

1932
 V. R. M.
 RAMAN
 CHETTYAR
 v.
 BANK OF
 CHETTINAD,
 LIMITED.
 PAGE, C.J.

that the Court had jurisdiction to try the suit could have been challenged in an appeal from the decree that was subsequently passed, if the appellant had elected to prefer an appeal from that decree, which finally disposed of the rights of the appellant.

Applying the test laid down by the Full Bench in *P.K.P.V.E. Chidambaram Chettyar and another v. N. A. Chettyar Firm* (1), in my opinion, the order under appeal is not a "judgment" within clause 13 of the Letters Patent.

For these reasons the appeal is dismissed with costs.

MYA BU, J.—I agree.

LETTERS PATENT APPEAL.

Before Sir Arthur Page, Kt., Chief Justice, and Mr. Justice Mya Bu.

R.M.A.R.M. CHETTYAR FIRM

v.

U HTAW.*

1932
 Nov. 25.

Proof of Mortgage—Transfer of Property Act (IV of 1882), ss. 3, 59—Evidence Act (I of 1872), s. 68, proviso—Attesting witness, when not called—Necessity of proving due execution aliunde.

In the case of a mortgage in the form prescribed under s. 59 of the Transfer of Property Act, as amended by Act XX of 1929 and Act V of 1930, in the absence of an admission by the defendant in that behalf it is incumbent upon the plaintiff in a mortgage suit to prove to the satisfaction of the Court that the document upon which he relies as being an instrument of mortgage was registered, signed by the mortgagor, and attested by at least two witnesses.

Where the due execution of such a mortgage is not specifically denied the proviso to section 68 of the Evidence Act only removes the necessity of calling an attesting witness to prove execution. It does not relieve the party of the

(1) (1928) 1.L.R. 6 Ran. 703.

* Letters Patent Appeal No. 4 of 1932 arising out of Special Civil 2nd Appeal No. 198 of 1931 from the judgment of the District Court of Myaungmya in Civil Appeal No. 15 of 1931.

necessity of proving the due execution of the mortgage by adducing other evidence in that behalf.

Biswanath Singh v. Kayastha Trading and Banking Corporation, I.L.R. 8 Pat. 450—discussed from.

1932

R.M.A.R.M.
CHETTYAR
FIRM
7.
U HTAW.

Basu for the appellants. Section 68 of the Evidence Act requires at least one attesting witness to be called to prove execution of a document; but a proviso has been added to it by Act XXXI of 1926 rendering it unnecessary to call an attesting witness if execution by the person by whom the document purports to have been executed is not specifically denied. In this case there is no denial of the execution, but a third party has raised a vague issue as to whether the mortgage was or was not according to law. No attesting witness need therefore be called. All that need be done is formally to prove execution by any witness, not necessarily an attesting witness. See *Biswanath Singh v. The Kayastha Trading and Banking Corporation, Limited* (1).

“Execution” of a deed refers to the signing, attesting (when necessary) and delivery of the instrument. See Wharton's Law Lexicon. That is to say, “execution” means the last act or series of acts which completes a document. It is its formal completion. *Bhawanji Harbhun v. Devji Punja* (2). It includes signing, attesting and delivery. *Arjun Chandra v. Kailas Chandra* (3).

Ba Maw for the respondent. Though execution is not specifically denied the respondent has raised doubts as to the validity of the document. Therefore all the formalities of the law to prove the validity of the deed have to be complied with. S. 3 of the Transfer of Property Act defines “attestation”, and

(1) I.L.R. 8 Pat. 450, 453.

(2) I.L.R. 19 Bom. 635.

(3) 27 C.W.N. 263, 266.

1932

R.M.A.R.M.
CHETTYAR
FIRM
v.
U HTAW.

there is no evidence in the case regarding any of the three alternative courses prescribed for proving attestation. The evidence of a third party is not sufficient to prove execution. One of the attesting witnesses, if alive and capable of giving evidence, must be called.

