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Babu Lal (1). In that case, however, the original judgment- debtor had died and the appellant Lachhoo had been brought on the record as his legal representative, and had thus become the judgment-debtor. The case is therefore distinguishable.

For the reasons given above we allow this second appeal and setting aside the decree of the lower appellate court restore that of the court of first instance. The appellant shall have his costs throughout.

APPELLATE CIVIL

1938

December, 15

Before Mr. Justice Bennet and Mr. Justice Verma

SHYAM LAL (PLAINTIFF) *v.* LAKSHMI NARAIN AND OTHERS (DEFENDANTS)*

Evidence Act (I of 1872), section 68—Mortgage deed—Attesting witness called but due "attestation" not proved—Whether deed inadmissible in evidence for any purpose—Acknowledgment of earlier mortgage contained in the deed—Admissibility in evidence to prove the acknowledgment for saving limitation on the earlier mortgage—Mortgage of joint family property—Rate of interest.

In a suit upon a mortgage, a recital of the mortgage in a deed of a subsequent mortgage by the same mortgagor was relied on as an acknowledgment saving limitation for the suit. The execution of this later deed was proved, and one of the "attesting" witnesses was called and examined but his evidence failed to establish that the deed had been duly "attested" as defined in section 3 of the Transfer of Property Act. The question was whether the deed could be used as evidence for the purpose of proving the acknowledgment:

Held, that although the document could not be used in evidence as a mortgage deed, which required attestation, yet it was not prevented by section 68 of the Evidence Act from being used in evidence for the purpose of proving the acknowledgment. The words, "it shall not be used as evidence", in section 68 should not be held to imply the words "it shall not be used as evidence for any purpose"; the words are to be held merely as applying to a suit for enforcement of the document, leaving the ordinary provisions of law in section 67 to apply where the document is to be used for any other purpose. The

*Second Appeal No. 145 of 1936, from a decree of S. B. Singh, Additional Civil Judge of Farrukhabad, dated the 19th of October, 1935, confirming a decree of G. D. Sahgal, Additional Munsif of Kanauj, dated the 30th of April, 1935.

(1) [1935] A.L.J. 74.

mere fact that a particular document requires to be executed with attestation and that attestation must be proved for the purpose of giving legal effect to the document has no bearing on the question as to what proof should be given of the document where it is tendered only to prove an admission in writing.

Held, also, that in the absence of proof of legal necessity to borrow at a higher rate of interest upon a mortgage of joint family property, the rate of one per cent. per mensem simple interest is a fair and reasonable rate of interest to be allowed by the court.

Mr. *Babu Ram Avasthi*, for the appellant.

Messrs. *G. S. Pathak* and *J. Swarup*, for the respondents.

BENNET and VERMA, JJ.:—This is a second appeal by the plaintiff whose suit for enforcement of a simple mortgage against defendant No. 1 has been dismissed by both the lower courts. The defendant No. 1 Lakshmi Narain is a minor and is the son of one Har Lal who was the son of one Bhagwan Din. On the 7th of February, 1918, the plaintiff advanced Rs.600 to Bhagwan Din on a simple mortgage, repayment to be made within two years and the rate of interest was 0-11-9 per cent. per mensem with six-monthly rests. The area mortgaged was a share of 20 biswansis. In 1929 Har Lal made a gift of 5 kachwansis to defendants Nos 2 and 3, Jiwa Lal and Chammi Lal. On the 21st of February, 1930, Har Lal executed a simple mortgage deed of $9\frac{3}{4}$ biswansis to defendants Nos. 2 and 3 for Rs.1,000 and he left of this consideration Rs.900 with defendants Nos. 2 and 3 to pay the plaintiff. This was paid to the plaintiff by these defendants on the same date, 21st February, 1930. Har Lal died before the present suit was brought on the 20th of August, 1934, and the present suit is brought to realise the balance due to the plaintiff on the mortgage of 1918, the amount claimed being Rs.1,160. One Sri Ram was first of all appointed guardian *ad litem* of the minor defendant No. 1 and he admitted the claim, but later he was displaced as guardian by the mother of the minor who

