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Court : Mumbai

Decided On : Aug-02-1912

Reported in : (1912)14BOMLR1020; 17Ind.Cas.722

Judge : Beaman, J.

Appeal No. : O.C.J. Suit No. 12 of 1912

Appellant : Jethibai

Respondent : Putlibai

Disposition : Suit dismissed

Judgement :

Beaman, J.

1. In this suit, the plaintiff seeks to enforce an alleged equitable mortgage for a consideration of Rs. 6079 against a house in 2nd Bhoiwada Lane, the property of the deceased Parvatibai, against her executrix under the Will her grandmother Putlibai. The relationship of the parties commenced with Damodar Kanji, who left a widow Putlibai and a son Daya Damodar. Daya Damodar left him surviving a daughter Parvatibai. The plaintiff claims through one, Laxman, who left a widow Jaykore and a sister Jethi, the present plaintiff.

2. The alleged equitable mortgage is said to have been made by Putlibai and Parvatibai in or about August 1906 to Laxman in consideration of a balance of Rs. 5079 at that time due as the result of long money transactions between himself and Damodar Kanji, and after Damodar Kanji, his son Daya Damodar ; and the further consideration of Rs. 1000 said to have been advanced by the said Laxman to Putlibai and Parvatibai to meet the expenses of a suit which had originally been brought against Putlibai and the deceased Daya Damodar.

3. It is important to state at the outset that the evidence of one Samuel Ezekiel, a Municipal clerk, shows that Parvatibai was born in the month of December 1887 and, therefore, attained her majority in December 1905, something less than a year before this alleged equitable mortgage.

4. Daya Damodar died in the Autumn of 1905, a few months before Parvatibai attained her majority. The Court has first to look at the evidence upon which the plaintiff relies for establishing the fact of the alleged deposit of title-deeds by Parvatibai or by her agent, generally or specially authorized in this behalf, Putlibai in the month of August 1906 ; or from the point of view of the plaintiff, it will be more correct to say that the title-deeds are alleged to have been deposited some time previously to the entry made by the deceased Laxman in the Samadaskat book of Parvatibai in August 1906. The plaintiff's case indeed appears to be that the deposit of the title-deeds preceded the actual creation of the mortgage and is left, so far as the evidence in this case goes, quite in. definite. But it may be presumed that the deposit is alleged to have been made subsequently to the death of Daya Damodar and before the entry in Parvatibai's Samadaskat book of 1906.

5. The plaintiff opened her case with the evidence of her husband Daya Virji and followed that up by the evidence of one Virji Bhagwan. Touching the material point of the deposit of title-deeds neither of these witnesses knows anything. It is true that in cross-examination it was being elicited from Virji Bhagwan that he had heard Putlibai's account of the deposit (which certainly would not have helped the plaintiff's case) when the witness was stopped. The plaintiff further asked to put in the answers given by Putlibai to certain interrogatories administered to her. The

object with which the plaintiff wished to introduce that evidence was to show an inconsistency between what was then said by Putlibai and what is set forth in her written statement. How far answers to interrogatories are admissible in evidence except as admissions and when the person making them is not called as a witness, is a matter upon which I entertain some doubt. If Putlibai's answer to the first interrogatory had been admissible (and it has been put in by the plaintiff), it supports the case of the defendant and is the only direct evidence before the Court with the exception of one witness Narayan Shanker upon whom I shall make more comments later on about the factor, of the deposit.

