

APPELLATE CIVIL.

Before Sir Norman Macleod, Kt., Chief Justice, and Mr. Justice Heaton

DALICHAND SHIVRAM MARWADI (ORIGINAL PLAINTIFF), APPELLANT
v. LOTU SAKHARAM PARDHI AND ANOTHER (ORIGINAL DEFENDANTS),
RESPONDENTS.^c

1911.

October 13

*Transfer of Property Act (IV of 1882), section 59—Mortgage—Attestation—
Execution—Scribe, whether an attesting witness—"Attesting witness,"
meaning of—Indian Evidence Act (I of 1872), section 68.*

A mortgage bond was written and signed at the writer's house where one of the attestants put his attestation on the deed, but the other witness attested the document in the Sub-Registrar's Office. Both the lower Courts held that there was no proper attestation of the document as required by the Transfer of Property Act, 1882. On appeal to the High Court, it was contended that the scribe who signed the document should be treated as an attesting witness,

Held, that a writer of a document who puts his signature at the end of a document could not be treated as an "attesting witness" within the meaning of section 68 of the Indian Evidence Act, 1872, unless he actually signed as an attesting witness in the document.

"Attesting witness" is a witness who has seen the deed executed and who signs it as a witness.

Govind Bhikaji v. Bhanu Gopal⁽¹⁾, distinguished.

Ranu v. Laxmanrao⁽²⁾, followed.

SECOND Appeal against the decision of S. J. Murphy, District Judge, Khandesh, confirming the decree passed by N. G. Chapekar, Subordinate Judge at Dhulia.

Suit to recover amount due on a mortgage.

Plaintiff sued to recover Rs. 200 due on a registered mortgage bond dated the 13th March 1911. This bond was written and signed at the writer's house where one of the attesting witnesses put his attestation on the deed, but the other witness attested the document at the Sub-Registrar's Office.

The defendant No. 1 admitted execution and consideration. Defendant No. 2, who was a purchaser from

^cSecond Appeal No. 848 of 1916.

⁽¹⁾ (1916) 41 Bom. 384.

⁽²⁾ (1908) 33 Bom. 44.

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defendant No. 1, contended that he was an agriculturist.

The Subordinate Judge dismissed the suit on the ground that there was no proper attestation of the document as required by section 59 of the Transfer of Property Act, 1882.

On appeal, the District Judge confirmed the decree observing as follows :—

"One witness attested this. The other did so at the Sub-Registrar's Office afterwards on an assurance by the executant that he had executed the deed. Section 59 of the Transfer of Property Act requires mortgages for Rs. 100 and upwards to be attested by two witnesses. Attested according to the latest Privy Council ruling on the point (I. L. R. 35 Mad. 607) means that the witness signs his name after seeing the actual execution of the deed. Mere acknowledgment of his signature by the executant is not sufficient."

The plaintiff appealed to the High Court.

W. B. Pradhan, for the appellant ;—The mortgagor admitted execution and consideration and so we submit that the plaintiff was entitled to a decree on these admissions under Order XII, Rule 6, Civil Procedure Code, 1908. The defendant No. 2 being the purchaser only of the equity of redemption was bound to pay the incumbrance to which the property was subject at the time of his purchase.

Secondly, we submit that the Court could have dispensed with the proof of attestation after the admission by defendant No. 1 : *Nund Kishore Lal v. Kancee Ram Tewary*⁽¹⁾ ; and section 68, Evidence Act, 1872.

The present case is similar on facts with *Govind Bhikaji v. Chau Gopal*⁽²⁾ ; as in that case, the scribe in our case has put his signature in two places, under exactly the same circumstances because the mortgagor was illiterate ; so the scribe should be treated as an attesting witness or the case be remanded for his

⁽¹⁾ (1902) 29 Cal. 355.

⁽²⁾ (1916) 41 Bom. 384.

evidence being taken. The same view has been held about the evidence of the scribe : see *Radha Kishen v. Fateh Ali Ram*⁽¹⁾; *Paramasiva Udayan v. Krishna Padayachi*⁽²⁾.

Merely because he is a scribe, he is not disqualified from being a witness to the transaction ; a person interested in the mortgage amount is held to be competent to witness the mortgage deed : *Balu v. Gopal*⁽³⁾.

H. B. Gumaste, for respondent No. 2 :—I submit that the lower Courts were right in dismissing the plaintiff's suit. Attestation is a requirement of law and no amount of admission by a party to the deed will make an invalid document a valid one, and this point is concluded by the Privy Council ruling in *Shamu Patter v. Abdul Kadir Ravuthan*⁽⁴⁾. I also rely on *Ranu v. Laxmanrao*⁽⁵⁾.

MACLEOD, C. J. :—The plaintiff filed this suit to recover on a mortgage bond the sum of Rs. 100 for principal and Rs. 100 as interest with costs and future interest. The 1st defendant admitted execution and consideration. But a preliminary issue was raised, whether the mortgage deed sued upon was valid under section 59 of the Transfer of Property Act. The learned Judge in the trial Court said :

“I examined the plaintiff to-day and he admits, as indeed he is bound to do, that the deed was written and signed at the writer's house where one of the attestants put his attestation on the deed. But the other witness attested the document in the Sub-Registrar's Office. It is evident, therefore, that there is no proper attestation of the document as required by the Transfer of Property Act”.

