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effect of the agreement made conditional on fixing the amount of the debt, so that it would be wholly inoperative unless this was first done, and, indeed, the defendant himself says :

"Nothing was settled as to when there would be adjustment of account."

It was, in effect, an agreement to give a mortgage for the true amount of the indebtedness, whatever this might be; nor does the fact that the action was begun before the account was settled deprive the plaintiffs of all right to relief.

The true relief to which the plaintiff was entitled was (*a*) an account of the amount due, (*b*) the execution of a proper mortgage to secure this sum. (*a*) has now become immaterial, but their Lordships can find no sufficient ground for depriving the appellants of relief (*b*), and as the litigation has been in substance for the protection of the plaintiff's security they think the proper order as to costs is that the plaintiff's and the appellants' costs should be added to the security, and they will humbly advise His Majesty accordingly.

Solicitor for appellants : *H. S. L. Polak.*

APPELLATE CIVIL.

Before Das and Kulwant Sahay, JJ.

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MUSAMMAT SHAHZADI BEGUM.

v.

SYED MUHAMMAD QASIM.*

Evidence Act, 1872, (*Act 1 of* 1872), *section* 69, *scope of—section applicable only when Court has exhausted all processes—warrant of arrest, issue of, against a witness—property, attachment of, whether obligatory—Code of Civil Procedure*, 1908 (*Act V of* 1908), *Order XVI, rule* 10.

* Appeal from Original Decree no. 111 of 1924, from a decision of Babu Kamla Prasad, Subordinate Judge of Muzaffarpur, dated the 26th February, 1924.

Section 68, Evidence Act, 1872, enacts as follows :—

"If a document is required by law to be attested, it shall not be used as evidence until one attesting witness at least has been called for the purpose of proving its execution, if there be an attesting witness alive, and subject to the process of the Court and capable of giving evidence."

Section 69 provides :—

"If no such attesting witness can be found.....it must be proved that the attestation of one attesting witness at least is in his handwriting, and that the signature of the person executing the document is in the handwriting of that person."

Held, that in order that a case may attract the operation of section 69, it must be proved that "no such attesting witness is found", and before a party can rely upon that section, he must ask the court to exhaust all its processes for the attendance of the witness.

Tula Singh v. *Gopal Singh* (1) and *Piyari Sundari Dasi* v. *Radha Krishna Datta* (2), followed.

When a Court issues a warrant for the arrest of a witness under Order XVI, rule 10(*3*), Code of Civil Procedure, 1908, it is obligatory on the Court under that rule to make an order for the attachment of his property.

Appeal by the defendant.

The facts of the case material to this report are stated in the judgment of Dass, J.

Sir Sultan Ahmad (with him *Sultanuddin Hussain*), for the appellant.

S. M. Mullick and *Hasan Jan*, for the respondents.

DAS, J.—This appeal arises out of a suit to enforce two mortgage bonds alleged to have been executed by one Ibrahim Hossain represented in this action by Musammat Shahzadi Begum, the appellant in this Court. The first of these bonds is alleged to have been executed on the 9th September, 1915. That was a bond for Rs. 6,000 which provided for payment of interest at Re. 1-4-0 per cent. per month. The latter

(1) (1916) 1 Pat. L. J. 369. (2) (1922-23) 27 Cal. W. N. LX (Notes).

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of these bonds is alleged to have been executed on the 5th April, 1917, to secure an advance of Rs. 1,200 with interest thereon at Rs. 1-8-0 per cent. per month. The learned Subordinate Judge has found that Rs. 5,825 was advanced on the earlier bond and that Rs. 1,100 was advanced on the later bond. He has given the plaintiff the usual mortgage decree in respect of those advances with interest as claimed by the plaintiff.

It is contended in this Court that the earlier bond has not been proved in this case as a mortgage bond and reliance is placed upon section 68 of the Evidence Act. It is not disputed that Rs. 5,825 was in fact advanced under that bond. The only question in respect of this bond is whether the plaintiff is entitled to a mortgage decree. It will be noticed on a reference to the bond that there are three attesting witnesses—Saiyid Kazim Hussain, Saiyid Muhammad Taqi and Mir Waris Hussain. Saiyid Kazim Hussain is dead and could not be called as a witness by the plaintiff on his behalf. The learned Subordinate Judge has found, and I entirely agree with his decision, that Mir Waris Hussain is not an attesting witness. There only remains Saiyid Muhammad Taqi and it is a matter for comment that he was not called as a witness on behalf of the plaintiff. With reference to Saiyid Muhammad Taqi the learned Subordinate Judge said as follows—

> "Saiyid Muhammad Taqi attended as a witness on 11th February, 1924, when the case was opened. But he absented from 12th. A warrant for his arrest was issued but he could not be arrested as he had concealed himself as appears from plaintiff's version."