6. The plaintiff has doubtless relied upon the presumption which was originally drawn in the English Courts, since this doctrine of equitable mortgage by title-deeds was created, in the year 1781, that from the mere adverse possession of title deeds and the existence of a debt the Courts were to infer that there had been a deposit with the intention of creating a security for the debt. It may be doubted whether the existing law in England is as strict in regard to that presumption sine it has been so strongly reflected upon in many cases, almost immediately following the three decisions of Lord Thurlow in Russel v. Russel (1783) 1 B. C. C. 269; Featherstone v. Fenwick (1784) 1 B. C. C. 270 Note and Hurford v. Carpenter (1785) 1 B. C. C. 270 Note by Lord Eldon, until it may be said to have been directly challenged in Chapman v. Chapman (1851) 13 Beav. 308 decided by Lord Langdale as it used formerly to be, and in this country Courts are to be governed by their own Statutes. The language, no doubt, designedly used in Section 59 of the Transfer of Property Act, in my opinion, points clearly to the Legislature having meant to adopt the principle of Chapman v. Chapman, afterwards distinctly affirmed in the case of Dixon v. Muckleston (1872) L.R. 8 Ch. 155 for that passage in Section 59 of the Transfer of Property Act lays particular stress on the intention of the depositor to create a security. So that even where there was a deposit and where there was a debt although in the first instance there might still survive from the Courts of England a leaning towards drawing a presumption of the kind I have mentioned, that presumption might usually be displaced, and in any event, I think, it will be the duty of the Court to ascertain as far as possible what the intention accompanying the deposit really was. No doubt, that emphasises, as Lord Eldon emphatically repeated on more than one occasion, the mischief of the whole

doctrine of these equitable mortgages by deposit of title-deeds, namely, that the Courts have to uphold the transfer of interests in immovable property by parole in direct opposition to the Statute of Frauds (to which full effect is given by our Registration Act) and not by writings. Still the law is now too well settled and in this country has been legislatively enacted in terms clear enough to preclude discussion of underlying principles.

7. Reverting, then, to what I understand to be the starting point of the plaintiff's case, namely, that there was a deposit and co-existing debt, it is first to be decided whether both these conditions precedent to the drawing of the presumption required by the plaintiff are established. The evidence upon which the plaintiff relies in support of the alleged deposit and of the existence of contemporaneous debt is to be found in Exts. E and K, and Ex. 1 and nowhere else. It is in evidence that Luxman used to lend money or have dealings with Damodar Kanji and Daya Damodar. Unfortunately for the plaintiff the books of Luxman for the years between 1901, 1902 and 1906 are not forthcoming. No one knows what has become of those books. And this brings me to a singular episode in this case, which I may as well here explain, comment upon and dismiss. The title-deeds, upon which this suit is based, and one of the late Luxman's account-books were, it appears, discovered by Mr. Dalpatram and the Official Assignee, upon the information supplied by the attorneys of the parties who were then litigating with the present plaintiff, in a room of the Railway Station at Colaba. To make this intelligible, it must be explained that on the death of Luxman, leaving a widow Jaykore (and after the death of Jaykore) litigation commenced between two persons Motilal and Gokuldas of the one part and the present plaintiff of the other; and it appears to be the theory of the plaintiff now that during her lifetime the widow Jaykore was going on pilgrimage and took these title-deeds as well as other documents of her husband and lost them at the Colaba Station. It is the suggestion of the defendant that some theory however untenable has to account for the non-production of the books. It is quite possible that the persons really responsible for carrying the books away and leaving them at Colaba Station were the two opponents of the present plaintiff Gokuldas and Motilal. However that may be, it appears to be a fact proved by the evidence of Mr. Dalpatram that after the death of Luxman and his widow Jaykore the title-deeds, upon which it is sought to

