
(1927) 08 PAT CK 0023
In the Patna High Court

Herbert Francis

APPELLANT

Vs

Muhammad Akbar and Others

RESPONDENT

Date of Decision : 11-08-1927

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 52
Stamp Act, 1899 — Section 34, 35

Citation : AIR 1928 Patna 134

Hon'ble Judges : Wort, J; Ross, J

Bench : Full Bench

Judgement

Wort, J.—This appeal is against the decision of the learned Subordinate Judge of Patna dismissing the suit of one Herbert Francis for the sum of ₹671-8s-6d and interest thereon, against three defendants Nawab Syed Mahomed Akbar, the father of one W.H.M. Jung, hereinafter mentioned, sued in his representative and individual capacity, Mt. Umrao Begum, described as the mistress of the first-named defendant and against Zabunissa Florie Jung, described in the plaint a widow and heiress of late Wasig Hossain Mobarak Jung. The claim was against the defendants as representing the estate of Nawab Wasig Hossain Mobarak Jung hereinafter described as W.H.M. Jung and also against defendant 1 in his personal capacity. The plaintiff also claims that the estate of W.H.M. Jung should be administered by the Court. In effect the claim against these defendants is as having come to possession and having intermeddled with the estate of W.H.M. Jung, and therefore brought u/s 52, Civil P.C.

2. In the plaint it is alleged that W.H.M. Jung had borrowed a sum of ₹1400 from Francis and that on the 15th September 1919 the said Jung entered into a deed which was intended to constitute a mortgage of his properties in India, and under which he contracted to repay the sum of ₹1400 in 5 years and in the meantime to pay interest at the rate of 15% per annum. The interest at the time of the action amounted to the sum of ₹630, the action having been brought on the 28th June 1923.

3. In addition to this ₹630 there was a claim for ₹35 together with interest on a promissory note signed by W.H.M. Jung, dated the 2nd December 1919, payable six months after date. The question of this promissory note may be dismissed from the discussion because it is admitted by the appellant that he has no case for the amount of this promissory note, inasmuch as it has not been proved formally and that in any event this claim is barred by limitation. We are concerned only with the amount of interest being ₹630 on the principal sum of ₹1400 alleged to have been advanced. The only question with which this Court has to deal is whether technically the plaintiff has proved his case. The circumstances appear to be these: W.H.M. Jung up to the year 1920 was a resident in England and his estate in India not producing the necessary means he had to resort to borrowing money, and for that purpose he was introduced to the plaintiff, a solicitor, practising in Bedford Row, London, by Dr. Abdul Majid, a member of The English Bar, who was practising before the Judicial Committee of the Privy Council. The greater part of this ₹1400 appears to have been advanced in comparatively small sums by the time the deed before mentioned was entered into and executed. But from the record in the case it would appear that the sum of ₹116-15s was advanced about a month after the date of the deed. This deed was drafted by Dr. Majid on the instructions of Mr. Francis and it was in Indian form. The explanation of this being that it related to Indian property and that Mr. Francis thought it necessary to have it drafted in that form by counsel who was acquainted with Indian conditions and Indian law.

4. It must be stated here that in the plaint the plaintiff states that he does not rely on the deed as a mortgage but as a simple bond. The reason for this will appear. Soon after its execution it was sent, so it is alleged, to India to one Hasan Jan for registration as a mortgage deed. But as the fees for registration were not sent with the documents Hasan Jan did not register it but waited for the remittance. According to his evidence the document lay on his table until about December 1919 when it disappeared. Suggestions are made but no clear explanations are forthcoming. In those circumstances it is clear, as the plaintiff states in his plaint, that the document cannot be relied upon as a mortgage-deed. It having been lost, the plaintiff sought to give and was allowed in the Court below to give secondary evidence in the form of a copy of the deed.

