

APPELLATE CIVIL.

Before Mr. Justice Mya Bu, and Mr. Justice Mackney.

MA THEIN SHIN AND ANOTHER

v.

MA NGWE NU AND ANOTHER.*

1938
Sep. 15.

Attestation—Signatures of registering officer and identifying witness—Personal acknowledgment to them by executant—Endorsements in executant's presence—Signatures not part of the instrument—Registration Act, ss. 58, 59—Transfer of Property Act, s. 3.

The signatures of the Registrar or of the Sub-Registrar and of the witnesses identifying the executant at the registration of a document made in the manner required by ss. 58 and 59 of the Registration Act are not "attestation" within s. 3 of the Transfer of Property Act, even though the Registering officer and the identifying witnesses did receive from the executant a personal acknowledgment of his signature or mark and they did sign in the executant's presence. They cannot be regarded as having signed the document with the intention of attesting the execution of the document by the executant.

The provisions of the law which require certain instruments to be attested must be deemed to have the effect of making those signatures form part of the instrument to which they are affixed. Neither the signature of the registering officer who affixes his signature to an endorsement signed by the executant on the paper containing the instrument in question, nor the signature of a person who has identified the executant before the registering officer is a signature of the instrument itself.

Chandrani v. Sheo Nath, I.L.R. 6 Luck. 619; *Lachman v. Bahadur Singh*, I.L.R. 54 All. 1051, followed.

S.M.A.R.A.L. Firm v. R.M.M.A. Firm, I.L.R. 5 Ran. 772, referred to.

Abinash v. Dasavath, I.L.R. 56 Cal. 598; *Alapati Nayamma v. Venkatramayya*, I.L.R. 58 Mad. 220; *Amarendra Nath v. Kashi Nath*, I.L.R. 27 Cal. 169; *Hurro Sundari v. Chunder*, I.L.R. 6 Cal. 17; *Neelima Basu v. Jaharlal*, I.L.R. 61 Cal. 525; *Nitye Gopal v. Nagendra Nath*, I.L.R. 11 Cal. 429; *Radha Mohan v. Nandy*, 47 Cal. L.J. 118; *Sarada Prasad v. Ray*, I.L.R. 1 Pat. 300; *Veerappa v. Subramania*, I.L.R. 52 Mad. 123, dissented from.

Maung Aye for the appellants.

Ze Ya for the respondents.

Special Civil Second Appeal No. 27 of 1938 of this Court came on for hearing before Ba U J. The suit

* Special Civil 2nd Appeal No. 27 of 1938 from the judgment of the District Court of Henzada in Civil Appeal No. 55 of 1937.

related to a mortgage and the question that arose before the learned Judge was whether the signatures of the registering officer and of an identifying witness, affixed to the registration endorsement, are sufficient attestation within the meaning of the Transfer of Property Act. In view of a conflict of decisions his Lordship referred the question for the decision of a Full Bench or Bench in the following terms :

BA U, J. (after stating the facts and deciding the other points in the case continued).—The only question that is left for consideration is the question of attestation. There is a conflict of decisions on this question among the different High Courts in India. The view held by the Madras, Calcutta and Patna High Courts is that the signatures of the registering officer and of an identifying witness, affixed to the registration endorsement, are sufficient attestation within the meaning of the Transfer of Property Act. See *Veerappa Chettiar v. Subramania Ayyar* (1), *Radha Mohan Dutta v. Nripendra Nath Nandy* (2), *Neelima Basu v. Jaharlal Sarkar* (3), and *Sarada Prasad Tej v. Triguna Charan Ray* (4). This view was also followed by the Allahabad High Court in *Ram Charan v. Bhairon* (5). Subsequently a Full Bench of the latter High Court held, following a decision of the Chief Court of Lucknow in *Chandrami Kumwar, Musammal v. Sheo Nath* (6), that—

“ the signatures of the Sub-Registrar and of the witnesses identifying the executant at registration are not sufficient attestation of a mortgage deed for the purpose of the Transfer of Property Act, even assuming that the Sub-Registrar and identifying witnesses did receive from the executant a personal acknowledgment of his signature or mark, and that they did sign in the executant's presence. The mere fact that a person sees, or receives an acknowledgment of, the execution of a document and signs it does not make him an attesting witness, unless he signs with the idea of bearing testimony to the execution and with the idea

1938

MA THEIN
SHIN
v.
MA NGWE
NG.

1938

Sep. 15.

(1) (1928) I.L.R. 52 Mad. 123.

(4) (1922) I.L.R. 1 Pat. 300.

(2) (1927) 47 Cal. L.J. 118.

(5) (1930) I.L.R. 53 All. 1.

(3) (1934) I.L.R. 61 Cal. 525.

(6) (1931) I.L.R. 6 Luck. 619.

1938
 MA THEIN
 SHIN
 v.
 MA NGWE
 NU.
 BA U, J.

further of permitting himself to be cited as a witness to prove the execution."

