

*Privy Council Appeal No. 22 of 1937*

*Allahabad Appeal No. 3 of 1934*

Kunwar Surendra Bahadur Singh and others - - *Appellants*

*v.*

Thakur Behari Singh and others - - - *Respondents*

FROM

THE HIGH COURT OF JUDICATURE AT ALLAHABAD

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JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE  
OF THE PRIVY COUNCIL, DELIVERED THE 17TH MARCH, 1939

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*Present at the Hearing :*

LORD ROMER

LORD PORTER

SIR LANCELOT SANDERSON

LORD NORMAND (LORD PRESIDENT  
OF THE COURT OF SESSION)

SIR GEORGE RANKIN

[*Delivered by* SIR LANCELOT SANDERSON]

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This is an appeal by the plaintiffs in the suit against a judgment and decree of the High Court of Allahabad dated the 28th of November, 1933, whereby the appeal of one of the present respondents, viz., Lachman Singh, was allowed and the suit as against the said Lachman Singh and his share of the mortgage property was dismissed. The plaintiffs are Kunwar Surendra Bahadur Singh and his two minor sons and the suit was brought for foreclosure of a mortgage dated the 23rd of June, 1909, purporting to be executed by Himmat Singh (now deceased), Mulu Singh and Musammat Jamna Kunwar, mother and certified guardian of the said Lachman Singh, who was then a minor, in favour of Surendra Bahadur Singh in respect of certain zemindari property to secure a loan of Rs.18,000 and 4½ per cent. interest in order to pay off prior mortgages at a higher rate of interest. The defendant-respondents Nos. 1-9 are heirs of Himmat Singh, No. 10 is Lachman Singh, Nos. 11, 12 and 13 are Mulu Singh and his two sons and Nos. 14 to 24 are various transferees.

Before the execution of the mortgage, Musammat Jamna Kunwar obtained the permission of the District Judge to borrow Rs.4,500 (one-fourth of Rs.18,000) by hypothecation of the one-fourth share of the minor Lachman Singh in the said property.

The principal and interest were payable on the 23rd of June, 1916.

The mortgage deed was presented for registration on the 24th of June, 1909, at the office of the sub-registrar of Etawah by Himmat Singh and it was duly registered.

It will be necessary to refer later in more detail to the proceedings of the registration.

The suit was brought for principal and interest amounting to Rs.41,400-14-6 on the 25th May, 1928.

Written statements were filed by Lachman Singh and by two of the transferees. The plea to which it is necessary to refer is that which is contained in paragraph 9 of Lachman Singh's written statement, viz.: "The contesting defendant does not admit the execution and completion of the document sued on, nor is receipt of any consideration of the same admitted." There were other pleas in the written statements but the above-mentioned plea is the only one which is material to the decision of this appeal.

The mortgage deed purported to be signed by Himmat Singh and Mulu Singh and to be executed by the thumb impression of Jamna Kunwar, the mother of Lachman Singh and it bore on the face of it the names of five persons who purported to sign as witnesses to the execution of the deed. At the trial, Himmat Singh's heirs and Mulu Singh did not dispute the execution of the deed, but it was contended on behalf of Lachman Singh that the execution and due attestation of the mortgage bond so far as his mother was concerned had not been proved.

One only of the five alleged witnesses, viz., Badri Prasad, was called to give evidence on behalf of the plaintiffs as to the execution and attestation of the mortgage deed on the 23rd of June, 1909. The plaintiff's mukhtaram and the scribe, who wrote out the mortgage, also gave evidence, but they were not attesting witnesses. In consequence of contradictory statements made by the above-mentioned persons, the Subordinate Judge came to the conclusion that he could not rely upon their evidence.

The learned Judge, however, relying on a Full Bench decision of the Madras High Court (*Veerappa Chettiar v. Subramania Ayyar*, I.L.R. 52 Mad. 123), held that the signatures of the registering officer and of the identifying witnesses affixed to the registration endorsement were sufficient attestation within the meaning of the Transfer of Property Act and its subsequent amending Acts. He therefore made a decree against the representatives of Himmat Singh, Mulu Singh and Lachman Singh, declaring their several liabilities to pay their proportionate shares of the amount due under the mortgage for principal, interest and costs which he assessed at Rs.44,229-0-0.

Lachman Singh appealed to the High Court of Allahabad, and the learned Judges who heard the appeal referred to a Full Bench the following questions:—

"1. When a mortgagee sues to enforce his mortgage, and execution and attestation of the deed are not admitted what must the mortgagee prove in order to obtain a decree?"

