Brij Raj Singh (Dead) by Lrs.

Vs

Sewak Ram

Civil Appeal No. 3093 of 1982

(K. Venkataswami, A.P. Misra JJ)

22.04.1999

JUDGMENT

K. Venkataswami, J.

1. This appeal by special leave is preferred against the judgment of the Punjab and Haryana High Court in R.S.A. No. 1807/71 dated February 3, 1982. The appellants are the legal representatives of the deceased plaintiff. For the sake of convenience, the parties are referred hereinafter as `plaintiff' and `defendants'. The second defendant, a proforma party, is the father of the first defendant.

2. The plaintiff filed Suit No. 722/67 for recovery of possession of the suit site from the defendants. According to the averments in the plaint, the suit site was acquired by the plaintiff under a gift deed dated 18.1.1961 registered on 9.2.1961 and marked as Ext. PW-6/1 in the suit. One Kanwar Chander Raj Saran Singh was the donor under the said gift deed. The plaintiff before filing the present suit for possession preferred an application for ejectment of the defendants before the Rent Controller alleging that the first defendant who was a tenant under him denied the title. The learned Rent Controller by his order dated 16.1.1967 held that the first defendant was a tenant under the plaintiff and further held that the first defendant was liable to be ejected from the suit site. However, on appeal the appellate authority by its order dated 3.6.1967 reversed the finding of the learned Rent Controller and held that the plaintiff has not proved that there existed a landlord and tenant relationship. Accordingly, while allowing the appeal, the appellate authority dismissed the application for ejectment preferred by the plaintiff.

3. In the light of the order of the appellate authority, the plaintiff filed the present suit for possession on the basis of the said gift deed. The plaintiff appears to have examined 13 witnesses on his side and placed a number of documents to support his claim for possession.

4. The defendants resisted the suit contending that they are the owners, that Kanwar Chander Raj Saran Singh had no connection whatsoever with the suit property and, therefore, had no right to make the gift deed in favour of the plaintiff. The gift deed, if any, he alleged, must be a device by the plaintiff to grab the defendants' property. The defendants also denied that the plaintiff was the landlord of the suit site.

5. Defendants appear to have examined three witnesses. However, the defendants have not filed any documents to substantiate their claim. The trial court on the basis of the pleadings framed the following issues :-

(i) Whether the plaintiff is the owner of the property in suit as alleged.

(ii) Whether the suit is within time.

(iii) Relief.

6. The trial court on the basis of the oral and documentary evidence found that the plaintiff derived title to the suit property under the gift deed dated 18.1.1961 and that the suit was in time. Accordingly a decree for possession was granted on 15.1.1971 by the trial court.

7. The defendants aggrieved by the decree for possession granted by the trial court preferred an appeal to the Senior Sub-Judge, Gurgaon. Before the first appellate court for the first time the Defendants raised an objection that the gift deed has not been duly proved in accordance with the provisions of Transfer of Property Act and hence cannot be taken into account to confer title on the plaintiff. The lower appellate court, for the reasons stated in its judgment, held that the gift deed was not duly proved and hence the plaintiff cannot be held to be the owner of the suit site. On that ground the lower appellate court allowed the appeal and dismissed the suit preferred by the plaintiff. The lower appellate court, however, held that the suit was in time and the original owner of the suit site was Kanwar Chander Raj Saran Singh.

8. The High Court in the second appeal preferred by the plaintiff, after noticing that no specific objection regarding execution or attestation of the gift deed was taken by the defendants, confirmed the judgment of the lower appellate court. Hence, the present appeal by special leave.

