

demands in fact. It follows that as Article 85 is applicable, the whole claim is in time, and it is unnecessary for us to consider the argument based upon section 20 of the Indian Limitation Act or section 61 of the Indian Contract Act. I need only say that upon these points I concur in the decision just pronounced.

1922.

SATAPPA
v.
ANNAPPA.

Decree varied.

J. G. R.

APPELLATE CIVIL.

*Before Sir Lallubhai Shah, Kt., Acting Chief Justice,
and Mr. Justice Crump.*

JAGANNATH NARSINGDAS MARWADI AND OTHERS, SONS AND HEIRS OF THE DECEASED, NARSINGDAS PEMRAJ MARWADI (HEIRS OF ORIGINAL PLAINTIFF), APPELLANTS v. RAVJI VALAD TULSIRAM PANSARE (ORIGINAL DEFENDANT), RESPONDENTS^a.

1922.

September 5.

Transfer of Property Act (IV of 1882), section 59—Attestation—No evidence that attestations were not proper—Execution or validity of the mortgage bond not disputed—Question whether the document was validly attested does not arise—Civil Procedure Code (Act V of 1908), Order VI, Rule 8—Indian Evidence Act (I of 1872), section 70.

The plaintiff sued to enforce a mortgage bond. The defendant in his written statement disputed the claim but he did not dispute either the execution or the validity of the mortgage bond. There was no evidence nor was there any indication on the record to show that the attestations were not proper. The first issue raised in the case was whether the mortgage bond was proved. Both the lower Courts held that the mortgage bond was not proved as there was no proof of such attestations as were required by section 59 of the Transfer of Property Act, 1882, and dismissed the plaintiff's suit. On appeal to the High Court,

Held, that the document was proved,

Per *Shah, Ag. C. J.*:—On the ground that there was nothing in the pleadings to show that the plaintiff was put to the proof of attestations; and that in

^a Second Appeal No. 721 of 1921.

1922.

JAGANNATH
NARSINGDAS
v.
RAVJI.

view of the provisions of section 70 of the Indian Evidence Act, 1872, the plaintiff was relieved from the obligation of proving the execution as the defendant had admitted it.

Per *Crump, J.* :—On the ground that there was never any allegation by the defendant that the contract was invalid or incapable of being enforced, and, that being so, the principle laid down in Order VI, Rule 8 of the Civil Procedure Code, 1908, applied and the Courts were wrong in going into the question whether the document was validly attested as that question did not properly arise.

Dalichand Shivram v. Lotu Sakharam⁽¹⁾ and *Shamu Patter v. Abdul Kadir Ravuthan*⁽²⁾, distinguished.

SECOND appeal against the decision of S. J. Murphy, District Judge of Nasik, confirming the decree passed by L. C. Sheth, Subordinate Judge at Sinnar.

Suit to recover money.

The plaintiff sued to recover Rs. 500 on a registered mortgage bond for Rs. 300, dated the 8th January 1912, passed by defendant No. 1.

Defendant No. 1 did not admit the claim but he did not dispute either the execution or the validity of the mortgage bond.

Defendant No. 2 was a purchaser of a portion of property from defendant No. 1.

Both these defendants were agriculturists.

On a preliminary issue, whether the mortgage bond in suit was proved, the Subordinate Judge held that the bond was not a validly executed deed, as no attesting witness was examined and the scribe who had signed for the executant was not even called; that in fact no proof was adduced to show the validity of the deed: *Shamu Patter v. Abdul Kadir Ravuthan* (35 Mad. 607) and *Dalichand Shivram v. Lotu Sakharam* (44 Bom. 405). The suit was, therefore, dismissed.

⁽¹⁾ (1919) 44 Bom. 405.

⁽²⁾ (1912) L. R. 39 I. A. 218;
35 Mad. 607.

On appeal, the District Judge confirmed the decree observing as follows :—

“The mortgage is attested by two men, Nana Keshvji Patil and Appaji Kakazi Joshi, and the writer was Anant Raghunath. One witness Keshav Balwant has been examined and has said that the two attesting witnesses are dead and that the writer is alive. There was no attempt to prove the signature of Appaji Kakazi; but Keshav Balwant has said he knows the handwriting of Nanaji Keshavji. But he has not said that the signature on the deed is that person's.

Evidently there are three persons who could have testified to the due attestation of the document; that is, that it was executed by defendant No. 1 in the presence of the two attesting witnesses, who saw him and each other sign. One of these, the scribe, has not been called; the defendant has not been asked any question as to it; and the plaintiff also has not referred to the execution and attestations. In the circumstances there is no evidence of valid execution to satisfy the requirements of law.

