Ebrahim Mandal and Others Vs Akshay Konar and Others

Court: Calcutta High Court

Date of Decision: May 23, 1935

Final Decision: Dismissed

Judgement

Nasim Ali, J.
The Appellants before me are the Plaintiffs in a suit to enforce a simple mortgage bond alleged to have been executed by the

father of the Defendant No. 1 in favour of the late Atar Mandal, the predecessor-in-interest of the Plaintiffs, and Defendant No. 1. The suit was

instituted more than six years after the date fixed for the payment of the loan. Defendant No. 1, as has been already stated, is the sole heir of the

mortgagor and Defendants Nos. 6 to 8 are the heirs of the transferee of equity of redemption from the Defendant No. 1. Defendants Nos. 2 and 3

are the daughters of the mortgagor and are not at all necessary parties, as they are not the heirs of the mortgagors under the Hindu law. Defendant

No. 5 is a lessee of the mortgaged property under the Defendants Nos. 6 to 8. Defendants Nos. 5 to 8 contested the suit. Defendant No. 5 denied

the execution as well as the attestation of the document according to law. Defendants Nos. 6 to 8 did not specifically deny the execution of the

document by the mortgagor but denied that the bond was attested according to law. The trial Court dismissed the suit against all the Defendants

excepting the Defendant No. 5. On appeal by the Plaintiffs to the lower Appellate Court the learned Judge has come to the conclusion that the

bond in execution cannot operate as a mortgage bond, inasmuch as it was not attested according to law. In that view the learned Judge dismissed

the appeal. Hence the present Second Appeal.

2. Dr. Mukherjee on behalf of the Appellants contends that the learned Judge is in error in holding that the bond in suit cannot operate as a

mortgage bond. Now "" 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 ""--(Sec. 59 of the Transfer of Property Act). Sec. 68 of the Indian

Evidence Act deals with the mode of proof of a document which is required by law to be attested. Sec. 68 as it stood before the amendment in

1926 was in these terms:--"" 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."" By sec. 70 of the said Act an exception was engrafted on the general rule embodied in sec. 68, viz.:--"" 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 cases, therefore, not covered by sec. 70, a document which is required by law to be attested, cannot be used as evidence

unless one attesting witness at least has been called. By Act XXXI of 1926 a proviso was introduced in sec. 68. It is in these terms:--"" Provided

that it shall not be necessary to call an attesting witness in proof of the execution of any document, not being a Will, which has been registered in

accordance with the pro-visions of the Indian Registration Act, 1908. unless its execution by the person by whom it purports to have been

executed is specifically denied."" The contention of Dr. Mukherjee is that in view of this proviso the Plaintiffs are not bound to prove attestation of

the bond in question by calling an attesting witness, inasmuch as in this case execution was not specifically denied by Defendants Nos. 6 to 8. The

proviso to sec. 68 dispenses with the proof of the execution of any document, if its execution is not specifically denied. The word ""execution"" has

not been defined in the Indian Evidence Act. Sec. 59 of the Transfer of Property Act does not use the word ""execution,"" but the word used there

is ""signed."" If the word "" execution "" as used in sec. 68 of the Evidence Act means simply "" signing,"" then the proviso removes the necessity of

proving the signature by calling an attesting witness. It does not relieve the party, who wants to enforce the bond as a mortgage bond, of the

necessity of proving attestation. If "" execution "" means something more than signing, that is, if it means not only signing but signing in the presence of

attesting witnesses, then the proviso to sec. 68 would relieve the party of proving attestation also if the signing as well as the attestation are not

specifically denied. In the present case. however, the attestation of the document was specifically denied in the written statement of Defendants

Nos. 6 to 8. A distinct issue was raised on the question as to whether the bond was attested according to law. Under these circumstances it was

incumbent upon the Plaintiffs to prove the attestation of the document according to law. The evidence in the present case is not sufficient to show

that the document was attested according to law. The learned Judge was, therefore, right in holding that the bond in execution cannot operate as a

mortgage bond.

3. Dr. Mukherjee next contended that as the Defendant No. 5 alone specifically denied the execution of the document, it was not necessary for the

Plaintiffs to prove attestation as against the Defendants Nos. 6 to 8. In view of what I have stated already it is not necessary to express any final

opinion, but I am inclined to think that if any of the Defendants to a mortgage suit denies that any of the alleged executants of the bond executed the

deed, the Plaintiff is bound to produce one of the attesting witnesses at least to prove the execution of the document.

4. Dr. Mukherjee at last pressed for a remand in order to enable the Plaintiffs to adduce additional evidence to show that the document was

attested according to law. In view of the fact that the Defendants Nos. 5 to 8 specifically denied the attestation of the document and an issue was

raised on that point, it was incumbent upon the Plaintiffs to produce all the available evidence in support of their case. There is nothing on the

record to indicate why this was not done by the Plaintiffs. I am, therefore, unable to accede to this prayer on behalf of the Plaintiffs. For the above

reasons I dismiss this appeal, but in view of the facts and circumstances of this case, I make no order as to costs.