9. Mr. Shanti Bhushan, learned Senior Counsel for the Plaintiff now represented by LRs., submitted that the lower appellate court and the High Court went wrong in allowing the defendants to raise an objection regarding execution or attestation of the gift deed as no such objection was specifically raised in the written statement nor in the cross-examination of the plaintiff's witnesses nor even in the arguments before the trial court. According to the learned Senior Counsel, the gift deed was duly attested by two witnesses on the first page of the document which was not noticed by the lower appellate court and the High Court. The attestation was duly proved by PW-6 who has subscribed his signatures in the gift deed at three places in three different capacities, namely, as scribe, as attesting witness and as identifying witness before the Registrar. He has spoken about his role as stated above in his evidence which was not challenged by the defendants in the cross-examination. In any event, according to the learned Senior Counsel, the examination of one attesting witness satisfies the requirement of Section 68 of the Evidence Act. He also submitted that even one attesting witness need not have been examined in view of proviso to Section 68 of Evidence Act as admittedly no specific challenge was raised either in the written statement or before the trial court even subsequent to the filing of the written statement. It is the further contention of the learned Senior Counsel that having regard to the recitals in the gift deed to the effect that the deed preceded by an oral gift coupled with the possession (long before the application of the provisions of the Transfer of Property Act to Punjab and Haryana), the compliance of section 123 of the Transfer of Property Act was not required. The learned Senior Counsel for the plaintiff cited a number of authorities to support these submissions.

10. Mr. M.L. Verma, learned Senior Counsel appearing for the defendants, contending contra, submitted that the presentation of the document, namely, gift deed by power of attorney, was defective inasmuch as that power was not produced. At this stage we must state that after perusing the original gift deed (PW-6/1) in the court and in particular the endorsement of the Sub-Registrar on the second page regarding the production of registered deed of power of attorney, the learned Senior Counsel did not pursue this contention. He also submitted that an identifying witness cannot

be treated as an attesting witness. In support of that, he cited an authority of this court. Again this point does not arise for consideration in view of the fact that it is not the case of the plaintiff before us that the identifying witnesses are to be treated as attesting witnesses. We may point out at this stage that such an argument no doubt was placed before the lower appellate court and the High Court on behalf of the plaintiff. Before us such argument was not advanced and, therefore, that question does not arise. Mr. Verma, learned Senior Counsel for the defendants, submitted that the point regarding execution or attestation though raised for the first time before the appellate court is permissible as it was only a question of law. Regarding what amounts to a valid attestation in a registered document, Mr. Verma, learned Senior Counsel, cited a number of authorities and submitted that the lower appellate court and the High Court had correctly decided the issue by holding that the gift deed was not proved and consequently the plaintiff did not derive any title to the suit site. He also contended that notwithstanding the finding of the courts below that the owner of the suit site was Kanwar Chander Raj Saran Singh, the defendants cannot be dispossessed except by the true owner. Lastly, he contended that mere marking of exhibit (gift deed) does not amount to proof.

11. In the light of the contentions raised before us the issue that arises for consideration is whether the lower appellate court and the High Court were right in law in allowing the defendants to challenge the gift deed based on want of strict compliance of Sections 3 and 123 of the Transfer of Property Act even though no such plea was raised in Written Statement, no issue was therefore framed and no argument was advanced in the trial court. Apart from the above question of law, we have to see whether the lower appellate court and the High Court correctly appreciated the facts and properly looked into the gift deed in issue.

12. After carefully going through the judgments of all the three courts below and after perusing the original gift deed (Exbt. PW6/1), we find that the lower appellate court and the High Court had not looked into the document carefully before giving their findings. The lower appellate court in the course of the judgment in more than one place has stated that the gift deed was executed by the power of attorney which is a wrong statement. The lower court has stated as follows :-

> "The gift deed is said to have been executed by one Shri Janardhan Parshad as an attorney of Kn. Chander Raj Saran Singh. It was pointed by Shri T.C. Jain that unless the plaintiff produced the power of attorney of Janardhan Parshad Sharma, it could not be held by the court below that the said document was executed by a person duly authorised to execute the same."

Again the lower appellate court observed as follows :-

> "The objection urged by Shri T.C. Jain regarding the admissibility of the gift deed must, therefore, prevail on the ground that the gift deed has not been duly got proved in accordance with the provisions of Section 123 of the T.P. Act and secondly it has also not been proved that the donor duly authorised Janardhan Dass to execute the same as a general attorney in favour of the plaintiff."