5. Before coming to the question which is at issue in this appeal it would be wise to make one or two statements regarding the course of the trial. The suit was started on the 28th June 1923. On the 19th November 1923 the plaintiff put in a petition before the learned Subordinate Judge for the issue of a commission for taking evidence of certain persons therein named, and on the 1st December 1928 the defendants filed a petition objecting to the issue of The commission. It was ordered by the learned Subordinate Judge that the evidence of the witnesses including the plaintiff should be taken on commission in England. On the 29th April 1924 the High Court reversed the order of the learned Subordinate Judge in so far as it allowed the examination of the plaintiff himself on commission, on the 3rd November 1924 the plaintiff filed a petition praying that the commissioner,

who was to receive the evidence, should also receive in evidence books produced by the plaintiff. This petition was objected to on the 4th November 1924 by the learned Subordinate Judge on the grounds that certain interrogatories that had been in the meantime sent to England for the examination of witnesses did not mention anything in regard to them and he ordered that the books should be produced in the Court at the earliest possible date to enable the defendants to inspect them deciding then whether the books should be admitted in evidence.

6. As a matter of fact these books were not admitted at the hearing. These matters are mentioned, as the appellants say that by reason of the learned Subordinate Judge allowing the petition for evidence to be taken on commission in the first instance, and then that order being reversed in part by the High Court subsequently, certain questions, which might have been put to the witnesses who were examined on commission, questions which would, in ordinary course of events, be answered by Mr. Francis himself, were not put to these witnesses although they could have answered them.

7. In consequence the proof of the case might not be considered to be complete. In those circumstances the appellants during the course of the hearing in this Court petitioned the Court to receive further evidence under Order 41, Rule 27, Civil P.C. However, having regard to the decision at which I have arrived, it becomes unnecessary to deal with this application.

8. It will be as well to deal with the case of the respondent in this appeal and his arguments and then come to a conclusion whether the appellant has satisfied this Court on the objections raised. One point, although not first raised but was (sic) suggested by the Court, has been urged against the plaintiff's case, this being, that nowhere either in the plaint or in the evidence is there any allegation that the interest due has not been paid. However, there seems to be two answers to this: first under para. 4 of the plaint it is stated that the defendants have paid nothing in respect of principal or interest. It is argued by the respondents, however, that the allegation there is that the "defendants have paid nothing, whereas, to meet their objection, it would have been necessary to have alleged that W.H.M. Jung had not paid. It seems to me, however, that this is a clearly stupid clerical error, because as the allegation stands without correction it is quite irrelevant. Defendants were never liable for these sums and they are only now sought to be made liable inasmuch as they have had the estate of the deceased in their hands. I think it is not doing violence to the case to assume that what was intended was an allegation that W.H.M. Jung had not paid. However, in para. 7 of The plaint it is clearly stated that ?671-8-6, was now due to the plaintiff, and in para. 8 it is stated that W.H.M. Jung died in about December 1920. It can, therefore, be seen that if, as was the fact, W.H.M. Jung died in December 1920 he certainly could not have paid the greater part of this sum. It is doubtful whether these allegations would be sufficient under the English rules of pleading, but in this country before the hearing there is a preliminary discussion as to the issues which are to be framed.

9. This course was followed in this case as one would expect, but nowhere in those issues which were stated at pp 28 and 29, Vol. 1 of the paper book is any issue framed on this point. It must, therefore, be assumed that it did not arise. The main controversy in this case is whether the bond as we must now call it, was proved. As I have stated, the plaintiff sought to give secondary evidence of the bond and his evidence took the following form: One R.H. Collins who was a clerk of the plaintiff was examined on commission and stated that he was present when the bond was executed. He gives details of the circumstances and states that although he would not remember the dealings of the ordinary English clients of Francis he remembers this case particularly as it was his first dealing with an Indian client; that two witnesses were not usual for an ordinary English mortgage-deed and he was struck by the peculiar wording of the bond. He said that he had never seen one like it before nor had he since. He produced a copy stating that he compared with the original and that copy was produced with his deposition before the learned Subordinate Judge at the hearing. One J.E. Sparshott, another clerk of Mr. Francis gave evidence to the like effect. He also stated that a copy of the deed was kept in the office, but that he did not compare the copy with the original. These two witnesses also deposed to the account books of Francis containing the entries relating to this transaction. Dr. Majid was also examined on commission and he gave evidence to the effect that he prepared the mortgage bond and also purported to state its contents. But as regards the latter part of his evidence it seems to me of doubtful admissibility, but he does not state a fact which is important and that is, he was present at the execution. In addition to this evidence Hasan Jan to whom the deed had been sent for registration was examined before the learned Subordinate Judge. He gives evidence to the effect that he received the deed and that ultimately before registration it was lost.

