

Murari Lal and ors. Vs. Muhammad SamiuddIn Ahmad Khan and ors.

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Court : Allahabad

Decided On : Dec-03-1936

Reported in : AIR1937All273

Appellant : Murari Lal and ors.

Respondent : Muhammad SamiuddIn Ahmad Khan and ors.

Judgement :

1. This is a plaintiffs' appeal arising out of a suit for the recovery of the sum of Rs. 5,250 alleged to have been due on a mortgage bond. The mortgage in suit was executed on 12th April 1919 by one Mohammad Sami-uddin Ahmad Khan and his wife Mt. Hidayat-un-nissa Begam in favour of Nand Kishore. In the deed it is recited that the property which was mortgaged had belonged to the husband, Mohammad Sami-uddin Ahmad Khan, and that he had transferred it to his wife Mt. Hidayat-un-nissa Begam on 3rd January 1919. The deed concludes with these words:

In case of non-payment of the amount the creditor shall at every time have power to realise the amount mentioned in this bond, through the Court, by means of auction sale of the property hypothecated, as well as the person and the other not mortgaged property of every kind of us, the executants.

2. Earlier in the deed there is a recital that it is the female executant who actually hypothecates the property. The suit upon the basis of the bond was contested by

subsequent transferees of the executant and in the written statement of Shahjahan Begam the deed is challenged in the following terms: 'Defendants 1 and 2 executed no mortgage deed sued on in favour of the plaintiff's ancestor.' The learned Subordinate Judge has dismissed the suit. He has held that the plaintiffs failed to prove that Mt. Hidayat-un-nissa Begam executed the deed. The evidence which was adduced by the plaintiffs fell short, in the view of the learned Subordinate judge, of establishing that the deed was signed by Mt. Hidayat-un-nissa Begam in the presence of the attesting witnesses. This finding has not been challenged by learned Counsel for the plaintiffs in appeal before us. He has contended however that the deed was duly and validly executed by the husband Mohammad Sami-uddin Ahmad Khan and that accordingly the property stood hypothecated and could be sold by the plaintiffs in terms of the deed. Learned Counsel for the respondents, on the other hand, contended that so far as Mohamad Sami-uddin Ahmad Khan was concerned there was no question of hypothecating any property. It was urged that he had. divested himself of the property Vj&ich; his wife intended to hypothecate and that at best he was a party to the deed in the capacity of a surety.

3. The intention of the parties to the deed is to be gathered from a consideration of the terms thereof as a whole. Now it is true that according to the terms of the deed it is the executant Mt. Hidayat-un-nissa Begam who states that she hypothecated the property which had been transferred to her by her husband. The husband, however, was made a party to the document, no doubt, at the instance of the mortgagee, who had in view the possibility of the transfer of the property to the wife being subsequently impugned and a suit upon the basis of the mortgage deed defended upon the ground that the mortgagor had no title to the property which she had purported to mortgage. Further, as we have already noted, both the executants agreed that in respect of the amount advanced by the mortgagee the property hypothecated should be liable to sale by auction. Learned Counsel for the respondents contended that, inasmuch as there had been no property which was validly hypothecated, it could not be held that Mohammad Sami-uddia Ahmad Khan had agreed that, the property should be charged in respect of the debt. We are unable to accept this contention. The term 'property hypothecated' in the concluding portion of the deed clearly refers to the property described earlier in the

document. The husband agreed that this property should be liable to sale by the mortgagee.

4. We would observe further that it is clear from the terms of the deed that the sum of Rs. 300, which was the mortgage consideration, was borrowed not by Mt. Hidayat-un-nissa Begam herself but by Mt. Hidayat-un-nissa Begam and her husband. The record of the proceedings before the Sub-Registrar further disclose that the Rs. 300 was received by both Mohammad Sami-uddin Ahmad Khan and Mt. Hidayat-un-nissa Begam. Upon a consideration of the terms of the deed itself, the record of the proceedings before the Sub-Registrar and the circumstances in which the deed was executed, in our judgment, it is clear that the intention of the parties to the document was that the property should stand hypothecated, whether the property did in fact belong to Mt. Hidayat-un-nissa or to Mohammad Sami-uddin Ahmad Khan, her husband. In short, we hold that the property in dispute was validly hypothecated by the deed. Learned Counsel for the respondents however maintained that there was no proof that the document had been validly executed even by Mohammad Sami-uddin Ahmad Khan. His contention was that the evidence did not establish that the attesting witnesses had signed the document in the presence of Mohammad Sami-uddin Ahmad Khan. Two witnesses were called to speak to the execution of the deed, Ram Kirpal and Mohammad Sami-uddin Ahmad Khan himself. Ram Kirpal was the scribe. He deposed as follows:

Mt. Hidayat-un-nissa and Sami-uddin Ahmad Khan wrote a bond in favour of Lala Nand Kishore. I was its scribe. Both the executants put their signatures before me and all the witnesses. I was also a marginal witness of the deed; other witnesses were present at that time. Both the executants put their signatures and thumb-marks in the presence of all the witnesses.

