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severely than an ignorant man. In fact his position as a servant of the municipality and as a literate person calls for a more severe sentence than if he were an ignorant man unconnected with the municipality. The application fails and is rejected. The applicant must surrender to his bail before the Magistrate.

Application rejected.

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March, 20.

APPELLATE CIVIL.

Before Mr. Justice Sir Harry Griffin and Mr. Justice Chamier.

GOBARDHAN DAS AND OTHERS (DEFENDANTS) *v.* HORI LAL (PLAINTIFF) AND LEKHA SINGH AND OTHERS (DEFENDANTS).*

Act No. I of 1872 *(Indian Evidence Act), sections* 69 *and* 70*—Evidence—Mortgage—Proof of execution of mortgage—Mortgagors illiterate, and both they and the attesting witnesses dead before suit brought.*

A mortgage deed was on the face of it executed in 1889 by three illiterate mortgagors, who affixed their marks, and was attested by more than two witnesses. At the time of the institution of a suit for sale thereon, all the executants and the attesting witnesses were dead, and the evidence tendered in proof of the mortgage consisted of (1) the statement of a witness who professed to be acquainted with the handwriting of two of the attesting witnesses, (2) a deed of usufructuary mortgage executed by one of the executants of the mortgage in suit and by the representative of the two other executants, which referred to and recognized the genuineness of the mortgage in suit, and (3) a deed of sale executed in 1902 by the representatives or some of the representatives of the executants of the deed in suit, which recognized the genuineness of the usufrucuary mortgage mentioned above.

Held that, having regard to sections 69 and 70 of the Indian Evidence Act, 1872, this evidence was not sufficient to prove the mortgage in suit.

THIS was suit for sale on a mortgage purporting to be executed in 1889 by three persons—Khushal Singh, Moti Singh and Baljit Singh. The executants, being illiterate, had merely made their marks on the document. The deed was also attested by several witnesses. At the time of suit all the executants and the attesting witnesses were dead, and the evidence tendered in proof of the mortgage consisted of (1) the statement of a witness who professed to be acquainted with the handwriting of two of the attesting witnesses, (2) a deed of usufructuary mortgage executed by one of the executants of the mortgage in suit and by the representative of the two other executants, which referred to and

*Second Appeal No. 846 of 1912, from a decree of F. E. Taylor, District Judge of Bareilly, dated the 14th of March, 1912, confirming a decree of Baijnath Das, Officiating Subordinate Judge of Bareilly, dated the 8th of May, 1911.

recognized the genuineness of the mortgage in suit, and (3) a deed of sale executed in 1902 by the representatives or some of the representatives of the executants of the deed in suit, which recognized the genuineness of the usufrutuary mortgage mentioned above. Both the courts below accepted this evidence as sufficient to prove the mortgage and gave the plaintiff a decree accordingly. Some of the defendants appealed to the High Court and contended that the lower court was wrong in holding that execution of the mortgage in suit had been proved within the meaning of section 69 of the Indian Evidence Act, 1872.

Babu *Lalit Mohan Banerji*, for the appellants:—

The mortgage-deed in suit has not been proved as required by section 68 and section 69 of the Evidence Act. There is no proof that the signatures of the executants are in their handwriting. The provisions of section 69 are imperative and are not satisfied by proving a later deed of usufructuary mortgage in which the deed in suit has been recited. Secondly, some of the representatives in interest of the executants of the deed in suit did not join in executing the usufructuary mortgage or the sale deed. They are, therefore, not bound by any admissions contained in those two documents.

Mr. *B. E. O'Conor*, for the respondents:—

The plaintiff produced the best evidence that could possibly be given under the circumstances in proof of the mortgage in suit. Section 69 does not say that direct evidence alone must be given in proof of the signature of the executant. Where direct evidence is not available, the execution may be proved by indirect evidence. Accordingly, proof of the later deed which recites the deed in suit is sufficient proof of the latter. The Indian law of evidence is founded on the English law. Section 69 should, therefore, be supplemented by the English rules of evidence which provide that in cases like the present the document can be proved by secondary evidence of handwriting, or by presumption or by any other evidence; *Phipson*: Evidence (5th Edition), page 494, *Taylor*. Evidence (9th Edition), page 1214.

