APPELLATE CIVIL.

Before Mr. Justice Dunkley.

1939

Aug 16.

ALAGAPPA CHETTYAR

v.

KO KALA PAI AND ANOTHER.*

"Attested"—Attesting witness—Scribe of a document—Competency of a scribe to be an attesting witness—Dual role of a scribe—Transfer of Property Act, ss. 3, 59.

"Attested" means that a person has signed the document by way of testimony to the fact that he saw it executed. When a man places his signature upon a document and at the same time describes himself as the writer thereof, the inference is that he signs as the writer and nothing else, but, as a matter of fact, it can be shown that he signed not only as the writer but also as a witness of the fact that he saw the document executed or received a personal acknowledgment from the executants that they had executed it. The writer of a document may perform a dual role ; he may be an attesting witness as well as the writer.

Abinash Chandra v. *Dasarath Malo*, I.L.R. 56 Cal. 598 ; *Burdett* v. *Spilsbury*, (1843) 10 Cl. & Fin. 340 ; *Jagannath Khan* v. *Bajrang Das*, I.L.R. 48 Cal. 61 ; *Paramasiva* v. *Padayachi*, I.L.R. 46 Mad. 535 ; *Shamu Patter* v. *Abdul Kadir*, I.L.R. 35 Mad. 607 (P.C.), referred to.

P. K. Basu for the appellant.

Po Aye for the respondents.

DUNKLEY, J.—The sole question for decision in this second appeal is whether the mortgage bond in suit had been duly executed within the provisions of section 59 of the Transfer of Property Act, namely, by being signed by the mortgagors and attested by at least two witnesses. The signature by the mortgagors is admitted, but the question in dispute is whether the bond had been attested by two witnesses. The original Court held that it had been so attested, but, on first appeal to the District Court, the learned District Judge has reversed this decision.

A reference to the bond itself shows that, besides the cross marks of the two mortgagors, which appear

* Special Civil 2nd Appeal No. 96 of 1939 from the judgment of the District Court of Henzada in Civil Appeal No. 5 of 1939.

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at the foot of the document, there appear two signatures on the left-hand side : one is that of Po Tauk and the other is that of a person named Somasundaram. Below Po Tauk's signature appears the word " writer ", and above Somasundaram's signature appears the word " witness ". The question for decision, therefore, is whether Po Tauk was an attesting witness, within the definition of " attested " appearing in section 3 of the Transfer of Property Act.

Unfortunately this definition is not of much assistance in the decision of the point which is raised in this case, namely, whether a person who has signed his name on a document as the writer thereof can be an attesting witness. In my view " attested " means that a person has signed the document by way of testimony of the fact that he saw it executed. This appears to me to be the definition of " attested " which was given by their Lordships of the Privy Council in *Shamu Patter* v. *Abdul Kadir Ravuthan* (1). Mr. Ameer Ali, in delivering the judgment of their Lordships, referred to the decision of the House of Lords in *Burdett* v. *Spilsbury* (2) and referred to the speech of the Lord Chancellor who said " The party who sees the will executed is in fact a witness to it ; if he subscribes as a witness, he is then attesting witness." There is ample authority for the proposition that the writer of a document may, as learned counsel for the respondents has put it, perform a dual role : he may be an attesting witness as well as the writer.—See *Jagannath Khan* v. *Bajrang Das Agarwala* (3) and *Paramasiva Udayan* v. *Krishna Padayachi* (4).

In *Abinash Chandra Bidyanidhi Bhattacharya* v. *Dasarath Malo* (5), a case upon which the learned

(1) (1912) I.L.R. 35 Mad. 607 (P.C.).
(2) (1843) 10 Cl. & Fin. 340.
(3) (1920) I.L.R. 48 Cal. 61.
(4) (1917) I.L.R. 41 Mad. 535.
(5) (1928) I.L.R. 56 Cal. 598.

District Judge relied, this question was fully considered, and it was there decided that because a person had put his signature on the document in some other capacity it did not necessarily follow that he could not also be an attesting witness. The head-note of the case reads as follows :

" The mere fact that a person is the scribe or that he puts the word ' scribe ' after his name will not, in itself, show that he has not put his signature on the document by way of saying that he had seen the instrument executed. At the same time, it is not right to hold as a matter of law that, even although, on the construction of the document, the name is put *alio intuito*, the fact that the name is on the document at all makes the man an attesting witness."

Consequently, it appears to me that the correct view is that when a man places his signature upon a document and at the same time describes himself as the writer thereof, the inference is that he signs as the writer and nothing else, but, as a matter of fact, it can be shown that he signed not only as the writer but also as a witness of the fact that he saw the document executed or received a personal acknowledgment from the executants that they had executed it.

In this case Po Tauk has given evidence, and he has definitely stated that he wrote this document, that after it had been written it was read over to the executants, that as they were illiterate they held the pen while he put their cross marks on the document and wrote their names opposite their respective cross marks, and that after all this had been done he wrote his name and the description " writer " on the left-hand side of the document. In cross-examination he stated that he could not give this evidence in reference to this particular document but that he gave his evidence as part of his invariable practice, his profession in life

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being the profession of a petition writer. He says that invariably, when he drew up documents which were to be executed by illiterate persons, he adopted this very procedure. The learned District Judge has discarded his evidence upon the ground that his evidence was not really relevant because it was not evidence in regard to the execution of this particular document but evidence in regard to his practice in the writing and executing of documents. But, to my mind, this makes his evidence of more value in this particular case, because it is to the effect that his invariable practice was to sign documents not merely as the writer but by way of testimony of the fact that he had seen the documents executed ; and, so far as this particular case is concerned, the fact that he cannot, out of the very large number of documents written by him, remember this particular document becomes of no importance in view of the evidence of Mutu Raman who has deposed that he was present when this document was written and executed and when Po Tauk signed it, and he has been able to state that in this particular case Po Tauk wrote the document, read it over to the executants, then caused them to hold the pen while he made their cross marks, and after all this had been done put his signature in the left-hand margin as the writer. Therefore, to my mind, it has been established as a fact in this case that Po Tauk signed his name upon this document not merely as the writer but also as testimony that he had actually seen the executants execute the document. That being so, he was an attesting witness, within the meaning of the definition in section 3 of the Transfer of Property Act.

This appeal is therefore allowed, the judgment and decree of the District Court on first appeal are set aside, and the judgment and decree of the Subdivisional Court of Henzada are restored with costs throughout, advocate's fee in this Court five gold mohurs.