In these circumstances the learned Subordinate Judge thought that the case attracted the operation of section 69 of the Evidence Act; and, as there was evidence before him that the attestation of one attesting witness at least was in the handwriting of that attesting witness, he thought he was justified in giving the plaintiff a mortgage decree in respect of that bond.

Section 68 of the Evidence Act provides as follows—

"If a document is required by law to be attested, it shall not be used as evidence until one attesting witness at least has been called for the purpose of proving its execution, if there be an attesting witness alive, and subject to the process of the Court and capable of giving evidence."

Section 69 engrafts an exception and provides as follows—

"If no such attesting witness can be found, or if the document purports to have been executed in the United Kingdom, it must be proved that the attestation of one attesting witness at least is in his handwriting, and that the signature of the person executing the document is in the handwriting of that person."

In order that the case may attract the operation of section 69 of the Evidence Act it must be proved that "no such attesting witness can be found." Now, in this case the only evidence that we have is that of the plaintiff who says as follows—

"I summoned Muhammad Taqi. He appeared one day and then disappeared. I got a warrant issued for his arrest. I have learnt that the defendant has gained him over to his side."

What the plaintiff learnt from somebody, whom he does not name is clearly not admissible in evidence as against the defendant. There is nothing in his evidence to suggest that Muhammad Taqi could not be found and the serving peon has not been examined in this case to prove that he did not find Muhammad Taqi. Order XVI, rule 10, of the Civil Procedure Code lays down the procedure to be followed by the Court where a witness fails to comply with a summons. Paragraph 2 of that rule provides as follows—

"Where the Court sees reason to believe that such evidence or production is material, and that such person has, without lawful excuse, failed to attend or to produce the document in compliance with such summons or has intentionally avoided service, it may issue a proclamation requiring him to attend to give evidence or to produce the document at a time and place to be named there; and a copy of such proclamation shall be affixed on the outer door or other conspicuous part of the house in which he ordinarily resides."

It is conceded in this case that no proclamation was issued in this case. Paragraph 3 of the same

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rule provides for an alternative procedure. It runs as follows—

"In lieu of or at the time of issuing such proclamation, or at any time afterwards, the Court may, in its discretion, issue a warrant, either with or without bail, for the arrest of such person and may make an order for the attachment of his property to such amount as it thinks fit, not exceeding the amount of the cost of attachment and of any fine which may be imposed under rule 12."

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Now, in my opinion if the Court adopts the procedure laid down in paragraph 3 then it is obligatory on it to make an order for the attachment of the property of the witness. Now, in this case it is conceded that no order for the attachment of the property of the witness was made. It has been held in this Court that before a party is entitled to rely upon section 69 of the Evidence Act he must ask the Court to exhaust all processes of the Court. See *Tula Singh* v. *Gopal Singh* (1). This case was followed by the Calcutta High Court in *Piyari Sundari Dasi* v. *Radha Krishna Datta* (2). I entirely agree with those decisions and I must hold that in this case it has not been established that Muhammad Taqi could not be found and that therefore one attesting witness at least not having been called for the purpose of proving its execution, the bond of the 9th September, 1915, cannot be looked upon as a mortgage bond. The plaintiff is, however, entitled to a money decree in respect of that bond for the sum of Rs. 5,825 with interest thereon at Re. 1-4-0 per cent. per month until the date of the institution of the suit as against the assets of the deceased in the hands of the defendant.

I now come to the bond of the 5th April, 1917, which is alleged to have been executed by Ibrahim Hossain to secure an advance of Rs. 1,200. It is contended before us that the passing of consideration has not been proved in this case. The bond recites as follows—

"Rs. 125 principal and Rs. 17 interest under a hand note, dated the 18th June, 1916, Rs. 100 principal and Rs. 18-6-0 interest under

(1) (1916) 1 Pat. L. J. 369. (2) (1922-23) 27 Cal. W. N. LX (Notes).

a hand note, dated the 23rd March, 1916, and Rs. 50 principal and Rs. 2-10-0 interest under a hand note, dated the 6th December, 1916, in all Rs. 313 being the principal and interest are rightly due by me to Saiyid Muhammad Qasim Mahajan, and I am also at present badly in need of Rs. 887 to meet the costs of suits and the necessary household expenses."

After reciting that it was impossible for the mortgagor to arrange for the money without executing a bond he proceeds to say as follows—

"Therefore, I, of my own accord and free will, in a sound state of body and mind, without any compulsion or coercion on the part of others, have borrowed from Saiyid Muhammad Hussain, son of Saiyid Muhammad Qasim, alive, by class Saiyid, by occupation a zamindar, resident of Mahalla Chandwara, one of the quarters of Muzaffarpur, Chakla Nai, pargana Bisara, thana, registry office division Munsif's Court and district Muzaffarpur, Rs. 1,200 in Imperial coin half of which is Rs. 600 promising to repay the same after two years and a half, i.e., by the 30th Bhado 1326 Fasli, with interest at the rate of 1½ per cent. per mensem, and I have received the said bond money in cash in one lump from the aforesaid Mahajan in this way that I have set off Rs. 313 against the principal and interest due and that I have received the balance amounting to Rs. 887 in cash and I have appropriated the same."

