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APPELLATE CIVIL.

Before Mr. Justice Mukerji and Mr. Justice Bennet

1930
June, 4.

RAM CHARAN (PLAINTIFF) *v.* BHAIRON AND OTHERS (DEFENDANTS)*

Transfer of Property Act (IV of 1882), sections 3 and 123—Deed of gift—"Attested" by two witnesses—Names of witnesses written by the scribe—Registration endorsement—Signature of sub-registrar and identifying witnesses—Registration Act (XVI of 1908), sections 58 and 59.

A deed of gift contained the signatures of a number of attesting witnesses, stated in the document to be by the pen of the scribe. It was proved by the evidence of one of them that they were present when the donor executed the deed; also, apparently the names of the attesting witnesses were written by the pen of the scribe in the donor's presence. *Held* that the deed was properly attested.

The signature of an attesting witness to a document is proved to have been made if it is shown to have been made at the request of the person in question by some other person who signed on his behalf as attesting witness.

Also, the signatures of the registering officer and of the identifying witnesses, affixed to the registration endorsement on the deed under sections 58 and 59 of the Registration Act, upon admission of execution by the executant, were a sufficient attestation within the meaning of section 123 of the Transfer of Property Act.

Messrs. *S. C. Goyel* and *S. B. L. Gaur*, for the appellant.

Mr. *P. L. Banerji*, for the respondents.

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* Appeal No. 188 of 1929, under section 10 of the Letters Patent.

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MUKERJI and BENNET, JJ.—This is a Letters Patent appeal by the plaintiff against a judgment of a learned single Judge of this Court dismissing his suit for possession of a house. The plaintiff Ram Charan *alias* Ram Das claimed this house partly on the ground that he was a son of the last owner Lalai and partly on the basis of a deed of gift from Lalai to the plaintiff on the 8th of November, 1908. The defendants are in possession of the house by virtue of various sale deeds from Mst. Saraswati, sister of Lalai the last male owner. The lower appellate court found that plaintiff had failed to prove that he was the son of Lalai but it found that plaintiff was entitled to the house through the deed of gift from Lalai.

In second appeal it has been held that the deed of gift is invalid as it has not been proved to have been duly attested by two witnesses as required by section 123 of the Transfer of Property Act. In support of this finding the learned counsel for the defendants has referred to *Param Hans* v. *Randhir Singh* (1). In that case, in reference to a mortgage deed it was held that a document was not shown to be duly attested when one of the two witnesses whose names appeared on the document as attesting witnesses was not shown to have been present at execution, and was not shown to have authorized the scribe to sign for him, or to have signed himself or to have put his mark on the document. In the present case the document shows that it was written by a scribe called Durga Prasad Pandey, who is now proved to be dead. There are the signatures of a number of attesting witnesses, stated in the document to be by the pen of Durga Prasad. Of these, one Umrao has been called and he has given evidence that the attesting witnesses were present when Lalai executed the document. On the document appears the signature of Lalai which purports to have been written by the pen of Lalai. Umrao states that Lalai made

(1) (1916) I. L. R., 38 All., 461.

this signature in his presence, and that the attesting witnesses made their marks. In the Full Bench case of *Deo Narain Rai* v. *Kukur Bind* (1), it has been held that a signature is proved to have been made if it is shown to have been made at the request of the person in question by some other person who signed on behalf of the first person as executant of the document. This we consider will also apply to the signature of an attesting witness to a document. Accordingly we consider that in the present case the document itself and the evidence of Umrao do show that the document was properly attested by the attesting witnesses. The only point which is urged against this attestation is that Umrao stated that he and other witnesses had made their marks. It is argued that the document does not show that there are any marks of attesting witnesses. As the document is torn and has a number of holes, it is not possible to say whether there are or are not such marks on it, but in any case, even if the document were intact and it was clear that there were no such marks, we consider that this difference in the statement of a witness would only be a matter on which the lower appellate court might come to a conclusion that the evidence of a witness was not worthy of credit. It is for the lower appellate court to come to that conclusion or not, and in the present case it held that the witness is worthy of credit, and that matter is not a matter which may be raised again in second appeal.

