its powers under order XLI, rule 25, of the Code of Civil Procedure. But the case should not be remanded under rule XXIII of that order unless the finding on the question of limitation is definitely reversed. Costs here and hitherto will abide the event.

Appeal allowed—Cause remanded.

Before Mr. Justice Muhammad Rafiq and Mr. Justice Piggott.

KRISHNA JIVA TEWARI AND OTHERS (DEFENDANTS) *v.* BISHNATH KALWAR AND OTHERS (PLAINTIFFS).*

Act No. I of 1872 (*Indian Evidence Act*), *section* 69—*Proof of document—Document required by law to be attested—Death of attesting witnesses—Hindu law—Joint Hindu family—Parties.*

On execution of a deed of mortgage the names of two out of the four attesting witnesses were written by the scribe, who also signed the document himself. *Held* that, it being necessary to prove the deed of mortgage after the death of all the attesting witnesses and the scribe, it was sufficient to prove the handwriting of the scribe. *Radha Kishen* v. *Fateh Ali Ram* (1) referred to.

Where all the adult members of a joint Hindu family appear on the record as plaintiffs or defendants, it is a legitimate presumption that they are acting as managers on behalf of themselves and of the minor members of the family who do not join in the suit. *Hori Lal* v. *Munman Kunwar* (2) and *Nathu Lal* v. *Lala* (3) referred to.

The plaintiffs in this case sued as heirs of the original mortgagee of a mortgage executed on the 9th of August, 1883, for sale of the mortgaged property. The defendants were the representatives of the original mortgagors, who were four out of five brothers, members of a joint Hindu family, and certain subsequent transferees. The court of first instance (Subordinate Judge of Ghazipur) decreed the plaintiffs' claim, exempting, however, a one-fifth share from the operation of the decree. The defendants appealed, but their appeal was dismissed by the District Judge. Some of the defendants then appealed to the High Court.

Mr. *Muhammad Ishaq Khan* and Babu *Surendro Nath Sen*, for the appellants.

Mr. *M. L. Agarwala* and Munshi *Gobind Prasad*, for the respondents.

MUHAMMAD RAFIQ and PIGGOTT, JJ. :—This was a suit for sale upon a mortgage of August the 9th, 1883, brought by the heirs

* Second Appeal No. 1175 of 1911, from a decree of Sri Lal, District Judge of Ghazipur, dated the 28th of June, 1911, modifying a decree of Chajju Mal, Subordinate Judge of Ghazipur, dated the 17th of March, 1911.

(1) (1898) I. L. R., 20 All., 532. (2) (1912) I. L. R., 34 All., 549.
(3) (1912) I. L. R., 34 All., 572.

1912

KRISHNA JIVA TEWARI v. BISHNATH KALWAR.

and representatives of the original mortgagee against the heirs and representatives of the four mortgagors, together with some subsequent transferees. The Court of first instance decreed the plaintiffs' claim, exempting a one-fifth share in the property originally mortgaged from the operation of the decree. An appeal by the defendants was dismissed by the District Judge of Ghazipur. Coming to this Court in second appeal, the defendants, or rather six defendants out of a large number who were impleaded in the court of first instance, have raised substantially five points. For convenience sake, we deal with them in the order in which they were raised. The first point taken is that the evidence on the record is not legally sufficient to prove the execution of the deed in suit, regard being had to the provisions of section 59 of the Transfer of Property Act, No. IV of 1882, and sections 68 and 69 of the Indian Evidence Act, No. I of 1872. This point was not taken in the court of first instance, and there was nothing in the memorandum of appeal in the lower appellate court to warn the plaintiffs that objection was being taken to the technical sufficiency of their evidence. The deed in suit purports to be signed by four marginal witnesses, of whom two are literate and two are illiterate. The scribe of the deed has signed his own name at the foot, and has written the names of the two illiterate witnesses. The plaintiffs produced one witness to prove execution of the deed in suit by the mortgagors, who has been accepted as a reliable witness by the courts below, and we must hold that his deposition sufficiently meets the requirements of section 69 of the Evidence Act so far as concerns proof of the signatures of the executants. There is evidence that all the marginal witnesses, and also the scribe, are dead, and we must presume that this evidence has been accepted by the courts below, as it would have been impossible for them, otherwise, to hold the document proved. The plaintiffs have proved the handwriting of the scribe, both as regards his own signature at the foot of the deed, and as regards the signatures of the witnesses, Babu Lal and Sundar Rai, which are in the handwriting of the said scribe. In the case of *Radha Kishen* v. *Fateh Ali Ram* (1) it was held by this Court that the scribe of a deed who had signed his name at the foot thereof, though not explicitly described as an attesting witness,

(1) (1898) I. L. R., 20 All., 532.

could give evidence on the same footing as an attesting witness, provided he could prove that the deed was, in fact, executed in his presence. There is a fair presumption to be drawn from the fact that the signatures of two of the attesting witnesses in this case were written by the pen of the scribe that the said scribe was present at the execution of the deed. We are of opinion, therefore, that the requirements of section 69 of the Indian Evidence Act with reference to proving the attestation of at least one attesting witness when all the attesting witnesses are dead, have been sufficiently complied with in this case by proof of the handwriting of the scribe and by the fact that two of the attesting witnesses appear to have signed by the pen of the said scribe.

