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possible by the application of section 34 to convict any of the persons taking part of an offence under the second part of section 304 of the Indian Penal Code, and the appropriate section in view of the wording of section 34 is section 325 of the Indian Penal Code.

Ziaul Hasan and Yorke, JJ.

We accordingly allow this appeal to this extent that we alter the conviction from one under section 302 of the Indian Penal Code to one under section 325 read with section 34 of the Indian Penal Code. Bearing in mind the fact that the persons who knocked down and beat and caused the death of Ram Sarup clearly lay in wait for him, we think that a sentence of five years' rigorous imprisonment will be proper, and we sentence the appellants Zahid Khan and Chhutai Khan accordingly.

Appeal partly allowed.

APPELLATE CIVIL

Before Mr. Justice A. H. deB. Hamilton

RAGHUBIR SINGH AND OTHERS (PLAINTIFFS-APPELLANTS) *v.* THAKURAIN SUKHRAJ KUAR (DEFENDANT-RESPONDENT)*

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Evidence Act (I of 1872), section 90—Ancient document—Presumption of genuineness of ancient documents—Proof of signatures of attesting witnesses and scribe, necessity of—Discretion of court in making presumption of genuineness—Interference by appellate court, how far justified—General Clauses Act (X of 1897), section 2(52)—"Sign", meaning of—Writing word "sahi", whether signing.

For raising the presumption of genuineness of an ancient document under section 90 of the Evidence Act it is not necessary that the signatures of the attesting witnesses or of the scribe be proved, for if everything was proved there would be no need to presume anything.

Where the trial court has not acted arbitrarily in exercising the discretion which it is entitled to exercise under section 90 of the Evidence Act, the appellate court should not interfere

*Second Civil Appeal No. 189 of 1936, against the order of Babu Avadh Bethari Lal Saheb, Sub-Judge of Sultanpur, dated the 9th April, 1936.

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with the exercise of that discretion. *Shamsunnissa Bibi* v. *Ali Asghar* (1), *Radhey Kishun* v. *Basdeo Lal* (2), and *Special Manager, Court of Wards, Balrampur* v. *Tribeni Prasad* (3), referred to.

Under section 2(52), General Clauses Act "sign" with reference to a person who is unable to write his name, includes "mark". The mark is, therefore, something done by a person who cannot write. The writing of a word such as "sahi" cannot be considered to be a mark made by a person who is unable to write his name in the absence of any proof that in fact that particular person is unable to write his own name. The fact that documents executed in Oudh before the advent of British rule not infrequently bore an expression like "sahi" instead of the signature entitle one to presume that documents so executed were valid documents. *Special Manager, Court of Wards, Balrampur* v. *Tribeni Prasad* (3), and *Shailendra Nath Mitra* v. *Girja Bhushan Mukerji* (4), referred to.

Mr. *Bhagwati Nath Srivastava*, for the appellants.

Mr. *P. N. Chowdhari*, for the respondent.

HAMILTON, J.:—This is an appeal by the plaintiffs against a decision of the Civil Judge of Sultanpur who modified against the appellants a decision of the Munsif of Sultanpur.

The suit of the plaintiffs was that they were in possession of the land in suit on a mortgage, dated the 2nd Badi Asarh 1229 F., that is to say 1822, and they asked for a declaration that they had become owners of the property as the usufructuary mortgage had now become irredeemable.

The learned Munsif decreed the suit, but in appeal the plaintiffs were only declared mortgagees of the land in suit by adverse possession starting from 1884. The learned Civil Judge held, if I understand his decision correctly, that the plaintiffs were tenants up to 1884, that they then obtained mutation, that subsequently they treated the property as if mortgaged to them and in 1934 the defendant admitted that the plaintiffs were mortgagees. I have not to consider here

(1) (1935) O.W.N., 1376.
(2) (1935) O.W.N., 845.
(3) (1936) I.L.R., 9 Luck., 55.
(4) (1931) I.L.R., 58 Cal., 686.

whether on the facts found by the learned Civil Judge to exist the plaintiffs were entitled to the decree which he has given but only whether they are entitled to more than he gave them, namely, to be declared as full owners for reasons stated above.