establish this equitable mortgage, were discovered in the 'Lost Goods Room' of the Colaba Railway Station. So that we have to start our investigation into the alleged indebtedness of the deceased Daya Damodar and after him his daughter Parvatibai to the deceased-Luxman upon what can be got from Luxman's account-books of the Samvat year, 1958, Ext. 1 in this case. The account between the parties in that book shows a total indebtedness of say roughly Rs. 3000. There is then a hiatus of from four to four and a half years before the plaintiff is able to produce any further evidence whatever relating to the alleged existing debt. That must be sought in the deceased Luxman's book of the Samvat year 1962, Ext. K. in this case. Turning, however, to the account of Putlibai and Parvatibai as representing the deceased Daya Damodar, it will be seen that it opens with a statement of balance of Rs. 5079. At the foot of this are two one-anna receipt stamps, evidently affixed to obtain the signatures of Parvatibai and Putlibai. Against the top stamp Putlibai's mark is set; but there is no signature or mark of Parvatibai. In the same account there immediately follows an item of Rs. 1000, said to have been advanced by Luxman to Parvatibai t(r) defray solicitors' costs of the litigation then being carried on against her and her son Daya Damodar-Beneath this again there are two one-anna receipt stamps against one of which Putlibai has set her mark. Again there is no signature of Parvatibai. The dates of these entries in the account-book of the deceased Luxman and all their particulars exactly correspond with the two similar entries admittedly in the handwriting of the deceased Luxman in Parvatibai's Samadaskat-book, Ext. E. But while in the latter the two entries are immediately followed by a statement that the title-deeds, which are the basis of this suit, are with the writer Luxman as security for the above mentioned sums, as well as a certain power, nothing of that kind occurs in Luxman's own book, and in Ex. E, being a Samadaskat book, of course there is neither of the signatures of Putlibai or Parvatibai.

8. The question first to be considered is whether Ex. E. is admissible in evidence at all, and, if so, of what value that evidence can be. As I stated at the close of the argument upon this exhibit when it was tendered, I think it cannot be excluded for want of registration upon the principles stated in a former judgment of mine in Shapurji v. Bai Ratanbai : (1907)9BOMLR287 (see also the cases of Kedarnath Dutt v. Shamloll Khettry (1873) 11 B. L.R. 405 and Gokul Dass v. Eastern

Mortgage and Agency Company ILR (1905) Cal. 41. Having regard to the common practice in Gujarat of entering accounts of this kind in what are called Samadaskat books belonging to the debtors, I think, it may fairly be said that these entries by the creditor in such a book fall within the language and intention of Section 32, Clause 2) of the Indian Evidence Act; and although they are admissions in his own favour they are not excluded by Section 21 of the Act, for that allows admissions of this kind to go in evidence if admissible also under Section 32. I am, therefore, in no doubt as to the admissibility of this exhibit; but it is altogether another question what weight should be attached to it. It is here, and here alone, that there is any evidence whatever of the intention with which the deposit of title-deeds was made. If that evidence could be trusted implicitly, then there would be an end of the case. It was strongly contended from the commencement on behalf of the defendant that inasmuch as no debt was proved to be existing against the alleged depositor, that is to say, Parvatibai, there could be no case of an equitable mortgage.

9. The debt, which the plaintiff alleges constituted the consideration of the mortgage, is made up, as I have said, of a balance of Rs. 5,079 and a further advance of Rs. 1,000. So far as the balance is concerned, there can be no question but that it is time-barred and was time-barred at the time Putlibai acknowledged it in Laxman's book, Ex. K. So that even were Putlibai at that time authorised to sign for Parvatibai, Section 19 of the Limitation Act could not help the plaintiff. Nor can the acknowledgment of this debt, time-barred at the time it was so acknowledged, be an agreement within the meaning of Section 25 of the Indian Contract Act. A mere acknowledgment of indebtedness without any promise to pay is certainly not such an agreement as was contemplated when the Legislature enacted Section 25 and so it has been held over and over again in our Courts: See Chowksi Himutlal v. Chowksi Achrutlal ILR (1883) 8 Bom. 194. The other part of the consideration, however, namely, Rs. 1000 alleged to have been advanced to Parvatibai as well as Putlibai on die 6th of August 1906, is not open to that objection. The only question touching that is whether Putlibai was authorised to acknowledge the debt on behalf of Parvatibai; whether in fact the loan was made to Parvatibai at all, and not as it appears on the face of it to Putlibai herself. In this connection I may revert to the fact already noticed that in Ext. K both factors of consideration were evidently intended to be acknowledged by Parvatibai as well

