

other accused persons for trial establishes as against the accused Kalidas Bhaidas a *prima facie* case such as to require the committal of this accused on the charges specified.

As to the form which this Court's order should take, I would add, because much was said at the hearing as to this Court's power to set aside an order of discharge, that I know of no warrant or authority in the Code of Criminal Procedure for the doctrine that an order of discharge under section 209 needs to be set aside before an order for committal of an accused person, held to be improperly discharged, can be made. Section 403 of the Criminal Procedure Code seems to be authority to the contrary. The learned Advocate General, however, asked, I presume *ex majore cautela*, that this may be made part of this Court's order if the accused be ordered to be committed for trial, and such an order has accordingly been included.

APPELLATE CIVIL.

Before Mr. Justice Crowe and Mr. Justice Aston.

RAMJI HARIBHAI AND ANOTHER (ORIGINAL PLAINTIFFS), APPELLANTS,
v. BAI PARVATI (ORIGINAL DEFENDANT), RESPONDENT.*

1902.

September 30.

Transfer of Property Act (IV of 1882), section 59—Attestation of mortgage-bond—Meaning of the word "attested"—Attestation in the presence of the mortgagor after having received from him a personal acknowledgment of his signature.

A mortgage-bond was signed by the mortgagor, was attested by three witnesses and was duly registered. In a suit for the mortgage-debt it appeared from the evidence that none of the attesting witnesses had actually seen the execution of the deed by the mortgagor, but must have attested merely on the mortgagor's admission of his signature. The lower Courts held that this was not sufficient under section 59 of the Transfer of Property Act (IV of 1882), and that the mortgage was, therefore, invalid. On appeal to the High Court,

Held, that the attestation was sufficient. A mortgage-deed is attested within the meaning of section 59 where the witnesses have signed it in the presence of the mortgagor after having received from him a personal acknowledgment of his signature.

* Second Appeal No. 200 of 1902.

1902.
EMPEROR
v.
VARJIVAN-
DAS.

1902.

RAMJI
v.
BAI PARVATI.*Abdul Karim v. Salimun*⁽¹⁾ dissented from.

SECOND appeal from the decision of E. H. Leggatt, Assistant Judge, F. P., at Broach, confirming the decree passed by Ráo Sáheb Tribhovandas Lakshmidas, Subordinate Judge of Broach.

Suit by a mortgagee to recover money due on his mortgage.

Plaintiffs sued to recover Rs. 199 on a mortgage-bond, dated the 4th November, 1895. The plaint prayed for the sale of the mortgaged property and also generally for payment of the sum claimed out of the estate of the deceased mortgagor.

The mortgage-bond was duly executed by the mortgagor and was registered. It was attested by three persons, two of whom were dead at the date of the suit, and the third deposed that he did not actually see the bond executed, but that the mortgagor admitted execution of the deed to him.

The Subordinate Judge passed a decree for the plaintiffs for the amount claimed, and ordered that the amount should be recovered out of the estate of the deceased mortgagor. He, however, refused to order the sale of the mortgaged property, holding that under section 59 of the Transfer of Property Act the deed was invalid as a mortgage. He was of opinion that the evidence showed that the attesting witnesses did not witness the *execution* of the deed, and that their attestation was not of the execution, but merely of the *admission* by the mortgagor of the execution of the deed, and on the authority of *Girindra Nath Mukerjee v. Bejoy Gopal*⁽²⁾ and *Abdul Karim v. Salimun*⁽¹⁾ he held this to be insufficient and that the mortgage was invalid. In his judgment he said :

As the mortgage-bond has been signed by the deceased Dayal Lakshmidas with his own hand and duly registered, I have no doubt about its execution by him.

The defendant's pleader has contended that the mortgage-bond is not valid as the requirements of section 59 of the Transfer of Property Act have not been complied with, and his contention appears to be sound. Under that section a mortgage for one hundred rupees or upwards is required to be effected by a registered instrument signed by the mortgagor and attested by at least two witnesses. Now, the mortgage-bond sued upon is signed by the mortgagor and attested by three witnesses, but the first attesting witness, Kasandas Mancharam, has stated that Dayal Lakshmidas who executed it admitted having signed it, and

(1) (1899) 27 Cal. 190.

