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Lecture-2



Attestation

A creation of a legal instrument requires some form and formality as a proof of authenticity of the same legal instrument or document in the eyes of law, that the document has not been created by any force, fraud, coercion or undue influence. This constitutes the essence of attestation. The Transfer of Property Act does not require attestation for every legal instrument but for some. Thus, legal instruments or documents which constitute transactions of lease, sale or any kind of exchange do not require attestation whereas gifts and mortgages require not only legally written documents but also for them to be a valid transaction, attestation is mandatory.

Section 3 of the Transfer of Property Act defines 'Attestation' in relation to a legal instrument. It states that a valid attestation constitutes an execution of a legal instrument by the executant or by any other person who has been directed by the executant to personally acknowledge the attestator of the execution, with the attestator signing or affixing his mark on the instrument in the presence of the executant as a proof of his acknowledgement of the attestation. Thus, by this the attestator becomes the 'attesting witness' to the act of execution of a legal document or instrument.

Essentials of a Valid Attestation

1. The attesting witnesses must always be two or more for it to be an authentic attestation.
2. The attestator though need not see the execution of the legal instrument, he must either see the executant sign or affix his mark or see anyone else do so on the direction of the executant or receive personal acknowledgement from the executant of the same.
3. But, it is mandatory for the attestator to sign or affix his mark in the presence of the executant for it to validate as an 'attesting witness'.
4. The attestator can only sign after the execution of the legal instrument/document is complete for it to be a valid attestation.

5. The attestators (two or more) need not sign or affix their mark at the same time.
6. There is no particular form of attestation that the parties need to adhere to. Even a signature by an attesting witness at the legal document with all form and formality may constitute attestation.
7. The personal acknowledgement to the attestator must be given by the executant himself and not through any other source.
8. 'Attestator should be sui generis' i.e. the attestator should be competent to contract. Thus, a minor cannot be an attestator.
9. 'Attestator must be Animo Attestandi' i.e. an attestation will only be valid if the attestator has signed the legal instrument with an 'intention to attest' to authenticate the execution of the document.
10. Attestation under the Transfer of Property Act does not validate an attestation if the attesting witness is a party to the transfer'.
11. The attestator is not 'estop' by the attestation of a deed except that he witnessed the execution of the deed. The mere attesting of a document by the attestator is no proof that he is aware of the contents of the document.
12. The attesting witnesses need not identify each other for it to constitute a valid attestation.

Effect of Invalid Attestation

The Transfer of Property Act deals with the transfer of 'movable' and 'immovable' property and the transfer when made in the form of a 'Gift' or 'Mortgage' requires attestation. Such attestation if invalid in nature renders the entire transaction of the transfer of property invalid, and therefore no property passes under it. Thus the deed cannot be invoked in a court of law. In *Krishna Kumar v Kayashta Pathshala* (AIR 1966 All 570) it was held that 'If the deed is a mortgage, it can neither operate as a mortgage, nor as a charge under Sec. 100. But though the deed may be ineffectual as a mortgage for want of proper attestation, still it will be admissible as evidence of a

personal covenant to repay the debt' i.e. though the mortgagee cannot emphasize the mortgagor to fulfil the mortgage deed as per the law, he still can approach the court and emphasize the mortgagor to repay his debt and the deed as a proof of the same.

In *Vellie Mary Andrade v Glory Immaculate D' Julia and Ors* (Suit no 38 OF 1989-2017) it was contented that the will was invalidly attested because the three signatories were not named as 'attesting witnesses'. The Supreme Court found out that all the three signatories had seen the testatrix affix her mark on the will and that there was no substance in the grievance that proof of the will was incomplete for want of attesting witnesses' evidence.

Illustration- Sushil is the owner of a land. He wants to mortgage it to Sameer and wants Akash to be the attesting witness. Shashi being the elder brother of Akash exercises undue influence over him and does not inform him of his status as an attesting witness. The mortgage deed is thus invalidly attested and the property will not pass under it for the purpose of mortgage.

Distinction between English Law & Indian Law

The English law mandates that the attestators i.e. the attesting witnesses should be present at the time of the execution of the legal instrument/document in order to testify that the particular deed was executed by the very same person who claims to have executed it voluntarily. The English law does not recognize personal acknowledgement given by the executant to the attestator as is the case with the Indian law.