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contested the suit. One of the issues was whether the suit was barred by limitation, and the courts below have held that the suit was barred by limitation against defendant No. 1. The trial court granted a decree for sale against defendants Nos. 2 and 3 so far as the property, the subject of the gift of 1929, was concerned. The plaintiff appealed to the lower appellate court and that court dismissed his suit on the ground of limitation. The main question in second appeal is limitation. The suit of the plaintiff was brought on the 20th of August, 1934, which was more than 12 years from the date on which payment should have been made under the mortgage deed of 1918, that is, on the 7th of February, 1920. The plaintiff relied for the saving of limitation on an admission contained in the mortgage deed of the 21st of February, 1930, executed by Har Lal in favour of defendants Nos. 2 and 3. That admission was contained in the following words in regard to the property in suit of which $9\frac{3}{4}$ biswansis were mortgaged by this mortgage deed of the 21st of February, 1930: "and excepting the charge of the mortgage executed by myself in favour of Shyam Lal dated 7th February, 1918, and registered on the 8th February, 1918, in book No. 1, volume 124 at page 129, is quite free from all other transfers and liabilities. Now for the purpose of paying the incumbrance of the said mortgage . . . ." It may be noted that the very purpose of this deed of 1930 was to pay off the mortgage bond of the 7th of February, 1918. On the same date an endorsement was made on the mortgage deed of the 7th of February, 1918, to the following effect: "To-day, the 21st of February, 1930, a sum of Rs. 900 has been received towards this mortgage deed from Har Lal, son and heir of Bhagwan Din deceased, through Jiwa Lal and Chammi Lal. A receipt for it has been given to-day to Jiwa Lal and Chammi Lal also. Signed Har Lal by his own pen." There is no signature of the plaintiff on this endorsement. On behalf of the plaintiff reliance is placed on

the acknowledgment by Har Lal the predecessor of defendant No. 1 in the mortgage deed of the 21st of February, 1930. This is a clear acknowledgment of liability under the mortgage deed of the plaintiff. It is true that that mortgage deed further states: "I have left a sum of Rs.900 for paying the mortgage aforesaid and bond debts in favour of the mortgagees. The mortgagees should pay the money to Shyam Lal aforesaid and obtain receipt from him." The plaintiff, however, did not accept the payment of Rs.900 as full discharge of the obligation. The fact that Har Lal intended that he should, does not prevent the acknowledgment of Har Lal being a good acknowledgment for the purpose of saving limitation.

The objection which has been taken to the acknowledgment is that it is not admissible in evidence because the mortgage deed of 1930 has not been proved in accordance with section 68 of the Evidence Act. The plaintiff called an attesting witness Amanatullah and he made a statement which was unsatisfactory and the plaintiff therefore got permission to cross-examine him. The witness began by stating that Har Lal executed the mortgage dated the 21st of February, 1930, in favour of Jiwan Lal and Chammi Lal. "I and Bhajan Lal attested it ..... Har Lal was present when we two attested the deed. I do not remember if I asked Har Lal whether he had executed that mortgage deed. It is possible that I did ask. He had already signed." In cross-examination he said: "At the time of execution I saw who Har Lal was and did not know otherwise ..... On seeing the signature I recognized that it was Har Lal's signature. I inquired all about this document after attesting it." Now we agree with the court below that this evidence does not satisfy the requirements of section 68 of the Evidence Act and section 3 of the Transfer of Property Act which gives the definition of "attested". The definition of "attested" requires that the attesting witness should see the executant sign or mark the document or someone on his

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behalf do so, or receive a personal acknowledgment from the executant and should sign the instrument in the presence of the executant. Having failed with the attesting witness under section 68 of the Evidence Act it was open to the plaintiff to prove the mortgage deed of 1930 by other evidence. If, however, the document is to be proved as a mortgage deed then that other evidence must prove the attestation. The plaintiff produced a witness Lakshmi Narain and he stated: "Har Lal executed the mortgage deed in favour of Jiwa Lal and Chammi Lal in my presence. Har Lal signed it in my presence. Seeing the mortgage deed dated the 21st of February, 1930, the witness said that this is that document." This evidence does not mention anything about the attesting witnesses who were presumably called in afterwards. Therefore the evidence of Lakshmi Narain does not prove that there was attestation of this document. The evidence of the plaintiff himself was given but it is similar to that of Lakshmi Narain. The conclusions of the lower court therefore are correct on this question of what the evidence proves and we agree that the evidence does not prove attestation of this mortgage deed of 1930. The evidence, however, does prove that Har Lal executed this mortgage deed. The question which arises therefore is whether the mortgage deed is admissible to prove the admission contained in it or whether it cannot be used for that purpose because it is a mortgage deed and would require to be proved to have been duly attested in a suit to enforce the document as a mortgage deed.