as Putlibai, but neither was. Putlibai was at that time off Allege and there is absolutely no evidence to show that in acknowledging the first balance or the receipt of the latter advance Putlibai was acting as an agent of Parvatibai. So that a consideration of the material question whether or not there was a deposit of these title-deeds, and, if so, with the intention of securing these two suras, may start from the point that Parvatibai, the alleged mortgagor, was certainly not liable in law for any part of the consideration for the equitable mortgage which the plaintiff now seeks to have enforced against her. And it appears to have been the defendant's view that if that were so, there would be an end of the plaintiff's case. I, however, am of a different opinion. I think there can be no doubt of the correctness of Mr. Dastur's contention on behalf of the plaintiff that he is not compelled to invoke the aid either of Section 19 of the Limitation Act, or Section 25 of the Indian Contract Act, but that if the sums of money shown in Exts. E and K were actually debts due to him (whether time-barred or not) by Daya Damodar, Putlibai and Parvatibai or by the two former alone and yet were accepted by Parvatibai and made the consideration for the equitable mortgage effected by the deposit of the title-deeds, then the consideration would be valid and good in law and the equitable mortgage would afford a sufficient ground for the plaintiff's present action. It cannot be doubted that a time-barred debt may yet be good consideration if deliberately accepted by the obligor as such. This is as old as the second resolution in Twyne's case (1601) 3 Coke 212, and although the English Courts have always looked with disfavour upon the doctrine of previous moral obligation, certain instances of that doctrine have survived all the reflections cast upon it. Thus it will be sufficient answer to what I understand to be the main part of the defendant's case to point to Sections 59 and 60 in our own Contract Act. It is also well-settled that an executor may pay a time-barred debt. I also agree with Mr. Dastur that if Ext. E be proved to the satisfaction of the Court to express the whole truth of the matter, then it could not be attacked on the ground that it fails to comply with the requirements of Section 25 of the Contract Act, for a mortgage, whether legal or equitable by which security is given for a debt, is something, I think, quite different from a mere agreement to pay a debt otherwise time-barred. In the case of a legal mortgage no opening exists for any such argument; as that upon which the defendant here relies, for there the form of the instrument would,

were that necessary, comply in all respects with the requirements of Section 25 ; yet I do not think that in any contest upon it, it would really be brought for the purposes of argument within the scope of that section, and the case appears to me to be precisely the same where the alleged mortgage is equitable instead of legal, that is to say, analysis reveals that what has been done between the parties is something more than a mere agreement to pay in future (which is what Section 25 of the Contract Act sanctions in the case of an otherwise time-barred debt). By the deposit of title-deeds as security for debt whether time barred or not, the equitable mortgagor virtually discharges the debt by assigning to the creditor an interest corresponding in money value with the debt due on the property mortgaged.

10. That being my view of the law governing the transaction in question, it becomes clear, I think, 'that the decision of the case must depend upon the answer given to a mere question of fact, namely : Were the title-deeds deposited as security for the debt, as alleged by the plaintiff, or were the title-deeds deposited, as contended by the defendant, merely for the purpose of safe custody In answering that question, considerations drawn from the nature of the debts which are alleged to form the consideration, will doubtless have weight; and it was for that reason that I have gone at greater length than otherwise I should have done into that part of the defendant's case. In favour of the plaintiff there is this fact, and as far as I can see this fact alone, that the title-deeds certainly were in her brother's possession, and she has produced the Samadaskat book of the deceased Parvatibai with the entry Ext. E, which, if true, shows how the title-deeds so came to be in Luxtnau's possession. But apart from that fact and that single piece of questionable evidence, there is absolutely nothing to support the plaintiff's case, nor will the presumption upon which the English Courts used to place so much reliance, here avail her, for if it is to be a matter of mere presumption from the deposit of deeds with the contemporaneous existence of debt, the ground of that, I think, would entirely be cut away if the debts were shown to be non-existent in law. However, so far as Parvatibai, the alleged mortgagor, is concerned there was no debt shown to have been incurred by her to Luxman nor any debt proved to have been binding upon her at the time the alleged deposit was made. The bulk of the alleged consideration money, as I have shown, was certainly not a debt