There are four pieces of evidence which have to be considered:

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(1) The mortgage deed. A copy of the mortgage deed has been filed and it shows that it was executed on the 2nd Badi Asarh 1229 F., that the scribe was Ishwari Prasad, that there were attesting witnesses, that Drigpal Singh is mentioned in the body as mortgagor, that the executant instead of signing his name wrote the word "sahi" and that there was a *paramsana of Rs.29*. *Paramsana* is the amount which the mortgagee must yearly pay to the mortgagor from the profits of the property after deducting that amount which he is entitled to keep in lieu of interest on the consideration money of the mortgage deed. As this document is more than 30 years old the learned Munsif presumed it genuine under section 90 of the Evidence Act, but the learned Civil Judge, for reasons which I shall consider later, held that it was not proved.

(2) Exs. 9, 5 and 6, papers of the first settlement in 1865 which show that the ancestor of the plaintiffs was entered as a tenant of the plots in dispute at a rental of Rs.51.

(3) In 1884 the plaintiffs applied for mutation and in their application referred to a mortgage deed, dated Sudi 2, Asarh, 1239, and stated the *paramsana* to be Rs.106-9-3, but the sum of Rs.29 is entered and cut out. "Sudi" for "Badi" is obviously a mistake and the learned Civil Judge himself calls it a slight mistake and the fact that there was entered the sum of Rs.29 which was then cut out and replaced by the sum of Rs.106-9-3 also

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shows that the mortgage so relied upon was the mortgage in suit.

(4) In 1934 the defendant brought a suit for arrears of rent against the plaintiffs alleging the rent to be Rs.106-9-3, that is to say, the same rent stated in the mutation application of the plaintiffs and that certain defendants in the suit, that is to say the plaintiffs here, were mortgagees and other defendants were sub-mortgagees.

It is not the case of either party that there is any other mortgage than the one of 1822, and consequently in this suit brought by the defendant in 1934, is really a recognition that what was stated in the mutation application was correct, and the mutation application was based on the very mortgage deed filed in the present suit. The learned Civil Judge has, therefore, failed to realize that there is this evidence to show that the mortgage deed in suit is genuine.

It has been held in *Shamsunnissa Bibi* v. *Ali Asghar* (1), that although no presumption of law can be made under section 90 of the Evidence Act as regards the genuineness of a document the original of which has not been produced in court, yet the court can make a presumption of fact about its genuineness if such presumption is justified by the proved facts and circumstances of the case. The same will of course apply to an original when it applies to a copy. It has been held in *Radhe Kishun* v. *Basdeo Lal* (2), that the raising of a presumption under section 90 of the Evidence Act as to the genuineness of an old document is a matter eminently within the discretion of the trial court and an appellate court ought not to interfere with the discretion of the trial court if the reasons given by it are not *prima facie* unsound. This was also held in *Special Manager, Court of Wards, Balrampur* v. *Tribeni Prasad* (3) where it was stated that an appellate court would

(1) (1935) O.W.N., 1376. (2) (1935) O.W.N., 845.
(3) (1936) I.L.R., 9 Luck., 35.

be slow to interfere with the discretion exercised by a lower court in the matter of raising a presumption under section 90 of the Evidence Act, but the discretion allowed by the section is a judicial discretion which has to be exercised on sound legal principles and after due regard to all the evidence and circumstances.

Hamilton, J.

There is nothing suspicious in the mortgage deed itself. The learned Civil Judge regards it as not being genuine for the following reasons.

