(1921) 02 AHC CK 0004

In the Allahabad High Court

Behari Lal Sahu and After his Death Baldeo Prasad and Others — APPELLANT

Vs

Shaikh Muhammad Husain and after his Death Musammat Hanifa Bibi and Others — RESPONDENT

Date of Decision : 21-02-1921

Acts Referred:

Citation : 63 Ind. Cas. 574

Hon'ble Judges : Grimwood Mears, C.J;P.C. Banerji, J

Bench : Division Bench

Judgement

1. This was suit to enforce a mortgage dated the 3rd of November 1909 alleged to have been executed by one Muhammad Hasan and his sister, Musammat Tula Bibi. Muhammad Hasan filed a written statement in the Court below but did not appear at the trial. Musammat Tula Bibi denied everything relating to the execution of the band and the receipt of consideration for it. The amount secured by the mortgage-bond is Rs. 3,000 of which Rs. 1,500 is alleged to have been due by Musammat Tula Bibi upon an earlier bond of 1903, Rs. 1,000 is said to have been due by Muhammad Hasan, Rs. 50 was received for stamp paper and costs of registration and Rs. 450 was paid in cash at the time of registration of the mortgage. The Court below has made a decree against Muhammad Hasan but has exempted from the claim Musammat Tula Bibi and her share of the mortgaged property. The plaintiff has preferred this appeal, and the first Question we have to consider is, whether Musammat Tula Bibi executed the document. Two of the marginal witnesses were sailed, viz., Brij Mohan and Nanku, and both of them proved that the lady executed the document and put her mark on it. The learned Subordinate Judge disbelieved these witnesses upon grounds which do not seem to us to be satisfactory. Brij Mohan was at one time in the service of the plaintiff but on the date of the mortgage he was not in the plaintiff''s employment and he was not in the service of the plaintiff for over 12 years before the trial of the suit. As to the witness Nanku there is nothing to discredit him beyond the fast that he owes; some money to the plaintiff, Both these witnesses have proved that the terms of the document were explained to

the lady and that she put her mark and attestation on the document, her signature to it having been written on it at her request by her brother, Muhammad Hasan. The strongest piece of evidence in support of the genuineness of the mortgage is the evidence relating to registration of the document. From the deposition of Hashim, who is by no means a witness favourable to the plaintiff, it is clear that the Sub-Registrar went to the house of Musammat Tula Bibi, that the lady put her thumb impression below the acknowledgment of execution and also her mark, and that the mark and the thumb impression were obtained by the witness, Hashim. This witness is a near neighbour and it is admitted that the lady appears before him and that he usually obtains her thumb impression on receipts for the pension which the lady gets, Hashim tried to prove that the document was not explained to the lady by the Sub Registrar in his presence and that the endorsement on the document to the effect that the terms of it had been explained to the lady was not in fast a true one. We do not believe him on this point. Had not the lady been explained the terms of the document Hashim would not have obtained on it her mark and her thumb-impression. Her thumb impression was also obtained in the Sub Registrar''s book. In these circumstances, we think we can safely assume that the document was executed by the lady and that the learned Subordinate Judge has disbelieved the evidence on the point for reasons whish do not commend themselves to us, It was nest said by the Court below that there was no evidence of the genuineness of the earlier document of 1903. We do not agree with the learned Subordinate Judge on this point. There is evidence which proves that the lady did execute that document. The plaintiff is a money lender. He has prod used his account-books and those account-books prove the indebtedness of Musammat Tula Bibi and of Muhammad Hasan to him both under the earlier bond of 1903 and the later document of 1909. Muhammad Hasan became security for his sister when the document of 1?03 was executed and the security-bond and the mortgage-bond which were executed by the lady have both been formally proved. Whether the evidence is sufficient to prove a duly executed mortgage, that is to say, whether the evidence is sufficient to prove the execution of the document as a mortgage-deed is immaterial for our purpose. In our opinion, it has been established that a loan was taken; that a document securing the loan was executed by Musammat Tula Bibi, and that this debt was due by her on the date on which the mortgage now in dispute was executed. It is also urged and the Court below has accepted the contention that there was no evidence to prove that the lady had independent advice. The document is a very simple one. It was undoubtedly understood by the lady, it was explained to her as the witnesses depose end it was not necessary that there should have been any independent advice. Her brother, with whom she was living for a number of years, joined her in executing the document and we do not think that the validity of the document could be questioned because there is an absence of evidence to prove independent advise. In a matter like this no ad vice was necessary or requisite. In these circumstance, we are of opinion that the Court below was wrong in dismissing the claim as against Musammat Tula Bibi and its decree must be set aside. There is a arose-objection on behalf of Muhammad Hasan in which it is urged that, in the view which the Court below took of the case, it ought not to have made a decree against him for the full amount of the claim, In the view which we have taken of the case and in the view that the document was executed by both the executants and that there was full consideration for it the contention on behalf of Muhammad Hasan in his cross-objection must fail. The result that we allow the appeal, vary the decree of the Court below and decree the plaintiff''s claim as against Musammat Tula Bibi to be recovered by the sale of all the mortgaged property unless paid with costs and future interest as provided by the decree of the Court below within six months from this date. The plaintiff will get his costs of this appeal also full costs in the Court below including in this Court fees on the higher scale. The cross-objection filed on behalf of Muhammad Hasan is dismissed with costs including in this Court fees on the higher scale.