issue was not questioned in the grounds of appeal filed in this Court, but an application was made to us at the hearing of the appeal for permission to add a new ground challenging the correctness of the finding on issue No. 5 in the memorandum of appeal. Simultaneously with this a request was also made for reception of some additional evidence alleged to have come into existence subsequent to the decision by the lower Court. In view of the conclusion reached by us as regards the title of Hajra Khatoon we do not think it necessary to pass any orders on these applications.

For the above reasons we allow both the appeals and dismiss the claim of Hajra Khatoon, but in the circumstances make no order as to costs against her. The claim of Mohammad Zafar will be decreed on payment of Rs.500 minus his costs of suit No. 18 of 1933 and his costs of this Court in appeal No. 45 of 1934. As these costs exceed the sum of Rs.500 therefore Mohammad Zafar is not required to deposit any amount in Court and is given a decree for pre-emption of the entire property in suit without making any deposit. He will be entitled to recover the amount of such costs payable to him as are in excess of the sum of Rs.500 by execution against the vendee.

Appeal allowed.

APPELLATE CIVIL

Before Mr. Justice Bisheshwar Nath Srivastava and Mr. Justice E. M. Nanavutty

1936 *February*, 17

RAJA RAM (DEFENDANT-APPELLANT) *v.* THAKUR RAMESHWAR BAKHSH SINGH AND OTHERS, PLAINTIFFS AND OTHERS (DEFENDANTS-RESPONDENTS)*

Transfer of Property Act (IV of 1882), section 59—Evidence Act (I of 1872), section 70—Mortgage suit—Execution of mortgage deed admitted by executant—Attesting witness not produced—Deed, if sufficiently proved—Limitation—General

*First Civil Appeal No. 4 of 1934, against the decree of Pandit Bishunath Hukku, Subordinate Judge of Bahraich, dated the 20th of September, 1933.

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Clauses Act (V of 1897), section 3(59)—Mortgage deed fixing period for redemption but specifying wrong Fasli year—Intention of parties, whether to be seen—Year, whether to be calculated according to British calendar year.

Where in a mortgage suit the registered deed of mortgage is expressly admitted by the executant and his counsel on the date of issues it is not necessary for the mortgagee to call an attesting witness in proof of its execution and the deed is sufficiently proved so far as the mortgagor executant is concerned.

It is only in cases where it appears on the face of a document or it is positively made out by the evidence on the record that a document required by law to be attested has not been attested in accordance with law that section 70 of the Indian Evidence Act cannot be made applicable in spite of the admission of a party to an attested document of its execution by himself, for the simple reason that a Court cannot shut its eyes to obvious facts appearing on the face of a document or on the surface of the record. But the position is quite different where there is no proof one way or the other about attestation and there is nothing on the face of the document to show that the document had not been properly attested. In such cases the admission of execution would be sufficient proof of its execution against the party making the admission so as to dispense with proof of attestation. *Hira Bibi* v. *Ram Hari Lal* (1), and *Mg. Po Gyi* v. *Mg. Min Din* (2), distinguished.

Where a mortgage-deed provides in the beginning that the property has been mortgaged for a period of four years but later on mentions a particular Fasli year for redemption according to which the period of mortgage comes to over three years while in a deed of agreement also executed simultaneously with the mortgage-deed, the mortgage is stated to have been executed for a period of four years, the parties have made a mistake in writing wrong Fasli year for redemption, and effect should be given to their real intention which is clearly to fix a term of full four years for redemption, and this period should be reckoned according to the British calendar as provided by section 3(59), General Clauses Act, 1897.

A ruling should be interpreted consistently with the provisions of the statute and not so as to make it nugatory.

Messrs. *Ghulam Hasan* and *Iftikhar Husain*, for the appellants.

Mr. *Hyder Husain*, for the respondents.

(1) (1925) L.R., 52 I.A., 362. (2) (1927) 104 I.C., 386.

SRIVASTAVA and NANAVUTTY, JJ.:—These are two first appeals arising out of a suit for sale on foot of a mortgage. On the 17th of April, 1916, Raja Ram, defendant No. 1, for himself and as guardian of his minor brother Ganga Prasad, defendant No. 2, and of his minor nephew Manohar Lal, defendant No. 4, executed a mortgage deed (exhibit 1) in favour of Jadunath Bakhsh Singh, father of the plaintiffs, in respect of an area of under-proprietary lands in village Fatehpurwa for a sum of Rs.10,500 carrying interest at 1 per cent. per mensem compoundable half-yearly. Musammat Munni, mother of Ganga Prasad, minor, also signed the deed as guardian of her minor son Jadunath Bakhsh Singh died in November, 1930. The plaintiffs as his heirs and legal representatives brought the present suit alleging that a sum of Rs.67,242 was due for principal and interest in respect of the mortgage in suit. They relinquished a sum of Rs.7,242 and claimed a decree for Rs.60,000 by sale of the mortgaged property.

