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Court : Kolkata

Decided On : Jul-06-1939

Reported in : AIR1940Cal189

Appellant : Jaikarandas Agarwalla and anr.

Respondent : Protapsing Agarwalla and anr.

Judgement :

B.K. Mukherjea, J.

1. This is an appeal on behalf of defendants 2 and 3 and it arises out of a suit commenced by the plaintiff for enforcement of a mortgage bond. The facts lie within a short compass and are, for the most part, undisputed. The defendant 1 executed a mortgage bond in favour of the plaintiff on 15th January 1935 to secure a loan of Rs. 2500. Shortly after this defendants 2 and 3 obtained a money decree against defendant 1 for a sum of about Rs. 1299 in the Court of the Munsif at Jalpaiguri. The date of the decree is 7th February 1935. The decree was executed in money execution Case No. 58 of 1935 and the properties included in the mortgage bond were attached on 22nd February 1935. The plaintiff mortgagee preferred a claim but it was dismissed for default as he did not appear at the date of hearing. In the result the attached properties were sold and they were purchased by defendants 2 and 3 for a sum of about Rs. 300 only. The plaintiff has now instituted the present suit and has prayed for sale of the mortgaged

property and also for setting aside the order of dismissal for default passed in the claim proceeding. The suit was contested by defendants 2 and 3 only and their contentions substantially were of a three-fold character. In the first place, it was contended that the mortgage bond was not executed and attested according to law. In the second place, it was pleaded that the bond was a collusive and a benami affair and that it was executed in order to defraud the creditors of defendant 1 and was not supported by any consideration. The third ground raised was that the mortgaged property was a coparcenary property belonging to a Mitakshara family of which defendant 1 was only one of the members. It was said that he had no authority to mortgage it and the transfer was totally void in law. All these defences were overruled by the trial Court which gave the plaintiff a decree. On appeal by defendants 2 and 3 the lower Appellate Court reduced the amount of, interest from 18 per cent, to 10 per cent, per annum but on all other points affirmed the decision of the trial Judge. It is against this decision of the District Judge of Jalpaiguri that the present second appeal has been preferred.

2. Mr. Bagchi who appears for the appellants has argued before us in the first place that no mortgage decree could be given to the plaintiff inasmuch as the mortgage bond failed for want of proof of attestation. It appears that there were two witnesses to the mortgage bond both of whom were examined by the plaintiff. The attesting witnesses however turned hostile and although they admitted their signatures on the bond, they denied having seen the executant signing the deed or obtaining any acknowledgment from him. The Courts below were of the opinion that these witnesses were gained over by the present appellants and relying on the evidence of the plaintiff on the point of execution and attestation they decreed the plaintiff's suit. Mr. Bagchi argues that under Section 71, Evidence Act, when the attesting witnesses denied the execution of the document, attestation could not be proved by any other evidence and he has further argued in this connection that, at any rate, the plaintiff himself was an incompetent witness to speak to attestation.

3. As regards the first branch of the appellant's contention it may be pointed out that Section 71 is one of the exceptions to the rule relating to proof of documents, required by law to be attested, which is laid down in Section 68, Evidence Act.

That Section requires that execution of a document compulsorily attestable must be proved at least by one attesting witness if he is alive and subject to the processes of the Court. This is a stringent rule and whether it is based on the ground that the attestor's testimony is the most desirable and trustworthy evidence, or that he being the witness agreed upon between the parties cannot be dispensed with, there is no doubt that the rule is mandatory and it cannot be relaxed except under circumstances provided for in the Act itself. One of such exceptional circumstances is to be found in Section 71, Evidence Act, which lays down that if the attesting witness who is called, denies execution or, refuses to prove the document or turns hostile the execution may be proved by other evidence. Mr. Bagchi contends that under this Section other evidence may be let in only to prove execution but not to prove attestation. This contention, in my opinion, is manifestly untenable. The same meaning must be given to the word 'execution' in Section 71 as in Section 68, Evidence Act. It has been held in several cases that in the case of a document which is not valid without attestation execution not only means signing by the executant but it means and includes attestation as well which is the last of the series of acts necessary to give completeness and formal validity to the deed *Arjun Chandra v. Kailas Chandra* (1923) 10 A.I.R. Cal. 149, and *Hari Nath Ghose v. Nepal Chandra Rai* (1937) 41 C.W.N. 306. In this view it would be necessary to call an attesting witness under Section 68 not merely to prove the signature of the executant but to prove attestation as well and if such witness turns hostile or refuses to prove execution or attestation other witnesses may be called for the same purpose. If, on the other hand, we accept the view of Mr. Bagchi that execution does not include attestation the result, in my opinion, would be exactly the same. In that case Section 68 would not make it compulsory on the plaintiff to examine any attesting witness at all for the purpose of proving attestation and there would be no necessity to invoke Section 71 in case the attesting witness proves hostile. The first branch of Mr. Bagchi's contention therefore must fail.

