Before Sir Shah Muhammad Sulaiman, Chief Justice, and Mr. Justice Bennet

AMIR HUSAIN AND OTHERS (DEFENDANTS) *v.* ABDUL SAMAD (PLAINTIFF)* 1937 *April*, 1

Transfer of Property Act (IV of 1882), section 3—"Attested"—"Personal" acknowledgment—Need not be express acknowledgment—Evidence Act (I of 1872), section 68—Proof of attestation, where no specific denial of due attestation of mortgage deed—Civil Procedure Code, order XXXIV, rule 1—Suit for possession by usufructuary mortgagee—Non-joinder of all the mortgagees.

The expression "personal acknowledgment" used in the definition of the word "attested" in section 3 of the Transfer of Property Act is not the equivalent of "express acknowledgment" by words, and an acknowledgment may be inferred from gestures or conduct. So, where a witness had attested a mortgage deed on being asked to do so by the mortgagee who told him in the presence of the mortgagor that the latter had signed it and no dissent was expressed by the mortgagor, it was *held* that the mortgage deed was duly attested by the witness.

The law in India regarding the requirements of a valid attestation of a will or other document is not different from that in England.

Where the defendant has merely not admitted the execution or attestation of the mortgage deed in suit and has put the mortgagee to proof thereof, there being no specific denial of the validity of the attestation, the requirements of section 68 of the Evidence Act are satisfied if only one attesting witness is called and he proves his attestation. It is only in the case where there is not only a want of an admission but a specific denial of the validity of the mortgage for lack of due attestation that the mortgagee is called upon to prove due attestation of two witnesses.

Where a suit for possession of the mortgaged property was brought by one of two co-mortgagees without impleading the other, it was *held* that the non-joinder of the other co-mortgagee was not a fatal defect; the provisions of order XXXIV, rule 1 of the Civil Procedure Code did not particularly apply as the suit was not one in which a decree under order XXXIV would have to be passed.

*First Appeal No. 486 of 1933, from a decree of J. N. Dikshit, Civil Judge of Ghazipur, dated the 1st of August, 1933.

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Dr. *M. Wali-ullah*, for the appellants.

Mr. *Mushtaq Ahmad*, for the respondent.

SULAIMAN, C.J., and BENNET, J.:—This is a defendants' appeal arising out of a suit for recovery of possession of certain properties on the strength of a usufructuary mortgage. On the 13th of May, 1920, Tufail Ahmad executed a usufructuary mortgage for Rs.9,750 of certain zamindari properties in favour of Abdul Ghani. The defendants first parties are the heirs of the mortgagor Tufail Ahmad. The defendant second party is the subsequent transferee from the mortgagor with whom we are not just at present concerned. Abdul Ghani had three wives, from whom he had one son, the plaintiff, and two daughters, one of whom Aziz-un-nissa, is now dead. The suit was brought by the plaintiff alone for recovery of possession of the entire property, without impleading his sister Hakim-un-nissa, on the allegation that under a will he had succeeded to the estate of his father Abdul Ghani. This case was given up and no proof was led as regards this will, possibly because the will in favour of an heir would have been void. The plaintiff did not choose to implead his sister even after he decided not to press his case as regards the will. The suit was instituted on the 29th of April, 1932, just within twelve years of the mortgage deed.

The main defence was a denial of the mortgage and its consideration. There was a further plea that all the heirs of Abdul Ghani were necessary parties and that the suit was defective on account of non-joinder. These points have been decided against the defendants by the court below.

As regards the plea of non-joinder, it may be pointed out that the court below has given the plaintiff a decree in respect of his legal share only, namely 35/64 sihams in respect of the share of Abdul Ghani and not in respect of the entire estate. There is no cross-appeal preferred by the plaintiff. The court below has also specified the plaintiff's share in the mortgage money,