Admissions are dealt with by sections 18 to 23 of the Evidence Act and section 18(2) refers to statements made by a person from whom the parties to the suit have derived their interest in the subject-matter of the suit. An admission may be a statement oral or documentary and in general an admission in a document is proved under section 67 of the Evidence Act which provides as follows: "If a document is alleged to be

signed or to have been written wholly or in part by any person, the signature or the handwriting of so much of the document as is alleged to be in that person's handwriting must be proved to be in his handwriting." Section 68 on the other hand states: "If a document is required by law to be attested it shall not be used as evidence until one attesting witness at least has been called for the purpose of proving its execution, if there be an attesting witness alive and subject to the process of the court and capable of giving evidence." The question at issue is whether the words "it shall not be used as evidence until one attesting witness at least has been called" etc. are to be held to imply the words "it shall not be so used as evidence for any purpose", or whether the words are to be held merely as applying to a suit for enforcement of the document, leaving the ordinary provisions of law in section 67 to apply where the document is to be used for any other purpose.

On general considerations it would appear difficult to hold that section 68 must always apply to the use of a document in evidence which is required by law to be attested. For example, supposing such document contained words which amounted to a criminal libel or to sedition and supposing the document instead of being attested had not been attested at all, could it be said that no use could be made of the document for the purpose of a criminal prosecution or a civil suit for damages for libel? If such a view was to be taken of the law then by merely having recourse to putting a libel in the form of a mortgage deed or will the law for libel could be evaded. Moreover it seems unlikely that it should be necessary in a criminal trial for sedition or libel to have to prove by calling attesting witnesses the document containing the words complained of. It is true that this was originally the view taken by the strict rules of evidence in English law as is shown by *R.* v. *Jones* (1), where the indenture was put in upon an indictment against an apprentice for a fraudulent enlistment,

(1) (1777) 1 Lea. 174.

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and also in *Manners* v. *Postan* (1) where the deed was used in evidence collaterally. On these rulings Taylor on Evidence, tenth edition, volume II, paragraph 1844, states: "The rule that where an attesting witness is necessary to the validity of an instrument, a person who was such witness must be called, applies whatever be the purpose for which the instrument is produced." The paragraph further proceeds: "Moreover, the party calling him is not precluded from giving further evidence, in case he denies, or does not recollect, having seen the instrument executed." Now the plaintiff has complied with this latter rule which is embodied in section 71 of the Indian Evidence Act. The further objection, however, is taken that the additional evidence ought to prove attestation. Now Taylor cannot be quoted as an authority for that proposition. What Taylor states indicates that further evidence should be given to prove the execution and not the attestation. Similar passages occur in other works on Evidence such as Best.

Learned counsel next referred to *Shib Chandra Singha* v. *Gour Chandra Pal* (2). At page 139, column 1, reference is made to two mortgage bonds which were executed by Kasinath and his widow defendant No. 4 in which it is stated that the mortgagors had not created any subordinate interest or encumbered the property in suit which they mortgaged by those deeds. The documents were proved not by any attesting witness to them but by evidence of persons who identified the signature of the executants. It appears therefore that in regard to these mortgage bonds an attesting witness was not called. On page 140 the Court, following Taylor on Evidence paragraph 1844, referred to the case of *Manners* v. *Postan* (1) already mentioned and held that the mortgage bonds were not admissible in evidence apparently for the purpose of proving a statement contained in them. In *Awadh Ram Singh* v. *Mahbub Khan* (3) there was a suit

(1) (1803) 4 Esp. 239. (2) (1922) 27 C.W.N. 134.
(3) A.I.R. 1924 Oudh. 255(259).

for pre-emption and two mortgage deeds were produced for what is briefly mentioned as a collateral purpose, and the Court said that they should be proved in accordance with section 68 of the Evidence Act and then the defence counsel admitted execution. There was practically no discussion of the question in this ruling.

