

1918

February, 20.

*Before Mr. Justice Sir Harry Griffin and Mr. Justice Chamber.*

BADRI PRASAD AND ANOTHER (PLAINTIFFS) v. ABDUL KARIM AND OTHERS (DEFENDANTS).\*

*Act No. I of 1872 (Indian Evidence Act), section 68—Mortgage—Evidence of execution—Attesting witness—Scribe.*

Held that the scribe of a mortgage deed cannot be counted as an attesting witness merely because he has signed the deed, even though the deed may in fact have been executed in his presence. To be an "attesting witness" within the meaning of section 68 of the Indian Evidence Act, 1872, the witness must have seen the document executed and have signed it as a witness.

*Ranu v. Laxmanrao* (1); *Burdett v. Spilsbury* (2) and *Shamu Patil v. Abdul Kadir Ravuthan* (3) followed. *Radha Kishen v. Fateh Ali Khan* (4), *Raj Narain Ghosh v. Abdur Rahim* (5) and *Muhammad Ali v. Jafar Khan* (6) discussed.

THE facts of this case were as follows:—The plaintiffs sued upon a mortgage bond. They produced none of the attesting witnesses to prove the bond, although one of them was alive and procurable. They produced the scribe, Ghulam Jilani, who stated that at the request of the executant, who was illiterate, he had signed the executant's name for him and that the executant had touched the pen. He also stated that the consideration was paid in his presence. Ghulam Jilani had signed the bond as a scribe and not expressly as an attesting witness. The Munsif held the bond proved. On appeal the District Judge held that the bond was not duly proved and dismissed the suit. The plaintiffs appealed to the High Court.

Maulvi *Muhammad Ishaq*, for the appellants:—

A scribe who has signed his name on the deed and who is in a position to give evidence as to the execution thereof may be considered to be an attesting witness although he has not signed specifically as such. The evidence of such a scribe is legally sufficient to prove the bond; *Muhammad Ali v. Jafar Khan* (6), *Radha Kishen v. Fateh Ali Khan* (4). To be an attesting witness a person need not describe himself as such on the deed,

\* Second Appeal No. 133 of 1912 from a decree of D. R. Lyle, District Judge of Shahjahanpur, dated the 5th of December, 1911, reversing a decree of Iftikhar Husain, Munsif of Budann West, dated the 18th of May, 1911.

(1) (1908) L. L. R., 33 Bom., 44. (4) (1898) J. L. R., 20 All., 532.

(2) (1843) 10 C. and F., 340. (5) (1901) 5 C. W. N., 454.

(3) (1912) I. L. R., 35 Mad., 607. (6) Weekly Notes, 1897, p. 146.

nor is it necessary that his name should appear on a particular part of the document, e.g. the margin, rather than on any other part of it. He is an attesting witness if the execution of the document has happened in his presence, and he is able to testify to it. I am further supported by the cases of *Raj Narain Ghosh v. Abdur Rahim* (1) and *Dinamoyee Debi v. Bon Behari Kapur* (2). At all events the District Judge should have granted our prayer for an opportunity to produce the attesting witness who is alive.

Munshi *Govind Prasad*, for the respondents:—

In order to be an attesting witness within the meaning of section 68 of the Evidence Act it is necessary that the witness should have seen the deed executed and have signed the deed as a witness of that fact. A scribe who signs the deed merely as the writer thereof, and not as purporting to be a witness of the execution, is not an attesting witness. I rely on the cases of *Ranu v. Laxmanrao* (3) and *Shamu Putter v. Abdul Kadir Ravuthan* (4). The appellants who deliberately failed to call the attesting witness have no right to be given an opportunity to call him now.

Maulvi *Muhammad Ishaq* replied.

GRIFFIN and CHAMBER, J. J.:—This was a suit upon a mortgage for Rs. 99 made in December, 1884. The claim was decreed by the first court, but was dismissed by the District Judge on appeal on the ground that the mortgage deed had not been proved as required by section 68 of the Evidence Act.

The only witness called to prove the execution of the deed was Ghulam Jilani, the man who wrote out the deed. He deposed that the deed was executed in his presence. The question is whether he was an attesting witness within the meaning of section 68 of the Evidence Act. He signed his name on the deed in the usual way, but he did so for the purpose of showing that it had been written out by him, not for the purpose of showing that he was an attesting witness. In fact there can be no doubt that he wrote his name on the deed before the deed was signed by the executant. The appellants rely upon the decision of BURKITT J.

(1) (1901) 5 C. W. N., 454.

(3) (1908) I. L. R., 33 Bom., 44.

(2) (1902) 7 C. W. N., 160.