The suit was resisted on various grounds many of which are no longer material for the decision of the appeal. The only grounds which have survived in the appeal are about the mortgage-deed in suit not having been validly attested and about the claim being barred by limitation.

The learned Subordinate Judge of Bahraich who tried the suit found that the mortgage-deed exhibit 1 was for consideration and had been satisfactorily proved against the defendant No. 1, but that the plaintiffs had failed to prove it against defendants 2 and 4. He further found that defendants 2 and 4 were separate from defendant No. 1 at the time of the execution of the mortgage in suit and that defendant No. 1 was not competent to alienate the shares of his minor brother and nephew as their guardian. On the question of limitation he held that the intention of the parties was to fix a term of four calendar years for payment of the

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mortgage money, and the suit having been brought within twelve years of this period was within time. As a result of these findings he held that the plaintiffs were entitled to a decree for the whole amount claimed against defendant No. 1 only in respect of his one-third share in the property in suit and decreed the claim accordingly, but dismissed it against defendants 2 and 4. It may be mentioned that Musammat Munni, defendent No. 3, though she was originally impleaded in the suit was discharged by the plaintiffs on the date of issues.

As the decision of the question of attestation of the mortgage-deed in suit turns to a great extent on the pleadings of the defendants on that point it would be worth while to state them at the outset. The plaintiffs in paragraph 1 of their plaint stated that their father Jadu Nath Bakhsh Singh was the mortgagee while the defendants were the mortgagors under the mortgage-deed in suit. The reply given by defendant No. 1 in his written statement was that this paragraph "is not admitted subject to additional pleas". In paragraph 9 of the additional pleas he stated that "the deed forming the basis of the claim was not duly executed and completed" and was therefore void as a mortgage-deed and no decree for sale could be passed on the basis thereof. Defendants 2 and 4 on the other hand denied paragraph 1 in unqualified terms. In their additional pleas also they stated that the execution of the deed in suit was totally denied. The defendant No. 1 was examined on oath on the date of issues. In this statement made in the course of oral pleadings he did not deny the execution of the mortgage-deed in suit. On the contrary he, by clear implication, if not expressly, admitted the execution of it. After the making of this statement when admissions and denials were made in respect of the documents exhibited by the parties the counsel for defendant No. 1 on the same day admitted the genuineness of exhibit 1 and the defendants 2 and

4 denied its genuineness. Accordingly the endorsement made by the Court on exhibit 1 was as follows:

"Admitted by defendant No. 1."

"Denied by defendants Nos. 2 to 4."

The deed exhibit 1 bears the autograph signature of Raja Ram, defendant No. 1, in Hindi and purports to have been attested by two persons Sahaspal and Mohan Singh. The plaintiffs examined P. W. 2 Shiam Lal, the scribe of the deed who stated that defendant No. 1 signed and Musammat Munni put her thumb-mark in his presence. He added further that the attesting witnesses also signed the deed in his presence. They also examined P. W. 5 Nageshwar Singh, brother of Mohan Singh, one of the attesting witnesses. He stated that Mohan Singh was dead and identified the signature of his deceased brother on exhibit 1. Besides these two witnesses they also examined P. W. 1 Jangli Singh who had been a general agent of Jadunath Bakhsh Singh. His statement is similar to that of the scribe. They had also made several applications for summoning Sahaspal who is admittedly alive but ultimately gave him up and closed their case without examining him. The learned Subordinate Judge held that the defendant No. 1 having admitted the execution of the mortgage-deed in suit, it was not required to be proved against him and was admissible in evidence against defendant No. 1 without any evidence as to its execution or attestation. On the other hand he was of opinion that Sahaspal one of the attesting witnesses being alive it was incumbent on the plaintiffs to produce him in order to make the deed admissible in evidence against defendants 2 and 4. The plaintiffs having failed to examine Sahaspal he held that the deed had not been proved against defendants 2 and 4. It has been strenuously contended on behalf of Raja Ram the appellant in First Civil Appeal No. 4 of 1934 that it was the duty of the plaintiffs to examine Sahaspal and to prove that the deed had been duly attested accord-

