

(1913) 01 AHC CK 0035
In the Allahabad High Court

Collector of Mirzapur

APPELLANT

Vs

Bhagwan Prasad and Others

RESPONDENT

Date of Decision : 21-01-1913

Acts Referred:

Citation : (1913) ILR (All) 164

Hon'ble Judges : Knight, C.J.;Tudball, J;Henry Richards, J;Banerji, J

Bench : Full Bench

Final Decision : Dismissed

Judgement

Henry Richards, Kt. C.J. and Banerji and Tudball, JJ.—This appeal arises out of a suit for sale on foot of an alleged mortgage. The document is dated the 11th of July, 1900. It purports to have been executed by a number of persons who are stated to have been the adult members of a joint Hindu family. The present suit is brought against all the members of the family. The court below dismissed the plaintiff's suit. Hence the present appeal.

2. The appellant has to admit that owing to the fact that the document was attested by one witness only, the deed cannot operate as a mortgage, having regard to the provisions of Section 59 of the Transfer of Property Act, which requires that a mortgage must be attested by at least two witnesses. It is, however, contended that the document, assuming it to have been executed by the persons who purported to do so, amounts to a charge u/s 100 of the Transfer of Property Act and ought to be given effect to as such. It was further contended that in any event the plaintiff ought to have a personal decree against such persons as in fact executed the document.

3. The question as to how a mortgage must be attested was recently before their Lordships of the Privy Council in the case of Shamu Patter v. Abdul Kadir Ravuthan ILR (1912) Mad. 607. In that case there were several witnesses to the document, but it appears that these witnesses had signed their names as such merely upon the admission of the executants and had not actually witnessed the

signatures of the executants. It was held by the High Court of Madras that such "attestation" did not fulfil the requirements of Section 59. On appeal their Lordships of the Privy Council took the same view and confirmed the decision of the Madras High Court. It is contended that their Lordships did not decide the question raised in the present appeal, namely that the document might be good as a charge although it fell short of fulfilling the necessary conditions of a mortgage. We cannot accept this view. The suit in that case was a suit for sale on an alleged mortgage, just as the present; and the present argument could not well have escaped the attention of their Lordships or of the Madras High Court. As a matter of fact we find from the report, at page 610, that it was contended before their Lordships of the Privy Council that the document must operate as a charge. We must take it that their Lordships considered and repelled the contention that a charge was created. We deem ourselves bound by the ruling of their Lordships in the case to which we have referred.

4. As to the other point we must point out in the first instance that the suit was not a suit for a personal decree. It was a suit to enforce payment of moneys alleged to be secured by mortgage by sale of the mortgaged property. Furthermore we find in the document itself the following clauses: "In case of breach of the condition laid down in this document the said Babu Sahib shall have power to realize the entire amount mentioned in this document together with interest at the said rate from the hypothecated properties. The said Babu Sahib shall have no power to realize it from the persons and pay, et cetera, of us, the executants."

5. It is true that in the earlier part of the deed there are provisions that upon failure to pay certain instalments the mortgagee shall have power to realize the entire amount from the property hypothecated and also from "other movable and immovable properties." These are ordinary clauses which find their way into a great number of mortgages in these provinces. But, reading the document as a whole, we think that it was the intention of the parties that the mortgagee should rely upon his remedy against the mortgaged property and not against the person of the mortgagors. There is certainly no provision that a personal decree should be obtained. Under these circumstances we consider that the decision of the court below was correct and ought to be confirmed.

6. We accordingly dismiss the appeal with one set of costs.