ORIGINAL CIVIL.

Before Roy J.

1934

Jan. 26; Feb. 2.

NEELIMA BASU

v.

JAHARLAL SARKAR.*

Attestation—Gift by deed of immovable property, attestation to such a deed—Endorsement by the registering officer, if sufficient attestation—Transfer of Property Act (IV of 1882 as amended by Acts XX of 1929 and V of 1930), ss. 123, 3—Indian Registration Act (XVI of 1908), ss. 58, 59.

If the conditions of a valid attestation under the Transfer of Property Act are fulfilled, there is nothing in law to prevent a Registrar from being treated as an attesting witness even though the Registrar put his signature *alio intuitu*, to satisfy the requirements of the Indian Registration Act.

Veerappa Chettiar v. *Subramania Ayyar* (1) discussed and followed.

Lachman Singh v. *Surendra Bahadur Singh* (2) not followed.

Abinash Chandra Bidyanidhi Bhattacharya v. *Dasarath Malo* (3) referred to.

The Indian Registration Act does not require the Registrar to affix his signature to the registration endorsement on a document in presence of the executant of the document; the Registrar's signature, therefore, cannot, in the absence of any other evidence, be taken as that of an attesting witness who is required to sign in presence of the executant.

ORIGINAL SUIT.

The facts of the case and arguments of counsel appear sufficiently from the judgment.

P. C. Ghose (with him *B. C. Mitra*) for the plaintiff.

J. N. Majumdar for the defendant.

ROY J. The plaintiff sues for a declaration that she is the owner of a 3/4ths share in premises No. 26, Musalmânparhâ Lane in the town of Calcutta, for partition and other incidental reliefs. The plaintiff

*Original Suit No. 2321 of 1929.

(1) (1928) I. L. R. 52 Mad. 123. (2) (1932) I. L. R. 54 All. 1051.
(3) (1928) I. L. R. 56 Calc. 598.

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is the sole surviving daughter of one Heeralal Sarkar, deceased. The defendant is the brother of Heeralal Sarkar and an uncle of the plaintiff. It is conceded that if the deed of gift executed by one Jeebankrishna Sarkar, an uncle of Heeralal, on the 16th of November, 1895, in favour of Heeralal Sarkar be held valid, the plaintiff, as Heeralal's daughter, would be entitled to a 3/4ths share in the property and the defendant would be entitled to the remaining 1/4th share. If, on the other hand, it is held that the gift by Jeebankrishna Sarkar in favour of Heeralal was not a valid gift, the plaintiff and the defendant would each be entitled to a half share in the property. The validity of the deed has been challenged on three grounds specified in the issues raised by counsel for the defendant, namely, (1) the deed was not properly attested, (2) the conditions mentioned in the deed were not fulfilled and (3) the deed was not acted upon. Counsel for the defendant, in his final address, made no reference to the second and third grounds and I presume that was because he took the view that there was no substance in them. In my judgment, the validity of the deed of gift cannot be successfully challenged on those grounds. It appears that by the deed of the 16th of November, 1895, Jeebankrishna Sarkar made a gift of his eight annas share in the premises in suit in favour of his nephew Heeralal Sarkar on condition that Heeralal and his heirs should pay Jeebankrishna Sarkar Rs. 10 per month during Jeeban's life. It was provided by the deed that, in case there was failure to pay Rs. 10 per month, Jeeban on cancelling the deed of gift, could take possession of the property. In the written statement, it was alleged that the conditions mentioned in the deed of gift were not fulfilled and the deed was never given effect to or acted upon. No evidence was adduced on behalf of the defendant in support of these allegations. It was admitted that Jeeban never cancelled the deed of gift. Moreover, we find that, in the deed of sale, dated the 25th of June, 1901, under which Heeralal

and the defendant acquired the remaining eight annas share of the premises from another branch of the family, there is a clear recital that Heeralal had obtained eight annas share by virtue of the deed of gift executed by Jeeban and had been in enjoyment and possession thereof. I do not think there can be any doubt that, if the gift was otherwise valid, Heeralal obtained the eight annas share of Jeeban in the property and that the eight annas share of Heeralal is now vested in the plaintiff. On the question as to whether the deed of gift was properly attested or not, there is, however, considerable difficulty in the plaintiff's way. Under section 123 of the Transfer of Property Act, a gift of immovable property must be effected by a registered instrument attested by at least two witnesses. On the face of the deed in suit the name of one person alone appears as an attesting witness. Counsel on both sides have argued before me the question as to whether the signature of the Registrar on the back of the deed can be said to be the signature of an attesting witness. The word "attested" has been defined in section 3 of the Transfer of Property Act, and it is clear from the definition that an attesting witness must have seen the executant sign or must have received from the executant a personal acknowledgement of the signature and he must himself sign the instrument in the presence of the executant. Counsel for the defendant has contended that the Registrar who made an endorsement to the effect that execution was admitted by the executant could in no circumstances be treated as an attesting witness. He relied on the case of *Lachman Singh* v. *Surendra Bahadur Singh* (1). In that case, a Full Bench of the Allahabad High Court held that the signatures of the sub-registrar and the witnesses identifying the executant at registration are not sufficient attestation of a mortgage deed for the purpose of the Transfer of Property Act, even

(1) (1932) I. L. R. 54 All. 1051.