In *Dalichand v. Lotu*, where as here, there was an admission of execution, there was evidence that the attestation had not been proper—here there is none that it has been proper and this is all the difference I can see between the two cases. I think it is not sufficient for a distinction between them, especially as there clearly was evidence available either way which has not been used.

I also think it is now little use to send an issue down with directions that evidence should be taken as to the execution; for there is an obvious danger that self interest may prevail on either side, the evidence desired being known to the parties.

I agree with the lower Court in holding that the legal execution of the mortgage has not been made out”.

The plaintiff appealed to the High Court.

D. R. Patwardhan, for the appellants.

No appearance for the respondent.

SHAH, AG. C. J. :—The plaintiff in this case sued to enforce his mortgage bond, dated the 8th January 1912. The bond was for Rs. 500. The defendant No. 1 filed a written statement in which he disputed the claim, but he did not dispute either the execution or the validity of the mortgage bond. The defendant No. 2 was joined as a

1922.

JAGANNATH
NARSINGDAS
v.
RAVJI.

1922.

JAGANNATH
NARSINGDAEv.
RAVJI.

purchaser of a part of the mortgaged property subsequent to the mortgage, but he did not appear to contest the plaintiff's claim. The first issue raised was whether the mortgage bond in suit was proved. It may be mentioned that when defendant No. 1 was examined in the suit, he admitted the execution of the bond in his evidence. The learned trial Judge, however, relying upon the decision in *Dalichand Shivram v. Lotu Sakharam*⁽¹⁾ came to the conclusion that as there was no proof in the case of such attestations as is required by section 59 of the Transfer of Property Act the bond was not proved and dismissed the plaintiff's suit.

In appeal to the District Court the same point was raised, and it was dealt with by the District Judge practically on the same lines. It may be mentioned, however, that he realised the circumstance which distinguishes this case from *Dalichand Shivram v. Lotu Sakharam*⁽¹⁾, namely, that there was no evidence in the present case that the attestations had not been made in the proper manner, whereas in the other case there was such evidence.

The present appeal is preferred by the plaintiff to this Court, and the respondents have not appeared before us. The defendant No. 2 has not been served, and Mr. Patwardhan for the plaintiff agrees that defendant No. 2's name may be struck off from the suit, as he does not desire to press his mortgage claim against that part of the mortgaged property which has been transferred to him. He is content to limit his security to the property in the possession and ownership of defendant No. 1.

The principal point, however, that has been urged on his behalf is that both the lower Courts are wrong in their view that the mortgage bond is not proved.

(1) (1919) 44 Bom, 405.

1922.

JAGANNATH
NARSINGDAS
v.
RAVJI.

The circumstances in the present case with regard to the mortgage bond are these. Defendant No. 1 not only has not denied the execution of the bond, but has in terms admitted it in his evidence. There is nothing in the pleadings to show that any point was raised by him that the attestations as appearing on the bond were not made as required by law. There are two attestations on the bond exclusive of the writer's signature after the attestations, and so far as the appearance of the document is concerned, those attestations would be consistent with their having been made in a proper manner.

There is nothing in the evidence in the case to show that the attestations were not properly made, i.e., that the attestants did not witness the actual execution of the document in their presence. Under these circumstances the question is whether the lower Courts are right in holding that unless the plaintiff adduces evidence to prove that the attestations were properly made, the bond should be held not to have been duly executed. It seems to me that the lower Courts have gone too far in holding that the bond is not proved.

In the first place, it is clear from section 70 of the Indian Evidence Act 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.

In the present case, there is the other circumstance that both the attesting witnesses are dead. In the case of *Shamu Patter v. Abdul Kadir Ravuthan*⁽¹⁾ there was evidence to show that the attestations were not made in the presence of the executant at the time when the executant signed the mortgage bond, and on that

(1) (1912) L.R. 39 I. A. 218; 35 Mad. 607.

1922.

JAGANNATH
NARSINGDASv.
RAVJI.

evidence it was found that the attestations were not in accordance with law. In the case of *Dalichand Shivram v. Lotu Sakharam*⁽¹⁾ also there was evidence to show that the attestations had not been proper. In the present case there is no such evidence, and no indication on the record whatever that the attestations were not proper.

Under these circumstances, it seems to me that the document is proved. I base my decision, first, on the ground that there is nothing in the pleadings to show that the plaintiff was put to the proof of the attestations; and, secondly, on the provisions of section 70 of the Indian Evidence Act, according to which the plaintiff is relieved from the obligation of proving the execution of the document, if the party to it has admitted its execution. We have not had the benefit of any argument in this case on behalf of respondent No. 1. But after a consideration of the arguments urged on behalf of the appellant, and of the facts in the case, we have come to the conclusion that the view taken by the lower Courts is wrong. I would, therefore, allow the appeal, set aside the decree of the lower appellate Court and remand the suit to the trial Court to be disposed of according to law. All costs up to date to be costs in the suit.