In this High Court there are the following rulings: In *Mathura Prasad* v. *Chhedi Lal* (1), BANERJI, J., sitting singly had the case of a bond which purported to be a mortgage bond and the suit was brought in the court of first instance to enforce the mortgage. That court held that the document had not been duly attested and could not be treated as a mortgage. In first appeal the plaintiff abandoned the claim for a sale on the mortgage and asked for a simple money decree on the document as proving a debt. The point was taken in second appeal that the document was not admissible in evidence for any purpose under section 68 of the Evidence Act. The learned Judge observed: "I am unable to agree with this contention. As a mortgage it was undoubtedly necessary that the document should be attested by at least two witnesses and that one of those witnesses should be called." He then stated that the document was shown by the evidence not to have been duly attested and that it could not be treated as a mortgage and stated: "It is only in the case of a document which required to be attested and was attested that under section 68 of the Evidence Act it was necessary to call an attesting witness. As the document in this case was not so attested section 68 has no application and the case in my opinion fell within the purview of section 72 of the Evidence Act. For a simple money bond it is not necessary that it should be attested by witnesses. As the bond in this case was not so attested it was a valid document as a simple money bond and was admissible in evidence."

In *Moti Chand* v. *Lalta Prasad* (2) a similar point arose before a Bench of this Court in regard to a docu-

(1) (1915) 13 A.L.J. 553. (2) (1917) I.L.R. 40 All. 256.

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ment executed as a mortgage deed. One of the attesting witnesses was dead and the other though summoned was not produced. It was held that by the terms of section 68 of the Evidence Act, when its provisions are not complied with a document cannot be used as evidence at all as a document either requiring attestation or in fact attested. But this does not prevent it from being used in evidence as something else or for any other purpose (page 264).

In *Jiwan Singh* v. *Dalip Singh* (1) there was a case before a Bench of this Court, which was somewhat similar to the present, where the plaintiff claimed a sum due under a mortgage deed of 6th January, 1912, and relied on an acknowledgment to bring the case within limitation, the acknowledgment being made in a mortgage deed of 27th March, 1914. In the court below reliance had been placed on the evidence of one Ram Chandra, who was the scribe, to prove the execution of this mortgage of 1914. The Court said: "Section 68 of the Evidence Act, in our opinion, lays down that a document which is required by law to be attested cannot be used as evidence until one attesting witness has been called, or, if no attesting witness is alive, by other means set out in the following sections of the Evidence Act. In this case no attempt was made to prove the document by either calling in an attesting witness, or even putting any question to Ram Chandra regarding the attesting witnesses or attestation. We are therefore of opinion that the plaintiffs' suit is barred by limitation and that this appeal must succeed." Now in this ruling there is no discussion of the point as to whether the document can be used for any other purpose such as an admission. The learned Judges also had before them a case where no attesting witness was called. In the present case an attesting witness has been called. And moreover the learned Judges did not refer to the previous rulings of this Court which we have mentioned

(1) [1929] A.L.J. 588.

and presumably those rulings were not brought to their notice. There is therefore a conflict between the decisions of this Court on the point and it is open to us to follow the rulings where the point has been more fully discussed.

Learned counsel for the respondents argued that the Evidence Act reproduced the law of England. That is not correct because in the preamble of the Evidence Act it is stated: "Whereas it is expedient to consolidate, define and amend the law of evidence; it is hereby enacted as follows." It does not follow, therefore, that because a rule of evidence may be in force in England it is embodied in the Evidence Act. The Evidence Act codified the law and we should have expected that if section 68 was intended to express that a document required by law to be attested should not be used as evidence *for any purpose* until one attesting witness at least had been called, then the words "for any purpose" would have found a place in the section. Those words are not in the section and therefore we conclude that this was not the intention of the framers of the Act. It is not possible to see why an admission in one document should require a different kind of proof from an admission in another document. The mere fact that one of the documents requires to be executed with attestation and that attestation must be proved for the purpose of giving legal effect to the document does not appear to have any bearing on the question as to what proof should be given of the document where it is tendered merely to prove an admission in writing. For these reasons we consider that the view of the appellant is correct and that section 68 does not apply to the case of a document which is merely to be proved for the purpose of an admission. We therefore consider that the acknowledgment in the deed of the 21st of February, 1930, did save limitation in the present case and that the suit of the plaintiff is within limitation against defendant No. 1. The trial court granted a decree against defendants Nos. 2 and 3 only in regard to the property gifted

