

persons, acting together, had committed each of the three offences specified in the several charges. On the wording of the section there was nothing illegal in the framing of the three joint charges against all the accused, or in the trial of these three charges at one and the same trial. If the learned Sessions Judge, on examining the record, comes to the conclusion that the accused persons, or any of them, were prejudiced, or that the interests of justice have suffered by the procedure adopted in the Magistrate's Court, it will still be open to him to order such new trial or trials as he may consider that the interests of justice require. We think he was wrong in holding himself bound by the view he took of certain older decisions of this Court to quash the whole of the convictions and direct the re-trial of all the accused on all the charges, on the one ground taken by him, namely, that the trial as held in the Magistrate's Court was absolutely illegal. We therefore set aside the order passed by the Sessions Judge in this matter and direct him to re-admit the appeals of Bechan Pande, Sat Narain Pande, Anrudh Prasad, and Ram Shankar on to his file of pending appeals and dispose of the same according to law with regard to the remarks that have been made above.

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 EMPEROR
 v.
 BECHAN
 PANDE.

Order set aside.

APPELLATE CIVIL.

Before Mr. Justice Walsh and Mr. Justice Sundar Lal.

PARAM HANS AND OTHERS (DEFENDANTS) v. RANDHIR SINGH (PLAINTIFF) AND SAHODRA (DEFENDANT).*

Act No. IV of 1882 (Transfer of Property Act), section 59—Attestation—Document attested by one witness only—Mortgage—Charge.

A document purporting to be a deed of mortgage bore the signature of one attesting witness; and the name of another person was written on the margin by the scribe, but there was no signature or mark made by this second person. In a suit brought upon the document after his death it was held that the document was not duly attested by two witnesses within the meaning of section 59 of the Transfer of Property Act, inasmuch as there was nothing to show that the person whose name appeared on the document as an attesting witness had authorised the scribe to sign it for him and therefore it could neither operate as a mortgage nor create a charge on immovable property.

 1916
 May, 8.

* First Appeal No. 176 of 1915, from an order of Abdyl Ali, Judge of the Court of Small Causes, exercising the powers of a Subordinate Judge, of Agra, dated the 28th of September, 1915.

1916

PARAM HANS
v.
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SINGH.

THE facts of this case were as follows :—

Defendant No. 1 Musammat Subhadra executed the mortgage deed in suit in 1908. Subsequently she transferred the equity of redemption to one Param Hans and defendants Nos. 2 and 3.

In a suit for sale instituted by the mortgagees, Musammat Subhadra admitted execution and receipt of consideration. The appellants transferees contested the suit. It appeared that there were only two marginal witnesses, Bansi and Gopal, the former of whom had neither signed the deed nor made his mark or thumb impression. His name was written on his behalf by the scribe of the deed. The Munsif held that this was not sufficient attestation and dismissed the suit.

The lower appellate court reversed the decree and remanded the case under Order XLI, rule 23, Civil Procedure Code.

The transferees-defendants appealed to the High Court from his order of remand.

Babu *Narain Prasad Asthana*, for the appellants, contended that the deed was not properly attested, as there was nothing to show that the scribe had been authorised by Bansi to put his signature, and Bansi himself had made no mark or put his thumb impression. The requirements of the law were not satisfied.

[He was stopped.]

Mr. *J. M. Banerji* (Babu *Lalit Mohan Banerji* with him), for the respondent.

The execution of the mortgage deed is admitted by the predecessor-in-title of the appellant, namely, the executant herself. The appellants purchased the equity of redemption with full knowledge of the mortgage and it would be iniquitous to allow them to go behind the admission of their predecessor-in-title.

[WALSH, J.—If she had admitted the execution before the transfer it might have been binding on the transferees, but her admission after she has lost all interest in the property does not bind them.]

[The appellants do not allege] fraud or collusion,

The execution of the mortgage deed has been proved and the attestation is proper inasmuch as out of two marginal witnesses one is dead and the other swears that the Musammat affixed her mark to the document in the presence of both the witnesses.

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[SUNDAR LAL, J.—Bansi neither signed the deed nor affixed his mark or thumb impression to it and you have not proved that he, in any way, authorised the scribe to sign on his behalf.]

I submit that his authority should be presumed.

[SUNDAR LAL, J.—Referred to *Ram Bahadur v. Ajodhia Singh* (Patna High Court) (1).]

In any case the mortgagee is entitled to a simple money decree against the executant herself.

Babu *Narain Prasad Asthana*, for the appellant, was not heard in reply.

