

APPELLATE CIVIL.

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

AMARAPPA BIN SANABASAPPA, GUMALPUR (ORIGINAL PLAINTIFF),
APPELLANT v. RACHAVA KOM SUGAPPA AND ANOTHER (ORIGINAL
DEFENDANTS), RESPONDENTS.*

1919.

September 5.

Transfer of Property Act (IV of 1882), section 123—Gift—Attestation—Meaning of "attested."

A deed of gift was attested by two witnesses. At the trial of the suit, only one witness was examined and he deposed that he was at some distance when the deed was being written and that he did not see the executant making his mark on the deed.

Held, that the deed of gift was not properly executed within the meaning of section 123 of the Transfer of Property Act, 1882.

The word "attested" in section 123 of the Transfer of Property Act, 1882, meant the witnessing of the actual execution of the document by the person purporting to execute it.

Shamu Putter v. Abdul Kadir⁽¹⁾, relied on.

SECOND appeal against the decision of A. C. Wild, District Judge of Bijapur, confirming the decree passed by V. V. Phadke, Joint Subordinate Judge at Muddebihal.

Suit to recover possession.

The property in suit belonged to one Doddbasappa. He made a gift of the property to the plaintiff who was a near relative of his. The plaintiff sued to recover possession of the property.

Defendant No. 1 daughter of Doddbasappa contended that the deed of gift was obtained by fraud and misrepresentation and that it was not properly executed within the meaning of section 123 of the Transfer of Property Act, 1882.

*Second Appeal No. 684 of 1917.

⁽¹⁾(1912) 14 Bom. L. R. 1034.

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The Subordinate Judge dismissed the suit on the ground that the deed of gift was not proved to have been properly executed within the meaning of section 123 of the Transfer of Property Act, 1882. His reasons were as follows :—

“Section 123 lays down that the transfer must be effected by a registered instrument signed by the donor and attested by at least two witnesses. The requirements here laid down are explained by the Privy Council in the case of *Shamu v. Abdul Kadir*, 14 Bom. L. R. 1034 to mean that the attesting witnesses must see the donor sign his name on the deed and that a mere acknowledgment of such signing made to them by the donor is not enough. Now in the present case the only attesting witness examined, Exhibit 53, admits that he was at some distance when the deed was being written in the Court compound and that it was brought to him for his signature after it was written.

“Furtheron he quite clearly says ‘I did not see Doddabasappa making his mark on it.’ It is thus that this witness did not attest the deed of gift, as required by the decision of the Privy Council. There are only two attesting witnesses on the deed, so that when one of the two did not validly attest the deed, it cannot be held to be properly executed.”

On appeal, the District Judge confirmed the decree.

The plaintiff appealed to the High Court.

S. R. Parulekar, for *A. G. Desai* for the appellant :—
I submit that the case of *Shamu Patter v. Abdul Kadir*⁽¹⁾ was wrongly applied by the lower Court to the facts of the present case. That was a case of a mortgage in which the deed was not executed in the presence of either of the attesting witnesses. The present case deals with gift and only one of the attesting witnesses examined said that he was at some distance when the deed was written and that it was brought to him for his signature. The Legislature never intended that the provision regarding attestation should be so strictly construed and it is to cure the defect in attestation in cases like the present, that the Legislature has passed Act XXVI of 1917. That Act is made applicable to

(1) (1912) 14 Bom. L. R. 1034.

United Provinces of Oudh and Agra. A representation to Government has been made to extend the Act to Bombay Presidency and till then the appeal should be allowed to stand over.

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H. B. Gumaste, for the respondents, not called upon.

MACLEOD, C. J.:—The plaintiff in this case relies upon a deed of gift. He was unable to prove in the trial Court that it was attested according to law. The deed would require to be attested by two witnesses under section 123 of the Transfer of Property Act. In *Shamu Patter v. Abdul Kadir*⁽¹⁾ it was held by their Lordships of the Privy Council that the word "attested" in section 59 of the Transfer of Property Act meant the witnessing of the actual execution of the document by the person purporting to execute it. It is quite clear that that decision also covers section 123 of the Transfer of Property Act, so the appeal must be dismissed, unless we agree to allow it to stand over as suggested by the appellants' pleader on the chance of Act XXVI of 1917 being extended to this Presidency. We do not think the mere chance that that Act may be extended is any ground for allowing the appeal to stand over. It is true that we are told that a representation has been made to Government to extend the Act to this Presidency, but it is impossible to say whether that application will result in the Act being extended. No doubt if the Act is extended then provision will be made that suits which have been dismissed on the ground that a document has not been properly attested according to the decision in *Shamu Patter v. Abdul Kadir*⁽¹⁾ may be restored. The appeal is dismissed with costs.

Decree confirmed.

J. G. R.

⁽¹⁾ (1912) 14 Bom. L. R. 1034.