CALCUTTA HIGH COURT

Abinash Chandra Bidyanidhi Bhattacharjee

Vs.

Dasarath Malo

(Rankin, C.J.)

25.07.1928

JUDGMENT

Rankin, C.J.

1. In this case, the plaintiff brought his suit upon a mortgage bond. The Munsif decreed the suit for the full amount holding that the execution of the bond had been proved and holding also as regards defendant 2 (who was interested because subsequently to the mortgage bond he had purchased a tin hut which was part of the mortgaged subjects) that the plaintiff's claim prevailed against the claim of the defendant 2. Defendant 2's case was that he had purchased the tin hut not from the mortgagor but from another. However, the Munsif decreed the suit both as regards the tin hut and the land. So far as defendant 1 is concerned, he did not appear at the trial to contest the suit. The contest was between the plaintiff and defendant 2 throughout. Defendant 2 appealed to the lower appellate Court and the first ground he took was that this mortgage was invalid because it had not been properly attested as required by law. On that issue, the learned Subordinate Judge of Dacca found for the appellant and held that the mortgage bond was not attested as required by law.

2. Now, when we come to look into the matter, we find that there are two people who are put forward as attesting witnesses. As to one, there can be no doubt at all because he was a person who was present at the time of the execution and who put his name down on the instrument to authenticate its execution. As regards the other, the position is this : that man was, in fact, the scribe or the person who wrote the document out. He put his name to a statement in the margin to the effect that he had read the document out to the executant and also that he had put in certain alterations at the executant's desire. This statement he affirmed with his signature and it is reasonably clear that he put his signature down for that purpose before the document was executed at all. There is, however, another part of the document on which the same man's signature appears. Underneath the word "scribe" the man has put his name. It is not a case where a person has put his name with the word scribe" after it by way of extra information. It is a case where the man has put his name under the heading "scribe." The question is whether, in these circumstances, this man is an attesting witness so as to satisfy the requirements of the law. The appellant says that the trial Court is to go into the evidence to find out from the oral evidence of the man if he is available--whether or not he put his name down with the object of attesting the document. It is contended also that it does not matter for what purpose that signature was put

down and that, as a matter of law, it is a good attestation.

3. That contention is based upon certain cases of this Court. The first case that is relied upon is the ease of *Raj Narayan Ghose v. Abdur Rahim*[1] being a decision of Harrington, J. In that case, the document is not well described in the report ; but it is said that the plaintiff called a person who was described in the deed as the writer of the mortgage and the learned Judge said that he was of opinion that a person who was present and witnessed the execution of the deed and whose name appeared on the document was a competent witness to prove the execution of the deed. In other words, he held that the person was a good attesting witness if he was present and witnessed the execution and his name appeared on the document at all for whatever purpose and in whatever manner. Whether the decision on the particular document before the Court was right or wrong, I have no materials before me to say. But it does appear to me that the learned Judge's exposition of the law is somewhat too wide. The next case relied upon is the case of *Dinomoyee Debi v. Bon Behary Kapur*[2] That was a case of a woman who executed a document by making her mark and underneath her mark was written her name "by the pen of so and so." These words were written in the ordinary way of "bakalam" signature as written in India, and the Court held that the person who wrote down the statement that the mark was the lady's mark and the statement that her name was written by his pen was an attesting witness. That is a very different case from the present case and from the case before Harrington, J. and I have no doubt that that decision was perfectly right because the man had put his name down on the document by way of saying that the lady had executed is his presence. The next case is the case of *Jagannath Khan v. Bajrang Das*[3]*,* There again the document and the facts are not too clear. But it would seem that the name of the writer--the name of the witness in question was put somehow upon the instrument but apparently only for the purpose of saying that he was the writer of the bond ; and the learned Judges there differing from certain decisions of the Allahabad and the Patna High Courts and proceeding upon the two cases which I have mentioned took the view that a person who was present and witnessed the execution of the deed and whose name appeared on the document though he was therein described merely as the writer of the deed was a competent witness.

4. Now, we have by recent legislation had a definition of "attested" given by Act 27 of 1926 and that definition has been made retrospective by an Act of 1927. The definition is:

> attested, in relation to an instrument, means 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 a personal acknowledgment 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 boon present at the same time, and no particular form of attestation shall be necessary.

5. Now, the word "attested" is the word to be defined because that word when it is used in the Statute with reference to an instrument is really a shorthand expression and the meaning of it is given at length in this Act--Act 27 of 1926. The word "attested" occurs not merely as the thing to be defined but as a part of the definition or explanation and it

[1] 5 C. W. N. 454 [3] AIR 1921 Cal 208 : (1921)ILR 48 Cal 61 : 62 Ind. Cas. 97

remains, therefore, to enquire in cases such as the present, what is meant by saying that a document has been attested or that its execution has been attested. In my judgment, the matter is reasonably clear. A person may be a witness to the execution of a mortgage or a will and yet may not have written his name at the time by way of saying that he was a witness. It is quite clear that in India no formal attestation clause is necessary. Ordinarily a string of signatures towards the end of an instrument or somewhere on the instrument without any explanation will be quite sufficient to show that the persons put their signatures by way of saying that they had seen the document executed or had received an acknowledgment. Again, the mere fact that a person is the scribe or that he puts the word "scribe" after his name will not, in itself, show that he has not put his signature on the document by way of saying that he had seen the instrument executed. Such a signature often occurs under the heading "witness" or, at least among a host of signatures put down without any explanation but obviously as the signatures of witnesses. The present case is not of that sort. The present case is where under the separate heading "scribe" the man has put his name. The question is whether it is right to hold as a matter of law that, even although on the construction of the document the name is put olio intuitu ; the fact that the name is on the document at all makes the man an attesting witness.

