

consistently with the well-known rules establishing practice in India, their Lordships see no reason to doubt that it will receive considerate attention by the Court before whom it is brought.

Their Lordships will humbly advise His Majesty that the appeal be dismissed.

Solicitor for the appellants : *H. S. L. Polak.*

Appeal dismissed.

1921

MUHAMMAD
HAFIZ
v.
MUHAMMAD
ZAKARIYA.

APPELLATE CIVIL.

Before Mr. Justice Walsh and Mr. Justice Wallace.

ASHARFI LAL (PLAINTIFF) v. MUSAMMAT NANNHI AND OTHERS
(DEPENDANTS)*

1921
July, 12.

Act No. I of 1872 (Indian Evidence Act), section 70—Attested document—Admission of execution in course of suit—Summoning of attesting witnesses not necessary.

Where execution of a document is admitted by the party to a suit against whom it is produced in evidence, there is no need to prove it formally, even though it may be a document attestation of which is required by law. *Jogendra Nath v. Nitai Churn (1)* and *Abdul Karim v. Salimun (2)* referred to.

THIS was a suit based upon two mortgage bonds. For the purposes of this report, the only material issue in the case was whether the bonds in suit had been properly proved or not. On this point the finding of the court of first instance was—

“The law requires attestation of witnesses on a mortgage-deed mainly to safeguard fraud. In India where many of the executants of the mortgage-deeds are *pardanashin* ladies such safeguards are very necessary, but in a case where the execution of a document is admitted no question of fraud arises, and to prove attestation by witnesses is simply to satisfy the technicality of law. In the present case the Musammats executants admit execution of the mortgage deeds in suit. Habib Shah, apparently a kinsman of theirs, states that he identified the said Musammats at registration. Thus there is no doubt about the fact that the Musammats executants did execute the deeds in suit,

* Second Appeal No. 1841 of 1919, from a decree of Muhammad Ziaul Hasan, Additional Subordinate Judge of Budaun, dated the 22nd of August, 1919, reversing a decree of Muhammad Junaid, Munsif of East Budaun, dated the 81st of August, 1918.

(1) (1908) 7 C. W. N., 884.

(2) (1899) I. L. R., 27 Cal., 190.

1921

ASHARFI LAL
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NANNHI.

and the pen marks on the margin of the said deeds are those of Musammats.

“To satisfy the requirements of law we have the evidence of Thakurdas for the bond of Rs. 150 and that of Lala Basdeo for that of Rs. 50. They are marginal witnesses to the said bonds, and swear that Musammats executed the bonds in their presence. No doubt the two Musammats were in *doolies*, but being of mendicant caste, it is not improbable to imagine that they were not the strict followers of *parda* system.

“The force of the Privy Council ruling on the point has been nullified by Act No. XXVI of 1915, section 2 of which lays down that a mortgage or gift shall not be deemed invalid by reason only that any person who purported to attest as a witness did not see the executant sign it, provided that such person before signing his name on the instrument received from the executants a personal acknowledgment of the same. The latest Privy Council ruling on the point, reported in 16 A. L. J., page 409, makes no mention of the said Act, and I think it must be read in the light of the latest Act on the point. For the said reasons I decide the issue in plaintiff's favour.”

The defendants appealed, and on this appeal the lower appellate court arrived at an opposite conclusion. It found:—

“In view of the rulings of *Chidambaram Chettyar v. Subbaragava Sastri* (1) and *Ganga Pershad Singh v. Ishri Pershad Singh* (2), a Full Bench case, I must hold that no valid mortgages were created by the bonds in suit. The evidence shows that none of the attesting witnesses for either bond saw the executants put their signatures on the deeds in suit. The learned pleader for the plaintiff respondent himself did not try to support the lower court's judgment on evidence. His point was that when the executants did not deny the execution of the bonds in suit they must be held to be valid. The question, however, is not whether the bonds in suit are genuine or false, but whether or not any valid mortgages were legally created by them. In the case of *Radha Shyam v. Chummi* (3) it was held that a document which was not executed in the manner prescribed by section 59

(1) (1912) 16 Indian Cases, 207. (2) (1918) I. L. R., 45 Calc., 748.

(3) (1916) 14 A. L. J., 361.

of the Transfer of Property Act did not operate as a mortgage, notwithstanding that the mortgagor did not deny the execution thereof. The learned Munsif refers to Act XXVI of 1915 and says in his judgment that under section 2 of the Act it is sufficient if the executant acknowledges execution of the deed in presence of a marginal witness; but this is not the case here. None of the witnesses says that the executants acknowledged execution before him."

The plaintiff appealed to the High Court.

Mr. *J. M. Banerji*, for the appellant.

Mr. *Muhammad Yusuf*, for the respondents.

WALSH and WALLACH, JJ. :— We think this appeal must be allowed. The finding of fact is that none of the attesting witnesses saw the executants put their signatures on the deeds. We cannot interfere with this finding. It seems to us somewhat narrow and pedantic, inasmuch as they were present and one would have thought that it was not unreasonable to presume that they saw what they were there to see. But this question is irrelevant. It does not matter whether they proved it or whether they did not. There is an admission of the execution of this document on the pleadings in the case, and section 70 of the Evidence Act, which appears to have been overlooked in the courts below, provides that the admission of a party to an attested document of its execution by himself shall be sufficient proof of its execution as against him, though it be a document required by law to be attested. That section, placed where it is amongst the sections which provide for the calling of attesting witnesses, clearly could only have been intended to dispense with calling such witnesses, and with proving formal execution in a case where the party has admitted it. We are not prepared to hold that that section is limited to an admission made in the course of a suit; but that is immaterial for this purpose. (*Vide Jogendra Nath v. Nitai Churn* (1), and *Abdul Karim v. Salimun* (2).) The appeal is well-founded and must be allowed and the decree of the first court restored with costs here and below.

Appeal allowed.

(1) (1903) 7 C. W. N., 334.

(2) (1899) I, L. R., 27 Cal., 190.