(2) (1898) 26 Cal. 246.

the other two attesting witnesses, Harji Girdhar and Pranjivan Waghji, are unfortunately dead, but they must have attested the mortgage-bond after Kasandas Mancharam attested it, and as their attestations appear to have been written with a different ink they could not have witnessed the execution of the mortgage-bond. The attestation required by section 59 of the Transfer of Property Act, as held in *Girindra Nath Mukerjee v. Bejoy Gopal Mukerjee* (1) and *Abdul Karim v. Salimun*, (2) is an attestation by witnesses of the execution of the document and not of the admission of execution, and as there is nothing to show that the mortgage-bond sued upon was signed by the executant Dayalbhai Lakshmidas in the presence of two attesting witnesses, I hold that the requirements of section 59 have not been complied with and that the mortgage-bond in suit is not valid according to law.

On appeal this decree was confirmed by the Assistant Judge, F. P.

Plaintiffs appealed to the High Court.

G. S. Rao for the appellants (plaintiffs):—The lower Courts have erred in interpreting the word “attested” in section 59 of the Transfer of Property Act (IV of 1882). They have unnecessarily narrowed the sense the word ordinarily bears. In the Indian Succession Act (X of 1865), section 50, clause (3), the word “attest” is meant to include attestation by a person who has received from the testator a personal acknowledgment of his signature or mark, and there is no reason why the word should not be given the same meaning in the Transfer of Property Act.

Of the two Calcutta cases relied upon by the lower Courts, the one, *Girindra Nath Mukerjee v. Bejoy Gopal Mukerjee*, (1) does not apply, because in that case the bond was not attested by two witnesses; and the second case, *Abdul Karim v. Salimun*, (2) was decided on the authority of the first case.

There was no appearance on behalf of respondent.

CROWE, J.:—The important question arising in this case is whether the lower Court has misconstrued section 59 of the Transfer of Property Act. Both the lower Courts have relied on the ruling of the Calcutta High Court in *Girindra Nath Mukerjee v. Bejoy Gopal Mukerjee* (1) and *Abdul Karim v. Salimun*. (2)

(1) (1899) 26 Cal. 246.

(2) (1899) 27 Cal. 190.

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Section 59 runs :

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Where the principal money secured is one hundred rupees or upwards, a mortgage can be effected only by a registered instrument signed by the mortgagor and attested by at least two witnesses.

* * * * *

The mortgage-bond here sued upon is signed by the mortgagor and attested by three witnesses, and has been duly registered. The deed has been acted upon and the mortgagees have been put in possession.

The case of *Girindra Nath Mukerjee v. Bejoy Gopal Mukerjee* ⁽¹⁾ does not apply, as there the deed was not attested by *two* witnesses. In the case of *Abdul Karim v. Salimun* ⁽²⁾ their Lordships held that the *attestation* required by section 59 of the Transfer of Property Act is an attestation by witnesses of the *execution* of the document and not of the *admission* of execution. To that view we are unable to express our assent. There is nothing in the wording of the section to lead us to infer that such was the intention of the Legislature. Here the instrument is signed by the mortgagor and bears the attestations of three witnesses. Two of them are dead and the third, who has been examined in the case, states that Dayal Lakshmidas, the mortgagor, asked him to attest the mortgage-bond and admitted having signed it and having received the consideration. It has never been contended that the signatures are not genuine. If all the witnesses had been dead it would only have been necessary, in the absence of any allegation of fraud, to prove the signatures, and the Court would have acted on the maxim *omnia præsumuntur rite esse acta*. No objection was taken in the written statement to the validity of the deed and no issue was raised on the point. We may remark there is nothing to justify the inference that as the attestations of the deceased witnesses appear to have been written with a different ink they could not have witnessed the execution of the mortgage-bond.

It has been held by their Lordships of the Privy Council in a recent case (*Gokul v. Pudmanund* ⁽³⁾) that "the essence of a Code is to be exhaustive on the matters in respect of which it declares

(1) (1898) 26 Cal. 246.

