Sristidhar Ghose Vs Rakhyakali Dasi

Court: Calcutta High Court

Date of Decision: June 21, 1921

Judgement

Mookerjee, J.
This is an appeal by the defendant in a suit to enforce a mortgage security, alleged to have been executed by him in favour

of the plaintiff-respondent on the 21st April, 1903. The principal sum advanced is stated to have been Rs. 90 which carried interest at the rate of

181 per cent, per annum and was repayable on the 13th April, 1909. The present action was commenced on the 28th November, 1917, for the

recovery of Rs. 210, upon the allegation that nothing had been paid towards the satisfaction of the mortgage debt, except three sums paid on

account of interest, Rs. 16-40 in 1910, Rs. 12 in 1911 and Rs. 12 in 1912. The defendant pleaded that the plaintiff was not competent to sue

inasmuch as the real creditor was her paramour, one Hari Pal, who had been paid in full; that the bond had not been duly attested and thus could

not operate as a mortgage bond; and that the suit was barred by limitation. The trial Court found that the real creditor was the plaintiff herself, that

the bond had been duly attested, that the suit was not barred by limitation, as it had been instituted within twelve years from the due date and in this

view, made the usual mortgage-decree. On appeal, the Subordinate Judge confirmed the decree of the Court of first instance. On second appeal, it

has been argued on behalf of the defendant that the facts found show that the bond was not duly attested, and in support of this contention reliance

has been placed upon the decision in Upendra Chandra v. Hukum Chand, which is also reported as Rajani v. Panchananda (1918) 46 Cal. 522 =

48 I.C. 720 = 23 C.W.N. 290.

2. The facts material for the decision of the question of law raised before us lie in a narrow compass. The defendant-mortgagor, Sristidhar Ghose,

was illiterate and was unable to sign his name. The bond was written out by one Bholanath Ghose.

3. The name of the executant was at his request written out by Bholanath Ghose.

4. The actual endorsement is as follows : ""Sri Sristidhar Ghose by the pen of Sri Bholanath Ghose."" At the foot of the document we have the

following entry; Witnesses, scribe Sri Bholanath Ghose""; Sri Hari Pal by the pen of Sri Bholanath Ghose.

5. Bholanath Ghose, who has been examined as a witness, states that at the request of Hari Pal who was illiterate he wrote his name. The

substance of the matter consequently is that Bholanath Ghose wrote the body of the document, wrote the name of the executant wrote the name of

Hari Pal as an attesting witness and signed his own name as an attesting witness. The question arises on these facts, whether the document was

attested by two witnesses within the meaning of S. 59 of the Transfer of Property Act. The decision of Fletcher and Walmsley, JJ., in Upendra v.

Hukum Chand; which is also reported as Rajani v. Puchananda (1918) 46 Cal. 522 = 48 I.C. 720 = 23 C.W.N. 290, shows that the question

must be answered in the negative. That case is an authority for the proposition that where no mark, seal or thumb impression of the mortgagor

appears on the mortgage-deed the scribe who executes the document for, and on behalf of the mortgagor is not competent to become an attesting

witness to attest the signature he himself has written out.

6. This decision is clearly applicable to the facts of the present case. We do not over look that an examination of the original document shows that

there is what looks like a small cross after the name of Sristidhar Ghose; that was apparently put by Bholanath Ghose, and there is no suggestion

that Sristidhar Ghose executed the document by affixing thereon his mark as he might have done (see Act III of 1885 which amends the Transfer

of Property Act and makes the provisions of S. 59 supplemental to the Indian Registration Act, S. 3: see also the General Clauses Act, 1897, S.

3, Cl. 52). Here the case is that Bholanath Ghose wrote out the name of Sristidhar Ghose at his request, and this constituted a valid execution of

the deed just as if Sristidhar Ghose had written out his own name. In such circumstances, it is plain, on the authority of the decision in Upendra v.

Hukum Chand (1918) 46 Cal. 522 = 48 I.C. 720 = 23 C.W.N. 290, that Bholanath Ghose was not competent also reported as Rajani v.