It is not signed nor thumb-marked and an incomplete and invalid document in the hands of an unscrupulous person might be validated by the mere writing on it of the word "sahi". I do not see any great force in this argument because it would be just as easy to put a thumb-mark of any one—the chances of finding a specimen of the genuine thumb-mark of the person alleged to be the executant being practically nil after more than 100 years have elapsed. It would, therefore, be, if anything, easier for the purposes of forgery to put a thumb-mark instead of writing the word "sahi" as there is more chance of finding some writing of the alleged executant than another thumb-mark. There would be no greater difficulty in forging the signature of the alleged executant than in writing the word "sahi". If there was no writing of his in existence there would be nothing to compare either the signature or the word "sahi" and if there was any writing of his it would be no more difficult to imitate it in writing his name than in writing the word "sahi".

As regards the argument that the signatures of the attesting witnesses or of the scribe are not proved, the answer is that if everything was proved there would be no need to presume anything.

The last reason given is that the genuineness is placed in great suspicion by the fact that at the first settlement no attempt was made by the alleged mortgagee to get the mortgage recorded and, on the other hand, he was shown as tenant at the rate of Rs.51 and this entry could

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not have been made except on a verification from the tenant and the landlord. The learned Civil Judge states that the mortgagee accepted his position as a tenant and had the rent determined at the rate of Rs.51, while the *paramsana* in the mortgage was said to be Rs.29 and it was not till 1884 that an application was made for mutation and then the *paramsana* was entered as Rs.106-9-3. It is true that no application was made by the mortgagee to be entered as such, but the entry as tenant is, I think, explicable. There is no doubt that under the mortgage deed *paramsana* had to be paid and it is undoubted that the price of grain has increased considerably after 1882. The amount payable as interest, on the other hand, remained the same, hence one would naturally expect the amount to be paid by the mortgagee to the mortgagor to increase as the value of the produce of the land increased and this would explain why from Rs.29 it became Rs.51 and finally became Rs.106-9-3. In 1934, although the defendant herself sued for arrears of rent alleging it was *paramsana*, she got a decree in the revenue court, that is to say, the court then considered *paramsana* to be a tenant's rent which could be recovered in an ordinary suit for arrears of rent. I do not by any means say that such a payment would be a payment of rent, but if it was, then the entry made at settlement about the payment of *paramsana* in no way disproved the existence of the mortgage. Even if this view is incorrect and such *paramsana* cannot be recovered in a suit for arrears of rent, there is nothing strange if the Settlement Officer and the parties themselves held the same view as was held by the revenue court in 1934. This entry, therefore, of tenancy, in the circumstances of the case, is no strong argument against the genuineness of the mortgage. Against this we have the fact that mutation was claimed and obtained on the very basis of this mortgage in 1884, and presumably the defendant had notice and the learned Civil Judge evidently thought she had

notice because he held that the adverse possession by mortgage started from the time that this application for mutation was filed. There was therefore, a silent recognition by the alleged mortgagor of the existence of this mortgage. In 1934 there was the clearest recognition of this mortgage by the suit brought by the defendant on the allegation that the present plaintiffs were her mortgagees and were liable to pay the same *paramsana* rent as was entered in the application for mutation.

In these circumstances, therefore, the learned Munsif acted in no way arbitrarily in exercising the discretion which he was entitled to exercise under section 90 of the Evidence Act, and the learned Civil Judge should not have interfered with the exercise of that discretion.

There remains one point whether that mortgage was valid or invalid. It was in former times not unusual for the executant of a mortgage, specially if he was a person of some position, to write the word "sahi" instead of his signature and instead of, or in addition to, an impression of his seal.

An example of this appears in *Shailendranath Mitra* v. *Girijabhushan Mukerji* (1), and other examples occur in *Special Manager, Court of Wards, Balrampur* v. *Tribeni Prasad* (2). The document in this case were not held to be genuine, but even if these documents were not genuine, the writing of the word "sahi" shows that this was a recognized way of executing a document. I have also myself come across documents with the word "sahi" or *"likha sahi"* in the place of the signature. In *Shailendranath Mitra* v. *Girijabhushan Mukerji* (1), where the actual words were "shree sahi" the words were held to be "a sort of symbolic writing which is to be taken to be the signature in the absence of proof to the contrary". With all due respect to the learned Judges who decided that case, I do not feel able

(1) (1931) I.L.R., 58 Cal., 686. (2) (1936) I.L.R., 9 Luck., 35.

