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(1938) 12 AHC CK 0006

Allahabad High Court

Case No: None

Pt. Shyam Lal	APPELLANT
Vs	
Lakshmi Narain and Others	RESPONDENT

Date of Decision: Dec. 15, 1938

Hon'ble Judges: Bennet, J

Bench: Single Bench

Final Decision: Dismissed

Judgement

Bennet, J.
This is a second appeal by a plaintiff whose suit for enforcement of a simple mortgage against defendant 1 has been dismissed by both the lower Courts. Defendant 1, Lakshmi Narain, is a minor and is the son of one Har Lal who was the son of one Bhagwan Din. On 7th February 1918 the plaintiff advanced Rs. 600 to Bhagwan Din on a simple mortgage, re-payment to be made within two years and the rate of interest was 11 annas 9 pies per cent, per mensem with six-monthly rests. The area mortgaged was a share of 2 biswansis. In 1929 Har Lal made a gift of 5 kachwansis to defendants 2 and 3, Jiwa Lal and Chammi Lal. On 21st February 1930 Har Lal executed a simple mortgage deed of 91/2 biswansis to defendants 2 and 3 for Rs. 1000 and he left of this consideration Rs. 600 with defendants 2 and 3 to pay the plaintiff. This was paid to the plaintiff by these defendants on the same date, 21st February 1930. Har Lal died before the present suit was brought on 20th August 1934 and the present suit is brought to realize the balance due to the plaintiff on the mortgage of 1918 the amount claimed being Rs. 1160. One Sri Ram was first of all appointed guardian ad litem of the minor defendant 1 and he admitted the claim, but later he was displaced as guardian by the mother of the minor who contested the suit. One of the issues was "whether the suit was barred by limitation?" and the Courts below have hold that the suit was barred by limitation against defendant 1. The trial Court granted a decree for sale against defendants 2 and 3 so far as the property, the subject of the gift of 1929, was concerned. The plaintiff appealed to the lower Appellate Court and that Court dismissed his suit on the ground of limitation. The main

question in second appeal is limitation. The suit of the plaintiff was brought on 20th August 1934 which was more than 12 years from the date on which payment should have been made under the mortgage deed of 1918, that is on 7th February 1920. The plaintiff relied for the saving of limitation on an admission contained in the mortgage deed of 21st February 1930 executed by Har Lal in favour of defendants 2 and 3. That admission was contained in the following words in regard to the property in suit of which 91/2 biswansis were mortgaged by this mortgage deed of 29th February 1930:

And excepting the charge of the mortgage executed by myself in favour of Shyam Lal dated 7th February 1918 and registered on 8th February 1918 in Book No. 1, Vol. 124 at page 129, is quite free from all other transfers and liabilities. Now for the purpose, of paying the incumbrance of the said mortgage.

2. It may be noted that the very purpose of this deed of 1930 was to pay off the mortgage bond of 7th February 1918. On the same date an endorsement was made on the mortgage deed of 7th February 1918 to the following effect:

To-day the 21st February 1930 a sum of Rs. 900 has been received towards this mortgage deed from 1 Ian Lal, son and heir of Bhagwan Din, deceased, through Jiwa Lal and Ohamrai Lal. A receipt for 51, has been given today to Jiwa Lal, and Chammi Lal also. Signed Har Lal by his own pen.

3. There is no signature of the plaintiff on this endorsement. On behalf of the plaintiff reliance is placed on the acknowledgment by Har Lal, the predecessor of defendant 1 in the mortgage deed of 21st February 1930. This is a clear acknowledgment of liability under the mortgage deed of the plaintiff. It is true that that mortgage deed further states:

I have left a sum of Rs. 900 for paying the mortgage aforesaid and bond debts in favour of the mortgage (land. The mortgagees should pay I, ho money to Shyam Lal aforesaid and obtain receipt from him.

4. The plaintiff however did not accept the payment of Rs. 900 as full discharge of the obligation. The fact that Har Lal intended that he should, does not prevent the acknowledgment of Har Lal being a good acknowledgment for the purpose of saving limitation.

