APPELLATE CIVIL

Before Mr. Justice Madgavkar and Mr. Justice Patkar.

YACUBKHAN WALAD DAIMKHAN SERGURO (ORIGINAL PLAINTIFF), APPELLANT *v.* GULJARKHAN WALAD ABDULKHAN GAFOORKHAN SERGURO AND OTHERS (ORIGINAL DEFENDANTS), RESPONDENTS.* 1927 *December* 2

Transfer of Property Act (IV of 1882), section 59, and (Amendment) Act XXVII of 1926—Indian Evidence Act (I of 1872), section 68, and (Amendment) Act XXXI of 1926—Attestation—Execution—No specific denial of execution—Acknowledgment of mark by executant—Signature of attesting witness in presence of executant—Scribe as attesting witness.

In 1920 a suit was filed to recover possession of property mortgaged under a deed of 1895. The defendants in their statement stated that they had no knowledge of the mortgage and that, if genuine, it was hollow. The deed itself was written by the witness Hari Bhikaji and was signed "mark by the hand of Mirjubibi by the hand of Hari Bhikaji." It was attested by three witnesses, B, R and S. One of them, B, was alive and gave evidence in the case. The other two witnesses, R and S, were dead at the date of the suit. R had similarly as above, attested the mark of Mirjubibi before the Sub-Registrar made below her acknowledgment as executant. Both the lower Courts regarded the attestation of B as of no value as he was not present at the time the deed was signed and executed, and, in the absence of evidence as to the signature of the two witnesses R and S who were dead, they held that the document was not proved to have been attested by two witnesses as was necessary under section 59 of the Transfer of Property Act. In their opinion the writer of the deed could be regarded as the only attesting witness. On appeal to the High Court,

Held, that the defendants in their written statement had not specifically denied execution within the meaning of Act XXXI of 1926 and therefore it was not strictly necessary for the appellant to call an attesting witness in proof of the execution of it.

Shamu Patter v. *Abdul Kadir Ravuthan*[1]; *Motilal* v. *Kasambhai*,[2] referred to.

Held also, that, even if the written statement be taken to be a specific denial, the execution of the document was properly proved within the meaning of section 68 of the Indian Evidence Act, as R was an attesting witness, inasmuch as he had received from the executant Mirjubibi an acknowledgment of her mark within the meaning of Act XXVII of 1926 and had signed the instrument in her presence; that another reason in favour of sufficient attestation was the signature of the writer Hari, which was not made as a scribe but as an attesting witness.

Govind Bhikaji v. *Bhau Gopal*[3]; *Lakshman* v. *Krishnaji*,[4] relied on.

Dalichand Shivram v. *Lotu Sakharam*,[5] distinguished.

*Second Appeal No. 181 of 1925.

[1] (1912) 35 Mad. 607 P. C.
[2] (1927) 29 Bom. L. R. 1334.
[3] (1916) 41 Bom. 384 at p. 389.
[4] (1927) 29 Bom. L. R. 1425.
[5] (1919) 44 Bom. 405.

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SECOND APPEAL against the decision of C. C. Dutt, District Judge at Ratnagiri, confirming the decree passed by R. M. Bhise, Subordinate Judge at Chiplun.

Suit in ejectment.

The plaintiff sued to recover possession of the plaint lands relying upon a mortgage, dated November 17, 1895, executed in his favour by Mirjubibi who was dead at the date of the suit. He alleged that he held possession under the mortgage; and that the defendants wrongfully dispossessed him on July 15, 1920.

The defendants contended that they had no knowledge of the mortgage and, even if genuine, it was a hollow transaction, as the plaintiff never held possession in pursuance of it; that, on Mirjubibi's death, the property devolved on defendants and their possession which began at her death was rightful in consequence.

The Subordinate Judge held that the deed was not validly executed because, although the document was attested by three witnesses, two of them were dead at the date of the suit, and there was no evidence to show that they subscribed their names after witnessing the execution of it, that the one who was living (Exhibit 44) stated that he was not present at the time the document was signed and executed; that the only other witness examined in this connection was the writer who had also signed the document for the executant. The learned Judge regarded the writer as an attesting witness and found that he was the only attesting witness to the document. The document however, being required to be attested by two witnesses under section 59 of the Transfer of Property Act, it was held that the document was not validly executed as a mortgage.

The suit was, therefore, dismissed.

On appeal, the District Judge agreed with the opinion expressed by the Subordinate Judge, and dismissed the appeal.

The plaintiff appealed to the High Court.