owed at that time by Parvatibai. The lesser sum of Rs. 100 appears on the face of the documents to have been advanced to Putlibai. The plaintiff, as I have said, has put in the answers of Putlibai to interrogatories, and if the Court is entitled to look at those (which I rather doubt), Putlibai is found to declare that she deposited the title-deeds with Luxman for safe custody. It is also her case that not only the loan of Rs. 100 was made to her personally but that she has completely discharged it. In addition to this there is the evidence of the witness Narayan Shankar, which I mentioned at the opening of this judgment. If that witness is to be believed, there can be no doubt of the truth of Putlibai's defence, namely, that these title-deeds never were deposited with Luxman by way of equitable mortgage. I do not, however, place much reliance upon the evidence of Narayan Shankar. On the face of it his evidence is so full of improbabilities and exposed to criticism as obvious as destructive that I should have been disposed to dismiss it altogether in calculating the probabilities for and against the truth of the rival cases. I must not, however, forget that where the central fact is left so much in uncertainty, the onus of proof lies heavily upon the plaintiff. She does not discharge it, in my opinion, as she evidently thinks she did by merely producing the title-deeds, and then by pointing to an entry in Luxman's own handwriting in his own favour showing how he became possessed of them. That very entry goes some way towards corroborating the truth of the defendant's case. The defendant's story is that on the death of Daya Damodar in the Autumn of 1905 his mother Putlibai went on a pilgrimage, and, before leaving deposited these deeds and other books of account with Luxman. The entry Ext. E shows that although the balance was struck and further advances made on August 6th 1906, the actual deposit of the deeds must have taken place at some previous time, for the entry is to the effect that 'the deeds are lying with us.' This entirely accords with the version given by the defence. Moreover, if the deeds had been lying for any length of time with Luxman before they were thus allocated to be the security for pre-existing debts, the deposit must certainly in the first instance have been made by bai and not by Parvatibai, and it is almost equally certain that at the time the deposit was made, there could have been no intention of thereby creating a security, or in other words, giving the plaintiff's brother Luxman the equitable mortgage. All these considerations point to the probable truth of the defendant's version, namely, that

at first, at any rate Putlibai did deposit the title-deeds of this property with Luxman for safe custody. Then what evidence is there of Parvatibai, after having come of age, having given authority to Putlibai to convert the custody of Luxman from that of a mere trustee into that of a mortgagee? Once more I repeat, except the entry in Luxman's handwriting in Parvatibai's Samadaskat book, absolutely none. Considering the terms of confidence upon which these two women were with Luxman in the year 1900, considering that Putlibai is so illiterate as not to be able to sign her own name and there is nothing to show that Parvatibai was in a better position to safeguard her own interest), I should hesitate indeed before accepting this single uncorroborated piece of evidence made by the plaintiffs brother himself and not really exposed to any critical scrutiny by the ignorant women, against whom it was to be used as a sufficient ground for holding that an equitable mortgage had been created and the plaintiff was, therefore, entitled to succeed in this suit. On the contrary, after having given my bust attention to the evidence as a whole, I have no hesitation in holding that the plaintiff has failed to prove the essential fact she was bound to prove, namely, that the title-deeds were deposited with her brother and deposited as security for the debts set forth in Ext. E and Ext. K by Parvatibai or by anyone, generally or specially, authorized by her to act on her behalf in a matter of such importance.

11. The result of this finding of fact is that the-plaintiff's suit must be dismissed with all costs.

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