

*Before Sir Grimwood Mears, Knight, Chief Justice, and
Mr. Justice King.*

BALKARAN SINGH AND OTHERS (PLAINTIFFS) *v.* DULARI
BAI AND OTHERS (DEFENDANTS).*

1926
June, 25.

Act No. I of 1872 (Indian Evidence Act), section 90—Presumption—Document more than thirty years old—Appeal—Pleadings—Omission of points which should have been raised and made subject of an issue in the trial court.

The presumption allowed by section 90 of the Indian Evidence Act, 1872, that a document more than thirty years old was executed by the party by whom it purported to be executed also includes the presumption that where the signature of the executant purports to have been made by the pen of a scribe the scribe was duly authorized to sign for the executant. *Haji Sheikh Bodha v. Sukhram Singh* (1), followed.

An appellate court ought not, as a matter of practice, to allow points to be raised before it which should have been alleged in the pleadings and made the subject of an issue and argument and of decision by the trial court and also stated in the grounds of appeal clearly and directly.

THE facts of this case, so far as they are necessary for the purposes of this report, appear sufficiently from the judgement of the Court.

Munshi *Shiva Prasad Sinha*, for the appellants.

The respondents were not represented.

MEARS, C. J., and KING, J. :—We are of opinion that this appeal must be allowed. Musammatt Dulari, who was the only appellant before the Subordinate Judge of Mirzapur, appears to have rested her appeal upon a preliminary point, that no evidence had been produced to prove that “the person signing the mortgage-deed (Bikram Singh) had authority to do so from the real executant.” The position of Musammatt Dulari was that she had “come into this suit for redemption by reason of her having bought from the auction-purchaser some portion of the mortgagee’s

* Second Appeal No. 341 of 1924, from a decree of H. Beatty, Subordinate Judge of Mirzapur, dated the 29th of November, 1923, reversing a decree of Nand Lal Singh, Munsif of Mirzapur, dated the 8th of May, 1923.

(1) (1924) I.L.R., 47 All., 31.

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rights. The issues, which were framed by the learned Munsif, were framed in the main upon her written statement. That written statement contains no allegation whatever of any want of authority in Bikram Singh. It was on this one point alone that her appeal was allowed. We have repeatedly stated in this Court that lower appellate courts and this Court sitting either in Letters Patent or in second appeal, ought not to entertain points which should have been alleged in the pleadings and made the subject of an issue and of argument and of decision by the trial court and also stated in the grounds of appeal clearly and directly. The trial Judge does not have an opportunity of giving a decision upon a point such as this and it is not fair to a lower court to upset an appeal on a ground never submitted to it. We, therefore, allow this appeal, but we deem it necessary to call attention to the case reported in *Haji Sheikh Bodha v. Sukhram Singh* (1), where it was decided that the presumption which is allowed by section 90 of the Evidence Act, that a document more than thirty years old was duly executed by the party by whom it purported to be executed also includes the presumption that where the signature of the executant purports to have been made by the pen of a scribe the scribe must be duly authorized to sign for the executant. In the case under appeal the authority of Bikram Singh who purported to act under the authority of Har Dayal Singh and Musammatt Khatua in the execution of the document was challenged. The mortgage-deed was of the year 1876 and we are of opinion that there was a presumption, rebuttable no doubt by evidence, but nevertheless a presumption, in favour of due and proper execution of that document by a person having authority to execute it.

(1) (1924) I.L.R., 47 All. 31.

We, therefore, allow this appeal, set aside the decree of the lower appellate court, and restore that of the court of first instance with costs in all courts.

Appeal allowed.

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APPELLATE CRIMINAL.

Before Mr. Justice Walsh and Mr. Justice Pullan.

EMPEROR v. HAR PIARI AND OTHERS.*

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June, 30.

Act No. XLV of 1860 (Indian Penal Code), section 201—
Section not inapplicable to principal offender—Unexplained death by poison of member of a family—Presumption as to complicity of other members—Act No. I of 1872 (Indian Evidence Act), section 24—Confession made to a mukhia, admissibility of.

A violent presumption arises when a man dies in his own house surrounded by his own family, and poisoned, shortly after eating food which must have been prepared for him by his wife, and no explanation is forthcoming from the members of the household as to what had happened to him to cause his death. And where, in addition to such violent presumption, the persons accused are proved to have been guilty of persistent lying in an attempt to account for the absence of the deceased and are also shown to have hidden the corpse to save themselves, the presumption becomes a certainty.

A person who has actually committed a crime himself—whether murder or any other crime—is none the less guilty of removing traces thereof, if it is proved against him that he has done so, because he was the person who actually committed the offence. *Empress v. Kishna* (1) and *Queen-Empress v. Dungar* (2), overruled.

The mere removal of a body from one place to another so as to remove traces of the place where the murder took place, or indications which implicate a particular individual, even though such removal does not remove undoubted evidence

* Criminal Appeal No. 342 of 1926, by the Local Government, from an order of Gopal Das Mukerji, Sessions Judge of Mainpuri, dated the 26th of March, 1926.

(1) (1880) I.L.R., 2 All., 713.

(2) (1886) I.L.R., 8 All., 252.