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KUMAR HARISH CHANDRA SINGH DAS & ORS.

v.

BANSIDHAR MOHANTY AND ORS.

May 5, 1965

B [K. N. WANCHOO, J. C. SHAH AND J. R. MUDHOLKAR, JJ.]

Transfer of Property Act (4 *of* 1882), *ss.* 3 *and* 59—*Mortgage deed in name of benamidar—Attestation by lender of money—Validity—Suit by lender—If maintainable.*

The first respondent lent money to the appellant and obtained a mortgage deed from him in the name of the second respondent. The first
C respondent was himself one of the two attesting witnesses. On the failure of the appellant to repay the amount, the first respondent instituted a suit and the suit was decreed by the High Court.

In his appeal to the Supreme Court, the appellant contended that: (i) the mortgage deed was not validly attested and (ii) the first respondent was not entitled to sue.

HELD: (i) A person who has lent money, for securing the payment
D of which a mortgage deed was executed by the mortgagor, but who was not a party to the deed, could be an attestor. [156C, G-H]

There is a distinction between a person who is a party to a deed and a person who, though not a party to the deed is a party to the transaction and the latter is not incompetent to attest the deed. The object of attestation is to protect the executant from being required to execute a document by the other party thereto by force, fraud or undue influence.
E Though, neither the definition of "attested" in s. 3 nor s. 59 of the Transfer of Property Act debars a party to a mortgage deed from attesting it, since the testimony of parties to a document cannot dispense with the necessity of examining at least one attesting witness to prove the execution of the deed, it must be inferred that a party is debarred from attesting a document which is required by law to be attested. Where, however, a person is not a party to the deed, there is no prohibition in law to the proof, of the execution of the document, by that person. [155H;
F 156 A-B]

(ii) When a transaction is a mortgage, the actual lender of the money is entitled to sue upon it. [157E]

A person who provides consideration for a transaction is entitled to maintain a suit concerning the transaction. In *Gur Narayan and Ors.* v. *Sheo Lal Singh and Ors.* (46 I.A.1) the Privy Council only recognised the
G right of a *benamidar* also to sue, but did not hold that the *benamidar* alone could sue and not the beneficial owner. [157 D-F]

CIVIL APPELLATE JURISDICTION: Civil Appeal No. 304 of 1963.

Appeal from the judgment and decree dated July 26, 1960 of
H the Orissa High Court in First Appeal No. 6 of 1954.

Sarjoo Prasad, S. Murty and *B. P. Maheshwari,* for the appellants.

A. V. Viswanatha Sastri and *R. Gopalakrishan*, for the respondent no. 1. A

The Judgment of the Court was delivered by

Mudholkar, J. Two questions are raised before us in this appeal from the judgment of the Orissa High Court. One is B whether the mortgage deed upon which the suit of the respondent no. 1 was based was validly attested. The other is whether the respondent no. 1 was entitled to institute the suit.

The mortgage deed in question was executed by the appellant in favour of Jagannath Debata, respondent no. 2 on April 30, C 1945, for a consideration of Rs. 15,000. The appellant undertook to repay the amount advanced together with interest within one year from the execution of the deed. The appellant, however, failed to do so. Respondent no. 1 therefore instituted the suit out of which this appeal arises.

According to respondent no. 1 though the money was advanced D by him to the appellant he obtained the deed in the name of the second respondent Jagannath Debata because he himself and the appellant were close friends and he felt it embarrassing to ask the appellant to pay interest on the money advanced by him. As the consideration for the mortgage deed proceeded from him he claimed the right to sue upon the deed. He, however, joined Jagannath E Debata as the third defendant to the suit. He also joined Dr. Jyotsna Dei as second defendant because she is the transferee of the mortgaged property—which consists of a house, from the appellant whose wife she is. This lady however remained *ex parte*. The appellant denied the claim on various grounds but we are only F concerned with two upon which arguments were addressed to us. Those are the grounds which we have set out at the beginning of the judgment. The third defendant Jagannath Debata disputed the right of respondent no. 1 to institute the suit and claimed that it was he who had advanced the consideration. His claim was, however, rejected by the trial court and he has remained content G with the decree passed by the trial court in favour of respondent no. 1. The trial court decreed the suit of respondent no. 1 with costs. Against that decree the appellant alone preferred an appeal before the High Court. The contention raised by the appellant before us were also raised by him before the High Court but were rejected by it. H

In our opinion there is no substance in either of the contentions urged on behalf of the appellant. It is no doubt true that there

A were only two attesting witnesses to the mortgage deed, one of whom was respondent no. 1, that is, the lender himself. Section 59 of the Transfer of Property Act, which, amongst other things, provides that a mortgage deed shall be attested by at least two witnesses does not in terms debar the lender of money from attesting the deed. The word "attested" has been defined thus in s. 3 B of the Transfer of Property Act :

> " '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 C 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 D than one of such witnesses shall have been present at the same time, and no particular form of attestation shall be necessary."