The suit was therefore dismissed.

In appeal the same question was raised, and the appeal was dismissed by the learned District Judge.

(1) (1898) 20 All. 532.

(3) (1911) 13 Bom. L. R. 944.

(2) (1917) 41 Mad. 535.

(4) (1912) 35 Mad. 607.

(5) (1908) 33 Bom. 44.

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It would seem at first sight that the judgments of both the lower Courts are perfectly correct. But we have been referred to a decision of this Court in *Govind Bhikaji v. Bhan Gopal*⁽¹⁾ which was decided after the decision of the lower appellate Court. In that case on the evidence the Court said: "the scribe signs his own name under the description of the [executant's] mark. His object in so doing presumably was, and the effect of his so doing, in our opinion, was, to authenticate the mark, that is to say, to vouch the execution; in other words, this last signature was made not as a scribe, but as an attesting witness". Now, if there had been evidence in this case that two witnesses had signed as attesting witnesses, then no doubt there would have been a valid mortgage under the provisions of section 59 of the Transfer of Property Act. We are asked in second appeal in consequence of that decision, either to hold on the facts in this case that the scribe putting his signature at the end of the document would be sufficient evidence that he signed as an attesting witness, or to send the case back to the trial Court to take further evidence to show that the scribe did sign as an attesting witness. This question was considered in *Hanu v. Laxmanrao*⁽²⁾ where it was held that the scribe could not be considered as an attesting witness, because his name occurred before the names of the executing parties and formed part of the body of the document. Reference was made to the case of *Burdett v. Spilsbury*⁽³⁾, where Lord Campbell said "what is the meaning of an attesting witness to a deed? Why, it is a witness who has seen the deed executed, and who signs it as a witness". This, we think, is the meaning of "attesting witness" in section 68 of the Evidence Act, and we, therefore, hold that the writer in the

⁽¹⁾ (1916) 41 Bom. 384 at p. 389.⁽²⁾ (1908) 33 Bom. 44.⁽³⁾ (1843) 10 Cl. & F. 340 at p. 417.

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circumstances of this case cannot be treated as an attesting witness.

I should myself be very disinclined to hold that in any case a scribe wherever he wrote his name could be considered to sign the document as an attesting witness, unless he actually said so in the document. There is a very great difference between an attesting witness and a scribe, and it would seem to me that it would lead to attempts to evade the plain words of section 59, and would also lead to constant difficulties thereafter, if the law was not strictly observed, since parties might think that they were executing a valid mortgage if only one outside person was brought in to witness the document; and evidence would have to be called to show that the scribe as a matter of fact did sign as an attesting witness. I think the case of *Govind Bhikaji v. Bhau Gopal*⁽¹⁾ must be taken to stand on its own facts. But I also think we must observe the test laid down by the Privy Council in *Shamu Patter v. Abdul Kadir Ravuthan*⁽²⁾ and by this Court in *Ranu v. Laxmanrao*⁽³⁾ which, in my opinion, lay down the correct principle to be followed, namely, that an attesting witness must clearly sign as such. Therefore I think the appeal ought to be dismissed with costs.

HEATON, J.:—I agree. Broadly speaking a scribe or writer of a document is not intended to be, and is not an attesting witness. But he may be such a witness in certain cases. It was, for example, held in the case of *Govind Bhikaji v. Bhau Gopal*⁽¹⁾ that the scribe there was an attesting witness. That could only have been held on a consideration of the evidence in that case. No evidence has been taken in this case to enable the Court to ascertain whether the scribe was or was not an

⁽¹⁾ (1916) 41 Bom. 384.

⁽²⁾ (1912) 35 Mad. 607.

⁽³⁾ (1903) 33 Bom. 44.

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attesting witness. It is, therefore, not established that he was. That being so, it is not established that the mortgage deed in this case was a duly executed mortgage deed. Therefore I think the appeal must be dismissed with costs.

Decree confirmed.

J. G. R.

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Before Mr. Justice Shah and Mr. Justice Hayward.

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WAMAN BALWANT KASHIKAR AND OTHERS (ORIGINAL PLAINTIFFS),
APPELLANTS, v. BALU HARSHET SHETE AND OTHERS (ORIGINAL
DEFENDANTS) RESPONDENTS. °

*Civil Procedure Code (Act V of 1908), section 9—Suit of a civil nature—
Right to worship—Temple—Right to carry processions through public
streets with music—Practice.*

A suit to establish the right to worship a deity according to one's own belief and to carry processions accompanied by music through a public street, is a suit of a civil nature within the meaning of section 9 of the Civil Procedure Code, 1908.

SECOND appeal from the decision of T. R. Kotwal, Assistant Judge at Ratnagiri, confirming the decree passed by S. A. Gupte, Subordinate Judge at Chiplun.

The facts of the case are fully stated in the judgment of Shah, J.

K. H. Kelkar, for the appellants.

Jayakar, with *S. S. Patkar*, for respondents Nos. 1 and 3.

SHAH, J. :—The question in this second appeal is whether the plaintiffs' claim is cognizable by civil Courts.

° Second Appeal No. 818 of 1917.