

Mathuri and ors. Vs. Gurcharan and anr.

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Court : Allahabad

Decided On : Jun-29-1912

Reported in : 16Ind.Cas.25

Judge : Karmat Husain and; Tudball, JJ.

Appellant : Mathuri and ors.

Respondent : Gurcharan and anr.

Judgement :

1. This appeal arises out of a suit for sale on the basis of a mortgage dated 1st November 1892, executed by one Lachman Singh. The principal sum secured was Rs. 1,300. In regard to the sum of Rs. 300, the Courts below have dismissed the suit but in regard to Rs. 1,000, the claim has been decreed. It is common ground that there was a prior mortgage-deed of 1890 by Lachman Singh and the Courts below have held that the second mortgage-deed covered the balance due on the deed of 1890 plus a sum due on accounts. Lachman Singh's defence was that of the Rs. 300 Rs. 300, though handed to him at the 'time of registration, had been handed back to the mortgagee afterwards. As to the whole debt he pleaded that he used to borrow money from Mangli Lal, the father of the plaintiffs and re-pay him from time to time; that the mortgage-deeds were taken from him from time to time to secure the amounts found due from him, that accounts had repeatedly been struck between them in the books of Mangli Lal and acknowledgments taken from him that if those accounts-books were examined' they would show clearly

that the balance was in his favour and not against him the fourth Issue was: Was the mortgage debt paid by the mortgagor in whole or in part. The defendant called upon the plain-tiffs to produce their account-books from the year Sambat 1940 up to Sambat 1960.

2. This was first done before the written statement was filed. The plaintiffs refused on the ground that the written statement must be filed first.

3. After it had been filed, they produced the books of Sambat 1958 to Sambat 1960 The defendants pressed for the books prior to Sambat 1958 as they were said to contain the entries as to payments. Thereupon the plaintiffs Pleader on instruction stated that there were not and never had been any regular books kept prior to Sambat 1958 that the account had been irregularly kept on bits of paper or loose sheets and they could produce no books.

4. When Goppi Lal was examined as a witness by the plaintiffs, it came out that he was the gumashta and had filled that position for 20 years, that it had been his duty keep the accounts and that he had regularly maintained, in due and proper form and in regular account-books, all the accounts of Mangli Lal's business. Even then, no further explanation was offered of the non-production of the books and they were never produced.

5. The defendants urged the Court to presume that the books, if produced, would support the plea of payment. All that the first Court said in its judgment was: 'It is much to be regretted that the plaintiffs have not produced their old bahi-khatas and destruction or loss of the old bahi-khatas has not been satisfactorily established. Such loss or destruction is not, however, altogether opposed to reason and I cannot ignore the fact of the plaintiffs' minority and that their guardian is a pardah-nashin lady.'

6. It is doubtful whether the Court ever contemplated Section 114 of the Evidence Act. No loss or destruction was ever pleaded. The plaintiffs had told a false story that the books had never been maintained.

7. It was the Court's duty either to draw the presumption allowed by Section 114 of the Evidence Act or to refuse to draw that presumption. It had to exercise that discretion judicially and not in an arbitrary manner without rhyme or reason. Practically the Court ignored the defendants' plea asking that the presumption might be drawn. If ever there was a case in which the presumption allowed by law should be drawn, it was the present case. It is proved beyond doubt that those books were prepared; the defendants placed trust in them and urged that the entries therein would prove re-payment of the loan. In spite of repeated demands, not only do the plaintiffs not produce them, but they even deny that they ever existed.

8. In these circumstances, the presumption is that those books contain entries which go to prove re-payment of the loan. The books would have settled the case beyond doubt one way or the other.

9. If the first Court's action be held to amount to a refusal to draw the presumption, it has refused without reason and has acted in an arbitrary and unjudicial-manner. Nor can the lower Appellate Court's action be placed any higher, All that it has said in its judgment is: The absence of the account-books, though their presence was desirable, is not sufficient to destroy the plaintiffs' right to recover.'

10. It is extremely doubtful whether the Court had in mind Section 114 of the Evidence Act. The Court nowhere comes to a conclusion that the defendants had not re-paid the debts due; though this (inferentially) was its opinion as it upheld the decree for Rs. 1,000 granted by the Court of first instance.

11. Like the first Court, it has failed to exercise the discretion allowed it by law. It did not even discuss the other evidence produced by the defendants to prove payment. We, therefore, as there is no clear finding on the point of payment, by the lower Court, proceed to determine the point for ourselves.

12. The defendant, Lachman Singh, produced some books and witnesses to prove payments. The first Court merely said that it disbelieved this evidence and the lower Court did not discuss it. In our opinion, there is a very strong and un rebutted presumption that the entries in the plaintiffs' own books are against them and

would go to prove the payment of the loan. Though the other evidence standing alone might be insufficient to prove payment, yet it is supported by this presumption which, we think, in the circumstances already set out, the Court is bound to draw in favour of the defendants. The mere fact that the plaintiffs are minors, and their guardian a woman is no reason for refusing to draw the presumption, nor does it explain the lie told to the Court. The presumption being that the plaintiffs' books contain entries proving re-payment, we hold that the loan, if made, has been repaid.

13. In this view, the plaintiffs' suit, must fail. We allow the appeal, set aside the decrees of the Courts below and dismiss the suit with costs in all Courts, including in this Court fees on the higher scale.

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