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MUSSAMMAT BIBI WAJIHUN-NISSA BEGUM v. BABU LAL MAHTON.

DAWSON MILLER, C.J.

sums deposited for the years 1325 and 1326 be paid out to the plaintiff. She will also be entitled to take out of Court the deposit made for 1327 in part satisfaction of her claim for rent for that year. The decree of the lower appellate Court will be varied in accordance with the decision above arrived at. The appellant has failed upon each of the main points argued before us but has succeeded in so far as the rent for 1327 is concerned and has succeeded in part as to the date from which the enhanced rent shall be payable. She has gained little advantage in so far as the rent for 1327 is concerned as this has been found to be payable at the old rate and the sum deposited could have been taken out of Court by her at any time. In the circumstances I think that the parties should each bear their own costs of this appeal.

MACPHERSON, J.—I agree.

Decree varied.

PRIVY COUNCIL.

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June, 23.

HIRA BIBI
v.
RAM HARI LALL.*

Mortgage—Attestation—Pardanishin Executant—Admission of Execution—Absence of due Attestation—Indian Evidence Act, 1872 (*I of* 1872), *section* 70—*Transfer of Property Act*, 1882 (*IV of* 1882), *section* 59.

In a suit to enforce a mortgage, it appeared that one of the executants was a pardanashin woman, who had signed the deed behind the parda; and that the persons who signed as attesting witnesses were outside the parda and did not see her affix her signature. At the trial she admitted having signed the deed.

By section 70 of the Indian Evidence Act, 1872, "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." The Transfer of Property Act, 1882, section 59, requires that the execution of a mortgage must be attested by at least two witnesses.

*PRESENT: Lord Atkinson, Lord Shaw and Lord Darling.

Held, that section 70 of the Indian Evidence Act, 1872, applies only to a document which is duly attested, and that as the mortgage deed was not attested within the meaning of section 59 of the Transfer of Property Act, 1882, it was invalid as against her in spite of her admission.

Shamu Patter v. *Abdul Kadir Ravuthan*(1) and *Ganga Pershad Singh* v. *Ishri Pershad Singh*(2), followed.

Padarath v. *Ram Nain Upadhia*(3), distinguished.

Judgment of the High Court(4), reversed.

Appeal (no. 6 of 1924) from a decree of the High Court (June 10, 1921) varying a decree of the District Judge of Patna (September 26, 1917).

The respondents sued the appellants to enforce by sale a mortgage, dated August 17, 1906, for Rs. 29,000.

Though other questions arose at the trial the sole question upon the appeal was whether the mortgage was binding upon the first appellant, a pardanishin woman. She had filed a separate written statement in which she pleaded that she was a pardanishin woman, and did not admit the validity of the deed; at the trial she admitted in her evidence that she had executed it.

The facts as to the attestation of her signature appear from the judgment of the Judicial Committee.

The suit was tried by the District Judge who made a decree for sale against the first appellant, but dismissed the suit as against the other defendants upon grounds not material to this report.

Upon an appeal and cross-objection the High Court set aside the decree, and made a mortgage decree against all the defendants. The learned Judges were of opinion that the execution of the deed by the first appellant was not duly attested, but they considered

(1) (1912) I. L. R. 35 Mad. 607; L. R. 39 I. A. 218
(2) (1918) I. L. R. 45 Cal. 748; L. R. 45 I. A. 94.
(3) (1915) I. L. R. 37 All. 474; L. R. 42 I. A. 163.
(4) (1921) 6 Pat. L. J. 465.

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themselves bound by Indian decisions to hold that the first appellant having in the course of the trial admitted execution section 70 of the Indian Evidence Act, 1872, rendered the document valid against her. After referring to *Satish Chandra Mitra* v. *Jogendra Nath Maharlanabis*(1), *Nibaran Chandra Sen* v. *Ram Chandra Sen*(2), followed by the Patna High Court in *Nageshwar Prasad* v. *Bachu Singh*(3), Das, J., by his judgment, with which Adami, J., agreed, said as appears from the judgment of the Judicial Committee.

1925, May 22, 26.—*DeGruyther*, *K. C.*, and *Wallach*, for the appellants.

Sir George Lowndes, *K. C.*, and *E. B. Raikes*, for the respondents nos. 1 to 5 and no. 8.

Reference was made to the decisions of the Board referred to in the present judgment.

June 23.—The judgment of their Lordships was delivered by:

LORD DARLING.—This is an appeal from a judgment and decree, dated 10th June, 1921, of the High Court of Judicature at Patna, partly affirming and partly reversing a judgment and decree of the District Judge of Patna. The suit was brought to enforce a mortgage, dated 17th August, 1906. It was pleaded by the defendants (appellants) that the mortgage bond is void by reason of its not being attested in accordance with the provisions of the Transfer of Property Act, IV of 1882, section 59.

The only important question upon this appeal is in regard to the appellant Musammat Hira Bibi and her liability on the mortgage bond. It is admitted that she actually signed the bond, but it is a document which requires attestation by witnesses, as is provided by statute.

(1) (1916) I. L. R. 44 Cal. 345. (2) (1917) 22 Cal. W. N. 444.
(3) (1919) 4 Pat. L. J. 511.