6. In my judgment, any such proposition is erroneous. A man's name may be put on the instrument by way of authenticating a statement that the supposed testator-did not execute. It may be put by way of professional advertisement to show that he acted as the scribe or by way of showing that he acted as the scribe for other purposes than professional advertisement. It may be put down for authenticating a particular correction in the body of the deed. In all those cases, it seems to me wrong to say that because the man's signature is on the document at all disregarding the purpose for which it is on the document and disregarding altogether what his signature is put to authenticate the man in question is an attesting witness. To take the ordinary case, a man is an attesting witness when he has seen the execution of the instrument and has put his name on the document by way of saying at the time that he has seen the execution of the document. To meet the cases where the execution is not seen but is acknowledged, this definition would have to be extended. The present is not such a case, The purpose of requiring an attesting witness would be entirely defeated by any other rule. The object is that when the factum of the document comes into question it may be years afterwards the document shall be proved by the evidence of witnesses who have this to vouch for the truth of their evidence. I take again the ordinary case the consideration that not only do they now say that at the time when they were present |they saw and witnessed the execution, but they are able to go on to say:

> I put my signature on the instrument at the time by way of saying then what I am saying now, namely, that it was executed and that I saw it " executed .
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> Any other meaning to the word " attestation " reduces the whole purpose of this requirement to an absurdity. It seems to me that the definition, if I may so call it, given by Act 27 of 1926 would be entirely perverted if the word " attested " which appears at the beginning of the definition is not correctly considered. For these reasons, it appears to me that in this case the signature as a matter of construction is not capable of being read as an attestation at all. In my opinion, therefore, the learned Sub-ordinate Judge, so far as defendant 2 the appellant before him was concerned, was right in dismissing the suit of the plain-biff altogether.

7. The only other question is whether or not the learned Judge of the Court of appeal below was right, defendant 1 having done nothing to resist the decree of the first Court and bringing no appeal before him in dismissing the whole suit, that is, not only as against defendant 2 but also" as against defendant 1 the mortgagor. In my judgment, the learned Judge had jurisdiction to do that by virtue of Rule 33, Order 41, Civil Procedure Code It does constantly occur where some people appeal and others do not that the Court is put in a position of having to make impossible or contradictory or unworkable orders. Accordingly, it has been given power to make a decree in favour of persons who have not even approached it. This power may be exercised by the Court in favour of any of the parties who may not have filed any appeal or objection. The only question is whether the learned Judge exercised a proper discretion in dismissing this mortgage suit against defendant 1 on the ground of this technical defect as regards attestation. Upon the whole, it seems to me that in a case of this character the learned Judge would have done well to confine himself to the case of defendant 2 and I think that this appeal ought to be allowed so far as regards the setting aside of the decree as against defendant 1.

8. It remains to consider in the present case another decision of this Court, namely, the decision in *Radha Mohun v. Nripendra Nath*[4], In that case, as in the present, the mortgagor at the time of registration admitted the execution, of the mortgage-deed and the Sub-Registrar by his signature and seal acknowledged or asserted on the document that execution had been admitted by the mortgagor. Accordingly, in the case to which I am now referring, it was held that the Court would take judicial notice of that signature and seal and that the Sub-Registrar was a good attesting iwitness as required by law. It appears to me that the learned Judges in that ease may not have paid sufficient attention to the circumstance that by Act 27 of 1926 and, indeed apart from that Act, it is necessary that each of the witnesses should have signed the instrument in the presence of the executant. It does not appear that there was any evidence before the learned Judges that the Sub-Registrar had affixed his signature or seal in the presence of the mortgagor. But in the case before us now, it is quite clear that there is no such evidence at all. In view of the fact that the instrument is an old one now, it seems unreasonable that we should reopen the matter by sending the case for further evidence. It has been suggested to us that the ordinary practice is for the Sub-Registrar to sign his statement in such cases in the presence of the mortgagor. Not only do I entertain considerable doubt as to whether this is, in fact, the ordinary practice but I need hardly say, whether it is so or not, there is no evidence that it is a practice which has been followed in this case. I do not therefore, think that the present case is complicated at all by any question as to what happened at the time of the registration. In this view, the appeal succeeds so far as against the heirs of defendant 1 and the Munsif's decree against the said defendant is restored. But the appeal must be dismissed with costs as against defendant 2. It is quite clear that the right of defendant 2 to the hut in question cannot be affected by the plaintiff's decree against the heirs of defendant 1.

Mukherji, J.

9. I agree.

[4] AIR 1928 Cal 154