Panchananda to attest his own signature as an attesting witness. But we have been pressed on behalf of the plaintiff-respondent to hold that the

decision in Upendra v. Hukum Chand (1918) 46 Cal. 522 = 48 I.C. 720 = 23 C.W.N. 290 is not well-founded on principle and to refer the

matter to a Full Bench. After examination of the arguments addressed to us we are unable to accede to this request.

7. S. 59 of the Transfer of Property Act provides that where the principal money secured is Rs. 100 or upwards a mortgage can be effected only

by a registered instrument signed by the mortgagor and attested by at least two witnesses. Prima facie, the persons who attest are different from

the person who signs. The term ""attest"" is not defined in the statute and may consequently be taken to have bean used in its ordinary sense; see

Sarurijigar Begum v. Baroda Kant (1910) 37 Cal. 526 = 14 C.W.N. 974 = 5 I.C 539 = 11 C.L.J. 563. where various definitions will be found

quoted. The Oxford Dictionary stated that the word is derived from the Latin ""ad"" and ""testari"" and means literally ""to witness"" or ""to bear witness.

This is the sense in which the term ""attestation"" is used by Blackstone in his commentaries (Vol. II, p. 307):

The last requisite to the validity of a deed is the attestation or execution of it in the presence of witnesses."" The same meaning is attributed to the

term by Lord St. Leonards when in his handy Book of property Law (Vol. XVIII. p.136) he says that the attestation of a will should be in this

form: ""Signed by the above testator, in the presence of us present at the same time who have hereunto signed our name"".

8. To the same effect are the observations in Wright v. Wakeford (1812) 4 Taunt 213 = 128 E.R. 310, where it was ruled that the witnesses who

attest must not only see the execution but sign their own names as part of the same transaction, so that an attestation added after many years by

persons who had seen the signing of the deed will not supply the defect. Reference may also be made to Hudson v. Parker (1844) 1 Rob. Eccl. 14

= 8 jur. 786, where Dr. Lushington said:

To attest is to bear witnesses to a fact. Take a common example. A notary public attests a protest. He bears witness, not to the statements in that

protest, but to the fact of the making of these statements. So the witnesses in a will bear witness to all the statute, requires attesting witnesses to

attest, namely, that the signature was made or acknowledged in their presence.

9. Of precisely the same import are the rules enunciated by Dr. Lushington in Byren v. White (1850) 2 Rob (Eccl.) 315 = 14 Jur. 919 by Lord

Campbell, C.J., in Roberts v. Phillips (1855) 4 E. & B. 450 = 24 L.J. Q.B. 171 = 1 Jur 444 and by Lord Landhurst, L.C., in Burdett v. Spilsbury

(1843) 10 Cl. & F. 340 = 59 R.R. 105 which were all quoted with approval by the Judicial Committee in Shamu Patter v. Abdul Kadir (1912) 35

Mad. 607 = 39 I.A. 218 = 16 C.W.N. 1009 = 16 I.C. 250 = 23 M.L.J. 321 (P.C.) all this obviously implies that the person who makes the

signature is not the identical person who witnesses that the signature has been made in his presence, We are unable to accept the contention of the

respondent that the scribe who wrote out the names of the executant may be taken to have at the same time witnessed that fact, in other words, to

have simultaneously performed a double function. It might have been maintained with equal plausibility that where a deed had to be executed by A

and B. under authority conferred by a power-of-attorney, executes it on his behalf writing thereon ""A by his duly constituted attorney B"" B is

competent to become an attesting witness, to witness the endorsement made by himself. Dr. Kanjilal frankly conceded that such a position was

manifestly incongruous and untenable. But, plainly, no real distinction in principle can be found between the hypothetical case mentioned and the

concrete instance before us. In our opinion, there is no escape from the position that a scribe cannot be an attesting witness of what he has himself

written. If in the case of execution of a document by a literate man, who can write his own name it is deemed necessary by the legislature to have

two other persons as attesting witnesses, it is at least equally essential to have two independent attesting witnesses when the man is illiterate and

cannot write his name which is written for him by another, Saroopchand v. Tularam (1911) 8 N.L.R. 17 = 13 I.C. 902. In such a case, one -

object of the statute in requiring attestation is to ensure identity of person and to prevent the fraudulent substitution of another document, another

object may be to surround the executant with witnesses who may be able to judge of his capacity. If for the attainment of these and other objects,

two attesting witnesses are necessary when the executant is literate, the need is very much more imperative, where the executant is illiterate, and

the additional question must arise whether his name has really been written by a person authorised in that behalf. It is plain that the contention of the

respondent ignores he fundamental distinction between execution and attestation.