10. One witness might be mentioned here; one Ganga Prasad who purported to prove the signature on the promissory-note and the signature on certain letters and receipts. However, in my opinion this evidence must be discarded and it was discarded by the learned Subordinate Judge. He was a chance witness in the sense that he was asked to give evidence in Court at the hearing for the first time and his cross-examination clearly proves that his depositions are worthless.

11. As we are dealing with the question of evidence it had better be stated that the evidence of the defendants such as it was, related merely to the alleged property of W.H.M. Jung. But this matter will be dealt with later. It will suffice to say that there was no evidence by the defendants as to the debt.

12. The real question in this case, therefore, is first, whether in the circumstances the document of 15th September 1919 can be and was proved by the secondary evidence. The appellants urge that they have complied with the provisions of the Indian Evidence Act in that regard. On behalf of the respondents Sir Sultan Ahmad relies on the case of Raja of Bobbili v. Sitaramasami Garu [1900] 23 Mad. 49, where a deed of gift which had been lost

was sought to be proved by the production of a copy of the instrument. From the facts of that case it is clear that the original had not been stamped and the Indian Courts before which the suit came were unanimous in rejecting the copy. The decision was based on Section 34, Stamp Act, then in force (Act 1 of 1879) which was similar to Section 35, Stamp Act (being Act 2 of 1899) which is now in force. The effect of those sections is that no document either unstamped or insufficiently stamped shall be admitted in evidence with the proviso that certain documents shall be admitted on the payment of the duty and penalty. The argument in the Madras case was that secondary evidence could not be admitted of a document that had not been stamped or was insufficiently stamped and was, therefore, not admissible itself in evidence, the argument being based on the decision of two cases, *Arunachellam Chetty v. Olagappah Chetty* 4 M H.C. 352 and *Kapasan v. Shamu* [1884] 7 Mad. 440. Lord Watson in the case to which I refer decided on construction of the Stamp Act 1879 that the Courts were right in rejecting a draft or copy as secondary evidence.

13. The appellant, however, differentiates this case from the present on the grounds that the case reported in 23 Madras, p. 49, was a case in which a gift was sought to be proved by a deed, that a deed is necessary to perfect a gift in Indian law. But that in the present case no such considerations apply, but that he was merely using it to prove the debt which in certain circumstances he might have proved by other evidence. However, the true answer seems to be the following: The bond, the subject-matter of the suit, was executed in England. I think the evidence clearly establishes that fact. Section 2 of the Act of 1899 defines *inter alia* a bond. This document clearly comes within that definition. But Section 3 enacts the general principles upon which the duty is chargeable under the Act. Sub Clause (a) of the first part of the section excludes by inference documents which were executed at places other than in British India. It would appear, therefore, that there was no necessity to stamp this as a bond, although if it had been registered as a mortgage bond it would have attracted duty. Now Section 35 deals with instruments upon which duty is chargeable and as the duty was not chargeable upon this document it does not come within the mischief of that section. Therefore, whatever view one would take of the case in *Raja of Bobbili v. Sitaramasami Garu* [1900] 23 Mad. 49, it is not an authority for the rejection of this instrument. We have been referred, however, to Section 18 of the Stamp Act which provides that every instrument chargeable with duty executed only out of British India, and not being a bill of exchange, cheque or promissory note may be stamped within three months after it has been first received in British India. It is argued, that the inference to be drawn must be that although this document was executed in England it attracts duty. The answer seems to be that this section deals only with those documents which, although being executed in places other than in British India, attract duty.