This definition is similar to that contained in the Indian Succession Act. It will be seen that it also does not preclude in terms the E lender of money from attesting a mortgage deed under which the money was lent. No other provision of law has been brought to our notice which debars the lender of money from attesting the deed which evidences the transaction whereunder the money was lent. Learned counsel, however, referred us to some decisions of the High Courts in India. These are *Peary Mohan Maiti &* F *Ors.* v. *Sreenath Chandra*(1); *Sarur Jigar Begum* v. *Barada Kanta*(2) and *Gomati Ammal* v. *V. S. M. Krishna Iyer*(3). In all these cases it has been held that a party to a document which is required by law to be attested is not competent to attest the document. In taking this view reliance has been placed upon the observations of Lord Selborne, L.C., in *Seal* v. *Claridge*(4).

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> "It (*i.e.*, the attestation) implies the presence of some person, who stands by but is not a party to the transaction."

The object of attestation is to protect the executant from being required to execute a document by the other party thereto by force, H fraud or undue influence. No doubt, neither the definition of

(1) 14 C.W.N. 1046. (2) I.L.R. 37 Cal. 526.
(3) A.I.R. 1954 Mad. 126. (4) L.R. 7 Q.B.D. 516.

'attested' nor s. 59 of the Transfer of Property Act debars a party to a mortgage deed from attesting it. It must, however, be borne in mind that the law requires that the testimony of parties to a document cannot dispense with the necessity of examining at least one attesting witness to prove the execution of the deed. Inferentially, therefore, it debars a party from attesting a document which is required by law to be attested. Where, however, a person is not a party to the deed there is no prohibition in law to the proof of the execution of the document by that person. It would follow, therefore, that the ground on which the rule laid down in English cases and followed in India would not be available against a person who has lent money for securing the payment of which a mortgage deed was executed by the mortgagor but who is not a party to that deed. Indeed it has been so held by the Bombay High Court in *Balu Ravji Charat* v. *Gopal Gangadhar Dhabu*(1) and by the late Chief Court of Oudh in *Durga Din & Ors.* v. *Suraj Bakhsh*(2). In the first of these cases an argument similar to the one advanced before us was addressed before the Bombay High Court. Repelling it the court observed :

> "In *Seal* v. *Claridge*(3) much relied upon by the appellant's pleader the old case of *Svire* v. *Bell* (1793) 5 T.R. 371, in which the obsolete rule was pushed to its farthest extent, was cited to the Court but Lord Selborne in delivering judgment said : 'What is the meaning of 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.' He then referred to *Freshfield* v. *Reed* (1842) 9 M & W 404 and said : 'It follows from that case that the party to an instrument cannot attest it.' Again in *Wickham* v. *Marquis of Bath* (1865) L.R. 1 Eq. 17 at p. 25, the remarks of the Master of the rolls imply that if the plaintiffs Dawe and Wickham had not executed the deed as parties but had only signed with the intention of attesting, the provision of the statute requiring two attesting witnesses would have been satisfied.' "

A distinction was thus drawn in this case between a person who is a party to a deed and a person who, though not a party to the deed, is a party to the transaction and it was said that the latter was not incompetent to attest the deed. This decision was followed by the Chief Court of Oudh. We agree with the view taken by the Bombay High Court.

(1) 12 I.C. 531.
(2) I.L.R. 7 Lucknow 41 (F.B.)
(3) L.R. 7 Q.B.D. 516.

A As regards the second question a number of High Courts in India had taken the view that a *benamidar* could not maintain a suit for the recovery of property standing in his name, beneficial interest in which was in someone else. Benami transactions are not frowned upon in India but on the other hand they are recognised. Indeed s. 84 of the Indian Trusts Act, 1882 gives recognition to B such transactions. Dealing with such transactions Sir George Farewell has observed in *Bilas Munwar* v. *Desraj Ranjit Singh*(1):

> "It is quite unobjectionable and has a curious resemblance to the doctrine of our English law, that the trust of the legal estate results to the man who pays the C purchase money, and this again follows the analogy of our common law, that where a feoffment is made without consideration the use results to the feoffor."

It must follow from this that the beneficial owner of property standing in the name of another must necessarily be entitled to institute a suit with respect to it or with respect to the enforcement of D a right concerning the property of a co-sharer. It will follow that a person who takes benefit under the transaction or who provides consideration for a transaction is entitled to maintain a suit concerning the transaction. Thus where a transaction is a mortgage, the actual lender of money is entitled to sue upon it. Indeed, till the decision of the Privy Council in *Gur Narayan & Ors.* v. *Sheo* E *Lal Singh & Ors.*(2) the right of a benamidar to sue upon a transaction which is only ostensibly in his favour was not recognised by several courts in India. Relying upon this decision it was contended before us on behalf of the appellant that in view of this decision it must be held that it is the benamidar alone who could F maintain a suit but not the beneficial owner. That, however, is not what the Privy Council decided. Indeed, that was never a question which arose for consideration before the Privy Council. Apart from that on principle the real beneficiary under a transaction cannot be disentitled to enforce a right arising thereunder.

In this view we uphold the decree of the High Court and dismiss G the appeal with costs.

Appeal dismissed.

(1) 42 I.A. 202, 205.
(2) 46 I.A. 1.