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Dilawar and ors. Vs. NaraIn Das and

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Court : Allahabad

Decided On : Dec-07-1918

Reported in : (1919)ILR61All250

Judge : Henry Richards, Kt., C.J. and ;Pramada Charan Banerji, J.

Appellant : Dilawar and ors.

Respondent : NaraIn Das and ;shanti Prakash

Judgement :

Henry Richards, Kt., C.J. and Pramada Charan Banerji, J.

1. We think that the view taken by the court below was correct. In the first place we consider that under the circumstances the mortgage of 1903 was proved. We think that execution of the mortgage having been proved in the manner prescribed by Section 71 of the Evidence Act, and on the face of it, it appearing to have been executed in the presence of more than one person, it was a good mortgage. The next contention was that, the mortgage being a usufructuary mortgage in form, the plaintiff could not recover the money. The mortgage was in a peculiar form and combined a simple mortgage with a usufructuary mortgage. As a matter of fact when the mortgage was made possession could not be delivered because possession was already in the hands of a prior mortgagee, who is the appellant here and was the contesting defendant in the court below. Furthermore, the mortgagee himself purchased the equity of redemption and remained in

possession, keeping the plaintiff out of possession. With regard to the consideration for the second mortgage, we think the court of first instance was wrong in holding that the recital in the bond was not evidence against Narain Das (we assume that this is what he meant). It is clear that if the acknowledgment in the bond was admissible against Narain Das it was prima facie evidence against him and even if it stood alone, cast the onus upon the defendant of showing that the consideration failed in whole or in part. This was expressly decided in the case of Babbu v. Sita Ram. (1914) L.R., 36 All., 478. That case was an appeal under the Letters Patent from the decree of a learned Judge of this Court, who held that the acknowledgment in the mortgage was good prima facie evidence, and a Bench of two Judges was unanimous in holding that the decision of the single Judge was correct. Furthermore, on the question as to whether or not the acknowledgment in the bond was admissible against the purchaser from the mortgagor we have the decision of the late Chief Justice Stanley and one of us. The case is Nawal Kunwar v. Bakhtawar Singh (1912) 10 A.L.J., 390. We think that the acknowledgments evidence against the, auction purchaser just as it would be evidence against a purchaser by private treaty. Of course it is possible that in different cases the value of the acknowledgment as evidence may vary, and possibly it may be more weighty against a purchaser by private contract than against an auction purchaser, but it is clearly evidence against both. The appeal fails and is dismissed with costs.

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