The second point taken is the most substantial point in this case. The bond in suit was executed by four brothers, Umrao, Sheoperson, Hari and Gopal. It is an admitted fact that at the date of the execution these four were members of a joint undivided Hindu family. It is also admitted that there was living at that time a fifth brother, named Bhondu, who was also a member of the joint Hindu family. Some evidence has been offered, on behalf of the plaintiffs, to prove that Bhondu would have been asked to join in the execution of the deed, but for the accident that he was lying ill at the time. The contention for the defendants appellants is that four of the brothers had no right to hypothecate any portion of the joint family property without the authority of the fifth, and that, in consequence of Bhondu's not having joined in the execution of this deed, the mortgage in suit is not binding even as against the interests of the four mortgagors in the joint family property. There are two circumstances in the case which appear to us decisive. In the first place, the deed in suit was executed for legal necessity, namely, to pay off an antecedent debt due from the father of the four executants, a debt for the payment of which the four mortgagors and their brother, Bhondu, were all liable because of their pious duty as Hindu sons. In the second place, it is to be noticed that the suit as now brought is not against a joint family. The joint family has been broken up, and the defendants, who are the legal representatives of the original mortgagors, form a number of separate groups, the members of which are joint amongst themselves but separate from the rest. Without any general discussion of the questions of law that have been argued

1912

KRISHNA JIVA TEWARI v. BISHNATH KALWAR.

before us, we are content to say that under these circumstances we are satisfied that the mortgage in suit is enforceable at least against the shares of the four executants of the mortgage deed. The question whether the courts below were right in exempting Bhondu's one-fifth share is not before us, as the plaintiffs never challenged the correctness of the decree of the court on this point.

It appears that one of the groups of defendants before us included a father and son, and that one Ram Prasad, a minor son of the latter defendant, was not impleaded in the suit at all. It is contended on behalf of the appellants that this omission is fatal to the entire suit, it being conceded that Ram Prasad cannot now be added as a defendant, the period of limitation for a suit against him having expired. On the principles laid down by the latest rulings of this Court in *Hori Lal* v. *Munman Kunwar* (1) and *Nathu Lal* v. *Lala* (2), it appears to us that the courts below were right in holding that the minor Ram Prasad was sufficiently represented in the suit by his father and grandfather. We would refer to the remarks of Mr. Justice CHAMIER, on page 417 of the report in the second of the rulings above referred to. In cases in which all the adult members of a family appeared on the record as plaintiffs, it was held that this alone justified the presumption that they were acting as managers on behalf of themselves and of the minor members of their family who had not joined in the suit. We think the same principle applies to the case of defendants.

The fourth point taken refers to a payment of Rs. 125, admitted in the plaint. It is sufficiently met by the fact that the interest claimed in the plaint is simple and not compound, and there is nothing in the pleadings or evidence to suggest that this payment of Rs. 125 could or ought to have been credited to principal.

The fifth point is the last point taken on behalf of the appellants, and it refers to an issue raised in the written statement of Baijnath Rai, defendant No. 23. The scanty information available on the record makes it difficult for us to understand the precise circumstances on which this plea is based. Baijnath Rai was impleaded in the plaint simply as a subsequent mortgagee, no details being given of his mortgage. In his written statement

(1) (1912) I. L. R., 34 All., 549. (2) (1912) I. L. R., 34 All., 572.

this defendant pleaded that a portion of the property in suit had been hypothecated to one Bija or Bijai Rai under a deed of August the 1st, 1886. He added that the said Bijai Rai had brought a suit upon his mortgage in the year 1898, impleading Raja Ram, whom he described as the ancestor of the plaintiffs, as a mortgagee subsequent to himself. The contention is that, as the said Raja Ram made no defence to that suit, the plaintiffs are estopped in the present suit from claiming priority for their mortgage as against that in favour of Bijai Rai. The courts below have contented themselves with remarking that, even if this plea were effective as against Raja Ram, there was nothing to show that Raja Ram represented all the present plaintiffs in that suit of 1898, and that there were still remaining a number of plaintiffs entitled to maintain the suit as brought. So far as we can gather from the materials on the record, this finding appears to be correct. There does not seem to be anything on the record to show how the defendant, Baijnath Rai, comes to have any interest in the mortgage in favour of Bijai Rai, or that he was impleaded as defendant because of this mortgage of August 1st, 1886. Again, the decree of September the 9th, 1898, which is the only evidence on the record on this point, merely shows that Raja Ram was impleaded as son and heir of Amrit Lal, and that the suit brought by the plaintiff, Bijai Rai, was decreed. It does not even show in what capacity Raja Ram was impleaded, or what interest he had in the subject-matter of the suit. It is incumbent on a defendant who raises the plea of *res judicata* to lay before the court adequate materials for a full and proper appreciation of that plea and a proper decision thereon. This has certainly not been done in the present case. For these reasons we overrule all the objections taken on behalf of the appellants and dismiss the appeal with costs.

Appeal dismissed.