Reading ss. 68, 69 and 70 of the Evidence Act together it is clear that "attestation" is something different from "execution". And, even though execution by the executant is admitted, attestation will have to be formally proved. *Hira Bibi v. Ram Hari Lall* (1). The definition of the word "attested" in s. 3 of the Transfer of Property Act, as added in 1926, was intended to go further than the Privy Council case and proof of attestation as prescribed by that section will have to be given. See *Zamindar of Pollavaram v. Maharaja of Pittapuram* (2).

Section 70 of the Evidence Act enables a plaintiff to dispense with proof of the matters therein mentioned if they are admitted by the other party. But this section cannot, and does not, render valid any document which it is apparent from the evidence before the Court is invalid. *Sheik Kachu v. Mahammad Ali* (3).

PAGE, C.J.—The course which this case has taken from the time when the plaint was filed until the case came before the High Court on second appeal to Baguley J. has been very unsatisfactory. By that I do not mean that either the learned Township Judge or the learned District Judge is in any way responsible for the difficulties that have arisen. These are due to the defective form of the pleadings. The result is, in my opinion, that the case has not been tried in such a way that the rights of the parties have been duly considered or determined.

(1) I.L.R. 5 Pat. 58.

(2) 45 Cal. L.J. 577.

(3) I.L.R. 54 Mad. 163.

The cause of action is a simple one, the suit being upon a mortgage executed by two mortgagors and a surety; the two mortgagors having thereafter transferred their interest in the property to the 4th defendant, who alone contested the suit, and who was the appellant in the second appeal, and the respondent in the Letters Patent Appeal.

In paragraph (1) of the plaint the details of the mortgage deed are set out. The respondent, who alone filed a written statement, in paragraph (1) thereof pleaded that "this defendant has no reason to deny the statements in paragraph (1) and subparagraphs (a), (b), (c), (d), (e), (f), (g) of the plaint".

Now, the effect of paragraph (1) of the plaint and paragraph (1) of the written statement is that the execution of the mortgage deed was not specifically denied either by the persons by whom it purports to have been executed, or by their transferee the respondent.

The learned Township Judge held that "the plaintiff evidently cannot dispense with the attendance of the attesting witnesses whose absence would only be detrimental to the interest of the defendants", and that unless the execution was proved by one of the attesting witnesses the mortgage deed "must be deemed to be invalid in view of section 59 of the Transfer of Property Act". Upon that ground he dismissed the suit.

On appeal the learned District Judge held that "unless want of proper attestation was definitely pleaded the plaintiff could not be called upon to prove attestation", and finding that the 4th defendant had not specifically pleaded the absence of proper attestation the learned District Judge set aside the decree of the Township Court, and granted a preliminary decree for sale of the mortgaged property.

1932

R.M.A.R.M
CHETTYAR
FIRMv.
U HTAW.

PAGE, C.J.

1932
 R.M.A.R.M.
 CHETTYAR
 FIRM
 ?
 U HTAW.
 PAGE, C.J.

In my opinion, with all due respect, the law was not correctly laid down either by the learned Township Judge or by the learned District Judge. Section 59 of the Transfer of Property Act (IV of 1882, as amended by Act XX of 1929 and Act V of 1930) runs as follows :

“Where the principal money secured is one hundred rupees or upwards, a mortgage other than a mortgage by deposit of title-deeds can be effected only by a registered instrument signed by the mortgagor and attested by at least two witnesses.”

In the absence of an admission by the defendant in that behalf it is incumbent upon the plaintiff in a mortgage suit to prove to the satisfaction of the Court that the document upon which he relies as being an instrument of mortgage was registered, signed by the mortgagor, and attested by at least two witnesses.

“Attested” is defined in section 3 of the Transfer of Property Act as follows :

“Attested”, in relation to an instrument, means (and shall be deemed always to have meant) attested by two or more witnesses each of whom has seen the executant sign or affix his mark to the instrument, or has seen some other person sign the instrument in the presence and by the direction of the executant, or has received from the executant a personal acknowledgment of his signature or mark, or of the signature of such other person, and each of whom has signed the instrument in the presence of the executant ; but it shall not be necessary that more than one of such witnesses shall have been present at the same time, and no particular form of attestation shall be necessary.