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ing to law and that the plaintiffs having failed to do so the deed is inadmissible in evidence against defendant No. 1 just as much as against defendants 2 and 4. His learned counsel has laid great emphasis on paragraph 9 of his written statement and contended that this paragraph read with paragraph 1, constitutes a clear denial of the execution of the document. We are inclined to think that when it was stated in paragraph 9 of the written statement that the deed was not duly executed and completed the reference was to the fact of the defendant having refused to get the deed registered with the result that it had to be compulsorily registered afterwards under the orders of the District Registrar. Be the matter as it may, it seems to us amply clear that the defendant did not in this written statement specifically raise any question about the provisions of section 59 of the Transfer of Property Act in regard to attestation not having been complied with. Even assuming that the allegations in paragraphs 1 and 9 of the written statement can be regarded as tantamount to an unqualified denial of the execution of the deed, we are satisfied that in the statement made by defendant No. 1 on the date of issues he tacitly withdrew from that position and admitted the execution of the mortgage-deed in suit by him, though he tried to avoid it on the ground of fraud, undue influence and misrepresentation. The matter seems to us to be clinched by the admission of his pleader as to the genuineness of exhibit 1 on that very date. It has been ingeniously argued on his behalf that the admission of genuineness is not the same thing as an admission of execution. We are unable to accept the distinction sought to be made by the learned counsel for the defendant-appellant. The admission was also understood in that sense by the learned Subordinate Judge who made the endorsement on the document of its being admitted by defendant No. 1. The correctness of this endorsement, it might be noted, was never questioned in the lower Court.

It is clearly laid down in the proviso to section 68 of the Evidence Act which was added by the Indian Evidence Amendment Act (XXXI of 1926) that it shall not be necessary to call an attesting witness in proof of the execution of any document, not being a will, which has been registered in accordance with the provisions of the Indian Registration Act, 1908, unless its execution by the person by whom it purports to have been executed is specifically denied. We are in full agreement with the learned Subordinate Judge that far from the execution of the mortgage-deed in suit being specifically denied by defendant No. 1 it was expressly admitted by him and his counsel on the date of issues. In the circumstances it was not necessary for the plaintiffs to call an attesting witness in proof of its execution so far as defendant No. 1 was concerned. The defendant-appellant cannot therefore derive any advantage from the fact of the non-production of Sahaspal by the plaintiffs.

The learned counsel for the defendant-appellant also referred to section 70 of the Evidence Act which runs as follows:

"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."

He argued that even though defendant No. 1 may be taken to have admitted the execution of the mortgage-deed in suit, yet it cannot dispense with the necessity for the plaintiffs proving its due attestation and relied on the decision of their Lordships of the Judicial Committee in *Hira Bibi* v. *Ram Hari Lal* (1), in support of this argument. In this case a suit was brought to enforce a mortgage, one of the executants of which was a *pardanashin* lady. She had signed the deed behind the parda and the persons who signed as attesting witnesses were outside the parda and did not see her affix

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her signature. At the trial she admitted having signed the deed. Their Lordships of the Patna High Court held that the deed was good as against the aforesaid pardanashin lady because she had admitted that she signed it. When the case went in appeal before their Lordships of the Judicial Committee they observed that section 70 of the Indian Evidence Act applies only to a document duly attested, and as the mortgage-deed in question was not attested within the meaning of section 59 of the Transfer of Property Act, 1882, it was invalid against her in spite of her admission. We are unable to accept this ruling as an authority for the broad proposition that in spite of the admission of a party to an attested document of its execution by himself its valid attestation must be proved in every case, if the document is one required by law to be attested. Such an interpretation of the section would completely nullify it. If the admission of execution cannot dispense with proof of attestation then there was no need at all for the enactment of the section. We have no doubt in our minds that their Lordships of the Judicial Committee did not mean to lay down any such rule. We must interpret the ruling consistently with the provision of the Statute and not so as to make it nugatory. In the case before their Lordships the evidence on the record showed clearly that the attesting witnesses could not see the pardanashin executant sign the deed as a screen intervened between her and the attesting witnesses. In such circumstances there being positive evidence of the deed not having been attested in accordance with the provisions of section 59 of the Transfer of Property Act their Lordships held that in spite of the admission of execution of the deed by the lady section 70 of the Indian Evidence Act could not apply to the case. But such is not the case here. There is no positive evidence that the deed in suit did not comply with the provisions of section 59 of the Transfer of Property Act. All that can be said is that there is a lack

of evidence on the point. In such circumstances we have no doubt that the section would be fully applicable and the admission of execution by defendant No. 1 should be accepted as sufficient proof as against him without any further proof of attestation. In short, our reading of the decision of their Lordships of the Judicial Committee in *Hira Bibi* v. *Ram Hari Lal* (1), is that it is only in cases where it appears on the face of the document or it is positively made out by the evidence on the record that a document required by law to be attested had not been attested in accordance with law that a section 70 of the Indian Evidence Act cannot be made applicable in spite of the admission of a party to an attested document of its execution by himself, for the simple reason that a Court cannot shut its eyes to obvious facts appearing on the face of a document or on the surface of the record. But the position is quite different where there is no proof one way or the other about attestation and there is nothing on the face of the document to show that the document had not been properly attested. In such cases the admission of execution would be sufficient proof of its execution against the party making the admission so as to dispense with proof of attestation.