which implies that when in future the defendants wish to redeem the property decreed to the plaintiff, they would have to pay only a proportionate share of the mortgage money. One item of the mortgage money has not been found to be proved but the rest has been established. The amount of the mortgage money is not challenged before us. It seems to us that if the plaintiff had impleaded his sister also he would certainly have been entitled to a decree for possession, provided there was no other defect, of the entire mortgaged property as the defendants would be in possession without title and the integrity of the mortgage had not been broken. The plaintiff, however, has got a decree for his share only. The defendants can in no way be prejudiced by any subsequent suit being brought by Mst. Hakim-un-nissa, as that suit, if it is still within time, can relate only to the share which the plaintiff has not got. The learned counsel for the defendants has argued before us that under order XXXIV, rule 1, it was incumbent on the plaintiff to implead all persons having an interest in the mortgage security or in the right of redemption. But the present suit is for recovery of possession of the mortgaged property and is not one in which a decree under order XXXIV would have to be ultimately passed. A co-mortgagee may well be entitled to possession as against the mortgagor but he is entitled to recover possession of the entire estate as he has an interest in every inch of the ground so long as the integrity of the mortgage is not broken, although it may be necessary in order to protect the interest of the other mortgagee to implead him. Indeed, such a mortgagee can be impleaded even at a late stage of the appeal. We, therefore, think that it is not a fatal defect.

The next point urged is that it was incumbent on the plaintiff to prove that at least two witnesses had attested the document and that the evidence in this case falls short of proving attestation by two witnesses. In the plaint the plaintiff had set forth the mortgage deed and

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its particulars and had asserted that there was a relation of mortgagee and mortgagor between the parties. In the opening part of the written statement, paragraphs 1, 2 and 3 of the plaint were simply "not admitted" which meant that the defendants were putting the plaintiff to proof without positively asserting the contrary. The only paragraph where the plea was specifically taken is paragraph 18 which is in the following terms: "If Abdul Ghani obtained any document without consideration its validity (binding character) is not admitted by these defendants. Neither Abdul Ghani himself paid any money to Sheikh Tufail Ahmad, deceased, nor was any debt paid by him (Abdul Ghani) on his behalf." Comparing this with the original written statement there is no doubt that what the plea was intended to mean was that if the document was without consideration, then it was not binding on the defendants. This in our opinion does not amount to a specific denial of proper attestation of the mortgage deed.

In the Full Bench case of *Lachman Singh* v. *Surendra Bahadur Singh* (1) a distinction was drawn between the case (1) "Where the execution and attestation of the deed are *not admitted*" and (2) "Where the validity of the mortgage is *specifically denied.*" In the former case the Full Bench held that the mortgagee need prove only this much that the mortgagor signed the document in the presence of an attesting witness and one man attested the document; provided the document on the face of it bears the attestation of more than one person. In the latter case it must be proved by the mortgagee that the mortgage deed was attested by at least two witnesses: (Page 1058).

It follows therefore that where the mortgagor has merely not admitted the execution or attestation of the document and has put the mortgagee to proof, then there being no specific denial of attestation, the attestation of one witness is regarded by the Full Bench as

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

being sufficient. It is not necessary for us to consider the authorities on which this view was based, because the opinion of the Full Bench is binding upon us. It is only in the case where there is not only a want of an admission but a specific denial of the validity of the mortgage that the mortgagee is called upon to prove attestation of two witnesses. On the view that we have taken of the written statement we must hold that there was no specific denial of the validity of the mortgage on the ground of want of proper attestation, and we must therefore hold that the proof of one attestation, in view of the opinion expressed by the Full Bench, was quite sufficient.

It is next contended before us that even one attestation has not been established by the defendant. Both the mortgagor Tufail Ahmad and the mortgagee Abdul Ghani are dead, and the scribe Muhammad Shafi also is dead. One of the attesting witnesses Raj Kumar Lal is also dead. Mr. Saiyid Muhammad Rashid, mukhtar, was another attesting witness who was alive when the case was before the trial court and was examined as a witness. He also has since then died. So the plaintiff's case rests entirely on the evidence of Mr. Muhammad Rashid which was taken down by the court below. * * * We have therefore to go by the attestation of Mr. Rashid Ahmad only in this case.