13. While negativing a contention put forward on behalf of the Plaintiff, the lower appellate court observed as follows :-

> ".... it was necessary on the part of the plaintiff to have proved by positive evidence that Janardhan Dass Sharma was duly authorised to execute the gift deed in favour of

the plaintiff by Kn. Chander Raj Saran Singh."

14. It is nobody's case that the gift deed was executed by the power of attorney. A perusal of the gift deed clearly shows that Kanwar Chander Raj Saran Singh admittedly owner of the property has executed the gift deed and the power of attorney, namely, Janardhan Parshad Sharma was only authorized to present the document for registration. The lower appellate court without looking into the document proceeded as if the execution of the document was by a power of attorney and in the absence of a power to execute the document, the gift was not proved. Further, the lower appellate court in the course of the judgment has held as follows :-

> "An attesting witness must be a person who signed the document purporting to do so as an attesting witness. I have examined the said document and find that *this document has been only attested by one witness namely Sobha Ram.* The name of Ram Saran Dass appears in the said document as that of a scribe and he is only an identifying witness who has identified the execution made before the Sub-Registrar. Thus, it is evident that the gift deed which was the basis of the suit and which alone could confer the title of ownership on the plaintiff has not been proved in accordance with the provisions of Section 123 of the Transfer of Property Act and in view of the same the Trial Court was not justified in placing reliance on this document."

15. Sobha Ram was not the attesting witness for the gift deed. He was only an identifying witness before the Registrar as seen at page 2 of the original gift deed. The lower appellate court has totally ignored the categorical evidence of PW 6 stating that he has also signed as witness. Section 3 of the Transfer of Property Act specifically states that no particular form need be followed in the matter of attestation. It can be at the first, as in this case, or at last page.

16. The High Court, however, has rightly noticed that the gift deed was executed by Kanwar Chander Raj Saran Singh. However, the High Court held that the gift deed has not been duly attested as required under Section 123 of the Transfer of Property Act. The High Court in the course of judgment observed as follows :-

> "From the perusal of the gift deed, it is quite evidence that this was executed by Kanwar Chander Raj Saran Singh on 18.1.1961. *No one has signed as a witness to the document.* The scribe Ram Saran Dass has written "dated 18th January, 1961 *Bakalam* Ram Saran Dass". Later on, on 9th of February, 1961, the said document was presented for registration by one Janardhan Sharma who claimed himself to be the Mokhtiar-a-Aam of donor Kanwar Chander Raj Saran Singh. The necessary power of attorney in his favour dated 18th of February, 1953 was also produced before the Sub-Registrar as is evident from his endorsement made on 9th of February, 1961. He was identified before the Sub-Registrar by Ram Saran Dass - the scribe and one Shabha Ram. According to the learned counsel for the appellant, since Janardhan Sharma, the Mukhtiar-a-Aam of the donor Kanwar Chander Raj Saran Singh admitted the execution of the document before the Sub-Registrar and Ram Saran Dass, the scribe and Shabha Ram attested the same before Sub-Registrar, it will amount to attestation as required under section 123 of the Transfer of Property Act. In support of this contention, he relied upon Girja Datt Singh v. Gangotri Datt Singh, AIR 1955 SC 346 and Narain Singh etc. v. Parsa Singh alias Parsu, 1971 CLJ 195. After hearing the learned counsel for the parties at a great length, as observed earlier, *it appears that before the trial Court no such objection was taken specifically*

