(1922) 02 CAL CK 0063

Calcutta High Court

Case No: None

Sahib Chandra Singh and on his Death His Rears and Legal Representatives, Sudhanya Kumar Singh and Others		APPELLANT
	Vs	
Gour Chandra Paul and Others		RESPONDENT

Date of Decision: Feb. 10, 1922

Acts Referred:

- Evidence Act, 1872 - Section 68, 69, 70, 71

Citation: AIR 1922 Cal 160 : 68 Ind. Cas. 86

Hon'ble Judges: Suhrawardy, J; Cuming, J

Bench: Division Bench

Judgement

1. This appeal arises cut of a suit for the recovery of possession of certain properties described in the plaint on establishment of the plaintiff''s title thereto. The facts of the cases which are rather complicated are folly set out in the judgment of the lower Appellate Court. The Court of first instance gave the plaintiff a partial decree by declaring the take right of plaintiffs Nos. 1 and 2 in four annas share of the land3 described as property No. 1 in the plaint and the coast raiyali title of the plaintiff''s to eleven annas four ganders share of property No. 2 and dismissed the plaintiff''s claim with regard to the rest of the properties in suit, On appeal the lower Appellate Court modified the decree of the first Court by declaring plaintiff''s note right under defendants Nos, I, 2 and 4 in property No. 1 and granting them a decree for has possession of that property, and in other repeats upheld the decree of the first Court. Several objections have been taken to the findings of the lower Appellate Court some of which, in our opinion, do not stand scrutiny. The points that require serious consideration are : that'' the Court of Appeal below has erred in holding that the family being joint and Ramsunder with his seven surviving sons including Kasinath living in joint mess, the property must be said to be the joint properties of

all, that the defendants must show that Kasinath had a separate fund of his own from which be acquired this property and (that hence the presumption is that it was joint property of the joint Hindu family of Ram-sunder and his sons. It is argued that as the family was one governed by the Daya-bhaga School of the Hindu Law, such pre-sumption caught not to have been raised and the burden cast upon the defendants to prove that the property was purchased with the funds of Kasinath, in whose name it stood. It is clear from the perusal of the judgment that the lamed District Judge on an examination of the oral evidence has found that the property was purchased in the name of Kasinath, as he was the ablest and most intelligent of Ramsunder''s sons, and in consideration of the facts and circum-stances of the ease he has demanded proof from the defendants that the property was purchased by Kasinath out of his personal fund. The question of onus loges its importance when both parties have add me d evidence in report of their respective cases, and the Court, on an examination of such evidence, shifts the burden of proof from party to the other This must be more so at the1 appellate stage : Krishna ****Eii(,r Be v. Nagendrabala Chaudhurani 66 Ind. Cas. 694 PC : 34.C L. J.333 : 25 C, W. N. 942,. The finding of the learned Judge is based on a consideration of the evidence in the case and is Unassailable in second appeal.

2. The second point is of some importance. The Court of first instance admitted in evidence two mortgage-bond, Exhibits A and B, without objection by the plaintiffs. These documents were executed by Kasinath and his widow, defendant No. 4, in which it is stated that the mortgagors had not treated 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, bat by evidence of persons who identified the signatures of the executants. The plaintiff claim in thin suit jutes created by Kasinath under his taluka right in property IN p. 1, It was attempted to show by these document that sometime ago, ie., in 1900 and 1912 Kasinath and his widow made statements to the effect that they had not created any such subordinate interest in the property. Considering the nine instances under which these statements were made it is doubtful if these admissions are admissible in evidence u/s 13 of the Evidence Act in, favour of the persons who made them or those claiming under such persons. But in view of our decision as to the documents having been legally proved it is rot necessary to discuss the matter further.

3. Section 59 of the Transfer of Property Act requires a mortgage-deed to be attested by two witnesses and Section 68 of the Indian Evidence Act enac''s as follows:

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," The only exception to this imperative rule is laid down in Section 70 of the Evidence Act to the if jot that the admission of a party

to an attested document of its execution by himself shall be sufficient proof of its execution as against him. In the present case there is no prove that there is in attesting witness to these documents alive or available In these circumstance, it is evident that the provisions of Section 68 of the Evidence Act have not been complied with and the documents not legally proved. It is contended for the appellant that the strict mode of proof prescribed in Section 68 of the Evidence Act applies only to cases where the document is attempted. from enforced to prove the legal right or section it creates. But in a case where snob document is sought to be proved for a collateral purpose, it may be proved by the ordinary law laid down for proof of a document as a piece of evidence. We do not think we should give effect to this contention. The law, as laid down in Section 68, is imperative and does not, on the face of it, admit of any relaxation except in the cases provided in sections 69, So and 71 of the Evidence Act. Section 58 of the Evidence Act is based on the English Law on the point which is thus stated in Taylor on Evidence, 11th Edition, page 1230, Section 1843. ''The general rule, which requires the production of an attesting witness, when the validity of an instrument depends upon its formal attestation, is so. inexorable that it applies even to a cancelled or a burnt deed, as also to one, the execution of which is admitted by the party to it and that, top, though such admission be deliberately made, either in open Court or in a subsequent agreement or even in a sworn answer to interrogatories delivered to the party in the cause. A patty in a cause, who is called as a witness by his opponent, cannot be required to prove the execution by himself of an instrument, to the validity of which attestation is requisite, be long as the attesting witness is capable of being could. So also the attesting witness must be called, though subsequently to the execution of the deed he has become blind, and the Court will not disposes with his presence on account of illness, however severe, If the, indisposition of the witness be of longstanding the party requiring his evidences should have applied for power to examine him before a Commissioner or Examiner, and if he be taken suddenly ill a motion must be made to postpone the trial.
Section 1344, page 1231.-" The rule is equally applicable, whatever be the purpose for which the instrument is produced."

