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Court : Chennai

Decided On : Feb-11-1930

Reported in : (1931)60MLJ302

Appellant : Ramanathan Chetti and ors.

Respondent : Delhi Batcha Tevar Alias Udayana Tevar and ors.

Judgement :

1. The suit is to recover from defendants 1 to 3 the sum of Rs. 49,982-3-2 due on a mortgage executed by the 1st defendant for himself and as guardian of his son since deceased, the 2nd defendant and Vengu Nachiar, who is also dead. The other respondents are subsequent mortgagees. The mortgage is dated the 20th January, 1902, and was for a consideration of Rs. 7,500 payable within six years with compound interest at 1 per cent, per mensem with ten months' rests and in default on demand with compound interest at the same rate with ten months' rests. It is alleged that the debt was contracted for the expenses of a suit, O.S. No. 18 of 1901, on the file of the Sub-Court, East Madura, for household expenses and for discharging prior sundry debts. There are two items of property recited in the mortgage deed and the first item is alleged to belong to the 2nd defendant but under the decree in the before-mentioned suit the 2nd defendant and the late Vengu Nachiar are each entitled to a quarter share. The plaintiffs who are the appellants in this appeal are content with a decree being passed against the half

share in that item, that is to say, the 2nd defendant's quarter share and Vengu Nachiar's quarter share.

2. In the Lower Court the 1st defendant admitted execution of the mortgage bond but denied that he had any interest in the mortgaged property and alleged that the suit as against him was barred by limitation. The 2nd defendant is a gosha lady. The defences raised were that the mortgage deed was not properly executed, that two of the executants, the 2nd defendant and Vengu Nachiar, being gosha ladies, had no knowledge of the contents of the deed, that it was not properly attested and that it was not validly registered. The defence also disputed the plaintiffs' claims to be entitled to a half share in item No. 1, it being alleged that if the bond was good, all that the plaintiffs would be entitled to was a quarter share. It was also alleged that there was no consideration for the deed.

3. The chief points for consideration in this appeal are whether the document was properly attested and whether it was validly registered. The document is Ex. B and there were five witnesses to the document, namely, Venkatachalam Chetty, who is now dead, Subbayyan, P.W. 4, Ramaswami Aiyar now dead, Rama Rao, the writer of the document P.W. 3 and Kaleeswara Aiyar, who was not called as a witness. The learned Subordinate Judge does not believe the evidence of P.Ws. 3 and 4 and rejects it as being entirely unreliable. The gosha ladies are said by these witnesses to have been behind the purdah, but P.W. 3 says that he was near the curtain and saw the ladies sign the document as there was a small space of 2 or 3 inches between the lower extremity of the curtain and the floor. He was sitting about 6 or 7 feet from the entrance step and obviously without bending his head could not have seen anything that went on behind the curtain. However, that difficulty is got over by the witness as he states that he bent his head a little in order to see what was being done behind the curtain and was able to see the ladies sign. P.W. 4's evidence is to the same effect as that of P.W. 3. The learned Subordinate Judge thinks that this evidence, besides being difficult to believe, was introduced in order to fulfil the requirements laid down by the Privy Council in *Shasmu Pattar v. Abdul Khadir Ravuthan*. There it was held, affirming the decision of the Madras High Court, that attestation of a mortgage deed within the meaning of Section 55 of the Transfer of Property Act (IV of 1882) must be made

by the witnesses signing their names after seeing the actual execution of the deed and that mere acknowledgment of his signature by the executant is not sufficient. The suit mortgage deed was executed in the year 1902, ten years before the decision of the Privy Council in the before-mentioned case. Up to that time attestation according to that strict interpretation by the Privy Council was not ordinarily had. I agree with the learned Subordinate Judge that the evidence of these two witnesses is unreliable on this point and should be rejected. Therefore the two ladies being gosh a ladies the evidence of their having signed the document should be clear beyond reasonable doubt. The Advocate-General, however, contends that it is probable that the ladies did properly execute the document as they could read and write and were therefore fully capable of understanding what the document was about and they have never until the present suit repudiated this mortgage. He refers also to Ex. D. That is a document executed in favour of one Annamalai Chettiar. There were six executants to that document including Delhi Batcha, the husband of both Vengu Nachiar and Boothaka Nachiar, Vengu Nachiar herself and Boothaka Nachiar herself. This document is dated the 14th March, 1903, and in it the suit mortgage is set out. In 1914 Vengu Nachiar wrote a letter Ex. F through a vakil to the 1st plaintiff's brother relating to an appeal to the Privy Council and for the purpose of getting all the mortgagees including the 1st plaintiff's brother to finance that appeal. This letter was written about four years before the present suit was filed, and this, the Advocate-General argues, shows that the suit mortgage was recognised by Vengu Nachiar. Then there is Ex. H, the judgment in a suit filed by the Court of Wards after the death of the Raja claiming the property on behalf of the present Raja. In that suit the plaintiffs were made party defendants as mortgagees and Boothaka Nachiar and Vengu Nachiar were also defendants and it is argued that as Vengu Nachiar and Boothaka Nachiar did not raise any contention in that suit that the appellants here were not mortgagees, they must be taken to have accepted the position. All the arguments of the Advocate-General based upon the conduct of these gosha ladies subsequent to the suit mortgage lose much of their force by reason of the fact that the ladies are gosha and there is no satisfactory evidence that they knew anything more about the documents in the proceedings referred to than they did about the suit mortgage. It is, however, contended that by reason of