> *either at the time of admission of the document Exhibit PW6/1 or at the time of the arguments.* It was only at the appellate stage that this objection was taken on behalf of the defendant that the gift deed on the basis of which the plaintiff claimed himself to be owner of the site in dispute, is not a valid document as it was never attested by any of the witnesses as required under the Transfer of Property Act. This objection prevailed with the lower appellate court. The argument of the learned counsel for the appellant that the admission made by Janardhan Sharma, Mukhtiar-a-Aam of the donor and signed by the scribe Ram Saran Dass and Shabha Ram before the Sub-Registrar, will amount to attestation, has no merit. The document was required to be attested at the time when it was actually executed on 18.1.1961 by Kanwar Chander Raj Saran Singh. Since no one attested the document at that time, the subsequent signatures of the scribe and Shabha Ram who identified the Mukhtiar-a-Aam Janardhan Sharma before the Sub-Registrar, could not fill up the lacuna. Under Sub-Section (2) of Section 35 of the Registration Act, the registering officer may, in order to satisfy himself that the persons appearing before him are the persons they represent themselves to be or for any other purpose contemplated by this Act, examine any one present in his office. Thus Ram Saran Dass and Shabha Ram only identified the Mukhtiar-a-Aam Janardhan Sharma in order to satisfy the registering officer. In Timmavva Dundappa Budihal v. Channava Appaya Kanasgeri, AIR 1948(35) Bombay 322 it has been held that signatures made by the Sub-Registrar while he made endorsement on the document admitting it to registration and the signatures of the identifying witnesses made by them when they identified the executant before the Sub-Registrar cannot be regarded as the signatures of attesting witnesses. Moreover, at the time of registration the donor himself did not appear. It was only his Mukhtiar-a-Aam Janardhan Sharma who presented the same for registration on his behalf. The authorities relied upon by the learned counsel for the appellant, are not at all applicable to the facts of the present case and are clearly distinguishable. Since, there was no attestating witness at the time of the execution of the document on 18th of January, 1961, the lower appellate court rightly came to the conclusion that the gift deed, if is taken away as not duly executed, the plaintiff cannot be held to be the owner of the suit land because he claimed his title on the basis of the gift deed alone."

17. At this stage, let us extract the relevant section in Transfer of Property Act and Evidence Act.

Transfer of Property Act :-

S. 3. In this Act, unless there is something repugnant in the subject or context, -

> "Attested" in relation to an instrument, means and shall be deemed always to have meant attested by two or more witnesses each of whom has seen the executant sign or affix his mark to the instrument, or has seen some other person sign the instrument in the presence and by the direction of the executant, or has received from the executant, or has received from the executant a personal acknowledgement of his signature or mark, or of the signature of such other person, and each of whom has signed the instrument in the presence of the executant; but it shall not be necessary that more than one of such witnesses shall have been present at the same time, and no particular form of attestation shall be necessary. [only relevant portion is set out]

> *"S. 123.* For the purpose of making a gift of immoveable property, the transfer must be effected by a registered instrument signed by or on behalf of the donor, and attested by at least two witnesses. For the purpose of making a gift of moveable property, the transfer may be effected either by a registered instrument signed as aforesaid or by delivery. Such delivery may be made in the same way as goods sold may be delivered.

The Indian Evidence Act.

> "S. 68. *Proof of executing of document required by law to be attested.* - 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, if there be an attesting witness alive, and subject to the process of the Court and capable of giving evidence :
>
> Provided that it shall not be necessary to call an attesting witness in proof of the execution of any document, not being a will, which has been registered in accordance with the provisions of the Indian Registration Act, 1908 (16 of 1908), unless its execution by the person by whom it purports to have been executed is specifically denied."

18. It is common ground that the defendants have not raised any objection, leave alone specific objection as to the validity of execution/attestation of/in gift deed. Naturally, there was no issue on this aspect. Even the witness (PW6) was not cross-examined from this angle. Hence we are unable to sustain the contention of Mr. Verma that this being a pure question of law can be raised at the appellate stage. This is a mixed question of fact and law. Proviso to Section 68 of the Evidence Act dispenses with the necessity of calling an attesting witness in proof of any document, except a Will, which has been registered in accordance with the provisions of the Indian Registration Act when there is no specific denial by the party against whom the document is relied upon.

