FULL BENCH.

Before Syed Wazir Hasan, Chief Judge, Mr. Justice Muhammad Raza and Mr. Justice Bisheshwar Nath Srivastava.

DURGA DIN AND OTHERS (DEFENDANTS-APPELLANTS) *v.* SURAJ BAKHSH (PLAINTIFF-RESPONDENT).* 1931 *March*, 16.

Transfer of Property Act (IV of 1882), section 59—Execution of mortgage deed benami *in the name of another—Attestation of person actually advancing money, if sufficient attestation by a witness.*

Held, that where a mortgage is executed *benami*, the attestation of the person who actually advanced the money is a sufficient attestation by a witness under section 59 of the Transfer of Property Act, there being nothing in the language of that section which would deprive him of the capacity of an attesting witness.

An attesting witness should not also be a party to the instrument but the fact that there may exist certain equities in the very nature of the thing between the legal-mortgagee and the beneficiary will not disentitle the latter from attesting the instrument of mortgage as a witness. The objection that a person was not a good witness on the ground that he was interested in the transaction was based upon the rule of evidence, which finds no place in modern English or Indian Procedure, that a person was not to be believed if he testified in a matter in which he was interested. *Balu Ravji Gharat* v. *Gopal Gangadhar Dharu* (1) relied on. *Swire* v. *Bell* (2), *Freshfield* v. *Reed* (3), *Wickham* v. *Marquis of Bath* (4), *Seal v. Claridge* (5), *Peary Mohan Maiti* v. *Sreenath Chandra Maiti* (6), *Debendra Chandra Roy* v. *Behari Lal Mukerjee* (7), *Surur Jigar Begam* v. *Bargda Kanta Mitter* (8), and *Chandrani Kuar* v. *Sheo Nath* (9) referred to.

*Second Civil Appeal No. 273 of 1930, against the decree of Pandit Bansidhar Misra, Subordinate Judge of Bara Banki, dated the 22nd of May, 1930, upholding the decree of Babu Tribeni Prasad, Additional Munsif, Bara Banki, dated the 15th of April, 1929.

(1) (1911) 12 I.C., 531.
(2) (1793) 5 T.R., 371.
(3) (1842) 9 M. & W., 404.
(4) (1865) L.R., 1 Eq., 17.
(5) (1881) 7 Q.B.D., 516.
(6) (1908) 14 C.W.N., 1046.
(7) (1912) 16 C.W.N., 1075.
(8) (1910) I.L.R., 37 Calc., 526.
(9) (1931) I.L.R., 6 Luck., 619 : 8 O.W.N., 194.

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The case was originally heard by Mr. Justice A. G. P. PULLAN, who referred a question of law to a Full Bench for decision. His order of reference is as follows :—

PULLAN, J. :—This second appeal has been argued before me on two grounds. The first is that the suit is barred by limitation. This contention is based upon the wording of the mortgage deed itself which allowed to the mortgagees two remedies. One of these would accrue on the first failure to pay interest on the part of the mortgagor which was in the year 1911, and the other arose on the failure to pay the principal within five years. This second remedy arose in the year 1915 and from that date the suit is within time. As I interpret the mortgage deed this was the only cause of action for bringing a suit of the present nature and in my opinion the suit was within time.

The second point raised in appeal is one of more difficulty. The mortgage deed in suit was signed by two persons Salik, who is dead, and Bajrang. Bajrang gave evidence as attesting witness. He admitted that the money was advanced by him and that the mortgage deed was executed *benami* in the name of the present plaintiff. It is argued before me that Bajrang was not a proper attesting witness, and that the mortgage deed is invalid not being attested according to law. It was laid down by Lord SELBORNE in the case *Seal* v. *Claridge* (1) that a person who is a party to the deed cannot be regarded as an attesting witness on the ground that if the person for whose benefit the instrument is executed is allowed to be an attesting witness the very object of attestation, namely the prevention of fraudulent malpractice may be completely defeated. Although Bajrang is not actually a party to the execution of this mortgage deed he is the person for whose benefit the instrument was executed and I doubt

(1) (1881) 7 L.R., Q.B.D., 516.

whether he can be held to be a proper attesting witness under section 59 of the Transfer of Property Act. I have been shown no Indian case which is directly in point, but there is one ruling of the Bombay High Court reported in *Balu Ravji Gharat* v. *Gopal Gangadhar Dharu* (1) which supports to some extent the view taken by the respondent. In that case the attestation of a partner who was one of the persons interested in the execution of the document made at the request of the executant was accepted by the court as sufficient attestation. As I am doubtful whether the attestation in the present case can be accepted and as there is no direct Indian authority on the point I refer the following question under section 14 clause (1) of the Oudh Courts Act for decision by a Full Bench :—

> Where a mortgage is executed *benami*, is the attestation of the person who actually advanced the money a sufficient attestation by a witness under section 59 of the Transfer of Property Act?