Section 2 of the Transfer of Property (Amendment) Act, 1926, the requirements as regards due attestation of a document required to be registered are satisfied in this case because the endorsements made by the Sub-Registrar, Sivaganga, show that the execution of the mortgage deed was admitted by the 1st defendant Vengu Nachiar and Boothaka Nachiar and that those admissions were witnessed by the two witnesses whose names are set out at the foot of the document. Section 2 of the Transfer of Property (Amendment) Act, 1926, states that:

'attested,' in relation to an instrument, means attested by two or more witnesses each of whom has seen the executant sign or affix his mark to the instrument, or has seen some other person sign the instrument in the presence and by the direction of the executant, or has received from the executant a personal acknowledgment of his signature, or mark, or of the signature of such other person, and each of whom has signed the instrument in the presence of the executant; but it shall not be necessary that more than one of such witnesses shall have been present at the same time, and no particular form of attestation shall be necessary.

4. From this it is argued that all the requirements of this section have been fulfilled and that not only did Vengu Nachiar and Boothaka Nachiar admit the execution of the mortgage deed but that they did so in the presence of two witnesses. It is further contended that it is not necessary to examine the Sub-Registrar as his endorsement is presumed to be correct and that the burden of proving that his endorsement is incorrect is cast upon the other side. In this connection *Radha Mohan Dutta v. Nripendra Nath Nandy* (1927) 47 C.L.J. 118 was referred to. In that case, it was held that judicial notice should be taken of the endorsement of the Sub-Registrar and his signature. In that case there were two witnesses to the mortgage deed whose names appeared as attesting witnesses. In the Registration Office the mortgagor acknowledged execution of the deed before the Sub-Registrar and the endorsement of the Sub-Registrar was to the effect that execution was admitted by the mortgagor. It was held that the acknowledgment before the Sub-Registrar and the signature below the endorsement on the deed amounted to sufficient attestation within the meaning of Section 3 of the Transfer of Property Act as amended by the Amendment Act XXVII of 1926. From a reading

of the facts of the case it appears that the admission of the execution of the document was made to the Sub-Registrar only and he therefore was the only witness to that admission. The Calcutta High Court therefore considered that the endorsement by the Sub-Registrar that the admission had been made in his presence was sufficient compliance with the provisions of the Transfer of Property (Amendment) Act and must be taken as being correct. But according to Section 2 of the Transfer of Property (Amendment) Act there must be two witnesses to the admission by the executant although they need not both be present at the same time. It is contended by the Advocate-General that his argument is supported by a decision of a Full Bench of this Court in *Veerappa Chettiar v. Subramania Aiyar* I.L.R. (1928) M. 123 : 55 M.L.J. 794. It was there held that Acts XXVII of 1926, X of 1927 and XII of 1927 relating to the attestation of certain documents, are retrospective in their nature, so as to apply to documents executed on a date prior to their coming into force and further that the signatures of the Registering Officer and of the identifying witnesses affixed to the registration endorsement under Sections 58 and 59 of the Registration Act (XVI of 1908) are a sufficient attestation within the meaning of Section 59 of the Transfer of Property Act and its amending Acts. This case originally came before a Bench consisting of the late Chief Justice Sir Murray Coutts Trotter and Mr. Justice Srinivasa Aiyangar and they passed an order calling for findings on the three following matters:

(1) Whether the Sub-Registrar who registered the instrument Ex. A in the case, made his signature in the registration endorsement referring to the admission of execution by the executants of the document, in the presence of the executants?