See *Lachman Singh v. Surendra Bahadur Singh* (1). Carr J., of this Court, also doubted the correctness of the view held by the Calcutta High Court in *Radha Mohan Dutta v. Nripendra Nath Nandy* (2): see *S.M.A.R.A.L. Firm v. R.M.M.A. Firm* (3).

In view of this conflict of decisions, I refer the following question for consideration by a Bench, Full or otherwise as the learned Chief Justice may direct :

"Whether the signatures of the Registrar and of the witnesses identifying the executant at registration are sufficient attestation of the deed for the purpose of the Transfer of Property Act, if they sign the deed in the presence of the executant after receiving acknowledgment from him of his signature or mark thereon."

MYA BU, J.—The question referred for the decision of this Bench is :

"Whether the signatures of the Registrar and of the witnesses identifying the executant at registration are sufficient attestation of the deed for the purpose of the Transfer of Property Act, if they signed the deed in the presence of the executant after receiving acknowledgment from him of his signature or mark thereon."

"Attestation" 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."

(1) (1932) I.L.R. 54 AH. 1051.

(2) (1927) 47 Cal. L.J. 118.

(3) (1927) I.L.R. 5 Ran. 772.

The signatures of the Registrar are, under section 59, appended to certain endorsements which are required to be made under sections 52 (1) (a) and 58 (1) of the Registration Act. Among such endorsements there is one relating to the admission by the executant of his execution of the document and one relating to the identification by some witness or witnesses of the executant or his representative or agent as the case may be. The endorsement relating to the admission of execution is signed by the executant or his representative or agent and that relating to the identification is signed by the witness or witnesses identifying the executant or his representative or agent. The question before us therefore resolves itself into whether the signature of the Registrar (or the Sub Registrar) and the signature or signatures of the witness or witnesses identifying the executant at the registration of a document made in the manner required by sections 58 and 59 of the Registration Act satisfy the term "attestation" as defined in section 3 of the Transfer of Property Act.

There has been a conflict of judicial opinion on the subject. There is a long string of cases according to which the question under consideration must be given an affirmative answer: *Hurro Sundari Dabia v. Chunder Kant Bhattacharjee* (1), *Nilye Gopal Sircar v. Nagendra Nath Mitter Mozumdar* (2), *Amarendra Nath Chatterjee and another v. Kashi Nath Chatterjee* (3), *Radha Mohan Dutta v. Nripendra Nath Nandy and others* (4), *Sarada Prasad Tej v. Triguna Charan Ray* (5), *Veerappa Chettiar v. Subramania Ayyar and others* (6), *Abinash Chandra Bidyanidhi Bhattacharya v. Dasarath Malo* (7), *Neelima Basu v.*

1938

MA THEIN
SHIN
v.
MA NGWE
NU.

MYA BU, J.

(1) (1880) I.L.R. 6 Cal. 17.

(4) (1927) 47 Cal. L.J. 118.

(2) (1885) I.L.R. 11 Cal. 429.

(5) (1922) I.L.R. 1 Pat. 370.

(3) (1899) I.L.R. 27 Cal. 169.

(6) (1928) I.L.R. 52 Mad. 123.

(7) (1928) I.L.R. 56 Cal. 598.

1938
 MA THEIN
 SHIN
 v.
 MA NGWE
 NU.
 MYA BU, J.

Jaharlal Sarkar (1) and *Alapati Nagamma v. Alapati Venkatramayya and two others* (2). The general trend of thought which underlies the decisions in the first 8 of these cases is that where the executant admits execution to the Registrar (or the Sub Registrar) in the presence of the witness or witnesses identifying him there are two or more witnesses each of whom has received from the executant a personal acknowledgment of his execution and as they themselves have signed the document by making their signatures under the respective endorsements the ingredients of the definition of "attestation" have been fulfilled: while in the 9th case it was added that the Registrar's (or Sub Registrar's) signature must have been made in the presence of the executant in order that, other conditions being fulfilled, he may be regarded as an attesting witness. Opposite view is to be found in *Chandrani Kumwar, Mussamat v. Sheo Nath and others* (3) and *Lachman Singh and others v. Surendra Bahadur Singh and others* (4). They lay down that the signatures of the Sub Registrar and of the witnesses identifying the executant at registration are not sufficient attestation of a mortgage deed for the purpose of the Transfer of Property Act even assuming that the Registrar and the witnesses had received from the executant a personal acknowledgment of his signature or mark and that they did sign in the executant's presence. The learned Judges proceeded upon the footing that the signatures of the witnesses identifying the executant at registration are appended simply and solely to the endorsement that they have identified the executant and that therefore they cannot be regarded as having signed the document with the

(1) (1934) I.L.R. 61 Cal. 525.

(2) (1934) I.L.R. 58 Mad. 220.

(3) (1931) I.L.R. 6 Luck. 619.

(4) (1932) 54 All. 1051.

intention of attesting the execution of the document by the executant; and as regards the Sub Registrar, his signature is also made not with the intention of attesting the document, but merely for the purpose of signing the endorsement which he made with reference to the admission of execution by the executant. In *S.M.A.R.A.L. Firm v. R.M.M.A. Firm and three* (1) Carr J. observed :

“ I note that a Bench of the Calcutta High Court has held in *Radha Mohan Dutta v. Nripendra Nath Nandi* (2), that the signature of the sub-registrar to the registration endorsement to the effect that the mortgagor has admitted execution to him now makes that officer an attesting witness. This goes very far, and, without expressly refusing to accept that decision as correct, I am not at present prepared to follow it.”