For instance Ram wanted to execute a mortgage deed in favour of Rahul and Rohan was the attesting witness. Rohan received a personal acknowledgement from Ram about the execution of a deed but Rohan did not physically see or hear Ram execute the deed. This deed is validly attested as per the Indian law but is an example of 'invalid attestation' according to English law.

Landmark Case laws

Kumar Harish Chandra Singh Deo v Bansidhar Mohanty (AIR 1965 SC 1738)

In the present case it was held that as 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, a party to the attestation cannot attest it. But any other party who is not a party to a deed may attest the document although he is a person interested in the transaction.

Padarath Halwai v Ram Narain (AIR 1915 PC 21)

In the present case the court observed that though the executants were pardanashin women, the two attesting witnesses recognized the ladies by their voices, and they say that they saw each lady execute the deed with her own hand. It was after that the attesting witnesses had put signatures on the document. Therefore, the document stands duly attested under Sec 59 of the T.P. Act, 1882.

M.L. Abdul Jabbar Singh v H. Venkata Sastri (AIR 1969 SC 1147)

In the present case the importance of valid attestation is highlighted in matters of transfer of property; it is essential that the witness put his signatures *animo attestandi* i.e. with the intention of attesting. In the present case, however, there was no evidence that the registering officer put his signature on the document with the intention of attesting it; nor that he signed it in the presence of the executant.

Girja Dutt v Gangotri Datt Singh (AIR 1955 SC 346)

In the present case two persons had identified the testator at the time of registration of will and had appended their signatures at the foot of endorsement by the sub-registrar, were not witnesses as their signatures were not put *animo attestandi*.

Bhagwat v Gorakh (AIR 1934 Pat 93)

In the present case the court observed that though mere attestation of a document is no proof that the attesting witness is aware of the contents of the document. But where an attesting witness was present at the transaction and attested the documents after having heard the contents, it was held that he was estopped from challenging the right of the transferee.

Illustrations

1. X and Y were parties to a transaction, X being the mortgagor and Y the mortgagee but the money was advanced to X by Z. Z became the 'attesting witness'. It was a valid deed because Z is interested in the transaction but not a party to the transaction.
2. A, the son of a pardanashin lady B, takes the document inside the purdah, gets it executed and brings it outside and then the attesting witnesses put their signatures after receiving the acknowledgement from A and not from B. The deed executed is thus invalid.
3. X and Y, two attesting witnesses to a deed were not present at the same time to sign and affix their mark on the deed. The deed is valid as their simultaneous presence is not mandatory.
4. A, a boy 16 years old is one of the attesting witnesses for the gift deed executed by A. The gift deed is invalid as A is a minor and is incompetent to become an attestator.
5. A and B executed a mortgage deed between them and C, A's son became one of the attesting witnesses to which B objected. The deed is valid as there is no prohibition on relatives being attesting witnesses.

MULTIPLE CHOICE QUESTION

1. Which section of the Transfer of Property Act defines 'Attestation' in relation to a legal instrument

- (a) 2 (b) 3 (c) 4 (d) None of the above

2. A valid attestation constitutes an execution of a legal instrument by

- (a) the executant or
(b) any other person who has been directed by the executant
(c) Both (a) and (b)
(d) Either (a) or (b)

3. . Under the Transfer of Property Act, 1882, the term "attested" means

- (a) attested by two or more witnesses
(b) attested by one witness only
(c) attested by two witnesses only
(d) no condition prevails.

4. Which of the following is correct about the Attestation

- (a) The attesting witnesses must always be two or more for it to be an authentic attestation.
(b) The attestator though need not see the execution of the legal instrument, he must either see the executant sign or affix his mark or see anyone else do so on the direction of the executant or receive personal acknowledgement from the executant of the same.
(c) it is mandatory for the attestator to sign or affix his mark in the presence of the executant for it to validate as an 'attesting witness'.
(d) All of the above

5. Under the Transfer of Property Act 1882 attestation requires for

- (a) Mortgage (b) Gift
(c) Both (a) and (b) (d) None of the above