14. I have already decided that this one does not. There is a further answer to this question of admissibility, and that is contained in Section 36, Stamp Act, which provides that an instrument having once been admitted in evidence, such

admission shall not, except as provided by Section 61, be called in question at any stage of the same suit or proceeding. This document was received by The Court below. Section 61 referred to in Section 36, deals with cases where the Court is exercising its civil or revenue jurisdiction and has no connexion with the present case. Before I leave the consideration of the Stamp Act, Sub-clause (c), Section 3 must be mentioned. That provides that a document although executed in a country other than in British India attracts duty if it relates to immovable property in British India. It is true that the deed in question here related to immovable property in India but that part of the document the plaintiff does not rely on and that provision in the deed must be disregarded by the Court for the reason that it is an unregistered deed and consequently invalid to the extent that it refers to immovable property.

15. There is one question; however, which arises at this point. It is said by the respondent that the actual identity of the deed which was executed in Mr. Francis' office and is alleged to have been sent to Patna and lost is not strictly proved. This is not that class of case, however, in which identity has to be strictly proved. The identity is doubted by the Subordinate Judge, but I think the reasonable presumption is and I have no doubt that the executed deed was the one which was lost in the vakil's office in Patna. That being so and by reason of the foregoing considerations I am of the opinion that the deed has been sufficiently proved by the secondary evidence adduced.

16. It remains to be seen what that proof amounts to. Does it prove the loan to W.H.M. Jung? The deed recites the fact that W.H.M. Jung did borrow the sum of ? 1400 at 15 per centum per annum simple interest from Mr. Francis. In my opinion that recital is sufficient *prima facie* proof of the fact. With that *prima facie* proof and in the absence of any evidence to the contrary I hold that the debt of ?1400 is proved against W.H.M. Jung. The liability for the payment of interest naturally follows.

17. In these circumstances it is unnecessary to decide whether the debt is proved by the cheques produced and which purport to show payments to W.H.M. Jung. The evidence as to these does appear to be defective. The signature of the plaintiff is in my opinion sufficiently established but some of the cheques are made payable to persons other than W.H.M. Jung and to bearer and therefore do not bear the endorsement of W.H.M. Jung. Others although made out to him, His signature by way of endorsement is not proved. There are matters on which, in my opinion, in the circumstances of the case the Court would allow the plaintiff to produce evidence at this stage, if necessary, to complete the links in the chain of proof. However a decision on that point is unnecessary.

18. The remaining question is whether the plaintiff can make defendant 1 the father of W.H.M. Jung, defendant 2 the wife or mistress of defendant 1 and defendant 3 the widow of W.H.M. Jung, and his heirs under Mahomedan law, liable as having come into possession of the deceased debtor's estate.

The property alleged to be that of the deceased was a mouza Chhareari under a deed of gift executed by defendant 1 in favour of his son W.H.M. Jung. After the death of W.H.M. Jung at Patna in December 1920 his widow came to India and commenced litigation with regard to this. The matter was referred to arbitration and this award decided that the deed of gift was a colourable one and that the deceased never went into possession. These proceedings, however, were compromised by a payment of Rs. 15,000 to the widow. However, this decision is not binding on the plaintiff as he was not a party to them.

19. It remains to be seen whether the defendant's evidence establishes the allegation that the deed of gift was a benami transaction. Apart from the bare statement that the gift by defendant 1 was a colourable transaction and a statement that defendant 1 has been in possession of the village for many years past there is no proof of the alleged character of the gift transaction. Defendant 1 who would have given the best evidence regarding this was not examined. On the other hand the entry in the register record giving particulars of the mutation of names case states that defendant 1 acquired his interest in the property by inheritance. In the absence of clear and reliable evidence to the contrary this in my opinion is conclusive as also it is on the question of whether the deceased entered into possession of the land the subject-matter of the gift. I am of the opinion, therefore, that the defendants have not established the fact that the deed of gift by defendant 1 was merely colourable. That being so the plaintiff is entitled to succeed.

20. The appeal will, therefore, be allowed with costs in this Court and the Court below. There will be a decree for the sum of ₹630 or its equivalent in Indian currency together with interest at the rate of 6 per cent per annum from date of suit until realization. The decree will be against the three defendants as the legal representatives of the deceased u/s 52, Civil P.C., in so far as they are in possession of the estate of deceased Wasig Hossain Mobarak Jung or under Sub-section 2 to the extent to which they have been in possession. If any further directions are necessary there will be liberty to apply.

Ross, J.

21. I agree.