

**(1913) 03 AHC CK 0019**  
**In the Allahabad High Court**

Hori Lal

APPELLANT

Vs

Gobardhan Das and Others and Lekha Singh and Others

RESPONDENT

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**Date of Decision :** 20-03-1913

**Acts Referred:**

**Citation :** (1913) ILR (All) 364

**Hon'ble Judges :** Harry Griffin, J;Chamier, J

**Bench :** Division Bench

**Final Decision :** Disposed Of

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## Judgement

Harry Griffin and Chamier, JJ.—This appeal arises out of a suit brought by the respondent Hori Lal on a mortgage made in his favour on the 22nd of November, 1889, by three persons, Khushal Singh, Moti Singh and Baljit Singh. Both the courts below have found that the mortgage in suit has been proved and have decreed the claim. This is a second appeal by some of the defendants, who contend, and have throughout contended, that the mortgage deed has not been proved. Other points are taken in the appeal to this Court. But, in the view we take of the question of the proof of the deed in suit, it is unnecessary to refer to them. The three executants of the deed, being unable to write, made their marks. All three of them and all the attesting witnesses to the deed died before this suit was brought. The evidence adduced to prove the document consists of (1) the statement of a witness named Lalta Prasad, who claimed to be acquainted with the hand-writing of two of the attesting witnesses, (2) a deed of usufructuary mortgage executed by one of the executants of the mortgage in suit and by the representative of the two other executants, which refers to and recognizes the genuineness of the mortgage in suit, and (3) a deed of sale executed in 1902 by the representatives or some of the representatives of the executants of the deed in suit, which recognizes the genuineness of the usufructuary mortgage mentioned above. This evidence leaves little doubt in our mind that the mortgage in suit is genuine, and it has been accepted by both the courts below as sufficient. But it is contended that the evidence, other than the

statement of the witness Lalta Prasad, is not evidence of the kind required by law. The appellants rely on Section 69 of the Evidence Act, which provides that "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 hand-writing, and that the signature of the person executing the document is in the hand-writing of that person." The evidence of Lalta Prasad proves that the attestation of two of the attesting witnesses is in their hand-writing. But it appears to us that the two deeds relied upon are not evidence that the signatures of the persons executing the document are in their hand-writing. It was contended on behalf of the plaintiff respondent that the usufructuary mortgage and the deed of sale prove indirectly that the signatures of the three executants are in their hand-writing. Section 69 of the Evidence Act reproduces, as regards attesting witnesses, part of a rule of the English law. According to that law where a document is required by law to be attested one attesting witness at least must be called. But there are several exceptions to this rule, one being that if the attesting witnesses are dead, insane, out of the jurisdiction or cannot be found, secondary evidence of the execution may be given by proof of the hand-writing of the witnesses or, if this is not obtainable, by presumptive or any other available evidence. (See the cases cited at page 494 of Phipson on Evidence, fifth edition; and paragraph 1851 on page 1214 of the 9th edition of Taylor on Evidence). It is quite clear that in England it is recognized that there is a distinction between proof of the hand-writing of a person and presumptive or other evidence that a document has been executed. The Indian law does not in a case of this kind appear to allow a party to rely on presumptive or other evidence of execution, where he is unable to comply with the provisions of Section 69, either as regards the attestation of the attesting witnesses or as regards the signatures of the executants. In our opinion the evidence adduced by the plaintiff respondent in the present case, to prove the signatures of the deed in suit, does not comply with Section 69 and we must, therefore, hold that the deed has not been proved. It was pointed out that one of the executants of the deed admitted execution by himself in one of the later deeds and Section 70 was referred to, but that does not avail the plaintiff respondent, for it is not sufficient for his purpose to prove the admission of execution by only one party to the document. It appears to be a hard case, but the plaintiff respondent has himself to thank for the result. He deferred instituting the suit until all the attesting witnesses had died, knowing that the executants, who could only make marks, had made their marks on the deed. In any case he had considerable difficulty in producing proper evidence of execution. We allow the appeal, set aside the decrees of the courts below and dismiss the plaintiff's claim with costs in all courts.