

Nibaran Chandra Sen Vs. Nagendra Chandra Sen and ors.

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Court : Kolkata

Decided On : Jul-12-1917

Reported in : 44Ind.Cas.984

Judge : N.R. Chatterjea and ;Richardson, JJ.

Appellant : Nibaran Chandra Sen

Respondent : Nagendra Chandra Sen and ors.

Judgement :

1. This appeal arises out of a suit to enforce a mortgage bond executed by the defendant No. 1. The defendant No. 2, who is the purchaser of the equity of redemption in respect of one of the properties in Schedule II at a sale held in execution of a decree upon a subsequent mortgage, and the defendants Nos. 3 and 4, who were subsequently added as parties defendants to the suit upon objection raised by the defendant No. 2, contested the suit. The defendant No. 2 in a written statement admitted that the defendant No. 1 had executed the bond but pleaded that the bond was not a bona fide transaction and that no consideration passed.

2. The Court of first instance decreed the suit, but that decree was reversed and the suit dismissed by the lower Appellate Court. The plaintiff has appealed to this Court.

3. The first question for consideration is whether the lower Appellate Court was right in holding the bond to be invalid because one of the attesting witnesses was not examined as required by Section 68 of the Evidence Act. The learned Judge says: Under Section 59 of the Transfer of Property Act, the bond must be attested by two witnesses and under Section 68 of the Evidence Act, one of the attesting witnesses must be examined to prove execution if there be an attesting witness alive and subject to the process of the Court and capable of giving evidence. In this case one of the attesting witnesses is a defendant, another is related to the defendants and the third is a very old man who is said to have lost his eyesight. Even if it be supposed that the first two would not speak the truth, the third ought to have been examined, as there is no evidence that he has lost his memory and no reason why he could not have spoken to the execution of the bond. Under the circumstances, it is quite clear that Exhibit I cannot be used in evidence so that the plaintiff's claim must fail on this ground.'

4. Having regard to the admission of the defendants, however, we do not think that it was necessary to examine any attesting witnesses in this case.

5. Section 70 of the Evidence Act lays down that 'an admission of a party to an attested document of its execution by himself shall be sufficient proof of its execution as against him, though it be a document required by law to be attested.' The defendant Ho. 1, the mortgagor, admitted the execution of the bond and the defendant No. 2, who now represents the interests of the mortgagor also, clearly admitted in his written statement that the bond was executed by defendant No. 1, and it appears that he was himself an attesting witness to it. We think that the admission of the defendants in the suit dispenses with the necessity of calling attesting witnesses or giving any other evidence.

6. We may in this connection refer to the provisions of Section 58 of the Evidence Act and Order XII, Rule 1, Civil Procedure Code.

7. But although an admission of execution dispenses with the necessity of complying with the provisions of Section 68 of the Evidence Act as against the party making the admission, the said provisions must be complied with in order to prove the execution of a document as against other parties to the suit who do not

admit such execution. The document must be proved as against them in accordance with the provisions of Sections 68, 69 and 71. This view was taken by Woodroffe and D. Chatterjee, JJ. (Newbould, J. differing), in the case of Satish Chandra Mitra v. Jogendra Nath Mahalanobis 31 Ind. Cas. 862 : 20 C.W.N. 1044 : 24 C.L. 175 : 44 C. 345 and the learned Judges held that the effect of Section 70 is that the proof by calling attesting witnesses is dispensed with when the party executant admits execution only as against himself. It may be pointed out that in that case Mr. Justice Woodroffe in referring to the case of Jogendra Nath Mukhopadhyaya v. Nitai Churn Bundopadhyu 7 C.W.N. 384 said that he was unable to agree with the decision if it meant that even when the executant admits execution, his admission or proof of execution or signing only does not dispense with the proof of attestation.

8. So far as the defendants Nos. 1 and 2 are concerned, therefore, it was not necessary to call any attesting witnesses and the document must be taken to be a valid document as against them.

9. There are, however, defendants Nos. 3 and 4 who were subsequently added as party defendants. It is contended on behalf of the appellant that they were not necessary parties to the suit. The defendant No. 2 alone purchased the mortgaged property at an auction sale and the defendants Nos. 3 and 4 have been made parties only in order to obviate the objection that they were also interested in the purchase made by him. Under the circumstances, the plaintiff prays that the defendants Nos. 3 and 4 may be dismissed from the suit and as they do not object, we order accordingly. Any question arising between the plaintiff and the defendants Nos. 3 and 4 is left undecided.

10. The next question is whether the learned Judge was right in holding that the plaintiff could not claim any right to the property described in Schedule II, as the mortgagor had no right to the property at the date of the mortgage. There is no dispute that originally the mortgagor had title to the property. It appears that at the date of the mortgage the title had passed to other persons; but before the defendant No. 2 acquired the equity of redemption, the title had come back to the mortgagor. Under the circumstances, the provisions of Section 43 of the Transfer

of Property Act will come into operation. It is contended on behalf of the respondent that the equity cannot be enforced as against the defendant No. 2 who is a purchaser, but he himself was an attesting witness to the mortgage-bond-He is not, therefore, a bona fide transferee without notice. This contention must, therefore, be overruled.

11. The result is that the decree of the lower Appellate Court will be set aside and that of the Court of first instance restored. It will, however, be stated in the decree that the defendants Nos. 3 and 4 are dismissed from the action and that all questions arising between the plaintiff and the said defendants are left open.

12. The plaintiff is entitled to costs of this Court and of the lower Appellate Court from the defendant No. 2, and the defendants Nos. 3 and 4 will be entitled to their costs of this Court and of the lower Appellate Court from the plaintiff.

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