5. The objection which has been taken to the acknowledgment is that it is not admissible in evidence because the mortgage deed of 1930 has not been proved in accordance with Section 68, Evidence Act. The plaintiff called an attesting witness Amanatullah and he made a statement which was unsatisfactory and the plaintiff therefore got permission to cross-examine him. The witness began by stating that Har Lal executed the mortgage deed dated 21st February 1930 in favour of Jiwa Lal and Chammi Lal:

I and Bhajan Lal attested it... Har Lal was present when we two attested the deed. I do not remember if I asked Har Lal whether he had executed that mortgage deed. It is

possible that I did ask. He had already signed.

6. In cross-examination he said:

At the time of execution I saw who Har Lal was and did not know otherwise... On seeing the signature I recognized that it was Har Lal''s signature. I enquired all about this document after attesting it.

7. Now we agree with the Court below that this evidence does not satisfy the requirements of Section 68, Evidence Act, and Section 3, T.P. Act, which gives the definition of ''attested''. The definition of ''attested'' requires that the attesting witness should see the executant sign or mark the document or someone on his behalf do so or receive a personal acknowledgment from the executant and should sign the instrument in the presence of the executant. Having failed with the attesting witness u/s 68, Evidence Act, it was open to the plaintiff to prove the mortgage deed of 1930 by other evidence. If however the document is to be proved as a mortgage deed then that other evidence must prove the attestation. The plaintiff produced a witness Lakshmi Narain and he stated:

Har Lal executed the mortgage deed in favour of Jiwa Lal and Chammi Lal in my presence. Har Lal signed it in my presence. Seeing the mortgage deed dated 21st February 1930 the witness said that this is that document.

8. This evidence does not mention anything about the attesting witnesses who were presumably called in afterwards. Therefore the evidence of Lakshmi Narain does not prove that there was attestation of this document. This evidence of the plaintiff himself was given but it is similar to that of Lakshmi Narain. The conclusions of the lower Court therefore are correct on this question of what the evidence proves and we agree that the evidence does not prove attestation of this mortgage deed of 1930. The evidence however does prove that Har Lal executed this mortgage deed. The question which arises therefore is whether the mortgage deed is admissible to prove the admissions contained in it or whether it cannot be used for that purpose because it in a mortgage deed and would require to be proved to have been duly attested in a suit to enforce the document as a mortgage deed. Admissions are dealt with by Sections 18 to 23, Evidence Act, and Section 18(2) refers to statements made by a person from whom the parties to the suit have derived their interest in the subject-matter of the suit. An admission may be a statement oral or documentary and in general an admission in a document is proved u/s 67, Evidence Act, which provides as follows:

If a document is alleged to be signed or to have been written wholly or in part by any person, the signature or the handwriting of so much of the document as is alleged to be in that person''s handwriting must be proved to be in his handwriting.

9. Section 68 on the other hand states:

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.

10. The question at issue is whether the wordy "it shall not be used as evidence until one attesting witness at least has been called", etc. are to be held to imply the words "it shall not be so used as evidence for any purpose"; or whether the words are to be held merely as applying to a suit for enforcement of the document leaving the ordinary provisions of law in Section 67 to apply where the document is to be used for any other purpose. On general considerations it would appear difficult to hold that Section 68 must always apply to the use of a document in evidence which is required by law to be attested, For example supposing such document contained words which amounted to a criminal libel or to sedition and supposing the document instead of being attested had not been attested at all, could it be said that no use could be made of the document for the purpose of a criminal prosecution or a civil suit for damages for libel. If such a view was to be taken of the law, then by merely having recourse to putting a libel in the form of a mortgage deed or a will the law for libel could be evaded. Moreover it seems unlikely that it should be necessary in a criminal trial for sedition or libel to have to prove by calling attesting witnesses the document containing the words complained of. It is true that this was originally the view taken by the strict rules of evidence in English law as is shown by R. v. Joseph Jones (1777) 1 Leach 174. where the indenture was put in upon an indictment against an apprentice for a fraudulent enlistment, and also in Manners v. Postan (1802) 4 Esp 239 where the deed was used in evidence collaterally. On these rulings Taylor on Evidence, Edn. 10, Vol. 2, Para. 1844, states:

The rule that where an attesting witness is necessary to the validity of an instrument, a person who was such witness must be called, applies, whatever be the purpose for which the instrument is produced.