10. The term ""executed"" signifies the acts required of the person who makes the deed either himself or through a representative, the term ""attested

signifies (the act of the witnesses who see the execution; obviously the same person cannot possess the twofold capacity.

11. Reliance has been placed by the respondent upon a series of judicial decisions which are not directly in point and lend no real support to his

contention. In Dinamoyee v. Bun Behari (1902) 7 C.W.N. 160 a lady executed a mortgage-deed by putting her finger mark to the same;

thereafter a person, who saw her put the finger-mark, wrote her name at her request and added the words ""by the pen of"" before his name written

by himself. It was ruled that the document was executed by the lady and not by him on her behalf, and that, consequently, he was a competent

attesting witness.

12. A similar view was adopted in Govind Bhikaji v. Bhau Gopal (1916) 41 Bom. 384 = 39 I.C. 61 = 19 Bom. L.R. 147. There an illiterate

person signed a mortgage-deed by patting his mark to it, which mark was subscribed by the scribe of the deed. The deed was attested by two

independent witnesses. It was ruled that the deed had been duly executed and attested. The execution was complete when the mortgagor, unable

to writs his name, placed his mark thereon. The function of the scribe ended when he signed his came at the conclusion of the body of the

document; he thereafter signed his own name under the description of the mark made by the executant, with a view to authenticate the mark, that

is, to vouch'' the execution of the deed by the marksman, in other words, to act as an attesting witness.

13. In Sasi Bhusan v. Chandara Peshkar (1906) 33 Cal. 861 = 4 C.L.J. 41, the question arose whether for purpose of valid attestation it is

essential that the witness must sign his name personally. It was ruled that a deed is properly attested when the signatures of the witnesses, who are

illiterate and unable to write, are affixed for them by another person at their request. The Court observed that it had previously been held, in the

case of executant himself that his name may be written on his behalf, by another person authorised for the purpose, Deo Narain v. Kakur Bind

(1902) 24 All. 319 = 1902 A.W.N. 127 (F.B.).

14. It may be added that the view taken in Sasi Bhusan v. Chandra Peshakar (1906) 33 Cal. 861 = 4 C.L.J. 41 is not inconsistent with that

adopted in Paramhans v. Randhir (1916) 38 All. 461 = 35 I.C. 748 = 14 A.L.J 673 and Ram Bahadur v. Ajodhya Singh (1916) 20 C.W.N. 699

= 1 P.L.J. 129 = 34 I.C. 370 = 3 P.L.W. 93. These cases, however, do not support the proposition that the person who, at the request of the

mortgagor writes out the name of the mortgagor as executant, can also become an attesting witness, that is attest the signature made by himself. On

the other hand, the principle of the decisions in Sarurijigar Begum v. Baroda Kant (1910) 37 Cal. 526 = 14 C.W.N. 974 = 5 I.C 539 = 11 C.L.J.

563 and Debendra Chandra v. Behari Lal (1912) 16 C.W.N. 1075 = 15 I.C. 668, militates against the contention ""of the respondent. In both

these cases, it was ruled that a person who is a party to a deed cannot be regarded as an attesting witness, and this conclusion was supported by

reference to the decisions in Freshfield v. Reed (1842) 9 M. & W. 404 = 60 R.R. 769 and Wickham v. Marquis of Bath (1865) L.R. 1 Eq. 17 =

35 Beav. 59, which recognise the fundamental principle that the law insists upon attestation in certain cases in order that a witness shall be present

to testify that the party who purports to have executed the deed had done the act required; consequently, a co executant or a mortgagee cannot be

an attesting witness. The reason for this view was emphasised by Lord Selbourne, L.C. in a well-known passage in his judgment in the case of