The mukhtar's evidence was that he remembered that Sheikh Tufail Ahmad had executed the deed and he was an attesting and an identifying witness and that he did identify Tufail Ahmad at the time of the registration. He further stated: "Abdul Ghani brought the deed to me and he asked me to put my signature on the deed and told me in presence of Tufail Ahmad that Tufail Ahmad had executed the deed and the deponent should sign and bear witness to that deed. So I signed the deed as marginal witness. I do not remember if any other attesting witness did sign the deed." In

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cross-examination he said: "When I reached the registration office then the signature of Tufail Ahmad was being taken. The deed had been presented by Tufail Ahmad, his signature about the presentation was being taken. The document was then read over to Tufail Ahmad by the sub-registrar who asked him if he had executed it and Tufail Ahmad replied that he had executed it. Tufail Ahmad then signed the deed again in the presence of the registration officer and then I put down my signature of identification of Tufail Ahmad."

There is no reason to disbelieve the statement of this witness who has been believed by the court below who saw him in the witness-box. We must, therefore, take it that Abdul Ghani brought the document to this witness in the presence of Tufail Ahmad and told the witness that Tufail Ahmad had executed it and asked the witness to attest the document, and it was on this that the witness signed the deed as a marginal witness. The evidence therefore proves that he attested the document on the statement made by Abdul Ghani in the presence of Tufail Ahmad that Tufail Ahmad had executed it.

The requirements of section 68 of the Evidence Act were fulfilled because one of the attesting witnesses was actually called by the mortgagee. The question is whether the requirements of section 3 of the Transfer of Property Act have been fulfilled. That section defines the meaning of the word "attested", which is a necessary condition for a mortgage under section 59. Section 3 requires that such an attesting witness must either have seen the executant, or other person who signs for him, sign the document or "has received from the executant a *personal acknowledgment* of his signature or mark or of the signature or mark of such other person", and each of such witnesses has signed the instrument in the presence of the executant. There can be no doubt that the attestation of Muhammad Rashid would under the English law be a sufficient

attestation made on the acknowledgment of the mortgagor. According to the English rulings it is not necessary that the acknowledgment should be express and should have been made verbally by the executant. In several cases where the executant was present and the attesting witnesses signed the document in his presence on being assured that he had executed the will, it was held that there had been sufficient acknowledgment. In *Inglesant* v. *Inglesant* (1) the deceased had signed her will in the presence of one witness; on the entry of the second witness a person present directed him to sign his name under the testatrix's signature. He did so and the second witness also subscribed the will. The deceased was in the room but said no word during the proceeding. The will was lying on the table open and had a heading in large characters that that was the last will and testament, etc. It was held that the deceased acknowledged her signature in the presence of two witnesses. So far as the attestation of a will is concerned, it is in India governed by the Indian Succession Act which uses the expression "personal acknowledgment" which occurs in section 3 of the Transfer of Property Act also. In the English Wills Act (1 Vict. Cap. XXVI, section 9) the section is similar except that the word "personal" does not occur therein.

Before 1926 there was no express definition of "attestation" in the Transfer of Property Act, but under that Act attestation was necessary for a mortgage deed. In *Shamu Patter* v. *Abdul Kadir Ravuthan* (2), their Lordships of the Privy Council had to consider the question whether a mortgage deed was sufficiently attested if the attestation had been made by witnesses on an acknowledgment received from the mortgagor. Their Lordships referred to several English authorities in support of the view that the word "attestation" by itself did not include the signing of a document by witnesses on an acknowledgment of the testator. At

(1) (1874) L.R., 3 P. and D., 172. (2) (1912) I.L.R., 35 Mad., 607.

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page 615 their Lordships quoted section 50 of the Indian Succession Act, which was stated substantially to have taken the place of the Indian Wills Act of 1838, but their Lordships considered that the provisions of that section were different and would not be applicable to the attestation of a mortgage deed which was governed by section 68 of the Evidence Act and section 59 of the Transfer of Property Act. In quoting section 50 of the Indian Succession Act their Lordships did not lay any emphasis on the word "personal" used therein.

In 1926 the legislature by Act XXVII of 1926 amended the Transfer of Property Act and for the first time introduced this definition. As already pointed out, the words "personal acknowledgment of his signature or mark, etc." have been reproduced from section 50 of the Indian Succession Act.