Messrs. *Manohar Lal* and *Mahabir Prasad Srivastava*, for the appellants.

Mr. *K. P. Misra*, for the respondents.

HASAN, C. J. : The question of law which this Bench is called upon to decide is formulated as follows by the learned Judge who has referred it for decision :—

Where a mortgage is executed *benami*, is the attestation of the person who actually advanced the money a sufficient attestation by a witness under section 59 of the Transfer of Property Act?

The facts underlying this question of law are these :—

The mortgage deed in question is on the face of it signed by two persons as witnesses, Salik and

(1) (1911) 13 Bom., L.R., 944.

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Bajrang. Salik is dead and the surviving witness Bajrang has given evidence in support of the execution of the deed of mortgage. In his evidence he also admitted that the money which formed the consideration of the mortgage in question was advanced by him and that the deed was executed *benami* in the name of the plaintiff of the present suit, Suraj Bakhsh. The precise question therefore is whether Bajrang must by force of the provisions of law as enacted in section 59 of the Transfer of Property Act, 1882, be excluded from the apparent character of an attesting witness which he occupies on the face of the document. Section 59 requires that the instrument of mortgage shall be signed by the mortgagor and attested by at least two witnesses. Bajrang is one of such witnesses. He therefore in my judgment satisfied the requirements of the provisions of law. There is nothing in the language of the section which would compel us to deprive him of the capacity of an attesting witness. But it is argued that there is some inherent disability in him and that it lies in the fact that he is a person who is almost wholly interested in the mortgage transaction. This argument is an echo of an old practice of English courts in determining the character of an attesting witness at Common Law. The earliest case which was referred to in this connection is that of *Swire* v. *Bell* (1). The next case in order of time is *Freshfield* v. *Reed* (2). The next case to it is *Wickham* v. *Marquis of Bath* (3) and the last case is *Seal* v. *Claridge* (4). These English decisions were referred to and considered in the judgment of Chief Justice Sir BASIL SCOTT and Mr. Justice RAO in *Balu Ravji Gharat* v. *Gopal Gangadhar Dharu* (5).

The point of view which I am taking in this case is well expressed, if I may respectfully say so, in the

(1) (1793) 5 T.R., 371.
(2) (1842) 9 M. & W. 404.
(3) (1865) L.R., 1 Eq., 17.
(4) (1881) 7 Q.B.D., 516.
(5) (1911) 12 I.C., 531.

Bombay case, just now cited. I would therefore freely quote from the judgment in that case.

"The objection taken is that one of the two witnesses attesting it was Sadu, a person interested in the money advanced though not himself a party to the document. The objection that a person was not a good witness on the ground that he was interested in the transaction was based upon the rule of evidence, which finds no place in modern English or Indian Procedure, that a person was not to be believed if he testified in a matter in which he was interested. The only trace of its survival is in the statutory provisions which debar legatees from taking legacies under Wills which they attest."

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In the case of *Seal* v. *Claridge* (1) the question arose on the interpretation of section 10 of the Bills of Sale Act, 1878. Lord SELBORNE held that that section required only such a solicitor to be an attesting witness who was not a party to the document. Reference was made to the earlier case of *Freshfield* v. *Reed* (2) and on the authority of that case Lord SELBORNE added :—"It follows from that case that the party to an instrument cannot attest it." I am unable to place wider restriction on the capacity of being an attesting witness than this that he should not also be a party to the instrument. In the present case in the eyes of the law the plaintiff is the mortgagee and Bajrang is only a beneficiary of the mortgagee's interest. He is certainly a party to the transaction but he is not a party to the instrument of the mortgage. A *benamidar* has a right in law to sue on the mortgage in his own name, to collect proceeds of the decree that may be passed in such a suit and as between him and the mortgagor the mortgage transaction can be put an end to without the beneficiary being brought on the scene at all. That there may exist certain equities,

(1) (1881) 7 Q.B.D., 516. (2) (1842) 9 M. & W., 404.