Babu *Lalit Mohan Banerji*, was not heard in reply.

GRIFFIN and CHAMIER, JJ:—This appeal arises out of a suit brought by the respondent Hori Lal on a mortgage made in his

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favour on the 22nd of November, 1889, by three persons, Khushal Singh, Moti Singh and Baljit Singh. Both the courts below have found that the mortgage in suit has been proved and have decreed the claim. This is a second appeal by some of the defendants, who contend, and have throughout contended, that the mortgage deed has not been proved. Other points are taken in the appeal to this Court. But, in the view we take of the question of the proof of the deed in suit, it is unnecessary to refer to them. The three executants of the deed, being unable to write, made their marks. All three of them and all the attesting witnesses to the deed died before this suit was brought. The evidence adduced to prove the document consists of (1) the statement of a witness named Lalta Prasad, who claimed to be acquainted with the hand-writing of two of the attesting witnesses, (2) a deed of usufructuary mortgage executed by one of the executants of the mortgage in suit and by the representative of the two other executants, which refers to and recognizes the genuineness of the mortgage in suit, and (3) a deed of sale executed in 1902 by the representatives or some of the representatives of the executants of the deed in suit, which recognizes the genuineness of the usufructuary mortgage mentioned above. This evidence leaves little doubt in our mind that the mortgage in suit is genuine, and it has been accepted by both the courts below as sufficient. But it is contended that the evidence, other than the statement of the witness Lalta Prasad, is not evidence of the kind required by law. The appellants rely on section 69 of the Evidence Act, which provides that "if no such attesting witness can be found, or if the document purports to have been executed in the United Kingdom, it must be proved that the attestation of one attesting witness, at least, is in his hand-writing, and that the signature of the person executing the document is in the hand-writing of that person." The evidence of Lalta Prasad proves that the attestation of two of the attesting witnesses is in their hand-writing. But it appears to us that the two deeds relied upon are not evidence that the signatures of the persons executing the document are in their hand-writing. It was contended on behalf of the plaintiff respondent that the usufructuary mortgage and the deed of sale prove indirectly that the signatures of the three executants are

in their hand-writing. Section 69 of the Evidence Act reproduces, as regards attesting witnesses, part of a rule of the English law. According to that law where a document is required by law to be attested one attesting witness at least must be called. But there are several exceptions to this rule, one being that if the attesting witnesses are dead, insane, out of the jurisdiction or cannot be found, secondary evidence of the execution may be given by proof of the hand-writing of the witnesses *or, if this is not obtainable, by presumptive or any other available evidence.* (See the cases cited at page 494 of Phipson on Evidence, fifth edition; and paragraph 1851 on page 1214 of the 9th edition of Taylor on Evidence). It is quite clear that in England it is recognized that there is a distinction between proof of the hand-writing of a person and presumptive or other evidence that a document has been executed. The Indian law does not in a case of this kind appear to allow a party to rely on presumptive or other evidence of execution, where he is unable to comply with the provisions of section 69, either as regards the attestation of the attesting witnesses or as regards the signatures of the executants. In our opinion the evidence adduced by the plaintiff respondent in the present case, to prove the signatures of the deed in suit, does not comply with section 69 and we must, therefore, hold that the deed has not been proved. It was pointed out that one of the executants of the deed admitted execution by himself in one of the later deeds and section 70 was referred to, but that does not avail the plaintiff respondent, for it is not sufficient for his purpose to prove the admission of execution by only one party to the document. It appears to be a hard case, but the plaintiff respondent has himself to thank for the result. He deferred instituting the suit until all the attesting witnesses had died, knowing that the executants, who could only make marks, had made their marks on the deed. In any case he had considerable difficulty in producing proper evidence of execution. We allow the appeal, set aside the decrees of the courts below and dismiss the plaintiff's claim with costs in all courts.

Appeal allowed.