Seal v. Claridge (1881) 7 Q.B.D. 516 = 44 L.T. 501, which may be usefully re-called here:

I was at first surprised that no authority could be found directly in point; but no doubt the common sense of mankind has always rejected the notion

that the party to a deed could also attest it. I do not pay much attention to the old rule of evidence where by interested persons were rendered

incompetent as witnesses; it has now been done away with by statute. What is the meaning of the word ''attestation'' apart from the Bills of Sale

Act, 1878? The word implies the presence of some person who stands by, but is not a party to the transaction. The view which I take seems to be

confirmed by the circumstance that attestation is unnecessary, unless it is required by an instrument creating a power or some statute. If the

argument of Mr. Dugdales is correct, the attestation required by the Bill of Sale Act, 1878, would be satisfied by the mere repetition of the

signature of a party to the deed; can this be regarded as a useful provision? I do not place much reliance upon what was said by Lord Eldon, L.C.,

in Coles v. Trecothick (1804) 9 Ves. 234 = 7 R.R. 167 = 1 Smith 233, but I do rely upon Fresh Field v. Reed (1843) 10 Cl. & F. 340 = 59 R.R.

105. It follows from that case that the party to an instument cannot ''attest'' it. Reference may further be made to the exposition of the meaning of

the term ""Attestation"" given by the judicial committee in the cases of Shamu Pattar v. Abdul Kadir (1912) 35 Mad. 607 = 39 I.A. 218 = 16

C.W.N. 1009 = 16 I.C. 250 = 23 M.L.J. 321 (P.C), Padavath Haldev v. Ram Nomi AIR 1915 P.C. 21 = 37 All. 474 = 42 I.A. 163 (P.C.) and

Ganga pershad v. Isri Pershad AIR 1918 P.C. 3 = 45 Cal. 748 = 45 I.A. 94 (P.C.); see also Sarurijigar Begam v. Baroda Kant (1910) 37 Cal.

526 = 14 C.W.N. 974 = 5 I.C 539 = 11 C.L.J. 563. The substance of the matter is that when an instrument is required to be attested, the

meaning is that a witness must be present at its execution and shall testify that it has been executed by the proper person; Freshfield'' v. Reed

(1842) 9 M. & W. 404 = 60 R.R. 769. To attest an instrument is accordingly, not merely, to subscribe one''s name to it as having been present at

its execution, but includes also essentially the presence in fact at its execution of some disinterested person, capable of giving evidence as to what

took place, Roberts v. Phillips (1855) 4 E. & B. 450 = 24 L.J. Q.B. 171 = 1 Jur 444 and Ford v. Kettle (1882) 9 Q.B.D. 139 = 46 L.T. 666 =

30 W.R. 741. We hold accordingly that the decision of Fletcher and Walmsley, JJ. in Upendra v. Hukum Chand (1918) 46 Cal. 522 = 48 I.C.

720 = 23 C.W.N. 290 which is also reported as Rajani v. Panchanandas (1918) 46 Cal. 522 = 48 I.C. 720 = 23 C.W.N. 290 is well-founded

on principle and we are not prepared to depart from the rule enunciated therein. The inference follows that the mortgage-deed in suit was not duly

attested and consequently does not operate as a mortgage; nor does it create a charge; Shamu Patter v. Abdul Kadir (1912) 35 Mad. 607 = 39

I.A. 218 = 16 C.W.N. 1009 = 16 I.C. 250 = 23 M.L.J. 321 (P.C) and Ram Narain v. Abhindra Nath AIR 1916 P.C. 119 = 44 Cal. 388 = 44

I.A. 87 (P.C). The mortgage-decree made by the Court below must accordingly be set aside.

15. The question next arises, whether the plaintiff is entitled to a personal decree for recovery of the money which has been found to have been

advanced. AM the suit was instituted more than six years after the due date of the bond, this involves the question of limitation which has not been

considered from this point of view, Its decision must depend upon the genuineness or otherwise of the payments of interests alleged to have been

made by the defendant to the plaintiff within the meaning of S. 20 of the Indian Limitation Act.

