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 Nidhi Parida
 vs.
 Karunakar
 Padhan.
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 Das, J.

compromise the suit on an agreement that in default of payment of the decretal money, the decree-holder would be entitled to realize the sum by the sale of the attached holding. There was a clear representation made to the decree-holder that his occupancy holding was attachable by the judgment-debtor. The decree-holder acted upon that representation and changed his position to his detriment. In my opinion the judgment-debtor must make good his representation.

This application is dismissed with costs.

ADAMI, J.—I agree.

Application dismissed.

APPELLATE CIVIL.

Before Das and Adami, JJ.

LAKSMAN SAHU,

v.

GOKHUL MAHARANA.*

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 December, 1.

Attestation—mortgage bond—one attesting witness dead and the other's evidence not in support of attestation—proof of execution—Evidence Act, 1872 (Act I of 1872), section 71.

Where one of the attesting witnesses to a mortgage bond was dead at the time of the suit, and the other stated that he had attached his signature to the document without knowing what it was and without witnessing its execution, *held*, that the plaintiff was entitled, under section 71 of the Evidence Act, 1872, to succeed on the bond on proof of its due execution.

The facts of the case material to this report were as follows:—

Plaintiff sued on a mortgage bond, the consideration for which was a loan of Rs. 100, alleged to have been executed by the father of defendants 1 and 2. Defendant No. 3 was a subsequent purchaser of the property. Of the two attesting witnesses one was dead

*Circuit Court, Cuttack. Appeal from Appellate Decree No. 31 of 1921 from a decision of D. H. Kingsford, Esq., District Judge of Cuttack, dated the 27th April, 1921, reversing a decision of Babu Bibhuti Bhushan Mukherji, Munsiff, of Cuttack, dated the 30th April, 1920.

at the time of suit and the other was declared hostile in the trial court and cross-examined by the plaintiff. He admitted his signature on the bond but alleged that at the time he signed it he did not know what the document was and that he did not see it executed. Plaintiff and the scribe swore that the bond was properly attested. The trial court decreed the suit. The defendants appealed to the District Judge who held that the bond had not been shown to be properly attested and reversed the decree of the trial court.

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The plaintiff appealed to the High Court.

Gopal Chandra Ray, for the appellant .

Sachindranath Chatterji, for the respondents.

DAS, J.—This appeal arises out of a suit instituted by the appellant to enforce a mortgage bond. There were two attesting witnesses to the mortgage bond. One of them is admittedly dead but the other was called by the plaintiff to prove that he did attest the mortgage bond. The attesting witness who was called by the plaintiff stated in court that he attached his signature to the document without knowing what it was and without seeing the executant sign it and that he did so at the request of the plaintiff who was his friend. The court of first instance thought that he was a witness unworthy of credit, and, relying upon the evidence of the plaintiff and the scribe, gave a decree to the plaintiff substantially as claimed by him. The lower appellate court has differed from the view which was taken by the court of first instance. The lower appellate court, however, admits that the memory of this witness in all probability would be quite blank regarding the circumstances after the expiry of 13 years from the date of the execution of the mortgage bond. I regard the finding of the lower appellate court on this point as a finding that the attesting witness who was called by the plaintiff denied or did not recollect the execution of the document.

If that be so then section 71 of the Evidence Act provides that the execution of the document must be proved by other evidence. The learned Vakil who has

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argued this case on behalf of the respondent urges before us that the proof of execution will not help the plaintiff: it must be proved that the document was properly attested. In my opinion so far as section 71 of the Evidence Act is concerned, execution includes attestation, for section 71 only operates if the attesting witness denies or does not recollect the execution of the document. We have, therefore, to see whether the plaintiff has proved the due execution of the document. Now on this point again the learned Judge says that there is again a strong probability that neither the plaintiff nor the scribe can in fact remember the details after so long a lapse of time. In my opinion the evidence of the plaintiff and the scribe should be reconsidered by the learned District Judge. The suit is on a mortgage and as I read the judgments of the courts below there is no doubt that the money was advanced and the document was executed at any rate by the defendants; and as the learned District Judge did not examine the evidence of the plaintiff and the scribe from the point of view which I have suggested in my judgment I think it only fair that their evidence should be reconsidered by the learned District Judge.

I would allow the appeal, set aside the judgment and decree of the court below and remand the case to that court for decision. Costs will abide the result and will be disposed of by the learned District Judge.

ADAMI, J.—I agree.

Case remanded.