G. B. Chitle, for the appellant.

K. N. Koyajee, for respondents Nos. 1 to 4.

MADGAVKAR, J. :—The question in this appeal is whether the lower Courts were right in rejecting the mortgage-deed of 1895 in favour of the plaintiff-appellant on the ground that the proof of attestation as required by law was wanting. The deed itself is written by the witness Hari Bhikaji and is signed "Mark by the hand of Mirjubibi by the hand of Hari Bhikaji." It is attested by three witnesses, one Baba or Bavakhan, who is alive and has given evidence, and the other two witnesses Roshankhan and Sheikh Ahmed, who were dead at the date of the suit. Of the last two, Roshankhan has similarly attested the mark of Mirjubibi before the Sub-Registrar made below her acknowledgment as executant. The witness Bavakhan stated that Mirjubibi was not present when he attested it, but that the appellant's father took him to Mirjubibi and she requested him to attest and then presumably he attested it, though he did not ask her if she had executed the document. In the absence of evidence as to the signature of the two witnesses who are dead, both the lower Courts held that it was not proved to have been attested by two witnesses as was necessary under section 59 of the Transfer of Property Act.

The judgment of the lower appellate Court was passed in 1924 prior to the two Acts Nos. XXVII and XXXI of 1926, which have a close bearing on the present question. The former Act, XXVII of 1926, defines the word "attested" as an addition to section 3 of the Transfer of Property Act, and widens its

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meaning beyond that in the decision of their Lordships of the Privy Council in *Shamu Patter* v. *Abdul Kadir Ravuthan*.[1] The amendment made by this Act XXVII of 1926 has been given a retrospective effect by Act X of 1927 : see *Motilal* v. *Kasambhai*.[2] The latter Act, XXXI of 1926, modifies section 68 of the Indian Evidence Act by adding a proviso that it shall not be necessary to call an attesting witness in the case of a mortgage-deed, such as the present, unless its execution is specifically denied.

We are of opinion in the present case that there is no such specific denial by the respondents as is necessary under Act XXXI of 1926 before the plaintiff-appellant is called upon to call the attesting witness. The exact words in the written statement are that " the defendants-respondents have no knowledge of the mortgage, and that if genuine, it must be hollow." Giving these words their plain effect, they mean that they neither admit nor deny its genuineness, but that they assert absence of consideration even if it is held to be genuine. It is not specifically denied within the meaning of the second Act XXXI of 1926, and if so, it is not strictly necessary for the appellant to call an attesting witness in proof of the execution of it.

But, even if the written statement be taken to be a specific denial, we are of opinion that execution of the document is properly proved within the meaning of section 68 of the Indian Evidence Act. Firstly, as regards Roshankhan, he is an attesting witness because he has, at least before the Sub-Registrar, received from the executant Mirjubibi an acknowledgment of her mark within the meaning of Act XXVII of 1926. The other necessary condition is that he signed the instrument in the presence of the executant. But we think in the case of a document of this date that, as in the case of

[1] (1912) 35 Mad. 607. [2] (1927) 29 Bom. L. R. 1334.

Bavakhan, Roshankhan also signed the document in the presence of the executant Mirjubibi. Another reason in favour of sufficient attestation is the signature of the writer. Adopting the test laid down by Batchelor J. in *Govind Bhikaji* v. *Bhau Gopal*,[1] immediately after the execution by Mirjubibi, Hari has signed his own name under the description of the mark. His object in so doing presumably was, and the effect of his so doing, we think, was, to authenticate the mark, that is to say, to vouch the execution; in other words, this last signature was made not as a scribe, but as an attesting witness. These facts and this element suffice to distinguish this case from cases such as the case of *Dalichand Shivram* v. *Lotu Sakharam*.[2] We might also refer to the recent case of *Lakshman* v. *Krishnaji*,[3] where, as here, one of the attesting witnesses was available.

For these reasons, we hold that the deed of mortgage, Exhibit A, of 1895, is admissible and that its execution is proved.

We allow the appeal, set aside the decree of the lower appellate Court and remand the case to it for decision on the merits.

Costs of this appeal to be costs in the remand.

Decree set aside.

J. G. R.

ORIGINAL CRIMINAL

Before Mr. Justice Madgavkar.

EMPEROR *v.* BABULAL ALIAS SHIVCHARAN BIHARI AND TWO OTHERS.*

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Indian Evidence Act (I of 1872), section 45—Opinion of expert—Identity of palm impression—Reasons on points of similarity and dissimilarity admissible in evidence.

*Case No. 17, 5th Criminal Sessions, 1927.

[1] (1916) 41 Bom. 384 at p. 389. [2] (1919) 44 Bom. 405.

[3] (1927) 29 Bom. L. R. 1425.