16. The result is that this appeal is allowed the decree of the Subordinate Judge set aside and the case remanded to him for re-consideration of the

question of limitation with reference to the provisions of S. 20 and Art, 116 of the Indian Limitation Act. The Subordinate Judge will be at liberty to

take additional evidence to be adduced by both sides upon the question, whether the alleged payments were made, and, if so on what dates. The

costs will abide the result.

Buckland, J.

17. This is an appeal by the defendant against the decision of the learned Judge of Burdwan, dated the 30th October, 1919, upholding the decision

of the Munsif of Katwa in a suit on mortgage.

18. It has been contended that the suit should have been dismissed so far as there was a claim to realise the amount due by sale of the property

purporting to have been mortgaged on the ground that the deed was not attested as required by S. 59 of the Transfer of Property Act.

19. What actually are the facts as regards the execution and attestation is not clear from the judgment of either of the lower Courts. The learned

Munsif says in his judgment that Hari Pal one of the attesting witnesses is dead and the other one is the scribe Bholanath. He does not say how the

executant executed the document. The learned Subordinate Judge has not considered the evidence on the point but has contended himself with

merely observing that ""the evidence on the record established that the bond in suit was attested as a mortgage bond by at least two witnesses and

the defendant admits execution"" On that he has found that the document was duly attested.

20. In these circumstances, ordinarily, the appeal would have to be remanded for a re-hearing on this point, but there is no dispute as to what

occurred and we have seen the deed for ourselves.

21. It is common ground that the executant was illiterate, that he executed the instrument, ""by the pen of Sri Bholanath Ghose,"" the scribe who also

purports to be an attesting witness.

22. The point therefore is, whether in these circumstances Bholanath was a competent attesting witness. Unless Bholanath was a competent

attesting witness it is immaterial, having regard to the provisions of the section, whether or how Hari Pal attested the document.

23. The case is clearly covered by authority in Rajani Kanta Bhadra v. Panchanand (1918) 46 Cal. 522 = 48 I.C. 720 = 23 C.W.N. 290, the

facts were that the scribe executed the document for and on behalf of the mortgagor. He signed it also as a scribe and there was one other attesting

witness. The scribe having executed the document for, and on behalf of, the mortgagor, was held to be incompetent to attest his own signature as

attesting witness even in the view that the subscription of his name as the scribe amounted to attestation.

24. But even were the matter res Integra I should not be prepared to hold otherwise. Though the case Shamu v. Abdul (1912) 35 Mad. 607 = 39

I.A. 218 = 16 C.W.N. 1009 = 16 I.C. 250 = 23 M.L.J. 321 (P.C) mentioned in the judgment to which I have just referred is not a direct

authority upon the point, it contains observations making it clear beyond all questions what is the meaning of the word ""attest."" The following

extract from the judgment of their Lordships will suffice. In Bryan v. White (1850) 2 Rob (Eccl.) 315 = 14 Jur. 919, Dr. Lushington in 1850 laid

down that ""attest"" means the persons shall be present and see what passed and shall be present and see what passes and shall, when required,

bear witness to the facts. In 1855 Lord Campbell, Chief Justice, in Roberts v. Phillips (1855) 4 E. & B. 450 = 24 L.J. Q.B. 171 = 1 Jur 444,

enunciated the same rule as regards the word ""attested"" that the witnesses should be present as witnesses and see it signed by the testator.

25. And the principle was given effect to in the House of Lords in Burdett v. Spilsbury (1843) 10 Cl. & F. 340 = 59 R.R. 105. The Lord

Chancellor summed up the conclusion in these words:Ã¯Â¿Â½""The party who sees the will is in fact a witness to it, if he subscribes as a witness, he is

then an attesting witness."" Though these observations were made in cases of wills, that does not prevent their application to the case of any

instrument requiring attestation where the only point involved is the meaning of the word ""attest"" without qualification. A scribe who executes a

document for, and on behalf of, the executant is not a person who ""sees what passes"" or sees it executed, when he himself does the very thing to

which by subsequently signing as a witness he professes to bear witness.

26. For these reasons, I agree that the deed in question was not validly attested as a mortgage and I concur in the order to be made.