19. In this context, we may usefully refer to the decision cited at the bar.

20. In *Venkata Reddi v. Muthu Pambulu, AIR 1920 Madras 588,* a Division Bench of the High Court had occasion to consider the scope of Section 68 of the Evidence Act. After setting out Section 68 the Court observed as follows :-

> "I think the implication from the language of the section is that, if one attesting witness has been called (if there be an attesting witness, alive, etc.) then the document can be accepted by the court (of court, if it believes his evidence) as evidencing a mortgage transaction as the necessary evidence insisted upon by S. 68, Evidence Act, of a document required by law to be attested has been given. In other words, the document can, having created the charge on immovable property which it purports to create. S. 68 requires that only one attesting witness (if alive) should be called for the purpose of proving execution subject, of course, to the condition that that witness is subject to the process of the Court and capable of giving evidence. *The lower appellate Court however, held that either two attesting witnesses should be called when two are alive and that, even assuming that one only need be called, he should, at least, be made to prove that another (or the other) attesting witness besides himself also saw the execution. Hence it held that the plaint document was*

not properly proved as a mortgage document as one only of the attesting witnesses was called and he merely proved its execution by defendant 1 and the attestation by himself (that witness) and he was not asked about any other attestor having seen the execution."

21. While upsetting the above view of the lower appellate court, the learned Judges held as follows :

"The fact that the Evidence Act is ten years older that (than ?) the Transfer of Property Act has no relevancy in the consideration of this question. I might add that S. 69, Evidence Act, says that, if no such attesting witness can be found, proof that the attestation of one attesting witness at least is in the hand-writing of that witness and that the signature of the person executing the document is in the handwriting of that person is proof which might be accepted as sufficient by the Court. If S. 59, Transfer of Property Act, is interpreted as we are invited to interpret it as adding another requisite (even in the circumstances contemplated by Section 69, Evidence Act, that is even where no attesting witness is alive or could be found), namely direct proof that two attesting witnesses saw the execution, it would be practically impossible in most such cases to adduce evidence of third persons about attestation by two witnesses and many old mortgage transactions could never be proved at all as such. Documents, say about 28 years old, where it is not at all unlikely that the two attestators and the mortgagee have died (life not being too long in this country), cannot be proved at all to be valid documents unless some third persons who did not attest but merely happened to be present at the execution and attestation (a very unlikely contingency) happened to be alive, remembered what happened long ago of a transaction at which they were casually present and could therefore be called to prove the attestation by two attestators. If the argument is pushed to its logical limit, then even S. 90, Evidence Act, which says that a document purporting to be 30 years old, can be presumed to have been validly executed and attested, must be deemed to have been overruled by the provisions of section 59 of the later Transfer of Property Act. No doubt where the provisions of Section 68, Evidence Act, have been complied with by calling the attesting witness to prove the execution by the mortgagor, and the attestation by himself (the witness) and the document may therefore be accepted by the court as *prima facie* sufficiently proved to be a valid mortgage, that *prima facie* proof can be rebutted by proof on the other side, that the other witness or witnesses who has or have also apparently attested the document did not really see its execution and that the document therefore did not comply with the requirements of section 59, Act 4 of 1882."

22. In *Lachman Singh v. Surendra Bahadur, AIR 1932 Allahabad 527* a Full Bench of the High Court considered the issue and answered as follows :-

"Now let us consider the merits of the arguments. For the appellants, it is argued that by compliance with the provisions of Ss. 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 Ss. 59 and 123, Transfer of Property 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."

"Where a mortgagee 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 affect a mortgage in law then it must be proved by the mortgagee that the mortgage deed was attested by at least two witnesses."

23. Again in *Jhillar Rai v. Rajnarain Rai, AIR 1935 Allahabad 781* the High Court held as follows :

"There has been a subsidiary argument that the plaintiffs cannot claim to be co-share, because the mortgage deed has not been proved. The argument is based on the provisions of S. 68, Evidence Act. It appears that the execution of the mortgage was proved, but not by the production of a marginal witness. Under S. 68 as it now runs, it is not necessary to prove or to produce a marginal witness unless the mortgage is specifically denied. It is obvious that there would be no necessity to prove the deed at all if it was admitted and consequently the section contemplates a distinction between the position where execution is not admitted and a position where execution is specifically denied. In the present case the plaintiffs in the first paragraph of the plaint stated that they were mortgagees under the deed dated 23rd September, 1929, and that they had been in possession of the plots in question. The defendants said in their written statement that they did not admit this paragraph. But it is clear from the additional pleas that what they were questioning really was not the execution of the deed but the fact of possession. No issue was framed clearly on the question of execution. In these circumstances it cannot be held that the execution of the mortgage was specifically denied. The mortgage was therefore sufficiently proved."