On the terms of the mortgage bond it would be impossible to say that the money was not in fact advanced by the plaintiff to the defendant; for there is a clear admission of the mortgagor of the receipt of the consideration money in the mortgage bond.

But the evidence of the plaintiff himself establishes that Rs. 887 was not advanced to the mortgagor at the time of the execution of the mortgage bond. In fact it is the case of the plaintiff himself that Rs. 887 was paid to the mortgagor after the registration of the bond. His evidence is that he withdrew Rs. 787 from the Savings Bank and that he had Rs. 100 with him and that he paid Rs. 887 to the mortgagor after the registration of the bond. It is because of this circumstance that the learned Subordinate Judge refused to give him a decree in respect of the entire sum alleged to have been advanced by him to Ibrahim Hussain. It was proved to his satisfaction that the plaintiff did in fact withdraw the sum of Rs. 787 from the Savings Bank and he considered that that fact was sufficient to establish that Rs. 787 was

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in fact paid to Ibrahim Hussain by the plaintiff. This is a circumstance which we must take into consideration in deciding whether Rs. 887 was in fact advanced by the plaintiff to the defendant. The recital in the mortgage bond is of no assistance to the plaintiff, for on his own evidence Rs. 887 had not been advanced to Ibrahim Hussain at the time of the execution of the mortgage bond. Is there then evidence to establish that the plaintiff did advance Rs. 887 to Ibrahim Hussain? It is conceded that at the time of the actual advance the plaintiff took no receipt from Ibrahim Hussain. He has not produced his books of account to show that the money was actually advanced. The case rests entirely on his oral testimony and on the oral testimony of the witnesses called by him. But their evidence has been disbelieved by the learned Subordinate Judge on a very material point, namely, as to the advance of the entire sum of Rs. 887 to Ibrahim Hussain. The learned Subordinate Judge has held that their evidence cannot be accepted in regard to the advance of Rs. 100 at least out of Rs. 887 which it is alleged the plaintiff had with him at the date of the execution of the mortgage bond. This being the position and the mortgagor being dead and his estate sought to be made liable in this action, it is impossible to hold that the plaintiff has established that there was an advance of Rs. 887 by him to Ibrahim Hussain. In my opinion the decision of the learned Subordinate Judge on this point is erroneous.

In regard to the alleged advance of Rs. 313 I am of opinion that the admission of Ibrahim Hussain in the mortgage bond is sufficient. Sir Sultan Ahmad has contended before us that that admission stands on the same footing as the admission of the receipt of Rs. 887 on the date of the execution of the mortgage bond. I am, however, unable to agree with this contention. The plaintiff's own evidence was sufficient to destroy the effect of the admission of Ibrahim Hussain in the mortgage bond of the 5th April, 1917. But so far as the sum of Rs. 313 is concerned, the

evidence of the plaintiff in no way throws any doubt on that advance. Ibrahim Hussain admits in specific terms his liability to the plaintiff to the extent of Rs. 313. In my opinion the plaintiff is entitled to a mortgage decree for Rs. 313 on the foot of the mortgage bond of the 5th April, 1917, with interest as provided in the mortgage bond. The interest as specified in the mortgage bond will run up to a date three months from this date and thereafter interest at 6 per cent. per annum will run on the entire sum found due to the plaintiff on the foot of the mortgage bond of the 5th April, 1917. The defendant will have three months time to redeem the mortgage bond so far as the claim on the bond of the 9th September, 1916, is concerned. As I have already said the plaintiff will be entitled to a decree for Rs. 5,825 with interest at the rate specified in that document up to the date of the institution of the suit and he will be entitled to interest at 6 per cent. per annum on the entire sum decreed to him from the date of the suit up to realisation. The parties will be entitled to their costs in proportion to their success. The cross-objection will be dismissed with costs.

KULWANT SAHAY, J.—I agree.

Decree modified.

APPELLATE CIVIL.

Before Dawson Miller, C. J. and Mullick, J.

BISHESHWAR PRATAP NARAYAN SAHI

v.

CHANDRESHWAR PRASAD NARAYAN SINGH.*

1928.

Jan., 6.

Code of Civil Procedure, 1908 (*Act V of* 1908), *section* 144 *—receiver, property originally in possession of—restitution, rightful owner whether entitled to possession by way of—*

* Miscellaneous Appeals nos. 48 and 50 of 1927, from an order of M. Saiyid Hasan, Subordinate Judge of Muzaffarpur, dated the 1st March, 1927.