in both the courts below. The parties will bear their own costs in this Court.

Appeal partly allowed.

1927

MATHURA v. H. H. MAHARANA SIR UDAI BHAN SINGH.

APPELLATE CIVIL.

Before Sir Louis Stuart, Knight, Chief Judge and Mr. Justice Muhammad Raza.

LAL BAHADUR SINGH (PLAINTIFF-APPELLANT) *v.* RAMESHWAR PRASAD AND ANOTHER (DEFENDANTS-RESPONDENTS).*

1927 *September, 22.*

Transfer of Property Act (IV of 1882), section 59—Attestation of a deed—Signatures of witnesses to a mortgage-deed affixed with their consent by another—Mortgage-deed, whether properly attested—Indian Evidence Act (I of 1877), section 90—Executant, scribe, attesting witness and sub-registrar all dead—Presumption of genuineness of mortgage-deed—Deed of further charge—Stipulation in a deed that, in default of its payment, its amount will be paid at the time of redeeming other land mortgaged with him, whether creates a charge on the property.

Held, that where the signatures of witnesses to a mortgage bond, who had witnessed the execution of the deed, are affixed for them to the deed by another person with their consent, the deed is properly attested within the meaning of section 59 of Act IV of 1882. [*Sasi Bhusan Pal* v. *Chandra Peshkar* (1), followed.]

Where all the executants of a deed, its scribe and attesting witnesses are dead, and the deed is registered and the executants admitted execution and receipt of consideration according to the endorsement of the sub-registrar, who is also dead, there is a very strong case for applying the presumption permitted by section 90 of the Evidence Act.

Where it is stipulated that the executant of a deed shall pay the amount mentioned therein with interest within one

*First Civil Appeal No. 26 of 1927, against the decree of Damodar Rao Kelkar, Subordinate Judge of Rae Bareli, dated the 11th of November, 1926, decreeing the plaintiff's claim.

(1) (1906) I.L.R., 33 Calc., 861.

1927

LAL BAHADUR SINGH v. RAMESHWAR PRASAD.

year and, in case of default, he shall pay in a lump sum at the time of redeeming land mortgaged under a separate deed to him, adding that that land will not be redeemed without the payment of the aforesaid amount with interest, the deed does create a charge on the property. [*Musammat Rais-un-nisa* v. *Zorawar Sah* (1) and *Har Prasad* v. *Ram Chandra* (2), referred to.]

Mr. *Ram Bharose Lal*, for the appellant.

Dr. *J. N. Misra*, for the respondents.

STUART, C. J., and RAZA, J. :—There are a large number of pleas taken in the grounds of appeal, but the learned Counsel for the appellant has confined himself to arguments on only a certain number of these pleas. We state first of all the points upon which he has argued the appeal.

He has argued that the deed exhibit A12 is bad for want of attestation, that it does not create a charge upon the mortgaged property, and that post diem interest cannot be allowed upon it.

He has argued that no interest should be awarded except for seven and half months on the sum of Rs. 5,315-10-0 less Rs. 750 in respect of exhibit A6.

He has argued that his client is entitled to compensation in respect of green trees cut. These are whole of the points upon which the appeal has been argued. Other points were abandoned. Our decision is as follows.

Exhibit A12 was executed on the 5th of December, 1885. All the executants are dead. The scribe is dead. The persons who purport to have been the attesting witnesses are dead. The deed was registered. The executants admitted execution and receipt of consideration according to the endorsement of the sub-registrar, who is also dead. There is thus a very strong case for applying the presumption permitted by section 90 of the Indian Evidence Act. The learned Counsel's objection on the

(1) (1926) I.L.R., 1 Luck., 92. (2) (1921) I.L.R., 44 All., 37.

1927

LAL BAHADUR SINGH v. RAMESHWAR PRASAD.

question as to attestation is based upon an allegation that one of the attesting witnesses, Drigpal Singh, did not sign the deed. But this allegation is not correct. An examination of the original deed, written in the handwriting of the scribe Dwarka Prasad in Urdu, shows: "Drigpal Singh, caste Bais, resident of village Omipur, pargana Surehi, tahsil Dalmau, district Rae Bareli, by the pen of Dwarka Prasad" and underneath is written in Urdu the word *alamat* which signifies his mark, and this is followed by two scrawled Hindi letters P and L. Unfortunately in the translation in the paper-book the translator has omitted to translate the word *alamat* and has omitted to record the two scrawled letters P and L. The construction which we place on this portion of the document is that P and L, which would be the nearest approach, as we take it, to a signature, that Drigpal Singh was capable of making, were attached to signify his signature and we find that the attestation is perfectly good. We are in agreement with the view taken by a Bench of the Calcutta High Court in *Sasi Bhusan Pal* v. *Chandra Peshkar* (1). It was held by the Bench, which decided that case, that where the signatures of witnesses to a mortgage bond, who had witnessed the execution of the deed, were affixed for them to the deed by another person with their consent the deed was properly attested within the meaning of section 59 of Act IV of 1882.

Stuart, C. J. and Raza, J.

In respect to the deed creating a charge upon the property we find that it did create a charge on the property. A similar question was discussed in a decision of a Bench of this Court in *Musammat Rais-un-nisa* v. *Zorawar Sah* (2) in which the view of the Full Bench decision of the Allahabad High Court in *Har Prasad* v. *Ram Chandra* (3) was accepted as the correct view upon the point. In respect of the question of post diem inter-

(1) (1906) I.L.R., 33 Calc., 861. (2) (1926) I.L.R., 1 Luck., 92.
(3) (1921) I.L.R., 44 All., 37.