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assuming that the sub-registrar and identifying witnesses did receive from the executant a personal acknowledgment of his signature or mark, and that they did sign in the executant's presence. The Full Bench further held that the mere fact that a person sees or receives an acknowledgment of the execution of a document and signs it does not make him an attesting witness, unless he signs with the idea of bearing testimony to the execution and with the idea further of permitting himself to be cited as a witness to prove the execution and that although the registering officer receives a personal acknowledgment from the executant of the fact of his executing the document, and puts his signature under a statement that the executant admitted the execution, he does not sign as an attesting witness. Counsel also drew my attention to the case of *Veerappa Chettiar* v. *Subramania Ayyar* (1), in which a Full Bench of the Madras High Court held that the signatures of the registering officer and of the identifying witness affixed to the registration endorsement under sections 58 and 59 of the Registration Act (XVI of 1908) are a sufficient attestation within the meaning of section 59 of the Transfer of Property Act and its subsequent amending Acts. The learned Judges in that case did not accept the argument that the signatures were made *alio intuitu*, to satisfy the requirements of the Registration Act, and could not, therefore, be invoked in aid for another purpose, *viz.*, attestation under the Transfer of Property Act, though in fact all the conditions laid down by the latter Act are fulfilled and they agreed with the decision of the Calcutta High Court in *Radha Mohan Dutta* v. *Nripendranath Nandy* (2). In the Madras case, there was a clear finding of fact that the sub-registrar had made his signature in the registration endorsement referring to the admission of execution by the executants of the document in the presence of the executants, and counsel for the defendant argued

(1) (1928) I. L. R. 52 Mad. 123. (2) (1927) 47 C. L. J. 118.

that even if I were disposed to follow the Madras Full Bench case the plaintiff could not succeed as there was no evidence before the Court in this case that the Registrar had signed in the presence of the executant. Counsel pointed out that the law does not require the registering officer to sign in the presence of the executant and under section 59 of the Registration Act the registering officer is only required to affix his signature to all endorsements made in his presence on the same day. Counsel for the plaintiff relied on *Hurro Sundari Dabia* v. *Chunder Kant Bhuttacharjee* (1), *Nitye Gopal Sircar* v. *Nagendra Nath Mitter Mozumdar* (2), in support of his contention that a Registrar can be an attesting witness. Counsel also referred me to *Abinash Chandra Bidyanidhi Bhattacharya* v. *Dasarath Malo* (3), for the proposition that a person may be a witness to the execution of a document though he may not have written his name at the time by way of saying that he was a witness. In the course of his judgment in that case, however, Rankin C.J. observed :—

> 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 *alio intuitu*, the fact that the name is on the document at all makes the man an attesting witness. In my judgment, any such proposition is erroneous.

He further observed that it was—

> wrong to say that because a 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.

I have carefully considered all the cases cited by learned counsel and I am of opinion that the law has been correctly laid down in the case of *Veerappa Chettiar* v. *Subramania Ayyar* (4). In my view, if the conditions for a valid attestation under the Transfer of Property Act are fulfilled, there is nothing in law to prevent a Registrar from being treated as an attesting witness even though the

(1) (1880) I. L. R. 6 Calc. 17.
(2) (1885) I. L. R. 11 Calc. 429.
(3) (1928) I.L. R. 56 Calc. 598, 604.
(4) (1928) I. L. R. 52 Mad. 123.

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signature of the Registrar might have been made *alio intuitu*, to satisfy the requirements of the Registration Act. But the plaintiff's difficulty in this case is that, though the endorsement of the Registrar shows that the executant had admitted execution of the document before the Registrar, there is no evidence at all that the Registrar had signed in the presence of the executant. Counsel referred me to section 90 of the Evidence Act and, as the document was over thirty years old, asked me to presume that the document was duly attested and that the signature of the Registrar was made in the presence of the executant. I do not think I can or ought to make any such presumption in this case. Section 90 of the Evidence Act simply says that the court may presume in the case of a document executed or attested that it was duly executed or attested by the persons by whom it purports to be executed and attested. I am unable to say that the document in this case purports to be attested by the Registrar. When he made his endorsement on the back of the document the Registrar was simply carrying out his statutory duties under the Registration Act and was not purporting to attest the document. He made his signature *alio intuitu* and it would be wrong to disregard the real purpose for which his signature appears on the document. It may be true that the endorsement made by the Registrar in the course of his duties shows that the Registrar received from the executant a personal acknowledgment of his signature. But the Registration Act did not require him to affix his signature in the presence of the executant and the Registrar could and might have affixed his signature to the endorsement at any time in the course of the same day. In the circumstances, I do not see how any presumption could possibly be made in favour of the plaintiff that the signature of the Registrar was affixed in the presence of the executant and that the document was duly attested. I must hold, therefore, that the document was not

validly attested and could not affect the immovable property which was the subject matter of the deed of gift. It follows that each of the parties has a half share in the premises in suit, and I make a declaration accordingly. As both parties desire that the property should be sold, there will be a decree for sale and division of the proceeds in terms of prayer (d) of the plaint. There will be a decree for accounts in terms of prayer (c) of the plaint.

Usual costs as in a partition suit.

Attorneys for plaintiff: *Mitra & Mukherji.*

Attorney for defendant: *A. K. Sarkar.*

P. K. D.