(2) (1899) 27 Cal. 190.

(3) (1902) 29 Cal. 707.

the law, and it is not the province of a Judge to disregard or go outside the letter of the enactment according to its true construction." If section 50 of the Succession Act (X of 1865) be referred to, it will be seen that attestation by a person who signs a will in the presence of the testator after receiving from the testator a personal acknowledgment of his signature or mark is treated by the Legislature as attesting the will, and not as a mere attestation of the testator's admission of execution. The words used in the third paragraph of section 50 of the Succession Act are "The will shall be attested by two or more witnesses.....shall be necessary." And the words used in section 59 of the Transfer of Property Act are "by a registered instrument signed by the mortgagor and attested by at least two witnesses." It seems to us there is nothing in section 59 of Act IV of 1882 to warrant the conclusion that the word "attested" is used in this Act by the Legislature in a different sense from that in which it is used in section 50 of the Succession Act, and to read into the former section a provision that an attestation in the presence of the mortgagor by a person who has received from him a personal acknowledgment of his signature on the instrument of mortgage is not an attestation within the requirements of section 59 of the Transfer of Property Act is "to disregard or go outside the letter of the enactment." With due deference to the authority by which the case of *Abdul Karim v. Salimun* ⁽¹⁾ was decided, we are of opinion that where a will under the provisions of the Succession Act is described by the Legislature as "attested" by witnesses who have signed it in the presence of the testator after having received from him a personal acknowledgment of his signature, an instrument of mortgage can equally be treated as attested under the provisions of section 59 of the Transfer of Property Act when the witnesses sign it in the presence of the mortgagor after having received from him a personal acknowledgment of his signature.

The mortgage-deed (Exhibit 15) which was held proved by the lower Courts was wrongly held to be invalid on the ground that the mortgagor who admitted his signature did not sign it in the presence of the attesting witnesses.

(1) (1899) 27 Cal. 190.

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v.
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We vary the decree of the lower Appellate Court by ordering that on failure to pay the amount within two months the decreed debt, Rs. 182, be recovered by sale of the mortgaged property described in the plaint, and the balance, if any, from the estate of the deceased Dayal Lakshmidas. In other respects the decree of the lower Appellate Court is confirmed. The costs throughout will be borne by the respondent.

Decree varied.

APPELLATE CIVIL.

Before Mr. Justice Crowe and Mr. Justice Aston.

1902.
October 15.

DHANRAM RAGHO (ORIGINAL PLAINTIFF), APPELLANT, v. GANPAT SADASHIV AND ANOTHER (ORIGINAL DEFENDANTS), RESPONDENTS.*

Civil Procedure Code (Act XIV of 1882), section 257A—Decree—Satisfaction of decree by a mortgage without sanction of Court—Mortgage bond void.

The plaintiff was the holder of a decree against the defendant for Rs. 2,370. On the 28th November, 1895, the plaintiff advanced to the defendant Rs. 59, and in consideration of this advance and of the amount already due by the defendant to the plaintiff under the decree, the defendant mortgaged certain property to the plaintiff. The mortgage bond provided for payment of interest on the mortgage debt at the rate of 10½ per cent. per annum. The plaintiff subsequently sued on the mortgage to recover the principal and interest.

Held (dismissing the plaintiff's suit), that the mortgage was void under section 257A of the Civil Procedure Code (XIV of 1882), no sanction having been obtained.

Heera Nema v. Pestonji Dossabhoj (1) followed.

SECOND appeal from the decision of Thakurdas Mathuradas, District Judge of Dhulia, confirming the decree passed by Ráo Sáheb K. R. Natu, Subordinate Judge at Yával.

The plaintiff was the holder of a decree against defendants for Rs. 2,370-7-3. On 28th November, 1895, the plaintiff advanced to the defendants a sum of Rs. 59-8-9, and in consideration of this advance and of the amount due by them on the decree, the defendants mortgaged certain property to the plaintiff. The mortgage

* Second Appeal No. 550 of 1901.

(1) (1898) 22 Bom. 693.