2. Whether the signatures of the Sub-Registrar and of the witnesses identifying the executant at registration are a sufficient attestation of the deed for the purposes of the Transfer of Property Act, 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 Full Court on the 26th June, 1932, answered the first question as follows:—

"Where a mortgagee sues to enforce his mortgage and the execution and attestation of the deed are not admitted, the mortgagee need prove only this much that the mortgagor signed the document in the presence of an attesting witness and one man attested the document; provided the document on the face of it bears the attestation of more than one person;

But if the validity of the mortgage be specifically denied, in the sense that the document did not effect a mortgage in law, then it must be proved by the mortgagee that the mortgage-deed was attested by at least two witnesses."

As to the second point the learned Judges of the Full Court were of opinion that as there were conflicting decisions, they should decide the matter on principle alone, and came to the conclusion that the answer to the second question must be in the negative.

It appears from the judgment of the Division Bench, delivered on the 10th of November, 1932, that when the appeal came before the Division Bench for further hearing it was conceded that on the record as it stood the plaintiffs had failed to prove due attestation of the mortgage deed so far as Musammatt Jamna Kunwar was concerned, and application was made on behalf of the plaintiffs to produce two further witnesses and for permission to cross-examine the said Badri Prasad and Kundan, the scribe, who were alleged to have turned hostile.

The ground of the application was that the plaintiffs had been misled by certain rulings of the Calcutta and Madras High Courts. The learned Judges made an order remanding the case to the Trial Court for taking the evidence of the two further witnesses and for the cross-examination of Badri Prasad and Kundan.

It was provided that Lachman Singh should have the opportunity of cross-examining the witnesses or producing evidence in rebuttal.

The High Court further directed that the Trial Court after taking such evidence should record a finding on the evidence as a whole, including the fresh evidence, on the question whether the mortgage deed had been duly executed and attested as far as Musammatt Jamna Kunwar was concerned.

Their Lordships express no opinion as to whether the order remitting the matter to the Trial Court was in the proper form or whether the ground for the said order was sufficient. The order was made at the instance of the plaintiffs, it was acted upon, and the Trial Court made its finding in accordance with the said order. It appears that the plaintiffs did not take the opportunity of producing any

fresh witnesses but Badri Prasad and Kundan were cross-examined. The Subordinate Judge held that as far as Musammat Jamna Kunwar was concerned the execution and attestation of the mortgage bond had not been duly proved.

The appeal was further considered by the Division Bench of the High Court and on the 28th November, 1933, the learned Judges agreed with the finding of the Subordinate Judge that the plaintiffs had failed to prove due attestation of the bond so far as Musammat Jamna Kunwar was concerned. They therefore held that the mortgage was invalid so far as the share of Lachman Singh was concerned, allowed the appeal, and dismissed the suit as against Lachman Singh and his share of the mortgage property. It is against that judgment and the decree made in pursuance thereof that the plaintiffs have appealed to His Majesty in Council.

It is necessary to refer to certain sections of the Indian Evidence Act [I of 1872] and of the Transfer of Property Act [IV of 1882]; the most material are section 68 of the Evidence Act and sections 3 and 59 of the Transfer of Property Act.

Section 68 of the Evidence Act is as follows:—

“ 68. 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.”

Section 59 of the Transfer of Property Act provides that:—

“ 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.”

What is meant by the word “attested” is stated in section 3 of the Transfer of Property Act.

The definition was inserted in the Interpretation clause by Act 27 of 1926 and made retrospective by Act 10 of 1927. It runs 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; ”.

It is therefore clear that the mortgage in this case, so far as Musammat Jamna Kunwar was concerned, could be effected only by a registered instrument to which she had attached her mark and which was attested by at least two witnesses, each of whom must have seen her affix her mark to the instrument or received from her a personal acknowledgment of her mark, and each of whom must have signed the instrument in the presence of Musammat Jamna Kunwar.

Their Lordships have examined the evidence relating to the alleged execution of the mortgage on the 23rd of June, 1909, and they agree with the findings of the Courts in India that the plaintiffs failed to prove by any reliable evidence that the mortgage deed, so far as Musammat Jamna Kunwar was concerned, was duly attested in accordance with the provisions of the statute. They are satisfied that Musammat Jamna Kunwar did execute the mortgage deed by affixing her mark thereto but they are not satisfied that the so-called attesting witnesses saw her make her mark or received her personal acknowledgment thereof or that they signed the instrument in her presence.

