

## APPELLATE CIVIL.

*Before Fletcher and Walmsley JJ.*

1918

Aug. 8.

UPENDRA CHANDRA BHADRA

v.

HUKUM CHAND DE.\*

*Mortgage Bond—Attestation—Scribe, signature and attestation by, validity of—Transfer of Property Act (IV of 1882), s. 59.*

Where no mark, seal or thumb impression of the mortgagor appears on a mortgage deed, the scribe who executes the document for and on behalf of the mortgagor is not competent to attest his own signature as an attesting witness.

*Shamu Patter v. Abdul Kadir Ravathan* (1) referred to.

Second appeal by Upendra Chandra Bhadra the plaintiff.

The facts are briefly these: The defendant's father, Panchananda De, who was the mortgagor, was illiterate and his name was, at his direction, written on the top of the mortgage deed by Uma Nath Dutt who wrote the document itself. Uma Nath Dutt also signed his name at the bottom of the deed as the scribe but not as a witness. The Munsif of Brahmanberiah decreed the suit brought by the mortgagee, no objection having been taken as to the validity of execution of the mortgage bond, a plea of payment, on the other hand, being set up. On appeal by the defendant, the Subordinate Judge of Comilla reversed that decision holding that there had not been any

\*Appeal from Appellate Decree, No. 105 of 1917, against the decree of Chandra Bhnsan Banerjee, Subordinate Judge of Comilla, dated Aug. 23, 1916, reversing the decree of Nishi Kanta Banerjee, Munsif of Brahmanberiah, dated Sep. 3, 1915.

(1) (1912) I. L. R. 35 Mad. 607; L. R. 39 I. A. 218.

proper attestation by two witnesses as required by section 59 of the Transfer of Property Act, the writer having signed his name at the bottom of the deed as the scribe and not as a witness. The plaintiff thereupon preferred this appeal from appellate decree to the High Court.

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*Babu Birendra Kumar De*, for the appellant. The lower Appellate Court ought not to have dismissed the suit upon a new ground taken for the first time at the time of arguing the appeal, *viz.*, that the mortgage bond had not been properly attested within the meaning of section 59 of the Transfer of Property Act.

My next point is that the lower Appellate Court was wrong in holding that the scribe could not be a valid attesting witness simply because he wrote his own name at the bottom of the bond as the scribe and not as a witness : *see* section 59 of the Transfer of Property Act. Here the mortgagor was present, but being illiterate, the scribe wrote his name at his direction. In the mofussil the practice is this, that the mortgagor, if illiterate, first touches the pen and then the scribe writes his name : *Dinamoyee Debi v. Bon Behari Kapur* (1). In the present case the scribe having signed the name of the mortgagor at his direction must have been present at the time of execution. Therefore it was not necessary that the scribe in writing his name at the bottom of the bond should also describe himself as a witness.

[*Babu Hemendra Kumar Das* (for the respondent) interposed and cited *Shamu Patter v. Abdul Kadir Ravuthan* (2) as authority on the question under argument.]

(1) (1902) 7 C. W. N. 160.

(2) (1912) I. L. R. 35 Mad. 607.

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[FLETCHER J. In the case of *Dinamoyee Debi v. Bon Behari Kapur* (1), the mortgagor put her finger mark on the document before the scribe wrote her name.]

[*Babu Hemendra Kumar Das*, for the respondent. But see *Sarurijigar Begum v. Baroda Kant Mitter* (2) and *Ram Bahadur Singh v. Ajodhya Singh* (3).]

In the last case CHAMIER C. J. was simply giving effect to his own view enunciated in *Badri Prasad v. Abdul Karim* (4). But JAWALA PRASAD J. decided the appeal on another ground, *viz.*, that there was no evidence to show that the scribe witnessed the execution of the deed. The view of the Calcutta High Court is different.

*Babu Hemendra Kumar Das* was not called upon to reply.

FLETCHER J. This is an appeal by the plaintiff against the decision of the learned Subordinate Judge of Comilla, dated the 23rd August 1916, reversing the decision of the Munsif at Brahmanberia. The plaintiff brought the suit to enforce a simple mortgage. The plaintiff is the heir of the original mortgagee and the defendant is the heir of the original mortgagor. The learned Judge of the lower Appellate Court has dismissed the suit for the reason, amongst others, that it has not been proved that the document sued upon was executed in the manner required by section 59 of the Transfer of Property Act. The facts found are these: The original mortgagor was an illiterate man and the document was drawn up by the scribe, one Uma Nath Dutt. The mortgagor not being able to sign his name, the document was executed on his behalf by Uma Nath, and it is found and is supported by an inspection

(1) (1902) 7 C. W. N. 160.

(2) (1910) 14 C. W. N. 974.

(3) (1916) 20 C. W. N. 699.

(4) (1913) I. L. R. 35 All. 254.

of the mortgage deed that no mark or seal or thumb impression of the mortgagor appears on the mortgage deed. The learned Judge considered that the document had not been attested by two witnesses as required by section 59 of the Transfer of Property Act, the only persons purporting to sign the document being Uma Nath as the scribe and one witness, Prokash. It is quite clear in the circumstances that Uma Nath having executed the document for and on behalf of the mortgagor was not competent to attest his own signature as an attesting witness even in the view that the subscription of his name as the scribe amounted to attestation within the meaning of section 59 of the Transfer of Property Act. In that view, only Prokash was the attesting witness. The document having been attested by only one attesting witness was not, therefore, executed in the manner prescribed by section 59 of the Transfer of Property Act. In my opinion, this case is clearly covered by the observations of the Privy Council in the case of *Shama Patter v. Abdul Kadir Ravuthan* (1). I agree with the conclusion arrived at by the learned Judge of the lower Appellate Court. The present appeal, therefore, fails and must be dismissed with costs.

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WALMSLEY J. I agree.

*Appeal dismissed.*

G.S.

(1) (1912) I. L. R. 35 Mad. 607 ; L. R. 39 I. A. 218.