

(1913) 02 AHC CK 0002
In the Allahabad High Court

Behari Lal and Others

APPELLANT

Vs

Makhdum Bakhsh and Others

RESPONDENT

Date of Decision : 12-02-1913

Acts Referred:

Evidence Act, 1872 — Section 21

Citation : 18 Ind. Cas. 744

Hon'ble Judges : Henry Griffin, J; Chamier, J

Bench : Division Bench

Judgement

1. This was a suit upon a mortgage made by one Najaf Khan in favour of an ancestor of the plaintiffs in May 1868. The first set of defendants are the heirs of Najaf Khan. The second set are purchasers, after the mortgage, of various portions of the mortgaged property. The mortgage purports to have been made in consideration of a sum of Rs. 92 due on a prior mortgage of 1867 and two sums said to have been paid just before and just after the execution of the deed. The Courts below have held that the payment of these two sums has not been proved but that the mortgage holds good for the sum of Rs. 92, and interest thereon.

2. The evidence that the last mentioned sum was due upon a prior mortgage consists of a recital in the deed in suit and the production by the heirs of the mortgagor of the earlier deed which does not bear any endorsement showing that it has been paid off.

3. In second appeal, it is contended that the recital in the deed is not admissible in evidence against the defendants. The defendants-appellants rely upon the decision of this Court in Manohar Singh v. Sumirta Kuar 17 A. 428, (1895) A.W.N. 93 and the decisions of the Calcutta High Court in Brajeshware v. Budhanuddi 6 C. 268 at p. 269, 7 C.L.R. 6; Ghurphenni v. Parmeshwar Dayal 5 C.L.J. 653; Bisheshwar Dayal v. Harbans Sahay 6 C.L.J. 659, 3 M.L.T. 38 and Rahim Jan Ribhi v. Iman Jan 17 C.L.J. 173, 15 Ind. Cas. 698.

4. The first of the Calcutta cases is no authority for the proposition that a recital of the receipt of consideration contained in a mortgage is not admissible in evidence against a subsequent transferee of the property. On the contrary, the Chief Justice, the only one of the three Judges who discusses the question at all, shows at page 278 of the report how the mortgagor's admission of the receipt of consideration was admissible against a subsequent purchaser of the property. The statement at the foot of page 277 of the report that a recital in a deed is not evidence against third persons must be read in conjunction with what follows. This seems to have been overlooked by the learned Judges who decided the case of *Manohar Singh v. Sumirta Koer* 17 A. 428, 1895) A.W.N. (93. In the last mentioned case and in the case of *Bisheshwar Dayal v. Harbans Sahay* 6 C.L.J. 659, 3 M.L.T. 38 the question was whether the admission by a mortgagor of the receipt of the consideration contained in a deed was admissible in evidence against subsequent auction-purchasers of the property. That question does not arise in the present case. There may be, we do not say that there is, some ground for distinguishing between the case of an auction-purchaser and the case of a mortgagee or a purchaser by private treaty. In the case of *Ghurphekni v. Parmeshwar Dayal* 5 C.L.J. 653 it was held that an admission of the receipt of consideration made by a mortgagor was not admissible against her step-daughters, who, however, did not claim title under her. That decision has no bearing upon the present case. In the case of *Rahim Jan Bibi v. Iman Jan* 17 C.L.J. 173, 15 Ind. Cas. 698 it was held that the recital of the receipt of consideration contained in a *hiba-bil-ewaz* was not admissible against the donor's daughter after his death. If, as seems to have been the case, the daughter was one of his heirs, we think that the correctness of the decision is open to doubt for u/s 21 of the Evidence Act, an admission is relevant and may be proved as against the person who makes it or his representative-in-interest.

5. In *Nawal Kunwar v. Bakhtawar Singh* 10 A.L.J. 390; 17 Ind. Cas. 644 it was held that a recital in a mortgage deed that a certain sum was due to the mortgagee was admissible in evidence against a subsequent purchaser by private treaty of the property mortgaged and in *Abdul Majid v. Mahbub Ali* First Appeal No. 129 of 1911 it was held that a recital of the receipt of consideration contained in a deed of mortgage was as much binding upon his heirs as upon the mortgagor himself.

6. It seems to us that the decisions in the two last mentioned cases are in reality supported by the decision in *Brajeshwari v. Budhanuddi* 6 C. 268 at p. 269, 7 C.L.R. 6 and we must hold that the admission of the receipt of consideration contained in the mortgage deed now in suit is admissible against the defendants-appellants, who are representatives-in-interest of the original mortgagor.

7. It is not for us in second appeal to consider the value of the admission but we may say that it receives, in our opinion, strong support from the production of the deed of 1867, which bears no signs of having been paid off.

8. For the above reasons, we dismiss this appeal with costs including fees on the

higher scale.