Now, what is the form of proof that an instrument of mortgage conforms to the provisions of section 59 of the Transfer of Property Act that is required by law. Section 68 of the Evidence Act runs as follows :

“If a document is required by law to be attested, it shall not be used as evidence until one attesting witness at least has been called for the purpose of proving its execution, if there be an

attesting witness alive, and subject to the process of the Court and capable of giving evidence.

“ Provided that it shall not be necessary to call an attesting witness in proof of the execution of any document, not being a will, which has been registered in accordance with the provisions of the Indian Registration Act, 1908, unless its execution by the person by whom it purports to have been executed is specifically denied.”

In my opinion the meaning and effect of section 68 is that in the case of a mortgage within section 59 of the Transfer of Property Act it is incumbent upon the party relying upon it to prove the due execution of the mortgage by adducing the evidence of at least one attesting witness in that behalf as laid down in section 68 of the Evidence Act, provided that unless its due execution, that is to say, its signature by the mortgagor in the presence of two attesting witnesses is specifically denied, the execution of the mortgage deed in the form required by law may be proved *aliunde* by adducing other evidence in that behalf.

In *Biswanath Singh v. The Kayastha Trading and Banking Corporation, Limited* (1) Ross J. held that “there is no specific denial of the execution of this registered mortgage by the persons by whom it purports to have been executed. All that the appellants pleaded was that they did not admit the genuineness of the bond. This is not sufficient to put the plaintiffs to proof of attestation.”

With all due deference I am unable to accept the law thus enunciated, because, in my opinion, the proviso to section 68 only removes the necessity of calling an attesting witness to prove the execution of the documents therein referred to and

1932

R. M. A. R. M.
CHETTYAR
FIRM
v.
U HTAW.
PAGE, C.J.

1932
 R. M. A. R. M.
 CHETTYAR
 FIRM
 v.
 U HTAW.
 PAGE, C.J.

does not, and does not purport to, relieve the party of the necessity of proving a mortgage in the form prescribed under section 59 of the Transfer of Property Act.

On second appeal to the High Court Baguley J. held, and I respectfully agree with him, that it was incumbent upon the plaintiff to prove that the mortgage deed had been attested "to bring the document within the the four corners of section 59 of the Transfer of Property Act". The learned Judge then proceeded to hold upon the evidence that attestation had not been proved. Accordingly Baguley J. allowed the appeal, set aside the decree of the lower Appellate Court, and dismissed the suit as against the present respondent. For the reasons that I have stated I do not think that the law which ought to have been applied in the circumstances of the present case was either appreciated or followed by the trial Court, and that the case has not been duly determined according to law.

The issues which were settled in the Township Court were vague and indefinite. In paragraph (3) of the written statement the respondent, in answer to an allegation in paragraph (4) of the claim "that the 1st and 2nd defendants had unlawfully sold to him the paddy land" therein referred to, pleaded that "the sale and purchase are not unlawful, but it is a lawful sale and purchase". The respondent in the said paragraph of the written statement added that "it is not known whether the mortgage deed of the plaintiff is or is not according to law". What those words mean it is not easy to understand. This sentence, if it is intended to be a reply to the allegations in paragraph (4) of the plaint, is *nihil ad rem*; on the other hand if it is taken to indicate that upon some ground which is not stated the mortgage of the plaintiff was invalid, it is too wide

and vague an allegation to enable the plaintiff to appreciate the nature of the defence to which the paragraph relates.