Hira Bibi is a pardanashin lady. The evidence shows, beyond contest, that when Hira Bibi signed the mortgage bond not one of the persons who signed as witnesses was present or saw her sign it. She was behind the purdah. Anant Prasad, her son, took this deed, and others, inside the purdah. He came out and told those outside, and out of sight of Hira Bibi, that she had signed the deed, and after this all those signed whose names appear as witnesses.

The learned Judges from whose judgments this appeal is brought have themselves declared that this is wholly insufficient to comply with the statute relating to the due execution and attestation of such a document as this mortgage bond, but they have held that the deed is good as against Hira Bibi, because she has admitted that she signed it.

DAS, J., with whose judgment ADAMI, J., agreed put the case thus:

"If the matter were res integra I should doubt whether the admission of a party can render valid that which is invalid. The question is—Is the rule enunciated in section 59 of the Transfer of Property Act a rule of law affecting the validity of the mortgage or is it a rule of evidence affecting the proof of the document? If it be a rule of evidence the question becomes one of proof and the admission of a party would be in the circumstances quite sufficient. But if it be a rule of law then it is difficult to understand how the admission of a party helps the solution of the problem. My own view is that section 70 of the Evidence Act operates only where the mortgagee has not given any evidence at all of due execution of the document by the mortgagor, but relies on the admission by the mortgagor. If, for instance, the mortgagor admits the execution of the document in the written statement it is wholly unnecessary for the mortgagee to adduce any evidence as to the execution of the document. But the matter would stand on an entirely different footing if the mortgagee produces his evidence of execution and that evidence establishes that the document was not attested in the manner required by section 59 of the Transfer of Property Act. I am, however, bound by the decisions of the Calcutta High Court and of this Court. In accordance with those decisions I must hold that the admission of the defendant renders it unnecessary for the plaintiffs to prove that the document was executed and attested in the manner required by section 59 of the Transfer of Property Act."

It appears, then, that the Judges of the High Court of Patna would have held that this mortgage bond was not duly executed by the appellant, Hira Bibi, had they not felt bound to follow earlier decisions

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of that Court and of the High Court of Calcutta. They appear to have been unaware of several cases decided on appeal by this Board, and directly dealing with the matter in question. When these are considered it appears to their Lorship that this case is already concluded by authority. It is nedless to do more than to call attention to them very briefly:

Shamu Patter v. *Abdul Kadir Ravuthan*(1) decides that to be a good signature attested by two witnesses, within the Transfer of Property Act, 1882, section 59, the persons signing as witnesses must be present at the execution of the instrument. Their Lordships adopted these words of Dr. Lushington [in *Bryan* v. *White*(2)]: "'Attest' means the persons shall be present and see what passes, and shall, when required, bear witness to the facts." And they followed the decision of the House of Lords in *Burdett* v. *Spilsbury*(3), to the same effect.

The case of *Padarath* v. *Ram Nain Upadhia*(4) is in its material facts totally different from this one, and has, therefore, no bearing on the question here to be decided. But another case—*Ganga Pershad Singh* v. *Ishri Pershad Singh*(5)—is in almost all particulars identical with this present one, and in that instance the mortgage deed was declared to be void as not being duly executed and attested.

These cases sufficiently confute the argument founded upon the words of section 70 of the Indian Evidence Act, 1872, that:

> "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."

Those words apply only to a document duly attested. The mortgage deed here in question was not, in a legal sense, attested; for it was merely signed

(1) (1912) I. L. R. 35 Mad. 607; L. R. 39 I. A. 218.
(2) (1850) 2 Rob. Ecc. 315, 317.
(3) (1843) 10 Cl. & F. 340.
(4) (1915) I. L. R. 37 All. 474; L. R. 42 I. A. 163.
(5) (1918) I. L. R. 45 Cal. 748; L. R. 45 I. A. 94.

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by persons who professed to be witnesses to its execution, although in truth and in fact they were not so.

Their Lordships are, therefore, of opinion that, as against the appellant Musammat Hira Bibi, the mortgage decrees of both the Courts below should be set aside with costs, and the suit dismissed as against her. With regard to the other appellants the decrees should stand.

The costs of Musammat Hira Bibi should be paid by the contesting respondents, but the other, and unsuccessful appellants, should pay the costs of such of the respondents who appeared. Their Lordships will humbly advise His Majesty accordingly.

Solicitor for appellants: *W. W. Box & Co.*

Solicitor for respondents: *Watkins and Hunter.*

APPELLATE CRIMINAL.

Before Mullick, A.C.J. and Jwala Prasad, J.

JAGWA DHANUK

v.

KING-EMPEROR.*

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June, 23, 24, 25, 26.

Code of Criminal Procedure, 1898 (Act V of 1898), sections 161, 162 and 360—Statement made by accused before the police, admissibility of—Indian Evidence Act, 1872 (Act I of 1872), sections 27, 28 and 54, effect of—Evidence of bad character to prove motive, admissibility of—Approver, nature of corroboration required—Deposition read over by deponent himself, admissibility of.

Although the amendment of section 162, Code of Criminal Procedure, 1898, has altered the previous law so as to exclude completely statements made by witnesses during the course of an investigation (except for certain limited purposes), the statements of accused persons are still admissible in law provided they do not amount to confessions.

* Death Reference no. 7 of 1925 with Criminal Appeal no. 101 of 1925, from a decision of H. R. Meredith, Esq., I.C.S., Sessions Judge of Monghyr, dated the 4th June, 1925.