

APPELLATE CIVIL.

Before Chief Justice Scott and Mr. Justice Chandavarkar.

1908.
August 14.

RANU BIN SHIVJI BARATE (ORIGINAL DEFENDANT 5), APPELLANT, v.
LAXMANRAO KRISHNA LIMAYE AND ANOTHER (ORIGINAL PLAINTIFF
AND DEFENDANT 1).*

Transfer of Property Act (IV of 1882), section 59—Dekkhan Agriculturists' Relief Act (XVII of 1879), section 63 (A) (1)—Mortgage-deed—Attestation by two witnesses—Signature by the Sub-Registrar—Statement by the writer of the deed in concluding the writing of the body of the document that it was written by him.

A deed of mortgage was signed by the Sub-Registrar who was bound to attest it under the provisions of section 63 (A) of the Dekkhan Agriculturists' Relief Act (XVII of 1879) and the writer of the deed in concluding the writing of the body of the document stated that it was written by him. The deed was not attested by two witnesses as required by section 59 of the Transfer of Property Act (IV of 1882).

Held, that neither the signature of the Sub-Registrar nor the statement by the writer that the body of the document was written by him were sufficient for effecting a valid mortgage.

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

Burdett v. Spilsbury(2), followed.

* Second Appeal No. 42 of 1908.

(1) Section 63 (A) of the Dekkhan Agriculturists' Relief Act (XVII of 1879) :—

63A. Mode of execution by agriculturists of instruments required to be registered under Act III of 1877.—(1) When an agriculturist intends to execute any instrument required by section 17 of the Indian Registration Act, 1877, to be registered under that Act, he shall appear before the Sub-Registrar within whose sub-district the whole or some portion of the property to which the instrument is to relate is situate and the Sub-Registrar shall write the instrument, or cause it to be written, and require it to be executed, and attest it, and, if the executant is unable to read the instrument, cause it to be further attested, and otherwise act in accordance with the procedure prescribed for a Village Registrar by sections 57 and 59 of this Act, and shall then register the instrument in accordance with the provisions of the Indian Registration Act, 1877.

(2) An instrument to which sub-section (1) applies shall not be effectual for any purpose referred to in section 49 of the Act last mentioned unless it has been written, executed and attested in the manner provided in that sub-section.

(2) (1848) 10 C. & F. 340.

SECOND appeal from the decision of R. D. Nagarkar, Joint First Class Subordinate Judge of Poona, with appellate powers, reversing the decree of T. N. Sanjana, Second Class Subordinate Judge of Haveli at Poona.

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Suit for a declaration that a certain deed was a valid mortgage or charge upon property.

The plaintiff alleged that the property in suit was mortgaged to him by defendants 2, 3 and 4 to secure repayment of Rs. 1,400 at 10 per cent, under a deed dated the 8th September 1893, and that Rs. 2,800 were due to him under the said deed on the date of the suit; that in execution of a decree obtained by defendant 1 the mortgaged property was attached; that the plaintiff thereupon presented an application praying that the attached property be sold subject to his mortgage encumbrance, but the Court dismissed the application on the 17th August 1904, holding that the mortgage-deed, not having been attested by at least two witnesses as required by section 59 of the Transfer of Property Act (IV of 1882), was invalid and ineffectual to create a mortgage or a charge. The plaintiff, therefore, brought the present suit for a declaration that the mortgage-deed effected a valid mortgage or charge upon the property and that he was entitled to hold the property as security for the payment of the amount due thereunder.

Defendant 1 denied the plaintiff's mortgage or his charge upon the property and contended, *inter alia*, that the document relied on by the plaintiff was illegal, without consideration, invalid and ineffectual.

Defendants 2, 3 and 4 were absent.

Defendant 5, the execution purchaser who was joined as co-defendant after the institution of the suit, raised substantially the same defence as defendant 1.