Further, it would appear from the pleadings that an issue ought to have been raised and determined as to whether the 4th defendant possessed a mortgage of the land in suit prior to that upon which the plaintiff relied. The learned Township Judge, however, decided the case upon the ground that it was incumbent upon the plaintiff to call an attesting witness to prove the due execution of the instrument of mortgage. In my opinion in so holding he failed to give effect to the proviso to section 68 of the Evidence Act. I am further of opinion that the learned District Judge also incorrectly stated the law when he held that proof of attestation was unnecessary in the absence of a definitely pleaded defence that the instrument of mortgage was invalid by reason of the absence of attestation; because, in my opinion, it was incumbent upon the plaintiff to prove the due execution of the mortgage although in the circumstances evidence in that behalf by witnesses other than one of the attesting witnesses was admissible. Baguley J. held that the plaintiff had not in fact proved that the execution by the mortgagors of the instrument of mortgage was duly attested. I am not disposed in this appeal to lay down what proof of attestation is necessary. In my opinion the pleadings and the issues as settled were so misleading that it may well be that the parties did not appreciate what the real issues were that fell for determination in the suit.

In those circumstances, and by consent of the parties, this appeal will be allowed and the decree of Baguley J. set aside. The case will be remanded to the Township Court of Einmè in order that the suit may be reheard and determined according to law in the

1932

R. M. A. R. M.
CHETTYAR
FIRMv.
U HTAW.

PAGE, C.J.

1932

R.M.A.R.M.
CHETTYAR
FIRM

U HTAW.

PAGE, C.J.

light of the observations which this Court has made in respect of the issues that arise.

The court-fees in this Court and in Civil Second Appeal No. 198 of 1931 will be refunded. The costs in the trial Court, in the District Court, before Baguley J., and in this Court will abide the result of the rehearing of the suit.

MYA BU, J.—The ends of justice demand the sending back of the case to the Court of first instance for its retrial upon the lines indicated by my Lord, the Chief Justice; and the learned advocates for the parties have very rightly consented to this action. I wish, however, to add a few words with reference to the proof requisite in a case like the present one, where a legal mortgage, the principal money secured being Rs. 100 or upwards, is required to be proved. The proof tendered must show that the terms of section 59 of the Transfer of Property Act were complied with, that is, that there is a registered instrument of mortgage signed by the mortgagor and attested by at least two witnesses. If the proof tendered fails in any of these particulars then it follows that the legal mortgage is not proved. Section 68 of the Indian Evidence Act makes it necessary for a party tendering proof of such a mortgage to call at least one of the attesting witnesses, if available, for the purpose of proving the execution of the instrument of mortgage. This rule, however, is modified by the proviso to the section in cases where the execution of the instrument by the mortgagor is not specifically denied, by allowing proof of execution to be tendered by means other than calling an attesting witness in proof of the execution. Reading the section and the proviso together it appears to me that where a legal

mortgage is to be proved in a case in which the execution of the mortgage deed by the mortgagor is not specifically denied it is not incumbent upon the party proving it to adduce the evidence of an attesting witness, but due execution of the instrument must be proved, and it can be proved by any means permitted by the Evidence Act. Due execution cannot in my opinion mean anything less than the signing by the mortgagor and attestation by at least two witnesses. Therefore, although the proviso relieves a party relying upon an instrument of mortgage of the burden of adducing the evidence of one of the attesting witnesses, yet it does not relieve him of the necessity of proving not only that the mortgagor signed the instrument of mortgage but also that he signed it either in the presence of two attesting witnesses or that he acknowledged his signature to each of the two witnesses within the meaning of the term "attested" in section 3 of the Transfer of Property Act.

I am therefore unable to agree with the observation of Ross J. in *Biswanath Singh v. The Kayastha Trading and Banking Corporation, Limited* (1) to the effect that in the absence of specific denial of execution of the registered mortgage by persons by whom it purported to have been executed, the party relying upon the mortgage was not put to proof of attestation.

I agree with the judgment of the learned Chief Justice and concur in the orders contained in it.

1932

R. M. A. R. M.
CHETTYAR
FIRM

U HTAW.

MYA BU, J.

(1) (1928) I.L.R. 8 Pat. 450.