of the District Munsif of Palghat for a declaration that the mortgage transaction was fraudulent and without consideration, and ineffective so far as their rights were concerned. This suit was afterwards transferred to the Court of the Subordinate Judge and was tried with Patter's action, the evidence in one being taken as evidence in, the other. 3. The trial began, as appears from the order sheet, on September 7, 1903; arguments were heard on November 16 and 17, and

judgment was reserved. On the same date, it appearing from the evidence of the witnesses to the mortgage deed that they were not present at its execution but had put their names on the document on the acknowledgment of the Ravuthans, the Subordinate Judge framed a supplemental issue in these terms: "Is it (meaning the mortgage deed) valid under Section 59 of the Transfer of Property Act? And on November 19, holding that the document was invalid under that section, he dismissed Patter's suit (save as regards a personal decree against the Ravuthans) and by a separate judgment decreed the action of the creditors.

4. From these two decrees Patter appealed to the High Court of Madras, which has upheld the Lower Court's decisions. 5. In the present appeals the judgments of the Courts in India have been challenged on two grounds, first that the Subordinate Judge acted irregularly and without jurisdiction in framing an issue after the close of the arguments and deciding the case on it; and secondly that the Courts are in error in holding that the word "attested" in Section 59 of the Transfer of Property Act implies the witnessing of the actual execution of a document. 6. With regard to the first point their Lordships are of opinion that Section 149 of the Civil Procedure Code (Act XIV. of 1882), which is applicable to the proceedings, is conclusive. That section declares that the Court may at any time before passing a decree amend the issues or frame additional issues on such terms as it thinks fit, and all such amendments or additional issues as may be necessary for determining the controversy between the parties shall be so made or framed. 7. The first part of the section leaves it in the discretion of the Court to frame such additional issues as it thinks fit, whilst the latter makes it imperative on the judge to frame such additional issues as may be necessary to determine the controversy between the parties. The Subordinate Judge was, therefore, fully empowered to frame the issue on which he decided the case. 8. Even had there been no such express provision in the Code, their Lordships consider every Court trying civil causes has inherent jurisdiction to take cognizance of questions which cut at the root of the subject-matter of controversy between the parties. 9. The substantial ground, however, on which the decrees of the High Court are impugned has reference to the interpretation put upon Section 59 of the Transfer of Property Act. It is contended on the authority of *Grayson v. Atkinson* 2 Ves. Sen. 454 and *Ellis v. Smith* 1 Ves. 11, which was followed in 1829 in *White v. Trustees of the British Museum* 6 Bing. 310, that the learned judges of the Madras High Court were in error in holding that the word "attested" in the section under reference means the witnessing of the actual execution of the document by the person purporting to execute it. 10. The construction put in those cases on the word "attested" occurring in Section 5 of 29 Car. 2, c. 3 (the Statute of Frauds), no doubt supports the contention of the appellant that attestation upon the acknowledgment of the executant is equivalent to being present at and witnessing the execution. They related, however, to the due execution of wills, and though the language of Lord Hardwicke in *Grayson v. Atkinson* 2 Ves. Sen. 454 was sufficiently wide to cover deeds, his interpretation has not passed without question in later cases. The eminent judges who decided *Grayson v. Atkinson* 2 Ves. Sen. 454 and *Ellis v.*

Smith 1 Ves. 11 themselves doubted the correctness as well as the expediency of widening the meaning of the word "attested," but felt overborne by authority. In the latter case the exact question for determination was whether a testator's declaration before three witnesses that it is his will is equivalent to signing it before them. Parker C.B. began his judgment with the following important observation:

I confess, if this had been *res integra*, I should doubt whether the testator's declaration is a proper execution within the 5th Clause; because, I think, an admission that it is sufficient tends to weaken the force of the statute, and let in inconveniences and perjuries. 11. Willes C.J. observed that he was not satisfied in his own mind that the testator's acknowledgment was sufficient, but he added "authorities bear me down and I must yield." And the Master of the Rolls pronounced the extended construction to be "a dangerous determination and destructive of those barriers the statute erected against perjury and frauds." The learned judges, however, felt bound by the previous decisions, and, proceeding on the principle of *stare decisis*, decided in favour of the view now pressed before their Lordships regarding the construction of a section of the Indian statute relating to a totally different subject. 12. As the question involved in these appeals is of considerable importance and there seems to be some divergence of opinion between the Indian High Courts, their Lordships do not desire to pass altogether unnoticed the other authorities discussed at the Bar as well as in the well-reasoned judgments of the learned judges in the Madras High Court. 13. In *Casement v. Fulton* 3 Moo. Ind. Ap. 395, which was decided in 1845, the question for decision was whether the signatures of two witnesses who had subscribed a will at different times, but the first had acknowledged to the second that he had signed the same, amounted to sufficient compliance with the provisions of Section 7 of the Indian Wills Act of 1838. Lord Brougham, in delivering the judgment of the Judicial Committee, observed that: "The Statute of Frauds (29 Car. 2, c. 3, Section 5) requires the will to be signed by the testator, in the presence of the witnesses; nevertheless, the construction put upon that important provision has been that an acknowledgment is equivalent to a signature. How far this latitude of interpretation was justified in principle we need not now stop to inquire, else it might well be suggested that to do an act in the presence of a witness, and to acknowledge having done it when the witness was not present, are two entirely different things, as different as the witnessing a fact or act, and the witnessing a confession of that fact or act." And after referring to the hesitation with which the decision had been arrived at in *Ellis v. Smith* 1 Ves. 11, he refused "to carry one step further a construction which so great a weight of authority lamented and showed to have been ill-advised in its inception." 14. The later cases are still more direct in the interpretation of the words "attestation" and "attested." In *Bryan v. White* 2 Rob. 315, 317 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 facts." In 1855 Lord Campbell C.J., in *Roberts v. Phillips* 4 E. & B. 450, enunciated the