The Subordinate Judge found that the mortgage-bond sued on was not proved according to law and it could not be used as evidence and that it was not effectual to create a valid mortgage of the property described therein, and failing to operate as a mortgage, it could not be used as creating a charge. The

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Subordinate Judge, therefore, dismissed the suit observing as follows :—

The mortgage-deed (exhibit 31) has been written under the provisions of the Dekkhan Agriculturists' Relief Act. The writer thereof (exhibit 30) swears that the defendant Govind Rangnath signed it for himself and as the Mukhtyar of the defendant Balkrishna Rangnath and that the defendant Waman signed it himself in his presence. The bond bears no attestation excepting that of the Sub-Registrar. The Sub-Registrar has been examined on commission (exhibit 39), but he simply admits the attestation and his other signatures on the bond to be in his handwriting. But he was not put a single question regarding execution and his evidence does not prove execution. Section 68 of the Evidence Act provides : "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." In this case the document being a mortgage-deed is required by section 59 of the Transfer of Property Act to be attested by at least two witnesses. It has been attested by one witness only, viz., the Sub-Registrar, but although his evidence has been given, it has not been given for the purpose of proving the execution of the document. Consequently under section 68 of the Evidence Act, the document cannot be used as evidence of the mortgage transaction which can be effected by an attested document only. I cannot therefore hold the execution of the document as a mortgage-bond proved.

Even holding it proved, I find that the deed, having been passed after the Transfer of Property Act was extended to this Presidency, is invalid and ineffectual to create a mortgage not having been attested by at least two witnesses as required by section 59 of the Transfer of Property Act. The learned pleader for the plaintiff contends that the deed was executed under section 63A of the Dekkhan Agriculturists' Relief Act which requires the document to be attested by the Registrar alone which has been done in this case; that it is only when the executant is unable to read the instrument that this section requires the document to be further attested and that in this case the executants knew to read and write and so further attestation was unnecessary. I think the argument is not correct. Beyond doubt the document has been properly executed in accordance with the provisions of the section 63A of the Dekkhan Agriculturists' Relief Act, but the question is whether that is sufficient to effect a valid mortgage. Section 63A of the Dekkhan Agriculturists' Relief Act does not provide how a transfer of property, such as mortgage, can be effected. That is provided by section 59 of the Transfer of Property Act. The above section of the Dekkhan Agriculturists' Relief Act simply prescribes the mode in which documents by agriculturists should be executed. That mode applies to all documents to be executed by agriculturists whether required by law to be attested or not. To ensure the genuineness of a document and to further pro-

vent any fraud being committed against an agriculturist, it requires all documents to be executed by agriculturists whether required by law to be attested or not to be attested by the Sub-Registrar and where the executant is illiterate to be further attested by other persons. It does not in any way affect the requisites prescribed by section 59 of the Transfer of Property Act for effecting a valid mortgage. A valid mortgage for Rs. 100 and upwards could only be effected under the above section by a registered instrument signed by the mortgagor and attested by at least two witnesses. Where the mortgagor is an agriculturist the further precautions laid down in section 63A of the Dekkhan Agriculturists' Relief Act have to be followed and the document has to be written by or under the superintendence of the Sub-Registrar and to be attested by him. That does not do away with the necessity of two attestations required by section 59 of the Transfer of Property Act to effect the mortgage itself. I therefore find that the document relied on by the plaintiff is invalid and ineffectual to create a valid mortgage; nor can the failure to comply with the provision for attestation contained in section 59 of the Transfer of Property Act convert a mortgage transaction into a charge (see *Narayan Babaji v. Lakshmandas*, 7 Bombay Law Reporter, p. 934). The plaintiff's suit must therefore be dismissed.

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On appeal by the plaintiff the Subordinate Judge's decree was reversed and the suit was allowed on the following grounds :—

The lower Court thinks that the mortgage-deed (exhibit 31) is a document which is required by law to be attested (section 59 of the Transfer of Property Act) and that therefore it cannot be used as evidence until one attesting witness at least has been called for the purpose of proving its execution (section 68 of the Evidence Act). The writer of the deed (exhibit 30) was called as a witness for the purpose of proving its execution and has deposed to its execution by the obligors. The only question is whether he can be treated as an attesting witness. "The evidence of the writer of the deed, who has signed his name, though not explicitly as an attesting witness, on the margin, and has been present when the deed was executed, is admissible under this section (section 59) of the Transfer of Property Act) as of an attesting witness." (Gour's Transfer of Property Act, second edition, vol. II, p. 605). This remark is based upon *Radha Kisen v. Fateh Ali*, I. L. R. 20 All. 532 and other cases given in the footnote No. 6 on page 605. In the present case the writer has signed his name on the deed and according to his evidence he was present when the deed was executed. His evidence is therefore admissible as of an attesting witness and the provisions of section 68 of the Evidence Act are sufficiently complied with.