The learned counsel for the defendant-appellant also relied on a decision of the Rangoon High Court in *Mg. Po Gyi* v. *Mg. Min Din* (2). This case is also distinguishable inasmuch as the mortgage-deed in that case had been attested by only one witness and therefore on the face of it the provisions of section 59 of the Transfer of Property Act had not been complied with. For these reasons we are of opinion that the deed exhibit 1 must be taken to have been sufficiently proved against defendant No. 1 in spite of the plaintiffs' failure to examine Sahaspal.

Next as regards the question of limitation, the mortgage-deed exhibit 1 provides in the beginning that the

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property had been mortgaged without possession "for a period of four years" (*bawa'da adai char sal*). Later on it is mentioned that the mortgagors shall pay the entire principal with interest, etc. "at the end of Jeth 1326 Fasli in the fallow season" and that if they failed "to deposit the entire amount and effect redemption at the stipulated period that is at the end of Jeth 1326 Fasli" then when the money is deposited in any "fallow season at the end of the month of Jeth the hypothecated property shall be redeemed." The mortgage-deed was executed on the 17th of April, 1916, corresponding to Chait 28, 1323 Fasli. If four years are to be calculated according to the Gregorian calendar the term fixed would be 17th of April, 1920. But Jeth 1326 Fasli which has been mentioned at two places in the latter part of the deed corresponds to 13th June, 1919, which would be only three years and two months from the date of the execution of the mortgage. The learned Subordinate Judge has held that for the purpose of limitation the period of twelve years prescribed by Article 132 of the Limitation Act should be calculated from the end of four years that is 17th of April, 1920. He was of opinion that Jeth 1326 Fasli was mentioned rather inadvertently. It may be mentioned that simultaneously with the execution of the mortgage-deed in suit two other documents were executed, namely exhibit 3 a deed of agreement and exhibit 4 a receipt. The agreement exhibit 3 provides that the mortgage-deed exhibit 1 would be registered after the mortgaged property had been released from an auction sale which had taken place. In this document also the mortgage-deed exhibit 1 is stated to have been executed for a period of four years. The inconsistency between the two statements contained in the mortgage-deed as regards the period of redemption appears to us to be a case of patent ambiguity. We have therefore excluded from our consideration the oral evidence which was given to show the real intention of the parties. Apart

from this the oral evidence also appears to us to be altogether inconclusive and of no help. In Kerr on Fraud and Mistake, 5th edition, at page 523 it is observed as follows:

"Where the mistake in the expression of a written contract is obvious upon the face of the instrument so as to leave no doubt of the intention of the parties without extrinsic evidence to explain it, the mistake is corrected as a mere matter of construction, and the contract is construed in accordance with the obvious intention, both at law and in equity."

It seems to us that the real intention of the parties was to fix a period of four years for redemption, 1916 A.D. covers a part of 1322 Fasli and a part of 1323 Fasli. It appears that the parties wanted that redemption should be made in the fallow season at the end of Jeth. We are inclined to think that they made a mistake either in calculating the period of four years by counting it from 1322 instead of 1923 Fasli or that they made a clerical mistake in writing 1326 Fasli for 1327 Fasli. We have therefore no hesitation in agreeing with the lower Court that 1326 Fasli had been written inadvertently for 1327 Fasli and that we must give effect to the real intention of the parties which was to fix a term of full four years for redemption. The same result would also be reached by applying the well-known rule that in deeds containing two clauses absolutely inconsistent with each other the latter is to be rejected being in that respect the converse of the rule which obtains in construing wills. Section 3(59) of the General Clauses Act (V of 1897) provides that "year" shall mean a year reckoned according to the British calendar. We must therefore calculate the period of four years as provided in the earlier part of the mortgage-deed according to the British calendar. In this view the claim is clearly within limitation. This disposes of both the contentions urged on behalf of the defendant-appellant.

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The result therefore is that First Civil Appeal No. 4 of 1934 must fail and is dismissed with costs.