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in the very nature of the thing between the legal mortgagee and the beneficiary will not in my opinion disentitle the latter from attesting the instrument of mortgage as a witness.

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The learned Advocate for the defendants-appellants also cited the case of *Peary Mohan Maiti* v. *Sreenath Chandra Maiti* (1); *Debendra Chandra Roy* v. *Behari Lal Mukerjee* (2) and *Surur Jigar Begam* v. *Buradi Kanta Mitter* (3). In these cases general observations were made in line with the decisions in English cases to which reference has already been made. In the first-mentioned case there were several mortgagors and they had all signed the mortgage deed in the character of co-executants. The argument in the High Court was that any one of such executants could not be regarded as also an attesting witness. The argument was accepted. A Bench of this Court has recently held in the case of *Chandrani Kuar* v. *Sheo Nath* (4) that only such persons can be regarded as attesting witnesses who have signed the instrument required by law to be attested by witnesses with the intention of attesting it. I was a party to that judgment and I still adhere to the opinion expressed therein. The signature of one of the co-executants to the deed of mortgage in the case decided by the High Court at Calcutta, just now referred to, could not therefore be treated as the signature of an attesting witness. To that extent I agree with the decision in that case.

In the second case, *Debendra Chandra Roy* v. *Behrai Lal Mukerjee* (2) it was held that a party to a document cannot under any circumstances be allowed to sign the document as an attesting witness. I am prepared to take the same view. The particular person in the Calcutta case had signed both as one of

(1) (1908) 14 C.W.N., 1046.
(2) (1912) 16 C.W.N., 1075.
(3) (1910) I.L.R., 37 Calc., 526.
(4) (1931) 8 O.W.N., 194.

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the executants and as one of the attesting witnesses to the document. Such is not the case before us.

In the last Calcutta case *i.e. Surur Jigar Begam* v. *Burada Kanta Mitter* (1) the facts were similar to the first-mentioned case of the same Court. The learned Judge in this case decided that when a document is jointly executed by more than one person in the presence of each other each executant cannot be treated as an attesting witness in respect of the signature of every other executant. The present case, as I have already stated, does not fall within the prohibition laid down in this case. In the general discussion of the subject reference is made to Halsbury's Laws of England, volume 10, page 389, wherein it is stated that an attesting witness must be some person who is not a party to the deed. I am prepared to apply that rule even to cases falling under section 59 of the Transfer of Property Act, 1882.

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Cases decided by the English courts, to which reference has already been made and some other cases, were also noticed in the judgment of this case. As regards the former class of cases I have already said what I had to say and I have nothing more to add. In short, I entirely follow the opinion expressed by the learned Judges of the Bombay High Court in *Balu Ravji Gharat* v. *Gopal Gangadhar Dharu* (2) already mentioned. My answer therefore to the question referred for decision to the Full Bench is in the affirmative.

RAZA, J. :—I entirely agree and have nothing to add to the judgment which has been delivered by the learned Chief Judge. In my opinion also when a mortgage is executed *benami* the person who actually advances the money is of course interested in the transaction and may be taken to be a party to the

(1) (1910) I.L.R., 37 Calc., 526. (2) (1911) 12 I.C., 531.

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transaction but he is actually not a party to the mortgage deed as it stands. If he attests the mortgage deed, his attestation should in my opinion be held to be a sufficient attestation by a witness under section 59 of the Transfer of Property Act, 1882.

SRIVASTAVA, J. :—I am of the same opinion. The word "attested" has been defined by the Transfer of Property Amending Act, XXVII of 1926, which definition has been incorporated in section 3 of the Transfer of Property Act, 1882. But this definition does not lay down any rule as regards the persons who are competent to be attesting witnesses. Thus so far as the statute law goes there is no express prohibition even as regards a party to the deed being an attesting witness. However the rule is well established that a party to the deed is not competent to be an attesting witness. This rule is based on sound general principles and is intended to prevent malpractices and fraud. As pointed out by the Hon'ble Chief Judge the old English law preventing persons interested in a transaction from being attesting witnesses has now been repealed and is no longer in force even in England.

In my opinion if we extend the rule in this country to persons whose names do not appear as a party to the instrument but who may be alleged to be interested in the transaction we will be opening a vista of inquiry which was never contemplated by the legislature. I would therefore answer the question referred to the Full Bench in the affirmative.

BY THE COURT :—The answer is in the affirmative.