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and this decree was not enlarged by the lower appellate court. As regards the property which was mortgaged to those defendants the title of the equity of redemption remains in defendant No. 1. The mortgage to defendants Nos. 2 and 3 will not affect the rights of the plaintiff to get a decree also in regard to this property. Even in English law there could not be any objection of limitation taken by defendants Nos. 2 and 3 because they are claiming under the mortgage deed in question of the 21st of February, 1930, and that is one of the exceptions laid down by Taylor in paragraph 1845, No. 5. We therefore grant a decree to the plaintiff for the sale of the whole of the property comprised in his mortgage of 7th February, 1918.

One further question remains for consideration and that is the claim which was made by defendant 1 in regard to interest. The defendant 1 is the son of Har Lal and the grandson of Bhagwan Din who executed the mortgage in question. Two issues were framed on the subject of interest: "(6) Is the rate of interest claimed by the plaintiff hard and excessive?" and "(8) Was there any legal necessity to borrow the amount in dispute at the rate of interest claimed?". The trial court found that the rate of interest was not excessive and the debt was taken to pay a previous loan which was very old. The court did not come to any finding that there was any legal necessity for the high rate of interest. The lower appellate court did not deal with the point because it dismissed the appeal of the plaintiff on the ground of limitation. It does not appear that there was any legal necessity for the high rate of interest. The interest was 0-11-9 per cent. per mensem compound interest with six-monthly rests. We consider that under these circumstances we should apply the rule laid down by their Lordships of the Privy Council in *Ram Bujhawan Prasad* v. *Nathu Ram* (1). In that case in the absence of legal necessity to prove a higher rate or compound interest their Lordships reduced the rate to 1

(1) (1922) I.L.R. 2 Pat. 285.

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per cent. per mensem simple interest. Applying that rate and taking into account the payment of Rs.900 made on 21st February, 1930, it appears that the amount due to the plaintiff will be less than the Rs.1,160 which has been granted by the trial court. The office will make a calculation of the amount now due to the plaintiff. We allow plaintiff proportionate costs in all courts. A decree will be prepared in the terms of order XXXIV, rule 4 for the whole of the property mortgaged, with costs against all the defendants. The period for payment will be fixed as six months from the date of our order. The rate of interest *pendente lite* and future interest till the end of the six months will be at 12 per cent. per annum simple interest and thereafter at 6 per cent. simple interest per annum.

APPELLATE CRIMINAL

Before Mr. Justice Allsop

EMPEROR *v.* RAM NARESH AND OTHERS*

1938

December, 15

Confession—Confession contained in written petition of surrender to Magistrate—Not recorded and verified by Magistrate—Admissibility in evidence—Evidence Act (I of 1872), sections 21, 24, 25, 26—Criminal Procedure Code, sections 164, 364—Criminal Procedure Code, section 1(2)—Special law—Relevancy of evidence not affected by the Code unless where specifically so stated—Public policy.

Two persons, who along with some others were accused of a crime, went into a Magistrate's court, confessed their guilt and asked that they should be arrested and sent to jail so that they should not fall into the hands of the police. The Magistrate sent for a petition writer, who went into the court room and took down the petition containing the confession to the dictation of the two persons, and the petition was then signed by them. The confession was not recorded and verified by the Magistrate in accordance with sections 164 and 364 of the Criminal Procedure Code:

Held, that the confession was admissible in evidence, under section 21 of the Evidence Act; and as it did not fall within

*Criminal Appeal No. 429 of 1938, from an order of K. N. Wanchoo, Sessions Judge of Benares, dated the 14th of June, 1938.