4. In support of the other branch of contention Mr. Bagchi has relied upon certain decisions of this Court as well as of English Courts, namely *Seal v. Claridge* (1881) 7 Q.B.D. 516, *Suraj Jigar Begum v. Barada Kanta* (1910) 37 Cal. 526 and *Peari Mohan Maiti v. Sreenath Chandra Maiti* (1910) 14 C.W.N. 1046. The

proposition of law which has been enunciated in these cases cannot, in my opinion, be disputed but I think it does not support the present contention of Mr. Bagchi. It was laid down by Lord Selborne in *Seal v. Claridge* (1881) 7 Q.B.D. 516 referred to above, that:

A person who is a party to the deed cannot be regarded as an attesting witness on the ground that if the person for whose benefit the instrument is executed is allowed to be an attesting witness, the very object of attestation namely the prevention of fraudulent malpractice, may be completely defeated.

5. Following this principle it has been held in *Suraj Jigar Begum v. Barada Kanta* (1910) 37 Cal. 526 that when a document or a bond is executed by two persons in the presence of each it could not be said that each executant was an attesting witness in respect of the signature of the other. In *Peari Mohan Maiti v. Sreenath Chandra Maiti* (1910) 14 C.W.N. 1046 the document which was a mortgage bond, was attested by four persons none of whom was called as a witness and execution was sought to be proved by the evidence of defendant 2 alone who was one of the mortgagors and was also a scribe of the document. It was rightly held by this Court that defendant 2 could not under the law be brought within the category of an attesting witness even though he might have been present at the execution of the bond. Nor was his evidence the evidence of an attesting witness. It was pertinently pointed out by the learned Judge who decided that case that it was the duty of the plaintiff to examine at least one of the attesting witnesses under Section 68, Evidence Act. But if no such attesting witness was available it was then and then only that the evidence of defendant 2 could be received in proof of the execution and attestation of the bond. In my opinion, the same principle applies in its entirety to the facts and circumstances of the present case. The plaintiff was not certainly an attesting witness in the proper sense of the word and he was not competent to attest the deed. Being grantee of the instrument he could not, I think, witness the execution of the document made to himself nor could he take its acknowledgment, but the attesting witnesses having turned hostile he was certainly competent to give evidence not as an attesting witness but as a witness to prove attestation by others. The Legislature, it seems, has not left the fate of attested documents completely at the mercy of the attesting witnesses. The

plaintiff's duty is at an end as soon as he calls one of the attesting witnesses under the provisions of Section 68, Evidence Act. If the witnesses turn hostile the plaintiff is not helpless and he is entitled to adduce other evidence as laid down in Section 71. This other evidence, in my opinion, would include his own evidence as well. This branch of Mr. Bagchi's contention therefore must also be overruled. I agree with the Courts below in holding that the plaintiff's evidence does establish that the document was executed and attested.

6. The second point that was raised by Mr. Bagehi is to the effect that the Court of appeal below did not properly consider the case which the appellants wanted to make under Section 53, T.P. Act. I do not think there is any substance in this contention. It is true that it was stated generally in the written statement that the mortgage was a benami affair the object of which was to defraud the creditors of defendant 1 but defendants 2 and 3 did not certainly attempt to make any case under Section 53, T.P. Act and it is very doubtful whether they were competent in law to make any such case in this form. The point was not set out specifically in the pleadings nor made the subject-matter of an issue and the question was not raised in either of the Courts below. In these circumstances this contention must also fail. The third ground put forward by Mr. Bagchi relates to the question as to whether the property mortgaged belonged to defendant 1 or it was a coparcenary property belonging to a Mitakshara family of which defendant 1 was only a member. This contention in my opinion has been concluded by the findings of fact concurrently arrived at by both the Courts below that the other coparcener whose claims were set up passed out of the family by adoption and the property did belong exclusively to defendant 1.

7. The last ground of the appellants relates to the rate of interest. The stipulation in the bond undoubtedly was for interest at the rate of 18 per cent, compound per annum. The lower Appellate Court in exercise of its powers under, the Bengal Moneylenders Act reduced it to 10 per cent, compound. We think that having regard to the circumstances of this case it will meet the ends of justice if we allow the plaintiff mortgagee interest at the rate of 8 per cent, simple up to the date of the preliminary decree and then at the rate of 6 per cent, simple from that date up to the date of the expiry of the period of grace and also for the subsequent period

till the mortgage money is realized. Subject to the modification as regards interest as mentioned above the appeal is dismissed with costs.

Roxburgh, J.

8. I agree.

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