Learned counsel for the appellants relied upon the terms of section 68 of the Evidence Act and especially upon the proviso, and submitted that it was not necessary for the plaintiffs at the trial to call an attesting witness, inasmuch as the mortgage deed had been registered and the execution thereof by Musammat Jamna Kunwar had not been specifically denied by Lachman Singh.

Their Lordships cannot accept that contention. It is clear that Lachman Singh in his written statement pleaded that he did not admit the execution of the mortgage deed, and it appears from the judgment of the Subordinate Judge that at the trial the pleader who appeared for Lachman Singh "hotly contended that the execution and due attestation of the mortgage bond in suit was not proved against "his client."

In these circumstances, in their Lordships' opinion, it must be held that the execution of the mortgage deed by Musammat Jamna Kunwar was in fact specifically denied by Lachman Singh.

Then it was urged that at least one attesting witness, viz., Badri Prasad, was called at the trial and therefore the provisions of section 68 of the Evidence Act were complied with, and no further evidence of the due execution and attestation of the mortgage deed was necessary.

This further contention cannot be accepted by their Lordships, for although Badri Prasad purported to have been an attesting witness, and although he was called at the trial for the purpose of proving the execution of the mortgage deed, his evidence has not been accepted as evidence upon which any reliance could be placed.

It was then urged that having regard to the terms of section 71 of the Evidence Act, the execution of the mortgage deed might be proved by other evidence. That section is

applicable only where the attesting witness "denies or does not recollect the execution of the document".

Their Lordships are doubtful whether that description is applicable to the case of Badri Prasad, but for the purpose of this appeal they will assume that the discrepancies in his evidence, which resulted in it not being accepted as reliable evidence were due to deficient recollection.

Upon that assumption it becomes necessary to consider the proceedings relating to the registration of the mortgage deed, for it was argued that those proceedings showed that the provisions of section 59 of the Transfer of Property Act had been complied with both as regards registration and attestation of the mortgage deed.

It was in connection with this part of the case that reliance was placed by the learned counsel for the appellants on the decision of the Full Bench of the Madras High Court in *Veerappa Chettiar v. Subramania Ayyar (supra)*. In that case it was held that the signatures of the registering officer and the identifying witnesses affixed to the registration endorsement under sections 58 and 59 of the Registration Act (XVI of 1908) were a sufficient attestation within the meaning of section 59 of the Transfer of Property Act and its subsequent amending Acts.

It is to be noted that when the appeal in that case was originally before the Division Bench the Subordinate Judge was required by the said Bench to consider further the case and record findings upon certain questions of fact stated by the High Court before the questions of law were considered.

The Subordinate Judge in compliance with the order, found the following facts.

1. That the sub-registrar who registered the Exhibit A made his signature in the registration endorsement referring to the admission of execution by the executants in the presence of the executants.

2. That the witnesses who identified the executants of exhibit A before the sub-registrar were present when the admission of execution of that document was made by the executants.

3. That both the identifying witnesses made their signatures in the presence of the executants of exhibit A.

In view of these findings the Division Bench referred two questions to the Full Bench, the second of which was as follows:—

"2. Whether the signatures of the Registering Officer and of the identifying witnesses affixed to the registration endorsement under sections 58 and 59 of the Indian Registration Act amount to sufficient attestation within the meaning of section 59 of the Transfer of Property Act read with the aforesaid amending Acts?"

The Full Bench answered that question in the affirmative.

It is material to notice that the Court recognised how necessary it was to have the above-mentioned findings of

fact before holding that the provisions of section 59 of the Transfer of Property Act and its amending Acts had been complied with.

The Full Bench of the Allahabad High Court in the case now under consideration declined to follow the above-mentioned decision in 52 Madras 123, and their reasons for their conclusion are set out in their judgment delivered on the 21st of June, 1932. It is not necessary to recite such reasons in detail. The main reason was that the Transfer of Property Act required three distinct things, (1) due execution by the mortgagor, (2) due attestation by two witnesses of such execution, (3) due registration of the deed.

The learned Judges were of opinion that if it were held that registration and what might happen at the time of registration might take the place of execution and attestation, which according to the language of the Act must precede registration, the entire spirit of the enactment would be broken. They further held that neither the registrar nor the identifying witnesses at the time of registration purported to sign as attesting witnesses of the execution of the mortgage deed.

The learned counsel for the appellants drew their Lordships' attention to several cases in the Indian Law Reports which showed that there is a conflict of authority in India on this question; their Lordships do not consider it necessary to examine them in detail or to express any opinion on this occasion whether the decision in 52 Madras 123, or that of the Full Bench in the present case, was correct for the following reasons.