5. The fact that the husband had signed the deed in the presence of the attesting witnesses was not challenged by learned Counsel for the respondents. Mohammad Sami-uddin Ahmad Khan in regard to the signatures of the attesting witnesses stated in cross-examination, after describing the signature of the deed by Mt. Hidayat-un-nissa Begam:

I brought that deed outside and gave it to the scribe; the scribe signed it and took down the signatures of witnesses. Both of us mortgaged the properties.

6. Now, we would observe in the first instance that none of the defendants took the specific plea that the mortgage deed was invalid in respect that the attesting witnesses had not signed it in the presence of the executant Mohammad Sami-uddin Ahmad Khan. There is the vague allegation to which we have referred that no mortgage deed was executed. It was not disputed however that a mortgage deed was drawn up and signed by the husband Mohammad Sami-uddin Ahmad Khan. In our view if the defendants had intended to impugn the deed upon the ground that the attesting witnesses did not sign in the presence of Sami-uddin Ahmad Khan, they should have definitely and specifically taken that plea in their written statement. Furthermore, they should have cross-examined the witnesses for the plaintiffs to elicit the fact-if it were a fact-that the witnesses did not append their signatures in the presence of Mohammad Sami-uddin Ahmad Khan. It is true that neither of the witnesses called by the plaintiffs state definitely that the attesting witnesses did sign in the presence of Mohammad Sami-uddin Ahmad Khan. On the other hand the only reasonable inference which can be drawn from that evidence is that Mohammad Sami-uddin was present when the attesting witnesses affixed their signatures.

7. The statement of Ram Kirpal and Mohammad Sami-uddin Ahmad Khan himself leaves no doubt in our minds that Mohammad Sami-uddin Ahmad Khan was present when the attesting witnesses signed. Now it has been held in the decision in a recent case by the Privy Council *Kundan Lal v. Musharrafi Begam*, that for the proper attestation of a document within the meaning of Section 3, T.P. Act, it is necessary that the attesting witnesses should sign in the presence of the executant, but if their signature is made under circumstances that the executant, if he was minded to see the witnesses sign, could have done so, then it is not necessary to establish affirmatively that he had in fact actually seen them signing the document. It may well be that from the evidence it is somewhat doubtful if Mohammad Sami-uddin Ahmad Khan actually saw the attesting witnesses affixing their signatures. There is no doubt left in our minds after a consideration of the evidence however that he was present when they did sign and he could have seen

them sign if he had so desired. Learned Counsel for the respondents further contended, however, that Mohammad Sami-uddin's evidence was inadmissible in view of the terms of Sections 68 and 71, Evidence Act. Section 68 enjoins that:

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 that process of the Court and capable of giving evidence, 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 provisions of the Registration Act of 1908, unless its execution by the person by whom it purports to have been executed is specifically denied.

8. Section 71 of the Act is in the following terms:

If the attesting witness denies or does not recollect the execution of the document, its execution may be proved by other evidence.

9. Learned Counsel for the respondents maintained that the evidence of the executant of the deed was not admissible unless the attesting witnesses denied or did not recollect the execution of the document. We are unable to accept this contention. It may be taken that Earn Kirpal did not recollect whether Mahomed Sami-uddin Khan was present or not when the attesting witnesses affixed their signatures. Apart altogether from that point however in our view, there is nothing in the Evidence Act to preclude the plaintiffs from adducing as witnesses to the execution of the deed any persons who happened to be present when the deed was executed and actually saw it signed by the executant and by the attesting witnesses. Section 71 does, it is true, permit the evidence of the executant of the deed in certain circumstances. It does not however have the effect of rendering his evidence or that of other witnesses inadmissible in different circumstances. In the result we hold that the plaintiffs have proved that by the deed of 12th April 1919 the property referred therein was validly mortgaged and that they are entitled to maintain a suit on the footing thereof. We accordingly allow the appeal and set aside the order of the learned Subordinate Judge. The record will be returned to the lower appellate Court for decision of the issues left undecided by the learned

Subordinate Judge including the issue in regard to the rate of interest which issue will be considered by the learned Subordinate Judge in the light of the recent debt legislation. The appellants are entitled to their costs of this appeal. In view of our decision in the appeal the cross-objection is dismissed with costs. The Court, fee will be refunded.

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