(4) (1912) I. L. R., 35 Mad., 607.

1913

BADRI PRASAD  
v.  
ABDUL KARIM.

in *Radha Kishen v. Fateh Ali Khan* (1) in which it seems to have been held that section 68 had been complied with where the plaintiff had called "scribe of the deed, who, though not an attesting witness, had affixed his name to the deed and who swore that the deed had been executed in his presence". That decision was cited with approval by HARRINGTON J. in *Raj Narain Ghosh v. Abdur Rahim* (2). BURKITT J. professed to follow the decision of BANERJI and AIKMAN J. J. in *Muhammad Ali v. Jafar Khan* (3). We do not think that those learned judges intended to hold in that case that a man should be regarded as an attesting witness merely because he had written out the deed and signed his name on it and sworn that the deed was executed in his presence. We think that they intended to hold only that if the writer of a deed signed it with a view to testifying to the fact of the execution he would be an attesting witness although he was not so described on the face of the deed. Unless the report of the case of *Radha Kishen v. Fateh Ali Khan* is misleading, we think that BURKITT J. must have misinterpreted the decision of BANERJI and AIKMAN JJ.

In *Ramu v. Laxmanrao* (4) it was held, following *Burdett v. Spilsbury* (5), that an attesting witness was a witness who had seen the deed executed and who had signed it as a witness. In the recent case of *Shamu Patter v. Abdul Kadir Ravuthan* (6) their Lordships of the Privy Council quoted the decision in *Burdett v. Spilsbury* with approval, and in particular approved of the statement of the Lord Chancellor that "the party who sees the will executed is in fact a witness to it and if he subscribes as a witness he is then an attesting witness". They held that the word "attested" in section 59 of the Transfer of Property Act was used in that sense. It is evident that the word 'attesting' in section 68 of the Evidence Act is used in the same sense. Ghulam Jilani may have witnessed the execution of the deed now in suit, but he did not sign the deed as a witness. We must therefore hold that he is not an attesting witness and the production of his evidence was not a compliance with section 60 of the Evidence Act. We think, however, that the case should go back to the lower

(1) (1888) I. L. R., 20 All., 532.

(4) (1908) I. L. R., 33 Bom., 44.

(2) (1901) 5 C. W. N., 454.

(5) (1848) 10 C. and F., 340.

(3) Weekly Notes, 1897, p. 146.

(6) (1912) I. L. R., 35 Mad., 607.

appellate court in order that the plaintiffs may have an opportunity of producing further evidence. Ghulam Jilani stated that one of the attesting witnesses was still alive. The decision of BURKITT J. justified the plaintiffs in supposing that they had complied with law. There is before us an affidavit that the plaintiffs asked the District Judge to give them an opportunity of producing other evidence. We allow the appeal, set aside the decision of the lower appellate court and remand the case to that court in order that it may be disposed of according to law with reference to the above remarks. Costs in this Court to be costs in the cause.

*Appeal allowed and cause remanded.*

1913

BADRI PRASAD  
v.  
ABDUL KARIM.

## MISCELLANEOUS CIVIL.

*Before Mr. Justice Sir Harry Griffin and Mr. Justice Muhammad Rafiq.*

JAIRAJ MAL (APPLICANT) v. RADHA KISHAN AND ANOTHER (OPPOSITE PARTIES.)\*

1913

February, 22.

*Civil Procedure Code (1908), section 287 (c)—Execution of decree—Mortgage on property sold notified at time of sale—Subsequent suit on mortgage—Auction purchaser not estopped from questioning validity of mortgage.*

In proceedings in execution of a decree a person alleging himself to be the mortgagee of property about to be sold asked the executing court to notify the existence of his prior incumbrance on the property to be sold, and the Court, without apparently making any inquiry as to the genuineness of the mortgage, did so, but did not sell the property subject to the prior incumbrance. The property was sold and purchased by the decree-holder.

Held on suit by the mortgagee that the decree-holder auction purchaser was not estopped from contesting the validity of the mortgage so notified. *Shib Kumwar Singh v. Sheo Prasad Singh* (1) followed.

THE facts of this case were as follows :—

Muhammad Mushtaq executed a mortgage on the 14th of January, 1895, in favour of Radha Kishan. The mortgage was unregistered. In execution of a decree against Muhammad Mushtaq, Jairaj Mal attached and put up to sale the property of Muhammad Mushtaq which had been mortgaged. Thereupon Radha Kishan applied, on the 19th of September, 1904, to the execution court that the amount due to him under the mortgage might be notified along with the decretal amount: and on the same day the court passed the order :—“ Let the amount be notified.” This was done.