The other appeal (No. 7 of 1934) has been filed by the plaintiffs who are aggrieved by the release from liability under the mortgage of two-thirds of the property belonging to defendants 2 and 4. Their main contention is that Raja Ram defendant No. 1 and defendants 2 and 4 constituted a joint Hindu family of which Raja Ram was the manager. It is further contended that, as such, defendants 2 and 4 were unnecessary parties and the plaintiffs ought to be given a decree against the entire property on the admission of Raja Ram about the execution of the mortgage-deed in suit. Thus the first thing to be seen is whether the fact of defendants 1, 2 and 4 being members of a joint Hindu family has been established. No doubt there is a presumption in favour of jointness, but we feel satisfied that the presumption has been rebutted in the present case. It is admitted that before the execution of the mortgage-deed in suit Musammat Munni made an application for appointment as guardian of her minor son Ganga Prasad, defendant No. 2, and was appointed guardian both of his person and property. The certificate of guardianship is exhibit B-1. It is well settled that the manager of a joint Hindu family is regarded as the guardian of the interest in the co-parcenary property of all the minor members of the family and therefore no certificated guardian can be appointed for such minors. Thus the fact that Musammat Munni was allowed to obtain the certificate of guardianship exhibit B-1 impliedly suggests that defendant No. 2 was separate from Raja Ram at the time when these guardianship proceedings took place. Subsequent to this, in 1924 there was a litigation which was finally decided by the Court of the Judicial Commissioner of Oudh (exhibit B-2). It related to a mortgage, dated the 29th of July, 1921. It was found in this case that a separation had taken place in the family before the execution of the

aforesaid mortgage. This clearly negatives the plaintiffs' case that no separation has ever taken place and the family still continues joint. There is also the oral evidence of two witnesses, D. W. 1 Ram Lal and D. W. 2 Ram Bahadur, in support of the separation. Ram Lal claims to be one of the persons who effected a partition about a year after the death of Chhedi Ram, the father of defendants 1 and 2. He says that he together with two others effected a partition of the grain, house, fields, cattle and utensils. As regards the zamindari share actual partition was not effected but the produce was ordered to be divided in three equal shares. D. W. 2 Ram Bahadur though not actually present at the partition has been seeing the parties separate for the last nineteen years. He deposes that their houses and *sir* are separate and that they divide the rents collected jointly amongst themselves. The evidence of these witnesses has been believed by the lower Court. It is in accord with the documentary evidence and we can see no reason to disbelieve these witnesses. The plaintiffs also examined three witnesses, P. W. 1 Jangli Singh, P. W. 2 Shiam Lal and P. W. 3 Sartaj Singh. It is impossible to believe their evidence that the family still continues joint in face of the decision of the Judicial Commissioner's Court in exhibit B-2. P. W. 1 Jangli Singh was in the service of the plaintiffs' father for thirty or thirty-five years and P. W. 3 Sartaj Singh is a tenant of the plaintiffs. P. W. 2 admits that he has no personal knowledge about the defendants forming a joint family and P. W. 3 has never been inside the defendants' house. We think that the evidence of these witnesses is quite worthless and have no hesitation in rejecting it. The fact of defendants 1 and 2 being step-brothers also makes it quite probable that Musammat Munni, the mother of defendant 2, should have sought a partition of the share of her minor son and grandson soon after the death of her husband. We therefore uphold the finding of the lower Court that the defendants were

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separate at the time of the execution of the deed in suit. It follows that defendant No. 1 cannot be regarded as manager of the family and any admission made by him cannot be binding on defendants 2 and 4.

It was also faintly argued that the plaintiffs should be allowed a fresh opportunity to produce Sahaspal. It is no doubt true that the plaintiffs made several applications for summoning him. In the last two applications the plaintiffs asked for a "*dasti*" summons being given to them and the report made by Jangli Singh the general agent of the plaintiffs on the summons given to him in pursuance of the last application, dated the 25th of February, 1933, was that Sahaspal had refused to take the summons. Even so, it was the duty of the plaintiffs under section 68 of the Evidence Act to examine Sahaspal. They ought to have applied for a warrant of arrest against him and exhausted all the means available to them for enforcing his attendance in Court. Instead of this they voluntarily gave him up and closed their case on the 16th of March, 1933. They were represented by a counsel and ought to have known the duty imposed on them by law for producing the witness, even if he was reluctant or hostile. In the circumstances we can see no sufficient ground for giving them a further opportunity for bringing Sahaspal before the Court when they themselves gave him up in the lower Court.

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The result therefore is that this appeal also fails and is dismissed with costs.

Appeal dismissed.