Further we may point out the change introduced in the law, subsequent to the ruling relied on by the learned counsel for the defendants by section 2 of the Transfer of Property Amending Act, Act XXVII of 1926. This Act has introduced a new definition of the word "attested" in section 3 of the Transfer of Property Act. This definition now covers the personal acknowledgment from the executant of a signature or

(1) (1902) I. L. R., 24 All., 319.

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mark. Consequently in *Veerappa Chettiar* v. *Subramania Ayyar* (1), it has been held that the signatures of the registering officer and of the identifying witnesses, if fixed to the registration endorsement under sections 58 and 59 of the Registration Act, Act XVI of 1908, are a sufficient attestation within the meaning of section 59 of the Transfer of Property Act. This ruling of course will also cover a gift attested under section 123 of the Transfer of Property Act. We may also refer to the case of *Bunkates Sewak Singh* v. *Rama Das* (2), in which it was held that when the executant of a mortgage deed acknowledged the execution of the deed before witnesses who attested it, there was a sufficient compliance with the provisions of section 59 of the Transfer of Property Act. The attestation in question was before the Sub-Registrar and the witnesses who attested it were witnesses who identified the executant. In the present case there has been a registration before the Sub-Registrar and his endorsement shows that there was an identification by two witnesses. Those witnesses have not in fact been called, but under the amended section 59 of the Indian Evidence Act it is not neecssary to call an attesting witness where a document has been registered unless its execution by the person by whom it purports to have been executed is specifically denied. There is no such denial here and it is admitted that the executant died on the 8th of November, 1908. Accordingly it was not necessary to call one of the attesting witnesses and the evidence of the witness Umrao is sufficient to prove the execution of the document. We may also refer to section 60, sub-section (2), of the Indian Registration Act which states that the certificate is admissible for the purpose of proving that the document has been duly registered and that the facts mentioned in the endorsement have occurred as mentioned therein.

(1) (1928) I. L. R., 52 Mad., 123. (2) (1909) 6 A. L. J., 737.

We consider therefore that for both these reasons in the present case there has been sufficient compliance with the particulars of the law in regard to attestation. Accordingly we allow this Letters Patent appeal and dismiss the appeal of the defendant in this Court and restore the judgment of the lower appellate court with costs to plaintiff in both appearances in this Court.

Before Mr. Justice Sen and Mr. Justice Niamat-Ullah.

SEWA RAM (DEFENDANT) *v.* HOTI LAL (PLAINTIFF) AND PANNA LAL (DEFENDANT).*

1930
June, 5.

Negotiable Instruments Act (XXVI *of* 1881), *section* 78—*Promissory note*—Benami *transaction*—*Holder a* benamidar—*Suit by real owner on the promissory note*—*Whether maintainable*—*Whether real owner can sue on the basis of the original consideration.*

Section 78 of the Negotiable Instruments Act does not prohibit any person other than the holder of a promissory note to bring a suit thereupon, if that person be the true owner and the holder a *benamidar* for him. It does not in terms refer to a right to sue, and all that it provides is that payment made to any person other than the holder shall not operate as a discharge of the maker in respect of his liability to the holder. In a suit brought by the real or beneficial owner, to which the maker and the holder of the promissory note are parties, a decree can be passed against the maker with due provisions for safeguarding the interests of all parties and making payment to the plaintiff contingent on his securing a valid discharge of the maker by the holder of the note.

A claim for recovery of the debt due under a promissory note cannot be enforced independently of it, and a plaintiff is not allowed to fall back upon the original obligation or loan if the promissory note is admissible in evidence and provable by the holder thereof who can recover the debt due thereunder. The real or beneficial owner of a promissory note executed in favour of a *benamidar*, can not, therefore, maintain a suit.

* Second Appeal No. 2308 of 1927, from a decree of Ali Ausat, Additional Judge of Aligarh, dated the 19th of October, 1927, reversing a decree of Kedar Nath Mehra, Munsif of Kasganj, dated the 22nd of July, 1927.