On behalf of the respondent it is urged that the word "personal" should make no material difference and that the law is the same in India as in England. It is on the other hand contended on behalf of the appellant that the legislature has thought fit to introduce an additional word "personal" in order to restrict the meaning of the word "acknowledgment" and that the English law has not been adopted *in extenso*. No doubt the word "personal" occurs in the Indian Acts, though it does not occur in the corresponding section of the English statute, but it is certainly not the equivalent of the word "express" and the legislature has not insisted on there being an express acknowledgment of the signature by the executant. All that is necessary is that the acknowledgment should be "personal". It was undoubtedly the intention of the legislature that the mortgagor should be present at the time because the section requires that the attesting witnesses must sign the instrument in the presence of the executant. It may well be that the intention of the legislature was that the acknowledgment should have been made by the executant

himself and not through an agent at a time when the executant is not present. There is no doubt some difficulty created by the use of this additional word, but we find that in one of the earliest cases in this country, *Manickbai* v. *Hormasji Bomanji* (1), the testator had produced a paper saying that it was his will and had asked the witnesses to attest it, which they did. He had not actually mentioned that he had signed it or that the signature was his. It was held by GREEN, J., that this was a sufficient acknowledgment by the testator of his signature to his will and that the introduction of the word "personal" into section 50 of the Indian Succession Act, which word had not occurred in the English Wills Act (1 Vict. Cap. XXVI, section 9), was not material in a case like the one before him. No case has been cited before us where it has been held in India that there should be an express acknowledgment by the executant and that such an acknowledgment cannot be inferred from his conduct at the time when the document is attested by witnesses; for example, by his gestures or in other ways. It may, therefore, be presumed that when the legislature in 1926 reproduced the words of section 50 of the Indian Succession Act it was aware of the interpretation put on similar words by the courts in India, and the definition was introduced because their Lordships of the Privy Council in *Shamu Patter's* case (2) had pointed out that the law as regards the method of attestation was different with regard to mortgage deeds and wills. We, therefore, think that on the whole there is no ground for assuming that the law in India is different from that in England. As already pointed out, the facts proved in this case establish a valid attestation under the English law. We, therefore, think that we must accept the finding of the court below that the mortgage deed had been duly attested on acknowledgment received from the executant, because Abdul Ghani had stated in the presence of

(1) (1877) I.L.R., 1 Bom., 547. (2) (1912) I.L.R., 35 Mad., 607.

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Tufail Ahmad that the document had been executed by him and had asked Muhammad Rashid to attest it and the latter attested it without any dissent having been expressed by the executant Tufail Ahmad.

We accordingly dismiss this appeal with costs.

REVISIONAL CIVIL

Before Mr. Justice Niamat-ullah

1937
April, 1

PEAREY LAL (PLAINTIFF) *v.* MUHAMMAD YUSUF (DEFENDANT)*

Limitation Act (IX of 1908), section 20—Payment of interest as such—Payment in handwriting of debtor but not mentioning as interest—Extrinsic evidence that payment was expressly towards interest—Evidence Act (I of 1872), sections 91, 92.

Where a payment, endorsed on the back of the promissory note in the handwriting of the debtor, made no mention that it was made towards interest as such, extrinsic evidence of witnesses to prove that at the time of making the payment the debtor expressly stated that it was towards interest was not precluded by sections 91 and 92 of the Evidence Act and was admissible; and upon such proof the payment would save limitation under section 20 of the Limitation Act.

Mr. *K. C. Mital*, for the applicant.

Mr. *Shah Habib*, for the opposite party.

NIAMAT-ULLAH, J.:—This is a revision under section 25 of the Small Cause Courts Act, and arises out of a suit for money on foot of a promissory note, dated the 25th of May, 1930. The lower court dismissed the suit, and the plaintiff has come to this Court in revision. The lower court has held that the suit, having been brought on the 27th of April, 1936, was barred by limitation. A payment of Rs.2 made on the 14th of May, 1933, was held not to have saved it. The payment is endorsed in the handwriting of the debtor on the back of the promissory note. It is, however, silent as to whether that sum was paid towards interest. The

*Civil Revision No. 395 of 1936.