1927

LAL BAHADUR SINGH v. RAMESHWAR PRASAD.

Stuart, C. J. and Raza, J.

est it is sufficient to quote a translation of the passage of the deed in question :—

> "It is stipulated that we shall pay the aforesaid amount with Rs. 2 per cent. per month as interest within one year, in case of default we shall pay the above amount with interest, in a lump sum, at the time of redeeming the *sir* land and groves, etc., detailed below, situate in villages Sulakhiapur and Bela Bhela known as Utter Para, pargana, tahsil and district Rae Bareli, which have been mortgaged in lieu of Rs. 6,700 to the said Pandey by means of a separate mortgage-deed with possession, dated the 12th of November, 1877, and the *sir* lands, etc., situate in village Sulakhiapur and Bela Bhela, known as Utter Para, pargana, tahsil and district Rae Bareli, will not be redeemed without the payment of the aforesaid amount with interest."

The appellant's plea in respect to the portion of the decree, which allows interest by way of damages against him in respect of Rs. 5,315-10-0 less Rs. 750 for a period longer than the period between the 12th of November, 1877, and the 15th of June, 1878, must be accepted. The facts here are as follows. The deed exhibit 1=A6 was for a consideration of Rs. 6,700. It was executed on the 12th of November, 1877. Certain *sir* lands etc., and groves were mortgaged with possession. Possession was given immediately over everything except the groves in lieu of Rs. 1,384-6-0. Possession was not given over the groves until the 15th of June, 1878, and the mortgagors agreed that in lieu of the profits of the groves between the 12th of November, 1877, and the 15th of June, 1878, interest at 2 per cent. per month would be calculated on Rs. 5,315-10-0

1927

LAL BAHADUR SINGH v. RAMESHWAR PRASAD.

Stuart, C. J. and Raza, J.

for that period and that that interest would be paid by the mortgagors at the time of redemption. The learned trial Judge having reduced the consideration by Rs. 750 has deducted Rs. 750 from Rs. 5,315-10-0. It is to be noted that no cross-objection or cross-appeal has been filed by the mortgagees. He has calculated the interest at 2 per cent. per month on Rs. 4,565-10-0 for 7½ months at Rs. 684-12-0. No objection is taken to this calculation. So far we accept his finding. But in addition he has allowed to the mortgagees interest at 12 per cent. by way of damages on Rs. 684-12-0 from the 28th of June, 1878 to the 9th of November, 1926. This amount comes to Rs. 3,984-6-6. We can find no justification for this charge.

The last plea argued by the learned Counsel was in respect of the trees. We agree with the finding of the learned trial Judge that there is no satisfactory evidence to prove that the mortgagees cut and appropriated any green trees, or that they did anything more than appropriate trees which had fallen down and trees which had withered as they were entitled under the terms of the mortgage-deed. The result is that the decree of the learned trial Judge will be slightly varied. The plaintiff-appellant will obtain possession of the mortgaged property by way of redemption against the defendants, if he pays to the defendants Rs. 56,234-4-6 up to the 9th of November, 1926, and future interest on Rs. 5,403-8-0 at 2 per cent. per month from the 11th of November, 1926, to a period of six months from that date with three-fourth costs of the suit. There will be no increase of this amount. The period within which it may be paid will be extended to six months from the date of this decree. If the amount is not paid within a period of six months from the date of this decree the plaintiff will be debarred from all rights to redeem. It is to be noted that the mortgage was a mortgage by conditional sale

1927

LAL BAHADUR SINGH v. RAMESHWAR PRASAD.

As the plaintiff has failed almost entirely we direct that he pay his own costs and the costs of the respondents in this appeal. These costs will, however, not form a portion of the main decree, but will form a portion of an additional decree.

Appeal dismissed.

REVISIONAL CIVIL.

1927
September, 22.

Before Mr. Justice Wazir Hasan and Mr. Justice Gokaran Nath Misra.

MIRZA ZAMIN ABBAS (PLAINTIFF-APPLICANT) *v.* LACHHMI NARAIN AND ANOTHER (DEFENDANTS-OPPOSITE-PARTY).*

Provincial Small Cause Courts Act (IX of 1887), second schedule, article 15—Pawning of goods—Suit for recovery of goods pawned or their value, whether a suit for specific performance—Jurisdiction of courts of small causes—Small cause courts jurisdiction to try suit for recovery of goods pawned, or their price.

A contract of pledge becomes complete when the pledgor hands over those goods to the pawnee after the receipt of money for which they have been pawned or pledged. If after the contract is complete the pawnee desires to recover the money, which he had lent to the pledgor or the pawner, or if the pawner sues for recovery of the goods pawned on condition of payment by him of the money due to the pawnee, he cannot be considered to be suing for specific performance. He is, no doubt, suing to enforce a right incidental in law to a contract of this nature. After the loan is received and the goods have been bailed the contract becomes an *executed* one. It passes from the domain of an *executory* contract into that of an *executed* contract. If subsequently anyone of the parties choose to enforce any right arising out of that contract he cannot be deemed to be suing for the specific performance of his contract and the suit is cognizable by the

*Miscellaneous Application No. 18 of 1927, against the order of Kishun Lal Kaul, Second Additional Judge of the Court of Small Causes, Lucknow, dated the 16th of March, 1927.