As the judicial decisions are not concurrent, I do not consider it necessary to discuss these cases in detail; but in my opinion the question under reference must be answered in the negative. The reasons given in *Chandrani Kunwar, Mussammal v. Sheo Nath and others* (3) and *Lachman Singh and others v. Surendra Bahadur Singh and others* (4) appear to me to be sufficient to support the conclusions which the learned Judges came to on this point. But still another reason which appears to me to be of great weight as to why the signing by the Registrar (or Sub Registrar) of the endorsements and the signing by the witnesses of the endorsement relating to the identity of the executant should not be regarded as satisfying the requirements of the definition given in section 3 is that according to the definition the witness attesting the instrument must sign the instrument in the presence of the executant. It is the instrument that an attesting witness has to sign

1938
 MA THEIN
 SHIN
 v.
 MA NGWE
 NU.
 MYA BU, J.

(1) (1927) I.L.R. 5 Ran. 772.

(2) (1927) 47 Cal. L.J. 118.

(3) (1931) I.L.R. 6 Luck. 619.

(4) (1932) 54 All. 1051.

1938
 MA THEIN
 SHIN
 v.
 MA NGWE
 NU.
 MYA BU, J.

in order to comply with the terms of the definition of the word "attested." When the Registrar (or Sub-Registrar) appends his signature to the endorsements or to the particular endorsement relating to the admission of execution and when the witnesses append their signatures to the endorsement as to the identification it cannot, in my opinion, be said by any stretch of imagination that they are signing the instrument.

For these reasons I would answer the question in the negative.

MACKNEY, J.—I agree with my learned brother that the question put to us must be answered in the negative.

The learned Judge who has made the reference has used the expression "if they signed the deed": but I take it that it is not meant to imply that the signatures of the Registrar and of the witnesses identifying the executant at registration, when applied in compliance with the provisions of the Registration Act, are signatures to the deed, for that would be, in my opinion, to beg the question. The provisions of the law which require certain instruments to be attested must be deemed to have the effect of making those signatures form part of the instrument to which they are affixed. Hence in the definition "attested" to be found in section 3 of the Transfer of Property Act we find the phrase "each of whom has signed the instrument in the presence of the executant." I find it impossible to hold that the signature of the registering officer who under section 59 of the Registration Act affixes his signature to an endorsement signed by the executant on the paper containing the instrument in question is a signature of that instrument; and I find it even more difficult to hold that the signature of the person who has identified the executant before the registering officer appended

on the aforesaid paper can be considered to be a signature of the instrument itself.

The decisions of the Calcutta High Court to which reference has been made by my learned brother all seem to assume that the registering officer and the identifying witnesses *sign the instrument*: but this is the whole question. In my opinion they cannot be said to sign the instrument.

This idea, I think, was in the minds of the learned Judges who decided the case of *Lachman Singh and others v. Surendra Bahadur Singh and others* (1) when they say that the attesting witness must sign with the idea of bearing testimony to the execution and with the idea of permitting himself to be cited as a witness to prove the execution, and where they point out that the effect of the Registration Act and the Acts requiring the attestation of certain documents is that a document must already have been duly executed, and duly attested, that is to say, it must have been completed, before it is presented for registration.

So, in the cases decided by the Privy Council to which reference is made in the Allahabad case, what was considered was, what was it that the signatories signed? Was it the will itself? or did their signatures merely signify the fact that the testator had made the will with their consent?—or, in another case, whether the signature had been appended to the deed of mortgage in token of attestation or in token of the signatory's approval of the transaction?

No doubt in deciding whether a person has signed an instrument or not, it is of great assistance to look to his intention in placing his signature on the paper: but the question to be decided is, did he sign the instrument?

1938
 MA THEIN
 SHIN
 v.
 MA NGWE
 NU.
 MACKNEY, J.

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

1938

MA THEIN
SHIN

v.

MA NGWE
NU.

MACKNEY, J.

In *Veerappa Chettiar v. Subramania Ayyar and others* (1) the learned Chief Justice says :

“The registering officer and the identifying witnesses had exactly the same duty imposed upon them by the Registration Act as would have rested upon them as attesting witnesses under the Transfer of Property Act, and that duty they discharged.”

With respect, I find it difficult to understand how an identifying witness, whose duty is merely to identify before the registering officer the person who apparently executed the deed, can be said to discharge the same duty as an attesting witness under the Transfer of Property Act. Surely neither the registering officer nor the identifying witness can be said to discharge any duty under the Transfer of Property Act as attesting witnesses, because they do not in fact sign the instrument.

1939

Jan. 6.

BA U, J.—As the answer of the Bench to the question referred by me is in the negative, this appeal must be dismissed.

I dismiss the appeal with costs.