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to go so far. Under section 2(52), General Clauses Act, "sign" with its grammatical variations and cognate expressions, shall, with reference to a person who is unable to write his name, include 'mark' with its grammatical variations and cognate expression". The mark is, therefore, something done by a person who cannot write and it appears to me, therefore, very doubtful whether it includes any writing such as the word "sahi", and I find it difficult to presume, that if a person can write the word "sahi" he is nevertheless unable to write his own name. Therefore, I am not able to consider the writing of a word such as "sahi" to be a mark made by a person who is unable to write his name in the absence of any proof that in fact that particular person is unable to write his own name. This document, however, purports to have been executed in the year 1822 in Oudh, which was then no part of British India, and, therefore, for valid execution it was not subject to the rules existing then or later in British India. What were the requirements in 1822 in Oudh to execute a valid mortgage deed I do not know nor can learned counsel tell me, but the fact that at that time document not infrequently bore an expression like "sahi" instead of the signature entitled one, in my opinion, to presume that documents so executed were valid documents and consequently this mortgage deed was a valid mortgage deed. Once it was a valid mortgage deed no question of adverse possession arises, and the plaintiffs are entitled to their decree. Even if this mortgage deed was not valid, if the possession of the defendants arose from that day and continued throughout on the basis of that deed, they have established their allegation of adverse possession since 1822 and are consequently entitled to the decree asked for, apart from those entries in these papers of 1865, there is no reason for holding that the possession of the plaintiffs was due to anything other than this mortgage deed, and I have already said that the application for mutation was an allegation that that

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mortgage deed had been acted upon and this allegation was not denied in 1884, and was actually, in my opinion admitted by the suit for *paramsana* rent in 1934.

Therefore, I find that the palintiffs hold this land on a valid usufructuary mortgage deed, dated 1822 and, therefore, the decision of the learned Munsif was correct and even if the mortgage was invalid they have held this land on that invalid mortgage since 1822, and have now acquired full title by adverse possession.

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I, therefore, set aside the decision of the learned Civil Judge and restore that of the original court decreeing the suit. The plaintiffs are entitled to their costs throughout.

Appeal allowed.

REVISIONAL CRIMINAL

1938 *November*, 23

Before Mr. Justice Ziaul Hasan and Mr. Justice R. L. Yorke

KING-EMPEROR THROUGH THAKUR DIN AND BHAGWAN DIN (APPLICANT) *v* SOM NATH AND OTHERS (OPPOSITE-PARTIES)*

Criminal Procedure Code (Act V of 1898), section 439—Enhancement of sentence on application of private individuals—High Court, whether should enhance sentence on application of private individuals.

The High Court has power to enhance the sentence of an accused on the application of a private person, but it should not entertain an application by private parties for enhancement of sentences, as Courts should not be allowed to become tools in the hands of members of the public in giving vent to their private animosities. Further in dealing with applications for enhancement of sentences, the High Court should have regard to what those responsible for maintenance of peace and order in the locality think of the matter, and where therefore an application for enhancement is rejected by the District Magistrate, as he does not consider it necessary in the interests of justice, the High Court should not interfere. *Jadunath Brahman* v. *King-Emperor* (1) and *Hanuman Prasad* v. *Mathura Prasad* (2), relied on.

Mr. *P. N. Chowdhary*, for applicants.

Mr. *K. P. Misra*, for opposite-party.

*Criminal Revision No. 80 of 1938, against the order of Chandra Bali Rai, Esq., District Magistrate, Sultanpur, dated the 26th April, 1938

(1) (1927) 4 O.W.N. 699. (2) (1933) 10 O.W.N. 303