3. This statement of the law found judicial recognition in the case of Manners v. Patton 1 Leach. C. C174 PC, in which Lord Alveoli clearly laid down that the rule of law (as codified in sections 63 of the Indian Evidence Act) is not confided to cases where the attested instrument was the ground of action but that it applied also to cases where it was Used in evidence for collateral purposes. This view is also supported by the imps restive end stringent wording of Section 68 which does not permit the me of tae instrument as evidence for any purpose whatsoever unless and until it is proved in strict accordant with the provisions of the section. The rig our of the English Law on which the present section is founded has been to a certain extant lessened by the proviso as contained in Section 70 of the Evidence Act. The enactment of this proviso, to our mind, clearly indicates that the Indian Legislature

intended to provide only one exception to this in flexible rule and no other.

4. It has been argued on the authority of Tofaluldi Peada v. Mahar Ali Shaka 26 C 78 PC: 13 Ind Dec (N.S.) 654, and other cases of this and other High Courts that a mortgage-deed though not endorsable as such has been used as evidence and prove in the ordinary way to enforce a personal covenant to pay. In all these cases the bond was Dot attested in accordance with Section 59 of the Transfer of Properly Act and hence it was not treated, as a mortgage-bond, but given effect to as a simple money bond. These cases, therefore, do no support the position taken by the appellants. We have not been referred to any case where a mortgage-bond properly arties ed, though not proved in conformity with Section 68 of the Evidence Act, was received in evidence to prove the personal obligation treated thereby. For the contrary view we have the authority of the case of Shamu Patter v. Abdul Kadi r 31 M 215 PC: 18 M.L. J. 219 : 3 M. L. T. 300. The case was taken to the Privy Council which affirmed the decision of the, Madras High Court in Shamu Patter v. Abdul Kadir16 Ind. Cas. 250 PC: 35 M. 607 PC: 16 C. W. N. 1009: 2 M L. J. 321V 12 M.L. T. 888 : (1912) M. W N 10 A L. J T 259 : 14 Bom. L. Rule 1034 : 16 C. L.J.586 : 39 I. A. 218 (P.C.). The point whether Each a document should be used as a bond was negatived by the Madras High Court; it was urged Counsel for the appellant at the Bar of the Privy Council but was presumably not pressed and there is no direct finding of the Judicial Committee on this question though the dismissal of the suit indicates that in their Lordships'' opinion there was no ground on whish the plaintiff in that case was entitled to any relief. It is further noticeable that in that case the deed in suit was admitted by the executants and the contesting defendants in the pleading?, which fact assumes importance with reference to the next question raised before us by the appellants.

5. It is further argued in this connection that the plaintiffs were not competent to object to the admissibility of the mortgage-bonds in the Court of Appeal below as they were admitted without objection in the first Court. It is not clear from the judgment of the lower Appellate Court whether the documents were rejected by it suo motu or on the objection of the respondents. We are not unmindful of the cases in which it has been laid down that where a piece of evidence not proved in the proper manner has been admitted without objection, it is not open to the opposite party to Challenge it at a later stage of the litigation. But where evidence has bean received without objection in direct contravention of an imperative provision of the law, the principle on which unobjected evidence is admitted, be it acquiescence, waiver or estoppels none of which is available against a positive legislative enactment, does not apply. See Harek Chand v. Bishun Chandra (13) S.C.W.N. 101. In the present cage the law has laid down an it flexible rule of proof which cannot be deviated from except so provided in the Act. If the Legislature had intended of modify the stringency of the English Law so far as to make an instrument not proved in accordance with the provisions of Section 70 of the Evidence Act admissible when not objected to by the other party, one would have expected a proviso to that effect

similar to Section 70 of the Evidence Act. In our opinion the enactment of Section 70 lends considerable colors to the supposition that the Legislature desired to add no further exception to the law laying down the special method of proof of instruments required by law to be attested. We accordingly hold that the mortgage-bonds were lightly re-jected by the learned Judge.

6. We may observe that the bonds even if admitted would have apparently afforded evidence of the weakest character, and the Munsif who decided the case in favour of the defendants, did not even refer to them in his elaborate judgment.

7. The decree of the lower Appellate Court requires slight modification in that it has decreed to the plaintiffs khan possession of the lands of property No. 1 in that 10 annas share." The plaintiffs claimed their note right in plots Nos. 1, 2 and 3 of property no. 1 and not in the whole of that properly. The plaintiff''s jote right will, therefore, be declared in, and khass possession granted to them of, plots Nos. J, 2 and 3 only of property No. 1. With this variation the decree of the Court of Appeal below is affirmed and this appeal dismissed with costs.