11. The paragraph further proceeds:

Moreover the party calling him is not precluded from giving further evidence, in case he denies, or does not recollect, having seen the instrument executed.

12. Now the plaintiff has complied with this latter rule which is embodied in Section 71, Evidence Act. The further objection however is taken that the additional evidence ought to prove attestation. Now Taylor cannot be quoted as an authority for that proposition. What Taylor states indicates that further evidence should be given to prove the execution and not the attestation. Similar passages occur in other works on evidence such as Best. Learned Counsel next referred to Sahib Chandra Singh and on his Death His Rears and Legal Representatives, Sudhanya Kumar Singh and Others Vs. Gour Chandra Paul and Others, reference is made to two mortgage-bonds which were executed by Kasinath and his widow defendant 4 in which it is stated that the mortgagors had not created any

subordinate interest or encumbered the property in suit which they mortgaged by those deeds. The documents were proved not by any attesting witness to them, but by evidence of persons who identified the signatures of the executants. It appears therefore that in regard to these mortgage bonds an attesting witness was not called. On p. 140 the Court, following Taylor on Evidence, Para. 1844, referred to the case in Manners v. Postan (1802) 4 Esp 239 already mentioned and held that the mortgage bonds were not admissible in evidence apparently for the purpose of proving a statement contained in them. In Awadh Ram Singh v. Mahbub Khan AIR (1924) Oudh 255 at p, 259 there was a suit for pre-emption and two mortgage deeds were produced for what is briefly mentioned as a collateral purpose, and the Court said that they should be proved in accordance with Section 68, Evidence Act, and then the defence counsel admitted execution. There was practically no discussion of the question in this ruling. In this High Court there are the following ridings.

13. In Mathra Pershad and Another Vs. Cheddi Lal, Sir P.C. Banerji sitting singly had the case of a bond which purported to be a mortgage bond and the suit was brought in the Court of first instance to enforce the mortgage. That Court held that the document had not been duly attested and could not be treated as a mortgage. In first appeal the plaintiff abandoned the claim for a sale on the mortgage and asked for a simple money decree on the document as proving a debt. The point was taken in. second appeal that the document was not admissible in evidence for any purpose u/s 68, Evidence Act. The learned Judge observed:

I am unable to agree with this contention. As a mortgage it was undoubtedly necessary that the document should be attested by at least two witnesses and that one of those witnesses should be called.

14. He then stated that the document was shown by the evidence not to have been duly attested and that it could not be treated as a mortgage and stated:

it is only in the case of a document which required to be attested and was attested that u/s 68, Evidence Act, it was necessary to call an attesting witness. As the document in this case was not so attested, Section 68 has no application and the case in my opinion fell within the purview of Section 72, Evidence Act. For a simple money bond it in not necessary that it should be attested by witnesses. As the bond in this case was not so attested, iii was a valid document as a simple money bond and was admissible in evidence.

15. In Moti Chand and Others Vs. Lalta Prasad and Others, a similar point arose before a Bench of this Court in regard to a document executed as a mortgage deed. One of the attesting witnesses was dead and the other though summoned was not produced. It was held that by the terms of Section 68, Evidence Act, when its provisions are not complied with a document cannot be used as evidence at all as a document either requiring attestation or in fact attested. But this does not prevent it from being used in evidence as

something else or for any other purpose (p. 127).

16. In 1929 A 1 J 5887 there was a case before a Bench of this Court, which was somewhat similar to the present, where the plaintiff claimed a sum due under a mortgage deed of 6th January 1912, and relied on an acknowledgment to bring the case within limitation, the acknowledgment being made in a mortgage deed of 27th March 1917. In the Court below, reliance had been placed on the evidence of one Ram Chandra, who was the scribe, to prove the execution of this mortgage of 19 Id. The Court said:

Section 68, Evidence Act, in our opinion, lays down that a document which is required by law to be attested cannot be used as evidence until one attesting witness has been called, or, if no attesting witness is alive, by other means set out in the following Sections of the Evidence Act. In this case no attempt was made to prove the document by either calling in an attesting witness, or, even putting any question to Ram Chandra regarding the attesting witnesses or attestation. We are therefore of opinion that the plaintiffs" suit is barred by limitation and that this appeal must succeed.