same rule as regards the word "attested," that the witnesses should be present as witnesses and see it signed by the testator. And the principle was given effect to in the House of Lords in *Burdett v. Spilsbury* 10 Cl. & F. 340. 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 attesting witness." 15. The meaning of the words "attest" and "attestation" has also been before the Courts under the Bills of Sale Act of 1878 (41 & 42 Vict. c. 31, Sections 8 and 14), and the interpretation put on them in *Roberts v. Phillips* 4 E. & B. 450 and *Bryan v. White* 2 Rob. 315, 317 has invariably been followed. 16. Section 50 of the Indian Succession Act (X. of 1865) was referred to in support of the appellant's contention regarding the meaning of the word "attested" in Section 59 of the Transfer of Property Act. The phraseology of the two sections are quite different, as different in fact as the object of the two statutes. 17. Section 2 of Act XXV. of 1838 (the Indian Wills Act) declared that, after the passing of that Act, 29 Car. 2 "shall cease to have effect" except to a limited extent within the territories of the East India Company. In Section 7 the word "attested" is left out, but it is provided that the testator's signature "shall be made or acknowledged by him in the presence of two or more witnesses present at the same time." The latter words gave rise to the question in *Casement v. Fulton* 3 Moo. Ind. Ap. 395. Act X. of 1865 (the Indian Succession Act) has substantially taken the place of the Indian Wills Act of 1838, and embodies the rules which constitute the law applicable in India to cases of intestate or testamentary succession, excepting as regards Mahomedans, for the major portion of this Act was made applicable to Hindus by the Hindu Wills Act. Section 50 provides for the due execution of what are called unprivileged wills, and paragraph 3 declares: The will shall be attested by two or more witnesses, each of whom must have seen the testator sign or affix his mark to the will, or have seen some other person sign the will in the presence and by the direction of the testator, or have received from the testator a personal acknowledgment of his signature or mark, or of the signature of such other person; and each of the witnesses must sign the will in the presence of the testator, but it shall not be necessary that more than one witness be present at the same time, and no particular form of attestation shall be necessary. 18. It will be noticed that the word "attested," which was omitted in Section 7 of the Act of 1838, is reintroduced in Section 50, and it is expressly provided that attestation may be effected on the acknowledgment of the testator. Had the word "attested" by itself conveyed the meaning that attestation upon the acknowledgment of the executant was sufficient, there would have been no reason for making an express provision in the section. The inference to be drawn from it is obvious. The Legislature considered it expedient in the case of wills to permit of witnesses "attesting the document," in other words, of testifying to its due execution, on the acknowledgment of the testator that it was in his hand, and, as the word "attest" was not sufficient to validate such attestation, introduced an express provision to that effect. Section 68 of the Indian Evidence Act (I. of 1872), which declares that "if a document is required by law to be attested, it shall not be

used as evidence until one attesting witness at least has been called for the purpose of proving its execution," appears to their Lordships to indicate that the Indian Legislature used the word "attested" in the sense in which it has been construed through a series of decisions in the English Courts. Section 59 of the Transfer of Property Act, in requiring that in a certain class of cases a mortgage "can be effected only by a registered instrument signed by the mortgagor and attested by at least two witnesses," could only mean that the witnesses were to attest the fact of execution. Any other construction in their Lordships' opinion would remove the safeguards which the law clearly intended to impose against the perpetration of frauds. 19. The Calcutta High Court has in three cases arising under Section 59 taken the same view as the Madras High Court has expressed in the present case. And although in one instance the Bombay High Court had extended the meaning of the word "attested" to include attestation upon, acknowledgment, in *Ranu v. Laxmanrao* I.L.R. 33 Bomb. 44 the learned judges, on the authority of *Burdett v. Spilsbury* 10 Cl. & F. 340, arrived at the same conclusions as the two other Presidency High Courts. The Allahabad High Court, however in the case of *Ganga Dei v. Shiam Sundar* I.L.R. 26 Allah. 69 has taken a different view. The learned judges seem to consider the introduction of the words "personal acknowledgment" in Section 50 of the Indian Succession Act as an interpretation of the word "attest." They say as follows: It seems to us reasonable to suppose that the interpretation put upon the word "attest" in that section, in the absence of good technical or substantial reason to the contrary, should be taken to be the meaning in which the word is used in Section 59 of the Transfer of Property Act. 20. With respect, their Lordships are wholly unable to follow the reasoning. As already observed, the provision as to attestation upon the testator's personal "acknowledgment" was quite a separate condition and in no sense an interpretation of the word "attest." In fact, it was provided that the witnesses might attest the document on witnessing the actual execution or on the personal acknowledgment of the testator of the execution. But that, in their Lordships' judgment, affords no warrant for extending the meaning of the word "attest." Nor do their Lordships agree with the view expressed by the learned judges regarding the policy of placing a larger construction on the word in consequence of the "social institutions of the country." Those very institutions their Lordships consider make it necessary that "the barriers against perjury and fraud," to use the language of the Master of the Rolls in *Ellis v. Smith* 1 Ves. 11, should not be removed upon speculative considerations. 21. On the whole their Lordships are of opinion that the judgment of the High Court of Madras is right, and that these appeals ought to be dismissed, and they will humbly advise His Majesty accordingly.