(2) Whether the witnesses who identified the executants before the Sub-Registrar were present when such admission of execution was made by the executant? and

(3) Whether they or either of them made their signature in the presence of the executants? 'In compliance with this order the Subordinate Judge sent up the following findings: On the first issue he found that the Sub-Registrar who registered Ex. A made his signature in the registration endorsement referring to the admission of the execution by the executants of the document in the presence of the executants; on the second issue, he found that the witnesses who identified the executants of Ex. A before the Sub-Registrar were present when the

admission of execution of that document was made by the executants; and on the third issue, he found that both the identifying witnesses made their signatures in the presence of the executants of Ex. A. On these findings a reference was made to a Full Bench which answered the questions referred to it in the manner already stated, in my view, this case does not assist the appellants because according to the findings of the Subordinate Judge in that case, the provisions of Section 2 of the Transfer of Property (Amendment) Act were strictly complied with. The difficulty with which the appellants are faced here is that there is no evidence on the face of the document to show that the signatures of both or either of the witnesses to the admission of execution by Vengu Nachiar and Boothaka Nachiar were affixed to the document in the presence of the admitting executants. That is what is required by the law and what was in fact actually done in the Full Bench case. All that appears from the endorsement of the Sub-Registrar is that two witnesses were examined and both of them being ladies, of course, were able to go behind the purdah. The particulars endorsed on the mortgage bond are those required by Sections 58 and 59 of the Indian Registration Act. Section 58 requires that there shall be endorsed the following particulars, namely, the signature and addition of every person admitting the execution of the document, the signature and addition of every person examined in reference to such document under the provisions of the Act and any payment of money or delivery of goods made in the presence of the registering officer or any admission of receipt of consideration made in his presence; and Section 59 requires that the registering officer shall affix the date and his signature to all endorsements made under Sections 52 to 58 relating to the same document and made in his presence on the same day. But as I have already stated, there is no evidence to show that there was sufficient attestation within the meaning of Section 59 of the Transfer of Property Act and its amending Acts. There is no endorsement to the effect that the two witnesses signed the document in the presence of the two admitting executants. Nevertheless we are asked to infer that they must have done so. If the Sub-Registrar could have been called as a witness in the Court below he might have been able to clear up the matter. It is pointed out that it was impossible or at the least very difficult to call him having regard to the fact that his whereabouts are not known after this lapse of time. That of course is quite true but it does not seem to

me to be a reason for drawing any inference in his absence of proper attestation of the document, and I must, therefore, hold that it has not been properly attested.

5. In view of the above findings, it is not necessary to deal with any of the other defences raised in the suit but nevertheless I propose to deal with them though very briefly. With regard to the defence that the suit mortgage deed was not validly registered, it is based upon the inclusion in the suit mortgage of item No. 2. [His Lordship then dealt with the evidence and concluded that]

6. The 1st defendant had no title to item No. 2. This, however, does not dispose of the respondent's contention that its inclusion in the suit mortgage deed renders the mortgage invalid. This seems to me to depend upon whether it was included in the deed for the purpose of committing a fraud upon the registration laws and the mortgagees were parties to that fraud. If the property had been non-existent, then it is clear that its inclusion would invalidate the mortgage. But to argue that because the 1st defendant had no title to it, the mortgage is invalid is a totally different matter. The learned Subordinate Judge thinks that item No. 2 was inserted in order to enable the document to be registered in Sivaganga itself which is probable, and he says that there is no evidence in the case that the plaintiffs' father who took the suit mortgage ascertained after enquiry whether the 1st defendant's father had any right to the property. I do not think that that is the correct test to apply. In my view, there should be the strongest possible evidence of the fact that there was collusion between the mortgagors and the mortgagees before the mortgagees can be deprived of the mortgage amount owing under the mortgage by reason of its registration being invalid because of the inclusion of a small item of property not belonging to the mortgagors. The penalty is a very heavy one and I can see no evidence at all here that the appellants' father had any reason to suppose that the 1st defendant had no title to the property. The appellants in fact did not carry through the transaction and it is not enough to say that he omitted to ascertain whether 1st defendant had a good title. It is not a question of negligence but of fraud and the burden of proving this lies upon the respondents. The 1st defendant who could have given evidence as to this was not examined as a witness in the case. I must hold, therefore, that the registration of the suit mortgage deed was not invalid on that account. With regard to the plea

that there was no consideration on the mortgage, although it is not one that need be decided now in view of the findings that the mortgage-deed was not properly attested, I cannot see any grounds for upholding the respondents' contention that no consideration passed. In the circumstances it is not necessary to go into the question as to whether the appellants would be entitled to a half share of the property or only a quarter. For the reasons already stated, this appeal must be dismissed with costs throughout.

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