17. Now in this ruling there is no discussion of the point as to whether the document can be used for any other purpose such as an admission. The learned Judges also had before them a case where no attesting witness was called. In the present case an attesting witness has been called. And moreover the learned Judges did not refer to the previous rulings of this Court which we have mentioned and presumably those rulings were not brought to their notice. There is therefore a conflict between the decisions of this Court on the point and it is open to us to follow the rulings where the point has been more fully discussed. Learned Counsel for the respondents argued that the Evidence Act reproduced the law of England. That is not correct because in the Preamble of the Evidence Act it is stated:

Whereas it is expedient to consolidate, define and amend the law of evidence; it is hereby enacted as follows:

18. It does not follow therefore that because a rule of evidence may be in force in England it is embodied in the Evidence Act. The Evidence Act codified the law and we should have expected that if Section 68 was intended to express that a document required by law to be attested should not be used as evidence for any purpose until one attesting witness at least had been called, then the words "for any purpose" would have found a place in the Section. Those words are not in the Section and therefore we conclude that this was not the intention of the framers of the Act. It is not possible to see why an admission in one document should require a different kind of proof from an admission in another document. The mere fact that one of the documents requires to be executed with attestation and that attestation must be proved for the purpose of giving legal effect to the document does not appear to have any bearing on the question as to what proof should be given of the document where it is tendered merely to prove en admission in writing. For these reasons we consider that the view of the appellant is

correct and that Section 68 does not apply to the case of a document which is merely to be proved for the purpose of an admission. We therefore consider that the acknowledgment in the deed of 21st February 1930 did save limitation in the present case and that the suit of the plaintiff is within limitation against defendant 1. The trial Court granted a decree against defendants 2 and 3 only in regard to the property gifted and this decree was not enlarged by the lower Appellate Court. As regards the property which was mortgaged to those defendants the title of the equity of redemption remain in defendant 1. The mortgage to defendants 2 and 3 will not affect the rights of the, plaintiff to get a decree also in regard to this property. Even in English law there could not be any objection of limitation taken by defendants 2 and 3 because they are claiming under the mortgage deed in question of 21st February 1930 and that is one of the exceptions laid down by Taylor in paragraph 1845 (No. 5). We therefore grant a decree to the plaintiff for the sale of the whole of the property comprised in his mortgage of 7th February 1918. One further question remains for consideration and that is the claim which was made by defendant 1 in regard to interest. Defendant 1 is the son of Har Lal and the grandson of Bhagwandin who executed the mortgage in question. Two issues were "framed cm the subject of interest:

(6) Is the rate of interest claimed by the plaintiff hard and excessive? and

(8) Was there any legal necessity to borrow the amount in dispute at the rate of interest claimed?

19. The trial Court found that the rate of interest was not excessive and the debt was taken to pay a previous loan which was very old. The Court did not come to any finding that there was any legal necessity for the high rate of interest. The lower Appellate Court did not deal with the point because it dismissed the appeal of the plaintiff on the ground of limitation. It does not appear that there was any legal necessity for the high rate of interest. The interest was As. 11-9 per cent, per mensem compound interest with six-monthly rests. We consider that under these circumstances we should apply the rule laid down by their Lordships of the Privy Council in Ram Bujhawan Prasad Singh v. Nathu Ram AIR (1932) P.C. 37. In that case in the absence of legal necessity to prove a higher rate or compound interest their Lordships reduced the rate to 1 per cent, per mensem simple interest. Applying that rate and taking into account the payment of Rs. 900 made on 21st February 1930 it appears that the amount due to the plaintiff will be less than the Rs. 1160 which has been granted by the trial Court. The office will make a calculation of the amount now due to the plaintiff. We allow plaintiff proportionate costs in all Courts. A decree will be prepared in the terms of Order 34, Rule 4 for the whole of the property mortgaged with costs against all the defendants. The period for payment will be fixed as six months from the date of our order. The rate of interest pendente lite and future interest till the end of the six months will be at 12 per cent, per annum simple interest and thereafter at 6 per cent, simple interest per annum.