CRUMP, J. :—The Courts in this case have held that the plaintiff cannot succeed because there is no evidence that his mortgage bond was attested by two witnesses, and, therefore, it is not proved that the requirements of section 59, paragraph 1, of the Transfer of Property Act, as explained by the Privy Council in *Shamu Patter v. Abdul Kadir Ravuthan*⁽²⁾, have been complied with. In so doing, the Courts have relied

⁽¹⁾ (1919) 44 Bom. 405.⁽²⁾ (1912) L. R. 39 I. A. 218; 35 Mad. 607.

upon the decision of this Court in *Dalichand Shivram v. Lotu Sakharam*⁽¹⁾. It appears to me, however, that the case of *Dalichand Shivram v. Lotu Sakharam*⁽¹⁾ is at once distinguishable from the case now before us. In that case the validity of the mortgage with reference to section 59 of the Transfer of Property Act was raised *in limine*, and was in fact made the subject of a preliminary issue. Upon that issue evidence was adduced, and it was found that the requirements of section 59 in the matter of attestation had not been complied with.

The District Judge in this case has observed this distinction, but has failed to draw from it the necessary conclusion that the matter was one which should have formed the subject of an issue upon which the parties would be entitled to give evidence. The reasons which he assigns for not sending down an issue upon the point are not satisfactory, for they are such as would apply in the case of every suit in which it is necessary to send down an issue. The case must, therefore, be approached apart from this decision, and, if it is so approached, it appears to me that the judgment of the Court below is wrong.

First, as regards the so-called admission of execution which has been pressed upon us as dispensing with the proof that the formalities of attestations have been complied with. Upon this point I feel considerable doubt. Section 70 of the Indian Evidence Act lays down 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.

Now the question that immediately arises on the application of this section is as to what is meant

1922.

JAGANNATH
NARSINGDASv.
RAVJI.⁽¹⁾ (1919) 44 Bom. 405.

1922.

JAGANNATH
NARSINGDASv.
RAVJI.

by "execution", and, as I understand the law, the word "execution" there means that the party by affixing his signature or mark has signified his assent to the contents of the document, and, if a party admits that he has done this, then he admits execution. I do not think that the admission of execution can be taken to mean an admission not only of the signature or mark in token of assent by him, but also that all the legal formalities connected with the document have been complied with. Nor do I see any reason for holding that where a party admits execution within the meaning of this section, he must necessarily be taken to admit that the document has been attested as required by section 59 of the Transfer of Property Act. But in the present case even if that fuller meaning were given to the words "admission of execution" the result would be precisely the same, for it would be, in my opinion, impossible to hold that that which the defendant here stated can be read as meaning that he admits that the document was validly attested. He is an agriculturist and illiterate, and all that he says is "I passed this document," and when he said that his meaning was that he put his signature or mark, and he cannot, I think, be taken to have intended more. Therefore, that admission can dispense with the proof of execution, only in the limited sense in which I understand that term. But there are other legal principles to be applied which appear to me to conclude the matter. The plaintiff in his plaint sets out that he is suing on a mortgage, and when he sets that out, he must be taken to assert that it is a valid mortgage. The defendant in his written statement raises no plea that the mortgage is invalid. There is a vague statement that the claim is not admitted. But the real defence suggested was that the consideration was not as represented, and that the advance set out in the

mortgage was on account of past dealings. Thus there was never any allegation by the defendant that the contract was invalid or incapable of being enforced, and that being so, the principle laid down in Order VI, Rule 8, of the Code of Civil Procedure, would, in my opinion, be applicable. Of course, where it is brought to the notice of the Court that the document is in any way invalid, for instance, where it is apparent upon the face of it or where it is so disclosed in evidence, then in spite of the absence of any pleading, it might be the duty of the Court to take notice of that fact. The defendant here is an agriculturist and there are certain matters which a Court is required to inquire into as laid down in section 12 of the Dekkhan Agriculturists' Relief Act. But the present point is not covered by that section and, so far as I understand the case, it was never pleaded in the suit, and there is nothing upon the face of the document or anything in the evidence to bring to the notice of the Court, that this document was not validly attested. In that aspect of the case, it appears to me that the Courts were wrong in going into this question, and that, as that question did not properly arise, the mortgage cannot be held to be invalid on account of the absence of proof which the plaintiff was never properly called upon to give.

For these reasons, I agree in the conclusions reached by my Lord the Chief Justice and in the order proposed by him in the case.

Decree reversed.

J. G. R.

1922.

JAGANNATH
NARSINGHAM

v.
RAVJI.