24. We do not want to add the citation except to refer a judgment of the Guwahati High Court in *Dhiren Bailung v. Bhutuki and others, AIR 1972 Guwahati 44,* wherein the Court held as follows :-

"All that Section 68 demands before a document requiring attestation can be used as evidence is that one attesting witness at least should be called "for the purpose of proving its execution". It has been stated above that one attesting witness was called in the present case and he testified that Sashi and Paniram had executed the mortgage deed Ex. 1 in his presence by placing their signatures on it and that he had attested the document. Therefore, the requirements of Section 68 were evidently satisfied. However, the two courts below were of the opinion that it was incumbent upon the plaintiff to establish before he could succeed in that suit, the attestation of the deed by two witnesses, as enjoined by Section 59 of Transfer of Property Act, in the manner required by section 3 thereof where the expression "attested" is defined. I find it difficult to endorse that opinion. AIR 1932 All. 527 (FB) Lachman Singh v.

> Surendra Bahadur, is an authority for the propositions that Sections 68 & 69 of the Evidence Act "make a document which is attested admissible in evidence if the requirements of those sections are complied with" and that "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, the Full Bench observed, 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. The Full Bench clinched the issue by stating further that to make a mortgage deed or a gift deed admissible in evidence as a deed of mortgage or gift, as the case may be, it is enough to comply with the provisions of section 68 or 69 of the Evidence Act. However, it was added that if the question raised is whether the document did create a mortgage or gift or not, it must be proved that the requirements of law as contained in Sections 59 and 123, Transfer of Property Act, have been complied with. I respectfully agree with these observations of the Full Bench. Therefore, the precise question that falls for determination in the present appeal is whether, on the pleadings of the parties, there arises a question whether the deed Ext. 1 does or does not create a mortgage."

.....

> "To sum up, I hold that the defendants had denied only the execution of the mortgage deed, that they had not challenged its due attestation, that the legality of the mortgage deed was assailed on the specific ground that Sashi and Paniram had no exclusive right to mortgage the land in dispute, and that the parties went to trial only on the specific allegations adopted by them in their written pleadings. I hold further that in the context of the parties' pleadings the plaintiff was called upon to prove only the execution of the mortgage deed, that the execution is proved by the testimony of Harakanta Duara, an attesting witness, and plaintiff's father Tularam, and that the testimony of Harakanta Duara constitutes enough of compliance with the statutory requirements set out in the body of section 68. Hence the mortgage pleaded by the plaintiff is proved beyond doubt."

25. We are of the view that the above extracts from the judgments of the various High Courts do reflect the correct position in law. In the case on hand PW6 has categorically stated that he has signed as scribe, signed as witness and signed as identifying witness. We also find his signatures at three places. Nothing was elicited from this witness to disbelieve his statement in Chief Examination. It is not denied that the deed was registered as per the Indian Registration Act. Therefore even on merits the appellant has established the due execution and attestation of the gift deed according to law. We find from the original gift deed at the first page by the side of signatures of the donor, two witnesses have subscribed their signatures. We, therefore, hold that the lower appellate court and the High Court went wrong in allowing the defendants to raise the plea of non-compliance of Section 123 of the Transfer of Property Act and in holding that the gift deed was not proved.

26. So far as the case law cited by Mr. Verma, learned Senior Counsel for the defendants, is concerned, we find that it may not be necessary to refer the same so far as they related to the points that identifying witness cannot be an attesting witness; that mere marking of exhibit does not amount to prove and that no one except the true owner can discharge possession as there is no dispute on these points.