In the first place the respondents in this appeal were not represented, and though their Lordships are confident that the learned counsel for the appellants drew their attention to all the sections of the Acts and all reported decisions which he considered material, their Lordships have not had the benefit of any argument on behalf of the respondents and they are loth to express an opinion on such an important question as the one under consideration upon an appeal which is presented *ex parte* unless it is really necessary.

Secondly their Lordships are of opinion that in this appeal it is not necessary for them so to do.

This case differs from the case reported in 52 Madras 123, in that there are no findings of fact as to what occurred at the time of registration, such as there were in the Madras case. There is no evidence except that which appears on the mortgage bond and the endorsement of the registration thereon.

That endorsement shows that on the 24th June, 1909, between 1 and 2 p.m., Himmat Singh presented the document at the office of the departmental sub-registrar at Etawah.

That endorsement was signed by the sub-registrar and Himmat Singh.

Next the endorsement records that Himmat Singh and Mulu Singh admitted the completion and execution of the document and that they were identified by Genda Lal and Narain Singh. The registering officer further recorded the fact that one of the witnesses was known to him.

Then appear the signatures and thumb impressions of Himmat Singh and Mulu Singh; and the signature of Genda Lal and the signature and thumb impression of Narain Singh as witnesses.

Then there is a further endorsement that Mussamat Jamna Kunwar admitted the completion and execution of the document in a loud voice from behind the door of the room in which she was: it was then stated that she was identified by Narain Singh and by Ajodhia Singh.

Both these witnesses apparently went behind the purdah to identify the lady.

Then appears the signature of the sub-registrar. These witnesses were identified by Genda Lal who was said to be known to the sub-registrar.

The endorsement then records that the mark and thumb impression of Mussamat Jamna were obtained in the presence of the identifying witnesses after she had extended her hand beyond the purdah; and the signatures and thumb impressions of Ajodhia Singh and of Narain Singh and the signature of Genda Lal are attached as witnesses.

Their Lordships are prepared to assume that the proceedings in connection with the registration were rightly and duly conducted by the sub-registrar: but even upon that assumption there is no evidence that he affixed his signature to the endorsement in the presence of Mussamat Jamna Kunwar.

It is provided by section 59 of the Registration Act that he must affix his signature "on the same day" and in the absence of any evidence as to the time when he signed it cannot be assumed that he signed the endorsement in the presence of Mussamat Jamna Kunwar.

Further there is no evidence which would entitle their Lordships to hold that the witnesses who identified her signed the endorsement in Mussamat Jamna Kunwar's presence, or that they heard her admit the completion and execution of the mortgage deed.

Section 60 (2) of the Registration Act of 1908 provides that the certificate of the registering officer shall be signed, sealed and dated by the registering officer and shall then be admissible for the purpose of proving that the document has been duly registered in manner provided by the Act and that the facts mentioned in the endorsement referred to in section 59 have occurred as therein mentioned. But the particulars which are to be endorsed on documents which are admitted for registration, under section 58, do not include statements as to the above-mentioned facts, which, in their Lordships' opinion, are necessary for proving



the due attestation of the mortgage deed according to the provisions of the Transfer of Property Act. Sections 58, 59 and 60 of the Registration Act, therefore, are of no avail to the appellants in this respect.

Reading the endorsements made at the time of the registration as a whole, and giving to them their natural meaning, they appear to be relevant to the matter of registration only, and the witnesses appear to have been present for the purpose of identifying Mussamat Jamna Kunwar and for that purpose only.

If it had been intended to rely on the proceedings of the registration as showing that the provisions of the Transfer of Property Act as to due execution and attestation of the mortgage deed were complied with, evidence should have been given on behalf of the plaintiffs to prove the necessary and material facts.

Assuming then, but not deciding, that it would be legitimate to look at the proceedings relating to the registration of the mortgage deed for the purpose of proving the due execution and attestation thereof by Mussamat Jamna Kunwar their Lordships are of opinion that the plaintiffs failed to prove the above-mentioned material facts which were necessary in order to comply with the provisions of the Transfer of Property Act.

For these reasons their Lordships are of opinion that the appeal should be dismissed and they will humbly advise His Majesty accordingly.

In the Privy Council

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KUNWAR SURENDRA BAHADUR  
SINGH AND OTHERS

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THAKUR BEHARI SINGH  
AND OTHERS

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