In the next place it is possible to treat the evidence of the Sub-Registrar (exhibit 39) as proving execution. He states on oath on reading the endorsement on the mortgage-bond (exhibit 31) that it was registered according to the provisions of the Dekkhan Agriculturists' Relief Act. Section 63A of the Act requires him to attest a document like the mortgage-deed (exhibit 31) and he

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has further admitted on oath his five signatures on the document. The first endorsement at the foot of the document, which is signed by him in his official capacity, shows that he saw the executants sign the document. Though no direct question was asked to him, as to the fact of execution by the obligors, the effect of his evidence, in my opinion, is that he proves execution by the obligors. Even assuming that that is not its effect, the document is, I think, sufficiently proved by the evidence of the writer (exhibit 30), which can be treated as the evidence of an attesting witness for the purposes of section 68 of the Evidence Act.

Defendant 5 preferred a second appeal.

D. A. Khare, for the appellant (defendant 5).

G. S. Rao, for respondent 1 (plaintiff).

N. M. Patvardhan for respondent 2 (defendant 1).

SCOTT, C. J.—The deed upon which the plaintiff relies being a mortgage-deed to secure repayment of Rs. 1,400 must, in order to be effective, be attested by two witnesses (see section 59 of the Transfer of Property Act). Assuming that we may take the signature of the Sub-Registrar who was bound to attest under the provisions of section 63A of the Dekkhan Agriculturists' Relief Act as that of an attesting witness, there is no one else whose name appears on the document who purports to sign as an attesting witness. But it is argued that the writer of the deed who, in concluding the writing of the body of the document, states that it is written by him, can be treated as an attesting witness. It was not suggested in the first Court that he could be regarded in this light, but the appellate Court relying upon a passage in Gour's Transfer of Property Act and upon the case of *Radha Kishen v. Fateh Ali Ram*⁽¹⁾, has held that his evidence was admissible as that of an attesting witness and that the provisions of section 68 of the Evidence Act had been sufficiently complied with. We cannot gather from the report in *Radha Kishen v. Fateh Ali Ram*⁽¹⁾ in what manner or place the scribe in that case affixed his name to the deed; we are however of opinion that the name of the writer in the case now before us cannot be held to be an attestation. It occurs before the names of the executing parties and forms part of the body of the document. In *Burdett v. Spilsbury*⁽²⁾ Lord Campbell said:

(1) (1898) 20 All. 532.

(2) (1843) 10 C. & F. 340 at p. 417.

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

It has, however, been argued that the Dekkhan Agriculturists' Relief Act is a special enactment which is not affected by the Transfer of Property Act and that the latter Act has no application to this case. The answer to this argument is given by the Subordinate Judge in the original Court. He says: "Beyond doubt the document has been properly executed in accordance with the provisions of section 63A of the Dekkhan Agriculturists' Relief Act, but the question is whether that is sufficient to effect a valid mortgage. Section 63A of the Dekkhan Agriculturists' Relief Act does not provide how a transfer of property such as a mortgage can be effected. That is provided by section 59 of the Transfer of Property Act. The above section of the Dekkhan Agriculturists' Relief Act simply prescribes the mode in which documents by agriculturists should be executed. That mode applies to all documents to be executed by agriculturists whether required by the law to be attested or not... It does not in any way affect the requisites prescribed by section 59 of the Transfer of Property Act for effecting a valid mortgage."

We allow the appeal. We set aside the decree and dismiss the suit with costs throughout on the plaintiff. Separate sets of costs between the appellant (defendant No. 5) and defendant No. 1.

Decree reversed.

G. B. R.