27. As regards the cases cited on the issue of attestation, we find that *Roda Framroze Mody v. Kanta Varjivandas Saraiya, AIR 1946 Bombay 12,* and *Vishnu Ramkrishna and others v. Nathi Vithal and others, AIR 1949 Bombay 266* relate to will and as such may not be apposite to the case on hand concerning gift deed. In *Sarkar Barnard & Co. v. Alok Manjary Kuari and another, AIR 1925 Privy Council 89, Abinash Chandra Bidyanidhi Bhattacharjee v. Dasrath Malo and others, AIR 1929 Calcutta 123,* and *Sundrabai Sonba Tendulkar v. Ramabai Jayaram, AIR 1947 Bombay 396* the question of failure to raise specific denial regarding execution/attestation and the consequences thereof did not arise and, therefore, those cases are not quite relevant. In *N. Ramaswamy Padayachi v. C. Ramaswami Padayachi and others, AIR 1975 Madras 88* factually specific denial was raised and in that context the judgment was delivered on the scope of Section 123 of Transfer of Property Act. In *Balappa Tippanna v. Asangappa Mallappa and another, AIR 1960 Mysore 234,* the Court held as follows :-

> "The net effect of S. 68 is that if the execution of a document of gift is specifically denied, then an attesting witness must be called to prove it. If, however, such execution is not specifically denied, then it would not be necessary to call an attesting witness to prove the same. But the document all the same will have to be proved. The effect of the proviso is that the due execution and attestation of the gift deed will have to be proved, although it may be proved by calling a person other than an attesting witness."

28. Here again there is no quarrel on the proposition set out above.

29. Now coming to the facts, the High Court is not right in proceeding that gift deed was not attested by any of the witnesses as required under the Transfer of Property Act. As noticed earlier the lower appellate court rested its conclusion about the gift deed on the wrong assumption that the deed itself was executed by a power of attorney and in the absence of such power of attorney, and as only the witness attesting the deed, the execution of gift cannot be upheld. Apart from that, we have perused the original document and we find that two witnesses, namely, Ram Chander Sharma and Ram Saran Dass Sharma, have signed on the first page of the document along side the signature of Kanwar Chander Raj Saran Singh. We do not know how this had escaped the attention of the courts below. At this stage, it is necessary to point out that Ram Saran Das Sharma who was examined as PW-6 has stated as follows. The entire deposition is given below :-

> "I know Kanwar Chander Raj Saran Singh son of Rao Brijraj Singh. I was employed with them for fifteen years. I have seen him, reading, writing and signing. I can identify his signatures. I am the scribe of the gift deed (Hibbanama) Ex. PW6/1. *I had scribed the same correctly on the instructions of Chander Rai Singh. I had read it over to him and after accepting the same as correct, he had signed in my presence. I have also signed as a witness.* I know Shri Janardhan Sharma. He was manager and a general power of attorney. He had the right to execute the sale. *I also identify the signatures of Janardhan."* (Emphasis supplied)

Cross-examination

> "I cannot tell the date of the deed of the general power of attorney (mukhtiarnama). I am not in possession of a copy now. It is incorrect to suggest that I was not present at the time of registration. My signatures are *also* there as a scribe. Gift deed (Hibbanama) was presented by Janardhan. There has been a partition between

> Chander Raj Singh and his son, but I cannot tell the year precisely, may be it took place in the year 1960-61. It does not bear my signature."

30. It is seen from the above that Ram Charan Dass Sharma has categorically stated that he has signed the document as a witness apart from the fact that he has also scribed and signed as identifying witness. We found three signatures of Ram Saran Sharma at different places in different capacities in the original gift deed.

31. On the important point regarding attestation, there was no cross-examination presumably this was not raised and hence was not an issue. This being the position, we are unable to comprehend how the lower appellate court and the High Court gave the findings against the plaintiff as noted above.

32. The gift deed was executed by the original owner and presented for registration by a duly authorised power of attorney and the document was duly attested by 2 witnesses, out of whom one was examined to prove the deed and nothing more is required to satisfy the requirements of Section 123 of Transfer of Property Act, particularly when no specific denial was taken to the execution or attestation of the gift deed in the written statement or even subsequently before the trial court.

33. In the result, we set aside the judgment of the lower appellate court as affirmed by the High Court and restore the decree of the trial court. The appeal is allowed with costs, which we quantify at Rs. 5,000/-.