SUNDAR LAL, J.—This is a suit upon a deed which purports to be a deed of mortgage, dated the 17th of July, 1908. The document bears the signature and mark of Musammat Subhadra the executant. It bears the signature of one Gopal, an attesting witness, and the only other witness whose name is written by the scribe is Bansi. In the margin of the deed is given the name of another witness or a person who was expected to be an attesting witness, who is described as Bansi “son of Randhir, caste Gola purab, resident of Saujan, by acknowledgement of the executant.” This is written in the hand-writing of the scribe. There is no signature or mark of this witness Bansi on the deed. He is dead, and there is nothing to show that he authorized the scribe to sign his name for him. He has not himself put his signature or mark. The question is whether he is an attesting witness within the meaning of section 59 of the Transfer of Property Act. In a recent case which came before the Patna High Court, *Ram Bahadur v. Ajodhia Singh* (1), Chief Justice CHAMBER and Mr. Justice JWALA PRASAD came to the conclusion that to be an attesting witness within the meaning of section 59

(1) (1914) 20 C. W. N., 699.

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of the Transfer of Property Act, the witness must not only have seen the execution of the document but should have also subscribed as a witness, that is, he must have put his own mark or signature to it. It may be that in the present case the scribe wrote up what he found in the draft of the deed with the intention of subsequently obtaining the signature or mark of Bansi on the acknowledgement of the executant, as before the Privy Council ruling in *Shamu Patter v. Abdul Kadir Ravuthan* (1), witnessing a document on the mere acknowledgement of the executant was regarded as sufficient by this Court. In our opinion in the absence of proof that the scribe was authorised by Bansi to sign for him as an attesting witness or to put his mark or signature to the document on his behalf as a witness, the document has not been duly attested by at least two witnesses and is not a valid mortgage according to the aforesaid Privy Council ruling. We think that the document cannot operate as a mortgage as against the transferee of the property. It creates no charge as has been recently ruled by a Full Bench of this Court in *The Collector of Mirzapur v. Bhagwan Prasad* (2). The suit for sale of the property therefore fails. It is, however, a suit upon a registered document and has been brought within six years from the date of the cause of action. The plaintiff is entitled to a money decree against Musammat Subhadra. We therefore vary the decree of the court below by dismissing the suit for sale and making a money decree for the claim against Musammat Subhadra with costs.

WALSH, J.—It is as well to add a caution against treating an important question like this, namely, as to whether an alleged attestation or execution is genuine or not, in the way in which it has been treated by the court below. That court has assumed in favour of the document that a witness who was actually called before the court must have seen the alleged executant touch the pen of the scribe as an authority to sign for him although there is not a scintilla of evidence on the point.

(1) (1912) I. L. R., 35 Mad., 607. (2) (1913) I. L. R., 35 All., 164.

BY THE COURT.—We allow the appeal of the transferee with costs, but amend the decree of the court below by making a decree for money against Musammat Subhadra with costs.

Appeal allowed.

1916

PARAM HANS
v.
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SINGH.

MISCELLANEOUS CIVIL.

Before Mr. Justice Walsh and Mr. Justice Sundar Lal.

GANGA PRASAD (PETITIONER) v. HAR NARAIN (OPPOSITE PARTY)*

1916
May, 11.

Act (Local) No. II of 1901 (Agra Tenancy Act), sections 58 and 177 (e) — Suit for ejectment—Question of proprietary title—Appeal—Jurisdiction.

In a suit for ejectment under section 58 of the Tenancy Act, the defendant denied the plaintiff's title and set up another man as his landlord. The court of first instance decreed the claim.

Held, that an appeal from this decision lay to the District Judge under section 177 (e) of the Act, inasmuch as the question of the plaintiff's proprietary title was put in issue in the court of first instance and was a matter in issue in the appeal.

THE facts of this case are fully set forth in the judgement of the Court.

The petitioner was not represented.

Munshi *Lakshmi Narain*, for the opposite party.

SUNDAR LAL, J.—This is a reference under section 195 of Act II of 1901 (United Provinces), made by the District Judge of Budaun, under the following circumstances:—

The plaintiff Har Narain avers that he is the zamindar and owner of two plots of land Nos. $\frac{1}{2}$ ⁷ and $\frac{5}{3}$ ² in patti Muhammad Ali in *mahal* Altaf Husain of mauza Ganaur of which the defendant Inderman is a non-occupancy tenant under the plaintiff. He sues for the ejectment of the said defendant under section 58 of Act II of 1901 (United Provinces). The second defendant to the suit is one Ganga Prasad *alias* Gangola, who, according to the plaint, is colluding with defendant No. 1 and has been put in possession of the said land by the defendant No. 1. Under section 64 of the Agra Tenancy Act (II of 1901), in all suits for ejectment any person in possession claiming through the tenant may be joined as a party to the suit. Ganga Prasad *alias*

* Civil Miscellaneous No. 62 of 1916.